No. 22-5703

In the United States Court of Appeals for the Sixth Circuit

DERIC JAMES LOSTUTTER; ROBERT CALVIN LANGDON; BONIFACIO R. ALEMAN,

Plaintiffs-Appellants,

v.

COMMONWEALTH OF KENTUCKY,

Defendant,

ANDREW G. BESHEAR, in his official capacity as Governor of Kentucky,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Kentucky at London, No. 6:18-cv-00277.
The Honorable **Karen K. Caldwell**, Judge Presiding.

BRIEF OF PLAINTIFFS-APPELLANTS

BEN CARTER
KENTUCKY EQUAL JUSTICE CENTER
222 S. First St., Suite 305
Louisville, KY 40202
(502) 303-4062

JON SHERMAN
MICHELLE KANTER COHEN
CECILIA AGUILERA
FAIR ELECTIONS CENTER
1825 K St. NW, Suite 450
Washington, DC 20006
(202) 331-0114

Counsel for Plaintiffs-Appellants
Deric James Lostutter, Robert Calvin Langdon, and Bonifacio R. Aleman

COUNSEL PRESS · (866) 703-9373 PRINTED ON RECYCLED PAPER

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 22-5703 Case Name: Lostutter, et al. v. Kentucky, et al.

Name of counsel: Jon Sherman

Pursuant to 6th Cir. R. 26.1, Deric J. Lostutter, Robert C. Langdon, Bonifacio R. Aleman
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No

CERTIFICATE OF SERVICE

I certify that on August 23, 2022 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Jon Sherman

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes and Other Authorities:

REQUEST FOR ORAL ARGUMENT

Plaintiffs-Appellants Deric James Lostutter, Robert Calvin Langdon, and Bonifacio R. Aleman ("Plaintiffs") request that oral argument be held. Oral argument will assist the Court in its adjudication of this appeal. The First Amendment doctrine at issue is eighty-four years old, well-established, and clearly applicable to Kentucky's arbitrary voting rights restoration system. But given this doctrine has not previously been applied to this particular First Amendment-protected conduct, oral argument can only help shed light on the legal issues in this appeal.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over Plaintiffs' federal claims pursuant to 28 U.S.C. §§ 1331 and 1343 because this case arises under the United States Constitution and seeks equitable and other relief for the deprivation of First Amendment rights under color of state law. The district court had jurisdiction to grant declaratory relief pursuant to 28 U.S.C. §§ 2201 and 2202.

On July 22, 2022, the district court entered final judgment in this action, dismissing this lawsuit for lack of standing and denying the cross-motions for summary judgment as moot. Opinion and Order, RE 68, Page ID # 842–50;

Judgment, RE 69, Page ID # 851.[1] Plaintiffs timely filed their Notice of Appeal on August 8, 2022. Notice of Appeal, RE 70, Page ID # 852–53.

This Court has jurisdiction over this appeal as it is a direct appeal of a final order and judgment entered by the U.S. District Court for the Eastern District of Kentucky. 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the district court ruled on the merits or, in the alternative, erred in dismissing Plaintiffs' case for lack of standing, given that standing and the constitutional merits are completely intertwined in this case.

2. Whether the district court erred in holding that Plaintiffs' First Amendment rights are not violated by Kentucky's voting rights restoration system for individuals with felony convictions pursuant to which the Governor has sole and unfettered discretion to grant or deny restoration applications.

STATEMENT OF THE CASE

This challenge to Kentucky's discretionary and arbitrary voting rights restoration system was filed pro se by Plaintiff Deric Lostutter on October 29, 2018, along with a motion for a temporary restraining order and preliminary injunction. Complaint, RE 1, Page ID # 1–4; Motion for Immediate Temporary and Permanent Injunctive Relief, RE 2, Page ID # 10–13. The complaint was amended twice in early

[1] All record entry references are to the district court docket for 18-cv-277 (E.D. Ky.).

November 2018. Amended Complaint, RE 10, Page ID # 63–79; Second Amended Complaint, RE 12, Page ID # 102–19. On November 7, 2018, the court denied the "motion for immediate temporary and permanent injunctive relief" to the extent it sought a temporary restraining order. Order Denying Motion for Immediate Temporary and Permanent Injunctive Relief, RE 13, Page ID # 122–24. Plaintiff Lostutter retained the undersigned counsel in early December 2018 and moved to amend the Complaint in order to narrow the claims to just two First Amendment challenges and to add plaintiffs. Motion for Leave to File Third Amended Complaint, RE 25, Page ID # 230–35; Third Amended Complaint, RE 28, Page ID # 274–300. On January 7, 2019, the court denied that motion as moot and granted leave to file a Fourth Amended Complaint, which was filed on February 4, 2019. Order Denying Pending Motion and Granting Leave to File Fourth Amended Complaint, RE 29, Page ID # 301–02. The operative Fourth Amended Complaint named eight plaintiffs, Stephon Doné Harbin, Robert Calvin Langdon, Richard Leroy Petro, Jr., Bonifacio R. Aleman, Margaret Sterne, Bryan LaMar Comer, Roger Wayne Fox II, and Deric James Lostutter, all individuals who could not vote under Kentucky law by reason of a prior felony conviction, and named then-Governor Matt Bevin as the sole defendant. Fourth Amended Complaint, RE 31, Page ID # 332–

60.[2] Plaintiffs asserted two claims: (1) a First Amendment challenge to the unfettered discretion Kentucky law affords the Governor to grant or deny voting rights restoration applications; and (2) a First Amendment challenge to the lack of reasonable, definite time limits by which the Governor must make these purely discretionary determinations on voting rights restoration applications. *Id.*

On February 15, 2019, then-Defendant Governor Bevin moved to dismiss the case for lack of jurisdiction and failure to state a claim. Motion to Dismiss, RE 32, Page ID # 361–63; Memorandum of Law in Support of Motion to Dismiss, RE 32-1, Page ID # 364–88. The briefing was completed on March 22, 2019. Response to Motion to Dismiss, RE 33; Reply to Response to Motion to Dismiss, RE 34. On August 30, 2019, the court issued a short order denying the motion to dismiss, stating: "[G]iven their significance, the Court finds that the remaining issues of this case should be resolved on summary judgment. The Defendant's outstanding Rule 12(b)(1) and 12(b)(6) claims are DENIED accordingly." Order Denying Motion to Dismiss, RE 35, Page ID # 576. The court also dismissed Plaintiff Margaret Sterne from the action, *id.*, because, as the parties noted in their briefs, subsequent to the filing of the Fourth Amended Complaint, Governor Bevin had granted Plaintiff

[2] The Commonwealth of Kentucky, though originally named in the pro se complaint, is no longer a party to this action. The Eastern District of Kentucky's clerk's office informed Plaintiffs' counsel that it does not amend case names after complaint amendments.

Sterne's pending voting rights restoration application, rendering her claims moot. Memorandum of Law in Support of Motion to Dismiss, RE 32-1, Page ID # 374; Response to Motion to Dismiss, RE 33, Page ID # 534. The court ordered a status conference for October 11, 2019. Order Denying Motion to Dismiss, RE 35, Page ID # 576. At the status conference, the court denied Plaintiffs' request for a period of limited discovery and ordered the parties to file cross-motions for summary judgment. Minute Entry Order for October 24, 2019 Telephone Conference, RE 43, Page ID # 605. The parties proceeded to file their cross-motions, and briefing was completed on December 5, 2019. Plaintiffs' Motion for Summary Judgment, RE 46; Defendant's Motion for Summary Judgment, RE 47; Memorandum in Support of Defendant's Motion for Summary Judgment, RE 47-1; Defendant's Response to Motion for Summary Judgment, RE 48; Plaintiffs' Response to Motion for Summary Judgment, RE 49.

Defendant-Appellee Governor Andrew G. Beshear ("Defendant") took office shortly thereafter on December 10, 2019 and was substituted as the named defendant in this action. Two days later, on December 12, 2019, Defendant issued Executive Order 2019-003 "Relating to the Restoration of Civil Rights for Convicted Felons" ("EO 2019-003"), which took people with certain felony convictions under Kentucky law out of the arbitrary voting rights restoration system and restored their right to vote immediately. Exhibit 1 to Plaintiffs' Motion to Dismiss Plaintiffs

Harbin, Comer, and Fox's Claims as Moot, EO 2019-003, RE 53-1, at Page ID # 761–65.

EO 2019-003 did not eliminate, replace, or otherwise modify the preexisting and purely discretionary system as to all other disenfranchised Kentuckians. *Id.* Under that system, Kentuckians with felony convictions are disenfranchised, KY. CONST. § 145, KY. REV. STAT. § 116.025, but those who are not eligible for restoration under EO 2019-003 may seek restoration of their right to vote only by application to the Governor. KY. CONST. § 145; KY. REV. STAT. § 196.045(1). They are eligible to apply once they are finally discharged from their sentences and complete payment of restitution. KY. REV. STAT. §§ 196.045(2)(a), (2)(c). These applications are initially sent to the Department of Corrections, which screens and forwards eligible applications to the Governor's office for a decision.[3] The Governor then has sole and unfettered discretion to grant or deny voting rights restoration. As the current restoration application itself states, "[i]t is the prerogative of the Governor afforded him or her under the Kentucky Constitution to restore these rights."[4] There is nothing in the Kentucky Constitution, Kentucky statutes, Kentucky

[3] *See* Exhibit 1 to Plaintiffs' Motion for Reconsideration of Judgment, Division of Probation and Parole Application for Restoration of Civil Rights (revised Mar. 2020), RE 57-1, Page ID # 786–88. This application can be found at: https://corrections.ky.gov/Probation-and-Parole/Documents/Restoration%20of%20Civil%20Rights%20Application%20Final.pdf.

[4] *Id*. at Page ID # 788.

rules or regulations, or any other written, codified source of Kentucky law that governs or constrains the Governor's ultimate decision on whether to grant or deny a voting rights restoration application. There are also no reasonable, definite time limits in the Kentucky Constitution, Kentucky statutes, Kentucky rules or regulations, or any other written, codified source of Kentucky law, by which the Governor must render decisions on such applications.

EO 2019-003 sorted the disenfranchised by their specific felony convictions and jurisdiction of conviction. It immediately restored the voting rights of Kentuckians who had completed their sentences for Kentucky state felony convictions except for certain expressly excluded offenses. Exhibit 1 to Plaintiffs' Motion to Dismiss Plaintiffs Harbin, Comer, and Fox's Claims as Moot, EO 2019-003, RE 53–1, Page ID # 763. This restoration was effective as to eligible individuals who had satisfied the terms of their probation, parole, or service of sentence, exclusive of restitution, fines, and any other court-ordered monetary conditions. *Id*. Kentuckians convicted of certain enumerated Kentucky offenses, crimes under federal law, and felonies in other jurisdictions are excluded from restoration under the executive order. *Id*.[5]

[5] *Id*. ("Automatic Restoration of Civil Rights: Department of Corrections will automatically review discharged offenders to determine if eligible for automatic restoration of civil rights. Inquiries on qualifications for automatic restoration can be submitted to civilrights.restoration@ky.gov. The following are excluded from automatic restoration of civil rights:

EO 2019-003 effected the immediate restoration of voting rights for three of the seven Plaintiffs in the action: Plaintiffs Harbin, Comer, and Fox. Plaintiffs moved to voluntarily dismiss these three individuals on January 13, 2020, as their claims had become moot. Motion to Dismiss Plaintiffs Harbin, Comer, and Fox's Claims, RE 53, Page ID # 758–60. Plaintiffs noted in that motion that two of the four remaining unrestored Plaintiffs had voting rights restoration applications pending with the Governor's office: "Mr. Langdon and Mr. Petro applied for restoration of their voting rights during the previous Governor's administration; those applications are still pending." *Id*. at Page ID # 759. The court granted this motion. Order Granting Motion to Dismiss Plaintiffs Harbin, Comer, and Fox's Claims, RE 54, Page ID # 768.

For individuals not restored through EO 2019-003, restoration is not per se foreclosed, but rather may only be pursued through application to the Governor for individual, discretionary restoration. *Id.* The civil rights restoration application was updated in March 2020 in light of EO 2019-003.[6] The revised application states that while people with certain felony convictions now qualify for restoration, everyone else who is disenfranchised due to a felony does not and, therefore, must apply for

---

- Certain felony convictions under KRS 439.3401, KRS Chapter 507, KRS Chapter 507A, KRS 508.020, KRS 508.040, KRS 508.170, KRS 529.100, bribery in an election or treason.
- Federal convictions or convictions occurring in other states.").

[6] *Id*. at Page ID # 787–88.

the Governor's purely discretionary grant of restoration using the same application.[7] The current restoration of civil rights application and process also embraces the right to hold public office, but this First Amendment challenge is solely focused on the right to vote.

Each of the Plaintiffs was convicted of a felony that bars them from voting rights restoration under EO 2019-003. As such, they can only secure restoration by applying for and securing Defendant's purely discretionary grant of their applications. Plaintiff Lostutter is excluded from restoration under EO 2019-003 because of his federal conviction. Lostutter Declaration, RE 46-9, Page ID # 674; EO 2019-003, RE 53-1, Page ID # 763. Plaintiff Langdon was convicted of a Kentucky state felony excluded by EO 2019-003, specifically second-degree assault under Ky. Rev. Stat. § 508.020.[8] Langdon Declaration, RE 46-4, Page ID # 659. And Plaintiff Aleman was convicted of a felony in Indiana, and out-of-state convictions are also excluded under EO 2019-003. Joint Status Report, RE 66, Page ID # 834; *State of Indiana v. Bonifacio Aleman*, Cause No. 10C01-9707-CF052, Amended

[7] *See id*. at Page ID # 788 ("Offenders who do not meet criteria for automatic restoration may submit this application for restoration of civil rights for consideration by the Governor's Office pursuant to KRS 196.045.") (underlining in original).

[8] This conviction is listed in an official, publicly available Kentucky state court record, which can be reviewed online at https://kcoj.kycourts.net/kyecourts/Login, and is not disputed by the parties. This Court may take judicial notice of this fact pursuant to Federal Rule of Evidence 201(b)(2).

Judgment of Conviction, RE 66-1, Page ID # 839–40. All three Plaintiffs remain subject to a purely discretionary and arbitrary voting rights restoration system that remains fully intact for people who are barred from restoration under EO 2019-003.

Eight months after EO-2019-003 was issued, without ordering briefing on the effect of EO 2019-003 and the question of mootness, the court dismissed the action as moot sua sponte and denied the cross-motions for summary judgment as moot. Opinion and Order Dismissing Fourth Amended Complaint, RE 55, Page ID # 769–77; Judgment, RE 56, Page ID # 778. The district court found EO 2019-003's non-discretionary restoration of some individuals with felony convictions meant that the restoration system was no longer marked by unfettered discretion as to *any* Kentuckians with felony convictions, including those who still have to submit an application to Defendant for discretionary voting rights restoration. Opinion and Order Dismissing Fourth Amended Complaint, RE 55, Page ID # 776.

Plaintiffs moved for reconsideration pursuant to Federal Rule of Civil Procedure 59. Plaintiffs' Motion for Reconsideration of Judgment, RE 57, Page ID # 779–85. Seven months later, on April 19, 2021, the court denied Plaintiffs' motion. Opinion and Order Denying Reconsideration, RE 60, Page ID # 807–13. Appellants filed their Notice of Appeal on May 4, 2021. Notice of Appeal, RE 61, Page ID # 814–16.

This Court reversed the district court's dismissal of the case for mootness and remanded for further proceedings, stating:

> To be sure, EO 2019-003 established a separate non-discretionary restoration track for certain felons who qualify, but Lostutter and Langdon do not qualify because they were convicted, respectively, of a federal offense and of second-degree assault under Kentucky law. For felons like them, EO 2019-003 left intact the discretionary scheme set out in Ky. Const. § 145 and Ky. Rev. Stat. Ann. § 196.045, which is the same one challenged in the operative complaint. Thus, EO 2019-003 did not remove the harms that Lostutter and Langdon allege, and the case remains suitable for judicial determination.

Lostutter v. Commonwealth of Ky., No. 21-5476, Doc. 24-2, at 4 (6th Cir. Oct. 4, 2021) (footnote omitted).[9]

Upon remand, the district court once again dismissed this action, this time finding a lack of standing, and denied the cross-motions for summary judgment as moot. Opinion and Order, RE 68, Page ID # 845–50. The district court found that Plaintiffs lacked an injury in fact under the First Amendment precedents. *Id*. But the court also reached the merits, writing that its standing "analysis would apply with equal force to the substantive merits of Plaintiffs' argument." *Id*. at Page ID # 846 n.1. Plaintiffs appealed. Notice of Appeal, RE 70, Page ID # 852–53.

[9] This Court also dismissed former plaintiff Richard Leroy Petro, Jr. from the appeal, *Lostutter v. Commonwealth of Ky.*, No. 21-5476, Doc. 22 (6th Cir. Sept. 2, 2021), because he was imminently moving out of Kentucky, *id*., Doc. 20 (6th Cir. Aug. 26, 2021).

SUMMARY OF ARGUMENT

This appeal concerns two constitutional claims brought by Kentuckians with felony convictions who are ineligible to vote by reason of their criminal records and who can only be re-enfranchised through Defendant's blessing. Plaintiffs contend that Kentucky laws that give Defendant sole and unfettered discretion to decide whether they may regain their right to vote and that lack reasonable, definite time limits by which the Governor must make those decisions, violate their First Amendment rights.

It is undisputed and indisputable that arbitrary enfranchisement or arbitrary disenfranchisement would be unconstitutional. The question before this Court is whether arbitrary *re*-enfranchisement should survive constitutional scrutiny simply based on that prefix "re". Plaintiff has argued it should not: If it is unconstitutional to selectively and arbitrarily grant or strip U.S. citizens of their right to vote, then it inexorably follows that it is unconstitutional to arbitrarily grant the right to vote to U.S. citizens who *currently* cannot vote due to a felony conviction. That such individuals once had but lost their right to vote under state law is irrelevant to the federal constitutional question presented here.

The district court erred in dismissing Plaintiffs' complaint for lack of standing and denying the parties' cross-motions for summary judgment as moot. First, the district court did reach and rule on the merits, notwithstanding the ultimate stated

disposition dismissing the case for lack of standing. Because standing here turns on a resolution of the merits of Plaintiffs' First Amendment challenges, under the U.S. Supreme Court's and this Court's precedents, the district court was barred from dismissing the case on jurisdictional grounds.

Second, the district court's order runs contrary to over eighty years of clear and settled U.S. Supreme Court precedent on the First Amendment unfettered discretion doctrine. Government officials may not be vested with unfettered discretion to grant or deny licenses or permits to engage in First Amendment-protected activity, such as voting. The U.S. Supreme Court has also repeatedly underscored that a plaintiff challenging such an arbitrary licensing system on unfettered discretion grounds is not required to first apply for and be denied a license to engage in that constitutionally protected conduct before filing suit.

Nevertheless, the district court concluded that because rights restoration has been labeled an act of clemency under Kentucky law, it per se cannot be an administrative licensing system akin to those scrutinized and struck down in First Amendment unfettered discretion cases. The law holds otherwise. Crucially, the U.S. Supreme Court has long and frequently held that the First Amendment's rules and doctrines do not turn upon mere labels or formalistic distinctions, but rather functionality. In rejecting the application of the unfettered discretion doctrine, the district court also erred in its functionality analysis by comparing the narrow act of

voting rights restoration, considered a "partial pardon" under Kentucky law, to *full* pardons, which, as Defendant has noted, have much broader effects. Accordingly, notwithstanding the labels used under Kentucky law, the state's system of giving its governors sole power to restore the right to vote to individuals with felony convictions—unbounded by any rules or criteria—is in all material respects a completely arbitrary licensing system no different from those long prohibited in the First Amendment context. Moreover, U.S. Supreme Court precedent also demonstrates that clemency is not immune from constitutional review.

Therefore, Plaintiffs suffer an injury under the First Amendment in being subjected to an arbitrary voting rights restoration system, and this Court should reverse the district court's order and rule on the merits in Plaintiffs' favor. This case is now four years old and on appeal for the second time. Because the district court also effectively and even explicitly ruled on the merits, the interests of judicial efficiency and clarification of the law weigh strongly in favor of this Court deciding the merits and ordering the district court to grant or deny the cross-motions for summary judgment accordingly.

ARGUMENT

I. Standard of review

Standing is an issue of subject-matter jurisdiction and, accordingly, a district court's dismissal for lack of standing is reviewed *de novo*. *Buchholz v. Meyer Njus Tanick, PA*, 946 F.3d 855, 860 (6th Cir. 2020). While the district court did not expressly grant summary judgment in Defendant's favor on the merits, if the district court agrees with Plaintiffs that the district court effectively ruled on the merits, that decision would also be reviewed *de novo*. *Brannam v. Huntington Mortg. Co.*, 287 F.3d 601, 603 (6th Cir. 2002).

II. The district court ruled on the merits; alternatively, it erred in dismissing Plaintiffs' case for lack of standing because standing and the constitutional merits are fully intertwined in this case.

This Court should construe the district court's opinion as a ruling on the merits. This obviates the need to find that the court erred in dismissing the case for lack of standing where the standing and constitutional merits questions are fully intermeshed. The district court itself seems to have at least initially contemplated its decision as a ruling on the merits, because the opening paragraph states: "[T]he Court will deny Plaintiffs' motion [for summary judgment] and grant summary judgment in favor of the Governor of Kentucky." Opinion and Order, RE 68, Page ID # 842. Ultimately, of course, it dismissed the case for lack of standing,

specifically lack of a constitutional injury in fact, and denied the cross-motions for summary judgment as moot. *Id*. at Page ID # 845, 850.

There are three components of Article III standing. The plaintiff "must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). Additionally, the injury in fact must be both "(a) concrete and particularized, . . . and (b) actual or imminent, not conjectural or hypothetical[.]" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotation marks and citations omitted). "An Article III injury, in turn, requires the invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical." *CHKRS, LLC v. City of Dublin*, 984 F.3d 483, 488 (6th Cir. 2021) (citing *Spokeo*, 578 U.S. at 339 (quoting *Lujan*, 504 U.S. at 560)) (quotation marks omitted).

Standing analysis "often turns on the nature and source of the claim asserted." *Warth v. Seldin*, 422 U.S. 490, 500 (1975). In many constitutional cases, "the standing question . . . is whether the constitutional . . . provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Id*. "To allege the invasion of a legally protected interest, a plaintiff must show that the plaintiff has a right to relief if the court accepts the plaintiff's interpretation of the constitutional or statutory laws on which the complaint relies."

CHKRS, 984 F.3d at 488 (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89–90 (1998) (citing *Bell v. Hood*, 327 U.S. 678, 682–83, 685 (1946))). Where a court determines on the merits that a plaintiff's constitutional rights have been violated, that plaintiff has also necessarily demonstrated a legally cognizable injury in fact.[10]

Here, the district court clearly ruled on the merits, stating that Defendant's "arguments as to the substantive merits of the case [were] applicable" to the standing question it was considering, and that its "analysis would apply with equal force to the substantive merits of Plaintiffs' argument." Opinion and Order, RE 68, Page ID # 846 n.1. In so stating, the district court expressed that any discussion of its reasoning on the constitutional merits would have been fully duplicative of and identical to its reasoning on standing. Because of the complete overlap between the Article III injury-in-fact analysis and the First Amendment merits question here, this Court should construe the opinion below as a ruling, not just on standing, but also on the merits. *See King v. Harwood*, 852 F.3d 568, 577 (6th Cir. 2017) (reaching merits of malicious prosecution claim where district court "appear[ed] . . . to base its holding on the merits question" in whole or in part).

[10] Defendant does not dispute that the traceability and redressability requirements are satisfied.

In the alternative, if this Court finds no merits ruling below, then the district court would have erred in failing to rule on the merits, given the standing analysis hinged upon analyzing and resolving the merits of Plaintiffs' First Amendment claims. It is well-established that where Article III standing turns on the resolution of the merits, the court must issue a decision on the merits. *See Bell v. Hood*, 327 U.S. 678, 682 (1946) ("[I]t is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction."). The district court's opinion amounts to a ruling that Plaintiffs' averments fail to state a violation of their First Amendment rights and that, accordingly, they do not suffer any legally cognizable injury. However, the Supreme Court has stated that, with rare exception, such an argument does not raise a challenge to subject-matter jurisdiction. It explained in *Steel Company v. Citizens for a Better Environment*:

> [J]urisdiction is not defeated by the possibility that the averments might fail to state a cause of action on which [the plaintiff] could actually recover. Rather, the district court has jurisdiction if the right of the [plaintiffs] to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another, . . . unless the claim clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous.

523 U.S. at 89 (internal quotation marks, citations, and ellipsis omitted). The Court explained further: "Dismissal for lack of subject-matter jurisdiction because of the

inadequacy of the federal claim is proper only when the claim is 'so insubstantial, implausible, foreclosed by prior decisions of [the Supreme] Court, or otherwise devoid of merit as not to involve a federal controversy.'" *Id*. (quoting *Oneida Indian Nation of New York v. Oneida Cnty.*, 414 U.S. 661, 666 (1974)); *see also Moore v. LaFayette Life Ins. Co.*, 458 F.3d 416, 444 (6th Cir. 2006) (holding that when basis of federal jurisdiction is intertwined with cause of action, court should assume jurisdiction over and decide case on merits).

In this case, the district court's finding that pardons and administrative licensing regimes are different, such that the First Amendment unfettered discretion doctrine cannot be invoked and applied by Plaintiffs, is a decision on the constitutional merits. Though such a determination necessarily also resolved the coterminous injury-in-fact inquiry, it was nonetheless a merits determination. *Bell*, 327 U.S. at 682 ("Whether the complaint states a cause of action on which relief could be granted is a question of law and . . . it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction."). Plaintiffs' claims are manifestly not "wholly insubstantial and frivolous" or foreclosed by precedent, *Steel Co.*, 523 U.S. at 89, and the district court did not find to the contrary.

Just last year, this Court ruled in *CHKRS* that a district court had impermissibly "conflated the merits of [a plaintiff's] takings claim with [the plaintiff's] standing to bring it." 984 F.3d at 489. This Court found this was in error:

> [J]ust because a plaintiff's claim might fail on the merits does not deprive the plaintiff of standing to assert it. *See Trump v. Hawaii*, —— U.S. ——, 138 S. Ct. 2392, 2416, 201 L.Ed.2d 775 (2018). "If that were the test, every losing claim would be dismissed for want of standing." *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1092 (10th Cir. 2006) (en banc).
>
> But that is not the test. Instead, once the plaintiff has alleged a "colorable" or "arguable" claim that the defendant has invaded a legally protected interest, the plaintiff has met this element of an Article III injury. *See Reoforce, Inc. v. United States*, 853 F.3d 1249, 1264 (Fed. Cir. 2017); *Booker-El v. Superintendent, Indiana State Prison*, 668 F.3d 896, 900 (7th Cir. 2012). Only if the claimed protected interest is "wholly insubstantial and frivolous" does a claim's failure on its merits turn into a jurisdictional defect. *Steel Co.*, 523 U.S. at 89, 118 S.Ct. 1003 (quoting *Bell*, 327 U.S. at 682–83, 66 S.Ct. 773); *Walker*, 450 F.3d at 1093; *see Apple v. Glenn*, 183 F.3d 477, 479 (6th Cir. 1999) (per curiam).

Id. The district court could not—consistent with the above precedents—dismiss Plaintiffs' case for lack of standing where the standing inquiry hinged upon the resolution of whether Plaintiffs have suffered a violation of their First Amendment rights. By holding that Defendant's arbitrary restoration of voting rights via "partial pardons" was per se not an administrative licensing regime, the district court reached and ruled on the merits. Once the district court reached the merits of the constitutional claims, binding precedent obligated it to base its order and judgment on the merits. Accordingly, if the court found a violation of Plaintiffs' First

Amendment rights, then there would be an Article III injury in fact, and the court would proceed to grant Plaintiffs relief. And in accordance with *Steel Company*, even if the court did not find such a constitutional violation, this would likewise be a determination on the merits, and the court would still be obligated to rule based on the merits, not standing.

Respectfully, Plaintiffs submit that this Court may construe the district court's opinion to have reached and ruled on the merits and should review that decision accordingly and reverse. However, if this Court finds that the district court ruled solely based on jurisdictional grounds, this Court should find that the dismissal for lack of standing was in error and then rule on the merits.

III. The district court erred in holding that Plaintiffs suffer no First Amendment injury under Kentucky's arbitrary voting rights restoration system.

Turning to the merits, as the district court acknowledged, under longstanding U.S. Supreme Court precedents, a violation of the First Amendment unfettered discretion doctrine can be established "'without the necessity of first applying for, and being denied, a license.'" Opinion and Order, RE 68, Page ID # 846–47 (quoting *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 755–56 (1988)). However, the district court proceeded to conclude that clemency is different from an administrative licensing scheme and that, therefore, Plaintiffs could not assert a First Amendment unfettered discretion claim. Because any perceived differences between

Kentucky's system of restoring voting rights through clemency and administrative licensing schemes governing First Amendment rights are immaterial to the constitutional questions at issue, and because the First Amendment requires a functional—not hyper-formalistic—approach, the district court erred. But before Plaintiffs delve further into their arguments on the district court's ruling, *see infra* Section III.C, it is necessary to first articulate Plaintiffs' claims and the First Amendment doctrine upon which they are based.

A. Plaintiffs have established their First Amendment injuries.

Plaintiffs' claims apply the well-settled precedents of the First Amendment unfettered discretion doctrine to the right to vote, which is protected by the First Amendment as a means of political expression and political association. Plaintiffs have alleged the following elements of Kentucky's voting rights restoration system violate the First Amendment: (1) Defendant's arbitrary decision-making over restoration of the right to vote; and (2) the lack of reasonable, definite time limits by which Defendant must grant or deny such restoration applications.

The First Amendment unfettered discretion doctrine applies to Plaintiffs' situation. The U.S. 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. *See Norman v. Reed*, 502 U.S. 279, 288 (1992) (recognizing "the constitutional interest of like-minded voters to gather in pursuit of common political

ends, thus enlarging the opportunities of all voters to express their own political preferences"); *Anderson v. Celebrezze*, 460 U.S. 780, 787–89, 806 (1983) (evaluating burdens on "the voters' freedom of choice and freedom of association"); *Kusper v. Pontikes*, 414 U.S. 51, 56–57 (1973) (recognizing "freedom to associate with others for the common advancement of political beliefs and ideas" is protected by First Amendment); *Williams v. Rhodes*, 393 U.S. 23, 30–31 (1968) ("[T]he state laws place burdens on two different, although overlapping, kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively."). The First Amendment also protects voting as a form of expressive conduct, just as it protects 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); *see also Nevada Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 134 (2011) (Alito, J., concurring in part and concurring in the judgment) (recognizing voting's "expressive content"). It would be absurd if all forms of speech and expression in the electoral context were

protected by the First Amendment, but not the political choice and expression at the very center of it—voting.

To safeguard against viewpoint discrimination, the First Amendment has long been construed to forbid vesting government officials with 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 Cnty. v. Nationalist Movement*, 505 U.S. 123, 130–33 (1992). Since the decision in *Lovell v. Griffin*, 303 U.S. 444 (1938), the Supreme Court has consistently applied this doctrine to strike down administrative licensing regimes that conferred limitless discretion across a wide range of First Amendment-protected expression and conduct. In *City of Lakewood*, the Supreme Court 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 absence of any limits on official discretion 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 civil rights 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 First Amendment-protected conduct "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"); *Saia v. New York*, 334 U.S. 558, 560–62 (1948) (striking down discretionary permit scheme for use of loudspeakers). These precedents are legion and consistent. They all hold that a law conferring arbitrary, unfettered power to grant or deny a license to engage in constitutionally protected expression violates the First Amendment.

Cases that specifically consider the right to vote, including felon disenfranchisement and re-enfranchisement laws, support the conclusion that arbitrarily issuing licenses to vote is unconstitutional. Arbitrarily giving select individuals the right to vote violates the Constitution. The Supreme Court made that plain in *Louisiana v. United States* when it wrote that "[t]he cherished right of people in a country like ours to vote cannot be obliterated by the use of laws like this, which leave the voting fate of a citizen to the passing whim or impulse of an individual registrar." 380 U.S. 145, 150–53 (1965); *see also Baker v. Carr*, 369 U.S. 186, 208 (1962) ("A citizen's right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution . . . "). Arbitrary

disenfranchisement is similarly unlawful. *See, e.g.*, *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"); *cf. Shepherd v. Trevino*, 575 F.2d 1110, 1114 (5th Cir. 1978) ("No one would contend that section 2 [of the Fourteenth Amendment] permits a state to disenfranchise all felons and then reenfranchise only those who are, say, white."). Therefore, it inexorably follows that a state may not arbitrarily re-enfranchise select individuals who once had but lost their right to vote under state law.[11]

Arbitrary categorical distinctions in re-enfranchisement would be unconstitutional. *Harvey v. Brewer*, 605 F.3d 1067, 1079 (9th Cir. 2010) (noting states cannot arbitrarily "re-enfranchise only those felons who are more than six-feet tall"). Furthermore, arbitrary determinations made on a case-by-case basis untethered to any rules or criteria 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.*

[11] And of course, some people are convicted of felonies as minors, KY. REV. STAT. § 635.020, and their application for "re-enfranchisement" is in fact an application for enfranchisement.

City of Long Beach, 574 F.3d 1011, 1042–43 (9th Cir. 2009) (holding legislative reservation of discretionary, administrative function is subject to First Amendment unfettered 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.").

In all material respects, this case's facts are no different from those in the First Amendment unfettered discretion cases that have struck down unconstitutional licensing schemes. In all of those cases, no one can engage in the specific type or manner of constitutionally protected activity without first obtaining a license or permit and will face criminal sanctions if they do so. Similarly, in Kentucky, a class of individuals cannot register and vote without first obtaining a license or permit—an executive official's discretionary grant of 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). Kentucky law simply requires a certain subset of U.S. citizen adults to obtain a state official's permission—a license—prior to registering and voting.[12]

[12] The district court quoted the definition of "license" in Black's Law Dictionary (11th ed. 2019), to argue that licenses are "usually revocable." Opinion and Order, RE 68, Page ID # 847. Leaving aside the fact that the "voting license" would be automatically revoked upon any subsequent felony conviction, it remains unclear why revocability is relevant in any way to whether Kentucky's voting rights restoration system functions as an arbitrary administrative licensing regime governing First Amendment-protected conduct.

Two different, successive Governors—Governor Beshear and the state's previous Governor, Governor Bevin—named as defendants in this case have both failed to identify any codified, objective, and uniformly applied laws, rules, or criteria that govern their decisions as to whether to grant or deny voting rights restoration applications. That is because none exist. At the October 24, 2019 status conference before the district court, Defendant's counsel conceded that there are no uncodified rules or criteria in any other source of binding legal authority: "[T]here is no secret . . . non-public binding anything that guides the Governor's discretion." Transcript of October 24, 2019 Telephone Conference, RE 45, Page ID # 617–18. Defendant, therefore, has absolute discretion to grant or deny a voting rights restoration application, and Plaintiffs filed suit to enjoin this system, requesting that the district court order the Governor to replace it with a non-arbitrary voting rights restoration system governed by specific, objective, neutral, and uniformly applied rules and criteria.[13]

According to the Supreme Court's and this Court's precedents, Plaintiffs per se continue to suffer a constitutional injury under the First Amendment unfettered

[13] In EO 2019-003, Defendant of course promulgated a set of criteria to restore certain Kentuckians, but those criteria have nothing to do with the decisions Defendant makes on the applications affirmatively submitted by those who do not qualify for restoration under the executive order. For the latter group, Kentucky law remains just as devoid of rules or criteria governing voting rights restoration as it did before the executive order was issued.

discretion doctrine—and the corollary requirement of reasonable, definite time limits—so long as they are subjected to a system of unfettered discretion with no reasonable, definite time limits. These are facial challenges to the lack of laws, rules, or criteria constraining official discretion in issuing a license, not as-applied actions. Plaintiffs' requested injunction seeks a non-arbitrary voting rights restoration system, regardless of whether it results in their personal re-enfranchisement. There are innumerable possible restoration rules and criteria that would be non-arbitrary and thereby cure these constitutional defects. Under some of those possible non-arbitrary restoration systems, Plaintiffs would be restored, while under others, they would not. But under all such non-arbitrary systems, Plaintiffs would no longer be subjected to an unconstitutional arbitrary licensing scheme in violation of the First Amendment.

Moreover, while Governor Beshear may have the power to permanently disenfranchise people with felony convictions, that power does not enable him to arbitrarily choose which felons may once again vote. "[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. The First Amendment permits time, place, and manner restrictions that

may categorically exclude some individuals, such as minors, from engaging in certain First Amendment-protected conduct, at least under certain circumstances. For instance, in the voting context, state voting eligibility laws do not violate the First Amendment by setting the minimum age at 18, but these laws would violate the unfettered discretion doctrine if they gave election officials unlimited discretion to selectively grant or deny the right to vote to 16- and 17-year-olds upon the submission of right-to-vote applications accompanied by high school transcripts and essays. Such arbitrary decision-making authority over the right to vote would clearly violate the First Amendment. *See Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981) (noting arbitrariness is "inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view").

Finally, Plaintiffs' second claim relies upon a closely related First Amendment rule. Kentucky's voting rights restoration scheme also lacks any reasonable, definite time limits by which Defendant must make a decision to grant or deny a restoration application. 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 pending applications. This is also why plaintiffs asserting First Amendment unfettered discretion claims need not first apply for and be denied a license, lest defendants shield themselves from liability by simply retaining and never making a decision on certain applications.

In sum, states are authorized to disenfranchise felons, even permanently, but once a state decides to re-enfranchise people with felony convictions, it may not do so arbitrarily. Any non-arbitrary system for voting rights restoration with reasonable, definite time limits will cure these constitutional violations. Instead of adopting such a system, Defendant is before this Court fighting to retain sole and absolute power to issue licenses to vote beyond the reach of the U.S. Constitution.

B. 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, which has been construed to authorize felon disenfranchisement, *Richardson v. Ramirez*, 418 U.S. 24, 53–56 (1974), and applying the prohibition on arbitrarily licensing First

Amendment-protected conduct in this case. 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." *Williams*, 393 U.S. at 29. In *Tashjian v. Republican Party of Connecticut*, the Supreme Court stated that the legislative authority given to states in the Elections Clause, U.S. CONST. art. I, § 4, cl. 1, "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); *see also 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 people with felony convictions. The First Amendment imposes independent and specific constitutional limitations, and Plaintiffs only challenge Defendant's claimed power to re-enfranchise felons arbitrarily, not the state's power to disenfranchise people with felony convictions. There is no conflict or even tension between permitting felon

disenfranchisement under the Fourteenth Amendment and forbidding arbitrary re-enfranchisement under the First Amendment, so this Court need not evaluate which amendment is more "specific" or trumps the other. There is no need to harmonize constitutional provisions that do not conflict.

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 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 table decision), unsuccessfully argued. Instead, Plaintiffs have argued that *arbitrary re-enfranchisement* violates the First Amendment, a constitutional challenge not adjudicated in any of those cases.

C. The district court erred in concluding Kentucky's arbitrary voting rights restoration system is not an administrative licensing scheme that brings it within the First Amendment unfettered discretion line of cases.

With respect to the district court, its ruling that Kentucky's arbitrary voting rights restoration system is not an administrative licensing scheme violates clear and longstanding U.S. Supreme Court precedent.

First, because Plaintiffs have asserted facial challenges, they suffer an injury from the arbitrariness of the state's voting rights restoration system. Whether or not the requested injunctive relief to create a non-arbitrary system ultimately would result in their personal re-enfranchisement is irrelevant. *See Forsyth Cnty.*, 505 U.S. at 133 n.10 ("Facial attacks on the discretion granted a decisionmaker are not dependent on the facts surrounding any particular permit decision."). The existence of an actual, improper discriminatory or biased motive need not be shown to strike down such a law on its face: "[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." *Id.* (emphasis added); *Prime Media, Inc. v. City of Brentwood*, 485 F.3d 343, 351 (6th Cir. 2007) ("[A] licensing provision coupled with unbridled discretion itself amounts to an actual injury.") (citations omitted); *see also Roach v. Stouffer*, 560 F.3d 860, 869 & n.5 (8th Cir. 2009) (holding that pro-life group "need not prove, or even

allege" viewpoint discrimination in successful facial First Amendment challenge to officials' "unbridled discretion" in administering specialty license plate program). Regardless of whether or how often it is exercised, and regardless of the disposition of any particular license or permit application, the power to discriminate is prohibited. Such unfettered power is per se unlawful in the First Amendment context.

Second, the U.S. Supreme Court has held since *Lovell v. Griffin*, 303 U.S. 444, 452–453 (1938), that the denial of a plaintiff's application for a license or permit is not a prerequisite to asserting a facial unfettered discretion challenge under the First Amendment. *City of Lakewood*, 486 U.S. at 755–56 (collecting cases) ("[O]ur cases have long held that when a licensing statute allegedly vests unbridled discretion in a government official over whether to permit or deny expressive activity, one who is subject to the law may challenge it facially without the necessity of first applying[ ]for, and being denied, a license."). The district court acknowledged this rule, Opinion and Order, RE 68, Page ID # 847, but nevertheless concluded that Kentucky's restoration system—considered under state law to be part of the executive clemency or pardon process—is not an administrative licensing scheme. The district court then concluded that the targeted voting rights restoration scheme did not fall under the First Amendment unfettered discretion doctrine line of

cases. However, the district court's analysis was clearly erroneous, both in its reliance on labels and its analysis of functionality.

As to the nomenclature, the mere label "clemency" does not put Kentucky's voting rights restoration system beyond the reach of judicial review for First Amendment violations. *Nat'l Ass'n for Advancement of Colored People v. Button*, 371 U.S. 415, 429 (1963) ("[A] State cannot foreclose the exercise of constitutional rights by mere labels."). In a litany of cases analyzing a wide range of First Amendment claims and doctrines, the U.S. Supreme Court has consistently held, that a functional—not formalistic—approach must be used. *See, e.g.*, *Press-Enter. Co. v. Superior Ct. of California for Riverside Cnty.*, 478 U.S. 1, 7–10 (1986) (recognizing qualified First Amendment right of access to preliminary hearings) ("[T]he First Amendment question cannot be resolved solely on the label we give the event, *i.e.*, 'trial' or otherwise, particularly where the preliminary hearing functions much like a full-scale trial."); *Branti v. Finkel*, 445 U.S. 507, 518–19 (1980) (holding First Amendment bars conditioning public defenders' continued employment upon affiliation with political party controlling county government) ("[T]he ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved."); *Bigelow v. Virginia*, 421 U.S. 809,

818–26 (1975) (recognizing First Amendment protects commercial advertisements) ("Regardless of the particular label asserted by the State—whether it calls speech 'commercial' or 'commercial advertising' or 'solicitation'—a court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation. The diverse motives, means, and messages of advertising may make speech 'commercial' in widely varying degrees."); *Evans v. Newton*, 382 U.S. 296, 299 (1966) ("Conduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action."); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963) ("We are not the first court to look through forms to the substance and recognize that informal censorship may sufficiently inhibit the circulation of publications to warrant injunctive relief."); *see also Fed. Election Comm'n v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 456 (2007) (noting that distinguishing between campaign advocacy and issue advocacy "requires [courts] first to determine whether the speech at issue is the 'functional equivalent' of speech expressly advocating the election or defeat of a candidate for federal office, or instead a 'genuine issue a[d]'" (citations omitted)); *Garcetti v. Ceballos*, 547 U.S. 410, 424–25 (2006) (in First Amendment retaliation claim concerning whether public employee had spoken as government employee or private citizen, "[t]he proper inquiry is a practical one" and "[f]ormal

job descriptions" are not dispositive). Other courts have held likewise. *Wag More Dogs Liab. Corp. v. Cozart*, 680 F.3d 359, 366 (4th Cir. 2012) ("Eschewing a formalistic approach to evaluating content neutrality that looks only to the terms of a regulation, the Supreme Court has instead embraced a more practical inquiry." (citing *Hill v. Colorado*, 530 U.S. 703, 719–20 (2000))). Such a functional approach makes sense given the fundamental importance of the First Amendment's guarantees.

Here, the district court placed undue weight upon the "clemency" label associated with voting rights restoration in Kentucky law. Kentucky statutes and a few Kentucky cases have referred to the Governor's discretionary power to restore voting rights as a "partial pardon." *See, e.g.*, KY. REV. STAT. § 196.045(1)(e) (directing Department of Corrections to "[f]orward information on a monthly basis of eligible felony offenders who have requested restoration of rights to the Office of the Governor for consideration of a partial pardon"); *Anderson v. Commonwealth*, 107 S.W.3d 193, 195 (Ky. 2003) (holding that "partial pardon" granted pursuant to Sections 145 and 150 of Kentucky Constitution "only restored [individual's] right to vote and to hold office and did not restore his 'right' to be a juror"); *Cheatham v. Commonwealth*, 131 S.W.3d 349, 351 (Ky. Ct. App. 2004) ("partial pardon" restoring rights to vote and hold public office did not encompass restoration of right to possess firearms). However, the use of this language of clemency to discuss the

Governor's power to restore voting rights does not mean that Kentucky's restoration system is exempt from constitutional scrutiny, or that voting rights restoration does not function as an arbitrary administrative licensing scheme. The "partial pardon" label is a bit of a misnomer because restoration is manifestly *not* a pardon.

When it comes to the functionality of Kentucky's voting rights restoration system, in all material respects, it operates as an administrative licensing scheme that selectively confers a right to vote upon certain individuals with felony convictions. The use of the term "partial pardon" in Kentucky statutes and cases applying Section 145 of the Kentucky Constitution, which gives the Governor the right to restore voting rights by "executive pardon," KY. CONST. § 145, seems to have led the district court astray. Though the district court understood that the granting of a voting rights restoration application only confers that one right upon a person with a felony conviction, it nevertheless proceeded to discuss at length the effect of "pardons" generally, not these so-called "partial pardons." The court wrote that "a pardon cannot be characterized as a mere license to vote—restoration of the right to vote is just one of several potential effects of a pardon." Opinion and Order, RE 68, Page ID # 847. But restoration of the right to vote is all that is at issue in this appeal. Pardons—or "full pardons," if one prefers—are simply not at issue in this case. Nevertheless, the district court proceeded to itemize some of the legal effects of a (full) pardon: "Loss of the right to vote is just one consequence of a felony

conviction, and a pardon can do much more than remove that single consequence—it can nullify a prison sentence, restore other civil rights, and expunge the conviction." Opinion and Order, RE 68, Page ID # 848. But granting a voting rights restoration application does not accomplish any of that.[14]

The district court erred by assessing whether *full* pardons function as licenses to vote instead of focusing on the sole and narrow question before it: whether the grant or denial of a voting rights restoration application functions as vote licensing. The court noted that: (1) "a pardon has the effect of 'removing all legal punishment for the offense and restoring one's civil rights . . . .' *Harscher v. Commonwealth*, 327 S.W.3d 519, 522 (Ky. Ct. App. 2010) (citing *Nelson v. Commonwealth*, 109 S.W. 337, 338 (Ky. 1908))"; and (2) "[a] pardon can also invalidate or expunge a conviction if it includes appropriately strong invalidating language, such as by referring to the pardonee's innocence or otherwise 'question[ing] or discredit[ing] a judicial finding of guilt.'" Opinion and Order, RE 68, Page ID # 848. For the latter proposition, the court cited to *West v. Louisville Jefferson County Metro Government*, No. 3:20-CV-00820-GNS, 2022 WL 468050, at *3 (W.D. Ky. Feb. 14, 2022), which, as it recounted, held "that a 'full and unconditional pardon' restoring

[14] The current civil rights restoration application does also restore the right to hold public office, but this case does not implicate and would have no effect on the restoration of that specific right. If Plaintiffs were to prevail, voting rights restoration would need to be separated from restoration of the right to hold public office.

'all rights and privileges' does not invalidate the pardonee's conviction and entitle him to expungement where the pardon 'made no reference to the pardonee's innocence or expungement of her record.'" Opinion and Order, RE 68, Page ID # 848. But, again, this case does not concern "full and unconditional pardon[s]," but rather only the granting or denying of voting rights restoration applications. No one—including Defendant and the district court—would argue that this "partial pardon" can remove all legal punishment, nullify a prison sentence, restore *all* civil rights, or invalidate or expunge a conviction. It cannot; it does not. A granted voting rights restoration application only restores the right to vote, and a person convicted of a felony need not secure a full pardon in order to vote in Kentucky once again.

Indeed, as Plaintiffs noted in their Motion for Summary Judgment filed in late 2019, "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 a bar to greater penalties for second offenses or a subsequent conviction as a habitual criminal.'" Plaintiffs' Motion for Summary Judgment, RE 46, Page ID # 643 (quoting Exhibit J to Plaintiffs' Motion for Summary Judgment, Executive Order No. 2015-871 (Nov. 24, 2015), RE 46-10, Page ID # 679). Even Defendant does not agree with the district court's erroneous conflation of a "partial pardon" that solely restores voting rights with the effects of a full pardon. This is

plain from Defendant's Executive Order 2019-003, which echoes the 2015 Executive Order:

> This Executive Order, and all future restorations of civil rights issued pursuant hereto, shall not be construed as a full pardon under Section 77 of the Constitution of the Commonwealth of Kentucky, or as a remission of guilt or forgiveness of the offense; shall not relieve any obligation to pay restitution, fines, or any other court-ordered monetary conditions; and shall not operate as a bar to greater penalties for second offenses or a subsequent conviction as a habitual criminal.

Exhibit 1 to Plaintiffs' Motion to Dismiss Plaintiffs Harbin, Comer, and Fox's Claims as Moot, EO 2019-003, RE 53-1, Page ID # 764. EO 2019-003—which was before the district court and served as the basis of its previous, reversed order dismissing this case as moot—is a highly significant source of authority as to the form and function of voting rights restoration under Kentucky law. But the district court's opinion fails to consider it. EO 2019-003 demonstrates that Defendant agrees with Plaintiffs that a restoration of voting rights is not a full pardon and simply does not bear the legal effects that the district court enumerated and relied upon in attempting to distinguish voting rights restoration from arbitrary licensing regimes long prohibited by the First Amendment unfettered discretion doctrine.

Furthermore, none of the differences the district court perceived between pardons and arbitrary administrative licensing regimes were material to the First Amendment analysis implicated by Plaintiffs' claims. The district court also wrote that: "A pardon is also retrospective, as opposed to prospective. A pardon nullifies

the legal consequences of one's past actions, whereas a license prospectively grants one permission to do something that would otherwise result in legal consequences." Opinion and Order, RE 68, Page ID # 848. This purported distinction is dubious, as pardons of course have such prospective effects as well but, more importantly, it is immaterial to the analysis of these "partial pardons" required by Plaintiffs' specific claims. This Court need not excavate the history of clemency, pardons, or the nomenclature and labels for the Governor's clemency powers under Kentucky law. Ultimately, the First Amendment unfettered discretion analysis asks only whether the law gives government officials uncontrolled power to grant or deny licenses to engage in First Amendment-protected conduct. Whether that law is part of or separate from a state's clemency system, or any other area of state executive or administrative functions, is immaterial. Function trumps form when it comes to the fundamental protections of the First Amendment.

Accordingly, the district court erred in citing all the legal consequences of a full pardon as reasons a granted voting rights restoration application or "partial pardon" does not function as a license to vote. The district court erroneously focused on irrelevant differences between full pardons (not the "partial pardons" or granted voting rights restoration applications at issue here) and Kentucky's voting rights restoration system. The practical inquiry that the court failed to apply would have evaluated whether the state's voting rights restoration system functionally is, in all

material respects, an administrative licensing scheme that vests a government official with unfettered discretion to selectively grant or deny licenses to engage in First Amendment-protected conduct. Such an approach would have inexorably yielded the conclusion that it is.

D. Clemency rules and procedures are not immune from constitutional scrutiny.

As noted, Defendant has placed 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. *See Herrera v. Collins*, 506 U.S. 390, 412 (1993) ("In England, the clemency power was vested in the Crown and can be traced back 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, as noted, labeling re-enfranchisement as "clemency" does not immunize it from judicial review.

Defendant's own cited 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, 461–66 (1981), and *Smith v. Snow*, 722 F.2d 630, 632 (11th Cir. 1983) (per curiam), are all due

process challenges. 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 codified, specific, and objective rules or criteria governing the Governor's discretion is, from a First Amendment perspective, arguably worse than a coin flip, which at least relies upon pure chance rather than unspoken, potentially discriminatory considerations. There is no conflict between these cases' conclusion that discretionary pardons or commutations are lawful and holding arbitrary voting rights restoration is 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 clemency process. Those cases did not consider the singular, powerful protections of the First Amendment, which go above and beyond what due process and equal protection afford.

A ruling for Plaintiffs would merely apply a well-settled First Amendment doctrine to another area of First Amendment-protected expression, association, and/or conduct, as it has been routinely applied in different contexts for over eighty years. The decision to incorporate voting rights restoration into the clemency system has created a specific and narrow First Amendment violation. Granting Plaintiffs' requested relief would be limited to the process for re-enfranchisement and would

not alter any other aspect of Kentucky's clemency system. Other species of clemency, including pardons and commutations, would remain unchanged.[15] Restoration is available to people with felony convictions separate and independent from a full pardon, which confers many other benefits and rights that do not implicate the First Amendment. KY. CONST. § 145. Accordingly, a decision in Plaintiffs' favor would have no effect on discretionary full pardons under Section 77 of the Kentucky Constitution, KY. CONST. § 77, because Kentucky has not made full pardons the single, exclusive means for voting rights restoration. It is only bringing felon disenfranchisement and re-enfranchisement into the discretionary clemency system that has caused a constitutional problem here, not the pardon power or felon disenfranchisement. There are numerous cases in which two otherwise-lawful government actions violate the Constitution when combined. *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).

Re-enfranchisement generally is neither inherently a clemency function nor inherently part of the pardon power; across the country, it can be and often is handled separately from the clemency system and/or as an alternative to a pardon. Today,

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

thirty-eight states and the District of Columbia have created a non-discretionary path to re-enfranchisement by restoring the voting rights of all people with felony convictions following the completion of incarceration, parole and probation, and/or a waiting period.[16] A ruling here will not affect Defendant's full pardon power.

[16] There are four categories of non-discretionary restoration schemes: (1) non-discretionary restoration upon release from incarceration (21 states), *see* CAL. ELEC. CODE § 2101(a); COLO. CONST. art. 7, § 10; COLO. REV. STAT. § 1-2-103(4); CONN. GEN. STAT. §§ 9-46, 9-46a; HAW. REV. STAT. § 831-2(a)(1); ILL. CONST. art. III, § 2, 730 ILL. COMP. STAT. 5/5-5-5; IND. CODE §§ 3-7-13-4, 3-7-13-5; MD. CODE ANN. ELEC. LAW § 3-102(b)(1); MASS. CONST. amend. art. III, MASS. GEN. LAWS ch. 51, § 1; MICH. COMP. LAWS § 168.758b; MONT. CONST. art. IV, § 2, MONT. CODE ANN. § 46-18-801(2); NEV. REV. STAT. § 213.157; N.D. CENT. CODE ANN. §§ 12.1-33-01, 12.1-33-03; N.H. REV. STAT. ANN. §§ 607-A:2, 607-A:3; N.J. STAT. ANN. §§ 2C:51-3, 19:4-1(8); N.Y. ELEC. LAW § 5-106(3); OHIO REV. CODE ANN. § 2961.01(A); OR. REV. STAT. § 137.281(7); 25 PA. CONS. STAT. §§ 2602(t), 2602(w), 3146.1, https://www.vote.pa.gov/Resources/Documents/Convicted_felon_brochure.pdf; R.I. CONST. art. II, § 1; UTAH CODE ANN. § 20a-2-101.5(2); WASH. REV. CODE § 29A.08.520(1); (2) non-discretionary restoration five years after release from incarceration (1 state), LA. STAT. ANN. § 18:102(A)(1)(b); (3) non-discretionary restoration following completion of parole and probation (15 states), *see* ALASKA STAT. § 15.05.030; ARK. CONST. amend. 51, § 11(d); GA. CONST. art. II, § I, para. III; IDAHO CODE ANN. § 18-310(2); KAN. STAT. ANN. §§ 21-6613, 22-3722; MINN. STAT. § 609.165; MO. REV. STAT. § 115.133; N.C. GEN. STAT. ANN. §§ 13-1, 13-2; N.M. STAT. ANN. § 31-13-1; OKLA. STAT. tit. 26, § 4-101; S.C. CODE ANN. § 7-5-120(B); S.D. CODIFIED LAWS § 24-5-2; TEX. ELEC. CODE ANN. § 11.002; W.VA. CODE § 3-2-2; WIS. STAT. § 304.078(2); and (4) non-discretionary restoration two years after completion of sentence (1 state), *see* NEB. REV. STAT. ANN. § 29-112. The Supreme Court of North Carolina will decide in *Community Success Initiative v. Moore*, No. 331PA21, whether North Carolina's existing statute requiring the completion of parole and probation for restoration violates the North Carolina Constitution. *Cmty. Success Initiative v. Moore*, 877 S.E.2d 878, 879 (N.C. 2022) (noting case will be heard "at the first regularly scheduled session of Court to be held in 2023"). Finally, Maine, Vermont, and the District of Columbia do not disenfranchise felons, even while they are incarcerated. ME. CONST. art. II, § 1; VT. STAT. ANN. tit. 28, § 807(a); D.C. MUN. REGS. tit. 3 § 500.2.

CONCLUSION

Plaintiffs respectfully request that this Court reverse the district court's dismissal of this action, reverse the denial of Plaintiffs' motion for summary judgment, and direct the district court to grant Plaintiffs' motion for summary judgment and enter judgment in Plaintiffs' favor on the constitutional merits.

DATED: November 21, 2022

Respectfully submitted,

/s/ Jon Sherman

Jon Sherman
D.C. Bar No. 998271
Michelle Kanter Cohen
D.C. Bar No. 989164
Cecilia Aguilera
D.C. Bar No. 1617884
FAIR ELECTIONS CENTER
1825 K St. NW, Suite 450
Washington, DC 20006
jsherman@fairelectionscenter.org
mkantercohen@fairelectionscenter.org
caguilera@fairelectionscenter.org
Phone: (202) 331-0114

Ben Carter
Kentucky Bar No. 91352
KENTUCKY EQUAL JUSTICE CENTER
222 South First Street, Ste. 305
Louisville, KY 40202
ben@kyequaljustice.org
Phone: (502) 303-4062

Counsel for Plaintiffs-Appellants

RULE 32(g) CERTIFICATE

I hereby certify that this document, including all headings, footnotes and quotations, but excluding the Disclosure Statement, Table of Contents, Table of Authorities, and any certificates of counsel, contains 11,626 words, as determined by the word count of the word-processing software used to prepare this document, specifically Microsoft Word for Mac Version 16.49 in Times New Roman 14-point font, which is fewer than the 13,000 words permitted under Fed. R. App. P. 32(a)(7)(B)(i).

/s/ Jon Sherman

November 21, 2022

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 21, 2022, an electronic copy of the Brief of Plaintiffs-Appellants was filed with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. The undersigned also certifies that participants who are registered CM/ECF users will be served via the CM/ECF system.

/s/ Jon Sherman

November 21, 2022

ADDENDUM

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Plaintiffs-Appellants hereby set forth their designation of relevant District Court documents as required by Sixth Circuit Rule 30(g).

Record Entry Number	Description of Document	Page ID#
1	Complaint	1–4
2	Motion for Immediate Temporary and Permanent Injunctive Relief	10–13
10	Amended Complaint	63–79
12	Second Amended Complaint	102–19
13	Order Denying Motion for Immediate Temporary and Permanent Injunctive Relief	122–24
25	Motion for Leave to File Third Amended Complaint	230–35
28	Third Amended Complaint	274–300
29	Order Denying Pending Motion and Granting Leave to File Fourth Amended Complaint	301–02
31	Fourth Amended Complaint	332–60
32	Motion to Dismiss	361–63
32-1	Memorandum of Law in Support of Motion to Dismiss	364–88
33	Response to Motion to Dismiss	533–59
34	Reply to Response to Motion to Dismiss	565–75
35	Order Denying Motion to Dismiss	576
43	Minute Entry Order for October 24, 2019 Telephone Conference	605
45	Transcript of October 24, 2019 Telephone Conference	608–19
46	Plaintiffs' Motion for Summary Judgment	620–46
46-4	Robert Langdon Declaration	659
46-9	Deric Lostutter Declaration	674
46-10	Exhibit J to Plaintiffs' Motion for Summary Judgment, Executive Order No. 2015-871 (Nov. 24, 2015)	679
47	Defendant's Motion for Summary Judgment	682–83
47-1	Memorandum in Support of Defendant's Motion for Summary Judgment	684–707

Record Entry Number	Description of Document	Page ID#
48	Defendant's Response to Motion for Summary Judgment	739–44
49	Plaintiffs' Response to Motion for Summary Judgment	745–51
53	Motion to Dismiss Plaintiffs Harbin, Comer, and Fox's Claims	758–60
53-1	Exhibit 1 to Plaintiffs' Motion to Dismiss Plaintiffs Harbin, Comer, and Fox's Claims as Moot, Executive Order 2019-003	761–65
54	Order Granting Motion to Dismiss Plaintiffs Harbin, Comer, and Fox's Claims	768
55	Opinion and Order Dismissing Fourth Amended Complaint	769–77
56	Judgment	778
57	Plaintiffs' Motion for Reconsideration of Judgment	779–85
57-1	Exhibit 1 to Plaintiffs' Motion for Reconsideration of Judgment, Civil Rights Restoration Application	786–88
60	Opinion and Order Denying Reconsideration	807–13
61	Notice of Appeal	814–16
66	Joint Status Report	834
66-1	*State of Indiana v. Bonifacio Aleman*, Cause No. 10C01-9707-CF052, Amended Judgment of Conviction	839–40
68	Opinion and Order Dismissing Case for Lack of Standing	842–50
69	Judgment	851
70	Notice of Appeal	852–53