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' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Over the course of fifty-one pages and one hundred and forty-two footnotes, Plaintiffs do not even cite—much less develop a legal theory consistent with—the most relevant felon disenfranchisement cases from the Supreme Court and Eleventh Circuit. Rather than grapple with *Richardson v. Ramirez*, 418 U.S. 24 (1974), *Beacham v. Braterman*, 300 F. Supp. 182 (S.D. Fla. 1969), *aff'd* 396 U.S. 12 (1969), *Johnson v. Governor of Fla.*, 405 F.3d 1214 (11th Cir. 2005) (en banc), *Shepherd v. Trevino*, 575 F.2d 1110 (5th Cir. 1978),[1] and their progeny, Plaintiffs entirely ignore them, all while

[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).

raising arguments and requesting relief that these cases have firmly rejected. Therefore, they cannot demonstrate entitlement to judgment as a matter of law.

To begin, Plaintiffs' attack on Florida's disenfranchisement laws and so-called "waiting periods"—as well as their principal request for relief—must fail. The Supreme Court and Eleventh Circuit have held that Section 2 of the Fourteenth Amendment affirmatively authorizes States to *permanently* disenfranchise *all* felons, including those who have completed their sentences. *Ramirez*, 418 U.S. at 53–55, 56; *Johnson*, 405 F.3d at 1216–17. It follows that States may take the less restrictive step of making re-enfranchisement available to felons who refrain from criminality for a number of years after completing their sentences. Similarly, caselaw authorizing permanent disenfranchisement of convicted felons militates against Plaintiffs' requested relief—automatic re-enfranchisement upon completion of a felon's sentence. It is no answer to argue that Florida's re-enfranchisement procedures are unconstitutional. That argument, valid or not, would not warrant invalidation of Florida's distinct and clearly constitutional disenfranchisement laws.

Plaintiffs' attack on Florida's re-enfranchisement procedures likewise fails as a matter of law. The Supreme Court has rejected the claim that the Equal Protection Clause prohibits States from making re-enfranchisement determinations "in a purely discretionary manner without resort to specific standards." *Beacham*, 300 F. Supp. at 183, *aff'd* 396 U.S. 12. It also has made clear that 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).

Instead of grappling with such caselaw, Plaintiffs offer little more than string citations to cases that have nothing to do with the subject of their suit: voting by, or disenfranchisement of, convicted felons. The Eleventh Circuit has rejected Plaintiffs' argument-by-loose-analogy approach. Because *Ramirez*, *Beacham*, and their progeny establish "specific precedent from this court and the Supreme Court dealing with criminal disenfranchisement," and "[b]ecause these cases establish clear standards by which to judge state action," this court is "bound by precedent and need not go into other areas of possibly analogous law." *Johnson*, 405 F.3d at 1226–27 (citing *Ramirez*, 418 U.S. at 24 and *Beacham*, 300 F. Supp. at 183).

Plaintiffs may not circumvent pertinent caselaw by recasting their attack on Florida's re-enfranchisement procedures 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). That instruction applies with particular force here. Having lawfully lost their right to vote, Plaintiffs have no First Amendment interest in voting upon which Florida's re-enfranchisement procedures might unlawfully operate. *See Wright v. City of St. Petersburg*, 833 F.3d 1291, 1299 (11th Cir. 2016).

For these and other reasons described in this Memorandum, Plaintiffs' Motion for Summary Judgment should be denied.

I. PLAINTIFFS' CHALLENGE TO FLORIDA'S DISENFRANCHISEMENT LAWS FAILS, AND BINDING PRECEDENT FORECLOSES THEIR PRIMARY REQUESTED RELIEF.

Plaintiffs contend that their case "does not question whether Florida may disenfranchise felons *per se*, but rather whether the state may do so in this manner," Motion at 1. However, nowhere in their Motion, much less in their Complaint, do Plaintiffs assert any constitutional defect in the "manner" of their disenfranchisement. That is because they can't. Florida law requires the automatic disenfranchisement of all felons upon their conviction, and there can be no allegation of invidious discrimination as "Florida's felon disenfranchisement provision is not a violation of the Equal Protection Clause under the standard the Court adopted in [*Hunter v. Underwood*, 471 U.S. 222 (1985)]." *Johnson*, 405 F.3d at 1224. Moreover, the Supreme Court and Eleventh Circuit have made clear that Section 2 of the Fourteenth Amendment affirmatively authorizes permanent disenfranchisement of all felons, including those who have completed their sentences. *See Ramirez*, 418 U.S. at 53–55, 56; *Johnson*, 405 F.3d at 1216–17. That is the end of the road for Plaintiffs' challenge to Florida's disenfranchisement laws, as well as for their quest for automatic restoration of voting rights upon completion of sentences.

Valid or not, Plaintiffs' challenges to Florida's re-enfranchisement regime have no application to Florida's disenfranchisement laws. To be sure, Plaintiffs urge this Court to treat the two processes as a unitary whole, contending that "there is no material or logical difference between the following statements: 'Ex-felons cannot

vote and they must apply to regain their right to vote'; and 'Ex-felons *can* vote if they obtain prior permission from a board of state officials." Motion at 19 (emphasis in original). Under Florida law, however, the loss of the right to vote and its restoration are temporally and analytically distinct. Therefore, arguments against the latter cannot be used to invalidate the former. In other words, it is one thing to say that "[i]t is not for this Court to 'remedy the defects' in the challenged constitutional provisions, statutes, and rules." Motion at 44. It is another to say that this Court should correct alleged defects in Florida's re-enfranchisement laws by striking down, in whole or in part, laws as to which Plaintiffs have not even alleged any identifiable defect.

Plaintiffs' reliance on *Hague v. CIO*, 307 U.S. 496 (1939), is misplaced. As Plaintiffs see it, *Hague* supports the proposition that the appropriate remedy "is striking down the requirement to obtain a license or permit before voting." Motion at 44–45. Even ignoring that *Hague* had nothing to do with disenfranchised felons and voting, and setting aside the numerous defects in their First Amendment argument, *see infra* Part II.C., Plaintiffs' argument collapses on itself. If the appropriate remedy is "striking down the requirement to obtain a license or permit before voting," it does not follow that the State's disenfranchisement laws must fall. That is because it is Florida's re-enfranchisement process—not its disenfranchisement laws—that Plaintiffs liken to a license or permit. Plaintiffs do not and cannot argue that lifetime disenfranchisement, for example, would amount to a "requirement to obtain a license or permit before voting."

If, as Plaintiffs assert, the problem with Florida's voting rights restoration procedure is that it lacks any "objective, transparent legal rules," Motion at 4, the logical remedy would be for the State to put some such rules 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. Motion at 43–45; Compl. at 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" rule, Motion at 4, might well work to the disadvantage of convicted felons. 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 all convicted felons maintain a *crime-free* (and not just a *felony-free*) record for seven (or ten, or twenty) years following the completion of their sentences.

Notably, Plaintiffs expressly concede that Florida has the "power to disenfranchise felons while they are still serving out their sentences," Motion at 45. If Florida has the authority to disenfranchise incarcerated felons, why does it not also

have the authority to continue that disenfranchisement beyond the completion of their sentences? Indeed, binding precedent makes clear that Section 2 of the Fourteenth Amendment gives States "the affirmative sanction" to do just that, and to do it indefinitely. *Ramirez*, 418 U.S. at 54; *Johnson*, 405 F.3d at 1217; *see also Harvey v. Brewer*, 605 F.3d 1067, 1079 (9th Cir. 2010) (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."). And if, as Plaintiffs concede, alleged problems with Florida's re-enfranchisement procedures do not require this Court to strike down Florida's disenfranchisement laws as applied to felons who are still serving their sentences, they likewise do not require this Court to strike down Florida's disenfranchisement laws as applied to felons who have completed their sentences.

To the extent that Florida's disenfranchisement laws are intertwined with the challenged re-enfranchisement procedures, severability analysis should inform this Court's assessment of the proper remedy for any alleged problem with the State's re-enfranchisement regime. Severability is a matter of state law. *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996). Florida law "clearly favors" severability, and "federal courts have an affirmative duty" under severability doctrine "to preserve the validity of legislative enactments when it is at all possible to do so." *Coral Springs St. Sys., Inc. v. City of Sunrise*, 371 F.3d 1320, 1347 (11th Cir. 2004) (quotation marks omitted). Plaintiffs bear the burden of rebutting the strong presumption of severability. *See Ray v. Mortham*, 742 So. 2d 1276, 1281, 1283–84 (Fla. 1999).

Applying those principles here, and assuming *arguendo* that Florida's re-enfranchisement procedures are unconstitutional, Florida law would require this Court to sever the portions of Florida's Constitution and statutes that provide for automatic disenfranchisement. This is because the purpose of the disenfranchisement provisions—felon disenfranchisement—would be accomplished independently of the re-enfranchisement provisions; those provisions are not inseparable and there is no indication that the former would not have been adopted without the latter; and the disenfranchisement provisions would remain complete in themselves were the re-enfranchisement provisions stricken. *See Fla. Hosp. Waterman, Inc. v. Buster*, 984 So. 2d 478, 493 (Fla. 2008) (outlining the three questions that the Florida Supreme Court considers when conducting a severability analysis).

As explained in the next Part, however, this Court should not reach any question of severability because, like their challenge to Florida's disenfranchisement laws, Plaintiffs' challenge to Florida's re-enfranchisement procedures fails as a matter of law.

II. PLAINTIFFS' CHALLENGE TO FLORIDA'S RE-ENFRANCHISEMENT PROCEDURES FAILS.

Plaintiffs devote virtually their entire Motion to an attack on Florida's re-enfranchisement procedures. They are not entitled to judgment on any of their claims, which Defendants discuss claim-by-claim below.

A. Plaintiffs Are Not Entitled to Judgment on Their Equal Protection Claim in Count II.

Plaintiffs devote merely one of their fifty-one pages to explaining their equal-protection theory. As Plaintiffs see it, the Equal Protection Clause requires state officials to employ "'specific standards'" in making re-enfranchisement determinations, Motion at 19 (quoting *Bush v. Gore*, 531 U.S. 98, 104–09 (2000) (per curiam)), even though the Supreme Court has rejected precisely that claim, *see Beacham*, 300 F. Supp. at 183, *aff'd*, 396 U.S. 12. Plaintiffs do not discuss or even cite *Beacham*. Instead, they rely solely upon *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam), and on a Sixth Circuit case applying *Bush v. Gore* to a challenge involving a state's provisional-ballot review procedures. *See* Motion at 19–20.

Plaintiffs' heavy reliance on *Bush v. Gore* is misplaced. The Court there addressed whether a state, "[h]aving once granted the right to vote on equal terms," may "by later arbitrary and disparate treatment, value one person's vote over that of another." *Id.* at 104–05. That principle has no application here. Convicted felons have not been "granted the right to vote," *see* Fla. Const. Art. VI, § 4(a); *Richardson*, 418 U.S. at 54–55; and felons who have regained their right to vote are not treated any differently than non-felons. In addition, the Court in *Bush v. Gore* cautioned that its consideration was "limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities." 531 U.S. at

109. Plaintiffs' claims do not involve "election processes" at all; and still less do they involve "the present circumstances" to which the holding in *Bush v. Gore* was expressly limited.

In their Motion, Plaintiffs make no serious attempt to explain why *Bush v. Gore* is applicable to their suit. Much less do they make any attempt to grapple with cases that directly speak to voting restrictions imposed on convicted felons. This should suffice to doom their equal-protection claim, as the Eleventh Circuit has rejected Plaintiffs' argument-by-loose analogy approach: Because *Ramirez*, *Beacham*, and their progeny establish "specific precedent from this court and the Supreme Court dealing with criminal disenfranchisement," and "[b]ecause these cases establish clear standards by which to judge state action," this court is "bound by precedent and need not go into other areas of possibly analogous law." *Johnson*, 405 F.3d at 1226–27 (citing *Ramirez*, 418 U.S. at 24 and *Beacham*, 300 F. Supp. at 183).

Plaintiffs' remaining arguments are unpersuasive.

1. Plaintiffs contend that "Defendants have *completely unlimited* discretion to deny or grant applications for the restoration of civil rights." Motion at 20 (emphasis added). But Defendants never have claimed that power in this litigation. Florida law does not give the Executive Clemency Board limitless or absolute power to make re-enfranchisement decisions in the absence of legal constraints. While Florida's re-enfranchisement procedures, like those upheld in *Beacham*, do not turn on "'specific standards,'" Motion at 19, Defendants are still bound by legal constraints inasmuch as

they may not violate generally applicable statutory or constitutional prohibitions in processing applications. For example, they may not invidiously discriminate, *Johnson*, 405 F.3d at 1218, nor may they reach their decisions by a coin flip without consideration of any relevant factors, *Banks v. Sec'y, Fla. Dep't of Corrs.*, 592 F. App'x 771, 773 (11th Cir. 2014) (citing *Woodard*, 523 U.S. at 279–85). Thus, Defendants do not claim "limitless power to decide if and when individual citizens may vote," Motion at 1, and Plaintiffs knock down a straw man of their own creation.

2. Plaintiffs further argue that "[t]he absence of objective, transparent legal rules for restoration opens the door to political, viewpoint, racial, religious, wealth and any other type of discrimination." Motion at 2. It is well settled that States may not invidiously discriminate in the disenfranchisement of felons. *Hunter v. Underwood*, 471 U.S. 222, 227–33 (1985). But Plaintiffs make no allegation of such malfeasance, and wisely so, given controlling Eleventh Circuit authority. *See Johnson*, 405 F.3d at 1224 (upholding Florida's felon disenfranchisement laws under the standard announced in *Hunter*). Instead, Plaintiffs rely on a supposed *vulnerability* to such kinds of discrimination in the re-enfranchisement process. This is simply another way of arguing that Defendants do not employ "'specific standards,'" Motion at 19, that are susceptible of mechanical and "uniform application," *id.* at 21. The Supreme Court decisively rejected this exact argument in *Beacham*.

Moreover, to the extent that Plaintiffs rely on applicants' own statements of partisan affiliation, support for certain policies, and religious devotion, *see* Motion at

25–30, they cannot establish that Defendants invidiously discriminate. To begin, Plaintiffs have not pled any claim or advanced any argument that Defendants have ever actually engaged in such invidious discrimination; instead, they ask this Court to strike down Florida's re-enfranchisement laws on the ground that Board members *could* engage in such discrimination, even if already prohibited by law. In addition, Plaintiffs ignore that the Board does not request any information regarding partisan affiliation, support for political causes, or religious affiliation. *See* D.E. 107-2 (Exhibit K to Defendants' Motion for Summary Judgment – Application for Clemency). Rather, any such statements that applicants make to the Board are unsolicited. Board members take an oath to uphold the law, and they should be presumed to discharge that solemn duty absent evidence to the contrary. At a minimum, the State's elected officers should not be presumed to engage in various forms of illicit discrimination based on information that they do not solicit.

3. Plaintiffs also assail the factors that Defendants consider in making their restoration decisions as a "modern-day moral character test for access to the ballot," Motion at 4; *see also id.* at 22, suggesting that the Voting Rights Act prohibits Defendants from weighing those factors, *id.* at 22 n.45. However, Plaintiffs have not brought any claims arising under the Voting Rights Act. In any event, Defendants do not deny that, in making their decisions, they evaluate applicants' contrition and rehabilitation. But as the former Fifth Circuit has explained, that is an entirely legitimate function of the re-enfranchisement process: "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" because "such persons have breached the social contract and . . . have raised questions about their ability to vote responsibly." *Shepherd*, 575 F.2d at 1115. Entrusting re-enfranchisement decisions only to those who have "familiarity with the individual defendant and his case" is constitutionally permissible because such careful case-by-case decision-making serves a legitimate state interest in "gaug[ing] the progress and rehabilitation of a convicted felon." *Id.* In other words, Plaintiffs should not be heard to complain that Florida's re-enfranchisement process serves the very purpose that binding precedent has expressly approved.

4. Plaintiffs spend a score of pages and several scores of footnotes compiling dispositions of individual restoration applications, Motion at 23–43, many of which pre-date the current Board. And they make these outcome comparisons even though they themselves admit that "they need not" do so according to their own understanding of their case, *id.* at 23. Such selective comparisons do not help their cause.

Individual clemency outcomes are not just unnecessary to Plaintiffs' case; they are irrelevant. That is because the Supreme Court has approved the existence of discretion in re-enfranchisement regimes and in clemency more generally, and caselaw precludes litigants from establishing constitutional violations through outcome

comparisons, even in areas (like criminal sentencing) in which they are entitled to considerably *more* judicial process. *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."); *Jones v. White*, 992 F.2d 1548, 1571–72 (11th Cir. 1993).

Plaintiffs make no attempt to address this caselaw. In cataloguing individual clemency outcomes without coherently explaining why doing so advances their case, Plaintiffs may simply be looking to "perfect a record, as they suggest, for any appellate action(s)." Order Granting Plaintiffs' Motion to Compel, D.E. 76 at 2. But any such record does nothing to undermine Supreme Court and Eleventh Circuit precedent rejecting Plaintiffs' outcome-comparison approach.

5. It is not persuasive to fault executive discretion in clemency on the basis that it originated in the Eighth Century. Motion at 50 (citing, *inter alia*, *Herrera v. Collins*, 506 U.S. 390, 412 (1993)). As the Supreme Court has explained, clemency's venerable pedigree is a reason to preserve its discretionary character and recognize its consistency with constitutional doctrine, not re-shape constitutional doctrine to invalidate a longstanding practice that is foundational to our conception of justice.

"[T]he clemency and pardon powers are committed, *as is our tradition*, to the authority of the executive." *Woodard*, 523 U.S. at 276 (emphasis added). And its origins as a royal prerogative are likewise no reason to disregard it; after all, "[o]ur Constitution adopts the British model" in its vesting of the discretionary reprieve and pardon powers in the executive. *Herrera v. Collins*, 506 U.S. 390, 411–12 (1993) (citing 4 William Blackstone, Commentaries 397). In the words of Chief Justice Marshall:

> "As this power had been exercised from time immemorial by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance; we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it."

Id. at 413 (quoting *United States v. Wilson*, 32 U.S. (7 Pet.) 150, 160–61 (1833)).

Plaintiffs thus ask this Court to remove the essential element—executive discretion—from the historic clemency power though the imposition of "'specific standards.'" Motion at 19. At the same time, however, they acknowledge that clemency was "devised to ensure there was an avenue for mercy outside the court system." *Id.* at 50–51. Plaintiffs' approach would therefore concededly eliminate "the heart of executive clemency, which is to grant clemency as a matter of *grace*." *Woodard*, 523 U.S. at 280–81 (plurality op.) (emphasis added).

In addition, by (correctly) framing their attack as one on executive clemency, *see* Motion at 50, Plaintiffs appear to have abandoned their prior argument that their suit does not target clemency, *see* D.E. 43 at 26. Thus, it now is (or should be) undisputed

that any ruling from this Court should be consistent with *Woodard* and other judicial authority that affirms the legitimacy of executive discretion in clemency. It also now is (or should be) undisputed that any ruling from this Court requiring "specific standards" for voting-rights restoration decisions likely would carry the same implication for other types of clemency determinations, thus eliminating (or heavily constraining) executive discretion in pardons, death-sentence commutations, and restorations of firearm rights.

6. Plaintiffs' reliance on selectively-quoted statements made by the Governor, Motion at 21, is misplaced. Such quotations do not displace the Board's established procedures governing the restoration of voting rights. At any rate, the remarks in question do not help Plaintiffs' cause. 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 while the latter involve matters of grace. Such unremarkable statements are consistent with settled law, and they do not come close to establishing that the Board's decision-making is unconstitutionally arbitrary. Plaintiffs cannot rely on the Governor's accurate characterization of the law in this area to establish entitlement to relief.

7. Finally, Plaintiffs contend that Florida's re-enfranchisement procedures are a national outlier, Motion at 1–2, and they complain that "[t]he current Board is reviewing fewer applications and granting fewer as well" when compared to prior

Boards, *id.* at 5. But at least eleven States provide officials or judges with substantial discretion in the re-enfranchisement context, either as to all felons or as to some class of felons.[2] In any event, Plaintiffs' survey of U.S. jurisdictions and comparison between past and current Clemency Boards avail them nothing. Binding precedent interprets Section 2 of the Fourteenth Amendment to authorize the *permanent* disenfranchisement of *all* felons, *Ramirez*, 418 U.S. at 53–55, 56; *Johnson*, 405 F.3d at 1216–17, and the Supreme Court has rejected the claim that re-enfranchisement determinations must proceed along a mechanical formula, *Beacham*, 396 U.S. 12. Florida law thus complies with—and, indeed, goes above and beyond—applicable constitutional requirements.

Commentators supporting felon-disenfranchisement reforms acknowledge that "nearly all" court challenges to "felon disenfranchisement and restoration laws" "have failed," and "doctrinal limitations have made it extraordinarily difficult for plaintiffs

[2] These States are Arizona, Delaware, Florida, 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).

even to survive a motion to dismiss." Note, *One Person, No Vote: The Laws of Felon Disenfranchisement*, 115 Harv. L. Rev. 1939, 1949–50, 1952 (2002). They suggest that "advocates might instead focus on legislative amendments" to achieve their policy goals. *Id.* at 1957. As Plaintiffs themselves have noted, the Florida Constitution Revision Commission is considering whether to propose an amendment to the Florida Constitution that would alter its felon disenfranchisement regime. *See* Motion at 5 n.7 (citing testimony before the committee considering the issue). Plaintiffs' arguments concerning Florida's purported outlier status—and indeed all their policy-based arguments—are properly directed toward that body, and more generally to the elected branches of state government.

* * *

Plaintiffs fail to demonstrate that they are entitled to judgment on their equal-protection claim in Count II.

B. Plaintiffs Are Not Entitled to Judgment on Their Claim Against So-Called "Waiting Periods" in Count IV.

Plaintiffs argue that the so-called "waiting periods" in the Rules of Executive Clemency, which require restoration applicants to refrain from all criminality for five years or additional felonies for seven years, unduly burden the right to vote in violation of the First and Fourteenth Amendments. Motion at 47. They observe that they "have already served their sentences," and they contend that the Rules impose a "de facto second sentence." *Id.* at 49. As support for their argument, they cite cases

from the Supreme Court and some out-of-circuit lower federal courts that addressed voting-rights claims by *non-felons*. Motion at 48.

Absent from Plaintiffs' argument is any discussion of relevant cases—*i.e.*, cases dealing with voting-rights claims by disenfranchised felons. Such cases offer no support for Plaintiffs' position. *Ramirez*, *Johnson*, and *Shepherd* all rejected voting-rights claims by disenfranchised felons. And in each of those cases, the plaintiffs had completed their sentences. *See Ramirez*, 418 U.S. at 26; *Johnson*, 405 F.3d at 1216–17; *Shepherd*, 575 F.2d at 1111.

Moreover, these cases are just as important for what they established as for what they rejected. "The 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*, 405 F.3d at 1217. In other words, "once a felon is properly disenfranchised a state is at liberty to keep him in that status indefinitely and never revisit that determination." *Harvey v. Brewer*, 605 F.3d 1067, 1079 (9th Cir. 2010) (O'Connor, J.). And the Supreme Court having made clear that states are authorized to *permanently* bar felons from voting, it follows that Florida may also take the less restrictive step of making re-enfranchisement available to those who demonstrate rehabilitation through their post-sentence conduct.

Plaintiffs may not circumvent such caselaw by adverting to precedent dealing with voting-rights claims by non-felons. Nor can they evade it by making unsupported

assertions that Defendants' Rules constitute a "de facto second sentence." Motion at 49. The Rules are not tantamount to a "second sentence" because the sentencing authority is not tasked with deciding whether and for how long a felon should be disenfranchised. Florida law requires disenfranchisement upon a felony conviction and provides that this status continues indefinitely unless and until a grant of clemency. *See* Fla. Const. art. IV, § 8(a); Fla. Const. art. VI, § 4(a); Fla. Stat. §§ 97.041(2)(b), 944.292(1). Sentencing courts do not and cannot alter these requirements of Florida law, just as the Executive Clemency Board's rules do not and cannot alter any of Plaintiffs' sentences.

Finally, Plaintiffs seek to bolster their claim by arguing the Rules "indefinitely delay[ ] the point of social reintegration" and are "counterproductive to the state's purported interest in ensuring rehabilitation." Motion at 48. They also quote the statement of one former Board member as support for their contention that "there is no important regulatory interest or legitimate, rational basis in delaying the restoration of civil rights for an ex-felon who has completed his or her sentence." Motion at 49. Such policy arguments do not support Plaintiffs' constitutional claims. The law of this Circuit holds that "Florida has a legitimate reason for denying the vote to felons," including those who have served their sentences, *Johnson*, 405 F.3d at 1225, and "[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," *Shepherd*, 575

F.2d at 1115; *see also Green v. Bd. of Elections*, 380 F.2d 445, 451 (2d Cir. 1967) (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," "especially" given the "heavy incidence of recidivism").

Plaintiffs fail to demonstrate that they are entitled to judgment on their claim in Count IV.

C. Plaintiffs Are Not Entitled to Judgment on Their First Amendment Claims in Counts I and III.

Plaintiffs' First Amendment claims in Counts I and III, both as pled in the Complaint and as argued in Plaintiffs' Motion, attack Defendants' discretion in making re-enfranchisement determinations. *See* Compl. ¶¶ 87, 90, 109; Motion at 16–18, 45–47. According to Plaintiffs, they have a First Amendment interest in voting, Motion at 13–16, and because the Board has discretion whether to grant or deny applications for the restoration of voting rights (and discretion in the timing of those determinations), the Board's re-enfranchisement procedures amount to an invalid prior restraint, *id.* at 16–18, 45–47. Plaintiffs seek to support their claims with long string-cites to irrelevant First Amendment cases, many of which did not involve voting, and none of which concerned voting by disenfranchised felons. *Id.* at 13–18, 45–46.

By attacking the Board's discretion in Florida's re-enfranchisement procedures, Plaintiffs' First Amendment claims duplicate their equal-protection claim, and they fail for the same reasons. In addition, their claims fail because Plaintiffs cite no case establishing that disenfranchised felons have a First Amendment interest in voting. In fact, caselaw cuts firmly against them.

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*, 178 F.3d at 1188 n.9. 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*, 833 F.3d at 1299 (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. 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.

Plaintiffs' cited authorities gain them no ground. Plaintiffs string-cite dozens of First Amendment cases, *see* Motion at 18 (describing the cases as "legion"), many of which did not concern voting, and none of which concerned voting by disenfranchised felons, *see id.* at 13–18, 45–46. That certain election-related activities carry First Amendment interests for lawful voters does not mean that lawfully disenfranchised felons have a constitutionally cognizable interest in voting. Indeed, every court to have confronted that argument has rejected it. *See, e.g.*, *Johnson*, 214 F. Supp. 2d at 1338 (disenfranchised felons have no First Amendment interest in voting); *Farrakhan*, 987 F. Supp. at 1314 (same); *see also Harvey*, 605 F.3d at 1080 (disenfranchised felons have no Twenty-Fourth Amendment interest in voting); *Johnson*, 624 F.3d at 751 (same); *Howard*, 205 F.3d at 1333 (same).

Plaintiffs' remaining First Amendment arguments are unpersuasive. They contend that disenfranchised felons "cannot do X (a constitutionally protected activity) without first obtaining a permit or license." Motion at 18. But Plaintiffs ignore that while voting may be "a constitutionally protected activity" for lawful

voters, it is not a constitutionally protected activity for lawfully disenfranchised felons. Similarly unavailing is their contention that "[t]he proposed Plaintiff Class has *not* lost its First Amendment rights, just their state law right to vote." *Id.* at 19. While Plaintiffs have not lost their right to speak (or, for that matter, their rights to freely exercise their religion, participate in the press, or assemble and petition the government for redress of grievances), they *have* lost their right to vote. *See Ramirez*, 418 U.S. at 53–55, 56; *Johnson*, 405 F.3d at 1216–17. Thus, regardless of the constitutional vehicle Plaintiffs might seek to employ, their claim of a constitutionally protected right to vote is barred by binding precedent. Moreover, that restoration applicants "may wait as many as ten years to receive notice of a hearing and/or a determination on their applications," Motion at 46, does not give rise to a constitutional violation. Florida is entitled to *permanently* bar Plaintiffs from voting, *see Ramirez*, 418 U.S. at 53–55, 56; *Johnson*, 405 F.3d at 1216–17, and they have no First Amendment interest to assert in voting unless and until their voting rights are restored. Thus, they have no First Amendment interest upon which Florida's re-enfranchisement procedures might be said to operate as a prior restraint.

* * *

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. Plaintiffs have failed to show they are entitled to judgment on Counts I and III.

CONCLUSION

This Court should deny Plaintiffs' Motion for Summary Judgment.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on this 4th day of December, 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 6,263 words.

/s/ Amit Agarwal

Attorney