No. 22-5703

In the United States Court of Appeals for the Sixth Circuit

DERIC JAMES LOSTUTTER; ROBERT CALVIN LANGDON; BONIFACIO R. ALEMAN,

Plaintiffs-Appellants,

v.

COMMONWEALTH OF KENTUCKY,

Defendant,

ANDREW G. BESHEAR, in his official capacity as Governor of Kentucky,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Kentucky at London, No. 6:18-cv-00277.
The Honorable **Karen K. Caldwell**, Judge Presiding.

PLAINTIFFS-APPELLANTS' PETITION FOR REHEARING AND REHEARING EN BANC

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INTRODUCTION

Plaintiffs-Appellants petition this Court for rehearing and rehearing en banc because the panel's decision (Ex. A) conflicts with decades of U.S. Supreme Court precedents concerning the First Amendment, as well as decisions of the Supreme Court and this Court establishing the requirements of a functional analysis. This appeal also raises questions of exceptional public importance.

Appellants sued the Governor of Kentucky to put an end to arbitrary restoration of voting rights, which puts U.S. citizens' right to express their political views at the mercy of a public official's unfettered discretion. The U.S. Supreme Court has long forbidden the arbitrary licensing of First Amendment-protected politically expressive conduct, which includes voting. Arbitrarily granting people the right to vote would indisputably violate the U.S. Constitution, as would arbitrarily disenfranchising them. Appellants have sought a parallel ruling that arbitrary re-enfranchisement is similarly unconstitutional.

The panel has ruled that the First Amendment unfettered discretion doctrine is not implicated by this case because voting rights restoration does not function as a licensing scheme. In reaching this determination, the panel formalistically relied upon the labels assigned to voting rights restoration under Kentucky law and thereby allowed state law categories to dictate the scope of a federal constitutional right. Respectfully, this threshold error led the panel to base its ultimate ruling on

perceived functional dissimilarities between "pardons" and "licenses," even though these purported differences had no material bearing on the First Amendment inquiry. In privileging means over ends and elevating the *form* of official action and state-created labels over the commonality in *practical effects*, the panel's decision conflicts with longstanding precedents commanding a functional analysis in First Amendment challenges.

ARGUMENT

I. THE PANEL'S DECISION CONFLICTS WITH PRECEDENTS OF THE U.S. SUPREME COURT AND THIS COURT.

A. PLAINTIFFS' CLAIMS

Plaintiffs have argued that Kentucky's voting rights restoration system functions as a licensing system governing First Amendment-protected conduct, triggering the operation of the unfettered discretion doctrine under *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988), *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992), and related Supreme Court precedents. This prophylactic doctrine instructs courts to enjoin licensing schemes governing the exercise of First Amendment-protected expression or expressive conduct where officials have been vested with unfettered discretion to grant or deny the license. *City of Lakewood*, 486 U.S. at 757, 763–64. A lack of reasonable definite time limits

on the exercise of the licensor's discretion also violates the First Amendment. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 226 (1990).[1]

Under such an arbitrary licensing system, the applicant is subjected to the risk of "undetectable" viewpoint or speaker-based discrimination and pressured into self-censorship so as not to jeopardize their application. *City of Lakewood*, 486 U.S. at 759, 762–63. "[A] facial challenge lies whenever a licensing law gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers." *Id*. at 759. The Supreme Court has also explained that in the absence of "standards to fetter the licensor's discretion," as-applied challenges are not viable, and the licensor's decision is "effectively unreviewable." *Id*. at 758–59.

This case implicates all the same concerns and principles that have animated the unfettered discretion doctrine for eighty-five years. *Lovell v. Griffin*, 303 U.S. 444 (1938). No rules or criteria govern Appellee's decision to grant or deny a voting rights restoration application. Application for Restoration of Civil Rights, RE 57-1, Page ID # 786–88; Appellants' Br. at 6–7, 28. According to his counsel, Governor Beshear grants or withholds permission to vote based on whether he considers the applicant "worthy." *See* Ex. B, Transcript of Oral Argument ("Oral Arg. Tr.") at

[1] Plaintiffs' Counts One and Two seek relief under these two closely related doctrines. Fourth Amended Complaint, RE 31, Page ID # 350–57.

22:17–23:10 ("Under Kentucky law, that is left to each governor who holds the office to ultimately subjectively determine what – who they think is worthy . . ."). Deciding whether to grant or deny an application to engage in First Amendment-protected expressive conduct based on a wholly subjective and arbitrary "worthiness" standard is precisely what the First Amendment unfettered discretion doctrine prohibits. Under Kentucky's purely discretionary system, a governor may review any information on the applicant's political viewpoints, including campaign donations, previous registration history, and social media posts, and selectively grant or deny applicants based on their viewpoints without ever disclosing these discriminatory motives. Such a scheme would understandably deter a current or future restoration applicant from expressing certain viewpoints. Accordingly, this system violates the principles articulated in *City of Lakewood*.

Imagine a restoration applicant with a social media presence filled with claims that the 2020 presidential election was stolen and expressing support for those convicted in connection with January 6, or an applicant who publicly expresses support for the right to an abortion or for a nationwide ban on the same. Nothing in Kentucky law prevents a Governor from covertly discriminating against such applicants and, in the absence of rules and criteria, there is simply no way to prove viewpoint discrimination in an as-applied challenge. *City of Lakewood*, 486 U.S. at 758–59. Consider, as well, the restoration applicant who holds any of the above

beliefs but is deterred from publicly sharing them because his restoration application is pending with a Governor known to have opposing political views. *Id*. at 757 ("[T]he mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech . . .").

B. THE PANEL DECISION'S FORMALISM

The principal question presented by this case is whether a state official may selectively and arbitrarily grant or deny the right to vote to people with felony convictions consistent with the First Amendment. A threshold question is whether voting rights restoration in Kentucky *functions* as a licensing scheme such that the unfettered discretion doctrine applies. The panel's decision answered only this threshold question and, with respect, erred because it failed to adhere to the Supreme Court's and this Court's instructions to apply a functional approach to First Amendment challenges. Notwithstanding the labels Kentucky law affixes to voting rights restoration, *see, e.g.*, Ky. Rev. Stat. § 196.045(1)(e) ("partial pardon"), *functionally* there is no material difference between the state's voting rights restoration system and licensing. It is not sufficient to identify differences between voting rights restoration and licensing: these differences must have some material impact on the functional analysis the First Amendment commands. Repeating the district court's error, the panel's decision is silent as to whether any of these identified "differences" *make* any difference in the First Amendment analysis.

Notably, the mechanics and outcomes of Kentucky's voting rights restoration system are remarkably similar to those of a licensing system. Disenfranchised individuals with any federal, any out-of-state, or an enumerated Kentucky felony conviction apply to a government office seeking permission to vote. Appellants' Br. at 6–8 & n.5. The Kentucky Department of Corrections reviews the applicant's eligibility, and then the Governor grants or denies that application in his absolute discretion. *Id*. If denied, the applicant can re-apply. Absent permission from the Governor, the applicant may not lawfully engage in the unlicensed politically expressive conduct. Ky. Rev. Stat. §§ 119.025, 532.020(1)(a). Finally, as the panel concedes, "the result of the felon reenfranchisement scheme is that a felon is 'allowed' to vote again, where previously prohibited. And the result of a license or permit is that a person is 'allowed' to engage in regulated conduct, where they were previously prohibited." Op. at 11.

Notwithstanding these functional commonalities, the panel focuses its attention on the Kentucky Constitution and statutes that refer to voting rights restoration as an "executive pardon" and a "partial pardon." Ky. Const. § 145; Ky. Rev. Stat. § 196.045(1)(e). However, voting rights restoration is one of the many legal effects of a pardon in Kentucky;[2] it is not itself a pardon. Restoration is not

[2] The district court also notes that "[r]estoring a felon's right to vote is just one of many possible effects of a pardon." R. 68, Page ID # 847–49.

intrinsically part of clemency: forty states plus D.C. handle voting rights restoration entirely outside their clemency systems—a reality the panel ignores. Appellants' Br. at 46–47 & n.16.[3] Appellee's own Executive Order 2019-003 itself disclaims that the grant of voting rights restoration bears any of the other effects of pardons. Executive Order 2019-003, RE 53-1, Page ID # 764. Ultimately, the phrase "partial pardon" has a strained, almost oxymoronic ring that betrays an understanding that rights restoration and pardons are different in kind.

Regardless, these state law semantics are irrelevant to the First Amendment question at issue, because the U.S. Supreme Court has repeatedly stated for decades that First Amendment rights and doctrines must be evaluated functionally, not formalistically. *See* Appellants' Br. at 36–38 (citing, *inter alia*, *Garcetti v. Ceballos*, 547 U.S. 410, 424–25 (2006) (in First Amendment retaliation claim concerning whether public employee had spoken as government employee or private citizen, "[t]he proper inquiry is a practical one" and "[f]ormal job descriptions" are not dispositive); *Press-Enter. Co. v. Superior Ct. of California for Riverside Cnty.*, 478 U.S. 1, 7–10 (1986) ("[T]he First Amendment question cannot be resolved solely on the label we give the event, *i.e.*, 'trial' or otherwise, particularly where the

[3] Though Appellants' Brief noted thirty-eight such states plus D.C. have non-discretionary restoration systems, this was due to the inadvertent omission of Maine and Vermont, which do not disenfranchise people convicted of felonies, from the total.

preliminary hearing functions much like a full-scale trial."); *Branti v. Finkel*, 445 U.S. 507, 518–19 (1980) ("[T]he ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position . . ."); *Bigelow v. Virginia*, 421 U.S. 809, 818–26 (1975) ("Regardless of the particular label asserted by the State—whether it calls speech 'commercial' or 'commercial advertising' or 'solicitation'—a court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation."); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963) ("We are not the first court to look through forms to the substance and recognize that informal censorship may sufficiently inhibit the circulation of publications to warrant injunctive relief."); *Nat'l Ass'n for Advancement of Colored People v. Button*, 371 U.S. 415, 429 (1963) ("[A] State cannot foreclose the exercise of constitutional rights by mere labels.")); *see also Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 392–93 (1995) ("The Constitution constrains governmental action by whatever instruments or in whatever modes that action may be taken . . . And under whatever congressional label.") (citation omitted). Seizing on the "partial pardon" label in Kentucky law leads the panel to misapply and breach this longstanding directive.

As a result, the panel proceeds to erroneously compare the features of pardons and licensing, bringing the panel's ruling into conflict with this Court's and the

Supreme Court's precedents. Representative of this central error is the panel's summation:

> Mere similarity in result does not change the nature of the vehicle used to reach that result, and Kentucky law is clear that it restores felons their voting rights through a partial executive pardon, not through the granting of an administrative license. . . So, regardless of any similarity in outcome—in that a pardoned felon and a licensed civilian may both engage in conduct previously forbidden—the vehicles to achieve that outcome remain fundamentally different.

Op. at 11–12. The panel's unsubstantiated assertion that the "nature of the vehicle"—and *not* the "result" or "outcome"—is dispositive, directly contradicts the litany of Supreme Court precedents Plaintiffs cited to the panel, forbidding formalistic analysis in a wide spectrum of First Amendment contexts and requiring a practical, functional inquiry. *See infra* at 7–8. The panel's focus on "the nature of the vehicle" erroneously privileges means over ends and minimizes the practical effects of Kentucky's voting rights restoration system.

The panel's reasoning also conflicts with this Court's precedent establishing that a functional analysis requires an examination of practical effects. In *Vogel v. U.S. Office Products Co.*, this Court held that a remand order is dispositive and, therefore, can only be granted by a district court, not a magistrate judge. 258 F.3d 509, 511 (6th Cir. 2001). In so ruling, this Court wrote:

> [W]e apply *a functional equivalency test to see if a particular motion has the same practical effect as a recognized dispositive motion* [in the federal statute]. Applying that test . . ., we too find that *a remand order is the functional equivalent of an order to dismiss. The practical effect*

> *of remand orders and orders to dismiss can be the same*; in both, cases are permitted to proceed in state rather than federal court.

Id. at 517 (emphasis added). Crucially, this Court did not dwell on the substantial differences between remand orders and orders to dismiss—the quite dissimilar "nature" of those two "vehicle[s]," Op. at 11—but rather on the practical effect of each. *Vogel*, 258 F.3d at 514–17.

Vogel relied on the Supreme Court's decision in *Quackenbush v. Allstate Insurance Co.*, which held that a remand order was appealable even though such orders "do not meet the traditional definition of finality." 517 U.S. 706, 715 (1996). Nonetheless, this difference in "the nature of the vehicle," to use the panel's phrase, was immaterial because the remand order was "functionally indistinguishable" from a stay order the Court had previously found appealable in a separate case. *Id*. at 714–15. Like a stay order, a remand "puts the litigants . . . 'effectively out of court,' […] and its *effect* is 'precisely to surrender jurisdiction of a federal suit to a state court.'" *Id*. (citations omitted, emphasis added); *see also In re Rizzo*, 741 F.3d 703, 705 (6th Cir. 2014) (holding unpaid "business tax" constitutes "excise tax" not dischargeable in bankruptcy "by engaging in a 'functional examination'" that requires "evaluat[ing] the statute's '*actual effects*'") (emphasis added). This Court's focus on practical effects—properly privileging ends over means—is what a functional

analysis requires.[4] Here, the panel decision has upended this framework and erased the dichotomy between formalism and functionality.

The panel's statement also cannot be squared with this Court's recent First Amendment rulings assessing what qualifies as a prior restraint. In *Novak v. City of Parma*, this Court wrote that "in light of our long history of guarding against prior restraints on speech, we should not be overly formalistic in defining what counts as an administrative order. . . [T]he formality of these classic cases should be a sufficient condition for prior restraint, not a necessary one." 932 F.3d 421, 432–33 (6th Cir. 2019); *see also Whitney v. City of Milan*, 677 F.3d 292, 295–99 (6th Cir. 2012) (finding public employer's informal order that employee refrain from speaking to terminated coworker constituted prior restraint). The same kind of functional inquiry articulated in *Novak* must also apply in the closely related context of evaluating whether a challenged practice, action, or law functions as a licensing scheme. *See Ostergren v. Frick*, 856 F. App'x 562, 570 n.10 (6th Cir. 2021) (unpublished) (citing *Novak*'s "recognition that the prior-restraint doctrine should be

[4] This Court's sister circuits are in accord—a functional analysis requires analyzing practical effects. *See Martinez v. Carnival Corp.*, 744 F.3d 1240, 1243–44 (11th Cir. 2014) (citations omitted) (applying Supreme Court's "functional test for finality" which requires "look[ing] to the practical effect of the district court's order, not to its form"); *Gautreaux v. Chicago Hous. Auth.*, 178 F.3d 951, 956–57 (7th Cir. 1999) ("This court has repeatedly held that it will look beyond labels such as 'clarification' or 'modification' to the actual effect of the order.").

applied functionally" and noting "it may be possible for a government to create a de facto licensing scheme").

C. THE PANEL DECISION'S COMPARISON OF VOTING RIGHTS RESTORATION AND LICENSING

To the extent the panel decision does compare voting rights restoration and licensing, it neither considers the highly similar mechanics between the two nor explains why any of the perceived differences it enumerates materially impact the First Amendment analysis. The panel seizes upon several purported differences between voting rights restoration, as practiced in Kentucky, and licensing, as described in the relevant First Amendment precedents. Each is an immaterial distinction because none alters the practical effects of voting rights restoration.

First, the panel points to the retrospective effect of pardons. But voting rights restoration, which is not itself a pardon, is *functionally* and predominantly prospective in effect, notwithstanding any concurrent retrospective effect. Indeed, the purported prospective/retrospective distinction is not rigid, as the panel portrays it. After all, the Governor may grant a pardon even "prior to formal indictment." *Fletcher v. Graham*, 192 S.W.3d 350, 359 (Ky. 2006). And while it may be accurate to say that restoration reverses or "nullif[ies]" one of the consequences of a felony conviction, Op. at 6, this legal effect is not principally retrospective. As a functional matter, the practical effect of voting rights restoration is felt prospectively: even once an individual's right to vote is restored, that person cannot regain the ability to vote

in past elections. Re-enfranchisement does not and cannot restore these citizens' opportunities to express their political views through the ballot box in elections gone by.

Additionally, with respect to those convicted as juveniles, voting rights restoration has no retrospective effect. To the extent the panel has concluded that voting rights restoration is backward-looking because it "restores the felon to the status quo before the conviction," Op. at 8, as Appellants noted in their opening brief, individuals convicted of felonies as juveniles never could vote and have never voted in their lives. Appellants' Br. at 26 n.11. For them, voting rights "restoration" is functionally first-time enfranchisement, not re-enfranchisement.

Most importantly, the panel fails to articulate why its proffered prospective/retrospective binary or restoration to the status quo ante has any material bearing on the First Amendment unfettered discretion analysis and the principles and concerns articulated in *City of Lakewood* and related precedents. Whether one views voting rights restoration as having prospective effects or both prospective and retrospective effects does not *functionally* alter the manifest risk of undetectable viewpoint discrimination in giving a government official like Governor Beshear sole and unfettered power to selectively bestow voting rights on a particular class of individuals without any reasonable definite time limits on such determinations.

Second, the panel adopts Appellee's contention that voting rights restoration is a "one-time act of clemency." Op. at 6–7. Restoration applicants who are denied one or more times will have recurring encounters with the Governor's discretionary vote-licensing system. In the meantime, an applicant will understandably be deterred from public political expression that might compromise pending or future attempts to secure the Governor's permission to vote. The ballot may be secret, but applicants' political views are just a Google, social media, or database search away. *City of Lakewood*, 486 U.S. at 759 ("[T]he licensor does not necessarily view the text of the words about to be spoken, but can measure their probable content or viewpoint by speech already uttered."). However, even assuming the accuracy of this characterization for argument's sake, the panel fails to explain what *functional*, material difference the "one-time" nature of restoration could possibly make in evaluating the manifest risk of viewpoint discrimination in giving a government official like Governor Beshear sole and absolute power to bestow voting rights selectively. Once again, focusing on the practical effects, as is required for functional analysis, demonstrates that this perceived difference has no bearing on the constitutional inquiry.

Third, the panel reasons that "[p]ermits or licenses regulating First Amendment activity by their nature do not restore any 'lost' rights; they only regulate how persons may engage in or exercise a right they already possess." Op.

at 8. But even the panel does not seem to believe in this purported distinction, noting the commonality between permitting a restoration applicant "to vote again, where previously prohibited" and permitting a license applicant "to engage in regulated conduct, where they were previously prohibited." *Id*. at 11. The fact that a person with a felony conviction is ineligible to vote prior to securing permission to do so is not a point of divergence, as license applicants also cannot engage in the "regulated conduct" prior to securing a permit to do so. That the latter group enjoys a freedom of speech or assembly in the abstract is another immaterial distinction, as such license applicants are strictly prohibited from engaging in the specific First Amendment-protected expression or expressive conduct until they secure a license to do so. In this way, the panel's reasoning appears to assume a system without time, place, and manner restrictions and devoid of licensing requirements. However, restoration applicants and license applicants are in the exact same posture: seeking permission to engage in specific expression or expressive conduct that is forbidden without prior authorization.

Accordingly, the panel's decision impermissibly allows state law labels, rather than practical effects, to dictate the scope of the First Amendment's protection and relies upon distinctions reflecting no functional, material difference from licensing to conclude that voting rights restoration in Kentucky does not operate as

a licensing scheme. Not only was this error, but it was error that conflicts with decisions of the U.S. Supreme Court and this Court.

II. THIS APPEAL PRESENTS A QUESTION OF EXCEPTIONAL PUBLIC IMPORTANCE.

As recognized by the Governor in his executive order, "the right to vote is the foundation of a representative government" and restoration of that right fosters "rehabilitation and reintegration into society" and reduces recidivism. Executive Order 2019-003, RE 53-1, Page ID # 762. Approximately 15,000 adults complete parole or probation each year in Kentucky, causing the population of post-sentence but disenfranchised individuals to grow continuously.[5] Many disenfranchised Kentuckians remain subject to an arbitrary voting rights restoration scheme and are consequently exposed to the threat of viewpoint discrimination.

Additionally, this case has implications beyond the right to vote. Through its formalism and surface-level functional analysis, the panel decision gives state government officials free rein to subject First Amendment-protected political expression and expressive conduct to arbitrary treatment by disguising their

[5] The Bureau of Justice Statistics ("BJS") reported that 5,657 adults completed parole and 10,660 adults completed probation in 2021. U.S. Dep't of Justice, *Probation and Parole in the United States* (2021), at 23, 30, *available at* https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/ppus21.pdf. BJS reported that 6,780 adults completed parole and 9,792 adults completed probation in 2020. U.S. Dep't of Justice, *Probation and Parole in the United States* (2020), at 21, 26, *available at* https://bjs.ojp.gov/content/pub/pdf/ppus20.pdf.

licensing scheme with immaterial distinctions. Numerous administrative licensing schemes previously invalidated on First Amendment grounds might be resurrected if officials relabel or superficially modify them, so they are less obviously or less formally such. *Cf. Novak*, 932 F.3d at 433 ("A government official should not have to declare his order official or jump through certain procedural hoops to create a prior restraint. Such a rule would allow government officials to cloak unconstitutional restraints on speech under the cover of informality.").

CONCLUSION

Accordingly, Appellants request that the panel grant their petition for rehearing or, alternatively, that this Court grant their petition for rehearing en banc.

DATED: August 3, 2023

Respectfully submitted,

/s/ Jon Sherman

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RULE 32(g) CERTIFICATE

I hereby certify that this document, including all headings, footnotes and quotations, but excluding the Table of Contents, Table of Authorities, and any certificates of counsel, contains 3,882 words, as determined by the word count of the word-processing software used to prepare this document, specifically Microsoft Word for Mac Version 16.49 in Times New Roman 14-point font, which is fewer than the 3,900 words permitted under Fed. R. App. P. 35(b)(2).

/s/ Jon Sherman
Jon Sherman

August 3, 2023

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 3, 2023, an electronic copy of Plaintiffs-Appellants' Petition for Rehearing and Rehearing En Banc was filed with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. The undersigned also certifies that participants who are registered CM/ECF users will be served via the CM/ECF system.

/s/ Jon Sherman
Jon Sherman

August 3, 2023

EXHIBIT A

NOT RECOMMENDED FOR PUBLICATION
File Name: 23a0332n.06

No. 22-5703

DERIC JAMES LOSTUTTER, ROBERT CALVIN LANGDON, and BONIFACIO R. ALEMAN,

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COMMONWEALTH OF KENTUCKY,

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Defendants-Appellees.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

OPINION

Before: BOGGS, WHITE, and READLER, Circuit Judges.

WHITE, Circuit Judge. In this First-Amendment challenge to Kentucky's felon-reenfranchisement scheme, Plaintiffs Deric Lostutter, Robert Langdon, and Bonifacio Aleman appeal the dismissal of their claims for lack of standing, contending that they satisfied all standing requirements under the unfettered-discretion doctrine.[1] Because Plaintiffs concede that their argument turns on a finding that Kentucky's voting-rights restoration process constitutes an administrative licensing or permitting scheme, and we conclude that this is not the case, we affirm the district court's dismissal of all claims without prejudice.

[1] The Supreme Court has held that, when bringing a facial challenge to a licensing or permitting scheme that allegedly gives government officials unfettered discretion to grant or deny licenses, a plaintiff need not apply for and be denied a license to challenge such a scheme's constitutionality. *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 755–56 (1988). Rather, "a licensing provision coupled with unbridled discretion itself amounts to an actual injury." *Prime Media, Inc. v. City of Brentwood*, 485 F.3d 343, 351 (6th Cir. 2007) (citations omitted).

I.

A.

Section 145 of the Kentucky Constitution strips convicted felons of the right to vote:

> Persons convicted in any court of competent jurisdiction of treason, or felony, or bribery in an election, or of such high misdemeanor as the General Assembly may declare shall operate as an exclusion from the right of suffrage, but persons hereby excluded may be restored to their civil rights by executive pardon.

Ky. Const. § 145. A Kentucky statute outlines the process by which a person's right to vote may be restored: a convicted felon may submit a request for restoration of civil rights to the Kentucky Department of Corrections (KDOC) and, if KDOC determines that the felon qualifies as an "eligible offender,"[2] the request will be forwarded to the Governor "for consideration of a partial pardon." Ky. Rev. Stat. Ann. § 196.045. The Governor then exercises his or her complete discretion in granting or denying the request. R. 57-1, PID 788 ("It is the prerogative of the Governor afforded him or her under the Kentucky Constitution to restore these rights.").

B.

In the operative complaint, eight plaintiffs—all disenfranchised residents of Kentucky with felony convictions who wish to vote in future elections—sued the Kentucky Governor in his official capacity under 42 U.S.C. § 1983, alleging that Kentucky's voting-rights restoration scheme violated the First Amendment because it (1) provided unfettered discretion to the Governor to restore civil rights (Count 1), and (2) did not contain a limitation on the time to exercise that discretion (Count 2). Essentially, Plaintiffs argued that Kentucky's reenfranchisement process operated as an administrative licensing or permitting scheme, and therefore it must adhere to the

[2] Kentucky law defines an "eligible felony offender" as a person convicted of one or more felonies who has received a final discharge or expiration of sentence, does not have any pending warrants, charges, or indictments, and does not owe any outstanding restitution. Ky. Rev. Stat. Ann. § 196.045(2).

constitutional standards applied when officials grant or deny licenses or permits to engage in First Amendment-protected activity. The operative complaint sought a declaration that the restoration scheme violated the First Amendment, and a permanent injunction ordering the Governor to establish a new reenfranchisement scheme that "restores the right to vote to felons based upon specific, neutral, objective, and uniform rules and/or criteria[.]" R. 31, PID 357-58.

While cross-motions for summary judgment were pending before the district court, Kentucky Governor Andrew Beshear issued Executive Order (EO) 2019-003, providing that a convicted felon's right to vote would be automatically restored upon the final discharge or expiration of his or her sentence, provided the crime of conviction was a Kentucky offense not involving treason, bribery in an election, criminal or fetal homicide, second-degree assault or assault under extreme emotional disturbance, first-degree strangulation, human trafficking, or violence as defined by Kentucky law. Three plaintiffs automatically became eligible to vote under EO 2019-003 and voluntarily dismissed their claims as moot. Five months later, the district court dismissed all remaining Plaintiffs' claims as moot on the basis that EO 2019-003 appeared to provide the relief they requested: non-arbitrary criteria to guide the process for restoration of voting rights.

Plaintiffs timely appealed to this court, and we concluded that EO 2019-003 failed to provide relief to Lostutter, Langdon, and possibly Aleman—because although it may have "established a separate non-discretionary restoration track for certain felons who qualify," Lostutter and Langdon did not qualify for that track "because they were convicted, respectively, of a federal offense and of second-degree assault under Kentucky law." *Lostutter v. Kentucky*, No. 21-5476, 2021 WL 4523705, at *2 (6th Cir. Oct. 4, 2021). "For felons like them, EO 2019-003 left intact the discretionary scheme set out in Ky. Const. § 145 and Ky. Rev. Stat. Ann. § 196.045,

which is the same one challenged in the operative complaint. Thus, EO 2019-003 did not remove the harms that Lostutter and Langdon allege, and the case remains suitable for judicial determination." *Id.*[3] We reversed and remanded for further proceedings.

C.

On remand, when faced with the same cross-motions for summary judgment, the district court again dismissed the remaining three Plaintiffs' claims, this time for lack of standing. It held:

> Here, it is not immediately apparent that Plaintiffs have suffered an injury in fact because they have never participated in the reenfranchisement scheme they challenge. . . . Langdon has applied for restoration of his right to vote, and he states that his application is pending before the Governor. (R. 31 ¶ 7.) Aleman and Lostutter have not applied. (R. 31 ¶ 7.)

R. 68, PID 846.[4] It also rejected Plaintiffs' argument that Kentucky's reenfranchisement process constituted an administrative licensing or permitting scheme, such that standing existed under the unfettered-discretion doctrine without regard to whether Plaintiffs applied for and were denied restoration of their rights. The district court explained:

> "Licensing" generally refers to "[a] governmental body's process of issuing a license," and a "license" is "permission, usually revocable, to commit some act that would otherwise be unlawful." *Licensing*, *Black's Law Dictionary* (11th ed. 2019). . . . [A] "permit" is defined as the certificate or official written statement evidencing that someone has permission or the right to do something. *Permit*, *Black's Law Dictionary* (11th ed. 2019).
>
> A pardon, on the other hand, is "[t]he act . . . of officially nullifying punishment or other legal consequences of a crime." *Pardon*, *Black's Law Dictionary* (11th ed.

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[3] Regarding Aleman, we noted that he

> [m]aintain[ed] that he does not qualify for automatic restoration of his right to vote because he was convicted of first-degree robbery. However, it appears that only first-degree robberies committed after July 15, 2002, are considered disqualifying violent offenses, Ky. Rev. Stat. Ann. § 439.3401(8), and the record suggests that Aleman was convicted of this offense in 1997. The district court should clarify Aleman's status on remand.

Id. at *2 n.4. On remand, Plaintiffs confirmed that Aleman's claims were not moot because he was convicted of a felony in Indiana, and out-of-state convictions are excluded under EO 2019-003.

[4] Aleman has since submitted his application, according to his counsel. At the time of oral argument, it remained pending before the Governor.

> 2019); *see also Fletcher*, 192 S.W.3d at 362 ("A 'pardon' is the act or an instance of officially nullifying punishment or other legal consequences of a crime.") (cleaned up). Receipt of a pardon can give a pardonee permission to do something that would otherwise be unlawful, such as vote, and in that narrow respect it bears some superficial similarity to a license. But a pardon cannot be characterized as a mere license to vote—restoration of the right to vote is just one of several potential effects of a pardon.
>
> . . .
>
> A pardon is also retrospective, as opposed to prospective. A pardon nullifies the legal consequences of one's past actions, whereas a license prospectively grants one permission to do something that would otherwise result in legal consequences.
>
> . . .
>
> A pardon is fundamentally different than a license and cannot be fairly characterized as a mere license to vote. Restoring a felon's right to vote is just one of many possible effects of a pardon. Beyond that single superficial similarity, a license and a pardon bear virtually no resemblance to one another. The nature of a pardon is to extend grace to a person with regard to certain consequences of their actions. A license, on the other hand, simply gives a person permission to engage in regulated activity. The Plaintiffs' argument is simply incorrect—in Kentucky, an executive pardon is not a license.

R. 68, PID 847-49 (footnote omitted). It thus concluded that *City of Lakewood* and its progeny did not apply, and dismissed the remaining Plaintiffs' claims without prejudice for lack of standing. Plaintiffs timely appealed.

II.

Plaintiffs maintain that dismissal on jurisdictional grounds was improper because the unfettered-discretion doctrine confers standing without regard to whether they actually applied for, and were denied, restoration of their right to vote. However, Plaintiffs also urge this court to "construe the district court's opinion to have reached and ruled on the merits" and "review [the] decision accordingly." Appellant Br. at 21; Oral Arg. at 8:20-8:50. In either case, Plaintiffs conceded at argument that their claims rest entirely on the contention that Kentucky's voting-rights

restoration process constitutes a licensing or permitting scheme. Because this underlying argument lacks merit, we affirm the district court's dismissal of all claims.

Contrary to Plaintiffs' assertions that Kentucky's voting-rights restoration scheme is fundamentally different from a pardon, the Kentucky Constitution expressly characterizes felon reenfranchisement as a type of executive pardon. Ky. Const. § 145 (providing that felons excluded from the franchise "may be restored to their civil rights by executive pardon"). Associated statutes and Kentucky caselaw likewise refer to the Governor's discretionary power to restore voting rights as a "partial pardon." Ky. Rev. Stat. Ann. § 196.045(1)(e) (directing KDOC to "[f]orward information on a monthly basis of eligible felony offenders who have requested restoration of rights to the Office of the Governor for consideration of a partial pardon"); *Anderson v. Commonwealth*, 107 S.W.3d 193, 195 (Ky. 2003) (holding that a "partial pardon" granted pursuant to Sections 145 and 150 of the Kentucky Constitution "only restored [an individual's] right to vote and to hold office and did not restore his 'right' to be a juror"); *Cheatham v. Commonwealth*, 131 S.W.3d 349, 351 (Ky. Ct. App. 2004) (holding that a "partial pardon" restoring a felon's rights to vote and hold public office did not encompass restoration of his right to possess a firearm). Plaintiffs' suit is therefore a challenge to an aspect of Kentucky's pardon regime, whether they characterize it that way or not. And receiving an executive pardon—partial or complete—is fundamentally different from obtaining an administrative license or permit.

First, as the district court explained, pardons are retrospective in the sense that they look backwards and excuse—indeed, nullify the consequences of—past misconduct. A license, in contrast, is usually prospective in that it looks forward and grants permission to engage in some future conduct. So, while a governor cannot pardon future crimes, licenses typically grant permission for an activity that has not yet occurred. Further, the Governor accurately observes

that a partial pardon is a one-time act of clemency, while a typical licensing or permitting scheme is ongoing—that is, the license or permit must be renewed periodically.[5] Third, felon reenfranchisement in Kentucky derives from the Governor's executive clemency power, which the Supreme Court has rarely subjected to judicial review. *See Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 276 (1998) (reiterating that as a fully discretionary "matter of grace," pardons and commutation decisions "have not traditionally been the business of courts; as such, they are rarely, if ever, appropriate subjects for judicial review," therefore "[t]he Due Process Clause is not violated where, as here, the procedures in question do no more than confirm that the clemency and pardon powers are committed, as is our tradition, to the authority of the executive" (quoting *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 464 (1981))); *see also Herrera v. Collins*, 506 U.S. 390, 413-15 (1993) (outlining the history of the federal pardon and state-level clemency schemes). In contrast, a licensing scheme regulating First Amendment-related conduct is typically grounded in the State's authority to promote public safety and well-being. *See Cox v. New Hampshire*, 312 U.S. 569, 574 (1941) ("The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend."). Such authority, when used to curtail free speech, is subject to extensive judicial review. *See id.* at 576 (holding that licensing schemes regulating speech must

[5] Plaintiffs contest this characterization, arguing that (1) it "assumes that an individual will only face felony disenfranchisement once in their lifetime"; and (2) "if the restoration application is denied one or more times, the licensing process will not be a one-time encounter." Reply Br. at 15. But both hypotheticals ignore the true distinction between the two processes: after a *successful* reenfranchisement, a felon need not re-apply for a new pardon every election cycle for fear that his right to vote has expired. A typical license or permit, on the other hand, must be routinely re-granted; should the applicant let it lapse, he or she may no longer engage in the regulated conduct. A partial pardon can therefore be fairly characterized as a "one-time" act of the clemency in the sense that *at the time it is granted* there is no predetermined expiration date for the restored right to vote, whereas the effects of a typical license or permit last only a fixed amount of time before they expire.

serve an important government interest); *see also Kunz v. New York*, 340 U.S. 290, 293-94 (1951) (noting that the Supreme Court has "consistently condemned licensing systems which vest in an administrative official discretion to grant or withhold a permit upon broad criteria unrelated to proper regulation of public places" and listing cases). Plaintiffs fail to explain why we should conflate the distinct processes of licensing and pardons, rooted as they are in separate provisions of Kentucky law, subject to differing levels of judicial scrutiny by the Supreme Court, and implemented to accomplish unrelated goals.

Perhaps most importantly, a pardon restores the felon to the status quo before the conviction, in that he or she regains a right once held but lost due to illegal conduct. Permits or licenses regulating First Amendment activity by their nature do not restore any "lost" rights; they only regulate how persons may engage in or exercise a right they already possess. So, while a person applying for a newspaper rack or parade permit is attempting to exercise his or her First Amendment right to freedom of speech, a felon can invoke no comparable right when applying to the Governor for a pardon because the felon was constitutionally stripped of the First Amendment right to vote. *Compare City of Lakewood*, 486 U.S. at 768 (explaining that the true "activity" at issue was "the circulation of newspapers, which is constitutionally protected"); *with Dumschat*, 452 U.S. at 467 (holding that "[a] state cannot be required to explain its reasons for a [commutation] decision when it is not required to act on prescribed grounds," because the power vested in the State to commute sentences "conferred no rights on respondents beyond the right to seek commutation"), *and Ohio Adult Parole Auth.*, 523 U.S. at 282–83 (holding that a Governor's executive discretion in matters of clemency "need not be fettered by the types of procedural protections sought by respondent" because there was "no substantive expectation of clemency"). Accordingly, Kentucky requires felons to fill out an "application for the *restoration* of civil rights,"

R. 57-1, PID 787 (emphasis added), which properly reflects the fact that the felon lacks any fundamental interest to assert and seeks to regain his or her interest through the clemency process, rather than a "permit to vote," which would suggest that the felon already has an intrinsic right to vote, and must merely go through the proper regulatory hoops to exercise it. *Cf. Johnson v. Bredesen*, 624 F.3d 742, 746 (6th Cir. 2010) (explaining that a state may constitutionally strip convicted felons of their right to vote, and that the plaintiffs, having constitutionally lost that right, lacked any fundamental interest to assert under the First Amendment). Based on these significant distinctions, we agree with the district court that Kentucky's voting-rights restoration scheme is different in kind from an administrative licensing or permitting scheme.

Plaintiffs offer no authority to the contrary equating a partial pardon to a type of administrative license, or even treating the two similarly. Plaintiffs' cited caselaw concerns only administrative schemes that were expressly designated as granting licenses or permits. And they fail to provide a single case in which a court interpreted a restored right to vote as a license or permit to vote. The State, on the other hand, points to Eleventh Circuit precedent holding that First Amendment cases invoking the unfettered-discretion doctrine are "inapposite to a reenfranchisement case." *See Hand v. Scott*, 888 F.3d 1206, 1210 (11th Cir. 2018). In *Hand*, disfranchised felons argued that Florida's reenfranchisement regime facially violated the First Amendment because it vested Florida's Executive Clemency Board with "unfettered discretion" to engage in a "standard-less process of arbitrary and discriminatory decision-making, which is untethered to any laws, rules, standards, criteria, or constraints of any kind, and unconstrained by any definite time limits," thereby abridging their right to vote and creating an impermissible risk of "arbitrary, biased, and/or discriminatory treatment." *Id.* (quoting Plaintiffs' Motion for Summary Judgment at 16, 18).

The Florida felons relied on several of the same First Amendment cases cited by Plaintiffs, including *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992), and *City of Lakewood*, 486 U.S. 750. But on appeal, the Eleventh Circuit rejected the felons' theory and held that "this precedent [did] not bear directly on the matters presented" because none of the 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.* Although the Eleventh Circuit did not directly address standing, its holding on the merits lends support to the State's argument that Plaintiffs' cited authority is inapt.

Plaintiffs resist this conclusion and maintain that the district court "erred by assessing whether full pardons function as licenses to vote instead of focusing on the sole and narrow question before it: whether the grant or denial of a voting rights restoration application functions as vote licensing." Appellant Br. at 40. True, in two paragraphs the district court discussed the nature of a complete pardon, although the relevant Kentucky statute characterizes voting restoration as only a "partial pardon." But this does not render the core thesis of the district court opinion incorrect: an executive pardon in general functions differently than an administrative license or permit. The district court's overall analysis of the differences between a license and a pardon remains sound. For example, the distinction between the prospective nature of a license versus the retrospective nature of a pardon applies to both a partial and a full pardon. So, while the district court might have avoided a discussion of full pardons, the two paragraphs that the district court devoted to that topic do not render the opinion as a whole incorrect.

Plaintiffs also contend that the district court erroneously placed "undue weight upon the 'clemency' label associated with voting rights restoration in Kentucky law." Appellant Br. at 38. Plaintiffs insist that "notwithstanding the labels used under Kentucky law, the state's system of

giving its governors sole power to restore the right to vote to individuals with felony convictions—unbounded by any rules or criteria—is in all material respects a completely arbitrary licensing system no different from those long prohibited in the First Amendment context." *Id.* at 14. Yet Plaintiffs never persuasively explain *why* voting restoration is more similar to a licensing scheme than to a partial executive pardon. They never list the defining features of a licensing or permitting scheme, much less explain how the voting-rights restoration process possesses those characteristics. Plaintiffs merely conclude that "[w]hen it comes to the functionality of Kentucky's voting rights restoration system, in all material respects, it operates as an administrative licensing scheme that selectively confers a right to vote upon certain individuals with felony convictions," without ever showing the concrete similarities between voting-rights restoration and obtaining a license. Appellant Br. at 39.

Plaintiffs' only proffered similarity between the two concepts is that Kentucky's reenfranchisement scheme grants felons permission to vote in future elections, just as a license or permit grants permission to engage in conduct like a parade. True, the result of the felon reenfranchisement scheme is that a felon is "allowed" to vote again, where previously prohibited. And the result of a license or permit is that a person is "allowed" to engage in regulated conduct, where they were previously prohibited. But this superficial parallel does not transform a partial executive pardon into an administrative license. Mere similarity in result does not change the nature of the vehicle used to reach that result, and Kentucky law is clear that it restores felons their voting rights through a partial executive pardon, not through the granting of an administrative license. And for the reasons discussed above, extending an executive pardon is fundamentally different from granting a permit or license. So, regardless of any similarity in outcome—in that a

pardoned felon and a licensed civilian may both engage in conduct previously forbidden—the vehicles to achieve that outcome remain fundamentally different.

Finally, Plaintiffs argue that "[c]lemency rules and procedures are not immune from constitutional scrutiny." Appellant Br. at 43. That may be. But the district court never found to the contrary. It held only that Kentucky's voting-rights restoration process is not an administrative licensing or permitting scheme, therefore *City of Lakewood* did not allow for an exception to the traditional rules of standing. Affirming this decision does not insulate Kentucky's restoration process from constitutional review. It merely requires Plaintiffs to satisfy either the traditional rules of standing or some exception other than *City of Lakewood*'s unfettered-discretion doctrine before they may bring suit.

In sum, the district court correctly held that a partial executive pardon restoring the right to vote is not a permit or license to vote, and thus the unfettered-discretion doctrine does not apply. The *City of Lakewood* line of cases is therefore inapplicable and dismissal for lack of standing was proper.

III.

For the reasons set out above, we AFFIRM the district court's dismissal of all claims without prejudice.

EXHIBIT B

DERIC LOSTUTTER, ET AL.) CASE NO.: 22-5703
Appellants,)
vs.)
COMMONWEALTH OF KENTUCKY,)
ET AL.,)
Defendants.)
)

TRANSCRIPTION OF AUDIO RECORDING

ORAL ARGUMENT

JUNE 22, 2023

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APPEARANCES:

PANEL JUDGES:
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SENIOR CIRCUIT JUDGE DANNY J. BOGGS
CIRCUIT JUDGE CHAD A. READLER

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JUNE 22, 2023

JUDGE READLER: Case Number 22-5703, Deric Lostutter, et al. versus Commonwealth of Kentucky et al. Oral argument not to exceed 15 minutes per side.

Mr. Sherman for the appellants?

Save three minutes for rebuttal?

MR. SHERMAN: Yes. That's correct, Your Honor.

JUDGE READLER: Okay.

MR. SHERMAN: Thank you, Your Honor. May it please the Court, Jon Sherman for the appellants.

The district court made two errors in dismissing plaintiffs' complaint. First, the district court applied a highly formalistic analysis and erroneously conflated voting rights restoration and pardons in deciding that the First Amendment unfettered discretion doctrine had no application here.

Second, having reached the constitutional merits of plaintiffs' claims, the Court then impermissibly backtracked and disposed of the case on jurisdictional grounds.

I'll first address the jurisdiction error, and I think I can do that quickly. Steel Company versus Citizens for a Better Environment and Bell v.

Hood, both Supreme Court precedents, have both decided that where the standing and the merits are intertwined, it's impermissible for the Court to reach the merits, decide the merits, and then recast that determination as a jurisdictional ruling.

In this case, the Court necessarily reached the merits of the First Amendment claims in the case but then recast that determination as a lack of standing and dismissed the case for lack of standing. This Court as well in CHKRS just two years ago found that this was impermissible. Again, that has to be the rule because otherwise every time a plaintiff lost a claim, it would be dismissed for lack of standing, rather than for failure to state a claim.

And neither the District Court nor Governor Beshear makes an argument that our claims are wholly frivolous, insubstantial, or immaterial such that they would fall within the narrow exception in Steel Company. And the Governor's brief actually ignores Steel Company and Bell v. Hood altogether.

So having addressed the jurisdictional error, if there are no questions from the bench on that particular point --

JUDGE READLER: Now, counsel, we obviously have to assure ourselves of standing. We do that at

every stage of the case. So why is it that your clients -- your three remaining clients have standing?

MR. SHERMAN: Right. So under -- thank you, Your Honor. Under the Supreme Court's precedent and this Court's precedent in cases like Prime Media and Miller v. City of Cincinnati, there's per se standing under the First Amendment on fettered discretion doctrine, where a licensing scheme governing First Amendment protected expressive conduct contains no rules or criteria to constrain official discretion. That's the case here.

Functionally, Kentucky's voting rights restoration system operates as a licensing scheme. There are no rules, no criteria whatsoever, and the Court has said -- the Supreme Court has said with a facial challenge, plaintiff's may facially challenge such a scheme without first applying for and being denied that permit. That's City of Lakewood.

The individual facts of any permit application are not relevant, the dispositive -- the linchpin is really whether there's anything on the -- in the ordinance or statute in the laws that prevents viewpoint discrimination. Here, there is none, and so facially, this -- plaintiff's can bring a fascial

challenge and have standing to bring that facial challenge.

JUDGE WHITE: And so do you conceive that everything depends upon characterizing this scheme as a license?

MR. SHERMAN: That is a threshold question. It is one that, yes, we need to win Your Honor in order for the First Amendment unfettered discretion doctrine to apply, and we believe that a functional approach needs to be taken, unlike the District Court's formalistic approach. And that would be consistent with recent rulings from this Court in Ostergren v. Frick from 2021, as well as Novak v. City of Parma. These cases apply to functional analysis to the question of whether an administrative order created a prior restraint in those cases.

Here, we believe this case also calls for a functional analysis to be applied as to whether an administrative licensing scheme has been created, and here, plaintiff, all of our plaintiffs, are required to submit an application to -- first, to the Department of Corrections, and then if it has pashed its threshold eligibility, it's referred to the Governor's Office. And then the Governor's Office has complete and unfettered discretion to grant or

deny permission to engage in First Amendment protected expressive conduct, voting. So that --

JUDGE READLER: Well, why is voting First Amendment expressive conduct? Isn't it governed by the -- if at all, by the Fourteen Amendment?

MR. SHERMAN: Well, there are numerous Supreme Court cases that say that voting is protected as both expression -- expressive conduct and as means for political association.

JUDGE READLER: Well, association --

MR. SHERMAN: I mean --

JUDGE READLER: -- is different than -- I mean, association, that's different.

MR. SHERMAN: Correct. Correct, Your Honor. But we claim that it's protected as both, and -- but even just sticking with political expression, there are numerous cases from Norman v. Reed to Anderson v. Celebrezze, Williams v. Rhodes that make clear that it's not just the candidates or the political parties' First Amendment interest in accessing the ballot but also the voters' expressive interest in being able, both individually and in the aggregate, being able to express their preference for candidates, parties --

JUDGE READLER: What's the best case that

says voting -- that says that, you know, the right to vote, formally, the right to go in the ballot box and check your ballot is a First Amendment protected activity?

MR. SHERMAN: Norman v. Reed is one of the best, everything in the Anderson verdict line of cases. A lot of these cases deal with voting, and they are dealing with it under both the First and Fourteenth Amendment. We're, of course, proceeding just under the First Amendment.

We'd also point to the Court's -- the Supreme Court's decision in Doe v. Reed, right. The fact that there was a legal effect to the political expression in Doe v. Reed didn't negate the expressive character of that -- the petition signatures in that case, right. Similarly here, just because voting has a legal effect in casting a ballot, it doesn't negate the expressive content of casting a vote.

JUDGE READLER: Petition signature is about getting on the ballot, and those cases seem to be fairly clear. But actually an individual's voting is distinct from getting a candidate on the ballot.

MR. SHERMAN: Correct, Your Honor. But there are numerous cases that --

JUDGE READLER: (Indiscernible)

JUDGE BOGGS: I mean, isn't it -- counsel, isn't it particular that casting the ballot itself isn't expressive because nobody knows how it comes out. In fact, if anything, the anti-selfie ballot laws are assigned that the law wants to make sure that the voting isn't expressive.

MR. SHERMAN: Thank you, Judge Boggs. I would point to two things in response to that question, one, McIntyre v. Ohio Elections Commission, right. The anonymity of speech does not negate the expressive content of that speech. In that case, the Supreme Court struck down Ohio's ban --

JUDGE READLER: I'm sorry. Those were petitions, right, petitions (indiscernible) --

MR. SHERMAN: Anonymous pamphlets in that case.

JUDGE BOGGS: That's anonymous speech, but again the people knew that somebody was saying it. Okay. Like if I could take you back one step just procedurally, so after your standing argument, if we accept that, is there any problem with our going forward and either ruling in your favor or against you on the merits?

MR. SHERMAN: No, Your Honor. We believe

that the Court -- the District Court has already essentially ruled on the merits. The first paragraph of its order seems to believe that the Court was ruling on the merits, and then once given that it was a ruling on the merits below, we think it's permissible for this Court to reach the merits. And on the merits, we believe the First Amendment unfettered discretion --

JUDGE BOGGS: Well, obviously, you want to win, but if we decided that you lost on the merits, that wouldn't be procedurally improper in your view?

MR. SHERMAN: No, Your Honor. Indeed, we believe Steel Company and Bell v. Hood instruct that this Court should reach the merits because that's what the Court effectively did and then backtracked --

JUDGE BOGGS: Thank you.

MR. SHERMAN: -- to lack of standing.

So on the merits holding -- and we've already rehearsed the Supreme Court's decisions regarding facial challenges --

JUDGE READLER: Let's go back to -- let's go back to the standing issue. I guess one of your three clients has applied for a pardon?

MR. SHERMAN: Two have actually applied for

voting rights restoration. We obviously dispute that voting rights restoration is just one of the effects of a pardon, but it is not in itself a pardon. Under state law, the Kentucky Courts and the Kentucky statute have labeled it -- they tried to split the difference and call it (indiscernible) --

JUDGE READLER: Was it one? Is the second one more recent? I just -- I thought it was one there.

MR. SHERMAN: The second one is more recent. Bonifacio al Aman (phonetic) applied more recently --

JUDGE READLER: Mr. Lostutter hasn't applied?

MR. SHERMAN: (Indiscernible) -- Deric Lostutter has not applied and Robert Lagon has.

JUDGE READLER: And the lead plaintiff. But it's just sort of odd that -- it's just sort of odd that even the lead plaintiff hasn't even applied for voting restoration.

MR. SHERMAN: Well, the Supreme Court has made clear in City of Lakewood and every decision in this line of cases going back to Lovell v. Griffin in 1938 that a person bringing a suit under the First Amendment unfettered discretion doctrine doesn't --

JUDGE READLER: I know, but you could --

couldn't you just apply and get rulings and then challenge the rulings as opposed to this sort of odd game about whether this is like a trade permit?

MR. SHERMAN: Well, the --

JUDGE READLER: Isn't that just easier? I mean, you've basically got (indiscernible) --

MR. SHERMAN: We think the First Amendment of -- sorry. I didn't mean to speak over you.

JUDGE READLER: Well, I mean, you got most of the relief you wanted from the Governor, from the grace of the Governor. You have three people left. Only one had even applied at the time when the case was in the District Court, I think, and it feels like -- rather than going through this procedural or standing hurdle that we spent all of our time on, they could all apply. They could all get a ruling from the Governor, and then if they don't like the Governor's ruling, that maybe you have a substantive constitutional challenge then.

MR. SHERMAN: Well, with respect, we strongly disagree, Your Honor. We think that there is a clear First Amendment violation here because --

JUDGE READLER: Well, you don't disagree with what I'm saying. I mean, you disagree with the procedure I laid out, which just, to me, seems

cleaner. You can do whatever you want obviously, but it seems to me there's a fairly clean route for doing this.

MR. SHERMAN: Well, that would only address the three individual plaintiffs who are left, and they have a facial challenge for the clear First Amendment violation because of the lack of rules or criteria in this(Indiscernible).

JUDGE READLER: Well, you only have three -- my point is you only have three plaintiff's left.

JUDGE WHITE: Counsel, if this is -- you want to differentiate this from a pardon, but if this is part of a pardon and your clients lose their voting rights because of the conviction and the way to get it restored if they are not in this automatic group is to apply for a pardon. And it's very clear that the law permits a limit on voting for convicted felons. So why is this not a pardon case as opposed to a First Amendment voting case?

MR. SHERMAN: Well, they don't need to obtain -- thank you, Your Honor. They don't need to obtain a pardon in order to regain the right to vote in Kentucky. What they need is voting rights restoration, which is just one of the effects of the pardon. Indeed, here, it's a partial, partial pardon

because normally the application includes the right to hold office, but all that's at issue in this case is arbitrary restoration of the right to vote.

Now, the Kentucky law -- and we don't challenge this -- can disenfranchise all of these people permanently, but it has created an exception to allow -- selectively allow people to regain the right to vote. Nothing turns on the state labels that state law assigns to this issue, right. They could call it a pardon or a partial pardon, clemency or not. Forty states in the country are dealing with this exact issue, voting rights restoration outside of the clemency procedure. There's nothing inherent about voting rights restoration that makes it part of a pardon or part of clemency.

JUDGE WHITE: Okay.

JUDGE BOGGS: Counsel, am I right --

JUDGE WHITE: (Indiscernible) -- I'm sorry. I was just -- go ahead. Go ahead.

JUDGE BOGGS: I just wanted to be clear that your people, the two that applied, they've applied, but there has been no ruling. So in a sense, you can't always complain about what the Governor denied because he can just let it sit, which is what's happening now; is that correct?

MR. SHERMAN: That's correct, Judge Boggs. Thank you for noting that because it is also the fact that we have a second claim on the lack of reasonable definite time limits, which is considered a species of unbridled discretion. And after you submit this application, the Governor could hold the application indefinitely. And indeed Rob Langdon's petition for restoration has been pending for over a year; I think even it's close to two years. So there's no requirement that it be decided by any time.

And that is exactly why this case is in sync with City of Lakewood. The same concerns and principles that obtained in that case, the risk of viewpoint discrimination due to the lack of rules and criteria, as well as the risk of unreviewability, effective unreviewability because it's submitted into a black box, and there's no way to challenge it through an as-applied challenge at a later date.

I see that my time has elapsed. So --

JUDGE WHITE: Well, I'm sorry. You're saying there's no way to challenge it if it just sits there, and there's no action?

MR. SHERMAN: Your Honor, under City of Lakewood, I'm referring also to the lack of an ability to challenge it as applied because there are

no standards. There are no rules or criteria. So --

JUDGE WHITE: Well, but, I mean, one can certainly imagine permitting a case where there is viewpoint discrimination in the application, right. I mean, if a governor only permits registered Democrats and not registered Republicans, then I would think that that would be a different case.

MR. SHERMAN: But because it's completely within the Governor's unfettered discretion, then it's totally subjective and there's no requirement for him to -- Governor Bashear to record his reasoning for granting or denying applications, there's no effective way to know what's happening in this black box system. So it is effectively unreviewable, and there's no way to challenge it as applied down the line.

There are a number of quotes from City of Lakewood dealing with this. Without standards to fetter the licenser's discretion, the difficulties of proof and the case-by-case nature of as-applied challenges render the licenser's action in large measure effectively unreviewable. So that's what I was speaking to, Your Honor.

JUDGE WHITE: All right. Thank you.

MR. SHERMAN: Thank you, Your Honor.

JUDGE READLER: Any other questions from the panel?

JUDGE BOGGS: No. I'm good.

JUDGE READLER: All right. You'll have your rebuttal time.

MR. SHERMAN: Thank you.

JUDGE READLER: Mr. Payne?

MR. PAYNE: Thank you, Your Honor.

Taylor Payne, Chief Deputy General Counsel on behalf of the Governor and may it please the Court.

It's clear from the District Court's order that the ruling was on standing as opposed to reaching the merits. Where I think the plaintiffs are wrong is that -- and it's suggesting that the District Court sort of comingled a standings and merits ruling -- is that ultimately the same reasons for finding that the plaintiffs lack standing in this case are also applicable to the merits had the Court reached that -- had the Court reached the merits of this decision.

But to begin, just to provide a little background to the Court on the pardon power in Kentucky, like many other states, convicted felons lose their right to vote under Section 145 of the

Kentucky Constitution. Such disenfranchisement has been sanctioned by the United States Supreme Court as being allowed under the Fourteenth Amendment, but also, like in many other states, Kentucky allows the Governor to issue a pardon that may nullify part of that punishment of being convicted of a felony, one of those punishments being losing your right to vote. So ultimately --

JUDGE READLER: Why hasn't the Governor done this? I mean, this one application has been waiting -- and I thought it was maybe even longer than what your friend on the other side said -- but one of these applications has been sitting there for quite a long time.

MR. PAYNE: Well, I believe the plaintiff suggested that one of the applications had been pending with the Governor's Office for about a year.

JUDGE READLER: Or two. I thought it was longer than a year. I mean, one was just-- maybe not. But --

MR. PAYNE: There may have been an application submitted to prior governors, Your Honor, but I'm not sure how long each of these -- the two plaintiffs that have applied have potentially been pending.

JUDGE READLER: Okay. Well, that's kind of wild to me because this is like what the -- the case is all about these three people. Only two of them applied, and you don't know when the two applied? All right. Let's assume it's two years. And let's assume, your friend on the other side, it's two years. You can't challenge that; I take it. Why has the Governor sat on one of these applications for two years?

MR. PAYNE: Well, I don't think it's a matter of necessarily sitting on the application and not taking any action. I mean, the ultimate --

JUDGE READLER: I mean, why has there not been -- let me rephrase. Why has there not been a final determination on whether to grant the partial pardon or not?

MR. PAYNE: Well, I think ultimately that would be the Governor has not made up his mind yet whether to grant it or deny it. So --

JUDGE READLER: Well, the Governor took like a month to grant clemency to like a whole bunch of people, and it's taken him two years to consider this one application?

MR. PAYNE: Well, Your Honor, we have ultimately thousands of applications that are

submitted to us. We --

JUDGE READLER: Well, do they always take two years?

MR. PAYNE: I don't think they always take two years. I think it's a very --

JUDGE READLER: It just feels like you guys could make this -- it just feels like you could make this case to some degree go away by either granting or denying the pardon. If you grant it, then I think your friend on the other side would be quite happy with that, and at least one or two of these individuals who applied would be able to vote. If you deny it, then maybe they have a separate challenge about the basis for the denial. But partly due to your own inaction, we're sort of stuck in this middle ground, where there's been an application, a lawsuit, no decision.

MR. PAYNE: Right. I understand that, Your Honor. What I would say though is, you know, when the Governor initially restored over 140,000 former convicted felons -- or convicted felons' right to vote, you know, that -- the District Court originally held that is what -- that did moot this case.

Now, this Court reversed that, essentially saying that EO didn't apply to these plaintiffs

because ultimately it didn't -- what it didn't act as was a denial for these plaintiffs. But what's sort of ironic or I think challenging for the plaintiffs here is that is to their benefit that the Governor retains their right to continually consider their pardons. I mean, one --

JUDGE READLER: Well, it's not much of a benefit if you never act on it. I mean, it just --

MR. PAYNE: Well --

JUDGE READLER: -- it seems like -- I just couldn't understand why you've taken this long. It would make the case either go away or crystalize, and it's almost -- I mean, are you like -- are you like wanting us to rule rather than you doing -- I mean, this is really a -- this is really a direction to the Governor. This is the Governor's power. It's a state matter. It almost feels like you're dragging your feet so we'll rule one way or the other, but you could make the case go away or, at least most of the case go away.

MR. PAYNE: Not at all, Your Honor. And you know, and I think, ultimately, that's just never been a consideration of this office is to go ahead and rule on these three so that this case would go away.

JUDGE READLER: Well, I mean, you're the

Governor's legal counsel. I think usually legal -- at least in Ohio, the legal counsel are the one who considers the pardons. So I just -- it's just a surprising fact to me, but I'll let you move on.

MR. PAYNE: Well, thank you, Your Honor.

I think, you know, just to conclude that point, I do think in many ways the Governor's original action establishing executive order of his parameters for automatic restoration -- I know this Court disagreed that it mooted that case, but ultimately what it did was the Governor made a decision on that point as to what his criteria was going to be. If it would have been a denial to these plaintiffs, I do think this case would have been moot. And I think this Court would have agreed with the District Court at that time.

But again it remains to the plaintiffs' benefit that the Governor can consider their application in one period of time and rather than saying it's a flat-out denial and I will never consider your pardon again, that he's saying I'm not granting it now when I'm granting these others, but I retain the power to reconsider this in the future should your conditions change, should you become a more worthy applicant to this office for the use of

that pardon power.

Again, back to the standing issue in this case --

JUDGE WHITE: Are there any criterion for deciding which of those people who don't get it automatically are worthy?

MR. PAYNE: No, Your Honor. Under Kentucky law, that is left to each governor who holds the office to ultimately subjectively determine what -- who they think is worthy --

JUDGE WHITE: Oh.

MR. PAYNE: -- of that --

JUDGE WHITE: Yeah. I'm just curious.

MR. PAYNE: -- clemency.

JUDGE WHITE: Does the Governor claim there are criteria?

MR. PAYNE: No. But this Governor did establish criteria early in his term that applied to the convicted -- disenfranchised, convicted felons.

JUDGE WHITE: Well, when you say he established that, are you talking about the order that says when you can automatically be restored?

MR. PAYNE: Yes. It was an executive order early in the --

JUDGE WHITE: Okay.

MR. PAYNE: -- first few days of the administration.

JUDGE WHITE: So I wasn't asking about that. I mean, like you referred to a candidate as not worthy now but maybe worthy in the future. Is there any internal definition of worthy?

MR. PAYNE: No, Your Honor. And, Your Honor, I think that's something that, for each governor in any state, they would consider. So they potentially have criteria of what they're looking for in an applicant that they think warrants the use of this extraordinary power.

JUDGE WHITE: Okay.

MR. PAYNE: And for an applicant who, you know, someone that it's -- this is just a hypothetical example here, but whether that's hours of community service logged or something to that effect, an applicant, you know, two years in has a much better chance of demonstrating that community service than if it was required to be decided within a month or a certain time frame of the governor receiving that application.

And applicants are welcome to routinely update this office as to --

JUDGE WHITE: So how do we know --

MR. PAYNE: -- their worthiness.

JUDGE WHITE: -- let's say -- would you agree that if the Governor were granting these limited pardons on an impermissible basis, that would be unconstitutional?

MR. PAYNE: Not necessarily, Your Honor, but I would concede that Justices of the Supreme Court have recognized -- I don't believe a majority has ever said this -- that the use of the pardon power to -- could in some ways be in violation of the Equal Protection Clause.

But again that's not the case here. There's been no allegation that that's ever been used in Kentucky to infringe on anyone's First Amendment rights, let alone their Equal Protection rights. But I do think --

JUDGE WHITE: So how would --

MR. PAYNE: -- there are --

JUDGE WHITE: -- how would one go about finding out if that's the case or establishing that that's the case if it is the case?

MR. PAYNE: Well, I think what a plaintiff could do is look at a governor's entire history of pardons. Obviously, they would have to engage in discovery and attempt to learn about what the

motivations were and the intent of the pardons. It would be a difficult case, Your Honor, but the Supreme Court has, I think, in some ways suggested the pardon power, after its use, could be challenged under those terms.

I think, you know, in another situation, certainly the pardon power, to the extent it was used to grant political favors or something like that, there could be potentially the criminal system, I think, could be involved in providing a check on the Governor's power there.

JUDGE WHITE: Well --

MR. PAYNE: What the (indiscernible) would be --

JUDGE WHITE: How do you respond to the black box argument?

MR. PAYNE: Well, you know, I mean, that is -- the Supreme Court has essentially said that the types of procedural processes that the plaintiffs are asking here -- certainly, they said this in the Equal Protection claim -- there is no right to a timeliness on the decision, and there is no right to impose outside procedural protections on these applications once they are received.

The Supreme Court has held essentially a

governor never has to act on a pardon -- on a pardon application, and largely, that is because, especially with the right to vote, these convicted felons have lost that right. They no longer have an interest in their right to vote. This Court and the Supreme Court have said once you are constitutionally disenfranchised from the exercise of that vote, this Court -- that there is no fundamental right left to assert by the plaintiffs.

And I would just briefly -- I believe the time has stopped on my computer. So I don't know how much time I have left. It's started --

JUDGE READLER: I think it stopped here -- I think it's stopped for both sides. So we're just being very generous today.

MR. PAYNE: Oh, okay. Thank you, Your Honor.

You know, I would just briefly in closing like to address the licensing cases that the plaintiff has admitted, conceded, that would require this Court to adopt that reasoning. As the District Court correctly held, they're wholly different animals that we're discussing here. The District Court essentially looked at it in just what is a license and what is a pardon. A license is obviously

granting permission to someone to exercise a right that they already have, whereas a pardon is a retroactive application nullifying a punishment.

But here again, as I've said before, the plaintiffs have lost any fundamental or constitutional right that may exist under the First Amendment or under the Equal Protection Clause -- I understand these are only First Amendment claims -- but they've lost any constitutional or fundamental right to assert. Therefore, there is no -- there is no process of the Governor licensing them to exercise those rights. They are gone.

But the bigger problem with the comparison to the licensing cases it those hinge completely on the ordinance being challenged being a prior restraint on the expression of the individual seeking the license and the threat, the risk that those seeking the license will self-censor their own speech going forward.

So in the City of Lakewood case, it was an annual permit in order to allow media outlets to publish their newspapers and put them in certain news racks around the city. The Court held that that hypothetical risk of having a license denied was enough of an actual injury to allow the plaintiffs

standing to assert a facial challenge in that case because of the prior restraint's risk of self-censorship.

So ultimately, what they're saying is the mayor of the city, the city council, could monitor the expression of a newspaper, ultimately decide they didn't like a negative article written about the council or the mayor, and then deny them the ability to put that in news racks throughout the city, deny them a license to do that.

The risk there is that the media outlet then will not run the critical story on the mayor or the local government in hopes that that won't deter the city or the mayor from granting their right to publish in the future.

But none of those issues are present in the case of a pardon. Here, the pardon power is not what is the prior restraint. The prior restraint, if anything, if it is a restraint on the free expression of speech, is their convicted felony. It's the Kentucky Constitution that deprives them of their right to vote the moment they become convicted felons. Again, that power has been upheld time and time again by the Supreme Court as constitutional.

But again the self-censorship is not even

here. Plaintiffs have lost their right to vote. They can't self-censor their right to vote while their pardon is pending before the Governor. So none of the same issues of why the Supreme Court allows a facial challenge to these licensing schemes exists in the context of the use of the pardon power.

So again, because of that, the District Court ultimately found the plaintiffs' lacked standing. Those arguments would also be applicable to the merits should the Court reach that decision.

If there are no other questions, Your Honors, we will wrap up.

JUDGE READLER: Any questions from the panel?

JUDGE WHITE: No. Thank you.

JUDGE READLER: Okay. Thank you, Mr. Payne.

Mr. Sherman, you have three minutes, depending on whether we stop the clock or not, perhaps more.

MR. SHERMAN: Thank you, Your Honor.

Well, this Court has heard it directly from Governor Bashear's counsel. That's as clear an unfettered discretion violation as this Court is likely to ever see. A person submits an application to engage in political expression once again, and the

Governor will decide whether they are "worthy." There are no rules, no criteria, admittedly, and there is no specific content whatsoever to that determination. Just one single official with sole and exclusive authority to determine whether that person is worthy or not.

JUDGE BOGGS: (Indiscernible), counsel? I mean, you know, we have 500 years of history about clemency and pardon powers on things that are, frankly, more important than voting. Voting is very important, but being left in prison -- you know, think about, you know, the famous case of Debs, the socialist candidate for president, who stayed in prison because Woodrow Wilson didn't like him. And when Harding came in, although he had his problems, he was perfectly happy to let Debs out with no criteria. I mean, isn't -- what you really have is a complete attack on the history of the pardon power?

MR. SHERMAN: We think not, Your Honor, but we're not talking about physical liberty here. We're talking about a First Amendment --

JUDGE BOGGS: But I'm saying --

MR. SHERMAN: -- protected right.

JUDGE BOGGS: -- isn't that -- isn't that even worse? Think about Debs, a candidate

(indiscernible), who's right to be out campaigning is in the sole discretion of the people that may be his opponents.

MR. SHERMAN: We think not, Your Honor. The First Amendment, as enjoyed at the Supreme Court, the highest protection. That's the reason that the First Amendment unfettered discretion doctrine operates as sort of a vaccination or an inoculation against viewpoint discrimination, and unlike with the Fourteenth Amendment, where you need to prove that discrimination has already occurred, here, you can bring a facial challenge.

I think a number of the questions today have suggested implicitly that our clients are only able to bring as-applied challenges but that's not so under Forsyth County and many of these other cases, City of Lakewood, a facial challenge is available. Forsyth County, for its part, says facial attacks on the discretion granted to decision maker are not dependent on the facts surrounding any particular permit decision. The success of that facial challenge rests not on whether the administrator had said --

JUDGE READLER: But this is a First Amendment -- this is a case of chill under the First

Amendment, right. It's a First Amendment case?

MR. SHERMAN: Correct, Your Honor. Right.

JUDGE READLER: Okay. Yeah. So I mean, the whole ball of wax is whether this is actually a First Amendment question that you're raising.

So suppose, I mean, we were thinking about other possibilities. Once you're a felon, you're disenfranchised of other rights. One, say, is jury service. I mean, if we think voting is -- if we think voting is expressive, why isn't serving on a jury also expressive in some ways? And that means that you could -- we could also have a facial challenge to the prohibition on serving on juries. And I don't know what the other ramifications are of being a felon, but this feels like a bit of a slippery slope.

MR. SHERMAN: With respect, we disagree, Your Honor. There's no precedent whatsoever suggesting that serving on a jury in any way implicates the First Amendment, where there is decades and decades, 85 years here going back, at least for voting, going back to Williams v. Rhodes in 1968 suggesting -- saying that voters have expressive First Amendment interest in casting their ballots.

I'd note also going back to the political

expression question, in the aggregate, voting is communicative. It speaks. Even if it's a secret ballot, those voters communicate by the people they vote for, the candidates they vote for, the parties they vote for, and also the causes they vote for through ballot initiatives. I do want to --

JUDGE READLER: I think your time is up, but does anyone else have any questions?

Okay. If you have one last point you want to make, go ahead.

MR. SHERMAN: I did want to just really quickly address the purported functional differences. Voting rights restoration is what the District Court should have been comparing to licensing, not pardons as a whole. Pardons are not at issue here. We're not attacking the pardon power. We're simply trying to constrain voting rights restoration, which is being dealt with arbitrarily, and the three purported differences that this is a one-time act of clemency. It's not. There could be repeating counters if voting rights restoration is denied one or more times. Revocability, there's no authority in the First Amendment law that revocability is an indispensable feature for licensing and, three, this notion of retrospective effect, right. Voting rights

has no retrospective effect. It's all prospective. You can't get back the elections you missed. You can only have license to vote in the future.

JUDGE READLER: Great. Thank you.

Unless there's other questions, we've been generous with our time. Thank you to both of you for your arguments, and we will take the case under consideration.

(END OF AUDIO RECORDING)

CERTIFICATE OF TRANSCRIPTIONIST

I certify that the foregoing is a true and accurate transcript of the digital recording provided to me in this matter.

I do further certify that I am neither a relative, nor employee, nor attorney of any of the parties to this action, and that I am not financially interested in the action.

Julie Thompson, CET-1036