No. 23-10459

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ANDREW H. WARREN, Plaintiffs-Appellants, v. RON DESANTIS, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF FLORIDA, Defendant-Appellee.	:	On Appeal from the United States District Court for the Northern District of Florida District Court Case No. 4:22-cv-302

BRIEF OF *AMICI CURIAE* STATES OF OHIO, ALABAMA, ARKANSAS, GEORGIA, KENTUCKY, LOUISIANA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, UTAH, AND WEST VIRGINIA SUPPORTING APPELLEE

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CERTIFICATE OF INTERESTED PERSONS

The State of Ohio and the other *amici* States certify that, to their knowledge, the Plaintiff-Appellant's Opening Brief contains a complete list (at C-1–C-3) of interested persons as required by Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1.

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STATEMENT OF *AMICI* INTEREST AND SUMMARY OF ARGUMENT

This case implicates a question of great concern to the *amici* States: May the States defend their constitutions against local prosecutors who, by pledging not to enforce laws they dislike, wield what amounts to a veto power over duly enacted legislation?

The States all depend on local prosecutors to faithfully enforce state laws. Those prosecutors have considerable discretion to decide whether to prosecute violations in particular cases. They do not have the power to effectively repeal laws by categorically suspending enforcement. In recent years, however, ideologically motivated prosecutors have abandoned prosecutorial discretion in favor of prosecutorial abdication. These prosecutors have publicly announced that they will not enforce state laws they dislike, frustrating the People's right to have their elected legislators make state law. This case provides a perfect example. It involves a Florida prosecutor, Andrew Warren, who pledged in his official capacity to refrain from prosecuting entire categories of state criminal laws.

The States can properly remove from office prosecutors who make non-prosecution pledges. These pledges violate the traditional separation of powers between government branches. As every schoolchild learns, the legislative branch, not the executive, makes law. Since the founding, Americans have rejected the idea that

executive power includes the power to suspend validly enacted laws. Michael W. McConnell, *The President Who Would Not Be King: Executive Power Under the Constitution*, 117–19, 324 (2020). Constitutions and statutes from States across the country reflect this traditional limit on executive power. Local prosecutors must abide by this limit. If they do not, States may turn to whatever disciplinary processes their laws make available. Relevant here, many States empower their governors to remove local prosecutors who refuse faithfully to enforce the law. By exercising that power, governors can protect their States from the constitutional dangers—not to mention the physical dangers—posed by prosecutors who refuse to enforce legislatively enacted criminal prohibitions.

The First Amendment's Free Speech Clause does not limit the States' ability to remove prosecutors who pledge not to do their jobs. This follows for two independent reasons. *First*, the Free Speech Clause "does not prohibit the evidentiary use of speech to establish" misconduct. *Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993). When a state official (like Governor DeSantis) removes a prosecutor (like Warren) who pledges not to enforce a category of laws, the official punishes the misconduct the speech proves, not the prosecutor's speech itself. Such punishment does not implicate the First Amendment. *Id.* *Second*, the First Amendment does not give public employees "a right to perform their jobs however they see fit." *Garcetti*

v. Ceballos, 547 U.S. 410, 422 (2006). This means that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Id.* at 421. It follows that prosecutors (like Warren) removed for official-capacity non-prosecution pledges have no valid gripe under the First Amendment.

The Court should therefore reject Warren's First Amendment claim, affirming the judgment below. Because a contrary ruling would hinder the States' ability to protect their constitutional systems from prosecutorial abuse, the States file this brief under Federal Rule of Appellate Procedure 29(a)(2) to urge affirmance.

ARGUMENT

This case implicates the question whether States may remove local prosecutors who refuse to do their jobs. They can. This brief explains why, in two parts. First, it addresses the relationship between the States and their local prosecutors. More precisely, it shows that the office of local prosecutor is a creature of state law. State law vests those who hold this office with limited power. That limited power does not include the power to suspend or dispense with validly enacted state laws. And many States have mechanisms by which other government actors—governors and attorneys general, for example—can remove or overrule prosecutors who

purport to exercise power that prosecutors do not have. Second, the brief explains why the Free Speech Clause of the First Amendment poses no hindrance to the States' removal of prosecutors who pledge not to enforce state law.

I. State law defines the nature and limits of local prosecutors' power.

A. When the States joined the Union, they retained all aspects of their sovereignty they did not surrender. *See* U.S. Const. amend 10. Relevant here, they retained broad authority to enact, repeal, and enforce criminal laws. *See Puerto Rico v. Sanchez Valle*, 579 U.S. 59, 69 (2016). In other words, the States retained the power to decide *what* their criminal laws should prohibit. *See Bond v. United States*, 572 U.S. 844, 858 (2014).

The States also retained broad authority over the structure of their governments, *Shelby County v. Holder*, 570 U.S. 529, 543 (2013), including the authority to determine *who* should make criminal laws. Centuries ago, English monarchs claimed at least some of that power. They said that two royal prerogatives, the dispensing power and the suspending power, allowed them to nullify duly enacted laws as they saw fit. McConnell, *The President Who Would Not Be King* at 115–17. Over time, the People determined that the executive ought not wield these powers. Since the time of the founding—indeed, beginning no later than 1689 in Britain—the Anglo-American view has been that executive officials possess no power to suspend or repudiate

laws they dislike. *Id.*; Philip Hamburger, *Is Administrative Law Unlawful?*, 67–69, 82 (2014).

States retained this view of executive power when they formed their governments, and retain it still today. Several common features of state law prove as much. Consider, for example, the many state constitutional provisions defining governors' powers and duties. Every State but one expressly requires its governor to "ensure faithful execution of the laws." Zachary S. Price, *Faithful Execution in the Fifty States*, 57 Ga. L. Rev. 651, 686 (2023). Ohio, for instance, designates its governor as the "supreme executive," Ohio Const. Art. III, §5, and instructs the governor to "see that the laws are faithfully executed," Ohio Const. Art. III, §6. Several state constitutions go even further, expressly forbidding executive officials from suspending the enforcement of laws. Price, *Faithful Execution in the Fifty States*, 57 Ga. L. Rev. at 699. Vermont's constitution, for example, says that the "power of suspending laws, or the execution of the laws, ought never to be exercised but by the Legislature." Vt. Const. Ch. I, Art. XV; *accord* N.H. Const. Pt. I, Art. XXIX; Haw. Const. Art. I, §15. North Carolina's constitution similarly provides that "All power of suspending laws or the execution of laws by any authority, without the consent of the representatives of the people, is injurious to their rights and shall not be exercised." N.C. Const. Art. I, §7.

As is true of limits on government power generally, limits on executive power are little more than "parchment barriers" unless backed up by some means of enforcement. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 501 (2010) (quoting The Federalist, No. 48, at 333 (J. Madison)). Recognizing this, the States created systems of checks and balances on executive power. For example, governors can be impeached or (in some States) recalled. *See, e.g.*, Ohio Const. Art. II, §§23–24; Cal. Const. Art. II, §14.

While governors may wield the *supreme* executive power, they do not (at least generally) wield the executive power completely or exclusively. *See* William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 Yale L.J. 2446, 2451–55 (2006); Christopher R. Berry & Jacob E. Gersen, *The Unbundled Executive*, 75 U. Chi. L. Rev. 1385, 1399–1401 (2008); Michael J. Ellis, *The Origins of the Elected Prosecutor*, 121 Yale L.J. 1528, 1530 n.3 (2012). Every State established local governments "as convenient agencies for exercising" state power, *Hunter v. Pittsburgh*, 207 U.S. 161, 178 (1907), including executive power. In the criminal law context, the people of most States have placed executive power in the hands of both state-level officials and local prosecutors. During the founding era, state officials appointed these local prosecutors. Price, *Faithful Execution in the Fifty States*, 57 Ga. L. Rev. at 687. But reform efforts eventually led

almost every State to make prosecutor an elected office, typically at the county level. *Id.* Reformers pushing for elected prosecutors hoped to reduce patronage and thus make the position less political. *Id.* at 688–89. Over the years, the ideal of the "disinterested" prosecutor became "widely accepted, if not taken for granted." Bruce A. Green & Rebecca Roiphe, *When Prosecutors Politick: Progressive Law Enforcers Then and Now*, 110 J. Crim. L. & Criminology 719, 721–22 (Fall 2020).

Even the idealized disinterested prosecutor might abuse unchecked power. Men are not angels, after all. *See* The Federalist No. 51, at 349 (Madison) (Cooke, ed. 1961). So States created checks. Most relevant to this case, many States grant state-level executives supervisory authority over local executive officers (including prosecutors) so as to prevent abuse of power and neglect of duty. Some States empower higher-ranking officials to override the decisions of local prosecutors. Price, *Faithful Execution in the Fifty States*, 57 Ga. L. Rev. at 703–10. California, for example, requires its attorney general to "see that the laws of the State are uniformly and adequately enforced." Cal. Const. Art. V, §13. The attorney general has "direct supervision over every district attorney and sheriff … and may require any of said officers to make reports concerning the investigation, detection, prosecution, and punishment of crime." *Id.* If "any law of the State is not being adequately enforced in any county," California's attorney general "shall" step in and "prosecute

violations of law," taking on "all the powers of a district attorney." *Id.* In sum, California's constitution assigns power so as to ensure "necessary supervision" of local prosecutors. Price, *Faithful Execution in the Fifty States*, 57 Ga. L. Rev. at 704 (quoting 1934 ballot-initiative materials).

Other States have adopted mechanisms for removing or suspending local prosecutors. Timothy D. Lazendorfer, Note, *When Local Elected Officials Behave Badly: An Analysis and Recommendation to Empower State Intervention*, 82 Ohio St. L.J. 653, 674–78 (2021). Take Massachusetts. Its high court may remove local prosecutors from office if "the public good so requires." Mass. Gen. Laws ch. 211, §4. Nebraska, for its part, permits private citizens to initiate removal proceedings by charging local prosecutors with "habitual or willful neglect of duty." Neb. Rev. Stat. §§23-2001, 23-2002, 23-2004.

Many States place the power to remove local prosecutors—or the power to initiate removal proceedings—in the hands of their governors. *See, e.g.*, Mich. Const. Art. V, §10; N.Y. Const. Art. XIII, §13; S.D. Cod. Laws §3-17-3; Wis. Stat. Ann. §17.06. Through such power, Governors may punish prosecutors who neglect their duties or who otherwise engage in misconduct. *See, e.g.*, Mich. Const. Art. V, §10; S.D. Cod. Laws §3-17-3; Tenn. Code Ann. §8-47-101; Wis. Stat. Ann. §17.001. Ohio's constitution, for example, requires the legislature to enact laws "for the

prompt removal" of officials from office for any "cause provided by law." Ohio Const. Art. II, §38. Consistent with that mandate, the General Assembly has empowered the governor to initiate removal proceedings against local prosecutors. Ohio Rev. Code §3.08. The governor may initiate such proceedings to remove a prosecutor who "refuses or willfully neglects to enforce the law or to perform any official duty imposed upon him by law." Ohio Rev. Code §3.07.

B. Keeping in mind the nature of and limits on prosecutorial power, turn to the subject of prosecutorial discretion. Because criminal codes are lengthy, and because government resources are limited, prosecutors in this country have "traditionally" received "wide discretion" in making decisions about when and how to enforce the law. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 248 (1980). Most significantly, prosecutors have considerable "discretion as to whom to prosecute." *Wayte v. United States*, 470 U.S. 598, 607 (1985) (quotation marks omitted). This discretion is part and parcel of the separation of powers, which protects liberty by making imprisonment contingent on "consensus from all three branches"; no one can be deprived of liberty unless the legislature "enact[s] a criminal law," the executive "initiate[s] a prosecution," and the judiciary "adjudicate[s] the case." *Gun Owners of Am., Inc. v. Garland*, 19 F.4th 890, 921 (6th Cir. 2021) (Murphy, J., dissenting).

There is a difference, however, between prosecutorial discretion and prosecutorial abdication. Prosecutorial discretion involves "declining enforcement in particular cases for case-specific reasons." *See* Price, *Faithful Execution in the Fifty States*, 57 Ga. L. Rev. at 666. And since the "full enforcement of every law in every case is impossible and inappropriate," *id.*, such case-by-case discretion accords with the traditional view that prosecutors are "servants of the public will reflected in legislation," *see id.* at 655. Prosecutorial abdication is different. It entails what might be called a "prosecutor's veto"—a refusal or reluctance to enforce entire categories of laws, not because of resource constraints or case-specific concerns, but rather because of a disagreement regarding the wisdom of the laws in question. Abdication, in other words, involves the sort of suspension and dispensing powers that Americans and their brethren across the Atlantic long ago rejected. *See* McConnell, *The President Who Would Not Be King* at 115–17.

Abdication is presently in vogue. Recent years have seen a "sudden and unexpected spread" of "nonenforcement policies across the United States." Price, *Faithful Execution in the Fifty States*, 57 Ga. L. Rev. at 673. Through such policies, prosecutors will often pledge not to enforce certain categories of laws. *See, e.g., id.* at 675–77. More subtly, some prosecutors announce what laws they will generally or presumptively decline to enforce.

Whether blatant or subtle, publicly announced non-prosecution policies undermine the separation of powers on which the American system of representative government depends. Prosecutors are executive officials charged with enforcing the law, while legislatures make law. *See Jones v. Governor of Fla.*, 975 F.3d 1016, 1028 (11th Cir. 2020); *Green v. Bd. of Elections*, 380 F.2d 445, 451 (2d Cir. 1967) (Friendly, J., writing for the court). When executive officials say to the public that they will not enforce certain laws, they intrude upon the legislature's power to "create and refine the laws to meet the needs of the citizens." *Arbino v. Johnson & Johnson*, 116 Ohio St. 3d 468, 472 (2007). Prosecutorial vetoes thus hinder the People's right to determine, either through their elected representatives or by direct initiative, the law that governs their States.

The legality of non-prosecution policies is an issue of state law, and thus not susceptible of a single, nationwide analysis. Because local prosecutors are creatures of state law, *see Hunter*, 207 U.S. at 178, the States may define the circumstances (if any) in which non-prosecution policies cross the line from prosecutorial discretion to prosecutorial abdication, and they may define the consequences (if any) for crossing that line. For example, prosecutors in North Dakota must discharge their duties "regardless of public sentiment about enforcing certain laws." *Olsen v. Koppy*, 593 N.W.2d 762, 767 (N.D. 1999). Prosecutors "may not effectively repeal a law by

failing to prosecute a class of offenses." *Id.* The Supreme Court of Florida has similarly concluded that a prosecutor's "blanket refusal" to pursue certain types of prosecutions "does not reflect an exercise of prosecutorial discretion." *Ayala v. Scott*, 224 So. 3d 755, 759 (Fla. 2017). Using similar language, New York's high court recognized that prosecutors abuse their power when they "functionally veto" a statute by adopting a "blanket policy" of non-prosecution. *Johnson v. Pataki*, 91 N.Y.2d 214, 227 (1997).

Quite a bit rides on the lawfulness of non-prosecution policies. Such policies encourage people to engage in behavior that lawmakers have prohibited. And, in addition to affecting how people behave, such policies also confuse the public as to "what the law really requires." Price, *Faithful Execution in the Fifty States*, 57 Ga. L. Rev. at 739. Imagine, for example, people who hear their local prosecutor say that certain laws will not be enforced, only to be prosecuted by the state attorney general (or a prosecutor in another county) for violating the laws in question. *See* Cal. Const. Art. V, §13. Worse still, non-prosecution policies risk blocking, or at least delaying, legislative action in areas where reform is needed. Lawmakers will naturally feel less pressure to fix a bad law if they know prosecutors are not enforcing that law. Finally, while non-prosecution policies of the moment might align with someone's policy preferences, the above problems have no ideology. If prosecutors have the power to

nullify laws they do not like, that means all prosecutors—whether liberal or conservative—get to exercise that power.

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In sum, the differences between prosecutorial discretion and prosecutorial abdication are often relevant as a matter of state law. And many States' laws contain mechanisms for removing or overruling prosecutors who ignore that distinction.

II. The First Amendment does not protect from discipline local prosecutors who announce non-prosecution policies.

The discussion above shows that many States have mechanisms for removing local prosecutors who refuse to enforce the law. This case asks whether the First Amendment prohibits the States from using these mechanisms to remove prosecutors who publicly commit to prosecutorial abdication.

More precisely: Do state officials (such as governors) violate the First Amendment's Free Speech Clause by removing prosecutors who pledge not to enforce the law? No, they do not. This follows for two reasons. First, prosecutors removed for pledging not to enforce the law are removed *not* because of their speech, but rather because of the misconduct the speech proves. The Free Speech Clause "does not prohibit the evidentiary use of speech to establish" misconduct. *Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993). Second, at least in cases (like this one) where prosecutors make non-prosecution pledges "pursuant to their official

duties," prosecutors "are not speaking as citizens for First Amendment purposes, and the Constitution does not" give them any right to speak without fear of removal. *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

A. The Free Speech Clause is not implicated when public officials are removed for failing to faithfully discharge their duties.

1. The Free Speech Clause prohibits laws "abridging the freedom of speech." U.S. Const. amend. 1. This prohibition bars "government officials from subjecting an individual to retaliatory actions for engaging in protected speech." *Nieves v. Bartlett*, 139 S. Ct. 1715, 1722 (2019) (quotation marks omitted).

The Free Speech Clause does not, however, bar all "consideration of speech." *Reichle v. Howards*, 566 U.S. 658, 668 (2012). Of particular relevance here, the right to free speech is not a right to be free from the consequences of misconduct that speech brings to light. That is why the First Amendment is not implicated when prosecutors use a defendant's admission in charging a crime or seeking a sentence enhancement. *Mitchell*, 508 U.S. at 489–90; *Dawson v. Delaware*, 503 U.S. 159, 164 (1992); *United States v. Smith*, 967 F.3d 1196, 1205 (11th Cir. 2020). Nor is there any "constitutional problem with using an employer's offensive speech as evidence of motive or intent in a case involving an allegedly discriminatory employment action." *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 208 (3d Cir. 2001). Indeed, all

litigants, whether governmental or private, may use their opponents' past admissions as evidence against them during litigation. *See* Fed. R. Evid. 801(d)(2).

Consider an example from closer to home. Suppose a law clerk brags at lunch about entering case-dispositive orders without the knowledge of the judge for whom she works. The judge hears this statement, and fires the clerk. Does the firing implicate the First Amendment? Of course not. The judge did not fire the law clerk based on the clerk's speech—the judge fired the law clerk for misconduct that the speech revealed.

In sum, although the First Amendment forbids the government from punishing someone in retaliation for speech, it "does not prohibit the evidentiary use of speech to establish" misconduct. *Mitchell*, 508 U.S. at 489.

2. Non-prosecution pledges provide evidence of misconduct for which prosecutors can be removed without implicating the First Amendment.

Recall that, at least in most States, prosecutors act outside their permitted discretion if they fail to faithfully enforce their States' laws. Against that backdrop, a prosecutor's stated intent to engage in prosecutorial abdication qualifies as a "non-retaliatory," valid "grounds" for discipline. *See Nieves*, 139 S. Ct. at 1722 (quotation marks omitted). Non-prosecution polices, by their very nature, prove a prosecutor's commitment to neglecting his duties. Thus, when the State disciplines a prosecutor

who announces a non-prosecution policy, it does so based on the prosecutor's misconduct. The prosecutor's speech (the announcement of the policy) simply serves as evidence of the prosecutor's actual or intended misconduct. Because the discipline in this context arises not based on retaliation for the speech itself, but rather from a "wholly legitimate consideration" of what the speech reveals about the prosecutor's conduct, *see Reichle*, 566 U.S. at 668, a prosecutor removed after pledging not to do his job has no valid First Amendment claim.

That makes sense. Local prosecutors "act as arms of the state." *D'Ambrosio v. Marino*, 747 F.3d 378, 387 (6th Cir. 2014). As arms of the State, prosecutors must operate within the parameters of whatever prosecutorial discretion state law allows. Prosecutors cannot refuse to perform the role that state law assigns them and expect to keep their jobs. Nor can they publicly pledge to do a bad job and expect no adverse consequences.

B. Prosecutors do not receive First Amendment protections for speech within the scope of their official duties.

1. When prosecutors make non-prosecution pledges pursuant to their official duties, a second, independent principle permits governors to remove those prosecutors without implicating the First Amendment. The principle is this: the Free Speech Clause does not protect statements that government employees, including prosecutors, make pursuant to their official duties.

The freedom of speech does not entail a right to government employment. *Connick v. Myers*, 461 U.S. 138, 143–44 (1983). Nor, for most of American history, did government employees who exercised their right to free speech have a right to keep their jobs after doing so. Justice Holmes accurately captured the state of the law with a now-famous aphorism: "although a policeman 'may have a constitutional right to talk politics ... he has no constitutional right to be a policeman.'" *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 716–17 (1996) (quoting *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 220 (1892)).

Times have changed. The Supreme Court "has rejected for decades now the proposition that a public employee has no right to a government job and so cannot complain that termination violates First Amendment rights." *Id.* at 716. Today, "public employees do not surrender all their First Amendment rights by reason of their employment." *Garcetti*, 547 U.S. at 417.

Still, "[w]hen a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom." *Id.* at 418. "Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services." *Id.* Most important here, "when public employees make statements pursuant to their official duties, the employees are not speaking as

citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Id.* at 421.

Whether employees speak within "the scope of [their] professional duties," is a "practical" inquiry. *Id.* at 424–25. It considers employees' "ordinary job responsibilities," *Lane v. Franks*, 573 U.S. 228, 237 (2014), along with the degree of "official significance" that attaches to the "expressions made by the speaker," *Garcetti*, 547 U.S. at 422.

Placing limits on the official communications of public employees ensures that public employers retain ultimate "control over" the job functions they have "commissioned or created." *Id.* at 422. That is critical to our system of government. The separation of powers, and representative government itself, would break down if courts could order executive-branch officers to retain "disobedient employees who decide they know better than their bosses how to perform their duties." *Thompson v. Dist. of Columbia*, 530 F.3d 914, 918 (D.C. Cir. 2008). And executive-branch officials could hardly ensure the law's faithful execution if the First Amendment barred them from taking disciplinary action against employees who announce an "unwillingness to abide by" job expectations, *Keeton v. Anderson-Wiley*, 664 F.3d 865, 878 (11th Cir. 2011), or who declare that they "no longer wish[]" to perform tasks they are "paid to perform." *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 957 (9th

Cir. 2011). *See also Lett v. City of Chicago*, 946 F.3d 398, 400–01 (7th Cir. 2020). Happily, the First Amendment has never been read to vest public employees with "a right to perform their jobs however they see fit." *Garcetti*, 547 U.S. at 422.

2. Prosecutors who make pledges about how they will handle (or presumptively handle) categories of cases are acting within "the scope of [their] duties," *id.* at 425, and therefore lack any First Amendment right to make such pledges, *id.* at 424. The "ordinary job responsibilities" of local prosecutors, *see Lane*, 573 U.S. at 237, include decisions about "whom to prosecute," *Wayte*, 470 U.S. at 607. What is more, statements local prosecutors make to the public about what laws they will decline to enforce carry obvious "official significance." *Garcetti*, 547 U.S. at 422. And the fact that local prosecutors are elected officials does not change the analysis. Remember that local prosecutors are creatures of state law. States have chosen to make the position an elected one, but that does not mean that the position is unsupervised or independent of the State. Rather, as discussed already, States to varying degrees have given statewide officers "control over" these county positions—positions that the States themselves "commissioned or created." *Garcetti*, 547 U.S. at 422.

Because the prosecutor in this case (Warren) was removed in response to speech (the non-prosecution pledge) he made pursuant to his official duties, his free-speech claim fails as a matter of law.

*

The States end with a coda. The discussion above shows that, under the Supreme Court's First Amendment decisions, Warren's claim fails for two independent reasons. The District Court below correctly denied Warren's bid for relief. But the court greatly overcomplicated the analysis, based in part on its mistaken belief that another decision of the Supreme Court—*Bond v. Floyd*, 385 U.S. 116 (1966)—presented circumstances similar to this case.

Bond held that the Georgia legislature violated the First Amendment by refusing to seat a newly elected member based on his criticism of the Vietnam War and the draft. *Id.* at 118, 132–33. The legislature defended the refusal to seat the new member on the ground that the anti-war statements cast doubt on the would-be member's ability to sincerely take the oath of office. The Court rejected that argument. It acknowledged that Georgia's legislature could require an oath of fidelity to the state constitution. *Id.* at 132. The First Amendment, however, forbade the legislature from using the oath to "limit[] … legislators' capacity to discuss their views of local or national policy." *Id.* at 135. To do so, the Court said, would defeat "the

manifest function of the First Amendment in a representative democracy," which "requires that legislators be given the widest latitude to express their views on issues of policy." *Id.* at 135–36.

Bond is triply distinguishable. First, the legislature in *Bond* refused to seat the duly elected member not because of any misconduct on the would-be member's part; he had neither engaged in, nor stated his intent to engage in, any misconduct. Rather, it refused to seat him as punishment for the would-be member's speech. Here, in contrast, Governor DeSantis removed Warren not because of his speech, but rather because of misconduct the speech brought to light. That distinction is dispositive, because only speech-based retaliation triggers the Free Speech Clause. *See above* 14–16.

Second, whereas the legislature in *Bond* refused to seat the newly elected member because of the member's *private* speech, Warren made the non-prosecution pledge in his official capacity as a prosecutor. That, again, is dispositive, since the Free Speech Clause does not give employees any protection with regard to statements they make "pursuant to their official duties." *Garcetti*, 547 U.S. at 421.

Finally, it is doubtful whether *Bond* has any application outside the context of a legislature. The Court's analysis in *Bond* was narrow; it focused on the special role of legislators and the need to provide them with "the widest latitude to express their

views on issues of policy." 385 U.S. at 136. That logic has far less purchase in the context of a state-created executive office charged with enforcing the law rather than making it. In that context, the Supreme Court has said that government employers have wide latitude to terminate a government employee even for private (as opposed to official) speech that interferes with the employee's ability to discharge his duties. *See Garcetti*, 547 U.S. at 418.

CONCLUSION

The Court should affirm.

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CERTIFICATE OF COMPLIANCE

I hereby certify, in accordance with Rule 32(g) of the Federal Rules of Appellate Procedure, that this brief complies with the type-volume requirements and contains 4,855 words. *See* Fed. R. App. P. 29(a)(5), 32(a)(7).

I further certify that this brief complies with the typeface requirements of Federal Rule 32(a)(5) and the type-style requirements of Federal Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Equity font.

/s/ Benjamin M. Flowers
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CERTIFICATE OF SERVICE

I hereby certify that on April 19, 2023, the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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