

EDVA Judge Narrows Suit Challenging Provision of Virginia Constitution Prohibiting Felons From Voting

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Virginia's Constitution automatically disqualifies all persons convicted of any felony from voting unless their civil rights are restored by the Governor. See Va. Const. art. II, § 1. In a recent case, two plaintiffs convicted of felonies, who had completed their sentences, brought suit against several state officials alleging that this provision of Virginia's Constitution violated the Virginia Readmission Act (the VRA). *King v. Youngkin, et al.*, Civil Action No. 3:23CV408. The VRA is a federal law passed in 1870, which re-admitted Virginia to representation in Congress after the Civil War. A condition to re-admission under the VRA was that Virginia could not change its Constitution to deprive any citizen of the right to vote who was entitled to vote when Congress enacted the VRA. Virginia's 1869 Constitution, which was in effect in 1870, only disenfranchised those convicted of crimes which were felonies at common law, while the current Constitution, enacted in 1971, disenfranchised all persons convicted of any felony, regardless of whether the felony was a crime at common law. The plaintiffs in *King* sought an injunction against enforcement of the current constitution provisions against individuals convicted of crimes that were not felonies at common law in 1870.

In a March 18 ruling on the defendants' motion to dismiss, EDVA Judge Gibney substantially narrowed the lawsuit, dismissing claims under the Eighth Amendment and 42 U.S.C. § 1983 and dismissing one plaintiff, a nonprofit organization called Bridging the Gap, for lack of standing. *King v. Youngkin, et al.*, Civil Action No. 3:23CV408. 2024 U.S. Dist. LEXIS 47830 (E.D.Va. March 18, 2024). Judge Gibney, however, denied the defendants' assertion of sovereign immunity and allowed the individual plaintiffs to pursue a claim to enjoin future enforcement of the felony disenfranchisement provision under the doctrine set forth in *Ex Parte Young*, 209 U.S. 123 (1908). The Supreme Court, the judge held, has long recognized in *Ex Parte Young* and subsequent cases that federal courts may issue injunctions upon finding an ongoing violation of federal law, and the VRA was a federal statute that could be enforced under that doctrine.

Ex Parte Young, however, requires a violation of *federal* law and does not allow a claim to compel a state to comply with *state* law. In *King*, the defendants claimed that the lawsuit, "in essence" sought to force the defendants to comply with the 1869 Constitution. Judge Gibney swiftly rejected this argument, noting that the plaintiffs did not ask the court to require the defendants to comply with the 1869 Constitution. Rather, the plaintiffs contended that enforcement of the current Virginia Constitution violated the VRA's "fundamental condition" that Virginia never alter its Constitution to disenfranchise citizens who could vote at the time of the VRA's enactment.

Ex Parte Young also applies only where the defendants are officers of the state who have responsibility for the challenged state action. The defendants claimed that the Governor and the Secretary of the Commonwealth played no role in enforcing the disenfranchisement of convicted felons. Instead, they only played a role in deciding whether to restore voting rights. Judge Gibney rejected this argument, holding that the Governor and Secretary of the Commonwealth may enforce the permanent disenfranchisement of certain individuals. Similarly, Judge Gibney rejected the argument that the plaintiffs' claims raised political questions beyond the court's jurisdiction, holding that the plaintiffs asked the court to decide whether Virginia's Constitution violated federal law, which required only the common judicial task of interpreting congressional enactments.

The defendants had more success on their motions to dismiss the plaintiffs' § 1983 and Eighth Amendment claims. First, Judge Gibney recognized the substantial precedent that § 1983 does not provide any substantive rights but is simply a vehicle for vindicating preexisting constitutional and statutory rights. The VRA, the court held, did not create any individual rights. Rather, its sole purpose was to readmit Virginia's representatives into Congress. The VRA did not, as the plaintiffs claimed, give any citizen the right to vote. It merely identified citizens who may benefit from the VRA, and the Supreme Court has cautioned against allowing plaintiffs to use § 1983 to enforce a statute so long as they fell within the "general zone of interest" the statute is intended to protect.

Judge Gibney also dismissed the plaintiffs' claims that the felony disenfranchisement provision violated the cruel and inhuman punishment prohibitions of the Eighth Amendment because felon disenfranchisement is not a "punishment" within the meaning of the Eighth Amendment. The purpose of the provision, the court held, was only to provide how a Virginian can qualify to vote, not to sanction those who cannot vote and has a rational connection to the nonpunitive purpose of regulating the franchise, and demonstrated no punitive effect.

Finally, Judge Gibney dismissed Bridging the Gap as a plaintiff for lack of standing. Bridging the Gap works to help former inmates transition into society following incarceration and assists felons with voting rights restoration. The felony disenfranchisement provisions, Bridging the Gap argued, impaired its mission and forced it to divert resources from other areas into rights restoration. Standing, however, requires a showing of an injury-in-fact, and an interest in a problem, no matter how longstanding and no matter how qualified the organization is in evaluating the problem, is insufficient. Bridging the Gap, Judge Gibney ruled, had simply made a budgetary choice among its focus areas and therefore lacked standing.

Shortly after Judge Gibney issued his opinion, the defendants filed a [Notice of Interlocutory Appeal](#) to the Fourth Circuit, asserting that the denial of sovereign immunity was an immediately appealable collateral order which divested the district court of jurisdiction. The defendants also moved to stay proceedings in the district court during the appeal. The motion to stay remains pending.

While *King* is a voting rights case, it addresses several issues that commonly arise in actions involving state or local government, including standing, sovereign immunity and private rights of action to enforce a federal or state statute. *King* also illustrates many of the procedural hurdles a plaintiff must overcome in any action against the government or government officials and so will be an important precedent for private litigants involved in government litigation.

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