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 REPLY BRIEF ON THE MERITS

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ARGUMENT IN REPLY

The answer brief filed by the Governor and the Secretary of State ("the Respondents") concedes that this case "presents a question of constitutional interpretation." Answer Brief ("AB") at p. 4. The way they see it, the Florida Constitution unambiguously grants the Governor broad authority to fill any judicial vacancy, of any duration. But as we detail below, this argument suffers from a fundamental flaw: this Court has already rejected that rigid construction of the Constitution, holding that there are, in fact, times when a vacancy must be filled by an election. Indeed, in reaching those decisions, this Court has made clear that the appointment power is subservient to the electoral process. Only where an election cannot readily fill the judicial seat, resulting in an unreasonable gap in service, is the Governor empowered to make an appointment. Because an election *can* fill the judicial seat at issue here, and because there will *not* be an unreasonable gap in service, this Court should quash the First District Court of Appeal's underlying decision.

What's at stake

We start with first principles. Florida has "a compelling state interest in preserving the integrity of [its] judiciary and maintaining the public's confidence in an impartial judiciary." *In re Amds. to Code of Jud. Conduct—Canon 7*, 167 So. 3d 399, 400 (Fla. 2015) (alteration in original) (quoting *In re Kinsey*, 842 So. 2d

77, 87 (Fla. 2003)). In that regard, this Court is entrusted with the ultimate responsibility "to ensure that the justice system maintains the respect of the public that is essential to its mission as the third branch of government." *In re Henson*, 913 So. 2d 579, 587-88 (Fla. 2005). Indeed, the first sentence of the first canon of Florida's Code of Judicial Conduct provides that "[a]n independent and honorable judiciary is indispensable to justice in our society." *Code of Judicial Conduct for the State of Florida* 6 (2018).

This case threatens that bedrock principle. As the undisputed facts show, a subset of Florida judges have, over the last few election cycles, specifically gamed the electoral process and this Court's corresponding case law to manufacture artificial judicial "vacancies" to be filled by gubernatorial appointment instead of, as our Constitution intends, by election of the people. These judges, despite submitting "resignation" letters, do not actually want to resign: their resignations are post-dated to a distant point in the future, mere days before the end of their terms. Most of them, like Judge Foster here, are ineligible to run for reelection anyway.

So why have they prospectively "resigned" in this way? The answer requires no guesswork. As we pointed out in the initial brief, the direct, uncontradicted record evidence shows that these resignations have been purposely timed to expose an alleged legal loophole allowing the disenfranchisement of

Florida voters. *See* Initial Brief ("IB") at pp. 26-29. Simply put, these judges want to prioritize their "personal preferences" for the appointment of their successors over the preference for election "espoused in the very Constitution they swore to defend." *Pincket v. Detzner*, No. SC16-768, 2016 WL 3127704, at *3 (Fla. June 3, 2016) (Lewis, J., concurring in result only).

The Respondents see no problem with any of this. In fact, they say, the Constitution requires this result because the Governor is empowered to fill any judicial "vacancy." And even if that weren't so—and, as we'll explain below, it surely isn't—the Respondents still think this is the right result because authorizing the Governor to fill all judicial "vacancies," even vacancies-in-name-only, "provides a degree of objective certainty to candidates and elected officials." *See* AB at p. 28.

The Respondents have lost the forest for the trees. They are wrong about what the Constitution and this Court's cases require, to be sure. But more importantly, they are worried about the wrong thing. "Judges are not politicians," Chief Justice Roberts recently told us, and they should not act like it. *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1662 (2015). Instead, "justice must satisfy the appearance of justice," which means that "public perception of judicial integrity is a state interest of the highest order." *Id.* at 1666 (internal quotations omitted). The

Respondents' arguments here, which embrace the First District's misguided decision, fail that essential test.

The Florida Constitution does not require every judicial vacancy, regardless of the circumstances, to be filled by gubernatorial appointment.

The Respondents first argue that "the plain language of the Florida Constitution requires this vacancy to be filled through the gubernatorial appointment process." AB at p. 7. The Respondents' position goes like this: Judge Foster submitted a resignation letter to Governor Scott, this Court's case law holds that a vacancy ripens upon the Governor's acceptance of the resignation, and the Constitution authorizes the Governor to fill any judicial vacancy that occurs. Thus, the Respondents claim, there are no exceptions to the Governor's appointment power.

But here's the problem: we already know that exceptions exist. One glaring example is when the resignation occurs after the start of the qualifying period for the next election. As this Court has explained, "upon the qualification of a candidate or candidates for a circuit or county judgeship during the statutory qualification period, the election method of selection required by [Article V,] section 10(b)(1) and (2) takes precedence over and forecloses the Governor's constitutional authority and obligation pursuant to [Article V,] section 11(b) to fill a vacancy that occurs during the balance of the incumbent judge's term of office." *In re Advisory Opinion to Governor re: Appointment or Election of Judges*, 824

So. 2d 132, 136 (Fla. 2002); *see also Advisory Opinion to Governor re Appointment or Election of Judges*, 983 So. 2d 526, 530 (Fla. 2008) ("[A] vacancy which occurs during a qualifying period in which any candidate qualifies for the judicial office is to be filled by election." (emphasis omitted)). So, not every vacancy requires an appointment.

This makes sense. Elections are the constitutionally mandated method of selecting Florida's trial judges. *See* Art. V, §§ 10(b)(1), 10(b)(2), Fla. Const. ("The election of circuit [and county] judges shall be preserved . . . ."). Voters have reaffirmed that time and again; in fact, as Justice Pariente pointed out in *Pincket*, "after the 1998 revision to the Florida Constitution, which allowed any county to opt out of election in favor of merit retention, not one county opted for this preference." *Pincket*, 2016 WL 3127704, at *2 (Pariente, J., concurring in result); *see also id.* at *3 (Lewis, J., concurring in result only) ("Without fail, a majority of 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."); *In re Advisory Opinion*, 824 So. 2d at 135 ("A majority of the voters within the territorial jurisdiction of each judicial circuit court and county court voted to retain the election of those judges instead of replacing the elective system with a merit-selection system for those courts.").

Elections are thus favored whenever possible: "the elective process retains that primacy which has historically been accorded to it consistent with the retention of all powers in the people." *Spector v. Glisson*, 305 So. 2d 777, 782 (Fla. 1974). In that vein, this Court long ago held that the elective process has "priority" over the Governor's corresponding constitutional authority to fill judicial vacancies through "interim appointments," a process that exists merely as a "stop gap" measure "until an election can be held." *Id.* at 782-83.

In fact, "[t]he nominating commission process in [Article V, section 11] is really a restraint upon the Governor," rather than a "process for removing from the people their traditional right to elect their judges." *Id.* at 783. The appointment power exists solely as a means to temporarily fill "those vacancies which occur at times and in situations where there is a need for someone to fill an interim judgeship so that the business of the courts can continue and will not suffer by lack of an incumbent judge . . . where the elective process is not available." *Id.* "Section 11(a) does not contemplate a strained application which would give priority to the appointive power over the paramount elective process when there is a known vacancy to occur in conjunction with and reasonably before a judicial election; the elective machinery should be allowed to function to provide the successor." *Id.*

This understanding of the appointment power as a "stop gap" measure is precisely what led this Court to hold, in the cases touted by the Respondents, that an appointment is generally required when a judge resigns before the "elective machinery" is underway. Specifically, as the Respondents have pointed out, this Court has said that, ordinarily, a resignation before the start of the statutory qualifying period for the election creates a vacancy that must be filled by an appointment. However, all of those cases involved situations in which the effective date of the resignation was to take place long before the end of the term—thereby leaving a long gap in service.

The first case to approve of an appointment under such circumstances called it a way to avoid an "unreasonable vacancy." *In re Advisory Opinion to the Governor*, 600 So. 2d 460, 463 (Fla. 1992). Building on that rationale, each of the subsequent cases cited by the Respondents involved real, substantial gaps in service, often of several months, between the resignation and the next available election. *See* IB at p. 4 (collecting cases).[1] In other words, they were all "unreasonable" vacancies, where there was "a need for someone to fill an interim

[1] The Respondents curiously omit this key distinction in claiming that "[t]he operative facts in the present case are indistinguishable from those in *Sheriff and Judicial Vacancies*," 928 So. 2d 1218 (Fla. 2006). AB at p. 24. The vacancy there was submitted two months in advance and left the judicial office open for seven months. *Id.* at 1219 (resignation submitted in April, with a future effective date in May, for a term that expired the following January). The vacancy here was submitted nine months in advance and will last four business days. (R. 206, 348).

judgeship so that the business of the courts c[ould] continue." *Spector*, 305 So. 2d at 783. And, unlike this case, they all involved situations where "the elective process [wa]s not available"; that is, there was no intervening election capable of filling the seat before the physical vacancy sprang into existence. *Id.*

If the Respondents' interpretation of the constitutional language were correct, though, and the Governor is authorized to fill *any* vacancy that arises, there would have been no need for the Court to characterize these vacancies as "unreasonable," or even to evaluate the amount of time that the vacancies would exist. Yet the Court did so. And it did so because the incumbent judge's resignation would "leave a judgeship vacant for an extended period," causing a disruption of the public business. *In re Advisory Opinion to Governor re Judicial Vacancy Due to Resignation*, 42 So. 3d 795, 797 (Fla. 2010); *see also In re Advisory Opinion of Governor Request of September 6, 1974*, 301 So. 2d 4, 7 (Fla. 1974) ("*The timing of the vacancy* created by the resignation of Judge Huttoe *makes it impossible to practicably hold the election* and allow ample time to afford the electorate an opportunity to fill the vacancy in the 1974 elections." (emphasis added)).

To put it another way, the Court had to evaluate the circumstances of the resignation and the impact it would have on the administration of justice. The Court did not simply apply some hard-and-fast constitutional rule as the

Respondents try to argue. Nor has the Court ever overruled or modified its holding that only an "unreasonable vacancy" requires an appointment.

But the First District, in deciding that it would not "engage in a determination of what does or does not constitute an unreasonable vacancy warranting an appointment," cast aside this Court's carefully considered precedent. *Scott v. Trotti*, No. 1D18-2387, 2018 WL 3580761, at *2 (Fla. 1st DCA July 26, 2018) (quoting *Trotti v. Detzner*, 147 So. 3d 641, 645 (Fla. 1st DCA 2014)). Under the First District's rule, a vacancy of *any* duration, even one day or one hour, creates a situation in which the vacancy must be filled by an appointment.

Simply put, that rule is contrary to the constitutional structure, as this Court has interpreted it. If, as is the case here, there is an intervening election capable of filling the seat, and if, as is the case here, the vacancy is of nominal duration, the people's preferred method of electing judges should prevail. *See In re Advisory Opinion*, 824 So. 2d at 136 ("In view of this conflict between sections of the constitution, we conclude that the conflict must be resolved by a construction which gives effect to the clear will of the voters that circuit and county judges be selected by election.").

A "bright-line rule" is neither necessary nor advisable.

Echoing the First District, the Respondents also complain that a "bright-line rule" is needed. *See* AB at pp. 28-30. To the Respondents, this means that any

resignation submitted prior to the start of the statutory qualifying period for the next election—regardless of how far in the future that resignation is to take effect and regardless of how long the resignation will leave the judicial office vacant—must authorize the Governor to fill the seat by an appointment.

But that argument is not supported by this Court's cases. Although it is true that this Court has held that a resignation submitted prior to the start of the statutory qualifying period ordinarily creates a vacancy to be filled by appointment, these cases were all based on a fundamental element of good faith that is absent from the situation we have here. "Judges are encouraged," this Court has said, "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." *In re Advisory Opinion to the Governor*, 600 So. 2d 460, 462 (Fla. 1992).

So in each of these prior situations where the Court held that a prospective resignation, creating a significant gap in service, required a gubernatorial appointment, the resigning judge was trying to be helpful by providing some notice of his or her impending resignation, and the Court was trying to reduce the length of time an actual vacancy existed. Stated differently, in holding that the vacancy occurred when the Governor accepted the resignation letter, and that the vacancy needed to be filled by an appointment, the Court was permitting the Judicial Nominating Commission process to start moving in order to avoid a guaranteed

physical vacancy of up to 90 days while the JNC went about its work. The Court was not fostering a situation in which a nominal vacancy could exist many months in advance, as is the case here.

This Court need not speculate about whether the resignations now at issue were tendered in the same spirit of good faith. As the trial court found, based on "unrefuted testimony," Judge Foster's intention was to "manipulate his resignation so that his seat would be filled by gubernatorial appointment." (R. 208). And as we outlined in the initial brief, every other judge who has resigned in a manner similar to Judge Foster has done so for the same admitted reason. *See* IB at pp. 26-29. A decision condemning and outlawing this manipulative practice will surely be enough to stop it.

This is not a hard case.

This Court has previously stated, in an analogous context, that "a judge who is subject to mandatory retirement under the constitution cannot control when the vacancy in his or her office will occur by writing a letter to the Governor announcing that he or she is prohibited from serving an additional term." *Advisory Opinion to Governor re Judicial Vacancy Due to Mandatory Retirement*, 940 So. 2d 1090, 1093 n.5 (Fla. 2006). That is, in essence, what Judge Foster did here. Although he couched his letter as a "resignation," Judge Foster has not actually resigned. He will not leave office until the end of the year, a mere four business

days before he would have been forced, by mandatory retirement, to leave the office anyway. He "resigned" in this manner, and at the specific time he did (nine months in advance) for the specific purpose of creating "an artificial appointment." (R. 208).

But neither the Florida Constitution, nor this Court's cases endeavoring to honor its spirit, requires such a result. Just the opposite. As the trial court astutely noted, "[t]here is no emergency or public business requiring an appointment," particularly given that "the actual vacancy is minimal." (R. 208-09). Under *In re Advisory Opinion* and its progeny, the vacancy is thus not "unreasonable." 600 So. 2d at 463. And under *Spector* and its progeny, the "elective machinery"—which will be fully completed before Judge Foster leaves office—can be used to choose his successor. 305 So. 2d 777. "This was simply an effort to circumvent the Constitution, not support, protect and defend it." (R. 212).

CONCLUSION

For the reasons expressed in this brief and in the initial brief, this Court should quash the First District's decision, reinstate the trial court's injunction, and remand with directions that the trial court enter a final declaratory judgment consistent with this Court's ruling on the constitutional issue.

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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), Meredith L. Sasso (meredith.sasso@eog.myflorida.com), John MacIver (john.maciver@eog.myflorida.com), Nicholas A. Primrose (nicholas.primrose@eog.myflorida.com), and Alexis Lambert (alexis.lambert@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 6th day of September 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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