UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION AT LONDON
CIVIL ACTION NO. 6:18-CV-277-KKC

DERIC JAMES LOSTUTTER, *et al.* **PLAINTIFFS,**

v.

MATTHEW G. BEVIN, in his official capacity as GOVERNOR OF THE COMMONWEALTH OF KENTUCKY **DEFENDANT.**

*** *** *** ***

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THE GOVERNOR'S RESPONSE TO THE PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT[1]

The Plaintiffs do not dispute that their case rises or falls based upon whether the Court extends First Amendment case law about licenses and permits to an entirely new context: restoring felons' ability to vote. The Plaintiffs identify no prior case that ultimately has taken this step, nor do they offer a principled reason for treating the restoration of felons' ability to vote as equivalent to receiving a license or permit. More importantly, the Plaintiffs cannot get around the fact that their licensing-and-permitting theory is foreclosed by Sixth Circuit precedent, specifically *Johnson v. Bredesen*, 624 F.3d 742 (6th Cir. 2010). The Court has no option but to deny the Plaintiffs' motion for summary judgment and to uphold Kentucky's longstanding voting-restoration process.

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[1] As part of his response to the Plaintiffs' motion for summary judgment, the Governor incorporates his memorandum in support of his motion for summary judgment. (R. Doc. 47-1).

ARGUMENT

The Plaintiffs' lead citation in their summary-judgment motion is *Louisiana v. United States*, 380 U.S. 145 (1965). The Plaintiffs' reliance on *Louisiana*—not to mention their unwillingness to grapple with the facts or claims at issue there—shows how far the Plaintiffs want the Court to reach in order to rule in their favor. *Louisiana* concerned an "interpretation test" for voting registration, which required an individual seeking to register to vote to "'give a reasonable interpretation' of any section of the State or Federal Constitution 'when read to him by the registrar.'" *Id.* at 149. Some state officials used this scheme as "part of a successful plan to deprive Louisiana [African-Americans] of their right to vote." *Id.* at 151. The Supreme Court summarized the evidence of this effort as follows: "As the evidence showed, [African-American] people, even some with the most advanced education and scholarship, were declared by voting registrars with less education to have an unsatisfactory understanding of the Constitution of Louisiana or of the United States." *Id.* at 153. The Supreme Court correctly concluded that this violates the Fifteenth Amendment. *Id.*

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This case, of course, is nothing like *Louisiana*. Most obviously, the Plaintiffs have not raised a Fifteenth Amendment claim here. Nor have they alleged that the Governor acted in a discriminatory fashion, as was shown about the state officials in *Louisiana*. If the Plaintiffs had a good-faith basis to make such a claim, it could be actionable under *Hunter v. Underwood*, 471 U.S. 222, 227-29 (1985). (*See* R. Doc. 47-1 at 9 n.6).

Instead of claiming that the Governor has used his restoration power in a discriminatory manner, the Plaintiffs have alleged that there is a mere "risk" that the Governor will do so. (R. Doc. 31 ¶¶ 3, 45, 53). This "risk," according to the Plaintiffs, makes Kentucky's reenfranchisement scheme unconstitutional in all circumstances, regardless of whether the Governor actually acts in a discriminatory manner. To state the obvious, this claim, which is based primarily on First Amendment case law about licenses and permits, is nothing like the Fifteenth Amendment claim that the Supreme Court decided in *Louisiana*, where there was *affirmative proof* of discrimination—not a hypothetical risk of such. Unlike *Louisiana*, where state officials created "a trap, sufficient to stop even the most brilliant man on his way to the voting booth," 380 U.S. at 153, the Plaintiffs have not even attempted to argue that the Governor has acted in such a discriminatory manner here.

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Regardless, the biggest problem with the Plaintiffs' claims is that they are contrary to binding Sixth Circuit precedent. More specifically, the Plaintiffs have no answer for *Johnson v. Bredesen*. The most that the Plaintiffs can muster is that *Johnson* is "necessarily limited to the facts and claims presented to the Court" and that the Court need not follow unidentified *dicta* from *Johnson*. (R. Doc. 46 at 13). But the legal issue decided by *Johnson*—that felons who have lost the ability to vote do not have a constitutional entitlement to regain the ability to vote—is dispositive of the Plaintiffs' First Amendment claims, which necessarily depend upon the Plaintiffs being able to invoke a constitutional right.

To recap, *Johnson* concerned a state statute that conditioned reenfranchisement on full payment of restitution and child support. 624 F.3d at 745. In rejecting a Fourteenth Amendment challenge, the Sixth Circuit held that "[h]aving lost their voting rights, Plaintiffs lack *any fundamental interest* to assert." *Id.* at 746 (emphasis added). Elsewhere in the decision, *Johnson* described a felon's ability to vote as a "mere 'statutory benefit.'" *Id.* at 749 (citation omitted). A statutory benefit, by definition, is not a constitutional right protected by the First Amendment. Eliminating any doubt about this issue, *Johnson* further held that felon reenfranchisement "merely relate[s] to the restoration of a civil right to which Plaintiffs *have no legal claim* . . . ." *See id.* at 748-49 (emphasis added). These aspects of *Johnson* will be rendered meaningless if the Court sustains the Plaintiffs' argument that felons who have lost the ability to vote have a First Amendment interest in voting.

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The portion of *Johnson* that resolved the felons' Twenty-Fourth Amendment claim provides even stronger reasons to reject the Plaintiffs' claims. By way of background, the *Johnson* plaintiffs claimed that requiring them to pay child support and restitution before receiving the ability to vote amounted to an unconstitutional poll tax, in violation of the Twenty-Fourth Amendment. *Id.* at 750-51. The Sixth Circuit rejected this argument, explaining that "[t]he re-enfranchisement law at issue does not deny or abridge *any rights*; it only restores them." *Id.* at 751 (emphasis added). *Johnson* then held, in unambiguous language that resolves this case: "As convicted felons constitutionally stripped of their voting rights by virtue of their

convictions, *Plaintiffs possess no right to vote* and, consequently, have no cognizable Twenty-Fourth Amendment claim." *Id.* (emphasis added). This passage—specifically the part that felons "possess no right to vote"—is undeniably part of *Johnson*'s binding holding, and it is irreconcilable with the Plaintiffs' argument that felons do in fact have a constitutional right to vote. In sum, *Johnson* is a complete answer to the Plaintiffs' claims.

CONCLUSION

The Court should deny the Plaintiffs' motion for summary judgment and, for the reasons explained in the Governor's motion for summary judgment and this response, should hold that Kentucky's longstanding process for felon reenfranchisement is fully consistent with the First Amendment.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

On December 5, 2019, I electronically filed this Response to the Plaintiffs' Motion for Summary Judgment through the ECF system, which will send a notice of electronic filing to the following:

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