IN THE SUPREME COURT OF FLORIDA

CASE NO. SC18-2397
L.T. CASE NO.: 1D18-2387; 37 2018 CA 001039

DAVID P. TROTTI,

Petitioner,

v.

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

Respondents.

RESPONSE IN OPPOSITION TO EMERGENCY NON-ROUTINE PETITION FOR ISSUANCE OF A CONSTITUTIONAL WRIT

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INTRODUCTION

Petitioner David Trotti accuses a sitting circuit judge of "electoral gamesmanship" to "disenfranchise Florida voters." Pet. at 2. He suggests that the underlying appeal presents the question of whether the successor to Fourth Circuit Judge Robert Foster should be chosen by "Florida voters" or, instead, whether "Governor Scott" should be allowed to "steal[] a judicial seat from Florida voters."[1] Pet. at 23. And now, on the supposed grounds that "there is no doubt that this Court will have jurisdiction" to review the forthcoming decision of the First District, the Petitioner seeks extraordinary relief: a constitutional writ that will effectively reinstate the trial court's preliminary injunction *disrupting* the status quo by declaring Petitioner to be a duly-qualified candidate for elected judicial office until this Court has decided the merits of a case that has not even been fully briefed before the district court. Pet. at 22.

As the Petition implicitly concedes, this Court currently has no basis to exercise jurisdiction over the underlying case. Petitioner's argument therefore

[1] Contrary to Petitioner's allegations, the trial court's order on review in the First District offers no choice to Florida voters. By validating Petitioner's decision to litigate his way into a judicial office that was not opened for election, the trial court has effectively awarded Petitioner the office of a circuit judge for a full six-year term, through January 2025, without providing an opportunity for a single voter in the Fourth Judicial Circuit to cast a ballot for or against Petitioner's candidacy. In contrast, a gubernatorial appointee chosen to fill the seat currently occupied by Judge Foster would be required to stand for election in August 2020. Art. V, § 11(b), Fla. Const.

depends entirely on his speculation that the First District will ultimately decide this case in a manner implicating this Court's jurisdiction, and his further assumption that this Court will subsequently choose to exercise its discretionary jurisdiction to review that decision, notwithstanding this Court's denial of review less than four years ago of a case from the same district court by the same Petitioner raising the same underlying issue. *Trotti v. Detzner*, 147 So. 3d 641 (Fla. 1st DCA 2014), *rev. denied*, 157 So. 3d 1051 (Fla. 2014). Petitioner's collection of assumptions, conjecture, and speculation about what the First District *might* do fails to provide any basis for such a dramatic expansion of this Court's "all writs" authority. The Petition should be denied.

RELEVANT FACTS & PROCEDURAL HISTORY

Judge Foster's resignation accepted before the start of candidate qualifying

The statutory qualifying period for the election of circuit court judges began at noon on April 30, 2018, and concluded at noon on May 4, 2018. One week before the beginning of the qualifying period, on April 23, 2018, Governor Scott accepted a letter of resignation tendered by Fourth Circuit Judge Robert M. Foster. App. 65.[2] The same day, the Fourth Circuit Judicial Nominating Commission was requested to convene and to submit the names of highly qualified nominees for

[2] Citations to the Appendix filed by Petitioner are denoted [App. 00]. Citations to the Supplemental Appendix filed by Respondents are denoted [Supp. App. 00].

appointment to the Fourth Judicial Circuit. App. 17. The Executive Office of the Governor provided notice of Judge Foster's resignation to Kristi Reid Willis, Bureau Chief for the Florida Division of Elections, noting that Judge Foster's judicial seat would be filled by appointment. App. 67, 70.

Petitioner's attempt to qualify for election

Well before the beginning of the candidate qualifying period, Petitioner was advised by Judge Foster of his plan to resign from his position as a circuit judge to allow the appointment of his successor. App. 101-102. No later than May 2, 2018, Petitioner was also aware that the Fourth Circuit Judicial Nominating Commission had been convened to nominate candidates for appointment to succeed Judge Foster. App. 102, 167. Nevertheless, on May 3, 2018, at 1:44 PM, Petitioner hand-delivered candidate qualifying documents for election to the office of Circuit Judge, Fourth Judicial Circuit, Group 6—the seat then held by Judge Foster—to the front desk of the Florida Division of Elections. App. 67, 78. That same day, Petitioner's qualifying paperwork was preliminarily reviewed by the Division's staff for completeness. App. 67. Based on the preliminary review's determination that the qualifying paperwork was complete on its face, Petitioner was erroneously listed on the Division's website as "qualified" from 3:29 PM until 4:08 PM on May 3, 2018. App 67-68.

Less than 45 minutes after the erroneous website posting, the Division

realized that its preliminary determination was in error—that the office for which Petitioner sought to qualify (Fourth Judicial Circuit, Group 6) was to be filled by judicial appointment, not election. App 67-68. The website was corrected at 4:08 PM and Petitioner was promptly notified that the judicial seat for which he had filed qualifying papers was not a seat that would be filled by election. App. 68, 107. The affidavit of Bureau Chief Willis filed by Respondents below states that Petitioner was further informed that he could "re-designate" to run for a different judicial seat in the Fourth Judicial Circuit, although Petitioner disputes that assertion. App. 68, 81. At that time, there were fifteen open judicial seats within the Fourth Judicial Circuit for which Petitioner could have qualified. App. 68.[3]

On May 10, 2018, the Division certified to the Supervisors of Elections of the counties comprising the Fourth Judicial Circuit the names of all "duly qualified" candidates who qualified with the Department of State during the candidate qualifying period. App. 68. Because Petitioner was not a duly qualified candidate for an office that would be elected in 2018, he was not included on the list of qualified candidates and his qualifying fee was returned to him. App. 68.

Proceedings before the Second Judicial Circuit

Rather than qualifying as a candidate for a different judicial seat, Petitioner

[3] Petitioner would later testify that he chose not to qualify for election to the other seats within the Fourth Judicial Circuit due to the perceived electoral strength of the candidates in those races. App. 103.

chose to file a lawsuit. App. 7. The purported legal basis for this action is nearly identical to a case the same Petitioner filed in 2014. *See Trotti v. Detzner*, 147 So. 3d 641 (Fla. 1st DCA 2014) ("*Trotti I*").[4] Petitioner also filed a Verified Motion for Ex Parte Injunctive Relief requesting that the circuit court "enjoin [the Governor] from appointing a lawyer to fill the Judicial Seat, Group 6 in the Fourth Judicial Circuit Court" and enjoin "[the Secretary] from removing Trotti from the August 28, 2018 election ballot." App. 26.

A hearing on the Motion for Injunctive Relief was held on May 16, 2018. App. 73. Three weeks later, on June 6, 2018, the trial court entered a written order granting Plaintiff's Motion for Injunctive Relief. App. 147. The Preliminary Injunction Order required the Governor to "suspend all of the Fourth Judicial Circuit's Judicial Nominating Commission's activities"; enjoined the Governor from "accepting any nominees" from the Fourth Judicial Circuit JNC or "making any appointments" to fill the seat currently occupied by Judge Foster; and ordered the Secretary of State to "not remove" Plaintiff from the ballot and as a qualified candidate "to include [the Secretary's] public webpage announcing that the

[4] In *Trotti I*, Petitioner sought to compel the Secretary of State to accept qualifying papers for a judicial vacancy that arose under similar circumstances. 147 So. 3d at 641. The trial court denied Petitioner's claim for relief after concluding that the vacancy was to be filled by gubernatorial appointment rather than by election. *Id.* Petitioner appealed to the First District, which issued a written opinion affirming the circuit court. *Id.* This Court denied review. *Trotti v. Detzner*, 157 So. 3d 1051 (Fla. 2014)

Plaintiff has qualified as a candidate for Group 6, of the Fourth Judicial Circuit." App. 155.

The trial court's order specifically found that Petitioner is likely to succeed on the merits of his case based on *Spector v. Glisson*, 305 So. 2d 777 (Fla. 1974)—a case explicitly distinguished by the First District in *Trotti I*—and on language contained in concurring opinions to this Court's unpublished order in *Pincket v. Detzner*, 2016 WL 3127704 (June 3, 2016). App. 151. Specifically, Judge Dodson stated during the oral pronouncement of his ruling:

> I do think I'm controlled by the Supreme Court's June 2016 opinion in the *Pincket* case….the language of four of the justices made it clear that they believe *Trotti*, as I interpret it, was wrongly decided, and they believe *Spector* should control in a case like this. App. 142.
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> **********
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> I just want to make it real clear to everybody that, in granting this injunction, I'm doing it because of the way I read *Pincket*. App. 154.

The trial court therefore held under "the spirit of the Constitution" and the facts of the case that the vacancy should be filled by election rather than by gubernatorial appointment. App. 154.

Proceedings before the First District Court of Appeal

Respondents immediately appealed the Preliminary Injunction Order, which was automatically stayed under Florida Rule of Appellate Procedure 9.310(b)(2). App. 293-303. The First District has subsequently issued orders: 1) quashing an

order by the trial court vacating the automatic stay; 2) denying Petitioner's suggestion for certification of the appeal for immediate resolution by the Florida Supreme Court; and 3) granting Petitioner's motion to expedite. App. 329, 346. Under the expedited briefing schedule, Respondents (Appellants below) filed their Initial Brief on June 21, 2018. Petitioner (Appellee below) filed his Answer Brief on July 2, 2018. Supp. App. 6. And Respondents will file their Reply Brief on or before July 16, 2018. App. 346.

On June 20, 2018, the Fourth Circuit Judicial Nominating Commission submitted the names of six nominees for appointment by the Governor to the circuit court seat being vacated by Judge Foster:

1. The Honorable Lester B. Bass
2. Michael T. Fackler
3. The Honorable Charles M. Greene
4. Magistrate Robin E. Lanigan
5. Rhonda Peoples-Waters
6. David G. Tucker

Supp. App. 7. Notwithstanding the First District's order reinstating the automatic stay of the Preliminary Injunction Order, the Governor has not made an appointment. As noted above, expedited briefing before the First District will be completed no later than July 16, 2018, more than one month before the Governor's constitutional deadline of August 19, 2018, to appoint one of the nominees to the office of circuit judge for the Fourth Judicial Circuit.

ARGUMENT

I. THE PETITION FAILS TO IDENTIFY AN INDEPENDENT JURISDICTIONAL BASIS FOR THIS COURT TO EXERCISE ITS ALL WRITS AUTHORITY.

Under the Florida Constitution, this Court may issue "all writs necessary to the complete exercise of its jurisdiction." Art. V, § 3(b)(7), Fla. Const. It is well-established that the all writs provision "does not constitute a separate source of original or appellate jurisdiction." *See, e.g., Williams v. State*, 913 So. 2d 541, 543 (Fla. 2005). Instead, this Court's all writs authority "operates as an aid to the Court in exercising its 'ultimate jurisdiction' conferred elsewhere in the constitution." *Id*.; *see also St. Paul Title Ins. Corp. v. Davis*, 392 So. 2d 1304, 1305 (Fla. 1980) ("The all writs provision of section 3(b)(7) does not confer added appellate jurisdiction on this Court, and this Court's all writs power cannot be used as an independent basis of jurisdiction as petitioner is hereby seeking to use it."). When this Court's jurisdiction has been properly invoked on separate constitutional grounds, the all writs authority may be used to ensure that the Court's jurisdiction over a case on those independent grounds is not rendered moot. *See, e.g., Amends to Fla. R. Crim. P. 3.853(d)(1)(A) (Postconviction DNA Testing)*, 857 So. 2d 190 (Fla. 2003) (exercising all writs authority to hold statutory deadline in abeyance while considering petitions invoking this Court's jurisdiction to issue writs of mandamus and to adopt rules of court procedure).

The Petition here asks this Court to exercise its all writs authority without identifying any present basis for invoking this Court's original or appellate jurisdiction over the underlying case. But Petitioner goes further by claiming that a separate source of jurisdiction is entirely unnecessary—that the all writs provision authorizes this Court to intervene in *any* case pending before a lower court that involves an "important constitutional issue" and is "likely to be considered by this Court in the future." Pet. at 5 (citing *League of Women Voters of Fla. v. Data Targeting*, 140 So. 3d 510 (Fla. 2014)). Petitioner's proposition goes far beyond the limited scope of *Data Targeting* and, if accepted by this Court, would effectively establish "all writs" as an independent basis for jurisdiction in a manner irreconcilable with the text of the Florida Constitution and this Court's longstanding precedent. *See* Harry Lee Anstead et al., *The Operation and Jurisdiction of the Supreme Court of Florida*, 29 Nova L. Rev. 431, 556 (2005) (noting that the "ultimate jurisdiction" requirement under this Court's precedents requires petitions invoking "all writs" to identify at least two constitutional provisions establishing jurisdiction: "One would be the provision creating the ultimate basis of jurisdiction, and the other would be the all writs clause.").

Even under Petitioner's expansive view of this Court's all writs authority, however, the Petition should still be denied as premature. Unlike *Data Targeting*, the First District here has not decided the merits of the underlying appeal by

issuing an order setting forth the basis of its decision. As noted above, the parties have not even concluded the expedited briefing ordered by the First District. Neither the Petitioner nor this Court has any basis for ascertaining whether it is "highly likely" that the First District will ultimately decide the underlying appeal in a manner implicating this Court's jurisdiction. And there is a substantial likelihood that the First District's decision ultimately *will not* provide a separate basis for the exercise of this Court's jurisdiction.

The Petition should also be denied because this Court's all writs authority is not necessary to the complete exercise of its jurisdiction. As noted above, the First District may decide the underlying appeal before the appointment deadline in a manner that does not provide a basis for jurisdiction in this Court. But even if the appointment process were to conclude, this Court might determine that its jurisdiction to decide the questions presented is not eliminated under an exception to the mootness doctrine for cases that are likely to recur while evading review.

Finally, even if this Court concludes that it has the authority to employ its all writs authority, it should still exercise its discretion by denying the relief sought in the Petition. The First District's opinion in *Trotti I* faithfully applied the text of the Florida Constitution and this Court's precedents in determining that a resignation in judicial office accepted before the beginning of the candidate qualifying period creates a vacancy in office to be filled by gubernatorial appointment rather than by

election. Petitioner has not identified any textual basis in the Florida Constitution that should lead this Court to discard its longstanding precedent establishing the commencement of the candidate-qualifying period as the objective "bright-line" marking the beginning of the election process, or to replace a clear standard with a subjective and fact-dependent analysis of a retiring judge's motivations and a case-by-case assessment of the length of a physical vacancy in office.

A. No separate jurisdictional basis currently exists for this Court to exercise jurisdiction over the underlying case.

Petitioner seeks to invoke this Court's all writs authority without identifying any present basis for invoking this Court's original or appellate jurisdiction over the underlying case. The Petition implicitly concedes that no independent basis currently exists for this Court to exercise its jurisdiction over this case, and a review of the jurisdiction granted to this Court by the Florida Constitution confirms that the Petitioner's concession is well-founded. The Petition should be denied.

As an initial matter, this case plainly does not implicate this Court's exclusive jurisdiction or its mandatory appellate jurisdiction. Specifically, the underlying case does not involve: 1) an appeal of a final judgment imposing the death penalty (Art. V, § 3(b)(1)); 2) a challenge to the validity of a statute or constitutional provision (Art. V, § 3(b)(1)); 3) an appeal from an order of the Florida Public Service Commission or from a final judgment in a bond validation

proceeding (Art. V, § 3(b)(2)); 4) admission to, or the regulation of, The Florida Bar (Art. V, § 15); 5) the adoption of rules for practice and procedure before the courts (Art. V, § 2(a)); 6) consideration of recommendations from the Judicial Qualifications Commission (Art. V, § 12(c)); 7) legislative apportionment (Art. III, § 16); or 8) the validity of an initiative petition (Art. V, § 3(b)(10)).

Similarly, this case indisputably does not involve a petition for a writ of mandamus, quo warranto, prohibition, or habeas corpus. Art. V, § 3(b)(7) – (9), Fla. Const. No question of law has been certified to this Court by the Supreme Court of the United States or a United States Court of Appeals. Art. V, § 3(b)(6), Fla. Const. The underlying case does not involve any decision certified by a district court of appeal to be of great public importance, nor does it involve a decision certified to be in direct conflict with a decision of another district court of appeal. Art. V, § 3(b)(4), Fla. Const. And the First District has denied Petitioner's suggestion for certification of the underlying judgment as a matter of "great public importance" requiring "immediate resolution" by this Court. Art. V, § 3(b)(5), Fla. Const. App. 329.

Finally, it is undisputed that no decision has been issued by the First District in this case that "expressly declares valid a state statute," "expressly construes a provision of the state or federal constitution," "expressly affects a class of constitutional or state officers," or "expressly and directly conflicts with a decision

of another district court of appeal or of the supreme court on the same question of law." Art. V, § 3(b)(3), Fla. Const.

This exhaustive review of the Court's potential sources of jurisdiction merely confirms what the Petition effectively concedes: this Court currently has no jurisdictional basis to consider the underlying case. And because the all writs provision "cannot be used as an independent basis of jurisdiction," *St. Paul Title Ins. Corp.*, 392 So. 2d at 1305, the absence of any separate jurisdictional basis for this Court to consider the underlying case should be dispositive of Petitioner's request for a constitutional writ.

The jurisdictional cases cited in the Petition stand for the same principle and—with a single exception, discussed in Section I(B), below—*every one* of those cases involved a party seeking to invoke this Court's jurisdiction on a separate and independent constitutional basis with the all writs provision involved in an ancillary role. *See Fla. House of Reps. v. League of Women Voters of Fla.*, 118 So. 3d 198, 199 (Fla. 2013) (petition sought writ of prohibition and all writs); *Roberts v. Brown*, 43 So. 3d 673, 675 (Fla. 2010) (petition sought writ of prohibition and all writs); *Amends to Fla. R. Crim. P. 3.853(d)(1)(A) (Postconviction DNA Testing)*, 857 So. 2d at 190 (petitions sought writ of mandamus, amendment to Florida Rule of Criminal Procedure, and all writs); *Fla. Senate v. Graham*, 412 So. 2d 360, 360-61 (Fla. 1982) (petition sought writ of

mandamus and all writs; Court employed all writs authority in aid of its exclusive jurisdiction over apportionment); *Petit v. Adams*, 211 So. 2d 565, 566 (Fla. 1968) (petition sought writ of mandamus and all writs). Each of these cases cited in the Petition confirms the longstanding use of this Court's all writs authority "as an aid to the Court in exercising its 'ultimate jurisdiction' conferred elsewhere in the constitution." *Williams*, 913 So. 2d at 543. The Petition should be denied because it fails to identify any present basis for this Court to exercise jurisdiction over the underlying case.

B. Petitioner's speculation regarding the "likelihood" of eventual review in this Court is insufficient to support the exercise of its all writs authority.

Because Petitioner cannot plausibly allege that this Court currently has any independent jurisdictional basis to review the underlying case, he argues that a separate source of jurisdiction is entirely unnecessary—that the all writs provision authorizes this Court to intervene in any case pending before a lower court that involves an "important constitutional issue" and is "likely to be considered by this Court in the future." Pet. at 5. Petitioner's approach would dramatically expand the scope of the all writs provision in a manner inconsistent with the text of the Florida Constitution and irreconcilable with this Court's longstanding precedent. The Petition should be denied.

The Petition relies almost entirely on a single case for the supposed proposition that this Court's all writs authority may be exercised in any case that is "likely to be considered by this Court in the future": *League of Women Voters of Florida v. Data Targeting*, 140 So. 3d 510 (Fla. 2014).[5] In *Data Targeting*, this Court considered an emergency petition for the issuance of a constitutional writ filed by plaintiffs in an ongoing lawsuit challenging the constitutional validity of the congressional redistricting plan. *Id*. at 511. On the eve of trial, the circuit court issued two orders determining that certain documents in the possession of non-parties to the litigation that were allegedly relevant to the plaintiffs' claims were to "remain confidential" even if offered as an exhibit or entered into evidence, but that the trial proceedings "shall remain open" during use of the documents by any party at trial. *Id*. at 512.

The non-parties in *Data Targeting* immediately appealed to the First District which, following expedited briefing, issued a short order reversing the circuit court's orders and prohibiting disclosure of "the constitutionally-protected contents of the privileged and confidential documents" at issue. *Id*. The First District's

[5] The statement that this Court's all writs authority may be used to protect jurisdiction that "likely will be invoked in the future" appears to have first arisen as *dicta* in *Roberts v. Brown*, 43 So. 3d 673 (Fla. 2010). In *Roberts*, the petitioners invoked this Court's jurisdiction on separate and independent grounds—they sought a writ of prohibition to protect this Court's exclusive jurisdiction over pre-election challenges to ballot initiatives—in addition to "all writs." *Id*. at 675.

decision cited *Perry v. Schwarzenegger*, a case from the United States Court of Appeals for the Ninth Circuit pertaining to the First Amendment's associational privilege, and promised a "forthcoming opinion explaining its reasoning in greater detail." *Id*.

The plaintiffs in *Data Targeting* then filed an emergency petition in this Court seeking to invoke the all writs provision to stay the First District's decision and to allow the introduction of the disputed documents in the ongoing trial. *Id*. at 513. Following expedited briefing, this Court granted the petition. *Id*. at 514. The majority opinion in *Data Targeting* reasoned that the First District's order had stated the basis for its forthcoming opinion on the merits and had cited to a federal case that: 1) involved the First Amendment's associational privilege; and 2) required an assessment of the "importance of the litigation," therefore making it "highly likely" that the forthcoming detailed opinion from the district court would construe provisions of the state and federal constitutions. *Id*. at 513-14 (referencing this Court's jurisdiction authority under Article V, section 3(b)(3)). Although the petitioners in *Data Targeting* argued that the First District's forthcoming decision could implicate other independent jurisdictional grounds, this Court concluded that it was "unable at this time to determine the likelihood" that the First District's decision would provide another jurisdictional basis for review. *Id*. at 514.

For several reasons, the facts and procedural posture of the underlying

appeal are readily distinguishable from *Data Targeting* and do not support the exercise of this Court's all writs authority:

First, and most significantly, this Court in *Data Targeting* was only able to determine that it was "highly likely" that the First District would construe provisions of the state and federal constitutions in its forthcoming opinion because the First District had *already issued an order on the merits* identifying the basis for its decision. *Id*. at 512. Here, in contrast, the First District has not issued any decision indicating the basis for its decision on the merits—and for good reason, as the expedited merits briefing ordered by the First District has not yet concluded.[6] For this reason alone, Petitioner errs in asserting that *Data Targeting* "is on all fours" with the present case. Pet. at 9.

Second, Petitioner asks this Court to speculate that the First District's decision on the merits "likely" will provide a basis for review in this Court. Pet. at 22. After all, Petitioner argues, the First District's decision could "expressly affect a class of constitutional officers" or "certify a question of great public importance" or "expressly constru[e]" provisions of the Florida Constitution or "create express and direct conflict with" a decision of this Court. Pet. at 21-23. Unless, of course,

[6] Petitioner sought to invoke this Court's "all writs" authority a full week before filing his Answer Brief in the First District on July 2, 2018. Respondents will file their Reply Brief in the First District within the next 10 days—on or before July 16, 2018.

the First District's decision doesn't do any of these things. In *Data Targeting*, this Court concluded that it was "unable at this time to determine the likelihood that the First District's forthcoming decision will expressly affect a class of constitutional officers." 140 So. 3d at 514. There was simply no basis in the record before the Court in *Data Targeting* to determine whether those independent jurisdictional grounds were likely to exist. The same is true here. To the extent *Data Targeting* provides a rule of decision for the present case, the Court should adhere to the measured approach adopted in that case and reject Petitioner's invitation to expand its scope by speculating—or simply "guessing"—what the First District's opinion in the underlying appeal ultimately will provide as the basis for its ruling.

Third, this Court should not exercise its all writs authority here because—unlike *Data Targeting*—it is reasonably possible that the First District's decision in the underlying appeal may *never* provide an independent basis for jurisdiction in this Court. *Data Targeting* involved a novel appeal implicating a privilege grounded in the federal constitution in the context of an ongoing trial over the once-in-a-decade reapportionment under new state constitutional standards. *Id*. at 511. The underlying case, in contrast, involves a claim that the Petition acknowledges was raised by the same Petitioner just four years ago. Pet. at 12-14. Petitioner's argument that a vacancy caused by the resignation of a judge on the Fourth Judicial Circuit should be filled by election rather than gubernatorial

appointment was considered and rejected in a written opinion by the First District in 2014. *Id*.; *Trotti I*, 147 So. 3d at 645. And then this Court denied review of the 2014 case. *Trotti v. Detzner*, 157 So. 2d 1051 (Fla. 2014).

The trial court in the present case granted a preliminary injunction to Petitioner explicitly on the grounds that he was not bound by the First District's decision in *Trotti I*, but was instead bound to follow two unpublished concurring opinions by members of this Court. App. 142. That Preliminary Injunction Order is the subject of the underlying appeal before the First District.

Given the First District's recent opinion addressing claims that are substantially identical to Petitioner's arguments in the underlying appeal, it is entirely possible that the First District's decision on the merits will decide Petitioner's current challenge based on *Trotti I* without revisiting that case's reasoning, without reexamining the same constitutional provisions, and without reconsidering the application of this or any other court's prior decisions to Petitioner's arguments, but simply stating:

PER CURIAM.

REVERSED. *See Trotti v. Detzner*, 147 So. 3d 641 (Fla. 1st DCA 2014), *rev. denied*, 157 So. 3d 1051 (Fla. 2014).

Alternatively, the First District may decide the appeal on the basis that the scope of the Preliminary Injunction Order exceeded the trial court's authority. App. 195. Or

the First District may conclude that the trial court abused its discretion in concluding that the Petitioner had satisfied his burden to demonstrate that the requested injunctive relief would serve the public interest. App. 200. Or the First District may even rule in Petitioner's favor. Unlike *Data Targeting*, there is simply no basis in the record for Petitioner or this Court to presume or to speculate on the likelihood that the First District will decide the underlying appeal in a manner implicating this Court's ultimate jurisdiction. And because the triggering event for this Court's jurisdiction "has not yet occurred," the Petition seeking all writs relief should be denied as premature. *See, e.g.*, *State ex rel. Chiles v. Pub. Employees Relations Com'n*, 630 So. 2d 1093, 1095 (Fla. 1994) (where the triggering event for the Court's jurisdiction had not yet occurred, all writs jurisdiction would be denied as premature).

Fourth, and finally, the narrow and specific circumstances supporting the *Data Targeting* opinion should not be extended to this case. To do so would dramatically expand the constitutional limitations on this Court's discretionary review. Significantly, this Court has previously stated it "will not allow the 'all writs necessary' provision of section 3(b)(7) to be used to circumvent the clear language of section 3(b)(3)" which permits discretionary review of decisions of the district courts of appeal in limited circumstances. *St. Paul Title Ins. Corp.*, 392 So. 2d at 1304–05. And this Court has long adhered to the "constitutional plan"

providing that "the powers of this Court to review decisions of the district courts of appeal are limited and strictly prescribed." *Ansin v. Thurston*, 101 So. 2d 808, 810 (Fla. 1958).

While Petitioner suggests the First District is "preventing" this Court from exercising its "inevitable jurisdiction," Pet. at 7, Petitioner disregards the structural limits on this Court's jurisdiction. The Florida Constitution does not permit this Court to assert jurisdiction over any case pending in the district courts that it deems sufficiently important and usurp the district court's ability to review the case and issue a final decision. *See, e.g., Bunkley v. State*, 882 So. 2d 890 (Fla. 2004) (Wells, J. concurring) ("The paramount effect of the 1980 amendment to article V of the Florida Constitution was to again restructure the Supreme Court's appellate jurisdiction so that in most cases the district courts were final appellate courts"); *Johns v. Wainwright*, 253 So. 2d 873, 874 (Fla. 1971) ("The District Courts of Appeal were never intended to be intermediate courts. It was the intention of the framers of the constitutional amendment which created the District Courts that the decision of those courts would, in most cases, be final and absolute.").

This Court should deny the Petition because Petitioner's speculation regarding the likelihood that the First District's forthcoming opinion will provide an independent basis for jurisdiction in this Court is unsupported by the record and

this Court's precedent and is wholly insufficient to justify the exercise of the all writs power.

C. The exercise of this Court's all writs authority is not necessary to the complete exercise of its jurisdiction.

Even if a separate jurisdictional basis existed, the all writs authority should still not be exercised because it is not "necessary to the complete exercise of [this Court's] jurisdiction." Art. V, § 3(b)(7), Fla. Const.; *see also Data Targeting*, 140 So. 3d at 514 (issuing all writs to preserve Court's ability to completely exercise jurisdiction and to prevent irreparable harm); *cf. Redner v. Fla. Dep't of Health*, SC18-740, 2018 WL 2386895, at *1 (Fla. May 25, 2018) (denying petition to invoke all writs jurisdiction where petitioner failed to demonstrate that all writs authority was necessary to protect this Court's jurisdiction or to prevent irreparable harm).

Petitioner argues that the judicial appointment process will continue unabated if this Court does not exercise its all writs authority. Pet. at 23. But the expedited briefing before the First District will conclude more than one month before the appointment deadline. One month is more than sufficient time for the First District to issue its opinion on the merits following expedited briefing. *See, e.g.*, *Non-Parties v. League of Women Voters of Fla.*, 150 So. 3d 221, 234 (Fla. 1st DCA 2014) (Makar, dissenting from en banc opinion) (explaining that First District panel's promised opinion providing detailed reasoning for the order stayed

in *Data Targeting* had been posted internally for expedited release on May 27, 2014—less than one week after the conclusion of briefing—before a non-panel member moved for rehearing en banc, "the effect of which was the withdrawal of the pending opinions."). After the First District has released its opinion in the underlying appeal, there will be no longer be any need to speculate regarding any potential basis for jurisdiction in this Court.

But even if the appointment process were to conclude before the First District or this Court had an opportunity to rule on the merits of the appeal, this Court might nonetheless determine that its jurisdiction to decide the questions presented is not eliminated under an exception to the mootness doctrine for cases that are likely to recur while evading review. *See, e.g.*, *Enter. Leasing Co. v. Jones*, 789 So. 2d 964, 965 (Fla. 2001) ("Although the issue presented in this appeal may be moot as it relates to these parties, the mootness doctrine does not destroy our jurisdiction when the question before us is of great public importance or is likely to recur.").

The underlying appeal, in which purely legal issues predominate, is therefore distinguishable on additional grounds from the fact-dependent, once-in-a-decade apportionment litigation at issue in *Data Targeting*, and from other cases that absent intervention, may have prevented this Court from engaging in meaningful review. *See*, *e.g.*, *Petit,* 211 So. 2d at 566 (invoking all writs to protect

jurisdiction where petitioner sought writ of mandamus to examine voting machine counters to determine whether the returns correctly reflected the votes cast in an election but respondents indicated they would erase the counters in the absence of a Supreme Court order directing otherwise).

II. THIS COURT SHOULD DENY THE PETITION EVEN IF AN INDEPENDENT CONSTITUTIONAL BASIS EXISTED FOR THE EXERCISE OF ITS ALL WRITS AUTHORITY.

Finally, even if this Court were to conclude that it has an independent jurisdictional basis to exercise its all writs authority, the relief sought in the Petition should still be denied. The First District's opinion in *Trotti I* faithfully applied the text of the Florida Constitution and this Court's precedents in determining that a resignation in judicial office accepted before the beginning of the candidate qualifying period creates a vacancy in office to be filled by gubernatorial appointment rather than by election. Petitioner has not identified any textual basis in the Florida Constitution that should lead this Court to discard its longstanding precedent establishing the commencement of the candidate-qualifying period as the objective "bright-line" marking the beginning of the election process, or to replace a clear standard with a subjective and fact-dependent analysis of a retiring judge's motivations and a case-by-case assessment of the length of a physical vacancy in office.

The Florida Constitution provides that a vacancy in office shall occur upon,

among other circumstances, the "resignation of the incumbent." Art. X, § 3, Fla. Const. When a letter of resignation is tendered with a future effective date, the vacancy in judicial office occurs on the date the resignation is accepted by the governor. *See In re Advisory Opinion to the Governor*, 600 So. 2d 460 (Fla. 1992) (concluding that when a letter of resignation to be effective at later date is received from a judge and accepted by the governor, a vacancy in that office occurs and actuates the process to fill it by appointment); *Advisory Opinion to Governor re Sheriff And Judicial Vacancies Due To Resignations*, 928 So. 2d 1218 (Fla. 2006) (holding that a judge's resignation accepted by the governor before the start of the candidate qualifying period and effective at a future date after the qualifying period created a vacancy to be filled by appointment rather than election); *accord Trotti*, 147 So. 3d 641 at 644 ("A judicial vacancy occurs when a letter of resignation is received and accepted by the Governor, even if the resignation has a future effective date.").

Upon the occurrence of a vacancy in judicial office, the Florida Constitution unambiguously mandates:

> The governor *shall fill each vacancy* on a circuit court ... *by appointing* for a term ending on the first Tuesday after the first Monday in January of the year following the next primary and general election *occurring at least one year after the date of appointment*.... An election shall be held to fill that judicial office for the term of the office beginning at the end of the appointed term.

Art. V, § 11(b), Fla. Const. (emphasis supplied). The Governor's authority and

obligation to appoint under Article V, section 11(b) is nondiscretionary. The Constitution does not state, as Petitioner suggests, that the Governor shall fill each vacancy "when an unreasonable vacancy is scheduled to occur for such a length that the business of the state necessitates the appointment." App. 31. Nor does the Constitution contain the standard provided by the Preliminary Injunction Order: that an office should be filled by gubernatorial appointment only when there is "emergency or public business requiring an appointment." App. 150-151. Instead, the Governor's duty to appoint yields to only one exception recognized by this Court: when the election process has commenced prior to the vacancy occurring. *See, e.g., Judicial Vacancy Due to Resignation,* 42 So. 3d 795, 797 (Fla. 2010). And the "election process" is deemed to commence at the start of the candidate qualifying period for judicial office. *Appointment or Election of Judges (2008),* 983 So. 2d 526, 528-30 (Fla. 2008) (establishing bright-line rule); *Appointment or Election of Judges (2002),* 824 So. 2d 132, 135 (Fla. 2002).

Although the constitutional language is clear, and this Court need go no further, the history of relevant amendments to Article V is also instructive. In 1996, the electorate voted to amend Article V, section 11(b), to provide that appointed judges will serve a term "ending on the first Tuesday after the first Monday in January of the year following the general election *occurring at least one year after the date of the appointment*." (emphasis added). This amendment

extended the length of gubernatorial appointments from the end of the term of a vacating judge. The amendment, enacted to address the "difficulties with appointing qualified individuals to serve relatively briefly on the circuit bench," was "intended to provide the governor with the authority to appoint" even "when an election is scheduled within the foreseeable future." *Pincket*, 765 So. 2d at 288. Thus, filling a vacancy by appointment, even when an election is imminent, was not only specifically contemplated and approved by the voters, it is mandated by Article V of the Florida Constitution.

Here, the undisputed facts establish that Judge Foster's resignation was tendered and accepted by the Governor before the election process commenced at the beginning of the candidate qualifying period. App. 65. The Governor is therefore constitutionally authorized and obligated to fill the vacancy by appointment, and the Secretary of State is prohibited from qualifying candidates for a judicial seat that will not be filled by election. Because Petitioner's arguments raised below are contrary to the language of the Florida Constitution and well-established precedent, the trial court erred as a matter of law in issuing the Preliminary Injunction Order.

CONCLUSION

The Emergency Non-Routine Petition for Issuance of a Constitutional Writ should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 6, 2018, a true copy of the foregoing has been served via email on the following counsel of record:

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I HEREBY CERTIFY that this computer-generated Response complies with the font requirements of Florida Rule of Appellate Procedure 9.100(l).

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