UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

ANDREW H. WARREN,

Plaintiff,

v. Case No.: 4:22cv302-RH-MAF

RON DESANTIS, individually and in His official capacity as Governor of the State of Florida,

Defendant.
_____/

BRIEF OF *AMICUS CURIAE* FLORIDA SHERIFFS ASSOCIATION IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION AND ANY FUTURE DISPOSITIVE MOTIONS

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Florida Sheriffs Association (FSA) is a statewide organization comprised of the sheriffs of the state of Florida. Its mission as a self-sustaining charitable organization is to foster the effectiveness of the office of sheriff through leadership, education and training, innovative practices, and legislative initiatives. On occasion the FSA appears as *amicus curiae* in cases of interest to the sheriffs that may impact their operational duties and responsibilities.[1]

Although the present case involves a challenge to the Governor's authority to remove the Plaintiff, Andrew H. Warren ("Warren") as the State Attorney for the 13th Judicial Circuit, the sheriffs are nonetheless affected. As set forth in Executive Order No. 22-176, Warren abused his authority as a state attorney by carving out categories of criminal activity that would no longer be prosecuted in his circuit. Fla. Exec. Order No. 22-176 (Aug. 4, 2022). Plaintiff's First Amendment and quo warranto actions characterize Warren's policies as prosecutorial discretion. The sheriffs adamantly disagree. The Governor's decision to remove Warren for neglect of duty and incompetence is amply justified by the Executive Order.

Historically, a sheriff and the state attorney have partnered to protect the public by enforcing the criminal laws of this state. The sheriff is the chief law

[1] The FSA is supported in this Brief by current and former law enforcement officials, including state attorneys and United States attorneys. They are identified in Appendix A to the Brief.

enforcement officer of the county. *Weitzenfeld v. Dierks*, 312 So. 2d 194, 196 (Fla. 1975). Statutorily, the sheriff's duties include serving as the conservator of the peace. § 30.15(1)(e), Fla. Stat. (2022).

In this role as conservator of the peace, sheriffs and their deputies serve as community caretakers by protecting people and property under a variety of circumstances. *See Pinto v. Rambosk*, 2021 WL 3406253, *21 at fn. 14 (M.D. Fla., August 4, 2021), citing *State v. A.R.R.*, 113 So. 3d 942, 944-45 (Fla. 5th DCA 2013). Sworn to uphold the law, sheriffs' deputies are required to protect against crime without waiting for it to occur. *Id.*

Sheriffs anticipate that arrests by their deputies will be reviewed on a case-by-case basis and the state attorney will exercise prosecutorial discretion. Although state attorneys have complete discretion in deciding whether to prosecute an individual, prosecutorial discretion requires a state attorney to make case specific and individualized determinations. *Ayala v. Scott*, 224 So. 3d 755, 759 (Fla. 2017) "[E]xercising discretion demands an individualized determination 'exercised according to the exigency of the case, upon a consideration of the attending circumstances.'" *Id.,* quoting *Barber v. State*, 5 Fla. 199, 206 (Fla. 1853) (Thompson J. concurring)

In the present case, Warren was not removed for exercising his prosecutorial discretion. Rather, he established policies indicating that his office would not

prosecute[2] certain classes of crimes or that there would be a presumption of non-prosecution for a variety of offenses, including charges arising from pedestrian and bicycle stops. These proclamations detrimentally impact a sheriff's ability to effectively safeguard the public.

Warren's Policy Regarding Prosecution of Cases Based on Pedestrian and Bicycle Violations (Complaint Exhibit 4) exemplifies the ramifications to law enforcement of a prosecutorial edict disqualifying categories of crimes from prosecution.[3] As in the case of vehicle stops for noncriminal moving violations, pedestrian and bicycle stops may lead to more serious charges relating to illegal drugs, offenders involved in committing property or other crimes, or arrests of suspects wanted for violent crimes. Indeed, in the Policy, Warren acknowledges that "[b]icycle and pedestrian stops can be a legal and legitimate tool to promote community safety, particularly in high crime areas." *Id*. at 1.

Although these stops serve as a means to effectively remove criminals from neighborhoods and communities, the presumption of non-prosecution has placed sheriffs in an untenable position. They can discontinue these enforcement efforts to

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[2] It is axiomatic that to "prosecute" means to bring legal action against for redress or punishment of a crime or violation of law. *Merriam-Webster Online Dictionary*, at https://www.merriam-webster.com/dictionary/prosecute.

[3] *See also* Exhibit 3 to the Complaint which identifies numerous criminal offenses, from unregistered motor vehicles to prostitution, that carry a presumption of no file or nolle prosequi.

the detriment of public safety or proceed with the arrests knowing these cases will not be prosecuted and thereby invite civil litigation.

Perhaps as an unintended consequence, the State Attorney's no prosecution policy concerning these arrests does not lessen crimes though it may lessen crime statistics. Rather, it encourages lawlessness. Assuming that deputies will no longer effect pedestrian and bicycle stops, drug dealers will be inclined to use these means to carry out their trade. In other words, the policy incentivizes criminals to explore methods that will escape the attention of law enforcement officers because the State Attorney has announced that these cases will never be charged.

Although the joint statements relating to gender-transition treatments and abortion may not impact sheriffs' efforts to address criminal activity as dramatically as the presumption of non-prosecution policies, the implication is clear. If a state attorney, under the guise of prosecutorial discretion, can decline to prosecute abortions, a state attorney could effectively, for example, legalize recreational marijuana by announcing that possession cases would not be prosecuted. In other words, regardless of legislation criminalizing certain conduct, a state attorney could effectively nullify the will of the legislature and advance his or her personal agenda through statements of policy as in the present case.

The Governor was justified in the removal because Warren, as result of his neglect of duty[4] and incompetence, effectively usurped the role of the legislature by dictating to the sheriffs and other law enforcement agencies what is a crime in the 13th Judicial Circuit. These actions fractured the relationship between the State Attorney and the sheriffs and effectively breached the trust reposed in the State Attorney's office that cases would be reviewed individually on their merits. Through these policies Warren has hindered sheriffs in their efforts to curb criminal conduct, including drug-related crimes, on the misguided assumption that through prosecutorial discretion he can pick and choose criminal offenses in the 13th Judicial Circuit.

A state attorney cannot hide behind prosecutorial discretion under these circumstances, nor can he claim protected speech under the First Amendment when the conduct in question is tied to his official duties as State Attorney. Warren's pronouncements went beyond prosecutorial discretion. Rather, he blatantly abused his executive powers. The Governor's Executive Order removing Warren from his position is well grounded as a matter of law and equally supported by the facts.

[4] *See* generally § 27.02(1), Fla. Stat. (2022): "The state attorney shall appear in the circuit and county courts within his or her judicial circuit and prosecute ... on behalf of the state all suits … civil or criminal, in which the state is a party…"

ARGUMENT

I. WARREN'S POLICY STATEMENTS ARE NOT PROTECTED SPEECH UNDER THE FIRST AMENDMENT.

Warren contends that in exercising his prosecutorial discretion, he engaged in speech protected by the First Amendment of the United States Constitution. This claim rings hollow because at all times he spoke in his capacity as the State Attorney for the 13th Judicial Circuit.

The First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern. *Pickering v. Board of Educ.*, 391 U. S. 563, 568 (1968); *Connick v. Myers*, 461 U.S. 138, 147 (1983). However, when public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes and their speech is not insulated from employer discipline. *Garcetti v. Ceballos*, 547 U. S. 410, 420 (2006).

Warren invokes the right of an elected official to speak freely on questions of government policy and to enter the field of political controversy. Complaint ¶ 83. In support of his claim that his public pronouncements opposing the criminalization of abortion and gender affirming healthcare are protected speech under the First Amendment, Warren relies upon an opinion of the United States Supreme Court, *Wood v. Georgia*, 370 U. S. 375 (1962) which ironically involves a sheriff. In *Wood*, the sheriff of Bibb County, Georgia, was held in contempt for criticizing a judge

who impaneled a grand jury to investigate allegations of vote buying involving African American voters. The sheriff challenged the contempt order, alleging that it violated his right to free speech. *Id*. at 380.

The Supreme Court reversed the contempt order, finding that the sheriff's statements, which were critical of the convening of the grand jury, did not present a danger to the administration of justice that warranted infringing upon his freedom to express his opinions. *Id*. at 394. Importantly, it was undisputed that the sheriff spoke as a private citizen and not as sheriff of the county. *Id.* at 381. Additionally, the Court's opinion noted that the sheriff "was directly and personally interested in the outcome of the current primary election not only as a private citizen but also as an announced candidate for public office in the general election." *Id*. at 382.

In contrast, in *Garcetti v. Ceballos*, 547 U.S. 410 (2006) the Court held that a disposition memorandum by an assistant district attorney recommending dismissal of criminal charges based on his concerns with an affidavit for a search warrant was not protected under the First Amendment. *Id.* at 421-22. Citing *Pickering*, the Court recognized that public officials should be able to speak out freely on matters of public concern without fear of retaliation. *Id*. at 421. The controlling factor in *Garcetti*, however, was that the deputy district attorney's memorandum was made pursuant to his duties as a calendar deputy. Because he spoke as a prosecutor

fulfilling his responsibility to advise his supervisor about how best to proceed with a pending case, the conduct was not constitutionally protected. *Id.*

Garcetti cannot be materially distinguished from the case at hand. In each instance in which Warren alleges protected speech, he was expressing himself as a state attorney and not as a private citizen.

For example, Exhibit A to the Executive Order is entitled "JOINT STATEMENT FROM ELECTED PROSECUTORS AND LAW ENFORCEMENT LEADERS CONDEMNING THE CRIMINALIZATION OF TRANSGENDER PEOPLE AND GENDER-AFFIRMING HEALTHCARE." Exhibit B to the Executive Order, addressing abortion, is entitled "JOINT STATEMENT FROM ELECTED PROSECUTORS." At the conclusion of each statement, the Plaintiff signed "Andrew Warren, State Attorney, 13th Judicial Circuit (Tampa), Florida."

Actions have consequences. As the Supreme Court concluded in *Garcetti*, "the First Amendment does not prohibit managerial discipline based on an employee's expressions made pursuant to his official responsibilities." *Garcetti*, 547 U.S. at 423. The fact that Warren was an elected official rather than a public employee does not give him any greater rights under the First Amendment for his speech. *See e.g., Parks v. City of Horseshoe Bend*, 480 F.3d 837, 840 at fn. 4 (8th Cir. 2007) (city council member's speech would not be protected under the First Amendment if it was made in the course of her official duties); *see also Hartman v.*

Register, No. 1:06-CV-33, 2007 U.S. Dist. LEXIS 21175 at *19 (S.D. Ohio Mar. 26, 2007) ("*Garcetti* is still applicable [to elected officials] because it makes clear that speech made pursuant to an individual's official duties is not protected by the First Amendment. The distinction between the public employee in *Garcetti* and an elected official, in this case Plaintiff, is inconsequential.").

Warren can find no solace in the First Amendment, therefore, when he alleges that the Governor removed him from office for the abuse of his duties and responsibilities after publicly issuing these Joint Statements as State Attorney. The Complaint fails to state a cause of action and should therefore be dismissed.

II. THE GOVERNOR LAWFULLY EXERCISED HIS DUTIES IN REMOVING WARREN FROM HIS POSITION AS STATE ATTORNEY

Warren challenges the factual basis for the Governor's action in removing him as state attorney. Warren contends that the stated grounds of incompetence and neglect of duty are insufficient as a matter of law because Warren was doing nothing more than exercising his prosecutorial discretion.

This argument misses the mark. This is not a case of prosecutorial discretion. Rather, this is a case where a state attorney abused his authority by establishing policies that directly impeded a sheriff's ability to enforce the criminal laws of this state.

Warren has asserted a claim of quo warranto, alleging that the justifications presented in Executive Order No. 22-176 are facially insufficient under Florida law to support removal. Quo warranto is used "to determine whether a state officer or agency has properly exercised a power or right derived from the State." *Fla. House of Representatives v. Crist*, 999 So. 2d 601, 607 (Fla. 2008).

It is the duty of the Governor under Article IV, § 1(a) of the Florida Constitution in the exercise of his executive power to "take care that the laws be faithfully exercised." *Finch v. Fitzpatrick*, 254 So. 2d 203, 204 (Fla. 1971). The Florida Constitution expressly provides authority to the Governor to suspend from office "any county officer for malfeasance, misfeasance, neglect of duty, drunkenness, incompetence, permanent inability to perform official duties, or commission of a felony." Art. IV, § 7(a), Fla. Const. The Florida Senate has the exclusive role of determining whether to remove or reinstate a suspended official. Art. IV, § 7(b), Fla. Const.

The courts have a limited role in reviewing the suspension or removal of a public official. *Israel v. DeSantis*, 269 So. 3d 491, 495 (Fla. 2019), citing *Jackson v. DeSantis*, 268 So. 3d 662 (Fla. 2019). If the executive order of suspension "names one or more of the grounds embraced in the Constitution and clothes or supports it with alleged facts sufficient to constitute the grounds of suspension, it is sufficient."

Israel, 269 So. 3d at 495, quoting *State ex rel. Hardie v. Coleman*, 155 So. 129, 133 (Fla. 1934).

The Florida Supreme Court's decision in *Ayala v. Scott* is instructive to the case at bar. Akin to Warren's actions, Ayala, the state attorney for the Ninth Judicial Circuit, announced at a press conference that she would not be seeking the death penalty prospectively in the cases handled in her office. *Ayala,* 224 So. 2d at 756. Like Warren's justifications for his policy statements, Ayala grounded her decision in the public interest. In her view, pursuing death sentences "[was] not in the best interest of the community or in the best interest of justice" even when an individual case "absolutely deserve[s] [the] death penalty." *Id.* at 756-57.

Governor Rick Scott issued executive orders reassigning death penalty eligible cases from Ayala's office to the State Attorney for the Fifth Judicial Circuit. As in the present case, Ayala filed a petition for writ of quo warranto in which she contested the Governor's authority to reassign the cases. *Id.* at 757.

Upholding the Governor's reassignment of death penalty cases, the Florida Supreme Court rejected Ayala's argument that she was acting with prosecutorial discretion. *Id.* at 758. Relevant to the instant case, the court held that her blanket refusal to seek the death penalty did not reflect an exercise of prosecutorial discretion but rather embodied "at best, a misunderstanding of Florida law." *Id.* at 759. The court concluded that "by effectively banning the death penalty in the Ninth Circuit—

as opposed to making case-specific determinations whether the facts of each death penalty eligible case justify seeking the death penalty—Ayala has exercised no discretion at all." *Id*. at 758. Citing to the decision of the New York Court of Appeals in *Johnson v. Pataki*, 691 N.E.2d 1002, 1007 (N.Y. 1997), the court explained that adopting a blanket penalty policy against the imposition of the death penalty is effectively refusing to exercise discretion and tantamount to a functional veto of state law authorizing prosecutors to pursue the death penalty in appropriate cases. *Ayala*, 224 So. 3d at 758.

There can be no appreciable distinction between Ayala's blanket policy not to pursue death sentences and Warren's stated policies opposing the criminalization of abortion and establishing presumptions of non-prosecution for numerous criminal offenses or arrests arising from vehicle or pedestrian stops. The Governor did not exceed his authority to reassign Ayala's death sentence cases because Ayala failed to exercise her duties as a state attorney to consider the death penalty for eligible cases. For similar reasons, the Governor did not overstep when he removed Warren.

The deficiencies in the quo warranto claim become even more evident upon reviewing *Israel v. DeSantis,* in which the sheriff of Broward County contested Governor DeSantis's authority to suspend him from office. As in the case of Warren, the stated grounds for Sheriff Israel's suspension included neglect of duty and incompetence. *Israel*, 269 So. 3d at 493. Israel argued that the Governor's Executive

Order failed to identify any statutory duty prescribed to his office which he failed to perform. *Id.* at 496. The court declined to accept this argument. *Id.*

Defining duty as "the action required by one's position or occupation" the court turned then to what constitutes neglect of duty and incompetence. *Id.* Neglect of duty, explained the court, refers to the neglect or failure on the part of a public officer "to do and perform some duty or duties laid on him as such by virtue of his office or which is required of him by law." *Id.*, quoting *Hardie,* 155 So. at 132. The court added that it was not material whether the neglect was willful through malice, ignorance, or oversight. *Id.* If the neglect was grave and the frequency of it endangered or threatened the public welfare, it is considered to be gross. *Id.*

Incompetence, reasoned the court, related to neglect of duty. *Id.* The court defined incompetency to refer to any "physical, moral, or intellectual quality, the lack of which incapacitates one to perform the duties of his office" and which "may arise from gross ignorance of official duties or gross carelessness in the discharge of them … from lack of judgment and discretion." *Id.*, quoting *Hardie,* 155 So. at 133.

In reviewing the executive order suspending Sheriff Israel, the court was satisfied that the factual allegations were sufficient to establish both neglect of duty and incompetency. *Id.* at 496-97. The executive order, held the court, contained allegations that bore a reasonable relation to the charges of neglect of duty and

incompetence as those terms were understood in their usual and ordinary meaning. *Id*.

The same is true for the Executive Order in this case, which contains sufficient facts that bear a reasonable relation to the charges against Warren particularly given the "low threshold" that the Governor must satisfy. *Israel*, 269 So. 3d at 496. The Executive Order alleges that Warren exceeded his authority as State Attorney by promulgating blanket policies that effectively nullified certain criminal offenses. Rather than fulfilling his duty to review arrests on a case-by-case basis, Warren unilaterally decided not to prosecute categories of criminal activity, regardless of their facts. In view of the factual allegations supporting the stated charges of neglect of duty and incompetence, the Executive Order is facially sufficient to withstand the quo warranto challenge. The quo warranto claim should therefore be dismissed.

CONCLUSION

Amicus curiae, the Florida Sheriffs Association, supports Governor DeSantis's removal of State Attorney Andrew H. Warren for the reasons articulated in Executive Order No. 22-176. The actions taken by Warren pursuant to his official duties as State Attorney that prompted his removal by the Governor are not protected by the First Amendment. Furthermore, the quo warranto claim fails because the Executive Order sets forth sufficient facts to support the neglect of duty and

incompetence charges against Warren. The Complaint should be dismissed with prejudice.

Respectfully submitted this 6th day of September 2022.

By: */s/ R. W. Evans*
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LOCAL RULE 7.1 CERTIFICATE

I hereby certify that the foregoing brief contains 4,136 words, excluding the items listed in Local Rule 7.1 (f).

By: */s/ R. W. Evans*
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of September 2022, I electronically filed the foregoing document with the Clerk of the United States District Court for the Northern District of Florida through the CM/ECF system, which will serve a true and correct copy on all counsel of record who have consented to electronic service.

By: */s/ R. W. Evans*
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APPENDIX A

List of Current and Former Law Enforcement Officials Supporting the *Amicus Curiae* Brief of the Florida Sheriffs Association

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Bill McCollum
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Paul Hawkes
Former Chief Judge for First District Court of Appeal of Florida

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Damon Devereaux
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Bret Bowling
Sheriff for Creek County, Oklahoma

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Sheriff for Haskell County, Oklahoma

Chris Morris
Sheriff for Pittsburg County, Oklahoma

Chris West
Sheriff for Canadian County, Oklahoma

Chris Elliott
Sheriff for Wagoner County, Oklahoma

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