

IN THE SUPREME COURT OF FLORIDA

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ARAMIS AYALA, as State Attorney  
for the Ninth Judicial Circuit,

*Petitioner,*

v.

RICHARD L. SCOTT,  
as Governor of the State  
of Florida,

*Respondent*

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Case No. SC 17-653

**AMICI CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES  
UNION FOUNDATION, AMERICAN CIVIL LIBERTIES UNION OF  
FLORIDA, FLORIDANS FOR ALTERNATIVES TO THE DEATH  
PENALTY, THE SENTENCING PROJECT, AND THE NAACP LEGAL  
DEFENSE & EDUCATIONAL FUND, INC. IN SUPPORT OF  
PETITIONER ARAMIS AYALA**

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### Other Authorities

Bureau of Justice Statistics, *Capital Punishment*, 2013 Statistical Tables 14 (Dec. 19, 2014), <http://www.bjs.gov/content/pub/pdf/cp13st.pdf>.....13

Death Penalty Information Center, *Death Row Inmates by State*, <https://deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year>.....12

Death Penalty Information Center, *Innocence: List of Those Freed From Death Row*, <https://deathpenaltyinfo.org/innocence-list-those-freed-death-row>.....14

Death Row Information Center, *Innocence and the Death*

Penalty, <https://deathpenaltyinfo.org/innocence-and-death-penalty#inn-st>.....17

Death Penalty Information Center, *States with and without the death penalty*, <https://deathpenaltyinfo.org/states-and-without-death-penalty> (noting states that have abolished death penalty and year of abolition).....20

Equal Justice USA, *Executions and Prison Safety*, <http://ejusa.org/learn/prison-killings/>.....9

Executive Summary: *Reports & Recommendations of the Florida Supreme Court Racial & Ethnic Bias Commission, Where the Injured Fly For Justice: Reforming Practices Which Impede the Dispensation of Justice to Minorities in Florida* (Deborah Hardin Wagner ed. 1991).....17

Fagan, Jeffrey, *Deterrence and the Death Penalty: Risk, Uncertainty, and Public Policy Choices*, [https://www.law.columbia.edu/law\\_school/communications/reports/summer06/capitalpunish](https://www.law.columbia.edu/law_school/communications/reports/summer06/capitalpunish).....11

FBI, *Officers Feloniously Killed, Table 1* (2015), [https://ucr.fbi.gov/leoka/2015/tables/table\\_1\\_leos\\_fk\\_region\\_geographic\\_division\\_and\\_state\\_2006-2015.xls](https://ucr.fbi.gov/leoka/2015/tables/table_1_leos_fk_region_geographic_division_and_state_2006-2015.xls).....12

Florida Department of Corrections, *Death Row*, <http://www.dc.state.fl.us/oth/deathrow/> .....15

Florida Department of Corrections, *Death Row Roster*, <http://www.dc.state.fl.us/activeinmates/deathrowroster.asp>.....6, 13

Florida Department of Corrections, *Doing Time: Most Florida Inmates Serving 85% of Their Sentence* (Jan. 2014), <http://www.dc.state.fl.us/pub/timeserv/doing/>.....5

Florida Department of Corrections, *Execution List 1976-Present*, <http://www.dc.state.fl.us/oth/deathrow/execlist.html>.....5, 6

Frank R. Baumgartner, *The Impact of Race, Gender, and Geography on Florida Executions* (Jan. 14, 2016), <https://www.unc.edu/~fbaum/articles/Baumgartner->

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NAACP Legal Defense and Education Fund, <i>Death Row USA 2014</i> , <a href="http://www.naacpldf.org/files/publications/DRUSA_Winter_2014.pdf">http://www.naacpldf.org/files/publications/DRUSA_Winter_2014.pdf</a> .....	5
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Public Policy Polling, <i>Orange and Osceola County Survey Results</i> (April 5-7, 2-17), <a href="https://www.scribd.com/document/344697856/Orange-Osceola-Results-PPP-Poll-April-2017">https://www.scribd.com/document/344697856/Orange-Osceola-Results-PPP-Poll-April-2017</a> .....	19
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Scott Powers, <i>Aramis Ayala becomes first black state attorney in Florida's history</i> , Florida Politics (Nov. 8, 2016), <a href="http://floridapolitics.com/archives/226799-aramis-ayala-becomes-first-black-state-attorney-floridas-history">http://floridapolitics.com/archives/226799-aramis-ayala-becomes-first-black-state-attorney-floridas-history</a> .....	3
Statement of Public Safety Officials on the Death Penalty, <a href="http://psodp.org/why-were-concerned/">http://psodp.org/why-were-concerned/</a> .....	9
U.S. Census, <i>Quick Facts: Orange County, Florida</i> (2016), <a href="https://www.census.gov/quickfacts/table/PST045216/12095">https://www.census.gov/quickfacts/table/PST045216/12095</a> .....	18
<u>Other Materials</u>	
Diane Turbyfill, <i>No More death penalty in Gaston</i> , Gaston Gazette (July 11, 2016), <a href="http://www.gastongazette.com/news/20160708/no-more-death-penalty-in-gaston">http://www.gastongazette.com/news/20160708/no-more-death-penalty-in-gaston</a> .....	20
H. Lee Sarokin, <i>Is It Time to Execute the Death Penalty?</i> , THE HUFFINGTON POST (Jan. 15, 2011), <a href="http://www.huffingtonpost.com/judge-h-lee-sarokin/is-it-time-to-execute-the_b_809553.html">http://www.huffingtonpost.com/judge-h-lee-sarokin/is-it-time-to-execute-the_b_809553.html</a> .....	11
James S. Purdy, <i>The Conservative Case Against the Death Penalty</i> , DAYTONA BEACH NEWS JOURNAL, L (Jan. 31, 2016), <a href="http://www.news-">http://www.news-</a>	

journalonline.com/article/20160131/OPINION/160139956/101027?  
 Title=The-conservative-case-against-the-death-penalty.!9.....16

K. Clark, "New DA McCann says Denver is done with the death penalty," 9News,  
 January 9, 2017, <http://www.9news.com/news/local/next/new-da-mccann-says-denver-is-done-with-the-death-penalty/384633301>.....20

M. Holsman, *Cost of Florida's death row easily exceeds \$1 million per inmate, investigation shows*, Scripps Treasure Coast Newspapers, October 8, 2012....16

Renee Stutzman, *Death penalty murder trial starts in Orange County, despite opposition from Ayala*, ORLANDO SENTINEL (April 17, 2017),  
<http://www.orlandosentinel.com/news/breaking-news/os-juan-rosario-aramis-ayala-murder-trial-20170417-story.html>.....4

S. V. Date, *The High Price of Killing Killers*, PALM BEACH POST (Jan. 4, 2000),  
 available at <http://www.deathpenaltyinfo.org/node/2289>.....16

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## PRELIMINARY STATEMENT

This brief is being filed by the American Civil Liberties Union Capital Punishment Project (ACLU-CPP), the American Civil Liberties Union of Florida (ACLU-FL), Floridians for Alternatives to the Death Penalty, the Sentencing Project, and the NAACP Legal Defense & Educational Fund, Inc. (“LDF”) in support of the Petitioner, ARAMIS AYALA.

The ACLU is a nationwide nonpartisan organization of nearly one million members dedicated to protecting the fundamental liberties and basic civil rights guaranteed by the state and federal Constitutions, while the ACLU’s Capital Punishment Project focuses on upholding those rights in the context of death-penalty cases. The ACLU of Florida is the ACLU’s state affiliate and has approximately 37,800 members in the State of Florida equally dedicated to the principles of liberty and equality embodied in the United States Constitution and the Florida Constitution.

Both the ACLU-CPP and the ACLU-FL have long been concerned with the constitutional implementation of the death penalty. Both have filed amicus curiae briefs in the United States Supreme Court in recent death penalty cases, *see, e.g., Hurst v. Florida*, \_\_\_ U.S. \_\_\_, No. 14-7505, 2016 WL 112683 (Jan. 12, 2016), and in this Court. *See, e.g., Perry v. State*, 210 So.3d 630 (Fla. 2016). Jointly, both currently represent a Florida death-row prisoner on direct appeal.



Floridians for Alternatives to the Death Penalty (FADP) is a non-profit and non-partisan Florida organization of individuals and groups united to abolish the death penalty in Florida. FADP works to build a strong, diverse, statewide, grassroots movement which: opposes executions, reduces the application of the death penalty until it is ultimately abolished, protects the humanity of all persons impacted by the death penalty, educates Floridians about the death penalty, and provides concrete action steps for individuals and groups.

The Sentencing Project, founded in 1986, is a national nonprofit organization engaged in research and advocacy on criminal justice and juvenile justice reform. The organization is recognized for its policy research documenting trends and racial disparities within the justice system, and for developing recommendations for policy and practice to ameliorate those problems. The Sentencing Project has produced policy analyses that document the increasing use of sentences of life without parole for both juveniles and adults, and has assessed the impact of such policies on public safety, fiscal priorities, and prospects for rehabilitation. Staff of the organization are frequently called upon to testify in Congress and before a broad range of policymaking bodies and practitioner audiences.

The NAACP Legal Defense & Educational Fund, Inc. (“LDF”), is the nation’s first and foremost civil rights law firm. LDF was founded as an arm of the NAACP in 1940 by Charles Hamilton Houston and Thurgood Marshall to redress racial

discrimination and to assist African Americans in securing their constitutional and statutory rights. Through litigation, advocacy, public education, and outreach, LDF strives to secure equal justice under the law for all Americans, and to break down barriers that prevent African Americans from realizing their basic civil and human rights.

LDF has long been concerned with laws, policies, and practices that impose a disproportionately negative impact on communities of color, including the administration of the death penalty. For example, LDF served as counsel of record for capital defendants in *Buck v. Davis*, 137 S. Ct. 759 (2017); *McCleskey v. Kemp*, 481 U.S. 279 (1987); *Enmund v. Florida*, 458 U.S. 782 (1982); *Coker v. Georgia*, 433 U.S. 584 (1977); *Furman v. Georgia*, 408 U.S. 238 (1972); and *Shepherd v. Florida*, 341 U.S. 50 (1951). Given its expertise in matters concerning the death penalty, LDF believes its perspective would be helpful to the Court in adjudicating this case.

## **SUMMARY OF ARGUMENT**

In her petition, State Attorney Ayala has shown that the Florida Constitution requires her to prosecute the 23 capital-felony cases Governor Scott has attempted to reassign to a state attorney from outside the Ninth Judicial Circuit. *See* Art. V, § 17, Fla. Const. (“[T] the state attorney shall be the prosecuting officer of all trial courts in that circuit and shall perform other duties prescribed by general law[.]”). Her petition further shows that Scott violated the Florida Constitution when he reassigned the 23 cases. Simply put, even as Governor, Scott’s disagreement with Ayala about the death penalty gave him no authority to reassign cases which Ayala was constitutionally required to prosecute. Amici here show that Ayala’s correct reading of the Florida Constitution finds further support in sound policy: vesting prosecutorial discretion with the state attorney allows local voters to determine what, if any, needed reforms should be explored at the local level. As long as such reforms take place within the limits of Florida law, the Governor should not be permitted to prevent them and thereby disenfranchise the voters who have elected the state attorney.

As amici show below, Ayala’s announcement that her office would generally decline to seek the death penalty – because it is an ineffectual and costly punishment that does a disservice to victims – is a reform effort that is not only

consistent with the law, but also of precisely the type the Florida Constitution permits the local state attorney to undertake. *See* Art. V, § 17, Fla. Const.

Furthermore, Scott claims authority to reassign Ayala’s cases under Section 27.14 of Florida Statutes. That provision allows the Governor to reassign a case, investigation, or matter if “any state attorney is disqualified to represent the state . . . or if, for any other good and sufficient reason, the Governor determines that the ends of justice would be best served[.]” § 27.14, Fla. Stat. (2006). This brief shows that Ayala’s position with respect to the death penalty is by no means “good and sufficient reason” to reassign cases where the death penalty is a potential punishment. On the contrary, Ayala’s reticence to use the death penalty is smart policy that aligns with empirical data showing the death penalty does not afford any greater public safety than the alternative punishment of life imprisonment without parole; does not protect law enforcement; does not provide closure for victim’s family members; and is not cost effective. The death penalty is also tainted by racial bias and needlessly risks the execution of innocent persons.

### FACTS

Amici adopt the more in-depth factual discussion set forth in Ayala’s petition, but set forth the following summary as most pertinent to the issues in this brief.

On November 8, 2016, the voters of the Ninth Judicial Circuit overwhelmingly elected Aramis Ayala to the office of state attorney, making her the first Black person, man or woman, to hold this office in Florida.<sup>1</sup> She took office in January of 2017, and in February, sought and obtained grand jury indictments of Markeith Loyd for the first-degree murder of Sade Dixon, the killing of Dixon’s unborn child, and the first-degree murder of Orlando Police Lieutenant, Debra Clayton. Pet. App. H 1-6. If convicted of first-degree murder, the only potential punishments are life imprisonment without parole or death. §§ 775.082, 921.141, Fla. Stat. (2017).

On March 16, 2017, Scott issued Executive Order 17-66, purporting to reassign prosecution of Loyd to Brad King, state attorney for the Fifth Judicial Circuit of Florida, citing as “good and sufficient reason” that Ayala would not seek Loyd’s death sentence “regardless of circumstances of [his] capital felonies and without regard for the presence of applicable statutory aggravators[.]” State of Florida, Office of the Governor, Executive Order No. 17-66. In April, Scott issued nearly identical executive orders reassigning 22 additional cases in which Ayala’s predecessor had previously filed either notice that the State would seek the death penalty or notice of aggravating circumstances to be proven by the State to support

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<sup>1</sup> Scott Powers, *Aramis Ayala becomes first black state attorney in Florida’s history*, Florida Politics (Nov. 8, 2016), <http://floridapolitics.com/archives/226799-aramis-ayala-becomes-first-black-state-attorney-floridas-history>.

a sentence of death. State of Florida, Office of the Governor, Executive Orders No. 17-76 through 17-96 and 17-98.

Scott's order, on March 16, 2017, followed and referenced Ayala's public statement about the death penalty earlier that same day. Ayala has attached a transcript of the statement as Appendix D to her petition. Ayala's petition shows that Scott mischaracterized her public statement. Pet. 30-32. Amici here show that even assuming Ayala had gone so far as to say that it was the policy of her office to never seek the death penalty, Scott had no authority to remove her from these cases. Troublingly, even as Ayala's action is pending, the trial of one of the 23 cases Scott has improperly reassigned, that of Juan Rosario, has now begun, with substitute State Attorney King seeking Rosario's execution.<sup>2</sup>

## **ARGUMENT**

### **I. Ayala's decision to focus scarce prosecutorial resources on obtaining sentences of life imprisonment without parole rather than death in no way justifies her removal from 23 capital-felony cases.**

Florida law provides two possible punishments for capital felonies, life imprisonment without parole or death. §§ 775.082, 921.141, Fla. Stat. (2017). In providing these alternative sentencing options, Florida law follows U.S. Supreme

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<sup>2</sup> Renee Stutzman, *Death penalty murder trial starts in Orange County, despite opposition from Ayala*, ORLANDO SENTINEL (April 17, 2017), <http://www.orlandosentinel.com/news/breaking-news/os-juan-rosario-aramis-ayala-murder-trial-20170417-story.html>.

Court law which prohibits mandatory death sentences. *See Woodson v. North Carolina*, 428 US 280 (1976).

Florida practice, in turn, not only reflects the choice of punishment provided by law, but also the overwhelming sentencing preference for life imprisonment without parole for capital felonies. As compared to the 410 prisoners on death row in 2014,<sup>3</sup> and the 89 prisoners Florida executed between 1976 and 2014, there were a total of 8,407 prisoners serving life without parole sentences in 2014.<sup>4</sup> Furthermore, since the Supreme Court approved the reinstatement of Florida's death penalty in 1976, *Proffitt v. Florida*, 428 U.S. 242 (1976), less than half (only 33 of 67) of the counties have had executions,<sup>5</sup> and 20 of Florida's 67 counties

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<sup>3</sup> NAACP Legal Defense and Education Fund, *Death Row USA 2014* (collecting death row rosters from all death-sentencing states, including Florida), [http://www.naacpldf.org/files/publications/DRUSA\\_Winter\\_2014.pdf](http://www.naacpldf.org/files/publications/DRUSA_Winter_2014.pdf); Florida Department of Corrections, Execution List 1976-Present, <http://www.dc.state.fl.us/oth/deathrow/execlist.html>.

<sup>4</sup> Florida Department of Corrections, *Doing Time: Most Florida Inmates Serving 85% of Their Sentence* (Jan. 2014), <http://www.dc.state.fl.us/pub/timeserv/doing/> (collecting various statistics about Florida prisoners and parole, including the number of prisoners serving life imprisonment without parole).

<sup>5</sup> No prosecutions from the following 34 Florida counties have thus far resulted in execution: Baker, Bay, Calhoun, Charlotte, Citrus, Collier, DeSoto, Flagler, Franklin, Gilchrist, Glades, Gulf, Hamilton, Hardee, Hendry, Highlands, Holmes, Indian River, Jackson, Lafayette, Levy, Liberty, Manatee, Martin, Nassau, Okeechobee, Putnam, Sumter, Suwanee, Taylor, Union, Walton, and Washington. *See* Florida Department of Corrections, Execution List 1976-Present, <http://www.dc.state.fl.us/oth/deathrow/execlist.html>.

currently have no representation among the 371 prisoners on Florida's death row.<sup>6</sup>

Ayala's statements about her office's preference for sentence of life imprisonment without parole were, thus, in line with not only Florida law, but also the sentencing practice across the State. At the same time, by making explicit what had been a widespread, yet unspoken, preference, Ayala signaled a transparent reform agenda for her judicial district. Ayala gave specific reasons for the sentencing preference announced by her office: that the death penalty offers no public safety benefit; that it does not increase law-enforcement safety; that it is not a deterrent, in part because of the wait between sentence and execution; that it offers a false promise of closure to victim's family members; and that it is costly and not a productive use of office resources. Pet. App. D-2 – D-7 (transcript of media statement).

The reform Ayala set out to achieve in her judicial district is both within Florida law, and based on sound policy concerns. The authority to undertake such lawful reform efforts is precisely what the Florida Constitution provides to state attorneys – but not the governor. *See* Art. V, § 17, Fla. Const. (“[T]he state

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<sup>6</sup> Florida Department of Corrections, *Death Row Roster*, <http://www.dc.state.fl.us/activeinmates/deathrowroster.asp> (listing 371 death row prisoners, the counties where they were prosecuted, and other data). The following Florida counties are not represented on the list: Baker, Calhoun, Columbia, DeSoto, Dixie, Franklin, Gilchrist, Gulf, Hardee, Hendry, Jackson, Jefferson, Lafayette, Levy, Liberty, Madison, Nassau, Suwanee, Taylor, and Washington.



attorney shall be the prosecuting officer of all trial courts in that circuit and shall perform other duties prescribed by general law[.]”). In any case, even if the Florida Constitution does not constrain Scott, Ayala’s stated preference for sentences of life imprisonment in no way constitutes the “good and sufficient reason[.]”§ 27.14, Fla. Stat. (2006), that is required to reassign 23 of Ayala’s capital-felony cases. On the contrary, as shown below, the compelling reasons for preferring life imprisonment without parole over the death penalty render Ayala’s explicit announcement of this preference the furthest thing possible from good and sufficient cause to remove her.

**II. Ayala is correct that the death penalty does not promote public safety, protect law enforcement officers, or deter murder.**

The argument that the death penalty can protect public safety and law enforcement officers comes from two separate but related notions: first, the State’s execution of a condemned murderer will incapacitate him and thereby make it impossible for him to murder again; and second, state executions will deter would-be future murderers. Resp. Br. in *Proffitt v. Florida*, 1976 WL 194474, 24-25 (1976) (arguing these public-safety purposes of death penalty). But four decades later, no evidence has emerged to support either theory.

**A. The death penalty does not incapacitate any better than life imprisonment.**

While the need to incapacitate dangerous offenders may once have been a legitimate rationale for the death penalty, life-without-parole sentences served in high security prisons serve this purpose equally well. As Justice Marshall correctly observed, “Whatever might be said concerning retribution and deterrence as justifications for capital punishment, it cannot be seriously defended as necessary to insulate the public from persons likely to commit crimes in the future. Life imprisonment and, if necessary, solitary confinement would fully accomplish the aim of incapacitation.” *California v. Ramos*, 463 U.S. 992, 1023 (1983) (Marshall, J., dissenting). *See also Glossip v. Gross*, \_\_\_ U.S. \_\_\_, 135 S.Ct. 2726, 2767 (2015) (Breyer, J., dissenting) ([T]he major alternative to capital punishment – namely, life in prison without possibility of parole –also incapacitates.”).

Nor are concerns about prison homicides sufficient to justify seeking the death penalty in any particular case. Murders in prison are exceedingly rare. Academic research confirms this. “A substantial body of empirical research supports the claim that lifers are less likely, often much less likely, than the average inmate to break prison rules, including prison rules prohibiting violence. Experience . . . reveals that the vast majority of lifers are manageable

prisoners.” Robert Johnson & Sandra McGunigall-Smith, *Life Without Parole, America's Other Death Penalty*, 88 *Prison J.* 328, 330 (2008) (collecting authorities and exploring why this is so).

Because life imprisonment without parole is just as effective as execution in maintaining safety and security, many corrections officials and experts do not see the death penalty as a smart use of scarce resources. As Ron McAndrew, a former warden at Florida State Prison who presided over eight executions has stated, “I don’t believe there is a single qualified prison warden in this country that wouldn’t trade the death penalty for more resources to keep his or her facility safe. The death penalty system is just a drain on those resources, and it serves no purpose in the safety of the public or prisons.”<sup>7</sup> Other public-safety officials have taken a similar position.<sup>8</sup>

Scott may disagree with the strong evidence that life imprisonment

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<sup>7</sup> Equal Justice USA, *Executions and Prison Safety*, <http://ejusa.org/learn/prison-killings/>

<sup>8</sup> “Some of us may support the death penalty, some of us may oppose it. But we all believe that it directs needed resources away from policing and community safety, that it is used disparately and often on vulnerable populations, and that it can make mistakes that are irrevocable. And while we have varying views on the death penalty, each of us is ready to explore alternative ways to achieve a more just and effective public safety system.” Statement of Public Safety Officials on the Death Penalty, <http://psodp.org/why-were-concerned/>. This non-profit group is comprised of “current and former public safety officials – including law enforcement, prosecutors, and corrections officials[.]” *Id.*

without parole is more effective in maintaining public safety, including for law enforcement officials, but his disagreement is neither “good and sufficient” cause to remove Ayala, § 27.14, Fla. Stat. (2006), nor basis for disregarding the Florida Constitution. *See* Art. V, § 17, Fla. Const.

**B. There is no evidence life imprisonment without parole deters any less than a death sentence.**

“[T]he theory of deterrence in capital sentencing is predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct.” *Atkins v. Virginia*, 536 U.S. 304, 320 (2002). In a 2012 analysis of deterrence studies going back thirty years, the National Research Council concluded, “research to date on the effect of capital punishment on homicide is not informative about whether capital punishment decreases, increases, or has no effect on homicide rates.”<sup>9</sup> *See also Baze v. Rees*, 553 U.S. 35, 79 (2008) (Stevens, J., concurring in judgment) (“The legitimacy of deterrence as an acceptable justification for the death penalty is also questionable, at best.”). The wait for such evidence has gone on for decades. *See Furman v. Georgia*, 408 U.S. 238, 301 (1972) (Brennan, J., concurring) (“[T]he available

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<sup>9</sup> Nagin, Daniel S., and Pepper, John V., eds, *Deterrence and the Death Penalty*, Committee on Deterrence and the Death Penalty; Committee on Law and Justice; Division on Behavioral and Social Sciences and Education; NATIONAL RESEARCH COUNCIL 2 (2012).

evidence uniformly indicates, although it does not conclusively prove, that the threat of death has no greater deterrent effect than the threat of imprisonment.”). *Id.* at 307, 347-54, 395-96 (similar observations).

Although some studies have claimed to measure an effect of executions on the number of homicides committed, the methodologies fail to answer the operative question – whether the death penalty deters more than life imprisonment without parole.<sup>10</sup> Because the studies have not isolated the additional deterrent effect of a potential death sentence over one of lengthy imprisonment and are unable to accurately model the decision-making processes of potential killers, the conclusions of these studies are incomplete and unreliable.<sup>11</sup> As one retired U.S. Court of Appeals judge observed, “Persons contemplating murder do not sit around the kitchen table and say I won’t commit this murder if I face the death penalty, but I will do it if the penalty is life without parole.”<sup>12</sup>

In terms of Ayala’s concern for protecting law enforcement, she alluded to studies showing that “the deadliest states for law enforcement officers are all states

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<sup>10</sup> See, e.g., Fagan, Jeffrey, *Deterrence and the Death Penalty: Risk, Uncertainty, and Public Policy Choices*, [https://www.law.columbia.edu/law\\_school/communications/reports/summer06/capitalpunish](https://www.law.columbia.edu/law_school/communications/reports/summer06/capitalpunish).

<sup>11</sup> Nagin, *supra*, at 4-5.

<sup>12</sup> H. Lee Sarokin, *Is It Time to Execute the Death Penalty?*, THE HUFFINGTON POST (Jan. 15, 2011), [http://www.huffingtonpost.com/judge-h-lee-sarokin/is-it-time-to-execute-the\\_b\\_809553.html](http://www.huffingtonpost.com/judge-h-lee-sarokin/is-it-time-to-execute-the_b_809553.html).

that have actively used the death penalty, including Florida.” Pet. App. D-5. This observation is supported by FBI crime statistics, which in 2015 (consistent with prior years) reveal that the three states with the highest death-row populations are the same states with the highest number of law enforcement officers feloniously killed. These are Texas (47), California (40), and Florida (34), while New York, a non-death penalty state of similar size to Florida, had only 19 such killings.<sup>13</sup>

Ayala was thus correct in her concern for the lack of evidence that the death penalty deters more than life imprisonment, and for the lack of any proof that it protects law-enforcement officers any better. Pet. App. D-5 – D-6. The Florida Constitution grants Ayala exclusive authority to pursue a reform agenda based on this concern, and nothing about her announcement in this regard qualifies as cause for removing her.

### **III. Ayala is correct to be concerned with delays in executions.**

Ayala identified the long wait between death sentence and execution, an average of 12 years and sometimes more than 30 years, as one of the reasons she would not pursue the death penalty. Pet. App. D-6. Ayala stated that such delays

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<sup>13</sup> FBI, *Officers Feloniously Killed*, Table 1 (2015), [https://ucr.fbi.gov/leoka/2015/tables/table\\_1\\_leos\\_fk\\_region\\_geographic\\_division\\_and\\_state\\_2006-2015.xls](https://ucr.fbi.gov/leoka/2015/tables/table_1_leos_fk_region_geographic_division_and_state_2006-2015.xls); Death Penalty Information Center, *Death Row Inmates by State* (listing three highest death-row populations as California, Florida, and Texas), <https://deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year>.

undermine any deterrent value of capital punishment; and that she had “learned that [the] death penalty traps many victims [s] families in decades-long cycle[s] of uncertainty, court hearings, appeals and waiting. They are left waiting for an execution -- some are waiting for an execution that may never occur.” Pet. App. D-6. Nationally, the average length of time between sentencing and execution is 15.5 years. Bureau of Justice Statistics, *Capital Punishment*, 2013 Statistical Tables 14 (Dec. 19, 2014), <http://www.bjs.gov/content/pub/pdf/cp13st.pdf>. Of the 371 individuals currently on Florida’s death row, 161 of them – well over 40% – were sentenced to death over twenty years ago; and 236 of these men – over 60% – were sentenced to death over 15 years ago. Florida Dept. of Corrections, Death Row Roster, available at <http://www.dc.state.fl.us/activeinmates/deathrowroster.asp>. Fifteen of the 23 death-row prisoners prosecuted in Ayala’s Circuit (comprising of Orange and Osceola Counties) were sentenced 15 years ago, or more. *Id.*

These delays undermine both a victim family member’s ability to achieve closure and a justice system’s ability to deter. However, these delays are oftentimes necessary for the litigation that has prevented unlawful executions and other miscarriages of justice. For example, Juan Melendez spent 18 years, Rudolph Holton spent 16 years, and Frank Smith spent 14 years on Florida’s death row before their exonerations. *See* Death Penalty Information Center, *Innocence: List of*

*Those Freed From Death Row*, <https://deathpenaltyinfo.org/innocence-list-those-freed-death-row>.

Meanwhile, many of those sentenced to death since 2002 may be eligible for sentencing relief under *Hurst v. State*, 202 So.3d 40 (2016). See *Mosley v. State*, 209 So.3d 1248, 1283 (Fla. 2016) (“In other words, defendants who were sentenced to death based on a statute that was actually rendered unconstitutional by *Ring [v. Arizona]*, 536 U.S. 584 (2002) should not be penalized for the United States Supreme Court’s delay in explicitly making this determination.”). *Thompson v. McNeil*, 556 U. S. 1114, 1116 (2009) (statement of Stevens, J., respecting denial of certiorari) (“Judicial process takes time, but the error rate in capital cases illustrates its necessity”).

Ayala’s concern over execution delays was yet another appropriate reason for her to exercise her discretion to favor life imprisonment without parole and the Governor was not empowered to second guess that determination.

**IV. Given the more effective alternatives, Ayala is correct that the financial cost of the death penalty cannot be justified.**

In her press announcement, Ayala also observed that “the death penalty costs millions of dollars that far outweigh the cost of life in prison sentences.” Pet. App. D-7. Every available study bears this out. Death penalty costs are substantial, come from a variety of sources, and cannot be realistically reduced while still honoring



the constitutional rights of people charged with or convicted of capital offenses.

Pre-trial costs in death penalty cases are higher because capital defendants are generally entitled to two court-appointed attorneys, who are constitutionally and statutorily obligated to prepare an extensive, detailed mitigation investigation on their clients' behalf. Fla. R. Crim. P. 3.112(e). In addition, death cases involve substantially more court days pre-trial, which requires the time and resources of judges, prosecutors, defense attorneys, corrections officers, and court staff.

The lengthy and thorough appellate process that is constitutionally necessary in a death penalty case also involves tremendous cost including court-appointed defense attorneys, prosecutors, and the state and federal courts that hear the appeals. Additional costs come from housing death row prisoners, who require higher levels of security, supervision, and resources.<sup>14</sup> Even these costs, standing alone, are higher for a prisoner sentenced to death than to life in prison without parole. A 2008 study estimated the housing costs for Florida's death row to be \$3.4 million per year more than that of prisoners in general population.<sup>15</sup> Indeed, a 2012 study estimated the additional cost to Florida for each prisoner sentenced to death

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<sup>14</sup> See generally Florida Department of Corrections, *Death Row*, <http://www.dc.state.fl.us/oth/deathrow/>.

<sup>15</sup> James S. Purdy, *The Conservative Case Against the Death Penalty*, DAYTONA BEACH NEWS JOURNAL, L (Jan. 31, 2016), <http://www.news-journalonline.com/article/20160131/OPINION/160139956/101027?Title=The-conservative-case-against-the-death-penalty.!9>

at roughly one million dollars.<sup>16</sup>

All told, the State must spend extensive additional funds to pursue a death sentence. A study conducted by the Palm Beach Post in 2000 estimated that the death penalty costs Florida \$51 million a year more than it would cost to punish all first-degree murderers with life imprisonment without parole.<sup>17</sup> Based on the 44 executions that Florida carried out from 1976 to 2000, that figure amounted to a cost of \$24 million for each execution. *See* note 17, *supra*.

Here, again, whatever disagreement Scott may have with this information, it is not a sufficient basis for removing Ayala from 23 capital felonies and certainly does not permit him to interfere with Ayala's constitutional purview to prosecute these matters.

**V. The risk of executing an innocent person and the role of racial bias also support a prosecutor's institutional preference for life imprisonment.**

**A. Innocence**

Florida's imposition of capital punishment is uniquely flawed as the state carries the dubious distinction of having the highest number of death-row exonerations in the nation. Twenty-six of the 157 prisoners exonerated from death

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<sup>16</sup> M. Holsman, *Cost of Florida's death row easily exceeds \$1 million per inmate, investigation shows*, Scripps Treasure Coast Newspapers, October 8, 2012.

<sup>17</sup> S. V. Date, *The High Price of Killing Killers*, PALM BEACH POST (Jan. 4, 2000), available at <http://www.deathpenaltyinfo.org/node/2289>.

rows in the United States since 1973 are from Florida, and this number dwarfs the number of exonerations from virtually every other state. Death Row Information Center, Innocence and the Death Penalty, <https://deathpenaltyinfo.org/innocence-and-death-penalty#inn-st>. With this high number of death-row exonerations comes the risk that other equally innocent people (who did not receive the benefit of zealous counsel or the fortuitous breaks that can sometimes lead to exonerations) remain on death row, or have already been executed. This is a risk that many prosecutors consider when deciding whether to pursue the death penalty, given the availability of the alternative of life imprisonment without parole.

## **B. Racial Bias**

This Court's Racial and Ethnic Bias Commission found in 1991 that criminal defendants were 3.4 times more likely to receive a death sentence when the victim was white. Executive Summary: *Reports & Recommendations of the Florida Supreme Court Racial & Ethnic Bias Commission, Where the Injured Fly For Justice: Reforming Practices Which Impede the Dispensation of Justice to Minorities in Florida* (Deborah Hardin Wagner ed. 1991).

A 2016 study found continuing disparities based on race. For example:

- “homicides involving a white female victim are 6.5 times more likely to result in a death sentence than homicides of black men;”
- “72% of all executions carried out in Florida between 1976 and 2014 were for crimes involving white victims despite the fact that 56% of all

homicide victims are White;

- “No White person has been executed in Florida for a homicide involving a Black victim. In contrast, 71% of the executions carried out against Black inmates were for homicides involving White victims.”<sup>18</sup>

Ayala is the first Black state attorney in Florida, and represents Orange County, which is 22 percent Black.<sup>19</sup> Although Ayala did not cite the role of race discrimination (or the risk of executing an innocent person) in the death penalty when she made her media statement, these considerations also support *any* prosecutor’s decision to pursue a policy of seeking life imprisonment without parole over death for capital felonies. Instituting such a policy is no basis for removing a Florida prosecutor from her capital-felony cases.

Indeed, it is deeply concerning that, as a Black woman, Ayala alone has been singled out for reassignment of her capital-felony cases when, as shown above, numerous other Florida prosecutors have pursued a similar policy (Florida executions have resulted from prosecution in only 34 of Florida’s 67 counties, and 20 counties currently have no representation on death row at all). Florida prisons are full of inmates eligible for the death penalty who are instead serving life

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<sup>18</sup> Frank R. Baumgartner, *The Impact of Race, Gender, and Geography on Florida Executions* (Jan. 14, 2016), <https://www.unc.edu/~fbaum/articles/Baumgartner-Florida-executions-Jan2016.pdf>.

<sup>19</sup> U.S. Census, *Quick Facts: Orange County, Florida* (2016), <https://www.census.gov/quickfacts/table/PST045216/12095>.

imprisonment without parole. No governor, current or past, looked over the shoulder of the prosecutors – heretofore always white – responsible for those many prosecutions ending in life imprisonment.

**VI. Ayala’s position on the death penalty is consistent with both the wishes of her constituents and of other reformers who have studied the issue.**

Ayala is not alone in turning away from the death penalty. Most important, her position reflects the will of the district in which she serves. A recent poll in the Ninth Judicial District reflects that over 60 percent of respondents preferred some form of life imprisonment over execution as punishment for murder.<sup>20</sup>

Further, although the constitutionality of the death penalty is by no means at issue here, U.S. Supreme Court justices who have studied the death penalty have found it deeply problematic for similar reasons to those discussed by Ayala in her announcement, and to those explored in this brief. *See Glossip*, 135 S.Ct. at 2756 (Breyer, J., dissenting) (“[T]he death penalty, in and of itself, now likely constitutes a legally prohibited ‘cruel and unusual punishment[t.]’”); *Baze v. Rees*, 553 U.S. 35 (2008) (Stevens, J., concurring in judgment) (“[T]he death penalty represents ‘the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes.’”) (quoting *Furman v.*

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<sup>20</sup> Public Policy Polling, *Orange and Osceola County Survey Results* (April 5-7, 2017), <https://www.scribd.com/document/344697856/Orange-Osceola-Results-PPP-Poll-April-2017>.

*Georgia*, 408 U.S. 238, 312 (1972) (White, J., concurring)); *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting) (“I shall no longer tinker with the machinery of death.”).

Legislators and governors from Maryland, Connecticut, Illinois, New Mexico, and New Jersey have in recent years repealed the death penalty.<sup>21</sup> And at least two elected prosecutors from other states have recently announced they would no longer seek the death penalty for similar reasons as discussed in this brief.<sup>22</sup> The same sound policy reasons behind these significant changes suffice as a reason for a Florida prosecutor to decline to seek the death penalty and instead to pursue sentences of life imprisonment without parole. Nothing about Ayala’s decision in this regard constituted “good and sufficient reason,” § 27.14, Fla. Stat. (2006), for the governor to remove her from 23 cases, much less gave him authority that the Florida Constitution has vested only in the duly elected local prosecutor.

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<sup>21</sup> Death Penalty Information Center, *States with and without the death penalty*, <https://deathpenaltyinfo.org/states-and-without-death-penalty> (noting states that have abolished death penalty and year of abolition).

<sup>22</sup> Diane Turbyfill, *No More death penalty in Gaston*, *Gaston Gazette* (July 11, 2016), <http://www.gastongazette.com/news/20160708/no-more-death-penalty-in-gaston>; K. Clark, "New DA McCann says Denver is done with the death penalty," *9News*, January 9, 2017, <http://www.9news.com/news/local/next/new-da-mccann-says-denver-is-done-with-the-death-penalty/384633301>.

## CONCLUSION

For the reasons set forth above, *amici* urge this Court to grant Petitioner's requested writ, nullify Governor Scott's orders and reinstate State Attorney Ayala's authority to prosecute the cases at issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that a true and correct copy of the foregoing has been furnished to all parties through the Florida Electronic Portal, this the 2<sup>1st</sup> day of April, 2017.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this computer-generated amicus curiae brief is in compliance with Florida Rules of Appellate Procedure 9.210 and 9.370.

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