

**No. 21-10368**

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

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UNITED STATES,

*Plaintiff-Appellee,*

v.

Dahryl Lamont Reynolds

*Defendant-Appellant.*

On Appeal from the United States District Court  
for the Northern District of California

No. 4:18-cr-00158-JD

Hon. James Donato

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**MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT  
OF APPELLANT SEEKING REVERSAL**

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### **MOTION FOR LEAVE TO FILE**

Pursuant to Federal Rule of Appellate Procedure 29, amici curiae move for leave to file the concurrently submitted amicus brief in support of Appellant Dahryl Lamont Reynolds. Pursuant to Rule 29(a)(2), counsel for amici curiae certify that amici curiae sought consent from all parties to the filing of this brief. Counsel for both the Appellant and the Appellee have consented to the filing of this brief.

Amici curiae are non-profit organizations dedicated to furthering the principles of liberty and equality embodied in the United States Constitution and this Nation's civil rights laws. Amici the American Civil Liberties Union ("ACLU") of Northern California, the ACLU of Southern California, and the ACLU of San Diego and Imperial Counties work to advance the civil rights and liberties of Californians in the courts, in legislative and policy arenas, and in the community. This work includes efforts to dismantle barriers to reentry and reintegration for people with prior criminal convictions, and address the disparate harm caused by certain criminal legal policies in communities of color.

Amici are familiar with the issues presented in this case and write separately to inform the Court about issues that are not directly raised by the parties but that are implicated by the condition of supervised release that prohibits association with anyone with a known prior felony conviction. Specifically, amici's brief speaks to the body of research demonstrating that a broad ban on association is counterproductive to goals of rehabilitation, deterrence and reintegration; addresses

the public policy implications of a condition that reinforces stigma on the basis of prior conviction status; and also tackles the disproportionate impact of an associational ban on Black and Latine communities.

Because of its unique perspective and its interest in the issues now before the Court, amici respectfully seek permission to file the accompanying proposed brief in support of Appellant.

Date: May 26, 2022

*/s/ Shilpi Agarwal*

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 26.1 and 29(a)(4)(A) of the Federal Rules of Appellate Procedure, amici curiae state that they do not have a parent corporation and that no publicly held corporation owns 10 percent or more of their stock.

Pursuant to Federal Rule of Appellate Procedure Rule 29(a)(4)(E), amici curiae also certify that no person or entity, other than amici, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief or authored this brief in whole or in part.

Date: May 26, 2022

*/s/ Shilpi Agarwal*

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## STATEMENT OF INTEREST<sup>1</sup>

The American Civil Liberties Union (“ACLU”) of Northern California, ACLU of Southern California, and ACLU of San Diego and Imperial Counties are regional affiliates of the ACLU, a national nonprofit, nonpartisan organization dedicated to furthering the principles of liberty and equality embodied in the U.S. Constitution and this Nation’s civil rights laws. For decades, the ACLU affiliates in California have advocated to advance racial justice and the right of free association for all Californians, as well as the rights of the criminally accused. The ACLU affiliates in California have participated in cases, both as direct counsel and as amici, involving the enforcement of constitutional guarantees, including those protected by the First Amendment, those that apply to the criminally accused, and those advancing equal protection for Black and Latine persons.

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<sup>1</sup> Pursuant to Rule 29(a)(2), counsel for amici curiae certify that amici curiae have sought consent from all parties to the filing of this brief. Counsel for Appellant Dahryl Lamont Reynolds and counsel for the Appellee the United States have consented to the filing of this brief. Pursuant to Rule 29(a)(4)(e), counsel for amici curiae state that no counsel for a party authored this brief in whole or in part, and no person other than amici curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

## INTRODUCTION

Felony non-association conditions of supervised release, like that challenged here by Dahryl Lamont Reynolds, are racially discriminatory and counter to the goals of rehabilitation, deterrence, and de-stigmatization. The condition here challenged by Mr. Reynolds reads:

[Y]ou must not associate, communicate, or interact with any person you know has been convicted of a felony, unless granted permission to do so by the probation officer.

Amici submit this brief to expound upon the challenged condition's far-reaching and often catastrophic implications for the lives of people on post-conviction supervision, their families, and their communities. Moreover, amici offer further evidence of how this condition is counterproductive to the objective of reducing crime and recidivism, underscoring its failure to meet the applicable statutory criteria.

*First*, felony non-association conditions fail to meet the “reasonably related” test of 18 U.S.C. § 3583(d); indeed, such clauses run counter to the goal of rehabilitation because broadly prohibiting association with others with former felony convictions prevents supervisees from accessing both informal and formal support systems vital for successful reentry. Furthermore, non-association conditions tied to conviction status—rather than present criminal behavior—serve only to further stigmatize and isolate those with past felony convictions. As jurisdictions across the nation have increasingly recognized, de-stigmatizing and reintegrating people who have completed their sentence following a felony

conviction yields corresponding benefits for those individuals and for society as a whole.

*Second*, felony non-association conditions operate in a criminal legal system that disproportionately arrests, charges, and convicts Black and Latine persons based on their race. Felony non-association conditions therefore disparately subject Black and Latine people to social exclusion during a crucial and difficult period of reentry. Non-association conditions are more likely to prohibit Black and Latine people on supervision from cultivating connections with their family, church, support groups, or other community members simply because these communities are more likely to include people with felony convictions. And, because of compounding racial disparities in the criminal legal system, the disruptive effects of these conditions fall more acutely on Black and Latine communities generally.

*Finally*, these conditions' grossly counter-productive effects are not remedied by the fact that probation officers can, at their discretion, grant exceptions to their requirements. Incremental exceptions do not meaningfully ameliorate the dramatic reach of these clauses. Moreover, discretion vested entirely with individual probation officers is likely to magnify, not reduce, the disparate impact of the condition on Black and Latine people. Accordingly, amici urge the Court to strike down the unlawful condition that Mr. Reynolds now challenges.

## ARGUMENT

### **I. Felony Non-Association Conditions are Contrary to the Goals of Rehabilitation and Deterrence.**

Conditions of supervised release are valid only if they:

- (1) [are] reasonably related to the goals of deterrence, protection of the public, and/or defendant rehabilitation;
- (2) involve[ ] no greater deprivation of liberty than is reasonably necessary to achieve these goals; and
- (3) [are] consistent with any pertinent policy statements issued by the Sentencing Commission.

*United States v. Wolf Child*, 699 F.3d 1082, 1100 (9th Cir. 2012); *see also* 18 U.S.C. § 3583(d). The non-association condition imposed here is invalid because it is not reasonably related to the goals of deterrence, protection of the public, or rehabilitation. In fact, robust research shows that the non-association condition directly undermines all of these goals.

**A. Non-association conditions prevent supervisees from accessing relationships and support systems necessary to facilitate successful reentry and achieve deterrence.**

The condition’s requirement that re-entering people avoid anyone with a former felony conviction—including close family members, friends, and romantic partners, irrespective of the quality of their influence—is squarely at odds with the goal of rehabilitation. Close family, community, and romantic relationships are often *essential* support systems following a period of incarceration.<sup>2</sup>

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<sup>2</sup> Indeed, the critical nature of these relationships is made plain by the fact that they are cloaked with constitutional protection. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984) (“The Court has long recognized that, because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State”). The way in which this condition interferes with associational rights is further discussed in Mr. Reynolds’ brief.



Research on recidivism shows that the development and strengthening of social bonds—both through interpersonal relationships and within pro-social institutions—is associated with a reduced risk of committing another crime after release.<sup>3</sup> This effect has been proven in studies examining the impact of jail visitation on rates of recidivism, as well as in data showing that, more than any other factor, successful reentry of formerly incarcerated people is attributed to familial support.<sup>4</sup>

Friends and family can mitigate chronic stressors experienced during reentry by providing both tangible resources and emotional support. These networks are particularly important during the early post-release period, as a significant majority of people reintegrating into their communities report relying on their family and friends for housing, immediate financial assistance, and help finding work.<sup>5</sup>

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<sup>3</sup> Michael Rocque ET AL., *Unraveling Change: Social Bonds and Recidivism among Released Offenders*, 8 VICTIMS & OFFENDERS 209, 220-21 (Mar. 27, 2013), available at: <https://doi.org/10.1080/15564886.2012.755141>. See also, Ryan Shanahan & Sandra Villalobos Anudelo, *The Family and Recidivism*, AMERICANJAILS (Sept./Oct. 2012), available at: <https://www.prisonpolicy.org/scans/vera/the-family-and-recidivism.pdf>.

<sup>4</sup> William D. Bales & Daniel P. Mears, *Inmate Social Ties and the Transition to Society: Does Visitation Reduce Recidivism?*, 45 J. OF RSCH. IN CRIME AND DELINQ. 287, 312 (June 4, 2008), available at: <https://doi.org/10.1177%2F0022427808317574>; Nancy G. La Vigne ET AL., *One Year Out: Tracking the Experiences of Male Prisoners Returning to Houston, Texas*, URBAN INST. 8 (June 2009), available at: <https://www.urban.org/sites/default/files/publication/30436/411911-One-Year-Out-The-Experiences-of-Male-Returning-Prisoners-in-Houston-Texas.PDF>.

<sup>5</sup> La Vigne, *supra* n.4, at 8; Kamala Mallik-Kane & Christy A. Visher, *Health and Prisoner Reentry: How Physical, Mental, and Substance Abuse Conditions Shape*

Critically, receiving this type of assistance is associated with better reentry outcomes across the board, *notwithstanding the fact that many formerly incarcerated people rely on family members who are or have been involved with the criminal justice system themselves*.<sup>6</sup>

Barring association on the basis of conviction status, therefore, cuts supervisees off from vital assistance at the time when they need it most. Put another way, these conditions create social isolation at a juncture when social support and cohesion is most critical. Cases within this Circuit expose myriad situations in which violations of release conditions have flowed from a person's positive engagement with familial networks, romantic relationships, community, and even addiction treatment programs. *See, e.g., United States v. Carter*, 732 Fed.Appx. 580, 581 (9th Cir. 2018) (supervision revoked for contact with stepson with prior felony conviction); *United States v. Napulou*, 593 F.3d 1041, 1044 (9th Cir. 2010) (supervision revoked for association with "life partner" with former felony conviction); *United States v. Coronado*, 2017 WL 3605346, \*2-5 (D. Ariz. 2017) (supervision violation alleged for association with intimate partner and fellow Alcoholics Anonymous meeting participant); *United States v. Standifer-Abell*, 2005 WL 2704972, \*2-6 (D. Alaska 2005) (supervision violation alleged for marriage to person with prior felony conviction).

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*the Process of Reintegration*, JUST. POL'Y CNTR.: URBAN INST. (Feb. 2008), available at: <https://www.urban.org/sites/default/files/publication/31491/411617-Health-and-Prisoner-Reentry.PDF>.

<sup>6</sup> La Vigne, *supra* n.4, at 2.

Indeed, this Court has expressly acknowledged that non-association conditions create a risk of further incarceration even though association with loved ones is generally beneficial for rehabilitation. *E.g.*, *Napulou, supra*, 593 F.3d at 1047 (“On the record before us, however, it appears that Napulou and Kahau’s relationship is not founded on criminality but rather involves productive behavior such as attending counseling sessions and finding a job”); *see also Coronado, supra*, 2017 WL at \*5 (observing that partner’s shared background and participation in substance abuse treatment diminished likelihood of supervisee’s return to criminal activity, notwithstanding partner’s prior felony conviction). As these cases illustrate, a non-association condition places people in the untenable position of choosing between forgoing meaningful support and returning to custody based on a violation of the condition.

Because non-association conditions indiscriminately isolate people from family, friends, and romantic partners based solely on their prior conviction status, they are detrimental—rather than “reasonably related”—to the goals of rehabilitation and deterrence set forth in section 3583. Moreover, non-association conditions do not just affect the person on whom they are directly imposed. Mass incarceration has a well-documented “spillover” effect, resulting in adverse public health consequences for communities that are most impacted by the trauma and loss associated with loved ones being incarcerated.<sup>7</sup> Non-association clauses

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<sup>7</sup> Emily von Hoffman, *How Incarceration Infects a Community*, THE ATLANTIC (Mar. 6, 2015), available at:

extend these spillover effects. By cutting formerly convicted people off from one another even after release, these clauses further entrench—rather than repair—social alienation within entire communities, perpetuating the cycle of harm that flows from incarceration. As discussed further below, these burdens and harms are exponentially greater in predominantly Black or Latine communities, where family members, neighbors, fellow religious congregants, and childhood friends are all—by virtue of their race—at heightened risk of experiencing a criminal conviction.

**B. Non-association conditions undermine rehabilitation by preventing supervisees from accessing peer support.**

Not only does the felony non-association condition erect barriers to familial and community support, but it can also impede access to rehabilitative programs that rely on peer networks. Research has made clear that peer mentorship and assistance is a critical component of successful reentry and rehabilitation models. The stigma and discrimination that flow from a criminal record present significant barriers to employment and reintegration during the reentry period.<sup>8</sup> Because of their shared experiences with incarceration, peer mentors offer a level of

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[https://www.theatlantic.com/health/archive/2015/03/how-incarceration-infects-a-community/385967/?utm\\_source=copy-link&utm\\_medium=social&utm\\_campaign=share](https://www.theatlantic.com/health/archive/2015/03/how-incarceration-infects-a-community/385967/?utm_source=copy-link&utm_medium=social&utm_campaign=share); Elizabeth J. Gifford, *How Incarceration Affects the Health of Communities and Families*, 80 N.C. MED. J. 372 (Nov. 2019), available at:

<https://www.ncmedicaljournal.com/content/nem/80/6/372.full.pdf>.

<sup>8</sup> Jason M. Williams ET AL., “*It’s Hard Out Here if You’re a Black Felon*”: A Critical Examination of Black Male Reentry, 99 THE PRISON J. 437, 442 (2019), available at: <https://journals.sagepub.com/doi/pdf/10.1177/0032885519852088>.

understanding inaccessible to other service providers and serve as proof that successful reentry is possible.<sup>9</sup> Peer support services are shown to improve participants' self-efficacy and perceptions of social support, as well as mitigate feelings of stigma and shame.<sup>10</sup> In the context of addiction rehabilitation, peer support is also associated with increased retention in treatment and lower rates of relapse.<sup>11</sup>

Indeed, many of the reentry programs that have been recognized at a statewide and national level incorporate mentorship from formerly convicted people as a central tenet of their success. In California, the Anti-Recidivism Coalition (ARC) was recently awarded state funding to send formerly incarcerated life coaches into prisons across the state in order to provide reentry support to people still in confinement.<sup>12</sup> The Ride Home Program, which began in California and was granted the "Champion of Change" award by the White House in 2016,

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<sup>9</sup> Chidi Umez ET AL., *Mentoring as a Component of Reentry: Practical Considerations from the Field*, THE NAT. REENTRY RESOURCE CNTR. (2017), available at: [https://www.prisonpolicy.org/scans/csg/mentoring\\_reentry.pdf](https://www.prisonpolicy.org/scans/csg/mentoring_reentry.pdf).

<sup>10</sup> Kathlene Tracy & Samantha Wallace, *Benefits of peer support groups in the treatment of addiction*, 7 SUBSTANCE ABUSE REHAB. 143 (Oct. 15, 2016), available at: <https://dx.doi.org/10.2147%2FSAR.S81535>.

<sup>11</sup> Sharon Reif ET AL., *Peer Recovery Support for Individuals With Substance Use Disorders: Assessing the Evidence*, 65 PSYCHIATRIC SERVICES 853 (July 1, 2014), available at: <https://ps.psychiatryonline.org/doi/full/10.1176/appi.ps.201400047>.

<sup>12</sup> ANTI-RECIDIVISM COAL., *ARC's Hope and Redemption Team to Expand to 31 CDCR Prisons* (July 2021), available at: <https://antirecidivism.org/news/arcs-hope-and-redemption-team-to-expand-to-31-cdcr-prisons/>.

also pairs people newly released from custody with formerly incarcerated reentry counselors from the moment they leave the prison gates.<sup>13</sup>

The benefits of peer support extend to addiction rehabilitation. Programs like San Francisco's Delancey Street and twelve-step groups like Narcotics or Alcoholics Anonymous all embrace some form of mentorship from people who have shared lived experiences, including experiences in the criminal legal system. Drug and alcohol treatment is a particularly salient component of reentry for many formerly incarcerated people, as a majority of people incarcerated in jails and prisons meet the diagnostic criteria for a substance use disorder.<sup>14</sup> Barring access to the peer-based support offered by these programs is a clear illustration of how felony non-association conditions erect barriers to, rather than promote, the rehabilitative goals set forth in section 3583.

**C. Non-association conditions reinforce stigmatization and are inconsistent with public policies promoting reintegration.**

In recent years, both the federal and state governments have increasingly recognized that isolating people with felony convictions is counterproductive to the goals of re-integration and restoration of communities most impacted by mass

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<sup>13</sup> The Ride Home Program, *About Us*, THREE STRIKES PROJECT, available at: <https://law.stanford.edu/three-strikes-project/the-ride-home-program/> (last accessed May 2, 2022).

<sup>14</sup> Adam Chamberlain ET AL., *Illicit substance use after release from prison among formerly incarcerated primary care patients: a cross-sectional study*, 14 ADDICTION SCI. & CLINICAL PRAC. (Feb. 19, 2019), available at: <https://doi.org/10.1186/s13722-019-0136-6>.

incarceration. Numerous states have passed laws shortening prison and jail sentences, increasing early release, and expanding alternatives to incarceration.<sup>15</sup> Congress has recently enacted significant reforms like the First Step Act aimed at shortening incarceration times and facilitating reentry into the community.<sup>16</sup> This national shift away from incarceration and towards prosocial alternatives has also resulted in a rolling back of the collateral consequences that alienate people with criminal convictions.

A clear example of this has been the gradual expansion of voting rights for people with felony convictions. In the 1800s, felony disenfranchisement laws were enacted by states across the country to suppress the representation of Black, Brown, Indigenous, and other people of color.<sup>17</sup> During the last few decades, dozens of state-level reforms have been passed to eliminate or significantly narrow

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<sup>15</sup> Nicole D. Porter, *Top Trends in State Criminal Justice Reform, 2020*, THE SENT'G PROJECT (Jan. 2021), available at: <https://www.sentencingproject.org/publications/top-trends-in-state-criminal-justice-reform-2020/>; Jamie Siebrase, *How 4 States Cut Their Criminal Justice Budgets Without Sacrificing Safety*, NAT'L CONF. OF STATE LEG. (Feb. 2022), available at: <https://www.ncsl.org/research/civil-and-criminal-justice/how-4-states-cut-their-criminal-justice-budgets-without-sacrificing-safety-magazine2022.aspx>; NAT'L CONF. OF STATE LEG., *Responding to Community Supervision Violations with Alternatives to Incarceration* (Feb. 2022), available at: <https://www.ncsl.org/research/civil-and-criminal-justice/alternatives-to-incarceration-for-supervision-violations.aspx>.

<sup>16</sup> First Step Act, S. 756, 115th Cong. (2018).

<sup>17</sup> Between 1850 and 1900, the number of states with felony disenfranchisement laws more than tripled. Jeff Manza & Christopher Uggen, *Locked Out—Felon Disenfranchisement and American Democracy*, OXFORD UNIV. PRESS (2006).



these segregation-era felony disenfranchisements laws.<sup>18</sup> Since 2016, more than a million people with convictions have had their right to vote restored as a result of these changes.<sup>19</sup> Most people affected by these reforms have completed their sentences or are living in the community on some form of supervised release; lawmakers passing these re-enfranchisement measures have emphasized the connection between social inclusion and successful reentry.<sup>20</sup>

In California, where Mr. Reynold's will be released, voters and lawmakers have steadily moved away from using stigma and isolation to indefinitely punish people with convictions.<sup>21</sup> Like other states across the country, California has

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<sup>18</sup> NAT'L CONF. OF STATE LEG., *Restoration of Voting Rights for Felons* (June 2021), available at: <https://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx>.

<sup>19</sup> Chris Uggen ET AL., *Locked Out 2020: Estimates of People Denied Voting Rights Due to a Felony Conviction*, THE SENT'G PROJECT (Oct. 2020), available at: <https://www.sentencingproject.org/publications/locked-out-2020-estimates-of-people-denied-voting-rights-due-to-a-felony-conviction/#IV.%20Recent%20Changes>.

<sup>20</sup> See, e.g., COMMON CAUSE EDUC. FUND, *Zero Disenfranchisement: The Movement to Restore Voting Rights* (Aug. 2019), available at: <https://www.commoncause.org/wp-content/uploads/2019/08/FelonyDisenfranchisementReportv4-1-1.pdf>.

<sup>21</sup> See, e.g., Right to a Jury of Your Peers Act, SB 310 (this law went into effect in 2020, allowing people with prior felony convictions to serve on juries for the first time); California Fair Chance Act, AB 1008 (also known as "ban the box," this law went into effect in 2018, protecting job applicants with convictions from hiring discrimination); Adult Use of Marijuana Act (Proposition 64) (voters passed this ballot measure in 2016, legalizing recreational cannabis and eliminating or reclassifying various drug crimes); The Safe Neighborhoods and School Act (Proposition 47) (voters passed this ballot measure in 2014, reclassifying many felonies as misdemeanors).



embraced re-enfranchisement of people with felony convictions, passing the Voting Rights Restoration for Persons on Parole Amendment (“Proposition 17”) in 2020.<sup>22</sup> Proposition 17 amended the state Constitution to eliminate the disenfranchisement of people on parole—immediately extending voting rights to tens of thousands of Californians<sup>23</sup> with felony convictions who are re-entering the community after their release from state prison.<sup>24</sup>

Proponents of Proposition 17 emphasized that, during the reentry period, people with felony convictions are working to re-integrate into the community while they “raise families, hold jobs, pay taxes, and contribute to society in every other way.”<sup>25</sup> They argued that “[r]estoring a person’s voting eligibility removes stigma and helps strengthen their connection to the community.”<sup>26</sup> These arguments were directly supported by research showing that people who become civically engaged after they are released are significantly less likely to commit

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<sup>22</sup> Morgan McLeod, *Expanding the Vote: Two Decades of Felony Disenfranchisement Reforms*, THE SENT’G PROJECT 5 (Oct. 17, 2018), available at: <https://www.sentencingproject.org/publications/expanding-vote-two-decades-felony-disenfranchisement-reforms/>.

<sup>23</sup> CAL. SEC’Y OF STATE, *Official Information Voter Guide: General Election Nov. 3, 2020* 32 (2020), available at: <https://vig.cdn.sos.ca.gov/2020/general/pdf/complete-vig.pdf>.

<sup>24</sup> Now, as a result of Proposition 17, the only time a conviction restricts an otherwise-eligible Californian’s right to vote is while they are serving a state or federal prison sentence. Cal. Const., art. II, § 4.

<sup>25</sup> *Official Voter Information Guide*, *supra* n.23.

<sup>26</sup> *Id.*

another crime or be reincarcerated and are more likely to adopt the shared values of their broader community.<sup>27</sup>

California, like much of the country, has demonstrated its support for policies that enable the formerly incarcerated to rebuild connections with their communities and directly participate in civic life. Felony non-association conditions run directly counter to those policies and to the goals that underlie them. Like former felony disenfranchisement laws, these broad restrictions on association are tied not to the specifics of an underlying conviction or any demonstrated risk of recidivism, but rather to antiquated ideas about the status and stigma of those convictions. Such stigma-based policies have been rejected by policymakers with good reason. Denying people access to community engagement after a felony conviction only undermines local efforts to promote justice and public safety.

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<sup>27</sup> See, e.g., Guy Padraic Hamilton-Smith & Matt Vogel, *The Violence of Voicelessness: The Impact of Felony Disenfranchisement on Recidivism*, 22 Berkeley LA RAZA L.J. 2 (2012), available at: <https://lawcat.berkeley.edu/record/1125056?ln=en>; Christopher Uggen & Jeff Manza, *Voting and Subsequent Crime and Arrest: Evidence from a Community Sample*, 36 COLUM. HUM. RTS. L. REV. 193 (2004); Victoria Shineman, *Restoring Rights, Restoring Trust: Evidence that Reversing Felony Disenfranchisement Penalties Increases Both Trust and Cooperation with Government*, UNIV. OF PITTSBURGH (Sept. 18, 2018), available at: <https://ssrn.com/abstract=3272694>.

## II. The Harmful Effects of Felony Non-Association Conditions Are Disproportionately Concentrated in Black and Latine Communities.

The longstanding effects of racial bias in the administration of this nation's criminal legal system mean that the costs of felony non-association conditions are particularly acute within communities of color. America has a history of defining and enforcing criminal laws based on racial prejudice.<sup>28</sup> Until approximately fifty years ago, many states maintained segregationist and anti-miscegenation laws that criminalized behavior based solely upon a person's race.<sup>29</sup> While explicit consideration of race as a criminogenic factor has since been disavowed,<sup>30</sup> Americans' racialized perceptions of crime persist.<sup>31</sup> Law enforcement officers, prosecutors, defense counsel, and judges are no more immune from implicit racial

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<sup>28</sup> Susan Nembhard & Lily Robin, *Racial and Ethnic Disparities throughout the Criminal Legal System*, URBAN INST. 1-2 (Aug. 2021), available at: <https://www.urban.org/sites/default/files/publication/104687/racial-and-ethnic-disparities-throughout-the-criminal-legal-system.pdf>.

<sup>29</sup> Larry D. Barnett, *Anti-Miscegenation Laws*, 13 THE FAM. LIFE COORDINATOR 95 (Oct. 1964), available at: <https://www.jstor.org/stable/581536>; Arthur and Emalie Gutterman Fam. Cntr. for Holocaust and Human Rts. Educ., *Map of Jim Crow America*, FLORIDA ATLANTIC UNIV., available at: <https://www.fau.edu/artsandletters/pjhr/chhre/pdf/sjc-map-jim-crow-america.pdf> (last accessed May 2, 2022).

<sup>30</sup> See *Buck v. Davis*, 137 S.Ct. 759, 775 (2017) (reversing denial of Rule 60(b) motion where expert opinion tied defendant's race to predictions of future criminality).

<sup>31</sup> Nazgol Ghandnoosh, *Race and Punishment: Racial Perceptions of Crime and Support for Punitive Policies*, THE SENT'G PROJECT 13-17 (Sept. 2014), available at: <https://www.sentencingproject.org/publications/race-and-punishment-racial-perceptions-of-crime-and-support-for-punitive-policies/>.

biases than are the general public.<sup>32</sup> These biases are compounded by other systemic factors and contribute to the disproportionate representation of Black and Latine people at every stage of the criminal legal system, including amongst those with felony convictions—i.e., those most directly impacted by a felony non-association condition.

It is well documented that police stop Black people at a much higher rate than they stop white people, even when controlling for other factors like neighborhood characteristics and race-specific estimates of crime.<sup>33</sup> These disparities are tied to both law enforcement biases and concentrated deployment of police in communities that are predominately people of color.<sup>34</sup> An analysis of California's stop data in 2020 found that Black people were stopped by police

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<sup>32</sup> Jeffrey J. Rachlinski ET AL., *Does Unconscious Racial Bias Affect Trial Judges?*, CORNELL L. FAC. PUBL'NS 1221-22 (Mar. 2009), available at: <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1691&context=facpub>; SpearIt, *Implicit Bias in Criminal Justice: Growing Influence as an Insight to Systemic Oppression*, THE STATE OF CRIM. JUST. 2020 (ABA 2020) (July 7, 2020), available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3645536](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3645536).

<sup>33</sup> Elizabeth Hinton ET AL., *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Legal System*, VERA INST. OF JUST. 7 (May 2018), available at: <https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf>; Emma Pierson ET AL., *A Large-scale analysis of racial disparities in police stops across the United States*, 4 NATURE HUMAN BEHAVIOR 736, 737 (July 2020), available at: <https://5harad.com/papers/100M-stops.pdf>; Jennifer L. Eberhardt, *Strategies for Change: Research initiatives and recommendations to improve police-community relations in Oakland, Calif.*, STANFORD UNIV.: SPARQ 9-10 (Jun. 2016), available at: <https://stanford.app.box.com/v/Strategies-for-Change>.

<sup>34</sup> Hinton, *supra* n.33, at 7; Eberhardt, *supra* n.33, at 4-5, 9-10.

151.5 percent more frequently than expected given their share of the state's population.<sup>35</sup> The same study found that Latine people were stopped 4.7 percent more frequently and white people were stopped 10 percent less frequently than would be expected if enforcement were race-neutral.<sup>36</sup>

For many Black and Latine people, the heightened risk of being stopped by police translates to a heightened risk of arrest. By age 23, nearly 50 percent of Black men and 44 percent of Latine men have been arrested.<sup>37</sup> In California, the felony arrest rates for Black and Latine people are far higher than for other demographic groups.<sup>38</sup> The racial disparities in felony arrests are most severe in populous areas of the state, including in the San Francisco Bay Area where the felony arrest rate for Black individuals is 6.4 times the rate of arrest for whites.<sup>39</sup>

Once formal charges are initiated, the judicial process often exacerbates, rather than mitigates, these disparities. Black people make up 19.5 percent of felony defendants in California, although they represent only 5.7 percent of the

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<sup>35</sup> Racial & Identity Profiling Advisory Bd., *Racial & Identity Profiling Advisory Board Annual Report 2022*, CAL. DEPT. OF JUST. 51 (Dec. 2021), available at: <https://oag.ca.gov/system/files/media/ripa-board-report-2022.pdf>.

<sup>36</sup> *Ibid.*

<sup>37</sup> Robert Brame ET AL., *Demographic Patterns of Cumulative Arrest Prevalence by Ages 18 and 23*, 3 CRIME & DELINQUENCY 471 (Jan. 6, 2014), available at: <https://doi.org/10.1177/02F0011128713514801>.

<sup>38</sup> Magnus Lofstrom ET AL., *Felony Arrests in California*, PUB. POL'Y INST. OF CAL. (Apr. 2020), available at: <https://www.ppic.org/publication/felony-arrests-in-california/>.

<sup>39</sup> *Id.*

population.<sup>40</sup> Latine people are also overrepresented among felony defendants, constituting 43 percent of felony defendants compared to 39.5 percent of the population.<sup>41</sup> Most strikingly, Black and Latine defendants facing felony charges have higher rates of felony conviction than similarly situated defendants of other races and are also more likely to be sentenced to prison if convicted, even when controlling for age, gender, and other legal factors that might explain differences in outcomes.<sup>42</sup> This is consistent with other studies finding that prosecutors are less likely to award Black and Latine defendants with charge reductions compared to defendants of other races, and are more likely to advocate that Black and Latine defendants receive punitive sentencing.<sup>43</sup>

The cumulative effect of these disparities over time is similarly well-studied. In 1980, an estimated 13 percent of Black men had felony convictions, whereas only 5 percent of the male population generally had felony convictions.<sup>44</sup> By 2010,

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<sup>40</sup> Letter from Jud. Council of Cal. To Diane F. Boyer-Vine, Erika Contreras, & E. Dotson Wilson regarding Disposition of Criminal Cases According to the Race and Ethnicity of the Defendant: 2018 Report to the California Legislature as Required by Penal Code Section 1170.45 (Feb. 14, 2019), at 8, available at: [https://www.courts.ca.gov/documents/lr-2019-JC-disposition-of-criminal-cases-race-ethnicity-pc1170\\_45.pdf](https://www.courts.ca.gov/documents/lr-2019-JC-disposition-of-criminal-cases-race-ethnicity-pc1170_45.pdf).

<sup>41</sup> *Ibid.*

<sup>42</sup> *Id.* at 15-16.

<sup>43</sup> Besiki Kutateladze ET AL., *Do Race and Ethnicity Matter in Prosecution? A Review of Empirical Studies*, VERA INST. OF JUST. 13, 15-16 (June 2012), available at: <https://www.vera.org/publications/do-race-and-ethnicity-matter-in-prosecution-a-review-of-empirical-studies>.

<sup>44</sup> Sarah K. S. Shannon ET AL., *The Growth, Scope, and Spatial Distribution of People With Felony Records in the United States, 1948-2010* 54 DEMOGRAPHY

around 33 percent of Black men had a felony record, compared to 13 percent of adult males generally.<sup>45</sup> At that time, California had one of the highest rates in the country of felony supervision for Black residents, of any gender, and it was estimated that one quarter of all Black people living in the state had a felony conviction history.<sup>46</sup> Similarly, the proportion of Latinos among federally sentenced people has risen dramatically: from 24 percent in 1991, to over 50 percent in 2019.<sup>47</sup> This trend far outpaces the growth of the Latine population (only 18 percent of the U.S. population in 2019), and is partly attributable to increasing rates of prosecution for immigration related offenses, for which Latinos make up a clear majority.<sup>48</sup>

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1795, 1807 (Sept. 11, 2017), available at:  
[https://link.springer.com/epdf/10.1007/s13524-017-0611-1?author\\_access\\_token=jXD6ohexE1c1ur2WRWhpkfe4RwlQNchNByi7wbcMA Y4uMYrYNkMZx9I1WjnbPAWM-g13AQlmw4x8-VaL1oT3wS1z7bR6McpJuw6uJspKuwHQtd1alIFBkHajdo4QVT1CPUCL7C\\_5xQhC8-ZXzjA6g%3D%3D](https://link.springer.com/epdf/10.1007/s13524-017-0611-1?author_access_token=jXD6ohexE1c1ur2WRWhpkfe4RwlQNchNByi7wbcMA Y4uMYrYNkMZx9I1WjnbPAWM-g13AQlmw4x8-VaL1oT3wS1z7bR6McpJuw6uJspKuwHQtd1alIFBkHajdo4QVT1CPUCL7C_5xQhC8-ZXzjA6g%3D%3D).

<sup>45</sup> *Ibid.*

<sup>46</sup> *Id.* at 1811.

<sup>47</sup> PEW RSCH. CNTR., *A Rising Share: Hispanics and Federal Crime* (Feb. 18, 2009), available at: <https://www.pewresearch.org/hispanic/2009/02/18/a-rising-share-hispanics-and-federal-crime/#i-overview>; Mark Motivans, *Federal Justice Statistics, 2019*, U.S. DEPT. OF JUST. 9 (Oct. 2021), available at: <https://bjs.ojp.gov/content/pub/pdf/fjs19.pdf>.

<sup>48</sup> Motivans, *supra* n.47, at 8, 15; Luis Noe-Bustamonte ET AL., *U.S. Hispanic population surpassed 60 million in 2019, but growth has slowed*, PEW RSCH. CNTR. (July 2020), available at: <https://www.pewresearch.org/fact-tank/2020/07/07/u-s-hispanic-population-surpassed-60-million-in-2019-but-growth-has-slowed/>.



This data makes clear that association with the carceral system disproportionately impacts Black and Latine communities. Accordingly, so does a supervisory condition that restricts association based on conviction status. Black people are 50 percent more likely than white people to have a family member who is or was incarcerated, and three times more likely to have a family member who has spent at least 10 years in prison.<sup>49</sup> Furthermore, historical policies such as housing exclusion and red-lining have contributed to de facto residential segregation along racial and socioeconomic lines, thereby creating racially concentrated neighborhoods where the consequences of criminal legal system involvement are most acute.<sup>50</sup>

The direct result of this multi-stage racial bias is that Black and Latine communities disproportionately include those with felony convictions. Because of this, the disruption and social erosion caused by broad non-association conditions wreak particular havoc in these communities. For many Black and Latine supervisees, non-association clauses restrict association with families, loved ones, friends, and communities who are the supervisee's most immediate—and most

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<sup>49</sup> EQUAL JUST. INITIATIVE, *Half of Americans Have Family Members Who Have Been Incarcerated* (Dec. 11, 2018), available at: <https://eji.org/news/half-of-americans-have-family-members-who-have-been-incarcerated/>.

<sup>50</sup> *Ibid.*; Margery Austin Turner & Solomon Greene, *Causes and Consequences of Separate and Unequal Neighborhoods*, URBAN INST., available at: <https://www.urban.org/racial-equity-analytics-lab/structural-racism-explainer-collection/causes-and-consequences-separate-and-unequal-neighborhoods> (last accessed May 2, 2022).



critical—support system during reentry. These communities bear the brunt of the social isolation and resulting erosion that these conditions perpetuate. Thus, the negative effects of non-association clauses are exponentially more acute in Black and Latine communities—groups already disproportionately burdened by our criminal legal system.

### **III. Probation Officer Discretion to Permit Association Perpetuates Racial Bias and Fails to Mitigate Harms.**

Under the standard felony non-association provision, probation officers have the discretion to permit association with individuals on a case-by-case basis. But discretionary exceptions to felony non-association conditions cannot cure their deficiencies. First, discretionary exceptions, left wholly up to individual probation officers, only amplify racial bias in the administration of these conditions. Second, a probation officer's ability to grant exceptions cannot correct a non-association condition's broad encouragement of social isolation and recidivism.

As noted above, the pervasive influence of racial bias in our criminal legal system results in Black and Latine people being most impacted by the burdens of non-association requirements. This disparate impact is further compounded, not ameliorated, by exceptions that can be granted only at the whim of a single probation officer. Studies examining racial and ethnic disparities in probation revocation make clear that Black probationers have their probation revoked at much higher rates than white and Latine probationers for reasons unexplained

outside of implicit racial discrimination.<sup>51</sup> This is because probation officers, like others in the criminal legal system, are prone to employing implicit racial bias in exercising their discretion.<sup>52</sup> Thus, probation officer discretion renders the enforcement of non-association clauses readily vulnerable to these same implicit or explicit biases.<sup>53</sup> While necessary and important exceptions can (and should) be made, the gulf between the condition's impact on white versus Black and Latine supervisees is likely exacerbated by the exercise of probation officer discretion.

Additionally, the mere possibility of case-by-case exceptions cannot remedy the erosion of positive relationships and reinforcement of stigma around conviction status created by the condition. That probation officers have the power to make exceptions does not mean that exceptions are readily granted where appropriate; indeed, precedent makes clear that unwarranted denials of associations with positive close relationships can, and do, happen. E.g., *Napulou, supra*, 593 F.3d at 1048 (vacating the supervision condition and finding “[i]f Napulou's representation was correct, we doubt that repeatedly incarcerating Napulou for desiring to

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<sup>51</sup> Jesse Jannetta ET AL, *Examining Racial and Ethnic Disparities in Probation Revocation*, URBAN INST. (Apr. 2014), available at: <https://www.urban.org/sites/default/files/publication/22746/413174-Examining-Racial-and-Ethnic-Disparities-in-Probation-Revocation.PDF>.

<sup>52</sup> Mark W. Bennett, *The Implicit Racial Bias in Sentencing: The Next Frontier*, 126 THE YALE L. J. 391 (Jan. 31, 2017), available at: <https://www.yalelawjournal.org/forum/the-implicit-racial-bias-in-sentencing>.

<sup>53</sup> Mark Jones & John J. Kerbs, *Probation and Parole Officers and Discretionary Decision-Making: Responses to Technical and Criminal Violations*, 71 FED. PROB. 1 (2019), available at: [https://www.uscourts.gov/sites/default/files/71\\_1\\_2\\_0.pdf](https://www.uscourts.gov/sites/default/files/71_1_2_0.pdf).

maintain a relationship with Kahau would best serve the interests of rehabilitation or deterrence, or would afford greater protection to the public.”); *see also Coronado, supra*, 2017 WL at \*5 (finding probation officer’s restriction on Coronado’s relationship with his romantic partner “substantively unreasonable.”).

Such denials also occur in the context of access to reentry services.<sup>54</sup> A number of reentry initiatives relying on formerly incarcerated people as counselors and mentors have had great success in reducing recidivism rates.<sup>55</sup> A study of one such an initiative, Homeboy Industries, found that of the 300 alumni they began

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<sup>54</sup> James M. Binnall, *Divided We Fall: Parole Supervision Conditions Prohibiting ‘Inter-Offender’ Associations*, 22.1 UNIV. OF PA. J. OF L. AND SOC. CHANGE (2019), available at:

<https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1229&context=jlasc>.

<sup>55</sup> *See, e.g.*, THE DELANCEY STREET FOUND., *Our Story* (2007), available at:

<http://www.delanceystreetfoundation.org/ourstory.php>; HOMEBOY INDUSTRIES, Website, available at: <https://www.homeboyindustries.org> (last accessed May 2, 2022); RIDE HOME PROGRAM, Website, available at: <https://law.stanford.edu/three-strikes-project/the-ride-home-program/> (last accessed May 2, 2022) (referenced in Jon Mooallem, *You Just Got Out of Prison, Now What?*, N.Y. TIMES (July 16, 2015), available at: [https://www.nytimes.com/2015/07/19/magazine/you-just-got-out-of-prison-now-what.html?referrer!&\\_r!0](https://www.nytimes.com/2015/07/19/magazine/you-just-got-out-of-prison-now-what.html?referrer!&_r!0)); ANTI-RECIDIVISM COALITION, Website, available at: <https://antirecidivism.org/> (last accessed May 2, 2022); INSIGHT PRISON PROJECT, Website, available at:

<http://www.insightprisonproject.org> (last accessed May 2, 2022); Project H.O.P.E., Website, available at:

[https://secure.projecthope.org/site/SPageNavigator/2021\\_04\\_DPO\\_r1\\_ctrl.html?autologin=true&mfc\\_pref=T&s\\_src=ads&s\\_subsrc=ads\\_sem\\_d2d\\_gs\\_evergreenbrand0921&utm\\_source=fundraising&utm\\_medium=ads&utm\\_campaign=evergreen&gclid=CjwKCAjwgr6TBhAGEiwA3aVuIYwA0vVekFtRzo35KwtXVbJQWGUBOv-abOe9aqLG5ndrM2v4MbY9eBoC9iQQA\\_vD\\_BwE](https://secure.projecthope.org/site/SPageNavigator/2021_04_DPO_r1_ctrl.html?autologin=true&mfc_pref=T&s_src=ads&s_subsrc=ads_sem_d2d_gs_evergreenbrand0921&utm_source=fundraising&utm_medium=ads&utm_campaign=evergreen&gclid=CjwKCAjwgr6TBhAGEiwA3aVuIYwA0vVekFtRzo35KwtXVbJQWGUBOv-abOe9aqLG5ndrM2v4MbY9eBoC9iQQA_vD_BwE) (last accessed May 2, 2022); ST. VINCENT DEPAUL REENTRY INITIATIVE, Website, available at: <https://perma.cc/E4PP-38M4> (last accessed May 2, 2022).

tracking in 2008, only 1 in 3 had been re-incarcerated—a marked improvement over the statewide recidivism rate of approximately 67 percent.<sup>56</sup> In April 2012, however, California probation officers reportedly forbid a number of probationers from participating in activities at Homeboy Industries, citing restrictions limiting contact with people with convictions or former gang affiliations.<sup>57</sup> As this example illustrates, notwithstanding the availability of exceptions, “offender no-association conditions make efforts by organizations like Delancey Street and Homeboy exceedingly more difficult, as former offenders are less likely to seek out help from other former offenders in the face of a restriction that, if violated, can lead to re-imprisonment.”<sup>58</sup>

Probation officers’ inappropriate exercise of discretion is not the only reason why possible exceptions do not save these conditions. In some instances, the information needed to seek an individualized exception may be unavailable. Many rehabilitative programs, such as Narcotics or Alcoholics Anonymous, require participants to maintain confidentiality of co-participants. A person subject to this condition would be precluded from seeking an exception to associate with co-

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<sup>56</sup> Molly Selvin, *Homeboy Industries: A History of Violence. A Hope for the Future*, UCLA BLUE PRINT (2017), available at <http://blueprint.ucla.edu/feature/homeboy-industries-a-history-of-violence-a-hope-for-the-future/>.

<sup>57</sup> Celeste Fremon, *LA Probation Officers Stop Jobless Kids from Working at Homeboy Industries*, WITNESS L.A (Apr. 18, 2012), available at: <http://witnessla.com/la-county-juvenile-p-o-s-wont-let-kids-at-work-homeboy-industries>.

<sup>58</sup> Binnall, *supra* n.54, at 31.

participants in such a program, as doing so would improperly disclose those participants' identities and infringe on expectations of confidentiality.

Finally, requiring people on supervision to seek exceptions to a non-association clause perpetuates a lifelong and unfair stigma on individuals with felony convictions—broadly categorizing them as “antisocial” and permanently prone to criminality. That a condition permits individuals with felony convictions to be “excepted” from a supervisee’s prohibited associations does nothing to undo the presumption against them created by the condition in the first instance; it likewise does nothing to remedy the harm associated with this status-based exclusion.

### CONCLUSION

For the reasons stated above, as well as those noted in Mr. Reynolds’ Opening Brief, amici the ACLU affiliates in California encourage the court to strike down the felony non-association clause.

Date: May 26, 2022

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## CERTIFICATE OF COMPLIANCE

I certify that this brief contains 5,428 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I further certify that this brief is an amicus brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

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