CRIMINAL DISENFRANCHISEMENT KEY LITIGATION TO KNOW

An introductory word on litigation: Many people ask, given the racist history of criminal disenfranchisement laws and the disparate impact of these laws today on Black and Latinx communities in the era of mass incarceration, *are criminal disenfranchisement laws constitutional? How do we fight them in court and win?*

Are criminal disenfranchisement laws constitutional?

Unfortunately, federal and state courts have generally upheld criminal disenfranchisement laws. Forty-six years ago, in ***Richardson v. Ramirez***, the U.S. Supreme Court upheld a California law permanently barring those convicted of "infamous" crimes from voting. The Court determined that the 14th Amendment grants states explicit permission or an "affirmative sanction" to disenfranchise people based on a conviction. Since the *Richardson* decision, states have had wide discretion to disenfranchise with one exception.

A state may not create a criminal disenfranchisement law with the intent of targeting a racial group. In a 1985 decision, ***Hunter v. Underwood***, the Supreme Court clarified that the permission granted to states under the 14th Amendment did not extend to laws created with a racially discriminatory purpose. The Court then went on to strike down a facially neutral provision in the 1901 Alabama Constitution as a violation of equal protection. The Court found that the provision disproportionately disenfranchised African Americans convicted of minor misdemeanors, such as petty larceny, while allowing white people convicted of crimes considered more serious, such as second-degree manslaughter, to retain their voting rights.

This *Hunter* exception, however, is narrow. In ***Cotton v. Fordice***, the Fifth Circuit Court of Appeals held that even if a state initially enacted its criminal disenfranchisement law to discriminate against one racial group, if the state later amends and re-enacts the law without an intent to discriminate, the change in the law removes the equal protection violation. Thus, while Mississippi's post-Reconstruction disenfranchisement law included only crimes targeting Black people, the legislature's amendment of the law in 1950 and 1968 to add crimes that did not just target Black people, did away with any violation of the equal protection clause.

Legal challenges to criminal disenfranchisement laws under the **Voting Rights Act of 1965 (VRA),** which allows laws to be struck if they disproportionately impact people of color, have also failed. Courts have again required intentional racial discrimination.

Finally, courts have also generally upheld state laws requiring payment of legal financial obligations **(LFOs),** meaning fines, fees, restitution, and even child support, prior to the restoration of the right to vote with one exception – courts have left open the possibility that one may be able to challenge LFOs if one can show indigency and inability to pay LFOs.

How do we fight this in the courts and win?

It is unclear how to win in the courts, but we should still keep fighting. Advocates, including those in Florida and Alabama, are currently litigating the indigency exception described above. Advocates in Alabama and Mississippi are currently litigating race discrimination claims against the other aspects of the disenfranchisement laws of those states. In addition, Minnesota, Kentucky, and North Carolina have active pending litigation.

The Upshot: The overwhelming number of cases filed against criminal disenfranchisement laws have failed. However, while many cases are lost in court, litigation remains useful when brought alongside and as part of overall strategy in a grassroots campaign in communities of color, especially a campaign led by formerly incarcerated and directly impacted people, which can win in legislatures or through other means. In an effort to help you sort through past and current litigation as you consider your strategy, we have prepared the following chart of past cases and current cases.

PAST DECISIONS FROM FEDERAL COURTS

Case	Background	Court's Decision	Takeaways
Richardson v. Ramirez[149] *(1974)* U.S. Supreme Court	Plaintiffs challenged California's law.	• 14th Amendment contains an "affirmative sanction" for felon disenfranchisement. • Therefore, felony disenfranchisement laws do not violate equal protection. • People with felony convictions lack a "fundamental" right to vote.	It is widely accepted by courts that under the 14th Amendment to the U.S. Constitution, states can choose to deny the right to vote based on a felony conviction.
Hunter v. Underwood[150] *(1985)* U.S. Supreme Court	Plaintiffs challenged Alabama's law that disenfranchised those convicted of a list of specific crimes in addition to crimes of "moral turpitude." Plaintiffs used the 14th Amendment's Equal Protection Clause.	• Evidence from state's 1901 constitutional convention and historians showed Alabama adopted list of specific crimes to target Black people. • Though the list of crimes was no longer valid, the legislature never amended the law without intent to discriminate therefore it violated 14th Amendment.	States cannot create a felony disenfranchisement law with the intent of targeting one racial group *NOTE: The ruling did not affect the state's prior law on felonies; only the law on misdemeanors.*
Cotton v. Fordice[151] *(1998)* 5th Cir. Court of Appeals (LA, MS, TX)	Plaintiffs challenged Mississippi's law that disenfranchised those convicted of certain crimes.	• The Mississippi Supreme Court previously found state adopted felony disenfranchisement law in the 1890s to include only crimes that targeted Black people. • Because the legislature amended the law to add crimes that did not target just Black	Even if a state initially enacted its felony disenfranchisement law to discriminate against one racial group, if the state later amended and re-enacted the law without an intent to discriminate, the change in the law removes the 14th Amendment violation.

		people, the current law is constitutional.	
Johnson v. Governor of Florida[152] *(2005)* 11th Cir. Court of Appeals (FL, GA, AL)	Plaintiffs challenged Florida's law that disenfranchises those convicted of a felony; the only path to rights restoration was clemency from the governor. Plaintiffs argued that the law disproportionately impacted Black people and operated as a poll tax, 1st, 14th, 15th, and 24th Amendments, and the VRA.	• Despite evidence of initial discriminatory intent, Court held that because the legislature changed the law in 1968 to narrow the disenfranchising crimes, the current law did not violate the 14th Amendment's Equal Protection bar against intentional discrimination. • Court ruled Section 2 of the VRA does not apply to state felony disenfranchisement laws.	• Even if a state initially enacted its felony disenfranchisement law to discriminate against one racial group, if the state later amended and re-enacted the law without an intent to discriminate, the change in the law removes the 14th Amendment violation. • Also, in the 11th Circuit, you cannot directly challenge felony disenfranchisement laws using the VRA. The 1st and 2nd Circuits have similar opinions.[153] *NOTE: This case has a small footnote on whether financial obligations may be a poll tax. The current FL case is using this footnote for their arguments against LFOs*
Janis v. Nelson[154] *(2009)* Federal District Court in South Dakota	Plaintiffs, two Native American probationers, challenged removal of their names from the voting rolls, arguing South Dakota's law only applies to those incarcerated. They brought claims under the 14th Amendment, Help America Vote Act (HAVA), the VRA, the National Voter Registration Act (NVRA), and the state constitution.	• Plaintiffs had some evidence that the state may have violated HAVA, the NVRA, and the VRA by removing probationers from the list of registered voters. • Plaintiffs survived the state's motion to dismiss, but the case did not result in a final ruling on the issues.	The parties successfully settled the lawsuit with state and local officials agreeing to fix registrations for people on probation. The conservative South Dakota legislature, however, reacted to this lawsuit by then passing a law disenfranchising people on probation and parole.
Farrakhan v. Gregoire[155] *(2010)* 9th Cir. Court of Appeals (WA,	Plaintiffs challenged Washington's disenfranchisement law as having a disproportionate impact on Black people. Plaintiffs used Section 2 of the VRA.	• Washington's felon disenfranchisement law does not violate Section 2 of the VRA. • Plaintiffs could possibly prove a VRA violation with a showing of intentional discrimination.	In the 9th Circuit, if you want to directly challenge felony disenfranchisement laws using the Voting Rights Act, have some evidence of intentional race discrimination.

CA, AZ, NV, MT, ID, OR, HI, AK)			
Harvey v. Brewer[156] *(2010)* 9th Cir. Court of Appeals (WA, CA, AZ, NV, MT, ID, OR, HI, AK)	Plaintiffs challenged law requiring payment of LFOs before restoration under equal protection, as a poll tax, under the Privileges and Immunities Clause (P&I), and the state's Free and Equal Elections Clause.	• Re-enfranchisement is a benefit and not a right. The state can choose to never restore a person's right to vote and can choose the terms of re-enfranchisement. • Arizona's LFO requirement is constitutional.	In the 9th Circuit, LFO requirements are generally constitutional, but the 9th Circuit left open the possibility that you may be able to challenge LFOs if you can show indigency and inability to pay these LFOs (see *Jones v. DeSantis* below).
Johnson v. Bredesen[157] *(2010)* 6th Cir. Court of Appeals (KY, TN, OH, MI)	Plaintiffs challenged Tennessee's law requiring payment of LFOs (including child support) prior to restoration. Plaintiffs brought federal constitutional claims under the 14th Amendment, the 24th Amendment, Ex Post Facto Clause, and P&I.	• Tennessee's re-enfranchisement law does not involve a fundamental right because people with felony convictions have no fundamental right to vote. • Tennessee's requirement for payment of restitution and child support does not violate the 14th Amendment and is not a poll tax.	In the 6th Circuit, it may be difficult to challenge LFOs as part of re-enfranchisement, but you may be able to challenge indigency and the inability to pay these LFOs (see *Jones v. DeSantis* below).
Hand v. Scott[158] *(2018)* 11th Cir. Court of Appeals (FL, GA, AL)	Plaintiffs challenged the Florida's governor wide discretion in the rules and processes he uses to grant clemency. Plaintiffs used the 14th Amendment's Equal Protection Clause and the 1st Amendment.	• The district court ruled for plaintiffs, holding that the clemency process is arbitrary. • But the 11th Circuit hinted that without a showing of intentional discrimination, the lower court was likely wrong. • The 11th Circuit did not reach a final decision, finding that the Amendment 4 adequately addressed the plaintiffs' concerns and mooted the case.[159]	In Florida, the governor has a lot of discretion in how to structure and conduct the clemency process. Any future challenges should include evidence of intentional discrimination.

PAST STATE COURT DECISIONS

Case	Background	Court's Decision	Other Wins
Madison v. Washington[160] *(2007)* Washington Supreme Court	Plaintiffs challenged LFO requirement under the 14th Amendment and the state's Privileges and Immunities Clause.	• The state has a legitimate interest in having people fulfill all terms of their sentence, including LFOs. • Therefore, the state's LFO requirement does not violate the constitution.	Though advocates lost in court, the legislature passed a bill the next year that removed the requirement that people pay LFOs before voting.
Howell v. McAuliffe[161] *(2016)* Virginia Supreme Court	Virginia's governor issued an executive order restoring voting rights on a mass scale. Legislators sued, challenging the governor's power under the Virginia Constitution to issue a mass restoration. They argued he had to restore rights on an individual basis.	• Governor did not have the authority to issue an executive order that provided a mass restoration. • Virginia's history has established that governors use their power on an individualized basis.	Though the governor lost in court, he still proceeded with a large number of restorations by streamlining the system and creating a Restoration of Rights office to assist people with the process.
Voice of the Experienced v. Louisiana[162] *(2017)* Louisiana 1st Cir. Court of Appeals	Plaintiffs challenged a Louisiana statute that disenfranchised those on probation and parole. Plaintiffs argued that the statute violated the Louisiana Constitution because the Constitution only disenfranchises those who are incarcerated.	• In the Louisiana Constitution, the language "under an order of imprisonment" is not limited to only those who are incarcerated. The language includes those on probation and parole.	Though VOTE did not win in court, its allies and friends supporting the litigation were part of the campaign to the pass Act 636, which restores voting rights to a limited group of parolees and most probationers.

CURRENT PENDING CASES

Case	The Issues	Most Promising Claims	Results
Thompson v. Alabama[163] Filed 9/26/16 in Alabama federal court	• Plaintiffs are challenging language in the Alabama constitution that disenfranchises those convicted of felonies involving "moral turpitude." • Plaintiffs argue that Alabama's law is vague, racially discriminatory and inflicts retroactive punishment. • Plaintiffs also challenge LFOs as a form of wealth discrimination.	• Plaintiffs recently added additional arguments – Alabama Secretary of State (SOS) violated the state-created right to vote in violation of federal due process when the SOS applied the new law retrospectively, and Alabama's voter registration forms fail to provide eligibility information in violation of the NVRA. • Plaintiffs' LFOs and race discrimination allegations are also moving forward.	• In 2017, the Alabama legislature responded in part to the case by passing a bill that defined 40+ crimes of moral turpitude. • The court dismissed some of the claims in the case, but many of the claims, e.g. claims against the LFOs, are moving forward. • The case goes to trial in Feb. 2021.

Hopkins v. Hosemann[164] Filed 3/27/18 in Mississippi federal court	• Plaintiffs challenge Mississippi's language permanently disenfranchising those convicted of certain crimes. • Plaintiffs also challenge the requirement that the legislature's process of restoring rights.	• Plaintiffs are currently litigating a claim that the legislative process for restoration is racially discriminatory because it was enacted in 1890 with the intent to discriminate on the basis of race.	• The plaintiffs appealed the dismissals and the Fifth Circuit heard oral argument. • The lower court stayed all proceedings on the remaining claims until the Fifth Circuit rules.
Lostutter v. Commonwealth of Kentucky[165] Filed 10/29/18 in Kentucky federal court	• Plaintiffs challenge the wide discretion that the rights restoration system gives to the governor. • Plaintiffs argue that the lack of limits and rules violates the 1st Amendment.	• Plaintiffs are still litigating the claim that the governor's arbitrary restoration process violates the 1st Amendment.	• The governor recently issued an executive order restoring the right to people with non-violent felonies. His position on this litigation is unclear.
Jones v. DeSantis[166] Filed 6/28/19 in Florida federal court	• Plaintiffs challenge language in Senate Bill 7066, a bill implementing Amendment 4. • Plaintiffs argue that the bill's requirement for the payment of LFOs restricts the right to vote and violates the U.S. Constitution.	• Plaintiffs are currently advancing on the idea of inability to pay LFOs. The legal theory is wealth-based disenfranchisement under the 14th Amendment. • Plaintiffs use the footnote in *Johnson v. Bush* and the case *Bearden v. Georgia.*[167]	• Plaintiffs got a preliminary injunction from district court. • Eleventh Circuit heard oral arguments on 1/28/20 and seemed favorable to plaintiffs. • State made a slight amendment to its clemency law requiring restitution.
Schroeder v. Simon[168] Filed 10/21/19 in Minnesota state court	• Plaintiffs challenge Minnesota's law that disenfranchises citizens on probation and parole.	• Plaintiffs allege violations of equal protection, due process, and state right to vote under the Minnesota state Constitution.	• The case is new. A right-wing group called Minnesota Voters Alliance has filed a motion to intervene in the case in order to defend Minnesota's practice of disenfranchising parolees and probationers.
Community Success Initiative v. Moore[169] Filed 11/20/19 in North Carolina state court	• Plaintiffs challenge North Carolina's law that disenfranchises citizens on probation and parole.	• Plaintiffs allege violations of the North Carolina state Constitution's Free Election Clause, Equal Protection Clause, Freedom of Speech and Assembly Clauses, and Ban on Property Qualifications.	• The case is new.