UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

JAMES MICHAEL HAND, *et al.*,

Plaintiffs,

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

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

Defendants.
_____/

REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

For the most part, Plaintiffs' response to Defendants' motion to dismiss painstakingly and persuasively refutes arguments that Defendants do not make. Over the course of eight full pages, for example, Plaintiffs insist that criminal disenfranchisement laws "are not immunized from constitutional challenge by Section 2 of the Fourteenth Amendment." Resp. 5-13. They are right, but that protracted digression does not speak to any disagreement between the parties. As Defendants explained on the second page of their motion, Plaintiffs' equal-protection claim must be rejected if Florida's reenfranchisement procedure is "rationally related to the advancement of a legitimate state interest." Mot. 2. Laws concededly subject to rational-basis review are not "immunized from constitutional challenge," Resp. 5, and

Defendants have never "argue[d] that Plaintiffs are foreclosed from challenging the constitutionality of Florida's disenfranchisement and reenfranchisement scheme," *id.*

Similarly, Plaintiffs charge that Defendants "mischaracterize" *Shepherd v. Trevino*, 575 F.2d 1110 (5th Cir. 1978), since that decision "does not stand for the proposition that states' power to disenfranchise ex-felons is unassailable in federal court." Resp. 11. Defendants cited *Shepherd* for exactly the opposite proposition: Florida's reenfranchisement regime may be challenged under the Equal Protection Clause, but "that system must be upheld if it is rationally related to the advancement of a legitimate state interest." Mot. 2 (citing 575 F.2d at 1115).

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

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

- In *Beacham v. Braterman*, the Supreme Court summarily affirmed a three-judge district court's holding that it is not "a denial of equal protection of law" for Florida "to restore discretionarily the right to vote to some felons and not to others," where it was undisputed that such decisions were made "in a purely discretionary manner without resort to specific standards." 300 F. Supp. 182, 183, 184 (S.D. Fla. 1969), *aff'd* 396 U.S. 12 (1969). According to Plaintiffs, the State's reliance on that case is "unavailing" because "[t]he three-judge court did not address a challenge to discretionary, standard-less decisions on the right to vote." Resp. 28.

- For purposes of assessing an equal-protection challenge to a state's procedure for reenfranchising convicted felons, the law of this Circuit holds that states have a legitimate "interest in limiting the franchise to responsible voters." *Shepherd*, 575 F.2d at 1115; *see Bonner v. Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc). Plaintiffs ask this Court to dismiss that interest as "just another vague phrase which invites arbitrary treatment." Resp. 24.

- As construed by the Supreme Court, Section 2 of the Fourteenth Amendment affirmatively authorizes states to permanently disenfranchise convicted felons. *Richardson v. Ramirez*, 418 U.S. 24, 54 (1974); *Johnson*, 405 F.3d at 1217. In Plaintiffs' view, the Executive Clemency Board's rules requiring convicted felons who have completed their sentences to wait for five or seven years before applying for restoration of voting rights run afoul of the First and Fourteenth Amendments. Resp. 31.

- In *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998), the Supreme Court confirmed that "the clemency and pardon powers are committed . . . to the authority of the executive," and reaffirmed prior caselaw holding that such decisions "'are rarely, if ever, appropriate subjects for judicial review.'" *Id.* at 276. Applying the logic of *Woodard*, the Eleventh Circuit has held that "in order for a claim of alleged violations of due process *and equal protection* in a clemency proceeding to succeed, the violation must be grave, such as where 'a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process.'" *Banks v. Sec'y, Fla. Dep't of Corrs.*, 592 F. App'x 771, 773 (11th Cir. 2014) (unpublished) (quoting *Woodard*, 523 U.S. at 289) (O'Connor, J.) (emphasis added). According to Plaintiffs, this Court should ignore

> that holding because the Eleventh Circuit's "disposition conflates due process with equal protection" and "it is not at all clear that the prisoner actually raised an equal protection claim." Resp. 17 n.4.

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

I. THE COMPLAINT SHOULD BE DISMISSED INSOFAR AS IT CHALLENGES FLORIDA LAW PROVIDING FOR THE AUTOMATIC AND IMMEDIATE DISENFRANCHISEMENT OF ALL CONVICTED FELONS.

This suit "challenges Florida's disenfranchisement *and* re-enfranchisement laws." DE29 ¶1 (emphasis added). The challenge to Florida's disenfranchisement laws fails because, as Defendants have explained, "[b]inding authority holds that Section 2 of the Fourteenth Amendment affirmatively authorizes states to permanently disenfranchise convicted felons." Mot. 1-2 (emphasis omitted); *see Johnson*, 405 F.3d at 1217. "Plaintiffs do not contest that Section 2 of the Fourteenth Amendment . . . authorizes Florida to disenfranchise felons," Resp. 5, and they have not alleged any constitutional defect in the process by which convicted felons *lose* their right to vote. Hence, their challenge to Florida's disenfranchisement laws fails to state a claim for which relief may be granted.

It is no answer to say that Florida has, in Plaintiffs' view, "made the process of voting rights *restoration* unconstitutionally arbitrary." DE29 ¶1 (emphasis added). Even if that were so—and it is not, *see infra* Part II—alleged problems with the State's reenfranchisement procedure would not warrant invalidation of the State's analytically

and temporally distinct disenfranchisement procedure. At bottom, Plaintiffs complain that a state may not use "ad hoc, subjective and vague standards and factors" in determining whether to restore a disenfranchised felon's voting rights, because "[t]he absence of objective, transparent legal constraints opens the door" to various kinds of illicit discrimination and malfeasance. Resp. 3. That argument, valid or not, has no application to Florida's disenfranchisement laws, which provide that *all* convicted felons automatically and immediately lose their right to vote. *See* Fla. Const. Art. VI, § 4(a); Fla. Stat. §§ 97.041(2)(b), 944.292(1).

II. THE COMPLAINT SHOULD BE DISMISSED INSOFAR AS IT CHALLENGES FLORIDA LAW GIVING THE EXECUTIVE CLEMENCY BOARD DISCRETION TO RESTORE THE VOTING RIGHTS OF DISENFRANCHISED FELONS.

Plaintiffs lump together their equal-protection and First Amendment claims. Resp. 13-31. In the State's view, it is helpful to analyze those claims separately.

A. Plaintiffs' Equal Protection Claim Fails as a Matter of Law.

At bottom, Plaintiffs argue that Florida's reenfranchisement system violates the Equal Protection Clause because the Clemency Board does not base its decisions on "any codified, objective test or set of criteria." Resp. 25. That argument is unpersuasive, for two distinct and independent reasons.

First, pertinent caselaw holds that the clemency process need not be guided by "specific standards." *Beacham*, 300 F. Supp. at 183, 184, *aff'd* 396 U.S. 12 (1969). Plaintiffs' efforts to distinguish *Beacham*, Resp. 28-29, are unpersuasive. Plaintiffs assert that "[t]he three-judge court did not address a challenge to discretionary,

standard-less decisions on the right to vote." Resp. 28. That would come as news to the court, which said it was addressing "whether it is a denial of equal protection of law . . . for the Governor of Florida, with the approval of three members of the Cabinet, to restore discretionarily the right to vote to some felons and not to others," where it was undisputed that such restoration decisions were made "in a purely discretionary manner without resort to specific standards." 300 F. Supp. at 183, 184.

Plaintiffs also try to distinguish *Beacham* on the ground that the Plaintiff there "applied for a pardon in the spring of 1968," arguing that "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." Resp. 29. Those purported distinctions miss the point: As Beacham made clear in the same jurisdictional brief on which Plaintiffs rely, Resp. 29 n.7, his appeal to the Supreme Court presented, among other issues, the question whether Florida law "violate[s] the Constitution in that there are no ascertainable standards governing the recovery of the fundamental right to vote?" 1969 WL 136703, at *3 (Question C). In summarily affirming the district court's judgment, the Supreme Court necessarily answered that question in the negative. *See* Mot. 20 (quoting circuit precedent holding that a summary affirmance prevents lower courts "from coming to opposite conclusions on the precise issues presented and necessarily decided").

Similarly, it makes no difference whether Florida law at the time required a convicted felon to invoke the pardon process in order to regain the right to vote. Resp. 28-29 & n.8. Like Plaintiffs here, Beacham claimed that it violated the Equal Protection Clause for Florida to "restore discretionarily the right to vote to some felons and not to others," where such decisions were made "in a purely discretionary manner without resort to specific standards." 300 F. Supp. at 183, 184. If that claim had merit, Florida could not have evaded the requirements of the federal Constitution by folding the reenfranchisement determination into the pardon process, and Plaintiffs here do not argue otherwise.

Assuming *arguendo* that *Beacham* is not controlling, the logic of that decision is persuasive. Hypertechnical distinctions aside, Beacham raised essentially the same challenge to the same set of laws. And now, as then, "[t]he restoration of civil rights . . . is an act of executive clemency not subject to judicial control." 300 F. Supp. at 184; *see* Fla. Const. Art. IV, § 8(a) (providing for authority to "restore civil rights" in "[c]lemency" provision of the state constitution); *Woodard*, 523 U.S. at 276 (explaining that "the clemency and pardon powers are committed, as is our tradition, to the authority of the executive," and that such powers "are rarely, if ever, appropriate subjects for judicial review"). Because "the heart of executive clemency . . . is to grant clemency as a matter of grace," a State may reasonably "allow[] the executive to consider a wide range of factors not comprehended by earlier judicial proceedings and sentencing determinations." *Woodard*, 523 U.S. at 280-81 (opinion of Rehnquist, C.J.).

For their part, Plaintiffs do not cite any case holding that a discretionary reenfranchisement regime is unconstitutionally "arbitrary" if the exercise of discretion is not governed by some objective legal standard. The absence of any such precedent speaks volumes. Many states have laws of the kind at issue here. Resp. 2 n.1 (asserting that "ten states" currently "have discretionary *and arbitrary* executive or judicial restoration schemes") (emphasis added); Mot. 15 n.3 (citing laws of "[a]t least ten States other than Florida [that] provide officials or judges with substantial discretion in the re-enfranchisement context"). And would-be litigants have had ample opportunity to challenge them. "Florida's policy of criminal disenfranchisement," for example, "has a long history, tracing back well before the Civil War." *Johnson*, 405 F.3d at 1218.

Second, and even assuming that existing caselaw does not directly address whether the Equal Protection Clause requires reenfranchisement determinations to be based on "specific standards," Plaintiffs' claim fails under the more general test applicable to challenges of this kind. "[S]elective disenfranchisement or reenfranchisement of convicted felons must pass the standard level of scrutiny applied to state laws allegedly violating the equal protection clause. Such laws must bear a rational relationship to the achieving of a legitimate state interest." *Shepherd*, 575 F.2d at 1114-15. That is not just the view of "*the Fifth Circuit*," Resp. 24 (emphasis added). It is the law of *this Circuit*. *Bonner*, 661 F.2d at 1207.

That law is fatal to Plaintiffs' equal-protection claim. Under *Shepherd*, Florida has a legitimate "interest in limiting the franchise to responsible voters." 575 F.2d at 1115. The State's totality-of-the-circumstances approach is "rationally calculated" to effectuate that interest, because it permits Board members to "gauge the progress and rehabilitation of a convicted felon" based on the full range of information concerning "the individual defendant and his case." *See* Mot. 3, 20; *Shepherd*, 575 F.2d at 1115.

Instead of applying the principles set forth in *Shepherd* to the state laws at issue here, Plaintiffs argue that *Shepherd* was wrong to hold that states have a legitimate "interest in limiting the franchise to responsible voters," as that is "just another vague phrase which invites arbitrary treatment." Resp. 24. Plaintiffs, of course, have a right to their own view of what the law should be; but they may not ask this Court to set aside "specific precedent . . . dealing with criminal disenfranchisement" and establishing "clear standards by which to judge" the challenged state laws. *Johnson*, 405 F.3d at 1226-27.

Plaintiffs' heavily reliance on *Bush v. Gore*, 531 U.S. 98 (2000), is misplaced. The Court there addressed whether a state, "[h]aving once granted the right to vote on equal terms," may "by later arbitrary and disparate treatment, value one person's vote over that of another." *Id.* at 104-05. That principle has no application here. Convicted felons have not been "granted the right to vote," *see* Fla. Const. Art. VI, § 4(a); *Richardson*, 418 U.S. at 54-55; and felons who have regained their right to vote are not treated any differently than non-felons. In addition, the Court in *Bush v. Gore*

cautioned that its consideration was "limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities." 531 U.S. at 109. Plaintiffs' claims do not involve "election processes" at all; and still less do they involve "the present circumstances" to which the holding in *Bush v. Gore* was expressly limited. *See also Johnson*, 405 F.3d at 1226-27 (explaining that "there is specific precedent . . . dealing with criminal disenfranchisement," so that courts considering challenges to disenfranchisement laws "need not go into other areas of possibly analogous law").

Plaintiffs' remaining arguments are unpersuasive.

1. Florida law does not give the Executive Clemency Board "limitless" and "absolute" power to make reenfranchisement decisions in the "absence of any legal constraints." Resp. 1, 5, 21. True, Florida's discretionary reenfranchisement procedure, like the "purely discretionary" reenfranchisement procedure upheld in *Beacham*, does not turn on "specific standards." 300 F. Supp. at 183. But the Board is still bound by "legal constraints," Resp. 21, inasmuch as it may not violate generally applicable statutory or constitutional prohibitions in processing applications. Thus, for example, Board members may not "intentionally discriminate on the basis of race," *Johnson*, 405 F.3d at 1218 (emphasis omitted), "make a completely arbitrary distinction between groups of felons," *Shepherd*, 575 F.2d at 1114, "flip[] a coin to determine whether to grant clemency," *Banks*, 592 F. App'x at 773, or arbitrarily deny an applicant "any access to its clemency process," *id.*

In other words, Defendants do not argue that felon disenfranchisement and reenfranchisement laws are "judicially unreviewable," such that Plaintiffs would have no recourse "if the state only disenfranchised ex-felons who were racial or religious minorities," or only "whomever officials deem physically attractive, or individuals who affiliate with or donate to a particular political party," Resp. 9-10. The problem for Plaintiffs is that they have not even alleged that the duly-elected state officials serving on the Clemency Board—officers who take an oath to uphold the law, including constitutional and statutory provisions prohibiting invidious discrimination—have ever engaged in any such malfeasance.

2. Defendants do not attempt "to recharacterize Count 2 as a due process claim." Resp. 23. The cases on which Defendants primarily rely—*Beacham*, *Johnson*, *Richardson* and *Shepherd*—all addressed equal-protection challenges. *Woodard* addressed a due process claim, but the Court there explained that clemency powers "are committed, as is our tradition, to the authority of the executive" and "are rarely, if ever, appropriate subjects for judicial review." 523 U.S. at 276. As the Eleventh Circuit has recognized, those general propositions apply with full force where, as here, a convicted felon brings an equal-protection challenge to a state's clemency procedures. *Banks*, 592 F. App'x at 773. In addition, Plaintiffs miss the mark in arguing that Florida's eminently reasonable reenfranchisement process, *see* Mot. 3, 5-8, 26-29, is irrelevant to their equal-protection challenge. Those procedures help to ensure that the Board obtains and reviews the full range of information relevant to

"gaug[ing] the progress and rehabilitation of a convicted felon," *Shepherd*, 575 F.2d at 1115; such review helps to effectuate the State's legitimate "interest in limiting the franchise to responsible voters," *id.*; and the State could reasonably conclude that the virtues of employing that totality-of-the-circumstances approach outweigh the benefits of using a mechanical formula of the kind Plaintiffs would prefer.

Moreover, Defendants do not rely solely on the extensive *process* the Board affords. They also rely on the eminently reasonable *factors* that, by the Complaint's own admission, the Board considers in rendering its decisions. Mot. 5-8, 26-28. These factors—such as illegal registration and voting, post-sentence drug and alcohol use, and evidence of remorse and reformation, *see* DE29 ¶¶ 55, 56, 59, 61—are reasonably related to the State's legitimate governmental interest in "limiting the franchise to responsible voters." *See Shepherd*, 575 F.2d at 1115.

3. Novel legal theories have real-world consequences, and this Court need not and should not close its eyes to unavoidable doctrinal and practical implications of accepting Plaintiffs' equal-protection claim. *See* Resp. 32-33. That claim carries vast and troubling implications for other kinds of clemency. *See* Mot. 17-19, 21-22. Plaintiffs' response shows why. To establish a violation of equal protection in this context, Plaintiffs argue, they "need only establish that 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." Resp. 22. If the absence of a "legal rule," standing alone, is fatal to Florida's re-enfranchisement procedure, however, why is it not also fatal to

other kinds of clemency decisions—including the decision whether to commute a death sentence, grant a liberty-conferring pardon, or restore a convicted felon's right to keep and bear arms?

It is no answer to say that "Plaintiffs only challenge the unfettered discretion involved in restoration of *voting* rights decisions." Resp. 26. Plaintiffs do not and cannot contend that felons have a stronger interest in voting than in avoiding execution, undoing the substantial deprivation of liberty attending protracted incarceration, or keeping a gun to effectuate "'the natural right'" of "'self-preservation . . . and defence,'" *District of Columbia v. Heller*, 554 U.S. 570, 594 (2008) (quoting 1 Blackstone Commentaries on the Laws of England 139-40 (1765)). Nor do Plaintiffs offer any principled basis for holding that a clear "legal rule" should be required as a matter of constitutional law in making some but not all kinds of clemency determinations.

4. Plaintiffs are wrong to say that "the remedies sought are consistent with *Richardson*," Resp. 5. If, as Plaintiffs assert, the problem with Florida's voting rights restoration procedure is that it "lacks any codified, objective test or set of criteria," Resp. 25, the logical remedy would be for the State to put some such test or criteria in place. But Plaintiffs do not ask for an order directing the State to do that. Instead, they ask for this Court to rewrite Florida law to provide for automatic restoration of voting rights upon completion of a convicted felon's sentence. Resp. 6; *see* Mot. 8

(citing DE29 at 73-79). That is exactly what *Richardson* held that states need not do. 418 U.S. at 56.

It is not surprising that Plaintiffs do not ask for a remedy reasonably tailored to address the alleged constitutional infirmity of which they complain. After all, a more "objective test," Resp. 25, might well work to the disadvantage of convicted felons. For example, Florida could "permanently disenfranchise convicted felons," *Johnson*, 405 F.3d at 1217, without providing any process—discretionary or otherwise—for restoration. Alternatively, the State might adopt objective criteria that make it harder for convicted felons to regain the franchise, such as a requirement that all convicted felons maintain a *crime-free* (and not just a *felony-free*) record for seven years following the completion of the sentence. *See* Fla. R. Exec. Clemency 10(A)(1) (providing that "[a]n individual who does not qualify to be granted clemency under Rule 9" "is eligible to apply" for restoration of civil rights "only if . . . [t]he person has had no new felony convictions for a period of 7 years").

B. Plaintiffs' First Amendment Claims Fail as a Matter of Law.

Defendants "concede" nothing by acknowledging that "Plaintiffs have rights under the First Amendment." Resp. 13. Under *Richardson*, convicted felons do not have a constitutional right to vote, regardless whether such a right is invoked under the First, Fourteenth, or Twenty-Fourth Amendment. 418 U.S. at 54-55; *see, e.g.*, *Harvey v. Brewer*, 605 F.3d 1067, 1080 (9th Cir. 2010) (O'Connor, J.) ("Having lost their right to vote, they now have no cognizable Twenty-Fourth Amendment claim *until*

their voting rights are restored.'") (emphasis added); *Johnson v. Bush*, 214 F. Supp. 2d 1333, 1338 (S.D. Fla. 2002) ("[I]t is clear that the First Amendment does not guarantee felons the right to vote."), *aff'd* 415 F.3d 1214 (11th Cir. 2005) (en banc). The absence of any constitutionally protected "right to vote" spells the end of Plaintiffs' First Amendment claim, because alleged "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." Mot. 10.

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

Contrary to Plaintiffs' assertion, for example, Defendants do not "dismiss all First Amendment case law on unfettered discretion in administrative licensing and prior restraints as 'unique' and inapplicable to the voting rights context," Resp. 13. Nor do they "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." Resp. 3. Instead, Defendants argue that "convicted felons do not have a constitutional right to vote because Section 2 of the Fourteenth Amendment affirmatively authorizes felon disenfranchisement," and that "Plaintiffs may not circumvent" that "settled law by recharacterizing their right-to-vote claims in the language of the First Amendment." Mot. at 9, 10.

That does not mean, Resp. 5-13, that the Board may flout independent constitutional prohibitions against arbitrary or discriminatory denials of clemency applications. *See Hunter v. Underwood*, 471 U.S. 222, 233 (1985); *Shepherd*, 575 F.2d at 1114; *Banks*, 592 F. App'x at 773; *accord Harvey*, 605 F.3d at 1079; *Williams v. Taylor*, 677 F.2d 510, 516 (5th Cir. 1982). It means that the pertinent protections for convicted felons do not derive from, and may not be bolstered by inapposite references to, caselaw addressing non-felons' constitutionally protected right to vote. *See Harvey*, 605 F.3d at 1079, 1080.

In their response, Plaintiffs cite a host of cases addressing how the First Amendment applies to non-felons who were not challenging state disenfranchisement or reenfranchisement regimes. Resp. 13-17. However, none of those cases holds that the First Amendment gives convicted felons a right to vote, and Plaintiffs do not argue otherwise.

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

III. THE COMPLAINT FAILS AS A MATTER OF LAW INSOFAR AS IT CHALLENGES THE EXECUTIVE CLEMENCY BOARD'S RULE REQUIRING CONVICTED FELONS NOT TO COMMIT ADDITIONAL FELONIES FOR A DEFINITE PERIOD FOLLOWING COMPLETION OF THEIR SENTENCES.

As construed by the Supreme Court, Section 2 of the Fourteenth Amendment affirmatively authorizes states to *permanently* disenfranchise all convicted felons. *Johnson*, 405 F.3d at 1217 (citing *Richardson*, 418 U.S. at 53-55); *see also Harvey*, 605 F.3d at 1079 ("[O]nce a felon is properly disenfranchised a state is at liberty to keep him in that status indefinitely and never revisit that determination."). It follows that Florida may also take the less restrictive step of (1) *temporarily* disenfranchising all convicted felons for any fixed span of time following completion of their criminal sentences, and (2) providing that an application for restoration of voting rights will not be granted if a convicted felon who has already lost the right to vote commits yet another franchise-disqualifying felony during the intervening period. That is just what Rules 9 and 10 do.

The "waiting period requirements" that Plaintiffs challenge, Resp. 31, bear a rational relationship to Florida's legitimate "interest in limiting the franchise to responsible voters," as they help the Board to make sure that felons who have completed their sentences no longer "manifest[] a fundamental antipathy to the criminal laws of the state or of the nation." *See Shepherd*, 575 F.2d at 1115; *see also Green v. Bd. of Elections*, 380 F.2d 445, 451 (2d Cir. 1967) (Friendly, J.) ("it can scarcely be deemed unreasonable for a state to decide that perpetrators of serious crimes shall not

take part in electing the legislators who make the laws," "especially" given the "heavy incidence of recidivism").

Adopting such waiting periods is not tantamount to "second-guessing the sentence," Resp. 31, because the sentencing authority is not tasked with deciding whether and for how long a felon should be disenfranchised. Similarly, it is not for Plaintiffs to say whether "[c]ontinued denial of the right to vote" is "counterproductive" to the state's "interest in ensuring rehabilitation," Resp. 31. Duly-elected state officials could reasonably conclude otherwise. In any event, Florida's "interest in limiting the franchise to responsible voters," *Shepherd*, 575 F.2d at 1115, is not the same as—and need not be subordinated to—its real but distinct interest in "ensuring rehabilitation," Resp. 31.

IV. THE IMPROPER DEFENDANTS SHOULD BE DISMISSED.

Plaintiffs offer no direct response to Defendants' motion under Rule 12(b)(6). Section 1983 authorizes suits only 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. Plaintiffs concede that the defendants in question "have not created the unconstitutional disenfranchisement and reenfranchisement scheme" and "do not grant or deny restoration applications." Resp. 33. Accordingly, it is now undisputed that the Improper Defendants have not subjected them, or caused them to be subjected, to "the deprivation of any rights, privileges, or immunities secured by" federal law, 42 U.S.C. § 1983. Nevertheless, Plaintiffs argue, those defendants need

not be dismissed because they do things that are related to Plaintiffs' overly broad request for relief. *See* Resp. 33-38. That puts the cart before the horse. To be entitled to an injunction against the Improper Defendants, Plaintiffs must first plead a section 1983 claim against them. Plaintiffs have failed to do so.

Plaintiffs' response to Defendants' motion under Rule 12(b)(1) misses the mark. The Eleventh Amendment bars suits against state officials "unless the state officer has some responsibility to enforce the statute or provision at issue." *Summit Med. Assocs., P.C. v. Pryor*, 180 F.3d 1326, 1341 (11th Cir. 1999). Here again, Plaintiffs concede that the Improper Defendants lack authority to enforce the constitutional provisions, statutes, and clemency rules they challenge. Resp. 33. So far as the Improper Defendants are concerned, that should be the end of this case.

CONCLUSION

The motion to dismiss should be granted.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on this 19th day of July, 2017, a copy of the foregoing reply was served on all counsel of record through the Court's CM/ECF Notice of Electronic Filing System.

/s/ *Amit Agarwal*
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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 reply contains 4,697 words.

/s/ *Amit Agarwal*
Attorney