

**Written Testimony of Campaign Legal Center
Before the U.S. House of Representatives Committee on Judiciary
Subcommittee on Constitution, Civil Rights and Civil Liberties
Hearing on “Discriminatory Barriers to Voting”
Memphis, Tennessee
September 5, 2018**

Recommendation:

Congress must ensure that a restored Voting Rights Act explicitly covers both felony disenfranchisement and re-enfranchisement laws, practices, and procedures to ensure that all racially discriminatory practices and procedures are eliminated from our democratic process. The coverage of these disenfranchisement and re-enfranchisement procedures can be justified under the Congressional authority of the Fourteenth and Fifteenth Amendments by a substantial record of racial discrimination in connection with criminal disenfranchisement and continued racially discriminatory results.

Members of the committee,

We write on behalf of Restore Your Vote Tennessee, a project of the Campaign Legal Center, which provides direct rights restoration services to people with past convictions, empowers community leaders to navigate complicated disenfranchisement and re-enfranchisement laws, and works to break down the false notion that a criminal conviction always means you cannot vote. This summer, our Restore Your Vote organizers in Knoxville, Nashville, and Memphis helped shepherd hundreds of Tennesseans with past convictions through the state’s voting rights restoration process. We write today to share some of the lessons we learned from working with Tennessee’s disenfranchisement scheme up close. In light of our extensive work on this issue in Tennessee and elsewhere, we urge Congress to include explicitly both felony disenfranchisement and re-enfranchisement procedures within the coverage of a new Voting Rights Act bill.

Background on Restore Your Vote

Campaign Legal Center (CLC) is a non-partisan, non-profit organization that works to protect and strengthen the U.S. democratic process across all levels of government through litigation, policy analysis, and public education. CLC’s Restore Your Vote Campaign restores voting rights to people with past convictions by providing direct rights restoration services, empowering community leaders to understand rights restoration laws, and breaking down the false notion that a felony conviction always means you cannot vote.

Millions of Americans have lost their right to vote because of a past felony conviction. Advocates have made vital progress across the country to reform these laws, but the problem is larger than the estimated 5 million people who are disenfranchised by their states’ voting laws. Across the country, there are an estimated 23 million people with

felony convictions. Because of complicated laws, misinformation, and poor administration, many of the 18 million Americans with past felony convictions who are currently eligible to vote remain *de facto* disenfranchised.

CLC's Restore Your Vote campaign aims to tackle this problem by developing and executing scalable models for rights restoration services, community leader training, and broad public education to combat *de facto* disenfranchisement. Our direct services and community empowerment work on the ground across the country has given CLC a unique ability to uncover hidden system errors that disenfranchise large numbers of eligible voters. We have been able to resolve some of these problems by formally raising these issues with relevant officials and negotiating for policy change. However, many other voter suppression policies related to felony disenfranchisement (and re-enfranchisement) will require either litigation or legislative fixes.

Overview of Tennessee's Disenfranchisement Law

In Tennessee, the laws regarding which people with past criminal convictions can and cannot vote is confusing. Whether a person can vote depends on the year of their conviction, the crime of their conviction, whether they are able to pay their legal debt, and whether they have completed their sentence(s). Moreover, people who lost their right to vote upon conviction but are eligible to restore their right to vote are required to file a documentary request for rights restoration. Our experience suggests that most people with past convictions do not know about this avenue for rights restoration. As a result, many Tennesseans with past convictions who are or could be eligible to vote simply do not know that they can participate.

Based on the most recent estimates from the Sentencing Project, Tennessee's law disenfranchises over 421,000 people in the state. The law denies the right to vote to 8.2 percent of the entire statewide voting-age population, including more than 21 percent of the adult black voting-age population.

People with convictions in Tennessee generally fall into one of three categories, depending on the date of their conviction(s):

- Before January 15, 1973: A felony conviction before January 15, 1973 only disqualifies a person from voting if the conviction is one of approximately twenty specific convictions **and** the judgment of conviction included a statement rendering the crime "infamous."
- Between January 15, 1973 and May 17, 1981: Convictions during this time period never disqualify a person from voting. A person with only convictions from this period can register to vote.
- After May 17, 1981: All felony convictions after May 17, 1981 disqualify a person from voting. However, many Tennesseans may be able to restore their

right to vote by applying for a Certificate of Restoration (COR). A person qualifies for a COR if they meet all of the following criteria:

- They have completed their sentence, including parole and probation;
- They have paid all court fees imposed at sentencing or have been declared indigent at the time of the COR application;
- They have paid all restitution imposed at sentencing;
- They are current on all child support, if applicable.

If eligible, a person must have a probation officer or clerk of court fill out the COR form for them and must get one form for each conviction.¹

Restore Your Vote Tennessee

From June to August 2019, CLC's Restore Your Vote project employed three organizers, one in each of Tennessee's most populous cities: Nashville, Knoxville, and Memphis. During that time, our organizers helped approximately 200 people determine their path to voting rights restoration and trained 300 community leaders on the law.

We found that across Tennessee the majority of people who have been involved with the criminal justice system do not understand Tennessee's disenfranchisement law and what it means for their right to vote. More shockingly, we found that many of the government officials responsible for executing the laws do not fully understand Tennessee's disenfranchisement law or rights restoration procedures. On the whole, this means that most people who are eligible to vote or eligible to restore their voting rights are unaware of their voting rights.

We also found that Tennessee's re-enfranchisement scheme post-conviction disenfranchises many people simply because they are too poor to pay their court costs, restitution, or child support. We found that, in practice, this requirement applies even in light of demonstrated indigency. Although Tennessee law includes an indigency exception to the court costs requirement, that exception is practically inaccessible for many Tennesseans. In short, we found that Tennessee's re-enfranchisement law operates as a modern-day poll tax.

We hope these findings and the stories of people in Tennessee struggling to realize their basic rights of citizenship can help inform the structure of and case for Congressional action to end felony disenfranchisement.

Discriminatory History of Tennessee's Felony Disenfranchisement Scheme

The history of Tennessee's felony disenfranchisement law, like so many other states across the country, reveals an underlying racially discriminatory purpose. The root of

¹ Tennessee law states that a probation officers or corrections officials will fill out the Certificate of Restoration. However, practice across the 96 counties varies. We estimate that roughly half of the counties delegate this responsibility to their clerks of court, if they are aware of the law at all.

Tennessee’s current felony disenfranchisement is found in Tennessee’s Constitution as passed after the Civil War in February of 1870, just after the passage of the Fifteenth Amendment to the U.S. Constitution. At this time, Tennessee legislators, like lawmakers in other Southern states, recognized that Section Two of the 14th Amendment might allow the criminal legal system to become a loophole to the promise of political equality in the Reconstruction Amendments. As Pippa Holloway explains in her book, “Living in Infamy,”:

Section Two offered an opportunity for southern whites to draw on the legal tradition of infamy to define the political rights of African Americans. Denying African Americans citizenship due to criminal convictions, thereby rendering them legally infamous, was part of the larger effort to save the status quo of white supremacy in the South. Extending the status of infamy to as much of the black population as possible would restrict citizenship in a way that had both precedent and utility, connecting race to the long tradition of denying the vote to infamous individuals. It could make those who had been “infamous in law” under slavery become “infamous in fact” during and after Reconstruction.²

The 1870 Tennessee constitution denied the right to vote to anyone convicted of “infamous crimes,” a phrase which is still the basis for disenfranchisement in the state today.

Perhaps unsurprisingly then, Tennessee’s law continues to have a disparate impact on African-American Tennesseans. As of 2016, an estimated 421,000 Tennesseans could not vote because of a past conviction, 8.26 percent of the voting-age population.³ Of that number, 173,895 were African American, accounting for 21.27% of the African American Voting Age Population.⁴ Black folks made up 16% of the total voting age population, but accounted for 41.3% of disenfranchised citizens.

Tennessee’s disenfranchisement scheme is still serving its purpose of circumventing the promise of political equality. Disenfranchisement in the Volunteer State is tainted by racism root and branch.

Tennessee’s Re-Enfranchisement Law Restores the Right to Vote to Some But Discriminates on the Basis of Wealth

Tennessee has both expanded and contracted the reach of its disenfranchisement law over the years. In 1981, Tennessee expanded disenfranchisement by defining “infamous

² Pippa Holloway, *Living in Infamy: Felon Disenfranchisement and the History of American Citizenship* 12 (2014).

³ The Sentencing Project, *Six Million Lost Voters*, <https://www.sentencingproject.org/publications/6-million-lost-voters-state-level-estimates-felony-disenfranchisement-2016/> (2016).

⁴ *Id.*

crimes” to mean all felonies.⁵ The state preserved a process by which a person who completed her sentence might restore her right to vote through petition to a court, but then went about narrowing that by creating a list of ineligible convictions in 1986,⁶ then subsequently expanding that list in 1996⁷ and 2006⁸.

In 1986, Tennessee created a new process by which those convicted of felonies could restore their right to vote.⁹ In subsequent years, Tennessee has narrowed that pathway. The 1986 law creating the Certificates of Restoration (COR) pathway to rights restoration required probation officials to issue CORs to all eligible individuals automatically. But, as a practical matter, there is little indication that those CORs were issued *sua sponte*. Three years later, Tennessee amended the law to require that a disenfranchised person must affirmatively request their COR.¹⁰ Since then, the Legislature has also added a requirement that all restitution be paid and that individuals be current on child support before CORs are granted.¹¹ Most recently, Tennessee added yet another requirement that all court costs be paid to receive a COR.¹² While that provision included an indigency exception, that exception is rarely implemented.

In Restore Your Vote’s work, we have found that legal financial obligations (LFOs) are the biggest barrier for people we have assisted. Fifty-four percent of people we assisted in Tennessee cannot restore their rights because of outstanding LFOs. Those numbers are even higher in the urban centers of Memphis (55%) and Nashville (68%). LFO requirements lead to wealth discrimination in voting, plain and simple. If a rich person and a poor person are convicted of the same crime with the same sentence in Tennessee, the rich person can buy their right to vote back while the poor person will remain disenfranchised indefinitely. That is a poll tax.

There is no state interest that can justify this type of wealth-based barrier. Depriving individuals who cannot afford to pay outstanding LFOs the right to vote will not make more payment forthcoming. A recent holding in the Federal Court for the Middle District of Tennessee stated the common sense principle that where a statute discriminates on wealth in a way that will “driv[e] those debtors into, or further and more inextricably into, poverty” there must be extra care to make sure the minimum requirements of rationality are met.¹³ Here, preventing whole communities of already poor individuals from exercising their electoral power will surely only keep them in poverty. When an individual who cannot find a job because of their past conviction also cannot use their

⁵ 1981 Tenn. Pub Acts c. 342, 345.

⁶ 1986 Tenn. Pub. Acts c. 906.

⁷ 1996 Tenn. Pub. Acts c. 675.

⁸ 2006 Tenn. Pub. Acts c. 860.

⁹ 1986 Tenn. Pub. Acts c. 906.

¹⁰ 1989 Tenn. Pub. Acts c. 227.

¹¹ 2006 Tenn. Pub. Acts c. 860.

¹² 2010 Tenn. Pub. Acts c. 1115.

¹³ *Thomas v. Haslan*, 303 F.Supp.3d 585, 628-629 (M.D. Tenn. 2019) (striking down Tennessee’s law that revoked driver’s licenses until LFOs are paid).

power as a citizen to support ballot measures or candidates that would “ban the box,” the deprivation of their right is literally keeping them poor.

Tennessee’s statutory scheme provides an indigency exception to just one of the legal financial obligations, court costs and fees. Yet our experience showed that even this narrow exception is often impossible to realize. To seek rights restoration, a person must have paid all court fees and costs unless they have been declared indigent by a court at the time of the COR application. While many of the people CLC’s organizers assisted were indigent, obtaining the court declaration of indigency proved challenging. The necessary processes vary from county to county and the criteria for indigency varies between judges. In some counties, you must go before the judge of conviction and each judge has different standards for what constitutes indigency. In some counties, paradoxically, you must *pay* to re-open your record to obtain the declaration of indigency. Other county clerks had never even heard of a declaration of indigency. During our Restore Your Vote campaign, we assisted several individuals who are only prevented from being COR eligible by court fees and are indigent but who have been unable to obtain the necessary court declarations of indigency to receive their CORs.

Many people who seek cost waivers or indigency declarations will not have their entire debt remitted. Frequently, they will be placed on a payment plan along with the court order declaring them indigent. In Shelby County, we found that the clerks of court were requiring citizens to complete their payment plan before receiving the COR, even though they had been declared indigent. This practice contravenes the statutory exception for individuals who have been found indigent by the court. CLC continues to advocate to resolve this issue in Shelby County. However, this may be the practice in any number of other counties across the state.

The story of one man we assisted lays bare the absurdity of Tennessee’s current LFO requirements. He is a Nashville resident who owes \$740,000 in restitution for a federal wire-fraud conviction from more than twenty years ago. He lives on a fixed social security income. He completed his sentence in 2009. He reached out to CLC on his 81st birthday because he hopes to vote in the next Presidential election. But he will likely never be able to vote in Tennessee because of his outstanding restitution. Tennessee has no meaningful interest in him paying this restitution; it is owed to the IRS and an out-of-state corporation. Moreover, disenfranchising him cannot possibly provide an incentive for him to pay a debt that he could never realistically hope to afford, even if he lived for another 81 years. The requirement that he pay off this enormous debt is cruel, pointless, and antidemocratic.

Tennessee’s Voting Rights Restoration Process Is Designed to Fail

During our Restore Your Vote campaign in Tennessee, we repeatedly found that people with past convictions are frequently unaware that a voting rights restoration process exists in Tennessee, much less how to navigate it. Tennessee’s complicated re-enfranchisement processes, lack of public information, and lack of training of relevant officials disenfranchise otherwise eligible Tennessee voters. Tennessee has the most

complicated felony disenfranchisement regime in the country and the state has done little to assuage the accompanying confusion.

Even if Tennesseans have knowledge of the legal requirement for rights restoration (which many do not), they may not know if they meet the criteria. Many people do not know the details of their convictions or whether they continue to owe LFOs. This means that they are not equipped to know how the law applies to them. Unfortunately, Tennessee does not have a state-wide criminal record database. The only publicly available databases are at the county level. But each county has a different system, and some do not have an online system at all.

Moreover, even if citizens can locate their past records, they may not be able to decipher whether they meet Tennessee's legal financial obligations requirements. As discussed above, Tennessee law requires that individuals pay certain legal financial obligations (LFOs) before they may apply to have their voting rights restored. These requirements are often administered incorrectly (for instance, by requiring individuals to pay certain amounts that are not required by Tennessee law) and inconsistently (for instance, by checking for payment of court costs in different ways in different counties). Even when county or state officials require the payment of the correct LFOs under state law, they often implement this requirement in a way that makes it burdensome for individuals to obtain verification that the requisite LFOs have been paid (for instance, by directing individuals to different offices in the same criminal court clerk's office).

It is also difficult for individuals seeking CORs and even local officials to determine which legal debt is disqualifying for voting rights purposes and which is not. Our Memphis organizer learned that Shelby County's Criminal Court Clerk's office was refusing to complete CORs for individuals with LFOs related to misdemeanors and municipal violations. After CLC sent a letter explaining why this policy was incorrect to the Shelby County Criminal Court Clerk, the issue was resolved and our organizer was able to assist several voters. Similar mistakes may be occurring in the other 95 counties in Tennessee.

Finally, the process for seeking a COR is burdensome. It can often require citizens to run from government office to office collecting paperwork. Few returning citizens have the means, resources, or time to navigate this maze. Moreover, a person must have a separate COR filled out for each conviction. This only duplicates the process for returning citizens with more than one past offense, particularly those with offenses in multiple counties.

For eligible COR applicants, it can be difficult to determine the right place to start. In some counties, probation officers handle COR applications. In others, the clerk of court is responsible for COR applications. This patchwork can lead to citizens stuck between multiple counties' contradictory policies. For example, one man we assisted was eligible for a COR but was unable to obtain his rights restoration paperwork without professional assistance. He was convicted of a felony in 1983 in Davidson County (Nashville) but is a resident of Cheatham County and served his sentence there. Cheatham County has its clerks of court process CORs but because his court records were not in Cheatham

County, they would not issue a COR. His court records are in Davidson County, but Davidson has probation officers handle CORs. Because he did not serve his probation sentence there, he could not get a COR in Davidson County either. Our organizers were able to remedy the problem but only after months of persistent follow up between seven different state and county agencies. There are likely many others similarly situated who do not have the time, resources, or knowledge of the bureaucracy to realize their statutory right to a COR.

The law may be even more complicated for people with out-of-state convictions. Tennessee law states that a person's voting rights are restored when a person has her rights restored in the state of her conviction. However, the Secretary of State and the Tennessee Board of Probation and Parole require individuals with out-of-state convictions to seek Certificates of Restoration from officers in the states in which they were convicted. This is impossible for many individuals who are either unable to request that officials in other states complete Certificates of Restoration (for instance, because they are unable to travel to those states and the counties of their conviction, for financial or other reasons) or when officials in other states refuse to complete Certificates of Restoration as unfamiliar and out-of-state paperwork. Moreover, Tennessee law does not always translate to out-of-state settings (for instance, when an individual is convicted of a felony in another state but does not have a probation or parole officer who can sign the Certificate of Restoration).

Perhaps even worse than the difficulties faced by people who need CORs to vote, we have encountered several people who never lost the right to vote under Tennessee law but believed – often because they had been told by state officials - that they could not vote.

For individuals with convictions before January 15, 1973, the law states that they only lost the right to vote if they were convicted of a certain subset of crimes and if the judgment rendered them infamous upon conviction. Yet the state's policy is to operate under the presumption that anyone with a felony conviction lost the right to vote and that they have to actively prove their eligibility. This improperly places the burden of seeking decades old court records on people who never lost their right to vote. We have encountered two people with pre-1973 convictions. One had a conviction that is not on the list of infamous crimes. The other had a conviction from the list, but after much work to locate his court records, we discovered that he had not been rendered infamous at sentencing. Both had not voted for decades but never actually lost the right to vote.

Similarly, no one with convictions solely between from January 15, 1973 to May 17, 1981 lost the right to vote in Tennessee. Yet many such Tennesseans have been denied the right to vote and forced to prove their eligibility. To date, Tennessee's voter registration forms do not explain this gap in felony disenfranchisement and require applicants to check a box if they have had any felony convictions, regardless of the date or their voting rights restoration status. The prevalent policy of election officials has been to reject any form with the box checked and place the burden on the registrant to prove that they have the right to vote. But for many, it is impossible to locate their criminal records from this time because the convictions are so old.

We've also encountered several people who were charged with felonies but who were never convicted or only had convictions for misdemeanors but who were told that they could not vote. Several were even turned away at the polls after having been lawfully registered. One of those individuals was Earl Edwards, a Memphis resident who was turned away at the polls in 2010 for a felony conviction that he did not have – his charge was diverted - and had not voted since until he met our organizer.

Tennessee's law is so complicated that it disenfranchises many people beyond the scope of its contours. The state does not provide adequate public information or assistance for those individuals to effectuate their rights. Even worse, it does not even educate its own officials who consistently apply the law incorrectly, thwarting even those who understand their rights. This is disenfranchisement by inaction, and it is no accident.

Congress Must Restore the Voting Rights Act and Ensure that Felony
Disenfranchisement and Re-Enfranchisement Is Covered By Its Terms

Tennessee's felony disenfranchisement and re-enfranchisement schemes are not race neutral. Indeed, over twenty percent of voting-age African Americans in Tennessee are disenfranchised. While the voting rights restoration process ameliorates the extent of Tennessee's disenfranchisement to some extent, its LFO requirements likely only exacerbate racial disparities in its application. And because African-Americans are disproportionately disenfranchised by past convictions, Tennessee's failures to apply its felony re-enfranchisement system accurately or evenly also fall unevenly on minority communities.

Several federal circuits have held that the current Voting Rights Act does not cover practices or procedures related to felony disenfranchisement. This gap in coverage has left in place the largest tool of voter suppression available today, leading to the disenfranchisement of over five million people and the *de facto* disenfranchisement of many, potentially millions, more. Given the dark racially discriminatory history of felony disenfranchisement in the United States and the stark racial disparities created by both felony disenfranchisement schemes and wealth discriminatory re-enfranchisement schemes, Congress would be well within its power to utilize its Fourteenth and Fifteenth Amendment enforcement powers to address felony disenfranchisement. Any restoration of the Voting Rights Act would be incomplete if it does not correct past court decisions and make clear that the VRA covers both felony disenfranchisement and re-enfranchisement. Where these schemes result in an unequal opportunity to participate for minority communities, they cannot be tolerated.

Respectfully Submitted,

Blair Bowie

Blair Bowie, Skadden Fellow
Campaign Legal Center