**Case No. SC17-653**

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**IN THE SUPREME COURT OF FLORIDA**

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

vs.

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

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# BRIEF OF *AMICI CURIAE* FORMER JUDGES, CURRENT AND FORMER PROSECUTORS, AND LEGAL COMMUNITY LEADERS IN SUPPORT OF PETITIONER'S EMERGENCY NON-ROUTINE PETITION FOR WRIT OF *QUO WARRANTO*

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Donald B. Verrilli, Jr.*
Chad I. Golder*
Sarah G. Boyce*
MUNGER, TOLLES & OLSON LLP
1155 F Street, NW, 7th Floor
Washington, D.C. 20004
Tel: (202) 220-1100
donald.verrilli@mto.com

Mark B. Helm*
John F. Muller*
MUNGER, TOLLES & OLSON LLP
350 South Grand Ave, 50th Floor
Los Angeles, CA 90071
Tel: (213) 683-9123
mark.helm@mto.com

Sharon L. Kegerreis
Fla. Bar # 852732
BERGER SINGERMAN
1450 Brickell Ave, Suite 1900
Miami, FL 33131
Tel: (305) 755-9500
skegerreis@bergersingerman.com

*Counsel for Amici Curiae*
* Pro hac vice application pending

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## STATEMENT OF INTEREST OF *AMICI CURIAE*

*Amici* are former state Supreme Court justices and other judicial leaders, current and former state and federal prosecutors and state attorneys general, as well as former U.S. Solicitors General and U.S. Department of Justice officials. In those capacities, *amici* have gained an understanding of the important role that prosecutorial discretion and independent decision making play in the criminal justice system and the strong need to insulate prosecutors from outside political pressures. *Amici* are as follows:

- **Former State Supreme Court Justices:** Harry Lee Anstead (Florida Chief Justice), Rosemary Barkett (Florida Chief Justice), Bobbe J. Bridge (Washington), Norman S. Fletcher (Georgia Chief Justice), Joseph R. Grodin (California), Gerald Kogan (Florida Chief Justice), Carlos Moreno (California), Deborah T. Poritz (New Jersey Chief Justice), and James E.C. Perry (Florida)
- **Former Solicitors General of the United States:** Walter Dellinger and Seth Waxman
- **Current and Former State Attorneys General:** Bruce Botelho (Alaska), Scott Harshbarger (Massachusetts), Jeff Modisett (Indiana), James M. Petro (Ohio), and Karl A. Racine (District of Columbia)
- **Current and Former State Attorneys:** Kimberly Foxx (Cook County, Illinois), Marilyn Mosby (Baltimore, Maryland), and Harry Shorstein (4th Jud. Cir., Florida)
- **Current and Former District Attorneys:** Mark Dupree (Kansas City, Kansas), Gil Garcetti (Los Angeles County, California), George Gascón (San Francisco, California), Christian Gossett (Winnebago County, Wisconsin), Beth McCann (Denver, Colorado), Kim Ogg (Harris County, Texas), Ira Reiner (Los Angeles County, California), Raul Torrez (Albuquerque, New Mexico), and Cyrus R. Vance, Jr. (New York County, New York)

- **Former U.S. Department of Justice Officials:** Jamie Gorelick (Deputy Attorney General), David W. Ogden (Deputy Attorney General), Ronald Weich (Assistant Attorney General), and Rory Little (Associate Deputy Attorney General)

- **Former U.S. Attorneys:** Pamela Marsh (N.D. Fla.), Carter Stewart (S.D. Ohio), Thomas L. Strickland (D. Colo.), and John Walsh (D. Colo.)

- **Former Assistant U.S. Attorneys:** Miriam Aroni Krinsky (C.D. Cal., D. Md.) and Neal Sonnett (S.D. Fla.)

- **Former Assistant Attorneys General, Assistant State Attorneys, and Assistant District Attorneys:** Bruce Jacob (Florida), Mina Q. Malik (Queens County, New York), and James Woodard (11th Jud. Cir., Florida)

- **Other Former Judges and Legal Community Leaders:** Martha Barnett (former ABA President), Talbot D'Alemberte (former ABA President), O.H. Eaton, Jr. (18th Jud. Cir., Florida), Nancy Gertner (D. Mass.; Senior Lecturer on Law, Harvard Law School), and William Jorden (President, National Black Prosecutors Association; Assistant District Attorney, East Baton Rouge, Louisiana)

Because the issues this case raises have national significance, *amici* come not only from Florida but from jurisdictions across the country. Although *amici*'s views on the death penalty may differ, *amici* are fully aligned in their commitment to prosecutorial independence. For that reason, they are deeply disturbed by the Florida Governor's unprecedented effort to remove a prosecutor simply for exercising the authority vested in her as a duly-elected state attorney to make charging and sentencing decisions.

Based on their decades of experience as jurists, prosecutors, and government officials, *amici* are intimately familiar with how a state wields its vast criminal

enforcement powers, and they know that the criminal justice system depends on a delicate balancing and careful allocation of roles. When one state actor usurps the responsibilities allocated to another, the balance is upset, and the legitimacy of the justice system itself is called into question. This is especially concerning where a defendant's life is at stake.

*Amici* therefore have an interest in preserving the proper allocation of roles in criminal law enforcement and offer their views here respectfully as friends of the Court.

## ARGUMENT

### I. INTRODUCTION AND STATEMENT OF THE CASE

Prosecutors occupy a unique and independent place in our legal system. "For though the attorney for the sovereign must prosecute the accused with earnestness and vigor, he must always be faithful to his client's overriding interest that 'justice shall be done.'" *United States v. Agurs*, 427 U.S. 97, 111-12 (1976). This duty ensures prosecutors are, at once, fierce advocates for their communities *and* quasi-judicial officers. Indeed, as the U.S. Supreme Court famously recognized, a prosecutor "is in a peculiar and very definite sense the servant of the law." *Berger v. United States*, 295 U.S. 78, 88 (1935). Given these dual roles, it is essential that prosecutorial decisions remain free from undue executive intrusion.

Like the Supreme Court, the American Bar Association has acknowledged a prosecutor's independent position. For example, the ABA's Criminal Justice Standards provide:

- "The prosecutor is an administrator of justice, a zealous advocate, and an officer of the court. The prosecutor's office should exercise sound discretion and independent judgment in the performance of the prosecution function." ABA Criminal Justice Standards for the Prosecution Function 3-1.2(a);
- "The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict. The prosecutor serves the public interest and should act with integrity and balanced judgment to increase public safety both by pursuing appropriate criminal charges of appropriate severity, and by exercising discretion to not pursue criminal charges in appropriate circumstances." *Id*. at 3-1.2(b);
- "In order to fully implement [a] prosecutor's functions and duties, including the obligation to enforce the law while exercising sound discretion, [a] prosecutor is not obliged to file or maintain all criminal charges which the evidence might support." *Id*. at 3-4.4 (a); and
- "The prosecutor is not merely a case-processor but also a problem-solver responsible for considering broad goals of the criminal justice system." *Id.* at 3-1.2(f).

Florida has adopted these standards after "prolonged and careful deliberation" by the bar. *See* Comment to Florida Bar Rule 4-3.8.

To this end, the roles of prosecutors and other state actors involved in the sentencing of criminal defendants are clearly codified under Florida law. The Legislature enacts statutes prescribing the allowable sentences for various crimes, and a death sentence (like any other) may not be imposed unless authorized by

statute. The governor in turn may either sign or veto statutes the Legislature passes that enact or repeal authorized criminal penalties. Art. III, § 8, Fla. Const.

When a particular defendant is charged, judges oversee the introduction of evidence and instruct the jury, and the jury ultimately decides whether a defendant is guilty. In cases where the death penalty is sought and a guilty verdict is reached, the jury may recommend that sentence only by unanimous vote. *Perry v. State*, 210 So. 3d 630, 640 (Fla. 2016). The judge must adopt and concur in that recommendation before it may be imposed. *Id.* at 638; *see also* § 921.141(3)(a) 2, Fla Stat. (2016). The governor then enters the process again, with the discretionary power to commute any sentence imposed. Art. IV, § 8, Fla. Const.

The official whom the Florida Constitution exclusively authorizes to decide whether a death sentence should be sought in the first place is the duly-elected state attorney. The nature of that position makes it especially well-suited to fulfill this important responsibility. Like the governor, the state attorney is elected, but in one of twenty judicial circuits throughout the state, not through a statewide vote. This means that decisions about which cases to prosecute and which sentences to seek may vary throughout the state, depending on the particular needs of a district and the particular concerns of its voters. Justice is not one-size-fits-all, and neither are prosecutorial charging or sentencing decisions under Florida law.

Here, State Attorney Aramis Ayala made exactly the kind of reasoned decision that the Florida Constitution authorizes her to make. As Ayala noted, she "took an oath to support, protect, and defend the Constitution and the American Bar Association Rules of Professional Conduct outline [her] duties as a prosecutor." Petition Appendix D-2. Consistent with her oath and those duties, Ayala explained that, after "extensive and painstaking thought and consideration," she had determined that seeking the death penalty generally would not be "in the best interest of this community or the best pursuit of justice." *Id.* at D-3.

State Attorney Ayala set forth her reasoning in some detail. She explained that "there is no evidence that death sentences actually protect the public;" the death penalty does not increase safety for law enforcement officers; it "generally is not a deterrent;" and it costs roughly $2.5 million more per person than life imprisonment. *Id.* at D-3 - D-6. She also observed that the "death penalty traps [victims'] families in decades-long cycle[s] of uncertainty, court hearings, appeals, and waiting. They are left waiting . . . for an execution that may never occur." *Id.* at D-6. Ultimately, State Attorney Ayala concluded that, by not "deciding to pursue death in a handful of cases we can spend more time pursuing justice in many more cases." *Id.* at D-7. She affirmed that "[t]here may be cases, even active ones, [where the] death penalty may be appropriate because of the egregiousness of the offense," but made clear her view that those cases must be

considered in light of the evidence regarding the effectiveness of the death penalty and its costs. *Id.* at D-13.

State Attorney Ayala's considered decision would be insulated from gubernatorial intermeddling even if it did not implicate the death penalty. But it, of course, does. And that fact only heightens the need for independent judgment here, because all of the values that prosecutorial independence serves are most directly at stake when a prosecutor decides whether to seek the death penalty. Forty years ago, in a case on appeal from this Court, Justice John Paul Stevens observed that "death is a different kind of punishment from any other which may be imposed in this country." *Gardner v. Florida*, 430 U.S. 349, 357 (1977) (plurality opinion announcing the judgment of the Court). "From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action." *Id*. at 357-58. For these reasons, "[it] is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Id.* at 358.

Proper respect for the constitutional roles of various state actors is critically important to ensuring that prosecutorial decisions both are and appear to be based on dispassionate, principled judgment. By seeking to remove Ayala from all cases

that might implicate the death penalty, the Governor does serious damage to the fundamental values of separation of powers and the democratic process, and threatens the bedrock principle of prosecutorial independence upon which much of our criminal justice system rests.

## II. STATE ATTORNEYS ARE QUASI-JUDICIAL OFFICERS OBLIGATED TO SERVE THE INTERESTS OF JUSTICE

As U.S. Supreme Court Justice Robert H. Jackson—a former prosecutor and United States Attorney General—once admonished: "Law enforcement is not automatic." R. Jackson, The Federal Prosecutor, Address Delivered at the Second Annual Conference of United States Attorneys, April 1, 1940.[1] It is impossible, as a matter of time and cost, for prosecutors to charge every legal violation or seek every penalty. By necessity, prosecutors must make difficult judgments about which cases to bring—and which penalties to seek.

This inescapable reality, along with the prosecutor's role as representative of the State, places prosecutors in a unique position. The prosecutor "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *The Florida Bar v. Cox*, 794 So. 2d 1278,

[1] Available at https://www.roberthjackson.org/speech-and-writing/the-federal-prosecutor/ (last visited Apr. 17, 2017).

1285 (Fla. 2001) (quoting *Berger*, 295 U.S. at 88); *see also* Gerard E. Lynch, *Prosecution: Prosecutorial Discretion*, Encyclopedia of Crime & Justice 1247 (2002) ("the prosecutor is not merely the attorney who represents society's interest in court, but also the public official whose job it is to decide, as a substantive matter, the extent of society's interest in seeking punishment").[2]

In choosing which cases to bring and how to prosecute them, prosecutors have "a higher duty to assure that justice is served." *The Florida Bar*, 794 So. 2d at 1285. Performing this duty requires formidable skill and judgment. Indeed, for Justice Jackson, the "qualities of a good prosecutor [were] as elusive and as impossible to define as those which mark a gentleman." Jackson, The Federal Prosecutor. He rightly observed that the "citizen's safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility." *Id.* At a minimum, the prosecutor's duty requires close attention to consistency and fairness. It also requires a delicate weighing of the benefits and costs of pursuing one case or punishment rather than another, mindful of the needs both of justice and of maximizing the impact of scarce prosecutorial resources.

[2] Available at http://www.encyclopedia.com/law/legal-and-political-magazines/prosecution-prosecutorial-discretion (last visited Apr. 17, 2017)

Consistent with these obligations, this Court has long identified the "unique role" of state attorneys as "both quasi-judicial and quasi-executive." *Valdes v. State*, 728 So. 2d 736, 739 (Fla. 1999). As a quasi-judicial officer, a state attorney's "main objective should always be to serve justice and see that every defendant receive[s] a fair trial." *Frazier v. State*, 294 So. 2d 691, 692 (Fla. Dist. Ct. App. 1974); *see Office of State Attorney, Fourth Judicial Circuit of Florida v. Parrotino*, 628 So. 2d 1097, 1099 (Fla. 1993) (it is "obvious" that "State Attorneys are quasi-judicial officers"); *Gluck v. State*, 62 So. 2d 71, 73 (Fla. 1952) ("State Attorneys … are quasi judicial officers of the court."); *see also Parrotino*, 628 So. 2d. at 1099 (holding that state attorneys are entitled to immunity that more closely resembles that afforded to judicial officials than executive officials).

"A judicial attempt to interfere with the decision whether and how to prosecute violates the executive component of the state attorney's office." *See Parrotino*, 628 So. 2d at 1099 n.2. By the same token, an attempt by the executive to interfere with the decision whether and how to prosecute threatens to violate the judicial component of the state attorney's office. Indeed, this Court has recognized that the state attorney's discretion "in deciding whether and how to prosecute" is "absolute." *State v. Cain*, 381 So. 2d 1361, 1367 (Fla. 1980).

In accordance with their role, state attorneys must be lawyers and longstanding members of the bar and must "reflect a scrupulous adherence to the

highest standards of professional conduct." *The Florida Bar*, 794 So. 2d at 1285; *see also* Art. V, § 17, Fla. Const. Florida bar rules provide that prosecutors have "the responsibility of a minister of justice and not simply that of an advocate." Comment, Florida Bar R. 4-3.8; *see also infra* at 4 (noting Florida's adoption of the ABA's rules regarding prosecutorial conduct).

## III. THE FLORIDA CONSTITUTION'S ALLOCATION OF RESPONSIBILITIES PRESERVES THE LOCAL STATE ATTORNEY'S INDEPENDENT AND QUASI-JUDICIAL ROLE

The Florida Constitution establishes a decentralized prosecutorial system, which ensures that prosecutorial decisions will be made at the local level without interference from statewide officials. The state attorney must be locally elected, must "reside in the territorial jurisdiction of the circuit," and must "devote full time to the duties of the office." Art. V, § 17, Fla. Const. And the state attorney "*shall* be *the* prosecuting officer of all trial courts in [his or her] circuit" "[e]xcept as otherwise provided in this constitution." *Id.* (emphasis added).

No other constitutional provisions displace the state attorney from this local prosecutorial role. The Florida Constitution provides that the Attorney General is the "chief state legal officer." Art. IV, § 4(b), Fla. Const. But it does not empower the Attorney General to supersede a state attorney's role as local prosecutor. *See* Art. V, § 17, Fla. Const. Indeed, Florida courts have recognized that state

attorneys are not answerable to the Attorney General for local prosecutorial decisions.

For instance, if a state attorney chooses to issue subpoenas, "any interest that the Attorney General might display in the matter of the subpoenas, or even his active participation therein, could not detract from, nor in anywise affect, the validity or compelling force of the subpoenas. On the right of issuance, the State Attorney is answerable only to himself and his conscience." *Imparato v. Spicola*, 238 So. 2d 503, 506 (Fla. Dist. Ct. App. 1970); *see also id.* (The state attorney "has been loosely referred to many times as a 'one-man grand jury.' And he is truly that."); Fla. Stat. Ann. § 16.08 (Attorney's General's role is limited to a "general superintendence and direction over the several state attorneys of the several circuits as to the manner of discharging their respective duties").

The governor has authority to suspend state attorneys, as well as certain other state officials, 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. But this authority does not disturb the local prosecutorial function. It is well established that "the power to remove is not analogous to the power to control." *Whiley v. Scott*, 79 So. 3d 702, 715 (Fla. 2011). The particularities of the governor's suspension power, moreover, only reinforce this rule: suspension is reserved for a confined set of circumstances

parallel to those that would warrant impeachment, and it is subject to legislative oversight. *See* Art. IV, § 7(a) & (b), Fla. Const.

The Florida Constitution's provision that the governor is to "take care that the laws be faithfully executed" also is not to the contrary. *See* Art. IV, § 1(a), Fla. Const. The "take care" clause may empower the governor to appoint temporary replacements for state attorneys who recuse themselves due to a conflict of interest and are thus unable to discharge their duties as prosecutors. *See Austin v. State ex rel. Christian*, 310 So. 2d 289 (Fla. 1975). But it cannot empower the governor, contrary to the Florida Constitution's express provision that state attorneys "shall" be "the" prosecutor within their circuits, to usurp prosecutorial duties. For the same reason, the Legislature also cannot confer this power on the governor.

Florida's separation of function between local prosecutors and state executive officials is common across the country.[3] "In most states, the relationship

[3] Although certain more centralized prosecutorial regimes exist, the "[e]xceptions … [p]rove the [r]ule," as the few states with more centralized systems tend to be much smaller by population. Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 Mich. L. Rev. 519, 561-63 (2011) (describing more centralized regimes in Alaska, Delaware, and Rhode Island). The federal system, of course, places more centralized authority in the Attorney General, and the President has authority to remove U.S. Attorneys. But even there, norms have developed to insulate U.S. Attorneys from undue interference by the executive. *See, e.g.*, Eric Tucker, Why the Justice Department Operates Free of White House Sway, L.A. Times (Nov. 24, 2016), available at http://www.latimes.com/nation/nationnow/la-na-justice-department-white-house-20161123-story.html (last visited Apr. 17, 2016). The President's removal power,

between state-level and local prosecutors is coordinate, not hierarchical, with the exception of appellate jurisdiction." Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 Mich. L. Rev. 519, 556 (2011). As in Florida, "[t]he dominant picture in the states is one where the [Attorney General] seeks to forge a cooperative relationship with local prosecutors by responding to their needs and working with them, not taking matters out of their control." *Id.* at 560; *see also* Wayne R. LaFave et al., *Checking the Prosecutor's Discretion*, 4 Crim. Proc. § 13.2(g) (4th ed. 2016) ("The prosecution function has traditionally been decentralized, so that state attorneys-general exercise no effective control over local prosecutors. Actions such as impeachment and quo warranto have only served to reach extreme cases of continued and flagrant abuse.").

Having prosecutorial decisions made at the local level permits familiarity with the community and constituents to infuse every decision about how justice is served. *See* Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. Crim. L. & Criminology 717, 731 (1996) ("The history of the development of the office of prosecutor has the clear theme … of 'local representation applying local standards to the enforcement of essentially local laws.'"); William T. Pizzi, *Understanding*

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moreover, does not confer authority to intervene directly in prosecutorial decisions by reassigning particular cases from one U.S. Attorney to another.

*Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform*, 54 Ohio St. L.J. 1325, 1342 (1993) ("[P]rosecutorial discretion in the American legal system must be seen as part of a political tradition that is built on a preference for local control over political power and on an aversion to strong centralized governmental authority and power."). Familiarity with local community sentiments is particularly important in the context of the death penalty. *See Spaziano v. Florida*, 468 U.S. 447, 468-69 (1984) (observing that the death penalty is "ultimately understood . . . as an expression of the community's outrage") (Stevens, J., concurring in part and dissenting in part) (footnote omitted), overruled by *Hurst v. Florida*, 136 S.Ct. 616 (2016).

Accordingly, where States have organizational structures like Florida's that preserve the discretion of local prosecutors, courts have read narrowly provisions granting statewide executive officials supervisory authority. *E.g.*, *Ryan v. Eighth Judicial Dist. Court In & For Clark Cty.*, 503 P.2d 842, 844 (Nev. 1972) (power to "supervise" "cannot sensibly be read as a grant of power to usurp the [prosecutor's] function"); *People v. Brophy*, 120 P.2d 946, 953 (Cal. Ct. App. 1942) (holding district attorneys "are public officers, as distinguished from mere employees, with public duties delegated and entrusted to them, as agents" and that "supervision" of such officers "does not contemplate control").

## IV. THE GOVERNOR'S EFFORTS TO USURP THE PROSECUTORIAL ROLE ARE CONTRARY TO SOUND ADMINISTRATION, THE WILL OF FLORIDA VOTERS, AND THE INTERESTS OF JUSTICE

As noted above, the concurrence of five bodies or officials is required before a death sentence may be imposed: the Legislature, the governor, the state attorney, the judge, and the jury. Governor Scott seeks to expand his role beyond what the Florida Constitution permits—and to eliminate the independent role it gives to State Attorney Ayala. Florida law denies the governor this power for good reason. The governor's interests are not coextensive with the interests that serve just and effective local prosecution and, indeed, may be deeply at odds with them.

As an initial matter, the governor need not be a lawyer, is not subject to heightened standards of legal ethics, and typically will not be a member of the local community in which a prosecution takes place. The governor also cannot plausibly be expected to keep track of the array of complex tradeoffs in enforcement that a particular state attorney's office may face. And even if the governor could keep track of all of these considerations in every circuit, he is not elected to focus on those sorts of issues, and can be only loosely accountable—via statewide elections—for prosecutorial decisions in a particular jurisdiction. Florida has devised a system in which individual circuits may, at the choice of their

voters and elected officials, take different approaches.[4] Given the nature of the Governor's statewide office, moreover, he has an incentive to score political points that have little to do with justice or consistent decision making.

Executive intervention through the particular mechanism attempted by Governor Scott in this case—reassignment of a subset of cases from the resident state attorney to a replacement—also threatens to yield mischief of various other sorts. Allowing such intervention would produce a prosecutorial regime in which the resident state attorney handles one subset of cases within a circuit while another state attorney handles another subset, pursuant to a division ordered by the governor. Under this arrangement, neither of the two state attorneys would possess effective authority to set enforcement priorities in the pursuit of justice: the availability of resources and the array of positions taken by the state attorney's office will depend, in part, on the actions of the other state attorney.

The potential for mischief—and injustice—wrought by intervention of this sort is hardly limited to cases potentially involving the death penalty. Across the

[4] Ayala's decision regarding the death penalty appears to be fully aligned with community sentiments within the counties that elected her. According to a recent poll, 62% of Orange and Osceola voters prefer life in prison to the death penalty as punishment for murder. Only 31% prefer the death penalty. *See* Public Policy Polling, Orange and Osceola Counties Survey Results (Apr. 5-7, 2017), available at https://www.scribd.com/document/344697856/Orange-Osceola-Results-PPP-Poll-April-2017 (last visited Apr. 17, 2017).

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 crack cocaine, while declining to prosecute drug cases involving a lesser amount." Michael Edmund O'Neill, *When Prosecutors Don't: Trends in Federal Prosecutorial Declinations*, 79 Notre Dame L. Rev. 221, 241 (2003). These policies vary by jurisdiction: smaller offices "may not have minimum thresholds for prosecuting certain drug offenses inasmuch as they occur relatively infrequently in the jurisdiction," whereas "offices located in urban areas may be overwhelmed with drug offenses, and therefore will allocate prosecutorial resources only for the most serious of these offenses." *Id.*

For these reasons, local prosecutors in Chicago,[5] New York,[6] and Houston,[7] among other places, have publicly stated that they generally will not prosecute

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[5] Greg Hinz, *Alvarez: "We're Not Being Soft on Crime. We're Being Smart,"* Crain's Chicago Business (Apr. 20, 2015), available at http://www.chicagobusiness.com/article/20150420/BLOGS02/150429993/alvarez were-not-being-soft-on-crime-were-being-smart (last visited Apr. 17, 2017).

[6] Stephanie Clifford & Joseph Goldstein, *Brooklyn Prosecutor Limits When He'll Target Marijuana*, N.Y. Times (July 8, 2014), available at https://www.nytimes.com/2014/07/09/nyregion/brooklyn-district-attorney-to-stop-prosecuting-low-level-marijuana-cases.html (last visited Apr. 17, 2017).

[7] Brandon Turbeville, *Harris County, Texas, Houston to Stop Prosecuting Pot Cases*, Washington's Blog (Mar. 3, 2017), available at

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. For instance, in December 2016, Chicago's top prosecutor announced her office generally would not prosecute as felonies thefts involving goods worth less than $1,000, even though Illinois law allows felony prosecutions for thefts involving goods worth $500.[8] And prosecutors in Oregon have stated they will not bring charges against fare evaders on public transit except in "extreme cases."[9]

If the governor may supersede a state attorney's prosecutorial discretion in a case like this, presumably he also may do so in response to policies regarding how prosecutors intend to charge drug offenses or theft, or how they divert certain classes of cases, or when they seek mandatory minimums. Indeed, if the governor can second-guess a state attorney's decision as to whether to seek the death penalty in a given case, the governor could second-guess any other charging, diversion,

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http://www.washingtonsblog.com/2017/03/harris-county-texas-houston-stop-prosecuting-pot-cases.html (last visited Apr. 17, 2017).

[8] Steve Schmadeke, *Top Cook County Prosecutor Raising Bar for Charging Shoplifters with Felony*, Chicago Tribune (Dec. 15, 2016), available at http://www.chicagotribune.com/news/local/breaking/ct-kim-foxx-retail-theft-1215-20161214-story.html (last visited Apr. 17, 2017).

[9] Aimee Gree, *Prosecutors Will Stop Pursuing Charges Against Most TriMet Fare Evaders*, The Oregonian (Jan. 4, 2017), available at http://www.oregonlive.com/portland/index.ssf/2017/01/prosecutors_will_stop_pursuing.html (last visited Apr. 17, 2017).

sentencing, or case processing decision—or even how a state attorney chooses to frame the themes of a given case. At bottom, Governor Scott seeks authority to supplant the elected state attorney with his own choice whenever he disagrees with the prosecutor's discretionary decisions. Such a regime would render state attorneys deputies of the governor, serving within—if the governor so chose—circuits splintered between multiple state attorneys with different prosecutorial priorities and areas of control. Florida law has done well to avoid such a chaotic, undemocratic, and unjust state of affairs. And prosecutors around the nation would undoubtedly feel the adverse and damaging ripple effects of a decision endorsing such an ill-advised intervention.

## CONCLUSION

Political debate around the Governor's actions has surfaced within many parts of Florida. Some legislators have now weighed in on the subject (including through calls for budgetary or other sanctions against State Attorney Ayala) and have caused the validity of the death penalty to become the focus of discussion. Yet the real issue—and the one properly before this Court—is the independence of state attorneys to exercise their discretion without interference from other political branches of government. Indeed, this case puts squarely at issue the fundamental independence of prosecutors and the judicial branch.

The correct decision in this case may be an unpopular one in some political circles. Yet, if the criminal justice system in Florida is to remain a fair, equitable and decentralized system, as envisioned by the Florida Constitution, it is up to this Court to support and protect it. The Florida Constitution does not allow the governor of the state to support the exercise of prosecutorial discretion only when he finds it agreeable and to intervene when he feels otherwise. To allow such intervention would undermine the principles of prosecutorial independence and separation of powers upon which Florida's justice system is predicated.

For the foregoing reasons, *amici* respectfully urge the Court to grant Petitioner's petition for a writ of *quo warranto*.

Dated: April 21, 2017

Respectfully submitted,

/s/ Donald B. Verrilli, Jr.
Donald B. Verrilli, Jr.*
Chad I. Golder*
Sarah G. Boyce*
MUNGER, TOLLES & OLSON LLP
1155 F Street, NW, 7th Floor
Washington, D.C. 20004
Tel: (202) 220-1100
donald.verrilli@mto.com

Mark B. Helm*
John F. Muller*
MUNGER, TOLLES & OLSON LLP
350 South Grand Ave, 50th Floor
Los Angeles, CA 90071
Tel: (213) 683-9123
mark.helm@mto.com

/s/ Sharon L. Kegerreis
Sharon L. Kegerreis
Fla. Bar # 852732
BERGER SINGERMAN
1450 Brickell Ave, Suite 1900
Miami, FL 33131
Tel: (305) 755-9500
skegerreis@bergersingerman.com

Counsel for *Amici Curiae*
* Pro hac vice application pending

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was sent on April 21, 2017, by email to:

Governor Rick Scott
William Spicola
Executive Office of the Governor
OFFICE OF THE GENERAL COUNSEL
400 S. Monroe Street, Room 209
Tallahassee, Florida 32399
william.spicola@eog.myflorida.com
rick.scott@eog.myflorida.com

Chesterfield Smith
Associate Deputy Attorney General
OFFICE OF THE ATTORNEY GENERAL
PL 01 The Capitol
Tallahassee, FL 32399-1050
chesterfield.smith@myfloridalegal.com

Marcos E. Hasbun
Mamie V. Wise
ZUCKERMAN SPAEDER LLP
101 E. Kennedy Blvd., Suite 1200
Tampa, FL 33602
mhasbun@zuckerman.com
mwise@zuckerman.com

Roy L. Austin, Jr.
Amy E. Richardson
HARRIS, WILTSHIRE & GRANNIS LLP
1919 M Street, N.W., Eighth Floor
Washington, D.C. 20036
raustin@hwglaw.com
arichardson@hwglaw.com

/s/ Sharon L. Kegerreis
Sharon L. Kegerreis

## CERTIFICATE OF COMPLIANCE

I hereby certify that this *amici curiae* brief complies with the font requirements of Rule 9.210(a) of the Florida Rules of Appellate Procedure.

/s/ Sharon L. Kegerreis
Sharon L. Kegerreis