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 BRIEF ON 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

AMIT AGARWAL
Solicitor General

EDWARD M. WENGER
Chief Deputy Solicitor General

JORDAN E. PRATT
Deputy Solicitor General

Office of the Attorney General
State of Florida
PL-01, The Capitol
Tallahassee, FL 32399-1050
(850) 414-3300
(850) 410-2672 (fax)
amit.agarwal@myfloridalegal.com
edward.wenger@myfloridalegal.com
jordan.pratt@myfloridalegal.com

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1, Defendants/Appellants submit the following certificate of interested persons:

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*

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Other Authorities

Constitutional Provisions

INTRODUCTION

Two months ago, this Court issued a published opinion concluding that Appellants are substantially likely to succeed as to every claim raised on appeal. *Hand v. Scott*, 888 F.3d 1206 (11th Cir. 2018). Of particular relevance, this Court carefully explained why "[b]inding precedent *holds* that [the Executive Clemency Board] has broad discretion to grant and deny clemency, even when the applicable regime lacks any standards." *Id.* at 1207 (emphasis added); *see id.* at 1208-14.

In response, Plaintiffs ask a three-judge panel of this Court to rule that such "binding precedent" does not mean what it says. The Supreme Court's ruling in *Beacham v. Braterman*, 396 U.S. 12 (1969), Plaintiffs urge, did not resolve whether Florida's discretionary clemency process violates the Fourteenth Amendment "in that there are no ascertainable standards governing the recovery of the fundamental right to vote"—even though that issue was resolved by the lower court and squarely presented for the Supreme Court's review. *See* Jurisdictional Statement Question C, *Beacham v. Braterman*, 396 U.S. 12 (1969) (No. 404), 1969 WL 136703. Subsequent cases may seem to "confirm the broad discretion of the executive to grant and deny clemency," 888 F.3d at 1209, Plaintiffs reason; but those precedents may all be cast aside as "due process" rulings. This Court has repeatedly invoked and applied the principle that "the First Amendment provides no greater protection for voting rights than is otherwise found in the Fourteenth Amendment," *id.* at 1211,

Plaintiffs acknowledge; but the three-judge panel considering this case should rule that "the First Amendment *does* protect the right to vote more than the Fourteenth Amendment." And binding precedent holds that a state may "permanently" deny the vote to convicted felons under the "affirmative sanction" set out in Section 2 of the Fourteenth Amendment, Plaintiffs concede; but convicted felons who have *already lost* the right to vote pursuant to Section 2 of the Fourteenth Amendment *still have* a "right to vote" under the First Amendment.

Plaintiffs' arguments are foreclosed by the "binding precedent" this Court identified when it stayed the district court's judgment; it is undisputed that no case—state or federal, published or unpublished, from this or any other circuit—has ever held or even suggested that clemency decisions in general or vote-restoration decisions in particular must be made pursuant to specific standards; and Plaintiffs' "novel" First Amendment theory (DE144:27; DE160:7) is at war with the longstanding historical practices of 48 states and the federal government. For those and other reasons set out herein, the district court's judgment should be reversed.

ARGUMENT

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

A. Equal Protection

1. As Plaintiffs see it, the Supreme Court's ruling in *Beacham v. Braterman* does not resolve "whether unfettered discretion in voting rights restoration is constitutional." Plaintiffs' Answer Brief (hereinafter "Answer") 53. In their view, the Supreme Court "*necessarily* decided" only that a purely "discretionary pardon power is constitutional," *id*. That ruling, Plaintiffs contend, does not speak to the issue here, because Plaintiffs challenge the discretionary process by which the Clemency Board exercises one part of the pardon power—restoration of civil rights. *Id.*

In staying the district court's judgment, this Court unanimously rejected that argument. As the Court stressed, Beacham "challenged the refusal to grant him a pardon *and* the concomitant restoration of his civil rights, including the right to register to vote." 888 F.3d at 1208 (emphasis in original). Thus, the Supreme Court's affirmance in *Beacham* "establishes the broad discretion of the executive to carry out a standardless clemency regime," even if the clemency applicant seeks restoration of civil rights *and* other rights. *Id.* It follows that *Beacham* likewise

"establishes the broad discretion of the executive to carry out a standardless clemency regime" when the clemency applicant seeks *only* restoration of civil rights. *See id*. If it were otherwise, the Constitution would give clemency applicants less protection when more of their rights are at stake. *See* Initial Brief ("IB") 19.

It is no answer to assert—without explanation or citation to any authority—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." Answer 54. The immediate question is whether *Beacham* forecloses Plaintiffs' Fourteenth Amendment claim, not their First Amendment claim; Plaintiffs cite no authority for the proposition that that the Fourteenth Amendment provides *less* protection against purportedly "arbitrary" governmental conduct when that conduct implicates asserted First Amendment rights *and* other rights; and, in any event, convicted felons who have already lost the right to vote pursuant to a state's lawful exercise of its authority under Section 2 of the Fourteenth Amendment do not have a constitutionally protected "right to vote" under the First or Fourteenth Amendments.

Even if accepted, Plaintiffs' revisionist interpretation of *Beacham* does not help their cause. As Plaintiffs see it, the Supreme Court might have affirmed because Beacham sought to restore a "bundle" of rights, including rights other than the right

to vote. *See* Answer 53-54. The same is true of Plaintiffs. Plaintiffs applied for restoration of all civil rights, including but not limited to voting rights. *See* DE85:2-10 (each plaintiff applied for "restoration of [his/her] civil rights"). Nothing in the record indicates that Plaintiffs applied for a conditional grant of clemency limited to restoration of their right to vote. *See* DE107-1:3 ("All of the preceding forms of clemency may be granted subject to various conditions."). Thus, Plaintiffs' facial claim under the Equal Protection Clause is not distinguishable from the claim the Supreme Court rejected in *Beacham*.

2. Assuming *arguendo* that *Beacham* is not controlling, "[o]ther precedents" from the Supreme Court and this Court "confirm the broad discretion of the executive to grant and deny clemency." *Hand*, 888 F.3d at 1209; *see* IB 20-28. Caselaw approving of discretionary clemency decisions may not be dismissed as "a few cases on due process, which Plaintiffs have not raised," Answer 3. "If one has no right to procedures, the purpose of which is to prevent arbitrariness and curb discretion, then one clearly has no right to challenge the fact that the decision is discretionary." *Smith v. Snow*, 722 F.2d 630, 632 (11th Cir. 1983) (per curiam). In *Snow*, this Court invoked that rationale as the basis for rejecting an Eighth Amendment challenge to "the presence of 'unfettered discretion' in the clemency process." *Id.* The same analysis applies here. *Hand*, 888 F.3d at 1209.

Plaintiffs' complaints concerning "arbitrary reenfranchisement" misapprehend the nature and purpose of executive clemency. As Plaintiffs see it, for example, the prohibition against "arbitrary disenfranchisement" implies that "arbitrary reenfranchisement" should also violate the Constitution. *See* Answer 15. That misses the mark. Executive clemency "provide[s] the 'fail safe' in our criminal justice system." *Herrera v. Collins*, 506 U.S. 390, 415 (1993). As Blackstone explained, clemency is not the power to take away a right; it is only the "power to extend mercy"—that is, "to soften the rigour of the general law, in such criminal cases as merit an exemption from punishment" that has been lawfully imposed. *Id.* at 412 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *397).

Because clemency *restores* rights that have already been lost pursuant to lawful and "elaborate procedures," it is not subject to the same requirements as processes that take rights away in the first place. *Snow*, 722 F.2d at 632. As this Court has explained, "[t]he discretion involved at the clemency stage can never cause" the hardship that clemency removes; instead, "it serves only as an act of grace to relieve that sentence even when the sentence has been legally imposed." *Id.*

Appellants do not claim that "[t]he 'clemency' label" "immunize[s] restoration of voting rights from constitutional scrutiny," Answer 47; *see, e.g.*, IB 46 ("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."). Rather, Appellants contend that caselaw addressing the scope of the clemency power applies to claims challenging how members of the "Executive Clemency Board" (Answer 1) exercise their "clemency powers" (Answer 49) in disposing of "Application[s] for Clemency" (Answer 5) submitted pursuant to the "Rules of Executive Clemency" (Answer 5; DE107-1). *See Hand*, 888 F.3d at 1207-13. Ensuring compliance with relevant caselaw is a matter of substance, not labelling.

Repudiating that caselaw will have real-world consequences, and not just for Florida. Indeed, Plaintiffs' "novel" constitutional theory (DE144:27; DE160:7) is at war with the longstanding historical practices of at least 48 states and the federal government.

Florida law, for example, has authorized the discretionary restoration of civil rights, including but not limited to voting rights, for 150 years. DE160:18. In addition, "48 states nationwide leave the restoration of incarcerated convicts' voting rights to executive discretion through the pardon power." Brief of Missouri & Seven Other States as Amici Curiae ("Brief for *Amici* States") at 6. Under Plaintiffs' theory, those 48 states "all have unconstitutional clemency systems." *Id.*; *see* IB 23-25.

Plaintiffs may not dismiss that implication of their theory by refusing to examine how state clemency processes apply to "a felon [who] obtains a full pardon *prior* to sentence completion" and looking only to whether clemency has any role to

play *after* the point at which, for certain categories of felons, some states have provided for automatic reenfranchisement. Answer 49-50 (emphasis added). Similarly, it is not accurate to say that various states "have *removed* reenfranchisement from the clemency system" by adopting a policy of "restoring voting rights in a uniform way, *following* the completion of incarceration, parole, probation, *and/or* a waiting period," *id.* (emphases added), because purely discretionary clemency processes still provide a mechanism by which voting rights may be restored *before* the point at which those states provide for automatic reenfranchisement. *See White v. Ind. Parole Bd.*, 266 F.3d 759, 766 (7th Cir. 2001) (Easterbrook, J.) ("[A] governor (or other holder of the pardoning power) need not provide any process at all and may resolve matters as he pleases.").

Plaintiffs' theory would also seem to invalidate the federal pardon power. A Floridian who has lost the right to vote due to a federal felony conviction may obtain restoration of the right to vote by applying for state clemency *or* a federal pardon. *See* DE107-1 (Rules 5(E), 9(C), 10(C)); *Ex parte Garland*, 71 U.S. 333, 380 (1866) (a full pardon "restores [the applicant] to all his civil rights"). Like Florida's clemency system, the federal clemency power is not "direct[ed]" by "specific and neutral criteria," DE160:21. To the contrary, the Supreme Court has held that the President's pardon power "is unlimited" and that "[t]he benign prerogative of mercy

reposed in him cannot be fettered by any legislative restrictions." *Garland*, 71 U.S. at 380.

Plaintiffs' theory carries vast and troubling implications for other kinds of executive clemency—including, for example, commutations of death sentences and restoration of the right to keep and bear arms. IB 25-28; Brief for *Amici* States at 2-3, 6, 10-14, 16-17. It is no answer to assert that "[t]he constitutional ruling in this case," by its terms, "is confined to voting rights restoration," Answer 18; *see* DE144:2 n.1; DE160:21. This Court's decisional law must make sense of this case *and* the next one, and Plaintiffs offer no principled basis for concluding that "standardless" clemency decisions are unconstitutionally "arbitrary" as to one—but only one—form of clemency. It is not persuasive to argue that "because of the unique First Amendment interests implicated by voting rights restoration, [the district court's ruling] need not have any effect on any other form of executive clemency," Answer 18. Plaintiffs do not and cannot dispute, for example, that the Clemency Board's "unfettered discretion" to commute a death sentence affects a convicted felon's "dual rights to political association and expression" (Answer 3) at least as much as its discretion to grant or deny restoration of civil rights.

Finally, Plaintiffs do not dispute that governmental decisions are not unconstitutionally "arbitrary" just because they are not made pursuant to specific standards. IB 22-23; *see id.* at 10-12, 30-31 (citing record evidence and explaining

that the Board follows eminently reasonable procedures, including careful collection and examination of pertinent information and "reasonable safeguards against improper decision-making"). Indeed, Plaintiffs argue that the Board's standardless process for granting other forms of clemency—including commutations of death sentences—"need not" be deemed unconstitutionally arbitrary. *See* Answer 18; *see also Banks v. Sec'y, Fla. Dep't of Corr.*, 592 F. App'x 771, 773 (11th Cir. 2014) ("In order for a claim of alleged violations of due process and equal protection in a clemency proceeding to succeed, the violation must be grave, such as where 'a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process.'").

B. First Amendment

1. Plaintiffs ask a three-judge panel of this Court to rule that "the First Amendment *does* protect the right to vote more than the Fourteenth Amendment." Answer 17. That is not the law of this Circuit. In at least three published decisions, this Court has relied on the principle that "the First Amendment provides no greater protection for voting rights than is otherwise found in the Fourteenth Amendment." *Hand*, 888 F.3d at 1211; *see Burton v. City of Belle Glade*, 178 F.3d 1175, 1188 n.9 (11th Cir. 1999); *Cook v. Randolph Cty.*, 573 F.3d 1143, 1152 n.4 (11th Cir. 2009). In a fourth published opinion, this Court summarily rejected a claim that the district

court erred in relying on that same principle. *See Lucas v. Townsend*, 763 F. Supp. 605, 618 (M.D. Ga. 1992), *aff'd* 967 F.2d 549, 556 (11th Cir. 1992).

For their part, Plaintiffs do not cite any case—from this or any other circuit—holding or opining otherwise. *See* Answer 33-43. Nevertheless, Plaintiffs advance an assortment of arguments to support their claim that this Court's cases do not mean what they say. *See id.* Those arguments are unpersuasive.

Burton, *Cook*, and *Lucas* may not be distinguished on the ground that those cases "had no occasion to consider the specific First Amendment doctrines and claims in this case," Answer 33. By its terms, the principle those cases invoked applies here. In addition, those cases did have occasion to consider one of the "specific" First Amendment arguments on which Plaintiffs here rely—i.e., that the First Amendment protects a fundamental right to vote, and that burdens imposed on that right to vote should be subject to strict scrutiny. *See* Answer 2-3; DE144:20-21.

For example, plaintiffs in *Burton* brought a "lawsuit alleging that the City of Belle Glade unlawfully deprived them of their right to vote." 178 F.3d at 1183. Like Plaintiffs here, plaintiffs in *Burton* cited *Anderson v. Celebreeze*, 460 U.S. 780 (1983), and *Williams v. Rhodes*, 393 U.S. 23 (1968), in support of their First Amendment right-to-vote claims. Brief for Appellants, *Burton v. City of Belle Glade*, 178 F.3d 1175 (11th Cir. 1999) (No. 97-5091), 1998 WL 34084582 at *47. Also like Plaintiffs here, the *Burton* plaintiffs claimed it was erroneous to believe that their

First Amendment right-to-vote claims "were adequately protected by other provisions." *Id.*

This Court "disposed of plaintiffs' First Amendment contention, *holding* that 'since the First and Thirteenth Amendment afford no greater protection for the voting rights claims than that already provided by the Fourteenth and Fifteenth Amendments, . . . the district court did not err in dismissing these claims.'" 888 F.3d at 1211 (quoting *Burton*, 178 F.3d at 1188 n.9; emphasis added). Notably, this Court did not apply strict scrutiny in reviewing plaintiffs' Fourteenth Amendment claims, *see* 178 F.3d at 1191-92, nor did it engage in a separate analysis to determine whether strict scrutiny should nevertheless be applied to plaintiffs' First Amendment claims, *see id.* at 1188 n.9.

Similarly, *Burton*, *Cook*, and *Lucas* cannot be distinguished on the ground that "those cases did not concern an analytically distinct First Amendment violation," Answer 33. Like Plaintiffs here, plaintiffs in those cases brought right-to-vote claims based on the First Amendment. In all three cases, the courts disposed of those claims by reasoning that plaintiffs could not, as a matter of law, establish a violation of any right to vote based on the First Amendment. If plaintiffs in those cases *could not* show a violation of the First Amendment, it stands to reason that those cases "*did not* concern an analytically distinct First Amendment violation," Answer 33

(emphasis added). Thus, Plaintiffs' purported distinction boils down to the unhelpful observation that this Court, in all three of the cases cited above, held what it held.

Put differently, Plaintiffs' posited distinction is just a circuitous way of saying that (1) this Court has repeatedly erred in relying on the principle that "the First Amendment provides no greater protection for voting rights than is otherwise found in the Fourteenth Amendment," *Hand*, 888 F.3d at 1211, and (2) the *judgments* in those earlier cases, in Plaintiffs' view, could have been affirmed for reasons other than the one this Court gave. Even if accepted, that argument would not help Plaintiffs' cause. As the stay panel recognized, a three-judge panel of this Court is bound to apply "well established" circuit precedent. *Id*. Accordingly, Plaintiffs' critique of that precedent is irrelevant at this stage of the litigation. *See, e.g.*, *Smith v. GTE Corp.*, 236 F.3d 1292, 1301-04 (11th Cir. 2001).

It is also unpersuasive. As Plaintiffs see it, this Court's caselaw is wrong because "[t]he 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 the Fourteenth Amendment's proof requirements." Answer 33 (emphasis added). That is incorrect, because the First Amendment cases on which Plaintiffs rely are "inapposite to a reenfranchisement case." *Hand*, 888 F.3d at 1212.

In particular, Plaintiffs cite cases establishing "the longstanding and important but (for our purposes) unremarkable point that a state cannot vest officials with unlimited discretion to grant or deny licenses as a condition of engaging in protected First Amendment activity." *Id.* at 1212-13. Such precedent "does not bear directly on the matters presented by this case." *Id.* at 1213. "Indeed, none of the cited cases involved voting rights or even mentioned the First Amendment's interaction with the states' broad authority expressly grounded in § 2 of the Fourteenth Amendment to disenfranchise felons and grant discretionary clemency." *Id.*; *see* Answer 34-35 (citing cases). Still less do those cases hold that clemency officers exercising traditional clemency powers may not be vested with the historic and defining characteristic of executive clemency—discretion to dispense "[t]he benign prerogative of mercy," *Garland*, 71 U.S. at 380.

Plaintiffs' conclusory assertions that such cases are "clearly applicable," "directly applicable," and "specifically" targeted at the challenged scheme, *e.g.*, Answer 16, 33, 36, 37, 43, do not gain them any ground. Moreover, those assertions are at odds with Plaintiffs' own acknowledgement that "the *specific* application of the unfettered discretion doctrine to the arbitrary allocation of voting rights has not been considered previously," Answer 42 (emphasis in original).

2. Assuming *arguendo* that the First Amendment may afford greater protection for the voting rights than the Fourteenth Amendment, Plaintiffs' First Amendment theory fails on its own terms. IB 32-36.

First, convicted felons who have lost their right to vote do not have a "right to vote" protected by the First Amendment. *See* Answer 2-3. The district court rejected Plaintiffs' claims insofar as they challenged the process by which Plaintiffs lost their right to vote, DE144:39, and Plaintiffs have not appealed that part of the court's judgment. Thus, it is undisputed that Plaintiffs, as convicted felons, have lost their right to vote pursuant to the State's lawful exercise of the "affirmative sanction" set out in Section 2 of the Fourteenth Amendment. *Id.*; *see Richardson v. Ramirez*, 418 U.S. 24, 54 (1974). It is also undisputed that Plaintiffs have no right to regain their ability to vote, *see* Answer 15, 19, and that the Constitution "does not require the States to enact a clemency mechanism," *Herrera*, 506 U.S. at 414.

In other words, Plaintiffs claim that convicted felons who have *already lost* their "right to vote" pursuant to a state's concededly valid exercise of the affirmative authorization specifically set out in Section 2 of the Fourteenth Amendment *still have* a constitutionally protected "right to vote" under the more general terms of the First Amendment. *See* Answer 2-3. That is unpersuasive, inasmuch as neither logic nor caselaw supports the proposition that the First Amendment gives back what the Fourteenth Amendment "expressly empowers" a State to take away, *see Hand*, 888

F.3d at 1207, 1209. Or, as this Court put it, it is "pretty clear that, in a reenfranchisement case, the specific language of the Fourteenth Amendment controls over the First Amendment's more general terms." *Id.* at 1212; *see also Farrakhan v. Locke*, 987 F. Supp. 1304, 1314 (E.D. Wash. 1997), *rev'd in part on other grounds*, 338 F.3d 1009 (9th Cir. 2003).

Thus, Plaintiffs are wrong to assert that their claim is supported by "eighty years' worth of clear Supreme Court precedent," Answer 3. No court has ever held that convicted felons who have lost the right to vote still have a right to vote under the First Amendment, and a number of courts have expressly held that there is no such right. *See, e.g.*, *Howard v. Gilmore*, 205 F.3d 1333, 2000 WL 203984, at*1 (4th Cir. 2000) (unpublished table) ("The First Amendment creates no private right of action for seeking reinstatement of previously canceled voting rights."); *accord Hayden v. Pataki*, No. 00 Civ. 8586, 2004 WL 1335921, at *6 (S.D.N.Y. 2004) ("[T]he case law 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) ("[I]t is clear that the First Amendment does not guarantee felons the right to vote.").

Second, a grant of executive clemency that has the effect of restoring a convicted felon's civil rights is not a "permit" or "license" for purposes of pertinent First Amendment doctrine, IB 36, just as a liberty-conferring pardon is not a "permit" or "license" to attend a protest outside a prison's walls or to run for political

office. Once again, Plaintiffs do not dispute that no case—from this or any other court—approves that essential premise of their challenge. *See* Answer 2-3. On the other hand, a great many precedents "confirm the broad discretion of the executive to grant and deny clemency." *Hand*, 888 F.3d at 1209; *see, e.g.*, *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 275-76 (1998); *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 464, 466-67 (1981); *Snow*, 722 F.2d at 632; *Beacham v. Braterman*, 300 F. Supp. 182, 184 (S.D. Fla. 1969), *aff'd* 396 U.S. 12.

In other words, Plaintiffs ask this Court to rule that the First Amendment bars clemency officers from exercising *any discretion* in granting or denying clemency applications implicating restoration of voting rights. *See* Answer 16 (explaining that Plaintiffs' First Amendment claim is based on cases in which the Supreme Court "has shown zero tolerance for even the risk of discriminatory or arbitrary treatment in the First Amendment context"). In case after case, however, the Supreme Court has explained that discretion to dispense "[t]he benign prerogative of mercy" is one of the historic and defining characteristics of executive clemency. *E.g.*, *Dumschat*, 452 U.S. at 464-66; *Garland*, 71 U.S. at 380. It is not "circular[]," Answer 49, to point out that a novel legal theory *prohibiting* discretionary clemency determinations cannot be reconciled with well-established caselaw expressly and unambiguously *approving* discretionary clemency determinations. *See* IB 36.

Unlike First Amendment licensing cases in which the complainants had a right to engage in the underlying First Amendment-protected activity, it is far from clear that the elimination of discretion from clemency proceedings would do clemency applicants any good. Plaintiffs instituted this litigation on the assumption that a court could order automatic restoration of voting rights as the remedy for the constitutional violations they alleged. DE29:73-79. However, they have now abandoned that position and conceded that a court "could not foreclose [clemency officers] from uniformly revoking all voting rights restoration," Answer 19. Similarly, Plaintiffs do not dispute that, if the district court's First Amendment ruling is affirmed, legitimate considerations might prompt the Board to adopt reforms that could make it harder rather than easier for many convicted felons—and especially those who have been convicted of certain presumptively troubling offenses—to regain the ability to vote. *See* DE163:23-24; Appellants' Stay Application at 21-22.

C. Plaintiffs cite no case contradicting this Court's conclusion that the mere "risk" of discrimination, without something more, does not establish that a state's clemency system is facially unconstitutional. *See Hand*, 888 F.3d at 1212; IB 33-38. Moreover, Plaintiffs acknowledge that they have not properly pleaded, much less proven, that Florida's clemency system has the purpose *or* effect of discriminating based on any constitutionally impermissible consideration. *See id.*; Answer 44.

D. The district court should not be lauded for "going beyond the requirements of Supreme Court precedent," Answer 47, when it "credited a few of [Plaintiffs'] comparisons [involving non-parties] as raising a clear inference of arbitrary, biased, and/or discriminatory treatment," Plaintiffs' Response to Stay Motion at 12. Specific instances of alleged discrimination either are or are not relevant to the claims Plaintiffs raised. *See* Answer 43-47. 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, afforded Defendants a fair chance to rebut them, and otherwise applied established legal principles governing the adjudication of such claims. *See id.*

The district court took a third approach: It ruled, at the outset of the litigation, that allegations of actual discrimination were "not relevant" to Plaintiffs' facial claims, and thus induced Defendants not to clutter the record with evidence tending to refute those "not relevant" claims. DE62:1. At the summary-judgment stage, however, the court "credited a few of" Plaintiffs' highly selective comparisons "as raising a clear inference of arbitrary, biased and/or discriminatory treatment," Plaintiffs' Resp. to Stay Motion at 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 to support its holding that the challenged state

rules, statutes, and constitutional provisions violate the First and Fourteenth Amendments. *See, e.g.*, DE144:2, 23-24.

That was error. IB 39-46. Plaintiffs do not dispute that, insofar as the court drew such "inference[s] of arbitrary, biased, and/or discriminatory treatment," the district court did not "draw[] all reasonable inferences in the light most favorable to the non-moving party," did not apply the presumption of regularity, and employed a comparative methodology incompatible with the Supreme Court's instruction that "[i]ndividual acts of clemency inherently call for discriminating choices because no two cases are the same." *See id.* (citing authorities); Answer 43-47.

Plaintiffs may not legitimate those errors by retroactively recharacterizing their argument and the district court's improper insinuations of misconduct. *See* Answer 43 (asserting that district court invoked Plaintiffs' "evidence" only "to conclude that the *risk* of discrimination, bias, and arbitrariness was real") (bold emphasis omitted). Plaintiffs told the district court that their selective comparisons supplied *actual* "[e]xamples of arbitrary, biased, and/or discriminatory decision-making." DE102:23 (bold emphasis omitted); and, not long ago, Plaintiffs expressly acknowledged that the district court "credited a few of" Plaintiffs' highly selective comparisons "as raising a *clear inference* of arbitrary, biased and/or discriminatory *treatment*," Plaintiffs' Resp. to Stay Motion at 12 (emphases added). Plaintiffs' new (and somewhat more guarded) formulation is just another way of saying that they

still want to *allege* gross malfeasance on the part of the State's highest-ranking executive officers—and to have the courts implicitly or explicitly "credit[]" those allegations, Plaintiffs' Resp. to Stay Motion at 12—without having to *prove* them.

In their opening brief, Appellants explained why the principal example on which the district court relied did not support the court's improper insinuations of invidious discrimination. IB 42-45; *see* DE144:24 ("It is not lost on the court that four of the five rejected applicants are African-American."). Plaintiffs offer no response to that analysis. Instead, they move on and ask this Court to assume that numerous *other* examples "demonstrate that the risk of discriminatory, biased, and arbitrary treatment is *real, not just theoretical*." Answer 8 (emphasis added); *see id.* at 9-12. Law and fairness both demand the same answer: Courts cannot credit or indulge allegations or insinuations of gross malfeasance—no matter what form of words is used to make them—unless they are properly pleaded and proven.

Finally, Defendants are not estopped from complaining that "the district court 'did not have the information required to properly assess'" allegations of invidious discrimination involving non-parties. Answer 45. As Defendants explained to the district court, they were duty-bound to protect the *confidentiality* of *Confidential* Case Analyses (CCAs) involving non-parties, just as district courts are duty-bound to protect the confidentiality of Presentence Investigation Reports prepared for the benefit of sentencing judges. What is more, it is now clear that Defendants were

right: The district court ruled that the non-party CCAs were "not relevant" to Plaintiffs' facial claims; Plaintiffs have not challenged that ruling on appeal; and it is thus undisputed, for present purposes, that Defendants had no cause to disclose confidential data pertaining to non-parties. Not surprisingly, Plaintiffs cite no authority to support the altogether remarkable proposition that Defendants should be penalized for successfully advancing a meritorious argument. *See id.*

E. *Amici* on both sides advance a variety of policy arguments for and against the State's current system. *Compare, e.g.*, Center for Equal Opportunity Br. 2, *with* Sentencing Project Br. 2-5. Such arguments warrant careful consideration, but they should be directed to the policymaking branches of Florida's government. Other states have shifted from discretionary to non-discretionary systems for restoring felons' civil rights. *See* Answer 50. 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.

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

Plaintiffs argue that "[w]ithout time limits, there is a significant risk of arbitrary, biased, or discriminatory treatment of a pending [clemency] application." Answer 24. As this Court has already explained, however, the mere "risk" of

discriminatory or arbitrary decision-making, "without something more," does not render a State's clemency process facially invalid. *See Hand*, 888 F.3d at 1212; IB 46-47. Plaintiffs do not refute that part of this Court's analysis. *See* Answer 24. Nor do they point to any case holding that a State's clemency process runs afoul of the First Amendment if the "act of grace" that clemency officers are permitted to bestow is not subject to "meaningful, specific, and expeditious time constraints," DE160:21.

The two cases Plaintiffs cite in passing do not support their claim. *See* Answer 24 (citing *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990); *Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781, 802 (1988)). In *FW/PBS*, three Justices expressed the view that "a prior restraint that fails to place limits on the time within which the decisionmaker must issue the license is impermissible." 493 U.S. at 226 (Opinion of O'Connor, J.). A convicted felon who has lost the right to vote is not operating under a "prior restraint" within the meaning of First Amendment caselaw. *See Hand*, 888 F.3d at 1213. And, even if the law were otherwise, any such "prior restraint" would be attributable to the permanent loss of voting rights to which convicted felons are permissibly subject under Florida law, not to the absence of a subsequent and discretionary act of mercy on the part of the State's clemency officers. *See Snow*, 722 F.2d at 632.

Similarly, the Court in *Riley* concluded that when a professional fundraiser who has a First Amendment-protected right to engage in speech must nevertheless

"obtain a license to speak," "such a regulation must provide that the licensor 'will, within a specified brief period, either issue a license or go to court.'" 487 U.S. at 801-02. That holding does not apply here: Plaintiffs have no First Amendment-protected right to vote, and a pardon is not a "license" within the meaning of *Riley*.

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

Plaintiffs seek to salvage the district court's injunction by rewriting it—that is, by asserting that "[t]he district court properly entered an injunction requiring Defendants to establish a non-arbitrary, uniform voting rights restoration system," Answer 54 (alterations omitted), and by conceding that a policy of "lifetime disenfranchisement" would satisfy such a requirement, *id.* at 55. That is not the injunction the district court entered, and the injunction the court did enter constitutes an abuse of discretion.

A. Plaintiffs concede that "the district court could not foreclose Defendants from uniformly revoking all voting rights restoration," Answer 19. What is more, Plaintiffs do not and cannot dispute that the district court did just that. IB 48-49; *see* DE160:14-20, 21. Nevertheless, Plaintiffs continue to insist that "the district court did not abuse its discretion in issuing its injunction," Answer 18.

That makes no sense. "'A district court by definition abuses its discretion when it makes an error of law,'" *Arthur v. King*, 500 F.3d 1335, 1339 (11th Cir.

2007) (quoting *Koon v. United States*, 518 U.S. 81, 100 (1996)), and it is now undisputed that the district court made an error of law when it permanently prohibited the State "from ending all vote-restoration processes," DE160:21. Accordingly, that part of the injunction must be reversed—not because Plaintiffs have "no objection" to such a disposition, Answer 55, but because the district court had no authority to bar the State from pursuing a policy affirmatively authorized by the U.S. Constitution. *See Hand*, 888 F.3d at 1213-14.

B. Properly understood, Plaintiffs' concession compels the conclusion that the district court lacked the authority to order the Board to "promulgate" new vote-restoration criteria. If "the district court could not foreclose" the State from exercising the greater power of *permanently revoking* its clemency process, Answer 19, it also could not foreclose the State from exercising the lesser power of *indefinitely suspending* that same process until such time as the State determines whether, how, and when to come up with a new clemency process. IB 50.

In commanding the State to promulgate a policy not required by federal law, the district court contravened vertical and horizontal separation of powers principles. IB 50-52. Plaintiffs make no attempt to argue otherwise.

The two cases Plaintiffs cite in passing are not to the contrary. *See* Answer 54-55 (citing *Atlanta Journal & Const. v. City of Atlanta Dep't of Aviation*, 322 F.3d 1298 (11th Cir. 2003) (en banc); *Sentinel Commc'ns Co. v. Watts*, 936 F.2d 1189

(11th Cir. 1991)). Neither case 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 at issue there, the proper remedy is to prevent the government from deciding whether, how and when to institute a new policy. *See Atlanta Journal & Constitution*, 322 F.3d at 1312 (ordering the district court "to afford the [City] an *opportunity* to formulate ascertainable non-discriminatory standards for the exercise of discretion") (emphasis added); *Sentinel Commc'ns Co.*, 936 F.2d at 1207 (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") (emphasis added).

In short, neither case supports the proposition that the district court was *permitted* to direct the Executive Clemency Board to "promulgate" new clemency rules. *See Hand*, 888 F.3d at 1213. Still less do those cases show that the district court's unprecedented injunction "was *required* by this Court's precedents," Answer 54 (emphasis added).

At a minimum, the district court abused its discretion insofar as it gave the Clemency Board 30 days in which to revamp a 150-year-old clemency system. It is no answer to assert that "Defendants did not request more time to comply with the

injunction or permission to adopt interim rules and adjust them subsequently," Answer 56. The question whether the district court abused its discretion when it issued its injunction does not and cannot turn on whether Defendants *subsequently* asked the district court to grant relief from its own order. Of particular relevance, the district court did not solicit pertinent input from Defendants (for example, by convening a hearing and asking for Defendants to offer a reasonable period of time in which to craft new rules) before it ordered a remedy that neither party requested. In any event, the court, in its own way, made quite clear that it would not entertain a request for an extension. *See, e.g.*, DE167:4 ("Defendants stamp their feet and wail that 30 days is 'not [a] reasonably calculated' time to create a constitutional system of executive clemency."); *id.* ("Defendants could simply identify those rules that run afoul of the Constitution and rewrite them with specific and neutral standards. Instead, Defendants scream into the wind various questions it might consider in crafting constitutional rules.").

It is inaccurate and irrelevant to say that "Defendants were able to craft new rules within the time allotted," Answer 56. The draft rules to which Plaintiffs point, *see id.* at 14 & n.23, were proposed by the Governor as a basis for discussion at an anticipated emergency meeting convened to comply with the district court's injunction. Because this Court subsequently stayed the injunction, that meeting never took place, and the Board did not endorse those proposed rules.

More importantly, the pertinent question is whether it was *proper* for the district court to order the State's policymakers to revamp a 150-year-old clemency system in 30 days, not whether it was *possible* for Defendants to comply with that order. Congress, for example, might be "able" (Answer 56) to replace the statutory sentencing factors with "specific and neutral criteria" in 30 days. That does not mean that a federal district court could properly issue such a command to a coordinate branch of government. Of course, the directive at issue here is even more problematic, because it contravenes vertical *and* horizontal separation-of-powers principles. *See* IB 50-52.

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)

CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume and word-count limits of Fed. R. App. P. 32(a)(7) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 6,483 words.

2. This document complies with the typeface and type-style requirements of Fed. R. App. P. 32(a) 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 5th day of July, 2018, a true copy of the foregoing 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 Filers. I FURTHER CERTIFY that all counsel for parties appearing below who are not registered Attorney Filers in this Court have been served by UPS and by electronic mail to the mailing addresses and e-mail addresses listed on the attached UPS 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

UPS AND ELECTRONIC SERVICE LIST

THEODORE 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

JON SHERMAN
jsherman@fairelectionsnetwork.com
MICHELLE KANTER COHEN
mkantercohen@fairelectionsnetwork.com
FAIR ELECTIONS LEGAL NETWORK
1825 K Street NW Suite 450
Washington, DC 20006

Counsel for Plaintiffs-Appellees