

Nos. 25A191, 25-5379

IN THE
Supreme Court of the United States

KAYLE BARRINGTON BATES,

Applicant,

v.

GOVERNOR OF FLORIDA,

Respondent,

On Emergency Application for a Stay of Execution and on Writ of Certiorari
to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR *AMICUS CURIAE*
THE SOUTHERN POVERTY LAW CENTER
IN SUPPORT OF APPLICANT/PETITIONER

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INTEREST OF AMICUS CURIAE

The Southern Poverty Law Center (“SPLC”)¹ is a nonprofit 501(c)(3) civil rights organization and a catalyst for racial justice in the South and beyond, working in partnership with communities to dismantle white supremacy, strengthen intersectional movements, and advance the human rights of all people. SPLC aims to reduce the incarcerated and detained population by decriminalizing and decarcerating Black and Brown people. SPLC has experience litigating 42 U.S.C. § 1983 cases and has served as counsel or *amicus curiae* before the U.S. Supreme Court, federal appellate and district courts, and state courts in its efforts to secure equal treatment and opportunity for marginalized members of society.

SUMMARY OF ARGUMENT

Despite significant and obvious evidence of racial bias and arbitrariness in the warrant selection process, the State seeks to execute Applicant-Petitioner Kayle Bates. Mr. Bates filed the instant action pursuant to 42 U.S.C. § 1983 in the U.S. District Court for the Northern District of Florida, seeking injunctive relief from these constitutional violations. He now seeks this Court’s review of these important constitutional questions, which will become moot absent entry of a stay.

Florida is the modern face of the South’s long history of racial violence, leading the nation in both executions and the dismantling of capital procedural safeguards.

¹ Pursuant to Rule 37.6, *amicus curiae* certifies that no party or its counsel authored this brief in whole or in part or made a monetary contribution intended to fund its preparation or submission. Nor did any person other than *amicus curiae* make such a monetary contribution.

Nearly one-third of all 2025 executions have taken place in Florida, and the state is on pace to triple Texas's execution total. This surge fits a broader pattern: almost all executions in recent years have occurred in former slaveholding states, and the overwhelming majority involve white victims, despite white people making up far fewer homicide victims overall. Florida exemplifies these disparities, with 94% of its executions since 2019 involving white victims.

These patterns are by design and stem from a criminal legal system distorted by racial bias at every stage. Black Floridians are disproportionately stopped, arrested, charged with enhancements, denied favorable pleas, convicted, and sentenced more harshly than their white counterparts.

Given this entrenched inequity, it is no surprise that Florida's warrant-selection process also reflects racial bias. The same forces that have long determined whose lives the death penalty values also shape decisions about who is executed and when. Racial subordination omnipresent throughout the legal system is not a quirk but a feature, and the continuation of a racial legacy that stretches from slavery to lynching to modern-day executions. Without meaningful safeguards that address this bias, the process for selecting execution warrants will remain constitutionally defective.

ARGUMENT

I. THE SOUTH'S EXECUTION PATTERNS, WITH FLORIDA AT THE FOREFRONT, ARE THE MODERN FACE OF HISTORICAL RACIAL VIOLENCE.

Of the twenty-eight executions that have taken place in the United States in 2025—the most in a decade²—Florida accounts for nearly one-third and has executed more than twice as many individuals as either Texas or South Carolina, the states tied for the second-highest number of executions.³ With two more executions scheduled this month, including that of Mr. Bates, Florida is on pace to nearly triple the individual execution counts of Texas and South Carolina and seize the ignominious title of the nation’s execution capital.⁴

The recent “execution surge,” however, has been geographically limited.⁵ Since January 2023, nearly 45% of executions have taken place in either Texas or Florida.⁶ And in 2025, all but one execution has taken place in “former enslavement jurisdictions.”⁷ Going back to 2019, the overwhelming majority of executions—97.7%—have occurred in states that were either part of the Confederacy, claimed by it, or permitted slavery.⁸

This racial legacy is not merely historical. It continues to shape who is sentenced to death and who is executed. Nationwide, 88% of executions that occurred

² Associated Press, *Florida Record for Executions Is Driving a National Increase*, NBC NEWS (Aug. 3, 2025), <https://www.nbcnews.com/news/us-news/desantis-florida-record-executions-rcna222733>.

³ *Execution List 2025*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/2025> (last visited August 15, 2025) [hereinafter Execution List].

⁴ *Id.*; Florida Supreme Court, *Death Warrant Cases*, <https://supremecourt.flcourts.gov/News-Media/Death-Warrant-Cases> (last visited Aug. 14, 2025).

⁵ Robert Dunham, *Executions Are Up, But the Sky Is Not Falling*, The DP3 Substack (Death Penalty Policy Project) (Aug. 14, 2025), <https://dppolicy.substack.com/p/executions-are-up-but-the-sky-is>.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

between January 1, 2024, and June 30, 2025 involved at least one white victim with 86% involving only white victims.⁹ This is despite white victims representing only about 41% of homicide victims overall.¹⁰ Florida is in lockstep with this pattern: since 2019, nearly 94% of executions in the state have involved white victims.¹¹ These disparities reflect how race influences sentencing outcomes and decisions about whose lives the death penalty prioritizes.

This current trend is consistent with execution patterns in the post-*Furman*¹² era: the South continues to carry out executions at a disproportionately high rate compared to the rest of the country.¹³ In 2025, Florida appears poised to lead the nation, with Governor Ron DeSantis setting a Florida execution record.¹⁴

⁹ Robert Dunham, *Surge in U.S. Executions Exhibits Huge White-Victim Preference*, The DP3 Substack (Death Penalty Policy Project) (June 10, 2025), <https://dppolicy.substack.com/p/surge-in-us-executions-exhibits-huge>.

¹⁰ Lizabeth Remrey, PhD, *Homicide Victimization in the United States, 2023*, Bureau of Justice Statistics Bulletin (May 2025), NCJ 309889, at 3, <https://bjs.ojp.gov/document/hvus23.pdf> (2023 is the most recently available data for homicide victim demographics).

¹¹ See *Execution Database*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/facts-and-research/data/executions> (last visited August 15, 2025) (filtering for executions in Florida from 2019–2025 yields eighteen executions; sixteen involved white victims; DPIC does not list victim race for Jeffrey Hutchinson; *but see* Tr. of R. vol. 1, at 2, *State v. Hutchinson*, No. SC2001-0500 (Fla.) (on file with Fla. Supreme Court Clerk’s Office) (describing two white male victims and two white female victims)).

¹² *Furman v. Georgia*, 408 US 238 (1972).

¹³ *Number of Executions by State and Region Since 1976*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/executions-overview/number-of-executions-by-state-and-region-since-1976> (last visited Aug. 14, 2025) (1,336 of 1,635 executions since 1976 have taken place in the South).

¹⁴ John Kennedy, *DeSantis shatters Florida record for executions in one year, with more to come*, TALLAHASSEE DEMOCRAT (Aug. 7, 2025), <https://www.tallahassee.com/story/news/local/state/2025/08/07/desantis-sets-mark-for-florida-executions-after-trump-sets-tone-at-top/85513628007/>.

The distinctive Southern embrace of capital punishment is in large part a product of the South's historical practice of chattel slavery and of slavery's enduring racial legacy long after the end of the Civil War. One of the strongest predictors of a state's propensity to conduct executions today is its history of lynch mob activity starting more than a century ago. Given this connection, it is no surprise that the current map of active death penalty states is predominantly a map of the former Confederacy; not a single state from that region is among the 29 states that either have abolished capital punishment or have conducted no more than three executions since 1976. It is the South's distinctive history with regard to the death penalty that eventually prompted the Supreme Court's constitutional scrutiny of capital punishment.¹⁵

While Southern states dominate in executions, Florida is becoming an outlier among them due to volume and its aggressive reshaping of capital punishment law.

Governor DeSantis leads not only in executions but also has used his second term to aggressively advance pro-death penalty policies. In 2023, he championed and signed into law legislation allowing non-unanimous jury recommendations in capital cases,¹⁶ making Florida one of only two states, along with Alabama,¹⁷ to allow such verdicts. Florida's outlier status is even clearer when considering the number of juror votes required for a death sentence: Florida has the lowest threshold in the nation, allowing 8-4 verdicts, while Alabama still requires at least ten jurors to agree.¹⁸

This return to non-unanimous verdicts follows a brief period where a similar scheme was found unconstitutional. In *Hurst v. Florida*, 577 U.S. 92 (2016), this Court

¹⁵ Carol S. Steiker and Jordan M. Steiker, *The Racial Origins of the Supreme Court's Death Penalty Oversight*, 42 HUM. RTS. 14, 14 (2017).

¹⁶ Kennedy, *supra* note 14.

¹⁷ Anthony Izaguirre, *Florida Eases Path for Death Penalty After Parkland Verdict*, AP News (Apr. 20, 2023), <https://apnews.com/article/florida-desantis-death-penalty-law-parkland-4aedef743fdb238c518cbfcbd71134065> (noting that aside from Florida and Alabama, Missouri and Indiana allow a judicial decision where a jury is split).

¹⁸ *Id.*

struck down Florida’s capital sentencing scheme because it allowed judges, rather than juries, to make the critical factual findings necessary to impose a death sentence, in violation of the Sixth Amendment. On remand, the Florida Supreme Court held that the ruling required not only jury fact-finding, but also a unanimous jury recommendation for death. *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). But the Florida Supreme Court reversed itself just four years later, holding that neither the federal nor state constitution requires unanimity, clearing the path for the 2023 legislation allowing 8-4 verdicts. *State v. Poole*, 297 So. 3d 487, 504 (Fla. 2020). The legislation was largely seen as a response to the 9-3 verdict that spared the life of Nikolas Cruz,¹⁹ who was convicted of killing seventeen people at Marjory Stoneman Douglas High School in Parkland, Florida, in February 2018.²⁰

Given this return to non-unanimity, it is unsurprising that Florida also leads the nation in new death sentences. In 2024, juries imposed death in seven cases—six of them non-unanimous.²¹ Indeed, nearly 60% of all of individuals currently on Florida’s death row were sentenced by non-unanimous juries.²²

Aside from making it easier to impose the death penalty, in 2023 Governor DeSantis also pushed for legislation to allow capital punishment for non-homicide crimes. Specifically, Florida passed a law allowing the death penalty in child sexual

¹⁹ *Id.*

²⁰ *Nikolas Cruz*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/tag/nikolas-cruz> (last visited Aug. 8, 2025).

²¹ Kennedy, *supra* note 14.

²² Robert Dunham, *Death Row U.S.A.—Spring 2025*, at 46 (NAACP Legal Defense and Educational Fund, Spring 2025), <https://www.naacpldf.org/wp-content/uploads/DRUSASpring2025.pdf>.

assault cases,²³ in direct violation of this Court’s ruling in *Kennedy v. Louisiana*, 554 U.S. 407 (2008). That same year, Florida and Texas accounted for 58% of all executions carried out nationwide.²⁴

This most recent legislative session, Governor DeSantis pushed the boundaries of capital punishment even further, signing a law mandating the death penalty for undocumented immigrants convicted of murder, and allowing it in cases where a person uses physical force to traffic or rape a child under twelve or a person who is mentally incapacitated.²⁵ He also signed legislation expanding the methods of execution to include nitrogen gas, hanging, or firing squad.²⁶

But the most telling evidence of the perilousness of Florida’s capital punishment system lies not in how many people it executes, but in how many it has nearly executed in error. Florida’s leadership in executions is not limited to the sheer number carried out. The state also leads the nation in death row exonerations, accounting for 15% of all death penalty exonerations nationally since 1973,²⁷ a wrongful conviction rate “much higher than the national average.”²⁸ That Florida is both the most aggressive execution state in 2025 and the state with the highest

²³ Kennedy, *supra* note 14.

²⁴ Tracy L. Snell, *Capital Punishment, 2023 — Statistical Tables*, at 1 (Bureau of Justice Statistics, July 2025), NCJ 310309, <https://bjs.ojp.gov/document/cp23st.pdf>

²⁵ Kimberly Leonard, *Florida’s Execution Expansion*, Politico: Florida Playbook (June 11, 2025), <https://www.politico.com/newsletters/florida-playbook/2025/06/11/floridas-execution-expansion-00398954>.

²⁶ *Id.*

²⁷ *Innocence Database*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/facts-and-research/data/innocence> (last visited Aug. 8, 2025).

²⁸ Kennedy, *supra* note 14.

number of death row exonerations underscores the lethal risks of lowering procedural safeguards in capital cases—including those governing warrant selection, as Mr. Bates now challenges.

II. THE CRIMINAL LEGAL SYSTEM SYSTEMATICALLY DEVALUES BLACK LIVES, FUELING RACIALLY SKEWED OUTCOMES AT EVERY STAGE, INCLUDING IN FLORIDA.

Florida's outlier status in its use of the death penalty cannot be separated from the deeper racial dynamics at play. From stops and arrests to charges, plea offers, and sentencing, racial disparities pervade every stage of the process, both nationally and in Florida.²⁹ These inequities shape who enters the system, how their cases are resolved, and whose lives the law ultimately devalues.

Starting with police encounters. In 2022, traffic stops were the most common type of police-initiated contact with those sixteen or older, amounting to more than sixteen million encounters that year.³⁰ Police do not stop or investigate all communities equally.³¹ Even though there is extensive evidence that white drivers

²⁹ Sarah J. Garcia, *The Death Penalty Seals Racial Minorities' Fate: The Unfortunate Realities of Being a Racial Minority in America*, 25 SCHOLAR: ST. MARY'S L. REV. RACE & SOC. JUST. 151, 187-88 (2023).

³⁰ *Contacts Between Police and the Public, 2022*, DEPT. OF JUSTICE BUREAU OF JUSTICE STATISTICS (Oct. 2024), at 4, <https://bjs.ojp.gov/document/cbpp22.pdf> (publishing data that showed police had contact with 12,446,800 drivers and 3,817,800 passengers during traffic stops in 2022).

³¹ See, e.g., Nazgol Ghandnoosh & Celeste Barry, *One in Five: Disparities in Crime and Policing*, The Sentencing Project (Nov. 2, 2023), <https://www.sentencingproject.org/app/uploads/2023/11/One-in-Five-Disparities-in-Crime-and-Policing.pdf>.

commit moving violations at the same or greater rates than other racial groups,³² racial disparities in traffic stops persist.³³

This is true in Florida, too. Data collected over a one-year period shows prolific, persistent, and severe racial and ethnic disparities in traffic stops.³⁴ A report analyzing enforcement of seatbelt laws in Florida found that police stopped and ticketed Black individuals far out of proportion to their representation, nearly twice as often as white drivers.³⁵

Black Americans are likewise more likely to be arrested than white people.³⁶ In 2020, Black Americans were arrested at roughly twice the rate of White Americans—4,223 arrests per 100,000 Black residents compared to 2,092 per 100,000 White residents.³⁷ Those statistics hold true for Florida as well.³⁸

³² See William Cai et al., *Measuring Racial and Ethnic Disparities in Traffic Enforcement with Large-scale Telematics Data*, 2022 PNAS NEXUS 1, 2 <https://perma.cc/3BMA-FUTJ>.

³³ See, e.g., Ghandnoosh & Barry, *supra* note 31, at 9-10.

³⁴ *Racial Disparities in Florida Safety Belt Law Enforcement*, at 9-11, ACLU (2016), https://www.aclu.org/wp-content/uploads/publications/racial_disparities_in_florida_safety_belt_law_enforcement.pdf.

³⁵ *Id.*

³⁶ Garcia, *supra* note 29, at 187; see also Vida B. Johnson, *Arresting Batson: How Striking Jurors Based on Arrest Records Violates Batson*, 34 YALE L. & POL'Y REV. 387, 389 (2016) (“A significantly higher percentage of people of color have arrest records due to the disproportionate number of stops, searches, and arrests of people of color.”).

³⁷ *Racial and Ethnic Disparities*, Prison Pol'y Initiative (visited Aug. 14, 2025), https://www.prisonpolicy.org/research/racial_and_ethnic_disparities/ (citing Office of Juvenile Justice and Delinquency Prevention, Statistical Briefing Book, Arrests by Offense, Age, and Race).

³⁸ Gary Blankenship, *Senate reviews ethnic and racial statistics on crime*, The Florida Bar News (Nov. 7, 2019), <https://www.floridabar.org/the-florida-bar-news/senate-reviews-ethnic-and-racial-stats-on-crime/>.

Once arrested, prosecutors are more likely to charge people of color than their white counterparts, including with harsh sentencing enhancements that result in greater sentences.³⁹ In Florida, 74% of individuals serving life sentences because of habitual offender enhancements are Black.⁴⁰ Similarly, prosecutors offer less favorable pleas to people of color.⁴¹ Multiple studies have shown that prosecutors are more lenient in cases with minority victims.⁴² In one Florida county, there was a 6% difference in dismissal rates between cases involving Black victims and white victims, with prosecutors more likely to dismiss those with Black victims.⁴³

Once charged, studies have shown that Black people facing misdemeanors are more likely to be convicted and sentenced to incarceration than white people.⁴⁴ This is especially true with all white juries. One Florida study showed that during a ten-

³⁹ Elizabeth Hinton, LeShae Henderson & Cindy Reed, *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, at 8-9, Vera Evidence Brief, Vera Institute of Justice (May 2018) <https://vera-institute.files.svdcdn.com/production/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf?dm=1568656329>.

⁴⁰ Dan Sullivan, Cary Aspinwall & Weihua Li, *He Got a Life Sentence When He Was 22 — For Robbery*, The Marshall Project (Nov. 11, 2021), <https://www.themarshallproject.org/2021/11/11/he-got-a-life-sentence-when-he-was-22-for-robbery>.

⁴¹ Darren Lenard Hutchinson, “*With All the Majesty of the Law*”: *Systemic Racism, Punitive Sentiment, and Equal Protection*, 110 CAL. L. REV. 371, 397 (2022).

⁴² Besiki Kutateladze, Vanessa Lynn & Edward Liang, *Do Race and Ethnicity Matter in Prosecution?: A Review of Empirical Studies (First Edition)*, at 13 (citations omitted), Vera Inst. Of Prosecution and Racial Justice Program (Vera Inst. of Justice June 2012), <https://www.prisonpolicy.org/scans/vera/race-and-ethnicity-in-prosecution-first-edition.pdf>.

⁴³ National Conference of State Legislatures, *Racial and Ethnic Disparities in the Criminal Justice System* (May 24, 2022; updated July 3, 2025), <https://www.ncsl.org/civil-and-criminal-justice/racial-and-ethnic-disparities-in-the-criminal-justice-system>.

⁴⁴ Hinton, Henderson & Reed, *supra* note 39, at 8.

year period, all white juries were 16% more likely to convict Black defendants than white defendants, a gap that was “nearly eliminated” when at least one Black member was present in the jury pool.⁴⁵ And in a review of forty different studies at both the state and federal level, the research shows that Black people are more likely to receive harsher sentences than white people, even when controlling for other contributing factors.⁴⁶

In examining federal sentences, the U.S. Sentencing Commission reports that Black men receive sentences that are 13.4% longer than white males, and were 23.4% less likely to receive a probationary sentence than white males.⁴⁷ Even among Black defendants, studies show that darker-skinned individuals receive more severe sentences than their lighter-skinned counterparts.⁴⁸ In Florida, 54% of all prisoners serving life sentences are Black.⁴⁹

Racial bias is more pronounced in the capital context, where juries must be “death qualified,” or willing to impose a death sentence.⁵⁰ Research illustrates that

⁴⁵ Dax-Devlon Ross, *Bias in the Box*, Virginia Quarterly Review (Fall 2014) (citations omitted), <https://fbaum.unc.edu/teaching/articles/BiasInTheBox-VirginiaQuarterlyReview2014.pdf>.

⁴⁶ Hinton, Henderson & Reed, *supra* note 39, at 8-9.

⁴⁷ United States Sentencing Commission, *Demographic Differences in Federal Sentencing* (Nov. 14, 2023), at 11, 13, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2023/20231114_Demographic-Differences.pdf.

⁴⁸ Hinton, Henderson & Reed, *supra* note 39, at 9.

⁴⁹ Sullivan, Aspinwall & Li, *supra* note 40.

⁵⁰ American Civil Liberties Union, *Fatal Flaws: Revealing the Racial and Religious Gerrymandering of the Capital Jury* (June 24, 2025), at 11-12, <https://assets.aclu.org/live/uploads/2025/06/Fatal-Flaws-Revealing-the-Racial-and-Religious-Gerrymandering-of-the-Capital-Jury-1.pdf> [hereinafter *Fatal Flaws*].

these juries are not only more likely to convict, “but also more white, more male, and more biased.”⁵¹ Death qualification also disproportionately removes jurors of color.⁵² Aside from the problem of having an imbalanced jury, white juries are also more likely to impose a death sentence; in fact, “the higher the proportion of Whites on the jury, the more likely the jury was to favor death.”⁵³ A 2021 study of twelve capital trials in Duval County —among the small group of counties responsible for a disproportionate share of Florida’s death sentences⁵⁴—Black people comprised nearly 26% of those summoned for jury service but almost 40% of those dismissed in death qualification.⁵⁵ When considering all jurors of color, the percentage of death-qualification dismissals rose to 54%.⁵⁶

Considering the disparity that exists at virtually every touchpoint within Florida’s criminal legal system, it is no surprise that the state’s warrant selection process likewise suffers the taint of racial inequity. In Florida, 94% of executions since 2019 have involved white victims.⁵⁷

These inequities inevitably result in a system that is reflective of that bias. Despite a decline in the prison population overall, Black Americans are imprisoned

⁵¹ *Id.* at 11.

⁵² *Id.*

⁵³ *Id.* at 12 (quoting Mona Lynch & Craig Haney, Capital Jury Deliberation: Effects on Death Sentencing, Comprehension, and Discrimination, 33 L. & HUM. BEHAV. 481, 486 (2009)).

⁵⁴ *Hurst v. Florida*, DEATH PENALTY INFO. CTR. (Jan. 12, 2016), <https://deathpenaltyinfo.org/stories/hurst-v-florida>.

⁵⁵ Fatal Flaws, *supra* note 50, at 16.

⁵⁶ *Id.*

⁵⁷ *Execution Database*, *supra* note 11.

at five times the rate of white Americans.⁵⁸ In Florida, Black people make up just 15% of Florida's population,⁵⁹ yet nearly 48% of those incarcerated in the Florida Department of Corrections,⁶⁰ a striking overrepresentation of thirty-three percentage points. By contrast, white people comprise nearly 58% of Florida's population⁶¹ but only about 39% of those incarcerated,⁶² a disparity that lays bare the system's deep racial imbalance. This same racial imbalance has deep historical roots and finds its clearest modern expression in the administration of the death penalty, an institution that evolved directly from the racial terror of lynching.

III. CAPITAL PUNISHMENT HAS EVOLVED FROM LYNCHING BUT CONTINUES TO SERVE THE SAME PURPOSE: RACIAL CONTROL THROUGH STATE VIOLENCE.

The modern-day death penalty as it exists in Florida and across the South mimics legal and extra-legal practices from previous eras. Throughout U.S. history, Black people have been subjected to the death penalty at higher rates, for a broader range of crimes, and by more gruesome methods than white people. It is against this backdrop that Florida currently constitutes its death row and selects individuals for execution.

⁵⁸ Brandee McGee, *No Apology Until Abolition: Redressing the Ongoing Atrocity of Slavery*, 60 SAN DIEGO L. REV. 535, 536 (2023).

⁵⁹ U.S. Census Bureau, *Florida: Race and Ethnicity*, data.census.gov (2020 Decennial Census), <https://data.census.gov/profile/Florida?g=040XX00US12#race-and-ethnicity> [hereinafter Florida Census].

⁶⁰ Florida Department of Corrections, *Annual Report 2023–2024* (Mar. 4, 2025), at 19, https://fdc-media.ccplatform.net/content/download/35691/file/Annual_Report_23-24%20-%20FINAL.pdf [hereinafter FDC Annual Report].

⁶¹ Florida Census, *supra* note 59.

⁶² FDC Annual Report, *supra* note 60, at 19.

In the late eighteenth century through the Civil War, more Black people than white people were sentenced to death, and “the rate of execution for nonlethal crimes varied considerably by race.”⁶³ Southern states during this period led the country in execution of Black people.⁶⁴ And while this same period saw a narrowing of the applicability of the death penalty across northern states, where such restrictions were enacted in the South, they were done so with explicit exception for enslaved persons, who remained subjected to a death sentence for a wider range of offenses.⁶⁵

In antebellum Virginia, seventy-one offenses carried the death penalty for enslaved people but not for white people.⁶⁶ Acts simultaneously ordinary and threatening to the racial order, such as teaching literacy or owning firearms, were criminalized for enslaved and free Black people alike, but not for white people.⁶⁷

The disparities continued despite Union victory and the subsequent ratification of the Reconstruction Amendments to the U.S. Constitution. Even as Southern Black citizens achieved significant political gains, including election to state and federal office during Reconstruction, white vigilante mobs enforced the racial order through lynchings, which surged across the South.⁶⁸ By the 1870s, when

⁶³ Carol S. Steiker and Jordan M. Steiker, *The American Death Penalty and the (in)visibility of Race*, 82 U. CHI. L. REV. 243, 245-46 (2015).

⁶⁴ *Id.* at 246.

⁶⁵ *Id.* at 247.

⁶⁶ ISABEL WILKERSON, *CASTE: THE ORIGINS OF OUR DISCONTENTS* 146 (Random House 2020).

⁶⁷ *Id.*

⁶⁸ EQUAL JUSTICE INITIATIVE, *LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR* 10-12 (3d ed. 2017), <https://lynchinginamerica.eji.org/drupal/sites/default/files/2021-11/report.pdf> [hereinafter EJI LYNCHING].

the number of lynchings had dropped across most of the country, the “exception to this national trend was the Southern states, where rates increased rather than decreased. These divergent trends continued, so that by 1890 the institution of lynching had become a predominantly Southern one, and its victims overwhelmingly [B]lack.”⁶⁹ 1877 saw the drawdown of federal troops from former Confederate states and an increase in white political violence. In the late nineteenth and early twentieth centuries, as white political, social, and economic power consolidated and became near total across the South, lynchings became even more common.⁷⁰

White mobs “redressed” so-called offenses ranging from leaving plantations—where Black workers were no longer enslaved but nominally employed—to interracial cohabitation to alleged rape. The latter was construed so broadly that it could include nothing more than a Black man’s perceived compliment to, or expression of interest in, a white woman, and was often punished through collective, public violence ending in the death of the Black person who had transgressed the accepted social order.⁷¹

In its comprehensive survey of the history of lynching in America, the Equal Justice Initiative (EJI) uses the term “racial terror lynchings” to describe the phenomenon of extrajudicial killings of Black people by white vigilantes, characterized by one or more of the following:

⁶⁹ David Garland, *Penal Excess and Surplus Meaning: Public Torture Lynchings in Twentieth-Century America*, 39 LAW & SOC’Y REV. 793, 801 (2005).

⁷⁰ EJI LYNCHING, *supra* note 68, at 27.

⁷¹ *See* EJI LYNCHING, *supra* note 68, at 15 (internal citation omitted) (White terror groups also focused intense energy on imposing “their own vision of a righteous society,” which usually meant targeting Black men for perceived sexual transgressions against white women.).

- (1) lynchings that resulted from a wildly distorted fear of interracial sex;
- (2) lynchings in response to casual social transgressions;
- (3) lynchings based on allegations of serious violent crime;
- (4) public spectacle lynchings;
- (5) lynchings that escalated into large-scale violence targeting the entire African American community; and
- (6) lynchings of sharecroppers, ministers, and community leaders who resisted mistreatment, which were most common between 1915 and 1940.⁷²

The purpose of terror lynchings was “to enforce Jim Crow laws and racial segregation—a tactic for maintaining racial control by victimizing the entire African American community, not merely punishment of an alleged perpetrator for a crime.”⁷³

The numbers are dramatic and chilling. In the 1880s, a lynching victim was four times more likely to be Black than white; after 1900, that ratio increased 325% ratio, “soar[ing] to more than 17 to 1.”⁷⁴ Between 1889 and 1929, a Black person was lynched every four days.⁷⁵ In its study of lynching records, EJI found the occurrence of 4,084 extrajudicial, “racial terror lynchings in twelve Southern states between the end of Reconstruction in 1877 and 1950.”⁷⁶

Though extra-judicial, lynchings served the widely accepted “system of racial control” in the South.⁷⁷ Lynchings were not state actions. Nevertheless, “they were staged public penalties imposed in response to allegations of serious crimes; they

⁷² *Id.* at 5.

⁷³ *Id.*

⁷⁴ *Id.* at 27.

⁷⁵ Zamir Ben-Dan, *Deeply Rooted in American History and Tradition: The U.S. Supreme Court’s Abysmal Track Record on Racial Justice and Equity*, 15 ALA. C.R. & C.L.L. REV. 45, 88–89 (2024).

⁷⁶ EJI LYNCHING, *supra* note 68, at 4.

⁷⁷ Dorothy E. Roberts, *Constructing a Criminal Justice System Free of Racial Bias: An Abolitionist Framework*, 39 COLUM. HUM. RTS. L. REV. 261, 274.

were conducted by respectable members of the white community, including local law officers; and they were approved by community leaders and state officials.”⁷⁸

The eventual decline in lynching in Southern states coincided with a reliance on “the increased use of capital punishment imposed by court order following an often accelerated trial.”⁷⁹ Anxious to impede the growing societal acceptance of lynching, Southern reformers proposed judicial process—immediate trials followed by immediate executions—that would achieve much the same result but would now bear the imprimatur of the state.⁸⁰

This trajectory—from state-sanctioned, judicially enforced death sentences in the early Republic and antebellum period, to the vigilante lynchings of Reconstruction and Jim Crow, to the decline of lynching and resurgence of judicial death penalty—reveals the enduring inclination of white-dominated society to subjugate Black citizens through the threat and imposition of death. Undergirding this history is the persistent insistence, enacted repeatedly and continually reinforced by individuals, mobs, and systems, that white lives are to be protected, while Black lives are disposable. As Isabel Wilkerson writes, “[t]he lesson teaches everyone . . . whose lives are considered expendable and whose are sacrosanct.”⁸¹

The historic nature of this devaluation of Black lives is precisely what makes it so entrenched and so dangerous. “Racial bias does not rest only or even primarily

⁷⁸ *Id.* (citing Garland, *supra* note 69, at 823).

⁷⁹ EJI LYNCHING, *supra* note 68, at 5.

⁸⁰ Steiker & Steiker, *supra* note 63, at 251 (citations omitted).

⁸¹ WILKERSON, *supra* note 66, at 241.

in the minds of those who implement the system; racism is engrained in the very construction of the system and implicated in its every aspect. . . .”⁸²

Sadly, Florida did not escape the repressive legacy of its Southern peers; indeed, as discussed *supra*, in 2025 it leads the nation—and sets a new state record—in executions as a tool for enforcing the social order. The State’s capital punishment regime must thus be viewed in the full context of its past. The unchecked, arbitrary power wielded against Black people in previous eras echoes through Florida’s current system. This is particularly true in the death warrant process, which accords total discretion to the Governor and requires no transparency or prescribed process to guard against arbitrary exercise. Whether Florida could ever constitute a death penalty system that operates free of its racist past need not be answered here; it has failed to do so thus far.

IV. THE FEDERAL RESURGENCE OF EXECUTIONS UNDER TRUMP FUNCTIONED AS A RACIAL SIGNAL, REINFORCING WHITE SUPREMACY AMID RISING EXTREMISM.

Florida’s current, outlier pace of executions should be viewed not only in the context of its past, as a function and reinforcement of the pervading racial order, but as it is situated today. President Donald Trump’s first administration reinstated federal executions after a seventeen-year hiatus, executing thirteen people in just six months, the majority of whom were Black or brown men.⁸³ This policy reversal,

⁸² Roberts, *supra* note 77, at 262.

⁸³ See *Executions under the Federal Death Penalty*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/federal-death-penalty/executions-under-the-federal-death-penalty/> (last visited August 15, 2025).

widely criticized for its racial disparity and rushed procedures,⁸⁴ was more than a punitive legal measure: it was a federal signal, affirming the legitimacy of racialized punishment in a country already grappling with a resurgence in white supremacist activity.⁸⁵ He also demonstrated a willingness to opine on active U.S. Department of Justice cases, tweeting a call for the death penalty in one such case.⁸⁶

On the first day of his second term, with most of federal death row cleared by commutations signed by outgoing President Joseph Biden, President Trump issued a formal statement in which he declared his support for the death penalty, explicitly invoking its historic use, and directed the U.S. Attorney General to, among other things, seek the death penalty in cases involving “a capital crime committed by an alien illegally present in this country.”⁸⁷ He further directed the Attorney General to “ensure that each state that allows capital punishment has a sufficient supply of drugs needed to carry out lethal injection,” and to imprison those whose death

⁸⁴ See Michael Tarm, *Fuller Picture Emerges of the Thirteen Federal Executions at the End of Trump’s Presidency*, ASSOCIATED PRESS (Oct. 3, 2023), <https://apnews.com/article/trump-executions-biden-death-penalty-brandon-bernard-c1b26807c5c40b337d14485c3d6df2de> (“The fuller picture reveals that officials cut corners and relied on a pliant Supreme Court to get the executions done, even when some — including Trump himself, in Bernard’s case — agreed that there might be valid reasons not to proceed with them all.”).

⁸⁵ Southern Poverty Law Center, *The Year in Hate & Extremism 2023*, (2023), <https://www.splcenter.org/wp-content/uploads/files/2023-year-in-hate-and-extremism.pdf> (noting that in 2023, SPLC documented the highest number of active white nationalist groups they ever recorded).

⁸⁶ J. Richard Broughton, *The Federal Death Penalty, Trumpism, and Civil Rights Enforcement*, 67 AM. U. L. REV. 1611, 1625 (2018).

⁸⁷ The White House, *Restoring the Death Penalty and Protecting Public Safety* (Jan. 20, 2025), <https://www.whitehouse.gov/presidential-actions/2025/01/restoring-the-death-penalty-and-protecting-public-safety/>.

sentences had recently been commuted “in conditions consistent with the monstrosity of their crimes and the threats they pose.”⁸⁸ Some have attributed Florida’s surge in executions to President Trump’s endorsement of them, and as Governor DeSantis’s “reach out” to him.⁸⁹

These directives and use of emotionally charged and dehumanizing language did not appear in a vacuum. The current operation of Florida’s death penalty exists in a history of racial violence and a contemporary climate of retributive politics grounded in hate. In 2023, the SPLC’s researchers found that Florida had “the second highest number of hate and antigovernment groups in the U.S.,” and “acted as the Southern base and headquarters for many national hate and anti-government groups.”⁹⁰ The convergence of federal policy and extremist ideologies presents a deeply troubling context for the administration of the ultimate punishment. In Florida, that convergence is not an abstraction. It is playing out in real time on death row.

CONCLUSION

Because “the death penalty is applied in a biased and discriminatory fashion,” there is no “method of which the State can avail itself to impose the death penalty in a constitutional manner.” *Asay v. State*, 210 So. 3d 1, 37 (Fla. 2016) (Perry, J., dissenting). When bias infects each stage of a criminal case—from charging decisions

⁸⁸ *Id.*

⁸⁹ Kennedy, *supra* note 14.

⁹⁰ Southern Poverty Law Center, *State of Hate in the Deep South* (June 4, 2024), <https://www.splcenter.org/resources/reports/hate-southern-states/>.

to jury selection to sentencing—death row itself is the product of that bias. While amicus curiae agrees that no execution should proceed absent a fair and non-discriminatory process for selecting warrants, the depth of bias in Florida’s capital system makes it so that, without robust procedural safeguards, such a process is unlikely ever to exist in practice. At a minimum, the Constitution demands a safeguard that meaningfully accounts for, and mitigates, this pervasive discrimination before the State may take the irrevocable step of setting an execution date. Until those safeguards exist, this execution must be stayed.

Respectfully submitted,

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