No. _____

IN THE

Supreme Court of the United States

BONIFACIO R. ALEMAN AND ROBERT C. LANGDON,
Petitioners,

v.

ANDREW G. BESHEAR, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF KENTUCKY, AND DERIC J. LOSTUTTER,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

Jon Sherman
Counsel of Record
Michelle Kanter Cohen
Beauregard Patterson
FAIR ELECTIONS CENTER
1825 K Street, NW, Suite 450
Washington, DC 20006
(202) 331-0114
jsherman@fairelectionscenter.org

Ben Carter
KENTUCKY EQUAL JUSTICE CENTER
222 S. First St., Suite 305
Louisville, KY 40202

Counsel for Petitioners

QUESTION PRESENTED

Whether Kentucky's system of discretionary restoration of the right to vote to people with felony convictions violates the First Amendment doctrine prohibiting unfettered discretion in licensing expressive conduct.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners are Bonifacio R. Aleman and Robert C. Langdon, who were plaintiffs below. None of the petitioners is a corporate entity.

Respondents are Andrew G. Beshear, in his official capacity as Governor of Kentucky, who was the defendant below, and Deric J. Lostutter, who was a plaintiff below. The Commonwealth of Kentucky was initially named as a defendant but was not named as a defendant in the operative complaint and was not an appellee.

RELATED CASES

The related cases include:

- *Lostutter v. Kentucky*, 6:18-cv-277, U.S. District Court for the Eastern District of Kentucky. Judgment entered July 22, 2022.

- *Lostutter v. Kentucky*, 22-5703, U.S. Court of Appeals for the Sixth Circuit. Judgment entered July 20, 2023.

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JURISDICTION

The Sixth Circuit entered judgment on July 20, 2023, and denied the petition for rehearing and rehearing en banc on August 31, 2023. App. 31a–32a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND EXECUTIVE ORDER INVOLVED

U.S. Const. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Ky. Const. § 145

Every citizen of the United States of the age of eighteen years who has resided in the state one year, and in the county six months, and the precinct in which he offers to vote sixty days next preceding the

election, shall be a voter in said precinct and not elsewhere but the following persons are excepted and shall not have the right to vote.

1. 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. Rev. Stat. Ann. § 116.025(1). *See* App. 34a.

Ky. Rev. Stat. Ann. § 196.045. *See* App. 35a–36a.

Executive Order 2019-003. *See* App. 37a–41a.

INTRODUCTION

This case will determine whether a state government official may arbitrarily restore the right to vote to the disenfranchised. Kentucky law vests the Governor, respondent Andrew Beshear ("Governor Beshear"), with exclusive and unfettered discretion to grant or deny voting rights to individuals who are ineligible to vote due to a felony conviction. Governor Beshear makes such decisions solely based on his subjective assessment of whether each applicant is "worthy."[1]

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[1] *See Lostutter v. Kentucky*, 22-5703 (6th Cir. June 22, 2023), RE 29, Ex. B, Transcript of Oral Argument, at 59:17–60:10 ("Under Kentucky law, that is left to each governor who holds the office to ultimately subjectively determine what – who they think is worthy . . . ."). All "RE" citations are to the Sixth Circuit's docket, and all page references are to the page number at the top right of the page.

Petitioners Bonifacio R. Aleman and Robert C. Langdon ("petitioners"), plaintiffs below, have challenged this system on First Amendment grounds. It is beyond dispute that selectively and arbitrarily enfranchising Kentuckians in the first instance would be unconstitutional. Petitioners have sought a ruling that establishes arbitrary *re*-enfranchisement is similarly unconstitutional. The prefix "re-" cannot make the unlawful lawful.

The Fourteenth Amendment authorizes states to disenfranchise individuals with felony convictions. *Richardson v. Ramirez*, 418 U.S. 24, 54–56 (1974). Even if petitioners prevail, Kentucky law may strip citizens of their voting rights upon a felony conviction. However, once state law creates a path to restoration—an exception to the default rule of disenfranchisement—it may not arbitrarily grant that exception and selectively confer voting rights on a case-by-case basis.

This suit invokes a well-established First Amendment doctrine to challenge arbitrary voting rights restoration and presents a federal question of fundamental importance that this Court has never specifically addressed. For 85 years since *Lovell v. City of Griffin*, 303 U.S. 444 (1938), this Court has prohibited the arbitrary licensing or permitting of political expression or expressive conduct within the First Amendment's protection. Because this Court has asserted that voting is a form of political expression, *see, e.g.*, *Norman v. Reed*, 502 U.S. 279, 288 (1992), state law may not confer arbitrary power on a government official to grant or deny the right to vote—either in its initial allocation or following the

loss of the right to vote after a felony conviction. Though people with felony convictions may be ineligible to vote under state law, they nevertheless retain their federal constitutional rights and have standing to challenge any unconstitutional disenfranchisement or re-enfranchisement system. *See Hunter v. Underwood*, 471 U.S. 222, 233 (1985). Just as state government officials may not selectively and arbitrarily grant particular non-citizens or seventeen-year-olds the right to vote, they also may not selectively and arbitrarily bestow voting rights on individuals who are ineligible due to a felony conviction.

There is no dispute that Governor Beshear grants or denies voting rights restoration free of rules, criteria, or any other constraint on his discretion. Rather, the Sixth Circuit dismissed petitioners' complaint upon concluding that they cannot invoke this Court's First Amendment unfettered discretion cases because voting rights restoration, in the panel's view, is different from licensing. However, this decision conflicts with decades of this Court's precedents establishing that the First Amendment compels a functional analysis that must focus on ends, not means. The purported distinctions upon which the Sixth Circuit relied are immaterial to the constitutional analysis. Contrary to this Court's directives for functional analyses, the panel's decision emphasized the formal labels assigned to voting rights restoration under Kentucky law and privileged "the nature of the vehicle" over restoration's practical effects. App. 16a. By elevating the form of official action and state-law labels over the commonality in

effects, the decision below strayed from this Court's instructions for functional analyses across a wide spectrum of legal doctrines and effectively concluded that arbitrarily licensing voting rights raises no First Amendment issue.

Furthermore, the panel's seal of approval for selective, arbitrary enfranchisement cannot be reconciled with either this Court's precedent or a system of democratic self-government. Clemency is well-established in our nation's legal system. But so too is First Amendment protection for political expression and expressive conduct. This case concerns the specific, narrow constitutional violation caused by the intersection of the nearly absolute discretion of executive clemency and the First Amendment's prohibition on arbitrarily licensing expressive conduct. While Governor Beshear seeks to avoid any limits on his discretion to restore voting rights to people with felony convictions, petitioners have only sought a non-arbitrary system bound by objective rules and criteria, as currently exists in 40 states plus the District of Columbia. RE 16 at 57–58 & n.16.[2] There are innumerable possible restoration systems that would comply with this First Amendment doctrine. Governor Beshear need only choose one of them.

[2] In the Brief of Appellants submitted to the Sixth Circuit, petitioners recorded thirty-eight states by omitting from the tally Maine and Vermont, where there is no felony disenfranchisement even during incarceration.

STATEMENT OF THE CASE

This challenge to Kentucky's discretionary and arbitrary voting rights restoration system was filed over five years ago. Eight plaintiffs, including petitioners, brought a challenge under longstanding First Amendment doctrine to the unfettered discretion Kentucky law affords the Governor to grant or deny voting rights restoration applications and the lack of a reasonable, definite time limit by which the Governor must make these discretionary determinations on restoration applications.

Kentuckians with felony convictions lose their right to vote under state law but may seek restoration by application and a discretionary grant from the Governor. Ky. Const. § 145; Ky. Rev. Stat. Ann. § 196.045(1). Such individuals are eligible to apply once they are finally discharged from their sentences and complete payment of restitution. Ky. Rev. Stat. Ann. §§ 196.045(2)(a), 196.045(2)(c). These applications are initially sent to the Department of Corrections, which compiles information on the applicants and then forwards eligible applications to the Governor's office for a final decision. Ky. Rev. Stat. Ann. § 196.045(1).

In reviewing applications, the Governor has sole and unfettered discretion to grant or deny voting rights restoration. As the current restoration application states, "[i]t is the prerogative of the Governor afforded him or her under the Kentucky Constitution to restore these rights." *See Lostutter v. Kentucky*, 18-cv-277 (E.D. Ky.), ECF No. 57-1, Division of Probation and Parole Application for

Restoration of Civil Rights (rev. Mar. 2020), at 788.[3] There is nothing in the Kentucky Constitution, Kentucky statutes, Kentucky rules or regulations, or any other source of Kentucky law that constrains or limits Governor Beshear's decision to grant or deny a voting rights restoration application. To make matters worse, there is also no reasonable, definite time limit in any source of Kentucky law by which the Governor must render decisions on such applications.

After petitioners' case survived the motion to dismiss, the district court held a status conference on October 11, 2019. At that conference, the court denied petitioners' request for a period of limited discovery and ordered the parties to file cross-motions for summary judgment. *See* ECF No. 45, Transcript of Telephone Conference (Oct. 24, 2019), at 614:4–8, 618:9–15. Then-Governor Matt Bevin's counsel also confirmed that Kentucky law is devoid of any objective, uniformly applied laws, rules, or criteria that govern decisions to grant or deny voting rights restoration applications. The Governor's counsel conceded that there are no rules or criteria in any source of binding legal authority or any other uncodified guidance: "[T]here is no secret . . . non-public binding anything that guides the Governor's discretion." *Id*. at 617:1–618:7.

Governor Beshear took office on December 10, 2019, shortly after briefing on the cross-motions for summary judgment was completed, and he was substituted as the named defendant. Two days later,

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[3] All "ECF No." citations refer to the district court's docket, and all page references are to the PageID#.

on December 12, 2019, Governor Beshear issued Executive Order 2019-003 "Relating to the Restoration of Civil Rights for Convicted Felons" ("EO 2019-003"), App. 37a–41a, which took people with certain felony convictions under Kentucky law out of the arbitrary voting rights restoration system and restored their right to vote immediately. App. 38a–39a.

EO 2019-003 sorted the disenfranchised by their specific felony convictions and jurisdiction of conviction. App. 39a–40a. It immediately restored the voting rights of Kentuckians who had completed their sentences for Kentucky state felony convictions except for certain expressly excluded offenses. *Id.* at 39a. This non-discretionary restoration applied to those individuals who had satisfied the terms of their probation, parole, or service of sentence, excluding the payment of restitution, fines, and any other court-ordered monetary conditions. *Id.* at 38a–39a. EO 2019-003, however, denied immediate, non-discretionary restoration to Kentuckians who have been convicted of certain Kentucky offenses, any federal offense, and any felony in another jurisdiction (even if it is identical to a Kentucky felony that qualifies for non-discretionary restoration under EO 2019-003). *Id.* at 39a–40a. EO 2019-003 caused the immediate restoration of voting rights to three plaintiffs, who were voluntarily dismissed in early 2020. ECF No. 54.

Petitioners and other individuals who are not eligible for immediate and non-discretionary post-sentence restoration under EO 2019-003 may only seek restoration of their right to vote through the

preexisting, discretionary restoration process. App. 39a–40a. The revised application states that while people with certain Kentucky felony convictions now qualify for immediate restoration, all other disenfranchised individuals who are not eligible for such non-discretionary restoration must still apply for the Governor's discretionary, selective grant of restoration. ECF No. 57-1 at 788.

Both petitioners were convicted of felonies that bar them from non-discretionary voting rights restoration under EO 2019-003 and, therefore, may only secure restoration by applying for and securing Governor Beshear's purely discretionary grant of restoration. Bonifacio Aleman was convicted of a felony in Indiana. ECF Nos. 66 & 66-1; App. 39a–40a. Robert Langdon was convicted of second-degree assault under Ky. Rev. Stat. Ann. § 508.020. ECF No. 46-4 at 659; App. 39a. Both petitioners have voting rights restoration applications pending before Governor Beshear. ECF No. 46-4 at 660; RE 18 at 10 n.2. Petitioners remain subject to a purely discretionary and arbitrary voting rights restoration system that remains fully intact for people who are barred from immediate restoration under EO 2019-003.

Eight months after EO 2019-003 was issued, the court dismissed the action as moot in reliance on that executive order and denied the cross-motions for summary judgment as moot. ECF No. 55 at 770, 777. The district court found EO 2019-003's non-discretionary restoration of some individuals with felony convictions meant that the restoration system was no longer a system of unfettered discretion as to *any* Kentuckians with felony convictions, including

those who still had to submit an application to Governor Beshear for discretionary voting rights restoration. *Id*. at 773–77.

After an unsuccessful motion for reconsideration, petitioners appealed to the U.S. Court of Appeals for the Sixth Circuit. The Sixth Circuit unanimously reversed the district court's dismissal for mootness and remanded the case for further proceedings. *Lostutter v. Kentucky*, No. 21-5476, 2021 WL 4523705, at *2 (6th Cir. Oct. 4, 2021). As to the remaining plaintiffs, the Court found that:

> EO 2019-003 left intact the discretionary scheme set out in Ky. Const. § 145 and Ky. Rev. Stat. Ann. § 196.045, which is the same one challenged in the operative complaint. Thus, EO 2019-003 did not remove the harms that [plaintiffs] allege, and the case remains suitable for judicial determination.

Id.

Upon remand, the district court once again dismissed this action, this time finding a lack of standing, and again denied the cross-motions for summary judgment as moot. App. 30a. The district court found that petitioners lacked an injury in fact under the First Amendment precedents. *Id*. at 23a–29a. The district court determined that voting rights restoration was an exercise of Governor Beshear's pardon power and that pardons are different from licensing systems such that the First Amendment unfettered discretion doctrine could not be invoked. *Id*. at 24a–29a. The court summed up its reasoning as follows:

> 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.

Id. at 29a. The court also wrote that its standing "analysis would apply with equal force to the substantive merits of Plaintiffs' argument." *Id*. at 25a n.1. Petitioners appealed to the Sixth Circuit again.

The Sixth Circuit panel affirmed the district court's ruling, finding petitioners' "contention that Kentucky's voting-rights restoration process constitutes a licensing or permitting scheme" "lacks merit." App. 2a, 9a. The panel's opinion relies heavily upon Kentucky law's classification of voting rights restoration, noting that "the Kentucky Constitution expressly characterizes felon reenfranchisement as a type of executive pardon" and that "[a]ssociated statutes and Kentucky caselaw likewise refer to the Governor's discretionary power to restore voting rights as a 'partial pardon.'" *Id*. at 9a. From this initial focus on the labels Kentucky law assigns to voting rights restoration, the Sixth Circuit proceeded to cite a series of perceived differences between executive pardons and administrative licensing that rendered the two "fundamentally different." *Id*. at 10a–13a. The panel relied upon the purported "retrospective" effect and "one-time" nature of pardons, as well as the proposition that "a pardon restores the felon to the status quo before the conviction." *Id*. Based upon these perceived

differences, the Court concluded that voting rights restoration and licensing systems were insufficiently alike to warrant the application of the First Amendment unfettered discretion doctrine, notwithstanding the acknowledged "similarity in outcome." *Id.* at 13a–17a. Finally, the panel wrote that "[m]ere similarity in result does not change the nature of the vehicle used to reach that result." *Id.* at 16a. Returning to the state-law nomenclature, the Court emphasized that "Kentucky law is clear that it restores felons their voting rights through a partial executive pardon, not through the granting of an administrative license." *Id.*

Petitioners timely filed a petition for rehearing and rehearing en banc. The court denied that petition on August 31, 2023. App. 31a–32a.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI IS WARRANTED BECAUSE THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENTS.

A. The Sixth Circuit's decision contravenes this Court's mandate to analyze First Amendment cases using a functional analysis.

The ultimate 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. Petitioners rely on a longstanding doctrine developed by this Court over the last 85 years

to combat the risk of viewpoint discrimination in licensing expressive conduct. This preventative doctrine requires the invalidation of licensing schemes governing the exercise of First Amendment-protected expression or expressive conduct where officials have been given limitless discretion to grant or deny the requested licenses or are not bound by any reasonable definite time limit. *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 757–64 (1988); *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 130–33 (1992); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 226 (1990).

The threshold question the Sixth Circuit panel decided was whether voting rights restoration in Kentucky constitutes a licensing scheme triggering the unfettered discretion doctrine's application. The panel decision answered only this threshold question and did so in a way that directly conflicts with this Court's instructions to apply a functional approach in First Amendment cases. This Court has never decided the ultimate merits question in this case but has provided consistent guidance regarding how this threshold question should be answered.

For decades, this Court has held that First Amendment rights and doctrines must be evaluated functionally, not formalistically. Across various First Amendment precedents and doctrines, the governing tests or frameworks always turn on functional analyses. *See, e.g.*, *Garcetti v. Ceballos*, 547 U.S. 410, 424–25 (2006) (in First Amendment retaliation claim implicating question as to whether public employee had spoken as government employee or private citizen, noting "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) (recognizing qualified First Amendment right of access to preliminary hearings) ("[T]he First Amendment question cannot be resolved solely on the label we give the event, *i.e.*, 'trial' or otherwise, particularly where the preliminary hearing functions much like a full-scale trial."); *Branti v. Finkel*, 445 U.S. 507, 518–19 (1980) (holding First Amendment bars conditioning public defenders' continued employment upon affiliation with political party controlling county government) ("[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) (recognizing First Amendment protects commercial advertisements) ("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."); *National 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).

This Court has approached many First Amendment challenges to campaign finance laws using a functional approach. After *Buckley v. Valeo*, 424 U.S. 1, 12–59 (1976), this Court applied the dichotomy between contributions and expenditures flexibly to prevent the evasion of contribution limits. In *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604, 616–18 (1996) ("*Colorado I*"), the spending limits set by the Federal Election Campaign Act were found unconstitutional where "the expenditures at issue were *not potential alter egos for contributions*, but were independent and therefore *functionally true expenditures*." *FEC v. Colorado Republican Federal Campaign Comm.*, 533 U.S. 431, 463 (2001) ("*Colorado II*") (emphasis added). Then, in upholding the facial constitutionality of coordinated party expenditure limits against the First Amendment challenge in *Colorado II*, this Court once again took a practical view of the regulated conduct and found "no significant functional difference between a party's coordinated expenditure and a direct party contribution to the candidate." 533 U.S. at 464. Such pragmatic assessments were necessary "to minimize circumvention of contribution limits." *Id.* at 465.

Functional equivalence is regularly invoked as a standard in First Amendment cases because of the fundamental importance of the right to political expression or expressive conduct and the risk that an unconstitutional regulation may evade a formalistic test's detection. For example, this Court's decision in

FEC v. Wisconsin Right To Life, Inc., 551 U.S. 449 (2007) ("*WRTL*") held that distinguishing between campaign advocacy and issue advocacy "requires [courts] first to determine whether the speech at issue is the 'functional equivalent' of speech expressly advocating the election or defeat of a candidate for federal office, or instead a 'genuine issue a[d].'" *Id*. at 456 (citations omitted). The regulatory scheme and multi-factor balancing test developed in the wake of *WRTL* would be revisited by this Court in *Citizens United v. FEC*, 558 U.S. 310, 334–35 (2010) (citing *WTRL*, 551 U.S. at 470). Once again, this Court evaluated that regulatory framework from a functional perspective and focused on the law's practical consequences. The majority wrote that even though this regulatory scheme would not qualify as "a prior restraint on speech in the strict sense of that term," it was inescapable that

> [a]s a practical matter, . . . given the complexity of the regulations and the deference courts show to administrative determinations, a speaker who wants to avoid threats of criminal liability and the heavy costs of defending against FEC enforcement must ask a governmental agency for prior permission to speak. *These onerous restrictions thus function as the equivalent of prior restraint by giving the FEC power analogous to licensing laws implemented in 16th- and 17th-century England*, laws and governmental practices of the sort that the First Amendment was drawn to prohibit.

Citizens United, 558 U.S. at 334–35 (internal citations omitted, emphasis added). *Citizens United*, therefore, accords with the long line of precedents in which this Court resolves First Amendment cases across a wide spectrum of doctrines using a functional, not formalistic, lens.

Given this consistent precedent, notwithstanding the labels Kentucky law affixes to voting rights restoration, *see, e.g.*, Ky. Rev. Stat. Ann. § 196.045(1)(e) ("partial pardon"), the Sixth Circuit panel was required to apply a functional analysis in assessing whether petitioners may invoke the First Amendment unfettered discretion doctrine. Functionally, there is no material difference between Kentucky's voting rights restoration system and a licensing system. 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 or out-of-state felony conviction or an enumerated Kentucky felony conviction apply to a government office seeking permission to vote. ECF No. 57-1.[4] The Kentucky Department of Corrections compiles information on the applicant, and then, if the applicant is deemed eligible for restoration, forwards the file to the Governor for a decision. Ky. Rev. Stat. Ann. § 196.045(1). The Governor grants or denies that restoration application in his absolute discretion. If denied, the applicant can re-apply. Absent permission from the Governor, the applicant may not register and

[4] The current restoration of civil rights application also embraces the right to hold public office, but Petitioners' First Amendment challenge is solely focused on the right to vote.

vote, and engaging in this form of political expressive conduct without a license is a crime. Ky. Rev. Stat. Ann. §§ 119.025, 532.020(1)(a). Finally, as the panel acknowledged, "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." App. 16a.

Notwithstanding these significant functional commonalities, the panel focused its attention on state-law semantics that are irrelevant to the First Amendment question. The Kentucky Constitution and statutes refer to voting rights restoration as an "executive pardon" and a "partial pardon," respectively. Ky. Const. § 145; Ky. Rev. Stat. Ann. § 196.045(1)(e). However, voting rights restoration is only one of the many legal effects of a pardon in Kentucky; it is not itself a pardon. Restoration is not intrinsically part of clemency. Forty states plus D.C. handle voting rights restoration entirely outside their clemency systems—a reality the panel ignored. RE 16 at 57–58 & n.16. Even Governor Beshear's own EO 2019-003 acknowledges that the grant of voting rights restoration does not bear any of the other effects of pardons. App. 40a. Ultimately, the phrase "partial pardon" has a strained, almost oxymoronic ring that betrays an understanding that voting rights restoration and pardons are different in kind. As a result of this initial terminological misstep, the panel proceeded to erroneously compare the features of pardons and licensing. App. 10a–13a.

Seizing on the "partial pardon" label in Kentucky law caused the panel to misapply and breach this Court's longstanding directive to engage First Amendment rights cases with a functional perspective, bringing its ruling into conflict with this Court's precedents. The panel's summary is emblematic of that central error:

> 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.

App. 16a. The panel's conclusion that the "nature of the vehicle" was dispositive—and not the "result" or "outcome"—lacked legal support and directly contradicted the litany of Supreme Court precedents forbidding formalistic analysis and requiring a practical, functional inquiry in a wide spectrum of First Amendment contexts. The panel's focus on the purported "nature of the vehicle" erroneously privileged means over ends and minimized or ignored the practical effects of Kentucky's voting rights restoration system.

No matter the area of the law, functional analyses always demand an evaluation of practical effects or impact. For instance, in *Quackenbush v. Allstate Insurance Co.*, this Court 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 borrow the Sixth Circuit's phrase) was immaterial because the remand order was "functionally indistinguishable" from a stay order the Court had previously found appealable in another 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). This Court's focus on practical effects—properly privileging ends over means—is what a functional analysis requires. But in this case, the panel's decision has upended that framework and erased the dichotomy between formalism and functionality.

The Sixth Circuit's reasoning even departs from its own precedent establishing that a functional analysis requires an examination of practical effects. Relying on *Quackenbush*, the Sixth Circuit held in *Vogel v. U.S. Office Products Co.* 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, the 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 (emphases added). Crucially, the Sixth Circuit did not dwell on the substantial differences between remand orders and orders to dismiss—the quite dissimilar "nature" of those two "vehicle[s]," App. 16a—but rather on the "practical effect" of each. *Vogel*, 258 F.3d at 514–17; *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).

The Sixth Circuit's failure to apply a proper functional analysis particularly undermines the purpose behind the First Amendment precedents upon which petitioners rely. From its inception, the unfettered discretion doctrine has been applied to strike down both obviously and less obviously unconstitutional schemes governing the licensing of protected expression and expressive conduct—*i.e.*, both overt and covert threats of viewpoint discrimination. For instance, in *Saia v. People of State of New York*, this Court invalidated an arbitrary permit scheme for loudspeaker use precisely because viewpoint discrimination is easily concealed by a licensing system with no definite rules or criteria:

> In this case a permit is denied because some persons were said to have found the sound annoying. In the next one a permit may be denied because some people find the ideas annoying. Annoyance at ideas can be cloaked in annoyance at sound.

334 U.S. 558, 562 (1948). As *Saia* and later cases articulated, this preventative doctrine is in large part animated by the risk that viewpoint discrimination will evade detection and judicial review entirely. *See City of Lakewood*, 486 U.S. at 759 (citing "the difficulty of effectively detecting, reviewing, and correcting content-based censorship 'as applied'" as one of two "major First Amendment risks associated with unbridled licensing schemes"); *see also id.* at 762 (noting "the twin threats of self-censorship and undetectable censorship"). Given this Court's stated objective to head off and neutralize difficult-to-detect risks of viewpoint discrimination, the constitutional ban on arbitrary licensing of expressive conduct must be construed functionally and flexibly. In this case, Kentucky's arbitrary voting rights restoration scheme functions as an arbitrary licensing scheme.

B. The panel's functional analysis is erroneous because it failed to consider the practical effects of Kentucky's discretionary voting rights restoration system.

The panel's purported functional analysis of the "nature of the vehicle" further contravened this Court's precedents by failing to consider the practical outcomes of voting rights restoration. This is largely because the panel focused its attention on Kentucky law's characterization of voting rights restoration as a "partial pardon" and thereby erroneously compared the features of pardons to licensing. App. 9a–17a. To the extent the panel decision did compare voting rights restoration and licensing, it neither considered the highly similar mechanics between the two, *see*

supra at 17–18, nor explained why any of these perceived differences *make* any difference in the First Amendment analysis. Each is an immaterial distinction because none alters the practical effect of voting rights restoration.

First, the panel pointed to the "retrospective" effect of pardons. App. 10a. 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-or-retrospective dichotomy is false. After all, Governor Beshear 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 "nullifies" one of the consequences of a felony conviction, App. 7a, this legal effect is not principally (let alone exclusively) retrospective. 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 concluded that voting rights restoration is backward-looking because it "restores the felon to the status quo before the conviction," App. 12a, disenfranchised individuals who were convicted of felonies as juveniles never could vote. For them, voting rights "restoration" is

functionally first-time enfranchisement, not re-enfranchisement.

The panel fails to articulate why its proffered prospective-or-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 alter the functional analysis. There is a clear risk of "undetectable" and "unreviewable" viewpoint discrimination in giving a government official like Governor Beshear sole and unfettered power to selectively bestow voting rights on particular individuals and without any reasonable, definite time limit by which the Governor must make such decisions. *City of Lakewood*, 486 U.S. at 758–59, 762; *FW/PBS, Inc.*, 493 U.S. at 226.

Second, the panel found that voting rights restoration is a "one-time act of clemency." App. 10a. However, voting rights restoration applicants who are denied one or more times will have recurring encounters with the Governor's discretionary vote-licensing system. During the course of those successive attempts, a restoration applicant will understandably be deterred from public political expression that might compromise any 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. By reviewing prior political expression, partisan affiliations, or donation history,

Governor Beshear can assess how applicants would likely vote if restored. *See 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."). The panel never explains how the purported "one-time" nature of restoration could have any functional, material impact on the inherent risk of viewpoint discrimination in giving a government official like Governor Beshear sole and absolute power to bestow voting rights selectively.

Third, the panel concluded 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." App. 12a. But whenever state or local law imposes a licensing requirement, there is no right to engage in such expression or expressive conduct without a license, regardless of whether the right to expression or expressive conduct originates in the First Amendment itself or state statutes. Even the panel did 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 16a. 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. License applicants also cannot lawfully engage in the "regulated conduct"—the specific form of First Amendment-protected expression or expressive conduct—prior to securing a

permit to do so. *Id*. Restoration applicants and license applicants stand, therefore, 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 allowed state law labels, rather than practical effects, to dictate the scope of the First Amendment's protection and relied upon distinctions reflecting no functional, material difference from licensing to conclude that voting rights restoration in Kentucky does not operate as a licensing scheme. In these ways, the decision violated this Court's precedents.

II. CERTIORARI IS WARRANTED BECAUSE THE SIXTH CIRCUIT'S DECISION SEVERELY UNDERMINES THIS COURT'S LONGSTANDING FIRST AMENDMENT SAFEGUARDS AGAINST ARBITRARY LICENSING SCHEMES.

The panel's decision ruled against petitioners on the threshold merits question of whether voting rights restoration constitutes a licensing scheme. As it is undisputed that Governor Beshear grants or denies the right to vote free of any legal constraint, the Sixth Circuit's opinion effectively upholds and authorizes arbitrary, selective enfranchisement of those who are currently ineligible to vote under state law. Though this Court has not adjudicated this particular application of the First Amendment unfettered discretion doctrine, the panel's ruling is deeply at odds with the principles articulated by this Court in this area.

When First Amendment-protected expressive conduct is at issue, arbitrary licensing systems are intolerable. Such schemes subject those seeking to engage in that protected conduct to the risk of "undetectable" viewpoint discrimination and pressure them into self-censorship to avoid jeopardizing their applications. *City of Lakewood*, 486 U.S. at 759, 762–63. 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. "[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. As this Court stated in *Forsyth County*, "[f]acial attacks on the discretion granted a decisionmaker are not dependent on the facts surrounding any particular permit decision." 505 U.S. at 133 n.10. The existence of an actual, improper discriminatory or biased motive need not be shown to strike down such a law on its face: "[T]he success of a facial challenge on the grounds that an ordinance delegates overly broad discretion to the decisionmaker rests not on whether the administrator has exercised his discretion in a content-based manner, but whether there is anything in the ordinance *preventing* him from doing so." *Id*. (emphasis added).

This case implicates all the same concerns and principles that have animated the unfettered discretion doctrine over the decades. Disenfranchised individuals in Kentucky submit an application to

regain their voting rights, and no rules or criteria constrain Governor Beshear's discretion to grant or deny that application. Notably, Governor Beshear has not argued that there is a fixed, objective list of rules or criteria he is using to decide whether to grant or deny voting rights restoration applications. Far from denying the arbitrariness of the challenged system, Governor Beshear has instead admitted to and embraced it by seeking to label voting rights restoration as "clemency" based "on purely subjective evaluations and on predictions of future behavior by those entrusted with the decision." *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 464 (1981); RE 17, Brief of Appellee, at 14.

Deciding whether to grant or deny an application to engage in First Amendment-protected expressive conduct based on a wholly subjective and arbitrary standard—such as whether Governor Beshear believes an applicant is "worthy" of the franchise[5]—is precisely what the First Amendment unfettered discretion doctrine prohibits. In *Shuttlesworth v. City of Birmingham*, this Court invalidated a permit scheme for marches or demonstrations precisely because it lacked "narrow, objective, and definite standards" and was "guided only by [Commissioners'] own ideas of 'public welfare, peace, safety, health, decency, good order, morals or convenience.'" 394 U.S.

[5] RE 29, Ex. B, Transcript of Oral Argument, at 59:17–60:10 ("Under Kentucky law, that is left to each governor who holds the office to ultimately subjectively determine what – who they think is worthy . . . ."). The parties do not dispute that Governor Beshear grants or denies voting rights restoration in his unfettered discretion.

147, 150–51 (1969). Protected expressive conduct cannot be subjected to licensing under open-ended, subjective, and indefinite standards. Under Kentucky's purely discretionary vote-licensing system, which is devoid of rules and criteria, 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 current or future restoration applicants from expressing certain viewpoints. Accordingly, this system violates the principles this Court has articulated in the First Amendment unfettered discretion cases.

This Court need only consider a voting rights restoration applicant whose social media accounts contain claims that the 2020 presidential election was stolen and expressions of support for those convicted in connection with January 6, or applicants who have publicly stated that they support or oppose abortion or that they support or oppose 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 intentional viewpoint discrimination in an as-applied challenge. *City of Lakewood*, 486 U.S. at 758–59. Additionally, some restoration applicants will hold one of the above beliefs but remain deterred from publicly sharing them because their restoration application is pending with a governor known to have opposing political

views: "The mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech . . . ." *Id.* at 757.

Accordingly, while ballots may be secret, Governor Beshear has readily available means to review evidence of a restoration applicant's viewpoints and grant or deny the right to vote on that discriminatory basis: "[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." *Id.* at 759. Proof of invidious discrimination is not required, as this Court has instructed that unfettered discretion is per se prohibited, "even if the discretion and power are never actually abused." *Id.* at 757. Kentucky law, on its face, confers upon the Governor limitless discretion to grant or deny voting rights to people who are ineligible due to felony convictions, causing a per se injury to petitioners.

Ultimately, the Sixth Circuit's decision authorizes the arbitrary and selective licensing of voting rights in contravention of this Court's precedents. Because the injury to petitioners' First Amendment rights squarely implicates the principles and protections in this Court's First Amendment unfettered discretion cases, certiorari is necessary to clearly extend that doctrine's protection to foreclose the arbitrary granting of voting rights.

III. CERTIORARI IS WARRANTED TO ADDRESS AN EXCEPTIONALLY IMPORTANT FEDERAL QUESTION THAT HAS NEVER BEEN DIRECTLY ADDRESSED BY THIS COURT.

A system of voting rights restoration that allows government officials to arbitrarily, selectively mete out voting rights to people who are currently ineligible to vote presents an intolerable risk of viewpoint discrimination. Arbitrary voting rights restoration survives in Kentucky as a vestige of two overlapping legal regimes: (1) discretionary executive clemency, which originates with the 8th Century English monarchy;[6] and (2) disenfranchisement upon a felony conviction. Although both regimes are, in themselves, constitutional, their conjunction in discretionary and arbitrary voting rights restoration fails constitutional scrutiny. As this Court has noted, two otherwise-lawful government actions may violate the Constitution when combined. For instance, in *West Lynn Creamery, Inc. v. Healy*, this Court applied a functional analysis to hold that a nondiscriminatory tax and a local subsidy program worked in tandem to

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[6] *See Herrera v. Collins*, 506 U.S. 390, 412 (1993) ("In England, the clemency power was vested in the Crown and can be traced back to the 700's. W. Humbert, The Pardoning Power of the President 9 (1941). Blackstone thought this 'one of the great advantages of monarchy in general, above any other form of government; that there is a magistrate, who has it in his power to extend mercy, wherever he thinks it is deserved: holding a court of equity in his own breast, to soften the rigour of the general law, in such criminal cases as merit an exemption from punishment.' 4 W. Blackstone, Commentaries.")

violate the dormant Commerce Clause. 512 U.S. 186, 199–201 (1994). As this Court explained:

> The choice of constitutional means—nondiscriminatory tax and local subsidy—cannot guarantee the constitutionality of the program as a whole. . . .
>
> Our Commerce Clause jurisprudence is not so rigid as to be controlled by the form by which a State erects barriers to commerce. Rather our cases have eschewed formalism for a sensitive, case-by-case analysis of purposes and effects.

Id. at 201. Similarly, in this instance, the overlap between executive clemency and felony re-enfranchisement has produced a narrow, yet significant, constitutional violation.

This Court has never answered the specific question presented by this case, but a decision in petitioners' favor would vindicate petitioners' well-established rights under the First Amendment unfettered discretion doctrine. It would also be well-aligned with recent First Amendment challenges to election laws decided by this Court. For instance, in *Minnesota Voters Alliance v. Mansky*, this Court struck down a Minnesota statute that banned voters from wearing "political" badges, buttons, or insignias while voting at a polling place. 138 S. Ct. 1876, 1891 (2018). This Court found the state statute violated the First Amendment because its text neither defined nor provided guidance on when the content of a badge, button, or insignia was impermissibly "political." *Id*. at 1890. Open-ended interpretation of the statute created an indeterminate prohibition, which in turn

enabled abuse. *Id.* at 1891. By vesting election judges with arbitrary discretion to define the contours of political speech, the statute created an unacceptable risk of covert, undetectable viewpoint discrimination. *Id*. (citing *Heffron v. International Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981) (warning of the "more covert forms of discrimination that may result when arbitrary discretion is vested in some governmental authority")). Similarly, Kentucky's voting rights restoration system violates the First Amendment because the arbitrary discretion afforded to the Governor subjects applicants to an unacceptable risk of covert, undetectable viewpoint discrimination.

The question presented by this case is of fundamental importance to our constitutional system. As recognized by Governor Beshear in his 2019 executive order, "the right to vote is the foundation of a representative government," and restoration of that right fosters "rehabilitation and reintegration into society." App. 37a–38a. Approximately 16,000 adults complete parole or probation each year in Kentucky, causing the population of individuals who have completed their sentences but remain disenfranchised to grow continuously.[7] Many

[7] The Bureau of Justice Statistics ("BJS") reported that in 2021 in Kentucky, 5,657 adults completed parole and 10,660 adults completed probation. 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 in 2020 in Kentucky, 6,780 adults completed parole and 9,792 adults completed probation. U.S. Dep't of Justice, Probation and Parole in the United States

disenfranchised Kentuckians remain subject to an arbitrary voting rights restoration scheme and are consequently exposed to the threat of viewpoint discrimination.

Moreover, Kentucky's arbitrary restoration process applies to every individual convicted of a federal or out-of-state felony. Kentucky's population is growing rapidly. The U.S. Census Bureau estimates that over 100,000 people moved to Kentucky in each of the last several years, most of them from states that, as previously noted, have non-discretionary restoration systems.[8] Without intervention by this Court, Kentucky law will continue to impose an arbitrary restoration system on any resident convicted of a federal or out-of-state felony, even if the person was convicted of an offense identical to those that qualify for immediate, non-discretionary restoration under EO 2019-003. Through this process, any person with a felony conviction from out of state who moves to Kentucky forfeits their right to vote at the state line and is subject to an arbitrary voting rights restoration scheme.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that this Court grant the writ of certiorari.

(2020), at 21, 26, *available at* https://bjs.ojp.gov/content/pub/pdf/ppus20.pdf.

[8] U.S. Census Bureau, American Community Survey 1-Year Estimates 2016–2022, State to State Migration Flows 2016–2022, *available at* https://www.census.gov/data/tables/time-series/demo/geographic-mobility/state-to-state-migration.html.

November 29, 2023

Respectfully submitted,

Jon Sherman
Counsel of Record
Michelle Kanter Cohen
Beauregard Patterson
FAIR ELECTIONS CENTER
1825 K St. NW, Suite 701
Washington, DC 20006
jsherman@
fairelectionscenter.org
(202) 331-0114

Ben Carter
KENTUCKY EQUAL
JUSTICE CENTER
222 South First Street,
Suite 305
Louisville, KY 40202

Counsel for Petitioners

APPENDIX

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED JULY 20, 2023

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.

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.

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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, 108 S. Ct. 2138, 100 L. Ed. 2d 771 (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).

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).

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. Ky.*, No. 21-5476, 2021 U.S. App. LEXIS 29976, 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, 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.

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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.

2021 U.S. App. LEXIS 29976, [WL] 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.

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

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

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. 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 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 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*,

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.

523 U.S. 272, 276, 118 S. Ct. 1244, 140 L. Ed. 2d 387 (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, 101 S. Ct. 2460, 69 L. Ed. 2d 158 (1981))); *see also Herrera v. Collins*, 506 U.S. 390, 413-15, 113 S. Ct. 853, 122 L. Ed. 2d 203 (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, 61 S. Ct. 762, 85 L. Ed. 1049 (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 serve an important government interest); *see also Kunz v. New York*, 340 U.S. 290, 293-94, 71 S. Ct. 312, 95 L. Ed. 280 (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," 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).

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, 112 S. Ct. 2395, 120 L. Ed. 2d 101 (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 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 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.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY, SOUTHERN DIVISION, LONDON, FILED JULY 22, 2022

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
LONDON

CIVIL NO. 6:18-277-KKC

DERIC LOSTUTTER, *ET AL.*,

Plaintiffs,

v.

ANDREW BESHEAR, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF KENTUCKY,

Defendant.

OPINION AND ORDER

This matter is before the Court on cross-motions for summary judgment. In their motion, Plaintiffs Deric Lostutter, Robert Calvin Langdon, and Bonifacio R. Aleman ask the Court to hold that Kentucky's system for restoring the voting rights of persons convicted of felonies violates the First Amendment of the United States Constitution and to order Defendant Andrew Beshear, the governor of Kentucky, to create a system governed by specific rules, criteria, and definite time limits. (R. 46.) The Governor's motion argues that Kentucky's

reenfranchisement scheme does not run afoul of the First Amendment and asks the Court to grant summary judgment in his favor on the Plaintiffs' claims. (R. 47-1.) For the reasons stated in this Opinion, the Court will deny Plaintiffs' motion and grant summary judgment in favor of the Governor of Kentucky.

Background

I. Procedural History

On October 29, 2018, Plaintiff Deric Lostutter sued the Commonwealth of Kentucky in this Court, seeking temporary and permanent injunctive relief. (R. 1.) Plaintiff amended the complaint four times, and various parties were added and removed. (R. 10; R. 12; R. 25; R. 31.) Plaintiffs in the operative pleading are all disenfranchised residents of Kentucky with felony convictions who wish to register and vote in future elections. (R. 31 at 7, 8-12.)

On February 15, 2019, the governor filed a motion to dismiss the complaint. (R. 32.) The Court issued an order granting the motion to dismiss as to one of the plaintiffs, but otherwise denying the motion because, in the Court's judgment, the remaining issues in the case, given their significance, should be resolved on summary judgment. (R. 35.) The parties' cross-motions for summary judgment were filed on November 25, 2019. (R. 46; R. 47.)

Seven days after the close of briefing on the cross-motions for summary judgment, newly-inaugurated Governor Andrew Beshear signed an executive order

that automatically restores the right to vote and right to hold office to persons convicted of certain felony offenses. The order does not apply to persons convicted of certain state law crimes (such as treason, bribery in an election, and certain violent offenses), and those persons must still apply to have their rights restored.

Following the issuance of the executive order, the Court dismissed Plaintiffs' claims on summary judgment after concluding that the Governor's order appeared to provide the only relief Plaintiffs requested: non-arbitrary criteria to guide the process for restoration of voting rights. (R. 55.) The order further stated that, even if the Governor maintained discretion with respect to restoring Plaintiffs' voting rights, their claims were moot because they did not seek the restoration of these rights. (*Id.*)

The United States Court of Appeals for the Sixth Circuit reversed this Court's decision on appeal. In its opinion, the Sixth Circuit concluded that while the Governor's order established a non-discretionary restoration track for certain felons, Lostutter and Langdon do not qualify because they were convicted, respectively, of a federal offense and of second-degree assault under Kentucky law. *Lostutter v. Kentucky*, No. 21-5476, 2021 U.S. App. LEXIS 29976, at *5, 2021 WL 4523705 (6th Cir. Oct. 4, 2021). Because the Governor's order does not apply to them, Lostutter and Langdon's claims are not moot because they must apply for restoration of their voting rights and thus remain subject to the discretionary restoration scheme they seek to challenge. *Id.* Additionally, the Sixth Circuit held that Plaintiffs claims were not moot

because of their failure to seek restoration of their voting rights, and thus that Aleman's claims might not be moot. *Id.* at *5-6. Accordingly, the case was remanded for this Court to address the Plaintiffs' challenges to Kentucky's discretionary voting rights restoration scheme.

On remand, this Court ordered the parties to meet and report on the status of the case. (R. 65.) The parties agreed that the case is ready for resolution based on previously submitted cross-motions for summary judgment and that no further filings were necessary. The matter is therefore ripe for review.

II. Kentucky's Felon Reenfranchisement Scheme

In Kentucky, a person convicted of a felony does not have the right to vote. Ky. Const. § 145(1). However, the right to vote may be restored by an executive pardon issued by the Governor. Ky. Const. § 145(1). The restoration provision of Kentucky's Constitution is self-executing and gives the Governor the power "to effect such restorations." *Arnett v. Stumbo*, 287 Ky. 433, 153 S.W.2d 889, 890 (Ky. 1941).

Although the Governor's power to restore a felon's ability to vote is self-executing, Kentucky Revised Statute § 196.045 provides the administrative process by which a person's right to vote may be restored: a person convicted of a felony may submit an application for restoration of civil rights to the state Department of Corrections and, if the Department of Corrections determines that the felon qualifies as an "eligible offender," the application will be

forwarded to the Governor "for consideration of a partial pardon."

In 2019, Kentucky Governor Andrew Beshear signed Executive Order 2019-003, "Relating to the Restoration of Civil Rights for Convicted Felons." EO 2019-003 automatically restores the right to vote and the right to hold public office to "offenders convicted of crimes under Kentucky state law who have satisfied the terms of their probation, parole, or service of sentence . . . exclusive of restitution, fines, and any other court-ordered monetary conditions." However, the Executive Order does not automatically restore the right to vote for those convicted of certain specified state crimes. It further notes that "no civil rights shall be restored pursuant to this Order to any person who has at the time of Final Discharge any pending felony charges or arrests, nor to any person who was convicted under federal law or the laws of a jurisdiction other than Kentucky."

If a person with a felony conviction does not qualify for automatic restoration of their civil rights under the Executive Order, they can submit an application for restoration under KRS 196.045 and the guidelines set by the Governor. There are no criteria or guidelines that the Governor must use when deciding to grant or deny a restoration application, and "the Governor is vested with a broad and virtually unfettered discretion to pardon," *Fletcher v. Graham*, 192 S.W.3d 350, 365 (Ky. 2006).

Appendix B

Analysis

I. Plaintiffs Do Not Have Standing to Challenge Kentucky's Reenfranchisement Scheme

Plaintiffs argue that they have standing to challenge Kentucky's reenfranchisement scheme even though they have not applied for restoration of their voting rights. (R. 46 at 5.) The Governor challenged Plaintiffs' standing in his motion to dismiss, (R. 32-1 at 9-11), but he does not argue the issue on summary judgment. However, because it is a threshold question and jurisdictional requirement, the Court must address the issue of Article III standing anytime it arises. *Davis v. Detroit Pub. Sch. Cmty. Dist.*, 899 F.3d 437, 443 (6th Cir. 2018) (citing *Warth v. Seldin*, 422 U.S. 490, 498, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975)).

Article III requires a plaintiff to establish three elements: (1) an "injury in fact," (2) a causal connection between the alleged injury and the defendant's conduct, and (3) a likelihood that the injury will be redressed by a favorable decision. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157-58, 134 S. Ct. 2334, 189 L. Ed. 2d 246 (2014) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)). The party claiming federal jurisdiction has the burden of establishing standing, and each element must be established in the same manner and with the same degree of evidence as any other matter at the given stage of the litigation. *Id.* at 158.

Appendix B

A. Plaintiffs Have Failed to Show They Have Suffered an Injury in Fact

The present case turns on the "first and foremost" of those elements: injury in fact. *Huff v. Telecheck Servs.*, 923 F.3d 458, 462 (6th Cir. 2019) (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998)) (cleaned up). To establish injury in fact, a plaintiff must show they have suffered an invasion of a legally protected interest that is "real, not abstract, actual, not theoretical, [and] concrete, not amorphous." *Id.* (citing *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339-40, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016)). The most obvious way this element can be satisfied is by showing actual injury, which here could be done by having a voting rights restoration application denied. But Article III standing can also be satisfied by allegations of future injury, so long as the threatened harm is "certainly impending" or there is a "substantial risk that the harm will occur." *Driehaus*, 573 U.S. at 158.

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. Three plaintiffs remain in the case: Langdon, Aleman, and Lostutter. (*See* R. 66 at 2, n.1.) 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.)

Plaintiffs maintain that standing is not dependent on their having applied for and been denied restoration

of their voting rights. They argue that Kentucky's reenfranchisement scheme constitutes an administrative licensing scheme governing the exercise of rights protected by the First Amendment, and that the Supreme Court has held that plaintiffs are not required to apply for and be denied a license to challenge such an administrative scheme's constitutionality. (R. 46 at 5 (citing *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 755-56, 108 S. Ct. 2138, 100 L. Ed. 2d 771 (1988).) On this point, the Governor disagrees.[1] He argues that Kentucky's reenfranchisement scheme and an administrative licensing scheme are "two different things entirely," and that a person convicted of a felony's interest in having their right to vote restored is "nothing like one's interest in receiving a license or a permit." (R. 47-1 at 19.)

1. Kentucky's Voter Restoration Scheme Is Not an Administrative Licensing Scheme

When bringing a facial challenge to a licensing scheme that allegedly gives government officials unlimited discretion to grant or deny licenses or permits that a person must obtain to engage in activity protected by the First Amendment, the injury in fact element can be

1. Like their theory of standing, Plaintiffs' theory on the merits of their case rests on their argument that Kentucky's voting rights restoration scheme constitutes an administrative licensing scheme. The Governor did not address the issue of standing on summary judgment, but his arguments as to the substantive merits of the case are applicable here. Though the Court only addresses the issue of Article III standing in this Opinion, the analysis would apply with equal force to the substantive merits of Plaintiffs' argument.

satisfied "without the necessity of first applying for, and being denied, a license." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 755-56, 108 S. Ct. 2138, 100 L. Ed. 2d 771 (1988). However, *City of Lakewood* is only applicable to the present case if Kentucky's felon reenfranchisement laws constitute a licensing or permitting scheme. Plaintiffs argue that an executive pardon restoring the right to vote is the same as a permit or license allowing a person to vote. This argument misses the mark.[2]

"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). And though often used interchangeably with the term "license," 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).

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2. The Eleventh Circuit has recently, and persuasively, considered similar arguments, and in response stated that "[t]hose cases established the longstanding and important but (for our purposes) unremarkable point that a state cannot vest officials with unlimited discretion to grant or deny licenses as a condition of engaging in protected First Amendment activity." *Hand v. Scott*, 888 F.3d 1206, 1212-13 (11th Cir. 2018). "However, this precedent does not bear directly on the matters presented by this case. Indeed, none of the cited 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.* at 1213.

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. 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).[3] 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.

Generally, a pardon has the effect of "removing all legal punishment for the offense and restoring one's civil rights . . . ." *Harscher v. Commonwealth*, 327 S.W.3d 519, 522 (Ky. Ct. App. 2010) (citing *Nelson v. Commonwealth*, 128 Ky. 779, 109 S.W. 337, 338, 33 Ky. L. Rptr. 143 (Ky. 1908)). Loss of the right to vote is just one consequence of a felony conviction, and a pardon can do much more than remove that single consequence—it can nullify a prison sentence, restore other civil rights, and expunge the conviction. *See, e.g.*, *Anderson v. Commonwealth*, 107 S.W.3d 193 (Ky. 2003) (examining the language of a pardon to determine whether it restored the pardonee's right to sit on a jury); *Cheatham v. Commonwealth*, 131 S.W.3d 349

3. "Courts have examined pardons in light of their scope in the state where the pardon was issued to determine whether the pardon has the same effect as expunging the conviction by executive order." *West v. Louisville Jefferson Cnty. Metro Gov't*, No. 3:20-CV-00820-GNS, 2022 U.S. Dist. LEXIS 26898, at *7, 2022 WL 468050 (W.D. Ky. Feb. 14, 2022) (collecting cases).

(Ky. Ct. App. 2004) (holding that a pardon issued pursuant to sections 145 and 150 of the Kentucky Constitution was a partial pardon restoring only the pardonee's rights to vote and hold office, but not the right to possess a firearm); *Jones v. Commonwealth*, No. 2020-CA-0790-MR, 2021 Ky. App. Unpub. LEXIS 440, 2021 WL 3118096 (Ct. App. July 23, 2021) (examining the language of an executive order to determine whether it constituted a pardon or commutation). 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 can also invalidate or expunge a conviction if it includes appropriately strong invalidating language, such as by referring to the pardonee's innocence or otherwise "question[ing] or discredit[ing] a judicial finding of guilt." *See West v. Louisville Jefferson Cnty. Metro Gov't*, 2022 U.S. Dist. LEXIS 26898, at *8-9, 2022 WL 468050 (W.D. Ky. Feb. 14, 2022) (holding that a "full and unconditional pardon" restoring "all rights and privileges" does not invalidate the pardonee's conviction and entitle him to expungement where the pardon "made no reference to the pardonee's innocence or expungement of her record"). "Expungement is equivalent to official erasure, a 'removal of a conviction [or here, charge] from a person's criminal record.'" *Hermansen v. White*, 2014 U.S. Dist. LEXIS 116620, at *11, 2014 WL 4182453 (E.D. Ky. June 27, 2014), *report and recommendation adopted*, 2014 U.S. Dist. LEXIS 116758, 2014 WL 4182453 (E.D. Ky. Aug. 21, 2014) (quoting *Black's Law Dictionary*). After a conviction is expunged, the "criminal process itself"

is "deemed to have never occurred," and the person no longer must disclose the fact of conviction "or any matter relating thereto on an application for employment, credit, or other type of application." *Moore v. Louisville/Jefferson Cnty. Metro. Gov't*, No. 2020-CA-1296-MR, 2022 Ky. App. LEXIS 1, at *8-9, 2022 WL 67441 (Ct. App. Jan. 7, 2022) (citing Ky. Rev. Stat.§ 431.076(6)).

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.

2. Plaintiffs' Alleged Injuries Are Hypothetical and Abstract

Because the Commonwealth's reenfranchisement scheme is not a licensing scheme, *City of Lakewood* is inapplicable to the present case. Plaintiffs therefore have the burden of showing that they (1) suffered an injury, (2) caused by the Governor, (3) that a judicial decision could redress." *Huff*, 923 F.3d at 462 (citing *Lujan*, 504 U.S. at 560-61). However, Plaintiffs' theory of standing rests entirely on the argument that they are challenging a licensing scheme, which the Court has rejected.

The only injury Plaintiffs have alleged is that they are harmed by the mere possibility of having a restoration application denied by the Governor. Although an intangible injury can satisfy the injury-in-fact requirement, the injury must be "real" and "not abstract." *Spokeo*, 136 S. Ct. at 1550. Plaintiffs have not shown that the Governor's discretion has caused them any actual injury—two plaintiffs have not even applied to have their rights restored, much less had their application denied. Accordingly, they have "suffered no denial, or other injury, that would allow [them] to challenge the reinstatement process." *El-Amin v. McDonnell*, 2013 U.S. Dist. LEXIS 40461, at *16, 2013 WL 1193357 (E.D. Va. Mar. 22, 2013). Because the injury alleged by Plaintiffs is entirely hypothetical and abstract, they do not have standing to challenge the Commonwealth's felon reenfranchisement scheme, and consequently this Court lacks authority to hear their claims.

Conclusion

Accordingly, for the reasons stated in this Opinion, it is hereby **ORDERED** that Plaintiffs' claims are **DISMISSED** without prejudice for lack of standing. Plaintiffs' and Defendant's motions for summary judgment (R. 46, 47) are therefore **DENIED** as moot and this matter shall be **STRICKEN** from the active docket.

Dated July 22, 2022.

/s/ Karen K. Caldwell
KAREN K. CALDWELL
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

APPENDIX C — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED AUGUST 31, 2023

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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.

ORDER

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

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

APPENDIX D — CONSTITUTIONAL PROVISIONS, STATUTES, AND EXECUTIVE ORDER INVOLVED

Ky. Const. § 145

Every citizen of the United States of the age of eighteen years who has resided in the state one year, and in the county six months, and the precinct in which he offers to vote sixty days next preceding the election, shall be a voter in said precinct and not elsewhere but the following persons are excepted and shall not have the right to vote.

1. 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.

2. Persons who, at the time of the election, are in confinement under the judgment of a court for some penal offense.

3. Idiots and insane persons.

Appendix D

Ky. Rev. Stat. § 116.025(1)

(1) Every person who is a citizen of the United States, a resident of this state, and a resident of the precinct in which he or she offers to vote on or before the day preceding the closing of the registration books for any primary, general, or special election, who possesses on the day of any election the qualifications set forth in Section 145 of the Constitution, exclusive of the durational residency requirements, who is not disqualified under that section or under any other statute, and who is registered as provided in this chapter, may vote for all officers to be elected by the people and on all public questions submitted for determination at that election, in the precinct in which he or she is qualified to vote. Any person who shall have been convicted of any election law offense which is a felony shall not be permitted to vote until his or her civil rights have been restored by executive pardon.

Appendix D

Ky. Rev. Stat. § 196.045

(1) The Department of Corrections shall promulgate administrative regulations in accordance with KRS Chapter 13A to implement a simplified process for the restoration of civil rights to eligible felony offenders. As part of this simplified process, the Department of Corrections shall:

(a) Inform eligible offenders about the process for restoration of civil rights and provide a standard form which individuals may sign upon their release to formally request that the Department of Corrections initiate the process;

(b) Generate a list on a monthly basis of eligible offenders who have been released by the Department of Corrections or discharged by the Parole Board and who have requested that their civil rights be restored;

(c) Conduct an investigation and compile the necessary information to ensure that all restitution has been paid and that there are no outstanding warrants, charges, or indictments;

(d) Provide notice to the Commonwealth's attorney in the county of commitment and to the Commonwealth's attorney in the offender's county of residence, setting out in the notification the criminal case number and charges for which the offender was convicted; and

(e) Forward 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.

(2) As used in this section, "eligible felony offender" means a person convicted of one (1) or more felonies who:

(a) Has reached the maximum expiration of his or her sentence or has received final discharge from the Parole Board;

(b) Does not have any pending warrants, charges, or indictments; and

(c) Had paid full restitution as ordered by the court or the Parole Board.

(3) As used in this section, "civil rights" means the ability to vote, serve on a jury, obtain a professional or vocational license, and hold an elective office. It does not include the right to bear arms.

(4) Any eligible offender not provided for under subsection (2) of this section may submit an application directly to the Department of Corrections to initiate the process outlined in subsection (1) of this section.

Appendix D

ANDY BESHEAR
GOVERNOR

EXECUTIVE ORDER

2019-003
December 12, 2019

Secretary of State
Frankfort, Kentucky

RELATING TO THE RESTORATION OF CIVIL RIGHTS FOR CONVICTED FELONS

WHEREAS, the right to vote is the foundation of a representative government; and

WHEREAS, under the Constitution of the Commonwealth of Kentucky, an individual convicted of a felony is denied the right to vote or hold public office; and

WHEREAS, these restrictions may continue long after a sentence has been fully served; and

WHEREAS, according to media reports, an estimated more than 140,000 Kentuckians have already completed their sentences for non-violent felonies but remain disenfranchised and cannot vote; and

WHEREAS, research indicates that people who have completed their sentences and who vote are less likely to re-offend and return to prison; and

Appendix D

WHEREAS, restoration of the right to vote is an important aspect of promoting rehabilitation and reintegration into society to become law-abiding and productive citizens; and

WHEREAS, Kentucky is one of only two states that does not currently provide an automatic process for restoring voting rights for citizens upon final discharge of their sentences; and

WHEREAS, the current means by which Kentuckians who have completed their sentences seek to have their rights restored is unnecessarily time consuming; and

WHEREAS, pursuant to Sections 145 and 150 of the Constitution of the Commonwealth of Kentucky, the Governor is authorized and empowered to restore the civil rights of any citizen that are forfeited by reason of a felony conviction:

NOW, THEREFORE, in consideration of the foregoing and by virtue of the authority vested in me by Sections 69, 145, and 150 of the Constitution of the Commonwealth of Kentucky, I, Andy Beshear, Governor of the Commonwealth of Kentucky, do hereby Order and Direct the following:

1. The civil rights, hereby expressly limited to the right to vote and the right to hold public office denied by judgment of conviction and any prior conviction, are hereby restored to all offenders convicted of crimes under Kentucky state law who

have satisfied the terms of their probation, parole, or service of sentence (hereinafter collectively referred to for purposes of this Order as "Final Discharge"), exclusive of restitution, fines, and any other court-ordered monetary conditions.

2. This Order shall not apply to any person presently convicted of:

   a) Treason,

   b) Bribery in an election,

   c) A violent offense defined in KRS 439.3401,

   d) Any offense under KRS Chapter 507 or KRS Chapter 507A,

   e) Any Assault as defined in KRS 508.020 or KRS 508.040,

   f) Any offense under KRS 508.170, or

   g) Any offense under KRS 529.100.

3. The provisions of this Order, as mentioned above, only restore the right to vote and the right to hold public office and do not restore any other civil right.

4. Kentuckians convicted of crimes under Kentucky state law not meeting the criteria for automatic

restoration as set forth in this Order, as well as Kentuckians convicted of crimes under federal law or the laws of jurisdictions other than Kentucky, may still make application for restoration of civil rights under guidelines provided by the Governor and the provisions of KRS 196.045.

5. This Executive Order, and all future restorations of civil rights issued pursuant hereto, shall not be construed as a full pardon under Section 77 of the Constitution of the Commonwealth of Kentucky, or as a remission of guilt or forgiveness of the offense; shall not relieve any obligation to pay restitution, fines, or any other court-ordered monetary conditions; and shall not operate as a bar to greater penalties for second offenses or a subsequent conviction as a habitual criminal.

6. In addition to the above, no civil rights shall be restored pursuant to this Order to any person who has at the time of Final Discharge any pending felony charges or arrests, nor to any person who was convicted under federal law or the laws of a jurisdiction other than Kentucky. The Department of Corrections shall take all reasonable steps necessary to effectuate compliance with the mandates and criteria set forth in this Order.

7. The Department of Corrections, including the Division of Probation and Parole within the Office of Community Services and Facilities, shall provide the information regarding any

Kentuckian who meets the criteria as set forth in this Order to the necessary election officials.

8. Any Kentuckian who has received a Final Discharge prior to the effective date of this Order and who meets the criteria for automatic restoration of civil rights as set forth herein shall be eligible to request verification from the Department of Corrections of the restoration of their civil rights.

9. The provisions of this Order shall be effective as of December 12, 2019, and shall have both prospective and retroactive application.

10. The Justice and Public Safety Cabinet and all other Kentucky state agencies are hereby directed to comply with the provisions of this Order.

11. The provisions of Executive Order 2015-052, dated December 22, 2015, be and are hereby rescinded, declared null and void, and are no longer in effect.

/s/ Andy Beshear
ANDY BESHEAR, GOVERNOR
Commonwealth of Kentucky

/s/ Alison Lundergran Grimes
ALISON LUNDERGRAN GRIMES
Secretary of State