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 JURISDICTIONAL BRIEF

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STATEMENT OF THE CASE AND FACTS

This case presents an important constitutional issue that strikes at the core of public trust and confidence in the judiciary: whether Florida's circuit and county court judges can unilaterally convert the selection of their successors from elections into appointments. Yesterday, two weeks to the day of this Court's order granting a constitutional stay writ to prevent Governor Rick Scott from making a prospective appointment to a seat on the Fourth Judicial Circuit Court,[1] the First District Court of Appeal once again cleared the way for the Governor to circumvent the electoral process and make the appointment. (A.13). The potential jurisdiction this Court just recently protected through its all-writs power has now ripened into a full-fledged, undeniable constitutional basis to accept review of the First District's decision and put an end, once and for all, to the electoral gamesmanship described in that all-writs petition.

The facts hardly need repeating.[2] To briefly summarize, the Petitioner, David P. Trotti, is a Florida lawyer who "submitted qualifying paperwork for the office of Circuit Judge, Fourth Judicial Circuit, Group 6." (A.6). That seat was

[1] *See* Order Granting Emergency Non-Routine Petition for Issuance of a Constitutional Writ, *Trotti v. Scott*, Case No. SC18-1012 (Fla. Sup. Ct. order filed July 12, 2018).

[2] There is no doubt that the four corners of the First District's opinion, although omitting some (unfavorable) details provided in the all-writs petition, set forth the facts in a sufficient manner to invoke this Court's discretionary jurisdiction under Article V, Section 3(b)(3), of the Florida Constitution. *See Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986).

coming open because its current occupant, Judge Robert M. Foster, had "reached the age of seventy" and "could not seek re-election." (A.6). However, instead of allowing the electoral process to play out and giving the voters of the Fourth Judicial Circuit an opportunity to choose his successor from any candidates who qualified for election, Judge Foster, on April 2, 2018, "tendered a letter of resignation to Governor Scott conveying his last day in office would be December 31, 2018, one week (four business days) before his term would expire on January 7, 2019." (A.6). Governor Scott accepted Judge Foster's so-called "resignation." (A.6).

Meanwhile, Mr. Trotti delivered paperwork seeking to qualify for the judicial seat Judge Foster is vacating. (A.6). "The Division of Elections preliminarily determined Mr. Trotti was a qualified candidate," but then changed course and "notified Mr. Trotti that the judicial seat for which he sought to qualify was not a seat that would be filled by election" since, unbeknownst to Mr. Trotti, Governor Scott had accepted Judge Foster's "resignation" prior to the start of "the statutory qualifying period for election of circuit court judges." (A.6).

"Mr. Trotti filed a declaratory judgment in the Second Judicial Circuit Court seeking a declaration that the judicial vacancy at issue must be filled by election, not appointment." (A.6). As part of that declaratory judgment action, and to preserve his rights during the litigation, Mr. Trotti filed a motion "to enjoin

Governor Scott from filling the judicial vacancy at issue by appointment and to enjoin Secretary Detzner from removing Mr. Trotti from the August 28, 2018, election ballot." (A.6).

The trial court granted the injunction, effective immediately. (A.8). The trial court relied on the majority view of this Court, expressed last election cycle, that a judicial vacancy of this type should be filled by election rather than by appointment. (A.11 (citing *Pincket v. Detzner*, No. SC16-768, 2016 WL 3127704 (Fla. June 3, 2016)). But the First District reversed. (A.6, 13).

Reaffirming its prior decision in *Trotti v. Detzner* (*Trotti I*), 147 So. 3d 641 (Fla. 1st DCA 2014), the First District held that this "familiar fact pattern" (A.7) was indistinguishable from *Trotti I* (A.9) and that "the individual views of justices in unpublished concurring opinions [in *Pincket*] did not overrule our decision in *Trotti I*." (A.11).[3] The First District's reasoning speaks for itself. (A.9-12).

In essence, the court applied its "bright-line rule" from *Trotti I*, which it said was "derived from the language of the Florida Constitution." (A.9). Under this analysis, "[w]hen a resignation is tendered with a future effective date, the vacancy is deemed to occur when the Governor accepts the resignation." (A.10). Based on

[3] For what it's worth (and lest this Court be concerned that its opinions are not being published), this Court's order and the separate opinions of Justice Pariente and Justice Lewis in *Pincket* actually are published and readily available to the public. They just are not reported in the hard-bound edition of the Southern Third Reporter.

its reading of Article V, Section 11(b), of the Florida Constitution, the First District said that "[w]hen a circuit court vacancy occurs before the commencement of the election process, the Governor shall fill each circuit court vacancy by appointment." (A.10) (emphasis omitted). Thus, the First District rejected "Mr. Trotti's arguments premised upon *Spector v. Glisson*, 305 So. 2d 777 (Fla. 1974)," a case the First District described as a "limited exception" to the Governor's appointment power that, if applied here, would "swallow Article V, section 11(b), of the Constitution." (A.7 (quoting *Trotti I*, 147 So. 3d at 645)).

In sum, after citing Article V, Sections 10 and 11, throughout its opinion, the First District concluded, on the basis of those provisions, "that the Florida Constitution directs the Governor to appoint a successor in situations like the one before us." (A.12). "[A]llowing for the immediate appointment to fill Judge Foster's seat," the First District said, "respects the language of the Florida Constitution." (A.13).[4]

Mr. Trotti invoked this Court's jurisdiction the same day the First District issued its decision and immediately sought a stay of the mandate.

[4] Perhaps it goes without saying, but the seat is not "Judge Foster's." He obviously is the current occupant. But the seat belongs to the people of Florida, whose Constitution protects their right, not Judge Foster's or Governor Scott's, to choose its occupant.

SUMMARY OF THE ARGUMENT

The First District's decision expressly construes the Florida Constitution, expressly and directly conflicts with a decision of this Court on the same question of law, and expressly affects a class of constitutional officers. It is also the type of decision this Court is especially well-suited to review. It involves the proper interpretation of the Florida Constitution, the right of Florida citizens to vote for their public officials, and actions taken by some Florida circuit and county judges that manipulate the very Constitution they have sworn to uphold and defend. This Court should grant review, settle the law on this recurring issue of great public importance, and put an end to this electoral gamesmanship before it happens for the fourth straight election cycle. This Court will never have a better opportunity to do so.[5]

[5] In fact, given the First District's full-throated defense of *Trotti I*, this Court is unlikely to ever have another opportunity. Although the First District's opinion reverses an order granting injunctive relief, rather than an order entered at the conclusion of the declaratory judgment action, both that order and the First District's decision reach and decide the merits of the constitutional issue. Based on the First District's analysis, which dictates the result of the lawsuit and tells the trial court that it is not at liberty to disagree with *Trotti I*, any future proceedings in this case are now preordained. The trial court will be forced to rule in the Governor's favor, and the First District will have no need to explain itself a second time. And, because the injunctive relief to prevent the appointment during the litigation is a necessary corollary to the declaratory relief sought by the lawsuit, the issue will always arise in this fashion (if it ever arises again at all, now that the First District has doubled-down on *Trotti I*). Simply put, it's now or never for this Court to intervene.

ARGUMENT

There are three independent bases for this Court to exercise its discretionary jurisdiction to resolve this important issue. We address each in turn.

I. The First District's decision expressly construes the Florida Constitution.

It is hard to imagine a clearer example of an opinion that expressly construes the Florida Constitution: the First District's opinion plainly states, while repeatedly citing provisions of Article V, that "the Florida Constitution directs the Governor to appoint a successor in situations like the one before us." (A.12). This holding, the First District tells us, is "derived from the language of the Florida Constitution." (A.9). It was first enunciated in *Trotti I*, where, as the First District reiterated here, the court determined that utilizing the elective process would "nullify[] the Governor's power of appointment in Article V, section 11(b), of the Constitution." (A.7 (quoting *Trotti I*, 147 So. 3d at 645)).

Put simply, the "bright-line rule" the First District adopted turns entirely on its construction of "the plain language of the Florida Constitution." (A.9). This Court recognized as much when it addressed the same issue in *Pincket*. *See Pincket*, 2016 WL 3127704, at *1 (Pariente, J., concurring in result) (stating that *Trotti I* is not "faithful to the true purpose of the Florida Constitution" and expressly analyzing the various provisions of the Constitution governing the issue);

id. at *3 (Lewis, J., concurring in result only) (citing the various applicable constitutional provisions governing the issue).

II. The First District's decision expressly and directly conflicts with *Spector v. Glisson*, 305 So. 2d 777 (Fla. 1974).

The First District's decision also plainly conflicts with this Court's decision in *Spector*. Again, this is a point that a majority of this Court previously recognized in *Pincket*. *See Pincket*, 2016 WL 3127704, at *1 (Pariente, J., concurring in result) (explaining that *Trotti I*, reaffirmed by the First District below, is not "in keeping with this Court's opinion in *Spector*"); *id.* at *3 (Lewis, J., concurring in result only) (stating that *Spector* should apply to these facts and compel the opposite result reached by the First District).

In *Spector*, as in this case, a judge who was ineligible to run for another term in office sent a letter of resignation to the Governor prior to the start of the qualifying period for the next general election. 305 So. 2d at 779. The resignation was prospective in nature—it was to take effect at midnight on the last day of the judge's term. *Id.* When a lawyer attempted to file paperwork to seek election to the seat, the Secretary of State turned him away, claiming that the "vacancy" was to be filled by appointment, rather than by election. *Id.*

This Court overruled that determination. As it 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 *was* an intervening general election capable of filling the retiring judge's seat, this Court held that there was no need for the Governor to step in and make an appointment. *Id.* 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.* "[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. The appointment power, on the other hand, exists simply as a failsafe, a "stop gap measure[]" to prevent an "emergency of the public business" when an otherwise elected seat will be unoccupied and unable to be filled in the normal course. *Id.* at 783.

As pointed out by the dissent in *Trotti I*, the only difference between the facts here and the facts of *Spector* is that the effective date of the resignation here is a few days before the end of the term rather than on the last day. *See Trotti I*, 147 So. 3d at 647 (Padovano, J., dissenting). That is not a distinction that has any

effect on the rule of law announced in *Spector*. Thus, the two cases are in express and direct conflict.[6]

III. The First District's decision expressly affects a class of constitutional officers.

Finally, the First District's decision expressly affects a class of constitutional officers—namely, judges. Circuit and county court judges, whose conduct is at issue and will be governed by the First District's decision, are constitutional officers whose offices are established by Article V. *See In re Advisory Op. to the Governor*, 154 So. 154, 156 (Fla. 1934) ("Circuit judges . . . are constitutional officers."); *Bd. of Cty. Comm'rs of Hillsborough Cty. v. Savage*, 58 So. 835, 836 (Fla. 1912) ("The county judge is a constitutional officer.").

Indeed, the First District's decision presents numerous hypotheticals about how Mr. Trotti's arguments supposedly would require inquiring into a judge's subjective intentions. (A.9). We obviously disagree with the First District's

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[6] The First District attempted to distinguish *Spector* based on the belief that its holding here is actually more consistent with *Spector*'s preference for elections over appointments. (A.12-13). That attempted distinction is hard to swallow. The First District created the very problem it is now complaining about when, in *Trotti I*, it made the highly debatable (and, we posit, incorrect) conclusion that a judicial seat like this should be filled by an appointment. Now that *Trotti I* has led to the type of electoral manipulation the dissent forewarned, the First District is suggesting that a decision to backtrack from *Trotti I* would undermine the electoral process.

In any event, putting the irony aside, the rule of law announced in *Spector*, as Justice Lewis explained in *Pincket*, is that a manufactured vacancy such as this one should be filled by an election. The rule is not simply a vague preference for elections over appointments in a general sense.

reasoning, but the point is that the decision quite obviously affects judges—after all, the First District is directly discussing their conduct. Thus, not only does the First District's decision expressly affect a class of constitutional officers, but it expressly affects the one type of constitutional officers whose conduct is uniquely within this Court's bailiwick. *See* Art. V, § 12, Fla. Const.

CONCLUSION

For the reasons set forth in this brief, this Court should exercise its discretion and grant jurisdiction to resolve the important constitutional issue presented by the First District's underlying decision.

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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 27th day of July 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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