



PROTECTING THE VOTE FOR ALL AMERICANS

TO: Jerry Hartman, Barbara McDowell and Gerald S. Hartman Foundation
FROM: Robert M. Brandon, Fair Elections Center
DATE: September 15, 2020
RE: 2020 Barbara McDowell Foundation Grant, Final Report, Kentucky Voting Rights Litigation

Fair Elections Center and the Kentucky Equal Justice Center represent Plaintiffs in a federal lawsuit challenging Kentucky's arbitrary process for voting rights restoration for felons on First Amendment grounds. The lawsuit was originally filed on behalf of eight individuals with felony convictions, but is now pursued on behalf of four such individuals.

Kentucky is the only state in the country that still denies the right to vote to a very large percentage of people with felony convictions until they successfully petition the state for rights restoration. In 2019, Florida's voting rights restoration system became non-arbitrary by virtue of a recently passed state constitutional amendment, and Iowa's Governor recently restored voting rights to individuals with all but the most serious felony convictions.

According to the Sentencing Project, as of 2016, Kentucky had an estimated 242,987 felons who were still disenfranchised after completing their full sentences including parole and probation, or 7% of the state's voting-age population.

At the time, Kentucky's voting rights restoration process required all people with felony convictions who have completed their full sentences to submit an application for voting rights restoration to the Department of Corrections' Division of Probation and Parole. The Division screens the applications and forwards them to the governor's office where the governor has unconstrained power to grant or deny applications with no rules, laws, or criteria governing these restoration determinations. The process also lacks any time limits for when the Department of Corrections or the governor must take action. This delay has created a backlog of applications in Kentucky. As of March 2018, there was a backlog of 1,459 restoration of civil rights applications.

We argued in the suit that, without any rules or criteria, applicants seeking restoration are subjected to arbitrary decision-making and the risk of biased treatment, violating the First Amendment to the U.S. Constitution. The case also challenges the lack of reasonable, definite time limits by which the Governor must make a decision on these restoration applications, another form of arbitrary government conduct that the First Amendment prohibits.

After the Court had denied the Defendant former Governor Matt Bevin's motion to dismiss our case and also denied our request for discovery, the parties proceeded to file cross-motions for summary judgment and completed their briefing on December 5, 2019.

Also in December 2019, just a few days after briefing on the cross-motions for summary judgment was completed, newly-elected Governor Andy Beshear took office and signed an executive order that restored the rights for an estimated 140,000 Kentucky residents. However, his executive order did not restore the voting rights of the other 100,000-plus returning citizens with Kentucky state court felonies in excluded categories, federal felonies, out-of-state felonies, and other excluded crimes on their records. These individuals still cannot vote and must still beg the Governor to restore their voting rights. By contrast, Iowa Governor Kim Reynolds restored individuals with out-of-state and federal felony convictions.

The Governor's Executive Order restored three of our Plaintiffs' voting rights, while perpetuating the disenfranchisement of the other four. (One plaintiff's case had already been rendered moot, due to an earlier, individual grant of restoration by the former governor, Matt Bevin.) We filed a motion to voluntarily dismiss those three Plaintiffs' claims as moot, and the Court granted that motion.

We continued to prosecute the case on behalf of those four clients and the other estimated 100,000-plus individuals the Governor's order excluded from coverage. Unfortunately, on August 14, 2020, the Court dismissed the case as moot, citing Governor Beshear's Executive Order 2019-003. We believe this decision is incorrect as the Executive Order changed nothing for our four remaining plaintiffs; it neither restored their voting rights, nor did it create a non-arbitrary system of voting rights restoration for them. Indeed, the revised application for voting rights restoration makes clear that some individuals are automatically restored and others who are in the excluded categories under the Executive Order can only be restored via Governor Beshear's purely discretionary (and therefore unconstitutionally arbitrary) grant of restoration. On August 31, 2020, we file a motion for reconsideration of this judgment. The Governor's lawyers have until September 21, 2020 to respond, and we expect a decision soon thereafter.

To date, Governor Beshear has shown no inclination to restore the voting rights of the individuals he excluded from his Executive Order.

The attorneys at Fair Elections Center who are working on this case are Jon Sherman, Michelle Kanter Cohen, and Cecilia Aguilera. Our co-counsel is Ben Carter at the Kentucky Equal Justice Center.

For further information, please contact Mary Anne Walker, Development Director, 202-248-5349 or mwalker@fairelectionscenter.org.