19-789

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

IN RE: WAYZARO YASHIMABET WALTON

****

WAYZARO YASHIMABET WALTON,
Petitioner

v.

WILLIAM P. BARR, UNITED STATES ATTORNEY GENERAL,
Respondent

ON EMERGENCY MOTION FOR STAY OF REMOVAL

BRIEF OF THE STATE OF CONNECTICUT AS AMICUS CURIAE IN SUPPORT OF PETITIONER WAYZARO YASHIMABET WALTON

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INTEREST OF AMICUS AND SUMMARY OF ARGUMENT

The State of Connecticut has a compelling interest in federal respect of Connecticut state laws; the clear prerogative to determine its own system and structure of government; and a deep and abiding concern for the health, well-being, and physical safety of its residents and their families. It files this brief on an emergency basis to protect its residents, secure the comity to which it is entitled in our federal system, and prevent misapprehension and misapplication of Connecticut law.

These critically-important questions of federalism and comity arise from the case of Petitioner Wayzaro Walton, who has lived in Connecticut since she was four years old. She has lived in Connecticut legally for most of her life: She received a Green Card here; married a U.S. citizen; and is parent to a child who is a U.S. citizen. Now, Immigration and Customs Enforcement seeks to deport Ms. Walton, arguing that she forfeited her legal status by virtue of committing non-violent crimes, the most recent of which is said to have occurred more than seven years ago.

But Ms. Walton, under Connecticut law, has not been convicted of any crime. Any offenses she may have committed have been erased by the full and unconditional pardon that she received on March 27 of this year from Connecticut's Board of Pardons and Paroles. Because of that "full, complete,

absolute, and unconditional" pardon – which has the legal effect of erasing her record and even the fact of any arrest, Conn. Gen. Stat. § 54-142a(e)(3) – she is entitled to a pardon waiver under 8 U.S.C. § 1227(a)(2)(A)(vi) (henceforth the "Pardon Waiver Clause.").

Unfortunately, Immigration and Customs Enforcement (ICE) has taken the mistaken position that Connecticut's full and unconditional pardons – granted, after due consideration of individualized facts, at the discretion of a Board of Pardons that is nominated by the governor, pursuant to a legislative scheme signed into law by the governor, Connecticut Public Act 2004-234 – have no weight for the purposes of the Pardon Waiver Clause. ICE appears believe that, because Ms. Walton's pardon was granted by a gubernatorial-appointed board rather than by the governor himself, the pardon is not a "full and unconditional pardon" issued "by the Governor of any of the several States" and thus does not comport with the Pardon Waiver Clause.

ICE's incorrect and unconstitutional misinterpretation of how Connecticut's statutory scheme interacts with the Pardon Waiver Clause deeply prejudices Connecticut residents like Ms. Walton. It means, in violation of Ms. Walton's Fifth Amendment right to equal protection under law, that Ms. Walton faces immediate deportation and separation from her family – while a pardon granted to an identically-situated person just across the state line in New York or Massachusetts,

pursuant to state laws that are no more reliable or procedurally fair than those in Connecticut, would be at liberty to remain in this country.

More than one in seven Connecticut residents – well over 500,000 people – is an immigrant, while another one in eight is a native-born U.S. citizen with at least one immigrant parent. They are vital members of our communities, our workforce, and our families. ICE's position denies those Connecticut residents the full benefits to which they are entitled under federal law, threatening the integrity of their families, the security of their jobs, and even their physical safety. The state of Connecticut has an interest in being heard on behalf of those residents, their families, and our entire state-wide community which is strong for their presence.

Connecticut also has a direct sovereign interest in the enforcement of its laws and in being accorded proper respect under our federal system. ICE's position damages federal-state comity by disrespecting Connecticut's prerogative to determine the proper interpretation of its own laws. ICE threatens to violate state sovereignty under the Tenth Amendment by effectively mandating that Connecticut's legislature enact, and Connecticut's executive administer, a specific Congressionally-mandated pardons scheme.

ARGUMENT

Wayzaro Walton's pardon is a "full and unconditional" gubernatorial pardon within the meaning of 8 U.S.C. § 1227(a)(2)(A)(vi), the Pardon Waiver Clause. She is entitled to a waiver, and she must be allowed to remain in Connecticut with her family.

I. UNDER CONNECTICUT'S PARDON SYSTEM, MS. WALTON'S PARDON IS AN EXECUTIVE PARDON.

Congress did not – and could not, constitutionally – have intended, by the Pardon Waiver Clause, to condition the validity of any pardon on the precise identity of the state executive-branch official who happens to sign the pardon. Instead, as the Board of Immigration Appeals has long recognized, under the Pardon Waiver Clause "the supreme pardoning power may rest with an executive or executive body other than . . . the Governor of a state." *Matter of Nolan*, 19 I&N Dec. 539, 542 (BIA 1988); *and see Matter of C-R-*, 8 I&N Dec. 59, 61 (BIA 1958) (holding that the Pardon Waiver Clause "has been interpreted to include a pardon granted by a state which has statutory provision for executive pardons to be issued by other than the governor of the state."). In fact, the Board of Immigration Appeals has long held that the Pardon Waiver Clause, properly understood, means only that the pardon must be executive in nature – that is, characterized by

executive discretion and individualized consideration – not legislative in the sense of occurring automatically by operation of law. *Nolan, supra*, 19 I&N Dec. at 544.

Connecticut's system for granting pardons is not legislative but executive within the meaning of the Pardon Waiver Clause as long understood by the Board of Immigration Appeals and as intended by Congress. Critically, absolute pardons granted by the Board of Pardons and Paroles cannot occur by operation of law, but must be the result of individualized consideration of the facts and circumstances of each case and the merits of each applicant. The process, which Ms. Walton successfully completed, includes a lengthy written application; a background investigation; individualized consideration of criminal record, work history, and references; and an opportunity for any victim to be heard.

Connecticut has no provision for legislative pardons that occur as a matter of course and by operation of law – the policy end that Congress sought to avoid with the Pardon Waiver Clause. Instead, Connecticut's pardons statute "vests in the board unfettered discretion in making its pardon and commutation decisions; it imposes no definitions, no criteria and no mandates giving rise to a duty to commute a sentence or grant a pardon, or creating a constitutional entitlement to an exercise of clemency." *McLaughlin v. Bronson*, 206 Conn. 267, 271, 537 A.2d 1004, 1007 (1988).

II. CONNECTICUT'S BOARD OF PARDONS IS A DELEGATE OF THE EXECUTIVE IN GRANTING PARDONS.

Eligibility for relief under the Pardon Waiver Clause hinges on the individualized consideration that goes into the pardon process, not the identity of the official granting the pardons. But even if it did: Under Connecticut law, the Board of Pardons and Paroles is effectively a delegate of the governor in granting pardons.

Like every state in the country, Connecticut has established a system for granting pardons to people who have been convicted of crimes. As a sovereign state, Connecticut joins its 49 sister states in exercising the prerogative, protected by the Tenth Amendment, to determine its own structures and systems of government. *Printz v. United States,* 521 U.S. 898 (1997). Like the power to punish, the power to pardon is typical of, and inherent in, each government's sovereignty. *See United States v. Wilson*, 32 U.S. (7 Pet.) 150, 160–61 (1833).

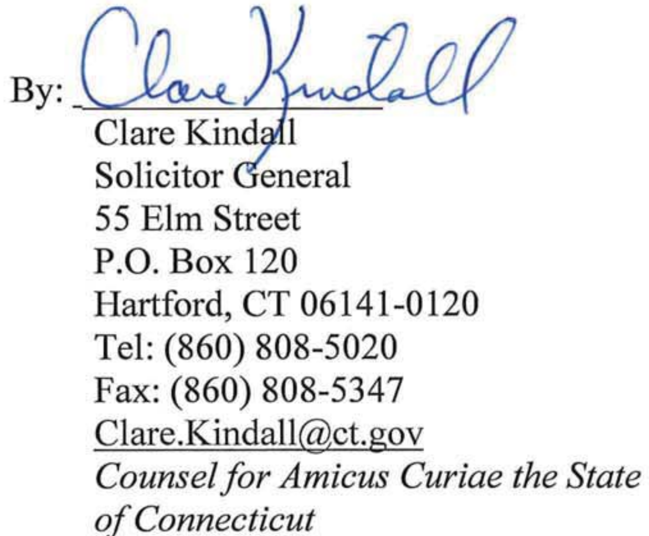
Under Connecticut's long-standing statutory scheme, the sovereign's power to pardon is delegated to a Board of Pardons and Paroles, whose members are appointed by the governor and which sits within the executive branch. *See* Conn. Gen. Stat. § 54-130a; Conn. Gen. Stat. § 54-124a(a)(1) ("There shall be a Board of Pardons and Paroles within the Department of Correction, for administrative purposes only. … [T]he board shall consist of ten full-time and up to five part-time

members appointed by the Governor with the advice and consent of both houses of the General Assembly."). Transformed into an autonomous executive agency in 1969, the Board effectively stands in the executive's shoes to exercise the state's sovereign power to grant full pardons.

ICE's reading of Pardon Waiver Clause disrespects Connecticut's well-established choice about where to situation and how to effectuate the state's power to pardon – a power that is inherent in Connecticut's sovereignty, and which rests within the state's sole discretion. To categorically bar Pardon Waiver Clause relief to all Connecticut residents pardoned by the state Board of Pardons and Paroles is effectively to dictate how Connecticut's legislature must establish its state pardon scheme and how Connecticut's executive branch can exercise its power. ICE's reading thus works a Tenth Amendment violation, since the federal government cannot dictate the content of legislation passed by a state nor commandeer the state's executive officers, ordering a specific officer to be the conduit for pardons. *New York v. United States*, 505 U.S. 144 (1992). State sovereignty means little absent the prerogative to organize state government independent of federal interference. *Printz v. United States*, 521 U.S. 898, 909 (1997).

CONCLUSION

ICE's interpretation inflicts a deep injury to Connecticut's independent identity and dignity within our federal system. And so that constitutionally-violative interpretation should be rejected, *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936), in favor of the statutory reading long preferred by the Bureau of Immigration Appeals, which properly respects Connecticut's sovereign prerogatives: The recognition that Connecticut residents are entitled to the full benefit of their executive pardons.



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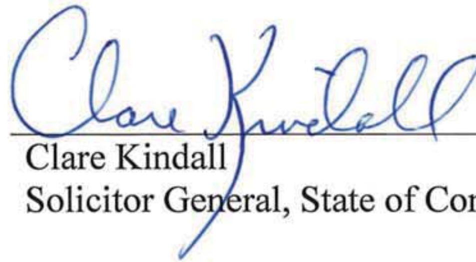
CERTIFICATION OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure in that this brief contains 1,577 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32 (a)(6) because it has been prepared in a 14-point proportionately spaced font (Times New Roman).



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CERTIFICATION OF SERVICE

I certify that on March 29, 2019, true and accurate copies of the foregoing Brief of the State of Connecticut as Amicus Curiae in Support of Plaintiffs–Appellees was served by email, by first class mail, postage prepaid, by Brescia's Printing Service in accordance with Rule 25 of the Federal Rules of Appellate Procedure and electronically via the Court's CM/ECF system to the following counsel of record:

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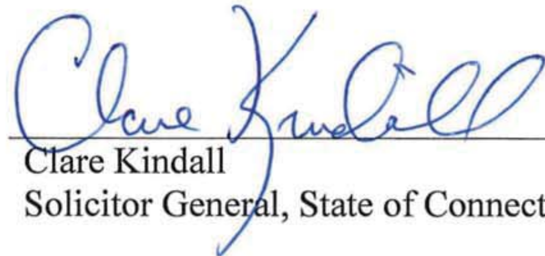

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