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A Pragmatic Approach to Challenging Felon Disenfranchisement Laws

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In the two states with the lowest percentage of minorities, Vermont and Maine, a citizen's criminal history in no way affects his or her right to vote. Not so in the rest of the country. Some states disenfranchise felons for the duration of their time in prison. Others keep felons disenfranchised until they have completed both their prison and probation time. Some other states extend the disenfranchisement period to include parole. And in a few states, citizens who commit felonies can lose their right to vote for life.[2]

While there may be strong policy arguments against these felon disenfranchisement laws, legal challenges have usually failed. Although Section 2 of the Voting Rights Act ("Section 2") does not require plaintiffs to satisfy the Equal Protection Clause's demanding intent requirement and is usually the most robust tool for challenging discrimination in voting, advocates have never succeeded in using it to prevent states from disenfranchising individuals convicted of felonies.

To date, all of the Section 2 challenges to felon disenfranchisement laws have been facial challenges, involving efforts to strike down felon disenfranchisement statutes in their entirety. In this issue brief, I argue that courts would be more receptive to an as-applied Section 2 lawsuit focusing only on disenfranchised African-American ex-felons convicted of low-level, non-violent drug offenses.[3]

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[1] The views expressed in this essay are solely those of the author. His views do not necessarily reflect, nor are they necessarily consistent with, those of his employer, the U.S. Department of Justice.

[2] CHRISTOPHER UGGEN, SARAH SHANNON & RYAN LARSON, SENTENCING PROJECT, 6 MILLION LOST VOTERS: STATE-LEVEL ESTIMATES OF FELONY DISENFRANCHISEMENT 4 (2016), http://www.sentencingproject.org/publications/6-million-lost-voters-state-level-estimates-felony-disenfranchisement-2016.

[3] Ex-felons are individuals convicted of felonies who have fully completed their sentences, including any probationary period, and are no longer under the supervision of the state penal system. For the purposes of this article, when I refer to low-level drug offenses, I am principally referring to felony convictions for drug possession, rather than drug trafficking. It should be noted that while certain states currently disenfranchise almost all of those convicted of felonies, regardless of whether the felony conviction was for a relatively minor drug offense such as possession of drugs, the criminal justice system responds to convictions for minor drug offenses very differently from how it responds to more serious felony convictions. Those convicted of a low-level drug-related felony offense routinely do not serve a day in prison for committing the crime. For instance, of the approximately 165,360 convicted in state court of the felony of drug possession, only approximately 53,910 (or 32.6%) received sentences involving prison time. Indeed, 23% of these individuals were sentenced *only* to treatment for drug addiction. BUREAU OF JUSTICE STATISTICS, FELONY SENTENCES

In the first part of this issue brief, I discuss the extent to which felon disenfranchisement laws have become a serious impediment to minority political participation. Then I explain why, in most contexts, Section 2 is often an effective tool for combating discrimination in voting. Next, I review a series of circuit court decisions where the courts have nonetheless rejected facial challenges to felon disenfranchisement laws under Section 2. I then argue that felon disenfranchisement remains vulnerable to an as-applied challenge under Section 2. In this section of the issue brief, I discuss how the rationales the courts have relied upon for declining to invalidate felon disenfranchisement laws in their entirety under Section 2 suggest that courts would be receptive to a properly crafted as-applied challenge. Finally, I also argue that the type of as-applied challenge advocated here is consistent with what has worked in the past in the context of constitutional challenges to felon disenfranchisement and other types of vote denial and abridgement practices.

I. Felon Disenfranchisement Has Metastasized into the Country's Greatest Impediment to Minority Political Participation

While felon disenfranchisement has been a longstanding practice in many states, in recent decades, there has been a dramatic increase in the number of citizens disqualified from voting because of it.[4] Since 1976, the number has climbed from roughly 1.2 million to approximately 6.1 million.[5] The dramatic increase has been propelled primarily by our roughly forty-year "War on Drugs," and the mass criminalization and incarceration of those either using or distributing illegal drugs.[6]

Felon disenfranchisement laws interact and operate in tandem with the effects of past discrimination and the current discriminatory practices pervading the criminal justice system to disenfranchise a large and grossly disproportionate swath of the Hispanic and African-American electorate. African Americans have been especially impacted. Approximately 2.2 million of the roughly 6.1 million Americans prevented from voting by felon disenfranchisement laws are African-American. Over 7.4 percent of the adult African American population is disenfranchised compared to 1.8 percent of the non-African American population. In certain states, felon disenfranchisement laws have had an even more extreme effect on African-American political participation. The African-American disenfranchisement rate is roughly 21% in Florida, 21% in Tennessee, 22% in Virginia, and 26% in Kentucky.[7]

In many of the states with the highest rates of minority disenfranchisement, the vast majority of those prevented from voting are no longer incarcerated or under probation or parole supervision. Instead, they are ex-felons living in their communities after having completed their sentences. The

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IN STATE COURTS, 2006 – STATISTICAL TABLES 2-3, (Dec. 2009), http://www.bjs.gov/content/pub/pdf/fssc06st.pdf.

[4] *See* Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1156 (2004) (noting that the numerical impact of criminal disenfranchisement is "greater than at any point in our history").

[5] UGGEN ET AL., *supra* note 2, at 4.

[6] *See* Heather Schoenfeld, *The War on Drugs, the Politics of Crime, and Mass Incarceration in the United States*, 15 J. GENDER RACE & JUST. 315 (2012); *see also* Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1274–76 (2004).

[7] UGGEN ET AL., *supra* note 2, at 3, 10–11, 16.

twelve states currently disenfranchising many of their ex-felons are Alabama, Arizona, Delaware, Florida, Iowa, Kentucky, Mississippi, Nebraska, Nevada, Tennessee, Virginia, and Wyoming.[8]

In a 2014 speech, Attorney General Eric Holder eloquently spoke of why he and a number of other leaders in the field of law enforcement came together to file an amicus brief in 2005 in support of a facial challenge to Florida's felon disenfranchisement law. He characterized felon disenfranchisement laws as "too unjust to tolerate." He explained, "At worst, [felon disenfranchisement] laws, with their disparate impact on minority communities, echo policies enacted during a deeply troubled period in America's past – a time of post-Civil War repression. And they have their roots in centuries-old conceptions of justice that were too often based on exclusion, animus, and fear."[9]

II. Section 2: Often a Robust Tool for Combating Discrimination in Voting

Outside of the felon disenfranchisement context, Section 2 has often been an effective tool for combating discrimination in voting. Section 2 prohibits any "voting qualification or prerequisite to voting or standard, practice, or procedure" that "results in a denial or abridgement" of the right to vote "on account of race or color."[10]

While the 15th Amendment and the Equal Protection Clause only prohibit intentional discrimination,[11] Section 2 prohibits actions which have either the purpose or the *result* of denying or abridging the right to vote on account of race, color, or membership in a language minority group.[12] Section 2 prohibits "not only voting practices borne of a discriminatory intent, but also voting practices that 'operate, designedly or otherwise,' to deny 'equal access to any phase of the electoral process for minority group members.'"[13]

To determine whether a voting practice violates the Section 2 results standard, a court must decide whether "as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice."[14] The inquiry is not whether the challenged practice standing alone causes disproportionality, but rather whether the practice "interacts with social and historical conditions" to produce an "inequality in the opportunities enjoyed by [minority] and white voters."[15]

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[8] *Id.*
[9] Eric Holder, Att'y Gen., Remarks on Criminal Justice Reform at Georgetown University Law Center (Feb. 11, 2014), *in* DEP'T JUST. NEWS, https://www.justice.gov/opa/speech/attorney-general-eric-holder-delivers-remarkson-criminal-justice-reform-georgetown.
[10] 52 U.S.C. § 10301(a).
[11] *City of Mobile v. Bolden*, 466 U.S. 55, 62, 67 (1980).
[12] 52 U.S.C. § 10301(b); *see also* United States v. Charleston Cty., 365 F.3d 341, 345 (4th Cir. 2004).
[13] *Charleston Cty.*, 365 F.3d at 345.
[14] Thornburg v. Gingles, 478 U.S. 30, 44 (1986); *see also* S. REP. NO. 97-417, at 28 (1982).
[15] *Gingles*, 478 U.S. at 47.

The statute provides that when assessing whether racial and ethnic minorities have an equal opportunity to participate in the political process, a court should consider the "totality of circumstances."[16] Courts are guided in this inquiry by a non-exhaustive list of nine factors originally developed in court cases and then included in the Senate Report accompanying the 1982 Amendments to the Voting Rights Act.[17] Those factors—often referred to as the "Senate Factors"—include the jurisdiction's history of official discrimination, whether voting patterns are polarized along racial lines, the extent to which the socioeconomic effects of discrimination hinder access to the political process, and the tenuousness of the justification for the challenged practice.[18] The Senate Factors were developed largely in the context of assessing whether an election standard, practice or procedure discriminates against minorities by impermissibly diluting the value of their vote.[19] No one factor is dispositive and "there is no requirement that any particular number of factors be proved, or [even] that the majority of them point one way or the other."[20] Instead, "the question whether the political processes 'are equally open' depends upon a searching practical evaluation of the 'past and present reality.'"[21]

In the last couple of years, as the courts have had to grapple with challenges to voter ID laws and other claims of vote denial and abridgement, the Fourth, Fifth, and Sixth Circuits have each adopted the same new two-element framework for analyzing these cases under Section 2.[22] Under the new framework for vote denial and abridgement cases, plaintiffs can establish a violation if they show that: (1) the challenged standard, practice, or procedure imposes a discriminatory burden on minority voters—meaning that it disproportionately impacts them; and (2) the burden is, in part, caused by or linked to social and historical conditions that have or currently produce discrimination

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[16] 52 U.S.C. 10301(b); *see also* Gonzalez v. Arizona, 624 F.3d 1162, 1193 (9th Cir. 2010), *aff'd sub nom.* Arizona v. Inter Tribal Council of Ariz., Inc., 133 S. Ct. 2247 (2013).

[17] *Gingles*, 478 U.S. at 36–37; *see also* Clark v. Calhoun Cty., 88 F.3d 1393, 1396 (5th Cir. 1996); S. REP. NO. 97-417, at 30.

[18] *Gingles,* 478 U.S. at 36–37; S. REP. NO. 97-417, at 28–29. The nine Senate Factors are: (1) The extent to which voting in the elections of the state or political subdivision is racially polarized; (2) The extent to which members of the minority group have been elected to public office in the jurisdiction; (3) The extent of any history of official discrimination in the state or political subdivision that touched upon the right of the members of the minority group to register, vote, or otherwise participate in the democratic process; (4) The extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment, and health, which hinder their ability to participate effectively in the political process; (5) The extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group; (6) If there is a candidate slating process, whether the members of the minority group have been denied access to that process; (7) Whether political campaigns have been characterized by overt or subtle racial appeals; (8) Whether elected officials are unresponsive to the particularized needs of the members of the minority group; and (9) Whether the policy underlying the State's or the political subdivision's use of the contested practice
. . . is tenuous. *Id.*

[19] *O*hio Conference of NAACP v. Husted, 768 F.3d 524, 554 (6th Cir. 2014), *vacated on other grounds by* No. 14–3877, 2014 WL 10384647, at *1 (6th Cir. Oct. 1, 2014) ("Unsurprisingly, then, the case law has developed to suit the particular challenges of vote dilution claims. A clear test for Section 2 vote denial claims—generally used to refer to any claim that is not a vote dilution claim—has yet to emerge.").

[20] LWV v. North Carolina, 769 F.3d 224, 240 (4th Cir. 2014) (quoting S. REP. NO. 97-417, at 29); S. REP. NO. 97-417, at 30.

[21] S. REP. NO. 97-417, at 30 (footnote omitted).

[22] *LWV*, 769 F.3d at 240; *Husted*, 768 F.3d at 554; Veasey v. Abbott, 830 F.3d 216, 244 (5th Cir. 2016).

against members of the protected class.[23] This new two element framework adds to and draws upon the Senate Factors courts have relied upon in the past to analyze vote dilution cases.[24] Though only adopted in three circuits, this very workable framework is likely to be more broadly adopted over the next few years if other circuits find themselves grappling with vote denial and abridgement cases.

The Supreme Court has emphasized the broadness of Section 2's reach, recently proclaiming in *Shelby County. v. Holder* that it imposes a "permanent, nationwide ban on racial discrimination in voting."[25] Section 2 "prohibits all forms of voting discrimination" that lessen opportunity for minority voters.[26] Though most Section 2 cases have involved state action that discriminates against minorities by reducing or diluting the value of their vote—such as cases involving claims against discriminatory redistricting plans or at-large methods of election—plaintiffs have used Section 2 to strike down various discriminatory vote denial and abridgement practices, including the imposition of barriers on the ability to register to vote,[27] restrictive voter ID laws,[28] reductions in the period available for early in-person voting,[29] unequal access to voter registration,[30] unequal access to polling places and early voting sites,[31] and underrepresentation of minority poll officials.[32]

III. Facial Challenges to Felon Disenfranchisement Laws Under Section 2 Have Failed

While voting rights advocates have effectively used Section 2 to combat many different types of discriminatory voting practices, they have had almost no success when attempting to use the statute to strike down felon disenfranchisement practices. Six circuits have reviewed and ultimately rejected Section 2 challenges to state felon disenfranchisement laws: the First, Second, Fourth, Sixth, Ninth, and Eleventh Circuits.[33]

In the most recent of the felon disenfranchisement cases reviewed by a federal circuit court – *Farrakhan v. Gregoire* (*Farrakhan II*)—the Ninth Circuit narrowed the scope of an earlier decision in which it had held that facial challenges to felon disenfranchisement laws can be mounted under

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[23] *See supra* note 22.
[24] The *en banc* panel that recently decided the Texas voter ID case explained that with vote denial and abridgement cases, the Senate Factors "should be used to help determine whether there is a sufficient causal link between the disparate burden imposed and social and historical conditions produced by discrimination." *Veasey*, 830 F.3d at 245. In other words, the Senate Factors should be used "to examine causality under the second part of the two-part analysis." *Id.*
[25] Shelby Cty. v. Holder, 133 S. Ct. 2612, 2631 (2013).
[26] Thornburg v. Gingles, 478 U.S. 30, 45 n.10 (1986).
[27] *LWV*, 769 F.3d at 239.
[28] Veasey v. Perry, 830 F.3d 216 (5th Cir. 2016) (en banc).
[29] Ohio Conference of the NAACP v. Husted, 43 F. Supp. 3d 808 (S.D. Ohio 2014), *aff'd*, 768 F.3d 524 (6th Cir. 2014), *vacated on other grounds by* No. 14–3877, 2014 WL 10384647, at *1 (6th Cir. Oct. 1, 2014).
[30] Operation PUSH v. Allain, 674 F. Supp. 1245 (N.D. Miss. 1987), *aff'd sub nom.* Operation PUSH v. Mabus, 932 F.2d 400 (5th Cir. 1991).
[31] Spirit Lake Tribe v. Benson Cty., No. 10-cv-095, 2010 WL 4226614 (D.N.D. Oct. 21, 2010); Brown v. Dean, 555 F. Supp. 502 (D.R.I. 1982); Brooks v. Gant, No. 12-cv-5003, 2012 WL 4482984 (D.S.D. Sept. 27, 2012).
[32] Harris v. Graddick, 615 F. Supp. 239 (M.D. Ala. 1985).
[33] Simmons v. Galvin, 575 F.3d 24 (1st Cir. 2009); Hayden v. Pataki, 449 F.3d 305 (2d Cir. 2006); Howard v. Gilmore, No. 99-2285, 2000 WL 203984, at *1 (4th Cir. Feb. 23, 2000); Wesley v. Collins, 791 F.2d 1255, 1259–61 (6th Cir. 1986); Farrakhan v. Gregoire (*Farrakhan II*), 623 F.3d 990 (9th Cir. 2010) (en banc).

Section 2. In *Farrakhan II*, the court held that—unlike other Section 2 cases–plaintiffs bringing facial challenges to felon disenfranchisement laws must prove that the state's "criminal justice system is infected by intentional discrimination or that the felon disenfranchisement law was enacted with such intent."[34]

The First and Second Circuits concluded that the felon disenfranchisement laws they reviewed, neither of which involved ex-felons, could not be facially challenged under Section 2.[35] In *Simmons*, the First Circuit noted at the outset that the case concerned a facial challenge to a law that is "among the narrowest of state felon disenfranchisement provisions" in the nation because it only denied the right to vote to currently incarcerated felons.[36] In *Hayden*, an *en banc* panel of the Second Circuit explained that, "it is important to emphasize, [the challenged New York statute] disenfranchises only currently incarcerated prisoners and parolees."[37] In his concurring opinion, Judge Sack asserted, "Today's decision, of course, explicitly leaves the issue [of disenfranchisement of ex-felons] open."[38]

When the Fourth and Sixth Circuits reviewed challenges to state felon disenfranchisement laws under Section 2, both circuits rejected the plaintiffs' claims based on plaintiffs' failure to plead a sufficient nexus between race and the disenfranchisement of felons.[39] In so doing, both of these circuit courts appeared to assume that a challenge to a state disenfranchisement law can be brought under Section 2 if appropriately pled.

In *Johnson v. Florida*, the Eleventh Circuit, sitting *en banc*, went further, construing Section 2 as inapplicable to a Florida constitutional provision that disenfranchises ex-felons as well as current felons.[40] However, the opinion does not address whether its holding insulates every application of a disenfranchisement provision. Indeed, as discussed below, the stated rationale underlying its holding suggests otherwise.

Finally, a significant number of judges in the circuits that have reviewed and rejected challenges to felon disenfranchisement provisions would have gone the other way on those cases. Four of the thirteen judges serving on the *en banc* panel in the *Hayden* case would have allowed plaintiffs to go forward with their facial challenge to New York's felon disenfranchisement provision.[41] Two of the twelve judges in the *Johnson* case found that plaintiffs' challenge to Florida's felon disenfranchisement provision was cognizable.[42] And in *Farrakhan II*, four of the eleven judges parted

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[34] *Farrakhan II*, 623 F.3d at 993 (alteration in original).
[35] *Simmons*, 575 F.3d 24 (holding that plaintiffs failed to state a claim under Section 2 when they challenged Massachusetts's law disenfranchising currently incarcerated felons); *Hayden*, 449 F.3d 305 (holding that plaintiffs cannot mount a challenge to a statute that disenfranchises incarcerated felons and parolees under Section 2 of the VRA).
[36] *Simmons*, 575 F.3d at 30–31.
[37] *Hayden*, 449 F.3d at 314.
[38] *Hayden*, 449 F.3d at 339 (Sack, J., concurring).
[39] Howard v. Gilmore, No. 99-2285, 2000 WL 203984, at *1 (4th Cir. Feb. 23, 2000); Wesley v. Collins, 791 F.2d 1255, 1259–61 (6th Cir. 1986).
[40] Johnson v. Florida, 405 F.3d 1214 (11th Cir. 2005) (en banc).
[41] *Hayden*, 449 F.3d at 343 (Parker, J., dissenting); *id.* at 362 (Calabresi, J., dissenting); *id.* at 367 (Sotomayor, J., dissenting); *id.* at 368 (Katzmann, J., dissenting).
[42] *Johnson,* 405 F.3d at 1239–44 (Wilson, J., concurring in part and dissenting in part); *id.* at 1244–51 (Barkett, J., dissenting).

company from the majority to the extent that the majority suggested that proof of discriminatory intent is required to prevail in a Section 2 challenge to a felon disenfranchisement provision.[43]

These judges indicated that, in their view, courts should focus on the standard Section 2 Senate Factors to determine whether, under the totality of the circumstances, a felon disenfranchisement provision violated Section 2.[44] Then-Judge Sotomayor, one of the dissenters in *Hayden,* explained her position as to whether Section 2 reached New York's felon disenfranchisement provision as follows:

> I fear that the many pages of the majority opinion and concurrences – and the many pages of the dissent that are necessary to explain why they are wrong – may give the impression that this case is in some way complex. It is not.
>
> It is plain to anyone reading the Voting Rights Act that it applies to all "voting qualifications[s]." And it is equally plain that [New York's felon disenfranchisement provision] disqualifies a group of people from voting. These two propositions should constitute the entirety of our analysis. Section 2 of the Act by its unambiguous terms subjects felon disenfranchisement and all other voting qualifications to its coverage.[45]

Notwithstanding the dissenting opinions of then-Judge Sotomayor and other jurists, the fact remains that the majorities on the circuits that have reviewed facial challenges to felon disenfranchisement laws under Section 2 have consistently treated those cases very differently from other vote denial cases and have ultimately rejected such challenges.

IV. Felon Disenfranchisement Remains Vulnerable to an As-Applied Challenge Under Section 2

To date, the Supreme Court has never reviewed a Section 2 case relating to felon disenfranchisement, and the circuit courts have only reviewed Section 2 challenges to the felon disenfranchisement laws themselves rather than to the application of those laws.[46]

Even though the courts have not yet considered a Section 2 as-applied challenge to a felon disenfranchisement law, there is nothing novel about challenging the application of a law under Section 2. The statute explicitly states that no "voting qualification . . . shall be . . . *applied* by any State . . . in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color."[47] Moreover, the statute's reference to voting "practice[s] or procedures" clearly encompasses the procedures for reinstating disenfranchised ex-

[43] Farrakhan v. Gregoire (*Farrakhan II*), 623 F.3d 990, 995–96 (9th Cir. 2010) (en banc) (Thomas, J., concurring).
[44] *Id.* at 997.
[45] *Hayden,* 449 F.3d at 367–68 (Sotomayor, J., dissenting).
[46] In 2010, the ACLU attempted an "as-applied" challenge to Arizona's disenfranchisement scheme under the Equal Protection Clause of the Fourteenth Amendment. Harvey v. Brewer, 605 F.3d 1067 (9th Cir. 2010). The case targeted practices similar to the ones this author proposes could be the focus of a lawsuit under Section 2 of the VRA. The 9th Circuit affirmed the district court's decision to grant defendants' motion to dismiss. For reasons explained below, the author believes voting rights advocates would have more success were they to seek to vindicate the rights of similarly situated voters under a Section 2 theory.
[47] 52 U.S.C. § 10301(a) (emphasis added).

felons that would be the focus of an as-applied felon disenfranchisement suit.

Not only does the statutory text speak for itself when it comes to the appropriateness of using Section 2 to challenge a particular application of a felon disenfranchisement law, plaintiffs have successfully used the statute in this way in other contexts. Examples of Section 2 as-applied cases include: *Dillard v. Town of North Johns*, where plaintiffs successfully challenged the way elected officials in the Town of North Johns applied Alabama's candidacy requirements, rather than the requirements themselves;[48] *Ohio Conference of the NAACP v. Husted*, where plaintiffs succeeded in obtaining a preliminary injunction after challenging the application of state law related to early in-person voting;[49] *Spirit Lake Tribe v. Benson County*, where plaintiffs successfully challenged how local officials applied state law related to polling place locations;[50] and *Harris v. Graddick*, where plaintiffs went forward with a challenge to the discriminatory application of a law related to the selection of poll officials.[51]

Given the Supreme Court's stated preference for as-applied constitutional challenges to statutes, there is good reason to believe that courts would be similarly receptive to plaintiffs who pursued the more restrained and conservative approach of challenging a specific application of a felon disenfranchisement law under Section 2 instead of a wholesale challenge to the law. As the Supreme Court has stated, facial challenges are "the most difficult . . . to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."[52] Indeed, in *Washington State Grange v. Washington State Republican Party*, the Supreme Court made clear that facial challenges are "disfavored."[53] The Court explained that such claims often rely on speculation as to the consequences of the law; "run contrary to the fundamental principle of judicial restraint" by, among other things, "formulat[ing] a rule . . . broader than is required by the precise facts to which it is applied";[54] and "threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution."[55]

A. Circuits Provide Guidance as to What Applications Violate Section 2

The rationales undergirding the majority opinions of the circuits that have reviewed felon disenfranchisement provisions suggest that courts will be receptive to a Section 2 suit challenging the application of a felon disenfranchisement provision to ex-felons, convicted of low-level, non-violent drug offenses felonized in the modern era.

First, much of the logic behind not extending Section 2 to felon disenfranchisement would not

[48] 717 F. Supp. 1471, 1473–76 (M.D. Ala. 1989)
[49] 43 F. Supp. 3d 808 (S.D. Ohio 2014), *aff'd*, 768 F.3d 524 (6th Cir. 2014), *vacated on other grounds by* No. 14–3877, 2014 WL 10384647, at *1 (6th Cir. Oct. 1, 2014).
[50] No. 2:10-cv-095, 2010 WL 4226614 (D.N.D. Oct. 21, 2010).
[51] 615 F. Supp. 239 (M.D. Ala. 1985).
[52] United States v. Salerno, 481 U.S. 739, 745 (1987).
[53] 552 U.S. 442, 450 (2008).
[54] *Id.* (citing Ashwander v. TVA, 297 U.S. 288, 346–47 (1936) (Brandeis, J., concurring).
[55] *Id.* at 451.

apply to a case focused on vindicating the rights of ex-felons only. In *Hayden*, the court stated that the Section 2 claim under its review—a facial challenge to a New York law that disenfranchised otherwise qualified felons still serving their criminal sentences—brought the Voting Rights Act into direct conflict with the state's strong constitutionally protected interest in determining how to run and administer its penal system.[56] The court went on to note that challenges to felon disenfranchisement provisions which also disenfranchised ex-felons "may not as clearly implicate the state's interest in the administration of prisons."[57] By taking this guidance a step further and focusing a claim on *only* those who have completed their sentence and who are no longer living under the supervision of the state penal system, voting rights advocates could avoid the conflict entirely.

The *Simmons* and *Hayden* courts also reasoned that since Section 2 concerns ensuring that voters can "fully participate in the political process," Congress could never have intended it to reach those who are incarcerated. The *Hayden* court explained, "There is no question that incarcerated persons cannot 'fully participate in the political process' – they cannot petition, protest, campaign, travel, freely associate, or raise funds. It follows that Congress did not have this subpopulation in mind when the VRA Section at issue took its present form in 1982."[58] This line of reasoning also counsels for targeting a claim only on the disenfranchised who are no longer incarcerated and have the ability to fully participate in the political process.

Second, the circuit courts have indicated that they would be more receptive to a Section 2 claim focused exclusively on crimes felonized in the modern era. The *Johnson* court expressed concerns about the potential conflict between Section 2 and the Penalty Clause of Section 2 of the Fourteenth Amendment, and the *Hayden*, *Simmons*, and *Johnson* courts refused to extend Section 2's reach to felon disenfranchisement cases if it allowed plaintiffs to challenge laws "deeply rooted in the Nation's history."[59] Plaintiffs would avoid these issues entirely if their Section 2 claim focused exclusively on the application of a felon disenfranchisement law to citizens disenfranchised for committing low-level drug crimes.

In *Johnson*, the court explained that because the Penalty Clause generally exempts felon disenfranchisement provisions,[60] Section 2 of the Voting Rights Act must be interpreted as not reaching felon disenfranchisement provisions to avoid "a serious constitutional question."[61]

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[56] Hayden v. Pataki, 449 F.3d 305, 327 (2d Cir. 2006).
[57] *Id.* at 328 n.23.
[58] *Id.* at 321; *see also* Simmons v. Galvin, 575 F.3d 24, 40–41 (1st Cir. 2009).
[59] *Hayden*, 449 F.3d at 338 (Sack, J., concurring); *Simmons*, 575 F.3d at 34; Johnson v. Florida, 405 F.3d 1214, 1228 (11th Cir. 2005) (en banc).
[60] The Penalty Clause of Section 2 of the Fourteenth Amendment states: "[W]hen the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State." U.S. CONST. amend. XIV, § 2.
[61] *Johnson*, 405 F.3d at 1228–30 (citing Richardson v. Ramirez, 418 U.S. 24, 55 (1974) (rejecting challenge to felon

Plaintiffs could avoid the perceived conflict with the Penalty Clause by explicitly limiting their challenge to relatively recent applications of a felon provision never envisioned at the time of the Fourteenth Amendment's ratification.

Language found in the Reconstruction and Enabling Acts that Congress passed when readmitting the Confederate States into the Union supports the argument that the Penalty Clause is not in tension with a Section 2 claim focused exclusively on low-level, recently felonized drug crimes. The Reconstruction and Enabling Acts, enacted by the same Congress that a few months earlier had submitted the Fourteenth Amendment to the States for ratification, conditioned readmission on the States not depriving citizens of their right to vote, except with regard to such crimes as "are now felonies at common law," or "rebellion."[62] Just as those two federal statutory laws, which prohibited states from disenfranchising citizens who had committed non-common law felonies, were not in conflict with the Penalty Clause, Section 2 would also not be in conflict if it were applied in a lawsuit challenging disenfranchisement based on a few types of crimes that do not meet the definition of "rebellion" or a "felony at common law."

In *Harvey v. Brewer*, the court rejected plaintiffs' argument that the language of the Reconstruction and Enabling Acts supported their Equal Protection claim challenging Arizona's application of its felon disenfranchisement law only to felonies not at common law. While the court found that the language of the Reconstruction and Enabling Acts did not have to be reconciled with the type of disenfranchisement permitted under the Fourteenth Amendment,[63] language in the decision strongly suggests that the court would have viewed such a case differently were it brought under Section 2 of the Voting Rights Act instead of the Equal Protection Clause. The court explained, "Simply because the Fourteenth Amendment does not itself prohibit States from enacting a broad array of felon disenfranchisement schemes does not mean that Congress cannot do so through legislation—provided, of course, that Congress has the authority to enact such a prohibition."[64]

A concern articulated by both the *Johnson* and *Hayden* majorities closely related to the perceived conflict between Section 2 facial challenges to felon disenfranchisement laws and the Penalty Clause is that extending Section 2's reach to encompass the felon disenfranchisement cases before them would mean that plaintiffs could challenge laws and practices no different from those "deeply rooted in the Nation's history."[65] An "as-applied" challenge directed at decisions to apply felon provisions at low-level drug crimes felonized in the modern era, with consequences only apparent in recent decades, would sidestep this issue as well. Such challenges would leave the "deeply rooted"

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disenfranchisement provision under Equal Protection Clause, in part, because "the exclusion of felons from the vote has an affirmative sanction in Section 2 of the Fourteenth Amendment")).

[62] Harvey v. Brewer, 605 F.3d 1067, 1075–77 (9th Cir. 2010) (citing 15 Stat. 73 (1868); 14 Stat. 428, § 5 (1867)). Neither "rebellion" nor "felonies at common law" encompass the types of less serious, recently felonized crimes that could be successfully challenged under the Voting Rights Act. *See id.* at 1071 (accepting that drug offenses are statutory crimes that are not felonies at common law).

[63] *Id.*, at 1076–77.

[64] *Id.*

[65] *Johnson*, 405 F.3d at 1228; *see also* Hayden v. Pataki, 449 F.3d 305, 338 (2d Cir. 2006) (Sack, J., concurring); Farrakhan v. Gregoire (*Farrakhan II*), 623 F.3d 990, 993 (9th Cir. 2010) (en banc).

felon disenfranchisement provisions themselves standing. Moreover, preventing large numbers of otherwise qualified voters from voting for life because they either used or distributed drugs has nothing to do with "deeply rooted" traditions. Instead, this type of mass disenfranchisement for the commission of a generally unreported crime that, according to social scientists, is routinely enforced in a racially discriminatory and profoundly disproportionate manner is a recent phenomenon.[66]

A focus on less serious, recently felonized crimes would also make it more difficult for courts to interpret a felon disenfranchisement case as at odds with the Voting Rights Act's legislative history. The majority in *Hayden* reasoned that since the Congressional Record establishes that Congress explicitly rejected the idea of including felon disenfranchisement as one of the tests or devices it would ban outright under Section 4 of the Act, Congress likely did not intend for Section 2 to encompass the type of disenfranchisement provision the court had before it.[67] This logic holds only to the extent that a court perceives a Section 2 felon disenfranchisement challenge as an attempt to circumvent Congress's decision in 1965 not to ban felon disenfranchisement statutes outright. A suit that only concerns those disenfranchised for the commission of low level drug offenses would avoid this perceived conflict with Section 4's legislative history as these offenses first became felonies years after the enactment of the Voting Rights Act. [68]

The *Hayden* majority also opined that the absence of an explicit discussion in the Congressional Record that Section 2 reached felon disenfranchisement was further indication that Section 2 had no application to the case before it.[69] By this, the court was not suggesting that every voting practice, procedure, or qualification challenged under Section 2 had to be discussed in the Congressional Record. Instead, the court was simply voicing concern about the absence of discussion in the Congressional Record relating to the type of felon disenfranchisement provision under its consideration when Congress was fully aware that these provisions existed at the time it enacted the Voting Rights Act and Section 2's results standard.[70] Presumably, a court reviewing a different type of challenge that focused exclusively on recent applications of a felon disenfranchisement provision—applications with impacts felt only after the enactment of the Voting Rights Act and Section 2's results standard—would not engender the same type of concerns from a reviewing court.[71]

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[66] MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 59–139 (2010) (citing HUMAN RIGHTS WATCH, PUNISHMENT AND PREJUDICE: RACIAL DISPARITIES IN THE WAR ON DRUGS (May 1, 2000), https://www.hrw.org/legacy/reports/2000/usa/); KATHERINE BECKETT & THEODORE SASSON, THE POLITICS OF INJUSTICE: CRIME AND PUNISHMENT IN AMERICA (2004)); MARC MAUER, SENTENCING PROJECT, THE CHANGING RACIAL DYNAMICS OF THE WAR ON DRUGS (Apr. 2009), http://www.sentencingproject.org/wp-content/uploads/2016/01/The-Changing-Racial-Dynamics-of-the-War-on-Drugs.pdf.

[67] *Hayden*, 449 F.3d at 318–19; *see also Farrakhan II,* 623 F.3d at 993.

[68] ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA 307–32 (2016); JAMES KILGORE, UNDERSTANDING MASS INCARCERATION: A PEOPLE'S GUIDE TO THE KEY CIVIL RIGHTS STRUGGLE OF OUR TIME 59–72 (2015).

[69] *Hayden*, 449 F.3d at 316–17.

[70] *Id.* at 322–23.

[71] *See* FACT SHEET: TRENDS IN U.S. CORRECTIONS, SENTENCING PROJECT 3 (2014). http://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf (reporting that "the number of Americans incarcerated for drug offenses has skyrocketed from 41,000 in1980 to nearly a half million in 2014.").

Third, courts will be much more receptive to a Section 2 lawsuit targeting an outlier application of a felon disenfranchisement statute. Courts have indicated that they have resisted applying Section 2's results standard to felon disenfranchisement laws, in part, because they are aware that doing so would inevitably require invalidating numerous longstanding laws existing in much of the country. Indeed, in *Farrakhan II*, before the court foreclosed using the Section 2 results standard to facially challenge felon disenfranchisement laws, it noted, "Today, an overwhelming number of states—including all states in our circuit—disenfranchise felons."[72] A lawsuit targeting what has become the outlier practice of disenfranchising disproportionate numbers of African-American ex-felons convicted of low-level drug crimes would avoid this concern entirely.

Indeed, the fact that only a small number of states have chosen to pursue this outlier practice speaks to the tenuousness of its justifications. Why is it that some of the states with the most pronounced histories of discrimination against African-Americans are the same states that are now most aggressively pursuing the practice? Why is it that states like Florida are disenfranchising individuals for life merely for committing the crime of possessing more than 20 grams of marijuana or growing a single marijuana plant when these are offenses that are not even treated as misdemeanors in parts of the country?[73] Why is it that these outlier states are disenfranchising ex-felons for having committed low-level drug crimes that social scientists tell us are especially susceptible to discriminatory enforcement practices?[74] Thus, we see that tenuousness, pretext, and the foul odor of underlying discriminatory intent is that much more discernable when the focus is on the outlier practice of disenfranchising ex-felons for committing low-level drug offenses. For this reason too, there is reason to anticipate that courts will be more receptive to this type of an as-applied Section 2 challenge.

B. An Approach Consistent With What Has Worked in the Past

The idea that courts could be receptive to a Section 2 claim targeting how a state applies its felon disenfranchisement law to a sympathetic subset of those impacted by the law is consistent with what has worked in the context of constitutional challenges.

In the one example of where an equal protection challenge to a criminal disenfranchisement statute was successful both at the circuit court level and at the Supreme Court—*Hunter v. Underwood*—plaintiffs prevailed by focusing on a subset of crimes where application of criminal disenfranchisement most clearly involved racial discrimination and where the legitimate rationale was most obviously tenuous.[75] In *Hunter*, the Supreme Court struck down a criminal disenfranchisement provision of the Alabama Constitution as violative of the Equal Protection Clause of the Fourteenth Amendment to the extent that it disenfranchised persons convicted of crimes involving "moral turpitude," as determined at the discretion of the Boards of Registrars.[76]

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[72] *Farrakhan II*, 623 F.3d 993.
[73] *Florida Laws & Penalties*, NORML (2017), http://norml.org/laws/item/florida-penalties.
[74] ALEXANDER, *supra* note 66, at 59–139.
[75] 471 U.S. 222 (1985).
[76] *Id.* at 226, 229–30.

Plaintiffs prevailed not by attempting to obtain voting rights for all those disenfranchised by Alabama's criminal statute, but by getting the Court to set aside only those parts of the criminal disenfranchisement law most clearly adopted with the intention of disenfranchising blacks and leaving most of the law undisturbed.

The crimes involved in *Hunter* were misdemeanors, not felonies. But just as Alabama would not have been able to insulate itself from the Court's decision in *Hunter* by felonizing crimes of moral turpitude that had previously been misdemeanors, States cannot insulate themselves simply by felonizing certain crimes that historically would have been either misdemeanors or would not have been regarded as crimes at all where those crimes disproportionately affect African-American voters. Today, a significant portion of the African-American population has been disenfranchised because of felonized, non-violent drug offenses;[77] crimes considered so minor that they routinely do not involve any type of a prison sentence.[78] These are crimes that only became felonies in the 1970s.[79] And they are unreported crimes often enforced by police who exercise their discretion in a discriminatory manner.[80] These drug crimes are, in many ways, the "crimes of moral turpitude" of today; they are the crimes most vulnerable to court challenges under Section 2.

At the district court level, plaintiffs have also had some success when they have focused on challenging how a felon disenfranchisement law has been applied to certain individuals or to a subset of felons. In *Hobson v. Pow*, the court invalidated an Alabama law disenfranchising persons convicted of the crime of "assault and battery on the wife."[81] There was no comparable provision disenfranchising women for "assault and battery on the husband." The court held that the law violated the Equal Protection Clause because it was a gender based classification for which the state had presented no reasonable justification.[82] And in *Williams v. Taylor*, the court of appeals vacated and remanded for trial a convicted felon's claim that local election officials in Marshall County, Mississippi selectively removed him from the list of registered voters because of his race and political association.[83] The court held that while the plaintiff, as a convicted felon, had no right to vote under state law, "he has the right not to be the arbitrary target of the Board's enforcement of the statute."[84]

Finally, in the recent *Frank v. Walker* (*Frank II*) case, the Seventh Circuit allowed an as-applied challenge to Wisconsin's treatment of those most burdened by the state's voter ID law to go forward after earlier rejecting a broader facial challenge to the law.[85] The court explained that although it would not strike down Wisconsin's voter ID law in its entirety because the application of

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[77] *See* BUREAU OF JUSTICE STATISTICS, *supra* note 3, at 2–3.
[78] *Id.*
[79] HINTON, *supra* note 68, at 307–32 (2016); KILGORE, *supra* note 68, at 59–72 (2015).
[80] Jamie Fellner, *Race, Drugs, and Law Enforcement in the United States*, 20 STAN.L.& POL'Y REV. 257, 261–77 (2009) (discussing the role of race in shaping enforcement of the country's drug laws).
[81] 434 F. Supp. 362 (N.D. Ala. 1977).
[82] *Id.* at 367.
[83] 677 F.2d 510 (5th Cir. 1982).
[84] *Id.* at 517.
[85] Frank v. Walker (*Frank II*), 819 F.3d 384, 385–87 (7th Cir. 2016).

the statute to the vast majority of voters is "amply justified," plaintiffs may still prevail on a claim focused on voters "who just can't get acceptable photo ID with reasonable effort."[86]

All of these examples suggest that courts will be more willing to embrace Section 2 felon disenfranchisement claims limited to vindicating the rights of a narrow band of voters such as low-level, minority drug offenders where the state's justifications are most tenuous and the impact most discriminatory.

V. Conclusion

While federal courts have declined thus far to strike down felon disenfranchisement laws under Section 2 of the Voting Rights Act, that does not mean that they can never run afoul of Section 2. Careful review of appellate court decisions in this area of the law suggests that courts may be receptive to an as-applied challenge targeting a state's disenfranchisement of otherwise qualified minority voters who have completed their sentences, but are nonetheless disenfranchised because they at some point committed a non-violent, low-level drug offense.

Of all the circuit opinions addressing felon disenfranchisement laws, *Johnson* goes the furthest in limiting the ability of plaintiffs to challenge such laws under Section 2. However, *Johnson* is limited both by the Supreme Court's decision in *Hunter* and its own internal logic. For these reasons, even in the Eleventh Circuit, states would be sorely mistaken if they assumed that *Johnson* automatically immunizes them from any type of a challenge under Section 2.

The Eleventh Circuit may find itself wrestling with felon disenfranchisement issues very soon. On September 26, 2016, a group of leading voting rights advocates filed a complaint against Alabama's current felon disenfranchisement law.[87] In the complaint, plaintiffs fashion their case as a facial challenge, and they state that they seek to strike down the state's felon disenfranchisement law in its entirety.[88] In addition to constitutional clams, the complaint includes a claim that the current law violates Section 2.[89] The case is an unusually strong one because it challenges Alabama's use of a provision very similar to the intentionally discriminatory and vague "moral turpitude" provision the Supreme Court struck down in *Hunter v. Underwood*.[90]

Even if the court concludes that intentional discrimination does not infect the entirety of Alabama's felon disenfranchisement statute or decides not to apply Section 2's results standard to strike down the law in its entirely, it may still require Alabama to modify how it goes about applying its law. Depending on how plaintiffs develop the record, the Court may decide that Alabama's law violates Section 2 to the extent that it ensnares individuals who remain disenfranchised after fully completing

[86] *Id.* at 387–88.
[87] Class-Action Complaint for Declaratory and Injunctive Relief, Thompson v. Alabama, No. 2:16-cv-783, 2016 WL 5405634 (M.D. Ala.) (Sept. 26, 2016).
[88] *Id.* at 3.
[89] *Id.* ("Plaintiffs pray that this Court strike down this discriminatory system in its entirety as racially discriminatory, unconstitutional, and unlawful under Section 2 of the Voting Rights Act").
[90] *Id.* at 2–3, 5–9, 23–39.

their sentences for committing low-level drug offenses or other relatively minor statutory offenses.[91]

In sum, although advocates have failed in the past when attempting to challenge felon disenfranchisement under Section 2, they may have more success going forward. There is reason to believe that, if a case is properly framed, courts will, at the very least, be receptive to using Section 2 to limit certain especially harmful and discriminatory applications of a felon disenfranchisement law, such as a state's refusal to reinstate the voting rights of citizens who have already paid their debt to society for the commission of a low-level drug offense.

About the Author

Avner Shapiro currently serves as a trial attorney in the Voting Section of the Civil Rights Division of the U.S. Department of Justice where he has participated in litigating Division voting rights cases under Section 2 of the Voting Rights Act, including: the successful challenge to North Carolina's roll back of early voting, elimination of same day voting and out-of precinct voting, and its photo ID law; the successful challenge to Texas's photo ID law; and successful challenges to at-large methods of election in Port Chester, NY, and Blaine County, MO. He has also served as a Special Litigation counsel at the Division's Special Litigation Section where he supervised investigations into and litigation against police departments, jails, prisons, and departments of corrections engaging in patterns or practices of constitutional violations, and in the Division's Criminal Section where he prosecuted hate crimes and color of law cases. The author also currently serves as a Commissioner on the Montgomery County Council's Commission on People with Disabilities of Montgomery County, MD. The author thanks Chris Asta, currently an associate at WilmerHale, for reviewing and providing suggestions as to how to improve a draft of this brief. The views expressed in this essay are solely those of the author. His views do not necessarily reflect, nor are they necessarily consistent with, those of his employer, the Department of Justice.

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[91] This type of cabining of the law's reach would be fully consistent with how the Fifth Circuit's en banc panel recently decided to mitigate the discriminatory effect of Texas's voter ID law by requiring the lower court to craft a remedy that would allow the narrow band of voters most burdened by the law to vote without a photo ID. Veasey v. Abbott, 830 F.3d 216, 269–272 (5th Cir. 2016).