FAIR ELECTIONS CENTER

PROTECTING THE VOTE FOR ALL AMERICANS

TO: Jerry Hartman, Barbara McDowell and Gerald S. Hartman Foundation
FROM: Robert M. Brandon, Fair Elections Center
DATE: March 30, 2020
RE: Interim 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 filed on behalf of eight former felons.

Kentucky is one of three states that deny the right to vote to all former felons until they petition for rights restoration. In 2019, Florida dropped off that list when its voting rights restoration system became non-arbitrary by virtue of a recently passed state constitutional amendment.

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.

Kentucky's voting rights restoration process requires felons who have completed their full sentences to submit an application for 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 argue 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.

December brought two key moments in the life this case. First, since the Court had previously denied the Defendant (former) Governor's motion to dismiss our case and had denied our request for discovery, the parties proceeded to cross-motions for summary judgment and completed their briefing on December 5, 2019. The case is now pending with the Court, and we await but have no guess as to when a decision will be handed down.

Also in December, just a few days after briefing on the cross-motions for summary judgment was completed, newly elected Gov. Andy Beshear took office and signed an executive order that restored the rights for an estimated 140,000 Kentucky residents. However, his executive order declined to restore the voting rights of the other 100,000-plus returning citizens with violent felonies, 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.

The Governor's Executive Order restored three of our Plaintiffs' voting rights, while preserving the disenfranchisement of the other four. (One plaintiff's case had already been rendered moot, due to an earlier, individual executive order by the outgoing governor, Matt Bevin, restoring her voting rights.) We filed a motion to voluntarily dismiss those three Plaintiffs' claims as moot, and the Court granted that motion. The Order is enclosed with this letter. We, of course, continue 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. It is hard to predict how this new Governor will react if we secure a favorable ruling. To date, Governor Beshear has shown no inclination to restore the voting rights of the individuals he excluded from his Executive Order. However, if the Court rules in our favor, perhaps he will be persuaded to craft a non-arbitrary, rule-bound system for their restoration, enter a settlement agreement or consent decree, and avoid appeals up to the Sixth Circuit and U.S. Supreme Court. Time will tell.

The attorneys at Fair Elections Center who are working on this case are Jon Sherman, Michelle Kanter Cohen, and Cecilia Aguilera. Our local 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.