No. 24-1791

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

GEORGE HAWKINS,

Plaintiff-Appellant,

v.

GLENN YOUNGKIN, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Virginia

BRIEF OF APPELLEES GLENN YOUNGKIN AND KELLY GEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

INTRODUCTION

Decades of Supreme Court precedent, centuries of historical practice, and two cases directly on point from other courts of appeals all confirm that the district court correctly granted summary judgment to the defendants. Plaintiff George Hawkins argues that the Governor's longstanding clemency power to restore felons' voting rights violates the First Amendment's "unfettered discretion" doctrine. But as the district court and multiple courts of appeals have held, that doctrine simply does not apply to felon re-enfranchisement.

The unfettered discretion doctrine is a special prophylactic rule that applies only to requirements to obtain a government license to engage in constitutionally protected speech, such as parade permitting schemes. Felons have no First Amendment right to vote. Rather, under the Fourteenth Amendment, States have the authority to disenfranchise felons permanently. *Richardson v. Ramirez*, 418 U.S. 24 (1974). And the "first amendment . . . offers no protection of voting rights beyond that afforded by the fourteenth or fifteenth amendments." *Washington v. Finlay*, 664 F.2d 913, 928 (4th Cir. 1981). Hawkins cites no case that has ever held that the unfettered discretion doctrine applies to felon re-

enfranchisement; to the contrary, the Sixth and Eleventh Circuits have rejected precisely the same meritless theory that Hawkins raises here. *Hand v. Scott*, 888 F.3d 1206, 1210–13 (11th Cir. 2018); *Lostutter v. Kentucky*, No. 22-5703, 2023 WL 4636868 (6th Cir. July 20, 2023).

This Court should decline Hawkins's invitation to create a circuit split and upend centuries of established gubernatorial clemency practice. The Governor is entitled to exercise the discretion vested in him by Virginia's Constitution to restore the voting rights of felons, as Virginia's Governors have done for 150 years. Governor Youngkin has restored voting rights for thousands of felons during his administration, and Hawkins cites no evidence in the record that these clemency decisions have discriminated based on applicants' viewpoints or any other suspect basis. Rather, the Governor's clemency decisions are based on a predictive determination of whether applicants are likely to live as responsible citizens and members of the political body in the future. This longstanding clemency practice is entirely constitutional, and the unfettered discretion doctrine is inapplicable.

Hawkins's First Amendment claims fail as a matter of law, and this Court should affirm.

ISSUE PRESENTED

Whether the district court correctly held that the Virginia Governor's clemency power to re-enfranchise felons is not a speech-licensing scheme in violation of the First Amendment unfettered discretion doctrine.

STATEMENT OF FACTS

I. Factual background

A. The Governor's discretionary power to grant clemency

State governors' clemency power dates back to the Founding, although its roots are even older. See *Herrera v. Collins*, 506 U.S. 390, 414 (1993); see also *Rosemond v. Hudgins*, 92 F.4th 518, 526 (4th Cir. 2024) (discussing "the long history of the clemency power in England"). Ever "since the British colonies were founded, clemency has been available in America." *Herrera*, 506 U.S. at 414. Today, "[a]ll fifty states have incorporated clemency provisions in their respective constitutions." *PA Prison Soc. v. Cortes*, 622 F.3d 215, 222 n.4 (10th Cir. 2010). The purpose of these provisions is "to help ensure that justice is tempered by mercy." *Cavazos v. Smith*, 565 U.S. 1, 8–9 (2011) (per curiam).

As chief executive, the Governor of Virginia has the exclusive power of clemency under the Constitution of Virginia. For over 170 years, the

Constitution of Virginia has vested the Governor with "the power to act alone in granting reprieves and pardons." *Gallagher v. Commonwealth*, 284 Va. 444, 451 (2012). As part of this clemency power, the Governor has the power to re-enfranchise felons. Article V, section 12 of the Virginia Constitution—entitled "Executive clemency"—grants the Governor the power "to remove political disabilities consequent upon conviction for offenses." Va. Const. art. V § 12. Thus, as explained by the Virginia Supreme Court, the power "to remove the felon's political disabilities remains vested solely in the Governor," the Governor "may grant or deny any request without explanation," and "there is no right of appeal from the Governor's decision." *In re Phillips*, 265 Va. 81, 87–88 (2003).

Virginia's Governors generally have exercised this discretionary power in a similar manner. Specifically, until 2016, all Governors exercised their power to re-enfranchise felons "on an individualized case-by-case basis taking into account the specific circumstances of each." *Howell v. McAuliffe*, 292 Va. 320, 341 (2016). The "unbroken historical record" of Governors exercising individualized discretion to re-enfranchise felons spanned 71 Governors. *Ibid.* In 2016, however,

Governor Terry McAuliffe attempted to re-enfranchise felons on a systematic rather than individualized basis; he issued an executive order purporting to restore voting rights to all "Virginians who had been convicted of a felony but who had completed their sentences of incarceration and any periods of supervised release, including probation and parole." *Id.* at 327–28.

The Virginia Supreme Court held that this executive order violated Virginia's Constitution. "Never before," the court explained, "have any of the prior 71 Virginia Governors issued" a voting-restoration order "to an entire class of unnamed felons without regard for the nature of the crimes or any other individual circumstances relevant to the request" for voting restoration. *Howell*, 292 Va. at 337. The Virginia Supreme Court held that Virginia's Constitution requires the Governor to exercise his clemency power to re-enfranchise felons "on an individualized case-by-case basis." See *id.* at 341.

Governor Glenn Youngkin took office in January 2022, and soon implemented an individualized voting-restoration process that remains in effect today. JA139. That process begins when a disenfranchised felon submits a voting-restoration application. See JA139. The application

form is provided directly to every person who is released from incarceration and is also available online on the Secretary of the Commonwealth's website. JA139. The form requests information regarding the applicant's identity, prior felonies, and status with respect to state supervision, fines, fees, or restitution. See JA140. Applicants may submit the application to the Secretary of the Commonwealth either online or by mail. JA139.

When the Secretary's Office receives an application, the Office reviews the application for "accuracy, completeness, eligibility, and previous restorations." JA141. If an applicant has failed to complete the application properly, the Secretary's Office contacts the applicant and requests the missing information. JA141. Applicants are not eligible to be considered for re-enfranchisement if they are still incarcerated, are still subject to a pending felony charge, are under supervised release for an out-of-state or federal conviction, or if they otherwise fail to satisfy the voting qualifications set forth by Virginia law, such as age, citizenship, and residency requirements. JA143.

When an eligible applicant has provided the necessary information, the Secretary's Office engages in a multi-agency review process for the

applicant. JA142. Specifically, the Secretary's Office sends the applicant's name and information to the Central Criminal Records Exchange, the Virginia Department of Elections, the Virginia Department of Behavioral Health and Developmental Services, the Virginia Department of Corrections, and the Virginia Compensation Board. JA141–42. These agencies then send the Secretary's Office information about the applicant, including the applicant's criminal history, citizenship, incarceration status, supervision status, and conditions of release; whether the applicant is awaiting trial, bonded with pre-trial services, under supervision, released to an out-of-state authority, or deceased; and information about any mental incapacity or insanity. JA141–43. The Secretary's Office "does not inspect applicants' donation history, political affiliations, or social media postings as part of the restoration process." JA330.

After the multi-agency review is complete, the Secretary's Office reviews all of the information for each individual applicant. JA143. The Secretary then makes a recommendation to the Governor as to whether the Governor should grant or deny the application. JA143. The Secretary and Governor engage in a holistic, case-by-case consideration of the

information gathered from the application and multi-agency review, including whether the applicant committed a violent crime, how recent the conviction is, and the applicant's conduct since the conviction. JA177. Equipped with the Secretary's recommendation and the results of the multi-agency review, the Governor is the ultimate decisionmaker and may grant or deny the application in his discretion. JA141, JA143. His decision to grant or deny an application is based on his "predictive judgment regarding whether an applicant will live as a responsible citizen and member of the political body." JA141.

After the Governor has made his decision, the Secretary's Office notifies the applicant. JA144. When an application is denied, the applicant must wait one year to reapply. See JA146. When an application is granted, the Secretary's Office congratulates the applicant, sends the official restoration order, and provides voter registration instructions. JA182.

The Governor takes seriously his clemency power to re-enfranchise convicted felons. He has expressed his admiration for those who have turned their lives around after committing a felony, saying, "I applaud those who have committed to starting fresh with renewed values and a

will to positively contribute to our society." JA184. And he has stated that "[s]econd chances are essential to ensuring Virginians who have made mistakes are able to move forward toward a successful future." JA184. Consistent with these views, Governor Youngkin has restored voting rights to thousands of convicted felons. See JA139.

B. Hawkins's application for voting restoration

In 2010, George Hawkins was convicted of five felony offenses: attempted murder in the first degree, aggravated malicious wounding, drug possession with intent to distribute, and two counts of the use of a firearm in commission of a felony. JA45. For these five felonies, he was sentenced to 78 years of imprisonment, with all but fifteen years suspended. JA45.

Hawkins was released from incarceration in May 2023. JA45. In June 2023, he applied for restoration of his voting rights. JA44. The Secretary's Office conducted its review of Hawkins's application, including Hawkins's violent criminal record. See JA141. Following his individualized review, in August 2023, the Governor notified Hawkins

that his application was deemed "[i]neligible at this time," meaning that it was denied. JA138, JA144.[1]

II. Procedural history

In April 2023, a political advocacy organization and a felon brought this action against Defendants Governor Youngkin and Secretary of the Commonwealth Kay Coles James, contending that Virginia's re-enfranchisement system violates the First Amendment. JA6; see JA20–21.[2] Hawkins was added to the lawsuit in the operative Second Amended Complaint. See JA7, JA15. The district court dismissed the organizational plaintiff for lack of standing, and the other felon plaintiff voluntarily dismissed his claims after Governor Youngkin granted his re-

[1] Hawkins argues that he met the eligibility requirements yet was denied as ineligible. Hawkins Br. 7. But as Hawkins has already stipulated, the Governor used the phrasing "ineligible at this time" simply to mean that he was denying Hawkins's application. JA144. Hawkins satisfied the eligibility criteria to have his application submitted to the Governor for consideration on the merits. See JA143. Hawkins was thus not ineligible for consideration on the merits, but rather ineligible to have his voting rights restored at that time—that is, his application was denied.

[2] Kay Coles James was named as a defendant in her official capacity as Secretary of the Commonwealth of Virginia. See JA21. Kelly Gee replaced Kay Coles James as Secretary of the Commonwealth in September 2023 and was automatically substituted as a party per Federal Rule of Civil Procedure 25(d). See JA51.

enfranchisement application. See JA44, JA67; Dist. Ct. Dkt. No. 28. The suit then proceeded with Hawkins as the sole plaintiff.

The operative complaint alleged that the Governor's discretion to grant or deny restoration applications infringed Hawkins's "First Amendment . . . right to vote" because the process was actually a speech-licensing system that violated the First Amendment's "unfettered discretion" doctrine. JA33; see generally JA32–38. Hawkins sought an injunction prohibiting the Governor from using Virginia's discretionary clemency process. Hawkins asked the court to require the Governor to "replace" that system with a "scheme which restores the right to vote based upon specific, neutral, objective, and uniform rules" and "reasonable, definite time limits." JA38–39.

Hawkins and Defendants each moved for summary judgment. JA10–11. The district court granted Defendants' motion for summary judgment and denied Hawkins's motion. JA363. The court observed that Hawkins's First Amendment argument "turns on whether Governor Youngkin's rights restoration system is an administrative licensing scheme subject to the First Amendment's unfettered discretion doctrine." JA366. It held that Hawkins's complaint had a "fatal flaw": the

restoration system "is not a licensing scheme," and thus "the First Amendment's unfettered discretion doctrine does not apply." JA363. Reviewing Hawkins's cited cases, the court concluded that each "assess[ed] schemes that regulate individuals' ability to exercise their rights to free speech" and none "address[ed] the kind of system at issue here." JA369–70. And the court noted that two other federal courts of appeals had reviewed the same challenge and held that the First Amendment unfettered discretion doctrine did not apply to felon re-enfranchisement systems. JA369–70 (citing decisions from the U.S. Courts of Appeals for the Sixth and Eleventh Circuits).

The district court explained that "Hawkins . . . refuses to confront the fundamental differences between administrative licensing schemes and the rights restoration system at issue here." JA370. The former, the district court explained, "functioned to regulate an existing right," whereas the "latter exists to aid Governor Youngkin in assessing whether a candidate deserves restoration of a right he has lost." JA370–71. Moreover, the court explained, the "decision stage" of the Governor's system "also differs from that in the speech-licensing cases." JA371. The "speech-licensing cases describe systems that function to regulate *how* a

person can exercise[] an existing right"; the administrator controls the time, place, and manner of the speech when an application is granted. JA371. By contrast, the Governor's restoration process "has a different function: it determines who can reenter the franchise." JA371. The court thus held that "Hawkins is not subject to a licensing scheme governed by the unfettered discretion doctrine." JA371. Therefore, the court held that the Governor's discretionary process for felon re-enfranchisement does not violate the First Amendment.

This appeal followed.

STANDARD OF REVIEW

This Court reviews the district court's grant of summary judgment *de novo*, applying the same legal standard as the district court. *Richardson v. Clarke*, 52 F.4th 614, 618 (4th Cir. 2022). Summary judgment is proper when the movant can show "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A dispute is genuine if a reasonable jury could return a verdict for the nonmoving party, and a fact is material if it might affect the outcome of the suit under the governing

law." *Lyons v. City of Alexandria*, 35 F.4th 285, 288 (4th Cir. 2022) (citation omitted).

SUMMARY OF ARGUMENT

Hawkins's claims fail several times over, and every appellate court to have encountered his theory has rejected it. First, the Supreme Court has made clear that a state executive's clemency decisions are rarely, if ever, subject to judicial review given clemency's historical role in our constitutional system. Supreme Court precedent also supports the constitutionality of discretionary voting-restoration processes. Further, this Court has held numerous times that the First Amendment does not provide any greater protections to voting rights than the Fourteenth Amendment, and all parties agree that Virginia's voting-restoration process satisfies the Fourteenth Amendment's requirements.

Second, Hawkins's analogy to speech-licensing cases fails because felons have no First Amendment right to vote. Hawkins argues that felon re-enfranchisement constitutes a speech-licensing scheme under the First Amendment, and that "unfettered discretion" in the process therefore violates the First Amendment. But Hawkins never establishes the necessary premise of this theory: he cannot show that the "unfettered

discretion" doctrine applies to re-enfranchisement processes at all. There is a fundamental and dispositive distinction between a challenge to a licensing scheme for protected speech and a challenge to a discretionary voting-restoration process. In the speech licensing cases, the licensing schemes burdened a *First Amendment right*, whereas here, felons do not have a First Amendment right to vote.

Finally, Hawkins's requested remedy underscores that his claims fail as a matter of law. Hawkins asks the judiciary to direct the Governor in his exercise of the clemency power by setting forth "criteria," "rules," and "time limits" the Governor must follow when restoring voting rights. But the decision to grant or withhold executive clemency is a quintessential nonjusticiable political question. Moreover, the injunction Hawkins contemplates vastly exceeds the scope of federal courts' equitable powers and would conflict with the Virginia Supreme Court's interpretation of the Virginia Constitution in *Howell*. There is no historical precedent for such an intrusive judicial interference with a state chief executive's longstanding historical clemency power.

ARGUMENT

I. The Governor's discretionary voting-restoration process is a constitutional exercise of clemency

Hawkins contends that discretionary clemency for voting restoration is actually a speech-licensing scheme that violates the First Amendment's unfettered discretion doctrine. In the nearly 250 years of discretionary clemency regimes, and 150 years of Virginia's own discretionary voting-restoration process, *no* court has held that this longstanding process violates the First Amendment. Indeed, two sister circuits rejected claims identical to Hawkins's. See *Hand v. Scott*, 888 F.3d 1206, 1210–13 (11th Cir. 2018); *Lostutter v. Kentucky*, No. 22-5703, 2023 WL 4636868 (6th Cir. July 20, 2023). Hawkins's challenge to this long-established state clemency power similarly fails.

A. Felons have no constitutional right to vote

Felons do not have a right to vote under the U.S. Constitution. The Equal Protection Clause in Section 1 of the Fourteenth Amendment guarantees "'the initial allocation of the franchise'—that is, the right to vote." *Wright v. North Carolina*, 787 F.3d 256, 263 (4th Cir. 2015) (quoting *Bush v. Gore*, 531 U.S. 98, 104 (2000)). Section 2 of the Fourteenth Amendment, however, "expressly empowers the states to

abridge a convicted felon's right to vote." *Hand*, 888 F.3d at 1207. That section imposes sanctions on States for denying "the right to vote" *except* "for participation in rebellion, or other crime." U.S. Const. amend. XIV, § 2.

Therefore, in *Richardson v. Ramirez*, 418 U.S. 24 (1974), the Supreme Court held that the Fourteenth Amendment permits "disenfranchisement grounded on prior conviction of a felony." *Id.* at 43; see *id.* at 43–52. *Richardson* held that "the exclusion of felons from the vote has an affirmative sanction in § 2 of the Fourteenth Amendment." *Id.* at 54. For that reason, unlike "other state limitations on the franchise which have been held invalid under the Equal Protection Clause," the Supreme Court recognized "the constitutionality of provisions disenfranchising felons." *Id.* at 53–54. This Court has accordingly rejected a constitutional challenge to Virginia's disenfranchisement of convicted felons, holding that "the Fourteenth Amendment itself permits the denial of the franchise upon criminal conviction." *Howard v. Gilmore*, 205 F.3d 1333 (Table), 2000 WL 203984, at *1 (4th Cir. Feb. 23, 2000) (citing *Richardson*, 418 U.S. at 54); see also Hawkins Br. 12 (agreeing

that the Constitution "authorizes states to disenfranchise individuals with felony convictions").

Because they may permanently prohibit all felons from voting, States have no constitutional obligation to provide any process for the re-enfranchisement of felons, much less any particular process on any particular timeline. The Supreme Court has held that a State does not violate the Fourteenth Amendment "in denying a petitioner's application for pardon and reenfranchisement, even though the Governor and selected cabinet officers did so in the absence of any articulable or detailed standards." *Hand*, 888 F.3d at 1208 (citing *Beacham v. Braterman*, 396 U.S. 12 (1969)).

In *Beacham*, a convicted felon challenged a state governor's refusal to grant him a pardon and the concomitant restoration of his civil rights, including the right to register to vote. *Beacham v. Braterman*, 300 F. Supp. 182, 182–83 (S.D. Fla. 1969). A three-judge district court squarely rejected the claim, holding that the discretionary power to restore civil rights of felons "has long been recognized as the peculiar right of the executive branch of government," and that the exercise of that executive power was free from judicial control. *Ibid.* The Supreme Court affirmed

the holding of the three-judge district court in a summary decision. 396 U.S. 12. *Beacham* thus "establishes the broad discretion of the executive to carry out a standardless clemency regime" as to the re-enfranchisement of felons. *Hand*, 888 F.3d at 1208.[3]

Re-enfranchisement of felons is part of the Governor's clemency powers. See Va. Const. art. V § 12; pp.3–4, *supra*. Executive clemency has a historic and unique status in our constitutional system; the Constitution allows for "the broad discretion of the executive to carry out a standardless clemency regime." *Hand*, 888 F.3d at 1208. Indeed, the Executive's exercise of the clemency power typically is not even subject to judicial review. Rather, "clemency has not traditionally 'been the business of courts'" because "executive clemency exists to provide relief from harshness or mistake in the judicial system, and is therefore vested in an authority other than the courts." *Ohio Adult Parole Auth. v.*

[3] Supreme Court summary dispositions are binding precedents on the lower courts. See *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (such dispositions "prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions"). In addition, the Supreme Court has subsequently cited *Beacham* approvingly. See *Richardson*, 418 U.S. at 53 ("[W]e have summarily affirmed two decisions of three-judge District Courts rejecting constitutional challenges to state laws disenfranchising convicted felons." (citing *Beacham*, 396 U.S. 12, and *Fincher v. Scott*, 411 U.S. 961 (1973))).

Woodard, 523 U.S. 272, 284–85 (1998) (plurality) (quoting *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 464 (1981)).

The "heart of executive clemency" is "to grant clemency as a matter of grace, thus allowing the executive to consider a wide range of factors not comprehended by earlier judicial proceedings and sentencing determinations." *Woodard*, 523 U.S. at 280–81. A clemency decision by its very nature turns "on purely subjective evaluations and on predictions of future behavior by those entrusted with the decision." *Dumschat*, 452 U.S. at 464. And this type of predictive judgment by a State's executive branch has "not traditionally been the business of courts" and is "rarely, if ever," properly subjected to judicial review. *Ibid.*

Thus, in *Dumschat*, the Supreme Court rejected an inmate's Due Process Clause challenge to a State's commutation system—even though that system "conferred 'unfettered discretion' on its Board of Pardons" to make commutation decisions. 452 U.S. at 465–66. And in *Woodard*, the Supreme Court reaffirmed that this clemency power is "rarely, if ever, appropriate . . . for judicial review." 523 U.S. at 276 (rejecting an inmate's Due Process Clause challenge to a State's clemency system) (quoting *Dumschat*, 452 U.S. at 464)). There, eight Justices across two opinions

agreed that clemency decisions are not typically subject to judicial review; they noted that clemency only "might" warrant judicial review in extreme circumstances, such as "a scheme whereby a state official flipped a coin to determine whether to grant clemency" or "arbitrarily denied a prisoner any access to its clemency process." See *Woodard*, 523 U.S. at 289 (O'Connor, J., concurring). Absent those extraordinary hypotheticals, however, the Supreme Court reaffirmed its holding in *Dumschat* and explained that the "Due Process Clause is not violated" when clemency procedures merely "confirm that the clemency and pardon powers are committed, as is our tradition, to the authority of the executive." *Id.* at 276.

Here, the Governor's clemency determinations are not based on a coin flip, nor on any constitutionally suspect factors, and Hawkins points to no evidence otherwise. See generally JA141–44, JA330. Rather, the Governor engages in a holistic, case-by-case determination as to each application, making a predictive judgment as to whether the applicant is likely to be a responsible citizen and member of the political body. See pp.7–8, *supra*. This is precisely the type of decision that *Dumschat* held is reserved to a state executive, 452 U.S. at 464, and that *Woodard* held

is "rarely, if ever" appropriate for judicial review, 523 U.S. at 276. This case is no exception to that principle.

B. The First Amendment does not limit the Governor's discretionary clemency power to re-enfranchise felons

Hawkins attempts to avoid the clear import of Supreme Court precedent by casting his re-enfranchisement claims solely under the First Amendment's unfettered discretion doctrine. But this tactic lacks merit, and courts have uniformly rejected it. See *Howard*, 2000 WL 203984, at *1; *Hand*, 888 F.3d at 1212; *Lostutter*, 2023 WL 4636868. The Supreme Court "ha[s] strongly suggested in dicta that exclusion of convicted felons from the franchise violates *no constitutional provision*." *Richardson*, 418 U.S. at 53 (emphasis added); see also *Fusaro v. Cogan*, 930 F.3d 241, 254–55 (4th Cir. 2019) (holding that lower courts are "obliged to afford great weight to Supreme Court dicta" (quotation marks omitted)).

Further, this Court "has held that in voting rights cases, no viable First Amendment claim exists in the absence of a Fourteenth Amendment claim." *Republican Party of N.C. v. Martin*, 980 F.2d 943, 959 n.28 (4th Cir. 1992), abrogated in part on other grounds, *Rucho v. Common Cause*, 588 U.S. 684 (2019). The First Amendment "offers no protection of voting rights beyond that afforded by the fourteenth or

fifteenth amendments." *Washington v. Finlay*, 664 F.2d 913, 928 (4th Cir. 1981); see also *Irby v. Virginia State Bd. of Elecs.*, 889 F.2d 1352, 1359 (4th Cir. 1989) ("the protections of the First" Amendment do not "extend beyond those more directly, *and perhaps only*, provided by the fourteenth and fifteenth amendments" (citation and quotation marks omitted) (emphasis added)).[4]

Thus, Hawkins cannot avoid the Fourteenth Amendment precedents rejecting felon re-enfranchisement claims by switching to a First Amendment theory. As this Court has explained, "[t]he First Amendment creates no private right of action for seeking reinstatement

[4] Hawkins argued below that these holdings are limited to vote-dilution cases. JA84–85. But this Court has cited this general rule in a case that did not involve a vote-dilution claim. See *Irby*, 889 F.2d at 1359. As *Irby* stated: "In *voting rights cases*, the protections of the First and Thirteenth Amendments 'do not in any event extend beyond those more directly, and perhaps only, provided by the fourteenth and fifteenth amendments.'" 889 F.2d at 1359 (quoting *Washington*, 664 F.2d at 927) (emphasis added). *Martin* also spoke in categorical terms: "This court has held that *in voting rights cases*, no viable First Amendment claim exists in the absence of a Fourteenth Amendment claim." 980 F.2d at 959 n.28 (emphasis added). In short, this Court has not limited the principle to the vote-dilution context. Nor would any such limitation make doctrinal sense. See, *e.g.*, *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 239 (4th Cir. 2014) ("[T]he principles that make vote dilution objectionable under the Voting Rights Act logically extend to vote denial.").

of previously canceled voting rights." *Howard*, 2000 WL 203984, at *1. Rather, "the specific language of the Fourteenth Amendment controls over the First Amendment's more general terms." *Hand*, 888 F.3d at 1212; see also *United States v. Lanier*, 520 U.S. 259, 272 n.7 (1997) (when a "constitutional claim is covered by a specific constitutional provision . . . the claim must be analyzed under the standard appropriate to *that specific provision*" (emphasis added)).

Indeed, the First Amendment applies to the States only because it has been incorporated by Section 1 of the Fourteenth Amendment. See *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). The Supreme Court has held that Section 1 "could not have been meant to bar outright a form of disenfranchisement which was expressly exempted from the less drastic sanction of reduced representation which [Section 2] imposed for other forms of disenfranchisement." *Richardson*, 418 U.S. at 55. This longstanding principle explains why this Court has already rejected a felon's First Amendment challenge to Virginia's voting-restoration system. *Howard*, 2000 WL 203984, at *1.

In fact, as a sister circuit has noted, "every First Amendment challenge to a discretionary vote-restoration regime" has been

"summarily rebuffed," *Hand*, 888 F.3d at 1212 (collecting cases), including by two United States Courts of Appeals rejecting near-identical claims in cases brought by Hawkins's counsel, see *Hand*, 888 F.3d 1206; *Lostutter*, 2023 WL 4636868. Accepting Hawkins's argument would thus create a circuit split between this Court and the Sixth and Eleventh Circuits.

Most recently, in *Lostutter*, the Sixth Circuit upheld the discretionary clemency power to re-enfranchise felons against a First Amendment challenge. The plaintiffs' argument there, nearly identical to Hawkins's here, was that "Kentucky's voting-rights restoration process constitutes an administrative licensing or permitting scheme" that violated the First Amendment unfettered discretion doctrine. See 2023 WL 4636868, at *1. The Sixth Circuit rejected that argument, concluding that receiving gubernatorial clemency "is fundamentally different from obtaining an administrative license or permit," and that voting restoration is an exercise of "executive clemency power" that "the Supreme Court has rarely subjected to judicial review." *Id.* at *3–4 (citing *Woodard*, 523 U.S. 272, and *Herrera*, 506 U.S. 390).

The Sixth Circuit further explained that the differences between gubernatorial voting restoration and First Amendment speech licensure make the unfettered discretion doctrine inapplicable. Specifically, the restoration of a felon's right to vote "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." *Lostutter*, 2023 WL 4636868, at *4. In contrast, "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." *Ibid.* "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 seeking restoration "can invoke no comparable right" because the felon has been "constitutionally stripped" of the right to vote. *Ibid.* Although both speech licensing and re-enfranchisement allow previously-forbidden conduct, the court explained that "this superficial parallel does not transform" the Governor's action "into an administrative license" because "[m]ere similarity in result does not change the nature of the vehicle used to reach that result"—which, for felon re-enfranchisement, is "not through the granting of an administrative license." *Id.* at *6.

Hand similarly rejected a First Amendment claim against a State's discretionary voting-restoration process under the unfettered discretion doctrine. The Eleventh Circuit held that the First Amendment claim failed, explaining that "[b]ecause a standardless pardon process, without something more, does not violate the Fourteenth Amendment, it follows that it does not run afoul of the First Amendment." 888 F.3d at 1211. As the court explained, the clemency power is different in kind from the licensing authority exercised in the First Amendment cases upon which plaintiffs relied, and the speech-licensing analogy failed because "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 1212–13; see also *id.* at 1212 (calling the unfettered discretion doctrine cases "inapposite to a reenfranchisement case").

Hawkins provides little response to these cases, even though they are directly on point. He tries to distinguish *Lostutter* based on differences between Virginia and Kentucky law. Hawkins Br. 51–53 (arguing that re-enfranchisement under Kentucky's system constituted

a "partial pardon"). But this distinction is irrelevant, because the Virginia Governor's power to restore voting rights is part of his clemency power, like the Kentucky Governor's power that *Lostutter* considered. See *Gallagher*, 284 Va. at 451 (power "to remove political disabilities consequent upon conviction for offenses" is part of Governor's "executive clemency" power under the Virginia Constitution); *Lostutter*, 2023 WL 4636868, at *4 ("[F]elon reenfranchisement in Kentucky derives from the Governor's executive clemency power . . . ."). Just as in *Lostutter*, re-enfranchisement is a form of *clemency*, an exercise of executive grace. *Woodard*, 523 U.S. at 280–81 ("[T]he heart of executive clemency . . . is to grant clemency as a matter of grace . . . ."). It makes no difference to the First Amendment analysis whether the clemency power removes a political disability resulting from a criminal conviction or is classified as a type of partial pardon.

With respect to *Hand*, Hawkins says almost nothing at all. He refers to the case only in a footnote, where he argues that after the Eleventh Circuit issued its stay opinion, the preliminary-injunction appeal was mooted by a state constitutional amendment. See Hawkins Br. 50–51 n.9. But these subsequent procedural developments do not

undermine the persuasiveness of the Eleventh Circuit's published opinion. See, *e.g.*, *Lostutter*, 2023 WL 4636868, at *5 (relying on *Hand* as "Eleventh Circuit precedent").

The ample authority rejecting Hawkins's theory is unsurprising. The longstanding tradition of Virginia's discretionary voting-restoration process demonstrates that it does not violate the First Amendment. Both "history and tradition of regulation" are "relevant when considering the scope of the First Amendment." *City of Austin v. Reagan Nat'l Advertising of Austin, LLC*, 596 U.S. 61, 75 (2022) (quotation marks omitted). "When faced with a dispute about the Constitution's meaning or application, long settled and established practice is a consideration of great weight." *Houston Comm. Coll. Sys. v. Wilson*, 595 U.S. 468, 474 (2022) (cleaned up). In the nearly 250 years of discretionary clemency regimes, and the 150 years of Virginia's discretionary voting-restoration process, there is no case holding that a discretionary voting-restoration process violates the First Amendment. This "unbroken tradition" of discretionary felon re-enfranchisement regimes, standing alone, forecloses "the adoption of [Hawkins's] novel rule." *City of Austin*, 596 U.S. at 75.

II. The Governor's clemency power to restore felons' voting rights is not subject to the First Amendment's unfettered discretion doctrine

The district court correctly held that the unfettered discretion doctrine does not apply to the Governor's clemency power. A speech-licensing scheme functions "to regulate an existing right," whereas the Governor's rights restoration system "exists to aid Governor Youngkin in assessing whether a candidate deserves restoration of a right he has lost." JA370–71.

A. Gubernatorial clemency is neither speech licensure nor analogous to speech licensure

Hawkins argues that the Governor's discretionary executive clemency for voting restoration violates the First Amendment because it "functions as a licensing system" for speech and thus "trigger[s] the operation of the unfettered discretion doctrine" set forth in a series of Supreme Court cases. Hawkins Br. 20. This argument fails. The unfettered discretion doctrine does not apply because felons have no First Amendment right to vote, and the Governor's voting-restoration process neither functions as nor is akin to a speech licensing system.

The First Amendment requires that, when the government opens an avenue of speech, "the government may not regulate [the] speech

based on its substantive content or the message it conveys." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995). One corollary of this principle is the unfettered discretion doctrine, which provides that "administrators may not possess unfettered discretion to burden or ban speech." *Child Evangelism Fellowship of S.C. v. Anderson Sch. Dist. Five*, 470 F.3d 1062, 1068 (4th Cir. 2006).

This doctrine is a special prophylactic rule to ensure that a "government official [will not] decide who may speak and who may not based upon the content of the speech or viewpoint of the speaker." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 763–64 (1988). Under this doctrine, the Supreme Court has struck down standardless licensing requirements that would burden the "exercise of First Amendment freedoms," including for demonstrations on public streets, news rack placement on public property, and parades. *Freedom From Religion Found. v. Abbott*, 955 F.3d 417, 427 (5th Cir. 2020) (gathering cases) (citations omitted).

To argue that the unfettered discretion doctrine applies to felon re-enfranchisement, Hawkins analogizes a felon's voting-restoration application to a would-be speaker's application to engage in protected

speech, such as a parade or the distribution of newspapers. See Hawkins Br. 38–39. But in the speech-licensing cases that Hawkins cites, the licensing schemes burdened an existing First Amendment right to speak. See, *e.g.*, *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 131 (1992) ("[A] law subjecting the exercise of *First Amendment freedoms* to the prior restraint of a license must contain narrow, objective, and definite standards to guide the licensing authority." (emphasis added) (quotation marks omitted)); *Lakewood*, 486 U.S. at 763 ("The danger giving rise to the First Amendment inquiry is that the government is silencing or restraining *a channel of speech*" (emphasis added)). Here, in contrast, felons do not have an underlying First Amendment right to vote. Because the voting-restoration process does not burden an existing First Amendment right, the speech-licensing cases simply do not apply.

No amount of "functional analysis," Hawkins Br. 28–36, can overcome this fundamental defect. Felon re-enfranchisement is neither formally nor functionally like permitting a parade. Hawkins contends that felon re-enfranchisement and a speech-licensing scheme produce "identical results" because re-enfranchisement involves an "appl[ication] to a government office seeking permission" to engage in conduct, and the

government investigates the application and then "grants or denies" it. Hawkins Br. 35. But at that level of generality, Hawkins's description would apply equally to any application to the government to engage in any conduct at all, from building a pipeline, to repairing a roof on a historic building, to opening a business.

The "unfettered discretion" doctrine that Hawkins seeks to invoke is not nearly so broad. It applies only where government officials have "unbridled discretion *directly to license speech*, or conduct commonly associated with speech." *Lakewood*, 486 U.S. at 767; see pp.25–27, *supra*. Indeed, the *Lakewood* Court was careful to note that it was not holding "that the press or a speaker may challenge as censorship any law involving discretion to which it is subject." 486 U.S. at 759. Although any permitting system could theoretically trigger the fear of viewpoint discrimination and concomitant self-censorship about which Hawkins speculates, Hawkins Br. 21, courts do not apply to every permitting system the same stringent constitutional test that applies where the government requires a license to engage in speech the speaker already enjoys a right to engage in.

Instead, *Lakewood* and its progeny apply only where the plaintiff must obtain a license before "attempting to exercise his or her First Amendment right to freedom of speech." *Lostutter*, 2023 WL 4636868, at *4. A "felon can invoke no comparable right" when applying for re-enfranchisement, because the felon has no underlying First Amendment right to vote. *Ibid.*

B. Hawkins's arguments that the unfettered discretion doctrine applies to felon disenfranchisement lack merit

Hawkins's remaining arguments for applying the unfettered discretion doctrine to felon re-enfranchisement similarly lack merit.

To begin, Hawkins argues that the district court's ruling hinges on a difference in the terminology one uses to describe what an applicant seeks to obtain from the government: a right (in this case) versus a license (in *Lakewood* and its progeny). Hawkins Br. 33–34, 37–38. To the contrary, what makes a difference here is not the *form* of the outcome, but rather the *substance* of the *status quo*—that is, whether the applicant has a "right" to do that which he seeks permission to do. The difference is apparent from the differing outcomes of the following scenarios: when a court holds a speech-licensing regime unconstitutional under the unfettered discretion doctrine, the plaintiff is returned to the default of

constitutionally protected free speech.[5] By contrast, if Virginia's voting-restoration process were deemed unconstitutional, Hawkins would be returned to the default of being a convicted felon who cannot vote. See pp.16–18, 26, *supra*.

Hawkins argues that he, like a parade permit seeker, enjoys a pre-existing right to engage in a form of political expression—an abstract right made concrete through government permitting. Hawkins Br. 39–41. But the right to vote is no mere channel for political expression—it is a distinct right, and one that Hawkins simply does not possess.

To recognize the distinction between the right to vote and the right to express oneself is not to leave "a black hole at the center of First Amendment doctrine in the electoral context." Hawkins Br. 16–19. Voting is the mechanism for democratically selecting governmental officials, which is why several federal courts, including the Fifth Circuit,

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[5] Hawkins cites *Roach v. Stouffer*, 560 F.3d 860, 869–70 (8th Cir. 2009), as a case applying the unfettered discretion doctrine in a context in which it was not obvious that the plaintiffs had a pre-existing right to engage in the speech in question. Hawkins Br. 41–43. It is indeed unclear how one could have a right to "speak" by way of license plates, which are government property. For that reason, the Supreme Court has since rejected First Amendment challenges specialty license plate programs, and *Roach* is no longer good law. See *Walker v. Texas Division, Sons of Confederate Veterans*, 576 U.S. 200 (2015).

have determined that collecting ballots does not qualify as expressive conduct protected by the First Amendment *at all*. See, *e.g.*, *Voting for Am. Inc. v. Steen*, 732 F.3d 382, 392 (5th Cir. 2013) (holding that the collection and delivering of voter-registration applications is not expressive conduct). Similarly, notarizing and returning ballot initiative petitions is not expressive conduct. *Miller v. Thurston*, 967 F.3d 727, 738–39 (8th Cir. 2020). And as already noted, this Court does not recognize a First Amendment voting right independent of the Fourteenth Amendment right to vote. *Martin*, 980 F.2d at 959 n.28. "Elections do not have a general expressive function." *N.A.A.C.P., Los Angeles Branch v. Jones*, 131 F.3d 1317, 1323 (9th Cir. 1997); see also *Schmitt v. LaRose*, 933 F.3d 628, 638 (6th Cir. 2019) ("Moreover, although the Supreme Court has acknowledged that a person or party may express beliefs or ideas through a ballot, it has also stated that '[b]allots serve primarily to elect candidates, not as forums for political expression.'" (quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363 (1997))).

Hawkins's cherry-picked quotations from Supreme Court precedent do not demonstrate otherwise. Most of the cases he cites involve the speech and association rights of parties and candidates, and do not

involve voting rights at all. For instance, *Norman v. Reed*, 502 U.S. 279 (1992) (cited at Hawkins Br. 18), and *Williams v. Rhodes*, 393 U.S. 23 (1968) (cited at Hawkins Br. 19), concerned the rights of political parties and not the right to cast a ballot. *Anderson v. Celebrezze*, 460 U.S. 780 (1983) (cited at Hawkins Br. 18), involved the rights of independent candidates to appear on a general-election ballot, not the right of any voter to cast a ballot.

That does not mean, as Hawkins put it, that the right to vote falls into some kind of constitutional "black hole." See Hawkins Br. 17. Rather, the right to vote is secured by constitutional provisions other than the First Amendment. Specifically, the Equal Protection Clause in Section 1 of the Fourteenth Amendment guarantees "'the initial allocation of the franchise'—that is, the right to vote." *Wright*, 787 F.3d at 263 (quoting *Bush*, 531 U.S. at 104). The Fifteenth Amendment also includes "protections of the right to vote." *United States v. Roof*, 10 F.4th 314, 394 (4th Cir. 2021); see also U.S. Const. amend. XIX (prohibiting the denial of the right to vote on the basis of sex); U.S. Const. amend. XXVI (lowering the minimum voting age to eighteen). That is why "selective, arbitrary enfranchisement" and "selective, arbitrary

disenfranchisement" would violate the Constitution—not because of the First Amendment unfettered discretion doctrine. Hawkins Br. 48; see *Plyler v. Doe*, 457 U.S. 202, 216–17 (1982) ("The Equal Protection Clause was intended as a restriction on state legislative action . . . that impinge[s] upon the exercise of a 'fundamental right.'"); *Sioux City Bridge Co. v. Dakota Cnty.*, 260 U.S. 441, 445 (1923) ("The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination." (quoting *Sunday Lake Iron Co. v. Wakefield Tp.*, 247 U.S. 350, 352–53 (1918))).

In any event, there is no need for this Court to reach the broad question of whether the First Amendment covers the right to vote more generally, because Hawkins's claims fail regardless. It is undisputed that the First Amendment does not confer a right for *felons* to vote, and there is also no First Amendment right of felons to be re-enfranchised. See pp.23–25, *supra*. In addition, this Court has already held that, even assuming the First Amendment applies to the right to vote at all, its protections of that right are no broader than those provided by the Fourteenth Amendment. See, *e.g.*, *Irby*, 889 F.2d at 1359; pp.22–23,

supra. And it is undisputed that the Fourteenth Amendment permits felon disenfranchisement. *Richardson*, 418 U.S. at 56; see pp.16–18, *supra*. Thus, regardless whether the First Amendment applies to the right to vote, Hawkins's claims still fail.

Next, Hawkins argues that the decision below turns on a mere "state-law label"—namely, Virginia's decision to treat a felony conviction as a disqualification. See Hawkins Br. 44–47. But this argument gets things exactly backwards. The decision below turns on the fact that *federal* law—namely the Fourteenth Amendment—expressly authorizes Virginia to disenfranchise felons (and minors, Hawkins Br. 47). Because it does so, felons (and minors) enjoy no federal constitutional right to vote, and a discretionary scheme that would *confer* such a right as a matter of *state* law does not violate the federal unfettered discretion doctrine.[6]

[6] Hawkins's hypothetical system of selectively granting the franchise to minors based on transcripts or an essay contest, Hawkins Br. 47, thus fails to advance his argument. That hypothetical system could well be unlawful or unconstitutional on other grounds. See, *e.g.*, *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 189 (2008) (plurality) ("even rational restrictions on the right to vote" violate the Fourteenth Amendment's Equal Protection Clause if they "are unrelated to voter qualifications"). The unfettered discretion doctrine, however, would not apply.

Finally, Hawkins argues that his First Amendment claim should not founder "simply based on the 're' prefix." Hawkins Br. 49. Nothing in the district court's decision suggests that the prefix is why Hawkins lost. But "the 're' prefix" does reveal something important: a felon seeking to have his vote restored *previously held and lost that right* because he committed a serious crime.

As a matter of constitutional text, precedent, and history, convicted felons occupy a dispositively different position with respect to voting rights than people who are not convicted felons (including minors). See *Richardson*, 418 U.S. at 54. The Fourteenth Amendment itself enshrines that distinction, centuries of history confirm it, and every case addressing the issue supports it. See pp.16–19, 22–27, *supra*. That Hawkins could not marshal a single apposite case places in stark relief the fundamental flaw of his claim. See *Lostutter*, 2023 WL 4636868, at *5 (noting plaintiffs' failure to identify "a single case in which a court interpreted a restored right to vote as a license or permit to vote").

Defendants do not ask the Court to hold that a discretionary re-enfranchisement regime could *never* violate the Constitution. As this Court has noted, a "decision to disenfranchise felons [that] was motivated

by race" would give rise to "claims under the Fourteenth and Fifteenth Amendments." *Howard*, 2000 WL 203984, at *1. And "a discretionary felon-reenfranchisement scheme that was facially or intentionally designed to discriminate based on viewpoint—say, for example, by barring Democrats, Republicans, or socialists from reenfranchisement on account of their political affiliation—might violate the First Amendment." *Hand*, 888 F.3d at 1211–12. But those hypothetical schemes would not implicate the First Amendment's unfettered discretion doctrine. Instead, they would violate other federal constitutional constraints on the exercise of all government power, like the Equal Protection Clause's prohibition on racial discrimination.

Hawkins provided no evidence here that Defendants actually subjected him or anyone else to unlawful viewpoint discrimination in considering felon re-enfranchisement applications; indeed, he has affirmatively disavowed that such a showing is necessary. Hawkins Br. 21. As an initial matter, Defendants do not inspect political donation history, political affiliations, or social media postings as part of the restoration process. JA330. Further, from a sea of over 7,000 restoration applications, see JA306, Hawkins points to only one that, he says,

demonstrates the *possibility* of viewpoint discrimination in the restoration process. See Hawkins Br. 25 (contending that an applicant email stating that the applicant is "a life-long Republican" shows that applicants "blatantly state their political alignment with the current governor to try to influence the ultimate decision"). But Hawkins neglects to note that the final disposition for this individual was a *denial*. JA327. The record thus fatally undermines any contention that Defendants engage in viewpoint discrimination in the felon re-enfranchisement process.

C. Hawkins's argument lacks a limiting principle, and thus would undermine discretionary executive clemency broadly

Hawkins's argument also fails because it is overbroad. The logical ramification of Hawkins's argument—that government officials cannot have unfettered discretion even over *re*-instituting expressive conduct—would effectively eradicate discretion in executive clemency under the First Amendment. But this longstanding power is deeply rooted in our constitutional system, and serves an important function: "clemency has provided the 'fail safe' in our criminal justice system." *Herrera*, 506 U.S. at 415.

Take pardons as an example. When a convicted criminal is incarcerated, he retains only "those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." *Pell v. Procunier*, 417 U.S. 817, 822 (1974). Thus, "'certain privileges and rights,'" including First Amendment rights, are "'necessarily [] limited in the prison context.'" *Lumumba v. Kiser*, 116 F.4th 269, 278 (4th Cir. 2024) (quoting *Johnson v. California*, 543 U.S. 499, 510 (2005)). When a Governor pardons some prisoners as "a matter of grace" by "consider[ing] a wide range of factors not comprehended by earlier judicial proceedings and sentencing determinations," *Woodard*, 523 U.S. at 273, 280–81, under Hawkins's theory that action would be unconstitutional because it would remove a restriction on First Amendment activity in an allegedly "selective, arbitrary" way, see Hawkins Br. 48.

Hawkins's theory would thus apparently subject most exercises of executive clemency to the unfettered discretion doctrine, requiring courts to evaluate the methodology behind each and every pardon, commutation, reprieve, remission of fines, or restoration of rights. See, *e.g.*, JA112 (discussing spreadsheet Defendants produced to Hawkins

containing "information on 7,414 applications for the restoration of rights"). The theory thus runs headlong into the Supreme Court's clear directive that "clemency has not traditionally 'been the business of courts,'" *Woodard*, 523 U.S. at 285 (quoting *Dumschat*, 452 U.S. at 464), and should "rarely, if ever" be subjected to judicial review, *Dumschat*, 452 U.S. at 464. It also runs directly counter to centuries of practice and jurisprudence recognizing discretionary executive clemency. See pp.19–21, *supra*.

This incongruity between Hawkins's argument and centuries of executive clemency jurisprudence writ large only further illustrate his argument's error. The unfettered discretion doctrine does not apply to executive clemency. Hawkins's arguments otherwise would contradict longstanding constitutional doctrine. His claims fail for this reason as well.

III. Hawkins's requested remedy demonstrates why his claim fails

The remedy Hawkins seeks also reveals that his claims cannot prevail. Hawkins asks that the Court "order Defendants . . . to replace" the current restoration process with a process in which the Governor's decisions must be made "based upon specific, neutral, objective, and

uniform rules and/or criteria and within reasonable, definite time limits." JA39. Hawkins's remedy would presumably mean that every restoration decision made by the Governor would be subject to judicial review to ensure adherence to these "rules and/or criteria" (whatever they may be) and "time limits" (however long those are). And to the extent Hawkins purports to ask the Court to provide "guidance" that Defendants are then obligated to implement, that maneuver fares no better. Hawkins's request for this drastic and intrusive interference with a state executive's exercise of clemency shows that his claims are meritless for several reasons.

First, any such standard governing the grant of executive clemency is a political question not fit for judicial review. Cases present an unreviewable "political question," and thus are not "cases" or "controversies" for the purposes of Article III, when they "lack judicially discoverable and manageable standards for resolving them." *Rucho v. Common Cause*, 588 U.S. 684, 695–96 (2019) (quotation marks and brackets omitted). In *Rucho*, the Supreme Court held that partisan gerrymandering presents a political question because there is no "limited and precise standard that is judicially discernible and manageable" to

adjudicate partisan gerrymandering claims. *Id.* at 710; see *id.* at 718. The Supreme Court explained that opposition to gerrymandering generally turns on "fairness" or "how much representation particular political parties *deserve*." *Id.* at 705. It thus poses "basic questions that are political, not legal," because there "are no legal standards discernible in the Constitution for making such judgments." *Id.* at 707. "Any judicial decision on what is 'fair' in this context," the Supreme Court concluded, "would be an unmoored determination of the sort characteristic of a political question beyond the competence of the federal courts." *Ibid.* (quotation marks omitted).

Rucho's analysis applies equally to Hawkins's challenge. A gubernatorial clemency decision, by its nature, "depends not simply on objective factfinding, but also on purely subjective evaluations and on predictions of future behavior by those entrusted with the decision." *Dumschat*, 452 U.S. at 464. This subjective decision-making process is unsuitable for judicial involvement, and would untenably require the judiciary to create and enforce rules for a Governor to follow in exercising his clemency power. Here, the Governor has explained that his voting-restoration decisions, consistent with the Supreme Court's observation in

Dumschat, turn on a predictive judgment regarding whether the applicant will live as a responsible member of the political body. See JA141. The Constitution "provides no basis whatever to guide the exercise of judicial discretion" in this endeavor, rendering it inappropriate for judicial involvement. *Rucho*, 588 U.S. at 716.

The same goes for the "reasonable" and "definite" clemency "time limits" that Hawkins asks the Court to impose. JA39. The Seventh Circuit, presented with a similar request, concluded that it had "no idea what a 'reasonable' time for deciding a clemency petition would be." *Bowens v. Quinn*, 561 F.3d 671, 676 (7th Cir. 2009). "Executive clemency," the Seventh Circuit explained, "is a classic example of unreviewable executive discretion because it is one of the traditional royal prerogatives" that was "borrowed by republican governments for bestowal on the head of government." *Ibid.* The court did not mince words: "We therefore balk at the idea of federal judges' setting timetables for action on clemency petitions by state governors." *Ibid.* There are no "judicially discoverable and manageable standards" to guide courts in deciding how the clemency power "should" be exercised. *Rucho*, 588 U.S. at 696.

Third, to the extent Hawkins purports to ask the Court to provide mere guidance that Defendants must then implement through regulation, that request raises additional constitutional concerns. The Supreme Court has "long held" that the equitable power of federal courts "is the jurisdiction in equity exercised by the High Court of Chancery in England at the time of the adoption of the Constitution." *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 (1999) (quotation marks omitted). And there is no historical basis for equity courts issuing guidelines that an executive must follow in exercising his clemency power.

The Eleventh Circuit recognized this problem in *Hand*. There, the district court had entered an injunction directing the Florida executive branch "to promulgate new standards" that would "determine when and how to exercise the Governor's power in order to reenfranchise convicted felons." 888 F.3d at 1214. That was "a tall order" for "a court sitting in equity," as the Eleventh Circuit explained, "even assuming the district court had the authority to enter this command in the first place." *Ibid.*

Echoing the concerns highlighted in *Rucho*, the court explained that "there are a multitude of considerations" to a voting-restoration decision,

"including but not limited to whether [the government] should adopt mathematical criteria, how 'specific and neutral' the criteria should be, whether arrests or convictions for certain kinds of misdemeanor or felony offenses (and there are many) should be either relevant or categorically disqualifying," among others. *Ibid.* The Eleventh Circuit deemed this unprecedented remedy an independent basis for concluding that the plaintiffs' challenge likely failed on the merits. *Ibid.*

Fourth, to the extent that Hawkins instead seeks a nonspecific injunction ordering the Governor to follow the unfettered discretion doctrine, the injunction would then run afoul of Federal Rule of Civil Procedure 65(d). This rule requires that an injunction order "state its terms specifically" and "describe in reasonable detail . . . the act or acts restrained or required." Fed. R. Civ. P. 65(d). Here, an injunction ordering Defendants to implement "criteria" or "reasonable" time limits that "satisfy the First Amendment," JA39, JA192, JA213, would be so general as to violate Rule 65. See, *e.g.*, *Hope v. Warden York Cnty. Prison*, 972 F.3d 310, 322 (3d Cir. 2020) (holding that an injunction violated Rule 65 when it permitted "the Government to impose 'reasonable nonconfinement terms of supervision'" on certain

individuals, because the term "'reasonable' is capacious enough to provoke disagreement between" the parties); *Burton v. City of Belle Glade*, 178 F.3d 1175, 1201 (11th Cir. 1999) (holding that an "obey the law" injunction does not satisfy Rule 65); *Payne v. Travenol Lab'ys., Inc.*, 565 F.2d 895, 897–98 (5th Cir. 1978) (same).

Finally, restoring voting rights in a manner that complies with the injunction Hawkins requests would likely violate *Virginia*'s Constitution. In *Howell*, the Virginia Supreme Court held that the Virginia Constitution *requires* the Governor to make voting-restoration decisions "on an individualized case-by-case basis taking into account the specific circumstances of each." 292 Va. at 341. But it is difficult to see how restricting the Governor's clemency power to a mechanical application of the categorical "rules," "criteria," and "time limits" that Hawkins demands would still enable the "individualized" and "case-by-case" consideration required under *Howell*. Thus, if the district court had entered the injunction requested by Hawkins, it is unclear how the Governor could restore rights while complying both with the court's ruling and the Virginia Supreme Court's ruling in *Howell*.

The unworkability of Hawkins's proposed remedy only further demonstrates the failure of his claim. He asks this Court to wade into a textbook nonjusticiable political question regarding when and how a Governor should exercise his clemency power. His proposed injunction would also lead to conflicts with the Virginia Supreme Court's interpretation of state law. This Court should decline Hawkins's invitation to issue an unworkable injunction that would require an unprecedented judicial incursion into the state clemency power. Hawkins's First Amendment claims fail.

CONCLUSION

This Court should affirm the district court's grant of summary judgment to the Defendants.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 9,809 words, excluding the parts of the brief exempted by Rule 32(f). This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century typeface.

/s/ Erika L. Maley

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CERTIFICATE OF SERVICE

I certify that on December 20, 2024, I electronically filed the foregoing brief with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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