UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

JAMES MICHAEL HAND, et al.,	)	
	)	
Plaintiffs,	)	
	)	**CIVIL ACTION**
v.	)	
	)	**CASE NO. 4:17-cv-00128-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.	)	
	)	

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants repeatedly invoke the phrase "responsible voter" from *Shepherd v. Trevino*, 575 F.2d 1110 (5th Cir. 1978). DE 103 at 3, 17–20, 22 n.3. *Shepherd* used that language to justify a statutory classification, which drew a line between federal and state felons and excluded the former from reenfranchisement. 575 F.2d at 1113–15. The court concluded that "the *classifications* created by the Texas system [bore] a rational relationship to the state's interest in limiting the franchise to responsible voters." *Id.* at 1115 (emphasis added). *Shepherd* concerned a challenge by federal probationers to legislative line-drawing in felon rights

restoration, *not* a claim by state probationers against unfettered discretion in licensing First Amendment-protected conduct. It did not address and therefore does not foreclose the claims raised in this case.

Comparing *Shepherd* to this case, Defendants state that "Florida's re-enfranchisement system draws no such classification among applicants." DE 103 at 17. The Rules of Executive Clemency ("the Rules") do separate felons into different categories based on their post-sentence record, but restoration of civil rights remains a function of executive discretion in Florida. Florida law vests the Executive Clemency Board ("the Board") with the absolute power to license some ex-felons to vote and deny the franchise to others. In 2017, Defendants are fighting for the power to decide who is a "responsible voter" and who is not, on an individual basis and without the constraints of any law. They wish to continue selectively issuing licenses to vote, by "rewarding" felons (DE 103 at 24) who meet their personal definitions of "responsible," their idea of a good citizen with good moral character—to decide which *individual* felons, in their view, have sufficiently rehabilitated themselves to be reenfranchised.[1]

[1] Defendants further rely on *Shepherd*'s dicta as purported support for the Board's individualized, discretionary restoration decisions, but the court expressly noted that arbitrariness would run afoul of the Constitution: "Nor can we believe that section 2 would permit a state to make a completely arbitrary distinction between groups of felons with respect to the right to vote." 575 F.2d at 1114. Additionally, the Court credited Plaintiffs' contention that 90 percent of successful state probationers were reenfranchised by Texas state courts, *id*. at 1112, 1115 n.6, and Texas eventually

Since the term "responsible voter" defies concrete definition, Defendants do not attempt to supply a meaning, except to suggest that all felons and/or two particular Plaintiffs do not qualify as such. DE 103 at 17–22 & n.3. Like the Board's ad hoc, subjective standards of "remorse" and "turning your life around," this label is hopelessly vague and invoked by the Governor and the Board to camouflage arbitrary treatment. Proving the risk of such treatment is sufficient alone on a facial challenge under the First Amendment, but Plaintiffs' Motion for Summary Judgment has set forth a wealth of evidence of actual and probable instances of arbitrary, biased and/or discriminatory treatment that has resulted from this purely discretionary licensing scheme.

Defendants' central contention throughout is that Plaintiffs "may not assert a First Amendment interest *in voting* until their voting rights are restored." DE 103 at 4. However, a state has zero power to strip U.S. citizens of their federal constitutional rights; Section 2 of the Fourteenth Amendment only authorizes a state to divest a felon of his or her voting eligibility as a matter of state law. *Richardson v. Ramirez*, 418 U.S. 24, 53–56 (1974). Plaintiffs' First Amendment rights are violated by the state's arbitrary restraint-and-licensing scheme for ex-felon voting. Once a state decides to tinker with ex-felons' voting rights, it may not do so

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raised that rate to 100 percent when it switched to automatic reenfranchisement after sentence completion. TEX. ELEC. CODE ANN. § 11.002(a)(4).

arbitrarily. *Johnson v. Bush*, 214 F. Supp. 2d 1333, 1338 (S.D. Fla. 2002) only rejected a claim that felon disenfranchisement is *per se* incompatible with the First Amendment; it has nothing to say about the different First and Fourteenth Amendment challenges raised here.

Plaintiffs have proven the First and Fourteenth Amendment violations alleged, and the Court should enjoin the Florida laws creating the felon disenfranchisement and reenfranchisement scheme as to the Plaintiff Class. This constitutional defect is confined to the restoration of voting rights and does not extend to any other form of executive clemency. First Amendment case law on unconstitutionally arbitrary licensing schemes militates in favor of not just curing the arbitrariness in the licensing regime, but of striking down the restraint on voting. An arbitrary and unduly burdensome felon reenfranchisement scheme indefinitely perpetuates disenfranchisement—they may be "temporally distinct" but they are not "analytically" distinct. DE 103 at 11. As a matter of both text and logic, felon disenfranchisement and reenfranchisement are inextricably conjoined in Florida, two sides of the same coin.

1. Plaintiffs may challenge Florida's felon disenfranchisement and reenfranchisement scheme because it is not immunized from constitutional challenge by Section 2 of the Fourteenth Amendment.

Defendants first argue that Plaintiffs cannot suffer any federal constitutional injuries because Florida law renders them ineligible to vote. DE 103 at 4.

Plaintiffs do not contest that Section 2 of the Fourteenth Amendment, as construed by *Richardson*, 418 U.S. at 53–56, authorizes Florida to disenfranchise felons. Rather, Plaintiffs argue that this grant of legislative authority to the states must be exercised in a manner consistent with other constitutional provisions and rights. "[T]he Constitution is filled with provisions that grant Congress or the States specific power to legislate in certain areas; these granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution." *Williams v. Rhodes*, 393 U.S. 23, 29 (1968). Plaintiffs' claims are consistent with *Richardson*. The First and Fourteenth Amendment arguments do not challenge Florida's power to disenfranchise and reenfranchise ex-felons, but rather its power to do so in an arbitrary and unduly burdensome manner. The sought-for remedy would permit Florida to continue disenfranchising felons for the duration of their full sentences.

Supreme Court precedents make it clear that ex-felons may challenge the constitutionality of state felon disenfranchisement laws. First, Section 2 of the Fourteenth Amendment, as construed by *Richardson*, 418 U.S. at 53–56, authorizes state legislatures to disenfranchise felons, much like Article I of the Constitution gives Congress certain enumerated powers. But neither immunizes state or federal laws from constitutional attack. This bedrock principle of constitutional law has

been echoed in many contexts. In *Tashjian v. Republican Party of Connecticut*, the Court stated that:

> [T]he Constitution grants to the States a broad power to prescribe the "Times, Places and Manner of holding Elections for Senators and Representatives," Art. I, § 4, cl. 1, which power is matched by state control over the election process for state offices. But this authority does not extinguish the State's responsibility to observe the limits established by the First Amendment rights of the State's citizens.

479 U.S. 208, 217 (1986); *see also 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516 (1996) (holding Twenty-First Amendment's grant of legislative authority to states to regulate commerce in or use of alcoholic beverages does not immunize state laws from attack under other constitutional provisions, in this case First Amendment).

Second, the Supreme Court has twice rejected this argument in challenges to felon disenfranchisement laws. In *Richardson*, the Court only addressed and rejected the first of the plaintiffs' two claims, which included: (1) a facial challenge to California's felon disenfranchisement law which argued the state *per se* could not deny the vote to felons; and (2) a separate equal protection and due process claim which attacked the lack of uniform enforcement of that law. 418 U.S. at 33–34. After holding that Section 2 of the Fourteenth Amendment authorizes states to disenfranchise felons and rejecting the first claim, the U.S. Supreme Court remanded the second claim to the Supreme Court of California. *Id*. at 56. If Defendants' theory

were correct, the U.S. Supreme Court would not have remanded the *Richardson* plaintiffs' alternative equal protection claim.

Defendants' theory is also belied by the Supreme Court's decision in *Hunter v. Underwood*, which struck down the 1901 Alabama Constitution's felon disenfranchisement provision on a finding of intentional racial discrimination in violation of the Equal Protection Clause. 471 U.S. 222, 231–33 (1985). The Supreme Court clarified that *Richardson* did not hold that Section 2 of the Fourteenth Amendment precludes ex-felons from challenging disenfranchisement laws:

> Without again considering the implicit authorization of § 2 [of the Fourteenth Amendment] to deny the vote to citizens 'for participation in rebellion, or other crime,' *see Richardson v. Ramirez*, 418 U.S. 24, 94 S.Ct. 2655, 41 L.Ed.2d 551 (1974), we are confident that § 2 was not designed to permit the purposeful racial discrimination attending the enactment and operation of § 182 which otherwise violates § 1 of the Fourteenth Amendment. Nothing in our opinion in *Richardson v. Ramirez*, *supra*, suggests the contrary.

Id. at 233.

When the Eleventh Circuit summarized the holding in *Richardson*, it narrowly stated that "[a] state's decision to permanently disenfranchise convicted felons does not, *in itself*, constitute an Equal Protection violation." *Johnson v. Bush*, 405 F.3d 1214, 1217, 1223–27 (11th Cir. 2005) (en banc) (citing *Richardson*, 418 U.S. at 53–55) (emphasis added). Defendants misread this line and *Richardson* to foreclose all constitutional challenges to felon disenfranchisement laws, not just those asserting

their unconstitutionality *per se*.[2] The U.S. Constitution empowers states to divest felons of their eligibility to vote under state law, but they cannot strip them of their federal constitutional rights against arbitrary, discriminatory and/or unduly burdensome laws and conduct. To the extent *Harvey v. Brewer*, 605 F.3d 1067, 1080 (9th Cir. 2010), *Johnson v. Bredesen*, 624 F.3d 742, 751 (6th Cir. 2010), and *Howard v. Gilmore*, 205 F.3d 1333, at *1–2 (4th Cir. 2000) (unpublished) say otherwise, they conflict explicitly with the Supreme Court's decision in *Hunter v. Underwood* and implicitly with the remand in *Richardson*.

Were Defendants' theory adopted – that ineligibility to vote under state law means ex-felons have "no constitutionally cognizable interest" in voting, DE 103 at 4 – felon disenfranchisement and reenfranchisement laws would be judicially unreviewable, even if such laws were discriminatory, arbitrary and/or irrational. A state could disenfranchise only racial or religious minorities, women or the unemployed, or only reenfranchise literate, rich, tall and/or physically attractive ex-

[2] The plaintiffs in *Johnson v. Bush* alleged that felon disenfranchisement is *per se* incompatible with the First Amendment. The district court rejected this outright, and the plaintiffs did not appeal that part of the order. *Johnson v. Bush*, 214 F. Supp. 2d 1333, 1338 (S.D. Fla. 2002). Defendants argue that Plaintiffs' First Amendment claims in Counts 1 and 3 are merely end runs around *Richardson*, DE 103 at 28–30, but *Johnson v. Bush*, *Farrakhan v. Locke*, 987 F. Supp. 1304, 1314 (E.D. Wash. 1997), and *Howard v. Gilmore*, 205 F.3d 1333, at *1 (4th Cir. 2000) (unpublished), are inapposite because these cases rejected arguments that felon disenfranchisement violates the First Amendment *per se*. That clearly differs from Plaintiffs' Counts 1 and 3, which challenge unfettered discretion, arbitrary treatment, and the lack of any definite time limits for processing restoration applications.

felons or individuals who affiliate with or donate to a particular political party. Plaintiffs challenge Defendants' professed right to license ex-felons to vote based on whom they deem is leading a moral, reformed life or any other unstated, uncodified, subjective criteria.[3]

Third, the circuit and district court decisions are in accord. In *Williams v. Taylor*, the Court remanded the case for trial on an equal protection claim challenging "selective and arbitrary enforcement of the disenfranchisement procedure." 677 F.2d 510, 515–17 (5th Cir. 1982). The Court explained that "[t]he Election Commissioners cannot discriminate arbitrarily among felons who fall within the group classified for mandatory disenfranchisement . . ." *Id*. at 515. *Williams* affirms that arbitrariness in a felon disenfranchisement or

[3] Defendants also contend *Richardson* endorsed "selective and categorical disenfranchisement of felons." DE 103 at 10 (citing *Richardson*, 418 U.S. at 53). The two cases *Richardson* cited were *Murphy v. Ramsey*, 114 U.S. 15 (1885) and *Davis v. Beason*, 133 U.S. 333 (1890), which upheld "exclusions of bigamists and polygamists from the franchise under territorial laws of Utah and Idaho." 418 U.S. at 53. Because those laws targeted Mormons for exclusion from the franchise – much like the authors of the unconstitutional 1901 Alabama Constitution provision in *Hunter v. Underwood*, 471 U.S. at 231–33, selected crimes to target African Americans for disenfranchisement – *Murphy* and *Davis* are no longer good law on intentional discrimination targeting a protected class. The Supreme Court expressly abrogated *Davis* in *Romer v. Evans*, 517 U.S. 620 (1996). The Court wrote: "To the extent *Davis* held that persons advocating a certain practice may be denied the right to vote, it is no longer good law. To the extent it held that the groups designated in the statute may be deprived of the right to vote because of their status, its ruling could not stand without surviving strict scrutiny, a most doubtful outcome." *Id*. at 634 (citations omitted).

reenfranchisement scheme is subject to constitutional attack, and only disenfranchised felons can bring such a challenge. Similarly, the Third Circuit has found ex-felons may bring equal protection challenges to felon disenfranchisement classifications:

> It has not been seriously contended that *Richardson* precludes any equal protection analysis when the state legislates regarding the voting rights of felons. . . Thus, the Commonwealth conceded . . . that the state could not disenfranchise similarly situated blue-eyed felons but not brown-eyed felons. It follows that the Equal Protection Clause remains applicable, even after *Richardson* . . .

Owens v. Barnes, 711 F.2d 25, 26–27 (3d Cir. 1983); *see also Hobson v. Pow*, 434 F. Supp. 362, 366–67 (N.D. Ala. 1977) (disenfranchisement of one class of misdemeanants struck down as unconstitutionally "irrational" "gender-based classification").

Shepherd itself rejected an equal protection challenge to a statutory classification in Texas's felon reenfranchisement law on the merits, *not* because disenfranchised ex-felons, as Defendants contend, lack a legally cognizable constitutional injury:

> [W]e are similarly unable to accept the proposition that section 2 removes all equal protection considerations from state-created classifications denying the right to vote to some felons while granting it to others. No one would contend that section 2 permits a state to disenfranchise all felons and then reenfranchise only those who are, say, white. Nor can we believe that section 2 would permit a state to make a completely arbitrary distinction between groups of felons with respect to the right to vote.

575 F.2d at 1114. Ex-felons may therefore challenge the arbitrariness of felon disenfranchisement and reenfranchisement laws and arbitrary administration, so long as they do not claim felon disenfranchisement is *per se* invalid.

2. Plaintiffs have established that Defendants' unfettered discretion and arbitrary and disparate treatment violate the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. [Counts 1, 2 and 3]

A. Defendants ignore or mischaracterize binding First Amendment precedents. [Counts 1 and 3]

Even though three of Plaintiffs' claims rely in whole or in part on the First Amendment, Defendants' brief is almost devoid of First Amendment precedents. They focus instead on equal protection and due process cases.

First, to justify their arbitrary system, Defendants argue that the greater power to permanently disenfranchise ex-felons includes the lesser power to arbitrarily, selectively restore some ex-felons' constitutionally protected right to vote and to impose years-long or even decades-long waiting periods on felons. DE 103 at 3-4, 27–28. This is clearly wrong. The Supreme Court has rejected this "legal sleight-of-hand" in "a host" of cases by noting that vesting unbridled discretion in government officials is still prohibited even if the mode of speech or conduct "might be otherwise regulated or prohibited entirely." *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 762–69 (1988). The Court emphasized that it had "considered on the merits facial challenges to statutes or policies that . . . vested

officials with open-ended discretion . . . even where it was assumed that a properly drawn law could have greatly restricted or prohibited the manner of expression or circulation at issue." *Id*. at 766.

Defendants warn that Plaintiffs' challenge may have the perverse consequence of causing Florida and other states to eliminate reenfranchisement entirely. DE 103 at 24–25. But that hypothetical system is not before this Court. Astoundingly, Defendants continue to characterize an outlier scheme that results in so many disenfranchised, post-sentence citizens and a backlog of 10,377 applicants[4] as a "reasonable middle road." DE 103 at 24. Though Florida has not implemented a scheme of permanent, irrevocable felon disenfranchisement, the massive scale of disenfranchisement and the comparatively miniscule number of restorations (2,691 over the last nearly seven years[5]) reveal the current system is already dangerously close to that hypothetical system.

Second, Defendants grossly mischaracterize the holding of *Wright v. City of St. Petersburg*, 833 F.3d 1291 (11th Cir. 2016). DE 103 at 30–31. In *Wright*, an individual challenged a trespass ordinance that had collateral consequences on his First Amendment rights. 833 F.3d at 1293. The plaintiff brought facial and as-applied First Amendment claims against the trespass ordinance and a challenge to a

[4] DE 102 at 4–5.
[5] DE 85-11, 86-12, 86-13.

provision authorizing city officials to suspend the trespass warning "if there [were] no other reasonable alternative location to exercise such [First Amendment] rights." *Id*. at 1294–95. The decision states that the trespass warning barring the plaintiff from a single park for a year had an indirect, "incidental" effect on his First Amendment rights. *Id*. at 1293, 1295–96. However, Defendants overlook the Court's clear distinction between the non-expressive, unprotected conduct of mere physical presence in a park, which is all the trespass warning barred, and the plaintiff's chosen constitutionally protected expressive activities which were "incidentally burdened" by the generally applicable criminal law. *Id*. at 1296–98.

The Court concluded that the trespass law was constitutional because it did not bar protected speech or expressive conduct, just the plaintiff's mere presence in his preferred park: "First Amendment scrutiny 'has no relevance to [a law] directed at imposing sanctions on nonexpressive activity.'" *Id*. at 1295–98 (quoting *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 707 (1986)). The panel decision likewise rejected the prior restraint challenge to the suspension provision because the plaintiff had no "lawful right" to be in the park, *not* because the plaintiff lacked a First Amendment right. *Id*. at 1298–99. The Court did *not* find the plaintiff was "lawfully barred from engaging in certain First Amendment-protected activity," as Defendants posit, DE 103 at 30, but rather that he was lawfully barred from entering a park.

Plaintiffs similarly cannot bring a First Amendment challenge to their felony convictions and sentences (the equivalent of the rejected challenge to the trespass law in *Wright*), but can attack an unconstitutionally arbitrary felon disenfranchisement and reenfranchisement regime. Defendants are trying to equate the regulation of a *venue* for expression with the regulation of *expression itself*. But voting is not a mere venue for expression; it is a fundamental right and expressive conduct itself. *Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964) (stating "the right of suffrage is a fundamental matter in a free and democratic society"). The *Wright* Court itself distinguished "cases involving permit requirements *for expressive activity* in places where the speaker has a lawful right to engage in it." 833 F.3d at 1299 (emphasis added). Florida's felon disenfranchisement and reenfranchisement scheme directly and completely switches off and on a person's voting eligibility; it does not merely exclude Plaintiffs from voting in a single precinct or manner. This is why the *Wright* Court emphasized that the plaintiff still had access to 141 other parks, sidewalks and other traditional public fora to engage in his chosen First Amendment activities. *Id.* at 1297–98. The mitigating effect of these reasonable alternatives for the plaintiffs' expression was central to the decision. Notwithstanding Defendants' suggestion that Plaintiffs can still express their political views by alternative means, DE 103 at 31, there are no alternatives or substitutes for voting. *See, e.g., City of Ladue v. Gilleo*, 512 U.S. 43, 54–56 (1994)

(striking down ban on campaign lawn signs, "a venerable means of communication that is both unique and important," noting it was "not persuaded that adequate substitutes exist"); *Meyer v. Grant*, 486 U.S. 414, 424 (1988) (striking down on First Amendment grounds Colorado prohibition on paid petition circulators because it "restrict[ed] access to the most effective, fundamental, and perhaps economical avenue of political discourse").[6]

Lastly, Wright's sole suspension application was granted, and the Court noted the absence of any "evidence to show that selective enforcement is a realistic possibility in the future." *Id*. at 1294, 1298–99. By contrast, Plaintiffs have marshalled a wealth of evidence of probable and actual instances of arbitrary, biased, selective and/or discriminatory treatment.

Third, Defendants proffer a false analogy to minors' ineligibility to vote. DE 103 at 30. Age restrictions on voting are uniform, non-discretionary and non-arbitrary time, place and manner regulations, whereas "[a] government regulation that allows arbitrary application is 'inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view.'" *Forsyth County, Ga. v.*

[6] An additional distinction from the instant case is that the trespass warning had a definite expiration date (a year), whereas the challenged scheme imposes no such definite time limit. Count 3 challenges that lack of reasonable, definite time limits for restoration decisions.

Nationalist Movement, 505 U.S. 123, 130–31 (1992) (quoting *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981)). An accurate analogy to the challenged scheme would be a local ordinance allowing 17-year-olds to vote in county or municipal elections, but only if they submitted applications that local election officials could grant or deny in the exercise of their unfettered discretion. That would also be unconstitutional.

Finally, Plaintiffs do not seek to "extend [the unfettered discretion doctrine] to other contexts," DE 103 at 31; they seek to apply a well-settled line of First Amendment precedent to the violation of a First Amendment right. Since *District of Columbia v. Heller*, 554 U.S. 570 (2008), litigants around the country have sought to extend these cases to the Second Amendment. They have all failed. *See Young v. Hawaii*, 911 F. Supp. 2d 972, 991–92 (D. Haw. 2012) (collecting cases); *but cf. Fisher v. Kealoha*, 855 F.3d 1067, 1072 (9th Cir. 2017) (Kozinski, J., ruminating) (suggesting that Second Amendment rights should not be subjected to unconstrained discretion by reference to First Amendment cases) ("Criminal punishment, of course, always involves the deprivation of rights, but such deprivations can still raise constitutional concerns. . . . This unbounded discretion sits in uneasy tension with how rights function. A right is a check on state power, a check that loses its force when it exists at the mercy of the state."). Whatever the outcome here, those efforts are likely to continue.

Defendants speculate that a judgment in Plaintiffs' favor would call into question discretionary restoration of firearm authority. DE 103 at 25–26. But the competing interests and considerations in the two contexts are so different that it is certainly not the case that a favorable judgment here would prove dispositive for Second Amendment litigants. As cases such as *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013) make clear, restoration in the Second Amendment context necessarily requires balancing the individual's right against the state's legitimate interest in public safety. *Id.* at 876–78. But in ex-felon voting rights cases, restoration does not pose any threat to election integrity or any other identified state interest.

Accordingly, Defendants have failed to rebut Plaintiffs' First Amendment claims.

B. Defendants mischaracterize Plaintiffs' equal protection claim as a due process claim and fail to rebut Plaintiffs' arguments based on *Bush v. Gore* and longstanding precedent striking down arbitrary treatment in voting.

Plaintiffs have also established a violation of the Equal Protection Clause in Count 2 on the same facts. Plaintiffs have not asserted a due process claim. Defendants' citations to *Ohio Adult Parole Authority v. Woodard*, in which a fractured Supreme Court divided on the question of what process was due a death row inmate seeking a pardon, 523 U.S. 272 (1998), and *Bowens v. Quinn*, in which the court rejected a due process challenge to delayed action on clemency petitions,

561 F.3d 671, 673–76 (7th Cir. 2009), are inapposite.[7] *Woodard* explicitly states that no equal protection claim was raised. 523 U.S. at 276 n.1. These cases also concern types of executive clemency that are not implicated by Plaintiffs' claims. *See infra* Section 2.D. Granted, Plaintiffs do challenge the lack of definite time limits for processing restoration applications in Count 3 and the undue burden imposed by the five- and seven-year waiting periods in Count 4, but neither claim relies on procedural or substantive due process. And Counts 1 and 2 attack the unfettered discretion Board members enjoy in making decisions on restoration applications; again, neither legal theory rests on due process. *See Osborne v. Folmar*, 735 F.2d 1316, 1317 (11th Cir. 1984) (holding that "a person may challenge a pardon or parole decision on equal protection grounds though he asserts a due process claim that fails").

Defendants' citation to *McCleskey v. Kemp*, 481 U.S. 279, 306–07 (1987) is also misplaced because Plaintiffs do not challenge their convictions, sentences, or any aspect of the criminal case proceedings, but rather the deprivation of their First and Fourteenth Amendment rights in an arbitrary restraint-and-licensing scheme for ex-felon voting. Defendants contend that "the sentencing authority is not tasked

[7] Defendants also cite the unpublished disposition in *Banks v. Secretary, Florida Department of Corrections*, which is a straightforward application of Justice O'Connor's plurality opinion in *Woodard*, the only case cited. 592 F. App'x 771, 773–74 (11th Cir. 2014). The disposition conflates due process and equal protection but omits any reasoning to extend *Woodard* to equal protection claims. *Id*.

with deciding whether and for how long a felon should be disenfranchised"; and "[c]ourts do not—and cannot—alter these requirements of Florida law in issuing a criminal sentence." DE 103 at 27. So, *McCleskey*, a case concerning the discriminatory impact of capital punishment across criminal cases, has no bearing here.

Plaintiffs' equal protection claim is in fact based on *Bush v. Gore*'s prohibition on "arbitrary and disparate treatment" in either the "allocation of the franchise" or "the manner of its exercise." 531 U.S. 98, 104 (2000) (per curiam). Seven Justices concluded that the "absence of specific standards" to implement the state's hopelessly vague "intent of the voter" standard was causing "arbitrary and disparate treatment" in Florida's manual recount in violation of the Equal Protection Clause. *Id*. at 104–09, 111. In *Hunter v. Hamilton County Board of Elections*, the Sixth Circuit panel applied *Bush v. Gore* to conclude that a "lack of specific standards for reviewing provisional ballots" had resulted in unconstitutionally "arbitrary and uneven exercise of discretion" in violation of the Equal Protection Clause. 635 F.3d 219, 235, 239–42 (6th Cir. 2011). Similarly, Plaintiffs challenge the limitless discretion vested in Defendants to decide which ex-felons may cast a ballot and which may not.

While Defendants insinuate that these are novel claims, there is a long history of federal courts policing and enjoining the arbitrary treatment of voters. Many of

these cases involved Jim Crow-era tests and devices, such as literacy tests, constitutional understanding tests, poll taxes and moral character tests, the enforcement of which permitted official discretion to mask official discrimination and arbitrary treatment. These cases are closely analogous because individuals who did not pass these tests were deemed ineligible to vote and were therefore in the same posture as members of the Plaintiff Class. In *Davis v. Schnell*, the court struck down a constitutional understanding test, because it gave registrars "a right to reject one applicant and accept another, depending solely upon whether it likes or dislikes the understanding and explanation offered" and therefore "'a naked and arbitrary power to give or withhold consent.'" 81 F. Supp. 872, 878 (S.D. Ala. 1949) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 366 (1886)), *aff'd mem.* 336 U.S. 933 (1949); *see also Louisiana v. United States*, 380 U.S. 145, 150–53 (1965) (striking down a constitutional interpretation prerequisite because it vested "uncontrolled power to determine whether the applicant's understanding of the Federal or State Constitution is satisfactory") ("The cherished right of people in a country like ours to vote cannot be obliterated by the use of laws like this, which leave the voting fate of a citizen to the passing whim or impulse of an individual registrar."); *South Carolina v. Katzenbach*, 383 U.S. 301, 312–13 (1966) (upholding Voting Rights Act's ban on tests and devices, including good moral character tests) ("The good-morals

requirement is so vague and subjective that it has constituted an open invitation to abuse at the hands of voting officials.").

Defendants fail to address the particular legal basis of Count 2—*Bush v. Gore* and the longstanding precedents striking down arbitrariness in voter registration and voting laws.

C. The specific constitutional prohibitions Plaintiffs assert in Counts 1, 2 and 3 do not require proof of actual discrimination or bias, but Plaintiffs' evidence of outcome disparities and arbitrariness bolsters their claims. Notwithstanding Defendants' procedures or ad hoc, subjective standards, the Board's decision-making remains unconstitutionally arbitrary both on its face and in operation.

Because Counts 1, 2 and 3 are facial challenges to the Board's arbitrary decision-making, Plaintiffs have met their burden under Federal Rule of Civil Procedure 56 by demonstrating that the absence of any legal constraints on official discretion in restoration of voting rights decisions – this assignment of unlimited power – is arbitrary on its face. DE 102 at 1–23. Plaintiffs' Motion also sets forth a wealth of evidence of actual and probable instances of arbitrary, biased and/or discriminatory treatment to demonstrate that Florida's disenfranchisement and reenfranchisement scheme is also arbitrary in its execution. *Id.* at 23–43. But this evidence is not required to establish a facial violation under Counts 1, 2 or 3. The Supreme Court explained this in *Forsyth County* with respect to challenges to discretionary licensing of First Amendment-protected conduct. 505 U.S. at 133 n.10

(citations omitted); *see also Students for Life USA v. Waldrop*, 162 F. Supp. 3d 1216, 1242 (S.D. Ala. 2016).

Equal protection challenges are no different. *Bush v. Gore* and *Hunter* successfully overturned unequal and arbitrary ballot counting standards and procedures, notwithstanding the fact that some ballots were processed and counted uniformly. 531 U.S. at 106–08; 635 F.3d 219, 236–37. Additionally, the Supreme Court's equal protection cases striking down Jim Crow era literacy and constitutional understanding tests as arbitrary and discriminatory, *see supra* at 19-21, were all facial challenges. The Court has never required, as Defendants argue, perfect, uniform discrimination – that a law be unequal in all of its applications – in order to strike down a facially unconstitutional voting requirement. *See Hunter*, 471 U.S. at 231–32 ("[A]n additional purpose to discriminate against poor whites would not render nugatory the purpose to discriminate against all blacks . . ."); *Miss. State Chapter, Operation Push v. Allain*, 674 F. Supp. 1245, 1255 (N.D. Miss. 1987) (noting "a similar impact is in all probability suffered by whites of low socio-economic status"), *aff'd sub nom. Miss. State Chapter, Operation Push v. Mabus*, 932 F.2d 400 (5th Cir. 1991). Defendants' notion that Plaintiffs must show inequality in all the outcomes of all similarly situated applicants before there is an equal protection violation is illogical and contrary to their own argument that individual applicants' cases are irrelevant.

To prove that Florida's disenfranchisement and reenfranchisement scheme violates equal protection, Plaintiffs need only establish that the officials' *decision-making* is standard-less and arbitrary. Defendants have implemented a standard-less process which is untethered to any laws, rules, standards, criteria or constraints of any kind and therefore prone to arbitrary, biased and/or discriminatory treatment. The Rules confer "unfettered discretion" on the Governor, and the Board only invokes ad hoc, subjective and vague phrases such as whether the applicant has "turned [his or her] life around" or has sufficiently shown remorse. DE 102 at 6–7, 20–22. These random, non-exhaustive metrics do not constrain official discretion and therefore do not cure the fundamentally arbitrary nature of the process. This scheme, on its face, violates the First Amendment and equal protection.

In an effort to recharacterize this case as a due process challenge, Defendants have argued that ex-felons are all given an opportunity to apply, that each applicant is investigated and, therefore, notwithstanding varying outcomes even for similarly situated applicants, they are afforded due process and treated equally. But Plaintiffs do not rest Count 1 or Count 2 on allegations of unequal process, while Count 3 is simply premised on the lack of uniform, definite time limits. Evidence of the Board's random, disparate consideration of post-sentence drug use, alcohol use, moving violations, time, registration and voting while ineligible, and other ad hoc factors are merely examples of how the exercise of unfettered discretion (1) actually

results in arbitrary and disparate treatment and (2) raises the specter of viewpoint, racial, wealth or any other form of discrimination. Absent legal constraints, the Board may grant or deny restoration for no reason or any reason, including a constitutionally impermissible one. Plaintiffs need not demonstrate an inequality of pre-decision process or an inequality of *all* outcomes. The target of their claims is the arbitrary *decision-making* scheme for restoration of civil rights applications as unconstrained by any law.

For the same reason, Defendants' reliance on the confidential case analyses ("CCAs") is meritless. The creation of these documents does nothing to constrain the Board's discretion. In the absence of objective laws and rules governing the restoration of the right to vote, there is nothing to stop the Board from arbitrarily applying or invoking the information contained in the CCAs, ignoring it altogether, and/or citing any random detail to deny or grant an application. Plaintiffs' Motion outlines this arbitrary, irreconcilable treatment with respect to several categories of information the CCAs review, such as drug and alcohol use, driving records, registering and voting as an ex-felon, and time since sentence completion. DE 100, Exs. 1–8; DE 103 at 23–43. In any event, the Court should disregard Defendants' arguments based on the CCAs because, in opposing Plaintiffs' Motion to Compel the production of certain non-parties' CCAs, they previously represented to the Court that these case files were irrelevant to their defense. The rule of judicial

estoppel prohibits Defendants' about-face. This Court relied on Defendants' representation in denying Plaintiffs' Motion to Compel, DE 62 at 2, so their "clearly inconsistent" positions worked to Plaintiffs' detriment. *See New Hampshire v. Maine*, 532 U.S. 742, 749–50 (2001).

Finally, Defendants again proffer a state "interest in limiting the franchise to responsible voters," DE 103 at 16–19, but that is just another vague phrase which invites arbitrary treatment, as government officials impose their own views as to who is sufficiently "responsible" to vote. Defendants appear to concede that irrational distinctions between different categories of ex-felons would violate the Constitution. DE 103 at 17. But they nevertheless urge the Court to find no constitutional defect in a system that allows government officials to choose, on an individual basis, who may vote and who may not, based on any reason, no reason or an unlawful reason such as political preference.

However, the courts actually view unfettered administrative discretion to make case-by-case determinations as more problematic than legislative line-drawing, and therefore treat the former with much less deference. *See, e.g., Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1042–43 (9th Cir. 2009) (holding unfettered administrative discretion subject to challenge, even if exercised by legislative body reserving discretionary, administrative function to itself); *Gasparo v. City of New York*, 16 F. Supp. 2d 198, 207–16, 221–23 (E.D.N.Y.

1998) (rejecting equal protection challenge to statutory classification singling out newsstands from all sidewalk vendors but issuing preliminary injunction against unfettered administrative discretion in terminating permits). Legislatures, after all, often draft laws without a specific individual in mind, whereas here the Board may learn or guess an individual applicant's race, politics or religion. Florida's restraint-and-licensing scheme for ex-felons lacks any objective legal test or criteria, which inexorably leads to the arbitrary and disparate treatment of citizens in violation of the First Amendment and the Equal Protection Clause.

D. The label "clemency" does not insulate a state law from constitutional scrutiny.

Defendants posit that because voting rights restoration is a form of executive clemency in Florida, it is categorically immune from constitutional challenge. This argument fails.

Florida has at least seven different forms of executive clemency: restoration of civil rights; restoration of alien status; remission of fine or forfeiture; specific authority to own, possess or use firearms; full pardon; pardon without firearm authority; and commutation of sentence.[8] Full pardons necessarily include the restoration of civil rights and firearm authority. Because ex-felons can apply in the alternative for restoration of those rights, the Board can deny a full pardon but restore

[8] DE 85-17, Application for Clemency, at 1.

civil rights and/or firearm authority. This is crucial because Plaintiffs only challenge the unfettered discretion involved in restoration of *voting* rights decisions. Though Defendants characterize this suit as an assault on executive discretion in clemency writ large, that is inaccurate, since ex-felons always have a distinct and direct avenue to regain their right to vote—pardons are not the exclusive means of rights restoration. The constitutional defect is isolated, and the constitutional challenge is targeted. Any more stringent requirements for other forms of executive clemency, DE 103 at 6, therefore have no bearing here.

Even the precedent Defendants cite relies on the distinction between pardons and other forms of clemency to justify a purely discretionary pardon power. In *Bowens*, the Seventh Circuit made this distinction: "[Petitioners] do not claim to be seeking pardons in order to remove statutory disabilities, either, such as the right to vote or to hold public office . . ." 561 F.3d at 675 (citation omitted). As a practical matter too, while pardons – or the denial thereof – do have significant consequences for felons, the right to vote is one of only a few rights deprivations that persist long after a person has regained his or her liberty and rejoined society. Six of the nine Plaintiffs completed their sentences more than thirteen years ago.[9] Plaintiff Jermaine

[9] DE 85-2 ¶ 5; DE 85-3 ¶ 5; DE 85-4 ¶ 5; DE 85-5 ¶ 4; DE 85-7 ¶ 5; DE 85-8 ¶ 5.

Johnekins completed his sentence – just 9.5 months of work release – approximately nineteen years ago.[10]

Discretion in executive clemency is not absolute when constitutional rights are infringed. *See Woodard*, 523 U.S. at 289 (O'Connor, J., concurring); *Anderson v. Davis*, 279 F.3d 674, 676 (9th Cir. 2002) (denial of clemency due to discrimination on basis of "race, religion, political affiliation, gender, nationality," or "bribery, personal or political animosity, or the deliberate fabrication of false evidence" or "capricious decisionmaking process" would raise constitutional problems); *Wilson v. U.S. Dist. Court for N. Dist. of Cal.*, 161 F.3d 1185, 1186–87 (9th Cir. 1998) (misleading petitioner's counsel constitutes due process violation).

E. Defendants' remaining case citations do not foreclose this action.

Beacham v. Braterman, 300 F. Supp. 182 (S.D. Fla.), *aff'd mem.* 396 U.S. 12 (1969) does not foreclose Count 2. This summary affirmance is of "considerably less precedential value than an opinion on the merits," *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 180–81 (1979), because it "represents an approval by the Supreme Court of the judgment below but should not be taken as an endorsement of the reasoning of the lower court." *Hardwick v. Bowers*, 760 F.2d 1202, 1207 (11th Cir. 1985) ("*Hardwick*"), *rev'd on other grounds*, *Bowers v. Hardwick*, 478 U.S. 186 (1986). Crucially, "the precedential effect of a summary

[10] DE 85-7 ¶ 5.

affirmance can extend no farther than 'the precise issues presented and *necessarily decided* by those actions.'" *Socialist Workers Party*, 440 U.S. at 182–83 (quoting *Mandel v. Bradley*, 432 U.S. 173, 176 (1977)) (emphasis added).

Beacham held that "[w]here 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." 300 F. Supp. at 184. But Beacham only "applied for a pardon, which would have included a restoration of his civil rights." *Id*. at 183.[11] There is nothing in the opinion, the jurisdictional statement, or in this record which indicates Beacham separately applied, *in the alternative*, for restoration of civil rights, as applicants could have done in 1968 and still can today.[12] The Court conflated the discussion of an attack on the pardon power with the different, more specific question as to whether it is constitutional to apply a system of unfettered discretion to civil rights restoration. *Id*. at 184. But deciding the latter question was not *necessary* to the decision since Beacham had only applied for a pardon. *Hardwick* is binding and squarely on point:

> [I]f the jurisdictional statement could expand a summary affirmance beyond the scope of issues necessarily decided, it would give the litigants considerable control over the scope of summary dispositions. . . . [I]t is only a tool in determining the ultimate question: the most narrow plausible rationale for the summary decision.

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[11] Jurisdictional Statement, *Beacham v. Braterman*, 396 U.S. 12 (1969) (No. 404), 1969 WL 136703 at *4 ("In the spring of 1968 he applied . . . for a pardon . . .").
[12] *See* Ex. A (sample Florida clemency applications from 1967, 1968 and 1969); DE 85-16 at 2.

> Lower courts may rely upon the jurisdictional statement as an outside limit on the prece[de]ntial [*sic*] scope of a summary decision but Supreme Court precedent does not allow us to consider the jurisdictional statement as both a minimum and a maximum formulation of the issues decided. Where . . . the facts of the case plainly reveal a basis for the lower court's decision more narrow than the issues listed in the jurisdictional statement, a lower court should presume that the Supreme Court decided the case on that narrow ground.

760 F.2d at 1208. Given the facts, the jurisdictional statement in *Beacham* exceeded the narrowest possible basis for the summary affirmance: holding a discretionary pardon system does not violate equal protection. 1969 WL 136703, at *2–3. But even if this Court concludes *Beacham* decided the further question of whether a discretionary voting rights licensing scheme violates equal protection, the opinion only addressed equal protection, not the other constitutional guarantees implicated here.

Jones v. White, 992 F.2d 1548 (11th Cir. 1993) is also unavailing. Since the challenged statute was on its face non-discretionary and the disparate treatment was excused by reference to "the problems encountered by prosecutors and courts in obtaining admissible evidence of prior felony convictions," *id*. at 1571, this case is clearly not support for a system of unfettered discretion in felon rights restoration. *Id*. at 1572–75.

Plaintiffs have therefore established their First Amendment and equal protection claims, and Defendants' Motion should be denied as to Counts 1, 2 and 3.

F. The remedy for an unconstitutional restraint-and-licensing scheme is to strike down the scheme.

The parties agree that – at a minimum – a violation of the unfettered discretion doctrine would entitle Plaintiffs to objective rules for the restoration of civil rights. Defendants again argue that even if Plaintiffs prevail, they would only be entitled to a remedy of objective, specific standards for the restoration of civil rights. DE 103 at 11–12, 23–24. The dispute is over whether the First Amendment precedents require not just that the licensing scheme be fixed, but that the restraint on voting be entirely struck down as to the Plaintiff Class.

Defendants' argument is belied by the line of cases in which the Supreme Court fully invalidated such restraints on First Amendment activity and their corresponding permit and license requirements. DE 102 at 16–18. The Supreme Court expressly rejected Defendants' argument in *Hague v. CIO*, 307 U.S. 496 (1939), holding the lower court had been "wrong" to preserve the permit requirement and simply impose "conditions under which a permit may be granted or denied":

> As the ordinance is void, the respondents are entitled to a decree so declaring and an injunction against its enforcement by the petitioners. They are free to hold meetings without a permit and without regard to the terms of the void ordinance. The courts cannot rewrite the ordinance, as the decree, in effect, does.

Id. at 518.

Neither Defendants nor the Florida Legislature have sought to cure the constitutional violations Plaintiffs have established. Though this Court has the power to order Florida to cure the constitutional violations in the challenged constitutional provisions, statutes, and rules, *see, e.g*., *Atlanta Journal & Constitution v. City of Atlanta Dep't of Aviation*, 322 F.3d 1298, 1310–12 (11th Cir. 2003) (en banc) (upon finding violation of unfettered discretion doctrine, remanding case to give agency "opportunity to formulate ascertainable non-discriminatory standards"), Supreme Court cases demonstrate that it is more appropriate to enjoin the challenged laws, forcing Florida to enact and promulgate constitutionally valid, non-arbitrary replacements. *See Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 397 (1988) ("[W]e will not rewrite a state law to conform it to constitutional requirements."); *Hynes v. Mayor and Council of Borough of Oradell*, 425 U.S. 610, 622 (1976) ("[W]e are without power to remedy the defects by giving the ordinance constitutionally precise content."). If the Court grants Plaintiffs' Motion, the remedy should be to enjoin the restraint on voting for the Plaintiff Class. Plaintiffs would not oppose a request for a stay of any such injunction.

3. Plaintiffs have established that Defendants have imposed an undue burden on post-sentence ex-felons' right to vote in violation of the *Anderson/Burdick* test. [Count 4]

Plaintiffs incorporate the arguments from their Motion regarding Count 4, and have previously disposed of the greater-power-includes-the-lesser argument in this memorandum. *See supra* at 11–12.

The state again asserts an interest in "making selective re-enfranchisement available to disenfranchised felons who refrain from criminality for a given amount of time." DE 103 at 28; *id*. at 3–4. This period is allegedly necessary to see if the ex-felon commits any new felonies (which would automatically disenfranchise the individual again), any misdemeanors (which are not disenfranchising), or is arrested for any felony or misdemeanor (which conflicts with the presumption of innocence). DE 85-15 at 127–31. This assumption of guilt from an arrest undermines Defendants' stated interest in incentivizing and ensuring rehabilitation. DE 103 at 24–25. Additionally, one of Defendants' predecessors admitted the state had no valid interest in a post-sentence wait-and-see period. DE 102 at 49–50. Finally, the state's purported interest is further belied by the fact that the Board denies applicants, not just for a failure to "refrain from criminality," DE 103 at 3–4, but for civil traffic violations or drinking alcohol. DE 102 at 23–43. The state has no coherent, legitimate interest in imposing unduly burdensome five- and seven-year pre-application waiting periods, and their Motion should be denied as to this claim as well.

4. Conclusion

Defendants, not Plaintiffs, have "invert[ed] the clemency paradigm." DE 103 at 15. Executive clemency was historically a fail-safe or act of mercy, but Florida has weaponized it to prolong indefinitely the mass disenfranchisement of its ex-felons. Defendants wield the clemency power to continue punishing people long after they have served their time.

For the foregoing reasons, Defendants' Motion for Summary Judgment should be denied.

DATED: December 4, 2017 Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 4, 2017, a true and correct copy of the foregoing document was served upon counsel for Defendants, including those listed below, by filing it in the Court's NextGen CM/ECF system.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 7.1(F) of the Local Rules of the Northern District of Florida, I certify that the foregoing Memorandum in Opposition to Defendants' Motion for Summary Judgment contains 7,978 words.

December 4, 2017

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