

No. 18-11388-G

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

JAMES MICHAEL HAND, JOSEPH JAMES GALASSO, HAROLD W. GIRCSIS, JR.,
CHRISTOPHER MICHAEL SMITH, WILLIAM BASS, JERMAINE JOHNEKINS, YRAIDA
LEONIDES GUANIPA, JAMES LARRY EXLINE, VIRGINIA KAY ATKINS,

Plaintiffs-Appellees,

v.

RICK SCOTT, in his official capacity as Governor of Florida and member of the
State of Florida's Executive Clemency Board, PAM BONDI, in her official capacity
as the Attorney General of Florida and member of the Executive Clemency Board,
ADAM H. PUTNAM, in his official capacity as Commissioner of Agriculture and
member of the Executive Clemency Board, JIMMY PATRONIS, in his official
capacity as Chief Financial Officer and member of the Executive
Clemency Board,

Defendants-Appellants.

On Appeal from the United States District Court for the Northern District of
Florida, No. 4:17-cv-00128-MW-CAS, Judge Mark E. Walker

**BRIEF FOR *AMICUS CURIAE* THE SENTENCING PROJECT IN
SUPPORT OF APPELLEES AND AFFIRMANCE**

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**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE
DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1, *Amicus Curiae* The Sentencing Project submits the following certificate of interested persons:

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68. Wyant, David A., Defendant-Appellant

No publicly traded company or corporation has an interest in the outcome of the case or appeal.

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IDENTITY AND INTEREST OF *AMICUS CURIAE*¹

The Sentencing Project is a national nonprofit organization established in 1986 to engage in public policy research and education on criminal justice reform. The Sentencing Project is dedicated to promoting rational and effective public policy on issues of crime and justice. Through research, education, and advocacy, the organization analyzes the effects of sentencing and incarceration policies, including on their impact on the reintegration of those convicted of a crime into civil society. The Sentencing Project also frequently participates as amicus in court cases relating to sentencing and criminal justice issues.

The Sentencing Project has produced widely cited scholarship on the levels of the disenfranchisement of people convicted of a felony across the states and the prevalence and impact of felony disenfranchisement laws in the United States. Because Florida has the highest rate of felony disenfranchisement in the United States, due primarily to the Sentencing Project's research and work, it has a unique perspective to bring to bear on the issues in this case.

¹ Pursuant to Federal Rule of Appellate Procedure 29, amici state that no party or party's counsel authored this brief in whole or in part. Amici further state that no party, party's counsel, or any other person other than amici and amici's counsel contributed money that was intended to fund preparing or submitting this brief. All parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

“[S]tatutes distributing the franchise constitute the foundation of our representative society.”² Florida denies more than ten percent of its citizens the opportunity to participate in representative society by disenfranchising all citizens for life upon a felony conviction and constructing a vote restoration scheme for restoring the franchise that imposes significant and systemic burdens on its citizens. Indeed, Florida “leads” in every conceivable ranking related to disenfranchisement. Florida has the highest percentage of disenfranchised citizens in the Nation (over ten percent), more people are disenfranchised in Florida than any other state, and of those who have been convicted of a felony and completed all aspects of their post-conviction punishment, a stunning 48 percent of people who remain disenfranchised nationally reside in Florida.

In Florida, it is a felony to intentionally sell malt beverages without first allowing such beverages to come “to rest at the licensed premises of an alcoholic beverage wholesaler in this state before being sold to a vendor by the wholesaler.” Fla. Stat. § 561.5101. A Florida citizen convicted (or who pleads guilty) of this, or any of the 532 other felonies under Florida law, loses their right to vote forever, even if they never spend a day in prison, unless their rights are restored. Fla. Const. art. VI, §§ 2, 4 (1968).

² *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 (1969).

Although Florida has enacted a vote restoration scheme, that scheme itself violates the Constitution. Florida's Constitution permits the Governor, with the approval of at least two other members of Florida's Executive Clemency Board, to restore civil rights, including the right to vote. Fla. Const. art. IV, § 8(a); Fla. Stat. Ann. § 944.292(1). Florida's Governor "has the unfettered discretion to deny clemency at any time, for any reason." Fla. R. Exec. Clemency 4.

While the Governor's discretion is unbounded, under the current set of rules, there are ample procedural hurdles merely to seek restoration. After release from prison, completion of multiple post-sentence requirements, and endurance of a five or seven-year waiting period (depending on the severity of the offense), *see* Fla. R. Exec. Clemency 9(A)(4), citizens may petition Florida's Office of Executive Clemency for the reinstatement of their civil rights, including the right to vote, serve on a jury, and run for office. Fla. R. Exec. Clemency 5. If an individual gets *arrested* for a misdemeanor or a felony during the waiting period, they must wait another five or seven-year period before they may seek to have their right to vote restored. Fla. R. Exec. Clemency 9.

After expiration of the waiting period, "[p]ersons seeking restoration" of their right to vote "must submit an application." Fla. R. Exec. Clemency 6A. Florida requires "supporting documents" to accompany the application. These include certified copies of (1) the initial charging instrument; (2) the judgment; and

(3) the sentence, for all relevant convictions. Fla. R. Exec. Clemency 6B.

Applications that fail to comply with these requirements will be returned “without further consideration.” Fla. R. Exec. Clemency 6D. After conclusion of the Parole Commission’s investigation, depending on the severity of the offense, the Board either makes its determination, or holds a hearing. Only those who had previously been convicted of more serious offenses are given the opportunity to be heard. Fla. R. Exec. Clemency 9.

The constitutionality of Florida’s scheme to arbitrate which of its disenfranchised citizens may have their right to vote restored—and not its disenfranchisement of those incarcerated after a felony conviction—is the subject of this appeal. For the reasons ably set forth in Respondents’ brief, the Sentencing Project believes that Florida’s vote restoration scheme violates the First and Fourteenth Amendments.

This brief focuses on how Florida’s felony disenfranchisement law and vote restoration scheme is an outlier among the vast majority of states and is responsible for Florida’s status as, in the words of a recent publication, the Nation’s “undisputed dis[en]franchisement champion.”³

³ Garrett Epps, *The ‘Slave Power’ Behind Florida’s Felon Disenfranchisement*, *The Atlantic* (Feb. 4, 2018), <https://www.theatlantic.com/politics/archive/2018/02/the-slave-power-behind-floridas-felon-disenfranchisement/552269/>.

It is likewise clear that Defendants and their amici cannot justify Florida's outlier status. They halfheartedly argue that disenfranchisement enhances public safety by discouraging recidivism. Tellingly, they marshal no evidence in support of this claim beyond an easily debunked comparison between two groups of vastly different size, demographics, and risk profile. In reality, empirically sound studies confirm what logic and common sense suggest: the restoration of civil rights, including the right to vote, facilitate reintegration into civil society, thereby discouraging recidivism.

ARGUMENT

I. FLORIDA'S VOTE RESTORATION PROCESS IS AN OUTLIER AMONG THE STATES

Florida's vote restoration scheme is a true outlier among the States. Today, along with Florida, only two other states—Kentucky and Virginia—remain in what former Florida Governor Crist deemed the “offensive minority”⁴ of states that, pursuant to their state constitutions, permanently disenfranchise all citizens who have been convicted of a felony, subject to a discretionary rights restoration process.⁵ In contrast, thirty-six states and the District of Columbia automatically

⁴ Abby Goodnough, *In a Break from the Past, Florida Will Let Felons Vote*, N.Y. Times (Apr. 6, 2007), <https://www.nytimes.com/2007/04/06/us/06florida.html>.

⁵ ACLU, *Felony Disenfranchisement Laws (Map)*, <https://www.aclu.org/issues/voting-rights/voter-restoration/felony-disenfranchisement-laws-map> (last visited June 22, 2018). Iowa also permanently disenfranchises individuals with felonies, but is not constitutionally required to do so. *Id.*

restore the voting rights of persons with felony convictions (two other states never disenfranchise at all) following completion of a specified period of supervision.⁶

Several additional states have non-arbitrary schemes for restoring the right to vote to some categories of citizens with felony convictions.⁷

⁶ Maine and Vermont do not disenfranchise persons with felony convictions, even while they are incarcerated. Me. Const. art. II, § 1; Vt. Stat. Ann. tit. 28, § 807(a); Jean Chung, *Felony Disenfranchisement: A Primer*, Sent’g Project (May 10, 2016), <https://www.sentencingproject.org/publications/felony-disenfranchisement-a-primer/>. There are four categories of automatic restoration schemes: (1) D.C. Mun. Regs. tit. 3 § 500.2(c); Haw. Rev. Stat. § 831-2(a)(1); Ill. Const. art. III, § 2; 730 Ill. Comp. Stat. 5/5-5-5; Ind. Code §§ 3-7-13-4, 3-7-13-5; Md. Code Ann. Elec. Law § 3-102(b)(1); Mass. Const. amend. art. III; Mass. Gen. Laws ch. 51, § 1; Mich. Comp. Laws § 168.758b; Mont. Const. art. IV, § 2; Mont. Code Ann. § 46-18-801(2); N.H. Rev. Stat. Ann. §§ 607-A:2, 607-A:3; N.D. Cent. Code Ann. §§ 12.1-33-01, 12.1-33-03; Ohio Rev. Code Ann. § 2961.01(A); Or. Rev. Stat. § 137.281(7); 25 Pa. Cons. Stat. §§ 2602(t), 2602(w), 3146.1; R.I. Const. art. II, § 1; Utah Code Ann. § 20A-2-101.5(2) (automatic restoration upon release from incarceration); (2) Cal. Elec. Code § 2101(a); Colo. Const. art. 7, § 10; Colo. Rev. Stat. § 1-2-103(4); Conn. Gen. Stat. §§ 9-46, 9-46a; N.Y. Elec. Law § 5-106(3) (automatic restoration after completion of parole, but prior to the end of probation); (3) Alaska Stat. § 15.05.030; Ark. Const. amend. 51, § 11(d); Ga. Const. art. II, § I, para. III; Idaho Code Ann. § 18-310(2); Kan. Stat. Ann. §§ 21-6613, 22-3722; La. Const. art. I, §§ 10, 20; Minn. Stat. § 609.165; Mo. Rev. Stat. § 115.133; N.J. Stat. Ann. §§ 2C:51-3, 19:4-1(8); N.M. Stat. Ann. § 31-13-1; N.C. Gen. Stat. Ann. §§ 13-1, 13-2; Okla. Stat. tit. 26, § 4-101; S.C. Code Ann. § 7-5-120(B); S.D. Codified Laws § 24-5-2; Tex. Elec. Code Ann. § 11.002; Wash. Rev. Code § 29A.08.520(1); W. Va. Code § 3-2-2; Wis. Stat. § 304.078(2) (automatic restoration following completion of parole and probation); and (4) Neb. Rev. Stat. Ann. § 29-112 (automatic restoration two years after completion of sentence).

⁷ Ala. Code §§ 15-22-36, 15-22-36.1 (non-discretionary executive restoration for certain felony convictions upon satisfaction of objective criteria, but permanent disenfranchisement for murder, treason and various sex offenses); Ariz. Rev. Stat. Ann. §§ 13-905–13-912 (discretionary judicial restoration for individuals with two or more felony convictions, but automatic restoration for first-time offenders); Del.

Florida's amici attempt to obfuscate these facts to make Florida's regime appear more palatable. Their attempt to do so is unavailing. First, amici refer on multiple occasions to "the 48 states" that disenfranchise incarcerated individuals after a felony conviction.⁸ But this number is irrelevant. This case is not a challenge to Florida's decision to disenfranchise those convicted of a felony while incarcerated. Rather, this case challenges the constitutionality of the process by which Florida decides whether the right to vote can be restored.

Second, amici dramatically overstate the number of states with vote restoration schemes like the one currently in place in Florida. According to the state, Florida is merely one of 11 that restores the right to vote "by petition only."

Code Ann. tit. 15, §§ 6103, 6104 (automatic restoration except permanent disenfranchisement for certain disqualifying felony convictions); Miss. Const., art. 12, § 241 (listing ten crimes that trigger lifelong disenfranchisement); *Cotton v. Fordice*, 157 F.3d 388 (5th Cir. 1998) (interpreting section 241 of the Mississippi Constitution to include certain felonies not expressly listed); *see also*, Op. Atty. Gen. No. 2009-00210, 2009 WL 2517257 (Miss. A.G. July 9, 2009) (interpreting section 241 in light of *Cotton* to mean 22 felonies currently trigger lifelong disenfranchisement in Mississippi). Nev. Rev. Stat. § 213.157 *as amended by* 2017 Nevada Laws Ch. 362 (A.B. 181) (discretionary judicial restoration for individuals with multiple felony convictions, if previously convicted for more serious, violent offenses and/or two or more offenses; otherwise, automatic restoration immediately upon release or following two-year waiting period for Category B felonies); Wyo. Stat. Ann. § 7-13-105 (*amended by* 2018 Wyo. Laws Ch. 108 (S.F. 70), 64th Leg., Budget Sess. (Wyo. 2018)) (discretionary executive restoration for all felony convictions but automatic restoration for non-violent first-time felony convictions).

⁸ Br. of Missouri and 7 Other States as *Amici Curiae* Supporting Reversal 2, 5, 6, 8, 17; *see also* Br. of Defendants-Appellants 25.

States Amicus Br. 7. In fact, of the 11 states listed, Nebraska has automatic vote restoration two years after completion of a sentence,⁹ Arizona automatically restores voting rights to first time offenders so long as there are no outstanding financial obligations,¹⁰ Wyoming automatically restores voting rights five years after completion of a prison term for first-time, non-violent offenders convicted of a felony after 2016, and Mississippi does not permanently disenfranchise citizens convicted of many felonies.¹¹

In any event, the states do not and cannot dispute that the unmistakable trend across the United States has been toward easing the path to restoration of the right to vote. Between 1997 and 2016, 24 states amended their felony disenfranchisement laws, allowing for an estimated 840,000 citizens to regain their voting rights.¹² Over the course of the last two decades, eight states have amended or repealed their lifetime voting ban laws for previously convicted felons; three states have amended or extended the right to vote to individuals on probation or

⁹ Neb. Rev. Stat. Ann. § 29-112.

¹⁰ Ariz. Rev. Stat. Ann. § 13-912.

¹¹ Wyo. Stat. Ann. § 7-13-105 (*amended by* 2018 Wyo. Laws Ch. 108 (S.F. 70), 64th Leg., Budget Sess. (Wyo. 2018)); Miss. Const. art. 12, § 241 (listing ten crimes that trigger lifelong disenfranchisement); *Fordice*, 157 F.3d 388 (interpreting section 241 of the Mississippi Constitution to include certain felonies not expressly listed); *see also*, Op. Atty. Gen. No. 2009-00210, 2009 WL 2517257 (Miss. A.G. July 9, 2009) (interpreting section 241 in light of *Cotton* to mean 22 felonies currently trigger lifelong disenfranchisement in Mississippi).

¹² Chung, *supra* note 6.

parole; and ten states have relaxed, streamlined, or otherwise simplified their rights restoration process after individuals complete their criminal sentence.¹³

Recent state action underscores Florida's outlier status. This year, Louisiana enacted a bill that will automatically restore the right to vote to citizens on probation and parole after a five-year waiting period.¹⁴ Louisiana had previously made a key modification in its law in 2008 when it required its Department of Public Safety and Corrections to provide individuals with a notification of their rights to a restoration process.¹⁵ In 2016, Maryland began automatically restoring voting rights to individuals immediately upon their release from prison.¹⁶ This policy change allowed an estimated 40,000 people to regain the right to vote.¹⁷ Additionally, Alabama enacted the Definition of Moral Turpitude Act in May of

¹³ *Id.*

¹⁴ *Disenfranchisement News: Louisiana Expands Voting Rights to People on Probation and Parole*, Sent'g Project (May 24, 2018), <https://www.sentencingproject.org/news/6243/> [hereinafter *Louisiana Expands Voting Rights*]; Greg LaRose, *Ex-Felons Have Voting Rights Restored by Louisiana Legislature*, Times-Picayune (May 17, 2018), https://www.nola.com/politics/index.ssf/2018/05/felons_voting_rights_louisiana.html.

¹⁵ Chung, *supra* note 6; *Louisiana Expands Voting Rights*, *supra* note 13.

¹⁶ Matt Ford, *Restoring Voting Rights for Felons in Maryland*, The Atlantic (Feb. 9, 2016), <https://www.theatlantic.com/politics/archive/2016/02/maryland-felon-voting/462000/>; *Maryland Legislature Expands Voting Rights for People with Felony Convictions*, Sent'g Project (Feb. 9, 2016), <https://www.sentencingproject.org/news/maryland-legislature-expands-voting-rights-for-people-with-felony-convictions/> [hereinafter *Maryland Expands Voting Rights*].

¹⁷ *Maryland Expands Voting Rights*, *supra* note 15.

2017 (also known as the “Felony Voter Disenfranchisement Act”). While Alabama permanently disenfranchises those who have committed a “felony involving moral turpitude,” the state had never supplied its citizens with a definitive list of the types of felonies that constituted “moral turpitude.” Thus, there was a lack of clear or consistent guidance on the types of felonies that would disenfranchise individuals. The Definition of Moral Turpitude Act sets forth a list of fewer than 50 crimes that will qualify as a “felony involving moral turpitude.” AL H.B. 282 (2017). This followed Alabama’s modification of its restoration process by allowing eligible individuals with non-violent offenses to apply for a Certificate of Eligibility to Register to Vote immediately after completing their sentence rather than waiting several years to apply.¹⁸

Other states have also eased the burdens associated with rights restoration. Tennessee made its voting restoration process more efficient by enacting legislation in 2006 that allowed individuals with felony convictions (except electoral or serious violent offenses) to directly apply to the Board of Probation

¹⁸ Nicole Porter, *Sentencing Project Expanding the Vote: State Felony Disenfranchisement Reform 1997-2010*, at 6 (2010), <https://www.sentencingproject.org/wp-content/uploads/2016/01/Expanding-the-Vote-State-Felony-Disenfranchisement-Reform-1997-2010.pdf>; Chung, *supra* note 6; *Fact Sheet: Felony Disenfranchisement*, Sent’g Project (Apr. 28, 2014) <https://www.sentencingproject.org/publications/felony-disenfranchisement-laws-in-the-united-states/> [hereinafter *Fact Sheet*].

and Parole upon completing their criminal sentences.¹⁹ In 2000, Delaware's General Assembly passed a constitutional amendment that restored voting rights to individuals five years after they completed their sentence.²⁰ Three years later, Delaware removed its five-year waiting period, and individuals convicted of felonies became eligible to vote upon completing their sentence.²¹ Texas has also repealed its two-year waiting period requirement after completion of sentence.²²

And while Virginia, like Florida, permanently disenfranchises citizens who are convicted of a felony, the process has undergone significant reform in recent years. Through executive action, Virginia has eliminated the waiting period and currently does not require an application process for non-violent offenders and has maintained a 60-day deadline to process all applications for voting rights restoration.²³ These reforms, coupled with large-scale individual restorations by the state's Governors, led to the restoration of voting rights of more than 173,000

¹⁹ Porter, *supra* note 17; *Fact Sheet*, *supra* note 17.

²⁰ *Fact Sheet*, *supra* note 17.

²¹ *Id.*

²² Chung, *supra* note 6.

²³ *Id.*

individuals previously convicted of a felony in Virginia.²⁴ In August of 2016 alone, Virginia restored the right to vote to 12,832 individuals, more than three times the number that have had their rights restored in Florida over the last eight years combined.²⁵

Florida's vote restoration scheme in its most recent form dates back only to 2011.²⁶ In 2007, then Governor Crist announced that nonviolent offenders were eligible for automatic rights restoration.²⁷ His administration also promulgated rules that eased the burden on those who had to apply to have their rights restored. These changes had a dramatic impact. In four years, more than 155,000 Florida citizens regained the right to vote. In contrast, from January 2011 through October 5, 2017, under the rules subject to challenge, only 2,807 people had their right to vote restored.

²⁴ Farah Stockman, *They Served Their Time. Now They're Fighting for Other Ex-Felons*, N.Y. Times (May 11, 2018), <https://www.nytimes.com/2018/05/11/us/voting-rights-felons.html>; *Voting Rights Restoration Efforts in Virginia*, Brennan Ctr. for Just. (Apr. 20, 2018), <https://www.brennancenter.org/analysis/voting-rights-restoration-efforts-virginia>; Jacey Fortin, *Can Felons Vote? It Depends on the State*, N.Y. Times (Apr. 21, 2018), <https://www.nytimes.com/2018/04/21/us/felony-voting-rights-law.html>.

²⁵ Christopher Uggen et al., *The Sentencing Project, 6 Million Lost Voters: State-Level Estimates of Felony Disenfranchisement* 4 n.12 (2016), <http://www.sentencingproject.org/wp-content/uploads/2016/10/6-Million-Lost-Voters.pdf>.

²⁶ Goodnough, *supra* note 4.

²⁷ *Id.*

In sum, a substantial number of states have eased the process by which those convicted of a felony can have their voting rights restored. Florida's scheme cuts against that widespread trend, and Florida is the only state in the union in this decade that has entrenched (and not expanded) the franchise among individuals who have been convicted of a felony.

II. FLORIDA'S FELONY DISENFRANCHISEMENT AND VOTE RESTORATION SCHEME HAS A DRASTIC AND DELETERIOUS IMPACT ON FLORIDA'S POPULATION

The problems with Florida's vote restoration scheme are amplified immeasurably by the sheer number of Florida voters from whom the state rips the franchise. Florida accounts for a wildly disproportionate number of citizens disenfranchised nationally. For the better part of two decades, The Sentencing Project has performed rigorous assessments of the scope and distribution of disenfranchisement in the United States. That process has consistently shown that Florida stands out from the remaining states in the size of its disenfranchised population.

In terms of its methodology, The Sentencing Project collaborates with Dr. Christopher Uggen, Regents Professor of Sociology at the University of Minnesota, and past vice-president of the American Sociological Association. The organization first uses data from the U.S. Department of Justice Bureau of Justice Statistics to estimate the number of individuals currently serving a felony sentence

who are disenfranchised in each state. For the 12 states, including Florida, that restrict voting rights in full or in part following completion of sentence, the organization estimates the number of people released from prison and those who have completed their terms of parole or probation based on demographic life tables and U.S. Census data. It then models each state's disenfranchisement rate in accordance with its policies. This includes compiling additional demographic tables to estimate the number of released individuals who have committed new crimes, and the number who are deceased. In its most recent analysis, it assumed both that two-thirds of released individuals will be reincarcerated, and a higher mortality rate for those convicted of felony offenses. Both recidivists and deaths are then removed from the post-sentence pool to avoid overestimating the number of individuals who have completed their sentence.

From these data, The Sentencing Project arrives both at an estimate of the current number of citizens disenfranchised nationally and disenfranchisement rates by state. As of November 2016, 6.1 million U.S. citizens were disenfranchised because of a current or past criminal conviction. Of that number, *more than 1.6 million*—more than a quarter of citizens disenfranchised nationally—reside in

Florida.²⁸ Most of these citizens, 1.48 million, have been released and completed all post-sentence requirements (this is half the national total).²⁹

Florida also has the highest disenfranchisement rate for citizens convicted of a felony in the country. One of every ten (10.43 percent) of Florida's voting-age citizens is unable to vote due to a felony conviction.³⁰ The next closest state, Mississippi, has a disenfranchisement rate of 9.6 percent, with Kentucky the only other state with a rate above 9 percent.³¹ In contrast, Florida's northern neighbor, Georgia, has a disenfranchisement rate of 3.2 percent.³² There is little reason to expect Florida's rate to decrease either, due to the life-long ban under which most of its disenfranchised population is serving. Overall, Florida disenfranchises more of its citizens than Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee combined.³³

²⁸ Uggen et al., *supra* note 24, at 3.

²⁹ *Id.* at 15 Table 3.

³⁰ Uggen et al., *supra* note 24, at 15 Table 3.

³¹ *Id.*

³² *Id.*

³³ Ari Berman, *Florida Will Vote on Restoring Voting Rights to 1.5 Million Ex-Felons*, Mother Jones (Jan. 23, 2018, 11:56 AM), <https://www.motherjones.com/politics/2018/01/florida-will-vote-on-restoring-voting-rights-to-1-5-million-ex-felons/>.

Much has been written about the racial disparities found in disenfranchisement laws in Florida³⁴ and throughout the nation, but Florida's restoration scheme severely impacts all of its citizens. While African Americans are indeed disenfranchised to a disproportionately high degree in Florida compared to the overall population, two-thirds of Florida's disenfranchised population are not African American.³⁵

III. FLORIDA'S VOTING RIGHTS RESTORATION SCHEME IS INCONSISTENT WITH DISCOURAGING RECIDIVISM

Defendants rationalize their vote restoration scheme on the ground that it allows Florida to "gauge the progress and rehabilitation of a convicted felon." Defendants-Appellants' Mot. for Stay Pending Appeal at 10 (Apr. 6, 2018). This justification could only possibly be relevant, however, if Florida defends its scheme by arguing that those whose voting rights it restores are unlikely to commit crimes anew. In other words, Defendants seek to justify their scheme as discouraging recidivism (and thereby encouraging public safety). Below, Defendants made just this argument (Defendants' Motion for Summary Judgement DE103 at 23-25). In their merits brief, however, Defendants dance around this

³⁴ In Florida, more than one in every five Black citizens have lost their voting rights. Uggen et al., *supra* note 24, at 16 Table 4. In 2016, it was reported that 21.3 percent of Florida's voting age Black population remained disenfranchised. Moreover, of the 1.6 million Floridians who are disenfranchised, a third of them are Black.

³⁵ Uggen et al., *supra* note 24, at 11 Figure 7, 15-16 Tables 3 & 4.

issue, characterizing their interest as limiting the franchise to “responsible” voters, though never explaining why the vote restoration scheme accomplishes this goal.³⁶

Amicus Center for Equal Opportunity (“CEO”) picks up the mantle and argues that Florida’s vote restoration scheme “is warranted to deter recidivism.” CEO Br. 12. CEO offers no reason why restoring the right to vote would encourage recidivism (Defendants offered no justification when they made the argument either). Rather, to support their puzzling assertion, CEO relies solely on the observation that the rate of recidivism for the few citizens who had their rights restored under the current restrictive scheme has been lower than it was from 2009-2011 under the prior regime when a far greater number of citizens saw their right to vote restored.

That apples to oranges comparison is unpersuasive. The population of citizens who saw their rights restored from 2009-2011 is at least 50 times larger than the population who had their rights restored under the current rules. Thus, the two populations are almost certainly quite dissimilar in both demographics and risk profile and CEO certainly makes no effort to control for either factor. Hence, CEO’s analysis ignores that certain populations are, at any time, more likely to commit a crime than others, irrespective of whether or not they have the right to vote. Put differently, CEO’s observation does no work to assess whether

³⁶ Defendants-Appellants Br. 29.

restoration of the right to vote increases the probability of recidivism as opposed to merely reflecting the fact that the population of citizens who have had their right to vote restored post-2011 is far smaller than its previous cohort.³⁷

Even among individuals who may be assessed as having a higher risk of recidivism, the question for public safety concerns is whether restoring the right to vote will make disenfranchised individuals more or less likely to commit a new offense.

Fortunately, thoughtful and reliable analysis exists and illustrates the positive benefits of the restoration of voting rights on the recurrence of criminal activity. For example, Professors Christopher Uggen and Jeff Manza conducted a regression analysis assessing the impact of voting on subsequent criminal activity.³⁸ They found, after controlling for other factors, that those with a previous arrest who subsequently voted were considerably less likely to be rearrested than

³⁷ If studies comparing different sized populations are fair game, defendants themselves previously have concluded that restoring the franchise discourages recidivism. In 2011, the Florida Parole Commission found that the recidivism rate was 11% for those with prior felony convictions who had their voting rights restored, whereas the recidivism rate was 33% for those who did not. See Kira Lerner, *Push to Restore Voting Rights of Florida's Ex-Felons Already Has Bipartisan Support*, Think Progress (Jan. 25, 2018, 3:57 PM) <https://thinkprogress.org/florida-felon-vote-bipartisan-df6cff80d5f8/>.

³⁸ Christopher Uggen & Jeff Manza, *Voting and Subsequent Crime and Arrest: Evidence From a Community Sample*, 36 Colum. Hum. Rts. L. Rev. 193 (2004).

those who did not.³⁹ The authors recognize that the single act of voting may not in itself produce dramatic results, but they conclude that “[v]oting appears to be part of a package of pro-social behavior that is linked to desistance from crime.”⁴⁰

These data were buttressed by interviews with a study population who had been convicted of felonies, many of whom viewed the loss of their voting rights as a “powerful symbol of their status as outsiders,” which in turn is correlated with recidivism.⁴¹ Likewise, in Virginia, interviews with individuals who voted reflect the significance of reintegration into society, with one voter noting that she “now felt like a citizen.”⁴² Another, who voted for the first time at age 53, stated that “having my right to vote back has made me feel whole as a human being.”⁴³

Subsequent work further supports the conclusion that restoration of voting rights deters recidivism. For example, data demonstrate that individuals who complete their criminal sentence in states that permanently disenfranchise after a felony conviction, like Florida, are ten percent more likely to reoffend than those individuals released in states that restore voting rights after completion of a

³⁹ *Id.* at 213.

⁴⁰ *Id.* at 214.

⁴¹ *Id.* at 212.

⁴² Sam Levine, *In Virginia, Ex-Felons Voted for the First Time After Regaining Their Rights*, Huffpost (Nov. 7, 2017, 9:59 PM), goo.gl/RNGZ2T.

⁴³ Camila DeChalus, *In Virginia, Ex-Felons Find Empowerment in the Voting Booth*, CNN (Nov. 5, 2016, 5:18 PM), goo.gl/78qr2E.

sentence.⁴⁴ These data confirm what logic suggests: Restoring the right to vote to citizens with prior felony convictions helps reintegrate those individuals into society. In turn, this helps reduce recidivism rates and enhances public safety because voting provides an opportunity to participate “in democratic rituals such as elections affirm[] membership in the larger community for individuals and groups.”⁴⁵ A number of studies make clear that civic engagement is pivotal in the transition from incarceration and discouraging repeat offenses.⁴⁶

It stands to reason that restoration of the right to vote is among the most important ways to ensure reintegration in society and civic engagement. The right to vote is a sacred one, and “voting can be viewed as a proxy for other kinds of civic engagement associated with the avoidance of illegal activity.”⁴⁷ As the

⁴⁴ Guy Padraic Hamilton-Smith & Matt Vogel, *The Violence of Voicelessness: The Impact of Felony Disenfranchisement on Recidivism*, 22 Berkeley La Raza L.J. 407, 427 (2012).

⁴⁵ Uggen & Manza, *supra* note 37, 36 Colum. Hum. Rts. L. Rev. at 195.

⁴⁶ See, e.g., Christopher Uggen, et. al., ‘Less than the Average Citizen’: Stigma, Role Transition and the Civic Reintegration of Convicted Felons, in *After Crime and Punishment: Ex-Offender Reintegration and Desistance from Crime* 258 (Shadd Maruna & Russ Immarigeon eds., 2004) (finding that “civic reintegration” is an important component of successfully rejoining society after incarceration); Christopher Uggen, et al., *Citizenship, Democracy, and the Civic Reintegration of Criminal Offenders*, 605 *Annals of the Am. Acad. of Pol. & Soc. Sci.* 281, 303-304 (2006); see also Hamilton-Smith & Vogel, *supra* note 43, at 426 (finding that after controlling for others variants, individuals released in states that permanently disenfranchise are roughly nineteen percent more likely to be rearrested than those released in states that restore the franchise post-release).

⁴⁷ Uggen & Manza, *supra* note 44, at 195.

Supreme Court noted in 1958, denying those with prior convictions their civil rights:

constitutes the very antithesis of rehabilitation, for instead of guiding the offender back into the useful paths of society it excommunicates him and makes him, literally, an outcast. I can think of no more certain way in which to make a man in whom, perhaps, rest the seeds of serious antisocial behavior more likely to pursue further a career of unlawful activity than to place on him the stigma of the derelict, uncertain of many of his basic rights.⁴⁸

This is particularly true because the loss of the right to vote diminishes citizens' exercise of other essential rights, including those protected by the First Amendment. As the Supreme Court stated in *Wesberry v. Sanders*, “[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws Other rights, even the most basic, are illusory if the right to vote is undermined.”⁴⁹ However, “without the vote, citizens are denied ‘any effective voice in the governmental affairs which substantially affect their lives.’”⁵⁰

CONCLUSION

The Court should uphold the District Court’s ruling and hold that Florida’s vote restoration scheme violates the First and Fourteenth Amendments.

⁴⁸ *Trop v. Dulles*, 356 U.S. 86, 111 (1958) (Brennan, J., concurring).

⁴⁹ *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

⁵⁰ *Hand v. Scott*, 888 F.3d 1206, 1219 (11th Cir. 2018) (quoting *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 627 (1969)).

Respectfully submitted,

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June 28, 2018

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(a)(4)(G) and Fed. R. App. P. 32(g)(1), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) and Fed. R. App. P. 29(a)(5).

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CERTIFICATE OF SERVICE

I hereby certify that, on this 28th day of June, 2018, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Eleventh Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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