IN THE SUPREME COURT OF THE STATE OF FLORIDA

ANDREW H. WARREN,

Petitioner,

v.

RON DESANTIS, as Governor of the State of Florida,

Respondent.

Case No. SC23-247

REPLY IN SUPPORT OF PETITION FOR WRITS OF QUO WARRANTO AND MANDAMUS

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INTRODUCTION

Mr. Warren's Petition established both that this Court should exercise jurisdiction over it and that he is entitled to the writs he seeks. Governor DeSantis violated the Florida Constitution once by issuing the Executive Order ("EO") and again by failing to reinstate Mr. Warren after a trial proved that the Governor's proffered justifications for suspending Mr. Warren were false. Neither the substantive nor the avoidance arguments set forth in the Response alter this conclusion.

First, the Petition showed that even ignoring the District Court proceedings entirely, Mr. Warren is entitled to relief because the EO suspending him fails to state any constitutionally proper grounds for suspension. The EO is clear that the Governor suspended Mr. Warren for four writings: two office policies and two Joint Statements. These writings are the *only* cited reasons for the suspension. And simply reading those documents confirms that none of them amount to "neglect of duty" or "incompetence."

Faced with the clear text of the EO and its failure to satisfy the standards of the Constitution, the Response claims, among other things, that Mr. Warren "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." [Resp. at 27] Not so. The Petition argued (at 5) that "none of the factual allegations reasonably relate to any" proper ground for suspension. The Petition demonstrated as much, canvassing this Court's precedents and other authorities to show how "none of the [EO]'s allegations relate to, or fall within, the well-defined boundaries of 'incompetence' or 'neglect of duty.'" [Pet. at 38]

The Response's newly invented claim (at 40) that "the Governor's suspension authority permits him to suspend a state attorney for exercising individualized discretion in what he views as an improper way" fares no better. The Governor cannot defend his illegal suspension by claiming that grounds not stated in the EO would justify it. Furthermore, even the EO concedes that "state attorneys have complete discretion in making the decision to prosecute a particular defendant." [APP6] State Attorneys do not answer to the Governor, nor can he substitute his discretion for theirs. *See Valdes v. State*, 728 So.2d 736, 738-39 (Fla. 1999).

Second, the Petition demonstrated that under the singular circumstances of this case—where a trial on the merits has

conclusively established numerous facts binding on the parties—the Governor cannot deny, and this Court must apply, those facts under the doctrine of collateral estoppel. The parties come before this Court having vigorously litigated "why the Governor did it—why he suspended Mr. Warren." [APP39] And answering that question, the U.S. District Court found six reasons for which the Governor suspended Mr. Warren. Those findings, and any other factual findings necessary to the outcome in that court cannot be contested anew by the Governor.

Accounting for those findings, it is clear not only that the writ of quo warranto should issue, but also that the Governor, after the factual findings of the District Court, had, and failed to discharge, a duty to reinstate Mr. Warren. Thus, Mr. Warren is entitled to a writ of mandamus.

Of course, before even getting to any of this substance, the Governor makes two avoidance arguments, neither of which have merit. The Governor tries to convince this Court that the Petition "is untimely," even though it was filed less than thirty days after judgment in the District Court. But the Governor does not identify any deadline that the Petition missed, as no such deadline exists.

Then the Response tries and fails in an even more audacious avoidance gambit: arguing that gubernatorial suspensions are non-justiciable political questions. They are not. Over 100 years of this Court's precedent show that the Court should consider the Petition on its merits.

This Court has previously held that where, as here, "the truth is discovered, the pattern for dispensing justice is obvious." *Ex parte Welles*, 53 So.2d 708, 711 (Fla. 1951). The EO does not identify anything that Mr. Warren did that satisfies the Constitution's standards for suspension from office. As explained by the District Court, Mr. Warren has always "diligently and competently perform[ed] the job he was elected to perform, very much in the way he told voters he would perform it." [APP48] And now in the words of this Court the "pattern for dispensing justice is obvious:" the Petition should be granted and Mr. Warren reinstated.

I. Even Ignoring the District Court Proceedings Entirely, Mr. Warren Is Entitled to a Writ of Quo Warranto.

"[I]t is the exclusive province of the judiciary to interpret terms in a constitution and to define those terms." *In re Senate Joint Resol.*, 83 So.3d 597, 631 (Fla. 2012). In this case, the terms at issue are

"neglect of duty" and "incompetence." Art. IV, § 7(a), Fla. Const.; *see, e.g. also State ex rel. Hardie v. Coleman*, 155 So.129, 133 (Fla. 1934); *Israel v. DeSantis*, 269 So.3d 491, 494 (Fla. 2019). And the familiar task at hand is to "determin[e] whether the executive order, on its face, sets forth allegations of fact relating to one of th[ose] constitutionally enumerated grounds of suspension." *Israel*, 269 So.3d at 495.

As set forth in the Petition, the EO fails to meet the standards required by the Constitution. First, nothing in the EO satisfies the definition of "incompetency," which is "any physical, moral, or intellectual quality, the lack of which incapacitates one to perform the duties of his office." *Id.* at 496 (citation omitted). Even the EO does not allege that Mr. Warren was ever incapacitated in performing the duties of his office. Second, nothing in the EO meets the definition of "neglect of duty." No clause in the EO shows that Mr. Warren has refused or failed to "perform some duty or duties laid on him as such by virtue of his office or which is required of him by law." *Id.* (citation omitted).

Not one of the four writings on which the Governor based the EO satisfies any constitutional ground for suspension. Most

obviously, both policies of Mr. Warren's office require that each case be judged individually, on its own facts. Under the Bike Stop Policy, prosecutors may file charges when, "based on the facts and circumstances of the case, the public safety needs of the community outweigh the presumption to not file the case." [APP106] Similarly, the Low-Level Offense Policy orders a case-specific evaluation, while also noting a non-prosecution "presumption [that] may be overcome by significant public safety concerns, such as pending felony charges," among several other circumstances. [APP102; *see also* APP45 (holding that the Bike Stop Policy, "[b]y its plain terms, … was not a blanket nonprosecution policy") & APP48 (holding that the Low-Level Offense Policy was "not a blanket nonprosecution policy")]

Faced with the clear discretionary text of the policies, the Response pushes a novel idea that "the Governor's suspension authority permits him to suspend a state attorney for exercising individualized discretion in what he views as an improper way." [Resp. at 40] That is not the law. It also is not the reason the Governor claims to have suspended Mr. Warren; that argument is nowhere in the EO, as it would have to be to justify the suspension. Art. IV, § 7(a), Fla. Const.

Even the EO itself concedes "state attorneys have complete discretion in making the decision to prosecute a particular defendant." [APP6]; *see also Valdes*, 728 So.2d at 738-39; R. Regulating Fla. Bar R. 4-3.8, cmt.

The Governor also insists that he was allowed to suspend Mr. Warren for affixing his name to two Joint Statements written by an advocacy group. One of these statements, the Gender Statement, criticizes the *proposed* criminalization of what the Response calls "*offenses related to gender identity*." [Resp. at 41] And to defend Mr. Warren's suspension based on the Gender Statement, the Governor insists that "[e]ven if he had not yet neglected his duty to enforce such a law [because no such law exists], the [gender] statement reflected his failure to appreciate that a 'blanket refusal' to enforce a criminal law … is 'incompetence.'" [*Id.* at 42 (citation omitted)]

But this Court has previously defined *incompetence*. And an alleged "blanket refusal" to enforce a nonexistent law is no part of that definition. As discussed in the Petition, unless a law exists, Mr. Warren cannot have "neglected any duty" (at 41-43) as he has not failed to "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 *Hardie*, 155 So. at 132).

The Response equally fails to justify suspension based on the Abortion Statement. Sure, the Response claims that "[t]he failure to exercise case-by-case prosecutorial discretion is both 'neglect of duty' and 'incompetence.'" [Resp. at 34] But here again, the EO identifies no instance, and indeed none exists, in which Mr. Warren either suffered from an incapacity or failed to do *exactly* what the Florida Constitution and the rules of ethics require of him: exercise his case-by-case judgment.

II. The District Court Necessarily Found That the Governor's Claimed Reasons for Suspending Mr. Warren Were False, and Issue Preclusion Requires that Those Proven Facts be Applied, Not Ignored.

"In Florida, the doctrine of collateral estoppel bars relitigation of the same issues between the same parties in connection with a different cause of action." *Topps v. State*, 865 So.2d 1253, 1255 (Fla. 2004). The parties do not dispute that collateral estoppel applies "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." [Resp. at 44 (cleaned up)] Each of these factors is satisfied here, and the Response contends otherwise based only on a mistaken claim that the only issue decided by the District Court in a multi-day trial "was whether the Governor suspended Mr. Warren in violation of the First Amendment." [*Id.*]

A. The District Court's Judgment Depended on Its Determination of the Six Reasons for the Suspension.

The U.S. Supreme Court has long recognized that "the determination of a question directly involved in one action is conclusive as to that question in a second suit." *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 147 (2015) (citation omitted). As to any issue or question meeting the four-part test, the District Court's determination "is conclusive in [this] subsequent action." *Id.* at 148 (citation omitted). Here, neither the parties nor this Court need guess about what the District Court did and didn't determine, because "[i]n cases tried to a judge, express findings of fact and conclusions of law often show clearly what has been—and what has not been—decided." 18 Fed. Prac. & Proc. Juris. § 4420 (3d ed.); *see*

also Zeidwig v. Ward, 548 So.2d 209, 211 (Fla. 1989) (approving use of collateral estoppel in Florida state court case based on prior litigation of same facts and issues in *federal* court when *federal* judge had made "detailed findings of fact and law").

Judge Hinkle himself explained that "[t]he overriding factual issue [in the trial was] why the Governor did it—why he suspended Mr. Warren." [APP39] And to resolve that "overriding" issue, the District Court first had to find that "Mr. Warren was suspended from office for six reasons." [Pet. at 24] Only then, after finding the reasons for Mr. Warren's suspension, could the District Court reach its conclusions by "sorting protected from unprotected factors" to determine if Mr. Warren was entitled to relief under the First Amendment. [APP76 (capitalization omitted)] As more fully demonstrated in the Petition, because the final outcome of the case "hinge[d] on [finding the reasons and then sorting them]," *Bobby v. Bies*, 556 U.S. 825, 835 (2009), those determinations were essential to the judgment, and the Governor is precluded from challenging them here.

The Response remarkably claims that "none" of the elements in the four-part test for issue preclusion is satisfied here because of the

counterfactual view, quoted above, that only one issue was decided in the District Court case. While surely Mr. Warren's federal cause of action was for violation of the First Amendment, the questions and issues decided by the District Court as part of its evaluation of that cause of action were many, including the six reasons for Mr. Warren's suspension.[1] Again, it is not just the outcome of a prior trial that is preclusive on the parties to a subsequent litigation; rather any "determination of a question directly involved in one action is conclusive as to that question in a second suit." *B&B Hardware*, 575 U.S. at 147 (citation omitted).

Even *A.J. Taft Coal Co. v. Connors*, 829 F. 2d 1577, 1581 (11th Cir. 1987), on which the Response relies heavily, is not to the contrary. True, there the Circuit Court declined to apply preclusion in a subsequent litigation involving one of two parties to a prior litigation. But there, unlike here, the issue for which preclusion was sought was labeled by the district court as an "alternative ground" for the outcome, a ground that thus was not fully litigated or

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[1] The Governor at times argues that this Court is not bound by Judge Hinkle's determination that the suspension violated the Florida Constitution. [*E.g.*, Resp. at 2-3, 47] Mr. Warren never claimed as much.

"necessarily determined." *A.J. Taft*, 829 F. 2d at 1581 (citation omitted). Unlike the *A.J. Taft* case, here there was no "alternative ground" for the decision stated in Judge Hinkle's order. Judge Hinkle's conclusion depended on his having previously and necessarily determined the six motivating factors for Mr. Warren's suspension and the facts surrounding them, including the non-existence of any "blanket policies."

B. Because All of the Reasons for the Suspension Proffered in the EO Have Been Adjudged False, this Court Should Grant the Writ of Quo Warranto.

In 1934, this Court held 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." *Hardie*, 155 So. at 133. The Petition (at 26-30) demonstrated in detail why the EO is arbitrary. It "involv[es] a determination made without consideration of or regard for facts" or is "founded on prejudice or preference rather than on reason or fact." *Arbitrary*, Black's Law Dictionary (11th ed. 2019); *see also Dravo Basic Materials Co. v. State, Dep't of Transp.*, 602 So.2d 632, 634 (Fla. 2d DCA 1992). Specifically, the Petition showed that the EO is arbitrary and thus

unconstitutional because the Governor's story—that he suspended Mr. Warren because Mr. Warren had four "blanket policies" of non-prosecution—was a lie.

A trial proved that "Mr. Warren's well-established policy, followed in every case by every prosecutor in the office, was to exercise prosecutorial discretion at every stage of every case." [APP34] "[Mr. Warren] never said he would not prosecute a case that absolutely deserved to be prosecuted. Quite the contrary. He said repeatedly that discretion would be exercised at every stage of every case." [APP37] And "[h]e had no blanket nonprosecution policies." [APP48]

To review: (1) nearly 100 years ago, this Court held that an arbitrary order of suspension is unconstitutional (*Hardie*, 155 So. at 133); (2) even the Governor (at 30) agrees that a decision is arbitrary where it is "not supported by facts or logic, or despotic"; and (3) the District Court found that the Governor's claim that Mr. Warren had "blanket policies" of non-prosecution is "false" (APP34)—in other words—"not supported by facts," *Bd. of Trs. of Internal Improvement Tr. Fund v. Levy*, 656 So.2d 1359, 1362 (Fla. 1st DCA 1995). The EO is arbitrary and Mr. Warren is thus entitled to a writ of Quo Warranto.

Fighting this conclusion, the Response claims that in urging this Court to apply issue preclusion and, based upon it, to issue the writ, "Mr. Warren would have the Court do something brand new." [Resp. at 29] But Mr. Warren asks only that this Court follow the rule confirmed nearly a century ago in *Hardie* and apply the principles of issue preclusion established even longer ago.

Nor does Mr. Warren's Petition "improperly invite[] this Court to usurp the constitutional role of the Senate." [*Id.* at 30] As explained in the Petition (at 31), Mr. Warren asks only that this Court "review … an executive order of suspension to ensure that the order satisfies the constitutional requirement." *Israel*, 269 So.3d at 495. Nowhere does he ask, nor is it necessary, for this Court to perform the Senate's task of weighing evidence. Indeed, there are no facts to be weighed. This Court must only apply binding facts to binding law; doing so confirms that the writ of quo warranto should issue.

C. Because the Reasons for the Suspension Have Been Proven False, Mandamus Lies.

The Petition (at 32-33) explained that this Court, again long ago and again in the specific context of a governor's suspension power, made clear that it is "the duty of the governor, on suspending an

officer … to reinstate when, under a misapprehension, he may have erroneously suspended an officer." *State ex rel. Lamar v. Johnson*, 11 So. 845, 852 (Fla. 1892). This Court's words in 1892 were unequivocal—a Florida governor has a duty to reinstate an official he has, "under a misapprehension," suspended. And this Court's precedents since then confirm that mandamus is available to compel reinstatement to a position from which a public-officer petitioner has been ousted in violation of a legal duty. *E.g.*, *State ex rel. Hawkins v. McCall*, 29 So.2d 739, 743 (Fla. 1947); *City of Daytona Beach v. Layne*, 91 So.2d 814, 815 (Fla. 1957).

In resisting the long-standing rule that the Governor is required to reinstate an officer he has wrongfully suspended, the Response (at 50) first claims that the District Court only "purportedly" found certain facts. As explained above, there is nothing "purported" about the District Court's factual findings. No matter how many pejorative adjectives the Governor uses to describe them, the District Court's factual findings were detailed and considered, and they are preclusive as described above.

Nor does Mr. Warren's mandamus claim rest any longer on "disputed facts." Or, more precisely, while the Governor has, and

presumably will, continue to dispute the facts of Mr. Warren's suspension in the media and on the campaign trail, he is legally barred from continuing to dispute them in any judicial forum, including in this Court.

The Governor claims (at 6) he suspended Mr. Warren because he believed "that Andrew Warren did not intend to exercise individualized prosecutorial discretion with respect to four broad categories of crimes." That belief as to Mr. Warren is a "misapprehension." *Johnson*, 11 So. at 852. As found by the District Court, "[a]fter a full and fair trial, the evidence establishes without genuine dispute that Mr. Warren had no blanket nonprosecution policies." [APP85-86]

The Governor was obligated to reinstate Mr. Warren, and this Court should issue a writ of mandamus to compel him to perform this clear duty he refuses to carry out.[2]

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[2] The Response also goes awry in insisting (at 51 (citation omitted)) that Mr. Warren is seeking mandamus "to settle the title" to the office of the State Attorney for the 13th Judicial Circuit. Mr. Warren seeks mandamus to compel the Governor to reinstate him, pursuant to the duty this Court made clear in 1892 in *Johnson*. 11 So. at 852; *State ex rel. Hatton v. Joughin*, 138 So. 392, 395 (Fla. 1931) ("[W]hen the title to office is involved, quo warranto is the usual

III. None of the Governor's Attempts to Avoid this Court's Scrutiny Have Merit.

Before even engaging the substance of the Petition, the Response begins with one reason and then another to avoid this Court reaching its merits. Neither reason bears scrutiny.

A. It Has Always Been the Job of the Courts to Determine whether the Governor Has Invoked his Suspension Power Lawfully.

"The fact that interpreting the law is a uniquely judicial function has been firmly established since at least 1803 when Chief Justice Marshall explained: 'It is emphatically the province and duty of the judicial department to say what the law is.'" *Costarell v. Fla. Unemployment Appeals Comm'n*, 916 So.2d 778, 782 n.2 (Fla. 2005) (citation omitted). And "[i]t is this Court's duty, given to it by the citizens of Florida, to enforce adherence to the constitutional requirements." *In re Senate Joint Resol.*, 83 So.3d at 607.

In the specific context of gubernatorial suspensions, this Court has often discharged this duty and should not stop now. *E.g.*, *Hardie*, 155 So. at 133 ("[T]he jurisdictional facts, in other words, the matters

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method of attack, though a like result may be reached in some cases by mandamus.").

and things on which the executive grounds his cause of removal, may be inquired into by the courts."). Most recently, of course, this Court reviewed another suspension by this Governor of another elected official and confirmed that "quo warranto is used to determine whether a state officer or agency has improperly exercised a power or right derived from the State." *Israel*, 269 So.3d at 494 (cleaned up).[3]

The Response's arguments to the contrary reduce to the fallacy that because the Senate has a role to play in *removing* an officer, the courts have no role in judging whether the Governor has illegally *suspended* that officer to begin with.[4] The Response argues, for example, that "had the people wanted a *removal* to take place only upon ascertainment by a court, the Florida Constitution would say

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[3] The Response itself concedes that "[t]his Court has recognized a 'limited role' for the courts in the suspension-and-removal process." [Resp. at 5 (quoting *Israel*, 269 So.3d at 495)] The Response nowhere explains how its insistence that suspension is suddenly nonjusticiable can be reconciled with *Israel* and other precedents.

[4] The analogies to impeachments and decisions of legislative qualifications to hold office, both *wholly* legislative processes made such by the Constitution's text, also fail for this reason. Mr. Warren here challenges the propriety of the *Governor's* action—the necessary predicate for the Senate to assume its limited role as a "court." Nowhere, for example, does the text of the Constitution say that the Governor is the judge of the propriety of his own executive actions.

so." [Resp. at 25 (cleaned up)] Removal is not at issue here. That is for the Senate to decide, but only after this Court first does what even *the Senate's own rules* contemplate it doing: determine whether the suspension power has been lawfully invoked in the first place. *E.g.*, *Hardie*, 155 So. at 134; *see also* Fla. Senate R. 12.

B. Mr. Warren Has Diligently Pursued his Claims.

Mr. Warren filed for relief in this Court promptly following judgment in the District Court. The Governor's suggestion that this Court should refuse to consider the Petition because Mr. Warren first joined and then litigated his quo warranto claim with his federal claim in an action that went from complaint to trial in less than four months, is without merit.

As the Governor acknowledges, no rule sets a time limit within which Mr. Warren was required to file his Petition. But even if the strict rules applicable to other appellate court proceedings like certiorari (petition filed within 30 days from the date of the decision to be reviewed under Fla. R. App. P. 9.100(c)(1)), or interlocutory appeal (briefing filed within 45 days under Fla. R. App. P. 9.130(b), (e)), Mr. Warren would *still* be timely here, coming less than 30 days after the judgment of the District Court.

IV. Conclusion

For the reasons set forth above and in the Petition, the Petition should be granted.

Dated: May 3, 2023

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Petition complies with the font requirements of Rule 9.045(b) of the Florida Rules of Appellate Procedure and the word count limit requirements of Rule 9.100(k) of the Florida Rules of Appellate Procedure.

By: */s/ Jean-Jacques Cabou*
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CERTIFICATE OF SERVICE

I hereby certify that on May 3, 2023, a copy of the foregoing was furnished via the e-Filing portal to Respondent's counsel listed below:

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