No. 24-1791

In the
United States Court of Appeals
for the Fourth Circuit

GEORGE HAWKINS,

Plaintiff-Appellant,

v.

GLENN YOUNGKIN, in his official capacity as Governor of Virginia, and KELLY GEE, in her official capacity as Secretary of the Commonwealth,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Virginia, Richmond Division, No. 3:23-cv-00232-JAG
The Honorable John A. Gibney, Jr., Judge Presiding

JOINT APPENDIX

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Counsel for Plaintiff-Appellant

Table of Contents

[1] Governor Youngkin's Responses to Plaintiffs' First Set of Interrogatories and Requests for Admission were also attached as Exhibit A to the Sherman Declaration. *See* ECF No. 57-1, PageID 668-674; *see also* ECF No. 84 (corrected Sherman Declaration, Ex. A).

[2] On March 5, 2024, Plaintiff filed his original, redacted Reply Brief in Support of Motion for Summary Judgment [ECF No. 72]. On April 16, 2024, Plaintiff filed a revised, unredacted Reply Brief in Support of Motion for Summary Judgment as Exhibit 3 to his Notice Pursuant to the Court's April 4, 2024 Opinion and Order Regarding Motions to Seal [ECF Nos. 91, 91-3] to conform to the district court's opinion and order on the parties' motions to seal the summary judgment pleadings [ECF Nos. 87, 88].

[3] On February 14, 2024, Plaintiff filed his original, redacted Memorandum in Support of Plaintiff's Motion for Summary Judgment [ECF No. 57]. On April 16, 2024, Plaintiff filed a revised, redacted Memorandum in Support of Plaintiff's Motion for Summary Judgment as Exhibit 1 to his Notice Pursuant to the Court's April 4, 2024 Opinion and Order Regarding Motions to Seal [ECF Nos. 91, 91-4] to conform to the district court's opinion and order on the parties' motions to seal the summary judgment pleadings [ECF Nos. 87, 88].

[4] On February 28, 2024, Defendants filed their original, redacted Memorandum in Opposition to Plaintiff's Motion for Summary Judgment [ECF No. 66]. On April 17, 2024, Defendants filed a revised, redacted Memorandum in Opposition to Plaintiff's Motion for Summary Judgment as Exhibit 1 to their Notice Pursuant to the Court's April 4, 2024 Opinion and Order Regarding Motions to Seal [ECF Nos. 95, 95-1] to conform to the district court's opinion and order on the parties' motions to seal the summary judgment pleadings [ECF Nos. 87, 88].

[5] On February 28, 2024, Defendants filed their original, redacted Declaration of Jennifer Moon in Support of Defendants' Memorandum in Opposition to Plaintiff's Motion for Summary Judgment [ECF No. 66-1]. On April 17, 2024, Defendants filed a revised, redacted Moon Declaration as Exhibit 2 to their Notice Pursuant to the Court's April 4, 2024 Opinion and Order Regarding Motions to Seal [ECF Nos. 95, 95-2] to conform to the district court's opinion and order on the parties' motions to seal the summary judgment pleadings [ECF Nos. 87, 88].

[6] This transcript was ordered by Appellant's counsel in preparation for the appeal. *See* ECF No. 104. The Release of Transcript Restriction in the district court is set for December 10, 2024 (*see* ECF No. 105), when it will be available on PACER as ECF No. 105.

APPEAL,CLOSED

U.S. District Court
Eastern District of Virginia - (Richmond)
CIVIL DOCKET FOR CASE #: 3:23-cv-00232-JAG

George Hawkins v. Youngkin et al
Assigned to: District Judge John A. Gibney, Jr
Case in other court: USCA, 24-01791
Cause: 28:1331 Fed. Question: Civil Rights Violation

Date Filed: 04/06/2023
Date Terminated: 08/07/2024
Jury Demand: None
Nature of Suit: 441 Civil Rights: Voting
Jurisdiction: Federal Question

Plaintiff

Nolef Turns, Inc.
TERMINATED: 10/06/2023

represented by **Victor Michael Glasberg**
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TERMINATED: 04/17/2024

Plaintiff

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TERMINATED: 07/25/2023

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in his official capacity as Governor of Virginia

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Defendant

Kelly Gee
in her official capacity as Secretary of the Commonwealth of Virginia

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Joseph O'meara Masterman
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PRO HAC VICE

ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
04/06/2023	1	Complaint *for Declaratory and Injunctive Relief* (Filing fee $ 402, receipt number AVAEDC-8879230.), filed by Nolef Turns, Inc., Gregory Williams. (Attachments: # 1 Exhibit Civil Cover Sheet)(Frank, Terry) (Main Document 1 replaced on 4/6/2023) (jenjones,). (Entered: 04/06/2023)
04/06/2023	2	Proposed Summons re 1 Complaint by Nolef Turns, Inc., Gregory Williams. (Frank, Terry) (Main Document 2 replaced on 4/6/2023) (jenjones,). (Entered: 04/06/2023)
04/06/2023	3	Proposed Summons re 1 Complaint by Nolef Turns, Inc., Gregory Williams. (Frank, Terry) (Main Document 3 replaced on 4/6/2023) (jenjones,). (Entered: 04/06/2023)
04/06/2023	4	Financial Interest Disclosure Statement (Local Rule 7.1) by Nolef Turns, Inc.. (Frank, Terry) (Entered: 04/06/2023)
04/06/2023		Notice of Correction: Filing attorney reminded to put civil case number on all pleadings and all documents must be uploaded as non-fillable PDF forms. The 9-element signature block procedure will need to be properly formatted on all future filings. (jenjones,) (Entered: 04/06/2023)
04/06/2023		Initial Case Assignment to District Judge John A. Gibney, Jr. (jenjones,) (Entered: 04/06/2023)
04/06/2023	5	Summons Issued as to Kay Coles James and Glenn Youngkin. NOTICE TO ATTORNEY: Please remove the headers and print two duplex copies of the electronically issued summons for each Defendant. Please serve one copy of the summons and a copy of the Complaint upon each Defendant. Please ensure that your process server returns the service copy (executed or unexecuted) to your attention. Electronically file returns using the filing events, Summons Returned Executed or Summons Returned Unexecuted. (jenjones,) (Entered: 04/06/2023)
04/11/2023	6	Motion to appear Pro Hac Vice by Jonathan Lee Sherman and Certification of Local Counsel Terry C. Frank Filing fee $ 75, receipt number AVAEDC-8886151. by Nolef Turns, Inc., Gregory Williams. (Frank, Terry) (Entered: 04/11/2023)
04/12/2023	7	ORDER granting 6 Motion for Jonathan Lee Sherman to appear as Pro Hac Vice for Nolef Turns, Inc. and Gregory Williams. Signed by Senior United States District Judge John A. Gibney, Jr. on 4/12/2023. (sbea) (Entered: 04/12/2023)
04/21/2023	8	WAIVER OF SERVICE Returned Executed by Nolef Turns, Inc., Gregory Williams. Glenn Youngkin waiver sent on 4/17/2023, answer due 6/16/2023. (Frank, Terry) (Entered: 04/21/2023)
04/21/2023	9	WAIVER OF SERVICE Returned Executed by Nolef Turns, Inc., Gregory Williams. Kay Coles James waiver sent on 4/17/2023, answer due 6/16/2023. (Frank, Terry) (Entered: 04/21/2023)
04/26/2023	10	Motion to appear Pro Hac Vice by Michelle Elizabeth Kanter Cohen and Certification of Local Counsel Terry C. Frank Filing fee $ 75, receipt number AVAEDC-8909436. by Nolef Turns, Inc., Gregory Williams. (Frank, Terry) (Entered: 04/26/2023)

04/26/2023	11	Motion to appear Pro Hac Vice by Beauregard William Patterson and Certification of Local Counsel Terry C. Frank Filing fee $ 75, receipt number AVAEDC-8909440. by Nolef Turns, Inc., Gregory Williams. (Frank, Terry) (Entered: 04/26/2023)
04/27/2023	12	ORDER granting 10 Motion for Michelle Eilzabeth Kanter Cohen to appear as Pro Hac Vice for Nolef Turns, Inc. and Gregory Williams. Signed by Senior United States District Judge John A. Gibney, Jr. on 4/27/2023. (sbea) (Entered: 04/27/2023)
04/27/2023	13	ORDER granting 11 Motion for Beauregard William Patterson to appear as Pro Hac Vice for Nolef Turns, Inc. and Gregory Williams. Signed by Senior United States District Judge John A. Gibney, Jr. on 4/27/2023. (sbea) (Entered: 04/27/2023)
06/15/2023	14	NOTICE of Appearance by Steven G. Popps on behalf of Kay Coles James, Glenn Youngkin (Popps, Steven) (Entered: 06/15/2023)
06/16/2023	15	NOTICE of Appearance by Andrew N. Ferguson on behalf of Kay Coles James, Glenn Youngkin (Ferguson, Andrew) (Entered: 06/16/2023)
06/16/2023	16	MOTION to Dismiss for Failure to State a Claim *and for lack of jurisdiction* by Kay Coles James, Glenn Youngkin. (Ferguson, Andrew) (Entered: 06/16/2023)
06/16/2023	17	Memorandum in Support re 16 MOTION to Dismiss for Failure to State a Claim *and for lack of jurisdiction* filed by Kay Coles James, Glenn Youngkin. (Attachments: # 1 Exhibit Declaration of Kay Coles James)(Ferguson, Andrew) (Entered: 06/16/2023)
06/16/2023	18	NOTICE of Appearance by Kevin Michael Gallagher on behalf of Kay Coles James, Glenn Youngkin (Gallagher, Kevin) (Entered: 06/16/2023)
06/28/2023	19	MOTION for Extension of Time to File Response/Reply as to 16 MOTION to Dismiss for Failure to State a Claim *and for lack of jurisdiction or First Amended Complaint and Request for Briefing Schedule* by Nolef Turns, Inc., Gregory Williams. (Attachments: # 1 Proposed Order)(Frank, Terry) (Entered: 06/28/2023)
06/30/2023	20	AMENDED COMPLAINT filed by Nolef Turns, Inc., Gregory Williams, Antonio Morris against All Defendants. (Frank, Terry). Modified on 7/7/2023. (sbea) (Entered: 06/30/2023)
07/06/2023	21	ORDER GRANTING PLAINTIFFS' MOTION FOR EXTENSION OF TIME and BRIEFING SCHEDULE. The Court hereby GRANTS Plaintiffs' Motion for Extension of Time to File a Response to Defendants' Motion to Dismiss or First Amended Complaint and ORDERS that the parties file any pleadings and motions to dismiss. See Order for details. Signed by Senior United States District Judge Henry E. Hudson on 7/6/2023. (sbea) (Entered: 07/06/2023)
07/24/2023	22	AMENDED COMPLAINT *[Second]* against All Defendants, filed by Nolef Turns, Inc., Gregory Williams, George Hawkins.(Frank, Terry) (Entered: 07/24/2023)
07/25/2023	23	ORDER- The plaintiffs did not obtain the defendants' written consent or the court's leave to file their Second Amended Complaint. The Court nevertheless DEEMS the Second Amended Complaint the operative complaint in this case. Additionally, the Court AMENDS the deadlines set forth in its July 6 Order. SEE ORDER FOR DETAILS AND DEADLINES. Signed by District Judge John A. Gibney, Jr. on 7/25/2023. (adun,) (Entered: 07/25/2023)
07/27/2023	24	NOTICE by George Hawkins, Antonio Morris, Nolef Turns, Inc., Gregory Williams re 22 Amended Complaint *Clarification Regarding Second Amended Complaint* (Frank,

		Terry) (Entered: 07/27/2023)
08/02/2023	25	SCHEDULING ORDER:Initial Pretrial Conference set for 9/19/2023 at 09:20 AM before District Judge John A. Gibney, Jr. Counsel shall report to Courtroom 6000. Signed by District Judge John A. Gibney, Jr. on 8/2/23. (wtuc) (Entered: 08/02/2023)
08/15/2023	26	MOTION to Dismiss for Failure to State a Claim *and for lack of jurisdiction* by Kay Coles James, Glenn Youngkin. (Ferguson, Andrew) (Entered: 08/15/2023)
08/15/2023	27	Memorandum in Support re 26 MOTION to Dismiss for Failure to State a Claim *and for lack of jurisdiction* filed by Kay Coles James, Glenn Youngkin. (Attachments: # 1 Exhibit Declaration of Kay Coles James)(Ferguson, Andrew) (Entered: 08/15/2023)
08/31/2023	28	NOTICE of Voluntary Dismissal by Gregory Williams (Frank, Terry) (Entered: 08/31/2023)
08/31/2023	29	ORDER. Plaintiffs filed 28 notice of dismissal pursuant to Federal Rule ofCivil Procedure 41 (a)(l)(A)(i) as to one of the plaintiffs in this case, Gregory Williams. The Court acknowledges this voluntary dismissal and DIRECTS the Clerk to terminate Williams as a plaintiff in this case. Signed by District Judge John A. Gibney, Jr. on 8/31/2023. (jsmi,) (Entered: 08/31/2023)
09/05/2023	30	Memorandum in Opposition re 26 MOTION to Dismiss for Failure to State a Claim *and for lack of jurisdiction* filed by George Hawkins, Nolef Turns, Inc.. (Frank, Terry) (Entered: 09/05/2023)
09/11/2023	31	Motion to appear Pro Hac Vice by John Dutoss Ramer and Certification of Local Counsel Kevin M. Gallagher Filing fee $ 75, receipt number AVAEDC-9118347. by Kay Coles James, Glenn Youngkin. (Gallagher, Kevin) (Main Document 31 replaced on 9/12/2023) (adun,). (Entered: 09/11/2023)
09/11/2023	32	Motion to appear Pro Hac Vice by Joseph O'Meara Masterman and Certification of Local Counsel Kevin M. Gallagher Filing fee $ 75, receipt number AVAEDC-9118362. by Kay Coles James, Glenn Youngkin. (Gallagher, Kevin) (Main Document 32 replaced on 9/12/2023) (adun,). (Entered: 09/11/2023)
09/11/2023	33	Motion to appear Pro Hac Vice by Charles Justin Cooper and Certification of Local Counsel Kevin M. Gallagher Filing fee $ 75, receipt number AVAEDC-9118374. by Kay Coles James, Glenn Youngkin. (Gallagher, Kevin) (Main Document 33 replaced on 9/12/2023) (adun,). (Entered: 09/11/2023)
09/12/2023		Notice of Correction re 31 , 32 , 33 , improper format- Filing attorney reminded that all documents must be uploaded as standard PDF's and not as fillable forms. Clerk has corrected. No further action needed at this time. (adun,) (Entered: 09/12/2023)
09/13/2023	34	NOTICE of Appearance by Haley N. Proctor on behalf of Kay Coles James, Glenn Youngkin (Proctor, Haley) (Entered: 09/13/2023)
09/19/2023		Minute Entry for proceedings held before District Judge John A. Gibney, Jr.: Initial Pretrial Conference held on 9/19/2023; hearing on Motion to dismiss set for October 6 at 9:00 a.m.; Summary judgment motions due by Feb 14; Hearing on Motions for Summary judgment set for March 20 at 9:00 a.m. (wtuc) (Entered: 09/19/2023)
09/19/2023	35	REPLY to Response to Motion re 26 MOTION to Dismiss for Failure to State a Claim *and for lack of jurisdiction* filed by Kay Coles James, Glenn Youngkin. (Ferguson, Andrew) (Entered: 09/19/2023)

09/19/2023	36	ORDER granting 32 Motion for Joseph O'meara Masterman to appear Pro hac vice for Kay Coles James, and Glenn Youngkin. Signed by District Judge John A. Gibney, Jr. on 9/19/2023. (jenjones,) (Entered: 09/19/2023)
09/19/2023	37	ORDER granting 31 Motion for John Duross Ramer to appear Pro hac vice for Kay Coles James, and Glenn Youngkin. Signed by District Judge John A. Gibney, Jr. on 9/19/2023. (jenjones,) (Entered: 09/19/2023)
09/19/2023	38	ORDER granting 33 Motion for Charles J. Cooper to appear Pro hac vice for Kay Coles James, and Glenn Youngkin. Signed by District Judge John A. Gibney, Jr. on 9/19/2023. (jenjones,) (Entered: 09/19/2023)
09/20/2023		Set as to 26 MOTION to Dismiss for Failure to State a Claim *and for lack of jurisdiction*, 16 MOTION to Dismiss for Failure to State a Claim *and for lack of jurisdiction* : Motion Hearing set for 10/6/2023 at 09:00 AM in Richmond Courtroom 6000 before District Judge John A. Gibney, Jr. (wtuc) (Entered: 09/20/2023)
10/04/2023	39	NOTICE by Kay Coles James, Glenn Youngkin *Regarding Plaintiff George Hawkins* (Popps, Steven) (Entered: 10/04/2023)
10/06/2023	40	ORDER that the Court GRANTS IN PART and DENIES IN PART the defendants' 26 motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1). The Court GRANTS the motion as to the plaintiff, Nolef Turns, Inc. The Court DIRECTS the Clerk to terminate Nolef Turns, Inc. as a plaintiff in this case. And the Court DENIES the motion as to the plaintiff, George Hawkins. George Hawkins is the sole remaining plaintiff in this case. At the initial pretrial conference, the Court set the following deadlines: the parties' motions for summary judgment shall be filed no later than February 14, 2023; and the Court will hold a hearing on any motion for summary judgment on March 20, 2023, at 9:00 a.m. The Court ORDERS that all discovery shall be completed by January 14, 2023. Written discovery shall be served such that the responses are due no later than January 14, 2023. Signed by District Judge John A. Gibney, Jr. on 10/6/2023. (jsmi,) (Entered: 10/06/2023)
10/06/2023	41	Minute Entry for proceedings held before District Judge John A. Gibney, Jr.:Motion Hearing held on 10/6/2023 re 26 MOTION to Dismiss for Failure to State a Claim *and for lack of jurisdiction* filed by Kay Coles James, Glenn Youngkin ; the Court grants the motion in part and the plaintiff Nolef Turns, Inc. is dismissed from the case leaving George Hawkins as the sole plaintiff; the Court takes under advisement the motion pursuant to 12(b)(6) (Court Reporter G. Halasz, OCR.)(wtuc,) (Entered: 10/06/2023)
10/12/2023	42	TRANSCRIPT of proceedings held on 10/06/2023, before Judge Hon. John A. Gibney, Jr., Court Reporter Gil Halasz, Telephone number 804 916-2248. **NOTICE RE REDACTION OF TRANSCRIPTS:The parties have thirty(30) calendar days to file with the Court a Notice of Intent to Request Redaction of this transcript. If no such Notice is filed, the transcript will be made remotely electronically available to the public without redaction after 90 calendar days. The policy is located on our website at www.vaed.uscourts.gov Transcript may be viewed at the court public terminal or purchased through the court reporter/transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER Redaction Request due 11/13/2023. Redacted Transcript Deadline set for 12/12/2023. Release of Transcript Restriction set for 1/10/2024.(halasz, gil) (Entered: 10/12/2023)**

10/20/2023	43	ANSWER to Complaint by Kay Coles James, Glenn Youngkin.(Ferguson, Andrew) (Entered: 10/20/2023)
11/13/2023	44	Redaction of 42 Transcript,,, (halasz, gil) (Entered: 11/13/2023)
01/12/2024	45	Joint MOTION for Protective Order by Kay Coles James, Glenn Youngkin. (Attachments: # 1 Exhibit A - Protective Order)(Popps, Steven) (Entered: 01/12/2024)
01/16/2024	46	Motion to appear Pro Hac Vice by Nina Gerda Beck and Certification of Local Counsel Terry C. Frank Filing fee $ 75, receipt number AVAEDC-9311174. by George Hawkins. (Frank, Terry) (Entered: 01/16/2024)
01/19/2024	47	STIPULATED PROTECTIVE ORDER AND fre 502(d) and (e) CLAWBACK AGREEMENT/ORDER; the Court grants 45 Motion for Protective Order (see order for details). Signed by District Judge John A. Gibney, Jr. on 1/19/24. (wtuc) (Entered: 01/19/2024)
01/19/2024	48	ORDER granting 46 Motion for Pro hac vice Appointed Nina Gerda Beck for George Hawkins. Signed by District Judge John A. Gibney, Jr. on 1/19/24. (wtuc) (Entered: 01/19/2024)
02/05/2024	49	MOTION Requesting *Judicial Notice of Information Relevant to Summary Judgment* by George Hawkins. (Attachment: # 1 Exhibit 1)(Frank, Terry). Modified on 2/6/2024. (sbea) (Entered: 02/05/2024)
02/05/2024	50	Memorandum in Support re: 49 MOTION Requesting *Judicial Notice of Information Relevant to Summary Judgment* filed by George Hawkins. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F)(Frank, Terry). Modified on 2/6/2024. (sbea) (Entered: 02/05/2024)
02/12/2024	51	Joint MOTION for Leave to File *Joint Stipulation of Undisputed Facts* by George Hawkins. (Attachments: # 1 Exhibit A)(Frank, Terry) (Entered: 02/12/2024)
02/12/2024	52	Memorandum in Support re 51 Joint MOTION for Leave to File *Joint Stipulation of Undisputed Facts* filed by George Hawkins. (Frank, Terry) (Entered: 02/12/2024)
02/13/2024	53	ORDER granting 51 Motion for Leave to File a joint stipulation of undisputed facts in connection with their cross motions for summary judgment. Signed by District Judge John A. Gibney, Jr. on 2/13/24. (wtuc) (Entered: 02/13/2024)
02/14/2024	54	MOTION to Seal by George Hawkins. (Frank, Terry) (Entered: 02/14/2024)
02/14/2024	55	Memorandum in Support re 54 MOTION to Seal filed by George Hawkins. (Frank, Terry) (Entered: 02/14/2024)
02/14/2024	56	MOTION for Summary Judgment by George Hawkins. (Frank, Terry) (Entered: 02/14/2024)
02/14/2024	57	Memorandum in Support (Redacted) re: 56 MOTION for Summary Judgment filed by George Hawkins. (Attachments: # 1 Exhibit A - Redacted, # 2 Exhibit B)(Frank, Terry). Modified on 2/20/2024. (sbea) (Entered: 02/14/2024)
02/14/2024	58	Notice of Filing Sealing Motion LCvR5(C) by George Hawkins re 57 Memorandum in Support *of Motion for Summary Judgment* (Frank, Terry) (Entered: 02/14/2024)
02/14/2024	59	STIPULATION _*Joint Stipulation of Undisputed Facts* by George Hawkins. (Frank, Terry) (Entered: 02/14/2024)

02/14/2024	60	MOTION for Summary Judgment by Kay Coles James, Glenn Youngkin. (Ferguson, Andrew) (Entered: 02/14/2024)
02/14/2024	61	Memorandum in Support re 60 MOTION for Summary Judgment filed by Kay Coles James, Glenn Youngkin. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3) (Ferguson, Andrew) (Entered: 02/14/2024)
02/15/2024	62	Unredacted Doument re 57 Memorandum in Support, 54 MOTION to Seal by George Hawkins. (Attachments: # 1 Exhibit C to Sherman Dec., # 2 Exhibit D to Sherman Dec., # 3 Exhibit E to Sherman Dec., # 4 Exhibit F to Sherman Dec., # 5 Exhibit K to Sherman Dec.)(Frank, Terry) (Attachment 1 replaced on 2/16/2024) (wtuc,). (Attachment 5 replaced on 2/16/2024) (wtuc,). (Entered: 02/15/2024)
02/20/2024	63	ORDER re 54 MOTION to Seal filed by George Hawkins; the Court directs the defendants to respond to the motion before February 23, 2024 to explain why ECF Nos. 62-1, 62-2, 62-3, 62-4, and 62-5 were marked "confidential" or "attorneys' eyes only" and why they should be sealed. Signed by District Judge John A. Gibney, Jr. on 2/16/24. (wtuc) (Entered: 02/20/2024)
02/20/2024		Set as to 56 MOTION for Summary Judgment, 60 MOTION for Summary Judgment: Motions Hearing set for 3/20/2024 at 09:00 AM in Richmond Courtroom 6000 before District Judge John A. Gibney, Jr. (wtuc) (Entered: 02/20/2024)
02/21/2024	64	RESPONSE in Support re 54 MOTION to Seal filed by Kay Coles James, Glenn Youngkin. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Proposed Order)(Ferguson, Andrew) (Entered: 02/21/2024)
02/28/2024	65	Memorandum in Opposition re 60 MOTION for Summary Judgment filed by George Hawkins. (Attachments: # 1 Exhibit A)(Frank, Terry) (Entered: 02/28/2024)
02/28/2024	66	Opposition *(Redacted)* to 56 MOTION for Summary Judgment filed by Kay Coles James, Glenn Youngkin. (Attachments: # 1 Exhibit Declaration of Jennifer Moon - Redacted)(Ferguson, Andrew). Modified on 2/29/2024. (sbea) (Entered: 02/28/2024)
02/28/2024	67	Sealed Opposition re 56 MOTION for Summary Judgment . (Attachments: # 1 Exhibit Declaration of Jennifer Moon)(Ferguson, Andrew) (Entered: 02/28/2024)
02/28/2024	68	MOTION to Seal *Defendants' Unredacted Memorandum in Opposition to Plaintiff's Motion for Summary Judgment and Accompanying Declaration (ECF No. 67)* by Kay Coles James, Glenn Youngkin. (Attachments: # 1 Proposed Order)(Ferguson, Andrew) (Entered: 02/28/2024)
02/28/2024	69	Memorandum in Support re 68 MOTION to Seal *Defendants' Unredacted Memorandum in Opposition to Plaintiff's Motion for Summary Judgment and Accompanying Declaration (ECF No. 67)* filed by Kay Coles James, Glenn Youngkin. (Ferguson, Andrew) (Entered: 02/28/2024)
02/28/2024	70	Notice of Filing Sealing Motion LCvR5(C) by Kay Coles James, Glenn Youngkin re 68 MOTION to Seal *Defendants' Unredacted Memorandum in Opposition to Plaintiff's Motion for Summary Judgment and Accompanying Declaration (ECF No. 67)* (Ferguson, Andrew) (Entered: 02/28/2024)
03/05/2024	71	REPLY to Response to Motion re 60 MOTION for Summary Judgment filed by Kay Coles James, Glenn Youngkin. (Ferguson, Andrew) (Entered: 03/05/2024)

03/05/2024	72	REPLY to Response (Redacted) to Motion re: 56 MOTION for Summary Judgment filed by George Hawkins (Frank, Terry). Modified on 3/6/2024. (sbea) (Entered: 03/05/2024)
03/05/2024	73	Unredacted Doument re 72 Reply to Response to Motion by George Hawkins. (Frank, Terry) (Entered: 03/05/2024)
03/06/2024	74	ORDER granting 49 Motion requesting judicial notice. Signed by District Judge John A. Gibney, Jr. on 3/6/24. (wtuc) (Entered: 03/06/2024)
03/07/2024	75	MOTION for Leave to Appear Telephonically *for Nina G. Beck, Esq.* by George Hawkins. (Frank, Terry) (Entered: 03/07/2024)
03/07/2024	76	MOTION for Leave to File *Corrected Sherman Declaration Exhibits* by George Hawkins. (Attachments: # 1 Exhibit !)(Frank, Terry) (Entered: 03/07/2024)
03/07/2024	77	Memorandum in Support re 76 MOTION for Leave to File *Corrected Sherman Declaration Exhibits* filed by George Hawkins. (Attachments: # 1 Exhibit A, # 2 Exhibit M)(Frank, Terry) (Attachment 1 replaced on 3/7/2024) (jenjones,). (Attachment 2 replaced on 3/7/2024) (jenjones,). (Entered: 03/07/2024)
03/11/2024	78	ORDER granting 76 Motion for Leave to File Corrected Exhibits; the Clerk shall substitute Exhibit A in ECF No. 57-1 with ECF 77-1 and substitute Exhibit M in ECF No. 57-1 with ECF No. 77-2. Signed by District Judge John A. Gibney, Jr. on 3/11/24. (wtuc) (Entered: 03/11/2024)
03/11/2024		Set as to 56 MOTION for Summary Judgment , 60 MOTION for Summary Judgment : Motion Hearing set for 4/23/2024 at 09:00 AM in Richmond Courtroom 6000 before District Judge John A. Gibney, Jr. (wtuc,) (Entered: 03/11/2024)
03/25/2024	79	MOTION to Withdraw as Attorney by Kay Coles James, Glenn Youngkin. (Ferguson, Andrew) (Entered: 03/25/2024)
03/27/2024	80	ORDER granting 79 Motion to Withdraw as Attorney. Attorney Andrew N. Ferguson terminated. Signed by District Judge John A. Gibney, Jr. on 3/26/24. (wtuc) (Entered: 03/27/2024)
03/29/2024	81	MOTION to Seal by George Hawkins. (Frank, Terry) (Entered: 03/29/2024)
03/29/2024	82	NOTICE by George Hawkins re 73 Unredacted Document *of Motion to Seal* (Frank, Terry) (Entered: 03/29/2024)
03/29/2024	83	Memorandum in Support re 81 MOTION to Seal filed by George Hawkins. (Frank, Terry) (Entered: 03/29/2024)
03/29/2024	84	EXHIBIT *A to ECF 57-1 (Corrected)* by George Hawkins.. (Frank, Terry) (Entered: 03/29/2024)
03/29/2024	85	EXHIBIT *M to ECF 57-1* by George Hawkins.. (Frank, Terry) (Entered: 03/29/2024)
04/01/2024	86	NOTICE of Appearance by Erika L. Maley on behalf of Kay Coles James, Glenn Youngkin (Maley, Erika) (Entered: 04/01/2024)
04/04/2024	87	MEMORANDUM OPINION. Signed by District Judge John A. Gibney, Jr. on 4/4/2024. (adun,) (Entered: 04/04/2024)

04/04/2024	88	ORDER- For the reasons stated in the accompanying Opinion, the Court GRANTS IN PART and DENIES IN PART Hawkins's motion to seal, (ECF No. 54), and the defendants' motion to seal, (ECF No. 68). The Court DENIES Hawkins's motion to seal, (ECF No. 81). The Court DIRECTS the parties to file public copies of the documents with appropriate redactions discussed above no later than April 17, 2024. SEE ORDER FOR DETAILS. Signed by District Judge John A. Gibney, Jr. on 4/4/2024. (adun,) (Entered: 04/04/2024)
04/05/2024	89	NOTICE of Appearance by Victor Michael Glasberg on behalf of George Hawkins, Antonio Morris, Nolef Turns, Inc., Gregory Williams (Glasberg, Victor) (Entered: 04/05/2024)
04/15/2024	90	ORDER granting 75 Motion for Leave to Appear; the Court DIRECTS Ms. Beck to contact chambers to receive call-in information for the hearing. Signed by District Judge John A. Gibney, Jr. on 4/15/24. (wtuc) (Entered: 04/15/2024)
04/16/2024	91	NOTICE by George Hawkins Gregory Williams *Plaintiff's Notice Pursuant to the Court's April 4, 2024 Opinion and Order Regarding Motions to Seal* (Attachments: # 2 Exhibit 2, # 3 Exhibit 3)(Glasberg, Victor) Modified docket text and attachment replaced on 4/16/2024: # 4 Exhibit 1) (jsmi,) (Entered: 04/16/2024)
04/16/2024	92	MOTION to Withdraw as Attorney *for Plaintiff* by George Hawkins. (Frank, Terry) (Entered: 04/16/2024)
04/17/2024	93	STANDING ORDER; the Court authorizes all counsel in this case to bring in their personal electronic devices to all hearings held before the undersigned in this case. Signed by District Judge John A. Gibney, Jr. on 4/17/24. (wtuc) (Entered: 04/17/2024)
04/17/2024	94	ORDER - This matter comes before the Court on the motion to withdraw filed by Terry C. Frank, Esq. (ECF No. 92.) "Virginia attorney Victor M. Glasberg has noted his appearance on behalf of Plaintiff and is prepared to assume the role of local counsel." (ECF No. 92, at 1.) Upon due consideration, the Court GRANTS the motion. (ECF No. 92 .). Signed by District Judge John A. Gibney, Jr on 4/16/2024. (jpow,) (Entered: 04/17/2024)
04/17/2024	95	NOTICE by Kay Coles James, Glenn Youngkin re: 88 Order to Seal *Defendants' Notice Pursuant to the Court's April 4, 2024 Opinion and Order Regarding Motions to Seal* (Attachments: # 1 Exhibit 1 (Redaction) - Opposition to Motion for Summary Judgment (Redacted), # 2 Exhibit 2 (Redaction) - Declaration of Jennifer Moon (Redacted))(Maley, Erika). Modified on 4/24/2024. (sbea) (Entered: 04/17/2024)
04/18/2024	96	MOTION Motion Requesting Judicial Notice of 2024 Senate Document No. 2 by George Hawkins. (Attachments: # 1 Exhibit A, # 2 Proposed Order)(Glasberg, Victor) (Entered: 04/18/2024)
04/18/2024	97	Memorandum in Support re 96 MOTION Motion Requesting Judicial Notice of 2024 Senate Document No. 2 filed by George Hawkins. (Attachments: # 1 Exhibit A) (Glasberg, Victor) (Entered: 04/18/2024)
04/23/2024	98	ORDER - This matter comes before the Court on the unopposed motion requesting judicial notice filed by the plaintiff, George Hawkins. (ECF No. 96.) Hawkins asks the Court to take judicial notice of the "Office of the Governor's List of Pardons, Commutations, Reprieves, and other Forms of Clemency to the General Assembly of Virginia, Senate Document No. 2, for the period January 17, 2023, to January 16, 2024." (ECF No 97, at 2.) Upon due consideration, the Court GRANTS the motion.

		(ECF No. 96 .). Signed by District Judge John A. Gibney, Jr on 4/22/2024. (jpow,) (Entered: 04/23/2024)
04/23/2024	99	Minute Entry for proceedings held before District Judge John A. Gibney, Jr:Motion Hearing held on 4/23/2024 re 60 MOTION for Summary Judgment, 56 MOTION for Summary Judgment filed by George Hawkins. The Court heard arguments. The Court stays the case until the Summary Judgments are ruled on. The Court to issue a decision. (Court Reporter Gil Halasz, OCR.)(jpow,) (Entered: 04/23/2024)
08/07/2024	100	MEMORANDUM OPINION. Signed by District Judge John A. Gibney, Jr. on 8/7/2024. (adun,) (Entered: 08/07/2024)
08/07/2024	101	FINAL ORDER- The Court DENIES the motion for summary judgment filed by the plaintiff, George Hawkins, (ECF No. 56), and GRANTS the motion for summary judgment filed by the defendants, Governor Glenn Youngkin and Secretaryof the Commonwealth Kelly Gee, (ECF No. 60). The Court ENTERS judgment for the defendants on all counts. Signed by District Judge John A. Gibney, Jr. on 8/7/2024. (adun,) (Entered: 08/07/2024)
08/19/2024	102	NOTICE OF APPEAL by George Hawkins. Filing fee $ 605, receipt number AVAEDC-9691663. (Glasberg, Victor) (Entered: 08/19/2024)
08/20/2024	103	Transmission of Notice of Appeal to US Court of Appeals re 102 Notice of Appeal (All case opening forms, plus the transcript guidelines, may be obtained from the Fourth Circuit's website at www.ca4.uscourts.gov) (Lgar,) (Entered: 08/20/2024)
08/21/2024		USCA Case Number 24-1791: Case Manager, TBarton, for 102 Notice of Appeal filed by George Hawkins. (Lgar,) (Entered: 08/21/2024)
08/29/2024	104	Transcript Order Acknowledgment from USCA re 102 Notice of Appeal : Court Reporter/Transcriber Gil Halasz, (24-1791) (Lgar,) (Entered: 08/29/2024)
09/11/2024	105	TRANSCRIPT of proceedings held on 04/23/2024, before Judge Hon. John A. Gibney, Jr., Court Reporter Gil Halasz, Telephone number 804 916-2248. **NOTICE RE REDACTION OF TRANSCRIPTS:The parties have thirty(30) calendar days to file with the Court a Notice of Intent to Request Redaction of this transcript. If no such Notice is filed, the transcript will be made remotely electronically available to the public without redaction after 90 calendar days. The policy is located on our website at www.vaed.uscourts.gov Transcript may be viewed at the court public terminal or purchased through the court reporter before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER Redaction Request due 10/11/2024. Redacted Transcript Deadline set for 11/12/2024. Release of Transcript Restriction set for 12/10/2024. (halasz, gil) (Entered: 09/11/2024)**

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

NOLEF TURNS, INC., GREGORY WILLIAMS, GEORGE HAWKINS, *Plaintiffs*, v. GLENN YOUNGKIN, in his official capacity as Governor of Virginia, KAY COLES JAMES, in her official capacity as Secretary of the Commonwealth of Virginia, *Defendants*.	)	Civil No. 3:23-cv-232-JAG

SECOND AMENDED COMPLAINT
FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs Nolef Turns, Inc. ("Nolef Turns"), Gregory Williams ("Mr. Williams"), and George Hawkins ("Mr. Hawkins") (collectively, "Plaintiffs") seek declaratory and injunctive relief and allege as follows:

NATURE OF ACTION

1. This case is about the exercise of the First Amendment-protected right at the heart of America's democratic system of self-government and the exercise of arbitrary control over that right. For nearly a decade, three successive Virginia Governors—Bob McDonnell, Terry McAuliffe, and Ralph Northam—restored voting rights to people with felony convictions based on specific, objective, and neutral criteria such as sentence completion or release from incarceration. In this way, they used their authority under the Virginia Constitution to remove

arbitrary decision-making from the process and create a uniformly administered, non-discretionary restoration system.

2. Defendant Governor of Virginia Glenn Youngkin ("Governor Youngkin") and Defendant Secretary of the Commonwealth of Virginia Kay Coles James ("Secretary James") (collectively, "Defendants") have terminated this policy and resurrected Virginia's purely discretionary and arbitrary voting rights restoration system. Virginians with felony convictions are once again subject to an arbitrary restoration scheme, under which the Governor grants or denies applications for voting rights restoration in his unfettered discretion, without objective rules or criteria or any reasonable definite time limits on rendering a decision.

3. An unbroken, well-settled line of U.S. Supreme Court precedent dating back eighty-five years prohibits the arbitrary licensing of First Amendment-protected expression or expressive conduct. This is because the risk of viewpoint discrimination is highest when a government official's discretion to authorize or prohibit First Amendment-protected activity is entirely unconstrained by law, rules, or criteria. Officials with absolute authority to selectively enfranchise U.S. citizens with felony convictions may grant or deny voting rights restoration applications for pretextual reasons or no stated reason, while secretly basing their decision on information—or informed speculation—on the applicant's political affiliations or viewpoints. Defendants are able to review the prior expression of a restoration applicants—from donations to voter registration to online publications and social media postings—and nothing in Virginia law prevents Defendant Governor Youngkin from bestowing or withholding a license to vote based on that prior and ongoing expression. This is why conditioning the right to vote on the exercise of unfettered official discretion and arbitrary decision-making violates the First Amendment.

4. Virginia is now the only state in the Union that consigns the voting rights of *all* residents with felony convictions to the unfettered discretion of public officials.[1] Under the Virginia Constitution, VA. CONST. art. II, § 1, art. 5, § 12, and the rescission of his predecessors' restoration system, Governor Youngkin has sole and limitless power to grant or deny applications for restoration of voting rights.[2] There are no laws, rules, or criteria governing Defendant Governor Youngkin's decisions to grant or deny voting rights restoration applications. Such unfettered discretion in considering restoration applications is apparent from Defendants' vague characterizations of the new process and their references to highly subjective, vague concepts. The Governor has recently stated that "[e]very individual is looked at carefully – they deserve that."[3] Further, in a March 22, 2023 letter to State Senator Lionel Spruill, Defendant Secretary James described the new process as follows:

> Virginians trust the Governor and his Administration to consider each person individually and take into consideration the unique elements of each situation, practicing grace for those who need it and ensuring public safety for our community and families.[4]

[1] VA. CONST. art. II, § 1 ("No person who has been convicted of a felony shall be qualified to vote unless his civil rights have been restored by the Governor or other appropriate authority."); Secretary of the Commonwealth of Virginia's Website, Restoration of Rights Process, *available at* https://www.restore.virginia.gov/restoration-of-rights-process (last visited June 30, 2023); Christopher Uggen, Ryan Larson, Sarah Shannon, and Robert Stewart, LOCKED OUT 2022: ESTIMATES OF PEOPLE DENIED VOTING RIGHTS, The Sentencing Project (Oct. 25, 2022) ("SENTENCING PROJECT REPORT"), at Table 1, *available at* https://www.sentencingproject.org/reports/locked-out-2022-estimates-of-people-denied-voting-rights/ (last visited June 30, 2023).

[2] Secretary of the Commonwealth of Virginia's Website, Restoration of Rights Process, *available at* https://www.restore.virginia.gov/restoration-of-rights-process/ (last visited June 30, 2023) ("The Constitution of Virginia gives the Governor the sole discretion to restore civil rights . . . .").

[3] David Ress, *Youngkin defends his approach to restoring former convicts' rights*, RICHMOND TIMES-DISPATCH, Apr. 1, 2023, https://richmond.com/news/local/govt-and-politics/glenn-young-ex-con-convictions-prison-inmates/article_44e8975a-d003-11ed-ac3e-77584d14a537.html.

[4] Letter from Secretary Kay Coles James to Senator Lionel Spruill (Mar. 22, 2023), *available at* https://www.virginiamercury.com/wp-content/uploads/2023/03/032323.Letter-to-Spruill-on-ROR-2-1.pdf.

This is the archetypal arbitrary licensing scheme that the Supreme Court has found runs afoul of the First Amendment unfettered discretion doctrine. *See, e.g.*, *Shuttlesworth v. City of Birmingham, Ala.*, 394 U.S. 147, 150–53 (1969) (invalidating permit scheme for marches or demonstrations that lacked "narrow, objective, and definite standards" and was "guided only by [Commissioners'] own ideas of 'public welfare, peace, safety, health, decency, good order, morals or convenience'").

5. This action challenges Virginia's selective and arbitrary voting rights restoration scheme for people with felony convictions. It does ***not*** challenge Virginia's authority to disenfranchise individuals upon their conviction for a felony. Nor does it challenge Virginia's system for restoring any other right beyond the right to vote.

6. Additionally, Virginia law does not set any reasonable, definite time limits by which the Governor must make a decision on an application for voting rights restoration. This additional legal void constitutes a separate violation of the First Amendment.

7. The disenfranchised population in Virginia remains one of the largest nationwide. As of October 2022, the Sentencing Project's most recent updated estimates of the disenfranchised population in each state reflect that Virginia has an estimated 211,344 people with felony convictions who remain disenfranchised even after completing their full sentences including parole and probation.[5] This constitutes 5.04 percent of the state's voting-age population—the sixth highest rate in the nation.[6]

8. Plaintiffs bring this action under 42 U.S.C. § 1983 against Defendants' unlawful deprivation of Plaintiffs' rights under the First Amendment to the United States Constitution.

[5] SENTENCING PROJECT REPORT, *supra* n.1, at Table 3.
[6] *Id.*

9. Plaintiffs Gregory Williams and George Hawkins are disenfranchised by reason of felony convictions. Mr. Williams and Mr. Hawkins have both applied for restoration of their voting rights, and their applications are currently pending before Defendants. Mr. Williams and Mr. Hawkins are seeking restoration of their voting rights so they can register and vote in future primary and general elections in Virginia for candidates of their choice and ballot initiatives, and to support and associate with candidates and political parties in order to advance their goals.

10. Plaintiff Nolef Turns, Inc. will be forced to divert substantial paid staff time and resources in response to this change from a non-discretionary voting rights restoration system to a purely discretionary and arbitrary restoration system.

JURSIDICTION AND VENUE

11. This Court has jurisdiction over Plaintiffs' federal claims pursuant to 28 U.S.C. §§ 1331, 1343 because this case arises under the United States Constitution and seeks equitable and other relief for the deprivation of constitutional rights under color of state law.

12. This Court has jurisdiction to award attorneys' fees and costs pursuant to 42 U.S.C. § 1988 and 28 U.S.C. § 1920.

13. This Court has jurisdiction to grant declaratory relief pursuant to 28 U.S.C. §§ 2201, 2202.

14. This Court has personal jurisdiction over Defendant Glenn Youngkin, the Governor of Virginia, and Defendant Kay Coles James, the Secretary of the Commonwealth of Virginia, who are sued in their official capacities. Defendant Governor Youngkin is an elected state government official who works in Richmond, Virginia. Defendant Secretary of the Commonwealth Kay Coles James is an appointed state government official who works in Richmond, Virginia.

15. Venue is appropriate in the Eastern District of Virginia, under 28 U.S.C. § 1391(b)(1), because Defendants are state officials working in Richmond, Virginia. Additionally, a substantial part of the events giving rise to these claims have occurred and will continue to occur in this district, as Plaintiffs have their residences in Richmond and Chesapeake, making venue also proper under 28 U.S.C. § 1391(b)(2).

PARTIES

16. Plaintiff Nolef Turns, Inc. is a 501(c)(3) non-profit organization based in Richmond, Virginia. Nolef Turns was founded in 2016 as an all-volunteer group to advocate for people with felony convictions throughout Virginia. It was established to build a network of resources to help individuals live self-sufficient lives after they have completed their sentences. Nolef Turns, Inc. now has four paid staff members who work with those affected by the criminal justice system to maintain a stable support system and to facilitate such individuals' reintegration into society by assisting with employment and financial literacy, restoration of voting rights, voter registration after restoration, and more. Some of Nolef Turns, Inc.'s programs include the following: Back To Work Program; Food Pantry; Annual Holiday Help Program; Voter Registration Drives; Right to Vote Campaign; Restoration of Rights; Pardon and Expungement Resource Workshops; Parenting Promises Campaign; Beyond Home Program; Healthcare Initiatives; First Thursdays Community Feeding; Drug and Alcohol Treatment Referrals; Mental Health Referrals; Character Building Program; Notary Services; Financial Literacy Program; and Finding Forgiveness Campaign.

17. Plaintiff Gregory Williams, a resident of Richmond, Virginia, was convicted of a felony in Virginia state court and lost his right to vote under Virginia law. After nineteen years in prison, Mr. Williams was released from incarceration in 2007. He was on parole until 2010. Mr.

Williams wants to register and vote in future primary and general elections in the Commonwealth of Virginia for candidates of his choice and state constitutional amendments, to express his political preferences, and to support and associate with political parties in order to advance their goals. His restoration application is pending with the Governor's office and subject to an arbitrary restoration process.

18. Plaintiff George Hawkins, a resident of Richmond, Virginia, was convicted of a felony in Virginia state court when he was 17 years old. Because he was convicted when he was a juvenile, Mr. Hawkins has never been eligible to vote in his life and has never voted. After thirteen years in prison, Mr. Hawkins was released on May 3, 2023. Mr. Hawkins wants to register and vote in future primary and general elections in the Commonwealth of Virginia for candidates of his choice and state constitutional amendments, to express his political preferences, and to support and associate with political parties in order to advance their goals. He has applied for voting rights restoration twice. His first restoration application was denied by Defendant Governor Youngkin, and the second is pending with the Governor's office and subject to an arbitrary restoration process.

19. Defendant Glenn Youngkin is the Governor of Virginia and is sued in his official capacity. The Virginia Constitution vests the Governor with the exclusive authority to restore voting rights. VA. CONST. art. II, § 1, art. 5, § 12.

20. Defendant Kay Coles James is the Secretary of the Commonwealth of Virginia and is sued in her official capacity. The Secretary of the Commonwealth is appointed by the Governor, Va. Code Ann. § 2.2-400, and is responsible for assisting the Governor in a number of different capacities, including restoration of rights.[7]

[7] Secretary of the Commonwealth of Virginia, *What We Do*, https://www.commonwealth.virginia.gov/ (last visited June 30, 2023).

BACKGROUND

A. Felony Disenfranchisement and Re-enfranchisement in Virginia Law

21. The Virginia Constitution sets forth the rules for voting eligibility and also includes a felony disenfranchisement provision: "No person who has been convicted of a felony shall be qualified to vote unless his civil rights have been restored by the Governor or other appropriate authority." VA. CONST. art. II, § 1. Article 5, Section 12 of the Virginia Constitution also states that "[t]he Governor shall have power . . . to remove political disabilities consequent upon conviction for offenses committed prior or subsequent to the adoption of this Constitution . . ." VA. CONST. art. 5, § 12. People with felony convictions may not register to vote prior to the restoration of their voting rights by the Governor. If an individual with a felony conviction willfully registers to vote without restoration, they commit a Class 5 felony. Va. Code Ann. § 24.2-1016.

22. Felony disenfranchisement and re-enfranchisement are also incorporated within Virginia's election code. Just after the enumerated eligibility criteria in the definition of a "qualified voter," Virginia law states that: "No person who has been convicted of a felony shall be a qualified voter unless his civil rights have been restored by the Governor or other appropriate authority." Va. Code Ann. § 24.2-101; *see also* Va. Code Ann. § 24.2-427(D.) (requiring cancellation of "registration of any registered voter shown to have been convicted of a felony who has not provided evidence that his right to vote has been restored").

23. Virginia law fails to establish any rules or criteria governing the Governor's decision-making on voting rights restoration applications. The Supreme Court of Virginia has noted that the Governor's powers of restoration are exclusive and unfettered: "[T]he power to remove the felon's political disabilities remains vested solely in the Governor, who may grant or

deny any request *without explanation*, and there is no right of appeal from the Governor's decision." *In re Phillips*, 265 Va. 81, 87–88 (2003) (emphasis added).

24. The Director of the Department of Corrections is required to notify anyone convicted of a felony of the loss of their voting rights and of the procedures for applying for restoration. Va. Code Ann. § 53.1-231.1. "The notice shall be given at the time the person has completed service of his sentence, period of probation or parole, or suspension of sentence." *Id*. The Director of the Department of Corrections is required to assist the Secretary of the Commonwealth in administering the restoration application review process. *Id*. The Secretary of the Commonwealth is instructed by statute to "maintain a record of the applications for restoration of rights received, the dates such applications are received, and the dates they are either granted or denied by the Governor" and to "notify each applicant who has filed a complete application that the complete application has been received and the date the complete application was forwarded by the Secretary to the Governor." *Id*. Virginia law requires that complete applications be forwarded to the Governor within ninety days of receipt. *Id*.

25. Those disenfranchised by reason of their felony convictions who seek to regain their voting rights in Virginia must submit an application to the Secretary of the Commonwealth's office through the website restore.virginia.gov. The website can walk the applicant through the rights restoration application form or, alternatively, the applicant can print a copy and fill it out by hand.[8] An individual with a felony conviction "is eligible to apply to have his/her rights restored by the Governor if he/she has been convicted of a felony and is no longer incarcerated."[9]

[8] Office of the Secretary of the Commonwealth, Restoration of Rights Form, https://www.restore.virginia.gov/media/governorvirginiagov/restoration-of-rights/pdf/ror_form.pdf (last visited June 30, 2023).

[9] Secretary of the Commonwealth of Virginia's Website, *Restoration of Rights Process*, https://www.restore.virginia.gov/restoration-of-rights-process/ (last visited June 30, 2023).

26. The application asks for personally identifying information, contact information, the court in which the applicant was convicted, and whether the applicant is a U.S. citizen.[10] One of the new questions that Defendants have added to the rights restoration application asks whether the applicant was convicted of a violent crime.[11] If the applicant answers "Yes," then they must list the specific crime and the date of conviction.[12] Ostensibly, applicants convicted of non-violent offenses need *not* list the offense or date of conviction.

27. Next, the application form asks all applicants, regardless of the type of offense, to answer three questions: "HAVE YOU COMPLETED SERVING ALL TERMS OF INCARCERATION? ARE YOU CURRENTLY ON PROBATION, PAROLE OR OTHER STATE SUPERVISION? IF YES, WHEN IS YOUR EXPECTED END DATE?"[13]

28. The revised restoration application form also includes two new checkboxes related to the payment of any legal financial obligations arising out of the felony conviction. An applicant who has paid off "all fines, fees and restitution" will check the first box; an applicant who is "currently paying [their] fines, fees and restitution" will check the second.[14] The second checkbox includes the parenthetical "(receipt or payment plan from court attached)", suggesting that the applicants needs to attach documentation of completed or ongoing payment.[15]

29. Finally, the rights restoration form informs the applicant that "the restoration of rights does not restore the right to possess a firearm" and they "must petition the appropriate circuit

[10] Office of the Secretary of the Commonwealth, Restoration of Rights Form, https://www.restore.virginia.gov/media/governorvirginiagov/restoration-of-rights/pdf/ror_form.pdf (last visited June 30, 2023).
[11] No definition of that term is provided; nor does the form enumerate which offenses constitute violent offenses.
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*

court pursuant to Virginia Code § 18.2-308.2."[16] The application form also emphasizes that restoration of rights "is not a pardon nor does it expunge a criminal conviction."[17]

30. Defendant Secretary James and her office staff "thoroughly review[ ]" restoration applications and conduct investigations, "including checking [an applicant's] records with various state agencies to ensure the individual meets the Governor's standards for restoration of rights."[18] During the investigation, the Secretary's office "works with other various state agencies to consider individuals who may be eligible to have their rights restored."[19] According to Defendant Secretary James, these state agencies at least include: the Virginia Department of Corrections, Virginia State Police, Virginia Department of Elections, Virginia Department of Behavioral and Developmental Services, and Compensation Board.

31. Defendants send "personalized restoration orders" to applicants when their applications are granted.[20] These documents are available to restored applicants online and are also sent by mail if there is a current mailing address on file for the restored applicant. However, prior to restoration, there is no publicly available timeline for decision-making.

32. Defendant Governor Youngkin's decision whether to grant or deny a restoration application rests with his unfettered discretion. Applicants may be granted or denied for a pretextual reason or no stated reason. The absence of objective, transparent rules or criteria for

[16] *Id.*
[17] *Id.*
[18] Secretary of the Commonwealth of Virginia's Website, *Restoration of Rights Process*, https://www.restore.virginia.gov/restoration-of-rights-process/ (last visited June 30, 2023).
[19] Secretary of the Commonwealth of Virginia's Website, *Restoration of Rights*, https://www.restore.virginia.gov (last visited June 30, 2023).
[20] Secretary of the Commonwealth of Virginia's Website, *Restoration of Rights Process*, https://www.restore.virginia.gov/restoration-of-rights-process/ (last visited June 30, 2023); Secretary of the Commonwealth of Virginia's Website, *FAQ—Will I receive proof after my rights are restored?*, https://www.restore.virginia.gov/frequently-asked-questions/ (last visited June 30, 2023).

restoration opens the door to viewpoint and political discrimination based on the applicant's prior and ongoing expression, including public statements, online writings and recordings, and social media posts, as well as informed speculation as to the applicant's viewpoints and politics based on their name, address, previous voter registration information, race, ethnicity, religion, income, occupation, donation history, partisan primary voting history prior to disenfranchisement, affiliations, and memberships. All of this information can be readily learned or ascertained from easily accessed sources, a Google search, or government databases.

33. A March 22, 2023 letter sent to State Senator Lionel Spruill by Defendant Secretary of the Commonwealth Kay Coles James constitutes the only description of this opaque and arbitrary restoration process:

> The Constitution places the responsibility to consider Virginians for restoration in the hands of the Governor and to the Secretary as delegated. After Inauguration, the Governor charged me and our team with ensuring our application and deliberation were legal and fair – that every applicant be considered individually as required by the Constitution and underscored by the Supreme Court of Virginia in 2016.
>
> Every applicant is different and we utilize our partners at the Virginia Department of Corrections, Virginia State Police, Virginia Department of Elections, Virginia Department of Behavioral and Developmental Services, and the Compensation Board to research each application and provide further information to be used in the consideration process.
>
> As we updated this process to ensure Constitutionality, we worked with the Secretary of Public Safety and the Department of Corrections to ensure that every discharged felon be provided with an application for restoration and explained its significance. Each inmate signs to attest to receiving this application. The Department of Corrections has indicated that roughly 12,000 people are released each year which includes individuals found guilty of misdemeanors and felonies.
>
> Our website was updated to include that applications are considered individually and not granted on an automatic basis. As noted earlier, individuals are informed upon release the recommendation of applying and given a paper application. Applicants use this same website to apply and to check the status of their application and advocates use this website to help individuals apply or to share the PDF paper application to be submitted by mail. We have scheduled a roundtable for advocates in April to discuss the process.

> Virginians trust the Governor and his Administration to consider each person individually and take into consideration the unique elements of each situation, practicing grace for those who need it and ensuring public safety for our community and families.

See supra note 4. This letter makes plain that Governor Youngkin's administration is fully exploiting the unfettered discretion the Virginia Constitution and state court cases confer upon him to restore or deny voting rights to people with felony convictions. Since the original Complaint in this lawsuit was filed on April 6, 2023, Defendants have not stated that the restoration process is governed by any rules or criteria whatsoever—a strong indication that it is a purely arbitrary restoration process.[21]

B. The Rise and Fall of Non-Arbitrary Voting Rights Restoration in Virginia

34. Almost a decade ago, in May 2013, Governor Bob McDonnell took the first steps towards giving Virginia a non-discretionary, non-arbitrary voting rights restoration system. *See* Office of the Governor, Executive Order No. 65 (July 15, 2013), Sharing of Criminal History Record Information for Determining Eligibility for Automatic Restoration of Rights Process. Governor McDonnell's restoration system "create[d] a procedure for automatic, individualized restoration of civil rights to non-violent felons who meet the following specific conditions: 1) completion of their sentence, probation or parole; 2) payment of all court costs, fines, restitution, and completion of court-ordered conditions, and 3) have no pending felony charges." *Id.*

[21] In a reported email to State Sen. Scott Surovell, Defendant Secretary James wrote: "We consider each application that we receive on the merits of each individual case, but we get information from state agency partners [Department of Behavioral Health and Developmental Services, Virginia State Police, Department of Elections, and the Compensation Board] from applicants to appropriately consider each candidate." Charlotte Rene Woods, *Surovell, Spruill ask if Youngkin has changed rights restoration process*, RICHMOND TIMES-DISPATCH (Mar. 17, 2023), https://richmond.com/news/state-and-regional/govt-and-politics/surovell-spruill-ask-if-youngkin-has-changed-rights-restoration-process/article_dd1232ba-c4fb-11ed-8b57-3723c72fb438.html.

Ultimately, Governor McDonnell restored voting rights to over 8,000 individuals with felony convictions.[22]

35. Governor Terry McAuliffe streamlined the process for non-discretionary, non-arbitrary restoration, expanded coverage to all felony convictions, and eliminated the prerequisite to pay off all fines, fees, and restitution. The Supreme Court of Virginia ruled in *Howell v. McAuliffe* that, pursuant to the Virginia Constitution, the Governor must restore people with felony convictions on an individualized basis. 292 Va. 320, 350–51 (2016). Following that decision, Governor McAuliffe used his power to individually restore the voting rights of over 173,000 people with felony convictions based on objective rules and criteria.[23]

36. Governor Ralph Northam expanded this non-discretionary restoration system still further, issuing an executive order in March 2021 that authorized the restoration of parolees and probationers as well.[24] That new system effectively restored individuals upon release from incarceration. All told, Governor Northam used his power to restore the voting rights of over 126,000 people with felony convictions based on objective rules and criteria.[25]

37. Defendants Governor Youngkin and Secretary of the Commonwealth Kay Coles James have ended their predecessors' system of non-discretionary restoration based on objective rules and criteria.

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[22] *See generally,* Office of the Governor, SD2 Reports – List of Pardons, Commutations, Reprieves and Other Forms of Clemency, *available at* https://rga.lis.virginia.gov/search/?query=SD2; Graham Moomaw, *Youngkin administration now requires felons to apply to get their voting rights back,* VIRGINIA MERCURY (Mar. 23, 2023), https://www.virginiamercury.com/2023/03/23/youngkin-administration-now-requires-felons-to-apply-to-get-their-voting-rights-back/.

[23] *Id.*

[24] Governor of Virginia's Website, *Governor Northam Restores Civil Rights to Over 69,000 Virginians, Reforms Restoration of Rights Process* (Mar. 16, 2021), https://www.governor.virginia.gov/newsroom/all-releases/2021/march/headline-893864-en.html.

[25] *See supra* note 22.

C. Effect of the Arbitrary Restoration of Voting Rights Process in Virginia

38. Not only is Defendants' arbitrary voting rights restoration process prone to inconsistent and discriminatory treatment, but the Governor actually does make decisions in a wholly arbitrary manner.

39. It remains unclear exactly when Defendants converted Virginia's non-discretionary restoration process into a purely discretionary, arbitrary restoration scheme. However, on information and belief, Defendants made this change at some time in 2022, as the effects on last year's total restorations are unmistakable. Restoration grants have declined steeply since Defendant Governor Youngkin assumed office in January 2022. In his first year in office, Governor Youngkin only granted restoration to approximately 4,300 people.[26]

40. The number of voting rights restoration applications currently pending with Defendants' offices is unknown.

41. On information and belief, Governor Youngkin does not deny any applications for voting rights restoration. Instead, certain applications are indefinitely held in limbo by the Governor's office, without any final decision.

42. The disenfranchised population in Virginia remains one of the largest nationwide. As of October 2022, the Sentencing Project's most recent updated estimates of the disenfranchised population in each state reflect that Virginia has an estimated 211,344 people with felony convictions who remain disenfranchised even after completing their full sentences including parole and probation.[27] This constitutes 5.04 percent of the state's voting-age population—the sixth highest rate in the nation.[28]

[26] *See supra* note 22.
[27] SENTENCING PROJECT REPORT, *supra* n.1, at Table 3.
[28] *Id.*

INJURY TO PLAINTIFFS

43. Voting rights restoration assistance is one of Plaintiff Nolef Turns, Inc.'s core programs, but paid staff members' time and organization resources are finite. Every hour and dollar spent on the rights restoration process is a dollar and an hour that cannot be spent fulfilling the other programs essential to fulfilling Plaintiff Nolef Turns, Inc.'s core mission of reintegrating their clients and reducing recidivism. Defendant Governor Youngkin's termination of his predecessors' non-discretionary voting rights restoration system and reversion to an arbitrary restoration system will have a significant impact on Nolef Turns, Inc.'s work. It will force the organization to divert substantial paid staff time, money, and other resources to guiding their clients through the process from beginning to end.

44. First and foremost, Nolef Turns will need to divert paid staff time, money, and other resources to explaining and educating community members with felony convictions on the changes in Virginia's restoration system. Many people with felony convictions are not adequately informed by Virginia state government agencies about the restoration process, so Nolef Turns will need to fill that public education gap on this sea change in the state's restoration system.

45. Second, given Defendants' arbitrary restoration process, now each restoration application will be unique and require specific documentation of the applicant's completed or ongoing payment of fines, fees, and restitution. Plaintiff Nolef Turns, Inc.'s four paid staff members will need to: (1) verify the specific offenses against the judgment; and (2) verify the completed or ongoing payment of legal financial obligations. The former may necessitate a background check, and the lack of clarity around what constitutes a "violent crime" means will entail even more research and communication. For the latter, Nolef Turns will need to help their clients obtain and submit the requisite paperwork documenting the completed payment of fines,

fees, and restitution or the ongoing payment plan. All of this work collecting information and documentation is burdensome and challenging, as criminal court records and request processes vary from county to county. This, in turn, means that Nolef Turns as an organization will be spending more time and resources per applicant than it would have prior to the imposition of an arbitrary restoration process with undisclosed and/or vague requirements. Furthermore, Defendants have not clarified whether there is a risk of prosecution for any inaccuracies on the form. Given the arbitrary and secretive nature of Defendants' restoration process, Nolef Turns, Inc. has a legitimate fear that their clients may be prosecuted for inaccuracies on the restoration of rights application form. Accordingly, this risk of prosecution will force an even more substantial diversion of Nolef Turns, Inc.'s paid staff time, money, and other resources to ensure accuracy on rights restoration forms.

46. Third, Defendant Secretary Kay Coles James has asserted that the new restoration process entails an investigation that will involve other Virginia state agencies providing information on applicants. This shift to a more expansive investigation into each restoration applicant will require Nolef Turns, Inc. to engage more deeply with each restoration applicant it assists, helping them to respond to Virginia state agencies' informational requests, as well as any requests for the submission of documents to Defendants' offices for consideration along with their application.

47. Fourth, Defendants have also communicated that the preexisting waiting period of two to four weeks has been increased to one to three months. But on information and belief, many restoration applications languish with Defendants' offices for longer than three months. Accordingly, as a result of this new arbitrary voting rights restoration system with no reasonable, definite time limits for the Governor to make a decision, Plaintiff Nolef Turns, Inc.'s work with

their clients will entail calling for status updates over far longer periods of time. Under the previous process, Nolef Turns, Inc. could assist people with the application and educate them on a simplified process that restored people by operation of neutral, objective criteria. Now, under this arbitrary and more complex process, Nolef Turns must help their clients navigate a process with subjective, vague criteria, open-ended investigations, and obscure procedures.

48. Accordingly, Defendants' new arbitrary restoration process will force Nolef Turns to divert substantial time and resources from other core mission programs focused on reintegrating people with felony convictions into society and reducing recidivism. This diversion of effort and resources will increase both the per-applicant and aggregate costs and resources for its restoration of rights program.

49. Plaintiffs Gregory Williams and George Hawkins are per se injured by being subjected to an arbitrary voting rights restoration process with no reasonable, definite time limits. Virginia law's complete lack of rules or criteria governing the voting rights restoration process and Defendants' operation of an arbitrary restoration system without any such rules or criteria violate Mr. Williams's and Mr. Hawkins's First Amendment rights.

CLAIMS

COUNT ONE
(All Plaintiffs)
(Unfettered Discretion and Arbitrary Treatment of Voting Rights Restoration Applicants in Violation of the First Amendment and 42 U.S.C. § 1983)

50. The factual allegations contained in the preceding paragraphs are incorporated into Count One, as though fully set forth herein.

51. Plaintiffs assert a claim pursuant to 42 U.S.C. § 1983 for violation of the First Amendment to the U.S. Constitution.

52. The First Amendment protects the right to vote because voting is political expression or expressive conduct, as well as political association. *Norman v. Reed*, 502 U.S. 279, 288-90 (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.").

53. The First Amendment forbids vesting government officials with unfettered discretion to issue or deny licenses or permits to engage in any First Amendment-protected speech, expressive conduct, association or any other protected activity or conduct. *Forsyth Cnty., Ga. v. Nationalist Movement*, 505 U.S. 123, 130–33 (1992) ("The First Amendment prohibits the vesting of such unbridled discretion in a government official."); *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 763–64 (1988) (noting "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"); *Shuttlesworth*, 394 U.S. at 150–53 (invalidating permit scheme for marches or demonstrations that lacked "narrow, objective, and definite standards" and was "guided only by [Commissioners'] own ideas of 'public welfare, peace, safety, health, decency, good order, morals or convenience'"); *Staub v. City of Baxley*, 355 U.S. 313, 322 (1958) (striking down licensing

scheme that turned on "uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official"). Absent any laws, rules, or criteria regulating the granting or denying of restoration of voting rights applications, the process is highly susceptible to arbitrary, biased, and/or discriminatory decision-making.

54. The Governor of the Commonwealth of Virginia is vested with the authority to grant or deny applications for voting rights restoration, and his discretion in issuing these licenses to vote is absolute. Voting rights restoration in Virginia is not governed by any laws, rules, or criteria of any kind. This scheme therefore constitutes an unconstitutional arbitrary licensing scheme regulating the exercise of the right to vote.

55. The First Amendment unfettered discretion doctrine does not require plaintiffs to demonstrate actual evidence of discriminatory treatment. The absence of any legal constraint *preventing* viewpoint discrimination is grounds for a facial challenge under this doctrine. *Forsyth Cnty.*, 505 U.S. at 133 n.10; *City of Lakewood*, 486 U.S. at 757, 769–70.

56. U.S. Supreme Court precedent prohibits the arbitrary licensing of First Amendment-protected expression or expressive conduct. This is because the risk of viewpoint discrimination is highest when a government official's discretion to authorize or prohibit First Amendment-protected activity is entirely unconstrained by law, rules, or criteria. *City of Lakewood*, 486 U.S. at 763–64 ("[W]ithout standards governing the exercise of discretion, a government official may decide who may speak and who may not based upon the . . . viewpoint of the speaker."). Officials with unfettered authority to selectively enfranchise people with felony convictions may grant or deny voting rights restoration applications on pretextual grounds while secretly basing their decisions on the applicants' political affiliations and viewpoints. The absence of objective, transparent rules or criteria for restoration opens the door to viewpoint discrimination

based on the applicants' prior and ongoing expression, including public statements, online writings and recordings, and social media posts, as well as informed speculation as to the applicants' viewpoints and politics based on race, ethnicity, religion, income, occupation, address, previous voter registration information, donation history, partisan primary voting history prior to disenfranchisement, affiliations, and memberships. All of this information can be readily learned or ascertained from easily accessed sources, a Google search, or government databases. Governor Youngkin "can measure" a restoration applicant's "probable . . . viewpoint[s] by speech already uttered." *Id.* at 759. In this way, an arbitrary licensing system enables viewpoint discrimination against "disfavored" votes and "disliked" voters. *Id.*

57. Va. Const. art. II, § 1, Va. Const. art. V, § 12, and Va. Code Ann. § 24.2-101 require a person with a felony conviction to obtain the Governor's permission in order to regain their right to vote, confer unfettered discretion on the Governor to grant or deny restoration, and therefore impose an unconstitutional arbitrary licensing scheme for First Amendment-protected voting. Virginia law contains no rules or criteria regulating the Governor's discretionary power to grant or deny applications for voting rights restoration, making the system prone to arbitrary, biased, and/or discriminatory treatment. As a licensing scheme of unfettered official discretion, it violates the First Amendment.

58. At all relevant times, Defendants have acted under color of state law.

59. Defendants have deprived and will continue to deprive Plaintiffs of their right not to be subjected to an unconstitutional arbitrary licensing scheme governing voting rights. This right is guaranteed by the First Amendment and enforced by 42 U.S.C. § 1983.

COUNT TWO
(All Plaintiffs)
(Lack of Reasonable, Definite Time Limits for Decisions on Voting Rights Restoration Applications in Violation of the First Amendment and 42 U.S.C. § 1983)

60. The factual allegations contained in the preceding paragraphs are incorporated into Count Two, as though fully set forth herein.

61. Plaintiff asserts a claim pursuant to 42 U.S.C. § 1983 for violation of the First Amendment to the U.S. Constitution.

62. The First Amendment protects the right to vote because voting is political expression or expressive conduct, as well as political association. *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.").

63. First Amendment doctrine clearly holds that an administrative 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). "Where 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. A scheme that fails to set reasonable time limits on the decisionmaker creates the risk of indefinitely suppressing permissible speech." *Id*. at 227; *see also*

Riley v. Nat'l Fed'n of the Blind of North Carolina, Inc., 487 U.S. 781, 802 (1988) ("[D]elay compels the speaker's silence. Under these circumstances, the licensing provision cannot stand."). Without reasonable, definite time limits, there is also a significant risk of arbitrary, biased, and/or discriminatory treatment of voting rights restoration applicants.

64. The Governor is not bound by any reasonable, definite time limits in processing voting rights restoration applications and issuing final decisions. Virginia law is devoid of any such time limits for granting or denying restoration applications.

65. Without binding time limits, the Governor's office may process individual restoration applications at any speed and may deliberately fast-track select applicants while delaying others.

66. Since no provision in Virginia law requires the Governor's office to render a decision on a voting rights restoration application within a reasonable, definite time period, Va. Const. art. II, § 1, Va. Const. art. V, § 12, and Va. Code Ann. § 24.2-101 create the risk of arbitrary delays, biased treatment, and viewpoint discrimination, and therefore violate the First Amendment.

67. Va. Const. art. II, § 1, Va. Const. art. V, § 12, and Va. Code Ann. § 24.2-101 contain no reasonable, definite time constraints on the Governor's processing of and decisions on voting rights restoration applications, making the system susceptible to arbitrary, biased, and/or discriminatory treatment. Accordingly, the lack of reasonable, definite time limits in Virginia's voting rights restoration process also violates the First Amendment.

68. At all relevant times, Defendants have acted under color of state law.

69. Defendants have deprived and will continue to deprive Plaintiffs of their right to a voting rights restoration scheme with reasonable, definite time limits on the Governor's decision-

making, which is guaranteed to Plaintiffs by the First Amendment and enforced by 42 U.S.C. § 1983.

PRAYER FOR RELIEF

Plaintiffs respectfully request that this Court:

(a) Assume jurisdiction over this matter;

(b) Declare that Virginia's arbitrary voting rights restoration scheme for people with felony convictions created by Va. Const. art. II, § 1, Va. Const. art. V, § 12, and Va. Code Ann. § 24.2-101 violates the First Amendment to the United States Constitution;

(c) Preliminarily and permanently enjoin Defendants Governor Youngkin and Secretary of the Commonwealth Kay Coles James, as well as their respective agents, officers, employees, successors, and all persons acting in concert with them, from subjecting Plaintiffs to the unconstitutional arbitrary voting rights restoration scheme created by Va. Const. art. II, § 1, Va. Const. art. V, § 12, and Va. Code Ann. § 24.2-101;

(d) Declare that the lack of reasonable, definite time limits in Virginia's voting rights restoration process created by Va. Const. art. II, § 1, Va. Const. art. V, § 12, and Va. Code Ann. § 24.2-101 violates the First Amendment;

(e) Preliminarily and permanently enjoin Defendants Governor Youngkin and Secretary of the Commonwealth Kay Coles James, as well as their respective agents, officers, employees, successors, and all persons acting in concert with them, from administering the voting rights restoration scheme created by Va. Const. art. II, § 1, Va. Const. art. V, § 12, and Va. Code Ann. § 24.2-101 without reasonable, definite time limits;

(f) Preliminarily and permanently order Defendants Governor Youngkin and Defendant Secretary James, their respective agents, officers, employees, successors, and all persons acting in concert with them, to replace the current arbitrary voting rights restoration scheme for people with felony convictions with a non-arbitrary voting rights restoration scheme which restores the right to vote based upon specific, neutral, objective, and uniform rules and/or criteria and within reasonable, definite time limits;

(g) Retain jurisdiction to enforce its order;

(h) Grant Plaintiffs their reasonable attorneys' fees and costs incurred in bringing this action pursuant to 42 U.S.C. § 1988, 28 U.S.C. § 1920, and as otherwise permitted by law; and

(i) Grant such other relief as this Court deems just and proper.

DATED: July 24, 2023

Respectfully submitted,

/s/ Terry Frank

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**Admitted Pro Hac Vice*

CERTIFICATE OF SERVICE

I certify that on July 24, 2023, I filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a "Notice of Electronic Filing" to the following CM/ECF participants:

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

NOLEF TURNS, INC., et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 3:23-cv-232-JAG
	)	
GLENN YOUNGKIN, Governor of Virginia, in his official capacity, et al.,	)	
	)	
	)	
Defendants.	)	

DECLARATION OF KAY COLES JAMES

I, Kay Coles James, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I currently serve as the Secretary of the Commonwealth of Virginia. I have held this office since January 24, 2022.

2. As outlined in the Code of Virginia, the Secretary of the Commonwealth's office administers the process for restoration of civil rights. See Va. Code §§ 53.1-231.1, 53.1-231.2. That process begins with the submission of an application either by paper or through my office's website, https://www.restore.virginia.gov/. A felon is eligible to apply to have his/her rights restored by the Governor if he or she is no longer incarcerated. The felon must disclose the nature of his or her conviction, whether the conviction was for a violent felony, whether he or she has finished serving all terms of his or her incarceration, whether he or she is serving on probation, parole, or other state supervision (and, if so, the expected end date), and whether he or she has paid or currently is paying all fines, fees, and restitution pertaining to the felony conviction. My office reviews each application and works with other various state agencies to consider who may be eligible to have their rights restored. My office thoroughly reviews all applications, including

records with various state agencies to ensure the individual meets the Governor's standards for restoration of rights.

3. Upon approval of an application, the Governor, through my office, issues personalized restoration orders. These orders are sent to the applicants via United States Postal Service.

4. Since 1971, Virginia's governors have re-enfranchised over 330,000 felons. Governor Youngkin's administration has re-enfranchised 6,162 felons since he took office in January 2022.

Plaintiff Gregory Williams

5. I understand that Plaintiff Gregory Williams alleges that he was convicted of a felony in Virginia state court; that after nineteen years in prison, he was released from incarceration in 2007; that he was on parole until 2010; and that he has a restoration application pending. Second Amend. Compl. (SAC) ¶ 17 (ECF No. 22).

6. Based on these allegations, my office conducted a thorough search of our records. We have located what we believe to be Plaintiff Gregory Williams's restoration application.

7. Plaintiff Gregory Williams's restoration application was filed with my office on March 17, 2023. It had been pending for 20 days before Plaintiff Gregory Williams commenced this lawsuit on April 6, 2023.

8. In preparing this declaration, I also reviewed Department of Corrections records relating to Plaintiff Gregory Williams.

9. In 1988, Plaintiff Gregory Williams was convicted in Henrico Circuit Court of one count of felony robbery and one count of the use of a firearm in the commission of a felony due to an armed robbery, for which he was sentenced to fifteen years in prison.

10. In 1989, Plaintiff Gregory Williams was convicted in Henrico Circuit Court for six offenses related to three different armed robberies. He was convicted of three counts of felony robbery and three counts of the use of a firearm in the commission of a felony and sentenced to fifty-two years in prison, with thirty years suspended.

11. All told, Plaintiff Gregory Williams was sentenced to thirty-seven years' imprisonment. After serving nineteen years of that sentence, he was released on mandatory parole on October 19, 2007, and discharged from parole supervision on October 19, 2010.

12. On July 13, 2023, Governor Youngkin granted Plaintiff Gregory Williams' restoration application, restoring Williams' right to vote. My office sent Plaintiff Gregory Williams a copy of his personalized restoration order via the United States Postal Service.

Plaintiff George Hawkins

13. I understand that Plaintiff George Hawkins alleges that he was convicted of a felony in Virginia state court when he was 17 years old; that after thirteen years in prison and was released from incarceration on May 3, 2023; and that he has submitted re-enfranchisement applications, including one that "is pending with the Governor's Office." SAC ¶ 18.

14. Based on these allegations, my office conducted a thorough search of our records. We have located what we believe to be a restoration application filed by Plaintiff George Hawkins.

15. Plaintiff George Hawkins' restoration application was filed with my office on June 18, 2023. It had been pending for 36 days before Plaintiff George Hawkins joined this lawsuit on July 24, 2023.

16. In preparing this declaration, I also reviewed Department of Corrections records relating to Plaintiff George Hawkins.

17. In 2010, Plaintiff George Hawkins was convicted in Richmond City Circuit Court of five felony offenses: attempted murder in the first degree; aggravated malicious wounding; drug possession with intent to distribute; and two counts of the use of a firearm in commission of a felony. Collectively, Plaintiff George Hawkins was sentenced to 78 years in prison, with 63 years suspended.

18. Plaintiff George Hawkins was released from incarceration on May 3, 2023.

I declare under penalty of perjury that, to the best of my knowledge, the foregoing is true and correct.

Executed on August 14, 2023.

Kay Coles James
Secretary of the Commonwealth of Virginia

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

NOLEF TURNS, INC., et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 3:23-cv-232-JAG
	)	
GLENN YOUNGKIN, Governor of Virginia, in his official capacity, et al.,	)	
	)	
	)	
Defendants.	)	

DEFENDANTS' NOTICE REGARDING PLAINTIFF GEORGE HAWKINS

Today, October 4, 2023, counsel for Defendants learned that George Hawkins's application for re-enfranchisement has been deemed "ineligible at this time."

Dated: October 4, 2023

Respectfully submitted,

GLENN YOUNGKIN
KELLY GEE

By: */s/ Steven G. Popps*
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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on October 4, 2023, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to all parties of record.

/s/ Steven G. Popps
Steven G. Popps (VSB #80817)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

Nolef Turns, Inc., et al

Plaintiffs,

versus 3:16 CR

Gregory Williams, etc., et al

Defendants

Before: HONORABLE JOHN A. GIBNEY, JR.
Senior United States District Judge

October 6, 2023

Richmond, Virginia

GILBERT F. HALASZ
Official Court Reporter
U. S. Courthouse
701 East Broad Street
Richmond, VA 23219

APPEARANCES

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TERRY FRANK LAW
by: Terry Catherine Frank
For the plaintiffs

OFFICE OF THE ATTORNEY GENERAL
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Deputy Attorney General

Andrew N. Ferguson, Esq.
Solicitor General
for the defendants

THE CLERK: Case number 3:23 C V 232.

Nolef Turns, Inc. and another versus Glenn Youngkin and another.

Much K A Y.

Mr. Jonathan Sherman and Ms Terry Frank represent the plaintiffs.

Mr. Steven Popps and Mr. Andrew Ferguson represent the defendants.

Are counsel ready to proceed?

MR. SHERMAN: Yes.

MR. POPPS: Yes, Your Honor.

MR. SHERMAN: Yes, Your Honor.

THE COURT: All right. Good morning. We are here today on October 6 on motions to dismiss filed by the various defendants in this case.

We have substituted Kay Coles James' successor, whose name is Kelly Gee, for her in this case. So we have lost one of our plaintiffs. So the only parties left in this case are Nolef Turns and George Hawkins as plaintiffs.

And Governor Younkin and Secretary Gee are the remaining defendants.

So we are here on the motion to dismiss by Governor Youngkin and Secretary Gee.

And I will address, first, the 12 (b) 1 motion.

Mr. Popps. So, as I understand it, Mr. Hawkins has been denied reinstatement; is that correct?

MR. POPPS: They is, Your Honor.

THE COURT: Please come up to the podium.

Good to see you.

MR. POPPS: Thank you, Judge.

May it please The Court, it is a pleasure to be in front of The Court as it has always been.

THE COURT: Always good to have a lawyer of your caliber here, although I must say, you have got quite a team on this case. You got six people on the brief here.

MR. POPPS: I need all the help I can get. If you see a hook pulling me away, that is what that is.

THE COURT: All right.

MR. POPPS: You are correct, Your Honor, that we did -- counsel learned late on Wednesday, and we filed an appropriate notice with The Court that the plaintiff, George Hawkins, his application has been denied.

THE COURT: I guess Governor Youngkin never learned his lesson that insurance companies give to trucking companies, never fire the driver until the litigation over the accident is done.

MR. POPPS: I think to the contrary, Your Honor, I

would say that the Governor and Secretary Gee are very diligent about --

THE COURT: And I agree. I am giving you a hard time about it. Hats off to them for doing what they apparently thought was the right thing regardless of this case.

MR. POPPS: I will note, Your Honor, that in front of The Court we have former plaintiff Gregory Williams. He filed his application March 17. It was granted July 13, less than three months later. Plaintiff George Hawkins filed on June 18, and that was denied less than two months later, on August 17.

So one of the criticisms in the complaint or the allegations is that this clemency scheme affords an unlimited amount of time to the Governor. I think at least on the two plaintiffs before The Court, one former and one current, that is just plainly not the case. I will note that for The Court.

Your Honor, as to the 12(b)1 motion --

THE COURT: So let me just ask you this.

The denial to have clemency to the individual plaintiff changed the motion on that.

MR. POPPS: The 12(b)1 motion, Your Honor? I think it does in this sense. The defendants now agree that plaintiff Hawkins' claim is ripe at this time

because his application has been denied. Secondly, as to the standing issue, the issue on standing that was briefed was one of a cognizable injury. The defendants agree that on plaintiff Hawkins' theory, which we reject, to be fair, that on his theory that he does have a cognizable --

THE COURT: Injury in fact. As to Hawkins it goes ahead. So why don't you address the organizational standing question.

MR. POPPS: Thank you, Your Honor.

I do think that although, you know, The Court has its independent duty perhaps to satisfy itself of jurisdiction, I think it should look at Nolef Turns, and we have argued that they did not have organizational standing. They are essentially an advocacy group. They have taken a policy position, which is laudable for them. But they have been -- they have not been forced to change their mission or anything like that with regard to this case.

They have simply made a voluntary decision to divert some resources within their organization, and the policy of their organization, the mission of their organization has not changed.

THE COURT: You know, there is a Fourth Circuit case that deals with some sort of an abortion group up

in Baltimore in which the Fourth Circuit said, well, you know, there are two kinds of organizational standing. One is when the organization asserts standing of its members, which clearly is not what we have here. And the fact that Mr. Hawkins is able to litigate the case proves we don't need organizational standing for that.

And then with respect to Nolef Turns, you know this is just part and parcel of their being an advocacy group. I don't get it.

MR. POPPS: I agree. I agree, Your Honor. Thank you.

THE COURT: Good job.

MR. SHERMAN: Good morning, Your Honor.

THE COURT: Good morning. How are you?

MR. SHERMAN: Good.

May it please The Court, I will respond first on the 12(b)1 motion.

THE COURT: That is what we are talking about right now. As to Nolef Turn.

MR. SHERMAN: No comment on George Hawkins, if I could address that briefly.

THE COURT: You won the motion on that.

MR. SHERMAN: Okay.

So I will move on to, I will move on to Nolef

Turns, if I could just come back briefly to George Hawkins at the end.

THE COURT: You don't need to come back. Hawkins is in the case. Okay?

MR. SHERMAN: Understood.

So for Nolef Turns the Fourth Circuit has reaffirmed the principle in Havens Realty that for organizational standing, and we are talking, as Your Honor mentioned, about direct organizational injury not associational standing on behalf of members, two things must be shown. Frustration of the organizational purpose. And a drain on the organization's resource. Usually this is construed as a diversion of resources. But for the allegedly unconstitutional action the organization wouldn't have to do X, Y or Z and divert time, resources, et cetera, away from other core mission police activities.

THE COURT: Havens is a testing case, right?

MR. SHERMAN: Havens Realty, right was challenging --

THE COURT: Was challenging, testing, more of a testing group.

MR. SHERMAN: -- was challenging against, I believe, racially steering --

MR. POPPS: And the standing question there dealt

with whether a testing group could litigate when they didn't intend to live in a place.

MR. SHERMAN: Correct, Your Honor.

This has been construed even in a case like Layne, which reaffirmed, Fourth Circuit reaffirmed it, the Fourth Circuit reaffirmed this decision, but in Layne there was a single conclusory allegation as to what -- single conclusory sorry allegation as to the organization, the second amendment foundation had to do research and make inquiries as to the effects and consequences of interstate, bans on interstate transactions of guns. Here we have made detailed allegations as to the effect that the arbitrary restoration system is having on Nolef Turns and will have on Nolef Turns. Not a single conclusory allegation. I point Your Honor in particular to paragraph 46 of our second amended complaint. Because there is this arbitrary open-ended process, unlike the previous nine, nine and a half years there are these open-ended investigations that go into the plaintiff's detailed -- the individual restoration applicant's details. It will be inquiries from state agencies. Nolef Turns works with a whole variety of people who are pre-restoration -- haven't yet made restoration application who are in the process of applying for and

have a pending restoration application, and because it is an arbitrary and open-ended process with no rules and criteria, they have to explain that process and answer inquires, many more inquires, and many more questions that come from each of the applicants that they deal with. And they also have to shepherd them through the request that they get from Virginia State agencies and anyone else who inquires from perhaps even the Governor's office as that application is working its way through the process.

These informational requests are just one aspect of it. Nolef Turns also has standing for counts two, which is over the lack of reasonable definite time limits. There are no time limits whatsoever on the Governor's decision-making process here. And as a result, it takes a lot more time and a lot more effort to deal with each individual applicant.

That is what, that, that is what is causing the consequent drain or diversion of Nolef Turn's resources.

We would point Your Honor, as we did in the brief, to Harrison v. Spencer where there was an immediate consequence on the programmatic, on the programs that the organization in Harrison v Spencer was engaging in.

There was a flood of inquiries, there was a flood

from service members with HIV. They -- and it had a burden on their ability to conduct their core mission activities across a whole variety of areas.

Nolef Turns, as we have alleged in the second amended complaint, is not just focused on rights restoration. It is a holistic -- an organization with a holistic approach for people who have been released from incarceration and are reentering society.

So there are employment programs. There are drug treatment programs. There are all sorts of assistance programs that we have enumerated in the complaint and every hour that -- every hour and every, all the efforts and resources that go into diverting time to deal with rights restoration diverts time, money, and resources that could be spent by their paid staff, members on other programs that are essential to their core mission.

THE COURT: Well, suppose the Sierra Club wanted to go and devote more time to air pollution. Could it file a law suit that said, you know, government, if you would -- of course there are provisions under the Clean Water Act, I know -- but suppose they said to the government, if you would just enforce the Clean Water Act correctly we could devote all our time to air pollution. Would that give them standing?

MR. SHERMAN: No, Your Honor. I think it wouldn't. They would be making a decision that wasn't based on some purported legal or unconstitutional conduct. The idea here is Nolef Turns wouldn't have had to divert its resources, time and money in this way, but for the change in the Governor's practices with respect to voting rights restoration. It is because of that change, which we allege is unconstitutional under the first amendment, that they are not having to spend that much time, that much more resources, on each individual restoration application that they deal with.

Again, this is not the sole -- it is a big component of the work, it is essential to their work, but it is not as if they decided we are going to spend -- not as if Nolef Turns decided we are going to spend a ton more time on rights restoration because that is what we care about, and that is what we are prioritizing. Under the previous administration there, when there was an immediate restoration upon the satisfaction of objective rulings and criteria --

THE COURT: Tell me what you had to do automatically to get a restoration when Governor Northam was involved.

MR. SHERMAN: Switched at some point I believe to

also encompass people with violent offenses on their record. But I do believe there was an application process, but after --

THE COURT: What did you have to show? You had to show you finished your time, obviously, in prison, and you had finished your parole or supervised release.

MR. SHERMAN: Because we haven't yet received discovery yet, Your Honor --

THE COURT: Well, you knew about it.

MR. SHERMAN: I have not seen Governor Northam's application. I have only the existing application. I do know there was an application --

THE COURT: And you know there was a change.

MR. SHERMAN: I do know from what my clients told me that there have been certain that have been added.

THE COURT: You don't know anything about the facts of the case, as to what the change is?

MR. SHERMAN: I do know what is different from the application.

THE COURT: Okay. Tell me what is different. That is what I am trying to figure is what it was that Northam did that Youngkin is not doing.

MR. SHERMAN: Well, there are certain features of the new application --

THE COURT: What are they?

MR. SHERMAN: -- asking about whether there is a violent offense in the person's record. Asking about whether there are payment of fines, fees, and restitution, and whether they are under a payment plan for that. But the main change, of course, is that the process is now completely arbitrary, and there was --

THE COURT: Under -- are you telling me that under Northam's procedures if you finished your time you automatically got restoration?

MR. SHERMAN: Immediately restored, yes. Yes, Your Honor. It was an objective process, it was immediate restoration upon the satisfaction of the sentence, completion of the sentence. There was a part of the process I believe for something like 70,000 people which was automatic even without an application. So there was some aspect, some aspects of Governor Northam's administration of voting rights restoration that didn't even require an application.

THE COURT: Are you telling me that if Ted Bundy had been in Virginia and had been released Governor Northam would have restored his rights to vote?

MR. SHERMAN: Under the previous system I believe that is correct, yes, Your Honor. If he had satisfied all aspects of his sentence including probation and parole, yes, Your Honor.

THE COURT: Do you believe that?

MR. SHERMAN: Under the pre-existing rule I believe that all people who satisfied their offenses, I don't remember if there was --

THE COURT: I don't know. I wasn't here. I mean I was here, but it didn't apply to me at that time.

MR. SHERMAN: Well, I don't believe there were any carve outs. Perhaps Governor's counsel can if there were any, but I don't believe there were any carve outs whatsoever. I believe at some point Governor Northam extended it to all offenses regardless of what offense, and as long as it had been completely satisfied that was the -- voting rights were restored.

THE COURT: Okay.

MR. SHERMAN: But the main thing I would add, Your Honor, is that Nolef Turns has not made a choice, you know, to devote more of its budget to this issue. It has diverted, it had to divert resources because of the change from Governor Northam to Governor Youngkin, and that main change is not what is required on the application form in those details. The main change is that the process is completely arbitrary now, and taking much longer.

THE COURT: So, okay. So tell me what Nolef Turns does that takes so much time.

MR. SHERMAN: So each applicant, as we have alleged in the allegations, of course as Your Honor knows, must be construed in favor of Nolef Turns. The allegation is that we, that Nolef Turns will have to spend time with each applicant in response to investigations; first explaining the new arbitrary system to applicants, which was not required --

THE COURT: That can't be too hard because there are no rules to explain, according to you.

MR. SHERMAN: Well, that is correct, Your Honor, but there are, there are more procedures in place now and whereas there would not be an open --

THE COURT: What extra procedures are there?

MR. SHERMAN: As former defendant Secretary Kay Cole James has said in public statements, there will be an open-ended investigation, state agencies may request inquiries --

THE COURT: What state agencies makes requests?

MR. SHERMAN: We don't know this yet, Your Honor, because discovery hasn't fully gotten under way.

THE COURT: Well, you have got -- Nolef Turns must advise hundreds of these people, right?

MR. SHERMAN: Yes, Your Honor, but we don't --

THE COURT: Okay. So you have had experience with hundreds of these people. Tell me what it is you do

that makes it so burdensome.

MR. SHERMAN: Well, this goes well beyond the scope of the pleading.

THE COURT: Okay. Then go beyond the scope of -- this is way beyond the scope of your law suit, but it is what I would like to know so I can make a correct decision on this. I would like to be not reversed.

MR. SHERMAN: Understood, Your Honor. I don't have a specific example for Your Honor of the people, of the specific agencies that have reached out to Nolef Turns at the tip of fingers here.

THE COURT: Tell me what investigation you did of these things before you filed the law suit.

MR. SHERMAN: Well, we had to file the law suit. We filed the law suit immediately after -- we filed the law suit immediately after the change came to light, that it was an arbitrary restoration process. We know from our clients, Nolef Turns, that they are dealing with a number of restoration applicants; and we know that agencies are making inquiries. I have read in the press of this happening. We have heard from the sec -- we have heard from the defendants themselves.

THE COURT: How many people work for Nolef Turns?

MR. SHERMAN: How many people?

THE COURT: How many people?

MR. SHERMAN: Four paid staff members.

THE WITNESS: Four paid staff members. Are they here?

MR. SHERMAN: Are they here? I believe Sheila Williams --

THE COURT: Are they with you?

MR. SHERMAN: Yes, absolutely, Your Honor.

THE COURT: And did they tell you what it was that took so much time and effort?

MR. SHERMAN: Yes, Your Honor. We put all of that --

THE COURT: And what did they say?

MR. SHERMAN: We have put all of that in the complaint.

THE COURT: All right.

So you don't really know. Because I have been asking you this question, and you really just don't know other than, well, they have to answer a lot of questions, but you are not sure what they are and who they come from.

MR. SHERMAN: Your Honor, respectfully, I would disagree. We have alleged that they have to Shepherd a number of applicants that they work with through the process. They have to respond to inquiries from state agencies. The defendants themselves have said that

those inquires are made by state agencies directly of restoration applicants, those restoration applicants come Nolef Turns. This is an on going process. Discovery has not fully gotten underway in this case. We will have, if we get past the motion to dismiss I am sure there will be evidence of Nolef Turns having to divert its resources and time to respond to those inquiries made by state agencies, and also to deal with applicants. And we with would marshal all of that evidence and put it before The Court.

THE COURT: Okay. Thank you.

MR. SHERMAN: Thank you, Your Honor.

THE COURT: Anything you want to say in response?

MR. POPPS: Nothing further on 12(b)1.

THE COURT: The 12(b)1 motion is granted as to Nolef Turns. They simply don't satisfy the standing requirement. They can't enumerate anything that amounts to injury in fact, and that satisfies the requirements of the constitution or of the case law that deals with standing.

That motion is granted.

All right. Now let's hear your motion to dismiss.

MR. POPPS: Thank you, Your Honor.

THE COURT: Go ahead.

So tell me this. Is it your position in this case

that there is no first amendment right to vote?

MR. POPPS: The Government's position in this case, Your Honor, is that the 14th and 15th amendments protect the right to vote and that any interaction of first amendment has with voting is cabined under the umbrella of the 14th and 15th amendments.

THE COURT: But that is -- there a first amendment. Is your right to vote protected at all by the first amendment?

MR. POPPS: To the extent it is, Your Honor, and I think the case law from the Supreme Court is a little bit muddled on this, but to the extent the first amendment does protect the right to vote, again, the Fourth Circuit has said in multiple cases, Washington, Martin, and Erby versus State Board of Elections that that falls under the umbrella of the work that the 14th and 15th amendments do.

THE COURT: So let me ask you this. Is voting expressive conduct under the first amendment?

MR. POPPS: Our position in the brief, Your Honor, is that it is not.

THE COURT: Okay.

Is voting somehow an exercise of the first amendment right to associate with other people under the first amendment?

MR. POPPS: I don't believe so, Your Honor.

THE COURT: What if Governor Youngkin said, I am not going to restore any members of the Socialist Labor Party who have been convicted of felonies. Would that be legal?

MR. POPPS: It would not, Your Honor.

THE COURT: Why would it not be legal?

MR. POPPS: First of all, there are no allegations of that, but --

THE COURT: Hypothetically. It is called a hypothetical.

MR. POPPS: Absolutely. It would not be legal because the government when it is handing out any benefits cannot discriminate on the basis of protected class or status. In this case protected speech.

THE COURT: So in this case -- so there is some element of first amendment activity in voting that is protected by the first amendment.

MR. POPPS: In clemency. In a clemency regime if, and I emphasize if, Your Honor, there was any allegation that there was discrimination, say, in the instance that The Court has proffered that, for the Socialist Party applicant they would not be restored to vote under any circumstances. If that were alleged that may state a viable claim. But that has not been

alleged now.

THE COURT: Well, that is not what we have here at this time, it is not alleged that Governor Youngkin, we are not going to restore the rights of people who are Democrats or Socialists or whatever, anarchists.

MR. POPPS: Correct. There have been three changes, Your Honor. On the third version of the complaint there are no allegations because there can be none. There is no evidence that Governor Youngkin has discriminated in his clemency regime. It is a case-by-case basis. He uses the broad discretion that is afforded to him by the constitution of Virginia.

THE COURT: But, somehow the first amendment has some sort of an effect on the exercise of clemency.

MR. POPPS: It could, Your Honor. In the scenario that The Court --

THE COURT: Governor Youngkin, you know, is apparently a decent person, and he would never do that because he knows he might want to not have any more Democrats voting. That is okay. He is allowed to say that. But he would never say, I am not going to restore any rights to Democrats because they are going to vote against the people I want to put in the general assembly. He would never say that because he knows it is unconstitutional. Right?

MR. POPPS: There are flow allegations to that.

THE COURT: This is -- we are in the hypothetical zone.

MR. POPPS: Sure.

Yes, I think, again, to the extent the first amendment has some interplay in that hypothetical situation, yes. If the government parses out and hands out benefits, it cannot do so in a discriminatory manner based on protected class.

THE COURT: That is what the plaintiffs say in this case. I know that this -- their analogy to licensing schemes is in some ways like a permit, because -- it's not like a parade permit that you get, but the point is that, as you just said, the government is giving out a benefit. Here the benefit is the right to vote. That is like if they wanted to have a parade on Broad Street, they would need to get a permit to do that to exercise their first amendment right. So I don't get -- you spend a lot of time in the brief, which is very well written, saying that the license cases don't apply here. It seems to me like it is a pretty good analogy.

MR. POPPS: I disagree with The Court, Your Honor, and here is why.

The licensing cases are very narrowly cabined the

first amendment activity. The important point is that the rights at issue in those cases are existing fundamental rights that citizens have. They possess the right to assemble. They possess the right to free speech. And they are asking the government to license their exercise of those existing rights.

THE COURT: Well, here they are -- you know, the plaintiffs make a pretty good point. They are not saying that the government can't take away the right to vote if someone is convicted of a felony. What they are saying is that when you reestablish it, it is a different process. There are two processes here. Taking away. And we have a criminal trial if you want to do that. Reinstating is an entirely different process. And they say that reinstating the right to vote is the same -- is analogous to giving someone the right to parade down Broad Street.

MR. POPPS: There is a key concession that plaintiffs have made, which is there is no underlying right to have the franchise restored, Your Honor.

THE COURT: Well --

MR. POPPS: That is agreed by all of us, it is undisputed.

THE COURT: Well, the underlying --

MR. POPPS: So the licensing regime governs the

exercise of a right that is already held, a fundamental right. There is no fundamental right, there is no right period under the constitution for felons to have the franchise to be reinstated.

THE COURT: Once you start reinstating them don't you have to do it in a fair way? That is what they are saying.

MR. POPPS: But there is -- but, again, I would say when we are talking about the decision as to whether to re-enfranchise, not after they have been re-enfranchised.

THE COURT: Whether.

MR. POPPS: Whether. And there is no right to re-enfranchisement. We have to go back to the broad discretion afforded to the Governor by the constitution and the long line of cases that have rejected this similar theory. It is novel perhaps on its face, Your Honor, but when you really dig in, the Lostutter case in the sixth circuit; Hand versus Scott in the 11th circuit, every single case, every single court that has ultimately ruled on this issue has rejected this theory.

THE COURT: Lostutter was a summary judgment.

MR. POPPS: I don't believe it was summary judgment, Your Honor. I believe it was on remand.

THE COURT: Well, okay.

MR. POPPS: Yes.

THE COURT: Remand after they had -- Lostutter denied the motion to dismiss. The district court did. And then went it up to whatever.

MR. POPPS: The sixth circuit decided -- it specifically analyzed these issues, Your Honor. That is why we cited it in our briefs so much because it is really right on point along with the Hand versus Scott case out of the 11th circuit.

THE COURT: Nothing quite like a midwestern case on point.

MR. POPPS: And southeastern, Your Honor. We are part of the southeast.

THE COURT: Yes. All right.

Anything else? I mean, I think that is where the nub of this case lies.

MR. POPPS: I agree, Your Honor. Thank you for The Court's questions. I will close by saying this.

THE COURT: Sure.

MR. POPPS: The Governor takes this power, this duty, very seriously. It is a solemn power that he has. And every governor is different. Governor Warner, Governor Kaine, McDonnell, Governor McAuliffe, Governor Northam each one had difference nuisances.

And the Governor is using a vast grant of discretionary power to him to accomplish what he believes is correct and just. And discretion is not a bad word, Your Honor. The word "arbitrary" has been thrown about a bunch. The proper word in my opinion is discretion. Our system affords courts discretion every day. And that is a good thing. We have good judges and good courts that exercise discretion in a good way. Similarly, the constitution gives the governor discretion in this particular arena. That is a good thing. And the Governor exercised it properly and lawfully. So we would ask --

THE COURT: Tell me this, Mr. Popps.

How is it -- does Governor Youngkin have some kind of internal checklist he goes through in order to figure out whether people ought to have their rights reinstated? Or does he just turn to his counsel for the Governor and ask him what he thinks ought to happen?

MR. POPPS: Your Honor, my understanding is that he utilizes a rigorous application, as The Court has touched on, a variety of factors. And the Governor has said publically in some of his correspondence with members of general assembly, and with correspondence with members of the NAACP of Virginia, that he will

look very searchingly at whether to restore, for instance, felons who have committed a crime with a firearm. Right. He hasn't said --

THE COURT: A crime of what?

MR. POPPS: Excuse me. A crime with a firearm. A felon who has applied and has committed a crime with a firearm. The Governor has said in correspondence to the NAACP that those are the types of crimes that he is going to look at very closely, and perhaps be less willing to quickly restore those types of applications.

THE COURT: You know, firearms have special protection under recent Supreme Court precedence. So he better watch out about that one.

MR. POPPS: Well, the Governor is a very thoughtful man, he has a thoughtful team around him, Your Honor. I am confident of that.

With that, I will close and ask The Court to grant the motion to dismiss.

Thank you very much.

THE COURT: All right.

Go ahead, sir.

MR. SHERMAN: Your Honor, I think the defendants' counsel would like this case to be decided as a matter of state law. But Mr. Hawkins, while he is ineligible to vote in Virginia as a matter of state law, as Your

Honor has suggested, has not lost his federal Constitutional rights. The first amendment does apply here.

I think I can most effectively and efficiently cut to the chase, Your Honor, by talking about what the parties first agree on.

Virginia has the power to disenfranchise people with felony convictions. The parties agree on that. That is the Supreme Court's decision in Richardson versus Ramirez.

The parties also agree that plaintiffs are not challenging anything to do with felony disenfranchisement. If we win, Virginia can still continue to disenfranchise people upon felony convictions.

The parties also agree that people with felony convictions have standing to sue and challenge unconstitutional disenfranchisement and re-enfranchisement regimes.

That is the only way Hunter v Underwood from 1985 makes sense, the Supreme Court's decision.

And plaintiffs, excuse me, the defendants have also stated in their briefs that a first amendment viewpoint discrimination claim would be viable. And a first amendment retaliation claim would be viable as

well.

They themselves don't believe that Washington, Fourth Circuit decision in Washington versus Finley and its progeny foreclose all first amendment actions in the voting rights space. They don't believe -- that is what their brief shows. I will come back to Washington and Erby, but I want to stick with disenfranchisement and re-enfranchisement for a second. I think they would have to concede they have conceded that arbitrary re -- excuse me -- they have conceded that arbitrary enfranchisement is unconstitutional. But the parties disagree as to the way in which it would be unconstitutional. So this is scenario to consider. Could the Virginia General Assembly enact an arbitrary licensing requirement for eligible Virginia voters? These are folks who, U.S. citizens 18 years old, residents of Virginia, not ineligible but by virtue of a felony conviction, could a law be enacted consistent with the first amendment that imposed an arbitrary licensing requirement on top of that? I am dying to know the answer defendants' counsel would give to that because I think they would have to concede that that would truly be an arbitrary licensing requirement that violates the first amendment unfettered discretion doctrine. They say arbitrary enfranchisement violates

the 14th amendment equal protection clause. We say it would violate first amendment as well for this reason.

There is also another hypothetical that we put in our brief, and they have stayed away from it, they won't touch it with a ten-foot pole because I think it is fatal to their arguments. If the Virginia Assembly were to enact a law -- enact a system whereby non citizens, or 16 or 17 year olds who are ineligible as matter of state law to vote whereby they could gain from the Governor a license to vote and be given permission to vote, and if the Governor were arbitrarily and selectively granting that right to vote based on an essay, an application, an essay on American government, interview, that system would violate the first amendment unfettered discretion doctrine. All of those individuals, non citizens, 16 and 17 year olds, are ineligible to vote as a matter of state law. But they have not lost their first amendment rights. They can challenge that system, that hypothetical system under the first amendment unfettered discretion doctrine.

Now the question is, what is different about that hypothetical scenario in our case and Mr. Hawkins' case? And our answer is nothing. Mr. Hawkins has a felony conviction and is barred as a matter of state

law from voting. But he hasn't lost his right under the first amendment to challenge an arbitrary licensing process.

The defendants would like to say that this whole case, this first amendment case turns on whether or not state law, Virginia law, has made someone eligible to vote. But just as a non citizen or 16 or 17 year old could challenge an arbitrary vote licensing system, so can Mr. Hawkins.

On the merits of the unfettered discretion claim, the Supreme Court decision in City of Lakewood makes clear that good faith, faith in public officials is not enough. That is not a defense to a first amendment unfettered discretion claim. So when defendants' counsel says the Governor is thoughtful, and says without producing a document or a public document or any official document, there are variety of factors, there is a rigorous application, it is a solemn duty, he reviews every application searchingly, these are not answers, these are not defenses to a first amendment unfettered discretion claim.

The law here is prophylactic. Because of the fundamental nature of the first amendment, because of the fundamental nature of the right to vote, Supreme Court's precedence don't just put trust in public

officials. When a state law confers totally unfettered discretion to grant or deny licenses to engage in expressive conduct, which voting is, that per se is prohibited. There is no requirement under Forsyth County and other Supreme Court decisions from '92. There is no requirement to prove that there has been actual viewpoint discrimination.

THE COURT: Don't they say that is not expressive conduct?

MR. SHERMAN: They have argued that it's not -- well, in the reply brief, and I noted this as defendants' counsel was speaking, Your Honor, they actually change their tune a bit. They said in their opening briefing, that it was expressive conduct, but in the reply brief, I believe on pages 15 and 16, they say it is not primarily expressive. So they concede that there is expressive conduct to voting. And voting is impressive conduct. It speaks and communicates in the aggregate. And there is a long tradition in this country, even of anonymous use, so even though the ballot is secret under the Supreme Court decision in McIntyre versus Ohio Election Commission, amenity, going back to the founding of the Republic, doesn't negate the expressive conduct in the first amendment's protections. If anonymous pamphleteering, putting out

anonymous campaign literature is protected speech, then so too is the anonymous vote which in the aggregate definitely communicates. Communicates the public's will. It's impressive conduct that is protected by the first amendment. As Your Honor suggested, in the absence of any rules or criteria Governor Younkin and the Secretary Of the Commonwealth can make these decisions for any reason whatsoever and don't have to announce what the reasons are. They can be, and this is why the doctrine exists, they can be discriminating against people based on any available information that they can glean from public sources, from the internet, Face Book, people's political donations, everything is a Google search away and they can act on that basis and no one is wiser.

That is why first amendment protected expressive conduct can't be subjected to an arbitrary licensing scheme.

Because there need to be rigorous criteria to prevent, to prevent that kind of discrimination prophylactically.

THE COURT: I don't know they concede that it is expressive conduct on pages 15 and 16. What they say is, plaintiffs cite no case holding voting is expressive conduct in the first amendment. It looks to

me like that is sort the opposite of what you just said. That is on page 16, the topic sentence of the first or the second paragraph.

MR. SHERMAN: An page 15 it is not primarily expressive. And then on page 16, Your Honor, voting is "primarily political action."

THE COURT: As opposed to expressive. And then they say, plaintiffs cite no case holding that voting is expressive conduct in the first amendment. And the court, they say, the court in Nevada Commission on Elections explained that Doe did no such thing as establish expressive character vote. I don't know. That seems to me like that may not be quite the admission that you are putting on it.

MR. SHERMAN: Maybe it is a little murkier, but as Your Honor is noting, but I read it does not protect conduct that is not expressive --

THE COURT: Well, what I just read is not murky.

MR. SHERMAN: Understood, Your Honor. But, Your Honor, we think we have established that voting is expressive conduct.

THE COURT: Well, you may think that. I may think that. But apparently the Supreme Court doesn't think that.

MR. SHERMAN: I know Justice Alito thinks that

because of his opinion in Nevada Commission on Ethics v Carrigan.

I strongly believe that if a case were to get up there, it has already said as much actually. In Norman v Reed, which we cited in our brief, they do say that voting is an expression of the voters' preferences. So there is that word "expression" right there in Norman v Reed. Those are not just valid axis cases that are focused on candidates and political parties. They also speak about the concurrent first amendment interest that voters have in expressing their preferences for candidates political parties. So that is why first amendment and the 14th amendment are both invoked in those ballot access cases.

If I could turn, Your Honor, to the line of cases that start with Washington versus Finley. I wanted to address that.

THE COURT: Sure.

MR. SHERMAN: In their opening brief the defendants' counsel relied strongly on Washington versus Finley, but they carefully omitted the language that limited that case to vote dilution cases.

Now, they have changed their tune. In their reply brief now they say, pay no attention to Washington versus Finley. Let's look at its progeny.

But its progeny in the Fourth Circuit, and it has been picked up in the Eleventh Circuit, too, we had to deal with it there as well, all of these cases, Erby, North Carolina Republican Party v Martin, none of these cases deal with vote denial. They are all cases that concern, again, vote dilution, or in the case of --

THE COURT: Finley isn't applicable here because in Washington versus Finley what they were arguing about is, we need to have enough African American people in this district to assure a win. That is what they were arguing.

MR. SHERMAN: Correct, Your Honor. It is a vote dilution case. At one point in the brief defendants' counsel tried to equate vote denial and vote dilution. But they are entirely different things. One has to do with the weight of a vote that is validly cast; and the other is denial. Denial of the right to vote. And none of these cases that they are citing have to do with vote denial. Erby may have that language in selectively quoting and perhaps not accurately quoting Washington v Finley, and have that language in voting rights cases. But Erby concerned an appointive system for local school board officials. In an appointive system there can't be any vote denial, no one votes. No one votes at all. So that is not a vote denial

case. And it was pure dicta to have the phrase in voting rights cases, because they didn't have a vote, the Fourth Circuit didn't have a vote denial case in front of it.

THE COURT: Well, you know, maybe it is -- maybe it is dicta, but if the Fourth Circuit says it, it is like of E. F. Hutton, people listen.

MR. SHERMAN: I understand, Your Honor is bound by what the Fourth Circuit says, but I think Your Honor would be on strong footing to say that that is dicta, and that The Court did not consider a vote denial claim in that case. There is no vote denial whatsoever in an appointive system. Similarly in Republican Party of North Carolina, this was, again, a challenge to the method and manner of nominating and electing judges. But there was no question that everyone was able to participate. There was no vote denial at issue in that case. So the court in both of those cases, the Fourth Circuit, couldn't have extended Washington versus Finley to vote denial, and there would be quite a momentous decision to say the first amendment doctrine, all of the first amendment rules and doctrines are erased in the voting rights space. These decisions have been quoting Washington v Finley in a footnote or in the last paragraph of decisions, and none of them

make a really clearly announced the momentous decision of all first amendment claims are not viable in the voting rights space.

I wanted to make one other point really quickly.

I think in large part the error in the defendants' counsel's reasoning is that they think that George Hawkins needs some kind of "right to re-enfranchisement." That is not so. Mr. Hawkins isn't suing for his personal restoration of his voting rights, he is suing for a non-arbitrary restoration process. He is not challenging his own disenfranchisement. He is challenging an arbitrary system that he is subjected to. He is not under Supreme Court precedent, he wasn't required to even apply for the right to vote. He is not required to have been denied that license to vote. He just needs to be subject to an arbitrary licensing system, and doesn't need to establish that he himself has been personally discriminated against on the basis of race, or view points. The mere -- the City of Lakewood makes clear the mere fact that there is the possibility, the openness in the system because of this completely arbitrary and completely open, and there are no rules and criteria, that means that it is per se invalid under the first amendment unfettered discretion

doctrine.

THE COURT: Let me ask you this.

When a governor comes into office he has a certain amount of patronage, right, that he can use to appoint people to positions.

MR. SHERMAN: Correct, Your Honor.

THE COURT: And the higher up -- I mean, at the lowest level he can't use political affiliation to appoint people, so he can't replace the entire highway department with Republicans or Democrats. But, when he gets, things get up higher he is allowed to to use that as a consideration, right?

MR. SHERMAN: Correct, Your Honor.

THE COURT: But there are no rules that govern that. Should there be rules that govern that?

MR. SHERMAN: Perhaps.

THE COURT: Required rules?

MR. SHERMAN: Perhaps. But no first amendment implication there. I was dismayed to hear the Governor's counsel refer repeatedly to voting as a benefit. It of course is not a benefit. It's a fundamentally protected right.

THE COURT: Well, I never thought that helped you because that was saying there was, to me that was to say it was kind of like a parade permit.

MR. SHERMAN: Correct, Your Honor. It is state statutory right is how I would characterize it. When the state confers that right, then it is then first amendment protection attaches. That is why the unfettered discretion doctrine applies, just as in the case of the parades or any newspaper distribution, parades, meeting in a park, all of these systems of licensing involve -- they are all brought, all these challenges under the first amendment are brought by someone who doesn't have a right at that moment to engage in the particular form of expressive conduct, or someone who did it without a license and was prosecuted. So the notion that you have to have the pre-existing right to engage in that expressive conduct to bring the first amendment unfettered discretion claim against the arbitrary licensing scheme is wrong. Because all of these cases decided by the Supreme Court in plaintiff's favor strike down these systems even though the plaintiffs don't have that underlying right under whether it is state law or local ordinance.

THE COURT: Okay. Anything else?

MR. SHERMAN: No, Your Honor, if there are no further questions from The Court I will rest.

THE COURT: All right. Thank you.

MR. SHERMAN: Thank you Your Honor.

Mr. Popps?

MR. POPPS: Nothing further from the defendant.

THE COURT: I have a question for you, Mr. Popps.

You keep citing in your brief City of Sacramento v Lewis for the proposition that when there is a textually specific constitutional provision we should go to that to determine the law that applies as opposed to a more general right. But what Sacramento v Lewis says -- that case is very specific -- it deals with substantive due process. What the court says in Sacramento, that is a case where the police officer ran over a kid on a motorcycle, and in that case the court said the plaintiff tried to make a case saying, well, okay, it was not an unlawful seizure under the fourth amendment. But it is a violation of our substantive due process right. And so it is sort of a case where there is a right to the extent substantive due process still exists, doesn't really come from any part of the text of the Constitution. I mean, there is, the constitution doesn't say substantive due process. What they are saying in that case is that we have no mention of your right not to be run over by a police officer as part of substantive due process. But we do have the fourth amendment which says no searches and seizures of the person or their property.

So that is a little different than here where we do have a substantive right under the first amendment that is textually specific. That says we have -- there is a right of freedom of speech or expression.

So Sacramento is not exactly applicable here, is it?

MR. POPPS: I think the point our brief makes, Your Honor, is that the 14th and 15th amendments quite directly govern the right to vote and protect the fundamental right to vote. And no case, no court in this country has held that the first amendment takes precedence over the 14th and 15th amendment protection. And the Fourth Circuit has said that as well, all the cases that we have cited, Your Honor.

THE COURT: All right. Thank you. Anything else?

MR. POPPS: No, sir, Your Honor.

THE COURT: All right. Thank you.

All right. I will issue a decision on this pretty quickly.

I urge you to get on with discovery. All right?

Thank you all very much. Good job on both sides. I appreciate it. Thank you.

HEARING ADJOURNED.

THE FOREGOING IS A TRUE AND CORRECT TRANSCRIPT.

GILBERT FRANK HALASZ, OCR

Official Court Reporter

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

GEORGE HAWKINS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 3:23-cv-232-JAG
	)	
GLENN YOUNGKIN, Governor of Virginia, in his official capacity, et al.,	)	
	)	
	)	
Defendants.	)	

DEFENDANTS' ANSWER TO PLAINTIFF'S SECOND AMENDED COMPLAINT

Defendants, by and through their counsel, make the following assertions, admissions, denials, and defenses in answer to the claims filed against them by Plaintiff George Hawkins.

NATURE OF ACTION

1. The bulk of the allegations in paragraph 1 are Plaintiff's legal conclusions to which no answer is required. Defendants admit that Bob McDonnell, Terry McAuliffe, and Ralph Northam have previously served as Governor of Virginia. Defendants lack sufficient information to form a belief as to the truth of the remaining factual allegations in the paragraph—namely, Plaintiff's characterization of previous Governors' voting-restoration schemes.

2. Defendants admit that Glenn Youngkin is the Governor of Virginia. Defendants deny that Kay Coles James is still Secretary of the Commonwealth because she has been replaced by Kelly Gee. Defendants admit that they exercise discretion to restore the voting rights of convicted felons. The remaining allegations in paragraph 2 are Plaintiff's legal conclusions to which no answer is required; however, to the extent a response is required, Defendants deny the allegations.

3. The allegations in paragraph 3 are Plaintiff's legal conclusions to which no answer is required.

4. The bulk of the allegations in paragraph 4 are Plaintiff's legal conclusions to which no response is required. Defendants admit that the Governor has stated that every individual's application "is looked at carefully" and that all individual applicants "deserve that." Defendants state that the letter to State Senator Lionell Spruill speaks for itself.

5. The allegations in paragraph 5 are Plaintiff's legal conclusions to which no response is required; however, to the extent a response is required, Defendants lack sufficient information to form a belief as to the truth of the factual allegations in the paragraph and neither admit nor deny them.

6. The allegations in paragraph 6 are Plaintiff's legal conclusions to which no response is required.

7. Defendants lack sufficient information to form a belief as to the truth of the factual allegations in paragraph 7 and neither admit nor deny them.

8. The allegations in paragraph 8 are legal conclusions to which no response is required.

9. Defendants admit that Plaintiff George Hawkins is a convicted felon, that he does not possess the right to vote, that he applied for restoration of his voting rights, and that his application has been deemed ineligible at this time. Defendants do not address the allegations regarding former Plaintiff Gregory Williams because he has been dismissed from the case.

10. Defendants do not address the allegations regarding former Plaintiff Nolef Turns, Inc., because it has been dismissed from the case.

JURISDICTION AND VENUE

11. The allegations in paragraph 11 are Plaintiff's legal conclusions to which no response is required.

12. The allegations in paragraph 12 are Plaintiff's legal conclusions to which no response is required.

13. The allegations in paragraph 13 are Plaintiff's legal conclusions to which no response is required.

14. The first sentence of paragraph 14 contains Plaintiff's legal conclusions to which no response is required. Defendants admit that Glenn Youngkin is an elected state government official who works in Richmond, Virginia. Defendants deny that Kay Coles James is an appointed state government official who works in Richmond, Virginia, because she has been replaced as Secretary of the Commonwealth by Kelly Gee.

15. The bulk of the allegations in paragraph 15 are Plaintiff's legal conclusions to which no response is required. Defendants admit that they are state officials working in Richmond, Virginia. Defendants lack sufficient information to form a belief as to the truth of the remaining factual allegations in paragraph 15 and neither admit nor deny them.

PARTIES

16. Defendants do not address the allegations in paragraph 16 regarding former Plaintiff Nolef Turns, Inc., because it has been dismissed from the case.

17. Defendants do not address the allegations in paragraph 17 regarding former Plaintiff Gregory Williams because he has been dismissed from the case.

18. Defendants admit that Plaintiff George Hawkins was convicted of felonies in Virginia state court for conduct committed when he was 17 years old, that he was released from

incarceration on May 3, 2023, that he has submitted an application to have his voting rights restored, and that his voting rights have not yet been restored because his application has been deemed ineligible at this time. Plaintiff's characterization of Virginia's voting-restoration scheme as "arbitrary" is a legal conclusion to which no response is required; however, to the extent a response is required, Defendants deny that the voting-restoration scheme is "arbitrary." Defendants lack sufficient information to form a belief as to the truth of the remaining factual allegations in paragraph 18 and neither admit nor deny them.

19. Defendants admit that Glenn Youngkin is the Governor of Virginia. The remainder of the allegations in paragraph 19 are Plaintiff's legal conclusions to which no response is required.

20. Defendants deny that Kay Coles James is the Secretary of the Commonwealth of Virginia because she has been replaced by Kelly Gee. The remainder of the allegations in paragraph 20 are Plaintiff's legal conclusions to which no response is required.

BACKGROUND

21. The allegations in paragraph 21 are Plaintiff's legal conclusions to which no response is required; however, to the extent a response is required, Defendants state that the cited legal authorities speak for themselves and deny any allegation inconsistent with the same.

22. The allegations in paragraph 22 are Plaintiff's legal conclusions to which no response is required; however, to the extent a response is required, Defendants state that the cited legal authorities speak for themselves and deny any allegation inconsistent with the same.

23. The allegations in paragraph 23 are Plaintiff's legal conclusions to which no response is required; however, to the extent a response is required, Defendants state that the cited legal authorities speak for themselves and deny any allegation inconsistent with the same.

24. The allegations in paragraph 24 are Plaintiff's legal conclusions to which no response is required; however, to the extent a response is required, Defendants state that the cited legal authorities speak for themselves and deny any allegation inconsistent with the same.

25. Defendants admit that convicted felons may use the form to apply to have their voting rights restored by mail and through the State's website. Defendants state that the form and website speak for themselves, and Defendants deny any allegations inconsistent with the same.

26. Defendants state that the form speaks for itself, and Defendants deny any allegations inconsistent with the same.

27. Defendants state that the form speaks for itself, and Defendants deny any allegations inconsistent with the same.

28. Defendants state that the form speaks for itself, and Defendants deny any allegations inconsistent with the same.

29. Defendants state that the form speaks for itself, and Defendants deny any allegations inconsistent with the same.

30. Defendants admit the factual allegations in paragraph 30, except to the extent that they are premised on Kay Coles James being the Secretary of the Commonwealth of Virginia because she has been replaced by Kelly Gee.

31. Defendants admit the factual allegations in paragraph 31.

32. The bulk of the allegations in paragraph 32 are Plaintiff's legal conclusions to which no response is required. Defendants lack sufficient information to form a belief as to the truth of the factual allegations regarding "[a]ll" the information that "can be readily learned or ascertained from easily accessed sources, a Google Search, or government databases" in paragraph 32, and Defendants neither admit nor deny those allegations.

33. Defendants state that the letter and "reported email" sent to State Senator Lionel Spruill speak for themselves, and Defendants deny any allegations inconsistent with the same. The remainder of the allegations in paragraph 33 are Plaintiff's legal conclusions to which no response is required; however, to the extent a response is required, Defendants deny the allegations in paragraph 33.

34. The bulk of the allegations in paragraph 34 are Plaintiff's legal conclusions to which no response is required. Defendants state that the cited Executive Order speaks for itself, and Defendants deny any allegations inconsistent with the same. Defendants admit that Governor McDonnell restored voting rights to over 8,000 convicted felons.

35. The bulk of the allegations in paragraph 35 are Plaintiff's legal conclusions to which no response is required. Defendants deny that Governor McAuliffe restored voting rights to over 173,000 convicted felons.

36. The bulk of the allegations in paragraph 36 are Plaintiff's legal conclusions to which no response is required. Defendants deny that Governor Northam restored voting rights to over 126,000 convicted felons.

37. The allegations in paragraph 37 are Plaintiff's legal conclusions to which no response is required.

38. The allegations in paragraph 38 are Plaintiff's legal conclusions to which no response is required.

39. The bulk of the allegations in paragraph 39 are Plaintiff's legal conclusions to which no response is required. Defendants admit that Governor Youngkin restored voting rights to approximately 4,300 convicted felons during his first year in office. Defendants admit that Governor Youngkin implemented his policy regarding voting restoration in 2022.

40. Defendants deny the allegation in paragraph 40.

41. The allegations in paragraph 41 are Plaintiff's legal conclusions to which no response is required; however, to the extent a response is required, Defendants deny the allegations in paragraph 41.

42. Defendants lack sufficient information to form a belief as to the truth of the factual allegations in paragraph 42 and neither admit nor deny them.

INJURY TO PLAINTIFFS

43. Defendants do not address the allegations relating to former Plaintiff Nolef Turns, Inc., because it has been dismissed from the case. The remaining allegations in paragraph 43 are Plaintiff's legal conclusions to which no response is required; however, to the extent a response is required, Defendants deny the remaining allegations in paragraph 43.

44. Defendants do not address the allegations relating to former Plaintiff Nolef Turns, Inc., because it has been dismissed from the case. Defendants deny the remaining factual allegations in paragraph 44.

45. Defendants do not address the allegations relating to former Plaintiff Nolef Turns, Inc., because it has been dismissed from the case. The remaining allegations in paragraph 45 are Plaintiff's legal conclusions to which no response is required; however, to the extent a response is required, Defendants deny the remaining allegations in paragraph 45.

46. Defendants do not address the allegations relating to former Plaintiff Nolef Turns, Inc., because it has been dismissed from the case. Defendants admit that former Secretary James previously stated that multiple Virginia state agencies provide information regarding applicants for voting restoration.

47. Defendants do not address the allegations relating to former Plaintiff Nolef Turns, Inc., because it has been dismissed from the case. Defendants deny that "many restoration applications languish with Defendants' offices for longer than three months," and Defendants deny the allegations regarding a specified "waiting period." The remainder of the allegations in paragraph 47 are Plaintiff's legal conclusions to which no response is required.

48. Defendants do not address the allegations relating to former Plaintiff Nolef Turns, Inc., because it has been dismissed from the case. The remaining allegations in paragraph 48 are legal conclusions to which no response is required; however, to the extent a response is required, Defendants deny the allegations.

49. Defendants do not address the allegations relating to former Plaintiff Gregory Williams because he has been dismissed from the case. The remainder of the allegations in paragraph 49 are Plaintiff's legal conclusions to which no response is required; however, to the extent a response is required, Defendants deny the remaining allegations in paragraph 49.

COUNT ONE

50. Defendants adopt and incorporate by reference their answers to the allegations in paragraphs 1 through 49.

51. The allegations in paragraph 51 are Plaintiff's legal conclusions to which no response is required.

52. The allegations in paragraph 52 are Plaintiff's legal conclusions to which no response is required.

53. The allegations in paragraph 53 are Plaintiff's legal conclusions to which no response is required.

54. The allegations in paragraph 54 are Plaintiff's legal conclusions to which no response is required; however, to the extent a response is required, Defendants deny the allegations.

55. The allegations in paragraph 55 are Plaintiff's legal conclusions to which no response is required.

56. The bulk of the allegations in paragraph 56 are Plaintiff's legal conclusions to which no response is required. Defendants lack sufficient information to form a belief as to the truth of the factual allegations regarding "[a]ll" the information that "can be readily learned or ascertained from easily accessed sources, a Google Search, or government databases" in paragraph 56, and Defendants neither admit nor deny those allegations.

57. The allegations in paragraph 57 are Plaintiff's legal conclusions to which no response is required; however, to the extent a response is required, Defendants deny the allegations.

58. The allegations in paragraph 58 are Plaintiff's legal conclusions to which no response is required.

59. The allegations in paragraph 59 are Plaintiff's legal conclusions to which no response is required; however, to the extent a response is required, Defendants deny the allegations.

COUNT TWO

60. Defendants adopt and incorporate by reference their answers to the allegations in paragraphs 1 through 59.

61. The allegations in paragraph 61 are Plaintiff's legal conclusions to which no response is required.

62. The allegations in paragraph 62 are Plaintiff's legal conclusions to which no response is required.

63. The allegations in paragraph 63 are Plaintiff's legal conclusions to which no response is required.

64. The allegations in paragraph 64 are Plaintiff's legal conclusions to which no response is required.

65. The allegations in paragraph 65 are Plaintiff's legal conclusions to which no response is required.

66. The allegations in paragraph 66 are Plaintiff's legal conclusions to which no response is required.

67. The allegations in paragraph 67 are Plaintiff's legal conclusions to which no response is required.

68. The allegations in paragraph 68 are Plaintiff's legal conclusions to which no response is required.

69. The allegations in paragraph 69 are Plaintiff's legal conclusions to which no response is required.

WHEREFORE, Defendants respectfully request that the Court dismiss Plaintiff's claims with prejudice, deny Plaintiff's Prayer for Relief, and grant any and all other relief deemed just and proper.

AFFIRMATIVE DEFENSES

First Affirmative Defense

70. Plaintiff's Complaint fails to state a valid claim for relief.

Second Affirmative Defense

71. Plaintiff lacks standing to bring his claims.

Dated: October 20, 2023

Respectfully submitted,

GLENN YOUNGKIN
KELLY GEE

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Counsel for Defendants Glenn Youngkin and Kelly Gee

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on October 20, 2023, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to all parties of record.

/s/ Andrew N. Ferguson
Andrew N. Ferguson (VSB #86583)
Solicitor General

Restoration of Rights
An official website of the Commonwealth of Virginia Here's how you know

Find a Commonwealth Resource

Restoration of Rights

Home | Restoration of Rights Process | Resources for Returning Citizens | Frequently Asked Questions | Testimonials

Restoration of Rights

EXHIBIT A

Vote

Become a Notary Public

Serve on a Jury

Run for Public Office

Individuals are eligible to apply to have their rights restored after being released from incarceration.

Please note: The Governor does not have the authority to restore firearms rights. If you have had your civil rights restored and are seeking restoration of your firearm rights, please contact your local circuit court.

Are your rights restored?

Anyone convicted of a felony in Virginia automatically loses their civil rights: the right to vote, serve on a jury, run for office, become a notary public and carry a firearm. The Constitution of Virginia gives the Governor the sole discretion to restore civil rights, not including firearm rights. Individuals seeking restoration of their civil rights are encouraged to contact the Secretary of the Commonwealth's office.

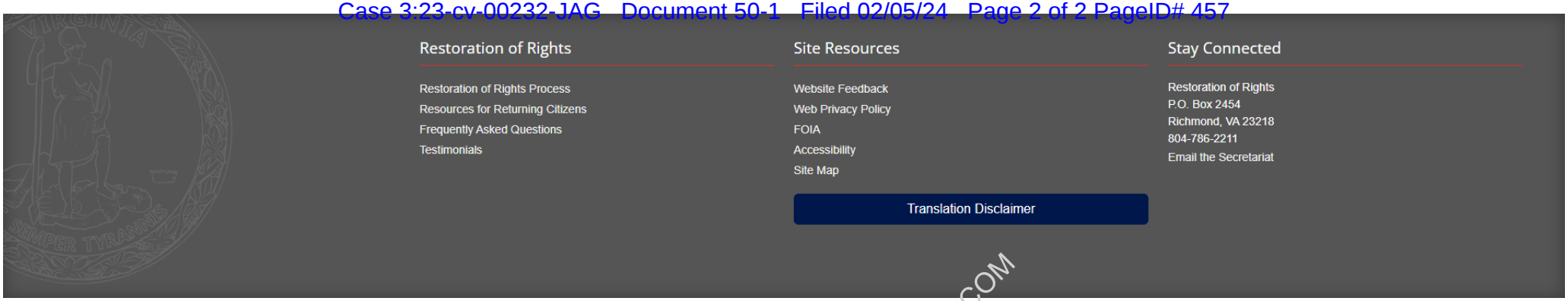
- To be eligible to apply for consideration for the restoration of civil rights, an individual must be free from any term of incarceration resulting from felony conviction(s).
- Individuals are encouraged to contact the Secretary of the Commonwealth to request consideration for restoration of their civil rights by using the button below or by calling (804) 692-0104.
- The Secretary of the Commonwealth's office works with various state agencies to consider individuals who may be eligible to have their rights restored.

Check the Status of Your Civil Rights

Request Your Rights Be Restored

Request the Copy of Your Grant Order

Printable Contact Form



Frequently Asked Questions

EXHIBIT B

Frequently Asked Questions

I want to have my rights restored, do I need to apply?

Yes. The most efficient way to have your rights restored is to contact us. You can apply to have your rights restored by clicking here.

You can find out if your rights have already been restored by clicking here.

Am I eligible to have my rights restored?

Governor Youngkin will consider restoration of rights for any individuals that have finished any term of incarceration as a result of a felony conviction.

Will I receive proof after my rights are restored?

The Restoration of Rights office will prepare a personalized restoration order for each individual who has his/her rights restored. A copy of the order will be available on the online portal and will also be mailed to the individual if there is a current mailing address on file.

How long does it take to get my rights restored?

The review process usually takes 1-3 months after an individual has contacted the office requesting restoration of rights. Click here to contact the office and request your rights be restored.

How can I check to see if my rights have already been restored?

Individuals can check their status on the Secretary of Commonwealth's website.

Are your rights restored?

Anyone convicted of a felony in Virginia automatically loses their civil rights - the right to vote, serve on a jury, run for office, become a notary public and carry a firearm. The Constitution of Virginia gives the Governor the sole discretion to restore civil rights, not including firearm rights. Individuals seeking restoration of their civil rights are encouraged to contact the Secretary of the Commonwealth's office.

Check the Status of Your Civil Rights

Request Your Rights Be Restored

Printable Contact Form

What if I was convicted in another state and now reside in Virginia?

Please contact our office at 804-692-0104

What if I was convicted in Virginia and now live in another state?

Your rights can be restored by the Governor of Virginia. Click here to contact our office to have your rights restored.

What about my firearms rights?

The Governor does not have the authority to restore firearms rights. Contact your local circuit court for information about restoration of firearms rights.

Again, this action does not restore the right to ship, transport, possess or receive firearms, which must be restored by a court in accordance with Va. Code §18.2-308.2. If you were convicted in Virginia Circuit Court, you must petition the circuit court in the jurisdiction where you reside to regain state firearms privileges. For out-of-state or federal felony convictions, you must petition the court of conviction to regain firearm privileges.

What if I am not a United States citizen?

Noncitizens are not eligible to vote, serve on a jury or run for office, but may be eligible to serve as a notary public. Contact our office at 804-692-0104 to have your rights restored.

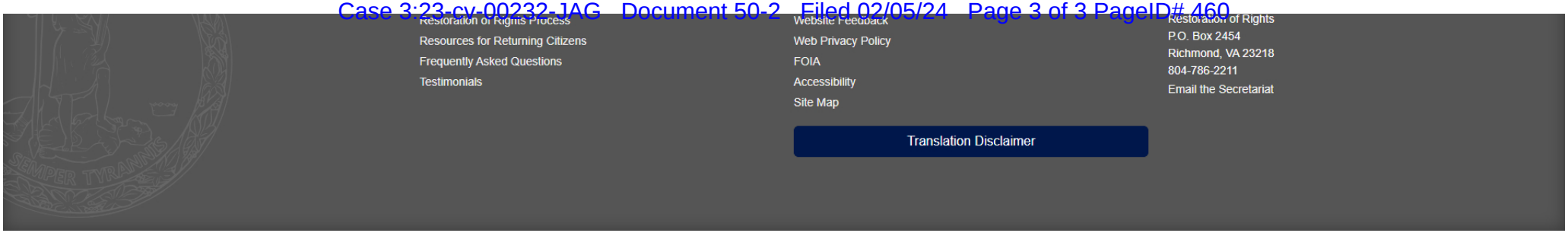
What is restoration of rights?

Anyone convicted of a felony in Virginia automatically loses their civil rights - the right to vote, serve on a jury, run for office, become a notary public and carry a firearm. The Constitution of Virginia gives the Governor the sole discretion to restore civil rights, not including firearm rights.

How do I contact the office?

If you would like to request your rights be restored, please use the online portal to submit your information by clicking here.

If you have any problems or questions, you may contact our office by email at rormail@governor.virginia.gov or phone at 804-692-0104.



Restoration of Rights

Restoration of Rights Process

EXHIBIT C

Restoration of Rights Process

- An individual is eligible to apply to have his/her rights restored by the Governor if he/she has been convicted of a felony and is no longer incarcerated.
- Individuals who would like to have their civil rights restored are encouraged to contact the Secretary of the Commonwealth (SOC) through the website.
- The SOC works with other various state agencies to consider who may be eligible to have their rights restored.
- All individuals, who apply to have their rights restored, will be thoroughly reviewed by the SOC, including checking their records with various state agencies to ensure the individual meets the Governor's standards for restoration of rights.
- Upon the Governor's approval, SOC will issue personalized restoration orders to individuals.

Are your rights restored?

Anyone convicted of a felony in Virginia automatically loses their civil rights - the right to vote, serve on a jury, run for office, become a notary public and carry a firearm. The Constitution of Virginia gives the Governor the sole discretion to restore civil rights, not including firearm rights. Individuals seeking restoration of their civil rights are encouraged to contact the Secretary of the Commonwealth's office.

Check the Status of Your Civil Rights

Request Your Rights Be Restored

Printable Contact Form

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

GEORGE HAWKINS Plaintiffs, v. GLENN YOUNGKIN, in this official capacity as Governor of Virginia, and KAY COLES JAMES, in her official capacity as Secretary of the Commonwealth of Virginia Defendants.	)	Civil Action No. 3:23-cv-00232

DECLARATION OF JONATHAN SHERMAN

I, Jonathan Sherman, being first duly sworn, under oath, hereby declares as follows:

1. I am one of the attorneys representing Plaintiff George Hawkins in the above-captioned action. I make this Declaration on personal knowledge of the facts and circumstances set forth herein, and in support of Plaintiff's Motion for Summary Judgment.

2. Attached as **Exhibit A** is a true and correct copy of Governor Youngkin's Responses to Plaintiffs' First Set of Interrogatories and Requests for Admission, dated October 25, 2023.

3. Attached as **Exhibit B** is a true and correct copy of Governor Youngkin's Responses to Plaintiff's Second Set of Interrogatories, dated November 28, 2023.

4. Attached as **Exhibit C** are true and correct copies of two letters of support from State Senator Bill DeSteph to the Hon. Kay Cole James on behalf of two rights restoration

applicants, both dated February 10, 2022, as produced by Defendants in discovery and Bates-labeled Hawkins_Def_001654-001655.

5. Attached as **Exhibit D** is a true and correct copy of an email chain relating to a rights restoration applicant, dated November 8, 2022, as produced by Defendants in discovery and Bates-labeled Hawkins_Def_001678.

6. Attached as **Exhibit E** is a true and correct copy of portions of Defendants' internal database showing information relating to rights restoration applications submitted between May 17, 2022 and January 22, 2024, as produced by Defendants in discovery and Bates-labeled Hawkins_Def_001660. The native, unredacted Excel spreadsheet produced at Hawkins_Def_001660 contains information on 7,414 applications for the restoration of rights. Because Defendants have designated the entirety of this exhibit "confidential" and/or "attorney's eyes only" and because Hawkins_Def_001660 includes applicants' personal identifying information, specifically applicants' names, Exhibit E is subject to a motion to seal filed contemporaneously herewith. Plaintiff seeks only to file a sealed, unredacted version of this spreadsheet. Due to the size of Exhibit E, Plaintiff submits to the Court a native, unredacted version of Exhibit E (Hawkins_Def_001660) via thumb drive.

7. Attached as **Exhibit F** are true and correct copies of emails from individuals regarding their rights restoration applications, as produced by Defendants in discovery and Bates-labeled Hawkins_Def_001661-1662, 001663, 001664-1665, 001676, 001680, 001681-001685, 001686, 001687, 001699, 001700, 001701, and 001702.

8. Attached as **Exhibit G** are true and correct copies of Governor Youngkin's press releases announcing the grant of restoration of rights, as produced by Defendants in discovery and Bates-labeled Hawkins_Def_000025-26.

9. Attached as **Exhibit H** is a true and correct copy of the current Restoration of Rights application form used by Defendants, as produced by Defendants in discovery and Bates-labeled Hawkins_Def_000023.

10. Attached as **Exhibit I** is a true and correct copy of a flowchart, as produced by Defendants in discovery and Bates-labeled Hawkins_Def_000018.

11. Attached as **Exhibit J** is a true and correct copy of a letter from former Secretary of the Commonwealth Kay Coles James to Senator Lionel Spruill, dated March 22, 2023, as produced by Defendants in discovery and Bates-labeled Hawkins_Def_000084-85.

12. Attached as **Exhibit K** is a true and correct copy of an email from John Cosgrove to Secretary of the Commonwealth Kelly Gee on behalf of a rights restoration applicant, dated December 11, 2023, as produced by Defendants in discovery and Bates-labeled Hawkins_Def_001658-1659.

13. Attached as **Exhibit L** is a true and correct copy of an email from the Restoration of Rights Division to an applicant, as produced by Defendants in discovery and Bates-labeled Hawkins_Def_000058.

14. Attached as **Exhibit M** is a true and correct copy of a letter from Virginia Deputy Attorney General Steven G. Popps to counsel for the NAACP, dated October 19, 2023, as produced by Defendants in discovery and Bates-labeled Hawkins_Def_000008-12.

15. Attached as **Exhibit N** is a true and correct copy of an email regarding a Central Criminal Records Exchange request, as produced by Defendants in discovery and Bates-labeled Hawkins_Def_000047.

16. Attached as **Exhibit O** are true and correct copies of screenshots of Defendants' internal database, as produced by Defendants in discovery and Bates-labeled Hawkins_Def_000663-669.

17. Attached as **Exhibit P** are true and correct copies of emails between the Restoration of Rights Division staff and applicants, as produced by Defendants in discovery and Bates-labeled Hawkins_Def_001404-1405, 001580, and 001590.

18. Attached as **Exhibit Q** are true and correct copies of emails and accompanying attachments between Restoration of Rights Division staff and various state agencies, as produced by Defendants in discovery and Bates-labeled Hawkins_Def_000644-653.

19. Attached as **Exhibit R** is a true and correct copy of an email chain between the Restoration of Rights Division staff and an applicant, as produced by Defendants in discovery and Bates-labeled Hawkins_Def_000078-81.

20. Attached as **Exhibit S** is a true and correct copy of an email chain between the Restoration of Rights Division staff and an applicant, as produced by Defendants in discovery and Bates-labeled Hawkins_Def_000069.

21. Attached as **Exhibit T** are true and correct copies of screenshots of Defendants' internal database, as produced by Defendants in discovery and Bates-labeled Hawkins_Def_000677-683 and 000692-697.

22. Attached as **Exhibit U** is a true and correct copy of a letter, dated December 9, 2022, from the Commonwealth of Virginia Department of Corrections regarding changes to the Restoration of Rights Form made by the Office of the Secretary of the Commonwealth, as produced by Defendants in discovery and Bates-labeled Hawkins_Def_000092-93.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 14th day of February, 2024.

/s/
Jon Sherman
Fair Elections Center

Exhibit B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

GEORGE HAWKINS, Plaintiff, v. GLENN YOUNGKIN, Governor of Virginia, in his official capacity, et al., Defendants.	)	Civil Action No. 3:23-cv-232-JAG

GOVERNOR YOUNGKIN'S RESPONSES TO PLAINTIFF'S SECOND SET OF INTERROGATORIES

Pursuant to Rules 26, 33, and 36 of the Federal Rules of Civil Procedure and Local Rule 26(C) of the U.S. District Court for the Eastern District of Virginia, Governor Youngkin, in his official capacity, submits the following responses to Plaintiff's Second Set of Interrogatories to Defendant Governor Glenn Youngkin. The Governor is providing these responses subject to, and without waiving, the objections he previously served on November 9, 2023. The Governor's responses do not waive his right to challenge the relevance, materiality, and admissibility of the information provided, or to object on any basis to the use of the information in any subsequent proceeding or trial. Because discovery is ongoing, the Governor reserves the right to supplement, revise, correct, add to, or clarify his responses, or to rely upon additional or different information or contentions at any hearing, appellate proceeding, or trial in the action.

RESPONSES TO INTERROGATORIES

INTERROGATORY NO. 1: Please identify any and all Virginia-law constraints or limits on the Governor of Virginia's discretion to grant, deny, or take any other action on voting rights restoration applications.

RESPONSE TO INTERROGATORY NO. 1: The Governor is prohibited by Virginia law from intentionally discriminating on the basis of suspect classifications or the exercise of fundamental rights, such as race, religion, sex, and viewpoint, when granting, denying, or taking any other action on voting-restoration applications. Moreover, the Governor must exercise his discretion on an individualized, case-by-case basis, as opposed to restoring voting rights in blanket fashion, consistent with the Virginia Supreme Court's decision in *Howell v. McAuliffe*, 292 Va. 320 (2016). And the Governor may not grant voting rights for individuals who do not satisfy the other voting qualifications set forth by Virginia law, such as age, citizenship status, and residency requirements. However, Virginia law does not otherwise constrain or limit the Governor's individualized discretion when deciding whether to grant a citizen's voting-restoration application.

In response to Plaintiff's First Set of Interrogatories, the Governor previously explained that "Defendants use multiple factors to guide their discretion in ultimately making a predictive judgment that an individual will live as a responsible citizen and member of the political body." *See* Gov. Youngkin's Resp. to Pls.' First Set of Interrogatories at 3. As the Governor explained, the factors are not "rules," *id.*, and thus do not impose any binding or otherwise enforceable legal constraint on the exercise of Defendants' discretion to restore a citizen's voting rights. Instead, the factors are considered as a matter of sound policy and merely help Defendants in their effort to make their ultimate "predictive judgment that an individual will live as a responsible citizen and member of the political body." *Id.* Defendants have the *legal* authority to ignore these factors in any particular case or to ignore them entirely. These factors do not "limit" or "constrain" the Governor's discretion in deciding whether to grant or deny any particular voting-restoration application. Thus, the ultimate decision determining the outcome of an individual's voting-restoration application—the predictive judgment regarding whether an applicant will live as a

responsible citizen and member of the political body—is committed to the Governor's discretion and is not subject to any legal constraint apart from those outlined above.

INTERROGATORY NO. 2: Please identify any and all federal-law constraints or limits on the Governor of Virginia's discretion to grant, deny, or take any other action on voting rights restoration applications.

RESPONSE TO INTERROGATORY NO. 2: The Governor is prohibited by federal law from intentionally discriminating on the basis of suspect classifications or the exercise of fundamental rights, such as race, religion, sex, and viewpoint, when granting, denying, or taking any other action on voting-rights restoration applications. However, federal law does not otherwise constrain or limit the Governor's individualized discretion when deciding whether to grant a citizen's voting-restoration application.

In response to Plaintiff's First Set of Interrogatories, the Governor previously explained that "Defendants use multiple factors to guide their discretion in ultimately making a predictive judgment that an individual will live as a responsible citizen and member of the political body." *See* Gov. Youngkin's Resp. to Pls.' First Set of Interrogatories at 3. As the Governor explained, the factors are not "rules," *id.*, and thus do not impose any binding or otherwise enforceable legal constraint on the exercise of Defendants' discretion to restore a citizen's voting rights. Instead, the factors are considered as a matter of sound policy and merely help Defendants in their effort to make their ultimate "predictive judgment that an individual will live as a responsible citizen and member of the political body." *Id.* Defendants have the *legal* authority to ignore these factors in any particular case or to ignore them entirely. These factors do not "limit" or "constrain" the Governor's discretion in deciding whether to grant or deny any particular voting-restoration application. Thus, the ultimate decision determining the outcome of an individual's voting-

restoration application the predictive judgment regarding whether an applicant will live as a responsible citizen and member of the political body is committed to the Governor's discretion and is not subject to any legal constraint apart from those outlined above.

INTERROGATORY NO. 3: Please identify any and all written or otherwise memorialized rules, policies, criteria, factors, or standards that constrain or limit the Governor of Virginia's discretion to grant, deny, or take any other action on voting rights restoration applications.

RESPONSE TO INTERROGATORY NO. 3: Apart from the legal constraints imposed by Virginia law and federal law as discussed in the Governor's responses to Interrogatories 1 and 2 above, there are no rules, criteria, factors, or standards that constrain or otherwise limit, as a matter of law, the Governor's discretion to grant, deny, or take any other action on citizens' voting rights restoration applications.

INTERROGATORY NO. 4: Please identify the number of voting rights restoration applications pending with the Governor of Virginia.

RESPONSE TO INTERROGATORY NO. 4: As of Tuesday, November 21, 2023, four-hundred and ninety (490) applications have been completed and are currently awaiting a decision.

VERIFICATION

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 28, 2023.

Jennifer Moon
Deputy Secretary of the Commonwealth

Dated: November 28, 2023

Respectfully submitted,

GLENN YOUNGKIN

By: */s/ Andrew N. Ferguson*

Andrew N. Ferguson (VSB #86583)
Solicitor General

Erika L. Maley (VSB #97533)
Principal Deputy Solicitor General

Kevin M. Gallagher (VSB #87548)
Deputy Solicitor General

Travis S. Andrews (VSB #90520)
Assistant Attorney General

Jason S. Miyares
Attorney General

Steven G. Popps (VSB #80817)
Deputy Attorney General

Office of the Attorney General
202 North Ninth Street
Richmond, Virginia 23219
(804) 786-2071 – Telephone
(804) 786-1991 – Facsimile
AFerguson@oag.state.va.us

Charles J. Cooper (*Pro Hac Vice*)
Haley N. Proctor (VSB #84272)
Joseph O. Masterman (*Pro Hac Vice*)
John D. Ramer (*Pro Hac Vice*)
COOPER & KIRK, PLLC
1523 New Hampshire Avenue, N.W.
Washington, D.C. 20036
Tel: (202) 220-9600
Fax: (202) 220-9601
ccooper@cooperkirk.com

Counsel for Defendants Glenn Youngkin and Kelly Gee

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on November 28, 2023, I served a copy of the above Objections by electronic mail on the following party at the following addresses.

Counsel for Plaintiff George Hawkins

Terry Catherine Frank
Terry Frank Law
6722 Patterson Ave
Ste B
Richmond, VA 23226
terry@terryfranklaw.com

Beauregard William Patterson
Fair Elections Center (DC-NA)
1825 K. Street NW
Suite 701
Washington, DC 20006
bpatterson@fairelectionscenter.org

Charles Henry Schmidt, Jr.
4310 Dorset Road
Richmond, VA 23234
charlieschmidtrva@gmail.com

Jonathan Sherman
Fair Elections Center
1825 K St. NW
Suite 701
Washington, DC 20006
jsherman@fairelectionscenter.org

/s/ Andrew N. Ferguson
Andrew N. Ferguson (VSB #86583)
Solicitor General

Exhibit D

Moon, Jenna (GOV)

From: Lovings, Jennifer (GOV) <Jennifer.Lovings@governor.virginia.gov>
Sent: Thursday, November 17, 2022 3:49 PM
To: Restoration of Rights, Office of
Subject: [redacted]

Please respond to this constituent message on behalf of the Governor.
If a printed letter is sent in response, please send me a copy in .PDF format. If by e mail, please forward me a copy of the response.

Cabinet Comments:

Contact Information For: [redacted]

Address:
[redacted]
Newport News, VA 23602

Phone: [redacted]
Email: [redacted]

Email Created On:11/8/2022 12:32 AM
Email Subject:Restoration of Rights
Constituent Email:
I am a life-long Republican voter who was recently released from incarceration. I have repeatedly attempted to advance my restoration of rights process using the Secretary of the Commonwealth's site only to have the website never proceed past the submit button. How can I submit the requested information and seek an expedited review? Please advise.

:

Exhibit H

OFFICE OF THE SECRETARY OF THE COMMONWEALTH

RESTORATION OF RIGHTS FORM

To apply to have your rights restored, or to check your restoration status, visit us at http://Restore.Virginia.gov or call us at 804-692-0104, or simply complete and return this application via mail to:

Secretary of the Commonwealth
Restoration of Rights Division
P.O. Box 2454
Richmond, Virginia 23218

FULL LEGAL NAME

FULL NAME WHEN CONVICTED

SOCIAL SECURITY NUMBER

DATE OF BIRTH

GENDER:

☐ Male ☐ Female

STREET ADDRESS

CITY

STATE

ZIPCODE

PHONE NUMBER

EMAIL ADDRESS

IN WHICH COURT WERE YOU CONVICTED?
(CHECK ALL THAT APPLY)

☐ Virginia Circuit Court
☐ Out of State Circuit Court
☐ Military Court
☐ Federal Court (district, if known)

_____

ARE YOU A U.S. CITIZEN?

☐ Yes
☐ Non-Citizen
(Non-citizens are still eligible to have their right to be a notary public restored.)

HAVE YOU EVER BEEN CONVICTED OF A VIOLENT CRIME?

☐ Yes
☐ No

IF YES, PLEASE LIST THE CRIME AND DATE OF CONVICTION

HAVE YOU COMPLETED SERVING ALL TERMS OF INCARCERATION?

ARE YOU CURRENTLY ON PROBATION, PAROLE OR OTHER STATE SUPERVISION?

IF YES, WHEN IS YOUR EXPECTED END DATE?

☐ I have paid all fines, fees and restitution.

☐ I am currently paying my fines, fees and restitution (receipt or payment plan from court attached)

THE CIVIL RIGHTS RESTORED THROUGH THIS PROCESS INCLUDE:

VOTE

BECOME A NOTARY PUBLIC

SERVE ON A JURY

RUN FOR PUBLIC OFFICE

Please note that the restoration of rights does not restore the right to possess a firearm. You must petition the appropriate circuit court pursuant to Virginia Code § 18.2-308.2. This is not a pardon nor does it expunge a criminal conviction.

OFFICE OF THE SECRETARY OF THE COMMONWEALTH
RESTORATION OF RIGHTS DIVISION

ROR 00007

Hawkins_Def_000023

Exhibit J

COMMONWEALTH of VIRGINIA

Office of the Governor

Kay C. James
Secretary of the Commonwealth

March 22, 2023

The Honorable Lionell Spruill
Post Office Box 5403
Chesapeake, VA 23324
Delivered Electronically to: district05@governor.virginia.gov

Re: Follow-up from our call on Friday, March 17, 2023

Dear Senator Spruill:

Thank you for your emailed letter and for your time on Friday afternoon discussing the Restoration of Rights process for individuals convicted of felonies in Virginia. The Governor firmly believes in the importance of second chances for formerly incarcerated individuals as they look to become active members of their community and citizenry.

The Constitution places the responsibility to consider Virginians for restoration in the hands of the Governor and to the Secretary as delegated. After Inauguration, the Governor charged me and our team with ensuring our application and deliberation were legal and fair – that every applicant be considered individually as required by the Constitution and underscored by the Supreme Court of Virginia in 2016.

Every applicant is different and we utilize our partners at the Virginia Department of Corrections, Virginia State Police, Virginia Department of Elections, Virginia Department of Behavioral and Developmental Services, and the Compensation Board to research each application and provide further information to be used in the consideration process.

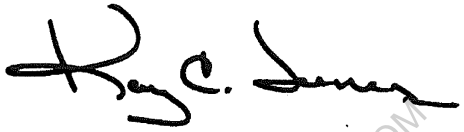
As we updated this process to ensure Constitutionality, we worked with the Secretary of Public Safety and the Department of Corrections to ensure that every discharged felon be provided with an application for restoration and explained its significance. Each inmate signs to attest to receiving this application. The Department of Corrections has indicated that roughly 12,000 people are released each year which includes individuals found guilty of misdemeanors and felonies.

Our website was updated to include that applications are considered individually and not granted on an automatic basis. As noted earlier, individuals are informed upon release the recommendation of applying and given a paper application. Applicants use this same website to apply and to check the status of their application and advocates use this website to help individuals

apply or to share the PDF paper application to be submitted by mail. We have scheduled a roundtable for advocates in April to discuss the process.

Virginians trust the Governor and his Administration to consider each person individually and take into consideration the unique elements of each situation, practicing grace for those who need it and ensuring public safety for our community and families. I appreciated the opportunity to discuss with you this important operation of the Secretary of the Commonwealth on behalf of the Governor of Virginia. Best wishes to you as you prepare to return to Richmond for the Reconvened Session.

Sincerely,



Kay Coles James
Secretary of the Commonwealth

Patrick Henry Building • 1111 East Broad Street • Richmond, Virginia 23219
(804) 786-2441 • TTY (800) 828-1120
socmail@governor.virginia.gov • www.commonwealth.virginia.gov

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

GEORGE HAWKINS	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	**Civil Action No. 3:23-cv-00232**
GLENN YOUNGKIN, in this official capacity as Governor of Virginia, and KAY COLES JAMES, in her official capacity as Secretary of the Commonwealth of Virginia	)	
	)	
Defendants.	)	

DECLARATION OF GEORGE HAWKINS

I, George Barry Hawkins, Jr., hereby declare:

I make this declaration based on my personal knowledge and if called to testify I could and would do so competently as follows:

1. My name is George Barry Hawkins, Jr. I was born on March 11, 1992, and I am currently 31 years old. I am a United States citizen and a resident of Richmond, Virginia. I have never been declared mentally incapacitated by any court.

2. In 2010, I was convicted of a felony in Virginia state court when I was 17 years old. After thirteen years in prison, I was released on May 3, 2023.

3. Because I was convicted as a juvenile, I have never been eligible to vote in my life, and I have never voted.

4. I want to register and vote in future primary and general elections in the Commonwealth of Virginia for candidates of my choice and state constitutional amendments, to

express my political preferences, and to support and associate with political parties in order to advance their goals.

5. Last year, I applied for voting rights restoration twice. The first time I applied was in early May 2023. My first rights restoration application was denied by Governor Glenn Youngkin. I cannot remember exactly what the Secretary of the Commonwealth's rights restoration online portal said, but I am almost certain that it did not say I was "ineligible."

6. In June 2023, I submitted a second rights restoration application. Then in July, the rights restoration online portal showed that my application was "pending." A screenshot that I took of the portal is attached as Exhibit A. Some time after that, my status changed. The portal showed that I was "ineligible at this time" and that the "date closed" for my application was August 17, 2023. A screenshot that I took of this new status is attached as Exhibit B. The portal did not state why I was "ineligible" for voting rights restoration, when (if ever) my application may be deemed eligible, or what conditions I must meet for my application to be deemed eligible.

7. I know from my attorneys that the Governor's lawyers notified the Court on October 4, 2023 that on that day they "learned that [my] application for re-enfranchisement ha[d] been deemed 'ineligible at this time.'"

8. I recently checked the rights restoration portal again, and it still reflects a date closed of "August 17, 2023" and that I am "ineligible at this time." A screenshot that I took on Sunday January 28, 2024 is attached as Exhibit C.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 31ST day of January, 2024.

EXHIBIT A

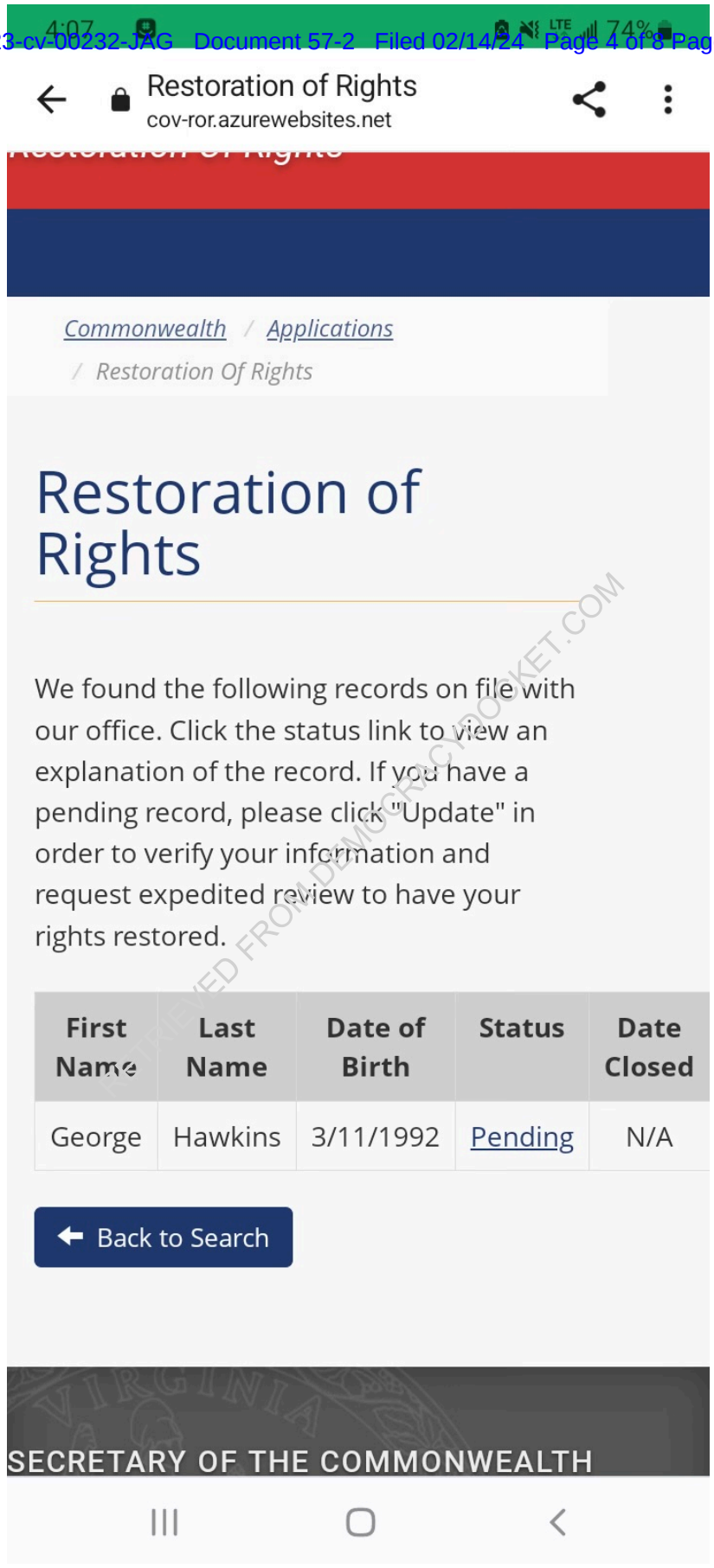


EXHIBIT B

EXHIBIT C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

GEORGE HAWKINS Plaintiff, v. GLENN YOUNGKIN, in his official capacity as Governor of Virginia, and KELLY GEE, in her official capacity as Secretary of the Commonwealth of Virginia Defendants.	)	Civil Action No. 3:23-cv-00232

JOINT STIPULATION OF UNDISPUTED FACTS

The Parties, by and through their undersigned counsel, hereby jointly stipulate to the following undisputed facts:

Undisputed Facts Relating to Plaintiff George Hawkins

1. In 2010, Plaintiff George Hawkins was convicted of at least one felony offense.

2. Mr. Hawkins was sentenced to a term of incarceration.

3. On May 3, 2023, Mr. Hawkins completed his term of incarceration.

4. On June 18, 2023, Mr. Hawkins submitted an application for the restoration of his voting rights.

5. On August 17, 2023, Governor Youngkin notified Mr. Hawkins that his application was deemed "ineligible at this time." *See* Declaration of Jonathan Sherman ("Sherman Decl.") ¶ 6, Ex. E (at Column M ("Date Closed")).

Undisputed Facts Relating to Virginia's Restoration of Voting Rights Process

6. On January 15, 2022, Governor Youngkin assumed office.

7. After taking office, Governor Youngkin decided to implement his current policy regarding rights restoration, which was fully implemented by December 9, 2022. *See* ECF No. 43, Ans. to SAC ¶ 39; *see also* Sherman Decl. ¶ 22, Ex. U.

8. From January 15, 2022, to August 14, 2023, Governor Youngkin granted restoration of voting rights to a total of 6,162 people with felony convictions. ECF No. 27-1, Declaration of Kay Cole James Decl. ¶ 4; *see also* Sherman Decl. ¶ 8, Ex. G (Gov. press releases announcing the grant of restoration of rights to 3,496 Virginians, dated May 20, 2022, and announcing the grant of restoration of rights "for over 800 formerly incarcerated Virginians," dated Oct. 21, 2022). The first group of 3,496 individuals whose voting rights were restored had their rights restored before Governor Youngkin's current policy was implemented.

9. The current version of the Restoration of Rights form was made available online on December 6, 2022, and fully incorporated into the materials provided to every person released from incarceration by December 9, 2022. *See* Sherman Decl. ¶ 9, Ex. H; *see also id.* at ¶ 22, Ex. U.

10. Applicants for voting rights restoration may (a) submit their application using the online form[1]; or (b) they may print out and mail a completed paper copy[2] to the Restoration of Rights Division within the Office of the Secretary of the Commonwealth ("Restoration of Rights Division").

[1] *Available at:* https://cov-ror.azurewebsites.net/Search
[2] *Available at:* https://www.restore.virginia.gov/media/governorvirginiagov/restoration-of-rights/pdf/ror_form.pdf

11. As of this filing, the Commonwealth's official Restoration of Rights website states that "[t]o be eligible to apply for consideration for the restoration of civil rights, an individual must be free from any term of incarceration resulting from felony conviction(s)." *See* ECF Nos. 49-50 (Motion for Judicial Notice and Memorandum in Support) at ECF No. 50-1, *also available at:* https://www.restore.virginia.gov. Further, in response to the Frequently Asked Question "Am I eligible to have my rights restored?", the Commonwealth's official website answers: "Governor Youngkin will consider restoration of rights for any individuals that have finished any term of incarceration as a result of a felony conviction."[3] *Id.* at ECF No. 50-2, *also available at:* https://www.restore.virginia.gov/frequently-asked-questions/.

12. The current application requests the following information from the restoration applicant: (a) full legal name; (b) full name when convicted; (c) Social Security Number; (d) date of birth; (e) gender (male/female); (f) street address; (g) phone number; (h) email address; (i) court of conviction (Virginia Circuit Court, Out of State Circuit Court, Military Court, Federal Court); (j) citizenship status; (k) whether the applicant has been convicted of a violent crime, and if so, the crime and date of conviction; (l) whether the applicant has completed serving all terms of incarceration; (m) whether the applicant is currently on probation, parole, or other state supervision, and if so, the expected end date; and (n) checkbox requiring applicant to indicate either that they have "paid all fines, fees, and restitution" or that they are "currently paying my fines, fees, and restitution" with a receipt or payment plan from the court attached. Sherman Decl. ¶ 9, Ex. H.

[3] https://www.restore.virginia.gov/frequently-asked-questions/ ("Am I eligible to have my rights restored?")

13. Apart from an applicant's death or citizenship status, the above data points are not, as a matter of law, dispositive of the outcome of a voting rights restoration application. Sherman Decl. ¶ 2, Ex. A at Response to Interrog. No. 2.

14. Defendants have stated that they "have the *legal* authority to ignore these factors in any particular case or to ignore them entirely. These factors do not 'limit' or 'constrain' the Governor's discretion in deciding whether to grant or deny any particular voting-restoration application." Sherman Decl. ¶ 3, Ex. B at Response to Interrog. Nos. 1 and 2.

15. Defendants have stated that the "ultimate decision determining the outcome of an individual's voting-restoration application—the predictive judgment regarding whether an applicant will live as a responsible citizen and member of the political body—is committed to the Governor's discretion." *Id.*

16. The application is reviewed for "accuracy, completeness, eligibility, and previous restorations" by the staff of the Restoration of Rights Division. *See* Sherman Decl. ¶ 10, Ex. I.

17. If there is data missing from the application, the applicant is notified. *See* Sherman Decl. ¶ 10, Ex. I. Defendants' policy is to give each restoration applicant the opportunity to provide the missing data or documentation. *See, e.g.*, *id*. ¶ 13, Ex. L. If an applicant fails to provide the missing data or documentation, the application will not be granted.

18. For complete restoration applications, the Restoration of Rights Division orders criminal record checks from the Central Criminal Records Exchange, which is run by the Virginia State Police. *See* Sherman Decl. ¶ 10, Ex. I; *see also id.* ¶ 14, Ex. M at Bates 000010; *see also id.* ¶ 15, Ex. N.

19. If the applicant was not convicted of a felony in a Commonwealth of Virginia court, the applicant is notified of that fact by phone or email. *See* Sherman Decl. ¶ 10, Ex. I; *see, e.g.*, *id.* ¶ 16, Ex. O.

20. If the applicant indicates that they have a federal conviction, the Rights Restoration Division staff will contact the applicant via email to request "information stating the exact date [the applicant] was released from federal incarceration or supervised release such as probation or parole." *See, e.g.*, Sherman Decl. ¶ 17, Ex. P.

21. The state agency review consists of the Restoration of Rights Division sending applicants' names and information to the Virginia Department of Elections, Virginia Department of Behavioral Health and Development Services, the Virginia Department of Corrections ("DOC"), and the Virginia Compensation Board. *See* Sherman Decl. ¶ 10, Ex. I; *see, e.g.*, *id.* ¶ 18, Ex. Q.

22. The state agencies then respond with any information they have regarding the identified applicants.

23. The Department of Elections provides data as to whether the applicant is deceased, mentally incapacitated, a non-citizen, or that they have no information on the applicant. *See* Sherman Decl. ¶ 14, Ex. M (at Bates 000010).

24. The Department of Behavioral Health and Development Services provides data as to whether the applicant is not on supervision, is incarcerated with the Virginia Center for Behavioral Rehabilitation or a state mental hospital or is on conditional or unconditional release from the Virginia Center for Behavioral Rehabilitation or has been found not guilty by reason of insanity ("NGRI"). *Id.*

25. The Virginia Compensation Board provides data as to whether the applicant is not on supervision, is an "inmate with a state or local responsibility felony," is an inmate with a federal offense, is released to an out-of-state authority, is awaiting trial, is released to a mental hospital, is on supervised release, or is bonded and with pre-trial services. *Id.*

26. The Department of Corrections provides data as to whether the applicant is not on supervision, incarcerated in a DOC facility, incarcerated in a local jail, on community supervision, an absconder or fugitive, or under interstate compact community supervision. *Id.*

27. "Using research and information provided by the applicant, CCRE [Central Criminal Records Exchange], and other state agencies," the Secretary of the Commonwealth makes a recommendation to the Governor as to the disposition of the application. The Governor may grant or deny the rights restoration application. Sherman Decl. ¶ 10, Ex. I.

28. Defendants have represented that their policy is that a voting rights restoration application is eligible for the Governor's consideration and ultimate decision to grant or deny it, unless the application was submitted by a person who is still incarcerated, a person who is currently subject to a pending felony charge, a person who is under supervised release for an out-of-state or federal conviction, or a person who does not satisfy the voting qualifications set forth by Virginia law, such as age, citizenship status, and residency requirements, or the application is incomplete.

29. Defendants' policy is that an application is complete if it fulfills two requirements (a) the applicant has filled out all required fields on the current application, whether they submitted it online or in paper form; and (b) the applicant has responded to all inquiries from the Governor's office, the Secretary of the Commonwealth's office, or any other Virginia agency that has submitted an inquiry to the applicant related to their voting rights restoration application.

30. Defendants maintain an internal database to assist in tracking application information. Defendants have produced a portion of this internal database showing specified entries regarding applications submitted by individuals between May 17, 2022, and January 22, 2024. Sherman Decl. ¶ 6, Ex. E. These entries reflect information automatically imported from an individual applicant's online application and/or information entered manually by employees of the Secretary of the Commonwealth. Defendants maintain the database in the ordinary course of business, strive to ensure its accuracy, and do not presently have any reason to believe any database entries are inaccurate.

31. In this database, all denials of voting restoration applications are coded with only the following three status codes in Defendants' internal database: "ineligible," "not granted at this time," or "ineligible at this time."

32. Applicants whose restoration applications are approved are notified online and by mail. Applicants who are deemed ineligible are also notified of that determination online. Sherman Decl. ¶ 10, Ex. I; *see, e.g.*, *id*. ¶ 19, Ex. R.

33. If the applicant's rights were already restored, a copy of the order is sent by email or mail to the applicant if requested. Sherman Decl. ¶ 10, Ex. I; *see, e.g.*, *id*. ¶¶ 20-21, Exs. S-T.

34. There is no time limit by which the Governor must grant or deny an application for voting rights restoration. Sherman Decl. ¶ 2, Ex. A at Response to RFA No. 4.

Data Regarding Restoration of Rights Applications Submitted from May 17, 2022 to January 22, 2024 (Hawkins_Def_001660)[4]

35. In the internal rights restoration database spreadsheet produced to Plaintiff, the column titled "Created On" reflects when the system recognizes that an application was started,

[4] *See* Sherman Decl. ¶ 6, Ex. E.

even if the applicant has not finished filling out the fields and submitted the application. *See* Sherman Decl. ¶ 6, Ex. E.

36. In the internal rights restoration database spreadsheet produced to Plaintiff, the column titled "Date Received" reflects when the applicant has submitted the application, and the system has put the application in a queue for review. Sherman Decl. ¶ 6, Ex. E.

37. In the internal rights restoration database spreadsheet produced to Plaintiff, the column titled "Claims to Have Finished Sentence" corresponds to the restoration application question of "have you completed serving all terms of incarceration?" *Compare* Sherman Decl. ¶ 6, Ex. E, *with id.* ¶ 9, Ex. H.

38. In the internal rights restoration database spreadsheet produced to Plaintiff, the column titled "Claims Currently on Probation" reflects responses to the application question of "are you currently on probation, parole or other state supervision?" *Compare* Sherman Decl. ¶ 6, Ex. E, *with id.* ¶ 9, Ex. H. The column titled "ProbationEndDate" accordingly reflects the expected end date of the applicant's probation, *parole or other state supervision. Id.* (emphasis added).

39. In the internal rights restoration database spreadsheet produced to Plaintiff, the column titled "Claims Paid All Fines" reflects when an applicant has checked the box stating, "I have paid all fines, fees and restitution." *Compare* Sherman Decl. ¶ 6, Ex. E, *with id.* ¶ 9, Ex. H. Conversely, the column titled "Claims Currently Paying Fines" reflects when an applicant has checked the box stating, "I am currently paying my fines, fees and restitution (receipt or payment plan from court attached." *Id.*

40. In the internal rights restoration database spreadsheet produced to Plaintiff, each application is assigned a "Current Status." Sherman Decl. ¶ 6, Ex. E. The current status of "Incomplete" indicates that there is information missing from the submitted application.

41. In the internal rights restoration database spreadsheet produced to Plaintiff, the current statuses of "Ineligible" and "Ineligible at this time" are used interchangeably in the internal rights restoration database spreadsheet and have equivalent effect.

42. The current status of "No Felony Found" indicates that the Restoration of Rights Division determined that the applicant has no record of a felony conviction for the Commonwealth of Virginia.

43. The current status of "Federal Release Required" indicates that the applicant has a federal conviction, and the Restoration of Rights Division is waiting for the applicant to provide "information stating the exact date [the applicant] was released from federal incarceration or supervised release such as probation or parole." *See, e.g.*, Sherman Decl. ¶ 17, Ex. P.

44. The current status of "Inapplicable" indicates that the applicant either does not need to apply to have his or her civil rights restored in Virginia or, in some instances, when an applicant failed to provide sufficient contact information to enable the Secretary's Office to follow up with the applicant.

45. The current status of "Duplicate" indicates that the applicant previously had his or her civil rights restored and has not since had a felony offense, that the applicant's application was denied within the previous year, or that the applicant already has a previous application pending.

46. The current status of "Opt Out" indicates that the applicant decided to withdraw his or her application.

47. The current status of "Awaiting Approval" indicates that an application was sent for review by state agencies and the Virginia State Police, and the Secretary's Office is awaiting the return of those requests for review.

48. The current status of "Received" indicates that the rights restoration application has been received by the Restoration of Rights Division, but the office has not begun researching the applicant.

49. The current statuses of "Needs More Info" and "Information Requested" indicate that the Restoration of Rights Division has requested that the applicant provide additional information to clarify or supplement their application.

Dated: February 14, 2024

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CERTIFICATE OF SERVICE

I certify that on February 14, 2024, I filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a "Notice of Electronic Filing" to the CM/ECF participants.

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

GEORGE HAWKINS, Plaintiff, v. GLENN YOUNGKIN, Governor of Virginia, in his official capacity, et al., Defendants.	)	Civil Action No. 3:23-cv-232-JAG

DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT UNDER FEDERAL RULE OF CIVIL PROCEDURE 56

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INTRODUCTION

Decades of Supreme Court precedent, centuries of historical practice, and two cases directly on point from the courts of appeals all confirm that Plaintiff Hawkins's claims fail as a matter of law. Hawkins argues that the Governor's discretionary clemency power to restore convicted felons' voting rights is *facially* unconstitutional under the First Amendment. Because Hawkins brings a facial challenge, this case is *not* about whether the Governor may discriminate based on viewpoint, race, or any other constitutionally forbidden criterion when restoring felons' voting rights. Everyone agrees he may not. Instead, this case is about whether the mere fact that the Governor possesses discretion to restore voting rights—discretion the Governor has held for 150 years—makes Virginia's voting-restoration process unconstitutional. As Supreme Court precedent and recent decisions from the Sixth and Eleventh Circuits demonstrate, the answer is no.

Hawkins's First Amendment claims fail several times over, and every appellate court to have encountered the theory has rejected it. First, the Supreme Court has made clear that a state executive's clemency decisions are rarely, if ever, subject to judicial review given clemency's historical role in our constitutional system. And the Supreme Court has both summarily affirmed and favorably cited previous precedent rejecting a constitutional challenge to a discretionary voting-restoration process. Second, the Fourth Circuit has held numerous times that the First Amendment does not provide any greater protections to voting rights than the Fourteenth Amendment, and all parties agree that Virginia's voting-restoration process satisfies the Fourteenth Amendment's requirements. Third, Hawkins's analogy to speech-licensing cases fails because felons have no constitutional right to vote, while a would-be speaker in a licensing regime does have the right to free speech.

Moreover, Hawkins's requested remedy only underscores that his claims fail as a matter of law. Hawkins asks this Court to direct the Governor in his exercise of the clemency power by setting forth "criteria," "rules," and "time limits" the Governor must follow when restoring voting rights. But the decision to grant or withhold executive clemency is a quintessential nonjusticiable political question. Moreover, the injunction Hawkins contemplates vastly exceeds the scope of federal courts' equitable powers. There is no historical precedent for such an intrusive judicial interference with a state chief executive's longstanding historical clemency power. Finally, even if Hawkins obtains an injunction requiring the categorical rules he seeks, it is unclear how the Governor could comply with it while also complying with the Virginia Constitution's requirement that he restore felons' voting rights on an individualized, case-by-case basis. The conflict between the requested injunction and the Virginia Constitution's command would be difficult to reconcile.

In short, the Governor is entitled to exercise the discretion vested in him by Virginia's Constitution to restore the voting rights of felons who will be responsible citizens and members of the political body—as Virginia's Governors have done for 150 years and Governor Youngkin has done for *thousands* of felons during his administration. Thus, Hawkins's First Amendment claims fail as a matter of law, and the Court should grant summary judgment for Defendants.

BACKGROUND

The undisputed material facts are set forth below, but Defendants provide this background to illuminate the Governor's clemency power to restore voting rights and the Commonwealth's current voting-restoration process. The Governor's clemency power was first established in Virginia's 1776 Constitution. See *Gallagher v. Commonwealth*, 284 Va. 444, 451 (2012). That Constitution required the Governor to obtain the concurrence of an advisory council when exercising his clemency power, but Virginia's 1851 Constitution removed that limitation and vested the clemency power in the Governor alone. *Ibid.* In 1870, Virginia added the power to

"'remove political disabilities consequent to conviction of offenses'" to the Governor's clemency power. *Ibid.* (quoting 2 A.E. Dick Howard, Commentaries on the Constitution of Virginia, 641–42 (1974)). And to this day, the Governor's clemency power includes the right to restore the voting rights of felons. Article V, section 12 of the Virginia Constitution—entitled "Executive clemency"—grants the Governor the power "to remove political disabilities consequent upon conviction for offenses."

Through the decades, Virginia's Governors generally exercised this discretionary power in a similar manner. Specifically, until 2016, all Governors exercised their power to restore felons' voting rights "on an individualized case-by-case basis taking into account the specific circumstances of each." *Howell v. McAuliffe*, 292 Va. 320, 341 (2016). The "unbroken historical record" of Governors exercising individualized discretion to restore voting rights spanned 71 Governors. *Ibid.* But in 2016, Governor McAuliffe issued an executive order purporting to restore voting rights to all "Virginians who had been convicted of a felony but who had completed their sentences of incarceration and any periods of supervised release, including probation and parole." *Id.* at 327–28. The Virginia Supreme Court held this executive order to be in violation of Virginia's Constitution. "Never before," the court explained, "have any of the prior 71 Virginia Governors issued a" voting-restoration order "to an entire class of unnamed felons without regard for the nature of the crimes or any other individual circumstances relevant to the request" for voting restoration. *Id.* at 337. The court held that Virginia's Constitution instead requires the Governor to exercise his clemency power to restore voting rights "on an individualized case-by-case basis." See *id.* at 341. And under Virginia law, the Governor "may grant or deny any request without explanation, and there is no right of appeal from the Governor's decision." *In re Phillips*, 265 Va. 81, 87–88 (2003).

In January 2022, Governor Youngkin took office. See Joint Stipulation of Undisputed Facts (JSUF) ¶ 6 (ECF No. 59). During his first year in office, the Governor decided to pursue his own process for voting restoration—which was fully implemented in December 2022 and remains the process to this day. JSUF ¶ 7. That process begins with an application submitted by the disenfranchised felon. See JSUF ¶ 10. That application form is posted on the Secretary of the Commonwealth's website and is provided to all individuals who are going through the process of being released from incarceration. JSUF ¶ 9. Applicants may fill out and submit the application online or mail a paper copy. JSUF ¶ 10. The application requests information regarding the applicant's identity, prior felonies, and status with respect to state supervision and fines, fees, or restitution. See JSUF ¶ 12.

Once the Secretary's Office receives the application, the Secretary's Office reviews the application for accuracy, completeness, eligibility, and previous restorations. JSUF ¶ 16. If an applicant failed to complete the application properly, the Secretary's Office will contact the applicant and request the missing information. JSUF ¶ 17. Applicants will be denied if they are still incarcerated, currently subject to a pending felony charge, under supervised release for an out-of-state or federal conviction, or if they otherwise fail to satisfy the voting qualifications set forth by Virginia law, such as age, citizenship status, and residency requirements. JSUF ¶ 28.

Once an applicant has provided the necessary information, the Secretary's Office engages in a multi-agency review process for each applicant. Specifically, the Secretary's Office will send applicants' names and information to the Central Criminal Records Exchange, the Virginia Department of Elections, the Virginia Department of Behavioral Health and Development Services, the Virginia Department of Corrections, and the Virginia Compensation Board. JSUF ¶¶ 18, 21.

In return, these agencies send information on each applicant back to the Secretary's Office. JSUF ¶ 22. The Central Criminal Records Exchange sends an applicant's criminal history record. JSUF ¶ 18. The Department of Elections states whether an applicant is deceased, mentally incapacitated, or a non-citizen. JSUF ¶ 23. The Department of Behavioral Health states whether the applicant is under state supervision, on conditional or unconditional release, incarcerated at a state hospital or with the Virginia Center for Behavioral Rehabilitation, or has been found not guilty by reason of insanity. JSUF ¶ 24. The Virginia Compensation Board states whether the applicant is under state supervision, on supervised release, released to an out-of-state authority, released to a mental hospital, awaiting trial, bonded with pre-trial services, or is an inmate with a federal offense. JSUF ¶ 25. Finally, the Department of Corrections states whether the applicant is under state supervision, on community supervision, under interstate compact community supervision, incarcerated in a Department of Corrections facility or local jail, or an absconder or fugitive. JSUF ¶ 26.

Once the multi-agency review is complete, the Secretary's Office reviews the sum-total of this information for each individual applicant. JSUF ¶ 27. This review results in a recommendation by the Secretary to the Governor as to whether the Governor should grant or deny the application. *Ibid.* The Secretary and Governor engage in a holistic, case-by-case consideration of the information gathered from the application and multi-agency review, including whether the applicant committed a violent crime, how recent the conviction is, and the applicant's conduct since the conviction. Ex. 1 at 3 (Gov. Youngkin Resps. to Pl.'s First Set of Interrogs. & Reqs. for Admis.). Armed with the Secretary's recommendation and the results of the multi-agency review, the Governor is the ultimate decisionmaker and may grant or deny the application in his discretion. JSUF ¶ 27; JSUF ¶ 15. Ultimately, his decision to grant or deny an application is based on a

predictive judgment regarding whether an applicant will live as a responsible citizen and member of the political body. JSUF ¶ 15. Once the Governor has made his decision, the Secretary's Office notifies the applicant. JSUF ¶¶ 32–33. If an application is denied, the applicant must wait one year to reapply or his application will be deemed a duplicate of the previously denied application. See JSUF ¶ 45. If an application is granted, the Secretary's Office congratulates the applicant, sends the official restoration order, and provides instructions for registering to vote. See Ex. 2 (Hawkins_Def_000030).

The Governor takes seriously his clemency power to restore convicted felons' voting rights. He has expressed his admiration for those who have turned their lives around after receiving a felony conviction: "I applaud those who have committed to starting fresh with renewed values and a will to positively contribute to our society." Ex. 3 (Hawkins_Def_000026). And he has stated that "[s]econd chances are essential to ensuring Virginians who have made mistakes are able to move forward toward a successful future." *Ibid.* Consistent with these views, since taking office, Governor Youngkin has restored voting rights to *thousands* of convicted felons. See JSUF ¶ 8.

STATEMENT OF UNDISPUTED MATERIAL FACTS

1. In 2010, Plaintiff George Hawkins was convicted of five felony offenses: attempted murder in the first degree, aggravated malicious wounding, drug possession with intent to distribute, and two counts of the use of a firearm in commission of a felony. Decl. of Kay Coles James (ECF No. 27-1) ¶ 17.

2. For these five felonies, he was sentenced to 78 years of imprisonment, with all but fifteen years suspended. James Decl. ¶ 17.

3. On January 15, 2022, Governor Youngkin assumed office. JSUF ¶ 6.

4. On May 3, 2023, Hawkins was released from incarceration. James Decl. ¶ 18.

5. On June 18, 2023, Hawkins submitted an application for the restoration of his voting rights. James Decl. ¶ 15.

6. On August 17, 2023, Governor Youngkin notified Mr. Hawkins that his application was deemed "ineligible at this time." See Defs.' Notice Re. Pl. George Hawkins (ECF No. 39).

LEGAL STANDARD

A party is entitled to summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). "A dispute is genuine if a reasonable jury could return a verdict for the nonmoving party," and "[a] fact is material if it might affect the outcome of the suit under the governing law." *Variety Stores, Inc. v. Wal-Mart Stores, Inc.*, 888 F.3d 651, 659 (4th Cir. 2018) (quotation marks omitted).

ARGUMENT

I. Virginia's Voting Restoration Process Is Constitutional

Plaintiff Hawkins brings a facial challenge against the voting-restoration process established by the Governor under Virginia's Constitution. Specifically, Hawkins contends that the discretion granted to the Governor by Virginia's Constitution violates the First Amendment because it would permit viewpoint discrimination in the voting-restoration process. Hawkins does not allege that he or anyone else has actually been subjected to unlawful viewpoint discrimination; indeed, he has affirmatively disavowed that such a showing is necessary to his claim. See Memo. in Opp. to Defs. Mot. to Dismiss Pls.' Second Am. Compl. (MTD Opp.) at 28 (ECF No. 30). Instead, Hawkins contends that the Governor's *discretion alone*—irrespective of how that discretion is exercised—violates the First Amendment. That argument fails because discretionary clemency regimes, like Virginia's voting-restoration process, are not typically subject to judicial

review; longstanding tradition confirms that Virginia's process is constitutional; and every court of appeals to encounter Hawkins's First Amendment argument has rejected it.

A. The Governor's Discretionary Clemency Power To Restore Voting Rights Does Not Violate The Constitution

The clemency power of the States dates back to the Founding. See *Herrera v. Collins*, 506 U.S. 390, 414 (1993). Ever "since the British colonies were founded, clemency has been available in America." *Ibid.* As a general matter, the Executive's exercise of the clemency power has not been subject to judicial review. Specifically, "clemency has not traditionally 'been the business of courts'" because "executive clemency exists to provide relief from harshness or mistake in the judicial system, and is therefore vested in an authority other than the courts." *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 285 (1998) (plurality) (quoting *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 464 (1981)). Instead, the "heart of executive clemency" is "to grant clemency as a matter of grace, thus allowing the executive to consider a wide range of factors not comprehended by earlier judicial proceedings and sentencing determinations." *Id.* at 280–81. For example, a clemency decision turns "on purely subjective evaluations and on predictions of future behavior by those entrusted with the decision." *Dumschat*, 452 U.S. at 464. And this type of predictive judgment made by a State's executive branch has "not traditionally been the business of courts" and thus is "rarely, if ever," properly subjected to judicial review. *Ibid.*

The Supreme Court has acknowledged this historic and unique status of executive clemency in our constitutional system. In *Dumschat*, the Court rejected an inmate's Due Process Clause challenge to the State of Connecticut's commutation system—even though that system "conferred 'unfettered discretion' on its Board of Pardons" to make commutation decisions. 452 U.S. at 465–66. And in *Woodard*, the Court rejected an inmate's Due Process Clause challenge to the State of Ohio's clemency system. 523 U.S. at 275–76. Across two opinions in *Woodard*, eight

Justices agreed that clemency decisions are not typically subject to judicial review and "might" warrant judicial review only in extreme circumstances such as "a scheme whereby a state official flipped a coin to determine whether to grant clemency" or "arbitrarily denied a prisoner any access to its clemency process." See *Woodard*, 523 U.S. at 289 (O'Connor, J., concurring). Absent those extraordinary hypotheticals, however, the Court reaffirmed its holding in *Dumschat* and held that the "Due Process Clause is not violated" when clemency procedures merely "confirm that the clemency and pardon powers are committed, as is our tradition, to the authority of the executive." *Id.* at 276. Here, the Governor's clemency determinations are not based on a coin flip, nor on any constitutionally suspect factors: rather, the Governor engages in a holistic, case-by-case determination of each application, including whether the applicant committed a violent crime, how recent the applicant's conviction is, and the applicant's conduct since the conviction, in order to make a predictive judgment as to whether the applicant is likely to be a responsible citizen and member of the political body. See pp.5–6, *supra*.

The rule that the clemency power is committed to executive discretion extends to voting restoration. In *Richardson v. Ramirez*, 418 U.S. 24, 54 (1974), the Court held that felon disenfranchisement does not violate the Fourteenth Amendment. Specifically, the Court exhaustively canvassed the text, history, and precedent regarding the Fourteenth Amendment and concluded "that the understanding of those who adopted the Fourteenth Amendment, as reflected in the express language of s[ection] 2 and in the historical and judicial interpretation of the Amendment's applicability to state laws disenfranchising felons," confirmed that States could lawfully exclude convicted felons from the franchise. *Ibid.* "As we have seen," the Court summed up, "the exclusion of felons from the vote has an affirmative sanction in s[ection] 2 of the Fourteenth Amendment." *Ibid.*

Especially relevant here, the Court's opinion favorably cited its summary affirmance of a three-judge district court's decision in *Beacham v. Braterman*. See *Ramirez*, 418 U.S. at 53 (citing *Beacham v. Braterman*, 300 F. Supp. 182 (S.D. Fla.), *aff'd*, 396 U.S. 12 (1969)). *Beacham* involved a convicted felon's challenge to Florida's pardon process after he "was refused the right to register" to vote "because he was a convicted felon whose civil rights had not been restored." 300 F. Supp. at 182–83. The plaintiff "applied for a pardon, which would have included a restoration of his civil rights, and his application was denied," so he challenged the process because "[n]either the Governor of Florida nor members of the State Cabinet ha[d] established specific standards to be applied to the consideration of petitions for pardon." *Id.* at 183. Specifically, the plaintiff sought "to enjoin the Governor of Florida from continuing to grant and deny petitions for pardons in a purely discretionary manner without resort to specific standards." *Ibid*. The court framed the case as a constitutional challenge to the Governor's ability, with approval of three cabinet members, "to restore discretionarily the right to vote to some felons and not to others." *Id.* at 184. And the court rejected that challenge because the power to restore felons' right to vote was "an act of executive clemency not subject to judicial control." *Ibid.* "The historic executive prerogative to grant a pardon as an act of grace has always been respected by the Courts," *Beacham* explained. *Ibid.* "Where the people of a state have conferred unlimited pardon power upon the executive branch of their government, the exercise of that power should not be subject to judicial intervention." *Ibid.*

The Supreme Court summarily affirmed *Beacham*. See *Beacham v. Braterman*, 396 U.S. 12 (1969). Given this summary affirmance, a court may not come "to opposite conclusions on the precise issues presented and necessarily decided" by *Beacham*. See *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (per curiam). And the conclusion in *Beacham* was that a discretionary vote-restoration process was "not subject to judicial control." 300 F. Supp. at 184. But even if there

were doubt about the effect of the Court's summary affirmance, the Supreme Court affirmatively endorsed *Beacham* in *Ramirez* as part of the "settled historical and judicial understanding of the Fourteenth Amendment's effect on state laws disenfranchising convicted felons." *Ramirez*, 418 U.S. at 53–54. Thus, *Beacham* confirms that Virginia's discretionary voting-restoration process is constitutional, and Defendants are entitled to summary judgment.

B. Plaintiff's Contrary Arguments Are Meritless

Despite the precedent and historical analysis detailed above, Hawkins argues that Virginia's discretionary vote-restoration process violates the First Amendment. Specifically, his theory is that Virginia's voting-restoration process should be subject to the First Amendment doctrine governing the licensing of protected speech. That argument fails for numerous reasons—as multiple courts of appeals have held.

First, the First Amendment does not prohibit the discretionary restoration of voting rights. The Fourth Circuit has held—multiple times—"that in voting rights cases, no viable First Amendment claim exists in the absence of a Fourteenth Amendment claim." *Republican Party of North Carolina v. Martin*, 980 F.2d 943, 959 n.28 (4th Cir. 1992). Put differently, "the protections of the First" Amendment do not "'extend beyond those more directly, and perhaps only, provided by the fourteenth and fifteenth amendments.'" *Irby v. Virginia State Bd. of Elections*, 889 F.2d 1352, 1359 (4th Cir. 1989) (quoting *Washington v. Finlay*, 664 F.2d 913, 927 (4th Cir. 1981)).

This longstanding principle helps explain why the Fourth Circuit had no difficulty previously rejecting a First Amendment challenge to Virginia's voting-restoration process in an unpublished opinion. See *Howard v. Gilmore*, 205 F.3d 1333 (Table), 2000 WL 203984, at *1 (4th Cir. Feb. 23, 2000). In *Howard*, a convicted felon sought to have his voting rights restored under the First Amendment. *Ibid.* The Fourth Circuit swiftly affirmed dismissal of that challenge because

the "First Amendment creates no private right of action for seeking reinstatement of previously canceled voting rights." *Ibid.* So too here: under *Irby*, *Finlay*, *Martin*, and *Howard*, Hawkins has no First Amendment claim arising from the Governor's consideration of his restoration application.

Second, the speech-licensing cases are inapposite. Hawkins analogizes a felon's voting-restoration application to a would-be speaker's application to engage in protected speech, such as a parade. See MTD Opp. at 2. But there is a fundamental and dispositive distinction between a challenge to a licensing scheme for protected speech and a challenge to a discretionary voting-restoration process. In the speech-licensing cases, the licensing schemes burdened *a constitutional right*—the right to free speech. See, *e.g.*, *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 226 (1990) ("a licensing scheme creates the possibility that *constitutionally protected speech* will be suppressed where there are inadequate procedural safeguards" (emphasis added)). Therefore, when a speech-licensing regime is deemed unconstitutional, the plaintiff is returned to the default of free speech. Here, in contrast, felons do not have a constitutional right to vote. *Ramirez*, 418 U.S. at 54. So if Virginia's voting-restoration process were deemed unconstitutional, Hawkins would be returned to the default of being a convicted felon who cannot vote. See *ibid.*; MTD Opp. at 10 (conceding that felon disenfranchisement is constitutional). Because the voting-restoration process does not burden any existing constitutional right, unlike a speech-licensing regime, the speech-licensing cases do not apply.

Two courts of appeals have already rejected Hawkins's theory for these very reasons. In *Hand v. Scott*, 888 F.3d 1206, 1210 (11th Cir. 2018), convicted felons brought an identical challenge to Florida's discretionary voting-restoration process, making the same analogy to the speech-licensing cases that Hawkins makes here. The district court initially ruled for the plaintiffs, but the Eleventh Circuit stayed that decision less than a month later. In concluding that the

plaintiffs' First Amendment challenge likely failed, the Eleventh Circuit first highlighted that, as in the Fourth Circuit, it "is well established in this Circuit that the First Amendment provides no greater protection for voting rights than is otherwise found in the Fourteenth Amendment." *Id.* at 1211. And "[b]ecause a standardless pardon process, without something more, does not violate the Fourteenth Amendment, it follows that it does not run afoul of the First Amendment." *Ibid.* Next, the Eleventh Circuit recognized that "every First Amendment challenge to a discretionary vote-restoration regime" that the court found "has been summarily rebuffed." *Id.* at 1212 (collecting cases). And finally, the Eleventh Circuit rejected the plaintiffs' analogy to the speech-licensing cases because "none of the cited cases involved voting rights or even mentioned the First Amendment's interaction with the states' broad authority expressly grounded in § 2 of the Fourteenth Amendment to disenfranchise felons and grant discretionary clemency." *Id.* at 1212–13.[1]

More recently, in *Lostutter*, the Sixth Circuit also rejected Hawkins's First Amendment theory. See *Lostutter v. Kentucky*, No. 22-5703, 2023 WL 4636868 (6th Cir. July 20, 2023). That case involved a nearly identical challenge to Kentucky's discretionary voting-restoration process. See *id.* at *1. There, as here, the plaintiffs argued that "Kentucky's voting-rights restoration process constitutes an administrative licensing or permitting scheme," and the court of appeals rejected the argument. *Ibid.* Specifically, the Sixth Circuit concluded that a clemency regime "is fundamentally different from obtaining an administrative license or permit" for several reasons. *Id.* at *3–4. First,

[1] After the Eleventh Circuit stayed the lower court's decision, but before it issued its opinion in the merits appeal of the preliminary injunction, Florida amended its Constitution with respect to felon-voting restoration, and the Florida Legislature revised the relevant statutory scheme, which mooted the appeal. See *Hand v. DeSantis*, 946 F.3d 1272 (11th Cir. 2020). But these subsequent procedural developments do not undermine the persuasiveness of the Eleventh Circuit's stay opinion. See, *e.g.*, *Lostutter v. Kentucky*, No. 22-5703, 2023 WL 4636868, at *5 (6th Cir. July 20, 2023) (relying on *Hand* as "Eleventh Circuit precedent").

the court noted differences in both the timing and nature of a grant of clemency as opposed to an award of a license to engage in protected speech. *Id.* at *4. Next, the court highlighted that voting restoration is a form of "executive clemency power, which the Supreme Court has rarely subjected to judicial review." *Ibid.* (citing *Woodard*, *Dumschat*, and *Herrera*).

Moreover, the Sixth Circuit underscored the material difference between a convicted felon seeking a restoration of his voting rights and an individual seeking a license to engage in protected speech. *Ibid.* Specifically, the restoration of a felon's voting rights "restores the felon to the status quo before the conviction, in that he or she regains a right once held but lost due to illegal conduct." *Ibid.* In contrast, "licenses regulating First Amendment activity by their nature do not restore any 'lost' rights; they only regulate how persons may engage in or exercise a right they already possess." *Ibid.* "So, while a person applying for a newspaper rack or parade permit is attempting to exercise his or her First Amendment right to freedom of speech," the court explained, "a felon can invoke no comparable right when applying to the Governor for a pardon because the felon was constitutionally stripped of the First Amendment right to vote." *Ibid.* Thus, like the Eleventh Circuit, the Sixth Circuit also rejected Hawkins's theory.

Finally, the longstanding tradition of Virginia's discretionary voting-restoration process further demonstrates that it does not violate the First Amendment. Both "history and tradition of regulation" are "relevant when considering the scope of the First Amendment." *City of Austin, Tex. v. Reagan Nat'l Advertising of Austin, LLC*, 596 U.S. 61, 75 (2022) (quotation marks omitted). "When faced with a dispute about the Constitution's meaning or application, long settled and established practice is a consideration of great weight." *Houston Comm. College Sys. v. Wilson*, 595 U.S. 468, 474 (2022) (cleaned up). In the nearly 250 years of discretionary clemency regimes, and the 150 years of Virginia's discretionary voting-restoration process, there is no case holding

that a discretionary voting-restoration process violates the First Amendment. Indeed, "every First Amendment challenge to a discretionary vote-restoration regime" that Defendants are aware of "has been summarily rebuffed." *Hand*, 888 F.3d at 1212. This "unbroken tradition" of discretionary voting-restoration regimes, standing alone, forecloses "the adoption of [Hawkins's] novel rule." *City of Austin*, 596 U.S. at 75.

In sum, Hawkins's First Amendment claims fail as a matter of law several times over. First, Supreme Court precedent and longstanding historical practice establishes the constitutionality of discretionary voting restoration. Second, Fourth Circuit precedent forecloses a First Amendment claim for the restoration of voting rights. And third, Hawkins's speech-licensing cases do not apply to discretionary voting restoration. As the Sixth and Eleventh Circuits recognized, Hawkins's First Amendment claims are meritless, and the Court should hold that they fail as a matter of law.

II. Plaintiff's Requested Remedy Demonstrates That His Claims Fail

Hawkins's vision of federal judicial superintendence over the clemency power of Virginia's governor only underscores that Hawkins's claims must fail. Hawkins asks this Court to "order Defendants . . . to replace" the current restoration process with a process "based upon specific, neutral, objective, and uniform rules and/or criteria and within reasonable, definite time limits." Second Am. Compl. at 25 (ECF No. 22). Hawkins's remedy would presumably mean that every restoration decision made by the Governor would be subject to judicial review to ensure adherence to these "rules and/or criteria" (whatever they may be) and "time limits" (however long those are). And to the extent Hawkins instead purports to ask this Court to merely provide "guidance" that Defendants are then obligated to implement, that maneuver fares no better. Hawkins's request for this drastic and intrusive interference with a State Executive's exercise of clemency shows that his claims are meritless for several reasons.

First, any standard governing the grant of executive clemency is a political question not fit for judicial review. Cases present a political question if they "lack judicially discoverable and manageable standards for resolving them." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2494 (2019) (quotation marks omitted). This rule applies in the voting context. In *Rucho*, the Supreme Court held that partisan gerrymandering presented a political question because there was no judicially discoverable and manageable standard to adjudicate partisan gerrymandering claims. *Id.* at 2506–07. In assessing whether any standard could be used, the Court explained that opposition to gerrymandering generally turned on "fairness" or "how much representation particular political parties *deserve*." *Id.* at 2499–2500 (emphasis in original). But deciding among different conceptions of fairness or what an individual or entity deserves "poses basic questions that are political, not legal," because there "are no legal standards discernible in the Constitution for making such judgments." *Id.* at 2500. "Any judicial decision on what is 'fair' in this context," the Court concluded, "would be an unmoored determination of the sort of characteristic of a political question beyond the competence of the federal courts." *Ibid.* (quotation marks omitted).

Rucho's analysis applies equally here. As the Supreme Court has explained, a clemency decision, by its nature, "depends not simply on objective factfinding, but also on purely subjective evaluations and on predictions of future behavior by those entrusted with the decision." *Dumschat*, 452 U.S. at 464. Consistent with this understanding, the Governor has explained that his voting-restoration decisions turn on a predictive judgment of whether an applicant will live as a responsible citizen and member of the political body. See JSUF ¶ 15. But what "criteria" or "rules" should a court impose on the Governor's exercise of his clemency power? Would a court develop rules based on type of felony, time since conviction, community service, or number of volunteer activities in order to determine the typical felon who *deserves*, in the *court's* opinion, voting

restoration? The Constitution "provides no basis whatever to guide the exercise of judicial discretion" in this endeavor. *Rucho*, 139 S. Ct. at 2506.

The same goes for "time limits." When presented with a similar request, the Seventh Circuit conceded it had "no idea what a 'reasonable' time for deciding a clemency petition would be." *Bowens v. Quinn*, 561 F.3d 671, 676 (7th Cir. 2009) (Posner, J., for the court). "Executive clemency," the Seventh Circuit explained, "is a classic example of unreviewable executive discretion because it is one of the traditional royal prerogatives" that was "borrowed by republican governments for bestowal on the head of government." *Ibid.* The court did not mince words: "We therefore balk at the idea of federal judges' setting timetables for action on clemency petitions by state governors." *Ibid.*

To the extent Plaintiff purports to ask the Court to provide mere guidance that Defendants must then implement through regulation, that request raises additional constitutional concerns. The Supreme Court has "long held" that the equitable power of federal courts "is the jurisdiction in equity exercised by the High Court of Chancery in England at the time of the adoption of the Constitution." *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 (1999) (quotation marks omitted). And there is no historical basis for equity courts issuing guidelines that an executive must follow in exercising his clemency power.

The Eleventh Circuit recognized this problem in *Hand*. There, the district court had entered an injunction directing the Florida executive branch "to promulgate new standards" that would "determine when and how to exercise the Governor's power in order to reenfranchise convicted felons." 888 F.3d at 1214. That was "a tall order" for "a court sitting in equity," as the Eleventh Circuit saw it, "even assuming the district court had the authority to enter this command in the first place." *Ibid.* "After all," the court explained, echoing the concerns highlighted in *Rucho*, "there

are a multitude of considerations" to a voting-restoration decision, "including but not limited to whether [the government] should adopt mathematical criteria, how 'specific and neutral' the criteria should be, whether arrests or convictions for certain kinds of misdemeanor or felony offenses (and there are many) should be either relevant or categorically disqualifying," among others. *Ibid.* The Eleventh Circuit deemed this unprecedented remedy an independent basis for concluding that the plaintiffs' challenge likely failed on the merits. *Ibid.*

Finally, restoring voting rights in a manner that complies with the injunction Hawkins requests would likely violate *Virginia's* Constitution. In *Howell*, the Virginia Supreme Court held that the Virginia Constitution *requires* the Governor to make voting-restoration decisions "on an individualized case-by-case basis taking into account the specific circumstances of each." 292 Va. at 341. But it is difficult to see how restricting the Governor's clemency power to a mechanical application of the categorical "rules," "criteria," and "time limits" that Hawkins demands would still enable the "individualized" and "case-by-case" consideration required under *Howell*. Thus, if this Court entered the injunction requested by Hawkins, it is unclear how the Governor could restore rights while complying both with this Court's ruling and the Virginia Supreme Court's ruling in *Howell*.

In sum, Hawkins's requested remedy underscores the flaws in his First Amendment claims. Hawkins asks this Court to determine how the Governor should exercise his clemency power to restore felons' voting rights through the issuance of rules, criteria, and time limits. This Court must decline that invitation because, although it is the Court's duty to say what the law is, sometimes that "duty is to say 'this is not law.'" *Rucho*, 139 S. Ct. at 2508. Hawkins's First Amendment claims raise political questions and ask this Court to exceed its equitable power in directing the Governor in the exercise of his clemency power. Those claims thus fail as a matter of law.

CONCLUSION

For these reasons, the Court should grant Defendants' Motion for Summary Judgment, dismiss this action with prejudice, and award the Defendants any further such relief the Court deems necessary and appropriate.

Dated: February 14, 2024

Respectfully submitted,

GLENN YOUNGKIN
KELLY GEE

By: */s/ Andrew N. Ferguson*
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Counsel for Defendants Glenn Youngkin and Kelly Gee

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on February 14, 2024, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to all parties of record.

Andrew N. Ferguson
Andrew N. Ferguson (VSB #86583)
Solicitor General

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

GEORGE HAWKINS, Plaintiff, v. GLENN YOUNGKIN, Governor of Virginia, in his official capacity, et al., Defendants.	)	Civil Action No. 3:23-cv-232-JAG

GOVERNOR YOUNGKIN'S RESPONSES TO PLAINTIFFS' FIRST SET OF INTERROGATORIES AND REQUESTS FOR ADMISSION

Pursuant to Rules 26, 33, and 36 of the Federal Rules of Civil Procedure and Local Rule 26(C) of the U.S. District Court for the Eastern District of Virginia, Governor Youngkin, in his official capacity, submits the following responses to Plaintiffs' First Set of Interrogatories and Requests for Admission to Defendant Governor Glenn Youngkin. The Governor is providing these responses subject to, and without waiving, the objections he previously served on October 10, 2023. The Governor's responses do not waive his right to challenge the relevance, materiality, and admissibility of the information provided, or to object on any basis to the use of the information in any subsequent proceeding or trial. Because discovery has only just commenced, the Governor reserves the right to supplement, revise, correct, add to, or clarify his responses, or to rely upon additional or different information or contentions at any hearing, appellate proceeding, or trial in the action.

RESPONSES TO REQUESTS FOR ADMISSION

REQUEST FOR ADMISSION NO. 1: Admit that You have total, absolute discretion in deciding to grant or deny an application for voting rights restoration.

RESPONSE TO REQUEST FOR ADMISSION NO. 1: Subject to and without waiving the Governor's previously served objections, the request is DENIED.

REQUEST FOR ADMISSION NO. 2: Admit that You do not use any criteria in deciding whether to grant or deny applications for voting rights restoration.

RESPONSE TO REQUEST FOR ADMISSION NO. 2: Subject to and without waiving the Governor's previously served objections, the request is DENIED.

REQUEST FOR ADMISSION NO. 3: Admit that there are no laws, rules, regulations, criteria, or any other legal constraint on Your discretion to grant or deny an application for voting rights restoration.

RESPONSE TO REQUEST FOR ADMISSION NO. 3: Subject to and without waiving the Governor's previously served objections, the request is DENIED.

REQUEST FOR ADMISSION NO. 4: Admit that there is no time limit by which You must grant or deny an application for voting rights restoration.

RESPONSE TO REQUEST FOR ADMISSION NO. 4: Subject to and without waiving the Governor's previously served objections, the request is ADMITTED.

RESPONSES TO INTERROGATORIES

As explained in the Governor's previously served objections, Plaintiff's "Interrogatory No. 1" effectively contained four discrete subparts potentially seeking explanations for four different Requests for Admission. The Governor is therefore treating Plaintiff's Interrogatory as four separate interrogatories.

INTERROGATORY NO. 1: For each Request for Admission above that You denied in full or in part, please explain that full or partial denial.

RESPONSE TO INTERROGATORY NO. 1: Request for Admission No. 1 asked the Defendants to admit that they have "total, absolute discretion in deciding to grant or deny an application for voting rights restoration." Defendants denied this Request because, although Defendants exercise discretion in deciding whether to grant or deny applications for voting rights restoration, the phrase "total, absolute discretion" implies that Defendants' discretion is completely unbounded by any legal constraint. As explained in Response to Interrogatory No. 3, Defendants do not view their exercise of discretion to be completely free from any legal constraint.

RESPONSE TO INTERROGATORY NO. 2: Request for Admission No. 2 asked Defendants to admit they "do not use any criteria in deciding whether to grant or deny applications for voting rights restoration." Defendants denied this request because Defendants use multiple factors to guide their discretion in ultimately making a predictive determination that an individual will live as a responsible citizen and member of the political body. The application calls for information regarding the various factors that guide Defendants' exercise of their discretion to grant or deny applications for voting rights restoration. Specifically, the application requires applicants to declare whether they are U.S. citizens, whether they have been convicted of a violent crime and, if so, to provide the crime and date of conviction; whether they have completed serving all terms of their incarceration; whether they are currently on probation, parole, or other state supervision; and whether they have paid, or are currently paying, all fines, fees, and restitution. Before granting any application, Defendants also ensure the applicant is still alive. Apart from an applicant's death or citizenship status, the factors do not serve as bright-line rules that automatically result in either a grant or denial of a voting-restoration application. Instead, these factors are part of Defendants' holistic process to make a predictive judgment about whether an individual applicant can live as a responsible citizen and member of the political body.

RESPONSE TO INTERROGATORY NO. 3: Request for Admission No. 3 asked Defendants to admit "that there are no laws, rules, regulations, criteria, or any other legal constraint on Your discretion to grant or deny an application for voting rights restoration." As explained in Defendants' briefing in support of their motion to dismiss, their discretion is not free from all legal constraint. For example, if Defendants were exercising their discretion to invidiously discriminate on the basis of race or to intentionally discriminate on the basis of viewpoint, that conduct would be subject to constitutional constraints. Moreover, as explained in Defendants' Response to Interrogatory No. 2, Defendants use several factors—which could be labeled "criteria"—to guide the exercise of their discretion in granting or denying a voting-restoration application.

RESPONSE TO INTERROGATORY NO. 4: Because Request for Admission was not "denied in full or in part," no further response is required for Interrogatory No. 4.

VERIFICATION

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 25, 2023.

Jennifer Moon
Deputy Secretary of the Commonwealth

Dated: October 25, 2023

Respectfully submitted,

GLENN YOUNGKIN

By: */s/ Andrew N. Ferguson*

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Counsel for Defendants Glenn Youngkin and Kelly Gee

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on October 25, 2023, I served a copy of the above Objections by electronic mail on the following party at the following addresses.

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/s/ Andrew N. Ferguson
Andrew N. Ferguson (VSB #86583)
Solicitor General

EXHIBIT 2

COMMONWEALTH of VIRGINIA

Office of the Governor

Glenn Youngkin
Governor

February 16, 2023

Congratulations! I am pleased to inform you that Governor Glenn Youngkin has restored your rights to vote, to become a notary public, to serve on a jury, and to hold public office. This letter has been provided to you in physical and electronic forms if you provided us with your email address. Enclosed is your official restoration order that will serve as documentation of Governor Youngkin's decision on your behalf. Please keep the order in a safe place as duplicates cannot be issued.

Your prior conviction no longer restricts your right to register to vote, become a notary public, serve on a jury, or hold public office. **All Virginians must be registered to vote in order to cast a ballot.** You may register to vote online by visiting the Virginia Department of Elections' Citizen Portal https://vote.elections.virginia.gov or by completing the enclosed voter registration form.

Please note this restoration does not change any other legal restrictions or requirements imposed by your conviction. In addition, this action does not restore the right to ship, transport, possess or receive firearms, which must be restored by a court in accordance with Va. Code §18.2-308.2.

If you have any questions regarding rights restoration, please contact the Restoration of Rights Office for the Secretary of the Commonwealth at (804) 692-0104 or visit our website for more information www.restore.virginia.gov. Governor Youngkin firmly believes in the grace of second chances and looks forward to your civic participation.

Sincerely,

Kay Coles James
Secretary of the Commonwealth

Patrick Henry Building • 1111 East Broad • Richmond, Virginia 23219
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ROR 00014

Hawkins_Def_000030

EXHIBIT 3

GOVERNOR OF VIRGINIA
Glenn Youngkin

For Immediate Release: October 21, 2022
Contacts: Office of the Governor: Macaulay Porter, Macaulay.Porter@governor.virginia.gov

Governor Glenn Youngkin Announces the Restoration of Rights for over 800 Formerly Incarcerated Virginians

RICHMOND, VA — Governor Glenn Youngkin announced that civil rights have been restored to over 800 Virginians. Rights were restored for approved individuals last week in order to ensure those who are interested in voting in the November 8th election could register to do so before Monday's registration deadline.

"Second chances are essential to ensuring Virginians who have made mistakes are able to move forward toward a successful future. I am proud of the efforts made by these formerly incarcerated Virginians to regain their civil rights," **said Governor Glenn Youngkin.** "I applaud those who have committed to starting fresh with renewed values and a will to positively contribute to our society."

"Civil rights are fundamental to active participation in one's government," **said Secretary Kay Coles James.** "Governor Youngkin strongly believes in the grace of second chances, and our team has given personal consideration to each approved candidate. We are committed to continuing our strong efforts for the fair consideration of all applicants."

The administration will continue to restore rights on an ongoing basis. Individuals who want more information or would like to apply to have their rights restored should visit: www.restore.virginia.gov

Applicants waiting for rights to be restored may check the status of their application online.

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GOVERNOR OF VIRGINIA
Glenn Youngkin

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

GEORGE HAWKINS Plaintiff, v. GLENN YOUNGKIN, in this official capacity as Governor of Virginia, and KELLY GEE, in her official capacity as Secretary of the Commonwealth of Virginia Defendants.	)	Civil Action No. 3:23-cv-00232

PLAINTIFF'S BRIEF IN RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

Plaintiff George Hawkins ("Plaintiff" or "Mr. Hawkins") has challenged the selective, arbitrary re-enfranchisement of Virginians with felony convictions. It is no defense that Governor Glenn Youngkin has restored voting rights to thousands of individuals, ECF No. 61 at 10, because he is also arbitrarily, selectively denying restoration to many Virginians. Just as Defendants could not impose an arbitrary vote-licensing scheme for eligible Virginia voters, they also cannot impose an arbitrary vote-licensing scheme on individuals who are presently ineligible to vote as a matter of Virginia law. Plaintiff and other similarly situated Virginians have not lost their rights under the First Amendment or any other part of the U.S. Constitution; to argue otherwise would run directly contrary to the U.S. Supreme Court's decision in *Hunter v. Underwood*, 471 U.S. 222 (1985), which struck down Alabama's felony disenfranchisement law as racially discriminatory. Furthermore, Plaintiff does not seek to end felony disenfranchisement in Virginia but to compel Defendants to adopt a non-arbitrary restoration system.

At the outset, what Defendants are *not* arguing is telling. Defendants no longer contend that the First Amendment does not protect voting as expressive conduct. This time around, Defendants have also not argued that the First Amendment unfettered discretion doctrine requires a showing of actual invidious discrimination. They appear to acknowledge that where the line of First Amendment cases culminating in *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988), and *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992), applies, the arbitrary licensing of protected expressive conduct is per se prohibited. Finally and crucially, Defendants make no argument that their voting rights restoration policies and procedures satisfy the demands of the First Amendment doctrine enforced in those precedents. They simply do not believe their restoration scheme must conform to this federal constitutional doctrine.

So then what is Defendants' explanation as to why this longstanding First Amendment doctrine should not apply? Defendants' answer is one word: clemency. In their view, because Virginia law chooses to confer the exclusive power of voting rights restoration on the Governor and does not restore the franchise by operation of law based on objective indicia like the completion of a term of incarceration, parole, and/or probation, the entire system is immune from First Amendment challenges. That is, regardless of the clear implications for First Amendment-protected expressive conduct and the pervasive risk of viewpoint discrimination that the Supreme Court has recognized in arbitrary licensing schemes, Defendants posit that the state-law choice to label voting rights restoration as "clemency" should bar all First Amendment scrutiny. They rely principally on a handful of Fourteenth Amendment equal protection and due process cases that have nothing to say about how the First Amendment and state executive clemency should be reconciled. Moreover, privileging state-law executive clemency regimes over First Amendment doctrine, as Defendants advocate, would turn the Supremacy Clause on its head.

As to similar First Amendment cases, there is no final decision on the merits that supports Defendants' argument. Defendants cite an Eleventh Circuit motions panel's order staying a decision that *did* find voting rights restoration subject to the First Amendment unfettered discretion doctrine. *Hand v. Scott*, 888 F.3d 1206 (11th Cir. 2018). But that appeal became moot upon the adoption of a constitutional amendment in Florida and *before* the separate merits panel could decide the First Amendment questions. *Hand v. DeSantis*, 946 F.3d 1272, 1274–75 (11th Cir. 2020). Defendants also point to a more recent Sixth Circuit decision affirming the dismissal of a similar First Amendment challenge. *Lostutter v. Kentucky*, No. 22-5703, 2023 WL 4636868 (6th Cir. July 20, 2023), *cert. denied sub nom. Aleman v. Beshear*, No. 23-590, 2024 WL 674760 (U.S. Feb. 20, 2024). But that case was dismissed for lack of standing, *not* based on any finding that

clemency is per se immune from First Amendment review. Further, that decision strays far afield from the U.S. Supreme Court's precedents commanding a functional analysis in First Amendment cases. Ultimately, Plaintiff's case presents a question of first impression in the Fourth Circuit.[1]

Finally, Defendants mischaracterize the nature of the relief sought in this case and misapply the political question doctrine. They erroneously argue that Plaintiff's request that this Court order Defendants to implement a non-arbitrary restoration system that comports with the First Amendment raises a non-justiciable political question and would violate the Virginia Constitution. But the requested relief is standard to cure violations of the First Amendment unfettered discretion doctrine. The legal doctrine at issue here is judicially manageable in the same way all longstanding, well-established constitutional tests are. And even though the Supremacy Clause of the U.S. Constitution means First Amendment rules trump any contrary state law or precedent, it would be quite simple for Defendants to replace the current arbitrary system with a restoration scheme that satisfies both federal and Virginia constitutional requirements.

II. RESPONSE TO DEFENDANTS' STATEMENT OF UNDISPUTED MATERIAL FACTS

Defendants propose just *six* "undisputed material facts"—all of which relate to Mr. Hawkins. ECF No. 61 at 10–11. Yet, two proposed facts are immaterial, and two other proposed facts are incomplete and, therefore, misleading.

1. The accuracy of the facts set forth in Paragraph 1 is undisputed, but they are immaterial. The nature of Mr. Hawkins' particular felony convictions is irrelevant to the

[1] Defendants' assertion that longstanding tradition supports the constitutionality of Virginia's restoration process is meritless. ECF No. 61 at 18–19. The fact that Virginia's rights restoration system has not been challenged previously on First Amendment grounds does not make it constitutional. In any event, as discussed *infra* at 24, Governor Youngkin's current arbitrary process dispensed with the non-discretionary, objective process of the prior three administrations. If anything, Virigina was nearly a decade into a new tradition.

adjudication of his constitutional claims, and Defendants have never claimed otherwise. It is indisputable that the nature of an applicant's felony convictions does not determine whether Governor Youngkin will grant or deny a voting rights restoration application. *See* ECF No. 57-1, Sherman Decl. ¶ 6, Ex. E. Yet, by singling out and highlighting the nature of Mr. Hawkins's convictions in a vacuum, Defendants seek only to prejudice him.

2. The accuracy of the facts set forth in Paragraph 2 is undisputed, but they are immaterial. The length of Mr. Hawkins's prison sentence is irrelevant, and Defendants have never claimed otherwise. If these facts were to be considered, it should be noted that it is undisputed that Mr. Hawkins served a fraction of his prison sentence, having been released from incarceration on May 3, 2023. *See* ECF No. 57-2, Hawkins Decl. ¶ 2.

3. Undisputed.

4. Undisputed.

5. This factual contention is undisputed with the clarification that on June 18, 2023, Mr. Hawkins submitted a *second* voting rights restoration application. Hawkins Decl. ¶ 6.

6. Plaintiff disputes this fact in part. Mr. Hawkins does not know the date on which Governor Youngkin "notified" him that Governor Youngkin had deemed him "ineligible at this time." Mr. Hawkins knows only that his status changed sometime after July 2023, and that the portal showed the "date closed" for his application was August 17, 2023. Hawkins Decl. ¶ 6, Ex. B. Therefore, Plaintiff disputes Defendants' contention that Governor Youngkin provided notice to Mr. Hawkins on August 17, 2023, which is not supported by the record. The source cited by Defendants for this contention (ECF No. 39) provides only the date on which Defendants' *counsel* learned that Mr. Hawkins' application for re-enfranchisement had been deemed "ineligible at this

time" (*i.e.*, October 4, 2023) and does not support Defendants' proposed factual contention that Governor Youngkin notified Mr. Hawkins on August 17, 2023.

III. ARGUMENT

A. Virginia's discretionary voting rights restoration scheme functions as a licensing scheme.

As a threshold matter, this Court will need to resolve whether the First Amendment unfettered discretion doctrine applies, and that will require deciding whether Virginia's voting rights restoration system is *functionally* a licensing system. Taking a formalistic approach, Defendants argue that voting rights restoration is a type of clemency, and "a clemency regime 'is fundamentally different from obtaining an administrative license or permit.'" ECF No. 61 at 17 (quoting *Lostutter*, 2023 WL 4636868, at *3–4). Though Defendants fail to develop this argument, they rely on the Sixth Circuit's decision in *Lostutter*, which is not binding on this Court and runs contrary to Supreme Court precedents requiring a functional analysis for First Amendment cases.

The Supreme Court has repeatedly held that First Amendment challenges must be analyzed functionally, not formalistically, and voting rights restoration in Virginia operates as the functional equivalent of a licensing scheme. Across various First Amendment precedents and doctrines, the governing tests or frameworks always turn on functional analyses. *See, e.g.*, *Garcetti v. Ceballos*, 547 U.S. 410, 424–25 (2006) (in First Amendment retaliation claim implicating question as to whether public employee had spoken as government employee or private citizen, noting "proper inquiry is a practical one" and "[f]ormal job descriptions" are not dispositive); *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 . . . ."); *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."); *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."); *National 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."); *see also Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 392–93 (1995) ("The Constitution constrains governmental action by whatever instruments or in whatever modes that action may be taken . . . And under whatever congressional label.") (citation omitted).

The Supreme Court has also analyzed First Amendment challenges in the election law context with a functional perspective. One prime example is the line of First Amendment challenges to campaign finance laws using a functional approach. After *Buckley v. Valeo*, 424 U.S. 1, 12–59 (1976), the Court applied the dichotomy between contributions and expenditures flexibly to prevent the evasion of contribution limits. In *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604, 616–18 (1996) ("*Colorado I*"), the spending limits set by the Federal Election Campaign Act were found unconstitutional where "the expenditures at issue were *not potential alter egos for contributions*, but were independent and therefore *functionally* true

expenditures." *FEC v. Colorado Republican Federal Campaign Comm.*, 533 U.S. 431, 463 (2001) ("*Colorado II*") (emphasis added). Then, in upholding the facial constitutionality of coordinated party expenditure limits against the First Amendment challenge in *Colorado II*, the Supreme Court once again took a practical view of the regulated conduct and found "no significant *functional* difference between a party's coordinated expenditure and a direct party contribution to the candidate." 533 U.S. at 464 (emphasis added). Such pragmatic assessments were necessary "to minimize circumvention of contribution limits." *Id*. at 465.

Functional equivalence is regularly invoked as the standard in First Amendment cases because of the fundamental importance of the constitutional right to political expression or expressive conduct and the risk that an unconstitutional regulation would evade a formalistic test's detection. For example, in *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) ("*WRTL*"), the Supreme Court ruled 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].'" *Id*. at 456 (citations omitted; alteration in quotation). The regulatory scheme and multi-factor balancing test developed in the wake of *WRTL* would be revisited by the Court in *Citizens United v. FEC*, 558 U.S. 310, 334–35 (2010) (citing *WTRL*, 551 U.S. at 470). Once again, the Court evaluated that regulatory framework from a functional perspective and focused on the law's practical consequences. The majority wrote that even though this regulatory scheme would not qualify as "a prior restraint on speech in the strict sense of that term," it was inescapable that

> [a]s a practical matter, . . . given the complexity of the regulations and the deference courts show to administrative determinations, a speaker who wants to avoid threats of criminal liability and the heavy costs of defending against FEC enforcement must ask a governmental agency for prior permission to speak. *These onerous restrictions thus function as the equivalent of prior restraint by giving the FEC power analogous to licensing laws implemented in 16th- and 17th-century*

> *England*, laws and governmental practices of the sort that the First Amendment was drawn to prohibit.

Citizens United, 558 U.S. at 334–35 (internal citations omitted, emphasis added). This passage accords with the long line of First Amendment cases across a wide spectrum of doctrines that the Court has resolved using a functional, not a formalistic, lens. *Citizens United* is particularly germane here, because it reflects the Court's reasoning by analogy to find a campaign finance regulation "function[s] as the equivalent" of an arbitrary licensing regime, *id.*, exactly what the First Amendment unfettered discretion doctrine prohibits.

Even beyond the First Amendment, functional analyses always demand an evaluation of practical effects or impact. In *Quackenbush v. Allstate Insurance Co.*, the Supreme Court held that a remand order was appealable, even though such orders "do not meet the traditional definition of finality." 517 U.S. 706, 715 (1996). Nonetheless, this difference in "the nature of the vehicle" (to borrow *Lostutter*'s phrase) was immaterial because the remand order was "functionally indistinguishable" from a stay order the Court had previously found appealable in another case. *Id.* at 714–15. Like a stay order, a remand "puts the litigants . . . effectively out of court, and its *effect* is precisely to surrender jurisdiction of a federal suit to a state court." *Id.* (citations omitted, emphasis added). The Court's focus on practical effects—properly privileging ends over means—is what a functional analysis requires.

Lostutter violated this uniform Supreme Court precedent by focusing on state-law semantics that are irrelevant to the First Amendment question and therefore is, with respect, wrongly decided. 2023 WL 4636868, at *3–6. Seizing on the "partial pardon" label in Kentucky law, Ky. Rev. Stat. § 196.045(1)(e), caused the panel to misapply and breach the Supreme Court's longstanding directive to engage First Amendment rights cases with a functional perspective. The panel's summary is emblematic of that central error:

> Mere similarity in result does not change the nature of the vehicle used to reach that result, and Kentucky law is clear that it restores felons their voting rights through a partial executive pardon, not through the granting of an administrative license. . . . So, regardless of any similarity in outcome—in that a pardoned felon and a licensed civilian may both engage in conduct previously forbidden—the vehicles to achieve that outcome remain fundamentally different.

Id. at *6. The panel's conclusion that the "nature of the vehicle"—and not the "result" or "outcome"—was dispositive lacked legal support and directly contradicted the litany of Supreme Court precedents requiring a functional inquiry in a wide spectrum of First Amendment contexts. The panel's focus on the purported "nature of the vehicle" erroneously privileged means over ends and minimized the practical effects of a purely discretionary voting rights restoration system.

The Sixth Circuit's failure to apply a functional analysis is particularly erroneous in this context as it runs directly contrary to the purpose of the First Amendment unfettered discretion doctrine. From its inception, the unfettered discretion doctrine has been applied to strike down both obviously and *less* obviously unconstitutional schemes governing the licensing of protected expression and expressive conduct—*i.e.*, both overt and covert threats of viewpoint discrimination. In *Saia v. People of State of New York*, the Supreme Court invalidated an arbitrary permit scheme for loudspeaker use precisely because viewpoint discrimination is easily concealed by a licensing system with no definite rules or criteria:

> In this case a permit is denied because some persons were said to have found the sound annoying. In the next one a permit may be denied because some people find the ideas annoying. Annoyance at ideas can be cloaked in annoyance at sound.

334 U.S. 558, 562 (1948). As *Saia* and later cases articulated, this preventative doctrine is in large part animated by the risk that viewpoint discrimination will evade detection and judicial review. *See City of Lakewood*, 486 U.S. at 759 (citing "the difficulty of effectively detecting, reviewing, and correcting content-based censorship 'as applied'" as one of two "major First Amendment risks associated with unbridled licensing schemes"); *see also id.* at 762 (noting "the twin threats of self-

censorship and undetectable censorship"). Given the Supreme Court's stated objective to head off and neutralize difficult-to-detect risks of viewpoint discrimination, the constitutional ban on arbitrary licensing of expressive conduct must be construed functionally and flexibly.

Given the Supreme Court's consistent precedent in the First Amendment context, this Court must apply a functional analysis in assessing whether Plaintiff may invoke the First Amendment unfettered discretion doctrine. Functionally, there is no material difference between Virginia's voting rights restoration system and a licensing scheme. The mechanics and outcomes of this restoration system are remarkably similar to those of a licensing system. Disenfranchised individuals with any felony conviction must apply to a government office seeking permission to vote. ECF No. 59, Joint Stipulation of Undisputed Facts ("JSUF") ¶¶ 9–11.[2] And Governor Youngkin has sole and unlimited discretion to decide whether to grant or deny a license to vote to these individual applicants. *Id.* ¶¶ 14–15. Therefore, an individual applies for a license to engage in expressive conduct, and a state official selectively and arbitrarily grants or denies that license. If denied, the applicant can reapply. *Id.* ¶ 45. Further, absent this license from the Governor, the applicant may not lawfully engage in this form of political expressive conduct. Virginians with felony convictions may not register and vote prior to restoration: if an individual with a felony conviction willfully registers to vote prior to restoration, that is a Class 5 felony. Va. Code Ann. § 24.2-1016. As *Lostutter* acknowledged, "the result of the felon reenfranchisement scheme is that a felon is 'allowed' to vote again, where previously prohibited. And the result of a license or permit is that a person is 'allowed' to engage in regulated conduct, where they were previously

[2] The current restoration of civil rights application also embraces several other civil rights, but Petitioners' First Amendment challenge is solely focused on the right to vote.

prohibited." 2023 WL 4636868, at *6. Accordingly, Virginia's voting rights restoration system has all the trappings of an administrative licensing scheme governing expressive conduct.

Defendants have also characterized *Lostutter* as "a nearly identical challenge," ECF No. 61 at 17, but carefully omit an important distinction between Kentucky law and Virginia law. Whereas Kentucky law labels voting rights restoration as a "partial pardon," Ky. Rev. Stat. § 196.045(1)(e)—and, contrary to Supreme Court precedent, *Lostutter* placed significant and undue weight on this state-law label, 2023 WL 4636868, at *3–6—Virginia law and even the current rights restoration form developed by Defendants expressly disclaim that voting rights restoration is in any way a pardon. Defendants' rights restoration form expressly states at the bottom: "This is not a pardon . . . ." Sherman Decl. ¶ 9, Ex. H. This disclaimer mirrors the Supreme Court of Virginia's jurisprudence in this area which refers to voting rights restoration and pardons as distinct executive actions. *See Howell v. McAuliffe*, 292 Va. 320, 337 (2016) ("Never before, however, have any of the prior 71 Virginia Governors issued a sua sponte clemency order of any kind, *whether to restore civil rights or grant a pardon*, to an entire class of unnamed felons . . .") (emphasis added); *id*. at 343 (distinguishing "the power to remove political disabilities alone" from "all the other clemency powers, such as the pardon power"). In their motion to dismiss, trying to make *Lostutter* work for them, Defendants had argued "[f]elon re-enfranchisement is a type of 'partial executive pardon,'" ECF No. 27 at 30, but they have since abandoned this characterization.

This is consistent with the challenged provisions in the Virginia Constitution and Virginia statutes, which give the Governor the power to "restore[ ]" voting rights, VA. CONST. art. II, § 1, Va. Code Ann. § 24.2-101, or, alternatively, "to remove political disabilities." VA. CONST. art. 5, § 12. None of these provisions reference the Governor's pardon power. Consistent with that, in Virginia, "[a] pardon may be full or partial, absolute or conditional." *Blount v. Clarke*, 291 Va.

198, 205 (2016). Voting rights restoration is just one of the many legal effects of a full or absolute pardon in Virginia, whereas a partial pardon may omit voting rights restoration. *Id*. at 205–06, 210–11. Voting rights restoration is not itself a pardon, and it is not inherently part of a pardon. Furthermore, and of greater relevance given Defendants' pivot to calling voting rights restoration a form of clemency, voting rights restoration is not even intrinsically or necessarily a species of clemency. Forty states plus D.C. handle voting rights restoration entirely outside their clemency systems by creating a non-discretionary path to re-enfranchisement by restoring voting rights upon the completion of incarceration, parole and probation, and/or a waiting period, or not disenfranchising people upon a felony conviction.[3] In any event, it would be formalistic and contrary to Supreme Court precedent to let state-law labels dictate the outcome of Plaintiff's First

[3] 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. 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.

Amendment claims. Instead, the proper inquiry is whether discretionary voting rights restoration in Virginia—and *not* the pardon power or clemency generally—functions as a licensing scheme such that the First Amendment unfettered discretion doctrine applies. As discussed above, the answer to that is clear.[4]

B. Plaintiff has not challenged Virginia's felony disenfranchisement laws.

Plaintiff has not argued that the First Amendment bars what the Fourteenth Amendment authorizes—felony disenfranchisement laws—or that it guarantees people with felony convictions the right to vote. The First Amendment imposes independent and specific constitutional limitations, and Plaintiff *only* challenges Defendants' claimed power to re-enfranchise people with felony convictions *arbitrarily*, not the state's power to disenfranchise them. Accordingly, Defendants continue to mistakenly cite inapposite cases in which the plaintiffs challenged felony disenfranchisement *itself* as a per se violation of the First Amendment. *See Howard v. Gilmore*, No. 99-2285, 205 F.3d 1333, 2000 WL 203984, at *1 (4th Cir. 2000) (per curiam) (unpublished). But Plaintiff makes no such argument. The sole First Amendment issue adjudicated in the Fourth Circuit's unpublished decision in *Howard* was a "complain[t] that *cancellation* of . . . voting privileges violates the First Amendment." *Id*. at *1 (emphasis added). Plaintiff has instead argued that arbitrary *re-enfranchisement* violates the First Amendment, a constitutional challenge not adjudicated in *Howard*. Nor does Plaintiff claim that he is entitled to vote under the First Amendment. Rather, Plaintiff argues that the First Amendment guarantees him a non-arbitrary

[4] Additional arguments against the *Lostutter* panel's reasoning based on the nature of pardons and the nature of licensing are contained in Plaintiff's response to Defendants' motion to dismiss. Plaintiff does not reproduce these here but incorporates them by reference. ECF No. 30 at 33–36. The panel's reasoning in this vein is of significantly diminished relevance here, given Defendants expressly disclaim any relation between pardons and voting rights restoration under Virginia law.

voting rights restoration system *regardless* of whether that system ultimately results in the restoration of his own right to vote.

An analogy is helpful here. 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. State voting eligibility laws clearly do not violate the First Amendment by setting the minimum age at 18 or requiring voters to be U.S. citizens, but they would if they gave election officials unlimited discretion to selectively grant or deny the right to vote to 16- and 17-year-olds or legal permanent residents upon the submission of applications accompanied by high school transcripts or essays on American government. 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").

As the above example demonstrates, it is indisputable that arbitrary enfranchisement—and also arbitrary disenfranchisement—would be unconstitutional. Defendants do not dispute this. The ultimate question then is whether arbitrary *re-enfranchisement* should survive constitutional scrutiny simply based on the prefix "re". Plaintiff contends that 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 are currently ineligible to vote under Virginia law due to a felony conviction. That such individuals once had but lost their right to vote under state law does not change the fact that the First Amendment unfettered discretion doctrine is violated by arbitrarily licensing expressive conduct such as voting.

Finally, Defendants contend that this First Amendment doctrine has no application here because disenfranchised Virginians presently have no right to vote, whereas the plaintiffs in other licensing cases have rights directly under the First Amendment. ECF No. 61 at 16, 18. This argument quickly proves illusory. It is noteworthy that this is *not* an argument that arbitrary vote-licensing is absent from Virginia. Rather, it is an argument that the arbitrary licensing of expressive conduct poses no constitutional problem when the source of the right to engage in the expressive conduct in question is a state statute like a voting eligibility law. Defendants do not substantiate this counterintuitive notion though. The sole authority they can point to is the Sixth Circuit's decision in *Lostutter*, which formalistically concluded that because a disenfranchised person seeks voting rights "restoration," they cannot assert any *current* interest in voting or be injured by the arbitrary allocation of voting rights to people with felony convictions. 2023 WL 4636868, at *4.[5] However, *Lostutter* is on its own in advancing this proposition. There are no First Amendment precedents that find arbitrarily conferring the right to engage in expressive conduct is permissible so long as that right is established by state statute instead of the U.S. Constitution directly.[6]

C. The "clemency" label affords no defense.

Beyond those threshold arguments, Defendants' principal argument in opposition to Plaintiff's First Amendment claims is that clemency is immune to constitutional challenges. American democracy inherits clemency from the English monarchy. The Supreme Court recounted this history in *Herrera v. Collins*:

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[5] By this logic, the Supreme Court's decision in *Hunter v. Underwood* would be wrongly decided. If the disenfranchised lacked any interest in voting, they would lack standing to challenge discriminatory disenfranchisement or re-enfranchisement, just the same as arbitrary disenfranchisement and re-enfranchisement.

[6] The only First Amendment case cited by the Sixth Circuit is *City of Lakewood*. *Lostutter*, 2023 WL 4636868, at *4. The panel's characterization of *Johnson v. Bredesen*, 624 F.3d 742 (6th Cir. 2010) is incorrect; there were no First Amendment claims in that case.

> 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; that there is a magistrate, who has it in his power to extend mercy, wherever he thinks it is deserved: holding a court of equity in his own breast, to soften the rigour of the general law, in such criminal cases as merit an exemption from punishment."

506 U.S. 390, 412 (1993) (internal citations omitted); *see also Bowens v. Quinn*, 561 F.3d 671, 676 (7th Cir. 2009) ("Executive clemency is a classic example of unreviewable executive discretion because it is one of the traditional royal prerogatives . . . borrowed by republican governments for bestowal on the head of government."). "Clemency" is just a label or term of art, which has no talismanic power to ward off federal courts' constitutional scrutiny. Its history only underscores why the "power to extend mercy" upon whim, *Herrera*, 506 U.S. at 412, and the right to express one's political preferences at the ballot box are fundamentally antithetical. As previously discussed, voting rights restoration is not even intrinsically or necessarily a form of clemency. *See supra* at 12–13. Ultimately, a ruling in Defendants' favor based on the "clemency" label would elevate formalism over functionality and violate the Supreme Court's directive for First Amendment cases. *See supra* at 5–13.

Defendants nonetheless seek to shore up their formalistic argument by pointing to Fourteenth Amendment cases on clemency. However, there is no Fourteenth Amendment question presented for this Court's resolution, and so these cases are inapplicable. Notwithstanding the fact that Plaintiff has only sued on First Amendment grounds, Defendants cite cases that addressed only Fourteenth Amendment claims. *See* ECF No. 61 at 12–15. *Beacham v. Braterman*, 300 F. Supp. 182, 182–83 (S.D. Fla. 1969), *summarily aff'd Beacham v. Braterman*, 396 U.S. 12 (1969), has no application here as it only considered an equal protection challenge. The Supreme Court had no occasion to rule on the First Amendment claims raised by Plaintiff, and the citation to

Beacham in *Richardson v. Ramirez*, 418 U.S. 24, 53 (1974), has no bearing on whether arbitrary *re-enfranchisement* passes muster under the First Amendment.

Defendants also cite to two decisions narrowly construing the role of the Fourteenth Amendment's Due Process Clause in the context of pardons and other forms of clemency: *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458 (1981), and *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998). *See* ECF No. 61 at 12–13. But Plaintiff has also not asserted any due process challenges under the Fourteenth Amendment. It is not a lack of process that Plaintiff challenges. Instead, Plaintiff challenges what is glaringly absent from this system: a set of objective rules and criteria to govern the ultimate dispositions of voting rights restoration applications and reasonable, definite time limits by which these determinations must be made. Indeed, Plaintiff's Count One under the First Amendment unfettered discretion doctrine plainly does not concern *process*, but the lack of *substantive* rules and criteria governing Governor Youngkin's power to grant or deny voting rights restoration applications.

These due process cases are particularly inapposite when one considers the fundamental importance of First Amendment rights and the Supreme Court's solicitous approach to safeguarding them. While it may suffice in the due process context to note that a clemency decision turns "on purely subjective evaluations and on predictions of future behavior by those entrusted with the decision," *Dumschat*, 452 U.S. at 464, subjective standards and arbitrary decision-making based on such vague, amorphous standards are per se prohibited in the First Amendment context. *See Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150–53 (1969) (invalidating Birmingham's permit scheme for marches or demonstrations that lacked "narrow, objective, and definite standards" and was "guided only by [Commissioners'] own ideas of 'public welfare, peace, safety, health, decency, good order, morals or convenience'"). The Governor's admission

that he is "mak[ing] a predictive determination that an individual will live as a responsible citizen and member of the political body" is damning in the First Amendment context because this subjective "responsible citizen" test *directly* controls whether an individual applicant may or may not cast a ballot—the most fundamental of all forms of political expression. Sherman Decl. ¶ 2, Ex. A at Response to Interrog. No. 2, at 3.

Nonetheless, Defendants dismiss the notion "that the Governor's *discretion alone*—irrespective of how that discretion is exercised—violates the First Amendment." ECF No. 61 at 11 (emphasis in original). Yet this is *precisely* what the U.S. Supreme Court has held. *See City of Lakewood*, 486 U.S. at 757 ("[T]he mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, *even if the discretion and power are never actually abused*.") (emphasis added); *Forsyth Cnty.*, 505 U.S. at 133 n.10 ("[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.") (emphasis added); *see also Child Evangelism Fellowship of Md., Inc. v. Montgomery Cnty. Pub. Schs.*, 457 F.3d 376, 389 (4th Cir. 2006) (holding that because take-home flyer policy "offer[ed] no protection against the discriminatory exercise of [school district's] discretion, it create[d] too great a risk of viewpoint discrimination to survive constitutional scrutiny"). Defendants confuse the First Amendment unfettered discretion doctrine with Fourteenth Amendment equal protection law and continue to ignore any ruling that forecloses or undermines their arguments.

Accordingly, state-law executive clemency regimes are not immune from the First Amendment's prohibitions. The existing case law on clemency is inapposite and, if anything, only

serves to underscore the constitutional problems that arise when unfettered official discretion and licensing political expressive conduct are combined.

D. The Fourteenth Amendment's guarantees do not displace the First Amendment's more robust rules in the voting rights context.

In another bid to cut off First Amendment challenges categorically, Defendants revisit their argument that the Fourth Circuit has (quietly and obliquely) taken the momentous step of holding that the Fourteenth Amendment is the only source for causes of action against laws governing the exercise of the right to vote. When they first raised this argument in their motion to dismiss, Defendants quoted repeatedly from *Washington v. Finlay*, arguing it stood for the proposition that the First Amendment "offers no protection of voting rights beyond that afforded by the fourteenth or fifteenth amendments." 664 F.2d 913, 928 (4th Cir. 1981); ECF No. 27 at 25. But Defendants had carefully omitted the crucial prefatory language that clearly narrowed *Washington*'s holding to vote dilution challenges:

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

664 F.2d at 928 (emphasis added). The omitted clauses strictly limit *Washington*'s holding to challenges to the dilution of an *otherwise-intact* right to vote. All that *Washington* holds is that when vote dilution is at issue, the First Amendment offers no distinct cause of action, and only the Fourteenth Amendment is violated *in those circumstances*. But Plaintiff has not asserted a vote dilution claim, and *Washington* does not discuss the First Amendment implications of a law that directly regulates whether a person is eligible or not to vote, such as an arbitrary voting rights restoration scheme. *Washington* made clear that its holding would not apply in such circumstances, where there is a "device in use that directly inhibits participation in the political process." *Id*.

In their motion for summary judgment, Defendants have shifted and now urge the Court to focus instead on *Washington*'s progeny. ECF No. 61 at 15–16. But despite some broadly phrased dicta, none of these cases has extended or could extend *Washington*'s narrow holding to the context of vote denial. In *Irby v. Virginia State Board of Elections*, the Fourth Circuit considered a challenge to an appointive system for filling a particular public office and summarily reaffirmed *Washington* without the limiting language. 889 F.2d 1352, 1359 (4th Cir. 1989). The Court had no occasion and no ability to extend *Washington* to the context of vote denial; in an appointive system, no voting occurs whatsoever. Similarly, in *Republican Party of North Carolina v. Martin*, the Fourth Circuit rejected an attempt to assert a First Amendment challenge to alleged partisan gerrymandering in the method of electing judges. 980 F.2d 943, 959 n.28 (4th Cir. 1992). As this too was a species of vote dilution claim, this decision also did not break any new ground. Accordingly, no court has ever held that the First Amendment *categorically* offers no protection to voting rights *in any context* simply because the Fourteenth Amendment exists. Even Defendants abandoned this argument by endorsing the idea that "'a discretionary felon-reenfranchisement scheme that was facially or intentionally designed to discriminate based on viewpoint . . . might violate the First Amendment.'" ECF No. 27 at 33 (quoting *Hand*, 888 F.3d at 1211–12).

It stands to reason that the First Amendment's rules remain available to plaintiffs suing over the right to vote. After all, as the Supreme Court has made clear, the First Amendment unfettered discretion doctrine affords significantly more robust protection than the Equal Protection Clause. This doctrine is not medicine for an ill patient, the way Fourteenth Amendment discrimination law is, but rather a vaccination inoculating First Amendment-protected expressive conduct against disease. *Compare Forsyth Cnty.*, 505 U.S. at 130–33 (striking down local government's arbitrary permit application process on its face without any proof of actual

discrimination), *with Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 264–65 (1977) (requiring proof of actual, intentional discrimination in equal protection case challenging local government's denial of rezoning application). The Supreme Court has shown zero tolerance for even the risk of discriminatory treatment under the First Amendment, whereas discrimination claims under the Fourteenth Amendment require proof that discrimination has already occurred.

Nevertheless, Defendants seek to blur the line between the First Amendment and Fourteenth Amendment doctrines. But they have notably abandoned the argument from their motion to dismiss that Plaintiff must demonstrate "actual invidious discrimination" to bring a First Amendment unfettered discretion claim. ECF No. 27 at 34. This notion was firmly rejected by the U.S. Supreme Court in *Forsyth County*:

> Facial attacks on the discretion granted a decisionmaker are not dependent on the facts surrounding any particular permit decision . . . [T]he success of a facial challenge on the grounds that an ordinance delegates overly broad discretion to the decisionmaker rests not on whether the administrator has exercised his discretion in a content-based manner, but whether there is anything in the ordinance *preventing* him from doing so.

505 U.S. at 133 n.10 (emphasis added) (citations omitted). Because Mr. Hawkins has asserted facial challenges, he suffers a per se 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 Mr. Hawkins's personal re-enfranchisement is irrelevant. The existence of an actual, improper discriminatory or biased motive need not be shown to strike down such a law on its face. *See 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); *Roach v. Stouffer*, 560 F.3d 860, 869 & n.5 (8th Cir. 2009) (holding pro-life group "need not prove, or even allege" viewpoint discrimination in successful facial First Amendment challenge to officials' "unbridled discretion" in specialty license plate program).

Regardless of whether or how often it is exercised, and regardless of the disposition of any particular license application, such unfettered discretion is per se unlawful in the First Amendment context.

E. Plaintiff's requested remedy is standard and necessary to redress the federal constitutional violation.

As a remedy for these First Amendment violations, Plaintiff has requested that this Court declare Defendants' rights restoration scheme unconstitutional, enjoin its arbitrary use, and order *Defendants* to cure their unconstitutionally arbitrary scheme in the first instance. ECF No. 22, Second Am. Compl. at 24–25. Defendants contend that this requested remedy "demonstrates that [Plaintiff's] claims fail" and that granting such relief would be "unprecedented" and violate Virigina's Constitution by running afoul of *Howell*'s individualized basis requirement. ECF No. 61 at 19–22; *see also Howell*, 291 Va. at 341 (requiring restoration on "individualized case-by-case basis taking into account the specific circumstances of each"). These arguments are meritless.

First, the remedy Mr. Hawkins seeks is run-of-the-mill in constitutional rights litigation. Plaintiff has merely requested the invalidation of Defendants' arbitrary restoration scheme and an injunction requiring *Defendants*, in the first instance, to cure that constitutional violation by imposing a new non-arbitrary scheme with objective rules and criteria and reasonable, definite time limits. Plaintiff is *not* asking this Court to fashion and impose a new rights restoration process or order Defendants to use any set of specific objective rules and criteria. Instead, Mr. Hawkins asks this Court to order Defendants to replace their current unconstitutional rights restoration system with objective and uniformly applied rules and criteria that satisfy the First Amendment.

Courts routinely declare challenged laws constitutionally invalid and issue injunctions that give defendants the first opportunity to cure that violation. This is commonplace in other constitutional and federal law challenges under 42 U.S.C. § 1983 to election and voting laws, most

commonly in redistricting cases where courts will enjoin defendants from using unlawful maps and afford defendants the first chance to draw maps that comply with the U.S. Constitution and the Voting Rights Act. *See, e.g.*, *Reynolds v. Sims*, 377 U.S. 533, 585–86 (1964) (affirming district court's decision to give Alabama Legislature opportunity to remedy unconstitutional legislative apportionment scheme); *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) ("When a federal court declares an existing apportionment scheme unconstitutional, it is therefore, appropriate, whenever practicable, to afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan."); *Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1022 (8th Cir. 2006) (affirming district court holding that defendants violated Section 2 of the Voting Rights Act and affirming district court's remedial plan) ("When a Section 2 violation is found, the district court is responsible for developing a constitutional remedy. As required, the defendants were afforded the first opportunity to submit a remedial plan."); *see also Cosner v. Dalton*, 522 F. Supp. 350, 364 (E.D. Va. 1981) ("Whenever possible, of course, a state legislature should have an opportunity to redraw a plan found by the courts to be unconstitutional."); *Brown v. Kentucky Legislative Research Comm'n,* 966 F. Supp. 2d 709, 712, 726–27 (E.D. Ky. 2013) (per curiam) (declaring legislative electoral districts unconstitutional, permanently enjoining their use in future elections, and providing state legislature opportunity to enact a constitutional plan for state legislative reapportionment). Many possible permutations of restoration rules and criteria would satisfy the First Amendment unfettered discretion doctrine; Defendants just need to adopt one of them.

Second, Plaintiff's requested relief would not necessarily create a conflict with *Howell*, which required governors to evaluate applicants on an individualized, case-by-case basis. 292 Va. at 341. But even assuming such a conflict emerged, Defendants ignore that the Supreme Court of

Virginia's interpretation of the Virginia Constitution must yield to the dictates of the U.S. Constitution, which is supreme over state law. U.S. CONST. art. VI, cl. 2; *Reynolds*, 377 U.S. at 584 ("When there is an unavoidable conflict between the Federal and a State Constitution, the Supremacy Clause of course controls."). If Mr. Hawkins prevails, then the First Amendment violation *requires* a remedy, and federal law trumps any conflicting state law or precedent.

Defendants nevertheless maintain that an objective, rules-based restoration system would violate *Howell*. ECF No. 61 at 22; *Howell*, 292 Va. at 341. Though there is no need to accommodate state law in issuing injunctive relief to cure a federal constitutional violation, Defendants or this Court can easily harmonize a non-arbitrary, rules-based restoration system with the Supreme Court of Virginia's decision in *Howell*. Defendants' flawed reasoning conflates an *individualized* assessment with a *subjective* assessment, but *Howell* never states or even suggests that an individualized process cannot also be objective or that these two concepts are mutually exclusive. And, in fact, they are not. It would be quite simple to devise a process that is individualized per *Howell* and objective and non-arbitrary per the First Amendment. Indeed, Governor Youngkin's predecessors, former Governors Terry McAuliffe and Ralph Northam, accomplished that very goal by implementing an objective, non-arbitrary, and non-discretionary rights restoration process that post-dated and complied with *Howell*. *See* Declaration of Nina Beck, ¶¶ 2–4, Exs. A–C. Eligible individuals can be required to submit an individualized application, and those applications can be individually reviewed against a set of objective rules and/or criteria. Such a system would pose no conflict with *Howell* but, in any event, federal law trumps state law when any such conflict arises.

For all the above reasons, there is nothing unusual about the remedies sought by Plaintiff, which would actually give Defendants themselves the first opportunity to cure these First Amendment violations.

F. Defendants' argument premised on the political question doctrine fails.

Lastly, because Defendants misunderstand the nature of Plaintiff's First Amendment claims and the relief sought, they now contend that Mr. Hawkins' lawsuit is barred by the political question doctrine. ECF No. 61 at 20–22. A case presents a nonjusticiable political question when there is a "lack [of] 'judicially discoverable and manageable standards for resolving'" the dispute. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2494 (2019) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)). The political question doctrine has zero application here, because the First Amendment unfettered discretion doctrine presents a longstanding, well-articulated, and judicially manageable standard, and the remedies awarded in such cases are standard and routine.

Whether Governor Youngkin's rights restoration process violates the First Amendment does not present a political question merely because it concerns a state executive exercising discretion to grant or deny Virginians a right to vote. Federal courts routinely scrutinize the constitutionality of state officials' conduct and state laws and frequently in contexts where political considerations and conflict are in play. It is bedrock constitutional law that even powers specifically committed to the states in the U.S. Constitution cannot be "exercised in a way that violates other specific provisions of the Constitution." *Williams v. Rhodes*, 393 U.S. 23, 29 (1968); *see also Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 217 (1986) (holding that 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."); *Baten v. McMaster*, 967 F.3d 345, 351–52 (4th Cir. 2020), *as amended* (July 27, 2020) (rejecting a political question argument because it is well-settled that

Electors Clause, U.S. CONST. art. II, § 1, cl. 2, "does not vest the states with unreviewable authority" in how they appoint presidential electors). In *Williams*, the Supreme Court rejected Ohio's argument that "the political-question doctrine precludes judicial consideration" of challenges to laws regulating access to the state ballot to choose presidential electors, holding that such cases "do raise a justiciable controversy under the Constitution and cannot be relegated to the political arena." 393 U.S. at 28. State power always "lies within the scope of relevant limitations imposed by the United States Constitution." *Baker*, 369 U.S. at 230 (quoting *Gomillion v. Lightfoot*, 364 U.S. 339, 344-45 (1960)). Any argument that federal courts cannot discern the contours of an 85-year-old constitutional doctrine, apply it to state officials' policies, and compel state officials to bring their policies in line with those constitutional requirements is absurd.

In this case, the exercise of state power—issuing licenses to engage in expressive conduct—is one that federal courts have considerable experience reviewing for constitutional compliance. Federal judges evaluating licensing schemes in First Amendment cases do this *routinely*. Under the unfettered discretion doctrine, federal courts invalidate any licensing schemes governing protected expressive conduct where the officials making the determinations have been vested with unfettered discretion to grant or deny the requested licenses, *City of Lakewood*, 486 U.S. at 757, 763–64, or where there are no reasonable, definite time limits within which the decisionmaker must grant or deny the license. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 226 (1990). Unlike partisan gerrymandering, where the U.S. Supreme Court repeatedly failed to identify a judicially manageable standard before declaring the question nonjusticiable in *Rucho*, over the last 85 years, the Supreme Court has refined and clarified the standard under which licensing schemes must be reviewed for First Amendment compliance.

Crucially, the reviewing courts ensure that licensing systems are governed by objective rules and criteria and reasonable, definite time limits. *See, e.g.*, *Am. Entertainers, L.L.C. v. City of Rocky Mount, North Carolina*, 888 F.3d 707, 720–22 (4th Cir. 2018) (holding that licensing scheme violated First Amendment by allowing police chief to deny permits if he thought a proposed business would not comply with "all applicable laws") ("[T]he denial provision vests impermissible discretion in the police chief to choose on a case-by-case basis which laws apply in reviewing a particular application and thus is too broad to survive constitutional scrutiny."); *Child Evangelism Fellowship of S.C. v. Anderson Sch. Dist. Five*, 470 F.3d 1062, 1069–73 (4th Cir. 2006) (holding unconstitutional provision that allowed school officials to waive space-usage fees when "determined to be in the district's best interest," finding standard both subjective and indefinite); *Child Evangelism Fellowship of Md., Inc.*, 457 F.3d at 387–89 (invalidating policy that gave school district "virtually unlimited discretion" to selectively grant or withdraw approval for flyers distributed to students "[b]ecause the policy offers no protection against the discriminatory exercise of [the school district's] discretion"); *Chesapeake B & M, Inc. v. Harford Cnty., Md.*, 58 F.3d 1005, 1011 (4th Cir. 1995) (striking down licensing scheme for adult bookstores that failed to satisfy constitutional requirement that administrative decision be made within "reasonably brief time"). Because the unfettered discretion doctrine provides "a judicially discoverable and manageable standard[]" for evaluating Virginia's voting rights restoration scheme, the political question doctrine is not implicated in this case. *See Rucho*, 139 S. Ct. at 2494.

In the face of Defendants' admissions that they are not constrained by any criteria or time limits, *see* Sherman Decl. ¶ 3, Ex. B at Response to Interrog. No. 1, at 2 (criteria), *and id*. ¶ 2, Ex. A at Response to Request for Admission No. 4, at 2 (time limits), *this* is the standard that Mr. Hawkins asks this Court to apply. Defendants, however, misconstrue Plaintiff's request as asking

this Court to dictate to the Governor what rules he "should" use in voting rights restoration. ECF No. 61 at 20. Not so. Courts adjudicating these First Amendment licensing cases do not make policy judgments as to the specific kind of non-arbitrary replacement scheme that should be adopted. Plaintiff is simply requesting that this Court order Defendants to bring their restoration process into compliance with the First Amendment by adopting objective rules and criteria and reasonable, definite time limits. *See Child Evangelism Fellowship of S.C.,* 470 F.3d at 1074 ("[The Constitution] does not require that the district adopt any particular concrete, reasonable, and viewpoint-neutral set of rules to govern access—it simply requires that the district adopt some such neutral system of its own choosing."); *see, e.g.*, *Sentinel Commc'ns Co. v. Watts*, 936 F.2d 1189, 1199–1200 (11th Cir. 1991) ("Some neutral criteria must be established in order to insure that the DBS's permit decision regarding newsracks is not based on the content or viewpoint of the speech being considered.") (internal quotation and citation omitted). Such constitutional review does not substitute the Court's judgment for Defendants' and does not concern what is "fair," which is not the governing legal standard. Instead, if this Court rules in Plaintiff's favor, it need only confirm that Defendants' proposed rules and criteria are objective and non-arbitrary and that the proposed time limits are reasonable and definite. This case is simpler than other First Amendment arbitrary licensing cases because Defendants admit they are unconstrained by *any* criteria or time limits and do not argue that their restoration system satisfies the First Amendment doctrine at issue.

Defendants once again ignore the Supreme Court's *First Amendment* precedents and instead rely on *Dumschat*, a due process challenge to clemency, for the proposition that "a clemency decision, by its nature, 'depends not simply on objective factfinding, but also on purely subjective evaluations and on predictions of future behavior by those entrusted with the decision.'"

ECF No. 61 at 20 (quoting *Dumschat*, 452 U.S. at 464). However, Plaintiff is not asking this Court to review Governor Youngkin's *individual* clemency decisions, but rather to order Defendants to *systemically* change the way they restore voting rights,[7] which is not inherently—and need not be—a part of Virginia's clemency regime. *See supra at* 12–13. If Plaintiff prevails, once that non-arbitrary voting rights restoration regime was put in place, this Court's work remedying the First Amendment violation would be complete. Any garden-variety errors in complying with that new objective restoration regime would be a matter of state law for adjudication in state court.

Defendants have cited no case that holds that the constitutionality of certain aspects of clemency is a political question beyond judicial competence to assess. The U.S. Supreme Court has never suggested that constitutional violations within voting rights restoration or clemency regimes present nonjusticiable political questions. Rather, the U.S. Supreme Court has specifically contemplated such federal court review. In *Hunter*, the Supreme Court indicated that the method for re-enfranchising a voter could violate federal equal protection principles if the scheme had both the purpose and effect of invidious discrimination. 471 U.S. at 227–28. Federal courts also have a role in ensuring that clemency powers are exercised according to due process. *See Woodard*, 523 U.S. at 288–89 (1998) (O'Connor, J., concurring) (holding that, in due process context, "some *minimal* procedural safeguards apply to clemency proceedings") (emphasis in original). Neither decision referenced the political question doctrine or suggested that federal courts lacked competence to consider federal constitutional violations concerning rights restoration or clemency.

[7] Disenfranchisement is the only disability collateral to a felony conviction that Plaintiff's suit implicates. No clemency decisions like pardons or commutations nor any other disabilities like the right to serve on a jury or run for political office are implicated.

Finally, having admitted that they are not bound by *any* time limits, Defendants now complain that it would be impossible for this Court to set a "reasonable time" for granting or denying voting rights restoration applications, citing *Bowens v. Quinn*, 561 F.3d 671 (7th Cir. 2009). ECF No. 61 at 21. Once again, Plaintiff actually requests that this Court order *Defendants* to set a reasonable, definite time limit. If Defendants fail to do so, the Court may then intervene and impose such a limit, but the Court need not impose any such limit in the first instance. In any event, Defendants' reliance on *Bowens* is misplaced. *Bowens* is a Fourteenth Amendment due process case in which the plaintiffs sought an injunction requiring the governor to decide whether to grant pardons within a reasonable time. 561 F.3d at 673–74. *Bowens* is not a voting rights restoration case, which the Seventh Circuit expressly distinguished:

> [Plaintiffs] do not claim to be seeking pardons in order to remove statutory disabilities, either, such as the right to vote or to hold public office; anyway most statutory disabilities resulting from a felony conviction are restored automatically upon the completion of the defendant's sentence . . . and others can be restored by administrative fiat.

Id. at 675. By contrast, Plaintiff's second claim asserting that Defendants must decide voting rights restoration applications within a reasonable, definite time limit is entirely consistent with First Amendment licensing jurisprudence. *FW/PBS, Inc.*, 493 U.S. at 226. *Bowens* is simply inapposite.

Accordingly, this Court should squarely reject Defendants' argument that this case presents a nonjusticiable political question.

IV. CONCLUSION

For the foregoing reasons, Defendants' motion for summary judgment should be denied.

Dated: February 28, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 28, 2024, I filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a "Notice of Electronic Filing" to the following CM/ECF participants:

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

GEORGE HAWKINS, Plaintiff, v. GLENN YOUNGKIN, Governor of Virginia, in his official capacity, et al., Defendants.	)	Civil Action No. 3:23-cv-232-JAG

DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

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Other Authorities

INTRODUCTION

Hawkins asks this Court to transform the Governor's *discretionary* clemency power to restore voting rights into those of a filing clerk, mechanistically reviewing re-enfranchisement applications to confirm that the applicant has checked all the boxes. Hawkins says this is what the United States Constitution commands, citing precedent that no court has ever applied in this context. Defendants have repeatedly explained the numerous flaws in his argument. Supreme Court precedent holds that the clemency power is committed to executive discretion and is rarely, if ever, subject to judicial review. Fourth Circuit precedent holds that there is no First Amendment right to voting restoration. And both courts of appeals to have addressed Hawkins's theory have rightly rejected it.

Despite countless opportunities in the many briefs he has filed over the last half year, Hawkins has failed to marshal a response to this overwhelming authority. He provides no case holding that an individual even has a First Amendment claim (as opposed to a Fourteenth or Fifteenth Amendment claim) with respect to voting rights. He provides no case even hinting that felon re-enfranchisement implicates the First Amendment. He provides no case suggesting that felon re-enfranchisement procedures are subject to the First Amendment's "unfettered discretion" doctrine. And he provides no case demonstrating that federal courts' equitable authority includes the power to order a state executive to exercise his clemency power in a particular way on a particular timeline. This Court should not be the first to adopt all these propositions.

Separately, Hawkins studiously avoids articulating the precise remedy he seeks. The only plausible explanation for this maneuver is that doing so would reveal that his claims raise a classic political question regarding when and how a State's chief executive should exercise his clemency power. But Hawkins's deliberate ambiguity creates the separate issue of whether his requested injunction would violate Federal Rule 65. And given the vagueness left by Hawkins's refusal to

specify a remedy, it is unclear how this Court's injunction would coexist with the Virginia Constitution's requirement of individualized consideration for all applicants. Hawkins's claims fail as a matter of law, and the Court should grant Defendants' motion for summary judgment.

ARGUMENT

I. The Governor's Clemency Power To Restore Felons' Voting Rights Is Not Subject To The First Amendment's Unfettered Discretion Doctrine

Every court of appeals to have encountered Hawkins's theory has rejected it—and for good reason. As Supreme Court precedent makes clear, a Governor's exercise of his clemency power is rarely, if ever, subject to judicial review. See *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 464 (1981); *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 284–85 (1998) (plurality). And the Supreme Court has both summarily affirmed and favorably cited prior precedent rejecting a constitutional challenge to a discretionary voting-restoration process. See *Beacham v. Braterman*, 300 F. Supp. 182 (S.D. Fla.), *aff'd*, 396 U.S. 12 (1969). In addition, the Fourth Circuit has held several times that the First Amendment provides no greater protection to voting rights than the Fourteenth Amendment, and Hawkins concedes Virginia's voting-restoration process satisfies the Fourteenth Amendment's requirements. See *Republican Party of N.C. v. Martin*, 980 F.2d 943, 959 n.28 (4th Cir. 1992); *Irby v. Virginia State Bd. of Elections*, 889 F.2d 1352, 1359 (4th Cir. 1989); *Washington v. Finlay*, 664 F.2d 913, 927 (4th Cir. 1981). Even more directly, the Fourth Circuit has stated in an unpublished decision that the "First Amendment creates no private right of action for seeking reinstatement of previously canceled voting rights." *Howard v. Gilmore*, 205 F.3d 1333 (Table), 2000 WL 203984, at *1 (4th Cir. Feb. 23, 2000). Finally, as the Sixth and Eleventh Circuits have held, the unfettered-discretion doctrine simply has nothing to do with the exercise of the Governor's clemency power to restore voting rights. See *Lostutter v. Kentucky*, No. 22-5703, 2023 WL 4636868 (6th Cir. July 20, 2023); *Hand v. Scott*, 888 F.3d 1206 (11th Cir. 2018).

Hawkins's response to this caselaw is meritless. First, he has no answer to the Supreme Court's precedent foreclosing his claim. See Memo. in Opp. to Defs.' Mot. for Summ. J. (Pl.'s MSJ Opp.) at 16–17 (ECF No. 65).[1] He primarily attempts to cabin *Beacham*, *Dumschat*, and *Woodard* as merely Due Process or Equal Protection Clause cases, but he ignores *why* those decisions rejected the constitutional challenges before them. In *Beacham*, for example, the Court summarily affirmed the rejection of a challenge to the state executive's power "to restore discretionarily the right to vote to some felons and not to others"—the precise power at issue here. See 300 F. Supp. at 183. And the decision the Court affirmed had rejected the challenge because the power to restore felons' voting rights was "an act of executive clemency *not subject to judicial control*." *Id.* at 184 (emphasis added). Similarly, *Dumschat* and *Woodard* rejected challenges to clemency procedures because clemency decisions "'have not traditionally been the business of courts; as such, they are rarely, if ever, appropriate subjects for judicial review.'" *Woodard*, 523 U.S. at 276 (quoting *Dumschat*, 452 U.S. at 464). The reasoning of *Beacham*, *Dumschat*, and *Woodard* did not turn on specifics regarding the Due Process or Equal Protection Clauses but rather on the fact that *clemency*—including the discretionary power to restore voting rights—was "not subject to judicial control." 300 F. Supp. at 184. That Hawkins styles his challenge as a First Amendment claim does not suddenly make the clemency process a proper subject for judicial review.

Indeed, under Fourth Circuit precedent, Hawkins *may not* bring a First Amendment claim seeking restoration of his voting rights. See Defs.' Memo. in Supp. of Mot. for Summ. J. (Defs.' MSJ Mem.) at 11–12 (ECF No. 61). Hawkins again has no answer to this precedent. His primary

[1] Hawkins purports to dispute several indisputable facts, Pl.'s MSJ Opp. at 3–4, but resolution of the disputes he raises would not "affect the outcome of the suit under the governing law," *Variety Stores, Inc. v. Wal-Mart Stores, Inc.*, 888 F.3d 651, 659 (4th Cir. 2018) (quotation marks omitted). The Court may therefore grant Defendants' motion for summary judgment without resolving them. See Fed. R. Civ. P. 56(a).

contention is that *Washington* is limited to "vote dilution" claims, but he then immediately acknowledges that the Fourth Circuit has cited *Washington*'s general rule in a case that did not involve a vote-dilution claim. See Pl.'s MSJ Opp. at 20 (citing *Irby*, 889 F.2d at 1359). As *Irby* stated: "In *voting rights cases*, the protections of the First and Thirteenth Amendments 'do not in any event extend beyond those more directly, and perhaps only, provided by the fourteenth and fifteenth amendments.'" 889 F.2d at 1359 (quoting *Washington*, 664 F.2d at 927) (emphasis added). *Martin* also spoke in categorical terms: "This court has held that *in voting rights cases*, no viable First Amendment claim exists in the absence of a Fourteenth Amendment claim." 980 F.2d at 959 n.28 (emphasis added). Hawkins suggests that *Irby* and *Martin* somehow mischaracterized the general principle from *Washington*. Pl.'s MSJ Opp. at 20. But rather than speculate how multiple decisions of the Fourth Circuit got it wrong, the obvious answer is that the Fourth Circuit held precisely what it said it held—there is no standalone First Amendment claim for voting rights.[2]

Hawkins suggests that Defendants have "abandoned this argument." See Pl.'s MSJ Opp. at 20.[3] They have not; Defendants have simply noted that there is no need for this Court to reach the

[2] The Fourth Circuit's cases are consistent with the ordinary principle of constitutional interpretation that where one provision specifically addresses a subject, its doctrine controls over those of more general provisions that might otherwise be thought to apply. See, *e.g.*, *Hand*, 888 F.3d at 1212 (for felon re-enfranchisement claim, "the specific language of the Fourteenth Amendment controls over the First Amendment's more general terms"). Plaintiff cannot bootstrap his way into a more exacting constitutional review by ignoring the directly applicable constitutional provision. See, *e.g.*, *Williams v. City of Columbia*, 906 F.2d 994, 999 (4th Cir. 1990) (when an "ordinance is a content-neutral time, place and manner restriction, [it] therefore is not an unconstitutional infringement of the right to free speech" under the Equal Protection Clause); *United States v. Lanier*, 520 U.S. 259, 272 n.7 (1997) ("[I]f a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision[.]").

[3] At several points, Hawkins erroneously asserts that Defendants have "abandoned" arguments that Defendants have either never made, see, *e.g.*, Pl.'s MSJ Opp. at 21 (invidious discrimination is required for an unfettered-discretion claim), or instead continue to make, see, *e.g.*, Pl.'s MSJ Opp. at 1 (the First Amendment does not separately protect voting as expressive conduct).

broader question whether the First Amendment covers the right to vote because Hawkins's claims fail regardless. Hawkins concedes that the First Amendment does not confer a right for *felons* to vote, see Pl.'s MSJ Opp. at 13, and there is also no First Amendment right of felons to be re-enfranchised, see Defs.' Memo. in Support of Mot. to Dismiss Second Am. Compl. (Defs.' MTD Mem.) at 25–26 (ECF No. 27). Thus, regardless whether the First Amendment applies to the right to vote, Hawkins himself has no First Amendment right to vote. His claims therefore still fail.

Hawkins also asserts that Defendants must agree that felons have voting rights under the First Amendment because they have acknowledged that a felon might be able to bring an as-applied challenge based on intentional viewpoint discrimination. But such a challenge would not be vindicating *voting rights*; it would vindicate the right to be free from *viewpoint discrimination*. The Constitution protects citizens from discrimination on the basis of, or retaliation against, their protected speech, even where they have no First Amendment interest in the government benefit or process at issue. See, *e.g.*, *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 214 (2013) ("[T]he Government may not deny a benefit to a person on a basis that infringes his constitutionally protected freedom of speech even if he has no entitlement to that benefit." (cleaned up)); *Matal v. Tam*, 582 U.S. 218, 240–41 (2017). The government may not, for example, deny a citizen access to a small-business-development program *because of* the content of his speech, even though he does not have a constitutional right to participate in the program itself.

By contrast, the *Lakewood* "unfettered discretion" doctrine that Hawkins seeks to invoke is a special prophylactic rule that applies only where government officials have "unbridled discretion *directly to license speech*, or conduct commonly associated with speech." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 767 (1988) (emphasis added). Indeed, *Lakewood* was careful to note that it was not holding "that the press or a speaker may challenge as

censorship any law involving discretion to which it is subject." *Id.* at 759. Rather, *Lakewood* and its progeny apply only where the plaintiff must obtain a license before "attempting to exercise his or her First Amendment right to freedom of speech." *Lostutter*, 2023 WL 4636868, at *4. A "felon can invoke no comparable right" when applying for re-enfranchisement, because the felon has no underlying First Amendment right to vote. *Ibid*. Hawkins's argument concerning the Supreme Court's decision in *Hunter v. Underwood*, 471 U.S. 222 (1985), suffers from the same flaw. Hawkins invokes *Hunter* as proof that "the disenfranchised" have an "interest in voting." See Pl.'s MSJ Opp. at 15 n.5. But *Hunter* is a case about the Fourteenth Amendment right to be free from *racial discrimination*; it held that a felon-disenfranchisement provision was unconstitutional *because* it was intended to discriminate on the basis of race. *Hunter*, 471 U.S. at 225. It did not hold that a felon was entitled to a particular re-enfranchisement process, or any process at all. And Hawkins does not bring a race-discrimination claim, nor could he. Virginia's 1971 Constitution was intended to rid Virginia's laws of any trace vestiges of racial discrimination. See, *e.g.*, A.E. Dick Howard, *Who Belongs: The Constitution of Virginia and the Political Community*, 37 J. L. & Politics 99, 113 (2022) ("Both by mandates and aspirations, today's Virginia Constitution seeks to define the political community to make fairness, justice, and inclusiveness signposts on the path to achieving a government 'for the common benefit.'"); A.E. Dick Howard & William Antholis, *The Virginia Constitution of 1971*, 129 Virg. Mag. of Hist. & Bio. 346, 356 (2021) (The 1971 Constitution's "aim was to put . . . opposition to civil rights behind us as Virginians.").

In a final attempt to warp Fourth Circuit caselaw, Hawkins suggests that *Howard* has nothing to do with voting restoration. Pl.'s MSJ Opp. at 13. This would be news to the panel, which plainly stated that "[t]he First Amendment creates no private right of action for seeking *reinstatement of previously canceled voting rights*." *Howard*, 2000 WL 203984, at *1 (emphasis

added). Hawkins's claims are thus foreclosed by numerous Fourth Circuit decisions.

Next, Hawkins fails to distinguish the Eleventh Circuit's decision in *Hand* and the Sixth Circuit's decision in *Lostutter*. With respect to *Hand*, Hawkins says almost nothing at all. Instead, he merely states that, after the Eleventh Circuit issued its stay opinion, the preliminary-injunction appeal was mooted by a state constitutional amendment. See Pl.'s MSJ Opp. at 2. But that procedural posture does not diminish the persuasive force of *Hand*'s analysis. See, *e.g.*, *Lostutter*, 2023 WL 4636868, at *5 (relying on *Hand* as "Eleventh Circuit precedent").

Hawkins's attempt to distinguish *Lostutter* fares no better. First, he says *Lostutter* is distinguishable because "that case was dismissed for lack of standing." Pl.'s MSJ Opp. at 2. But he again fails to explain *why* it was dismissed for lack of standing—because "Kentucky's voting-rights restoration process" was *not* "an administrative licensing or permitting scheme" under the unfettered-discretion doctrine. *Lostutter*, 2023 WL 4636868, at *1.[4]

Next, despite his insistence elsewhere that the Court use a "functional analysis," Hawkins asks this Court to distinguish *Lostutter* on the ground that the opinion used the label "pardon" to describe voting restoration in Kentucky. See Pl.'s MSJ Opp. at 11. Specifically, Hawkins notes that *Lostutter* referred to the Kentucky Governor's decision to restore voting rights as a "partial pardon" and that, in Virginia, "voting rights restoration" is not "a pardon." *Ibid.* Hawkins then says Defendants have "abandoned th[e] characterization" that felon re-enfranchisement "is a type of 'partial executive pardon.'" *Ibid.* (some quotation marks omitted). It is not entirely clear what Hawkins means by this. Defendants' point—as it has been all along—is that the Governor's power to restore voting rights is part of his *clemency power*, just as it was in *Lostutter* with respect to the

[4] If this Court would prefer to follow the Sixth Circuit directly, it could hold that Hawkins's claims fail for lack of standing because the unfettered-discretion doctrine and its corresponding permission to bring a facial challenge does not apply here.

Kentucky Governor. Indeed, Virginia's Constitution has included the power "to remove political disabilities consequent upon conviction for offenses" as part of the Governor's "Executive clemency" power, alongside his power to grant pardons, for over 150 years. See *Gallagher v. Commonwealth*, 284 Va. 444, 451 (2012); Va. Const. art. V, § 12.[5] Thus, the point is not that felon re-enfranchisement is a "pardon." It is not: a pardon removes penal consequences, while re-enfranchisement removes a non-penal political disability. The point is instead that—just as in *Lostutter*—re-enfranchisement is a form of *clemency*, because it is an exercise of executive grace to remove a political disability resulting from a criminal conviction. *Woodard*, 523 U.S. at 280–81 ("[T]he heart of executive clemency . . . is to grant clemency as a matter of grace[.]"). Both precedent and tradition demonstrate that "the Governor's *executive clemency power*" is "rarely subjected to judicial review." *Lostutter*, 2023 WL 4636868, at *4 (emphasis added).

Hawkins continues his focus on labels to contend that "voting rights restoration is not even intrinsically or necessarily a species of clemency." Pl.'s MSJ Opp. at 12. Hawkins leaves unexplained the Platonic version of "clemency," what it "intrinsically or necessarily" entails, or what the various "species of clemency" are. Rather than propose a taxonomy of clemency, he seems to suggest that other States do it differently than Virginia. See *id.* at 12 n.3. What this proves is also left unexplained, and it is certainly not self-evident. What matters is the undisputed fact that for a century and a half the Governor of Virginia's "clemency power"—as defined by Virginia's Constitution—has included the power to restore convicted felons' voting rights. See *Gallagher*, 284 Va. at 451; Va. Const. art. V, § 12.

[5] Hawkins inexplicably states that the constitutional provision granting the Governor the power to remove political disabilities does not "reference the Governor's pardon power." Pl.'s MSJ Opp. at 11. Hawkins is flatly wrong as the text of Article V, § 12—entitled "Executive clemency"—demonstrates. Va. Const. art. V, § 12 ("The Governor shall have power to … grant reprieves and pardons after conviction … [and] to remove political disabilities consequence upon conviction.").

Moreover, even the States Hawkins cites as examples would seemingly violate his theory. For example, Hawkins repeatedly stresses that he is *not* challenging a Governor's discretionary power to pardon a felon or commute his sentence. See, *e.g.*, Pl.'s MSJ Opp. at 29 n.7. But at the same time, Hawkins champions States where voting restoration is tied solely to a felon's "release from incarceration" or "completion of parole and probation." See *id.* at 12 n.3. If the Governor has discretion to pardon a felon or commute his sentence, and thus to release the felon from incarceration and other restraints, then the voting restoration power in these States is *still* subject to the Executive's "unfettered discretion" that Hawkins says is unconstitutional. And Hawkins offers no reason why his theory does not also extend to those restoration schemes.

Apparently cognizant that his efforts to distinguish *Lostutter* and *Hand* do not work, Hawkins pivots to arguing that the Sixth and Eleventh Circuits are wrong. But the Supreme Court recently denied the petition for certiorari arising from the Sixth Circuit's rejection of the very theory Hawkins raises here—and not a single Justice noted his or her dissent. See *Aleman v. Beshear*, No. 23-590, 2024 WL 674760 (U.S. Feb. 20, 2024). Undeterred, Hawkins argues that the Sixth Circuit erred by using "a formalistic approach" while First Amendment doctrine requires "a functional analysis." Pl.'s MSJ Opp. at 5. Hawkins then spends several pages providing a paean to the use of a "functional analysis" in judicial interpretation. *Id.* at 5–10. But text, history, and precedent are all more relevant to judicial interpretation of novel constitutional claims. See *Houston Cmty. Coll. Sys. v. Wilson*, 595 U.S. 468, 474 (2022).

In any event, the Sixth Circuit also undertook a functional analysis, and Hawkins's theory still failed. The Sixth Circuit walked through numerous reasons why, as a functional matter, a discretionary clemency regime is "fundamentally different from obtaining an administrative license or permit." *Lostutter*, 2023 WL 4636868, at *3. First, clemency regimes "are retrospective

in the sense that they look backwards and excuse—indeed, nullify the consequences of—past misconduct," while a license "is usually prospective in that it looks forward and grants permission to engage in some future conduct." *Id.* at *4. Second, a pardon or the restoration of voting rights "is a one-time act of clemency, while a typical licensing or permitting scheme is ongoing—that is, the license or permit must be renewed periodically." *Ibid.* Third, felon re-enfranchisement "derives from the Governor's executive clemency power, which the Supreme Court has rarely subjected to judicial review" while "a licensing scheme regulating First Amendment-related conduct is typically grounded in the State's authority to promote public safety and well-being." *Ibid.* As the Sixth Circuit saw it, "the core thesis" of both the district court's opinion and its own is that a discretionary vote-restoration regime "in general *functions* differently than an administrative license or permit." *Id.* at *5 (emphasis added). Therefore, if Hawkins desires a functional analysis, that is precisely what the Sixth Circuit's opinion provided.

Hawkins nevertheless disputes the conclusions that followed from that functional analysis. But Hawkins, like the plaintiffs in *Lostutter*, "merely conclude[s]" that a discretionary vote-restoration regime is governed by the speech-licensing cases; he "never persuasively explain[s] *why* voting restoration is more similar to a licensing scheme" than to a clemency regime. *Id.* at *5 (emphasis in original). Indeed, a permit to hold a parade is simply a different matter than felon re-enfranchisement. And Hawkins, just like the plaintiffs in the Sixth Circuit, "fail[s] to provide a single case in which a court interpreted a restored right to vote as a license or permit to vote." *Ibid.*

Even setting aside all the precedent that forecloses Hawkins's claims, his "functional" arguments fare no better on their own. To begin, Hawkins has not offered a single case holding that the franchise itself is a First Amendment right at all. Perhaps recognizing this problem, Hawkins tries to dodge it by insisting that Defendants "no longer contend that the First Amendment

does not protect voting as expressive conduct." Pl.'s MSJ Opp. at 1. That is wrong, and Defendants do not know on what he bases this claim. See, *e.g.*, Defs.' Memo. in Opp. to Pl.'s Mot. for Summ. J. at 7 (ECF No. 66) (citing Defendants' prior argumentation on this issue). Although this question is ultimately irrelevant to the resolution of this case, it is undisputable that no case has *ever* held that the First Amendment, and its corresponding doctrines such as the "unfettered discretion doctrine," governs the right to vote. Hawkins does not even attempt to argue otherwise.

Relatedly, Hawkins equates felon re-enfranchisement with allowing minors and non-citizens to vote. Pl.'s MSJ Opp. at 14. If a State may not "selectively grant or deny the right to vote to 16 and 17-year-olds or legal permanent residents," the argument goes, then it may not "selectively grant or deny" re-enfranchisement to felons. *Ibid.* To do otherwise, Hawkins says, is to make an argument "simply based on the prefix 're.'" *Ibid.* But "the prefix 're'" reveals something important: The individual seeking to have his vote restored *previously held and lost that right* because he committed a serious crime. As a matter of constitutional text, precedent, and history, convicted felons occupy a dispositively different position with respect to voting rights than people who are not convicted felons. See *Richardson v. Ramirez*, 418 U.S. 24, 54 (1974). Most relevant here, convicted felons may be permanently stripped of their right to vote; adult citizens who are not convicted felons may not. See *ibid.* The Fourteenth Amendment itself enshrines that distinction, centuries of history confirm it, and every case addressing the issue supports it. See *ibid.*; Defs.' MTD Mem. at 18–19. Thus, Hawkins's attempt to equate convicted felons with other classes of individuals who are *not* convicted felons fails.

In sum, Hawkins's arguments are foreclosed by centuries of judicial and historical precedent. Throughout the last 150 years, there has been no indication of any First Amendment concern regarding Virginia's discretionary vote-restoration regime. Both "history and tradition of

regulation" are "relevant when considering the scope of the First Amendment." *City of Austin, Tex. v. Reagan Nat'l Advertising of Austin, LLC*, 596 U.S. 61, 75 (2022) (quotation marks omitted). And "[w]hen faced with a dispute about the Constitution's meaning or application, long settled and established practice is a consideration of great weight." *Wilson*, 595 U.S. at 474 (brackets and quotation marks omitted). Hawkins has failed to offer *a single case* holding that a discretionary vote-restoration regime violates the First Amendment. To the contrary, "every First Amendment challenge to a discretionary vote-restoration regime" that Defendants are aware of "has been summarily rebuffed." *Hand*, 888 F.3d at 1212. "The unbroken tradition" of discretionary vote-restoration regimes forecloses "the adoption of [Hawkins's] novel rule." *City of Austin*, 596 U.S. at 75. In short, Hawkins's First Amendment challenge to Virginia's discretionary vote-restoration process fails as a matter of law.

II. Hawkins's Requested Remedy Underscores The Flaws In His Argument

Hawkins's refusal to specify precisely what remedy he seeks shows that his claims fail as a matter of law. As Defendants previously explained, see Defs.' MSJ Mem. at 16–17, determining what "criteria," "rules," or "time limits" should govern a state executive's exercise of the clemency power is a quintessential political question because "the Constitution provides no basis whatever to guide the exercise of judicial discretion" in this endeavor, *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506 (2019). To avoid this obvious conclusion, Hawkins has now clarified that he does not actually ask the Court to specify what "rules and criteria" or "time limits" are necessary to make a voting restoration process constitutional. See Pl.'s MSJ Opp. at 22. He thus steadfastly refuses to explain what a constitutional voting restoration process looks like; he just asserts that *this one* is unconstitutional. At most, then, the remedy for Hawkins's claims would be an injunction prohibiting administration of the current restoration process; in other words, the remedy that would redress Hawkins's claims would be to halt voting restoration entirely. Indeed, that remedy—an

injunction barring a speech-permitting scheme—is precisely what is awarded in the speech-licensing cases he cites. See, *e.g.*, *Lakewood*, 486 U.S. at 752–53 (noting that the government was appealing the judgment "enjoining enforcement of its local ordinance regulating the placement of newsracks"); see also Pl.'s MSJ Opp. at 26 (acknowledging that the proper remedy is to "invalidate" the licensing scheme).

But Hawkins obviously does not desire the cessation of voting restoration entirely. That result would restore the default—which Hawkins acknowledges is constitutional—that no felon may vote. So instead, he says he seeks an injunction that "order[s] Defendants to replace" the current restoration process "with objective and uniformly applied rules and criteria that satisfy the First Amendment"—leaving to Defendants to determine which "rules and criteria" would "satisfy the First Amendment." Pl.'s MSJ Opp. at 22. In other words, he asks this Court for an order not only *enjoining* the enforcement of the current process but also *mandating* that Defendants "replace" the process with "rules" and "criteria" that Hawkins refuses to describe.

Not only would a judicial order *requiring* an Executive to exercise his clemency power in a particular way be unprecedented, but such a vague injunction would violate the Federal Rules of Civil Procedure. Specifically, Rule 65(d) "requires courts granting injunctions to 'describe in reasonable detail the act or acts restrained or required.'" *Pashby v. Delia*, 709 F.3d 307, 331 (4th Cir. 2013) (ellipses omitted). "The Supreme Court has explained that Rule 65(d) 'was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood.'" *Ibid.* (quoting *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974)). Here, an injunction ordering Defendants to implement "criteria" or "reasonable" time limits that "satisfy the First Amendment" would violate Rule 65. See, *e.g.*, *Bone v. University of N.C. Health Care Sys.*, No. 1:18-cv-994, 2023 WL

4144277, at *32 (M.D.N.C. June 22, 2023) ("obey-the-law injunctions run afoul of the traditional equitable principle" that is "codified in Federal Rule of Civil Procedure 65(d)"). For example, the Third Circuit held that an injunction violated Rule 65 when it permitted "the Government to impose 'reasonable nonconfinement terms of supervision'" for individuals released from incarceration due to Covid because the term "'reasonable' is capacious enough to provoke disagreement between" the parties. See *Hope v. Warden York Cnty. Prison*, 972 F.3d 310, 322 (3d Cir. 2020). Yet Hawkins expressly asks this Court to order Defendants to implement "reasonable" time limits without clarifying what those time limits should be. See Pl.'s MSJ Opp. at 30 ("If Defendants fail to" set a "reasonable" time limit, "the Court may then intervene and impose such a limit."). And Defendants would be choosing time limits with the hope that the Court would deem them "reasonable" if the parties' dispute ever reached a contempt proceeding.

Hawkins presumably refuses to specify his requested remedy with any more particularity because it would reveal that he is asking this Court to make "an unmoored determination" that is "characteristic of a political question beyond the competence of the federal courts." *Rucho*, 139 S. Ct. at 2500 (quotation marks omitted). Indeed, the Seventh Circuit has said it has "no idea what a 'reasonable' time for deciding a clemency petition would be." *Bowens v. Quinn*, 561 F.3d 671, 676 (7th Cir. 2009). And the court thus "balk[ed] at the idea of federal judges' setting timetables for action on clemency petitions by state governors." *Ibid.*[6]

[6] As with other cases, Hawkins tries to cabin *Bowens* as "a Fourteenth Amendment due process case," Pl.'s MSJ Opp. at 30, while ignoring *the reason* the court held that the challenge failed—because clemency "is a classic example of unreviewable executive discretion," *Bowens*, 561 F.3d at 676. And Hawkins, returning to labels, says *Bowens* is not a "voting rights restoration case." Pl.'s MSJ Opp. at 30. True enough, but *Bowens* is a *clemency* case; and although voting rights were restored automatically in Illinois and thus not subject to the Governor's clemency power, restoring voting rights in Virginia *is* part of the Governor's clemency power. Thus, *Bowens*'s clemency analysis is equally applicable here.

Hawkins suggests that this type of injunction—ordering a state executive affirmatively to implement a new policy—is "commonplace." Pl.'s MSJ Opp. at 22. But then he offers remedial examples from only one context—redrawing electoral maps for redistricting cases. *Id.* at 22–23. Redistricting raises unique remedial issues, however, given the practical reality that States *must* hold elections so *some map* will have to be created and approved before the election. See *Reynolds v. Sims*, 377 U.S. 533, 585–86 (1964) (noting the unique remedial issues associated with redistricting). And if the State fails to produce a remedial map, or produces one that fails to cure the constitutional violation, the court must step in to redistrict the jurisdiction itself. See *id.* at 586; *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978). Here, in contrast, there is no constitutional obligation for States to operate a voting-restoration process. It is telling that Hawkins provides no other examples of injunctions ordering state defendants to "replace" policies deemed unconstitutional, as opposed to merely enjoining the unconstitutional policy. The exception for redistricting thus effectively proves the rule. Apart from the unique redistricting context, Hawkins provides no historical basis for a court sitting in equity to issue the remedy he seeks here. See *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 (1999).

Next, Hawkins deems it "absurd" to think it is unclear how the contours of the speech-licensing cases apply to a clemency process. See Pl.'s MSJ Opp. at 26. But the lack of clarity is Hawkins's own doing. For example, the "procedural safeguards" in speech-licensing cases are the following: "(1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained"; "(2) expeditious judicial review of that decision must be available"; and "(3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 227 (1990). Hawkins mentions none of this, let alone explains how it would apply here.

Thus, it is far from "absurd" to wonder how these requirements map onto the vote restoration process. For example, what happens if the Governor fails to act within a "reasonable" time on a voting-restoration application? Does the "restraint" (*i.e.*, disenfranchisement) simply vanish? In other words, is the applicant deemed re-enfranchised as a matter of remedial decree? Or would a state court review the failure to address the petition—exercising jurisdiction that Virginia's laws do not confer? Hawkins does not say, yet he suggests it should be patently obvious to everyone.

Finally, Hawkins offers shrugging indifference for the concern that this Court's injunction would be difficult to reconcile with the Virginia Supreme Court's requirements in *Howell v. McAuliffe*, 292 Va. 320 (2016). *Howell* interpreted the Virginia Constitution to require the Governor to exercise his re-enfranchisement power "on an individualized case-by-case basis taking into account the specific circumstances of each." *Id.* at 341. In other words, the Virginia Constitution contemplates a Governor exercising executive discretion based on individualized circumstances, not functioning as a box-checking automaton. It seems that Hawkins fails to comprehend the consequences of such a potential conflict. He says that, "even assuming such a conflict emerged, Defendants ignore that the Supreme Court of Virginia's interpretation of the Virginia Constitution must yield to the dictates of the U.S. Constitution." Pl.'s MSJ Opp. at 23–24. But this response misses the point. Because *Howell* stands for the proposition that Virginia's Constitution permits the Governor to exercise the power *only* in a way that Hawkins argues federal law *forbids*, then in granting Hawkins relief this Court would be forbidding the Governor from restoring *any* voting rights until Virginia's Constitution is amended.

Hawkins offers some conclusory assertions for why his preferred restoration scheme would not contradict *Howell*, but none obviously solves the problem. Hawkins says "individualized" consideration can still be made with "objective criteria." See Pl.'s MSJ Opp. at 24. But this much

does not follow. For example, if the Governor issued "objective and uniformly applied rules," *id.* at 22, that said *every* convicted felon who has completed his incarceration and supervised release will have his voting rights restored, Hawkins does not explain how the Governor would be "taking into account the specific circumstances of each" applicant "on an individualized case-by-case basis." *Howell*, 292 Va. at 341. After all, the restoration process that *Howell* deemed unconstitutional restored the voting rights to all felons "who had completed their sentences of incarceration and any periods of supervised release, including probation and parole." *Id.* at 327–28. But that type of system seems to be precisely what Hawkins seeks here. Hawkins also suggests that Governor McAuliffe's post-*Howell* restoration process provides an example of a permissible restoration process—but that process merely said that individuals who "are no longer incarcerated or under active supervision" "*may meet* the Governor's standards for restoration." Ex. B to Declaration of Nina Beck (ECF No. 65-1) (emphasis added). Thus, these criteria did not operate as "rules" in the sense Hawkins suggests.[7]

In sum, Hawkins studiously avoids articulating precisely what remedy he seeks. The only plausible explanation for this maneuver is to avoid exposing that his claims raise a classic non-justiciable political question regarding when and how a state executive should exercise his clemency power. But Hawkins's deliberate ambiguity creates the separate issue that the unprecedented injunction he seeks would violate Rule 65. And given the vagueness left by Hawkins's refusal to specify a remedy, it is unclear precisely how this Court's injunction would

[7] Hawkins also holds up Governor Northam's restoration policy from spring of 2021, but Governor Northam himself said his policy "*automatically* restore[d] voting rights to individuals upon completion of their sentence of incarceration." Ex. C to Declaration of Nina Beck (ECF No. 65-1). Defendants do not concede that Governor Northam's policy satisfied the requirements of *Howell*.

coexist with the holding of *Howell*. These flaws all underscore that Hawkins's claims fail as a matter of law.

CONCLUSION

For these reasons, the Court should hold that Hawkins's claims fail as a matter of law, grant summary judgment for Defendants, dismiss this action with prejudice, and award Defendants any further such relief the Court deems necessary and appropriate.

Dated: March 5, 2024

Respectfully submitted,

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Exhibit 3

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

GEORGE HAWKINS Plaintiff, v. GLENN YOUNGKIN, in this official capacity as Governor of Virginia, and KELLY GEE, in her official capacity as Secretary of the Commonwealth of Virginia Defendants.	)	Civil Action No. 3:23-cv-00232

PLAINTIFF'S REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

1. **Defendants' "responsible citizen" test for voting rights restoration clearly violates the First Amendment.**

The headline here is that Defendants make no argument—*even in the alternative*—that their voting rights restoration scheme satisfies the First Amendment unfettered discretion doctrine. *See* ECF No. 67 at 11 ("Virginia's restoration (not licensing) process therefore is not subject to the unfettered discretion doctrine.").[1] They do not engage with the Supreme Court's relevant First Amendment precedents because they believe that voting rights restoration is clemency and that clemency is exempt from First Amendment scrutiny. For the reasons stated in Plaintiff's

[1] Plaintiff cites to the sealed version of Defendants' brief in response to Plaintiff's motion for summary judgment. Because Plaintiff was served an unstamped version of that sealed version of the brief, Plaintiff cites to the corresponding ECF page number in the unsealed, redacted version. ECF No. 66.

opposition to Defendants' motion for summary judgment (and not restated here), Defendants' principal defense is incorrect.[2]

Because Defendants do not argue that they are complying with the First Amendment, the parties' dispute can and should be resolved as a matter of law based on Defendants' three crucial admissions: (1) "there are no rules, criteria, factors, or standards that constrain or otherwise limit, as a matter of law, the Governor's discretion to grant, deny, or take any other action on citizens' voting rights restoration applications," ECF No. 57-1, Sherman Decl. ¶ 3, Ex. B at Response to Interrog. No. 3, at 4; (2) beyond constitutional prohibitions on intentional discrimination based on "suspect classifications or the exercise of fundamental rights" and the inability to grant voting rights to an individual who fails to satisfy the other voting eligibility criteria, "Virginia law does not otherwise constrain or limit the Governor's individualized discretion when deciding whether to grant a citizen's voting-restoration application," *id*. at Response to Interrog. No. 1, at 2; and (3) Governor Youngkin grants or denies restoration based on his "predictive determination that an individual will live as a responsible citizen and member of the political body." *Id.* ¶ 2, Ex. A at Response to Interrog. No. 2, at 3. These admissions are dispositive of Plaintiff's Count One, the First Amendment unfettered discretion challenge to the lack of objective rules and criteria in Defendants' de facto vote-licensing scheme.

Plaintiff marshalled the facts and evidence contained in his summary judgment brief in anticipation of the alternative argument that Defendants ultimately have not made. During

[2] In this brief, Plaintiff largely only responds to any new or additional legal arguments raised by Defendants' Brief in Opposition to Plaintiff's Motion for Summary Judgment. ECF No. 67. As to arguments that duplicate those found in Defendants' Memorandum in Support of their Motion for Summary Judgment, ECF No. 61, Plaintiff incorporates by reference all arguments from his Brief in Response to Defendants' Motion for Summary Judgment. ECF No. 65.

discovery, in response to Plaintiff's First Set of Interrogatories, it appeared that Defendants might argue that their restoration scheme complies with the First Amendment. Governor Youngkin asserted that he "use[s] multiple factors to guide [his] discretion in ultimately making a predictive determination that an individual will live as a responsible citizen and member of the political body" and then enumerated all of the fields and/or questions on the current rights restoration application as these purported "factors." Sherman Decl. ¶ 2, Ex. A at Response to Interrog. No. 2, at 3; *see also* ECF No. 59, Joint Stipulation of Undisputed Facts ("JSUF") ¶ 12 (listing information requested on rights restoration application). To preempt this potential argument, Plaintiff delved deeply into the evidence, especially the database entries, and presented on summary judgment those facts demonstrating that Governor Youngkin does not consistently grant restoration applicants under *any* combination of "factors."[3] ECF No. 62 at 12-18. This conclusion is consistent with Defendants' three admissions above and with Defendants' statement in their opposition that "[b]ecause the [restoration] process is a holistic review that does not turn on any one factor, one would *expect* that applicants who share some unspecified number of characteristics would indeed have different outcomes." ECF No. 67 at 14 (internal citation omitted) (emphasis in original). Therefore, Defendants have admitted that they do not use any objective factors and criteria to grant or deny voting rights restoration applications, and that their purported "factors" fail to eliminate arbitrary decision-making, are not dispositive, and do not result in consistent dispositions.

Accordingly, because Defendants refuse to engage with the First Amendment precedents at issue and do not defend their system as compliant with the unfettered discretion doctrine, the

[3] All redactions in this Reply Brief, all descriptions or summaries of the database entries, *see* Sherman Decl., Ex. E, are subject to Plaintiff's original Motion to Seal, ECF No. 54, which has already been fully briefed.

facts and evidence contained in Plaintiff's opening brief—beyond Defendants' several crucial admissions—are of diminished relevance to Plaintiff's facial challenge. To put a finer point on it, Plaintiff does not *need* this evidence because the admissions above suffice to establish as a matter of law that there are no constraints on the Governor's discretionary restoration of voting rights, and that alone is dispositive of Count One. *See Forsyth County v. Nationalist Movement*, 505 U.S. 123, 133 n.10 (1992). Nonetheless, that evidence retains value to (i) corroborate what Defendants have already conceded—that there is no combination of "factors" or information recorded on a restoration application that results in consistent treatment; and (ii) illustrate for the Court that Defendants are not applying objective, uniform rules and criteria, meaning that applicants obtain divergent outcomes based on the same purported "factors."

Despite Defendants' professions of good faith in administering what they call a "comprehensive, detailed, and just" restoration process, ECF No. 67 at 12, the parties are in fact before this Court because Governor Youngkin is fighting for the right to selectively deny Virginians the right to vote based on his *prediction* that they will not live as "responsible citizens"—a phrase or standard that not only lacks but *defies* objective definition. The Governor seeks to second-guess the criminal justice system and judge for himself whether Virginians convicted of felonies, like George Hawkins, have sufficiently reformed themselves such that he finds a particular applicant "deserving." *See* ECF No. 67 at 6.[4] But voting rights restoration is *not*

[4] Defendants contend that Mr. Hawkins has "had little time to demonstrate that he ha[s] renounced violent criminal behavior and would now live as a responsible citizen and member of the political body." ECF No. 67 at 16. In trying to explain away the confusing disposition of Mr. Hawkins' applications, Defendants cannot help but invent new rules on the fly. There is now apparently a de facto waiting period for people convicted of violent offenses, but that criterion is not found in either the public or non-public versions of Defendants' restoration eligibility policy. ECF No. 62

a pardon, as Virginia law underscores, *Howell v. McAuliffe*, 292 Va. 320, 337, 343 (2016), and deeming it a matter of purely discretionary executive "clemency" is constitutionally problematic. Conditioning the exercise of the right to vote—that most fundamental form of political expressive conduct—on a single government official's prediction as to whether a person will meet a hopelessly subjective and vague standard is anathema to the controlling First Amendment law. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150–53 (1969). It is baffling that Defendants continue to quote *Connecticut Board of Pardons v. Dumschat* for the proposition that a clemency decision "generally depends not simply on objective factfinding, but also on *purely subjective evaluations* and on *predictions of future behavior* by those entrusted with the decision." 452 U.S. 458, 464 (1981) (emphasis added). This quotation only serves to underscore why Defendants' purely discretionary, prediction-based restoration scheme flagrantly violates the First Amendment.

Curiously, while Defendants fail to make any argument that their restoration regime satisfies the requirements of the First Amendment, they repeatedly tell this *federal* court in a *federal* constitutional challenge that their restoration scheme complies with the requirements of the *state* constitution as interpreted in *Howell*, which requires restoration on an "individualized case-by-case basis taking into account the specific circumstances of each." 292 Va. at 341. Defendants boldly conclude that Virginia's restoration process works "as described and required under the Virginia Constitution" and, therefore, it "is undoubtedly constitutional." ECF No. 67 at 16. Turning the Supremacy Clause on its head, Defendants appear to contend that to comply with the Virginia Constitution's mandates is to comply with the U.S. Constitution.

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at 11 (Undisputed Material Facts ¶¶ 11-12); JSUF ¶¶ 11, 28. This is yet another example of Defendants either arbitrarily changing the rules or creating ad hoc, unwritten rules that are only applied to particular applicants.

That is not the only instance in which Defendants urge this Court to decide this case based on a point of state law. Much of Defendants' argument for granting summary judgment in their favor turns on the undisputed fact that Plaintiff and other disenfranchised people with felony convictions are presently ineligible to vote as a matter of *state* law. *See* ECF No. 61 at 16. Virginia law could not impose an arbitrary licensing scheme for otherwise-*eligible* Virginia voters; this, Defendants would surely concede, would be inconsistent with the First Amendment. But, in their view, such arbitrary licensing of the right to vote becomes constitutional when a disenfranchised citizen is currently *ineligible* to vote as a matter of state law. This argument is erroneous. Were this theory the law, then no disenfranchised person would ever have Article III standing to assert their federal constitutional rights, even if state officials were allocating or re-allocating voting rights based on height, singing ability, English proficiency, or sense of humor.

Ultimately, Defendants cannot forever disregard the First Amendment doctrine at issue. The application of the Supreme Court's rulings is clear: because voting is political expressive conduct, Plaintiff wins because there can be no arbitrary licensing of any expressive conduct. This inquiry does not turn on whether the "restoration process [is] 'facially or intentionally designed to discriminate based on viewpoint.'" ECF No. 67 at 21–23 (quoting *Hand v. Scott*, 888 F.3d 1206, 1211–12 (11th Cir. 2018)). In brief after brief, Defendants ignore the First Amendment rules in the precedents Plaintiff cites, which expressly ask only whether the licensing scheme is arbitrary and, therefore, vulnerable to the discriminatory exercise of discretion, and *not* whether it is intentionally designed to produce such results. *Forsyth Cnty.*, 505 U.S. at 133 n.10; *Child Evangelism Fellowship of Md., Inc. v. Montgomery Cnty. Pub. Schs.*, 457 F.3d 376, 389 (4th Cir. 2006) (emphasizing that First Amendment inquiry turns on "*risk* of viewpoint discrimination") (emphasis added).

Finally, Defendants also take issue with the inexorable corollary of the unfettered discretion Governor Youngkin wields—that licensors can access and make decisions based upon any information they can obtain on an applicant. Plaintiff has suggested ways in which the licensor can do this by way of reviewing publicly available registration or donation history or by reviewing publicly available writings or statements of an applicant, including social media postings. Defendants have responded with Jennifer Moon's Declaration, which asserts that the Secretary of the Commonwealth's Rights Restoration "Office does not inspect applicants' donation history, political affiliations, or social media postings as part of the restoration process." ECF No. 67-1, Declaration of Jennifer Moon ("Moon Decl.") ¶ 9. However, not only does that statement fail to acknowledge the fact that the Rights Restoration Office *could* conduct such an inspection, but it says nothing about what the *Governor*, his staff, his counsel, or any other agents can do or what applicants can do to signal or communicate their political views and partisan affiliations.

What is legally dispositive of the constitutional claim under the Supreme Court's decision in *Forsyth County* is whether there is anything "preventing" the Governor from using such information in his decision-making. 505 U.S. at 133 n.10; *see also Child Evangelism Fellowship of Md.*, 457 F.3d at 389. Moreover, the unfettered discretion doctrine is also concerned with the *risk* of self-censorship and chilling caused by purely arbitrary licensing like the scheme challenged here. So, even if a licensor were not reviewing the political views and leanings of individual applicants, there is per se harm from a system of unfettered discretion because there is nothing preventing the licensor from doing so. *See City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 758 (1988) ("Only standards limiting the licensor's discretion will eliminate this danger by adding an element of certainty fatal to self-censorship."); *see also Child Evangelism Fellowship of S.C. v. Anderson Sch. Dist. Five*, 470 F.3d 1062, 1072 (4th Cir. 2006) (holding policy

unconstitutional because there was nothing *preventing* administrators from exercising their discretion in a content-based manner, even though administrators claimed to apply content-neutral criteria). As construed by the Supreme Court, in addition to precluding the risk of viewpoint discrimination, the First Amendment was designed to prevent the deterrence of political expression through arbitrary licensing.

2. Defendants' criticisms of Plaintiff's factual assertions and evidence are misplaced.

Though Defendants' failure to make any argument in the alternative that their restoration scheme complies with the First Amendment reduces the materiality of some of these factual and evidentiary issues, Plaintiff will respond to a few of Defendants' assertions.

With respect to Mr. Hawkins' application specifically, Defendants strain to justify denying his application as "ineligible at this time." Taking a step back, there are three reasons that a restoration applicant would be denied. First, the applicant fails to meet Defendants' internal eligibility criteria. JSUF ¶ 28. Second, the application is incomplete. *Id.* Third, the Governor considers the complete application of an eligible applicant and denies the application on the merits. Under the first or second scenarios, the applicant should receive either the "ineligible" or "ineligible at this time" status code. Under the third scenario, the application should receive the "not granted at this time" status code. *Id.* ¶ 31. While all three status codes are effectively denials, they convey two very different reasons to the applicant.

It is undisputed that Mr. Hawkins satisfies Defendants' eligibility criteria, and there is no evidence that Defendants deemed his application incomplete. Nevertheless, Defendants have deemed him "ineligible at this time." Why not tell Mr. Hawkins (and presumably other similarly situated applicants) that he was denied on the merits and not for ineligibility? This is what makes Mr. Hawkins' denial mysterious and contrary to Defendants' own eligibility policy. The treatment

of Mr. Hawkins' application perfectly illustrates the arbitrariness and lack of transparency in Defendants' rights restoration scheme. Defendants employ a non-public eligibility "policy" and then communicate decisions to applicants that are inconsistent with said policy while using euphemistic and inaccurate language. For applicants like Mr. Hawkins who otherwise checked all the boxes, receiving a notice that he was "ineligible" without any explanation is evidence of an arbitrary, haphazard, and unconstitutional scheme.

Turning to the rights restoration database entries, while Defendants critique Plaintiff's presentation of facts derived with simple filtering and calculations, Defendants do not point to any evidence from the database entries that demonstrates their process complies with the dictates of the First Amendment.

Plaintiff agrees that the calculations and facts based on Governor Youngkin's grants and denials contained in the database entries carry less weight now that Defendants' summary judgment briefing has confirmed that Defendants *do not use any objective rules or criteria* in the rights restoration decision-making process and do not argue their restoration system complies with the First Amendment. Now it is clear that Defendants embrace the fact that outcomes vary for applicants who check the same boxes and do not even aspire to treat applicants in a non-arbitrary, uniform manner based on objective rules and criteria. They assert that Plaintiff's "litany of calculations demonstrates that Defendants' voting-restoration process works precisely as expected." ECF No. 67 at 14; *see also id.* ("[E]ven applicants who share some specified number of criteria will warrant a different predictive judgment as to whether one individual 'will live as a responsible citizen and member of the political body' and the other would not.").

Defendants' additional complaints concerning Plaintiff's factual contentions based on the rights restoration database all fail. Defendants' overarching criticism is that the database entries

upon which Plaintiff relied are static reflections of applicants' attestations and, therefore, do not take into account other information gathered by Defendants during their review. ECF No. 67 at 18–19.

First, Defendants do not dispute the accuracy of *any* of Plaintiff's breakdowns derived from Defendants' data. *See* ECF No. 67 at 11–15.[5] While Defendants complain that the database entries upon which Plaintiff relied reflect merely an applicant's attestations, *id*. at 13–14,[6] the record is devoid of any evidence that applicants' attestations are inaccurate generally or with any meaningful frequency.

Second, Defendants have never qualified the reliability of their data production because it is a "*static*" snapshot of a "*dynamic* database." ECF No. 67 at 18 (emphasis in original). To the contrary, Defendants stipulated that they produced a "portion of [their] internal database" and that they "maintain the database in the ordinary course of business, strive to ensure its accuracy, and do not presently have any reason to believe any database entries are inaccurate." JSUF ¶ 30. Defendants contend that they gather additional information about applicants during the review process but do not assert that they never update their internal database with information they obtain that is contrary to what a restoration applicant supplied on their application. ECF No. 67 at 18–19.

[5] Defendants attempt to minimize Plaintiff's facts further by relying on averages and medians, rather than raw numbers of applications impacted. Yet, at no time do Defendants dispute Plaintiff's calculations or use of the raw data. *See* L.C.R. 56(B) ("In determining a motion for summary judgment, the Court may assume that facts identified by the moving party in its listing of material facts are admitted, unless such a fact is controverted in the statement of genuine issues filed in opposition to the motion.").

[6] Defendants' sole factual dispute is that the database entries reflect an applicants' attestations—which Plaintiff repeatedly acknowledged in his Statement of Undisputed Material Facts. *See* ECF No. 62 at 12–18, ¶¶ 17–37; *see, e.g.*, *id.* ¶ 17 ("who attested they are U.S. citizens"); *id.* ¶ 25 ("who attested that they (i) are U.S. citizens; (ii) had finished their term of incarceration; (iii) had not been convicted of a violent crime; and (iv) had paid all fines, fees, and restitution"); *id.* ¶ 31 ("who attested that they had not finished their terms of incarceration").

Third, Defendants fail to dispute any of Plaintiff's proffered material facts relating to the length of time that applications have remained pending. ECF No. 62 at 18–20, ¶¶ 38–46; *see generally* ECF No. 67 at 7–9, 17–20. Therefore, each is deemed admitted. *See* L.C.R. 56(B) (any fact not specifically controverted by the opposing party may be deemed admitted). Plaintiff's calculations show that Defendants are not constrained by any definite time limits and regularly exceed the estimate they publicly communicate to applicants. In fact, Defendants do not dispute Plaintiff's calculation that half of all applicants who applied during the Relevant Time Period[7] and were denied waited longer than three months to receive a decision. ECF No. 67 at 17 (citing ECF No. 62 at 19, ¶ 41). Further, Defendants criticize Plaintiff's reference to three individuals who expressed frustration at the length of time their applications were pending, noting that these individuals do not appear in the produced dataset or, according to the dataset, applied long after the applicant sent the email. ECF No. 67 at 19. In relying entirely on the database excerpt, Defendants ignore that, by agreement of the parties, their dataset only covers restoration applicants who applied on or after May 17, 2022. *See* JSUF ¶ 30. Defendants fail to acknowledge the strong possibility that each of these three individuals had applications pending prior to May 17, 2022.

Fourth, Defendants shift blame to applicants for delays in the process, claiming that applicants fail to timely respond to inquiries from the Restoration of Rights Division. ECF No. 67 at 19 (citing Moon Decl. ¶¶ 7–9 (outlining the timeline for two applications)). Once again, Defendants cherry-pick the record. By their own telling, the Restoration of Rights Division sat on applications for *months* before informing the applicants that they needed to submit federal release paperwork. Moon Decl. ¶ 7 (reflecting a delay of nine months between application submission in

[7] "Relevant Time Period" is the period between May 17, 2022 and January 22, 2024, as previously defined in Plaintiff's opening summary judgment brief. *See* ECF No. 62 at 11.

October 2022 and the Office's inquiry in July 2023); *id.* ¶ 8 (reporting a delay of three months between application submission in November 2022 and the Office's inquiry in February 2023). Similarly, to justify long delays in informing applicants without felony convictions, Defendants blame these confused applicants for not registering to vote. Defendants ignore that applicants risk criminal prosecution if they register when they are not *absolutely certain* that they are eligible. *See* Va. Code Ann. § 24.2-1016 (making a false statement on a voter registration form a Class 5 felony, punishable with up to ten years in prison or up to $2,500 in fines).[8] Recurring delays such as these are symptomatic of a system unconstrained by any reasonable, definite time limits where Defendants feel no pressure to timely respond to applicants.

Accordingly, none of Defendants' criticisms undermine the veracity of Plaintiff's proffered facts and calculations regarding the database entries.

CONCLUSION

For all the reasons above, Plaintiff respectfully requests that this Court grant summary judgment in his favor as to both Counts One and Two and deny Defendants' motion for summary judgment. Plaintiff respectfully requests that this Court issue a declaratory judgment finding both violations of the First Amendment, permanently enjoin Defendants' current voting rights restoration scheme, and require Defendants to implement a non-arbitrary system of voting rights restoration governed by objective rules and criteria and reasonable, definite time limits.

Dated: March 5, 2024

Respectfully submitted,

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[8] *Available at* https://vote.elections.virginia.gov/Registration/Ineligible ("Please be aware that making a false statement on a voter registration application is punishable under Virginia law as a felony. Violators may be sentenced up to 10 years in prison, or up to 12 months in jail and/or fined up to $2,500.").

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Exhibit 1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

GEORGE HAWKINS Plaintiff, v. GLENN YOUNGKIN, in this official capacity as Governor of Virginia, and KELLY GEE, in her official capacity as Secretary of the Commonwealth of Virginia Defendants.	)	Civil Action No. 3:23-cv-00232

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

Plaintiff George Barry Hawkins, Jr. ("Plaintiff" or "Mr. Hawkins") seeks to end the arbitrary restoration of voting rights to Virginians with felony convictions. Plaintiff has asserted two First Amendment claims, challenging both the lack of objective rules and criteria governing Defendants Governor Glenn Youngkin and Secretary of the Commonwealth Kelly Gee's ("Defendants") voting rights restoration system and the lack of reasonable, definite time limits by which the Governor must grant or deny a restoration application. Because Virginia law has created a path to restoration—an exception to the default rule of disenfranchisement upon felony conviction—a government official may not arbitrarily administer that exception by selectively conferring voting rights on the disenfranchised on a case-by-case basis. The First Amendment forbids this de facto licensing scheme.

The U.S. Supreme Court has long construed the First Amendment to prohibit such limitless discretion in licensing protected expressive conduct because it creates the risk of undetectable viewpoint discrimination. The Court has been clear that the unfettered discretion doctrine does not require evidence of particular instances of viewpoint discrimination. Rather, this preventative rule prohibits the very grant of arbitrary power which enables such discrimination. Accordingly, in a facial challenge to an arbitrary licensing scheme governing the exercise of First Amendment-protected conduct such as Count One, a plaintiff need only demonstrate the absence of any objective rules or criteria that constrain official discretion. Without such rules or criteria, any licensing process is susceptible to biased treatment of applicants and, therefore, unconstitutional. Applicants can signal their viewpoints and party preferences to the licensor, or the licensor can access or receive information on the same through readily available sources like political donation or voter registration history and social media accounts. Because Virginia law assigns sole power

over restoration to one government official's unfettered discretion, there is no way to detect and redress viewpoint discrimination.

The evidence in this case demonstrates the wisdom of the Supreme Court's 85-year-old doctrine. *Lovell v. City of Griffin*, 303 U.S. 444 (1938). Defendants have admitted that—aside from constitutional prohibitions on intentional discrimination based on "suspect classifications or the exercise of fundamental rights" and the inability to grant voting rights to an individual who fails to satisfy the other voting eligibility criteria such as U.S. citizenship—"Virginia law does not otherwise constrain or limit the Governor's individualized discretion when deciding whether to grant a citizen's voting-restoration application."[1] Similarly, the Governor has admitted that "there are no rules, criteria, factors, or standards that constrain or otherwise limit, as a matter of law, the Governor's discretion to grant, deny, or take any other action on citizens' voting rights restoration applications."[2] Finally, Governor Youngkin has further admitted that he grants or denies restoration based on his "predictive determination that an individual will live as a responsible citizen . . ."[3] These admissions alone are dispositive of Count One: Defendants' "responsible citizen" test for restoration is unlawfully arbitrary and subjective.

Additional evidence corroborates this conclusion and demonstrates that Virginia's arbitrary restoration scheme is haphazard and fails to preclude the exercise of discretion in a biased manner. Even a limited sample of communications to and from Defendants on rights restoration demonstrates that applicants and their supporters can signal viewpoints or partisan affiliations.

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[1] Declaration of Jonathan Sherman ("Sherman Decl.") ¶ 3, Ex. B (Gov. Youngkin's Responses to Plaintiff's Second Set of Interrogatories) at Response to Interrog. No. 1, at 2.
[2] *Id*. at Response to Interrog. No. 3, at 4.
[3] Sherman Decl. ¶ 2, Ex. A (Gov. Youngkin's Responses to Plaintiffs' First Set of Requests for Admission and Interrogatories) at Response to Interrog. No. 2, at 3.

State Senator Bill DeSteph, a Republican recently appointed by Governor Youngkin to the Atlantic States Marine Fisheries Commission, wrote two letters to the Rights Restoration Division expressing his support for restoring the voting rights of [redacted] and [redacted].[4] Governor Youngkin restored the voting rights of both applicants.[5] It is unknown whether these restoration applicants' or the State Senator's partisan affiliation played a role in the decisions to grant restoration. Signaling that an applicant shares the political viewpoints or partisan affiliations of *any* governor of *any* political party can be implicit and leave no trace. This signaling can also be more explicit. In a November 8, 2022 email received by the Secretary of the Commonwealth's office, a prospective restoration applicant, [redacted], announces that he is "a life-long Republican voter who was recently released from incarceration" and asks for assistance and "expedited review."[6] Regardless of the disposition of any particular application, because nothing in Virginia law *prevents* Governor Youngkin from issuing—or withholding—these licenses to vote based on an applicant's viewpoints or partisan affiliation, Defendants' restoration system violates the First Amendment.

With respect to Count Two, Defendants have also admitted that there are no reasonable, definite time limits by which Governor Youngkin must grant or deny a voting rights restoration application. This too violates the First Amendment.

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[4] Sherman Decl. ¶ 4, Ex. C; *see also* ECF Nos. 49-50 (Motion for Judicial Notice and Memorandum in Support); ECF No. 50-6 at 3 (Press Release, "Governor Glenn Youngkin Announces Additional Administration and Board Appointments" (Oct. 13, 2023), *also available at* https://www.governor.virginia.gov/newsroom/news-releases/2023/october/name-1015925-en.html).

[5] *See id*. at ECF No. 50-4 at 42, 48 ("The Office of the Governor's List of Pardons, Commutations, Reprieves and Other Forms of Clemency to the General Assembly of Virginia, Senate Document No. 2" (Jan. 15, 2023), *also available at* https://rga.lis.virginia.gov/Published/2023/SD2/PDF).

[6] Sherman Decl. ¶ 5, Ex. D.

II. LEGAL BACKGROUND ON FELONY DISENFRANCHISEMENT AND REENFRANCHISEMENT IN VIRGINIA

The Virginia Constitution sets forth the rules for voting eligibility and also includes a felony disenfranchisement provision: "No person who has been convicted of a felony shall be qualified to vote unless his civil rights have been restored by the Governor or other appropriate authority." VA. CONST. art. II, § 1. Article 5, Section 12 of the Virginia Constitution also states that "[t]he Governor shall have power . . . to remove political disabilities consequent upon conviction for offenses committed prior or subsequent to the adoption of this Constitution . . ." VA. CONST. art. 5, § 12. People with felony convictions may not register to vote prior to the restoration of their voting rights by the Governor. If an individual with a felony conviction willfully registers to vote without restoration, they commit a Class 5 felony. Va. Code Ann. § 24.2-1016.

Felony disenfranchisement and re-enfranchisement are also incorporated within Virginia's statutes. Just after the enumerated eligibility criteria in the definition of a "qualified voter," Virginia law states that: "No person who has been convicted of a felony shall be a qualified voter unless his civil rights have been restored by the Governor or other appropriate authority." Va. Code Ann. § 24.2-101; *see also* Va. Code Ann. § 24.2-427(D) (requiring cancellation of "registration of any registered voter shown to have been convicted of a felony who has not provided evidence that his right to vote has been restored").

It is uncontested that Virginia law does not establish any rules or criteria to govern the Governor's decision-making on voting rights restoration applications. In fact, the Supreme Court of Virginia has noted that the Governor's powers of restoration are exclusive and unfettered: "[T]he power to remove the felon's political disabilities remains vested solely in the Governor, who may grant or deny any request *without explanation*, and there is no right of appeal from the Governor's decision." *In re Phillips*, 265 Va. 81, 87–88 (2003) (emphasis added).

The Director of the Department of Corrections is required to notify anyone convicted of a felony of the loss of their voting rights and of the procedures for applying for restoration. Va. Code Ann. § 53.1-231.1. "The notice shall be given at the time the person has completed service of his sentence, period of probation or parole, or suspension of sentence." *Id*. The Director of the Department of Corrections is required to assist the Secretary of the Commonwealth in administering the restoration application review process. *Id*. The Secretary of the Commonwealth is instructed by statute to "maintain a record of the applications for restoration of rights received, the dates such applications are received, and the dates they are either granted or denied by the Governor" and to "notify each applicant who has filed a complete application that the complete application has been received and the date the complete application was forwarded by the Secretary to the Governor." *Id*. Virginia law requires that complete applications be forwarded to the Governor within ninety days of receipt. *Id*.

III. UNDISPUTED MATERIAL FACTS

A. Material Facts from Joint Stipulation of Undisputed Facts

Plaintiff incorporates by reference and relies upon the following undisputed material facts from the Joint Stipulation of Undisputed Facts ("JSUF"): Nos. 1 through 6, 10 through 28, 30 through 49.

B. Undisputed Material Facts Relating to Plaintiff George Hawkins

1. Plaintiff George Hawkins was born on March 11, 1992, and is currently 31 years old. Mr. Hawkins is a United States citizen and a resident of Richmond, Virginia. Mr. Hawkins has never been declared mentally incapacitated by any court. Declaration of George Barry Hawkins, Jr. ("Hawkins Decl.") ¶ 1.

2. In 2010, Mr. Hawkins was convicted of a felony in a Commonwealth of Virginia court when he was 17 years old. *Id*. ¶ 2.

3. On May 3, 2023, Mr. Hawkins completed his term of incarceration for a felony conviction. *Id.*

4. Because Mr. Hawkins was convicted as a juvenile, he has never been eligible to vote in his life, and he has never voted. *Id.* ¶ 3.

5. Mr. Hawkins wants to register to vote in future primary and general elections in the Commonwealth of Virginia for candidates of his choice and state constitutional amendments, to express his political preferences, and to support and associate with political parties in order to advance their goals. *Id.* ¶ 4.

6. Last year, Mr. Hawkins applied for voting rights restoration twice. The first time he applied was in early May 2023. His first rights restoration application was denied by Governor Glenn Youngkin. *Id.* ¶ 5.

7. On or around June 18, 2023, Mr. Hawkins submitted a second application for the restoration of his voting rights. *Id.* ¶ 6; *see also* Sherman Decl. ¶ 6, Ex. E (portions of Defendants' internal database).

8. In July 2023, the rights restoration online portal showed that his application was "pending." Hawkins Decl. ¶ 6, Ex. A.

9. Sometime after July 2023, Mr. Hawkins' status changed. The portal showed that he was "ineligible at this time" and the "date closed" for his application was August 17, 2023. *Id.* ¶ 6, Ex. B.

10. Mr. Hawkins was not told why his application was deemed "ineligible at this time," when his application may be deemed eligible, or what conditions he must satisfy in order for his application to be deemed eligible. Hawkins Decl. ¶ 6.

C. Undisputed Material Facts Relating to Virginia's Restoration of Voting Rights Process.

11. The only information on eligibility for voting rights restoration that is contained in any public-facing material or source, including the Secretary of the Commonwealth's rights restoration website, is what is contained in the JSUF Paragraph 11.

12. "Completeness" and "eligibility" for voting rights restoration applications are not defined or otherwise specified in any public-facing materials or websites. *See also* Sherman Decl. ¶¶ 9, Ex. H; *see also* ECF Nos. 49-50 (Motion for Judicial Notice and Memorandum in Support); ECF Nos. 50-1 (ROR homepage),[7] 50-2 (ROR "Frequently Asked Questions" webpage),[8] and 50-3 (ROR "Process" webpage).[9]

13. Between May 17, 2022 and January 22, 2024, the period for which Defendants produced rights restoration database entries as to reach new application submitted, (the "Relevant Time Period"), at least 785 voting rights restoration applications submitted were deemed "incomplete" and, therefore, rejected. *See* Sherman Decl. ¶ 6, Ex. E.[10]

14. There is no deadline in Virginia law or administrative rules by which state agencies must respond with information on a rights restoration applicant.

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[7] *Also available at:* https://www.restore.virginia.gov/restoration-of-rights-process/.
[8] *Also available at:* https://www.restore.virginia.gov/frequently-asked-questions/ (In response to the FAQ "Am I eligible to have my rights restored?", the answer is "Governor Youngkin will consider restoration of rights for any individuals that have finished any term of incarceration as a result of a felony conviction.")
[9] *Also available at:* https://www.restore.virginia.gov/restoration-of-rights-process/ ("An individual is eligible to apply to have his/her rights restored by the Governor if he/she has been convicted of a felony and is no longer incarcerated.").
[10] Filtering in Column K ("Current Status") for "Incomplete."

D. Undisputed Material Facts Regarding Rights Restoration Applications Submitted from May 17, 2022 to January 22, 2024[11]

15. Apart from federal and state constitutional constraints, "there are no rules, criteria, factors, or standards that constrain or otherwise limit, as a matter of law, the Governor's discretion to grant, deny, or take any other action on citizens' voting rights restoration applications." Sherman Decl. ¶ 3, Ex. B at Response to Interrog. No. 3, at 4.

16. For all applications submitted during the Relevant Time Period, 7,414 applications were submitted for restoration. In that period, Governor Youngkin granted restoration to 2,742 applicants. Governor Youngkin denied restoration to 624 applicants (*i.e.*, current status indicates "ineligible," "ineligible at this time," and "not granted at this time").[12] Currently, 1,250 applications remain pending (*i.e.*, current status indicates "information requested," "awaiting approval," "federal release required," "needs more info," "pending research," or "received"). The 2,798 remaining applications have current statuses of "inapplicable," "incomplete," "duplicate," "no felony found," or "opt out." Sherman Decl. ¶ 6, Ex. E.[13]

17. For all applications submitted during the Relevant Time Period, Govern Youngkin denied the restoration applications of 618 applicants who attested that they are U.S. citizens. In that same time period, Governor Youngkin granted the restoration applications of 2,728 applicants who fit that same criterion. *Id.*[14]

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[11] All breakdowns (subtotals) included in this section and throughout Plaintiff's summary judgment brief are derived by applying one or more filters included in the rights restoration database spreadsheet produced by Defendants. *See* Sherman Decl. ¶ 6, Ex. E.

[12] These statuses are reflected in Column K of Defendants' produced database. *Id.* All of these applications are "denied" because the applicant will have to re-apply to be granted restoration.

[13] Filtering in Column K ("Current Status"). Many of the column names and status codes are explained in the Joint Stipulation of Undisputed Facts at paragraphs 31 and 35 through 49.

[14] Filtering in Column K and for "Yes" in Column N ("US Citizen").

18. For all applications submitted during the Relevant Time Period, Governor Youngkin denied the restoration applications of 609 applicants who attested that they (i) are U.S. citizens; and (ii) had finished their term of incarceration.[15] In the same time period, Governor Youngkin granted the restoration applications of 2,721 applicants who fit those same two criteria. *Id.*[16]

19. For all applications submitted during the Relevant Time Period, Governor Youngkin denied the restoration applications of 334 applicants who attested that they (i) are U.S. citizens; and (ii) had not been convicted of a violent crime. In the same time period, Governor Youngkin granted the restoration applications of 1,193 applicants who fit those same two criteria. *Id.*[17]

20. For all applications submitted during the Relevant Time Period, Governor Youngkin denied the restoration applications of 327 applicants who attested that they (i) are U.S. citizens; (ii) had finished their term of incarceration; and (iii) were not convicted of a violent crime. In the same time period, Governor Youngkin granted the restoration applications of 1,191 applicants who fit those same three criteria. *Id.*[18]

21. For all applications submitted during the Relevant Time Period, Governor Youngkin denied the restoration applications of 192 applicants who attested that they (i) are U.S. citizens; (ii) had finished their term of incarceration; and (iii) were not on probation, parole, or

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[15] *See* JSUF ¶ 37 (confirming column titled "Claims to Have Finished Sentence" corresponds to the restoration application question of "have you completed serving all terms of incarceration?").
[16] Filtering in Column K, for "Yes" in Column N and for "Yes" in Column R ("Claims to Have Finished Sentence").
[17] Filtering in Column K, for "Yes" in Column N and for "No" in Column O ("Claims Violent Crime Conviction").
[18] Filtering in Column K, for "Yes" in Column N, for "No" in Column O, and for "Yes" in Column R.

other state supervision. In the same time period, Governor Youngkin granted the restoration applications of 1,358 applicants who fit those same three criteria. *Id.*[19]

22. For all applications submitted during the Relevant Time Period, Governor Youngkin denied the restoration applications of 238 applicants who attested that they (i) are U.S. citizens; (ii) had finished their term of incarceration; and (iii) had paid all fines, fees, and restitution. In the same time period, Governor Youngkin granted the restoration applications of 1,173 applicants who fit those same three criteria. *Id.*[20]

23. For all applications submitted during the Relevant Time Period, Governor Youngkin denied the restoration applications of 141 applicants who attested that they (i) are U.S. citizens; (ii) had not been convicted of a violent crime; and (iii) were not on probation, parole, or other state supervision. In the same time period, Governor Youngkin granted the restoration applications of 1,100 applicants who fit those same three criteria. *Id.*[21]

24. For all applications submitted during the Relevant Time Period, Governor Youngkin denied the restoration applications of 140 applicants who attested that they (i) are U.S. citizens; (ii) had finished their term of incarceration; (iii) had not been convicted of a violent crime; and (iv) were not on probation, parole, or other state supervision. In the same time period,

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[19] Filtering in Column K, for "Yes" in Column N, for "Yes" in Column R, and for "No" in Column S ("Claims Currently on Probation"); *see also* JSUF ¶ 38 (confirming that Column S titled "Claims Currently on Probation" reflects responses to the application question of "are you currently on probation, parole or other state supervision?").

[20] Filtering on Column K, for "Yes" in Column N, for "Yes" in Column R, and for "Yes" in Column V ("Claims Paid All Fines").

[21] Filtering in Column K, for "Yes" in Column N, for "No" in Column O, and for "No" in Column S.

Governor Youngkin granted the restoration applications of 1,099 applicants who fit those same four criteria. *Id.*[22]

25. For all applications submitted during the Relevant Time Period, Governor Youngkin denied the restoration applications of 168 applicants who attested that they (i) are U.S. citizens; (ii) had finished their term of incarceration; (iii) had not been convicted of a violent crime; and (iv) had paid all fines, fees, and restitution. In the same time period, Governor Youngkin granted the restoration applications of 935 applicants who fit those same four criteria. *Id.*[23]

26. For all applications submitted during the Relevant Time Period, Governor Youngkin denied the restoration applications of 134 applicants who attested that they (i) are U.S. citizens; (ii) had finished their term of incarceration; (iii) were not on probation, parole, or other state supervision; and (iv) had paid all fines, fees, and restitution. In the same time period, Governor Youngkin granted the restoration applications of 1,111 applicants who fit those same four criteria. *Id.*[24]

27. For all applications submitted during the Relevant Time Period, Governor Youngkin denied the restoration applications of 95 applicants who attested that they (i) are U.S. citizens; (ii) had finished their term of incarceration; (iii) had not been convicted of a violent crime; (iv) were not on probation, parole, or other state supervision; and (v) had paid all fines, fees, and

[22] Filtering on Column K, for "Yes" in Column N, for "No" in Column O, for "Yes" in Column R, and for "No" in Column S.
[23] Filtering on Column K, for "Yes" in Column N, for "No" in Column O, for "Yes" in Column R, and for "Yes" in Column V.
[24] Filtering on Column K, for "Yes" in Column N, for "Yes" in Column R, for "No" in Column S, and for "Yes" in Column V.

restitution. In the same time period, Governor Youngkin granted the restoration applications of 903 applicants who fit those same five criteria. *Id.*[25]

28. For all applications submitted during the Relevant Time Period, Governor Youngkin granted the restoration applications of 145 applicants who had a federal court conviction. Of those 145 granted applications: (i) 16 applicants attested that their federal court conviction was from out-of-state; and (ii) 7 applicants attested that they were on probation, parole, or other state supervision at the time of their application. *Id.*[26]

29. For all applications submitted during the Relevant Time Period, Governor Youngkin denied the restoration applications of 29 applicants who had a federal court conviction. Of those 29 denied applications: (i) 5 applicants attested that their federal court conviction was from out-of-state; and (ii) 10 applicants attested that they were on probation, parole, or other state supervision at the time of their application. *Id.*[27]

30. For all applications submitted during the Relevant Time Period, Governor Youngkin granted the restoration applications of 285 applicants who attested that they had been convicted of a violent crime. Of those 285 applicants, 25 applicants attested that they were on probation, parole, or other state supervision at the time of their application. In that same time period, Governor Youngkin denied the restoration applications of 109 applicants who attested that

[25] Filtering on Column K, for "Yes" in Column N, for "No" in Column O, for "Yes" in Column R, for "No" in Column S, and for "Yes" in Column V.
[26] Filtering on Column K, for "Yes" in Column Z ("Claims Federal Court Conviction"), and then separately filtering on Column AA ("Out-of-State Federal Court") and for "Yes" in Column S.
[27] Applying the same filters as above, except as applied to denied applications.

they had been convicted of a violent crime. Of those 109 applicants, 59 applicants attested that they were on probation, parole, or other state supervision at the time of their application. *Id*.[28]

31. For all applications submitted during the Relevant Time Period, Governor Youngkin granted the restoration applications of 8 applicants who attested that they had not finished their terms of incarceration. *Id*.[29]

32. For all applications submitted during the Relevant Time Period, Governor Youngkin granted the restoration applications of 103 applicants who attested that they were on probation, parole, or other state supervision at the time of their application. *Id*.[30]

33. For all applications submitted during the Relevant Time Period, Governor Youngkin granted the restoration applications of 386 applicants who attested that they had not paid all fines, fees, and restitution. *Id*.[31]

34. For all applications submitted during the Relevant Time period, Governor Youngkin granted the restoration applications of 13 applicants who attested that they were not U.S. citizens and 1 applicant who did not disclose his citizenship status. *Id*.[32]

35. Governor Youngkin has also granted rights restoration applications for at least seven individuals who had federal convictions and were still on probation, parole, or other state supervision at the time they were restored. *Id*.[33]

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[28] Filtering on Column K, for "Yes" in Column O, for "Yes" in Column S, and per the date provided in Column T ("Probation End Date").
[29] Filtering on Column K, for "No" in Column R.
[30] Filtering on Column K, for "Yes" in Column S and per the date provided in Column T.
[31] Filtering on Column K, for "No" in Column V.
[32] Filtering on Column K, for "No" or "Blank" in Column N.
[33] Filtering on Column K, for "Yes" in Column S and for "Yes" in Column Z.

36. Governor Youngkin has deemed "ineligible" or "ineligible at this time" 404 applications from individuals who were no longer incarcerated. *Id.*[34]

37. Governor Youngkin has deemed "ineligible" or "ineligible at this time" 129 applications from individuals who submitted complete applications, are no longer incarcerated, are not under parole, probation, or any other state supervision, and are U.S. citizens. *Id.*[35]

E. Undisputed Material Facts Regarding Length of Time that Restoration of Rights Applications Remained Pending During the Relevant Time Period

38. In response to the Frequently Asked Question "How long does it take to get my rights restored?", the Secretary of the Commonwealth's official rights restoration website answers: "The review process usually takes 1-3 months after an individual has contacted the office requesting restoration of rights." *See* ECF Nos. 49-50, Motion for Judicial Notice and Memorandum; ECF No. 50-2, at 1, *also available at* https://www.restore.virginia.gov/frequently-asked-questions/.

39. Restoration of Rights Office staff have informed applicants via email that their office has been "experiencing an extended timeline under [the Youngkin] administration." Sherman Decl. ¶ 7, Ex. F at Hawkins_Def_001682.

40. For all applications submitted during the Relevant Time Period that were eventually granted, and that have both a "Date Received" and "Date Closed" provided, 66 percent waited longer than three months. Sherman Decl. ¶ 6, Ex. E.

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[34] Filtering in Column K, for "Yes" in Column R.
[35] Filtering in Column K, for "Yes" in Column R, for "No" in Column S, for "Yes" in Column N.

41. For all applications submitted during the Relevant Time Period that were eventually denied (*i.e.*, current status of "not granted at this time," "ineligible," or "ineligible at this time"), 53.5 percent waited longer than three months. *Id*.

42. For all applications submitted during the Relevant Time Period, 573 were found not to have any felony convictions and only reported Virginia state court convictions (i.e., did not report an out of state court conviction or a federal conviction). Yet, many of these applications remained pending for extended periods of time before the applicant was informed they were not, in fact, disenfranchised. For these applications, (i) 125 applicants waited between 91-180 days; (ii) 84 applicants waited between 181-270 days; (iii) 117 applicants waited between 271-365 days; and (iv) 81 applicants waited more than one year before the Restoration of Rights Office communicated this information. *Id*.

43. Of the applications received in 2023 that are still pending with the Secretary of the Commonwealth's Rights Restoration Office (*i.e.*, applications that do not have a "Date Closed" provided), 355 have been pending since September 2023 or earlier. Of those 355, 167 have been pending since July 2023 or earlier. *Id*.

44. There are two applications that were received by the Rights Restoration Office in 2022 that are still pending and for which the Rights Restoration Office is not waiting for information from the applicant. *Id*.[36]

45. The application that had been pending for the longest period of time was pending for 599 days. It was received on May 20, 2022, and closed on January 9, 2024. The applicant was found not to have any felony conviction and, thus, was in fact eligible to vote. *Id*.

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[36] Filtering on Column K, Column L ("Date Received") and showing no "Date Closed" in Column M.

46. The top six longest-pending applications—pending for a range of 572 to 599 days—were eventually deemed to be cases where the applicant had not been convicted of a felony and had not lost their right to vote. *Id*.

IV. ARGUMENT

A. The evidence establishes that plaintiff has standing to bring these First Amendment claims.

Mr. Hawkins has standing to pursue his First Amendment claims against Defendants' arbitrary voting rights restoration scheme. 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 v. Plain Dealer Publishing Co.*, 486 U.S. 750, 755–56 (1988) (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."). A license application's denial is also obviously not a prerequisite to filing suit under the corollary First Amendment precedents requiring reasonable, definite time limits in licensing. The purpose of that related doctrine—to eliminate the risk of discriminatory or biased delays—would be defeated with a contrary rule.

Nevertheless, Mr. Hawkins did submit two voting rights restoration applications last year, and both were denied. Hawkins Decl. ¶¶ 5-6. Mr. Hawkins' second application was deemed "ineligible at this time" and administratively closed last August. *Id*. ¶ 6. The online rights restoration portal maintained by the Secretary of the Commonwealth's office informed him of this outcome but did not explain why he was "ineligible" for restoration, what conditions he would need to satisfy to become eligible for restoration, and when, if ever, he would become eligible. *Id*.

The disposition of Mr. Hawkins' application is mysterious because according to Defendants' alleged internal policy on restoration eligibility, he is eligible for the Governor's consideration: Mr. Hawkins is not "a person who is still incarcerated, a person who is currently subject to a pending felony charge, a person who is under supervised release for an out-of-state or federal conviction, or a person who does not satisfy the voting qualifications set forth by Virginia law, such as age, citizenship status, and residency requirements." *See* JSUF ¶ 28. Nor have Defendants asserted that he submitted an incomplete application, *id*., which would presumably merit the "incomplete" status code, not "ineligible at this time." Mr. Hawkins' denial for unexplained "ineligibility" is emblematic of the arbitrary and haphazard nature of Defendants' restoration process. Indeed, this eligibility policy is not even publicly communicated. *See* Undisputed Material Facts ¶¶ 11-12 (Official Restoration of Rights division webpages stating only eligibility criterion is release from incarceration).

Plaintiff remains subject to an arbitrary vote-licensing scheme without any substantive rules or criteria or any reasonable definite time limits on the licensor's decision-making.[37] Since an ineligibility determination is tantamount to a denial, Mr. Hawkins would need to re-apply to

[37] Mr. Hawkins is not alone. Time and time again, applicants in limbo have contacted the Governor's Office and/or the Restoration of Rights Office, desperately seeking information on the status of their delayed rights restoration applications. *See* Sherman Decl. ¶ 7, Ex. F at Hawkins_Def_001663 (applicant requesting information on application pending for seven months); *id*. at Hawkins_Def_001676 (applicant requesting information on application pending for "a couple months"); *id*. at Hawkins_Def_001680 (applicant requesting information on application "pending for forever"); *id*. at Hawkins_Def_001681 (requesting information on application pending for ten months); *id*. at Hawkins_Def_001686 (applicant requesting information on application pending for three months); *id*. at Hawkins_Def_001687 (applicant requesting information on application pending for "a few months"); *id*. at Hawkins_Def_001699 (applicant requesting information on application pending for nine months); *id.* at Hawkins_Def_001700 (applicant requesting information on application pending for approximately nine months).

secure restoration under Defendants' current system. JSUF ¶¶ 31-32, 34. Accordingly, this establishes his standing to bring Counts One and Two under these related First Amendment doctrines. Because Mr. Hawkins has asserted facial challenges, he suffers a cognizable constitutional injury from the arbitrariness of the state's voting rights restoration system. Whether or not Plaintiff's requested injunctive relief to create a non-arbitrary system ultimately would result in his personal re-enfranchisement is irrelevant. Furthermore, the existence of an actual, improper discriminatory or biased motive need not be shown to strike down such a law on its face. *See, e.g.*, *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); *Roach v. Stouffer*, 560 F.3d 860, 869 & n.5 (8th Cir. 2009) (holding pro-life group "need not prove, or even allege" viewpoint discrimination in successful facial First Amendment challenge to officials' "unbridled discretion" in specialty license plate program). Regardless of whether or how often it is exercised, and regardless of the disposition of any particular license application, such unfettered discretion is per se unlawful in the First Amendment context.

Lastly, Defendants have already conceded that disenfranchised individuals can suffer *federal* constitutional injuries even though they are presently ineligible to vote under *state* law. They have previously pointed to racial discrimination under the Fourteenth and Fifteenth Amendments and "facial[] or intentional[]" political viewpoint discrimination under the First Amendment as viable constitutional claims for disenfranchised people with felony convictions to assert. ECF No. 27, Defs.' Mem. in Supp. of Mot. to Dismiss, at 33; *see Hunter v. Underwood*, 471 U.S. 222, 231–33 (1985) (striking down Alabama's felony disenfranchisement regime as racially discriminatory).

B. Plaintiff has established a violation of the First Amendment unfettered discretion doctrine as a matter of law.

1. Lack of Objective Rules and Criteria (Count One)

Plaintiff has asserted two claims under longstanding First Amendment doctrine. First, in Count One, Mr. Hawkins claims that Virginia's voting rights restoration system functions as a licensing system governing First Amendment-protected expressive conduct, triggering the operation of the unfettered discretion doctrine under *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988), *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992), and related Supreme Court precedents. This preventative doctrine requires the invalidation of licensing schemes governing protected expressive conduct where officials have been vested with unfettered discretion to grant or deny the requested licenses. *City of Lakewood*, 486 U.S. at 757, 763–64.

Under such an arbitrary licensing system, the applicant is subjected to the risk of undetectable viewpoint or speaker-based discrimination and pressured into self-censorship so as not to jeopardize their application. *City of Lakewood*, 486 U.S. at 759, 762–63. The Supreme Court has also explained that in the absence of "standards to fetter the licensor's discretion," as-applied challenges are not viable, and the licensor's decisions are "effectively unreviewable." *Id*. at 758–59. "[A] facial challenge lies whenever a licensing law gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers." *Id*. at 759. Crucially, "[f]acial attacks on the discretion granted a decisionmaker are not dependent on the facts surrounding any particular permit decision." *Forsyth Cnty.*, 505 U.S. at 133 n.10. The existence of an actual, improper discriminatory or biased motive in granting or denying any particular application need not be demonstrated to strike down such laws on their 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).

This First Amendment doctrine applies to voting. The U.S. Supreme Court has long stated that when citizens express their political views and preferences at the ballot box, that vote, though secret, is nevertheless protected by the First Amendment as politically expressive conduct. *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*") (emphasis added); *Anderson v. Celebrezze*, 460 U.S. 780, 806 (1983) (evaluating burdens on "the voters' freedom of choice and freedom of association"); *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"). The First Amendment 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.

This case implicates all the same concerns and principles that have animated the unfettered discretion doctrine since its inception 85 years ago. Disenfranchised individuals submit applications to regain their voting rights, and no rules or criteria govern Defendant Governor Youngkin's decision to grant or deny that application. As Governor Youngkin admitted in his responses to Plaintiff's interrogatories, aside from constitutional prohibitions on intentional discrimination based on "suspect classifications or the exercise of fundamental rights" and the inability to grant voting rights to an individual who fails to satisfy the other voting eligibility criteria such as U.S. citizenship, "Virginia law does not otherwise constrain or limit the Governor's individualized discretion when deciding whether to grant a citizen's voting-restoration

application." Sherman Decl. ¶ 3, Ex. B at Response to Interrog. No. 1, at 2. Similarly, the Governor has admitted that "[a]part from the legal constraints imposed by Virginia law and federal law as discussed in the Governor's responses to [the previous interrogatories], there are no rules, criteria, factors, or standards that constrain or otherwise limit, as a matter of law, the Governor's discretion to grant, deny, or take any other action on citizens' voting rights restoration applications." *Id*. at Response to Interrog. No. 3, at 4.

Defendants have not argued or represented during discovery that there is any fixed, objective list of rules or criteria that constrains, limits, or otherwise regulates the Governor's discretion to grant or deny restoration applications. In one interrogatory response, Governor Youngkin asserted that he "use[s] multiple factors to guide [his] discretion in ultimately making a predictive determination that an individual will live as a responsible citizen and member of the political body" and then enumerated all of the fields and/or questions on the current rights restoration application. Sherman Decl. ¶ 2, Ex. A at Response to Interrog. No. 2, at 3; *see also* JSUF ¶ 12 (listing information requested on rights restoration application). The Governor added that "the factors do not serve as bright-line rules that automatically result in either a grant or denial of a voting-restoration application" but instead "are part of Defendants' holistic process to make [that] predictive judgment . . ." Sherman Decl. ¶ 2, Ex. A at Response to Interrog. No. 2, at 3. In response to Plaintiff's subsequent interrogatories, Defendant Governor Youngkin emphasized that these so-called "factors" do not operate like rules or criteria that control, constrain, or limit his decision-making in any way:

> [T]he factors are not "rules," and thus do not impose any binding or otherwise enforceable legal constraint on the exercise of Defendants' discretion to restore a citizen's voting rights. Instead, the factors are considered as a matter of sound policy and merely help Defendants in their effort to make their ultimate "predictive judgment that an individual will live as a responsible citizen and member of the political body." Defendants have the *legal* authority to ignore these factors in any

> particular case or to ignore them entirely. These factors do not "limit" or "constrain" the Governor's discretion in deciding whether to grant or deny any particular voting-restoration application. Thus, the ultimate decision determining the outcome of an individual's voting-restoration application—the predictive judgment regarding whether an applicant will live as a responsible citizen and member of the political body—is committed to the Governor's discretion and is not subject to any legal constraint apart from those outlined above.

Sherman Decl. ¶ 3, Ex. B at Response to Interrog. No. 1, at 2-3 (citations omitted, emphasis in original).

These admissions are dispositive of Count One: at its core, Defendants' restoration scheme is an arbitrary, subjective "responsible citizen" test. Far from denying the arbitrariness of the challenged system, Defendants have admitted to and embraced it by seeking to label voting rights restoration as clemency, which, as they have previously noted, is based "'on purely subjective evaluations and on predictions of future behavior by those entrusted with the decision.'" ECF No. 27 (Defs.' Mem. in Supp. of Mot. to Dismiss) at 27 (quoting *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 464 (1981)).

But the "clemency" label is no shield against Plaintiff's First Amendment claims. Deciding whether to grant or deny licenses to engage in First Amendment-protected expressive conduct based on arbitrary and subjective standards like Governor Youngkin's "responsible citizen" test is exactly what the First Amendment unfettered discretion doctrine forbids. In *Shuttlesworth v. City of Birmingham*, the Supreme Court invalidated Birmingham's permit scheme for marches or demonstrations that lacked "narrow, objective, and definite standards" and was "guided only by [Commissioners'] own ideas of 'public welfare, peace, safety, health, decency, good order, morals or convenience.'" 394 U.S. 147, 150–53 (1969). Similarly, Governor Youngkin's "responsible citizen" test must be invalidated. Instead of imposing *and adhering* to a list of objective rules and criteria, Defendants' restoration regime employs ever-changing, subjective, and vague standards.

In the words of former Secretary of the Commonwealth (and former Defendant) Kay Coles James, they were "practicing grace" and "ensuring public safety." *See* Sherman Decl. ¶ 11, Ex. J at 2. And as noted, subsequently, the Governor's responses to Plaintiff's interrogatories have conveyed that he now seeks to "mak[e] a predictive determination that an individual will live as a responsible citizen and member of the political body." Sherman Decl. ¶ 2, Ex. A at Response to Interrog. No. 2, at 3.

Conditioning a license to engage in protected expressive conduct based on such subjective guesswork about an applicant's future behavior is unconstitutionally arbitrary. Defendants' "responsible citizen" test is not the "narrow, objective, and definite standard" that *Shuttlesworth* and its progeny require. 394 U.S. at 151. Further, under Virginia's purely discretionary vote-licensing system, a governor may review any information on the applicant's political viewpoints, including previous voter registration and campaign donation history, as well as social media posts, and selectively grant or deny applicants based on their viewpoints or party affiliation without ever revealing these discriminatory motives. While ballots may be secret, the Governor "can measure their probable content or viewpoint by speech already uttered." *City of Lakewood*, 486 U.S. at 759.

The record evidence corroborates Defendants' admissions regarding the lack of any objective rules or criteria constraining Governor Youngkin's discretion to restore selectively. In response to Plaintiff's requests for production of documents, Defendants produced to Plaintiff the Secretary of the Commonwealth's rights restoration database entries for all rights restoration applications received on or after May 17, 2022. The data clearly confirm that none of the fields or questions on the rights restoration application form—the so-called "factors" Defendants cite—are outcome-determinative and that no combination of applicant responses yields uniform treatment. As detailed above, *see* Undisputed Material Facts ¶¶ 15-37, applications with ***any*** combination of

responses to the application fields or questions have resulted in numerous grants, numerous denials, and other dispositions.

For instance, Defendants' own data establishes that Governor Youngkin has denied the restoration applications of 238 applicants who attested that they (i) are U.S. citizens; (ii) had finished their term of incarceration; and (iii) had paid all fines, fees, and restitution. In the same time period, Governor Youngkin granted the restoration applications of 1,173 applicants who fit those same three criteria. *See* Undisputed Material Facts ¶ 22. Additionally, for all applications submitted during the Relevant Time Period, Governor Youngkin denied the restoration applications of 327 applicants who attested that they (i) are U.S. citizens; (ii) had finished their term of incarceration; and (iii) were not convicted of a violent crime. In the same time period, Governor Youngkin granted the restoration applications of 1,191 applicants who fit those same three criteria. *See* Undisputed Material Facts ¶ 20. Clearly, as Defendants concede, these combinations of purported "factors" do not constrain the Governor's discretion in any way. Moreover, with an approximate 1-to-5 ratio of denials to grants for each of these sets, these "factors" cannot be said to meaningfully guide the Governor's discretion either. Sherman Decl. ¶ 3, Ex. B at Response to Interrog. No. 1, at 2-3. The same holds true for all the other Undisputed Material Facts on the aggregate data for each permutation of applicant responses. *See* Undisputed Material Facts ¶¶ 15-35.

The documents and data further confirm that, notwithstanding their representations, Defendants do not have a consistent eligibility policy for restoration of rights applicants and/or arbitrarily and unevenly administer their stated policy. Defendants' publicly communicated eligibility policy is simple: "An individual is eligible to apply to have his/her rights restored by the Governor if he/she has been convicted of a felony and is no longer incarcerated." *See* Undisputed

Material Facts ¶ 12 ("Restoration of Rights Process" webpage). In this action, Defendants have articulated a different (non-public) eligibility policy: "[A] voting rights restoration application is eligible for the Governor's consideration and ultimate decision to grant or deny it, unless the application was submitted by a person who is still incarcerated, a person who is currently subject to a pending felony charge, a person who is under supervised release for an out-of-state or federal conviction, or a person who does not satisfy the voting qualifications set forth by Virginia law, such as age, citizenship status, and residency requirements, or the application is incomplete." JSUF ¶ 28. In addition to the erroneous determination that Mr. Hawkins is ineligible under this stated policy, *see supra* at 16-17, Governor Youngkin has deemed ineligible rights restoration applications for hundreds of individuals that satisfy one or both of these purported eligibility "policies." Specifically, if one uses the eligibility policy communicated on the "Restoration of Rights Process" webpage, Governor Youngkin has deemed "ineligible" or "ineligible at this time" 404 applications from individuals who are no longer incarcerated. *See* Undisputed Material Facts ¶ 36. If one uses Defendants' eligibility policy as represented in the Joint Stipulation of Facts, Governor Youngkin has deemed "ineligible" or "ineligible at this time" 129 applications from individuals who submitted complete applications, are no longer incarcerated, are no longer on parole, probation, or any other state supervision, and are U.S. citizens. *See id.* ¶ 37.

Furthermore, Governor Youngkin has also *granted* rights restoration applications for at least seven individuals who had federal convictions and were still on probation, parole, or other state supervision, thereby failing to satisfy the Governor's own purported criteria for restoration eligibility. *See* Undisputed Material Facts ¶ 35. It is no surprise that applicants felt the process was not "fair or just." *See* Sherman Decl. ¶ 7, Ex. F at Hawkins_Def_001701; *see also id.* at Hawkins_Def_001661-1662 ("Further, I believe that I meet current requirements for restoration

of rights – and need to know who can I appeal this DECISION RENDERED TO QUALIFY ME INELIGIBLE FOR RESTORATION OF RIGHTS.") (emphasis original). This arbitrary administration of the policies that Defendants have represented they are using is further evidence of the system's unconstitutionality under the First Amendment.

Additional evidence demonstrates precisely why the First Amendment unfettered discretion doctrine was developed and must be enforced in this context. State Senator Bill DeSteph, a Republican recently appointed by Governor Glenn Youngkin to the Atlantic States Marine Fisheries Commission, wrote two letters expressing his support for restoring the voting rights of [redacted] and [redacted]. *See* Sherman Decl. ¶ 4, Ex. C. Governor Youngkin restored the voting rights of both applicants. *See supra* at 3. Similarly, former Virginia State Senator John A. Cosgrove—whom Governor Youngkin appointed last year as Deputy Commissioner on the Virginia Marine Resources Commission—wrote a letter on behalf of [redacted]. Sherman Decl. ¶ 12, Ex. K. [redacted] application is still pending. *See* Sherman Decl. ¶ 6, Ex. E. Finally, in a November 8, 2022 email received by the Secretary of the Commonwealth's office, [redacted] announces that he is "a life-long Republican voter who was recently released from incarceration" and asks for assistance and "expedited review." *Id.* ¶ 5, Ex. D.

It is unknown whether the partisan affiliations of these restoration applicants and/or of the support-letter authors in their favor has played or will play a role in any decisions to grant voting rights restoration. These communications demonstrate that signaling that an applicant shares the political viewpoints or partisan affiliations of *any* governor of *any* political party can be implicit or explicit. Regardless of the disposition of any particular application, because nothing in Virginia law *prevents* Governor Youngkin from issuing—or withholding—these licenses to vote based on

an applicant's viewpoints or partisan affiliation, Defendants' restoration system violates the First Amendment.

2. Lack of Reasonable, Definite Time Limits (Count Two)

Plaintiff also claims in Count Two that a lack of reasonable, definite time limits on the exercise of the licensor's discretion also violates the First Amendment. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 226 (1990), *overruled on other grounds by City of Littleton v. Z.J. Gifts D-4, LLC*, 541 U.S. 774, 774-775 (2004). Virginia's voting rights restoration scheme also lacks any reasonable, definite time limits by which Defendant Governor Youngkin must make a decision to grant or deny a restoration application.

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.*, 493 U.S. at 226. 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). 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.

Governor Youngkin has admitted that "there is no time limit by which [he] must grant or deny an application for voting rights restoration." Sherman Decl. ¶ 2, Ex. A at Response to Request for Admission No. 4, at 2. Therefore, as a matter of law, Defendants' restoration policy violates the First Amendment and must be struck down.

Absent reasonable, definite time limits—as required by the Constitution in *any* licensing scheme regulating the exercise of First Amendment-protected expressive conduct such as this—pending applications languish, and licensors can selectively choose which applications may receive expedited review and which will not. Defendants' *own data* establishes that a vast majority of applicants wait more than three months for a determination—and *hundreds* of applicants wait upwards of nine months to one year for a determination. *See* Undisputed Material Facts ¶¶ 38-46. This pattern of protracted review persists unchecked with little to no recourse for frustrated applicants left in limbo. *See, e.g.,* Sherman Decl. ¶ 7, Ex. F at Hawkins_Def_001664-1665 (requesting status on application pending for five months); Hawkins_Def_001681-1682 (requesting status on application pending for nearly seven months); and Hawkins_Def_001702 (requesting status on pending application hoping to get a decision in time for the November 2022 election).[38] But not all applicants meet such delays; as with the lack of objective rules and criteria, this is another facet of Defendants' arbitrary system of restoration. Such an unreasonable system with no definite time limits on the Governor's decision-making enables biased treatment and is accordingly forbidden by the First Amendment.

V. CONCLUSION

Accordingly, Plaintiff respectfully requests that this Court grant summary judgment in his favor as to both Counts One and Two and issue a declaratory judgment finding both violations of the First Amendment. To remedy these constitutional violations, Plaintiff respectfully requests that this Court issue a permanent injunction requiring Defendants to implement a non-arbitrary system

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[38] In the case of the applicant referenced in Hawkins_Def_001702, the application was submitted on August 9, 2022, three months before the November 2022 general election. However, the Rights Restoration Division did not enter a disposition on this application until June 14, 2023, and well after the November 2022 general election. *Id*. ¶ 6, Ex. E. This applicant was deemed ineligible but was eventually restored after he submitted another application in September 2023. *Id*.

of voting rights restoration governed by objective rules and criteria and reasonable, definite time limits.

Dated: February 14, 2024

Respectfully submitted,

/s/ Terry C. Frank

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CERTIFICATE OF SERVICE

I certify that on February 14, 2024, I filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a "Notice of Electronic Filing" to the CM/ECF participants.

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EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

GEORGE HAWKINS, Plaintiff, v. GLENN YOUNGKIN, Governor of Virginia, in his official capacity, et al., Defendants.	)	Civil Action No. 3:23-cv-232-JAG

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiff Hawkins, in his own words, "claims that Virginia's voting rights restoration system functions as a licensing system governing First Amendment-protected expressive conduct, triggering the operation of the unfettered discretion doctrine under *City of Lakewood v. Plain Dealer Publishing Co*., 486 U.S. 750 (1988), *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992), and related Supreme Court precedents." Memo. in Supp. of Pl.s' Mot. for Summ. J. (Pl.'s MSJ Mem.) at 19 (ECF No. 57). Hawkins thus argues that the First Amendment prohibits the Governor of Virginia (and presumably the governors of every other State) from exercising discretion in the process of restoring convicted felons' voting rights under his clemency power. But the clemency power has been committed to executive discretion since the Nation's founding, and the clemency power in Virginia has included the discretionary restoration of felons' voting rights for over 150 years. One would therefore expect Hawkins to offer some explanation for how such a supposed violation of the First Amendment—a facial violation no less—could go unnoticed for so long. He offers none. One would also expect Hawkins to inform this Court that both the Sixth and the Eleventh Circuits have rejected precisely the same First Amendment claim, relying on precisely the same Supreme Court cases. After all, Hawkins's counsel represented the plaintiff felons in both cases. Yet, those cases are nowhere mentioned, let alone distinguished, in Hawkins's motion papers. Having lost in court twice before, Hawkins's counsel is shopping for a different answer here.

Perhaps sensing the legal infirmities of his argument, Hawkins attempts to gin up suspicion regarding the restoration process. First, he deploys a litany of cherry-picked and half-baked statistics that, he says, suggest the restoration process is "arbitrary." Although (as Hawkins admits) these arguments are legally irrelevant, they collapse on even a cursory inspection—and many are contradicted by facts to which he has stipulated. For example, Hawkins spends several pages

drawing comparisons between groups of individuals who shared some specified number of criteria but received different outcomes in the restoration process. But his calculations merely demonstrate that the case-by-case restoration process works precisely as designed and expected: decisions turn on an individualized and holistic review of each applicant, not box-checking. Hawkins also tries to paint a picture of applications languishing for years. But the stipulated facts and the data on which Hawkins relies show otherwise: applications are usually decided within approximately two to three months. Indeed, for all applications received and decided since the current restoration policy was fully implemented in December 2022, the average time to disposition was 86.3 days, and the median time was 68 days. The record thus establishes that Defendants diligently carry out the Commonwealth's comprehensive restoration process on a timely basis.

Second, Hawkins attempts to raise the specter of viewpoint discrimination—most prominently by noting that two Republican State Senators, DeSteph and Cosgrove, wrote letters of support on behalf of three separate applicants. Some might think it admirable that a public official writes in support of restoring voting rights for a deserving constituent who is seeking a second chance; Hawkins thinks it portends a constitutional violation. But the record contains not a shred of evidence that partisan affiliation has ever played a role in any application decision, and these three individual applications—in a sea of over 7,000—certainly do not suggest otherwise. Indeed, the letters are not remotely partisan; one of the applicants is still awaiting a decision; and the other two had their rights restored under the automatic restoration regime of the prior administration, before the Governor's current policy even took effect. Even Hawkins is forced to admit that no evidence suggests any illicit motive.

Once the smoke clears from Hawkins's statistical sideshow, the legal question is as straightforward as before. As decades of Supreme Court precedent, centuries of historical practice,

and both on-point court of appeals decisions show, Virginia's restoration process is constitutional, and Hawkins's claims fail as a matter of law. The Court should therefore deny his motion for summary judgment and grant Defendants' motion for summary judgment.

RESPONSE TO STATEMENT OF FACTS

Under Local Civil Rule 56(B), a brief in response to a motion for summary judgment must "include a specifically captioned section listing all material facts as to which it is contended that there exists a genuine issue *necessary to be litigated* and citing the parts of the record relied on to support the facts alleged to be in dispute." L. Cv. R. 56(B) (emphasis added). As Plaintiff has made clear, he brings facial challenges to Virginia's voting restoration scheme based on the fact that the Governor exercises discretion when restoring convicted felons' voting rights. Pl.'s MSJ Mem. at 18 ("Mr. Hawkins has asserted facial challenges."). Accordingly, Defendants do not believe there are any facts that are "necessary to be litigated" to resolve Hawkins's claims—especially given the parties' Joint Stipulation of Undisputed Facts (JSUF) (ECF No. 59).

Nevertheless, though not required under Local Civil Rule 56(B), Defendants note that they dispute the following facts listed by Plaintiff:

6–7. Defendants dispute that "Mr. Hawkins applied for voting rights restoration twice," once in "early May 2023" and once "[o]n or around June 18, 2023." Defendants have no record of a May 2023 application from Hawkins. See Ex. 1, Declaration of Jennifer Moon (Moon Decl.) at ¶ 10. Defendants have record of Hawkins applying for rights restoration only once, on June 18, 2023. *Ibid.*

28–29. Defendants dispute that the database entries indicate whether an applicant "had" a federal court conviction because the database entries instead indicate when an applicant *attested to* having a federal court conviction. See Ex. E to Declaration of Jonathan Sherman

(Hawkins_Def_001660) (ECF No. 62-3) (Column Z is entitled "*Claims* Federal Court Conviction" (emphasis added)).

35. Defendants dispute that the database entries indicate that applicants "had" federal court convictions and "were" on some form of supervised release because the database entries instead indicate when an applicant *attested to* having a federal conviction and being on supervised release. See Hawkins_Def_001660 (Column S is entitled "*Claims* Currently on Probation," and Column Z is entitled "*Claims* Federal Court Conviction" (emphasis added)).

36. Defendants dispute that the database entries indicate that applicants "were" no longer incarcerated because the database entries instead indicate when an applicant *attested to* no longer being incarcerated. Hawkins_Def_001660 (Column R is entitled "*Claims* to Have Finished Sentence" (emphasis added)). Further, Defendants dispute ¶ 36 to the extent Plaintiff asserts or implies that the coded designation of "ineligible" or "ineligible at this time" is a disposition other than a denial, as explained in the parties' joint stipulation of undisputed facts. See JSUF ¶ 31 ("all denials of voting restoration applications are coded with only the following three status codes in Defendants' internal database: 'ineligible,' 'not granted at this time,' or 'ineligible at this time'").

37. Defendants dispute that the database entries indicate that applicants "are" no longer incarcerated, "are not" under state supervision, and "are" U.S. citizens because the database entries indicate only that an applicant *attested to* this information. See, *e.g.*, Hawkins_Def_001660 (Column R is entitled "*Claims* to Have Finished Sentence," and Column S is entitled "*Claims* Currently on Probation" (emphasis added)). Further, Defendants dispute ¶ 37 to the extent Plaintiff asserts or implies that the coded designation of "ineligible" or "ineligible at this time" is a disposition other than a denial, as explained in the parties' joint stipulation of undisputed facts. See JSUF ¶ 31 ("all denials of voting restoration applications are coded with only the following three

status codes in Defendants' internal database: 'ineligible,' 'not granted at this time,' or 'ineligible at this time'").

LEGAL STANDARD

A party is entitled to summary judgment if there is no genuine dispute as to any material fact, and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). When reviewing a motion for summary judgment, the Court must "resolve all factual disputes and any competing, rational inferences in the light most favorable to the party opposing th[e] motion." *Rossignol v. Voorhaar*, 316 F.3d 516, 523 (4th Cir. 2003) (quotation marks omitted).

ARGUMENT

I. Hawkins's First Amendment Claims Are Meritless

Defendants' memorandum in support of their motion for summary judgment explains in detail why Hawkins's facial challenges fail as a matter of law, see Memo. in Support of Defs.' Mot. for Summ. J. (Defs.' MSJ Mem.) (ECF No. 61). Defendants incorporate that memorandum in its entirety, and will not unnecessarily enlarge this submission by repeating that analysis here. The short of it is this:

As a general matter, discretionary clemency regimes, like Virginia's voting-restoration process, are rarely, if ever, subject to judicial review. See *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 464 (1981); *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 284–85 (1998); Defs.' MSJ Mem. at 8–9. And the Supreme Court has summarily affirmed—and favorably cited that summary affirmance—a decision holding flatly that a discretionary vote-restoration process was "not subject to judicial control." See *Beacham v. Braterman*, 300 F. Supp. 182, 184 (S.D. Fla.), *aff'd*, 396 U.S. 12 (1969); *Richardson v. Ramirez*, 418 U.S. 24, 53–54 (1974) (citing *Beacham* as part of the "settled historical and judicial understanding of the Fourteenth Amendment's effect on state laws disenfranchising convicted felons").

Moreover, Hawkins does not dispute that the Commonwealth's restoration process satisfies the Fourteenth Amendment, and Fourth Circuit precedent makes clear that the First Amendment as incorporated against the States by the Due Process Clause of the Fourteenth Amendment provides no greater protection for voting rights than other provisions of the Fourteenth Amendment. See *Republican Party of North Carolina v. Martin*, 980 F.2d 943, 959 n.28 (4th Cir. 1992); *Irby v. Virginia State Bd. of Elections*, 889 F.2d 1352, 1359 (4th Cir. 1989); *Washington v. Finlay*, 664 F.2d 913, 927 (4th Cir. 1981). This longstanding principle helps explain why the Fourth Circuit swiftly rejected a previous First Amendment challenge to Virginia's voting-restoration process. See *Howard v. Gilmore*, 205 F.3d 1333 (Table), 2000 WL 203984, at *1 (4th Cir. Feb. 23, 2000) (The "First Amendment creates no private right of action for seeking reinstatement of previously canceled voting rights.").

It follows that Hawkins's reliance on the speech-licensing cases fails, as both the Sixth and Eleventh Circuits have squarely held. See *Lostutter v. Kentucky*, No. 22-5703, 2023 WL 4636868 (6th Cir. July 20, 2023); *Hand v. Scott*, 888 F.3d 1206 (11th Cir. 2018). "[N]one of the cited [speech-licensing] cases involved voting rights or even mentioned the First Amendment's interaction with the states' broad authority expressly grounded in § 2 of the Fourteenth Amendment to disenfranchise felons and grant discretionary clemency." *Hand*, 888 F.3d at 1212–13. And as the Sixth Circuit explained, "while a person applying for a newspaper rack or parade permit is attempting to exercise his or her First Amendment right to freedom of speech, a felon can invoke no comparable right when applying to the Governor for a pardon because the felon was constitutionally stripped of the First Amendment right to vote." *Lostutter*, 2023 WL 4636868, at *4. Just last week, the Supreme Court denied the *Lostutter* plaintiffs' petition for certiorari with no noted dissents. See *Aleman v. Beshear*, No. 23-590, 2024 WL 674760 (U.S. Feb. 20, 2024). In

sum, even if voting were "politically expressive conduct," Pl.'s MSJ Mem. at 20, but see Memo. in Support of Defs.' Mot. to Dismiss at 25–26 (ECF No. 27), it is not politically expressive conduct in which Mr. Hawkins has a right to engage. Virginia's restoration (not licensing) process therefore is not subject to the unfettered discretion doctrine.

Finally, the vague remedy Hawkins seeks raises a quintessential political question and urges the Court to exceed its equitable power. On Hawkins's theory, a court would ultimately need to adjudicate any claim that the restoration process does not contain *enough* "rules and/or criteria" or *short enough* "time limits." Second Am. Compl at 25 (SAC) (ECF No. 22). There "are no legal standards discernible in the Constitution for making such judgments." See *Rucho v. Common Cause*, 139 S. Ct. 2484, 2500 (2019). "Any judicial decision on what is fair in this context would be an unmoored determination of the sort characteristic of a political question beyond the competence of the federal courts." *Ibid.* (quotation marks omitted); see also *Bowen v. Quinn*, 561 F.3d 671, 676 (7th Cir. 2009) ("We therefore balk at the idea of federal judges' setting timetables for action on clemency petitions by state governors."). Moreover, an injunction providing "guidance" to Defendants would exceed the remedial power of "a court sitting in equity." See *Hand*, 888 F.3d at 1214. Thus, Hawkins's requested remedy only underscores that his claims fail as a matter of law.

II. Hawkins's Statistical Analysis Is Neither Sound Nor Material

Hawkins's memorandum is shot through with factual assertions that would be relevant only to a Due Process Clause challenge or an as-applied viewpoint discrimination claim. But throughout this litigation, Hawkins has affirmatively disavowed that he is bringing either claim. And once one analyzes his factual assertions, Hawkins's refusal to pursue those theories is understandable because both would still fail as a matter of law. Under any analysis, Virginia's voting restoration process is constitutional.

A. The Commonwealth Diligently Administers Its Comprehensive Voting Restoration Process

Hawkins has confirmed that he is not bringing a Due Process Clause challenge. Memo. in Opp. to Defs. Mot. to Dismiss Pls.' Second Am. Compl. (MTD Opp.) at 16 (ECF No. 30) ("Plaintiffs have also not asserted any due process challenges under the Fourteenth Amendment."). He could not do so anyway. Under the Due Process Clause, the Commonwealth's discretionary restoration process could be subject to, at most, "*minimal*" judicial limits, such as the prohibition of "a scheme whereby a state official flipped a coin to determine whether to grant clemency." *Woodard*, 523 U.S. at 289 (O'Connor, J., concurring) (emphasis in original). As the stipulated facts establish, Defendants' restoration process is comprehensive, detailed, and just, and it is nothing like the extreme scenario of "flipping a coin." See also Defs.' MSJ Mem. at 4–6 (detailing the restoration process). Hawkins caricatures this process as "arbitrary" or "haphazard" by reciting a host of gerrymandered statistics that, on even cursory inspection, have no persuasive value.

1. The Voting Restoration Process Provides For Comprehensive Individual Consideration Informed By Data From Multiple State Agencies

Although Hawkins suggests the Commonwealth's voting-restoration process is "haphazard" or "arbitrary," the undisputed facts show otherwise. First, applicants must apply and provide responses to numerous questions. See JSUF ¶¶ 9–10, 12. Second, every applicant is subject to a multi-agency review that provides various types of information, including an applicant's carceral status, citizenship status, and criminal history. *Id.* ¶¶ 18, 21–26. Third, this information is used to form the basis for the Secretary's recommendation on each application to the Governor. See *id.* ¶ 27. Finally, the Governor exercises his constitutional discretion to grant or deny an application based on his predictive judgment regarding whether the applicant will live as a responsible citizen and member of the political body. *Ibid.*; *id.* ¶ 15.

Hawkins's assertion of an "arbitrary" process stems largely from his overreading and misinterpretation of the report produced during discovery that reflects part of the Secretary's internal database for voting restoration. See Hawkins_Def_001660. As Hawkins implicitly acknowledges, the material produced in that report represents a sliver of the entire voting-restoration process—specifically, it reflects only the information provided by an applicant on the application form. See, *e.g.*, Pl.'s MSJ Mem. at 9 (couching assertions as to what the applicant "attested"). Although the database entries Hawkins cites reflect what an applicant *said* on the form, merely parroting what the applicant submits, as Hawkins does, does not provide a full and accurate picture of the process with respect to any particular applicant. Missing entirely from Hawkins's presentation of the process is any material gained from the multi-agency review—which allows Defendants not only to *verify* information provided by the applicant, but also to obtain additional information about each applicant.

The absence of this information makes Hawkins's reliance on his purported calculations effectively meaningless. For example, Hawkins asserts that the Governor "granted the restoration applications of 13 applicants who attested that they were not U.S. citizens." Pl.'s MSJ Mem. at 13. But simply because an applicant "attests" that he is a non-citizen, which could merely be a matter of mistakenly providing the wrong answer on the form, does not mean the applicant actually *was* a non-citizen. And as explained in the joint statement of undisputed facts, as part of the multi-agency review, the Secretary's Office *verifies* an individual's citizenship status with the Department of Elections. JSUF ¶ 23.[1] Hawkins's calculations reflect *none* of the information gained from the multi-agency review process that can be used to verify an applicant's responses.

[1] Compounding the error is Hawkins's misunderstanding that non-citizens may use the same application process to seek restoration of their civil right to serve as a *notary public*—as Hawkins's own exhibit demonstrates—and those applications are tracked in the same database.

Nor do Hawkins's calculations reflect the *additional* information provided as part of the multi-agency review. Most notably, Defendants obtain an applicant's criminal history from the Central Criminal Records Exchange. See JSUF ¶¶ 18, 27. And the Secretary uses an applicant's criminal history when making "a recommendation to the Governor as to the disposition of the application." *Id.* ¶ 27. Therefore, simply comparing the outcomes for applicants who happened to "attest" to similar information tells us nothing about the implementation of the process.

If anything, Hawkins's litany of calculations demonstrates that Defendants' voting-restoration process works precisely as expected. Because the process is a holistic review that does not turn on any one factor, see Defs.' MSJ Mem. at 9, one would *expect* that applicants who share some unspecified number of characteristics would indeed have different outcomes. As the Supreme Court has explained, a clemency decision "generally depends not simply on objective factfinding, but also on purely subjective evaluations and on predictions of future behavior by those entrusted with the decision." *Dumschat*, 452 U.S. at 464. And here, even applicants who share some specified number of criteria will warrant a different predictive judgment as to whether one individual "will live as a responsible citizen and member of the political body" and the other would not. See JSUF ¶ 15.

The data reveal the logic of Defendants' restoration process at work. For example, when applicants attested that they had "paid all fines, fees, and restitution," the grant rate was 83%. See Hawkins_Def_001660 (showing 1,180 grants and 240 denials for such applicants). But when applicants did *not* attest that they had paid all fines, fees, and restitution, the grant rate was 61%. See *ibid.* (showing 386 grants and 246 denials for such applicants). Because an applicant's

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See ECF No. 50-2 at 2 (Secretary's Website's FAQ noting that "[n]oncitizens are not eligible to vote . . . but may be eligible to serve as a notary public" and can seek to have their "rights restored" for that purpose).

successful repayment of his literal debt to society reflects his commitment to live as a responsible citizen, this disparity in outcomes makes sense. Similarly, when applicants did not attest that they had been convicted of a violent crime, the grant rate was 82%. See *ibid.* (showing 2,457 grants and 515 denials for such applicants). But when applicants attested that they *had* been convicted of a violent crime, the grant rate was 72%. See *ibid.* (showing 285 grants and 109 denials for such applicants). Again, this disparity in outcomes aligns with the restoration process's aim to restore the voting rights of individuals who will live as responsible citizens and members of the political body.

Finally, Hawkins's calculations show that the Governor grants *vastly* more applications than he denies. For some of Hawkins's specified categories, the ratio is as high as nine grants for every one denial. See Pl.'s MSJ Mem. ¶ 27. Far from operating as some bureaucratic black hole, Hawkins's own calculations show that the restoration process provides convicted felons with fair consideration.

Separately, Hawkins suggests the Governor's denial of Hawkins's restoration application as "ineligible at this time" is somehow "mysterious." Pl.'s MSJ Mem. at 16–17. Plaintiff considers the denial "mysterious" because he satisfies certain relevant criteria: he is not incarcerated, nor currently subject to a pending felony charge, nor on supervised release, nor a non-citizen. See *ibid.* But as Hawkins stipulated, the Governor used the phrasing "ineligible at this time" simply to mean that he was *denying* Hawkins's application.[2] Hawkins merely satisfied the criteria that determine

[2] Hawkins has stipulated that the "ineligible at this time" code is a denial. See JSUF ¶¶ 31–32; see also Pl.'s MSJ Mem. at 17 ("an ineligibility determination is tantamount to a denial"); *Christian Legal Soc. Chapter of the University of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 677 (2010) (*CLS*) ("Factual stipulations are binding and conclusive." (brackets and quotation marks omitted)); *Juniper v. Hamilton*, 529 F. Supp. 3d 466, 504 n.65 (E.D. Va. 2021) (Gibney, J.) (same).

whether he is eligible to have his application *submitted* to the Governor for consideration on the merits. See JSUF ¶ 28. Hawkins is thus not ineligible *for consideration* on the merits at this time, but he is ineligible *to have his voting rights restored* at this time—that is, his application was denied. And the denial of Hawkins's application is far from "mysterious." The Governor's holistic, case-by-case determination of applications turns upon, among other factors, whether the applicant committed a violent crime, how recent the applicant's conviction is, and the applicant's conduct since the conviction. See Ex. 1 to Defs.' Mot. for Summ. J. at 3 (ECF No. 61-1). Here, Hawkins committed multiple serious violent crimes, including attempted murder in the first degree and aggravated malicious wounding. See Decl. of Kay Coles James (ECF No. 27-1) ¶ 17. And while he completed his incarceration, he did so in May 2023, only shortly before submitting his application. *Id.* ¶¶ 4–5. He thus had little time to demonstrate that he had renounced violent criminal behavior and would now live as a responsible citizen and member of the political body. There is nothing "arbitrary and haphazard" about denying the application of an attempted murderer who only recently finished serving his prison sentence. Pl.'s MSJ Mem. at 17. To the extent any misunderstanding results from using the word "eligible" differently in other contexts, that misunderstanding says nothing about how the restoration process is actually implemented—which is described in the parties' "binding and conclusive" joint stipulation. *CLS*, 561 U.S. at 677.

Ultimately, the Commonwealth's restoration process works precisely as described and required under the Virginia Constitution: it provides for individualized consideration of each applicant and is informed by data from the applicant and numerous state agencies. See *Howell v. McAuliffe*, 292 Va. 320, 341 (2016) (requiring review "on an individualized case-by-case basis taking into account the specific circumstances of each"). The process is undoubtedly constitutional.

2. Defendants Diligently Research, Assess, And Decide Whether To Grant Felons' Applications On An Individualized Basis

As set forth in the joint stipulation of undisputed facts, Defendants' current restoration process was not fully implemented until December 9, 2022. JSUF ¶ 7. Since that date, Defendants have received and decided over 3,500 applications. See Hawkins_Def_001660 (reviewing "Date Closed" column for applications with "Date Received" of December 9, 2022, or later). Defendants usually took approximately two to three months to decide applications. Specifically, for this category of applications, the average amount of time from the date the application was "Received" to the "Date Closed" was 86.3 days. See *ibid.* The median amount of time for that same group of applications was 68 days. See *ibid.* Of the applications that were *granted* from this group, the average amount of time was 97 days, with a median of 89 days. See *ibid.* These statistics therefore align—almost to the day—with Defendants' statement that the process, as currently implemented, "'usually'" takes up to "'3 months.'" See Pl.'s MSJ Mem. at 14 (quoting website).

Indeed, even on Hawkins's own calculations—which include applications submitted before the current policy was fully implemented—nearly half of the denials were issued *within three months*. See Pl.'s MSJ Mem. ¶ 41. And further inspection of Hawkins's calculations further undermines his argument. For example, Hawkins says that 355 applications from 2023 are still pending even though they were received before September of last year. *Id.* ¶ 43. For context, Defendants received nearly 4,500 applications in 2023. See Hawkins_Def_001660 (filtering all applications with a "Date Received" during 2023). Hawkins's handpicked selection thus constitutes less than 8% of them. And as noted above, the average time to disposition for applications since the current process was fully implemented is 86.3 days. But even taking Hawkins's handpicked selection of 355 applications, 292 of them—over 82%—are awaiting information *from the applicant*. See Hawkins_Def_001660 (showing status of "Information

Requested," "Needs More Info," and "Federal Release Required" for applications filtered by "Date Received" between January 1, 2023, and September 30, 2023). Of the remaining 63 applications in Hawkins's selection, 61 are awaiting feedback from the multi-agency review, see *ibid.*, and the remaining 2 (from September 25 and September 18 respectively) are preparing to enter the multi-agency review process, see Moon Decl. ¶¶ 3–5. These statistics are hardly the stuff of a bureaucratic dead-end.

Hawkins next attempts to rely on database entries for individuals whose voting rights *were never lost*. See Pl.'s MSJ Mem. ¶¶ 45–46. Defendants' current policy is to notify applicants who did not, in fact, lose their voting rights. See JSUF ¶ 19. In any event, the "applications" erroneously submitted by these individuals were not an obstacle to their ability to apply to *the Department of Elections* (*not Defendants*) to register to vote. And the time during which these applications were pending therefore does not represent a period of time in which any such individual was actually denied the right to register to vote or cast a ballot. In addition, because there can be no disposition for such an application—it cannot be granted or denied—the "date closed" in the database necessarily communicates only that it was submitted in error and thus closed. And the fact that these individuals *were always free to vote* destroys Hawkins's invocation of the "top six longest-pending applications," which Hawkins admits were all examples where the individual "had not lost their right to vote." Pl.'s MSJ Mem. ¶ 46.

Hawkins also says there are two applications from 2022 "that are still pending and for which the Rights Restoration Office is not waiting for information from the applicant." Pl.'s MSJ Mem. ¶ 44. What Hawkins either misunderstands or fails to explain, however, is that the report in Hawkins_Def_001660 is a *static* report from a *dynamic* database—so although the report states that the Office was not *currently* awaiting information from the applicant when the report was

generated just last month, the report *does not* reflect the amount of time the Office was waiting for these applicants to provide requested information *before* the most recent status update. And as it turns out, the delay in processing these two applications was due to the applicants' months-long failures to provide Defendants with requested information. Moon Decl. ¶¶ 7–9. Indeed, once the applicants finally provided the requested information in December 2023, Defendants processed their applications shortly thereafter. *Ibid.* And, less than two months later, both applicants had their rights restored by the Governor. *Ibid.* Thus, again, Hawkins's statistic is meaningless with respect to the duration of the restoration process.

Next, Hawkins tries to leverage emails to further suggest that Defendants take an unreasonably long time to grant or deny applications, but these quotations are not what they seem. See Pl.'s MSJ Mem. at 17 n.37. For example, Hawkins quotes an individual's email stating that her application had been "pending forever," but the database entry corresponding to her name suggests she did not even apply until *a year after* sending this email—and when she did actually apply, her application was *granted in 57 days*. Compare Ex. F. to Declaration of Jonathan Sherman at 7 (ECF No. 62-4) (email from [redacted] stamped Hawkins_Def_001680), with Hawkins_Def_001660 (showing application timeline for [redacted], application no. [redacted]). Hawkins also quotes an email from an individual who asserted it had been "a couple of months" since he had applied, but the database reflects no application corresponding to his name. Compare Ex. F to Declaration of Jonathan Sherman at 6 (email from [redacted] stamped Hawkins_Def_001676), with Hawkins_Def_001660 (showing no entry for [redacted]). Similarly, Hawkins quotes two emails sent by one individual asserting that the individual's application had been pending "for a few months," but there is again no record in the database showing that this individual even applied during the Youngkin administration. Compare Ex. F to

Declaration of Jonathan Sherman at 13–14 (emails from [redacted] stamped Hawkins_Def_001686 and 1687), with Hawkins_Def_001660 (showing no entries for [redacted]). Although individuals may send an email expressing the belief that they have an application pending, that does not establish that they did, in fact, apply. Indeed, Hawkins himself alleges that he applied for rights restoration twice, but Defendants have no record of a second application. Moon Decl. ¶ 10.

Finally, Hawkins suggests that a letter in which former Secretary James described the restoration process is somehow different from Defendants' interrogatory responses. See Pl.'s MSJ Mem. at 23. In Secretary James's letter, she highlighted that the "Governor firmly believes in the importance of second chances for formerly incarcerated individuals as they look to become active members of their community and citizenry." See Ex. J to Declaration of Jonathan Sherman at 1 (ECF No. 57-1). And she explained that the Governor and his Administration "consider each person individually and take into consideration the unique elements of each situation." *Id.* at 2. Here, Defendants have reiterated that they engage in "an individualized, case-by-case," review, Ex. B to Declaration of Jonathan Sherman at 2 (ECF No. 57-1), as part of their "holistic process to make a predictive judgment about whether an individual applicant can live as a responsible citizen and member of the political body," Ex. 1 to Defs.' Mot. for Summ. J. at 3 (ECF No. 61-1)—which is precisely what Secretary James described. The Governor takes his clemency power to restore voting rights seriously, and he has set up a process to ensure applicants receive the fair and just consideration they deserve.

B. Plaintiff Offers No Evidence Of Actual Viewpoint Discrimination In The Restoration Process

Hawkins has repeatedly stressed he is *not* arguing that he has been the subject of viewpoint discrimination in the voting restoration process. See Pl.'s MSJ Mem. at 18; MTD Opp. at 28.

Instead, his claim is that he suffers a First Amendment injury by merely being subject to the Commonwealth's discretionary restoration process. Therefore, as he describes his own theory, the "existence of an actual, improper discriminatory or biased motive in granting or denying any particular application need not be demonstrated." Pl.'s MSJ Mem. at 19.

Nor could Hawkins even plausibly *allege* that he was the subject of viewpoint discrimination. A "discretionary felon-reenfranchisement scheme that was facially or intentionally designed to discriminate based on viewpoint—say, for example, by barring Democrats, Republicans, or socialists from reenfranchisement on account of their political affiliation—might violate the First Amendment." *Hand*, 888 F.3d at 1211–12. But there is no basis whatsoever for concluding, or even speculating, that Defendants engage in viewpoint discrimination in the restoration process. As an initial matter, Defendants do not request information regarding any applicant's political affiliations or beliefs. As just one example, Defendants have no idea what Hawkins believes or says about any political matter, and nothing in the record discloses his political beliefs. Hawkins speculates that Defendants *could* obtain such information by searching through "political donation or voter registration history and social media accounts." Pl.'s MSJ Mem. at 1. But as the parties' stipulated facts demonstrate, Defendants do not inspect political donation history, political affiliations, or social media postings as part of the restoration process. See JSUF ¶¶ 16–27 (laying out all steps of the restoration process); Moon Decl. ¶ 9. Instead, the process turns on information such as an individual's carceral status and criminal history.

From a sea of over 7,000 applications, Hawkins has plucked four that, he says, demonstrate the *possibility* of viewpoint discrimination in the restoration process. To begin, Hawkins focuses on letters submitted by State Senator DeSteph on behalf of two applicants and a letter submitted by then-State Senator Cosgrove on behalf of a different applicant. See Pl.'s MSJ Mem. at 26. As

an initial matter, to even entertain Hawkins's implied assertion that these letters raise the specter of viewpoint discrimination, one must layer cynical inference upon cynical inference. For example, one must infer that the applicants mentioned in those letters are Republicans, that Senator DeSteph and former Senator Cosgrove would write letters only on behalf of Republicans, that Defendants would *know* Senator DeSteph and former Senator Cosgrove write letters only on behalf of Republicans, and that Defendants granted the applications on the basis of these partisan political inferences when, but for those inferences, they would not have granted the individuals' applications. That chain of inferences is baseless.[3] To the contrary, the letters show that Senator DeSteph and former Senator Cosgrove supported the applications because the applicants had become "model citizen[s]," Ex. K to Declaration of Jonathan Sherman at 1 (ECF No. 62-5), "with strong ties to the community and a pledge to succeed," Ex. C to Declaration of Jonathan Sherman at 2, 3 (ECF No. 62-1)—by, for instance, [redacted] Ex. K to Declaration of Jonathan Sherman at 1.

Even Hawkins stops short of expressly suggesting that Senator DeSteph and former Senator Cosgrove were attempting to communicate to the Governor that these applications should be granted because the individuals were Republicans—or that the Governor somehow decoded and acted on this secret partisan motive. Pl.'s MSJ Mem. at 26 ("It is unknown whether the partisan affiliations of these restoration applicants and/or of the support-letter authors in their favor has played or will play a role in any decisions to grant voting rights restoration."). The completely unremarkable—and, indeed, admirable—fact that public servants write letters on behalf of constituents whom they believe warrant a second chance does not in the least reflect a restoration

[3] Indeed, this stacking of implausible inferences would not even survive a motion to dismiss, let alone warrant a *grant* of summary judgment. See *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009).

process "facially or intentionally designed to discriminate based on viewpoint." *Hand*, 888 F.3d at 1211–12.

The undisputed facts also undermine Hawkins's reliance on these letters. First, as the parties have stipulated, the applications for the individuals mentioned in Senator DeSteph's letters were granted under the Governor's "predecessors' non-discretionary voting rights restoration system," SAC ¶ 43, "*before* Governor Youngkin's current policy was implemented," JSUF ¶ 8 (emphasis added) (noting that the first group of granted applications were publicly announced on May 20, 2022); ECF No. 50-2 at 42 (showing that [redacted] application was granted on May 17, 2022); ECF No. 50-2 at 48 (same for [redacted]). Thus, any alleged improper motive cannot be attributed to the current restoration process. Second, the application for the individual mentioned in former Senator Cosgrove's letter is pending and has not been granted. See Hawkins_Def_001660 (showing status of "Information Requested" for application no. [redacted]).

Hawkins's final example is an individual who emailed the Governor's office stating that he was a "lifelong Republican voter." Pl.'s MSJ Mem. at 26 (quotation marks omitted). Hawkins neglects to note that the final disposition for this individual was a *denial*. See Moon Decl. ¶ 2. This fact thus fatally undermines any implication that Defendants engage in viewpoint discrimination in the restoration process.

Apart from these four applicants, thousands upon thousands of individuals applied for restoration. Nowhere in the process did Defendants seek individuals' political affiliation or viewpoint, and the only example Hawkins provides where Defendants could possibly have known anything about an applicant's political views—because the applicant gratuitously volunteered it in an email—demonstrates that it played no role in the disposition of the application.

Defendants' restoration process is precisely what it looks like: an individualized and holistic review process where Defendants make a predictive judgment about whether the applicant will live as a responsible citizen and member of the political body. See Defs.' MSJ Mem. at 5. That process is unquestionably constitutional.

CONCLUSION

For these reasons and those explained in Defendants' memorandum in support of their motion for summary judgment, the Court should deny Plaintiff's motion for summary judgment and grant Defendants' motion for summary judgment.

Dated: February 28, 2024

Respectfully submitted,

GLENN YOUNGKIN
KELLY GEE

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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on February 28, 2024, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to all parties of record.

Andrew N. Ferguson
Andrew N. Ferguson (VSB #86583)
Solicitor General

EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

GEORGE HAWKINS, Plaintiff, v. GLENN YOUNGKIN, Governor of Virginia, in his official capacity, et al., Defendants.	)	Civil Action No. 3:23-cv-232-JAG

DECLARATION OF JENNIFER MOON

I, Jennifer Moon, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I currently serve as the Deputy Secretary of the Commonwealth of Virginia. I have held this office since January 15, 2022.

2. In Plaintiff Hawkins's memorandum in support of his motion for summary judgment, he refers to an email the Secretary of the Commonwealth's Office received from an individual named [redacted]. Mem. In Supp. of Pl.s' Mot. for Summ. J. (Pl.'s MSJ Mem.) at 3, 26 (ECF No. 57). As reflected in the database report in Hawkins_Def_001660, the Office received an application for restoration of voting rights from an individual named [redacted] on March 28, 2023. This application was deemed a "Duplicate" and closed on the same day because, within the preceding year, the Governor had previously determined that [redacted] was not eligible for the restoration of his voting rights.

3. In Plaintiff's memorandum in support of his motion for summary judgment, he states that there were 355 applications from 2023 that are still pending even though they were received before September of last year. See Pl.'s MSJ Mem. ¶ 43. Based on Defendants' review of the database report reflected in Hawkins_Def_001660, it appears that, at the time the report was

generated, there were only two applications that were submitted in 2023, not awaiting information from the applicant, and not yet sent to state agencies for research. Those two applications are application no. [redacted] for [redacted] and application no. [redacted] for [redacted] I provide further information about each application here.

4. On September 25, 2023, the Office received an application from [redacted]. On that same day, the Office emailed [redacted], notifying her that she needed to provide a letter indicating that she had been released from out-of-state custody and supervision. On December 14, 2023, [redacted] was again notified via email that additional information was needed to process her application. [redacted] responded to the email and asked what information was needed. The Office again explained that she needed to provide a letter indicating that she had been released from out-of-state custody and supervision. On December 15, 2023, [redacted] stated that she did not receive a release letter. That same day, the Office advised [redacted] to contact the court or her probation officer to obtain the requested information. [redacted] responded that she was not on probation or parole and that supervised release was not part of her sentencing. On December 20, 2023, the Office asked [redacted] for the name of the court where she was convicted, and [redacted] replied that it was in [redacted]. On December 20, 2023, the Office contacted [redacted] and verified that [redacted] had been released on [redacted], and was not on probation or parole. The Office then began processing [redacted] application, and her application is now pending research.

5. On September 18, 2023, the Office received an application from [redacted] That same day, [redacted] was notified that he needed to provide a letter indicating that he had been released from custody and supervision. On December 14, 2023, the Office notified [redacted] that he needed to provide additional information. On December 18, 2023, [redacted]

replied to the email, and the Office again advised him that he needed to provide a letter indicating that he had been released from out-of-state custody and supervision. On January 4, 2024, [redacted] provided the requested letter. The Office then began processing his application, and it is now pending research.

6. In Plaintiff Hawkins's memorandum in support of his motion for summary judgment, he refers to "two applications that were received by the Rights Restoration Office in 2022 that are still pending and for which the Rights Restoration Office is not waiting for information from the applicant." Pl.'s MSJ Mem. ¶ 44. Although Plaintiff does not specify which applications he is referring to, based on Defendants' review of the database report reflected in Hawkins_Def_001660, I believe that Plaintiff is referencing application no. [redacted] for [redacted] and application no. [redacted] for [redacted]. I provide further information about each application here.

7. The application for [redacted] was received on October 22, 2022. On July 17, 2023, the Office notified [redacted] that the Office needed a letter indicating his release from federal custody and supervision. [redacted] did not respond. On December 12, 2023, the Office emailed [redacted] that his application was incomplete until he provided a letter indicating his release from federal custody and supervision. On December 13, 2023, [redacted] sent the Office the requested release letter. The Office then began processing his application. On February 5, 2024, the Governor granted [redacted] application for restoration of rights.

8. The application for [redacted] was received on November 7, 2022. On February 10, 2023, the Office notified [redacted] that the Office needed a letter indicating his release from federal custody and supervision. On March 20, 2023, the Office emailed [redacted] again requesting a copy of documentation reflecting his release from federal custody and supervision.

On December 14, 2023, the Office again emailed [redacted], reiterating that his application was incomplete until he provided a letter indicating his release from federal custody and supervision. On December 20, 2023, [redacted] replied, stating that he could not locate his release document but that he was released from [redacted]. On December 20, 2023, the Office called the United States Probation Office for the Eastern District of Virginia, which verified that [redacted] was released from probation on [redacted]. The Office then began processing his application. On February 5, 2024, the Governor granted [redacted] application for restoration of rights.

9. The Office does not inspect applicants' donation history, political affiliations, or social media postings as part of the restoration process.

10. In Plaintiff Hawkins's memorandum in support of his motion for summary judgment, he alleges that he "applied for voting rights restoration twice," once in "early May 2023" and once "[o]n or around June 18, 2023." Pl.'s MSJ Mem. at 6. The Office has no record of a May 2023 application from Hawkins. The Office has record of Hawkins applying for rights restoration only once, on June 18, 2023.

I declare under penalty of perjury that, to the best of my knowledge, the foregoing is true and correct.

Executed on February 28, 2024.

Jennifer Moon
Deputy Secretary of the Commonwealth

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

GEORGE HAWKINS,

plaintiff,

versus 3:23CV232

GLENN YOUNGKIN, et al,

defendants,

Before: HONORABLE JOHN A. GIBNEY, JR.
Senior United States District Judge

April 23, 2024

Richmond, Virginia

GILBERT F. HALASZ
Official Court Reporter
U. S. Courthouse
701 East Broad Street
Richmond, VA 23219

APPEARANCES

FAIR ELECTIONS CENTER

by: Jonathan Sherman, Esq.

VICTOR MICHAEL GLASBERG & ASSOCIATES

by: Victor M. Glasberg, Esq.

for the plaintiff

OFFICE OF THE ATTORNEY GENERAL

by: Steven G. Popps, Esq.

Erika L. Maley, Esq.

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COOPER & KIRK, PLLC

by: John Duross Ramer, Esq.

for the defendants

THE CLERK: Case number 3:23 CV 232.

George Hawkins versus Glenn Younkin, et al.

The plaintiff is represented by Jonathan Sherman and Victor Glasberg.

On the AT&T line for the plaintiff is Nina Beck.

The defendants are represented by Erika Maley, Steven Popps and John Ramer.

Are counsel ready to proceed?

MR.POPPS: Yes, Madam Clerk.

MR. SHERMAN: Yes.

THE COURT: I didn't hear you.

MR. SHERMAN: Yes, Your Honor.

THE COURT: Still can't hear you.

MR. SHERMAN: Sorry.

Yes, Your Honor. My apology.

THE COURT: Mr. Popps. Nice suit. All right. Thank you all for a coming today. We are here today on the cross motions for summary judgment in this case.

So, who wants -- have you all discussed who is going first?

Who filed it?

MR.POPPS: We filed simultaneously, Your Honor. We have not discussed the order of operations.

THE COURT: I will tell you what. Why don't you go ahead, Mr. Popps. Always good to have you here.

MR.POPPS: Thank you, Your Honor. Always a pleasure to be before The Court.

May it please The Court.

Your Honor, as you know, we are here on cross motions for summary judgment on this case brought by Mr. Hawkins. The defendants, Governor Glenn Youngkin, and Secretary of the Commonwealth, Kelly Gee, respectfully request that The Court grant our motion for summary judgment and deny the plaintiffs' motion for the following reasons:

First, and foremost, Your Honor, the unfettered discretion doctrine, or the speech licensing doctrine that the plaintiffs advance is simply not applicable to this case.

Secondly, Your Honor, there are multiple appellate courts who have considered this theory and have rejected it. Most notably --

THE COURT: There are two.

MR.POPPS: There may be three, Your Honor. There is a Fourth Circuit case which I would think is of particular relevance to us. It is Howard versus Gilmore. It was a shorter opinion, to be frank. But if we are being technical, there were three.

The Sixth Circuit in Losfetter, the Eleventh Circuit in Hand, and then the Fourth Circuit in Howard

versus Gilmore.

So all three of those appellate courts have considered the exact same theory advanced by the plaintiffs here, Your Honor, and those courts have ultimately rejected that theory.

Third, Your Honor, there are decades --

THE COURT: That's the license theory.

MR.POPPS: I'm sorry?

THE COURT: That is their license theory.

MR.POPPS: Yes, Your Honor, the applicability of the first amendment licensing, speech licensing theory to the restoration of voting.

There are also, Your Honor, decades of Supreme Court precedent, and there is long-standing historical practice in the Commonwealth that demonstrates that the clemency powers accorded to the governor are rarely, if ever, reviewed by courts.

So, Your Honor, for those reasons we ask that The Court grant our motion for summary judgment, and I look forward to questions from The Court.

THE COURT: All right. Thank you.

Let's hear from the plaintiff.

Well, let me -- before we get to that let me just ask. Here is something that I have puzzled over. Suppose the Governor used his clemency power in some

invidious way? Like he only restored voting rights of white people, or whatever. Is there any remedy for that? Other than voting him out of office?

MR.POPPS: There is a legal remedy, Your Honor, and it is the protections accorded by the 14th amendment.

THE COURT: Okay. So he would have to bring a 14th amendment, not first amendment?

MR.POPPS: That's right. But it is important to remember in this case Your Honor, there is no evidence of that.

THE COURT: I understand that.

MR.POPPS: Okay.

THE COURT: I am just sort of --

MR.POPPS: Not even an allegation.

THE COURT: -- trying to figure out whether there is a remedy in an appropriate case.

MR.POPPS: There absolutely is. The 14th amendment --

THE COURT: Does this sort of executive privilege argument that you are making, does that apply to lower level executives? Could the mayor of Ashland, for instance, or mayor of Richmond, claim that?

MR.POPPS: I think it would depend on what exactly the power of the authority that that executive, that

subordinate executive is claiming, Your Honor. In this instance we have perhaps the highest and most important level of clemency, which is re-enfranchisement. And that is specifically accorded to the governor by the constitution of Virginia and by statute.

So I think it would depend on what clemency powers, if any, a subordinate executive at the county level may have.

THE COURT: Well, okay.

I am fairly familiar with some local government stuff. Suppose the executive of, you know, the head of a local government were to grant somebody a conditional use permit for their property. Is that something that they could be sued over? Or they would be immune from suit under this doctrine that you are discussing with us?

MR.POPPS: I think it would depend on what type of right is being exercised, but from what I understand The Court's hypothetical to be positing --

THE COURT: Land use permit.

MR.POPPS: -- so property rights, yes, sir.

So in that case I think it would be a form perhaps of speech or of use of your property. And so in that case you may have a licensing scheme that would be subject to review. But, again, the difference here is

that in those cases a potential plaintiff is seeking permission to exercise a right that he or she already has and is constitutionally guaranteed.

THE COURT: Well, it may not. I mean when you get a license you don't have the right.

MR.POPPS: I think in that, in the hypothetical we would be talking about -- well, for instance in the speech cases, Your Honor, we are talking about a first amendment right of speech. That is guaranteed by the constitution. And an applicant is asking the government for permission to prospectively exercise that right that is already guaranteed.

In this instance we have rights that have been stripped by the constitution, both the Virginia constitution and authorized by the U.S. constitution, and now there is no underlying right to be re-enfranchised. So I think it is apples and oranges.

THE COURT: But you have no general right to have a parade or a demonstration.

MR.POPPS: But you do have a right --

THE COURT: You have a right to speak freely.

MR.POPPS: Yes, sir.

THE COURT: So in order to exercise that right you need to -- you need to get the permits, the parade permit is what I will call it.

MR.POPPS: Yes, sir.

THE COURT: And here in order to exercise the right to vote you need to get the governor's approval, right? Or clemency, that is a form of clemency.

MR.POPPS: Yes, Your Honor.

THE COURT: So, I am a little -- so, does your argument require me to conclude that voting is not protected by the first amendment?

MR.POPPS: I don't think so, Your Honor. I think my argument only requires The Court to conclude that a doctrine in Lakewood and Forsyth County and those lines of cases from the Supreme Court apply just as the Supreme Court has said, which is only to speech licensing cases. In Lakewood it was seeking permission to put a newspaper vending machine. In Forsyth County it was permission to hold a particular parade at a particular time and place. That is clearly speech, and regulating speech, and a license for speech. This case does not regulate speech. This case involves the re-enfranchisement power, which is --

THE COURT: So then you are saying that in order to distinguish this case from Lakewood and Forsyth I have to conclude that voting is not a form of expression?

MR.POPPS: That is my argument, Your Honor, but I

don't think The Court even needs to go that far. I think The Court simply would need to rule that speech licensing cases are limited, as the Supreme Court has said, to speech licensing issues. And this is a re-enfranchisement issue. And that doctrine has no applicability here.

THE COURT: Okay.

And is your sort of executive immunity argument part of the political question doctrine that you have raised?

MR.POPPS: I would resist The Court's label that it is an immunity doctrine.

THE COURT: Well, whatever it is, the thing he can't sued about.

MR.POPPS: Just simply under this doctrine, Your Honor -- and I want to be make clear that, as we discussed earlier, that there are remedies, not the case right now, but if there was invidious discrimination, unlawful discrimination happening in a restoration of voting rights system there are remedies for that. It is just not a speech licensing doctrine that is the remedy.

THE COURT: Okay. But you said that there is a -- that there is a doctrine that says that this is entrusted to the discretion of the governor and

therefore there should not be litigation to compel him to exercise his discretion one way or the other.

MR.POPPS: Yes, Your Honor.

THE COURT: Is that a branch of the political question doctrine?

MR.POPPS: I think partially, yes, Your Honor. I think it is also a branch of the doctrine in the line of cases. Willard, excuse me, Woodward and Dumschat where the Supreme Court has said, albeit in the parting context, that the clemency powers accorded to a chief executive are rarely if ever reviewed; and, yes, Your Honor, in part because of the political question doctrine.

THE COURT: Well, this is a form of clemency.

MR.POPPS: It is, yes, Your Honor.

THE COURT: It is not complete clemency, but a form of it.

MR.POPPS: Correct.

THE COURT: Okay.

I just find the whole political question doctrine to be sort of a troublesome area. Courts used to use it to get out cases they don't want to decide.

Okay. All right.

Anything else you want you to add?

MR.POPPS: No, Your Honor. Thank you.

THE COURT: Thank you.

Let's hear from Mr. Sherman.

MR. SHERMAN: Yes, Your Honor.

THE COURT: Your client is here today?

MR. SHERMAN: Good morning, Your Honor.

Yes, George Hawkins is with us today, plaintiff.

THE COURT: Mr. Hawkins, good to see you, sir. Thank you for coming.

AUDIENCE MEMBER: Yes, sir.

MR. SHERMAN: Good morning, Your Honor. Thank you.

All one has to do to see the first amendment violation in this case is to say defendants go out loud. Governor Youngkin is here fighting for the right to retain the power to selectively decide who may be given the right to vote after a felony conviction has stripped them of it. And the governor refers to this as a quote, predictive determination, as to who will quote, live as a responsible citizen.

The governor's predictions as to who will live as a quote-unquote, responsible citizen do not satisfy the Supreme Court standards under Everson, Shuttlesworth. In 1965 the Supreme Court decides in Shuttlesworth that when first amendment political expression or expressive conduct is on the line the standards governing that

need to be narrow, quote, narrow, objective and definite.

THE COURT: Is there a Supreme Court case that says that voting is an exercise of first amendment rights?

MR. SHERMAN: Is there a case that says that?

THE COURT: Yes.

MR. SHERMAN: There are cases that do refer to, like Norman V Reed from 1992 that refer to voters' right to express themselves at the ballot. They are speaking of the right to select candidates, the right to chose political parties. There is also, you know, going back as far as 1965, there is Illinois Socialist Workers Party. A variety of Supreme Court cases that refer to it. They are usually in ballot access cases that are talking about the right of political parties and candidates to get on the ballot. But in those cases, as we have said in our briefs, they are also speaking of the other side of the coin where voters have the right to chose their candidates and chose political parties as well.

THE COURT: Go ahead.

MR. SHERMAN: So since that decision in Shuttlesworth there has been a long-standing precedent for nearly 60 years that the standard governing rights

restoration needs to be narrow, objective and definite. And the Responsible Citizen test clearly -- that Governor Youngkin has been employing -- clearly fails that standard. They don't even --

THE COURT: They have no idea what Governor Youngkin uses to decide these cases. He announces at the end that somebody is a responsible citizen or not, but how he gets there is anybody's guess.

MR. SHERMAN: Well, Your Honor --

THE COURT: He has a bunch of information, but how --

MR. SHERMAN: Right.

THE COURT: -- you know, if this was, if this was Google we would say we take all that information and put it in an algorithm that leads to responsible citizen. But we don't have that algorithm. We don't have any way to know how it is Governor Youngkin does it.

MR. SHERMAN: Correct, Your Honor.

But in response to the interrogatories and requests for admission that plaintiff served on defendants they did say that, however vague it is, and subjective, their standard is they look at this, the objective information they have collected and then Governor Youngkin makes an assessment as to whether or

not the person, quote, in the future -- he makes a prediction as to whether they will, quote, live as a responsible citizen.

But, we, our position is that is hopelessly vague and subjective, and they could have mooted this case by converting that standard into a set of objective rules and criteria. If they mean law abiding, they could have set a requirement that says, no convictions within three years. They could reconstruct that very vague and subjective standard and make it objective. But they have refused to do so.

They don't make any argument, though, in their briefs that this standard complies with the first amendment rules that we have been discussing in this case. And along with the key admissions about the lack of rules and criteria, and Governor Youngkin has admitted that he is free to ignore any of those purported, quote-unquote, factors, he is free to ignore them entirely, that is essentially the ball game on liability.

THE COURT: Well, they say, opponents say, that we have to classify this as a license.

MR. SHERMAN: It is functionally a licensing system.

THE COURT: Functionally, but it is not a license.

MR. SHERMAN: It is not formally --

THE COURT: I think of a license, I think of what somebody gets to drive a car, or to, in other states, have a liquor store or whatever. But this is different from that.

MR. SHERMAN: Formally it is different, but someone applies to a government office for permission to engage in first amendment protected expressive conduct. That government official reviews their application. And then in their discretion, their unfettered discretion, decides whether or not to grant or deny permission to engage in that expressive conduct.

In that respect it is functionally no different from applying for a parade permit or a newspaper rack permit, or any of the other permit or licensing schemes considered in the Supreme Court's prior decisions in these areas.

It is as prospective, it is not purely retrospective, it is prospective, someone can vote in the future. It is not simply a quote, a one-time act of clemency. If you are denied you have to keep re-applying in order to one day hopefully regain your right to vote. Many of those purported distinctions sort of crumble upon a closer inspection,

dysfunctionally this is operating like a license scheme.

It is curious that they balk at applying objective rules and criteria when all of the information they are ingesting from the application from the applicant is objective. So what is the hesitation for applying a system of objective rules and criteria when all of the information they are reviewing is objective. They are not holding a hearing, they are not getting an essay. It doesn't make sense other than that Governor Youngkin wants the right to second guess what the courts have already done in imposing a sentence.

THE COURT: So if we were to take the word "license" out of this case, because, I don't know, it doesn't seem like a licensing, what your argument is that when the governor makes a discretionary decision that affects someone's first amendment rights, he has to use objective criteria.

MR. SHERMAN: Correct. We believe Shuttlesworth requires that. The word "license" is not important. What is happening is what is important. And functionally the governor is selecting who may and who may not regain the right to vote.

THE COURT: Does that include that the right to vote is a form of protected speech?

MR. SHERMAN: Expressive conduct, yes, Your Honor. So, yes, absolutely. For the fist amendment for unfettered discretion doctrine to apply we have to, we believe we have established that, you know, every form of conduct and expression surrounding the right to vote in the electoral context is already protected by the right to vote. Electioneering outside of a polling place, campaign contributions, campaign expenditures, even of a yard sign, City of Ladue v Gilleo, a yard sign on the lawn. That is first amendment.

THE COURT: What is the message that is communicated by a vote?

MR. SHERMAN: What is the message communicated?

THE COURT: What is the expression?

MR. SHERMAN: Voters, even though it is anonymous, voters show up at the ballot box and express their support for candidates, political parties, when they are voting on ballot initiatives or Constitutional amendments, they are voting for a particular causes or changes in the law. All of this speaks in the aggregate. We don't know what any individual voter says, but this country, of course, has a long history of protecting anonymous speech, going all the way back to Common Sense and Thomas Payne, which was published under a pseudonym. The Federalist Papers were

published under a pseudonym. MacIntyre V Ohio Election Commission from the '90s, in the case decided by the Supreme Court, protected, struck down a ban on anonymous pamphlets. So the anonymity of voting doesn't cancel out the expressive content of what voters are doing.

I also want to address head on the argument that there is no first amendment protection here because disenfranchised people with felony convictions don't currently have a right to vote under state law. Their position essentially is the first amendment unfettered discretion doctrine only applies when the person in question currently has a right to speak, a right to publish, a right to vote. But that just can't be. They are fixated on where the applicant begins, that default position, but not where they end up. Where they end up is people are granted the right to engage in expressive conduct. Whether we call that a license or something else, doesn't really matter. The Governor is selectively authorizing people to engage in that right, which is protected by the first amendment as expressive conduct.

I think it is telling that over all the time we have been briefing this case and debating this, the defendants, defendants have not come with a coherent

response to our hypothetical about 16 and 17 year olds, and non citizens being selectively enfranchised. The most they say in the reply brief is that the prefix "re" in re-enfranchisement is doing a lot of work because the people at issue in this case once had but lost the right to vote because they quote, committed a serious crime. But that is a moral argument, not a legal one. For purposes of the first amendment all three groups of people are ineligible as a matter of state law, and selectively, arbitrarily enfranchising or re-enfranchising them is a violation of the first amendment unfettered discretion doctrine.

Otherwise it would just turn on the semantics, you know, this doctrine application would just turn on the semantics of state law. And any state legislature could frustrate the application of this federal constitutional rule.

Beyond that argument there are essentially two broad arguments that defendants make in this case, clemency and tradition. They argue that because Virginia law defines voting rights restoration as a form of clemency that federal courts have no business whatsoever reviewing this under -- on first amendment grounds.

One of the great ironies I think of this case is

that defendants are invoking a vestige of the English monarchy as a shield against the claim under the first amendment which, of course, was originally designed to get at or to prevent the exercise of arbitrary power that subjects of the English monarchy had experienced.

They make this argument even though we are not arguing for system of like judicial review of the denial. We are not asking for review of George Hawkins' denial. We are not asking for a system of judicial review of the individual restoration decisions. What we are arguing for is systemic change to a non-arbitrary system. And Woodward v Dumschat, really those due process cases only speak to review of individual denials of individual clemency in individual clemency cases.

Tradition is a much weaker argument. I won't spend a great deal of time on this, but suffice it to say --

THE COURT: Pause for a second here.

Suppose someone who is, you know, of the caliber of Mother Teresa and applies to vote and meets all the -- let's just assume for a second that the Governor were to adopt -- I don't know -- sort of a policy manual or a set of rules that governs. And if Mother Teresa is deemed ineligible even though she meets all

the criteria, and is clearly a good citizen, could she then sue the governor to grant her or to compel him to grant her clemency?

MR. SHERMAN: So, I think this would be a mater of state law following this case. Let's presume --

THE COURT: But it is still a -- it is still -- she would still be denied first amendment rights, according to you.

MR. SHERMAN: Correct, Your Honor. But our view of it is that she wouldn't be able to bring a federal -- it wouldn't be a federal constitutional issue if there were a non-arbitrary systems. So if Mother Teresa is applying, and there is a non-arbitrary system, we don't believe that she can invoke the federal constitutional doctrine at issue in this case. If plaintiff were to prevail here, if defendants were to replace the current system with a set of objective rules and criteria, that is now Virginia policy or law. And if it is not being followed, then I think Mother Teresa might have an action in state court if reasonable time limits, for instance, were not being followed, or if an obvious -- if the basis for the denial was something that she had obviously satisfied, that might be a question of state law to be adjudicated in state court, but, no, I don't think every individual

applicant can run to federal court and say, you know, this non-arbitrary system wasn't applied correctly in my case. That, I don't think --

THE COURT: They could come in and say, well, I still am not being able to exercise my first amendment right because the Governor didn't apply the rule correctly.

MR. SHERMAN: Correct. I think that is correct. Right. Once there is a system of objective rules and criteria, no one has standing at that point to bring a claim under the first amendment unfettered discretion doctrine.

THE COURT: Okay. Well, but are there other first amendment doctrines that they could rely on? Other than the unfettered discretion doctrine?

MR. SHERMAN: There is a doctrine under the first and 14th amendment, the Anderson Burdick test, which Your Honor, may be familiar with, which sort of argues that a certain scheme is an undue burden on the right to vote. Traditionally this has been thought to only apply to people who have the present existing right to vote, not people who were disenfranchised. But I don't think that would have -- I don't think a plaintiff invoking that would have much traction. But it is possible that someone would try to sue, but I don't

know how far they would get.

THE COURT: Okay.

MR. SHERMAN: I did want to add on the clemency point before moving on that defendant's counsel said clemency is a part of the political question doctrine, I have never seen any case linking the two before there is clemency on the one hand and political question doctrine, whatever it is, whether it is jurisdictional or justiciability, I have never seen the two overlap.

On defendant's tradition argument. Tradition, of course, doesn't trump the constitution. Many Constitutional rules --

THE COURT: We have had a few traditions in Virginia that were unconstitutional.

MR. SHERMAN: Correct, Your Honor. Yes, there were no Miranda warnings for much of the U.S. history, segregation, there was a long tradition of segregation in this country. There was no right to counsel for indigent criminal defendants. Many constitutional rights that have been established for the first time, or applied in a new context, as this one, we are suing under an 86-year-old, long-standing precedent decided by the Supreme Court. So, if anything, there is long standing tradition in this country of protecting the political expressive conduct from arbitrary licensing.

I did want to also address defendant's argument in their brief that if we were to prevail in this case then other suits, other legal actions are coming for pardons and commutations, and other forms of clemency. We just don't see that as the case. Courts can draw a bright line rule and say voting rights restoration, that is directly influencing, directly controlling whether someone can exercise the right to vote, but the other forms of clemency just have an indirect effect at best. That is a bright line rule.

THE COURT: Can somebody bring a second amendment suit because the governor hasn't restored their right to possess a firearm?

MR. SHERMAN: People have tried to apply the unfettered discretion doctrine in the second amendment case, context. So far they have been losing. There is a case Fisher, forgetting the defendant's name, out of the ninth circuit. So far they have all been unsuccessful, because the origins, the original understanding of the first amendment and the second amendment are completely different. There are reasons that we have this prophylactic doctrine in the context of speech and other expression, other political expression, and don't have that in the context of the right to firearms, which is treated just very

differently because of the public safety concerns.

A quick word on, before, getting off the merits to the remedy arguments of the defendants make, I did want to say a word on the evidence. Defendants of course make no argument here that their restoration scheme satisfies the first amendment. We think that the evidence though does corroborate they have admitted to in the interrogatories and in the request for admission, the main purpose here is just to demonstrate that it is not the case that Governor Youngkin just doesn't want told what to do, but has magically landed upon a system of objective rules and criteria that treats applicants in a uniform consistent coherent manner. It is quite the opposite. Any permutation of, quote-unquote, factors -- that is their term -- any permutation results in inconsistent treatment of applicants. And we demonstrate that in the brief, our opening brief.

So, quickly on the remedy. We don't think that the political question doctrine has any application here whatsoever. Primarily because even if the plaintiff prevails The Court doesn't need to implement and impose a specific set of objective rules and criteria. Doesn't need to implement and impose a specific reasonable definite time limit. That can be

for the defendants to come up with. There are numerous cases throughout the country, numerous federal constitutional cases, in which defendants proposed a remedial scheme in the first instance. Redistricting is one line of cases where this occurs, the remedial plan is first a proposal by the state legislature before the court steps in if they can't come up with one that complies with the constitution or the voting rights act. There are also cases under, in prison reform cases, there are also cases under the first amendment unfettered discretion doctrine. We cited to this Court Child Evangelism Fellowship of South Carolina where the Fourth Circuit said it is not incumbent upon defendants to impose any particular set of objective, neutral, rules and criteria, they just need to pick some. Sentinel Communications, another first amendment case out of the Eleventh Circuit. There are lots of instances around the country. Swann, even going back to the desegregation cases from the '60s and '70s, Swann v Charlotte-Mecklenburg. The remedial plan was first for the defendants to propose, and then for The Court to review for compliance. So the political question doctrine doesn't have any application where the court is imposing and selecting specific -- a specific remedy. All the court needs to

do is review whether that proposed remedy complies with the first amendment requirements. Not unique to this case.

Lastly --

THE COURT: What do you have to do comply with that?

MR. SHERMAN: Sorry? I didn't hear.

THE COURT: What do you have to do to comply with that?

MR. SHERMAN: To comply with the first amendment they need a set of objective neutral rules and criteria and a reasonable definite time limit. They have made the case themselves that three months is a workable time limit. They make some arguments about how do we know, you know, in certain cases they are waiting for information from state agencies or the client. They could set a reasonable definite time limit of two months from the completion. Two months from the completion of the application. That would be a reasonable definite time limit for the governor to make his decision once an application is complete. So that it doesn't linger for months and months. They could also set a reasonable definite time limit for the application process to be initiated. Sometimes they have waited months just to initiate the request from

the applicant or initiate the request from other state agencies.

Lastly, I do want to address defendants' claim that the proposed remedy would conflict with Howell v McAuliffe and the Supreme Court of Virginia's interpretation of the Virgina Constitution. To the extent they are arguing that Howe v McAuliffe requires a purely discretionary restoration system, that would conflict with the federal court order saying that kind of system violates the first amendment and the federal court's injunction would trump any state court decision to the contrary. But to the extent they are arguing that Howe versus McAuliffe requires individualized review, there is a way, an easy way, to reconcile the two. Individualized doesn't mean arbitrary. And any application that demonstrates whether the individual factors and facts of this person's case, the crime they have committed, whether they are paying off their legal financial obligations, et cetera, those are the individualized facts of that case, and they -- a remedial scheme can simply reconcile the two saying it is non discretionary, it is not arbitrary, but it also has to be based on an application and individualized consideration of those facts.

So we don't see any conflict there. And I think

they are just conflating these two in an attempt to deter The Court from ruling in plaintiff's favor.

Without -- with that, if The Court has any other questions from me, Your Honor.

THE COURT: Thank you.

MR. SHERMAN: Thank you, Your Honor.

THE COURT: Mr. Popps, do you have anything to say in response to that?

MR.POPPS: Your Honor, the defendants don't have anything to add unless The Court has questions.

THE COURT: All right.

I have in front of me a motion requesting judicial notice -- why is this here? I already decided that.

Okay. Why is this here? In case I need to look at it? All right.

Tell me this. What if this case goes forward? I take it both of you think that this is a case in which there really aren't any factual disputes and it is ripe for summary judgment. Is that fair to say?

MR. SHERMAN: Yes, Your Honor.

MR.POPPS: Yes, Your Honor.

THE COURT: So there are no pending discovery matters or anything like that that need to be addressed by me or on-going between the two sides?

MR. SHERMAN: No, Your Honor.

MR.POPPS: No, Your Honor, no discovery issues at all.

THE COURT: All right.

Well, okay. I have got to say that this case raises difficult questions. I have a hard time seeing re-enfranchisement as a form a license. But I understand it a little better when I call it the unfettered discretion doctrine that affects someone's first amendment rights.

But I think it is a difficult case. So I am going to, to the extent anything is threatening to be on going in this case I will stay the case until I decide the summary judgment motion. And I will have a decision on this relatively quickly.

So, Mr. Popps, you don't want to -- you don't want to respond to the accusation you are reaching back to the English monarchy? I realize that you are a fan of all things English.

MR.POPPS: Particularly King William and Queen Mary, Your Honor.

THE COURT: There you go.

MR.POPPS: We are not reaching back to the monarchy in the sense --

THE COURT: I don't think you are.

MR.POPPS: Okay. Thank you, Your Honor.

THE COURT: All right. Thank all very much.
And I will be catching up with you soon.
Thank you.

HEARING ADJOURNED.

THE FOREGOING IS A TRUE AND CORRECT TRANSCRIPT.

GILBERT FRANK HALASZ
Official Court Reporter

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

GEORGE HAWKINS,
Plaintiff,

v. Civil Action No. 3:23cv232

GLENN YOUNGKIN, in his official Capacity as Governor of Virginia & KELLY GEE, in her official capacity as Secretary of the Commonwealth of Virginia,
Defendants.

OPINION

Virginia's Constitution vests the Governor with discretion to restore felons' voting rights. The plaintiff, George Hawkins, has launched a facial First Amendment challenge to the system that Governor Glenn Youngkin uses to assess felons' voting rights restoration applications. But his suit has a fatal flaw: the First Amendment's unfettered discretion doctrine does not apply to Governor Youngkin's rights restoration system. For the reasons discussed below, the Court will deny Hawkins's motion for summary judgment, (ECF No. 56), and grant the motion for summary judgment filed by the defendants, Governor Youngkin and Secretary of the Commonwealth Kelly Gee, (ECF No. 60).

I. UNDISPUTED MATERIAL FACTS[1]

Hawkins was convicted of a felony in 2010. (ECF No. 59 ¶ 1.) He served a thirteen-year term of incarceration and was released on May 3, 2023. (*Id.* ¶¶ 2–3.) On June 18, 2023, Hawkins submitted a voting rights restoration application. (*Id.* ¶ 4.) On August 17, 2023, Governor

[1] The parties jointly stipulate to the following undisputed facts. (*See* ECF No. 59.)

Youngkin deemed Hawkins "ineligible [to have his voting rights restored] at this time" and denied his application. (*Id.* ¶ 5.)

By the time Hawkins had submitted his application, Governor Youngkin had "fully implemented" his system to assess voting rights restoration applications. (*See id.* ¶ 7.) Under this system, an individual is eligible to apply for a restoration of his civil rights only if he has "finished any term of incarceration as a result of a felony conviction." (*Id.* ¶ 11 (quoting https://www.restore.virginia.gov/frequently-asked-questions/).) The current application asks for the following information:

> (a) full legal name; (b) full name when convicted; (c) Social Security Number; (d) date of birth; (e) gender (male/female); (f) street address; (g) phone number; (h) email address; (i) court of conviction (Virginia Circuit Court, Out of State Circuit Court, Military Court, Federal Court); (j) citizenship status; (k) whether the applicant has been convicted of a violent crime, and if so, the crime and date of conviction; (l) whether the applicant has completed serving all terms of incarceration; (m) whether the applicant is currently on probation, parole, or other state supervision, and if so, the expected end date; and (n) checkbox requiring applicant to indicate either that they have "paid all fines, fees, and restitution" or that they are "currently paying my fines, fees, and restitution" with a receipt or payment plan from the court attached

(*Id.* ¶ 12.) "Apart from an applicant's death or citizenship status," these factors are not "dispositive [to] the outcome of a voting rights restoration application." (*Id.* ¶ 13.) Once an individual applies to have their rights restored, staff members of the Restoration of Rights Division within the Office of the Secretary of the Commonwealth (the "Restoration of Rights Division") review the application and seek additional information about the applicant by contacting state agencies, including the Virginia Department of Elections, Virginia Department of Behavioral Health and Development Services, Virginia Department of Corrections, and Virginia Compensation Board. (*Id.* ¶ 21.) "[A]n application is complete if . . . the applicant has filled out all required fields on the current application . . . and . . . responded to all inquiries from the Governor's office, the

Secretary of the Commonwealth's office, or any other Virginia agency that has submitted an inquiry to the applicant regarding" the application. (*Id.* ¶ 29.) Completed applications then go to the Governor for final consideration, unless the applicant does not satisfy other voting qualifications (such as age and residency requirements), is still incarcerated, subject to a pending felony charge, or on supervised release for an out-of-state or federal conviction. (*Id.* ¶ 28.)

"'Using research and information provided by the applicant, [Central Criminal Records Exchange,] and other state agencies,' the Secretary of the Commonwealth makes a recommendation to the Governor as to the disposition of the application." (*Id.* ¶ 27 (quoting Sherman Decl. ¶ 10, Ex. I).) The factors listed on the application "do not 'limit' or 'constrain' the Governor's discretion in deciding whether to grant or deny any . . . application.'" (*Id.* ¶ 14 (quoting Sherman Decl. ¶ 3, Ex. B at Response to Interrog. Nos. 1 and 2).) And "[t]here is no time limit by which the Governor must grant or deny an application." (*Id.* ¶ 34.)

II. DISCUSSION[2]

No one would suggest that Governor Youngkin's "fully implemented" system is transparent, or that it gives the appearance of fairness. Much like a monarch, the Governor receives petitions for relief, may or may not rule upon them, and, when he does rule, need not explain his reasons. But transparency and the appearance of fairness are not the issues in this case.

[2] Under Federal Rule of Civil Procedure 56, a party may move for summary judgment on a claim, defense, or part of a claim or defense. The Rule directs courts to grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The party seeking summary judgment may succeed by establishing the absence of a genuine issue of material fact or showing that the other party cannot produce admissible evidence to support their claim: "a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). When reviewing cross-motions for summary judgment, "the court examines each motion separately, employing the familiar standard under Rule 56 of the Federal Rules of Civil Procedure." *Desmond v. PNGI Charles Town Gaming, L.L.C.*, 630 F.3d 351, 354 (4th Cir. 2011).

Rather, this case turns on whether Governor Youngkin's rights restoration system is an administrative licensing scheme subject to the First Amendment's unfettered discretion doctrine. "[I]n the area of free expression[,] a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757 (1988). Plaintiffs may facially challenge administrative licensing schemes that "allegedly vest[] unbridled discretion in a government official over whether to permit or deny expressive activity." *Id.* at 755. The parties dispute whether the First Amendment's unfettered discretion doctrine applies to Governor Youngkin's rights restoration system. Citing *Lakewood* and its progeny, Hawkins asserts that the discretionary system Governor Youngkin uses to assess rights restoration applications functions as a licensing scheme. The defendants reject this notion and explain that, in asking Governor Youngkin to restore his voting rights, Hawkins has not applied for a license.

The defendants' argument wins the day. Because Governor Youngkin's rights restoration system is not a licensing scheme subject to the unfettered discretion doctrine, the Court will grant the defendants' motion for summary judgment and deny Hawkins's motion for summary judgment.

A. Courts Can Review Executive Clemency Regimes in Limited Circumstances

The defendants contend that "discretionary clemency regimes, like Virginia's voting-restoration process, are not typically subject to judicial review" because "the 'heart of executive clemency' is 'to grant clemency as a matter of grace, thus allowing the executive to consider a wide range of factors not comprehended by earlier judicial proceedings and sentencing determinations.'" (ECF No. 61, at 11–12 (quoting *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 280–81 (1998) (plurality)).) In Virginia, a felony conviction automatically results in a

person's loss of the right to vote. Va. Const. art. II, § 1. Article V, section 12—the "Executive clemency" section—of Virginia's Constitution grants the Governor power

> to remit fines and penalties under such rules and regulations as may be prescribed by law; to grant reprieves and pardons after conviction except when the prosecution has been carried on by the House of Delegates; *to remove political disabilities consequent upon conviction for offenses committed prior or subsequent to the adoption of this Constitution*; and to commute capital punishment.
>
> He shall communicate to the General Assembly, at each regular session, particulars of every case of fine or penalty remitted, of reprieve or pardon granted, and of punishment commuted, with his reasons for remitting, granting, or commuting the same.

Va. Const. art. V, § 12 (emphasis added).[3] Thus, in Virginia, felons may not vote unless and until their "civil rights have been restored by the Governor or other appropriate authority." Va. Const. art. II, § 1. "[T]he power to remove [a] felon's political disabilities remains vested solely in the Governor, who may grant or deny any request without explanation, and there is no right of appeal from the Governor's decision." *In re Phillips*, 265 Va. 81, 87–88, 574 S.E.2d 270, 273 (2003).[4]

Because Governor Youngkin's ability to restore felons' voting rights—and create a system by which to do so—stems from his clemency power, the defendants assert that Governor Youngkin's decision to grant or deny rights restoration applications involves a nonjusticiable political question. They contend that "clemency decisions are not typically subject to judicial review and 'might' warrant judicial review only in extreme circumstances such as 'a scheme

[3] Virginia's 1776 Constitution established the Governor's clemency power, and "[i]n the constitutional revision of 1870, the Governor was given the additional power to 'remove political disabilities consequent to conviction of offenses.'" *Gallagher v. Commonwealth*, 284 Va. 444, 451, 732 S.E.2d 22, 25 (2012) (quoting 2 A.E. Dick Howard, Commentaries on the Constitution of Virginia, 641–42 (1974)).

[4] The "loss of the right to vote" is a political disability. *See Howell v. McAuliffe*, 292 Va. 320, 328 n.1, 788 S.E.2d 706, 710 n.1 (2016).

whereby a state official flipped a coin to determine whether to grant clemency' or 'arbitrarily denied a prisoner any access to its clemency process.'" (ECF No. 61, at 12–13 (quoting *Woodard*, 523 U.S. at 289 (O'Connor, J., concurring)).)

Although clemency regimes traditionally do not fall within the "business of courts," some courts have addressed plaintiffs' claims that discretionary rights restoration systems had run afoul of the First Amendment. *Woodard*, 523 at 285 (plurality); *see*, *e.g.*, *Hand v. Scott*, 888 F.3d 1206 (11th Cir. 2018); *Lostutter v. Kentucky*, No. 22-5703, 2023 WL 4636868, at *4 (6th Cir. July 20, 2023), *cert. denied sub nom. Aleman v. Beshear*, 144 S. Ct. 809 (2024).[5] The Court will therefore review Governor Youngkin's rights restoration system to determine whether it is a licensing scheme subject to the First Amendment's unfettered discretion doctrine.

B. Licensing Schemes Are Subject to the Unfettered Discretion Doctrine

Before turning to the merits of the specific question at issue here, the Court will review the most relevant Supreme Court cases on which Hawkins relies. Hawkins cautions that "the 'clemency' label is no shield against [his] First Amendment claims" and argues that Governor Youngkin's rights restoration system functions as an administrative licensing scheme. (ECF No. 62, at 22.) Courts must invalidate licensing schemes that vest administrative officials with unbridled discretion to grant or deny an applicant's license to engage in protected expressive conduct. *Lakewood*, 486 U.S. at 757, 763–64. "If the permit scheme 'involves appraisal of facts, the exercise of judgment, and the formation of an opinion[]' by the licensing authority, 'the danger of censorship and of abridgment of our precious First Amendment freedoms is too great' to be permitted." *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 131 (1992) (first quoting

[5] *But see Beacham v. Braterman*, 300 F. Supp. 182 (S.D. Fla. 1969), *aff'd* 396 U.S. 12 (1969) ("The restoration of civil rights is part of the pardon power and as such is an act of executive clemency not subject to judicial control.").

Cantwell v. Connecticut, 310 U.S. 296, 305 (1940); and then quoting *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975)). Similarly, the United States Supreme Court has struck down such schemes that did not set time limits by which administrators must render decisions. *E.g.*, *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225–29 (1990); *Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781, 803 (1988).

Each of these cases addressed administrative licensing schemes that burdened applicants' First Amendment rights to free speech. In *Lakewood*, the Supreme Court struck down an ordinance that gave a "mayor the authority to grant or deny applications for annual newsrack permits." 486 U.S. at 755, 772. The Court allowed the plaintiff newspaper to bring a facial challenge to the licensing ordinance because "without standards to fetter the licensor's discretion, the difficulties of proof and the case-by-case nature of 'as applied' challenges render the licensor's action in large measure effectively unreviewable." *Id.* at 758–59. And in *Forsyth County*, the Supreme Court reviewed an ordinance that conferred unlimited authority upon administrative officials to regulate "public speaking, parades, or assemblies in 'the archetype of a traditional public forum.'" 505 U.S. at 130 (quoting *Frisby v. Schultz*, 487 U.S. 474, 480 (1988)). There, the Court explained that a plaintiff may successfully launch a facial First Amendment attack on a licensing scheme if it grants a licensor leeway to arbitrarily "exercise[] his discretion in a content-based manner." *Id.* at 133 n.10. In *FW/PBS*, the Supreme Court reviewed an ordinance "regulat[ing] sexually oriented businesses through a scheme incorporating zoning, licensing, and inspections" that "fail[ed] to set a time limit within which the licensing authority must issue a license, and, therefore create[d] the likelihood of arbitrary denials and the concomitant suppression of speech." 493 U.S. at 220–221, 223. Finally, in *Riley*, the Supreme Court struck down a licensing scheme that governed the

solicitation of charitable contributions because it "fail[ed] to provide for definite limitations on the time within which the licensor must issue the license." *Id.* (citing *Riley*, 487 U.S. at 802).

In summary, the speech-licensing cases that Hawkins cites assess schemes that regulate individuals' ability to exercise their rights to free speech. Notably, none of these cases address the kind of system at issue here. And in similar challenges to states' rights restoration systems, two federal courts of appeals have declined to apply the First Amendment's unfettered discretion doctrine. *Lostutter*, 2023 WL 4636868, at *6 ("[T]he district court correctly held that a partial executive pardon restoring the right to vote is not a permit or license to vote, and thus the unfettered-discretion doctrine does not apply. The *City of Lakewood* line of cases is therefore inapplicable and dismissal for lack of standing was proper."); *Hand*, 888 F.3d at 1212 ("[T]he First Amendment cases cited by the appellees appear inapposite to a reenfranchisement case.") With these cases in mind, the Court turns to address Governor Youngkin's rights restoration system.

C. Governor Youngkin's Rights Restoration System Is Not a Licensing Scheme

Hawkins argues that, "[f]unctionally, there is no material difference between Virginia's voting rights system and a licensing scheme." (ECF No. 65, at 17.) He hones in on the process itself, explaining that, first, a disenfranchised person applies to a government office to regain the right to vote. Governor Youngkin then has unbridled discretion to assess the individual's rights restoration application. Finally, Governor Youngkin has the sole authority to grant or deny that application, and without Governor Youngkin's approval, an applicant may not lawfully vote.

Hawkins, however, refuses to confront the fundamental differences between administrative licensing schemes and the rights restoration system at issue here. True, the licensing schemes in the cases above have similar steps to those of Governor Youngkin's rights restoration system. But the former functioned to regulate an existing right, and the latter exists to aid Governor Youngkin

in assessing whether a candidate deserves restoration of a right he has lost. In the cases above, at the first step, applicants asked government officials for licenses to exercise their right to free speech. Here, Hawkins has no similar underlying right. In assessing Kentucky's rights restoration system, the Sixth Circuit highlighted this critical difference: "[w]hile a person applying for a newspaper rack or parade permit is attempting to exercise his or her First Amendment right to freedom of speech, a felon can invoke no comparable right . . . because the felon was constitutionally stripped of the First Amendment right to vote." *Lostutter*, 2023 WL 4636868, at *4.

The decision stage of Governor Youngkin's rights restoration system also differs from that in the speech-licensing cases. If Governor Youngkin grants a rights restoration application, the disenfranchised felon regains his previously lost right. But in the speech-licensing cases, administrators who granted applicants' licenses confirmed how, when, and where those applicants could engage in their right to free speech. In short, the speech-licensing cases describe systems that function to regulate how a person can exercises an existing right. Governor Youngkin's rights restoration system, however, has a different function: it determines who can reenter the franchise. The Court therefore concludes that, in applying for rights restoration, Hawkins is not subject to a licensing scheme governed by the unfettered discretion doctrine.

III. CONCLUSION

For the reasons discussed above, the Court will deny Hawkins's motion for summary judgment, (ECF No. 56), and grant the defendants' motion for summary judgment, (ECF No. 60).

The Court will issue an appropriate Order.

Let the Clerk send a copy of this Opinion to all counsel of record.

/s/
John A. Gibney, Jr.
Senior United States District Judge

Date: 7 August 2024
Richmond, VA

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

GEORGE HAWKINS,
Plaintiff,

v. Civil Action No. 3:23cv232

GLENN YOUNGKIN, in his official Capacity as Governor of Virginia & KELLY GEE, in her official capacity as Secretary of the Commonwealth of Virginia,
Defendants.

FINAL ORDER

This matter is before the Court on the parties' cross-motions for summary judgment, (ECF Nos. 56, 60). For the reasons stated in the accompanying Opinion, the Court DENIES the motion for summary judgment filed by the plaintiff, George Hawkins, (ECF No. 56), and GRANTS the motion for summary judgment filed by the defendants, Governor Glenn Youngkin and Secretary of the Commonwealth Kelly Gee, (ECF No. 60). The Court ENTERS judgment for the defendants on all counts.

It is so ORDERED.

Let the Clerk send a copy of this Order to all counsel of record.

/s/
John A. Gibney, Jr.
Senior United States District Judge

Date: 7 August 2024
Richmond, VA

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

(Richmond Division)

GEORGE HAWKINS, Plaintiff, v. GLENN YOUNGKIN, in his official capacity as Governor of Virginia and KELLY GEE, in her official capacity as Secretary of the Commonwealth of Virginia, Defendants.	)	C.A. #3:23-cv-00232

NOTICE OF APPEAL

Notice is hereby given that Plaintiff George Hawkins hereby appeals to the United States Courts of Appeals for the Fourth Circuit from the final order entered in this action on August 7, 2024 (ECF No. 101).

Respectfully submitted,

GEORGE HAWKINS,

By counsel

Dated: August 19, 2024

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Certificate of Service

I, Victor M. Glasberg, hereby certify that on this 19th day of August 2024, I filed the foregoing Notice of Appeal with the Clerk of the Court using the CM/ECF system, which will send a "Notice of Electronic Filing" to the following CM/ECF participants:

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