No. 21-5476

In the United States Court of Appeals for the Sixth Circuit

DERIC LOSTUTTER, aka Deric James Lostutter; ROBERT CALVIN LANGDON; RICHARD LEROY PETRO, JR.; BONIFACIO R. ALEMAN,

Plaintiffs-Appellants,

v.

COMMONWEALTH OF KENTUCKY, et al.,

Defendants,

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

Defendant-Appellee.

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

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit Case Number: 21-5476 Case Name: Deric Lostutter, et al. v. KY, et al.

Name of counsel: Jon Sherman

Pursuant to 6th Cir. R. 26.1, Deric Lostutter, Robert Calvin Langdon, Bonifacio R. Aleman, Richard Leroy Petro, Jr.
Name of Party

makes the following disclosure:

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

No

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

No

CERTIFICATE OF SERVICE

I certify that on May 28, 2021 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Jon Sherman

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

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JURISDICTIONAL STATEMENT

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

This Court has jurisdiction over this appeal as it is a direct appeal of a final order and judgment entered by the U.S. District Court for the Eastern District of Kentucky, dismissing this lawsuit sua sponte as moot and denying the cross-motions for summary judgment as moot. 28 U.S.C. § 1291.

Appellants filed their Notice of Appeal on May 4, 2021. Notice of Appeal, RE 61, Page ID#814–16.[1] The district court entered final judgment in this action on August 14, 2020. Opinion & Order Dismissing Fourth Amended Complaint, RE 55, Page ID#769–77; Judgment Dismissing Fourth Amended Complaint, RE 56, Page ID#778. Plaintiffs timely filed a motion to alter or amend the judgment pursuant to Federal Rule of Civil Procedure 59. Motion for Reconsideration, RE 57, Page ID#779–85. The district court denied Plaintiffs' motion on April 19, 2021. Opinion & Order Denying Motion for Reconsideration, RE 60, Page ID#807–13. Accordingly, this appeal is timely under Federal Rule of Appellate Procedure

[1] All record entry references are to 18-cv-277 (E.D. Ky.).

4(a)(4)(A)(iv), which tolls the time allowed to file an appeal until the district court enters an order disposing of a Rule 59 motion to alter or amend the court's judgment.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred in holding that Appellants' First Amendment challenges to Kentucky's discretionary voting rights restoration system for individuals with felony convictions—pursuant to which the Governor has sole and unfettered discretion to grant or deny restoration applications—became moot upon Appellee's issuance of Executive Order 2019-003, which restored disenfranchised individuals meeting specific criteria but preserved the same discretionary and arbitrary voting rights restoration system for all individuals not restored by the executive order, including Appellants.

2. If this Court finds that this case is not moot, whether this Court should now reach and decide the merits of Appellants' First Amendment claims or reverse and remand with a limited instruction regarding the merits.

STATEMENT OF THE CASE

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

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

Page ID#332–60.[2] Plaintiffs asserted two claims: (1) a First Amendment challenge to the unfettered discretion state law affords the Governor to grant or deny voting rights restoration applications; and (2) a First Amendment challenge to the lack of reasonable, definite time limits by which the Governor must make these purely discretionary determinations on voting rights restoration applications. *Id.*

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

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

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

Defendant-Appellee Governor Andrew G. Beshear ("Appellee") took office shortly thereafter on December 10, 2019 and was substituted as the named defendant in this action. Two days later, on December 12, 2019, he issued Executive Order 2019-003 "Relating to the Restoration of Civil Rights for Convicted Felons" (hereinafter "EO 2019-003"), which took people with certain felony convictions out of the arbitrary voting rights restoration system and restored their rights immediately. Exhibit – EO 2019-003, RE 53-1, Page ID#761–65. But, crucially, EO 2019-003 did not eliminate, replace, or otherwise modify the preexisting and purely

discretionary system, which still applied to all other disenfranchised Kentuckians. *Id.* Under that system, Kentuckians with felony convictions are disenfranchised, Ky. Const. § 145, Ky. Rev. Stat. § 116.025, but those who are not eligible for restoration under EO 2019-003 may seek restoration of their right to vote only upon application to the Governor. KY. CONST. § 145; KY. REV. STAT. § 196.045(1). They are eligible to *apply* once they are finally discharged from their sentences and complete paying restitution. KY. REV. STAT. §§ 196.045(2)(a), (2)(c). These applications are initially sent to the Department of Corrections, which screens and forwards eligible applications to the Governor's office for a decision.[3] The Governor then has sole and unfettered discretion to grant or deny voting rights restoration. As the current restoration application itself states, "[i]t is the prerogative of the Governor afforded him or her under the Kentucky Constitution to restore these rights."[4] There is nothing in the Kentucky Constitution, Kentucky statutes, Kentucky rules or regulations, or any other written, codified source of law that constrains the Governor's ultimate decision on whether to grant or deny a voting rights restoration application. There are also no reasonable, definite time limits in the Kentucky Constitution, Kentucky

[3] *See* Exhibit – Civil Rights Restoration Application, RE 57-1, Page ID#786-88, Division of Probation and Parole Application for Restoration of Civil Rights (revised Mar. 2020), https://corrections.ky.gov/Probation-and-Parole/Documents/Restoration%20of%20Civil%20Rights%20Application%20Final.pdf.

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

statutes, Kentucky rules or regulations, or any other written, codified source of law by which a determination must be made on these applications.

EO 2019-003 sorted the disenfranchised by their specific felony convictions and jurisdiction of conviction. First, it immediately restored the voting rights of Kentuckians who had completed their sentences for *Kentucky* state felony convictions except for certain expressly excluded offenses. Exhibit – EO 2019-003, RE 53–1, Page ID#763. This restoration was extended to eligible individuals who had satisfied the terms of their probation, parole, or service of sentence, exclusive of restitution, fines, and any other court-ordered monetary conditions. *Id*. The expressly excluded Kentucky offenses include: "a) Treason, b) Bribery in an election, c) A violent offense defined in KRS 439.3401, d) Any offense under KRS Chapter 507 or KRS Chapter 507A, e) Any Assault as defined in KRS 508.020 or KRS 508.040, f) Any offense under KRS 508.170, or g) Any offense under KRS 529.100." *Id*. Kentuckians convicted of crimes under federal law and felonies in other jurisdictions are also excluded from restoration under the executive order. *Id*. This provision effected the immediate restoration of voting rights for three of the seven Plaintiffs in the action: Plaintiffs Harbin, Comer, and Fox. Plaintiffs moved to voluntarily dismiss these three individuals on January 13, 2020, as their claims were moot. Motion to Dismiss Plaintiffs Harbin, Comer, and Fox's Claims, RE 53, Page ID#758–60. Plaintiffs noted in that motion that two of the four remaining unrestored

Plaintiffs had applications for discretionary restoration pending with the Governor's office: "Mr. Langdon and Mr. Petro applied for restoration of their voting rights during the previous Governor's administration; those applications are still pending." *Id*. at Page ID#759. The court granted this motion to voluntarily dismiss. Order Granting Motion to Dismiss Plaintiffs Harbin, Comer, and Fox's Claims, RE 54, Page ID#768. At no time, in that order or thereafter, did the court suggest that the action was moot or order Plaintiffs-Appellants to show cause why the action should not be dismissed as moot. No briefing, conference, or oral argument on the issue was ever requested.

While their then-co-plaintiffs' claims were dismissed, EO 2019-003 changed nothing for the other four Plaintiffs remaining in this action: Appellants Robert Calvin Langdon, Richard Leroy Petro, Jr., Bonifacio R. Aleman, and Deric James Lostutter. As to these individuals, restoration is not per se foreclosed, but rather may only be pursued through application to the Governor. EO 2019-003 states:

> Kentuckians convicted of crimes under Kentucky state law not meeting the criteria for automatic restoration as set forth in this Order, as well as Kentuckians convicted of crimes under federal law or the laws of jurisdictions other than Kentucky, may still make application for restoration of civil rights under guidelines provided by the Governor and the provisions of KRS 196.045.

Id. Indeed, the application for restoration of civil rights was updated in March 2020 in light of EO 2019-003.[5] Page 2 of the revised application makes clear that while people with certain felony convictions now qualify for restoration, everyone else does not and, therefore, must apply for the Governor's purely discretionary grant of restoration using the same application:

> **If not qualifying for Automatic Restoration, procedures to submit Application for Restoration of Civil Rights:**
>
> Offenders who do not meet criteria for automatic restoration may submit this application for restoration of civil rights for consideration by the Governor's Office pursuant to KRS 196.045.
>
> To apply for Restoration of Civil Rights under KRS 196.045, applicants shall meet the following eligibility criteria:
> - Received a final discharge or expiration of sentence.
> - Not have any pending charges, outstanding warrants, or indictments.
> - Not owe any outstanding restitution.[6]

Accordingly, by the clear text of the state's own restoration application, the discretionary restoration system challenged by Appellants' First Amendment claims is still very much alive and continues to govern whether they can regain their right to vote. Each of Appellants was convicted of a felony that bars them from voting

[5] *See* Exhibit – Civil Rights Restoration Application, RE 57-1, Page ID#786-88, Division of Probation and Parole Application for Restoration of Civil Rights (revised Mar. 2020), https://corrections.ky.gov/Probation-and-Parole/Documents/Restoration%20of%20Civil%20Rights%20Application%20Final.pdf.

[6] *Id.* at Page ID#788 (bold and underlining in original).

rights restoration under EO 2019-003 and, as such, they can only secure restoration by applying for and securing Appellee's purely discretionary grant of their applications. Per EO 2019-003 and Page 2 of the revised restoration application,[7] Appellants Petro and Lostutter are excluded from restoration because they were convicted of federal offenses. Petro Declaration, RE 46-5, Page ID#662; Lostutter Declaration, RE 46-9, Page ID#674. Appellee can, as a matter of Kentucky state law, restore their voting rights in his unfettered discretion. Appellants Aleman and Langdon were convicted of Kentucky state offenses excluded by EO 2019-003, first-degree robbery under Ky. Rev. Stat. § 515.020, which is defined as a violent offense, *see* Ky. Rev. Stat. § 439.3401(1)(n), and second-degree assault under Ky. Rev. Stat. § 508.020, respectively. Aleman Declaration, RE 46-6, Page ID#665; Langdon Declaration, RE 46-4, Page ID#659.[8] All four Appellants remain subject to a purely

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

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

[8] These felony convictions are listed in official, publicly-available Kentucky state court records, which are searchable online at https://kcoj.kycourts.net/kyecourts/Login, and not disputed by the parties. This Court may take judicial notice of these facts pursuant to Federal Rule of Evidence 201(b)(2).

discretionary and arbitrary restoration system that remains fully intact for people who are barred from restoration under EO 2019-003.

Eight months later, the court dismissed the action as moot sua sponte and denied the cross-motions for summary judgment. Opinion & Order Dismissing Fourth Amended Complaint, RE 55, Page ID#769–77; Judgment, RE 56, Page ID#778. The court found EO 2019-003's restoration requirements as to some individuals with felony convictions meant that the restoration system was no longer marked by unfettered discretion as to *any* Kentuckians with felony convictions, including those who still have to submit a voting rights restoration application, which the Governor may grant or deny in his unfettered discretion. The court stated that: "Plaintiffs seek a non-arbitrary system for restoring the franchise to convicted felons that is guided by objective criteria – it *appears that* they have received that relief." Opinion & Order Dismissing Fourth Amended Complaint, RE 55, Page ID#776 (emphasis added).

With respect, Appellants believed that the district court had misconstrued what EO 2019-003 did and did not do and so moved for reconsideration pursuant to Federal Rule of Civil Procedure 59. Motion for Reconsideration, RE 57, Page ID#779-85; *see Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000) ("[A] motion for reconsideration is appropriate where the court has misapprehended the facts, a party's position, or the controlling law."). This motion was Appellants'

first opportunity to brief the court on mootness. Briefing was completed on October 5, 2020. Response to Motion for Reconsideration, RE 58, Page ID#791–93; Reply to Response to Motion for Reconsideration, RE 59, Page ID#794–804. Seven months later on April 19, 2021, the court denied Plaintiffs-Appellants' motion. Opinion & Order Denying Reconsideration, RE 60, Page ID#807–13. Appellants filed their Notice of Appeal on May 4, 2021. Notice of Appeal, RE 61, Page ID#814–16.

SUMMARY OF ARGUMENT

This appeal concerns two constitutional claims brought by Kentuckians with felony convictions who are ineligible to vote by reason of their criminal records. Appellants contend that Kentucky laws that give Appellee sole and unfettered discretion to decide whether they may regain their right to vote and that lack reasonable, definite time limits by which the Governor must make those decisions, violate their First Amendment rights.

The district court erred in dismissing Appellants' complaint as moot and denying the parties' cross-motions for summary judgment as moot because Appellants remain disenfranchised and subject to the exact same arbitrary voting rights restoration process as when their claims were initially filed. The intervening change in the law upon which the district court relied—an executive order issued by Appellee in December 2019—did not in any way alter Kentucky's restoration

system *as to Appellants and other individuals who do not qualify for restoration under EO 2019-003*. Before the executive order, the only way Appellants could regain their right to vote was by submitting an application to the Governor, who has complete and unfettered discretion to grant or deny that application. After the executive order, the only way Appellants can regain their right to vote is by submitting an application to the Governor, who retains complete and unfettered discretion to grant or deny that application, unconstrained by any laws, rules, or criteria. Before the executive order, there were no reasonable, definite time limits by which Appellee must make a decision on these applications, and the executive order created none. Nothing in the law or facts as to Appellants has changed and, therefore, their case cannot be moot.

Moreover, the district court's order runs contrary to over eighty years of U.S. Supreme Court precedents on the unfettered discretion doctrine. The law is clear and settled: government officials may not be vested with unfettered discretion to grant or deny licenses or permits to engage in First Amendment-protected activity, such as voting. Imposing a threshold requirement that determines who must still submit to a purely discretionary and arbitrary licensing scheme—and who is exempt—does nothing to cure the First Amendment violation in subjecting the former group's First Amendment rights to a system of unfettered discretion. In effect, EO 2019-003 bifurcated Kentucky's voting rights restoration system such that individuals with

specific Kentucky felonies are immediately restored upon sentence completion while everyone else must secure the Governor's discretionary grant of restoration. Appellee has thus split Kentucky's disenfranchised population in two: restoring one group through the use of specific criteria, and preserving the exact same arbitrary voting rights restoration system for the other. Respectfully, the district court erred in concluding that curing the First Amendment violation for the former group necessarily cured it for the latter.

Allowing the district court's ruling to stand would eviscerate this longstanding and fundamental First Amendment rule. Such an unprecedented change would permit state and local officials to avoid liability and continue arbitrarily licensing any and all First Amendment-protected political and religious expression, so long as they impose any threshold requirement to determine who is subject to their arbitrary licensing scheme. State and local laws and regulations can be modified to exempt a subset of people from an arbitrary administrative scheme and issue licenses or permits to them in a non-discretionary manner. But that process will only be non-arbitrary and constitutionally valid as to those exempted; those who, like Appellants, must still pass through the arbitrary licensing process retain standing to challenge it on First Amendment grounds.

Finally, because the district court found that the intervening change in the law cured Appellants' alleged First Amendment violations, it reached the merits to

decide a jurisdictional question. In such circumstances, the court should have actually ruled on the merits instead of denying the case as moot. Sixth Circuit precedent authorizes this Court to consider the purely-legal merits of this action at this juncture, since remanding this case would not serve the interest of judicial economy. Alternatively, this case should be remanded for a decision on the constitutional merits, with a limited instruction that at least EO 2019-003 does not foreclose Appellants' claims on the merits.

ARGUMENT

I. Standard of Review

This Court reviews the dismissal of a case for mootness de novo. *Ammex, Inc. v. Cox*, 351 F.3d 697, 704 (6th Cir. 2003).

II. The district court erred in holding that Appellants' First Amendment challenges to Kentucky's discretionary voting rights restoration system for individuals with felony convictions became moot upon Appellee's issuance of Executive Order 2019-003, which restored disenfranchised individuals meeting specific criteria but preserved the same discretionary and arbitrary voting rights restoration system for all individuals not restored by the executive order, including Appellants.

a. Mootness Generally

Article III, Section 2 of the U.S. Constitution vests federal courts with jurisdiction to address "actual cases and controversies." *Coal. for Gov't Procurement v. Fed. Prison Indus., Inc.*, 365 F.3d 435, 458 (6th Cir. 2004) (citing U.S. Const. art III, § 2). A corollary of this bedrock requirement is that a plaintiff's

injury must not be wholly speculative, unripe, or moot. The Supreme Court has described mootness as "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Arizonans for Off. English v. Ariz.*, 520 U.S. 43, 68 n.22 (1997) (citation omitted). "'A federal court has no authority to render a decision upon moot questions or to declare rules of law that cannot affect the matter at issue.'" *U.S. v. City of Detroit*, 401 F.3d 448, 450 (6th Cir. 2005) (quoting *Cleveland Branch, N.A.A.C.P. v. City of Parma*, 263 F.3d 513, 530 (6th Cir. 2001)); *see also League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 473 (6th Cir. 2008) (explaining that mootness implicates Article III's "case or controversy" requirement and is a jurisdictional requirement).

The Supreme Court's test for mootness is straightforward. "[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496 (1969); *see also Ohio Citizen Action v. City of Englewood*, 671 F.3d 564, 581 (6th Cir. 2012) ("A case may become moot if, as a result of events that occur during pendency of the litigation, the issues presented are no longer 'live' or parties lack a legally cognizable interest in the outcome." (quoting *Campbell v. PMI Food Equip. Grp., Inc.*, 509 F.3d 776, 781 (6th Cir. 2007)) (internal quotation marks and citation omitted)). Federal courts are prohibited from rendering decisions that do "not affect the rights of the

litigants." *Coal. for Gov't Procurement*, 365 F.3d at 458 (citation omitted). This Court has also framed "[t]he test for mootness" as "'whether the relief sought would, if granted, make a difference to the legal interests of the parties.'" *McPherson v. Mich. High Sch. Athletic Ass'n, Inc.*, 119 F.3d 453, 458 (6th Cir. 1997) (alteration, citation, and quotation marks omitted).

A change in circumstances can of course moot an action, and voluntary repeal of a challenged law or an amendment that indisputably erases a constitutional defect may constitute such a change. *See Arizonans for Off. English*, 520 U.S. at 72; *Sullivan v. Benningfield*, 920 F.3d 401, 410 (6th Cir. 2019); *Hadix v. Johnson*, 144 F.3d 925, 933 (6th Cir. 1998), *overruled on other grounds by Miller v. French*, 530 U.S. 327, 338–39 (2000). This Court has explained that where "[l]egislative repeal or amendment of a challenged statute" "effectively nullifie[s]" a claim, then the case is moot. *Ky. Right to Life, Inc. v. Terry*, 108 F.3d 637, 644 (6th Cir. 1997). However, "where the changes in the law arguably do not remove the harm or threatened harm underlying the dispute, 'the case remains alive and suitable for judicial determination.'" *Cam I, Inc. v. Louisville/Jefferson Cnty. Metro Gov't*, 460 F.3d 717, 720 (6th Cir. 2006) (quoting *Hadix*, 144 F.3d at 933 (citation omitted)); *see also Benningfield*, 920 F.3d at 411 ("Put another way, before voluntary cessation of a practice could ever moot a claim, the challenged practice must have *actually ceased*." (emphasis in original)); *Hamilton Cnty. Educ. Ass'n v. Hamilton Cnty. Bd.*

of Educ., 822 F.3d 831, 835 (6th Cir. 2016) ("A controversy does not cease to exist merely by virtue of a change in the applicable law."); *Miller v. City of Cincinnati*, 709 F. Supp. 2d 605 (S.D. Ohio 2008), *aff'd*, 622 F.3d 524, 532 (6th Cir. 2010) (holding that city's amended regulation did not cure plaintiffs' constitutional injury, where it continued to provide officials with unfettered discretion to deny applications to use city hall building for First Amendment-protected activities, as had previous version); *Lamar Advert. of Penn, LLC v. Town of Orchard Park, N.Y.*, 356 F.3d 365, 378 (2d Cir. 2004) ("[A] plaintiff's claims will not be found moot where the defendant's amendments are merely superficial or the law, after amendment, suffers from similar infirmities as it did at the outset.").

Therefore, if the constitutional defects are not completely cured by the revised law, the action cannot be dismissed as moot. The Supreme Court and this Court's precedents have repeatedly emphasized this self-evident point:

> As the Supreme Court recognized in *Northeastern Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 113 S.Ct. 2297, 124 L.Ed.2d 586 (1993), where the new statute is substantially similar to the old statute and operates in "the same fundamental way," the statutory change has not "sufficiently altered [the circumstances] so as to present a substantially different controversy," and the case is not moot.

Hadix, 144 F.3d at 933 (citations omitted). In *Miller*, this Court found that a regulation restricting use of a city hall building for First Amendment-protected activities continued to provide officials unfettered discretion to reject applications to

use the space, even after the defendants amended it. 622 F.3d at 532–33. And in *Rosales-Garcia v. Holland*, this Court found that a habeas petition had not become moot where the petitioner's "detention" by the INS did not terminate upon his release:

> Although Rosales is not currently being detained, his immigration parole can be revoked by the INS at any time for almost any reason. Unlike parole granted following incarceration for a criminal conviction, Rosales need not do anything for the INS to revoke his parole; for instance, the INS can revoke Rosales's parole if it deems such revocation to be "in the public interest." *See* 8 C.F.R. § 212.12(h) (2002). Thus, Rosales's "release" into the United States does not constitute a termination of detention; it simply constitutes a reprieve from detention. Under these circumstances, we believe that Rosales is threatened with an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision.

322 F.3d 386, 395–96 (6th Cir. 2003).

b. The Nature of Appellants' First Amendment Claims

Decisions on mootness are, of course, highly fact- and claim-dependent, and so evaluating whether a claim is moot must begin with the details of the claim itself. Appellants' first cause of action applies the well-settled precedents of the First Amendment unfettered discretion doctrine to the right to vote, which is protected by the First Amendment as a means of political expression and association. Appellants alleged the following constitutional defects are: (1) Appellee's arbitrary decisionmaking over the right to vote, which is First Amendment-protected political

expression and association; and (2) the lack of reasonable, definite time limits in which Appellee must grant or deny voting rights restoration applications.

The Supreme Court has long held that, as a means for citizens to associate with political parties, ideas and causes, voting is protected by the First Amendment. *Cal. Democratic Party v. Jones*, 530 U.S. 567, 574 (2000); *Norman v. Reed*, 502 U.S. 279, 288–90 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 787–89, 806 (1983); *Kusper v. Pontikes*, 414 U.S. 51, 56–58 (1973); *Williams v. Rhodes*, 393 U.S. 23, 30–31 (1968). The First Amendment also protects voting as a form of expressive conduct, just as it protects expressions of support for candidates, parties, and causes, regardless of the format or medium. *City of Ladue v. Gilleo*, 512 U.S. 43, 54–59 (1994) (political yard signs); *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979) (describing ballot access restrictions as "impair[ing] the voters' ability to express their political preferences"); *Buckley v. Valeo*, 424 U.S. 1, 48 (1976) (advocacy for election or defeat of candidates). It would be absurd if all forms of speech and expression in the electoral context were protected by the First Amendment, but not the political choice and expression at the very center of it—voting.

To safeguard against viewpoint discrimination, the First Amendment forbids giving government officials unfettered discretion to grant or deny licenses or permits to engage in any First Amendment-protected speech, expressive conduct,

association, or other protected activity. *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 130–33 (1992). Since 1938, the Supreme Court has consistently applied this doctrine to strike down administrative licensing regimes that conferred limitless discretion across a wide range of First Amendment freedoms. In *City of Lakewood v. Plain Dealer Publishing Company*, the Supreme Court invalidated an ordinance containing "no explicit limits on the mayor's discretion" to grant or deny permit applications for newspaper distribution. 486 U.S. 750, 769–72 (1988). This made the process vulnerable to the "use of shifting or illegitimate criteria" and viewpoint discrimination. *Id*. at 757–58. "This danger [of viewpoint discrimination] is at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official." *Id*. at 763; *see also Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150–51 (1969) (invalidating permit scheme for civil rights marches or demonstrations that lacked "narrow, objective, and definite standards" and was "guided only by [Commissioners'] own ideas of 'public welfare, peace, safety, health, decency, good order, morals or convenience'"); *Staub v. City of Baxley*, 355 U.S. 313, 321–22 (1958) (invalidating permit scheme for union solicitation because it made First Amendment-protected conduct "contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official"); *Saia v. New York*, 334 U.S. 558, 560–62 (1948) (striking down discretionary permit scheme for use of

loudspeakers). These precedents are legion and consistent. They all hold that a law conferring arbitrary, unfettered power to grant or deny a license to engage in constitutionally-protected expression violates the First Amendment.

Cases that specifically consider the right to vote, including felon disenfranchisement and reenfranchisement laws, support the conclusion that arbitrarily licensing the right to vote is unconstitutional. Arbitrarily giving select individuals the right to vote violates the Constitution. The Supreme Court made that plain in *Louisiana v. United States* when it wrote that, "The cherished right of people in a country like ours to vote cannot be obliterated by the use of laws like this, which leave the voting fate of a citizen to the passing whim or impulse of an individual registrar." 380 U.S. 145, 150–53 (1965); *see also Baker v. Carr*, 369 U.S. 186, 208 (1962) ("A citizen's right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution . . . "). Arbitrary disenfranchisement is similarly unlawful. *Shepherd v. Trevino*, 575 F.2d 1110, 1114 (5th Cir. 1978); *Owens v. Barnes*, 711 F.2d 25, 26–27 (3d Cir. 1983) ("[T]he state could not disenfranchise similarly situated blue-eyed felons but not brown-eyed felons."); *Williams v. Taylor*, 677 F.2d 510, 515–17 (5th Cir. 1982) (remanding for trial on equal protection challenge to "selective and arbitrary enforcement of the disenfranchisement procedure"). Therefore, it inexorably follows that a state may not arbitrarily *restore* the right to vote to select individuals.

This case's facts are not materially different from the unconstitutional licensing schemes struck down in the above First Amendment cases. In all of these cases, no one can engage in the specific type or manner of constitutionally-protected activity without first obtaining a license or permit and will face criminal sanctions if they do so. Similarly, in Kentucky, a class of individuals cannot register and vote without first obtaining a license or permit—an executive official's discretionary grant of restoration—and will be prosecuted if they do so. KY. REV. STAT. §§ 119.025, 532.020(1)(a) (unlawfully registering to vote a Class D felony). Kentucky law simply requires a certain subset of U.S. citizen adults to obtain a state official's permission—a license—prior to registering and voting.

Two different, successive Governors named as defendants in this case have both failed to identify any objective rules or criteria that govern their decisions as to whether to grant or deny voting rights restoration applications. In Appellants' view, for those individuals compelled to apply for voting rights restoration, the First Amendment prevents the Governor from making the latter case-by-case restoration decisions in a purely discretionary, arbitrary manner. In the course of this litigation, Governor Beshear and the state's previous Governor, Governor Bevin, have never identified any rules and criteria governing their decisions on restoration applications. That is because none exist. At the October 24, 2019 status conference, Appellee's counsel conceded that there are no uncodified rules or criteria in any other source of

binding legal authority: "[T]here is no secret . . . non-public binding anything that guides the Governor's discretion." Transcript, RE 45, Page ID#617-18. Appellee, therefore, has absolute discretion to grant or deny a voting rights restoration application, and Appellants filed suit to enjoin this system, requesting that the district court order the Governor to replace it in a timely manner with a non-arbitrary voting rights restoration system governed by specific, objective, neutral, and uniformly-applied rules and criteria.

In EO 2019-003, Appellee has of course promulgated a set of criteria to restore certain Kentuckians, but those criteria have nothing to do with the decisions Appellee makes on the applications affirmatively submitted by those who do not qualify for restoration under the executive order. For the latter group, Kentucky law remains just as devoid of rules or criteria governing voting rights restoration as it did before the executive order was issued. Because Appellants have asserted facial challenges, they suffer an injury from the arbitrariness of the state's voting rights restoration system; whether or not the requested injunctive relief to create a non-arbitrary system ultimately would result in their personal reenfranchisement is irrelevant. *See Forsyth Cnty.*, 505 U.S. at 133 n.10 ("Facial attacks on the discretion granted a decisionmaker are not dependent on the facts surrounding any particular permit decision."). Accordingly, Kentucky's arbitrary voting rights restoration system for the many individuals categorically excluded from restoration under EO

2019-003 including those convicted of any federal or out-of-state offense, such as Appellants, continues to violate the First Amendment. In other words, they continue to suffer an injury, traceable to Appellee's conduct, that can be redressed by a favorable ruling. *See Gill v. Whitford,* 138 S. Ct. 1916, 1929 (2018).

The foregoing makes plain that the unfettered discretion Appellants challenged in their suit has not been cured or eliminated. As discussed above, and as with any other claim, an intervening change in the law can of course defeat a First Amendment unfettered discretion claim but it must actually "cure[ ] the constitutional deficiencies." *Outdoor Media Grp., Inc. v. City of Beaumont*, 506 F.3d 895, 901 (9th Cir. 2007). There are numerous cases in which a city council or other governmental entity revises its licensing or permit regulations in response to First Amendment litigation. In those cases, that new ordinance will impose objective rules and criteria or otherwise eliminate discretion, rendering the licensing of First Amendment-protected conduct or expression non-arbitrary and curing the constitutional violation. For example, in *Craft v. Village of Lake George New York*, after the plaintiff challenged the Mayor's unfettered discretion in issuing seasonal permits, the village board amended its code, and summary judgment was entered in its favor. 39 F. Supp. 3d 229, 240 (N.D.N.Y. 2014). The court explained that "the new Village Code imposes *a set of clearly defined criteria* for granting or denying a seasonal permit, which tends to significantly undermine [the plaintiff's] argument

regarding the unbridled discretion afforded to the Mayor as decisionmaker." *Id.* (emphasis added). Similarly, in *Coral Springs Street Systems, Inc. v. City of Sunrise*, the Eleventh Circuit reversed and remanded a First Amendment unfettered discretion claim with instructions to dismiss the case as moot, upon finding that "[t]he Amended Sign Code [did] not grant unbridled discretion to officials reviewing applications for sign permits" because it "specifically provide[d] that '[t]he department shall approve or deny the sign permit based on whether it complies with the requirements'" of the code. 371 F.3d 1320, 1346 (11th Cir. 2004).

By contrast, in *Miller*, this Court held that the plaintiffs had standing and that their unfettered discretion claim against a Cincinnati city government regulation was not moot after the city amended the regulation at issue. 622 F.3d at 532–33. The initial regulation stated:

> No private business enterprises or solicitations should be permitted in City buildings or operated therefrom. Exceptions should be made only by specific approval of the Department Head when it is judged to be in the public interest, as in the case, for example, of the United Way Campaign.
>
> No private signs or advertising materials should be displayed on or in City buildings unless for an approved public purpose authorized by the Department Head.

Id. at 529. It further "urged" Department Heads "to consider not only what is proper, but also how it appears to the public" when granting exceptions. *Id.* After the plaintiffs filed suit, the city amended the regulation to read:

> The interior spaces of City Hall are reserved for use by the Mayor, the City Manager and his assistants, City Councilmembers, City Department Directors, City Commissions and Boards, and City employees. The interior of City Hall is open to the public for purposes of visiting City officers and attending City Council and other public meetings. The interior of City hall is not generally available to the public for other purposes.
>
> When the Mayor, City Manager and his assistants, City Councilmembers, City Department Directors, and City Commissions and Boards intend to use interior spaces of City Hall for assemblages, they should notify the Facilities Management Division of the Public Services Department . . .

Id. at 530. The new regulation therefore required private groups to obtain sponsorship from city officials with authority to use the interior space in order to hold gatherings there and gave officials "full and independent discretion" to grant or withhold sponsorship. *Id.* at 531. On appeal, the city argued that plaintiffs lacked standing because they had not sought sponsorship under the new regulation, *id.*, and that their claim was moot because "the city manager requested that authorized officials not schedule assemblages in the interior front lobby and stairs of city hall." *Id.* at 533.

The Court rejected both arguments. With respect to standing, it noted that "both the original and revised versions of Administrative Regulation # 5 afford authorized officials precisely this kind of unfettered discretion in deciding whether to sponsor an event in the interior of city hall" and that "when a plaintiff's protected-speech activities are subject to restriction at the government's unfettered discretion,

the plaintiff has suffered an injury in fact." *Id.* at 532. The Court held that the plaintiffs' claim was not moot because the city did not dispute that interior areas of the building remained available to individuals who could obtain sponsorship. *Id.* at 533. Thus, as here, the plaintiffs' unfettered discretion claim continued to present a live case or controversy because the amended regulation continued to subject their ability to speak to government officials' unrestrained discretion.

Appellants' second claim relies upon a closely-related First Amendment rule. Kentucky's voting rights restoration scheme also lacks any reasonable, definite time limits by which Appellee must make a decision to grant or deny a restoration application. This also violates the First Amendment. The Supreme Court also has held that a licensing scheme "that fails to place limits on the time within which the decisionmaker must issue the license is impermissible." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 226 (1990). This is because "[w]here the licensor has unlimited time within which to issue a license, the risk of arbitrary suppression is as great as the provision of unbridled discretion." *Id*. at 227; *Riley v. Nat'l Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781, 802 (1988) (same); *East Brooks Books, Inc. v. City of Memphis*, 48 F.3d 220, 224 (6th Cir. 1995) ("Failure to place time limitations on a decision maker is a form of unbridled discretion."). Without fixed, neutral time limits, there is a significant risk of arbitrary or discriminatory treatment of pending applications. And of course, a claim for reasonable definite time limits is

only mooted once such limits are put in place. *See, e.g., Tanner Advert. Grp., L.L.C. v. Fayette Cnty.*, 451 F.3d 777, 790 (11th Cir. 2006) ("[The plaintiff's] complaint that the 1998 Sign Ordinance lacks time limits for decisions and appeals is no longer 'live,' because the 2005 Sign Ordinance requires the Zoning Administrator to grant or deny a permit within thirty days . . .") (internal citation omitted).

c. This Case Is Not Moot.

The district court first erred in failing to apply the specific tests the Supreme Court and this Court have set forth for assessing whether a case is moot. Opinion & Order Dismissing Fourth Amended Complaint, RE 55, Page ID#773. Applying those standards, it becomes clear that the issues presented in this action remain "live," and Appellants have "a legally cognizable interest in the outcome." *Powell*, 395 U.S. at 496. Appellants are still subjected to an administrative licensing scheme that gives Appellee absolute and arbitrary power to restore First Amendment-protected voting rights. Under the unfettered discretion doctrine, Appellants suffered an injury before EO 2019-003 issued, and they continue to suffer the exact same injury after EO 2019-003. Indeed, nothing has changed in the law or facts as to Appellants and all other individuals excluded from restoration under EO 2019-003. Accordingly, it still holds that "the relief sought would, if granted, make a difference to the legal interests of the parties." *McPherson*, 119 F.3d at 458 (citation and quotation marks omitted).

Standing and the merits are of course distinct. Even if a federal court does not think a plaintiff's claim can ultimately prevail, that does not mean the case is moot. This Court has noted that even

> "[a] bad theory (whether of liability or of damages) does not undermine federal jurisdiction." *Gates* [*v. Towery*, 430 F.3d 429, 432 (7th Cir. 2005)]. "[T]he absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts' statutory or constitutional *power* to adjudicate the case." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998); *see Bell v. Hood*, 327 U.S. 678, 682, 66 S. Ct. 773, 90 L. Ed. 939 (1946) ("Jurisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction.").

Hrivnak v. NCO Portfolio Mgmt., 719 F.3d 564, 568 (6th Cir. 2013) (emphasis in original). The question then is whether an intervening change in the facts or law has made it such that Appellants no longer have a legally cognizable interest in the relief they sought—a non-arbitrary voting rights restoration system with reasonable, definite time limits. As this Court has stated, if "the changes in the law arguably do not remove the harm or threatened harm underlying the dispute," then "the case remains alive and suitable for judicial determination." *Cam I, Inc.*, 460 F.3d at 720 (citation and quotation marks omitted).

The district court's essential conclusion was that Appellee's imposition of objective criteria for the restoration of a subset of people with felony convictions renders the *totality* of Kentucky's voting rights restoration laws and procedures non-

arbitrary. With respect, this is not so. As previously summarized in the Statement of the Case, Appellee's EO 2019-003 immediately restored people with qualifying Kentucky felony convictions but preserved the discretionary restoration system unamended for those who have been convicted of (1) specific, categorically-excluded Kentucky offenses, (2) out-of-state offenses, and (3) federal offenses. It bears highlighting that the executive order did *not* restore all people with felony convictions; nor did it end the other restoration process or system that the Governor administers, granting or denying applications on a case-by-case basis relying solely on his judgment or opinions, not any set of codified, objective, and uniformly-applied laws, rules, or criteria. As to all individuals excluded from restoration under EO 2019-003, including Appellants, there are no objective rules and criteria for non-discretionary, non-arbitrary restoration, and Appellee retains sole and unfettered discretion to select which felons may once again exercise their right to vote. There are thus zero constraints on Appellee's power to restore voting rights under Section 145 of the Kentucky Constitution. KY. CONST. § 145. Because Appellee has unfettered discretion to make these decisions for all Kentuckians left unrestored after EO 2019-003, including Appellants, there is a live case or controversy as to whether that specific process violates the First Amendment unfettered discretion doctrine.

Consequently, this action cannot be moot because nothing in the law or facts has changed *as to these four Appellants*. They could only be restored by the

Governor's purely discretionary restoration application process prior to EO 2019-003 and, after EO 2019-003, they remain disenfranchised and can still only be restored by Appellee's purely discretionary restoration application process. Appellee can still deny applications based on an applicant's race, religion, political affiliations, or any other impermissible consideration, while citing wholly pretextual reasons for their denial; the applications can also be denied simply based on whim and for no reason. Before EO 2019-003, there were no reasonable, definite time limits by which the Governor must act on these applications, and there are still none. To be sure, there has been an intervening change in the law, but it effected zero material changes *as to Appellants and all those excluded from restoration under EO 2019-003*. These individuals remain subject to an arbitrary voting rights restoration process no different from the arbitrary administrative licensing schemes that have been struck down for decades under the First Amendment unfettered discretion doctrine.

By operation of EO 2019-003, Kentucky now effectively has two voting rights restoration systems: non-discretionary restoration for people who have committed specific Kentucky state felonies and a completely discretionary restoration system for everyone else. The first system, a set of requirements that triggers restoration, of course requires no affirmative application or grant from Appellee, while the second system requires the person with an ineligible felony conviction to submit a voting

rights restoration application to Appellee, who has total discretion to grant or deny these applications unbounded by any laws, rules, or criteria. The former system is irrelevant to the further proceedings of this case, and Appellants remain injured by and entitled to challenge the discretionary and arbitrary voting rights restoration system—the only one that has ever applied to them.[9]

The district court erred in characterizing this legal change as voluntary cessation of an unlawful practice, *see* Opinion & Order Dismissing Fourth Amended Complaint, RE 55, Page ID#775, because—*as to all disenfranchised felons in Kentucky not restored by EO 2019-003, including Appellants*—the Governor's completely discretionary and arbitrary restoration of voting rights has not ceased. EO 2019-003 did remove a swath of Kentucky's disenfranchised from the arbitrary restoration system. But for those categorically excluded from restoration by the executive order, this purely discretionary restoration system has not changed one iota. The "capable of repetition but evading review" exception to mootness is similarly inapposite where the constitutional injury to Appellants is ongoing and has never stopped. Opinion & Order Dismissing Fourth Amended Complaint, RE 55, Page ID#775–76.

[9] Ultimately, it is irrelevant whether the discretionary, arbitrary restoration process is considered separate and distinct from EO 2019-003's restoration scheme, or a component part or branch of Kentucky's voting rights restoration system. Either way, purely-discretionary arbitrary restoration is alive in Kentucky, and so is this case and controversy challenging it on First Amendment grounds.

Where the facts and the law hold constant as to the litigants, a case cannot be moot. *See, e.g.*, *Sable Commc'ns of Cal., Inc. v. F.C.C.*, 492 U.S. 115, 123 n.5 (1989) ("Since the substantive prohibitions under this amendment remain the same, this case is not moot."); *Kentucky Riverkeeper, Inc. v. Rowlette*, 714 F.3d 402, 406 (6th Cir. 2013) ("[W]hen an expired permit's conditions remain in effect, so too does the case and controversy."); *Miller*, 709 F. Supp. 2d at 618 (finding claims not moot where "the current version" of the regulation was "no different from Defendants' interpretation and application of the previous [regulation]"), *aff'd*, 622 F.3d at 532 ("[B]oth the original and revised versions of Administrative Regulation # 5 afford authorized officials precisely this kind of unfettered discretion . . ."). Accordingly, as to *all disenfranchised felons in Kentucky not restored by EO 2019-003, including Appellants*, this case is not moot.

This point is echoed by federal courts nationwide. *See Kescoli v. Babbitt*, 101 F.3d 1304, 1309 (9th Cir. 1996) (appeal of mining permit not moot where offensive permit condition was included in subsequent permit without material modification); *Religious Sisters of Mercy v. Azar*, No. 3:16-CV-00386, 2021 WL 191009, at *21 (D.N.D. Jan. 19, 2021), *judgment entered sub nom. Religious Sisters of Mercy v. Cochran*, No. 3:16-CV-00386, 2021 WL 1574628, at *21 (D.N.D. Feb. 19, 2021) (holding that plaintiffs' RFRA and Spending Clause claims against federal laws compelling them to perform and provide insurance coverage for gender transitions

were not moot "because nothing has changed since the Plaintiffs submitted their amended complaints" and "the challenged legal regime has stayed constant since this litigation recommenced"); *Braggs v. Dunn*, 321 F.R.D. 653, 663 (M.D. Ala. 2017) ("[N]othing has changed with respect to the allegations of these prisoners—the claim of the proposed settlement class presented a live case or controversy against the Department, and their claim was not moot."); *Treesh v. Taft*, 122 F. Supp. 2d 881, 883–85 (S.D. Ohio 2000) (finding plaintiffs' facial and as-applied challenges not moot where "essence of both of Plaintiffs' challenges to the policy [on death row prisoner's last statements] remain[ed] unchanged by the 1998 revisions to the policy").

The parties appear to agree on the basic facts in play here: that there is a group of people in Kentucky who are (1) disenfranchised by reason of their felony convictions, (2) ineligible for restoration under EO 2019-003, and (3) only able to secure restoration of their First Amendment-protected right to vote by application to the Governor, who retains absolute discretion to grant or deny those applications. Appellee has not disputed any of those facts. What *is* in dispute is whether the restoration criteria outlined in EO 2019-003 nevertheless moot or cure Appellants' First Amendment claims, and neither the district court nor Appellee has explained

how those criteria can be both wholly inapplicable to Appellants and others excluded from EO 2019-003's restoration provisions and yet also moot their claims.[10]

If, instead of preserving the discretionary restoration system, EO 2019-003 had permanently and irreversibly disenfranchised individuals convicted of the excluded Kentucky, out-of-state, and federal offenses, then this First Amendment unfettered discretion challenge would clearly fail. Indeed, if the Governor had categorically barred Appellants from seeking restoration, this case would be moot. But Appellee did not do that. While Governor Beshear has the power to permanently disenfranchise, that power does not enable him to arbitrarily choose which felons may once again vote. "[I]n a host of other First Amendment cases," the Supreme Court has rejected the "'greater-includes-the-lesser'" argument, striking down arbitrary licensing schemes with "open-ended discretion . . . even where it was

[10] The district court may still conclude that the discretionary restoration process no longer violates the First Amendment in light of EO 2019-003's restoration criteria, but that would be a decision *on the merits*, not a finding that the court lacks jurisdiction due to mootness. *See Hrivnak*, 719 F.3d at 570 ("The defendants may be right, but each argument goes to the merits of [the plaintiff's] claims, and the merits of those claims are not so insubstantial as to deprive the court of jurisdiction."). A finding of mootness would mean that Appellants have no legally cognizable interest in seeking to impose rules and criteria to make this arbitrary restoration process non-arbitrary. Appellee may argue that EO 2019-003's restoration criteria apply to discretionary restoration (they do not) or that Appellants have already been afforded "all the First Amendment requires," Response to Motion for Reconsideration, RE 58, Page ID#792, but these are merits arguments, not arguments for mootness, and they necessitate a ruling on the merits of the cross-motions for summary judgment. Appellee believes Appellants should *lose*, but that does not mean the claim is *moot*. *See infra* Section III.

assumed that a properly drawn law could have greatly restricted or prohibited the manner of expression . . .” *City of Lakewood*, 486 U.S. at 766.[11]

EO 2019-003 is merely a starting point or threshold inquiry, not the sum total of Kentucky’s voting rights restoration laws and procedures. If a person qualifies for immediate restoration under EO 2019-003, they are restored and that is all they will ever experience of Kentucky’s voting restoration system; this non-arbitrary set of categorical rules does not violate the First Amendment unfettered discretion doctrine as to those restored by the executive order. However, the balance of Kentucky’s laws on restoration continue to violate the First Amendment as to all other individuals. If a person was convicted of a felony that is per se disqualified under EO 2019-003, barring them from restoration, that individual then enters the preexisting discretionary restoration process and can only regain their voting rights if the Governor approves their restoration application.

[11] The First Amendment of course permits time, place, and manner restrictions that may categorically exclude some speakers, such as minors in certain contexts. For instance, in the voting context, state voting eligibility laws do not violate the First Amendment by setting the minimum age at 18, but these laws surely would violate the unfettered discretion doctrine if they permitted 16- and 17-year-olds to submit right-to-vote applications, along with their high school transcripts, to state or county election officials and gave those officials unlimited discretion to selectively grant or deny them the right to vote. Such arbitrary decision-making authority over the right to vote would clearly violate the First Amendment. *See Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981) (noting arbitrariness is “inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view”).

Because EO 2019-003 *immediately* restores voting rights to Kentuckians with covered felonies, the *only* remaining disenfranchised Kentuckians who will necessarily be subjected to the challenged arbitrary restoration process are those whose offenses make them ineligible for restoration under the executive order. Those restored by EO 2019-003 of course cease to be disenfranchised felons. They are now *reenfranchised, eligible voters* and, going forward, absent a new felony conviction, will not be subject to any restoration system whatsoever. New individuals satisfy the executive order's criteria for restoration every week, freeing them from the arbitrary restoration system and mooting the First Amendment violation *as to themselves.* But for disenfranchised felons who must apply for their restoration, their applications will be granted, denied, or ignored by the Governor whose decisions are unconstrained by objective rules and criteria. There remains a live case or controversy as to whether requiring these individuals to apply for and secure restoration that is bestowed in Appellee's unfettered discretion violates the First Amendment. Because this purely discretionary and arbitrary restoration process is precisely what Appellants challenged on First Amendment grounds and because this process remains unaltered—except to the limited extent that it now applies to many but fewer than all people with felony convictions in Kentucky—this lawsuit is not moot.

Ultimately, with respect, this is where the district court erred—in conflating the previously reenfranchised with those who must still secure Appellee's discretionary grant of restoration to end their disenfranchisement. The district court erred in concluding that curing the First Amendment violation for the former group necessarily cured it for the latter. Absent from the court's decision was any explanation as to how the intervening change in Kentucky law renders the state's voting rights restoration scheme non-arbitrary and consistent with the First Amendment as to *all* disenfranchised felons seeking voting rights restoration in Kentucky, including Appellants, such that their constitutional claims have become moot. The district court appeared to sidestep this problem by concluding that Appellants could only retain "a personal stake in the outcome of the lawsuit," *Spencer v. Kemna*, 523 U.S. 1, 7 (1998) (citation and internal quotation marks omitted), if their prayer for relief in the complaint sought *their own* voting rights restoration. *See* Opinion & Order Dismissing Fourth Amended Complaint, RE 55, Page ID #776 ("[T]heir claims are nonetheless moot because their suit does not seek their own re-enfranchisement."). However, again with respect, that misconstrues the nature of Appellants' *facial* First Amendment challenges.

The Supreme Court has explained that "[f]acial attacks on the discretion granted a decisionmaker are not dependent on the facts surrounding any particular permit decision." *Forsyth Cnty.*, 505 U.S. at 133 n.10. The existence of an actual,

improper discriminatory or biased motive 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.*; *Prime Media, Inc. v. City of Brentwood*, 485 F.3d 343, 351 (6th Cir. 2007) ("[A] licensing provision coupled with unbridled discretion itself amounts to an actual injury.") (internal quotation marks and citations omitted); *see also Roach v. Stouffer*, 560 F.3d 860, 869 & n.5 (8th Cir. 2009) (holding that pro-life group "need not prove, or even allege" viewpoint discrimination in successful facial First Amendment challenge to officials' "unbridled discretion" in administering specialty license plate program,). Regardless of whether or how often it is exercised, and regardless of the disposition of any particular license or permit application, the power to discriminate is prohibited: such unfettered power is per se unlawful in the First Amendment context.

Therefore, according to the Supreme Court's and this Court's precedents, Appellants per se continue to suffer a constitutional injury under the First Amendment unfettered discretion doctrine—and the corollary requirement of reasonable, definite time limits—so long as they are subjected to a system of unfettered discretion with no reasonable, definite time limits. These are facial challenges to the lack of laws, rules, or criteria constraining official discretion in

issuing a license, not as-applied actions. Appellants' requested injunction seeks a non-arbitrary voting rights restoration system, regardless of whether it results in their personal reenfranchisement. There are innumerable possible restoration rules and criteria that would be non-arbitrary and thereby cure these constitutional defects. Under some of those possible non-arbitrary restoration systems that Appellee could impose in response to this lawsuit (or in compliance with an injunction), Appellants would be restored, while under others, they would not. EO 2019-003 split the plaintiffs into three restored and four still-disenfranchised and subject to the discretionary system, and a new non-arbitrary restoration system could of course split the remaining four Appellants, restoring some but not all of them. However, under all such non-arbitrary systems, Appellants would no longer be subjected to an unconstitutional arbitrary licensing scheme in violation of the First Amendment. Such relief would make a clear difference to Plaintiffs' legal interests under the Constitution, *regardless* of whether or not the new objective rules and criteria resulted in their own restoration immediately or ever. *See Grant, Konvalinka & Harrison, PC v. Banks (In re McKenzie)*, 716 F.3d 404, 421 (6th Cir. 2013) ("Absent a showing that the relief sought would make *no difference* to the legal interests of the parties, we cannot conclude that the appeal should be dismissed as moot." (emphasis added) (internal citation omitted)).

This is consistent with other well-developed constitutional doctrines. Equal protection cases, for instance, are replete with challenges to systemic unconstitutionality that were decided on the merits, even if a constitutionally valid system might not have resulted in, for instance, the plaintiff's admission to a university or the awarding of a government contract to the plaintiff. *See, e.g.*, *Gratz v. Bollinger*, 539 U.S. 244, 262–63 (2003) (premising standing on "opportunity to compete for admission on an equal basis"); *Ne. Fla. Chapter, Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993) (holding association challenging ordinance that gave preferential treatment to certain minority-owned businesses in award of city contracts did not need to show that one of its members would have received a contract absent ordinance in order to establish standing and noting injury in fact is "the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit").

This may seem like a novel or idiosyncratic situation, but the district court's ruling, if affirmed, would work a radical change in a legal doctrine that protects the most fundamental of constitutional rights. The First Amendment doctrine upon which Appellants have relied has had an extremely broad reach and, for over eighty years, has safeguarded the speech and expression of countless ideologically, politically, and religiously diverse individuals and groups from across the spectrum. Upending this First Amendment rule would have severely negative and far-reaching

consequences for the future of political and religious speech, expression, and conduct in America.

As just one of countless hypothetical examples of how this ruling would eviscerate this First Amendment rule, Appellants point this Court to the Eighth Circuit's decision in *Roach v. Stouffer*, 560 F.3d 860 (8th Cir. 2009). In that case, a Missouri pro-life group's application for a "Choose Life" specialty license plate was denied, and it challenged and secured an injunction against the statutory provision that gave the state's Joint Committee on Transportation Oversight "unbridled discretion" to grant or deny such applications. 560 F.3d at 869–70. This of course violated the First Amendment because it allowed the agency to deny a specialty license plate application for any reason or "based solely on the organization's viewpoint." *Id*. at 870. Indeed, unfettered discretion gives officials the power to discriminate and selectively choose preferred speakers without disclosing their true reasons. *Id*. ("Because section 21.795(6) allows the Joint Committee unbridled discretion to determine who may speak based on the viewpoint of the speaker, we find that section 21.795(6) allows for viewpoint discrimination and is therefore unconstitutional."); *see also Trewhella v. City of Findlay*, 592 F. Supp. 2d 998, 1006 (N.D. Ohio 2008) (invalidating city's "All Events Policy," which had been applied against pro-life protestors, because it lacked "any criteria" for issuing a permit and

granted Mayor and Safety Director "sole and absolute authority over administering" it).

If the district court's interpretation of this First Amendment doctrine is allowed to stand, all cases justifiably attacking a state or local body's arbitrary power over protected political speech, brought by pro-life, civil rights, environmental, gun rights or any other advocacy groups, would be easily defeated. Indeed, all such First Amendment unfettered discretion cases could be easily extinguished, and the doctrine itself would become a dead letter. Under the district court's ruling in this case, to defeat the First Amendment claim in *Roach*, the Missouri legislature or the state agency could have simply enacted or promulgated a new requirement or criterion that siphoned off some specialty license plate applicants for preferential, non-discretionary, and non-arbitrary treatment. For instance, a new Missouri law could have been enacted mandating that the Joint Committee on Transportation Oversight automatically approve any application for a college sports-related license plate, while retaining a purely-discretionary and arbitrary decision-making process for all other applicants. This of course would not cure the First Amendment violation because the state agency would retain unfettered discretion in evaluating all applications *other than* those related to college sports. Whether this new requirement is characterized as a threshold inquiry, *i.e.*, the first step in a decision tree, or as a bifurcation of the administrative licensing scheme into distinct non-discretionary

and discretionary systems, the revised specialty license plate program would still violate the First Amendment just as surely as the prior version did.

All legal interpretation must avoid absurd results. *United States v. Turkette*, 452 U.S. 576, 580 (1981) ("[A]bsurd results are to be avoided . . ."). With respect, the above hypothetical demonstrates that, if adopted, the district court's holding would yield an absurd result that would effectively spell the end of one of the most significant rules protecting First Amendment freedoms from arbitrary government control.

Finally, Appellants' second claim, a First Amendment challenge to the lack of reasonable, definite time limits for rendering a decision on voting rights restoration applications, is also not moot. Not only does EO 2019-003 fail to set rules or criteria for the Governor's disposition of voting rights restoration applications submitted by those ineligible for restoration under the executive order, but it also fails to set any reasonable, definite time limits by which such determinations must be made.

III. After reaching and deciding the merits of Appellants' First Amendment claims, the district court should not have dismissed the action on jurisdictional grounds as moot. This Court may rule on the purely-legal merits; in the alternative, it should reverse and remand with a limited instruction that EO 2019-003 does not foreclose this action on the merits.

Because the district court found that the intervening change in the law cured the First Amendment violations Appellants alleged, the court should have granted

and denied, respectively, the parties' cross-motions for summary judgment on the merits, instead of dismissing the action as moot. One of the Supreme Court's leading cases on disentangling mootness from the merits is *Chafin v. Chafin*, 568 U.S. 165 (2013). In that case, the Eleventh Circuit had dismissed an international custody dispute as moot when the mother moved back to Scotland with the child. *Id*. at 169. The Supreme Court reversed, finding that an argument that "goes to the . . . legal availability of a certain kind of relief" "confuses mootness with the merits." *Id*. at 174. The Court explained that the father's "prospects of success are . . . not pertinent to the mootness inquiry." *Id*. Indeed, "a case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party. As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Id*. at 172 (internal citations and quotation marks omitted).

This Court has also underscored that mootness, an application of Article III standing doctrine, should not be confused or conflated with the legal merits of a case. *Grant, Konvalinka & Harrison, PC*, 716 F.3d at 421 (citation omitted) ("[C]are must be taken not to confuse mootness with the merits."); *see also Moore v. Lafayette Life Ins. Co.*, 458 F.3d 416, 443–45 (6th Cir. 2006) (noting the confusion that often ensues when "standing and merits questions converge"); *Primax Recoveries, Inc. v. Gunter*, 433 F.3d 515, 518 (6th Cir. 2006) (noting Supreme Court has admonished

courts to use the term "jurisdiction" with "more precision"). "To rule on whether [the plaintiff] is entitled to a particular kind of relief is to decide the merits of the case." *Hrivnak*, 719 F.3d at 570. Other federal courts have also recognized that where the question of mootness turns on an evaluation of the merits, the jurisdictional question is eclipsed by the merits, and the latter must be reached and decided:

> [U]nder the mootness doctrine, "a superseding statute or regulation moots a case only to the extent that it removes challenged features of the prior law." *Coalition for the Abolition of Marijuana Prohibition v. City of Atlanta*, 219 F.3d 1301, 1310 (11th Cir. 2000) (citations and quotations omitted). In this case, the superseding ordinance alters one but not other challenged features of the seizure ordinance. Obviously, the only way to determine whether that single alteration cures the alleged constitutional defects (and thus renders the case moot) is to evaluate the challenged features of the seizure ordinance and to identify the actual constitutional defect. *But once that inquiry has been completed, the issue of mootness is itself moot.*

Harrington v. Heavey, No. 04 C 5991, 2006 WL 3359388, at *3 (N.D. Ill. Nov. 16, 2006) (internal citation and quotation marks omitted) (emphasis added).

In this case, because of the purely-legal nature of the dispute and the intervening change in the law, assessing mootness required the district court to reach the merits. But once it did, it should not have dismissed the action as moot. In *Craft*, the court did not dismiss the lawsuit as moot, but rather ruled on the merits and entered summary judgment. *See* 39 F. Supp. 3d at 240. Here, though the district court characterized its merits ruling as a jurisdictional decision, it clearly reached the

merits of the decision when it wrote: "The Executive Order, however, appears to provide the relief that Plaintiffs seek: non-arbitrary criteria to guide restoration of the franchise. Kentucky's amended re-enfranchisement scheme thus appears to be consistent with at least Plaintiffs' proffered interpretation of what the First Amendment allows." Opinion & Order Dismissing Fourth Amended Complaint, RE 55, Page ID#774; *see also id*. at Page ID#776 ("Plaintiffs seek a non-arbitrary system for restoring the franchise to convicted felons that is guided by objective criteria – it appears that they have received that relief."). The repeated use of the word "appears" suggests some uncertainty or ambiguity in the district court's own First Amendment analysis, but what is at least certain and unambiguous is that the court reached the merits of Appellants' unfettered discretion claim. The court effectively issued a ruling on the legal merits stating its conclusion that the alleged First Amendment violation had been cured, but the ultimate disposition, dismissing the case for lack of jurisdiction, did not match its reasoning.

In the event this Court is inclined to rule in Appellants' favor, there is precedent for this Court to retain jurisdiction and rule on the purely-legal merits of this action because remanding this case would not serve the interest of judicial economy. In *Kerr for Kerr v. Commissioner of Social Security*, this Court declined to remand the case and instead reached the purely-legal merits in the first instance. 874 F.3d 926, 933 (6th Cir. 2017). This Court noted that "[a]lthough it is generally

true that 'an appellate court may not consider an issue not addressed below,'" it may "'decide an issue a lower court does not reach if the issue is a purely legal one or if doing so is in the interest of judicial economy.'" *Id*. (quoting *Davis v. Lifetime Cap., Inc.*, 560 F. App'x 477, 494–95 (6th Cir. 2014) (citing *Lindsay v. Yates*, 498 F.3d 434, 441 (6th Cir. 2007))). Where adjudication does "not necessitate any findings of fact, the district judges' expertise in evaluating factual matters cannot advance [this Court's] appellate review." *Hadix*, 144 F.3d at 935. The *Kerr* court set forth several factors for this Court to consider before invoking this exception. First, the merits must turn on "a purely legal issue." *Kerr*, 874 F.3d at 933. Additionally, this Court explained that it could take up the previously-unadjudicated merits because (1) its "answer to these legal questions [was] integral to the outcome of [the] litigation and others"; (2) "the issues ha[d] been clearly and thoroughly briefed and argued before [this Court] and [were] therefore capable of clear resolution"; and (3) "remand would not [have been] in the interest of judicial economy because either party would [have] almost certainly appeal[ed] an adverse decision by the district court and [this Court] would eventually be called upon to address these very issues." *Id*.; *see also Brown & Williamson Tobacco Corp. v. Fed. Trade Comm'n*, 710 F.2d 1165, 1173 (6th Cir. 1983), *petition for rehearing denied*, 717 F.2d 963 (6th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984) (after district court erred in dismissing case for lack of jurisdiction, in the "interest of judicial economy" and where plaintiff asserted no further need for

factual findings, reaching and deciding merits of APA and other challenges to new FTC methodology for testing "tar" and nicotine levels in cigarettes).

There are, to be sure, precedents that point in the other direction. *See, e.g.*, *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 770 (6th Cir. 2019) ("In assessing Speech First's likelihood of success on the merits, the district court did not address the merits beyond what was necessary for determining mootness and standing. Although we find that the district court was incorrect in its determination of Speech First's standing to challenge the Response Team and whether the challenge to the definitions of bullying and harassing was moot, we will not resolve the ultimate question of Speech First's likelihood of success on the merits. Instead, we remand this case for the district court to consider in the first instance Speech First's likelihood of success in light of our findings here."). But this option remains available here, given the nature and history of this litigation.

It has taken two and a half years for this purely-legal constitutional challenge to reach this point—a year and a half since the cross-motions for summary judgment were fully briefed. As in *Kerr*, this case involves two purely-legal First Amendment claims. No discovery was taken, and there are no disputed issues of material fact. The district court correctly identified this as a case well-suited for cross-motions for summary judgment, which were fully briefed, and, even if the court characterized its holding as jurisdictional, it effectively reached and decided the merits of these First

Amendment claims. Further, unlike in *Green Party of Tennessee v. Hargett*, here the district court has already had an opportunity to consider the amendment's effect on the challenged legal regime. 700 F.3d 816, 824 (6th Cir. 2012). Further, the resolution of the legal questions will be dispositive of this lawsuit since there are no evidentiary or factual disputes. And given the parties' respective litigation positions to date, it is inevitable that any further decision issued by the district court will return to this Court.

The one *Kerr* factor that is not yet satisfied is whether "the issues have been clearly and thoroughly briefed and argued before [this Court] and are therefore capable of clear resolution . . ." *See* 874 F.3d at 933. These legal issues were thoroughly briefed to the district court in the cross-motions for summary judgment. In this appeal, Appellants have rehearsed their affirmative case on the merits in this brief. But, given the jurisdictional nature of the current appeal and the issues presented, it seems unlikely that Appellee will have cause or opportunity to address its arguments on the merits in its brief to this Court; nor will Appellants have an opportunity to respond to those merits arguments in their briefing. Therefore, if this Court agrees that principles of judicial economy weigh in favor of this Court resolving the merits now, then, respectfully, it should order supplemental briefing on the merits of the First Amendment claims.

Alternatively, this Court should reverse and remand this case for a ruling on the constitutional merits of the parties' cross-motions for summary judgment. Given the significant overlap between the mootness and merits inquiries here, any ruling that EO 2019-003 does not moot Appellants' claims is also per se a ruling that EO 2019-003 does not foreclose Appellants' claims *on the merits*. Accordingly, if this Court is inclined to rule in Appellants' favor, since the district court and this Court will have already effectively adjudicated the question of whether EO 2019-003 forecloses this case, then Appellants respectfully request that this Court remand with a limited instruction that the district court cannot find that EO 2019-003 forecloses Appellants' First Amendment claims on the merits. This way the district court cannot simply issue the exact same opinion and order except for changing the final disposition to rulings on the cross-motions for summary judgment. While this Court cannot prejudge how the district court will rule upon remand—especially if this Court issues the requested instruction—with respect, it also need not and should not leave open the possibility of the district court redeploying the exact same reasoning in ultimately ruling on the merits. This will ultimately protect this Court's jurisdiction: if this Court agrees with Appellants, then in ruling on mootness in this particular context, it effectively will have decided against one possible merits ruling as well.

CONCLUSION

Appellants respectfully request that this Court reverse the district court's dismissal of this action as moot and reverse the denials of the cross-motions for summary judgment. This Court may and should retain jurisdiction, request further briefing from the parties on the merits, and proceed to rule on the merits of Appellants' constitutional claims. Alternatively, this Court should remand for further proceedings, with a limited instruction that Executive Order 2019-003 does not foreclose Appellants' claims on the merits.

DATED: June 18, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this document, including all headings, footnotes and quotations, but excluding the Disclosure Statement, Table of Contents, Table of Authorities, and any certificates of counsel, contains 12,966 words, as determined by the word count of the word-processing software used to prepare this document, specifically Microsoft Word for Mac Version 16.49 in Times New Roman 14-point font, which is fewer than the 13,000 words permitted under Fed. R. App. P. 32(a)(7)(B)(i).

/s/ Jon Sherman

June 18, 2021

ADDENDUM

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

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

Record Entry Number	Description of Document	Page ID#
1	Complaint	1–4
2	Motion for Immediate Temporary and Permanent Injunctive Relief	10–13
10	Amended Complaint	63–79
12	Second Amended Complaint	102–19
13	Order Denying Motion for Immediate Temporary and Permanent Injunctive Relief	122–24
25	Motion for Leave to File Third Amended Complaint	230–35
28	Third Amended Complaint	274–300
29	Order Denying Pending Motion for Leave as Moot and Granting Leave to File Fourth Amended Complaint	301–02
31	Fourth Amended Complaint	332–60
32	Motion to Dismiss for Failure to State a Claim and Lack of Jurisdiction	361–63
32-1	Memorandum of Law in Support of Motion to Dismiss	364–88
33	Response in Opposition to Motion to Dismiss	533–59
34	Reply in Support of Motion to Dismiss	565–75
35	Order Denying Motion to Dismiss	576
43	Minute Entry Order for 10/24/19 Telephone Conference	605
45	Transcript of 10/24/19 Telephone Conference	608–19
46	Plaintiffs-Appellants' Motion for Summary Judgment	620–46
46-4	Langdon Declaration	658–60
46-5	Petro Declaration	661–63
46-6	Aleman Declaration	664–66
46-9	Lostutter Declaration	673–75
47	Defendant-Appellee's Motion for Summary Judgment	682–83
47-1	Memorandum in Support of Defendant-Appellee's Motion for Summary Judgment	684–707

Record Entry Number	Description of Document	Page ID#
48	Defendant-Appellee's Response to Motion for Summary Judgment	739–44
49	Plaintiffs-Appellants' Response to Motion for Summary Judgment	745–51
53	Motion to Dismiss Plaintiffs Harbin, Comer, and Fox's Claims as Moot	758–60
53-1	Exhibit – Executive Order 2019-003	761–65
54	Order Granting Motion to Dismiss Plaintiffs Harbin, Comer, and Fox's Claims as Moot	768
55	Opinion & Order Dismissing Fourth Amended Complaint and Denying Cross-Motions for Summary Judgment as Moot	769–77
56	Judgment Dismissing Fourth Amended Complaint and Denying Cross-Motions for Summary Judgment as Moot	778
57	Motion for Reconsideration of Judgment Pursuant to Rule 59	779–85
57-1	Exhibit – Civil Rights Restoration Application	786–88
58	Defendant-Appellee's Response in Opposition to Motion for Reconsideration of Judgment	791–93
59	Plaintiffs-Appellants' Reply In Support of Motion for Reconsideration of Judgment	794–804
60	Opinion & Order Denying Motion for Reconsideration of Judgment Pursuant to Rule 59	807–13
61	Notice of Appeal	814–16