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.

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes & Other Authorities:

Plaintiffs-Appellants do not believe oral argument is necessary to resolve this appeal of the district court's mootness ruling. However, if this Court is persuaded to reach and decide the merits of Plaintiffs' First Amendment claims without remanding, then Plaintiffs do request oral argument. Plaintiffs should have made that distinction clear in their principal brief, but do so now, with apologies to the Court for failing to note this earlier. Given this appeal has focused on the jurisdictional question, if this Court decides to reach the merits of the case, Plaintiffs believe further briefing and oral argument will be helpful to the Court.

ARGUMENT

1. Defendant's brief makes clear that this action is not moot.

Defendant-Appellee Governor Andrew Beshear's brief concedes in the clearest possible terms that under current Kentucky law he "retains discretion to restore Plaintiffs' voting rights – *even arbitrarily so* . . ." Doc. 15, Appellee's Brief, Page ID # 8 (emphasis added). Therefore, the parties clearly agree that Kentucky law gives Defendant the power to *arbitrarily* restore voting rights—based on any reason, no reason, inconsistent reasons, or whim. That agreement alone resolves this appeal on mootness in favor of Plaintiffs.

What Defendant actually disputes is a merits issue: whether this state of affairs violates the First Amendment, notwithstanding Executive Order 2019-003's removal of certain individuals who meet enumerated criteria from that arbitrary

restoration scheme. Defendant contends that Executive Order 2019-003 ("EO 2019-003") satisfies the requirements of the First Amendment unfettered discretion doctrine, while Plaintiffs have argued it does not. In other words, the parties are construing and applying federal constitutional law to Kentucky state law; this is, of course, the merits of this litigation. As noted in Plaintiffs' principal brief, there is no way to disentangle the merits from the mootness dispute in this facial and purely legal challenge which seeks a non-arbitrary voting rights restoration scheme. RE 31, Fourth Amended Complaint, Page ID # 358. Given Defendant has conceded that the Governor retains the power to "arbitrarily" restore voting rights, Doc. 15, Appellee's Brief, Page ID # 8—the very thing Plaintiffs have challenged as unconstitutional—this case cannot be moot. Moreover, should the Court reach the merits at this juncture, Defendant's admission underscores once again that the continued arbitrary restoration of voting rights violates the First Amendment.

Defendant's central argument is that even though he may "arbitrarily" restore voting rights, his discretion is "no longer absolute." Doc. 15, Appellee's Brief, Page ID # 8. Those two statements are fundamentally irreconcilable, as arbitrariness of course means the complete absence of any constraints on the arbiter's discretion or judgment. As Plaintiffs noted to the district court, two of the definitions Merriam-Webster gives for "arbitrary" include: "not restrained or limited in the exercise of power: ruling by *absolute authority*" and "depending on individual discretion (as of

a judge) and not fixed by law." RE 49, Plaintiffs' Response in Opposition to Defendant's Motion for Summary Judgment, Page ID ## 747–48 (citing Merriam-Webster Online Dictionary, at https://www.merriam-webster.com/dictionary/arbitrary) (emphasis added).

Nevertheless, taking Defendant's argument at face value, the theory seems to be that while a discretionary voting rights restoration system with no rules or criteria for certain individuals to secure non-discretionary restoration would constitute unfettered discretion and violate the First Amendment,[1] the addition of such rules and criteria permitting selective non-discretionary restoration for some but not all cures the constitutional violation as to all. To underscore this point, it is Defendant's position that the addition of such criteria eliminates all discretion and arbitrariness *even as to those individuals whose sole path to regain their voting rights has always been and remains the Governor's discretionary grant of restoration*. Doc. 15, Appellee's Brief, Page ID # 7 ("To be sure, the new restoration scheme applies to

[1] Defendant appears to at least agree that the preexisting state of Kentucky law on voting rights restoration ran afoul of the First Amendment unfettered discretion doctrine, and it is this "voluntary cessation" that has "remedie[d]" the alleged constitutional violations. Doc. 15, Appellee's Brief, Page ID # 6 ("[T]hrough a formal process, modification of the restoration scheme *remedies* the specific allegations set forth by Plaintiffs in the Complaint. Plaintiffs do not argue the modification does not appear genuine or that the issues are capable of repetition in the future.") (emphasis added). Of course, that only corroborates Plaintiffs' central argument that the Governor's preservation of completely discretionary restoration for those categorically excluded by EO 2019-003 violates the First Amendment.

Plaintiffs, just as it applied to the subset of 140,000 or more offenders who regained the right to vote. Executive Order 2019-003 established objective criteria by which to automatically restore or not restore voting rights to all disenfranchised offenders. All offenders are subject to those criteria, and for Plaintiffs, that resulted in the denial of automatic restoration."). According to this theory, the innumerable individuals excluded per se from EO 2019-003 and compelled to seek a grant of restoration through Defendant's admittedly arbitrary voting rights restoration process can no longer assert that the Governor's discretion to grant or deny restoration is unfettered; allegedly, they would have had a First Amendment claim prior to EO 2019-003 but do not now. With respect, this position is untenable. Defendant fails to explain how criteria or specifications that do not apply to categorically excluded individuals, such as Plaintiffs, and, more importantly, that have zero effect on the discretionary restoration application process to which Plaintiffs are subjected, constrain the Governor's discretion to grant or deny those applications in any way.

As explained in Plaintiffs' principal brief, Kentucky's restoration system has been split in two: a non-discretionary system for those who satisfy the criteria in EO 2019-003 and a discretionary, concededly arbitrary system. Doc. 14, Appellants' Brief, Page ID ## 24–25. The non-discretionary part has no effect on the discretionary part and vice versa. For those who meet the criteria for non-discretionary restoration, Defendant has no control or further involvement in their

restoration. Prospectively, individuals restored by operation of EO 2019-003 may simply register to vote; they do not need any certificate or other official document from the Governor's office or any other state or local government office to register and vote. RE 53-1, Exhibit 1 to Plaintiffs' Motion to Dismiss, Executive Order 2019-003 "Relating to the Restoration of Civil Rights to Convicted Felons," Page ID # 763 ("The civil rights . . . are hereby restored . . ."). Indeed, the Governor only retains discretion over decisions on the voting rights restoration applications submitted to him by those excluded from EO 2019-003. Because those restored by way of EO 2019-003 need not seek Defendant's discretionary approval at all, it is illogical to talk about that non-discretionary part of Kentucky's restoration scheme in terms of the Governor's discretion.

Likewise, the purported "fettering" or "constraints" established in EO 2019-003 have no bearing or effect whatsoever on the fate of those excluded from restoration under EO 2019-003 who must still apply and seek restoration through the arbitrary, discretionary part of the system. Because this discretionary path in Kentucky's restoration system—the one and only target of this constitutional challenge—has remained unchanged throughout the course of this litigation, no amendment to the operative pleading was necessitated by EO 2019-003. Accordingly, it is also illogical to characterize the Governor's complete discretion with respect to this latter group as fettered or constrained based on wholly

inapplicable non-discretionary criteria. Defendant's discretion remains very much unfettered and absolute with respect to those who must still affirmatively apply for restoration.

It bears underscoring that for large numbers of Kentuckians whose out-of-state, federal, and specific Kentucky felony convictions categorically bar them from restoration under EO 2019-003, including Plaintiffs, there are simply no applicable criteria that, if met, will bring about their reenfranchisement. Defendant argues that EO 2019-003 established objective criteria, such as satisfying the terms of probation and parole, that apply to *all* Kentuckians with felony convictions and constrain his discretion such that it is no longer absolute and unfettered with respect to *any* disenfranchised Kentuckians. Doc. 15, Appellee's Brief, at 11–12. But that is not so. Whole swathes of Kentucky's disenfranchised population have been categorically excluded from EO 2019-003's non-discretionary restoration provisions and thereby compelled to seek discretionary restoration via the preexisting application process. *There are simply no criteria for these individuals, including Plaintiffs, to meet.* Given the sheer inapplicability of the executive order's criteria to individuals like Plaintiffs who are per se ineligible for non-discretionary restoration and who per se must seek restoration through the discretionary, arbitrary process, these criteria simply do not impose any kind of constraint on the discretionary restoration process, which has held constant and unchanged throughout the course of this litigation.

Defendant additionally argues that Plaintiffs' claims will force the Governor to choose between purely discretionary and arbitrary restoration, on the one hand, and permanent disenfranchisement, on the other. Doc. 15, Appellee's Brief, Page ID # 7 ("Plaintiffs stake out a precarious position: they seek to prevent a governor from arbitrarily restoring voting rights in favor of a restoration scheme that would permanently disenfranchise them."). This is manifestly a false choice. As noted in Plaintiffs' principal brief, Doc. 14, Appellants' Brief, Page ID # 52, there are of course innumerable permutations of restoration schemes that would be non-arbitrary and cure these First Amendment violations. If confronted with a court order requiring him to adopt a non-arbitrary restoration system, Governor Beshear may well choose to permanently disenfranchise some or all categories of felons heretofore excluded under EO 2019-003, but he also may not. For instance, Governor Beshear's executive order has restored people with certain Kentucky felony convictions, but categorically bars people with the exact same felonies on their records if they were convicted in another state. It would certainly be surprising if Defendant believed that those with out-of-state felony convictions warranted lifetime disenfranchisement, while those convicted of the identical offenses in Kentucky should be restored upon sentence completion. EO 2019-003 also categorically excludes *all* federal offenses from non-discretionary restoration. It may or may not be Defendant's view that, if his power to arbitrarily grant or deny

restoration is foreclosed by the U.S. Constitution, then all federal drug and firearm possession offenses should result in the lifetime, irrevocable withdrawal of that most fundamental right of United States citizenship, the right to vote. But these are all policy choices upon which the Governor has made no clear statement in this brief or anywhere else and, more importantly, that have no bearing on whether the restoration scheme Defendant administers is unconstitutional.

Finally, Defendant has mischaracterized the dismissal of the appeal in *Hand v. DeSantis*, 946 F.3d 1272 (11th Cir. 2020). The undersigned counsel at Fair Elections Center were the principal attorneys on that action as well. That appeal was ultimately dismissed as moot because every appellant in that case regained their right to vote: some immediately upon the effective date of Amendment 4 and others upon payment of their outstanding legal financial obligations ("LFOs"), such as fines and court costs, thereby completing the terms of their sentences as defined under Florida law. That dismissal based on every plaintiff's loss of standing due to their restoration is not support for the proposition that such a First Amendment challenge becomes moot once the law changes to restore some individuals based on specified criteria. Indeed, the Eleventh Circuit panel did not dismiss the appeal sua sponte after Amendment 4 took effect, but rather sought further briefing from the parties identifying whether any of the plaintiffs still had outstanding LFOs. RE 59-1, Exhibit 1 to Reply Brief in Support of Plaintiffs' Motion for Reconsideration, Eleventh

Circuit Memorandum to Parties in *Hand v. DeSantis* (Sept. 12, 2019), Page ID # 806 ("The Court requests supplemental briefing to update whether all plaintiffs have now satisfied outstanding court costs and fees."). Defendant has mischaracterized what the Eleventh Circuit panel did. The Court's September 12, 2019 memorandum to the parties explicitly stated that "[i]n the event that there are plaintiffs with outstanding court costs and fees, the Court requests supplemental briefing on whether the Executive Clemency Board takes the position that any plaintiffs in this case will continue to be disqualified from voting *such that this appeal is not moot*." *Id*. (emphasis added). No one need speculate whether the Eleventh Circuit panel would have ruled on the merits if any plaintiff in *Hand* was still disenfranchised due to outstanding LFOs and, therefore, in the Court's view, still had standing. The Court said it would.

Accordingly, the adoption of Amendment 4 and its conditions for the restoration of convicted felons was not enough to moot *Hand*. Had some of the plaintiffs still not qualified for non-discretionary restoration pursuant to Amendment 4, they would have remained subject to the discretionary restoration process administered by Florida's Executive Clemency Board, and their First Amendment claims would have still been live. Accordingly, *Hand* is therefore no support for Defendant's argument that this case is moot.

2. Appellants have established First Amendment violations on the merits of their claims.

Though this appeal, to date, has only concerned the district court's dismissal of this action as moot, Plaintiffs have suggested that the merits could be reached under this Court's precedent. At this time, the Court has not ordered supplemental briefing on the merits, but since Defendant has raised a number of arguments on the merits, Plaintiffs are compelled to respond. Plaintiffs continue to believe that separate and comprehensive supplemental briefing is warranted before reaching the merits in this case, especially given the necessarily shorter nature of reply briefs, but will set forth their counterarguments here.

a. Though presently disenfranchised as a matter of state law, Plaintiffs nevertheless retain their First Amendment rights to a non-arbitrary voting rights licensing or allocation system.

Plaintiffs have been stripped of their right to vote under state law and are not contesting the constitutionality of felon disenfranchisement, as authorized by the Supreme Court's construction of Section 2 of the Fourteenth Amendment. *Richardson v. Ramirez*, 418 U.S. 24, 53–56 (1974). But they cannot be deprived of their federal constitutional rights, and a state reenfranchisement scheme that arbitrarily restores or allocates the right to vote violates the First Amendment.

Defendant contends that felons are ineligible to vote in Kentucky until restored to their civil rights and therefore cannot claim a constitutional injury from

arbitrary decision-making on their restoration applications. Doc. 15, Appellee's Brief, Page ID # 15. Respectfully, that is contrary to the law and logic. In a closely analogous situation, sixteen- and seventeen-year-olds and lawful permanent residents are also not eligible to vote and their ineligibility—a categorical, uniform disenfranchisement—does not violate the Constitution. However, if state or local government officials were vested with the arbitrary power to enfranchise individuals from these two groups, perhaps based upon their subjective evaluation of an essay written on American government, that would trigger and violate the First Amendment unfettered discretion doctrine. In the same way, disenfranchised felons can suffer *federal* constitutional injuries even though *state* law bars them from voting. Since the selective authorization to vote and threshold eligibility are at issue, the only people who can challenge the arbitrary licensing or allocation of voting rights are currently-disenfranchised felons. If these injuries were not legally cognizable and did not confer standing, no one could challenge the constitutionality of a felon voting rights restoration scheme—even for intentional, express racial or sex discrimination—and the Governor's arbitrary decision-making would be immune from judicial review. State officials could make voting rights restoration decisions based on partisan affiliation,[2] height, attractiveness, or English literacy.

[2] Nothing in Kentucky law prevents the Governor from acting on partisan motivation or an educated guess as to a restoration applicant's politics. If a Governor announced that voting rights will only be restored to those who were previously registered as

The cases support Plaintiffs' position. The Supreme Court has twice rejected the argument that felon disenfranchisement laws need not comply with constitutional limitations, *i.e.* that no one has standing to challenge these laws and, therefore, they are beyond judicial review. In *Ramirez* itself, the Supreme Court only addressed and rejected the first of the plaintiffs' two claims: (1) a facial challenge to California's felon disenfranchisement law that argued the state per se could not deny the vote to felons; and (2) a separate equal protection and due process claim that attacked the lack of uniform enforcement of that law. 418 U.S. at 33–34. After holding that Section 2 of the Fourteenth Amendment authorizes states to disenfranchise felons and rejecting the first claim, the U.S. Supreme Court remanded the second claim to the Supreme Court of California. *Id.* at 56. If Defendant's theory were correct, the Supreme Court would not have remanded the *Ramirez* plaintiffs' alternative equal protection claim for further adjudication.

Defendant's contention is also belied by the Supreme Court's decision in *Hunter v. Underwood*, which struck down the 1901 Alabama Constitution's felon disenfranchisement provision, finding intentional racial discrimination in violation

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Democrats or Republicans or even that voting rights restoration decisions would take into account prior party affiliation, Defendant would surely agree those schemes would cause a legally cognizable injury even though the unrestored felons are not presently able to vote. So too does a discretionary vote-licensing scheme violate the First Amendment because it is inherently arbitrary and vulnerable to discriminatory decision-making.

of the Equal Protection Clause. 471 U.S. 222, 231–33 (1985). The Supreme Court clarified that *Ramirez* did not hold that Section 2 of the Fourteenth Amendment precludes felons from challenging disenfranchisement laws when they violate constitutional limitations:

> Without again considering the implicit authorization of § 2 [of the Fourteenth Amendment] to deny the vote to citizens 'for participation in rebellion, or other crime,' *see Richardson v. Ramirez*, 418 U.S. 24 . . . (1974), we are confident that § 2 was not designed to permit the purposeful racial discrimination attending the enactment and operation of § 182 which otherwise violates § 1 of the Fourteenth Amendment. Nothing in our opinion in *Richardson v. Ramirez, supra,* suggests the contrary.

Id. at 233; *see also Hobson v. Pow*, 434 F. Supp. 362, 366–67 (N.D. Ala. 1977) (holding sex discrimination in felon disenfranchisement scheme violates Equal Protection clause).

Accordingly, it is clear that discriminatory disenfranchisement violates the Constitution.[3] Similarly, as the Fifth Circuit explained in *Shepherd v. Trevino*, discriminatory *reenfranchisement* is also unconstitutional:

> [W]e are similarly unable to accept the proposition that section 2 [of the Fourteenth Amendment] removes all equal protection considerations from state-created classifications denying the right to vote to some felons while granting it to others. No one would contend that section 2 permits a state to disenfranchise all felons and then reenfranchise only those who are, say, white.

[3] The Supreme Court has never stated that an intentional discrimination claim under the Fourteenth Amendment is the only type of constitutional claim that can be brought against a felon disenfranchisement or reenfranchisement scheme.

575 F.2d 1110, 1114 (5th Cir. 1978). The Court then rejected the plaintiffs' equal protection claim *on the merits*, not for lack of a constitutional interest or injury. *Id.* at 1114–15. Several courts have also stated that arbitrary disenfranchisement would be unconstitutional. *Id.* at 1114; *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 challenge to "selective and arbitrary enforcement of the disenfranchisement procedure"). *Shepherd*'s broad language indicates that the same would hold true for arbitrary reenfranchisement. 575 F.2d at 1114 ("Nor can we believe that section 2 would permit a state to make a completely arbitrary distinction between groups of felons with respect to the right to vote."); *Harvey v. Brewer*, 605 F.3d 1067, 1079 (9th Cir. 2010) (noting a state cannot arbitrarily "re-enfranchise only those felons who are more than six-feet tall"). All of these courts would be wrong if felons could not claim a constitutional injury once *state* law divested them of their right to vote. And of course arbitrarily giving select individuals the right to vote violates the Constitution. *See Louisiana v. United States*, 380 U.S. 145, 150–53 (1965) ("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."). It would be nonsensical if discriminatory enfranchisement, discriminatory disenfranchisement, discriminatory

reenfranchisement, arbitrary enfranchisement, and arbitrary disenfranchisement all violated the Constitution, but arbitrary reenfranchisement did not.

This Court's decision in *Johnson v. Bredesen*, 624 F.3d 742 (6th Cir. 2010) does not foreclose this action either. The plaintiffs in *Johnson* challenged the requirement that felons pay restitution and child support before regaining their right to vote as a violation of the Equal Protection Clause, the Twenty-Fourth Amendment's ban on poll taxes, the Privileges and Immunities Clause, and the Ex Post Facto clause. *Id*. at 744–45. *Johnson* did not consider whether selectively licensing or allocating threshold eligibility violates the First Amendment unfettered discretion doctrine, and its holdings are necessarily limited to the facts and claims presented to the Court. *See Satty v. Nashville Gas Co.*, 522 F.2d 850, 853 (6th Cir. 1975) ("[T]he precedential value of a decision should be limited to the four corners of the decisions' [*sic*] factual setting."), *aff'd in part on other grounds, vacated in part on other grounds, Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977).

In considering *Johnson*'s equal protection claim, this Court invoked the plaintiffs' current ineligibility to vote in order to apply rational basis review rather than strict scrutiny. 624 F.3d at 746–50. This Court did not conclude that felons lack any legally cognizable interest in voting, but rather stated the plaintiffs "lack[ed] any *fundamental* interest." *Id*. at 746 (emphasis added). Otherwise, if the felon plaintiffs had no interest whatsoever, there would have been no need to evaluate the state's

competing interests at all. *Id*. at 747. The Court would have simply held that it lacked jurisdiction to review the claims and ordered them dismissed. Here, there is no equal protection challenge, and the tiers of scrutiny have no application in a First Amendment unfettered discretion challenge. When a licensing scheme governs the exercise of First Amendment rights, officials cannot be given unfettered discretion to select who may speak, publish, demonstrate, or vote. Disenfranchised felons are the only individuals who can bring that challenge to arbitrariness in voting eligibility determinations. If they have no legally cognizable interest, any and all felon disenfranchisement and reenfranchisement schemes are beyond judicial review.

Turning to the Twenty-Fourth Amendment claim, this Court narrowly held that the ban on poll taxes only applies to individuals who currently have a right to vote. *Johnson*, 624 F.3d at 751. This is unremarkable given the Twenty-Fourth Amendment says, "*The right of citizens of the United States to vote* [in any federal election] shall not be *denied or abridged* by the United States or any State by reason of failure to pay any poll tax or other tax." U.S. CONST. amend. XXIV (emphasis added). But this holding cannot be extended to the First Amendment unfettered discretion doctrine, which is only ever raised by an individual who does not possess the right or permission under state law to engage in a certain First Amendment-protected activity. The two claims are completely different. Plaintiffs here do not allege that a voter's current right to vote has been burdened or taxed in some manner,

but rather challenge Defendant's system for arbitrarily, selectively bestowing threshold voting eligibility, a set of facts not present or considered in *Johnson*. Plaintiffs clearly do not contend that they currently have a right to vote under state law or any per se right to restoration. Rather, Plaintiffs seek a constitutional, non-arbitrary restoration system, which may or may not result in the restoration of their voting rights. Nothing in *Johnson* conflicts with Plaintiffs' claim or forecloses the remedy sought.[4]

At bottom, Defendant wants the merits of this case decided based on the prefix "re" in reenfranchisement. Defendant would surely concede that arbitrary *enfranchisement* is unconstitutional, but if state officials are arbitrarily enfranchising those who were *previously* eligible to vote, in Defendant's view, the unlawful is made lawful.[5] There is no case, including *Johnson*, that supports that arbitrary distinction.

[4] The Court added that legal financial obligations incurred by convicted felons (as well as misdemeanants, who remain eligible to vote) are objective requirements that "exist independently of" felon disenfranchisement and reenfranchisement. *Johnson*, 624 F.3d at 751; *Harvey*, 605 F.3d at 1080 ("Plaintiffs' right to vote was not abridged because they failed to pay a poll tax; it was abridged because they were convicted of felonies."). By contrast, arbitrary voting rights restoration *directly* implicates and affects the right to vote.

[5] Some felons are of course convicted as minors, KY. REV. STAT. § 635.020, and their bid for "*re*enfranchisement" is in fact first-time enfranchisement.

b. Prohibiting arbitrary licensing of First Amendment-protected voting rights does not conflict with Section 2 of the Fourteenth Amendment.

There is no conflict between Section 2 of the Fourteenth Amendment and the prohibition on arbitrarily licensing First Amendment-protected conduct. The grant of legislative authority in Section 2 of the Fourteenth Amendment must be exercised in a manner consistent with other constitutional provisions and rights. "[T]he Constitution is filled with provisions that grant Congress or the States specific power to legislate in certain areas; these granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution." *Williams v. Rhodes*, 393 U.S. 23, 29 (1968). In *Tashjian v. Republican Party of Connecticut*, the Supreme Court stated that the legislative authority given to states in the Elections Clause, U.S. CONST. art. I, § 4, cl. 1, "does not extinguish the State's responsibility to observe the limits established by the First Amendment rights of the State's citizens." 479 U.S. 208, 217 (1986); *see also 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516 (1996) (holding Twenty-First Amendment's grant of legislative authority to states does not shield laws regulating commerce in or use of alcoholic beverages from First Amendment challenges).

A ruling in Plaintiffs' favor would be entirely consistent with *Ramirez* and would still permit Kentucky to continue disenfranchising felons. The First Amendment imposes independent and specific constitutional limitations, and

Plaintiffs only challenge Defendant's claimed power to reenfranchise felons arbitrarily, not the state's power to disenfranchise people with felony convictions. "[I]n a host of other First Amendment cases," the Supreme Court has rejected the "'greater-includes-the-lesser'" argument, striking down arbitrary licensing schemes with "open-ended discretion . . . even where it was assumed that a properly drawn law could have greatly restricted or prohibited the manner of expression." *City of Lakewood v. Plain Dealer Publishing Company*, 486 U.S. 750, 766 (1988). There is no conflict or even tension between permitting felon disenfranchisement under the Fourteenth Amendment and forbidding arbitrary reenfranchisement under the First Amendment, so this Court need not evaluate which amendment is more "specific" or trumps the other. There is no need to harmonize constitutional provisions that do not conflict. For another example, the Elections Clause authorizes states to draw district maps, but the Supreme Court has consistently held that the Equal Protection Clause prohibits racial gerrymandering. *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1263–64 (2015) (summarizing racial gerrymandering test). There is no conflict there either.

Finally, there is also no conflict between a ruling in Plaintiffs' favor on these two First Amendment claims and Section 2 of the Fourteenth Amendment as construed in *Ramirez* because Plaintiffs clearly have not alleged that felon disenfranchisement itself per se violates the First Amendment, as the plaintiffs

unsuccessfully argued in *Kronlund v. Honstein*, 327 F. Supp. 71, 73 (N.D. Ga. 1971); *Farrakhan v. Locke*, 987 F. Supp. 1304, 1314 (E.D. Wash. 1997); *Johnson v. Bush*, 214 F. Supp. 2d 1333, 1338 (S.D. Fla. 2002), *aff'd on other grounds sub nom. Johnson v. Governor of the State of Fla.*, 405 F.3d 1214 (11th Cir. 2005) (en banc); *Hayden v. Pataki*, No. 00 Civ. 8586(LMM), 2004 WL 1335921, at *6 (S.D.N.Y. June 14, 2004); and *Howard v. Gilmore*, 205 F.3d 1333 (unpublished table decision), No. 99-2285, 2000 WL 203984, at *1 (4th Cir. Fed. 23, 2000). Instead, Plaintiffs have argued that *arbitrary reenfranchisement* violates the First Amendment, a constitutional challenge not adjudicated in any of those cases.

CONCLUSION

The district court's ruling dismissing this action as moot should be reversed. The order should be vacated, and this case should either be retained by this Court for further proceedings on the merits or, in the alternative, remanded with a limited instruction as outlined in Plaintiffs' principal brief.

DATED: August 5, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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Dated: August 5, 2021

/s/ Jon Sherman
Jon Sherman
One of the Attorneys for Plaintiffs-Appellants

SUPPLEMENTAL DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

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

Record Entry Number	Description of Document	Page ID#
59-1	Exhibit 1 to Reply Brief in Support of Plaintiffs' Motion for Reconsideration, Eleventh Circuit Memorandum to Parties in *Hand v. DeSantis* (Sept. 12, 2019)	806