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IN THE SUPREME COURT OF FLORIDA

STEVE PINCKET

Petitioner,

v. Case No. SC16 - _____

KEN DETZNER, as
Secretary of State of the State of Florida,

Respondent.
_____/

PETITION FOR WRIT OF MANDAMUS

The petitioner, Steve Pincket, respectfully submits this non-routine petition requesting that the Court issue a writ of mandamus to the respondent, Ken Detzner, as Secretary of State of the State of Florida, directing him to accept petitioner's qualifying papers for an election to the circuit court in Group 6 of the Tenth Judicial Circuit.

BASIS FOR INVOKING JURISDICTION

The Florida Supreme Court has jurisdiction under Article V, section 3(b)(8) of the Florida Constitution to issue writs of mandamus to state officers and state agencies. Secretary Detzner is a "state officer" within the meaning of section 3(b)(8). *See Moreau v. Lewis*, 648 So. 2d 124 (Fla. 1995).

The petitioner, Steve Pincket is a Florida attorney in good standing. He is qualified by his residence and his experience to be a candidate for the office of

circuit judge in the Tenth Judicial Circuit. As more fully explained in the statement of facts, the petitioner submitted the required qualifying papers and paid the qualifying fee to run for circuit judge in Group 6 of the Tenth Judicial Circuit, but the respondent maintains that the seat in that group must be filled by an appointment and has therefore canceled the election that would have been held for the seat. The petitioner contends that the respondent was without legal authority to cancel the election for the seat in Group 6 and that he had a ministerial duty to accept petitioner's qualifying papers and place him on the ballot.

Mandamus is a remedy that is used to enforce an established legal right by compelling a public officer to perform a duty required by law. *See Pleus v. Crist*, 14 So. 3d 941 (Fla. 2009). In the present case the petitioner contends that he has a clear legal right to run for the office of circuit judge and that the respondent has a duty under Florida law to put his name on the ballot. Therefore, mandamus is the proper remedy. *See Smith v. Smathers*, 372 So. 2d 427 (Fla. 1979) (the petitioner sought mandamus to compel the Secretary of State to place his name on the ballot as a write-in candidate); *Hoy v. Firestone*, 453 So. 2d 814 (Fla. 1984) (the petitioner sought a writ of mandamus to compel the Secretary of State to place his name on the ballot in a nonpartisan judicial election).

The petitioner recognizes that the district courts of appeal and the circuit courts also have jurisdiction to issue writs of mandamus but respectfully submits

that this case falls within the class of cases that should be considered by the Supreme Court. In *Harvard v. Singletary*, 733 So. 2d 1020 (Fla. 1999), the Court outlined the factors it considers in deciding whether it should retain jurisdiction over an extraordinary writ petition or transfer it to a lower court. As the Court explained, the case must present an issue that is not "individualized" to the immediate parties, the petition must not be based on facts that are in dispute, and the case must be one that requires the "specific or immediate" attention of the Supreme Court. *Harvard*, 733 So. 2d at 1022, 1020-1023.

All of these factors favor a decision to retain jurisdiction over the merits of the petition in this case and to refrain from transferring it to a lower court. The ultimate question presented in this case is whether a circuit judge whose term is expiring 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. It is an important constitutional issue that involves the interplay between the right of the people to elect circuit judges and the right of the Governor to make interim judicial appointments. The resolution of the issue will have an impact far beyond the outcome for the immediate parties.

There are no facts in dispute. The factual basis for the argument made in the petition is established entirely by letters to and from the Governor and by other

official documents that are a matter of public record. All of the records the Court will need to resolve the issue are contained in the appendix to the petition.

The issue is one that requires the "specific or immediate" attention of the Supreme Court. *Harvard*, 733 So. 2d at 1023. In fact, it requires both the specific and immediate attention of the Court. Whether a judge can properly submit a resignation in such a way as to avoid an election is not only a question of constitutional law but also a question of judicial administration. This Court has exclusive jurisdiction under Article V, section 12 of the Florida Constitution to regulate the conduct of judges. Consequently, this Court might be the only Florida court that could fashion an appropriate remedy. If, for example, it becomes necessary to place a restriction on the length of an *in futuro* judicial resignation in order to resolve the broader problem presented by the case, this Court is the only court in Florida that would have the authority to do that.

The immediacy of the problem is clear. The time for a resolution is necessarily limited by the calendar of events in the upcoming election cycle. And, given the fact that the Governor has now decided to appoint Judge Shinholser's successor, it will be necessary to resolve the issue before a candidate is actually appointed. The appointment process must be completed under Article V, section 11(c) within 120 days from the date of the resignation letter, now only 98 days from today.

Apart from the factors identified in *Harvard*, the petitioner submits that it would not be in the interest of judicial economy to transfer the petition to a lower court. If this Court were to transfer the case to the circuit court, the result would be a foregone conclusion. The circuit court has no authority to depart from the holding by the First District Court of Appeal in *Trotti v. Detzner*, 147 So. 3d 641 (Fla. 1st DCA 2014), a case that is discussed in detail in the argument below. If this Court were to transfer the case to the Second District Court of Appeal, and if that court were to agree with the argument made here, it would be obligated to certify conflict with *Trotti* and, as a consequence, the case would be once again before this Court.

The problem with a potential transfer to a lower court is complicated by the fact that there are two companion cases before the Court from different judicial circuits. In *Boyle v. Detzner*, Case No. SC16-756, filed with the clerk yesterday, the petitioner seeks a writ of mandamus forcing the respondent to put her name on the ballot in a judicial election in the Twelfth Circuit, and in *Lambert v. Scott*, Case No. SC16-762, also filed with the clerk yesterday, the petitioner contends that the Governor and Secretary of State lack authority to close a judicial election in the Seventh Circuit. The issue on the merits in *Lambert* and in *Boyle* is identical to the issue presented here. If the Court were to transfer the three cases they would be on their way to three different judicial circuits, one within the jurisdiction of the Fifth

District Court of Appeal and the other two within the jurisdiction of the Second District.

For these reasons, the petitioner respectfully submits that this Court has discretionary jurisdiction to issue a writ of mandamus and that it should exercise its jurisdiction to decide the case on the merits.

STATEMENT OF THE FACTS

The constitutional issue in this case arose from the resignation of Judge Olin Shinholser, a sitting circuit judge in the Tenth Judicial Circuit. Specifically, the issue arose from the manner in which he chose to resign; that is, by submitting a formal resignation before the start of the statutory qualifying period and then specifying an effective date of the resignation after the November general election and just four business days before the expiration of his term in office. By resigning in this way, Judge Shinholser effectively converted what would have been a judicial election into what is now a judicial appointment.

On April 1, 2016, Judge Shinholser wrote a letter to Governor Scott stating that he was resigning his office. (Appendix "App." A) He stated in the letter that he was resigning before the qualifying period and leaving a physical vacancy in the office between the effective date of the resignation on December 26, 2016, and the end of his term on January 2, 2017. (App. A) And, he candidly explained in the letter that he was resigning in that way in order to create a vacancy that would have

to be filled by an appointment rather than by an election. (App. A) The resignation letter reads as follows:

> April 1, 2016
>
> Dear Governor Scott,
>
> I have had the honor and privilege to serve the citizens of this state for the last 36 years and 3 months. I served as an assistant state attorney for 10 years. In January, 1990, I began serving as County Judge for Highlands County. I served in that role until September 2002, when I was appointed to the Circuit bench wherein I have served until now.
>
> I am formally announcing my retirement effective 11:59 PM on December 26, 2016. This date precedes the end of my term. 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 year of observation that the appointment process is superior to the election process in the judicial context.
>
> Please formally accept my retirement as of the date indicated above.
>
> Thank you.
>
> Sincerely,
>
> Olin W. Shinholser
> Circuit Judge

(App. A) Governor Scott accepted Judge Shinholser's resignation on April 13, 2016, specifically noting in his acceptance letter that the resignation would not become effective until December 26, 2016. (App. B)

The qualifying period for judicial races opened on May 2, 2016, and is set to close at noon on May 6, 2016. On May 4, 2016, the petitioner filed his qualifying

papers for the seat in Group 6 of the Tenth Judicial Circuit (App C), the seat now held by Judge Shinholser. The petitioner also tendered a check for the qualifying fee. (App. D)

He received a letter the same day from Kristi Reid Bronson, the respondent's Deputy Chief of Election Records. (App. E) Ms. Bronson stated in the letter that the Secretary of State was declining to accept the petitioner's qualifying documents for the judicial election because the set in Group 6 for the Tenth Judicial Circuit will require an appointment by the Governor. (App. E)

The election for circuit judge in Group 6 in the Tenth Judicial Circuit is not the only one that has been cancelled this year on the basis of a post-dated resignation like the one Judge Shinholser submitted. Judge Scott Brownell of the Twelfth Circuit resigned before the qualifying period with the proviso that his resignation will not become effective until December 28, 2016. (App. F) Based on this resignation letter, the respondent cancelled the election in Group 4 for the Twelfth Judicial Circuit and removed attorney Elizabeth M. Boyle as a candidate for the election to that seat. (App. G)

Judge Joseph Will of the Seventh Circuit resigned before the qualifying period on the condition that his resignation would not take effect until December 28, 2016. (App. H) Based on Judge Will's resignation letter, the respondent closed

the election to the seat in Group 8 and removed attorney Linda Gaustad as a candidate for election to that seat. (App. I)

In each of these cases, including this one, the resigning judge expressly stated that the purpose of resigning with an effective date so far off in the future was to ensure that his successor would be selected by an appointment rather than an election. (App. A, F, H)

ARGUMENT

Article V, section 10(b)(1) of the Florida Constitution provides that circuit judges shall be elected "by a vote of the electors within the territorial jurisdiction of the court." There is no reason why the seat that will be vacated by Judge Shinholser should not be filled by an election in accordance with this provision. 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 submits 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 cannot defeat 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*, 305 So. 2d 777 (Fla. 1974), a decision that is not distinguishable in any material respect from the present case. In *Spector*, Justice Ervin resigned from his position as a Justice of the Supreme Court in February 1974 and stated in his letter to the Governor that the resignation would be effective on the last day of his 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 Secretary argued in *Spector* that the resignation created a vacancy to be filled by a gubernatorial appointment under Article V, section 11 of the Florida Constitution. The Court rejected that argument and held that the seat must be filled by an election. In support of this conclusion, the Court reasoned that the appointive process is subordinate to the elective process and that it should be employed only when necessary to fill a seat that will be unoccupied until the next election. The Court stated 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 <u>if the</u>

> 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 of circuit judge must be filled by the elective 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 the instant case, as in *Spector*, the seat can easily be filled by the intervening election. Judge Shinholser resigned before the start of the qualifying period. Therefore, any candidate who is interested in running for his seat could easily qualify. Judge Shinholser continues to hold the office to this day, despite his resignation, and he will remain in the office through the 2016 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.

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 fell 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). There, Judge Richard Fuller resigned his position as a circuit judge on March 3, 1992, before the qualifying period for the general election that year, with a resignation to become effective on July 31, 1992. In these circumstances, the Court held that Judge Fuller's successor must be chosen by a gubernatorial appointment. Although the qualifying period had not yet begun, the elective process would have left the office unoccupied for a period of five months from August until January. The Court reasoned that an appointment was necessary to prevent an "unreasonable vacancy" in the office. *Advisory Opinion*, 600 So. 2d at 463. On this point, the Court was speaking of a <u>physical</u> vacancy in the office.

The exception for an "unreasonable vacancy" 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).

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 characterized as unreasonable. In *Trotti v. Detzner*, the decision that paved the way for the procedure employed here, the judge resigned on March 31, 2014, with an effective date of January 2, 2015, just one business day before the expiration of the judge's term in office. The court concluded that a physical vacancy of one day was enough to trigger an exception to the rule in *Spector* and therefore held that the judge's office must be filled by a gubernatorial appointment.

In this case, as in *Trotti*, the resigning judge created a nominal physical vacancy to avoid the rule in *Spector*. Judge Shinholser resigned effective December 26, 2016, which is four business days before the end of his term on January 2, 2017. For the sake of these four days, and to prevent the possibility that

there may not be someone at work during those four days, the respondent has cancelled an entire election and deprived the voters of their constitutional right to select a judge of their choosing.

With the advent of the *Trotti* decision, the idea that an appointment is necessary to avoid "unreasonable vacancy" is now gone. *See Advisory Opinion*, 928 So. 2d 1218. We are no longer using a physical vacancy in the office as reason to appoint a person to fill a large gap in service, as was the case in all of the post-*Spector* decisions. Now we are using it as an excuse to justify the need for an appointment.

The effect of the decision in *Trotti*, though obviously well intended, was to empower judges to decide 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) became 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

Trotti decision. 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 wants to force an election 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.

There can be no doubt that Judge Shinholser resigned before qualifying but with an effective date just short of the end of his term in order to ensure that his successor would be chosen by an appointment and not by an election. He candidly stated in his letter that he did it that way because he believed the appointment process was superior to the elective process. (App. A) The same is true for the other two judges referred to in the statement of the facts. Judges Brownell and Will each stated in their resignation letters that they in to "create" a vacancy that would have to be filled by an appointment. (App F, H)

Whether the appointment process is superior to the elective process, as Judge Shinholser believes, is simply not a matter for the departing judge to decide. There is a general election this year and there are qualified candidates who wish to run for each one of these seats. 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.

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 *Trotti* decision. The effect of the decision, now proven by the resignation in this case and others this year, 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 1220 (emphasis added).

But the future effective date of the resignation in this case was not designed to ensure continuous service to the court. Nor did it have that effect. The maximum period of time for the appointment process under Article V, section 11(c) of the Florida Constitution is 120 days. Judge Shinholser resigned nine months before he will be leaving the office. If the Governor were to appoint a successor in accordance with the timeline in Article V, section 11(c), we will 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 Shinholser 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 Shinholser'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 Shinholser 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 chose a judge in the 2016 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.

Additionally, the petitioner respectfully submits that it is a position 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 court expressed a concern in *Trotti* that it would be hard to draw a line between physical vacancies that are long enough to justify an appointment and those that are short enough to allow an election to go forward. That may be a valid concern, but it is not a reason to approve of a deliberate manipulation of the election process, like the one we have here. The courts of this state can make distinctions. That is part of what they do.

Moreover, this Court has the power to regulate the conduct of judges in this state, a power not shared by the District Courts of Appeal. If this Court were so inclined, it could prohibit judges from resigning more than 120 days in the future.

That time period would align perfectly with the maximum period of time for an appointment under Article V, section 11(c). If the Court were to restrict judicial resignations in this way, a judge would not be able to resign before the qualifying period for an election and still serve out the remainder of his or her term.

The petitioner does not suggest that this is the only potential remedy, or even that it is the best one. This Court may have other ideas and solutions. The point the petitioner makes here is simply that the Court should not back away from a serious problem like this merely because it is difficult to draw a line.

The petitioner closes his argument 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, as it is composed today, unanimously affirmed this principle in *Pleus v. Crist* 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" 14 So. 3d 941, 944 (Fla. 2009), *quoting Spector*, 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.

For these reasons, the petitioner respectfully submits that the Court should issue a writ of mandamus.

NATURE OF THE RELIEF SOUGHT

The petitioner respectfully requests that this Court issue a writ of mandamus directing the respondent to accept his qualifying papers, restoring the seat for Group 6 of the Tenth Judicial Circuit to an active status for the election and adding the petitioner as an active and qualified candidate.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by email and U.S. Mail to Ken Detzner (SecretaryofState@DOS.MyFlorida.com), R.A. Gray Building, 500 South Bronough Street, Tallahassee, Florida 32399; and Office of the General Counsel (dos.generalcounsel@dos.myflorida.com), Florida Department of State, R.A. Gray Building, 500 S. Bronough Street, Tallahassee, Florida 32399 this 5th day of May 2016.

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CERTIFICATE OF COMPLIANCE

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

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