No. 25-12762

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

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Kayle Barrington Bates,
*Plaintiff-Appellant*,

- v -

Ron DeSantis,
*Defendant-Appellee.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
NO: 5:25-CV-192-MCR-MJF

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# BRIEF OF THE CENTER FOR CONSTITUTIONAL RIGHTS; CONSERVATIVES CONCERNED; THE MUSLIM LEGAL FUND; HARRY LEE ANSTEAD; JODY DAVID ARMOUR; CHESA BOUDIN; CATHERINE GROSSO; AND AUSTIN SARAT; AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT

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***** EXECUTION SCHEDULED FOR AUGUST 19, 2025, AT 6:00 P.M. *****

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***Bates v. DeSantis*** **No. 25-12762**

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

The undersigned counsel of record certifies that the following listed persons as entities as described in 11th Cir. R. 26.1-2(a) have an interest in the outcome of this case, and were omitted from the Certificate of Interested Persons in briefs that were previously filed per 11th Cir. R. 26.1-2(b).

1. Anstead, Harry Lee, *amici curiae*
2. Armour, Jody David, *amici curiae*
3. Boudin, Chesa, *amici curiae*
4. The Center for Constitutional Rights, *amici curiae*
5. Conservatives Concerned, *amici curiae*
6. Dunn, Thomas, counsel for *amici curiae*
7. Grosso, Catherine, *amici curiae*
8. The Muslim Legal Fund, *amici curiae*
9. Sarat, Austin, *amici curiae*

Corporate disclosure: The Center for Constitutional Rights and Muslim Legal Fund are non-profit entities exempt from income tax under section 501(c)(3) of the Internal Revenue Code. 26 U.S.C. § 501(c)(3). None of the aforementioned are publicly traded companies or corporations with an interest in the outcome.

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## STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

*Amici* listed and described below are national organizations devoted to the protection of civil rights and fighting against racial discrimination within the justice system and death penalty scholars. *Amici* believe the judiciary has a critical role in ensuring that the administration of justice is free from racial bias, particularly in capital cases where the stakes are highest.

*Amici* are:

The Center for Constitutional Rights (CCR) is dedicated to advancing and protecting the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights, including the prohibitions against cruel and inhuman treatment and race discrimination. CCR engages in litigation, advocacy and public education on a broad range of civil and human rights issues.

Conservatives Concerned is a network of political and social conservatives who question the alignment of capital punishment with conservative principles and values. Our programs include educating conservatives about the failed death penalty system and mobilizing them to bring about its end.

The Muslim Legal Fund (MLFA) is a national civil liberties legal organization that engages in litigation, policy advocacy, and public education to protect the rights

[1] No party's counsel authored this brief in whole or in part. No person, other than amicus curiae's counsel, funded the preparation or submission of this brief. All parties have consented to the filing of this brief

of Muslims and other marginalized or targeted communities facing injustice in the United States. MLFA challenges government overreach, discriminatory practices, and violations of constitutional rights, particularly where national security or immigration law has been used to justify unequal treatment. MLFA's Criminal Defense Department has a strong focus in its cases on the discriminatory enforcement and impact of harsh sentencing laws on Muslims in the United States, including advocating for sentencing reform at the United States Sentencing Commission. MLFA joins as amicus to underscore the imperative that the justice system remain free from racial and religious discriminatory enforcement, especially in capital cases where the consequences are irreversible.

Former Justice Harry Lee Anstead was the 76th Justice on the Florida Supreme Court and served from 1994-2009. Justice Anstead worked his way through both undergraduate and law school at the University of Florida and he later was the first sitting judge in the United States to earn an academic degree in the judicial process when he was awarded a Master of Laws degree at the University of Virginia. Between undergraduate and law school he served with the National Security Agency in Washington, D.C. Justice Anstead was a trial and appellate lawyer in South Florida until 1977 when he became a judge of the Fourth District Court of Appeal, where he served as Chief Judge and from time to time as a circuit and county judge throughout the district. As an appellate judge, he was especially noted for his many

dissenting and other opinions later approved or adopted by the Florida Supreme Court. Justice Anstead has been troubled by Mr. Bates' case – dissenting from the affirmance of Mr. Bates death sentence and from the denial of DNA testing.[2]

Jody David Armour is the Roy P. Crocker Professor of Law at the University of Southern California Gould School of Law. He has been a member of the faculty since 1995. His expertise ranges from personal injury claims to claims about the relationship between racial justice, criminal justice, and the rule of law. Armour studies the intersection of race and legal decision making as well as torts and tort reform movements. He is a Soros Justice Senior Fellow of The Open Society Institute's Center on Crime, Communities and Culture. He has published articles in *Stanford Law Review, California Law Review, Vanderbilt Law Review, Boston College Law Review, Southern California Review of Law and Women's Studies, University of Colorado Law Review, University of Pittsburgh Law Review, Loyola of*

[2] Justice Anstead dissented to the affirmance of Mr. Bates' death sentence arguing that he should have been allowed to waive his right to parole giving the jury the life without parole option that the jury requested. He was joined by Justice Pariente and Justice Kogan on the direct appeal of Mr. Bates' resentencing. *Bates v. State*, 750 So. 2d 6, 22 (1999) (Anstead, J. dissenting, joined by Pariente, J., and Kogan, Senior Justice). Justice Anstead later dissented from the denial of Mr. Bates' request for DNA testing. "I cannot agree with the majority that Bates is not entitled to have DNA testing of certain evidence in order to bring more certainty to the sentencing process." *Bates v. State*, 3 So. 3d 1071, 1108 (2009) (Anstead, Senior Justice, concurring in part and dissenting in part).

*Los Angeles Law Review, Southwestern University Law Review,* and *Ohio State Journal of Criminal Law*. His book *Negrophobia and Reasonable Racism: The Hidden Costs of Being Black in America* (New York University Press) addresses three core concerns of the Black Lives Matter movement—namely, racial profiling, police brutality, and mass incarceration.

Chesa Boudin is the founding Executive Director of Berkeley's Criminal Law & Justice Center (CLJC). CLJC is a leading research institution dedicated to advancing criminal justice reform and sentencing equity throughout the legal system whose scholarship appears in prestigious academic publications including Sage, Boston College Law Review, Wake Forest Law Review, and Berkeley Journal of Criminal Law, to name a few. CLJC's national conferences have garnered significant media coverage, including recognition from the Wall Street Journal. CLCJ combines rigorous research with practical advocacy, having spearheaded class action litigation and established strategic partnerships with local government agencies, including District Attorney offices, to directly address sentencing disparities. Affiliated with UC Berkeley School of Law, CLJC operates independently in its research and advocacy efforts. The University of California is not a party to this brief.

Catherine Grosso is a Professor of Law at the Michigan State University College of Law. Her interdisciplinary scholarship examines the role of race and other extralegal factors in criminal investigations, trials, and the administration of capital

punishment. She teaches criminal procedure, capital punishment law, and a seminar on criminal juries. Her recent work examines the persistent role of race in jury selection and in charging and sentencing decisions relating to capital punishment. Her National Science Foundation-sponsored project with Professor Barbara O'Brien analyzes the ways stereotypes influence *voir dire* in capital cases. She is also the consulting editor of the National Registry of Exonerations, a virtual home for exoneration stories and an accessible, searchable statistical database about the cases; and was co-president of Society of American Law Teachers from 2020-2022. She was elected to the American Law Institute in 2022.

Austin Sarat is the William Nelson Cromwell Professor of Jurisprudence and Political Science at Amherst College. Professor Sarat is a pioneering figure in the development of legal study in the liberal arts, of the humanistic study of law, and of the cultural study of law. He is also an internationally renowned scholar of capital punishment, specializing in efforts to understand its social, political, and cultural significance in the United States.

## ARGUMENT

### I. MR. BATES' EXECUTION WARRANT IS THE PRODUCT OF RACIAL DISCRIMINATION IN VIOLATION OF EQUAL PROTECTION

*Amici* wish to underscore that on the merits of the question before the Courts, this Court should consider the role that race ineluctably played in the decision to execute Mr. Bates. The Equal Protection Clause of the Fourteenth Amendment mandates that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend VIII. This constitutional guarantee prohibits racially discriminatory practices in all aspects of the criminal legal system, including the decision to seek execution warrants. The judiciary has a critical role in ensuring that the administration of justice is free from racial bias, particularly in capital cases where the stakes are highest. The Supreme Court has consistently held that racial discrimination in legal proceedings violates the Equal Protection Clause. For example, in *Batson v. Kentucky*, 476 U.S. 79 (1986), the Court ruled that racial discrimination in jury selection is unconstitutional, establishing a precedent for addressing racial bias in other areas of the criminal justice process. The Supreme Court has demonstrated a willingness to address racial discrimination in legal proceedings, as seen in *Loving v. Virginia*, 388 U.S. 1 (1967). These cases underscore the importance of judicial intervention in correcting systemic biases and ensuring fairness in the justice system, especially in capital cases.

In 2025, there has been a noticeable increase in executions. According to an analysis by the Death Penalty Policy Project, the surge does not reflect a national trend. Rather, the execution surge "has been confined almost exclusively to jurisdictions that, as states or territories at the time of the civil war, practiced 26 of the 27 executions so far in 2025 (96.3%) have been in these former enslavement jurisdictions." *Robert Dunham, Executions Are Up But the Sky Is Not Falling, THE DP3 SUBSTACK (Aug. 4, 2025),* https://dppolicy.substack.com/p/executions-are-up-but-the-sky-is.

So far in 2025, Florida has executed nine people, the highest of any state in the country. Governor DeSantis is responsible for setting this state record with more executions in a single year since the death penalty was reinstated in 1976. The Florida record for executions is driving a national increase. "Governor Ron DeSantis is attempting to position himself among the far-right wing of his party as a potential successor to President Trump." *Id.* The apparent politicization of the death penalty in the final two years of his last term as governor raises additional concerns of lack of due process and a denial of equal protection. Kate Payne, *DeSantis set a Florida record for executions. It's driving a national increase*, THE ASSOCIATED PRESS (Aug. 2, 2025, 12:03 AM), https://apnews.com/article/death-penalty-florida-execution-desantis-trump-5a2271ea97d40dfbc175c9ee829121f7.

Racial bias against defendants of color and in favor of white victims has a strong effect on who is capitally prosecuted, sentenced to death, and executed. A bias towards white-victim cases has been found in almost all the sophisticated studies exploring this area over many years. These studies typically control for other variables in the cases studied, such as the number of victims or the brutality of the crime and still found that defendants were more likely to be sentenced to death if they killed a white person. "Nationwide, more than 75% of death row defendants who have been executed were sentenced to death for killing white victims, even though in society as a whole about half of all homicide victims are African American." Race and the Death Penalty by the numbers, Death Penalty Information Center *Available at* https://deathpenaltyinfo.org/policy-issues/biases-and-vulnerabilities/race/race-and-the-death-penalty-by-the-numbers. According to a 2020 study focused on the administration of capital punishment in Texas from 1976 through 2016, white females are valued more highly than the lives of other victims. The study found that a defendant who killed a white female was 2.8 times more likely to be sentenced to death than a defendant who did not kill a white female. Scott Phillips & Trent Steidley, A Systematic Lottery: The Texas Death Penalty, 1976 to 2016, Colum. Hum. Rts. L. Rev. Vol. 51.3, 1044, 1063 (2020).

Although race of the victim is a significant factor in who gets sentenced to death, the more relevant issue is who gets executed. The truth of modern death penalty is that most persons sentenced to death are not executed. "Between 1973 and June of 2019, more than 8,000 persons have been sentenced to death, but about 1,500 persons have been executed. Death sentences are remarkably poor predictors of who will ultimately be executed." *Whom the State Kills*, Scott Phillips & Justin Marceau, Harv. C. R. C. L. L. Rev., Vol. 55, 601, 602, (2020). This study establishes that the "overall execution rate is substantially greater for defendants convicted of killing a white victim than for those convicted of killing a black victim. Specifically, 2.26% (22/972) of the defendants who were convicted of killing a white victim were ultimately executed, compared to just 0.13% (2/1503) of the defendants convicted of killing a black victim. Thus, the overall execution rate is a staggering seventeen times greater for defendants convicted of killing a white victim." *Id.* This study demonstrates that "the race of one's victim is an important factor in determining who will be executed." *Id.* at 659.

*Amici* respectfully submit that the statistics presented in Mr. Bates' complaint, in context, demonstrates a bias towards executing those who kill white victims. In addition, Florida's execution warrant selection process is devoid of transparency and gives the Governor unguided and sole discretion in deciding who should die. The resulting disparity is due to discrimination based on race, or it is at

least due to a constitutionally impermissible degree of arbitrariness. *See Furman v. Georgia*, 408 U.S. 238, 249 (1972) ("the basic theme of equal protection is implicit in 'cruel and unusual' punishments [and a] penalty…should be considered 'unusually' imposed if it is administered arbitrarily or discriminatorily.") (quotation marks omitted).

*Amici a*re aware that Governor DeSantis issued a death warrant for Curtis Windom hours after Mr. Bates served DeSantis with his complaint alleging racial discrimination in the warrant signing process. Mr. Windom is a Black man and was sentenced to death for killing three Black victims. Governor DeSantis' decision to seek that warrant on Mr. Windom is akin to an admission of racial discrimination based on the race of the victim and is itself an exercise of power based on race. *Amici* submit that the judiciary has a critical role in ensuring that the administration of justice is free from racial bias, particularly in capital cases where the stakes are highest, and especially at the stage of determining who will be executed.

## CONCLUSION

Given the role or at least impermissible risk that race has played in Mr. Bates' selection for the death penalty and ultimate execution, *Amici* believe that his proceedings – and his execution – should be stayed in order to investigate the question more closely and ensure that no execution should go forward where race in fact played a role.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I hereby certify this brief complies with the type-volume limit set by Fed. R. App. P. 29(a)(5), 32(a)(7)(B)(i), and 11th Cir. R. 32-4 because it contains 2,312 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief also complies with the typeface and type-style requirements of Fed. R. App. P. 32(a)(5)-(6) and 11th Cir. R. 32-3 because it uses a proportionally spaced 14-point font (Times New Roman) and is double spaced.

*/s/Thomas H. Dunn*
Thomas H. Dunn

## CERTIFICATE OF SERVICE

I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Eleventh Circuit on August 14, 2025, by using the

appellate CM/ECF system, and service was accomplished on all counsel of record by the appellate CM/ECF system.

*/s/Thomas H. Dunn*
Thomas H. Dunn