

No. 22-5703

In the
United States Court of Appeals
for the Sixth Circuit

DERIC JAMES LOSTUTTER; ROBERT CALVIN LANGDON;
BONIFACIO R. ALEMAN,

Plaintiffs-Appellants,

v.

COMMONWEALTH OF KENTUCKY,

Defendant,

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.

**PLAINTIFFS-APPELLANTS' PETITION FOR REHEARING AND
REHEARING EN BANC**

BEN CARTER
KENTUCKY EQUAL JUSTICE
CENTER
222 S. First St., Suite 305
Louisville, KY 40202
(502) 303-4062

JON SHERMAN
MICHELLE KANTER COHEN
FAIR ELECTIONS CENTER
1825 K St. NW, Suite 450
Washington, DC 20006
(202) 331-0114

Counsel for Plaintiffs-Appellants
Deric James Lostutter, Robert Calvin Langdon, and Bonifacio R. Aleman



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INTRODUCTION

Plaintiffs-Appellants petition this Court for rehearing and rehearing en banc because the panel's decision (Ex. A) conflicts with decades of U.S. Supreme Court precedents concerning the First Amendment, as well as decisions of the Supreme Court and this Court establishing the requirements of a functional analysis. This appeal also raises questions of exceptional public importance.

Appellants sued the Governor of Kentucky to put an end to arbitrary restoration of voting rights, which puts U.S. citizens' right to express their political views at the mercy of a public official's unfettered discretion. The U.S. Supreme Court has long forbidden the arbitrary licensing of First Amendment-protected politically expressive conduct, which includes voting. Arbitrarily granting people the right to vote would indisputably violate the U.S. Constitution, as would arbitrarily disenfranchising them. Appellants have sought a parallel ruling that arbitrary re-enfranchisement is similarly unconstitutional.

The panel has ruled that the First Amendment unfettered discretion doctrine is not implicated by this case because voting rights restoration does not function as a licensing scheme. In reaching this determination, the panel formalistically relied upon the labels assigned to voting rights restoration under Kentucky law and thereby allowed state law categories to dictate the scope of a federal constitutional right. Respectfully, this threshold error led the panel to base its ultimate ruling on

perceived functional dissimilarities between “pardons” and “licenses,” even though these purported differences had no material bearing on the First Amendment inquiry. In privileging means over ends and elevating the *form* of official action and state-created labels over the commonality in *practical effects*, the panel’s decision conflicts with longstanding precedents commanding a functional analysis in First Amendment challenges.

ARGUMENT

I. THE PANEL’S DECISION CONFLICTS WITH PRECEDENTS OF THE U.S. SUPREME COURT AND THIS COURT.

A. PLAINTIFFS’ CLAIMS

Plaintiffs have argued that Kentucky’s voting rights restoration system functions as a licensing system governing First Amendment-protected conduct, triggering the operation of the unfettered discretion doctrine under *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988), *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992), and related Supreme Court precedents. This prophylactic doctrine instructs courts to enjoin licensing schemes governing the exercise of First Amendment-protected expression or expressive conduct where officials have been vested with unfettered discretion to grant or deny the license. *City of Lakewood*, 486 U.S. at 757, 763–64. A lack of reasonable definite time limits

on the exercise of the licensor’s discretion also violates the First Amendment. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 226 (1990).¹

Under such an arbitrary licensing system, the applicant is subjected to the risk of “undetectable” viewpoint or speaker-based discrimination and pressured into self-censorship so as not to jeopardize their application. *City of Lakewood*, 486 U.S. at 759, 762–63. “[A] facial challenge lies whenever a licensing law gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers.” *Id.* at 759. The Supreme Court has also explained that in the absence of “standards to fetter the licensor’s discretion,” as-applied challenges are not viable, and the licensor’s decision is “effectively unreviewable.” *Id.* at 758–59.

This case implicates all the same concerns and principles that have animated the unfettered discretion doctrine for eighty-five years. *Lovell v. Griffin*, 303 U.S. 444 (1938). No rules or criteria govern Appellee’s decision to grant or deny a voting rights restoration application. Application for Restoration of Civil Rights, RE 57-1, Page ID # 786–88; Appellants’ Br. at 6–7, 28. According to his counsel, Governor Beshear grants or withholds permission to vote based on whether he considers the applicant “worthy.” See Ex. B, Transcript of Oral Argument (“Oral Arg. Tr.”) at

¹ Plaintiffs’ Counts One and Two seek relief under these two closely related doctrines. Fourth Amended Complaint, RE 31, Page ID # 350–57.

22:17–23:10 (“Under Kentucky law, that is left to each governor who holds the office to ultimately subjectively determine what – who they think is worthy . . .”). Deciding whether to grant or deny an application to engage in First Amendment-protected expressive conduct based on a wholly subjective and arbitrary “worthiness” standard is precisely what the First Amendment unfettered discretion doctrine prohibits. Under Kentucky’s purely discretionary system, a governor may review any information on the applicant’s political viewpoints, including campaign donations, previous registration history, and social media posts, and selectively grant or deny applicants based on their viewpoints without ever disclosing these discriminatory motives. Such a scheme would understandably deter a current or future restoration applicant from expressing certain viewpoints. Accordingly, this system violates the principles articulated in *City of Lakewood*.

Imagine a restoration applicant with a social media presence filled with claims that the 2020 presidential election was stolen and expressing support for those convicted in connection with January 6, or an applicant who publicly expresses support for the right to an abortion or for a nationwide ban on the same. Nothing in Kentucky law prevents a Governor from covertly discriminating against such applicants and, in the absence of rules and criteria, there is simply no way to prove viewpoint discrimination in an as-applied challenge. *City of Lakewood*, 486 U.S. at 758–59. Consider, as well, the restoration applicant who holds any of the above

beliefs but is deterred from publicly sharing them because his restoration application is pending with a Governor known to have opposing political views. *Id.* at 757 (“[T]he mere existence of the licensor’s unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech . . .”).

B. THE PANEL DECISION’S FORMALISM

The principal question presented by this case is whether a state official may selectively and arbitrarily grant or deny the right to vote to people with felony convictions consistent with the First Amendment. A threshold question is whether voting rights restoration in Kentucky *functions* as a licensing scheme such that the unfettered discretion doctrine applies. The panel’s decision answered only this threshold question and, with respect, erred because it failed to adhere to the Supreme Court’s and this Court’s instructions to apply a functional approach to First Amendment challenges. Notwithstanding the labels Kentucky law affixes to voting rights restoration, *see, e.g.*, Ky. Rev. Stat. § 196.045(1)(e) (“partial pardon”), *functionally* there is no material difference between the state’s voting rights restoration system and licensing. It is not sufficient to identify differences between voting rights restoration and licensing: these differences must have some material impact on the functional analysis the First Amendment commands. Repeating the district court’s error, the panel’s decision is silent as to whether any of these identified “differences” *make* any difference in the First Amendment analysis.

Notably, the mechanics and outcomes of Kentucky’s voting rights restoration system are remarkably similar to those of a licensing system. Disenfranchised individuals with any federal, any out-of-state, or an enumerated Kentucky felony conviction apply to a government office seeking permission to vote. Appellants’ Br. at 6–8 & n.5. The Kentucky Department of Corrections reviews the applicant’s eligibility, and then the Governor grants or denies that application in his absolute discretion. *Id.* If denied, the applicant can re-apply. Absent permission from the Governor, the applicant may not lawfully engage in the unlicensed politically expressive conduct. Ky. Rev. Stat. §§ 119.025, 532.020(1)(a). Finally, as the panel concedes, “the result of the felon reenfranchisement scheme is that a felon is ‘allowed’ to vote again, where previously prohibited. And the result of a license or permit is that a person is ‘allowed’ to engage in regulated conduct, where they were previously prohibited.” Op. at 11.

Notwithstanding these functional commonalities, the panel focuses its attention on the Kentucky Constitution and statutes that refer to voting rights restoration as an “executive pardon” and a “partial pardon.” Ky. Const. § 145; Ky. Rev. Stat. § 196.045(1)(e). However, voting rights restoration is one of the many legal effects of a pardon in Kentucky;² it is not itself a pardon. Restoration is not

² The district court also notes that “[r]estoring a felon’s right to vote is just one of many possible effects of a pardon.” R. 68, Page ID # 847–49.

intrinsically part of clemency: forty states plus D.C. handle voting rights restoration entirely outside their clemency systems—a reality the panel ignores. Appellants’ Br. at 46–47 & n.16.³ Appellee’s own Executive Order 2019-003 itself disclaims that the grant of voting rights restoration bears any of the other effects of pardons. Executive Order 2019-003, RE 53-1, Page ID # 764. Ultimately, the phrase “partial pardon” has a strained, almost oxymoronic ring that betrays an understanding that rights restoration and pardons are different in kind.

Regardless, these state law semantics are irrelevant to the First Amendment question at issue, because the U.S. Supreme Court has repeatedly stated for decades that First Amendment rights and doctrines must be evaluated functionally, not formalistically. *See* Appellants’ Br. at 36–38 (citing, *inter alia*, *Garcetti v. Ceballos*, 547 U.S. 410, 424–25 (2006) (in First Amendment retaliation claim concerning whether public employee had spoken as government employee or private citizen, “[t]he proper inquiry is a practical one” and “[f]ormal job descriptions” are not dispositive); *Press-Enter. Co. v. Superior Ct. of California for Riverside Cnty.*, 478 U.S. 1, 7–10 (1986) (“[T]he First Amendment question cannot be resolved solely on the label we give the event, *i.e.*, ‘trial’ or otherwise, particularly where the

³ Though Appellants’ Brief noted thirty-eight such states plus D.C. have non-discretionary restoration systems, this was due to the inadvertent omission of Maine and Vermont, which do not disenfranchise people convicted of felonies, from the total.

preliminary hearing functions much like a full-scale trial.”); *Branti v. Finkel*, 445 U.S. 507, 518–19 (1980) (“[T]he ultimate inquiry is not whether the label ‘policymaker’ or ‘confidential’ fits a particular position . . .”); *Bigelow v. Virginia*, 421 U.S. 809, 818–26 (1975) (“Regardless of the particular label asserted by the State—whether it calls speech ‘commercial’ or ‘commercial advertising’ or ‘solicitation’—a court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation.”); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963) (“We are not the first court to look through forms to the substance and recognize that informal censorship may sufficiently inhibit the circulation of publications to warrant injunctive relief.”); *Nat’l Ass’n for Advancement of Colored People v. Button*, 371 U.S. 415, 429 (1963) (“[A] State cannot foreclose the exercise of constitutional rights by mere labels.”)); *see also Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 392–93 (1995) (“The Constitution constrains governmental action by whatever instruments or in whatever modes that action may be taken . . . And under whatever congressional label.”) (citation omitted). Seizing on the “partial pardon” label in Kentucky law leads the panel to misapply and breach this longstanding directive.

As a result, the panel proceeds to erroneously compare the features of pardons and licensing, bringing the panel’s ruling into conflict with this Court’s and the

Supreme Court’s precedents. Representative of this central error is the panel’s summation:

Mere similarity in result does not change the nature of the vehicle used to reach that result, and Kentucky law is clear that it restores felons their voting rights through a partial executive pardon, not through the granting of an administrative license. . . . So, regardless of any similarity in outcome—in that a pardoned felon and a licensed civilian may both engage in conduct previously forbidden—the vehicles to achieve that outcome remain fundamentally different.

Op. at 11–12. The panel’s unsubstantiated assertion that the “nature of the vehicle”—and *not* the “result” or “outcome”—is dispositive, directly contradicts the litany of Supreme Court precedents Plaintiffs cited to the panel, forbidding formalistic analysis in a wide spectrum of First Amendment contexts and requiring a practical, functional inquiry. *See infra* at 7–8. The panel’s focus on “the nature of the vehicle” erroneously privileges means over ends and minimizes the practical effects of Kentucky’s voting rights restoration system.

The panel’s reasoning also conflicts with this Court’s precedent establishing that a functional analysis requires an examination of practical effects. In *Vogel v. U.S. Office Products Co.*, this Court held that a remand order is dispositive and, therefore, can only be granted by a district court, not a magistrate judge. 258 F.3d 509, 511 (6th Cir. 2001). In so ruling, this Court wrote:

[W]e apply a *functional equivalency test to see if a particular motion has the same practical effect as a recognized dispositive motion* [in the federal statute]. Applying that test . . . , we too find that *a remand order is the functional equivalent of an order to dismiss. The practical effect*

of remand orders and orders to dismiss can be the same; in both, cases are permitted to proceed in state rather than federal court.

Id. at 517 (emphasis added). Crucially, this Court did not dwell on the substantial differences between remand orders and orders to dismiss—the quite dissimilar “nature” of those two “vehicle[s],” *Op.* at 11—but rather on the practical effect of each. *Vogel*, 258 F.3d at 514–17.

Vogel relied on the Supreme Court’s decision in *Quackenbush v. Allstate Insurance Co.*, which held that a remand order was appealable even though such orders “do not meet the traditional definition of finality.” 517 U.S. 706, 715 (1996). Nonetheless, this difference in “the nature of the vehicle,” to use the panel’s phrase, was immaterial because the remand order was “functionally indistinguishable” from a stay order the Court had previously found appealable in a separate case. *Id.* at 714–15. Like a stay order, a remand “puts the litigants . . . ‘effectively out of court,’ [...] and its *effect* is ‘precisely to surrender jurisdiction of a federal suit to a state court.’” *Id.* (citations omitted, emphasis added); *see also In re Rizzo*, 741 F.3d 703, 705 (6th Cir. 2014) (holding unpaid “business tax” constitutes “excise tax” not dischargeable in bankruptcy “by engaging in a ‘functional examination’” that requires “evaluat[ing] the statute’s ‘*actual effects*’”) (emphasis added). This Court’s focus on practical effects—properly privileging ends over means—is what a functional

analysis requires.⁴ Here, the panel decision has upended this framework and erased the dichotomy between formalism and functionality.

The panel’s statement also cannot be squared with this Court’s recent First Amendment rulings assessing what qualifies as a prior restraint. In *Novak v. City of Parma*, this Court wrote that “in light of our long history of guarding against prior restraints on speech, we should not be overly formalistic in defining what counts as an administrative order. . . . [T]he formality of these classic cases should be a sufficient condition for prior restraint, not a necessary one.” 932 F.3d 421, 432–33 (6th Cir. 2019); *see also Whitney v. City of Milan*, 677 F.3d 292, 295–99 (6th Cir. 2012) (finding public employer’s informal order that employee refrain from speaking to terminated coworker constituted prior restraint). The same kind of functional inquiry articulated in *Novak* must also apply in the closely related context of evaluating whether a challenged practice, action, or law functions as a licensing scheme. *See Ostergren v. Frick*, 856 F. App’x 562, 570 n.10 (6th Cir. 2021) (unpublished) (citing *Novak*’s “recognition that the prior-restraint doctrine should be

⁴ This Court’s sister circuits are in accord—a functional analysis requires analyzing practical effects. *See Martinez v. Carnival Corp.*, 744 F.3d 1240, 1243–44 (11th Cir. 2014) (citations omitted) (applying Supreme Court’s “functional test for finality” which requires “look[ing] to the practical effect of the district court’s order, not to its form”); *Gautreaux v. Chicago Hous. Auth.*, 178 F.3d 951, 956–57 (7th Cir. 1999) (“This court has repeatedly held that it will look beyond labels such as ‘clarification’ or ‘modification’ to the actual effect of the order.”).

applied functionally” and noting “it may be possible for a government to create a de facto licensing scheme”).

C. THE PANEL DECISION’S COMPARISON OF VOTING RIGHTS RESTORATION AND LICENSING

To the extent the panel decision does compare voting rights restoration and licensing, it neither considers the highly similar mechanics between the two nor explains why any of the perceived differences it enumerates materially impact the First Amendment analysis. The panel seizes upon several purported differences between voting rights restoration, as practiced in Kentucky, and licensing, as described in the relevant First Amendment precedents. Each is an immaterial distinction because none alters the practical effects of voting rights restoration.

First, the panel points to the retrospective effect of pardons. But voting rights restoration, which is not itself a pardon, is *functionally* and predominantly prospective in effect, notwithstanding any concurrent retrospective effect. Indeed, the purported prospective/retrospective distinction is not rigid, as the panel portrays it. After all, the Governor may grant a pardon even “prior to formal indictment.” *Fletcher v. Graham*, 192 S.W.3d 350, 359 (Ky. 2006). And while it may be accurate to say that restoration reverses or “nullif[ies]” one of the consequences of a felony conviction, Op. at 6, this legal effect is not principally retrospective. As a functional matter, the practical effect of voting rights restoration is felt prospectively: even once an individual’s right to vote is restored, that person cannot regain the ability to vote

in past elections. Re-enfranchisement does not and cannot restore these citizens' opportunities to express their political views through the ballot box in elections gone by.

Additionally, with respect to those convicted as juveniles, voting rights restoration has no retrospective effect. To the extent the panel has concluded that voting rights restoration is backward-looking because it “restores the felon to the status quo before the conviction,” Op. at 8, as Appellants noted in their opening brief, individuals convicted of felonies as juveniles never could vote and have never voted in their lives. Appellants' Br. at 26 n.11. For them, voting rights “restoration” is functionally first-time enfranchisement, not re-enfranchisement.

Most importantly, the panel fails to articulate why its proffered prospective/retrospective binary or restoration to the status quo ante has any material bearing on the First Amendment unfettered discretion analysis and the principles and concerns articulated in *City of Lakewood* and related precedents. Whether one views voting rights restoration as having prospective effects or both prospective and retrospective effects does not *functionally* alter the manifest risk of undetectable viewpoint discrimination in giving a government official like Governor Beshear sole and unfettered power to selectively bestow voting rights on a particular class of individuals without any reasonable definite time limits on such determinations.

Second, the panel adopts Appellee’s contention that voting rights restoration is a “one-time act of clemency.” Op. at 6–7. Restoration applicants who are denied one or more times will have recurring encounters with the Governor’s discretionary vote-licensing system. In the meantime, an applicant will understandably be deterred from public political expression that might compromise pending or future attempts to secure the Governor’s permission to vote. The ballot may be secret, but applicants’ political views are just a Google, social media, or database search away. *City of Lakewood*, 486 U.S. at 759 (“[T]he licensor does not necessarily view the text of the words about to be spoken, but can measure their probable content or viewpoint by speech already uttered.”). However, even assuming the accuracy of this characterization for argument’s sake, the panel fails to explain what *functional*, material difference the “one-time” nature of restoration could possibly make in evaluating the manifest risk of viewpoint discrimination in giving a government official like Governor Beshear sole and absolute power to bestow voting rights selectively. Once again, focusing on the practical effects, as is required for functional analysis, demonstrates that this perceived difference has no bearing on the constitutional inquiry.

Third, the panel reasons that “[p]ermits or licenses regulating First Amendment activity by their nature do not restore any ‘lost’ rights; they only regulate how persons may engage in or exercise a right they already possess.” Op.

at 8. But even the panel does not seem to believe in this purported distinction, noting the commonality between permitting a restoration applicant “to vote again, where previously prohibited” and permitting a license applicant “to engage in regulated conduct, where they were previously prohibited.” *Id.* at 11. The fact that a person with a felony conviction is ineligible to vote prior to securing permission to do so is not a point of divergence, as license applicants also cannot engage in the “regulated conduct” prior to securing a permit to do so. That the latter group enjoys a freedom of speech or assembly in the abstract is another immaterial distinction, as such license applicants are strictly prohibited from engaging in the specific First Amendment-protected expression or expressive conduct until they secure a license to do so. In this way, the panel’s reasoning appears to assume a system without time, place, and manner restrictions and devoid of licensing requirements. However, restoration applicants and license applicants are in the exact same posture: seeking permission to engage in specific expression or expressive conduct that is forbidden without prior authorization.

Accordingly, the panel’s decision impermissibly allows state law labels, rather than practical effects, to dictate the scope of the First Amendment’s protection and relies upon distinctions reflecting no functional, material difference from licensing to conclude that voting rights restoration in Kentucky does not operate as

a licensing scheme. Not only was this error, but it was error that conflicts with decisions of the U.S. Supreme Court and this Court.

II. THIS APPEAL PRESENTS A QUESTION OF EXCEPTIONAL PUBLIC IMPORTANCE.

As recognized by the Governor in his executive order, “the right to vote is the foundation of a representative government” and restoration of that right fosters “rehabilitation and reintegration into society” and reduces recidivism. Executive Order 2019-003, RE 53-1, Page ID # 762. Approximately 15,000 adults complete parole or probation each year in Kentucky, causing the population of post-sentence but disenfranchised individuals to grow continuously.⁵ Many disenfranchised Kentuckians remain subject to an arbitrary voting rights restoration scheme and are consequently exposed to the threat of viewpoint discrimination.

Additionally, this case has implications beyond the right to vote. Through its formalism and surface-level functional analysis, the panel decision gives state government officials free rein to subject First Amendment-protected political expression and expressive conduct to arbitrary treatment by disguising their

⁵ The Bureau of Justice Statistics (“BJS”) reported that 5,657 adults completed parole and 10,660 adults completed probation in 2021. U.S. Dep’t of Justice, *Probation and Parole in the United States* (2021), at 23, 30, available at <https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/ppus21.pdf>. BJS reported that 6,780 adults completed parole and 9,792 adults completed probation in 2020. U.S. Dep’t of Justice, *Probation and Parole in the United States* (2020), at 21, 26, available at <https://bjs.ojp.gov/content/pub/pdf/ppus20.pdf>.

licensing scheme with immaterial distinctions. Numerous administrative licensing schemes previously invalidated on First Amendment grounds might be resurrected if officials relabel or superficially modify them, so they are less obviously or less formally such. *Cf. Novak*, 932 F.3d at 433 (“A government official should not have to declare his order official or jump through certain procedural hoops to create a prior restraint. Such a rule would allow government officials to cloak unconstitutional restraints on speech under the cover of informality.”).

CONCLUSION

Accordingly, Appellants request that the panel grant their petition for rehearing or, alternatively, that this Court grant their petition for rehearing en banc.

DATED: August 3, 2023

Respectfully submitted,

Ben Carter
Kentucky Bar No. 91352
KENTUCKY EQUAL JUSTICE CENTER
222 South First Street, Ste. 305
Louisville, KY 40202
Phone: (502) 303-4062
ben@kyequaljustice.org

/s/ Jon Sherman
Jon Sherman
D.C. Bar No. 998271
Michelle Kanter Cohen
D.C. Bar No. 989164
FAIR ELECTIONS CENTER
1825 K St. NW, Suite 701
Washington, DC 20006
Phone: (202) 331-0114
jsherman@fairelectionscenter.org
mkantercohen@fairelectionscenter.org

Counsel for Plaintiffs-Appellants

RULE 32(g) CERTIFICATE

I hereby certify that this document, including all headings, footnotes and quotations, but excluding the Table of Contents, Table of Authorities, and any certificates of counsel, contains 3,882 words, as determined by the word count of the word-processing software used to prepare this document, specifically Microsoft Word for Mac Version 16.49 in Times New Roman 14-point font, which is fewer than the 3,900 words permitted under Fed. R. App. P. 35(b)(2).

/s/ Jon Sherman

Jon Sherman

August 3, 2023

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 3, 2023, an electronic copy of Plaintiffs-Appellants' Petition for Rehearing and Rehearing En Banc was filed with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. The undersigned also certifies that participants who are registered CM/ECF users will be served via the CM/ECF system.

/s/ Jon Sherman

Jon Sherman

August 3, 2023

EXHIBIT A

NOT RECOMMENDED FOR PUBLICATION

File Name: 23a0332n.06

No. 22-5703

DERIC JAMES LOSTUTTER, ROBERT)
CALVIN LANGDON, and BONIFACIO R.)
ALEMAN,)

Plaintiffs-Appellants,)

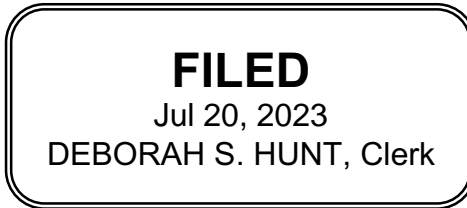
v.)

COMMONWEALTH OF KENTUCKY,)

Defendant,)

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

Defendants-Appellees.)



ON APPEAL FROM THE)
UNITED STATES DISTRICT)
COURT FOR THE EASTERN)
DISTRICT OF KENTUCKY)

OPINION

Before: BOGGS, WHITE, and READLER, Circuit Judges.

WHITE, Circuit Judge. In this First-Amendment challenge to Kentucky’s felon-reenfranchisement scheme, Plaintiffs Deric Lostutter, Robert Langdon, and Bonifacio Aleman appeal the dismissal of their claims for lack of standing, contending that they satisfied all standing requirements under the unfettered-discretion doctrine.¹ Because Plaintiffs concede that their argument turns on a finding that Kentucky’s voting-rights restoration process constitutes an administrative licensing or permitting scheme, and we conclude that this is not the case, we affirm the district court’s dismissal of all claims without prejudice.

¹ The Supreme Court has held that, when bringing a facial challenge to a licensing or permitting scheme that allegedly gives government officials unfettered discretion to grant or deny licenses, a plaintiff need not apply for and be denied a license to challenge such a scheme’s constitutionality. *City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 755–56 (1988). Rather, “a licensing provision coupled with unbridled discretion itself amounts to an actual injury.” *Prime Media, Inc. v. City of Brentwood*, 485 F.3d 343, 351 (6th Cir. 2007) (citations omitted).

No. 22-5703, *Lostutter v. Commonwealth of Ky., et al.*

I.

A.

Section 145 of the Kentucky Constitution strips convicted felons of the right to vote:

Persons convicted in any court of competent jurisdiction of treason, or felony, or bribery in an election, or of such high misdemeanor as the General Assembly may declare shall operate as an exclusion from the right of suffrage, but persons hereby excluded may be restored to their civil rights by executive pardon.

Ky. Const. § 145. A Kentucky statute outlines the process by which a person’s right to vote may be restored: a convicted felon may submit a request for restoration of civil rights to the Kentucky Department of Corrections (KDOC) and, if KDOC determines that the felon qualifies as an “eligible offender,”² the request will be forwarded to the Governor “for consideration of a partial pardon.” Ky. Rev. Stat. Ann. § 196.045. The Governor then exercises his or her complete discretion in granting or denying the request. R. 57-1, PID 788 (“It is the prerogative of the Governor afforded him or her under the Kentucky Constitution to restore these rights.”).

B.

In the operative complaint, eight plaintiffs—all disenfranchised residents of Kentucky with felony convictions who wish to vote in future elections—sued the Kentucky Governor in his official capacity under 42 U.S.C. § 1983, alleging that Kentucky’s voting-rights restoration scheme violated the First Amendment because it (1) provided unfettered discretion to the Governor to restore civil rights (Count 1), and (2) did not contain a limitation on the time to exercise that discretion (Count 2). Essentially, Plaintiffs argued that Kentucky’s reenfranchisement process operated as an administrative licensing or permitting scheme, and therefore it must adhere to the

² Kentucky law defines an “eligible felony offender” as a person convicted of one or more felonies who has received a final discharge or expiration of sentence, does not have any pending warrants, charges, or indictments, and does not owe any outstanding restitution. Ky. Rev. Stat. Ann. § 196.045(2).

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constitutional standards applied when officials grant or deny licenses or permits to engage in First Amendment-protected activity. The operative complaint sought a declaration that the restoration scheme violated the First Amendment, and a permanent injunction ordering the Governor to establish a new reenfranchisement scheme that “restores the right to vote to felons based upon specific, neutral, objective, and uniform rules and/or criteria[.]” R. 31, PID 357-58.

While cross-motions for summary judgment were pending before the district court, Kentucky Governor Andrew Beshear issued Executive Order (EO) 2019-003, providing that a convicted felon’s right to vote would be automatically restored upon the final discharge or expiration of his or her sentence, provided the crime of conviction was a Kentucky offense not involving treason, bribery in an election, criminal or fetal homicide, second-degree assault or assault under extreme emotional disturbance, first-degree strangulation, human trafficking, or violence as defined by Kentucky law. Three plaintiffs automatically became eligible to vote under EO 2019-003 and voluntarily dismissed their claims as moot. Five months later, the district court dismissed all remaining Plaintiffs’ claims as moot on the basis that EO 2019-003 appeared to provide the relief they requested: non-arbitrary criteria to guide the process for restoration of voting rights.

Plaintiffs timely appealed to this court, and we concluded that EO 2019-003 failed to provide relief to Lostutter, Langdon, and possibly Aleman—because although it may have “established a separate non-discretionary restoration track for certain felons who qualify,” Lostutter and Langdon did not qualify for that track “because they were convicted, respectively, of a federal offense and of second-degree assault under Kentucky law.” *Lostutter v. Kentucky*, No. 21-5476, 2021 WL 4523705, at *2 (6th Cir. Oct. 4, 2021). “For felons like them, EO 2019-003 left intact the discretionary scheme set out in Ky. Const. § 145 and Ky. Rev. Stat. Ann. § 196.045,

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which is the same one challenged in the operative complaint. Thus, EO 2019-003 did not remove the harms that Lostutter and Langdon allege, and the case remains suitable for judicial determination.” *Id.*³ We reversed and remanded for further proceedings.

C.

On remand, when faced with the same cross-motions for summary judgment, the district court again dismissed the remaining three Plaintiffs’ claims, this time for lack of standing. It held:

Here, it is not immediately apparent that Plaintiffs have suffered an injury in fact because they have never participated in the reenfranchisement scheme they challenge. . . . Langdon has applied for restoration of his right to vote, and he states that his application is pending before the Governor. (R. 31 ¶ 7.) Aleman and Lostutter have not applied. (R. 31 ¶ 7.)

R. 68, PID 846.⁴ It also rejected Plaintiffs’ argument that Kentucky’s reenfranchisement process constituted an administrative licensing or permitting scheme, such that standing existed under the unfettered-discretion doctrine without regard to whether Plaintiffs applied for and were denied restoration of their rights. The district court explained:

“Licensing” generally refers to “[a] governmental body’s process of issuing a license,” and a “license” is “permission, usually revocable, to commit some act that would otherwise be unlawful.” *Licensing, Black’s Law Dictionary* (11th ed. 2019). . . . [A] “permit” is defined as the certificate or official written statement evidencing that someone has permission or the right to do something. *Permit, Black’s Law Dictionary* (11th ed. 2019).

A pardon, on the other hand, is “[t]he act . . . of officially nullifying punishment or other legal consequences of a crime.” *Pardon, Black’s Law Dictionary* (11th ed.

³ Regarding Aleman, we noted that he

[m]aintain[ed] that he does not qualify for automatic restoration of his right to vote because he was convicted of first-degree robbery. However, it appears that only first-degree robberies committed after July 15, 2002, are considered disqualifying violent offenses, Ky. Rev. Stat. Ann. § 439.3401(8), and the record suggests that Aleman was convicted of this offense in 1997. The district court should clarify Aleman’s status on remand.

Id. at *2 n.4. On remand, Plaintiffs confirmed that Aleman’s claims were not moot because he was convicted of a felony in Indiana, and out-of-state convictions are excluded under EO 2019-003.

⁴ Aleman has since submitted his application, according to his counsel. At the time of oral argument, it remained pending before the Governor.

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2019); *see also Fletcher*, 192 S.W.3d at 362 (“A ‘pardon’ is the act or an instance of officially nullifying punishment or other legal consequences of a crime.”) (cleaned up). Receipt of a pardon can give a pardonee permission to do something that would otherwise be unlawful, such as vote, and in that narrow respect it bears some superficial similarity to a license. But a pardon cannot be characterized as a mere license to vote—restoration of the right to vote is just one of several potential effects of a pardon.

...

A pardon is also retrospective, as opposed to prospective. A pardon nullifies the legal consequences of one’s past actions, whereas a license prospectively grants one permission to do something that would otherwise result in legal consequences.

...

A pardon is fundamentally different than a license and cannot be fairly characterized as a mere license to vote. Restoring a felon’s right to vote is just one of many possible effects of a pardon. Beyond that single superficial similarity, a license and a pardon bear virtually no resemblance to one another. The nature of a pardon is to extend grace to a person with regard to certain consequences of their actions. A license, on the other hand, simply gives a person permission to engage in regulated activity. The Plaintiffs’ argument is simply incorrect—in Kentucky, an executive pardon is not a license.

R. 68, PID 847-49 (footnote omitted). It thus concluded that *City of Lakewood* and its progeny did not apply, and dismissed the remaining Plaintiffs’ claims without prejudice for lack of standing. Plaintiffs timely appealed.

II.

Plaintiffs maintain that dismissal on jurisdictional grounds was improper because the unfettered-discretion doctrine confers standing without regard to whether they actually applied for, and were denied, restoration of their right to vote. However, Plaintiffs also urge this court to “construe the district court’s opinion to have reached and ruled on the merits” and “review [the] decision accordingly.” Appellant Br. at 21; Oral Arg. at 8:20-8:50. In either case, Plaintiffs conceded at argument that their claims rest entirely on the contention that Kentucky’s voting-rights

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restoration process constitutes a licensing or permitting scheme. Because this underlying argument lacks merit, we affirm the district court’s dismissal of all claims.

Contrary to Plaintiffs’ assertions that Kentucky’s voting-rights restoration scheme is fundamentally different from a pardon, the Kentucky Constitution expressly characterizes felon reenfranchisement as a type of executive pardon. Ky. Const. § 145 (providing that felons excluded from the franchise “may be restored to their civil rights by executive pardon”). Associated statutes and Kentucky caselaw likewise refer to the Governor’s discretionary power to restore voting rights as a “partial pardon.” Ky. Rev. Stat. Ann. § 196.045(1)(e) (directing KDOC to “[f]orward information on a monthly basis of eligible felony offenders who have requested restoration of rights to the Office of the Governor for consideration of a partial pardon”); *Anderson v. Commonwealth*, 107 S.W.3d 193, 195 (Ky. 2003) (holding that a “partial pardon” granted pursuant to Sections 145 and 150 of the Kentucky Constitution “only restored [an individual’s] right to vote and to hold office and did not restore his ‘right’ to be a juror”); *Cheatham v. Commonwealth*, 131 S.W.3d 349, 351 (Ky. Ct. App. 2004) (holding that a “partial pardon” restoring a felon’s rights to vote and hold public office did not encompass restoration of his right to possess a firearm). Plaintiffs’ suit is therefore a challenge to an aspect of Kentucky’s pardon regime, whether they characterize it that way or not. And receiving an executive pardon—partial or complete—is fundamentally different from obtaining an administrative license or permit.

First, as the district court explained, pardons are retrospective in the sense that they look backwards and excuse—indeed, nullify the consequences of—past misconduct. A license, in contrast, is usually prospective in that it looks forward and grants permission to engage in some future conduct. So, while a governor cannot pardon future crimes, licenses typically grant permission for an activity that has not yet occurred. Further, the Governor accurately observes

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that a partial pardon is a one-time act of clemency, while a typical licensing or permitting scheme is ongoing—that is, the license or permit must be renewed periodically.⁵ Third, felon reenfranchisement in Kentucky derives from the Governor’s executive clemency power, which the Supreme Court has rarely subjected to judicial review. *See Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 276 (1998) (reiterating that as a fully discretionary “matter of grace,” pardons and commutation decisions “have not traditionally been the business of courts; as such, they are rarely, if ever, appropriate subjects for judicial review,” therefore “[t]he Due Process Clause is not violated where, as here, the procedures in question do no more than confirm that the clemency and pardon powers are committed, as is our tradition, to the authority of the executive” (quoting *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 464 (1981))); *see also Herrera v. Collins*, 506 U.S. 390, 413-15 (1993) (outlining the history of the federal pardon and state-level clemency schemes). In contrast, a licensing scheme regulating First Amendment-related conduct is typically grounded in the State’s authority to promote public safety and well-being. *See Cox v. New Hampshire*, 312 U.S. 569, 574 (1941) (“The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend.”). Such authority, when used to curtail free speech, is subject to extensive judicial review. *See id.* at 576 (holding that licensing schemes regulating speech must

⁵ Plaintiffs contest this characterization, arguing that (1) it “assumes that an individual will only face felony disenfranchisement once in their lifetime”; and (2) “if the restoration application is denied one or more times, the licensing process will not be a one-time encounter.” Reply Br. at 15. But both hypotheticals ignore the true distinction between the two processes: after a *successful* reenfranchisement, a felon need not re-apply for a new pardon every election cycle for fear that his right to vote has expired. A typical license or permit, on the other hand, must be routinely re-granted; should the applicant let it lapse, he or she may no longer engage in the regulated conduct. A partial pardon can therefore be fairly characterized as a “one-time” act of the clemency in the sense that *at the time it is granted* there is no predetermined expiration date for the restored right to vote, whereas the effects of a typical license or permit last only a fixed amount of time before they expire.

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serve an important government interest); *see also Kunz v. New York*, 340 U.S. 290, 293-94 (1951) (noting that the Supreme Court has “consistently condemned licensing systems which vest in an administrative official discretion to grant or withhold a permit upon broad criteria unrelated to proper regulation of public places” and listing cases). Plaintiffs fail to explain why we should conflate the distinct processes of licensing and pardons, rooted as they are in separate provisions of Kentucky law, subject to differing levels of judicial scrutiny by the Supreme Court, and implemented to accomplish unrelated goals.

Perhaps most importantly, a pardon restores the felon to the status quo before the conviction, in that he or she regains a right once held but lost due to illegal conduct. Permits or licenses regulating First Amendment activity by their nature do not restore any “lost” rights; they only regulate how persons may engage in or exercise a right they already possess. So, while a person applying for a newspaper rack or parade permit is attempting to exercise his or her First Amendment right to freedom of speech, a felon can invoke no comparable right when applying to the Governor for a pardon because the felon was constitutionally stripped of the First Amendment right to vote. *Compare City of Lakewood*, 486 U.S. at 768 (explaining that the true “activity” at issue was “the circulation of newspapers, which is constitutionally protected”); *with Dumschat*, 452 U.S. at 467 (holding that “[a] state cannot be required to explain its reasons for a [commutation] decision when it is not required to act on prescribed grounds,” because the power vested in the State to commute sentences “conferred no rights on respondents beyond the right to seek commutation”), and *Ohio Adult Parole Auth.*, 523 U.S. at 282–83 (holding that a Governor’s executive discretion in matters of clemency “need not be fettered by the types of procedural protections sought by respondent” because there was “no substantive expectation of clemency”). Accordingly, Kentucky requires felons to fill out an “application for the *restoration* of civil rights,”

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R. 57-1, PID 787 (emphasis added), which properly reflects the fact that the felon lacks any fundamental interest to assert and seeks to regain his or her interest through the clemency process, rather than a “permit to vote,” which would suggest that the felon already has an intrinsic right to vote, and must merely go through the proper regulatory hoops to exercise it. *Cf. Johnson v. Bredesen*, 624 F.3d 742, 746 (6th Cir. 2010) (explaining that a state may constitutionally strip convicted felons of their right to vote, and that the plaintiffs, having constitutionally lost that right, lacked any fundamental interest to assert under the First Amendment). Based on these significant distinctions, we agree with the district court that Kentucky’s voting-rights restoration scheme is different in kind from an administrative licensing or permitting scheme.

Plaintiffs offer no authority to the contrary equating a partial pardon to a type of administrative license, or even treating the two similarly. Plaintiffs’ cited caselaw concerns only administrative schemes that were expressly designated as granting licenses or permits. And they fail to provide a single case in which a court interpreted a restored right to vote as a license or permit to vote. The State, on the other hand, points to Eleventh Circuit precedent holding that First Amendment cases invoking the unfettered-discretion doctrine are “inapposite to a reenfranchisement case.” *See Hand v. Scott*, 888 F.3d 1206, 1210 (11th Cir. 2018). In *Hand*, disfranchised felons argued that Florida’s reenfranchisement regime facially violated the First Amendment because it vested Florida’s Executive Clemency Board with “unfettered discretion” to engage in a “standard-less process of arbitrary and discriminatory decision-making, which is untethered to any laws, rules, standards, criteria, or constraints of any kind, and unconstrained by any definite time limits,” thereby abridging their right to vote and creating an impermissible risk of “arbitrary, biased, and/or discriminatory treatment.” *Id.* (quoting Plaintiffs’ Motion for Summary Judgment at 16, 18).

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The Florida felons relied on several of the same First Amendment cases cited by Plaintiffs, including *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992), and *City of Lakewood*, 486 U.S. 750. But on appeal, the Eleventh Circuit rejected the felons' theory and held that "this precedent [did] not bear directly on the matters presented" because none of the cases "involved voting rights or even mentioned the First Amendment's interaction with the states' broad authority expressly grounded in § 2 of the Fourteenth Amendment to disenfranchise felons and grant discretionary clemency." *Id.* Although the Eleventh Circuit did not directly address standing, its holding on the merits lends support to the State's argument that Plaintiffs' cited authority is inapt.

Plaintiffs resist this conclusion and maintain that the district court "erred by assessing whether full pardons function as licenses to vote instead of focusing on the sole and narrow question before it: whether the grant or denial of a voting rights restoration application functions as vote licensing." Appellant Br. at 40. True, in two paragraphs the district court discussed the nature of a complete pardon, although the relevant Kentucky statute characterizes voting restoration as only a "partial pardon." But this does not render the core thesis of the district court opinion incorrect: an executive pardon in general functions differently than an administrative license or permit. The district court's overall analysis of the differences between a license and a pardon remains sound. For example, the distinction between the prospective nature of a license versus the retrospective nature of a pardon applies to both a partial and a full pardon. So, while the district court might have avoided a discussion of full pardons, the two paragraphs that the district court devoted to that topic do not render the opinion as a whole incorrect.

Plaintiffs also contend that the district court erroneously placed "undue weight upon the 'clemency' label associated with voting rights restoration in Kentucky law." Appellant Br. at 38. Plaintiffs insist that "notwithstanding the labels used under Kentucky law, the state's system of

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giving its governors sole power to restore the right to vote to individuals with felony convictions—unbounded by any rules or criteria—is in all material respects a completely arbitrary licensing system no different from those long prohibited in the First Amendment context.” *Id.* at 14. Yet Plaintiffs never persuasively explain *why* voting restoration is more similar to a licensing scheme than to a partial executive pardon. They never list the defining features of a licensing or permitting scheme, much less explain how the voting-rights restoration process possesses those characteristics. Plaintiffs merely conclude that “[w]hen it comes to the functionality of Kentucky’s voting rights restoration system, in all material respects, it operates as an administrative licensing scheme that selectively confers a right to vote upon certain individuals with felony convictions,” without ever showing the concrete similarities between voting-rights restoration and obtaining a license. Appellant Br. at 39.

Plaintiffs’ only proffered similarity between the two concepts is that Kentucky’s reenfranchisement scheme grants felons permission to vote in future elections, just as a license or permit grants permission to engage in conduct like a parade. True, the result of the felon reenfranchisement scheme is that a felon is “allowed” to vote again, where previously prohibited. And the result of a license or permit is that a person is “allowed” to engage in regulated conduct, where they were previously prohibited. But this superficial parallel does not transform a partial executive pardon into an administrative license. Mere similarity in result does not change the nature of the vehicle used to reach that result, and Kentucky law is clear that it restores felons their voting rights through a partial executive pardon, not through the granting of an administrative license. And for the reasons discussed above, extending an executive pardon is fundamentally different from granting a permit or license. So, regardless of any similarity in outcome—in that a

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pardoned felon and a licensed civilian may both engage in conduct previously forbidden—the vehicles to achieve that outcome remain fundamentally different.

Finally, Plaintiffs argue that “[c]lemency rules and procedures are not immune from constitutional scrutiny.” Appellant Br. at 43. That may be. But the district court never found to the contrary. It held only that Kentucky’s voting-rights restoration process is not an administrative licensing or permitting scheme, therefore *City of Lakewood* did not allow for an exception to the traditional rules of standing. Affirming this decision does not insulate Kentucky’s restoration process from constitutional review. It merely requires Plaintiffs to satisfy either the traditional rules of standing or some exception other than *City of Lakewood*’s unfettered-discretion doctrine before they may bring suit.

In sum, the district court correctly held that a partial executive pardon restoring the right to vote is not a permit or license to vote, and thus the unfettered-discretion doctrine does not apply. The *City of Lakewood* line of cases is therefore inapplicable and dismissal for lack of standing was proper.

III.

For the reasons set out above, we AFFIRM the district court’s dismissal of all claims without prejudice.

EXHIBIT B

DERIC LOSTUTTER, ET AL.) CASE NO.: 22-5703
Appellants,)
vs.)
COMMONWEALTH OF KENTUCKY,)
ET AL.,)
Defendants.)

TRANSCRIPTION OF AUDIO RECORDING
ORAL ARGUMENT
JUNE 22, 2023

DIGITAL EVIDENCE GROUP
1730 M Street, NW, Suite 812
Washington, D.C. 20036
(202) 232-0646

1 APPEARANCES:

2

3 PANEL JUDGES:

4 SENIOR CIRCUIT JUDGE HELENE N. WHITE

5 SENIOR CIRCUIT JUDGE DANNY J. BOGGS

6 CIRCUIT JUDGE CHAD A. READLER

7

8 ON BEHALF OF PLAINTIFF:

9 FAIR ELECTIONS CENTER

10 BY: JONATHAN SHERMAN, ESQUIRE

11 1825 K Street NW, Suite 450

12 Washington, D.C. 20006

13 BY: JONATHAN SHERMAN

14

15 ON BEHALF OF DEFENDANT:

16 OFFICE OF THE GOVERNOR OF KENTUCKY

17 BY: TAYLOR PAYNE, ESQUIRE

18 700 Capitol Avenue, Suite 100

19 Frankfort, Kentucky 40601

20

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22

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24

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1 JUNE 22, 2023

2 JUDGE READLER: Case Number 22-5703, Deric
3 Lostutter, et al. versus Commonwealth of Kentucky et
4 al. Oral argument not to exceed 15 minutes per side.

5 Mr. Sherman for the appellants?

6 Save three minutes for rebuttal?

7 MR. SHERMAN: Yes. That's correct, Your
8 Honor.

9 JUDGE READLER: Okay.

10 MR. SHERMAN: Thank you, Your Honor. May it
11 please the Court, Jon Sherman for the appellants.

12 The district court made two errors in
13 dismissing plaintiffs' complaint. First, the
14 district court applied a highly formalistic analysis
15 and erroneously conflated voting rights restoration
16 and pardons in deciding that the First Amendment
17 unfettered discretion doctrine had no application
18 here.

19 Second, having reached the constitutional
20 merits of plaintiffs' claims, the Court then
21 impermissibly backtracked and disposed of the case on
22 jurisdictional grounds.

23 I'll first address the jurisdiction error,
24 and I think I can do that quickly. Steel Company
25 versus Citizens for a Better Environment and Bell v.

1 Hood, both Supreme Court precedents, have both
2 decided that where the standing and the merits are
3 intertwined, it's impermissible for the Court to
4 reach the merits, decide the merits, and then recast
5 that determination as a jurisdictional ruling.

6 In this case, the Court necessarily reached
7 the merits of the First Amendment claims in the case
8 but then recast that determination as a lack of
9 standing and dismissed the case for lack of standing.
10 This Court as well in CHKRS just two years ago found
11 that this was impermissible. Again, that has to be
12 the rule because otherwise every time a plaintiff
13 lost a claim, it would be dismissed for lack of
14 standing, rather than for failure to state a claim.

15 And neither the District Court nor Governor
16 Beshear makes an argument that our claims are wholly
17 frivolous, insubstantial, or immaterial such that
18 they would fall within the narrow exception in Steel
19 Company. And the Governor's brief actually ignores
20 Steel Company and Bell v. Hood altogether.

21 So having addressed the jurisdictional
22 error, if there are no questions from the bench on
23 that particular point --

24 JUDGE READLER: Now, counsel, we obviously
25 have to assure ourselves of standing. We do that at

1 every stage of the case. So why is it that your
2 clients -- your three remaining clients have
3 standing?

4 MR. SHERMAN: Right. So under -- thank you,
5 Your Honor. Under the Supreme Court's precedent and
6 this Court's precedent in cases like Prime Media and
7 Miller v. City of Cincinnati, there's per se standing
8 under the First Amendment on fettered discretion
9 doctrine, where a licensing scheme governing First
10 Amendment protected expressive conduct contains no
11 rules or criteria to constrain official discretion.
12 That's the case here.

13 Functionally, Kentucky's voting rights
14 restoration system operates as a licensing scheme.
15 There are no rules, no criteria whatsoever, and the
16 Court has said -- the Supreme Court has said with a
17 facial challenge, plaintiff's may facially challenge
18 such a scheme without first applying for and being
19 denied that permit. That's City of Lakewood.

20 The individual facts of any permit
21 application are not relevant, the dispositive -- the
22 linchpin is really whether there's anything on the --
23 in the ordinance or statute in the laws that prevents
24 viewpoint discrimination. Here, there is none, and
25 so facially, this -- plaintiff's can bring a fascial

1 challenge and have standing to bring that facial
2 challenge.

3 JUDGE WHITE: And so do you conceive that
4 everything depends upon characterizing this scheme as
5 a license?

6 MR. SHERMAN: That is a threshold question.
7 It is one that, yes, we need to win Your Honor in
8 order for the First Amendment unfettered discretion
9 doctrine to apply, and we believe that a functional
10 approach needs to be taken, unlike the District
11 Court's formalistic approach. And that would be
12 consistent with recent rulings from this Court in
13 Ostergren v. Frick from 2021, as well as Novak v.
14 City of Parma. These cases apply to functional
15 analysis to the question of whether an administrative
16 order created a prior restraint in those cases.

17 Here, we believe this case also calls for a
18 functional analysis to be applied as to whether an
19 administrative licensing scheme has been created, and
20 here, plaintiff, all of our plaintiffs, are required
21 to submit an application to -- first, to the
22 Department of Corrections, and then if it has passed
23 its threshold eligibility, it's referred to the
24 Governor's Office. And then the Governor's Office
25 has complete and unfettered discretion to grant or

1 deny permission to engage in First Amendment
2 protected expressive conduct, voting. So that --

3 JUDGE READLER: Well, why is voting First
4 Amendment expressive conduct? Isn't it governed by
5 the -- if at all, by the Fourteen Amendment?

6 MR. SHERMAN: Well, there are numerous
7 Supreme Court cases that say that voting is protected
8 as both expression -- expressive conduct and as means
9 for political association.

10 JUDGE READLER: Well, association --

11 MR. SHERMAN: I mean --

12 JUDGE READLER: -- is different than -- I
13 mean, association, that's different.

14 MR. SHERMAN: Correct. Correct, Your Honor.
15 But we claim that it's protected as both, and -- but
16 even just sticking with political expression, there
17 are numerous cases from Norman v. Reed to Anderson v.
18 Celebrezze, Williams v. Rhodes that make clear that
19 it's not just the candidates or the political
20 parties' First Amendment interest in accessing the
21 ballot but also the voters' expressive interest in
22 being able, both individually and in the aggregate,
23 being able to express their preference for
24 candidates, parties --

25 JUDGE READLER: What's the best case that

1 says voting -- that says that, you know, the right to
2 vote, formally, the right to go in the ballot box and
3 check your ballot is a First Amendment protected
4 activity?

5 MR. SHERMAN: Norman v. Reed is one of the
6 best, everything in the Anderson verdict line of
7 cases. A lot of these cases deal with voting, and
8 they are dealing with it under both the First and
9 Fourteenth Amendment. We're, of course, proceeding
10 just under the First Amendment.

11 We'd also point to the Court's -- the
12 Supreme Court's decision in Doe v. Reed, right. The
13 fact that there was a legal effect to the political
14 expression in Doe v. Reed didn't negate the
15 expressive character of that -- the petition
16 signatures in that case, right. Similarly here, just
17 because voting has a legal effect in casting a
18 ballot, it doesn't negate the expressive content of
19 casting a vote.

20 JUDGE READLER: Petition signature is about
21 getting on the ballot, and those cases seem to be
22 fairly clear. But actually an individual's voting is
23 distinct from getting a candidate on the ballot.

24 MR. SHERMAN: Correct, Your Honor. But
25 there are numerous cases that --

1 JUDGE READLER: (Indiscernible)

2 JUDGE BOGGS: I mean, isn't it -- counsel,
3 isn't it particular that casting the ballot itself
4 isn't expressive because nobody knows how it comes
5 out. In fact, if anything, the anti-selfie ballot
6 laws are assigned that the law wants to make sure
7 that the voting isn't expressive.

8 MR. SHERMAN: Thank you, Judge Boggs. I
9 would point to two things in response to that
10 question, one, McIntyre v. Ohio Elections Commission,
11 right. The anonymity of speech does not negate the
12 expressive content of that speech. In that case, the
13 Supreme Court struck down Ohio's ban --

14 JUDGE READLER: I'm sorry. Those were
15 petitions, right, petitions (indiscernible) --

16 MR. SHERMAN: Anonymous pamphlets in that
17 case.

18 JUDGE BOGGS: That's anonymous speech, but
19 again the people knew that somebody was saying it.
20 Okay. Like if I could take you back one step just
21 procedurally, so after your standing argument, if we
22 accept that, is there any problem with our going
23 forward and either ruling in your favor or against
24 you on the merits?

25 MR. SHERMAN: No, Your Honor. We believe

1 that the Court -- the District Court has already
2 essentially ruled on the merits. The first paragraph
3 of its order seems to believe that the Court was
4 ruling on the merits, and then once given that it was
5 a ruling on the merits below, we think it's
6 permissible for this Court to reach the merits. And
7 on the merits, we believe the First Amendment
8 unfettered discretion --

9 JUDGE BOGGS: Well, obviously, you want to
10 win, but if we decided that you lost on the merits,
11 that wouldn't be procedurally improper in your view?

12 MR. SHERMAN: No, Your Honor. Indeed, we
13 believe Steel Company and Bell v. Hood instruct that
14 this Court should reach the merits because that's
15 what the Court effectively did and then backtracked
16 --

17 JUDGE BOGGS: Thank you.

18 MR. SHERMAN: -- to lack of standing.

19 So on the merits holding -- and we've
20 already rehearsed the Supreme Court's decisions
21 regarding facial challenges --

22 JUDGE READLER: Let's go back to -- let's go
23 back to the standing issue. I guess one of your
24 three clients has applied for a pardon?

25 MR. SHERMAN: Two have actually applied for

1 voting rights restoration. We obviously dispute that
2 voting rights restoration is just one of the effects
3 of a pardon, but it is not in itself a pardon. Under
4 state law, the Kentucky Courts and the Kentucky
5 statute have labeled it -- they tried to split the
6 difference and call it (indiscernible) --

7 JUDGE READLER: Was it one? Is the second
8 one more recent? I just -- I thought it was one
9 there.

10 MR. SHERMAN: The second one is more recent.
11 Bonifacio al Aman (phonetic) applied more recently --

12 JUDGE READLER: Mr. Lostutter hasn't
13 applied?

14 MR. SHERMAN: (Indiscernible) -- Deric
15 Lostutter has not applied and Robert Lagon has.

16 JUDGE READLER: And the lead plaintiff. But
17 it's just sort of odd that -- it's just sort of odd
18 that even the lead plaintiff hasn't even applied for
19 voting restoration.

20 MR. SHERMAN: Well, the Supreme Court has
21 made clear in City of Lakewood and every decision in
22 this line of cases going back to Lovell v. Griffin in
23 1938 that a person bringing a suit under the First
24 Amendment unfettered discretion doctrine doesn't --

25 JUDGE READLER: I know, but you could --

1 couldn't you just apply and get rulings and then
2 challenge the rulings as opposed to this sort of odd
3 game about whether this is like a trade permit?

4 MR. SHERMAN: Well, the --

5 JUDGE READLER: Isn't that just easier? I
6 mean, you've basically got (indiscernible) --

7 MR. SHERMAN: We think the First Amendment
8 of -- sorry. I didn't mean to speak over you.

9 JUDGE READLER: Well, I mean, you got most
10 of the relief you wanted from the Governor, from the
11 grace of the Governor. You have three people left.
12 Only one had even applied at the time when the case
13 was in the District Court, I think, and it feels like
14 -- rather than going through this procedural or
15 standing hurdle that we spent all of our time on,
16 they could all apply. They could all get a ruling
17 from the Governor, and then if they don't like the
18 Governor's ruling, that maybe you have a substantive
19 constitutional challenge then.

20 MR. SHERMAN: Well, with respect, we
21 strongly disagree, Your Honor. We think that there
22 is a clear First Amendment violation here because --

23 JUDGE READLER: Well, you don't disagree
24 with what I'm saying. I mean, you disagree with the
25 procedure I laid out, which just, to me, seems

1 cleaner. You can do whatever you want obviously, but
2 it seems to me there's a fairly clean route for doing
3 this.

4 MR. SHERMAN: Well, that would only address
5 the three individual plaintiffs who are left, and
6 they have a facial challenge for the clear First
7 Amendment violation because of the lack of rules or
8 criteria in this (Indiscernible).

9 JUDGE READLER: Well, you only have three --
10 my point is you only have three plaintiff's left.

11 JUDGE WHITE: Counsel, if this is -- you
12 want to differentiate this from a pardon, but if this
13 is part of a pardon and your clients lose their
14 voting rights because of the conviction and the way
15 to get it restored if they are not in this automatic
16 group is to apply for a pardon. And it's very clear
17 that the law permits a limit on voting for convicted
18 felons. So why is this not a pardon case as opposed
19 to a First Amendment voting case?

20 MR. SHERMAN: Well, they don't need to
21 obtain -- thank you, Your Honor. They don't need to
22 obtain a pardon in order to regain the right to vote
23 in Kentucky. What they need is voting rights
24 restoration, which is just one of the effects of the
25 pardon. Indeed, here, it's a partial, partial pardon

1 because normally the application includes the right
2 to hold office, but all that's at issue in this case
3 is arbitrary restoration of the right to vote.

4 Now, the Kentucky law -- and we don't
5 challenge this -- can disenfranchise all of these
6 people permanently, but it has created an exception
7 to allow -- selectively allow people to regain the
8 right to vote. Nothing turns on the state labels
9 that state law assigns to this issue, right. They
10 could call it a pardon or a partial pardon, clemency
11 or not. Forty states in the country are dealing with
12 this exact issue, voting rights restoration outside
13 of the clemency procedure. There's nothing inherent
14 about voting rights restoration that makes it part of
15 a pardon or part of clemency.

16 JUDGE WHITE: Okay.

17 JUDGE BOGGS: Counsel, am I right --

18 JUDGE WHITE: (Indiscernible) -- I'm sorry.

19 I was just -- go ahead. Go ahead.

20 JUDGE BOGGS: I just wanted to be clear that
21 your people, the two that applied, they've applied,
22 but there has been no ruling. So in a sense, you
23 can't always complain about what the Governor denied
24 because he can just let it sit, which is what's
25 happening now; is that correct?

1 MR. SHERMAN: That's correct, Judge Boggs.
2 Thank you for noting that because it is also the fact
3 that we have a second claim on the lack of reasonable
4 definite time limits, which is considered a species
5 of unbridled discretion. And after you submit this
6 application, the Governor could hold the application
7 indefinitely. And indeed Rob Langdon's petition for
8 restoration has been pending for over a year; I think
9 even it's close to two years. So there's no
10 requirement that it be decided by any time.

11 And that is exactly why this case is in sync
12 with City of Lakewood. The same concerns and
13 principles that obtained in that case, the risk of
14 viewpoint discrimination due to the lack of rules and
15 criteria, as well as the risk of unreviewability,
16 effective unreviewability because it's submitted into
17 a black box, and there's no way to challenge it
18 through an as-applied challenge at a later date.

19 I see that my time has elapsed. So --

20 JUDGE WHITE: Well, I'm sorry. You're
21 saying there's no way to challenge it if it just sits
22 there, and there's no action?

23 MR. SHERMAN: Your Honor, under City of
24 Lakewood, I'm referring also to the lack of an
25 ability to challenge it as applied because there are

1 no standards. There are no rules or criteria. So --

2 JUDGE WHITE: Well, but, I mean, one can
3 certainly imagine permitting a case where there is
4 viewpoint discrimination in the application, right.
5 I mean, if a governor only permits registered
6 Democrats and not registered Republicans, then I
7 would think that that would be a different case.

8 MR. SHERMAN: But because it's completely
9 within the Governor's unfettered discretion, then
10 it's totally subjective and there's no requirement
11 for him to -- Governor Bashear to record his
12 reasoning for granting or denying applications,
13 there's no effective way to know what's happening in
14 this black box system. So it is effectively
15 unreviewable, and there's no way to challenge it as
16 applied down the line.

17 There are a number of quotes from City of
18 Lakewood dealing with this. Without standards to
19 fetter the licensor's discretion, the difficulties of
20 proof and the case-by-case nature of as-applied
21 challenges render the licensor's action in large
22 measure effectively unreviewable. So that's what I
23 was speaking to, Your Honor.

24 JUDGE WHITE: All right. Thank you.

25 MR. SHERMAN: Thank you, Your Honor.

1 JUDGE READLER: Any other questions from the
2 panel?

3 JUDGE BOGGS: No. I'm good.

4 JUDGE READLER: All right. You'll have your
5 rebuttal time.

6 MR. SHERMAN: Thank you.

7 JUDGE READLER: Mr. Payne?

8 MR. PAYNE: Thank you, Your Honor.

9 Taylor Payne, Chief Deputy General Counsel
10 on behalf of the Governor and may it please the
11 Court.

12 It's clear from the District Court's order
13 that the ruling was on standing as opposed to
14 reaching the merits. Where I think the plaintiffs
15 are wrong is that -- and it's suggesting that the
16 District Court sort of comingled a standings and
17 merits ruling -- is that ultimately the same reasons
18 for finding that the plaintiffs lack standing in this
19 case are also applicable to the merits had the Court
20 reached that -- had the Court reached the merits of
21 this decision.

22 But to begin, just to provide a little
23 background to the Court on the pardon power in
24 Kentucky, like many other states, convicted felons
25 lose their right to vote under Section 145 of the

1 Kentucky Constitution. Such disenfranchisement has
2 been sanctioned by the United States Supreme Court as
3 being allowed under the Fourteenth Amendment, but
4 also, like in many other states, Kentucky allows the
5 Governor to issue a pardon that may nullify part of
6 that punishment of being convicted of a felony, one
7 of those punishments being losing your right to vote.
8 So ultimately --

9 JUDGE READLER: Why hasn't the Governor done
10 this? I mean, this one application has been waiting
11 -- and I thought it was maybe even longer than what
12 your friend on the other side said -- but one of
13 these applications has been sitting there for quite a
14 long time.

15 MR. PAYNE: Well, I believe the plaintiff
16 suggested that one of the applications had been
17 pending with the Governor's Office for about a year.

18 JUDGE READLER: Or two. I thought it was
19 longer than a year. I mean, one was just-- maybe
20 not. But --

21 MR. PAYNE: There may have been an
22 application submitted to prior governors, Your Honor,
23 but I'm not sure how long each of these -- the two
24 plaintiffs that have applied have potentially been
25 pending.

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1 JUDGE READLER: Okay. Well, that's kind of
2 wild to me because this is like what the -- the case
3 is all about these three people. Only two of them
4 applied, and you don't know when the two applied?
5 All right. Let's assume it's two years. And let's
6 assume, your friend on the other side, it's two
7 years. You can't challenge that; I take it. Why has
8 the Governor sat on one of these applications for two
9 years?

10 MR. PAYNE: Well, I don't think it's a
11 matter of necessarily sitting on the application and
12 not taking any action. I mean, the ultimate --

13 JUDGE READLER: I mean, why has there not
14 been -- let me rephrase. Why has there not been a
15 final determination on whether to grant the partial
16 pardon or not?

17 MR. PAYNE: Well, I think ultimately that
18 would be the Governor has not made up his mind yet
19 whether to grant it or deny it. So --

20 JUDGE READLER: Well, the Governor took like
21 a month to grant clemency to like a whole bunch of
22 people, and it's taken him two years to consider this
23 one application?

24 MR. PAYNE: Well, Your Honor, we have
25 ultimately thousands of applications that are

1 submitted to us. We --

2 JUDGE READLER: Well, do they always take
3 two years?

4 MR. PAYNE: I don't think they always take
5 two years. I think it's a very --

6 JUDGE READLER: It just feels like you guys
7 could make this -- it just feels like you could make
8 this case to some degree go away by either granting
9 or denying the pardon. If you grant it, then I think
10 your friend on the other side would be quite happy
11 with that, and at least one or two of these
12 individuals who applied would be able to vote. If
13 you deny it, then maybe they have a separate
14 challenge about the basis for the denial. But partly
15 due to your own inaction, we're sort of stuck in this
16 middle ground, where there's been an application, a
17 lawsuit, no decision.

18 MR. PAYNE: Right. I understand that, Your
19 Honor. What I would say though is, you know, when
20 the Governor initially restored over 140,000 former
21 convicted felons -- or convicted felons' right to
22 vote, you know, that -- the District Court originally
23 held that is what -- that did moot this case.

24 Now, this Court reversed that, essentially
25 saying that EO didn't apply to these plaintiffs

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1 because ultimately it didn't -- what it didn't act as
2 was a denial for these plaintiffs. But what's sort
3 of ironic or I think challenging for the plaintiffs
4 here is that is to their benefit that the Governor
5 retains their right to continually consider their
6 pardons. I mean, one --

7 JUDGE READLER: Well, it's not much of a
8 benefit if you never act on it. I mean, it just --

9 MR. PAYNE: Well --

10 JUDGE READLER: -- it seems like -- I just
11 couldn't understand why you've taken this long. It
12 would make the case either go away or crystalize, and
13 it's almost -- I mean, are you like -- are you like
14 wanting us to rule rather than you doing -- I mean,
15 this is really a -- this is really a direction to the
16 Governor. This is the Governor's power. It's a
17 state matter. It almost feels like you're dragging
18 your feet so we'll rule one way or the other, but you
19 could make the case go away or, at least most of the
20 case go away.

21 MR. PAYNE: Not at all, Your Honor. And you
22 know, and I think, ultimately, that's just never been
23 a consideration of this office is to go ahead and
24 rule on these three so that this case would go away.

25 JUDGE READLER: Well, I mean, you're the

1 Governor's legal counsel. I think usually legal --
2 at least in Ohio, the legal counsel are the one who
3 considers the pardons. So I just -- it's just a
4 surprising fact to me, but I'll let you move on.

5 MR. PAYNE: Well, thank you, Your Honor.

6 I think, you know, just to conclude that
7 point, I do think in many ways the Governor's
8 original action establishing executive order of his
9 parameters for automatic restoration -- I know this
10 Court disagreed that it mooted that case, but
11 ultimately what it did was the Governor made a
12 decision on that point as to what his criteria was
13 going to be. If it would have been a denial to these
14 plaintiffs, I do think this case would have been
15 moot. And I think this Court would have agreed with
16 the District Court at that time.

17 But again it remains to the plaintiffs'
18 benefit that the Governor can consider their
19 application in one period of time and rather than
20 saying it's a flat-out denial and I will never
21 consider your pardon again, that he's saying I'm not
22 granting it now when I'm granting these others, but I
23 retain the power to reconsider this in the future
24 should your conditions change, should you become a
25 more worthy applicant to this office for the use of

1 that pardon power.

2 Again, back to the standing issue in this
3 case --

4 JUDGE WHITE: Are there any criterion for
5 deciding which of those people who don't get it
6 automatically are worthy?

7 MR. PAYNE: No, Your Honor. Under Kentucky
8 law, that is left to each governor who holds the
9 office to ultimately subjectively determine what --
10 who they think is worthy --

11 JUDGE WHITE: Oh.

12 MR. PAYNE: -- of that --

13 JUDGE WHITE: Yeah. I'm just curious.

14 MR. PAYNE: -- clemency.

15 JUDGE WHITE: Does the Governor claim there
16 are criteria?

17 MR. PAYNE: No. But this Governor did
18 establish criteria early in his term that applied to
19 the convicted -- disenfranchised, convicted felons.

20 JUDGE WHITE: Well, when you say he
21 established that, are you talking about the order
22 that says when you can automatically be restored?

23 MR. PAYNE: Yes. It was an executive order
24 early in the --

25 JUDGE WHITE: Okay.

1 MR. PAYNE: -- first few days of the
2 administration.

3 JUDGE WHITE: So I wasn't asking about that.
4 I mean, like you referred to a candidate as not
5 worthy now but maybe worthy in the future. Is there
6 any internal definition of worthy?

7 MR. PAYNE: No, Your Honor. And, Your
8 Honor, I think that's something that, for each
9 governor in any state, they would consider. So they
10 potentially have criteria of what they're looking for
11 in an applicant that they think warrants the use of
12 this extraordinary power.

13 JUDGE WHITE: Okay.

14 MR. PAYNE: And for an applicant who, you
15 know, someone that it's -- this is just a
16 hypothetical example here, but whether that's hours
17 of community service logged or something to that
18 effect, an applicant, you know, two years in has a
19 much better chance of demonstrating that community
20 service than if it was required to be decided within
21 a month or a certain time frame of the governor
22 receiving that application.

23 And applicants are welcome to routinely
24 update this office as to --

25 JUDGE WHITE: So how do we know --

1 MR. PAYNE: -- their worthiness.

2 JUDGE WHITE: -- let's say -- would you
3 agree that if the Governor were granting these
4 limited pardons on an impermissible basis, that would
5 be unconstitutional?

6 MR. PAYNE: Not necessarily, Your Honor, but
7 I would concede that Justices of the Supreme Court
8 have recognized -- I don't believe a majority has
9 ever said this -- that the use of the pardon power to
10 -- could in some ways be in violation of the Equal
11 Protection Clause.

12 But again that's not the case here. There's
13 been no allegation that that's ever been used in
14 Kentucky to infringe on anyone's First Amendment
15 rights, let alone their Equal Protection rights. But
16 I do think --

17 JUDGE WHITE: So how would --

18 MR. PAYNE: -- there are --

19 JUDGE WHITE: -- how would one go about
20 finding out if that's the case or establishing that
21 that's the case if it is the case?

22 MR. PAYNE: Well, I think what a plaintiff
23 could do is look at a governor's entire history of
24 pardons. Obviously, they would have to engage in
25 discovery and attempt to learn about what the

1 motivations were and the intent of the pardons. It
2 would be a difficult case, Your Honor, but the
3 Supreme Court has, I think, in some ways suggested
4 the pardon power, after its use, could be challenged
5 under those terms.

6 I think, you know, in another situation,
7 certainly the pardon power, to the extent it was used
8 to grant political favors or something like that,
9 there could be potentially the criminal system, I
10 think, could be involved in providing a check on the
11 Governor's power there.

12 JUDGE WHITE: Well --

13 MR. PAYNE: What the (indiscernible) would
14 be --

15 JUDGE WHITE: How do you respond to the
16 black box argument?

17 MR. PAYNE: Well, you know, I mean, that is
18 -- the Supreme Court has essentially said that the
19 types of procedural processes that the plaintiffs are
20 asking here -- certainly, they said this in the Equal
21 Protection claim -- there is no right to a timeliness
22 on the decision, and there is no right to impose
23 outside procedural protections on these applications
24 once they are received.

25 The Supreme Court has held essentially a

1 governor never has to act on a pardon -- on a pardon
2 application, and largely, that is because, especially
3 with the right to vote, these convicted felons have
4 lost that right. They no longer have an interest in
5 their right to vote. This Court and the Supreme
6 Court have said once you are constitutionally
7 disenfranchised from the exercise of that vote, this
8 Court -- that there is no fundamental right left to
9 assert by the plaintiffs.

10 And I would just briefly -- I believe the
11 time has stopped on my computer. So I don't know how
12 much time I have left. It's started --

13 JUDGE READLER: I think it stopped here -- I
14 think it's stopped for both sides. So we're just
15 being very generous today.

16 MR. PAYNE: Oh, okay. Thank you, Your
17 Honor.

18 You know, I would just briefly in closing
19 like to address the licensing cases that the
20 plaintiff has admitted, conceded, that would require
21 this Court to adopt that reasoning. As the District
22 Court correctly held, they're wholly different
23 animals that we're discussing here. The District
24 Court essentially looked at it in just what is a
25 license and what is a pardon. A license is obviously

1 granting permission to someone to exercise a right
2 that they already have, whereas a pardon is a
3 retroactive application nullifying a punishment.

4 But here again, as I've said before, the
5 plaintiffs have lost any fundamental or
6 constitutional right that may exist under the First
7 Amendment or under the Equal Protection Clause -- I
8 understand these are only First Amendment claims --
9 but they've lost any constitutional or fundamental
10 right to assert. Therefore, there is no -- there is
11 no process of the Governor licensing them to exercise
12 those rights. They are gone.

13 But the bigger problem with the comparison
14 to the licensing cases is those hinge completely on
15 the ordinance being challenged being a prior
16 restraint on the expression of the individual seeking
17 the license and the threat, the risk that those
18 seeking the license will self-censor their own speech
19 going forward.

20 So in the City of Lakewood case, it was an
21 annual permit in order to allow media outlets to
22 publish their newspapers and put them in certain news
23 racks around the city. The Court held that that
24 hypothetical risk of having a license denied was
25 enough of an actual injury to allow the plaintiffs

1 standing to assert a facial challenge in that case
2 because of the prior restraint's risk of self-
3 censorship.

4 So ultimately, what they're saying is the
5 mayor of the city, the city council, could monitor
6 the expression of a newspaper, ultimately decide they
7 didn't like a negative article written about the
8 council or the mayor, and then deny them the ability
9 to put that in news racks throughout the city, deny
10 them a license to do that.

11 The risk there is that the media outlet then
12 will not run the critical story on the mayor or the
13 local government in hopes that that won't deter the
14 city or the mayor from granting their right to
15 publish in the future.

16 But none of those issues are present in the
17 case of a pardon. Here, the pardon power is not what
18 is the prior restraint. The prior restraint, if
19 anything, if it is a restraint on the free expression
20 of speech, is their convicted felony. It's the
21 Kentucky Constitution that deprives them of their
22 right to vote the moment they become convicted
23 felons. Again, that power has been upheld time and
24 time again by the Supreme Court as constitutional.

25 But again the self-censorship is not even

1 here. Plaintiffs have lost their right to vote.
2 They can't self-censor their right to vote while
3 their pardon is pending before the Governor. So none
4 of the same issues of why the Supreme Court allows a
5 facial challenge to these licensing schemes exists in
6 the context of the use of the pardon power.

7 So again, because of that, the District
8 Court ultimately found the plaintiffs' lacked
9 standing. Those arguments would also be applicable
10 to the merits should the Court reach that decision.

11 If there are no other questions, Your
12 Honors, we will wrap up.

13 JUDGE READLER: Any questions from the
14 panel?

15 JUDGE WHITE: No. Thank you.

16 JUDGE READLER: Okay. Thank you, Mr. Payne.

17 Mr. Sherman, you have three minutes,
18 depending on whether we stop the clock or not,
19 perhaps more.

20 MR. SHERMAN: Thank you, Your Honor.

21 Well, this Court has heard it directly from
22 Governor Bashear's counsel. That's as clear an
23 unfettered discretion violation as this Court is
24 likely to ever see. A person submits an application
25 to engage in political expression once again, and the

1 Governor will decide whether they are "worthy."
2 There are no rules, no criteria, admittedly, and
3 there is no specific content whatsoever to that
4 determination. Just one single official with sole
5 and exclusive authority to determine whether that
6 person is worthy or not.

7 JUDGE BOGGS: (Indiscernible), counsel? I
8 mean, you know, we have 500 years of history about
9 clemency and pardon powers on things that are,
10 frankly, more important than voting. Voting is very
11 important, but being left in prison -- you know,
12 think about, you know, the famous case of Debs, the
13 socialist candidate for president, who stayed in
14 prison because Woodrow Wilson didn't like him. And
15 when Harding came in, although he had his problems,
16 he was perfectly happy to let Debs out with no
17 criteria. I mean, isn't -- what you really have is a
18 complete attack on the history of the pardon power?

19 MR. SHERMAN: We think not, Your Honor, but
20 we're not talking about physical liberty here. We're
21 talking about a First Amendment --

22 JUDGE BOGGS: But I'm saying --

23 MR. SHERMAN: -- protected right.

24 JUDGE BOGGS: -- isn't that -- isn't that
25 even worse? Think about Debs, a candidate

1 (indiscernible), who's right to be out campaigning is
2 in the sole discretion of the people that may be his
3 opponents.

4 MR. SHERMAN: We think not, Your Honor. The
5 First Amendment, as enjoyed at the Supreme Court, the
6 highest protection. That's the reason that the First
7 Amendment unfettered discretion doctrine operates as
8 sort of a vaccination or an inoculation against
9 viewpoint discrimination, and unlike with the
10 Fourteenth Amendment, where you need to prove that
11 discrimination has already occurred, here, you can
12 bring a facial challenge.

13 I think a number of the questions today have
14 suggested implicitly that our clients are only able
15 to bring as-applied challenges but that's not so
16 under Forsyth County and many of these other cases,
17 City of Lakewood, a facial challenge is available.
18 Forsyth County, for its part, says facial attacks on
19 the discretion granted to decision maker are not
20 dependent on the facts surrounding any particular
21 permit decision. The success of that facial
22 challenge rests not on whether the administrator had
23 said --

24 JUDGE READLER: But this is a First
25 Amendment -- this is a case of chill under the First

1 Amendment, right. It's a First Amendment case?

2 MR. SHERMAN: Correct, Your Honor. Right.

3 JUDGE READLER: Okay. Yeah. So I mean, the
4 whole ball of wax is whether this is actually a First
5 Amendment question that you're raising.

6 So suppose, I mean, we were thinking about
7 other possibilities. Once you're a felon, you're
8 disenfranchised of other rights. One, say, is jury
9 service. I mean, if we think voting is -- if we
10 think voting is expressive, why isn't serving on a
11 jury also expressive in some ways? And that means
12 that you could -- we could also have a facial
13 challenge to the prohibition on serving on juries.
14 And I don't know what the other ramifications are of
15 being a felon, but this feels like a bit of a
16 slippery slope.

17 MR. SHERMAN: With respect, we disagree,
18 Your Honor. There's no precedent whatsoever
19 suggesting that serving on a jury in any way
20 implicates the First Amendment, where there is
21 decades and decades, 85 years here going back, at
22 least for voting, going back to Williams v. Rhodes in
23 1968 suggesting -- saying that voters have expressive
24 First Amendment interest in casting their ballots.

25 I'd note also going back to the political

1 expression question, in the aggregate, voting is
2 communicative. It speaks. Even if it's a secret
3 ballot, those voters communicate by the people they
4 vote for, the candidates they vote for, the parties
5 they vote for, and also the causes they vote for
6 through ballot initiatives. I do want to --

7 JUDGE READLER: I think your time is up, but
8 does anyone else have any questions?

9 Okay. If you have one last point you want
10 to make, go ahead.

11 MR. SHERMAN: I did want to just really
12 quickly address the purported functional differences.
13 Voting rights restoration is what the District Court
14 should have been comparing to licensing, not pardons
15 as a whole. Pardons are not at issue here. We're
16 not attacking the pardon power. We're simply trying
17 to constrain voting rights restoration, which is
18 being dealt with arbitrarily, and the three purported
19 differences that this is a one-time act of clemency.
20 It's not. There could be repeating counters if
21 voting rights restoration is denied one or more
22 times. Revocability, there's no authority in the
23 First Amendment law that revocability is an
24 indispensable feature for licensing and, three, this
25 notion of retrospective effect, right. Voting rights

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1 has no retrospective effect. It's all prospective.
2 You can't get back the elections you missed. You can
3 only have license to vote in the future.

4 JUDGE READLER: Great. Thank you.

5 Unless there's other questions, we've been
6 generous with our time. Thank you to both of you for
7 your arguments, and we will take the case under
8 consideration.

9 (END OF AUDIO RECORDING)

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CERTIFICATE OF TRANSCRIPTIONIST

I certify that the foregoing is a true and accurate transcript of the digital recording provided to me in this matter.

I do further certify that I am neither a relative, nor employee, nor attorney of any of the parties to this action, and that I am not financially interested in the action.



Julie Thompson, CET-1036

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