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.

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INTRODUCTION

Defendant-Appellee Governor Andrew Beshear's brief errs in the exact same way the district court erred. It discusses the merits of Plaintiffs' First Amendment claims, finds no violation of the unfettered discretion doctrine, and then backtracks to deem this finding a jurisdictional determination. Doc. 17 at Page ID# 9–13. This violates *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89–90 (1998). Notwithstanding Defendant's adoption of the district court's error, Plaintiffs address each of Defendant's arguments about the First Amendment doctrine at issue as arguments on the merits.

ARGUMENT

I. Defendant's arguments directly contradict U.S. Supreme Court and Sixth Circuit precedents on facial First Amendment unfettered discretion challenges.

Defendant's brief consistently runs afoul of binding precedent. Defendant confuses the First Amendment unfettered discretion doctrine with Fourteenth Amendment equal protection law, attempts to erase the line between facial and as-applied challenges, and simply ignores any opinion that forecloses his arguments.

As the U.S. Supreme Court has made clear, the First Amendment unfettered discretion doctrine affords significantly more robust protection than the Fourteenth Amendment's Equal Protection Clause. This doctrine is not medicine for an ill patient, the way Fourteenth Amendment discrimination law is, but rather a

vaccination inoculating First Amendment-protected conduct against disease. *Compare Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 130–33 (1992) (striking down local government's arbitrary permit application process on its face without any proof of actual discrimination), *with Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 264–65 (1977) (requiring proof of actual, intentional discrimination in equal protection case challenging local government's denial of rezoning application). The Supreme Court has shown zero tolerance for even the risk of discriminatory or arbitrary treatment in the First Amendment context, whereas discrimination claims under the Fourteenth Amendment require a showing that discrimination has already occurred.

Defendant seeks to blur the line between facial and as-applied challenges and make the former play by the latter's rules. But the Supreme Court has underscored what is and what is not required for a facial unfettered discretion challenge. In their opening brief, Plaintiffs quoted this excerpt from the decision in *Forsyth County*:

> Facial attacks on the discretion granted a decisionmaker are not dependent on the facts surrounding any particular permit decision. . . . [T]he success of a facial challenge on the grounds that an ordinance delegates overly broad discretion to the decisionmaker rests not on whether the administrator *has* exercised his discretion in a content-based manner, but whether there is anything in the ordinance *preventing him from doing so*.

505 U.S. at 133 n.10 (emphasis added). But because this passage precludes Defendant's central argument, Defendant ignores it. Instead, Defendant asserts that

"[t]he problem is Plaintiffs do not allege they have suffered discriminatory or arbitrary treatment. The mere risk of discriminatory or arbitrary treatment is not an actual injury to establish standing to sue." Doc. 17 at Page ID# 9. This directly contradicts *Forsyth County* and the entire line of Supreme Court precedents governing facial challenges invoking this well-established, longstanding First Amendment doctrine.[1]

This Court has strictly adhered to the Supreme Court's instructions on facial First Amendment unfettered discretion challenges and rejected Defendant's argument that Plaintiffs must "allege they have suffered discriminatory or arbitrary treatment." *Id*. In *Miller v. City of Cincinnati*, this Court reiterated that "a plaintiff may bring facial challenges to statutes granting such discretion 'even if the discretion and power are never actually abused.'" 622 F.3d 524, 532 (6th Cir. 2010) (quoting *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757 (1988)). And in *Prime Media, Inc. v. City of Brentwood*, this Court put it even more plainly: "[A] licensing provision coupled with unbridled discretion itself amounts to an actual injury." 485 F.3d 343, 351 (6th Cir. 2007) (internal quotation marks and citations omitted). That is Kentucky's arbitrary voting rights restoration system in a nutshell: "a licensing provision" to selectively bestow voting rights "coupled with unbridled

[1] The doctrine was first articulated in *Lovell v. City of Griffin*, 303 U.S. 444, 451 (1938).

discretion," which Defendant admittedly possesses. Doc. 17 at Page ID# 6 (". . . because it provides unfettered discretion to the governor to restore civil rights . . ."). Nevertheless, once again, because this Court's statements of this First Amendment doctrine conflict with Defendant's argument, Defendant ignores them.

Defendant cites a different line from *Prime Media* for the unremarkable and undisputed proposition that "the requirement of an actual injury is not obviated by . . . [a] prior restraint claim." 485 F.3d at 351. But Plaintiffs have never argued that First Amendment unfettered discretion claims are exempt from standing requirements. Rather, Plaintiffs have noted that, under binding Supreme Court and Sixth Circuit precedents, conferring unfettered discretion on a government official to grant or deny licenses to engage in First Amendment-protected expression or expressive conduct *per se* creates an "actual injury" for Article III standing. Indeed, *Prime Media* says just that in the balance of the same paragraph Defendants cite:

> Prime Media claims that the ordinance imposes a permitting requirement that gives local officials impermissibly broad discretion in determining what types of signs can be posted. . . Such a licensing requirement "constitutes a prior restraint and may result in censorship." *Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 757, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988). Thus, the prior restraint of a licensing provision coupled with unbridled discretion itself amounts to an actual injury. *See G & V Lounge*, 23 F.3d at 1075 ("This prior restraint constitutes a concrete and particularized actual injury in fact.").

Id. This passage cannot be squared with Defendant's contention that Plaintiffs must allege they have submitted a restoration application and have been denied in a

discriminatory or arbitrary manner in order to assert a facial First Amendment unfettered discretion claim, so Defendant omits it.

Lakewood reaffirmed that a facial challenge can be asserted without first applying for a license:

> [O]ur cases have long held that when a licensing statute allegedly vests unbridled discretion in a government official over whether to permit or deny expressive activity, one who is subject to the law *may challenge it facially without the necessity of first applying for, and being denied, a license*.

486 U.S. at 755–56 (emphasis added). Unlike Defendant, the district court did not dispute or ignore the existence or authority of this principle. Opinion and Order, RE 68, Page ID# 846–47.[2] The court simply concluded that Plaintiffs could not benefit from that precedent because it believed Kentucky's restoration scheme did not operate as a licensing system.

Accordingly, Defendant's threshold argument is foreclosed by binding precedent.

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[2] Plaintiff Deric Lostutter has never applied for restoration. Plaintiffs' counsel recently learned that Plaintiff Bonifacio Aleman had in fact applied for restoration of his voting rights in December 2020. To date, Defendant has taken no action on Plaintiff Aleman's restoration application. The fact that Plaintiff Aleman submitted this application has no bearing on his standing to sue or the merits of this case, but nevertheless Plaintiffs' counsel are immediately disclosing this to correct the prior misstatement to this Court that Plaintiff Robert Langdon was the only plaintiff with a pending restoration application. As noted in Plaintiffs' opening brief, Plaintiff Aleman has an Indiana felony conviction that renders him ineligible for non-discretionary restoration under Executive Order 2019-003.

II. The scope of the term of art "prior restraint" has no effect on this case.

The term "prior restraint" has been defined variously and used inconsistently. Some cases define it narrowly as "administrative and judicial orders that block expressive activity before it can occur." *Polaris Amphitheater Concerts, Inc. v. City of Westerville*, 267 F.3d 503, 506 (6th Cir. 2001). Others include the statutes and ordinances, *i.e.* the licensing requirements themselves, in the definition, *Prime Media*, 485 F.3d at 351 ("[A] licensing requirement 'constitutes a prior restraint[.]'" (citation omitted)), even if there is no "licensing-scheme rejection" of a plaintiff's application. *Ostergren v. Frick*, 856 Fed. Appx. 562, 569 (6th Cir. 2021) (unpublished). Some passages conflate unfettered discretion with "prior restraint," contending a licensing system with the former necessarily creates the latter. *Lakewood*, 486 U.S. at 757 ("[A] licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint . . ."). Others differentiate the two concepts as separate powers and violations. *Id*. ("[T]he mere existence of the licensor's unfettered discretion, *coupled with the power of prior restraint* . . .") (emphasis added); *see also Alexander v. United States*, 509 U.S. 544, 553–54 (1993) (contrasting "prior restraints and subsequent punishments"); *Bourgeois v. Peters*, 387 F.3d 1303, 1316–17 (11th Cir. 2004) (granting relief for the plaintiffs on distinct unfettered discretion and "prior restraint" claims).

These terminological ambiguities do not matter here, because the law is clear that *facial* First Amendment unfettered discretion challenges can be asserted "without the necessity of first applying for, and being denied, a license." *Lakewood*, 486 U.S. at 755–56. Furthermore, the unfettered discretion doctrine sweeps broadly in per se invalidating any licensing scheme that vests officials with unfettered power to grant or deny licenses to engage in First Amendment-protected expression. Accordingly, either the term "prior restraint" is irrelevant and not the trigger for this constitutional rule, or the statutory licensing requirement functions as the "prior restraint." Doc. 16 at Page ID# 47–49 (collecting First Amendment cases articulating that functionality trumps formalism). If this term were deemed relevant, Kentucky's voting rights licensing system for people with felony convictions and the corresponding bar against unrestored, disenfranchised individuals registering to vote functionally impose a "prior restraint." KY. CONST. § 145; KY. REV. STAT. §§ 116.025, 119.025, 532.020(1)(a).

III. Defendant's attempt to narrow and distinguish the First Amendment unfettered discretion cases fails.

Defendant next argues that the unfettered discretion doctrine only applies when there is a risk of censorship or self-censorship. Doc. 17 at Page ID# 10–12. Defendant argues that this eighty-four-year-old line of First Amendment unfettered discretion cases can be distinguished. As Defendant contends, unlike in those cases, there is no threat of censorship or self-censorship here because the act of restoration

is "unassociated with Plaintiffs' prior expression." *Id*. at Page ID# 12. This is incorrect.

First, the goal animating the ban on arbitrary licensing systems governing First Amendment-protected activity is more broadly and more accurately described as precluding the risk of content-based *and speaker-based* viewpoint discrimination, not solely censorship per se of known or existing expression. The Supreme Court made this clear in *Lakewood* in writing that "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*." 486 U.S. at 759 (emphasis added). The Court does use the term "censorship" interchangeably with "discrimination," as in the following passage:

> [A] law or policy permitting communication in a certain manner for some but not for others raises the specter of content and viewpoint censorship. This danger is at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official.

Lakewood, 486 U.S. at 763. However, read in context, the unfettered discretion doctrine cases are not solely concerned with the risk of explicit censorship of existing, proposed expression, *i.e.* known content, but more broadly with the dual threat of discrimination against viewpoints and "disliked speakers" inherent in purely discretionary licensing systems. *Id*. at 759. In the context of First

Amendment-protected voting rights, that translates to the risk of discrimination against disfavored political expression at the ballot box and against the voters who express these disfavored viewpoints and preferences and associate themselves with disfavored parties and causes.

Kentuckians with felony convictions cannot vote until their right to do so is restored but they are nonetheless vulnerable to content-based or speaker-based viewpoint discrimination in a rights restoration scheme utterly devoid of objective rules, criteria, or any other guardrails. Because voting is First Amendment-protected expressive conduct, a licensing scheme devoid of any objective rules or criteria to constrain official discretion poses a severe risk of discrimination against disfavored voters, votes, causes, and parties. Plaintiffs' Fourth Amended Complaint alleged this connection between unfettered discretion and the risk of viewpoint discrimination, beginning in Paragraph 2:

> The decision whether to grant or deny a felon's restoration application rests with the Governor's unfettered discretion. Applicants may be granted or denied for any reason. The absence of objective, transparent legal rules or criteria for restoration opens the door to political, viewpoint, racial, religious, wealth, and any other type of discrimination.

Fourth Amended Complaint, RE 31, Page ID# 335. Paragraph 3 developed this argument further:

> An unbroken, 80-year-old, and well-settled line of Supreme Court precedent prohibits the arbitrary licensing of First Amendment-protected conduct. This is because the risk of viewpoint discrimination

> is highest when a government official's discretion to authorize or prohibit First Amendment-protected activity is entirely unconstrained by law. *Officials with unfettered authority to selectively permit felons to vote may grant or deny restoration applications on pretextual grounds while secretly basing their decision on information or speculation as to the applicant's political affiliation or views*, the applicant's race, faith, wealth, or other characteristics. This is why conditioning the enjoyment of a fundamental constitutional right on the exercise of unfettered official discretion and arbitrary decision-making violates the First Amendment to the United States Constitution.

Id. at Page ID# 335–36 (emphasis added). In Paragraph 43, Plaintiffs also alleged that "[a]bsent any legal constraints, rules, or criteria regulating the granting or denying of restoration of voting rights applications, the process is highly susceptible to arbitrary, biased, and/or discriminatory decision-making." *Id*. at Page ID# 353. Plaintiffs, therefore, did allege Kentucky's arbitrary voting rights restoration scheme has created an ongoing danger of discrimination against disfavored political viewpoints and the voters and groups who harbor or are suspected of harboring them.

Defendant relies upon *Phillips v. DeWine*, which concerned an action brought by death row inmates challenging laws requiring the sealing of documents during litigation and giving an Ohio official "'unfettered discretion' to permit the disclosure of the identities of lethal-injection participants." 841 F.3d 405, 415–16 (6th Cir. 2016). However, the district court dismissed these claims for lack of standing, and this Court affirmed, because there was simply no nexus with any expression or expressive conduct. *Id*. at 416–17. That is clearly not the case here. And no case limits the unfettered discretion doctrine to pure speech or the explicit "censorship"

of existing or known expression. The unbroken line of precedent over the previous eighty-plus years confirms that this rule is coextensive with the First Amendment's reach, applies broadly and extensively to every type of First Amendment-protected expression *or expressive conduct*, and is intended to prevent viewpoint discrimination. *Lakewood*, 486 U.S. at 769–72 (newsrack design and distribution); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150–51 (1969) (marches and demonstrations); *Staub v. City of Baxley*, 355 U.S. 313, 321–22 (1958) (union solicitation); *Kunz v. New York*, 340 U.S. 290, 293 (1951) (religious meeting); *Saia v. New York*, 334 U.S. 558, 560–62 (1948) (use of loudspeakers). Voting is indisputably expressive conduct; indeed, it is the apex of expressive conduct conveying a political viewpoint. Doc. 16 at Page ID# 33–35. Defendant does not present any argument to the contrary.

Furthermore, *Phillips* does not stand for the proposition that plaintiffs asserting a *facial* First Amendment unfettered discretion challenge must establish that the licensing scheme forced them to "alter[ ] or deter[ ]" "their speech or association." *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 602 F.3d 1175, 1183–84 (10th Cir. 2010).[3] Aside from the fact that *Brammer-Hoelter* is an out-of-circuit ruling, the proposition for which it is cited would directly contradict the U.S.

[3] This line appears in the parenthetical for a "see also" citation in *Phillips*, 841 F.3d at 416, *not* in the text of that opinion, as Defendant's quotation with an improper citation implies.

Supreme Court's precedents on facial unfettered discretion challenges, including *Forsyth County*'s instruction that "[f]acial attacks on the discretion granted a decisionmaker are not dependent on the facts surrounding any particular permit decision." 505 U.S. at 133 n.10. No Supreme Court or Sixth Circuit decision has ever held that a plaintiff bringing such a facial challenge must establish that their intended expression or expressive conduct was altered or deterred by the arbitrary licensing scheme.

Second, though Defendant flatly asserts that the act of voting rights restoration is "unassociated with Plaintiffs' prior expression," Doc. 17 at Page ID# 12, there are obviously myriad ways in which a system of completely arbitrary, unfettered power to restore voting rights threatens content-based and speaker-based viewpoint discrimination.[4] Notwithstanding that restoration applicants cannot vote, Defendant has ample means to learn, consider, and act upon information about a restoration applicant's political viewpoints or to make inferences or rely on assumptions as to their political leanings based on the available information. And in case there is any doubt as to whether the Governor, his predecessor and his successor engage, have engaged, or will engage, respectively, in such behind-the-scenes efforts, the constitutional test here hinges "not on whether the administrator has exercised his

[4] Plaintiffs need not allege and this Court need not anticipate all of these ways because unfettered discretion is per se prohibited by First Amendment doctrine.

discretion in a content-based manner, but whether there is anything in the ordinance preventing him from doing so." *Forsyth Cnty.*, 505 U.S. at 133 n.10.

Nothing in Kentucky law prevents the governor from taking all of the following into account in considering a restoration application and discriminating against disfavored votes and voters. Kentucky voters often register with a political party and vote in closed partisan primaries. KY. REV. STAT. § 116.055. The partisan affiliation of restoration applicants who registered to vote in Kentucky before their conviction is public information. KY. REV. STAT. §§ 116.095, 116.045. The applicant may be known to the governor or his staff as a supporter or donor or as a supporter of or donor to a political opponent or another political party. Unfettered discretion gives rise to all manner of possible viewpoint discrimination based on inferences, assumptions, or biases regarding the restoration applicant's name, address, previous registration information, race, ethnicity, religion, income, occupation, donation history, partisan primary voting history prior to disenfranchisement, affiliations and memberships, as well as publicly available statements, social media posts, or other writings. All of this data can be just a Google or government database search away. Just as in *Lakewood*, the governor does not know for certain how each restoration applicant will vote if restored "but can measure [the] probable content or viewpoint [of that political expression] by speech already uttered." 486 U.S. at 759 (citation omitted). The governor has limitless authority to consider anything from that

applicant's "prior expression" and grant or deny restoration based on whether the governor favors or disfavors that "prior expression" or anticipated future expression based on perceived indicia of that applicant's viewpoints.

In a similar constitutional challenge litigated in federal court in Florida, the record included extensive evidence of restoration applicants seeking to publicly align themselves with the perceived political and ideological views of the Executive Clemency Board ("ECB") in an attempt to steer the outcome on their application. *Hand v. Scott*, 17-cv-128, Doc. 102, Plaintiffs' Motion for Summary Judgment, at Page ID# 24–29 (N.D. Fla. Nov. 13, 2017). Such applicants stated that they had voted for the governor prior to their disenfranchisement and stated or signaled that they were ideologically aligned with the governor. *Id*. at 25–28. Such appeals were made to both Democratic and Republican governors. *Id*. Witnesses would also testify to the politics of the applicant, noting one applicant held "conservative views" and another was "very conservative." *Id*. at 27–28. The ECB restored these individuals' voting rights, sometimes over contrary staff recommendations. *Id*. The ECB held hearings, which are not a feature of Kentucky's restoration scheme, potentially or occasionally giving the members more visibility on the applicant and their politics. Nevertheless, like his predecessor Governor Bevin and his successors, Defendant and his staff have every opportunity to investigate and review information

on restoration applicants and learn or infer their political viewpoints and preferences. This purely discretionary system is just as vulnerable to viewpoint discrimination.

Lastly, Defendant also tries to make hay out of the notion that voting rights restoration is "a one-time act of clemency." Doc. 17 at Page ID# 12. This premise is dubious at best. For one, if the restoration application is denied one or more times, the licensing process will not be a one-time encounter. It also assumes that an individual will only face felony disenfranchisement once in their lifetime. But even accepting Defendant's premise for argument's sake, it is unclear why this should be relevant to a First Amendment unfettered discretion challenge. Defendant posits that "a pardon is not an ongoing licensing scheme that allows the Governor to consider Plaintiffs' prior expression" and therefore "carries no danger of self-censorship." *Id*. at Page ID# 12. But this explanation is belied by the numerous ways in which Defendant and his staff may and are able to review any information on a restoration applicant's viewpoints, make inferences about the same, and discriminate on these bases. Whether the licensing scheme is "ongoing" or a one-time grant, there is the ever-present risk of viewpoint discrimination when government officials are vested with unlimited power over licensing First Amendment-protected expressive conduct. Multiple or repeated encounters with such a licensing system are not a prerequisite for unfettered discretion claims, as Defendant suggests. *Id*. at Page ID# 11–12 (quoting *Lakewood*, 486 U.S. at 760–61). Given the widespread availability

of information on applicants' political viewpoints, *see infra* at 13–14, Kentucky's arbitrary vote licensing system is quite close to a system that "allow[s] a licensor to view the actual content of the speech to be licensed or permitted," *Lakewood*, 486 U.S. at 760, in this case, votes. At a minimum, Kentucky's arbitrary restoration system enables speaker-based viewpoint discrimination. Ultimately, even if some fraction of the governor's inferences about applicants and their political views proves inaccurate, the absence of anything in Kentucky law *preventing* such viewpoint discrimination violates the First Amendment.

Third, what Defendant ultimately takes issue with is the absence of allegations as to how the individual Plaintiffs *themselves* have been subject to discriminatory treatment, but that contention simply misunderstands *Forsyth County*, *Lakewood*, and other precedents. To assert a *facial* challenge to an arbitrary licensing scheme, Plaintiffs need not allege that they themselves have *personally* faced discriminatory treatment. *Forsyth Cnty.*, 505 U.S. at 133 n.10. Longstanding precedents have found that unfettered discretion in licensing First Amendment-protected expression *inexorably* creates a risk of viewpoint discrimination and accordingly ban such wholly arbitrary licensing systems on their face. *See, e.g.*, *Lakewood*, 486 U.S. at 759–64; *Saia*, 334 U.S. at 560–62; *see infra* at 11. An arbitrary voting rights restoration system devoid of any objective rules or criteria is completely vulnerable

to the same viewpoint discrimination that has long animated the First Amendment unfettered discretion doctrine.

As an example, in *Roach v. Stouffer*, the Eighth Circuit considered a *facial* First Amendment challenge to officials' "unbridled discretion" in administering a specialty license plate program. 560 F.3d 860, 869–70 (8th Cir. 2009). The Court wrote that "[i]f Choose Life can prevail on a facial challenge, it need not prove, or even allege, that the Joint Committee denied the specialty plates based on Choose Life's viewpoint." *Id*. at 869. If Defendant's reading of the precedent were correct, then Choose Life would have been required to prove that their application for a license plate with a pro-life message was denied for reasons of content-based or speaker-based viewpoint discrimination. But that is not the law; they did not bring an as-applied challenge.

In sum, the risk of discrimination against disfavored political viewpoints and the people who hold or are perceived to hold them justifies the application of the First Amendment unfettered discretion doctrine to the arbitrary licensing of the most significant form of politically expressive conduct—voting. Facial challenges under the unfettered discretion doctrine do not require allegations that the individual plaintiffs endured discriminatory treatment. It suffices that the arbitrary restoration scheme governs protected expression, is devoid of objective rules and criteria, and

thereby gives officials limitless opportunities to review and discriminate based upon information on applicants and their viewpoints.

IV. Defendant's remaining arguments fail as well.

A. Though presently disenfranchised as a matter of *state* law, Plaintiffs nevertheless retain their First Amendment rights to a non-arbitrary voting rights licensing or allocation system.

Defendant cites to *Johnson v. Bredesen*, 624 F.3d 742 (6th Cir. 2010), a constitutional challenge to the requirement that felons pay restitution and child support before regaining their right to vote, *id*. at 744–45, for the following statements: (1) "As convicted felons constitutionally stripped of their voting by virtue of their convictions, Plaintiffs possess no right to vote . . .", *id*. at 751; and (2) "Having lost their voting rights, Plaintiffs lacked any fundamental interest to assert." *Id*. at 746. Plaintiffs concededly have been stripped of their right to vote under state law and are not contesting the constitutionality of felon disenfranchisement, as authorized by the Supreme Court's construction of Section 2 of the Fourteenth Amendment. *Richardson v. Ramirez*, 418 U.S. 24, 53–56 (1974). But they retain the protection of federal constitutional rights, and a state re-enfranchisement scheme that arbitrarily restores or allocates the right to vote violates the First Amendment.

Defendant is using *Johnson* to insinuate that Kentuckians with felony convictions who are presently ineligible to vote under state law cannot claim a federal constitutional injury from arbitrary decision-making on their restoration

applications. Respectfully, that is contrary to the law and logic. For example, sixteen- and seventeen-year-olds and lawful permanent residents are also ineligible to vote under Kentucky law and that ineligibility—a categorical, uniform disenfranchisement—does not in and of itself violate the Constitution. However, if state or local government officials were vested with the arbitrary power to enfranchise individuals from these two groups, perhaps based upon their subjective evaluation of an essay written on American government, that would trigger and violate the First Amendment unfettered discretion doctrine. In the same way, disenfranchised felons can suffer federal constitutional injuries even though state law bars them from voting.

Furthermore, since the selective authorization to vote and threshold eligibility are at issue, the only people who can challenge this arbitrary licensing or allocation of voting rights are currently disenfranchised felons. If these injuries were not legally cognizable *because* a person is disenfranchised and has no current right to vote, no one could challenge the constitutionality of a felon voting rights restoration scheme—even for intentional, express racial, sex, or partisan discrimination[5]—and

[5] Imagine the governor announcing that voting rights will only be restored to those who were previously registered as Democrats or Republicans or even that voting rights restoration decisions would take into account prior party affiliation. Defendant would surely agree those schemes would cause a legally cognizable injury even though the unrestored felons are not presently able to vote. So too does a discretionary vote-licensing scheme cause an injury in fact and violate First

the Governor's arbitrary decision-making would be immune from judicial review. State officials could make voting rights restoration decisions based on height, attractiveness, or English literacy, without recourse to the courts.

The cases support Plaintiffs' position. The Supreme Court has twice rejected the argument that felon disenfranchisement laws need not comply with constitutional limitations. In *Ramirez* itself, the Supreme Court only addressed and rejected the first of the plaintiffs' two claims: (1) a facial challenge to California's felon disenfranchisement law that argued the state per se could not deny the vote to felons; and (2) a separate equal protection and due process claim which attacked the lack of uniform enforcement of that law. 418 U.S. at 33–34. After holding that Section 2 of the Fourteenth Amendment authorizes states to disenfranchise felons and thus rejecting the first claim, the Supreme Court remanded the second claim to the Supreme Court of California. *Id*. at 56. If Defendant's theory were correct, the Supreme Court would not have remanded the *Ramirez* plaintiffs' alternative equal protection claim for further adjudication.

Defendant's contention is also belied by the Supreme Court's decision in *Hunter v. Underwood*, which struck down the 1901 Alabama Constitution's felon disenfranchisement provision, finding intentional racial discrimination in violation

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Amendment precedents because it threatens arbitrary and discriminatory decision-making.

of the Equal Protection Clause. 471 U.S. 222, 231–33 (1985). The Supreme Court clarified that *Ramirez* did not hold that Section 2 of the Fourteenth Amendment precludes felons from challenging disenfranchisement laws when they violate constitutional limitations:

> Without again considering the implicit authorization of § 2 [of the Fourteenth Amendment] to deny the vote to citizens 'for participation in rebellion, or other crime,' *see Richardson v. Ramirez*, 418 U.S. 24 . . . (1974), we are confident that § 2 was not designed to permit the purposeful racial discrimination attending the enactment and operation of § 182 which otherwise violates § 1 of the Fourteenth Amendment. Nothing in our opinion in *Richardson v. Ramirez, supra*, suggests the contrary.

Id. at 233; *Hobson v. Pow*, 434 F. Supp. 362, 366–67 (N.D. Ala. 1977) (holding sex discrimination in felon disenfranchisement scheme violates equal protection). Accordingly, *Johnson*'s dicta does not mean that those disenfranchised by reason of a felony conviction can never suffer a federal constitutional injury.

There are additional reasons why *Johnson* does not bar Plaintiffs' action. Most basically, this Court did not have occasion to consider and decide whether selectively licensing or allocating threshold voting eligibility violates the First Amendment unfettered discretion doctrine, and its holdings are necessarily limited to the facts and claims presented in that appeal. *Satty v. Nashville Gas Co.*, 522 F.2d 850, 853 (6th Cir. 1975) ("[T]he precedential value of a decision should be limited to the four corners of the decisions' [*sic*] factual setting."), *aff'd in part on other grounds, vacated in part on other grounds, Nashville Gas Co. v. Satty*, 434 U.S. 136

(1977); *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 363 (2006) ("[W]e are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated.").

In considering Johnson's equal protection claim, the Sixth Circuit invoked the plaintiffs' current ineligibility to vote in order to apply rational basis review rather than strict scrutiny. *Johnson*, 624 F.3d at 746–50. The Court did not conclude that people with felony convictions lack *any* legally cognizable interest in voting but rather stated the plaintiffs "lack[ed] any *fundamental* interest." *Id*. at 746 (emphasis added). Otherwise, if the plaintiff had no legally cognizable interest *whatsoever*, there would have been no need to evaluate the state's claimed interests. *Id*. at 747. Additionally, Plaintiffs did not bring an equal protection challenge here, and the tiers of scrutiny have no application to a First Amendment unfettered discretion claim.

As to the Twenty-Fourth Amendment claim, this Court held that the ban on poll taxes only applies to individuals who are currently eligible to vote. *Johnson*, 624 F.3d at 751. This narrow ruling is unremarkable given the Twenty-Fourth Amendment provides: "The right of citizens of the United States to vote [in any federal election] shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax." U.S. Const. amend. XXIV (emphasis added). But this holding is inapplicable to the First Amendment unfettered discretion doctrine, which is only ever raised by an individual who does *not* possess

the right or permission under state law to engage in a certain First Amendment-protected activity. The two claims are completely different. Plaintiffs here do not allege that a current right to vote under state law has been burdened or taxed in some manner, but rather challenge Defendant's system for arbitrarily, selectively bestowing threshold voting eligibility, a situation not considered in *Johnson*. Plaintiffs clearly do not contend that they *currently* have a right to vote under Kentucky law or any per se right to restoration. Rather, Plaintiffs seek a constitutional, non-arbitrary restoration system, which may or may not result in the restoration of their own voting rights but would free them from the arbitrary system to which they are currently subject. Nothing in *Johnson* conflicts with Plaintiffs' claims or forecloses the remedies sought.

Finally, *Johnson* also noted that legal financial obligations incurred by convicted felons—as well as misdemeanants, who remain eligible to vote—are objective requirements that "exist independently of" felon disenfranchisement and re-enfranchisement. 624 F.3d at 751. By contrast, the target of this lawsuit, arbitrary voting rights restoration, *directly and solely* concerns the right to vote and has no existence independent from voting.

Accordingly, *Johnson* has no effect on this case.

B. The additional cases Defendant cites did not consider a First Amendment unfettered discretion claim and do not preclude Plaintiffs' constitutional injuries and claims.

As noted in Plaintiffs' opening brief, Doc. 16 at Page ID# 44, the First Amendment cases cited by Defendant on page 13 were all lawsuits challenging felony disenfranchisement as a per se violation of the First Amendment, Doc. 17 at Page ID# 13, *not*, as here, a facial First Amendment unfettered discretion challenge to arbitrary re-enfranchisement. The difference is everything. If Plaintiffs prevail, Kentucky law would continue to disenfranchise people with felony convictions; it just would no longer be permissible to arbitrarily re-enfranchise them.

Additionally, Plaintiffs' opening brief already addressed why *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998), and *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458 (1981), have no impact on this appeal. Doc. 16 at Page ID# 55–56. Both are due process challenges that manifestly do not stand for the proposition that clemency systems are immune from constitutional scrutiny.[6] Kentucky law's placement of voting rights restoration within the Governor's "clemency" powers is purely arbitrary and semantic, and the First Amendment's protection follows the right to vote wherever the law locates authority over it.

[6] Defendant is also off-base in arguing that "if the Fourteenth Amendment does not require specific procedures to govern the discretion afforded in the pardon process, Plaintiffs cannot argue for similar procedures under the First Amendment." Doc. 17 at Page ID# 15. The First Amendment unfettered discretion doctrine goes well beyond the protection afforded by the Fourteenth Amendment. *See infra* at 1–2.

Moreover, Plaintiffs are not arguing they are *personally entitled* to restoration—nominally a "partial pardon" under Kentucky law—but rather entitled to a non-arbitrary restoration system consistent with the First Amendment. Therefore, Defendant's line of argument here is entirely misplaced.

C. A ruling in Plaintiffs' favor will remain restricted to voting rights restoration and have no effect on prosecutorial discretion.

Defendant asserts that any ruling in Plaintiffs' favor will impact prosecutorial discretion because criminal prosecution precedes disenfranchisement for a felony conviction. Prosecutorial discretion is readily distinguishable and will be unaffected by this Court's decision in this matter.

First, felony disenfranchisement is the opposite of licensing or granting permission to vote. The First Amendment unfettered discretion doctrine prohibits arbitrary re-enfranchisement and arbitrary enfranchisement because both involve the granting or denying of licenses to vote. But it would offer no support to a plaintiff alleging arbitrary disenfranchisement, which is not implicated by this case and could only be challenged on equal protection grounds. Doc. 16 at Page ID# 37 (collecting cases).

Second, the connection between a prosecutor's charging decisions and disenfranchisement is highly attenuated. Deciding to prosecute a criminal defendant does not deny the defendant permission to engage in protected political expression. It is merely a decision to initiate criminal legal proceedings. Those proceedings are

not certain to result in a conviction and disenfranchisement, and the decision whether to convict ultimately lies with a jury or a defendant if the defendant chooses to plead guilty. Moreover, prosecutors lack discretion to seek a defendant's disenfranchisement; under Kentucky law, a defendant is automatically disenfranchised upon a felony conviction. KY. CONST. § 145(1). By contrast, for individuals with federal, out-of-state and certain Kentucky felony convictions, the Governor has sole and unfettered authority over restoration of their right to vote.

Third, unlike Defendant's discretion to restore the right to vote, "prosecutorial discretion is not 'unfettered.'" *Loza v. Mitchell*, 766 F.3d 466, 495 (6th Cir. 2014). A prosecutor must have probable cause to sustain an indictment for a felony offense and must prove the case beyond a reasonable doubt. *United States v. Howell*, 17 F.4th 673, 687 (6th Cir. 2021); *United States v. Ashrafkhan*, 964 F.3d 574, 578 (6th Cir. 2020). Additionally, prosecutors who abuse their discretion face potential civil liability. *Hartman v. Moore,* 547 U.S. 250, 256 (2006); *Bickerstaff v. Lucarelli*, 830 F.3d 388, 399 (6th Cir. 2016).

For these reasons, Defendant's claim about the effects of this case on prosecutorial discretion is erroneous.

D. Defendant's silences speak volumes.

Defendant conspicuously fails to respond to a number of Plaintiffs' arguments. Plaintiffs noted that Defendant's Executive Order 2019-003 expressly

distinguishes "restorations of civil rights" from "full pardon[s]." Doc. 16 at Page ID# 52–53. Defendant ignores this point entirely and instead repeatedly and misleadingly refers to voting rights restoration as "a pardon" and quotes the district court's recounting of the effects of a *full* pardon. Doc. 17 at Page ID# 7–10, 12, 17–18. But Governor Beshear's EO 2019-003 articulated that voting rights restoration bears none of the other features of pardons. Doc. 16 at Page ID# 52–53. Defendant therefore fails to reconcile this provision in his 2019 executive order with his representations to this Court and fails to rebut Plaintiffs' argument that restoration functions as a licensing system.

Additionally, Defendant also conspicuously fails to mention that EO 2019-003 excluded individuals convicted of federal and out-of-state offenses, including those identical to Kentucky offenses for which restoration is immediate upon sentence completion. Doc. 17 at Page ID# 7. By only enumerating a series of the gravest Kentucky offenses for which non-discretionary restoration is barred, Defendant seeks to deflect attention from the much broader categories of people with felony convictions denied non-discretionary restoration under EO 2019-003.

Finally, Defendant has no response to the question Plaintiffs posed as to how there could possibly be a legal rationale justifying treating arbitrary enfranchisement and arbitrary disenfranchisement differently from arbitrary re-enfranchisement. Doc. 16 at Page ID# 23. Defendant remains silent as to arbitrary enfranchisement

and arbitrary disenfranchisement, which are indisputably unconstitutional. With respect to the First Amendment doctrine at issue, there is no material difference between arbitrary enfranchisement and arbitrary re-enfranchisement. Relying upon the prefix "re" would be an arbitrary justification for an arbitrary scheme.

CONCLUSION

For all the foregoing reasons, this Court should reverse the district court's dismissal of this action, reverse the denial of Plaintiffs' motion for summary judgment, and direct the district court to enter judgment in Plaintiffs' favor.

DATED: January 18, 2023

Respectfully submitted,

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RULE 32(g) CERTIFICATE

I hereby certify that this document, including all headings, footnotes and quotations, but excluding the Disclosure Statement, Table of Contents, Table of Authorities, and any certificates of counsel, contains 6,489 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 6,500 words permitted under Fed. R. App. P. 32(a)(7)(B)(ii).

Dated: January 18, 2023

/s/ Jon Sherman
Jon Sherman
One of the Attorneys for Appellants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 18, 2023, an electronic copy of the Reply Brief of Plaintiffs-Appellants 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
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