IN THE SUPREME COURT OF FLORIDA

DAVID P. TROTTI, an individual,

Petitioner,

v.

RICK SCOTT, Governor of the State of Florida, in his official capacity; and KEN DETZNER, Secretary of the State of Florida, in his official capacity,

Respondents.

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Case No. SC18-_____

L.T. Case No. 1D18-2387

EMERGENCY NON-ROUTINE PETITION FOR ISSUANCE OF A CONSTITUTIONAL WRIT

It's déjà vu all over again. The Petitioner, David P. Trotti, is a Florida lawyer who qualified to run for an open judicial seat in Jacksonville. After Mr. Trotti filed his paperwork and completed all requirements to be placed on the ballot, the Florida Secretary of State informed him that the seat would no longer be filled by election but would instead be filled by gubernatorial appointment. The reason? The seat's current occupant, Judge Robert Foster, who is ineligible to run for reelection, submitted a prospective resignation to Governor Rick Scott, indicating his intent to resign from office just four business days prior to the expiration of his term—solely so that Governor Scott, rather than Florida voters, could choose his replacement.

If this fact-pattern sounds familiar, that's because it is. In fact, this is the *third straight election cycle* in which a handful of Florida county and circuit court judges have, contrary to the express instructions of a majority of this Court, gamed the judicial appointment process to disenfranchise Florida voters. Last time it happened, in 2016, this Court denied several extraordinary writ challenges, on procedural grounds, but suggested that this electoral gamesmanship is antithetical to our Constitution and should be resolved through a declaratory judgment action. *See Pincket v. Detzner*, No. SC16-768, 2016 WL 3127704 (Fla. June 3, 2016).

So Mr. Trotti followed this Court's directive. He expeditiously filed a lawsuit in Leon County circuit court and he sought a temporary injunction to prevent the Governor from moving forward with the appointment process in the meantime. The trial court ruled in his favor. The court, attempting to be faithful to this Court's 2016 decision, found that Mr. Trotti had satisfied the elements for injunctive relief, including a likelihood of success on the merits and the existence of irreparable harm, and enjoined Governor Scott from making any appointments to fill Judge Foster's seat. (A.148, 153-55).[1]

[1] Citations are to the PDF page number of the consecutively paginated appendix filed with this Petition.

But here's where the rubber meets the road. The State[2] appealed the trial court's nonfinal injunction order, received the benefit of an automatic stay of the injunction pursuant to Florida Rule of Appellate Procedure 9.310(b)(2), and carried on with convening the Judicial Nominating Commission and interviewing potential candidates for appointment. None too pleased with the State's apparent disregard for its order, the trial court vacated the automatic stay and, once again, told the Governor to hit pause on the appointment process. (A.264-65). So the State appealed that decision too, and on June 18, 2018, the First District Court of Appeal quashed the trial court's order vacating the stay, reinstituted the automatic stay of the trial court's injunction, and cleared the way for the Governor to make an appointment. (A.329).

Which brings us to today. This Court is now the only thing standing in the way of that appointment—an appointment that essentially steals a judicial seat from Florida voters, in violation of the state Constitution, and gives it to Governor Scott—becoming a reality.[3] As we demonstrate in this petition, this Court should not allow that to happen.

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[2] We use the term "the State," for ease of reference, to connote the defendants in this action, who are the Respondents here: the Honorable Rick Scott, the Governor of the State of Florida, and the Honorable Ken Detzner, Florida's Secretary of State.

[3] As we explain in further detail below, there is no realistic possibility that the First District will decide the injunction issue, let alone the merits of the underlying

Instead, this Court should step in now, to safeguard its jurisdiction to decide this recurring issue once and for all, by issuing a constitutional writ directing the First District to reinstate the trial court's injunction and to maintain the status quo pending a resolution of Mr. Trotti's declaratory judgment action on its merits. Any other result risks yet again sidestepping this Court's ultimate power to have the final say on the meaning of the Florida Constitution, thereby precluding meaningful judicial review, allowing the State to run out the clock, and forcing this vital constitutional issue to be decided by default.

I. BASIS FOR INVOKING JURISDICTION

This is not a routine extraordinary writ petition, because this is not a routine case. But the basis for this Court to exercise its jurisdiction to grant the petition is well-established.

Article V, section 3(b)(7), of the Florida Constitution grants this Court the authority to issue "all writs necessary to the complete exercise of its jurisdiction." *See League of Women Voters of Fla. v. Data Targeting, Inc.*, 140 So. 3d 510, 514 (Fla. 2014); *Fla. Senate v. Graham*, 412 So. 2d 360, 361 (Fla. 1982). The all writs provision in section 3(b)(7) is not an independent source of appellate jurisdiction;

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lawsuit, before the Governor makes an appointment. The First District has essentially told us that it has no intention of doing so, setting a briefing schedule in the pending injunction appeal that will not even conclude until July 19—almost a full month after the Nominating Commission forwarded six names to Governor Scott for appointment to the seat. (A.346).

rather, it exists as an ancillary power to protect appellate jurisdiction that is conferred elsewhere in the Constitution. *See Fla. House of Reps. v. League of Women Voters of Fla.*, 118 So. 3d 198, 203 (Fla. 2013); *Roberts v. Brown*, 43 So. 3d 673, 677 (Fla. 2010).

The remedy afforded by section 3(b)(7) applies not only to cases that have been filed in the Supreme Court on other jurisdictional grounds, but also to cases that are likely to be considered by this Court in the future. *See Data Targeting*, 140 So. 3d at 513; *Roberts*, 43 So. 3d at 677. The point of the remedy is to prevent the possibility that an impending action will effectively foreclose this Court's power to resolve an important constitutional issue. *See Data Targeting*, 140 So. 3d at 513-14 (utilizing the all writs provision to stay enforcement of a First District order pending completion of an ongoing trial); *Amends. to Fla. R. Crim. P. 3.853(d)(1)(a) (Postconviction DNA Testing)*, 857 So. 2d 190, 190 (Fla. 2003) (exercising all writs authority to hold a statutory deadline in abeyance while considering whether to exercise jurisdiction and avoid rendering the proceedings moot); *Petit v. Adams*, 211 So. 2d 565, 566 (Fla. 1968) (utilizing the all writs provision to preserve the status quo); *see also Redner v. Fla. Dep't of Health*, No. SC18-740, 2018 WL 2386895, at *1 (Fla. May 25, 2018) (denying petition to invoke all writs jurisdiction on account of a failure to show that all writs relief was

"necessary to protect this Court's eventual jurisdiction or to prevent irreparable harm").

This case presents the archetypical example. The important constitutional issue in the pending declaratory judgment action is whether a circuit or county court judge can create a "vacancy" within the meaning of Article V, section 11(b), of the Florida Constitution, by tendering a resignation before the start of a qualifying period in an election year but deferring the effective date of the resignation until a point in time just before the end of his or her term in office. Stated differently, the question is whether a Florida judge whose term is expiring can unilaterally decide that his or her successor will be chosen by an appointment rather than an election.

This is an issue that has proven controversial. But despite its importance and its recurrence in multiple election cycles, a final resolution has evaded review by this Court in the past. And, importantly for our purposes here, if the judicial seat at issue in Mr. Trotti's pending declaratory judgment lawsuit is filled by appointment before the case can be presented to this Court on its merits, the issue is likely to evade review by this Court once again.

The issue could hardly be better postured in the lower courts to eventually reach this Court for review. As a majority of this Court observed just two years ago, answering the question presented by this case involves the express

construction of various provisions of the Florida Constitution and the interpretation of this Court's prior decision in *Spector v. Glisson*, 305 So. 2d 777 (Fla. 1974)—to say nothing of its statewide importance and effect on a class of constitutional officers. *See Pincket*, 2016 WL 3127704, at *2 (Pariente, J., concurring in result, joined by Quince and Perry, JJ.); *id.* at *3 (Lewis, J., concurring in result only). In other words, the issue is one this Court is highly likely to have jurisdiction to decide. *See* Art. V, §§ 3(b)(3), (4), Fla. Const. (vesting this Court with jurisdiction to review decisions that expressly construe the Florida Constitution, expressly affect a class of constitutional officers, expressly conflict with one of this Court's decisions, and those that are certified to be of great public importance); *see also Data Targeting*, 140 So. 3d at 514 (analyzing the various likely bases for ultimate Supreme Court review in considering whether to grant similar all writs relief).

Yet, as it stands now, the First District is effectively preventing this Court from ever being able to exercise its inevitable jurisdiction. The First District is currently considering an appeal from a nonfinal order granting injunctive relief (*i.e.*, the trial court's order enjoining the Governor from making an appointment during the litigation). Under our appellate rules, the trial court cannot render a final order in the declaratory judgment action until that appeal has been decided. *See* Fla. R. App. P. 9.130(f). But the First District's order of June 18, reinstating the automatic stay that had been vacated by the trial court, effectively nullifies the

trial court's injunction. Stated another way, it puts the cart before the horse, allowing the very action that's being challenged as unconstitutional to occur, even while the trial court—which has suggested that the constitutional challenge is likely to succeed (A.153-54)—is still considering the merits of the case.

The result is predictable: the process of nominating candidates for appointment is now underway in the Fourth Judicial Circuit Nominating Commission, and it will continue unabated, presumably until the Governor appoints someone to fill the "vacancy," which could happen any day. Indeed, the Nominating Commission sent the Governor a list of six potential nominees on Wednesday, June 20, which means the 60-day countdown is now on. *See* Art. V, § 11(c), Fla. Const. And if that appointment process continues, as it will under the First District's June 18 order, this Court's ability to resolve the constitutional question of whether the appointment process was even proper to begin with will continue to be avoided.

Unless, of course, this Court steps in and orders the First District to vacate its stay and reinstate the trial court's injunction. Such action would have the effect of hitting pause on the appointment process—and preventing the irreparable harm found by the trial court (A.153)—while the issue is fully litigated in the lower courts.

There is ample precedent for utilizing all writs jurisdiction in this manner. *Data Targeting*, for example, is on all fours. There, this Court granted a petition for all writs relief to stay enforcement of the First District's decision in a case with important constitutional implications. 140 So. 3d at 513-14. This Court reasoned that issuing the writ was necessary to "maintain the status quo" during the ongoing litigation, "preserve this Court's ability to completely exercise the eventual jurisdiction it is likely to have to review the First District's decision, and prevent any irreparable harm that might occur" if the First District's decision were not stayed. *Id.* at 514. In other words, to do *exactly what Mr. Trotti asks this Court to do here*.

Simply put, issuing a constitutional writ under the circumstances presented is not only authorized, but essential "to protect this Court's eventual jurisdiction" and "to prevent irreparable harm." *Redner*, 2018 WL 2386895, at *1. If not now, when?

II. STATEMENT OF THE CASE AND FACTS

To understand where we are, we first must step back and figure out how we got here. So we begin our recitation of the facts with a trip down this Court's memory lane—starting in what seems like ancient history, and ending in the not-so-distant past.

Spector

Florida law strongly favors the election of trial court judges. Article V, section 10(b), of the Florida Constitution provides that the election of county and circuit court judges "shall be preserved," unless a majority of citizens in the county opt out of election in favor of the merit selection and retention process. *See* Art. V, §§ 10(b)(1) & (2), Fla. Const. No county has ever ceded its electoral privilege. *See Pincket*, 2016 WL 3127704, at *2 (Pariente, J., concurring in result).

At the same time, the Constitution empowers the Governor to fill "each vacancy on a circuit court or on a county court" through the judicial nominating process set forth in Article V, section 11. *See* Art. V, § 11(b), Fla. Const. But, as this Court made clear nearly half a century ago, the appointment power exists simply as a failsafe, a "stop gap measure[]" to prevent an "emergency of the public business" when an otherwise elected seat will be unoccupied and unable to be filled in the normal course. *Spector v. Glisson*, 305 So. 2d 777, 781, 783 (Fla. 1974).

Specifically, in *Spector*, a judge who was ineligible to run for another term in office sent a letter of resignation to the governor prior to the start of the qualifying period for the next general election. *Id.* at 779. The resignation was prospective in nature—it was to take effect at midnight on the last day of the judge's term. *Id.* When a lawyer attempted to file paperwork to seek election to

the seat, the Secretary of State turned him away, claiming that the "vacancy" was to be filled by appointment, rather than by election. *Id.*

This Court overruled that determination. As it stated, "if the elective process is available . . . it should be utilized to fill any available office by vote of the people at the earliest possible date." *Id.* at 782. "Interim appointments need only be made when there is no earlier, reasonably intervening elective process available." *Id.* at 784.

Because there *was* an intervening qualifying period and *was* an intervening general election capable of filling the retiring judge's seat, this Court held that there was no need for the governor to step in and make an appointment. *Id.* In other words, elections reign supreme: "[a]s between the appointive power on the one hand and the power of the people to elect on the other, the policy of the law is to afford the people priority." *Id.* "[T]he elective process retains that primacy which has historically been accorded to it consistent with the retention of all powers in the people." *Id.* at 782.

Trotti **(take I)**

Spector stood unchallenged for decades,[4] until a new movement took shape—where some judges decided they preferred appointments over elections and

[4] There were a few rulings in the interim that distinguished *Spector*—or, perhaps more accurately, applied its rule to situations where an actual vacancy disrupting the public business would exist—to prevent a lengthy gap in service. *See Advisory*

would take matters into their own hands.[5] In 2014, just before the start of the qualifying period for the November elections, a judge in the Fourth Judicial Circuit tendered a prospective letter of resignation to Governor Rick Scott, in which he stated that he would resign on the last day of his term in office. *Trotti v. Detzner*, 147 So. 3d 641, 642 (Fla. 1st DCA 2014). But, under *Spector*, that meant his seat would be filled by an election. The judge thus "clarif[ied] that his specific date of resignation was to be . . . three calendar days (one business day) before" his term was set to expire. *Id.*

A Jacksonville lawyer named David Trotti—the same David Trotti who is the Petitioner here—wanted to run for the seat being vacated by this judge, so he submitted his qualifying paperwork to the Secretary of State and was listed as a

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Op. to the Governor re Judicial Vacancy Due to Resignation, 42 So. 3d 795 (Fla. 2010) (the resignation created an actual vacancy of seven months); *Advisory Op. to the Governor re Sheriff & Judicial Vacancies Due to Resignations*, 928 So. 2d 1218 (Fla. 2006) (the judge resigned in April, effective the following May, thus leaving the office unoccupied for seven months, regardless of the scheduled election that year); *In re Advisory Opinion to the Governor*, 600 So. 2d 460 (Fla. 1992) (the judge resigned in March, with an effective date at the end of July, leaving an actual vacancy in the office of five months); *Pincket v. Harris*, 765 So. 2d 284 (Fla. 1st DCA 2000) (the judge resigned on June 19, effective the next day, leaving an actual vacancy in the office for a period of six months).

[5] This new movement occurred even though this Court, as far back at 2006, had clearly stated that "a judge who is subject to mandatory retirement under the constitution cannot control when the vacancy in his or her office will occur by writing a letter to the Governor announcing that he or she is prohibited from serving an additional term." *Advisory Op. to the Governor re Judicial Vacancy Due to Mandatory Retirement*, 940 So. 2d 1090, 1093 n.5 (Fla. 2006).

candidate on the Secretary's website. *Id.* at 643. However, Trotti was prohibited from running when, after he had submitted his paperwork, Governor Scott accepted the judge's resignation; this caused the Secretary to state that the seat "would be filed by gubernatorial appointment rather than election." *Id.*

Trotti filed a petition for writ of mandamus seeking to compel the Secretary of State to accept his qualifying papers, but the circuit court found that because the judge "resigned prior to the start of the qualifying period and a physical vacancy [of one day] would occur between the effective date of his resignation and the start of the following term, his seat should be filled by gubernatorial appointment." *Id.*

The First District, in a 2-1 decision, affirmed. The First District reasoned that *Spector* is limited to situations in which a judge resigns effective at a future date and no interim vacancy will exist, explaining that the length of the interim vacancy is irrelevant. *Id.* at 645. Stating that it would not engage "in a determination of what does or does not constitute an unreasonable vacancy warranting an appointment," the First District majority held that any other conclusion would "nullify[] the Governor's power of appointment" and allow the "limited exception created by *Spector* to swallow Article V, section 11(b), of the [Florida] Constitution." *Id.*

The dissent questioned both the rationale and the wisdom of the majority's decision. Pointing out that the First District majority's interpretation of *Spector*

"will have a high potential for abuse" by "bestow[ing] upon an individual judge the power to block an election by resigning just short of the end of his or her term in office," the dissent criticized the First District for "fail[ing] to account for the fact that the resignation was to take place at a distant point in the future." *Id.* at 645-46 (Padovano, J., dissenting). In the dissent's view, "[t]he only difference between [*Trotti*] and the *Spector* case is that the effective date of the resignation in [*Trotti*] was one day before the end of the term and not on the last day." *Id.* at 647. Thus, according to the dissent, "[t]he question we should be asking ourselves is whether this is the kind of difference that should compel an exception to the rule in *Spector*." *Id.* Unaware of "any case that stands for the proposition that *any* actual vacancy, no matter how brief it may be, requires an appointment," the dissent was "confident" in the absence of "authority for the proposition that the rights of voters can be overcome by a manufactured vacancy like the one" in *Trotti*. *Id.* at 647-48.

Pincket

Two years (or one election cycle) after the First District gave its blessing to certain judges' "manipulat[ion] of the election process to suit their own political or philosophical objectives," *id.* at 648, the scope of that electoral circumvention came into full view. Several judges, explicitly conceding that their goal was to have their successors chosen by Governor Scott and not by the citizens of Florida, submitted the same kind of prospective resignations as in *Trotti*—resignations that

were tendered just before the start of the qualifying period but that would not take effect until mere days before the end of the incumbent judge's term. *See Pincket*, 2016 WL 3127704, at *1 (Pariente, J., concurring in result).[6]

Several candidates who wished to run for election to fill these judges' seats sought mandamus or quo warranto relief in this Court. Constrained by *Trotti* and the relevant standards for issuing writs of mandamus and quo warranto, this Court unanimously denied the petitions. However, four Justices did so only "reluctantly," explaining that they disagreed with the First District's decision in *Trotti*. *Id.* at *2-3.

Justice Pariente, joined by Justices Quince and Perry, stated that *Trotti* was not "faithful to the true purpose of the Florida Constitution and the voters' preference for election of their circuit and county court judges." *Id.* at *1. Thus, if the case had been before this Court "on the merits to decide the constitutional question," those Justices would have adopted the reasoning of the *Trotti* dissent, as "[t]he personal preferences of individual judges . . . should not be the basis for determining whether a vacancy exists that can either be filled by election or

[6] *See also Lambert v. Scott*, No. SC16-762, 2016 WL 3128286 (Fla. June 3, 2016); *Boyle v. Detzner*, No. SC16-756, 2016 WL 3128392 (Fla. June 3, 2016). The petitions and the opinions in *Lambert* and *Boyle* were substantially the same as in *Pincket*. For ease of reference, we speak only of *Pincket* here. We note *Lambert* and *Boyle* simply to point out that the electoral gamesmanship in *Pincket* was not an isolated incident.

appointment." *Id.* at *2. Those Justices stated that the "way to resolve this issue for the future is by a declaratory judgment." *Id.*

Like the *Trotti* dissent, Justice Lewis said that he would apply *Spector* to this situation, reasoning that it "defies both logic and common sense that an elected judge in the last year of a term could unilaterally effect such a change by simply resigning before the statutory qualifying period with an effective date just days before the end of the term." *Id.* at *3 (Lewis, J., concurring in result only). "It is truly a sad day for Floridians," Justice Lewis wrote, "when their trial court judges may manipulate the electoral process and prioritize their personal preferences over those espoused in the very Constitution they swore to defend." *Id.*

Trotti (take II)

Given the clear view of a majority of this Court, as expressed in *Pincket*, one would think that trial judges and the Governor would have put an end to this manipulative practice. And yet, another election cycle later, here we go again—with some of the very same players.

For the third straight time, this constitutional issue has reared its ugly head. The action that precipitated the newest crisis was the prospective resignation tendered on April 2, 2018, by Judge Robert M. Foster, a sitting circuit judge in the Fourth Judicial Circuit. (A.16). Just like the prior times this issue has arisen, Judge Foster's resignation was sent to Governor Scott prior to the start of the

statutory qualifying period, but it specified a much-later effective date (eight months in the future), after the November general election and just a few days (four business days, to be exact) before the expiration of his term in office. (A.9).[7]

It is unrebutted that Judge Foster, *who is ineligible to run for reelection* due to his age (A.9, 148), explicitly resigned in this way to ensure a gubernatorial appointment rather than an election for the seat he is vacating. (A.101-02, 148, 158). Despite his "resignation," Judge Foster continues to serve as a circuit judge in the Fourth Circuit. And he will hold the office of circuit judge in the Fourth Circuit until December 31, 2018, the point in time he chose to define as his "last day." (A.16, 150).

The qualifying period to run for election to the office of circuit judge opened at noon on April 30, 2018, and closed at noon on May 4, 2018. (A.148, 171). The Petitioner, David Trotti, qualified on May 3, 2018, to run for the seat in Group 6 for the Fourth Judicial Circuit, the seat now held by Judge Foster. (A.148, 172). He submitted his check for the filing fee, along with all of the required qualifying papers. (A.172). The Secretary of State listed Mr. Trotti's status as that of a "qualified candidate," an indication that all of his papers were in order. (A.148).

After Mr. Trotti had qualified to run for election, he received a call from Kristi Willis, the Chief of the Bureau of Election Records for the Division of

[7] As with the 2016 election cycle, Judge Foster is not the only judge to take such an action. (A.347).

Elections, informing him that he was no longer a qualified candidate and that his name had been removed from the Division's records. (A.172). Mrs. Willis explained that she had received an email from the Governor's office stating that Judge Foster had submitted his resignation and that his seat would be filled by a gubernatorial appointment. (A.172). Indeed, Governor Scott had accepted Judge Foster's letter and had directed the Fourth Judicial Circuit Nominating Commission to submit names for appointment to the "vacancy" created by Judge Foster's "resignation." (A.148, 166-67).

Frustrated yet again in his attempt to run for election, Mr. Trotti followed the procedure suggested by Justice Pariente's opinion in *Pincket* and, less than a week after being told he no longer qualified to run for the seat, filed a declaratory judgment suit in the circuit court for the Second Judicial Circuit. (A.7). Mr. Trotti's lawsuit sought a declaration that the Florida Constitution requires an election to fill the vacancy created by Judge Foster's prospective resignation. (A.13, 163).

To ensure that his lawsuit wasn't for naught, and that any remedy ultimately ordered by the circuit court would not be illusory, Mr. Trotti also moved to provisionally enjoin Governor Scott from making an appointment to the seat. (A.26-35). His motion for an injunction pointed out that the public would not be

harmed by putting the appointment process on hold; after all, Judge Foster will continue to occupy the seat for another six months. (A.27).

The State filed a response, primarily arguing that Mr. Trotti's lawsuit had no likelihood of success on the merits (A.52-62), and the circuit court set the matter for an expedited hearing, during which Mr. Trotti testified about the facts in support of his request for temporary injunctive relief. (A.76-145). After listening to the testimony and hearing argument from both sides, the circuit court granted the injunction, interpreting the majority view of this Court in *Pincket* as "clear guidance" for this declaratory judgment action. (A.144). The court stated that the injunction was "in the public's interest . . . because the constitution clearly provides that the public desires to elect its circuit and county judges and there wouldn't be an adequate remedy at law if we went forward with the JNC process on this and allowed that to go through." (A.144).

The court's subsequent order memorializing its ruling elaborated further on its rationale, finding that this case involves the "creation of an artificial appointment." (A.150). The court further stated that denying the request for an injunction would "result in irreparable harm," including harm to Florida voters and the potential absence of any remedy "[i]f the appointment is made and accepted by the Governor." (A.153). And the court made clear that granting the injunction

would create "no disservice to the public interest as the seat remains occupied by Judge Foster until December 31, 2018." (A.153).

The State immediately appealed the trial court's order granting the injunction (A.293), *see* Fla. R. App. P. 9.130(a)(3)(B), and received the benefit of an automatic stay of the injunction, *see* Fla. R. App. P. 9.310(b)(2). Thereafter, Mr. Trotti moved the circuit court to vacate the automatic stay, as contemplated by Rule 9.310(b)(2), (A.175-78), and the circuit court held another expedited hearing. (A.203-62). Mr. Trotti's argument was simple: the court should put the appointment process, which by then was already well-underway, on hold to enable a "full resolution," so that "we don't have to revisit this thing for the next 20 or 30 years." (A.251).

After hearing more testimony from Mr. Trotti and more argument from both sides, the trial court granted the motion and vacated the stay. (A.259-60). The court expressed some "surprise[]" that the State had continued the appointment process in spite of the injunction order, explaining that "the fact that the JNC machinery didn't even slow down is unfortunate." (A.259-60). The court therefore entered an order vacating the stay, finding "no prejudice to the Governor and Secretary of State" because, even if the circuit court were ultimately proven wrong, "there is plenty of time to reconvene the JNC and proceed with an appointment" before the end of Judge Foster's term. (A.265).

Again, the State immediately sprang into action, filing a motion in the First District for review of the circuit court's order vacating the stay. (A.267-90). On June 18, the First District entered an order granting the State's motion, quashing the circuit court's order vacating the automatic stay, and holding that the stay "shall remain in effect pending final disposition of the merits of this [injunction] appeal." (A.329).

With the stay back in place, the Judicial Nominating Commission continued its activities and, on June 20, forwarded six names to the Governor for appointment to Judge Foster's seat. The Governor's 60-day clock to make an appointment is now running. *See* Art. V, § 11(c), Fla. Const.

III. ARGUMENT

As set forth in the jurisdictional statement above, this Court's recent caselaw has crystallized that all writs jurisdiction is appropriate to safeguard the Court's eventual jurisdiction to decide an important issue and to prevent irreparable harm in the interim. Both of those factors strongly favor issuance of the writ here.

There's no speculating: this Court *will* have jurisdiction to decide the issue.

This case presents pure questions of constitutional interpretation. The issue of whether Judge Foster's seat should be filled by an election or an appointment strikes at the core of the provision in the Florida Constitution providing that the election of circuit and county judges "shall be preserved." Art. V, §§ 10(b)(1) &

(2), Fla. Const. It is impossible to answer this question without expressly construing both that language and the language in Article V, section 11, granting the Governor the authority to fill "each vacancy on a circuit court or on a county court." Art. V, § 11(b), Fla. Const. It only takes one look at *Trotti* and *Pincket* to realize as much. Thus, because the First District's ultimate decision will have to expressly construe the Florida Constitution, there is no doubt that this Court will have jurisdiction to decide the issue. *See* Art. V, § 3(b)(3), Fla. Const.

But that's not all. Any decision against Mr. Trotti will also invariably conflict with this Court's decision in *Spector*. Indeed, Justice Lewis's concurring-in-result-only opinion in *Pincket* clearly explained that *Spector* should apply to these facts. *See Pincket*, 2016 WL 3127704, at *3 (Lewis, J., concurring in result only). So, if the First District adheres to *Trotti I*, it will create an express and direct conflict with *Spector*, thus vesting this Court with jurisdiction. *See* Art. V, § 3(b)(3), Fla. Const.

There are other likely grounds for Supreme Court review, too. Any decision on this issue will also expressly affect a class of constitutional officers—namely, circuit and county judges, whose offices are established by Article V. *See In re Advisory Op. to the Governor*, 154 So. 154, 156 (Fla. 1934) ("Circuit judges . . . are constitutional officers."); *Bd. of Cty. Comm'rs of Hillsborough Cty. v. Savage*, 58 So. 835, 836 (Fla. 1912) ("The county judge is a constitutional officer."). And,

in light of its importance and statewide impact, along with the tension between *Trotti I* and *Pincket*, the First District very-well could (and, given the stakes, probably should) certify a question of great public importance. *See Star Cas. v. U.S.A. Diagnostics, Inc.*, 855 So. 2d 251, 252 (Fla. 4th DCA 2003) ("[A] question should be certified where our decision will affect a large segment of the public and the extant decisional law may not coalesce around a single answer to the question posed.").

In short, there is no guesswork involved in concluding that this Court inevitably will have jurisdiction to decide the issue presented by this case. Anything the First District does will create that jurisdiction.

The harm is real: intervention by this Court is essential to protect its eventual jurisdiction and to prevent irreparable harm.

Although this case is perfectly postured to eventually, inevitably arrive at this Court's door, that jurisdiction could evaporate if this Court does not act now to protect it. That's because, absent intervention, the issue could be decided by default as the appointment process is allowed to continue unabated.

Mr. Trotti has done everything in his power to prevent that from happening. He filed a declaratory judgment action right away, moved for a temporary injunction to stop the appointment process from moving forward, got the trial court to hold an expedited hearing and issue an immediate ruling granting the injunction, and then had the automatic stay vacated and the injunction put back in place when

the State took its appeal. In other words, everything was set up to keep the appointment on hold while the issue was fully litigated.[8]

There were many legally valid reasons for doing so. As the trial court explained, both Mr. Trotti (who would be prevented from running for election to the seat) and the Florida voters (who would be prevented from choosing their circuit judge, as the Constitution requires) would be irreparably harmed if the Governor could simply appoint Judge Foster's replacement. (A.153). Equally compelling, there is absolutely no harm to the State in tapping the brakes on the appointment process while the issue is litigated and resolved once and for all by this Court. (A.153, 265). Because this is a manufactured "vacancy," no actual vacancy on the Fourth Circuit will exist until December 31—more than enough time, in the elections context, for the court process to fully play out.

This makes sense. It is exactly why, in *Pincket*, Justice Pariente suggested that the appropriate way to resolve this issue was through a declaratory judgment action. *See Fla. Pub. Employees Council 79, AFSCME v. Dep't of Children & Fams.*, 745 So. 2d 487, 491-92 (Fla. 1st DCA 1999) (constitutional questions should be presented in a declaratory judgment action in circuit court). The trial

[8] Mr. Trotti also moved to pass the appeal through to this Court or to expedite the proceedings in the First District. (A.330-34). The district court denied the pass-through suggestion (A.329), and expedited the case in name only, setting a schedule that does not even require all the briefs to be filed until the Governor's 60-day appointment window is half over. (A.346).

court's injunction was a necessary corollary to that action, a procedural vehicle to maintain the status quo and preserve the circuit court's ability to order a non-illusory remedy. *See Kailin Hu v. Haitian Hu*, 942 So. 2d 992, 994 (Fla. 5th DCA 2006) ("The purpose of a temporary or preliminary injunction is not to resolve disputes, but rather to prevent irreparable harm by maintaining status quo until a final hearing can occur when full relief may be given." (internal quotation omitted)); *Bailey v. Christo*, 453 So. 2d 1134, 1136-37 (Fla. 1st DCA 1984) ("The purpose of a temporary injunction is to preserve the status quo until a final hearing may be held and the dispute resolved."). Put differently, the injunction stopped the process long enough to rule on the merits. *See League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 416 (Fla. 2015) (noting that "the people of Florida have, through their constitution, entrusted [the] responsibility" of interpreting the Constitution "to the judiciary"); *Chemrock Corp. v. Tampa Elec. Co.*, 71 So. 3d 786, 793 (Fla. 2011) (Pariente, J., concurring) ("[A] primary concern of the courts is to see that cases are resolved on their merits.").

But, with one order, the First District upended all of this. The First District's June 18 decision has the effect of overturning the injunction and allowing the Governor to fill the "vacancy" before the courts even have an opportunity to address whether the Governor should have that appointment power in the first place. Based on *Pincket*, there is every reason to believe he does not.

Indeed, *Pincket* would itself have put an end to this practice if not for the difficult procedural posture in which this issue always arises. This case presents the opportunity, finally, for this Court to settle the law and decide the issue at long last. Yet the First District's actions have single-handedly thwarted that opportunity. If this Court does not step in and put the appointment process back on hold, as the circuit court ordered, this Court may never be able to resolve this important issue. That would be a travesty of justice and, in the words of Justice Lewis, another truly sad day for Floridians.

IV. NATURE OF THE RELIEF SOUGHT

The relief sought by this petition is limited. All we are asking this Court to do is what the circuit court already did: keep a temporary injunction in place long enough to allow this issue to be sorted out and decided once and for all. In other words, this petition merely seeks to maintain the status quo and stop the appointment process long enough to enable this Court to fully exercise its jurisdiction over the constitutional question presented by Mr. Trotti's lawsuit. Doing so is essential to prevent irreparable harm and to uphold the interpretation of the Florida Constitution espoused by a majority of this Court.

V. CONCLUSION

For all the reasons set forth above, this Court should exercise its discretion under Article V, section 3(b)(7), of the Florida Constitution to issue all writs

necessary to the complete exercise of its jurisdiction and stay the enforcement of the First District's June 18 order pending the conclusion of the underlying litigation. The effect of such a constitutional stay writ would be to reinstate the trial court's order vacating the automatic stay under Florida Rule of Appellate Procedure 9.310(b)(2), which itself will have the effect of putting the circuit court's temporary injunction back in place and provisionally precluding Governor Scott from appointing someone to fill Judge Foster's seat until this Court has an opportunity to determine whether the seat should be filled by an election.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by U.S. Mail and email to David A. Fugett (david.fuggett@dos.myflorida.com) and Jesse Dyer (jesse.dyer@dos.myflorida.com), Florida Department of State, R.A. Gray Building, Suite 100, 500 South Bronough Street, Tallahassee, Florida 32399; Daniel E. Nordby (daniel.nordby@eog.myflorida.com) and Meredith L. Sasso (meredith.sasso@eog.myflorida.com), Executive Office of the Governor, The Capitol, PL-05, Tallahassee, Florida 32399; and Nicholas A. James (nick@nickjameslaw.com; nick.james@adjustmentlaw.com), Law Office of Nick James, 10175 Fortune Parkway, Unit 303, Jacksonville, Florida 32256, on this 25th day of June 2018.

/s/Philip J. Padovano
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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Petition for Issuance of a Constitutional Writ complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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