NO. 18-11388-G

In the

United States Court of Appeals

for the

Eleventh Circuit

JAMES MICHAEL HAND, JOSEPH JAMES GALASSO, HAROLD W. GIRCSIS, JR., CHRISTOPHER MICHAEL SMITH, WILLIAM BASS, JERMAINE JOHNEKINS, YRAIDA LEONIDES GUANIPA, JAMES LARRY EXLINE, and VIRGINIA KAY ATKINS,

Plaintiffs/Appellees,

v.

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

Defendants/Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
CASE NO: 4:17-cv-00128-MW-CAS

APPELLEES' BRIEF

THEODORE LEOPOLD
DIANA L. MARTIN
POORAD RAZAVI
COHEN MILSTEIN SELLERS & TOLL PLLC
2925 PGA Boulevard, Suite 200
Palm Beach Gardens, FL 33410
tleopold@cohenmilstein.com
dmartin@cohenmilstein.com
prazavi@cohenmilstein.com
(561) 515-1400

JON SHERMAN*
MICHELLE KANTER COHEN*
FAIR ELECTIONS CENTER
1825 K Street NW, Suite 450
Washington, DC 20006
(202) 331-0114
jsherman@fairelectionscenter.org
mkantercohen@fairelectionscenter.org
*Appearing *Pro Hac Vice*

Counsel for Appellees

Hand, et al. v. Scott, et al.
Eleventh Circuit Case 18-11388-G

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

1. Plaintiffs-Appellees identify the following additional interested person as required by Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1:

A. Fair Elections Center, which is representing Plaintiffs-Appellees, was established to carry on the Fair Elections Legal Network's work as a separate 501(c)(3) non-profit organization.

2. In addition, prior to leaving her position at Fair Elections Legal Network, Brittnie R. Baker moved to withdraw as Plaintiffs' counsel and was terminated as counsel by the district court in this action. She is no longer counsel for Plaintiffs-Appellees.

3. Plaintiffs-Appellees certify that, other than as stated above, the Certificate filed by Defendants-Appellants in their Motion for Stay Pending Appeal is complete and accurate.

STATEMENT REGARDING ORAL ARGUMENT

This Court has set oral argument for July 25, 2018.

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INTRODUCTION

This case is about the exercise of the fundamental right at the heart of America's democratic system of self-government and the exercise of arbitrary governmental control over that right. It is principally a First Amendment challenge to the Florida Executive Clemency Board's arbitrary process for restoring the right to vote to felons. Florida's authority to disenfranchise felons, as supported by the U.S. Supreme Court's interpretation of Section 2 of the Fourteenth Amendment in *Richardson v. Ramirez*, 418 U.S. 24, 53–56 (1974), is not at issue. The only question presented is whether government officials may lawfully exercise unfettered discretion to decide which felons may vote and which may not.

Florida's laws have long subjected felons to an arbitrary scheme in which government officials exercise limitless power to decide if and when individual felons may vote. These laws violate the Constitution by arbitrarily licensing or allocating First Amendment-protected rights and leaving restoration applicants in limbo for years. Plaintiffs challenge the lack of any rules, standards, criteria, or reasonable time limits for this voting rights restoration scheme.

The most protected rights in America's constitutional framework are the dual rights to political expression and association because they are indispensable to democracy. "Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association. This right was

enshrined in the First Amendment of the Bill of Rights." *Sweezy v. New Hampshire by Wyman*, 354 U.S. 234, 250 (1957). In *Buckley v. Valeo*, the Supreme Court deemed these "the most fundamental First Amendment activities," and stated "[t]he First Amendment affords the broadest protection to such political expression . . ." 424 U.S. 1, 14 (1976). The rights to political expression and association are "the core" of the First Amendment. *Fed. Election Comm'n v. Beaumont*, 539 U.S. 146, 161 (2003); *Buckley*, 424 U.S. at 44–45; *see also R.A.V. v. City of St. Paul*, 505 U.S. 377, 422 (1992) (Stevens, J., concurring) (stating that "[c]ore political speech occupies the highest, most protected position" in First Amendment "hierarchy"). The Supreme Court has long vehemently defended these core First Amendment rights, which embrace voting.

In a well-settled line of cases decided between 1938 and the present, the Supreme Court has held consistently that government officials may not be vested with unfettered discretion to grant or deny licenses or permits to engage in First Amendment-protected conduct. From newspaper circulation to peaceful demonstrations to religious meetings in a public park, the Supreme Court has held that discretionary administrative licensing schemes regulating the exercise of free speech or free press rights, or political or religious expression or association, run afoul of the First Amendment when they are not governed by any rules, standards, or criteria. In another well-settled line of cases, the Supreme Court has held that the

First Amendment protects the right to vote because it encompasses the dual rights to political association and expression. The district court united these two lines of precedent to hold that Defendants—the elected officials who comprise the Florida Executive Clemency Board ("the Board")—may not exercise unfettered discretion in deciding which felons may vote and which may not. App.Vol.3DE144:102–124. As the district court wrote: "The question is whether the Clemency Board's limitless power over Plaintiffs' vote-restoration violates their First Amendment rights to free association and free expression. It does. This should not be a close question." App.Vol.3DE144:117.

To combat eighty years' worth of clear Supreme Court precedent protecting First Amendment rights from arbitrary government conduct, Defendants have armed themselves with a 1969 summary affirmance issued by the Supreme Court that did not address a First Amendment claim, one footnote that summarily dispatched a claim that did not present an analytically distinct First Amendment violation, and a few cases on due process, which Plaintiffs have not raised. None of these decisions militates in favor of reversal. Respectfully, the district court's judgment should be affirmed.

STATEMENT OF THE ISSUES

I. Whether Florida's arbitrary voting rights restoration scheme for disenfranchised felons, which is devoid of any rules, standards, or criteria for restoration application dispositions, violates the First Amendment.

II. Whether the lack of reasonable and definite time limits for granting or denying applications for voting rights restoration in Florida violates the First Amendment.

III. Whether Florida's arbitrary voting rights restoration scheme for disenfranchised felons, which is devoid of any rules, standards, or criteria for restoration application dispositions, violates the Equal Protection Clause of the Fourteenth Amendment.

IV. Whether the district court abused its discretion in issuing its injunction.

STATEMENT OF THE CASE

Plaintiffs are nine disenfranchised felons who have completed their full sentences and would be eligible to register and vote but for Florida's felon disenfranchisement and reenfranchisement scheme. DE176:11–12 & nn.34–36.[1] In Florida, disenfranchised felons are required to apply for restoration of their right to vote. FLA. CONST. art. IV, § 8; FLA. CONST. art. VI, § 4(a); FLA. STAT. ANN. §

[1] DE176 is the sealed, unredacted version of Plaintiffs' Motion for Summary Judgment. The publicly-filed, redacted version is DE102, which appears in Volume 2 of Appellants' Appendix.

97.041(2)(b); FLA. STAT. ANN. § 944.292(1); App.Vol.2DE107-1 (Rules of Executive Clemency). Under the current rules, an individual seeking the restoration of civil rights must be eligible for that type of clemency and must submit an Application for Clemency.[2] Each restoration applicant must provide information and supporting documents as to each felony conviction.[3]

The Florida Commission on Offender Review's Office of Executive Clemency screens each application to verify it meets the threshold eligibility criteria such as completion of the full sentence, including parole and probation, and a five- or seven-year waiting period, among others.[4] Applicants must then undergo an investigation by the Office of Clemency Investigations.[5] After a preliminary investigation, the Board decides whether to approve a restoration applicant without a hearing.[6] Applicants who are not so approved are referred to the Office of Clemency Investigations for possible restoration with a hearing,[7] and that office prepares a confidential case analysis ("CCA") with a favorable or unfavorable recommendation.[8] While the applicants must undergo an investigation, the CCAs

[2] App.Vol.2DE107-1:163–66, 168–72 (Rules 5, 6, 9, 10).
[3] App.Vol.2DE107-1:163–66 (Rules 5, 6); DE85-17, Application for Clemency.
[4] App.Vol.2DE107-1:163–66, 168–72 (Rules 5, 6, 9, 10); DE115-4, Defendants' Response to Interrogatory No. 2; App.Vol.2DE107-3:197, FCOR 2015-2016 Annual Report.
[5] App.Vol.2DE107-3:198.
[6] App.Vol.2DE107-1:168–72 (Rules 9, 10); DE 85-6, Bass Affidavit ¶ 7 & Ex. A.
[7] *Id*.
[8] App.Vol.2DE107-3:198; DE100, Plaintiffs' CCAs (under seal).

do not bind Defendants. Because decisions can be made for any reason or no reason at all, Defendants are entitled to completely ignore the CCAs and make decisions on whim or personal belief.

The Office of Executive Clemency places applicants on the Board's hearing agenda, notifies them of their hearing dates, and provides them with the case analyses prepared by the Office of Clemency Investigations.[9] The Board only holds four hearings per year.[10] Since 2011, the Board has heard an average of only 52 applicants for restoration of civil rights per hearing.[11]

At a typical Board hearing, felons who already have completed their full sentences come forward one by one to plead their cases. They publicly confess their crimes and talk about their family, employment, community participation, and faith in the hope that this information convinces the Board they are living on the "straight and narrow"[12] path. DE176:23–43.[13] It is undisputed that Florida law expressly affords Defendants "unfettered discretion" to grant or deny those restoration applications: "The Governor has the unfettered discretion to deny clemency at any

[9] App.Vol.2DE107-3:197; App.Vol.2DE107-1:173–74 (Rules 11, 12).
[10] App.Vol.2DE107-1:173 (Rule 12).
[11] DE117-12, 117-13, 117-14, 118-1, 118-2, 118-3 & 118-4, Board Hearing Annotated Agendas (2011–2017).
[12] DE123-2, Hearing (Dec. 2000) (transcript at 99).
[13] Plaintiffs' Motion for Summary Judgment (DE 176 / App.Vol.2DE102) contains all supporting record citations. Plaintiffs have cited to that Motion in order to summarize the voluminous evidence contained in that document and facilitate this Court's review.

time, for any reason. The Governor, with the approval of at least two members of the Clemency Board, has the unfettered discretion to grant, at any time, for any reason . . . clemency." App.Vol.2DE107-1:161 (Rule 4); DE176:6–7. No rules, standards, or criteria for restoration decisions are set forth in the clemency rules or any of the relevant constitutional and statutory provisions. *Supra* at 4–5. The Board's members—all of whom have won a statewide election and may seek reelection or another office—decide whether the applicant can vote again. Board members may ask questions about the applicant's past, family, faith, employment, any drug or alcohol use, driving infractions, and anything else. DE176:23–43.

In the absence of any legal constraints, the Board invokes a variety of ad hoc, shifting, subjective, and vague standards and factors: whether the applicant has "turned [his or her] life around,"[14] has shown sufficient remorse,[15] or has an "attitude" the Board appreciates.[16] Governor Scott has bluntly stated that the process is not constrained by any law: "[T]here's no standard. We can do whatever we want";[17] and "There is no law we're following. The law has already been followed

[14] DE101-165, Hearing (June 2015) (video 2:09:20-2:09:25); DE101-146, Hearing (Mar. 2012) (video, Disc 2 00:37:20-00:37:25).
[15] DE101-155, Hearing (June 2013) (video 3:39:04-3:39:12); DE101-161, Hearing (June 2014) (video 3:46:24-3:46:45); DE94-1, Hearing (June 2000) (transcript at 80).
[16] DE101-164, Hearing (Mar. 2015) (video 00:03:12-00:03:25).
[17] DE101-173, Hearing (Dec. 2016) (video, Disc 1 2:02:10-2:02:15).

by the judges. So we get to make our decisions based on our own beliefs."[18] The absence of objective, transparent legal rules for restoration opens the door to political, viewpoint, racial, religious, wealth, and any other type of discrimination. With such vague standards based on personal beliefs, the Board may deny or grant restoration applications for any reason—an applicant's race, ethnicity, religion, failure to identify with any religion, dress, manner of speech, a guess as to the applicant's politics—or no reason at all, just a state official's whim. Sometimes they provide a reason, though none is required, but often they say little or nothing before granting or denying an application.[19] And there is no administrative appeal or judicial review of a denial.

Plaintiffs obtained discovery on two decades' worth of hearings under Democratic and Republican gubernatorial administrations, and the evidence revealed a process that was fundamentally arbitrary and susceptible to discriminatory and biased decision-making no matter which political party was in power. This evidence included the following examples that demonstrate that the risk of discriminatory, biased, and arbitrary treatment is real, not just theoretical.

[18] DE101-169, Hearing (Mar. 2016) (video 00:04:38-00:04:54).
[19] *See, e.g.*, DE101-172, Hearing (Sept. 2016) (video, Disc 3).

Viewpoint discrimination and bias in favor of a political party are ever-present risks, as the Board can infer political party affiliation, or the applicant may volunteer or signal their partisan or ideological leanings. DE176:24–29.

- In 2000, just days after *Bush v. Gore* was decided, restoration applicant Paul Daniel Maloney stated he was pro-life and congratulated former Governor Jeb Bush on his brother's presidential election victory. Notwithstanding an unfavorable recommendation from the Office of Clemency Investigations, the Board restored his voting rights.
- In 2001, Robert Kenneth Travis told Governor Bush how much he admired Barbara Bush, as well as former Governor Bob Martinez and former Attorney General Jim Smith because they had switched from the Democratic Party to the Republican Party. Mr. Travis identified himself as a registered Republican and regained his civil rights.
- In 2003, George Michael Grabek told Governor Bush he was "proud of [his] brother, President Bush" and was granted restoration.
- In 2013, Governor Scott confronted Stephen A. Warner with his illegal voting but then the Board granted his restoration application, after he informed them he had voted for Governor Scott.

- Witnesses on behalf of Patrick Durden (March 2016), Ronald Arnold Martin (December 2016), and Scott Moore (June 2015) identified them as "conservative" or "very conservative," and each was granted restoration.
- The Board restored Raymond Neil Oberman in 1997, after his uncle ingratiated himself with Governor Lawton Chiles by reminding him they had seen each other at "the convention," almost certainly referencing the 1996 Democratic National Convention.

The Board has long denied restoration applicants because of a record of traffic or moving violations, including speeding, driving with a suspended license, running a red light, among others, most of which are civil infractions. It also has granted applications notwithstanding similar or worse records of driving infractions. Governor Scott usually states his view that such violations are indicative of an unwillingness to abide by the law. Additionally, the Board, at whim, will *conditionally* grant certain applicants with significant records of moving violations; if these randomly-fortunate individuals can complete a year or two without a new ticket, they will regain their right to vote. DE176:30–33.

Drug use is another factor the Board invokes on occasion. Sometimes it denies for this reason; other times it grants; and there is no way to reconcile these cases. DE176:33–36.

- In 2015, Michael Lee Hazelwood's restoration application was denied because he admitted to occasionally smoking marijuana because it helps him sleep. Yet, just the next year, Roger Simon's and Melissa Beth Ann-Miller's applications were granted despite admitting they continued to use marijuana after completing their sentences.
- Paul Antoine's application was denied in 2016 because of a 2008 cocaine possession charge, on which prosecutors took no action, while Governor Chiles granted Manuel Eduardo Pinate's application, notwithstanding a dismissed cocaine possession charge just three years prior to the hearing. Similarly, Semitra Brown's civil rights were restored in 2005, despite her arrest just two years earlier for drug possession.
- Kevin Michael Grenier was denied restoration in 2015 because, over 18 years before his hearing, he had failed a drug test, violating his community control and resulting in his incarceration, and because Board members believed he had not finished a drug treatment program when he was 17 years old. The Board professes to focus on the rehabilitation of felons, but in Mr. Grenier's case, it rejected a restoration application based on nearly two-decades-old, *pre-incarceration* issues.

Alcohol use is another factor the Board invokes on occasion. Sometimes it denies for this reason; other times it grants; and there is no way to reconcile these

cases. The Board denied Ronald Kessler's, Brent Walter Rouse's, Robert Allen Parsons's, and James Traina's applications, citing their continued drinking following their respective convictions for felonies including DUI manslaughter, even when the applicants represented that their drinking was rare and responsible. However, the Board granted Gerald Bryan Kelly's, Brian Ohle's, and Ronald Burgess Kilpatrick's applications after confirming that their drinking is now minimal, occasional, and responsible. DE176:36–39.

Notwithstanding the rule requiring a felon to wait at least five years following completion of the full sentence before even applying for restoration, the Board also will reject people based on subjective, unexplained feelings that insufficient time has passed since completion of the applicant's sentence. Governor Bush would say there needs to be "a little bit more time," and Governor Scott says that he does not yet "feel comfortable" and that "more time needs to pass." Governor Scott rejected Plaintiff Virginia Atkins's application on these vague grounds ten years after she completed her sentence. DE176:39–41. There is no consistency in these determinations as to what constitutes an adequate amount of time between sentence completion and reenfranchisement.

All of this evidence inexorably leads to the conclusion that there is an inherent, ever-present *risk* of arbitrariness, bias, and/or discrimination in subjecting the restoration of voting rights to the unbridled discretion of state government officials.

A system of absolute discretion in the licensing or allocating of voting rights is a license to treat applicants in an arbitrary, biased, and/or discriminatory manner.

Applicants also face severe administrative delays. As of June 16, 2017, the Board had a backlog of 10,232 restoration of civil rights applications;[20] and as of October 1, 2017, that figure had risen to 10,377.[21] The current Board has granted far fewer restoration applications than previous administrations: just 2,691 individuals between the start of 2011 and June 15, 2017, compared with over 154,000 during Governor Crist's tenure.[22]

In 2017, Plaintiffs filed this lawsuit challenging Florida's arbitrary voting rights restoration system on First and Fourteenth Amendment grounds. On February 1, 2018, the district court granted Plaintiffs summary judgment on three of their four claims, and they have not appealed the adverse ruling on the fourth claim. App.Vol.3DE144:139.

To effectuate its constitutional ruling, the district court entered a declaratory judgment and a permanent injunction, ordering Defendants to replace the current

[20] DE115-5, Defendants' Response to Interrogatory No. 3.

[21] DE176:5 n.7 (requesting judicial notice of Testimony of Office of Executive Clemency Coordinator Julia McCall, Constitution Revision Commission Ethics and Elections Committee Hearing (Nov. 1, 2017) (video at 2:22:56–2:24:04), *available at* http://thefloridachannel.org/videos/11117-constitution-revision-commission-ethics-elections-committee/).

[22] DE115-6, DE115-7, Defendants' Responses to Interrogatories Nos. 4–5. Such wildly varying outcomes are the foreseeable consequence of giving politicians absolute power to grant or deny a license to vote.

arbitrary scheme with a non-arbitrary system governed by "specific and neutral criteria to direct vote-restoration decisions" and "meaningful, specific, and expeditious time constraints." App.Vol.4DE160:26; App.Vol.4DE161:29–30. The district court also enjoined Florida from eliminating all restoration of voting rights. App.Vol.4DE160:26; App.Vol.4DE161:29.

Defendants drafted and were poised to adopt new rules for voting rights restoration when a majority of this Court's motions panel stayed the injunction pending appeal.[23] Plaintiffs agree with Defendants' statement of the standards of review.

SUMMARY OF THE ARGUMENT

The First Amendment prohibits Defendants from implementing an arbitrary voting rights restoration scheme for felons. Because this system vests the Board with unfettered discretion to deny or grant restoration applications—to issue or withhold licenses to vote—without any rules, standards, or criteria, it creates the grave risk of discrimination, bias, and arbitrary treatment infecting a process that controls the exercise of a First Amendment-protected right. *City of Lakewood v.*

[23] Florida Attorney General's Website, Draft Temporary Rule Revisions for Florida Rules of Executive Clemency (Apr. 25, 2018), *available at* http://www.myflorida.com/myflorida/cabinet/agenda18/0425/drafttemporaryrulerevisions.pdf; *Rothenberg v. Sec. Mgmt. Co., Inc.*, 667 F.2d 958, 961 n.8 (11th Cir. 1982) (stating this Court may "take judicial notice of subsequent developments in cases that are a matter of public record and are relevant to the appeal").

Plain Dealer Publ'g Co., 486 U.S. 750, 769–72 (1988); *Norman v. Reed*, 502 U.S. 279, 288–90 (1992). Additionally, the lack of reasonable and definite time limits on restoration decisions violates the First Amendment. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 226 (1990). Although Section 2 of the Fourteenth Amendment authorizes states to disenfranchise felons, even permanently, *Ramirez*, 418 U.S. at 53–56, once a state restores the voting rights of any felons, it may not do so arbitrarily.

Even though felons are initially ineligible to vote as a matter of *state* law in Florida, arbitrary allocation or deprivation of the right to vote causes a *federal* constitutional injury. Section 2 of the Fourteenth Amendment authorizes States to disenfranchise convicted felons, but they must comply with all parts of the U.S. Constitution. *Williams v. Rhodes*, 393 U.S. 23, 29 (1968); *Ramirez*, 418 U.S. at 33–34, 56; *Hunter v. Underwood*, 471 U.S. 222, 231–33 (1985); *Shepherd v. Trevino*, 575 F.2d 1110, 1114–15 (5th Cir. 1978). Discriminatory disenfranchisement, discriminatory reenfranchisement, and arbitrary disenfranchisement all violate the Constitution, *Hunter*, 471 U.S. at 231–33, *Shepherd*, 575 F.2d at 1114, and it inexorably follows that arbitrary reenfranchisement does too. *Hunter* does not impose a ceiling on constitutional challenges to felon disenfranchisement and reenfranchisement schemes. Since the district court's judgment would continue to permit Florida to disenfranchise felons and since Plaintiffs have not alleged that

felon disenfranchisement in and of itself is unconstitutional, there is no conflict between permitting felon disenfranchisement and prohibiting arbitrary reenfranchisement.

Defendants argue that, when it comes to voting, the First Amendment is fully subsumed under or preempted by the Fourteenth Amendment, so the analysis need not extend beyond Fourteenth Amendment cases. This is not the law. The First Amendment presents rules, doctrines, protections, prohibitions, and causes of action that are legally and analytically distinct from the Fourteenth Amendment, specifically targeted at the challenged scheme, and not subject to the Fourteenth Amendment's proof requirements.

The Supreme Court's precedents demonstrate that restrictions on Fourteenth Amendment discrimination claims do not apply to First Amendment unfettered discretion claims. The Court has shown zero tolerance for even the risk of discriminatory or arbitrary treatment in the First Amendment context, whereas discrimination claims under the Fourteenth Amendment require a showing of actual, intentional discrimination that has already occurred. *Compare Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 133 n.10 (1992) (striking down local government's arbitrary permit application process without any proof of actual, intentional discrimination), *with Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 264–65 (1977) (requiring proof of actual, intentional

discrimination in equal protection case challenging local government's denial of rezoning application). Individuals who wish to exercise their First Amendment rights need not wait for an actual instance of viewpoint or other form of discrimination to strike down an arbitrary licensing scheme. The Supreme Court has strictly prohibited unfettered discretion in licensing First Amendment-protected conduct, regardless of whether invidious discrimination is proven. In this way, because the Constitution is at its most protective and vigilant when free political expression and association are at stake, the First Amendment *does* protect the right to vote more than the Fourteenth Amendment.

While, in some cases, the First Amendment does not provide a well-developed, analytically distinct doctrine or legal rule, *see Burton v. City of Belle Glade*, 178 F.3d 1175, 1187–88 n.9 (11th Cir. 1999), *Cook v. Randolph Cty.*, 573 F.3d 1143, 1152 n.4 (11th Cir. 2009), it does in this case. Here, there is a longstanding, well-developed, and analytically distinct doctrine that *specifically* addresses the arbitrary licensing of First Amendment-protected conduct—the very scheme challenged here—and that rule must be applied.

The record was filled with evidence demonstrating the risk of arbitrary, biased, and/or discriminatory conduct. The district court only invoked Plaintiffs' evidence to demonstrate that the *risk* of discrimination, bias, and/or arbitrariness was real, not merely theoretical. Because proof of actual, intentional discrimination is

not required by this First Amendment doctrine and the Board may disregard the confidential case analyses ("CCAs") on each restoration applicant, the parties' discovery dispute over the CCAs and Defendants' objections to the district court's characterizations of certain Board decisions on individual restoration applications are irrelevant.

The constitutional ruling in this case is confined to voting rights restoration and, because of the unique First Amendment interests implicated by voting rights restoration, it need not have any effect on any other form of executive clemency. Voting rights restoration is *not* intrinsically part of the pardon power or the executive clemency system. The "clemency" label does not immunize felon reenfranchisement from judicial scrutiny.

Beacham v. Braterman, 300 F. Supp. 182 (S.D. Fla.), *aff'd mem.*, 396 U.S. 12 (1969), does not foreclose Plaintiffs' equal protection claim. *Beacham*'s facts reveal that what the Supreme Court *necessarily* decided in its summary affirmance is narrower than what is suggested by the three-judge court's opinion or the jurisdictional statement. *Hardwick v. Bowers*, 760 F.2d 1202, 1208 (11th Cir. 1985). Plaintiffs ultimately seek a narrow construction or reversal of *Beacham* and, in any event, *Beacham* could not and did not foreclose any First Amendment claims.

Finally, the district court did not abuse its discretion in issuing its injunction. Upon finding a violation of the First Amendment unfettered discretion doctrine, the

Supreme Court's and this Court's precedents required the district court to order the Board to create non-arbitrary, uniform restoration rules. *Atlanta Journal & Constitution v. City of Atlanta Dep't of Aviation*, 322 F.3d 1298, 1310–12 (11th Cir. 2003) (en banc). However, the district court could not foreclose Defendants from uniformly revoking all voting rights restoration.

ARGUMENT

1. The district court correctly held that the First Amendment prohibits Defendants from implementing their arbitrary voting rights restoration scheme.

a. The First Amendment prohibits arbitrary licensing schemes regulating the exercise of the constitutionally-guaranteed rights to political expression and association, which embrace voting.

As the district court reaffirmed, the First Amendment protects the right to vote because voting is both expressive conduct and a means of political association. App.Vol.3DE144:106–114. The Supreme Court has long held that, as a means for citizens to associate with political parties, ideas and causes, voting is protected by the First Amendment. *Cal. Democratic Party v. Jones*, 530 U.S. 567, 574 (2000); *Norman v. Reed*, 502 U.S. 279, 288–90 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 787–89, 806 (1983); *Kusper v. Pontikes*, 414 U.S. 51, 56–58 (1973); *Williams v. Rhodes*, 393 U.S. 23, 30–31 (1968). The First Amendment also protects voting because it constitutes expressive conduct—"the citizen's ultimate form of political expression." App.Vol.3DE144:113. That protection covers expressions of support

for candidates, parties, and causes, regardless of the format or medium. *City of Ladue v. Gilleo*, 512 U.S. 43, 54–59 (1994) (political yard signs); *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979) (describing ballot access restrictions as "impair[ing] the voters' ability to express their political preferences"); *Buckley*, 424 U.S. at 48 (advocacy for election or defeat of candidates); *Hobbs v. Thompson*, 448 F.2d 456, 469–75 (5th Cir. 1971) (campaign bumper stickers). It would be highly anomalous for all forms of speech and expression in the electoral context to be protected by the First Amendment, except the political choice and expression at the very center of it—voting. App.Vol.3DE144:113. Unsurprisingly, Defendants do not contend that the First Amendment fails to protect the right to vote.

Most relevant here, the First Amendment forbids giving government officials unfettered discretion to grant or deny licenses or permits to engage in any First Amendment-protected speech, expressive conduct, association or other protected activity. *Forsyth Cty.*, 505 U.S. at 130–33. Since 1938, the Supreme Court has consistently applied this doctrine to strike down administrative licensing regimes that conferred limitless discretion as to a wide range of First Amendment freedoms. In *City of Lakewood v. Plain Dealer Publishing Co.*, the Supreme Court facially invalidated an ordinance containing "no explicit limits on the mayor's discretion" to grant or deny permit applications for newspaper distribution. 486 U.S. 750, 769–72

(1988). This made the process vulnerable to the "use of shifting or illegitimate criteria" and viewpoint discrimination. *Id*. at 757–58. "This danger [of viewpoint discrimination] is at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official." *Id.* at 763; *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150–51 (1969) (invalidating permit scheme for marches or demonstrations that lacked "narrow, objective, and definite standards" and was "guided only by [Commissioners'] own ideas of 'public welfare, peace, safety, health, decency, good order, morals or convenience'"); *Staub v. City of Baxley*, 355 U.S. 313, 321–22 (1958) (invalidating permit scheme for union solicitation because it made "the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official").

These precedents are legion and consistent. They all stand for the proposition that a law conferring arbitrary, unfettered power to grant or deny a license or permit to engage in constitutionally protected expression violates the First Amendment; the existence of an actual improper discriminatory or biased motive need not be shown to strike down such a law on its face. *Forsyth Cty.*, 505 U.S. at 133 n.10; *Saia v. New York*, 334 U.S. 558, 560–62 (1948) (striking down discretionary permit scheme for use of loudspeakers) ("Annoyance at ideas can be cloaked in annoyance at

sound."); *Lovell v. City of Griffin*, 303 U.S. 444, 450–53 (1938) (striking down arbitrary permit scheme governing distribution of any literature).[24]

This Court has even struck down laws that confer unfettered discretion to *inhibit or burden* the exercise of First Amendment rights. In *Bourgeois v. Peters*, this Court found a First Amendment violation where decisions as to whether to conduct mass searches at particular demonstrations were "not made according to any set, objective, neutral criteria." 387 F.3d 1303, 1316–19 (11th Cir. 2004) ("[R]estrictions on First Amendment rights may not be left to an executive agent's uncabined judgment."). Judge Tjoflat wrote that:

> The problem is not that the Chief applied an inappropriate standard in deciding whether to implement this search policy. Instead, the problem is that there were no objective, established standards for the Chief to utilize in making this decision other than those he happened to deem relevant. . . . Because there are no established standards, nothing prevents the Chief from applying one standard to the SAW protest and an entirely different standard to other public gatherings (including those sponsored by organizations with which he might be more sympathetic).

387 F.3d at 1318.

The district court correctly held that Florida's arbitrary process for granting or denying felons' voting rights restoration applications is just this kind of purely discretionary, unregulated licensing scheme that infringes upon a First Amendment

[24] The Supreme Court continues to demonstrate significant concern when First Amendment rights are subjected to officials' discretion in the absence of clear, objective standards. *Minn. Voters Alliance v. Mansky*, No. 16-1435, 2018 WL 2973746, at *10–12 (U.S. June 14, 2018).

right. App.Vol.3DE144:114–124. The district court stated that "[i]n Florida, elected, partisan officials have extraordinary authority to grant or withhold the right to vote from hundreds of thousands of people without any constraints, guidelines, or standards. The question now is whether such a system passes constitutional muster. It does not." App.Vol.3DE144:100. Since the process is divorced from any rules, standards, criteria or constraints of any kind, it is highly susceptible to discriminatory, biased, and arbitrary treatment, which can easily be camouflaged by a variety of pretextual reasons for denials or grants.

This case's facts are not materially different from the unconstitutional licensing schemes struck down in the above cases. In all of these cases, no one can engage in the *specific type or manner* of constitutionally protected activity without first obtaining a license or permit and will be prosecuted if he or she does so. In Florida, a class of individuals cannot register and vote without first obtaining a license or permit (a restoration order) and will be prosecuted if they do so. FLA. STAT. ANN. § 104.15 (ineligible voters who willfully vote guilty of third-degree felony). There is no material or logical difference between the following statements: "Felons cannot vote and they must apply and be approved to regain their right to vote"; and "Felons *can* vote if they obtain prior permission from a board of state officials." Florida's voting eligibility laws do not strip felons of their constitutional

rights; they simply require a certain subset of U.S. citizen adults to obtain a license prior to registering and voting.

Relatedly, the Supreme Court also has held that a licensing scheme "that fails to place limits on the time within which the decisionmaker must issue the license is impermissible." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 226 (1990). "Where the licensor has unlimited time within which to issue a license, the risk of arbitrary suppression is as great as the provision of unbridled discretion." *Id*. at 227; *Riley v. Nat'l Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781, 802 (1988) (same). The district court also correctly held that the lack of reasonable, definite time limits on the Board's decision-making for restoration applications violates the First Amendment. App.Vol.3DE144:124–128. Without time limits, there is a significant risk of arbitrary, biased, or discriminatory treatment of a pending application.

b. State felon disenfranchisement and reenfranchisement laws must comply with all parts of the Constitution.

Defendants' principal argument is that felons are ineligible to vote in Florida until restored to their civil rights and therefore cannot claim a constitutional injury from arbitrary decision-making on their restoration applications. Appellants' Brief 33–36; App.Vol.2DE103:151–55.

The Supreme Court has twice rejected the argument that felon disenfranchisement laws need not comply with constitutional limitations. In *Ramirez* itself, the Supreme Court only addressed and rejected the first of the

plaintiffs' two claims, which included: (1) a facial challenge to California's felon disenfranchisement law that contended the state per se could not lawfully deny the vote to felons; and (2) a separate equal protection and due process claim which attacked the lack of uniform enforcement of that law. 418 U.S. at 33–34. After holding that Section 2 of the Fourteenth Amendment authorizes states to disenfranchise felons and rejecting the first claim, the Supreme Court remanded the second claim to the Supreme Court of California. *Id*. at 56. If Defendants' theory were correct, the Supreme Court would not have remanded the *Ramirez* plaintiffs' alternative equal protection claim.

Defendants' contention is also belied by the Supreme Court's decision in *Hunter v. Underwood*, which struck down the 1901 Alabama Constitution's felon disenfranchisement provision on a finding of intentional racial discrimination in violation of the Equal Protection Clause. 471 U.S. 222, 231–33 (1985). The Supreme Court clarified that *Ramirez* did not hold that Section 2 of the Fourteenth Amendment precludes felons from challenging disenfranchisement laws when they run afoul of constitutional limitations:

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

Id. at 233; *see also Hobson v. Pow*, 434 F. Supp. 362, 366–67 (N.D. Ala. 1977) (holding sex discrimination in felon disenfranchisement scheme violates Equal Protection clause).

Accordingly, it is clear that discriminatory disenfranchisement violates the Constitution. Similarly, the former Fifth Circuit explained that discriminatory *reenfranchisement* is also unconstitutional:

> [W]e are similarly unable to accept the proposition that section 2 [of the Fourteenth Amendment] removes all equal protection considerations from state-created classifications denying the right to vote to some felons while granting it to others. *No one would contend that section 2 permits a state to disenfranchise all felons and then reenfranchise only those who are, say, white.*

Shepherd v. Trevino, 575 F.2d 1110, 1114 (5th Cir. 1978) (emphasis added). The Court then rejected the plaintiffs' equal protection claim *on the merits*, not for lack of a constitutional interest or injury. *Id*. at 1114–15. Several Courts of Appeals, including the former Fifth Circuit, have also stated that arbitrary disenfranchisement would be unconstitutional. *Id*. at 1114; *Owens v. Barnes*, 711 F.2d 25, 26–27 (3d Cir. 1983) ("[T]he state could not disenfranchise similarly situated blue-eyed felons but not brown-eyed felons."); *Williams v. Taylor*, 677 F.2d 510, 515–17 (5th Cir. 1982) (remanding for trial on equal protection challenge to "selective and arbitrary enforcement of the disenfranchisement procedure"). The broad language in *Shepherd* indicates that the same would hold true for arbitrary reenfranchisement. 575 F.2d at 1114 ("Nor can we believe that section 2 would permit a state to make a

completely arbitrary distinction between groups of felons with respect to the right to vote.").

If, as Defendants have agreed, an irrational, arbitrary *categorical* distinction between different groups of felons violates the Constitution, App.Vol.2DE103:140, App.Vol.3DE141:55, 65, 72, then arbitrary, irreconcilable determinations made on a case-by-case basis untethered to any rules, standards, or criteria, must also violate the Constitution. DE176:23–43; *supra* at 6–12. Courts traditionally view unfettered administrative discretion to make case-by-case determinations as far more problematic than legislative line-drawing, and therefore treat the former with much less deference. *See, e.g., Gasparo v. City of New York*, 16 F. Supp. 2d 198, 207–16, 221–23 (E.D.N.Y. 1998) (rejecting equal protection challenge to statutory classification singling out newsstands from all sidewalk vendors, but issuing preliminary injunction against unfettered administrative discretion in terminating permits).

Defendants defy both the law and logic in arguing that discriminatory disenfranchisement, discriminatory reenfranchisement, and arbitrary disenfranchisement violate the Constitution, but arbitrary reenfranchisement does not. Disenfranchised felons suffer a *federal* constitutional injury even though *state* law bars them from voting, as Defendants have already acknowledged by conceding that discriminatory reenfranchisement is unconstitutional. Appellants' Brief 37–39

& n.6, 46; Stay Motion 10–11; App.Vol.3DE141:72. Were it otherwise, those individuals could not be victims of unlawful discrimination. Felons are also injured by arbitrary reenfranchisement, even though they are ineligible to vote until their rights are restored. If felons' injuries were not legally cognizable, the Board's arbitrary, standardless decision-making would be immune from judicial review, and state officials could make voting rights restoration decisions based on height, attractiveness, or English literacy.[25] The district court properly rejected Defendants' argument, writing: "If anything, the constitutional limitations for vote-restoration should be construed more broadly than those for disenfranchisement because vote-restoration involves the allocation (or re-allocation, as the case may be) of a fundamental right." App.Vol.3DE144:104n.5.

Finally, the Supreme Court in *Hunter* did not say—nor has it ever said—that the prohibition on intentional racial discrimination is the only constitutional

[25] Defendants' phrasing is strange: "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." Appellants' Brief 46. This implies that some alleged constitutional violations need not be addressed on the merits because felon disenfranchisement and reenfranchisement laws would be "immune from judicial review" with respect to those constitutional requirements. There is no binding legal authority for this proposition. To the extent *Harvey v. Brewer*, 605 F.3d 1067, 1080 (9th Cir. 2010), *Johnson v. Bredesen*, 624 F.3d 742, 751 (6th Cir. 2010), and *Howard v. Gilmore*, 205 F.3d 1333, at *1–2 (4th Cir. 2000) (unpublished), suggest that disenfranchised felons have no constitutional interest in voting, they conflict explicitly with the Supreme Court's decision in *Hunter* and implicitly with the remand in *Ramirez*.

limitation on felon disenfranchisement and reenfranchisement laws. Though Defendants and the motions panel majority have treated *Hunter* as a ceiling on challenges to felon disenfranchisement and reenfranchisement laws, no legal precedent supports that conclusion. The motions panel majority appeared to impose a discriminatory purpose-and-effect test on First Amendment unfettered discretion challenges, *Hand v. Scott*, 888 F.3d 1206, 1211–12 (11th Cir. 2018), but—with respect—there is no legal authority for such a requirement. *Hunter* focused on discrimination and disenfranchisement, whereas this challenge focuses on arbitrariness and reenfranchisement. *Hunter* is silent as to whether arbitrary reenfranchisement is constitutional. To that question, the First Amendment provides a specific answer—arbitrarily licensing First Amendment-protected conduct is unlawful.

c. Prohibiting arbitrary licensing of First Amendment-protected voting rights does not conflict with Section 2 of the Fourteenth Amendment.

There is no conflict between Section 2 of the Fourteenth Amendment and the prohibition on arbitrarily licensing First Amendment-protected conduct. Because there is no need to harmonize constitutional provisions that do not conflict, the district court's order and *Ramirez* can coexist.

Nothing about the district court's February 1st ruling on the merits disturbs the state's power to disenfranchise felons upon their conviction.[26] Plaintiffs do not contest that Section 2 of the Fourteenth Amendment, as construed by *Ramirez*, authorizes Florida to disenfranchise felons. Instead, Plaintiffs argue that this grant of legislative authority must be exercised in a manner consistent with other constitutional provisions and rights. "[T]he Constitution is filled with provisions that grant Congress or the States specific power to legislate in certain areas; these granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution." *Rhodes*, 393 U.S. at 29. This bedrock principle of constitutional law has been echoed in many contexts. In *Tashjian v. Republican Party of Connecticut*, the Court stated that:

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

479 U.S. 208, 217 (1986); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516 (1996) (holding Twenty-First Amendment's grant of legislative authority to states does not shield laws regulating commerce in or use of alcoholic beverages from First Amendment challenges).

[26] Plaintiffs discuss the district court's injunction in Section 3.

The district court's First Amendment rulings are consistent with *Ramirez*—they are based on independent and specific constitutional limitations and do not challenge Florida's power to disenfranchise and reenfranchise felons, but rather its power to do so arbitrarily. "[I]n a host of other First Amendment cases," the Supreme Court has rejected the "'greater-includes-the-lesser'" argument, striking down arbitrary licensing schemes with "open-ended discretion . . . even where it was assumed that a properly drawn law could have greatly restricted or prohibited the manner of expression." *Plain Dealer*, 486 U.S. at 766. Consistent with Section 2, the district court's judgment would still permit Florida to continue disenfranchising felons.

For this reason, the motions panel majority's assertion that "the specific language of [Section 2 of] the Fourteenth Amendment controls over the First Amendment's more general terms" is, with respect, not the law. *Hand*, 888 F.3d at 1212. There is no conflict or even tension between permitting felon disenfranchisement and forbidding arbitrary reenfranchisement, so this Court need not evaluate which amendment is more "specific" or trumps the other. If two provisions granting legislative authority or two provisions conferring rights—one more specific than the other—were in conflict, the more specific provision would control. But there is no need to harmonize constitutional provisions that do not conflict. As one of countless other examples, the Elections Clause specifically

authorizes states to draw district maps, but the Supreme Court has consistently held that the more general language of the Equal Protection Clause prohibits racial gerrymandering. *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1263–64 (2015) (collecting cases and summarizing racial gerrymandering test). There is no conflict there. Constitutional limitations and prohibitions may not be ignored even if they are stated in general, broad terms.

There is also no conflict between the district court's rulings on the First Amendment claims and Section 2 of the Fourteenth Amendment as construed in *Ramirez* because Plaintiffs clearly have not alleged that felon disenfranchisement itself per se violates the First Amendment, as the plaintiffs unsuccessfully argued in *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 on other grounds sub nom. Johnson v. Governor of Fla.*, 405 F.3d 1214 (11th Cir. 2005) (en banc); *Hayden v. Pataki*, No. 00 Civ. 8586(LMM), 2004 WL 1335921, at *6 (S.D.N.Y. June 14, 2004); and *Howard v. Gilmore*, 205 F.3d 1333, at *1 (4th Cir. 2000) (unpublished). Instead, Plaintiffs have argued that *arbitrary* reenfranchisement violates the First Amendment, a constitutional challenge not adjudicated in any of those cases. Section 2 of the Fourteenth Amendment does not foreclose these claims or "blunt[ ] the First Amendment's application here," *Hand*, 888 F.3d at 1212, because the constitutional

requirement that voting rights restoration be non-arbitrary is completely consistent with the states' power to disenfranchise felons.

d. The First Amendment presents rules, doctrines, and causes of action that are analytically distinct from the Fourteenth Amendment, specifically targeted at the challenged scheme, and not subject to Fourteenth Amendment proof requirements.

Just as Section 2 of the Fourteenth Amendment does not foreclose this action, neither does Section 1. Fourteenth Amendment case law does not preempt the First Amendment unfettered discretion doctrine or preclude its application to an arbitrary voting rights restoration scheme. The First Amendment presents rules, doctrines, and causes of action that are distinct from the Fourteenth Amendment, aimed at the challenged restoration process, and not subject to doctrinal requirements specific to Fourteenth Amendment claims.

Defendants have argued and the motions panel majority agreed that in this case the First Amendment "afford[s] no greater protection for voting rights claims than that already provided by the Fourteenth" Amendment, citing *Burton v. City of Belle Glade*, 178 F.3d 1175, 1187–88 n.9 (11th Cir. 1999). However, *Burton*'s footnote 9 and the few precedents upon which it relied had no occasion to consider the specific First Amendment doctrines and claims in this case; those cases did not concern an analytically distinct First Amendment violation. Contrary to Defendants' insinuations, state conduct may violate multiple constitutional rights or provisions at once or may violate some but not others.

First and foremost, unlike Fourteenth Amendment discrimination claims, the First Amendment's unfettered discretion doctrine does not require proof of actual, intentional discrimination. Though Plaintiffs have provided numerous examples that demonstrate the high risk of viewpoint, racial, or other types of discrimination to infect Florida's voting rights restoration process, Plaintiffs are not required to prove actual, intentional discrimination. Instead, unfettered discretion in licensing constitutionally protected conduct or expression is per se invalid under the First Amendment, regardless of whether there are any proven instances of discrimination. The Supreme Court has made this clear:

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

Forsyth Cty., 505 U.S. at 133 n.10 (citations omitted); *see also Miami Herald Publ'g Co. v. Hallandale*, 734 F.2d 666, 674 n.4 (11th Cir. 1984) ("[I]n the unique context of first amendment challenges upon the facial validity of licensing statutes, it is the very existence of official discretion that gives rise to a threat of injury sufficient to warrant an injunction."); *Roach v. Stouffer*, 560 F.3d 860, 869 & n.5 (8th Cir. 2009) (holding that, in facial First Amendment challenge to officials' "unbridled discretion" in administering specialty license plate program, pro-life group "need not prove, or even allege" viewpoint discrimination); *Fernandes v. Limmer*, 663

F.2d 619, 625 (5th Cir. Unit A 1981) ("A court may invalidate an excessively broad grant of discretion on its face, without regard to the particular facts of the plaintiff's case, because the very existence of the discretion lodged in the public official is constitutionally unacceptable."), *cert. denied*, 458 U.S. 1124 (1982); *Students for Life USA v. Waldrop*, 162 F. Supp. 3d 1216, 1242 (S.D. Ala. 2016) (Steele, C.J.) ("The thrust of the unbridled discretion doctrine, moreover, is that such discretion of itself raises an unacceptable risk of viewpoint discrimination; there is no burden on the plaintiff to prove that the government has exercised, or will exercise, its unbridled discretion in a viewpoint-biased manner."). A discriminatory purpose-and-effect test is wholly absent from this line of cases. *Supra* at 20–22.[27]

The unfettered discretion doctrine is not medicine for an already-ill patient, the way Fourteenth Amendment racial discrimination law is, but rather a vaccination inoculating First Amendment-protected conduct against disease. "[A] facial challenge lies whenever a licensing law gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers." *Plain Dealer*, 486 U.S. at 759. Regardless of whether or how frequently it is exercised, the power to discriminate is

[27] In its First Amendment jurisprudence, this Court has recognized the unfettered discretion doctrine as an independent basis for relief. *See Bourgeois*, 387 F.3d at 1316–25 (applying numerous First Amendment doctrines and finding violations separately under unfettered discretion doctrine and under content-based restriction doctrine, among several others).

prohibited in the First Amendment context: such unfettered, arbitrary power is per se unlawful. This prophylactic rule is necessary because actual, intentional discrimination is exceedingly difficult to prove, particularly when a decision-making body, like the Board, need not disclose its reasons. *Id.* (discussing "difficulty of effectively detecting, reviewing, and correcting" viewpoint discrimination in as-applied challenges). Proof of "actual and systemic discrimination" is not required. Stay Motion 13. The district court agreed that the risk of discrimination is a real and grave threat, and preventing it justifies this broad prophylactic rule. App.Vol.3DE144:119–20.

By contrast to Fourteenth and Fifteenth Amendment discrimination cases, which require proof of discriminatory purpose, here there is a clearly applicable First Amendment doctrine that does not require such proof. *Compare Forsyth Cty.*, 505 U.S. at 130–33, 133 n.10 (striking down local government's arbitrary permit application process without any proof of actual, intentional discrimination), *with Arlington Heights*, 429 U.S. at 264–65 (requiring proof of actual, intentional discrimination for Fourteenth Amendment equal protection challenge to local government's denial of rezoning application). The motions panel majority erroneously applied a Fourteenth Amendment test to distinct First Amendment claims, when it stated that "a reenfranchisement scheme could violate equal protection if it had both the purpose and effect of invidious discrimination" and that

"the First Amendment provides no additional protection of the right to vote." *Hand*, 888 F.3d at 1207. This contradicts the Supreme Court's First Amendment unfettered discretion precedents. The very fact that the First Amendment forbids unfettered discretion in the licensing of protected expression and association *regardless of any proof of actual discrimination* demonstrates that the First Amendment *does* protect political expression and association—voting—in a different and much more protective way than the Fourteenth Amendment.

Second, cases in which the First Amendment lacks a rule or application that is analytically distinct from the Fourteenth Amendment are inapposite. The motions panel majority did not dispute that the First Amendment protects the right to vote. Rather, citing only cases that concern electoral districts, their boundaries, and other factual situations vastly different from this case, the majority concluded that the First Amendment offers no greater protection for voting rights than the Fourteenth Amendment and concluded the equal protection case law is dispositive.

In the cases Defendants and the motions panel majority cite, the First Amendment lacks an analytically distinct doctrine and/or legal rule that is directly applicable to the challenged laws and practices. *Burton*, 178 F.3d at 1187–88 n.9 (challenging city's refusal to annex African-American housing project); *Cook v. Randolph Cty.*, 573 F.3d 1143, 1152 n.4 (11th Cir. 2009) (challenging attempted reassignment to different voting district); *Irby v. Va. State Bd. of Elections*, 889 F.2d

1352, 1359 (1989) (challenging appointive system for filling public office). These cases originate with *Washington v. Finlay*, 664 F.2d 913 (4th Cir. 1981), a racial minority vote dilution challenge to an at-large election system. But the qualifying language in *Washington* that limits the holding to challenges to the dilution of an otherwise-intact right to vote has been omitted through successive, incomplete citations. Citing zero precedents, *id*. at 927–28, the Fourth Circuit dismissed the First Amendment claim by writing (in full):

> *Where, as here, the only challenged governmental act is the continued use of an at-large election system, and where there is no device in use that directly inhibits participation in the political process*, the first amendment, like the thirteenth, offers no protection of voting rights beyond that afforded by the fourteenth or fifteenth amendments.

Id. at 928 (emphasis added). Reasoning that there is no First Amendment right to electoral victory, the Court clearly limited its holding to the only situation before it: the dilution of an otherwise-unimpeded vote. It also did not express any opinion as to the First Amendment implications of a law that denies the right to vote or "directly inhibits participation in the political process," *id*., such as an arbitrary voting rights restoration scheme for felons.

It was that clear, limiting language from *Washington* that *Burton* omitted, even as it characterized the plaintiffs' First Amendment claim as a "vote dilution" claim. 178 F.3d at 1187–88 n.9. But regardless of how that claim was labeled, it was dead on arrival on the facts, and without *Washington*'s limiting language,

Burton overstated its own holding. Because the *Burton* plaintiffs were alleging racial discrimination under the Fourteenth and Fifteenth Amendments for the city's refusal to annex an African-American housing project—claims which require proof of "discriminatory purpose and effect," *id.* at 1188–89—it is accurate and uncontroversial to say that the First Amendment provided them with no analytically and legally distinct rule or cause of action to attack a city's allegedly discriminatory annexation decisions. Bringing a *racial discrimination* claim touching on First Amendment-protected conduct still requires a plaintiff to satisfy the Fourteenth Amendment's restrictions for such claims. *Arlington Heights*, 429 U.S. at 264–65. However, Plaintiffs have not alleged intentional racial discrimination, but rather have attacked an arbitrary system for licensing First Amendment-protected conduct, a violation of a longstanding, analytically distinct First Amendment doctrine that does *not* require proof of discriminatory purpose. The unfettered discretion doctrine cannot be reduced to or recharacterized as a racial discrimination test because, by design, it preemptively shields First Amendment rights from all types of discrimination, bias, and arbitrary treatment and does not hinge on whether these harms have already occurred.

This Court's subsequent decision in *Cook* is also inapposite. Not only did the case challenge a public official's reassignment to a different board of education district rather than complete vote denial or arbitrary grants or denials of the right to

vote, but the opinion also quickly reveals that the alleged violations never even came to pass:

> Assuming for the sake of argument that Cook has a constitutional right to vote in and run for office in a particular district, the attempt to deprive him of that right did not succeed. . . .
>
> Cook was able to continue voting in and running for office from District 5. He won the 2006 election. His tenure on the Board of Education was not interrupted. Nothing changed. Because Cook was never actually deprived of his rights to vote in or run for office from District 5, he suffered no loss of any constitutional or statutory right.

573 F.3d at 1152–54. Lacking an injury, Cook had no standing to sue, and this Court lacked subject matter jurisdiction. Therefore, footnote 4's commentary on the First Amendment is pure dicta and cannot be relevant to a case involving actual denial of the right to vote via arbitrary licensing specifically prohibited by a First Amendment doctrine. *Id*. at 1152 n.4. Footnote 4 also must be read in the context of the Court's description of the complaint as a "shotgun pleading." *Id.* at 1151. Unlike this case, *Cook* reflected no distinct First Amendment claims or doctrines, as the complaint lumped multiple rights and causes of action together. *Id*. at 1148 (alleging county officials "violated his due process and equal protection rights under the 1st, 13th, 14th, and 15th Amendments"). Shotgun pleadings conflate and confuse separate legal issues and are poor vehicles for courts to articulate the contours of distinct rules and causes of action. *Magluta v. Samples*, 256 F.3d 1282, 1284–85 (11th Cir. 2001) (per curiam) (refusing "to address and decide serious constitutional issues on the

basis of" a "quintessential 'shotgun' pleading of the kind [this Court has] condemned repeatedly").

The only other circuit court case cited by the motions panel majority is also inapposite. The plaintiffs in *Irby* challenged Virginia's appointive system for school board as racially discriminatory on Fourteenth and Fifteenth Amendment grounds and as causing a racially discriminatory effect under the Voting Rights Act. There was no proof of discriminatory purpose, so the Fourteenth and Fifteenth Amendment claims were properly dismissed, 889 F.2d at 1356–57, and, as in *Burton*, the First Amendment provides no analytically distinct rule or doctrine concerning appointive offices, *id.* at 1359. There is no arbitrariness or unequal treatment in an appointive system; no one can vote for the office, so there is neither vote denial nor vote dilution. Citing that fact, the Court also held that Section 2 of the Voting Rights Act was most likely "not applicable to appointive offices." *Id*. at 1357. Therefore, *Irby* is irrelevant to a scheme permitting state officials to arbitrarily restore voting rights to some felons while continuing to deny the same to others.

The motions panel majority extended the above racial discrimination and minority vote dilution cases to the instant context of vote denial and arbitrary reenfranchisement, which *Burton*, *Cook*, *Washington*, and *Irby* never considered. But the majority nonetheless tentatively concluded that the First Amendment unfettered discretion cases did not apply because no previous cases have specifically

considered the First Amendment right to vote and its interaction with arbitrary felon reenfranchisement. *Hand*, 888 F.3d at 1211–13. But "common-law adjudication" has always been an "evolutionary process" that "assigns an especially broad role to the judge in applying [the rule] to specific factual situations." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 502 (1984). If the right to vote is protected by the First Amendment (and it is, *supra* at 19–20), then precedent requires this doctrine be applied. Respectfully, that the *specific* application of the unfettered discretion doctrine to the arbitrary allocation of voting rights has not been considered previously should not prevent this Court from considering it on the merits now.

Plaintiffs have not alleged racial discrimination under the Fourteenth and Fifteenth Amendments or the dilution of a minority group's voting power under the Voting Rights Act. Instead, they have challenged the arbitrariness of the voting rights restoration scheme for Florida's felons, and the relevant First Amendment precedents merely point to the risks of viewpoint, race, wealth, and other forms of discriminatory, biased, and/or arbitrary treatment as justification for the unfettered discretion doctrine. The First Amendment is not absorbed within or rendered superfluous by the Fourteenth Amendment in this context of arbitrary licensing schemes infringing on a protected right, and *Burton*'s and *Cook*'s footnotes do not preclude Plaintiffs' First Amendment claims. There may be no legally and analytically distinct First Amendment doctrine that specifically protects against

racial discrimination, vote dilution, appointive offices, or the denial of an annexation petition, but there is a distinct First Amendment doctrine that specifically addresses—and condemns—what is challenged here: an arbitrary licensing scheme regulating the exercise of a First Amendment right.

e. The district court only invoked Plaintiffs' evidence to conclude that the *risk* of discrimination, bias, and arbitrariness was real.

Although proof of actual discrimination, bias, and/or arbitrary treatment is not required under binding First Amendment precedents, Plaintiffs nevertheless marshalled significant evidence of arbitrary, inconsistent treatment and also of Board dispositions that plausibly suggested discriminatory or biased decision-making. The district court reviewed this evidence, *supra* at 7–12, to assure itself that the risk of viewpoint, racial or other discrimination and bias was not merely theoretical. This evidence clearly demonstrates that the risk of discrimination, bias, and arbitrariness infecting voting rights restoration decisions is a clear and present danger.

Defendants' objections to the district court's characterizations of the Board's treatment of certain individual restoration applicants and their references to the confidential case analyses ("CCAs") are irrelevant. The district court did not conclusively find that there was discrimination or bias in any particular case. It used Plaintiffs' evidence only to note that there was in fact a credible risk of discrimination, bias, and arbitrary treatment in Defendants' voting rights restoration

system. App.Vol.3DE144:121 ("It is of no consequence to this Court that 'Plaintiffs have not pled any claim or advanced any argument that Defendants have ever actually engaged in such invidious discrimination.' . . . It is exactly that 'Board members *could* engage in [unconstitutional, viewpoint-based] discrimination,' *id.*, that is so troublesome."). Even if today were the first day of this arbitrary restoration system and there was no historical evidence, the complete lack of rules, standards, and criteria would still violate the First Amendment. But the district court did *more* than what the Supreme Court has required for facial challenges to such arbitrary licensing schemes; it satisfied itself that the risks of discrimination, bias, and arbitrariness were not merely abstract or theoretical. App.Vol.3DE144:120 ("[T]he risk of viewpoint discrimination is distressingly real.").

Plaintiffs requested that Defendants produce the CCAs for 54 non-party restoration applicants who appeared to have been treated in an arbitrary and/or discriminatory fashion.[28] Defendants refused to provide these CCAs even under a protective order or under seal for *in camera* review. App.Vol.2DE51:7–14; App.Vol.2DE57:36, 43–44. Plaintiffs moved to compel production, and the district court denied that motion, stating the non-party CCAs were only "marginally

[28] These included the CCAs for all the examples in DE176:23–43, *supra* at 8–12, including Stephen A. Warner and the five African-American applicants who appeared to have been denied in large part due to their registering and/or voting while disenfranchised.

relevant" to Plaintiffs' facial challenges and that the CCAs were not relevant to Defendants' defenses. App.Vol.2DE62:51–52.

Plaintiffs were therefore deprived of the opportunity to review these CCAs, make even more granular, comparative assessments of the Board's restoration decisions, and extract additional, though not required, evidence of actual arbitrary, inconsistent, biased, and/or discriminatory treatment. Nevertheless, in their summary judgment motion, Plaintiffs cited numerous instances of *apparent* inconsistent, arbitrary, biased, and/or discriminatory treatment. DE176:23–43. The district court credited some of these examples as establishing a clear risk of such impermissible treatment. App.Vol.3DE144:120–21. Those statements do not in any way undermine its First Amendment rulings, as actual discrimination need not be proven. Because Defendants refused to produce these CCAs and persuaded the district court to deny Plaintiffs' motion to compel, they cannot now complain that the district court "did not have the information required to properly assess such allegations." Appellants' Brief 40. They themselves said these CCAs were irrelevant to their defense and cannot now make arguments based on documents and information not in the record. *Id*. at 30–31, 43.[29]

[29] Only the eight sealed CCAs Defendants produced for eight of the Plaintiffs may be cited.

Moreover, as the district court found, the Board is free to ignore or invoke information in the CCAs as it pleases. App.Vol.3DE144:102, 121–22; DE176:23-43 (evidence of arbitrary, selective use of applicants' records). The evidence in the record demonstrated that the Board frequently singles out a particular fact in an applicant's record to deny an application; at other times, the Board grants a restoration application notwithstanding the same information. *Supra* at 8–12. Additionally, the Board will often ignore everything in a CCA and deny an application because they do not "feel comfortable" granting it, DE176:39–41, or do not believe the applicant has sufficiently conveyed remorse or "turned [his/her] life around." DE176:20–21. Because there are no legal constraints, rules, or criteria governing the Board's decision-making, the CCAs do not function as a check on uncontrolled discretion.

Nevertheless, Defendants contend that state officials should be presumed to act in a lawful manner with no discriminatory motives or bias in their minds, Appellants' Brief 38, 41, but the Supreme Court has rejected this "trust us" argument. In *Plain Dealer*, the Supreme Court stated that the presumption that officials "will act in good faith and adhere to standards absent from the [law's] face . . . is the very presumption that the doctrine forbidding unbridled discretion disallows." 486 U.S. at 770. The hearings may be public, but the Board is not

required to give any reason for granting or denying an application and may give a pretextual reason that serves only to camouflage invidious discrimination.

When a law lacks rules, standards, or criteria to constrain official discretion in decision-making that regulates the exercise of First Amendment-protected conduct, the risks of discrimination, bias, and arbitrariness are self-evident, and the unlawful scheme is facially invalid. The district court committed no error in going beyond the requirements of Supreme Court precedent, reviewing the evidence, and assuring itself that the *risk* of discrimination, bias, and arbitrariness was real.

f. The "clemency" label does not immunize restoration of voting rights from constitutional scrutiny.

Imagine a state law that forced all felons seeking the franchise to submit voter registration applications, along with their criminal records, to state or county election officials and gave those officials unlimited discretion to add these applicants to the voting rolls—to grant or deny them the right to vote. Such arbitrary decision-making authority over the qualification and registration of voters would clearly violate the Constitution. *Louisiana v. United States*, 380 U.S. 145, 153 (1965) ("The cherished right of people in a country like ours to vote cannot be obliterated by the use of laws . . . which leave the voting fate of a citizen to the passing whim or impulse of an individual registrar."). Arbitrary decision-making power over voting rights restoration violates the Constitution for the same reasons. Defendants argue the latter is different because restoration of voting rights has been made part of the

clemency process, but that is a superficial and semantic distinction. While the label, the arbiter, and the timing might be different, this hypothetical scheme and the one challenged in this case present the exact same constitutional violations. The word "clemency" has no talismanic power to make the unlawful lawful.

Defendants nevertheless place great weight on the fact that Florida has incorporated voting rights restoration into its executive clemency system, which originated with the English monarchy in the Eighth Century. *Herrera v. Collins*, 506 U.S. 390, 412 (1993) ("In England, the clemency power was vested in the Crown and can be traced back to the 700's. Blackstone thought this 'one of the great advantages of monarchy in general, above any other form of government . . .'") (internal citation omitted); *Bowens v. Quinn*, 561 F.3d 671, 676 (7th Cir. 2009) (describing clemency as "one of the traditional royal prerogatives . . . borrowed by republican governments"). But in our constitutional and democratic system of government,[30] labeling reenfranchisement as "clemency" does not immunize it from judicial review. *Osborne v. Folmar*, 735 F.2d 1316, 1317 (11th Cir. 1984) (holding that "a person may challenge a pardon or parole decision on equal protection grounds though he asserts a due process claim that fails").

[30] *Yick Wo v. Hopkins*, 118 U.S. 356, 369–70 (1886) ("When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.").

Defendants' own authorities demonstrate that clemency powers must still yield to federal constitutional limitations. *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 288–90 (1998) (O'Connor, J., concurring); *Schick v. Reed*, 419 U.S. 256, 266 (1974) (state officials may impose conditions on clemency as long as "any condition . . . does not otherwise offend the Constitution"). Those cases, as well as *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458, 466 (1981), *Smith v. Snow*, 722 F.2d 630, 632 (11th Cir. 1983) (per curiam), and *Mann v. Palmer*, 713 F.3d 1306, 1316–17 (11th Cir. 2013), are all *due process* challenges that do not address or foreclose Plaintiffs' claims.

Either assuming what is in dispute or conceding a First Amendment violation, Defendants circularly argue that voting rights restoration is an act of clemency and "a matter of grace," and, therefore, cannot be an exercise in licensing First Amendment-protected conduct because such licenses "may not be dispensed as a matter of grace." Appellants' Brief 36. But reenfranchisement is neither inherently a clemency function nor inherently part of the pardon power; it can be and often is handled separately from the clemency system and handled as a separate alternative to a pardon. Today, unless a felon obtains a full pardon prior to sentence completion (an impossibility in Florida, where applicants become eligible for a pardon ten years

after sentence completion[31]), thirty-nine states have removed reenfranchisement from the clemency system by restoring voting rights in a uniform way, following the completion of incarceration, parole, probation, and/or a waiting period, or by never disenfranchising felons even during incarceration. App.Vol.3DE147:158–59n.8 (listing state statutes).[32] Additionally, the Board's option to exclude firearm authority from a pardon, DE85-17:1, demonstrates that rights restored by a pardon are not intrinsically part of this type of clemency.

This case has always been narrowly aimed at voting rights restoration. The district court underscored that its ruling did not extend to any other type of clemency and that it was "not examining any specific decision of Florida's Clemency Board, but rather its structure and unfettered discretion in the re-enfranchisement context." App.Vol.4DE161:1; App.Vol.3DE144:122. In Florida, restoration is available to all felons separate and independent from the pardon power; Florida has not made pardons the "single, exclusive" means for voting rights restoration. Appellants' Brief 26. Furthermore, the district court was actually only evaluating one of the

[31] Before a pardon can be sought, applicants' full sentences including parole and probation must have been completed "for a period of no less than 10 years." App.Vol.2DE107-1:163 (Rule 5). Currently, "liberty-conferring pardon[s]," Appellants' Brief 27, do not exist in Florida.

[32] The sole caveat is the exceedingly limited permanent disenfranchisement provision in Maryland. Maryland forces felons "convicted of buying or selling votes" to seek a pardon to regain their voting rights. MD. CODE ANN. ELEC. LAW § 3-102(b)(3). For all other felons in Maryland, restoration occurs upon the end of incarceration.

three rights within civil rights restoration and, under this ruling, the other two—the rights to serve on a jury and run for public office—would still be subject to the Board's discretionary clemency authority. Likewise, pardons confer many other benefits and rights that do not implicate the First Amendment, and these would be uneffected by this case.

Additionally, at all times, this case has only defended the right of individuals who have served their full sentences including parole and probation. App.Vol.1DE29:51–57, 93–100. Commutations of sentence, by nature, only apply to people who are still serving out the terms of their sentences. They are also governed by a separate application; the current Application for Clemency points anyone seeking a commutation to a Request for Review. DE85-17:1–2.

It is of no moment to compare death sentences or the deprivation of physical liberty with arbitrary reenfranchisement. Appellants' Brief 26–27. Due process and the other constitutional rights of criminal defendants are afforded prior to the deprivation of life, physical liberty, and other rights, but the First Amendment is triggered when the state engages in arbitrary voting rights restoration. For countless Floridians, disenfranchisement persists long after they regain their physical liberty, and death row inmates will never regain their voting rights, regardless of whether they are granted a commutation to life imprisonment without parole. These are separate constitutional interests governed by different constitutional frameworks,

and the Constitution does not impose false choices between life and liberty or physical liberty and the right to vote.

Lastly, Defendants also warn that a ruling in Plaintiffs' favor would call into question discretionary restoration of firearm authority. Appellants' Brief 26–27. Since *District of Columbia v. Heller*, 554 U.S. 570 (2008), litigants around the country have sought to extend the First Amendment unfettered discretion cases to the Second Amendment. They have all failed. *Drake v. Filko*, 724 F.3d 426, 435 (3rd Cir. 2013); *Young v. Hawaii*, 911 F. Supp. 2d 972, 991–92 (D. Haw. 2012) (collecting cases); *but cf. Fisher v. Kealoha*, 855 F.3d 1067, 1072 (9th Cir. 2017) (Kozinski, J., "ruminating") (suggesting that Second Amendment rights should not be subjected to unconstrained discretion by reference to First Amendment cases) ("Criminal punishment, of course, always involves the deprivation of rights, but such deprivations can still raise constitutional concerns. . . . This unbounded discretion sits in uneasy tension with how rights function. A right is a check on state power, a check that loses its force when it exists at the mercy of the state."). Whatever the outcome here, those efforts are likely to continue.

2. The Equal Protection Clause of the Fourteenth Amendment also prohibits Defendants' arbitrary conduct and is not foreclosed by the cases Defendants cite.

Plaintiffs' alternative equal protection claim targets the same arbitrary restoration system, and it too is not foreclosed by the due process cases Defendants

cite. Appellants' Brief 21–23, 36–38; *supra* at 49. Nor is it foreclosed by *Shepherd*, which only concerned the statutory and categorical exclusion of federal probationers from reenfranchisement. 575 F.2d at 1114–15.

Defendants point to *Beacham*. However, "the precedential effect of a summary affirmance can extend no farther than 'the precise issues presented and *necessarily* decided . . .'" *Socialist Workers Party*, 440 U.S. at 182–83 (quoting *Mandel v. Bradley*, 432 U.S. 173, 176 (1977)) (emphasis added). Beacham only "applied for a pardon, which would have included a restoration of his civil rights." *Beacham*, 300 F. Supp. at 183; Jurisdictional Statement, *Beacham v. Braterman*, 396 U.S. 12 (1969) (No. 404), 1969 WL 136703 at *4. Civil rights restoration was available as a separate form of clemency in 1968, DE136-1 (Florida Applications for Clemency 1967–1969), but there is nothing in the opinion, the jurisdictional statement, or this record to indicate Beacham also applied for restoration. Accordingly, construing the summary affirmance on the narrowest basis possible, the Supreme Court could have only *necessarily* decided whether a discretionary pardon power is constitutional, not whether unfettered discretion in voting rights restoration is constitutional. 300 F. Supp. at 184. This Court's opinion in *Hardwick v. Bowers* is squarely on point: "Where . . . the facts of the case plainly reveal a basis for the lower court's decision more narrow than the issues listed in the jurisdictional statement, a lower court should presume that the Supreme Court decided the case on

that narrow ground." 760 F.2d 1202, 1208 (11th Cir. 1985), *rev'd on other grounds*, 478 U.S. 186 (1986). Given the facts, the jurisdictional statement exceeded the narrowest possible basis for the summary affirmance.

Defendants argue this would give pardon applicants "*less* protection" than restoration applicants, Appellants' Brief 19, but this is not so. It simply means that the discretionary pardon power does not trigger the First Amendment unfettered discretion doctrine when the bundle of rights and benefits the pardon confers is disaggregated and the First Amendment-protected right may be regained through an independent, separate type of clemency. There is no evidence Beacham pursued that alternative.

But even if this Court disagrees with this narrow construction of *Beacham*, Plaintiffs preserve their right to seek its reversal. More importantly, that decision only addressed an equal protection claim, not the First Amendment; *Beacham* could not and did not foreclose Plaintiffs' distinct First Amendment claims.

3. The district court properly entered an injunction requiring Defendants to establish a non-arbitrary, uniform voting rights restoration system.

The district court's injunction directing Defendants to establish a non-arbitrary system to remedy the constitutional violations it found was required by this Court's precedents. *Atlanta Journal & Constitution v. City of Atlanta Dep't of Aviation*, 322 F.3d 1298, 1310–12 (11th Cir. 2003) (en banc) (affirming part of

injunction that "prohibited the administration of any plan that did not explicitly constrain official discretion" and remanding to give state agency "opportunity to formulate ascertainable non-discriminatory standards"); *Sentinel Commc'ns Co. v. Watts*, 936 F.2d 1189, 1207 (11th Cir. 1991) (holding that Florida could not "continue to take an utterly discretionary, 'seat of the pants' regulatory approach towards activity that is entitled to first amendment protection" and ordering implementation of "written" and "specific criteria"). This Court has not limited relief to declaratory judgments. Instead, the remedy in First Amendment challenges like this is to enjoin the exercise of unfettered discretion and to order the defendants to implement a new scheme marked by objective, uniform, non-arbitrary rules. *Atlanta Journal & Constitution*, 322 F.3d at 1310–12.

To cure the constitutional violations it found, the district court had the authority to require Defendants to adopt a uniform, non-arbitrary restoration policy, even if that policy were lifetime disenfranchisement. However, the part of the injunction that barred Defendants from eliminating all voting rights restoration likely violated *Ramirez*. Though Defendants have stated they "do not want or intend to end vote-restoration processes," Stay Motion 17–18 n.1, Plaintiffs have no objection to this Court vacating that part of the injunction but respectfully request that this Court affirm the balance of the judgment.

Finally, Defendants did not request more time to comply with the injunction or permission to adopt interim rules and adjust them subsequently. Contrary to their protestations, Defendants were able to craft new rules within the time allotted. *Supra* at 14 & n.23.

CONCLUSION

For our democracy to stay true to its founding principles, core political expression and association rights must not be arbitrarily licensed or allocated by government officials. The Supreme Court's precedents compel one conclusion in this case: Defendants' arbitrary vote-licensing scheme violates the First Amendment's unfettered discretion doctrine and the Fourteenth Amendment's Equal Protection Clause. Respectfully, the district court's judgment should be affirmed.

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Respectfully submitted,

/s/ Jon Sherman
Jon Sherman*
D.C. Bar No. 998271
Michelle Kanter Cohen*
D.C. Bar No. 989164
Massachusetts Bar No. 672792 (inactive)
Fair Elections Center
1825 K St. NW, Suite 450
Washington, DC 20006
jsherman@fairelectionscenter.org
mkantercohen@fairelectionscenter.org
Phone: (202) 331-0114

Theodore Leopold
Florida Bar No. 705608
Diana L. Martin
Florida Bar No. 624489
Poorad Razavi
Florida Bar No. 022876
Cohen Milstein Sellers & Toll PLLC
2925 PGA Boulevard | Suite 200
Palm Beach Gardens, FL 33410
tleopold@cohenmilstein.com
dmartin@cohenmilstein.com
prazavi@cohenmilstein.com
phone 561.515.1400
fax 561.515.1401

*Appearing *Pro Hac Vice* in the United States Court of Appeals for the Eleventh Circuit

Attorneys for Plaintiffs-Appellees

CERTIFICATE OF COMPLIANCE

1. I hereby certify that the foregoing, Appellees' Brief, complies with the type-volume and word-count limits of Federal Rule of Appellate Procedure 32(a)(7)(B) because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), this document contains 12,875 words.

2. I hereby certify that the foregoing, Appellees' Brief, complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5)–(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

June 21, 2018

/s/ *Jon Sherman*
Jon Sherman*
Attorney for Plaintiffs-Appellees

*Appearing *Pro Hac Vice* in the United States Court of Appeals for the Eleventh Circuit

CERTIFICATE OF SERVICE

I hereby certify that on June 21, 2018, a true and correct copy of the foregoing document was served upon counsel for Defendants-Appellants, including those listed below, by filing it in this Court's CM/ECF system.

Amit Agarwal
Solicitor General
Fla. Bar No. 125637
Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050
Tel. (850) 414-3300
Fax (850) 410-2672
amit.agarwal@myfloridalegal.com
Jennifer.bruce@myfloridalegal.com

Edward M. Wenger
Chief Deputy Solicitor General
Fla. Bar No. 85568
Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050
Tel. (850) 414-3300
Fax (850) 410-2672
edward.wenger@myfloridalegal.com

Jonathan Alan Glogau
Chief, Complex Litigation
Florida Bar # 371823
Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050
850-414-3300
Jon.glogau@myfloridalegal.com
chanda.johnson@myfloridalegal.com

Jordan E. Pratt
Office of the Attorney General – Tallahassee FL
The Capitol STE PL-01
400 S Monroe St.
Tallahassee, FL 32399
850-414-3300
Email: jordan.pratt@myfloridalegal.com

Lance Eric Neff (FBN 0026626)
Senior Assistant Attorney General
Office of the Attorney General
The Capitol, Pl-01
Tallahassee, Florida 32399-1050
(850) 414-3681
(850) 410-2672 (fax)
lance.neff@myfloridalegal.com

Attorneys for Defendants-Appellants

June 21, 2018

/s/ *Jon Sherman*
Jon Sherman*
Attorney for Plaintiffs-Appellees

*Appearing *Pro Hac Vice* in the United States Court of Appeals for the Eleventh Circuit