UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

JAMES MICHAEL HAND, *et al.*,

Plaintiffs,

v. Case No. 4:17-CV-128-MW-CAS

RICK SCOTT, in his official capacity as Governor of Florida and Member of the State of Florida's Executive Clemency Board, *et al.*,

Defendants.
_____/

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND INCORPORATED MEMORANDUM OF LAW

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Defendants move for summary judgment on all of Plaintiffs' claims.

Under various legal theories, Plaintiffs bring a facial constitutional challenge to Florida's voting restrictions on convicted felons. Each of their legal theories fails. Binding authority holds that Section 2 of the Fourteenth Amendment affirmatively authorizes states to permanently disenfranchise convicted felons. *Johnson v. Governor of Fla.*, 405 F.3d 1214, 1217 (11th Cir. 2005) (en banc). Plaintiffs do not dispute that settled law, nor have they alleged any constitutional defect in the process by which convicted felons *lose* their right to vote. Hence, their challenge to Florida's disenfranchisement laws fails.

Plaintiffs' equal-protection challenge to Florida's re-enfranchisement system also lacks merit. As binding authority makes clear, a state need not automatically restore voting rights upon the completion of a felon's sentence, *Richardson v. Ramirez*, 418 U.S. 24 (1974), nor is it required to employ specific standards susceptible of mechanical application, *Beacham v. Braterman*, 300 F. Supp. 182, 182-83, 184 (S.D. Fla. 1969), *aff'd* 396 U.S. 12 (1969). Rather, such clemency determinations are "committed, as is our tradition, to the authority of the executive" and are therefore "rarely, if ever, [an] appropriate subject[ ] for judicial review." *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 276 (1998).

Even putting aside these lines of binding precedent, Plaintiffs' equal-protection claim fails under the more general test applicable to challenges of this kind. Plaintiffs do not and cannot allege that Florida's re-enfranchisement system employs any suspect classifications. Hence, that system must be upheld if it is rationally related to the advancement of a legitimate state interest. *Shepherd v. Trevino*, 575 F.2d 1110, 1115 (5th Cir. 1978). Indeed, the Eleventh Circuit appears to apply a particularly deferential form of rational-basis review to clemency determinations: "[I]n order for a claim of alleged violations of due process and equal protection in a clemency proceeding to succeed, the violation must be grave, such as where 'a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process.'" *Banks v. Secretary*, 592 F. App'x 771, 773 (11th Cir. 2014). Under applicable law, moreover, Plaintiffs may not establish an

equal-protection violation by comparing the outcomes of their own clemency proceedings to those of other selectively identified individuals alleged to be similarly situated. Still less may they use such ad hoc comparisons to show that Florida's re-enfranchisement regime is facially unconstitutional.

Florida's re-enfranchisement process goes above and beyond the Constitution's requirements. The Executive Clemency Board adheres to eminently reasonable procedures—and considers a host of relevant factors—in determining whether to restore voting rights. For example, the Board solicits, obtains, and reviews pertinent information from each applicant; examines a Confidential Case Analysis detailing the applicant's relevant criminal and personal history, including factors relevant to determining whether the applicant has expressed remorse or demonstrated rehabilitation; and will not deny an application without first affording the applicant the opportunity to review his or her analysis and then appear before, and make a statement to, the Board. Such careful case-by-case review helps the Board "gauge the progress and rehabilitation of a convicted felon" and ensures that it has sufficient "familiarity with the individual defendant and his case." *See Shepherd*, 575 F.2d at 1115. Hence, the State's re-enfranchisement system is rationally calculated to serve a legitimate state "interest in limiting the franchise to responsible voters." *See id.*

Plaintiffs fare no better in challenging so-called "waiting periods" that condition the restoration of voting rights on abstaining from criminality for a period following applicants' completion of their sentences. Settled law holds that States may

permanently disenfranchise all convicted felons. *Johnson*, 405 F.3d at 1217. *A fortiori*, States may also take the less restrictive step of making re-enfranchisement available only to those who refrain from criminality for a fixed period of time.

Finally, Plaintiffs may not circumvent settled law by recasting their equal-protection challenge in the language of the First Amendment. The First Amendment "afford[s] no greater protection for voting rights claims than that already provided by the Fourteenth" Amendment. *Burton v. City of Belle Glade*, 178 F.3d 1175, 1188 n.9 (11th Cir. 1999). Thus, "it is clear that the First Amendment does not guarantee felons the right to vote." *Johnson v. Bush*, 214 F. Supp. 2d 1333, 1338 (S.D. Fla. 2002), *aff'd* 415 F.3d 1214 (11th Cir. 2005) (en banc). Having lost their right to vote, Plaintiffs may not assert a First Amendment interest *in voting* until their voting rights are restored. Therefore, they have no constitutionally cognizable interest on which Florida's discretionary re-enfranchisement system might be said to operate as a prior restraint.

STATEMENT OF UNDISPUTED FACTS

Each of the plaintiffs has been convicted of at least one felony and has thereby lost his or her right to vote under Florida law. Exs. A–I. One of the plaintiffs (Guanipa) is barred from applying for restoration of her civil rights until June 2019, Ex. I, and another (Bass) has an application pending, Ex. E. The rest have applied and their applications have been denied. Exs. A–D, F–H. All of the plaintiffs want to register to vote and vote in Florida. Exs. A–I.

Under Florida law, "[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); *see* Fla. Stat. § 97.041(2)(b). Subject to certain exceptions not relevant here, "the governor may, by executive order filed with the custodian of state records, . . . with the approval of two members of the cabinet, grant full or conditional pardons, restore civil rights, commute punishment, and remit fines and forfeitures for offenses." Fla. Const. art. IV, § 8(a); *see* Fla. Stat. § 944.292(1). Florida's current restoration system is reflected in the Rules of Executive Clemency ("Rules"), which were last amended by unanimous consent of the Board on March 9, 2011. *See* Ex. J at 2, 21 (Rules 2, 19).

Under the Rules, decisions whether to restore civil rights (among which is the right to vote) rest with the Governor and Cabinet sitting as the Clemency Board, which consists of the Governor, Attorney General, Chief Financial Officer, and Commissioner of Agriculture. The Governor, acting alone, may deny restoration applications, but the concurrence of the Governor and two other Board members is required to grant them. *See* Ex. J at 2–3 (Rules 1, 4); Fla. Const. art. IV, § 8(a); Fla. Stat. §§ 940.01(1), 940.03. The same application is used for all types of clemency, including pardons, restoration of civil rights, and the specific authority to own, possess, and use firearms. Applicants must provide certain information and indicate on the form the type(s) of clemency they seek. *See* Ex. K; *see also* Ex. J at 5–8, 10–14 (Rules 5, 6, 9, 10).

Individuals may apply for restoration of civil rights without a hearing if they have not been convicted of any listed serious felonies, have not committed or been arrested for any crimes for five years following completion of their sentences, and meet several other conditions. Ex. J at 10–12 (Rule 9). For all other individuals, a hearing is required and the Rules require applicants to remain felony-free for seven years after completing their sentences before they may apply. *Id.* at 14 (Rule 10).

The Rules also impose eligibility requirements for other kinds of clemency. They impose ten-year and eight-year waiting periods, respectively, before applications for a pardon or restoration of gun rights will be accepted. *Id.* at 5–6 (Rule 5.A., 5.D.). Individuals are not eligible for a commutation of their sentence unless they have completed a specified portion of their sentence and been granted a "Request for Review" or had their case placed on the Board's agenda by a Board member on the grounds of "exceptional merit." *Id.* at 8–9, 21 (Rules 8.A., 17). A separate process applies to applications for commutation of death sentences. *Id.* at 17–18 (Rule 15). All of these clemency determinations may occur only after a hearing, and as with decisions whether to restore voting rights, they are at the Board's discretion. *Id.* at 3, 15 (Rules 4, 11, 12).

The Florida Commission on Offender Review ("FCOR") "operates as the administrative and investigative arm of the [Clemency] Board." Ex. L at 10; *see* Fla. Stat. §§ 947.002, 947.01, 947.13(1)(e). FCOR reviews all clemency applications, and for those that require a hearing, it investigates applicants' "criminal convictions;

history of adjustment to incarceration or supervision; criminal record; traffic record; payment of fines, court costs, public defender fees and victim restitution; history of domestic violence; alcohol and substance abuse history; voter registration information; as well as judicial, state attorney and victim input." Ex. L at 18. FCOR "conducts quality assurance reviews on each" of its investigations. *Id.* After its investigations, FCOR prepares a report and recommendation called a Confidential Case Analysis ("CCA"). Applicants receive a copy of their CCA "prior to" their hearing. *Id.*

The CCAs contain several categories of information that the Board considers in making its decisions. They disclose applicants' franchise-disqualifying felony convictions, including the circumstances of the offenses as reported by law enforcement, as well as applicants' version of the offenses. The CCAs also disclose prior and subsequent criminal records and the circumstances of those offenses. In addition, they contain information relating to any domestic-violence issues, citizenship, alcohol and drug abuse, traffic records, employment, military history, illegal voting and registration activity, any comments from judges and prosecutors, applicants' stated reasons for seeking voting-rights restoration, and applicants' attitudes in dealing with FCOR investigators. They end with a recommendation from FCOR. *See* Exs. M–T (Plaintiffs' CCAs) (filed under seal).

Upon transmittal of the CCA, an application is placed on the agenda for the next quarterly Board hearing. Ex J at 15–16 (Rules 11, 12). Applicants are encouraged

to attend, and having received a copy of the CCA, they are given an opportunity to address the Board. *Id.* at 15–16 (Rule 12). The Board may grant, conditionally grant, or deny applications, either at or after the hearing. *Id.* at 3–4 (Rule 4). A denial triggers a two-year waiting period before eligibility to re-apply. *Id.* at 17 (Rule 14).

Plaintiffs allege—and Defendants agree that relevant discovery materials support—that in determining whether to grant an application for restoration of civil rights, the Board generally weighs various factors "relating to whether [applicants] are leading reformed lives" or whether they have "sufficiently shown remorse." Compl., D.E. 29 ¶¶ 55, 56. At hearings, for example, some Board members have considered factors such as drug use, "especially . . . if [the applicant] was convicted of a drug trafficking offense or if drug use played a role in the offense"; alcohol use, "especially if [the applicants] were convicted of DUI manslaughter or any other offense in which intoxication played a substantial role"; "traffic violations such as speeding or driving with a suspended license"; "illegal registration and voting"; "employment status"; "family"; "'attitude'" while appearing before the Board; and other "indicia of living a moral life or having 'turned [one's] life around.'" *Id.* ¶¶ 55, 56, 59, 61.

LEGAL STANDARD

Under Rule 56 of the Federal Rules of Civil Procedure, "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."

ARGUMENT

I. DEFENDANTS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW INSOFAR AS PLAINTIFFS CHALLENGE FLORIDA'S DISENFRANCHISEMENT LAWS.

Plaintiffs bring a "facial challeng[e]" to Florida's "disenfranchisement and re-enfranchisement laws." Compl. ¶¶ 1, 71. The challenge to the State's disenfranchisement laws fails.

In *Richardson v. Ramirez*, the Supreme Court rejected an equal-protection challenge to a state law that disenfranchised felons, including those who had "completed their sentences and paroles." 418 U.S. 24, 56 (1974). Rather than undertake a generic equal-protection analysis, the Court rested its rejection of the claim on a proposition that has equal force here: "the exclusion of felons from the vote has an affirmative sanction in § 2 of the Fourteenth Amendment." *Id.* at 54. Section 2 of the Fourteenth Amendment, the Court emphasized, reduces "the basis of representation" for any state in which the right to vote is denied or abridged, "except for participation in rebellion, or other crime," U.S. Const. amend. XIV, § 2; *see* 418 U.S. at 41–42, 54–55. Section 1 of the Fourteenth Amendment "could not have been meant to bar outright a form of disenfranchisement which was expressly exempted from the less drastic sanction of reduced representation which § 2 imposed for other forms of disenfranchisement." *Id.* at 55.

This textual analysis, the Court noted, comports with history and judicial precedent. Available legislative history indicates the text of § 2 "was intended by

Congress to mean what it says." *Id.* at 43. In other words, the Framers of the Fourteenth Amendment expressly contemplated—and thus did not intend to prohibit—disenfranchisement of convicted felons. *See id.* at 43–48. The Court further observed that at the time the Fourteenth Amendment was ratified, 29 states had constitutional provisions allowing or requiring felon disenfranchisement, and states with such provisions were admitted to the Union pursuant to the Reconstruction Act. *Id.* at 48–49. That Act required the constitutions of re-admitted states to conform "in all respects" to the federal Constitution, and it required that those constitutions be framed by a convention of delegates elected by the state's male citizens, "*except such as may be disenfranchised for participation in the rebellion or for felony at common law*." *Id.* at 49 (emphasis in opinion). "This convincing evidence of the historical understanding of the Fourteenth Amendment," the Court explained, "is confirmed by the decisions of this Court which have discussed the constitutionality of provisions disenfranchising felons" and "indicated approval of [selective and categorical disenfranchisement of felons] on a number of occasions." *Id.* at 53 (compiling and discussing cases).

In short, "[t]he Supreme Court made . . . clear" in *Ramirez* that "[a] state's decision to *permanently* disenfranchise convicted felons does not, in itself, constitute an Equal Protection violation" because "Section 2 of the Fourteenth Amendment . . . expressly permits states to" do precisely that. *Johnson v. Governor of Fla.*, 405 F.3d 1214, 1217 (11th Cir. 2005) (en banc). And Plaintiffs do not allege any defect in the process by which convicted felons *lose* the right to vote. *Compare Hunter v. Underwood*, 471 U.S.

222, 227-33 (1985). Hence, this Court should reject Plaintiffs' claims insofar as they challenge the State's disenfranchisement laws, regardless of whether the Court finds merit in Plaintiffs' challenge to the State's re-enfranchisement process.

It is no answer to say that Florida has, in Plaintiffs' view, "made the process of voting rights *restoration* unconstitutionally arbitrary." Complaint ¶1 (emphasis added). Even if that were so—and it is not, *see infra* Part II—alleged problems with the State's re-enfranchisement procedure would not warrant invalidation of the State's analytically and temporally distinct disenfranchisement procedure. At bottom, Plaintiffs complain that a state may not use "ad hoc, subjective and vague standards and factors" in determining whether to restore a disenfranchised felon's voting rights, because "[t]he absence of objective, transparent legal constraints opens the door" to various kinds of illicit discrimination and malfeasance. D.E. 43, at 3; *see* Complaint ¶97. That argument, valid or not, has no application to Florida's disenfranchisement laws, which provide that *all* convicted felons automatically and immediately lose their right to vote. *See* Fla. Const. Art. VI, § 4(a); Fla. Stat. §§ 97.041(2)(b), 944.292(1).

Notably, Plaintiffs' requested relief cannot be reconciled with their purported challenge to the State's disenfranchisement laws. Plaintiffs seek automatic restoration of voting rights upon completion of sentences, Compl. at pp. 74-78 ¶¶ (e)-(*l*), and thus implicitly concede that the State may continue to disenfranchise convicted felons while they are serving their sentences. Consistent with that concession, this Court

should decline to disturb the State's disenfranchisement laws, regardless of whether it accepts Plaintiffs' challenge to the State's re-enfranchisement regime.

II. Defendants Are Entitled to Judgment as a Matter of Law on Plaintiffs' Claims in Counts I, II, III, and IV Against Florida's Re-Enfranchisement Procedures.

Plaintiffs bring a variety of claims challenging various aspects of the State's re-enfranchisement procedures. Counts I and II bring First Amendment and equal-protection challenges, respectively, against Defendants' discretion in making restoration decisions. Count III challenges a "lack of definitive time limits" for processing restoration applications, again under a First Amendment theory. And Count IV challenges rules requiring that applicants maintain a crime- or felony-free record for certain fixed periods of time following the completion of their sentences. All of those claims fail as a matter of law.

A. Defendants Are Entitled to Judgment on Plaintiffs' Equal Protection Claim in Count II.

In Count II of the Complaint, Plaintiffs allege that Florida's re-enfranchisement system violates the Equal Protection Clause of the Fourteenth Amendment because "the Board's decisions are unconstrained by any laws or rules," Compl. ¶ 97, and "Florida state law and administrative rules and procedures do not in any way regulate or limit the Board's discretionary authority to grant or deny applications for the restoration of voting rights," *id.* ¶ 99. As Plaintiffs have explained, this claim rests on an assertion that "Florida's voting rights restoration scheme lacks any codified,

objective test or set of criteria" cabining the Board's decisions, D.E. 43 at 25—"*i.e.* that the Board's ad hoc, vague factors and standards do not make a legal rule," *id.* at 22. This claim is foreclosed by binding precedent directly addressing the same claim at issue here, would falter even on background equal-protection principles, and would give rise to unacceptable practical and doctrinal implications.

1. Binding precedent forecloses Plaintiffs' equal-protection claim. In *Beacham v. Braterman*, 300 F. Supp. 182, 183 (S.D. Fla. 1969), *aff'd*, 396 U.S. 12 (1969), a disenfranchised Florida felon made the same argument that Plaintiffs advance and attacked the same set of laws. The *Beacham* plaintiff had been denied a pardon and restoration of civil rights, including the right to vote, and "[n]either the Governor of Florida nor members of the State Cabinet ha[d] established specific standards to be applied to the consideration of petitions for pardon." 300 F. Supp. at 183. He brought equal-protection and due-process claims seeking "to enjoin the Governor of Florida from continuing to grant and deny petitions for pardons in a purely discretionary manner without resort to specific standards . . . ." *Id.* A three-judge panel of the Southern District of Florida rejected those claims, holding that Equal Protection and Due Process are not denied when the Governor and Cabinet "restore discretionarily the right to vote to some felons and not to others." *Id.* at 184. "The historic executive prerogative to grant a pardon as an act of grace," the court explained, "has always been respected by the Courts. Where the people of a state have conferred unlimited

pardon power upon the executive branch of their government, the exercise of that power should not be subject to judicial intervention." *Id.*

The Supreme Court summarily affirmed, 396 U.S. 12 (1969), necessarily rejecting the claim that Equal Protection requires "specific standards" to cabin re-enfranchisement decisions, *see* 300 F. Supp. at 183. This affirmance adjudicated the merits and therefore binds lower courts, *Picou v. Gillum*, 813 F.2d 1121, 1122 (11th Cir. 1987), prohibiting them "from coming to opposite conclusions on the precise issues presented and necessarily decided," *Plante v. Gonzalez*, 575 F.2d 1119, 1125 (5th Cir. 1978).[1] Thus, Plaintiffs' equal-protection challenge—which seeks to cabin the Board's decisions with a "codified, objective test or set of criteria," D.E. 43 at 25—is foreclosed by *Beacham*.

2. *Beacham* fits within a well-established line of authority upholding the existence of wide discretion in other clemency contexts, such as the weightier matter of death-sentence commutations. In *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998), for example, the Supreme Court confirmed that "the clemency and pardon powers are committed . . . to the authority of the executive," and reaffirmed prior caselaw holding that such decisions "'are rarely, if ever, appropriate subjects for judicial review.'" *Id.* at 276. Intrusive judicial review of clemency decisions would

[1] Decisions of the Fifth Circuit rendered on or before September 30, 1981 are binding precedent in the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

invert the clemency paradigm, since the whole point of clemency is to supplement the judicial process. Clemency "is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted." *Herrera v. Collins*, 506 U.S. 390, 411–12 (1993); *see also Woodard*, 523 U.S. at 280–81, 84–85 (plurality op.) (observing "the heart of executive clemency . . . is to grant clemency as a matter of grace, thus allowing the executive to consider a wide range of factors not comprehended by earlier judicial proceedings," and "clemency has not traditionally been the business of courts" because "executive clemency exists to provide relief from harshness or mistake in the judicial system, and is therefore vested in an authority other than the courts"). In short, "[t]here is no constitutional right to clemency," *Banks v. Sec'y, Fla. Dep't of Corrs.*, 592 F. App'x 771, 773 (11th Cir. 2014), which remains committed to executive discretion "as 'a matter of grace,'" *Valle v. Sec'y, Fla. Dep't of Corrs.*, 654 F.3d 1266, 1268 (11th Cir. 2011) (quoting *Woodard*, 523 U.S. at 280–81)).

Applying the logic of *Woodard*, the Eleventh Circuit has held that "in order for a claim of alleged violations of . . . equal protection in a clemency proceeding to succeed, the violation must be grave, such as where 'a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process.'" *Banks*, 592 F. App'x at 773 (quoting *Woodard*, 523 U.S. at 289 (O'Connor, J., concurring in part and concurring in the judgment)). Defendants' examination of CCAs, consideration of applicants' hearing

statements, and weighing of various factors related to applicants' remorse and reformation easily satisfies that test.

3. Even if Plaintiffs' equal-protection challenge were not foreclosed by *Beacham* or the well-established line of authority approving the existence of discretion in clemency, it falters on the general equal-protection principles that apply to re-enfranchisement determinations. As Justice O'Connor, writing for the Ninth Circuit, has emphasized, "a litigant bringing an equal protection challenge to a felon-disenfranchisement scheme must first face the formidable task of escaping [*Ramirez*'s] long shadow." *Harvey*, 605 F.3d at 1073. This Circuit takes the same view: "section 2 of the fourteenth amendment blunts the full force of section 1's equal protection clause with respect to the voting rights of felons. . . . Section 2's express approval of the disenfranchisement of felons thus grants to the states a realm of discretion in the disenfranchisement and reenfranchisement of felons which the states do not possess with respect to limiting the franchise of other citizens." *Shepherd v. Trevino*, 575 F.2d 1110, 1114 (5th Cir. 1978).

Under the law of this Circuit, a state policy providing for the selective disenfranchisement or re-enfranchisement of convicted felons satisfies the requirements of the Equal Protection Clause if that policy bears "a rational relationship to the achieving of a legitimate state interest." *Id.* at 1115. Moreover, "[a] state properly has an interest in excluding from the franchise persons who have manifested a fundamental antipathy to the criminal laws of the state or of the nation

by violating those laws sufficiently important to be classed as felonies." *Id.* By "breach[ing] the social contract," convicted felons "have raised questions about their ability to vote responsibly," and the state may seek to "limit[ ] the franchise to responsible voters." *Id.*; *see also Green v. Bd. of Elections of N.Y.*, 380 F.2d 445, 451 (2d Cir. 1973) (Friendly, J.) ("[I]t can scarcely be deemed unreasonable for a state to decide that perpetrators of serious crimes shall not take part in electing the legislators who make the laws, the executives who enforce these, the prosecutors who must try them for further violations, or the judges who are to consider their cases."). And a case-by-case re-enfranchisement system, like Florida's, that allows the state to "gauge the progress and rehabilitation of a convicted felon"—especially one offering "familiarity with the individual defendant and his case"—is rationally related to that legitimate interest. *Shepherd*, 575 F.2d at 1115.

The equal-protection claim here is weaker than the one the former Fifth Circuit rejected in *Shepherd*. There, the re-enfranchisement system on its face drew a classification: applicants sentenced by state judges, but not those sentenced by federal judges, could petition the governor or their sentencing judge for re-enfranchisement. *Id.* at 1112. Despite an applicant's sentencing authority bearing only dubious relevance to his suitability for re-enfranchisement, the court nevertheless upheld the classification. *Id.* at 1115. Here, by contrast, Florida's re-enfranchisement system draws no such classification among applicants. Moreover, *Shepherd* instructs that the chief target of Plaintiffs' equal-protection challenge—the case-by-case nature of

Florida's re-enfranchisement procedures—is an equal-protection-honoring feature, not an equal-protection-violating problem. *See id.*

In any event, the Board employs eminently reasonable procedures, including the examination of a host of indisputably relevant factors, in reaching its decisions.[2] For example, the Board requires applications listing pertinent information, and the FCOR investigates the applicants. After its investigations, the FCOR prepares a CCA that resembles a pre-sentence investigation report, which the Board reviews and which is sent to the applicant. Having received a copy of the CCA, applicants are then given an opportunity to address the Board. These procedures are reasonably calculated to help the Board "gauge the progress and rehabilitation of a convicted felon" and thereby effectuate "the state's interest in limiting the franchise to responsible voters." *Shepherd*, 575 F.2d at 1115.

[2] The complaint selectively quotes some of the Governor's statements at Board hearings to support Plaintiffs' claim that the Board's decisions are arbitrary. *See* Compl. ¶¶ 3, 55 (citing March 3, 2016 hearing at 00:04:25, http://thefloridachannel.org/videos/3316-executive-clemency-board-meeting-part-1/; December 7, 2016 hearing at 2:02:00–2:02:07, http://thefloridachannel.org/videos/12716-executive-clemency-board-meeting/). Such quotations do not displace the Board's established procedures and factors governing the restoration of voting rights. At any rate, the remarks in question do not help Plaintiffs' case. The Governor never said or implied the Board fails to engage in reasoned decision-making. Rather, he compared judicial determinations to clemency determinations and emphasized that the former involve matters of law and the latter involve matters of grace. Such unremarkable statements are consistent with settled law and do not come close to establishing that the Board's decision-making is arbitrary.

Not only does the Board provide ample process; it grounds its decisions on a weighing of relevant factors. The factors examined in the CCAs—including the circumstances of any franchise-disqualifying felonies, prior and subsequent criminal records, and any illegal registration and voting—are plainly relevant to the legitimate government interest that binding precedent identifies. *See Johnson*, 405 F.3d at 1225 ("Florida has a legitimate reason for denying the vote to felons."); *Shepherd*, 575 F.2d at 1115 (felons "have breached the social contract," and States have a valid interest "in limiting the franchise to responsible voters"). In addition, the Complaint itself discloses numerous considerations that rationally relate to whether applicants will make responsible voters, and it even reveals some reasons why these factors may apply differently in different cases. In particular, Plaintiffs recognize that the Board considers drug use, "especially . . . if [the applicant] was convicted of a drug trafficking offense or if drug use played a role in the offense"; alcohol use, "especially if [the applicants] were convicted of DUI manslaughter or any other offense in which intoxication played a substantial role"; "traffic violations such as speeding or driving with a suspended license"; "illegal registration and voting"; "employment status"; "family"; "'attitude'" while appearing before the Board; and "other perceived indicia of living a moral life or having 'turned [one's] life around.'" Compl. ¶¶ 55, 56, 59, 61. It is readily apparent why drug or alcohol use, for example, might weigh more heavily in cases where substance abuse played a role in the applicant's offense of conviction.

The Rules' time limits for eligibility to apply for re-enfranchisement, and the Board's case-specific denials based on insufficient passage of time, *see* Compl. ¶¶ 44, 46, 66, also rationally advance the State's valid interest "in limiting the franchise to responsible voters." *Shepherd*, 575 F.2d at 1115. Determining whether a convicted felon who has completed his sentence can be a responsible voter requires "familiarity with the individual defendant and his case," because the inquiry involves "gaug[ing] [his] progress and rehabilitation." *Id.* One cannot perform this inquiry without the passage of time. Plaintiffs understandably would prefer a process that moves more promptly, but the Constitution allows the State to require a track record before it restores the voting rights of "persons who have manifested a fundamental antipathy to the criminal laws of the state" and "breached the social contract." *Id.*; *see also Bowens v. Quinn*, 561 F.3d 671, 676 (7th Cir. 2009) ("Executive clemency is a classic example of unreviewable executive discretion . . . . We therefore balk at the idea of federal judges' setting timetables for action on clemency petitions by state governors.").

4. Furthermore, to the extent Equal Protection operates in clemency, it focuses on process, not outcomes. Plaintiffs devote 17 pages of the Complaint to cataloguing individual outcomes. Compl. ¶¶ 57–67. But Equal Protection guarantees only a non-arbitrary *system*; no court has gone so far as to hold that applicants for re-enfranchisement, as individuals who might appear to be similarly situated, have a right to similar outcomes or a weighing of factors with precision. *See, e.g.*, *Banks*, 592 F. App'x at 773 (rejecting equal-protection and due-process claims because "Mr. Banks

has made no conceivable allegation that is sufficient to establish that Florida's clemency *process* is as arbitrary as a coin flip or that he was denied access to Florida's clemency *process*" (emphases added)); *see also E & T Realty v. Strickland*, 830 F.2d 1107, 1114 (11th Cir. 1987) ("Even arbitrary administration of a statute, without purposeful discrimination, does not violate the equal protection clause."). This Court, in its orders on Plaintiffs' motions to compel, appears to agree. *See* D.E. 62 at 1 (CCAs of non-parties "are not relevant to" Plaintiffs' claims); D.E. 76 at 2 (dispositions of non-party clemency applications are, at best, of only "marginal relevance . . . in Plaintiffs' facial challenge" but "may help Plaintiffs perfect a record, as they suggest, for any appellate action(s)").

A different conclusion would make a mess of the law, as selectively culled comparisons of individuals alleged to be similarly situated are not allowed to make out equal-protection violations in circumstances where claimants are entitled to considerably *more* judicial process. Consider, for example, criminal sentencing, where different outcomes frequently result between defendants who might appear to be similarly situated. Nevertheless, such sentencing disparities alone do not establish an equal-protection claim without proof of "constitutionally impermissible motives such as racial or religious discrimination." *Jones v. White*, 992 F.2d 1548, 1571–72 (11th Cir. 1993). In the more consequential capital-sentencing context, the Supreme Court has derived the same proposition from the Eighth Amendment. *See McCleskey v. Kemp*, 481 U.S. 279, 306–07 (1987) (Defendants "cannot prove a constitutional violation by

demonstrating that other defendants who may be similarly situated did *not* receive the death penalty." (emphasis in original)); *id.* at 312–13 ("Apparent disparities in sentencing are an inevitable part of our criminal justice system," and the Court will "decline to assume that what is unexplained is invidious."); *id.* at 307 n.28 ("The Constitution is not offended by inconsistency in results based on the objective circumstances of the crime.").

If outcome disparities among similarly situated individuals do not establish an equal-protection claim in criminal sentencing or a cruel-and-unusual-punishment claim in capital cases, then they certainly do not establish an equal-protection claim in clemency, where proceedings supplement—rather than operate within—the judicial process, and where decision-makers are subject to far fewer limitations. *See Woodard*, 523 U.S. at 276; *Banks*, 592 F. App'x at 773. In both contexts, however, the core rationale for this rule is the same: sentencing and re-enfranchisement decisions are case-specific inquiries that inherently require the exercise of discretion, and the case-by-case nature of these decisions renders comparisons between individual outcomes inappropriate. Where, as here, there is no discrimination against a suspect class, Equal Protection guarantees only a non-arbitrary system, not similarity in result between selectively identified individuals alleged to be similarly situated.[3]

[3] Even putting aside their inability to make out a facial violation by relying on selective comparisons to applicants alleged to be similarly situated, the Complaint references hearings that show a readily-identifiable, non-arbitrary basis for many of the Board's decisions. For example, Plaintiff Smith's application was denied after

5. Plaintiffs' theory is not just incompatible with settled law; it also carries troubling and unacceptable practical and doctrinal consequences. If accepted, Plaintiffs' equal-protection claim would cast a cloud of doubt over all discretionary re-enfranchisement systems—of which there are at least eleven in the country.[4] If, as Plaintiffs assert, the problem with Florida's voting-rights-restoration procedure is that it "lacks any codified, objective test or set of criteria," D.E. 43 at 25, the logical

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unrebutted testimony that he committed (and was arrested for) domestic violence after completing his sentence. Sept. 21, 2016 hearing at 4:24:03–4:29:37, http://thefloridachannel.org/videos/92116-executive-clemency-board-meeting-part-2/ (cited in Compl. ¶ 21 n.10). Plaintiff Johnekins's application was denied after he admitted to illegally registering to vote and voting, both of which—if done willfully—are third-degree felonies under state law. Mar. 22, 2012 hearing at 2:08:33–2:13:44, http://thefloridachannel.org/videos/32212-executive-clemency-board-meeting/ (cited in Compl. ¶ 23 n.11); *see* Fla. Stat. §§ 104.011, 104.15. Surely the commission of crimes after completion of one's sentence—especially violent crimes and voting fraud—provide a legitimate basis for concluding an applicant would not make a responsible voter. Moreover, Plaintiffs' CCAs disclose additional legitimate factors supporting the Board's decisions on their applications. *See* Exs. M–T (Plaintiffs' CCAs) (filed under seal).

[4] At least ten States other than Florida provide officials or judges with substantial discretion in the re-enfranchisement context, either as to all felons or as to some class of felons. These States are Arizona, Delaware, Iowa, Kentucky, Maryland, Mississippi, Nevada, New Jersey, Virginia, and Wyoming. *See* Ariz. Rev. Stat. §§ 13-908, 13-911; Del. Const. Art. V, § 2; 15 Del. Code §§ 6102(a)(1), 6103(b); Iowa Const. art. II, § 5; Iowa Governor's Exec. Order 2011-70, *available at* http://felonvoting.procon.org/sourcefiles/Exec_Order_70_Iowa_voting.pdf; *Griffin v. Pate*, 884 N.W.2d 182, 194 (Iowa 2016); Ky. Const. § 145; Ky. Rev. Stat. § 196.045; Kentucky Governor's Exec. Order 2015-52, *available at* https://www.brennancenter.org/sites/default/files/blog/Bevin%20Order%202015-052.pdf; Md. Code Ann., Election Law, § 3-102(b)(3); Miss. Const. art. XII, §§ 241, 253; Miss. Const. art. V, § 124; Miss. Code. §§ 47-7-5(3), 47-7-31, 99-19-37; Nev. Rev. Stat. §§ 213.155, 213.157; N.J. Stat. §§ 2C:51-3, 19:4-1; Va. Const. art. II, § 1; Va. Const. art. V, § 12; Va. Code. § 24.2-101; *Howell v. McAuliffe*, 788 S.E.2d 706, 716–19, 722–24 (Va. 2016); Wyo. Code §§ 6-10-106, 7-13-105, 22-1-102(a)(xxvi), 22-3-102(a)(v).

remedy would be for the State to put some such test or criteria in place. But Plaintiffs do not ask for an order directing the State to do that. Instead, they ask for this Court to rewrite Florida law, *see* Fla. Const. art. IV, § 8(a) (Governor and Cabinet "may" restore civil rights); Fla. Stat. § 940.01 (same), to provide for automatic restoration of voting rights upon completion of a convicted felon's sentence. Compl. pp. 73–79 ¶¶ (g)–(*l*). That is exactly what *Ramirez* held that States need not do. 418 U.S. at 56.

It is not surprising that Plaintiffs do not ask for a remedy reasonably tailored to address the alleged constitutional infirmity of which they complain. After all, a more "objective test," D.E. 43 at 25, might well work to their detriment. For example, Florida could "permanently disenfranchise convicted felons," *Johnson*, 405 F.3d at 1217, without providing any process—discretionary or otherwise—for restoration. Alternatively, the State might adopt objective criteria that make it harder for convicted felons to regain the franchise, such as a requirement that restoration applicants maintain a *crime-free* (and not just a *felony-free*) record for seven (or ten, or twenty) years following the completion of their sentences.

In any event, faced with Plaintiffs' proffered all-or-nothing choice of automatic re-enfranchisement or permanent disenfranchisement, States might well opt for the latter course. *See Ramirez*, 418 U.S. at 55; *Johnson*, 405 F.3d at 1217. By presenting States with such a binary choice, Plaintiffs would prevent policymakers from taking the reasonable middle road and advancing the important interest that lies at the heart of discretionary re-enfranchisement systems: encouraging rehabilitation and

discouraging recidivism by rewarding those who, after a meaningful passage of time, demonstrate an intent and ability to reform their ways and abide by the law. *See Shepherd*, 575 F.2d at 1115. States need not and should not be put to such a choice.

Moreover, accepting Plaintiffs' legal theory would likely have unacceptable implications for other clemency determinations. If the absence of a "codified, objective test or set of criteria" should doom Florida's regime for restoring the right to vote under the Equal Protection Clause, D.E. 43 at 25, why would it not also prove fatal for other kinds of clemency decisions, including the decision whether to commute a death sentence, grant a liberty-conferring pardon, or restore a convicted felon's Second Amendment right to keep and bear arms? Indeed, federal law and the laws of most States—including Florida, under the same rights-restoration regime challenged here—provide officials with substantial discretion in the decision whether to restore that latter fundamental constitutional right. *See* 18 U.S.C. § 925(c); Fla. Stat. § 790.23(2); Ex. J at 5–6 (Rule 5.D.). Any equal-protection analysis of such rights-restoration regimes would follow the same contours as an equal-protection analysis here. Plaintiffs cannot contend that they have a stronger interest in voting than in avoiding execution, undoing the substantial deprivation of liberty attending protracted incarceration, or keeping and carrying a firearm to effectuate "'the natural right'" of "'self-preservation . . . and defence,'" *District of Columbia v. Heller*, 554 U.S. 570, 594 (2008) (quoting 1 William Blackstone, Commentaries on the Laws of England 139–40 (1765)). Nor can Plaintiffs offer any principled basis for holding that the Equal

Protection Clause requires a "clear legal rule" for making some but not all kinds of clemency determinations.

Like discretionary death-sentence-commutation regimes, *see Woodard*, 523 U.S. at 276, discretionary gun-rights-restoration systems never have been thought to raise a constitutional problem. *See Heller*, 554 U.S. at 626. Indeed, federal courts of appeals have upheld discretionary permitting regimes against constitutional challenges brought by law-abiding plaintiffs who, with no criminal history, enjoy full Second Amendment rights. *E.g.*, *Drake v. Filko*, 724 F.3d 426, 440 (3d Cir. 2013); *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 101 (2d Cir. 2012); *see also Woollard v. Gallagher*, 712 F.3d 865, 883 n.11 (4th Cir. 2013) (rejecting an equal-protection challenge against such a discretionary regime). *A fortiori*, the State should be allowed to employ a discretionary rights-restoration regime when it seeks "to protect the public by preventing the possession of firearms by persons who, because of their past conduct, have demonstrated their unfitness to be entrusted with such dangerous instrumentalities," *State v. Snyder*, 673 So. 2d 9, 10 (Fla. 1996) (emphasis added).

* * *

In sum, Plaintiffs' equal-protection claim cannot be reconciled with binding precedent, falters even under generally-applicable equal-protection principles, might well frustrate the cause Plaintiffs seek to advance, and would give rise to unacceptable practical and doctrinal implications. Defendants are entitled to judgment as a matter of law on Count II.

B. Defendants Are Entitled to Judgment on Count IV.

In Count IV, Plaintiffs challenge certain eligibility requirements in Rules 9 and 10 of the Rules of Executive Clemency, which Plaintiffs label "waiting periods." Rule 9 permits applications for restoration without a hearing if the applicant has not committed or been arrested for any crimes for five years following completion of his felony sentence. Rule 10 permits applications for restoration with a hearing if the applicant has not been convicted of any felonies for seven years since completing his felony sentence. Plaintiffs assail these requirements as a "de facto second sentence" and an "undue burden" or "severe restriction" on the right to vote. Compl. ¶ 115.

Plaintiffs are wrong to consider these eligibility requirements a "de facto second sentence" because the sentencing authority is not tasked with deciding whether and for how long a felon should be disenfranchised. Disenfranchisement occurs by operation of law as a consequence of a felony conviction, and its duration is permanent unless voting rights are restored through the clemency process. *See* Fla. Const. art. IV, § 8(a); Fla. Const. art. VI, § 4(a); Fla. Stat. §§ 97.041(2)(b), 944.292(1). Courts do not—and cannot—alter these requirements of Florida law in issuing a criminal sentence.

In any event, labels aside, this claim fails for the same reason that Plaintiffs' attack on Florida's disenfranchisement laws fails. As construed by the Supreme Court, Section 2 of the Fourteenth Amendment allows States not only to "burden" or "restrict[ ]" voting by felons, Compl. ¶¶ 114, 115, but to permanently prohibit it

altogether. *Johnson*, 405 F.3d at 1217 (citing *Richardson*, 418 U.S. at 53–55); *see also Harvey*, 605 F.3d at 1079 (O'Connor, J.) ("[O]nce a felon is properly disenfranchised a state is at liberty to keep him in that status indefinitely and never revisit that determination."). It follows that Florida may take the less restrictive step of making selective re-enfranchisement available to disenfranchised felons who refrain from criminality for a given amount of time. That is just what Rules 9 and 10 do.

C. Defendants Are Entitled to Judgment on Plaintiffs' First Amendment Claims in Counts I and III.

In Counts I and III, Plaintiffs claim that voting carries First Amendment interests, and "Florida's felon disenfranchisement and re-enfranchisement laws together operate as an invalid prior restraint" because of the "unfettered official discretion" vested in the Board (Count I) and lack of time limits for processing applications (Count III). Compl. ¶¶ 87, 90, 109.[5] By attacking the Board's discretion, these claims duplicate Plaintiffs' equal-protection claim, and they fail for the same reasons. Furthermore, these claims fail for the additional reason that disenfranchised felons cannot bootstrap their way to a constitutional right to vote via the First Amendment.

[5] Plaintiffs also seek to deploy the First Amendment in Count IV. That claim fails for the reasons described above in Part II.B., but the argument here also applies to Count IV and provides an independent ground for summary judgment on the claim.

As the Eleventh Circuit has explained, "the First and Thirteenth Amendments afford no greater protection for voting rights claims than that already provided by the Fourteenth and Fifteenth Amendments." *Burton v. City of Belle Glade*, 178 F.3d 1175, 1188 n.9 (11th Cir. 1999). Accordingly, Plaintiffs may not circumvent settled law rejecting their claims by invoking the First Amendment. *See, e.g.*, *Howard v. Gilmore*, 205 F.3d 1333 (4th Cir. 2000) (unpublished); *Johnson v. Bush*, 214 F. Supp. 2d 1333, 1338 (S.D. Fla. 2002), *aff'd sub nom. Johnson v. Governor of Fla.*, 405 F.3d 1214, 1235 (11th Cir. 2005) (en banc); *Farrakhan v. Locke*, 987 F. Supp. 1304, 1314 (E.D. Wash. 1997). Interpreting the First Amendment to guarantee felons a right to vote would nullify Section 2 of the Fourteenth Amendment, which—as authoritatively construed by the Supreme Court in *Ramirez*—authorizes felon disenfranchisement. *See, e.g.*, *Farrakhan*, 987 F. Supp. at 1314.

What is more, courts have uniformly rejected similar attempts to circumvent Section 2 of the Fourteenth Amendment as unpersuasive bootstrapping. For example, the Ninth Circuit, in an opinion by retired Justice O'Connor, rejected a claim that requiring felons to "pay all debts owed under their criminal sentences" as a condition of re-enfranchisement amounted to an unconstitutional poll tax. *Harvey*, 605 F.3d at 1080. The court reasoned that, "[h]aving lost their right to vote, they now have no cognizable Twenty-Fourth Amendment claim until their voting rights are restored." *Id.* The Sixth and Fourth Circuits have rejected similar poll-tax claims under the same rationale. *Johnson v. Bredesen*, 624 F.3d 742, 751 (6th Cir. 2010); *Howard*, 205 F.3d at

1333 (rejecting a challenge to the fee accompanying a civil-rights-restoration application because "it is not his right to vote upon which payment of a fee is being conditioned; rather, it is the restoration of his civil rights upon which the payment of a fee is being conditioned"). Under the same reasoning, a convicted felon who has lost the right the vote is no more subject to a "prior restraint" than a minor who has not yet gained the right to vote.

Extrapolating the logic of Plaintiffs' prior-restraint theory to more traditional free-speech contexts further illustrates the deficiencies of their theory. Under the logic of Plaintiffs' theory, one might say that an individual trespassed from a city park has a First Amendment claim against the city for requiring him to obtain permission before speaking there again. The Eleventh Circuit, however, has rejected such a claim, along with the notion that those lawfully barred from engaging in certain First Amendment-protected activity can circumvent the prohibition by raising a prior-restraint claim. *See Wright v. City of St. Petersburg*, 833 F.3d 1291, 1299 (11th Cir. 2016) (concluding that an ordinance requiring a permit to speak in a park "did not impose a prior restraint on [the plaintiff's] speech" because, "[u]nlike cases involving permit requirements for expressive activity in places where the speaker has a lawful right to engage in it, [the plaintiff] had no right to be in Williams Park for one year after he received a trespass warning as a result of breaking the law in that park." (citations omitted)).

So too here. A right lawfully removed cannot be unlawfully restrained. Having lost their right to vote, Plaintiffs have no cognizable First Amendment interest to

assert until their voting rights are restored. Therefore, they have no First Amendment interest on which Florida's discretionary re-enfranchisement system might be said to operate as a prior restraint.

Assuming *arguendo* that convicted felons may raise a right-to-vote claim under the auspices of the First Amendment, the restrictions they challenge do not constitute a "prior restraint" on speech. Prior-restraint doctrine is a unique aspect of First Amendment jurisprudence that does not extend to other contexts. *See Bernard v. Gulf Oil Co.*, 619 F.2d 459, 467–69 (5th Cir. 1980) (en banc) (summarizing prior-restraint doctrine and noting "the prior restraint's judicial origin and unique purpose"); *accord Drake*, 724 F.3d at 435 (declining to apply prior-restraint doctrine to a Second Amendment claim); *Kachalsky*, 701 F.3d at 91–92 (same).

At all events, Florida's disenfranchisement and re-enfranchisement laws do not prevent Plaintiffs from engaging in any kind of protected speech. Notwithstanding those laws, for example, Plaintiffs are free to speak their minds, publish articles, petition policymakers for a redress of grievances, and otherwise express their views on matters of public concern. What they may not do, the only thing they may not do, is engage in certain conduct—i.e., voting—that is, as to them, constitutionally unprotected. *See Richardson*, 418 U.S. at 54-55; *accord Harvey*, 605 F.3d at 1079.

* * *

In sum, any alleged expressive interests tied to the right to vote do not apply where, as here, there is no right to vote in the first place. Accordingly, Defendants are entitled to judgment as a matter of law on Counts I and III.

CONCLUSION

This Court should grant summary judgment to Defendants on all of Plaintiffs' claims.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on this 13th day of November, 2017, a copy of the foregoing was served on all counsel of record through the Court's CM/ECF Notice of Electronic Filing System.

/s/ *Amit Agarwal*

Attorney

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 7.1(F) of the Local Rules of the Northern District of Florida, I certify that the foregoing Motion and Incorporated Memorandum contains 7,985 words.

/s/ *Amit Agarwal*
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