

INTEREST OF AMICI

The Brennan Center for Justice at New York University School of Law respectfully submits this brief *amicus curiae* in support of Governor Thomas J. Vilsack. The Brennan Center is a nonprofit, nonpartisan institute that promotes full and equal participation in our democracy. The Brennan Center works to advance this goal by, among other efforts, advocating to end felony disenfranchisement. Much of the Brennan Center's work in this area takes place under the auspices of the Right to Vote Campaign, a consortium of national organizations and state coalitions working to re-enfranchise people with felony convictions.

The Brennan Center is active in several key felony disenfranchisement cases. It has participated as *amicus curiae* in *Muntaqim v. Coombe*, 366 F.3d 102 (2d Cir.), *cert. denied*, 125 S. Ct. 480, *and reh'g en banc granted*, 396 F.3d 95 (2d Cir. 2004), and *Hayden v. Pataki*, 00 civ. 8586, 2004 WL 1335921 (S.D.N.Y. June 14, 2004), both challenges to New York's felony disenfranchisement law, which were consolidated and heard *en banc* by the U.S. Court of Appeals for the Second Circuit in June 2005; and *Farrakhan v. Washington*, 359 F.3d 1116 (9th Cir. 2004), a challenge to Washington's felony disenfranchisement law, which the Ninth Circuit sent back for trial (now scheduled for March 2006). The Center also is lead counsel in *Johnson v. Bush*, 377 F.3d 1163 (11th Cir. 2004) (*en banc*), challenging Florida's felony disenfranchisement law on behalf of a class of more than 600,000 people with felony convictions who have completed their sentences. Like Iowa, Florida indefinitely denies the right to vote to all people with felony convictions, even when they have fully served their sentences. A petition for a writ of certiorari in that case has been filed with the U.S. Supreme Court.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Before issuance of the Executive Order challenged in this case, Iowa was one of the five most restrictive states in the nation in its disenfranchisement policies, and was the most restrictive

outside of the South. In contrast to most states, all persons convicted of a felony in Iowa were permanently barred from voting, even after completion of their sentences, unless granted discretionary restoration of rights. See Iowa Const. art. II, § 5; Iowa Code § 914.1 *et seq.* Until July 2005, an estimated 100,631 Iowa citizens were not eligible to vote, of whom the vast majority – 80,257 – had served their sentences. The Sentencing Project, *Iowa & Felony Disenfranchisement*, 1-2, at <http://www.sentencingproject.org/pdfs/Iowa-disenfranchisement.pdf> (last visited Aug. 25, 2005). The only other states to bar all people with felony records from the polls for life, or until they receive discretionary clemency, are Alabama, Florida, Kentucky, and Virginia. *Id.* at 1.

All of the states neighboring Iowa have more measured disenfranchisement policies. Illinois and South Dakota disenfranchise only persons in prison, allowing those returning to their communities to vote even if they are under parole supervision. 730 Ill. Comp. Stat. 5/5-5-5(c); S.D. Codified Laws § 23A-27-35¹. Minnesota, Missouri, and Wisconsin disenfranchise people in prison or on probation or parole, but restore voting rights automatically upon completion of sentence. Minn. Stat. § 609.165(1); Mo. Rev. Stat. § 115.133(2); Wis. Stat. § 304.078(2). Until earlier this year, Nebraska had disenfranchised felons for life, but that state automatically restores voting rights two years after completion of sentence. Leg. Bill No. 53, 99th Leg., 1st Reg. Sess. (Neb. 2005) (to be codified at Neb. Rev. Stat. § 29-112).

As of 2005, the proportion of the adult population that was disenfranchised in Iowa – 4.65% – was double the national average of 2.28%. *Iowa & Felony Disenfranchisement* at 2. Moreover, Iowa had the highest rate of African-American disenfranchisement of any state in the nation – nearly a quarter of African-American citizens of voting age were barred from the Iowa polls. *Id.* Iowa's rate of African-American disenfranchisement (24.87%) was more than triple the national

¹ It should be noted that the South Dakota Attorney General has issued an opinion stating that the right to vote is restored upon completion of the entire sentence, not just the term of imprisonment. 05-01 Op. S.D. Att'y Gen. 1 (2005).

average of 7.48%. *Id.* Even states in the deep South did not so disproportionately disenfranchise African-American citizens.

Iowa has a process in place whereby people with felony convictions may apply to the Governor or the Board of Parole to have their rights restored. *See* Iowa Code § 914.1 *et seq.* From 1998 to 2003, 3,067 people applied to the Iowa Board of Parole for restoration of rights, of whom 79% (2,245) were recommended for restoration. *Iowa & Felony Disenfranchisement* at 3. Of the 2,654 applications that reached the Governor between 1999 and 2004, 81% (2,158) were approved for restoration of rights. *Id.* However, the total number of individuals whose rights were restored amounted to only 2.68% of the 80,257 citizens disenfranchised under Iowa law. *Id.*

Across the country, there has been significant momentum for reform of disenfranchisement policies. Since 1997, eleven states have enacted legislative reforms reducing barriers to voting for people with criminal records. The Sentencing Project, *Felony Disenfranchisement Laws in the United States*, 1-2, at <http://www.sentencingproject.org/pdfs/1046.pdf> (last visited Aug. 25, 2005). Six of the bills were signed into law by Republican governors and four by Democrats. (One majority Republican legislature overrode a gubernatorial veto). *Id.* Seven states have repealed laws permanently disenfranchising some or all people with felony convictions: Delaware (automatic restoration for all after a five-year waiting period), Maryland (automatic restoration extended to non-violent, two-time offenders after a three-year waiting period), Nebraska (automatic restoration after a two-year waiting period), Nevada (automatic restoration for first-time, non-violent felony offenders), New Mexico (automatic restoration for all after completion of sentence), Texas (automatic restoration for all after completion of sentence), and Wyoming (automatic restoration for all after five-year waiting period). In addition, Connecticut extended voting rights to people currently on probation. *Id.* Alabama, Kentucky and Virginia eased their clemency application procedures.

On July 4, 2005, in a celebration of liberty and equality to mark Independence Day, Governor Thomas Vilsack issued Executive Order Number 42, *available at* http://www.governor.state.ia.us/legal/41_45/EO_42.pdf (attached as an addendum to this brief). This Order restored the right to register to vote and hold office to more than 80,000 citizens of Iowa who had fully served their sentences on felony or aggravated misdemeanor convictions. In addition, the Order establishes a mechanism for ongoing restorations as others complete their sentences.

On June 30, 2005, before the Executive Order had been issued, the Muscatine County Attorney filed a Petition for Order of Mandamus and requested a temporary order barring Governor Vilsack from issuing any order during the pendency of the action. On that same day, this Court denied the temporary relief. The Governor filed a Resistance to the County's Petition together with a Motion to Dismiss on July 14, 2005. This Court denied the Governor's Motion to Dismiss on August 3, 2005, and scheduled a hearing on the County's Petition for August 31, 2005. The Governor filed a Motion for Summary Judgment on August 22, 2005.

Amicus curiae agrees with and adopts the Governor's argument, made in Point I of his Memorandum of Authorities in Support of his Motion for Summary Judgment, that mandamus is not an appropriate remedy in this case. Indeed, our argument on the merits supports the Governor's argument against mandamus. As the Governor states, mandamus may issue under Iowa law only when "the right involved and the duty sought to be enforced are clear and certain." Mem. Authorities Supp. Summ. J. at 4 (quoting *Headid v. Redman*, 179 N.W.2d 767, 770 (Iowa 1970)). Our argument on the merits establishes that, far from clearly establishing a duty in the Governor to surmount procedural hurdles before granting clemency, Iowa law protects the Executive's broad and independent clemency powers.

ARGUMENT

This case presents two questions on the merits. First, what is the scope of the Governor's clemency power under the Iowa Constitution and to what extent may the Legislature constrain this power? The Iowa Supreme Court, and the high courts of other states with similar constitutions, have held that the Governor's clemency powers are broad and the Legislature's, correspondingly narrow. Second, insofar as the Legislature has the constitutional power to shape the clemency process, has it done so through the relevant statutes in a manner that precludes Executive Order Number 42? A close reading of the statutes, and of cases interpreting analogous statutes, reveals that the Iowa Legislature has not in fact enacted any law that prevents the Governor from restoring rights of citizenship as he has in this Executive Order.

I. Under the Iowa Constitution, the Governor Has Broad Clemency Power, Including the Authority to Restore Rights of Citizenship to Persons Convicted of Crimes.

The Iowa Constitution, Article IV, section 16, gives the Governor broad powers of executive clemency. The Governor may grant reprieves, commutations, and pardons, and restore the rights of citizenship, including the right to hold public office and to vote. The Legislature cannot substantively restrict the Governor's clemency power, although the Constitution permits the Legislature to establish clemency procedures.

Article IV, section 16, of the Iowa Constitution, reads in part:

The governor shall have power to grant reprieves, commutations and pardons, after conviction, for all offences except treason and cases of impeachment, subject to such regulations as may be provided by law.

The Iowa Supreme Court understands this clause to “vest[] the pardoning power exclusively in the governor, and, because of the division of the powers . . . , neither the judiciary nor the legislature may interfere with or encroach upon this constitutional power lodged in the chief executive of the

state.” *Slater v. Olson*, 299 N.W. 879, 881 (Iowa 1941).² The Court interprets the phrase “subject to such regulations as may be provided by law,” Iowa Const. art. IV, § 16, to permit “regulat[ion] as to implementation, but not as to inherent power, by legislative enactments.” *State ex rel. Dean v. Haubrich*, 83 N.W.2d 451, 456 (Iowa 1957).

The leading case, *Slater v. Olson*, 299 N.W. 879, illustrates one kind of impermissible legislative encroachment. In *Slater*, the Iowa Supreme Court invalidated a statute that barred people with felony convictions from civil service positions, even after they had received gubernatorial pardons. The Court held that the statute infringed the Governor’s constitutional powers, which extend not only to relief from the punishment a law inflicts for a crime, but also to the collateral consequences of a conviction: “When, through the power of the pardon, the doors of the penitentiary opened to plaintiff, he took his place in society with all his civil rights restored entitled to start life anew unburdened by the onus of his conviction.” *Id.* at 881. In violation of the Constitution, the Legislature attempted to keep the plaintiff and others like him under the “onus of [their] conviction[s]” by disqualifying them from employment in the civil service despite their pardons. Like the denial of the right to hold a civil service job, the denial of the right to vote is a collateral consequence of conviction within the Governor’s power to undo, as even the dissent in *Slater* concedes. *Id.* at 882 (“The pardon, when granted, unquestionably restores the convicted person to the rights of his previous citizenship, that of suffrage . . .”) (Wennerstrum, J., dissenting).

In this case, the County Attorney does not quarrel with the Governor’s constitutional authority to restore the rights of citizenship, but insists that the Legislature has the power to interpose procedural barriers to the Governor’s exercise of that authority. In particular, the County

² See also, e.g., *People ex rel. Madigan v. Snyder*, 804 N.E.2d 546, 556 (Ill. 2004) (the Illinois Governor’s clemency power is “extremely broad” and “cannot be controlled by either the courts or the legislature”) (internal citations omitted); *Roll v. Carnahan*, 225 F.3d 1016, 1018 (8th Cir. 2000) (“[T]he decision to grant or deny clemency [in Missouri] is left to the discretion of the governor.”); *Richley v. Gaines*, 860 F. Supp. 636, 637 (E.D. Ark. 1994) (“The sole pardoning power is vested in the governor under . . . the Arkansas constitution.”) (internal citation omitted).

Attorney alleges that Iowa law prohibits the Governor from acting except upon a clemency application and with some involvement by the Board of Parole. Mem. Supp. Mot. Temp. Order at 3. In fact, the Iowa Code contains no such proscriptions. *See infra* Point II. Moreover, there is a serious question whether the Iowa Constitution would permit the Legislature to circumscribe executive clemency in this way.

The Iowa Supreme Court has not addressed whether the Legislature may limit the Governor's power to grant clemency on his own initiative and without the involvement of the Board of Parole. In a 1940 opinion, however, the Attorney General concluded that the Iowa Constitution would not countenance a law that required the Governor to seek and obtain the recommendation of the parole board. Op. Iowa Att'y Gen. 125-27 (1940) (citing 46 *Corpus Juris* 1187) ("It has been held that . . . a statute is invalid where it provides that the executive shall not grant a pardon until he has obtained the advice of the board of pardons.").

State courts today continue to debate the extent of the legislatures' constitutional powers to establish prerequisites to the exercise of clemency by the executive. The Illinois Supreme Court has interpreted its state constitution to prohibit the Legislature from restricting the Governor's power. The Illinois Constitution authorizes the governor to grant clemency "as he thinks proper" but states, "The manner of applying therefore may be regulated by law." Ill. Const. art. 5, § 12. Upholding then-Governor Ryan's blanket commutation of all death sentences in Illinois, the court held that this constitutional provision "merely allows the legislature to regulate the process for *applying* for executive clemency. It does not purport to give the legislature the power to regulate the Governor's authority to *grant* clemency." *Madigan v. Snyder*, 804 N.E.2d at 552.³ Thus, the Governor was

³ The Court distinguished a previous version of the state constitution that, in language more similar to Iowa's, made the governor's power "'*subject to* such regulations as may be provided by law.'" *Id.* at 553 (quoting Ill. Const. art. V, § 13 (1870)). The Court stated that the argument in favor of legislative authority would have been "at least . . . plausible," though not necessarily successful, under this earlier provision. *Id.*

free to commute death sentences without applications or other consent by the prisoners. *Id.* at 552-54.

In contrast, the Ohio Supreme Court has held that its constitution permits the Legislature to cabin the Governor's powers. *State ex rel. Maurer v. Sheward*, 644 N.E.2d 369 (1994).

Interpreting a provision that authorizes executive clemency "subject, however, to such regulations, as to the manner of applying for pardons, as may be prescribed by law," Ohio Const. art. III, § 11, the court wrote:

[W]e do not believe that the General Assembly has the authority to regulate only the applicants for pardons. We interpret the language of the "subject to" clause as providing the General Assembly with the authority to establish a regulatory scheme that includes prerequisites to the exercise of the Governor's power to grant pardons.

Id. at 374. Thus, the Legislature could require the Governor to await a recommendation from the parole board before granting a pardon. *Id.* at 374-75.

In the face of the Attorney General's 1940 opinion and the differing views of other states' high courts, there is a serious question whether the Iowa Constitution would permit the Legislature to restrict the Governor's blanket restoration of citizenship rights. Fortunately, this Court need not resolve in this case the perplexing issue of the constitutional limits of legislative authority over the clemency process, because, whatever the Legislature may be authorized to do, it has not in fact passed laws restricting the Governor's power to restore citizenship rights. There is simply no statute in Iowa that precludes Executive Order Number 42. And even if the statutes were ambiguous in this regard, which they are not, any doubt should be resolved in favor of the Governor's clemency power so as to avoid potential constitutional conflict. *State v. Abrahamson*, 696 N.W.2d 589, 593 (Iowa 2005) ("If the law is reasonably open to two constructions, one that renders it unconstitutional and one that does not, the court must adopt the interpretation that upholds

the law's constitutionality”) (citing *Iowa Supreme Ct. Bd. of Prof'l Ethics & Conduct v. Visser*, 629 N.W.2d 376, 380 (Iowa 2001)).

II. Iowa Statutes Do Not Impair the Governor’s Clemency Power.

The Iowa Code reinforces the Constitution’s broad grant of executive clemency power: “The power of the governor under the constitution to grant a reprieve, pardon, commutation of sentence, remission of fines and forfeitures, or restoration of rights of citizenship shall not be impaired.”

Iowa Code § 914.1. Other provisions of the Code establish alternative procedures that people with felony convictions may use in seeking clemency, including voting rights restoration. But those provisions do not limit the Governor’s clemency power.

Nothing in Iowa law requires that a person make an application before the Governor can exercise his clemency powers. The relevant statute confers on individuals the *right* to apply but nowhere *requires* an application. Iowa Code § 914.2 (“[A] person convicted of a criminal offense *has the right* to make application to the board of parole for recommendation or to the governor for a reprieve, pardon, commutation of sentence, remission of fines or forfeitures, or restoration of rights of citizenship at any time following the conviction.”) (emphasis added).

Again, *Madigan v. Snyder*, 804 N.E.2d 546, is instructive. “[E]ven if we assume, *arguendo*, that the legislature could restrict the Governor’s commutation powers through its power to regulate the application process,” wrote the Illinois Supreme Court, “the legislature did not do so.” *Id.* at 553. The Illinois statute, like the Iowa statutes, created a process for *individuals* to apply for clemency but did not bind the *Governor* to that process. *Id.* Moreover, *Madigan* approved a blanket commutation of death sentences similar to the blanket restoration of rights at issue here. Illinois’ Governor Ryan “intended to grant blanket clemency because he believed that [the] death penalty system was broken” *Id.* at 554. Likewise, Governor Vilsack recognized the unfairness and disproportionate racial impact of permanent criminal disenfranchisement. *See* Executive Order No.

42 (“Whereas” clauses). Like Governor Ryan, Governor Vilsack attempted to ameliorate a systemic problem through mass clemency. The courts have long recognized such efforts as within the clemency power. *See, e.g., Brown v. Walker*, 161 U.S. 591, 601 (1896) (“The Constitution does not use the word ‘amnesty,’ and, except that the term is generally applied where pardon is extended to whole classes or communities, instead of individuals, the distinction between them is one rather of philological interest than of legal importance.”) (internal citations omitted); *Kent County Prosecutor v. Kent County Sheriff*, 391 N.W.2d 341, 343-44 (Mich. 1986) (noting the “trivial distinction between individualized and general clemency”).

As to Iowa’s clemency application procedures, the statutory provisions are clear on their face that the Governor is free to act independently of the Board of Parole. The statute gives convicted individuals the right to apply *either* to the Board of Parole for a recommendation, “*or* to the governor for a reprieve, pardon, commutation of sentence, remission of fines or forfeitures, or restoration of rights of citizenship” Iowa Code § 914.2 (emphasis added). The board has no authority to grant or deny clemency, and the Governor may choose to solicit its recommendation or not. *Id.*; *see also* § 914.3(2) (“The board of parole shall, *upon request of the governor*, take charge of all correspondence in reference to an application filed with the governor and shall, after careful investigation, provide the governor with the board’s *advice and recommendation* concerning any person for whom the board has not previously issued a recommendation.”) (emphases added). The statutes delineating the duties of the board of parole thus respect that the Iowa Constitution reposes in the Governor independent power over clemency determinations.

Because the Iowa Legislature has not imposed procedural requirements on the Governor’s exercise of his clemency power, the County Attorney’s reliance on *Maurer*, 644 N.E.2d 369, is misplaced in this context. The Ohio Supreme Court emphasized that the relevant statutes in that state “require[d] that *all* applications for pardons *shall* be made to the APA [Adult Parole

Authority]. The General Assembly has chosen the word ‘all’ to indicate that every request for a pardon must go to the APA for evaluation.” *Id.* at 378. In contrast, Iowa law explicitly permits direct applications to the Governor and leaves to his discretion whether to refer an application to the parole board for a recommendation. Iowa Code §§ 914.2, 914.3(2). The Ohio Supreme Court stressed further that “the General Assembly has chosen to use the word ‘shall’ . . . three times in connection with the APA’s role in the pardon application process. This indicates the mandatory nature of the APA investigation and of the entire APA involvement in the application process.” *Maurer*, 644 N.E.2d at 378. The Iowa statutes, on the contrary, require certain actions by the parole board *if* it is involved in the application process, but do not demand that it be involved. Iowa Code §§ 914.2, 914.3(2). The Ohio Supreme Court relied on the specific wording of the pertinent statutes imposing procedural prerequisites to the Ohio Governor’s exercise of the pardon power; such requirements do not exist in Iowa law.⁴

Because the Iowa Legislature did not create preconditions to the Governor’s exercise of clemency, the Executive Order stands, and the County Attorney’s petition must fail.

CONCLUSION

The Governor’s clemency power is broad enough to encompass Executive Order Number 42. The Order rests on the Governor’s views that “ex-offenders that vote are less likely to re-offend” and “restoration of the right to vote is an important aspect of reintegrating offenders in society to become law-abiding and productive citizens.” Exec. Order No. 42 (“Whereas” clauses). The goal of rehabilitation he articulates is a traditional part of the clemency determination.

⁴ Iowa Code § 915.19, requiring victim notification in the case of “reprieve, pardon, or commutation,” does not apply to the restoration of rights, and for obvious reasons. The victim has an interest in learning that the person who harmed him will remain in or return to the community at unexpected times, or has been exonerated through a pardon. The victim has no comparable interest in learning that the person who harmed him may vote or seek public office.

The Governor's Executive Order expresses a realization that Iowa's severe felony disenfranchisement laws not only permanently exclude hardworking, tax-paying citizens from the democratic process, but also put Iowa out of step with the majority of the country. Democracy can only benefit from the Governor's decision.

For these reasons, and those stated in the Governor's brief, the Petition should be dismissed in its entirety.

August 26, 2005

Respectfully submitted,

CATHERINE WEISS
ERIKA WOOD
JENNIFER WEISER
Counsel for Amicus Curiae
Brennan Center for Justice
at New York University School of Law
161 Avenue of the Americas, 12th Floor
New York, NY 10013
Telephone: 212-998-6733
Fax: 212-995-4550
Email: catherine.weiss@nyu.edu
erika.wood@nyu.edu

Copy to:

Gary R. Allison
Alan R. Ostregen
Muscatine County Attorney's Office
Muscatine County Courthouse
401 East Third Street
Muscatine, IA 52761

Thomas J. Miller
Julie F. Pottorff
Office of the Attorney General
Hoover State Office Building
1305 East Walnut
Des Moines, IA 50319

Gary D. Dickey, Jr.
State Capitol Building
Des Moines, IA 53109

Randall Wilson
Iowa Civil Liberties Union
505 Fifth Avenue, Suite 901
Des Moines, IA 50309