UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

JAMES MICHAEL HAND, *et al.*,

Plaintiffs,

v. Case No. 4:17-CV-128-MW-CAS

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

Defendants.
_____/

DEFENDANTS' BRIEF ON REMEDIES

For more than 170 years, the State of Florida has penalized those convicted of serious crimes with the forfeiture of voting rights. As this Court acknowledged, "[i]t is well-settled that a state can disenfranchise convicted felons under Section Two of the Fourteenth Amendment," Order at 6 (citing *Richardson v. Ramirez*, 418 U.S. 24, 56 (1974)); *see also Johnson v. Governor of Fla.*, 405 F.3d 1214, 1228 (11th Cir. 2005) (en banc) ("Florida's discretion to deny the vote to convicted felons is fixed by the text of § 2 of the Fourteenth Amendment . . . ."). Indeed, at the time of the Fourteenth Amendment's ratification, twenty-nine of the thirty-six states had some form of criminal disenfranchisement law. *See Ramirez*, 418 U.S. at 48; *Johnson*, 405 F.3d at 1218 n.5.

This Court's Order on Cross-Motions for Summary Judgment (the "Order"), issued on February 1, 2018, does not disturb these controlling precedents regarding Florida's longstanding constitutional and statutory provisions imposing criminal disenfranchisement. Instead, the Order concluded that "[i]t is the [Clemency] Board's process to restore voting rights that this Court finds unconstitutional." Order at 39. Specifically, the Court concluded that the Rules of Executive Clemency addressing the restoration of voting rights to convicted felons fail to contain sufficient standards for the exercise of discretion (*id.* at 27, 32) and time limits to process and decide clemency applications (*id.* at 30) under the Court's interpretation of the First and Fourteenth Amendments to the United States Constitution.

In response to the Court's request that the parties "submit additional briefing as to the contours of injunctive relief, if any, in light of" its Order, *id.* at 40, Defendants submit this brief regarding remedies.[1]

I. PLAINTIFFS' REQUESTED RELIEF SHOULD BE REJECTED.

As a threshold matter, Plaintiffs are not entitled to the relief they request in their First Amended Complaint. The remedies discussion in their Complaint spans seven pages and seeks a wide variety of potential injunctive relief. 1st Am. Compl. at 73–79.

[1] In submitting this brief, Defendants do not waive any objections to the Court's Order and expressly preserve all rights to appeal and to seek a stay either from this Court or from the Eleventh Circuit. *See* Order at 40 (recognizing that "Defendants will likely object to the substance of this order" and clarifying that "additional remedies-related briefing will not constitute a waiver of any objections").

Even if the Court opts to grant injunctive relief (and, as discussed below, it should not), Plaintiffs are not entitled to any of the injunctive relief requested in their Complaint.

First, Plaintiffs request that the Court enjoin the Board "from denying any member of the Plaintiff Class the right to register to vote and cast a ballot in the State of Florida on the grounds of his or her prior felony convictions." 1st Am. Compl. at 75. They follow that request with a host of others premised on their request for automatic re-enfranchisement upon completion of an incarceration term. *See id.* at 75–78. Court-ordered automatic re-enfranchisement, however, is foreclosed by United States Supreme Court precedent, *Ramirez*, 418 U.S. at 54, and Eleventh Circuit precedent, *Johnson*, 405 F.3d at 1217.[2] Indeed, this Court expressly recognized in its Order that such relief is categorically unavailable. *See* Order at 39 (rejecting Plaintiffs' request to strike Florida's criminal disenfranchisement statutes "because states have an 'affirmative sanction' in the Constitution to disenfranchise felons" (quoting *Ramirez*, 418 U.S. at 54)).

Similarly, Plaintiffs request that the Court enjoin the Board "from requiring Plaintiff Class members to petition the Executive Clemency Board for and secure the

[2] The Eleventh Circuit in *Johnson* concluded that there was "no doubt that Florida's decision to adopt a criminal disenfranchisement law" under its 1838, 1861, and 1865 Constitutions "was based on a non-racial rationale" because, at the time these provisions were adopted, "the right to vote was not extended to African-Americans, and, therefore, they could not have been the targets of any disenfranchisement law." 405 F.3d at 1218.

restoration of their voting rights." 1st Am. Compl. at 75. The Court's Order does not support that request, as the Court granted relief regarding only two specific aspects of the Board's specific procedures to restore voting rights. *See* Order at 39. Nothing in the Court's Order suggests that the Clemency Board's Rules requiring a convicted felon to seek restoration of voting rights—if accompanied by clear standards and time constraints within which to act—would raise constitutional concerns under the First or Fourteenth Amendments.

Second, Plaintiffs request that the Court enjoin the Board "from enforcing Fla. Const. art. VI, § 4(a), Fla. Stat. Ann. § 97.041(2)(a), Fla. Const. art. IV, § 8, Fla. Stat. Ann. § 944.292(1) and the Florida Rules of Executive Clemency as to Plaintiff Class members' right to vote." 1st Am. Compl. at 74. That request cannot be reconciled with the analysis set out in this Court's Order. The challenged constitutional and statutory provisions, *inter alia*, provide that no person convicted of a felony may vote (or hold office) until restoration of civil rights. As the Court explained, it cannot "strike Florida's disenfranchisement statutes as unconstitutional . . . because states have an 'affirmative sanction' in the Constitution to disenfranchise felons." Order at 39 (quoting *Ramirez*, 418 U.S. at 54). Accordingly, the Court left intact the Florida constitutional and statutory provisions Plaintiffs challenged. Enjoining the enforcement of valid state laws and constitutional provisions does not constitute a proper remedy for any of the Court's conclusions regarding the State's vote-restoration process.

In addition, the Court's order makes explicit that "[i]t is *the Board's process* to restore voting rights that [it] finds unconstitutional." Order at 39 (emphasis added). To the extent that the Board's current process for restoring voting rights to convicted felons involves the exercise of "unfettered discretion," the Board may revise that process by amendment to the Rules of Executive Clemency without judicial invalidation of the State's longstanding statutes and constitutional provisions regarding criminal disenfranchisement. Accordingly, there is no reason to upend the State's constitutional and statutory framework. *See, e.g.*, *Knop v. Johnson*, 977 F.2d 996, 1008 (6th Cir. 1992) (in fashioning injunctive relief against a state agency or official, a district court must ensure that the relief ordered is "'no broader than necessary to remedy the [federal] violation.'" (quoting *Toussaint v. McCarthy*, 801 F.2d 1080, 1086 (9th Cir. 1986)).[3]

A traditional severability analysis also supports this Court's refusal to invalidate Florida's disenfranchisement provisions. "In determining whether to sever a constitutionally flawed provision, courts should consider whether the balance of the

[3] *Accord EagleMed LLC v. Cox*, 868 F.3d 893, 906 (10th Cir. 2017) (finding that district court abused its discretion by entering an amended judgment that "went well beyond what was necessary to remedy the federal violation" because it "plac[ed] an affirmative duty on state officials," which duty was "a creation only of state, not federal, law"); *Ruiz v. Estelle*, 679 F.2d 1115, 1144–45 (5th Cir.), *amended in part, vacated in part on other grounds*, 688 F.2d 266 (5th Cir. 1982) (because "principles of federalism[,] which play such an important part in governing the relationship between federal courts and state governments are applicable where injunctive relief is sought . . . against those in charge of an executive branch of an agency of state government," courts "should . . . fashion the least intrusive remedy that will still be effective" (quotation marks omitted)).

legislation is incapable of functioning independently." *United States v. Romero-Fernandez*, 983 F.2d 195, 196 (11th Cir. 1993); *see Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984) (plurality opinion) (explaining that "a court should refrain from invalidating more of the statute than is necessary," and concluding that when a challenged law "'contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the act in so far as it is valid'") (quoting *El Paso & Northeastern R. Co. v. Gutierrez*, 215 U.S. 87, 96 (1909)). "Severability" of a state statute "is a question of state law[,] . . . [a]nd Florida law clearly favors (where possible) severance of the invalid portions of a law from the valid ones." *Coral Springs St. Sys., Inc. v. City of Sunrise*, 371 F.3d 1320, 1347 (11th Cir. 2004) (quoting *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 772 (1988)). The Florida Supreme Court has construed "[s]everability [a]s a judicial doctrine recognizing the obligation of the judiciary to uphold the constitutionality of legislative enactments where it is possible to strike only the unconstitutional portions." *Ray v. Mortham*, 742 So. 2d 1276, 1280 (Fla. 1999) (citing *State v. Calhoun Cty.*, 170 So. 883, 886 (Fla. 1936)).

Florida's constitutional forfeiture of voting rights for convicted felons is separable from, and stands intact without, Florida's vote-restoration process that the Court has found unconstitutional. At the outset, it bears noting that the vote-restoration process the Court found unconstitutional is a creature of Clemency Board Rules, while disenfranchisement is enshrined in the Florida Constitution and statutes. Moreover, Article VI, section 4(a) of the Florida Constitution provides that "[n]o person convicted

of a felony . . . shall be qualified to vote or hold office until restoration of civil rights," and Section 944.292(1), Florida Statutes, provides that, "[u]pon conviction of a felony as defined in § 10, Art. X of the State Constitution, the civil rights of the person convicted shall be suspended in Florida until such rights are restored by a full pardon, conditional pardon, or restoration of civil rights granted pursuant to § 8, Art. IV of the State Constitution."[4] In other words, by operation of the Florida Constitution and State statutes, a convicted felon loses the right to vote until civil rights are restored. The Court's determination that the current process used by the State to restore a felon's rights violates the First and Fourteenth Amendments does not "'infect[]'" these disenfranchisement laws in an way that would "'requir[e]'" the entire "'unit to fail.'" *Coral Springs St. Sys., Inc.*, 371 F.3d at 1347 (quoting *Schmitt v. State*, 590 So. 2d 404, 414 (Fla. 1991)). Indeed, this Court has already recognized as much by rejecting Plaintiffs' challenge to Florida's disenfranchisement laws and procedures. *See* Order at 39.

II. A DECLARATORY JUDGMENT WOULD PROVIDE A SUFFICIENT REMEDY.

As the Court observed, it has the authority to issue a declaratory judgment. *See* Order at 39. Consistent with the Court's order, however, any such declaration should be limited to Florida's "process to restore voting rights." *See id.* It is that vote-restoration process—rather than "Florida's disenfranchisement statutes" and constitutional

[4] *See also* § 97.041(2)(b), Fla. Stat. ("persons . . . not entitled to register or vote" include "[a] person who has been convicted of any felony by any court of record and who has not had his or her right to vote restored pursuant to law").

provisions—that the Court found unconstitutional. *Id.* Similarly, any declaratory judgment must not stray from the issues the Court has identified—the "unfettered discretion," *id.* at 17, 27, 32, 39, lack of "any constraints, guidelines, or standards," *id.* at 3, and "lack of time limits in processing and deciding vote-restoration applications," *id.* at 30. Finally, any declaration should also be confined to the source of the Court's concerns—*i.e.*, the Rules of Executive Clemency that set the parameters for the Board's discretion, and not the criminal disenfranchisement statutes or constitutional provisions, *see id.* at 2, 3–4, 18, 24, 39.

The Court's remedial order should also adhere to the presumption of regularity ordinarily accorded to public officials entrusted with the duty of executing the law. *See, e.g.*, *Banks v. Dretke*, 540 U.S. 668, 696 (2004) (explaining that courts "[o]rdinarily . . . presume that public officials have properly discharged their official duties" (quotation marks omitted)); *see also United States v. Chem. Found.*, 272 U.S. 1, 14–15 (1926) ("The 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."); *accord United States v. Hanks*, 569 F. App'x 785, 788 (11th Cir. 2014). In other words, the Court should presume that, absent a stay, the Board will abide by the Court's determination that the current Rules may not, consistent with the First and Fourteenth Amendments, be used for re-enfranchisement determinations. Accordingly, although Defendants object to the Court's conclusions and expressly reserve their rights to appeal and seek a stay of its decision, a declaratory

judgment consistent with this Court's conclusions in its Order would provide a sufficient remedy to Plaintiffs.

III. INJUNCTIVE RELIEF IS NEITHER NECESSARY NOR APPROPRIATE.

The Court's Order expressly contemplated the possibility that injunctive relief may not be proper. *See* Order at 40 (directing the parties to "submit additional briefing as to the contours of injunctive relief, *if any*, in light of this order" (emphasis added)). In Defendants' view, injunctive relief is neither necessary nor appropriate. "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. And, as this Court has already recognized, federal courts "cannot issue an order that is tantamount to saying 'act right.'" Order at 39 (citing *Burton v. City of Belle Glade*, 178 F.3d 1175, 1201 (11th Cir. 1999)).

Plaintiffs "must satisfy a four-factor test before [the] [C]ourt may grant" an injunction. *Monsanto Co.*, 561 U.S. at 156 (quotation marks omitted). Specifically, they must show (1) "irreparable injury"; (2) that "remedies available at law, such as monetary damages, are inadequate to compensate for that injury"; (3) that "considering the balance of hardships between the [P]laintiff[s] and [D]efendant[s], a remedy in equity is warranted"; and (4) that "the public interest would not be disserved by a permanent injunction." *Id*. at 156–57.

Applying those principles here, the Court should decline to issue an injunction. Several considerations support that conclusion.

A. Nothing in the record suggests that Defendants would, in the face of a judgment declaring the State's vote-restoration procedures of the Clemency Board unconstitutional, continue to implement and apply those procedures in contravention of the Court's decision. *See Banks*, 540 U.S. at 696 (courts "[o]rdinarily . . . presume that public officials have properly discharged their official duties"). Significantly, the Court has not found that Defendants have engaged in *any* kind of illicit discrimination. Instead, the Court concluded that the Board's current vote-restoration rules are unconstitutional because they give rise to an unacceptable *risk* of improper conduct. *See* Order at 8, 21, 23–24, 30. Absent any finding that Defendants have ever engaged in misconduct, an injunction ordering Defendants *not* to act unconstitutionally would thus be unnecessary and inappropriate, and a declaratory judgment would provide a sufficient remedy to Plaintiffs. *See, e.g.*, *United States v. Armstrong*, 517 U.S. 456, 464 (1996) ("[I]n the absence of clear evidence to the contrary, courts presume that [the Attorney General and United States Attorneys] have properly discharged their official duties."). Indeed, the Court expressly recognized that it "cannot issue an order that is tantamount to saying 'act right.'" Order at 39 (citing *Burton*, 178 F.3d at 1201).

B. Moreover, an injunction requiring Defendants to affirmatively act to create a new vote-restoration procedure would be inappropriate. The Court has concluded that Florida's "vote-restoration process is constitutionally infirm." Order at 40. This

conclusion, however, leaves a range of options available to the State during the pendency of appellate review, any one of which would comport with the Court's ruling and the United States Constitution. These options include, but are not limited to, the following (or some combination thereof):

- adopting a uniform policy of declining to restore any convicted felon's ability to vote, either permanently or as an interim measure pending the amendment of the Rules of Executive Clemency in a manner consistent with the requirements of this Court's order;
- amending the Rules of Executive Clemency by providing for a permanent loss of voting rights as to those convicted of certain serious felonies and codifying new standards or guidelines for vote-restoration with a definite timeline for decisions for those convicted of other categories of felonies;
- amending the Rules of Executive Clemency to provide for discretionary or non-discretionary vote-restoration for all categories of felonies according to codified standards or guidelines with a definite timeline for decisions; or
- amending the Rules of Executive Clemency provisions imposing waiting periods before convicted felons may apply for vote-restoration to account for this Court's conclusions regarding the exercise of discretion in vote-restoration.

Nothing in the federal Constitution requires Florida to choose one of these options—or an entirely different system of executive clemency—over any other. Indeed, as this Court recognized, the United States Constitution permits states to "disenfranchise convicted felons permanently," Order at 9, and, therefore, there can be no claim of a federal constitutional right to any particular re-enfranchisement system, *see also* *Ramirez*, 418 U.S. at 54; *Johnson*, 405 F.3d at 1217. Thus, proceeding without a

vote-restoration system in place while Defendants seek appellate review or until they implement revisions to the Rules of Executive Clemency that address this Court's concerns would fully comport with the Court's ruling and fully remedy the purported federal constitutional issues this Court has identified.

Considerations of federalism and comity support the conclusion that the Court should not issue an injunction prohibiting the State from exercising its right to choose a particular course, so long as its choice is compatible with the requirements of federal law. In seeking federal court relief under Section 1983, Plaintiffs opted to invoke a cause of action intended to address federal-right deprivations. *See Filarsky v. Delia*, 566 U.S. 377, 380 (2012) ("Section 1983 provides a cause of action against state actors who violate an individual's *rights* under *federal* law." (emphases added)); *Thomas v. Bryant*, 614 F.3d 1288, 1317 (11th Cir. 2010) (describing the requirements for issuance of an injunction and noting that "we must also ensure that the scope of the awarded relief does not exceed the identified harm"). A declaratory judgment identifying any federal constitutional concerns with the State's existing vote-restoration process is adequate to the task of vindicating the federal-right deprivations that form the sole and proper basis for an action under Section 1983. *See Lewis v. Casey*, 518 U.S. 343, 362–63 (1996) (praising a remedy that left to a state "the task of devising a Constitutionally sound program" and permitted "wide discretion within the bounds of constitutional requirements," and condemning a remedy that did not).

C. An injunction directing the Board to adopt specific standards or criteria is neither necessary nor appropriate to remedy the issues identified by the Court in the current system.

First, because nothing in the federal Constitution requires a State to have a vote-restoration system at all, an injunction ordering the Board to adopt specific new standards, criteria, or procedures chosen by the Court would raise serious constitutional concerns. Simply put, the federal government may not "regulate state governments' regulation" without running afoul of federalism principles articulated by the United States Supreme Court. *See, e.g., New York v. United States*, 505 U.S. 144, 166 (1992); *see also Strahan v. Coxe*, 127 F.3d 155, 169 (1st Cir. 1997) (explaining that the strictures of the "Tenth Amendment apply to *all* branches of the federal government, including the federal courts" (emphasis added)).

As this Court recognized, States have the prerogative under the federal Constitution to permanently disenfranchise felons. Order at 9. Binding precedent confirms that, if a State opts to restore the vote to convicted felons, it has the further prerogative to determine the process for doing so (checked only by the United States Constitution). Specifically, whether "felons should be enfranchised" at all remains "a policy decision that the United States Constitution expressly gives to the state governments, not the federal courts," *Johnson*, 405 F.3d at 1234, and states across the nation have crafted different mechanisms for deciding which felons should have their voting rights restored, *see* Nat'l Conference of State Legislatures, *Felon Voting Rights*,

http://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx (last visited Feb. 12, 2018). Accordingly, this Court may direct the Board "to find a means of bringing the [State's] scheme into compliance with *federal* law," *Strahan*, 127 F.3d at 170 (emphasis added), but it may not require the State to pursue any particular kind of remedy if other kinds of remedies would also be valid under federal law.

Second, issuing an injunction on the basis that *Florida law* purportedly requires or presumes a particular vote-restoration process for convicted felons would raise serious concerns under the Eleventh Amendment. Plaintiffs' action under Section 1983 allows them to seek a remedy for federal-right deprivations, not to enforce their view of state law. *See Paul v. Davis*, 424 U.S. 693, 700 (1976) ("Violation of local law does not necessarily mean that federal rights have been invaded."); *Snowden v. Hughes*, 321 U.S. 1, 11–12 (1944) ("Mere violation of a state statute does not infringe the federal Constitution."). That is because a "federal court's grant of relief against state officials on the basis of state law . . . conflicts directly with the principles of federalism that underlie the Eleventh Amendment," and "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). This is true even where, unlike here, state courts have "spoken definitively" on the state-law issue, *see id.* at 95, and where plaintiffs have pleaded a state-law claim, *see id.* at 92; *see also EagleMed LLC*, 868 F.3d at 907 ("Principles of comity and federalism require us to limit the remedy ordered to correct the federal violation without

otherwise interfering in Defendants' interpretation of and application of state law."); *Knop*, 977 F.2d at 1008 ("'Injunctive relief against a state agency or official must be no broader than necessary to remedy the constitutional violation'" because "'[f]undamental precepts of comity and federalism admit of no other rule'" (quoting *Toussaint*, 801 F.2d at 1086)).

D. Assuming *arguendo* that Plaintiffs may ask the Court to enforce their own understanding of state law—and, as explained above, they may not—state law does not support the issuance of a federal court injunction directing Defendants to institute a new vote-restoration system. Under Florida law, forfeiture of voting rights upon the conviction of a felony is the longstanding rule; restoration through the discretionary grant of executive clemency—the process Plaintiffs have asked this Court to strike down—is the limited exception; and state law does not require policymakers to institute any particular remedy among the broad range of available options compatible with the requirements of federal law as construed by the Court.

Under Florida's Constitution, "[n]o person convicted of a felony . . . shall be qualified to vote or hold office until restoration of civil rights . . . ." Fla. Const. art. VI, § 4(a); *see also* § 97.041(2)(b), Fla. Stat. (disqualifying "[a] person who has been convicted of any felony by any court of record and who has not had his or her right to vote restored pursuant to law"). That restoration, if any, may come only in the form of executive clemency: "Upon conviction of a felony as defined in § 10, Art. X of the State Constitution, the civil rights of the person convicted shall be suspended in Florida until

such rights are restored by a full pardon, conditional pardon, or restoration of civil rights granted pursuant to § 8, Art. IV of the State Constitution." § 944.292(1), Fla. Stat. And as the Florida Constitution makes clear, the power to restore voting rights—like the power to pardon and grant other forms of clemency—is discretionary: "[T]he governor *may*, . . . with the approval of two members of the cabinet, grant full or conditional pardons, *restore civil rights*, commute punishment, and remit fines and forfeitures for offenses." Fla. Const. art. IV, § 8(a) (emphases added); *see also* § 940.01(1), Fla. Stat. (same). Consistent with this constitutional text, the Florida Supreme Court has observed that "[t]he clemency process in Florida derives solely from the Florida Constitution[,] and . . . the people of the State of Florida have vested sole, unrestricted, unlimited discretion exclusively in the executive in exercising this act of grace." *Davis v. State*, 142 So. 3d 867, 877 (Fla. 2014) (quotation marks omitted; first alteration supplied by *Davis*).[5]

Thus, while Florida law *permits* the restoration of a felon's voting rights, *see* Order at 41, State law does not *require* the State's policymakers to institute any particular kind of remedy in the event that an existing vote-restoration scheme is declared invalid.

[5] This view of clemency's discretionary nature, of course, comports with longstanding tradition. *See Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 276 (1998) ("[T]he clemency and pardon powers are committed, as is our tradition, to the authority of the executive."); *see also Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 464 (1981) ("[P]ardon and commutation decisions have not traditionally been the business of courts; as such, they are rarely, if ever, appropriate subjects for judicial review.").

Instead, the only process that Florida law even arguably presumes is the one historically grounded in the executive's discretionary clemency power. *See* Fla. Const. art IV, § 8(a); Fla. Const. art. VI, § 4(a). And under Florida law, the court-ordered imposition of standards or criteria—much less a court order directing the clemency power's exercise in specified cases or classes of cases—would be entirely foreign to that power. *See Sullivan v. Askew*, 348 So. 2d 312, 315 (Fla. 1977) ("An executive may grant a pardon for good reasons or bad, or for any reason at all, and his act is final and irrevocable. . . . The constitution clothes him with the power to grant pardons, and this power is beyond the control, or even the legitimate criticism, of the judiciary." (quotation marks omitted)).

Thus, a court-ordered system restoring voting rights to convicted felons—whether interim or permanent—that excises "the heart of executive clemency, which is to grant clemency as a matter of grace," *Woodard*, 523 U.S. at 280–81 (plurality op.), would not only violate the foundational principles of federalism and separation of powers by impermissibly intruding upon the constitutional authority expressly reserved by the Florida Constitution to the Executive, but would also be inconsistent with state laws that treat the forfeiture of voting rights upon the conviction of a felony as the rule and discretionary restoration through clemency as the only available exception. *See* Fla. Const. art. VI, § 4(a) ("No person convicted of a felony . . . shall be qualified to vote or hold office until restoration of civil rights . . . ."); § 944.292(1), Fla. Stat. ("Upon conviction of a felony as defined in § 10, Art. X of the State Constitution, the civil rights of the person convicted shall be suspended in Florida until such rights are restored by

a full pardon, conditional pardon, or restoration of civil rights granted pursuant to § 8, Art. IV of the State Constitution."). Upon invalidation of the current clemency process, the remedy most consistent with state law is a declaration regarding that process—not an order affirmatively mandating the restoration of voting rights to Plaintiffs or other convicted felons pending the adoption of an amended process.

A court-ordered interim "mandatory clemency" process likewise would be inconsistent with longstanding state policy favoring felon disenfranchisement. Florida's 1838 Constitution authorized the Legislature to enact criminal disenfranchisement laws, and the Legislature did so in 1845. *Johnson*, 405 F.3d at 1218. None of these provisions offered a process for the restoration of voting rights to convicted felons. *See* Fla. Const. art. VI, §§ 4, 13 (1838); 1845 Fla. Laws Ch. 38, art. II, § 3 ("And no person who shall hereafter be convicted of bribery, perjury, or other infamous crime, shall be entitled to the right of suffrage."). "Florida's 1861 and 1865 Constitutions also contained criminal disenfranchisement provisions," *Johnson*, 405 F.3d at 1218, and yet again, neither of these provisions offered a process for the restoration of voting rights, *see* Fla. Const. art. VI, §§ 2, 9 (1861); Fla. Const. art. VI, §§ 2, 9 (1865). Every revision of Florida's Constitution thereafter has affirmatively provided for the forfeiture of voting rights upon the conviction of a felony and conditioned the restoration of voting rights upon the general restoration of civil rights, *see* Fla. Const. art. XIV, §§ 2, 4 (1868); Fla. Const. art. VI, §§ 4, 5 (1885); Fla. Const. art. VI, § 4 (1968)—a power that the 1968 Constitution made clear belongs to the clemency process, *see* Fla. Const. art. IV, § 8(a)

(1968). Indeed, the drafters of Florida's 1968 Constitution considered and affirmatively rejected proposals to eliminate automatic and indefinite felon disenfranchisement. *See Johnson*, 405 F.3d at 1221–22.

In short, for over 170 years, forfeiture of voting rights upon a felony conviction has been the rule in Florida; and, during that time, the only narrow exception has been the restoration of civil rights through clemency. Longstanding Florida law does not favor a "mandatory clemency" process instituted on an expedited and emergency basis. Rather, state law contemplates that state decision-makers—including the Board of Executive Clemency and the Legislature—should be afforded the prerogative to choose among the variety of available remedies that are equally compatible with federal law.

E. In determining how to respond to the Court's Order, the Board of Executive Clemency may properly consider many different factors relevant to whether voting rights should be restored to convicted felons. Those factors include but are not limited to: the time elapsed since the completion of sentence; payment of court costs, fines, and restitution; the nature and circumstances of the offense of conviction, including whether the conviction at issue involved domestic violence or violence against a vulnerable population, such as children or the elderly; prior and subsequent criminal history; drug or alcohol abuse; a history of domestic, dating, stalking, or repeat-violence

injunctions; whether the applicant has illegally registered to vote or voted illegally[6]; input from the judiciary, state attorneys, and victims; and many others. Determining which of these factors to weigh and how to properly weigh them are inherently policy-driven questions committed to the discretion of state officials. *See Johnson*, 405 F.3d at 1234 (felon enfranchisement remains "a policy decision that the United States Constitution expressly gives to the state governments, not the federal courts"). Moreover, to the extent Rules 2(A) and 4 of the Rules of Executive Clemency would need to be revised because of the discretion they afford, *see* Order at 3–4,[7] the Board would confront additional, complex policy issues. Rules 2 and 4 apply to all types of clemency, and a carve-out for discretion in clemency determinations not involving the restoration of voting rights, if Defendants should choose to retain one, could result in a need to restructure the clemency process to bifurcate these determinations.

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[6] The willful submission of false voter registration information, such as the registrant's status as a convicted felon without having his or her civil rights restored, is itself a third-degree felony under Section 104.011, Florida Statutes. A person who willfully votes despite knowing he or she is not a qualified elector commits a third-degree felony under Section 104.15, Florida Statutes.

[7] The Court's Order expressly distinguished between the State's re-enfranchisement procedures and "other types of clemency that Florida offers." Order at 2 n.1. Those other kinds of clemency, the Court concluded, are "guided by a different set of rules" and involve "a different set of considerations." *Id.* In light of the Court's clarification that its Order leaves other aspects of Florida's clemency system intact, Defendants do not assert that they must change the rules governing those other clemency determinations in order to comply with federal law. Instead, they simply observe that existing rules could be revised to specify that different procedures will be applicable to different kinds of clemency determinations.

Given these factors, and others identified above, no basis exists for injunctive relief directing Defendants to adopt any particular solution among the range of permissible options.

F. Even though the Court found that the Board's "*unfettered* discretion in restoring voting rights violates the First Amendment," Order at 17 (emphasis added), the Board does not interpret the Court's order to require a wholly mechanical process for the restoration of voting rights—*i.e.*, one that eliminates *all* the Board's discretion. It is well established that vote-restoration procedures may, consistent with the United States Constitution, incorporate elements of discretion. This is so because the mere existence of discretion itself does not license invidious discrimination.

For example, discretion exercised on the basis of clearly identified standards or criteria is permissible under the First Amendment. *See, e.g.*, *Cox v. State of New Hampshire*, 312 U.S. 569, 576, (1941); *see also Jean v. Nelson*, 472 U.S. 846, 855 (1985) (upholding INS's parole discretion under statute that provided "a lengthy list of neutral criteria" that "d[id] not extend to considerations of race or national origin"). Discretion guided by neutral criteria—whether objective or not—operates constitutionally in a variety of contexts, from prosecutorial decisions to discretionary rulings by district courts to sentencing determinations. *See, e.g., U.S. Attorneys' Manual, Principles of Federal Prosecution*

§ 9–27.730 (U.S. Dep't of Justice 2007) ("Making Sentencing Recommendations");[8] Fed. R. Civ. P. 37(b) (discovery sanctions); 18 U.S.C. § 3553(a) (statutory sentencing factors). For these reasons, courts have historically approved vote-restoration processes that incorporate a level of discretion. *See, e.g.*, *Shepherd v. Trevino*, 575 F.2d 1110, 1114 (5th Cir. 1978) ("Section 2's express approval of the disenfranchisement of felons . . . grants to the states a realm of discretion in the disenfranchisement and reenfranchisement of felons which the states do not possess with respect to limiting the franchise of other citizens.").

In other words, a mathematical formula is not the only alternative to unfettered discretion. Thus, if and when State policymakers seek to institute a new vote restoration system, they should be allowed to adopt blanket policies (such as permanent disenfranchisement or automatic re-enfranchisement based on objective criteria); but they should also be free to adopt clearly identified standards or criteria—like, for example, the statutory sentencing factors—that require the exercise of judgment and are not susceptible of mechanical application. *See* 18 U.S.C. § 3553(a) (directing federal sentencing courts to consider, among other non-objective factors, "the nature and circumstances of the offense and the history and characteristics of the defendant," as well as "the need for the sentence imposed . . . to reflect the seriousness of the offense,

[8] *Available at* https://www.justice.gov/usam/usam-9-27000-principles-federal-prosecution.

to promote respect for the law, and to provide just punishment for the offense"). And given the presumption of regularity in governmental proceedings, under which courts presume that public officials are properly discharging their duties, *see United States v. O'Callaghan*, 500 F. App'x 843, 848 (11th Cir. 2012), as well as comity's requirement that the federal government "respect and defer to the processes put in place by state governments," *see In re Clayton*, 829 F.3d 1254, 1266 n.15 (11th Cir. 2016), this Court should presume that Defendants would abide by such guidelines in exercising their discretion. Thus, to the extent that Plaintiffs request a remedy that would eliminate the application of *any* discretion by the Board of Executive Clemency, that remedy would be inconsistent with well-settled principles of law and would not be reasonably tailored to the purported constitutional violation at issue.

G. As the foregoing analysis makes clear, Plaintiffs have not satisfied the four-factor test for obtaining a permanent injunction. *See Monsanto*, 561 U.S. at 156–57.

As to the first two factors, a declaratory judgment is sufficient to remedy the federal constitutional concerns identified in the Court's Order. *See id.* Plaintiffs have not shown that any additional injury, irreparable or otherwise, will result absent the issuance of injunctive relief. Discontinuation of the present policy will ensure that Plaintiffs are not required to submit to a vote-restoration regime that the Court has declared to be unconstitutional; and Plaintiffs do not and cannot show that Defendants will fail to comply with the dictates of the Court's order. As this Court has already concluded,

Plaintiffs have no federal right to be re-enfranchised or to insist that the State institute any re-enfranchisement process. *See* Order at 9, 39.

As to the third and fourth factors, a balancing of interests does not support the issuance of injunctive relief. A purely prohibitory injunction is unnecessary and inappropriate, and the Court has already concluded that it "cannot issue an order that is tantamount to saying 'act right,'" Order at 39 (citation omitted). In addition, an injunction requiring Defendants to embark on any particular course of action would impermissibly force the State to choose among a wide range of options concededly compatible with the requirements of federal law. Such a course would exceed the scope of this Court's remedial authority and trench on vital principles of comity and federalism. It is far from clear that such a drastic and extraordinary remedy would help the cause Plaintiffs espouse, and the public interest would be disserved by any such grave violation of prudential and constitutional constraints on the scope of federal power.

In sum, the Court should limit its forthcoming final judgment to a declaration regarding the constitutionality of the current Rules of Executive Clemency concerning vote-restoration under the First and Fourteenth Amendments, and it should refrain from entering any injunctive relief.

CONCLUSION

The relief requested in Plaintiffs' First Amended Complaint should be denied. Because declaratory relief would provide a sufficient remedy, injunctive relief is neither necessary nor appropriate and should likewise be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 12th day of February, 2018, a copy of the foregoing was served on all counsel of record through the Court's CM/ECF Notice of Electronic Filing System.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 7.1(F) of the Local Rules of the Northern District of Florida, I certify that the foregoing Brief contains 6,304 words.

/s/ *Amit Agarwal*
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