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

JAMES MICHAEL HAND, et al.,	)	
	)	
Plaintiffs,	)	
	)	**CIVIL ACTION**
v.	)	
	)	**CASE NO. 4:17-cv-00128-MW-CAS**
RICK SCOTT in his official capacity as Governor of Florida and member of the State of Florida's Executive Clemency Board, et al.,	)	
	)	
Defendants.	)	
	)	

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

This case is about whether it is lawful to give elected state officials limitless power to decide whether and when individual citizens can regain their right to vote. It is not about whether Florida can disenfranchise felons at all. The laws of forty states and the District of Columbia provide for the automatic, non-arbitrary restoration of the right to vote to ex-felons after release from incarceration, the completion of parole and/or probation, or a waiting period, or do not disenfranchise felons even during incarceration. Florida, however, remains one of just ten states

using a discretionary and arbitrary voting rights restoration scheme for certain ex-felons (6 states) or all ex-felons (4 states including Florida).[1]

At the typical Executive Clemency Board ("Board") hearing before the Governor and his Cabinet, felons who have already completed their full sentences come forward one by one to plead their case. They publicly confess their crime and cite their family, employment, community participation and faith in the hope that this information convinces the Board they are living on the straight and narrow path. The politicians on the Board – who have won one election and may seek reelection or another office – decide whether that person can vote again. Sometimes they give a reason, but often they say little or nothing before rendering a decision. Board members may ask questions about the applicant's past, his or her family, any drug or alcohol use, driving infractions and any other information the Board believes is related to whether the applicant has "turned [his or her] life around" or has sufficiently shown remorse. DE 29 ¶¶ 2-5, 46-60, 53-67. This inquiry into whether

[1] DE 29 ¶ 1 & n.1; *see also* Jean Chung, *Felony Disenfranchisement: A Primer*, The Sentencing Project (2017) (Table 1), *available at* http://www.sentencingproject.org/publications/felony-disenfranchisement-a-primer/ (last visited July 3, 2017). Table 1's last column for post-sentence disenfranchisement includes the ten states which have discretionary and arbitrary executive or judicial restoration schemes and two states with automatic, non-discretionary restoration laws: Delaware and Nebraska. DEL. CODE ANN. tit. 15, §§ 6103, 6104 (automatic restoration except permanent disenfranchisement for certain "disqualifying" felony convictions); NEB. REV. STAT. § 29-112 (automatic restoration two years after completion of sentence).

the applicant is living a moral life functions as a modern-day moral character test for access to the ballot.

The Board's rules explicitly confer "unfettered discretion" to decide restoration applications, and consequently the Board uses ad hoc, subjective and vague standards and factors to make such determinations. DE 29 ¶ 3. The absence of objective, transparent legal constraints opens the door to political, ideological, racial, religious or any other type of discrimination. Defendant Governor Rick Scott has bluntly communicated that the process is legally unbound: "[T]here's no standard. We can do whatever we want"; and "[W]e get to make our decisions based on our own beliefs." *Id*. ¶¶ 55, 3. This arbitrary decision-making which controls the right to vote violates both the First and Fourteenth Amendments.

Defendants counter 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. DE 36 at 2. This is plainly wrong. The U.S. Supreme Court has rejected this "legal sleight-of-hand" in "a host" of cases by noting that vesting unbridled discretion in government officials is still prohibited even if the mode of speech or conduct "might be otherwise regulated or prohibited entirely." *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 762–69 (1988) (noting that the Court has "considered on the merits facial challenges to statutes or policies that . . . vested officials with open-ended discretion . . . even where it was assumed

that a properly drawn law could have greatly restricted or prohibited the manner of expression or circulation at issue"). Once a state decides to reenfranchise ex-felons, it may not do so arbitrarily.

Not only do ex-felon restoration applicants face an arbitrary decision-making process but they must wait years for a decision. Applicants must wait five or seven years before they can even apply for restoration, a requirement which unduly burdens the right to vote in violation of the First and Fourteenth Amendments. They also will face administrative delay—the Board currently has a backlog of 10,513 applications but nevertheless hears an average of only 52 cases per quarter.[2] DE 29 ¶¶ 5-6, 44–48. As a result, Florida ranks first in the nation in mass disenfranchisement: it has both the largest percentage of its adult population disenfranchised by reason of a prior felony conviction (10.43 percent) and the largest actual number of disenfranchised ex-felons (1.68 million total, 1.48 million of whom have finished their full sentences, which accounts for more than a quarter of all disenfranchised ex-felons nationwide). *Id*. ¶ 52. Notably, the current Board is reviewing fewer restoration applications and granting fewer as well—less than 2,500 over the last six years, compared with over 155,000 over the prior four years. *Id*. ¶ 51. Such wildly varying outcomes are the foreseeable consequence of giving

[2] This figure excludes the monthly grants to restoration of civil rights applicants who may be restored without a hearing. DE 29 ¶ 51.

politicians absolute power to grant or deny a license to vote. The First and Fourteenth Amendments forbid such an arbitrary system and, accordingly, Defendants' motion to dismiss should be denied.

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

Defendants first argue that Plaintiffs are foreclosed from challenging the constitutionality of Florida's disenfranchisement and reenfranchisement scheme because Section 2 of the Fourteenth Amendment authorizes states to disenfranchise ex-felons.

As a threshold matter, Plaintiffs do not contest that Section 2 of the Fourteenth Amendment, as construed by *Richardson v. Ramirez*, 418 U.S. 24, 53–56 (1974), authorizes Florida to disenfranchise felons. Rather, Plaintiffs argue that this grant of legislative authority to the states must be exercised in a manner consistent with other constitutional provisions and rights. "[T]he Constitution is filled with provisions that grant Congress or the States specific power to legislate in certain areas; these granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution." *Williams v. Rhodes*, 393 U.S. 23, 29 (1968). Plaintiffs' claims and the remedies sought are consistent with *Richardson*. The First and Fourteenth Amendment arguments underpinning all four claims do not challenge Florida's power to

disenfranchise and reenfranchise ex-felons, but rather its power to do so in an arbitrary or unduly burdensome manner. Notably, all four claims are brought only on behalf of a subset of Florida's ex-felons—the estimated 1.48 million Floridians who have completed their sentences, not the estimated 200,000 who have not. DE 29 ¶¶ 5 n.4, 52, 69, 76. This is why the Plaintiff Class and Subclass A definitions exclude felons who are still incarcerated and those still completing their sentences. *Id*. ¶¶ 68–81.[3] Even if Plaintiffs prevail and are granted the relief they seek, *id*. at 73–79, Florida may continue to disenfranchise felons for the duration of their sentences including parole, probation, community control and/or supervised release.

Assuming Defendants would nevertheless press their threshold argument, the Supreme Court's precedents make it abundantly clear that ex-felons may challenge the constitutionality of state laws enacted pursuant to Section 2 of the Fourteenth Amendment. First, Section 2 of the Fourteenth Amendment, as construed by *Richardson*, 418 U.S. at 53–56, authorizes state legislatures to enact felon

[3] Plaintiffs have asserted facial challenges but seek a more limited remedy than facial invalidation—a remedy which is limited to the parties before this Court, all ex-felons who have completed their sentences. *See United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 477–78 (1995) ("[T]he relief should be limited to the parties before the Court. First, although the occasional case requires us to entertain a facial challenge in order to vindicate a party's right not to be bound by an unconstitutional statute, we neither want nor need to provide relief to nonparties when a narrower remedy will fully protect the litigants." (internal citations omitted)); *Citizens United v. FEC*, 558 U.S. 310, 331 (2010) (favorably citing discussion of remedy in *National Treasury Employees Union*).

disenfranchisement laws, much like Article I of the Constitution gives Congress certain enumerated powers. But neither immunizes state or federal legislation from constitutional attack. This bedrock principle of constitutional law has been echoed in many contexts. In *Tashjian v. Republican Party of Connecticut*, the Court stated that:

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

479 U.S. 208, 217 (1986); *see also Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 548 (2001) (finding section of the Legal Services Corporation Act violated First Amendment); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516 (1996) (holding Twenty-First Amendment's grant of legislative authority to states to regulate commerce in or use of alcoholic beverages does not immunize state legislation from attack under other constitutional provisions, in this case the First Amendment).

Second, the Supreme Court has twice rejected this argument in challenges to felon disenfranchisement laws. In *Richardson*, the Court only addressed and rejected one of the plaintiffs' two claims, which included: (1) a facial challenge to California's felon disenfranchisement law which argued the state *per se* could not deny the vote to felons; and (2) a separate equal protection (and due process) claim

which attacked the lack of uniform enforcement of that law. 418 U.S. at 33–34. After holding that Section 2 of the Fourteenth Amendment authorizes states to disenfranchise felons, thereby rejecting the first claim, the U.S. Supreme Court remanded the second claim to the Supreme Court of California:

> The California court did not reach respondents' alternative contention that there was such a total lack of uniformity in county election officials' enforcement of the challenged state laws as to work a separate denial of equal protection, and we believe that it should have an opportunity to consider the claim before we address ourselves to it.

Id. at 56. If Defendants' theory were correct, the U.S. Supreme Court would not have remanded the *Richardson* plaintiffs' alternative equal protection claim.

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

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

Id. at 233. Defendants' theory directly contradicts *Hunter v. Underwood*. Although Defendants assert that Plaintiffs' claims would force a contradiction between Sections 1 and 2 of the Fourteenth Amendment, DE 36 at 12–13, this argument has been squarely rejected by the Supreme Court. When the Eleventh Circuit summarized the holding in *Richardson*, it narrowly stated that "[a] state's decision to permanently disenfranchise convicted felons does not, *in itself*, constitute an Equal Protection violation." *Johnson v. Governor of Fla.*, 405 F.3d 1214, 1217, 1223–27 (11th Cir. 2005) (en banc) (citing *Richardson*, 418 U.S. at 53-55) (applying *Hunter* to equal protection claim against Florida's disenfranchisement law) (emphasis added). Defendants misread this line and *Richardson* to foreclose all constitutional challenges to felon disenfranchisement laws, not just those asserting their unconstitutionality *per se*. The U.S. Constitution empowers states to divest felons of their right to vote under state law, but they cannot strip them of their federal constitutional rights.

Were Defendants' theory adopted, felon disenfranchisement and reenfranchisement laws would be judicially unreviewable, even if such laws were discriminatory, arbitrary and/or irrational—for example, if the state only disenfranchised ex-felons who were racial or religious minorities, women or unemployed, or only reenfranchised the literate, the rich, the tall, whomever officials deem physically attractive, or individuals who affiliate with or donate to a particular

political party. Here, Plaintiffs challenge Defendants' professed right to license ex-felons to vote based on whom they deem is leading a moral, reformed life or any other unstated, subjective criteria not set down in law. This could include the applicant's demeanor, dress, a guess as to his or her political or religious beliefs, whether the applicant has a family and/or children, or simply no criteria whatsoever, just officials' passing whims. DE 29 ¶¶ 3, 53–56. Unfettered discretion in licensing is a license to discriminate. *Id*. ¶ 60.

Third, the circuit court decisions are in accord. In *Williams v. Taylor*, the court remanded the case for trial on an equal protection claim challenging "selective and arbitrary enforcement of the disenfranchisement procedure." 677 F.2d 510, 515–17 (5th Cir. 1982). The court noted that: "The Election Commissioners cannot discriminate arbitrarily among felons who fall within the group classified for mandatory disenfranchisement . . ." *Id*. at 515; *id*. at 517 ("While he has no right to vote as a convicted felon . . . he has the right not to be the arbitrary target of the Board's enforcement of the statute."). *Williams* underscores that any arbitrariness in a felon disenfranchisement or reenfranchisement scheme is subject to constitutional attack. Similarly, the Third Circuit has found ex-felons may bring equal protection challenges to felon disenfranchisement classifications:

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

> It follows that the Equal Protection Clause remains applicable, even after *Richardson* . . .

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

Defendants rely heavily on *Shepherd v. Trevino*, in which the plaintiffs challenged "Texas' creation of a reenfranchisement scheme for state probationers but not for federal probationers" as a violation of the Equal Protection Clause, 575 F.2d 1110, 1112 (5th Cir. 1978), *cert. denied*, 439 U.S. 1129 (1979), but they mischaracterize this case. While the court ultimately rejected the equal protection challenge, the court explicitly stated that the decision does not stand for the proposition that states' power to disenfranchise ex-felons is unassailable in federal court:

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

Id. at 1114–15. Ex-felons may therefore challenge the arbitrariness of felon disenfranchisement and reenfranchisement laws and arbitrary administration, so long as they do not claim felon disenfranchisement is *per se* invalid.

Defendants restate their threshold argument in a few different ways but these reformulations are also unavailing. They argue that Plaintiffs' First Amendment claims in Counts 1 and 3 are merely end runs around *Richardson*. DE 36 at 12. Their citations to *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), and *Howard v. Gilmore*, 205 F.3d 1333, at *1 (4th Cir. 2000) (unpublished), are inapposite. *Johnson*, *Howard*, and *Farrakhan* rejected arguments that felon disenfranchisement was *per se* a violation of the First Amendment. But that is clearly different from Plaintiffs' Counts 1 and 3, which challenge unfettered discretion, arbitrary treatment and the lack of any definite time limits for processing restoration applications, not the *per se* validity of felon disenfranchisement. The *remedy* for these constitutional challenges against unfettered discretion is striking down the license or permit requirement in full and here Plaintiffs seek that relief for a class of ex-felons who have completed their sentences. *Staub v. City of Baxley*, 355 U.S. 313, 321–25 (1958) (invalidating ordinance conditioning union solicitation on issuance of permit "in [Mayor and city council's] uncontrolled discretion"); *Hague v. CIO*, 307 U.S. 496, 518 (1939) (granting declaratory and injunctive relief against prior restraint and finding plaintiffs were "free to hold meetings without a permit"). Plaintiffs do not assert that felon disenfranchisement is inherently inconsistent with the First Amendment,

but rather that Defendants violate the First Amendment guarantee against unfettered official discretion.

Lastly, Defendants assert that the First Amendment's unfettered discretion precedents have no application because Plaintiffs have no right to vote under state law. DE 36 at 13. This argument once again seeks to override independent, federal constitutional constraints by reference to state law, but Supreme Court precedent holds that those independent constraints still apply.

2. Plaintiffs have stated claims of unfettered discretion and arbitrary and disparate treatment in violation of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. [Counts 1, 2 and 3]

A. The First and Fourteenth Amendments forbid arbitrary felon disenfranchisement and reenfranchisement laws, which subject ex-felons to unfettered official discretion and arbitrary and disparate treatment. [Counts 1, 2 and 3]

As a threshold matter, Defendants concede that Plaintiffs have rights under the First Amendment and that the right to vote is expressive conduct protected by the First Amendment. DE 36 at 10 ("expressive interests tied to and derived from the right to vote"), 14 (felons "enjoy applicable First Amendment protections"); DE 29 ¶¶ 85, 105.

Defendants appear to dismiss all First Amendment case law on unfettered discretion in administrative licensing and prior restraints as "unique" and inapplicable to the voting rights context, though they offer no legal support for this

assertion. DE 36 at 14. This line of cases applies to both administrative and judicial restraints. *See Alexander v. United States*, 509 U.S. 544, 550 (1993); *Plain Dealer*, 486 U.S. at 757 ("[A] licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint . . ."). Additionally, this prohibition on unfettered discretion in licensing covers *all* First Amendment freedoms. *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 130–33 (1992) ("The First Amendment prohibits the vesting of such unbridled discretion in a government official."); *Staub*, 355 U.S. at 322 ("[A]n ordinance which . . . makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms."). Those freedoms include the right to vote.

Since 1938, the Supreme Court has consistently applied this doctrine to strike down a range of administrative licensing regimes which conferred limitless discretion on local or state officials. In *Plain Dealer*, the Court struck down an ordinance containing "no explicit limits on the mayor's discretion" to grant or deny newspaper rack permit applications, which made the process vulnerable to "the use of shifting or illegitimate criteria" and viewpoint discrimination. 486 U.S. at 757–58, 769. In *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969), a permit

requirement for parades or demonstrations was invalidated because "in deciding whether or not to withhold a permit, the members of the Commission were to be guided only by their own ideas of 'public welfare, peace, safety, health, decency, good order, morals or convenience.'" *Id*. at 150–51. In *Staub*, the Court struck down a permit scheme for union solicitation, because the Mayor and city council were "expressly authorized to refuse to grant the permit if they [did] not approve of the applicant or of the union or of the union's 'effects upon the general welfare of citizens of [the city].'" 355 U.S. at 321; *see also Niemotko v. Maryland*, 340 U.S. 268, 271–73 (1951) (striking down permit requirement for use of parks, which allowed Mayor to deny applications based on "whims or personal opinions"); *Saia v. New York*, 334 U.S. 558, 560–62 (1948) (striking down permit requirement for loud-speakers); *Lovell v. City of Griffin*, 303 U.S. 444, 450–53 (1938) (striking down prior restraint on distribution of literature). Plaintiffs rely on this line of cases and state a claim that Defendants have imposed a "standard-less process prone to arbitrary and discriminatory treatment" which is "untethered to any laws, rules, standards, criteria or constraints of any kind," DE 29 ¶¶ 1–5, 53–55, 82–92, and unconstrained by any "definite time limits," *id*. ¶¶ 102–12.

Defendants' attempted analogy to minors' ineligibility to vote betrays a misunderstanding of this constitutional doctrine. Age restrictions on voting are uniform, non-discretionary and non-arbitrary time, place and manner regulations.

But "[a] government regulation that allows arbitrary application is 'inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view.'" *Forsyth Cnty.*, 505 U.S. at 130–31 (quoting *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981)). A better analogy would be if a local jurisdiction decided that 17-year-olds can vote in county or municipal elections, but only if they submit applications which local election officials could grant or deny in the exercise of their unfettered discretion. That would also be unconstitutional.

Additionally, Plaintiffs do not seek to "extend [this doctrine] to other contexts," DE 36 at 14; they seek to apply a well-settled line of First Amendment precedent to the violation of a First Amendment right. That other litigants have sought and uniformly failed to extend the unfettered discretion or prior restraint doctrine to the Second Amendment has no bearing here. *See Young v. Hawaii*, 911 F. Supp. 2d 972, 991–92 (D. Haw. 2012) (collecting cases); *but cf. Fisher v. Kealoha*, 855 F.3d 1067, 1072 (9th Cir. 2017) (Kozinski, J., ruminating) (suggesting that Second Amendment rights should not be subjected to unconstrained discretion by reference to First Amendment cases) ("Criminal punishment, of course, always involves the deprivation of rights, but such deprivations can still raise constitutional concerns. . . . This unbounded discretion sits in uneasy tension with how rights

function. A right is a check on state power, a check that loses its force when it exists at the mercy of the state.").

Count 2 states a claim under the Equal Protection Clause; Plaintiffs do not assert a due process claim. Accordingly, Defendants' citations to *Ohio Adult Parole Authority v. Woodard*, in which a fractured Supreme Court divided on the question of what process was due a death row inmate seeking a pardon, 523 U.S. 272 (1998),[4] and *Bowens v. Quinn*, in which the court rejected a due process challenge to delayed action on clemency petitions, 561 F.3d 671, 673–76 (7th Cir. 2009), are inapposite. Granted, Plaintiffs do challenge the lack of definite timelines for processing restoration applications in Count 3 and the undue burden imposed by the 5- and 7-year waiting periods in Count 4, but neither claim is based on procedural or substantive due process. And Claims 1 and 2 attack the unfettered discretion Board members enjoy in making the ultimate determination on a voting rights restoration application; again, neither legal theory rests on due process. *See Osborne v. Folmar*, 735 F.2d 1316, 1317 (11th Cir. 1984) (holding that "a person may challenge a pardon

[4] Defendants also cite the unpublished disposition in *Banks v. Secretary, Florida Department of Corrections*, which is a straightforward application of Justice O'Connor's plurality opinion in *Woodard* to deny a *due process* challenge. 592 F. App'x 771, 773 (11th Cir. 2014). The disposition conflates due process with equal protection, and it is not at all clear that the prisoner actually raised an equal protection claim. *Id*. at 774. Nor does *Banks* contain any reasoning extending *Woodard* to equal protection claims.

or parole decision on equal protection grounds though he asserts a due process claim that fails").

Plaintiffs' equal protection claim is based on *Bush v. Gore*'s prohibition on "arbitrary and disparate treatment" in either the "allocation of the franchise" or "the manner of its exercise." 531 U.S. 98, 104 (2000). Ballots cast in Florida during the 2000 presidential election were subjected to different manual recount standards and procedures in different counties and even within a county. *Id*. at 105-07. In its *per curiam* opinion, the Supreme Court concluded that the "absence of specific standards" to implement the state's hopelessly vague "intent of the voter" standard was inexorably causing "arbitrary and disparate treatment" in the manual recount in violation of the Equal Protection Clause. *Id*. at 104–09. Circuit courts have applied this precedent to find equal protection violations. *See, e.g.*, *Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219, 235, 239–42 (6th Cir. 2011) (applying *Bush v. Gore* to conclude "lack of specific standards for reviewing provisional ballots" had resulted in unconstitutionally "arbitrary and uneven exercise of discretion"). As in *Bush v. Gore* and its progeny, Plaintiffs challenge the standard-less and limitless discretion given to officials to decide which ex-felons may cast a ballot. DE 29 ¶¶ 93–101.

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

these cases involved Jim Crow era tests and devices, such as literacy tests, constitutional understanding tests, poll taxes and moral character tests, the enforcement of which permitted official discretion to mask official discrimination and arbitrary treatment. These cases are closely analogous because individuals who failed these tests were deemed ineligible to vote. In *Davis v. Schnell*, the court struck down a constitutional understanding test, because it gave the board of registrars "a right to reject one applicant and accept another, depending solely upon whether it likes or dislikes the understanding and explanation offered" and therefore "'a naked and arbitrary power to give or withhold consent.'" 81 F. Supp. 872, 878 (S.D. Ala. 1949) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 366 (1886)), *aff'd mem.* 336 U.S. 933 (1949).

In *Louisiana v. United States*, the Supreme Court also struck down a constitutional interpretation prerequisite because it vested "uncontrolled power to determine whether the applicant's understanding of the Federal or State Constitution is satisfactory." 380 U.S. 145, 150–53 (1965). Justice Black wrote: "The cherished right of people in a country like ours to vote cannot be obliterated by the use of laws . . . which leave the voting fate of a citizen to the passing whim or impulse of an individual registrar." *Id*. at 153.

Good moral character requirements were also struck down as vague and arbitrarily enforced. In *United States v. Mississippi*, for instance, the Supreme Court

reversed the dismissal of a complaint challenging literacy, constitutional interpretation and moral character tests, which alleged the character test "provide[d] no objective reference by which the county registrar may determine good moral character and thus is so vague and indefinite as to permit registrars to arbitrarily reject Negro applicants" because it "depend[ed] solely on the registrar's own whim or caprice, ungoverned by any legal standard." 229 F. Supp. 925, 930–31 (S.D. Miss. 1964), *rev'd and remanded by* 380 U.S. 128, 133 (1965); *see also South Carolina v. Katzenbach*, 383 U.S. 301, 312–13 (1966) ("The good-morals requirement is so vague and subjective that it has constituted an open invitation to abuse at the hands of voting officials."); *Miss. State Chapter, Operation Push v. Allain*, 674 F. Supp. 1245, 1247–48 (N.D. Miss. 1987), *aff'd sub nom. Miss. State Chapter, Operation Push v. Mabus*, 932 F.2d 400 (5th Cir. 1991) (citing registrars' use of their "unguided discretion" "in a racially discriminatory manner" in striking down Mississippi's dual registration requirement and prohibition on satellite or off-site voter registration).

B. Plaintiffs have brought facial challenges against Florida's felon disenfranchisement and reenfranchisement laws, attacking the arbitrariness of the Board's decision-making, and have adequately alleged the Board exercises unfettered discretion and treats ex-felon restoration applicants arbitrarily.

Because Counts 1, 2 and 3 are facial challenges to the Board's arbitrary decision-making, Plaintiffs have met their Rule 12(b)(6) burden by alleging the

absence of any legal constraints on official discretion in restoration of voting rights decisions, that this assignment of unlimited power is arbitrary on its face. The First Amended Complaint sets forth a wealth of evidence of arbitrary treatment to demonstrate that Florida's disenfranchisement and reenfranchisement laws are also arbitrary in their execution. DE 29 ¶¶ 55–67. But this evidence is not required to establish a facial violation under either Count 1 or Count 2's legal theory. The Supreme Court made this clear in *Forsyth County*:

> Facial attacks on the discretion granted a decisionmaker are not dependent on the facts surrounding any particular permit decision. . . . [T]he success of a facial challenge on the grounds that an ordinance delegates overly broad discretion to the decisionmaker rests not on whether the administrator has exercised his discretion in a content-based manner, but whether there is anything in the ordinance preventing him from doing so.

505 U.S. at 133 n.10 (citations omitted); *Students for Life USA v. Waldrop*, 162 F. Supp. 3d 1216, 1242 (S.D. Ala. 2016) ("The thrust of the unbridled discretion doctrine, moreover, is that such discretion of itself raises an unacceptable risk of viewpoint discrimination; there is no burden on the plaintiff to prove that the government has exercised, or will exercise, its unbridled discretion in a viewpoint-biased manner.").

Facial equal protection challenges are no different. *Bush v. Gore* was a facial equal protection challenge, which successfully overturned the unequal and arbitrary recount standards and procedures implementing the voter intent standard, notwithstanding the fact that some ballots were recounted with objective standards

in a uniform manner. 531 U.S. at 109–10. Additionally, the Supreme Court's equal protection cases striking down Jim Crow era literacy and constitutional understanding tests as arbitrary and discriminatory, *see supra* Section 2.A, were all facial challenges. The Court has never required, as Defendants argue, perfect, uniform discrimination – that a law be unequal in all of its applications – in order to strike down a facially unconstitutional voting requirement. *See Hunter*, 471 U.S. at 231–32 ("[A]n additional purpose to discriminate against poor whites would not render nugatory the purpose to discriminate against all blacks . . ."); *Operation Push*, 674 F. Supp. at 1255 (noting "a similar impact is in all probability suffered by whites of low socio-economic status").

To prove that Florida's disenfranchisement and reenfranchisement scheme violates equal protection, Plaintiffs need only establish that the officials' decision-making is standard-less and arbitrary – *i.e.* that the Board's ad hoc, vague factors and standards do not make a legal rule. DE 29 ¶¶ 53–67, 82-101. Defendants have implemented a "standard-less process prone to arbitrary and discriminatory treatment" which is "untethered to any laws, rules, standards, criteria or constraints of any kind." *Id.* ¶¶ 53–55. That, on its face, violates the First Amendment and equal protection. The Rules of Executive Clemency confer "unfettered discretion" on the Governor, and the Board only invokes subjective, "vague, amorphous standards such as whether the applicant has 'turned [his or her] life around' or has

sufficiently shown remorse." *Id*. ¶¶ 3, 55–56. Ad hoc standards and ad hoc factors may be conjured by the Board members as they probe the morality of applicants, but these random, non-exhaustive factors do not constrain official discretion and therefore do not cure the fundamentally arbitrary nature of the process. *Id*. The Board does not always disclose its reasons for granting or denying an application. *Id*. ¶ 56. They may be deciding based on any reason, including even the testimony of family members or friends, an applicant's demeanor, a guess as to the applicant's politics or religiosity, or no reason whatsoever, just whim, impression, or gut instinct. *Id*. ¶¶ 3, 53–67. If the Board states a reason, that reason itself may be pretextual, in the absence of any objective test or opportunity for judicial review. *Id*. ¶¶ 4, 56, 62, 65.

In their effort to recharacterize Count 2 as a due process claim, Defendants have argued that each restoration applicant is given an equal opportunity to apply, and that each is investigated and therefore, notwithstanding varying outcomes even for similarly situated applicants, the applicants are given due process and treated equally. DE 36 at 22–25 & n.4. But Plaintiffs do not rest their equal protection claim – or their First Amendment claims – on allegations of unequal process. DE 29 ¶¶ 3, 82–112. The cited instances of the Board's random, disparate consideration of post-sentence drug use, alcohol use, moving violations, time, registration, voting and other ad hoc factors are merely examples of how the exercise of unfettered

discretion actually *results* in arbitrary and disparate treatment. DE 29 ¶¶ 55–67. Plaintiffs need not demonstrate an inequality of process or inequality of *all* outcomes. The target of their facial claims is the decision-making on applications for restoration of civil rights as unconstrained by any law, rule or standard, which inevitably results in arbitrary and disparate treatment.

In an attempt to justify this system, Defendants proffer a state "interest in limiting the franchise to responsible voters," *Shepherd*, 575 F.2d at 1115, but that is just another vague phrase which invites arbitrary treatment, as government officials impose their own views as to who is sufficiently "responsible" to vote. In *Shepherd*, the Fifth Circuit held that an equal protection challenge to a felon reenfranchisement law's statutory classification was cognizable and proceeded to apply a "rational relationship" test. *Id*. at 1114–15. Contrary to Defendants' assertion, Plaintiffs' claims are far stronger cases of arbitrary state action than that challenged in *Shepherd*. Defendants appear to concede that irrational distinctions between different categories of ex-felons would violate the Constitution. DE 36 at 22–23. But they nevertheless urge the Court to find no constitutional defect in a system that allows politicians to choose who may vote and who may not based on any reason or no reason. However, the courts actually view unfettered administrative discretion to make case-by-case determinations as more problematic than legislative line-drawing, and therefore treat the former with much less deference. *See, e.g.*, *Long*

Beach Area Peace Network v. City of Long Beach, 574 F.3d 1011, 1042–43 (9th Cir. 2009) (concluding that legislative reservation of discretionary, administrative function is subject to unbridled discretion challenge to same extent as executive's unfettered discretion) ("If a legislative body retains discretion to make an important decision as part of that permitting scheme—here, whether to fund an event or to waive fees and charges—that discretion is distinct from the general discretion a legislative body has to enact (or not enact) laws."); *Gasparo v. City of New York*, 16 F. Supp. 2d 198, 207–16, 221–23 (E.D.N.Y. 1998) (rejecting equal protection challenge to statutory classification singling out newsstands from all sidewalk vendors but issuing preliminary injunction against unfettered administrative discretion in terminating permits). Legislatures, after all, often draft laws without a specific individual in mind, an individual whose race, politics or religion may be learned, guessed or volunteered. DE 29 ¶¶ 3–4, 60, 64–65. Florida's voting rights restoration scheme lacks any codified, objective test or set of criteria, and Board members' subjective, random reasons (when they are verbalized) are irrational in the extreme and inexorably lead to the arbitrary and disparate treatment of citizens.

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

Defendants offer no reasoned argument in opposition to the unfettered discretion cases or the equal protection doctrine applied in *Bush v. Gore*. Instead, they posit that because voting rights restoration is a form of clemency in Florida, it

cannot be struck down as unconstitutionally arbitrary, that executive discretion in clemency is categorically immune from constitutional challenge. This contention does not withstand scrutiny.

There are at least seven different forms of executive clemency in Florida: restoration of civil rights; restoration of alien status under Florida law; remission of fine or forfeiture; specific authority to own, possess or use firearms; full pardon; pardon without firearm authority; and commutation of sentence.[5] Full pardons necessarily include the restoration of civil rights and firearm authority. However, because ex-felons can apply in the alternative for restoration of those rights through separate forms of clemency, the Board can restore civil rights and/or firearm authority while denying a full pardon. This is crucial because Plaintiffs only challenge the unfettered discretion involved in restoration of *voting* rights decisions.[6] Though Defendants characterize this suit as an assault on executive discretion in clemency writ large, that is inaccurate, since ex-felons always have a distinct and direct avenue to regain their right to vote, without obtaining a pardon. The constitutional defect is isolated, and the constitutional challenge is targeted.

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[5] Florida Application for Clemency, *available at* https://www.fcor.state.fl.us/docs/clemency/ClemencyApplication.pdf (last visited July 3, 2017).

[6] As the Prayer for Relief makes clear, the claims and the relief sought do not embrace the other two civil rights—the right to serve on a jury and the right to run for public office. DE 29 at 73-79.

Even the precedent Defendants cite relies on the distinction between pardons and other forms of clemency to justify a purely discretionary pardon power. In *Bowens*, the Seventh Circuit makes this distinction and emphasizes that voting rights are frequently automatically restored: "[Petitioners] do not claim to be seeking pardons in order to remove statutory disabilities, either, such as the right to vote or to hold public office; anyway most statutory disabilities resulting from a felony conviction are restored automatically upon the completion of the defendant's sentence." 561 F.3d at 675 (citation omitted). As a practical matter too, while pardons (or the denial thereof) do have significant consequences for felons, whether they are on death row or struggling to secure employment, the right to vote is one of only a very few constitutional rights that continue to be suspended long after a person has regained his or her liberty and rejoined society. Six of the Plaintiffs completed their sentences more than thirteen years ago. Plaintiff Jermaine Johnekins is still denied the right to vote, even though he was sentenced to a 9.5-month work-release program, which he completed approximately nineteen years ago. DE 29 ¶¶ 18–26.

Discretion in executive clemency is not absolute when constitutional rights are infringed. *See Woodard*, 523 U.S. at 289 (O'Connor, J., concurring); *Anderson v. Davis*, 279 F.3d 674, 676 (9th Cir. 2002) (a denial of clemency due to discrimination on basis of "race, religion, political affiliation, gender, nationality," or "bribery, personal or political animosity, or the deliberate fabrication of false

evidence" or "capricious decisionmaking process" would raise constitutional problems); *Wilson v. U.S. Dist. Court for N. Dist. of Cal.*, 161 F.3d 1185, 1186–87 (9th Cir. 1998) ("[An] assertion that the state's communications misled his counsel about the issues to be considered in the clemency proceeding states a claim of a violation of due process."). In any event, the post-*Woodard* due process cases do not dispose of the instant challenge, because different constitutional rights are infringed by Florida's restoration scheme.

Beacham v. Braterman, 300 F. Supp. 182 (S.D. Fla.), *aff'd mem.* 396 U.S. 12 (1969) is also unavailing. This summary affirmance is of "considerably less precedential value than an opinion on the merits," *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 180–81 (1979), because it "represents an approval by the Supreme Court of the judgment below but should not be taken as an endorsement of the reasoning of the lower court." *Hardwick v. Bowers*, 760 F.2d 1202, 1207 (11th Cir. 1985), *rev'd on other grounds*, *Bowers v. Hardwick*, 478 U.S. 186 (1986). The three-judge court did not address a challenge to discretionary, standard-less decisions on the right to vote. Calling the power to pardon "an act of grace," the court held that "the exercise of that power should not be subject to judicial intervention." 300 F. Supp. at 184. But the plaintiff in *Beacham* only

applied for a pardon in the spring of 1968. *Id*. at 183.[7] Contrary to Defendants' characterization, DE 36 at 19, there is no indication that Beacham could or did seek, in the alternative, solely the restoration of his civil rights, or that the court considered the different, narrower question as to whether it is constitutional to apply a system of unfettered discretion to civil rights restoration decisions *specifically*, leaving aside attacks on the pardon power as a whole.[8] "[S]ummary affirmances should not be taken as expressing a view on a legal claim or constitutional theory not presented to the Supreme Court or discussed in the appealed lower court opinion." *Picou v. Gillum*, 813 F.2d 1121, 1122 (11th Cir. 1987). *Beacham* did not address the specific issues in this case, but even if this Court concludes otherwise, the opinion only addressed an equal protection claim, not any of the other constitutional guarantees raised by this case.

[7] Jurisdictional Statement, *Beacham v. Braterman*, 396 U.S. 12 (1969) (No. 404), 1969 WL 136703 at *2.

[8] The historical versions of the Florida Constitution and statutes strongly indicate that the Application for Clemency – as it existed in the spring of 1968 – only allowed a petitioner to seek a pardon, not the restoration of civil rights in the alternative. Florida's 1885 Constitution was still in effect at the time, and it did not list the restoration of civil rights as a distinct form of executive clemency as does today's Florida Constitution, which was ratified in November 1968. FLA. CONST. art. IV, § 8; *compare* FLA. STAT. ANN. § 940.05 (West 1967) (stating pardons restore "all the rights of citizenship" but suggesting pardons are the only means to secure restoration of civil rights) *with* FLA. STAT. ANN. § 940.05 (West 1969) (following 1968 amendment of Florida Constitution, listing pardon as just one of the ways in which an ex-felon may be entitled to restoration of civil rights).

Finally, in *Jones v. White*, 992 F.2d 1548 (11th Cir. 1993), the challenged law – Alabama's Habitual Felony Offender Act ("HFOA") – was mandatory for both courts and prosecutors: "[T]he prosecutor . . . has no discretion about whether to inform the court of a convicted defendant's prior convictions." *Id*. at 1569. Even though the court ultimately rejected the selective prosecution claim, its decision pointed to errors and testimony regarding poor documentation of prior convictions as reasons for non-application of the HFOA in thirty percent of cases. *Id*. at 1572–75. Since the statute was on its face non-discretionary and the disparate treatment was justified by reference to "the problems encountered by prosecutors and courts in obtaining admissible evidence of prior felony convictions," *id*. at 1571, this case is clearly not support for a system of unfettered discretion in felon rights restoration.

Defendants concede that irrational or discriminatory distinctions between different *categories* of ex-felons would violate the Constitution, DE 36 at 22–23, but nevertheless urge the Court to find no constitutional defect in a system that allows politicians to license an ex-felon to vote when they believe he or she has earned it. DE 29 ¶¶ 3, 53–55. There is no codified, objective test or set of criteria for restoration of voting rights, and the random reasoning of Board members is irrational in the extreme, untethered to any fixed law, and inexorably leads to arbitrary and disparate treatment.

Therefore, Counts 1, 2 and 3 state valid, facial First Amendment and equal protection claims attacking unfettered discretion and arbitrary and disparate treatment in Florida's disenfranchisement and reenfranchisement scheme.

3. Plaintiffs have stated a claim of undue burden on the right to vote in violation of the *Anderson/Burdick* test. [Count 4]

Count 4 of the First Amended Complaint alleges that the five- and seven-year waiting period requirements, which were first imposed in 2011, unduly burden the right to vote by denying Plaintiff Yraida Guanipa and Subclass A of the Plaintiff Class even the opportunity to regain their voting rights. *See Gratz v. Bollinger*, 539 U.S. 244, 262 (2003) (premising standing on opportunity to compete). Defendants appear to argue that the state has a legitimate interest in delaying restoration for five or seven years as a wait-and-see period on top of parole or probation. DE 36 ¶¶ 28–29. But second-guessing the sentence, which a legislature and a court have already determined is the necessary punishment and time period for rehabilitation, is not a rational basis for delaying reenfranchisement. Continued denial of the right to vote indefinitely delays the point of social reintegration and is, therefore, counterproductive to the state's purported interest in ensuring rehabilitation. *Green Party of Tenn. v. Hargett*, 767 F.3d 533, 549 (6th Cir. 2014) (liberal ballot access for independent candidates undermines state's purported interest in avoiding voter confusion); *One Wis. Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 934 (W.D. Wis.

2016) (state interest in alleviating burdens on clerks undermined by changes to absentee voting laws). Defendants' motion to dismiss must also fail as to Claim 4.

4. Defendants' Policy Arguments

Defendants warn that a judgment in Plaintiffs' favor would "call into question" discretionary restoration of firearm authority. DE 36 at 21. Since *District of Columbia v. Heller*, 554 U.S. 570 (2008), litigants around the country have sought to apply the unfettered discretion cases to ex-felons' Second Amendment rights. This case will not diminish those efforts or change their outcomes. Even though both are individual rights, the competing interests at stake in the two contexts are so different that it is certainly not the case that a favorable judgment here would prove dispositive for Second Amendment litigants. As cases such as *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013) make clear, restoration of Second Amendment rights necessarily requires balancing the individual's right against the state's legitimate interest in public safety. *Id.* at 876–78. But in felon disenfranchisement challenges, restoration does not pose any threat to election integrity or any other state interest of that magnitude.

Defendants also suggest that Plaintiffs' challenge may have the perverse consequence of causing Florida and other states to withdraw *all* reenfranchisement opportunities, if they cannot be conducted with unfettered official discretion. DE 36 at 15–16. Astoundingly, Defendants state that a scheme that results in 1.68 million

disenfranchised, 1.48 million disenfranchised post-sentence, and a backlog of 10,513 applicants[9] is a "reasonable middle road." DE 29 ¶¶ 5 & n.4, 51–52; DE 36 at 16.

Florida has not implemented a permanent, irrevocable felon disenfranchisement scheme, even though the massive disenfranchisement in the state and the comparatively miniscule number of restorations (less than 2,500 over the last six years, DE 29 ¶ 51) reveal the current system is already dangerously close to such a scheme. That hypothetical system is not before this Court.

5. The non-Board Defendants are properly joined and should not be dismissed from the case.

Defendants Detzner, McCall, Jones, Coonrod, Davison and Wyant argue that they are not proper defendants, relying on the Eleventh Amendment. While these six Defendants have not created the unconstitutional disenfranchisement and reenfranchisement scheme and they do not grant or deny restoration applications, they are all directly involved in the challenged laws' enforcement. If Plaintiffs prevail on the merits, without these six Defendants this Court would be unable to award fully effective relief which begins but does not end with: enjoining all Defendants from enforcing Florida's disenfranchisement and reenfranchisement

[9] Even if only half of these individuals required hearings under the Rules of Executive Clemency, it would take 25 years to review all of them at the Board's average rate of 52 restoration applicants per quarter. DE 29 ¶ 5.

scheme as to the Plaintiff Class and allowing all former felons to register and vote after the completion of their sentences. DE 29 at 73–79.

The *Ex parte Young* doctrine – which allows suits to proceed against state officials in federal court – applies when the state officials sued are responsible for and have "some connection" to the challenged action or law's enforcement. *Ex parte Young*, 209 U.S. 123, 157 (1908). In *Luckey v. Harris*, 860 F.2d 1012 (11th Cir. 1988), the Eleventh Circuit reiterated that the only requirement to sue state officers in their official capacity is that they be responsible for and have some connection to the unconstitutional act:

> [a]ll that is required is the official be responsible for the challenged action. As the *Young* court held, it is sufficient that the state officer sued must, "by virtue of his office, ha[ve] some connection" with the unconstitutional act or conduct complained of. "[W]hether [this connection] arises out of general law, or is specially created by the act itself, is not material so long as it exists."

860 F.2d at 1015–16 (quoting *Young*, 209 U.S. at 157). Given this test, Defendants' reliance on *Women's Emergency Network v. Bush*, 323 F.3d 937 (11th Cir. 2003), is misplaced. In that case, the court found that the Governor's "general executive power" was "too attenuated to establish that he is 'responsible for' the distribution of funds," *id.* at 949–50, but Plaintiffs do not rely on mere "general executive power" for any of the non-Board member Defendants. Notwithstanding the non-Board member Defendants' lack of personal involvement in setting the Rules of Executive Clemency and the arbitrary decisions on restoration applications, Plaintiffs allege

that these six Defendants are proper parties because they are responsible for and connected to the enforcement of Florida's felon disenfranchisement and reenfranchisement scheme. The First Amended Complaint also seeks equitable relief that will ensure an effective legal change including administrative and public information changes.

As Florida's chief elections officer, Defendant Secretary of State Detzner enforces and administers Florida's election laws. He is responsible for uniform implementation of the election laws, including Florida's voter registration form and eligibility requirements, and providing technical assistance and written direction to the sixty-seven County Supervisors of Elections on the performance of their official duties including list maintenance activities related to felon disenfranchisement. FLA. STAT. § 97.012(1), (2), (5) and (16). The Department of State also receives information, which it uses to identify registered voters and registration applicants who are ineligible to vote, or applicants who are newly eligible due to restoration. FLA. STAT. § 98.093; DE 29 ¶ 30. The requested injunction would alter the current voter eligibility requirements, requiring the Secretary of State to issue directives on the new requirements to the county Supervisors of Elections, update public-facing materials including Florida's voter registration form, websites, handouts and all other materials pertaining to voter eligibility and registration, and revise list maintenance procedures and retrain the supervisors on the same. *Id*. at 75-76; *Fla.*

Democratic Party v. Detzner, No. 4:16cv607, 2016 WL 6090943, at *4–5 (N.D. Fla. Oct. 16, 2016) (rejecting argument that Florida Secretary of State cannot issue directive to Supervisors of Elections). Notably, the Court in *Brown v. Detzner*, No. 4:15cv398, slip op. (N.D. Fla. Jan. 13, 2016) found Florida's Secretary of State "sufficiently 'enforces'" districts that are drawn by the legislature. *Id*. at *5. Here the Secretary's connection to the challenged laws is even stronger, as his office oversees the enforcement of Florida's voter eligibility and registration requirements including felon disenfranchisement.

Defendant McCall is the Coordinator for the Office of Executive Clemency and, as an agent or officer reporting directly to the Board, is also closely connected to the enforcement of Florida's felon disenfranchisement and reenfranchisement laws. Defendant McCall and her staff are responsible for processing applications for the restoration of voting rights, communicating with applicants, referring applications for investigation by the Office of Clemency Investigations, and preparing executive orders and certificates for successful restoration applicants. DE 29 ¶ 34. If Plaintiffs prevail, Defendant McCall will need to follow legal and procedural changes and inform all recently denied, pending and new applicants that their voting rights have been restored. *Id*. at 78.

As Secretary of the Department of Corrections, Defendant Jones is charged with "inform[ing] and educat[ing] inmates and offenders on community supervision

about the restoration of civil rights." FLA. STAT. § 940.061. Every month the Department of Corrections must transfer to the Florida Commission on Offender Review "a list of the names of inmates who have been released from incarceration and offenders who have been terminated from supervision who may be eligible for restoration of civil rights." *Id.*; DE 29 ¶ 31. If full relief is granted, the Department of Corrections would be required to educate inmates and released felons of their right to register and vote once they complete their sentences and send the names of such ex-felons to the Secretary of State and the Florida Commission on Offender Review for voter registration purposes. *Id.* at 76–77. The relief might also call for sending lists of ex-felons who have finished their sentences in the last ten or twenty years. Including Defendant Jones "does not substantially increase the scope of the remedy . . . but does improve the effectiveness of such relief." *See Santiago v. City of Philadelphia*, 435 F. Supp. 136, 153 (E.D. Pa. 1977) ("[T]he degree of participation required of a particular defendant is less when only injunctive relief is requested if the court determines that some equitable relief is necessary to prevent constitutional violations."), *abrogated on other grounds by Chowdhury v. Reading Hosp. & Med. Ctr.*, 677 F.2d 317 (3d Cir. 1982).

The same principle militates in favor of keeping Defendants Coonrod, Davison and Wyant in the suit. As the three members of the Florida Commission on Offender Review, they oversee the Office of Executive Clemency as well as the

Office of Clemency Investigations, which conducts the background investigations into each applicant for restoration of civil rights, and they make policy decisions for the Commission. DE 29 ¶¶ 32–33. If Plaintiffs prevail, any injunction should also run against the Commissioners to ensure that their policies, materials and website accord with any legal changes effected by this case. *Id*. at 77.

Whether the non-Board member Defendants personally disenfranchised Plaintiffs, denied Plaintiffs reenfranchisement, or have authority over Florida's clemency procedures is irrelevant. Each Defendant is involved in the disenfranchisement and reenfranchisement scheme and is responsible for a portion of the entire process through which the Board utilizes unfettered discretion in making arbitrary determinations on each applicant's voting rights. Accordingly, each Defendant is a proper party to this suit under the *Ex parte Young* exception. If Plaintiffs prevail, the inclusion of these Defendants is necessary for any equitable relief this Court orders to ensure the remedy's effectiveness.

6. Conclusion

Many of the cases Defendants cite to argue discretion in executive clemency is sacrosanct point to the historical origin of clemency in monarchy. *See Herrera v. Collins*, 506 U.S. 390, 412 (1993) ("In England, the clemency power was vested in the Crown and can be traced back to the 700's. Blackstone thought this 'one of the great advantages of monarchy in general, above any other form of government; that

there is a magistrate, who has it in his power to extend mercy, wherever he thinks it is deserved . . .'") (citation omitted); *Bowens*, 561 F.3d at 676 (describing clemency as "one of the traditional royal prerogatives . . . borrowed by republican governments"). Perhaps then it should be no surprise that its application to the right to vote has worked such a perversion of our democracy. An estimated 1.48 million Floridians have already paid their debt to society by completing their full sentences including parole, probation and any supervised release, but the denial of their right to vote goes on. A system devised to ensure there was an avenue for mercy outside the court system today serves as a tool for prolonged mass disenfranchisement in a shrinking minority of states.

For the foregoing reasons, Defendants' Motion to Dismiss should be denied. If, however, the Court grants the motion, Plaintiffs respectfully request leave to file a Second Amended Complaint.

DATED: July 5, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 5, 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 to Dismiss contains 9,470 words.

July 5, 2017 /s/ Jon Sherman

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