

**IN THE DISTRICT COURT OF APPEAL OF FLORIDA,
FOURTH DISTRICT**

Case No.: 4D22-3429

L.T. No.: 2022-8077CF10A

STATE OF FLORIDA,
Appellant,

v.

TERRY HUBBARD,
Appellee.

ON APPEAL FROM A FINAL ORDER OF THE CIRCUIT COURT
FOR THE SEVENTEENTH JUDICIAL CIRCUIT IN AND FOR
BROWARD COUNTY, FLORIDA

BRIEF OF *AMICI CURIAE*
**AMERICAN CIVIL LIBERTIES UNION, BRENNAN CENTER FOR
JUSTICE, ACLU FOUNDATION OF FLORIDA, AND NAACP LEGAL
DEFENSE AND EDUCATIONAL FUND**
IN SUPPORT OF APPELLEE TERRY HUBBARD

PROSKAUER ROSE LLP
Matthew Triggs (FBN 865745)
One Boca Place
2255 Glades Road
Suite 421 Atrium
Boca Raton, Florida 33431-7360
(561) 241-7400
mtriggs@proskauer.com

Counsel for Amici Curiae

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STATEMENT OF INTEREST OF AMICI CURIAE

The American Civil Liberties Union (“ACLU”) is a nationwide, nonprofit, nonpartisan organization dedicated to defending the civil liberties guaranteed by the Constitution and our nation’s civil rights laws. The ACLU Foundation of Florida, Inc. (“ACLU-FL”) is its Florida affiliate and has more than 50,000 members statewide. The protection and expansion of voting rights, as well as the rights of the accused in criminal proceedings, are of great concern to both organizations. Specifically, the ACLU and ACLU-FL combat voter suppression, including that faced by Black people, who are disproportionately incarcerated and subject to felony disenfranchisement.

The Brennan Center for Justice at NYU Law School¹ (the “Brennan Center”) is a nonprofit, nonpartisan law and policy institute that seeks to strengthen, revitalize, and defend our systems of democracy and justice. Through its Voting Rights Program, the Brennan Center works nationwide to re-enfranchise Americans with

¹ This brief does not purport to convey the position of New York University School of Law.

past convictions. The Brennan Center also regularly participates as counsel or *amicus* in litigation related to felony disenfranchisement.

The NAACP Legal Defense and Educational Fund, Inc. (“LDF”) is a nonprofit, nonpartisan, legal organization founded in 1940 under the leadership of Thurgood Marshall to secure equal justice under the law for all Americans and to break down barriers that prevent Black people from realizing their basic civil and human rights. To this end, LDF has spearheaded litigation, legislation, education, and other advocacy to end felony disenfranchisement and challenge baseless prosecutions of Black voters for alleged voter fraud.

For over two decades, *amici* have worked inside and outside of the courtroom to expand and defend the right to vote of returning citizens² in Florida and other states. *Amici* also advocated for the passage of Amendment 4, the historic amendment to Florida’s constitution that was meant to end the State’s system of lifetime disenfranchisement.

Amici have a significant interest in this case: The State (“Appellant”) seeks this Court’s support for an unprecedented

² A “returning citizen” is an individual with a felony conviction.

expansion of the authority of the Office of Statewide Prosecution (“OSP”). Such an expansion would be contrary to OSP’s constitutional authority, purpose, and longstanding practice, and would permit further prosecutions of returning citizens—such as Appellee Terry Hubbard—who have been confused or misled about their eligibility to vote by Florida’s byzantine voting-rights restoration system. Such an expansion would also intimidate and disenfranchise returning citizens who *are* eligible to vote. Bias in the criminal justice system has meant that a disproportionate number of such citizens in Florida are Black.

Accordingly, *amici* respectfully submit this brief to underscore the threat presented by Appellant’s position to the rule of law and democratic norms in Florida.

PRELIMINARY STATEMENT

In 2018, Florida voters overwhelmingly approved Amendment 4, automatically restoring voting rights for returning citizens who have completed the terms of their sentences, except those convicted of murder or felony sexual offenses.³ Approximately 1.4 million

³ Art. VI, § 4(a)-(b), Fla. Const. (2018).

people were expected to benefit from the Amendment. But in 2019 the State enacted Senate Bill 7066 (“SB7066”), requiring returning citizens to satisfy certain court-imposed debts before they can vote.⁴ SB7066 also defined the terms “murder” and “felony sexual offense,” for which voting rights are not automatically restored by Amendment 4, to include an amorphous list of crimes.⁵ Under SB7066, it is “sometimes hard, sometimes impossible” for returning citizens to determine whether they are eligible to vote.⁶

Since SB7066 was enacted, Florida’s voting-rights restoration system has been an “administrative train wreck.”⁷ The State does not provide timely verification of eligibility; instead, it keeps potentially-ineligible voters on the rolls for years after it has approved their registrations and sent them voter-information cards, thereby leading them to believe they are eligible to vote. Appellant is now prosecuting returning citizens like Mr. Hubbard for good-faith mistakes about

⁴ Ch. 2019-162, § 25, Laws of Fla.

⁵ *Id.*

⁶ *Jones v. Governor of Fla. (Jones II)*, 975 F.3d 1016, 1062 (11th Cir. 2020) (en banc) (Martin, J., dissenting) (citation omitted), *rev’g Jones v. DeSantis (Jones I)*, 462 F.Supp.3d 1196 (N.D. Fla. 2020).

⁷ *Jones II*, 975 F.3d at 1059 (Martin, J., dissenting) (quoting “District Court’s unchallenged findings of fact” that Florida’s implementation has been an “administrative train wreck”).

their eligibility, despite representations to federal courts that it would not do so.⁸

Last August, five days before Florida’s primary election, Governor DeSantis held a press conference to announce the arrests of Mr. Hubbard and 19 other returning citizens for allegedly voting while ineligible in 2020.⁹ Flanked by over a dozen uniformed officers, the Governor called the arrests the “opening salvo” of Florida’s new Office of Election Crimes and Security.¹⁰ He also announced OSP was going to prosecute Mr. Hubbard and the other individuals arrested because there are “some prosecutors that have been loath to bring these cases.”¹¹

Mr. Hubbard’s brief sets forth ample grounds for upholding the circuit court’s order of dismissal. *Amici* write to present three additional considerations in support of Mr. Hubbard’s arguments.

First, Appellant’s position that OSP has authority to prosecute Mr. Hubbard for alleged single-circuit voting crimes that do not

⁸ See *infra* notes 79-80 and accompanying text.

⁹ First Coast News, *Watch Live: Governor DeSantis Press Conference*, YouTube (Aug. 18, 2022), <https://www.youtube.com/watch?v=IBkT4A1RET8>.

¹⁰ *Id.* at 1:10:48-1:12:20.

¹¹ *Id.* at 1:05:48-1:06:40.

involve organized criminal activity contradicts the plain language of the constitutional provision that created OSP, along with its history and intent, and OSP's longstanding practice. Notably, the limitation of OSP's authority to multi-circuit crimes was deliberately placed in the constitution so that the Legislature could not, through statutory amendment, expand OSP to usurp the role of State Attorneys. In tasking OSP to prosecute Mr. Hubbard, and using an amendment to OSP's enabling statute enacted *after* his case was dismissed to justify doing so on appeal, Appellant has done just that.

Second, OSP's prosecution of Mr. Hubbard is improper because he is a victim of the confusion caused by Florida's failure to administer its complex voting-rights restoration system, not an "election fraudster."

Third, to allow OSP to bring this prosecution will chill voting among eligible returning citizens in Florida, who are disproportionately Black, as well as other Black voters.

This Court should affirm the ruling below.

ARGUMENT

I. OSP LACKS AUTHORITY TO PROSECUTE MR. HUBBARD.

OSP was created for a specific purpose: to enhance Florida’s ability to combat complex, multi-circuit organized crimes, which geographically-bound State Attorneys were unable to prosecute effectively. OSP’s prosecution of Mr. Hubbard, for alleged single-circuit voting crimes that are unconnected with organized criminal activity, does not fall within that purpose. Appellant cannot invoke an amendment to OSP’s enabling legislation—enacted *after* Mr. Hubbard’s case was dismissed—to expand OSP’s power to prosecute him because the Florida Constitution limits OSP’s authority to crimes that have “occurred[] in two or more judicial circuits as part of a related transaction” or “affected two or more judicial circuits as provided by general law.”¹² Accordingly, Appellant’s attempts to expand OSP’s statutory authority beyond the limits of the constitution must be denied.

¹² Art. IV, § 4(b), Fla. Const.

A. OSP’s Prosecution of Mr. Hubbard Stands in Contrast to the History and Intent Behind OSP’s Creation, and to OSP’s Longstanding Practice.

The Legislature and voters created OSP in 1986 because Florida’s geographically-bound State Attorney system could not confront the challenge of organized crime.¹³

A 1977 report by a special committee of The Florida Bar concluded that Florida was ineffective at prosecuting cross-jurisdictional crimes because each of the 20 State Attorneys focused on a specific judicial circuit: They were not “responsible for nor aware of crime problems in other parts of the State” and there was “no unified or central direction ... on existing or imminent criminal activity of statewide importance which should have a unified, state-wide response.”¹⁴ Newspapers reiterated this concern, observing that a centralized prosecutor was needed to address “Florida’s high rate of organized crime” and other statewide criminal conspiracies.¹⁵

¹³ R.S. Palmer & Barbara M. Linthicum, *The Statewide Prosecutor: A New Weapon Against Organized Crime*, 13 Fla. St. U. L. Rev. 653, 654 (1985).

¹⁴ The Florida Bar Special Committee on the Statewide Prosecution Function, Report to the Board of Governors 1, 12 (1977), <https://tinyurl.com/4csp9r67>.

¹⁵ *Id.* at 48-59.

Throughout the 1970s and early 1980s, efforts were made to create a statewide prosecutor.¹⁶ Alternatives such as the Statewide Grand Jury, Office of Prosecution Coordination, and Council for the Prosecution of Organized Crime all proved inadequate.¹⁷ So, in 1984, Governor Graham formed the Governor's Commission on the Statewide Prosecution Function (the "Commission") to develop recommendations for a statewide agency to address "the threat that organized criminal activity poses to the quality of life of the citizens of Florida."¹⁸ The Commission was directed to:

(1) draft a constitutional amendment to permit the establishment of an agency with statewide responsibility for prosecuting organized criminal activity, and (2) draft legislation to establish and define the jurisdiction of an agency with statewide responsibility for prosecuting organized criminal activity.¹⁹

Given the potential for conflict with State Attorneys, the Commission recommended that the statewide prosecutor have authority only if two conditions were met:

[F]irst, the subject matter of the offense prosecuted must be one of the offenses enumerated in the

¹⁶ Palmer & Linthicum, *supra* note 13, at 654-63.

¹⁷ *Id.*

¹⁸ Fla. Exec. Order No. 84-150 (Aug. 8, 1984), <https://tinyurl.com/9wvxe7bu>.

¹⁹ *Id.* § 5.

enabling legislation, and second, such offense must be occurring, or must have occurred, in two or more circuits as part of a related transaction.²⁰

The Commission also considered, but ultimately declined to recommend, authorizing the statewide prosecutor to prosecute single-circuit public corruption cases without a request from a State Attorney.²¹ Such a grant of authority, the Commission concluded, would detract from the office's focus on "large criminal organizations."²²

In 1985, adopting the Commission's recommended constitutional amendment and enabling legislation, Governor Graham called for creation of a statewide prosecutor to focus on "long-term, complex organized crime cases" and "long-term investigations to assure the recovery of ill-gotten gains and convict major criminals."²³ This office, he said, would "accumulate expertise in organized crime investigations," "assume responsibility for cases

²⁰ Palmer & Linthicum, *supra* note 13, at 666-67.

²¹ *Id.* at 667-68.

²² *Id.*

²³ *Id.* at 668-69.

with a statewide impact,” and serve as “front line troops in the war on drugs and organized crime.”²⁴

The Commission recommended that the enabling legislation explicitly set forth the multi-circuit limitation on the statewide prosecutor’s authority.²⁵ The Florida Prosecuting Attorneys Association—historically the chief opponent of creating a statewide prosecutor—urged that this limitation be enshrined in the constitution to make it more difficult for the Legislature to expand the statewide prosecutor’s powers to usurp theirs.²⁶

To ensure the support of State Attorneys, the Legislature placed the multi-jurisdictional limitation in the proposed constitutional amendment.²⁷ The Legislature then referred the proposed amendment to voters.²⁸ It also passed enabling legislation authorizing OSP to pursue specific crimes, including criminal fraud, extortion, gambling, dangerous drugs crimes, and violations of the

²⁴ *Id.* at 669.

²⁵ *Id.* at 671, 677-78.

²⁶ *Id.* at 671.

²⁷ *Id.* at 671.

²⁸ Fla. HJR 386 (1985) at 1 (proposed amendment to art. IV, § 4(c), Fla. Const. (now renumbered § 4(b))).

Florida RICO Act.²⁹ Consistent with the legislative intent, the enabling legislation specifically limited OSP’s authority to when any such offense “is occurring, or has occurred, in two or more judicial circuits as part of a related transaction” or “is connected with an organized criminal conspiracy affecting two or more judicial circuits.”³⁰

For nearly four decades—from its creation until Appellant’s “opening salvo”—OSP has prosecuted multi-circuit crimes that would be difficult for a State Attorney to pursue, such as organized fraud, human trafficking, drug trafficking, and white-collar crime.³¹ OSP’s website states that it focuses on “complex, often large scale, organized criminal activity.”³² OSP’s annual reports also show that, before 2022, it never prosecuted anyone for alleged voting crimes.³³ Only when the Governor expressed his concern last August that some State Attorneys are “loath” to prosecute voter fraud did OSP shift

²⁹ Ch. 85-179, § 1, Laws of Fla.

³⁰ *Id.*

³¹ See generally Office of the Attorney General, *Office of Statewide Prosecution Annual Reports*, <http://tinyurl.com/mr2ueccc> (last visited Dec. 13, 2023) (annual overviews of OSP for 2011-2021).

³² Office of the Attorney General, *Office of Statewide Prosecution*, <http://tinyurl.com/j2hn9b4c> (last visited Dec. 13, 2023).

³³ *Office of Statewide Prosecution Annual Reports*, *supra* note 31.

course. As an attorney directly involved with OSP's creation explained:

At that time, it was about organized crime. I can guarantee you that it never came to anybody's mind that [OSP] would be prosecuting election laws.³⁴

B. Appellant's Position Would Expand OSP's Authority Beyond the Limits Set by the Florida Constitution.

1. The Constitution Limits OSP's Authority to Multi-Circuit, Organized Crimes That Cannot Be Efficiently Prosecuted by State Attorneys.

Florida's ordinary principles of constitutional interpretation require this Court to reject Appellant's arguments. Florida courts "adhere to the 'supremacy-of-text principle': 'The words of a governing text are of paramount concern, and what they convey, in their context, is what the text means.'"³⁵ What the text means here is what "voters would have understood" them to mean.³⁶ In addition, the Florida Supreme Court has long recognized:

³⁴ Lori Rozsa, *The First Arrests from DeSantis's Election Police Take Extensive Toll*, Wash. Post (May 1, 2023), <http://tinyurl.com/8u7ynvj4> (quoting Barbara Linthicum).

³⁵ *Advisory Op. to Governor re: Implementation of Amendment 4, the Voting Restoration Amendment (Amendment 4)*, 288 So.3d 1070, 1078 (Fla. 2020) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 56 (2012)).

³⁶ *Id.* at 1084.

The fundamental object to be sought in construing a constitutional provision is to ascertain the intent of the framers and the provision must be construed or interpreted in such manner as to fulfill the intent of the people, never to defeat it. Such a provision must never be construed in such manner as to make it possible for the will of the people to be frustrated or denied.³⁷

The intent of a constitutional provision can be “discerned from historical precedent, from the present facts, from common sense, and from an examination of the purpose the provision was intended to accomplish and the evils sought to be prevented.”³⁸ Courts also “look to the explanatory materials available to the people as a predicate for their decision as persuasive of their intent.”³⁹ Finally, “[w]here possible, [courts should be] guided by [the] circumstances leading to the adoption of a provision.”⁴⁰

Turning first to the constitutional text, Article IV, Section 4(b) provides that OSP has “concurrent jurisdiction with the state attorneys to prosecute violations of criminal laws occurring or having

³⁷ *Id.* at 1085 (Labarga, J., concurring in result and dissenting in part) (citing *Gray v. Bryant*, 125 So.2d 846, 852 (Fla. 1960)).

³⁸ *Dep’t of Env’tal Prot. v. Millender*, 666 So.2d 882, 885-86 (Fla. 1996).

³⁹ *Id.*

⁴⁰ *Gallant v. Stephens*, 358 So.2d 536, 539 (Fla. 1978).

occurred, in *two or more judicial circuits* as part of a related transaction, or when any such offense is affecting or has affected *two or more judicial circuits* as provided by general law.”⁴¹ It explicitly limits OSP’s authority to crimes that occur in or affect “two or more judicial circuits.”⁴² Viewed in the context in which OSP was created, there is only one “unambiguous ‘ordinary meaning’ that the voters ‘would most likely understand’”: OSP only has authority to prosecute multi-circuit crimes.⁴³

The textual reading of OSP’s constitutional authority is consistent with the framers’ intent. As acknowledged by Appellant, “an animating purpose of [OSP] was to ‘combat organized crime,’” and this purpose is “undoubtedly relevant to legal interpretation[.]”⁴⁴ In addition, the constitutional amendment that created OSP was deliberately written by the Legislature to limit OSP’s encroachment

⁴¹ Art. IV, § 4(b), Fla. Const. (emphases added).

⁴² *Id.*

⁴³ *Amendment 4*, 288 So.3d at 1078 (citing *Advisory Op. to Governor—1996 Amendment 5*, 706 So.2d 278, 283 (Fla. 1997)); see also *Lab’y Corp. of Am. v. Davis*, 339 So.3d 318, 324 (Fla. 2022) (“Context is a primary determinant of meaning.” (quoting Scalia & Garner, *supra* note 35, at 167)).

⁴⁴ Appellant State of Florida’s Reply Brief at 18, *State v. Miller*, No. 3D22-2180 (Fla. 3d DCA Nov. 15, 2023) (citation omitted).

on the authority of State Attorneys.⁴⁵ Governor Graham’s Commission and the Legislature also declined to empower OSP to address single-circuit public corruption cases.⁴⁶ Moreover, at no point was OSP intended to replace State Attorneys, or to prosecute cases they declined to pursue.

This reading of OSP’s authority is also consistent with the intent of voters. Governor Graham and major publications communicated to voters that OSP’s focus would be limited to “major criminals” and complex, multi-circuit organized crimes that could not be effectively prosecuted by State Attorneys.⁴⁷ In addition, the ballot summary for the proposed constitutional amendment creating OSP provided for “a statewide prosecutor having concurrent jurisdiction with the state attorneys to prosecute *multi-circuit* violations of the criminal laws of the state.”⁴⁸ Thus, the voters who approved OSP’s creation

⁴⁵ Palmer & Linthicum, *supra* note 13, at 667.

⁴⁶ *Id.* at 666-67, 671.

⁴⁷ Palmer & Linthicum, *supra* note 13, at 668-69; *see also, e.g., Amendments*, Orlando Sentinel, Nov. 3, 1986, at A-8, <https://tinyurl.com/2csv55vr>; *State Referendums*, St. Petersburg Times, Oct. 30, 1986, at 8, <https://tinyurl.com/5n7z96jr>.

⁴⁸ Fla. Div. Elections, Initiative Information, *Authority of Attorney General to Appoint a Statewide Prosecutor*, <http://tinyurl.com/3n2x3wsb> (last visited Dec. 13, 2023) (emphasis added).

understood that OSP would focus exclusively on “major criminals” and complex, multi-circuit crimes that cannot be effectively prosecuted by State Attorneys.

Appellant does not accuse Mr. Hubbard of anything other than registering and voting in a single circuit while ineligible.⁴⁹ Nor does Appellant allege that he organized with anyone, or cast or helped to cast any vote other than his own.⁵⁰ And there is no dispute that a State Attorney could have prosecuted Mr. Hubbard for his alleged crimes. In fact, State Attorneys in other circuits have brought similar prosecutions; those who declined did so for lack of sufficient evidence of intent, not lack of authority.⁵¹ To hold OSP has authority here because (i) “voter fraud undermines public confidence in the integrity of statewide elections,” (ii) Mr. Hubbard’s conduct “triggered state election-administration processes that involve state action in both the Seventeenth and Second Circuits,” and (iii) his alleged “scheme to vote illegally in the 2020 election” is a crime “occur[ing] in at least two judicial circuits as part of a related transaction”—as Appellant

⁴⁹ R. 9-15, 68-69.

⁵⁰ *Id.*

⁵¹ *See infra* note 78 and accompanying text.

alleges—would render meaningless the words of the Florida Constitution and accord boundless authority to OSP.⁵²

2. The Legislature Cannot Expand OSP’s Statutory Authority Beyond the Constitution.

“State constitutions are limitations upon the power of state legislatures.”⁵³ Accordingly, a statute is invalid if it “conflicts with the express or clearly implied mandate[s] of the Constitution.”⁵⁴

Since OSP’s creation, the Legislature has twice amended its enabling statute, Florida Statute § 16.56, to empower OSP to prosecute voting-related crimes. In 2005, the Legislature authorized OSP to pursue “[a]ny crime involving voter registration, voting, or candidate or issue petition activities.”⁵⁵ Importantly, this addition to Section 16.56 did not authorize OSP to prosecute single-circuit voting crimes that are not part of a larger statewide conspiracy; indeed, such power could not have been accorded legislatively. Consistent with the constitution, OSP’s authority remained restricted to crimes

⁵² Appellant Br. 10, 17, 22.

⁵³ *Notami Hosp. of Fla., Inc. v. Bowen*, 927 So.2d 139, 142 (Fla. 1st DCA 2006), *aff’d sub nom.*, *Fla. Hosp. Waterman, Inc. v. Buster*, 984 So.2d 478 (Fla. 2008).

⁵⁴ *Fla. Dep’t of Agric. & Consumer Servs. v. Dolliver*, 283 So.3d 953, 959 (Fla. 2d DCA 2019) (quotation omitted).

⁵⁵ Ch. 2005-277, § 73, Laws of Fla.

in which “such offense is occurring, or has occurred, in two or more judicial circuits as part of a related transaction, or when any such offense is connected with an organized criminal conspiracy affecting two or more judicial circuits.”⁵⁶

The Legislature amended Section 16.56 again this year, purportedly to give OSP authority to prosecute Mr. Hubbard, after circuit courts dismissed Appellant’s cases against him and other returning citizens for lack of authority to prosecute.⁵⁷ The amendment authorizes OSP to prosecute voter-registration and voting-related crimes that are “occurring, or [have] occurred, in two or more judicial circuits as part of a related transaction,” or when “any such offense is affecting, or has affected, two or more judicial circuits,” without the requirement of an “organized criminal conspiracy.”⁵⁸

The Legislature’s perceived need to amend Section 16.56 confirms that, in its prior form, the section did not authorize OSP to

⁵⁶ *Id.*

⁵⁷ R. 74-76; Order on Mot. to Dismiss, *State v. Miller*, No. 13-2022-CF-015012-0001-XX (11th Fla. Cir. Ct. Dec. 12, 2022); Order on Mot. to Dismiss, *State v. Wood*, No. 13 2022 CF 015009 0001 XX (Fla. 11th Cir. Ct. Oct. 21, 2022).

⁵⁸ Ch. 2023-2, § 1, Laws of Fla.

prosecute Mr. Hubbard. Indeed, the staff analysis for the House companion to the bill amending Section 16.56 cited Mr. Hubbard's case and the other dismissed prosecutions.⁵⁹ The modified version cannot apply to Mr. Hubbard because it was passed *after* Mr. Hubbard's case was dismissed. But even if it did apply, it could not be construed to authorize OSP's prosecution of him because the Legislature cannot expand OSP's authority beyond the explicit limits in Florida's constitution.⁶⁰

II. MR. HUBBARD'S CASE INVOLVES, AT WORST, AN ISOLATED INSTANCE OF VOTER CONFUSION CAUSED BY FLORIDA'S FAILURE TO ADMINISTER ITS VOTING-RIGHTS RESTORATION SYSTEM.

Florida's incoherent voting-rights restoration system, put into place by SB7066 to undermine Amendment 4, has kept returning citizens like Mr. Hubbard uninformed about their eligibility, and in many cases has affirmatively misled them.⁶¹

⁵⁹ Fla. H.R. Comm. on Judiciary, HB 3B (2023) Post-Meeting Staff Analysis 3 (Feb. 8, 2023), <https://tinyurl.com/vxjhz8wp>.

⁶⁰ *Notami*, 927 So.2d at 142.

⁶¹ Matt Dixon, *Defendants Targeted in DeSantis' Voter Fraud Crackdown Were Told They Could Vote*, Politico (Aug. 26, 2022), <https://tinyurl.com/rx4pamr3>; Sam Levine, *Floridians Charged Over Voting Believed They Were Eligible, Documents Show*, Guardian (Aug. 25, 2022), <https://tinyurl.com/mwen363f>.

Since SB7066 was enacted, Florida has struggled to timely verify the eligibility of returning citizens. Under Florida law and the Department of State’s (“DOS”) regulations, DOS is charged with verifying voter eligibility and identifying potentially-ineligible voters whose voting rights have not been restored so they can be removed from the rolls.⁶² DOS is supposed to check new registrations within 24 hours of receipt against the Florida Department of Law Enforcement’s (“FDLE”) database and then conduct a manual review to confirm potential matches are actually ineligible.⁶³ Florida’s voter registration database is also supposed to be “cross-checked daily against FDLE records” to identify potentially-ineligible voters.⁶⁴ In addition, the Bureau of Voter Registration Services is supposed to conduct monthly checks to identify potentially-ineligible voters.⁶⁵

Over the last four years, DOS has failed to meet these responsibilities. Between January 8, 2019 (Amendment 4’s effective

⁶² §§ 98.075(5), 98.0751(3)(a), Fla. Stat. (2022); Fla. Admin. Code R. 1S-2.041(4)(c), R. 1S-2.039(11)(f)(3).

⁶³ Trial Transcript at vol. 5, 1181:17-1186:10, *Jones I*, No. 4:19cv300-RH/MJF (N.D. Fla. May 4, 2020), <https://tinyurl.com/2p9rk7wv>.

⁶⁴ *Id.* at 1181:25-1182:3.

⁶⁵ Fla. Admin. Code R. 1S-2.039(11)(f)(3).

date) and May 2020, DOS flagged for vetting some 85,000 pending registrations by returning citizens.⁶⁶ In those 16 months, however, DOS had “yet to complete its screening of any of the [85,000] registrations.”⁶⁷ DOS advised a federal court that its review of those registrations could take until 2026 because its caseworkers could only process, on average, 57 registrations per day.⁶⁸

DOS is not the only Florida agency that has failed to perform its responsibilities. Through three statewide elections, FDLE failed to identify potentially-ineligible voters “in a time and manner that enables [DOS] to meet its obligations under state and federal law.”⁶⁹ Between 2019 and at least January 2022, FDLE did not send monthly reports to DOS about potential matches of voters with individuals in the Florida Offender Registration and Tracking Services database.⁷⁰

In addition to keeping potentially-ineligible voters on its rolls for years, Florida sends voter-information cards to every newly-

⁶⁶ *Jones II*, 975 F.3d at 1026.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ § 98.093(2)(d), Fla. Stat. (2022).

⁷⁰ Fla. Dep’t L. Enf’t, *Investigative Report* (2021), <https://tinyurl.com/3n5uwkdd>.

registered voter, regardless of their eligibility,⁷¹ including Mr. Hubbard.⁷² Until this year, the card gave no indication that the recipient might not be eligible.⁷³ Making matters worse, Florida’s eligibility requirements for returning citizens are overly complex—so complex that DOS’s internal “workflow” for determining whether a returning citizen is eligible to vote is *32-pages* long.⁷⁴ Florida’s voter registration application also does not alert applicants with disqualifying convictions like Mr. Hubbard that they cannot vote unless they receive clemency.⁷⁵

Florida’s inability to administer its voting-rights restoration system, coupled with its failure to educate the public about its complicated eligibility requirements, has perpetuated widespread confusion.⁷⁶ This confusion has caused some State Attorneys to

⁷¹ § 97.071, Fla. Stat. (2022).

⁷² R. 68-69.

⁷³ Ch. 2023-120, § 4, Laws of Fla. (voter-information cards now must disclaim: “This card is proof of registration but is not legal verification of eligibility to vote.”)

⁷⁴ See Bureau of Voter Registration Services, Fla. Div. Elections, *Processing Potential Felon Match Files* (2021), <https://tinyurl.com/4deyrjrm>.

⁷⁵ See Form DS-DE 39, *Florida Voter Registration Application*, Fla. Dep’t St. (Oct. 2013), <https://tinyurl.com/2parkdcy>.

⁷⁶ Levine, *supra* note 61.

decline to prosecute cases similar to this one because criminal intent could not be established.⁷⁷ For example, the State Attorney for the Fifth Judicial Circuit declined to prosecute six returning citizens who allegedly voted while ineligible in 2020 because they were given voter-information cards, were never notified that they were ineligible, and were “encouraged to vote by various mailings and misinformation.”⁷⁸

OSP’s prosecution of Mr. Hubbard for an isolated instance of voter confusion is especially inappropriate because Appellant—in litigation brought by *amici* challenging certain provisions of SB7066—repeatedly downplayed the risk of prosecution for returning citizens who made “good faith, but mistaken” decisions about their eligibility, citing the scienter requirements in the same statutes that OSP now alleges Mr. Hubbard violated.⁷⁹ Relying in part on these

⁷⁷ It is a crime to register or vote while ineligible only if the accused knew they were ineligible but did so anyway. §§ 104.011(1), 104.15, Fla. Stat. (2022); *see also Corrales v. State*, 84 So.3d 406, 408 (Fla. 1st DCA 2012) (“The willfulness requirement assures that ‘no one will be convicted of a crime because of a mistake or because he does something innocently, not realizing what he was doing.’”) (citation omitted); *Polite v. State*, 973 So.2d 1107, 1112-14 (Fla. 2007).

⁷⁸ Memorandum from Jonathan Olson, Div. Supervisor, State Att’y Off., Fifth Jud. Cir. (June 13, 2022), <https://tinyurl.com/mr39xa5p>.

⁷⁹ *See, e.g.*, Opposition to Application to Vacate the En Banc 11th Circuit’s Stay at 52, *Raysor v. DeSantis*, 140 S.Ct. 2600 (2020) (No.

representations, the Eleventh Circuit confirmed that no returning citizen who “honestly believes he has completed the terms of his sentence commits a crime by registering and voting[.]”⁸⁰

Appellant knows that Florida’s voting-rights restoration system is an “administrative nightmare,” there is widespread confusion about voter eligibility, and the State Attorneys who have declined to prosecute have done so for good reason. Yet, despite its previous representations to multiple federal courts that it would not prosecute good-faith mistakes, Appellant is doing just that. This Court should not countenance Appellant’s about-face.

19A1071), <http://tinyurl.com/2p8d27u8>; En Banc Opening Brief at 74, 75, *Jones II*, 975 F.3d 1016 (No. 20-12003), <http://tinyurl.com/cbxhsctw>; En Banc Reply Brief at 68, *Jones II*, 975 F.3d 1016 (No. 20-12003), <http://tinyurl.com/9jaj99kj>.

⁸⁰ *Jones II*, 975 F.3d at 1047-48; *see also id.* at 1093 (Martin, J., dissenting) (“Florida downplays this risk [of prosecution], proclaiming that felons should rest assured that they will not be convicted if they registered in good faith because willfulness must be shown....”).

III. ALLOWING OSP TO PROSECUTE ISOLATED INCIDENTS OF VOTER CONFUSION WILL CHILL VOTING BY ELIGIBLE RETURNING CITIZENS.

OSP’s “opening salvo” has caused, and will continue to cause, eligible voters to fear participating in elections.⁸¹ Before the November 2022 elections, one Supervisor of Elections observed:

I have not encountered in the past this many voters calling, concerned that they may be prosecuted or what have you for voter fraud. *And these are all eligible voters that have contacted me.*⁸²

OSP’s prosecutions are particularly chilling for Black Floridians, including those who *do not* have felony convictions. Since the Office of Election Crimes and Security commenced operations last July, it has focused its resources primarily on pursuing Black returning citizens like Mr. Hubbard who were confused or misled about their eligibility.⁸³ Of the 20 returning citizens OSP charged last year, 15

⁸¹ See, e.g., Paul Blest & Trone Dowd, ‘Complete Setup’: Florida Crackdown Has Ex-Felons Afraid to Vote, Vice (Nov. 3, 2022), <https://tinyurl.com/4me7sty9>; Matt Shuham, Some Eligible Ex-Felons Fear Voting Because of Ron DeSantis, HuffPost (Oct. 28, 2022), <https://tinyurl.com/2waxpdcy>.

⁸² News Service of Florida, *Florida Elections Officials Grapple with Misinformation, Myths*, Tampa Bay Times (Oct. 26, 2022), <https://tinyurl.com/9kh4xfja> (emphasis added).

⁸³ Wayne Washington, *Voter Intimidation? Black Voters Over-Represented Among Those Arrested So Far for Election Crimes*, Palm Beach Post (Oct. 10, 2022), <https://tinyurl.com/36bp627e>.

are Black. Family members of Black returning citizens prosecuted by OSP have indicated that they no longer intend to vote.⁸⁴ This was an entirely foreseeable outcome, particularly given the Governor’s vow that there are “many more [arrests] in the pipeline.”⁸⁵ Recognizing this chilling effect, the U.S. Department of Justice recommends against conducting election-related arrests close to an election.⁸⁶

OSP’s prosecutions will continue to harm Black voters disproportionately. Because of persistent discrimination in the criminal legal system, approximately one in eight Black Floridians is disenfranchised, a rate roughly twice that of non-Black Floridians.⁸⁷ A nationwide study of voter fraud cases also found that Black and poor individuals are more likely than white individuals to be subject to “high-profile prosecutions” resulting in “draconian charges,” and

⁸⁴ Rozsa, *supra* note 34.

⁸⁵ First Coast News, *supra* note 9, at 1:05:48-1:05:55.

⁸⁶ *See, e.g.*, U.S. Dep’t of Just., *Justice Manual*, ch. 9-85.300 (2022), <https://tinyurl.com/4e7tmjxs>.

⁸⁷ *Florida Bans Voting Rights of Over One Million Citizens*, Sent’g Proj. (Jan. 2023), <https://tinyurl.com/5n6fnkfw>.

that in that sense, “Florida is an exaggerated version of America as a whole.”⁸⁸

CONCLUSION

For the foregoing reasons, this Court should affirm the circuit court’s dismissal.

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Respectfully submitted,

PROSKAUER ROSE LLP

/s/ Matthew Triggs
Matthew Triggs (FBN 865745)
One Boca Place
2255 Glades Road
Suite 421 Atrium
Boca Raton, Florida 33431-
7360
(561) 241-7400
mtriggs@proskauer.com

Counsel for Amici Curiae

⁸⁸ See Michael Wines, *In Voter Fraud, Penalties Often Depend on Who’s Voting*, N.Y. Times (Sept. 7, 2022), <https://tinyurl.com/pe84x8xf>.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY, under Florida Rule of Appellate Procedure 9.045(e), that this Brief complies with the applicable font and word-count requirements. It was prepared in Bookman Old Style 14-point font, and it contains 4,993 words.

/s/ Matthew Triggs
Matthew Triggs

Dated: December 14, 2023

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 14, 2023, a true and correct copy of the foregoing will be furnished via the Florida Court's

E-Filing Portal:

Office of the Attorney General

Henry C. Whitaker
Jeffrey Paul DeSousa
Alison E. Preston
The Capitol, PL-01
Tallahassee, Florida 32399
(850) 414-3300
alison.preston@myfloridalegal.com
jenna.hodges@myfloridalegal.com

Jeremy B. Scott
Chief Assistant Statewide Prosecutor
SunTrust International Center
One SE Third Ave., Ste. 900
Miami, FL 33131
(786) 792-6196
jeremy.scott@myfloridalegal.com

Counsel for the State of Florida

Craig Trocino

1311 Miller Drive
Suite B400
Coral Gables, FL 33146
(305) 284-8201
ctrocino@law.miami.edu

Michael A. Gottlieb P.A.

Michael A. Gottlieb
Clark Alan Strandell
1311 SE Second Avenue
Fort Lauderdale, FL 33316
(954) 355-7286
mike@mgottlielaw.com
clark@mgottlielaw.com

Counsel for Terry Hubbard

/s/ Matthew Triggs
Matthew Triggs