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.

PETITION FOR WRITS OF QUO WARRANTO AND MANDAMUS

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Page

TABLE OF CITATIONS

Page(s)

CASES

TABLE OF CITATIONS

Page(s)

TABLE OF CITATIONS

Page(s)

TABLE OF CITATIONS

Page(s)

STATUTES & RULES

TABLE OF CITATIONS

Page(s)

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

Petitioner Andrew H. Warren, the elected State Attorney for the Thirteenth Judicial Circuit of the State of Florida, petitions this Court for a writ of quo warranto and a writ of mandamus directed to Respondent Governor Ron DeSantis. In support of his Petition, Mr. Warren states as follows:

NATURE OF THE CASE

On August 4, 2022, the Governor broke the laws of Florida and of the United States when he issued an Executive Order suspending Mr. Warren from his duly elected office. [*See* Appendix to Petition for Writs of Quo Warranto and Mandamus, filed herewith ("APP") 5-33 (State of Florida, Office of the Governor, *Executive Order Number 22-176 (Executive Order of Suspension)* (Aug. 4, 2022) (the "Executive Order" or "EO"))]

The Executive Order does not identify any lawful or legitimate basis for suspending Mr. Warren under article IV, section 7(a) of the Florida Constitution; no such basis exists.

In fact, a federal court has already held that the Executive Order is unconstitutional. In a 59-page order following discovery and trial, the U.S. District Court for the Northern District of Florida held that the Governor's suspension of Mr. Warren "violated the Florida

Constitution" and "was based in part on a violation of the First Amendment to the United States Constitution." [*See* APP34-92 (Order on the Merits, at APP34–35, *Warren v. DeSantis*, No. 4:22cv302-RH-MAF (N.D. Fla. Jan. 20, 2023), ECF No. 150 (hereafter, "Order on the Merits")][1]

The federal court further held that any "assertion that Mr. Warren neglected his duty or was incompetent is incorrect." [*Id.* at APP48] Ultimately, that court declined to grant relief to Mr. Warren for the Governor's violations of the Florida Constitution on the ground that the Eleventh Amendment barred a federal court in these circumstances from awarding injunctive relief. [*Id.* at APP35] But the Court suggested that, in light of its holding that the Executive Order was wrong and illegal, the Governor ought to voluntarily "set it right" by "simply rescind[ing] the suspension." [*Id.* at APP85-86] Despite Mr. Warren's request, the Governor refused to reinstate him.

Mr. Warren thus brings this Petition because this Court has authority to remedy the Governor's violations of the Florida

[1] This Court may take judicial notice of the "[r]ecords of . . . any court of record of the United States or any state, territory, or jurisdiction of the United States." § 90.202(6), Fla. Stat.

Constitution. *See* Art. V, §§ 3(b)(8) & 15, Fla. Const.; Fla. R. App. P. 9.030(a)(3).

BASIS FOR INVOKING JURISDICTION

Mr. Warren is a duly elected constitutional officer of the State of Florida who, through this Petition, seeks relief against the Governor, a fellow constitutional officer. This Court has jurisdiction to issue Mr. Warren's requested writs of quo warranto and mandamus pursuant to article V, section 3(b)(8) of the Florida Constitution. *See also* Fla. R. App. P. 9.030(a)(3); *Whiley v. Scott*, 79 So.3d 702, 707 (Fla. 2011) ("[I]t is clear that the Florida Constitution authorizes this Court . . . to issue writs of quo warranto."). And while this Court's jurisdiction is discretionary, the nature of and issues presented by this case warrant this Court's immediate attention.

As described below, the Governor has exceeded his constitutional authority by suspending Mr. Warren from office and replacing him with a handpicked ally for whom no one has ever voted. "[T]he importance and immediacy of the issue justifies [this Court] deciding this matter now rather than transferring it for resolution [to an inferior court]." *Fla. House of Representatives v. Crist*, 999 So.2d 601, 608 (Fla. 2008). This case raises "serious constitutional

question[s] relating to the authority of the Governor," *Whiley*, 79 So.3d at 708, relating to the sovereignty of voters in Florida's 20 judicial circuits, and relating to the authority of this Court regarding the suspension and discipline of elected State Attorneys based on purported neglect of duty or incompetence, among other important issues. Moreover, as long as the Executive Order remains in place, the people of Florida's Thirteenth Judicial Circuit are, wrongfully, without their duly elected minister of justice.[2]

Further, Mr. Warren invokes this Court's jurisdiction because his petition presents wholly legal issues of constitutional magnitude "requir[ing] resolution by this State's highest Court." *Harvard v. Singletary*, 733 So.2d 1020, 1021-22, 1024 (Fla. 1999) (declining jurisdiction over petition with "substantial issues of fact or present[ing] individualized issues that do not require immediate resolution by this Court, or are not the type of case in which an

[2] Furthermore, this Petition comes after the Governor's actions have already been held to violate the United States and Florida Constitutions by the United States District Court for the Northern District of Florida after a full trial on the merits. [*See* Order on the Merits at APP34–35] That the Governor's actions against Mr. Warren have already been held without lawful basis presents a unique, further reason for this Court to exercise its jurisdiction.

opinion from this Court would provide important guiding principles for the other courts of this State" (emphasis omitted)).

The Executive Order violates article IV, section 7 of the Florida Constitution first because it is founded on proven falsehoods and second because, even ignoring that its factual claims have been adjudged false, none of the factual allegations reasonably relate to any of the enumerated constitutional grounds for suspending Mr. Warren. Instead, the Executive Order seeks to substitute the Governor's own discretion and policy preferences for Mr. Warren's while at the same time making false claims about Mr. Warren's job performance.

This Court's final determination that the Governor exceeded his power under Florida's Constitution by issuing the Executive Order is necessary for the proper function of Florida's government both now and in the future. Accordingly, this Court should exercise its jurisdiction to issue a writ of quo warranto. Alternatively, because the Governor refuses to reinstate Mr. Warren despite a duty to do so, this Court should exercise its jurisdiction to issue a writ of mandamus.

STATEMENT OF FACTS

A. Mr. Warren Is a Career Prosecutor Who Was Twice Elected State Attorney.

Petitioner Andrew Warren is a native Floridian, husband, father, and career prosecutor. Mr. Warren was admitted to the Florida Bar in 2003. For eight years, Mr. Warren was a prosecutor for the U.S. Department of Justice where he prosecuted matters including street crimes in Washington, D.C., as well as complex fraud cases across the country. During his tenure with the Justice Department, Mr. Warren earned multiple accolades and awards, including the 2013 Attorney General Award for Trial Litigation.

In 2016, Mr. Warren resigned from his position as a federal prosecutor to run for State Attorney in Florida's Thirteenth Judicial Circuit. Mr. Warren ran as a Democrat against the then-incumbent Republican and was successfully elected. In 2020, Mr. Warren was reelected to his office, with 369,129 people choosing him to continue to lead the office of approximately 300 prosecutors, investigators, and other professional staff. *See* Florida Dep't of State, Division of Elections, *November 3, 2020 General Election Official Results*, https://results.elections.myflorida.com/Index.asp?ElectionDate=11

/3/2020&DATAMODE= (select "State Attorney / Public Defender" from dropdown); *see* § 90.202(11), (12), Fla. Stat.

Mr. Warren was elected and re-elected after making and keeping numerous promises to voters about how he would perform his duties. Among other things, Mr. Warren set forth a vision for his office that began with criminal justice reform, including focusing on long-term safety by balancing punishment, prevention, treatment, and rehabilitation. Both as a candidate and as State Attorney, Mr. Warren also stressed, spoke out about, and relentlessly pursued the use of smart, innovative strategies to hold low-level offenders accountable while steering them away from the criminal justice system's historical downward spiral toward prison. As the federal district court described it, Mr. Warren was a "reform prosecutor" or "progressive" (i.e., Democrat) prosecutor, who frequently advocated, both during his campaigns and while in office, for "reform-prosecutor positions." [*See* Order on the Merits at APP39–40, 55]

B. While in Office, Mr. Warren Has Guided the Exercise of Discretion by his Assistant State Attorneys through Certain Policies.

As State Attorney, Mr. Warren is required to serve as "the prosecuting officer of all trial courts in [his] circuit and . . . perform

other duties prescribed by general law." Art. V, § 17, Fla. Const. Among other obligations, a State Attorney must "reflect a scrupulous adherence to the highest standards of professional conduct," including "the responsibility of a minister of justice and not simply that of an advocate." *The Fla. Bar v. Cox*, 794 So.2d 1278, 1285, 1286 (Fla. 2001) (citations omitted). The State Attorney must "exercise sound discretion and independent judgment in the performance of the prosecution function." ABA Criminal Justice Standards for the Prosecution Function 3-1.2(a); R. Regulating Fla. Bar 4-3.8, cmt. (noting Florida's adoption of the American Bar Association Standards of Criminal Justice Relating to Prosecution Function). And a State Attorney "should seek to develop general policies to guide the exercise of prosecutorial discretion, and standard operating procedures for the office . . . to achieve fair, efficient, and effective enforcement of the criminal law within the [State Attorney's] jurisdiction." ABA Criminal Justice Standards for the Prosecution Function 3-2.4(a).

Mr. Warren did just that. He maintained numerous policies providing guidance and executive direction to the approximately 130 Assistant State Attorneys ("ASAs") in Hillsborough County. For instance, in a memorandum disseminated to his ASAs in 2021, Mr.

Warren reiterated that "ASAs must exercise discretion based on the facts of [each individual] case—the nature and circumstances of the offense, the defendant's criminal history (or lack thereof), victim input, and other factors. ASAs must exercise that discretion at every stage . . . ." [*See* APP93–101 (Memorandum from Andrew H. Warren, State Attorney 13th Judicial Circuit, to Assistant State Attorneys, regarding *Prosecutorial Discretion and the Mission of Criminal Justice* (Dec. 14, 2021) (the "Discretion Memo"))]

Other policies are more specific, providing principles to guide prosecutorial discretion in particular types of cases. Two such policies (the "Presumptive Non-Prosecution Policies") guide the discretion of ASAs by establishing a "[p]resumption of [n]on-[p]rosecution" for certain criminal violations including "[t]respass[ing] at a business location" and "[d]isorderly conduct" and in cases "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." [*See* APP102–104 (*Presumption of Non-Prosecution* (Mar. 9, 2021) (the "Low Level Offense Policy")); APP105–106 (*Policy Regarding Prosecution of Cases Based on Pedestrian and Bicycle Violations* (the "Bike Stop Policy"))]

The Presumptive Non-Prosecution Policies speak for themselves and are not absolute. By their terms, both policies state presumptions, only. But in all cases covered by these policies (indeed in all cases within the State Attorney's Office), ASAs are bound by ethics and by policy to apply their judgment and discretion to the individual case before them. In other words, the Presumptive Non-Prosecution Policies "worked in tandem with the always-applicable policy requiring the exercise of prosecutorial discretion at every stage of every case." [Order on the Merits at APP45]

In sum, Mr. Warren is "an extraordinarily well-qualified prosecutor," and he "was diligently and competently performing the job he was elected to perform, very much in the way he told voters he would perform it." [*Id.* at APP41, 48]

C. While in Office, Mr. Warren Has Spoken out on Important Issues Affecting his Office and the Criminal Justice System.

As an elected official, part of Mr. Warren's job is to state his positions and opinions on matters of public importance impacting the criminal justice system. And he has done that repeatedly.

In June 2021, for example, Mr. Warren co-signed a Joint Statement with other elected prosecutors that, in part, called "on

policymakers to . . . leave healthcare decisions to patients, families, and medical providers." In the Joint Statement, the signatories went on to "pledge to use [their] discretion and not promote the criminalization of gender-affirming healthcare or transgender people." [EO Ex. A (the "Gender Statement") at APP16]

Last year, in the wake of the U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, 142 S.Ct. 2228 (2022), Mr. Warren co-signed a similar Joint Statement stating the signatories' opinion that, among other things, "[c]riminalizing and prosecuting individuals who . . . provide abortion care makes a mockery of justice; prosecutors should not be part of that." [EO Ex. B (the "Abortion Statement") at APP27] This Joint Statement also stated that signatories would "exercise [their] well-settled discretion and refrain from prosecuting those who seek, provide or support abortions." [*Id.* at APP25] And it stated that "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.* at APP27]

At no time while in office, though, has Mr. Warren had any policy, written or otherwise, of his office that applied specifically to

cases involving abortion or transgender rights. Nor has Mr. Warren ever been referred a case for prosecution involving an abortion- or transgender-rights-related crime.

D. The Governor Suspended Mr. Warren.

On August 4, 2022, the Governor issued an Executive Order invoking article IV, section 7(a) of the Florida Constitution, suspending Mr. Warren from office, and immediately appointing a replacement. In the Executive Order, recognizing that he was required to "stat[e] the grounds" for the suspension, Art. IV, § 7(a), Fla. Const., the Governor alleges "neglect of duty" and "incompetence." [*See* EO at APP11–13] In support, the Executive Order cites four writings: (1) the Abortion Statement, (2) the Gender Statement, (3) the Low Level Offense Policy, and (4) the Bike Stop Policy. [*See id.* at APP7–10] According to the Executive Order, these four writings constitute "blanket policies" of nonenforcement and thus "demonstrate [Mr. Warren's] incompetence and lack of judgment," "gross ignorance of his official duties," and a supposed "fundamentally flawed and lawless understanding of his duties as state attorney." [*Id.* at APP7, 12]

The Governor "staged a media event in Tampa to announce [his] decision" to suspend Mr. Warren, and he enlisted armed guards to escort Mr. Warren from his office without prior notice or even an opportunity to review the Executive Order. [Order on the Merits at APP56–58]

E. Mr. Warren Sued in Federal Court to Vindicate his Constitutional Rights.

On August 17, 2022, Mr. Warren sued the Governor in the United States District Court for the Northern District of Florida (the "District Court"). Mr. Warren sought injunctive and declaratory relief requiring the Governor to rescind the Executive Order because it (1) violated the First Amendment to the United States Constitution, and (2) exceeded the Governor's powers under article IV, section 7 of the Florida Constitution.

After initial expedited briefing and argument, the District Court denied in part the Governor's motion to dismiss the complaint and denied Mr. Warren's request for preliminary relief. *See Warren v. DeSantis*, No. 22CV302, 2022 WL 6250952, at *1 (N.D. Fla. Sept. 29, 2022). The District Court denied the Governor's motion to dismiss Mr. Warren's federal constitutional claim, finding that Mr. Warren's

complaint easily satisfied the three elements of a First Amendment retaliation claim. *Id.* at *4. But the court granted dismissal without prejudice of Mr. Warren's second claim—based on Florida law—because "the Eleventh Amendment bars any claim in federal court for declaratory or injunctive relief based on state law against a state or state officer." *Id.* at *2. The District Court made clear that this "dismissal does not affect one way or the other the question whether Mr. Warren can obtain relief in state court." *Id.* at *3.

In this preliminary order, the District Court also declined to grant Mr. Warren's request for a preliminary injunction, "without reaching the merits" of the First Amendment claim. [Order on the Merits at APP38] Instead, the District Court denied the request based on "the public interest." *Warren*, 2022 WL 6250952, at *11. The District Court concluded that, to avoid the risk of disruption associated with multiple changes in leadership of the State Attorney's office, "[t]he public interest calls for proceeding to trial" and entering permanent relief "as soon as possible." *Id.*

F. The Governor and Mr. Warren Conducted Extensive Discovery and Proceeded to Trial in the District Court,

but the Governor Still Failed to Prove Even a "Hint" of Misconduct by Mr. Warren.

Following the District Court's preliminary order, the parties conducted extensive discovery, including over a dozen depositions and the production of thousands of pages of documents by the Governor, Mr. Warren, and third parties. A bench trial began on November 29, 2022, and concluded after three days.

At trial, "[t]he overriding factual issue" that the District Court had to decide was "why the Governor did it—why he suspended Mr. Warren." [Order on the Merits at APP39] The Governor argued, as he claimed in the Executive Order, that he suspended Mr. Warren solely because of four writings—the Gender Statement, the Abortion Statement, the Low Level Offense Policy, and the Bike Stop Policy—and because those writings constituted so-called "blanket" policies of non-prosecution, a term he borrowed from this Court's decision in *Ayala v. Scott*, 224 So.3d 755 (Fla. 2017). [*See* EO at APP7–10]

But in its 59-page Order on the Merits following trial, the District Court found emphatically that this "allegation was false." [Order on the Merits at APP34] "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." [*Id.*] "Mr. Warren never made a statement similar to Ms. Ayala's. He 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." [*Id.* at APP37] And "[h]e had no blanket nonprosecution policies." [*Id.* at APP48]

Nor did the Governor uncover any *other* evidence of "neglect of duty" or "incompetence" by Mr. Warren, despite having "unlimited time and the full array of discovery available in federal litigation." [*Id.* at APP86] In the end, the District Court found: "The assertion that Mr. Warren neglected his duty or was incompetent is incorrect. This factual issue is not close." [*Id.* at APP48] "The record includes not a hint of misconduct by Mr. Warren." [*Id.*]

G. The Governor in Fact Suspended Mr. Warren for Partisan and Policy Reasons that Have No Place in a Proper Suspension.

The record at trial "establishe[d] beyond doubt that" the Governor's *real* reasons for suspending Mr. Warren were the following "six factors":

(1) "Mr. Warren's general approach to the prosecutorial function—how he did his job";

(2) Mr. Warren's "*advocacy* of reform-prosecutor positions, including his association with a left-leaning organization, Fair and Just Prosecution ('FJP'), and his joinder in four FJP statements";

(3) "[A] sentence in the FJP abortion statement committing to refrain from prosecuting some kinds of abortion cases";

(4) "[T]wo office policies, one dealing with bicycle and pedestrian stops, the other with low-level offenses";

(5) "Mr. Warren's political affiliation with and receipt of campaign funding from the Democratic Party and, indirectly, from George Soros"; and

(6) "[T]he anticipated political benefit to the Governor from the suspension."

[*Id.* at APP39–40]

The origins of the suspension began in December 2021, when the Governor asked his staff to look into whether any State Attorneys were not adhering to the Governor's "right-leaning," ideological approach to criminal justice. [*See id.* at APP49] A senior advisor to the Governor quickly identified Mr. Warren as a "reform prosecutor" whose ideologies clashed with the Governor's and who the Governor viewed as "an expresser or a conduit for [George] Soros's world views on criminal prosecution." [*Id.* at APP53] George Soros is an "oft-vilified Democratic Party contributor." [*Id.* at APP48] The Governor's Office then searched on Google, found that Mr. Warren had joined various "joint statements" authored by a left-leaning organization

known as Fair and Just Prosecution, and that Mr. Warren's campaign might have received funds indirectly from George Soros, and thus became "determined" to suspend Mr. Warren from office. [*Id.* at APP48–53] From there, it was merely a job for the Governor's lawyers to "sanitize[e]" the draft Executive Order of the real reasons for the suspension and replace them with grounds they knew were not true but hoped would be "more defensible." [*Id.* at APP55, 89] Of course, "[t]he untrue statement that Mr. Warren had a blanket policy not to prosecute abortion cases was left in." [*Id.* at APP56]

The Governor's Office therefore "did not conduct an investigation" into Mr. Warren. [*Id.* at APP49] They did not speak to Mr. Warren, "to anyone who worked in the office," or "to anyone in a position to know whether Mr. Warren in fact had any blanket nonprosecution policies." [*Id.* at APP49–50] They "paid no attention to the details and took not a single note" about Mr. Warren, because they "did not wish to know" the truth. [*Id.* at APP50, 88] The sole purpose of their minimal research about Mr. Warren was to dig up "a pretext" that could be used "to justify a decision already in the works on other grounds" that the Governor knew he could not lawfully say out loud. [*Id.* at APP88–89, 91]

The Governor even knew about—but ignored—evidence demonstrating that the grounds in the Executive Order were false. [*See id.* at APP89] Specifically, just four days after the Abortion Statement was issued, "Mr. Warren made clear in an interview on local television station FOX-13 that he would exercise discretion whether to prosecute any abortion case that came to the office—none ever had—just as the office exercised discretion in every other case of every other kind." [*Id.* at APP52] Mr. Warren had also publicly agreed, as an enforceable condition of his dismissal from a lawsuit challenging the constitutionality of Florida's abortion statute, that he would abide by the ruling in the case—a case now on appeal before this Court. [*Id.* at APP52–53; Stipulation and Order of Dismissal of State Attorney Defendants Upon Conditions, *Planned Parenthood of Sw. & Cent. Fla. v. State*, Case No. 2022 CA 912 (Fla. 2d Jud. Cir. June 17, 2022), ECF No. 70] But this evidence "did not fit" within the political "narrative" the Governor wished to advance, so the Governor "chose to ignore it." [Order on the Merits at APP89] And, perhaps most troubling, the Governor's staff admitted that they chose not to speak with Mr. Warren because they "fear[ed]" this might give him an

opportunity "to set the record straight." [*Id.*] "The actual facts . . . did not matter" to the Governor. [*Id.* at APP90–91]

In sum, the Governor used his solemn power under the Florida Constitution to suspend another elected official indefinitely from his elected office based on allegations of neglect of duty and incompetence that were never true and now have been conclusively proven false. And after a full and fair trial, the evidence showed that 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." [*Id.* at APP48]

H. The District Court Found that it Could Not Remedy the Governor's Violations of Mr. Warren's Rights.

Ultimately, the District Court concluded that "[t]he Governor violated the First Amendment by considering Mr. Warren's speech on matters of public concern" and by "considering Mr. Warren's association with the Democratic Party." [*Id.* at APP91] The court held further that the Governor was also motivated by reasons that "violated the Florida constitution" and that those motivations were "controlling." [*Id.* at APP48, 90] On that basis, the District Court concluded that the Eleventh Amendment prohibited it from granting

Mr. Warren relief. [*Id.* at APP91–92] Nonetheless, the Court stressed that the Governor "can easily set it right" voluntarily, and that "[i]f the facts matter" to the Governor, he should "simply rescind the suspension." [*Id.* at APP85–86]

I. The Governor Refuses to Reinstate Mr. Warren.

Following the District Court's ruling on the merits, Mr. Warren sent a letter to the Governor pleading with him to fulfill his duty "to faithfully execute the laws of the state" and "voluntarily reinstate [Mr. Warren]" as the duly elected State Attorney "for the remainder of [Mr. Warren's] four-year term without further delay" in light of the District Court's ruling. [APP107–109 (1/25/2023 Letter from A. Warren to R. DeSantis regarding *Executive Order #22-276*)]

The Governor did not respond. Instead, his Press Secretary issued a press release insisting that "Mr. Warren signed a statement refusing to prosecute the laws of the land[]" and that the Governor "need not address" the District Court's "dicta, which are merely opinions." Valerie Crowder, *DeSantis Says He Won't Reinstate Suspended Hillsborough Prosecutor Andrew Warren*, WUSF Public Media (Jan. 26, 2023, 6:55 AM), https://wusfnews.wusf.usf.edu/politics-issues/2023-01-

26/desantis-says-he-wont-reinstate-suspended-hillsborough-prosecutor-andrew-warren. Rather than make it right as the District Court suggested, the Governor used this as another opportunity to perpetuate his false political narrative, closing with: "Mr. Warren remains suspended from the office he failed to serve." [*Id.*]

NATURE OF THE RELIEF SOUGHT

Mr. Warren seeks a writ of quo warranto directed to the Governor because the Governor lacked authority to issue the Executive Order. Mr. Warren also, and alternatively, seeks a writ of mandamus commanding the Governor to reinstate him, as it is now the Governor's duty to do.

The Executive Order relies on proven falsehoods. It also fails to identify any duty that was neglected or any condition rendering Mr. Warren incompetent, within the meaning of the Florida Constitution. The Executive Order merely takes issue with Mr. Warren's policy choices and political views and speech, which are impermissible bases for suspension. The Governor's Executive Order further violates Florida law because it encroaches upon powers that belong exclusively to the People or to other branches of Florida's government.

Given the significant public interest in the constitutional issues at stake, and especially because another court has already found that the Governor acted unconstitutionally, Mr. Warren respectfully requests expeditious review of this matter.

MEMORANDUM OF LAW

I. The Governor Suspended Mr. Warren for Six Reasons, None of Which Is in the Executive Order and None of Which Is an Authorized Basis for Suspension Under the Florida Constitution. The Writ of Quo Warranto Must Therefore Be Granted.

"Quo warranto is used 'to determine whether a state officer or agency has improperly *exercised* a power or right derived from the State.'" *Israel v. DeSantis*, 269 So.3d 491, 494 (Fla. 2019) (quoting *League of Women Voters of Fla. v. Scott*, 232 So.3d 264, 265 (Fla. 2017)). Mr. Warren is entitled to a writ of quo warranto because the Governor exceeded his powers in suspending Mr. Warren in violation of multiple provisions of the Florida Constitution.

The Florida Constitution grants the Governor a limited power to suspend certain state officers, including state attorneys "in extraordinary circumstances." *See Abusaid v. Hillsborough Cnty. Bd. of Cnty. Comm'rs*, 405 F.3d 1298, 1307 (11th Cir. 2005). Specifically, the Governor is permitted to suspend a state attorney "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. After a complete trial on the merits between these same parties, a court found that the Governor suspended Mr. Warren for six reasons, reasons listed neither in the Executive Order nor the Constitution.

A. The Reasons for Mr. Warren's Suspension Were Found by the District Court.

There is no doubt about why the Governor suspended Mr. Warren. Although the Governor *claimed* to suspend Mr. Warren "on the ground that Mr. Warren had blanket policies not to prosecute certain kinds of cases," that "allegation was false"; it was mere "pretext." [Order on the Merits at APP34, 91] Rather, Mr. Warren was suspended from office for six reasons listed in Section G of the Statement of Facts, above. [*See id.* at APP39]

B. The Factual Findings of the District Court Are Preclusive and Must be Given Effect.

"Collateral estoppel, referred to as issue preclusion in the federal courts, is a judicial doctrine that prevents relitigation of an issue that has been previously adjudicated." *Gawker Media, LLC v. Bollea*, 129 So.3d 1196, 1203 (Fla. 2d DCA 2014). "Collateral

estoppel . . . bars relitigation of specific issues—'that is to say points and questions'—that were actually litigated and decided in the former suit." *Zikofsky v. Mktg. 10, Inc.*, 904 So.2d 520, 525 (Fla. 4th DCA 2005) (citation omitted). Collateral estoppel applies where, as here:

> (1) the issue at stake is identical to the one involved in the prior proceeding; (2) the issue was actually litigated in the prior proceeding; (3) the determination of the issue in the prior litigation must have been 'a critical and necessary part' of the judgment in the first action; and (4) the party against whom collateral estoppel is asserted must have had a full and fair opportunity to litigate the issue in the prior proceeding.

Gawker Media, 129 So.3d at 1204 (citation omitted).

Each of these four prongs is satisfied here as to the factual issue of why Mr. Warren was suspended. First, as Judge Hinkle himself explained, at trial in the District Court, the "[t]he overriding factual issue [was] why the Governor did it—why he suspended Mr. Warren." [Order on the Merits at APP39] And "[t]he record [of that trial] establishes beyond doubt" that Mr. Warren was suspended because of the "six factors" listed above. [*Id.*] Second, the issue was fully litigated; again the Order on the Merits and the record of proceedings in the District Court proves that beyond doubt. Third, the question

of why Mr. Warren was actually suspended was plainly "a critical and necessary part" of Judge Hinkle's judgment. "An issue is a critical and necessary part of the prior proceeding where its determination is essential to the ultimate decision." *Provident Life & Accident Ins. Co. v. Genovese*, 138 So.3d 474, 478 (Fla. 4th DCA 2014). The District Court's judgment depended entirely on determining the reasons for Mr. Warren's suspension and then "sorting protected from unprotected factors" to decide if Mr. Warren was entitled to relief under the First Amendment. [Order on the Merits at APP76] Finally, the Governor had a full and fair opportunity to litigate the reasons for Mr. Warren's suspension. He had a complete trial on the merits. [*See, e.g.*, *id.* at APP86 (noting that the parties had "the full array of discovery available in litigation" before proceeding to trial)]

Because the question of why the Governor suspended Mr. Warren has already been conclusively answered, this Court's review must not ignore those factual findings.

C. The Factual Bases Claimed in the Executive Order Have Been Adjudged False, and thus the Executive Order is Arbitrary.

As this Court has explained, "[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." *State ex rel. Hardie v. Coleman*, 155 So. 129, 133 (Fla. 1934). An arbitrary decision is one that "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) ("A proposed rule is 'arbitrary' only if it is 'not supported by fact or logic.'" (citation omitted)).

The appellate courts of Florida have also made clear that "[a]n arbitrary decision is one not supported by facts or logic, or despotic." *Bd. of Trustees of Internal Imp. Tr. Fund v. Levy*, 656 So.2d 1359, 1362 (Fla. 1st DCA 1995). Here, the Executive Order is both unsupported and despotic.

First, it demonstrates a complete disregard of facts and logic, being based entirely on assertions that have been conclusively adjudged to be false. Indeed, the first page of the District Court's ruling makes this clear, saying that the Governor's allegation of non-prosecution "was false." [Order on the Merits at APP34] "Any

minimally competent inquiry would have confirmed . . . [that] [t]he assertion Mr. Warren neglected his duty or was incompetent is incorrect." [*Id.* at APP48] The Executive Order—which is based on factual allegations that are demonstrably false and which could have been debunked with even a "minimally competent inquiry"—thus is a "mere arbitrary" order and does "not meet the requirements of the Constitution." *Hardie*, 155 So. at 133.

Second, the Executive Order is "despotic," because the Governor issued it without conducting any investigation and for reasons that any reasonable officer in his shoes would have known were unauthorized and unlawful. In fact, before Mr. Warren was even identified as a target for suspension, the Governor *had already decided* what he wanted to do: "t[ake] down a reform prosecutor," i.e., "a prosecutor whose performance did not match the Governor's law-and-order agenda." [Order on the Merits at APP89–90] "The actual facts . . . did not matter" to the Governor. [*Id.* at APP90–91] His staff's minimal and biased research about Mr. Warren had one goal: to dig up "a pretext" that could be used "to justify a decision already in the works on other grounds" that the Governor knew he could not lawfully say out loud. [*Id.* at APP88–89 & 91]

The Governor thus disregarded the truth, and the law, and utilized his limited suspension power to advance a false political "narrative" because he believed it would benefit him. [*See id.* at APP89] And in doing so, the Governor has effectively nullified a democratic election, deprived Mr. Warren of his livelihood, and violated, among other things, Mr. Warren's rights to freedom of speech and association under the United States Constitution. [*See id.* at APP91] This is textbook despotism. *See Despotism*, Black's Law Dictionary (11th ed. 2019) ("A government by a ruler with absolute, unchecked power."). As this Court has explained, "nothing can attain a greater degree of despotism than an abuse of [a public official's discretionary] power." *Singletary v. State ex rel. Kauffman*, 69 So.2d 794, 798 (Fla. 1954); *see also Cmty. Fin. Servs. Ass'n of Am., Ltd. v. Consumer Fin. Prot. Bureau*, 51 F.4th 616, 623 (5th Cir. 2022) ("An elective despotism was not the government we fought for; but one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced . . . , as that no one could transcend their legal limits, without being effectually checked and restrained by the others.") (quoting The Federalist No. 48 (J. Madison)) (alteration in original).

For nearly 100 years since *Hardie*, this Court has made clear that where an executive order is "arbitrary," it does "not meet the requirements of the Constitution." 155 So. at 133. And even though no prior executive order of suspension has been held by this Court to be "arbitrary," this one must be. Where, as here, an executive order of suspension is not merely *alleged* to be based on falsehoods but rather *already proven* to be, it is arbitrary, as this Court and other courts have defined that term.[3]

D. That this Court does Not Weigh Evidence in Quo Warranto Proceedings against a Governor Does Not Alter the Effect of the District Court's Findings.

Mr. Warren's Petition asks this Court to do no more than it is permitted, indeed required, to do. There are no facts to be weighed and no evidence the sufficiency of which must be reviewed. *See Israel*, 269 So.3d at 495 ("suspended officer may seek judicial review of an

[3] Indeed, a contrary conclusion, or a conclusion that this Court cannot consider proven facts in exercising its judicial function, would render the Governor's suspension power completely beyond the power of the judiciary to limit. He could then, for example, suspend Mr. Warren by alleging that he was not a member of the Bar of this Court, even though the records of this Court readily prove the contrary. He could even suspend Mr. Warren by alleging he killed President Kennedy, even though records would readily demonstrate that Mr. Warren was not alive in 1963.

executive order of suspension to ensure that the order satisfies that constitutional requirement"); *State ex rel. Kelly v. Sullivan*, 52 So.2d 422, 425 (Fla. 1951) ("It is the function of the Senate, and never that of the Courts, to review the evidence upon which the Governor suspends an officer in the event the Governor recommends his removal from office."). The Court must only apply proven facts to the law.

Any contrary conclusion would strain, indeed ignore logic, common sense, and justice, which this Court does not do. *Lohr v. Byrd*, 522 So.2d 845, 847 (Fla. 1988) (holding "that logic, common sense, and justice dictate" the outcome in that case); *Sch. Bd. of Palm Beach Cnty. v. Survivors Charter Schs., Inc.*, 3 So.3d 1220, 1235 (Fla. 2009) ("We are not required to abandon either our common sense or principles of logic in statutory interpretation."). Certainly in considering the factual background against which this case must be judged, this Court is not required to ignore reality or "to exhibit a naivete from which ordinary citizens are free." *United States v. Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977) (Friendly, J.); *see also Aguilera v. Inservices, Inc.*, 905 So.2d 84, 97 (Fla. 2005) ("We cannot ignore facts . . . .").

The Executive Order is arbitrary, based in already-proven falsehoods. For this reason alone, a writ must be granted.

II. Following the District Court's Judgment, the Governor Was Required to Reinstate Mr. Warren. A Writ of Mandamus Should Issue Compelling him to Do So.

A petitioner is entitled to mandamus relief where, as here, he has "a clear legal right to the requested relief, the respondent [has] an indisputable legal duty to perform the requested action, and the petitioner [has] no other adequate remedy available." *Pleus v. Crist*, 14 So.3d 941, 945 (Fla. 2009) (citation omitted). In the specific context of gubernatorial orders of suspension, this Court has held that it is "the duty of the governor, on suspending an officer . . . to refuse to suspend when [the facts] do not seem to demand removal, *or 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) (emphasis added). And mandamus is available to compel reinstatement to a position from which a public officer petitioner has been ousted in violation of a legal duty. *State ex rel. Hawkins v. McCall*, 29 So.2d 739, 743 (Fla. 1947) (issuing writ of mandamus directing reinstatement of removed police officer after examining "jurisdictional facts" and finding "[t]here is no evidence in

the record to support either of the other four alleged grounds for removal[]"). This Court has not hesitated to grant mandamus when confronted with cases of unjustified removal of public officers because "[d]ischarging one from an office or employment that he is shown to have discharged well and faithfully for years is a serious matter and should be done in strict compliance with law." *City of Daytona Beach v. Layne*, 91 So.2d 814, 815 (Fla. 1957).

As described above, any minimally competent inquiry into Mr. Warren's performance would have shown that there was "not a hint of misconduct . . . [and that] he was diligently and competently performing the job he was elected to perform, very much in the way he told voters he would perform it." [Order on the Merits at APP48] "After a full and fair trial, the evidence establishes without genuine dispute that Mr. Warren had no blanket nonprosecution policies." [*Id.* at APP85–86] The Governor is duty-bound to reinstate him.

Notably, Mr. Warren asked for just that. Following the District Court's Order, Mr. Warren wrote to the Governor, asking the Governor, "pursuant to [his] oath of office to uphold [the Florida and federal] constitutions and [his] solemn duty to execute Florida law faithfully," to "reinstate [Mr. Warren] as Hillsborough County's duly

elected state attorney for the remainder of [Mr. Warren's] four-year term without further delay." [APP107] The Governor did not give him even the courtesy of a response, instead issuing a snarky press statement refusing to reinstate Mr. Warren. Crowder, *supra*. Because the Governor has refused to fulfill his duty to reinstate Mr. Warren, this Court must issue a writ of mandamus compelling him to do so.

III. The Executive Order Violates Article IV, Section 7 because it Fails to State any Constitutionally Proper Grounds Authorizing Suspension.

Even if this Court were to ignore the proceedings in the District Court (and it should not), the Executive Order—on its face—violates article IV, section 7(a) of the Florida Constitution. A writ of quo warranto should therefore issue to the Governor.

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

In all events, this Court has a role in reviewing the Governor's exercise of the suspension power. The Florida Constitution requires the Governor's Executive Order to "stat[e] the grounds" of the officer's suspension. Art. IV, § 7(a), Fla. Const. As a result, suspended officers "may seek judicial review . . . to ensure that the order satisfies that constitutional requirement." *Israel*, 269 So.3d at 495. Indeed, "it is

the exclusive province of the judiciary to interpret terms in a constitution and to define those terms." *In re Senate Joint Resol. of Legislative Apportionment 1176*, 83 So.3d 597, 631 (Fla. 2012) (Mem.).

In doing so, the judiciary must, at a minimum, "determin[e] whether the executive order, on its face, sets forth allegations of fact relating to one of the constitutionally enumerated grounds of suspension." *Israel*, 269 So.3d at 495; *see also Hardie*, 155 So. at 133 (Because suspensions "affect[] the lawful rights of individuals, the jurisdictional facts, in other words, the matters and things on which the executive grounds his cause of removal, may be inquired into by the courts."). Put differently, it is the job of the courts, if asked, to say whether the facial allegations in an executive order fall within this Court's definitions of the enumerated categories of offenses for which the Constitution permits suspension. If they are not, or, if as discussed above the executive order is otherwise "arbitrary," *Hardie*, 155 So. at 133, the order is insufficient to withstand judicial review.

B. None of the Grounds Stated in the Executive Order Falls within the Limited Circumstances Justifying Suspension Enumerated in Article IV, Section 7(a) of the Constitution.

The Governor's Executive Order claims that four separate writings by Mr. Warren, and these four writings *only*, are proof of both "incompetence" and "neglect of duty." These words have meanings long ago confirmed by this Court and nowhere present here. [*See* EO at APP5–14]

As this Court has explained, "[i]ncompetency" refers "to any physical, moral, or intellectual quality, the lack of which incapacitates one to perform the duties of his office." *Israel*, 269 So.3d at 496 (quoting *State ex rel. Hardie*, 155 So. at 133). This is consistent with the plain text definition of the term. *See Incompetent*, Oxford English Dictionary (3d ed. 2000), https://www.oed.com ("Of inadequate ability or fitness; not having the requisite capacity or qualification; incapable."); *Advisory Opinion to Governor re Implementation of Amend. 4, The Voting Restoration Amend.*, 288 So.3d 1070, 1078–79 (Fla. 2020) (In construing constitutional language, the Court often "looks to dictionary definitions of the terms because we recognize that, 'in general, a dictionary may provide the

popular and common-sense meaning of terms presented to the voters.'" (citation omitted)). And though "[i]ncompetency" "may arise from gross ignorance of official duties or gross carelessness in the discharge of them . . . [or] from lack of judgment and discretion," that gross ignorance or carelessness must be the product of the public officer's "physical, moral, or intellectual quality" that "incapacitates [the officer] to perform the duties of his office." *Israel*, 269 So.3d at 496 (quoting *Hardie*, 155 So. at 133) (first and second alterations in original).

Similarly, this Court has defined neglect of duty as having "reference to the neglect or failure on the part of a public officer to do and perform some duty or duties laid on him as such by virtue of his office or which is required of him by law." *Id.* (quoting *Hardie*, 155 So. at 132).[4] Other high courts have similarly concluded that

[4] Florida's constitutional provision concerning the suspension power was amended after *Hardie* but retained the same grounds for suspension, including "incompetency" and "neglect of duty." *Compare* Art. IV, § 15, Fla. Const. (1934), *with* Art. IV, § 7, Fla. Const. Those words therefore carried forward their prior meanings, including as interpreted in *Hardie*. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 322 (2012) ("If a word or phrase has been authoritatively interpreted by the highest court in a jurisdiction, . . . a later version of that act perpetuating the wording is presumed to carry forward that interpretation.").

"[n]eglect of duty and nonfeasance mean the same thing." *Holmes v. Osborn*, 115 P.2d 775, 783 (Ariz. 1941). And they have said that "[n]onfeasance by an officer is the substantial failure to perform duty." *Id.* (citation omitted).

For the reasons set forth below, none of the reasons relied on in the Executive Order constitute incompetency or neglect of duty.

C. The Governor Has Not Invoked his Suspension Power Lawfully.

In this case, none of the Executive Order's allegations relate to, or fall within, the well-defined boundaries of "incompetence" or "neglect of duty." At a minimum, the Governor's Executive Order is facially insufficient under article IV, section 7(a).

1. The Gender Statement.

To support Mr. Warren's suspension, the Executive Order cites his signature of the Gender Statement (a statement that Mr. Warren did not himself author), which criticizes the *proposed* criminalization of transgender people and gender-affirming healthcare. In doing so, the Executive Order does not allege conduct that would constitute "incompetence" or "neglect of duty" as defined by this Court.

The Order first alleges that Mr. Warren "demonstrated his incompetence and willful defiance of his duties as a state attorney . . . when he signed a 'Joint Statement' with other elected prosecutors *in support of* gender-transition treatments for children and bathroom usage based on gender identify." [EO at APP7 (emphasis added)] Among other things, and as alleged in the Executive Order, the Gender Statement asserted that the numerous signatories pledged to use their "discretion and not promote the criminalization of gender-affirming healthcare or transgender people." [*Id.*] Further, the signatories pledged to use their "settled discretion and limited resources on enforcement of laws that will not erode the safety and well-being" of communities and that the signatories do not support "the use of scarce criminal justice and law enforcement resources on criminalization of doctors." [*Id.*] In the end, the Gender Statement affirmed that the signatories were "committed to ending this deeply disturbing and destructive criminalization of gender-affirming healthcare and transgender people." [*Id.*] In short,

the Governor has suspended Mr. Warren because he supports certain policies and opposes criminalizing certain conduct.[5]

As alleged in the Executive Order, the Gender Statement nowhere asserted that Mr. Warren categorically planned not to

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[5] These statements are core political speech protected under the First Amendment to the U.S. Constitution and the Florida Constitution. [*See* Order on the Merits at APP69–70 ("[T]he FJP transgender and abortion statements were chock full of core political speech" protected by the First Amendment.); *Dep't of Educ. v. Lewis*, 416 So.2d 455, 461 (Fla. 1982) ("The scope of the protection accorded to freedom of expression in Florida under article I, section 4 is the same as is required under the First Amendment.")] As such, these statements cannot lawfully be a basis for suspending Mr. Warren, and they do not constitute "neglect of duty" or "incompetence." *See Bond v. Floyd*, 385 U.S. 116, 135–36 (1966) ("The manifest function of the First Amendment in a representative government requires that [elected officials] be given the widest latitude to express their views on issues of policy."); *Houston Cmty. Coll. Sys. v. Wilson*, 142 S.Ct. 1253, 1259 (2022) ("[T]he First Amendment prohibits government officials from subjecting individuals to 'retaliatory actions' after the fact for having engaged in protected speech." (citation omitted)). Indeed, the role of elected officials "makes it all the more imperative that they be allowed to freely express themselves." *Id.* at 1261 (quoting *Republican Party of Minn. v. White*, 536 U.S. 765, 781 (2002)).

At minimum, article IV, section 7 should be construed to avoid this violation of the federal Constitution. *See, e.g.*, *State v. Presidential Women's Ctr.*, 937 So.2d 114, 116 (Fla. 2006) ("[W]e adhere to the settled principle that '[w]hen two constructions of a statute are possible, one of which is of questionable constitutionality, the statute must be construed so as to avoid any violation of the constitution.'" (quoting *Indus. Fire & Cas. Ins. Co. v. Kwechin*, 447 So.2d 1337, 1339 (Fla. 1983)).

enforce *any* specific law. And, indeed, the Executive Order concedes that the "Florida Legislature has not enacted such criminal laws." [*Id.*] Nonetheless, according to the Governor, these statements evidence Mr. Warren's incompetence and neglect of duty because they "prove that [Mr.] Warren thinks he has authority to defy the Florida Legislature and nullify . . . criminal laws with which he disagrees." [*Id.*] Wrong.

These allegations are facially insufficient to show "[i]ncompetenc[e]," or "any physical, moral, or intellectual quality" that Mr. Warren is lacking that incapacitates him from performing the duties of his office. *Israel*, 269 So.3d at 496 (quoting *Hardie*, 155 So. at 133). Nor are there any allegations of "gross ignorance" that could give rise to, or provide evidence of, this incapacitation. *Id.* (quoting *Hardie*, 155 So. at 133). Indeed, there are no allegations that Mr. Warren lacks "knowledge or awareness" generally about his job duties "or about a particular thing." *Ignorance*, Oxford English Dictionary, *supra*. And because Florida has not even enacted any such criminal law, Mr. Warren cannot have neglected any duty that might stem from it as "the prosecuting officer of all trial courts in [Hillsborough County]." Art. V, § 17, Fla. Const.

At most, under the most generous reading of the allegations, Mr. Warren has pledged to use "discretion and not promote the criminalization of gender-affirming healthcare or transgender people." [EO at APP7] Instead of showing extreme ignorance of his job duties—and, in fact, evidencing awareness of his precise powers as a prosecutor—this statement recognizes that it is his duty to "serve justice," *Frazier v. State*, 294 So.2d 691, 692 (Fla. 1st DCA 1974), and to "exercise . . . prosecutorial discretion" over criminal cases, *Ayala*, 224 So.3d at 759.

The statements in the Executive Order also do not relate to "[n]eglect of duty," or the failure "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 *Hardie*, 155 So. at 132). Again, no clause in the Executive Order alleges that Mr. Warren has refused to enforce any specific law.[6] Indeed, the

[6] Similarly, Mr. Warren has no duty to prosecute any one specific case. *See* ABA Criminal Justice Standards for the Prosecution Function 3-4.4 (A "prosecutor is not obliged to file or maintain all criminal charges which the evidence might support."); *see also id.* 3-1.2(b) (A prosecutor's "primary duty" is "to seek justice," which includes "exercising discretion to not pursue criminal charges in appropriate circumstances."). And failing to prosecute in a single case, absent allegations of a series or system of repeated failures,

Executive Order concedes (at APP7) that no specific Florida laws exist as to the subjects in the Gender Statement. Absent any such law, Mr. Warren cannot have neglected any duty as the "prosecuting officer of all trial courts" in Hillsborough County. Art. V, § 17, Fla. Const.[7]

2. The Presumptive Non-Prosecution Policies.

Next, in relying on Mr. Warren's Presumptive Non-Prosecution Policies, the Executive Order does not allege conduct that would constitute "incompetence" or "neglect of duty."

Without explanation, the Executive Order (at APP8) says the Presumptive Non-Prosecution Policies are "not a proper exercise of prosecutorial discretion because they do not require 'case-specific' and 'individualized' determinations as to whether the facts warrant prosecution" and "instead are based on categorical exclusions of

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would not constitute "neglect of duty" in any event. *See, e.g.*, *Carr v. de Blasio*, 197 A.D.3d 124, 136 (N.Y. App. Div. 2021) ("'neglect of duty' means 'the outright omission of performance of a duty'" (citation omitted)).

[7] The Executive Order also says this conduct "prove[s] that [Mr.] Warren thinks he has authority to defy the Florida Legislature and nullify . . . criminal laws with which he disagrees." [EO at APP7] But, again, "the Florida Legislature has not enacted such criminal laws," as the Executive Order concedes. [*Id.*] Mr. Warren therefore cannot "defy" or "nullify" a law that does not exist.

otherwise criminal conduct that is tantamount to rewriting Florida criminal law."

The Governor's allegations about the Presumptive Non-Prosecution Policies, however, are facially insufficient, as a matter of law, to establish incompetence or neglect of duty. As the Executive Order concedes, "state attorneys have complete discretion in making the decision to prosecute a particular defendant." [EO at APP6 (citing *Cleveland v. State*, 417 So.2d 653, 654 (Fla. 1982))] "[P]rosecutorial discretion requires a state attorney to make 'case-specific' and 'individualized' determinations as to whether the facts warrant prosecution," as the Executive Order further concedes. [*Id.* (quoting *Ayala*, 224 So.3d at 758–59)] And "exercising discretion demands an individualized determination '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 (Fla. 1853) (Thompson, J., concurring)).

Mr. Warren's policies do precisely that. As State Attorney, Mr. Warren rightfully exercised his prosecutorial discretion in setting guidelines for his office when charging cases. Both policies are "presumptive" only, as the Governor *admits*. [EO at APP8; *see also*

Order on the Merits at 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 "not a blanket nonprosecution policy")] One policy, in fact, enumerates specific exemptions that would trigger prosecution. Those policies require prosecutors to consider each case individually and on a case-by-case basis. And by making these "case-specific determinations," Mr. Warren's policies "reflect an exercise of prosecutorial discretion." *Ayala*, 224 So.3d at 758–59 (citation omitted). Mr. Warren has in no way failed "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 *Hardie*, 155 So. at 132). Rather, he has performed the precise duties laid on him as the prosecutor for Hillsborough County.

This Court's opinion in *Ayala* confirms that Mr. Warren did not neglect the duties of his office.[8] In *Ayala*, then-Governor Rick Scott

[8] Though *Ayala* provides some useful guidance here, to be clear, *Ayala* is not a case about the Governor's suspension power, which is strictly limited by the Constitution. Instead, *Ayala* involved a governor's exercise of his much broader statutory power to reassign cases under certain circumstances. *See* § 27.14, Fla. Stat. (allowing the governor, among other things, to reassign cases between state

reassigned death penalty-eligible cases from a State Attorney who adopted "a blanket 'policy' of not seeking the death penalty in any eligible case," "even where an individual case 'absolutely deserve[s] [the] death penalty.'" 224 So.3d at 756–57 (alterations in original). The Court upheld the Governor's actions "because by effectively banning the death penalty in the [county]—as opposed to making case-specific determinations as to whether the facts of each death-penalty eligible case justify seeking the death penalty—Ayala" adopted a policy that "is 'in effect refusing to exercise discretion' and tantamount to a 'functional[] veto' of state law authorizing prosecutors to pursue the death penalty in appropriate cases." *Ayala*, 224 So.3d at 758 (alterations in original) (citation omitted).

The policy in *Ayala* is opposite of the policies here. In setting guidelines for charging decisions, Mr. Warren required case-specific determinations. That is the heart of prosecutorial discretion. *See Ayala*, 224 So.3d at 758–59. Mr. Warren is doing exactly what the Constitution requires. As a matter of law, the statements in the

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attorneys "for any . . . good and sufficient reason" where "the Governor determines that the ends of justice would be best served").

Executive Order therefore do not relate to "[n]eglect of duty." *Israel*, 269 So.3d at 496 (quoting *Hardie*, 155 So. at 132).

Moreover, none of these allegations relates to "[i]ncompetenc[e]," or "any physical, moral, or intellectual quality" that Mr. Warren lacks and that "incapacitates" him from performing the duties of his office. *Id.* (quoting *Hardie*, 155 So. at 133). Further, because "state attorneys have complete discretion in making the decision to prosecute a particular defendant" [EO at APP6], the Presumptive Non-Prosecution Policies cannot relate to any "gross ignorance" that could give rise to, or provide evidence of, this incapacitation, *Israel*, 269 So.3d at 496 (quoting *Hardie*, 155 So. at 133).

3. The Abortion Statement.

Finally, the Executive Order alleges that Mr. Warren (along with many other prosecutors across the country) signed the Abortion Statement (which Mr. Warren did not author), condemning the criminalization of abortion and promising to use prosecutorial discretion when reviewing charges concerning abortion. This signature also does not fall within the well-defined contours of "incompetence" or "neglect of duty."

Specifically, the Executive Order (at APP8) alleges that Mr. Warren made a "public declaration that he would not enforce criminal laws enacted by the Florida Legislature that prohibit providers from performing certain abortions to protect the lives of unborn children."[9] The Executive Order, however, then quotes from the Abortion Statement. None of the statements cited, or contained in the Abortion Statement, however, contain any categorical statement that Mr. Warren would not prosecute any law, let alone any Florida law.

Instead, the Abortion Statement, as quoted in the Executive Order, contains broad value statements, like "[e]nforcing abortion bans runs counter to the obligations and interest we are sworn to uphold." [EO at APP10] At its most forceful, the Abortion Statement contains the assertion that the signatory prosecutors would "decline to use [their] offices' resources to criminalize reproductive health decisions" and would "commit to exercise [their] well-settled

[9] Among other things, the Executive Order cites (at APP9) Florida's criminal ban on certain late-term abortions and Florida's recently enacted law "which prohibits a physician from performing an abortion after a fetus reaches the gestational age of 15 weeks, with certain exceptions."

discretion and refrain from prosecuting" certain (but not all) people "who seek, provide, or support abortions."[10] [Abortion Statement at APP25] The Joint Statement concludes, however, by affirming that the undersigned prosecutors would exercise their discretion given their judgment. As the Executive Order recites (at APP10), the signatory prosecutors affirm: "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."[11]

Perhaps recognizing that that this Joint Statement amounts to little more than a value statement, the Executive Order draws the ultimate conclusion that "*there is no reason to believe* that Warren will faithfully enforce the abortion laws of this State and properly exercise his prosecutorial discretion on a 'case-specific' and

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[10] Even with this assertion, the Joint Statement caveats it with the express belief that certain individuals should be prosecuted under abortion-related statutes. [Abortion Statement at APP25 n.2]

[11] Again, these statements are core political speech protected under the First Amendment to the U.S. Constitution and the Florida Constitution. They cannot lawfully be a basis for suspending Mr. Warren, and they do not constitute "neglect of duty" or "incompetence." *See supra* n.5.

'individualized' basis." [EO at APP11 (emphasis added)] It does not allege, because it cannot, that Mr. Warren himself asserted any intention to abdicate his duty of case-by-case discretion, let alone actually acted on any such assertion. Again, "[s]tate attorneys have complete discretion in making the decision to prosecute a particular defendant," as the Executive Order concedes. [*Id.* at APP6 (citing *Cleveland*, 417 So.2d at 654)]

In the end, the Executive Order's allegations concerning the Abortion Statement cannot relate to "[i]ncompetenc[e]," or "any physical, moral, or intellectual quality" that Mr. Warren is lacking that "incapacitates" him from performing the duties of his office. *Israel*, 269 So.3d at 496 (quoting *Hardie*, 155 So. at 133). Because "state attorneys have complete discretion in making the decision to prosecute a particular defendant" [EO at APP6], Mr. Warren's value statements condemning the criminalization of abortion cannot evidence any "gross ignorance" that could give rise to, or provide evidence of, this incapacitation, *Israel*, 269 So.3d at 496 (quoting *Hardie*, 155 So. at 133). The Abortion Statement also does not relate to "[n]eglect of duty." *Israel*, 269 So.3d at 496 (quoting *Hardie*, 155

So. at 132). In exercising his discretion in considering what cases to prosecute, Mr. Warren is doing what is constitutionally required.

The Governor has suspended Mr. Warren simply for opining on public issues and for exercising prosecutorial discretion—as the Constitution requires—by setting guidelines for charging decisions. The Florida Constitution prohibits the Governor's actions, and a writ of quo warranto is proper on this basis alone.

IV. A Contrary Conclusion—Allowing the Governor to Suspend a State Attorney Merely Because He Disagrees with How the State Attorney is Doing his Job—Would Steal Power Reserved to the People and Violate Florida's Separation of Powers.

Were this Court to hold that the Governor could suspend Mr. Warren because the Governor disagrees or is dissatisfied with how he is exercising his duties, it would, in effect, be permitting the Governor to usurp powers that the Constitution entrusts (a) to the People, (b) to State Attorneys, and (c) to this Court.

A. A Contrary Conclusion Would Allow the Governor to Exercise Power Reserved to the People.

In Florida, as in many other States, the Constitution is clear that "[a]ll political power is inherent in the people." Art. I, § 1, Fla. Const. As an elected official, Mr. Warren is accountable to the people

who elected him. *See, e.g.*, *Austin v. State ex rel. Christian*, 310 So.2d 289, 293 (Fla. 1975) ("Being an elected official," the State Attorney "is responsible to the electorate of his circuit, this being the traditional method in a democracy by which the citizenry may be assured that vast power will not be abused."); *DeSantis v. Fla. Educ. Ass'n,* 306 So.3d 1202, 1220 (Fla. 1st DCA 2020) (Policy questions about operation and opening of schools rests with elected school board members "who are directly accountable to the people."); *Whitney v. Hillsborough County*, 127 So. 486, 492 (Fla. 1930) ("[C]ounty commissioners are elected by the people to be affected by their acts, and are directly answerable to them at the polls."); *State ex rel. Kan. City Power & Light Co. v. McBeth*, 322 S.W.3d 525, 533–34 (Mo. 2010) ("Elected officials . . . are accountable to the voters, who may use the remedy of election if dissatisfied with the[ir] . . . exercise of discretion.").

Despite the Governor's recent insistence to the contrary, he is not Mr. Warren's boss, and Mr. Warren does not answer to him. [*See, e.g.*, Order on the Merits at APP72 ("[T]he Governor had no authority to manage the Thirteenth Judicial Circuit State Attorney's Office or to impose discipline on Mr. Warren."); *cf. DaSilva v. Indiana*, 30 F.4th

671, 675 (7th Cir. 2022) ("[I]n Indiana, as in many other states, the Attorney General is directly elected and is not answerable to the Governor.")] The Governor's insistence that he can stretch the words of Florida's Constitution to authorize him to substitute his judgment and policy preferences for those of the elected State Attorney steals power textually reserved by the people, to themselves, and illegally claims that power as his own.

B. A Contrary Conclusion Would Allow the Governor to Exercise Power that Belongs Exclusively and Absolutely to State Attorneys.

Under the Florida Constitution, "the state attorney shall be the prosecuting officer of all trial courts in [the] circuit" to which he or she was elected. Art. V, § 17, Fla. Const. "[A]s the prosecuting officer, the state attorney has 'complete discretion' in the decision to charge and prosecute." *Valdes v. State*, 728 So.2d 736, 738–39 (Fla. 1999) (citations omitted). No other state officer—not even other members of the judicial branch—has power to "interfere with this 'discretionary executive function.'" *Id.* at 739 (quoting *State v. Bloom*, 497 So.2d 2, 3 (Fla. 1986)). Rather, it is "inherent in our system of criminal justice" that decisions about whether to charge and prosecute belong solely and "absolute[ly]" to the State Attorney (and his or her ASAs). *State*

v. Cain, 381 So.2d 1361, 1364 (Fla. 1980) (citation omitted). In fact, to ensure "full and unfettered exercise of" independent prosecutorial discretion, such decisions are cloaked with absolute judicial immunity. *Off. of State Att'y, Fourth Jud. Cir. of Fla. v. Parrotino*, 628 So.2d 1097, 1099 (Fla. 1993).

The Governor, of course, is a member of the executive branch. *See* Art. IV, § 1, Fla. Const. Mr. Warren, on the other hand, holds office pursuant to article V of the Constitution, which "creates the judicial branch of this state, deliberately separating it from and making it coequal to the other branches of government." *Off. of State Att'y*, 628 So.2d at 1099. The judicial branch "cannot be subject in any manner to oversight by the executive branch." *Chiles v. Children A, B, C, D, E, & F*, 589 So.2d 260, 269 (Fla. 1991). And that article V "creates the office of State Attorney" "impl[ies] what is obvious—the State Attorneys are quasi-judicial officers." *Off. of State Att'y*, 628 So.2d at 1099.

Allowing the Governor to nonetheless direct or override a State Attorney's exercise of his or her absolute discretion *by suspending the State Attorney from office* would contravene the separation of powers. "Indeed, there is considerable authority for the proposition

that prosecutorial discretion is itself an incident of the constitutional separation of powers, and that as a result the courts"—much less the Governor—"are not to interfere with the free exercise of the discretionary powers of the prosecutor in his control over criminal prosecutions." *Cain*, 381 So.2d at 1368 n.8.

But that is precisely what the Governor's Executive Order would permit. For example, the Executive Order attacks certain guidance Mr. Warren has given to his ASAs regarding the exercise of prosecutorial discretion in specific kinds of cases, like those involving "trespassing at a business location, disorderly conduct, disorderly intoxication, and prostitution," and crimes covered by the Bike Stop Policy. [EO at APP7–8] In the Governor's view, these policies "are not a proper exercise of prosecutorial discretion." [*Id.* at APP8] In other words, if the Governor were State Attorney for the Thirteenth Circuit, he would have drawn a different balance in exercising his discretion. But the Governor has no authority to replace his own judgment for an elected State Attorney's when it comes to exercising prosecutorial discretion.[12]

[12] The legislature has afforded the Governor power to reassign a case to another State Attorney under certain circumstances. *See* § 27.14,

C. A Contrary Conclusion Would Allow the Governor to Usurp this Court's "Exclusive Jurisdiction" to Adjudicate whether a State Attorney Has Improperly or Unethically Performed his Duties.

Finally, to the extent the Executive Order claims that Mr. Warren has failed to competently perform his professional duties as an attorney, the Governor has also encroached on this Court's exclusive jurisdiction under article V, section 15.

Among other powers, the Constitution grants this Court "exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted." Art. V, § 15, Fla. Const. This includes the power to "designat[e] . . . educational and moral requirements" for attorneys, to "supervis[e] and scrutin[ize]" the professional conduct of attorneys, *State ex rel. Fla. Bar v. Evans*, 94 So.2d 730, 733 (Fla. 1957), and "to prescribe standards of conduct for lawyers," R. Regulating Fla. Bar 3-1.2. It

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Fla. Stat. Whether or not that statute is constitutional, it is fundamentally different because reassignment simply grants *another elected State Attorney* power to exercise his or her discretion over the case. Here, in contrast, the Governor has substituted *his own* discretion entirely by removing Mr. Warren and appointing his own hand-selected and unelected replacement.

also includes plenary power to determine when an attorney "must be or shall be disciplined." *Evans*, 94 So.2d at 734.

The Executive Order suspending Mr. Warren would allow the Governor to usurp this Court's jurisdiction to regulate members of the Bar. The Executive Order directly challenges Mr. Warren's fitness and competence in his professional capacity as an attorney. But these issues are within this Court's exclusive jurisdiction under article V, section 15. [*Compare* EO at APP7 (alleging Mr. Warren demonstrated "incompetence and willful defiance of his duties"), *with* R. Regulating Fla. Bar 4-1.1 (requiring lawyers to "provide competent representation"); *compare also* EO at APP7 (alleging Mr. Warren has a "flawed and lawless understanding of his duties as a state attorney"), *with* R. Regulating Fla. Bar 3-4.3 (allowing discipline where an attorney commits "any act that is unlawful or contrary to honesty and justice"); *compare also* EO at APP12 (alleging that Mr. Warren "can no longer be trusted to fulfill his oath of office and his duty to see that Florida law is faithfully executed"), *with* R. Regulating Fla. Bar 3-4.7 ("Violation of the oath taken by [a] lawyer to support the constitution[] of . . . the state of Florida is ground for disciplinary action.")] Accordingly, the Governor lacks authority to determine for

himself whether Mr. Warren neglected a professional duty or otherwise demonstrated incompetence to act as an attorney.[13]

State Attorneys are elected by the people, and as quasi-judicial officers, they are held to the highest standard of independence and subject to professional supervision exclusively by the judiciary. *See* Art. V, §§ 15 & 17, Fla. Const.; *see also State ex rel. Hardee v. Allen*, 172 So. 222, 231 (Fla. 1937) (Davis, J., dissenting) ("It is clear beyond

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[13] Mr. Warren does not dispute that, if this Court were to issue a predicate order, in a proper proceeding, finding that Mr. Warren was subject to discipline for incompetence or unfit to practice law, the Governor would in some circumstances be authorized to suspend on that basis. *See In re Advisory Opinion to the Governor*, 213 So.2d 716, 717, 720 (Fla. 1968) (holding that the governor "do[es] not possess the power under the Florida Constitution" to "review the judicial accuracy and propriety of a judge and to thereupon suspend him . . . if it does not appear that the judge has exercised proper judicial discretion and wisdom," but that suspension could be proper if the incompetency were first "established and determined within the Judicial Branch by a court of competent jurisdiction"). But there is no such predicate order here. And the Governor is collaterally estopped from attempting to obtain one because another court has already finally determined that there is "not a hint of misconduct by Mr. Warren" and that "[t]he assertion that Mr. Warren neglected his duty or was incompetent is incorrect." [Order on the Merits at APP48; *see Dailide v. U.S. Att'y Gen.*, 387 F.3d 1335, 1342 (11th Cir. 2004) (Collateral estoppel, or issue preclusion, generally "precludes a party from litigating an issue in a subsequent action if that issue was fully litigated in a previous action."); *Andujar v. Nat'l Prop. & Cas. Underwriters*, 659 So.2d 1214, 1216 (Fla. 4th DCA 1995) (holding that "federal claim preclusion law governs, rather than Florida's" when the judgment at issue was rendered by a federal court)]

all need of exposition that it is indispensable that there should be some *nonpolitical* forum in which the rights of the people shall be impartially debated . . . . The . . . solicitors of criminal courts of record should be no more amenable to executive coercion in the exercise of their accusatory powers than are grand juries in counties where no criminal courts of record exist."). Indeed, "the people of Florida themselves confirmed" that they wished to entrust attorney regulation exclusively to the judiciary in 1956 "when they overwhelmingly approved the revision of Section 5, Article 5, Florida Constitution." *Evans*, 94 So.2d at 733 (Fla. 1957).

In exercising their professional and ethical duties as lawyers, State Attorneys are subject to the regulation and discipline of this Court, exclusively. The Governor cannot, by executive order or otherwise, adjudicate whether an attorney properly discharged his professional duties.

CONCLUSION

Mr. Warren respectfully requests that this Court grant his Petition and issue a writ of quo warranto or a writ of mandamus directed to the Governor.

Dated: February 15, 2023

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CERTIFICATE OF SERVICE

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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(g) of the Florida Rules of Appellate Procedure.

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