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# Virginia Moves to Dismiss Suit Claiming Denial of Voting Rights to Felons Violates Civil War Era Statute

## Virginia Rocket Docket Blog

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In June, four individuals and an advocacy organization for previously incarcerated individuals brought suit in the Eastern District of Virginia against several state and local officials alleging that Virginia was denying voting rights to some felons in violation of an 1870 statute, which set conditions for readmission of Virginia's representatives to Congress after the Civil War. [King, et al. v. Youngkin](#), et al., Case No. 3:23CV408 (EDVA June 26, 2023).

### **Plaintiffs' Claims**

The crux of the plaintiffs' claim was that the 1870 statute, called the Virginia Readmission Act, 16 Stat. 62 (Jan. 26, 1870), barred Virginia from amending its Constitution to deprive any class of citizens of the right to vote, except as punishment for crimes recognized as felonies at common law. Despite this prohibition, the plaintiffs claimed, Virginia amended its Constitution in 1902 and 1971 to disenfranchise all felons, not just those convicted of felonies recognized at common law.

The four individual plaintiffs alleged that they had been denied the right to vote because they had been convicted of crimes considered "statutory felonies," as opposed to felonies recognized at common law in 1870. The organizational plaintiff, Bridging the Gap in Virginia, alleged that the defendants' violations of the Readmission Act caused it to divert limited resources in order to combat disenfranchisement of formerly incarcerated individuals.

The plaintiffs brought suit for violation of the Virginia Readmission Act under 42 U.S.C. § 1983 and *Ex Parte Young*, 209 U.S. 123 (1908). As relief, the plaintiffs sought an injunction barring enforcement of the provisions of the Virginia Constitution prohibiting citizens convicted of felonies which were not recognized at common law when the Readmission Act was passed in 1870 from voting.

### **Defendants Move to Dismiss**

On August 17, the defendants filed a [motion to dismiss](#) the complaint in its entirety. The motion asserts several grounds for dismissal which often arise in litigation against state and local government officials, including the following:

#### Sovereign Immunity

All suits in federal court against state officers sued in their official capacity, including the *King* defendants, require a plaintiff to show that the state has waived its sovereign immunity under the Eleventh Amendment to the U.S. Constitution.

The *King* defendants argue that Congress has not abrogated sovereign immunity for claims under § 1983, and so the plaintiffs must show that their claims fall within the limited exception to sovereign immunity provided by *Ex Parte Young*. The defendants assert that *Ex Parte Young* only allows a federal court to issue prospective injunctive relief against a state officer to prevent ongoing violations of *federal* law, but the plaintiffs, the defendants assert, only seek an injunction to require state officials to conform their conduct to *state* law, and so *Ex Parte Young* does not apply. See *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 102 (1984).

Central to many of the defendants' arguments, including their sovereign immunity defense, is the version of the Virginia Constitution enacted in 1869, which Congress approved when it adopted the Readmission Act. According to the defendants, the Readmission Act only prohibited Virginia from amending the 1869 Virginia Constitution to disenfranchise those entitled to vote under that version of the Constitution. Thus, the defendants argue, the plaintiffs "in essence" ask the court to interpret the scope of disenfranchisement under a state law, *i.e.*, the 1869 Virginia Constitution, and require the defendants to comply with that state law.

The issue, however, is a close one, as the plaintiffs do not assert that the defendants violated the 1869 Constitution or ask for an injunction requiring the defendants to comply with the 1869 Constitution. In fact, the complaint does not even reference the 1869 Constitution. Rather, the plaintiffs argue that the 1971 Constitution violates the Readmission Act. In the course of evaluating that claim, the court may well have to interpret the scope of voting rights granted under the 1869 Constitution, but interpreting a state statute is arguably very different from finding that a state official has violated a state statute or requiring a defendant to conform its conduct to a state statute.

### Standing

State and local officials often raise standing as a defense to claims by private plaintiffs. In *King*, the defendants assert that two of the plaintiffs lack standing based on their individual circumstances. According to the defendants, one plaintiff had his voting rights restored by the governor three days before suit was filed, and another was convicted of a larceny, which is a felony at common law, and so is grounds for disenfranchisement under the Readmission Act.

The more interesting standing issue presented in *King* relates to Bridging the Gap's standing as a plaintiff. Organizational plaintiffs often base standing on the standing of their individual members, but, as the defendants point out, Bridging the Gap does not allege that it has any members. As to standing in its own right, Bridging the Gap alleges that the defendants' actions have forced it to divert limited resources in order to combat disenfranchisement of formerly incarcerated individuals, but the defendants point out that Fourth Circuit law holds that such a diversion of resources is insufficient to establish standing. See *North Carolina State Conf. of the NAACP v. Raymond*, 981 F.3d 295, 301 (4<sup>th</sup> Cir. 2020).

### The Political Question Doctrine, Private Rights of Action and Constitutional Avoidance

The *King* defendants also raise several defenses going to another common issue in suits against state or local officials — whether an individual citizen has the right to bring an action to enforce compliance with a federal statute.

First, the *King* defendants challenge the court's jurisdiction under the political question doctrine, which deprives the court of jurisdiction over issues committed to Congress. Congress' authority to pass the Readmission Act, the defendants point out, was derived from its obligation under the Guarantee Clause of the Constitution, which guarantees to every State a republican form of government. Enforcement of the Readmission Act, defendants argue, is solely the province of Congress. Further, to hold that Virginia is in violation of the Readmission Act would conflict with Congress' continuing determination that Virginia has a republican form of government and is thus entitled to representation in Congress.

Mirroring the defense that violations of the Readmission Act are committed solely to Congress, the *King* defendants also argue that there is no private right of action to enforce the Readmission Act. The Readmission Act, the defendants point out, contains no language creating a cause of action to enforce the act, and the Guarantee Clause of the Constitution, under which the Readmission Act was passed, provides no judicially enforceable rights by an individual. Likewise, § 1983 creates only a cause of action to enforce a federal statute only where the underlying statute provides a right to enforce the statute.

Third, the defendants assert that if the plaintiffs have a private right of action to enforce the Readmission Act, the act itself would be unconstitutional because Congress does not have the constitutional authority to provide such a cause of action. The Fourteenth Amendment, the defendants argue, permits the disenfranchisement of felons, and the Guarantee Clause, which authorized Congress to enact the Readmission Act, does not authorize the creation of individually-enforceable federal rights.

### **Takeaways**

While the Civil War-era statute at issue in *King* is unique, the issues it raises are often litigated in cases involving state and local officials, and so the case will bear watching as it progresses in the EDVA and, inevitably, on to the Fourth Circuit.

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