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

PLAINTIFF-APPELLANT'S PETITION FOR REHEARING AND REHEARING EN BANC

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STATEMENT OF PURPOSE

Plaintiff-Appellant George Hawkins challenged Virginia's arbitrary voting rights restoration system for disenfranchised people with felony convictions as a violation of the First Amendment unfettered discretion doctrine. Defendants-Appellees Governor Glenn Youngkin and Secretary of the Commonwealth Kelly Gee have 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." JA120. That the Governor has admitted he is selectively granting permission to engage in political expressive conduct based on a "predictive judgment regarding whether an applicant will live as a responsible citizen and member of the political body" (JA141) demonstrates why this system of unlimited discretion is intolerable under the First Amendment's requirement for "narrow, objective, and definite standards." *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150–53 (1969) (invalidating permit scheme for marches and 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 First Amendment forbids the Governor's "responsible citizen" test because this subjective, amorphous standard controls whether a Virginian may or may not engage in a fundamental form of political expressive conduct.

Yet the panel affirmed the district court's order granting summary judgment to Appellees, relying on Virginia law's classification of voting rights restoration as a form of executive clemency. Op. at 21–24. The panel found that affixing the state-law label "clemency" means that the First Amendment unfettered discretion doctrine cannot apply because clemency, in its view, is categorically different from licensing. In so ruling, the panel erred in two principal ways that put it at odds with the U.S. Supreme Court's and this Court's precedents.

First, in relying on Virginia law's classification of voting rights restoration as "clemency," the panel opinion conflicts with decades of U.S. Supreme Court precedents mandating a flexible, functional analysis in First Amendment challenges, not a formalistic one. These Supreme Court precedents are not "irrelevant." Op. at 22. Rather, whether re-enfranchisement in Virginia *functions* as an arbitrary, selective licensing scheme is the dispositive question, not whether the former has any superficial differences from the latter. The panel erred in dismissing the relevance of this well-settled Supreme Court precedent to this First Amendment challenge and thereby failed to engage in a proper functional analysis focused on practical effects. The panel's formalistic reliance on immaterial features of clemency violates longstanding decisions by the Supreme Court and this Court.

Second, by rejecting this challenge based on Virginia law's location of voting rights restoration authority within executive clemency, the panel has subordinated a

longstanding federal constitutional rule to a state-law label, inverting the supremacy of federal law over state law. State-law label semantics cannot dictate when a federal constitutional doctrine applies, and this is why a functional analysis is required in First Amendment cases.

Finally, this case involves a constitutional-rights question of exceptional importance, as it concerns the Governor's system of selectively and arbitrarily granting Virginians permission to vote. If left to stand, the panel opinion will also warp longstanding First Amendment doctrine. It would enable licensors and lawmakers to defeat liability under the unfettered discretion doctrine by camouflaging arbitrary licensing with labels and other legislative sleight-of-hand.

REASONS FOR GRANTING THE PETITION

I. The panel's opinion contradicts Supreme Court and Fourth Circuit First Amendment decisions requiring a functional analysis.

As a threshold matter, the panel agreed that the First Amendment unfettered discretion doctrine applies when an official arbitrarily grants permission to vote but erred in failing to apply it in this case. Jettisoning the district court's reliance on disenfranchised individuals' present ineligibility to vote, JA370–371, the panel agreed with Appellant that arbitrary allocation of voting rights likely *would* violate the First Amendment unfettered discretion doctrine if a governor were selectively licensing 16- and 17-year-olds to vote. Op. at 23. This acknowledgment is consistent

with this Court's decision in *Child Evangelism Fellowship of Maryland, Inc. v. Montgomery County Public Schools*, which noted that even though state law may categorically ban an entire form of protected expression, it may not authorize officials to arbitrarily grant or deny permission to engage in that form of expression. 457 F.3d 376, 389 (4th Cir. 2006) (invalidating arbitrary licensing scheme but noting private individuals could be barred from sending flyers home with public-school students, "eliminating private speech altogether").

Despite this crucial acknowledgment that the First Amendment unfettered discretion doctrine would apply to a vote-licensing scheme, the panel declined to extend it to individuals disqualified from voting because of a felony conviction. In the panel's view, this is because selective enfranchisement in that "very different context" is "rooted in the executive's clemency power." Op. at 23. But there is no *functional*, practical difference between selectively enfranchising minors in high school and selectively enfranchising people with felony convictions, just a *formalistic* difference based on the state-law category of "executive clemency."

This error put the panel opinion at odds with decades of Supreme Court decisions requiring that First Amendment challenges be subjected to a flexible, functional inquiry, as well as this Court's own decisions. The panel summarily dismissed Appellant's recitation of these precedents as "correct, but irrelevant." *Id.* at 22. But the Supreme Court's mandate for functional analysis is critical and

dispositive. The question at issue is not whether "[p]ardons and licenses have characteristics that distinguish them," *id.*, as the panel wrote, but rather whether voting rights restoration—formally an executive clemency power in Virginia—nonetheless *functions* as an arbitrary licensing scheme. A functional analysis focuses on practical effects or outcomes, privileging ends over nominal differences in means. *See, e.g.*, *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 714–15 (1996) (finding remand order appealable, even though such orders "do not meet the traditional definition of finality," because it was "functionally indistinguishable" from a stay order and "puts the litigants . . . effectively out of court" (citations omitted)).

Across various First Amendment precedents and doctrines, the governing tests or frameworks *always* turn on a functional analysis. *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.*, 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 . . . ."); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963) ("We are not the first court to look through forms to the substance and recognize that informal censorship may sufficiently inhibit the circulation of publications to warrant injunctive relief."); *see also 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).

Similarly, this Court has used a flexible, functional approach in First Amendment cases. In *Child Evangelism Fellowship of South Carolina v. Anderson School District Five*, a First Amendment challenge to a school district's fee waiver system, this Court took a functional approach in construing the fee waiver as a de facto "speech subsidy" and finding that "the waiver system constitutes the relevant forum." 470 F.3d 1062, 1069 (4th Cir. 2006).

In the election law context specifically, the Supreme Court has approached First Amendment challenges to campaign finance regulations using a functional approach. After *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme 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 RFCC I*"), the Federal Election Campaign Act's spending limits 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 Fed. Campaign Comm.*, 533 U.S. 431, 463 (2001) ("*Colorado RFCC II*"). Then, in upholding the facial constitutionality of coordinated party expenditure limits in *Colorado RFCC 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 . . . ." *Id.* at 464.

Functional equivalence is regularly invoked as the standard in First Amendment cases because of the fundamental importance of the right to political expression and the risk that unconstitutional regulations may evade a formalistic test. *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) ("*WRTL*") held 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). And in *Citizens United v. FEC*, the Supreme Court once again evaluated this regulatory framework from a functional perspective, focusing on the law's practical consequences. 558 U.S. 310,

334–35 (2010) (citation omitted). 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.

Id. at 35 (internal citations omitted). *Citizens United*, therefore, accords with Supreme Court decisions resolving a wide spectrum of First Amendment cases using a functional lens, not a formalistic litmus test. It is this bedrock First Amendment precedent that the panel failed to apply.

The panel never addresses what "licensing" is functionally; nor does it explain why voting rights restoration does not function as "licensing." Instead, the panel asserts that it is a "wholly different context," Op. at 23, and that "[t]he unique role of the executive in this process is enough to demonstrate that this *ancien* prerogative is not just functionally different but different in kind from the power to issue an administrative license." *Id*. at 22.

But Black's Law Dictionary defines "license" as "[a] permission . . . to commit some act that would otherwise be unlawful." *License* (n.), BLACK'S LAW

DICTIONARY (12th ed. 2024). "Licensing" is, therefore, the act of a government official granting permission to engage in certain conduct that would be unlawful absent such permission. Further, as the panel conceded, granting or denying "permission to vote" to minors "might look very much like a licensing or permitting scheme," and it "suspect[ed] that in such a case . . . the unfettered-discretion doctrine *would* apply." Op. at 23. If selectively granting minors permission to vote functions as a licensing system, then it necessarily follows that any system of selectively granting permission to vote to any group of ineligible individuals would *function* as licensing. The panel's only rationale for why selective re-enfranchisement is not functionally licensing is the *formalistic* point that Virginia law happens to have made this official action a form of executive clemency.

Such formalistic reasoning—which fails to answer the decisive question of whether re-enfranchisement and licensing have the same practical effects—contravenes U.S. Supreme Court precedent requiring a functional, flexible approach to First Amendment challenges. This leaves the opinion's reasoning in a strange place. On the one hand, the panel finds that voting triggers First Amendment protections like the unfettered discretion doctrine, and that selectively granting permission to vote to minors *would* constitute licensing and thereby violate that doctrine. On the other, even though re-enfranchisement is effectuated by operation of law in most states and is, therefore, not intrinsically or necessarily part of

clemency regimes, Op. at 12–13, merely placing the selective re-enfranchisement of people with felony convictions within the historical tradition and prerogative of executive clemency shields it from challenge under the unfettered discretion doctrine. In this way, the panel effectively based its decision on the prefix "re-" in re-enfranchisement. Per the opinion, selective, arbitrary enfranchisement would constitute licensing, but selective, arbitrary re-enfranchisement would not. With respect, this distinction is untenable.

No state-law label can trump the functional equivalence between selectively enfranchising people with felony convictions and licensing; the practical effects are the same. Both the restoration applicant and the license applicant seek to engage in political expressive conduct, need a government body or official's approval to do so, cannot lawfully do so without that permission, and *can* do so once that permission is granted.

If conducted without any constraints on official discretion, such vote-licensing constitutes a textbook violation of the unfettered discretion doctrine. As the Supreme Court reasoned in *City of Lakewood v. Plain Dealer Publishing Co.*, the "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." 486 U.S. 750, 763 (1988); *see also Child Evangelism Fellowship of S.C.*, 470 F.3d at 1064 ("[T]he unfettered discretion conferred by district policy presents

such a risk of viewpoint discrimination as to run afoul of the First Amendment."); *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"). The panel acknowledged that the unfettered discretion Virginia law confers on the Governor creates the risk of viewpoint discrimination and that the "use [of] verboten criteria as a basis for re-enfranchisement decisions" would "be hard to detect." Op. at 24. Notwithstanding this accurate restatement of the concerns animating this constitutional safeguard, the panel concludes that the "unfettered-discretion doctrine does not provide a suitable vehicle" for remedying this problem. *Id*. But Virginia's open-ended system is *precisely* why the doctrine exists: "[W]ithout 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." *City of Lakewood*, 486 U.S. at 758–59.

The panel does not resolve these contradictions with the Supreme Court's precedent and instead reaches the puzzling conclusion that Virginia's voting rights restoration system is "discretionary, not arbitrary." Op. at 21. However, if an official's discretion is unfettered, then it is, by definition, arbitrary. Arbitrariness is not confined to random chance like "flipp[ing] a coin." *Ohio Adult Parole Auth. v.*

Woodard, 523 U.S. 272, 289 (1998) (O'Connor, J., concurring). Rather, the definition of "arbitrary" means that an authority or official is "not restrained or limited in the exercise of power" or is "ruling by absolute authority." *Arbitrary* (adj.), MERRIAM-WEBSTER'S DICTIONARY, https://www.merriam-webster.com/dictionary/arbitrary (last visited Sep. 2, 2025). As the Governor has conceded that his discretion to grant or deny restoration applications is unfettered, Virginia's selective re-enfranchisement system functions as an arbitrary licensing system.

For all these reasons, the panel's reliance on the purported differences between licensing and voting rights restoration in *Lostutter v. Kentucky*, No. 22-5703, 2023 WL 4636868 (6th Cir. July 20, 2023), *cert. denied sub nom. Aleman v. Beshear*, 144 S. Ct. 809 (2024), was contrary to Supreme Court precedent. Op. at 21–22.

The panel's discussion of *Lostutter* erroneously refers to the pardon power: "The Sixth Circuit identified four ways in which a pardon is 'fundamentally different from . . . an administrative license or permit.'" Op. at 21 (quoting *Lostutter*, 2023 WL 4636868, at *3); *see also id*. at 22 ("Pardons and licenses have characteristics that distinguish them."). However, as Appellant noted, Opening Br. at 51, voting rights restoration is *not* a pardon or partial pardon in Virginia, as it is under the Kentucky laws considered in *Lostutter*. Kentucky law deems re-enfranchisement a

"partial pardon," KY. REV. STAT. § 196.045(1)(e), but Virginia law expressly disclaims that it is a pardon. Appellees' restoration application form expressly states at the bottom: "This is not a pardon . . . ." JA126. The Supreme Court of Virginia has also referred to restoration and pardons as distinct executive actions. *See Howell v. McAuliffe*, 292 Va. 320, 337 (2016) (referring to different "kind[s]" of clemency orders "whether to restore civil rights or grant a pardon"). The panel's recitation of the Sixth Circuit's points about *the pardon power* are inapplicable to Virginia law, which rejects such a conflation between voting rights restoration and pardons.

Furthermore, these purported distinguishing features are tenuous and immaterial. Clemency is not solely retrospective; it authorizes *prospective* conduct. The distinction between enfranchisement and re-enfranchisement is cosmetic, not legally relevant under the First Amendment, and particularly dubious with respect to Appellant George Hawkins, who has never been eligible to vote since he was convicted as a minor. JA130. Nor is clemency a "one-time act"; a restoration applicant may apply several times before the Governor grants the request. Additionally, the suggestion that licenses do not restore a lost right is at odds with the fact that licenses can be granted, revoked, suspended, and reactivated or restored, much like permission to vote under Virginia's selective re-enfranchisement system.

Regardless, all of *Lostutter*'s points are immaterial in light of the Supreme Court's directive to analyze First Amendment challenges functionally. Indeed, *Lostutter*'s reasoning betrays this 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.

2023 WL 4636868, at *6. The panel's conclusion that the "nature of the vehicle" was dispositive—and not the "result" or "outcome"—lacked legal support and directly contradicted the litany of Supreme Court precedents requiring a practical inquiry in First Amendment cases. So too here: The panel violated Supreme Court and Fourth Circuit precedent by elevating these cosmetic differences over the practical effects that voting rights restoration and licensing hold in common.

II. The panel opinion makes a First Amendment doctrine subservient to a state-law classification or label.

Second, because the panel opinion considers Virginia law's classification of voting rights restoration as a form of "clemency" to be dispositive, it has also erred by subordinating a federal constitutional doctrine to a state-law label. This formalistic move turns the supremacy of federal law on its head and gives de facto licensing regimes with uncontrolled discretion an end run around the First

Amendment if the legislature or city council cleverly chooses its terms. U.S. CONST. art. VI, cl. 2; *Harris v. Quinn*, 573 U.S. 616, 641 n.10 (2014) ("[T]he First Amendment's meaning does not turn on state-law labels. . . ."); *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 O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 722 (1996) ("Recognizing the distinction in these circumstances would invite manipulation by government, which could avoid constitutional liability simply by attaching different labels to particular jobs.") (citation omitted). The panel notes that the pardon power and licensing authority "derive from different sources of power within the Virginia Constitution." Op. at 22. But this argument, which is wholly irrelevant to a functional analysis, only underscores the extent to which the panel has made a federal constitutional doctrine contingent upon state-law taxonomy and semantics.

The panel relies on Virginia law's inclusion of voting rights restoration within its executive clemency regime to find that the First Amendment unfettered discretion doctrine cannot be applied, even while acknowledging that most states handle voting rights restoration outside of executive clemency. Op. at 12–13. In an extended discussion of clemency nationwide, the panel acknowledges that the overwhelming majority of states restore voting rights by operation of law at a fixed moment such as release from incarceration or the end of probation or parole, *not* through executive

clemency. *Id*. Accordingly, voting rights restoration is not inherently or necessarily part of executive clemency. Virginia law grants this authority to the Governor but could just as easily have conferred it upon the state legislature, as in Mississippi, MISS. CONST. art. 12, § 253, or state courts, as in Arizona, ARIZ. REV. STAT. § 13-908. Therefore, the power to re-enfranchise is not per se "rooted in the executive's clemency power," so much as it has been arbitrarily placed there. Op. at 23. The panel nevertheless found that the state-law "clemency" label was sufficient to defeat federal constitutional liability in this case, a conclusion that turns the supremacy of federal law upside-down.

III. This petition presents questions of exceptional importance.

This case strikes at the core of the federal constitutional right to political expression. The panel discounted the clear dictates of the unfettered discretion doctrine, in favor of allowing Governor Youngkin to camouflage an arbitrary licensing scheme using state-law labels. Whether the First Amendment allows Governor Youngkin to wield such power over re-enfranchisement—Virginians' most fundamental political expression—is a question of exceptional importance that requires en banc review.

Mr. Hawkins and many other disenfranchised Virginians remain subject to an arbitrary vote-licensing system and the threat of undetectable viewpoint discrimination. *City of Lakewood*, 486 U.S. at 759. The panel recognized as much,

noting that it would "not be farfetched" to fear that the Governor could rely on "verboten criteria as a basis for re-enfranchisement decisions" and that this type of "malfeasance would also be hard to detect." Op. at 23–24. And yet the panel rejected the application of a constitutional doctrine that mandates a prophylactic rule in the face of such unfettered discretion simply because Virginia law has labeled voting rights restoration "clemency." Op. at 24; *see also Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 133 n.10 (1992) (holding that the key question is "whether there is anything in the [state law] *preventing* him" from considering viewpoint, not whether there is *proof* of actual viewpoint discrimination) (emphasis added)). By allowing the Governor to camouflage an arbitrary licensing scheme using state-law labels, the panel has weakened this crucial constitutional safeguard against the arbitrary licensing of political expression and provided a road map for other licensors seeking to evade liability.

CONCLUSION

Respectfully, this Petition for Rehearing and Rehearing En Banc should be granted.

Dated: September 3, 2025

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 40(d)(3)(A) because it contains 3,883 words, excluding the parts of the brief exempted by Rule 32(f). This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 365 in 14-point Times New Roman.

Dated: September 3, 2025

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CERTIFICATE OF SERVICE

I certify that on September 3, 2025, I electronically filed the foregoing Plaintiff-Appellant's Petition for Rehearing and Rehearing En Banc with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

Dated: September 3, 2025

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