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 OF LAW IN SUPPORT OF THE GOVERNOR'S MOTION TO DISMISS

This lawsuit tries to accomplish judicially what can only be done by constitutional amendment. For more than two centuries, the Kentucky Constitution has vested the Governor with the discretion to restore or not restore felons' ability to vote. This lawsuit alleges that this age-old scheme has violated the First Amendment to the U.S. Constitution all along. According to the Plaintiffs, the First Amendment requires the Governor to establish criteria to determine which felons can vote and to put time limits on his restoration decisions. This lawsuit, at base, is an attempt to impose the Plaintiffs' policy preferences on the Commonwealth through judicial fiat. The Supreme Court has rejected such an effort before, holding in the context of felon voting that "it is not for [courts] to choose one set of values over the other," but instead for the "legislative forum" to decide. *See Richardson v. Ramirez*, 418 U.S. 24, 55

(1974). In fact, amending Kentucky's felon reenfranchisement scheme is currently being considered in the Kentucky General Assembly.[1]

Questions of policy aside, the legal analysis required to reject the Plaintiffs' claims is straightforward. It is well established that states may constitutionally remove a felon's right to vote. In fact, the Fourteenth Amendment states as much. And the Supreme Court has held that it does not violate the Fourteenth Amendment—the constitutional provision about felon voting—for an official, like the Governor, to exercise discretion in determining which disenfranchised felons can vote. The Plaintiffs' First Amendment claims, which likewise challenge the Governor's exercise of discretion, are nothing more than a repackaging of the Fourteenth Amendment claims that the Supreme Court has already rejected. Also, once the Plaintiffs' ability to vote has been constitutionally removed, as has happened here, their interest in voting is no longer of a constitutional dimension. This point is settled in the Sixth Circuit.

If the Plaintiffs' claims are nevertheless successful, similar discretionary restoration regimes in at least 13 other states also will fall in whole or in part, as will some of the President's federal pardon power. So too for many other schemes that vest government officials with discretion over other restoration decisions, like restoring felons' ability to serve on a jury or to possess a gun. All of these regimes

[1]*See* 2019 H.B. 91, *available at* https://apps.legislature.ky.gov/record/19rs/hb91.html (last visited Feb. 12, 2019). This bill proposes amending the Kentucky Constitution to accomplish essentially what the Plaintiffs seek through this lawsuit.

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 impose on Kentuckians what the Plaintiffs—rather than the voters—think is the best policy. The Court should tell the Plaintiffs to join those currently making their case to the Kentucky General Assembly for why, as a policy matter, Kentucky's felon reenfranchisement scheme should be amended.

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 seven 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 allege 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 Complaint alleges, suffices to render Kentucky's voting-restoration scheme facially unconstitutional.

The Plaintiffs claim that two aspects of Kentucky's reenfranchisement process create this "risk." First, the Plaintiffs allege 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 cite case law about government officials issuing licenses and permits. (*Id.* ¶ 43). The Complaint identifies no case law that ultimately extends this licensing-and-permitting case law into the voting context. None exists. Second, the Plaintiffs allege that Kentucky's voting-restoration scheme lacks "reasonable, definite time limits," thereby violating the First Amendment. (*Id.* ¶ 54). For this point, 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, but that the Court order Governor Bevin 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 Plaintiffs, it seems, envision the judicial branch supervising the

executive of a sovereign state as he implements the "rules and/or criteria" that the Plaintiffs will supply at the appropriate time.[2]

This motion to dismiss the Complaint follows.

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).

[2] The Governor will oppose this as necessary at the appropriate time. *See Hand v. Scott*, 888 F.3d 1206, 1214 (11th Cir. 2018) ("What's more, the permanent injunctions entered by the district court command the Governor and three cabinet members to promulgate new standards [regarding felon reenfranchisement by a date certain] . . . . As a court sitting in equity, that seems to us to be a tall order, even assuming the district court had the authority to enter this command in the first place.").

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 a restoration of their ability to vote. *See generally* KRS 196.045. Under this statutory process, the Department of Corrections is directed to create a monthly list of eligible offenders who have requested the 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 to provide notice to the applicable Commonwealth's attorney(s) of the felon's restoration application under certain circumstances. 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 rights. 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 right to vote.[3] The process by which these 48 states restore felons' 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;

[3] 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* Supporting Reversal, filed June 1, 2018 (11th Cir.). A copy is attached as Exhibit 1.

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' Complaint tries to cast Kentucky's reenfranchisement scheme as an outlier. (R. Doc. 31 ¶ 1). Kentucky, the Plaintiffs allege, 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 more states, similar to Kentucky, give a government official discretion over at least some voting-restoration decisions. More specifically, in addition to Kentucky, the laws of at least 13 other states vest a government official with the discretion to decide some or all requests for a restoration of the ability to vote.[4] Thus, if the Plaintiffs' current challenge to gubernatorial discretion succeeds, those 13 other states necessarily have an unconstitutional voting-restoration scheme, in whole or in part. Also, under the Plaintiffs' constitutional paradigm that forbids giving officials discretion over felon reenfranchisement, the President's pardon power in Article II Section 2 of the federal Constitution, which similarly grants ultimate discretion to the President, also is constitutionally suspect.[5] The same fate will follow for other

[4] Ala. Code § 15-22-36, 15-22-36.1; Ariz. Rev. Stat. Ann. § 13-905(A); Del. Const. art. V, § 2; Fla. Const. art. VI, § 4(b) (as amended effective Jan. 8, 2019); 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); Nev. Rev. Stat. § 213.157; 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).

[5] 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

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)[6] (finding such a First Amendment claim is unlikely to prevail and summarizing that "every First Amendment challenge to a discretionary vote-restoration regime we've found has been summarily rebuffed"); *Kronlund v. Honstein*, 327 F. Supp. 71, 73 (N.D. Ga. 1971) (rejecting a First Amendment challenge); *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 (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). In fact, the Supreme Court "ha[s]

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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 Feb. 14, 2019).

[6] 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).

strongly suggested in *dicta* that exclusion of convicted felons from the franchise violates *no constitutional provision*." *Richardson*, 418 U.S. at 53 (emphasis added).

As explained below, the Court should dismiss this matter. At least five of the Plaintiffs have jurisdictional problems preventing them from bringing their claims, and, in any event, all of the Plaintiffs' claims fail on the merits.

I. The Court lacks jurisdiction over the claims of five of the Plaintiffs.[7]

Before addressing the merits of this matter, the Court must determine whether the Plaintiffs possess standing to press their claims. To establish Article III standing, a plaintiff must allege that:

> (1) he has suffered an injury-in-fact that is both "(a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical"; (2) the injury is fairly traceable to the defendant's conduct; and (3) it is likely that the injury will be redressed by a favorable decision.

Binno v. Am. Bar Ass'n, 826 F.3d 338, 344 (6th Cir. 2016). Under this three-part test, the Court should hold that Plaintiffs Deric James Lostutter, Bryan LaMar Comer, Roger Wayne Fox II, Bonifacio R. Aleman, and Margaret Sterne have failed to establish their standing. *See* Fed. R. Civ. P. 12(b)(1) (allowing dismissal for lack of subject-matter jurisdiction). Alternatively, if the Court does not credit Ms. Sterne's demonstrably wrong allegation that she cannot vote, the Court should find this lawsuit moot as to her.

[7] Although not necessary because of the jurisdictional nature of standing, the Governor reserves the right to challenge the standing of the other three Plaintiffs after discovery, if this case gets that far.

Plaintiffs Lostutter, Comer, Fox, and Aleman challenge Kentucky's discretionary reenfranchisement regime, but, by their own admission, they have not actually applied to Governor Bevin for a restoration of their ability to vote. (R. Doc. 31 ¶ 7 ("Mr. Aleman, Ms. Sterne, and Mr. Comer have finished their full sentences but not yet applied for restoration of their right to vote.") ("Mr. Fox has not yet applied for the restoration of his voting rights. And Mr. Lostutter is on probation until 2021 and has not yet applied for restoration of his voting rights.")). Because Messrs. Lostutter, Comer, Fox, and Aleman have not even initiated the process that they challenge, they cannot allege an injury-in-fact of being subjected to Kentucky's reenfranchisement scheme. Nor can they challenge their inability to vote. *See El-Amin v. McDonnell*, 2013 WL 1193357, at *5 (E.D. Va. Mar. 22, 2013) ("Since he has not applied for restoration of his voting rights, he has suffered no denial, or other injury, that would allow him to challenge the *reinstatement process* as well.").

These Plaintiffs cannot get around this problem on the basis that they imminently will be subject to Kentucky's voting-restoration process. For one thing, nowhere in the Complaint do they actually allege that they will imminently apply for a restoration of the ability to vote. (R. Doc. 31 ¶¶ 7-8, 17-22). There's a reason for that omission. Mr. Aleman concedes that he completed his sentence almost a decade ago and still has not applied to the Governor (*id.* ¶¶ 7, 17); Mr. Lostutter alleges that his sentence will not be complete until 2021 (*id.* ¶ 7), while Mr. Fox's will not be complete until March 2019 (*id.*); and Mr. Comer claims that his voting rights were removed based upon a conviction that dates all the way to 2002, after which he never

applied to recover his ability to vote (*id.* ¶¶ 7, 19). In light of these allegations, these Plaintiffs' bare allegation that they wish to vote in "future primary and general elections" (*id.* ¶ 22)—the date of which is not even specified—does not amount to a plausible injury-in-fact that is imminent, but instead one that is merely "conjectural or hypothetical." *See Binno*, 826 F.3d at 344.

Accepting the allegations in the Complaint as true, Ms. Sterne's claims also should be dismissed for lack of standing. (R. Doc. 31 ¶ 7 (alleging that Ms. Sterne has not applied to the Governor to have her ability to vote restored)). However, as the attached executive order shows, Ms. Sterne has in fact received a restoration of her ability to vote. *See* Exhibit 2, Sterne Executive Order (Dec. 20, 2018); *see also Rogers v. Stratton Indus., Inc.*, 798 F.2d 913, 918 (6th Cir. 1986) ("It cannot be overlooked, however, that with an appropriate Rule 12(b)(1) motion a court can and should *resolve* factual disputes."). Because Ms. Sterne can now vote, and because this lawsuit only requests declaratory and injunctive relief going forward, this lawsuit is moot as to her. *See Howard v. Tennessee*, 740 F. App'x 837, 840 (6th Cir. 2018) (unpublished) ("[W]e agree that by registering him to vote the State mooted Howard's claim that the Department's in-person application procedures violate the NVRA."). Thus, Ms. Sterne should be dismissed from this matter either for lack of standing or because the lawsuit is moot as to her.

II. The Court should dismiss this matter on the merits.

For any Plaintiff who possesses standing to prosecute this matter, the Court should dismiss his or her claims for failure to state a claim. To overcome a Rule

12(b)(6) motion, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). In considering a Rule 12(b)(6) motion, the Court need not accept as true "legal conclusions or unwarranted factual inferences." *Theile v. Michigan*, 891 F.3d 240, 243 (6th Cir. 2018) (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, 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 purportedly violates the First Amendment. (*Id.* ¶ 57). Both of these claims should be dismissed under Rule 12(b)(6) for failure to state a claim.

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

Granting discretion to a government official, like the Governor, to decide whether to restore a felon's ability to vote—as more than a dozen states do in some form—does not violate the First Amendment. The Plaintiffs do not plausibly allege (because they have no basis to do so) that the Governor has exercised his restoration

power in a discriminatory or arbitrary fashion.[8] Instead, they claim that it is facially unconstitutional to grant the Governor discretion over felon reenfranchisement because that discretion alone 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 discriminatory or arbitrary fashion, which the Plaintiffs do not even plausibly allege has happened. 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 (as enacted):

> 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.

[8] 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's Equal Protection Clause. *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). Notably, the Plaintiffs chose not to allege an equal-protection claim. The Plaintiffs do allege, without explanation, that "the Governor actually does make decisions in a wholly arbitrary manner" (R. Doc. 31 ¶ 38), but the Court need not credit that allegation. The Plaintiffs offer no factual allegations to support this bald assertion. *See Theile*, 891 F.3d at 243 (holding that a court need not accept as true "unwarranted factual inferences" (citation omitted)).

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*, 418 U.S. at 54. States, the Supreme Court has held, 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 three-judge 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 three-judge 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 an appeal to the 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. 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 taken away, the Plaintiffs have no First Amendment right to assert. 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.[9] In *Johnson v. Bredesen*, 624 F.3d 742 (6th Cir. 2010), the plaintiffs challenged Tennessee's reenfranchisement scheme, which conditioned voting restoration on full payment of restitution and child support.

[9] 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.").

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 do not have a constitutionally protected interest in having their ability to vote restored. 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 any fundamental interest, *Johnson* described restoring a felon's ability to vote as a mere "statutory benefit"—*i.e.*, an interest not of 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 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).

That holding is dispositive of the Plaintiffs' claims here. The Plaintiffs have acknowledged that their First Amendment claims naturally depend upon them having a First Amendment interest to assert. They 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." 624 F.3d at 746; *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)). 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 Governor Bevin to exercise discretion over an ability to which they no longer have a constitutional entitlement.

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."[10] *Id.* at 282 (emphasis added).

Dumschat and *Woodard* decisively reject the Plaintiffs' assertion that a hypothetical "risk" of discriminatory or arbitrary conduct raises constitutional problems. The same "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. The Plaintiffs likely will try to minimize *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.[11] The Eleventh Circuit agrees: "If a state pardon regime need not

[10] 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) ("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.").

[11] Nor can the Plaintiffs distinguish *Dumschat* and *Woodard* on the basis that they

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 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.

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

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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.

Amendment impliedly trump the specific terms of the Fourteenth Amendment. As the Eleventh Circuit put it:

> 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—does not forbid.

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 & 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' challenge to Kentucky's reenfranchisement scheme rests entirely on case law that they read to forbid giving a government official "unfettered discretion to issue or deny licenses or permits." (R. Doc. 31 ¶ 43 (collecting cases)). Relying on this case law, the Plaintiffs allege that Kentucky's voting-restoration process "constitutes an unconstitutional arbitrary licensing scheme regulating the exercise of the right to vote." (*Id.* ¶ 44). The Plaintiffs' argument, by their own admission, requires analogizing the restoration of the ability to vote to receiving a license or permit. However, none of the Plaintiffs' favored licensing-and-permitting cases concerns voting.

Even putting that aside, the Plaintiffs' comparison to licensing-and-permitting case law fails. To apply this case law to executive clemency would require overruling *Dumschat* and *Woodard*, which, as discussed above, affirmed the constitutionality of granting discretion to a government official in this context. *Woodard* and *Dumschat* saw no problem with any alleged "risk" of discriminatory or arbitrary action that the Plaintiffs interpret their favored case law to forbid. The Plaintiffs' licensing-and-permitting cases also are distinguishable because they dealt with First Amendment-protected conduct (for example, holding a rally and giving speeches, *see Forsyth County v. Nationalist Movement*, 505 U.S. 123, 127, 130 (1992), or selling newspapers on public property, *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 753, 769-70 (1988)). Here, by contrast, the Plaintiffs no longer have any constitutionally protected interest in voting. *See Johnson*, 624 F.3d at 751 ("As

convicted felons constitutionally stripped of their voting rights by virtue of their convictions, Plaintiffs possess no right to vote . . . .").

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 pardon 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 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 sentence and parole does not have a constitutional right to vote, neither does he have a constitutional right to a defined period in which the Governor must make a decision about whether to restore his 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 may not reasonably be construed to mean that the lack of a time limit on the Governor's restoration decision is facially unconstitutional.

CONCLUSION

This case raises a policy question that should be resolved through a constitutional amendment, not in a courtroom. The Court should grant the Governor's motion to dismiss this matter, either because the Plaintiffs lack standing or some of their claims are moot or because the Plaintiffs' claims fail as a matter of law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On February 15, 2019, I electronically filed this Memorandum in Support of the Governor's Motion to Dismiss through the ECF system, which will send a notice of electronic filing to the following:

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