No. 13-12738

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BEN E. JONES,

Plaintiff-Appellant,

v.

STATE OF FLORIDA PAROLE COMMISSION, ET AL.,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
NO. 6:13-CV-00745-PCF-DAB

APPELLANT'S SUPPLEMENTAL REPLY BRIEF

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*MEGHAN E. GREENFIELD
Counsel of Record
SHAY DVORETZKY
JONES DAY
51 Louisiana Ave. N.W.
Washington, D.C. 20001
(202) 879-3939
mgreenfield@jonesday.com

*Appointed to represent Plaintiff-Appellant pro bono pursuant to Addendum Five.

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INTRODUCTION

Mr. Jones argued in his Supplemental Brief that Florida's amendment to its parole law that reduced the required frequency of parole interviews violated the Ex Post Facto Clause of the U.S. Constitution. The Florida Commission on Offender Review's (the "Commission") Supplemental Brief misconstrues the legal standard that applies to the analysis of ex post facto claims, relying on decades-old inapposite authority and conflating the due process analysis with the ex post facto analysis. Thus, the Commission's argument that the amendment does not facially violate the Ex Post Facto Clause is wrong. In addition, the Commission fails even to contest Mr. Jones's specific allegation that the amendment has prevented him from becoming eligible for parole in advance of the next required hearing. Accordingly, at a minimum, Mr. Jones is entitled to discovery to determine whether the amendment, as applied to him, creates a "significant risk" that he will face a longer period of incarceration.

ARGUMENT

I. THE COMMISSION APPLIES THE WRONG LEGAL STANDARD IN EVALUATING WHETHER THE AMENDMENT TO THE FLORIDA PAROLE LAW VIOLATES THE EX POST FACTO CLAUSE.

Under *Garner v. Jones*, 529 U.S. 244 (2000), and *California Department of Corrections v. Morales*, 514 U.S. 499 (1995), a change to a parole law governing the frequency of required hearings violates the Ex Post Facto Clause if it creates "a

significant risk of prolonging [the plaintiff prisoner's] incarceration." *Garner*, 529 U.S. at 251-52; *see also Morales*, 514 U.S. at 514.

Here, Florida's amendment to its parole law reduced the frequency of required parole hearings from once every two years to once every seven years. The Commission does not address whether this amendment creates a "significant risk of increased punishment," either on its face or as applied to Mr. Jones. *Garner*, 529 U.S. at 257. Instead, the Commission argues that procedural changes to parole laws can *never* violate the Ex Post Facto Clause. (Comm'n Supp. Br. at 7-9.) The Commission also asserts that Mr. Jones must show a liberty interest in parole to prevail on his ex post facto claim, (*id*. at 12-13), that the Eleventh Circuit long ago foreclosed all ex post facto challenges to parole laws (*id*. at 8-9), and that the Florida Legislature's purportedly non-punitive purpose in enacting the amendment to the parole law is dispositive of the ex post facto challenge (*id*. at 6). Each of these contentions is meritless.

A. A Prisoner May Demonstrate an Ex Post Facto Violation Based on a Procedural Change to a Parole Law that Creates a Significant Risk of Increased Punishment.

It is well established that a procedural change to a parole law violates the Ex Post Facto Clause where it creates a "significant risk" of prolonging a prisoner's incarceration. *Garner* expressly recognized that a prisoner may demonstrate an ex post facto violation based on a reduction in the frequency of required parole

hearings where, "by its own terms," the law "show[s] a significant risk" of a longer period of incarceration or where, "as applied to [the prisoner's] own sentence the law created a significant risk of increasing his punishment." *Garner*, 529 U.S. at 255. Indeed, as discussed in Mr. Jones's Supplemental Brief at 21-24, the Supreme Court, as well as the Eleventh Circuit and other courts of appeal, have remanded cases to allow a prisoner to show that, as applied to him, the reduction in the frequency of required parole hearings put him at a significant risk of a longer prison term and thus violated the Ex Post Facto Clause. *See, e.g.*, *Garner*, 529 U.S. at 256; *Smith v. Ga. Bd. of Pardons & Paroles*, 160 F. App'x 836, 838 (11th Cir. 2005); *Harris v. Hammonds*, 217 F.3d 1346, 1349-50 (11th Cir. 2000); *Sears v. Blanco*, 267 F. App'x 393, 395 (5th Cir. 2008); *Dyer v. Bowlen*, 465 F.3d 280, 288 (6th Cir. 2006).

If the Commission's per se rule were correct, and a prisoner could *never* show an ex post facto violation based on a procedural change to a parole law, these cases would have come out differently, requiring no remand, no discovery, and no detailed analysis of the risk of increased punishment posed by the new law.

The Commission relies primarily on *Dobbert v. Florida*, 432 U.S. 282 (1977), for the principle that "procedural changes do not violate ex post facto laws (sic)." (Comm'n Supp. Br. at 7.) It is true that nearly 40 years ago, *Dobbert* stated generally that "a procedural change is not ex post facto." 432 U.S. at 293

(concluding that ameliorative law that changed the role of judge and jury in the imposition of death sentence did not violate the Ex Post Facto Clause). *Dobbert* did not, however, define the term "procedural." *Id*. The Supreme Court has since explained that "a procedural change" may constitute an ex post facto violation if it "affects matters of substance" such as the length of a prisoner's punishment, and that "simply labeling a law 'procedural' . . . does not thereby immunize it from scrutiny." *Collins v. Youngblood*, 497 U.S. 37, 45-46 (1990) (discussing *Dobbert*, 432 U.S. at 293). Both *Garner* and *Morales* relied on *Collins*'s definition of the Ex Post Facto Clause, and neither case addressed *Dobbert*'s "rule" that procedural changes are not ex post facto. *See Garner*, 529 U.S. at 250; *Morales*, 514 U.S. at 504. Thus, the Commission's reliance on *Dobbert* is misplaced.

B. A Prisoner May Demonstrate that the Amendment to the Florida Parole Law Violates the Ex Post Facto Clause Without Showing a Liberty Interest in Parole.

The Commission also argues that Mr. Jones's ex post facto claim requires him to show a protected liberty interest in parole. (*See* Comm'n Supp. Br. at 7-8, 12 (relying on *Staton v. Wainwright*, 665 F.2d 686 (5th Cir. 1982); *Hunter v. Fla. Parole & Probation Comm'n*, 674 F.2d 847 (11th Cir. 1982); *Sultenfuss v. Snow*, 35 F.3d 1494 (11th Cir. 1994); and *Jago v. Van Curen*, 454 U.S. 14 (1981).) But the authorities the Commission cites all analyzed claims that parole laws violated the Due Process Clause; they do not address the Ex Post Facto Clause in any way.

See Jago, 454 U.S. at 21 (holding Ohio parole law did not create a protected liberty interest for due process purposes); *Sultenfuss*, 35 F.3d at 1503 (holding that Georgia parole law did not create a protected liberty interest for due process purposes); *Hunter*, 674 F.2d at 848 (holding that Florida parole law did not create a protected liberty interest for due process purposes); *Staton*, 665 F.2d at 688 (same). Indeed, numerous courts have recognized that the due process analysis is wholly distinct from the ex post facto analysis. *See Jones v. Ga. State Bd. of Pardons & Paroles*, 59 F.3d 1145, 1148 n.6 (11th Cir. 1995) (holding that failure of due process challenge "does not by itself foreclose the instant ex post facto challenge" because "the presence of an ex post facto violation is not dependent on the existence of a liberty interest, protected by due process."); *see also Olstad v. Collier*, 326 F. App'x 261, 263 (5th Cir. 2009) (holding "an ex post facto challenge does not turn on the existence of a liberty interest") (citing *Orellana v. Kyle*, 65 F.3d 29, 32 (5th Cir. 1995)).) Nothing about these authorities requires Mr. Jones to prove a liberty interest in parole to establish an ex post facto violation.

C. The Eleventh Circuit Has Not Foreclosed All Ex Post Facto Challenges of Florida's Parole Laws.

The Commission also asserts that Mr. Jones's ex post facto challenge is foreclosed by purportedly "settled" law addressing "determinations of the Florida Parole Commissioners and the framework in which those Commissioners makes (sic) their decisions." (Comm'n Supp. Br. at 8.) Contrary to the Commission's

contention, the Eleventh Circuit has not "settled" all questions of whether changes to Florida's parole laws violate the Ex Post Facto Clause. Rather, the cases the Commission cites, all preceding *Garner* and *Morales*, address the single, narrow question of whether Florida's enactment of objective parole guidelines violated the Ex Post Facto Clause. (Comm'n Supp. Br. at 8-9 (citing *Paschal v. Wainwright*, 738 F.2d 1173, 1179 (11th Cir. 1984) (evaluating whether objective parole guidelines increased prisoner's punishment); *Johnson v. Wainwright*, 772 F.2d 826, 827 (11th Cir. 1985) (relying on *Paschal* to conclude ex post facto claim failed); *Damiano v. Fla. Parole & Probation Comm'n*, 785 F.2d 929, 933 (11th Cir. 1986) (same); *Jonas v. Wainwright*, 779 F.2d 1576, 1577 (11th Cir. 1986) (same).))

In *Paschal*, the Eleventh Circuit considered whether Florida's adoption of objective parole guidelines that required the Commission to assess, along with other factors, the "seriousness of the [prisoner's] crime" in making parole decisions violated the Ex Post Facto Clause. 738 F.2d at 1179. Prior to this amendment, the Commission had complete discretion over parole decisions and was not required to consider any specific factors. *Id*. at 1181. The Eleventh Circuit held that adoption of the objective parole guidelines did not result in "disadvantageous treatment" of any prisoners because the Commission retained discretion to make parole decisions and "[o]nly the form by which the Commission

exercised that discretion [had] changed." *Id*. at 1180-81 (quotation marks & citation omitted). Thus, the adoption of the guidelines did not violate the Ex Post Facto Clause. *Id*.

Here, however, the amended parole law does result in the "disadvantageous treatment" of prisoners because it requires parole interviews less frequently. *Id*. The amended parole law does not change the "form" of the Commission's discretion. Rather, in the time between interviews, the Commission does not exercise its discretion *at all* and there is no possibility that a prisoner will be released on parole. (*See infra* at 8-12; Supp. Br. at 15-20, 24-27.) Thus, *Paschal* does not foreclose Mr. Jones's ex post facto claim.[1]

[1] The Commission also relies on *Gwin v. Snow*, 870 F.2d 616, 627 (11th Cir. 1989) and *Allison v. Kyle*, 66 F.3d 71 (5th Cir. 1995). (Comm'n Supp. Br. at 9-10.) *Gwin* dismissed a prisoner's claim that a change to Georgia's parole guidelines violated the Ex Post Facto Clause without any analysis or citation to authority whatsoever. *Gwin*, 870 F.2d at 627. It does not support the Commission's position.

In addition, *Allison* is inapposite. The prisoner in that case challenged Texas's amendment to its law governing parole hearings that allowed the parole board discretion to determine the timing of subsequent hearings. 66 F.3d at 74. The Fifth Circuit held that this change did not violate the Ex Post Facto Clause because, both before and after the amendment, the parole board had total discretion to determine the timing of parole hearings. *Id*. Thus, the prisoner was not disadvantaged by the change. *Id*.

D. The Florida Legislature's Purpose in Enacting the Amendment to the Parole Law is Irrelevant to the Ex Post Facto Analysis.

Lastly, the Commission argues that "the purpose behind the changes" to the parole law is central to determining whether the amendment violates the Ex Post Facto Clause. (Comm'n Supp. Br. at 6.) The Supreme Court has held the opposite. In *Lynce v. Mathis*, 519 U.S. 433 (1997), the Court rejected Florida's contention that a law cancelling prisoners' accrued "gain time" credits did not violate the Ex Post Facto Clause because the purpose of the law was to eliminate prison overcrowding and was not punitive, *id*. at 442-43. The Supreme Court explained that the ex post facto analysis did not depend on the "subjective motivation of the legislature." *Id*. at 442. Rather, the sole question is whether "objective considerations" demonstrate that the amendment will lengthen the prisoner's "period of incarceration." *Id*. at 443-44.

II. THE FLORIDA PAROLE LAW CREATES A SIGNIFICANT RISK THAT PRISONERS WILL FACE INCREASED PUNISHMENT.

Analyzed under the correct legal standard—whether the law creates a "significant risk of increased punishment"—it is clear that the amendment to Florida parole law violates the Ex Post Facto Clause on its face. *Garner*, 529 U.S. at 251-52. A law governing the early release of prisoners creates a significant risk of increased punishment where it results in "reduced opportunity [for prisoners] to shorten [their] time in prison." *Weaver v. Graham*, 450 U.S. 24, 33-34 (1981), or,

where it makes "ineligible for early release a class of prisoners who were previously eligible," *Lynce*, 519 U.S. at 447. The amendment to the Florida parole law at issue here creates a significant risk of increased punishment on its face because it reduces the opportunities for prisoners to shorten their time in prison and effectively makes them ineligible for early release in the time between scheduled interviews.

The amendment to the Florida parole law broadly applies to any prisoner convicted of numerous offenses and provides that these prisoners are required to receive parole interviews only once every seven years regardless of the amount of time that they have served or the amount of time remaining in their sentence. Fla. Stat. § 947.174(1)(b) (2013) (prisoners are entitled to parole interviews "once within 7 years after the initial interview and once every 7 years thereafter . . ."). The parole law in effect at the time Mr. Jones was sentenced, however, required prisoners to receive parole interviews every two years. Fla. Stat. § 947.174(1) (1979). Requiring parole interviews less frequently creates a "significant risk" that prisoners will face a longer prison term because there is no realistic possibility that prisoners will be released on parole in the time between required interviews. (*See* Supp. Br. at 16-20.)

The Commission does not contest that the amendment to the Florida parole law applies to a much larger class of prisoners than the California law at issue in

Morales, which applied only to multiple murders, 514 U.S. at 503, or the Georgia law in *Garner*, which applied only to prisoners serving life sentences, 529 U.S. at 247. Rather, the Commission argues only that the law does not create a "'hard and fast rule'" and that parole-eligible inmates may be eligible for special interviews if they satisfy the "several circumstances of 'good cause' as required by the statute as well as the 'catch all' of 'good cause in exceptional circumstances.'" (Comm'n Supp. Br. at 11 (citing Fla. Admin. Code Ann. r. § 23-21.014(1)(d) (2014)).)

As discussed at length in Mr. Jones's Supplemental Brief, the delay between required interviews puts prisoners at a significant risk of increased punishment because prisoners are eligible for earlier, special interviews only in extremely limited circumstances. (Supp. Br. at 17-18.) Specifically, good cause exists for an earlier interview only where a prisoner (a) saves the life or protects a Department of Corrections employee from "assault or injury," (b) "assists in preventing an escape or results in the recapture of an escaped inmate," (c) "provid[es] relevant information for investigations . . . that may result in arrest or prosecution," or (d) "[f]or good cause in exceptional circumstances." Fla. Admin. Code Ann. r. § 23-21.014 (2014).

The Commission characterizes subsection (d), which allows for an earlier interview "for good cause in exceptional circumstances," as a "catch all" provision. (Comm'n Supp. Br. at 11.) But the term "exceptional circumstances" is a

"decidedly narrow definition" and does not provide a "catch all" that broadly allows for special interviews in changed circumstances. *Cf. Modarresi v. Gonzales*, 168 F. App'x 80, 83 (6th Cir. 2006) (analyzing term "exceptional circumstances" in immigration statute). In contrast, the laws at issue in *Morales* and *Garner* both *did* allow for earlier interviews in the event of changed circumstances. *See Morales*, 514 U.S. at 513; *Garner*, 529 U.S. at 256.

That special interviews are rarely available increases the risk that the reduced frequency of required parole interviews will result in prisoners serving longer prison terms. Florida's parole law recognizes that a prisoner may become eligible for parole if he makes "restitution to the victim of this crime," develops a "poor medical prognosis," or has a "record of clearly exceptional program achievement," along with other factors. Fla. Admin. Code Ann. r. § 23-21.010(5)(b)(2)(e), (f), & (j) (2014). These circumstances are among those that can change during the time a prisoner is incarcerated. It is not clear, however, that any of these changes would qualify as "exceptional circumstances" and allow a prisoner to obtain an earlier special interview. § 23-21.014(1)(d) (2014). Thus, it is likely that some prisoners who have become good candidates for release will remain incarcerated for a longer period of time than they would have under the prior law.

The Commission also argues that the Florida parole law provides an adequate safety valve for prisoners to seek earlier interviews because "[t]here is absolutely no restriction stated in either statute or rule that the inmate cannot ask for a special interview or bring new information to the Commission's attention." (Comm'n Supp. Br. at 12.) That a prisoner is not expressly prohibited from petitioning for an earlier interview does not show that such a petition would be considered by the Commission or provide a realistic opportunity to receive an earlier interview. In both *Morales* and *Garner*, the practice of prisoners petitioning and receiving earlier interviews in changed circumstances was well established. *See Garner*, 529 U.S. at 257 (stating that Georgia had a "formal, published statement" allowing for inmates to petition in the event of changed circumstances); *Morales*, 514 U.S. at 512-13 (relying on California's presentation that the parole board had a practice of granting inmates' requests for early review). No similar practice exists here. Thus, the amendment to the Florida parole law here creates a significant risk that the delay between required parole interviews will result in increased punishment for some prisoners.[2]

[2] The Commission also argues that the Supplemental Brief includes an "improper characterization" of the number of individuals eligible for parole. (Comm'n Supp. Br. at 2.) The Commission argues that "a significantly less (sic) amount of people were paroled in 2013 when compared to 1979-80 for the singularly substantial fact that less people eligible for parole existed in 2013 . . . ." (*Id*.)

III. MR. JONES IS ENTITLED TO DISCOVERY BECAUSE THE COMMISSION DOES NOT CONTEST HIS SPECIFIC ALLEGATIONS SHOWING THAT HE WILL FACE A LONGER PRISON TERM AS A RESULT OF THE AMENDMENT.

Mr. Jones is entitled to discovery to demonstrate that the Florida parole law violates the Ex Post Facto Clause because it creates a "significant risk of increased punishment" "as applied to his own sentence." *Garner*, 529 U.S. at 255-57. *See also Harris v. Hammonds*, 217 F.3d 1346, 1349-50 (11th Cir. 2000) (as applied challenge requires court to "consider evidence of the general operation of the [ ] parole system" as well as "any other evidence a prisoner challenging the regulation may produce that the amended parole regulation . . . created a significant risk of increasing his punishment") (quotation marks & citation omitted). He need not "show an *actual* increase in punishment." *Dyer*, 465 F.3d at 288 (emphasis in original).

(continued…)

That fewer people were eligible for parole in 2013 does not fully explain why only 22 prisoners were released on parole that same year. In 2013, 5,107 prisoners were eligible for release on parole. Fla. Dep't of Corr., Office of the Inspector Gen., Ann. Rep. FY 2012-13, at 8 (2013), *available at* https://www.fcor.state.fl.us/docs/reports/FCORannualreport201213.pdf. Thus, in 2013, only .43 percent of eligible prisoners were released on parole. *Id*. In 1979-80, by contrast, assuming that all 19,995 prisoners were eligible for parole, more than 25 percent of all eligible prisoners were released. *See* Fla. Dep't of Corr., Ann. Rep. FY 1980-81, at 70 (1981), *available at* https://www.ncjrs.gov/pdffiles1/Digitization/86173NCJRS.pdf. This is nearly *sixty* times the number of eligible prisoners released in 2013.

Here, Mr. Jones has alleged that the amended parole law prolonged his incarceration because it has made him ineligible to attend an institutional program that he must complete to "gain parole." (Supp. Br. at 24-26.) Specifically, Mr. Jones asserts that his eligibility to enroll in the "Lifer's Program" is dependent on the timing of his next parole interview. Because his next parole interview is not required for seven years, he cannot complete the program, which is required by his "transitional goals," and he therefore cannot become eligible for parole. (*Id*.) At a minimum, Mr. Jones is entitled to discovery to demonstrate that the amended parole law has affected his eligibility for parole and prolonged his incarceration.[3]

The Commission does not contest Mr. Jones's allegation that the amendment to the Florida parole law has prevented him from becoming eligible for parole in advance of his next required interview. Instead, the Commission argues that the district court "determined that the Appellant did not make the requisite prima facie showing" and that this conclusion is entitled to deference because "the lower court

[3] The Commission states that Mr. Jones's Supplemental Brief "incorrectly notes" the date of his next required interview and that "[t]he record is clear . . . that the Appellant received his interview in 2012 and the Commission scheduling his subsequent for five years out." (Comm'n Supp. Br. at 11 n.3 (citing Complaint, ECF No. 1).) Mr. Jones's Complaint misstates that the Florida parole law requires interviews "every five (5) years." (ECF No. 1 at 6, 8, 11.) The current law, as discussed above, requires interviews only once every seven years. It is unclear, based on Mr. Jones's repeated misunderstanding of the law's requirements, when his next interview will be held—whether in 2017 or in 2019. It is undisputed that the Commission is not required to conduct an interview until 2019.

has the authorization to manage and regulate the procedure that governs the case." (Comm'n Supp. Br. at 13.) This argument is meritless.

The district court's holding that Mr. Jones's complaint failed to state a claim is a legal conclusion that is reviewed de novo. *Leal v. Ga. Dep't of Corr.*, 254 F.3d 1276, 1279-80 (11th Cir. 2001). The Commission's reliance on cases addressing the district court's discretion to manage discovery is misplaced because these cases have nothing to do with the standard for reviewing dismissal of a complaint for failure to state a claim. (*See* Comm'n Supp. Br. at 13-14 (citing *Burks v. Am. Cast Iron Pipe Co.*, 212 F.3d 1333, 1336 (11th Cir. 2000) (addressing standard of review of decision to deny continuance of discovery); *Comer v. City of Palm Bay*, 265 F.3d 1186, 1190-91 (11th Cir. 2001) (addressing standard of review of decision to deny motion to stay proceedings); *United States v. McCutcheon*, 86 F.3d 187, 190 (11th Cir. 1996) (addressing standard of review for refusal to grant severance of defendants in criminal case).)[4] In other words, although the conduct of discovery is within the district court's discretion, whether to dismiss a complaint without allowing *any* discovery is a legal question reviewed de novo.

[4] The Commission also relies on Federal Rule of Civil Procedure 83(b), which allows a district court judge to regulate practice before it, such as by adopting rules for practice, as long as these rules are consistent with federal law, federal rules, and the local rules. (Comm'n Supp. Br. at 13.) Again, this rule has no bearing on the standard of review for dismissal of a complaint for failure to state a claim.

The Commission also argues that it was proper for the district court to dismiss Mr. Jones's complaint "to limit the burden of discovery for public policy reasons." (Comm'n Supp. Br. at 14 (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982).) In short, the Commission asserts that the burden of imposing discovery on a state entity is greater than the benefit of adjudicating constitutional violations. *Harlow* does not support this position. It held only that government officials performing discretionary functions are shielded from liability for civil damages unless their conduct violated clearly established law. *Harlow*, 457 U.S. at 818. It did not address the standard for pleading claims for injunctive relief against governmental entities. *Id*. at 819 n.34 (stating that the Court "express[ed] no view as to the conditions in which injunctive . . . relief might be available").

In any event, vague notions of public policy cannot override Mr. Jones's constitutional rights. The sole test for determining whether dismissal of Mr. Jones's complaint was proper is whether his complaint "contain[ed] 'sufficient factual matter' to state a claim that is 'plausible on its face.'" *Watkins v. Hudson*, Case No. 13-3761, 2014 U.S. App. LEXIS 5386, at *5 (11th Cir. Mar. 24, 2014) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

CONCLUSION

For the reasons stated above, Mr. Jones has stated a claim that the amendment to Florida's parole law violates the Ex Post Facto Clause on its face

and as applied to him. Each of the Commission's arguments lack merit, and the decision of the district court should be reversed.

September 12, 2014

Respectfully submitted,

/s/ Meghan E. Greenfield
MEGHAN E. GREENFIELD
Counsel of Record
SHAY DVORETZKY
JONES DAY
51 Louisiana Ave. N.W.
Washington, D.C. 20001
(202) 879-3939
mgreenfield@jonesday.com

Counsel for Plaintiff-Appellant Ben E. Jones

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(ii), because it contains 4,090 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 11th Cir. R. 32-4. I further certify that the brief complies with the typeface and typestyle requirements of Fed. R. App. P. 32(a)(5), (a)(6), because it has been prepared in proportionally spaced typeface using Times New Roman, font size 14.

/s/ Meghan E. Greenfield
MEGHAN E. GREENFIELD
Counsel for Plaintiff-Appellant Ben E. Jones

CERTIFICATE OF SERVICE

I hereby certify that on September 12, 2014, I filed the foregoing Appellant's Supplemental Reply Brief with this Court, by causing a copy to be electronically uploaded and by causing seven paper copies to be delivered by UPS. I further certify that opposing counsel waived receipt of paper copies.

/s/ Meghan E. Greenfield
Meghan E. Greenfield
Counsel for Plaintiff-Appellant
Ben E. Jones