



Sent via email

February 9, 2023

House Speaker Paul Renner
Florida House of Representatives
417 House Office Building
402 South Monroe Street
Tallahassee, FL 32399-1300

Re: Joint Opposition to House Bill 3B (Statewide Prosecutor)

Dear House Speaker Renner and members of the House:

The NAACP Legal Defense and Educational Fund, Inc., Brennan Center for Justice at NYU School of Law, American Civil Liberties Union (“ACLU”), ACLU of Florida, Florida State Conference of Branches and Youth Units of the NAACP, The League of Women Voters of Florida, Common Cause Florida, All Voting is Action Local Florida, and LatinoJustice PRLDEF write to express in the strongest possible terms our opposition to House Bill (“H.B.”) 3B, which seeks to expand the jurisdiction of the Office of Statewide Prosecution (“OSP”) to investigate and prosecute certain crimes related to voting, petition activities, and voter registration.¹ For the reasons explained below, we have serious concerns that this proposed law risks further waste of resources on flimsy investigations and prosecutions of returning citizens for what appear to be honest mistakes about voting eligibility. The proposed law also does nothing to address the problems of Florida’s complex and un navigable voting rights restoration system, which Florida officials have been well aware

¹ *H.B. 3B Bill Analysis, Florida House Judiciary Committee (Feb. 4, 2023, 11:46 A.M.), <https://myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=h.0003B.JDC.DOCX&DocumentType=Analysis&BillNumber=0003B&Session=2023B>.*

of since at least 2019. **We urge you to withdraw H.B. 3B from consideration or vote to reject it from being advanced out of committee.**

As nonprofit, nonpartisan civil and voting rights organizations, our aim is to ensure that all voters, including eligible returning citizens who are disproportionately Black, have equal, meaningful, and non-burdensome access to the ballot box and the opportunity to elect candidates of their choice. We enthusiastically supported Amendment 4 of 2018, which automatically restored voting rights to most Floridians with felony convictions. Several of us filed federal litigation that sought to protect the Amendment after the Florida Legislature and Governor enacted Senate Bill (“S.B.”) 7066 of 2019 to undercut its impact by requiring payment of court-imposed debts before voting rights would be restored.² That lawsuit documented and forewarned how S.B. 7066 created an unnavigable system that puts returning citizens at risk of criminal liability because there is no centralized and credible way for them to determine if they are eligible to vote.³ Although an appellate court determined that Florida’s unnavigable system did not violate the due process clause of the U.S. Constitution per se, those same concerns remain today.

To date, the State of Florida has failed to timely verify the eligibility of returning citizens. That is because the Legislature has made the voter eligibility requirements for returning citizens deeply confusing. The State also refuses to provide sufficient guidance to those who inquire whether they can vote. Making matters worse, the statewide voter registration form does not include all of the requirements that applicants with felony convictions must satisfy in order to be eligible to vote in Florida.⁴ The application likewise fails to mention the different mechanisms through which an individual who lost their voting rights may regain them. At the same time, government officials have allowed, and, in some cases, overtly encouraged, returning citizens to register to vote without verifying their eligibility to do so.⁵ The Department of State (“DOS”)—the agency tasked with verifying voter eligibility for those with past convictions⁶—has also approved voter registration applications and kept voters on the rolls while failing to perform their duty to

² *Litigation to Protect Amendment 4 in Florida: Gruver v. Barton (Consolidated with Jones v. DeSantis)*, Brennan Ctr. for Just. (Sept. 11, 2020), <https://www.brennancenter.org/our-work/court-cases/litigation-protect-amendment-4-florida>.

³ A federal court found that it is “sometimes hard, sometimes impossible” to determine how much a returning citizen in Florida must pay to become eligible to register and to vote. *Jones v. DeSantis*, 462 F. Supp. 3d 1196, 1241 (N.D. Fla. 2020) [hereinafter *Jones*]. State officials and the appellate court downplayed the risk of prosecution for returning citizens confused about their eligibility, saying the criminal statutes for illegal registration and voting require prosecutors to show that those charged knew they were ineligible but registered or voted anyway. See *Jones v. Governor of Fla.*, 975 F.3d 1016, 1047-48 (11th Cir. 2020).

⁴ Form DS-DE 39, Florida Voter Registration Application, DOS (Oct. 2013), available at <https://files.floridados.gov/media/704789/dsde39-english-pre-7066-20220429.pdf> (requiring applicants to check a box stating “I affirm that I am not a convicted felon, or if I am, my right to vote has been restored”).

⁵ 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>; 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>; Sam Levine, *Floridians Charged Over Voting Believed They Were Eligible, Documents Show*, THE GUARDIAN (Aug. 25, 2022), <https://www.theguardian.com/us-news/2022/aug/25/florida-voting-fraud-charges-eligibility>; Press Release, Fla. Dep’t of Law Enf’t, *In Case You Missed It: FDLE Arrests Convicted Murders, Sex Offenders for Voting Illegally* (Aug. 18, 2022), <http://www.fdle.state.fl.us/News/2022/August/In-case-you-missed-it-FDLE-arrests-convicted-murde>.

⁶ Fla. Stat. §§ 98.075(5), 98.0751(3)(a).

identify voters potentially ineligible to vote.⁷ And the Florida Department of Law Enforcement (“FDLE”), which is required by law to help DOS identify potentially ineligible voters whose voting rights have not been restored, has also failed for years, and through at least three statewide elections, to notify DOS about potentially ineligible voters with felony sexual offenses.⁸

Despite these grave failings, just five days before Florida’s 2022 primary election, Florida officials, including the Office of Election Crimes and Security (“OECS”), in coordination with OSP, arrested and began prosecuting returning citizens for allegedly registering or voting while ineligible. Under the Florida Constitution, OSP has “concurrent jurisdiction with the 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.”⁹ (emphasis added).

OSP thus has the power to prosecute only when a criminal offense has occurred in, or has affected, two or more judicial circuits. OSP has asserted that it has authority to prosecute the 19 returning citizens arrested by OECS and FDLE on the grounds that they registered and voted outside of the Second Judicial Circuit (containing Tallahassee) and state authorities *in Tallahassee* approved their registrations and allowed them to vote. In other words, OSP’s theory of their authority is that the DOS’ Division of Elections is an out-of-circuit co-conspirator in the alleged criminal activity because of the Division’s role in administering voter registration and elections. That is just as absurd as it sounds. And it’s why Florida courts have rejected this argument not once, but *three times*, concluding that OSP lacks jurisdiction to prosecute the allegations it has raised. One Florida court reasoned: “If the Court accepts OSP’s arguments then the Court must ignore hundreds of years of *stare decisis* and the foundation of our legal system. Not to mention, the State would have to become a ‘co-conspirator,’ which is highly improbable, and the parties have

⁷ Between Amendment 4’s effective date on January 8, 2019, and May, 2020, DOS identified as many as 85,000 pending voter registrations for returning citizens in need of screening. *Trial Tr. Vol. 5*, at 1298:8–1301:22, *Jones*, 462 F. Supp. 3d 1196 (No. 4:19cv300-RH/MJF). The Department estimated that the process could take until 2026 at the earliest to complete because the Department’s caseworkers could only process an average of 57 registrations per day. *Jones*, 462 F. Supp. at 1228-29.

⁸ *Investigative Report*, FDLE (January 2022), <https://www.brennancenter.org/sites/default/files/2022-11/FDLE%20JA-32-0008%20IR%2049%20-%20info%20from%20FDLE%20re%20MOU%20sex%20offender%20checks.pdf>.

⁹ Fla. Const., Art. IV, § 4(b); *see also* Fla. Stat. § 16.56(1)(a)(17).

already stipulated there are no co-conspirators.”¹⁰ With H.B. 3B, OSP is asking the Legislature to abet an end-run around these decisions.

Publicly-available information, including police bodycam footage from some of the 19 arrested and prosecuted by OSP, suggests that most, if not all, of those charged made honest mistakes about their voting eligibility. Many of those charged, for example, had been told by a government official that they could vote.¹¹ Several received voter information cards in the mail. Florida sends this card to all newly-registered voters, including those it later determines to be ineligible, so long as the application is complete and the State has confirmed the registrant to be a real person.¹² Local prosecutors, moreover, already have authority to prosecute election fraud—and at least one local prosecutor concluded that, under the circumstances of these cases, “[t]he evidence fails to show willful actions[.]”¹³ That prosecutor declined to bring charges against six individuals previously convicted of felony sex offenses for voting in 2020 because those individuals, like the other people charged by OSP, were given voter information cards, were never notified that they were ineligible, and were “encouraged to vote by various mailings and misinformation.”¹⁴ Indeed, news reports show that the Governor tasked OSP with prosecuting the above-mentioned 19 people because “people weren’t getting prosecuted” by local prosecutors.¹⁵ But the reason why “people weren’t getting prosecuted” is because there simply is no widespread voter fraud in Florida’s elections. That is why more than half of the 3,026 alleged “election law

¹⁰ See [Order Granting Def.’s Mot. to Dismiss Due to Lack of Subject Matter Jurisdiction](#), *State v. Hubbard*, No. 22008077CF10A (Fla. 17th Jud. Cir. Ct. Dec. 23, 2022; see also [Order on Motion to Dismiss](#), *State v. Wood*, No. 13-2022-CF-015009-0001-XX (Fla. 11th Jud. Cir. Ct. Oct. 21, 2022); [Order on Mot. to Dismiss](#), *State v. Miller*, No. 13-2022-CF-015012-0001-XX (Fla. 11th Jud. Cir. Ct. Dec. 12, 2022). Moreover, as of February 6, 2023, another 6 (of the 19) defendants charged by OSP have pending motions challenging the office’s authority to prosecute. *State v. Washington*, No. 2022-CF-009611-A-O (Fla. 9th Jud. Cir. Ct.); *State v. Foster*, No. 2022-CF-009607-A-O (Fla. 9th Jud. Cir. Ct.); *State v. Singleton*, No. 22008118CF10A (Fla. 17th Jud. Cir. Ct.); *State v. Simpson*, No. 50-2022-CF-006574-AXXX-MB (Fla. 15th Jud. Cir. Ct.); *State v. Suggs*, No. 22008080CF10A (Fla. 17th Jud. Cir. Ct.); and *State v. Dana*, No. 22008078CF10A (Fla. 17th Jud. Cir. Ct.). OSP dropped charges against another defendant because of “information received” from the Hillsborough County Supervisor of Elections and because the defendant had been sentenced to prison in a separate, unrelated case, making his motion moot. *State v. Patterson*, No. 22-CF-011036-A (Fla. 13th Jud. Cir. Ct.). A judge denied a motion filed by another defendant in Hillsborough County; however, the defendant has since filed an addendum notifying the court that the Legislature has taken up this bill. *State v. Hart*, No. 22-CF-011041-A (Fla. 13th Jud. Cir. Ct.).

¹¹ *Supra* n.5.

¹² See Fla. Stat. § 97.071.

¹³ Memorandum from Jonathan Olson, Div. Supervisor, State Att’y Office, Fifth Judicial Dist. Circuit (June 13, 2022), <https://www.brennancenter.org/sites/default/files/2022-11/2022.06.13%20Non-prosecution%20letter%20from%20State%20Attorney%205th%20Judicial%20Circuit%20re%20voters%20with%20sex%20offenses.pdf>.

¹⁴ *Id.*

¹⁵ Lori Rozsa & Tim Craig, *DeSantis’s New Election Crimes Unit Makes Its First Arrests*, WASHINGTON POST (Aug. 18, 2022), <https://www.washingtonpost.com/politics/2022/08/18/desantis-florida-election-arrests/> (quoting Gov. DeSantis as saying, in reference to OECS, at his August 18, 2022, press conference: “Before I proposed this, this was my idea, because people weren’t getting prosecuted. There were just examples of stuff seeming to fall through the cracks.”); Michael Wines, *DeSantis Hails Voter Fraud Crackdown, but Start Is Slow*, NEW YORK TIMES (Aug. 18, 2022), <https://www.nytimes.com/2022/08/18/us/desantis-election-voter-fraud.html> (quoting Gov. DeSantis as saying “[n]ow we have the ability with the attorney general and statewide prosecutors to bring these cases on behalf of the state,” at his August 18, 2022, press conference).

violations or irregularities” referred to OECS since the office opened last summer have been closed.¹⁶

For all these reasons, there is no need to expand OSP’s jurisdiction to permit it to investigate and prosecute the “voting” and “elections” crimes identified in H.B. 3B. To expand OSP’s jurisdiction and increase the already significant resources allocated to that office risks that returning citizens will continue to be arrested, prosecuted, and ensnared in the criminal legal system for honest mistakes about their eligibility. It also risks intimidating returning citizens who *are* eligible to vote. Such an outcome is unjust, and it is particularly cruel given the well-documented inability of Florida officials to determine and verify returning citizens’ voting eligibility.

Florida should stop bringing these cases against returning citizens who seem to have registered or voted in good faith, even if mistakenly—that’s an error, not a crime. Nor should it be adding to or increasing OSP’s resources.¹⁷ Instead, state officials should find ways to fix the complex and unnavigable system for returning citizens to determine their eligibility, including those with outstanding legal financial obligations, and invest resources to solve current known problems. For example, the Legislature could mitigate the harm of its pay-to-vote system by enacting a law stating that any court debts still outstanding once a person has completed their supervisory sentence are automatically converted to civil obligations, and such civil obligations are not part of someone’s sentence. The voter registration form must also be revised: currently, it fails to provide sufficient information to inform applicants with felony convictions of the eligibility requirements for voting in Florida, putting them at risk of misguided prosecution. Some of the undersigned organizations, and others, have put the Secretary of State on notice of our concerns with the form.¹⁸ Moreover, there is a need for a centralized system that returning citizens can consult to determine their eligibility. Based on the record developed in the challenge to Florida’s pay-to-vote system, legislative staff testified that it would require significant funding, information technology resources, and staff capacity that Florida’s DOS did not have. The Legislature even contemplated such a clearinghouse or centralized location for all the relevant data to verify citizens’ eligibility, but rejected the idea because it was very costly and viewed as unnecessary. Now, years later, for the reasons described above, that funding is still needed and it is nowhere to be found. Yet the Legislature inexplicably focuses on OSP. None of the fundamental defects we noted above will be addressed by expanding OSP’s jurisdiction or giving it more resources.

Again, we urge you to **withdraw H.B. 3B from consideration or to vote to reject it from being advanced out of committee.**

¹⁶ Based on OECS’s own data, its outsized investigations have led to startlingly few, though nonetheless impactful outcomes: 52% of all alleged violations turned into closed cases and 47% of all alleged violations were closed by OECS; 26 cases (0.86%) resulted in arrests; and OECS was the source of 33% of all alleged violations. DOS, OECS Report, Jan. 15, 2023 at 10-90, <https://files.floridados.gov/media/706232/dos-oecs-report-2022.pdf>.

¹⁷ *Supra* n1 at 4.

¹⁸ On January 13, 2023, several of the undersigned and other signatories sent a letter to the Secretary of State regarding Florida’s likely non-compliance with the National Voter Registration Act because its voter registration application does not adequately inform applicants with felony convictions of their eligibility under Florida law. The letter also proposes changes to the form to bring it in compliance with federal law.

We would welcome the opportunity to discuss our concerns in more detail. If you have any questions, feel free to contact Kara Gross, Legislative Director, ACLU of Florida at (786) 363-4436 or kgross@aclufl.org.

Respectfully,

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