No. 18-11388-G

In the United States Court of Appeals for the Eleventh Circuit

JAMES MICHAEL HAND, ET AL,

Plaintiffs–Appellees,

v.

RICK SCOTT, ET AL,

Defendants–Appellants.

DEFENDANTS–APPELLANTS' REPLY IN SUPPORT OF MOTION FOR STAY PENDING APPEAL

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

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Defendants–Appellants certify that the following is a complete list of interested persons as required by Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1:

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-11388-G

JAMES MICHAEL HAND, ET AL,

Plaintiffs–Appellees,

v.

RICK SCOTT, ET AL,

Defendants–Appellants.

REPLY IN SUPPORT OF TIME-SENSITIVE MOTION FOR STAY PENDING APPEAL

The immediate question before this Court is whether to stay the district court's injunction pending appeal. That injunction (1) bars the State from restoring civil rights to convicted felons pursuant to a discretionary clemency process that has been authorized by state law for 150 years; (2) prohibits the State from determining whether, how, and when to put a new clemency process in place; (3) directs the State's highest-ranking executive officers—the Governor and the other three members of the Executive Clemency Board—to "promulgate" new rules of executive clemency within 30 days of the district court's remedial order; and (4) forces the State to start granting and denying clemency applications pursuant to those

new rules, even though convicted felons concededly have no right to any clemency process in the first place.

Until now, no court has ever done any *one* of those four things.

The district court's judgment should be stayed pending appeal. Pertinent judicial authority supports the validity of Florida's discretionary clemency process; the injunction is unnecessary and overbroad; and equitable considerations support maintaining the status quo pending appeal. Plaintiffs' arguments to the contrary are unpersuasive.

I. Likelihood of Success

A. Equal Protection Claim

Beacham may not be dismissed because the challenger there sought restoration of voting rights by applying for a pardon. Resp. 15. The pardon Beacham sought "would have included a restoration of his civil rights," 300 F. Supp. at 183, among which is the right to vote. Thus, *Beacham* necessarily decided that the Board need not employ specific standards when it assesses an application seeking restoration of civil rights *and* other rights. It follows that the Board need not use specific standards when an applicant seeks *only* restoration of civil rights. Under Plaintiffs' reading of *Beacham*, the Constitution would give clemency applicants *less* protection when *more* of their rights are at stake—an absurd result.

This Court need not decide now whether *Beacham* is either controlling or persuasive. It is enough that (1) *Beacham* rejected a virtually identical challenge; (2) no case has ever held that vote-restoration decisions must be made pursuant to specific standards; (3) post-*Beacham* caselaw continues to approve of discretionary clemency determinations; and (4) this Court has identified *Beacham* as a relevant precedent. Mot. 7-9. Taken together, those propositions establish a substantial likelihood that Appellants will prevail on the equal protection issue.

B. First Amendment Claims

Plaintiffs cite many cases in support of their First Amendment claims. Resp. 5-14. None holds that convicted felons may assert expressive or associational interests in the act of voting, and Plaintiffs do not assert otherwise. *See id.*

At bottom, Plaintiffs argue that "the First Amendment forbids giving government officials unfettered discretion to grant or deny licenses or permits to engage in any First Amendment-protected" activity. Resp. 6. That argument fails for two reasons. First, decisions to grant executive clemency are not "licenses" or "permits"; they are acts of grace "committed, as is our tradition, to the authority of the executive," and "rarely, if ever, appropriate subjects for judicial review." *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 276 (1998). Second, a felon's ability to vote is not "First Amendment-protected" activity, because convicted felons have no constitutionally protected right to vote. *See Richardson v. Ramirez*, 418 U.S. 24,

54 (1974); *see also Harvey v. Brewer*, 605 F.3d 1067, 1080 (9th Cir. 2010) (O'Connor, J.); *Johnson v. Bredesen*, 624 F.3d 742, 751 (6th Cir. 2010); *Howard v. Gilmore*, 205 F.3d 1333 (4th Cir. 2000) (per curiam) (unpublished).

Plaintiffs' contrary argument cannot be reconciled with the reasoning of *Ramirez*. There, the Supreme Court rejected the argument that "a State must show a 'compelling state interest' to justify exclusion of ex-felons from the franchise." 418 U.S. at 54. Under Plaintiffs' approach, the law challenged in *Ramirez* would have been subject to strict scrutiny if the challengers had repackaged their Fourteenth Amendment claim in terms of the First Amendment. As the Court explained, however, heightened scrutiny was inappropriate because "the exclusion of felons from the vote has an affirmative sanction in § 2 of the Fourteenth Amendment." *Id.*

Appellants do not argue that "arbitrary" or "discriminatory" decisions are "immune from judicial review." Resp. 7-8. Aggrieved parties may *allege* actual discrimination or arbitrary decisions—e.g., decisions made by a coin toss—but they must *prove* such misconduct to obtain relief. *Compare Hunter v. Underwood*, 471 U.S. 222, 233 (1985) (proven as to Alabama), *with Johnson v. Gov. of Florida*, 405 F.3d 1214, 1223-26 (11th Cir. 2005) (not proven as to Florida). Similarly, Florida law does not "make a completely arbitrary distinction between groups of felons with respect to the right to vote," Resp. 8, the Board does not covertly employ any such

arbitrary group-based classifications, and Plaintiffs have not alleged or proven otherwise.

Clemency decisions are not unconstitutionally "arbitrary" merely because they are not made pursuant to specific and objective standards. *E.g.*, *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 464-66 (1981); *Smith v. Snow*, 722 F.2d 630, 631-32 (1983); *Beacham*, 300 F. Supp. at 184. The issue is substance, not "labeling," Resp. 9; the law governing clemency proceedings applies when, as here, clemency applicants challenge the Executive Clemency Board's exercise of its clemency powers. *See Banks v. Secretary*, 592 F. App'x 771 (11th Cir. 2014).

Construed in the light most favorable to Defendants, the record does not establish that the Board makes clemency decisions arbitrarily or based on improper considerations. Record evidence demonstrates that the Board considers relevant factors and follows a careful process in resolving clemency applications, including the preparation of a confidential report analogous to a Presentence Investigation Report; the consideration of factors germane to assessing a felon's criminal history and rehabilitation; and televised public hearings that give applicants and other stakeholders an opportunity to be heard and promote transparent decision-making. DE103:5-8, 18-19.

It is not merely "Appellants" who "assert that the First Amendment 'afford[s] no greater protection for voting rights claims than that already provided by the

Fourteenth" Amendment. *See* Resp. 13. This Court has so held, and that law may not be disregarded because it was explicated in a claim-dispositive footnote. *See Burton v. Belle Glade*, 178 F.3d 1175, 1188 n.9 (11th Cir. 1999); *accord Lucas v. Townsend*, 783 F. Supp. 605, 618 (M.D. Ga. 1992), *aff'd* 967 F.2d 549, 556 (11th Cir. 1992); *Irby v. State Bd. of Elections*, 889 F.2d 1352, 1359 (4th Cir. 1989). That precedent was not abrogated by *Shapiro v. McManus*, 136 S.Ct. 450 (2015), which held that petitioners could *present* a First Amendment-based gerrymandering claim to a three-judge panel, while omitting any view on the merits. *Id.* at 456.

Finally, specific instances of alleged discrimination either are or are not relevant to the claims Plaintiffs raised. *See* Resp. 11-13. If they are not relevant, the district court should not have relied on such alleged instances in granting Plaintiffs' motion for summary judgment. If they are relevant, the district court should have required Plaintiffs to prove such allegations and afforded Defendants a fair chance to rebut them.

The district court took a third approach: It "credited a few of" Plaintiffs' highly selective comparisons "as raising a clear inference of arbitrary, biased and/or discriminatory treatment," Resp. 12, even though the court concededly lacked evidence critical to a fair assessment of those decisions; and it then relied on such purported instances of discrimination in its summary-judgment order. DE163:9-13.

That was error. Mot. 11-14. Plaintiffs now ask this Court to make the same mistake, citing "many other examples of *apparent* discrimination, bias, and/or arbitrariness." Resp. 12 n.2 (emphasis added). Law and fairness both demand the same answer: Courts cannot credit allegations of invidious discrimination unless they are properly alleged and proven.

C. Injunction

"This Court" has not "made clear" that the remedy in a case "like this" one is "to enjoin the exercise of unfettered discretion" and to "order that a state . . . implement a new scheme marked by objective, uniform, non-arbitrary rules." Resp. 16. Nor could it have. Thus far, this Court has only *approved* discretionary clemency decisions. *Supra* at 2-5.

The two cases Plaintiffs cite, Resp. 16-17, are inapposite. Neither addressed how to cabin discretion in clemency proceedings or considered a scenario in which the Federal Constitution gives States an "affirmative sanction" not to have any policy at all. And neither case "makes clear" that, even in the very different circumstances there, the proper remedy is to permanently bar the government from discontinuing an optional policy and to tell the government whether, how and when to promulgate a new policy. *See Atlanta Journal & Constitution v. City of Atlanta Dep't of Aviation*, 322 F.3d 1298, 1312 (11th Cir. 2003) (en banc) (order[ing] the district court "to afford the [City] an *opportunity* to formulate ascertainable non-discriminatory

standards for the exercise of discretion") (emphasis added); *Sentinel Communications Co. v. Watts*, 936 F.2d 1189, 1204-05, 1207 (11th Cir. 1991) (addressing placement of newspapers in a non-public forum, and requiring state agencies to "establish *some type* of written *regulatory or statutory* scheme with specific criteria to guide the discretion of officials administering it").

Contrary to Plaintiffs' suggestion, Resp. 3-4, Defendants never told the district court it could enjoin them from deciding whether, when, and how to institute a new clemency process. Just the opposite, as Defendants explained in the very same paragraph from which Plaintiffs selectively quote. *See* DE103:24 ("For example, Florida could 'permanently disenfranchise convicted felons,' without providing any process—discretionary or otherwise—for restoration.") (citations omitted).

The district court's authority to permanently prohibit the State's clemency officers from ending vote-restoration processes does not turn on whether those officers have presently "disclaim[ed] any desire to withdraw all voting rights restoration." Resp. 17. A federal court may not bar a State from implementing a policy affirmatively authorized by the Federal Constitution, Mot. 16-17, and the district court's injunction prevents the State from deciding how and when—and not just whether—to institute a new clemency process.

Plaintiffs misconstrue the State's reliance on the "affirmative sanction" set out in the Fourteenth Amendment. Because the Federal Constitution authorizes States

to "disenfranchise convicted felons permanently," DE144:9, a federal court may not order the State to promulgate rules for reenfranchising convicted felons. In advancing that argument, the State is not "threaten[ing] an irrevocable lifetime ban for all felons," Resp. 19; rather, it is asking for the district court's remedial authority to be exercised within the bounds of the Constitution as construed by the Supreme Court.

II. Irreparable injury

Appellants do not "claim an ongoing 'injury' based on the third-party interests of felons whose restoration applications" may not be granted because of the injunction. Resp. 18. Rather, appellants claim that the State is injured when it "is enjoined by a court from effectuating statutes enacted by representatives of its people," *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers); *see* Mot. 20-21.

The district court's 30-day deadline is not attributable to any "delay," "inaction," or "foot-dragging" on the part of the State. Resp. 19. The court issued its remedial order on March 27, 2018. Until then, the court had not ordered Appellants to do anything. Indeed, the district court directed the parties to "submit additional briefing as to contours of injunctive relief, *if any*," DE144:40 (emphasis added), expressly contemplating the possibility that no injunction would issue. Similarly,

Appellants have not "so far refused to comply with the injunction," Resp. 3, which does not require action before April 26. DE160:21.

The 30-day deadline was unprompted and arbitrary; Plaintiffs did not ask for that deadline to be imposed, and the court did not offer any reason for choosing April 26. It is no answer to say that hastily enacted rules may "be amended" in the future. Resp. 19. The State has an interest in avoiding chaos and uncertainty in its election procedures, and should not be forced to employ a rushed decision-making process on an artificial deadline now, Mot. 18-19, just because a more thorough decision-making process could be employed later. In any event, a federal judicial order directing state executive officers to "promulgate" a discretionary state policy by a date certain offends horizontal and vertical separation-of-powers principles. Mot. 21.

III. Injury to Plaintiffs

Plaintiffs do not show that they would be "severely injured" by a stay. Significantly, Plaintiffs do not assert that they are more likely to have their voting rights restored—or to have a restoration application considered sooner—if a stay is denied. Resp. 20. In stressing that fact, the Board does not improperly "threaten to establish restrictive criteria for voting rights restoration." *Id.* Instead, it asks this Court to assess Plaintiffs' assertions of injury in light of common sense and record evidence. Mot. 21-22.

The sole stay-related injury Plaintiffs posit is entirely speculative—the mere possibility that they *might* be subjected to the State's current clemency process *if* their clemency applications are resolved while this appeal is pending *and* pursuant to the currently existing rules (rather than, for example, new rules adopted by the Board members who will take office in January).

Plaintiffs' statement that "[t]hey have waited many years, even decades, for the opportunity to regain their right to vote," Resp. 20, merits serious consideration; on balance, however, that fact hurts rather than helps their cause. Plaintiffs could have brought their facial challenges to the constitutional and statutory provisions the district court struck down once they lost their right to vote; and they could have brought facial challenges to the current rules of executive clemency in March 2011. They filed suit in 2017. Having sat on their (asserted) rights for "many years, even decades," Plaintiffs are not in a good position to demand that the State be forced to revamp a 150-year-old clemency system in 30 days.

IV. Public Interest

When the State is the appealing party, its interest merges with that of the public. *See Nken v. Holder*, 556 U.S. 418, 435 (2009). Thus, the public interest is not "nearly indistinguishable from that of the plaintiffs," Resp. 21.

It is not "ironic," Resp. 21, for the State to guard against potential confusion resulting from unstable voter-eligibility rules. If a stay is denied and the injunction

is later vacated, the State's voter-eligibility rules may change twice in a short timespan. Indeed, Plaintiffs *defend* the district court's arbitrary 30-day deadline by observing that hastily promulgated rules may be instituted on an "interim" basis, Resp. 23, underscoring that the injunction is likely to generate instability even if Plaintiffs prevail on appeal.

Plaintiffs' policy arguments, Resp. 21-22 & n.5, do not militate against a stay. Even if relevant, such advocacy should acknowledge room for honorable disagreement about complicated questions of social policy. *Compare* Resp. 22 (charging that "Appellants now feign interest in the ability of former felons . . . to cast a ballot, while still refusing to reform the system"), *with* DE163:7 n.1 (citing data indicating that "the Board's current procedures more effectively avoid restoring civil rights to applicants who are likely to subsequently re-offend than did the less selective procedures that were previously in place").

More importantly, such policy arguments should be directed to the policymaking branches of State government. Other states have shifted from discretionary to non-discretionary systems for restoring felons' civil rights. Resp. 18 n.4. Not one did so because a federal court threatened to hold State officials in contempt if they did not promulgate a policy giving state clemency officers less discretion than the Federal Government enjoys in determining whether to commute the death sentence of, or grant a pardon to, a federal convict.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume and word-count limits of Fed. R. App. P. 27(d) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 2,591 words.

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/s/ Amit Agarwal
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 16th day of April, 2018, a true copy of the foregoing reply brief was filed electronically with the Clerk of Court using the Court's CM/ECF system, which will send by e-mail a notice of docketing activity to the registered Attorney Filer listed on the attached electronic service list. I FURTHER CERTIFY that all counsel for parties appearing below who are not registered Attorney Filers in this Court have been served by U.S. Mail and by electronic mail to the mailing addresses and e-mail addresses listed on the attached U.S. mail and electronic service list. All parties appearing below have been served.

/s/ Amit Agarwal
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