APPEAL NO. 18-11388-G

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JAMES MICHAEL HAND, et al.,

Plaintiffs-Appellees,

v.

RICK SCOTT, in his official capacity as Governor of Florida and member of the State of Florida's Executive Clemency Board, et al.,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Florida,

Case No. 4:17-cv-128-MW-CAS

BRIEF OF AMICUS CURIAE THE CENTER FOR EQUAL OPPORTUNITY IN SUPPORT OF APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In accordance with Federal Rule of Appellate Procedure 26.1 and related Eleventh Circuit Local Rules, the undersigned hereby certifies that, in addition to the Certificates of Interested Persons and Corporate Disclosure Statements submitted by Defendants-Appellants Rick Scott, in his official capacity as Governor of Florida and others, the following persons or entities have an interest in the outcome of this case:

A. Interested Persons

Center for Equal Opportunity

John J. Park, Jr.

Roger Clegg

Strickland Brockington Lewis LLP

B. Corporate Disclosure Statement

Counsel for amicus further certifies that no publicly traded company or corporation has an interest in the outcome of this case or appeal.

s/ John J. Park, Jr.
John J. Park, Jr.

INTEREST OF *AMICUS CURIAE*[1]

The Center for Equal Opportunity (CEO) is a research and educational organization formed pursuant to Section 501(c)(3) of the Internal Revenue Code and devoted to issues of race and ethnicity. Its fundamental vision is straightforward: America has always been a multiethnic and multiracial nation, and it is becoming even more so. This makes it imperative that our national policies do not divide our people according to skin color and national origin. Rather, these policies should emphasize and nurture the principles that unify us. *E pluribus unum* . . . out of many, one. CEO supports color-blind policies and seeks to block the expansion of racial preferences in all areas, including voting. Likewise, it opposes efforts to paint as discriminatory policies that are, in fact, not discriminatory.

CEO has filed *amicus curiae* briefs in other federal appellate courts on felon disenfranchisement issues. CEO's President and General Counsel Roger Clegg has written law review articles about felon disenfranchisement issues. *See* Roger Clegg, George T. Conway III, & Kenneth K. Lee, *The Bullet and the Ballot: The Case for Felon Disenfranchisement Statutes*, 14 J. Gender Soc. Pol'y & Law 1

[1] All parties have consented to the filing of this brief. Pursuant to Fed. R. App. P. 29(c)(5), *amicus curiae* affirms that no counsel for any party authored this brief in whole or in part, and no counsel for any party or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to the brief's preparation or submission.

(2006) ("Bullet and Ballot"); Roger Clegg, *Who Should Vote*? 1 Tex. Rev. L. and Pol. 159 (2001). He has also testified before Congress more than once and expressed similar views to state legislatures and officials on felon disenfranchisement issues.

CEO believes that this Court will benefit from its perspective and expertise in this case.

SUMMARY OF THE ARGUMENT

Collateral consequences, including disenfranchisement, have long been in force in the United States, preceding, in particular, the Civil War. In particular, this Court has held 11-1 that felons can be disenfranchised permanently. *Johnson v. Gov. of Florida*, 405 F. 3d 1214 (2005) (en banc). Florida allows felons who have completed their sentences to ask for relief, including the restoration of the right to vote. The district court found fault with the way Florida goes about that inherently discretionary process and directed it to change its process. In so doing, the district court stuck its nose into a matter the Constitution gives to the states and, thereby, intruded on Florida's sovereignty as a state. It thereby ignored the strong policy reasons supporting Florida's approach and did so with no persuasive and overriding constitutional rationale. That district court judgment and remedial order represent a substantial overreaching on its part. This Court has already stayed the district court's ruling, and it should reverse the judgment.

ARGUMENT

The district court's remedial order intrudes into an area the Constitution reserves to the States and imposes its own view of sound policy. In this portion of its Brief, CEO will first show that determining the qualification of voters is constitutionally reserved to the states. Before a federal court interferes with that state prerogative, it should have a clear and unambiguous constitutional basis for doing so. Then, CEO will show that a state can reasonably conclude that the process of restoring civil rights is necessarily individualized and not amenable to the imposition of specific standards or rigorous time limits, like those ordered by the district court, particularly where recidivism is concerned.

1. The Constitution gives the states the authority to determine the qualifications of their voters.

Under the Constitution, the qualifications or eligibility requirements that states apply to their residents voting for state legislators must be applied to the same residents voting for members of Congress. Voters for the members of the U.S. House of Representatives "shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." U.S. Const. Art. I, § 2, cl.1. The Seventeenth Amendment provides the same qualification for voters for members of the U.S. Senate. U.S. Const. Amend. XVII. As a result, the Constitution explicitly gives the states the ability to determine the qualifications for individuals voting in federal elections.

That power is not undercut by Congress's power to alter the "Time, Places and Manner of holding Elections for Senators and Representatives," U.S. Const. Art. I, § 4, because that power does not extend to the "qualifications" of voters. The Supreme Court made that clear in *Arizona v. Inter Tribal Council of Arizona*, 133 S. Ct. 2247 (2013). In his majority opinion, Justice Scalia tracked the analysis in the preceding paragraph, observing, "Arizona is correct that the Elections Clause empowers Congress to regulate *how* federal elections are held, but not *who* may vote in them." *Id*. at 2257 (emphasis in original). [2]

As Alexander Hamilton noted in Federalist No. 60, prescribing voter qualifications "forms *no part* of the power to be conferred on the national government" by the Elections Clause, because that Clause is "expressly restricted to the regulation of the times, the places, and the manner of elections." The Federalist No. 60, at 371 (emphasis added). James Madison warned that a Congress that could regulate the qualification of those who voted for it could "by degrees subvert the Constitution." 2 Records of the Federal Convention of 1787, p. 250 (M. Farrand rev. 1966). By linking the federal and state franchises instead of

[2] The decision was 7-2, but both Justices Thomas and Alito, each of whom dissented, agreed with the proposition that the Constitution gives the states, not the national government, the authority to determine the qualifications of voters. Justice Thomas wrote, "Both text and history confirm that States have the *exclusive* authority to set voter qualifications and to determine whether those qualifications are satisfied." 133 S. Ct. at 2265 (Thomas, J., dissenting) (emphasis added); *see also id*. at 2270 (Alito, J., dissenting).

leaving the qualifications of federal electors to the states alone, the Constitution avoids "render[ing] too dependent on the State governments that branch of the federal government which ought to be dependent on the people alone. The Federalist No. 52, at 326 (J. Madison).

The states' authority extends to the disqualification of felons from voting. While Section 2 of the Fourteenth Amendment protects the right to vote, it allows for its "abridge[ment]" in cases of "participation in rebellion, or other crime." U.S. Const. Amend. XVII, cl. 2. In *Richardson v. Ramirez*, 418 U.S. 24 (1974), the Supreme Court held that "this language was intended by Congress to mean what it says." *Id*. at 43. It explained, "[W]e may rest on the demonstrably sound proposition that § 1 [of the Fourteenth Amendment], in dealing with voting rights as it does, could not have been meant to bar outright a form of disenfranchisement which was exempted from the less drastic sanction of reduced representation which § 2 imposed for other forms of disenfranchisement." *Id*. at 55.

In *Richardson v. Ramirez*, the Court held that California could constitutionally "exclude from the franchise convicted felons who have completed their sentences and paroles." 418 U.S. at 56. This Court found support in *Richardson*, when it observed, "A state's decision to *permanently* disenfranchise convicted felons does not, in itself, constitute an Equal Protection violation." *Johnson v. Governor of Fla*., 405 F. 3d at 1217 (emphasis added).

Oregon v. Mitchell, 400 U.S. 12 (1970), does not affect the constitutionality of state felon disenfranchisement laws. While the Court, in a fractured series of opinions, upheld the constitutionality of a federal law requiring states to allow 18-year olds to vote in federal elections, only Justice Black thought that the Elections Clause provided the necessary power. Other than Justice Black, the other Justices who did not dissent relied on interpretations of the Fourteenth and Fifteenth Amendments that are inconsistent with the Court's later rulings in *Richardson v. Ramirez* and *City of Boerne v. Flores*, 521 U.S. 507 (1997). More to the point, only six months later, the Twenty-Sixth Amendment was ratified, thereby allowing 18-year olds to vote constitutionally.

In short, the States' power to determine the qualifications of their voters includes the power to disenfranchise felons.

2. The district court's remedial order represents a substantial intrusion on state sovereignty.

The remedial powers of the national government, including its judiciary, are limited by both the Constitution and federalism considerations. The district court exceeded those limitations when it imposed an obligation to promulgate specific standards for applying Florida law on Florida officials.

In *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984), the Supreme Court held that the Eleventh Amendment bars federal courts from telling state officials to follow state law. It rejected the attempt to extend *Ex parte Young*,

209 U.S. 123 (1908), and its progeny, which allow for injunctive actions seeking to compel state officials to follow federal law, to cover claims arising under state law. The Court explained, "A federal court's grant of relief on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." 465 U.S. at 106.

The district court's remedial order is no less intrusive than the court order set aside in *Pennhurst*. The court may not have told state officials to follow state law, but it did direct Florida to "promulgate specific and neutral criteria" to guide its vote-restoration decisions and to devise "meaningful, specific, and expeditious time constraints" for making those decisions.[3] In short, it told state officials what state law had to be in general terms and told them to come up with specific standards. As Appellant Scott notes, the district court has effectively commandeered the state officials. Defendants-Appellants Br. at 51-52.

[3] The district court's instruction to devise "meaningful, specific, and expeditious time standards" reminds one of the Supreme Court's decision in *Blessing v. Freestone*, 520 U.S. 329 (1997), in which the Court rejected the notion that federal laws and regulations requiring a state agency to establish a child support enforcement unit "which meets such staffing and organizational requirements as the Secretary by regulation may provide" and to provide "sufficient staff" created federally enforceable rights. In addition, the notion of "sufficiency" is as indefinite (and, inherently, unenforceable) as "meaningful, specific, and expeditious."

The intrusion is all the more serious because of the thin legal and constitutional grounding for the district court's decision. That court first disregarded the Supreme Court's summary affirmance in *Beacham v. Braterman*, 396 U.S. 12 (1969). There, the Court resolved the question whether Florida's discretionary procedure for restoring the civil rights of convicted felons "violate[s] the Constitution in that there are no ascertainable standards governing recovery of the fundamental right to vote." *See* Jurisdictional Statement Question C, *Beacham v. Braterman*, 396 U.S. 12 (1969) (No. 404), 1969 WL 136703, at * 3. As this Court's stay panel observed, the summary affirmance in *Beacham* "remains binding precedent that cannot ... simply be ignored." *Hand v. Scott*, 888 F. 3d 1206, 1208 (11 th Cir. 2018).

Likewise, the district court's reliance on the First Amendment is misplaced. This Court has concluded that the First Amendment provides "no greater protection for voting rights claims than that already provided by the Fourteenth and Fifteenth Amendments." *Burton v. City of Belle Glade*, 178 F. 3d 1175, 1188 n. 9 (11th Cir. 1999). As the stay panel noted, any protection it gives is phrased "in more general terms" than the "specific language" of the Fourteenth Amendment, and that specificity "controls." *Hand v. Scott*, 888 F. 3d at 1212 (citing, *inter alia*, *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 843 (1998)).

The Fourteenth Amendment, as noted above, explicitly allows for the disenfranchisement of felons, even permanently. As the Supreme Court held in

Richardson v. Ramirez, it is a mistake to read content into Section 1 of the Fourteenth Amendment that is inconsistent with the terms of Section 2.

Moreover, if Congress were acting pursuant to its powers under Section 5 of the Fourteenth Amendment, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne v. Flores*, 521 U.S. at 520 (1997). Before a federal court intrudes on state sovereignty, it should find a "record of constitutional violations," *Johnson v. Florida*, 405 F. 3d at 1231, just like Congress must. And, its remedy should be narrowly tailored to preventing or remedying those violations. *See Fla. Prepaid Postsecondary Educ. Bd. v. Coll. Savs. Bank*, 527 U.S. 627, 628 (1999).

3. Felon disenfranchisement laws have substantial policy support that has endured over time.

Sound policy reasons support both the disenfranchisement of felons and cautious, individualized consideration when reenfranchising them. Indeed, it is entirely reasonable for a state to determine that no mechanical formula will help it decide whether a felon has in fact turned over a new leaf—that is, whether it is likely that the felon is now responsible, trustworthy, and committed enough to following the law that he or she can be entrusted with a role in the solemn enterprises of justice. *See* pp. 14-15, *infra*. As a result, it is an inquiry that has to be approached holistically. The amount of time that has lapsed, the seriousness of the crime, whether it was part of a pattern of criminal activity, and what the felon did

in confinement and has done since release: all are relevant, and the overall context matters. There is some irony in the fact that the same groups that insist that sentencing should he highly discretionary and are critical of, for example, the federal Sentencing Guidelines, now insist that only mechanical decisionmaking can be constitutional.

A. Felon disenfranchisement laws have long been in force in the United States for justifiable reasons.

"[F]elon disenfranchisement laws are justified on the basis of the Lockean notion of a social contract; as Judge Henry Friendly once put it, someone "who breaks the laws" may "fairly be thought to have abandoned the right to participate" in making them." Bullet and Ballot, at 23 (quoting *Green v. Bd. of Elections*, 380 F. 2d 445, 451 (2d Cir 1967). Those who vote either make the law—either directly in a ballot initiative or referendum or indirectly be choosing lawmakers—or decide who will enforce the law by choosing local prosecutors, sheriffs, and judges. It cannot be too much to demand that those who would make the laws for others, and, therby participate in self-government, be willing to follow those laws themselves.

Moreover, this nation maintains certain minimum, objective standards of responsibility, trustworthiness, and commitment to our laws for those allowed to participate in the solemn enterprise of self-government. As a result, not everyone in the United States may vote; noncitizens, children, and those adjudicated to be mentally incompetent may not vote. In the same way, it is reasonable to believe

that those who have committed serious crimes against their fellow citizens lack the necessary responsibility, trustworthiness, and commitment to our nation's laws.

Society considers convicts, even those who have completed their prison terms, to be less trustworthy than other, non-convicted citizens. Federal law prohibits the possession of a firearm for anyone indicted for or convicted of a felony punishable by imprisonment for one year or more. *See* 18 U.S.C. § 922(d)(1), (g)(1) (2004). In the same way, federal law bars those who have a "charge pending" or have been convicted of a crime punishable by imprisonment for one year or more from serving on a jury. *See* 28 U.S.C. § 1865(b)(5) (2004). Many states bar felons from working as police officers or school teachers. Disenfranchisement likewise targets those who have shown themselves to be untrustworthy.

Finally, disenfranchisement of felons has long been one of the consequences of their criminal activity. As the Supreme Court noted in *Richardson v. Ramirez*, when the Fourteenth Amendment was adopted, "29 States had provisions in their connstitutions which prohibited, or authorized the legislature to prohibit, exercise of the franchise by persons convicted of felonies or infamous crimes." 418 U.S. at 48. When the authors published Bullet and Ballot in 2006, 48 states prohibited felons from voting to varying degrees. *See* Bullet and Ballot at 3.

B. Individualized consideration of applications for restoration of voting and other rights is warranted to deter recidivism and increase the incentive for felons to turn over a new leaf.

Florida's discretionary process necessarily entails individualized consideration of "many facts and circumstances."[4] As Governor Scott explained, the focus is on determining whether the applicant has demonstrated remorse and has turned his or her life around. The Board seeks to make a fair judgment of the suitability of relief, taking into account public safety.

Public safety includes consideration of recidivism.[5] As Appellants showed in their Stay Application, the Florida Clemency Board's "current procedures more effectively avoid restoring civil rights to applicants who are likely to re-offend than

[4] *See* Executive Clemency Board Hearing (Dec. 7, 2016 at 2:02:00-2:02:07), *available at* https://thefloridachannel.org/videos/12716-executive-clemency-board-meeting.

[5] Contrary to the contention of former Attorney General Eric Holder, felon disenfranchisement laws do not promote recidivism. Rather, as former Attorney General Michael Mukasey has pointed out, that claim derives from a flawed study done in Florida. See Michael B. Mukasey, *What Holder Isn't Saying About Letting Felons Vote*, The Wall Street Journal, Feb. 14, 2014. As General Mukasey noted, Florida's process, which requires felons to apply for the restoration of their voting privileges, felons who choose to apply "self-select as a group less likely to repeat their crimes." *Id*. General Mukasey explained, "Suggesting that the automatic restoration of voting rights to all felons would lower recidivism is rather like suggesting that we can raise the incomes of all college students if we automatically grant them a college degree—because statistics show that people with college degrees have higher incomes than those without them." *Id*.; *see also* Hans A. von Spakovsky & Roger Clegg, Felon Voting and Unconstitutional Congressional Overreach, The Heritage Foundation (Feb. 11, 2015) at 10, *available at* http://report.heritage.org/lm145.

did the less selective procedures that were previously in place." No. 163 at 7 n. 1.

That assertion is reflected in reports from the Florida Department of Corrections. In the report for 2015-2016, the Florida Commission on Offender Review (FCOR) reported that, by July 1, 2011, 11.1% of the applicants who were granted restoration of their civil rights during the two previous calendar years had re-offended and been returned to the custody of the Florida Department of Corrections. *See* FCOR, Restoration of Civil Rights' Recidivism Report for 2014 and 2015 (July 1, 2016), at 4, Table III ("Percentage at Time of Original Report" column).[6] After the procedures were changed, and under the Board's current procedures, recidivism rates for the same reporting periods fell to 0.0%, 0.1%, 0.3%, and 0.4%. *See* FCOR, Restoration of Civil Rights Recidivism Report for 2015 & 2016 (July 1, 2017), at 4, Table III (for the 2011-12, 2012-13, 2013-14, and 2014-15 calendar years, respectively).[7]

In the years following the original reports, the contrast between recidivism rates under the prior and current processes has become even more pronounced. As of

[6] Available at https://www.fcor.state.fl.us/docs/reports/RecidivismReport2014-2015.pdf.

[7] Available at https://www.fcor.state.fl.us/docs/reports/RecidivismReport2015-2016.pdf

June 5, 2017, applicants whose rights were restored in 2009-2010 and 2010-2011 reoffended at rates of 28.8% and 27.6%, respectively. *Id*. ("Percentage as of 6/5/2017" column). Under the Board's more rigorous review since 2011, recidivism rates have as of June 5, 2017 remained at 1% or lower. *Id*.

As Defendants noted below, those FCOR figures "confirm that the current Board's more stringent eligibility criteria, and its exercise of case-by-case discretion—as informed by the CCAs [confidential case analyses] and the testimony offered at Board hearings—are well calculated to 'gauge' applicants' 'progress and rehabilitation.'" No. 163 at 7 fn. 1.

In the same way, in a recently released Special Report, the U.S. Department of Justice Bureau of Justice Statistics pointed to the appalling pattern of arrests among state prisoners released in 30 states, including Florida, in 2005. *See* Mariel Alper, Matthew R. Durose, & Joshua Markman, 2018 Update on Prisoner Recidivism: A 9-Year Follow-up Period (2005-2014), NCJ250975 (May 2018), *available at* https://www.bjs.gov/content/pub/pdf/18upr9yfup0514.pdf. They concluded, "Five in 6 (83%) state prisoners released in 2005 across 30 states were arrested at least once during the nine years following their release." *Id*. at 1. Significantly, while an estimated 68% of released prisoners were arrested within three years of their release, extending the follow-up period in the study showed that the overall desistance from criminal activity declined with time. *Id*. at 1, 5.

The study's authors explain, "[C]omparing the 3-year and 9-year follow-up periods showed that the basic recidivism percentage (defined as the cumulative arrest percentage following release) was underestimated by an average of 15 percentage points using the 3-year widow." *Id*. at 14. As a result, "[w]ith a follow-up period of 3 years, researchers and policymakers would not have observed more than half of the arrests of prisoners after their release." *Id*.

The Justice Department's study and Florida's experience show that caution in reenfranchising felons is warranted.

CONCLUSION

For the reasons stated in the Brief of Defendants-Appellants and this *amicus* brief, this Court should reverse the judgment of the District Court and direct that court to enter summary judgment in favor of Defendants-Appellants and vacate its injunction.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume and word-count limits of Fed. R. App. P. 29(d) and 32(a)(7)(B) because this brief contains 3,576 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft 2010 in 14-point Times New Roman.

s/ John J. Park, Jr.
John J. Park, Jr.

CERTIFICATE OF SERVICE

I certify that, on June 1, 2018, I electronically filed this document using the Court's CM/ECF system, which will serve notice of such filing on all counsel of record.

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