UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION AT LONDON
CIVIL ACTION NO. 6:18-CV-277-KKC

DERIC JAMES LOSTUTTER, *et al.* **PLAINTIFFS,**

v.

MATTHEW G. BEVIN, in his official capacity as GOVERNOR OF THE COMMONWEALTH OF KENTUCKY **DEFENDANT.**

*** *** *** ***

MEMORANDUM IN SUPPORT OF THE GOVERNOR'S MOTION FOR SUMMARY JUDGMENT

For more than two centuries, the Kentucky Constitution has vested the Governor with the discretion to restore or not restore the ability to vote for persons convicted of certain crimes. This lawsuit alleges that this age-old scheme has violated the First Amendment to the United States Constitution all along. According to the Plaintiffs, it is facially unconstitutional for the Governor merely to exercise discretion in deciding who has their ability to vote restored. The First Amendment, the Plaintiffs argue, requires the Governor to establish criteria to determine which felons can vote and to put time limits on his restoration decisions.

This theory has no basis in the First Amendment. It is well established that states may constitutionally remove a felon's right to vote, as Kentucky has done. And once that right has been taken away, the person no longer has a constitutional entitlement to vote. This point is settled in the Sixth Circuit, and it forecloses the

Plaintiffs' claims. Without a constitutional right to vote, it follows that the Governor's decision to restore or not restore a felon's ability to vote does not implicate a constitutional right.

If this lawsuit is nevertheless successful, similar discretionary restoration regimes in at least 12 other states also will fall at least in part. The President's pardon power also will be constitutionally suspect because the President exercises discretion to determine who receives a pardon and, as a result, who has his or her ability to vote restored. Similar problems will arise for many other schemes that vest government officials with discretion over restoration decisions, like restoring felons' ability to serve on a jury or to possess a gun. All of these regimes share the same characteristic challenged here—the placing of discretion in a government official or body.

For the reasons explained below, the Court should reject the Plaintiffs' attempt to upend all of these processes and should uphold Kentucky's longstanding felon-reenfranchisement regime.

BACKGROUND

Deric James Lostutter originally brought this action *pro se*. (R. Doc. 1). After some machinations, in which Lostutter filed two amended complaints (R. Docs. 10, 12) and the Court denied repeated motions for temporary injunctive relief (R. Docs. 7, 13), the Commonwealth moved to dismiss Lostutter's claims (R. Doc. 18). Counsel then entered appearances for Lostutter and filed a third amended complaint (R. Doc. 28) and ultimately a fourth amended complaint (R. Doc. 31).

Lostutter's fourth amended complaint (the "Complaint"), which is joined by several other Plaintiffs, focuses on Kentucky's scheme for felon disenfranchisement and restoration, which disenfranchises felons upon conviction and allows the Governor to decide whether to restore a felon's ability to vote. Ky. Const. § 145(1). With good reason, the Complaint does not dispute Kentucky's "authority to disenfranchise felons upon conviction." (R. Doc. 31 ¶ 1). Nor does the Complaint plausibly claim that the Governor has used his restoration authority in a discriminatory or arbitrary manner. Instead, the Plaintiffs claim that the Governor's discretion over voting restoration creates a "risk" of discriminatory or arbitrary treatment. (*Id.* ¶¶ 3, 45, 53). This mere "risk," the Plaintiffs claim, suffices to render Kentucky's voting-restoration scheme facially unconstitutional.

The Plaintiffs allege that two aspects of Kentucky's reenfranchisement process create this "risk." First, the Plaintiffs argue that the Governor's exercise of discretion in determining whether to restore a felon's ability to vote renders Kentucky's scheme facially unconstitutional. (*Id.* ¶ 44). For this proposition, the Plaintiffs do not rely on case law about voting, but instead on case law about government officials issuing licenses or permits. (*Id.* ¶ 43). Second, the Plaintiffs allege that Kentucky's voting-restoration scheme lacks "reasonable, definite time limits" in violation of the First Amendment. (*Id.* ¶ 54). For this argument, the Plaintiffs similarly rely on case law that concerns an "administrative licensing scheme." (*Id.* ¶ 53).

The Complaint's prayer for relief is not shy. The Plaintiffs not only ask that Kentucky's voting-restoration scheme be declared unconstitutional in all respects,

but that the Court order the Governor to "replace the current [process] . . . with a non-arbitrary voting rights restoration scheme which restores the right to vote to felons based upon specific, neutral, objective, and uniform rules and/or criteria." (*Id.* at Prayer for Relief (b), (d)). The Plaintiffs provide no description about what these "rules and/or criteria" look like.

The Governor moved to dismiss the Complaint under Rule 12(b)(1) and 12(b)(6). (R. Doc. 32). The Court granted this motion in part, dismissing one of the Plaintiffs. (R. Doc. 35). The Court otherwise denied the Governor's motion to dismiss in light of the "significance" of the issues raised and because "the remaining issues of this case should be resolved on summary judgment." (*Id.*).

This motion for summary judgment follows. (*See* R. Doc. 43).

ARGUMENT

Since 1792, the Kentucky Constitution has taken away the right to vote from persons convicted of certain crimes. Ky. Const. art. VIII, § 2 (1792); Ky. Const. art. VI, § 4 (1799); Ky. Const. art. VIII, § 4 (1850). At present, the Constitution takes away the right to vote from any person who has been "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." Ky. Const. § 145(1) (1891). The Constitution, however, allows a felon's ability to vote to be "restored . . . by executive pardon" by the Governor. *Id.* A similar grant of discretion to the Governor was part of Kentucky's earlier Constitutions, as well. Ky. Const. art. II, § 10 (1792); Ky. Const. art. III, § 11 (1799); Ky. Const. art. III, § 10 (1850). The restoration provision in

Kentucky's current Constitution is "self-executing"—*i.e.*, no implementing legislation is necessary—and grants the Governor the power to issue pardons "to effect such restorations." *Arnett v. Stumbo*, 153 S.W.2d 889, 890 (Ky. 1941).

Although the Governor's power to restore a felon's ability to vote is "self-executing," the General Assembly has adopted a "simplified process" for those seeking to have their ability to vote restored. *See generally* KRS 196.045. More specifically, under the statute, the Department of Corrections is to create a monthly list of eligible offenders who have requested a restoration of their ability to vote, to conduct an investigation to ensure that "all restitution has been paid and that there are no outstanding warrants, charges, or indictments," and, under certain circumstances, to provide notice to the applicable Commonwealth's attorney(s) of the felon's restoration application. KRS 196.045(1)(b)-(d). On a monthly basis, the Department of Corrections also is to inform the Governor of "eligible felony offenders" who have requested a restoration of their ability to vote. KRS 196.045(1)(e). The statute defines "eligible felony offenders" as those (i) who have reached the "maximum expiration of his or her sentence" or "received final discharge from the Parole Board"; (ii) who do not have any pending warrants, charges, or indictments; and (iii) who have paid full restitution. KRS 196.045(2). *But see* KRS 196.045(4).

Kentucky is not alone in prohibiting felons from voting. All but two states take away a felon's ability to vote.[1] The process by which these 48 states restore felons'

[1] Unless otherwise noted, the Governor's description of other states' practices is taken from the *amicus curiae* brief filed by Missouri and seven other states in the recent challenge to Florida's previous voting-restoration process. *See Hand v. Scott*, Case No. 18-11388, Brief of the State of Missouri & 7 Other States as *Amici Curiae*

ability to vote and the circumstances in which those restorations occur differ considerably. Some states restore a felon's ability to vote upon release from prison; others restore the ability to vote upon completion of probation or parole; and still others, like Kentucky, leave some or all restoration decisions to the discretion of a government official, usually the governor, a board, or a court.

The Plaintiffs try to cast Kentucky's reenfranchisement scheme as an outlier. (R. Doc. 31 ¶ 1). Kentucky, the Plaintiffs claim, is "one of just three states that deny the right to vote to *all* convicted felons until they successfully petition for the restoration of their civil rights." (*Id.*). But the Plaintiffs fail to mention that many states, similar to Kentucky, give a government official or body discretion over *at least some* voting-restoration decisions. More specifically, in addition to Kentucky, the laws of at least 12 other states vest a government official with the discretion to decide some or all requests for a restoration of the ability to vote.[2] Thus, if the Plaintiffs' current challenge to executive discretion succeeds, those 12 other states necessarily have an unconstitutional voting-restoration scheme, in whole or in part. Also, under the Plaintiffs' constitutional paradigm that forbids giving government officials discretion over felon reenfranchisement, the President's pardon power in Article II Section 2 of

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Supporting Reversal, filed June 1, 2018 (11th Cir.). A copy of that brief is in the record at R. Doc. 32-3.

[2] Ala. Code § 15-22-36, 15-22-36.1; Ariz. Rev. Stat. Ann. § 13-908; Del. Const. art. V, § 2; Fla. Const. art. VI, § 4(b); Iowa Code § 914.2; Md. Code Ann., Election Law § 3-102(b)(3); Miss. Const. art. 5, § 124, Miss. Const. art. 12, §§ 241, 253; Neb. Rev. Stat. § 32-313(1); N.J. Stat. § 19:4-1(6)-(7); Tenn. Code Ann. § 40-29-204; Va. Const. art. II, § 1; Wyo. Stat. Ann. § 7-13-105. This list also technically should include Washington's restoration regime, which gives sentencing courts some discretion to revoke the ability to vote after it has been provisionally restored. Wash. Rev. Code § 29A.08.520(2)(a).

the federal Constitution, which similarly grants ultimate discretion to the President, also is constitutionally suspect.[3] The same fate may well follow for other discretionary powers given to government officials, like restoring a felon's ability to serve on a jury (*e.g.*, KRS 29A.080(2)(e)) and restoring a felon's ability to possess a gun (*e.g.*, KRS 527.040(1)(a)).

With good reason, the Plaintiffs' First Amendment theory has never been ultimately successful in court. *See Hand v. Scott*, 888 F.3d 1206, 1212 (11th Cir. 2018)[4] ("[E]very First Amendment challenge to a discretionary vote-restoration regime we've found has been summarily rebuffed."); *Harness v. Hosemann*, Civil Action No. 3:17-cv-791, R. Doc. 91 at 23 (S.D. Miss. Aug. 7, 2019) (rejecting a First Amendment claim), *appeal filed* No. 19-60632 (5th Cir.)[5]; *Kronlund v. Honstein*, 327 F. Supp. 71, 73 (N.D. Ga. 1971) (same); *Farrakhan v. Locke*, 987 F. Supp. 1304, 1314 (E.D. Wash. 1997) (same); *Howard v. Gilmore*, 205 F.3d 1333, 2000 WL 203984, at *1

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[3] In the recent Florida litigation, the plaintiffs, who raised essentially the same First Amendment claims pressed here, more or less conceded before the Eleventh Circuit that their constitutional challenge, if sustained, would alter the President's pardon power. *See Hand v. Scott*, Case No. 18-11388, Oral Argument at 28:28-35:39, July 25, 2018 (11th Cir.), *available at* http://www.ca11.uscourts.gov/oral-argument-recordings?title=18-11388&field_oar_case_name_value=&field_oral_argument_date_value%5Bvalue%5D%5Byear%5D=&field_oral_argument_date_value%5Bvalue%5D%5Bmonth%5D= (last visited Nov. 25, 2019).

[4] As of the filing of this brief, the Eleventh Circuit has been asked to vacate its decision in *Hand*, which stayed a district court's judgment invalidating Florida's previous felon-reenfranchisement scheme, on the basis that Florida's new regime, passed by the voters in November 2018, moots the appeal. Even if this occurs, the Eleventh Circuit's thorough stay decision in *Hand* can still be relied upon as persuasive authority. *See, e.g.*, *Gutter v. E.I. DuPont de Nemours & Co.*, 2001 WL 36086589, at *6 (S.D. Fla. Mar. 27, 2001); *SmartData, S.A. v. Amazon.com, Inc.*, 2015 WL 6955000, at *2 (N.D. Cal. Nov. 10, 2015).

[5] A copy of this decision is attached as Exhibit 1.

(4th Cir. 2000) (unpublished) (per curiam) (same); *Johnson v. Bush*, 214 F. Supp. 2d 1333, 1338 (S.D. Fla. 2002) (same), *aff'd sub nom. Johnson v. Governor of Fla.*, 405 F.3d 1214 (11th Cir. 2005) (en banc); *Hayden v. Pataki*, 2004 WL 1335921, at *6 (S.D.N.Y. June 14, 2004) (same).

For the reasons that follow, the Court should reach the same conclusion as these other courts and grant summary judgment to the Governor.

I. Kentucky's reenfranchisement scheme is consistent with the First Amendment.

The Governor is entitled to summary judgment on the Plaintiffs' claims. Under Rule 56, summary judgment should be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Because the Plaintiffs have brought a facial challenge to Kentucky's felon-reenfranchisement scheme—*i.e.*, they allege that it is unconstitutional in all circumstances—this matter raises only legal questions. *See Kansas Judicial Review v. Stout*, 519 F.3d 1107, 1118 (10th Cir. 2008) ("[A] first amendment challenge to the facial validity of a statute is a strictly legal question; it does not involve the application of the statute in a specific factual setting." (citation omitted)).

The Plaintiffs have brought two claims under the First Amendment. First, they allege that Kentucky's scheme for voting-rights restoration "contain[s] no constraints on and no rules or criteria for the Governor's discretionary power to grant or deny applications for the restoration of voting rights." (R. Doc. 31 ¶ 46). In their view, merely allowing the Governor to possess what they label as "unfettered official

discretion" violates the First Amendment. (*Id.*). Second, they claim that Kentucky's process for voting-rights restoration lacks "reasonable, definite time limits in processing applications for restoration of voting rights and issuing final decisions." (*Id.* ¶ 54). This, they say, is a "scheme of unfettered official discretion" that violates the First Amendment. (*Id.* ¶ 57). Neither of these claims has any basis in the First Amendment.

A. Discretionary reenfranchisement schemes do not violate the First Amendment.

Granting discretion to a government official to decide whether to restore a felon's ability to vote—as a dozen or so states do to some extent—does not violate the First Amendment. The Plaintiffs, it should be noted, do not plausibly allege that the Governor has exercised his restoration power in a discriminatory or arbitrary fashion.[6] Instead, they claim that it is facially unconstitutional to grant the Governor discretion over felon reenfranchisement because that discretion creates a "risk" of discriminatory or arbitrary treatment. (R. Doc. 31 ¶¶ 3, 45, 53, 56). In other words, according to the Plaintiffs, a mere "risk" of discriminatory or arbitrary treatment, no matter how small the risk, makes Kentucky's restoration regime unconstitutional in all circumstances, regardless of whether the Governor actually acts in a

[6] If the Plaintiffs had a good-faith basis to make such a claim, at least some of that claim could be brought under the Fourteenth Amendment. *See Hunter v. Underwood*, 471 U.S. 222, 227-29 (1985) (allowing an equal-protection challenge to a disenfranchisement regime that had both the purpose and the effect of invidious discrimination); *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 289 (1998) (O'Connor, J., concurring in part and concurring in the judgment) ("Judicial intervention might, for example, be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process.").

discriminatory or arbitrary fashion, which the Plaintiffs do not even plausibly allege has happened here. This claim is as legally baseless as it sounds.

By way of background, Section 2 of the Fourteenth Amendment expressly permits a state to take away a felon's ability to vote. It states in full:

> Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a state, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, *except for participation in rebellion, or other crime*, the basis of representation therein shall be reduced in the proportion which the number of male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

U.S. Const. Amend XIV, § 2 (emphasis added). Interpreting this provision, the Supreme Court has concluded that the "exclusion of felons from the vote has an affirmative sanction in s[ection] 2 of the Fourteenth Amendment." *Richardson v. Ramirez*, 418 U.S. 23, 54 (1974). In other words, states may constitutionally "exclude from the franchise convicted felons who have completed their sentences and paroles." *Id.* at 56.

One of the first notable challenges to felon reenfranchisement arose in Florida. The plaintiff there, much like the Plaintiffs here, claimed that the discretionary nature of a voting-rights restoration process was unconstitutional. *See Beacham v. Braterman*, 300 F. Supp. 182, 183 (S.D. Fla. 1969) ("Plaintiff seeks to enjoin the Governor of Florida from continuing to grant and deny petitions for pardons in a purely discretionary manner without resort to specific standards . . . ."). The

Beacham plaintiff based this claim on the Fourteenth Amendment's Equal Protection Clause and Due Process Clause as opposed to the First Amendment. *Id.* The district court rejected the plaintiff's Fourteenth Amendment claim because "[t]he discretionary power to pardon has long been recognized as the peculiar right of the executive branch of government." *Id.* at 184 (collecting cases). The court continued: "Where the people of a state have conferred unlimited pardon power upon the executive branch of their government, the exercise of that power should not be subject to judicial intervention." *Id.*

The *Beacham* plaintiff challenged this holding in a direct appeal to the United States Supreme Court, asking the Court to determine whether Florida's discretionary pardon regime "violate[s] the Constitution in that there are no ascertainable standards governing the recovery of the fundamental right to vote." Jurisdictional Statement, *Beacham v. Braterman*, 1969 WL 136703, at *3 (July 26, 1969). The Supreme Court, however, summarily affirmed the district court's decision. 396 U.S. 12 (1969).

A summary affirmance by the Supreme Court, like that in *Beacham*, affirms the district court's judgment, which necessarily includes the reasoning that was "essential to sustain that judgment." *See Ill. St. Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 182 (1979). All such aspects of a summary affirmance therefore are binding on this Court. *See United States v. Landham*, 251 F.3d 1072, 1086 (6th Cir. 2001). The summary affirmance in *Beacham* means that it does not violate the Fourteenth Amendment's Due Process Clause or Equal Protection Clause to grant or

deny a felon's request for reenfranchisement "even though the Governor and selected cabinet officers did so in the absence of any articulable standards." *Hand*, 888 F.3d at 1208. More generally, the Supreme Court's summary affirmance in *Beacham* "establishes the broad discretion of the executive to carry out a standardless clemency regime." *Id.*

Likely because of *Beacham*, the Plaintiffs opted not to bring a Fourteenth Amendment challenge to Kentucky's discretionary voting-restoration regime. Instead, they brought the same claim rejected in *Beacham*, but this time they brought it under the First Amendment. However, for the reasons that follow, the Plaintiffs' attempt to repackage a failed claim under a different constitutional provision does not change the result from *Beacham*.

First, because the Plaintiffs' right to vote has been constitutionally removed, the Plaintiffs have no First Amendment right to assert. This is the most straightforward way to reject the Plaintiffs' claims. As discussed above, Section 2 of the Fourteenth Amendment contains an "affirmative sanction" allowing states to take away a felon's right to vote. *Richardson*, 418 U.S. at 54. There is no corresponding requirement, constitutional or otherwise, that Kentucky must immediately or even eventually restore the Plaintiffs' ability to vote after they complete their sentences or paroles. *See Harvey v. Brewer*, 605 F.3d 1067, 1079 (9th Cir. 2010) (O'Connor, J.) ("[O]nce a felon is properly disenfranchised a state is at liberty to keep him in that status indefinitely and never revisit that determination."). In fact, *Richardson* specifically holds that a state may "exclude from the franchise convicted felons who

have *completed their sentences and paroles*." 418 U.S. at 56 (emphasis added). The "affirmative sanction" recognized in *Richardson* would be meaningless if the First Amendment is construed to implicitly withdraw the authority that Section 2 of the Fourteenth Amendment expressly grants. In short, having properly lost their right to vote, the Plaintiffs no longer have any constitutional entitlement to exercise the franchise.

This is settled law in the Sixth Circuit.[7] In *Johnson v. Bredesen*, 624 F.3d 742 (6th Cir. 2010), the plaintiffs challenged Tennessee's reenfranchisement scheme, which conditioned voting-rights restoration on full payment of restitution and child support. *Id.* at 744. The *Johnson* plaintiffs brought both an equal-protection challenge and one based on the Twenty-Fourth Amendment's ban on poll taxes. *Id.* at 746-51. In rejecting those claims, the Sixth Circuit squarely held that felons who have lost the right to vote no longer possess a constitutionally protected interest in voting. The Court explained: "Having lost their voting rights, Plaintiffs lack *any fundamental interest to assert*." *Id.* at 746 (emphasis added). Because the *Johnson* plaintiffs lacked a fundamental interest, *Johnson* described restoring a felon's ability to vote as a mere "statutory benefit"—*i.e.*, an interest not of federal constitutional dimension. *Id.* at 749. The Sixth Circuit further held that "Tennessee's re-enfranchisement conditions . . . merely relate to the restoration of a civil right to which Plaintiffs *have*

[7] Even the lone district court to invalidate a discretionary-restoration regime all but acknowledged that its holding was contrary to Sixth Circuit precedent. *Hand v. Scott*, 285 F. Supp. 3d 1289, 1295 n.5 (N.D. Fla. 2018), *judgment stayed by* 888 F.3d 1206 (11th Cir. 2018) ("This Court, however, acknowledges non-binding authority from some circuit courts stating that former felons do not have a fundamental right to vote." (citing, e.g., *Johnson v. Bredesen*, 624 F.3d 742 (6th Cir. 2010)).

no legal claim . . . ." *Id.* at 748-49 (emphasis added). Because, under *Johnson*, felons have no "fundamental interest" in and no "legal claim" to having their ability to vote restored, they have no First Amendment right to assert. As *Johnson* put it, "the re-enfranchisement law at issue does not deny or abridge any rights; it only restores them. As convicted felons constitutionally stripped of their voting by virtue of their convictions, *Plaintiffs possess no right to vote . . . .*" *Id.* at 751 (emphasis added); *see also Wesley v. Collins*, 791 F.2d 1255, 1261 (6th Cir. 1986) ("It is undisputed that a state may constitutionally disenfranchise convicted felons, and that the right of felons to vote is not fundamental." (internal citation omitted)).

That holding is dispositive of the Plaintiffs' claims. The Plaintiffs have acknowledged that their First Amendment claims naturally depend upon them having a First Amendment interest to assert. After all, how can it violate the First Amendment for the Governor to exercise discretion if the Plaintiffs have no constitutional right to vote? The Plaintiffs therefore plead that "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." (R. Doc. 31 ¶ 3 (emphasis added)). But this allegation of a "fundamental constitutional right" is irreconcilable with *Johnson*, which squarely holds that those in the Plaintiffs' shoes "lack any fundamental interest to assert." *Johnson*, 624 F.3d at 746. Because the Plaintiffs lack any constitutional right in having their ability to vote restored—as *Johnson* put it, they have no "legal claim" and "no right to vote"—it cannot violate the First Amendment for the Governor to

exercise discretion over an ability to which they no longer have a constitutional entitlement. More to the point, *Johnson*'s holding that the Plaintiffs have "no right to vote" forecloses their claim that the Governor's failure to use his restoration power in a certain way infringes their First Amendment rights.

Second, the Plaintiffs' First Amendment theory fails because discretionary-clemency regimes, like Kentucky's, have long been a constitutional way for a government official to exercise "executive grace" as he or she sees fit. In *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458 (1981), for example, an inmate challenged the parole board's failure "to provide him with a written statement of reasons for denying his commutation" as a violation of the Fourteenth Amendment's Due Process Clause. *Id.* at 461. The Supreme Court rejected this claim, holding that "pardon and commutation decisions have not traditionally been the business of courts; as such, they are rarely, if ever, appropriate subjects for judicial review." *Id.* at 464. An inmate's right to clemency, the Court emphasized, is "simply a unilateral hope" that rests on "purely subjective evaluations and on predictions of future behavior by those entrusted with the decision." *See id.* at 464-65. A plurality of the Supreme Court later explained that "the heart of executive clemency" is "to grant clemency as a matter of grace, thus allowing the executive to consider a wide range of factors not comprehended by earlier judicial proceedings and sentencing determinations." *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 280-81 (1998) (plurality). The plurality therefore affirmed that "[u]nder *any* analysis, the

Governor's executive discretion need not be fettered by the types of procedural protections sought by respondent."[8] *Id.* at 282 (emphasis added).

Dumschat and *Woodard* decisively reject the Plaintiffs' assertion that a hypothetical "risk" of discriminatory or arbitrary treatment through the exercise of discretion raises constitutional problems. The same hypothetical "risk" on which the Plaintiffs base their claims obviously also was present in *Dumschat* and *Woodard*. These cases nevertheless hold that executive discretion is an intrinsic and constitutional aspect of executive clemency. In short, the Plaintiffs' objections to executive discretion cannot coexist with *Dumschat* and *Woodard*.

The Plaintiffs want the Court to ignore *Dumschat* and *Woodard* because they dealt with the Due Process Clause of the Fourteenth Amendment, not the First Amendment. But if the Due Process Clause—*the Constitution's guarantee of process*—does not require specific procedures for executive clemency, it logically follows that the discretionary nature of clemency cannot be attacked on process grounds under the First Amendment.[9] The Eleventh Circuit agrees: "If a state pardon regime need not be hemmed in by procedural safeguards, it cannot be attacked for its purely discretionary nature." *See Hand*, 888 F.3d at 1209; *see also Smith v. Snow*, 722 F.2d

[8] Justice O'Connor's *Woodard* concurrence, which three other justices joined, agreed with this conclusion, except in the most egregious of cases (which the Plaintiffs have not alleged occurred here). 523 U.S. at 289 (O'Connor, J., concurring in part and concurring in the judgment).

[9] Nor can the Plaintiffs distinguish *Dumschat* and *Woodard* on the basis that they did not concern voting. *Dumschat* and *Woodard* involved an inmate's ability to receive a reprieve from the death penalty or a life sentence. If executive discretion did not raise constitutional problems in questions of that magnitude, surely executive discretion is constitutional when it comes to whether or not to restore a felon's ability to vote.

630, 632 (11th Cir. 1983) ("If one has no right to procedures, the purpose of which is to prevent arbitrariness and curb discretion, then one clearly has no right to challenge the fact that the decision is discretionary."). The fact that Kentucky's voting-restoration scheme fully complies with the Due Process Clause, as *Dumschat* and *Woodard* establish, forecloses the Plaintiffs' back-door process challenge through the First Amendment.[10]

Third, the fact that discretionary-pardon regimes do not violate the Fourteenth Amendment, as established by *Beacham*, necessarily means that discretionary-pardon regimes also do not violate the First Amendment. As the Eleventh Circuit held, "[i]t's . . . pretty clear that, in a reenfranchisement case, the specific language of the Fourteenth Amendment controls over the First Amendment's more general terms." *Id.* at 1212 (collecting cases for the proposition that a specific constitutional provision governs over a general one). The Fourteenth Amendment is the part of the Constitution that speaks directly to taking away felons' voting rights, and the Supreme Court has held that discretionary-restoration regimes, like that in *Beacham* and in Kentucky, do not violate the Fourteenth Amendment. It would introduce inconsistencies into the Constitution to conclude that the general terms of the First Amendment impliedly trump the specific terms of the Fourteenth Amendment. As the Eleventh Circuit put it:

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[10] The Plaintiffs also have tried to distinguish *Dumschat* and *Woodard* on the basis that Kentucky's decision to incorporate voting restoration into the clemency process is a "superficial and semantic distinction." (R. Doc. 33 at 19). However, Kentucky's Constitution has long provided that voting restoration is done by executive pardon. Ky. Const. § 145(1) (1891) ("[P]ersons hereby excluded may be restored to their civil rights by executive pardon.").

> As we see it, a constitutional challenge arising under the First Amendment but asserting the same basic claim—that standardless clemency regimes create an unacceptable risk of discriminatory determinations—is unlikely to yield a different result. In other words, the appellees likely cannot succeed by bringing the same challenge using only a different label or nomenclature.

Id. In short, the Court should not interpret the First Amendment to prohibit something that the Fourteenth Amendment—the provision that speaks directly to this issue—allows.

Fourth, the Court should hold, as the Fourth and Eleventh Circuits have done, that "the First Amendment provides no greater protection for voting rights than is otherwise found in the Fourteenth Amendment." *Id.* at 1211 (collecting cases); *Irby v. Va. St. Bd. of Elections*, 889 F.2d 1352, 1359 (4th Cir. 1989) ("In voting rights cases, the protections of the First and Thirteenth Amendments do not in any event extend beyond those more directly, and perhaps only, provided by the [F]ourteenth and [F]ifteenth [A]endments." (citation and internal quotation marks omitted)). Under this rule, *Beacham*'s rejection of a Fourteenth Amendment challenge to a discretionary-restoration regime necessarily defeats the Plaintiffs' First Amendment claims. *See Hand*, 888 F.3d at 1211 ("Since a standardless reenfranchisement scheme, without more, does not state an Equal Protection claim based on invidious discrimination, it likely follows that a standardless regime, without more, cannot establish a First Amendment violation based on viewpoint discrimination.").

The Plaintiffs' arguments to the contrary rest entirely on case law that they interpret to forbid giving a government official "unfettered discretion to issue or deny licenses or permits." (R. Doc. 31 ¶ 43 (collecting cases)). For example, the Plaintiffs

cite *Staub v. City of Baxley*, 355 U.S. 313, 322 (1958), for the proposition that an "ordinance which . . . makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms." Relying on licensing and permitting case law like this, the Plaintiffs allege that Kentucky's voting-restoration process "constitutes an unconstitutional arbitrary licensing scheme regulating the exercise of the right to vote." (R. Doc. 31 ¶ 44). The Plaintiffs' argument, by their admission, requires analogizing the restoration of the ability to vote to receiving a license or permit. However, *none* of the Plaintiffs' favored cases concerns voting. Nor have the Plaintiffs identified any case law that treats voting-rights restoration as receiving a license or permit. Moreover, the *only* case of which the Governor is aware that has ever extended this licensing and permitting case law to voting-rights restoration was promptly stayed by an appellate court. *See Hand*, 285 F. Supp. 3d at 1299-1304, *judgment stayed by* 888 F.3d 1206 (11th Cir. 2018). In short, a felon's interest in having his or her ability to vote restored is nothing like one's interest in receiving a license or a permit. They are two different things entirely.

The Plaintiffs' comparison to licensing and permitting case law also runs headlong into binding precedent. To apply the Plaintiffs' favored cases here would require overruling *Dumschat* and *Woodard*, which, as discussed above, affirmed the constitutionality of granting discretion to a government official in the context of

executive clemency. *Dumschat* and *Woodard* saw no problem with a mere "risk" of discriminatory or arbitrary action. In fact, these cases affirm that executive discretion is *the essence* of executive clemency. *Dumschat*, 452 U.S. at 464 (holding that a clemency decision rests on "purely subjective evaluations and on predictions of future behavior by those entrusted with the decision"); *Woodard*, 523 U.S. at 276 (plurality) ("[C]lemency and pardon powers are committed, as is our tradition, to the authority of the executive."). These cases confirm that the exercise of discretion in the context of executive clemency is altogether different from a situation involving a license or a permit.

The Plaintiffs' licensing and permitting cases also are distinguishable because they dealt with First Amendment-protected conduct, whereas here the Plaintiffs no longer have a constitutional entitlement in voting. Take, for example, *Forsyth County v. National Movement*, 505 U.S. 123 (1992)—one of the Plaintiffs' favored cases. There, a government official exercised discretion to decide how much an individual or group had to pay to hold a parade or to otherwise assemble—*i.e.*, the official exercised discretion over whether someone could engage in *constitutionally protected conduct*. *Id.* at 124. The Court characterized this as a "prior restraint on speech" in "the archetype of a traditional public forum." *Id.* at 130; *see also City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 757 (1988) ("At the root of this long line of precedent is the time-tested knowledge that in the area of free expression a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship."). Thus, *Forsyth County*

concerned a situation where constitutional rights were very much at stake—the ability to hold a parade. Here, by contrast, no constitutional interest is implicated because the Plaintiffs no longer have a constitutional entitlement in the franchise. As the Sixth Circuit held in *Johnson*, "[a]s convicted felons constitutionally stripped of their voting rights by virtue of their convictions, Plaintiffs *possess no right to vote* . . . ." *Johnson*, 624 F.3d at 751 (emphasis added). Thus, this case differs from *Forsyth County* and other cases like it because the interest at stake here is not constitutional. This simple, but key difference distinguishes the Plaintiffs' favored licensing and permitting cases.

B. Reenfranchisement schemes without time limits do not violate the First Amendment.

In Count II of their Complaint, the Plaintiffs allege that Kentucky's reenfranchisement process violates the First Amendment for the further reason that the Governor need not act on a restoration application within a defined time period. (R. Doc. 31 ¶ 56). The Court can reject this argument for the four reasons listed above. If a discretionary reenfranchisement regime comports with the First Amendment, so does a regime without time limits. Discretion over a restoration application necessarily includes the ability to act or not act on that application when the Governor sees fit.

The Court should reject Count II for the further reason that Section 2 of the Fourteenth Amendment expressly authorizes states to *permanently* withhold a felon's ability to vote. The fact that a felon has completed his or her sentence or parole does not require a state to restore that felon's ability to vote. *See Richardson*, 418 U.S. at

56 (holding that Section 2 of the Fourteenth Amendment allows a state to "exclude from the franchise convicted felons who have completed their sentences and paroles"). If a felon who has completed his or her sentence and parole does not have a constitutional right to vote, neither does the felon have a constitutional right to a defined period in which the Governor must make a decision about whether to restore his or her ability to vote. As Justice O'Connor wrote for the Ninth Circuit, "once a felon is properly disenfranchised a state is at liberty to keep him in that status indefinitely and never revisit that determination." *Harvey*, 605 F.3d at 1079. In sum, because Section 2 of the Fourteenth Amendment gives states an "affirmative sanction" to permanently deny the vote to convicted felons, the First Amendment cannot be construed to mean that the lack of a time limit on the Governor's restoration decision is facially unconstitutional.

CONCLUSION

The Court should grant summary judgment to the Governor because Kentucky's longstanding process for felon reenfranchisement is fully consistent with the First Amendment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On November 25, 2019, I electronically filed this Memorandum in Support of the Governor's Motion for Summary Judgment through the ECF system, which will send a notice of electronic filing to the following:

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