No. 21-5476

UNITED STATES COURT OF APPEALS
for the SIXTH CIRCUIT

DERIC LOSTUTTER, *et al.*

Plaintiffs-Appellants

v.

ANDY BESHEAR, in his official capacity as
GOVERNOR OF THE COMMONWEALTH OF KENTUCKY,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
No. 6:18-cv-00277

BRIEF OF GOVERNOR ANDY BESHEAR

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STATEMENT OF THE CASE

Through Executive Order, Plaintiffs achieved the relief they sought below: "replace[ment of] the current arbitrary voting rights restoration scheme for felons 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[.]" (*See* Fourth Amended Complaint, RE 31, Page ID # 358.) Their claims are now moot, and the District Court properly dismissed the Complaint. (Order, RE 55, Page ID # 770-74.) Plaintiffs are not satisfied with the requested relief because they do not meet the objective criteria to qualify for restoration under the current voting rights restoration scheme and were instead denied.

On February 4, 2019, Plaintiffs, along with others, filed the underlying operative Fourth Amended Complaint against a former governor under 42 U.S.C. § 1983, alleging the voting rights restoration scheme (hereinafter "restoration scheme") in Kentucky violated the First Amendment in that it provided unfettered discretion to the governor to restore civil rights and did not contain a limitation on the time to exercise that discretion. (Complaint, RE 31, Page ID # 350-57.) They argued the restoration scheme – accomplished through the pardon power granted to the governor in the Kentucky Constitution – must adhere to constitutional procedures for when officials "grant or deny licenses or permits to engage in First Amendment-protected . . . activity." (Motion for Summary Judgment, RE 46, Page

ID#: 625.) They sought a declaration that the restoration scheme violated the First Amendment and a permanent injunction enjoining the Governor from subjecting them to the restoration scheme and ordering the Governor to establish a new restoration scheme that "restores the right to vote to felons based upon specific, neutral, objective, and uniform rules and/or criteria[.]" (RE 31 at 357-58.)

On December 12, 2019, newly-inaugurated Governor Andy Beshear did just that, issuing Executive Order 2019-003, "Relating to the Restoration of Civil Rights for Convicted Felons[.]"[1] The order established a new voting rights restoration scheme, restoring the voting rights of "offenders convicted of crimes under Kentucky state law who have satisfied the terms of their probation, parole, or service of sentence . . . exclusive of restitution, fines, and any other court-ordered monetary conditions." *Id*. The order did not restore the voting rights of offenders convicted of certain crimes or with pending felony charges. *Id*. Under the order, the voting rights of eligible offenders will be restored prospectively upon completion of their probation, parole or sentence. *Id*.

Executive Order 2019-003 applies to Plaintiffs. Several former Plaintiffs voluntarily dismissed their claims upon the automatic restoration of their right to

[1] Executive Order 2019-003, available at https://governor.ky.gov/attachments/20191212_Executive-Order_2019-003.pdf (last visited July 7, 2021), and Plaintiffs' Motion to Dismiss Plaintiffs Harbin, Comer, and Fox's Claims as Moot, Exhibit 1, RE 53, Page ID#: 761- 64.

vote. (Order, RE 54, Page ID # 768.) Applying the objective criteria established by the order, the Governor declined to restore Plaintiffs' right to vote.

On August 14, 2021, the District Court dismissed Plaintiffs' claims as moot. (Opinion and Order, RE 55, Page ID # 777.) The Court held that Executive Order 2019-003 provided Plaintiffs the relief they sought in the Complaint because it established criteria – the nature and seriousness of conviction – to guide voting rights restoration and created a time limit to apply that criteria – automatically upon completion of probation, parole or sentence. (*Id*. at 774.) Additionally, the Court held that "Kentucky's amended re-enfranchisement scheme thus appears to be consistent with at least Plaintiffs' proffered interpretation of what the First Amendment allows." (*Id*.)

After denial of their motion for reconsideration (Order, RE 60), Plaintiffs appealed. (Notice of Appeal, RE 61.)

SUMMARY OF THE ARGUMENT

The District Court properly dismissed Plaintiffs' claims as moot because they achieved the relief sought in the Complaint. The restoration scheme in Kentucky no longer affords the Governor unfettered discretion and unlimited time to decide all restoration matters. Restoration occurs automatically based on an offender meeting objective criteria. As the District Court found, the restoration scheme is now consistent with Plaintiff's "proffered" interpretation of what the

First Amendment requires of public officials when granting or denying a license or permit to engage in First Amendment-protected activity.

If the District Court erred in its determination, the error was harmless because Plaintiffs did not establish a First Amendment violation. As convicted felons constitutionally stripped of their right to vote, Plaintiffs do not possess a fundamental or constitutionally protected interest in the restoration of that right, let alone an interest protected under the First Amendment. Discretionary restoration schemes – like that in Kentucky at the time challenged – have long been found to comply with the Constitution.

ARGUMENT

I. The District Court Appropriately Dismissed Plaintiffs' Claims.

A. Plaintiffs' Claims Are Moot.

The United States Constitution limits the federal judicial power to "cases" and "controversies." U.S. Const., Art. III, § 2. The issue of mootness addresses whether an actual, live controversy exists during the litigation or whether an intervening event will render the Court's final adjudication merely advisory. *Calderon v. Moore*, 518 U.S. 149, 150 (1996). In other words, a court that at one point had jurisdiction may lose that jurisdiction if the case becomes moot because an intervening event has "completely and irrevocably eradicated the effects of the

alleged violation." *Los Angeles Cty. v. Davis*, 440 U.S. 625, 631 (1979) (citations omitted).

A once justiciable issue may become moot by the government's voluntary cessation of the alleged illegal conduct. *Bench Billboard Co. v. City of Cincinnati*, 675 F.3d 974, 981 (6th Cir. 2012). Dismissal based on mootness is appropriate so long as the government's corrective course "appears genuine." *Id*. (citation omitted). Voluntary modification of existing policies through a formal process can eliminate the requisite case-or-controversy. *Hanrahan v. Mohr*, 905 F.3d 947, 961-62 (6th Cir. 2018).

Here, the District Court properly dismissed Plaintiffs' claims because the Governor's voluntary modification of the restoration scheme rendered the claims moot. Plaintiffs' challenged the prior scheme. In Count 1, they alleged the prior restoration scheme violated the First Amendment by providing the Governor "absolute" discretion to deny or grant applications for restoration of voting rights, (Complaint, RE 31, Page ID # 353, ¶ 44.) They alleged the restoration scheme was "not governed by any laws, rules, or criteria of any kind." (*Id*.) In Count 2, they alleged the prior restoration scheme lacked "any reasonable, definite time limits in processing applications . . . and issuing final decisions." (*Id*. at 356, ¶ 54.)

This is no longer true. By Executive Order, new law governs the restoration scheme that establishes objective criteria automatically restoring certain offenders'

right to vote. Ky. Ex. Order 2019-003. Those criteria are the nature and seriousness of the felony conviction and the completion of probation, parole or sentence. *Id*. The timeline for restoration depends upon an offender meeting those criteria. *Id*. Thus, through a formal process, modification of the restoration scheme remedies the specific allegations set forth by Plaintiffs in the Complaint.

Plaintiffs do not argue the modification does not appear genuine or that the issues are capable of repetition in the future. Indeed, Plaintiffs accept that the modification resolved some issues. (Plaintiffs' Motion to Dismiss Plaintiffs Harbin, Comer, and Fox's Claims as Moot, RE 53, Page ID # 758.) Instead, they argue that the new scheme does not moot their claims because the Executive Order did not restore their rights. (Appellant's Brief, Doc. 14, Page: 40.) Plaintiffs insist that, for them, "nothing has changed in the law or facts[.]" (*Id*.) This argument moves the goalpost set in the Complaint.

The District Court recognized this, stating, "Even if the governor maintains some discretion within the re-enfranchisement scheme to deny voting rights to these plaintiffs, their claims are nonetheless moot because their suit does not seek their own re-enfranchisement." (Opinion and Order, RE 55, Page ID # 776.) In other words, the Complaint controls, and "the constitutionality of th[e] amended scheme is not presently before the Court." (Opinion and Order, RE 55, Page ID #

776.) Because Plaintiffs challenged the restoration scheme as a whole, everything "has changed in the law and facts," rendering their claims moot.

To be sure, the new restoration scheme applies to Plaintiffs, just as it applied to the subset of 140,000 or more offenders who regained the right to vote. Executive Order 2019-003 established objective criteria by which to automatically restore or not restore voting rights to all disenfranchised offenders. All offenders are subject to those criteria, and for Plaintiffs, that resulted in the denial of automatic restoration. Fortunately, for Plaintiffs, the new scheme does not deny their restoration permanently; the Governor can still restore their rights. Yet, Plaintiffs would reject that option in exchange for permanent disenfranchisement. (*See* Appellant's Brief, Doc. 14, Page: 47 ("If . . . EO 2019-003 had permanently and irreversibly disenfranchised individuals convicted of the excluded Kentucky, out-of-state, and federal offenses, then this First Amendment unfettered discretion challenge would clearly fail. Indeed if the Governor had categorically barred [Plaintiffs] from seeking restoration, this case would be moot.").) In doing so, Plaintiffs stake out a precarious position: they seek to prevent a governor from arbitrarily restoring voting rights in favor of a restoration scheme that would permanently disenfranchise them. (*See id*. ("While Governor Beshear has the power to permanently disenfranchise, that power does not enable him to arbitrarily choose which felons may once again vote."

While it is true that the Governor retains discretion to restore *Plaintiffs*' voting rights – even arbitrarily so – his discretion is no longer absolute. If Plaintiffs met the criteria of Executive Order 2019-003, their rights would have been automatically restored. Therefore, Executive Order 2019-003 extinguished the controversy regarding the Governor's unfettered and absolute discretion. Plaintiff's challenge now is that the Governor retains *any* discretion to restore their rights. But Plaintiffs did not plead that below and the claim provides no basis for a First Amendment violation in any of the cases relied upon by Plaintiffs. (*Id*. at 31-(citing *Forsyth Cnty. v. Nationalist Movement* 505 U.S. 123, 130-33 (1992) (addressing "unfettered discretion to grant or deny licenses"); *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 769-72 (1988) (addressing discretion with no limits to permit newspaper distribution); *Shuttlestworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969) (permit scheme lacked "objective standards"); *Staub v. City of Baxley*, 355 U.S. 313, 321-22 (1958) (permit scheme subject to "uncontrolled will"); *Saia v. New York*, 334 U.S. 558, 560-62 (1948) (standardless discretion); *Louisiana v. United States*, 380 U.S. 145, 150-53 (1965) ("leave voting fate . . . to the passing whim or impulse of an individual registrar"); *Shepherd v. Trevino*, 575 F.2d 1110, 1114 (5th Cir. 1978); *Owens v. Barnes*, 711 F.2d 25, 26-27 (3d Cir. 1983); *Williams v. Taylor*, 677 F.2d 510, 515-517 (5th Cir. 1982).

The Eleventh Circuit recently addressed a similar issue and concluded that claims of plaintiffs were moot. In *Hand v. Desantis*, 946 F.3d 1272 (11th Cir. 2020), plaintiffs with felony convictions challenged Florida's voting rights restoration scheme under the First Amendment. *Id*. at 1274. While the case was pending, Florida voters amended the state constitution and Florida legislators revised the statutory scheme, "thus setting into motion a new system for vote restoration." *Id*. at 1274-75. The plaintiffs were now able to seek restoration of their voting rights under the new scheme. *Id*. at 1275. The Eleventh Circuit held the case was moot because they "no longer have the ability to accord Hand meaningful relief from the former system which he challenged." *Id*.

Because a new restoration scheme exists in Kentucky that establishes objective criteria to automatically restore or decline to restore voting rights of disenfranchised offenders, this case – like the case before the Eleventh Circuit – is moot. The District Court properly dismissed the Complaint.

B. Alternatively, Kentucky's Restoration Scheme Does Not Violate the First Amendment.

Plaintiffs not only request that this Court reverse the District Court's Order dismissing their claims as moot but to also find the new restoration scheme violates the First Amendment after additional briefing. (Appellant's Brief, Doc. 14, Page: 59-64.) If this Court disagrees that Plaintiffs' claims are moot, it should find that Kentucky's restoration scheme is consistent with the First Amendment and find the

District Court's error was harmless. No additional briefing is necessary to reach that alternative conclusion supporting the District Court's order.

Irrespective of the new restoration scheme implemented by Executive Order 2019-003 and the relief it provided, the Court properly dismissed Plaintiffs' claims because they have no basis in the First Amendment. *Richardson v. Ramirez*, 418 U.S. 24, 53 (1974) ("Much more recently we have strongly suggested in dicta that exclusion of convicted felons from the franchise violates no constitutional provision."); *See also Hand v. Scott*, 888 F.3d 1206, 1212 (11th Cir. 2018) ("[E]very First Amendment challenge to a discretionary vote-restoration regime we've found has been summarily rebuffed.") (citing *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) (King, J.), aff'd sub nom. Johnson, 405 F.3d at 1214; *Hayden v. Pataki*, No. 00 Civ. 8586 (LMM), 2004 WL 1335921, at *6 (S.D.N.Y. June 14, 2004); *Howard v. Gilmore*, 205 F.3d 1333 (unpublished table decision), 2000 WL 203984, at *1 (4th Cir. 2000)). Because Plaintiffs' attack is facial, it raised only legal questions. *See Kansas Judicial Review v. Stout*, 519 F.3d 1107, 1118 (10th Cir. 2008) ("[A] first amendment challenge to the facial validity of a statute is a strictly legal question; it does not involve the application of the statute in a specific factual setting." (citation omitted)). Therefore, dismissal at the summary judgment state was still

appropriate, and this Court may ignore possible error as to whether the claims were moot as harmless. Fed. R. Civ. P. 61 ("At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights.").

This Court plainly rejects assertion of a constitutionally protected interest in a state restoration scheme. In *Johnson v. Bredesen*, 624 F.3d 742, 744 (6th Cir. 2010), plaintiffs challenged Tennessee's restoration scheme which conditioned restoration on full payment of restitution and child support. Rejecting an equal protection challenge and a Twenty-Fourth Amendment ban on poll taxes challenge, this Court held: "Having lost their voting rights, Plaintiffs lacked any fundamental interest to assert." *Id*. at 746 (citing *See 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."). This Court further recognized that "Plaintiffs have no legal claim" as it pertains to "restoration of a civil right." *Id*. at 748-49. As the Court put another way, "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. *Johnson* controls even though Plaintiffs here couch their fundamental interest as protected by the First Amendment, rather than the Fourteenth Amendment.

II. Because The District Court Held The Claims Were Moot, It Did Not Address The Merits.

Plaintiffs mistakenly allege that the District Court held the prior restoration scheme violated the First Amendment in order to find that the new restoration scheme cured those violations and dismiss the claims as moot. (Appellant's Brief, Doc. 15, Pages: 56-59.) They argue that because the District Court needed to reach the merits of the First Amendment claims, those claims could not have been moot. This is an incorrect understanding of the Opinion. The Opinion is clear: The Court dismissed Plaintiffs claims because the new restoration scheme ended any case or controversy between the Plaintiffs and the Governor. The claims are moot because Plaintiffs sought an end to a restoration scheme that provided unfettered discretion to the Governor, a restoration scheme and discretion that no longer exist. It did not, nor need to, reach the merits of the First Amendment claims to reach that conclusion.

Plaintiffs' confusion rests on two conclusions reached by the District Court. First, the District Court stated, "Kentucky's amended re-enfranchisement scheme thus appears to be consistent with at least Plaintiffs' proffered interpretation of what the First Amendment allows[.]" (Opinion and Order, RE 55, Page ID# 774.) It also stated that that Executive Order 2019-003 "appears" to have provided the relief sought by Plaintiffs. (*Id*. at 774, 776.) Neither point is inconsistent with dismissal of the claims as moot. The District Court did not address – as Plaintiffs

argue – the "legal availability of a certain kind of relief[.]" (Appellant's Brief, Doc. 15, Page 57 (citing *Chafin v. Chafin*, 568 U.S. 165, 174 (2013).) Instead, the Court found that Plaintiffs achieved the relief sought, regardless of whether they were entitled to it. Nor did the Court find that the order "cured" the First Amendment issues. Rather, it found that even under Plaintiffs' "*proffered*" interpretation, the new scheme would not violate the First Amendment. Because the new restoration scheme replaced the challenged scheme and eliminated the absolute discretion afforded to the Governor that Plaintiffs challenged, the Court appropriately dismissed Plaintiffs' claims as moot.

CONCLUSION

For the reasons set forth herein, this Court should affirm the District Court's Opinion and Order dismissing Plaintiffs' claims.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with Fed. R. App. P. 32 and the type-volume limitation because it contains 2,921 words and uses proportionally spaced typeface of Times New Roman in 14 point.

/s/ Amy D. Cubbage
Amy D. Cubbage

CERTIFICATE OF SERVICE

I hereby certify that on July 16, 2021, I electronically filed the foregoing Response via the Court's CM/ECF system, causing all counsel of record to be served.

/s/ Amy D. Cubbage
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