

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

JOHN BOYD RIVERS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No.: 1D23-1473

L.T. No.: 22-CF-924

ON APPEAL FROM THE CIRCUIT COURT OF THE EIGHTH
JUDICIAL CIRCUIT, IN AND FOR ALACHUA COUNTY, FLORIDA

**BRIEF OF *AMICUS CURIAE* ELECTION LAW CLINIC
AT HARVARD LAW SCHOOL
IN SUPPORT OF APPELLANT JOHN BOYD RIVERS**

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INTERESTS OF AMICUS CURIAE

The Election Law Clinic (“ELC”) is a clinic at Harvard Law School that aims to build power for voters and ensure that citizens have an equal opportunity to elect candidates of their choice. The Clinic works on a range of election law issues, including voter suppression and intimidation. ELC is interested in the administration and impact of felony disenfranchisement laws and ensuring that all Americans with past felony convictions (“returning citizens”) who are eligible to vote can do so. ELC engages in litigation and advocacy across the country and is concerned by actions that chill voter turnout.

INTRODUCTION

In 2018, a supermajority of Florida voters approved Amendment 4 to embrace as many as 1.4 million returning citizens as part of the State’s democracy. Florida’s prosecution of Mr. Rivers and dozens of other returning citizens for what appear to be honest mistakes is part of the State’s broader effort to curtail the reach of Amendment 4.

Florida’s efforts to undermine Amendment 4 began in 2019, when the Legislature enacted Senate Bill 7066 (“SB7066”) to require returning citizens to pay off all fines, fees, court costs, and restitution (“LFOs”) ordered by a court before voting. Since SB7066 was enacted,

Florida has failed to provide a system by which returning citizens can determine their eligibility to vote. This failure has resulted in widespread confusion about who can and who cannot vote after a felony conviction. This confusion has had real consequences, as evidenced by the State's prosecutions of Mr. Rivers and dozens of other returning citizens for what appear to be good-faith errors. It can also chill voting amongst those with past convictions who are eligible to vote but refrain from voting for fear of prosecution. Both anecdotal and empirical evidence indicate that this chill is already occurring.

The harmful nature of this sort of "chilling effect" is well-recognized in law. In the First Amendment context, concern over the chilling effects of state enactments motivates the United States Supreme Court to hold such laws unconstitutional. In the voting context, the United States Department of Justice's guidelines discourage prosecutions and arrests for voter fraud absent efforts to "corrupt the process," aware of the chilling and intimidating nature prosecutions have. Indeed, federal courts have recognized that law enforcement activity—including prosecutions—can itself constitute voter intimidation in violation of the Voting Rights Act.

The chilling impact on voting caused by convictions like that of Mr. Rivers is all the more pernicious, as it is likely to disproportionately discourage Black Floridians from going to the polls. Not only are Black people disproportionately incarcerated in Florida due to past and ongoing discrimination, but the recent voter fraud prosecutions themselves appear to target Black voters in particular. Accordingly, this Court should reverse Mr. Rivers's conviction.

ARGUMENT

I. Floridians Voted to Enfranchise Returning Citizens, and the Legislature has Undermined that Choice.

a. The people of Florida passed Amendment 4.

In 2018, Floridians voted overwhelmingly to re-enfranchise most returning citizens by passing Amendment 4. Amendment 4 replaced a Jim Crow-era policy—adopted in the 19th century to disenfranchise Black Floridians—that permanently barred anyone with a felony conviction from voting. See Annika Hammerschlag, *Florida's Felon Voting Ban Dates Back to Jim Crow*, Naples Daily News (Jan. 15, 2018), <https://www.naplesnews.com/story/news/government/2018/01/15/floridas-felon-voting-ban-dates-back-jim-crow-unfinished-business-civil-rights-movement/1032339001/>.

By 2016, 27% of the nation's disenfranchised population lived in Florida. See Alexander Klueber & Jeremy Grabiner, Voting Rights Restoration in Florida: Amendment 4 – Analyzing Electoral Impact and its Barriers 4 (2020). Florida disenfranchised 1.4 million people who had completed their sentences—more than the total population of 11 states and the District of Columbia. *Id.* Black Americans made up 21% of disenfranchised Floridians (while being only 16% of the population). *Id.*

Floridians voted to reject this draconian policy after a campaign led by the Florida Rights Restoration Coalition (“FRRRC”). The Amendment was a testament to the power of democratic organizing, with FRRRC gathering over 799,000 signatures to get Amendment 4 on the ballot. *Id.* Amendment 4 needed a 60% supermajority to prevail. Tireless campaigners reached out to Floridians across the political spectrum, and the people of the state came together to resoundingly approve re-enfranchising their fellow Floridians. Over 5.1 million people—64.5% of voters—chose to pass Amendment 4. *Voting Restoration Amendment*, Fla. Division of Elections, <https://dos.elections.myflorida.com/initiatives/initdetail.asp?account=64388&seqnum=1>.

Amendment 4 represented a vindication of civil rights and democratic principles. It also reflected an important policy and moral decision made by Florida's voters: Florida's democracy should include the voices of returning citizens who have served their time.

b. The State Legislature limited Amendment 4.

In 2019, the Legislature stymied Amendment 4's intended impact by enacting SB7066. The law, codified in Florida Statutes Section 98.0751(5), requires returning citizens to pay off certain LFOs before their voting rights can be restored. University of Florida Professor Daniel Smith estimated that SB7066 revoked the eligibility of 774,490 Floridians whose rights would have been restored by Amendment 4. Second Suppl. Expert Report of Daniel A. Smith, ¶¶ 21-22, *Jones v. DeSantis*, 462 F. Supp. 3d 1196 (N.D. Fla. 2020) (No. 19-cv-300), ECF No. 286-12. He also found that most returning citizens who owe LFOs cannot afford to pay them, and Black Floridians are more likely to owe money and to owe more than white Floridians. *Id.* ¶¶ 23-33.

Worse yet, the State has failed to provide the resources and infrastructure to fulfill SB7066's requirements. "Florida does not maintain a publicly available, unified, up-to-date, centralized

database or repository that compiles information on whether an individual with a felony conviction has completed all the terms of his or her sentence.” *Id.* ¶ 4; see also Complaint ¶ 4, *Fla. Rts. Restoration Coal. v. DeSantis*, No. 1:23-cv-22688-CMA (S.D. Fla.). Rather, the sixty-seven counties and state agencies each maintain their own databases and the State does not track information for federal or out-of-state convictions. Bianca Fortis, *A Government Official Helped Them Register. Now They’ve Been Charged with Voter Fraud.*, ProPublica (July 21, 2022), <https://www.propublica.org/article/florida-felonies-voter-fraud> [hereinafter Fortis, *A Government Official*].

Indeed, as a federal court found, it is “sometimes hard, sometimes impossible” for individuals to determine how much they have paid and how much they still owe for the purposes of establishing voting eligibility. *Jones*, 462 F. Supp. 3d at 1208. In 2020, Professor Traci Burch attempted to verify the criminal history and LFOs of a random sample of 153 returning citizens. Expert Report of Traci R. Burch at 6-8, *Jones*, 462 F. Supp. 3d 1196, ECF No. 286-13. She looked at three official sources: the Florida Department of Law Enforcement, online databases of circuit court

clerks, and information from clerks' offices directly. *Id.* For only 3 of the 153 people in this sample was the information provided to her by these sources consistent. *Id.* "In other words, 98% of the 153 people in [the] sample experienced inconsistencies across the three sources." *Id.*

Impacted individuals have spoken repeatedly about the shortcomings of the State's processes. For example, one returning citizen was initially notified her outstanding balance with the court system was a few hundred dollars, only to later find out it was actually over \$52,000. See Opinion, *Florida Puts A Price Tag on Voting. 'That's Not Right.'*, Wash. Post (Oct. 16, 2021), <https://www.washingtonpost.com/opinions/2021/10/16/florida-voting-pay-fees-court-fines-felony-convictions-not-right/>. Another went to his local courthouse to pay off his debt and learned it had been sold to a private collection agency that had added twenty-five percent interest to the principal balance. See *id.* These discrepancies across state and county offices underscore the confusion returning citizens must navigate to unveil the costs obstructing their participation in the democratic process.

Anticipating these insufficiencies, elected officials and civic groups warned that SB7066 would spur uncertainty throughout the process. But various actors assured voters that mistakes wouldn't be prosecuted. The Eleventh Circuit Court of Appeals, in upholding SB7066, assured that nobody "who honestly believes he has completed the terms of his sentence commits a crime by registering and voting." *Jones v. Governor*, 975 F.3d 1016, 1048 (11th Cir. 2020). Mark Earley, the Leon County Supervisor of Elections noted in June 2019 that SB7066 would create confusion about voter eligibility but encouraged registration: "I certainly don't want people to feel threatened or fearful about trying to get registered to vote if they were previously convicted of a felony, because unless it's obvious intent to defraud the system, they aren't going to be prosecuted." Dara Kam, *Gov. Ron DeSantis Signs Florida Election Bill; Groups Sue over Voting Rights*, Tallahassee Democrat (June 28, 2019), <https://www.tallahassee.com/story/news/2019/06/28/desantis-signs-election-bill-groups-sue-over-voting-rights/1602545001/>.

These assurances were wrong: as Mr. Rivers's case demonstrates, the State has criminalized good faith attempts to vote, *even when* returning citizens relied on government officials' advice.

II. Prosecutions Like These Have a Chilling Effect on Democratic Participation.

At the press conference publicizing the Office of Statewide Prosecution's prosecution of twenty returning citizens for election-related crimes, Attorney General Ashley Moody emphasized the duty of elected leaders "to ensure free and fair elections and instill confidence in the voting process." Ron DeSantis, *AG Ashley Moody on the Arrest of 20 for Election Crimes*, Rumble (Aug. 18, 2022), <https://rumble.com/v1gi0w3-ag-ashley-moody-on-the-arrest-of-20-for-election-crimes.html>. But Floridians voted for returning citizens to participate in free and fair elections. Only through an engaged electorate does the will of the people truly prevail. Public confidence in elections is *undermined* when the electorate is chilled from voting.

These prosecutions lead to that chill. Against a backdrop of widespread confusion and a lack of reliable sources to determine eligibility and outstanding payments, eligible voters will abstain from voting. Prosecutions like that of Mr. Rivers will chill voters from exercising their constitutional right to vote for the sole reason of not wanting to risk further entwining themselves with the criminal legal system.

- a. *The prosecution of returning citizens like Mr. Rivers who did not realize they were ineligible threatens to chill voting by those who are eligible.*

Prosecuting individuals like Mr. Rivers, who did not realize they were ineligible to vote, threatens to deter voting by those who *are* eligible. This chilling effect is even worse when, as here, the prosecution is highly publicized and part of a wider pattern of prosecutions across the state.

Mr. Rivers's case is part of a larger trend of highly publicized prosecutions of returning citizens who made good-faith mistakes and voted while ineligible. State Attorney Brian Kramer charged ten people, including Mr. Rivers, who relied on incorrect information from an Alachua County Supervisor of Elections official. Fortis, *A Government Official*. In August 2022, days before a primary election (and during early voting), Governor DeSantis held a press conference, surrounded by uniformed law enforcement, announcing the Office of Statewide Prosecution's prosecution of twenty returning citizens. Sam Sachs, 'Opening Salvo': DeSantis Announces 20 Arrests for Voter Fraud in Florida, WFLA (Aug. 19, 2022), <https://www.wfla.com/news/florida/desantis-to-make-major-announcement-at-broward-courthouse/> [hereinafter Sachs,

‘*Opening Salvo.*’]. Like Mr. Rivers, many of these citizens received a voter information card or were otherwise informed by the government that they could vote. Matt Dixon, *Defendants Targeted in DeSantis’ Voter Fraud Crackdown Were Told They Could Vote*, Politico (Aug. 26, 2022), <https://www.politico.com/news/2022/08/26/desantis-voter-fraud-defendants-florida-00053788>. These prosecutions were intentionally given a high profile. The Governor’s office promoted the August 2022 press conference as a “major announcement.” *Id.* At the press conference, Governor DeSantis pledged that the 20 defendants would now “pay the price.” Sachs, ‘*Opening Salvo.*’ He described the arrests as “just the opening salvo,” and warned that, going forward, the state would “rigorously” enforce election laws. *Id.*

These public pronouncements—and the prosecution of individuals like Mr. Rivers who *relied on advice from county officials*—risk chilling thousands of eligible votes. Why would anyone with a prior conviction watching these events unfold choose to vote? Even if someone thought they were now eligible, these public prosecutions were of others who likewise thought they were eligible.

As Mr. Rivers’s case illustrates, it is not easy to ascertain one’s status. As described above, SB7066 created an environment of

confusion as to who was and was not eligible to vote. Amid this confusion, Mr. Rivers and others were registered to vote in the Alachua County jail by an official with the Alachua County Supervisor of Elections' office. Mr. Rivers was issued a voter identification card, which caused him to believe the state had verified his eligibility. Mr. Rivers voted because he was registered to vote by a county election official and repeatedly received information from government officials indicating he was eligible. Those officials were wrong. As a result, Mr. Rivers was prosecuted. Even the state attorney prosecuting Mr. Rivers has acknowledged that "[w]hile it may seem easy to know if one has completed all their financial obligations, in practice, it is not." Brian Kramer, *State Attorney Creating Way for Former Felons to Determine Voting Eligibility*, Gainesville Sun (May 13, 2022), <https://www.gainesville.com/story/opinion/2022/05/13/brian-kramer-program-helps-former-felons-determine-voting-eligibility/9716597002/>.

These prosecutions deter those who *are* eligible from voting. Based on these highly publicized actions, returning citizens would understandably worry that they cannot rely on their own knowledge and information from government officials to feel confident that they

will not be prosecuted for voting. At the same time, Florida has failed to create a system to enable people to determine whether they are eligible. Even SB7066's author has recognized that state election officials have failed to adequately help people verify their eligibility. See James Call & John Kennedy, *Florida Election Crimes Unit Sends Out Last-Minute Felons-Removal List, Causes Confusion*, Palm Beach Daily News (Nov. 7, 2022), <https://www.palmbeachdailynews.com/story/news/politics/elections/2022/11/04/florida-desantis-election-crimes-unit-removal-felons-voting-rolls/8256072001/>.

There is ample evidence that these prosecutions have made many eligible voters fearful. Leon County Supervisor of Elections Mark Earley stated: "I have not encountered in the past this many [eligible] voters calling, concerned that they may be prosecuted . . . for voter fraud." *Florida Elections Officials Grapple with Misinformation, Myths*, Tampa Bay Times (Oct. 30, 2022), <https://www.tampabay.com/news/florida-politics/elections/2022/10/26/florida-elections-officials-grapple-with-misinformation-myths/>. One returning citizen told the Palm Beach Daily News: "I'd be scared to go vote . . . I don't want to get into any trouble." Douglas Soule, *Why Did Voter Turnout Drop in 2022 Versus 2018? Strict Voting*

Laws, Voter Arrests, Say Voting Rights Advocates, Palm Beach Daily News (Oct. 27, 2023), <https://www.palmbeachdailynews.com/story/news/politics/elections/2022/12/05/2022-voter-turnout-dropped-year-strict-voting-laws-voter-arrests-ron-desantis-florida/10816752002/> [hereinafter Soule, *Why Did Turnout Drop*]. The 2022 midterms—the first elections held after the arrests—saw a marked drop in turnout compared to 2018, falling from 63% to 54%, and several advocacy groups attributed this dip to concern about the prosecutions. *Id.*

More recent actions by the State threaten to further exacerbate the chilling effect of Mr. Rivers’s prosecution and conviction. Governor DeSantis included in his 2023–24 proposed budget an increase in funding for the Office of Election Crimes and Security of more than \$1 million. *Fiscal Year 2023–24 Framework for Freedom Budget Highlights* at 22, Ron DeSantis: 46th Gov. of Fla., <https://www.flgov.com/wp-content/uploads/2023/06/FY-23-24-Budget-Highlights-Draft-1.pdf> (last visited Nov. 16, 2023). Additionally, Senate Bill 4-B, which Governor DeSantis signed into law earlier this year, sought to expand the reach of the Office of the Statewide Prosecutor to prosecute voting-related crimes anywhere in

the state, even when they occurred wholly within the jurisdiction of a local prosecutor. SB4-B, 2023 Leg. (Fla. 2023). He also signed legislation liable to make people even less confident in their eligibility to vote. Senate Bill 7050 adds language to voter registration cards saying, “This card is proof of registration but is not legal verification of eligibility to vote.” Ashley Lopez, *Advocates in Florida Clamor for a Fix for the Formerly Incarcerated Who Want to Vote*, NPR (May 4, 2023), <https://www.npr.org/2023/05/04/1173786694/felon-voting-database-florida-registration-card-disclaimer>.

The prosecution and conviction of Mr. Rivers and others who also unintentionally voted while ineligible thus threatens to chill voting amongst the very people Floridians overwhelmingly chose to re-enfranchise through Amendment 4.

b. Many other areas of the law recognize the dangers associated with chill and intimidation.

In other contexts, the law recognizes and accounts for chilling effects. A “chilling effect” is “a claim that an otherwise legitimate regulation has the incidental effect of deterring—or chilling—benign activity.” Leslie Kendrick, *Speech, Intent, and the Chilling Effect*, 54 Wm. & Mary L. Rev. 1633, 1649 (2013). The “foremost” source of

chilling is “uncertainty in the legal process,” which “may stem from ambiguous rules or erroneous applications.” *Id.* at 1652. The statutory scheme the State is using to prosecute Mr. Rivers and others exemplifies this prevalent form of chilling, as the process for re-enfranchisement is quite uncertain.

In the First Amendment context, the U.S. Supreme Court has recognized the importance of ameliorating the potential chilling effect of regulations burdening individuals’ rights. Because the unjustified inhibition of speech is wholly inimical to the First Amendment’s goals, concern about chilling effects motivates the Court’s holdings in cases covering a wide variety of issues. *See* Kendrick, *supra*, at 1648. Such issues include defamation, *see New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), obscenity, *see Smith v. California*, 361 U.S. 147 (1959), fraud, *see Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 619-20 (2003), invasion of privacy, *see Time, Inc. v. Hill*, 385 U.S. 374, 388-89 (1967), intentional infliction of emotional distress, *see Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 53 (1988), and campaign finance disclosure requirements, *see Americans for Prosperity v. Bonta*, 141 S. Ct. 2373 (2021).

The law is so concerned with First Amendment chill that it has substantially relaxed the traditional Article III standing requirements. “Litigants . . . are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute’s very existence may cause others not before the court to refrain from constitutionally protected speech or expression.” *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) (emphasis added). In *Susan B. Anthony List v. Driehaus*, for example, the Court found that the plaintiff, the Susan B. Anthony List (“SBA”), alleged a sufficiently imminent injury—the substantial risk of future enforcement under an Ohio state law—to constitute proper Article III standing. 573 U.S. 149, 152, 164 (2014). The Ohio state law SBA challenged criminalized knowingly or recklessly making a false statement about a candidate for office. *Id.* SBA asserted that its speech about a candidate had been chilled and that it faced the prospect of its speech being chilled again when it engages in similar activity in the future. *Id.* at 155.. With the substantial threat of future criminal enforcement and SBA’s First Amendment rights at stake, *id.* at 163-64, the Court found sufficient

injury to permit SBA to bring this pre-enforcement challenge. *Id.* at 168.

Driehaus confirmed the longstanding concern about chill and the relaxed standing doctrine to mitigate its effects. The law recognizes and accounts for chill in the First Amendment context to protect speakers forced in a precarious position by the law. Returning citizens who are eligible to vote are in a similarly precarious situation. Florida's uncertain scheme, aggravated by the prosecutions of those like Mr. Rivers who made good faith mistakes, risks chilling their political expression.

And voting is no less susceptible to chill than speech. As discussed above, many Floridians who are eligible to vote have declined to do so for fear of being prosecuted for good faith mistakes—like Mr. Rivers was. The U.S. Department of Justice recognizes the chilling potential of public prosecutions for voting, and the resulting need to carefully handle prosecutions. The Department's guidelines note it “should not engage in overt criminal investigative measures in matters involving alleged ballot fraud until the election in question has been concluded,” out of appreciation that “[d]oing otherwise runs the risk of chilling legitimate voting and

campaign activities.” U.S. Dep’t of Just., Just. Manual § 9-85.300 (2022). In light of the high risk of chill, the Department also cautions that—timing aside—criminal prosecution is not the appropriate tack in every case. It emphasizes that “prosecution is most appropriate when the facts demonstrate that the defendant’s objective was to corrupt the process by which voters were registered, or by which ballots were obtained, cast, or counted.” U.S. Dep’t of Just., Federal Prosecution of Election Offenses 10–11 (8th ed. 2017), <https://www.justice.gov/criminal/file/1029066/download>. Of course, these federal guidelines do not constrain Florida prosecutors, but the concerns and principles reflected in those guidelines are relevant on the state level. A straightforward application of these principles would counsel *against* prosecuting Mr. Rivers and others like him who made unwitting errors. Governor DeSantis’s press conferences regarding prosecutions—held mere days before an election—are also inconsistent with the values and care reflected in these guidelines.

Further, federal and state law acknowledge the serious threat of voter intimidation and its unique consequences. Three federal statutes and Florida law prohibit voter intimidation. In Section 2 of

the Enforcement Act of 1871 (“KKK Act”), Congress made it illegal to “conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner” in federal elections. 42 U.S.C. § 1985(3). Congress strengthened this prohibition in Section 131(b) of the Civil Rights Act of 1957, creating a cause of action that applied beyond just federal elections. 52 U.S.C. § 10101(b). Section 11(b) of the Voting Rights Act of 1965 (“VRA”) contains a yet stronger voter intimidation prohibition. 52 U.S.C. § 10307(11)(b) (“No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote.”). Florida law, too, addresses such threats, stating that “[a] person may not directly or indirectly use or threaten to use force, violence, or intimidation or any tactic of coercion or intimidation to induce or compel an individual to,” among other things “vote or refrain from voting; [or] . . . [r]efrain from registering to vote.” Fla. Stat. § 104.0615(2) (2005).

In recent years, there has been an uptick in voter intimidation campaigns conducted under this guise of preventing “voter fraud.” For instance, over the past fifteen years, self-proclaimed “ballot

security” groups have proliferated. See Ben Cady & Tom Glazer, *Voters Strike Back: Litigating Against Modern Voter Intimidation*, 39 N.Y.U. Rev. L & Soc. Change 173, 177 (2015). These groups engage in aggressive conduct, such as making frivolous and harassing voter registration challenges, often targeted at minority groups. *Id.* at 178.

Threats of arrest and prosecution have frequently been used as a tool to chill voting. During the 2012 election cycle, activists placed billboards in low-income, minority neighborhoods in swing states reading “Voter Fraud is a Felony!” accompanied by images of two Black men behind bars. *Id.* at 218–19. Such threats have been a central component of numerous voter intimidation cases. In 2021, a federal court found voter intimidation in violation of Section 11(b) of the VRA after a group placed robocalls to thousands of voters in predominantly Black communities falsely claiming that voting by mail would lead to their personal information being added to a database “used by police departments to track down old warrants.” *Nat’l Coalition on Black Civic Participation v. Wohl*, 512 F. Supp. 3d 500, 505 (S.D.N.Y. 2021). In *Daschle v. Thune*, a federal court granted a temporary restraining order after individuals associated with a candidate campaign intimidated Native American voters at polling

places by standing closely behind them and engaging in loud conversations about Native Americans being prosecuted for voting illegally. TRO at 2, *Daschle v. Thune*, No. 4:04-cv-04177-LLP (D.S.D. Nov. 1, 2004). The harmful effects of these campaigns have been recognized by the courts, with one federal court noting that “[t]he effects of ballot security initiatives . . . pose a far greater threat to the integrity of modern elections than in-person voter fraud.” *Democratic Nat’l Comm. v. Republican Nat’l Comm.*, 671 F. Supp. 2d 575, 610 (D.N.J. 2009), *aff’d*, 673 F.3d 192 (3d Cir. 2012).

Courts have indicated that the suggested threat of arrest or prosecution is itself intimidating. In 1982, the Democratic National Committee (“DNC”) brought a voter intimidation claim against the Republican National Committee (“RNC”) after the RNC hired off-duty police officers—allegedly wearing law enforcement uniforms—to stand outside polling places; the case led to a consent decree prohibiting such behavior. *See id.* at 579-80. Courts have consistently recognized that a threat need not be physical to constitute intimidation. Rather, “actions or communications that inspire fear of . . . legal repercussions . . . can constitute unlawful threats or intimidation under [section 11(b)].” *Wohl*, 512 F. Supp. 3d

at 509. Official acts of law enforcement and prosecutors can also constitute voter intimidation. Both Section 11(b) and Section 131(b) explicitly state that their provisions apply to any person “whether acting under color of law or otherwise.” 52 U.S.C. §§ 10101(b), 10307(b).

Intimidation is not limited to *per se* unlawful acts; rather “acts otherwise lawful may become unlawful . . . if the purpose and effect of the acts is to interfere with the right to vote.” *United States by Katzenbach v. Original Knights of Ku Klux Klan*, 250 F. Supp. 330, 348 (E.D. La. 1965). In *United States v. McLeod*, for example, the Fifth Circuit recognized that the arrests of Black individuals attending a voter registration meeting in Alabama was unlawful intimidation due to its chilling effect on voter registration. 385 F.2d 734, 740-41 (5th Cir. 1967). The court noted that “[t]hese acts cannot be viewed in isolation,” but rather must be viewed in the broader context. *Id.* at 740. Similarly, the Eleventh Circuit has acknowledged that targeted prosecution and investigation can have the effect of chilling the exercise of constitutional rights including “to discourage [B]lack voters from voting.” *Smith v. Meese*, 821 F.2d 1484, 1488 (11th Cir. 1987).

In each of these areas of law, courts and law enforcement agencies have taken care to acknowledge and guard against the deleterious consequences of a chilling effect. Whether or not a prosecution is technically permissible, prudent protection of democratic values demands great care before charging someone with illegal voting based on unwitting error and good faith reliance on official advice. Mr. Rivers's prosecution runs headlong into that important principle. It is made all the worse by politicians trumpeting these types of prosecutions to aggravate their chilling effect.

III. These Prosecutions Disproportionately Target Black Floridians, and the Chill They Cause Has Racially Disparate Impact.

These prosecutions threaten to chill Black voters in particular from going to the polls. These prosecutions appear to target Black residents at a disproportionately high rate. As of last year, 15 of the 19 returning citizens charged by Governor DeSantis's statewide investigators were Black. See Wayne Washington, *Voter Intimidation? Black Voters Over-represented Among Those Arrested so Far for Election Crimes*, Palm Beach Post (Oct. 10, 2022), <https://www.palmbeachpost.com/story/news/2022/10/10/>

black-voters-over-represented-among-those-arrested-election-crimes/10436294002/.

Not only are Black Floridians most often the target of these arrests, but they are also often met with comparatively draconian tactics when facing arrest for “voter fraud.” There have been several high-profile instances in which Black returning citizens—who were confused or misled about their eligibility—faced violent arrest for non-violent, inadvertent voting crimes. In Miami-Dade, a SWAT team was dispatched to effectuate the early morning arrest of a Black man who only voted after the county itself helped him register to vote and mailed him a voter card. Matt Dixon, *supra*. In Tallahassee, the police banged on the door at 3 AM to handcuff a 69-year-old Black woman who inadvertently voted while ineligible, drawing the ire of civil rights groups. Douglas Soule & Elena Barrera, ‘How? What?’ *Body Camera Footage of 3 a.m. Florida Voter Fraud Arrest Shows Confusion*, Tallahassee Democrat (Oct. 17, 2023), <https://www.tallahassee.com/story/news/politics/2023/10/17/police-camera-shows-confusion-in-latest-florida-voter-fraud-arrest/71205459007/>. Similar incidents occurred in the Tampa area. Lawrence Mower, *Police Cameras Show Confusion, Anger Over*

Desantis' Voter Fraud Arrests, Tampa Bay Times (Oct. 18, 2022), <https://www.tampabay.com/news/florida-politics/2022/10/18/body-camera-video-police-voter-fraud-desantis-arrests/>. In contrast, white defendants do not face the same arrest tactics or public scrutiny. *Id.* There have been several arrests made in The Villages, an overwhelmingly white area, related to people who voted twice in the 2020 election. Governor DeSantis held no events highlighting those arrested, each of whom entered pretrial diversion programs and avoided jail time. Understandably, returning citizens have expressed shock, surprise, and confusion when faced with an arrest for exercising a right that they thought they possessed—because of confusion or inaccurate information from the State. *See id.; supra* Section I.C.

These violent arrests and the mass confusion created by the clawback of Amendment 4 have had a particularly pronounced chilling effect on Black, formerly-incarcerated voters. Voters report deep hesitancy about registering to vote and voting, even when eligible. *See, e.g.*, Matt Shuham, *Some Eligible Ex-Felons Fear Voting Because of Ron DeSantis*, Huffington Post (Oct. 28, 2022), <https://www.huffpost.com/entry/ron-desantis-florida-former-ex->

felon-voter-fraud-arrests_n_635c084ae4b0cf522df862a8. Advocacy groups, too, have explained that these arrests and prosecutions affect Black turnout in particular. See Soule, *Why Did Turnout Drop*. The President of the League of Women Voters of Florida has explained, “[m]any Black people were feeling very timid about voting, uncomfortable about voting,” reporting “many phone calls where people have said that they were uncomfortable about voting for fear of making a mistake.” *Id.* These arrests and confusion around new rules disproportionately deter eligible Black voters.

CONCLUSION

Amendment 4 should be allowed to have the impact Floridians imagined and voted for. The heavily publicized arrests and prosecution of returning citizens like Mr. Rivers, who had a reasonable belief that they were eligible to vote, have a chilling effect on democratic participation. Due to these harms, Mr. Rivers’s conviction should not stand.

DATED this 16th day of November 2023.

Respectfully submitted,

/s/ Patrick O'Bryant

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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 4,876 words.

/s/ Theresa J. Lee
Theresa J. Lee

DATED this 16th day of November, 2023

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 16, 2023, a true and correct copy of the foregoing was served upon all counsel of record through the Florida Courts E-Filing Portal.

/s/ Patrick O'Bryant
Patrick O'Bryant

DATED this 16th day of November, 2023