UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION AT LONDON

STEPHON DONÉ HARBIN, ROBERT CALVIN LANGDON, RICHARD LEROY PETRO, JR., BONIFACIO R. ALEMAN, MARGARET STERNE, BRYAN LAMAR COMER, KRISTIN R. HARGIS, ROGER WAYNE FOX II, DERIC JAMES LOSTUTTER, *Plaintiffs*, v. MATT BEVIN, in his official Capacity as Governor of Kentucky, *Defendant*.	)	**Civil No. 6:18-cv-277-KKC**

PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION TO DISMISS

By Kentucky law, the Governor has sole and unfettered discretion to select which felons may once again exercise their right to vote, the right at the heart of America's democratic system of government. No written, objective, and uniformly-applied rules or criteria govern voting rights restoration in Kentucky. States are authorized to disenfranchise felons, even permanently, but once a state decides to reenfranchise felons, it may not do so arbitrarily.

For over eighty years, the Supreme Court has held that government officials cannot be lawfully vested with unfettered discretion to grant or deny licenses or permits to engage in First Amendment-protected rights, including political expression and association. This longstanding body of law compels the conclusion that arbitrary power over the right to vote—which is protected by the First Amendment as a means of political expression and

association—is unconstitutional. For this reason, Plaintiffs have asserted that Kentucky's voting rights restoration scheme for felons violates the First Amendment. Defendant largely ignores the relevant First Amendment case law and instead has fixated on Plaintiffs' current ineligibility to vote and cited to inapposite Fourteenth Amendment due process and equal protection cases. Plaintiffs have not asserted any Fourteenth Amendment claims.

I. Plaintiffs have standing to sue Defendant Governor Matt Bevin for these First Amendment violations.

Plaintiff Margaret Sterne's claims are now moot and can be dismissed. Though the Executive Order restoring her civil rights was apparently signed and dated on December 20, 2018, Ms. Sterne's attached declaration shows that Defendant did not mail her the Executive Order until February 6, 2019, two days after Ms. Sterne joined this lawsuit as a Plaintiff in the Fourth Amended Complaint. *See* Exhibit 1 (Declaration) and Exhibit A to Exhibit 1 (image of postmarked letter).

The remaining Plaintiffs have standing to sue on these First Amendment claims. As the Supreme Court has made clear, plaintiffs challenging an arbitrary administrative licensing scheme governing the exercise of First Amendment-protected rights need not apply for and be denied a license prior to challenging the scheme's constitutionality. *See City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 755–56 (1988) ("[W]hen 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." (collecting cases)); *Ohio Citizen Action v. City of Englewood*, 671 F.3d 564, 580–81 (6th Cir. 2012) (but for mootness, suggesting plaintiffs would have had standing to assert First Amendment claim against unfettered discretion in curfew waiver law "regardless whether [the organization]

or its members suffered any injury linked to its use"); *Miller v. City of Cincinnati*, 622 F.3d 524, 532 (6th Cir. 2010) (same); *Prime Media, Inc. v. City of Brentwood*, 485 F.3d 343, 351 (6th Cir. 2007) (same).

Defendant relies on *El-Amin v. McDonnell*, No. 3:12–cv–00538–JAG, 2013 WL 1193357, at *4–5 (E.D. Va. Mar. 22, 2013) for the principle that each Plaintiff must have applied for restoration to have standing to sue. However, the pro se plaintiff in *El-Amin* brought *only* claims rooted in the Fourteenth Amendment and the Eighth Amendment. As the Supreme Court and Sixth Circuit precedents establish, anyone subject to a licensing scheme can bring a First Amendment challenge to that scheme without first applying.

II. Plaintiffs have stated a First Amendment unfettered discretion claim, because Kentucky law vests the Governor with absolute, unfettered power to select which felons may vote and which may not.

a. The First Amendment prohibits arbitrary licensing schemes regulating the exercise of the constitutionally-guaranteed rights to political expression and association, which embrace voting.

On the merits of Count One, Defendant steers clear of all First Amendment unfettered discretion cases. The Supreme Court has long held that, as a means for citizens to associate with political parties, ideas and causes, voting is protected by the First Amendment. *Cal. Democratic Party v. Jones*, 530 U.S. 567, 574 (2000); *Norman v. Reed*, 502 U.S. 279, 288–90 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 787–89, 806 (1983); *Kusper v. Pontikes*, 414 U.S. 51, 56–58 (1973); *Williams v. Rhodes*, 393 U.S. 23, 30–31 (1968). The First Amendment also protects voting because it constitutes expressive conduct. That protection covers expressions of support for candidates, parties, and causes, regardless of the format or medium. *City of Ladue v. Gilleo*, 512 U.S. 43, 54–59 (1994) (political yard signs); *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173,

184 (1979) (describing ballot access restrictions as "impair[ing] the voters' ability to express their political preferences"); *Buckley v. Valeo*, 424 U.S. 1, 48 (1976) (advocacy for election or defeat of candidates); *Hobbs v. Thompson*, 448 F.2d 456, 469–75 (5th Cir. 1971) (campaign bumper stickers). It would be highly anomalous for all forms of speech and expression in the electoral context to be protected by the First Amendment, except the political choice and expression at the very center of it—voting. Unsurprisingly, Defendant does not contend that the First Amendment fails to protect the right to vote.

Most relevant here, the First Amendment forbids giving government officials unfettered discretion to grant or deny licenses or permits to engage in any First Amendment-protected speech, expressive conduct, association or other protected activity. *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 130–33 (1992). Since 1938, the Supreme Court has consistently applied this doctrine to strike down administrative licensing regimes that conferred limitless discretion as to a wide range of First Amendment freedoms. In *City of Lakewood*, the Supreme Court facially invalidated an ordinance containing "no explicit limits on the mayor's discretion" to grant or deny permit applications for newspaper distribution. 486 U.S. at 769–72. This made the process vulnerable to the "use of shifting or illegitimate criteria" and viewpoint discrimination. *Id.* at 757–58. "This danger [of viewpoint discrimination] 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." *Id.* at 763; *see also Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150–51 (1969) (invalidating permit scheme for marches or demonstrations that lacked "narrow, objective, and definite standards" and was "guided only by [Commissioners'] own ideas of 'public welfare, peace, safety, health, decency, good order, morals or

convenience'"); *Staub v. City of Baxley*, 355 U.S. 313, 321–22 (1958) (invalidating permit scheme for union solicitation because it made "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").

These precedents are legion and consistent. They all stand for the proposition that a law conferring arbitrary, unfettered power to grant or deny a license or permit to engage in constitutionally-protected expression violates the First Amendment. *Saia v. New York*, 334 U.S. 558, 560–62 (1948) (striking down discretionary permit scheme for use of loudspeakers); *Lovell v. City of Griffin*, 303 U.S. 444, 450–53 (1938) (striking down arbitrary permit scheme governing distribution of any literature).[1] The Supreme Court has explained that the existence of an actual, improper discriminatory or biased motive need not be shown to strike down such a law on its face:

> 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.

Forsyth Cty., 505 U.S. at 133 n.10.

This case's facts are not materially different from the unconstitutional licensing schemes struck down in the above cases. In all of these cases, no one can engage in the *specific type or manner* of constitutionally-protected activity without first obtaining a

[1] The Supreme Court continues to demonstrate significant concern when First Amendment rights are subjected to officials' discretion in the absence of clear, objective standards. *Minn. Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1888–91 (2018).

license or permit and will be prosecuted if he or she does so. In Kentucky, a class of individuals cannot register and vote without first obtaining a license or permit—an executive order granting restoration—and will be prosecuted if they do so. KY. REV. STAT. §§ 119.025, 532.020(1)(a) (unlawfully registering to vote a Class D felony). There is no material or logical difference between the following statements: "Felons cannot vote, and they must apply and secure approval to regain their right to vote"; and "Felons *can* vote if they obtain prior permission from the Governor." Kentucky's voting eligibility laws cannot strip felons of their constitutional rights; they simply require a certain subset of U.S. citizen adults to obtain state permission—a license—prior to registering and voting.

b. 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.

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 cannot be deprived of their federal constitutional rights, and a state reenfranchisement scheme that arbitrarily restores or allocates the right to vote violates the First Amendment.

Defendant's principal argument is that felons are ineligible to vote in Kentucky until restored to their civil rights and therefore cannot claim a constitutional injury from arbitrary decision-making on their restoration applications. DE 32-1 at 16–18. Respectfully, that is contrary to the law and logic. In a closely analogous situation, sixteen- and seventeen-year-olds and lawful permanent residents are also not eligible to vote 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, *e.g.*, 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. Since the selective authorization to vote and threshold eligibility are at issue, the only people who can challenge the arbitrary licensing or allocation of voting rights are currently-disenfranchised felons. If felons' injuries were not legally cognizable, no one could challenge the constitutionality of a felon rights restoration scheme—*even for* intentional, express racial, sex, or partisan discrimination[2]—and 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.

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, which included: (1) a facial challenge to California's felon disenfranchisement law that contended the state per se could not lawfully deny the vote to

[2] Arbitrary restoration is unconstitutional no matter which political party is in power. Nothing in Kentucky law on the reenfranchisement process prevents the Governor from acting on partisan motivation or an educated guess as to a restoration applicant's politics. Imagine a new Governor is sworn in after November's elections and announces that voting rights will only be restored to those who were previously registered as Democrats or even that voting rights restoration decisions would take into account prior party affiliation. Defendant would likely agree those schemes would cause a legally cognizable injury even though the unrestored felons are not presently able to vote. So too, under First Amendment precedent, does a purely discretionary vote-licensing scheme because, by nature, it is vulnerable to arbitrary and discriminatory decision-making.

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. Defendant neglects to mention that after holding that Section 2 of the Fourteenth Amendment authorizes states to disenfranchise felons and 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 on a finding of intentional racial discrimination in violation 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; *see also Hobson v. Pow*, 434 F. Supp. 362, 366–67 (N.D. Ala. 1977) (holding sex discrimination in felon disenfranchisement scheme violates Equal Protection clause).

Accordingly, it is clear that discriminatory disenfranchisement violates the Constitution.[3] Similarly, discriminatory *reenfranchisement* is also unconstitutional:

[3] The Supreme Court has never stated that an intentional discrimination claim under the Fourteenth Amendment is the only type of constitutional claim that can be brought against a felon disenfranchisement or reenfranchisement scheme.

> [W]e are similarly unable to accept the proposition that section 2 [of the Fourteenth Amendment] removes all equal protection considerations from state-created classifications denying the right to vote to some felons while granting it to others. *No one would contend that section 2 permits a state to disenfranchise all felons and then reenfranchise only those who are, say, white.*

Shepherd v. Trevino, 575 F.2d 1110, 1114 (5th Cir. 1978) (emphasis added). The Court then rejected the plaintiffs' equal protection claim *on the merits*, not for lack of a constitutional interest or injury. *Id*. at 1114–15. Several Courts of Appeals have also stated that arbitrary disenfranchisement would be unconstitutional. *Id*. at 1114; *Owens v. Barnes*, 711 F.2d 25, 26–27 (3d Cir. 1983) ("[T]he state could not disenfranchise similarly situated blue-eyed felons but not brown-eyed felons."); *Williams v. Taylor*, 677 F.2d 510, 515–17 (5th Cir. 1982) (remanding for trial on equal protection challenge to "selective and arbitrary enforcement of the disenfranchisement procedure"). The broad language in *Shepherd* indicates that the same would hold true for arbitrary reenfranchisement. 575 F.2d at 1114 ("Nor can we believe that section 2 would permit a state to make a completely arbitrary distinction between groups of felons with respect to the right to vote."); *see also Harvey v. Brewer*, 605 F.3d 1067, 1079 (9th Cir. 2010) (noting a state cannot arbitrarily "re-enfranchise only those felons who are more than six-feet tall"). All of these courts would be wrong if felons could not claim a constitutional injury once *state* law divested them of their right to vote. Moreover, it would be nonsensical if discriminatory disenfranchisement, discriminatory reenfranchisement, and arbitrary disenfranchisement violated the Constitution, but arbitrary reenfranchisement did not.

If an arbitrary *categorical* distinction between different groups of felons violates the Constitution, then arbitrary determinations made *on a case-by-case basis* untethered to any rules or criteria must also violate the Constitution. After all, courts traditionally view

unfettered administrative discretion to make case-by-case determinations as far more problematic than legislative line-drawing, and therefore treat the former with much less deference. *See Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1042–43 (9th Cir. 2009) (holding legislative reservation of discretionary, administrative function is subject to unbridled discretion challenge) ("If a legislative body retains discretion to make an important decision as part of that permitting scheme . . . that discretion is distinct from the general discretion a legislative body has to enact (or not enact) laws."); *Gasparo v. City of New York*, 16 F. Supp. 2d 198, 207–16, 221–23 (E.D.N.Y. 1998) (rejecting equal protection challenge to statutory classification singling out newsstands from all sidewalk vendors, but issuing preliminary injunction against unfettered administrative discretion to terminate permits).

The Sixth Circuit's decision in *Johnson v. Bredesen*, 624 F.3d 742 (6th Cir. 2010) is not to the contrary. The plaintiffs in *Johnson* challenged the requirement that felons pay restitution and child support before regaining their right to vote as violations of the Equal Protection Clause, the Twenty-Fourth Amendment's ban on poll taxes, the Privileges and Immunities Clause, and the ban on ex post facto laws. *Id*. at 744–45. Crucially, *Johnson* did not consider and decide whether selectively licensing or allocating threshold eligibility is lawful, as in this case. In considering the equal protection claim, the Sixth Circuit invoked the plaintiffs' current ineligibility to apply rational basis review, instead of strict scrutiny, not to conclude they had no legally cognizable interest in voting. *Id*. at 746–50. But there is no equal protection challenge in this case, and the tiers of scrutiny have no

application in a First Amendment unfettered discretion challenge.[4] By contrast, when a licensing scheme governs the exercise of First Amendment rights, officials *per se* cannot be given unfettered discretion to select who may speak, publish, demonstrate, worship in a public park, or vote. Currently-disenfranchised felons are the only individuals who can bring that challenge to arbitrariness in voting eligibility determinations.

Unremarkably, in responding to the Twenty-Fourth Amendment claim in *Johnson*, the Sixth Circuit held that the ban on poll taxes narrowly applies to individuals who currently have a right to vote. *Id*. at 751 ("The re-enfranchisement law does not condition the right to vote on payment of restitution or child support . . ."); U.S. CONST. amend. XXIV ("*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.") (emphasis added). Additionally, the Court noted that legal financial obligations incurred by convicted felons (*and misdemeanants*, who remain eligible to vote) are objective requirements that "exist independently of" felon disenfranchisement and reenfranchisement. *Johnson*, 624 F.3d at 751; *see also Harvey*, 605 F.3d at 1080 ("Plaintiffs' right to vote was not abridged because they failed to pay a poll tax; it was abridged because they were convicted of felonies."). Plaintiffs here do not allege that a current right to vote has been burdened or taxed in some manner, but rather challenge Defendant's system for arbitrarily bestowing threshold voting eligibility. Selective, arbitrary enfranchisement or reenfranchisement and the First Amendment unfettered

[4] This is but one of the ways in which this First Amendment doctrine is more protective and robust than Equal Protection Clause cases. *See infra* at 14–18 (discussion of First Amendment providing, not just different, but greater protection than Fourteenth Amendment).

discretion doctrine were not raised in *Johnson* and are therefore not covered by its holding. Plaintiffs clearly do not contend that they currently have a right to vote under state 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 voting rights. They seek to establish that, just like arbitrary enfranchisement, arbitrary reenfranchisement violates the Constitution, and nothing in *Johnson* conflicts with that principle.

At bottom, Defendant wants this Court to decide this case based on the prefix "re" in reenfranchisement. Defendant would surely concede that arbitrary *enfranchisement* is unconstitutional, but if state officials are arbitrarily enfranchising those who were *previously* eligible to vote, in Defendant's view, the unlawful is made lawful.[5] There is no case, including *Johnson*, that supports that arbitrary distinction.

c. Prohibiting arbitrary licensing of First Amendment-protected voting rights does not conflict with Section 2 of the Fourteenth Amendment.

There is no conflict between Section 2 of the Fourteenth Amendment and the prohibition on arbitrarily licensing First Amendment-protected conduct. The grant of legislative authority in Section 2 of the Fourteenth Amendment must be exercised in a manner consistent with other constitutional provisions and rights. "[T]he Constitution is filled with provisions that grant Congress or the States specific power to legislate in certain areas; these granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution." *Rhodes*, 393 U.S. at 29. This bedrock principle has been echoed in many contexts. In *Tashjian v. Republican Party of Connecticut*, the Court stated that:

[5] Some felons are of course convicted as minors, KY. REV. STAT. § 635.020, and their bid for "*re*enfranchisement" is in fact first-time enfranchisement.

> [T]he Constitution grants to the States a broad power to prescribe the "Times, Places and Manner of holding Elections for Senators and Representatives," Art. I, § 4, cl. 1, which power is matched by state control over the election process for state offices. But this authority does not extinguish the State's responsibility to observe the limits established by the First Amendment rights of the State's citizens.

479 U.S. 208, 217 (1986); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516 (1996) (holding Twenty-First Amendment's grant of legislative authority to states does not shield laws regulating commerce in or use of alcoholic beverages from First Amendment challenges).

A ruling in Plaintiffs' favor would be entirely consistent with *Ramirez* and would still permit Kentucky to continue disenfranchising felons. The First Amendment imposes independent and specific constitutional limitations, and Plaintiffs only challenge Defendant's claimed power to reenfranchise felons arbitrarily. "[I]n a host of other First Amendment cases," the Supreme Court has rejected the "'greater-includes-the-lesser'" argument, striking down arbitrary licensing schemes with "open-ended discretion . . . even where it was assumed that a properly drawn law could have greatly restricted or prohibited the manner of expression." *City of Lakewood*, 486 U.S. at 766.[6] There is no conflict or even tension between permitting felon disenfranchisement under the Fourteenth Amendment and forbidding arbitrary reenfranchisement under the First Amendment, so this Court need not evaluate which amendment is more "specific" or trumps the other. If two provisions were in conflict, the more specific provision would control, but there is no need to harmonize constitutional provisions that do not conflict. For another example, the Elections Clause authorizes states to draw district maps, but the Supreme Court has

[6] No state in the country has a law mandating uniform, lifetime disenfranchisement for all felons without any restoration option, a rule that would not violate the First Amendment unfettered discretion doctrine.

consistently held that the more general language of the Equal Protection Clause prohibits racial gerrymandering. *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1263–64 (2015) (summarizing racial gerrymandering test). There is no conflict there either.

Finally, there is also no conflict between a ruling in Plaintiffs' favor on these two First Amendment claims and Section 2 of the Fourteenth Amendment as construed in *Ramirez* because Plaintiffs clearly have not alleged that felon disenfranchisement itself per se violates the First Amendment, as the plaintiffs unsuccessfully argued in *Kronlund v. Honstein*, 327 F. Supp. 71, 73 (N.D. Ga. 1971); *Farrakhan v. Locke*, 987 F. Supp. 1304, 1314 (E.D. Wash. 1997); *Johnson v. Bush*, 214 F. Supp. 2d 1333, 1338 (S.D. Fla. 2002), *aff'd on other grounds sub nom. Johnson v. Governor of the State of Fla.*, 405 F.3d 1214 (11th Cir. 2005) (en banc); *Hayden v. Pataki*, No. 00 Civ. 8586(LMM), 2004 WL 1335921, at *6 (S.D.N.Y. June 14, 2004); and *Howard v. Gilmore*, 205 F.3d 1333, at *1 (4th Cir. 2000) (unpublished). Instead, Plaintiffs have argued that *arbitrary* reenfranchisement violates the First Amendment, a constitutional challenge not adjudicated in any of those cases.

d. The First Amendment presents rules, doctrines, and causes of action that are analytically and legally distinct from Fourteenth Amendment doctrines, specifically targeted at the challenged scheme, and not subject to Fourteenth Amendment proof requirements.

Just as Section 2 of the Fourteenth Amendment does not foreclose this action, neither does Section 1. Defendant points to *Beacham v. Braterman*, 300 F. Supp. 182 (S.D. Fla.), *aff'd mem.*, 396 U.S. 12 (1969), *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272 (1998), *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458, 466 (1981), and *Smith v. Snow*, 722 F.2d 630, 632 (11th Cir. 1983) (per curiam). But all of these decisions are Fourteenth Amendment equal protection and/or due process cases, which have nothing to

say about the First Amendment unfettered discretion doctrine. As such, they do not foreclose this action.

Plaintiffs have asserted no Fourteenth Amendment claims of any kind—under the Due Process clause, Equal Protection clause, or any other clause or cases. Fourteenth Amendment case law does not preempt the First Amendment unfettered discretion doctrine or preclude its application to an arbitrary voting rights restoration scheme. The First Amendment presents rules, doctrines, and causes of action that are distinct from the Fourteenth Amendment, targeted at the challenged restoration process, and not subject to doctrinal requirements specific to Fourteenth Amendment claims. Notwithstanding the dicta Defendant refers to in *Burton v. City of Belle Glade*, 178 F.3d 1175, 1187–88 n.9 (11th Cir. 1999) (challenging city's refusal to annex African-American housing project), *Cook v. Randolph County*, 573 F.3d 1143, 1152 n.4 (11th Cir. 2009) (challenging attempted reassignment to different voting district), and *Irby v. Virginia State Board of Elections*, 889 F.2d 1352, 1359 (4th Cir. 1989) (challenging appointive system for filling public office), no court has ever decided or *could* ever decide that *all* First Amendment rules and doctrines are superfluous or redundant with the Fourteenth Amendment in the voting rights context.[7]

[7] These cases originate with *Washington v. Finlay*, 664 F.2d 913 (4th Cir. 1981), a racial minority vote dilution challenge to an at-large election scheme. But the qualifying language in *Washington* that limited the holding to challenges to the dilution of an otherwise-intact right to vote has been omitted through successive, incomplete citations:

> *Where, as here, the only challenged governmental act is the continued use of an at-large election system, and where there is no device in use that directly inhibits participation in the political process*, the first amendment, like the thirteenth, offers no protection of voting rights beyond that afforded by the fourteenth or fifteenth amendments.

Id. at 928 (emphasis added). The Court clearly limited its holding to the only situation before it, the dilution of an otherwise-unimpeded vote, and expressed no opinion as to

This is because no case has ever considered or could ever consider the application of *all* First Amendment doctrines to *all* possible voting rights issues. More to the point, prior to *Hand v. Scott*, 285 F. Supp. 3d 1289 (N.D. Fla. 2018),[8] no court had ever considered the application of the First Amendment's unfettered discretion doctrine to voting rights restoration.[9]

Holdings are necessarily limited to the facts and claims presented in a case. "[T]he precedential value of a decision should be limited to the four corners of the decisions' [*sic*] factual setting." *Satty v. Nashville Gas Co.*, 522 F.2d 850, 853 (6th Cir. 1975), *aff'd in part on other grounds, vacated in part on other grounds, Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977); *see also Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 363 (2006) ("[W]e

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whether a law that denies the right to vote or "directly inhibits participation in the political process," such as an arbitrary restoration scheme, violates the First Amendment.

[8] Defendant repeatedly quotes from a stay order issued by the Eleventh Circuit's motions panel in *Hand v. Scott*, 888 F.3d 1206 (11th Cir. 2018), not a final decision on the merits. A different panel of three Eleventh Circuit judges heard oral argument on the merits last July. While that appeal is still pending, the case is now moot following the ratification and implementation of Amendment 4 in Florida, DE 31 ¶ 1 n.1 (Ballot Question 4 citations), Case No. 18-11388, Appellees' Supplemental Brief, and, that stay order, as well as the district court opinion, may be vacated any day now.

[9] Defendant advocates extending to this case dicta in *Burton*, *Cook*, and *Irby*, which concerned very different facts and causes of action, while nevertheless noting that "none of the Plaintiffs' favored licensing-and-permitting cases concerns voting." DE 32-1 at 22; *see also id*. at 19 n.11, 22 (arguing for extension of *Dumschat* and *Woodard* to new First Amendment voting rights context). These arguments are irreconcilable. First, "common-law adjudication" has always been an "evolutionary process" that "assigns an especially broad role to the judge in applying [the rule] to specific factual situations." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 502 (1984). Second, the First Amendment unfettered doctrine is a well-developed and well-settled rule that has been consistently invoked for decades to strike down arbitrary licensing schemes regulating an endless array of First Amendment conduct. By contrast, *Burton*, *Cook*, and *Irby* are just three cases that overstated a prior case's holding, overstated their own limited holdings, and do not set forth a well-developed legal principle that applies with respect to all First Amendment claims or all voting rights cases. If the right to vote is protected by the First Amendment (and it is, *see supra* at 3–4), then precedent requires that the unfettered discretion doctrine be applied.

are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated.") (citation omitted).[10] Plaintiffs do not know of any case that holds that *all* First Amendment rules, doctrines, or causes of action are redundant with the Fourteenth Amendment's Equal Protection Clause and/or that no First Amendment rule or doctrine is more protective of voting rights than the Equal Protection Clause. This Court need not determine that *Burton*, *Cook*, and *Irby* were wrongly decided in order to distinguish them from the instant claims; they need only be properly limited to their specific facts and claims. The First Amendment may not offer a distinct prohibition from or greater protection than the Fourteenth Amendment when the target is racial discrimination, a city's refusal to annex a majority-black housing project, the reassignment of a registration to another voting district, and the use of appointments to fill public offices.[11]

But the First Amendment unfettered discretion doctrine *does* afford more robust protection than the Supreme Court's Fourteenth Amendment equal protection precedents. The unfettered discretion doctrine is not medicine for an already-ill patient, the way Fourteenth Amendment discrimination law is, but rather a vaccination inoculating First Amendment-protected conduct against disease. The Court has shown zero tolerance for even the risk of discriminatory or arbitrary treatment in the First Amendment context,

[10] The Eleventh Circuit has also repeatedly affirmed this principle, which limits the reach of both *Burton* and *Cook*. *See, e.g.*, *KMS Rest. Corp. v. Wendy's Int'l, Inc.*, 361 F.3d 1321, 1326 (11th Cir. 2004) ("[J]udicial decisions can reach only as far as the facts that give rise to them.").

[11] Even the plaintiffs-appellants in *Burton* did not differentiate their First Amendment claim: "The court also erred in granting the motion to dismiss plaintiffs' claims under the first and thirteenth amendments . . . . Plaintiffs' rights to be *free of racial discrimination* in voting are protected by these amendments." Brief for Appellants, *Burton v. City of Belle Glade*, 178 F.3d 1175 (11th Cir. 1999) (No. 97-5091), 1998 WL 340845 at *47 (emphasis added). And as to *Cook*, the facts reveal there was no injury in fact whatsoever and therefore no subject matter jurisdiction. 573 F.3d at 1152–54 & n.4.

whereas discrimination claims under the Fourteenth Amendment require a showing that actual, intentional discrimination has already occurred. *Compare Forsyth Cty.*, 505 U.S. at 133 n.10 (striking down local government's arbitrary permit application process without any proof of actual, intentional 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). In *Forsyth County*, the Supreme Court made this distinction clear:

> [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; *see also Roach v. Stouffer*, 560 F.3d 860, 869 & n.5 (8th Cir. 2009) (holding that, in facial First Amendment challenge to officials' "unbridled discretion" in administering specialty license plate program, pro-life group "need not prove, or even allege" viewpoint discrimination); *Miller*, 622 F.3d at 532 ("[A] plaintiff may bring facial challenges to statutes granting such discretion 'even if the discretion and power are never actually abused.'" (quoting *City of Lakewood*, 486 U.S. at 757)); *Prime Media, Inc.*, 485 F.3d at 351 ("[A] licensing provision coupled with unbridled discretion itself amounts to an actual injury.") (internal quotation marks and citations omitted); *Matwyuk v. Johnson*, 22 F. Supp. 3d 812, 824–25 (W.D. Mich. 2014) (same). Defendant ignores *Forsyth County*, *City of Lakewood*, and their Sixth Circuit progeny, insisting Plaintiffs must prove discrimination, DE 32-1 at 3, 12–13, but with respect, that is not the law. Regardless of whether or how frequently it is exercised, the power to discriminate is prohibited in the First Amendment context: such unfettered, arbitrary power is per se unlawful.

e. The only aspect of Kentucky's executive clemency system implicated by this case is restoration of the right to vote, and the "clemency" label does not immunize it from constitutional scrutiny.

Imagine a state law that forced all felons seeking the franchise to submit voter registration applications, along with their criminal records, to state or county election officials and gave those officials unlimited discretion to add these applicants to the voting rolls—to grant or deny them the right to vote. Such arbitrary decision-making authority over the qualification and registration of voters would be clearly unconstitutional. *Louisiana v. United States*, 380 U.S. 145, 153 (1965) ("The cherished right of people in a country like ours to vote cannot be obliterated by the use of laws . . . which leave the voting fate of a citizen to the passing whim or impulse of an individual registrar.").[12] So too does arbitrary decision-making power over voting rights restoration violate the Constitution. Defendant argues the latter is different because voting rights restoration has been incorporated into the clemency process, but that is a superficial and semantic distinction. While the label, the arbiter, and the timing might be different, that hypothetical scheme and the one challenged in this case both violate the Constitution. The word "clemency" has no talismanic power to make the unlawful lawful.

Defendant nevertheless places great weight on the fact that Kentucky has incorporated voting rights restoration into its executive clemency system, which originated with the English monarchy in the Eighth Century. *Herrera v. Collins*, 506 U.S. 390, 412 (1993) ("In England, the clemency power was vested in the Crown and can be traced back

[12] *See also Yick Wo v. Hopkins*, 118 U.S. 356, 369–70 (1886) ("When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.").

to the 700's. Blackstone thought this 'one of the great advantages of monarchy in general, above any other form of government . . .'") (internal citation omitted); *Bowens v. Quinn*, 561 F.3d 671, 676 (7th Cir. 2009) (describing clemency as "one of the traditional royal prerogatives . . . borrowed by republican governments"). But in our constitutional and democratic system of government, labeling reenfranchisement as "clemency" does not immunize it from judicial review. *See, e.g., Osborne v. Folmar*, 735 F.2d 1316, 1317 (11th Cir. 1984) (concluding that "a person may challenge a pardon or parole decision on equal protection grounds though he asserts a due process claim that fails").

Defendant's own authorities demonstrate that clemency powers must still yield to federal constitutional limitations. *See, e.g., Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 288–90 (1998) (O'Connor, J., concurring). *Woodard*, as well as *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458, 466 (1981), and *Smith v. Snow*, 722 F.2d 630, 632 (11th Cir. 1983) (per curiam), are all *due process* challenges that do not address or foreclose Plaintiffs' claims. In her concurrence in *Woodard*, Justice O'Connor wrote that: "Judicial intervention might . . . 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." 523 U.S. at 289. The current absence of any written, objective, and uniform constraints on the Governor's discretion is arguably worse than a coin flip, which at least relies upon pure random chance. There is no conflict between these cases' conclusion that discretionary pardons or commutations are lawful and enjoining arbitrary voting rights restoration as unlawful. *Woodard* and *Dumschat* are not obstacles to a ruling in Plaintiffs' favor, because such a judgment in this case would only affect the right to vote as incorporated in the executive clemency process.

Those cases had no occasion to consider the singular and powerful protections for First Amendment rights, which go above and beyond what due process and equal protection afford.

A ruling in Plaintiffs' favor would merely apply a well-settled First Amendment doctrine to yet another area of First Amendment-protected expression, association, or conduct, as it has been routinely applied in different factual contexts for eighty years. The decision to incorporate voting rights restoration into the executive clemency system has created a specific and narrow First Amendment violation in Kentucky. A ruling in Plaintiffs' favor would be limited to the right to vote and need not alter any other aspect of the executive clemency system. Other species of executive clemency, including pardons and commutations, would remain constitutional.[13]

Restoration is available to all felons separate and independent from a full pardon, which confers *many* other benefits and rights that do not implicate the First Amendment. KY. CONST. §§ 77, 145. Accordingly, a decision in Plaintiffs' favor would have no effect on discretionary full pardons, because Kentucky has not made full pardons the single, exclusive means for voting rights restoration. If a state did so and that rule was challenged in a future case, the First Amendment doctrine outlined here would require that the right to vote—and only that right—be handled separately from the discretionary pardon power at the state or federal level. But that is not this case and even that further, derivative holding would not mean that the state or federal pardon power itself is "constitutionally suspect."

[13] Because this case is narrowly aimed at voting rights restoration, it also does not implicate other rights included in civil rights restoration, such as running for office or serving on a jury. KY. CONST. § 150; KY. REV. STAT. § 29A.080(2). Those would remain subject to the Governor's discretionary clemency authority.

DE 32-1 at 7. It is only bringing felon disenfranchisement and reenfranchisement into the discretionary clemency system that has caused a constitutional problem here, not the pardon power or disenfranchisement alone. There are numerous cases in which two otherwise-lawful government actions combine or interact to violate the Constitution. *See, e.g.*, *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994) (holding nondiscriminatory tax and local subsidy program operated in tandem to violate Dormant Commerce Clause).

Reenfranchisement is neither inherently a clemency function nor inherently part of the pardon power; it can be and often is handled separately from the clemency system and as a separate alternative to a pardon. Today, unless a felon obtains a full pardon prior to sentence completion, thirty-eight states and the District of Columbia have removed reenfranchisement from the clemency system by creating a non-discretionary path to restoration, typically by restoring voting rights following the completion of incarceration, parole, probation, and/or a waiting period. DE 31 ¶ 1 & n.1.[14] Further, there is evidence that voting rights restoration is functionally very different from a pardon. For example, former Governor Beshear's 2015 Executive Order underscored that the restoration it was effecting should "not be construed as a pardon" and, accordingly, it would "not operate as

[14] The sole caveat is the exceedingly limited permanent disenfranchisement provision in Maryland. Maryland forces felons "convicted of buying or selling votes" to seek a pardon to regain their voting rights. MD. CODE ANN. ELEC. LAW § 3-102(b)(3). For all other felons in Maryland, restoration occurs upon the end of incarceration. Nebraska should not be on Defendant's list of states with discretionary restoration, because Nebraska law restores all felons upon completion of a two-year waiting period after sentence completion, even if they are not granted full pardons. NEB. REV. STAT. ANN. § 29-112. Likewise, Tennessee is erroneously included because the state appears to have a non-discretionary, albeit convoluted, process for voting rights restoration. TENN. CODE. ANN. §§ 40-29-202–204; *id*. § 40-29-203 ("A person eligible to apply for a voter registration card and have the right of suffrage restored, pursuant to § 40-29-202, may request, and then *shall be issued*, a certificate of voting rights restoration . . .") (emphasis added). Maine and Vermont are excluded here because they never disenfranchise felons, even during incarceration.

a bar to greater penalties for second offenses or a subsequent conviction as a habitual criminal."[15]

It is meaningless to compare capital punishment or the deprivation of physical liberty with arbitrary reenfranchisement. DE 32-1 at 19 n.11. Due process and the other rights of criminal defendants are afforded prior to the deprivation of life, physical liberty, and other rights, but the First Amendment is triggered when the state engages in arbitrary voting rights restoration. Under existing law, disenfranchisement persists long after many Kentuckians regain their physical liberty. These are separate constitutional interests governed by different constitutional frameworks, and the Constitution does not impose false choices between life and liberty or physical liberty and the right to vote.

Lastly, Defendant argues that a ruling in Plaintiffs' favor would call into question discretionary restoration of firearm authority. DE 32-1 at 2, 7–8. Since *District of Columbia v. Heller*, 554 U.S. 570 (2008), litigants around the country have sought to extend the First Amendment unfettered discretion cases to the Second Amendment. They have all failed. *Drake v. Filko*, 724 F.3d 426, 435 (3rd Cir. 2013); *Young v. Hawaii*, 911 F. Supp. 2d 972, 991–92 (D. Haw. 2012) (collecting cases); *but cf. Fisher v. Kealoha*, 855 F.3d 1067, 1072 (9th Cir. 2017) (Kozinski, J., "ruminating") (suggesting that Second Amendment rights should not be subjected to unconstrained discretion) ("Criminal punishment, of course, always involves the deprivation of rights, but such deprivations can still raise constitutional concerns. . . . This unbounded discretion sits in uneasy tension with how rights function. A right is a check on state power, a check that loses its force when it exists at the mercy of the state."). Whatever the outcome here, those efforts will likely

[15] DE 31 ¶ 31 (quoting Ky. Exec. Order No. 2015-871 (Nov. 24, 2015)).

continue and will require the consideration of factors different from the principles and considerations that govern the inquiry into arbitrary licensing or allocation of voting rights.

III. The lack of reasonable, definite time limits on the Governor to make a decision to grant or deny a restoration application also violates the First Amendment.

Kentucky's voting rights restoration scheme also lacks any reasonable, definite time limits by which the Governor must make a decision to grant or deny a restoration application. As alleged, Defendant Governor Bevin does not deny any applications; he just indefinitely holds those he does not grant. DE 31 ¶ 35. This also violates the First Amendment. The Supreme Court also has held that a licensing scheme "that fails to place limits on the time within which the decisionmaker must issue the license is impermissible." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 226 (1990). This is because "[w]here the licensor has unlimited time within which to issue a license, the risk of arbitrary suppression is as great as the provision of unbridled discretion." *Id*. at 227; *Riley v. Nat'l Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781, 802 (1988) (same); *East Brooks Books, Inc. v. City of Memphis*, 48 F.3d 220, 224 (6th Cir. 1995) ("Failure to place time limitations on a decision maker is a form of unbridled discretion."). Without fixed, neutral time limits, there is a significant risk of arbitrary or discriminatory treatment of a pending application.

If this Court were to rule in Plaintiffs' favor on Count One, the requested injunction would give the state the freedom to craft a non-arbitrary restoration system. Depending on the specifics of that replacement non-arbitrary scheme, *e.g.*, if there were no application requirement but rather an enumerated list of specific criteria, ultimately it might be unnecessary for this Court to order relief as to Count Two.

IV. Defendant's remaining policy-based arguments are unavailing.

From the very first sentences of the memorandum in support of the Motion to Dismiss, Defendant disregards the U.S. Constitution's Supremacy Clause, U.S. CONST. art. VI, cl. 2, and the concept of judicial review. DE 32-1 at 1. Whether Kentucky's legislature and citizens seek to amend the state Constitution or not has no bearing on the constitutionality of the current restoration scheme challenged in this case. The longevity of Kentucky's current scheme is similarly irrelevant. DE 32-1 at 1. Plaintiffs have not discovered and Defendant has not cited any abstention doctrine related to proposed legislation or amendments that may or may not be adopted. *Id*. at 1-2 & n.1. And contrary to Defendant's assertions, *id*. at 1, 4–5, Plaintiffs' requested relief seeking specific, objective rules and criteria for voting rights restoration would give Defendant, not the Court, the opportunity to make specific policy decisions.[16] The Court need only assure itself that the replacement scheme is non-arbitrary.

Accordingly, Plaintiffs respectfully request that Defendant's Motion to Dismiss be denied or, in the alternative, that any dismissal be ordered without prejudice.

DATED: March 8, 2019

Respectfully submitted,

/s/ Jon Sherman

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[16] Defendant claims that "[t]his lawsuit, at base, is an attempt to impose the Plaintiffs' policy preferences on the Commonwealth through judicial fiat." DE 32-1 at 1. The requested injunction is what the First Amendment requires, not a "policy preference." The relief Plaintiffs seek is extremely modest, the absolute minimum fair treatment guaranteed by the Constitution. Plaintiffs ask that Defendant be ordered to put in place *any* non-arbitrary scheme. That replacement scheme may or may not comport with Plaintiffs' individual policy preferences or ideas of a fair restoration system, but it will at least eliminate arbitrariness from the system and cure the constitutional defect. There are other efforts to make significant, larger changes to Kentucky law on voting rights restoration, which may or may not succeed, but those efforts are irrelevant to this narrow challenge.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Plaintiffs' Response to Defendant's Motion to Dismiss was served upon the following parties via the CM/ECF system on March 8, 2019:

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March 8, 2019