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

DERIC JAMES LOSTUTTER, *et al.*

Plaintiffs,

v.

MATT BEVIN, in his official
Capacity as Governor of Kentucky,

Defendant.

Civil No. 6:18-cv-277-KKC

PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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The precedents make clear that arbitrary disenfranchisement is unconstitutional, but Defendant offers no response to these cases. This silence underscores that Defendant cannot reconcile its position that arbitrary reenfranchisement is exempt from constitutional challenge with *Shepherd v. Trevino*, 575 F.2d 1110, 1114 (5th Cir. 1978), *Owens v. Barnes*, 711 F.2d 25, 26–27 (3d Cir. 1983), *Williams v. Taylor*, 677 F.2d 510, 515–17 (5th Cir. 1982), the Supreme Court's remand of the constitutional claim against non-uniform enforcement in *Richardson v. Ramirez*, 418 U.S. 24, 33–34, 56 (1974), and *Hunter v. Underwood*, 471 U.S. 222, 231–33 (1985). Defendant's theory appears to be either that felon reenfranchisement laws are exempt from constitutional requirements or can only be challenged for intentional, express racial discrimination. But no decision by any court has ever endorsed either of those theories. What federal courts, including the U.S. Supreme Court, have said for over eighty years is that individuals who are not presently-entitled to engage in certain First Amendment-protected conduct *as a matter of state law* nevertheless

must be afforded a non-arbitrary process to apply for the government's permission to engage in that activity or conduct. This is the bare minimum the First Amendment requires.

No U.S. Supreme Court or Sixth Circuit case forecloses this action.[1] Defendant badly misreads *Johnson v. Bredesen*, 624 F.3d 742 (6th Cir. 2010). *Johnson* only says convicted felons' interest in voting is not "fundamental" and thereby not entitled to strict scrutiny under the Fourteenth Amendment. 624 F.3d at 746–50. *Johnson* does not say that there can be no *federal* constitutional injury or interest when a felon is ineligible to vote under *state* law. If that were true, felon disenfranchisement and reenfranchisement laws would be exempt from this Court's review for constitutional violations. Had that been true in *Johnson*, the plaintiffs would have lacked standing, and the Court would have lacked jurisdiction to rule on the constitutionality of Tennessee's scheme. Instead, the *Johnson* Court engaged in an equal protection analysis, applying rational basis review. *Id*. at 746–50. *Johnson* also rejected a poll tax claim, finding that Twenty-Fourth Amendment claims, specifically, can only be asserted by currently-eligible voters. *Id*. at 750–51. That conclusion can be read as consistent with the amendment's language, and the Court did not and *could not* extend its holding to any other constitutional claims. *Johnson* did not consider a First Amendment unfettered discretion claim and could not hold that felons lack a constitutional injury from a process that arbitrarily licenses voting rights to felons.

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[1] A contradiction rests at the heart of Defendant's argument that this case is unprecedented and yet is nevertheless specifically rejected by precedent. Only two of the cases Defendant cites involved a First Amendment unfettered discretion claim against felon reenfranchisement, and neither was finally adjudicated on the merits. *Hand v. Scott* proceeded to an Eleventh Circuit stay order, before it became moot. 888 F.3d 1206 (11th Cir. 2018); *see also* No. 18-11388 (11th Cir.), Defendants/Appellants' Second Supplemental Brief, at 5–6 (noting parties' agreement that appeal is moot). *Harness v. Hosemann*, Civil Action No. 3:17-cv-791, R. Doc. At 91 at 23 (S.D. Miss. Aug. 7, 2019), is before the Fifth Circuit on interlocutory appeal and was argued this Tuesday.

Accordingly, the *Johnson* Court necessarily found currently-disenfranchised felons retain a constitutionally-protected interest in voting, even while finding—*on the merits*—that Tennessee's scheme did not violate the Constitution. Defendant ignores this distinction. It is circular reasoning to argue that "no constitutional interest is implicated because the Plaintiffs no longer have a constitutional entitlement in the franchise." Def.'s Mot. at 21; *see also id*. at 2 ("Without a constitutional right to vote, it follows that the Governor's decision to restore or not restore a felon's ability to vote does not implicate a constitutional right."). This contention also flies in the face of the Supremacy Clause: state law cannot dictate when the Constitution applies, and a person who is ineligible to vote under *state* law nevertheless can suffer a *federal* constitutional injury. Whenever a government's administrative licensing scheme governs the exercise of First Amendment-protected political expression and association rights, it triggers the First Amendment's unfettered discretion doctrine. Here, Kentucky's arbitrary decision-making *process* injures Plaintiffs—Kentuckians whose only option to regain their voting rights is to participate in a system unconstrained by specific, non-arbitrary, objective criteria.[2]

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The Governor argues Plaintiffs have not shown he makes restoration decisions in an arbitrary manner, but this is mistaken. Def.'s Mot. at 9. "Arbitrary" does not only mean "existing or coming about seemingly at random or by chance or as a capricious and unreasonable act of will"; it also means "not retrained or limited in the exercise of power,"

[2] There are many other contexts in constitutional law, where an injury in fact for Article III standing is established based on a constitutional defect in the process for obtaining a desired benefit, permit or license, even if the applicant currently lacks and is not per se entitled to that benefit, permit or license. *See, e.g.*, *Gratz v. Bollinger*, 539 U.S. 244, 262 (2003) (premising standing on opportunity to compete for college admission).

"depending on individual discretion" and "not fixed by law."[3] Arbitrary power is per se prohibited in the First Amendment context regardless of how that power is exercised.

Plaintiffs would have no First Amendment unfettered discretion claim if all felons were uniformly, permanently disenfranchised but, *once the state creates a restoration process*, the First Amendment kicks in and guarantees those applying to engage in a First Amendment-protected activity the right to a non-arbitrary licensing (here, restoration) system.[4] Plaintiffs cannot challenge their ineligibility to vote under current law; instead, they challenge Kentucky's arbitrary restoration system, knowing full well that one, more, or all of them might not be restored even under a non-arbitrary system governed by specific and objective rules and criteria. There is a wide spectrum of possible non-arbitrary systems that would cure the First Amendment violation here—from restoration of all felons upon release from incarceration to permanent disenfranchisement for all felons and everything in between. Defendant need only pick one of them. Instead, Defendant is fighting to remain off the spectrum entirely and endowed with unfettered discretion to select which felons may once again vote. Moreover, even under the relief Plaintiffs seek, Defendant would retain discretion to establish non-arbitrary restoration rules and criteria that could vary from administration to administration. The Governor would only lose the power to make case-by-case decisions to restore select individuals' voting rights. It would be the end of an opaque, arbitrary system and the beginning of a transparent, rule-bound one.

Clemency's purpose is to confer mercy or correct miscarriages of justice, but a minority of states have corrupted this purpose by incorporating voting rights restoration

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[3] MERRIAM-WEBSTER DICTIONARY, www.merriam-webster.com/dictionary/arbitrary.

[4] Defendant asserts that restoration is "nothing like" licensing or permitting. Def.'s Mot. at 19. But restoration is the state government giving a felon *permission* or a *license* to vote.

into this discretionary process. In Kentucky, clemency has been weaponized to keep hundreds of thousands disenfranchised for decades after they have completed their sentences. Clemency was never intended to be a systemic barrier to so many citizens regaining their right to vote. Contrary to Defendant's arguments as to other forms of clemency, the sky will not fall if the Court rules in Plaintiffs' favor. Thirty-eight states have already removed voting rights restoration from the clemency process entirely, and others have removed it for certain categories of felonies. If a state were to make purely-discretionary full pardons the exclusive means of voting rights restoration, this too would run afoul of the First Amendment unfettered discretion doctrine, but that is not this case and, in that future, hypothetical case, the remedy would simply be to extricate voting rights restoration from the bundle of rights and benefits a pardon confers. Clemency is not an impenetrable fortress, and certainly not when a state makes voting contingent upon a public official's mercy. Defendant's citations to *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), are an attempt to draw a line around the clemency process and keep out this Court and the Constitution. But not even those due process cases stand for such an extreme proposition.

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Finally, not only does Defendant claim the unfettered power to grant or deny restoration of voting rights, but the unfettered power to even consider and decide applications. Under this theory, Defendant may grant one restoration application within six months and hold fifty others for six years before granting them. During that arbitrary delay, those fifty later-granted applicants would be denied their right to vote in multiple elections on a public official's whim. This practice also violates the First Amendment.

DATED: December 5, 2019

Respectfully submitted,

/s/ Jon Sherman

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Plaintiffs' Response to Defendant's Motion for Summary Judgment was served upon the following parties via the CM/ECF system on December 5, 2019:

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December 5, 2019