No. _____

IN THE

Supreme Court of the United States

GEORGE BARRY HAWKINS, JR.,

Petitioner,

v.

GLENN YOUNGKIN, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF VIRGINIA, AND KELLY GEE, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE COMMONWEALTH,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Virginia's system of discretionary restoration of the right to vote to people with felony convictions violates the First Amendment doctrine prohibiting unfettered discretion in selectively granting permission to engage in expressive conduct.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is George Barry Hawkins, Jr., who was the plaintiff below. The petitioner is not a corporate entity.

Respondents are Glenn Youngkin, in his official capacity as Governor of Virginia, and Kelly Gee, in her official capacity as the Secretary of the Commonwealth, who were the defendants below.

RELATED CASES

The related cases include:

- *Hawkins v. Youngkin*, 3:23cv232, U.S. District Court for the Eastern District of Virginia. Judgment entered August 7, 2024.

- *Hawkins v. Youngkin*, 24-1791, U.S. Court of Appeals for the Fourth Circuit. Judgment entered August 20, 2025.

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JURISDICTION

The Fourth Circuit entered judgment on August 20, 2025, App. 1a–27a, and denied the petition for rehearing and rehearing en banc on September 16, 2025. App. 41a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Va. Const. art. II, § 1

In elections by the people, the qualifications of voters shall be as follows: Each voter shall be a citizen of the United States, shall be eighteen years of age, shall fulfill the residence requirements set forth in

this section, and shall be registered to vote pursuant to this article. 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. As prescribed by law, no person adjudicated to be mentally incompetent shall be qualified to vote until his competency has been reestablished.

Va. Const. art. V, § 12

The Governor shall have 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. Code Ann. § 24.2-101

As used in this title, unless the context requires a different meaning:

. . .

"Qualified voter" means a person who is entitled to vote pursuant to the Constitution of Virginia and who is (i) 18 years of age on or before the day of the election

or qualified pursuant to § 24.2-403 or subsection D of § 24.2-544, (ii) a resident of the Commonwealth and of the precinct in which he offers to vote, and (iii) a registered voter. 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. . . .

INTRODUCTION

This case concerns whether a state government official may arbitrarily grant or deny permission to vote. Virginia law vests the governor, respondent Governor Glenn Youngkin ("Governor Youngkin" or "the Governor"), with exclusive and unfettered discretion to restore or refuse to restore voting rights to individuals who are ineligible to vote due to a felony conviction. Governor Youngkin makes such decisions solely based on his subjective, "predictive judgment regarding whether an applicant will live as a responsible citizen." CA JA141.[1]

Petitioner George Barry Hawkins, Jr., plaintiff below, has challenged this system on First Amendment grounds. It is beyond dispute that if the First Amendment unfettered discretion doctrine applies, it would forbid respondents' "responsible citizen" test, as this Court's First Amendment jurisprudence has long required "narrow, objective, and definite standards." *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150–53 (1969). As the U.S. Court of Appeals for the Fourth Circuit

[1] All "CA JA" citations are to the Joint Appendix on appeal, *Hawkins v. Youngkin*, No. 24-1791, at docket entry 20.

acknowledged, selectively and arbitrarily enfranchising Virginians in the first instance likely would violate the First Amendment. App. 25a. Petitioner merely seeks a ruling that establishes arbitrary *re*-enfranchisement is similarly unconstitutional.

The Fourteenth Amendment authorizes states to disenfranchise individuals with felony convictions. *Richardson v. Ramirez*, 418 U.S. 24, 54–56 (1974). Even if petitioner prevails, Virginia law may continue to strip citizens of their voting rights upon a felony conviction. However, once state law creates a path to restoration—an exception to the default rule of disenfranchisement—it may not arbitrarily grant that exception and selectively confer voting rights on a subjective and arbitrary basis.

This suit invokes a well-established First Amendment doctrine to challenge arbitrary voting rights restoration and presents a federal question of fundamental importance that this Court has never addressed. For eighty-seven years since *Lovell v. City of Griffin*, 303 U.S. 444 (1938), this Court has prohibited the arbitrary licensing or permitting of political expression or expressive conduct. Because this Court has asserted that voting is a form of political expression, *see, e.g.*, *Norman v. Reed*, 502 U.S. 279, 288 (1992), state law may not confer arbitrary power on a government official to grant or deny permission to vote—either in its initial allocation or following the loss of the right to vote after a felony conviction. Though people with felony convictions may be ineligible to vote under state law,

they nevertheless retain their First Amendment right of political expression and have standing to challenge any unconstitutional disenfranchisement or re-enfranchisement system. *Hunter v. Underwood*, 471 U.S. 222, 233 (1985). Just as state government officials may not selectively and arbitrarily grant particular sixteen-year-olds and seventeen-year-olds the right to vote, they also may not selectively and arbitrarily bestow voting rights on individuals who are ineligible due to a felony conviction.

There is no dispute that Governor Youngkin grants or denies voting rights restoration free of rules, criteria, or any other constraint on his discretion. Rather, the Fourth Circuit affirmed the district court's summary judgment in respondents' favor upon concluding that petitioner cannot invoke this Court's First Amendment unfettered discretion cases because voting rights restoration, in the panel's view, is a type of clemency and, therefore, per se different from licensing. This ruling contravenes this Court's First Amendment precedents.

First, in adopting Virginia law's classification of voting rights restoration as "clemency," the panel opinion conflicts with decades of this Court's precedents mandating a flexible, functional analysis in First Amendment challenges, not a formalistic one. Contrary to those precedents, the panel's decision emphasized the label Virginia law assigns to voting rights restoration. But the central question is whether re-enfranchisement in Virginia *functions* as an arbitrary, selective licensing scheme, *not* whether the former bears any superficial differences from the

latter. By elevating a state-law label and immaterial distinctions over the commonality in effects, the decision below strayed from this Court's instructions for functional analyses and effectively concluded that arbitrarily granting or withholding permission to vote raises no First Amendment issue. This outcome is untenable under this Court's First Amendment jurisprudence.

Second, by rejecting this challenge based on Virginia'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 semantics cannot dictate when a federal constitutional doctrine applies, and this is why a functional analysis is required in First Amendment cases.

Third and finally, this case involves a constitutional question of exceptional importance that will eventually impact hundreds of thousands of Virginians who seek to restore their voting rights, as it concerns the governor's system of selectively and arbitrarily granting Virginians' permission to vote. If left to stand, the panel opinion will allow respondents to continue to subvert longstanding First Amendment doctrine.

Clemency is well-established in our nation's legal system. But so too is First Amendment protection for political expression and expressive conduct. While Governor Youngkin seeks to avoid any limits on his discretion to restore voting rights to Virginians with felony convictions, petitioner has merely sought a

ruling requiring a non-arbitrary re-enfranchisement system bound by objective rules and criteria, as currently exists in forty states plus the District of Columbia. RE 19, Brief of Appellant, at 67 & n.10.[2] There are innumerable possible restoration systems that would comply with this First Amendment doctrine, and Governor Youngkin only needs to choose one.

STATEMENT OF THE CASE

Petitioner brought this First Amendment challenge to the unfettered discretion that Virginia law affords the governor to grant or deny voting rights restoration applications and the lack of a reasonable, definite time limit by which the governor must make these discretionary determinations on restoration applications.

I. Factual and Legal Background

In Virginia, individuals convicted of felonies are not qualified to vote. Va. Const. art. V, § 12; Va. Const. art. II, § 1. Disenfranchisement for felony convictions is mandated by the Virginia Constitution: "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 V, 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

[2] All "RE" citations are to the Fourth Circuit's docket, and all page references are to the page number at the top right of the page.

prior or subsequent to the adoption of this Constitution . . . ." Va. Const. art. V, § 12. Felony disenfranchisement and re-enfranchisement are also codified in Virginia statutes. Specifically, Virginia law states that "[n]o 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").

Until the governor restores their right to vote, Virginians with felony convictions are not qualified to vote and may not register to vote; if they willfully do so before restoration, they commit a Class 5 felony. Va. Code Ann. § 24.2-1016. Currently, the only person with the power to restore that statutory right or qualification to vote is the governor. Va. Const. art. V, § 12; Va. Const. art. II, § 1; *see also* CA JA141, 117–20; *In re Phillips*, 574 S.E.2d 270, 273 (Va. 2003) ("[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."). Individuals seeking re-enfranchisement must complete an application and submit it to the Secretary of the Commonwealth's Restoration of Rights Office, which conducts research on applicants and submits a non-binding recommendation to the governor. *See* CA JA139–43.

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." Va. Code Ann. § 53.1-231.1. Virginia law requires that complete applications be forwarded to the governor within ninety days of receipt. *Id.*

It is undisputed that Virginia law does not establish any rules or criteria to govern the governor's decision-making on voting rights restoration applications. Respondents have confirmed that, 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." CA JA120. Furthermore, they have conceded that "Virginia law does not otherwise constrain or limit the Governor's individualized discretion when deciding whether to grant a citizen's voting-restoration application." CA JA118–19. Nor is there any time limit by which the governor must grant or deny an application for voting rights restoration. CA JA144.

Respondents have admitted that the "ultimate decision determining the outcome of an individual's voting-restoration application" is based on a

"predictive judgment regarding whether an applicant will live as a responsible citizen and member of the political body," and this predictive judgment is "committed to the Governor's discretion." CA JA141.

After taking office in January 2022, Governor Youngkin's rights restoration policy was fully implemented by December 9, 2022. CA JA139. Individuals seeking restoration of their voting rights must complete an application.[3] *See* CA JA126, 139–40. Respondents have represented that their policy is that a voting rights restoration application is deemed "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 unless the application is incomplete. CA JA143.

Applicants must provide the following information: (i) the court of their felony conviction; (ii) whether they are U.S. citizens; (iii) whether they have been convicted of a "violent crime"; (iv) whether they "completed serving all terms of incarceration"; and (v) whether they are "currently on probation, parole or other state supervision" (and if so, the expected end

[3] Off. of the Sec'y of the Commonwealth, Restoration of Rights Form, https://www.restore .virginia.gov/media/governorvirginiagov/restoration-of-rights/pdf/ror_form.pdf (last visited Dec. 3, 2025).

date). *See* CA JA126, 139–40. Applicants must also check a box indicating whether they have paid all fines, fees, and restitution or are paying fines, fees, and restitution. *See id*. There is no restriction on what the governor may or may not consider in making his decision to grant or deny a voting rights restoration application. Governor Youngkin has admitted that he has "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." CA JA118–19, 141 (emphasis in original). This is because the "ultimate decision . . . is committed to the Governor's discretion." *Id*.

In 2010, petitioner was convicted of at least one felony offense and sentenced to a term of incarceration. CA JA130, 138. Because petitioner was convicted as a juvenile, he has never been eligible to vote and has never voted in his life. CA JA130. He completed his term of incarceration on May 3, 2023. CA JA130, 138. In early May 2023 after his release, petitioner submitted an application for voting rights restoration, which was denied by Governor Youngkin. CA JA131. On June 18, 2023, petitioner submitted a second voting rights restoration application. CA JA131, 138. His application was denied. CA JA46, 131, 135, 137–38.

II. Procedural History

On April 6, 2023, this action commenced with two First Amendment claims challenging: (1) the lack of objective rules and criteria governing respondents'

voting rights restoration system; and (2) the lack of reasonable, definite time limits by which the governor must grant or deny permission to vote. The operative complaint is the Second Amended Complaint, filed on July 24, 2023. CA JA15–39. On February 14, 2024, petitioner and respondents filed cross-motions for summary judgment. *See* CA JA266–98, 301–24, 250–61, 150–72, 185–221, 225–47.

On August 7, 2024, the district court denied petitioner's motion for summary judgment, granted summary judgment in respondents' favor, and entered a final order. The district court concluded that because those disenfranchised by reason of a felony conviction lack a present right to vote, they cannot invoke the First Amendment unfettered discretion doctrine. App. 38a–40a (Opinion); CA JA373 (Final Order). In its view, this prophylactic rule only applies when an individual has an "underlying right" to engage in a form of expressive conduct and is merely applying for a particular time slot, place, or manner for that expression. App. 39a–40a.

On August 19, 2024, petitioner appealed to the U.S. Court of Appeals for the Fourth Circuit. CA JA374. The Fourth Circuit panel affirmed the district court's ruling, finding that "the discretionary exercise of Virginia's clemency power does not constitute a licensing system." App. 23a. Even though, as the Fourth Circuit acknowledged, many states have not made voting rights restoration part of the executive clemency power, *id.* at 12a, because Virginia's voting rights restoration system is "rooted in the executive's

clemency power," *id*. at 26a, the court concluded that it cannot function as a system of selectively licensing expressive conduct. *Id*. at 23a–26a. As such, the panel concluded that the challenged re-enfranchisement system does not violate the First Amendment unfettered discretion doctrine. *Id*. at 26a.

Petitioners timely filed a petition for rehearing and rehearing en banc. The Court denied that petition on September 16, 2025. *Id*. at 41a.

REASONS FOR GRANTING THE WRIT

I. Certiorari is warranted because the Fourth Circuit's decision conflicts with this Court's First Amendment precedents.

A. The Fourth Circuit's decision contravenes this Court's mandate to analyze First Amendment cases using a functional analysis.

i. Virginia's voting rights restoration system violates the First Amendment.

The First Amendment prohibits a state official from selectively and arbitrarily granting or denying permission to cast a vote to people with felony convictions. Relying on a longstanding doctrine developed by this Court over the last eighty-seven years to combat the risk of viewpoint discrimination in licensing expressive conduct, *see Lovell v. Griffin*, 303 U.S. 444 (1938), petitioner has argued that Virginia's voting rights restoration system functions as a licensing system governing First Amendment-

protected conduct and 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 precedents. This preventative doctrine requires the invalidation of licensing schemes governing the exercise of First Amendment-protected expression or expressive conduct when the law gives officials limitless discretion to grant or deny permission to engage in that expression or expressive conduct, or when they are not bound by any reasonable definite time limit in reaching such decisions. *City of Lakewood*, 486 U.S. at 757–64; *Forsyth Cnty.*, 505 U.S. at 130–33; *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 226 (1990). Underlying this doctrine is the concern that limitless discretion risks enabling viewpoint discrimination. As this Court reasoned in *City of Lakewood*, 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. at 763.

When First Amendment-protected expressive conduct is at issue, this Court has found arbitrary licensing intolerable. Such arbitrary schemes subject those seeking to engage in protected expressive conduct to the risk of "undetectable" viewpoint discrimination and pressure them into self-censorship to avoid jeopardizing their applications. *Id.* at 759, 762–63. This 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 decision is "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. As this Court stated in *Forsyth County*, "[f]acial attacks on the discretion granted a decisionmaker are not dependent on the facts surrounding any particular permit decision." 505 U.S. at 133 n.10. The existence of an actual, improper discriminatory or biased motive need not be shown to strike down such a law on its face: "[T]he success of a facial challenge on the grounds that an ordinance delegates overly broad discretion to the decisionmaker rests not on whether the administrator has exercised his discretion in a content-based manner, but whether there is anything in the ordinance *preventing* him from doing so." *Id.* (emphasis added).

Virginia's re-enfranchisement scheme presents a quintessential, forbidden system of granting or refusing permission to engage in expressive conduct based on an arbitrary standard. Disenfranchised individuals in Virginia submit an application to regain their voting rights, and no objective rules or criteria constrain the governor's discretion to grant or deny that application. When conducted without any constraints on official discretion, selectively granting or refusing permission to vote constitutes a textbook violation of the unfettered discretion doctrine. And respondents' subjective "responsible citizen" test does not provide that missing constraint. CA JA141, 118–20. Such vague, amorphous standards for selectively permitting First Amendment activities are strictly

prohibited by this Court's decision in *Shuttlesworth v. City of Birmingham*, which invalidated Birmingham's permit scheme for marches or demonstrations because it 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).

Tellingly, respondents have never argued—even in the alternative—that their restoration system or standard satisfies *Shuttlesworth* and survives the unfettered discretion doctrine. Instead, they have asserted that it categorically does not apply. Furthermore, Governor Youngkin has not argued that there is a fixed, objective list of rules or criteria that govern whether a voting rights restoration application is granted or denied. Far from denying the arbitrariness of the challenged system, Governor Youngkin has instead admitted to and embraced it by seeking to label voting rights restoration as "clemency" based "on purely subjective evaluations and on predictions of future behavior by those entrusted with the decision." *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 464 (1981); RE 23, Brief of Appellees, at 28, 54.

The Fourth Circuit panel acknowledged that the unfettered discretion Virginia law has conferred 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." App. 26a. However, notwithstanding its accurate restatement of the reasons and concerns

animating this constitutional safeguard, the panel concluded 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 this 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. Under Virginia's purely discretionary vote-licensing system, a governor may review any information on the applicant's political viewpoints—including campaign donations, previous registration history, and social media posts or other publicly available statements—and selectively grant or deny applicants based on their viewpoints without ever disclosing these discriminatory motives. Such a scheme would understandably deter current or future restoration applicants from expressing certain viewpoints.

This Court need only consider a voting rights restoration applicant whose social media accounts contain claims that the 2020 presidential election was stolen, or applicants who have publicly stated that they support or oppose abortion, or that they support or oppose a nationwide ban on the same. Nothing in Virginia law prevents a governor from covertly discriminating against such applicants and, in the absence of rules and criteria, there is simply no way to prove intentional viewpoint discrimination in an as-applied challenge. *Id.* Additionally, some restoration applicants will hold one of the above beliefs but remain deterred from publicly sharing

them because their restoration applications are pending with a governor known to have opposing political views: "[T]he mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech . . . ." *Id.* at 757.

Accordingly, while ballots may be secret, the governor has readily available means to review evidence of a restoration applicant's viewpoints and grant or deny the right to vote on that discriminatory basis: "[T]he licensor does not necessarily view the text of the words about to be spoken, but can measure their probable content or viewpoint by speech already uttered." *Id.* at 759. Proof of invidious discrimination is not required, as this Court has instructed that unfettered discretion is per se prohibited, "even if the discretion and power are never actually abused." *Id.* at 757. Virginia law, on its face, confers upon the governor limitless discretion to grant or deny voting rights to people who are ineligible due to felony convictions, causing a per se injury to petitioner. Accordingly, Virginia's re-enfranchisement system implicates all the same concerns that have animated the unfettered discretion doctrine over the decades.

The Fourth Circuit, however, failed to resolve this incompatibility between Virginia law giving the governor unbounded discretion over a form of political expressive conduct and this Court's unfettered-discretion precedents. The panel's principal conclusion was that the First Amendment unfettered discretion doctrine categorically does not apply because selective re-enfranchisement is not

functionally the equivalent of licensing. App. 23a–26a. Yet the panel also surprisingly asserted that, even if the doctrine does apply, Virginia's voting rights restoration system is "discretionary, not arbitrary." *Id.* at 23a n.13. 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, "arbitrary" means that an authority or official is "not restrained or limited in the exercise of power" or is "ruling by absolute authority."[4]

Having set forth petitioner's affirmative case for why Virginia's re-enfranchisement scheme violates the First Amendment, petitioner will turn to the reason this Court should grant certiorari and reverse the Fourth Circuit's conclusion that the unfettered discretion doctrine categorically does not apply to arbitrary, selective re-enfranchisement.

ii. This Court has long required a functional analysis in First Amendment cases.

As Governor Youngkin 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 and violates the First Amendment. To resolve whether it

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[4] *Arbitrary* (adj.), Merriam-Webster's Dictionary, https://www.merriam-webster.com/dictionary/arbitrary (last visited Dec. 8, 2025).

agreed with petitioner's claims, the Fourth Circuit panel needed to decide whether voting rights restoration in Virginia functions as a system of selective licensing or permitting of First Amendment-protected conduct, thereby triggering the unfettered discretion doctrine's application. The panel answered this question in a way that directly conflicts with this Court's instructions to apply a functional approach in First Amendment cases.

This Court has consistently held that First Amendment rights and doctrines must be evaluated functionally, not formalistically. 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 Cal.*, 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).

In the election law context, this Court has approached many First Amendment challenges to campaign finance laws using a functional approach. After *Buckley v. Valeo*, 424 U.S. 1, 12–59 (1976), this 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 Fed. Campaign Comm'n*, 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*, this 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. Such

pragmatic assessments were necessary "to minimize circumvention of contribution limits." *Id*. at 465.

Functional equivalence is regularly invoked as a standard in First Amendment cases because of the fundamental importance of the right to political expression or expressive conduct and the risk that an unconstitutional regulation may evade a formalistic test's detection. For example, this Court's decision in *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). The regulatory scheme and multi-factor balancing test developed in the wake of *WRTL* would be revisited by this Court in *Citizens United v. FEC*, 558 U.S. 310, 334–35 (2010) (citing *WTRL*, 551 U.S. at 470). Once again, this 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 335–36 (emphasis added) (internal citations omitted). *Citizens United*, therefore, accords with the long line of precedents in which this Court has resolved First Amendment cases across a wide spectrum of doctrines using a functional, not formalistic, lens.

iii. Voting rights restoration functions as a selective licensing system, triggering the unfettered discretion doctrine.

Given this consistent precedent, notwithstanding the labels Virginia law affixes to voting rights restoration, the Fourth Circuit panel erred in failing to apply the requisite functional analysis in assessing whether petitioner may invoke the First Amendment unfettered discretion doctrine. Functionally, there is no material difference between Virginia's voting rights restoration system and systems in which other First Amendment-protected activities are licensed.

The mechanics and outcomes of Virginia's voting rights restoration system are remarkably similar to those of a licensing system. Disenfranchised individuals apply to a government office seeking

permission to vote. The Secretary of the Commonwealth compiles information on the applicant, and then, if the applicant is deemed eligible for restoration, forwards the file to the governor for a decision. CA JA141–43; Va. Code Ann. § 53.1-231.1. The governor grants or denies that restoration application in his absolute discretion. If denied, the applicant can re-apply. CA JA146. Absent permission from the governor, the applicant may not register and vote, and engaging in this form of political expressive conduct without a license is a crime. Va. Code Ann. § 24.2-1016. As the Sixth Circuit has stated, "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 prohibited." *Lostutter v. Kentucky*, No. 22-5703, 2023 WL 4636868, at *6 (6th Cir. July 20, 2023), *cert. denied sub nom. Aleman v. Beshear*, 144 S. Ct. 809 (2024). Accordingly, 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.

Notwithstanding these significant functional commonalities, the panel based its ruling on the fact that Virginia law classifies voting rights restoration as an executive clemency power. The panel found that affixing the state-law label "clemency" necessarily means that the First Amendment unfettered discretion doctrine cannot apply because clemency, in its view, is categorically different from licensing. But

even though Virginia law vests the governor with the power of re-enfranchisement as a matter of executive clemency, this choice does not immunize this regime from constitutional scrutiny, as the panel agreed. App. 18a–20a. Nor does it alter the basic nature of what is occurring—a government official is selectively granting or denying permission to engage in the most fundamental form of political expression.

The fact that the applicants have a criminal history also does not alter that inexorable conclusion. Tellingly, the panel agreed with petitioner that the First Amendment unfettered discretion doctrine would apply if an official was arbitrarily granting permission to vote but erred in failing to apply that reasoning in this case. The panel agreed with petitioner and stated that arbitrary allocation of voting rights likely *would* violate the First Amendment unfettered discretion doctrine if a governor were selectively granting sixteen-year-olds and seventeen-year-olds permission to vote. *Id.* at 25a.

Nonetheless, despite this crucial acknowledgment that the unfettered discretion doctrine would apply to a vote-licensing scheme, the panel declined to extend this reasoning 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." *Id.* at 25a–26a. 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 conclusion puts the panel opinion at odds with this Court's many decisions requiring that First Amendment challenges be subjected to a flexible, functional inquiry. The panel dismissed petitioner's citation to those precedents as "correct, but irrelevant." *Id.* at 24a. However, this Court's mandate to apply a functional analysis is critical and, properly applied, should have been dispositive. The question at issue is *not* whether "[p]ardons and licenses have characteristics that distinguish them," *id.*, but rather whether voting rights restoration—formally an executive clemency power in Virginia—nonetheless *functions* as an arbitrary licensing scheme. A functional analysis would have focused on the practical effects or outcomes, privileging ends over nominal differences in means. No matter the area of the law, functional analyses always demand an evaluation of the practical effects. *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). A focus on practical effects—privileging ends over means—is what a functional analysis requires. But in this case, the panel's decision has upended that framework.

Furthermore, the panel never addresses what constitutes "licensing" functionally. Instead, the court

simply asserts that it is a "wholly different context," App. 25a, 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 24a–25a. However, 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. Furthermore, 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." App. 25a (emphasis in original). If selectively granting or denying 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 also function as licensing.

The panel's sole rationale for why selective re-enfranchisement does not functionally operate as licensing is the formalistic point that Virginia law happens to have made it 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 effect—contravened this Court's precedent requiring a functional, flexible approach to First Amendment challenges. As the Fourth Circuit acknowledged, restoration is not

intrinsically a form of clemency. Forty states plus D.C. handle voting rights restoration entirely outside their clemency systems. RE 19, Brief of Appellant, at 67 & n.10. However, even though re-enfranchisement is effectuated automatically by operation of law in most states at the end of incarceration, parole, or probation, *id.*, and is, therefore, not intrinsically or necessarily part of executive clemency, App. 12a, the panel concluded that merely placing the selective re-enfranchisement of people with felony convictions within this historical tradition and prerogative 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. According to this reasoning, selective, arbitrary enfranchisement would constitute licensing, but selective, arbitrary re-enfranchisement would not. With respect to the panel, this attempted differentiation is formalistic and untenable.

Ultimately, the Fourth Circuit's failure to apply a proper functional analysis particularly undermines the purpose of the First Amendment precedents upon which petitioner relies. From its inception, the unfettered discretion doctrine has been applied to strike down both obviously unconstitutional and less obviously unconstitutional schemes governing the licensing of protected expression and expressive conduct—*i.e.*, both overt and covert threats of viewpoint discrimination. For instance, in *Saia v. New York*, this 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 entirely. *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"). Given this Court's stated objective to head off and neutralize risks of viewpoint discrimination that are not easily detected, the constitutional ban on arbitrary licensing of expressive conduct must be construed functionally and flexibly. In this case, Virginia's arbitrary voting rights restoration scheme functions as an arbitrary licensing scheme.

iv. The panel's discussion of the Sixth Circuit's opinion in Lostutter *does not bolster its conclusions.*

For all these reasons, the panel's reliance on the purported differences between licensing and voting rights restoration in *Lostutter* was also contrary to this Court's precedent. App. 23a–24a.

Throughout its opinion, the Fourth Circuit erroneously referred to the pardon power, which was

at issue in *Lostutter* but is not implicated in this case. The panel noted that: "The Sixth Circuit identified four ways in which a pardon is 'fundamentally different from . . . an administrative license or permit.'" *Id.* at 23a (quoting *Lostutter*, 2023 WL 4636868, at *3); *see also id.* at 24a ("Pardons and licenses have characteristics that distinguish them."); *id.* at 25a ("[T]hat hypothetical system bears no relation to the pardon power."). However, voting rights restoration in Virginia is *not* a pardon or a partial pardon, as it is under the Kentucky laws considered in *Lostutter*. Kentucky law deems re-enfranchisement a "partial pardon," Ky. Rev. Stat. Ann. § 196.045(1)(e), but Virginia law expressly disclaims that it is a pardon. Respondents' restoration application form expressly states at the bottom: "This is not a pardon . . . ." CA3JA126. The Supreme Court of Virginia has also referred to restoration and pardons as distinct executive actions. *See Howell v. McAuliffe*, 788 S.E.2d 706, 716 (Va. 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, therefore, inapplicable to Virginia law, which rejects such a conflation between voting rights restoration and pardons.

Furthermore, the *Lostutter* panel's arguments for distinguishing pardons and licenses, which the Fourth Circuit quoted but did not discuss or analyze, are tenuous and immaterial. App. 23a–24a. Clemency is not solely retrospective; it authorizes *prospective* conduct. *Id.* at 23a. The practical effect of voting rights restoration is felt prospectively: even once an

individual's right to vote is restored, that person cannot regain the ability to vote in past elections. The distinction between enfranchisement and re-enfranchisement is cosmetic and not legally relevant under the First Amendment. It is particularly dubious with respect to petitioner George Hawkins, who has never been eligible to vote because he was convicted as a minor and, therefore, whose voting rights cannot be "restored" per se. CA JA130. Nor is clemency a "one-time act," App. 23a–24a; a restoration applicant may apply several times before the governor grants the request. Additionally, the suggestion that licenses do not restore a lost right, *see id*. at 24a, 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 this Court's directive to analyze First Amendment challenges functionally. The panel fails to articulate why any of *Lostutter*'s proffered distinctions between licenses and pardons (which Virginia law distinguishes from restoration) have any material bearing on the First Amendment unfettered discretion analysis and the principles and concerns articulated by this Court in the governing precedents. Regardless of whether one views voting rights restoration as having prospective effects or both prospective and retrospective effects does not alter the functional analysis. Indeed, *Lostutter*'s reasoning itself 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 many decisions issued by this Court requiring a practical inquiry in First Amendment cases.

Accordingly, the panel violated this Court's precedent by elevating these cosmetic differences over the practical effects that voting rights restoration and licensing hold in common. Because the injury to petitioner's First Amendment rights squarely implicates the concerns and principles in this Court's First Amendment unfettered discretion cases, certiorari is warranted to clearly extend that doctrine's protection to foreclose the arbitrary granting and denial of permission to vote.

B. The Fourth Circuit panel's opinion violates this Court's precedents and the supremacy of federal law by rendering a First Amendment doctrine subservient to a state-law label.

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 . . . ."); *Nat'l Ass'n for Advancement of Colored People v. Button*, 371 U.S. 415, 429 (1963) ("[A] State cannot foreclose the exercise of constitutional rights by mere labels."); *cf. O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 722 (1996) ("Recognizing the distinction [between employees and independent contractors] 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 also noted that the clemency power and licensing authority "derive from different sources of power within the Virginia Constitution." App. 24a. 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. *Id.* at 12a–14a, 23a–27a. 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 purely discretionary executive clemency. *Id.* at 12a–14a. Virginia law grants this authority to the governor but could just as easily have conferred it upon the state legislature, as in Mississippi, *see* Miss. Const. art. 12, § 253, or the state courts, as in Arizona *see* Ariz. Rev. Stat. Ann. § 13-908. Therefore, the power to re-enfranchise is not so much "*rooted* in the executive's clemency power" as arbitrarily placed there. App. 26a (emphasis added). Nonetheless, the panel found that the state-law "clemency" label was sufficient to defeat federal constitutional liability, a conclusion that turns the hierarchy of federal law and state law upside-down.

II. Certiorari is warranted to address an exceptionally important federal question that has never been squarely addressed by this Court.

A system of voting rights restoration that allows government officials to arbitrarily, selectively mete out voting rights to people who are currently

ineligible to vote presents an intolerable risk of viewpoint discrimination. Arbitrary voting rights restoration survives in Virginia as a vestige of two overlapping legal regimes: (1) discretionary executive clemency, which originates with the 8th Century English monarchy;[5] and (2) disenfranchisement upon a felony conviction. Although both regimes are, separately, constitutional, their conjunction in discretionary and arbitrary voting rights restoration fails constitutional scrutiny. As this Court has noted, two otherwise-lawful government actions may violate the Constitution when combined. For instance, in *West Lynn Creamery, Inc. v. Healy*, this Court applied a functional analysis to hold that a nondiscriminatory tax and a local subsidy program worked in tandem to violate the dormant Commerce Clause. 512 U.S. 186, 199–201 (1994). As this Court explained:

> The choice of constitutional means—nondiscriminatory tax and local subsidy—cannot guarantee the constitutionality of the program as a whole. . . .
>
> Our Commerce Clause jurisprudence is not so rigid as to be controlled by *the form* by which a

[5] *See Herrera v. Collins*, 506 U.S. 390, 412 (1993) ("In England, the clemency power was vested in the Crown and can be traced back to the 700's. W. Humbert, The Pardoning Power of the President 9 (1941). 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.' 4 W. Blackstone, Commentaries.").

> State erects barriers to commerce. Rather our cases have *eschewed formalism* for a sensitive, case-by-case analysis of purposes and *effects*.

Id. at 201 (emphasis added). Similarly, in this instance, the overlap between the unfettered discretion of executive clemency and felony re-enfranchisement has produced a narrow, yet significant, constitutional violation. And just as this Court's Commerce Clause jurisprudence requires a functional examination, challenges implicating fundamental First Amendment activities such as voting also require courts to "eschew[] formalism." *Id.*

Moreover, the question presented in this case is of exceptional importance to our constitutional system, considering both the fundamental right at issue and the volume of people impacted. Under respondents' system, all Virginians with felony convictions released from incarceration can apply to have their civil rights restored. CA JA143. Yet, for three consecutive years, Governor Youngkin has restored the voting rights of fewer and fewer eligible Virginians, denying this fundamental right to actively participate in government to tens of thousands of disenfranchised Virginians.[6] As of

[6] Governor Youngkin restored the rights of approximately 1,600 people in 2024, down from over 2,500 people in 2023, and over 4,000 people in 2022. Commonwealth of Va. Off. of the Governor, List of Pardons, Commutations, Reprieves and Other Forms of Clemency, S. Doc. No. 2, at 18–58 (2025), https://rga.lis.virginia.gov/Published/ 2025/SD2/PDF, S. Doc. No. 2, at 48–108 (2024), https://rga.lis.virginia.gov/Published/2024/SD2/PDF, and S. Doc. No. 2, at 18–117 (2023),

February 2025, upwards of 300,000 Virginians are prohibited from voting due to their felony conviction.[7] And as of October 2025, more than 53,000 adults were on probation or parole.[8] Viriginia's probation and parole population has remained relatively constant since Governor Youngkin took office.[9] At the end of 2023, approximately 60,380 adults were on probation for a felony conviction and another 1,580 were on

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https://rga.lis.virginia.gov/Published/ 2023/SD2/PDF; *see also* Press Release, Commonwealth of Va. Off. of the Governor, Governor Glenn Youngkin Announces the Restoration of Rights for Thousands of Virginians (May 20, 2022), https://www.governor.virginia.gov/newsroom/news-releases/2022/may/name-933455-en.html (announcing restoration of 3,496 Virginians); *see also* Press Release, Commonwealth of Va. Off. of the Governor, Governor Glenn Youngkin Announces the Restoration of Rights for over 800 Formerly Incarcerated Virginians (Oct. 21, 2022), https://www.governor.virginia.gov/newsroom/news-releases/2022/october/name-941493-en.html (announcing restoration of 800 Virginians); *see also* CA JA139.

[7] *See* Pls.' Statement of Undisputed Material Facts ¶¶ 47–49, *King v. Youngkin*, No. 23-cv-00408 (JAG) (E.D. Va. July 18, 2025), ECF No. 152-1.

[8] According to the Virginia Department of Corrections' October 2025 monthly population summary, 52,168 adults are on probation, and 1,258 adults are on parole. Va. Dep't of Corrs., Monthly Population Summary—October 2025, 2, 9 (Oct. 2025), https://vadoc.virginia.gov/media/2317/populationsummary oct2025.pdf.

[9] For example, the Virigina Department of Corrections' December 2024 monthly population summary reports that 53,563 adults were on probation and 1,423 adults were on parole. Va. Dep't of Corrs., Population Summary—December 2024, 2, 9 (Dec. 2024), https://vadoc.virginia.gov/media/2130/population-summa ry-december-2024.pdf.

parole.[10] That same year, approximately 22,400 adults completed probation or parole.[11] Likewise, at the end of 2022, approximately 60,640 adults were on probation and another 1,770 were on parole.[12] Approximately 19,490 adults completed probation or parole in 2022.[13] Even though respondents do not require the completion of parole or probation to restore voting rights, CA JA143, these data show that the number of Virginians who are disenfranchised *even after* the completion of their sentences is increasing every year under this unconstitutional vote-licensing scheme.

Governor Youngkin has restored the voting rights of just a fraction of Virginia's disenfranchised population. Thus, thousands of Virginians remain indefinitely subject to an arbitrary voting rights restoration scheme that inherently exposes them to the persistent and systemic threat of viewpoint discrimination. Such treatment is intolerable under this Court's well-established First Amendment precedents, especially given this arbitrary system impacts a large and growing number of Virginians.

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[10] Danielle Kaeble, BJS Statistician, U.S. Dep't of Just., Off. of Just. Programs, Bureau of Just. Stats., Probation and Parole in the United States, No. NCJ310118, at 24, 32 (July 2025) https://bjs.ojp.gov/document/ppus23.pdf.

[11] *Id.* at 28, 34.

[12] U.S. Dep't of Just., Off. of Just. Programs, Bureau of Just. Stats., Probation and Parole in the United States, 2022, No. NCJ308575, at 22, 29 (rev. Aug. 22, 2024), https://bjs.ojp.gov/document/ppus22.pdf.

[13] *Id.* at 24, 31.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that this Court grant the writ of certiorari.

December 15, 2025

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED AUGUST 20, 2025

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 24-1791

GEORGE HAWKINS,

Plaintiff-Appellant,

v.

GLENN YOUNGKIN, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF VIRGINIA; KELLY GEE, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE COMMONWEALTH OF VIRGINIA,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. John A. Gibney, Jr., Senior District Judge. (3:23-cv-00232-JAG)

Argued: May 9, 2025 Decided: August 20, 2025

Before WYNN, HARRIS, and BENJAMIN, Circuit Judges.

Affirmed by published opinion. Judge Wynn wrote the opinion, in which Judge Harris and Judge Benjamin joined.

Appendix A

WYNN, Circuit Judge:

Virginia's Constitution automatically strips individuals convicted of felony offenses of the right to vote but vests in the Governor the discretionary power to restore those rights. George Hawkins, previously convicted of a felony, petitioned to have his voting rights restored. So far, Governor Glenn Youngkin has declined to do so.

Hawkins brought this 42 U.S.C. § 1983 action against Governor Youngkin and Secretary of the Commonwealth Kelly Gee[1] in their official capacities, asserting two First Amendment claims: (1) that the Governor's unfettered discretion over voting-rights restoration violates the Constitution, and (2) that the lack of a reasonable, definite time limit for the restoration process likewise offends the First Amendment. The district court granted summary judgment for the Commonwealth officials.

Because the district court correctly rejected Hawkins's claims, we affirm.

I.

A.

Article II, Section 1 of Virginia's Constitution provides that "[n]o 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. And among the clemency powers it vests in the Governor is the ability "to remit fines and

1. Although Gee is a named defendant in this action, for simplicity, we refer throughout this opinion primarily to the Governor.

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; [and] *to remove political disabilities* consequent upon conviction for offenses[.]" *Id.* at art. V, § 12 (emphasis added). The term "political disabilities" encompasses a broad array of rights, one of which, and most relevant here, is the right to vote. *See Howell v. McAuliffe*, 292 Va. 320, 788 S.E.2d 706, 710 n.1 (Va. 2016).

The power of the Governor to grant clemency has been part of Virginia's Constitution since 1776, but the specific power to "remove political disabilities consequent to conviction of offenses" was not added until its 1870 Constitution. *Gallagher v. Commonwealth*, 284 Va. 444, 732 S.E.2d 22, 25 (Va. 2012) (paraphrasing 2 A.E. Dick Howard, *Commentaries on the Constitution of Virginia* 642 (1974)). To rejoin the Union following the Civil War, the Commonwealth was required to ratify a new constitution,[2] and the 1870 Constitution was drafted in light of the Fourteenth Amendment's "implicit authorization . . . to deny the vote to citizens 'for participation in rebellion, or

2. Nearly two years after the ratification of the Fourteenth Amendment, Congress passed an act establishing the "fundamental conditions" for Virginia's readmission to the Union, including that "the Constitution of Virginia shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the right to vote who are entitled to vote by the Constitution herein recognized, *excepted as a punishment for such crimes as are now felonies at common law*, whereof they shall have been duly convicted under laws equally applicable to all the inhabitants of said State." An Act to Admit the State of Virginia to Representation in the Congress of the United States, ch. 10, 16 Stat. 62, 63 (1870) (emphasis added).

other crime.'" *Hunter v. Underwood*, 471 U.S. 222, 233, 105 S. Ct. 1916, 85 L. Ed. 2d 222 (1985) (quoting U.S. Const. amend. XIV, § 2).

The Supreme Court of Virginia has emphasized that "the 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 to appeal from the Governor's decision." *In re Phillips*, 265 Va. 81, 574 S.E.2d 270, 273 (Va. 2003). It has also held that clemency powers should be exercised "on an individualized case-by-case basis taking into account the specific circumstances of each." *Howell*, 788 S.E.2d at 718.

B.

In December 2022, following his assumption of office earlier that year, Governor Youngkin implemented a new process for voting-rights restoration.[3] Under the current system, applicants must complete a Restoration of Rights form, which is available online and included in materials provided to individuals released from incarceration after December 9, 2022.[4] The Restoration of Rights Division of

3. Information about the current process for felon re-enfranchisement is drawn from the parties' Joint Stipulation of Undisputed Facts.

4. The Restoration of Rights form requests 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

the Office of the Secretary of the Commonwealth reviews the application for "accuracy, completeness, eligibility, and previous restorations." J.A. 141. The Restoration of Rights Division contacts applicants with incomplete applications to give them an opportunity to provide missing data or documentation; if the applicant fails to do so, the application is not further processed.

The Restoration of Rights Division then determines the nature of the conviction. To do so, it orders criminal-record checks from a database operated by the Virginia State Police. If an applicant has not been convicted of a felony in a Virginia court, the Restoration of Rights division informs them of this. If an applicant indicates that they have been convicted in a federal court, the Restoration of Rights Division contacts the applicant through email to request documentation concerning the date they were released from incarceration or completed supervised release.[5]

> 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.

J.A. 140. (Citations to the "J.A." refer to the Joint Appendix filed by the parties in this appeal.)

5. Though the Joint Stipulations of Undisputed Facts does not describe how the Restoration of Rights Division pursues

Next, the Restoration of Rights Division seeks information from four Virginia agencies. From the Department of Elections, it learns whether the applicant is in its records, and, if so, whether the applicant is deceased, mentally incapacitated, or a non-citizen. From the Department of Behavioral Health and Development Services, it learns whether the applicant is or has been incarcerated in a state mental hospital, is on supervised release from such a hospital, or has been found not guilty by reason of insanity. From the Department of Corrections, it learns whether the applicant is incarcerated in a prison or a local jail, on community supervision, an absconder or fugitive, or under interstate compact community supervision. And from the Compensation Board, it learns whether the applicant is a current inmate for a federal or state offense, has been released to an out-of-state authority, is awaiting trial, has been released to a mental hospital, is on supervised release, or is bonded and being supervised by pre-trial services.

The Restoration of Rights Division screens out applicants who do not meet voting qualifications under Virginia law, based on, for instance, age, citizenship status, or residence; who did not submit complete applications; who failed to respond to inquiries from the Restoration of Rights Division; who are still incarcerated; who are subject to a pending felony charge; or who are on supervised release for an out-of-state or federal conviction.

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information about out-of-state convictions, a declaration from the Deputy Secretary of the Commonwealth appears to suggest that such convictions follow the same process as that used for federal convictions. *See* J.A. 327-30.

Following this review, the Secretary of the Commonwealth makes a recommendation to the Governor as to the disposition of the application. Governor Youngkin represents that the ultimate disposition of the individual's restoration application is based on his "predictive judgment regarding whether an applicant will live as a responsible citizen and member of the political body." J.A. 118-19.

C.

Hawkins tried, unsuccessfully, to have his voting rights restored through this system following his May 2023 release from state prison for a felony offense. Because he was convicted as a minor, Hawkins has never been able to exercise the franchise. He wishes to express his political preferences by voting for constitutional amendments and in future primary and general elections. To facilitate this, he has submitted at least one application for voting-rights restoration.[6] His efforts have been rebuffed.

In July 2023, Hawkins joined this lawsuit, which had, at that time, been ongoing for several months. (The

6. Hawkins contends he submitted two applications, the first in early May 2023 and the second in June 2023. The Deputy Secretary of the Commonwealth represents that only the June 2023 application was received. Regardless, Hawkins raises a facial challenge to the system under the First Amendment's unfettered-discretion doctrine. Under that doctrine, "one who is subject to the law may challenge it facially without the necessity of first applying for, and being denied, a license." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 755-56, 108 S. Ct. 2138, 100 L. Ed. 2d 771 (1988). Hawkins has applied for restoration at least once, and this challenge would continue even if he had not, so we need not resolve this dispute.

original plaintiffs are no longer involved in the litigation.) The complaint alleges that the discretion accorded to Virginia's Governor for deciding whether to restore the voting rights of someone previously convicted of a felony violates the unfettered-discretion doctrine of the First Amendment. In general terms, this doctrine forbids administrators from exercising unfettered discretion over whether to grant licenses that implicate an individual's First Amendment rights. The district court found the doctrine to be inapplicable because licensing schemes "describe systems that function to regulate how a person can exercise[] an existing right" whereas the function of Virginia's voting-restoration system is to "determine[] who can reenter the franchise." *Hawkins v. Youngkin*, No. 3:23-cv-232, 2024 U.S. Dist. LEXIS 140758, 2024 WL 3732462, at *5 (E.D. Va. Aug. 7, 2024). So it granted summary judgment to the Governor. Hawkins timely appealed.

II.

The preliminary question for this Court is whether we may wade into this dispute over the Governor's clemency power at all. A review of the history of the clemency power, and the more general pardon power, reveals that constraints over such powers have traditionally been politically, not judicially, imposed. But precedent and history also make clear that this appeal falls into the narrow subset of cases where judicial review is appropriate.

Chief Justice Marshall long ago identified English practice as the starting point for understanding the

contours of the pardon power and the role of the judiciary therein, observing that "[a]s this power had been exercised from time immemorial by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance; we adopt their principles respecting the operation and effect of a pardon." *United States v. Wilson*, 32 U.S. (7 Pet.) 150, 160, 8 L. Ed. 640 (1833).

English use of the pardon power can be traced to the eighth century. *Herrera v. Collins*, 506 U.S. 390, 412, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993). The power was held in such esteem that Blackstone considered that "one of the great advantages of monarchy in general, above any other form of government[, is] 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." 4 William Blackstone, *Commentaries* *397, quoted in *Herrera*, 506 U.S. at 412.

This is not to say that the English monarch's use of the pardon power was always cause for popular celebration. As one mid-nineteenth-century court noted, "at the time of Magna Charta, and for many reigns subsequently, the abuse of the pardoning power by the king, and the impositions practiced upon him, were the subject of frequent and clamorous complaint." *In re Greathouse*, 10 F. Cas. 1057, 1059, F. Cas. No. 5741 (C.C.N.D. Cal. 1864); *see, e.g.*, William Shakespeare, *Richard II* act 5, sc. 3, ll. 83-84 (Duke of York warning King Henry IV, "If thou do pardon whosoever pray, / More sins for this forgiveness

prosper may."); William Shakespeare, *Measure for Measure* act 2, sc. 4, ll. 120-21 (Isabella, recognizing that Angelo is attempting to use the offer of a pardon to spare her brother's life as a means of coercion, observing, "[L]awful mercy / Is nothing kin to foul redemption."). Because of "potential or actual abuses [that] were perceived," the history of the pardon power in England "reveals a gradual contraction to avoid its abuse and misuse."[7] *Schick v. Reed*, 419 U.S. 256, 260, 95 S. Ct. 379, 42 L. Ed. 2d 430 (1974).

At the Constitutional Convention, the Framers had to decide how closely to follow the English tradition. Although neither the Virginia Plan nor the New Jersey plan addressed pardons, the delegates quickly decided to lodge this power in the Executive. *See* 1 Max Farrand, *The Records of the Federal Convention of 1787*, at 20-23 (1911) (Virginia Plan); *id.* at 242-45 (New Jersey Plan). Roger Sherman proposed obliging the President to seek consent of the Senate to effectuate a pardon, but that proposal was quickly defeated. *See* 2 Max Farrand, *The Records of the Federal Convention of 1787*, at 419 (1911). So, the Supreme Court has observed, "the pardoning power was intended to be generally free from legislative control." *Schick*, 419 U.S. at 263.

7. Such pre-Revolution limitations on the pardon power included that the king could not pardon those in prisons outside of the realm, an offense which resulted in private loss to another, an unredressed common nuisance, or an offense against a popular or penal statute after an information was brought, and could not use the pardon power to undermine parliamentary impeachment. 4 William Blackstone, *Commentaries* *398-99.

Appendix A

Alexander Hamilton explained the rationale for lodging the clemency power in a single person. "As the sense of responsibility is always strongest in proportion as it is undivided, it may be inferred that a single man would be most ready to attend to the force of those motives which might plead for a mitigation of the rigor of the law, and least apt to yield to considerations which were calculated to shelter a fit object of its vengeance." *The Federalist No.* 74, at 447-48 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Moreover, "[t]he reflection that the fate of a fellow-creature depended on his sole fiat, would naturally inspire scrupulousness and caution; the dread of being accused of weakness or connivance, would beget equal circumspection, though of a different kind." *Id.* at 448.

Thus, the federal pardon power was located entirely in the President, and political accountability became the primary means for restraining that power. So, as a general rule, "[i]f the clemency power is exercised in either too generous or too stingy a way, that calls for political correctives, not judicial intervention." *Cavazos v. Smith*, 565 U.S. 1, 9, 132 S. Ct. 2, 181 L. Ed. 2d 311 (2011) (per curiam). For this reason, "pardon and commutation decisions have not traditionally been the business of courts; as such, they are rarely, if ever, appropriate subjects for judicial review." *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 464, 101 S. Ct. 2460, 69 L. Ed. 2d 158 (1981).

Of course, nothing compels States to vest similar power in the executive—or even to establish the power at all. *Herrera*, 506 U.S. at 414. Yet, clemency has been widely available in the States since they came into

existence. *Id.* States initially hesitated to grant such power to the executive, and some have opted to divide the power between the Governor and an advisory board selected by the legislature. But, over time, the power has shifted in the direction of exclusive executive control.[8] *Id.* That is where it lies under Virginia's current Constitution. *See* Va. Const. art. V, § 12.

While most States lodge the power of *clemency* in the executive, they typically take a different approach with re-enfranchisement decisions, often not treating them as falling under the clemency power at all. States may constitutionally disenfranchise felons, and the Constitution does not require States to ever restore those voting rights once lost, even after a person has completed their sentence and any period of parole. *Richardson v. Ramirez*, 418 U.S. 24, 56, 94 S. Ct. 2655, 41 L. Ed. 2d 551 (1974). But all States provide a path to re-enfranchisement, and in most, re-enfranchisement occurs automatically at some point.

8. The Commonwealth of Virginia is a prime example of a State that vacillated between vesting the power exclusively in the executive and dividing the power. Its first Constitution vested in the Governor "the power of granting Reprieves or pardons"—"with the advice of the Council of State." Va. Const. (1776). The Council of State, sometimes known as the Privy Council, was an eight-member body elected by a joint ballot of both houses. Virginia's third Constitution eliminated the Council of State and vested the whole of the pardon power in the Governor. *See* Va. Const. art. V, § 5 (1851) ("[The Governor] shall have power . . . to grant reprieves and pardons after conviction[.]"). A 1928 amendment to Virginia's 1902 Constitution permitted the General Assembly to create, and the Governor to appoint, a pardon board. *See* Va. Const. art. V, § 73 (1902). Under Virginia's current Constitution, adopted in 1971, the pardon power again lies exclusively with the Governor.

Specifically, as of 2024, in Vermont, Maine, Puerto Rico, and the District of Columbia, those who were incarcerated for felonies never lost their right to vote in the first place. *See* C.R. Div., U.S. Dep't of Just., *Guide to Voting Rules that Apply After a Criminal Conviction* (rev. Sept. 2024), https://www.justice.gov/usdoj-media/crt/media/1332106/dl?inline [https://perma.cc/HHJ7-VPPN]. Twenty-five States automatically restored voting rights for most individuals upon their release from prison, although eight of those States provided differing requirements if the individual had been convicted of an election-related offense. *Id.* In twelve other States, individuals became eligible for automatic voter-rights restoration after completing their sentences (sometimes with a brief waiting period), including parole, probation, and (in some States) the payment of any unpaid debts related to the offense. *Id.* Eight more States listed enumerated offenses that required an individual to apply for restoration, generally from an entity in the executive branch. *Id.*

Three States—Iowa, Kentucky, and Virginia—indefinitely stripped those convicted of felonies of their right to vote and obliged them to seek restoration from the Governor. But the Governors of the first two States have enacted Executive Orders providing for automatic restoration in most circumstances. *Id.* at 45-51; *see* Iowa Exec. Order No. 7 (Aug. 5, 2020); Ky. Exec. Order No. 2019-003 (Dec. 12, 2019). As of 2024, Virginia was the lone State that disenfranchised everyone convicted of a felony, placed re-enfranchisement decisions entirely within the Governor's pardon power, and did not provide

for automatic restoration for any class of convictions.[9,10] As discussed, decisions related to the exercise of such power are typically not subject to judicial review.

Still, there are limitations to this general rule.[11] Most obviously, when a State creates a right, due process may

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9. The Virginia General Assembly has initiated the process to amend the Virginia Constitution to provide that every person convicted of a felony shall, "upon release from incarceration for that felony conviction and without further action required of him, . . . be invested with all political rights, including the right to vote." 2025 Va. Acts Ch. 601. In order for this amendment to become part of the Virginia Constitution, the next General Assembly must also agree to it before it is submitted to the voters for their approval. Va. Const. art. XII, § 1.

10. This Court is aware of ongoing litigation in the Eastern District of Virginia where plaintiffs contend that federal law prohibits Virginia from disenfranchising individuals for offenses that would not have been considered felonies at common law in 1870. *See* Second Am. Compl., *King v. Youngkin*, No. 3:23-cv-408 (E.D. Va. Apr. 4, 2024). This opinion expresses no view on whether the Commonwealth may categorically disenfranchise individuals for any felony conviction.

11. The following discussion focuses on judicial review of State exercises of the clemency power. On the federal side, this Court has observed that "[t]he President's clemency power is not only expansive, but also exclusive[, so n]either the legislative nor the judicial branches can exercise or alter it." *Rosemond v. Hudgins*, 92 F.4th 518, 525 (4th Cir. 2024). Because of this general rule, "the Judiciary's role in the matter of executive commutations is very sharply circumscribed." *Id.* at 526. Still, there are judicially enforceable limitations even in the federal context. For instance, the Supreme Court has determined that a pardon cannot be issued for an offense that has not yet occurred. *Ex Parte Garland*, 71 U.S.

entitle individuals to certain procedural protections. Or, as the Supreme Court put it, "[a] state-created right can, in some circumstances, beget yet other rights to procedures essential to the realization of the parent right." *Dumschat*, 452 U.S. at 463. So, for example, if a State creates objective criteria, the completion of which is supposed to result in restoration of voting rights, due process protections preclude State actors from imposing improper procedural hurdles beyond those objective criteria.

Further, even in the absence of State-created rights, the Supreme Court has instructed that "some *minimal* procedural safeguards apply to clemency proceedings." *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 289, 118 S. Ct. 1244, 140 L. Ed. 2d 387 (1998) (O'Connor, J.,

(4 Wall.) 333, 380, 18 L. Ed. 366 (1866). Nor may a pardon be used to affect rights vested in a third party. *Knote v. United States*, 95 U.S. 149, 154, 24 L. Ed. 442, 13 Ct. Cl. 517 (1877). In order to be valid, a pardon must be accepted by the recipient, so it cannot be used to make an unwilling witness forgo their right against self-incrimination. *Burdick v. United States*, 236 U.S. 79, 91, 35 S. Ct. 267, 59 L. Ed. 476 (1915); *see Wilson*, 32 U.S. at 161 ("[A pardon] may then be rejected by the person to whom it is tendered; and if it be rejected, we have discovered no power in a court to force it on him."). *But see Biddle v. Perovich*, 274 U.S. 480, 487, 47 S. Ct. 664, 71 L. Ed. 1161, 5 Alaska Fed. 359 (1927) (declining to let habeas petitioner refuse a commutation of a capital sentence to a life sentence because "[s]upposing that [the petitioner] did not accept the change, he could not have got himself hanged against the Executive order"). The Supreme Court has also made clear that the pardon power does not permit the President to commute sentences on conditions which "in themselves offend the Constitution." *Schick*, 419 U.S. at 264.

concurring in part and concurring in the judgment).[12] For this reason, "[j]udicial intervention might . . . be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process." *Id.*

Judicial review and intervention are not limited to due-process issues. As Governor Youngkin rightly acknowledges, a scheme where the decision to re-enfranchise felons was based on race would violate the Fourteenth and Fifteenth Amendments. Response Br. at 40-41; *e.g.*, *Harvey v. Brewer*, 605 F.3d 1067, 1079 (9th Cir. 2010) (O'Connor, J.) ("[A] state could not choose to re-enfranchise voters of only one particular race." (citing *Hunter*, 471 U.S. at 233)); *Jones v. Governor of Fla.*, 975

12. Even though Justice O'Connor wrote for only four justices, Justice Stevens, writing separately, agreed with her analysis. Thus, her opinion on this point has long been considered controlling. *See, e.g., Creech v. Idaho Comm'n of Pardons & Parole*, 94 F.4th 851, 855 n.1 (9th Cir.) (per curiam), *cert. denied*, 144 S. Ct. 1027, 218 L. Ed. 2d 185 (2024); *Woods v. Comm'r, Ala. Dep't of Corr.*, 951 F.3d 1288, 1294 (11th Cir. 2020); *Winfield v. Steele*, 755 F.3d 629, 630 (8th Cir. 2014) (en banc) (per curiam); *see also Harvey v. Horan*, 285 F.3d 298, 313-14 (4th Cir. 2002) (Luttig, J., statement respecting the denial of rehearing en banc); *Knight v. Florida*, 528 U.S. 990, 991, 120 S. Ct. 459, 145 L. Ed. 2d 370 (1999) (Thomas, J., concurring in denial of certiorari) (noting that "five Members of [the Supreme] Court [took the view] that procedural due process principles govern a clemency hearing in which the clemency decision is entrusted to executive discretion" (footnote omitted)). We adopt this consensus view. For simplicity, this opinion will hereafter cite to the binding portions of Justice O'Connor's analysis without a parenthetical denoting that the citation is to her opinion.

F.3d 1016, 1030 (11th Cir. 2020) (en banc) ("Although States enjoy significant discretion in distributing the franchise to felons, it is not unfettered. A State may not rely on suspect classifications in this area any more than in other areas of legislation.").

Similarly, basing re-enfranchisement on political affiliation—or other such viewpoint discrimination—would run afoul of the First Amendment. Response Br. at 41; *see Woodard*, 523 U.S. at 292 (Stevens, J., concurring in part and dissenting in part) ("[N]o one would contend that a Governor could ignore the commands of the Equal Protection Clause and use race, religion, or political affiliation as a standard for granting or denying clemency."); *Hand v. Scott*, 888 F.3d 1206, 1211-12 (11th Cir. 2018) ("[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[.]").

Additionally, numerous circuits have held that rational-basis review applies to Equal Protection claims related to felon re-enfranchisement. *See Hayden v. Paterson*, 594 F.3d 150, 170 (2d Cir. 2010); *Owens v. Barnes*, 711 F.2d 25, 27 (3d Cir. 1983); *Williams v. Taylor*, 677 F.2d 510, 514 (5th Cir. 1982); *Johnson v. Bredesen*, 624 F.3d 742, 746 (6th Cir. 2010); *Harvey*, 605 F.3d at 1079 (9th Cir.); *Jones*, 975 F.3d at 1029-30 (11th Cir.). This is because, while the right to vote is normally a fundamental right subject to strict scrutiny if severely restricted, *see Burdick v. Takushi*, 504

U.S. 428, 434, 112 S. Ct. 2059, 119 L. Ed. 2d 245 (1992), felons "cannot complain about their loss of a fundamental right to vote because felon disenfranchisement is explicitly permitted" by Supreme Court precedent, *Harvey*, 605 F.3d at 1079. Nevertheless, while rational-basis review might be minimal, it provides some protection. As Justice O'Connor wrote for a Ninth Circuit panel, "a state could not choose to . . . re-enfranchise only those felons who are more than six-feet tall" because this act would "distinguish[] between groups in a manner that is not rationally related to a legitimate state interest." *Id.*

The Governor also recognizes that analogous Virginia laws prevent re-enfranchisement decisions "on the basis of suspect classifications or the exercise of fundamental rights, such as race, religion, sex, and viewpoint." J.A. 118. As the Supreme Court of Virginia has recognized, the clemency power "may be broad, but it is not absolute." *Howell*, 788 S.E.2d at 710.

Nevertheless, the Governor marshals the decision in *Beacham v. Braterman* to suggest that this Court may not review a voter-restoration scheme at all. 300 F. Supp. 182 (S.D. Fla.), *aff'd*, 396 U.S. 12, 90 S. Ct. 153, 24 L. Ed. 2d 11 (1969) (per curiam). But that case does not require such a result.

In *Beacham*, a three-judge district-court panel evaluated whether a system in which the Governor could "restore discretionarily the right to vote to some felons and not to others" violated Equal Protection or Due Process. *Id.* at 184. It concluded that it did not. *Id.* The

panel further adopted the broad rule that "[w]here the people of a state have conferred unlimited pardon power upon the executive branch of their government, the exercise of that power should not be subject to judicial intervention." *Id.* The Supreme Court summarily affirmed in a one-sentence, per curiam order. 396 U.S. at 12.

Beacham should not be—and has not been—read to be so expansive as to preclude all challenges to a system of felon disenfranchisement or re-enfranchisement. "[T]he precedential effect of a summary affirmance can extend no farther than the precise issues presented and necessarily decided by those actions," which in *Beacham* were merely whether the challenged system violated Equal Protection or Due Process. *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 182, 99 S. Ct. 983, 59 L. Ed. 2d 230 (1979) (cleaned up). More importantly, "since *Beacham*, the Supreme Court has recognized that, at least in limited circumstances, a state's pardon power may be cabined by judicial decree." *Hand*, 888 F.3d at 1209.

Indeed, years after summarily affirming *Beacham*, the Supreme Court unanimously permitted disenfranchised voters to challenge the disenfranchisement provision in Alabama's Constitution as a violation of equal protection. *Hunter*, 471 U.S. at 225; *see id.* at 231-32 (examining the history of Alabama's 1901 Constitutional Convention and determining that a "racially discriminatory motivation" was "a motivating factor" for the disenfranchisement of persons convicted of any crime "involving moral turpitude" (quoting Ala. Const. art. VIII, § 182 (1901))). And more than a decade after that, in *Woodard*, no justice

questioned whether inmates challenging state clemency proceedings could bring their claims, and a majority of the justices found that at least a minimal amount of procedure was required during those proceedings. 523 U.S. at 289.

The foregoing shows that a State executive's use of the pardon power—including to restore voting rights—may be judicially reviewed in at least certain narrow circumstances, including where a plaintiff alleges that the use of the pardon power flouts a State-created process, is arbitrary, engages in suspect classifications, or violates the First Amendment. Because Hawkins raises a claim sounding in the First Amendment, we proceed to review his claim.

III.

Hawkins contends that the entirely discretionary nature of Virginia's voting re-enfranchisement system—both in whether the Governor opts to restore a particular individual's voting rights, and in how long he takes to make that decision—facially violates the First Amendment's unfettered-discretion doctrine. We review the district court's grant of summary judgment de novo, and we affirm. *Philpot v. Indep. J. Rev.*, 92 F.4th 252, 257 (4th Cir. 2024).

The Supreme Court has long held that "a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional." *Shuttlesworth v. City of Birmingham*,

394 U.S. 147, 150-51, 89 S. Ct. 935, 22 L. Ed. 2d 162 (1969). "At the root of this long line of precedent is the time-tested knowledge that in 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, 108 S. Ct. 2138, 100 L. Ed. 2d 771 (1988). Further, "the 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." *Id.* In this way, "[i]t is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion." *Thornhill v. Alabama*, 310 U.S. 88, 97, 60 S. Ct. 736, 84 L. Ed. 1093 (1940) (first citing John Milton, *Areopagitica* (1644); and then citing *Near v. Minnesota*, 283 U.S. 697, 713, 51 S. Ct. 625, 75 L. Ed. 1357 (1931)).

Governor Youngkin argues that the unfettered-discretion doctrine does not apply to voting-rights challenges like Hawkins's because, in his view, voting doesn't implicate the First Amendment at all and, even if it did, any such challenges would be circumscribed by, and dependent on, the Fourteenth Amendment. He cites two cases in which we held that the role of the First Amendment in determining who appeared on the ballot was no broader than that which the Fourteenth Amendment would provide. *See Irby v. Va. State Bd. of Elections*, 889 F.2d 1352, 1359 (4th Cir. 1989) ("In voting rights cases, the protections of the First and Thirteenth Amendments 'do

not in any event extend beyond those more directly, and perhaps only, provided by the [F]ourteenth and [F]ifteenth [A]mendments.'" (quoting *Washington v. Finlay*, 664 F.2d 913, 927 (4th Cir. 1981))); *Republican Party of N.C. v. Martin*, 980 F.2d 943, 959 n.28 (4th Cir. 1992) (noting that we "ha[ve] held that in voting rights cases, no viable First Amendment claim exists in the absence of a Fourteenth Amendment claim" (first citing *Irby*, 889 F.2d at 1359; and then citing *Finlay*, 664 F.2d at 927)), *abrogated in part on other grounds by Rucho v. Common Cause*, 588 U.S. 684, 139 S. Ct. 2484, 204 L. Ed. 2d 931 (2019).

The Governor reads this precedent too broadly. *Irby* concerned whether racial animus was behind the decision to appoint, rather than to elect, a school board; and in *Martin*, voters challenged the statewide election method for selecting superior court judges. When voters challenge the constitutionality of whether a governmental official is elected or appointed or whether primaries are local or statewide, their Fourteenth Amendment rights are directly implicated and their collective Free Speech rights only peripherally so. But when voters contend that components of the electoral system directly burden their First Amendment rights, as Hawkins does, this Court applies First Amendment doctrines to decide the issue. *See, e.g., Fusaro v. Howard*, 19 F.4th 357, 369 (4th Cir. 2021) (applying a First Amendment standard of review to a challenge brought by a voter who claimed that a Maryland election law restricting access to the State's voter roll infringed his free-speech rights).

Nevertheless, Hawkins's claim fails because, as both other federal courts of appeal to consider this question have concluded, the discretionary exercise of Virginia's clemency power does not constitute a licensing system.[13] *See Hand*, 888 F.3d at 1207 (concluding that Florida was likely to succeed on the merits of its arguments against a facial unfettered-discretion challenge to its system of placing the re-enfranchisement decision in the hands of an "Executive Clemency Board," which included the Governor and three others); *Lostutter v. Ky.*, No. 22-5703, 2023 U.S. App. LEXIS 18631, 2023 WL 4636868, at *3 (6th Cir. July 20, 2023) (rejecting facial unfettered-discretion challenge to Kentucky's system of placing the re-enfranchisement decision solely in the hands of the Governor).

The Sixth Circuit identified four ways in which a pardon is "fundamentally different from . . . an administrative license or permit." *Lostutter*, 2023 U.S. App. LEXIS 18631, 2023 WL 4636868, at *3. First, "pardons are retrospective in the sense that they look backwards and excuse—indeed, nullify the consequences of—past misconduct," whereas a license "is usually prospective in that it looks forward and grants permission to engage in some future conduct." 2023 U.S. App. LEXIS 18631, [WL] at *4. Second, "a

13. In his filings before this Court, Hawkins refers to Virginia's "arbitrary re-enfranchisement" system. *E.g.*, Opening Br. at 15. We agree that a truly arbitrary system would be unconstitutional. *See Woodard*, 523 U.S. at 289 ("Judicial intervention might . . . be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency[.]"). But, based on the facts before us, the system Hawkins challenges is discretionary, not arbitrary.

partial pardon is a one-time act of clemency, while a typical license or permitting scheme is ongoing—that is, the license or permit must be renewed periodically." *Id.* Third, "felon reenfranchisement . . . derives from the Governor's executive clemency power," but "a licensing scheme regulating First Amendment-related conduct is typically grounded in the State's authority to promote public safety and well-being." *Id.* Fourth and finally, "a pardon restores the felon to the status quo before the conviction" so that they "regain[] a right once held but lost due to illegal conduct," but "licenses regulating First Amendment activity by their nature do not restore any 'lost' rights[but] only regulate how persons may engage in or exercise a right they already possess." *Id.*

We agree with the Sixth Circuit's reasoning. Pardons and licenses have characteristics that distinguish them. Perhaps most importantly, they derive from different sources of power within the Virginia Constitution.

Hawkins attempts to overcome the differences between licensing and re-enfranchisement systems by arguing that the Supreme Court has commanded courts to evaluate First Amendment challenges functionally, not formalistically. This is correct, but irrelevant.

In Virginia, an individual convicted of a felony is constitutionally stripped of the right to vote. Consistent with historical practice, only the Governor can exercise the executive grace to restore this right. Our Constitution does not contemplate a similar deprivation of rights absent a criminal conviction. The 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. And that constitutionally grounded distinction, in turn, has implications for how felon reenfranchisement—as opposed to licensing—interacts with the First Amendment. Given the historically limited role of the judiciary in restraining the use of the executive clemency power, and the longstanding role of discretion in that power, we will not import the unfettered-discretion doctrine from the licensing world into this wholly different context.

This distinction also resolves a hypothetical Hawkins poses. He hypothesizes a system in which the Governor has unbridled discretion to grant the right to vote to 16- and 17-year-olds. Those minors, he reasons, possess no fundamental right to vote, so they are situated similarly to the constitutionally disenfranchised felon. He posits that the Governor could not exercise unfettered discretion in granting some minors the right to vote but not others—and that this demonstrates that the unfettered-discretion doctrine applies to his case, too.

A system in which minors would be able to vote but for their age and could, in the hypothetical, seek gubernatorial permission to vote *despite* their age, might look very much like a licensing or permitting scheme. We suspect that in such a case, therefore, the unfettered-discretion doctrine *would* apply. But, even if so, that hypothetical system bears no relation to the pardon power. It tells us nothing about the very different context of a constitutionally disenfranchised felon seeking re-

enfranchisement through a discretionary system rooted in the executive's clemency power.

To be sure, Hawkins touches upon an important underlying concern when he points out that "[a]pplicants [for voting restoration] can signal their viewpoints and party preferences to the [Governor], or the [Governor] can access or receive information on the same through readily available sources like political donation or voter registration history and social media accounts." J.A. 270. To be clear, Hawkins does not allege that Governor Youngkin or any other Virginia official has done such a thing. But the implication is that a future Governor may do what has not been alleged here: namely, use verboten criteria as a basis for re-enfranchisement decisions. That concern may not be farfetched: it is much easier for a sophisticated actor to gather sufficient information on the average individual to make a predictive judgment about a person's future voting behavior today than it would have been in 1870 when the Virginia Constitution first vested the Governor with this discretion. Such malfeasance would also be hard to detect. To whatever extent it is normatively desirable to create a prophylactic rule to prevent such behavior, however, the foregoing discussion shows why the First Amendment unfettered-discretion doctrine does not provide a suitable vehicle to do so.

In short, we hold that Virginia's entirely discretionary system for voting-rights restoration, rooted in the executive clemency power, does not facially violate the First Amendment unfettered-discretion doctrine.

IV.

Hawkins's challenge to Virginia's re-enfranchisement system is fit for review by this Court but ultimately fails. Thus, for the foregoing reasons, the judgment of the district court is affirmed.

AFFIRMED

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, RICHMOND DIVISION, FILED AUGUST 7, 2024

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

Civil Action No. 3:23cv232

GEORGE HAWKINS,

Plaintiff,

v.

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 me 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 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

1. The parties jointly stipulate to the following undisputed facts. (*See* ECF No. 59.)

> 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

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

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.

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, 108 S. Ct. 2138, 100 L. Ed. 2d 771 (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

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essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (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).

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, 118 S. Ct. 1244, 140 L. Ed. 2d 387 (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]

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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).

Appendix B

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 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. Ky.*, No. 22-5703, 2023 U.S. App. LEXIS 18631, 2023 WL 4636868, at *4 (6th Cir. July 20, 2023), *cert, denied sub nom. Aleman v. Beshear*, 144 S. Ct. 809, 218 L. Ed. 2d 24 (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.

5. *But see Beacham v. Braterman*, 300 F. Supp. 182 (S.D. Fla. 1969), *aff'd* 396 U.S. 12, 90 S. Ct. 153, 24 L. Ed. 2d 11 (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.").

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, 112 S. Ct. 2395, 120 L. Ed. 2d 101 (1992) (first quoting *Cantwell v. Connecticut*, 310 U.S. 296, 305, 60 S. Ct. 900, 84 L. Ed. 1213 (1940); and then quoting *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553, 95 S. Ct. 1239, 43 L. Ed. 2d 448 (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, 110 S. Ct. 596, 107 L. Ed. 2d 603 (1990); *Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781, 803, 108 S. Ct. 2667, 101 L. Ed. 2d 669 (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 753, 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, 108 S. Ct. 2495, 101 L. Ed. 2d 420 (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 U.S. App. LEXIS 18631, 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 U.S. App. LEXIS 18631, 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.
John A. Gibney, Jr.
Senior United States District Judge

Date: 7 August 2024
Richmond, VA

APPENDIX C — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED SEPTEMBER 16, 2025

FILED: September 16, 2025

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 24-1791
(3:23-cv-00232-JAG)

GEORGE HAWKINS,

Plaintiff-Appellant,

v.

GLENN YOUNGKIN, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF VIRGINIA; KELLY GEE, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE COMMONWEALTH OF VIRGINIA,

Defendants-Appellees.

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 40 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Wynn, Judge Harris, and Judge Benjamin.

For the Court

/s/ Nwamaka Anowi, Clerk