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Excessive Force: No Qualified Immunity Despite Absence of Clearly Established Precedent; "Obvious Clarity Rule" Applies

Teel v. Lozada, no. 19-14530 (11th Cir. Sept. 23, 2020).

Reversing the district court, the Eleventh Circuit holds that, where an officer shot a diminutive, suicidal woman approaching him slowly with a knife, qualified immunity did not apply despite the lack of precedent clearly on point.

Dr. Dudley Teel (Teel) called 911 in Indian River County, Florida, to report a mental health crisis involving his wife Susan (Susan), who was threatening to kill herself. Deputy Sheriff Jonathan Lozada (Lozada) arrived, heard from Teel that Susan was upstairs, and had cut her wrists. Lozada went to the master bedroom doorway, and saw Susan on the bed holding a knife. He announced his presence, whereupon she arose and began walking slowly towards him holding the knife pointing downwards. Lozada was on his radio communicating with headquarters as she approached. He did not demand that she drop her knife or notify her that he might shoot. She told him "shoot me" and continuing approaching. As she moved within roughly 10 feet of Lozada, he fired. The first shot did not fell Susan, and he fired two more rounds, toppling her. She died within minutes.

Teel sued Lozada under Section 1983 for excessive force and under Florida's wrongful death statute. He also sued the Sheriff's Office of Indian River County under Monell for failing to train, supervise, and direct deputy sheriffs in citizens encounters. At the close of discovery, the defendants moved for summary judgment, which the court granted. It determined that Lozada's use of deadly force was constitutionally permissible because Susan was approaching, armed with a knife, and was "relatively close" to him. Finding no constitutional violation, the court did not evaluate whether Susan's clearly establish

rights were violated for Section 1983 purposes. In the absence of an excessive use of force, all other charges were dismissed.

On appeal, the court evaluated the circumstances under the *Graham* standards. These include "(1) the severity of the crime at issue; (2) whether the subject poses an immediate threat to the safety of the officers; and (3) whether [she] is actively resisting arrest or attempting to evade arrest flight." The use of deadly force is reasonable only if the suspect poses a significant threat of death or serious physical injury to the officer or others.

Under the first of these standards, there was no issue, because attempted suicide is not a crime under Florida law. Second, while Susan indisputably a threat to herself, it was not conceivable that she represented any true threat to Lozada: even under his own testimony, she was walking gradually and never picked up her pace or made any sudden movement. Furthermore, she was 5' 4" tall and weighed approximately 120 pounds. In addition, Lozada conceded that alternative actions such as retreating into the sitting room or down the stairs were available means of resolving the situation. Finally there is no evidence that Susan was actively resisting arrest. The Circuit concluded that viewing the evidence and, critically to this case, drawing all inferences in favor of Dr. Teel, all of the factors articulated in *Graham* weighed in his favor and Lozada had used excessive force.

Lozada argued that even if he did use excessive force, he had not violated clearly established law, because there was no factually similar case that clearly established his conduct as unconstitutional. The court disagreed. While the circuit recognized that clearly established law must be "settled and not merely a suggestion," it also noted that the rule requiring particularized precedents to establish the law clearly in excessive force cases has a narrow exception, known as the obvious clarity rule. To come within the narrow exception, a plaintiff must show that the official's conduct "was so far beyond the hazy border between excessive and acceptable force" that the officer "had to know he was violating the Constitution even without case law on point."

Here, Lozada's use of force "was wholly unnecessary to any legitimate purpose." Susan was bleeding profusely from cuts in her arms and neck, and was walking gradually - not running - towards Lozado. The Circuit found that qualified community did not apply at the summary judgment stage given the light in which it must view the evidence, and although Lozada "may yet prevail on qualified immunity grounds after a trial or motion for judgment as a matter of law, Dr. Teel is entitled to a trial on his excessive force claim." The court reversed the lower court decision on excessive force and vacated its judgment as to all other claims, remanding for further pleadings.

LINK

Housing: Discriminatory Lending Practices Give Rise to Municipal Claims for Lost Property Tax Revenues.

City of Oakland v. Wells Fargo & Co., no. 19-1569 (9th Cir. Aug. 26, 2020).

In a decision that draws upon *Bank of America Corp. v City of Miami*, the Ninth Circuit holds that Oakland's case against Wells Fargo for lost property tax revenues due to the bank's predatory loan practices with Black and Latino borrowers falls within the proximate cause parameters of the Fair Housing Act and survives a motion to dismiss.

The Fair Housing Act of 1968 (FHA) makes it unlawful to "discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race." 42 U.S.C. § 3604(b). An "aggrieved person" may seek relief, and It is now well established that the term "aggrieved person" under the FHA includes cities. *Bank of America Corp. v. City of Miami*, 137 S. Ct. 1296, 1306 (2017) ("[T]he City is an 'aggrieved person' able to bring suit under the statute.").

Oakland sued Wells Fargo (Bank) to recover increased expenses and lost property tax revenues resulting from the Bank's lending practices. The Bank's own data revealed clear patterns of providing higher-cost, more risky adjustable rate loans to Black and Latino borrowers. Oakland's regression analyses illustrated that Black borrowers are 2.4 times more likely to receive a predatory loan from the Bank than a similarly situated White borrower. For Latinos, the likelihood is even higher-2.5 times. The discrepancy holds true even for more credit-worthy borrowers—Black and Latino borrowers with FICO scores above 660 are, respectively, 2.3 and 2.4 times more likely to receive predatory loans from the Bank than similarly situated Whites. Not surprisingly, these loans result in far higher rates of foreclosure than for White borrowers: 2.6 times more for Blacks and 3.3 times more for Latinos. More than 14% of the Banks' loans in minority neighborhoods resulted in foreclosure.

While *City of Miami* had found that municipalities could bring claims under the FHA, it had declined to establish bright-line parameters and had remanded to the Eleventh Circuit for closer analysis of specific proximate cause elements. Here, the Ninth Circuit had to conduct its own inquiry:

> We are thus asked to decide the questions before us as a matter of first impression, guided by the two-step analysis laid out by the Supreme Court in Miami I: first, we must evaluate "the contours of proximate cause under the FHA," and second, we "decide how that standard applies to the City's claim for lost property-tax revenue and increased municipal expenses." Miami I, 137 S. Ct. at 1306. We now turn to each prong of this analysis.

> The contours of the FHA's proximate-cause requirement. To determine the "contours" of a statute's proximate cause requirement, we evaluate (1) the "nature of the statutory cause of action" and (2) what is administratively feasible. Id (quoting Lexmark, 572 U.S. at 133). In this case, both considerations lead us to confidently conclude that the FHA's proximate-cause requirement is sufficiently broad and inclusive to encompass aggregate, city-wide injuries.

In reaching its conclusion, the Circuit cited FHA legislative history which clearly indicated a recognition of the impact that discriminatory housing practices have on municipalities:

> Our own review of the Congressional Record reveals that Congress enacted the FHA not only to address direct discrimination but also to reshape in meaningful ways the landscape of American cities. Indeed, the entire purpose of the statute was to target and reverse the large-scale insidious effects of discrimination, including racial and economic segregation within cities, suburban flight, and urban decay. We have no doubt that Congress was keenly focused on the impact that discriminatory housing practices, including discriminatory lending, were having on cities and their tax base.

The words of a co-sponsor of the FHA also provided clarity:

> Even more relevant to Oakland's claims, Senator Mondale specifically and repeatedly referenced cities' "declining tax base" as one of the large-scale injuries that the FHA was designed to mitigate. Id. at 2274 ("Declining tax base, poor sanitation, loss of jobs, inadequate educational opportunity, and urban squalor will persist as long as discrimination forces millions to live in the rotting cores of central cities." (emphasis added)). In no uncertain terms, he underscored that continued housing discrimination would "lead to the destruction of urban centers by loss of jobs and businesses to the suburbs, a declining tax base, and the ruin brought on by absentee ownership of property." Id. at 2993

Given that backdrop, "especially Senator Mondale's reference to a 'declining tax base'—we have no difficulty concluding that Oakland's city-wide financial injury claims fall squarely within the FHA's intended purposes, which include helping cities fight the insidious and large-scale effects of housing discrimination on a neighborhood-wide and city-wide basis."

The panel had little patience for the Bank's proximate cause argument: "[I]t cannot be that an intervening step automatically vitiates proximate cause. Indeed, Wells Fargo does not explain why, if the proximate-cause requirement under the FHA is as straight-forward and categorical as Wells Fargo suggests, the Supreme Court did not simply pronounce it as such in Miami I."

While the panel held that Oakland sufficiently pleaded that its reduced property tax revenues were proximately caused by the Bank's discriminatory lending practices, it did not allow the claim for municipal expenses. The panel further held that the FHA's proximate-cause requirement applies to claims for injunctive or declaratory relief, and reversed the district court's conclusion that Oakland did not have to satisfy that requirement as to its claims for injunctive and declaratory relief.

LINK

Opioids: Sixth Circuit Reverses Certification of Plaintiffs' "Negotiation Class"

In re National Prescription Opiate Litigation, nos. 19-4097/4099 (6th Cir. Sept 24, 2020).

Placing in question the bargaining posture of thousands of municipalities that have not as yet filed any opioid action, the Sixth Circuit reverses the district court's certification of a negotiation class that was intended to speak on behalf of more than 30,000 localities.

In an effort to create a massive bloc of plaintiff entities which might collectively commit to a common settlement rubric, the opioid Plaintiffs' Executive Committee in the national multidistrict litigation conceived of a "Negotiation Class." That vehicle purported to include more than 34,000 local governments around the country and created a matrix of potential settlement recovery percentages, based on each locality's (1) opioid deaths; (2) opioid use disorder cases; and (3) volume of opioids sold in their jurisdiction.

Although the vehicle did not comport strictly with the mandates Federal Rule 23 regarding class actions, MDL Judge Polster certified the class, finding that was a useful, innovative and fair mechanism for advancing settlement discussions, adequately within the parameters of Rule 23.

Approximately 550 localities opted out of the Negotiation Class, including Houston/Harris County. A number of cities, many AGs and the opioid defendants opposed the Class, seeking reversal at the Sixth Circuit.

On September 24, 2020, the Sixth Circuit reversed. It found that the Class did not meet either of the two tracks (litigation class or settlement class) defined for class actions under Rule 23. It was not a "litigation class" because it expressly allows Class members to continue their own actions even as the Class negotiates:

> Rule 23 permits litigation classes primarily for the purposes of aggregating and adjudicating common claims for trial, which can avoid conflicting judgments in individualized proceedings and can more efficiently resolve the claims of the class through a single lawsuit. That aggregation cannot occur where, as here, independent cases continue in parallel with a negotiation class that will not bring any common claims to trial.

And it was not a "settlement class" because it did not deal with a known settlement; it was merely promoting the possibility of settlement:

> The class formed in the present case is not being formed for the purposes of litigation or "for purposes of settlement," but rather for the purposes of negotiation. At most, the class is being formed, pursuant to a set of rules outside the parameters of Rule 23, to explore the possibility of negotiating a settlement. But the Rule contemplates settlement classes that are formed after a deal has been reached and the parties wish to formalize their arrangement. The district court even emphasized that participation in the negotiation class is not compulsory—no MDL plaintiff must join it, nor do any of the Defendants have to negotiate with it. It made clear that its certification order "does not approve, or commence the approval process for, any specific settlement or proposed settlement."

The majority also disagreed with the argument that the Class would empower local governments that previously had no stake in the opioid litigation:

> The district court found that because only "a small fraction" of the over 34,000 municipal entities are individually litigating their own claims, the negotiation class will increase "individual control and involvement" by engaging class members in the negotiation and voting process. *In re Nat'l Prescription Opiate Litig.*, 332 F.R.D. at 551. Actually, the district court's approach would do the opposite of increasing individual control and involvement by requiring class action participants to commit to the negotiation class without knowing the issue parameters or the amount or prospect of any potential recovery.

The Circuit also found fault with Judge Polster's determination that common questions of law predominated; he had cited common federal law issues but had ignored the spectrum of diverse state law questions: **"[E]ven without prejudging whether common issues do in fact predominate in this MDL, we think that the court's analysis was made incomplete by its decision to restrict its reasoning to the common federal claims in order to certify a negotiation class."**

The Circuit was unconvinced that a traditional litigation or settlement class structure could not be pursued, and implied that some elements of the Class could be infused into a more traditional settlement class:

> Plaintiffs have also not shown why the options of a litigation class or settlement class are infeasible in the present case. While there are drawbacks to both approaches, the opioid crisis MDL might be amenable to either. If common issues actually predominate, then a litigation class might be certifiable. Alternatively, Plaintiffs may privately seek a settlement with Defendants and ultimately propose an agreement to the court for certification of a settlement class. **There is no apparent reason why some of the procedural elements of the negotiation class, such as the supermajority voting scheme and county-level allocation formula, could not be used to facilitate the participation of more Plaintiffs in a lawful settlement class.**

Ultimately, the Class could not survive regardless of its potential utility, because it had not been derived via longstanding formal processes:

> However innovative and effective the addition of negotiation classes would be to the resolution of mass tort claims—particularly those of grave social consequence—we are to be "mindful that the Rule as now composed sets the requirements [courts] are bound to enforce," and we "are not free to amend a rule outside the process Congress ordered." *Amchem*, 521 U.S. at 620. That process involves careful review of a proposed amendment by the Rules Advisory Committee, the Judicial Conference, the Supreme Court, and Congress. *See* 28 U.S.C. §§ 2072-74. . . . **This multi-layered review process ensures that alterations to the Rules can only be made after thorough deliberations by multiple expert bodies, which can assess the virtues and drawbacks of a proposed change as well as evaluate the possible implications of the proposed rule across the entire judicial system, rather than by individual judges facing the pressures of litigation.**

Perhaps in due course the Rules Advisory Committee and Judicial Conference will recommend revising Rule 23 to sanction the negotiation class, which the Supreme Court and Congress may then approve. Until that time, however, this novel mechanism is beyond the Rule's scope.

LINK

Speech: Unwritten Policy Prohibiting Comments at Sheriff's Sale is Reasonable Limit on Free Speech

Porter v. City of Philadelphia, no. 18-3105 (3d Cir. Sept. 18, 2020).

A city's unwritten policy of prohibiting any individual commentary during the Sheriff's sale of foreclosed real property was permissible in a limited public forum; the occasional allowance, by an attorney for the Sheriff's Office, of comments did not undermine the larger no-comment policy because the attorney was not a decision maker.

James Porter (Porter) co-owned a property in Philadelphia (City) with a partner. His wife Debra also held an unrecorded mortgage on the property to secure a $2.8 million promissory note. Unbeknownst to Porter, his partner obtained a second mortgage on the property from Commerce Bank (Bank). That mortgage eventually went into default and the property was thereafter listed for sale at a regularly scheduled mortgage foreclosure sheriff's sale conducted by the City.

The Porters filed several actions prior to the sheriff's sale. A Pennsylvania state court awarded Debra damages for the title company's failure to record her mortgage but declined to have it retroactively recorded and denied the Porters' motion to postpone the sale. The Porters also filed a declaratory judgment action in the Eastern District of Pennsylvania claiming that Debra's unrecorded mortgage on the property had priority over the Bank's subsequently recorded mortgage, and that federal declaratory judgment action was pending at the time of the sheriff's sale.

Determined to warn potential bidders about his wife's alleged interest in the property, Porter sought the Bank's assurance that it would inform bidders at the sheriff's sale about the pending lawsuit. Porter's attorney e-mailed Commerce Bank's attorney to confirm that "the bank will make sure that the sheriff announces the existence of the federal court action at the sheriff's sale to potential bidders."

Porter and Debra attended the sale on to ensure potential bidders were warned. The Bank's attorney never arrived at the sale; thus, when the property came up for sale, Porter stood and began reading a statement to alert buyers. An attorney for the Sheriff's Office and a Deputy Sheriff immediately grabbed Porter to silence him. When he resisted, they then "pulled Porter by the collar, put Porter in a chokehold, placed him in handcuffs, hit him with a stun gun, and eventually dragged him from the room." Porter and at least one deputy required medical attention as a result of the scuffle. Porter was arrested and later convicted of misdemeanor resisting arrest, although he was acquitted of all other charges.

Porter sued the City and various individuals in their official capacities alleging that their conduct violated his First Amendment right to free speech. Porter's civil rights claims

included a Monell charge against the City based upon its unwritten policy of not allowing any non-bidder to comment at sheriff's sales.

At trial, the court instructed the jury that "Mr. Porter had a constitutionally-protected right to speak at the sheriff's sale in order to make the announcement that had been discussed with [his] attorney. In other words, no person employed by the sheriff's office, whether a law enforcement officer or not, had any right to interfere with their making such an announcement," and that the sheriff's policy against announcements "as applied to the plaintiff[] at the hearing, was in violation of [his] constitutional right to freedom of speech and to petition."

The jury returned a verdict for Porter on the Monell claim and awarded him $750,000 in damages, and also awarded Porter $7,500 on his claim against the Sheriff's Office attorney for retaliating against him for the exercise of his First Amendment rights.

The Third Circuit reversed. Its task was to "first determine what official city policy or custom is at issue for the purposes of § 1983, and then identify and apply the correct First Amendment principles to that policy based on the nature and use of the government owned or controlled forum where the speech occurred."

The Circuit reviewed the nature of the City's Sheriff's sales, which take place once a month in a room about four times the size of a typical courtroom, with hundreds of properties being sold. To avoid chaos, the auction is conducted with the decorum of a courtroom. "In an effort to maintain such an environment, the sheriff has adopted an unwritten policy barring comments or announcements from non-bidding members of the public during the sale. A property owner, or his or her attorney, may present a court order or bankruptcy petition to stop or postpone the sale when a property comes up for auction, but all other comments are prohibited."

Monell Analysis: The Monell claim required a showing of an official policies or custom. **A policy need not be passed by a legislative body, or even be in writing, to constitute an official policy for the purposes of § 1983, and a pertinent decision by an official with decision-making authority on the subject constitutes official policy**. If the conduct that gave rise to Porter's First Amendment claim was pursuant to an official policy or custom, the Monell claim could proceed, if not, and the behavior was simply that of an individual employee who was not acting pursuant to a policy or custom, no Monell liability would arise.

There was uncontroverted evidence from multiple witnesses, including the Sheriff, that the City had an unwritten policy prohibiting comments during sheriff's sales, and the District Court had instructed the jury that "[t]he policy or custom at issue here, as testified by representatives of the sheriff's office, is not to allow announcements or statements at a sheriff's sale." The Circuit agreed: "We therefore conclude that the City's policy of precluding public announcements at sheriff's sales was an official policy of the City for purposes of § 1983 liability under Monell."

The District Court had found that, despite the City's policy, the attorney for the Sheriff's office enforced it selectively, aggressively cutting off speech that might devalue a particular property, but not always being as vigilant for other topics.

Even if this were true, however, Porter had not shown that the attorney was a policymaker. "To the extent the District Court suggests that the City is liable for Chew's individual decision-making, we cannot agree. His unendorsed actions, without more, did not become municipal policy or give rise to municipal liability under Monell. There is no evidence to suggest that municipal decision-makers were aware of Chew's inconsistent implementation of the no-comment policy or that Chew had previously used force to enforce it with the tacit approval of policymakers."

First Amendment Forum Analysis. Because Porter's speech was not obscene, geared towards the incitement of violence, or libelous, it was undeniably protected by the First Amendment. The government's authority to suppress that speech therefore depended on the forum, because "not every public property is the same, and different types of property will require different treatment."

Traditional public forums are places that the government has historically held out for speech and assembly, such as public streets and parks; these are entitled to the greatest protection of speech, and any content-based restrictions will receive strict scrutiny.

Designated public forums are properties that have "not traditionally been regarded as a public forum [but are] intentionally opened up for that purpose; " when the government opens a forum for speech-related activity, the same standards apply as in a traditional public forum.

Finally, a nonpublic forum (or limited public forum) is a public property that has "not, as a matter of tradition or designation, been used for purposes of assembly and communication." Rather, it is "a forum that is limited to use by certain groups or dedicated solely to the discussion of certain subjects," giving the government "much more flexibility to craft rules limiting speech."

The parties conceded that the sheriff's sale was a limited public forum. The District Court had agreed, but had nevertheless stated that the Sheriff's Office "has no right to forbid an individual with an interest in the property making a short statement as to the individual's interest in the property being offered for sale." The Circuit disagreed. "As the government entity charged with conducting sheriff's sales, the Sheriff's Office has the right to limit speech in accordance with the First Amendment principles applicable to nonpublic forums."

In sum, the Third Circuit concluded that the Sheriff's Office's policy prohibiting comments during the sheriff's sale was a reasonable, viewpoint neutral speech restriction aimed at protecting the City's ability to sell hundreds of foreclosed properties in a single auction. And any abuse of discretion by the Sheriff's attorney in enforcing an

otherwise clear and non-discriminatory policy prohibiting all comments did not alone give rise to municipal liability. Given the insufficient basis for a reasonable jury to find that the City's policy violated the First Amendment, the Circuit reversed and dismissed the First Amendment claim against the City.

LINK

Voting: Requirement that Felons Pay All Fees and Fines to Re-establish Voting Rights Does Not Violate Fourteenth or Twenty-Fourth Amendment

Jones v. Governor of Florida, no. 20-12003 (11th Cir. Sept. 11, 2020).

Reversing an earlier panel, the Eleventh Circuit, en banc, finds that Florida's requirement that felons pay all fines and fees before being allowed to vote comports with the Constitution's equal protection, due process and poll tax provisions.

Since statehood, Florida has denied voting privileges to those convicted of a felony. Until late 2018, the constitution of Florida provided without qualification that "[n]o person convicted of a felony . . . shall be qualified to vote or hold office until restoration of civil rights." Fla. Const. art. VI, § 4(a) (2018).

In 2018, the people of Florida amended their constitution to restore the voting rights of some felons: Amendment 4 began as a voter initiative that appeared on the general election ballot in November 2018 and provides that "any disqualification from voting arising from a felony conviction shall terminate and voting rights shall be restored upon completion of all terms of sentence including parole or probation." Fla. Const. art. VI, § 4(a).

Shortly after Amendment 4 took effect, the Florida Legislature enacted a statute, Senate Bill 7066, to implement the amendment. This statute defined the phrase "[c]ompletion of all terms of sentence" to mean any portion of a sentence, including fines, fees, and costs. Fla. Stat. § 98.0751(2)(a).

Several felons sued Florida officials to challenge the requirement that they pay their fines, fees, costs, and restitution before regaining the right to vote. Among other provisions, they alleged that the re-enfranchisement laws violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment and the Twenty-Fourth Amendment prohibition against poll taxes. At the time of trial, Florida had received

85,000 registrations from felons who believe they were re-enfranchised by Amendment 4.

The district court entered a preliminary injunction in favor of the felons because it concluded they were likely to succeed on their claim under the Equal Protection Clause, finding that requiring felons to complete all financial terms of their sentences before regaining the right to vote was unconstitutional wealth discrimination. A panel of the Eleventh Circuit affirmed, applying heightened scrutiny to hold that the decision to condition re-enfranchisement on the completion of "all terms of sentence" violated the Equal Protection Clause as applied to indigent felons, discriminating on the basis of wealth.

After a trial on the merits, the district court ruled that Amendment 4 and Senate Bill 7066 violate the Equal Protection Clause as applied to felons who cannot afford to complete their sentences. It applied heightened scrutiny, but alternatively ruled that the laws failed even rational basis review. The lower court also ruled that Amendment 4 and Senate Bill 7066 impose a "tax" on voting, in violation of the Twenty-Fourth Amendment.

Governor DeSantis and the Florida Secretary of State successfully sought en banc review, petitioning for a hearing and moving to stay most aspects of be permanent injunction. A majority of the Circuit found that Amendment 4 and Senate Bill 7066 do not violate equal protection. When the States ratified the 14th amendment in 1868, 29 of them already had disenfranchisement legislation on their books, and Section 2 of the Fourteenth Amendment expressly allows States to disenfranchise criminals without having their representation reduced in Congress.

Here, the equal protection question arose because some felons - those who had paid their fines - could vote, whereas others would be prohibited. But this distinction did not implicate a suspect class, meaning that only rational basis review was necessary. The panel had relied on the Supreme Court poll tax decision in *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966), a case which struck down a Virginia law requiring payment of a $1.50 to vote as violating the equal protection clause. But the present case did not involve an overt distinction between wealthy and poor citizens, it merely required capital felons to complete all terms of their sentences before establishing rights to vote: "The per se rule of *Harper* does not apply to voting requirements that are related to legitimate voter qualifications, even if some voters must pay to comply with the requirement." The circuit found that the Florida policy was rationally related to the legitimate governmental interests, to wit the twin interests in disenfranchising those who disregard the law and restoring those who satisfy the demands of Justice.

The court next analyzed whether Amendment 4 violated the 24th amendment, which states that the right of citizens to vote for a president, vice president, senator or congressman, "shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax." The Circuit placed significant emphasis on the fact that the 24th amendment uses the language "by reason of" whereas the 15th, 19th and 26th Amendments all use the language "on account of." The

latter terminology, reasoned the court, was much more categorical than "by reason of" and allowed for logical nuances; even if the requirement to pay a fine was construed as a" tax," it would not fall within the prohibitions of the 24th Amendment. (For example, if the reason for incarceration was the criminal failure to pay an income tax, the resulting disenfranchisement would clearly not violate the provisions of the 24th Amendment.)

Finally, the court reviewed the felons' due process challenge, and found it unavailing:

> A fundamental confusion in this litigation has been the notion that the due process clause somehow makes Florida road responsible not only for giving felons notice of these standards that determine their eligibility to vote but also for locating and providing felons with the facts necessary to determine whether they have completed their financial terms of sentence. The due process clause imposes no such obligation. States are constitutionally entitled to set legitimate voter qualifications through laws of general application and to require voters to comply with those laws through their own efforts. So long as a state provides adequate procedures to challenge individual determinations of ineligibility-as Florida does-due process requires nothing more.

LINK

THIS JUST IN: Miami's Reforms for Addressing Homeless Satisfy Consent Decree

Yesterday, the Eleventh Circuit affirmed a lower court determination that Miami has undergone institutional reforms in its handling of homeless individuals, allowing for termination of the Pottinger consent decree.

Miami City Attorney Victoria Mendez notified city officials as follows:

Honorable Mayor and City Commissioners,

I write to update you on a significant appellate victory in the matter of *David Peery, et al. v. City of Miami*, Case No. 19-10957 (11th Cir.), which was an appeal of the termination of the *Pottinger* consent decree. As you are all aware, the Pottinger consent decree was originally entered in 1998, following ten years of litigation regarding the City's systemic mistreatment and frequent arrests of homeless individuals. In 2018, after two decades under the decree, the City moved to terminate the decree, arguing that we had substantially complied with the decree and had undergone intuitional reform. The plaintiffs filed a cross motion to enforce the decree and for contempt, arguing that the City's then-recent cleanup operations showed a continued systemic violation of the decree and the constitutional rights of homeless individuals. Following a seven-day

evidentiary hearing, the district court granted the City's motion to terminate and denied the plaintiff's motion for contempt.

The plaintiffs appealed both decisions to the Eleventh Circuit Court of Appeals. Following briefing and oral argument, today, the Court issued its opinion, affirming in all respects.

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The case was handled at trial by Senior Assistant City Attorney Doug Harrison, former Assistant City Attorney Carlos Gamez, outside counsel Tom Scott, Litigation Division Chief Chris Green, Police Legal Advisor George Wysong, Senior Assistant City Attorney J.C. Perez, and Senior Appellate Counsel Kerri McNulty, and on appeal by Senior Appellate Counsel Kerri McNulty. Outside counsel Tom Scott assisted with oral argument.

IMLA thanks Robin Jones Jackson for forwarding notice of the decision and congratulates Victoria and her entire team on this significant victory for the City!