IN THE SUPREME COURT OF FLORIDA

CASE NO. SC18-1217

DAVID P. TROTTI,

Petitioner,

v.

HONORABLE RICK SCOTT, et al.,

Respondents.

ON PETITION FOR REVIEW FROM THE
DISTRICT COURT OF APPEAL, FIRST DISTRICT
CASE NO. 1D18-2387

RESPONDENTS' ANSWER BRIEF ON THE MERITS

DANIEL E. NORDBY (FBN 14588)
General Counsel
MEREDITH L. SASSO (FBN 58189)
Chief Deputy General Counsel
JOHN MACIVER (FBN 97334)
NICHOLAS A. PRIMROSE (FBN 104804)
ALEXIS LAMBERT (FBN 24001)
Deputy General Counsel
EXECUTIVE OFFICE OF THE GOVERNOR
The Capitol, PL-05
Tallahassee, Florida 32399-0001
(850) 717-9310

Counsel for Governor Scott

JESSE DYER (FBN 0114593)
Assistant General Counsel
FLORIDA DEPARTMENT OF STATE
R.A. Gray Building, Suite 100
Tallahassee, Florida 32399-0250
(850) 245-6536

Counsel for Secretary Detzner

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTORY PROVISIONS

OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

Because the Petitioner's Statement of the Case and Facts incorporates extensive argument regarding more than four decades of precedent preceding the present case, Respondents submit the following brief statement of the case and facts relevant to the present dispute. Fla. R. App. P. 9.210(c).

Prior Litigation between the Parties: Four years ago, Petitioner David Trotti attempted to qualify for election to a vacancy on the Fourth Judicial Circuit Court created by the resignation of Judge Donald R. Moran, Jr. *Trotti v. Detzner*, 147 So. 3d 641, 643-644 (Fla. 1st DCA 2014) ("*Trotti I*"). The First District, applying the language of the Florida Constitution and this Court's precedents, held the vacancy was to be filled by gubernatorial appointment—rather than election—because the vacancy occurred before the commencement of the candidate qualifying period. *Id*. A dissenting opinion argued the vacancy should be filled by election. *Id*. at 645-646. Discretionary review was sought in this Court, which declined jurisdiction. *Trotti v. Detzner*, 157 So. 3d 1051 (Fla. 2014).

The Present Vacancy: On April 2, 2018, Fourth Judicial Circuit Judge Robert M. Foster tendered a letter of resignation to Governor Scott effective December 31, 2018, one week (four business days) before his term would expire on January 7, 2019. R. 396. On April 23, 2018, Governor Scott accepted Judge Foster's resignation. R. 397. The Fourth Circuit Judicial Nominating Commission

was convened to solicit applications for highly qualified candidates for nomination to the Governor. R. 72. One week later, on April 30, 2018, the statutory qualifying period for election of circuit court judges began. *See* § 105.031, Fla. Stat. (providing that candidates for judicial office shall qualify no earlier than noon of the 120th day, and no later than noon of the 116th day, before the primary election). One day before the conclusion of the qualifying period, the Petitioner delivered qualifying paperwork to run for the seat held by Judge Foster. R. 399. The Division of Elections preliminarily determined that the Petitioner was a qualified candidate, but promptly notified him that the judicial seat for which he sought to qualify was not a seat that would be filled by election. R. 399-400.

Course of Proceedings and Disposition in the Lower Tribunal: The Petitioner filed a complaint for declaratory judgment in the Second Judicial Circuit, seeking a declaration that the vacancy at issue must be filled by election, not appointment. R. 62. The Petitioner also filed a motion for injunctive relief, seeking to enjoin Governor Scott from filling the judicial vacancy by appointment and to enjoin Secretary Detzner from removing the Petitioner from the ballot. R. 354. "Without distinguishing the facts in the instant case from the facts in *Trotti I*," the circuit court granted a preliminary injunction. R. 903.

The Respondents immediately appealed the preliminary injunction to the First District, which reversed the circuit court's ruling. Specifically, the First

District held the circuit court "erred in granting injunctive relief" because the Petitioner "did not establish a substantial likelihood of success on the merits." R. 903. In so holding, the First District explained it was "error" for the circuit court to disregard *Trotti I*, which is "binding precedent that the circuit court was obligated to follow." R. 906. The First District noted that the circuit court "did not find *Trotti I* distinguishable from the instant case, nor do we…" R. 904.

The First District also found that the Petitioner had not established injunctive relief would serve the public interest, as the circuit court's preliminary injunction would prohibit the voters of the Fourth Judicial Circuit from "actually choosing Judge Foster's successor" for a period of six years. R. 907. In contrast, an individual appointed by the Governor after screening by the judicial nominating commission would face the voters in only two years. R. 907-908.

During the course of proceedings before the First District, the Fourth Circuit Judicial Nominating Commission submitted six nominees to the Governor for appointment to fill the vacancy created by Judge Foster's resignation. *See* Press Release, "Fourth Judicial Circuit Judicial Nominating Commission Announces Certified List of Nominees" (June 20, 2018), *available at*: www.flgov.com/wp-content/uploads/pdfs/Certified%20List%20of%20Nominees%20(Foster).pdf (last accessed August 30, 2018). On July 26, 2018, Governor Scott announced his intent to appoint Duval County Judge Lester Bass to the Fourth Judicial Circuit. *See*

Press Release, Executive Office of the Governor, "Gov. Scott Announces Intent to Appoint Judge Lester Bass to the Fourth Judicial Circuit" (July 26, 2018), *available at https://www.flgov.com/2018/07/26/gov-scott-announces-intent-to-appoint-judge-lester-bass-to-the-fourth-judicial-circuit-court* (last accessed Aug. 30, 2018). On August 9, 2018, this Court accepted discretionary jurisdiction and ordered expedited briefing.

STANDARD OF REVIEW

Legal questions concerning the interpretation of the Florida Constitution are reviewed de novo. *Zingale v. Powell*, 885 So. 2d 277, 282 (Fla. 2004).

SUMMARY OF THE ARGUMENT

This case presents a question of constitutional interpretation: when a vacancy occurs on a circuit court, is that vacancy initially filled by gubernatorial appointment or through the election process? Both the Florida Constitution and this Court's precedent provide a clear answer: a vacancy that occurs before the beginning of the statutory candidate qualifying period is filled by gubernatorial appointment for an initial appointed term, followed by an election to fill the office for a full term.

The Florida Constitution specifies that the governor "shall fill each vacancy on a circuit court" by appointing, for an initial appointed term, a person nominated by the appropriate judicial nominating commission. Art. V, § 11(b), Fla. Const.

"[A]t the end of the appointed term," an election must be held to fill the office for a full term. *Id*. A "vacancy" in judicial office is created upon the governor's acceptance of an incumbent judge's letter of resignation. Art. X, § 3, Fla. Const.; § 114.01(1)(d), Fla. Stat. Under well-established precedent, the vacancy occurs upon the governor's acceptance of the resignation even where, as here, the resignation is effective at a future date: "[w]hen a letter of resignation to be effective at a later date is received and accepted by [the Governor], a vacancy in that office occurs and actuates the process to fill it." *In re Advisory Op. to the Governor (Judicial Vacancies)*, 600 So. 2d 460, 462 (Fla. 1992).

In a series of cases, this Court has identified the beginning of the statutory candidate qualifying period as the objective and non-variable fixed point marking the beginning of the "election process." *See*, *e.g.*, *Advisory Opinion to Governor re Appointment or Election of Judges*, 983 So. 2d 526, 530 (Fla. 2008). And this Court has specifically held that a judicial vacancy arising from a resignation submitted and accepted before the beginning of the candidate qualifying period is to be filled by gubernatorial appointment, *even where that resignation is tendered with a future effective date falling after the conclusion of the candidate qualifying period*. *Sheriff and Judicial Vacancies*, 928 So. 2d at 1219.

The Petitioner's arguments against the use of the appointment process in the present case are irreconcilable with the language of the Florida Constitution and

this Court's precedents. The Petitioner misconstrues an unrelated provision of Article V as establishing a constitutional preference for the election process. And the Petitioner relies heavily on excerpts from a 1974 opinion of this Court, *Spector v. Glisson*, while failing to acknowledge that the *Spector* opinion has been limited to its specific and distinguishable facts by subsequent decisions of this Court and by intervening amendments to the Florida Constitution that have been adopted by the voters over the past four decades. The Petitioner's policy arguments in favor of the election process are misdirected to this Court and, in any event, would not resolve the underlying problem that he perceives to exist.

The First District's decision under review correctly applied the language of the Florida Constitution and this Court's precedents. Because it is undisputed that the vacancy created by Judge Foster's resignation occurred before the beginning of the candidate qualifying period, the vacancy must be filled by gubernatorial appointment. This Court should affirm the First District.

ARGUMENT

I. BOTH THE FLORIDA CONSTITUTION AND PRECEDENT REQUIRE THE CIRCUIT COURT VACANCY CREATED BY JUDGE FOSTER'S RESIGNATION TO BE FILLED BY GUBERNATORIAL APPOINTMENT.

This case presents a question of constitutional interpretation. The Florida Constitution provides that the governor "shall fill each vacancy on a circuit court" by appointing, for an initial appointed term, a person who has been nominated by

the appropriate judicial nominating commission. Art. V, § 11(b), Fla. Const. "[A]t the end of the appointed term," an election must be held to fill the office for a full term. *Id*. This Court's precedent has also affirmed the constitutional authority of the governor to fill circuit court vacancies that occur before the beginning of the candidate qualifying period. *Advisory Opinion to Governor re Sheriff and Judicial Vacancies Due To Resignations*, 928 So. 2d 1218, 1219 (Fla. 2006).

Because both the explicit language of the Florida Constitution and this Court's precedent require the circuit court vacancy created by Judge Foster's resignation to be filled by gubernatorial appointment, the First District's decision should be affirmed.

A. The Florida Constitution requires the vacancy to be filled by appointment.

The Florida Constitution specifies that the governor "shall fill each vacancy on a circuit court" by appointing, for an initial appointed term, a person nominated by the appropriate judicial nominating commission. Art. V, § 11(b), Fla. Const. "[A]t the end of the appointed term," an election must be held to fill the office for a full term. *Id*. In the present case, it is undisputed that a vacancy in the office of circuit court judge arose when the Governor accepted the resignation of Fourth Circuit Judge Robert Foster on April 23, 2018. R. 397. The First District's decision should be affirmed because the plain language of the Florida Constitution requires this vacancy to be filled through the gubernatorial appointment process.

Any inquiry into the meaning of a constitutional provision "must begin with examining that provision's explicit language." *Ford v. Browning*, 992 So. 2d 132, 136 (Fla. 2008). "If the constitutional language is clear, unambiguous, and addresses the matter at issue, it must be enforced as written, and courts do not turn to rules of constitutional construction." *Id*. An examination of the explicit language of the Florida Constitution confirms both: 1) Judge Foster's resignation created a vacancy in office on the Fourth Judicial Circuit; and 2) gubernatorial appointment is the constitutionally mandated process for filling the vacancy created by Judge Foster's resignation.

i. A vacancy in office occurred upon Judge Foster's resignation.

The Florida Constitution identifies eight circumstances giving rise to a vacancy in office, including the "resignation of the incumbent." Art. X, § 3, Fla. Const.; *see also* § 114.01(1)(d), Fla. Stat. (deeming an office vacant "[u]pon the resignation of the officer and acceptance thereof by the Governor"). Here, a vacancy in office occurred upon the Governor's acceptance of Judge Foster's resignation on April 23, 2018. R. 397.

The Petitioner appears to concede[1] that a vacancy in office occurred upon Judge Foster's resignation. Pet. Br. Merits at 21 ("It is true that a vacancy for the

[1] Although the Petitioner states that the effect of the resignation here is "not the policy the Court intended to advance," he does not offer a contrary interpretation

purpose of an appointment is deemed to take place when the resignation letter is received and accepted by the Governor"). That concession is appropriate, as this Court has consistently held that a vacancy in judicial office is created upon the governor's acceptance of an incumbent judge's letter of resignation. *See*, *e.g.*, *Sheriff & Judicial Vacancies*, 928 So. 2d at 1218 (stating that "[u]nder our precedent, a judicial vacancy occurs when a letter of resignation is received and accepted by the Governor"). That precedent applies even where, as here, a judge has tendered a letter of resignation that is explicitly made effective at a future date. As this Court held more than 25 years ago, "[w]hen a letter of resignation to be effective at a later date is received and accepted by [the Governor], a vacancy in that office occurs and actuates the process to fill it." *In re Advisory Op. to the Governor (Judicial Vacancies)*, 600 So. 2d 460, 462 (Fla. 1992).

Under the undisputed facts of the present case and the plain language of the Florida Constitution, a vacancy in the office of circuit court judge in the Fourth Judicial Circuit occurred on April 23, 2018, upon the Governor's acceptance of Judge Foster's resignation. R. 397.

---

of the constitutional or statutory provisions, nor does he argue that this Court has previously misinterpreted the relevant provisions of law. Pet. Br. Merits at 22.

ii. The Florida Constitution requires the governor to "fill each vacancy on a circuit court."

The explicit language of the Florida Constitution also specifies the manner in which a vacancy in the office of an elected circuit court judge must be filled. Section 11(b) of Article V—entitled "Vacancies"—provides:

> *The governor shall fill each vacancy on a circuit court* or on a county court, wherein the judges are elected by a majority vote of the electors, *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, *one of not fewer than three persons nor more than six persons nominated by the appropriate judicial nominating commission*. An election shall be held to fill that judicial office for the term of the office beginning at the end of the appointed term.

(emphasis added).

The Florida Constitution therefore addresses the precise question raised in this case by identifying, in clear and unambiguous terms: 1) who is responsible for filling each circuit court vacancy ("[t]he governor"); 2) the manner in which each circuit court vacancy is to be filled on an interim basis (by the governor "appointing" a person who has been nominated by the judicial nominating commission); 3) the length of the appointed term (until "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"); and 4) the manner in which each circuit court vacancy is thereafter to be filled on an ongoing basis

(through "[a]n election" for a full term "beginning at the end of the appointed term").

Although the constitutional language is clear, and this Court need not go any further, the history of a 1996 amendment to Article V, section 11, is also instructive. Under the prior version of the constitutional provision addressing the manner of filling circuit-court vacancies, the "appointed term" of a judge appointed by the governor to fill a vacancy ended "on the first Tuesday after the first Monday in January of the year following the next primary and general election." Art. V, § 11(b), Fla. Const. (1995). The First District has noted that the "practical effect" of this provision was to leave judicial vacancies unfilled for an untenable time period, as "most individuals would not choose to be considered for a judicial appointment in which they would serve relatively briefly." *Pincket v. Harris* ("*Pincket I*"), 765 So. 2d 284, 288 (Fla. 1st DCA 2000).

As early as 1982, this Court recognized the problem created by this provision and suggested that it could be remedied by the adoption of a constitutional amendment first suggested by the 1978 Constitutional Revision Commission: increasing the length of the initial "appointed term" of a judge appointed by the governor to fill a judicial vacancy until "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*." *Id*. at 287

(emphasis added) (citing *Judicial Nominating Commission, Ninth Circuit v. Graham*, 424 So. 2d 10, 12 (Fla. 1982)).

The Florida Legislature, following the suggestion of an Article V Task Force, took up this Court's suggestion in 1996. *Pincket I*, 765 So. 2d at 287-88. With Senate Joint Resolution 978, the Legislature proposed a constitutional amendment increasing the length of the initial appointed term of a judge appointed by the governor to fill a judicial vacancy. *Id*.; *see also* Fla. SJR 978 (1996) (proposed art. V, § 11, 12 Fla. Const.) (entitled "A joint resolution proposing amendments to sections 11, and 12 of Article V of the State Constitution relating to the Judiciary") (*available at*: http://dos.elections.myflorida.com/initiatives/fulltext/pdf/10-84.pdf) (last accessed August 30, 2018). The amendments to Article V proposed in Senate Joint Resolution 978 were subsequently approved with the overwhelming support of nearly three-quarters of the voters in the 1996 General Election. *See* "Florida Division of Elections, Initiatives/Amendments/Revisions Database," (*available at*: http://dos.elections.myflorida.com/initiatives/initdetail.asp?account=10&seqnum=84) (last accessed August 30, 2018) (reflecting a total of 3,436,753 votes for the measure and only 1,153,367 votes against).

Just four years after the voters approved the 1996 amendment increasing the length of an appointed circuit judge's initial appointed term, the First District

acknowledged the amendment's clear intent and effect. *Pincket I*, 765 So. 2d at 288. The court in *Pincket I* noted that the amendment had been proposed to address the "difficulties with appointing qualified individuals to serve relatively briefly on the circuit bench" by providing "the governor with the authority to appoint qualified individuals to serve in the position of the former incumbent judge," even "when an election is scheduled within the foreseeable future." *Id*. This Court, citing the First District's decision in *Pincket I*, similarly concluded that a circuit court vacancy created by a judicial resignation in April 2006 must be filled by gubernatorial appointment, notwithstanding the fact that candidates had already announced their intent to qualify to seek that very office in the 2006 election scheduled to take place only a few months after the resignation. *Sheriff and Judicial Vacancies*, 928 So. 2d at1220.

The history of the 1996 amendment to Article V, section 11(b), therefore confirms what is apparent from the constitutional provision's plain language: the constitutionally-mandated process for filling a vacancy in the office of circuit court judge is a gubernatorial appointment for an initial appointed term, followed by an election to fill the office for a full six-year term. The affirmative vote of more than three-fourths of the electorate in 1996 to increase the length of the appointed term of a judge appointed by the governor to fill a judicial vacancy can also be taken as evidence of the voters' preference for an initial gubernatorial appointment,

followed by an election, as the constitutional process for filling a vacancy in the office of circuit court judge.

In the face of a constitutional provision explicitly addressing the process for filling vacancies on the circuit court—a constitutional provision conspicuously entitled "Vacancies"—the Petitioner makes no attempt to contend with the language of Article V, section 11(b). Indeed, the Petitioner's Initial Brief hardly references the provision. The Petitioner inexplicably claims that Article V, section 11, "is not a grant of constitutional power to the Governor to make appointments." Pet. Br. Merits at 14; *but see* Art. V, § 11(b), Fla. Const. (providing that the governor "*shall fill each vacancy*" on a circuit court "*by appointing*" a person nominated by the appropriate judicial nominating commission) (emphasis added); *id*. at § 11(c) ("*The governor shall make the appointment* within sixty days after the nominations have been certified to the governor") (emphasis added).

The Petitioner also insists that the appointment process set forth in the Florida Constitution is intended only as a temporary measure "until an election can be held," quoting this Court's 1974 opinion in *Spector v. Glisson*, 305 So. 2d 777, 783 (Fla. 1974). *See, e.g.*, Pet. Br. Merits at 14, 16. By relying on precedent pre-dating the 1996 amendments to Article V, the Petitioner utterly fails to acknowledge the current operative language of the Florida Constitution addressing the process for filling vacancies in judicial office. As discussed above, the 1996

amendments had the *explicit purpose and effect* of extending the terms of many judges appointed by the governor to fill vacancies on the trial courts well beyond the "next election." The 1996 amendments added up to *two years* to the length of the appointed term when a judicial appointment is made within a year of a scheduled primary election.

Because the Florida Constitution explicitly provides for "each vacancy on a circuit court" to be filled by the governor for an initial appointed term, this Court should affirm the First District's decision upholding the Governor's authority to fill the vacancy created by Judge Foster's resignation through the appointment process.

iii. The 1998 Amendments to Article V proposed by the Constitution Revision Commission did not affect the process for filling vacancies in judicial office.

In the face of an explicit constitutional provision mandating the use of the appointment process to fill "each vacancy on a circuit court," the Petitioner raises only a single argument based on the text of the Florida Constitution: that "Article V, section 10(b), of the Florida Constitution requires that the seat vacated by Judge Foster's resignation be filled by an election." Pet. Br. Merits 16. The Petitioner's argument fails as a matter of law, as the provision of the constitution he cites does not even address the process for filling a vacancy in judicial office, much less specify election as the constitutionally-mandated process for filling a vacancy.

The fundamental flaw in Petitioner's argument arises from his out-of-context repetition of a single clause in Article V, section 10(b)(1): "the election of circuit judges shall be preserved." *See*, *e.g.*, Pet. Br. Merits 16. When properly construed in the context of the entirety of section 10, however, it is clear that this clause relates exclusively to the ordinary process for electing a circuit judge to a full six-year term. The language of Article V, section 10(b)(1), is therefore entirely irrelevant to the separate question of how a *vacancy* in judicial office is to be filled—a topic addressed exclusively by Article V, section 11 (again, the section of Article V entitled "Vacancies"). To appreciate the nature of the Petitioner's erroneous interpretation of section 10(b), it is helpful to review the history and purpose of the 1998 amendments to Article V that added this language to our constitution.

In 1998, the Constitution Revision Commission proposed a revision to the Florida Constitution entitled "Local Option for Selection of Judges and Funding of State Courts." Fla. Const. Rev. Comm'n, Revision 7 (1998) (*available at*: http://dos.elections.myflorida.com/initiatives/fulltext/pdf/11-3.pdf) (last accessed August 30, 2018). The ballot summary for Revision 7 disclosed, in relevant part, that the amendment "[p]rovides for future local elections to decide whether to continue electing circuit and county judges or to adopt system of appointment of those judges by governor, with subsequent elections to retain or not retain those

judges; provides election procedure for subsequent changes to selection of judges." *Id.*; *see also Kainen v. Harris*, 769 So. 2d 1029, 1032-33 (Fla. 2000) (Anstead, concurring) (describing Constitution Revision Commission debate over ballot summary).

The operative language of Revision 7 established a constitutional option for local jurisdictions in Florida to choose whether to dispense with judicial elections at the trial-court level in favor of merit selection and retention. Before Revision 7, only a "justice of the Supreme Court" or "judge of a district court of appeal" could qualify for retention by a vote of the electors. Fla. Const. Rev. Comm'n, Revision 7 (1998) (proposed Art. V, § 10(a), Fla. Const.). Following Revision 7, each circuit and county in the State of Florida was required to hold a local option vote at the general election in the year 2000 on whether to select circuit and county court judges "by merit selection and retention rather than by election." Fla. Const. Rev. Comm'n, Revision 7 (1998) (proposed Art. V, § 10(b)(3), Fla. Const.).

To accommodate the possibility of retention elections for circuit and county court judges, the Constitution Revision Commission also proposed conforming language to Article V, section 10, and Article V, section 11. Revision 7 amended Article V, section 10, in relevant part, as follows:

> SECTION 10. Retention; election and terms.--
> (a) Any justice <u>or judge</u> ~~of the supreme court or any judge of a district court of appeal~~ may qualify for retention by a vote of the electors in the general election next preceding the expiration of the

> justice's or judge's ~~his~~ term in the manner prescribed by law. If a justice or judge is ineligible or fails to qualify for retention, a vacancy shall exist in that office upon the expiration of the term being served by the justice or judge. When a justice ~~of the supreme court~~ or ~~a~~ judge ~~of a district court of appeal~~ so qualifies, the ballot shall read substantially as follows: "Shall Justice (or Judge) ...(name of justice or judge)... of the ...(name of the court)... be retained in office?" If a majority of the qualified electors voting within the territorial jurisdiction of the court vote to retain, the justice or judge shall be retained for a term of six years. The term of the justice or judge retained shall commence ~~commencing~~ on the first Tuesday after the first Monday in January following the general election. If a majority of the qualified electors voting within the territorial jurisdiction of the court vote to not retain, a vacancy shall exist in that office upon the expiration of the term being served by the justice or judge.
>
> (b)(1) *The election of circuit judges shall be preserved notwithstanding the provisions of subsection (a)* unless a majority of those voting in the jurisdiction of that circuit approves a local option to select circuit judges by merit selection and retention rather than by election. The election of circuit judges shall be by a vote of the qualified electors within the territorial jurisdiction of the court.
>
> * * *
>
> (3)c. . . . ~~Circuit judges and judges of county courts shall be elected by vote of the qualified electors within the territorial jurisdiction of their respective courts~~. The terms of circuit judges and judges of county courts shall be for six years. ~~The terms of judges of county courts shall be for four years.~~

(emphasis added).

Placed in its appropriate and complete context, the isolated clause relied upon by the Petitioner—"[t]he election of circuit judges shall be preserved"—does not speak to a generic preference for "preserving" the election of circuit judges.

Nor does this clause suggest that the governor's constitutional appointment authority is "subordinate to the rights of the voters." Pet. Br. Merits 16. Instead, when viewed in the context of Revision 7's amendments to subsection 10(a), the unmistakable intent and effect of the language stating that the election of circuit judges shall be preserved "notwithstanding the provisions of subsection (a)" simply means that the election of judges by a vote of the qualified electors will remain in force *unless and until* the jurisdiction votes to abandon election in favor the new procedures for choosing trial-court judges by merit selection and retention authorized by section 10(a). Stated differently, the constitutional language on which Petitioner places primary reliance simply clarifies that the newly-authorized merit selection and retention process for circuit judges will only apply in jurisdictions that vote in favor of the local option—nothing more, nothing less, and nothing at all that would affect the constitution's entirely separate process for filling *vacancies* in judicial office.

Although not explicitly discussed in the Petitioner's Initial Brief, Revision 7 also included conforming amendments to Article V, section 11, as follows:

> SECTION 11. Vacancies.--
> (a) Whenever a vacancy occurs in a judicial office to which election for retention applies, the governor shall fill the ~~each~~ vacancy ~~on the supreme court or on a district court of appeal~~ by appointing for a term ending on the first Tuesday after the first Monday in January of the year following the next general election occurring at least one year after the date of appointment, one of

> not fewer than three persons nor more than six persons nominated by the appropriate judicial nominating commission.
>
> (b) The governor shall fill each vacancy on a circuit court or on a county court, wherein the judges are elected by a majority vote of the electors, 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, one of not fewer than three persons nor more than six persons nominated by the appropriate judicial nominating commission. An election shall be held to fill that judicial office for the term of the office beginning at the end of the appointed term.

As with the amendments to Article V, section 10, the clear intent and effect of the amendments to Article V, section 11, is to accommodate the possibility of a local option vote to select circuit and county judges by merit selection and retention rather than by election. For any local jurisdiction that chooses to adopt merit selection and retention for trial court judges, the process for filling vacancies on the circuit or county court would now be governed by Article V, section 11(a)—the preexisting constitutional provision addressing the gubernatorial appointment and merit retention of appellate court judges. For local jurisdictions that *do not* vote in favor of the local option for merit selection and retention—*i.e.*, those jurisdictions in which circuit and county court judges are "elected by a majority vote of the electors"—the process for filling a vacancy on the circuit or county court under Article V, section 11(b) would remain unchanged: a gubernatorial appointment for an initial appointed term, followed by an election to fill the office at the end of the appointed term.

As with the amendments to Article V, section 10, Revision 7's amendments to Article V, section 11, do not speak to any generic "preference" for the election process. Nor do they address any "subordination" of the appointment process. Instead, the 1998 amendments to section 11, viewed in the context of the entirety of Revision 7, simply accommodate the new constitutional possibility of merit retention elections for trial court judges by authorizing a merit retention election for circuit and county court judges at the conclusion of the initial appointed term. As no local jurisdiction to date has voted in favor of the local option, the constitutional procedure for filling a vacancy in the office of circuit court judge is entirely unaffected by the 1998 amendments to Article V proposed by the Constitution Revision Commission.

* * *

A vacancy in the office of circuit court judge was created by Judge Foster's resignation in April 2018. The explicit terms of the Florida Constitution require the Governor to "fill each vacancy" on the Fourth Judicial Circuit by appointing a person nominated by the Fourth Circuit Judicial Nominating Commission to an initial appointed term, followed by an election in 2020 to fill the office for a six-year term beginning in January 2021. The First District's decision should be affirmed.

B. Precedent also confirms that the Florida Constitution requires the vacancy created by Judge Foster's resignation to be filled by appointment.

In addition to the plain language of the Florida Constitution, precedent from both this Court and the First District also confirms the authority of the Governor to fill the vacancy created by Judge Foster's resignation through the appointment process. In a series of cases, this Court has identified the beginning of the statutory candidate qualifying period as the objective and non-variable fixed point marking the beginning of the "election process." *See, e.g.*, *Advisory Opinion to Governor re Appointment or Election of Judges*, 983 So. 2d 526, 530 (Fla. 2008). And this Court has specifically held that a judicial vacancy arising from a resignation submitted and accepted before the beginning of the candidate qualifying period is to be filled by gubernatorial appointment, *even where that resignation is tendered with a future effective date falling after the conclusion of the candidate qualifying period*. *Sheriff and Judicial Vacancies*, 928 So. 2d at 1219. The First District's decision should be affirmed because it faithfully applied this Court's precedent requiring the vacancy created by Judge Foster's resignation to be filled by gubernatorial appointment.

This Court spoke directly to the issue presented in the present dispute in a 2006 advisory opinion to Governor Bush. *Sheriff and Judicial Vacancies*, 928 So. 2d 1218. In that case, Circuit Judge Gene R. Stephenson had tendered his

resignation to Governor Bush on April 5, 2006, with a future effective date of May 31, 2006. *Id*. at 1219. Governor Bush accepted the resignation on April 14, 2006. *Id*. Judge Stephenson's seat would have been up for election in 2006 had he not tendered his resignation. *Id*. The statutory qualifying period for the seat was scheduled to begin on May 8, 2006, and to conclude on May 12, 2006. *Id*. Several candidates had already stated their intent to run for Judge Stephenson's seat, and at least one candidate had actively pursued qualification through the petition process. *Id*. at 1220. Governor Bush sought this Court's opinion regarding whether the seat should be filled by appointment or election. *Id*. at 1219.

Under the circumstances presented in the 2006 advisory opinion, this Court was of the unanimous opinion that the vacancy created by Judge Stephenson's resignation "should be filled by appointment." *Id*. Relying on prior case law, the opinion confirmed that the judicial vacancy had occurred on April 14, 2006, when Governor Bush "received and accepted Judge Stephenson's resignation." *Id*. at 1220. Because the candidate qualifying period for Judge Stephenson's seat had not commenced on April 14, at the time the judge's resignation was accepted by the governor, this Court concluded that the vacancy should be filled by appointment notwithstanding the fact that the resignation would take effect on May 31, after the conclusion of the candidate qualifying period. *Id*. In response to arguments from potential candidates who wished to seek Judge Stephenson's seat in an election

that year, the advisory opinion noted that "the Governor's appointment is for a limited term" and that "there will be an opportunity to fill this seat by election in 2008." *Id*. at 1220-1221.

The operative facts in the present case are indistinguishable from those in *Sheriff and Judicial Vacancies* and this Court should reach the same conclusion. Like Judge Stephenson, Judge Foster tendered his resignation to the governor early in the month of April in a year that his seat would otherwise have been up for election. R. 396. Just as in 2006, the judge's resignation was received and accepted by the governor—creating a vacancy in judicial office—before the beginning of the candidate qualifying period. R. 397. Just as in 2006, the judge's resignation had a future effective date falling after the candidate qualifying period. R. 396. Just as in 2006, an attorney—the Petitioner here—wished to seek the resigning judge's seat as a candidate in an election. R. 399. And just as in 2006, this Court should conclude—as did the First District in the decision under review—that the vacancy is to be filled by a gubernatorial appointment for a limited term, with an opportunity for the Petitioner and other potential candidates to seek the seat by election in two years' time.

In *Sheriff and Judicial Vacancies*, this Court followed the approach previously taken by the First District in *Pincket I*, 765 So. 2d 284, 285 (Fla. 1st DCA 2000), which also involved the resignation of a circuit judge before the

beginning of the candidate qualifying period. Both the circuit court and the First District in *Pincket I* agreed that the gubernatorial appointment process must be used to fill a judicial vacancy that occurred before the candidate qualifying period. *Id.* at 288. In its opinion, the First District evaluated the effect of the 1996 amendment to Article V, section 11(b), on this Court's prior case law regarding judicial vacancies and concluded that those cases had largely been superseded by the amendment. *Id*. Specifically, the First District in *Pincket I* noted that the voters had chosen to adopt a longer initial appointed term for judges appointed by the governor to provide the governor with the authority to appoint qualified individuals to fill judicial vacancies even where "an election is scheduled within the foreseeable future." *Id*.

In its other cases concerning vacancies in judicial office, this Court has consistently emphasized the significance of the statutory candidate qualifying period as marking the objective, fixed point beginning the "election process." In a 2002 advisory opinion, the Court addressed a judicial vacancy that arose when a circuit judge was "involuntary retired" more than two weeks after the beginning of the candidate qualifying period for her seat and three persons had qualified as candidates for the seat. *In re Advisory Opinion to Governor re: Appointment or Election of Judges*, 824 So. 2d 132, 133 (Fla. 2002). Under those circumstances, a majority of this Court concluded that the election process should continue to avoid

the gubernatorial appointment rendering the ongoing election "a nullity." *Id*. at 136. The majority explicitly distinguished the First District's decision in *Pincket I* on the basis that the vacancy in *Pincket* arose before the candidate qualifying period. *Id*. at 136 n. 9.

Notably, Justice Lewis did not join in the majority's opinion concluding that the vacancy at issue should be filled by election:

> Rather, it is the opinion of Justice Lewis that the majority rewrites the Florida Constitution. Justice Lewis finds nothing in the Florida Constitution that limits the appointment powers with reference to the phrase coined by the majority as when "the election process begins."

Id. at 137.

The dispositive significance of the candidate qualifying period was also emphasized in *Appointment or Election of Judges*, 983 So. 2d 526. In that case, a judicial vacancy was created by the involuntary retirement of a judge *during* the candidate qualifying period. *Id*. at 529. This Court concluded that the election process should continue, holding that the beginning of the statutory candidate qualifying period provided an objective and fixed date to mark the beginning of the election process:

> A set date for commencement of the "election process" provides a definitive time period and a practical answer to the election-versus-appointment conundrum with regard to defining an "election process."

Id. at 530. The Court went on to describe the practical and doctrinal problems with applying subjective, fact-dependent criteria to determine the manner in which a judicial vacancy is to be filled:

> The establishment of a fluctuating date based upon some variable factor such as when potential candidates take specific actions toward qualifying for candidacy, or when the first candidate qualifies, would inject uncertainty into defining the "election process." If we were to conclude that the process begins upon the occurrence of one of these variable factors, new facts could arise during every election year, and this Court would routinely be called upon to determine the precise commencement of any particular "election process." *The determination of constitutional provisions should not vary based upon fluctuations of the individual "election process" for a given year*.

Id. (emphasis added); *see also Advisory Opinion to the Governor Re Judicial Vacancy Due To Resignation*, 42 So. 3d 795, 797 (Fla. 2010) (upholding governor's appointment authority to fill judicial vacancy and stating that "[i]n order to promote consistency in the process of filling judicial vacancies, we identified the beginning of the statutory qualifying period as a fixed point to mark the commencement of the election process").

To be sure, some of this Court's decisions finding an "exception" to the gubernatorial appointment power after the beginning of the "election process" have suggested that a conflict exists between sections 10(b) and (11)(b) of Article V. *See, e.g.*, *Appointment or Election of Judges*, 824 So. 2d at 134-35. For the reasons stated at pages 7 to 21 above, and consistent with Justice Lewis's separate

observations in *Appointment or Election of Judges*, 824 So. 2d at 137, Respondents submit that only Article V, section 11, addresses the filling of judicial vacancies and that these constitutional provisions can (and therefore should) be interpreted in a manner that avoids any conflict. But the resolution of the present case need not involve a reassessment of this Court's precedents, because *even under those precedents*, the vacancy created by Judge Foster's resignation occurred before the beginning of the candidate qualifying period and must be filled by gubernatorial appointment.

Moreover, the solution fashioned by this Court to the perceived conflict—an objective, bright line rule recognizing the governor's appointment power to fill circuit and county court vacancies other than those occurring during the pendency of an ongoing and time-limited "election process"—at least provides a degree of objective certainty to candidates and elected officials. The Petitioner's proposed solution—to have the judiciary examine the subjective reasons for judges' resignations, or assess the "reasonableness" of a particular vacancy based on slightly different facts each election cycle—would inject uncertainty and doubt into the process and make the determination of constitutional provisions vary "based upon the fluctuations of the individual 'election process' for a given year." *Appointment or Election of Judges*, 983 So. 2d at 530; *see also Trotti II*, R. 905 (noting that the Petitioner's approach would require the courts "to analyze a

resigning judge's subjective intent in the hopes of determining whether the resignation was a matter of political gamesmanship"). This Court should decline the Petitioner's invitation to replace its objective bright-line rule with the case-by-case "exercise of some judgment" as to how long is "too long to leave an office vacant." Pet. Br. Merits 30-31.

The Petitioner disregards the entirety of this Court's precedent holding that a judicial vacancy that occurs before the start of the candidate qualifying period is to be filled by gubernatorial appointment. Instead, he claims that this Court adopted a "rule" in *Spector* that all judicial vacancies are to be filled by election, and that each of the cases in which this Court has upheld the governor's appointment authority represents a fact-dependent application of a judicially-created "'unreasonable vacancy' exception" to avoid a "lengthy gap in service." Pet. Br. Merits 3-4. Setting aside the fact that this Court has never articulated the "unreasonable vacancy exception" he posits, the precedent is utterly irreconcilable with the Petitioner's theory. The Petitioner's approach cannot explain, for example, the different results in *Appointment or Election of Judges*, 983 So. 2d at 530 (concluding that judicial vacancy effective May 1 must be filled by election notwithstanding the fact that the seat would remain unoccupied for more than 8 months); and *Sheriff and Judicial Vacancies*, 928 So. 2d at 1219, 1222 (concluding that vacancy effective May 31 must be filled by appointment, even

though election would have filled seat after a gap of only seven months). As described above, and as found by the First District in the decision under review, this Court's precedent has applied a bright-line rule holding that judicial vacancies that occur before the statutory candidate qualifying period are to be filled by gubernatorial appointment. The Petitioner provides no basis to depart from this precedent.

* * *

Contrary to the Petitioner's arguments, this Court has consistently held that a vacancy in the office of circuit court judge occurs at the time the governor accepts a letter of resignation from the incumbent judge, even where the resignation is effective at a future date. And this Court has specifically held that a judicial vacancy created by a resignation that is accepted by the governor before the beginning of the candidate qualifying period is to be filled by gubernatorial appointment, *even where that resignation is tendered with a future effective date falling after the conclusion of the candidate qualifying period*, and notwithstanding the desire of potential candidates to seek that office in an election. The First District's decision should be affirmed.

II. THE FIRST DISTRICT'S DECISION IN *TROTTI II* CORRECTLY APPLIED THE CONSTITUTION AND PRECEDENT IN REVERSING THE CIRCUIT COURT'S PRELIMINARY INJUNCTION.

A. Independently of the underlying merits, the First District properly reversed the preliminary injunction because the circuit court failed to follow controlling precedent.

As explained in the Respondents' Jurisdictional Brief, the First District decision under review was resolved on a single narrow but dispositive issue: whether the circuit court "erred as a matter of law in failing to follow binding precedent." *See Trotti II*, at R. 907. The First District answered that question by adhering to universally accepted precedent holding that district court decisions are binding on trial courts, and that trial courts are free to express their disagreement with decisions of higher courts, but are not at liberty to disregard them in the adjudicatory process. R. 905 (citing *Pardo v. State*, 596 So. 2d 665, 666 (Fla. 1992); *Wood v. Fraser*, 677 So. 2d 15, 19 (Fla. 2d DCA 1996). Finally, the First District concluded that the circuit court had erred in relying upon dicta from this Court rather than following binding precedent from the First District. R. 906 (citing *Miller v. State*, 980 So. 2d 1092, 1094 (Fla. 2d DCA 2008) (stating concurring opinions are not precedent and "[o]nly the written, majority opinion of an appellate court has precedential value")).

Remarkably, the Petitioner argues to this Court that the circuit court was justified in disregarding binding precedent: "[s]urely no one could fault" the trial

judge for its failure to follow precedent. Pet. Br. Merits 32. After all, that precedent (or, as Petitioner would have it, "precedent") had *effectively* been overruled by the concurring opinions to this Court's order in *Pincket v. Detzner, SC16-786,* 2016 WL 3127704 (Fla. June 3, 2016) ("*Pincket II*"). Pet. Br. Merits 32. And the Petitioner seems to believe that "it makes no difference" that the circuit court disregarded binding precedent because—as long as the Petitioner prevails before this Court—the trial court's order can be affirmed on a kind of anticipatory tipsy-coachman theory. Pet. Br. Merits 33.

The First District succinctly summarized its holding as follows: "Because this Court had already spoken to the issue, the circuit court erred as a matter of law in failing to following *Trotti I. Trotti I* has not been overruled by an en banc opinion from this Court. Nor has it been overruled by the Florida Supreme Court. Therefore, it is still binding precedent, and the circuit court was obligated to follow it." R. 904. This holding accurately states the law, and explains why the First District's decision properly reversed the preliminary injunction. The Petitioner's apparent suggestion to the contrary—that circuit courts are at liberty to grant injunctive relief contrary to binding district court precedent as long as they believe this Court might ultimately agree with them—is a recipe for chaos and wholesale disregard of the rule of law by Florida's trial courts. For reasons entirely

independent from the merits of the underlying dispute, this Court should either discharge jurisdiction or affirm the First District's decision.

B. The First District correctly applied the Florida Constitution and this Court's precedent in determining that the vacancy in office created by Judge Foster's resignation must be filled by appointment.

As to the underlying constitutional question presented in this case, both the First District's decision in *Trotti I* and the decision under review correctly applied the language of the Florida Constitution and this Court's precedent in determining that the vacancy created by Judge Foster's resignation must initially be filled by a gubernatorial appointment. That decision should be affirmed.

In the decision under review, the First District noted that "[w]hen a resignation is tendered with a future effective date, the vacancy is deemed to occur when the Governor accepts the resignation." R. 905 (citing *Trotti I*, 147 So. 3d at 644 (citing *In re Judicial Vacancies*, 600 So. 2d at 462)). The First District recognized that this Court has employed a bright line rule, allowing "a reviewing court to apply neutral principles to evaluate objective facts." R. 904 (citing *Appointment or Election of Judges*, 983 So. 2d at 530). And the First District's decision accurately stated the test found in this Court's precedents: "[w]hen a circuit court vacancy occurs before the commencement of the election process, the Governor shall fill each circuit court vacancy by appointment." R. 905 (citing

Trotti I, 147 So.3d at 643-44; *Sheriff & Judicial Vacancies*, 928 So. 2d at 1220-21; Art. V, § 11(b), Fla. Const.).

Because it is undisputed that the vacancy created by Judge Foster's resignation occurred before the start of the candidate qualifying period, the First District correctly applied the Florida Constitution and this Court's precedents in determining that "the judicial vacancy had to be filled by appointment rather than by election." R. 905.

The Petitioner claims that the First District in *Trotti II* (and *Trotti I*) should have concluded that this Court's decision in *Spector* required the vacancies at issue to be filled by an election. Pet. Br. Merits 16-17. In *Trotti I*, the First District explicitly distinguished *Spector* and explained why that opinion did not require a contrary conclusion. *Trotti I*, 147 So. 3d at 644-45. The Respondents also address this argument in Section III, below.

More generally, the Petitioner argues that the First District decision under review should have decided the case based upon its assessment of Judge Foster's "intent" and what a "reasonable person" would conclude from an assessment of several subjective and case-specific factors. Pet. Br. Merits 24-25. The court in *Trotti II* correctly rejected these arguments as inconsistent with this Court's precedents, and instead applied a bright-line rule that "allows a reviewing court to

apply neutral principles to evaluate objective facts." *Trotti II*, R. 904 (citing *Appointment or Election of Judges*, 983 So. 2d at 530).

Because the First District correctly applied the Florida Constitution and this Court's precedent in determining that the vacancy created by Judge Foster's resignation must be filled by appointment, the decision under review should be affirmed.

III. THIS COURT'S 1974 OPINION IN *SPECTOR V. GLISSON* DOES NOT REQUIRE A DIFFERENT RESULT.

The Petitioner's argument depends almost entirely on his interpretation of *Spector v. Glisson*, 305 So. 2d 777 (Fla. 1974), a case decided by this Court more than four decades ago, which the Petitioner claims is "not distinguishable in any material respect" from the present dispute. Pet. Br. Merits 17. A dissenting opinion in *Trotti I* and two concurring opinions from members of this Court in *Pincket II* also expressed the view that the analysis of *Spector* should control. As explained below, *Spector* is distinguishable from the present dispute on both factual and legal grounds. But to the extent this Court believes *Spector* would otherwise control the result here, this Court should acknowledge that the approach in *Spector* is fundamentally irreconcilable with the current language of the Florida Constitution and, if necessary, recede from the decision.

A. Facts of *Spector*

Although *Spector* is ultimately distinguishable from the present dispute on both factual and legal grounds, the cases do bear some similarities. In *Spector*, this Court addressed the question of how Justice Ervin's successor on the Florida Supreme Court should be chosen: election or appointment? *Spector*, 305 So. 2d 777. The vacancy in *Spector* arose following Justice Ervin's decision to resign from the Court in a manner specifically intended to provide for his successor to be elected, rather than appointed by the governor. *Id*. at 783 (stating that Justice Ervin had "arranged his affairs to permit" the election of his successor). Justice Ervin was subject to mandatory retirement on January 26, 1975. *Id*. at 779. Had he chosen to continue his service through the date of his mandatory retirement, the Constitution would plainly have required his successor to have been appointed by the governor. But through the "[r]elinquishment of 20 days of the Justice's tenure," and the submission of a written letter of resignation in February 1974 with a future effective date at midnight of January 6, 1975 (the date and time immediately before an elected successor would take office, Justice Ervin sought to ensure that his successor would be chosen by election rather than gubernatorial appointment. *Id*. at 780; *see also id.* at 781 ("Justice Ervin chose to make his resignation effective coincident with the date for taking office by all elected … thereby

undertaking to accommodate the election of a successor by the traditional method of an election...").

Under the circumstances presented in *Spector*, this Court concluded that the constitution required the vacancy created by Justice Ervin's resignation to be filled by election. *Spector*, 305 So. 2d at 783-84. In so holding, the Court opined that "if the elective process is available, and if it is not expressly precluded by the applicable language, it should be utilized to fill any available office by vote of the people at the earliest possible date." *Id*. at 782. Under the facts presented in *Spector*, the Court concluded that the elective process was "available" because an election was scheduled to be held in September 1974 following the February 1974 resignation. *Id*. at 784; *see also id.* at 784 (finding election appropriate because "the present justice's tenure would continue until that effective date of January 6, 1975").

The Court in *Spector* characterized the governor's judicial appointments as "in effect, 'stop gap' measures until an election can be held." *Id*. at 783. Significant to the Court's analysis was the effect of a then-recent change to the length of an appointed term. *Id*. at 782. Under the version of Article V adopted in 1956, a judge appointed by the governor to fill a vacancy in judicial office would serve for "the entire remainder of an unexpired term of the vacancy" created by, for instance the retirement of an incumbent judge. *Spector*, 305 So. 2d at 782 (citing Art. V, §§ 14,

15, Fla. Const. (1956)). Under the version of Article V adopted in 1973, however, the Court in *Spector* noted that "the Governor's power to fill such vacancies has now been reduced to extend only to" the first Tuesday after the first Monday in January of the year following the next primary and general election—not for the total unexpired term of the judge vacating the office. *Id*. The Court found it significant that the "appointive power" had been "reduced or limited from what it was" under a prior version of the relevant constitutional provision. *Id*.

B. *Spector* is legally and factually distinguishable from the present dispute.

Much has changed in Florida since 1974. In the four-plus decades following this Court's opinion in *Spector*, the people have adopted substantial amendments to the provisions of the Florida Constitution governing judicial selection. In 1976, the voters approved a constitutional amendment proposed by the Florida Legislature to eliminate contested judicial elections for all appellate judges in Florida and to provide instead for mandatory merit retention elections for appellate judges. *See* SJR 49, 81 (1976) (proposed art. V, § 3, 10, 11 Fla. Const.). In 1996, as discussed above, the voters approved a constitutional amendment to Article V, section 11, to increase the length of the appointed term of a judge who has been appointed to fill a circuit or county court vacancy. *See* SJR 978 (1996) (proposed art. V, § 11, 12 Fla. Const.). And in 1998, as discussed above, the voters approved constitutional amendments proposed by the Constitution Revision Commission to provide local

jurisdictions the option to replace contested judicial elections with merit selection and retention at the trial court level. Fla. Const. Rev. Comm'n, Revision 7 (1998) (proposed Art. V, § 10(a), Fla. Const.).

Each of these constitutional amendments represented a movement in favor of the governor's judicial appointment authority at the expense of more (or more frequent) judicial elections. These constitutional amendments—under which the voters have consistently expanded the potential scope of gubernatorial appointment power—have also undermined the presumption in *Spector* that the appointment process is disfavored because of a 1973 amendment in which the voters reduced the length of an appointed judge's initial term.

Given these changes to the Article V of the Florida Constitution over the past forty years, *Spector* is legally distinguishable from the dispute addressed in the First District's decision below. Specifically, *Spector*'s statement that the governor's appointment power operates as a "stop gap" measure only "until an election can be held" has plainly been superseded by the 1996 amendment to Article V, section 11, which extended the appointed term for up to two years beyond the next election. Yet the Petitioner relies on *Spector*'s analysis of the language of the 1974 version of Article V. Pet. Br. Merits 14. Even *Spector* acknowledged that vacancies should not be filled by election where "expressly precluded by the applicable language" of the Florida Constitution. *Spector*, 305 So.

2d at 782. The language of Article V, section 11, provides that the governor "shall fill each vacancy on a circuit court" by appointment, thereby expressly precluding the use of the election process to fill those vacancies. Both this Court and the First District have previously acknowledged that various issues addressed in *Spector* have been superseded by constitutional amendment. *See, e.g.*, *Physicians Healthcare Plans, Inc. v. Pfeifler*, 846 So. 2d 1129, 1139 n.4 (Fla. 2003) (noting that the voters had adopted a constitutional amendment eliminating contested elections of appellate judges and justices in favor of merit selection and retention); *Pincket I,* 765 So. 2d at 286 (concluding that subsequent opinions of this Court and the adoption of the 1996 amendments to Article V had "limited *Spector* to its facts"). *Spector* is therefore legally distinguishable from the present dispute and does not dictate a different result from that reached by the First District.

Spector is also factually distinguishable. As noted by the First District in *Trotti I,* the holding of *Spector* is limited to "situations in which a judge resigns effective at a future date and no interim vacancy will exist." *Trotti I,* 147 So. 3d at 644-45 (quoting *Pincket I,* 765 So. 2d at 287). Here, Judge Foster's resignation, unlike Justice Ervin's, involves an interim vacancy of several days' duration. *Spector* therefore does not address the question presented here: whether the vacancy created by Judge Foster's resignation should be filled by election or

appointment. The First District's decision on review properly distinguished *Spector* and should be affirmed.

C. To the extent this Court does not distinguish *Spector*, it should recede from the decision.

Both for the reasons stated by the First District and the additional reasons outlined above, this Court's decision in *Spector* is distinguishable from the present dispute and does not demand a contrary result from that reached by the First District. But to the extent this Court does not distinguish *Spector*, it should recede from the decision as its pronouncement that if the "elective process is available, and if it is not expressly precluded by the applicable language, it should be utilized to fill any available office by vote of the people at the earliest possible date" is fundamentally irreconcilable with the current language of the Florida Constitution and the bright-line rule adopted in this Court's precedents. *Id.* at 782.

Although stare decisis normally requires deference to prior precedent, it does not command blind allegiance. *See, e.g., State v. Gray*, 654 So. 2d 552 (Fla. 1995). The doctrine bends where there has been an error in legal analysis. *Dorsey v. State*, 868 So. 2d 1192 (Fla. 2003); *Valdes v. State*, 3 So. 3d 1067 (Fla. 2009) (the doctrine of stare decisis counsels the Florida Supreme Court to follow its precedents unless there has been an error in legal analysis). Stare decisis will also yield when an established rule has proven unacceptable or unworkable in practice. *See Tiara Condo Ass'n Inc. v. Marsh & McLennan Companies, Inc.,* 110 So. 3d

399, 407 (Fla. 2013) (citing *Westgate Miami Beach, Ltd. v. Newport Operating Corp.*, 55 So. 3d 567, 574 (Fla. 2010)).

In cases in which this Court has considered whether the presumption in favor of stare decisis may be overcome, it has employed the following factors:

> (1) Has the prior decision proved unworkable due to reliance on an impractical legal 'fiction'?
>
> (2) Can the rule of law announced in the decision be reversed without serious injustice to those who have relied on it and without serious disruption in the stability of the law?
>
> (3) Have the factual premises underlying the decision changed so drastically as to leave the decision's central holding utterly without legal justification?

See, e.g., *Strand v. Escambia County*, 992 So. 2d 150, 159 (Fla. 2008) (quoting *N. Fla. Women's Health & Counseling Servs., Inc. v. State,* 866 So. 2d 612, 637 (Fla. 2003)).

In answer to the first question, *Spector*'s statement that the elective process should be utilized whenever reasonable has been scrutinized, tested, and rendered inapplicable to a host of judicial vacancy questions. *See In re Advisory Opinion of Governor Request of September 6, 1974*, 301 So. 2d 4, 7 (Fla. 1974) (noting *Spector* did not apply where timing of the vacancy created by the resignation of

Judge Huttoe makes it impossible to practicably hold the election and similarly did not compel a special election); *Smith v. Brantley*, 400 So. 2d 443, 448 (Fla. 1981) (where Court noted it was "not aided" by *Spector* decision in determining when a judicial vacancy occurred); *Judicial Nominating Com'n, Ninth Circuit v. Graham*, 424 So. 2d 10, 12 (Fla. 1982) (applying *Spector* but revising rule as: "if the vacancy is known in sufficient time to schedule a special election during the already scheduled primary and general election dates"); *Hoy v. Firestone*, 453 So. 2d 814, 816 (Fla. 1984) (noting *Spector* did not compel newly created judicial offices to be filled through election, rather than appointment); *Pincket v. Harris*, 765 So. 2d 284, 286 (Fla. 1st DCA 2000) (recognizing the broad language used by the *Spector* court, but noting that the Court in *In re Advisory Opinion to the Governor*, 600 So. 2d 460 (Fla.1992), and the 1996 amendment to article V, section 11(b), had limited *Spector* to its facts); *Physicians Healthcare Plans, Inc. v. Pfeifler*, 846 So. 2d at 1139 (noting *Spector* did not require a showing of "emergency of public business" before senior judges could be appointed); *Advisory Opinion to Governor re Appointment or Election of Judges*, 983 So. 2d 526, 530 (Fla. 2008) (A set date for commencement of the "election process" provides a definitive time period and a practical answer to the election-versus-appointment conundrum with regard to defining an "election process"); *Advisory Opinion to the Governor re Judicial Vacancy Due to Resignation*, 42 So. 3d 795 (Fla. 2010)

(noting bright line rule established "in order to promote consistency in the process of filling judicial vacancies…"); *Trotti v. Detzner*, 147 So. 3d 641, 645 (Fla. 1st DCA 2014) ("Deciding the election versus appointment question on the duration of the vacancy created rather than on the interplay between the vacancy and the commencement of the election process would result in inconsistent and confusing precedent"). This Court has previously receded from precedent when courts have subsequent found a decision to be unworkable or difficult to follow. *See, e.g.*, *Valdes*, 3 So. 3d at 1067. If this Court chooses not to distinguish *Spector* on legal or factual grounds, this case presents an opportunity to recede from *Spector*.

In response to the second question, there is little doubt that the rule of law announced in *Spector* can be reversed without causing injustice to those who have relied upon it or disruption in the stability of the law. As noted above, it is the bright-line rule developed through this Court's advisory opinions—not *Spector*—that the lower courts and candidates have relied upon in the judicial vacancy context. Those opinions—not *Spector*—were applied by the First District in *Pincket I, Trotti I,* and *Trotti II*. Likewise, it cannot be said that any disruption will occur by receding from *Spector*'s questionable pronouncements when that decision preceded the constitutional amendments that render it inapplicable, preceded this Court's advisory opinions on the issue of judicial vacancies, and preceded the First District's decision 18 years ago in *Pincket I* stating that subsequent constitutional

amendments and this Court's decisions had "limited *Spector* to its facts." *Pincket I*, 765 So. 2d at 286. This case therefore stands in stark contrast to the instances in which departing from precedent would disrupt governmental actors who have relied on precedent, but instead reflects precisely the justification this Court has used to depart from precedent in the past: abandoning a rule that has proven unworkable. *Compare Strand*, 992 So. 2d at 159 (Fla. 2008) (declining to recede from precedent where doing so would cause serious disruption to the governmental authorities that have relied upon that precedent for planning public works), *with Valdes*, 3 So. 3d at 1077 (receding from precedent where "primary evil" test had proven unworkable).

Finally, to the extent this Court does not distinguish *Spector*, it should answer "yes" to the third question and recognize that the factual premises underlying the decision have changed so drastically that *Spector*'s holding is without legal justification. Since *Spector*, the electorate has voted to amend Article V in a variety of ways to expand the appointment authority of the governor in the area of judicial vacancies. Even at the time Spector was decided, the decision was based on a tenuous attachment to the plain language of the constitutional text. Continuing to promote that precedent, rather than distinguishing or receding from the decision, would result in a judicial appointment jurisprudence disconnected from the clear mandate of the Florida Constitution. Although the doctrine of stare

decision generally requires deference to this Court's prior decisions, no precedent should be permitted to stand in conflict with the plain language of Florida's constitution. *Haag v. State*, 591 So. 2d 614, 618 (Fla. 1992); *see also Wilson v. Salamon*, 923 So. 2d 363, 367 (Fla. 2005) ("Rather than allowing continuing confusion surrounding the rule to continue, we conclude that interpreting the language of Florida Rule of Civil Procedure 1.420(e), as amended in 1976, by its plain meaning will further the purpose of decreasing litigation over the purpose of the rule and fostering the smooth administration of the trial court's docket").

The First District correctly concluded that this Court's opinion in *Spector v. Glisson* does not mandate a result in this case contrary to the plain language of the Florida Constitution or this Court's more recent precedent. This Court, like the First District, should continue to distinguish *Spector* on both legal and factual grounds. But to the extent this Court believes it cannot distinguish *Spector*, the Court should recede from its 1974 opinion as it is fundamentally irreconcilable with the current language of the Florida Constitution regarding the filling of vacancies in judicial office.

IV. THE PUBLIC POLICY CONCERNS EXPRESSED IN THE CONCURRING OPINIONS IN *PINCKET V. DETZNER* WOULD NOT BE RESOLVED BY A RULING IN FAVOR OF THE PETITIONER.

Finally, the Respondents acknowledge that members of this Court in *Pincket II* raised policy-related concerns associated with the choices made by some trial

court judges to resign from office under circumstances similar to those presented in the present case. *See Pincket II*, SC16-768, 2016 WL 3127704 at *2 (Pariente, J., concurring in result) ("The personal preferences of individual judges, however well-motivated their intentions, should not be the basis for determining whether a vacancy exists that can either be filled by election or appointment"); *id*. at *3 (Lewis, J., concurring in result only) (criticizing trial court judges who "manipulate the electoral process and prioritize their personal preferences over those espoused in the very Constitution they swore to defend"). Even if this Court were to hold that the vacancy created by Judge Foster's resignation must be filled by election, however, that decision would not prevent the reoccurrence of the underlying issue. The First District's decision should be affirmed not only because it faithfully applies the language of the Florida Constitution and this Court's precedent, but also because the Petitioner has proposed no judicially-manageable standard capable of consistent and objective application that would resolve the concerns raised by the concurring opinions in *Pincket II*.

To illustrate why a decision in favor of the Petitioner would not ultimately address the concerns of members of this Court in *Pincket II*, it is only necessary to review the nature of the relief requested by the Petitioner: a holding that a resignation that is submitted "before the qualifying period but with an effective date after the general election at a point near the end of the judge's term in office is

unconstitutional." Pet. Br. Merits 30. The Petitioner claims that this holding would likely "put an end to the manipulative practice at issue here." *Id*.

But why would it? As long as a judge is at liberty to resign from office at a time of his or her own choosing, the resignation can always be made effective at a date dictated by whatever standard the courts provide. The binding precedent set forth in *Trotti I* at the time of Judge Foster's resignation was that any resignation accepted before the candidate qualifying period, and effective any time before the end of his term, would create a vacancy to be filled by gubernatorial appointment. If the First District in *Trotti I* had held instead that a judicial vacancy will only be filled by gubernatorial appointment if a judge's resignation is: 1) accepted before the candidate qualifying period; and 2) effective on a date *before the general election*, a judge preferring the election (or appointment) of his or her successor could simply submit a resignation letter incorporating a different effective date. The same would be true if this Court were to hold that a judicial vacancy will only be filled by gubernatorial appointment if a judge's resignation is accepted by the governor before the candidate qualifying period and effective *immediately*; a judge preferring the appointment (or election) of his or her successor could accomplish either result by choosing the appropriate effective date.

Surely the Petitioner does not mean to suggest that any judge (or justice) who has a personal preference regarding how his or her successor is selected is

necessarily engaged in a betrayal of the oath of office; recall that Justice Ervin's resignation in *Spector v. Glisson* arose out of *his* own preference regarding the manner in which his successor on this Court would be selected and was timed accordingly.

Even the Petitioner acknowledges that the gubernatorial appointment process must be used to fill an "unreasonable vacancy" that would be "too long" Pet. Br. Merits 31. But in response to the litany of practical concerns identified by the First District's decision, *Trotti II*, R. 904, the Petitioner asks this Court to take on the role of a common law court of equity: to "decide this case" based on the Court's assessment of a fair result, and leave all of the difficult line-drawing questions for another day. Pet. Br. Merits 30-31. The Petitioner's view of this Court's role as that of a policy-making common law body is fundamentally incompatible with the role of the judiciary in constitutional interpretation.

Finally, even if it were appropriate for this Court to act in a common law policymaking role when engaging in constitutional interpretation, the Respondents submit that it is neither irrational nor an abdication of his or her duty for a retiring judge to prefer the selection of his or her successor by gubernatorial appointment rather than election.

CONCLUSION

The First District's decision should be affirmed.

Respectfully submitted,

/s/ Daniel E. Nordby
DANIEL E. NORDBY (FBN 14588)
General Counsel
MEREDITH L. SASSO (FBN 58189)
Chief Deputy General Counsel
JOHN MACIVER (FBN 97334)
NICHOLAS A. PRIMROSE (FBN 104804)
ALEXIS LAMBERT (FBN 24001)
Deputy General Counsel
EXECUTIVE OFFICE OF THE GOVERNOR
The Capitol, PL-05
Tallahassee, Florida 32399-0001
(850) 717-9310
Daniel.Nordby@eog.myflorida.com
Meredith.Sasso@eog.myflorida.com
John.MacIver@eog.myflorida.com
Nicholas.Primrose@eog.myflorida.com
Alexis.Lambert@eog.myflorida.com

Counsel for Governor Scott

/s/ Jesse Dyer
JESSE DYER (FBN 0114593)
Assistant General Counsel
FLORIDA DEPARTMENT OF STATE
R.A. Gray Building, Suite 100
Tallahassee, Florida 32399-0250
(850) 245-6536
david.fugett@dos.myflorida.com
jesse.dyer@dos.myflorida.com

Counsel for Secretary Detzner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 30, 2018, a true copy of the foregoing has been served via email on the following counsel of record:

Nick James
2980 Hartley Road
Jacksonville, Florida 32257
nick@nickjameslaw.com

David Trotti
1542 Glengarry Road
Jacksonville, Florida 32207
david@dptrottilaw.com

Robert Slama
6817 Southpoint Parkway, Suite 2504
Jacksonville, Florida 32216
support@RobertJSlamaPA.com

Phillip J. Padovano
Joseph T. Eagleton
BRANNOCK & HUMPHRIES
1111 West Cass Street, Suite 200
Tampa, Florida 33606
ppadovano@bhappeals.com
jeagleton@bhappeals.com
eservice@bhappeals.com

/s/ Daniel E. Nordby
Attorney

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(d).

/s/ Daniel E. Nordby
Attorney