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 State of the State of Florida, in his official capacity,

Respondents.

Case No. SC18-1012

L.T. Case No. 1D18-2387

REPLY IN SUPPORT OF EMERGENCY NON-ROUTINE PETITION FOR ISSUANCE OF A CONSTITUTIONAL WRIT

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ARGUMENT IN REPLY

The response by the Governor and the Secretary of State (collectively, "the State") is light on substance but heavy on misdirected outrage. It fails to offer any valid or compelling reason—through Florida law, sound judicial policy, or common sense—to deny the limited relief the petition requests.

In this reply, we will focus on the State's two main points: that the petition is premature and that it seeks an expansion of this Court's all writs jurisdiction. We begin, however, by getting back to basics, because the Governor and Secretary of State have brushed aside what's really going on here—electoral gamesmanship they fully support.

The real story. Judge Robert Foster is ineligible to run for reelection. The judicial seat he is currently occupying will become vacant in the first week of January 2019, without the need for any further action on Judge Foster's part. Nevertheless, Judge Foster chose to submit, and the Governor chose to accept, a resignation of his judicial office. But that resignation did not take effect immediately. Nor even in the near future, say, once Judge Foster had time to clear his weekly docket. It wasn't a resignation to spend more time with his family, or because he no longer felt he could diligently perform the duties of a circuit court judge.

In fact, Judge Foster doesn't really want to resign at all. For the next six months, he will continue to hear cases, adjudicate disputes among Duval and Nassau County residents, wear a robe, and take a salary paid by Florida taxpayers. The only reason he has offered for his resignation is the same reason he is ineligible to run for reelection anyway: he has reached the age of "constitutional senility." (A. 16).

But if the office he currently occupies were to become vacant by operation of the mandatory retirement law, or if Judge Foster waited to announce his four-day-early retirement until after the start of the statutory qualifying period, his successor would be chosen by the voters of the Fourth Judicial Circuit. And Judge Foster did not want that to happen. (A. 101-02, 221-22).

So, with Governor Scott's blessing, Judge Foster "resigned" at this time, and in this manner, solely so that Governor Scott could choose his replacement. This is not a mere allegation; it is what Judge Foster has admitted, and what the trial court has found. (A. 148, 150, 154).

The misdirected outrage. And yet, rather than be outraged by what Justice Lewis has aptly called a "manipulat[ion] [of] the electoral process," the Governor and Secretary of State have cast aspersions on Mr. Trotti for having the temerity to "accuse[] a sitting circuit judge" of engaging in behavior a majority of this Court has previously condemned. *Pincket v. Detzner*, No. SC16-768, 2016 WL 3127704,

at *3 (Fla. June 3, 2016) (Lewis, J., concurring in result only). To be clear, Mr. Trotti does not intend to demean or otherwise impugn Judge Foster, a long-serving and distinguished jurist.

But just like the other long-serving and distinguished jurists who "resigned" last election cycle in precisely the same fashion, for precisely the same (admitted) reasons, Judge Foster has unfortunately put his personal preferences ahead of the Constitution he has sworn to uphold. Indeed, it was only two short years ago, when several other circuit judges partook in the same "circumvent[ion] [of] . . . the Florida Constitution," that four Justices still on this Court made clear that "[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 appointment." *Pincket*, 2016 WL 3127704, at *2 (Pariente, J., concurring in result).

Not that you'd know it from the Governor and Secretary of State's response. The opinions this Court took the time and effort to write and make known to the Bench and the Bar, presumably with the hope of putting an end to this unfortunate practice moving forward, have been discarded as irrelevant and unworthy of consideration. The State's response to the petition hardly references them at all, even while devoting several pages to a discussion of the constitutional question. And that's an *improvement* over how the State has treated those opinions in the

lower courts, where the Governor and Secretary of State have referred to a majority view of this Court as "dicta" in an "unpublished decision" that has "no precedential value." (A. 58, 278-79).

The State's apparent disregard for this Court's pronouncements is emblematic of a broader theme in this litigation, where the trial court is the only one trying to be faithful to the intent of the Constitution and this Court's interpretation of it. The State and the First District Court of Appeal, on the other hand, seem perfectly content to allow the practice of unilaterally converting judgeships from elections to appointments to continue unabated, with this Court's 2016 admonishment hardly a blip on the radar.

To that effect, the Governor has forcefully resisted a stay of the nominating process—a curious decision if, as he claims in his response, his interpretation of the law is so clearly correct. Given that the "vacancy" at issue will not even arise for another six months, it would seem a simple matter to let the litigation play out and allow this Court (as the Florida Constitution envisions) to have the final say on whether Judge Foster's successor should be chosen by election or by appointment. Instead, though, the Governor's approach has been to aggressively push forward with the nominating process and try to run out the clock on this important constitutional issue before it can be presented to this Court on its merits.

Thus, contrary to the response's claims about the allegedly "premature" timing of the petition, actions speak louder than words. And the State's actions throughout this litigation demonstrate that this Court's ability to meaningfully adjudicate the constitutional issue presented by Mr. Trotti's declaratory judgment lawsuit will likely be lost forever if it does not step in now to protect and preserve the rights of the parties and the voters of the Fourth Judicial Circuit.

The timing. In this vein, the through-line of the State's response is that there is no need for this Court to grant the petition because there is supposedly plenty of time for the First District to resolve the "underlying appeal" prior to the conclusion of the "appointment process." (Response, pp. 10-11, 23-24). This argument suffers from at least three fatal flaws.

First, it assumes that the State will prevail and that the only thing left for the Governor to do is make the appointment. But what if—as the trial court has suggested, and as a majority of this Court said two years ago—the seat must be filled by an election? In that event, the case might be subject to extremely confining time-limitations. Indeed, although the State has told this Court that Mr. Trotti would be "effectively awarded" the seat by "litigat[ing] his way into a judicial office," (Response, p. 2 n.1), the State has taken a diametrically opposite position in the First District, pointing out that the remedy in such a circumstance should be to "reinstate the election" and "accept candidates seeking to qualify"

during a new and separate qualifying period established by the court. (A. 286 (citing *Lerman v. Scott*, No. SC16-783, 2016 WL 3127708, at *1 (Fla. June 3, 2016))).

Whether the State is correct about the proper remedy for the electoral gamesmanship undertaken by Judge Foster, and sanctioned by Governor Scott, is not yet at issue in the underlying litigation. And it is certainly far beyond the scope of the limited relief sought by this petition. But the point is that the clock is undoubtedly ticking. Things move quickly when there are deadlines, especially when elections depend on it.

The time constraints of the underlying litigation are easily revealed by the speed with which the State itself has approached any unfavorable ruling in the case. For example, the State filed its notice of appeal within *a few hours* of the trial court's order enjoining the Governor from moving forward with the appointment, knowing full-well that it could take advantage of the automatic stay. (*Compare* A. 147 *with* A. 293). It then used that automatic stay to continue the nominating process; in fact, as the trial court mentioned, "the JNC machinery didn't even slow down." (A. 260). When the stay was vacated, the State, later *that same night*, filed a "time-sensitive" motion asking the First District to overturn the trial court's decision and allow the appointment process to plow full steam ahead.

(*Compare* A. 264 *with* A. 267). In short, the State clearly believes time is of the essence when the rulings aren't going its way.

Second, the State's argument that the all writs petition is premature is based on the erroneous assumption that the constitutional question necessarily will be decided in short order by the interlocutory appeal that is now pending in the First District. The State says, for instance, that "[t]he expedited briefing before the First District will conclude more than one month before the [Governor's] appointment deadline." (Response, p. 23). The State then adds that "[o]ne month is more than sufficient time for the First District to issue its opinion on the merits following expedited briefing." (Response, p. 23). That may be true, or it may not. Certainly, the First District has given no indication that it plans to render its decision prior to the expiration of the nomination deadline it has allowed to remain in place.

However, regardless of the timing or the outcome of that proceeding, the appeal the State is referring to, which is currently pending in the First District, is *not* the appeal on the merits of the case. Rather, it is an appeal from a nonfinal order granting an injunction. That appeal has had a paralyzing effect on the entire litigation, greatly reducing the possibility that the lower courts will be able to decide the constitutional issue presented by the declaratory judgment action in time.

Such an outcome was entirely avoidable, though. It would have been easy enough for the State to obtain a ruling on the merits, as the trial court was perfectly prepared to do in an expedited fashion, and to then have that ruling reviewed in the First District. Instead, the State chose to immediately appeal the trial court's order granting a temporary injunction. This brought the declaratory judgment suit to a halt, because the pendency of the nonfinal appeal prohibits the trial court from rendering a final judgment. *See* Fla. R. App. P. 9.130(f) (stating that "the lower tribunal may not render a final order disposing of the cause pending [non-final appellate] review").

Of course, this would not have been a problem if the trial court's injunction had its intended effect of keeping the rights of the parties intact during the course of the litigation. But it did not. The State effectively nullified the injunction altogether by persuading the First District to reinstate an automatic stay. And the effect of that stay has been to allow the appointment process to proceed along its normal course, as though the injunction had never been issued—while simultaneously preventing the merits of the lawsuit from being adjudicated. So not only has the First District sanctioned the appointment of Judge Foster's successor, it has allowed that appointment to go forward before there is even an opportunity to resolve Mr. Trotti's claim that the seat should be filled by an election. This is exactly (and only) what Mr. Trotti's petition is trying to claw-back.

Third, the State has stressed that the Governor has not yet made the appointment, even though he presumably could have done so at any time given that the injunction has been stayed. What the State did not say, however, is that the Governor has used the stay to complete all of the work before the Judicial Nominating Commission. During the injunction appeal, the Governor has been able to acquire a list of six nominees, and he is now in a position to make an appointment at a moment's notice. Notably, he has not offered any assurance, to this Court or to the lower courts, that he will continue to hold off on the appointment until the issue has been decided. To the contrary, as the actions detailed above have shown, he has done everything in his power to preserve his ability to make the appointment while the litigation continues.

In sum, this Court need only consider the course of this litigation to understand the urgency of the matter. The State is arguing in the First District that the injunction must be reversed because Mr. Trotti does not have a likelihood of success in the face of the First District's prior decision in *Trotti I*. (A. 275-83). Unless the First District decides to hear the injunction appeal en banc (an event that will consume an inordinate amount of time), the panel assigned to the appeal appears poised to agree with the State. *See Fla. Dep't of Health v. People United for Medical Marijuana*, No. 1D18-2206, 2018 WL 3233113, at *2 (Fla. 1st DCA July 3, 2018) (making clear that the First District evaluates the likelihood of

success on the merits in determining whether to vacate or reinstate an automatic stay). If the injunction is reversed, as the State is requesting, the Governor could then make the appointment before the trial court even has a chance to rule on the merits of the case. In reality, given the stay, the Governor could make the appointment tomorrow. And, in the end, an important constitutional issue will likely have escaped review, once again.

Knowing this, the best the State can offer in response is that there might be other options for deciding the issue, such as "an exception to the mootness doctrine for cases that are likely to recur while evading review." (Response, p. 24). But that is, in principle, what this Court tried to do two years ago, when it denied relief in the particular cases before it while issuing opinions setting forth a majority view on the constitutional issue. And we can see the result: the State has either ignored or, worse, told the lower courts that those opinions have no value. Accordingly, this Court should be awfully skeptical of a solution calling for more of the same, from a party whose actions during this litigation have actively prevented this Court from being presented with a meaningful opportunity to settle the issue once and for all.

The sky is not falling. The State has bootstrapped its misguided argument about timing to an equally unconvincing argument about jurisdiction. Basically,

the State's position is that even if this Court wants to act now, it is powerless to do so. This argument is based on fear, not reason.

Specifically, the State says that the petition seeks a "dramatic expansion" of the all writs authority that would "go[] far beyond the limited scope" of this Court's precedent and "usurp the district court's ability to review the case and issue a final decision." (Response, pp. 3, 10, 22). But granting the petition would do nothing of the sort. The relief sought here is actually quite limited. Mr. Trotti is not asking this Court to intervene and decide the merits before the lower courts have addressed them. In fact, Mr. Trotti is asking this Court to do precisely the opposite: make sure that the lower courts *can* address those merits and issue a final decision that is not meaningless and that can ultimately be reviewed by this Court. No more, no less.

This is hardly a revolutionary request. Although the all writs provision is not an independent source of jurisdiction, the law does not, as the State's response claims again and again, require another basis for jurisdiction to exist at the time the petition is filed. Rather, as this Court has said many times, it has the power to issue a constitutional writ to protect a *future* exercise of jurisdiction. *See League of Women Voters of Fla. v. Data Targeting, Inc.*, 140 So. 3d 510, 513 (Fla. 2014); *Roberts v. Brown*, 43 So. 3d 673, 677 (Fla. 2010); *United Servs. Auto Ass'n v. Goodman*, 826 So. 2d 914, 915 (Fla. 2002); *State ex rel. Chiles v. Pub. Employees*

Relations Comm'n, 630 So. 2d 1093, 1095 (Fla. 1994); *Fla. Senate v. Graham*, 412 So. 2d 360, 361 (Fla. 1982); *Petit v. Adams*, 211 So. 2d 565, 566 (Fla. 1968); *Couse v. Canal Auth.*, 209 So. 2d 865, 867-68 (Fla. 1968).

This makes sense. Indeed, if an independent basis to invoke the Court's jurisdiction already existed at the time the petition was filed, there would be no need for the all writs remedy at all. As this Court explained in *Couse*, the all writs provision, "though ancillary, extends to support an ultimate power of review, though it not be immediately and directly involved." 209 So. 2d at 868 (internal quotations omitted). Stated differently, the remedy is designed to protect the Court's *potential* jurisdiction, and it exists precisely *because* there are some situations, like this one, in which that jurisdiction would be lost forever if the Court lacked the power to protect it.

Unable to explain away this precedent, the State attempts to weaken our argument by mischaracterizing it. Several times, the response claims that the petition asks this Court to issue a writ because the case involves "an important constitutional issue." (Response, pp. 10, 15). The issue is important, to be sure, but that is not the basis for invoking the Court's all writs power.

As explained by the petition, the basis for invoking the all writs provision is to protect the future jurisdiction this Court will have under Article V, section 3(b), of the Florida Constitution to issue a ruling *on the merits* of Mr. Trotti's

declaratory judgment lawsuit. The petition stated numerous grounds upon which that Article V jurisdiction could be invoked in the future. Those grounds likely will arise when the First District issues its decision in the nonfinal injunction appeal. But even if the First District resolves the injunction appeal on narrower grounds (a disposition that seems doubtful), its eventual review of the declaratory judgment will clearly vest this Court with Article V jurisdiction. Simply put, there is no way for the First District to issue a decision, in good faith, that resolves the merits of the constitutional issue without providing a basis for this Court to review it. A majority of this Court has already recognized as much in *Pincket*.

On this point, the State offers two primary arguments in response. *First*, the State ascribes significance to this Court's denial of jurisdiction in *Trotti I*. But that denial is irrelevant. This Court's jurisdiction is largely discretionary, and the Court could have denied review in 2014 for any number of reasons, including that the issue did not then appear to be a matter of statewide concern. *See Fla. Star v. B.J.F.*, 530 So. 2d 286, 288 (Fla. 1988).

A lot has happened since. This Court had no way of knowing, for instance, that in 2016 a handful of judges around the state would use the First District's opinion in *Trotti I* to deliberately manipulate the Constitution. It had no way of knowing that four of its members would find it necessary in 2016 to publicly disapprove that practice of circumventing the electoral process by creating a

nominal "vacancy" at a distant point in the future. And it had no way of knowing that the practice of unilaterally manipulating the Constitution to avoid elections would continue into the 2018 election cycle despite that publicly expressed disapproval. The bottom line is that whether there was a need for this Court to intervene when *Trotti I* was decided or not, there is most certainly a need for the Court to intervene now.

Second, the State claims that we're just speculating about the Court's future exercise of jurisdiction and that *Data Targeting*, upon which the petition relies, is distinguishable. But *Data Targeting* engaged in precisely the same analysis we have suggested. It found that the lower courts' resolution of the issue was "highly likely" to construe the Constitution and this Court's prior decisions. 140 So. 3d at 514. So too here, where the resolution of Mr. Trotti's declaratory judgment action is highly likely to construe Article V, sections 10 and 11, of the Florida Constitution, along with this Court's prior decision in *Spector v. Glisson*, 305 So. 2d 777 (Fla. 1974). *Data Targeting* further noted that it was possible for the lower courts' resolution of the issue to expressly affect a class of constitutional officers or give rise to a certified question of great public importance. 140 So. 3d at 514. Again, the same is true here—particularly given the State's own acknowledgement that "purely legal issues predominate." (Response, p. 24).

In sum, the future basis for jurisdiction was no more certain in *Data Targeting* than it is here: the two cases are identically postured in terms of the "highly likely" nature that the merits of the issue will be decided in a manner that will eventually vest this Court with an independent source of jurisdiction. That is enough to support all writs jurisdiction under this Court's longstanding case law.

The harm is real. This case is also like *Data Targeting* in that irreparable harm might occur if the petition is not granted. *See* 140 So. 3d at 514. Indeed, the trial court has actually made a *finding* of irreparable harm here. (A. 153). In some ways, then, the rationale for exercising the Court's authority to issue a constitutional stay writ is even stronger in this case than it was in *Data Targeting*. That is especially true given that this case involves the conduct of judges, a subject within the exclusive province of this Court under Article V, section 12, of the Florida Constitution.

In any event, a decision to grant the petition would break no new ground. We acknowledge that all writs is an extraordinary remedy; that's why it's a type of extraordinary writ. But this is an extraordinary case. And the issuance of a constitutional stay writ under these circumstances would be nothing more than an application of settled law to a set of egregious facts. There could hardly be a more appropriate, or more urgent, need for the remedy.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by email to David A. Fugett (david.fugett@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 10th day of July 2018.

/s/Philip J. Padovano
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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Reply in Support of the 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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