No. 18-375

In The
Supreme Court of the United States

DANIEL H. ALEXANDER,

Petitioner,

v.

BAYVIEW LOAN SERVICING, LLC,

Respondent.

On Petition For Writ Of Certiorari To The District Court Of Appeal Of Florida, Third District

BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTIONS PRESENTED

1. Whether the Petition for Writ of Certiorari is timely and confers jurisdiction.

2. Whether this Court can and should exercise its power of discretionary review to consider whether the *per curiam* affirmance of an order denying a motion to vacate final judgment[1] violated federal due process protections, where Petitioner failed to raise any federal issues in this standard state court foreclosure and there is no asserted split of authority.

3. Whether this Court can and should exercise its power of discretionary review to examine the Florida Supreme Court and Third District's purported refusal to "grant disqualifications" as a violation of federal due process protections, where Petitioner never formally moved to disqualify either state appellate court for any reason prior to filing the present petition.

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[1] In his Questions Presented for Review, Petitioner incorrectly refers to the underlying decision as the *per curiam* affirmance of a final judgment. Pet. i. In fact, the decision at issue is the *per curiam* affirmance of an order denying a motion to vacate a final judgment. *See* Pet'r App. A1–2.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Daniel H. Alexander, an individual. He was a defendant in the state court foreclosure proceeding in the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County; the appellant in the state appellate proceeding in the Third District Court of Appeal for the State of Florida; and the petitioner in an original proceeding in the Florida Supreme Court.

Respondent is Bayview Loan Servicing, LLC, a wholly owned subsidiary of Bayview Asset Management, LLC. No publicly held company holds an interest of 10% or more in Bayview Loan Servicing, LLC.

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PRELIMINARY STATEMENT

This is a petition for a writ of certiorari seeking review of a decision of a lower state court. In this brief in opposition, Petitioner, Daniel H. Alexander, will be referred to as "Borrower," while Respondent, Bayview Loan Servicing, LLC, will be referred to as "Bayview." Other terms will be defined where they appear. In addition, Bayview will use the following designations:

Pet. at ___	-	Petition for Writ of Certiorari at page no.
P-App. at ___	-	Borrower's Appendix to the Petition for Writ of Certiorari at page no.
R-App. at ___	-	Bayview's Appendix to the Brief in Opposition at page no.
R. ___	-	Record on Appeal, received by the Third District on 12/1/16, page no. (p. 1–375)
SR1. ___	-	First Supplemental Record, received by the Third District on 3/10/17, page no. (p. 376–95)
SR2. ___	-	Second Supplemental Record, approved by the Third District on 6/6/17, page no. (p. 396–97)

SR3. ___ - Third Supplemental Record, approved by the Third District on 7/5/17, page no. (p. 398–408)

REPORTS OF OPINIONS BELOW

Bayview acknowledges Borrower's citations to the reports of opinions and orders entered below, but makes a correction. Borrower cites the *per curiam* decision of the Third District in *Alexander v. Bayview Loan Servicing, LLC*, 241 So. 3d 825 (Fla. 3d DCA 2018), and "the decision of the Florida Supreme Court that declined to accept jurisdiction to review that opinion," *Alexander v. Bayview Loan Servicing, LLC*, SC18-624, 2018 WL 2069311 (Fla. May 3, 2018). Pet. at 4. However, the Florida Supreme Court was never called to accept jurisdiction to review the Third District's decision. Borrower filed a Petition for Writ of Mandamus asking the Florida Supreme Court to compel the Third District to write an opinion. *See* Pet. at 14. The Florida Supreme Court found it lacked jurisdiction and dismissed the case. *See id.*; P-App. at A5.

JURISDICTION

This Court lacks jurisdiction to review the subject Petition for Writ of Certiorari as to the Third District's *per curiam* decision because it is untimely. Pursuant to United States Supreme Court Rule 13:

> [A] petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort or a United States court of appeals (including the United States Court of Appeals for the Armed Forces) is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment. A petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review.

In this case, the Third District issued its *per curiam* decision, affirming the order denying the motion to vacate final judgment, on January 24, 2018. P-App. at A1–2. The decision was rendered final on March 21, 2018, with the denial of a timely motion for rehearing. R-App. at A41.

In Florida, a *per curiam* decision without opinion is not subject to discretionary review by the Florida Supreme Court. *Stallworth v. Moore*, 827 So. 2d 974, 978 (Fla. 2002) (holding that the Florida Supreme Court does not have jurisdiction to review unelaborated *per curiam* orders or opinions from the district courts). As a result, the Third District became the state court of last resort for this case, and Borrower needed to seek review by this Court within 90 days of the rendition of the *per curiam* decision. *See Williams v. Florida*, 399 U.S. 78, 80 n.5 (1970) (determining that the district court became the highest court from which a decision could be had, where the Florida Supreme

Court was without jurisdiction to entertain the petitioner's direct appeal). He failed to do so.[1]

Assuming *arguendo* the subject Petition for Writ of Certiorari was timely, this Court still has no basis to exercise jurisdiction. Borrower claims that "the Court's jurisdiction is invoked under 28 U.S.C. § 1257(a)." Pet. at 4–5. This statute allows for review inter alia of final state court judgments "where any title, right, privilege, or immunity is specially set up or claimed under the Constitution." 28 U.S.C. § 1257(a). Here, while Borrower does not specify how the subject case qualifies under this statute in his statement on jurisdiction, he references the due process protections of the Fifth and Fourteenth Amendments throughout his Petition for Writ of Certiorari. Pet. at i, 5, 18–42. Nonetheless, Bayview does not believe that the record shows any due process violation that would confer jurisdiction to evaluate the *per curiam* decision or the judicial disqualification.

Moreover, this Court generally only reviews matters that were raised in the lower court. *Granfinanciera*

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[1] Borrower did initiate an original petition in the Florida Supreme Court following the conclusion of his appeal to the Third District. *See* Pet. at 14. After the Petition for Writ of Mandamus was dismissed, Borrower moved for an extension on the deadline to seek certiorari relief from this Court. This Court granted the request, and Borrower filed the subject Petition for Writ of Certiorari within the time provided. However, because Borrower's petition is only timely as to the Florida Supreme Court's dismissal of the Petition for Writ of Mandamus, this Court should limit its consideration accordingly. *See* U.S. Sup. Ct. Rule 13.1; *Williams*, 399 U.S. at 80 n.5.

v. Nordberg, 492 U.S. 33, 39 (1989). Borrower has not shown that he raised due process or any federal question in the court below, particularly in relation to judicial disqualification. *See* Pet. at *passim*. In fact, he never moved for disqualification at all before filing the subject Petition for Writ of Certiorari. *See* Docket for *Daniel H. Alexander and Jacqueline P. Alexander v. Bayview Loan Servicing, LLC*, No. 3D16-2228; Docket for *Daniel H. Alexander, et al. v. Bayview Loan Servicing, LLC*, SC18-624. Thus, this Court lacks jurisdiction to consider this case.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

28. U.S.C. § 1257(a):

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Amendment V to the U.S. Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV to the U.S. Constitution:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Florida Rule of Civil Procedure 1.540(b):

> Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. – On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, decree, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been

> discovered in time to move for a new trial or rehearing; (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) that the judgment or decree is void; or (5) that the judgment or decree has been satisfied, released, or discharged, or a prior judgment or decree upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment or decree should have prospective application. The motion shall be filed within a reasonable time, and for reasons (1), (2), and (3) not more than 1 year after the judgment, decree, order, or proceeding was entered or taken. A motion under this subdivision does not affect the finality of a judgment or decree or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, decree, order, or proceeding or to set aside a judgment or decree for fraud upon the court.

STATEMENT OF THE CASE

A. Background

The subject Petition for Writ of Certiorari arises from a foreclosure action filed by Bayview on July 24, 2014. R. 11–47. Borrower was named as a defendant. *Id.* He responded to the complaint on August 11, 2014, claiming Bayview had no authority to foreclose. R. 53. After the pleadings were closed, Bayview moved for summary judgment. R. 79–129. Borrower opposed the

motion, again challenging Bayview's standing. *See* R. 156, 158–59, 166–78.

On June 17, 2015, after a hearing, the trial court granted Bayview's motion for summary judgment and entered final judgment in its favor. R. 179–83. Borrower appealed the final judgment to the Third District. *See* R. 341–46; *Daniel Alexander v. Bayview Loan Servicing, LLC*, No. 3D15-1384. Ultimately, the Third District affirmed, *per curiam*, without opinion. R. 148. The mandate issued on December 28, 2015. R. 347.

On June 17, 2016, Borrower moved to vacate the final judgment under Rule 1.540(b) ("Motion to Vacate Judgment") based on allegations of fraud.[2] R. 276–331. The trial court conducted a hearing on August 17, 2016, for all pending motions. SR3. 400. At the hearing, Borrower asked the court for an evidentiary hearing on his Motion to Vacate Judgment. SR3. 400. The court complied and scheduled the motion to be heard during a 30-minute special set hearing to be held on

[2] In his Statement of the Case, Borrower details the assertions contained in his Motion to Vacate Judgment, claiming inter alia that his motion set forth that "the sworn testimony of Cynthia Riley stating her signature was affixed to original notes within days of origination was false," and "Chase perpetrated a fraud on the court by presenting the surrogate signed endorsements as if affixed by Ms. Riley before her termination in 2006." *See* Pet. at 6–9. To the extent that these and other statements from the Motion to Vacate Judgment are presented as "facts," Bayview would clarify that there was no evidence presented in the lower court to support them. *See* R. 276–331; SR1. 376–95. They were merely the beliefs of Borrower's counsel. *See* SR1. 391–92.

September 2, 2016. R. 357; SR3. 404–05. Bayview filed a notice of hearing for the event. SR2. 396–97.

When the parties appeared before the court on September 2, 2016, Borrower did not object to the nature of the hearing as evidentiary or non-evidentiary.[3] SR1. 379–81. He proceeded with his argument, contending that the issue was whether Bayview's endorsement had legal effect. SR1. 381–83, 389–93. Bayview countered, citing case law for the proposition that absent some concrete indication of misuse or fraud, there was no reason to doubt that a duly authorized signature stamp carries the same authority as the original signature. SR1. 383–88. Bayview advised the court that there was no such evidence presented in this case. SR1. 388. After considering the arguments of both sides, the trial court denied the Motion to Vacate Judgment.[4] R. 375; SR1. 394.

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[3] Borrower states that "Bayview noticed a hearing on [his] motion, but not as an evidentiary hearing." Pet. at 9–10. This is misleading, as trial court scheduled the 30-minute special set hearing at Borrower's request. *See* R. 357; SR3. 404–05. Bayview merely filed notice of the hearing. SR2. 396–97. Borrower never objected to the notice or filed a notice of his own. R. 1–8; SR1. *passim*.

[4] Borrower claims that the trial court prohibited discovery of the fraud and then denied the Motion to Vacate Judgment. Pet. at 10. This is incorrect. There is no indication in the record to show that Borrower sought discovery related to the allegations raised in his motion, and the order entered by the court contains no statements regarding discovery of fraud. *See* R. 1–8, 375.

B. Appellate Proceedings and Disposition Regarding the Denial of the Motion to Vacate Judgment

Borrower appealed the order denying his Motion to Vacate Judgment to the Third District. *See* R. 373–74; *Daniel H. Alexander and Jacqueline P. Alexander v. Bayview Loan Servicing, LLC*, No. 3D16-2228. The case was briefed by both parties. *See* Docket for *Daniel H. Alexander and Jacqueline P. Alexander v. Bayview Loan Servicing, LLC*, No. 3D16-2228. After briefing was complete, the Third District scheduled oral argument pursuant to Borrower's request, but it later removed the case from the calendar. *See id.*; Pet. at 10. On January 24, 2018, the Third District issued its decision, affirming the order on appeal, *per curiam*, without opinion. Pet. at 10; P-App. at A1–2.

On February 22, 2018, Borrower filed a Motion for Rehearing, for Rehearing *En Banc*, and Request for Written Opinion ("Motion for Rehearing"), expressing his objection to the use of a *per curiam* affirmance without written opinion in his case. *See* Pet. at 11; R-App. at A1–40. Borrower claims in his Statement of the Case that the Motion for Rehearing showed that there was a colorable claim for fraud by senior Chase executives related to backdated endorsements used in thousands of cases. Pet. at 11–12. There is simply no support for this statement in the record and no citation in the petition. *Id.*

Among the points made in the Motion for Rehearing, Borrower argued that a judge should disqualify himself or herself in any proceeding where their

impartiality might be reasonably questioned. R-App. at A31. He then claimed that "[t]here is objectively reason [sic] to question whether this Honorable Court has an institutional bias against homeowners, and [Borrower]'s counsel, for zealously advocating on behalf of homeowners, as evidenced by the Daily Business Review articles and [Borrower]'s counsel's body of appellate work." R-App. at A32–33. Borrower did not specifically ask that any judge disqualify himself or herself from the proceeding. R-App. at *passim*. Indeed, he reiterated his request for *en banc* consideration of the order denying his Motion to Vacate Judgment. R-App. at A39.

The Third District denied the Motion for Rehearing on March 21, 2018. *See* Pet. at 14; R-App. at 41. On April 19, 2018, Borrower filed a Petition for Writ of Mandamus in the Florida Supreme Court. Pet. at 14. Borrower asked the Florida Supreme Court to compel the Third District to write an opinion, explaining the basis for its affirmance. *Id.* The Florida Supreme Court dismissed the petition for lack of jurisdiction on May 3, 2018.[5] *Id.*; P-App. at A5.

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[5] Within his Statement of the Case, Borrower includes a section titled, "the Florida Supreme Court Has Taken No Action as the Third [District] Repeatedly Denied Motions to Disqualify that Set Forth Objective Reasons to Question its Impartiality." Pet. at 14–18. In this section, Borrower cites to a Daily Business Review article, claiming without support that it contained "statistical, empirical evidence" regarding the Third District's decisions *See* Pet. at 15–16. Borrower also references three motions to disqualify that he claims have been filed by his counsel in other cases. Pet. at 16. These motions are not before this Court, and none of the statements made about their underlying circumstances are

On July 23, 2018, Borrower filed an application to extend the time to file a petition for writ of certiorari from August 1, 2018, to September 21, 2018. This Court granted the relief. The subject Petition for Writ of Certiorari followed, docketed by the clerk on September 21, 2018.

ARGUMENT

Borrower argues that certiorari should be granted in this case to protect the due process rights guaranteed by the Constitution, to prevent fraud on the court, and to avoid "biased appellate judges" from granting equitable relief condoning that fraud. Pet. at 18. To the extent that Borrower has timely raised these positions, this Court should deny relief because Borrower has not established any due process violation below, judicial disqualification is not appropriate for consideration, and Borrower has not shown a compelling reason for review.

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supported. See Pet. at 16–18. Moreover, as Borrower cannot dispute that he did not file a motion for disqualification in this case, the references are irrelevant and serve only to impugn honorable members of the courts below.

A. Borrower's Petition is Untimely as to the Targeted Decision

As a preliminary matter, this Court should decline to review the case at hand because the petition is untimely as to the *per curiam* affirmance issued by the Third District, which stands at its core. There is no basis for review of the subsequent dismissal issued by the Florida Supreme Court.

A petition for a writ of certiorari to review the decision of a state court of last resort must be filed within 90 days after entry of the judgment. U.S. Sup. Ct. Rule 13.1. If a petition seeks review of a judgment from the lower court that is subject to discretionary review by the state court of last resort, it is timely if filed within 90 days after entry of the order denying discretionary review." *Id.* In Florida, a *per curiam* decision without opinion is not subject to discretionary review by the Florida Supreme Court. *See Gandy v. State*, 846 So. 2d 1141, 1144 n.1 (Fla. 2003); *Stallworth*, 827 So. 2d at 978. Extraordinary writ petitions cannot be used to circumvent this jurisdictional pitfall and obtain the right to review. *Foley v. State*, 969 So. 2d 283, 285 (Fla. 2007). Thus, in such cases, the district court of appeal is considered the highest court from which a decision could be had, creating the basis for a potential petition for further review. *See Williams*, 399 U.S. at 80 n.5.

Here, the Third District issued an unelaborated *per curiam* affirmance in Borrower's appeal on January 24, 2018. P-App. at A1-2. Borrower filed a timely motion for rehearing. R-App. at A1–40. The Third

District denied the motion on March 21, 2018. R-App. at A41. On April 19, 2018, Borrower filed a Petition for Writ of Mandamus in the Florida Supreme Court, which was quickly dismissed for lack of jurisdiction. *See* Pet. at 14; P-App. at A5.

Borrower states in the subject Petition for Writ of Certiorari that he is seeking review of the Third District's *per curiam* affirmance without opinion and the Florida Supreme Court's dismissal of his Petition for Writ of Mandamus. Pet. at 4. However, since the Third District was the court of last resort following the issuance of its *per curiam* affirmance and the Florida Supreme Court lacked jurisdiction for discretionary review, Borrower's deadline to seek further review from this Court expired on June 19, 2018, 90 days from rendition of the decision. U.S. Sup. Ct. Rule 13.1; *Williams*, 399 U.S. at 80 n.5. Because Borrower waited until July 23, 2018, to file the first documents with this Court, his petition is not timely as to the decision of the Third District, leaving only the Florida Supreme Court's dismissal of the Petition for Writ of Mandamus subject to review. *Id.*

There is no basis to review the Florida Supreme Court's dismissal of the Petition for Writ of Mandamus because there was no violation of any federal or state right. Mandamus lies to compel the performance of a mandatory duty. *Fla. Soc'y of Newspaper Editors, Inc. v. Fla. Pub. Serv. Com.*, 543 So. 2d 1262, 1264 (Fla. 1st DCA 1989) (finding mandamus will not lie to direct the exercise of discretionary authority or to alter or review action taken in the proper exercise of that discretion).

In other words, if performance is discretionary, there are no grounds to issue the writ. *Id.* The Florida Supreme Court has long upheld the inherent discretion of the district courts to issue written opinions only when, in their reasoned judgment, a written opinion is required. *R. J. Reynolds Tobacco Co. v. Kenyon*, 882 So. 2d 986, 989 (Fla. 2004).

Since Borrower's Petition for Writ of Mandamus sought to compel the Third District to perform a discretionary task, the Florida Supreme Court did not violate any laws in dismissing the petition. *See Kenyon*, 882 So. 2d at 989; *Fla. Soc'y of Newspaper Editors, Inc.*, 543 So. 2d at 1264. Furthermore, as the Florida Supreme Court rightfully acknowledged, it had no authority to use the Petition for Writ of Mandamus to circumvent its jurisdictional requirements and review an unelaborated *per curiam* decision. *See* P-App. at A5; *Foley*, 969 So. 2d at 285. As to the Florida Supreme Court's decision, the subject Petition for Writ of Certiorari should be denied at the outset.

B. Borrower Has Not Shown Any Violation of Due Process Involving the Disposition of his Appeal to the Third District

In his first question presented, Borrower contends that the Third District and the Florida Supreme Court violated due process in disposing of his appeal. Assuming *arguendo* this argument has been timely raised, it lacks merit on both procedural and substantive grounds.

i. Borrower Failed to Raise His Due Process Challenge Below

First, Borrower's argument fails on procedural grounds because it was not raised below. In general, this Court will only consider arguments that were raised and decided by the lower court. *See Adams v. Robertson*, 520 U.S. 83, 85 (1997) (dismissing a petition for a writ of certiorari as improvidently granted where the federal challenge to the state rule was never presented to the state supreme court); *accord Granfinanciera*, 492 U.S. at 39.

Here, Borrower mentioned federal due process protections only briefly in his Motion for Rehearing of the *per curiam* affirmance. R-App. at A24–26, 30, 35. He did not include the detailed arguments contained in the subject petition. *Compare* Pet. at 18–42 *with* R-App at A1–40. Indeed, Borrower did not rely on any federal issues or split of authority in his defense of this standard state court foreclosure until the subject appeal. *Id.* As a result, this Court should find the arguments made in the petition were not preserved.

ii. Borrower Has Not Shown that the Third District or the Florida Supreme Court Violated Due Process

Even if Borrower had preserved a due process challenge to the Third District's *per curiam* affirmance, his argument would have no merit.

In his petition, Borrower cites two tests employed by federal courts to determine whether due process

protections apply. Pet. at 18–19. Considering these tests alongside the facts presented, Borrower concludes that he has met all requirements entitling him to due process protections. Pet. at 20–24. Regardless of whether this is accurate, it is merely the start of the analysis. Where due process applies, it requires that the parties whose rights are to be affected receive notice and an opportunity to be heard. *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972). In this case, the record shows that Borrower received just that.

Borrower participated in the lower court proceedings by responding to the complaint, opposing the motion for summary judgment, and engaging at the hearings. R. 53, 156, 158–59, 166–78, 179–83. After entry of the final judgment, Borrower appealed to the Third District. *See* R. 341–46. Upon the resolution of the appeal, Borrower moved to vacate the final judgment based on fraud, filing his motion exactly one year from the date the final judgment was entered. R. 276–331. Borrower had received notice and an opportunity to be heard on his motion to vacate. *See* R. 357; SR1. 376–95; SR3. 400–05. Indeed, the trial court scheduled a 30-minute special set hearing at his request. R. 357; SR2. 396–97; SR3. 404–05. At the hearing, Borrower chose to rely on the arguments of his counsel, presenting no evidence to support his claims. SR1. 376–95. Still, after the trial court denied the motion, Borrower appealed and received an opportunity to make appellate arguments in his briefs. *See* Docket for *Daniel H. Alexander and Jacqueline P. Alexander v. Bayview Loan Servicing, LLC*, No. 3D16-2228. When the Third

District affirmed the order on appeal without need for oral argument, Borrower moved for rehearing. *Id.*; R-App. at A1–40. These actions show that to the extent due process was implicated, the courts did not violate its protections. *See Fuentes*, 407 U.S. at 80.

iii. Borrower Did Not Establish Fraud on the Court

In his petition, Borrower contends that "fraud on the court violates due process when it deprives life, liberty, or property." Pet. at 25. As examples, Borrower cites to several cases that he asserts involved fraudulent conduct by various banks in foreclosure proceedings. Pet. at 25–30. None of the citations on these pages involve the parties to this case. *Id.*

To be clear, Borrower did not present any evidence here that indicated Bayview committed fraud. As stated, Borrower actively participated in litigation below, which gave him an opportunity to develop a record. *See* R. 53, 156, 158–59, 166–78. Yet, there was no evidence of fraud. R. *passim*. One year to the date after the entry of final judgment for Bayview, the eve of the deadline established by rule, Borrower moved to vacate the final judgment for purported fraud involving the note's endorsement. R. 276–331. The motion sat pending for over two months before the trial court held a special set hearing. R. 1–8, 357. Nonetheless, Borrower produced no evidence before or during the hearing to establish his allegations. *Id.* Any effort to suggest otherwise would be erroneous. This case comes down to a

fact-bound disagreement about the discretionary choice not to write an opinion following the disposition of a standard foreclosure appeal. It lacks merit.

iv. Borrower Was Not Entitled to a Written Opinion from the Third District

Borrower shoehorns a potential basis for this Court's review by arguing that "[b]y refusing to write an opinion, the Third District denied Borrower equal access to the Florida Supreme Court and due process of law." *Id.* This statement is the crux of Borrower's petition, and it fails to establish jurisdiction.

The discretion to write an opinion has long rested with the district courts. *R. J. Reynolds Tobacco Co.*, 882 So. 2d at 989. As the First District Court of Appeal has noted:

> The respective District Courts of Appeal in the State of Florida are courts of final appellate jurisdiction except for a narrow classification of cases made reviewable by the Supreme Court. Article V, Section 5(3), Constitution of the State of Florida, F.S.A. These courts were not established by the people of Florida as intermediate appellate courts or "way stations" to the Supreme Court of Florida. Each of the some eight hundred cases reviewed by this Court in each calendar year does not require a full written opinion in the disposition of same. This Court and not the attorney for the losing party is charged with

> the responsibility of deciding which cases merit and warrant a full written opinion upon the basis of that opinion's contribution to the jurisprudence of this State and those cases of great public interest. This Court is not now denying and has not denied appellants herein any constitutional right and has not overlooked or failed to consider the jurisprudence of this State in ruling upon the merits of the appeal. Appellants are not entitled as a matter of constitutional right to a written opinion from this Court in order that they might petition for writ of certiorari.

Taylor v. Knight, 234 So. 2d 156, 157 (Fla. 1st DCA 1970).

Here, Borrower asserts that the Third District has abused the *per curiam* affirmance to "deny appeals" in cases involving allegations of fraud, perjury, or the destruction of evidence. Pet. at 32. While Borrower contends that the Third District's use of such affirmances has become so arbitrary that it violates due process, he provides no support for this point. Pet. at 33–35. Indeed, no case has held that a court violates due process by exercising its discretion not to write an opinion in circumstances like those at issue in this case. In fact, the opposite is true. *See Taylor*, 234 So. 2d at 157.

Where Borrower has failed to show any basis or need for this Court to review the unelaborated *per curiam* affirmance, this Court should decline to exercise its certiorari jurisdiction.

C. This Court Lacks Jurisdiction to Consider the Arguments Involving Disqualification

In his second question presented, Borrower asks this Court to consider whether the Florida Supreme Court and the Third District violated federal due process by refusing to grant disqualification in the subject case. Pet. at i. Despite failing to file any motion for disqualification or recusal in any court below, Borrower contends that "[d]ue process demands the Third District disqualify itself from foreclosures as its impartiality is objectively questioned." Pet. at 35. Assuming *arguendo* this argument has been timely raised in this Court, it fails for several reasons.

First, as noted throughout this brief, Borrower never properly raised the issue of disqualification in either state appellate court, placing the argument asserted in his petition squarely within the realm of those this Court has routinely declined to consider. *See Adams*, 520 U.S. at 85; *accord Granfinanciera*, 492 U.S. at 39.

Second, even if the argument was raised, it is not supported by law or fact. As Borrower acknowledges, "the disqualification of an appellate judge is a matter which rests largely within the sound discretion of the individual involved." *Giuliano v. Wainwright*, 416 So. 2d 1180, 1181 (Fla. 1982). Each judge must determine for himself the legal sufficiency of a motion and the propriety of withdrawal under the circumstances. *In re Estate of Carlton*, 378 So. 2d 1212, 1216 (Fla. 1979). The procedural rules applicable to trial judges do not

apply. *Id.* Nonetheless, appellate judges may consider whether the request was made within a reasonable time and shows a well-grounded fear of bias. *Clarendon Nat'l Ins. Co. v. Shogreen*, 990 So. 2d 1231, 1232-33 (Fla. 3d DCA 2008). "It is well settled that an adverse decision will not serve as the basis for a motion to disqualify." *Moore v. State*, 820 So. 2d 199, 206 (Fla. 2002); *Correll v. State*, 698 So. 2d 522, 525 (Fla. 1997) (stating that adverse rulings are not sufficient to establish bias or prejudice).

Here, Borrower's basis for disqualifying the Third District involves its decisions in foreclosure cases and the alleged appearance of impartiality that those decisions have created. *See* Pet. at 14–16, 35–41. Borrower claims that one of the many "objective reasons" to question the Third District's impartiality comes from recent articles published by the Daily Business Review. *See* Pet. at 14–16, 39. But Borrower's description of these articles is misleading. *See id.* The articles do not establish that, "there is no question that the Third District is pro-business and couldn't care less about homeowners." *See* Pet. at 14. In fact, the primary article upon which Borrower relies reports on an attorney frustrated with the Third District's decisions in his cases. *See id*. Importantly, the Florida Supreme Court, as well as this Court, have rejected results-based motions for disqualification or recusal. *See e.g. Moore*, 820 So. 2d at 206; *Liteky v. U.S.*, 510 U.S. 540, 555 (1994) (finding that judicial rulings alone almost never constitute a valid basis for a bias or partiality). Thus, there is no basis to assert any error with the Third District

or the Florida Supreme Court's decision on disqualification, to the extent that either had the opportunity to consider the issue.

Third, even if there was a potential legal issue with disqualification, this Court has recognized that while a fair trial is a basic requirement of due process, most matters relating to judicial disqualification do not rise to a constitutional level. *Caperton v. A.T. Massey*, 556 U.S. 868, 876 (2009). Federal due process incorporates the common law rule that a judge must recuse himself when he has a direct, personal, substantial, pecuniary interest in a case. *Id.* "Personal bias or prejudice alone would not be sufficient basis for imposing a constitutional requirement under the Due Process Clause." *Id.* at 877.

In this case, again, Borrower's only arguments for disqualification stem from an alleged appearance of impartiality or bias against homeowners. Pet. at 14–16, 35–39. Regardless of the veracity of such arguments, which Bayview would dispute, they do not implicate federal due process concerns. *Caperton*, 556 U.S. at 876–77. This Court should reject Borrower's Petition for Writ of Certiorari to the extent it seeks review of a determination on disqualification related to purported bias.

Borrower relies on two cases for his challenge to the disqualification of the court, but neither directly supports the proposition for which it was cited. *See* Pet. at 39–41. Borrower's first case, *Sundquist v. Bank of America*, involved a sanctions order for alleged

misconduct by Bank of America. *See Sundquist*, 566 B.R. 563 (U.S. Bankr. E.D. Cal. 2017). There were no findings involving Bayview. *Id*. at *passim*. Borrower's second case does name Bayview, but it concerned unique circumstances surrounding repeated failures to participate in mediation. *Bayview Loan Servicing, LLC v. Bartlett*, 87 A.3d 741, 749 (Me. Sup. Ct. 2014). Contrary to Borrower's contention, the Maine Supreme Court did not "award the Borrower a free home." *See* Pet. at 41. While the court acknowledged that a prejudicial dismissal could impact a subsequent action, it expressly declined to reach that question. *Bartlett*, 87 A.3d at 747 n.6.

Overall, Borrower has not shown any basis for jurisdiction or a need to consider the *sua sponte* disqualification or recusal of district court judges without a motion filed below. This Court should deny Borrower's Petition for Writ of Certiorari on this issue.

D. Borrower Has Not Shown Any Compelling Reason for Review

In short, Borrower's Petition for Writ of Certiorari is a diatribe against the Third District for a fact-specific decision. If there is a basis for jurisdiction, this Court should still deny the petition, because Borrower has not established any compelling reason to exercise jurisdiction.

As with a written opinion, "review on a writ of certiorari is not a matter of right." U.S. Sup. Ct. Rule 10. Even if a petitioner can establish a jurisdictional basis

for review, he must still provide a compelling reason or some conflict to justify relief. *Id.* As the rule states, a petition is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. *Id.* Borrower's petition falls squarely in that category.

Despite pages of argument, Borrower simply has not established a compelling reason to warrant this Court's review. Borrower makes no effort to argue that the state court decided an important federal issue in a manner that conflicts with decisions of the federal or state appellate courts. Pet. at *passim*. Indeed, there is no assertion of any conflict between or among jurisdictions. *Id.* The record would not support it. Instead, Borrower asserts that review is necessary to protect against fraud, despite the absence of any record evidence. Pet. at 35.

Without any compelling reason or split of authority presented, this Court should decline to consider whether the disposition of a standard foreclosure appeal by way of a *per curiam* affirmance without opinion and the absence of any *sua sponte* disqualifications by the Third District or the Florida Supreme Court violated Borrower's federal due process rights. It should deny the Petition for Writ of Certiorari.

CONCLUSION

For the reasons stated herein, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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