

The ACLU also has been active in challenging felon disfranchisement laws in the courts. Section 2 of the Fourteenth Amendment grants states the authority to deny voting rights to anyone with a criminal conviction, and it is up to the states to determine their own restoration process if they choose to enact one.<sup>1</sup> The seminal case regarding felon disfranchisement is Richardson v. Ramirez.<sup>2</sup> In Richardson, the U.S. Supreme Court held that a state could, consistent with the Equal Protection clause of the 14<sup>th</sup> Amendment, exclude from the franchise convicted felons.<sup>3</sup> However, courts since have recognized that there are some fundamental constitutional parameters that states cannot overstep and have struck down those disfranchisement laws which states enacted with racial animus or which resulted in gender discrimination.<sup>4</sup>

In 2006, the ACLU filed a lawsuit (Madison v. Washington) in Washington state court on behalf of indigent plaintiffs to challenge the state practice of requiring payment of legal financial obligations (LFOs), such as court fines and victim restitution, prior to restoring a felon's voting rights.<sup>5</sup> The lower court struck the law down as unconstitutional under the Equal Protection clause, reasoning that "there is simply no rational relationship between the ability to pay and the exercise of constitutional rights."<sup>6</sup> Unfortunately, the Washington Supreme Court reversed the lower court's decision and

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<sup>1</sup> U.S. Const. amend. XIV, § 2.

<sup>2</sup> 418 U.S. 24 (1974).

<sup>3</sup> Id. at 54.

<sup>4</sup> See Hunter v. Underwood, 471 U.S. 222 (1985) (striking down Alabama's felon disfranchisement in light of evidence that law was enacted to discriminate against African-Americans); Hobson v. Pow, 424 F.Supp. 362 (N.D. Ala. 1977) (holding that provision of Alabama's law that allowed for disfranchisement of men convicted of assault and battery of wife, but did not apply to wives convicted of same offense committed against husbands was unconstitutional).

<sup>5</sup> No. 04-2-33414-4SEA (Wash. Super. Ct. Apr. 21, 2006).

<sup>6</sup> Id. at \*10-12.

held that, once convicted, felons no longer have a constitutionally protected right to vote even upon completion of their sentences.<sup>7</sup> The court also rejected the plaintiff/respondents' argument that the LFO requirement constituted wealth discrimination, finding that the law does not distinguish between rich and poor people but is applicable to all felons.<sup>8</sup> Finally, the court ruled that there was a rational relationship between the requirement that LFOs be fully paid and the state's interest in ensuring that felons complete all of the terms of their sentence before participating in the electoral process.<sup>9</sup>

In October 2006, the ACLU's Voting Rights Project and the Mississippi affiliate filed a lawsuit (Strickland v. Clark) challenging the state's expansion disfranchising crimes in contravention of state and federal laws.<sup>10</sup> Section 241 of the Mississippi Constitution denies the right to vote to anyone convicted of one of the following ten crimes: murder, rape, forgery, bribery, obtaining money or goods under false pretense, bigamy, embezzlement, perjury, theft and arson.<sup>11</sup> However, the provision states that people convicted of any of those ten crimes may still vote in U.S. Presidential elections.<sup>12</sup> Nevertheless, in 2004, the Attorney General issued an advisory opinion expanding the list of disfranchising crimes, without legislative approval, to include eleven additional offenses. The Secretary of State then amended the voter registration form to include

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<sup>7</sup> Madison v. Washington, No. 78598-8, 2007 WL 2128346, at \*7-9 (Wash. S. Ct., July 26, 2007).

<sup>8</sup> Id. at \* 6.

<sup>9</sup> Id. at \* 12.

<sup>10</sup> No. G2006-1753 S/2 (Miss. Ch. Ct. Oct. 6, 2006).

<sup>11</sup> Miss. Const. art. XII, § 241.

<sup>12</sup> Id.

twenty-one disqualifying crimes and the form does not allow someone to register to vote only in federal elections.

Despite repeated requests, the Secretary of State refused to revise the registration form to list only the ten crimes enumerated in the constitution or to allow individuals to register to vote only for President and Vice President. Therefore, the ACLU legally contested the state's actions as violating the plain meaning of the constitution, the separation of powers doctrine, the equal protection clause of the 14<sup>th</sup> Amendment, and the National Voter Registration Act. The court denied the defendants' motion to dismiss the case and the case is still pending.

The ACLU also filed an amicus brief in the case Farrakhan v. Gregoire in which the plaintiffs sought to strike down Washington state's felon disfranchisement law as racially discriminatory in violation of Section 2 of the Voting Rights Act and several constitutional laws.<sup>13</sup> During the trial, the plaintiffs produced evidence showing that: (1) law enforcement officials are more prone to racially profile and search minorities during traffic stops; (2) minorities are targeted for prosecution of serious crimes; and (3) minorities receive lengthier sentences than whites and, therefore, are overrepresented in prison populations. Thus, the plaintiffs maintained, the state's felon disfranchisement scheme results in minorities being denied the right to vote at much greater rates than whites and dilutes the overall voting strength of minority communities.

During the first phase of the case, the district court dismissed the plaintiffs' constitutional law claims and, after the trial, found that the plaintiffs failed to establish a

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<sup>13</sup> No. CV-96-076-RHW, 2006 WL 1889273 (E.D. Wash. July 6, 2007).

Section 2 violation.<sup>14</sup> The Ninth Circuit Court of Appeals reversed the district court's ruling on the Section 2 claim and held that a court must consider "how a challenged voting practice interacts with external factors such as 'social and historical conditions' to result in denial of the right to vote on account of race or color," and that "evidence of discrimination within the criminal justice system can be relevant to a Section 2 analysis."<sup>15</sup> On remand, the district court found that, even though there was racial bias in the state's criminal justice system, the plaintiffs failed to show a history of official discrimination against minorities in other areas of voting and, thus, still failed to support their Section 2 claim.<sup>16</sup> The plaintiffs have appealed the case and, in its amicus brief, the ACLU argued that the district court's finding of racial discrimination in the criminal justice system and that such discrimination was inextricably tied to the overrepresentation of people of color who are disfranchised was sufficient to establish a Section 2 violation.

The ACLU's Voting Rights Project and the Arizona affiliate recently filed a lawsuit (Coronado v. Napolitano) challenging two aspects of Arizona's felon disfranchisement law: (a) the denial of voting rights to ex-felons based on their inability to pay the court fines, fees, and restitution associated with their sentences; and (b) the disfranchisement of people convicted of certain offenses which never existed when Congress enacted Section 2 of the 14<sup>th</sup> Amendment.<sup>17</sup> Under current Arizona law, those who have only one criminal conviction are eligible for automatic restoration of their voting rights once they receive a Certificate of Absolute Discharge from the state and pay

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<sup>14</sup> Farrakhan v. Locke, 987 F.Supp. 1304 (E.D.Wash. 1997).

<sup>15</sup> Farrakhan v. Washington, 338 F.3d 1009, 1011-12 (9th Cir. 2003).

<sup>16</sup> Farrakhan v. Gregoire, No. CV-96-076-RHW, 2006 WL 1889273 (E.D.Wash. Jul 07, 2006).

<sup>17</sup> No. CV07-01089 PHX SMM (D. Ariz. June 1, 2007).

all of their legal financial obligations.<sup>18</sup> However, those convicted of two or more felonies must seek discretionary approval from a judge before the State can restore their civil rights which is a very arbitrary and intimidating process.<sup>19</sup>

In the complaint, the Plaintiffs argue that conditioning the right to vote on the payment of any fee constitutes a poll tax in violation of the 14<sup>th</sup> and 24<sup>th</sup> Amendments to the U.S. Constitution, the Voting Rights Act, and state laws. The lawsuit also attempts to narrow the scope of crimes which Section 2 of the 14<sup>th</sup> Amendment covers. If successful, the case will dramatically streamline the rights restoration process by eliminating the fee payment requirement and will significantly reduce the number of people who lose their voting rights in the first place.

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<sup>18</sup> Ariz. Rev. Stat. § 13-912.

<sup>19</sup> Id. at §§ 13-905, 13-908.