No.

IN THE

Supreme Court of the United States

LUKE O. PICKENS

Petitioner

vs.

BREVARD POLICE TESTING
AND SELECTION CENTER

Respondent

On Petition for Writ of Certiorari to the Supreme Court of Florida

PETITION FOR WRIT OF CERTIORARI

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Pro-Se

QUESTIONS PRESENTED FOR REVIEW

Respondent, a state agency, discriminated against Petitioner by excluding Petitioner from participating in a basic public law enforcement training and certification program, on the sole basis that Respondent perceived Petitioner to be disabled. Petitioner claimed no disability.

Florida's PCA Doctrine of Judicial Administration splits Florida into five judicial substates, each with its own highest court, its own application of judicial procedure, and its own interpretation of the law. On appeal, Florida's 5th District Court of Appeals deprived the Florida Supreme Court of discretionary review of this case on technical grounds.

The questions presented are:

1. Whether 42 USC §12132 bars a state agency from discriminating against a qualified individual, perceived by the agency as disabled, by excluding the individual from participating in a public law enforcement training and certification program, on the sole basis of the perceived disability?

2. Whether Florida's PCA Doctrine of Judicial Administration (based on the Florida Constitution, Article V), as applied, fails to provide Florida citizens equal protection guarantees under the 14th Amendment and due process protections under the 5th and 14th Amendments to the U.S. Constitution?

PARTIES TO THE PROCEEDING

Petitioner is Luke O. Pickens. Respondent is the Brevard Police Testing and Selection Center, represented by Gray Robinson, PA.

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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INTRODUCTION

Title II of the Americans with Disability Act ("ADA"), 28 CFR part 35, ensures the right of disabled citizens to participate in public educational programs on the same basis as non-disabled citizens. 42 USC §12132 bars public entities from discriminating against disabled individuals.

This case involves discrimination by a state agency against an individual the agency perceives to be disabled, although the individual does not believe himself to be disabled. There is no medical or other evidence of any disability, either.

Petitioner applied for admission to a public Basic Recruit Law Enforcement certification training program ("Program"). Successful completion of the Program would allow Petitioner to seek employment in a number of fields, including law enforcement.

Respondent, a state agency processing applications to the Program, perceived Petitioner to be disabled due to an auto accident in which Petitioner had suffered a head injury three years prior. Petitioner explained that his injury was not disabling, that he had completed high school and a college degree since this injury, and submitted a medical certificate declaring him "CAPABLE" of participating in the Program (p. App-39).

Nonetheless, Respondent ordered Petitioner to undergo additional medical and psychological evaluation to determine the extent of any disability they perceived Petitioner might have (pp. App-37-38). Petitioner refused, citing the ADA, equal access, and privacy concerns. Subsequently, Respondent denied Petitioner admission to the Program on the sole basis that Respondent continued to perceive Petitioner as disabled (pp. App-35-36).

DECISIONS BELOW

The ***Florida Supreme Court***'s denial of jurisdiction in the case is unreported and reprinted in Petition Appendix A (p. App-1).

Florida Fifth District Court of Appeals' unreported denial of Petitioner's Motions for Rehearing and Certification is reprinted in Appendix B (p. App-3). The court's unreported order denying Petitioner's Appeal is reprinted in Appendix C (p. App-5).

Florida 18th Circuit Court's unreported denial of Petitioner's Motion for Rehearing is reprinted in Appendix D (p. App-6). The court's unreported dismissal of Petitioner's Complaint, without hearing, is reprinted in Appendix E (p. App-8).

BPTSC 's Final Order of Appeals Committee is reprinted in Appendix F (p. App-11).

STATEMENT OF JURISDICTION

The Florida Supreme Court denied appellate court direct conflict review, on May 15, 2018. The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Article VI

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Fourth Amendment to the U.S. Constitution

> The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated . . .

Fifth Amendment to the U.S. Constitution

> No person shall be . . . deprived of life, liberty, or property without due process of law. . .

Fourteenth Amendment to the U.S. Constitution

> No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Americans with Disability Act, Title II (28 CFR)

> *§ 35.104* Disability means [being] regarded as having an impairment [while having] none of the impairments defined [but being] regarded by a public entity of having such an impairment. . . Mental impairment means . . . any [neurological] disorder or condition . . .[or] any mental or psychological disorder . . .
>
> *§ 35.130(a8)* A public entity shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability.. . . from fully and equally enjoying any . . . program . . .
>
> *§ 42.12132* Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

Florida Constitution, Article V

2a - The supreme court shall adopt rules for the practice and procedure of all courts including . . . the administrative supervision of all courts [and] no cause shall be dismissed because an improper remedy has been sought . . .

3b6 - May review a question of law certified by the Supreme Court of the United States . . . which is determinative of the cause and for which there is no controlling precedent of the supreme court of Florida.

3b8 - May issue writs of mandamus . . . to state officers and state agencies.

STATEMENT OF THE CASE

Respondent, BPTSC, a Florida state agency, denied Petitioner, Luke O. Pickens, access to a public Basic Recruit Law Enforcement certification training program ("Program"), on the sole basis that Respondent perceived Petitioner to be disabled (pp. App-35-38).

Petitioner denied that he was disabled in any way, and refused to submit to medical/psychological procedures, to which other applicants were not required to submit, in order for Respondent to determine the extent of Petitioner's disability, as Respondent perceived it (pp. App-28-34).

Petitioner, citing protections under the Americans with Disabilities Act ("ADA") and U.S. Constitution, sought a writ of *mandamus* in Florida circuit court to order Respondent to finalize Petitioner's admission to the Program on the same basis as non-disabled applicants. Unfortunately, Petitioner's petition was dismissed on the basis of Respondent's unheard Motion to Dismiss (pp. App-6-10, App-16-27).

On appeal, Florida's 5th DCA issued only an unelaborated PCA ruling, despite conflict with every other Florida DCA on the same due process authority (pp. App-17-18, App-48-49). By issuing an unelaborated PCA ruling, the 5th DCA deprived the Florida Supreme Court of jurisdiction to resolve the conflict, on technical grounds (p. App-5).

Two important issues are involved:

- the right of citizens, perceived to be disabled by a public entity, whether or not they believe themselves to be disabled, to equal access to a public law enforcement certification training program, on the same basis as citizens not perceived to be disabled, as protected by the Americans with Disabilities Act.

- The right of Floridians to have equal access to the courts, and harmonious application of the law and due process in Florida's courts, such rights being protected under the Due Process Clauses of the

U.S. Constitution's Fifth and Fourteenth Amendments, and the Equal Protection Clause of the Fourteenth Amendment;

A. **Exclusion from Program - Perceived Disability**

Petitioner is a non-lawyer, pro-se litigant, now 28 years of age, employed since 2014 as a licensed Class D (unarmed) security officer, residing in Melbourne Beach, Florida.

In April 2012, as a 22-year old college sophomore pending completion of a degree in Criminal Justice, Petitioner sought to continue his education by applying for admission to the college's Basic Recruit Law Enforcement certification training program ("Program"). Admission to the Program is administered by Respondent.

Candidates who successfully complete the training, and pass a certification test at the end, may apply for employment as a police officer, or pursue other educational or professional opportunities.

Petitioner paid a non-refundable application fee, submitted all required documentation, and successfully passed a required physical fitness test and criminal background check. Respondent, rather than complete the ministerial act of admitting Petitioner to the Program, ordered Petitioner to

undergo additional medical and psychological procedures, not required of other applicants, as Respondent declared it perceived Petitioner to have "some sort of psychological disorder."

The detailed results of the medical and psychological findings were to be given to and retained by Respondent's Director in a "locked cabinet" (p. App-29).

Petitioner argued that he was being singled out (special requirements for him not required of other applicants), that any such "results" were private, and that any such requirement would have to take place post job offer, not as a condition for continuing his education. In September 2016, Respondent disqualified Petitioner from the Program (p. App-36).

B. Procedural Background of Litigation

Petitioner appealed the disqualification following Respondent's administrative procedure, but the appeal was denied October 27, 2016 (p. App-11). The administrative hearing panel was not duly constituted, though, and the hearing did not follow administrative rules. However, a transcript of the hearing was made by a court reporter hired by Petitioner (extract p. App-28-32).

Petitioner filed a petition for writ of *mandamus* in Florida's 18th Circuit Court in November 2016.

The petition was filed under Florida Rule of Civil Procedure 1.630 (p. App-48), which terms such petitions a Complaint and requires issuance of an Alternative Writ of Mandamus (order to show cause) before filing any pleadings.

Unfortunately, the circuit court did not follow mandatory procedure, and instead dismissed the Complaint based on Respondent's unheard Motion to Dismiss, in June 2017 (Appendices D and E). No hearing was allowed on Petitioner's Motion for issuance of an order to show cause (Appendix E), either, nor at any other time throughout the case.

Petitioner then appealed to Florida's Fifth DCA in July 2017, but the Appeal was simply PCA'd without elaboration. Petitioner's Motion to Certify Conflict with all other Florida DCA's, on Rule 1.630 procedure, was similarly denied April 23, 2018.

Petitioner next sought review by the Florida Supreme Court, under exclusive and discretionary jurisdiction, but was denied May 15, 2018, citing PCA Doctrine caselaw barring review of unelaborated PCA opinions (p. App-1).

REASONS FOR GRANTING THE PETITION

The issues raised in this petition are either raised for the first time in this Court, or approached in a different way than similar cases in the past.

The U.S. Supreme Court's review is vital to Petitioner and similarly-situated citizens, in considering protection under the Americans with Disability Act ("ADA") as it applies to a public law enforcement training and certification program ("Program"), for which Respondent, a state agency, processes applications for admission. Respondent, in the instant case, disqualified Petitioner, a student applicant, from admission to the Program on the sole basis that Respondent perceived Petitioner to be disabled, even though Petitioner did not consider himself to be disabled.

The U.S. Supreme Court's review is also vital to all Florida citizens, in considering Fourteenth Amendment protections. The Florida Supreme Court, citing the Florida Constitution, refuses to even consider review of any Florida case, such as Petitioner's, unless expressly requested to do so by one of five District Courts of Appeal, or by the U.S. Supreme Court itself.

A. Discrimination due to Perceived Disability

Petitioner established a *prima facie* case against Respondent for discrimination under the ADA. A *prima facie* case of discrimination requires three prongs (*Melton v. Dallas Area Rapid Transit*, 391 F. 3d 669, 671–72 (5th Cir. 2004)):

- that he or she is a qualified individual within the meaning of the ADA

- that he or she is being excluded from participation in, or being denied benefits of services, programs, or activities for which the public entity is responsible, or is otherwise being discriminated against by the public entity; and

- that such exclusion, denial of benefits, or discrimination is by reason of his or her disability.

The Americans with Disability Act (§ 35.104) defines one type of disabled person as an individual who:

> . . . ***is regarded as having an impairment*** . . . [while having] none of the impairments defined . . . ***but is regarded by a public entity as having such an impairment.***

In the instant case, Petitioner conceded that he had a head injury in a vehicular accident in 2009, but attests that this condition would not affect his ability to participate fully in the Program.

Respondent's Director, Mr. Louis Pernice, perceiving Petitioner to be disabled, noted in a memo to file that Petitioner had "some sort of psychological disorder". On that arbitrary basis, Respondent ordered Petitioner to undergo medical and psychological evaluation, not required of other applicants, so that Respondent could determine the extent of the "disorder" (p. App-37). Petitioner refused on privacy and equal access grounds, and Respondent denied Petitioner entry to the Program.

1. Application of ADA Title II to Police Programs

The U.S. Supreme Court has determined that Title II of the ADA applies to police programs:

a. *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206 (1998)

> State prisons fall squarely within the statutory definition of "public entity," which includes "any department, agency, special purpose district, or other instrumentality of a State or States or local government." §12131(1)(B).

b. ***Olmstead v. L.C.***, 527 U.S. 581 (1999)

. . . under Title II of the ADA, States are required to place persons with mental disabilities in community settings rather than in institutions . . .

c. *Hainze* v. *Richards*, 207 F. 3d 795 (CA5 2000)

A disabled plaintiff can succeed in an action under Title II if he can show that, by reason of his disability, he was either "excluded from participation in or denied the benefits of the services, programs, or activities of a public entity," . . .

d. *Tennesse v Lane*, 541 U.S. 509 (2004)

Title II constitutes a valid exercise of Congress' authority under §5 of the Fourteenth Amendment to enforce that Amendment's substantive guarantees.

e. *City of San Francisco v. Sheehan*, 135 S.Ct. 1765 (2015)

Title II of the ADA commands that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public

entity, or be subjected to discrimination by any such entity." 42 U. S. C. §12132.

2. Mental Impairment (28 C.F.R. § 35.104)

One person's mental impairment is another person's natural state of mind. "He's crazy", "she's weird", may indicate one person's perception of another as having "some sort of psychological disorder". The ADA states:

> ***Mental impairment*** means . . . any [neurological] disorder or condition . . .[or] any ***mental or psychological disorder*** . . .

The disability under the ADA exists only because it is perceived by the public entity as disabling.

3. Major Life Activity (§ 35.104)

> Major life activities include training certification programs enabling an individual to earn a livelihood. The ADA states: ***Major life activities*** mean functions such as . . . ***learning*** . . .

Petitioner is clearly "Capable" (as attested by a medical assessment, see p. App-39) "to participate in the basic recruit training program". Respondent perceives Petitioner to be incapable due to a perceived disability.

4. Eligibility Criteria (28 C.F.R. § 35.130(8))

Requirements for admission to the Program included payment of a nonrefundable application fee, submission of specific documentation (including fingerprints, proof of citizenship and residency, and two medical assessments), passing a strenuous physical fitness test, and passing a criminal background check, all of which Petitioner did successfully.

Respondent, through its Director, then arbitrarily created new requirements for Petitioner to submit - an unspecified medical and psychological report. Such a requirement is contrary to the ADA, which states:

> ***A public entity shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability*** or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity . . .

5. Direct Threat Exemption (28 C.F.R. § 35.139)

The ADA provides an exception should a disabled individual pose a "direct threat" to the public Program. To determine this, an Individual Assessment (IA) is required to determine the "nature, duration, and severity of the risk".

In its Answer Brief on appeal to the Florida 5th DCA, Respondent argued that the Petitioner's "refusal" to provide ***additional inexistent medical documentation***, "prevented [Respondent] from being able to conduct the necessary [internal] assessment" to determine whether or not Petitioner's perceived disability constituted a "direct threat" to the Program.

28 C.F.R. §35.139(b) stipulates that:

> In determining whether an individual poses a direct threat to the health or safety of others, **a public entity must make** an individualized assessment, based on reasonable judgment that ***relies on current medical knowledge*** or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur . . .

No IA was ever prepared by Respondent concerning the "direct threat" posed by what Respondent perceived to be Petitioner's disability.

In an interesting and relevant 2016 federal case a local school perceived a student as having a disability posing a direct threat to the school. The student had no such disability and no IA had been prepared by the school.

Consequently, the opinion read, the facts "negate the 'reasonable judgment' and the 'best available objective evidence' standards [and] do not establish a direct threat defense." *Chadam v. Palo Alto Unified School District* (4:13-CV-04129-CW), USCA 9th Circuit opinion dated November 15, 2016

Petitioner's "refusal" to provide ***additional inexistent medical documentation*** did not preclude Respondent from making an IA, as the IA "***relies on current medical knowledge***", not on "knowledge" that doesn't exist.

Further, available medical knowledge (medical doctor certificate) declares that Respondent is "Capable of participating in the basic recruit training program activities", notably "firearms high-liability training" which "requires firing a handgun and long gun" (p. App-39).

Petitioner poses no direct threat to any Program or anyone, and should be allowed to pursue his education without discrimination based on Respondent's arbitrary perception of some sort of disability.

B. PCA Doctrine Contrary to U.S. Constitution

Florida's PCA Doctrine of judicial administration unconstitutionally divides Florida into five judicial substates. Rather than distributing case type

categories among the District Courts of Appeal, each substate, Districts 1-5, has its own distinct geographic area and its own highest court with jurisdiction over the same types of cases.

Consequently, conflict in application of the laws between the District Courts is inevitable.

These five District Courts of Appeal each interpret Florida's laws and judicial procedures in its own way. The Florida Supreme Court, although constitutionally required to supervise judicial administration (p. App-42), cannot review any DCA opinion unless expressly authorized to do so by the DCA (pp. App-1, App-42-44).

To deprive Florida's Supreme Court of review jurisdiction, on technical grounds, the DCA merely has to issue an unelaborated PCA decision.

As citizens in each District are treated differently under the law than those in other Districts, and no mechanism exists to ensure the harmonious application of law, Florida's citizens are denied equal protection under the law, as required by the Fourteenth Amendment to the U.S. Constitution.

The history and rationale for Florida's PCA Doctrine is documented by Florida Supreme Court Chief Justice England, in his concurring opinion in *Jenkins v. State*, 385 So.2d 1356 (Fla. 1980). Briefly,

an amendment to the Florida Constitution, Article V, approved by the voters in 1980, was designed to solve two problems:

> First, the amendment would eliminate delay in the supreme court, both by removing from the Court's docket those district court decisions which had no written opinion, and by eliminating all direct appeals to the supreme court from trial courts (except in bond validation cases and cases in which a death penalty had been imposed). Second, the amendment would reduce the cost of litigation by reducing the number of multiple appeals and by making the district courts truly final in the bulk of matters brought to Florida's appellate courts.

Petitioner, *pro-se*, in the instant case, and in other cases, has three times sought Florida Supreme Court constitutional review of statutes - and their misapplication against Petitioner in the trial court. All three times the cases, PCA'd by the district court, were simply denied review, and, for the third time now, Petitioner turns to the U.S. Supreme Court for relief (ref. prior cases SC15-2107 and SC16-826).

Under Florida's PCA Doctrine, most Florida cases, and particularly those involving non-lawyer *pro-se* litigants, such as Petitioner, have little practical access to discretionary certiorari review by the Florida Supreme Court. District Courts of

Appeal, even separate panels within each District court, have full power to arbitrarily deprive the Florida Supreme Court of review jurisdiction in any case whatsoever, by issuing an unelaborated PCA ruling.

The Constitution of the United States, through the Due Process and Equal Protection Clauses of the Fourteenth Amendment, requires Florida to provide equal protection of its citizens, under a harmonious application of law, and fundamental fairness in its judicial process. Florida's PCA Doctrine fails to provide the necessary safeguards to ensure these principles.

Florida had similar issues with recounting ballots:

> The Clause's requirements apply to the manner in which the voting franchise is exercised. Having once granted the right to vote on equal terms, Florida may not, by later arbitrary and disparate treatment, value one person's vote over that of another. . . The record shows that the standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single county from one recount team to another. *Bush v Gore*, 531 U.S. 98 (2000).

Petitioner argues that Florida's PCA Doctrine:

1. unconstitutionally divides Florida into five geographically distinct judicial substates, each with its own highest court and standards;

2. bars the Florida Supreme Court from supervising the district or subordinate trial courts unless the district courts expressly seek the Supreme Court's intervention;

3. authorizes any District court, or any panel within the District court, to arbitrarily deprive the Supreme Court of jurisdiction on technical grounds;

4. permits District Courts of Appeal to ignore Florida Supreme Court precedent and implement the District's own judicial administration, without review;

5. permits District courts and subordinate trial courts to arbitrarily ignore decisions of other District Courts of Appeal; and

6. has a chilling effect, particularly on non-lawyer *pro-se* litigants, from seeking redress of grievances in the courts, having scarce hope of obtaining relief.

Argument against the PCA Doctrine can be found in the dissenting opinion in *Jenkins*, propounded by Justice Adkins. Justice Adkins, concerned about the

1980 Amendment to Article V, wherein *per curium affirmed* rulings are not reviewable by the Florida Supreme Court, cited Justice Drew's concurring opinion in *Foley v. Weaver Drugs, Inc.*, 177 So. 2d 221 (Fla. 1965), stating:

> . . . the responsibility was placed in this Court to keep the law harmonious and uniform. . . A different rule of law could prevail in every appellate district without the possibility of correction. The history of similar courts in this country leads to the conclusion that some of such courts have proven unsatisfactory simply because of the impossibility of maintaining uniformity in the decisional law of such state. *Jenkins supra* citing *Foley supra*

The Florida Supreme Court, overturning *Foley's* "reach down" jurisdiction, has confirmed the PCA Doctrine in *Wells v. State*, 132 So. 3d 1110 (Fla. 2014), *Jackson v State*, 926 So. 2d 1262 (Fla. 2006); *Gandy v. State*, 846 So. 2d 1141 (Fla. 2003); *Stallworth v. Moore*, 827 So. 2d 974 (Fla. 2002); *Harrison v. Hyster Co.*, 515 So. 2d 1279 (Fla. 1987); *Dodi Publ'g Co. v. Editorial Am. S.A.*, 385 So. 2d 1369 (Fla. 1980); *Jenkins v. State*, 385 So. 2d 1356 (Fla. 1980). See Appendix A.

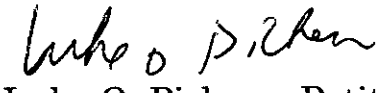
Florida's PCA Doctrine of judicial administration impinges on the rights of all Floridians to equal application of law. Petitioner asks this Honorable Court to suspend application of the 1980 amendment

to Florida's constitution until modified, or until the Florida Supreme Court either revises its interpretation of that amendment, or revises its method of assigning jurisdiction among District Courts of Appeal such that equal protection of law is restored in Florida.

CONCLUSION

Petitioner respectfully requests this Honorable Court to grant this Petition for Writ of Certiorari, clarify the points of law presented, remand this case to the Florida Supreme Court for further action consistent with this clarification, and grant all other relief that this Honorable Court deems just and proper.

Respectfully submitted,



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