UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

JAMES MICHAEL HAND, *et al.*,

Plaintiffs,

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

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

Defendants.
_____/

DEFENDANTS' MOTION TO DISMISS AND INCORPORATED MEMORANDUM OF LAW

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, Defendants move to dismiss Plaintiffs' First Amended Complaint (D.E. 29) for failure to state a claim upon which relief can be granted. In the alternative, Defendants also move, pursuant to Rules 12(b)(1) and 12(b)(6), to dismiss all claims against improper party-defendants—*i.e.*, Defendants Ken Detzner, Julie L. Jones, Melinda N. Coonrod, Richard D. Davison, David A. Wyant, and Julia McCall.

The Complaint, under various legal theories, brings a facial constitutional challenge to Florida's voting restrictions on convicted felons. Each of these legal theories fails. Binding authority holds that Section 2 of the Fourteenth Amendment

affirmatively authorizes states to *permanently disenfranchise* convicted felons. *Johnson v. Governor of Fla.*, 405 F.3d 1214, 1217 (11th Cir. 2005) (en banc). *A fortiori*, Florida's more generous policy of selectively *re-enfranchising* convicted felons does not implicate, much less violate, any constitutionally protected right to vote. Plaintiffs may not circumvent that settled law by recasting their right-to-vote claims in the language of the First Amendment. Like Section 1 of the Fourteenth Amendment, the First Amendment does not implicitly take away what Section 2 of the Fourteenth Amendment expressly gives. Accordingly, Plaintiffs' First Amendment and undue-burden claims fail as a matter of law.

Plaintiffs' claim under the Equal Protection Clause is no more viable. Plaintiffs do not and cannot allege that Florida's re-enfranchisement system employs any suspect classifications. Hence, that system must be upheld if it is rationally related to the advancement of a legitimate state interest. *Shepherd v. Trevino*, 575 F.2d 1110, 1115 (5th Cir. 1978). Indeed, the Eleventh Circuit appears to apply a particularly deferential form of rational-basis review to clemency determinations. *See Banks v. Secretary*, 592 F. App'x 771, 773 (11th Cir. 2014) ("[I]n order for a claim of alleged violations of due process and equal protection in a clemency proceeding to succeed, the violation must be grave, such as where 'a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process.'").

Florida's re-enfranchisement process goes above and beyond that minimal constitutional requirement. As the Complaint grudgingly acknowledges, the Executive Clemency Board adheres to a variety of procedures in determining whether to grant an application for restoration of civil rights. For example, the Board solicits, obtains, and reviews pertinent information from each applicant; examines a Confidential Case Analysis detailing the applicant's relevant criminal and personal history; and will not deny an application without first affording the applicant the opportunity to review his or her Analysis and then appear before, and make a statement to, the Board. Such procedures help the Board "gauge the progress and rehabilitation of a convicted felon," by ensuring that it has sufficient "familiarity with the individual defendant and his case." *See Shepherd*, 575 F.2d at 1115. Hence, the Board's procedures are rationally calculated to serve a legitimate state "interest in limiting the franchise to responsible voters." *See id.*

Plaintiffs' remaining arguments are meritless. As binding authority makes clear, a State need not automatically restore voting rights upon the completion of a defendant's sentence, *e.g.*, *Richardson v. Ramirez*, 418 U.S. 24, 56 (1974), and is not required to employ specific standards susceptible of mechanical application, *Beacham v. Braterman*, 300 F. Supp. 182, 182-83, 184 (S.D. Fla. 1969), *aff'd* 396 U.S. 12 (1969). Under applicable law, moreover, Plaintiffs may not establish an equal-protection violation *in their own cases* by comparing the outcomes of their clemency proceedings to those of other selectively identified individuals alleged to be similarly situated. Still less

may Plaintiffs use such selective comparisons to meet their burden of showing that Florida's re-enfranchisement system is unconstitutional in *all of its applications*.

Finally, and putting aside the merits-related considerations fatal to Plaintiffs' claims, this Court should dismiss all claims against parties who have no hand in the alleged harms of which Plaintiffs complain. Plaintiffs fail to state a section 1983 claim against parties other than the Executive Clemency Board members because they have not plausibly alleged that such parties have caused any injury of which they have a right to complain. In any event, the Eleventh Amendment independently bars relief against those parties.[1]

BACKGROUND

For purposes of this Motion, all of the Complaint's well-pleaded factual allegations are assumed true. The Complaint alleges that each of the plaintiffs has been convicted of at least one felony and has thereby lost his or her right to vote under Florida law. Compl. ¶¶ 18–26. One of the plaintiffs is barred from applying for restoration of her civil rights until June 2019, *id.* ¶ 26, and another has an application pending, *id.* at ¶ 22. The rest have applied and their applications have been denied. *Id.* ¶¶ 18–21, 23–25. All of the plaintiffs want to register and vote in Florida. *Id.* ¶ 27.

[1] The Complaint alleges that Plaintiffs represent a class and subclass, Compl. ¶¶ 68–81, but Plaintiffs have not yet moved for class certification. Defendants reserve their right to respond to pertinent allegations supporting class certification in a future pleading.

Under Florida law, "[n]o person convicted of a felony . . . shall be qualified to vote or hold office until restoration of civil rights . . . ." Fla. Const. art. VI, § 4(a); *see* Fla. Stat. § 97.041(2)(b). Subject to certain exceptions not relevant here, "the governor may, by executive order filed with the custodian of state records, . . . with the approval of two members of the cabinet, grant full or conditional pardons, restore civil rights, commute punishment, and remit fines and forfeitures for offenses." Fla. Const. art. IV, § 8(a); *see* Fla. Stat. § 944.292(1). Florida's current restoration system is reflected in the Rules of Executive Clemency ("Rules"), which were last amended by unanimous consent of the Board on March 9, 2011. Compl. ¶ 41; *see* Rules of Executive Clemency, *available at* http://www.flgov.com/wp-content/uploads/2011/03/2011-Amended-Rules-for-Executive-Clemency.final_.3-9.pdf.

Under the Rules, decisions whether to restore civil rights rest with the Governor and Cabinet sitting as the Executive Clemency Board, which consists of the Governor, Attorney General, Chief Financial Officer, and Commissioner of Agriculture. The Governor, acting alone, may deny restoration applications, but the concurrence of the Governor and two other Board members is required to grant them. Compl. ¶ 28 (citing Fla. Const. art. IV, § 8(a); Fla. Stat. §§ 940.01(1), 940.03; Fla. R. Exec. Clemency 4). The same application is used for all types of clemency, including pardons, restoration of civil rights (among which is the right to vote), and the specific authority to own, possess, and use firearms. Applicants must provide certain information and indicate on the form the type(s) of clemency they seek.

Compl. ¶ 42 (citing Fla. R. Exec. Clemency 5, 6, 9, 10; Fla. Comm'n on Offender Rev., Application for Clemency, *available at* https://www.fcor.state.fl.us/docs/clemency/ClemencyApplication.pdf).

Individuals may apply for restoration of civil rights without a hearing if they have not been convicted of any listed serious felonies, they have not committed or been arrested for any crimes for five years following completion of their sentences, and they meet several other conditions. *Id.* ¶ 44 (citing Fla. R. Exec. Clemency 9). For all other applicants, a hearing is required and the Rules impose a seven-year waiting period between completion of sentences and eligibility to apply. *Id.* ¶ 46 (citing Fla. R. Exec. Clemency 10).

The Florida Commission on Offender Review ("FCOR") "'[a]cts as the administrative and investigative arm' of the Executive Clemency Board and, in this capacity, must report to the Board on 'the circumstances, the criminal records, and the social, physical, mental, and psychiatric conditions and histories of persons under consideration by the board for' any form of clemency." *Id.* ¶ 32 (citing Fla. Stat. §§ 947.002, 947.01, 947.13(1)(e); Fla. Comm'n on Offender Rev., 2015–16 Annual Report ("FCOR Report") at 7, *available at* https://www.fcor.state.fl.us/docs/reports/FCORannualreport201516.pdf). FCOR reviews all applications, and for those that require a hearing, it investigates an applicant's "criminal record, traffic record, family situation, employment, any alcohol or drug abuse history, any unlawful voter registration or voting activity and any military history." *Id.* ¶ 34 n.15 (citing FCOR

Report at 15). After its investigations, FCOR prepares a report and recommendation called a "Confidential Case Analysis," "which the Board reviews and which is sent to the applicant." *Id.* (citing FCOR Report at 15).

Upon transmittal of the Confidential Case Analysis, an application is placed on the agenda for the next quarterly Board hearing. *Id.* ¶ 47 (citing Fla. R. Exec. Clemency 11, 12). Applicants are encouraged to attend, and having received a copy of the Confidential Case Analysis, they are given an opportunity to address the Board. *Id.* ¶ 49 (citing Fla. R. Exec. Clemency 12). The Board may grant, conditionally grant, or deny applications, either at the hearing or at a later date. *Id.* ¶¶ 49, 58. A denial triggers a two-year waiting period before eligibility to re-apply. *Id.* ¶ 49 (citing Fla. R. Exec. Clemency 14).

In determining whether to grant an application for restoration of civil rights, the Board weighs various factors "relating to whether [applicants] are leading reformed lives" or whether they have "sufficiently shown remorse." *Id.* ¶¶ 55, 56. These factors include drug use, "especially . . . if [the applicant] was convicted of a drug trafficking offense or if drug use played a role in the offense"; alcohol use, "especially if [the applicants] were convicted of DUI manslaughter or any other offense in which intoxication played a substantial role"; "traffic violations such as speeding or driving with a suspended license"; "illegal registration and voting"; "employment status"; "family"; "attitude" while appearing before the Board; and

"other perceived indicia of living a moral life or having 'turned [one's] life around.'" *Id.* ¶¶ 55, 56, 59, 61.

The Complaint makes numerous and overlapping requests for relief, *see id.* pp. 73–79 ¶¶ (a)–(p), three of which warrant particular mention: *first*, declaratory and injunctive relief precluding the State from requiring convicted felons who have completed their sentences to petition the Executive Clemency Board—pursuant to any process, no matter how reasonable and well-defined the pertinent eligibility requirements—for restoration of voting rights, *see id.* at ¶¶ (d), (e), (f); *second*, and relatedly, injunctive relief requiring the State to automatically restore the voting rights of all convicted felons upon completion of their sentences, regardless whether state law allows or requires state authorities to impose reasonable additional requirements, *id.* at ¶ (h); *see id.* at ¶¶ (g), (i), (j), (k), (*l*); and *third*, "[i]n the alternative—and only if the Court rules in favor of Plaintiffs *solely* on Count 4"—declaratory and injunctive relief invalidating "the 5- and 7-year waiting periods in Florida Rules of Executive Clemency 9 and 10," *id.* at ¶ (m) (emphasis in original).

LEGAL STANDARDS

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In reviewing a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, courts generally are limited to the four corners of the complaint and must assume all well-pleaded factual allegations to

be true, although they need not accept legal conclusions or naked assertions. *Id.* Where a complaint references other materials that are central to its claims, the court may look to those materials in ruling on the motion, *Brooks v. Blue Cross & Blue Shield of Fla., Inc.*, 116 F.3d 1364, 1369 (11th Cir. 1997), and in the event of a conflict between the materials and general or conclusory allegations, the materials govern, *Griffin Indus., Inc. v. Irvin*, 496 F.3d 1189, 1206 (11th Cir. 2007).

Rule 12(b)(1) allows motions to dismiss for lack of subject-matter jurisdiction. Defenses premised on Eleventh Amendment immunity are properly raised in such a motion. *See Nat'l Ass'n of Bds. of Pharm. v. Bd. of Regents of the Univ. Sys. of Ga.*, 633 F.3d 1297, 1305, 1312–19 (11th Cir. 2011); *Thomas v. U.S. Postal Serv.*, 364 F. App'x 600, 601 n.3 (11th Cir. 2010).

ARGUMENT

I. PLAINTIFFS' UNDUE-BURDEN AND FIRST AMENDMENT CLAIMS FAIL AS A MATTER OF LAW.

In Counts I and III, Plaintiffs argue that the First Amendment guarantees them a right to vote and Florida's re-enfranchisement system is an unconstitutional prior restraint on that right. Compl. ¶¶ 82–92, 102–12. In Count IV, Plaintiffs allege that the Board's five- and seven-year waiting periods violate the First and Fourteenth Amendments as an "undue burden" on their right to vote. *Id.* ¶¶ 113–20. All these claims fail as a matter of law. Under binding precedent, convicted felons do not have a constitutional right to vote because Section 2 of the Fourteenth Amendment

affirmatively authorizes felon disenfranchisement. *A fortiori*, Florida's system for *re-enfranchising* convicted felons does not implicate, much less violate, any such right. Plaintiffs may not circumvent settled law allowing the States to permanently disenfranchise convicted felons by recharacterizing their right-to-vote claims in the language of the First Amendment. The First Amendment does not take away from the States what the Fourteenth Amendment gives to them; and expressive interests tied to and derived from the right to vote do not apply where, as here, there is no right to vote in the first place.

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

This textual analysis, the Court noted, comports with history and judicial precedent. Available legislative history indicates the text of § 2 "was intended by Congress to mean what it says." *Id.* at 43. In other words, the Framers of the

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

In short, "[t]he Supreme Court made . . . clear" in *Ramirez* that "[a] state's decision to *permanently* disenfranchise convicted felons does not, in itself, constitute an Equal Protection violation" because "Section 2 of the Fourteenth Amendment . . . expressly permits states to disenfranchise convicted felons." *Johnson v. Governor of Fla.*, 405 F.3d 1214, 1217 (11th Cir. 2005) (en banc) (emphasis added). Because convicted felons have *no* constitutional right to vote, laws that merely *burden* felons' eligibility for

re-enfranchisement do not run afoul of the Constitution. For this reason, the undue-burden claim is foreclosed by binding precedent.

Counts I and III fail for a similar reason. In those counts, Plaintiffs claim that voting carries First Amendment interests, and "Florida's felon disenfranchisement and re-enfranchisement laws together operate as an invalid prior restraint" because of the "unfettered official discretion" vested in the Board (Count I) and lack of time limits for processing applications (Count III). Compl. ¶¶ 87, 90, 109. Those claims fail because disenfranchised felons cannot bootstrap their way to a constitutional right to vote via the First Amendment. Rarely have courts confronted such bold attempts to circumvent *Ramirez*, but when they have confronted them, they have not hesitated to reject them. *See, e.g.*, *Johnson v. Bush*, 214 F. Supp. 2d 1333, 1338 (S.D. Fla. 2002), *aff'd*, 405 F.3d 1214, 1235 (11th Cir. 2005) (en banc); *Farrakhan v. Locke*, 987 F. Supp. 1304, 1314 (E.D. Wash. 1997); *see also Howard v. Gilmore*, 205 F.3d 1333 (4th Cir. 2000) (unpublished). This is because interpreting the First Amendment to guarantee felons a right to vote would conflict with Section 2 of the Fourteenth Amendment, which allows felon disenfranchisement. *See, e.g.*, *Farrakhan*, 987 F. Supp. at 1314.

Indeed, because the First Amendment's free-speech guarantee applies to the States only via Section 1 of the Fourteenth Amendment, *Gitlow v. New York*, 268 U.S. 652, 664, 666 (1925), Plaintiffs' speech claims urge this Court not only to interpret the First Amendment to conflict with the Fourteenth, but also the latter Amendment's first and second sections to conflict with each other. The Supreme Court refused to

countenance such a contradiction in *Ramirez*, and this Court should do likewise here. *See Ramirez*, 418 U.S. at 55; *see also Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803) ("It cannot be presumed that any clause in the constitution is intended to be without effect . . . .").

Courts have uniformly rejected similarly structured claims 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 v. Brewer*, 605 F.3d 1067, 1080 (9th Cir. 2010). 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").

Similarly 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.

Assuming *arguendo* that convicted felons may raise a right-to-vote claim under the auspices of the First Amendment, the restrictions they challenge do not constitute a "prior restraint" on speech. Prior-restraint doctrine is a unique aspect of First Amendment jurisprudence that does not extend to other contexts. *See Bernard v. Gulf Oil Co.*, 619 F.2d 459, 467–69 (5th Cir. 1980) (en banc) (summarizing prior-restraint doctrine and noting "the prior restraint's judicial origin and unique purpose");[2] *accord Drake v. Filko*, 724 F.3d 426, 435 (3d Cir. 2013) (declining to apply prior-restraint doctrine to a Second Amendment claim); *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 91–92 (2d Cir. 2012) (same). 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. Neither may cast a ballot, but both fully enjoy applicable First Amendment protections.

Plaintiffs' undue-burden and First Amendment claims fail for another, perhaps even more fundamental reason. At their core, the claims attack Florida's re-enfranchisement system because it vests the Executive Clemency Board with discretion to make case-by-case determinations (Count I), establish time periods between completion of sentences and eligibility to apply for re-enfranchisement (Count IV), and determine when to act on applications (Count III). As explained in

[2] 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).

the next section, however, the Supreme Court and Eleventh Circuit have made abundantly clear that case-specific discretion is a traditional, widespread, and constitutionally permissible component of executive clemency. Thus, such discretion cannot form the basis for invalidating Florida's system. *See infra* at 17-22.

Binding precedent aside, practical considerations suggest that this Court should exercise caution before accepting Plaintiffs' claims. The logic of Plaintiffs' undue-burden and First Amendment claims would imperil all discretionary re-enfranchisement systems, of which there are at least eleven in the country.[3] And such a holding need not work to the benefit of convicted felons. Faced with the choice of automatic re-enfranchisement or permanent disenfranchisement, States might well opt for the latter course *See Ramirez* , 418 U.S. at 55; *Johnson*, 405 F.3d at 1217. Plaintiffs are wrong to assume that the alleged constitutional violations of which they complain could properly be remedied by an injunction requiring automatic re-enfranchisement.

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

See Compl. 73-79 ¶¶ (g)-(*l*). Of particular relevance here, Florida's Constitution and statutes merely authorize, rather than require, restoration of civil rights. *See* Fla. Const. art. IV, § 8(a) (Governor and Cabinet "may" restore civil rights); Fla. Stat. § 940.01 (same).

By presenting States with such a binary choice, Plaintiffs would prevent policymakers from taking the reasonable middle road and advancing the important interest that lies at the heart of discretionary re-enfranchisement systems: encouraging rehabilitation and discouraging recidivism by rewarding those who, after a meaningful passage of time, demonstrate an intent and ability to reform their ways and abide by the law. *See, e.g.*, *Shepherd v. Trevino*, 575 F.2d 1110, 1115 (5th Cir. 1978). The States need not and should not be put to such a choice.

In sum, Plaintiffs' undue-burden and First Amendment claims cannot be reconciled with binding precedent, might well frustrate the cause Plaintiffs seek to advance, and must be dismissed as a matter of law.

II. PLAINTIFFS' EQUAL PROTECTION CLAIM FAILS AS A MATTER OF LAW.

In Count II of the Complaint, Plaintiffs allege Florida's re-enfranchisement system violates the Equal Protection Clause of the Fourteenth Amendment. Compl. ¶¶ 93–101. That claim fails as a matter of law. As described below, undisputed facts set out in the Complaint and incorporated materials demonstrate that state authorities have established eminently reasonable procedures for determining when to restore a convicted felon's civil rights. Those procedures are rationally related to legitimate

government interests, and the existence of such procedures fatally undermines the Complaint's selective and misleading quotations from particular hearings. Finally, because Plaintiffs have chosen to bring a facial challenge and Equal Protection guarantees a fair re-enfranchisement process rather than equality in outcomes, Plaintiffs cannot rely on allegations that similarly situated persons received different results or that the Board has at times differently weighed the factors it considers. Rather, they must show that Florida's *process* is completely arbitrary *in all its applications*. Plaintiffs do not come close to satisfying that demanding standard.

A. Discretion Is a Valid Component of Clemency, and Binding Precedent Has Rejected the Argument that Selective Re-Enfranchisement Must Operate Under a Set Formula.

As Justice O'Connor, writing for the Ninth Circuit, has emphasized, "a litigant bringing an equal protection challenge to a felon-disenfranchisement scheme must first face the formidable task of escaping [*Ramirez*'s] long shadow." *Harvey*, 605 F.3d at 1073. This Circuit takes the same view: "section 2 of the fourteenth amendment blunts the full force of section 1's equal protection clause with respect to the voting rights of felons. . . . Section 2's express approval of the disenfranchisement of felons thus grants to the states a realm of discretion in the disenfranchisement and reenfranchisement of felons which the states do not possess with respect to limiting the franchise of other citizens." *Shepherd*, 575 F.2d at 1114.

At bottom, Plaintiffs complain that Florida's re-enfranchisement system does not guarantee them clemency upon satisfaction of specified criteria. Compl. ¶¶ 55, 97,

99. However, the Supreme Court has made clear that clemency—even clemency that makes the difference between life and death—may constitutionally be committed to the discretion of executive-branch decision-makers not constrained by any mechanical formula. *See Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 280–81, 282, 285 (1998) (plurality op.); *id.* at 288 (O'Connor, J., concurring in part and concurring in the judgment) ("clemency is committed to the discretion of the executive"); *Wellons v. Comm'r, Ga. Dep't of Corrs.*, 754 F.3d 1268, 1269 n.2 (11th Cir. 2014) (viewing Justice O'Connor's concurrence in *Woodard* as the controlling opinion). In short, "[t]here is no constitutional right to clemency," *Banks v. Sec'y, Fla. Dep't of Corrs.*, 592 F. App'x 771, 773 (11th Cir. 2014), which remains committed to executive discretion "as a matter of grace," *Valle v. Sec'y, Fla. Dep't of Corrs.*, 654 F.3d 1266, 1268 (11th Cir. 2011).

Searching judicial review of clemency decisions would invert the clemency paradigm, since the whole point of clemency is to supplement the judicial process. As the Supreme Court has observed, clemency "is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted." *Herrera v. Collins*, 506 U.S. 390, 411–12 (1993); *see also Woodard*, 523 U.S. at 280–81, 84–85 (plurality op.) (observing "clemency has not traditionally been the business of courts" because "executive clemency exists to provide relief from harshness or mistake in the judicial system, and is therefore vested in an authority other than the courts"). In Blackstone's words, clemency is "a court of equity in [the executive's] own breast," and its purpose

is "to soften the rigour of the general law" and blunt the "very dangerous power in the judge or jury" that would otherwise result without the existence of clemency. 4 William Blackstone, *Commentaries on the Laws of England* 390 (1st ed. 1765–69).

This also holds true for re-enfranchisement—a particular type of clemency, *see Beacham v. Braterman*, 300 F. Supp. 182, 184 (S.D. Fla. 1969), *aff'd* 396 U.S. 12 (1969), that, while important, does not rise to the level of a life-or-death determination. Disenfranchisement is a product of the judicial process and happens by operation of law as a consequence of a conviction; selective re-enfranchisement operates as a supplement to that aspect of the judicial process, and therefore wide executive discretion—standing alone—does not pose any constitutional problem. To the extent Plaintiffs argue otherwise, *see* Compl. ¶¶ 55, 97, 99, binding precedent forecloses their position.

In *Beacham v. Braterman*, for example, a disenfranchised Florida felon had been denied a pardon and restoration of civil rights (including the right to vote), and "[n]either the Governor of Florida nor members of the State Cabinet ha[d] established specific standards to be applied to the consideration of petitions for pardon." 300 F. Supp. at 183. He brought equal-protection and due-process claims seeking "to enjoin the Governor of Florida from continuing to grant and deny petitions for pardons in a purely discretionary manner without resort to specific standards . . . ." *Id.* A three-judge panel of the Southern District of Florida rejected those claims, holding Equal Protection and Due Process are not denied when the

Governor and Cabinet "restore discretionarily the right to vote to some felons and not to others." *Id.* at 184. "The historic executive prerogative to grant a pardon as an act of grace," the court explained, "has always been respected by the Courts. Where the people of a state have conferred unlimited pardon power upon the executive branch of their government, the exercise of that power should not be subject to judicial intervention." *Id.*

The U.S. Supreme Court summarily affirmed *Beacham* on appeal, 396 U.S. 12 (1969), necessarily rejecting the claim that Equal Protection requires "specific standards" to cabin re-enfranchisement decisions, *see* 300 F. Supp. at 183. This affirmance adjudicated the merits and therefore binds lower courts, *Picou v. Gillum*, 813 F.2d 1121, 1122 (11th Cir. 1987), prohibiting them "from coming to opposite conclusions on the precise issues presented and necessarily decided," *Plante v. Gonzalez*, 575 F.2d 1119, 1125 (5th Cir. 1978).

Subsequent caselaw points to the same conclusion. The Supreme Court in *Ramirez* favorably cited *Beacham*, 418 U.S. at 53, and consistent with *Beacham*, the former Fifth Circuit has expressly approved the rationale for non-automatic re-enfranchisement, stressing that "familiarity with the individual defendant and his case" allows the relevant decision-maker to "gauge the progress and rehabilitation of a convicted felon" and thereby assists the State to rationally achieve its legitimate "interest in limiting the franchise to responsible voters," *Shepherd*, 575 F.2d at 1115. The same analysis applies here.

In sum, binding precedent forecloses any argument that Equal Protection requires officials to make re-enfranchisement decisions automatic or based on a specific formula. Accordingly, Plaintiffs' equal-protection claim fails as matter of law.

Consistent with established caselaw, at least ten other States, like Florida, provide decision-makers—including judges—with substantial discretion in the re-enfranchisement context. *See supra* note 3. Indeed, federal law and the laws of most States—including Florida, under the same rights-restoration regime challenged here—also provide officials with substantial discretion in the decision whether to restore another fundamental constitutional right: the Second Amendment right to keep and bear arms. *See* Compl. ¶ 42; Fla. Stat. § 790.23(2); Fla. R. Exec. Clemency 5.D; *see also, e.g.*, 18 U.S.C. § 925(c). Accepting Plaintiffs' claim could call into question the process by which the Executive Clemency Board considers applications for restoration of firearm authority.

Discretionary gun-rights restoration systems, of course, never have been thought to raise a constitutional problem. *See District of Columbia v. Heller*, 554 U.S. 570, 626 (2008). Indeed, federal courts of appeals have upheld discretionary permitting regimes against constitutional challenges brought by *law-abiding* plaintiffs who, with no criminal history, enjoy full Second Amendment rights. *E.g.*, *Drake*, 724 F.3d at 440; *Kachalsky*, 701 F.3d at 101; *see also Woollard v. Gallagher*, 712 F.3d 865, 883 n.11 (4th Cir. 2013) (rejecting an equal-protection challenge against such a discretionary regime). *A fortiori*, the State should be allowed to employ a discretionary rights-restoration regime

when it seeks "to protect the public by preventing the possession of firearms by persons who, because of their past conduct, have demonstrated their unfitness to be entrusted with such dangerous instrumentalities," *State v. Snyder*, 673 So.2d 9, 10 (Fla. 1996) (emphasis added).

B. Florida's Re-enfranchisement System Easily Survives Rational-Basis Scrutiny, and Applicable Caselaw Does Not Countenance Claims Based on Selective Comparisons of Individual Clemency Determinations.

Under the law of this Circuit, a state policy providing for the selective disenfranchisement or re-enfranchisement of convicted felons satisfies the requirements of the Equal Protection Clause if that policy bears "a rational relationship to the achieving of a legitimate state interest." *Shepherd*, 575 F.2d at 1115. Indeed, the Eleventh Circuit appears to apply a particularly deferential form of rational-basis review to clemency determinations. *See Banks*, 592 F. App'x at 773 ("[I]n order for a claim of alleged violations of due process and equal protection in a clemency proceeding to succeed, the violation must be grave, such as where 'a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process.'") (quoting *Woodard*, 523 U.S. at 289 (O'Connor, J., concurring)); *see also Shepherd*, 575 F.2d at 1114-15 (explaining that equal protection would not permit a state to classify applicants on the basis of race or "to make a completely arbitrary distinction between groups of felons with respect to the right to vote").

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

In addition, to the extent Equal Protection operates in this context, it focuses on process, not outcomes. The Complaint spends 17 pages cataloguing individual outcomes. Compl. ¶¶ 57–67. But Equal Protection guarantees only a non-arbitrary system; no court has gone so far as to hold that applicants for re-enfranchisement, as individuals, have a right to the same outcome as persons who might appear to be similarly situated. *See, e.g.*, *Banks*, 592 F. App'x at 773 (rejecting equal-protection and due-process claims because "Mr. Banks has made no conceivable allegation that is sufficient to establish that Florida's clemency *process* is as arbitrary as a coin flip or that he was denied access to Florida's clemency *process*" (emphases added)); *see also Shepherd*, 575 F.2d at 1114; *Harvey*, 605 F.3d at 1079.

This focus on process makes sense. In the nature of things, certain kinds of determinations require the application of judgment to particular facts and circumstances. That is the case with clemency determinations, which seek to "gauge

the progress and rehabilitation of a convicted felon" in order to effectuate "the state's interest in limiting the franchise to responsible voters." *Shepherd*, 575 F.2d at 1115.

A different conclusion would make a mess of the law, since selectively culled comparisons of individuals alleged to be similarly situated are not allowed to make out equal-protection violations in circumstances where claimants are entitled to considerably *more* judicial process. Consider, for example, criminal sentencing,[4] where different outcomes frequently result between defendants who might appear to be similarly situated. Nevertheless, such sentencing disparities alone do not establish an equal-protection claim without proof of "constitutionally impermissible motives such as racial or religious discrimination." *Jones v. White*, 992 F.2d 1548, 1571–72 (11th Cir. 1993); *see Springer v. Sec'y, Fla. Dep't of Corrs.*, No. 3:12-CV-284-RV-EMT, 2013 WL 5954719, *14 (N.D. Fla. Nov. 7, 2013) (observing that "the only Supreme Court case that appears to have addressed the issue . . . . did not clearly establish that a sentencing court's imposition of a more severe sentence upon a less culpable co-defendant violates the Equal Protection Clause").[5]

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[4] In making clemency decisions, the Board reviews a Confidential Case Analysis that is given to the applicant and resembles a pre-sentence investigation report. Applicants are allowed to allocute at a hearing, giving the Board an opportunity to observe and evaluate assertions of contrition and reformation. *See supra* at 6-7.

[5] In the more consequential capital-sentencing context, the Supreme Court has derived the same proposition from the Eighth Amendment. *See McCleskey v. Kemp*, 481 U.S. 279, 306–07 (1987) (Defendants "cannot prove a constitutional violation by demonstrating that other defendants who may be similarly situated did *not* receive the death penalty." (emphasis in original)); *id.* at 312–13 ("Apparent disparities in

If outcome disparities among similarly situated individuals do not establish an equal-protection claim in criminal sentencing, then they certainly do not establish an equal-protection claim in clemency, where proceedings supplement—rather than operate within—the judicial process, and where decision-makers are subject to far fewer limitations. In both contexts, however, the core rationale for this rule is the same: sentencing and clemency decisions may both reasonably be made to turn on intensely case-specific inquiries that require the application of judgment to particular facts, and the inherently case-by-case nature of such decisions renders comparisons between individual outcomes inappropriate. Where, as here, there is no discrimination against a suspect class, Equal Protection guarantees only a non-arbitrary system, not equality in result between selectively identified individuals alleged to be similarly situated.

C. Florida's Re-Enfranchisement System Far Exceeds the Applicable Equal Protection Standard.

To the extent it attacks more than simply a perceived inadequacy of standards to limit discretion, Plaintiffs' equal-protection claim faces at least two additional insurmountable hurdles that, operating together, doom the claim. First, they have brought a facial challenge, Compl. ¶ 71; therefore, Plaintiffs must plead Florida's re-

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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.").

enfranchisement system is unconstitutional in all its applications and cannot rely on allegations about individual cases. *See Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008); *Scott v. Frankel*, 562 F. App'x 950, 952 (11th Cir. 2014) (applying no-set-of-circumstances test to facial equal-protection challenge). Second, the complaint and materials it necessarily incorporates show the Board employs several procedural mechanisms conducive to rational decision-making, and reference a host of rational factors the Board weighs in reaching its decisions. In short, the complaint and materials it incorporates provide ample basis for concluding that the Board's procedures are rationally related to a legitimate state interest, *see Shepherd*, 575 F.2d at 1114-15; and Plaintiffs, at a minimum, do not come close to showing that those procedures are so gravely defective as to amount to a "coin flip" or complete denial of "access to Florida's clemency process," *see Banks*, 592 F. App'x at 773. Accordingly, Plaintiffs have failed to plead that Florida's re-enfranchisement system is unconstitutional in any application, much less all applications.

The complaint selectively quotes some of the Governor's statements at Board hearings to support Plaintiffs' claim that the Board's decisions are arbitrary.[6] 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'

[6] Compl. ¶¶ 3, 55 (citing March 3, 2016 hearing at 00:04:25, http://thefloridachannel.org/videos/3316-executive-clemency-board-meeting-part-1/; December 7, 2016 hearing at 2:02:00–2:02:07, http://thefloridachannel.org/videos/12716-executive-clemency-board-meeting/).

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 process is arbitrary.

Indeed, on its face the Complaint discloses that the Board employs substantial procedural mechanisms conducive to rational decision-making. For example, the Board asks applicants to provide pertinent information, and the FCOR investigates an applicant's "criminal record, traffic record, family situation, employment, any alcohol or drug abuse history, any unlawful voter registration or voting activity and any military history." Compl. ¶ 34 n.15. After its investigation, the FCOR prepares a Confidential Case Analysis that resembles a pre-sentence investigation report, "which the Board reviews and which is sent to the applicant." *Id.* Having received a copy of their Confidential Case Analysis, applicants are then given an opportunity to address the Board. *Id.* ¶¶ 43, 45, 47, 49. These procedures are reasonably calculated to help the Board "gauge the progress and rehabilitation of a convicted felon" in order to effectuate "the state's interest in limiting the franchise to responsible voters." *Shepherd*, 575 F.2d at 1115.

Not only does the Board provide ample process; it grounds its decisions on a weighing of relevant factors. The Complaint discloses numerous considerations that

rationally factor into the Board's decisions, and it even reveals some reasons why these factors may rationally apply differently in different cases. In particular, the Complaint concedes that the Board considers drug use, "especially . . . if [the applicant] was convicted of a drug trafficking offense or if drug use played a role in the offense"; alcohol use, "especially if [the applicants] were convicted of DUI manslaughter or any other offense in which intoxication played a substantial role"; "traffic violations such as speeding or driving with a suspended license"; "illegal registration and voting"; "employment status"; "family"; "attitude" while appearing before the Board; and "other perceived indicia of living a moral life or having 'turned [one's] life around.'" *Id.* ¶¶ 55, 56, 59, 61. It is readily apparent why drug or alcohol use, for example, might weigh more heavily in cases where substance abuse played a role in the applicant's offense of conviction. And all of the factors the Complaint lists plainly relate to the permissible government interest that binding precedent identifies. *See Shepherd*, 575 F.2d at 1115 (felons "have breached the social contract," and States have a valid interest "in limiting the franchise to responsible voters"); *Johnson*, 405 F.3d at 1225 ("Florida has a legitimate reason for denying the vote to felons."); *accord Green v. Bd. of Elections of City of N.Y.*, 380 F.2d 445, 451–52 (2d Cir. 1967).

The Rules' time limits for eligibility to apply for re-enfranchisement, and the Board's case-specific denials based on insufficient passage of time, *see* Compl. ¶¶ 44, 46, 66, also rationally advance the State's valid interest "in limiting the franchise to responsible voters." *Shepherd*, 575 F.2d at 1115. Determining whether a convicted

felon who has completed his sentence can be a responsible voter requires "familiarity with the individual defendant and his case," because the inquiry involves "gaug[ing] [his] progress and rehabilitation." *Id.* One cannot perform this inquiry without the passage of time. Plaintiffs understandably would prefer a process that moves more promptly, but the Constitution allows the State to require a track record before it restores the voting rights of "persons who have manifested a fundamental antipathy to the criminal laws of the state." *Id.*; *see also Bowens v. Quinn*, 561 F.3d 671, 676 (7th Cir. 2009) ("Executive clemency is a classic example of unreviewable executive discretion . . . . We therefore balk at the idea of federal judges' setting timetables for action on clemency petitions by state governors.").

At bottom, the Complaint takes issue with how the Board has weighed different factors in different cases, contending that similarly situated applicants have received different results. Compl. ¶¶ 54–67. This is insufficient to show that those particular dispositions were arbitrary, much less that the decision-making process is completely arbitrary for *all* applicants, as is required to successfully plead a facial challenge. Therefore, the equal-protection claim fails.

Even though the foregoing is enough to defeat Plaintiffs' equal-protection claim and Plaintiffs cannot rely on allegations about individual cases, the Complaint references numerous examples of hearings that show a readily-identifiable, non-arbitrary basis for the Board's decisions. For example, Plaintiff Smith's application was denied after unrebutted testimony that he committed (and was arrested for)

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

To be clear, Equal Protection does not require the Board to weigh factors with precision, and it does not guarantee similarly-situated persons a right to the same outcomes. However, the Complaint and incorporated materials disclose examples of patently rational decision-making, bolstering what is already apparent from the ample procedures and factors that guide the Board's decisions: Florida's re-enfranchisement system far exceeds the minimal demands of the Equal Protection Clause.

III. SECTION 1983 DOES NOT AUTHORIZE—AND THE ELEVENTH AMENDMENT BARS—PLAINTIFFS' CLAIMS AGAINST DEFENDANTS WHO ARE NOT RESPONSIBLE FOR THEIR ALLEGED HARMS.

Plaintiffs bring suit under 42 U.S.C. § 1983. Section 1983 authorizes suits against those "who, under color of" state law, "subject[], or cause[] to be subjected," a plaintiff "to the deprivation of" federal rights. 42 U.S.C. § 1983. Putting aside the

Complaint's failure to plead that any rights have been deprived at all, Plaintiffs have failed to plausibly allege that Defendants Ken Detzner, Julie L. Jones, Melinda N. Coonrod, Richard D. Davison, David A. Wyant, and Julia McCall ("Improper Defendants") have subjected them, or caused them to be subjected, to any such deprivation. This is because the Improper Defendants do not promulgate the Rules of Executive Clemency or decide whether to grant re-enfranchisement—only the members of the Executive Clemency Board wield these powers. And Plaintiffs' disenfranchisement occurred by operation of law as a consequence of their felony convictions, rather than any actions that the Improper Defendants took. With no plausible allegation the Improper Defendants have deprived them of any rights, Plaintiffs have failed to plead a Section 1983 claim against them, and dismissal under Rule 12(b)(6) is required.

Dismissal of claims against the Improper Defendants also is required under Rule 12(b)(1) pursuant to the Eleventh Amendment. "[T]he principle of [state] sovereign immunity is a constitutional limitation on the federal judicial power established in Art. III," and that principle now is enshrined in the Eleventh Amendment to the U.S. Constitution. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98 (1984). As construed, the Eleventh Amendment generally precludes suits in federal court against a State by its own citizens or those of another State. *See Summit Med. Assocs., P.C. v. Pryor*, 180 F.3d 1326, 1336 (11th Cir. 1999). "Moreover, the

Eleventh Amendment prohibits suits against state officials where the state is, in fact, the real party in interest." *Id.*

There is a narrow exception to the Eleventh Amendment's proscription for suits "challenging the constitutionality of a state official's action in enforcing state law," which are not deemed to be against the State. *Green v. Mansour*, 474 U.S. 64, 68 (1985) (citing *Ex Parte Young*, 209 U.S. 123, 159–60 (1908)). However, that exception applies "only when those officers [sued] are responsible for a challenged action and have some connection to the unconstitutional act at issue." *Women's Emergency Network v. Bush*, 323 F.3d 937, 949 (11th Cir. 2003). Without that connection, the suit "merely make[s the officer] a party as a representative of the state, and thereby attempt[s] to make the state a party," which is prohibited. *Ex Parte Young*, 209 U.S. at 157.

The Improper Defendants did not disenfranchise Plaintiffs or deny them re-enfranchisement, and they have no authority to alter Florida's clemency procedures. Plaintiffs fail to identify any real connection between the Improper Defendants and the harms they allege. The Complaint does not even suggest that the Improper Defendants would impede any relief this Court might issue if it accepts Plaintiffs' claims. Because Plaintiffs cannot make any real connection between the Improper Defendants and the alleged harms of which they complain, this suit wrongly attempts to use the Improper Defendants to make the State a party.

CONCLUSION

This Court should dismiss the Complaint with prejudice. In the alternative, it should dismiss the claims with prejudice as to the Improper Defendants.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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

/s/ *Amit Agarwal*

Attorney

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 7.1(F) of the Local Rules of the Northern District of Florida, I certify that the foregoing Motion and Incorporated Memorandum contains 7,998 words.

/s/ *Amit Agarwal*

Attorney