SC23-247

In the Supreme Court of Florida

ANDREW WARREN,
Petitioner,

v.

RON DESANTIS, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF FLORIDA,
Respondent.

ON PETITION FOR A WRIT OF QUO WARRANTO AND MANDAMUS

RESPONSE TO PETITION FOR WRITS OF QUO WARRANTO AND MANDAMUS

RYAN NEWMAN (FBN1031451)
General Counsel
RAY TREADWELL (FBN93834)
Chief Deputy General Counsel
Executive Office of the Governor
400 S Monroe Street
Tallahassee, FL 32399-6536

GEORGE T. LEVESQUE
JEFF AARON
GrayRobinson, P.A.
301 S Bronough Street, Suite 600
Tallahassee, Florida 32302
(850) 577-9090
george.levesque@gray-robinson.com

ASHLEY MOODY
Attorney General

HENRY C. WHITAKER (FBN1031175)
Solicitor General
JEFFREY PAUL DESOUSA (FBN110951)
DANIEL WILLIAM BELL (FBN1008587)
Chief Deputy Solicitors General
DAVID M. COSTELLO (FBN1004952)
Deputy Solicitor General
ROBERT SCOTT SCHENCK
Solicitor General Fellow
Office of the Attorney General
The Capitol, PL-01
Tallahassee, Florida 32399
(850) 414-3300
henry.whitaker@myfloridalegal.com

Counsel for Governor Ron DeSantis

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INTRODUCTION AND SUMMARY OF ARGUMENT

During his tenure as State Attorney for the Thirteenth Judicial Circuit, Andrew Warren "commit[ted]" not to prosecute virtually all abortion crimes because he disagreed that they should be crimes, App. 10; "pledge[d]" not to enforce any future laws the Legislature might pass regulating gender-transition treatments, App. 7; and hamstrung his line prosecutors in their efforts to deter offenses like prostitution and disorderly conduct. App. 7–8. Florida's state attorneys, however, are charged with enforcing the criminal law, not with rewriting it. That job belongs to the Legislature.

It therefore should have surprised no one that Governor Ron DeSantis suspended Mr. Warren for neglect of duty and incompetence. That was eight months ago. Yet only last month did Mr. Warren petition this Court for writs of quo warranto and mandamus, challenging the Governor's suspension order under Article IV, Section 7 of the Florida Constitution. Mr. Warren resorted to state court only after a federal court rejected his First Amendment retaliation theory. For that delay alone, the Court should refuse to issue an extraordinary writ.

The petition also should be denied because it presents quintessential political questions. Article IV, Section 7 authorizes the Governor to suspend an official for enumerated grounds and grants the Senate the sole power to remove. As with impeachment, the Constitution leaves it to the political branches to determine what constitutes "neglect of duty" or "incompetence," the grounds for which Mr. Warren was suspended. This Court should now make clear what it has often implied: the validity of a suspension and removal is a non-justiciable political question.

Mr. Warren's request for quo warranto also fails because the traditional standard governing quo warranto actions is highly deferential and asks only whether the allegations in the suspension order bear a reasonable relation to the grounds for suspension—a standard that this suspension order clears with ease.

Mr. Warren never grapples with the reasonable-relation test. He instead insists that the doctrine of issue preclusion compels this Court to permit various extraneous musings in the federal district court's order to usurp the Governor's judgment and the role of the Senate. But this Court does not look behind the face of a suspension

order, and it follows with even greater force that the Court should not give effect to a federal court's decision to do so. And the federal court's gratuitous assertions—including its remarkable choice to opine on whether the Governor violated *Florida law*, despite appreciating full well that it lacked jurisdiction to adjudicate that issue—were not essential to its judgment and have no preclusive effect.

Finally, mandamus is unavailable. This Court has repeatedly held that quo warranto is the sole avenue for resolving disputes about title to public office. Attempts to circumvent the quo warranto standard by other means are improper. And Mr. Warren has not established that the Governor has a clear legal duty to reinstate him.

In the end, Mr. Warren must direct his claims to the only constitutional body with the power to hear them: the Senate. It is for that chamber, not this Court—and certainly not a *federal* court—to decide whether Mr. Warren's stated refusals to enforce Florida criminal law constitute neglect of duty and incompetence.

The petition should be denied.

STATEMENT OF THE CASE AND FACTS

A. The Governor's suspension authority

As Florida's chief executive officer, the Governor has broad authority to manage the State's executive branch. *See, e.g.*, Art. IV, § 1, Fla. Const. (vesting the "supreme executive power" in the Governor). That authority includes, among other things, "tak[ing] care that the laws be faithfully executed," "commission[ing]" state and county officers, and "transact[ing] all necessary business with the officers of government." *Id.* § 1(a). The Governor's take-care power, in turn, encompasses supervising the state attorneys. *Austin v. State* ex rel. *Christian*, 310 So. 2d 289, 292. (Fla. 1975). A state attorney is "not merely a prosecuting officer in the circuit in which he is elected." *Id.* "[H]e is also an officer of the State in the general matter of enforcement of the criminal law" and exercises his responsibilities as part of the State's executive branch subject to the Governor's authority to execute the laws. *Id.* (observing that the Governor's take-care authority would permit him to reassign state attorneys even without statutory authority to do so).

The Governor's supervisory power would be incomplete without the authority to suspend state and county officials who falter in their

duties. As a result, the Governor—"[b]y executive order stating the grounds and filed with the custodian of state records"—"may suspend from office any state officer not subject to impeachment, any officer of the militia not in the active service of the United States, or any county officer." Art. IV, § 7(a), Fla. Const. The permissible bases for suspension are "malfeasance, misfeasance, neglect of duty, drunkenness, incompetence, permanent inability to perform official duties, or commission of a felony." *Id.* To foster the continuity of government operations, the Governor may also "fill the office by appointment for the period of suspension." *Id.*

Once the Governor has suspended an official, the matter goes to the Senate, which "may, in proceedings prescribed by law, remove from office or reinstate the suspended official." *Id.* § 7(b). The Governor "may" reinstate the official at any time before removal by the Senate. *Id.* § 7(a).

This Court has recognized a "limited role" for the courts in the suspension-and-removal process. *Israel v. DeSantis*, 269 So. 3d 491, 495 (Fla. 2019). That role, at most, entails "determining whether the executive order on its face sets forth allegations of fact relating to one

of the constitutionally enumerated grounds of suspension." *Id.* In that inquiry, the Court asks only whether the executive order alleges facts that "bear some reasonable relation" to the charge levied against the officer. *Id.* at 496. If so, the correctness of the Governor's action is a question solely for the Senate. *See id.* at 495–96.

B. Mr. Warren's refusal to enforce the law results in his suspension

On August 4, 2022, after it became clear that Andrew Warren did not intend to exercise individualized prosecutorial discretion with respect to four broad categories of crimes, the Governor suspended Mr. Warren from his position as State Attorney for the Thirteenth Judicial Circuit. *See* App. 5–14 (Exec. Order 22-176).

As explained in the executive order, a state attorney's "blanket refusal" to enforce a criminal law "is not an exercise of prosecutorial discretion." App. 6 (quoting *Ayala v. Scott*, 224 So. 3d 755, 758 (Fla. 2019)). Refusing outright to enforce a criminal law is instead "tantamount to a 'functional veto'" of the legislature's authority. *Id.* (same). Thus, when a state attorney fails to make "'case-specific' and 'individualized' determinations as to whether the facts warrant prosecution," the state attorney commits "neglect of duty." App. 5–6. And

when a state attorney demonstrates that he has a "gross ignorance of official duties," he evinces "incompetence" and may be suspended for that as well. App. 5.

The Governor concluded that Mr. Warren both neglected his duty and was incompetent in announcing that he would not enforce four categories of crimes.

1. Abortion-related crimes

The Governor found that Mr. Warren had pledged not to prosecute abortion-related crimes. App. 8–11. Indeed, though Florida law has and does criminalize certain conduct pertaining to abortions—including partial-birth abortions, § 390.0111(5)(a), Fla. Stat., abortions during the third trimester, § 390.0111(1), Fla. Stat. (2020), and as recently enacted, abortions performed after 15 weeks' gestation, § 390.0111(1), Fla. Stat. (2022)—Mr. Warren signed a "Joint Statement" with other prosecutors from around the country, dated June 24, 2022 and updated July 25, 2022, that swore off prosecuting abortion providers. App. 10. That letter announced:

- "Criminalizing and prosecuting individuals who . . . provide abortion care makes a mockery of justice; prosecutors should not be part of that."

- "Enforcing abortion bans runs counter to the obligations and

interests we are sworn to uphold."

- "As such, we [the undersigned prosecutors] decline to use our offices' resources to criminalize reproductive health decision and commit to exercise our well-settled discretion and refrain from prosecuting those who . . . provide, or support abortions."

- "Our legislatures may decide to criminalize personal healthcare decisions, but *we* remain obligated to prosecute only those cases that serve the interests of justice and the people."

Id.

Those statements, the Governor concluded, demonstrated that Mr. Warren had "clearly, unequivocally, and publicly declared that his office will not prosecute violations of Florida criminal laws that prohibit providers from performing certain abortions to protect the life of the unborn child." *Id.*

Mr. Warren was the only Florida state attorney to sign that letter. *Id.*; *see also* App. 25–33.

2. Crimes related to gender identity

Next, Mr. Warren had signed a similar letter in June 2021 stating that he would refuse to prosecute laws the Legislature might enact governing gender-transition treatments for children and bathroom usage based on gender identity. App. 7.

Among other things, the letter declared:

- "[W]e pledge to use our discretion and not promote the criminalization of gender-affirming healthcare or transgender people."

- "Bills that criminalize safe and crucial medical treatments or the mere public existence of trans people do not promote public safety, community trust, or fiscal responsibility. They serve no legitimate purpose. As such, we pledge to use our settled discretion and limited resources on enforcement of laws that will not erode the safety and well-being of our community. And we do not support the use of scarce criminal justice and law enforcement resources on criminalization of doctors who offer medically necessary, safe, gender-affirming care to trans youth, parents who safeguard their child's health and wellbeing by seeking out such treatments, or any individuals who use facilities aligned with their gender identity."

- "We are committed to ending this deeply disturbing and destructive criminalization of gender-affirming healthcare and transgender people."

Id.

Though Florida currently has no such criminal laws, the Governor interpreted Mr. Warren's statements regarding gender-transition treatments as further evidence that Mr. Warren "thinks he has the authority to defy the Florida Legislature and nullify in his jurisdiction criminal laws with which he disagrees." *Id.*

3. Crimes arising during pedestrian and bicycle stops

Mr. Warren had also "instituted a policy during his current term against prosecuting crimes where the initial encounter between law enforcement and the defendant results from a non-criminal violation in connection with riding a bicycle or a pedestrian violation." App. 8. That policy covers offenses like "resisting arrest without violence"—for instance, where a suspect flees from police. *Id.* "The only exception," the Governor observed, "is where there is a direct threat to public safety, such as where an individual has suffered physical harm or where a firearm is involved." *Id.*

4. Misdemeanor crimes, including trespassing at a business, disorderly conduct, and prostitution

Finally, Mr. Warren had a policy of "presumptive non-enforcement for certain criminal violations, including trespassing at a business location, disorderly conduct, disorderly intoxication, and prostitution." App. 7–8. Declining to prosecute based on "categorical exclusions," the Governor reasoned, "is tantamount to rewriting Florida criminal law." App. 8.

C. Mr. Warren's failed federal First Amendment retaliation lawsuit

Rather than contest the suspension order in the Florida Senate, Mr. Warren sued the Governor in the Northern District of Florida, drawing Judge Robert Hinkle. Mr. Warren claimed that his suspension violated the First Amendment because the Governor allegedly retaliated against him for his protected speech. He also sought a writ of quo warranto based on his view that the Governor violated Article IV, Section 7(a) of the Florida Constitution.

The Governor moved to dismiss the suit in its entirety. *See* Gov.'s App. 31–69. He argued, among other things, that the First Amendment allows him to discipline a state attorney for his prosecutorial speech, *see Garcetti v. Ceballos*, 547 U.S. 410 (2006), and that the Eleventh Amendment precluded a federal court from granting a writ of quo warranto based on an alleged violation of state law, *see Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984).

On September 19, 2022, the district court denied the motion to dismiss the First Amendment claim but granted the motion to dismiss the writ of quo warranto. The court explained that, under the Eleventh Amendment, a federal court has no power to enjoin a state

officer to comply with state law. Gov.'s App. 75–77 (citing *Pennhurst*, 465 U.S. at 121), 98; App. 38 (same).

In response, Mr. Warren did not raise his quo warranto claim in state court. He instead proceeded to trial on the First Amendment retaliation claim.

After a three-day trial, the district court ruled for the Governor. *See* App. 34–92. In doing so, the court applied (App. 68) the two-step framework from *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). Under *Mt. Healthy*, the plaintiff has the initial burden of showing that protected speech or activity was a substantial or motivating factor in the challenged decision. App. 68. If that burden is met, the defendant may then show that he would have made the same decision in the absence of the protected speech or activity. *Id.* If the defendant makes that showing, no "constitutional violation will [] be found." *Borges Colon v. Roman-Abreu*, 438 F.3d 1, 15 (1st Cir. 2006).

Turning to the first step, the district court found that Mr. Warren had carried his initial burden. App. 69–74. On that score, the

court found that Mr. Warren's abortion and transgender letters contained "core political speech" protected by the First Amendment, App. 69, as opposed to unprotected government speech that the Governor validly could use to suspend. The district court also opined that the speech was a "motivating factor" in the Governor's decision to suspend Mr. Warren, App. 75, along with Mr. Warren's political affiliation. App. 76.

That took the court to the second, burden-shifting step of *Mt. Healthy*. In the court's words, whether the Governor would "have made the same decision" without considering protected factors "[wa]s the *controlling question*." App. 84 (emphasis added). And as to that issue, Mr. Warren could not prevail: "*the Governor would have suspended Mr. Warren based on* [*unprotected*] *factors alone*." App. 86 (emphasis added). Those "unprotected factors" included "Mr. Warren's actual performance—not advocacy—as a reform prosecutor, the one sentence in the abortion statement [that pledged to refrain from prosecuting abortion crimes], the bike and low-level-offense policies, and the anticipated political benefit [of suspending Mr. Warren]." *Id.* (emphasis omitted). In light of those considerations, what the district

court deemed "First Amendment violations" "were not essential to the" suspension decision, and so the district court dismissed the First Amendment claim with prejudice. App. 92.

The district court also offered some extraneous thoughts on the lawfulness of the Governor's suspension order under state law, even though, as it previously conceded, it lacked any power under the Eleventh Amendment to adjudicate the quo warranto claim. App. 38, 92. The district court declared, for example, that Mr. Warren lacked any "blanket nonprosecution policies," App. 77; *see also* App. 34, and believed that the Governor should have conducted a more thorough investigation before suspending him. App. 86. In the district court's view, the Governor violated Article IV, Section 7 because Mr. Warren had not displayed incompetence, neglect of duty, or even a "hint of misconduct" by pledging not to enforce certain criminal laws. App. 77, 87. But the district court did not grant relief on that basis given the Eleventh Amendment bar to doing so. *See* App. 48 ("[U]nder *Pennhurst*, Mr. Warren cannot obtain relief in this court on the ground that his suspension violated the Florida Constitution."), 92.

Nearly a month after the federal district court entered judgment

against him, Mr. Warren appealed to the U.S. Court of Appeals for the Eleventh Circuit. He filed the present petition for writs of quo warranto and mandamus on February 15—195 days after he was suspended.

On February 21, 2023, Governor DeSantis wrote a letter to Mr. Warren (Gov.'s App. 102) consenting to moving forward with removal proceedings in the Florida Senate, which the Senate had suspended when Mr. Warren filed his federal lawsuit, and asking for Mr. Warren's consent as well. *See* Fla. Sen. Rule 12.9(2) (providing for a stay of the Senate removal proceedings pending litigation but allowing them to move forward if both parties consent). Mr. Warren has not provided that consent.

ARGUMENT

I. The petition is untimely.

To start, Mr. Warren's unreasonable delay in petitioning this Court alone warrants denying discretionary relief. "Since the nature of an extraordinary writ is not of absolute right, the granting of such writ lies within the discretion of the court." *Israel v. DeSantis*, 269 So. 3d 491, 494 (Fla. 2019). Extraordinary writs—including those for quo warranto and mandamus—may thus "be denied for numerous

and a variety of reasons, some of which may not be based upon the merits of the petition." *See Topps v. State*, 865 So. 2d 1253, 1257 (Fla. 2004) (per curiam). Among them, a petition "may be denied if it has been unreasonably delayed." *Snow v. State*, 352 So. 3d 529, 534 (Fla. 1st DCA 2022) (writ of prohibition denied after five-month delay).

In *Thompson v. DeSantis*, the Court concluded that a writ of quo warranto "would not be proper" where the petitioner had waited six months to seek relief. 301 So. 3d 180, 184 (Fla. 2020); *see also State ex rel. Pooser v. Wester*, 170 So. 736, 739 (Fla. 1936) (four-month delay). Dismissal for the same reason is justified here. The Governor suspended Mr. Warren on August 4, 2022—eight months ago. Mr. Warren could have filed his petition then, but opted instead to pursue the same relief in a different forum. Indeed, it was clear from the outset that Mr. Warren's quo warranto claim, to the extent it had any merit at all, should have been brought in state court. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 121 (1984) (federal courts may not grant injunctive relief based on violations of

state law). The federal court agreed, dismissing the claim on September 19, 2022, yet still Mr. Warren delayed filing his petition in this Court for another five months. It was only after Mr. Warren lost on his federal claim in the district court that he got around to suing in state court, and even then he waited a full month after the federal decision to do so.

That should end the matter. Entertaining his petition would reward Mr. Warren for his tactic of suing first in Tallahassee federal district court and invoking this Court as a backup plan only after that court denied him relief—many months after the court rightly ruled that it lacked power to enjoin the Governor on state-law grounds. And while Mr. Warren dawdled in federal court, the state attorney's office has busied itself undoing Mr. Warren's harmful policies, entrenching new policies and personnel under the leadership of the incumbent state attorney who was appointed to replace him.

Mr. Warren has even made the remarkable—and baseless—suggestion that the controversy over his suspension "jeopardize[s] every prosecution in the Thirteenth Judicial Circuit handled by an interim state attorney who lacks valid authority because she was appointed

as part" of what he views as an "illegal suspension." Gov's App. 101 (Letter to Ron DeSantis from Andrew Warren (Jan. 25, 2023)). If that is truly his belief, Mr. Warren's delay in seeking the writ is all the more inexcusable.

For delay alone, the Court should deny the petition.

II. The Court lacks jurisdiction to resolve the non-justiciable political questions Mr. Warren raises.

Even if the petition were timely, the case should be dismissed for lack of jurisdiction because the petition presents non-justiciable political questions.

This Court has long recognized that, "under the constitutional process for suspension and removal, the 'Senate is nothing less than a court provided to examine into and determine whether or not the Governor exercises the power of suspension in keeping with the constitutional mandate.'" *Israel*, 269 So. 3d at 495 (quoting *State ex rel. Hardie v. Coleman*, 155 So. 129, 134 (Fla. 1934)). In other words, the Florida Constitution commits the traditional role of "a court" in "suspension and removal" decisions to other, specific arbiters—the political branches. *Id.* The Court should now make explicit what it has long implied: Suspension and removal decisions (and the questions

underlying them) are non-justiciable political questions that courts have no business addressing.

"The nonjusticiability of a political question is primarily a function of the separation of powers," *Baker v. Carr*, 369 U.S. 186, 210 (1962), which the Florida Constitution expressly compels. *See* Art. II, § 3, Fla. Const.; *Coal. for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles*, 680 So. 2d 400, 407–08 (Fla. 1996). "[T]his Court has no power to resolve" political questions, *Penn v. Fla. Def. Fin. & Accounting Serv. Ctr. Auth.*, 623 So. 2d 459, 461 (Fla. 1993); *see also Johnson v. State*, 660 So. 2d 637, 646 (Fla. 1995), because they "revolve around policy choices and value determinations constitutionally committed for resolution to the halls of [the legislature] or the confines of the Executive Branch." *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986).

A question is "political" and therefore non-justiciable if there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it." *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 195 (2012) (quoting *Nixon v. United*

States, 506 U.S. 224, 228 (1993)); *see also Citizens for Strong Schs., Inc. v. Fla. State Bd. of Educ.*, 262 So. 3d 127, 137 (Fla. 2019). These factors typically feed into one another. That is, the "lack of manageable standards to channel any judicial inquiry" often flows from a textual commitment to other branches that "reflects the institutional limitations of the judiciary." *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 843–44 (D.C. Cir. 2010) (citing *Nixon*, 506 U.S. at 228–29).

As a prototypical example of "a textually demonstrable constitutional commitment of [an] issue" to political decisionmakers, *Zivotofsky*, 566 U.S. at 195, this Court has long suggested that matters of impeachment are political questions vested with the House and Senate. *See State v. Gleason*, 12 Fla. 190, 238 (1868) (noting that if impeachment "is a power legitimately within [the Legislature's] constitutional authority, then [this Court] cannot exercise it"); *cf. Nixon*, 506 U.S. at 229 (noting that the U.S. Senate's "sole Power to try all Impeachments" presents a political question). Because the Florida Constitution expressly assigns a traditional judicial power to a different arbiter (the Senate), courts have no power to address issues that

underlie the exercise of that power (for example, the sufficiency of facts to meet a legal standard). Art. III, § 17, Fla. Const.; *see Nixon*, 506 U.S. at 229; *cf. also Roudebush v. Hartke*, 405 U.S. 15, 18–19 (1972).

This Court has reached the same conclusion with respect to the qualifications of legislators to hold office. *See McPherson v. Flynn*, 397 So. 2d 665, 667–68 (Fla. 1981) (citing Art. III, § 2, Fla. Const.); *see also Roudebush*, 405 U.S. at 19 (same for members of Congress) (citing Art. I, § 5, U.S. Const.). Again, the Constitution assigns the "power to judge these qualifications" not to the judiciary but "to the legislature in unequivocal terms." *McPherson*, 397 So. 2d at 667–68. Thus, "the doctrine of separation of powers requires that the judiciary refrain from deciding" whether those qualifications are met. *Id.*

No less than those provisions, the Suspension and Removal Clauses of the Florida Constitution are "a textually demonstrable constitutional commitment of" the power to adjudge a suspension to the political branches. *Zivotofsky*, 566 U.S. at 195. The Governor initiates that political process by "suspend[ing] from office any state

officer . . . for malfeasance, misfeasance, neglect of duty, drunkenness, incompetence, permanent inability to perform official duties, or commission of a felony." Art. IV, § 7(a), Fla. Const. That power—like the House's power to impeach—"carries with it the exclusive power to hear and decide" whether the evidence before the Governor supports suspension. *State ex rel. Lamar v. Johnson*, 11 So. 845, 850 (Fla. 1892). The Governor must also decide whether the pertinent legal standard (incompetence, for example) is satisfied, and that decision should be equally free of judicial scrutiny. "[W]hether the failure to prosecute was justifiable or constituted a neglect of duty is a question for the Senate and the Senate alone to determine." *State ex rel. Hardee v. Allen*, 172 So. 222, 232 (Fla. 1937) (separate op. of Buford, J.). In short, the power to suspend "has been given to the [G]overnor," and "the courts . . . cannot exercise it, any more than they can the power of trying an officer under impeachment." *Johnson*, 11 So. at 851.

Once an official is suspended, "[t]he senate may, in proceedings prescribed by law, remove from office or reinstate the suspended official." Art. IV, § 7(b), Fla. Const. That text grants the Senate "the

exclusive role of determining whether to remove or reinstate that suspended official," *Israel*, 269 So. 3d at 495, including "reviewing the charges and the evidence to support them." *Coleman*, 155 So. at 130. The Florida Constitution therefore renders the Senate "nothing less than a court" for the purpose of the ensuing trial—just as in an impeachment trial. *Israel*, 269 So. 3d at 495 (quoting *Coleman*, 155 So. at 134). Like the impeachment clauses of the U.S. and Florida Constitutions, the Suspension and Removal Clauses of the Florida Constitution not only identify specific non-judicial decisionmakers, but also assign to them certain functions: weighing evidence, prosecuting and hearing a trial, and deciding whether legal standards are satisfied. An additional layer of review would impermissibly add to the finely wrought constitutional structure that "made the senate," not the courts, "the sole check upon any erroneous action on [the Governor's] part." *Johnson*, 11 So. at 852.

Consistent with textual commitment of these issues to the political branches, Article IV, Section 7 allows suspension and removal for "neglect of duty" and "incompetence"—subjective standards that

in many cases will require, among other things, analysis of the resources available to an official and how those resources could and should have been used. *See Israel*, 269 So. 3d at 496. That is the kind of analysis courts are not especially good at, but that the Governor and Legislature routinely undertake, for instance, in the appropriations process. *See Coal. for Adequacy & Fairness in Sch. Funding*, 680 So. 2d at 407–08; *cf. also Schneider v. Kissinger*, 412 F.3d 190, 197 (D.C. Cir. 2005).

History confirms what the text makes clear. In 1885, the same Constitutional Convention that added the Suspension and Removal Clauses to the Florida Constitution rejected a proposal whereby grand jury indictments would trigger suspension and "circuit court[s]" would decide whether county officials engaged in "incompetency, willful neglect of duty, malfeasance, misfeasance, drunkenness, gambling, and any violation of the criminal laws of the state." *Johnson*, 11 So. at 849. The Convention's choice reflects "the intention . . . to lodge in the chief executive, and in him alone, the exclusive power to investigate and decide," and in the Senate the exclusive power to determine whether the suspension should stand. *Id.* at 849–

50. Had the people wanted a removal to "take place only upon the ascertainment by a court," the Florida Constitution would say so. *Id.* at 849.

Mr. Warren will no doubt take the view that judicial review is "necessary . . . to place a check on" the Governor's power. *Nixon*, 506 U.S. at 235; *see* Pet. 28–29 (suggesting that suspension is anti-democratic). But "[t]he lack of power in the courts is not because the Governor [and Legislature are] above the law"; it is because "the Constitution itself has set up its own special court to try the matter, namely, the state Senate." *Coleman*, 155 So. at 136 (Davis, C.J., concurring). And the U.S. Supreme Court has rejected that argument as to the Senate's impeachment power because the Impeachment Clause fits within the Constitution's overall system of "checks and balances." *Nixon*, 506 U.S. at 234–36. Impeachment is itself a part—indeed a critical part—of the separation of powers. The courts were not free to provide an additional, extraconstitutional check in *Nixon*, and the same is true here. *See id.*[1]

[1] Precedent is no barrier to holding the validity of a suspension to be a political question. Although decisions of this Court have entertained judicial challenges to suspensions under a deferential standard, *see, e.g.*, *Israel*, 269 So. 3d at 496; *Allen*, 172 So. at 224;

III. The Court should deny the quo warranto petition.

If the Court reaches the merits, it should deny the petition. The Governor suspended Mr. Warren because of non-prosecution policies that simultaneously revealed Mr. Warren's neglect of duty and incompetence and reduced the deterrent effect of the criminal law in the Thirteenth Judicial Circuit. *See* App. 5–14. In publicly proclaiming his "commit[ment]" not to "prosecut[e] those who . . . provide, or support abortions," App. 10, for example, Mr. Warren invited infractions of Florida's laws criminalizing certain types of abortions. So too, the artificial limits he placed on his attorneys' authority to enforce

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Coleman, 155 So. at 133–34, those decisions denied relief and did not decide whether review could also have been denied on the ground that the entire matter is a political question.

The only precedent of this Court we have found that is arguably to the contrary is the four-paragraph opinion in *State ex rel. Bridges v. Henry*, 53 So. 742 (Fla. 1910), which some decisions of this Court have characterized in dicta as establishing that "the jurisdictional facts" behind a suspension "may be inquired into by the courts." *Coleman*, 155 So. at 133; *see also Allen*, 172 So. at 225 (Whitfield, C.J., concurring); *but cf. id.* at 234 (separate op. of Buford, J.) (urging that *Bridges* "be overruled"). But the cryptic opinion in *Bridges* did not address any of the reasons why this matter is a political question. "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Fla. Hwy. Patrol v. Jackson*, 288 So. 3d 1179, 1183 (Fla. 2020) (cleaned up).

other crimes undermined the Legislature's bans on things like prostitution and disorderly intoxication. The Governor properly concluded that Mr. Warren misapprehended his role as a state attorney and neglected his duty, warranting his suspension.

Mr. Warren offers a slew of theories in support of a writ of quo warranto. But he never grapples with the applicable legal test—whether the facts alleged in the suspension order bear a reasonable relation to the charge of neglect of duty and incompetence. And Mr. Warren's collateral-estoppel theory is both inconsistent with the reasonable-relation test and fails on its own terms, among other reasons, because the findings on which he relies were not essential to its judgment.

A. If the Court reviews the suspension at all, it should ask only whether the facts alleged in the Governor's suspension order "bear a reasonable relation" to the charge.

Most immediately, Mr. Warren premises his petition on a legal standard this Court has consistently rejected. Urging the Court to peer beyond the four corners of the suspension order and conclude that the "factual bases" listed in the order were "false," "pretext[ual]," and asserted without "[a]ny minimally competent inquiry," Pet. 23–

27, Mr. Warren claims that the Court should quash the suspension order as "unsupported" and "despotic." Pet. 27–30. But were judicial review appropriate here at all, the proper test would ask only whether the "allegations" in the suspension order "bear some reasonable relation" to the charge of neglect of duty and incompetence. *Israel*, 269 So. 3d at 496.

As the Suspension Clause's express delegation of authority to the Governor and the Senate shows, the judiciary has at most a "limited role in reviewing the exercise of the suspension power." *Id.* (quoting *Jackson v. DeSantis*, 268 So. 3d 662, 663 (Fla. 2019)); *see also id.* (explaining that "the Constitution commits to the governor" the power of suspension). That principle traces to the Court's 1892 decision in *Johnson*, in which it held that the Governor can suspend an official without a prior judicial determination that suspension was justified. *See* 11 So. at 848–51; *but see* Pet. 58 n.13 (suggesting that Mr. Warren could not be suspended absent a "predicate order" from a court). As this Court has put it in recent years, "[w]here an executive order of suspension 'names one or more of the grounds embraced

in the Constitution and clothes or supports it with alleged facts sufficient to constitute the grounds or cause of suspension, it is sufficient.'" *Israel*, 269 So. 3d at 495 (quoting *Coleman*, 155 So. at 133). "Similarly, the Senate's judgment of removal or reinstatement 'is final, and will not be reviewed by the courts,' as under the constitutional process for suspension and removal, the 'Senate is nothing less than a court provided to examine into and determine whether or not the Governor exercises the power of suspension in keeping with the constitutional mandate.'" *Id.* (same).

That standard is "a low threshold": "if, on the whole, [the executive order] contains allegations that bear some reasonable relation to the charge made against the officer, it will be adjudged as sufficient." *Id.* at 496 (same). The inquiry is "facial" in nature and focuses on "the factual allegations in an executive order of suspension." *Id.* The only facts relevant to that inquiry are therefore those appearing in the suspension order.

Mr. Warren would have the Court do something brand new: explore whether the suspension was "unsupported" or "despotic"—and thus "arbitrary"—based on alleged grounds for the suspension that,

Mr. Warren admits, were *not* "listed [] in the Executive Order." Pet. 24, 23–30. He also argues that, even taking the allegations in the suspension order as given, this Court should itself decide whether the suspension was proper. Pet. 34–51.

That improperly invites this Court to usurp the constitutional role of the Senate, which this Court has long maintained is the body tasked with evaluating the correctness of the suspension order. *See Israel*, 269 So. 3d at 495; *Johnson*, 11 So. at 850, 852. No Florida court has ever applied Mr. Warren's unsupported-and-despotic standard to a suspension proceeding, and certainly none has looked behind the four corners of a suspension order.

In arguing for his standard, Mr. Warren takes out of context this Court's warning that "[a] mere arbitrary or blank order of suspension without supporting allegations of fact, even though it named one or more of the constitutional grounds of suspension, would not meet the requirements of the Constitution." Pet. 26–27 (quoting *Coleman*, 155 So. at 133). It is true enough that "arbitrary" has been used to describe a decision that "is [] not supported by facts or logic, or despotic." Pet. 27 (quoting *Bd. of Trs. of Internal Imp. Tr. Fund v. Levy*,

656 So. 2d 1359, 1362 (Fla. 1st DCA 1995)). But the Court's point in *Coleman* was not that this Court should engage in a free-floating inquisition into whether the twice-elected Governor of Florida's actions smack of despotism. The point was whether a suspension lists "supporting allegations of fact" that bear a "reasonable relation" to the charge. *Coleman*, 155 So. at 133.

Mr. Warren cannot justify his novel standards by resort to Florida's "separation of powers," Pet. 53–59, or on the theory that the suspension order arrogates "power reserved to the people"—the right to elect the local state attorney. Pet. 51–53. Yes, our Constitution tasks the elected state attorneys with prosecuting crime within their judicial circuits. Art. V, § 17, Fla. Const. But those officials are not free from oversight. The Constitution instead delegates to the Governor the "supreme executive power" and corresponding duty to "take care that the laws be faithfully executed," *id.* Art. IV, § 1(a), authority that encompasses some degree of supervision of state attorneys. *See Austin v. State ex rel. Christian*, 310 So. 2d 289, 292 (Fla. 1975) (holding that the Governor's take-care authority authorizes reassignment of state attorneys). The Governor's additional authority to suspend

state attorneys, and to appoint new ones in place, is a logical corollary of that power. Art. IV, § 7(a), Fla. Const. And again that express power—exercised by a Governor who, unlike Mr. Warren, was twice elected by all the people of Florida—is itself subject to democratic check, as only the Senate has ultimate authority to remove a suspended state attorney. Art. IV, § 7(b), Fla. Const.

The suspension-and-removal process the Florida Constitution contemplates is unfolding right now, notwithstanding Mr. Warren's attempts at obstruction in federal and state court. The Governor suspended Mr. Warren "[b]y executive order stating the grounds and filed with the custodian of state records." *Id.* Art. IV, § 7(a). The Senate then promptly contacted Mr. Warren about holding a hearing. Those proceedings have been on pause only because of Mr. Warren's lawsuits, *see* Fla. Sen. R. 12.9(2), and his refusal to consent to lifting the abeyance in the Senate. If the Senate concludes that Mr. Warren is guilty of neglect of duty and incompetence, it will remove him; if not, it will reinstate him. The only lurking threat to the "separation of powers" (Pet. 54) is Mr. Warren's insistence that the Court trench

on the Senate's prerogative to adjudicate the propriety of the suspension.

And far from infringing on the "policy preferences" (Pet. 53) of the voters who elected Mr. Warren to office, those voters knew when they went to the ballot box that state attorneys are subject to the Suspension Clause. This Court has observed that suspension is consistent with "the elective system": when "the suspension or removal takes place, the expressed will of the people has been enforced by the suspension and removal." *Johnson*, 11 So. at 853. Those same voters, and millions more, elected the Governor and 40 Florida Senators on the understanding that they would serve a check on wayward officials.

Consequently, if the petition raises a justiciable question, the Court should apply the reasonable-relation standard to the facts alleged on the face of the suspension order.

B. The suspension order easily satisfies that standard.

The allegations in the suspension order more than reasonably relate to the charge of neglect of duty and incompetence. To understand the significance of the various non-prosecution policies that got Mr. Warren suspended, Florida law dictates that a prosecutor's

charging discretion, though in many ways broad, is cabined by the requirement that it be exercised on a case-by-case basis. *See Ayala*, 224 So. 3d at 758. "[A]dopting a 'blanket policy' against" enforcing certain types of criminal laws is "in effect refusing to exercise discretion." *Id.* (quoting *Johnson v. Pataki*, 691 N.E.2d 1002, 1007 (N.Y. 1997)). Not just that, refusing to prosecute certain categories of crimes is "tantamount to a 'functional[] veto' of state law." *Id.* (same). Florida law thus requires prosecutors to "mak[e] case-specific determinations" about whether to charge a crime. *Id.*

The failure to exercise case-by-case prosecutorial discretion is both "neglect of duty" and "incompetence"—not to mention subversion of the rule of law. Neglect of duty refers 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." *Israel*, 269 So. 3d at 496 (quoting *Coleman*, 155 So. at 132). "It is not material whether the neglect be willful, through malice, ignorance, or oversight." *Id.* (same). "Incompetence," meanwhile, refers to "any physical, moral, or intellectual quality, the lack of which incapacitates one to perform the duties of his office," and "may arise

from gross ignorance of official duties or gross carelessness in the discharge of them." *Id.* (quoting *Coleman*, 155 So. at 133). That includes, as relevant here, a "lack of judgment and discretion." *Id.* (same).

Applying those considerations, the facts described on the face of the suspension order "bear some reasonable relation" to the charge of neglect of duty and incompetence. *Id.* (same). The Governor's order lists four categories of crimes that Mr. Warren pledged not to prosecute, or to prosecute in only some cramped fashion. Those observations, taken together and individually, suffice to uphold the order and send the case to the Senate.

Non-prosecution of abortion offenses. As the Governor found, Mr. Warren publicly announced a policy of not prosecuting abortion offenses. App. 25–27. In a letter signed by a group of prosecutors after the *Dobbs*[2] decision, Mr. Warren proclaimed that "prosecutors should not be part of" enforcing abortion limitations, as doing so

[2] *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022) (overturning *Roe v. Wade* and holding that the federal constitution does not guarantee a right to abortion).

"runs counter to the obligations and interests we are sworn to uphold." *Id.* "As such," Mr. Warren wrote, he would "decline to use [his] office['s] resources to criminalize reproductive health decisions" and "commit[ted] to exercise [his] well-settled discretion and refrain from prosecuting those who . . . provide, or support abortions." *Id.* And while a state legislature "may decide to criminalize personal healthcare decisions," *he* was "obligated to prosecute only those cases that serve the interests of justice and the people"—cases, in other words, not involving abortion crimes.[3]

Despite that bold stance, Mr. Warren now protests that the letter does not "contain any categorical statement that Mr. Warren would not prosecute any law." Pet. 48. On his telling, it is no more than a "value statement." Pet. 49. Reasonable readers will conclude otherwise. Most notably, the letter "*commit*[*s*]" Mr. Warren's office to "*refrain*[*ing*] from prosecuting those who . . . provide, or support abortions"—full stop. App. 25 (emphasis added). Even the federal district

[3] As the Governor observed in the suspension order, that pledge could be understood to commit Mr. Warren to permitting especially gruesome procedures, such as partial-birth and late-term abortions. App. 9, 11.

court decision that Mr. Warren heralds saw it that way. *See* App. 81 (observing that the abortion statement "could reasonably be understood as a commitment not to prosecute some categories of abortion cases").

Mr. Warren cannot evade responsibility for that statement by pointing to its reference to "discretion." Pet. 49. The letter does not pledge to exercise individualized discretion. Rather, it invokes a prosecutor's "well-settled discretion" as the very basis for its sweeping promise not to prosecute abortion providers. App. 25. Under Florida law, green-lighting a broad class of conduct the Legislature has criminalized is not an exercise in individualized discretion—it is a "functional[] veto." *Ayala*, 224 So. 3d at 758–59.

It is likewise no defense that the abortion letter contains the "caveat" that "certain individuals" may be prosecuted for crimes that arise during an abortion, Pet. 49 n.10 (citing App. 25 n.2)—namely, abortion providers who "carry[] out a forced abortion" or who "perform an abortion negligently or with the intent to harm" the mother. App. 25 n.2. If anything, that marginal exception underscores just

how categorical Mr. Warren's promise not to prosecute abortion offenses truly was. And it reflects his misconception that he has the power to prosecute only those crimes supporting policies he agrees with—here, abortion laws that protect the mother, not those that protect unborn children.

Non-prosecution of pedestrians and bicyclists with limited exception. Next, Mr. Warren instructed his line prosecutors not to enforce crimes "where the initial encounter between law enforcement and the defendant results from a non-criminal violation in connection with riding a bicycle or a pedestrian violation." App. 8. That policy applied "even to crimes" involving "resisting arrest without violence," *id.*, and its "only exception" was for the prosecution of crimes posing a "direct threat to public safety, such as where an individual has suffered physical harm or where a firearm is involved." *Id.*

Mr. Warren apparently found police encounters with pedestrians or bicyclists to be unsavory. But as the Governor concluded, that hardly excuses turning a blind eye to an array of felonies and misdemeanors discovered or occurring during such encounters—crimes that might include public displays of obscenity, theft, resisting arrest,

and other offenses against the public good. Depending on how broadly individual line prosecutors chose to interpret the policy, it might even be said to encompass serious drug violations not obviously and directly involving "physical harm" or "safety." By eroding respect for law enforcement and the Legislature's enactments, the existence of the policy, as alleged in the suspension order, bears "some reasonable relation" to neglect of duty or incompetence. *Israel*, 269 So. 3d at 496.

It is beside the point that, as Mr. Warren argues, the public-safety exception "require[s] prosecutors to consider each case individually." Pet. 45. The question is not whether prosecutors must evaluate the individual circumstances of a case when deciding whether it meets some narrow exception to an otherwise blanket non-prosecution policy; the question is whether prosecutors enjoy the discretion, writ large, to make "individualized determination[s] 'exercised according to the exigency of the case, upon a consideration of the attending circumstances.'" *Ayala*, 224 So. 3d at 759 (quoting *Barber v. State*, 5 Fla. 199, 206 (1853) (Thompson, J., concurring)). Where prosecutors first must establish that their cases fit within carefully

defined windows not imposed by the Legislature itself, they lack the freedom to charge as appropriate.

Indeed, Mr. Warren's policy effectively added an additional element to the crimes covered by the policy—an element not specified by the Legislature. Within the Thirteenth Judicial Circuit under his tenure, each of those offenses was prosecutable only if the offense involved a threat of "physical harm" or "safety."

Finally, even if the pedestrian/bicyclist policy could be said to involve the exercise of permissible "case-specific determinations," Pet. 46, the Governor's suspension authority permits him to suspend a state attorney for exercising individualized discretion in what he views as an improper way. That follows from this Court's decision in *Allen*, in which this Court held that the Governor could suspend a prosecutor who had charged only a handful of gambling cases during an illegal-gambling epidemic in the 1930s. 172 So. at 224. In denying the quo warranto petition, this Court declined to examine "the weight or sufficiency of anything of an evidentiary nature in the order of suspension." *Id.* It was enough that "to knowingly permit gambling and prefer no charges therefor was a neglect of duty." *Id.*

Presumptive non-prosecution of various misdemeanors. The Governor also noted Mr. Warren's policy of "presumptive non-enforcement for certain criminal violations, including trespassing at a business location, disorderly conduct, disorderly intoxication, and prostitution." App. 7–8. As with the pedestrian/bicyclist policy, the Governor reasonably concluded that this policy was inconsistent with Florida law's requirement that prosecutorial discretion be exercised on an "individualized" basis, *Ayala*, 224 So. 3d at 759, rather than in some sort of "presumptive" manner favoring non-prosecution. Even now, Mr. Warren does not contend that this policy (unlike the pedestrian/bicyclist policy) "enumerates specific exemptions" that would allow prosecutors to charge these misdemeanors in some instances. Pet. 45. That is an invitation to lawlessness that no governor must idly accept.

Non-prosecution of offenses related to gender identity. Last, the Governor found further evidence of Mr. Warren's neglect of duty and incompetence in his public statement pledging not to prosecute offenses related to "gender-affirming" care or sex-segregated facilities like public bathrooms. App. 7. Like with Mr. Warren's comments on

abortion, that statement made abundantly clear that Mr. Warren would not authorize his office to charge violations of any such criminal laws the Legislature might adopt in the future, as those laws would not, by his estimation, "promote public safety, community trust, or fiscal responsibility," and would "serve no legitimate purpose." *Id.* As a result, Mr. Warren "pledge[d] to use [his] discretion" to not "promote the criminalization of gender-affirming healthcare or transgender people." *Id.*

Mr. Warren says that the transgender statement "nowhere asserted that [he] categorically planned not to enforce any specific law." Pet. 40–41 (emphasis omitted). But the import was clear: Mr. Warren would not enforce laws with which he disagreed. Even if he had not yet neglected his duty to enforce such a law, the statement reflected his failure to appreciate that a "blanket refusal" to enforce a criminal law "in any eligible case . . . embodies, at best, a misunderstanding of Florida law." *Ayala*, 224 So. 3d at 759. That is "incompetence," Art. IV, § 7(a), Fla. Const., which "'may arise from gross ignorance of official duties.'" *Israel*, 269 So. 3d at 496 (quoting *Coleman*, 155 So. at

126). At the very least, the statement confirms the Governor's interpretation of the other policies described in the order: on the whole, they bespeak a "blatant defiance of the Florida Legislature." App. 12.

All in all, the Governor alleged facts easily bearing a "reasonable relation to the charge" of neglect of duty and incompetence. *Israel*, 269 So. 3d at 497. That forecloses a writ of quo warranto.

C. Mr. Warren's collateral-estoppel theory is baseless.

Mr. Warren does not stop at asking this Court to second-guess the Governor's judgment and usurp the role of the Senate in adjudicating suspensions. He also proposes that the Court give preclusive force to a *federal district court's* findings made in his failed First Amendment retaliation lawsuit. He stresses that the federal district court concluded that Mr. Warren did not have "blanket policies not to prosecute certain kinds of cases" and that the Governor's claim to the contrary "was false." Pet. 24 (quoting App. 34, 91). Those findings grounded the district court's (jurisdiction-less) conclusion that the suspension violated Florida law. *See* App. 48, 92. Mr. Warren's preclusion argument fails, even apart from being inconsistent with the deference owed to the Governor's suspension order.

The preclusive effect of a federal judgment in a federal-question

case, which the district-court case was, is determined by uniform rules of federal common law. *See Taylor v. Sturgell*, 553 U.S. 880, 891 (2008). As under Florida law, collateral estoppel—or "issue preclusion"—applies under federal law when (1) "the issue at stake is identical to the one involved in the prior litigation"; (2) "was actually litigated in the prior suit"; (3) "was a critical and necessary part of the judgment in that action"; and (4) "the party against whom the earlier decision is asserted had a full and fair opportunity to litigate the issue in the earlier proceeding." *Miller's Ale House, Inc. v. Boynton Carolina Ale House, LLC*, 702 F.3d 1312, 1318 (11th Cir. 2012).

Here, however, none of those elements are present. The issue at stake, and what was actually litigated in the federal suit, was not whether Mr. Warren "had blanket policies," Pet. 24, or whether his policies were a valid basis for suspension under Florida law. The issue was whether the Governor suspended Mr. Warren in violation of the First Amendment. *See* App. 68–92; *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 284–87 (1977). While Mr. Warren did include a state-law quo warranto claim in his federal complaint, that claim was dismissed on the pleadings, Gov.'s App.

75–77 (citing *Pennhurst*, 465 U.S. at 121), 98, and so was neither at issue nor actually litigated on the merits. App. 38. Because "the legal standards in the two courts differ[]," issue preclusion does not apply. *Smith v. Bayer Corp.*, 564 U.S. 299, 309 (2011). And to the extent Mr. Warren tried to make his federal suit about Florida law, rather than the Governor's motives, the Governor can hardly be said to have had an adequate opportunity to litigate that point because the district court dismissed the Florida-law claim at the threshold, well before the parties conducted discovery and tried the case.

Mr. Warren also falters at the third prong, because the findings on which he relies were not an essential part of the district-court judgment. "A determination ranks as necessary or essential only when the final outcome hinges on it." *Bobby v. Bies*, 556 U.S. 825, 835 (2009).

Here, the outcome—victory for the Governor on the merits of the First Amendment retaliation claim—turned on his satisfying the "same decision" defense under *Mt. Healthy*, which the district court characterized as the "controlling question." App. 84; *see* App. 75–91.

Under that test, a defendant can defeat a First Amendment retaliation claim by showing that he would have taken the same adverse action even without considering the protected speech that assertedly motivated the adverse action. *Mt. Healthy*, 429 U.S. at 285–87. And on that issue, Mr. Warren flat out lost: "The unprotected factors that motivated the suspension were Mr. Warren's actual *performance*—not advocacy—as a reform prosecutor, the one sentence in the abortion statement [pledging not to prosecute abortion offenses], the bike and low-level-offense policies, and the anticipated political benefit," and, critically, "*the Governor would have suspended Mr. Warren based on these factors alone*." App. 86 (second emphasis added).

In contending that the district court's decision entitles him to relief, Pet. 26–34, Mr. Warren does not cite that finding. He instead trumpets the district court's conclusion that he had no "blanket policies," Pet. 24, which in turn buttressed that court's extraneous view that the suspension violated Florida law. *See* App. 48. But that and related findings were not essential to the outcome, which the district court could have reached based on the same-decision defense all the same. *See Smithey v. McDuffie*, No. 408CV207, 2010 WL 11607304,

at *6 (S.D. Ga. Jan. 20, 2010) (explaining that the court "need not make a firm determination on the causation issue because" defendant proved "he would have made the same decision"). Mr. Warren's contrary argument "conflates a determination necessary to the bottom-line judgment with a subsidiary finding that, standing alone, is not outcome determinative." *Bies*, 556 U.S. at 835.

The findings that the district court did make on the same-decision defense hardly aid Mr. Warren's argument that the Governor's order was "based entirely on assertions that have conclusively been adjudged to be false." Pet. 27. Those findings in fact confirm that, as the suspension order states, Mr. Warren was suspended because of his conduct as a prosecutor, including the pedestrian/bicyclist policy, the low-level offense policy, and the statement pledging not to prosecute abortion crimes. *See* App. 86, 90–91. The district court disagreed about whether those policies were "blanket" ones that justified the suspension under Florida law. But that conclusion is not binding on this Court.

Under similar circumstances, the Eleventh Circuit has found collateral estoppel inapplicable. *See A.J. Taft Coal Co. v. Connors*, 829

F.2d 1577 (11th Cir. 1987). In *Taft*, a coal company sued an employee investment fund, seeking a declaration that the company owed fewer contributions to the fund than the fund demanded. *Id.* at 1578. The coal company moved for summary judgment and asserted that the fund was collaterally estopped from arguing that the company could not claim a certain type of "deduction" that would have lowered the company's required contributions. *Id.* at 1578–79. It based its collateral-estoppel claim on an earlier lawsuit—brought by the fund against another coal company—in which the court had found that (1) the company could claim the deduction but (2) the fund was nevertheless entitled to partial judgment in its favor because the company failed to prove the full amount of the deduction. *Id.* at 1579.

The Eleventh Circuit held that the fund was not collaterally estopped by the first finding in the earlier suit. *Id.* at 1580–81. Rather, because the fund had won on the ultimate question of liability—and "prevailed on [its] primary challenge" that the coal company had "failed to prove the moisture deduction" amount—the question of whether the deduction was proper at all "was not . . . necessary to the holding" in the earlier suit. *Id.*; *see also* 18 Charles Alan Wright,

Arthur R. Miller, & Edward H. Cooper, Federal Practice and Procedure § 4421, Westlaw (3d ed. database updated April 2022) ("Application of the necessity principle is most clearly illustrated by findings that are contrary to the judgment in the sense that, standing alone, they would conduce to an opposite judgment.").

So too here. Like the coal company in *Taft*, Mr. Warren convinced the district court to make findings on various questions but lost on what the federal court acknowledged was the "*controlling question*": the same-decision defense. Put differently, "in order to resolve the issue before it, the [district court] need only have found that [the Governor would have reached the same decision based on unprotected factors]." *See Pantex Towing Corp. v. Glidewell*, 763 F.2d 1241, 1246 (11th Cir. 1985). Everything else was dicta. *See Bath Iron Works Corp. v. Coulombe*, 888 F.2d 179, 180 (1st Cir. 1989) (explaining that dicta "cannot have any collateral estoppel effect because it is not essential to the judgment").

In sum, the findings Mr. Warren cites are not preclusive and do not justify intruding on the Senate's role.[4]

[4] If the Court were inclined to deem any of these findings preclusive, it should at least postpone adjudicating this case until the

IV. The Court should deny the mandamus petition.

Mr. Warren asks in the alternative for the same relief through a writ of mandamus. Pet. 32–34. As he sees it, the Governor has a "duty . . . to reinstate" him because—as purportedly found by the federal court—the Governor "erroneously suspended" Mr. Warren based on a "misapprehension" of the facts. Pet. 32. This Court should deny that request. Mandamus is an improper remedy for resolving disputed claims to the title of a public office and the scope of the Governor's authority; and even if it were not, it is unavailable here because the Governor has no "clear legal duty" to reinstate Mr. Warren. *See Pleus v. Crist*, 14 So. 3d 941, 945 (Fla. 2009) ("To be entitled to man-

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Eleventh Circuit rules on Mr. Warren's pending appeal. *See* Wright & Miller, *supra*, § 4433 (recommending postponing adjudication where a court is inclined to grant preclusive effect to a judgment pending appeal); *id.* § 4421 (noting that once an appellate court reviews a district court opinion, only those grounds affirmed on have preclusive effect). Although the Governor prevailed, Mr. Warren has chosen to appeal, and the Governor intends to urge affirmance of the district court's judgment on the alternative grounds that the district court erred in making any findings whatsoever into the Governor's motives. For example, it is the Governor's view that the case should have been dismissed because Mr. Warren's statements were government speech that the Governor had every right to account for in disciplining Mr. Warren. *See, e.g.*, *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

damus relief, 'the petitioner must have a clear legal right to the requested relief, the respondent must have an indisputable legal duty to perform the requested action, and the petitioner must have no other adequate remedy available.'").

This Court has repeatedly emphasized that quo warranto is the "exclusive method of determining the right to hold and exercise a public office." *McSween v. State Live Stock Sanitary Bd. of Fla.*, 122 So. 239, 244 (Fla. 1929). It has also held that the writ may be used to challenge the power of the Governor. *Whiley v. Scott*, 79 So. 3d 702, 707 (Fla. 2011). Because quo warranto proceedings are the "only proper remedy in cases in which they are available," *McSween*, 122 So. at 244, a party may not circumvent the standard applicable to quo warranto by recharacterizing the claim as one seeking mandamus. *See Winter v. Mack*, 194 So. 225, 228 (Fla. 1940) ("This Court held that quo warranto and not mandamus was the proper remedy to settle the title to said office[.]"); *City of Sanford v. State*, 75 So. 619, 620 (Fla. 1917) ("[T]he court below erred in adjudicating the title to the office and the right to the possession thereof as between these conflicting claimants thereto in this proceeding by mandamus, as

quo warranto was the only proper and specific remedy to test the title and right of possession to such office as between the two rival claimants thereto."); Fla. Jur. 2d Quo Warranto § 11. Any other writ—including mandamus—is thus precluded. *See McSween*, 122 So. at 244; *see also Pleus*, 14 So. 3d at 945 (mandamus is precluded where another adequate remedy exists).

What is more, to be entitled to mandamus, Mr. Warren must show that the Governor has "an indisputable legal duty to perform the requested action"—here, reinstatement. *Huffman v. State*, 813 So. 2d 10, 11 (Fla. 2000). But Mr. Warren's claim rests on disputed facts, and he cannot rely on the doctrine of collateral estoppel. *Supra* 43–50.

Mr. Warren has also failed to identify a clear textual basis or any case showing that the Governor must reinstate a suspended official under any circumstances. Most of the precedents he cites did not involve the Governor's suspension power at all. *See State* ex rel. *Hawkins v. McCall*, 29 So. 2d 739 (Fla. 1947) (suspension by City Commission); *City of Daytona Beach v. Layne*, 91 So. 2d 814 (Fla. 1957) (City of Daytona Beach). The one that did, in dicta, mentioned

that the Governor may have a "duty" to reinstate "when, under a misapprehension, he may have erroneously suspended an officer." *Johnson*, 11 So. at 852. The same case, however, also made clear that any such "duty" would be nonjusticable: "the courts may not inquire into the factual basis for reinstatement, any more than they may inquiry as to the sufficiency of the evidence for suspension." *State* ex rel. *Kelly v. Sullivan*, 52 So. 2d 422, 425 (Fla. 1951) (citing *Johnson*).

In any event, the Suspension Clause plainly creates no such duty: it says that the Governor "*may*," not shall, "reinstate[]" the suspended official. Art. IV, § 7(a), Fla. Const.; *compare Edwards v. State*, 987 So. 2d 1209 (Fla. 2008) (Table) ("mandamus 'is [not] proper to mandate the doing (or undoing) of a discretionary act'"), *with Pleus*, 14 So. 3d at 945 (finding mandamus appropriate in the context of another provision that contained the word "shall").

CONCLUSION

This Court should deny or dismiss the petition.

Dated: April 3, 2023

Respectfully submitted,

RYAN NEWMAN (FBN1031451)
General Counsel
RAY TREADWELL (FBN93834)
Chief Deputy General Counsel
Executive Office of the Governor
400 S Monroe Street
Tallahassee, FL 32399-6536

GEORGE T. LEVESQUE
JEFF AARON
GrayRobinson, P.A.
301 S Bronough Street, Suite 600
Tallahassee, Florida 32302
(850) 577-9090
george.levesque@gray-robinson.com

ASHLEY MOODY
Attorney General

/s/ Henry C. Whitaker
HENRY C. WHITAKER (FBN1031175)
Solicitor General
JEFFREY PAUL DESOUSA (FBN110951)
DANIEL WILLIAM BELL (FBN1008587)
Chief Deputy Solicitor General
DAVID M. COSTELLO (FBN1004952)
Deputy Solicitor General
ROBERT SCOTT SCHENCK
Solicitor General Fellow
Office of the Attorney General
The Capitol, PL-01
Tallahassee, Florida 32399
(850) 414-3300
henry.whitaker@myfloridalegal.com

Counsel for Governor Ron DeSantis

CERTIFICATE OF COMPLIANCE

I certify that this brief was prepared in 14-point Bookman font, in compliance with Florida Rule of Appellate Procedure 9.210(a)(2) and contains 10,414 words.

/s/ Henry C. Whitaker
Solicitor General

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was furnished via the e-Filing Portal on this **third** day of April 2023, to the following:

OLDER LUNDY KOCH & MARTINO
David B. Singer (FBN 72823)
Matthew T. Newton (FBN 111679)
100 W. Cass Street
Tampa, FL 33606
dsinger@olderlundylaw.com
mnewton@olderlundylaw.com
813.254.8998

PERKINS COIE LLP
Jean-Jacques Cabou (AZ #022835)
Alexis E. Danneman (AZ #030478)
Margo R. Casselman (AZ #034963)
2901 N. Central Avenue, Suite 2000
Phoenix, Arizona 85012-2788
JCabou@perkinscoie.com
ADanneman@perkinscoie.com
MCasselman@perkinscoie.com
602.351.8000

DEBEVOISE & PLIMPTON LLP
David O'Neil (DC #1030615)
801 Pennsylvania Ave NW
Suite 500
Washington, D.C. 20004
daoneil@debevoise.com
202.383.8000

/s/ Henry C. Whitaker
Solicitor General