SC17-653

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.

On Emergency Non-Routine Petition for Writ of Quo Warranto

REPLY BRIEF OF PETITIONER ARAMIS AYALA IN SUPPORT OF EMERGENCY PETITION FOR WRIT OF QUO WARRANTO

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INTRODUCTION

Governor Rick Scott falsely claims that, as long as he has *some* reason for removing a state attorney from any case, he can do so at any time, whether or not the state attorney opposes removal. Scott ignores the constitutional mandate that state attorneys "shall" prosecute local cases. Instead, to support his striking conclusion, he points to the fact that State Attorney Aramis Ayala requested another state attorney to prosecute six of the cases in her judicial circuit, implying that, since the Constitution tolerates transfers *by consent* or to resolve conflicts of interest, Scott may freely remove state attorneys from all other cases as well. Opp. 51–52. That conclusion has no support in the law.

Not long ago, Scott acknowledged that he had no power to forcibly intrude on state attorneys. On at least four separate occasions, when citizens wrote to complain about cases or investigations, Scott's office consistently and firmly told them that he could not intervene, because "[e]ach state attorney is an elected official charged with the duty to determine how to prosecute any crime committed within his jurisdiction," and that, "as elected officials, [state attorneys] answer to the voters of their individual jurisdictions." Pet. 5–6; Appendix C-1; *see also* Supplemental Appendix A-C. One letter specifically addressed Scott's assignment authority: "This authority, however, is not designed to allow the Governor to review or second-guess the actions of the state attorney." Supp. Appendix C-1.

Either Scott was being less than honest with these citizens or his view has suddenly changed. In his Opposition, Scott now claims that he can reassign state attorneys against their will whenever he wants, and for whatever reason he wants, as long as doing so is not "without any reason whatsoever." Opp. 30. How does that square with the Constitution's directive that each state attorney "shall be the prosecuting officer of all trial courts in [her] circuit," or with the traditional notions of independent prosecutors? It doesn't. And there is nothing "modest," Opp. 6, 53, about Scott's claimed authority.

Scott's lead case is *Austin v. State ex rel. Christian*, 310 So. 2d 289 (Fla. 1975), a 42-year-old opinion in which—like in every reported case *even before* the modern Constitution—the state attorney in question did not object to the transfer at issue. For more than ten pages (Opp. 40–51), Scott relies on *Austin* to defend against a facial constitutional challenge to Section 27.14 that Ayala never made. As Ayala explained in her petition, "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 concern of gubernatorial overreach" and likewise, "if the person who 'shall' prosecute cases is unavailable, then the governor offends no constitutional power by naming a replacement." Pet. 28. Ayala has only ever argued that the Constitution does not tolerate transfers of cases from a qualified state attorney who opposes transfer. *Austin* holds nothing to the contrary.

Scott concedes that Florida law never requires a prosecutor to seek the death penalty, "even when the statutory criteria are satisfied." Opp. 35. Nor does he dispute the bedrock principle of prosecutorial discretion. Instead, he essentially argues that, if someone is going to exercise prosecutorial discretion, the governor gets to decide who that is. For this, Scott cites only to his power to "take care that the laws be faithfully executed." Opp. 35. But as this Court recently held in *Whiley v. Scott*, 79 So. 3d 702 (Fla. 2011), that does not make the governor "all powerful," and it does not permit him to usurp other constitutionally-granted powers.

As a rhetorical matter, Scott starts and ends with a parade of horribles: state attorneys "categorically refus[ing] to enforce any and all state laws with which [they] disagree," while "the various instrumentalities of the State" stand by "powerless to do anything about it." Opp. 7, 60. Yet elected state attorneys have exercised discretion independently—including discretion not to seek death—for half a century without calamity. In truth, it is Scott who has ushered in a brave new world: A direct interference with independent prosecutorial discretion that the state has never before seen, and one that this Court should not sanction.

ARGUMENT

Scott's actions violated fundamental Florida law, and this matter is ripe for review in this Court. This case involves the most important functions of State

government, and there are no facts for the Court to resolve[1]—there is no dispute about Ayala's specific death penalty announcement, or about the facts of Loyd's case and others in Ayala's circuit, or about Scott's statements in connection with removing Ayala from these cases.[2] The Constitution and laws are clear, and Scott's orders must be overturned.

I. The Florida Constitution's Plain Language Renders Scott's Orders Invalid.

Scott pays little mind to the actual language of the Florida Constitution that ultimately controls this case. As Ayala explained in her petition, Article V, Section 17 reserves the powers of the "prosecuting officer" to elected state attorneys and creates limited exceptions "provided for in this constitution." That clear and unambiguous language "must be enforced as written." *Lawnwood Med. Ctr., Inc. v. Seeger*, 990 So. 2d 503, 511 (Fla. 2008) (quoting *Fla. Soc'y of Ophthalmology v. Fla. Optometric Ass'n*, 489 So. 2d 1118, 1119 (Fla. 1986)). Here, Ayala is the state attorney for the Ninth Judicial Circuit, and the constitutional prerogative is that she prosecutes all cases in those courts.

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[1] Scott tries to dispute collateral facts, such as whether Ayala ever warned King that his assignment was interfering with day-to-day prosecutions in her office. Opp. Attachment Tab D at para 8. But, despite King's sworn denial, Ayala has said this a number of times to King. *See, e.g.*, Supp. Appendix G-1; Opp. 21.

[2] Scott also does not dispute that he refused to let Ayala explain her decision to him during their phone call before he removed her from Loyd's case, even though he now argues that such "important questions should be afforded more, not less, process." Opp. 59.

Scott attempts two arguments to interpret what is otherwise clear language contravening his orders. His first argument, Opp. 42, 51–52, is that the constitutional role of "prosecuting officer of all trial courts in that circuit" does not include the authority to exercise charging discretion over criminal cases brought in those courts. In support of that assertion, Scott offers no interpretation of Section 17's actual words. Instead, he appears to argue that drafters should have separately granted prosecutorial control over "criminal *cases* tried in that circuit." Opp. 42. Scott fails, however, to grapple with that argument's startling consequences. If the role of "prosecuting officer" for a circuit does not include directing criminal cases—the core prosecutorial function—what else could "prosecuting officer" mean? Scott's interpretation would gut a role expressly created by the Florida Constitution and filled by the voters.

Second, Scott argues that Article V, Section 17's requirement that state attorneys "shall perform other duties prescribed by general law" "appear[s] to authorize laws allowing one state attorney to be assigned to cases pending in other another circuit." Opp. 42. This argument suffers from a basic logical gap: How the assignment of "other duties" could also authorize *removing* a state attorney from the role of "prosecuting officer," Scott never explains.[3] It is much more

[3] The Governor's citation of *Johns v. State* on this point is misleading. *See* 197 So. 791, 796 (1940). At that time, the relevant constitutional provision allowed *all* of the state attorneys' duties to be "prescribed by law."

straightforward—and consistent with the requirement to give the Constitution's words their plain meaning—to interpret this requirement as an *addition* of duties, not a limitation. That could mean that the governor can require a state attorney to fill in for another state attorney who has been disqualified, in addition to her role as the "prosecuting officer" in her own judicial circuit. But there is no support for the idea that this provision was intended to shrink a state attorney's authority.

Sparse, too, is Scott's argument that the "structure" of the Constitution supports his atextual reading of the state attorney's power. Scott starts here with the bare conclusion that "it would make little sense" if the governor could not remove cases from state attorneys given his "supreme executive power" and obligation to "take care that the laws be faithfully executed." Opp. 43. Far from "making little sense," this is the law: Scott ignores this Court's directive in *Whiley* that those general grants of power do not supplant specific constitutional grants to constitutional officers. 79 So. 3d 702 (Fla. 2011). In fact, Scott appears to have conceded that point, as, outside of his discussion of the separation of powers, he never once rebuts *Whiley*'s holding that his plenary executive power cedes to a specific grant of power. *Compare* Pet. 18–20 (discussing specific versus general grants of power in *Whiley*), *with* Opp. 53 (briefly addressing *Whiley*, and only with respect to separation of powers). So this argument, too, finds no support.

Scott similarly argues that his ability to "suspend from office" an officer charged with "malfeasance, misfeasance, neglect of duty, drunkenness, incompetence, permanent inability to perform official duties, or commission of a felony" must include the "less disruptive" power to reassign "particular cases." Opp. 43–44. But Scott ignores that suspension power—*unlike* the power Scott now claims for himself—comes with a substantive standard. Scott has not here accused Ayala of "malfeasance, misfeasance, neglect of duty, [or] incompetence," nor could he, particularly given that he concedes that Florida law never requires a prosecutor to seek the death penalty, even when all aggravating factors are met.[4] *See* Opp. 35. The fact that a governor can initiate suspension proceedings based on very serious charges does not support his claim that he can transfer cases to control exercises of prosecutorial discretion. *See also Whiley*, 79 So. 3d at 715 ("the power to remove is not analogous to the power to control"). Likewise entirely unsupported is Scott's claim that the attorney general's statutory power to oversee state attorneys generally would permit a governor to transfer cases. Opp. 44.

[4] The Florida Prosecuting Attorneys' Association's (FPAA's) *Amicus* describes a process for considering capital cases that is not found in the statutory language. Florida Statute 728.04 defines capital crimes and says what a prosecutor must do "[i]f the prosecutor intends to seek the death penalty." None of the relevant statutes says that a state attorney must seek the death penalty. The FPAA also attempts to limit the governor's reassignment power to only capital or death penalty cases. FPAA *Amicus* at 2 and 5. Yet, Scott's argument is not so modest.

Scott turns next to legislative history to explain why the text does not mean what it says. But with the text itself clear, the Court may not divine meaning from the few historical tea leaves Scott provides. Scott's argument ignores the "well established rule of construction that courts will look to legislative history only to resolve ambiguity in the statute." *Dep't of Legal Affairs v. Sanford-Orlando Kennel Club, Inc.*, 434 So. 2d 879, 882 (Fla. 1983); *see also Webber v. Dobbins*, 616 So. 2d 956, 958 (Fla. 1993) ("An inquiry into the legislative history may begin only if the court finds that the statute is ambiguous."). Scott does not even attempt to identify an ambiguity in the constitutional text—because there is none. Instead, he simply asks the Court to re-interpret the clear constitutional language based on his self-serving interpretation of the limited legislative history. But "[l]egislative history cannot be used to change the plain and clear language of a statute." *Fla. Dep't of Revenue v. Fla. Mun. Power Agency*, 789 So. 2d 320, 324 (Fla. 2001). The legislative history does not change the unambiguous constitutional command that Ayala "shall" be the prosecuting officer in her circuit.[5]

[5] Scott's House of Representative *Amicus* tries to rewrite Florida's death penalty statute to *require* the state attorney to seek death whenever an aggravator is present, despite the fact that the statute *allows* prosecutors to do so. *See* § 782.04(b), Fla. Stat. (2016). Of course, Scott's *amici* do not speak for the full Legislature; members of both the Florida House and Senate appear as *Amici* in support of Ayala.

If the records related to the adoption of Article V, Section 17 bear on this case at all, they merely confirm that the amended Constitution "consolidate[s] all prosecutorial power in the office of state attorney." Opp. 45. As Scott points out, the drafters of the version of Article V, Section 17 approved by the voters in 1972 do not appear to have considered Section 27.14 in their deliberations. And, since 1972, the Legislature has not amended Section 27.14 to authorize reassignments like the ones in question here. This Court has never approved of the replacement of an elected state attorney under the circumstances found here. *See* Pet. 17, 26–27. Scott's arguments about the subsequent amendments to Section 27.14 suffer the same defect: none of the later changes to the statute ratify Scott's expansive view of his power to control state attorneys' charging decisions.

Because Florida's Constitution is the supreme law of the State, the fact that it does not permit transfer here means that no state law—including Section 27.14—can change that. The Constitution is alone sufficient to resolve this case.

II. The Existence of Permissive Transfers Does Not Override the Constitution.

Stuck with clear text that contradicts his position, Scott turns to the assertion that allowing permissive transfers necessarily allows forced transfers.[6] Scott's

[6] Scott's comparison to *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) is instructive. Just because the governor's power may be "at its maximum" when he acts with the consent of a state attorney he is replacing does not imply that he has the same authority when he "takes measures incompatible with the

argument essentially goes as follows: Even though state attorneys "shall" be the "prosecuting officer" in local courts, that cannot mean what it says because governors have reassigned thousands of cases. Ergo, it must be that a state attorney is *never* "require[d]" to prosecute local cases, and the governor may reassign them more or less without limitation. Opp. 2–3.

But nothing about permissive and conflicts-driven transfers validates Scott's bold claim that he can use Section 27.14 to override the decision of any state attorney whose charging decisions he disagrees with. Permissive transfers are consistent with this Court's holding that state attorneys are imbued with "absolute" discretion "in deciding whether and how to prosecute." *State v. Cain*, 381 So. 2d 1361, 1367 (Fla. 1980).[7] By contrast, neither authority nor logic support Scott's argument.

First, this Court has never held words of the Constitution to be so devoid of meaning. Scott urges the Court to ignore what he calls the "solitary sentence fragment," Opp. 43, guaranteeing voters control over their local prosecutions. But

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expressed or implied will" of a state attorney, and his power is therefore "at its lowest ebb." 343 U.S. at 637 (Jackson, J., concurring).

[7] The FPAA constructs an entire argument around the Black's Law Dictionary definition of "discretion," but Oxford Dictionaries define "discretion" as simply "[t]he freedom to decide what should be done in a particular situation"—a definition that clearly describes what Ayala has done. Discretion, Oxford Dictionaries, *available at* https://en.oxforddictionaries.com/definition/discretion (last accessed May 5, 2017).

this Court has made clear that it is "not at liberty to [ ] ignore words that were expressly placed [in the Constitution] at the time of the adoption of the provision." *Pleus v. Crist*, 14 So. 3d 941, 945 (Fla. 2009). Scott disregards this, arguing that the mandate that the state attorney "shall" prosecute local cases entrusts no actual power in that office, but instead casually suggests who might prosecute cases as long as the governor approves.[8] But under the Court's holding in *Whiley*, extending the governor's power that far would largely render the Constitution's grant of power to the state attorney "meaningless," *Whiley*, 79 So. 3d at 714, violating basic principles of constitutional construction.

Scott relies primarily on *Austin*, 310 So. 2d at 293 to support his position, because it is the only case in which the Court considered the reach of Section 27.14 under the current version of the Constitution. Scott asserts that *Austin* controls because it contravenes "Petitioner's argument that cases may not constitutionally be reassigned from one state attorney to another when the state attorney of the circuit in question is ready, willing, and able to handle that case." Opp. 47.

But of course, that has never been Ayala's argument. Ayala's argument is that the governor may not remove cases from a state attorney who is ready, willing, and able, and *who opposes transfer* on account of her constitutional authority. The

[8] Under Scott's interpretation, he should be reviewing every case-related decision of every state attorney and replacing that state attorney whenever he believes the law is not being "faithfully executed."

Court did not even suggest that it was addressing that question in *Austin*.

Moreover, in *Austin*, the elected state attorney was *not* actually "ready, willing, and able" to handle the case in the first place, let alone opposed to transfer. Opp. 47. As recounted by the First District Court of Appeal's decision in *Austin*, the resident state attorney was occupied with a statewide grand jury that precluded him from investigating a particular case and, as a result, requested that the governor appoint another state attorney to investigate that case. *State ex rel. Christian v. Austin*, 302 So.2d 811, 812 (Fla. 1st DCA 1974). The challenge to the governor's reassignment came not from the resident state attorney, who had originally requested reassignment, but rather from the defendant.[9] In those circumstances, where the resident state attorney voluntarily requested assistance and ceded power in his circuit, this Court found no constitutional conflict. *Austin*, 310 So.2d at 291.[10]

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[9] The resident state attorney then "refused" the defendant's request to initiate *quo warranto* proceedings to challenge defendant's prosecution by the non-resident state attorney appointed by the governor at the resident state attorney's request. *Austin*, 310 So. 2d at 291.

[10] Scott's claim that there have been prior examples of gubernatorial replacement over the wishes of a state attorney "because of questionable applications of prosecutorial discretion" is without merit. Opp. 13–14. Scott cites just two instances: the incredibly complex set of prosecutions related to the 1991 alleged murder of Kay Cornell Sybers by her husband who was a district medical examiner (http://www.brainerddispatch.com/content/jury-decide-mystery-embalmed-wife) (Opp. Attachments K, L, M, N, O, P, Q and R), and an investigation into an organization that "supported, endorsed, and financially contributed" to the resident state attorney's campaign. (Opp. Attachment S). Both matters involved obvious conflicts of interest and are irrelevant to the forced removals at issue here.

Scott's other cases only prove the weakness of his argument. In *Taylor v. State*, this Court explicitly noted that it was *not* "called upon to say whether a wholesale appointment that would have the effect of ousting a constitutional officer might not be an abuse of discretion such as this court might feel impelled to revise," 38 So. 380, 383 (Fla. 1905), and in any event, the Court never actually held that the local state attorney was available to do his job.[11] *Id.* Similarly, *Hall v. State* involved a challenge to a replacement state attorney's authority to bring charges outside his circuit, not a challenge to the governor's decision to replace the local prosecutor. 187 So. 392, 397 (Fla. 1939). The Court never held that state attorneys are fungible, *see* Opp. 57, or that the governor can freely move them around to suit his preferences for how individual cases are prosecuted.

For the same reason, the Attorney General's argument that Ayala is not the only representative of the State is a non sequitur, because the issue is not whether the Attorney General also has authority to represent the State in court but whether the Governor has authority to remove the attorney currently representing the State because he disagreed with charging policy.[12] This case presents the exact situation

[11] Likewise, in *Johns*, there was no suggestion that the state attorney objected to being replaced. 197 So. at 794, 796.

[12] The Attorney General also notes that the statewide prosecutor has concurrent jurisdiction with the state attorney in some cases, but there is no suggestion that any of the cases at issue here fall in that category.

that the *Taylor* Court suggested *would* constitute an abuse of power, because Scott has completely ousted Ayala from all capital cases in her circuit.

Without any supporting authority, Scott's argument ought at least to derive from fundamental legal principles, but that too is lacking. The existence of *some* exception to the direction that the state attorney "shall be the prosecuting officer" in her circuit does not imply the existence of a further exception that overwhelms the rule. Some of Scott's facts on this issue are simply confused—he points to Ayala's relinquishment of one of the Loyd cases and asks, "[i]f Ayala's duty to serve as 'the prosecuting officer' of her circuit 'requires' her to try one of Loyd's cases, why does it not also require her to try the *other*?" Opp. 2 (emphasis in original). The answer is that the text of the Scott's order says that King is assigned Ayala's duties "as they relate to the investigation, prosecution, and *all* matters related to Markeith Loyd," (emphasis added) so she has simply ceded all of Loyd's remaining cases to King pending a ruling by this Court.[13] Pet. Attachment F-2.

[13] Scott tries to make a great deal of the fact that Ayala has requested transfer of six cases. Opp. 10–13. These transfers are nothing but further evidence of Ayala acting ethically and appropriately: As per Scott's order, Ayala requested transfer of two cases involving Loyd. Opp. Attachment H and http://www.clickorlando.com/news/accused-police-killer-markeith-loyd-threatened-woman-in-august-police-say (Purdy case); Ayala requested that two other cases be reassigned to King because before Ayala became state attorney, the prior state attorney requested reassignment because the defendants were relatives of Ninth Judicial Circuit employees, the Governor assigned King, and a probation violation was being sought against one defendant (Opp. Attachment F (Thomas case)) and the other defendant was requesting expungement (Opp. Attachment J

But more essentially, Scott's argument boils down to the assertion that it is impossible to interpret the Constitution in a way that permits a state attorney simultaneously to *cede* power to another state attorney in appropriate cases while precluding the governor from *taking* power forcibly in others. *See, e.g.*, Opp. 2 (criticizing Ayala's "assertion of unilateral authority" to exercise her constitutional power). But that is precisely what it means for the *state attorney*, and not the *governor*, to be the prosecuting officer in her circuit. This is a perfectly sensible way to interpret the Constitution, and it is the only interpretation that is consistent with both *Whiley* and this Court's other precedent.

Finally, if the Court takes Scott's recommendation and considers "historical practice" to determine whether permissive and conflicts-based transfers differ from forced ones, then Scott's own practice undermines his position. Opp. 7, 22, 50, 60. The one *relevant* practice here is Scott's longstanding view that he cannot intervene in prosecutorial matters because state attorneys are "charged with the duty to determine how to prosecute any crime committed within his jurisdiction," and "answer to the voters of their individual jurisdictions."[14] Appendix C-1; Supp.

(Hurtado case)); and Ayala twice requested assignment of a different state attorney because she personally represented those defendants when she was in private practice. (Opp. Attachments B and D (Rios and Buchan cases)). Interestingly, Scott identified a state attorney other than King to take the Rios and Buchan cases.

[14] Scott also refused in 2014 to replace an elected public defender, Matt Shirk, accused of numerous improprieties in office, claiming that only the voters could make that decision. Topher Sanders, *Grand jury excoriates Matt Shirk; Gov. Rick*

Appendix A-C. That historical practice affirms that even Scott previously appreciated the limits on his power to replace a state attorney.

III. Nothing in Ayala's Exercise of Discretion Warrants Scott's Action Here.

Scott makes the extraordinary claim that he possesses unlimited power under Section 27.14 as long as he does not act completely arbitrarily, Opp. 30, and for all the reasons discussed above, that is wrong. But Scott nevertheless appears to argue in that same discussion that, even if there were some limitation on his power, he has satisfied it because Ayala acted improperly. Opp. 29–40. Yet Scott offers nothing to support that idea.

First, and most importantly, Scott concedes (as he must) that Florida's death penalty is never mandatory, "even when the statutory criteria are satisfied." Opp. 35 (admitting that this "may well be so"). Any other conclusion would, of course, be to admit that Florida's death penalty is unconstitutional. *See* Pet. 8. That means that Scott has conceded not only that a state attorney is never required to seek the death penalty, but also that, as a corollary, a state attorney may *always* consider factors outside of those that are statutorily mandated. Otherwise, state attorneys would have to treat the death penalty as mandatory when the statutory factors were met. That is an unavoidable admission by Scott, and one that is, in fact, largely

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Scott says public defender's political future up to voters, Jacksonville.com (Dec. 30, 2014), available at http://jacksonville.com/news/crime/2014-12-30/story/grand-jury-excoriates-matt-shirk-gov-rick-scott-says-public-defenders.

dispositive.[15] *See Sumner v. Shuman*, 483 U.S. 66, 83 (1987) (discussing unconstitutionality of mandatory death penalty statutes).

Scott nevertheless makes two arguments about why Ayala's exercise of prosecutorial discretion permits his intervention. First, he argues that Ayala is unprotected by traditional notions of prosecutorial discretion because she has "promis[ed] *not* to exercise discretion" with respect to the death penalty, whereas his reassigning of cases to King will "ensure rather than preclude the independent exercise of traditional prosecutorial discretion." Opp. 31, 34 (emphasis in original). But that does not follow at all.

With respect to the Loyd case, Ayala did exactly what Scott is claiming that

[15] The Florida House of Representatives thus cannot actually mean that "a state attorney must pursue death . . . in each case where she believes . . . that she can prove . . . at least one aggravating factor." Br. 2. Such a rule would immediately render Florida's death penalty regime unconstitutional, because it would essentially make death the mandatory minimum sentence for an entire category of crimes. § 921.141(6), Fla. Stat. (2016). If Scott's House *Amicus* were accurate, practically every state attorney should have already been removed because many of them have not sought the death penalty where there was a capital offense and at least one aggravator. *See* Pet. n.26 (providing specific examples). In addition, state attorneys could never consider mitigating evidence when deciding whether to seek death. These same legislators are taking over a million dollars and numerous positions from Ayala's office as punishment for her exercise of discretion. Associated Press, *Florida Legislators Want To Cut $1.3M In Budget Of Prosecutor That Refuses To Seek Death Penalty*, WLRN (May 4, 2017), *available at* http://wlrn.org/post/florida-legislators-want-cut-13m-budget-prosecutor-refuses-seek-death-penalty. In the event Ayala's actions are found constitutional, she would expect this funding, that helps her protect the safety of her community, to be fully reinstated.

she must do: She considered the specific facts of the case and she spoke to family members of the victim. Pet. 8–9; Supp. Appendix E-22–23. That she used both case-specific facts and broader policy-related facts is of no moment. Again, nothing in the Constitution or the statutes require a state attorney to only consider case-specific facts when making a prosecutorial determination, in capital or any other cases. With respect to Ayala's broader statement about other cases, she has similarly made clear that she intends to look at the specific details of each case (and she could not avoid doing so, since she is prosecuting them) with respect to charging decisions. She has also made clear, however, that she expects that other social factors—all of which she is *allowed to consider*—will weigh significantly until other evidence emerges. Ayala thus necessarily exercised discretion in choosing not to seek death. And she did so in a way prosecutors do every day.

That reality also belies Scott's related claim that his executive orders *promote* independent prosecutorial discretion.[16] Scott objected to Ayala considering additional factors in sentencing, and so transferred her capital cases. That act therefore implies that the only independent discretion permitted a prosecutor is the discretion to weigh factors in a way that does not offend the

[16] Scott points out that King has already identified several cases that might not be appropriate for the death penalty. Those cases should be returned to Ayala immediately, because there is no good and sufficient reason for leaving them in the hands of a different state attorney who happens to agree with Ayala that the death penalty is not appropriate.

governor. Otherwise, Scott is simply concluding that Ayala's judgment is not as good as King's—and that is plainly the voters' decision to make, not Scott's.

Scott's second argument thus seems to be that what Ayala has done wrong is to exercise her prosecutorial discretion "regardless of circumstances of [the relevant] capital felonies and without regard for the presence of applicable statutory aggravators." Opp. 31 (emphasis omitted). But that is not what Ayala did here. Ayala considered both specific case-related and additional factors prior to concluding that the death penalty is unwarranted. Again, considering those additional factors is something that Scott has necessarily conceded she may do, since death is never mandatory. So this argument also fails.

Scott offers a sub-part to this second argument, however, which is that Ayala's supposed articulation of a bright-line rule about how she intends to prosecute is not a "traditional exercise in prosecutorial discretion," and it offends the legislature. Opp. 31, 33–34. As an initial matter, Scott refuses for no reason to take Ayala at her word that she may elect to seek the death penalty in the future. *See* Pet. 10. But even assuming that Ayala has crafted a bright-line rule here, Scott offers nothing to explain why a bright-line rule is in itself problematic. Such charging policies are integral components of prosecutorial discretion, just as much as case-specific decision-making. Ayala's former prosecutor *Amici* explained that:

> Across the country, prosecutors routinely exercise their discretion by articulating general policies regarding charging, diversion, sentencing,

> and enforcement priorities. For instance, it is not unusual for prosecutors to have an intra-office policy of prosecuting only drug cases involving x-grams of cocaine, while declining to prosecute drug cases involving a lesser amount.
>
> * * *
>
> For these reasons, local prosecutors in Chicago, New York, and Houston, among other places, have publicly stated that they generally will not prosecute low-level drug crimes, and will instead direct their resources toward more serious offenses. Local prosecutors across the country have adopted similar policies regarding various other crimes and punishments as well.

(Br. 19 (internal quotation marks and citations omitted)). Ayala's policy does not offend the Legislature any more than those policies.[17] And, to be clear, Ayala did not improperly usurp the role of the Legislature by deciding not to seek the death penalty. While only the Legislature can make laws, state attorneys necessarily consider policy when exercising the quintessentially *executive* function of deciding how best to enforce those laws. *See Printz v. United States*, 521 U.S. 898, 927 (1997) ("Executive action that has utterly no policymaking component is rare . . . ."). There is nothing improper about doing so.

Scott also devotes significant attention to the New York Court of Appeals' decision in *Johnson v. Pataki*, 91 N.Y.2d 214 (1997). But as we explained in our petition, that decision is not relevant here, because New York's Constitution is fundamentally different and does not give district attorneys exclusive authority to

[17] Contrary to Scott's criticism (Opp. 36–37), Ayala is doing as she said she would during her campaign—being consistent within her judicial district. Opp. Appendix Tab A.

prosecute cases in their districts the way Florida's Constitution does for state attorneys. Pet. 20. Scott offered no response to this flaw in his argument.

Importantly, nowhere in his opposition does Scott argue that Ayala has somehow failed to do her job—and wisely so, because that charge would be unfounded. Ayala did not refuse to prosecute capital cases or pledge to seek lenient sentences for convicted killers. She was—and is—zealously prosecuting crimes in her judicial circuit. Nor has Ayala refused to listen to victims' families as she decides how to prosecute cases. Ayala has honored all of her statutory obligations as state attorney, and will continue to do so. The fact that victims' families have filed *amicus* briefs on both sides of this case illustrates the rich diversity of views among victims' families, and considering the full range of those views is an important responsibility of Ayala's job. Ayala has made clear that her death penalty decision was influenced by her concern for victim's families. Even when the State does not seek the maximum penalty available, capital prosecutions have many critical points where victims' families can meaningfully influence how prosecutors handle a case. And nothing in Ayala's statement suggests that she would refuse to genuinely consider a victim's family that wanted her office to pursue the death penalty.

What Ayala did do is simply determine that in death penalty cases, the prevailing legal, social, economic, and penological factors do not justify seeking

the maximum statutory sentence. Neither Scott nor any of his *Amici* challenge the accuracy of her evidence-based explanation. Ayala's decision includes, among other things, a determination that, where for example the death penalty does not increase officer or civilian safety, her circuit can better use the enormous resources required for the death penalty on more direct policing and victim assistance.

It is also impossible to consider this case without confronting the recent history of Florida's death penalty statute, which Ayala explained was a major consideration in her decision. Since 2015, both this Court and the United States Supreme Court have struck down Florida's death penalty law, leading to a flurry of resentencings, and a legislative scramble to enact a constitutional capital punishment regime. Ayala's decision was eminently reasonable in this context.

As Ayala's *amicus* Advancement Project points out, fairness in the criminal justice system was a major priority for voters in the Ninth Judicial Circuit, and public opinion polls show that a majority of voters in Ayala's circuit favor alternatives to the death penalty.[18] So Ayala is carrying out precisely the role that the Constitution envisions for locally-accountable prosecutors.

[18] Scott's response overstates the noteworthiness of the results of a LexisNexis News Database search spanning Ayala's campaign. Opp. 8 n.1. Though the search yields 1,476 articles in which the term "Florida" appears in the same sentence as "death penalty" or "capital punishment," only about 500 of these articles are from Florida-based publications, and of these 500 articles, only 147 do not include one or more of the terms "unconstitutional," "on hold," "limbo," "struck down," "strike down," "botch," "exonerate," or "exonerated." Supp. Appendix I.

That exercise of prosecutorial judgment stands in marked contrast to the actions of Scott, who cannot credibly dispute the baldly political character of his actions. The same day Ayala filed her petition, Scott told reporters that her decision regarding the death penalty had "*personally* offended him." This only confirmed his earlier remarks that he replaced Ayala because he "strongly disagree[d]" with her decision not to seek the death penalty in the Loyd case, and that he was upset that Ayala "would not fight for justice." Indeed, Scott does not explain why—if his motivation truly was not political—he refused even to let Ayala explain her decision during the brief phone call before he removed her. That is a heavily-politicized intrusion into a realm of prosecutorial discretion that the State has never before seen and that contrasts sharply with Ayala's diligent service.

IV. Separation of Powers Considerations Also Militate Against Upholding Scott's Orders.

Finally, Scott offers no pertinent response to the separation of powers concerns we raised in Ayala's petition. Specifically, Ayala points out that Scott's orders prevent her from exercising her judicial functions. Pet. 21–24. That intrusion of the executive into the quasi-judicial violates Florida's strict separation of powers doctrines. *Id.*

Scott responds only by claiming that "the decision whether and how to enforce a duly-enacted state law is not a quasi-judicial function at all." Opp. 54. But even if that were true, Scott says *nothing* in response to the assertion that he

undeniably withdrew *judicial* functionality from Ayala—including ensuring the fair treatment of all parties—when he replaced her *entirely* on the cases in question. That violates separation of powers doctrines. Indeed, as Ayala warned in her petition, Scott's orders are having a harmful effect on her office's overall ability to function even in cases where she has not been removed. King has requested that Ayala notify him of all *potential* capital cases, so that the Governor can systematically remove Ayala and allow King to decide how to charge the case. Supp. Appendix G. Such a system would be unworkable in practice, and only underscores that Scott's reliance on Section 27.14 is inappropriate.

Scott's only other argument here is a variation on his main theme: that, since separation of powers principles do not preclude permissive transfers, they cannot preclude forced ones. Opp. 55. But just as in other contexts, neither law nor logic supports that conclusion. A permissive transfer is a *de facto* delegation of authority *by* one quasi-judicial officer *to another* quasi-judicial officer, so there are no separation of powers concerns. Forced transfer is a deprivation of authority by a purely executive officer *at the expense of* a quasi-judicial officer. That directly implicates the balance between the governmental branches in a way that permissive transfers do not, and does so in a way that the law does not permit.

Scott's discussion of *Whiley* in this context is similarly off-point. Scott seems to suggest that he has "maximum" authority here because the legislature has

granted him transfer power under Section 27.14, and so *Whiley* has no application here. Opp. 53–54. But the legislature cannot delegate *judicial* power to the executive, and it is quasi-judicial power that the governor infringes here. *Whiley* is in fact directly apt: It holds that the governor cannot take over a power possessed and delegated by another branch—in that case, the legislature—whereas here, Scott similarly cannot take over a power possessed (and not delegated) by the judicial branch. Thus, separation of powers concerns also invalidate Scott's orders.

CONCLUSION

The Court should invalidate Governor Scott's orders and direct that all cases that he has purported to remove from State Attorney Ayala be returned to her for her to exercise her constitutional authority. If the Court finds that there is some specific constitutional or statutory process that Ayala must follow with these cases, that process should be described and she should be ordered to follow it. Under these facts, Scott should not be permitted to forcibly reassign these cases to a state attorney who was not elected by the citizens of the Ninth Judicial Circuit.

Scott complains throughout his brief that Ayala has presented the court with "novel" arguments. Opp. 3, 5, 12, 41, 50. But the only reason for novelty is that Scott has interfered with an elected independent prosecutor in a way the State has never seen before. This innovation does not comport with the Constitution or laws.

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Respectfully submitted

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed a true and correct copy of the foregoing with the Florida E-Portal, which will provide service by email to all attorneys of record this 8th day of May, 2017.

s/ Marcos E. Hasbun
MARCOS E. HASBUN

CERTIFICATE OF COMPLIANCE

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

s/ Marcos E. Hasbun
MARCOS E. HASBUN