IN THE SUPREME COURT OF FLORIDA

ARAMIS AYALA, as State Attorney for the Ninth Judicial Circuit,

Petitioner,

v.

RICHARD L. SCOTT, as Governor of the State of Florida,

Respondent.

Case No. SC17-_____

EMERGENCY NON-ROUTINE PETITION FOR WRIT OF *QUO WARRANTO*

Petitioner Aramis Ayala, the duly elected State Attorney for the Ninth Judicial Circuit ("State Attorney Ayala"), files this emergency, non-routine petition for writ of *quo warranto* pursuant to Florida Rules of Appellate Procedure 9.100 and 9.030(a)(3) against Respondent Florida Governor Rick Scott. Through this petition, State Attorney Ayala asks this Court to order Governor Scott to show by what authority—not in violation of the Florida Constitution—he replaced State Attorney Ayala on twenty-three homicide cases pending in her judicial circuit with State Attorney Brad King, who was not elected by the Ninth Judicial Circuit's voters. Because the Governor's reassignment of cases for political reasons is illegal, unfair, and disruptive to Ayala, her employees in the State Attorney's Office, the Circuit Court of the Ninth Circuit, defendants and the defense bar, and,

most importantly, the community Ayala represents, this Court should immediately reverse or stay all of the Governor's orders, establish an expedited briefing schedule, and decide this petition on an emergency basis.

BASIS FOR INVOKING JURISDICTION

This Court has jurisdiction to issue a writ of *quo warranto* under Article V § 3(b)(8) of the Florida Constitution, which provides that it may issue such writs to state officers. *Quo warranto* is the proper remedy to challenge actions that are beyond the authority granted to a public official. *Martinez v. Martinez*, 545 So. 2d 1338 (Fla. 1989); *State ex rel. Christian v. Austin*, 302 So. 2d 811 (Fla. Dist. Ct. App. 1974). This Court has exercised its discretionary *quo warranto* jurisdiction to review and provide relief where the functions of government would be adversely affected absent an immediate determination by the Court. *See Whiley v. Scott*, 79 So. 3d 702, 707 (Fla. 2011). The Court should exercise that jurisdiction here, especially where there is no dispute as to any material fact.

On April 6, 2017, Ayala requested that Attorney General Pamela Bondi initiate a petition for a writ *quo warranto* to decide this issue as described in Florida Statutes § 80.01. (Appendix A-1). The next day, an Associate Deputy Attorney General declined on Bondi's behalf.[1] (Appendix B-1).

[1] It is noteworthy that until this matter, Attorney General Bondi was a proponent of prosecutorial discretion in death penalty cases. In *State v. Perry*, 192 So. 3d

This petition seeks to preserve the constitutional role of the elected state attorney as the prosecutor for all criminal cases in her or his judicial circuit. Scott has purported to remove Ayala from prosecuting twenty-three homicide cases in her judicial circuit because he falsely claims that she "won't fight for justice." But she has fought and will fight for justice, and Florida's Constitution gives only the elected state attorney authority to decide how best to prosecute these cases. Scott's intrusion into those prosecutions violates Florida's Constitution, and this Court should not permit it.

BACKGROUND

A. The Ninth Judicial Circuit Elected Aramis Ayala its State Attorney.

On November 8, 2016, Orange and Osceola County voters elected Aramis Ayala as the new state attorney for the Ninth Judicial Circuit. Ayala defeated the incumbent state attorney by 13 percentage points in a primary election for the Democratic nomination, and then won a near-unanimous victory in the general election with 99.7 percent of the vote.[2]

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70 (Fla. Dist. Ct. App. 2016), the court noted that the State, represented by the Attorney General's office, argued that the State "has the exclusive discretion to decide whether to seek the death penalty in a given case . . . ." 192 S. 3d at 72. If the State has discretion to seek the death penalty, it naturally follows that it has discretion to not seek the death penalty.

[2] *August 30, 2016 Primary Election Democratic Primary*, Florida Dep't of State, Div. of Elections,

Ayala's election marked the first time an African American was appointed or elected a state attorney in Florida.[3] Ayala had previously served as both an assistant state attorney and a public defender, and she announced her run for state attorney asserting that "[t]he state attorney is one of the gatekeepers to our justice system" and that "[w]e need someone with integrity and a fresh vision to lead."[4] Ayala explained to voters that she was running for office because "[p]olice want to know they're being cared for and protected[, and] [c]ertain communities want to know that their cries are heard."[5] As a candidate, she promoted a more holistic approach to running the State Attorney's Office, including engaging more actively with the community and transitioning the office to be more victim-oriented.[6]

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https://enight.elections.myflorida.com/Index.asp?ElectionDate=8/30/2016&DATAMODE=Fla.; *November 8, 2016 General Election*, Florida Dep't of State, Div. of Elections, https://enight.elections.myflorida.com/Index.asp?ElectionDate=11/8/2016&DATAMODE=.

[3] Scott Powers, *Aramis Ayala becomes first black state attorney in Florida history*, Florida Politics (Nov. 8, 2016), http://floridapolitics.com/archives/226799-aramis-ayala-becomes-first-black-state-attorney-floridas-history.

[4] *See Aramis Ayala announces run for State Attorney*, Aramis Ayala For State Attorney (Mar. 1, 2016), http://www.aramisayala.com/launch.

[5] Scott Powers, *Aramis Ayala's 9th Judicial Circuit state attorney run could be historic*, Florida Politics (July 16, 2016), http://floridapolitics.com/archives/216558-aramis-ayalas-9th-judicial-circuit-state-attorney-run-historic.

[6] *Id.*

Until the 1948 general election, the governor appointed all state attorneys, *see* Art. V, § 47, Fla. Const. (1949) (requiring the first election of state attorneys), and before 1972, the Florida Constitution did not specifically require a state attorney to prosecute all local cases, *compare id.* Art. V, § 6(6) (1968) (state attorneys "fulfill duties prescribed by law"), *with id.* Art. V, § 17 (1972) (the state attorney "shall be the prosecuting officer of all trial courts in that circuit and shall perform other duties prescribed by general law"). A 1905 law permitted the governor to move state attorneys among judicial circuits for any "good and sufficient reason." § 27.14, Fla. Stat. (2016).

By contrast, the modern Florida Constitution gives voters control over who will prosecute criminal cases in their communities. Art. V, § 17, Fla. Const. Amendments to the Florida Constitution adopted in 1972 and 1986 in turn expressly required for the first time that "the state attorney *shall* be the prosecuting officer of all trial courts" in his or her judicial circuit and made clear that any exception to this must be "provided in *this constitution*." *Id.* (emphasis added). Until the last few weeks, the Office of Governor Scott agreed that the Ninth Circuit State Attorney had discretion over the cases in his judicial circuit. In response to a Floridian who complained about Jeff Ashton, the state attorney Ayala defeated, the Governor's office explained that "state attorneys operate independently, and as

elected officials, they answer only to the voters of their individual jurisdictions." (*See* Appendix C-1).

B. The Murders of Sade Dixon and Debra Clayton[7]

On December 13, 2016—after Ayala was elected but before she took office—an attacker shot and killed a pregnant woman named Sade Dixon in northwest Orlando. That attacker also shot, but did not kill, Dixon's brother Ronald Stewart, who attempted to intervene. An investigation named the primary suspect as Markeith Loyd, Dixon's ex-boyfriend and the father of her unborn child. Stewart later described his sister's murder: Loyd showed up at Dixon's house and began to argue with her, and as Dixon tried to turn away and return to her house, Loyd pulled out a gun and began shooting at her. Dixon fell, and Loyd continued shooting her as she tried to shelter herself between two pillars. As he fled, Loyd fired several shots at Dixon's mother and younger brother.

Loyd was a fugitive from justice for about a month. On January 9, 2017, a person approached Orlando Police Lieutenant Debra Clayton while she was shopping at Walmart and told her that he had seen Loyd. Lieutenant Clayton—a 42-year-old mother, community activist, and 17-year veteran of the police department—called for backup, and when Loyd emerged from the store, she

[7] All of the facts here come from publicly released information from the investigation.

ordered him to the ground. In response, Loyd hid behind a pillar, drew a gun, and fired on Clayton as she tried to retreat. Clayton fell, injured, and Loyd stood over her and shot her several more times, killing Clayton. Several of Loyd's shots hit parked cars nearby, and sent other Walmart shoppers fleeing for safety. Police ultimately apprehended Loyd nine days later, hiding in an abandoned house.

On February 15, 2017, Ayala sought and received from a Ninth Judicial Circuit grand jury indictments of Loyd for Dixon's first-degree murder, the attempted first-degree murder of Stewart, the killing of an unborn child, and the first-degree murder of Clayton, among other charges. (Appendix H-1–6)

C. Ayala's Decision on the Death Penalty

Florida law authorizes the death penalty for first-degree murder, and Florida entrusts its prosecutors with sole discretion to decide whether to seek death in any case. In January 2016, the United States Supreme Court held Florida's then-applicable process for death penalty cases unconstitutional because it allowed judges, rather than juries, to impose death sentences. *See Hurst v. Florida*, 136 S. Ct. 616, 619 (2016). In March 2016, the Florida legislature changed the law such that "[i]f at least 10 jurors determine that the defendant should be sentenced to death, the jury's recommendation to the court should be a sentence of death."[8] In

[8] HB 7101, 2016 Leg., Reg. Sess. 2016 (Fla. 2016), *available at* https://www.flsenate.gov/Session/Bill/2016/7101/BillText/er/PDF.

October, this Court ruled that Florida's death penalty law was still unconstitutional because it did "not require unanimity in the jury's final recommendation as to whether the defendant should be sentenced to death." *Perry v. State*, --- So. 3d ---, 2016 WL 6036982, at *1 (Fla. Oct. 14, 2016). On March 13, 2017, Scott signed a law which required unanimous juries throughout the death penalty process.[9]

With the death penalty now available again in Florida, Loyd's alleged crimes appear to have made him eligible for that punishment if convicted. During her run for office, Ayala always believed that she would seek death sentences in appropriate circumstances, but the death penalty was never raised as an issue during her candidacy. The Loyd case was the first time that Ayala had to specifically consider seeking the death penalty.

Florida's death penalty is not mandatory—indeed, the U.S. Supreme Court long ago held that mandating the death penalty for a particular crime is unconstitutional, *see Sumner v. Shuman*, 483 U.S. 66 (1987)—so Ayala's duty is to examine whether it is fair, just, and prudent to seek a punishment of life imprisonment without parole or to seek death. During her assessment of the Loyd case, Ayala considered the factors discussed in Florida's death penalty statute, met with victims' families, considered the fiscal and resource implications, and

[9] SB 280, 2017 Leg., Reg. Sess. 2017 (Fla. 2017), *available at* https://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=56830.

comprehensively reviewed evidence on how the death penalty affects the community at large. As she explained later, she gave "th[e] issue extensive and painstaking thought and consideration."[10] Ultimately, however, she concluded that seeking death "is not in the best interest of this community or the best interest of justice." Having made a "pragmatic" analysis of the issue that was not "impulsive or emotional," Ayala concluded that the "evidence-based" answer was clear: there was no indication that the death penalty protected the public or law enforcement officers, the death penalty cost about $2.5 million more than a life sentence, and uncertainty in the law often led to a decades-long, harmful lack of closure for victims' families.[11] Ayala therefore determined that her office would vigorously prosecute Loyd for his alleged brutal crimes and would seek a sentence of life imprisonment without parole—but she would not seek his death.[12] Ayala also individually reviewed approximately half a dozen of her Office's death-penalty eligible cases and came to the same conclusion.

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[10] (Appendix D-3.)

[11] (*Id.*)

[12] Ayala's analysis is not unique. In July 2016, sitting Gaston County, North Carolina, District Attorney Locke Bell decided that he would no longer seek the death penalty because it was "a tremendous waste of time and money." Diane Turbyfill, *No more death penalty in Gaston*, Gaston Gazette (July 11, 2016), http://www.gastongazette.com/news/20160708/no-more-death-penalty-in-gaston.

Ayala's decision leaked out before she completed her preparations to announce it publicly, and she heard from the media that Florida Governor Rick Scott wanted her to recuse herself from the Loyd case. Ayala called Scott and he asked her to step down as prosecutor in the Loyd case. When Ayala declined and asked for an opportunity to explain her decision, Scott abruptly ended the conversation.

Shortly thereafter, Ayala made a public statement explaining to her constituents that the benefits of seeking a sentence of life without parole outweigh the benefits of seeking the death penalty in virtually all cases, so she "[would] not be seeking death in the cases handled by [her] office."[13] As part of that statement, however, Ayala made clear that she had not uniformly ruled out seeking the death penalty, and that, among other things, "[t]here may be cases, even active ones, that I think death penalty may be appropriate because of the egregiousness of the offense."[14] Ayala further explained her view that, "[i]f the death penalty system was one that, again, did not drag out for years and years, decades and decades, and if the death penalty was one that didn't take victims' families through this whole entire process . . . we would revisit this issue."[15]

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[13] (Appendix D-3.)

[14] (Appendix D-13.)

[15] (Appendix D-20–21.)

D. Scott's Response

Hours after Ayala's press conference, Scott issued an executive order purporting to remove Ayala from prosecuting Loyd, and assigning Brad King,[16] the state attorney elected in Florida's Fifth Judicial Circuit,[17] to do so in her place.

For authority to remove Ayala, Scott relied on the 1905 law—still nominally on the books—permitting governors to move state attorneys. Scott claimed that replacing Ayala was appropriate because Ayala purportedly declined to seek death in the Loyd case "regardless of circumstances of those capital felonies and without regard for the presence of applicable statutory aggravators."[18] Scott claimed that

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[16] Scott's pick of State Attorney Brad King was not just based on the proximity of the Judicial Circuits. King testified before the Florida Legislature in January 2016 against legislation that would require unanimous juries in death penalty cases because he believed that unanimous juries made it too difficult to obtain death sentences. Anna M. Phillips, *How the nation's lowest bar for the death penalty has shaped death row*, Tampa Bay Times (Jan. 31, 2016), http://www.tampabay.com/projects/2016/florida-executions/jury-votes/; *see also* Dara Kam, *State will interview 11 Supreme Court applicants*, Jacksonville.com (Nov. 14, 2016), http://jacksonville.com/metro/2016-11-14/panel-will-interview-11-state-supreme-court-applicants ("Brad King has been an outspoken proponent of a new law [later found unconstitutional by this Court] dealing with the death penalty.").

[17] Ayala's Ninth Judicial Circuit and King's Fifth Judicial Circuit are significantly different. The two counties that make up Ayala's Judicial Circuit, Orange and Osceola, have a much larger population than the five counties that make up King's Judicial Circuit, Citrus, Hernando, Lake, Marion, and Sumter. Ayala's Judicial Circuit is more than 40% larger with more than half a million more people—1,650,382 to 1,134,868. In addition Ayala's Judicial Circuit is on average more diverse and significantly younger. (Appendix E-1).

[18] (Appendix F-1.)

Ayala "has made it abundantly clear that she will not fight for justice for Lt. Debra Clayton and our law enforcement officers who put their lives on the line every day."[19] But Scott cited no part of the Florida Constitution to undo the constitutional prescription that Ayala "shall" serve as prosecutor in her judicial circuit, except to assert that the Constitution provided that he was to "take care that the laws be faithfully executed."[20]

Then on April 3, 2017, Scott issued twenty-one virtually identical executive orders purporting to remove Ayala from *every case* in her judicial circuit in which her predecessor had filed a notice of intent to seek the death penalty. (Appendix G-1–63). On April 6, 2017, Scott issued another virtually identical order purporting to remove Ayala from a twenty-third case. Scott replaced Ayala with King in each of these cases. Scott did not call Ayala to ask her about her intentions with respect to these cases or even to tell her that he planned to issue new executive orders. Instead, Ayala learned about the orders from media reports. Scott relied on the same authority for these orders as he did when he ordered a replacement state attorney for the Loyd case. As more fully described in the accompanying Motion to Invoke the Court's All Writs Jurisdiction, Scott fails to recognize that these cases are factually or procedurally different from each other and that changing the

[19] (Appendix I-1.)

[20] (Appendix F-1.)

lead prosecutor on them at the last minute possibly jeopardizes convictions. For example, some cases are scheduled for trial later this month, while another is not scheduled for trial until late July. In some of these cases, Ayala filed her notice that she was not seeking the death penalty *before* Scott's executive order purported to give the cases to State Attorney King. The proper way for the Governor to have resolved any question about State Attorney Ayala's authority over these prosecutions would have been for him to seek a writ of *quo warranto*. Instead, the Governor has unnecessarily and precipitously created confusion in ongoing criminal prosecutions, and has done so just to score political points.[21]

The Florida Constitution directly entrusts Ayala with the exercise of prosecutorial powers in her circuit, and she is the elected representative of her constituents' interests. This petition for a writ of *quo warranto* asks this Court to nullify Governor Scott's attempt to usurp State Attorney Ayala's constitutional power and provide Ayala's community with the benefit of the chief prosecutor they elected.

THE NATURE OF THE RELIEF SOUGHT

The nature of the relief sought by this petition is a writ of *quo warranto* directing the respondent, Governor Scott, to demonstrate his authority for

[21] Under Scott's executive order, unless the results are preordained, it is unclear who the prosecutor should be should it turn out that the death penalty is not sought in any of 23 purportedly reassigned cases.

removing a state attorney from office because he disagrees with the exercise of the state attorney's prosecutorial discretion. Ultimately, State Attorney Ayala seeks a judicial determination that Scott is not authorized to replace her from cases for exercising a quintessential prosecutorial function: deciding not only which cases to prosecute, but also what punishment to seek.[22]

ARGUMENT

I. The Florida Constitution Requires That Ayala Prosecute All of the Cases At Issue Here.

The voters of the Ninth Judicial Circuit elected Ayala to prosecute all trial court cases in the Ninth Judicial Circuit, and she is the only person with authority under the Florida Constitution to do so. The Governor has no power to remove her for exercising her prosecutorial discretion, and his executive orders are therefore invalid.

A. For the Cases Here, the Florida Constitution Vests Prosecutorial Power Only in Elected State Attorney Ayala.

The Florida Constitution requires that "except as provided in this constitution," the elected State Attorney for each judicial circuit "*shall* be the

[22] Every lead prosecutor in this country makes discretionary decisions every day—from what cases to investigate, to what cases to prosecute, to what sentences to seek—based on a range of factors including community priorities, budget, law enforcement personnel, prosecuting personnel, court dockets, and jail and prison space. Scott's orders against Ayala ignore this fact to the detriment of every state attorney in Florida who now should be constantly looking over her or his shoulder.

prosecuting officer in all trial courts in that circuit." Art. V, § 17, Fla. Const. (emphasis added). In fulfilling that role, the State Attorney acts as a quasi-judicial officer charged with seeing that "every defendant receive[s] a fair trial," *Frazier v. State*, 294 So. 2d 691, 692 (Fla. Dist. Ct. App. 1974), and is imbued with "absolute" discretion "in deciding whether and how to prosecute." *State v. Cain*, 381 So. 2d 1361, 1367 (Fla. 1980). *See also Woodard v. Wainwright*, 556 F.2d 781, 786 (5th Cir. 1977) (describing the "traditionally broad" discretion of Florida prosecutors); (Appendix C-1 ("state attorneys operate independently, and as elected officials, they answer only to the voters of their individual jurisdictions.")). Article V, Section 17 thus gives local communities control over who exercises that discretion, increasing accountability to the voters and promoting the independent judgment the prosecutor's role requires. *See, e.g.*, National District Attorneys Association, *National Prosecution Standards* (3d ed. 2009), at 3.

The Florida Constitution provides for two exceptions to the State Attorney's role as sole prosecutor in a judicial circuit, but neither is relevant here. The first exception gives the statewide prosecutor concurrent jurisdiction to prosecute crimes involving two or more circuits, Art. IV, § 4(b), Fla. Const. The twenty-three cases at issue here involve only the Ninth Judicial Circuit. The second exception permits municipal prosecutors to prosecute violations of municipal ordinances, Art. V, § 17, Fla. Const., but no municipal ordinances are in play here. Those are the

only exceptions that the Constitution contemplates, and in fact, the "except as provided in this constitution" language was added specifically in 1986 to account for the newly created office of the statewide prosecutor. *Compare* Art. V, § 17, Fla. Const. (1972), *with* Art. V, § 17, Fla. Const. (1986). *See* Fla. House J. Res. 386 (1985) (proposing ballot language to amend Article V, Section 17 and Article IV, Section 14 to create the statewide prosecutor role); *see also* R. Scott Palmer & Barbara M. Linthicum, *The Statewide Prosecutor: A New Weapon Against Organized Crime,* 13 Fla. S. U. L. Rev. 634 (1985) (describing the multijurisdictional functions of the statewide prosecutor that were ultimately adopted in 1986).

Florida's Constitution is therefore "clear, unambiguous, and addresses the matter in issue," with respect to who can prosecute crimes, and so "it must be enforced as written." *Lawnwood Med. Ctr. v. Seeger*, 990 So. 2d 503, 511 (Fla. 2008). Here, that means that Ayala is to prosecute cases in her judicial circuit.

B. No Constitutional Provision Authorizes Scott to Remove Ayala as the Local Prosecutor on Her Cases Here.

Scott nevertheless appears to claim constitutionally-granted power to replace Ayala on cases as he sees fit. No such power exists, and an unlimited right to replace elected State Attorneys would offend both the constitutional grant of prosecuting authority to independent prosecutors and Florida's separation of powers.

As a preliminary matter, Scott has relied first on authority purportedly granted by Florida Statutes § 27.14, which provides for replacement of state attorneys with other state attorneys. That authority, however, must cede to Florida's Constitution, which provides that state attorneys "shall" prosecute local cases. *See, e.g.*, *City of Daytona Beach v. Harvey*, 48 So. 2d 924, 925 (Fla. 1950) ("The voice of the people expressed in the constitution is the supreme law of the land and it rises above that of the legislature, the courts or the executive."). We nevertheless discuss Section 27.14 in some detail below—but for now it is sufficient to note that Section 27.14 is inferior to the Constitution and its facial breadth is explained by the fact that it predates elected state attorneys by decades, and that this Court has never interpreted it to empower a governor to replace an elected prosecutor because he disagreed with how the prosecutor exercised her or his discretion.

1. The Governor's Plenary Executive Authority Does Not Authorize Removal of a State Attorney from Her Cases.

As for constitutional authority for his position, Scott appears to rely only on the Constitution's plenary grant of executive power to the governor. Specifically, Article IV, Section 1(a) of the Florida Constitution provides that the governor shall "take care that the laws be faithfully executed." (*See* Appendix F-1–3; G-1–63); Art. IV, § 1(a), Fla. Const. Although he has not cited it here, Scott has in the past also suggested that the closely-related grant in Article IV, Section 1(a) of "supreme

executive power" to the governor justifies executive action. *See Whiley v. Scott*, 79 So. 3d 702, 715 (Fla. 2011).

Neither clause permits the Governor's acts. Just six years ago, in *Whiley v. Scott*, this Court made clear that the phrase "supreme executive power" is not "so expansive" as to make the governor "all-powerful." *Id.* The Court similarly rejected the idea that the governor's duty to see that the laws be "faithfully executed" permitted a broad assertion of authority. *Id.* Instead, this Court held that express grants of constitutional authority—just like, here, the mandate that state attorneys "shall" prosecute local cases—supersede any generic grant of executive authority. *Id.*

In *Whiley*, Scott had interpreted his general executive power to give him the power to direct executive department heads to summarily suspend certain rulemaking. *Id.* at 714–15. Scott did this in spite of the fact that Article IV, Section 6 of the Florida Constitution entrusts rulemaking functions to the executive departments, not the governor. When a citizen challenged the relevant executive orders, this Court barred Scott's acts as unconstitutional. *Id.*

The Court found the keystone in that case to be "the fundamental principle that our state constitution is a limitation upon, rather than a grant of, power." *Id.* The Court therefore held that Scott's general executive authority did not allow him to undo the specific powers accorded to other officers. *Id.*; *see also State ex rel.*

Kennedy v. Lee, 274 So. 2d 881, 882 (Fla. 1973) ("Our Constitution is a limitation upon power, not a grant of power[.]"). Instead, the Court held that, since the Florida Constitution had allotted the power to make rules elsewhere, the Governor could not infringe that power *even* with respect to state officers within the executive branch of government.

Significantly, Scott had far greater constitutional power over the officers in *Whiley* than he does here, and yet this Court concluded the Florida Constitution circumscribed that power. Specifically, those officers were not independently elected, but instead "serv[ed] at the pleasure of the governor." Art. IV, § 6, Fla. Const. Scott thus argued—intuitively—that he had power to control those individuals as an obvious corollary to his power to remove them. But this Court held that Florida's Constitution must be read literally, and that the governor's power cannot conflict with or take away from express power. 79 So. 3d at 715 ("power to remove is not analogous to the power to control.") So even in the face of express constitutional power to remove other officers, the governor's executive power could not infringe on the power otherwise given those officers.

Here, Scott has no enumerated constitutional power to dictate how state attorneys prosecute cases, and, unlike in *Whiley*, he cannot point to any express constitutional authority to direct Ayala's prosecutions. Scott thus has substantially *less* authority here to override an express grant of constitutional power than he did

in *Whiley*, where the Court found his authority insufficient. Likewise, the grant of power to a state attorney is both clear and—as discussed next—provided in the Judicial part of Florida's constitution.[23] So the Governor's orders here are invalid.

Florida courts have never ruled on whether the governor may usurp a state prosecutor's constitutional power to prosecute cases, and, to our knowledge, only New York has ever addressed a similar issue under its own constitution. *See Johnson v. Pataki*, 91 N.Y.2d 214, 221 (1997). One simple reason that case is not relevant, however, is that the New York constitution does not give a local prosecutor any constitutional power to prosecute cases. Instead, "[t]he [New York] Constitution provides for the offices of Governor, Attorney-General and District Attorneys, but it does not identify particular—let alone exclusive—prosecutorial duties or allocate the responsibility among them." *Id.* at 225. Consistent with this, the allocation of prosecutorial power in New York "has consistently been left to the Legislature," which in turn has directed that the governor may order the Attorney General to prosecute any case throughout the state. *Id.* It comes as little

[23] This Court has stated (in dicta) that the governor's plenary executive power may permit him to replace a state attorney who is already disqualified. *See Austin v. State ex rel. Christian*, 310 So. 2d 289, 292 (Fla. 1975) (citing *Advisory Opinion to Governor*, 10 So. 2d 926 (1942)). But that is the exercise of executive power to fill a vacuum—i.e., it happens when the Constitution says that a state attorney "shall" prosecute, but the state attorney is unavailable, typically because of a conflict of interest. But *Whiley* makes clear that, in the face of an express grant of constitutional power to another state actor, the governor has no plenary executive authority to override that power.

surprise, then, that the New York courts found that the governor's plenary executive power permitted him to direct New York's Attorney General to replace a state prosecutor against his will. *Id.* at 226. But in New York, the constitution gives the local prosecutor literally no directive about what cases she is to prosecute.

Florida's constitution is different. It guarantees that the state attorney "shall" prosecute cases in her judicial circuit, and Ayala *was* prosecuting all the cases subject to the Executive Orders. The Constitution makes no accommodation for the attorney general—or anyone else—to supersede that authority. This Court has in turn protected such powers, and it has not permitted the governor to use his general executive authority to override a specifically granted power. Florida's Constitution thus does not permit Scott to disregard the voters who elected Ayala, and his orders therefore should be invalidated.

2. Separation of Powers Principles Also Prohibit Scott from Removing Ayala from Her Cases.

This Court has explained that it applies the doctrine of separation of powers "strictly," and that it is "fundamental" that "no branch may encroach upon the powers of another." *Whiley*, 79 So. 3d at 708; *see also* Art. II, § 3, Fla. Const. ("No person belonging to one branch of government shall exercise any powers appertaining to either of the other branches unless expressly provided herein."). As relevant to this case, the governor obviously resides in the executive branch, and "Article V of the Florida Constitution creates the judicial branch of this state,

deliberately separating it from and making it coequal to the other branches of government." *Office of State Attorney, Fourth Judicial Circuit of Florida v. Parrotino*, 628 So. 2d 1097, 1099 (Fla. 1993). This Court has noted that "Article V also creates the office of state attorney, implying what is obvious—the state attorneys are quasi-judicial officers." *Id.* (granting absolute prosecutorial immunity based on a state attorney's judicial functions). As "quasi-judicial" officers, state attorneys have a foot in each of two branches of government: the charging function of a state attorney is executive in nature, while the conduct of trial and the right to immunity is judicial. *See State v. Bloom*, 497 So. 2d 2, 3 (Fla. 1986) (discussing charging as an executive function of state attorneys); *Fotopoulos v. State*, 838 So. 2d 1122, 1137 (Fla. 2002) ("[I]t is beyond debate that a state attorney in Florida is a quasi-judicial officer of the court. It is his or her duty to see that a defendant gets a fair and impartial trial. As an officer of the court, he or she is charged with the duty of assisting the Court to see that justice is done, and it is not his or her duty merely to secure convictions." (citations, quotations, and alterations omitted)).

Here, Scott has purported to remove Ayala *entirely* from the cases that his orders apply to. So under the Governor's orders, not only would Ayala not decide whether to seek the death penalty here, she also would not participate in other crucial aspects of the case, including ensuring compliance with *Brady v. Maryland*, safeguarding a fair trial, and considering the interests of victims and the public.

Those latter functions are precisely those that an *independent* judiciary protects and that the executive may not meddle in. *See Fotopoulos*, 838 So. 2d at 1137 (noting that state attorneys have judicial-based obligations to ensure a fair trial). Even if Scott had some control over a state attorney's charging decision—and he does not—removal of the state attorney from an entire case interferes with the operations of the judicial branch, and therefore violates Florida's strict separation of powers.[24]

On this point, *Wiley* again provides helpful guidance. There, this Court pointed out that, although the agency heads Scott sought to control nominally served in the executive branch, the rulemaking at issue was a "delegated function" that the legislature gave to "the department head," and not "the Governor." 79 So. 3d at 715. So, like state attorneys, the department heads in *Whiley* had functions in two different branches of government. In light of that dual role, this Court concluded that separation of powers required even closer circumscription of

[24] The more general power to suspend "any state office not subject to impeachment . . . for malfeasance, misfeasance, neglect of duty, drunkenness, incompetence, permanent inability to perform official duties, or commission of a felony" and "fill the office by appointment for the period of suspension" similarly does not imply a right of control. Art. IV, § 7(a), Fla. Const.; *see also* Art. IV, § 7(b), Fla Const. (providing for a legislative check on § 7(a)). The Court has unambiguously rejected such arguments: "the power to remove is not analogous to the power to control." *Whiley*, 79 So. 3d at 715.

the Governor's powers. *Id.* at 715. Otherwise, the executive would be impermissibly affecting the operations of the legislative branch. *Id.*

Finally, because the state attorney is a quasi-judicial officer, Scott's orders also encroach on the judiciary's exclusive authority under Article V, Section 15 to regulate the bar. Florida's Rules of Professional Conduct, which this Court promulgates, adopt the American Bar Association Standards of Criminal Justice Relating to Prosecution Function. *See* Rule 4-3.8 cmt. Those standards require Ayala "to seek justice, not merely to convict," ABA Standard 3-1.2(c), and prohibit her from "mak[ing] the severity of sentences the index of . . . her effectiveness." ABA Standard 3-6.1(a). Ayala's announcement concerning the death penalty made it clear that she was fulfilling those ethical duties when she decided that justice required her to pursue a life without parole sentence. Scott, by contrast, has no such ethical limitations, and his orders appear to penalize Ayala for following those guidelines. This Court has recognized that "[a] statute violates the separation of powers clause when it interferes with the ethical duties of attorneys, as prescribed by this Court." *Abdool v. Bondi*, 141 So. 3d 529, 553 (Fla. 2014). The same must therefore be true for executive actions that interfere with the ethical duties of lawyers, as Scott's action here does. For this reason, too, the Court should nullify Scott's orders.

C. This Court's Cases on Section 27.14 Do Not Suggest that Scott Has Constitutional Authority to Remove Ayala from Her Cases.

As we already have shown, the fundamental issue here is constitutional: the Florida Constitution guarantees that Ayala "shall" prosecute cases in her circuit, and Scott has no valid constitutional basis to support his exercise of authority to the contrary. But because Scott expressly relies on Section 27.14 in his orders, and because this Court has analyzed that statute in prior cases, we discuss that provision in more detail here.

Section 27.14 purports to give the governor power to "order an assignment of any state attorney to discharge the duties of the state attorney" if "any state attorney is disqualified to represent the state in any investigation, case, or matter pending in the courts of his or her circuit or if, for any other good and sufficient reason, the Governor determines that the ends of justice would be best served." § 27.14, Fla. Stat. (2016). The statute's breadth, however, derives from the fact that it dates to 1905, when the governor appointed state attorneys and, moreover, the constitution did not designate state attorneys as the mandatory prosecutors for local crimes.[25] *See* Art. VI, § 19, Fla. Const. (1868) (providing for appointment of state

[25] In 1905, Florida's system of appointing state attorneys was out of step with the national trend in the nineteenth century toward electing local prosecutors. As of 1912, only five states did not select their local prosecutors by election. Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. Crim. L. & Criminology 717, 777 (1996).

attorneys by governor); *see Stone v. State*, 71 Fla. 514, 517 (Fla. 1916) (describing the appointment of state attorneys and the adoption of Section 27.14's predecessor as part of the Acts of 1905). In 1948, however, the people chose to elect state attorneys, and in 1972 they expressly designated that those state attorneys "shall" prosecute local crimes. Since those constitutional changes in 1948 and 1972, this Court has *never* suggested that Section 27.14 gives a governor authority to remove an elected state attorney from a case where the attorney is ethically and competently able to proceed, and it has never construed the Florida Constitution to permit such an act.

This case is the first to squarely present the question of the constitutionality of Section 27.14 in light of the current version of the Florida Constitution. Cases upholding the statute based on earlier versions of Article V, Section 17 can no longer be treated as authoritative, or even persuasive, because they turned on constitutional authority no longer available to the governor. In *Stone v. State*, for example, the Court found that the Legislature could provide for re-assignment and exchange of positions among state attorneys because "the Constitution requires the appointment of 'a state attorney in each judicial circuit, whose duties shall be *prescribed by law*'" and which were therefore alterable by statute. 71 Fla. 514, 517 (Fla. 1916) (emphasis added). Under that language, "the Constitution did not expressly or impliedly require the duties 'prescribed by law' for such officer to be

confined to the judicial circuit in which he is appointed." *Id.*; *see also Johns v. State*, 144 Fla. 256, 267 (1940) (adopting *Stone*'s analysis that, under the then-current constitution, "the nature and extent of the duties of state attorneys and the territorial limits within which they are to be performed could appropriately be left to the legislature.").

In contrast, the modern Florida Constitution *does* expressly define the role of each state attorney and gives it to a single elected official: the state attorney "*shall* be *the* prosecuting officer in all trial courts in that circuit." Art. V, § 17, Fla. Const. (emphasis added). Since that phrase was added in 1972, this Court has never ruled on the constitutionality of forcibly removing a state attorney. In most cases involving Section 27.14, even before the 1972 change, the local state attorney was already disqualified or ethically conflicted out of representing the state when the governor ordered a replacement. *See, e.g.*, *State v. Fitzpatrick*, 464 So. 2d 1185, 1189 (Fla. 1985); *Kirk v. Baker*, 224 So. 2d 311, 312 (Fla. 1969) (governor authorized to temporarily switch 5th Circuit State Attorney and 11th Circuit State Attorney to address clear conflict of interest in case related to bribery and 5th Circuit State Attorney, where both state attorneys maintained full authority to manage cases in their temporary judicial circuits); *Finch v. Fitzpatrick*, 254 So. 2d 203, 205 (Fla. 1971) (state attorney replaced to resolve conflicts of interests). Likewise, in *State ex rel. Christian v. Austin*, a State Attorney requested

substitution because his own work on a statewide grand jury had placed "great demand on his resources." 302 So. 2d 811, 812 (Fla. Dist. Ct. App. 1974), *rev'd sub nom. Austin v. State ex rel. Christian*, 310 So. 2d 289, 290 (Fla. 1975). There, the state attorney affirmatively ceded his prosecutorial power in the case in question.

In no case, however, has this Court passed on the constitutionality of removing a prosecutor who *opposed* removal. Forcible encroachment on a constitutional power is far different from an officer ceding power, and it is far different from the governor filling a void in power. By analogy to *Whiley*, nothing would stop department heads from asking the governor his policy preferences and then voluntarily deciding to stop rulemaking. Likewise, if a state attorney voluntarily cedes the power to prosecute, the state attorney has *herself* given the power to prosecute to another, so there is little constitutional concern of gubernatorial overreach. Similarly, if the person who "shall" prosecute cases is unavailable, then the governor offends no constitutional power by naming a replacement. But none of that suggests that the governor may forcibly remove the power to prosecute from the hands of an available state attorney. In fact, that is precisely what the Constitution prohibits.

This Court has thus *never* endorsed the idea that the governor has plenary authority to control the charging decisions of a locally elected state attorney.

Scott's reliance on Section 27.14 cannot make up for the fact that he has no constitutional authority to override the prescription that Ayala "shall" prosecute the cases in her judicial circuit.

II. Scott Did Not Satisfy the Statutory Standard for Replacing Ayala.

Even if there were a constitutional basis for replacing Ayala here, the Governor failed to satisfy the statutory requirements of Section 27.14 because his stated reason for dismissing Ayala did not constitute a "good and sufficient reason" to remove Ayala from Loyd's prosecution. Section 27.14 only allows the Governor to replace a state attorney for two reasons: disqualification, or "other good and sufficient reason." § 27.14, Fla. Stat. (2016). Since there is no suggestion that Ayala is disqualified, the Governor can only rely on Section 27.14 if there is a good and sufficient reason to replace Ayala.

When Ayala exercised her prosecutorial discretion and decided that she would not seek the death penalty, she was acting entirely within her authority. That *entirely legal* act cannot possibly constitute "a good and sufficient reason" for replacement. Nothing in Florida law requires Ayala to seek the death penalty, even when statutory aggravators are present,[26] so the suggestion that her charging policy is grounds for replacing her is meritless.

[26] In fact, there are numerous recent cases across Florida where it appears that state attorneys had capital felonies and aggravators and the state attorney used

Additionally, good and sufficient reason cannot include an inaccurate, pretextual justification.[27] Scott relied on a mischaracterization of Ayala's prosecutorial judgment to justify replacing her. The Executive Orders allege that Ayala "will not seek the death penalty . . . *regardless* of [the] circumstances . . . and *without regard* for the presence of applicable statutory aggravators." (Appendix F-1 (emphasis added)). And in a press release issued the same day, the Governor doubled down on his mischaracterization of Ayala's decision, accusing her of making it "abundantly clear that she will not fight for justice for Lt. Debra Clayton and our law enforcement officers who put their lives on the line every day." (Appendix I-1). Just the opposite is true.

Ayala's public explanation of her death-penalty decision showed that she very carefully weighed all of the relevant factors, and that she specifically intended

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her or his discretion to not seek death. *See State v. Michael Woods* (5th Judicial Circuit); *State v. Stephen Underwood* (8th Judicial Circuit); *State v. Keishanna Thomas* (12th Judicial Circuit); *State v. Amber McCray and Larry Haynes* (17th Judicial Circuit); *State v. Joseph Milman* (18th Judicial Circuit); *State v. Jennifer Trent* (18th Judicial Circuit). The governor did not remove these state attorneys from these cases.

[27] Although Florida courts do not appear to have had occasion to address this specific issue, other courts have. *See, e.g.*, *Watson v. State*, 291 So. 2d 741, 742 (Miss. 1974) (citing *Tipler v. State*, 57 Miss. 685 (1880) (distinguishing between a "good and sufficient reason . . . , or . . . simply a pretext.")); *In re O'Donnell*, 43 B.R. 679, 680 (E.D. Pa. Bankr. 1984) (holding that client's emotional inability to appear in court would be "good and sufficient reason" to waive attendance, but that counsel's "unsupported assertion" that client was unable to appear in public did not constitute good and sufficient reason).

to fight for victims' rights. Ayala explained that "[d]eciding when and if to seek death penalty is one of the most important decisions that I will have to make in my capacity as state attorney," and she reached her conclusion after "extensive and painstaking thought and consideration." (Appendix D-3). The result of this painstaking evaluation was a "pragmatic" and "evidence-based" determination that seeking the death penalty "is not in the best interest of [the] community or the best interest of justice." (*Id.*) Ayala emphasized that her "duty is to seek justice, which is fairness, objectivity, and decency." And while her decision would have "grave consequences for victims' families," she explained that "the death penalty traps many victims in a decades-long cycle of uncertainty," and that "[w]e can offer victims' families more closure and more certainty" by declining to seek the death sentence.

Not only did Ayala weigh all the circumstances, she also made it clear that she was not categorically refusing to apply the death penalty "regardless of the circumstances." In response to press questions, she explained that "[t]here may be cases, even active ones, that I think death penalty may be appropriate because of the egregiousness of the offense." (Appendix D-13). And she explained that "[i]f the death penalty system was one that, again, did not drag out for years and years, decades and decades, and if the death penalty was one that didn't take victims' families through this whole entire process . . . we would revisit this issue."

(Appendix D-21). These statements reveal that Ayala's decision did not *disregard* the circumstances; she simply evaluated prevailing circumstances differently than the Governor did and said if circumstances changed she would reevaluate. The Governor's justification was therefore not a "good and sufficient reason" for displacing an elected state attorney, because it was nothing more than an unsupported pretext to remove a prosecutor from cases where the Governor "strongly disagree[d]" with her sentencing decision.

III. Ayala Reserves Her Federal Constitutional Challenges to Scott's Acts for Resolution in a Pending Federal Court Action.

Finally, we attach here a copy of a federal complaint that Ayala filed in the United States District Court for the Middle District of Florida (Appendix J-1) also challenging Scott's action here on Equal Protection and Due Process grounds. Because the Florida State constitutional issues here are important and have not been squarely addressed by Florida courts, *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941) and its progeny generally prevent Ayala from pursuing those claims in federal court and likewise direct federal courts to abstain from hearing even federal claims while state claims are resolved. *See, e.g.*, *Palmer v. Jackson*, 617 F.2d 424, 428 (5th Cir. 1980) (applying *Pullman* abstention when a case "present[s] a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law" (citations omitted)). However, in situations such as this, "federal abstention doctrines should

not force the litigant to pursue the federal law claim in state court." *Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d 1299, 1304 (11th Cir. 1992) (citing *England v. La. State Bd. Of Med. Examiners*, 375 U.S. 411, 415 (1964)). So *England* guarantees litigants a federal forum for their federal constitutional claims, 375 U.S. at 420, even when those claims relate to claims barred under *Pullman*.

We therefore make here what courts call an "*England* reservation," whereby we inform this court of our federal claims (which are set out in the attached federal complaint), but ask that this Court *not* judge those claims. To properly make an *England* reservation, "(1) the litigant must first file in federal court, (2) the federal court will stay the federal proceedings to allow the state courts to consider any state law questions, and (3) the litigant must inform the state court that, if necessary [she] intends to pursue any federal constitutional questions in federal court following the conclusion of the state court proceedings." *See Fields*, 953 F.2d at 1304–5. Pursuant to the third step in the *England* procedure, we are here giving notice to this Court that Ayala intends to pursue her federal constitutional claims in federal court following the conclusion of this proceeding, if necessary. While as noted above, *Windsor* requires Petitioner to include her federal claims in this proceeding, it does not require the Court to actually rule on those claims. *See England* 375 U.S. at 421 ("Despite these uncertainties arising from application of *Windsor*—which decision, we repeat, *does not require that federal claims be*

actually litigated in the state courts—a party may readily forestall any conclusion that he has elected not to return to the District Court.") (emphasis added). As such, Petitioner respectfully requests that this Court rule only on the state law claims here.

CONCLUSION

The Court should nullify Governor Scott's orders and direct that State Attorney Ayala is the prosecutor for all of the cases from which Scott has purported to remove her.

Dated: April 11, 2017

Respectfully submitted:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by email and U.S. Mail to Rick Scott (rick.scott@eog.myflorida.com), Executive Office of the Governor, 400 S. Monroe Street, Room 209, Tallahassee, Florida 32399; and Office of the General Counsel (william.spicola@eog.myflorida.com), Executive Office of the Governor, 400 S. Monroe Street, Room 209, Tallahassee, Florida 32399 this 11th day of April 2017.

s/ Marcos E. Hasbun
MARCOS E. HASBUN

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this petition complies with the font requirements of Rule 9.100(l) of the Florida Rules of Appellate Procedure.

s/ Marcos E. Hasbun
MARCOS E. HASBUN