IN THE SUPREME COURT OF FLORIDA

DAVID P. TROTTI,

Petitioner,

v.

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

Respondents.

Case No. SC18-1217

L.T. Case No. 1D18-2387

ON REVIEW FROM THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

PETITIONER'S INITIAL BRIEF ON THE MERITS

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INTRODUCTION

The question in this case is whether a trial judge who is ineligible to run for another term in office can effectively decide that his or her successor will be chosen by an appointment rather than an election, by submitting a resignation letter before the qualifying period and specifying an effective date of the resignation at a point after the election and just a few days before the end of the term.

The First District opened the door to this method of ensuring gubernatorial appointments in 2014 with its decision in *Trotti v. Detzner*, 147 So. 3d 641 (Fla. 1st DCA 2014) ("*Trotti I*"), but two years later in *Pincket v. Detzner*, 2016 WL 3127704 (Fla. June 3, 2016) four Justices of this Court condemned the practice as a manipulation of the electoral process. The Justices who spoke out on the issue stated that *Trotti I* had been incorrectly decided.

In the present case, the First District rejected the views of the four Justices in *Pincket* and doubled down on its position in *Trotti I* that the Florida Constitution requires a gubernatorial appointment even for a nominal vacancy of just a few days. *See Scott v. Trotti*, 2018 WL 3580761 (Fla. 1st DCA July 26, 2018) ("*Trotti II*") (A.6). Because the First District's interpretation of the Florida Constitution is incorrect, and because its decision will continue to enable a subset of judges to circumvent the judicial election process, this Court should quash the decision and put an end to this recurring problem.

STATEMENT OF THE CASE AND FACTS

A brief history of the case law pertaining to deferred judicial resignations will serve to put the proceedings in this case in the proper context. So, before we state the facts of this case we offer this brief overview of the cases that have come before.

Spector

When Justice Ervin resigned from his position as a Justice of this Court, he stated in his letter to the Governor that the resignation would be effective on the last day of the 1974 term. He did it that way to give lawyers notice that he would not be qualifying to run for another term and that his seat would be open for an election. Several candidates attempted to qualify for the election, but the Secretary of State declined to accept their papers.

The controversy made its way to this Court in *Spector v. Glisson*, 305 So. 2d 777 (Fla. 1974), and the Court held that Justice Ervin's seat must be filled by an election. As the Court stated, "if the elective process is available . . . it should be utilized to fill any available office by vote of the people at the earliest possible date." *Id*. at 782. "Interim appointments need only be made when there is no earlier, reasonably intervening elective process available." *Id*. at 784.

Because there was an intervening qualifying period and there was an intervening general election capable of filling Justice Ervin's seat, this Court held

that there was no need for the governor to step in and make an appointment. In other words, elections reign supreme: "[a]s between the appointive power on the one hand and the power of the people to elect on the other, the policy of the law is to afford the people priority." *Id*. at 784. "[T]he elective process retains that primacy which has historically been accorded to it consistent with the retention of all powers in the people." *Id*. at 782.

In the wake of the *Spector* decision, the Court was asked to decide whether the same rule would hold true if the effective date of the resignation occurred earlier in the year, thereby leaving the office physically vacant for a substantial period of time. The Court distinguished *Spector* on that ground in *In re Advisory Opinion to the Governor*, 600 So. 2d 460 (Fla. 1992). In that case, Judge Richard Fuller submitted his resignation letter on March 3, 1992, (before the qualifying period for the election), and stated in the letter that his resignation would become effective on July 31, 1992. Because the elective process would have left the office unoccupied for a period of five months from August until January, the Court held that Judge Fuller's successor must be chosen by a gubernatorial appointment. The Court reasoned that an appointment was necessary to prevent an "unreasonable vacancy" in the office. *Advisory Opinion*, 600 So. 2d at 463.

The "unreasonable vacancy" exception was applied in several other cases, as well. The common feature of these cases is that they all distinguish the rule in

Spector, in order to avoid a lengthy gap in service. *See Advisory Opinion to the Governor re Sheriff & Judicial Vacancies Due to Resignations*, 928 So. 2d 1218 (Fla. 2006) (the judge resigned in April, effective the following May, thus leaving the office unoccupied for seven months, regardless of the scheduled election that year); *Advisory Opinion to the Governor re Judicial Vacancy Due to Resignation*, 42 So. 3d 795 (Fla. 2010) (the resignation created an actual vacancy of seven months); *Pincket v. Harris*, 765 So. 2d 284 (Fla. 1st DCA 2000) (the judge resigned on June 19th, effective the next day, leaving an actual vacancy in the office for a period of six months).

Trotti I

The next step in this series of cases, and it was not a logical step, was to apply the exception to the rule in *Spector* to a case in which there would be a physical vacancy of <u>any</u> duration and not merely to a vacancy that could be considered as "unreasonable." In 2014, just before the start of the qualifying period for the election that year, Judge Don Moran of the Fourth Judicial Circuit tendered a prospective letter of resignation to Governor Rick Scott, stating in his letter that his resignation would become effective on the last day of his term in office. *See Trotti v. Detzner*, 147 So. 3d 641, 642 (Fla. 1st DCA 2014). Under the rule in *Spector*, that meant his seat would be filled by an election. But, in an apparent effort to avoid that result, Judge Moran "clarif[ied] that his specific date

of resignation was to be . . . three calendar days (one business day) before" his term was set to expire. *Id*. 147 So. 3d at 642.

A Jacksonville lawyer named David Trotti—the same David Trotti who is the Petitioner here—wanted to run for the seat being vacated by Judge Moran, so he submitted his qualifying papers to the Secretary of State and was listed as a candidate on the Secretary's website. *Id*. at 643. However, Mr. Trotti was prohibited from running when, after he had submitted his paperwork, Governor Scott accepted Judge Moran's resignation. When the Secretary of State learned of the resignation he informed Mr. Trotti that Judge Moran's seat would be filed "by gubernatorial appointment rather than election." *Id.* at 643.

Trotti filed a petition for writ of mandamus seeking to compel the Secretary to accept his qualifying papers, but the circuit court found that because the judge "resigned prior to the start of the qualifying period and a physical vacancy [of one day] would occur between the effective date of his resignation and the start of the following term, his seat should be filled by gubernatorial appointment." *Id*. at 643.

The First District, in a 2-1 decision, affirmed. The majority reasoned that *Spector* is limited to situations in which a judge resigns effective at a future date and no interim vacancy will exist, explaining that the length of the interim vacancy is irrelevant. *Id.* at 644. Stating that it would not engage "in a determination of what does or does not constitute an unreasonable vacancy warranting an

appointment," the First District majority held that any other conclusion would "nullify[] the Governor's power of appointment" and allow the "limited exception created by *Spector* to swallow Article V, section 11(b), of the [Florida] Constitution." *Id.* at 645.

The dissent questioned both the rationale and the wisdom of the majority's decision. Pointing out that the First District majority's interpretation of *Spector* "will have a high potential for abuse" by "bestow[ing] upon an individual judge the power to block an election by resigning just short of the end of his or her term in office," the dissent criticized the First District for "fail[ing] to account for the fact that the resignation was to take place at a distant point in the future." *Id*. at 645-46 (Padovano, J., dissenting). The dissent noted that "[t]he only difference between [*Trotti*] and *Spector* is that the effective date of the resignation in [*Trotti*] was one day before the end of the term and not on the last day," and questioned "whether this is the kind of difference that should compel an exception to the rule in *Spector*." *Id.* at 647.

With the advent of *Trotti I*, the test was no longer whether an appointment would be necessary to fill an "unreasonable vacancy." *See Advisory Opinion*, 600 So. 2d at 463. The new test – contrary to all of the earlier post-*Spector* decisions – was to use a vacancy of <u>any</u> duration, even a single day, as a justification for a gubernatorial appointment.

Pincket

Two years (or one election cycle) after the First District gave its blessing to the practice of resigning just before the end of a term, the scope of that electoral circumvention came into full view. Several judges, explicitly conceding that their goal was to have their successors chosen by Governor Scott and not by the citizens of Florida, submitted the same kind of prospective resignations as in *Trotti I* — resignations that were tendered just before the start of the qualifying period but that would not take effect until mere days before the end of the incumbent judge's term. *See Pincket*, 2016 WL 3127704, at *1 (Pariente, J., concurring in result). [1]

Several candidates who wished to run for election to fill these judges' seats sought mandamus or quo warranto relief in this Court. The Court concluded that it was constrained by the standards for issuing writs of mandamus and quo warranto, and therefore denied the petitions. However, four Justices categorically stated in two concurring opinions, one by Justice Pariente and the other by Justice Lewis, that they disagreed with the First District's decision in *Trotti I*. *Id*. at *1-3.

Justice Pariente, joined by Justices Quince and Perry, stated that *Trotti I* was not "faithful to the true purpose of the Florida Constitution and the voters'

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

preference for election of their circuit and county court judges." *Id.* at *1. Thus, if the case had been before this Court "on the merits to decide the constitutional question," *id*, at *1, those Justices would have adopted the reasoning of the *Trotti I* dissent, as "[t]he personal preferences of individual judges . . . should not be the basis for determining whether a vacancy exists that can either be filled by election or appointment." *Id*. at *2. Those Justices stated that the "way to resolve this issue for the future is by a declaratory judgment." *Id*. at *2.

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

This Case

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

For the third straight time, this constitutional issue has reared its ugly head. The action that precipitated the newest crisis was the prospective resignation tendered on April 2, 2018, by Judge Robert M. Foster, a sitting circuit judge in the Fourth Judicial Circuit. (A.24).[2] Just like the prior times this issue has arisen, Judge Foster's resignation was sent to Governor Scott before the start of the statutory qualifying period, but it specified a much-later effective date (nine months in the future), after the November general election and just a few days (four business days, to be exact) before the expiration of his term in office. (A.24).

The qualifying period to run for election to the office of circuit judge opened at noon on April 30, 2018, and closed at noon on May 4, 2018. (A.175 ¶3). The Petitioner, David Trotti, qualified on May 3, 2018, to run for the seat in Group 6 for the Fourth Judicial Circuit, the seat now held by Judge Foster. (A.71 ¶¶6,7). He submitted his check for the filing fee, along with all of the required qualifying papers. (A.45,71). The Secretary of State listed Mr. Trotti's status as that of a "qualified candidate," an indication that all of his papers were in order. (A.71 ¶7).

After Mr. Trotti had qualified to run for election, he received a call from Kristi Willis, the Chief of the Bureau of Election Records for the Division of Elections, informing him that he was no longer a qualified candidate and that his

[2] Because the briefing in this case was accelerated and the record has not yet been filed, pertinent documents filed in the First District are submitted here in an appendix. (A.). This brief also refers to a few documents filed in this Court in earlier stages of this proceeding and these are included in the appendix, as well.

name had been removed from the Division's records. (A.72 ¶9). Mrs. Willis explained that she had received an email from the Governor's office stating that Judge Foster had submitted his resignation and that his seat would be filled by a gubernatorial appointment. (A.72 ¶9). Indeed, Governor Scott had accepted Judge Foster's letter and had directed the Fourth Judicial Circuit Nominating Commission to submit names for appointment to the "vacancy" created by Judge Foster's "resignation." (A.69,170).

Although there was one day left in the qualifying period when the Secretary informed Mr. Trotti that he could not run for Judge Foster's seat, no other lawyer qualified or attempted to qualify for the seat. And, no other lawyer has intervened in this case to argue that he or she would have qualified were it not for the Secretary's position that the seat must be filled by an appointment.

Frustrated yet again in his attempt to run for election, Mr. Trotti followed the procedure suggested by Justice Pariente's opinion in *Pincket* and, less than a week after being told he no longer qualified to run for the seat, filed a declaratory judgment suit in the circuit court for the Second Judicial Circuit. (A.15). Mr. Trotti's lawsuit sought a declaration that the Florida Constitution requires an election to fill the vacancy created by Judge Foster's prospective resignation. (A.21).

To ensure that his lawsuit wasn't for naught, and that any remedy ultimately

ordered by the circuit court would not be illusory, Mr. Trotti also moved to provisionally enjoin Governor Scott from making an appointment to the seat. (A.30-40). His motion for an injunction pointed out that the public would not be harmed by putting the appointment process on hold; after all, Judge Foster will continue to occupy the seat for another six months. (A.36).

The Respondents argued that the motion for injunctive relief should be denied because Mr. Trotti was not likely to succeed on the merits. (A.56-67). The trial judge held an expedited hearing on the motion (A.76-150) and, after listening to the testimony and hearing argument from both sides, the trial judge granted the motion for an injunction. (A.148). The judge interpreted the majority view of this Court in *Pincket* as "clear guidance" for this declaratory judgment action. (A.148). He stated that the injunction was "in the public's interest . . . because the constitution clearly provides that the public desires to elect its circuit and county judges and there wouldn't be an adequate remedy at law if we went forward with the JNC process on this and allowed that to go through." (A.148).

The trial judge elaborated on its rationale in a subsequent written order. There he made a specific finding that Judge Foster's intent in resigning the way he did was to "create an artificial appointment which is in violation of the Constitutionally required elective process set forth in *Spector* [*v. Glisson*]." (A.154). The undisputed evidence at the hearing, the judge noted, was that Judge

Foster intended "to manipulate his resignation so that his seat would be filled by gubernatorial appointment," (A.154).

In the end, the trial judge concluded that there was no reason why Judge Foster's seat could not be filled by an election, because both the primary election and the general election will have taken place "before the effective date of Judge Foster's resignation." (A.155). "Because Judge Foster's tenure will continue until December 31, 2018, just four business days prior to the end of his term under his unconditional mandatory resignation," the judge concluded, "the actual vacancy is minimal." (A.155).

The Respondents appealed the trial court's order granting the injunction and, in the interim, there was a heated dispute about whether the injunction should be stayed. The Respondents relied on the automatic stay provision in Rule 9.130(a)(3)(B) of the Florida Rules of Appellate Procedure, but Mr. Trotti immediately moved to vacate the stay. (A.179). The trial judge agreed with Mr. Trotti and entered an order vacating the stay, (A.201) but that order was soon reversed by the First District Court of Appeal. (A.204).

With the stay back in place, the Judicial Nominating Commission continued its activities and, on June 20, forwarded six names to the Governor for appointment to Judge Foster's seat. Fearing that appointment might come at any time, the Petitioner asked this Court to issue a constitutional stay writ under the all writs

provision in Article V, section 3(b)(7). *See Trotti v. Scott*, SC 18-1012. (Petition). The Respondent opposed the petition, claiming that the Constitution empowers the Governor to make the appointment. For this reason, the Respondent argued that the Petitioner was not likely to prevail on the merits of a future proceeding in this Court. *Id*. (Response).

Shortly thereafter, on July 12, 2018, this Court issued an order granting Mr. Trotti's petition for a constitutional stay writ. In this order the Court stated that "[t]he First District Court of Appeal's order staying the circuit court's preliminary injunction is lifted." *Trotti v. Scott*, SC18-1012, (Fla. July 12, 2018). The effect of the order by this Court was to reinstate the trial court's injunction pending a final resolution of the appeal in the First District.

On July 26, 2018 the First District rendered its decision in *Scott v. Trotti*, 2018 WL 3580761 (Fla. 1st DCA July 26, 2018) (*Trotti II*) (A.6), the decision now under review in this Court. The First District reversed the trial court's injunction, concluding as it had in *Trotti I*, that the Florida Constitution requires that the seat be filled by a gubernatorial appointment

The Petitioner immediately filed a notice to invoke this Court's jurisdiction, (A.205) a motion for stay (A.208) and a jurisdictional brief. The Respondents opposed the request for a stay arguing, once again, that the Petitioner was unlikely to prevail on the merits. (A.214,221). The Court granted the motion for stay

(A.228) and later accepted review of the case. (A.230).

SUMMARY OF THE ARGUMENT

Trial judges are chosen in Florida by election. *See* Art. V, § 10(b), Fla. Const. Judicial candidates who qualify for office must run against each other in the primary election and, if no candidate receives a majority vote in the primary election, the two candidates receiving the highest number of votes must then run against each other in the general election. *See* § 105.051(1)(a), Fla. Stat. (2017). That is our system.

We also have a process for appointing trial judges, but that merely provides a method of filling gaps in service between the elections. *See* Art. V, § 11, Fla. Const. This limited function of the appointment process was best explained in the following passage from *Spector v. Glisson*:

> We must bear in mind that in all events the Governor's judicial appointments are only interim appointments, in effect 'stop gap' measures until an election can be held. It is not, therefore, a measure to be applied in those instances where the electorate has a reasonable, available opportunity to express its choice.

Spector, 305 So. 2d at 783. (emphasis added).

The error at the heart of the First District's decision in this case is that it reversed these essential functions. It treated the appointment process as though it is the primary method of judicial selection. Article V, section 11 is not a grant of constitutional power to the Governor to make appointments. To the contrary, it is

a limitation on his power. Yet the decision by the First District treats the appointment process as though it takes precedence over the constitutional right of the voters in Article V, section 10(b) to select their trial judges in elections.

The effect of the decision by the First District is to enable a resigning judge to get around the rule in *Spector* simply by resigning a few days before the end of the term. But surely the constitutional principles upon which the *Spector* decision was based cannot be swept away by the use of an artifice such as this. The nominal vacancy in this case, and others like it, was nothing more than a device to manipulate the process. And the Court should recognize it for what it is.

The people of this State have expressed their preference for elected trial judges not only by adopting Article V, section 10(b) but also by consistently declining opportunities to accept a system of gubernatorial appointments in its place. A local option was added to Article V, section 10(b) in 1998 enabling individual counties to employ the appointment process instead, but since then not a single Florida county has opted out of the election process. *See Pincket*, Pariente J. concurring, ("not one county opted for this preference"); 2016 WL 3127704 *2; Lewis J., concurring ("the citizens of every jurisdiction have voted to reject merit selection and retention of their trial judges every time such an opportunity has been presented"). 2016 WL 3127704 *3.

Because there is no valid reason why the seat that will be left vacant by

Judge Foster's resignation cannot be filled by an election, we ask the Court to quash the decision by the First District.

STANDARD OF REVIEW

There are no disputed issues of fact and this case is certainly not the kind of case that involves any degree of judicial discretion. Because the issue before this Court is a pure issue of law involving only the proper interpretation of the applicable constitutional provisions, the decision by the District Court is reviewable de novo. *See West Florida Medical Center v. See*, 79 So. 3d 1 (Fla. 2012).

ARGUMENT

I. Article V, Section 10(b), of the Florida Constitution Requires that the Seat Vacated by Judge Foster's Resignation be Filled by an Election.

Article V, section 10(b)(1) of the Florida Constitution provides that "the election of circuit judges shall be preserved" and that they shall be elected "by a vote of the qualified electors within the territorial jurisdiction of the court." The Governor has authority to appoint trial judges under Article V, section 11, but that authority is subordinate to the rights of the voters, and it is properly exercised only when it is necessary to fill a gap in service between the elections. As this Court stated in *Spector v. Glisson*, the "Governor's judicial appointments are only interim appointments, in effect 'stop gap' measures until an election can be held." *Spector*, 305 So. 2d at 783.

In the present case, the First District erred in applying these fundamental principles of Florida constitutional law. There is no valid reason why the seat that will be vacated by Judge Foster should not be filled by an election in accordance with Article V, section 10(b). It is true that a resignation before the qualifying period would ordinarily require an appointment. But a resignation that is post-dated this far in the future to a point just a few days before the end of the term is really nothing more than a decision not to seek election for another term.

The Petitioner respectfully asserts that the process of selecting judges cannot be manipulated in this way to convert a position that can and should be filled by an election into a position that will be filled by an appointment. A circuit judge who decides not to seek another term in office (or, as in this case, is unable to seek another term) cannot disenfranchise the rights of the voters under Article V, section 10(b)(1) simply by announcing in advance a resignation that will not take place until the end of the term or very near the end of the term.

These arguments are directly supported by *Spector v. Glisson*, a decision that is not distinguishable in any material respect from the present case. There, the Court reasoned that the appointment process is subordinate to the electoral process and that it should be employed only when necessary to fill a seat that will be unoccupied until the next election. The Court affirmed that the public policy in Florida favors elections and that a vacant position should be filled by an election

when possible. As the Court explained,

> We feel that it necessarily follows from this consistent view and steadfast public policy of this state as expressed above, 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. Thus, the elective process retains that primacy which has historically been accorded to it consistent with the retention of all powers in the people, either directly or through their elected representatives in their Legislature, which are not delegated and also consistent with the priority of the elective process over appointive powers except where explicitly otherwise provided. We thereby continue the basic premise of our democratic form of government, that it is a government of the people, by the people and for the people.

Spector, 305 So. 2d at 782 (emphasis added). Thus, the Court held that the office must be filled by the electoral process if there is an election in the time between the date the resignation is submitted and the date it becomes effective. Regarding the availability of an election, the Court stated,

> In the circumstances sub judice where the resignation is clearly unconditional and fixed, with an intervening election making the elective process reasonably available, a vacancy in the office in question was made clear and certain to occur on January 6, 1975, which should be filled by the intervening elective machinery. To hold otherwise would frustrate the plain requirement of our constitution and public policy of the State for over 100 years.

Id. at 784.

In this case, as in *Spector*, the seat can easily be filled by the intervening election. Judge Foster was not eligible to run for another term in office. Any candidate who was interested in running for his seat could have qualified. Judge

Foster continues to hold the office to this day, despite his resignation, and he will remain in the office through the 2018 general election. His seat could be filled during the election, and the judge-elect could assume the duties of the office in January without any disruption in the business of the court.

But the First District rejected this straightforward analysis in favor of a rule that will enable trial judges to decide for themselves how their successors are chosen. In the end, Justice Ervin's noble gesture (to give notice to all interested candidates that the seat will be open for an election) has become a tool that can be used to defeat the constitutional right of the voters to choose their circuit judge in an election. A judge who favors the appointment process can now force an appointment by resigning before the start of the qualifying period while retaining the right to stay in the office until the end of the term or very near the end of the term.

Whether a judicial vacancy should be filled by an appointment or by an election should be determined by an objective legal standard. It should not be left to the discretion of the departing judge. But unfortunately, that is the result of the decision under review here. It enables a judge to force an appointment by resigning before qualifying with an effective date just a few days before the end of the term. On the other hand, a judge who prefers judicial elections can simply notify the Bar that he or she does not intend to qualify for election to another term.

Candidates will qualify for the office and the seat will be filled by an election.

Whether the appointment process is superior to the elective process is simply not a matter for the departing judge to decide. This is an election year and our Constitution provides that circuit judges shall be elected by a vote of the electors. It is not for the departing judge to circumvent the elective process by resigning with an effective date a few days before the end of the term, simply because that judge holds a personal view that the appointment process might yield a better result. Justice Lewis captured the essence of this point in his concurring opinion in *Pincket,*

> While I may even agree that the merit selection and retention of judges is far superior to the election of judges, the citizens of Florida clearly disagree. Thus, it is truly a sad day for Floridians when their trial court judges may manipulate the electoral process and prioritize their personal preferences over those espoused in the very Constitution they swore to defend.

Pincket, 2016 WL 3127704 *3, Lewis J, concurring in the result only.

The idea that the method of filling a judicial vacancy can be left to the discretion of the departing judge is antithetical to one of the most basic principles of state constitutional law. It is well established that the Florida Constitution "is not a grant of power but a limitation upon power of the government." *In re Senate Joint Resolution of Legislative Apportionment 2-B*, 89 So. 3d 872, 891 (Fla. 2012) (Pariente concurring); *Bush v. Holmes*, 919 So. 2d 392, 414 (Fla. 2006). Nothing in our Constitution could be fairly read as a grant of power to a judge to decide

whether his or her successor will be selected by an election or by an appointment. Yet, in practical terms that is precisely the result of the First District's decision. The effect of the decision is to enable a judge to manipulate the resignation process to obtain a desired result.

It is true that a vacancy for the purpose of an appointment is deemed to take place when the resignation letter is received and accepted by the Governor. This rule makes perfect sense. A judge can resign a few months before leaving the office thereby enabling the Nominating Commission and the Governor to fill the position at or near the time the judge actually steps down. As the Court explained in *Advisory Opinion*, "Judges are encouraged to and do submit their resignations, to be effective in the future, at a time that permits the process to proceed in an orderly manner and keep the position filled." *See Advisory Opinion*, 600 So. 2d at 462 (emphasis added).

But the future effective date of the resignation in this case, and others like it, was not designed to ensure continuous service to the court or to prevent an unreasonable vacancy. Nor did it have that effect. Judge Foster resigned nine months before he will be leaving the office, but the appointment process under Article V, section 11(c) of the Florida Constitution takes only 90 days. If the Governor were to appoint a successor in accordance with the timeline in Article V, section 11(c), we would have a judge-in-waiting for a period of five months.

This is not the policy the Court intended to advance. In these circumstances there is no real need to "keep the position filled." *Advisory Opinion*, 600 So. 2d at 462. Judge Foster is in the office now and he will remain there long past the appointment of his successor. The office will be vacant in the future but not until four business days before the start of the next term in office.

The Respondent's position that Judge Foster's resignation triggers an appointment would require the Court to embrace a legal fiction that is completely divorced from reality. Reduced to its essence, the Respondent's position is this:

> (1) a vacancy is created when the Governor accepts a judge's resignation and the appointment process must begin right then to avoid a gap in service;
>
> (2) Judge Foster resigned in such a way that his office will be unoccupied for a period of four working days at the end of the year during the holiday season;
>
> (3) it is necessary to appoint a judge, rather than to allow the voters to choose a judge in the 2018 general election, because that is the only way to ensure that there will be someone in the office who can do the work of the circuit court during those four days.

This is a hyper-technical position that stretches the rule in *Advisory Opinion* well beyond its intended application.

The Respondent's position is one the voters will not accept or even understand. A resignation that is merely announced before the qualifying period for an election, but not made effective until after the election, will seem to any reasonable person as nothing more than a device to defeat the election.

The Petitioner's argument concludes precisely where he began with a reference to the Court's decision in *Spector v. Glisson*. This Court has never receded from the main point it made in that case: that the appointment process is subordinate to the elective process and that a judicial vacancy should be filled by an election whenever that is possible. The Court affirmed this principle in *Pleus v. Crist,* 14 So. 3d 941, 944 (Fla. 2009), when it stated that "[t]he nominating commission process in § 11 of Art. V is really a restraint upon the Governor – not a new process for removing from the people their traditional right to elect their judges," *quoting Specto*r, 305 So. 2d at 783. The reasons to hold an election are no different here. Surely the principle stated in *Spector* and reaffirmed in *Pleus* cannot be circumvented simply by resigning with an effective date in the future just a few days before the end of the term.

II. The Reasons Given by the First District in *Trotti II* do not Justify a Decision to Fill the Vacancy by a Gubernatorial Appointment

The First District gave several reasons why it believed that Judge Foster's seat must be filled by a gubernatorial appointment: (1) the court will have to delve into the subjective intent of the resigning judge to determine whether the judge intended to manipulate the election process; (2) the court would not be able to draw a bright line between a vacancy that is long enough to justify an appointment and one that is short enough to require an election; (3) the trial judge erred in following the concurring opinions by Justices Pariente and Lewis because

concurring opinions have no precedential value and; (4) an election will not be held, in any event, because the Petitioner was the only candidate who qualified. As we explain in the following sections, these arguments do not justify the First District's decision to dispense with an election and to allow the Governor to make an appointment instead.

A. It is Not Necessary to Examine the Motive of the Resigning Judge

The First District assumed that it would have to analyze "subjective factors" such as "Judge Foster's motivation to resign," in order to hold that the seat must be filled by an election. *Trotti II* (A.10). Specifically, the court stated that it "would have to analyze a resigning judge's subjective intent in the hopes of determining whether the resignation letter was a matter of political gamesmanship." *Trotti II* (A.10). These assumptions are incorrect. Whether the resignation triggers an election or an appointment is an issue that should be adjudicated by an objective standard, not by a subjective test as the First District thought.

The argument for an objective standard is perhaps best supported by the familiar expression "actions speak louder than words." The method and timing of the resignation is likely to be much more revealing than anything the resigning judge might have to say about it. Any court could determine the judge's intent simply by asking pertinent questions about the resignation itself.

Here are the questions a court might ask in this case.

Why did Judge Foster think it was necessary to resign his office? *He was ineligible to run for another term and he would have been able to remain in the office until December 31, 2018, the date he intended to depart, if had done nothing at all.*

Was there any plausible reason why Judge Foster resigned right before the start of the qualifying period? *Had he resigned after the qualifying period, there would be no question the seat would be filled by an election.*

Was there any plausible reason why Judge Foster submitted his resignation letter nine full months in advance? *The gubernatorial appointment process takes only 90 days.*

Was there any plausible reason why Judge Foster set the effective date of his resignation just four business days before the end of his term? *Had he served these last few days there would be no question that his seat would be filled by an election.*

Was there any plausible reason why the actual vacancy was to take place during the holiday season? *It is not likely that any judicial circuit would require the temporary service of a senior judge during this brief period at this time of year, much less the services of a permanent judge appointed by the Governor.*

A reasonable person would conclude from these circumstances that the resignation was submitted in this way for an improper purpose. The resignation was structured in such a way that the first critical date (the letter to the governor) came before the qualifying period, and the second critical date (the date the judge will actually leave the office) was to take place after the primary election and after the general election itself. The resignation will literally swallow up the entire election process.

i. Judge Foster Stated His Intent

There was no need to speculate about the judge's motive, as we have explained, but it is worth noting if the First District had been looking for evidence of "political gamesmanship" it could have easily found it in the record of this case. Following an evidentiary hearing on the motion for injunction, the trial court found as a matter of fact that Judge Foster had privately communicated to Mr. Trotti that he intended to have the seat appointed by the Governor. (A.154). This finding was supported by Mr. Trotti's sworn testimony that he met with Judge Foster to let him know that he planned to run for the seat he was vacating, and that Judge Foster told him that he was "going to manipulate [his] resignation so it goes to gubernatorial appointment." (A.106). The trial judge found that this evidence of Judge Foster's intent was "not refuted" by the Governor or Secretary of State. (A.154).

ii. Other Judges Have Also Stated Their Intent

Judge Foster did not attempt to conceal his intent. And that is also true of the other judges who have resigned under the procedure approved in *Trotti I*. In fact, all of the judges who submitted deferred resignations during the 2016 election cycle candidly admitted that they were resigning in that way for the purpose of creating an appointment.

For example, Judge Joseph Will of the Seventh Circuit resigned before the

2016 qualifying period with an effective date just two business days before the end of his term in order "to create a physical vacancy" in the seat and to "permit [Governor Scott] to fill the vacancy by appointment."[3] Likewise, Judge Scott Brownell of the 12th Circuit resigned before qualifying with an effective date two business days before the end of his term in order to "permit [Governor Scott] to fill the vacancy by appointment."[4]

The most revealing of the resignation letters during the 2016 election cycle came from Judge Olin Shinholser of the Tenth Circuit. He resigned before qualifying with an effective date just four business days before the end of his term and he specifically stated in his letter to Governor Scott:

> It is my desire and request that my successor be appointed by you. While there are certainly debatable points as to the pros and cons of succession by appointment verses election, it is my belief based upon years of observation that the appointment process is superior to the

[3] Judge Will's resignation letter is a public record. It can be found on the Governor's website https://www.flgov.com/wp-content/uploads/pdfs/Resignation_Letter_Will.pdf and in the Appendix to the Petition in *Lambert v. Scott*, SC16-762, 2016 WL3128286 (Fla. 2016) (Pet. Appendix B) https://efactssc-public.flcourts.org/casedocuments/2016/762/2016-762_petition_64239.pdf

[4] Judge Brownell's resignation letter is in the Appendix to the Petition *Boyle v. Detzner*, 16SC-756, 2106 WL 3128392 (Fla. 2016) (Pet. Appendix G). https://efactssc-public.flcourts.org/casedocuments/2016/756/2016-756_petition_64235.pdf

election process in the judicial context.[5]

Judge Shinholser was remarkably candid. And there can be no doubt that he believed he was entitled to make the call that his successor would be chosen by a gubernatorial appointment.

The concurring opinions in *Pincket*, *Boyle* and *Lambert* recognized that these resignations made during the 2016 election cycle were all made with an improper purpose. Justice Pariente noted in *Pincket* that Judge Shinholser "wanted his judicial seat to be filled by an appointment" and that he resigned the way he did because he believed that "the appointment process is superior to the election process." *Pincket v. Detzner*, 2016 WL 3127704 at *1. Justice Lewis characterized the resignation as a manipulation of the electoral process to satisfy a "personal preference." *Id*. at *3. Similar statements of intent can be found in the concurring opinions in *Boyle* and *Lambert.*

The practice of submitting a deferred resignation for the purpose of creating an appointment has continued in the 2018 election cycle. And Judge Foster's resignation was not an isolated example. Paul Kanarek of the Nineteenth Circuit resigned before the qualifying period with an effective date of December 30, 2018. He told the Governor in his resignation letter that he was doing it that way "so as to

[5] Judge Shinholser's resignation in the Appendix to the Petition in *Lambert v. Scott*, SC16-762, 2016 WL3128286 (Fla. 2016) (Pet. Appendix H) https://efactssc-public.flcourts.org/casedocuments/2016/762/2016-762_petition_64239.pdf

permit [him] to fill the vacancy by appointment."[6] And Judge Bo Bayer of Union County resigned on February 26, 2018, with an effective date of December 31, 2018, to enable the Governor to "appoint [his] successor."[7]

In summary of this point, we submit that it is not necessary to present direct evidence of the judge's intent. Whether the resignation triggers an election or an appointment is an issue to be adjudicated by an objective standard. In any event, there was, in fact, direct evidence in this case, and in all of the others, that the judge resigned for the purpose of creating a gubernatorial appointment. Judge Foster made his intentions clear and so did all of the other judges who resigned under the procedure approved in *Trotti I.* The opportunity for "political gamesmanship" was created by the decision itself. Again and again, the decision in *Trotti I* has been used to manipulate the process.

B. There is No Need to Draw a "Bright Line"

The First District concluded that an appointment is required even for a vacancy of a few days because it would be difficult to draw the line between vacancies that are long enough to require an appointment and those that are not. *Trotti II* (A.10). On this point, the First District posed a series of hypotheticals.

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[6] Judge Kanarek's resignation letter is on the Governor's website. www.flgov.com/wp-content/uploads/pdfs/Retirement%20Letter%20(Kanarek).pdf

[7] Judge Bayer's resignation can also be found on the Governor's website. https://www.flgov.com/wp-content/uploads/pdfs/Resignation%20Letter%20(Bayer).pdf

"Is resigning with five days left in a term gamesmanship? What about two weeks? Or two months?" *Trotti II* (A.10). This analysis merely avoids the task at hand.

The First District was not asked to adopt a fixed rule that could be applied in all future disputes. All the court was asked to do was to decide this case. The rationale for the court's decision as expressed in its opinion would serve as a guide for lawyers and judges. That is how the common law works. And that is all we ask of this Court. A decision by this Court will serve as a powerful example, but we do not suggest that it will decide the fate of every judicial resignation that will be made in the future. Nor should it.

If the Court holds 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, the decision will likely put an end to the manipulative practice at issue here. Lower courts will have no trouble distinguishing between an "unreasonable vacancy" that must be filled to keep the work flowing and a "nominal vacancy" that was just a sham designed to ensure an appointment. This will not be difficult. As Oliver Wendell Holmes Jr. once said, "even a dog distinguishes between being stumbled over and being kicked." Oliver Wendell Holmes Jr. Lecture I from the Common Law (1909).

This Court has already recognized that the issue presented here will require the exercise of some judgment. As we previously pointed out, the Court

established an exception to the rule in *Spector* for "unreasonable vacancies." *See, e.g. In re Advisory Opinion to the Governor*, 600 So. 2d 460, 463 (Fla. 1992) (an appointment was required because the effective date was July 31, 1992, six full months before the end of the term). The Court did not ask itself what would be "unreasonable" in other cases. Five months? Four months? Three? No, the Court just ruled on the facts of the case before it that an appointment was necessary because six months was too long a period of time to leave the office vacant.

A period of time that is alleged to be too long to leave an office vacant will have to be decided in the future by a court applying the principles announced by this Court in *In re Advisory Opinion*. By the same token a period of time that is alleged to be short enough to allow an intervening election to go forward will have to be decided by the principles announced by the Court in its opinion in this case.

The First District's concern about the difficulty of drawing a line was vastly overstated. It is not necessary to draw a line. And even if that were necessary, the courts should not shy away from the task. The citizens of Florida should not have to live with a deprivation of their constitutional rights merely because it might be difficult to find the outer boundary of those rights.

C. The Trial Court was Ultimately Correct in Granting Injunctive Relief.

The First District concluded that the trial judge had erred in following the concurring opinions by the four Justices in *Pincket* because those opinions were

"unpublished" and because concurring opinions "have no precedential value." *Trotti II* (A.12). The First District's earlier decision in *Trotti I* was directly on point, the court said, and the trial judge was obligated under the rule in *Pardo v. State*, 596 So. 3d 665 (Fla. 1992), to follow it. *Trotti II* (A.11).

On the first of these points the First District is simply wrong. The opinion in *Pincket* is not reproduced in the hardbound edition of the Southern Reporter, but it is published. *See Pincket v. Detzner*, 2016 WL 3127704 (Fla. June 3, 2016). There is no indication on the face of the opinion or in the Westlaw report of the opinion that it was intended to be "unpublished."

As for the second point, the First District has simply placed too low a value of the opinions of individual Justices of this Court. The concurring opinions joined by the four Justices in *Pincket* were not just any concurring opinions. They were opinions by Justices of a higher court expressly rejecting the holding by the First District in the 2014 decision the First District chose to adopt. It is fair to assume that the four Justices who joined the concurring opinions in *Pincket* intended to put a stop to the manipulative practice approved by the First District in *Trotti I*. And it appears that the trial judge got the message. Surely no one could fault him for applying the law as stated in *Pincket*.

The First District's argument that the trial judge should have ignored the concurring opinions in *Pincket* and followed the "precedent" in *Trotti I* is a hyper-

technical argument that ignores the reality of the situation. A majority of the Justices of this Court effectively overruled the very "precedent" the First District is relying on here. It is no real answer to say that the opinions don't count for anything because they are just concurring opinions.

It makes no difference, in any event, whether there was a violation of the principle of stare decisis as stated in *Pardo*, because the trial court's decision to grant the injunction was ultimately correct. Appellate courts can (and often do) excuse faulty reasoning if the trial judge has nonetheless arrived at the right conclusion. *See Dade County School Board v. Radio WQBA*, 731 So. 2d 638 (Fla. 1999) (holding that a decision can be affirmed for any reason that is supported in the record).

Thus, the lengthy discussion in *Trotti II* about the value of concurring opinions is beside the point. Whether the Florida Constitution requires an election or an appointment in the circumstances presented here is a pure question of law. All that really matters is whether the trial judge arrived at the right conclusion. And in this case, he surely did.

D. It Makes No Difference that Petitioner was the Only Electoral Candidate

The First District reasoned that an election would "still disenfranchise voters of the Fourth Judicial Circuit" because the Petitioner was the only candidate who qualified for election to the seat. *Trotti II* (A.13). The election, the court stated,

would be an "election in name only" because the voters would not have an opportunity to vote, in any event. *Trotti II* (A.14). Here the court has focused on a matter that is not material to the issue.

It is true that the Petitioner was the only candidate who qualified during the statutory qualifying period. But if an election is required in the circumstances presented here, and it surely is for the reasons we have given, then it is required whether one candidate qualifies or whether ten qualify.

The Florida Legislature has outlined the procedure to follow when only one candidate qualifies for election to the office of circuit judge. Section 105.051(1)(a) Florida Statutes (2017) states in material part that "[t]he name of an unopposed candidate for the office of circuit judge . . . shall not appear on any ballot, and such candidate shall be deemed to have voted for himself or herself at the general election. The Legislature did not say that an unopposed candidate shall be disqualified and that the Governor shall then have a right to fill the seat by appointment. Yet that is essentially what the First District is advocating here.

For these reasons, the Court should not be concerned about the fact that the Petitioner was the only candidate who qualified for the seat vacated by Judge Foster's resignation. That has no bearing on the issue presented here.

III. The Proper Remedy is to Quash the First District's Decision, Reinstate the Trial Court's Injunction, and Direct the Trial Court to Enter a Declaratory Judgment Consistent with this Court's Ruling on the Constitutional Issue

Although the constitutional issue has percolated up to this Court by way of a proceeding to review an appellate decision on a nonfinal order, resolving this issue will necessarily resolve the entire case. Following that resolution, the final judgment in the trial court, and the decision on any subsequent appeal, will be a mere formality.

Both the injunction order and the decision to reverse it were based on the merits of the underlying constitutional issue. The trial judge granted injunctive relief based on his conclusion that the issue in the case was controlled by *Spector*, as explained in the concurring opinions of the four justices of this Court in *Pincket*. And the First District reversed the injunction based on its conclusion that the trial judge failed to follow its own decision on the merits of the constitutional issue in *Trotti I*.

It follows, then, that the First District's decision on the injunction order is not merely a decision that deals with the status of the case pending the final judgment. For all practical purposes, it is actually a decision on the merits of the case itself.

When this Court renders an opinion on the issue presented here, there will be nothing left to litigate in the lower courts. Thus, the Petitioner respectfully suggests

that, under these circumstances, the proper remedy is for this Court to declare the rights of the parties and to direct the trial court to enter a final declaratory judgment according to its decision.

CONCLUSION

For these reasons, the Petitioner respectfully submits that this Court should quash the decision by the First District Court of Appeal.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by email to David A. Fugett (david.fuggett@dos.myflorida.com) and Jesse Dyer (jesse.dyer@dos.myflorida.com), Florida Department of State, R.A. Gray Building, Suite 100, 500 South Bronough Street, Tallahassee, Florida 32399; Daniel E. Nordby (daniel.nordby@eog.myflorida.com) and Meredith L. Sasso (meredith.sasso@eog.myflorida.com), Executive Office of the Governor, The Capitol, PL-05, Tallahassee, Florida 32399; and Nicholas A. James (nick@nickjameslaw.com; nick.james@adjustmentlaw.com), Law Office of Nick James, 10175 Fortune Parkway, Unit 303, Jacksonville, Florida 32256, on this 20th day of August 2018.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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