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' REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

As set out in Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment, *Richardson v. Ramirez*, 418 U.S. 24 (1974), *Beacham v. Braterman*, 300 F. Supp. 182 (S.D. Fla.), *aff'd mem.* 396 U.S. 12 (1969), *Johnson v. Bush*, 405 F.3d 1214 (11th Cir. 2005) (en banc), *Shepherd v. Trevino*, 575 F.2d 1110 (5th Cir. 1978), and *Wright v. City of St. Petersburg*, 833 F.3d 1291 (11th Cir. 2016),

do not foreclose Plaintiffs' claims; these arguments need not be restated.[1] Plaintiffs have brought different claims.

1. First Amendment and Equal Protection Challenges to Florida's Arbitrary Restraint-and-Licensing Scheme [Counts 1, 2 and 3]

In brief after brief, Defendants have largely refused to engage the Supreme Court's First Amendment precedents on the unfettered discretion doctrine and the evidence of probable and actual instances of the Executive Clemency Board's arbitrary, biased and/or discriminatory treatment of restoration of civil rights applicants. In their Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment, Defendants implicitly concede that the First Amendment protects the right to vote, though they assert without explanation that voting is a less "traditional free-speech context[ ]." DE 137 at 23. They also do not dispute that longstanding Supreme Court precedents prohibit arbitrary restraint-and-licensing systems. DE 102 at 16–18. Further, Defendants cite no legal authority for the proposition that the power to disenfranchise felons includes the power to treat them arbitrarily. All the case law is to the contrary. *Shepherd*'s dicta cannot bear the weight of their argument for discretionary licensing. Their assertion based on *Shepherd*—that the

[1] Leaving aside the fact that these are not binding precedents in the Eleventh Circuit, *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v. Bredesen*, 624 F.3d 742, 751 (6th Cir. 2010), and *Howard v. Gilmore*, 205 F.3d 1333, at *1–2 (4th Cir. 2000) (unpublished) conflict explicitly with the Supreme Court's decision in *Hunter v. Underwood*, 471 U.S. 222, 231–33 (1985), and implicitly with the remand in *Richardson*.

state has an interest in "evaluat[ing] applicants' contrition and rehabilitation," DE 137 at 12—is in tension with the Supreme Court's advisement that disenfranchisement is "a *nonpenal* exercise of the power to regulate the franchise." *Trop v. Dulles*, 356 U.S. 86, 96–97 (1958) (emphasis added).

Defendants resort to attacking the very nature of common law adjudication by: (a) calling Plaintiffs' claims "argument-by-loose-analogy," DE 137 at 3, 10, while failing to distinguish the Supreme Court's First Amendment precedents, DE 102 at 13–18; (b) noting Plaintiffs cite to some political expression cases outside the voting context, DE 137 at 21; and (c) citing *Johnson* to argue this Court must avert its eyes from any claim against felon disenfranchisement and reenfranchisement laws not previously adjudicated. *Id*. at 3. The common law is an "evolutionary process," *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 502 (1984), and the Supreme Court's unfettered discretion doctrine applies directly here. This Court should consider these claims on the merits.[2]

[2] Defendants cite a single footnote in a race-based vote denial and dilution challenge under the Voting Rights Act. *Burton v. City of Belle Glade*, 178 F.3d 1175, 1187 n.9 (11th Cir. 1999). This challenge to a city's refusal to annex a black housing project does not foreclose the First Amendment claims in this case. *Burton* addressed racial discrimination claims, and not categorical vote denial or the arbitrary treatment of voters. Even in the context of precedents involving representational injuries (as opposed to vote denial), the *Burton* footnote runs counter to current doctrine. In his concurrence in *Vieth v. Jubelirer*, Justice Kennedy noted that, though the Fourteenth Amendment has not yet yielded a justiciable standard for voters' representational rights, the First Amendment might provide a sound basis for such claims:

Plaintiffs' Motion for Summary Judgment establishes a violation of the First Amendment prohibition on arbitrary restraint-and-licensing schemes for constitutionally protected expressive conduct and a violation of the Equal Protection Clause as construed by *Bush v. Gore*, 531 U.S. 98, 104 (2000) (per curiam). Defendants finally concede disenfranchised felons can suffer federal constitutional injuries, in their view, at least for racial discrimination (*Hunter v. Underwood*, 471 U.S. 222 (1985)) or a violation of due process (*Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998)). DE 137 at 10–11. But Defendants cite zero legal authority for why disenfranchised felons would *only* have cognizable injuries for these two constitutional violations, but not those Plaintiffs have established. None exists.

Defendants do argue that "[h]aving lost their right to vote, Plaintiffs have no cognizable First Amendment interest to assert until their voting rights are restored." DE 137 at 24. But this argument flies in the face of every Supreme Court precedent

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> The First Amendment may be the more relevant constitutional provision in future cases that allege unconstitutional partisan gerrymandering. After all, these allegations involve the First Amendment interest of not burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views.

541 U.S. 267, 314 (2004) (Kennedy, J., concurring). Voters' rights under the First and Fourteenth Amendments are not *per se* coterminous.

striking down an arbitrary restraint-and-licensing scheme. In each case, the unlicensed speaker or demonstrator or distributor of literature or newspapers cannot lawfully speak or demonstrate or distribute *as a matter of state or municipal law* but nevertheless has a cognizable First Amendment injury, and the Court strikes down the culprit arbitrary restraint-and-licensing scheme. These injured parties start restrained or disallowed from engaging in their chosen speech or conduct the same way ex-felons are disenfranchised and later licensed to vote. *See, e.g., Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 149-53 (1969) (invalidating ordinance which made it "'unlawful to organize or hold, or to assist in organizing or holding, or to take part or participate in, any parade or procession or other public demonstration . . . unless a permit therefore has been secured'"); *Staub v. City of Baxley*, 355 U.S. 313, 314 n.1, 325 (1958) (invalidating ordinance which required "persons, firms or organizations" soliciting membership for a fees- or dues-collecting organization or union to obtain a permit first and which criminalized solicitation "without first obtaining a permit"). If, as Defendants posit, state or municipal law could dictate whether a First Amendment right to a particular form of speech or expressive conduct were presently activated or deactivated, none of those constitutional challenges could have succeeded. As no one may demonstrate or distribute pamphlets or place newspaper racks in the Supreme Court's precedents, until the

state or city grants a permit or license, so too no ex-felon in Florida may vote until they are licensed to vote.

Defendants next argue that they "take an oath to uphold the law" and "should be presumed to discharge that solemn duty absent evidence to the contrary." DE 137 at 12. But the Supreme Court has expressly rejected this "trust us" argument. In *City of Lakewood v. Plain Dealer Publishing Co.*, the defendants asked the Supreme Court to "presume[ ] the mayor will act in good faith and adhere to standards absent from the ordinance's face." 486 U.S. 750, 770 (1988). The Court responded by noting "this is the very presumption that the doctrine forbidding unbridled discretion disallows." *Id*. On a facial challenge, it is not a matter of whether the Court "presume[s]" Defendants "engage in various forms of illicit discrimination," DE 137 at 12, or whether there is smoking-gun evidence that "Defendants invidiously discriminate" on the basis of party affiliation, race, or religion, *id.*, but rather, "whether there is anything in [Florida law] preventing [them] from doing so." *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 133 n.10 (1992). The risk is sufficient, since a system of unfettered discretion – devoid of a legal obligation to apply objective criteria and communicate the bases for decisions – makes it impossible to identify unlawful bias or discrimination in individual cases. *Plain Dealer*, 486 U.S. at 758.

In any event, Plaintiffs have introduced substantial evidence that gives rise to the reasonable inference that the Board has been and continues to be influenced by information regarding applicants' partisan and/or ideological affiliation and/or religious devotion, whether or not that information was solicited. DE 102 at 24–30. Applicants volunteer this information because they understand the Board has unfettered discretion and that these details may persuade the Board to grant their applications. Even when applicants do not divulge this information, Board members may infer partisan and/or ideological affiliation, religious affiliation and devotion, and other bases of invidious discrimination such as wealth or sexual orientation, from the information contained in the confidential case analyses ("CCAs"), the applicant's race, dress, or manner of speech, or other information outside the CCAs. *Plain Dealer*, 486 U.S. at 759 ("[A] facial challenge lies whenever a licensing law gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech *or disliked speakers*.") (emphasis added). Plaintiffs have shown that nothing in Florida law prevents arbitrary, biased and/or discriminatory conduct and have far exceeded their burden on a facial challenge by showing that arbitrary treatment is the norm, and that biased and/or discriminatory treatment is in all probability also occurring. DE 102 at 24–43.

Plaintiffs have First and Fourteenth Amendment rights to non-arbitrary decision-making concerning their voting rights. These are not merely rights to "reasoned decision-making," DE 137 at 16; irreconcilable, irrational, arbitrary outcomes result from nominally "reasoned" decision-making in the absence of objective rules and criteria. Defendants again urge the Court to consider the CCAs as evidence that the restoration process is non-arbitrary (an about-face from their argument in opposition to Plaintiffs' Motion to Compel, *see* Ex. A, at 7–14), but nothing about the CCAs constrains the Board's discretion. Plaintiffs have proven that material in the CCAs can be invoked or ignored on whim and applied in wildly inconsistent fashion. Restoration applicants are granted despite speeding tickets and other traffic violations and denied for the same; applicants are granted despite post-sentence drug use and denied for the same; applicants are granted notwithstanding their use of alcohol following a DUI manslaughter conviction and denied for the same; and applicants are inconsistently granted or denied depending on whether the Board feels sufficient time has passed since sentence completion or the applicant has sufficiently expressed remorse. DE 102 at 30–43. When Plaintiffs' Motion to Compel was denied (DE 62), Plaintiffs were deprived of the opportunity to prove through yet more examples that the factors and information developed in the CCAs are erratically applied or disregarded. Since part of Defendants' defense relies on

the CCAs, Plaintiffs were entitled to review selected CCAs to rebut that defense. FED. R. CIV. P. 26(b)(1).

Defendants also attack *Bush v. Gore*'s applicability. The case prohibits "arbitrary and disparate treatment" in all circumstances in the electoral process, and that principle should be applied regardless of the specific facts in *Bush*. 531 U.S. at 104. The Court expressly stated that "[t]he right to vote is protected in *more than the initial allocation of the franchise.*" *Id.* (emphasis added). Voter registration, which asks for affirmation of eligibility, is part of the electoral process, and so too is Defendants' restoration of civil rights, because that system controls which ex-felons can vote and which cannot.

Finally, this case has never attacked executive clemency itself, but rather *the application of* purely discretionary executive clemency to ex-felons' voting rights. That is the specific constitutional violation, and ruling in Plaintiffs' favor will have no impact on the exercise of executive discretion for other forms of clemency. DE 137 at 15–16. Additionally, any litigation attempting to extend the unfettered discretion doctrine to the Second Amendment will continue, regardless of what happens here, and Plaintiffs have previously distinguished the two contexts.

2. The Remedy

Restraints and licensing schemes go hand in hand. If there were no restraint, there would be no need for a permit or license. Felon disenfranchisement operates

as a restraint on the expressive conduct of voting, which – contrary to Defendants' mischaracterization, DE 137 at 5 – does indeed *require* a speaker, demonstrator or voter to obtain a license or permit. The licensing system is the means by which one obtains that permission, but the restraint triggers that requirement.[3] In *Shuttlesworth*, the ordinance made it illegal to hold a parade or demonstration without a permit (the restraint) and created a permit application process (the licensing scheme). 394 U.S. at 149–50. Here, the felon disenfranchisement provisions in the Florida Constitution and statutes, as well as corresponding criminal laws, force ex-felons to obtain the state's permission to vote. Though Defendants strenuously argue that felon *dis*enfranchisement and *re*enfranchisement are "distinct" and separate "laws" (plural), DE 137 at 5, FLA. CONST. art. VI, § 4(a), FLA. STAT. ANN. § 97.041(2)(b), FLA. CONST. art. IV, § 8(a), and FLA. STAT. ANN. § 944.292(1) all conflate felon disenfranchisement and reenfranchisement in one unitary law—they are textually and functionally conjoined.[4] This makes sense, since these provisions could have simply said: "Individuals convicted of felonies must apply to the Executive Clemency Board for permission to vote."

[3] Only if Florida made felon disenfranchisement permanent and irrevocable *notwithstanding a pardon* would disenfranchisement cease to create a "requirement to obtain a license or permit." DE 137 at 5. It has not done so.

[4] The Rules of Executive Clemency, which expressly confer "unfettered discretion" on the Board, DE 85-15 at 120, are also challenged in this suit.

Under the relevant cases, a violation of the unfettered discretion doctrine should trigger declaratory and injunctive relief against the above, challenged laws as to the Plaintiff Class. Such relief would not involve "rewrit[ing]" Florida laws or the question of severability. DE 137 at 6. To remedy the current scheme, the requested injunction would allow post-sentence ex-felons to register and vote without first seeking the state's permission. Defendants argue that regardless of whether this Court credits Plaintiffs' claims, these challenges – insofar as they implicate felon *disenfranchisement* – must fail. DE 137 at 4–8. But countless cases in this vein point in the opposite direction. In *Staub*, the Supreme Court could have held – as Defendants contend this Court should hold – that the restraint applies uniformly to everyone so it is only necessary to strike down the application process and/or force the city to come up with objective and definite rules and/or criteria. But the Court did not do that; instead they invalidated the full ordinance, *both* the licensing process *and* the restraint, *see id.* at 355 U.S. at 314 n.1 (the solicitation restraint-and-licensing ordinance), 325, compelling the city to enact a constitutionally valid restraint-and-licensing scheme. In the seminal case *Lovell v. City of Griffin*, the challenged ordinance criminalized distributing "literature of any kind" "without first obtaining written permission from the City Manager." 303 U.S. 444, 447 (1938). The Supreme Court declared the ordinance "void on its face." *Id.*

at 452. It did not seek to cure the arbitrariness of the permitting process while preserving the restraint.

Normally, a facial violation would lead to full facial invalidation. But Plaintiffs have sought to limit the requested relief to the Plaintiff Class because the Plaintiffs and proposed class do not include any felons who are still serving their sentences, *see United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 477–78 (1995), and this would preserve Florida's ability to disenfranchise felons while they are completing their sentences.

Even if the Court were to order Defendants to create objective rules and criteria for civil rights restoration, there would still be no need to contemplate the severability of the challenged laws and rules. Severability would only be implicated by a remedy that Plaintiffs have not requested and that would exacerbate Florida's voting rights crisis: striking down reenfranchisement while preserving disenfranchisement. Defendants point the Court in this direction because they seem to prefer permanent, irrevocable disenfranchisement to all other possible alternatives, but the analysis—which would turn on 19th and 20th Century legislative history that Defendants have not developed—does not militate in favor of severability.

Whether a statute is severable is determined by "'its relation to the overall legislative intent of the statute of which it is a part, and whether the statute, less the

invalid provisions, can still accomplish this intent.'" *Coral Springs St. Sys., Inc. v. City of Sunrise*, 371 F.3d 1320, 1347 (11th Cir. 2004) (quoting *Martinez v. Scanlan*, 582 So. 2d 1167, 1173 (Fla. 1991). The multi-factor test for severability under Florida law focuses on several factors, including whether "the good and the bad features [of the law] are not so inseparable in substance that it can be said that the Legislature would have passed the one without the other." *Id.* at 1348 (citing *Smith v. Dep't of Ins.*, 507 So. 2d 1080, 1089 (Fla. 1987)). Under this analysis, felon reenfranchisement cannot simply be excised from the challenged constitutional and statutory provisions, because leaving an avenue for restoration has been part and parcel of disenfranchisement since at least 1868. For at least 149 of the 179 years in which Florida has disenfranchised felons, Florida has paired its disenfranchisement of felons with a means for restoration. FLA. CONST. art. VI, §§ 4, 13 (1838); FLA. CONST. art. XIV, § 2 (1868). Florida's 1868 constitution stated: "[N]or shall any person convicted of felony be qualified to vote at any election unless restored to civil rights." FLA. CONST. art. XIV, § 2 (1868). Since then, Florida has never intended that felon disenfranchisement should exist without an avenue for reenfranchisement. The challenged constitutional and statutory provisions, as discussed above, *see supra* at 10–11, conflate felon disenfranchisement and reenfranchisement in their text, betraying the intent to create a disenfranchisement scheme with a means for restoration.

Therefore, simply severing these laws is improper because there is no indication the framers and voters would have created and ratified the 1868 and 1968 Florida Constitutions to include disenfranchisement without reenfranchisement.

3. Count 4

On Count 4, Plaintiffs will only add that their citation to Governor Crist's statement disclaiming a state interest in a wait-and-see period delaying restoration of civil rights, DE 102 at 49–50, is not a mere "policy argument[ ]." DE 137 at 20. It is a relevant fact under the *Anderson-Burdick* framework that even Board members have at times thought their own process an unfair, illegitimate exercise in prolonging the restoration of civil rights—*i.e.* that the state lacks a constitutionally valid interest. For that reason, Governor Crist's Board reformed the process, resulting in the reenfranchisement of over 154,000 ex-felons over four years. DE 85-15 at 110–12 (amending Rule 9 to mandate automatic restoration for certain felons); DE 85-11, 86-12, 86-13. The current Board members may now think differently, but the fact that the rights restoration process shifts with the political winds from administration to administration is further evidence of how ex-felons' voting rights are at the mercy of politicians' personal beliefs and whims, unconstrained by any law.

* * *

For the foregoing reasons, Plaintiffs respectfully request that this Court grant their Motion for Summary Judgment.

DATED: December 11, 2017 Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 11, 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 3,186 words.

December 11, 2017

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