IN THE DISTRICT COURT OF APPEAL OF FLORIDA,
FOURTH DISTRICT

STATE OF FLORIDA, Appellant, v. Terry Hubbard, Appellee.	Case No.: 4D22-3429 L.T. No.: 22-8077CF10A

AMENDED[1] UNOPPOSED MOTION OF THE DUE PROCESS INSTITUTE FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF IN SUPPORT OF APPELLEE TERRY HUBBARD

Pursuant to Florida Rule of Appellate Procedure 9.370, the Due Process Institute moves for leave to file the attached brief as *amicus curiae* in support of Appellee Terry Hubbard. In support of this motion, proposed *amicus curiae* states the following:

1. The Due Process Institute is a non-partisan, non-profit organization devoted to honoring, preserving, and restoring principles of fairness in the criminal legal system. Preserving the

[1] This Unopposed Motion for Leave to File an *Amicus Curiae* Brief in Support of Appellee Terry Hubbard amends and replaces the December 14, 2023, Motion on behalf of Due Process Institute and Former State Senator Jeff Brandes filed for the same purpose.

right to vote is essential to the preservation of our democracy and a core mission of the Due Process Institute.

2. The issue to be addressed in this case is whether the Office of Statewide Prosecution ("OSP") has authority to prosecute Appellee for alleged voting crimes that occurred in and affected one judicial circuit.

3. *Amicus curiae* has a significant interest in the resolution of this issue due to its commitment to the principles of fairness in the criminal legal system.

4. The participation of *amicus curiae* will benefit this Court by apprising it of important legal precedent and grounds that may aid the Court in its decision in the above-captioned matter.

5. The participation of *amicus curiae* will not cause any delay or disruption in these proceedings.

6. Undersigned counsel has conferred with Alison E. Preston, counsel for Appellant, and Michael Gottlieb and Craig Trocino, counsel for Appellee, and is authorized to represent that all parties consent to the relief requested in this motion.

WHEREFORE, the Due Process Institute respectfully requests that this Court grant this motion for leave to file the attached brief as *amicus curiae* in support of Appellee.

Respectfully submitted,

DAVIS WRIGHT TREMAINE LLP

By: */s/Matthew R. Tuchman*

Matthew R. Tuchman
Florida Bar No.: 109297
1301 K Street NW Suite 500 East
Washington, D.C. 20005
202.973.4220
matthewtuchman@dwt.com

Rachel R. Goldberg
pro hac vice pending
865 S. Figueroa Street, Suite 2400
Los Angeles, CA 90017
rachelgoldberg@dwt.com

Counsel for Due Process Institute

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 18, 2023, a true and correct copy of the foregoing will be furnished via the Florida Court's E-Filing Portal to:

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
Counsel for the State of Florida

Jeremy B. Scott
Chief Assistant Statewide Prosecutor
SunTrust International Center
One SE Third Ave, Suite 900
Miami, FL 33131
(786) 792-6196
jeremy.scott@myfloridalegal.com
Co-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 Gottlieb
Michael Gottlieb, PA
1311 SE 2nd Ave
Ft. Lauderdale, FL 33136
(954) 462-1005
mike@mgottlieblaw.com
Counsel for Terry Hubbard

/s/ Matthew R. Tuchman
Matthew R. Tuchman
Florida Bar No.: 109297

IN THE DISTRICT COURT OF APPEAL OF FLORIDA,
FOURTH DISTRICT

Case No. 4D22-3429
L.T. No. 22-8077CF10A

STATE OF FLORIDA,

Appellant,

v.

TERRY HUBBARD,

Appellee.

BRIEF OF DUE PROCESS INSTITUTE AS AMICUS CURIAE IN SUPPORT OF APPELLEE

On Appeal from a Final Order of the Circuit Court for the Seventeenth Judicial Circuit in and for Broward County

---

Matthew R. Tuchman
Florida Bar No. 109297
1301 K Street NW
Suite 500 East
Washington, DC 20005
202.973.4200
matthewtuchman@dwt.com

Rachel R. Goldberg
pro hac vice
865 S. Figueroa Street, Suite 2400
Los Angeles, CA 90017
rachelgoldberg@dwt.com

Counsel for Due Process Institute

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes

Regulations

Other Authorities

INTEREST OF AMICUS CURIAE

Due Process Institute is a non-partisan, non-profit organization devoted to honoring, preserving, and restoring principles of fairness in the criminal legal system. The right to vote is essential to the functioning of our democracy and therefore restoring the right to vote to those with past convictions is a core mission of Due Process Institute.

The issue to be addressed in this case is whether the Office of Statewide Prosecution (OSP) has authority to prosecute Appellee Terry Hubbard for alleged voting crimes that occurred in and affected a single judicial circuit. *Amicus Curiae* has a significant interest in the resolution of these issue due to its commitment to fairness in the criminal legal system and to advocating for, protecting, and preserving the right to vote for people with past convictions.

SUMMARY OF ARGUMENT

This appeal is one of several in which the State challenges dismissals of the OSP's prosecutions of people with felony convictions who unwittingly registered to vote and voted while ineligible to do so. In each case, those charged were wholly unaware of their ineligibility. And reasonably so: The voting eligibility of people with felony

convictions in Florida significantly changed in 2018, and the rules governing voter eligibility are confusing to navigate. Each of the voters, including Mr. Hubbard, submitted a voter-registration application, received a voter-information card, and was subsequently permitted to vote in the 2020 election. Only years later, when they were arrested and charged by the OSP, did the voters learn of their mistake.

Some locally elected state attorneys have declined to prosecute these cases because, like here, the evidence failed to show willful wrongdoing. This exercise of prosecutorial discretion makes good sense: Where a voter is given a voter-information card and left on the voter rolls for years after they register, the State has provided the voter with every indication that he or she legally may vote. The State thus cannot show that the voter willfully registered and voted despite knowing that he or she was ineligible. Indeed, here, there is no indication that Mr. Hubbard's decision to register or vote was based on anything but the mistaken belief that he was eligible to do so—and his concomitant desire to exercise his franchise as a Florida citizen.

The OSP, on the other hand, has taken a different approach from these state attorneys. Despite being authorized to prosecute only crimes occurring in, or affecting, multiple judicial circuits, and despite knowing that some state attorneys had declined to bring these cases, the OSP brought cases against Mr. Hubbard and 19 other people with disqualifying felonies, each of whom voted more than two years ago. This effort to arrogate to itself the authority—and discretion—of local state attorneys to address potential single-circuit voting crimes goes beyond the OSP's constitutional and statutory authorization. And although the Legislature amended the OSP's enabling statute, apparently in an attempt to give the OSP authority to prosecute people like Mr. Hubbard, that amendment would not authorize this prosecution because the OSP continues to lack the constitutional or statutory authority to prosecute single-circuit crimes. And in any event, that amendment was not explicitly retroactive, as would be necessary for the State to rely upon it here.

The OSP's activities here are especially problematic when evaluated in the context of the State's own failures to ensure that only eligible voters may register and cast ballots. The State is *required* to check the eligibility of newly registered voters, including

those with felony convictions, and maintain "accurate and current voter registration records," § 98.075(1), Fla. Stat. (2023), but it has entirely shirked this obligation. That obligation became especially critical when Florida voters approved Amendment 4 to automatically restore voting rights to as many as 1.4 million Floridians with felony convictions, Art. VI, § 4(a)-(b), Fla. Const. (2018), but the Legislature thereafter enacted a complex statutory scheme where one's eligibility depends on the crime of conviction, the court of conviction, and the person's particular sentence. Ch. 2019-162, § 25, Laws of Fla. Instead of checking the registrations of applicants with felony convictions to ensure they are eligible, the State apparently did nothing to screen these voters in advance of the 2020 election. Instead, it issued them voter-information cards, and then on election day 2020, allowed them to vote. These actions by the State communicated to the voters charged by the OSP that they were legally entitled to cast a ballot—even if that was not correct. Prosecuting these voters after the State's own actions led them astray violates fundamental principles of fairness.

The Court should reject the State's appeal and uphold the dismissal of this case.

ARGUMENT

I. The OSP's Continued Pursuit of Mr. Hubbard And Similar Individuals Is An Abuse of Power.

A. The OSP abused its prosecutorial discretion by charging Mr. Hubbard in the absence of the required mens rea.

The OSP has brought charges against Mr. Hubbard for supposed violations of sections 104.011(1) and 104.15 of Florida's Election Code—but these violations indisputably have mens rea requirements that the State cannot meet.

This requirement is plain on the face of the statutes on which the State relies. Section 104.011(1) has an explicit willfulness requirement. *See* § 104.011(1), Fla. Stat. (2022) ("A person who *willfully* swears or affirms falsely to any oath or *willfully* procures another person to swear or affirm falsely to an oath or affirmation, in connection with or arising out of voting or elections commits a felony of the third degree ...."') (emphases added). Likewise, Section 104.15 has both a willfulness *and* a knowledge requirement. *See* § 104.15, Fla. Stat. (2022) ("Unqualified electors *willfully* voting.— Whoever, *knowing* he or she is not a qualified elector, *willfully* votes at any election is guilty of a felony of the third degree ...." (emphases added)).

In other words, to convict Mr. Hubbard for these violations, the State must prove that he "willfully" misrepresented his eligibility to register and "willfully" cast a ballot "knowing" he was ineligible to do so.

Given this clear statutory language, it is unsurprising that courts also have held, in cases involving people with felony convictions who mistakenly register and vote because they were confused or misled about their eligibility, that there is a mens rea requirement for prosecution under these statutes. In the Order of Dismissal, *State v. Suggs*, No. 22-008080CF10A (Fla. 17th Cir. Ct. May 19, 2023), for example, the circuit court dismissed the OSP's charges against another voter with a felony conviction who was charged with the same voting crimes as Mr. Hubbard. The court ruled that the OSP lacked authority to prosecute the defendant there because his alleged crimes only occurred in one circuit. In so holding, the court observed that, "Given the statutory authority vested in the Supervisor of Elections and the Secretary of State to be final arbiters of Defendant's eligibility to register and vote, *no prosecuting authority will ever be able to meet the scienter requirement under the statutes* …." *Id.* at 3 (emphasis added) (noting that "even if this action were brought by the State Attorney for the 17th Judicial

Circuit it is fatally flawed and must be dismissed"); *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.'" (quoting *United States v. Hall*, 346 F.2d 875, 879 (2d Cir. 1965)).

Indeed, the United States Court of Appeals for the Eleventh Circuit, in upholding the constitutionality of the Florida legislation to implement Amendment 4, specifically noted the scienter requirements in Section 104.011(1) and Section 104.15 and explained that, as a result, "no felon who honestly believes he has completed the terms of his sentence commits a crime by registering and voting." *Jones v. Governor of Florida*, 975 F.3d 1016, 1048 (11th Cir. 2020).

Here, there is no way for the State to possibly demonstrate that Mr. Hubbard registered to vote and subsequently cast his ballot with the required scienter because the evidence indicates that he honestly (and understandably) believed he was eligible to vote, including because he was sent multiple voter-information cards. *See* R. 81. Public reporting on Mr. Hubbard's case also indicates that he

thought he was eligible because he heard on the radio after voters approved Amendment 4 that people with felony convictions could now vote. Tim Craig & Lori Rozsa, *Florida Let Them Vote. Then DeSantis's Election Police Arrested Them.*, WASH. POST (Sept. 4, 2022), https://tinyurl.com/ycnfd4bf. Indeed, Mr. Hubbard's prosecution raises the precise concerns raised by the dissenters in *Jones*—namely, that "a 'wrong guess' [would] result[] in 'severe consequences': the wrongful denial of the right to vote, or an arrest for a voting violation." *Jones*, 975 F.3d at 1098 (Jordan, J., dissenting) (citation omitted). Notably, the *Jones* majority thought it "strain[ed] credulity" that such a prosecution might ever happen. *Id.* at 1048. But these are the precise circumstances under which Mr. Hubbard is being prosecuted by the OSP. Prosecuting someone when it is evident that he or she lacks the requisite scienter is a clear abuse of prosecutorial discretion.

Lambert v. California, 355 U.S. 225 (1957), a U.S. Supreme Court case that discussed a scienter requirement in another context, is also informative here. In *Lambert*, a Los Angeles municipal ordinance required persons previously convicted of a felony to register with the chief of police within five days of entering Los

Angeles. 355 U.S. at 226-27. Because there was no notice of the duty to register, the Supreme Court found that the ordinance did not satisfy due process. *Id.* at 229. The Court noted that "ignorance of the law" is ordinarily no excuse, but held that in the circumstances of that case the lack of clear notice violated due process. *Id.* at 228 (citation omitted). The Court explained that, "[a]s Holmes wrote in The Common Law, 'A law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear.'" *Id.* at 229 (citation omitted). Thus, "[w]here a person did not know of the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process." *Id.* at 229-30. Precisely the same reasoning applies here—where the voting eligibility of people with felony convictions significantly changed in recent years; the rules governing voter eligibility are confusing even to those with a law degree; and the State itself issued Mr. Hubbard a voter-information card and allowed him to vote, despite his ineligibility.

Rehaif v. United States, 588 U.S. ---, 139 S. Ct. 2191 (2019), is also informative. In that case, the U.S. Supreme Court held that a

federal sentencing statute, 18 U.S.C. § 924(a)(2), which authorizes imprisonment for up to ten years if a person "knowingly" violates a separate statutory provision listing nine categories of individuals who cannot lawfully possess firearms—including people with felony convictions and undocumented immigrants who are "illegally or unlawfully in the United States," 18 U.S.C. § 922(g)—requires the individual to know *not only* that he possessed a firearm, but *also* that he had the relevant status when he possessed the firearm. 139 S. Ct. at 2192. As the Court explained, to convict a defendant under the statute the Government "must show that the defendant knew he possessed a firearm and also that he knew he had the relevant status when he possessed it." *Id.* at 2194. This is because "[s]cienter requirements … 'separate those who understand the wrongful nature of their act from those who do not.'" *Id.* at 2196 (quoting *United States v. X-Citement Video*, 513 U.S. 64, 72-73 n.3 (1994)).

The OSP's decision to prosecute Mr. Hubbard, in the face of objective circumstances that would cause any reasonable person to honestly believe in his or her eligibility to register and vote—including being provided voter-information cards by the State—was an

egregious abuse of prosecutorial discretion, and should not be countenanced.

B. The OSP's attempt to prosecute Mr. Hubbard violates the State Constitution and the OSP's authorizing statute.

The OSP's prosecutions of Mr. Hubbard and similarly situated individuals are also unlawful because the OSP has far exceeded its specific, limited authority to prosecute crimes that occur in, or affect, multiple judicial circuits. Mr. Hubbard both registered and voted while allegedly ineligible in just one judicial circuit—as did those other individuals.

1. The OSP "is a creature of the Florida Constitution and of specific Florida Statutes," which define and circumscribe its authority. *Winter v. State*, 781 So. 2d 1111, 1113 (Fla. 1st DCA 2001), *as clarified* (Mar. 27, 2001). The constitutional provision governing the OSP's jurisdiction provides "concurrent jurisdiction with … state attorneys to prosecute violations of criminal laws occurring or having 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." Art. IV, § 4(b), Fla. Const. (emphases added). The OSP's statutory

authorization similarly limits its authority to multi-circuit crimes. At the time the OSP charged Mr. Hubbard, the office was allowed to "[i]nvestigate and prosecute" voter-registration and voting-related crimes where the offense in question "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*." § 16.56(1)(a), Fla. Stat. (2022) (emphasis added).

2. The circuit court below correctly held that the OSP's efforts to prosecute Mr. Hubbard exceeds that authority. Specifically, the circuit court found, based on the stipulation of the parties, that Mr. Hubbard's "only acts occurred in Broward County and he took no affirmative role or actions in disseminating his completed voter application to Leon County, Florida." R. 80. Furthermore, Mr. Hubbard "is alleged to have voted only in Broward County," *id.*, and "the acts charged in the State's Information does [sic] not involve a criminal conspiracy." R. 81. Therefore, the circuit court concluded, "this case and this Defendant's charges are not related to two or more judicial circuits," and the OSP lacked jurisdiction to prosecute him. R. 87.

That the OSP lacked the authority to prosecute Mr. Hubbard under the plain terms of its statutory and constitutional authorizations is confirmed by case law. In *Carbajal v. State*, 75 So. 3d 258 (Fla. 2011), for example, the Florida Supreme Court held that "Carbajal is correct that if his criminal activity in Florida actually occurred *in only Lee County, Florida*, the OSP was not authorized to prosecute charges arising from that conduct." *Id.* at 262 (emphasis added). *See also, e.g.*, *Scott v. State*, 102 So. 3d 676, 677 (Fla. 5th DCA 2012) (statute requires a showing of "criminal activity in two or more judicial circuits"); *Winter*, 781 So. 2d at 1116-17 ("declin[ing] to give [the OSP's jurisdiction] the expansive reading advanced by the State"; instead requiring criminal conspiracy with "some clear proof of an actual impact in other judicial circuits").

3. In the time since the conduct at issue in this and the other cases brought by the OSP occurred—and since the OSP's case against Mr. Hubbard was dismissed on the grounds that it lacks jurisdiction to prosecute him—the Legislature amended the OSP's authorizing statute to purportedly expand its jurisdiction over voting-related crimes. *See* § 16.56(1)(c), Fla. Stat. (2023). This later

expansion of the OSP's jurisdiction cannot, however, legitimize the OSP's conduct in prosecuting Mr. Hubbard.

For starters, this amendment does not in fact by its terms authorize the OSP to prosecute Mr. Hubbard or the other individuals with felony convictions against whom the State brought charges after the 2020 election. Although the amendment to the OSP's authorizing statute purports to expand its authority to prosecute voter-registration and voting-related crimes, that grant of authority is still limited to instances in which a crime has occurred in or affected two or more judicial circuits. *See* § 16.56(1)(c), Fla. Stat. (2023) ("The office shall have such power *only* when any 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 affecting, or has affected, two or more judicial circuits.") (emphases added); *see also* Art. IV, § 4(b), Fla. Const. But as noted above, all of Mr. Hubbard's actions occurred in and affected just one judicial circuit.

Beyond that, even if the new law were to cover actions like those of Mr. Hubbard, the law does not apply retroactively to authorize these prosecutions. The OSP's amended authorizing statute does not explicitly state that the new authority was to be retroactive, and the

State does not argue that it did. But Florida law provides that "Except as expressly provided in an act of the Legislature … the … amendment of a criminal statute operates prospectively." § 775.022(3), Fla. Stat. (2019). And this rule of prospectivity expressly applies to procedural rules in addition to substantive ones. *See* § 775.022(2), Fla. Stat. (2019) ("the term 'criminal statute' means a statute, whether substantive *or procedural*, dealing *in any way* with a crime or its punishment") (emphases added). Thus, because the OSP lacked authority to prosecute Mr. Hubbard at the time it filed charges against him, it cannot do so now.

C. The OSP abused its power by ignoring the decisions of local state attorneys' offices.

Finally, even if there were any evidence of Mr. Hubbard's mens rea, and even if the amendment to the OSP's authorizing statute retroactively had given it authority to prosecute these cases—neither of which is the case—the State's use of the OSP to prosecute here would nonetheless be an abuse of power because it is inconsistent with the decisions of local state attorneys. Indeed, Governor DeSantis, when he announced the arrest of Mr. Hubbard and the 19 other voters with felony convictions who allegedly voted while

ineligible in 2020, admitted that the OSP was prosecuting these cases because "some prosecutors [] have been loath to take these cases." First Coast News, *Watch Live: Governor DeSantis Press Conference*, YouTube (Aug. 18, 2022), https://www.youtube.com/watch?v=IBkT4A1RET8 at 1:06:12-1:06:17. Unlike the appointed OSP, local state attorneys are elected and thus answerable to voters for the decisions they make regarding what cases to bring and how to prioritize them. And notably, some state attorneys have brought these types of cases, while others—given the lack of criminal intent—have declined to do so. Nor can the OSP claim that these cases involve complex, multi-circuit organized criminal activity that are beyond the capacity of local state attorneys—the original reason for creating the OSP. *See generally* R. Scott Palmer & Barbara M. Linthicum, *The Statewide Prosecutor: A New Weapon Against Organized Crime*, 13 Fla. St. U. L. Rev. 653 (1985). Rather, these cases—to the extent they are worth prosecuting at all—properly belong within the jurisdiction of state attorneys, to prosecute, or decline to prosecute, as appropriate.

* * * * *

The Court should reject the OSP's efforts to arrogate to itself the authority to prosecute ineligible voters, who act wholly within a single judicial circuit.

II. The State Should Focus Its Attention On Removing Ineligible Voters From The Rolls Before They Have The Opportunity To Vote, Rather Than On Prosecuting Them.

The prosecution here is doubly problematic because of the State of Florida's own actions: The State first misleads ineligible voters regarding their eligibility, where, as was the case here, it gives them voter-information cards; it fails to remove them from the rolls despite its statutory obligation to do so; and then, years later, it prosecutes them after they have relied on the mistaken impression that they may cast a ballot.

Florida law entrusts the Department of State's Division of Elections with the authority and obligation to "protect the integrity of the electoral process by ensuring the maintenance of accurate and current voter registration records." § 98.075(1), Fla. Stat. (2022). By statute, the Department "shall identify" potentially ineligible voters with felony convictions whose voting rights have not been restored "by comparing information received from, but not limited to, a clerk

of the circuit court, the Board of Executive Clemency, the Department of Corrections, the Department of Law Enforcement, or a United States Attorney's Office" to "make an initial determination as to whether the information is credible and reliable." § 98.075(5)(a), Fla. Stat. (2022); *see also* § 98.0751(3)(a), Fla. Stat. (2022); Fla. Admin. Code R. 1S-2.041(4)(c) (2022); R. 1S-2.039(11)(f)(3) (2022).

Florida law also provides a detailed process by which the local supervisor of elections must notify a voter identified by the Department as potentially ineligible and, if appropriate, remove that voter from the rolls. § 98.075(7), Fla. Stat. (2022). These systems appropriately place the onus on the State itself to determine who is eligible to vote—and to ensure that those who are not eligible to vote are precluded from doing so.

Despite these clear statutory directives, the State is apparently doing little to check whether registered voters are ineligible and if so to remove them from the rolls. In the sixteen months after voters approved Amendment 4, the Department identified over 85,000 pending registrations for review. *Jones*, 975 F.3d at 1026. But months later—and less than two months before the 2020 election—

"Florida ha[d] yet to complete its screening of *any* of the registrations." *Id.* (emphasis added). Thus, the State allowed 85,000 potentially ineligible voters to remain on the rolls, despite the fact that the State itself had determined that there was some question as to those voters' eligibility. *Id.* And in 2020, a federal court found that this screening process could take until 2026 at the earliest to complete because the Division of Elections' caseworkers could only process an average of 57 registrations per day. *Jones v. DeSantis*, 462 F. Supp. 3d 1196, 1228 (N.D. Fla. 2020), *reversed and vacated sub nom*, *Jones v. Governor of Florida*, 975 F.3d 1016 (11th Cir. 2020).

In fact, Florida has actually taken steps that *decrease* its ability to ensure that ineligible voters are prevented from voting, further demonstrating its failure to live up to its statutory obligations. Florida used to participate in a multi-state, nonpartisan partnership called the Electronic Registration Information Center (ERIC). ERIC enables participating states to use and share government data to check their voter rolls to ensure eligibility. *See* Miles Parks, *3 more Republican states announce they're leaving a key voting data partnership*, NPR (Mar. 6, 2023), *available at* https://tinyurl.com/yrxd9374. But in March 2023, Florida

withdrew from ERIC. *Id.* It thus gave up access to a significant resource—relied upon by 25 states—that exists precisely to assist states ensure that ineligible voters cannot vote. *See* Miles Parks, *Republican states swore off a voting tool. Now they're scrambling to recreate it*, NPR (Oct. 20, 2023), *available at* https://tinyurl.com/ynpmv86f. While the ERIC system would not directly address Florida's concern about people ineligible to vote due to felony sentences, the State's withdrawal from this resource shows just how misplaced are its priorities for election integrity.

The State's carelessness in fulfilling its statutory duties extends even to ineligible voters with felony convictions who the OSP *has already prosecuted*. Indeed, at least one of these voters remained on the rolls for almost three months after her arrest—and at least one was issued a new voter-information card almost a month after he was arrested. *See* Lawrence Mower, *DeSantis' voter fraud suspect was issued new voter ID*, TAMPA BAY TIMES (Nov. 7, 2022), *available at* https://tinyurl.com/4m5pj8sa. By not focusing its attention on removing ineligible voters from the rolls, the State causes a dynamic by which voters who rely on the State's eligibility determination do so at their peril—risking an unfair prosecution like that at issue here.

Voters, on the other hand, have no ready way to determine their own eligibility. In Florida, voter eligibility after a felony conviction depends on the crime of conviction, the court of conviction, and the terms of the voter's sentence. There is no statewide database that would permit would-be voters with felony convictions to determine whether they are eligible. Douglas Soule, *As DeSantis and lawmakers make it easier to prosecute election crimes, advocates question their priorities,* TALLAHASSEE DEMOCRAT (Feb. 23, 2023), *available at* https://tinyurl.com/4adr3ja4. Commentators have described the system as difficult if not impossible to navigate without a lawyer—and challenging even for lawyers themselves. *Id.* The average voter may well be deterred from voting, rather than jump through the hoops necessary to attempt to confirm eligibility.

This system can hardly be considered fair. "Ordinarily, citizens may not be punished for actions undertaken in good faith reliance upon authoritative assurance that punishment will not attach." *United States v. Laub*, 385 U.S. 475, 487 (1967). Where the government has provided such assurances, allowing prosecution afterwards would "sanction the most indefensible sort of entrapment by the State—convicting a citizen for exercising a privilege which the

State clearly had told him was available to him." *Raley v. Ohio*, 360 U.S. 423, 437-38 (1959) (due process prohibits conviction for invoking a privilege where government statements assured defendants that they may use it, and "behavior toward [another individual] obviously gave the same impression"). *See also United States v. Hedges*, 912 F.2d 1397, 1405 (11th Cir. 1990) ("entrapment by estoppel applies when an official tells a defendant that certain conduct is legal and the defendant believes that official").

It is entirely reasonable for voters to assume that Florida's actions—providing voter-information cards, failing to check eligibility in a timely fashion despite systems purportedly designed to do so, and actively permitting ineligible voters to remain on the rolls for years and cast ballots—qualify as the State's assurance that the voters legally may vote, even if that is not correct. These assurances set up ineligible voters for criminal prosecution when they cast their ballot, even though they have no reason to know it is unlawful for them to do so. Allowing prosecutions in these circumstances violates fundamental principles of fairness and due process.

The State is best positioned—and legally required—to determine eligibility, and it should focus its resources on those efforts instead of prosecuting unwittingly ineligible voters.

CONCLUSION

The decision of the Circuit Court should be affirmed.

Respectfully submitted,

/s/Matthew R. Tuchman

Matthew R. Tuchman
Florida Bar No. 109297
1301 K Street NW
Suite 500 East
Washington, DC 20005
202.973.4200
matthewtuchman@dwt.com

Rachel R. Goldberg
pro hac vice
865 S. Figueroa Street, Suite 2400
Los Angeles, CA 90017
rachelgoldberg@dwt.com

Counsel for Due Process Institute

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 18, 2023, a true and correct copy of the foregoing will be furnished via the Florida Court's E-Filing Portal to:

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
Counsel for the State of Florida

Jeremy B. Scott
Chief Assistant Statewide Prosecutor
SunTrust International Center
One SE Third Ave, Suite 900
Miami, FL 33131
(786) 792-6196
jeremy.scott@myfloridalegal.com
Co-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 Gottlieb
Michael Gottlieb, PA
1311 SE 2nd Ave
Ft. Lauderdale, FL 33136
(954) 462-1005
mike@mgottlieblaw.com
Counsel for Terry Hubbard

/s/ Matthew R. Tuchman
Matthew R. Tuchman
Florida Bar No.: 109297

CERTIFICATE OF COMPLIANCE

Pursuant to Florida Rules of Appellate Procedure 9.045, 9.210, and 9.370, Amicus Curiae, the Due Process Institute, hereby certifies that the foregoing brief complies with the applicable font and word count requirements. It was prepared in 14-point Bookman Old Style font, and it contains 4,389 words.

/s/ Matthew R. Tuchman
Matthew R. Tuchman
Florida Bar No.: 109297