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.
_____/

REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

For the most part, Plaintiffs' response to Defendants' motion for summary judgment painstakingly and persuasively refutes arguments that Defendants do not make. Over the course of six full pages, for example, Plaintiffs insist that criminal disenfranchisement laws are "not immunized from constitutional challenge by Section 2 of the Fourteenth Amendment." Resp. 4–11. They are right, but that protracted digression does not speak to any disagreement between the parties. As Defendants explained on the second page of their motion, Plaintiffs' equal-protection claim must be rejected if Florida's re-enfranchisement procedure is "rationally related to the advancement of a legitimate state interest." Mot. 2. Laws concededly subject to rational-basis review are not "immunized from constitutional challenge." Resp. 4.

Likewise, Defendants have never argued that "felon disenfranchisement laws and reenfranchisement laws" are "judicially unreviewable, even if such laws [are] discriminatory, arbitrary, and/or irrational." Resp. 8. Rather, Defendants observed that "Plaintiffs do not and cannot allege that Florida's re-enfranchisement system employs any suspect classifications." Mot. 2. Absent any suspect classification, Defendants argued, "that system must be upheld if it is rationally related to the advancement of a legitimate state interest." *Id.* (citing *Shepherd v. Trevino*, 575 F.2d 1110, 1115 (5th Cir. 1978)).

As those and many other examples make clear, Plaintiffs do a thorough job of knocking down a straw man of their own creation; but that extended exercise in opposing the indefensible does not help their cause. Nor does it come to terms with the principal argument underlying Defendants' motion for summary judgment: Like all laws, criminal disenfranchisement laws must comport with applicable constitutional requirements, including those imposed by the Equal Protection Clause. But constitutional challenges to such laws must be adjudicated under, and in a way that makes sense of, legal standards enunciated by the Supreme Court and the Court of Appeals for this jurisdiction. *See Johnson v. Governor of Fla.*, 405 F.3d 1214, 1226–27 (11th Cir. 2005) (en banc).

Plaintiffs' claims flunk that test. Consider the following examples:

- In *Beacham v. Braterman*, the Supreme Court summarily affirmed a three-judge district court's holding that it is not "a denial of equal protection of law" for Florida "to restore discretionarily the right to vote to some felons and not to

others," where it was undisputed that such decisions were made "in a purely discretionary manner without resort to specific standards." 300 F. Supp. 182, 183, 184 (S.D. Fla. 1969), *aff'd* 396 U.S. 12 (1969). A few months ago, Plaintiffs told this Court that *Beacham* "did not address a challenge to discretionary, standard-less decisions on the right to vote." DE43 at 28. They now appear to have abandoned that altogether untenable assertion. *See* Resp. 28-30. Instead, Plaintiffs now argue that *Beacham* is not controlling because Beacham "applied for a pardon, which would have included a restoration of his civil rights," instead of "separately" applying only for the restoration of voting rights. Resp. 29. That makes no sense. Beacham asked the Supreme Court to decide whether Florida's re-enfranchisement procedure "violate[s] the Constitution in that there are no ascertainable standards governing the recovery of the fundamental right to vote?" 1969 WL 136703, at *3 (Question C). By summarily affirming the lower court's ruling, the Supreme Court necessarily decided that question in the negative. If, on the other hand, Beacham's claim had merit, Florida could not have evaded the requirements of the federal Constitution by folding the re-enfranchisement determination into the pardon process, and Plaintiffs here do not argue otherwise. Accordingly, Plaintiffs' equal-protection claim cannot be reconciled with either the judgment of the Supreme Court or the rationale of the lower court in *Beacham*.

- For purposes of assessing an equal-protection challenge to a state's procedure for re-enfranchising convicted felons, the law of this Circuit holds that states have a legitimate "interest in limiting the franchise to responsible voters." *Shepherd*, 575 F.2d at 1115; *see Bonner v. Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc). Plaintiffs ask this Court to dismiss that interest as "just another vague phrase which invites arbitrary treatment." Resp. 25.

- As construed by the Supreme Court, Section 2 of the Fourteenth Amendment affirmatively authorizes states to *permanently* disenfranchise convicted felons. *Richardson v. Ramirez*, 418 U.S. 24, 54 (1974); *Johnson*, 405 F.3d at 1217. In Plaintiffs' view, the Executive Clemency Board's rules requiring convicted felons who have completed their sentences to wait for five or seven years before applying for restoration of voting rights violate the First and Fourteenth Amendments. Resp. 33.

- In *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998), the Supreme Court confirmed that "the clemency and pardon powers are committed . . . to the authority of the executive," and reaffirmed prior caselaw holding that such decisions "'are rarely, if ever, appropriate subjects for judicial review.'" *Id.* at

276. Applying the logic of *Woodard*, the Eleventh Circuit has held that "in order for a claim of alleged violations of due process *and equal protection* in a clemency proceeding to succeed, the violation must be grave, such as where 'a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process.'" *Banks v. Sec'y, Fla. Dep't of Corrs.*, 592 F. App'x 771, 773 (11th Cir. 2014) (unpublished) (quoting *Woodard*, 523 U.S. at 289) (O'Connor, J.) (emphasis added). According to Plaintiffs, this Court should ignore that holding because, as they see it, the Eleventh Circuit's "disposition conflates due process and equal protection" and "omits any reasoning to extend *Woodard* to equal protection claims." Resp. 18 n.7.

- The Eleventh Circuit has instructed that the First Amendment "afford[s] no greater protection for voting rights claims than that already provided by the Fourteenth and Fifteenth Amendments." *Burton v. City of Belle Glade*, 178 F.3d 1175, 1188 n.9 (11th Cir. 1999). It has also affirmed the judgment of a district court that rejected a First Amendment challenge to Florida's disenfranchisement law on the ground that "the First Amendment does not guarantee felons the right to vote." *Johnson v. Bush*, 214 F. Supp. 2d 1333, 1338 (S.D. Fla. 2002), *aff'd sub nom. Johnson v. Governor of Fla.*, 405 F.3d 1214 (11th Cir. 2005) (en banc). Nevertheless, Plaintiffs assert they have a "constitutionally protected right to vote" under the First Amendment. Resp. 11.

In short, Plaintiffs' claims cannot be reconciled with pertinent caselaw, and the main thrust of their response is to refute arguments that the State does not make. For those and other reasons discussed herein, Defendants' motion for summary judgment should be granted.

I. Defendants Are Entitled to Judgment as a Matter of Law Insofar as Plaintiffs Challenge Florida's Disenfranchisement Laws and Seek Automatic Re-Enfranchisement.

This suit "challenges Florida's disenfranchisement *and* re-enfranchisement laws." DE29 ¶1 (emphasis added). The challenge to Florida's disenfranchisement laws fails because, as Defendants have explained, "[b]inding authority holds that Section 2

of the Fourteenth Amendment affirmatively authorizes states to permanently disenfranchise convicted felons." Mot. 1; *see Johnson*, 405 F.3d at 1217. "Plaintiffs do not contest that Section 2 of the Fourteenth Amendment . . . authorizes Florida to disenfranchise felons," Resp. 5, and they have not asserted any constitutional defect in the process by which convicted felons *lose* their right to vote. Hence, their challenge to Florida's disenfranchisement laws and request for automatic restoration of voting rights fail.

It is no answer to say that Florida has, in Plaintiffs' view, "[a]n arbitrary and unduly burdensome felon reenfranchisement scheme." Resp. 4. Even if that were so—and it is not, *see infra* Part II—alleged problems with the State's re-enfranchisement procedure would not warrant invalidation of the State's analytically and temporally distinct disenfranchisement laws, which provide that *all* convicted felons automatically and immediately lose their right to vote. *See* Fla. Const. Art. VI, § 4(a); Fla. Stat. §§ 97.041(2)(b), 944.292(1).

Plaintiffs counter that "felon disenfranchisement and reenfranchisement are inextricably conjoined in Florida" because "[a]n arbitrary and unduly burdensome felon reenfranchisement scheme indefinitely perpetuates disenfranchisement." Resp. 4. On the very next page of their pleading, however, Plaintiffs concede that their "sought-for remedy would permit Florida to continue disenfranchising felons for the duration of their full sentences." *Id.* at 5. As that concession makes clear, Florida's disenfranchisement laws are not "inextricably" intertwined with its re-

enfranchisement procedure, inasmuch as alleged problems with the latter do not require the court to strike down the former.

As support for their position, Plaintiffs offer First Amendment cases having nothing to do with voting by disenfranchised felons, which they believe stand for the proposition that "[t]he remedy for an unconstitutional restraint-and-licensing scheme is to strike down the scheme." Resp. 31–32. However, it is only Florida's *re*-enfranchisement procedures that Plaintiffs liken to a licensing scheme. Plaintiffs do not and cannot argue that lifetime disenfranchisement, for example, would amount to a system that "issu[es] licenses to vote." Resp. 2. If this Court accepts Plaintiffs' argument that Florida's system is invalid because it lacks an "objective legal test or criteria," Resp. 26, the logical remedy would be an order requiring the State to put some such test or criteria in place, not an injunction against enforcement of the State's indisputably "objective" disenfranchisement laws.

Regardless how this Court adjudicates Plaintiffs' challenge to Florida's re-enfranchisement procedures, Defendants are entitled to judgment on Plaintiffs' challenge to Florida's disenfranchisement laws, and Plaintiffs are not entitled to their primary requested relief.

II. DEFENDANTS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW ON PLAINTIFFS' CLAIMS IN COUNTS I, II, III, AND IV AGAINST FLORIDA'S RE-ENFRANCHISEMENT PROCEDURES.

Plaintiffs lump together their equal-protection and First Amendment claims. Resp. 11–32. In Defendants' view, it is helpful to analyze those claims separately.

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

At bottom, Plaintiffs argue that Florida's re-enfranchisement system violates the Equal Protection Clause because the Clemency Board does not base its decisions on "any objective legal test or criteria." Resp. 26; *see also id.* at 24. That argument is unpersuasive, for two distinct and independent reasons.

First, pertinent caselaw holds that the clemency process need not be guided by "specific standards." *Beacham*, 300 F. Supp. at 183, 184, *aff'd* 396 U.S. 12 (1969). Plaintiffs' effort to distinguish *Beacham*, Resp. 28–30, is unpersuasive. Most importantly, Plaintiffs have now abandoned their position—which they urged this Court to adopt just a few months ago—that *Beacham* "did not address a challenge to discretionary, standard-less decisions on the right to vote." DE43 at 28. And for good reason. The Supreme Court in *Beacham* summarily affirmed a three-judge district court's holding that it is not "a denial of equal protection of law" for Florida "to restore discretionarily the right to vote to some felons and not to others," where it was undisputed that such decisions were made "in a purely discretionary manner without resort to specific standards." 300 F. Supp. 182, 183, 184 (S.D. Fla. 1969), *aff'd* 396 U.S. 12 (1969). Thus, the Court there addressed virtually the exact same challenge that Plaintiffs raise here.

Plaintiffs observe that "Beacham only 'applied for a pardon,'" and "[t]here is nothing . . . which indicates Beacham separately applied, *in the alternative*, for

restoration of civil rights." Resp. 29 (emphasis in original). This purported distinction misses the point. As the court noted, "Florida's right to disenfranchise convicted felons is being challenged," and it was addressing "whether it is a denial of equal protection of law . . . for the Governor of Florida, with the approval of three members of the Cabinet, to restore discretionarily the right to vote to some felons and not to others," where it was undisputed that such restoration decisions were made "in a purely discretionary manner without resort to specific standards." 300 F. Supp. at 183, 184. The mechanism through which Beacham sought restoration was of no import; indeed, "[t]he restoration of civil rights is part of the pardon power . . . ." *Id.* at 184. In any event, the Supreme Court and Eleventh Circuit have understood *Beacham* to speak specifically to States' disenfranchisement authority, and not just their pardon power more generally, as Plaintiffs urge. *Compare* Resp. 30 *with Ramirez*, 418 U.S. at 53 *and Johnson*, 405 F.3d at 1226 (noting that *Beacham* is "specific precedent from . . . the Supreme Court dealing with *criminal disenfranchisement*" (emphasis added)).

Similarly, it makes no difference whether Florida law at the time required a convicted felon to invoke the pardon process in order to regain the right to vote. Resp. 29 & n.11. Like Plaintiffs here, Beacham claimed that it violated the Equal Protection Clause for Florida to "restore discretionarily the right to vote to some felons and not to others," where such decisions were made "in a purely discretionary manner without resort to specific standards." 300 F. Supp. at 183, 184. If that claim had merit, Florida could not have evaded the requirements of the federal Constitution

by folding the re-enfranchisement determination into the pardon process, and Plaintiffs here do not argue otherwise.

Assuming *arguendo* that *Beacham* is not controlling, the logic of that decision is persuasive. Hypertechnical distinctions aside, Beacham raised essentially the same challenge to the same set of laws. And now, as then, "[t]he restoration of civil rights . . . is an act of executive clemency not subject to judicial control." 300 F. Supp. at 184; *see* Fla. Const. Art. IV, § 8(a) (providing for authority to "restore civil rights" in "[c]lemency" provision of the state constitution); *Woodard*, 523 U.S. at 276 (explaining that "the clemency and pardon powers are committed, as is our tradition, to the authority of the executive," and that such powers "are rarely, if ever, appropriate subjects for judicial review").

For their part, Plaintiffs do not cite any case holding that a discretionary re-enfranchisement regime is unconstitutionally "arbitrary" if the exercise of discretion is not governed by some "objective legal test or criteria." The absence of any such precedent speaks volumes. Many states have laws of the kind at issue here. Resp. 2 n.1 (asserting that "ten states" currently "have discretionary *and arbitrary* executive or judicial restoration schemes") (emphasis added); Mot. 23 n.4 (citing laws of "[a]t least ten States other than Florida [that] provide officials or judges with substantial discretion in the re-enfranchisement context"). And would-be litigants have had ample opportunity to challenge them. "Florida's policy of criminal

disenfranchisement," for example, "has a long history, tracing back well before the Civil War." *Johnson*, 405 F.3d at 1218.

Second, and even assuming that existing caselaw does not directly address whether the Equal Protection Clause requires re-enfranchisement determinations to be based on "specific standards," Plaintiffs' claim fails under the more general test applicable to challenges of this kind. "[S]elective disenfranchisement or reenfranchisement of convicted felons must pass the standard level of scrutiny applied to state laws allegedly violating the equal protection clause. Such laws must bear a rational relationship to the achieving of a legitimate state interest." *Shepherd*, 575 F.2d at 1114–15.

That law is fatal to Plaintiffs' equal-protection claim. Under *Shepherd*, Florida has a legitimate "interest in limiting the franchise to responsible voters." 575 F.2d at 1115. The State's totality-of-the-circumstances approach is "rationally calculated" to effectuate that interest, because it permits Board members to "gauge the progress and rehabilitation of a convicted felon" based on the full range of information concerning "the individual defendant and his case." *See* Mot. 2, 16–20; *Shepherd*, 575 F.2d at 1115.

Instead of applying the principles set forth in *Shepherd* to the state laws at issue here, Plaintiffs argue that *Shepherd* was wrong to hold that states have a legitimate "interest in limiting the franchise to responsible voters" because that interest "defies concrete definition" and is "just another vague phrase which invites arbitrary treatment." Resp. 3, 25. Plaintiffs have a right to their own view of what the law

should be; but they may not ask this Court to set aside "specific precedent . . . dealing with criminal disenfranchisement" and establishing "clear standards by which to judge" the challenged state laws. *Johnson*, 405 F.3d at 1226–27.

Plaintiffs' continued reliance on *Bush v. Gore*, 531 U.S. 98 (2000), is misplaced, and they fail to rebut Defendants' explanation of why that case is inapplicable. 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.

Plaintiffs' remaining arguments are unpersuasive.

1. Defendants are not "fighting for the power to" selectively re-enfranchise "without the constraints of any law." Resp. 2. Nor do they claim "the power to arbitrarily" re-enfranchise "based on any reason, no reason or an unlawful reason." Resp. 11, 25. As they have explained, state officials making re-enfranchisement

determinations are subject to generally applicable laws prohibiting various kinds of malfeasance, including laws barring invidious discrimination. Consistent with that position, Defendants have acknowledged that the Equal Protection Clause imposes constraints on their re-enfranchisement authority. Mot. 15–17 (citing *Banks* and *Shepherd*). Defendants simply argue that Plaintiffs fail to establish a constitutional violation under the applicable equal-protection standards. Plaintiffs' claim that Florida's re-enfranchisement system is "arbitrary" in violation of the Equal Protection Clause hinges on their assertion that it lacks "'specific standards.'" Resp. 19 (citing *Bush v. Gore*). *Beacham* forecloses that claim.

2. Plaintiffs observe that *Shepherd* "did not address and therefore does not foreclose the claims raised in this case," Resp. 2, but Defendants have not argued that *Shepherd* addressed Plaintiffs' claim. Instead, as they explained, *Shepherd* rejected a much stronger one: whether states may make selective re-enfranchisement available to felons sentenced by state judges but not those sentenced by federal judges. Mot. 17; 575 F.2d at 1112. And Defendants never have contended that *Shepherd* held disenfranchised felons cannot have a "legally cognizable constitutional injury." Resp. 10. Plaintiffs conflate Defendants' argument that the challenged procedures are subject to—but pass—applicable equal-protection requirements with their separate argument that lawfully disenfranchised felons have no constitutionally protected right to vote (and, therefore, no derivative First Amendment right to be free from certain kinds of restrictions on their ability to vote).

3. Defendants do not "mischaracterize Plaintiffs' equal protection claim as a due process claim." Resp. 17. The cases on which Defendants primarily rely—*Beacham*, *Johnson*, *Richardson* and *Shepherd*—all addressed equal-protection challenges. *Woodard* addressed a due process claim, but the Court there explained that clemency powers "are committed, as is our tradition, to the authority of the executive" and "are rarely, if ever, appropriate subjects for judicial review." 523 U.S. at 276. As the Eleventh Circuit has recognized, those general propositions apply with full force where, as here, a convicted felon brings an equal-protection challenge to a state's clemency procedures. *Banks*, 592 F. App'x at 773. In addition, Plaintiffs miss the mark in arguing that Florida's eminently reasonable re-enfranchisement process, *see* Mot. 3, 5–8, 18–19, is irrelevant to their equal-protection challenge. Those procedures help to ensure that the Board obtains and reviews the full range of information relevant to "gaug[ing] the progress and rehabilitation of a convicted felon," *Shepherd*, 575 F.2d at 1115; such review helps to effectuate the State's legitimate "interest in limiting the franchise to responsible voters," *id.*; and the State could reasonably conclude that the virtues of employing that totality-of-the-circumstances approach outweigh the benefits of using a mechanical formula of the kind Plaintiffs would prefer.

Moreover, Defendants do not rely solely on the extensive *process* the Board affords. They also rely on the eminently reasonable *factors* that, by the Complaint's own admission, the Board considers in rendering its decisions. Mot. 5–8, 18–19. These factors—such as illegal registration and voting, post-sentence drug and alcohol

use, and evidence of remorse and reformation, *see* DE29 ¶¶ 55, 56, 59, 61—are reasonably related to the State's legitimate governmental interest in "limiting the franchise to responsible voters." *See Shepherd*, 575 F.2d at 1115. Plaintiffs might disagree with how the Board has weighed these factors in different cases, but as Defendants explained, Mot. 20–22, that is insufficient to establish an equal-protection violation.

To the extent that Defendants point to Plaintiffs' CCAs, Mot. 19, 23, they offer them only to show what categories of information are brought before the Board as part of its decision-making process. Contrary to Plaintiffs' argument, Resp. 24–25, this use of Plaintiffs' CCAs is entirely consistent with the position Defendants have previously taken in this litigation. Before this Court, Defendants argued that *non-parties*' CCAs are irrelevant because applicable caselaw precludes Plaintiffs' outcome-comparison approach, DE57 at 5–6, but they nevertheless advised that they could offer *Plaintiffs*' CCAs to show "what type of material is being furnished to the board for its consideration," and Defendants would "refer to the types of material that would be included in a [CCA]" to "speak to the general list of factors and considerations that weigh into the board's decisions." DE138 at 8, 12–13.

4. Novel legal theories have real-world consequences, and this Court need not and should not close its eyes to unavoidable doctrinal and practical implications of accepting Plaintiffs' equal-protection claim. *See* Resp. 17, 27. That claim carries vast and troubling implications for other kinds of clemency. *See* Mot. 23–26. Plaintiffs'

response shows why. To establish an equal-protection violation in this context, Plaintiffs argue, they "need only establish that the officials' *decision-making* is standard-less and arbitrary"—*i.e.*, that "Florida's restraint-and-licensing scheme for ex-felons lacks any objective legal test or criteria." Resp. 23, 26. If the absence of an "objective legal test or criteria," standing alone, is fatal to Florida's re-enfranchisement procedure, however, why is it not also fatal to other kinds of clemency decisions—including the decision whether to commute a death sentence, grant a liberty-conferring pardon, or restore a convicted felon's right to keep and bear arms?

It is no answer to say that "Plaintiffs only challenge the unfettered discretion involved in restoration of *voting* rights decisions." Resp. 27. Plaintiffs do not and cannot contend that felons have a stronger interest in voting than in avoiding execution, undoing the substantial deprivation of liberty attending protracted incarceration, or keeping a gun to effectuate "'the natural right'" of "'self-preservation . . . and defence,'" *District of Columbia v. Heller*, 554 U.S. 570, 594 (2008) (quoting 1 Blackstone Commentaries on the Laws of England 139–40 (1765)). Nor do Plaintiffs offer any principled basis for holding that the Equal Protection Clause requires a clear "legal test or criteria" in making some but not all kinds of clemency determinations. And while Plaintiffs' *First Amendment* claims may or may not carry the same doctrinal implications, Resp. 16–17, this is no response to Defendants' arguments regarding the doctrinal implications of Plaintiffs' *equal-protection* claim.

5. Plaintiffs misperceive why Defendants cited *McCleskey v. Kemp*, 481 U.S. 279 (1987) and other caselaw dealing with disparities in criminal sentencing. *See* Resp. 18–19. Defendants cited these cases not as directly controlling authority, but rather as an illustration of how Plaintiffs' outcome-comparison approach to their equal-protection claim would create a doctrinal anomaly: outcome comparisons are not allowed to make out constitutional violations in contexts where litigants are entitled to considerably *more* judicial process. Mot. 21–22. Indeed, the Supreme Court has observed that "[i]ndividual acts of clemency inherently call for discriminating choices because no two cases are the same." *Schick v. Reed*, 419 U.S. 256, 268 (1974).

Nevertheless, Plaintiffs continue to refer to their selective outcome comparisons while failing to respond to Defendants' argument, Resp. 21 (citing DE102 at 23–43), other than to accuse Defendants of asserting that "perfect, uniform discrimination"—*i.e.*, "inequality in all the outcomes of all similarly situated applicants"—is required to establish a claim, *id.* at 22. Defendants did not make that argument. Instead, they contended that "Equal Protection guarantees only a non-arbitrary system, not similarity in result between selectively identified individuals alleged to be similarly situated." Mot. 22.[1]

[1] Regardless, Plaintiffs omit crucial details from their comparisons. Take, for example, Plaintiffs' comparisons between applicants' alcohol use. Plaintiffs note that the Board denied some restoration applications, but approved several others, after admissions of alcohol use. The hearings often disclose ample bases for the divergent outcomes. For instance, Brent Rouse (discussed in DE102 at 37), who was so drunk that he did not remember the accident that killed his friend, still drinks "occasionally,"

6. Plaintiffs are wrong to say that their claims and sought-for remedy "are consistent with *Richardson*." Resp. 5. Plaintiffs ask for this Court to invalidate Florida's disenfranchisement laws and rewrite them to provide for automatic restoration of voting rights upon completion of a convicted felon's sentence. DE29 at 73–79. That is exactly what *Richardson* held that states need not do. 418 U.S. at 56.

B. Defendants Are Entitled to Judgment on Plaintiffs' Claim Against So-Called "Waiting Periods" in Count IV.

As construed by the Supreme Court, Section 2 of the Fourteenth Amendment affirmatively authorizes states to *permanently* disenfranchise all convicted felons. *Johnson*, 405 F.3d at 1217 (citing *Richardson*, 418 U.S. at 53–55); *see also Harvey*, 605 F.3d at 1079. It follows that Florida may take the less restrictive step of making selective re-enfranchisement available to disenfranchised felons who refrain from criminality for a given amount of time. That is just what Rules 9 and 10 do.

The "waiting periods" that Plaintiffs challenge, Resp. 33, bear a rational relationship to Florida's legitimate "interest in limiting the franchise to responsible

---

and the victim's family opposed restoration, noting the victim's son had grown up without a father and contending they had not received any communication from Mr. Rouse—to apologize, express remorse, or otherwise—until he applied for restoration of civil rights. The Board denied his application after hearing these victim statements and Mr. Rouse's admission to continued alcohol use. DE101-153, Hearing (Dec. 2012) (video, Disc 2 at 1:41:45-1:52:23). By contrast, Brian Ohle's (discussed in DE102 at 38) alcohol-related crime—a break-in and fight during college—did not result in a fatality, and the Board approved his application after learning that his CCA had "positive" information from the victim of his crime, he was enrolled in Alcoholics Anonymous, and he had last had a drink in 2007. DE101-150, Hearing (Sept. 2012) (video, Disc 1 at 1:49:43-1:56:38).

voters," as they help the Board to make sure that felons who have completed their sentences no longer "manifest[] a fundamental antipathy to the criminal laws of the state or of the nation." *See Shepherd*, 575 F.2d at 1115; *see also Green v. Bd. of Elections*, 380 F.2d 445, 451 (2d Cir. 1967) (Friendly, J.).

It is not for Plaintiffs to say whether the State's procedures "undermine[ ] Defendants' stated interest in incentivizing and ensuring rehabilitation." Resp. 33. Duly-elected state officials could reasonably conclude otherwise. In any event, Florida's "interest in limiting the franchise to responsible voters," *Shepherd*, 575 F.2d at 1115, is not the same as—and need not be subordinated to—its real but distinct interest in "ensuring rehabilitation," Resp. 33.

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

Plaintiffs' First Amendment claims hinge on the assumption that they have a "constitutionally protected right to vote" under the First Amendment. Resp. 11. Under *Ramirez*, however, convicted felons do not have a constitutional right to vote, regardless whether such a right is invoked under the First, Fourteenth, or Twenty-Fourth Amendment. 418 U.S. at 54–55; *see, e.g.*, *Harvey v. Brewer*, 605 F.3d 1067, 1080 (9th Cir. 2010) (O'Connor, J.) ("Having lost their right to vote, they now have no cognizable Twenty-Fourth Amendment claim *until their voting rights are restored*.") (emphasis added); *Johnson v. Bush*, 214 F. Supp. 2d 1333, 1338 (S.D. Fla. 2002) ("[I]t is clear that the First Amendment does not guarantee felons the right to vote."), *aff'd* 415

F.3d 1214 (11th Cir. 2005) (en banc). The absence of any constitutionally protected "right to vote" spells the end of Plaintiffs' First Amendment claim, because "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." Mot. 32.

Instead of responding to that contention, Plaintiffs take pains to refute altogether different arguments that the State does not make.

Contrary to Plaintiffs' assertion, for example, Defendants do not argue that a state has "power to strip U.S. citizens of their federal constitutional rights." Resp. 3. Nor do 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." Resp. 11. Instead, Defendants argue that under *Ramirez*, disenfranchised felons do not have a constitutional right to vote, and "Plaintiffs may not circumvent settled law by recasting their equal-protection challenge in the language of the First Amendment." Mot. at 4.

That does not mean, Resp. 4–11, that the Board may flout independent constitutional prohibitions against arbitrary or discriminatory denials of clemency applications. *See Hunter v. Underwood*, 471 U.S. 222, 233 (1985); *Shepherd*, 575 F.2d at 1114; *Banks*, 592 F. App'x at 773; *accord Harvey*, 605 F.3d at 1079. It means that the pertinent protections for convicted felons do not derive from, and may not be bolstered by inapposite references to, caselaw addressing non-felons' constitutionally protected right to vote. *See Harvey*, 605 F.3d at 1079, 1080.

In their response, Plaintiffs cite cases addressing how the First Amendment applies to non-felons who were not challenging state disenfranchisement or re-enfranchisement regimes. Resp. 11, 21, 32. However, none of those cases holds that the First Amendment gives convicted felons a right to vote, and Plaintiffs do not argue otherwise.

Plaintiffs dismiss as "inapposite" *Johnson v. Bush*, 214 F. Supp. 2d 1333 (S.D. Fla. 2002), *Farrakhan v. Locke*, 987 F. Supp. 1304 (E.D. Wash. 1997), and *Howard v. Gilmore*, 205 F.3d 1333 (4th Cir. 2000) (unpublished). While these cases rejected First Amendment challenges to disenfranchisement regimes (as opposed to re-enfranchisement regimes), they did so on the ground that "the First Amendment does not guarantee felons the right to vote," *Johnson*, 214 F. Supp. 2d at 1338, and a contrary conclusion would result in a Constitution that is "internally inconsistent," *Farrakhan*, 987 F. Supp. at 1314. These propositions equally dispose of Plaintiffs' claims, which wrongly presuppose a "constitutionally protected right to vote" under the First Amendment. Resp. 11.

Defendants do not "mischaracterize the holding of *Wright v. City of St. Petersburg*, 833 F.3d 1291 (11th Cir. 2016)" in drawing an analogy to Plaintiffs' First Amendment claims. Resp. 12. In *Wright*, a minister trespassed from a city park brought a First Amendment challenge to the ordinance under which his trespass had been issued. 833 F.3d at 1294. The ordinance empowered city officials with discretion to lift the trespass before its expiration for the purpose of "'exercis[ing] . . . First Amendment

rights,'" and Wright argued that it "amounts to a prior restraint on speech in a traditional public forum." *Id.* at 1294–95. The ordinance was not a prior restraint, the Court held, because "Wright had no right to be in" the park, and the ordinance "offered a way in which Wright could engage in speech or other First Amendment activities in one place where he would otherwise not be permitted to be present." *Id.* at 1299. "It is the opposite of a censorial prior restraint because it allows *more* speech, not less; it allows speech in *more* locations, not fewer." *Id.*

While *Wright* confronted a different claim, it provides a useful analogy, and its logic is equally compelling here. Plaintiffs have no constitutional right to vote, under the First Amendment or otherwise, and Florida's re-enfranchisement system affords disenfranchised felons *more* voting rights than they are constitutionally entitled to claim.

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

CONCLUSION

This Court should grant Defendants' motion for summary judgment.

Respectfully Submitted,

PAMELA JO BONDI
ATTORNEY GENERAL

/s/ Amit Agarwal
Amit Agarwal (FBN 125637)
Solicitor General
Jordan E. Pratt (FBN 100958)
Deputy Solicitor General
Office of the Attorney General
The Capitol, Pl-01
Tallahassee, Florida 32399-1050
(850) 414-3681
(850) 410-2672 (fax)
jordan.pratt@myfloridalegal.com
amit.agarwal@myfloridalegal.com

Counsel for All Defendants

CERTIFICATE OF SERVICE

I certify that on this 11th 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 5,488 words.

/s/ Amit Agarwal

Attorney