

IN THE IOWA DISTRICT COURT FOR MUSCATINE COUNTY

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State of Iowa, ex rel. Gary L. Allison,	)	No. EQCv016165
as County Attorney for Muscatine County,	)	
Iowa,	)	AMICUS CURIAE BRIEF
Plaintiff,	)	OF IOWA CIVIL
vs.	)	LIBERTIES UNION AND
Thomas J. Vilsack, Governor of the	)	LEAGUE OF WOMEN
State of Iowa,	)	VOTERS OF IOWA.
Defendant.	)	

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STATEMENT OF INTEREST

The Iowa Civil Liberties Union (ICLU) is a private, nonprofit membership corporation founded in 1935 as an affiliate of the American Civil Liberties Union. The ICLU has over 3,500 members within the State of Iowa and has appeared in numerous cases of first impression as *amicus curiae*. The mission of the ICLU and the common interest of its members are to preserve and protect fundamental constitutional rights such as those embodied within the federal Bill of Rights including the right to vote. Historically, the ACLU and its affiliates have given priority to cases and issues protecting the right to vote. To this day, the ACLU maintains a project office devoted to exclusively to protection and restoration of voting rights. In Iowa, the ICLU has extensively lobbied the executive and legislative branches in Iowa to secure restoration of voting rights for felons who have “paid their debt” to society.

In view of the ICLU, restoration of voting rights for these individuals is desirable not only to support rehabilitation, but to maintain a strong, democratic and participatory society. Loss of the right to vote from felony conviction has the further undesirable

effect of disenfranchising tens of thousands of minority class voters in Iowa. Reenfranchisement is an essential step in rectifying the results of unwanted racial bias in our criminal justice system which despite our best efforts tends to arrest and convict African-Americans and other minorities at a much higher rate than non-minorities. In the final analysis, the ICLU believes that democracy works best when all who are capable of participating responsibly are allowed to do so.

The League of Women Voters of Iowa (LWV), an affiliate of the League of Women Voters, is a private, nonprofit membership with over 700 members within the state of Iowa. The mission of the LWV is to encourage the informed and active participation of citizens in government and influence public policy through education and advocacy. The specific interest of the LWV in this case stems from one of the original principles of the organization that every citizen has the right to vote. Based on this principle, the LWV encouraged the Governor of Iowa to use his authority to restore the voting rights of citizens that have been taken away as a result of a felony conviction at the completion of their incarceration, probation or parole.

#### STATEMENT OF FACTS

On March 11, 2005, a bi-partisan group of three legislators sent a letter Governor Thomas Vilsack requesting an expedited method of restoring rights to persons who had fulfilled their sentences. Governor Vilsack announced his intention to issue an executive order that would restore citizen rights to all offenders who had lost the rights through conviction and a process where future consideration of future discharged offenders would be given the rights automatically. Plaintiff filed his Petition for Order of Mandamus and requested a temporary order barring Governor Vilsack from issuing any executive orders during the pendency of this action. On July 4, 2005, Governor Vilasck issued Executive Order Number 42. This Executive Order provides, in part:

The rights of citizenship, including that of voting and qualification to hold public office, which were forfeited by reason of conviction shall be restored for all offenders that are completely discharged from criminal sentencing, including any accompanying term of probation, parole, or supervised release, as of July 4, 2005, but have not made any application pursuant to Iowa Code Chapter 914. This executive order will serve as evidence of restoration of citizenship rights for such individuals.

On July 14, 2005 the Court denied the Plaintiff's request for temporary relief. Governor Vilsack moved for a dismissal of the petition on July 14, 2005. On August 3, 2005, the Court overruled the Motion to Dismiss.

### ARGUMENT

Amicus curiae supports and adopts the State's argument that mandamus is not the proper remedy in this case.

#### I. THE GOVERNOR POSSESSES EXCLUSIVE POWER TO RESTORE RIGHTS.

Article 3, section 1 of the Iowa Constitution provides for the distribution of power in the state government as follows:

The powers of the government of Iowa shall be divided into three separate departments – the legislative, the executive, and the judicial; and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any function appertaining to either of the others, except in cases hereinafter expressly directed or permitted.

Iowa Const. art. 3, sec. 1. The separation of powers requires that one branch of government not impair the constitutional powers of another branch. *Klouta v. Sixth Judicial Dist.*, 642 N.W.2d 255, 260 (Iowa 2002). The Iowa Constitution empowers the governor 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. . .” Iowa Const, art. 4, sec. 16. This power includes the power to restore the rights of citizenship. *See* Op. Iowa Atty. Gen. June 9, 1964.

Iowa statutory law supports this grant of exclusive power. Iowa Code section 914.1 provides that “[t]he power of the governor under the constitution to grant . . . restoration of rights shall not be impaired.” Iowa Code Sec. 914.1 (2005). In addition, early Iowa case law buttresses the governor’s power. In *Slater v. Olson* the plaintiff applied to take the civil service examination. *Slater v. Olson*, 230 Iowa 1005, \_\_\_\_, 299 N.W. 879, 879 (1941). The Civil Service Commission denied the application because Iowa law required that an applicant not be a felon. *Id.* The plaintiff brought a writ of certiorari arguing that the governor had pardoned him and restored all his rights. 230 Iowa at \_\_\_\_, 299 N.W. at 879-80.

The Iowa Supreme Court stated that “[t]he Constitution vests the pardoning power exclusively in the governor, and, because of the powers of government in section 1, Article 3 of the Constitution, neither the judiciary nor the legislature may interfere with or encroach upon this constitutional power lodged in the chief executive of the state . . .” 230 Iowa at \_\_\_\_, 299 N.W. at 881. The appellate court ruled that to accept the Commission’s interpretation of the statute would render the statute unconstitutional as a clear encroachment upon the governor’s power to pardon. *Id.*

Similarly, the Iowa Supreme Court stated in *State ex rel. Preston v. Hamilton* that “[n]o one but the Governor, under our system of government, has the power, right, or authority to thus remit, reprieve, commute or pardon”. *State ex rel Preston v. Hamilton*, 206 Iowa 414, \_\_\_\_, 220 N.W. 313, 314 (1928) (citing *State v. Voss*, 80 Iowa 467, 45 N.W. 898 (1890); *Miller v. Evans*, 115 Iowa 101, 88 N.W. 198 (1901); *McKay v.*

*Woodruff*, 77 Iowa 413, 42 N.W. 428 (1889); *Gunn v. Mahaska County*, 155 Iowa 527, 136 N.W. 929 (1912); *State v. Hume*, 193 Iowa 1395, 188 N.W. 796 (1922); *Hall v. Wheeler*, 196 Iowa 100, 194 N.W. 268 (1923); *Ex parte United States*, 242 U.S. 27, 37 S.Ct. 72, 61 L.Ed. 129 (1916). Clearly, the Iowa Constitution gave the governor exclusive power to restore rights and the Iowa courts have acknowledged that power.

## II. CHAPTER 914 DOES NOT RESTRICT THE GOVERNOR'S POWER TO RESTORE RIGHTS.

Iowa statutory law addresses reprieves, pardons, commutations, and restoration of rights in Iowa Code chapter 914. *See* Iowa Code Chap. 914. The Iowa Court of Appeals has stated that “the relevant Iowa statutes provide for a relatively-unfettered discretion in the parole board and the governor when making a decision concerning parole or commutation of sentence. No substantive predicates are placed upon the governor’s discretion in granting a commutation of sentence.” *Lyon v. State*, 404 N.W.2d 580, 583 (Iowa Ct. App. 1987). (citing Iowa Code Secs. 248.6-10, 902.1, 902.2 (1985); 16 Iowa Admin. Code Sec. 4.2 (1985)).

Chapter 914 only describes a means by which a prisoner may seek the restoration of rights. When a felon elects to proceed by way of Chapter 914, he or she is provided with a statutory right of access to a parole board recommendation and a decision on the request for a pardon. Thus, Chapter 914 has the purpose of facilitating rather than restricting the process of seeking and obtaining a pardon. Section 914.2 provides that “ 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 . . . restoration of rights of citizenship.” Iowa Code Sec. 914.2 (2005).

Further, “[t]he board of parole shall periodically review all applications . . . and shall recommend to the governor the restoration of rights of citizenship . . .” Iowa Code 914.3(1) (2005).

The board of parole also, “shall upon the 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 . . . Iowa Code Sec. 914.3(2) (2005). Section 914.4 provides that “[t]he governor shall respond to all recommendations made by the board of parole within ninety days of the receipt of the recommendation . . .” Iowa Code Sec. 914.4 (2005).

Similarly, regulations promulgated by the board of parole apply to the prisoner seeking restoration of rights. After the discharge of his sentence, a person may apply for restoration of rights and submit the application form to the governor. Iowa Admin. Code r. 205-14.3(3) (2005). The board of parole may investigate the application. Iowa Admin. Code r. 205-14.4 (2005). The board of parole then shall make a recommendation to the governor. Iowa Admin. Code r. 205-14.5 (2005).

Chapter 914, however, is not the only method by which the governor receives a recommendation for restoration of rights. Iowa Code section 907, governing an offender’s discharge from probation, provides, in part, that “the court shall forward to the governor a recommendation for or against restoration of citizenship rights to that person.” Iowa Code Sec. 907.9(4) (2005). Nothing in section 907.9 requires that the governor follow the procedures set out in chapter 914. Nothing in the statute requires the person discharged from probation to apply for a restoration of rights. Finally, nothing in the statute requires that the board of parole play a part in the restoration of rights.

Clearly, the legislature did not intend to restrict the governor's power by requiring that he follow chapter 914 when he received a recommendation from the court and, thus, did not intend to restrict the governor's power by requiring that he follow chapter 914 in all circumstances.

### III. EXECUTIVE ORDER NUMBER 42 DOES NOT VIOLATE CHAPTER 914.

The Iowa legislature recognizes that the governor has the sole power to restore rights. Chapter 914 itself states that “[t]he power of the governor under the constitution to grant . . . restorations of rights shall not be impaired. Iowa Code Sec. 914.1 (2005). Other provisions in chapter 914 support this discretion. Section 914.5 allows the governor to a copy of the minutes taken at trial and other facts “having reference to the propriety of the governor’s exercise of the governor’s power in the premises.” Iowa Code Sec. 914.5(1) (2005). The governor may also take testimony. Iowa Code Sec. 914.5(2) (2005). Finally, in the case of restoration of rights and upon the request of the governor, the warden or superintendent is to provide to the governor information regarding the prisoner’s deportment while in prison and any recommendation any recommendations the warden or superintendent may have. Iowa Code Sec. 914.5(3) (2005).

The board of parole plays merely a supporting role. Chapter 914 confers no power to the board of parole to reprieve, pardon, or commute sentences of any prisoner. *State v. Duff*, 144 Iowa 142, \_\_\_\_, 122 N.W. 829, 830 (1909). The legislature once required that the governor present all pardons to the board of parole and obtain the board’s advice. Iowa Code Sec. 248.6 (1985). The legislature, however, excluded this

requirement when it repealed chapter 248 and substituted it with chapter 914. *See Weber v. Warnke*, 650 N.W.2d 90, 96 (Iowa 2003) (“legislative intent . . . is expressed by omission as well as by inclusion, and the express mention of one thing implies the exclusion of others not so mentioned.”). The legislature plainly excluded the requirement that the governor present and obtain advice from the board of parole.

#### CONCLUSION

On the above grounds the Iowa Civil Liberties Union requests that the Court uphold Executive Order 42.

SUBMITTED RESPECTFULLY BY

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