No. 18-11388-G

In the United States Court of Appeals for the Eleventh Circuit

JAMES MICHAEL HAND, *et al.*,
Plaintiffs/Appellees,

v.

RICK SCOTT, *et al.*,
Defendants/Appellants.

DEFENDANTS/APPELLANTS' INITIAL BRIEF ON APPEAL

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
NO. 4:17-CV-128-MW-CAS

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STATEMENT REGARDING ORAL ARGUMENT

This Court has set oral argument for the week of July 23, 2018. *See* Notice to Counsel or Parties (May 1, 2018).

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STATEMENT OF SUBJECT-MATTER AND APPELLATE JURISDICTION

This is an appeal from a final judgment entered by the U.S. District Court for the Northern District of Florida in a civil case. DE161. Because Plaintiffs' claims arise under federal law, *see* DE29 ¶¶ 82–120, the district court had jurisdiction pursuant to 28 U.S.C. § 1331. This Court has jurisdiction under 28 U.S.C. § 1291. Judgment was entered on March 27, 2018. DE161. On April 4, 2018, Appellants filed a timely notice of appeal. DE162; *see* Fed. R. App. P. 4(a)(1)(A).

STATEMENT OF THE ISSUES

I. Whether Florida's system for offering executive clemency to convicted felons is facially unconstitutional under the First Amendment or the Equal Protection Clause of the Fourteenth Amendment because the Executive Clemency Board is not required to make clemency decisions implicating restoration of voting rights pursuant to specific standards.

II. Whether Florida's system for offering executive clemency to convicted felons is facially unconstitutional under the First Amendment insofar as the Executive Clemency Board need not make clemency decisions implicating restoration of voting rights within specific time constraints.

III. Whether the district court abused its discretion in enjoining the State from permanently ending vote-restoration processes and commanding the Executive Clemency Board to promulgate new vote-restoration rules within 30 days.

STATEMENT OF THE CASE

I. Legal Background

For 150 years, Florida law has entrusted the State's highest-ranking executive officers with discretion to restore the civil rights, including voting rights, of convicted felons. DE160:18. Fifty years ago, a convicted felon by the name of Rufus Beacham sought to enjoin Florida's Governor and the State Cabinet from continuing to grant and deny such petitions "in a purely discretionary manner without resort to specific standards." *Beacham v. Braterman*, 300 F. Supp. 182, 183 (S.D. Fla. 1969). A three-judge panel of the district court unanimously rejected Beacham's plea, holding that it was not "a denial of equal protection of law" for the State's clemency officials "to restore discretionarily the right to vote to some felons and not to others," even though "[n]either the Governor of Florida nor members of the State Cabinet [had] established specific standards to be applied to the consideration" of such petitions. *Id.* at 183, 184.

The case did not end there. In a direct appeal, Beacham asked the Supreme Court to decide whether Florida's discretionary pardon procedure "violate[s] the Constitution in that there are no ascertainable standards governing the recovery of the fundamental right to vote?" Jurisdictional Statement Question C, *Beacham v. Braterman*, 396 U.S. 12 (1969) (No. 404), 1969 WL 136703, at *3. The Supreme Court resolved that issue by summarily affirming the lower court's judgment.

Beacham v. Braterman, 396 U.S. 12 (1969).

Post-*Beacham* caselaw establishes three additional principles of relevance to this case. First, as construed by the Supreme Court, Section 2 of the Fourteenth Amendment gives States an "affirmative sanction" to "disenfranchise convicted felons *permanently*." DE144:9, 39 (emphasis added); *see Richardson v. Ramirez*, 418 U.S. 24, 54 (1974); *Johnson v. Governor of Fla.*, 405 F.3d 1214, 1217 (11th Cir. 2005) (en banc). Second, strict scrutiny does not apply to an equal-protection claim challenging the "selective . . . reenfranchisement of convicted felons"; instead, the challenged practice "must bear a rational relationship to the achieving of a legitimate state interest." *Shepherd v. Trevino*, 575 F.2d 1110, 1114–15 (5th Cir. 1978); *see Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc). Third, the First Amendment "afford[s] no greater protection for voting rights claims than that already provided by the Fourteenth" Amendment. *Burton v. City of Belle Glade*, 178 F.3d 1175, 1187 n.9 (11th Cir. 1999).

II. Course of Proceedings

A. Plaintiffs ("Appellees") are a group of nine convicted felons who have completed their sentences but are ineligible to vote. DE144:2 n.2. They brought suit against Florida's Governor and the other members of the Executive Clemency Board ("the Board," "Defendants," or "Appellants"), claiming that the State's discretionary clemency system violates the Equal Protection Clause because the Board has

discretion to deny vote-restoration applications without resort to specific standards. DE29 ¶¶ 93–101 (Count Two). The absence of such standards, Plaintiffs argue, also violates the First Amendment, *id.* ¶¶ 82–92 (Count One), as do the lack of definitive time limits for acting on applications seeking restoration of the right to vote, *id.* ¶¶ 102–12 (Count Three), and certain rules requiring convicted felons to wait five or seven years before applying for restoration of civil rights, *id.* ¶¶ 113–20 (Count Four).

Plaintiffs do not claim that Florida's discretionary clemency system has the purpose or effect of discriminating on the basis of race, viewpoint, or any other improper consideration. DE29. In addition, all of Plaintiffs' claims are facial challenges. *Id.* ¶ 71. Thus, none of their four counts alleged that the Clemency Board *actually discriminated* against any particular applicants based on constitutionally impermissible factors. *Id.* Instead, Plaintiffs claimed that the unfettered discretion vested in the Board creates a constitutionally unacceptable *risk* of illicit discrimination. *Id.* ¶¶ 4, 89.

Accordingly, at an early stage of the case, the district court denied Plaintiffs' motion to compel certain Confidential Case Analyses ("CCAs") pertaining to non-parties, explaining that those materials "are not relevant to the claims set forth in Plaintiffs' operative complaint." DE62:1; *see also id.* ("To the extent they are marginally relevant, the CCAs [would] only serve as individual examples in support

of Plaintiffs' facial claims."). Relying on that ruling, the Board did not seek to introduce evidence or make arguments tending to rebut "not relevant" insinuations of invidious discrimination involving particular clemency applicants. *E.g.*, DE103:21 (citing DE62:1); *see id.* at 2–3; DE137:13; DE141:16.

B. On cross-motions for summary judgment, the district court accepted three of Plaintiffs' claims (Counts One, Two, and Three), but rejected their challenge to the waiting periods (Count Four). DE144.

As to Plaintiffs' equal-protection challenge, the court did not distinguish this case from *Beacham*. Rather, the court reasoned, it was free to set aside the Supreme Court's ruling in that case because, "[u]nlike a fine wine, this summary affirmance has not aged well." *Id.* at 34. In support of that conclusion, the court did not point to any subsequent case holding that vote-restoration decisions must be made pursuant to specific standards. *Id.* Instead, the court explained, one "statement" made by the three-judge panel "carries no precedential value because it stands for the flawed presumption that an unconstitutional executive clemency structure is immune from judicial review." *Id.*

Applying "strict scrutiny," *id.* at 20–21, the court held that Florida's clemency system violates the First Amendment because vote-restoration decisions are not made pursuant to specific standards. *Id.* at 17–27. In addition, the court concluded that "the Board's lack of clear time limits in processing and deciding clemency

applications violates the First Amendment." *Id.* at 27–28.

In its remedial order, the court declared that four of Florida's constitutional and statutory provisions, along with the Rules of Executive Clemency, are partially invalid under the First and/or Fourteenth Amendments. DE160:21. In addition, the court permanently enjoined the Board "from enforcing the current unconstitutional vote-restoration scheme," ordered that the Board was "permanently enjoined from ending all vote-restoration processes," and directed that, within 30 days, the Board "shall promulgate specific and neutral criteria to direct vote-restoration decisions in accordance with this Order," as well as "meaningful, specific, and expeditious time constraints in accordance with this Order." *Id*.

The court did not afford the parties a hearing before issuing its summary-judgment order or its injunction.

C. The Board filed a notice of appeal, DE162, and the district court denied its application for a stay. DE167.

In a published opinion, a panel of this Court stayed the district court's judgment pending appeal. *Hand v. Scott*, 888 F.3d 1206 (11th Cir. 2018). As to the merits of Plaintiffs' claims, the Court summarized its conclusion as follows:

> The Fourteenth Amendment expressly empowers the states to abridge a convicted felon's right to vote. U.S. Const. amend. XIV, § 2. Binding precedent holds that the Governor has broad discretion to grant and deny clemency, even when the applicable regime lacks any standards. And although a reenfranchisement scheme could violate equal

> protection if it had *both* the purpose and effect of invidious discrimination, appellees have not alleged—let alone established as undisputed facts—that Florida's scheme has a discriminatory purpose *or* effect. And the First Amendment provides no additional protection of the right to vote.

Id. at 1207.

The stay panel also determined that "there are serious and substantial problems that inhere in the remedies the district court has chosen." *Id.* at 1213. Under Section 2 of the Fourteenth Amendment, the panel emphasized, a state may "permanently" deny the vote to convicted felons. *Id.* Nevertheless, "the district court enjoined Florida from exercising the authority that § 2 clearly establishes." *Id.* A majority of the panel also took issue with the district court's order directing the Executive Clemency Board to promulgate new standards within 30 days of its remedial order. *Id*. at 1213–14. As the panel saw it, that was "a tall order, even assuming the district court had the authority to enter this command in the first place." *Id*. at 1214. "After all," the panel explained, "there are a multitude of considerations" for the Board to study before revamping the State's clemency system. *Id.*

Judge Martin concurred in part and dissented in part. *Id.* at 1215. Judge Martin "agree[d] with the majority that the Supreme Court's summary affirmance in *Beacham* appears to foreclose the plaintiffs' Fourteenth Amendment claims." *Id.* at 1217 n.3. In her view, however, circuit precedent leaves open the possibility that the First Amendment affords greater protection for a convicted felon's interest in voting

than does the Fourteenth Amendment. *Id.* at 1217–18.

Based on Supreme Court precedent, Judge Martin concluded that "the Constitution empowers states to choose to permanently disenfranchise those convicted of felonies." *Id.* at 1221–22. Thus, she agreed with the majority that the district court exceeded the scope of its remedial authority insofar as it prohibited the State from "ending all vote restoration processes." *Id.* at 1221.

III. Statement of the Facts

This case involves facial challenges to Florida's system for granting executive clemency to convicted felons. The following section provides an overview of how that system works.

Under Florida law, "[n]o person convicted of a felony . . . shall be qualified to vote or hold office until restoration of civil rights . . . ." Fla. Const. art. VI, § 4(a); *see* Fla. Stat. § 97.041(2)(b). Subject to certain exceptions not relevant here, "the governor may, . . . with the approval of two members of the cabinet, grant full or conditional pardons, restore civil rights, commute punishment, and remit fines and forfeitures for offenses." Fla. Const. art. IV, § 8(a); *see* Fla. Stat. § 944.292(1). Florida's current restoration system is reflected in the Rules of Executive Clemency ("Rules"), which were last amended by unanimous consent of the Board on March 9, 2011. *See* DE107-1:2, 21 (Rules 2, 19).

Decisions whether to restore civil rights (among which is the right to vote)

rest with the Executive Clemency Board, which consists of the Governor, Attorney General, Chief Financial Officer, and Commissioner of Agriculture. The Governor, acting alone, may deny restoration applications, but the concurrence of the Governor and two other Board members is required to grant them. *See* DE107-1:2–3 (Rules 1, 4); Fla. Const. art. IV, § 8(a); Fla. Stat. § 940.01(1). The same application is used for all types of clemency, including pardons, restoration of civil rights, and the specific authority to own, possess, and use firearms. Applicants must provide certain information and indicate on the form the type(s) of clemency they seek. *See* DE107-2; *see also* DE107-1:5–7, 10–14 (Rules 5, 6, 9, 10).

Individuals may apply for restoration of civil rights without a hearing if they have not been convicted of any listed serious felonies, have not committed or been arrested for any crimes for five years following completion of their sentences, and meet several other conditions. *Id*. at 10–12 (Rule 9). For all other individuals, a hearing is required and the Rules require applicants to remain felony-free for seven years after completing their sentences before they may apply. *Id.* at 14 (Rule 10).

Voting rights may be restored by applying for a pardon or restoration of civil rights in general, *see* Fla. Stat. § 944.292(1); the Rules do not create a separate "vote-restoration" process by which applicants may seek only restoration of voting rights. *See generally* DE107-1. Like decisions on whether to commute sentences or restore firearms authority, decisions on whether to grant pardons or restoration of civil rights

are at the Board's discretion. *Id.* at 3–4 (Rule 4).

The Florida Commission on Offender Review ("FCOR") "operates as the administrative and investigative arm of the [Clemency] Board." DE107-3:10; *see* Fla. Stat. §§ 947.01, 947.13(1)(e). FCOR reviews all clemency applications, and, for those that require a hearing, it investigates applicants' "criminal convictions; history of adjustment to incarceration or supervision; criminal record; traffic record; payment of fines, court costs, public defender fees and victim restitution; history of domestic violence; alcohol and substance abuse history; voter registration information; as well as judicial, state attorney and victim input." DE107-3:18. FCOR "conducts quality assurance reviews on each" of its investigations. *Id.* After its investigations, FCOR prepares a report and recommendation called a Confidential Case Analysis ("CCA").

The CCAs contain several categories of information that the Board considers in making its decisions. They disclose applicants' franchise-disqualifying felony convictions, including the circumstances of the offenses as reported by law enforcement, as well as applicants' version of the offenses. They also disclose prior and subsequent criminal records and the circumstances of those offenses. In addition, they contain information relating to any domestic-violence issues, citizenship, alcohol and drug abuse, traffic records, employment, military history, illegal voting and registration activity, any comments from judges and prosecutors,

applicants' stated reasons for seeking restoration of rights, and applicants' attitudes in dealing with FCOR investigators. FCOR does not inquire into, and the CCAs do not disclose, the applicant's political views or voting history (other than any history of illegal voting). The CCAs end with a recommendation from FCOR. *See* DE108; DE109; DE111 (Plaintiffs' CCAs, attached as Exs. M–T to DE103 and filed under seal).

Upon transmittal of the CCA, an application is placed on the agenda for the next quarterly Board hearing. DE107-1:15–16 (Rules 11, 12). Applicants receive a copy of their CCA "prior to" their hearing, DE107-3:18, and they are encouraged to attend and afforded an opportunity to address the Board. DE107-1:15–16 (Rule 12). The Board may grant, conditionally grant, or deny applications, either at or after the hearing. *Id.* at 3–4 (Rule 4). A denial triggers a two-year waiting period before eligibility to re-apply. *Id.* at 17 (Rule 14).

Hearings on clemency applications are open to the public and broadcast by the Florida Channel; video recordings are available on the Internet.[1] As they are

[1] *See*, *e.g.*, DE101-142 (video of Executive Clemency Board hearing held on June 2, 2011), *available at* http://thefloridachannel.org/videos/621111-executive-clemency-board-meeting/; DE101-144 (video of Executive Clemency Board hearing held on Dec. 16, 2011), *available at* http://thefloridachannel.org/videos/121611-executive-clemency-board-meeting/; DE101-173 (video of

called during the hearings, applications are typically grouped according to whether FCOR has favorably or unfavorably recommended them, so the press and affected applicants may compare each Board member's vote on a clemency application with the commission's recommended action.[2] As the broadcast hearings show, Board members do not ask applicants about their political views. As to hearing-based applications, each Board member typically announces his or her vote on each application at the public hearing.[3]

Since adopting the current Rules of Executive Clemency in March 2011, "the Clemency Board has ruled on more than 4,200 applications for the restoration of civil rights." DE163-1:3 ¶ 6.

Executive Clemency Board hearing held on Dec. 7, 2016), *available at* http://thefloridachannel.org/videos/12716-executive-clemency-board-meeting/; *see also* DE144:2, 23-24, 30 (citing these hearings).

[2] *See, e.g.*, DE101-142, http://thefloridachannel.org/videos/621111-executive-clemency-board-meeting/, at 0:03:27–0:03:32 (calling favorably recommended pardon applicants); DE101-144, http://thefloridachannel.org/videos/121611-executive-clemency-board-meeting/, at 0:03:31–0:03:38 (same); DE101-173, http://thefloridachannel.org/videos/12716-executive-clemency-board-meeting/, at 0:05:17–0:05:22 (calling unfavorably recommended pardon applicants).

[3] *See, e.g.*, DE101-143 (video of Executive Clemency Board hearing held on Sept. 21, 2011), *available at* http://thefloridachannel.org/videos/92111-executive-clemency-board-meeting/, at 2:01:12–2:01:25 (Governor moved to grant restoration of civil rights and other Board members concurred); DE101-174 (video of Executive Clemency Board hearing held on Dec. 7, 2016), *available at* http://thefloridachannel.org/videos/12716-executive-clemency-board-meeting/, at 2:06:42–2:06:47 (same).

IV. Standards of Review

This Court "review[s] a district court's grant of summary judgment de novo, viewing the record and drawing all reasonable inferences in the light most favorable to the non-moving party." *Johnson*, 405 F.3d at 1217 (quotation marks omitted).

The district court's entry of a permanent injunction is reviewed for an abuse of discretion. *Thomas v. Bryant*, 614 F.3d 1288, 1303 (11th Cir. 2010). Underlying legal determinations are reviewed de novo. *Id*. "A district court by definition abuses its discretion when it makes an error of law." *Arthur v. King*, 500 F.3d 1335, 1339 (11th Cir. 2007).

SUMMARY OF THE ARGUMENT

I. Florida's 150-year-old system for offering executive clemency to convicted felons is not facially unconstitutional insofar as it gives the Executive Clemency Board discretion to make clemency decisions implicating restoration of voting rights without resort to specific standards.

A. As all three members of the stay panel agreed, Plaintiffs' equal-protection claim is foreclosed by the Supreme Court's affirmance in *Beacham v. Braterman*. The district court was not free to cast *Beacham* aside, and it was wrong to assert that *Beacham* "has not aged well." The Supreme Court and this Court have both cited *Beacham* with approval; post-*Beacham* caselaw expressly and unambiguously affirms the validity of purely discretionary clemency decisions; no court, before or

after *Beacham*, has ever held or opined that clemency decisions in general or vote-restoration decisions in particular must be made pursuant to specific standards; and a veritable host of States give clemency officials broad discretion to grant pardons to, and thereby restore the voting rights of, some or all categories of convicted felons.

Generally applicable equal-protection principles confirm the validity of Florida's discretionary clemency system. A law providing for the selective reenfranchisement of convicted felons survives equal-protection scrutiny if it is rationally related to the advancement of a legitimate state interest. Florida's clemency system easily passes that test. The Board employs a careful and thorough process for evaluating clemency applications; its public hearings guard against improper decision-making; and its case-by-case approach is reasonably calculated to effectuate the Supreme Court's teaching that "individual acts of clemency inherently call for discriminating choices because no two cases are the same," *Schick v. Reed*, 419 U.S. 256, 268 (1974).

Put differently, it is not and cannot be irrational for a clemency system to be based on discretion, because well-settled caselaw holds that discretion is one of the defining characteristics of executive clemency.

B. Plaintiffs may not circumvent caselaw establishing the validity of discretionary clemency decisions by repackaging failed Fourteenth Amendment claims in the language of the First Amendment. "It is well established in this Circuit

that the First Amendment provides no greater protection for voting rights than is otherwise found in the Fourteenth Amendment." *Hand*, 888 F.3d at 1211. And "a purely discretionary clemency regime does not, without something more, violate the Fourteenth Amendment." *Id.* at 1212. Thus, the law of this Circuit compels the conclusion that Florida's discretionary system for restoring civil rights to convicted felons does not violate the First Amendment.

At any rate, Plaintiffs' First Amendment challenge to Florida's discretionary clemency regime fails on its own terms. As the stay panel explained, the cases on which Plaintiffs rely are "inapposite to a reenfranchisement case." Plaintiffs' argument to the contrary is based on at least two assumptions: first, that voting is "First Amendment-protected conduct" for convicted felons, even though Section 2 of the Fourteenth Amendment, as the district court recognized, gives States an "affirmative sanction" to "disenfranchise convicted felons permanently"; and second, that grants of executive clemency are "licenses" or "permits" for purposes of First Amendment jurisprudence. Both assumptions must be valid for Plaintiffs to prevail on their First Amendment challenge; neither assumption can be reconciled with established caselaw. Accordingly, and as the stay panel noted, every court to have considered the issue has rejected First Amendment challenges of this kind.

II. For similar reasons, Florida's clemency system does not run afoul of the First Amendment insofar as it lacks definitive time limits for acting on clemency

applications. Because, as the district court acknowledged, Section 2 of the Fourteenth Amendment gives States an "affirmative sanction" to *permanently* deny the vote to convicted felons, the First Amendment may not reasonably be construed to mean that the lack of definitive time limits in processing and deciding vote-restoration applications is *facially* unconstitutional. As Justice O'Connor has explained, "once a felon is properly disenfranchised a state is at liberty to keep him in that status indefinitely and never revisit that determination." *Harvey v. Brewer*, 605 F.3d 1067, 1079 (9th Cir. 2010) (O'Connor, J.).

That does not mean that the Board may use the lack of time limits to mask invidious discrimination based on race, viewpoint, or any other impermissible consideration. Rather, it means that a party seeking relief for alleged discrimination must plead and prove such a claim and not invoke the mere "risk" of discrimination as cause for striking down longstanding and presumptively valid state laws.

III. The district court abused its discretion in granting injunctive relief.

A. As all three members of the stay panel agreed, the district court exceeded the scope of its remedial authority by permanently enjoining the State from ending vote-restoration processes. Section 2 of the Fourteenth Amendment expressly empowers States to permanently prohibit convicted felons from voting, and a federal court may not bar a State from adopting a policy affirmatively authorized by the United States Constitution.

B. The district court abused its discretion in ordering the Executive Clemency Board to promulgate new vote-restoration criteria in 30 days. The State's greater power to *permanently* discontinue vote-restoration processes includes the lesser power to *temporarily* discontinue vote-restoration processes until the State determines whether, when, and how to put a new vote-restoration system in place. In addition, a federal court order commanding state executive officers to "promulgate" a concededly discretionary state policy—i.e., a policy not required by federal law—contravenes horizontal and vertical separation-of-powers principles. Finally, it was arbitrary and unreasonable for the district court to order the Executive Clemency Board to revamp a 150-year-old clemency system in 30 days.

ARGUMENT

I. FLORIDA'S CLEMENCY PROCESS IS NOT FACIALLY UNCONSTITUTIONAL INSOFAR AS IT AUTHORIZES THE EXECUTIVE CLEMENCY BOARD TO MAKE CLEMENCY DECISIONS IMPLICATING RESTORATION OF VOTING RIGHTS WITHOUT RESORT TO SPECIFIC STANDARDS.

A. The Equal Protection Clause Does Not Require Vote-Restoration Decisions To Be Made Pursuant To Specific Standards.

1. In assessing Plaintiffs' constitutional challenges, the district court should have looked to "specific precedent from this court and the Supreme Court dealing with criminal disenfranchisement," as those "cases establish clear standards by which to judge state action." *Johnson*, 405 F.3d at 1226. *Beacham* is one such case. *Id.*

As Plaintiffs have explained, this suit involves "a challenge to discretionary, standard-less decisions on the right to vote." DE43:28. *Beacham* addressed the exact same challenge, holding that it was not "a denial of equal protection of law" for Florida's Governor and the Cabinet "to restore discretionarily the right to vote to some felons and not to others," even though "[n]either the Governor of Florida nor members of the State Cabinet [had] established specific standards to be applied to the consideration of [such] petitions." *Beacham*, 300 F. Supp. at 183, 184.

Beacham took aim at that holding in his appeal to the Supreme Court. In his statement of jurisdiction, Beacham asked the Supreme Court to decide whether Florida's discretionary pardon procedure "violate[s] the Constitution in that there are no ascertainable standards governing the recovery of the fundamental right to vote." Jurisdictional Statement Question C, *Beacham v. Braterman*, 396 U.S. 12 (1969) (No. 404), 1969 WL 136703, at *3. By summarily affirming the district court's ruling, the Supreme Court necessarily decided that question in the negative.

Beacham "remains binding precedent that cannot, as the district court suggested, simply be ignored." *Hand*, 888 F.3d at 1208; *see* DE144:34. A summary affirmance by the Supreme Court prohibits lower courts "from coming to opposite conclusions on the precise issues presented and necessarily decided." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (per curiam). Of particular relevance here, "[s]ummary affirmances . . . without doubt reject the specific challenges presented

in the statement of jurisdiction." *Id*.

Beacham may not be distinguished because the challenger there sought restoration of voting rights by applying for a pardon. *See* Resp. to Stay Mot. at 18. The pardon Beacham sought "would have included a restoration of his civil rights," 300 F. Supp. at 183; *see* Fla. Stat. § 944.292(1), among which is the right to vote. Thus, *Beacham* necessarily decided that the Board need not employ specific standards when it assesses an application seeking restoration of civil rights *and* other rights. It follows that the Board need not use specific standards when an applicant seeks *only* restoration of civil rights. Under Appellees' reading of *Beacham*, the Constitution would give clemency applicants *less* protection when *more* of their rights are at stake—an absurd result.

Appellees have sought to distinguish *Beacham* by asserting that "[t]he three-judge court did not address a challenge to discretionary, standard-less decisions on the right to vote." DE43:28. That would have come as news to the three-judge court, which held that it was not "a denial of equal protection of law and due process 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," 300 F. Supp. at 184, where it was undisputed that such decisions were made "in a purely discretionary manner without resort to specific standards," *id.* at 183.

In short, the Supreme Court's affirmance in *Beacham* "establishes the broad

discretion of the executive to carry out a standardless clemency regime." *Hand*, 888 F.3d at 1208. Hence, *Beacham* forecloses Plaintiffs' "challenge to discretionary, standard-less decisions on the right to vote." DE43:28. If this Court is "bound" by *Beacham*, so too was the district court. *See Johnson*, 405 F.3d at 1226–27.

2. Even if not controlling, *Beacham* is persuasive: Same state; same claim; same core argument. It is wrong to say that *Beacham* "has not aged well," DE144:34, for three reasons.

First, the Supreme Court and this Court have both cited *Beacham* with approval. *See Ramirez*, 418 U.S. at 53; *Johnson*, 405 F.3d at 1226–27. Indeed, this Court has instructed that courts *must* look to *Beacham* as one of several cases supplying "specific precedent from this court and the Supreme Court dealing with criminal disenfranchisement." *Johnson*, 405 F.3d at 1226. Moreover, no subsequent authority casts doubt on *Beacham*'s holding. Fifty years have passed since *Beacham* "establishe[d] the broad discretion of the executive to carry out a standardless clemency regime," *Hand*, 888 F.3d at 1208. Since then, only two courts have disagreed with or sought to distinguish *Beacham*; both decisions were reversed on appeal. *See Ramirez v. Brown*, 507 P.2d 1345, 1353 n.10 (Cal. 1973), *rev'd sub nom. Richardson v. Ramirez*, 418 U.S. 24 (1974); *Allen v. Ellisor*, 477 F. Supp. 321, 325 (D.S.C. 1979), *rev'd*, 664 F.2d 391 (4th Cir. 1981), *cert. granted, judgment vacated*, 454 U.S. 807 (1981).

Second, post-*Beacham* caselaw "confirm[s] the broad discretion of the executive to grant and deny clemency," *Hand*, 888 F.3d at 1209, notwithstanding the theoretical risk of discrimination that comes with such authority. *See, e.g.*, *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 275–76 (1998); *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 464, 466 (1981); *Smith v. Snow*, 722 F.2d 630, 632 (11th Cir. 1983) (per curiam).

In *Dumschat*, the Supreme Court "held that a state was entitled to vest the Board of Pardons with 'unfettered discretion' to grant pardons based on 'purely subjective evaluations . . . by those entrusted with the decision,' leaving inmates with only a 'unilateral hope' for pardon." *Hand*, 888 F.3d at 1209 (quoting 452 U.S. at 464–66). As the Court explained, "pardon and commutation decisions have not traditionally been the business of courts; as such, they are rarely, if ever, appropriate subjects for judicial review." *Dumschat*, 452 U.S. at 464. That latter "holding" was expressly "reaffirm[ed]" in *Woodard*, which concluded that "the clemency and pardon powers are committed, as is our tradition, to the authority of the executive." 523 U.S. at 276.

Similarly, this Court in *Smith* rejected claims attacking "Georgia's purely discretionary pardon regime." *Hand*, 888 F.3d at 1209 (discussing *Smith*, 722 F.2d at 631–32). The Court reasoned that the failure of Smith's Eighth Amendment claim "necessarily followed" from the fact that his due process claim "was foreclosed by

Dumschat." *Id.* After all, "[i]f a state pardon regime need not be hemmed in by procedural safeguards, it cannot be attacked for its purely discretionary nature." *Id.*; *see Smith*, 722 F.2d at 632 ("If one has no right to procedures, the purpose of which is to prevent arbitrariness and curb discretion, then one clearly has no right to challenge the fact that the decision is discretionary."). Since *Smith*, this Court has expressly and repeatedly approved of discretionary clemency decisions. *See, e.g.*, *Mann v. Palmer*, 713 F.3d 1306, 1316 (11th Cir. 2013) ("Because clemency is committed to the discretion of the executive, due process provides only minimal protections for death-row inmates in the clemency process."); *Valle v. Secretary*, 654 F.3d 1266, 1268 (11th Cir. 2011) ("The Florida Constitution vests the clemency power solely in the executive branch, and exercise of the power is discretionary.").

As those and other cases make clear, governmental decisions are not unconstitutionally "arbitrary" merely because they are not made pursuant to specific standards or objective criteria. *E.g.*, *Dumschat*, 452 U.S. at 464–66. Indeed, many important governmental decisions—including presidential pardons, congressional declarations of war, and gubernatorial vetoes, just to name a few—are "unmoored from any constraints, guidelines, or binding procedures," DE144:36–37. Countless other decisions are informed by flexible and open-ended standards but not "direct[ed]" by "specific and neutral criteria," DE160:21; *see, e.g.*, 18 U.S.C. § 3553(a) (providing that "[t]he court, in determining the particular sentence to be

imposed, shall consider," among other factors, "the nature and circumstances of the offense and the history and characteristics of the defendant," as well as "the need for the sentence imposed . . . to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense").

In all such cases, the absence of "specific and neutral criteria" does not support an inference that officers who have been entrusted with discretion are making decisions arbitrarily, for improper reasons, or without careful consideration of the full range of pertinent information. *See, e.g.*, *Beckles v. United States*, 137 S. Ct. 886, 894 (2017) (concluding that "the system of purely discretionary sentencing that predated the Guidelines was constitutionally permissible" and that "a system of unfettered discretion is not unconstitutionally vague"). That is particularly true when, as here, those officers are chosen by and accountable to the electorate. *See Banks v. Sec'y, Fla. Dep't of Corrs.*, 592 F. App'x 771, 773–74 (11th Cir. 2014); *Ex Parte White*, 178 So. 876, 880 (Fla. 1938).

Third, Appellees have not cited, and Appellants have not found, any case—from this or any other Court—holding that clemency decisions in general or vote-restoration decisions in particular must be made pursuant to specific standards. The absence of any such authority speaks volumes. At least thirteen other states appear to have discretionary vote-restoration procedures for all or some categories of felons,

even if those felons have already completed their sentences.[4] And a veritable host of states give clemency officials discretion to grant pardons to—and thereby restore the voting rights of—felons who seek restoration of voting rights but have not yet been released from incarceration, successfully completed probation, or otherwise satisfied criteria triggering automatic restoration of voting rights.[5] Thus, if it is facially

[4] Those States are Alabama, Arizona, Delaware, Iowa, Kentucky, Maryland, Mississippi, Nevada, New Jersey, Tennessee, Virginia, Washington, and Wyoming. *See* Ala. Code §§ 15-22-36(a), 15-22-36.1(g), (h); Ariz. Rev. Stat. §§ 13-908, 13-911; Del. Const. art. V, § 2; 15 Del. Code §§ 6102(a)(1), 6103(b); Iowa Const. art. II, § 5; Iowa Const. art. IV, § 16; Iowa Governor's Exec. Order 2011-70, *available at* http://publications.iowa.gov/10194/1/BranstadEO70.pdf; *Griffin v. Pate*, 884 N.W.2d 182, 194 (Iowa 2016); Ky. Const. § 145; Ky. Rev. Stat. § 196.045; Kentucky Governor's Exec. Order 2015-52, *available at* http://apps.sos.ky.gov/Executive/Journal/execjournalimages/2016-MISC-2015-0052-243103.pdf; Md. Code Ann., Election Law, § 3-102(b)(1); Miss. Const. art. XII, §§ 241, 253; Miss. Const. art. V, § 124; Miss. Code. §§ 47-7-41, 99-19-37; Nev. Rev. Stat. §§ 213.155, 213.157; N.J. Stat. §§ 2C:51-3, 19:4-1; Tenn. Code Ann. §§ 40-29-202(a)(1), 40-29-204; *Carroll v. Raney*, 953 S.W.2d 657, 659 (Tenn. 1997); *Fite v. State ex rel. Snider*, 88 S.W. 941, 943 (Tenn. 1905); Va. Const. art. II, § 1; Va. Const. art. V, § 12; Va. Code. § 24.2-101; *Howell v. McAuliffe*, 788 S.E.2d 706, 716–19, 722–24 (Va. 2016); Wash. Stat. Ann. §§ 9.96.010, 29A.04.079; Wyo. Code §§ 6-10-106, 7-13-105, 22-1-102(a)(xxvi), 22-3-102(a)(v).

[5] Only two states—Maine and Vermont—allow incarcerated felons to vote. Felon Voting Rights, Nat'l Conference of State Legislatures, Apr. 30, 2017, *available at* http://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx (last visited May 23, 2018); *see* Me. Rev. Stat. tit. 21-a, §§ 111, 112(14); Vt. Stat. Ann. tit. 17, §§ 2121, 2122(a). In every other state, felons who are incarcerated presumably must apply for a discretionary pardon to obtain restoration of voting rights. *See, e.g.*, Tenn. Code Ann. § 40-29-202(a) (providing that a convicted felon "is eligible to . . . have the right of suffrage restored upon . . . "[r]eceiving a pardon," "[t]he discharge from custody," *or* "[b]eing granted a certificate of final discharge from supervision by the board of parole").

unconstitutional for clemency officials to have standardless discretion when deciding whether to grant pardons that would restore a felon's voting rights, then most if not all of the 48 states that deny the vote to some or all convicted felons have unconstitutional clemency systems.

Similarly, a great many states, like the federal government, give executive officers discretion to grant other forms of clemency—including general pardons, life-preserving commutations of death sentences, and restoration of the fundamental right to keep and bear arms for self-defense—without resort to specific "standards," "constraints" or "guidelines," DE144:1, 36–37. *See Schick*, 419 U.S. at 266 ("The plain purpose of the broad power conferred by § 2, cl. 1, was to allow *plenary* authority in the President to 'forgive' the convicted person in part or entirely, to reduce a penalty in terms of a specified number of years, or to alter it with conditions which are in themselves constitutionally unobjectionable." (emphasis added)); *Ex parte Garland*, 71 U.S. 333, 380 (1866) ("The power thus conferred is unlimited, with the exception stated. . . . The benign prerogative of mercy reposed in [the President] cannot be fettered by any legislative restrictions."); *accord, e.g.*, *In re Hooker*, 87 So. 3d 401, 411–12 (Miss. 2012); *People v. Ansell*, 24 P.3d 1174, 1189 (Cal. 2001); *Bacon v. Lee*, 549 S.E.2d 840, 854 (N.C. 2001); *Montgomery v. Cleveland*, 98 So. 111, 114 (Miss. 1923).

The district court purported to restrict its ruling to clemency requests

involving "vote-restoration" decisions. DE144:2 n.1; DE161:1 (stating that the court's declaratory judgment "applies only to the right to vote, not to any other civil right"). Like many states, however, Florida has not created a separate clemency process limited to "vote-restoration" applications. *See* Fla. Const. art. IV, § 8(a); Fla. Stat. § 944.292(1); DE107-1. Thus, the district court's ruling presumes, without citation to any supporting authority, that a State may not enact a single, exclusive, and discretionary pardon process that could eliminate all disabilities resulting from a felony conviction, unless the State also provides for a separate "vote-restoration" process "direct[ed]" by "specific and neutral criteria," DE160:21.

That presumption is erroneous. So far as federal law is concerned, a state need not have *any* vote-restoration process, *Ramirez*, 418 U.S. at 54, just as it need not have *any* clemency process in general. It follows that a State may create an exclusive and unitary pardon process (or, as relevant here, a unitary process for restoration of all civil rights, including but not limited to voting rights) predicated on the historic and defining characteristic of executive clemency—discretion to exercise "[t]he benign prerogative of mercy," *Garland*, 71 U.S. at 380; *see Woodard*, 523 U.S. at 276.

If allowed to stand, the district court's ruling would make a mess of the law and spawn serious anomalies. For example, if the absence of a "codified, objective test or set of criteria" renders Florida's system for restoring civil rights facially

invalid, DE43:25, why would it not also prove fatal for 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 Second Amendment right to keep and bear arms? Indeed, federal law and the laws of most States give officials substantial discretion in deciding whether to restore that latter constitutional right. *See* 18 U.S.C. § 925(c); Fla. Stat. § 790.23(2); DE107-1:5–6 (Rule 5.D.). Any equal-protection analysis of such rights-restoration regimes would follow the same contours as an equal-protection analysis here.

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 and carrying a firearm to effectuate the fundamental and "'natural right'" of "'self-preservation and defence,'" *District of Columbia v. Heller*, 554 U.S. 570, 594 (2008) (quoting 1 Blackstone 136, 140 (1765)); *see McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010). It is no answer to say that voting is tied to "expressive" and "associational" interests that are not implicated by other forms of executive clemency. A felon who seeks to have a death sentence commuted, like a felon who seeks to be released from incarceration, might just as plausibly claim that continued life or liberty is indispensable to exercising important expressive or associational interests.

The district court's concededly novel and unprecedented ruling, *see*

DE144:27; DE160:7, has already had strange and troubling practical implications. For example, on March 8, 2018, the Clemency Board held a previously scheduled public meeting. DE163-1 ¶ 3. In light of the district court's earlier summary-judgment ruling, "the Clemency Board declined to consider 62 applications seeking the restoration of civil rights with a hearing." *Id.* ¶ 4. At the very same meeting, however, the Board did "entertain 9 applications for a full pardon that *included* restoration of civil rights," including the right to vote; four of those pardon applications were granted. *Id.* (emphasis added). Thus, the district court's order had the practical effect of giving the Board *more* discretion when more of the applicant's rights—including but not limited to voting rights—were at stake.

3. Even if Plaintiffs' equal-protection challenge were not foreclosed by *Beacham* or by the well-established line of authority approving the existence of discretion in clemency, it falters on the general equal-protection principles that apply to re-enfranchisement determinations. As Justice O'Connor, writing for the Ninth Circuit, has emphasized, "a litigant bringing an equal protection challenge to a felon-disenfranchisement scheme must first face the formidable task of escaping [*Ramirez*'s] long shadow." *Harvey*, 605 F.3d at 1073. This Circuit takes the same view: "section 2 of the fourteenth amendment blunts the full force of section 1's equal protection clause with respect to the voting rights of felons," and for that reason, "Section 2's express approval of the disenfranchisement of felons . . . grants

to the states a realm of discretion in the disenfranchisement and reenfranchisement of felons which the states do not possess with respect to limiting the franchise of other citizens." *Shepherd*, 575 F.2d at 1114.

In light of those principles, *Shepherd* held that a state policy providing for the "selective . . . reenfranchisement of convicted felons" satisfies equal protection requirements if that policy bears "a rational relationship to the achieving of a legitimate state interest." *Id.* at 1114–15. Florida's 150-year-old clemency system easily passes that test.

Under *Shepherd*, the State "properly has an interest in excluding from the franchise persons who have manifested a fundamental antipathy to the criminal laws of the state or of the nation by violating those laws sufficiently important to be classed as felonies." *Id.* By "breach[ing] the social contract," the Court reasoned, felons "have raised questions about their ability to vote responsibly." *Id.* In determining whether to restore a felon's rights, the Court concluded, the State has a legitimate "interest in limiting the franchise to responsible voters." *Id.*; *see also Green v. Bd. of Elections of N.Y.*, 380 F.2d 445, 451 (2d Cir. 1973) (Friendly, J.) ("[I]t 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, the executives who enforce these, the prosecutors who must try them for further violations, or the judges who are to consider their cases.").

Florida's case-by-case approach to clemency is rationally related to those interests, because it allows the State to "gauge the progress and rehabilitation of a convicted felon" based on the full range of information concerning "the individual defendant and his case." *Shepherd*, 575 F.2d at 1115. Indeed, it is not and cannot be irrational for clemency officers to make clemency decisions that are not "direct[ed]" by "specific and neutral criteria," DE160:21, since "[t]he very essence of the pardoning power is to treat each case individually," *Schick*, 419 U.S. at 265; *id.* at 268 ("[I]ndividual acts of clemency *inherently* call for discriminating choices because *no two cases are the same*." (emphases added)).

In any event, the Board employs eminently reasonable procedures, including the examination of a host of indisputably relevant factors, in reaching its decisions. For example, the Board requires applications listing pertinent information, and the FCOR investigates the applicants. After its investigations, the FCOR prepares a CCA that resembles a pre-sentence investigation report, which the Board reviews and which is sent to the applicant. Having received a copy of the CCA, applicants are then given an opportunity to address the Board. These procedures are reasonably calculated to help the Board "gauge the progress and rehabilitation of a convicted felon" and thereby effectuate "the state's interest in limiting the franchise to responsible voters." *Shepherd*, 575 F.2d at 1115.

Not only does the Board provide ample process; it also grounds its decisions

on a weighing of relevant factors. The factors examined in the CCAs—including the circumstances of any franchise-disqualifying felonies, prior and subsequent criminal records, and any illegal registration and voting—are relevant to the legitimate government interest that binding precedent identifies. *See Shepherd*, 575 F.2d at 1115 (felons "have breached the social contract," and States have a valid interest "in limiting the franchise to responsible voters").

Florida's clemency system includes reasonable safeguards against improper decision-making. For example, the Board's hearings are open to the public, broadcast on the Florida Channel, and available on the Internet; when decisions are made at those hearings, the press and members of the public typically may compare each Board member's vote on an application with the ultimate recommendation made by the expert commission tasked with investigating that applicant. *See supra* 11–12. And while the district court thought it problematic that clemency decisions are made by "partisan government officials," DE144:36, this Court has rejected the claim that "Florida's clemency process violates . . . equal protection and due process of law" insofar as "the clemency board is composed of elected politicians." *See Banks*, 592 F. App'x at 773–74.

B. Florida's Discretionary System For Offering Executive Clemency To Convicted Felons Is Not Facially Invalid Under the First Amendment.

As this Court has already explained, pertinent judicial authority "*establishes*

the broad discretion of the executive to carry out a standardless clemency regime." *Hand*, 888 F.3d at 1208 (emphasis added). Plaintiffs may not circumvent that established law by repackaging "the same basic claim" in the language of the First Amendment. *Id.* at 1212.

"It is well established in this Circuit that the First Amendment provides no greater protection for voting rights than is otherwise found in the Fourteenth Amendment." *Id.* at 1211; *see Burton*, 178 F.3d at 1187 n.9 (invoking that principle as the sole basis for "conclud[ing] that the district court did not err in dismissing" appellant's voting-rights "claims under the First and Thirteenth Amendments"). "In the wake of *Beacham*, *Dumschat*, *Woodard*, and *Smith*, a purely discretionary clemency regime does not, without something more, violate the Fourteenth Amendment." *Hand*, 888 F.3d at 1212. Thus, Florida's discretionary clemency system also does not violate the First Amendment. *See Burton*, 178 F.3d at 1187 n.9; *accord Cook v. Randolph*, 573 F.3d 1143, 1148 (11th Cir. 2009).

Under the law of this Circuit, that should be the end of Plaintiffs' First Amendment challenge to Florida's discretionary clemency regime.

Even putting that law aside, Plaintiffs' First Amendment claim fails on its own terms. That claim, as Plaintiffs have explained, requires the unification of "two lines of precedent," Resp. to Stay Mot. at 2, neither of which involves convicted felons who have lost the right to vote, *see Hand*, 888 F.3d at 1212. The first line of

authority, as Plaintiffs see it, holds that "government officials may not be vested with unfettered discretion to grant or deny *licenses or permits* to engage in *First Amendment-protected conduct*." Resp. to Stay Mot. at 2 (emphases added). The second holds that "the First Amendment *protects the right to vote* because it embraces the twin rights to political association and political expression." *Id.* (emphasis added); *see also Hand*, 888 F.3d at 1216–17 (Martin, J., concurring in part and dissenting in part) ("In order to reach these conclusions, the District Court *necessarily* and actually found that voting constitutes the sort of expressive and associational activity protected by the First Amendment." (emphasis added)). "As Plaintiffs sought, the district court united these two lines of precedent to hold that Defendants . . . cannot exercise unfettered discretion in deciding which *felons* may vote and which may not." Resp. to Stay Mot. at 2 (emphasis added).

As Plaintiffs' explanation makes clear, their First Amendment challenge to Florida's discretionary clemency system is predicated on at least two assumptions: first, that voting is "First Amendment-protected conduct" for convicted felons who have lost the right to vote; and second, that clemency decisions restoring the right to vote to convicted felons are "licenses or permits" for purposes of First Amendment jurisprudence. Both assumptions must be accepted for Plaintiffs to prevail on their claim. Neither is valid.

So far as convicted felons are concerned, voting is not "First Amendment-

protected conduct." *Id*. Section 2 of the Fourteenth Amendment, as authoritatively construed by the Supreme Court, gives States an "affirmative sanction" to "disenfranchise convicted felons *permanently*." DE144:9 (emphasis added); *see Ramirez*, 418 U.S. at 54. That affirmative authorization necessarily implies that convicted felons do not have a constitutionally protected right to vote. *See Hand*, 888 F.3d at 1212. If it were otherwise, the Supreme Court in *Ramirez* should have accepted rather than rejected plaintiffs' contention that "the state's abridgement of their right to vote triggered strict scrutiny." *Shepherd*, 575 F.2d at 1113; *see Ramirez*, 418 U.S. at 54.

As this Court's stay makes clear, one need not be "wedded to the rotten landscape of a hyper-formalist worldview," DE144:31, to conclude that voting is not "First Amendment-protected conduct," Resp. to Stay Mot. at 2, for convicted felons who have lost the right to vote. *See Hand*, 888 F.3d at 1212–13. The "affirmative sanction" recognized in *Ramirez*, 418 U.S. at 54, would be meaningless if the First Amendment is construed to impliedly withdraw authority that Section 2 of the Fourteenth Amendment expressly provides; even prior to *Ramirez*, the Supreme Court had "strongly suggested in dicta that exclusion of convicted felons from the franchise *violates no constitutional provision*," *id.* at 53 (emphasis added); this Court, in staying the district court's judgment, thought it "pretty clear that, in a reenfranchisement case, the specific language of the Fourteenth Amendment

controls over the First Amendment's more general terms," *Hand*, 888 F.3d at 1212; and it appears that "*every* First Amendment challenge" to a criminal disenfranchisement or "discretionary vote-restoration regime . . . has been summarily rebuffed," *id.* (emphasis added); *see, e.g.*, *Kronlund v. Honstein*, 327 F. Supp. 71, 73 (N.D. Ga. 1971); *Farrakhan v. Locke*, 987 F. Supp. 1304, 1314 (E.D. Wash. 1997); *Johnson v. Bush*, 214 F. Supp. 2d 1333, 1338 (S.D. Fla. 2002), *aff'd sub nom. Johnson*, 405 F.3d at 1214; *Hayden v. Pataki*, No. 00-cv-8586, 2004 WL 1335921, at *6 (S.D.N.Y. June 14, 2004); *Howard v. Gilmore*, 205 F.3d 1333 (unpublished table decision), 2000 WL 203984, at *1 (4th Cir. 2000).

What is more, courts have uniformly rejected similar attempts to circumvent Section 2 of the Fourteenth Amendment as unpersuasive bootstrapping. In an opinion authored by Justice O'Connor, for example, the Ninth Circuit rejected a claim that requiring felons to "pay all debts owed under their criminal sentences" as a condition of re-enfranchisement amounted to an unconstitutional poll tax. *Harvey*, 605 F.3d at 1080. The court reasoned that, "[h]aving lost their right to vote, they now have no cognizable Twenty-Fourth Amendment claim until their voting rights are restored." *Id.* The Sixth and Fourth Circuits have rejected similar poll-tax claims under the same rationale. *See Johnson v. Bredesen*, 624 F.3d 742, 751 (6th Cir. 2010); *Howard*, 2000 WL 203984, at *2.

The same logic applies here. "Having lost their right to vote," Plaintiffs "now

have no cognizable" First Amendment right-to-vote claim "until their voting rights are restored." *Harvey*, 605 F.3d at 1080.

Assuming *arguendo* that convicted felons who have lost the right to vote may still assert a right to vote protected by the First Amendment, no authority supports Plaintiffs' creative contention that grants of executive clemency are "licenses" or "permits," Resp. to Stay Mot. at 2, for purposes of First Amendment jurisprudence. To the contrary, "the Supreme Court [has] reaffirmed that . . . clemency decisions are 'matter[s] of grace' for which the executive may consider 'a wide range of factors not comprehended by earlier judicial proceedings and sentencing determinations.'" *Hand*, 888 F.3d at 1209 (quoting *Woodard*, 523 U.S. at 281). "Licenses" or "permits" to engage in "First-Amendment-protected activity," Resp. to Stay Mot. at 2, on the other hand, may not be dispensed as a matter of grace. In other words, the law of this Circuit forecloses an essential premise of Plaintiffs' First Amendment claim. *See, e.g.*, *Valle*, 654 F.3d at 1268 ("Clemency is granted as 'a matter of grace.'").

C. The "Risk" Of Discrimination Does Not Make Florida's Discretionary Clemency System Unconstitutional.

Invidious discrimination has no place in the administration of a State's vote-restoration system, *Shepherd*, 575 F.2d at 1114, but the mere "risk" of discrimination does not render a State's clemency process *facially* unconstitutional. *See Smith*, 722

F.2d at 631–32; *Beacham*, 300 F. Supp. at 184, *aff'd* 396 U.S. 12. Indeed, that risk exists whenever decisionmakers—executive, legislative, or judicial—are vested with discretion, and discretion is one of the defining characteristics of executive clemency. *See, e.g.*, *Woodard*, 523 U.S. at 276; *Dumschat*, 452 U.S. at 463–67.

Based on analogous caselaw, "a state's method for reenfranchising a convicted felon would violate equal protection if the scheme had *both* the purpose and effect of invidious discrimination." *Hand*, 888 F.3d at 1209 (emphasis in original); *see Hunter v. Underwood*, 471 U.S. 222, 227–28 (1985) (citing *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–65 (1977)). As the stay panel held:

> The problem for the appellees in this case, however, is that they have not shown (nor have they even claimed) that Florida's constitutional and statutory scheme had as its purpose the intent to discriminate on account of, say, race, national origin, or some other insular classification; or that it had the effect of a disparate impact on an insular minority.

Hand, 888 F.3d at 1210. Instead, "[a]ll we have is the assertion by the appellees and a statement by the district court that there is a real 'risk' of disparate treatment and discrimination, precisely because the Florida regime is standardless." *Id.* That same risk, however, was present in other cases in which the Supreme Court and this Court have *approved* discretionary clemency decisions. *See, e.g.*, *Dumschat*, 452 U.S. at 463–67; *Beacham*, 300 F. Supp. at 184, *aff'd* 396 U.S. 12; *Smith*, 722 F.2d at 631–

32.

Properly understood, "unfettered discretion" to process clemency applications does not license the Board to violate generally applicable anti-discrimination principles, including those embodied in the United States Constitution. Like the Rules of Executive Clemency, many regulations and opinions use the phrase "unfettered discretion" to indicate that a decision is entrusted to the judgment of a properly constituted authority. *E.g.*, *Shin v. Cobb Cty. Bd. of Educ.*, 248 F.3d 1061, 1065 (11th Cir. 2001) ("We have 'unfettered discretion' to grant or deny a Rule 23(f) petition." (quoting Fed. R. Civ. P. 23(f)). Such references should not be construed to authorize illicit discrimination; and executive officers who take an oath to uphold the law—like judges and legislators—should be presumed to "have properly discharged their official duties" in the "absence of clear evidence to the contrary." *United States v. Armstrong*, 517 U.S. 456, 464 (1996).

Thus, Appellants do not "insist they can do whatever they want" in processing clemency applications, DE167:1, if that means engaging in invidious discrimination or comparable malfeasance, just as this Court did not "insist" that it could discriminate on the basis of race when it asserted "unfettered discretion" to resolve

applications under Rule 23, *Shin*, 248 F.3d at 1065.[6]

D. The District Court Erred Insofar As It Relied On Unpleaded, Unproven, And "Not Relevant" Allegations Of Invidious Discrimination.

As the stay panel emphasized, "appellees have not alleged—let alone established as undisputed facts—that Florida's [clemency] scheme has a discriminatory purpose *or* effect." *Hand*, 888 F.3d at 1207 (emphasis in original). Nevertheless, the district court's summary-judgment order appeared to credit or indulge unpleaded and unproven insinuations of illicit discrimination based on race, viewpoint, and party affiliation. *E.g.*, DE144:24 (discussing Board's decision to deny the applications of five non-parties and stating "[i]t is not lost on this Court that

[6] Considered in context, the Governor's passing statement that "[w]e can do whatever we want," DE144:2, does not suggest that the Board can or does engage in arbitrary decision-making. The Governor's very next words were: "But it's *tied to what we said in the beginning*, it's tied to remorse, and it's tied . . . to understanding that *we all want to live in a law-abiding society*." Executive Clemency Board Hearing (Dec. 7, 2016 at 2:02:00–2:02:07), *available at* http://thefloridachannel.org/videos/12716-executive-clemency-board-meeting/ (cited in DE29 ¶ 55 n.26) (emphases added). At the beginning of the hearing, the Governor correctly explained the Board has discretion because "[c]lemency is an act of mercy—there is no right or guarantee to clemency," while at the same time averring "[o]ur decisions are based upon many facts and circumstances." *Id.* at 0:03:57–0:04:04. After describing the factors that guide his discretion, he then expressly affirmed his view that the Board has an "obligation" to "treat people fairly." *Id.* at 0:04:37-0:04:53 ("I think all of us would tell you that we want . . . everybody to succeed. . . . But it's also our obligation to make sure we keep . . . all the citizens in our state safe and treat people fairly."). The "obligation to . . . treat people fairly" rules out invidious discrimination based on race, viewpoint, or other constitutionally prohibited considerations. *Id*.

four of the five rejected applicants are African-American"); *id.* (concluding that "Plaintiffs offer more than enough examples for this Court to infer that such discrimination is not some cockamamie idea Plaintiffs cooked up"). Such insinuations were improper and unpersuasive, and they provide an independent basis for vacating the district court's summary-judgment ruling.

First, as the district court ruled early on in the case, allegations of invidious discrimination in particular clemency proceedings—especially proceedings involving non-parties—were "not relevant" to an assessment of Plaintiffs' facial challenges. DE62:1; *see United States v. Salerno*, 481 U.S. 739, 745 (1987); *AFSCME v. Scott*, 717 F.3d 851, 863, 866 (11th Cir. 2013). Those challenges were based on the purportedly unconstitutional "risk" of discrimination inherent in standardless clemency decisions and did not involve allegations that Florida's clemency system has a discriminatory purpose or effect. *See Hand*, 888 F.3d at 1207.

Second, because the Board had no occasion to develop a factual record germane to "not relevant" claims of invidious discrimination involving non-parties, *see* DE62:1, the district court did not have the information required to properly assess such allegations. For example, the court appeared to indulge insinuations of racial discrimination against four African-American non-parties, even though—unlike the Board—it did not have access to the Confidential Case Analyses for those four applicants. *See* DE144:24; DE163:11–13.

Third, "[t]he presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." *United States v. Chem. Found.*, 272 U.S. 1, 14–15 (1926); *accord NARA v. Favish*, 541 U.S. 157, 173 (2004); *Armstrong*, 517 U.S. at 464. Plaintiffs in this case "have not alleged—let alone established as undisputed facts—that Florida's scheme has a discriminatory purpose *or* effect." *Hand*, 888 F.3d at 1207 (emphasis in original).

Fourth, allegations of gross malfeasance should not have been credited or indulged at the summary-judgment stage, when courts are required to "draw[] all reasonable inferences in the light most favorable to the non-moving party." *Johnson*, 405 F.3d at 1217. As Plaintiffs acknowledge, "[t]he district court credited a few of [their] comparisons as raising a clear inference of arbitrary, biased, and/or discriminatory treatment." Resp. to Stay Mot. at 12.

Fifth, "[i]ndividual acts of clemency inherently call for discriminating choices because no two cases are the same." *Schick*, 419 U.S. at 268. Thus, findings of unconstitutional discrimination on the part of the Board may not be predicated on comparisons of selectively chosen non-parties alleged to be similarly situated. *See*

id.[7]

An analysis of the principal example on which the district court relied helps to illustrate the problems with Plaintiffs' unpleaded and unproven insinuations of improper discrimination. The court's summary-judgment order repeatedly refers to one clemency hearing in which the voting rights of Steven Warner, "a white man," were restored after the applicant volunteered that he voted for the Governor. *See* DE144:2, 23–24. The court cites that incident as an "alarming illustration" of the problems with Florida's system, contrasting it with five examples—out of the 4,200 applications the Board had decided since 2011—of cases in which other applicants, including four African Americans, had their applications denied. *Id.* at 2 ("It is not lost on this Court that four of the five rejected applicants are African-American.").

Because Defendants had relied in good faith on the court's earlier ruling that

[7] A similar analysis applies in the criminal sentencing context, where different outcomes frequently result between defendants who might appear, in some ways, to be similarly situated. Nevertheless, such sentencing disparities alone do not establish an equal-protection claim without proof of "constitutionally impermissible motives such as racial or religious discrimination." *Jones v. White*, 992 F.2d 1548, 1571–72 (11th Cir. 1993). The Supreme Court has reached the same conclusion in rejecting Eighth Amendment challenges to death sentences. *See McCleskey v. Kemp*, 481 U.S. 279, 306–07 (1987) (Defendants "cannot prove a constitutional violation by demonstrating that other defendants who may be similarly situated did *not* receive the death penalty." (emphasis in original)); *id.* at 312–13 ("Apparent disparities in sentencing are an inevitable part of our criminal justice system," and the Court will "decline to assume that what is unexplained is invidious.").

Plaintiffs' comparisons were "not relevant" to their facial challenges, *see* DE62:1, the court should have declined Plaintiffs' invitation to pass on the propriety of those six clemency decisions, all of which involved non-parties. If the court had changed its mind on that issue, it should have notified the parties and afforded Defendants a fair chance to introduce evidence and legal argument relevant to grave allegations of gross malfeasance and invidious discrimination. It could, for example, have convened a short hearing and asked counsel for Defendants if they could submit evidence or present argument supplying a justifiable basis for the differential outcomes in those six cases.

At a minimum, the court was bound to apply established legal principles for assessing allegations made at the summary-judgment stage. Drawing "all reasonable inferences in the light most favorable to the non-moving party," *Johnson*, 405 F.3d at 1217, the court should have concluded that the Board's disposition of Mr. Warner's application did not even tend to suggest—much less suffice to prove—actual discrimination based on viewpoint, race, or any other improper criterion. Many considerations support that conclusion, including the following:

- In resolving the applications of Mr. Warner and the other five applicants discussed above, the Board—unlike the court—had access to confidential case analyses containing a broad range of additional information. Those CCAs are not in the record, because the court found them "not relevant" in the context of Plaintiffs' facial challenge. DE62:1.

- Record evidence supplies reasonable grounds on which the Board may have granted Mr. Warner's application. *See* DE101-159 (3:47:35–3:50:25), *available at* http://thefloridachannel.org/videos/121213-executive-clemency-board-meeting/. Mr. Warner's offenses were old and relatively non-serious: Twenty years ago he had been convicted of possession of marijuana, for which he spent no time in prison. Twenty-eight years ago, he had been convicted of an offense involving a bar fight; as Mr. Warner explained it, a drunk assailant had grabbed him from behind as he was trying to exit the bar, and Mr. Warner's act of violence was committed while trying to extricate himself from the alleged assaulter's grip. Mr. Warner had voted illegally on one occasion; but, on his telling, only after he had spoken with three or four "representatives" in Tallahassee, and based on his understanding that the relevant conviction had been expunged. *Id*.

- Record evidence also supplies reasonable grounds on which the Board might have distinguished between the other five applicants and Mr. Warner. *See* DE144:23 ("Similar conduct can lead to different results in front of the Board."). For example, one applicant voted illegally *four times*; appeared at one point to admit that he had received a letter advising him that his voting rights had *not* been restored; and incorrectly—as established by a staff member in response to Governor Scott's question during the hearing—asserted that he had the "right" to vote over the course of a certain 17-year period. DE89-6:23 (2:09:06–2:16:49), *available at* http://thefloridachannel.org/videos/621111-executive-clemency-board-meeting/.

- The Governor's immediate response to Mr. Warner's unsolicited statement—declining to comment on the applicant's alleged voting history, DE101-159 (3:50:00–3:50:10), *available at* http://theflorida channel.org/videos/121213-executive-clemency-board-meeting/—cannot reasonably be construed as evidence of partisan bias. *Compare* DE144:2. Indeed, it is far more reasonable to interpret that response, offered at a public hearing that was broadcast on the Florida channel, as a polite indication that such information was not relevant to the Board's decision-making process.

- Notwithstanding the court's repeated statement that "[t]he Governor then granted the former felon his voting rights," DE144:2; *see also id*. at 24, Mr. Warner's application could not have been granted without the support of at least two other Cabinet members; and the record shows that two other members agreed. DE101-159 (3:50:15–3:50:25), *available at* http://thefloridachannel.org/videos/121213-executive-clemency-board-meeting/. Construing that vote in the light most favorable to the Board, one could reasonably infer that two other Board members—high-ranking constitutional officers whose official actions are entitled to the presumption of regularity—were unlikely to be swayed by an unsolicited and unverifiable statement that Mr. Warner had voted for a different Board member in the past.

- Record evidence establishes that the Florida Commission on Offender Review and the Clemency Board routinely solicit a broad range of information from applicants, but do not solicit information about an applicant's political views. *See supra* 9–12. Construing those facts in the light most favorable to the Board, the court could reasonably have inferred that FCOR does not make its recommendations, and the Board does not make its decisions, based on partisan political considerations.

In sum, the court erred insofar as it relied on and propagated unsubstantiated insinuations of actual discrimination involving non-parties. *See, e.g.*, DE144:2, 23–24. Such allegations, as the court itself recognized at an earlier phase of the litigation, were "not relevant" to Plaintiffs' facial challenges. DE62:1. Even if they were relevant, the court was not in a position to fairly assess those allegations, as it did not have access to the full range of pertinent information. *See id*. at 1–2. In any event, the court failed to apply the right law—the familiar summary-judgment standard and the presumption of regularity—to Plaintiffs' unpleaded allegations of wrongdoing,

and the court's analysis of Plaintiffs' cherry-picked examples was unpersuasive on its own terms.

* * *

A clemency system that has the purpose and effect of discriminating on the basis of race or any other constitutionally impermissible consideration would not be immune from judicial review. *See Hand*, 888 F.3d at 1209–10; *Shepherd*, 575 F.2d at 1114. To prevail on such a claim, however, the complaining party must properly allege and prove prohibited discrimination; and the parties accused—be they ordinary citizens or a state's highest-ranking constitutional officers—must have a fair chance to defend themselves. That did not happen here; and the district court's improper reliance on unpleaded, unproven, and "not relevant" insinuations of malfeasance, standing alone, requires reversal.

II. THE LACK OF TIME CONSTRAINTS DOES NOT MAKE FLORIDA'S SYSTEM FOR OFFERING EXECUTIVE CLEMENCY TO CONVICTED FELONS FACIALLY INVALID UNDER THE FIRST AMENDMENT.

The district court erred in concluding that "[t]he lack of time limits in processing and deciding vote-restoration applications risks viewpoint discrimination and is therefore unconstitutional." DE144:30. The "risk" of illicit discrimination, "without something more," does not render a clemency process facially invalid. *Hand*, 888 F.3d at 1212. Indeed, applicable caselaw "establishes the broad discretion of the executive to carry out a standardless clemency regime," *id.* at 1208; and a

"standardless clemency regime," by definition, is one in which decisions need not be made on a fixed timetable. *See, e.g.*, *Bowens v. Quinn*, 561 F.3d 671, 676 (7th Cir. 2009) (Posner, J.) ("Executive clemency is a classic example of unreviewable executive discretion . . . . We therefore balk at the idea of federal judges' setting timetables for action on clemency petitions by state governors.").

It is no answer to cite "inapposite" First Amendment cases, *Hand*, 888 F.3d at 1212, disapproving of rules that make "the peaceful enjoyment of freedoms *which the Constitution guarantees* contingent upon the uncontrolled will of an official," DE144:28 (emphasis added). Because "the exclusion of felons from the vote has an affirmative sanction in § 2 of the Fourteenth Amendment," *Ramirez*, 418 U.S. at 54, "[i]t is clear that the First Amendment *does not guarantee* felons the right to vote," *Johnson*, 214 F. Supp. 2d at 1338 (emphasis added), *aff'd* 405 F.3d at 1235 (en banc). Nor does the First Amendment "guarantee" that convicted felons will be afforded any opportunity to apply for—much less receive—executive clemency. Hence, First Amendment jurisprudence does not make it improper for the Board to "defer specifying *any* restoration timeline," DE144:30 (emphasis in original), for clemency applications. "[O]nce a felon is properly disenfranchised a state is at liberty to keep him in that status indefinitely and never revisit that determination." *Harvey*, 605 F.3d at 1079.

That does not mean that the Board may use the lack of time limits to "mask unconstitutional viewpoint discrimination." DE144:28. "[A] discretionary felon-reenfranchisement scheme that was facially or intentionally designed to discriminate based on viewpoint . . . might violate the First Amendment," *Hand*, 888 F.3d at 1211–12, as well as the Equal Protection Clause. But "no such showing has been made in this case." *Id.* at 1212. Indeed, "appellees have not alleged—let alone established as undisputed facts—that Florida's scheme has a discriminatory purpose *or* effect." *Id.* at 1207 (emphasis in original).

III. THE DISTRICT COURT ABUSED ITS DISCRETION IN GRANTING INJUNCTIVE RELIEF.

In its remedial order, the district court prohibited the State "from ending all vote-restoration processes" and commanded the Board to "promulgate specific and neutral criteria to direct vote-restoration decisions," as well as "expeditious time constraints," within 30 days of its order. DE160:21. Both aspects of the injunction constituted an abuse of discretion.

A. The District Court Lacked Authority To Bar The State From Adopting A Policy Affirmatively Authorized By The United States Constitution.

As all three members of the stay panel agreed, *see Hand*, 888 F.3d at 1213–14; *id*. at 1221–22 (Martin, J., concurring in part and dissenting in part), the district court erred in prohibiting the State "from ending all vote-restoration processes" for

convicted felons. DE160:21. The district court's own orders show why. As the district court explained, Section 2 of the Fourteenth Amendment gives States an "affirmative sanction" to "disenfranchise convicted felons *permanently*." DE144:9, 39 (emphasis added). In other words, the district court barred the State from adopting a policy that the United States Constitution affirmatively authorizes. *See Ramirez*, 418 U.S. at 54; *Johnson*, 405 F.3d at 1217. To state that fact is to establish an abuse of discretion.

State law cannot and does not support a federal-court injunction requiring state officials to institute a new state policy. *See Hand*, 888 F.3d at 1213–14. It *cannot* because, as the Supreme Court has explained, "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984). And it *does not* because Florida law, properly construed, does not require the Clemency Board to continuously solicit and process applications seeking restoration of civil rights. The pertinent constitutional and statutory provisions *allow* the State to create processes by which civil rights may be restored; they do not *require* any particular process to be created by a date certain or to remain continuously in operation. *See* Fla. Const. art. IV, § 8(a); *id.* art. VI, § 4(a); Fla. Stat. § 940.01(1).

B. The District Court Abused Its Discretion In Commanding The Executive Clemency Board To "Promulgate" New Clemency Rules In 30 Days.

1. The district court had no authority to command that the Board "promulgate" a discretionary state policy. Section 2 of the Fourteenth Amendment "expressly empowers" Florida to "permanently" prohibit convicted felons from voting. *Hand*, 888 F.3d at 1207, 1213. The greater power to *permanently* end vote-restoration processes necessarily includes the lesser power to *temporarily* end vote-restoration processes pending the State's determination of whether, how, and when to devise a new clemency system.

By directing the Board to "promulgate" new vote-restoration rules, the district court did not just ignore the affirmative sanction set out in Section 2 of the Fourteenth Amendment; it also contravened horizontal *and* vertical separation-of-powers principles. A federal court may not direct *federal* policymakers to "promulgate" a discretionary *federal* policy—i.e., a policy not required by federal law. *See, e.g.*, *Greater L.A. Council on Deafness, Inc. v. Cmty. Television of S. Cal.*, 719 F.2d 1017, 1023 (9th Cir. 1983) ("[I]n light of the strong policy of separation of powers and the broad discretion granted the executive agency, we hold that the trial court erred in requiring the Department of Education to promulgate rules."); *accord INS v. Legalization Assistance Project*, 510 U.S. 1301, 1305–06 (1993) (O'Connor, J., in chambers); *Heckler v. Rosebud Hosp. Dist.*, 473 U.S. 1308, 1313 (1985)

(Rehnquist, J., in chambers). *A fortiori*, federal courts may not require *state* policymakers to "promulgate" a discretionary *state* policy. *See* DE160:21.

Recent caselaw makes that clear. As the Supreme Court has repeatedly "warned," it has "'never . . . sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations.'" *Murphy v. Nat'l Collegiate Athletic Ass'n*, __ S. Ct. __, 2018 WL 2186168 (U.S. May 14, 2018), at *14 (quoting *FERC v. Mississippi*, 456 U.S. 742, 761–62 (1982) (alteration in original)); *accord Printz v. United States*, 521 U.S. 898, 926 (1997). And for good reason. The Constitution creates a system of "dual sovereignty," under which "both the Federal Government and the States wield sovereign powers." *Murphy*, 2018 WL 2186168, at *10; *accord Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). The authority to make policy decisions "is perhaps the quintessential attribute of sovereignty," inasmuch as "having the power to make decisions and to set policy is what gives the State its sovereign nature." *FERC*, 456 U.S. at 761. A state's sovereign "power to make decisions and to set policy," *id.*, includes the right to decide whether, when, and how to formulate a state policy not required by federal law.

The federal directive at issue here is more problematic than the directives struck down in the Supreme Court's anti-commandeering jurisprudence. Those cases hold that "[t]he Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their

political subdivisions, to administer or enforce a federal regulatory program." *Printz*, 521 U.S. at 935. If, as the Supreme Court has "categorically" concluded, *id.* at 933, "[t]he Federal Government may not compel the States to enact or administer a *federal* regulatory program," *New York v. United States*, 505 U.S. 144, 188 (1992) (emphasis added), it assuredly may not compel a state to enact, "promulgate," or administer a discretionary *state* program, *see* DE160:21. "[N]o case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty." *Printz*, 521 U.S. at 935.

2. Putting aside its lack of authority, the district court abused its discretion in ordering the State to revamp its clemency system in 30 days. As the district court stressed, Florida's Constitution has authorized the discretionary restoration of voting rights "*for the past 150 years*." DE160:18 (emphasis in original). For the first time in that long history—indeed, for the first time in the history of the Nation—the court below held that state clemency procedures are unconstitutional if they do not set forth "specific and neutral criteria to direct vote-restoration decisions," *id*. at 21.

To implement that ruling, the State's policymakers would have to resolve any number of complicated and difficult questions, including the following:

- Which instrumentality of the state government is best positioned to formulate "specific and neutral criteria" that are apt to enjoy broad public support and to withstand the test of time?

- Assuming *arguendo* that the current Board should put new rules in place on an interim basis, how "specific" and "neutral" should the "specific and neutral criteria" be? Should the Board adopt mathematical criteria that are susceptible of mechanical application, even if such criteria work to the disadvantage of convicted felons with presumptively troubling histories? Or should it promulgate more flexible standards akin to the statutory sentencing factors? *See* 18 U.S.C. § 3553(a).

- Even if each criterion, standing alone, is completely objective, should an applicant's failure to meet *all* the criteria be disqualifying?

- Should arrests or convictions for certain kinds of misdemeanor or felony offenses be either relevant or categorically disqualifying?

- How should the vote-restoration criteria relate to the process by which other kinds of executive clemency applications are resolved, including applications for pardons, commutations, and restoration of firearm authority? Should the Board create a newly bifurcated system for processing applications involving civil rights other than voting rights, such as the right to serve on a jury or to hold or run for public office?

- What kinds of rules have other States put in place, how were they instituted, and how have they worked in practice?

In light of those and other questions, the issue is not whether the Board *could* unilaterally prescribe new rules in a short span of time, *see* DE167:4, but whether the State's policymakers and citizenry—including but not limited to the Board—*should* be afforded sufficient time to carefully consider the important issues at hand. Before resolving the above-mentioned questions, for example, the Board should have adequate opportunity to consult with interested and knowledgeable parties—including state and local governmental agencies, members of the Florida Legislature,

law-enforcement authorities, legal experts, victim's rights groups, community leaders, and clemency officials serving in other states. Following such consultation, the Board should have adequate time to debate the various options and to carefully craft rules that are likely to engender public confidence, withstand the test of time, and strike an appropriate balance between the diverse and competing interests at stake. Finally, the timetable for doing all that should take into account the full scope and importance of the other pressing duties entrusted to the State's highest executive officers.

An order directing the Governor, Attorney General, Chief Financial Officer, and Commissioner of Agriculture and Consumer Services to create a new system for restoration of voting rights in 30 days is not reasonably calculated to effectuate those objectives.

CONCLUSION

This Court should reverse the district court's decision to grant Plaintiffs' motion for summary judgment as to Counts One, Two, and Three of the Amended Complaint, and it should likewise reverse the district court's denial of the Board's motion for summary judgment as to those counts. The injunction should be reversed in its entirety.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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/s/ Amit Agarwal
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 25th day of May, 2018, a true copy of the foregoing motion was filed electronically with the Clerk of Court using the Court's CM/ECF system, which will send by e-mail a notice of docketing activity to the registered Attorney Filer listed on the attached electronic service list. I FURTHER CERTIFY that all counsel for parties appearing below have been served by U.S. Mail and by electronic mail to the mailing addresses and e-mail addresses listed on the attached U.S. mail and electronic service list. All parties appearing below have been served.

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