**UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF KENTUCKY**
**SOUTHERN DIVISION AT LONDON**

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| STEPHON DONÉ HARBIN, ROBERT CALVIN LANGDON, RICHARD LEROY PETRO, JR., BONIFACIO R. ALEMAN, BRYAN LAMAR COMER, ROGER WAYNE FOX II, DERIC JAMES LOSTUTTER,<br><br>*Plaintiffs*,<br><br>v.<br><br>MATT BEVIN, in his official Capacity as Governor of Kentucky,<br><br>*Defendant*. | ) | **Civil No. 6:18-cv-277-KKC** |



**PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

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").

It inexorably follows that a state may not arbitrarily restore the right to vote to select individuals.

For over eighty years, the Supreme Court has held that government officials cannot be lawfully vested with unfettered discretion to grant or deny licenses or permits to engage in First Amendment-protected conduct. *See, e.g.*, *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 755–56 (1988); *Lovell v. City of Griffin*, 303 U.S. 444, 450–53 (1938). This longstanding body of law compels the conclusion that arbitrary power over the right to vote—which is protected by the First Amendment as a means of political expression and association—is unconstitutional. Whether the state is enfranchising or reenfranchising ineligible individuals, such as legal permanent residents, 17-year-olds, or convicted felons, the First Amendment forbids it from doing so arbitrarily, beyond the constraints of any rules, criteria, other legal restraints, or any reasonable, definite time limits. By Kentucky law, the Governor has sole and unfettered discretion to select which felons may once again exercise their right to vote. No codified, objective, and uniformly-applied rules or criteria constrain those voting rights restoration decisions, and this violates the Constitution.



Today, a shrinking minority of states, Kentucky among them, still choose to include reenfranchisement within the discretionary clemency process available to convicted felons, instead of choosing to restore voting rights by operation of law upon the completion of incarceration, parole, and/or probation. Defendant has argued that the First Amendment cannot constrain the state law-created clemency process, but there is no legal authority that supports that contention. Clemency cannot make the unlawful lawful. States are authorized to disenfranchise felons, even permanently, but once a state decides to reenfranchise felons, it may not do so arbitrarily. Any non-arbitrary system for voting

rights restoration with reasonable, definite time limits will cure the claimed constitutional violations in this case. Instead of adopting such a system, Defendant is before this Court fighting to retain sole power to issue licenses to vote beyond the reach of the U.S. Constitution, any other legal constraint, and this Court's review.

## FACTUAL BACKGROUND

Kentuckians with felony convictions are disenfranchised, KY. CONST. § 145, KY. REV. STAT. § 116.025, but they may seek restoration of their right to vote upon application to the Governor. KY. CONST. § 145; KY. REV. STAT. § 196.045(1). They are eligible to apply once they receive final discharge 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 them for eligibility and forwards eligible applications to the Governor's office for a decision.[1] The Governor of Kentucky has sole, unfettered discretion to grant or deny voting rights restoration. As the application itself states, "It is the prerogative of the Governor afforded him or her under the Kentucky Constitution to restore these rights."[2] 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 restoration application. There are also no reasonable, definite time limits in the Kentucky Constitution, Kentucky statutes, Kentucky rules or regulations, or any other written, codified source of law by which a decision must be made on these applications. While the



[1] Ex. A, Ky. Dep't of Corrections, Division of Probation and Parole, Application for Restoration of Civil Rights, *available at* https://corrections.ky.gov/Probation-and-Parole/Documents/Civil%20Rights%20Application%2007-2012.pdf.
[2] *Id.*

current backlog of applications is unknown, that figure stood at 1,093 pending applications in March 2018.[3] Defendant has conceded that he does not deny applications for restoration; instead, these applications simply remain pending indefinitely. DE 40 ¶ 7; DE 45 at 6–7.

At the October 24th status conference, Defendant's counsel stated that this case involves "purely an issue of law" and that they "don't intend to assert any facts, but argue this as an issue of law." *Id*. at 4. Plaintiffs' counsel requested a short discovery period or some time for the parties to enter joint stipulations of facts, including the lack of any rules, criteria or any other codified, legal restraint on the Governor's unfettered discretion to grant or deny voting rights, and the lack of any reasonable, definite time limits on the Governor's decision. *Id*. at 2–6, 8–9. Plaintiffs' counsel expressed concern that, absent discovery, Defendant may seek to rely upon uncodified rules or criteria for restoration. *Id*. at 8–9. The Court asked Defendant's counsel directly whether any such uncodified and/or non-public rules, criteria, "factors," or any "semi-secret administrative body within the governor's office" exist to govern Defendant's decision-making on voting rights restoration applications. *Id*. at 9–11. Defendant responded that the Kentucky Constitution confers "discretion to grant or deny restoration" and that "there is no secret . . . non-public binding anything that guides the Governor's discretion." *Id*. at 10–11. Given Defendant's representations to this Court and the Complaint's facial challenges, this Court denied Plaintiffs' request for discovery and ordered the parties to submit cross-motions for summary judgment.



## ARGUMENT

### I. Plaintiffs have standing to sue Defendant.

[3] Ex. B, Ky. Op. Atty. Gen. 18-ORD-056, *1 n.1 (Mar. 14, 2018).

As disenfranchised Kentuckians with felony convictions, Plaintiffs have standing to sue on these First Amendment claims. Exs. C–I, Harbin Decl. ¶¶ 2–7; Langdon Decl. ¶¶ 2–5; Petro Decl. ¶¶ 2–5; Aleman Decl. ¶¶ 2–5; Comer Decl. ¶¶ 2–5; Fox Decl. ¶¶ 2–5; Lostutter Decl. ¶¶ 2–5. As the Supreme Court has made clear, plaintiffs challenging an arbitrary administrative licensing scheme governing the exercise of First Amendment-protected rights need not apply for and be denied a license prior to filing suit over the scheme's constitutionality. *See City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 755–56 (1988) ("[W]hen a licensing statute allegedly vests unbridled discretion in a government official over whether to permit or deny expressive activity, one who is subject to the law may challenge it facially without the necessity of first applying for, and being denied, a license." (collecting cases)); *Ohio Citizen Action v. City of Englewood*, 671 F.3d 564, 580–81 (6th Cir. 2012) (but for mootness, suggesting plaintiffs would have had standing to assert First Amendment claim against unfettered discretion in curfew waiver law "regardless whether [the organization] or its members suffered any injury linked to its use"); *Miller v. City of Cincinnati*, 622 F.3d 524, 532 (6th Cir. 2010) (same); *Prime Media, Inc. v. City of Brentwood*, 485 F.3d 343, 351 (6th Cir. 2007) (same).



Defendant has cited *El-Amin v. McDonnell*, No. 3:12–cv–00538–JAG, 2013 WL 1193357, at *4–5 (E.D. Va. Mar. 22, 2013) for the principle that each Plaintiff must have applied for restoration to have standing to sue. However, the pro se plaintiff in *El-Amin* brought *only* claims rooted in the Fourteenth Amendment and the Eighth Amendment, and, as noted above, anyone subject to a licensing scheme can bring a *First Amendment* challenge to that scheme without first applying.

## II. Plaintiffs have established that Defendant is violating the First Amendment unfettered discretion doctrine, because Kentucky law vests

**the Governor with absolute, unfettered power to select which felons may vote and which may not.**

**a. The First Amendment prohibits arbitrary licensing schemes regulating the exercise of the constitutionally-guaranteed rights to political expression and association, which embrace voting.**

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 highly anomalous for all forms of speech and expression in the electoral context to be protected by the First Amendment, except the political choice and expression at the very center of it—voting.



Most relevant here, 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 Cty. 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 as to a wide range of First Amendment

freedoms. In *City of Lakewood*, 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. at 769–72. 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 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").



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. *Saia v. New York*, 334 U.S. 558, 560–62 (1948) (striking down discretionary permit scheme for use of loudspeakers).[4] Crucially, the Supreme Court has explained that the existence of an actual, improper discriminatory or biased motive need not be shown to strike down such a law on its face:

> Facial attacks on the discretion granted a decisionmaker are not dependent on the facts surrounding any particular permit decision. . . . [T]he success of a facial

[4] The Supreme Court continues to demonstrate significant concern when First Amendment rights are subjected to officials' discretion in the absence of clear, objective rules or criteria. *See Minn. Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1888–91 (2018).

> 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.

*Forsyth Cty.*, 505 U.S. at 133 n.10.

This case's facts are not materially different from the unconstitutional licensing schemes struck down in the above 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 be prosecuted if he or she does so. In Kentucky, a class of individuals cannot register and vote without first obtaining a license or permit—an executive order granting 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). There is no material or logical difference between the following statements: "Felons cannot vote, and they must apply and secure approval to regain their right to vote"; and "Felons *can* vote if they obtain prior permission from the Governor." Kentucky's voting eligibility laws can only strip felons of their right to vote under state law, not their rights under the U.S. Constitution; they simply require a certain subset of U.S. citizen adults to obtain state permission—a license—prior to registering and voting.



Kentucky law contains no rules or criteria governing the restoration of voting rights to felons. Defendant has absolute discretion in deciding whether to grant or deny voting rights restoration applications. Furthermore, at the October 24, 2019 status conference, Defendant'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." DE 45 at 10–11. Accordingly, Kentucky's arbitrary voting rights restoration system violates the First Amendment. Plaintiffs

respectfully request that this system be enjoined and that Defendant be ordered to replace it in a timely manner with a non-arbitrary system of voting rights restoration governed by specific, objective, neutral, and uniformly-applied rules and criteria. In the following sections, Plaintiffs consider the arguments Defendant has proffered to date.

**b. 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 concededly 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's principal argument is 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 of their restoration applications. DE 32-1 at 16–18. 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 *in and of itself* 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, no one could challenge the constitutionality of a felon voting rights restoration scheme—*even for* intentional, express racial, sex, or partisan discrimination[5]—and the Governor's arbitrary decision-making would be immune from judicial review. State officials could make voting rights restoration decisions based on height, attractiveness, or English literacy.

The cases support Plaintiffs' position. The Supreme Court has twice rejected the argument that felon disenfranchisement laws need not comply with constitutional limitations. 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 which 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 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.



[5] Nothing in Kentucky law prevents the Governor from acting on partisan motivation or an educated guess as to a restoration applicant's politics. Imagine a Governor announcing that voting rights will only be restored to those who were previously registered as 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 First Amendment precedents because it is vulnerable to arbitrary and discriminatory decision-making.

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 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.[6] 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.

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

[6] 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.

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. Moreover, it would be nonsensical if discriminatory enfranchisement, discriminatory disenfranchisement, discriminatory reenfranchisement, arbitrary enfranchisement, and arbitrary disenfranchisement violated the Constitution, but arbitrary reenfranchisement did not.



If an arbitrary *categorical* distinction between different groups of felons violates the Constitution, then arbitrary determinations made *on a case-by-case basis* untethered to any rules or criteria must also violate the Constitution. After all, courts traditionally view unfettered administrative discretion to make case-by-case determinations as far more problematic than legislative line-drawing, and therefore treat the former with much less deference. *See Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1042–43 (9th Cir. 2009) (holding legislative reservation of discretionary, administrative function is subject to unfettered discretion challenge) ("If a legislative body retains discretion to make an important decision as part of that permitting scheme . . . that

discretion is distinct from the general discretion a legislative body has to enact (or not enact) laws."); *Gasparo v. City of New York*, 16 F. Supp. 2d 198, 207–16, 221–23 (E.D.N.Y. 1998) (rejecting equal protection challenge to statutory classification singling out newsstands from all sidewalk vendors, but issuing preliminary injunction against unfettered administrative discretion to terminate permits).

The Sixth Circuit's decision in *Johnson v. Bredesen*, 624 F.3d 742 (6th Cir. 2010) is not to the contrary. 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 and decide 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); *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 363 (2006) ("[W]e are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated.").



In considering *Johnson*'s equal protection claim, the Sixth Circuit invoked the plaintiffs' current ineligibility to vote in order to apply rational basis review rather than strict scrutiny. 624 F.3d at 746–50. The 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, there would have been no need to

evaluate the state's claimed interests. *Id*. at 747. Here, there is no equal protection challenge, and the tiers of scrutiny have no application in a First Amendment unfettered discretion challenge.[7] 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.

Turning to the Twenty-Fourth Amendment claim, the 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 very different. Plaintiffs here do not allege that a 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 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



[7] This is but one of the ways in which this First Amendment doctrine is more protective and robust than Equal Protection Clause doctrine. *See infra* at 17–21 (discussion of First Amendment providing, not just different, but greater protection than Fourteenth Amendment).

not result in the restoration of their voting rights. Nothing in *Johnson* conflicts with Plaintiffs' claim or forecloses the remedy sought.[8]

At bottom, Defendant wants this Court to decide this case 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.[9] There is no case, including *Johnson*, that supports that arbitrary distinction.

**c. 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." *Rhodes*, 393 U.S. at 29. In *Tashjian v. Republican Party of Connecticut*, the Court stated that the legislative authority given to states in the Election Clause, U.S. CONST. art. I, § 4, cl. 1, "does not extinguish the State's responsibility to observe the limits established by the First



[8] 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 concerns the right to vote.

[9] 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.

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. "[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*, 486 U.S. at 766. 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. If two provisions were in conflict, the more specific provision would control, but 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, at *1 (4th Cir. 2000) (unpublished). Instead, Plaintiffs have argued that *arbitrary* reenfranchisement violates the First Amendment, a constitutional challenge not adjudicated in any of those cases.



**d. The First Amendment presents rules, doctrines, and causes of action that are analytically and legally distinct from Fourteenth Amendment doctrines, specifically targeted at the challenged scheme, and not subject to Fourteenth Amendment proof requirements.**

Just as Section 2 of the Fourteenth Amendment does not foreclose this action, neither does Section 1. Defendant points to *Beacham v. Braterman*, 300 F. Supp. 182 (S.D. Fla.), *aff'd mem.*, 396 U.S. 12 (1969), *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272 (1998), *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458, 466 (1981), and *Smith v. Snow*, 722 F.2d 630, 632 (11th Cir. 1983) (per curiam). But all of these decisions are Fourteenth Amendment equal protection and/or due process cases, which say nothing about the First Amendment unfettered discretion doctrine and do not foreclose this action.

Plaintiffs have asserted no Fourteenth Amendment claims of any kind. Fourteenth Amendment case law does not preempt the First Amendment unfettered discretion doctrine or preclude its application to an arbitrary voting rights restoration scheme. The First Amendment presents rules, doctrines, and causes of action that are distinct from the

Fourteenth Amendment, targeted at the challenged restoration process, and not subject to doctrinal requirements specific to Fourteenth Amendment claims. *Burton v. City of Belle Glade*, 178 F.3d 1175, 1187–88 n.9 (11th Cir. 1999), *Cook v. Randolph County*, 573 F.3d 1143, 1152 n.4 (11th Cir. 2009), and *Irby v. Virginia State Board of Elections*, 889 F.2d 1352, 1359 (4th Cir. 1989), did not consider a First Amendment challenge to arbitrary voting rights restoration, but rather challenged a city's refusal to annex an African-American housing project, the attempted reassignment of a voter to a different district, and an appointive system for a school board, respectively, and produced narrow holdings. Any dicta as to the relationship between the First and Fourteenth Amendments is overstated and contradicted by Supreme Court precedent.

Holdings only extend to the facts and claims addressed in a case. *See infra* at 13.[10] *Burton*, *Cook*, and *Irby* incorrectly state the specific holdings of prior cases, principally *Washington v. Finlay*, 664 F.2d 913, 928 (4th Cir. 1981), a racial minority vote dilution challenge to an at-large election scheme which expressly limited its holding to the context of vote dilution,[11] and overstate their own limited holdings. This Court need not determine



[10] The Eleventh Circuit has also repeatedly affirmed this principle, which strictly limits the reach of both *Burton* and *Cook*. *See, e.g.*, *KMS Rest. Corp. v. Wendy's Int'l, Inc.*, 361 F.3d 1321, 1326 (11th Cir. 2004) ("[J]udicial decisions can reach only as far as the facts that give rise to them.").

[11] The qualifying language in *Washington* that limited the holding to challenges to the dilution of an otherwise-intact right to vote has been omitted from successive citations: "*Where, as here, the only challenged governmental act is the continued use of an at-large election system, and where there is no device in use that directly inhibits participation in the political process*, the first amendment, like the thirteenth, offers no protection of voting rights beyond that afforded by the fourteenth or fifteenth amendments." 664 F.2d at 928 (emphasis added). The Court clearly limited its holding to the only situation before it, the dilution of an otherwise-unimpeded vote, and expressed no opinion as to whether a law that "directly inhibits participation in the political process," such as an arbitrary restoration scheme, violates the First Amendment.

that *Burton*, *Cook*, and *Irby* were wrongly decided in order to distinguish them from the instant claims; they need only be properly limited to their specific facts and claims. They did not consider the facts and claims raised here; no case had prior to *Hand v. Scott*, 285 F. Supp. 3d 1289 (N.D. Fla. 2018).

The First Amendment may not offer a distinct prohibition from or greater protection than the Fourteenth Amendment when the target is racial discrimination, a city's refusal to annex a majority-black housing project, the reassignment of a voter's registration to another voting district, or the use of appointments to fill public offices, but the courts' conflation of these separate constitutional claims is necessarily narrowed to the facts and arguments in these cases. In *Burton*, for instance, even the plaintiffs-appellants did not differentiate their First Amendment claim from their Fourteenth and Fifteenth Amendment claims: "The court also erred in granting the motion to dismiss plaintiffs' claims under the first and thirteenth amendments . . . . Plaintiffs' rights to be *free of racial discrimination* in voting are protected by these amendments." Brief for Appellants, *Burton v. City of Belle Glade*, 178 F.3d 1175 (11th Cir. 1999) (No. 97-5091), 1998 WL 340845 at *47 (emphasis added). In *Cook*, the facts reveal there was no injury whatsoever and therefore no subject matter jurisdiction. 573 F.3d at 1152–54 & n.4. And *Irby* solely concerned an appointive system for selecting school board members, under which everyone was deprived of a vote. 889 F.2d at 1355–60. *Burton*, *Cook*, and *Irby* do not set forth a well-developed legal principle that applies to all First Amendment claims or all voting rights cases. By contrast, the First Amendment unfettered discretion doctrine is a well-developed, well-settled rule that has been consistently invoked for decades to strike down arbitrary licensing schemes regulating an endless array of First Amendment conduct. No court has ever decided or

*could* ever decide that *all* First Amendment doctrines are superfluous or redundant with the Fourteenth Amendment in the voting rights context or that First Amendment doctrines offer no greater protection for voting rights than the Fourteenth Amendment.

However, as the Supreme Court cases make clear, the First Amendment unfettered discretion doctrine *does* afford more robust protection than the Fourteenth Amendment. The unfettered discretion doctrine is not medicine for an already-ill patient, the way Fourteenth Amendment discrimination law is, but rather a vaccination inoculating First Amendment-protected conduct against disease. The Court has shown zero tolerance for even the risk of discriminatory or arbitrary treatment in the First Amendment context, whereas discrimination claims under the Fourteenth Amendment require a showing that actual, intentional discrimination has already occurred. *Compare Forsyth Cty.*, 505 U.S. at 133 n.10 (striking down local government's arbitrary permit application process without any proof of actual, intentional discrimination), *with Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 264–65 (1977) (requiring proof of actual, intentional discrimination in equal protection case challenging local government's denial of rezoning application). In *Forsyth County*, the Supreme Court underscored this distinction:

> [T]he success of a facial challenge on the grounds that an ordinance delegates overly broad discretion to the decisionmaker rests not on whether the administrator has exercised his discretion in a content-based manner, but whether there is anything in the ordinance preventing him from doing so.

505 U.S. at 133 n.10; *see also Roach v. Stouffer*, 560 F.3d 860, 869 & n.5 (8th Cir. 2009) (holding that, in facial First Amendment challenge to officials' "unbridled discretion" in administering specialty license plate program, pro-life group "need not prove, or even allege" viewpoint discrimination); *Miller*, 622 F.3d at 532 ("[A] plaintiff may bring facial challenges to statutes granting such discretion 'even if the discretion and power are never

actually abused.'" (quoting *City of Lakewood*, 486 U.S. at 757)); *Prime Media, Inc.*, 485 F.3d at 351 ("[A] licensing provision coupled with unbridled discretion itself amounts to an actual injury.") (internal quotation marks and citations omitted); *Matwyuk v. Johnson*, 22 F. Supp. 3d 812, 824–25 (W.D. Mich. 2014) (same). Regardless of whether or how often it is exercised, the power to discriminate is prohibited in the First Amendment context: such unfettered power is per se unlawful. This is the most important difference from equal protection doctrine, and this is only the second case to consider the application of this First Amendment doctrine to arbitrary voting rights restoration.

**e. The only aspect of Kentucky's clemency system implicated by this case is restoration of the right to vote, and the "clemency" label does not immunize this restoration system from constitutional scrutiny.**

Imagine a state law that forced all felons seeking the vote to submit registration applications, along with their criminal records, or, alternatively, permitted 16- and 17-year-olds to submit applications, along with their high school transcripts, to state or county election officials and gave those officials unlimited discretion to add these applicants to the voting rolls—to grant or deny them the right to vote. Such arbitrary decision-making authority over the qualification and registration of voters would clearly violate the Constitution. *Louisiana*, 380 U.S. at 153. So too does arbitrary decision-making power over voting rights restoration. Defendant has argued the latter is different because voting rights restoration has been incorporated into the clemency system, but that is a superficial, semantic distinction. While the label, the arbiter, and the timing might be different, that hypothetical scheme and the one challenged in this case both violate the Constitution. The word "clemency" has no magical power to make the unlawful lawful.

Defendant has nevertheless placed great weight on the fact that Kentucky has incorporated voting rights restoration into its executive clemency system, which originated with the English monarchy in the Eighth Century. *See Herrera v. Collins*, 506 U.S. 390, 412 (1993) ("In England, the clemency power was vested in the Crown and can be traced back to the 700's. Blackstone thought this 'one of the great advantages of monarchy in general, above any other form of government . . .'") (internal citation omitted); *Bowens v. Quinn*, 561 F.3d 671, 676 (7th Cir. 2009) (describing clemency as "one of the traditional royal prerogatives . . . borrowed by republican governments"). But in our constitutional and democratic system of government, labeling reenfranchisement as "clemency" does not immunize it from judicial review.

Defendant's own authorities demonstrate that clemency powers must still yield to federal constitutional limitations. *See, e.g.*, *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 288–90 (1998) (O'Connor, J., concurring). *Woodard*, as well as *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458, 466 (1981), and *Smith v. Snow*, 722 F.2d 630, 632 (11th Cir. 1983) (per curiam), are all *due process* challenges that do not address or foreclose Plaintiffs' claims. In her concurrence in *Woodard*, Justice O'Connor wrote that: "Judicial intervention might . . . be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process." 523 U.S. at 289. The current absence of any codified, specific and objective legal constraints on the Governor's discretion is arguably worse than a coin flip, which at least relies upon pure chance. There is no conflict between these cases' conclusion that discretionary pardons or commutations are lawful and finding arbitrary voting rights restoration as unlawful. *Woodard* and

*Dumschat* are not obstacles to a ruling in Plaintiffs' favor, because such a judgment in this case would only affect the right to vote as incorporated in the clemency process. Those cases did not consider the singular, powerful protections of the First Amendment, which go above and beyond what due process and equal protection afford.

A ruling for Plaintiffs would merely apply a well-settled First Amendment doctrine to another area of First Amendment-protected expression, association, or conduct, as it has been routinely applied in different contexts for over eighty years. The decision to incorporate voting rights restoration into the clemency system has created a specific and narrow First Amendment violation. A ruling for Plaintiffs would be limited to the right to vote and need not alter any other aspect of the clemency system. Other species of clemency, including pardons and commutations, would remain unchanged.[12]

Restoration is available to all felons separate and independent from a full pardon, which confers *many* other benefits and rights that do not implicate the First Amendment. KY. CONST. §§ 77, 145. Accordingly, a decision in Plaintiffs' favor would have no effect on discretionary full pardons, because Kentucky has not made full pardons the single, exclusive means for voting rights restoration. If a state did so and that rule was challenged in a future case, the First Amendment doctrine outlined here would require that the right to vote—and only that right—be handled separately from the discretionary pardon power. But that is not this case and even that further holding would not mean that the state or federal pardon power itself is "constitutionally suspect." DE 32-1 at 7. It is only bringing



[12] Because this case is narrowly aimed at voting rights restoration, it also does not implicate other rights included in civil rights restoration, such as running for office or serving on a jury. KY. CONST. § 150; KY. REV. STAT. § 29A.080(2). Those would remain subject to the Governor's discretionary clemency authority.

felon disenfranchisement and reenfranchisement into the discretionary clemency system that has caused a constitutional problem here, not the pardon power or felon disenfranchisement. There are numerous cases in which two otherwise-lawful government actions combine or interact to violate the Constitution. *See, e.g.*, *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994) (holding nondiscriminatory tax and local subsidy program operated in tandem to violate Dormant Commerce Clause).

Reenfranchisement is neither inherently a clemency function nor inherently part of the pardon power; it can be and often is handled separately from the clemency system and/or as an alternative to a pardon. Today, unless a felon obtains a full pardon prior to sentence completion, thirty-eight states and the District of Columbia have removed reenfranchisement from the clemency system by creating a non-discretionary path to restoration, typically by restoring voting rights following the completion of incarceration, parole, probation, and/or a waiting period. DE 31 ¶ 1 & n.1.[13] Further, there is evidence that voting rights restoration is functionally very different from a pardon. For example, former Governor Beshear's 2015 Executive Order underscored that the restoration it was effecting should "not be construed as a pardon" and, accordingly, it would "not operate as a bar to greater penalties for second offenses or a subsequent conviction as a habitual criminal."[14] A ruling here will not affect the Governor's full pardon power.



### III. The lack of reasonable, definite time limits on the Governor to make a decision to grant or deny a restoration application also violates the First Amendment.

[13] The sole caveat is the very limited permanent disenfranchisement provision in Maryland: a felon "convicted of buying or selling votes" must secure a pardon to regain their voting rights. MD. CODE ANN. ELEC. LAW § 3-102(b)(3). Maine and Vermont are excluded here because they never disenfranchise felons, even during incarceration.

[14] Ex. J, Ky. Exec. Order No. 2015-871 (Nov. 24, 2015).

Kentucky's voting rights restoration scheme also lacks any reasonable, definite time limits by which the Governor must make a decision to grant or deny a restoration application. Defendant does not deny any applications; he just indefinitely holds those he does not grant. DE 40 ¶ 7; DE 45 at 6–7. 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.

If this Court were to rule in Plaintiffs' favor on Count One, the requested injunction would give the state the freedom to craft a non-arbitrary restoration system. Depending on the specifics of that replacement non-arbitrary scheme, *e.g.*, if there were no application requirement but rather an enumerated list of specific criteria, ultimately it might be unnecessary for this Court to order relief as to Count Two.



**CONCLUSION**

Accordingly, Plaintiffs respectfully request that this Court grant this Motion for Summary Judgment and order Defendant to create a non-arbitrary system of voting rights restoration governed by specific rules and criteria and reasonable, definite time limits.

DATED: November 25, 2019 Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of Plaintiffs' Motion for Summary Judgment was served upon the following parties via the CM/ECF system on November 25, 2019:

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