IN THE SUPREME COURT OF THE STATE OF FLORIDA

ANDREW H. WARREN,

Petitioner, Case No. SC23-247

v.

RON DESANTIS, as Governor of the State of Florida,

Respondent.

BRIEF OF *AMICUS CURIAE* CONSTITUTION REVISION COMMISSION MEMBERS AND STATE CONSTITUTIONAL LAW SCHOLARS IN SUPPORT OF PETITIONER ANDREW H. WARREN'S REQUEST FOR WRIT OF QUO WARRANTO

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SUMMARY OF ARGUMENT

Pursuant to Florida Rule of Appellate Procedure 9.210(b)(4), a succinct, accurate, and clear summary of *Amici's* argument is as follows:

1. The text of Executive Order 22-176 does not articulate "neglect of duty" or "incompetence" as established by judicial precedent or understood by legal scholarship. "Neglect of duty" in the context of Article IV, Section 7(a) of Florida's Constitution means a failure to satisfy a mandatory obligation of public office. "Incompetence," in the same context, means incapacity to perform such mandatory obligations due to a physical, moral, or intellectual condition.

2. The allegations of fact on the face of Executive Order 22-176 are nowhere near sufficient to constitute "neglect of duty" or "incompetence" because they do not accuse Andrew Warren of failing to execute any mandatory obligation of his office. Executive Order 22-176 only predicts Andrew Warren will fail to meet his obligations in the future as a result of his public opinions concerning policy issues. Article IV, Section 7(a) cannot be applied to suspend an elected official for hypothetical future conduct.

3. To expand Article IV, Section 7(a)'s definition of "neglect of duty" or "incompetence" to encompass hypothetical future conduct based on the public speech of elected officials risks bringing this section of Florida's Constitution into conflict with the Constitution of the United States. Florida's courts have long construed the laws of Florida in a manner to avoid such controversy, and Florida's 1997-1998 Constitution Revision Commission intentionally declined to expand Article IV, Section 7(a) to include political campaign misconduct as a result of such First Amendment concerns.

4. The text of Executive Order 22-176 does not accuse Andrew Warren of failing to satisfy the mandatory obligations of his elected office. The text only predicts he will fail to do so in the future based on Andrew Warren's policy statements. Allegations of future conduct cannot constitute "neglect of duty" or "incompetence" in the context of Article IV, Section 7(a) of Florida's Constitution. Accordingly, Governor DeSantis has exceeded his authority and this Court should issue a writ of *quo warranto.*

STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici curiae are members of Florida's 1997-1998 Constitution Revision Commission and state constitutional law scholars.[1] *Amici*'s participation in the Constitution Revision Commission that most recently amended the relevant state constitutional provision and *Amici*'s expertise in state constitutional interpretation enable them to bring broader perspectives than those of the parties regarding the application of Article IV, Section 7(a) to the facts alleged in Governor DeSantis's executive order ("the Order") suspending Andrew Warren from elected office.

This Court must determine whether the "allegations of fact" set forth in Governor DeSantis's Order constitute "neglect of duty" or "incompetenc[e]" under the Florida Constitution, *State ex rel. Hardie v. Coleman*, 155 So. 129, 133 (Fla. 1934). In *Amici*'s opinions, the Governor's allegations are nowhere near sufficient.

As the Florida Supreme Court made clear nearly a century ago, the Governor's suspension power "is not an arbitrary one"; it is

[1] A full list of Amici is attached as Appendix A.

"guarded by constitutional limitations which should be strictly followed." *Id.* at 134. *Amici* recognize the role of these constitutional limitations as critical safeguards of the stability and endurance of Florida's democratic system of government. Democracy requires that the will of the people as expressed in elections be respected. *See Reynolds v. Sims*, 377 U.S. 533, 555 (1964) ("The right to vote freely for the candidate of one's choice is of the essence of a democratic society[.]"). If Governors were permitted to suspend State Attorneys because of their prosecutorial priorities and replace them with attorneys whose priorities mirror their own, Florida's electoral process for the office of State Attorney—and potentially all elected state officers—would be virtually meaningless.

ARGUMENT

I. "Neglect of Duty" and "Incompetence" Have Well-Established Meanings in the Context of State Officer Suspension and Removal.

A. These Concepts Have Been Part of Florida's Constitutional Fabric for More Than 150 Years.

The grounds Governor DeSantis invoked for suspending Andrew Warren are deeply rooted in Florida's constitutional history. The earliest iteration of these grounds appears in Florida's 1861

Constitution, which provided that "[o]fficers shall be removed from office for incapacity, misconduct, or neglect of duty." Fla. Const. art. IV, § 26 (1861). Every subsequent iteration of the Florida Constitution limits the Governor's authority to suspend or remove state officers to a similar set of enumerated grounds. *See* Fla. Const. art IV, § 22 (1865) ("incapacity, misconduct or neglect of duty"); Fla. Const. art. V, § 19 (1868) ("wil[l]ful neglect of duty, or a violation of the criminal laws of the State, or for incompetency"); Fla. Const. art. IV, § 15 (1885) ("malfeasance, or misfeasance, or neglect of duty in office, for the commission of any felony, or for drunkenness or incompetency").

Florida's 1968 constitution introduced the grounds for suspension that remain in force today: "malfeasance, misfeasance, neglect of duty, drunkenness, incompetence, permanent inability to perform his official duties, or commission of a felony." Fla. Const. art. IV, § 7(a) (1968). This provision was amended most recently in 1998, following a comprehensive review of the Florida Constitution by a 37-member Commission whose members include multiple *Amici.* The Commission traveled the State over a yearlong period, meeting dozens of times to examine and propose constitutional amendments—

including amendments to Article IV, Section 7(a). The amendments ultimately proposed by the Commission and approved by the voters were "technical" rather than substantive. Fla. Const. Rev. Comm'n, *Florida's Constitutions: The Documentary History*, FSU Law Library, http://library.law.fsu.edu/Digital-Collections/CRC/CRC-1998/conhist/contents.html (last visited Feb. 27, 2023).[2] The Commission did not alter the longstanding scope of the Governor's suspension authority—including the "terms of art that have been used in connection with executive suspensions forever, throughout Florida history." Fla. Const. Rev. Comm'n, *Meeting Proceedings for January 28, 1998* at 35:14–16, FSU Law Library, http://library.law.fsu.edu/Digital-Collections/CRC/CRC-1998/minutes/crcminutes012898.html (last visited Feb. 27, 2023).

B. "Neglect of Duty" and "Incompetence" Have Long Been Understood to Concern Mandatory Responsibilities of Public Office.

[2] Section 7(a) was revised in 1998 only to remove the "gender-specific reference[]" to state officeholders and to require filing of the executive order with "the custodian of state records" rather than the "secretary of state." Fla. Const. Rev. Comm'n, *Analysis of the Revisions for the November 1998 Ballot*, FSU Law Library, http://library.law.fsu.edu/Digital-Collections/CRC/CRC-1998/tabloid.html (last visited Feb. 27, 2023).

"Neglect of duty" as used in the Florida Constitution's officer suspension provision means—and has meant for generations—a failure to satisfy a requirement of public office. At the time "neglect of duty" made its first appearance in the State's constitution, "duty" was defined as an "obligation," or something a person is "bound to do, or to refrain from doing." Joseph E. Worcester, *A Dictionary of the English Language* 456 (1860). In 1934, the Florida Supreme Court explained that the term "has reference to the neglect or failure on the part of a public officer to do and perform some duty or duties laid on him as such by virtue of his office or which is required of him by law." *Hardie*, 155 So. at 132.

Florida courts' understanding of "duty" as concerning a mandatory obligation has not changed. *See Israel v. DeSantis*, 269 So. 3d 491, 496 (Fla. 2019) (quoting *Hardie*, 155 So. at 132); *see also* 1984 Fla. Op. Att'y Gen. 20 n.1 (1984) (explaining that "cases decided under [the 1885] version of the suspension power are useful precedents for the current § 7(a), Art. IV"); *Crowder v. State ex rel. Baker*, 285 So. 2d 33, 34 (4th DCA 1973) (same). The Florida Supreme Court's most recent analysis of Section 7(a) further expounded on the term "neglect of duty" with the aid of a dictionary definition that emphasized the

mandatory nature of the obligation at issue. Specifically, the Court looked to *Webster's Seventh New Collegiate Dictionary*, which defined "duty" "in part as 'the action *required* by one's position or occupation,'" as well as the *American Heritage Dictionary*'s definition of "duty" as "[a]n act or a course of action that is *required* of one by position, social custom, law, or religion." *Israel*, 269 So. 3d at 496 (quoting *Webster's Seventh New Collegiate Dictionary* 259 (1967) and *American Heritage Dictionary* 573 (3d ed. 1992) (emphasis added)).

"Incompetence" as a ground for officer suspension likewise concerns requirements of public office. Florida courts have long described the term as "refer[ring] to any physical, moral, or intellectual quality, the lack of which incapacitates one to perform the *duties* of his office." *Hardie*, 155 So. at 133 (emphasis added); *see Israel*, 213 So. 3d at 496 (same); *In re Advisory Opinion to the Governor*, 213 So. 2d 716, 718 (Fla. 1968) (same). The Florida Supreme Court has also favorably cited the Supreme Court of Alabama's conclusion that the term stands for "little, if anything, ... other than mere incapacity for the performance of *duties* devolved by law on the official in respect of the particular office he fills." *In re Advisory Opinion to the Governor*, 213 So. 2d at 720 ((emphasis

added) quoting *State ex rel. Brickell v. Martin*, 61 So. 491, 494 (Ala. 1913)). The dictionary on which the Florida Supreme Court relied in *Israel* similarly defines "incompetence" with reference to mandatory requirements: "lacking the qualities *necessary* to effective independent action." *Webster's Seventh New Collegiate Dictionary* 424 (1967) (emphasis added).

II. Governor DeSantis's Executive Order Does Not Describe Actions That Constitute "Neglect of Duty" or "Incompetence."

A question for this Court is "whether the executive order, on its face, sets forth allegations of fact relating to" "neglect of duty" or "incompetence" as defined above. *Israel*, 269 So. 3d at 495–96. *Amici* respectfully submit that the answer is no. Andrew Warren exercised his First Amendment right to state opinions that are contrary to the Governor's opinions on several policy issues. The Order does not even allege that Warren has acted on those opinions. Without such action, he cannot have committed one of the sins that would authorize the Governor to suspend him under settled Florida constitutional law.

A. The Executive Order's Allegations Do Not Relate to Any Mandatory Responsibility of the Office of State Attorney.

The factual allegations in Governor DeSantis's executive order point to the following "actions and omissions" as constituting "'neglect of duty' and 'incompetence' for the purposes of Article IV, section 7 of the Florida Constitution." App. to Pet. for *Quo Warranto* and *Mandamus* at APP5.

- Andrew Warren "signed a 'Joint Statement' with other elected prosecutors in support of gender-transition treatments for children and bathroom usage based on gender identity," pledging "to use our discretion and not promote the criminalization of gender-affirming healthcare." *Id.* at APP7. (Gender-affirming healthcare has not been criminalized in Florida. *Id.*)
- Andrew Warren "signed a 'Joint Statement … with other elected prosecutors" in opposition to "[c]riminalizing and prosecuting individuals who … provide abortion care," pledging to "exercise [his] well-settled discretion" accordingly. *Id.* at APP10. (Florida law criminalizes some but not all abortions. *Id.* at APP9.)
- Andrew Warren instituted policies of "presumptive non-prosecution" for certain violations, such as disorderly conduct and disorderly intoxication. *Id.* at APP7–APP8.

None of these allegations concerns decisions Andrew Warren has made regarding whether to prosecute any particular instance of criminal activity. While the Order makes the point that "'blanket refusal' to enforce a criminal law is not an exercise of prosecutorial discretion," it identifies no "blanket refusal" that has occurred. *Id.* at APP6. Indeed, the Order's conclusions regarding Andrew Warren's exercise of his duties as State Attorney are phrased in the future tense. The Order predicts that Warren "*will* not prosecute violations of Florida criminal laws that prohibit providers from performing certain abortions"; it asserts that "there is no reason to believe that Warren *will* faithfully execute the abortion laws of this State"; and it claims that Warren "*will* exercise no discretion at all in entire categories of criminal cases." *Id.* at APP10–APP12 (emphasis added).

Governor DeSantis's executive order does not come close to describing "neglect of duty" or "incompetence" within the meaning of Section 7(a) because the Order does not accuse Andrew Warren of conduct that contravenes any requirement of the office of State Attorney. To the contrary, the gravamen of Governor DeSantis's complaint concerns Andrew Warren's expressions of intent to *fulfill* his official duty of "exercising discretion to not pursue criminal

charges in appropriate circumstances." *ABA Criminal Justice Standards* § 3-1.2(b) (4th ed. 2017). The Order itself confirms that "state attorneys have complete discretion in making the decision to prosecute a particular defendant." APP6 (citing *Cleveland v. State*, 417 So. 2d 653, 654 (Fla. 1982)). As the Amicus Brief of Former Prosecutors, Attorneys General, Judges, United States Attorneys and Federal Officials, and Current and Former Law Enforcement Officials filed with the United States District Court in *Warren v. DeSantis*, 4:22-cv-00302-RH-MAF (N.D. Fla. Aug. 26, 2022) at ECF 14-1 explained in detail, Andrew Warren's alleged "actions and omissions" are entirely consistent with "[the] duties laid on him" as State Attorney, *Israel*, 269 So. 3d at 496 (quoting *Hardie*, 155 So. at 132).

The Order's focus on Andrew Warren's anticipated *future* charging decisions further demonstrates that the Governor lacked authority to suspend Warren. Such an application of "neglect of duty" and "incompetence" finds no support in the long history of judicial examination of these grounds for officer suspension and removal. The three cases cited in the Order as authority for Warren's suspension illustrate this point. In *Hardie*, the Florida Supreme Court concluded that three executive orders were "sufficient" to suspend an elected

sheriff for "neglect of duty in office" and "incompetency" where they described prior violations of the sheriff's official duties. *Hardie*, 155 So. at 133–34. The executive orders described specific occasions on which the sheriff, for instance, "refused to listen to" a report of a particular arrest his deputies made in an "inhuman, unmanly, and cruel manner"; "refused to listen to" "facts in connection with the beating to death of an old man by masked men" "which was his duty to hear and investigate"; and "actively enter[ed] into and participate[d] in the making of plans to throw dynamite upon a certain building." *Id.* at 131–32. In *State ex rel. Hardee v. Allen*, the Court declined to overrule the 1936 suspension of an appointed solicitor for "neglect of duty in office" based on specific charging decisions made in 1934 and 1935 regarding criminal activity that had occurred in those prior years. 172 So. 222, 223–25 (Fla. 1937). Finally, in *Israel*, the Court affirmed the dismissal of a quo warranto petition challenging a sheriff's suspension for "neglect of duty" and "incompetence" where the allegations related to the sheriff's failure to implement "proper protocols" or provide for "frequent training for his deputies resulting in the deaths of twenty-two individuals." 269 So. 3d at 494. Article

IV, Section 7(a) is not—and has never been—a vehicle to punish elected officeholders for hypothetical future conduct.

B. Constitutional Avoidance Principles Confirm that the Grounds for Warren's Suspension Do Not Qualify as "Neglect of Duty" or "Incompetence."

Constitutional avoidance counsels against interpreting a provision of law in a way that would create doubt as to the provision's constitutionality, and it is regularly applied in the context of Florida law. *See, e.g.*, *State v. Presidential Women's Ctr.*, 937 So. 2d 114, 116 (Fla. 2006) ("[W]e adhere to the settled principle that '[w]hen two constructions of a statute are possible, one of which is of questionable constitutionality, the statute must be construed so as to avoid any violation of the constitution.'" (quoting *Indus. Fire & Cas. Ins. Co. v. Kwechin*, 447 So. 2d 1337, 1339 (Fla. 1983)); *Franklin v. State*, 887 So. 2d 1063, 1073 (Fla. 2004) (explaining that acts "must be construed, if fairly possible, as to avoid unconstitutionality and to remove grave doubts on that score" (quotation marks omitted)); *Hiers v. Mitchell*, 116 So. 81, 84 (Fla. 1928) (noting that "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter"). As applied

here, constitutional avoidance principles counsel against an interpretation of a state constitutional provision that would create doubt as to the provision's legality under the federal Constitution. *See* 10 Fla. Jur 2d Constitutional Law § 38, Westlaw (2d ed., database updated Nov. 2022) ("With regard to the State of Florida, the Florida Constitution is the supreme law adopted by the people, although within its sphere, the Constitution of the United States is the supreme law of the land." (footnote omitted)); *cf. Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 325 (2015) (observing that the Supremacy Clause "instructs courts what to do when state and federal law clash").

Declaring that the Governor may suspend officials for speaking out on matters of public concern would throw Article IV, Section 7(a) into doubt under the federal Constitution. Even assuming such an interpretation is "possible" under current precedent, the "questionable constitutionality" of that construction means that the provision "must be construed" to remove any doubts on that score. *Presidential Women's Ctr.*, 937 So. 2d at 116.

Not only is constitutional avoidance a well-established doctrine in Florida courts, it was also a guiding principle in the 1997-1998

Constitution Revision Commission's debate regarding Article IV, Section 7(a). In considering a proposal to expand the provision to authorize suspension for misdeeds an officeholder committed while he or she was a candidate, potential "First Amendment issues" arising from such an amendment were of significant concern to the Commission. Fla. Const. Rev. Comm'n, *Meeting Proceedings for January 28, 1998* at 32:12 (Commissioner Mills); *see id.* at 44:23–45:3 (Commissioner Scott) (declining to support the proposal because "I don't know that it is constitutional, I mean, under the Federal Constitution"); *id.* at 45:8–9 (Chairman Douglass) (inquiring into whether the proposal would "violate the First Amendment"); *id.* at 45:14–46:1 (Commissioner Brochin) (declining to support the proposal because "[t]he problem is simply the First Amendment"); *id.* at 46:6–24 (Commissioner Sundberg) (opposing the proposal because "I think you have some very, very serious First Amendment problems with this"). The proposal failed because of the Commission's concerns about creating a conflict between Section 7(a) and the First Amendment.

These Commissioners' comments cannot be squared with the premise of the Governor's Order. *See* 10 Fla. Jur 2d Constitutional

law § 58, Westlaw (2d ed., database updated Nov. 2022) (citing *City of Ft. Lauderdale v. Crowder*, 983 So. 2d 37, 39 n.2 (Fla. 4th DCA 2008) ("In interpreting a constitutional provision, comments by the Constitution Revision Commission ... as to the meaning of text are especially important.")). The First Amendment protects the speech of candidates for office and elected officeholders alike. *See, e.g.*, *Houston Cmty. Coll. Sys. v. Wilson*, 142 S. Ct. 1253, 1261 (2022) ("The First Amendment surely promises an elected representative ... the right to speak freely on questions of government policy."); *Bond v. Floyd*, 385 U.S. 116, 132–37 (1966) (rejecting the State's argument that the First Amendment extends greater protection to citizens than to elected officials). It is therefore inconceivable that the Commission would have roundly rejected a proposed amendment to Section 7(a) because it could create First Amendment problems in the context of candidate speech if the Commission had understood Section 7(a) to already suffer from equally weighty First Amendment problems in the context of officeholder speech. In reality, the Commission understood Section 7(a) to authorize the suspension of state officers only for reasons unrelated to protected speech, and its understanding was correct.

CONCLUSION

For the foregoing reasons, the Court should find that Governor DeSantis exceeded his authority in suspending Andrew Warren as State Attorney for the 13th Judicial Circuit and grant the writ of *quo warranto* Andrew Warren has requested.

Dated: February 27, 2023

Respectfully,

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Certificate of Service

I certify that on February 27, 2023, I electronically filed the foregoing motion and proposed brief of *amicus curiae* with the Clerk of the Court and caused an electronic copy to be generated to all counsel of record.

/s/ Lawrence J. Dougherty
Attorney

Certificate of Compliance

I certify that this brief was drafted with 14 pt. Bookman Old Style font as required by the Florida Rules of Appellate Procedure and does not exceed the 5,000-word limit imposed by Florida Rule of Appellate Procedure 9.370(b).

/s/ Lawrence J. Dougherty
Attorney

APPENDIX A

LIST OF AMICI

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