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' 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

PAMELA JO BONDI
Attorney General

EDWARD M. WENGER
Chief Deputy Solicitor General
edward.wenger@myfloridalegal.com

JORDAN E. PRATT
Deputy Solicitor General
jordan.pratt@myfloridalegal.com

AMIT AGARWAL*
Solicitor General
Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050
(850) 414-3681
(850) 410-2672 (fax)
amit.agarwal@myfloridalegal.com
**Counsel of Record*

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:

1. Agarwal, Amit, *Attorney for Defendants/Appellants*
2. Atkins, Virginia Kay, *Plaintiff/Appellee*
3. Atwater, Jeff, *Defendant/Appellant*
4. Baker, Brittnie R., *Attorney for Plaintiffs/Appellees*
5. Bass, William, *Plaintiff/Appellee*
6. Bondi, Pam, *Defendant/Appellant*
7. Cohen Milstein Sellers & Toll, *Attorney for Plaintiffs/Appellees*
8. Cohen, Michelle Kanter, *Attorney for Plaintiffs/Appellees*
9. Coonrod, Melinda N., *Defendant/Appellant*
10. Davidson, Richard D., *Defendant/Appellant*
11. Davis, Ashley E., *Attorney for Defendants/Appellants*
12. Detzner, Ken, *Defendant/Appellant*
13. Executive Clemency Board of the State of Florida
14. Exline, James Larry, *Plaintiff/Appellee*
15. Fair Elections Legal Network, *Attorneys for Plaintiffs/Appellees*
16. Florida Commission on Offender Review

17. Florida Department of Corrections

18. Florida Department of State

19. Fugett, David Andrews, *Attorney for Defendant/Appellant Ken Detzner*

20. Galasso, Joseph James, *Plaintiff/Appellee*

21. Gircsis, Harold W., Jr., *Plaintiff/Appellee*

22. Glogau, Jonathan Alan, *Attorney for Defendants/Appellants*

23. Guanipa, Yraida Leonides, *Plaintiff/Appellee*

24. Hand, James Michael, *Plaintiff/Appellee*

25. Harle, Denise, *Attorney for Defendants/Appellants*

26. Johnekins, Jermaine, *Plaintiff/Appellee*

27. Jones, Julie L., *Defendant/Appellant*

28. Jones, William Jordan, *Attorney for Defendant/Appellant Ken Detzner*

29. Leopold, Theodore Jon, *Attorney for Plaintiffs/Appellees*

30. Martin, Diana L., *Attorney for Plaintiffs/Appellees*

31. McCall, Julia, *Defendant/Appellant*

32. Neff, Lance, *Attorney for Defendants/Appellants*

33. Patronis, Jimmy, *Defendant/Appellant*

34. Pratt, Jordan E., *Attorney for Defendants/Appellants*

35. Putnam, Adam H., *Defendant/Appellant*

36. Razavi, Poorad, *Attorney for Plaintiffs/Appellees*

37. Scott, Rick, *Defendant/Appellant*

38. Sherman, Jonathan Lee, *Attorney for Plaintiffs/Appellees*

39. Schlackman, Mark R., *Amicus Curiae*

40. Smith, Christopher Michael, *Plaintiff/Appellee*

41. Walker, Hon. Mark E., *U.S. District Judge*

42. Wenger, Edward M., *Attorney for Defendants/Appellants*

43. Wyant, David A., *Defendant/Appellant*

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.

TIME-SENSITIVE MOTION FOR STAY PENDING APPEAL AND FOR AN ADMINISTRATIVE STAY

Pursuant to Federal Rule of Appellate Procedure 8(a) and Eleventh Circuit Rule 8-1, Appellants respectfully move for a stay of the district court's final order pending appeal. In deciding whether to grant a stay, this Court considers "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434 (2009). The first two factors are the "most critical." *Id*. For the reasons set forth below, all four factors support the issuance of a stay.

LEGAL BACKGROUND

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

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

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

PROCEDURAL HISTORY

1. Plaintiffs here are a group of nine convicted felons who have completed their sentences but are ineligible to vote. DE144:2 n.2. Plaintiffs brought suit against the Governor and the other members of the Executive Clemency Board, claiming that Florida's discretionary vote-restoration system violates the Equal Protection Clause because the Board has discretion to deny vote-restoration applications without resort to specific standards. DE29 ¶ 97. The absence of such

standards, Plaintiffs argue, also violates the First Amendment, *id.* ¶ 90, as do certain rules requiring convicted felons to wait five or seven years before applying for restoration of civil rights, *id.* ¶ 112, and the lack of definitive time limits for acting on applications seeking restoration of the right to vote, *id.* ¶ 120.

All of Plaintiffs' claims are facial challenges. DE29. In their amended complaint, Plaintiffs did not allege that Defendants *actually* discriminated against them—or anyone else—on the basis of race, viewpoint, or any other improper consideration. *Id.* Instead, Plaintiffs claimed that the unfettered discretion vested in Defendants created a constitutionally unacceptable *risk* of illicit discrimination. *Id.* ¶¶ 4, 89. Accordingly, and early on in the case, the district court denied Plaintiffs' motion to compel certain confidential case analyses (CCAs) pertaining to non-parties, explaining that those materials "are not relevant to the claims set forth in Plaintiffs' operative complaint." DE62:1; *see also id.* ("To the extent they are marginally relevant, the CCAs only serve as individual examples in support of Plaintiffs' facial claims."). Relying on that ruling, Defendants did not seek to introduce evidence tending to rebut "not relevant" insinuations of invidious discrimination involving non-parties.

2. On cross-motions for summary judgment, the district court accepted all of Plaintiffs' claims other than their challenge to the waiting periods. DE144.

As to Plaintiffs' equal-protection challenge, the court did not distinguish this

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

Applying "strict scrutiny," *id.* at 19, 21, the court held that Florida's vote-restoration system violates the First Amendment because restoration decisions are not made pursuant to specific standards. *Id.* at 17-27. In addition, the court concluded that "the Board's lack of clear time limits in processing and deciding clemency applications violates the First Amendment." *Id.* at 27-28.

In its remedial order, the court declared that four of Florida's constitutional and statutory provisions, along with the Rules of Executive Clemency, are partially invalid under the First and/or Fourteenth Amendments. DE160:21. The court did not find that Defendants are likely to continue applying state law in a manner inconsistent with the court's declaratory judgment. Nevertheless, it permanently enjoined Defendants "from enforcing the current unconstitutional vote-restoration scheme." DE160:21. The court also ordered that Defendants are "permanently

enjoined from ending all vote-restoration processes," and directed that, "[o]n or before April 26, 2018, Defendants shall promulgate specific and neutral criteria to direct vote-restoration decisions in accordance with this Order," as well as "meaningful, specific, and expeditious time constraints in accordance with this Order." DE160:21.

Like its summary-judgment order, the court's injunction was issued without holding a hearing.

3. The district court denied Appellants' motion for a stay pending appeal, concluding that none of the four factors supports a stay. DE167. On the merits, the court faulted Defendants for "basically dodg[ing] the First Amendment issue," *id.* at 2, but did not address Defendants' reliance on circuit precedent holding that the First Amendment does not afford greater protection for voting rights than the Fourteenth Amendment, DE163:14-15. In the court's view, Defendants' "irreparable-harm arguments based on" vote-restoration applications that had been put on hold "are, at best, disingenuous," because the court's order requires the Board to reconsider such applications under the new rules that it has ordered the Board to put in place. DE167:3. The court did not consider 30 days an unreasonable amount of time in which to promulgate new rules of executive clemency, because "drafting new rules need not be complicated or time-consuming." DE167:4. Finally, the court found that a stay would not be in the

public interest, because a stay would allow "continued infringement of Plaintiffs' First and Fourteenth Amendment rights" and its order striking down the State's vote-restoration system would not sow public confusion. *Id.* at 4-5.

ARGUMENT

I. DEFENDANTS ARE SUBSTANTIALLY LIKELY TO SUCCEED ON APPEAL.

A. Equal Protection Claim

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

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

Beacham took aim at that holding in his appeal to the Supreme Court. In his statement of jurisdiction, Beacham asked the Supreme Court to decide whether the

Constitution required Florida's Governor and Cabinet to adopt "ascertainable standards governing the recovery of the fundamental right to vote," Jurisdictional Statement Question C, *Beacham v. Braterman*, 396 U.S. 12 (1969) (No. 404), 1969 WL 136703 at *3. By summarily affirming the district court's ruling, the Supreme Court necessarily decided that question in the negative.

The district court was not free to cast *Beacham* aside. *See* DE144:34. A summary affirmance by the Supreme Court prohibits lower courts "from coming to opposite conclusions on the precise issues presented and necessarily decided." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (per curiam); *see Picou v. Gillum*, 813 F.2d 1121, 1122 (11th Cir. 1987). Of particular relevance for this case, "[s]ummary affirmances . . . without doubt reject the specific challenges presented in the statement of jurisdiction." *Mandel*, 432 U.S. at 176.

In short, *Beacham* speaks to the precise issue in this case. If this Court is "bound" by such precedent, 405 F.3d at 1226-27, so too was the district court. Accordingly, there is no need to rely on "other areas of possibly analogous law." *Id.*; *see* DE144:32 ("Plaintiffs largely base their Equal Protection argument on *Bush v. Gore*").

Even if not controlling, *Beacham* is persuasive: Same state; same claim; same core argument. It is wrong to say that *Beacham* "has not aged well," DE144:34, for three reasons. First, in subsequent cases, the Supreme Court and this

Court have both cited *Beacham* with approval. *See Ramirez*, 418 U.S. at 53; *Johnson*, 405 F.3d at 1225-26. Second, post-*Beacham* caselaw continues to approve "unfettered discretion" in clemency proceedings, notwithstanding the theoretical risk of discrimination that comes with such authority. *E.g.*, *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 464, 466 (1981); *Smith v. Snow*, 722 F.2d 630, 632 (11th Cir. 1983) (per curiam). If, as such cases hold, clemency officers may exercise "unfettered discretion" in considering an application to commute a death sentence, they may also exercise such discretion in processing an application seeking restoration of civil rights. Third, no case—from this or any other Circuit—holds that any kind of clemency determination, including decisions on applications seeking restoration of civil rights, must be made pursuant to specific standards.

The absence of any such authority speaks volumes. Ten other states have discretionary re-enfranchisement procedures, DE103:23 & n.4; and many states, like the federal government, give executive officers discretion to grant other forms of clemency—including life-preserving commutations of death sentences, liberty-conferring pardons, and restoration of the fundamental right to keep and bear arms for self-defense—without resort to specific "standards," "constraints" or "guidelines," DE144:1, 36-37.

2. Plaintiffs' claim also falters based on generally applicable equal-protection principles. A law providing for the "selective disenfranchisement or

reenfranchisement of convicted felons" comports with the Equal Protection Clause if it "bear[s] a rational relationship to the achieving of a legitimate state interest." *Shepherd v. Trevino*, 575 F.2d 1110, 1114-15 (5th Cir. 1978).

Florida's longstanding vote-restoration system passes that test. Under *Shepherd*, Florida has a legitimate "interest in limiting the franchise to responsible voters." *Id.* at 1115. The State's totality-of-the-circumstances approach is rationally calculated to effectuate that interest, because it permits Board members to "gauge the progress and rehabilitation of a convicted felon" based on the full range of information concerning "the individual defendant and his case." *Id.*

3. Invidious discrimination has no place in the administration of a State's vote-restoration system, *Shepherd*, 575 F.2d at 1114, but the mere "risk" of discrimination does not render a State's clemency process *facially* unconstitutional. *See Smith*, 722 F.2d at 631-32; *Beacham*, 300 F. Supp. at 184. Indeed, that risk exists whenever decisionmakers—executive, legislative, or judicial—are vested with discretion; and discretion is one of the defining characteristics of executive clemency. *See, e.g.*, *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 276 (1998); *Dumschat*, 452 U.S. at 463-67.

Properly understood, "unfettered discretion" to process clemency applications does not license the Board to violate generally applicable anti-discrimination prohibitions, including those embodied in the Florida and U.S.

Constitutions. Like the Rules of Executive Clemency, many regulations and opinions use the phrase "unfettered discretion" to indicate that a decision is entrusted to the judgment of a properly constituted authority. *E.g.*, *Shin v. Cobb Cty. Bd. of Educ.*, 248 F.3d 1061, 1065 (11th Cir. 2001) ("We have 'unfettered discretion' to grant or deny a Rule 23(f) petition."). Such references should not be construed to authorize illicit discrimination; and executive officers who take an oath to uphold the law—like judges and legislators—should not lightly be presumed to suppose otherwise.

Thus, Appellants do not "insist they can do whatever they want" in processing clemency applications, DE167:1, if that means engaging in invidious discrimination or comparable malfeasance, just as this Court was not "insist[ing]" that it could discriminate on the basis of race when it asserted "unfettered discretion" to resolve applications under Rule 23. *See Shin*, 248 F.3d at 1065.

4. In partially granting Plaintiffs' motion for summary judgment, the district court appeared to rely on unpleaded and unproven insinuations of illicit discrimination based on race, viewpoint, and party affiliation. *E.g.*, DE144:24 (discussing Board's decision to deny the applications of five non-parties, and stating "[i]t is not lost on this Court that four of the five rejected applicants are African-American"); *id.* (concluding that "Plaintiffs offer more than enough examples for this Court to infer that such discrimination is not some cockamamie

idea Plaintiffs cooked up"). Such reliance was improper and unpersuasive.

First, as the district court ruled early on in the case, allegations of invidious discrimination in particular clemency proceedings—especially proceedings involving non-parties—were "not relevant" to an assessment of Plaintiffs' facial challenges. DE62:1; *see United States v. Salerno*, 481 U.S. 739, 745 (1987); *AFSCME v. Scott*, 717 F.3d 851, 863, 866 (11th Cir. 2013).

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

Third, "[t]he presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." *United States v. Chem. Found.*, 272 U.S. 1, 14-15 (1926); *accord Banks v. Dretke*, 540 U.S. 668, 696 (2004). Plaintiffs in this case have not pleaded—much less proven with "clear evidence"—that the duly-elected constitutional officers serving on the Board discriminated for or against anyone based on race, viewpoint or any other impermissible criterion.

See DE29.

Fourth, allegations of gross malfeasance should not have been credited or indulged at the summary-judgment stage, when courts are required to "draw[] all reasonable inferences in the light most favorable to the non-moving party." *Johnson*, 405 F.3d at 1217.

Fifth, "[i]ndividual acts of clemency inherently call for discriminating choices because no two cases are the same." *Schick v. Reed*, 419 U.S. 256, 268 (1974). Thus, findings of unconstitutional discrimination on the part of the Board may not be predicated on comparisons among selectively chosen non-parties alleged to be similarly situated. *See id.*; *cf. McCleskey v. Kemp*, 481 U.S. 279, 306-07, 312-13 (1987).

At any rate, the district court's comparisons were not based on careful analysis of a statistically significant number of clemency proceedings. Since adopting the current Rules of Executive Clemency in March 2011, "the Clemency Board has ruled on more than 4,200 applications for the restoration of civil rights." DE163-1:2 ¶ 6. Reliable findings of actual and systemic discrimination could not reasonably be based on selective comparisons involving "five" or even "seventeen" of those 4,000-plus applicants. *See* DE144:24; DE76:1; *see also* DE102:23-43.

Laws authorizing unconstitutional discrimination are not immune from judicial review. *Shepherd*, 575 F.2d at 1114. To establish such discrimination,

however, the complaining party must properly allege and prove prohibited misconduct; and the parties accused—be they ordinary citizens or a state's highest-ranking constitutional officers—must have a fair chance to defend themselves. That did not happen here; and the district court's reliance on unpleaded, unproven, and "not relevant" insinuations of malfeasance, standing alone, requires reversal.

B. First Amendment Claims

This Court is substantially likely to hold that Florida's discretionary re-enfranchisement regime does not violate the First Amendment. Because "the exclusion of felons from the vote has an affirmative sanction in § 2 of the Fourteenth Amendment," *Ramirez*, 418 U.S. at 54, "[i]t is clear that the First Amendment does not guarantee felons the right to vote." *Johnson v. Bush*, 214 F. Supp. 2d 1333, 1338 (S.D. Fla. 2002), *aff'd* 405 F.3d at 1235. That law is fatal to Plaintiffs' First Amendment claims. Convicted felons, like all Americans, are free to engage in expression that is constitutionally protected *as to them*; but alleged expressive interests tied to and derived from the "right to vote" do not apply where, as here, there is no right to vote in the first place.

Assuming *arguendo* that convicted felons may raise First Amendment claims based on the "right to vote," the First Amendment does not mandate that vote-restoration decisions be made pursuant to specific standards. Consistent with the "affirmative sanction" recognized in *Ramirez*, this Court has held the First

Amendment "afford[s] no greater protection for voting rights claims than that already provided by the Fourteenth" Amendment. *Burton v. City of Belle Glade*, 178 F.3d 1175, 1187 n.9 (11th Cir. 1999) (invoking that principle as the sole basis for "conclud[ing] that the district court did not err in dismissing" appellant's voting-rights "claims under the First and Thirteenth Amendments"). As explained above, the Fourteenth Amendment does not require vote-restoration decisions to be made pursuant to specific standards. *See supra* at 7-14. Nor does it call for "strict scrutiny" of a selective reenfranchisement system that, like Florida's, does not employ suspect classifications. *Shepherd*, 575 F.2d at 1114-15. The First Amendment "afford[s] no greater protection for [Plaintiffs'] voting rights claims." *Burton*, 178 F.3d at 1187 n.9.

Similarly, because Section 2 of the Fourteenth Amendment gives States an "affirmative sanction" to "disenfranchise convicted felons *permanently*," DE144:9, (emphasis added), the First Amendment may not reasonably be construed to mean that "[t]he lack of time limits in processing and deciding vote-restoration applications" is *facially* "unconstitutional," *id.* at 30. *See also Harvey v. Brewer*, 605 F.3d 1067, 1079 (9th Cir. 2010) (O'Connor, J.) ("[O]nce a felon is properly disenfranchised a state is at liberty to keep him in that status indefinitely and never revisit that determination."). That does not mean that the Board may use the lack of time limits to mask invidious discrimination based on race, viewpoint, or any other

impermissible consideration. *See* DE144:30. Rather, it means that a party seeking relief for alleged discrimination must plead and prove such a claim, and not invoke the mere "risk" of discrimination as cause for striking down longstanding and presumptively valid state laws.

C. Remedial Order

There is a substantial likelihood that this Court will reverse the grant of injunctive relief. "An injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010). Where "a less drastic remedy . . . [i]s sufficient to redress [an] injury, no recourse to the additional and extraordinary relief of an injunction [i]s warranted." *Id*. at 165-66.

The district court's injunction is unnecessary. The court did not find or suggest that Defendants are likely to disregard its rulings and set up a new vote-restoration system incompatible with the requirements of its order. Accordingly, the "drastic and extraordinary remedy" of an injunction is not required. *See Monsanto*, 561 U.S. at 165-66.

The district court's injunction is also overbroad, and the district court's own orders show why. The injunction prohibits the State "from ending all vote-restoration processes" for convicted felons. DE160:21. As the district court explained, however, Section 2 of the Fourteenth Amendment, as authoritatively

construed by the Supreme Court, gives States an "affirmative sanction" to "disenfranchise convicted felons *permanently*." DE144:39, 9 (emphasis added). In other words, the district court's order prohibits the State from temporarily or permanently implementing a policy that the U.S. Constitution affirmatively authorizes. *See Ramirez*, 418 U.S. at 54; *Johnson*, 405 F.3d at 1217. To state that fact is to establish an abuse of discretion.[1]

State law cannot and does not support a federal-court injunction requiring state officials to institute a new state policy. It *cannot* because, as the Supreme Court has explained, "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984). And it *does not* because Florida law, properly construed, does not require the Clemency Board to continuously solicit and process applications seeking restoration of civil rights. *See generally* DE149:15-18. The pertinent constitutional and statutory provisions *allow* the State to create processes by which civil rights may be restored; they do not *require* any particular process to be created by a date certain or to remain continuously in operation. *See* FLA. CONST.

[1] That error has practical significance, even though Defendants do not want or intend to end vote-restoration processes, separate from the still-operative (and also fully discretionary) pardon process. That is because the court's injunction, as a

art. IV, § 8(a); FLA. CONST. art. VI, § 4(a); FLA. STAT. § 940.01(1).

At a minimum, Defendants should not have been ordered to promulgate new criteria in 30 days. Florida's Constitution has authorized the discretionary restoration of voting rights "*for the past 150 years*." DE160:18. For the first time in that long history—indeed, for the first time in the history of the Nation—the court below held that state clemency procedures are unconstitutional if they do not set forth "specific and neutral criteria to direct vote-restoration decisions," DE160:21.

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

- Which instrumentality of the state government is best positioned to formulate "specific and neutral criteria" that are apt to enjoy broad public support and to withstand the test of time?
- Assuming *arguendo* that the current Board should put new rules in place on an interim basis, how "specific" and "neutral" should the "specific and neutral criteria" be? Should the Board adopt mathematical criteria that are susceptible of mechanical application, even if such criteria work to the disadvantage of convicted felons with presumptively troubling histories?
- Even if each criterion, standing alone, is completely objective, should an applicant's failure to meet *all* the criteria be disqualifying?
- Should arrests or convictions for certain kinds of misdemeanor or felony offenses be either relevant or categorically disqualifying?
- How should the vote-restoration criteria relate to the process by which other kinds of executive clemency applications are resolved, including applications for pardons, commutations, and restoration of firearm authority?

---

practical matter, prevents the State from deciding how and when to put a new vote-restoration system in place.

Should the Board create a newly bifurcated system for processing applications involving civil rights other than voting rights, such as the right to serve on a jury or to hold or run for public office?

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

In light of those and other questions, the issue is not whether the Board *could* unilaterally prescribe new rules in a short span of time, *see* DE167:4, but whether the State's policymakers and citizenry—including but not limited to the Board—*should* be afforded sufficient time to carefully consider the important issues at hand. Before resolving the above-mentioned questions, for example, the Board should have adequate opportunity to consult with interested and knowledgeable parties—including state and local governmental agencies, members of the Florida Legislature, law-enforcement authorities, legal experts, victim's rights groups, community leaders, and clemency officials serving in other states. Following such consultation, the Board should have adequate time to debate the various options and to carefully craft rules that are likely to engender public confidence, withstand the test of time, and strike an appropriate balance between the diverse and competing interests at stake. Finally, the timetable for doing all that should take into account the full scope and importance of the other pressing duties entrusted to the State's highest executive officers.

An order directing the Governor, Attorney General, Chief Financial Officer, and Commissioner of Agriculture and Consumer Services to create a new system

for restoration of voting rights in 30 days is not reasonably calculated to effectuate those objectives.

II. DEFENDANTS WILL BE IRREPARABLY INJURED ABSENT A STAY.

"[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1301 (2012) (Roberts, C.J., in chambers). That principle applies here. The district court enjoined the State from effectuating its "current . . . vote-restoration scheme," and partially invalidated four state constitutional and statutory provisions. DE160:21.

The district court's order has already prevented the State from restoring voting rights to eligible Florida citizens. *See* DE163-1 ¶¶ 4-5. It is not "disingenuous" for the State to seek relief from that injury. DE167:3. The State is harmed if it cannot apply its own laws to grant clemency to eligible applicants *now*, even if it *might later* be able to afford such applicants clemency pursuant to a system not yet in place and not of the State's choosing. That is particularly true insofar as the new system may strip the Board of its current discretion to grant clemency to eligible applicants with presumptively troubling records. *See infra* at 21-22.

Finally, the injunction in this case does not just *prevent* the State from effectuating state law. *Compare Veasey v. Perry*, 769 F.3d 890, 895-96 (5th Cir.

2014). It also *compels* four of the State's highest-ranking executive officers to "promulgate" new rules in 30 days. DE160:21. A federal court order requiring state policymakers to institute new state policies in a fixed span of time contravenes horizontal *and* vertical separation of powers principles. *See, e.g.*, *F.E.R.C. v. Mississippi*, 456 U.S. 742, 761 (1982) ("[H]aving the power to make decisions and to set policy is what gives the State its sovereign nature."). Those constitutional injuries are particularly acute where, as here, the federal Constitution gives States an "affirmative sanction" *not* to institute any such policy in the first place. *See Ramirez*, 418 U.S. at 54.

III. A STAY WILL NOT SUBSTANTIALLY INJURE PLAINTIFFS.

A stay would not thwart Plaintiffs' rights. Plaintiffs assert the right not to have a vote-restoration application denied based upon the exercise of discretion pursuant to an allegedly unconstitutional process. *See* DE144:39. A stay of the district court's injunction would not impair any such right, because there is no basis for believing that the State will put in place a new process incompatible with the requirements of the district court's order.

Plaintiffs have an interest in regaining the franchise sooner rather than later. However, they cannot show that a stay will postpone the likely date on which a renewed application for restoration of voting rights would be either considered or granted. Indeed, the district court's remedial order might well have the practical

effect of making it harder for Plaintiffs to get back the right to vote. Under the current rules, for example, a convicted felon satisfying certain neutral eligibility criteria may apply to have civil rights restored seven years after the completion of the sentence, even if the applicant has been "arrested for a misdemeanor or felony" within five years of completing the sentence or "convicted" of a crime set out in a list of enumerated—and presumptively troubling—offenses. *See* DE107-1:9-11, 13 (Rules 9(A), 10(A)). New rules might extend the seven-year waiting period, make such arrests or offense-specific convictions categorically disqualifying, or both.

That is not a remote possibility. It would be altogether reasonable for the Clemency Board to tighten what are now only *threshold* eligibility criteria if, as the district court has ruled, the Board will no longer retain its *subsequent* discretion to reject the applications of convicted felons who satisfy the "specific and neutral criteria" on which the Board's decisions must be based.

IV. THE PUBLIC INTEREST WOULD BE SERVED BY A STAY.

As discussed at length above, a stay of the district court's order would serve any number of compelling public interests: allowing continued effectuation of longstanding state law authorizing restoration of voting rights to convicted felons; ensuring proper consultation and careful deliberation before making major changes to the State's voter-eligibility requirements; and preserving the autonomy of the States in our federal system. The significance of that last interest should not be

underestimated. When "fundamental questions of federalism" are at stake, "considerations of comity [should] prevent this Court from determining that the interests of the State of Florida are either outweighed by any threatened harm to [private litigants], or are inconsistent with 'public policy.'" *Jupiter Wreck, Inc. v. Unidentified, Wrecked & Abandoned Sailing Vessel*, 691 F. Supp. 1377, 1390 (S.D. Fla. 1988) (Marcus, J.).

Plaintiffs have conceded that a stay of injunctive relief is "necessary if the relief would tend to sow public confusion by going in and out of effect during the course of the full appeals process." DE157:7. That is the case here. As explained above, Defendants are substantially likely to prevail on appeal. *See supra* at 7-20. Accordingly, immediate implementation of the district court's order is apt to "sow public confusion" about the requirements of Florida law. Such confusion is particularly problematic insofar as it threatens to undermine public confidence in, and understanding of, rules governing the conduct of elections. *See, e.g.*, *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) ("Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls.").

CONCLUSION

The district court's judgment should be stayed pending appeal. In light of the April 26 deadline for promulgating new rules of executive clemency, Appellants also respectfully request an administrative stay during the pendency of this motion.

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL

/s/ Amit Agarwal
Amit Agarwal
Solicitor General

Edward M. Wenger
Chief Deputy Solicitor General

Jordan E. Pratt
Deputy Solicitor General

Office of the Attorney General
The Capitol, Pl-01
Tallahassee, Florida 32399-1050
(850) 414-3681
(850) 410-2672 (fax)
amit.agarwal@myfloridalegal.com
edward.wenger@myfloridalegal.com
jordan.pratt@myfloridalegal.com

Counsel for All Defendants

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 5,187 words.

2. This document complies with the typeface and type-style requirements of Fed. R. App. P. 27(d) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

/s/ Amit Agarwal
Amit Agarwal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 6th day of April, 2018, a true copy of the foregoing motion was filed electronically with the Clerk of Court using the Court's CM/ECF system, which will send by e-mail a notice of docketing activity to the registered Attorney Filer listed on the attached electronic service list. I FURTHER CERTIFY that all counsel for parties appearing below 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
Amit Agarwal

ELECTRONIC SERVICE LIST

DIANA L. MARTIN
dmartin@cohenmilstein.com
COHEN MILSTEIN SELLERS & TOLL
2925 PGA Boulevard
Palm Beach Gardens, FL 33410
Counsel for Plaintiffs-Appellees

U.S. MAIL AND ELECTRONIC SERVICE LIST

MICHELLE KANTER COHEN
mkantercohen@projectvote.org
Project Vote
805 15th St. NW, Suite 250
Washington, DC 20005
Counsel for Plaintiffs-Appellees

THEODORE JON LEOPOLD
tleopold@cohenmilstein.com
POORAD RAZAVI
prazavi@cohenmilstein.com
COHEN MILSTEIN SELLERS & TOLL
2925 PGA Boulevard
Palm Beach Gardens, FL 33410
Counsel for Plaintiffs-Appellees

JONATHAN LEE SHERMAN
jsherman@fairelectionsnetwork.com
FAIR ELECTIONS LEGAL NETWORK
1825 K Street NW Suite 450
Washington, DC 20006
Counsel for Plaintiffs-Appellees