

ACCESS TO JUSTICE FOR CHILDREN: **UNITED STATES**

This report was produced by White & Case LLP in December 2013 but may have been subsequently edited by Child Rights International Network (CRIN). CRIN takes full responsibility for any errors or inaccuracies in the report.

I. What is the legal status of the Convention on the Rights of the Child (CRC)?

A. What is the status of the CRC and other relevant international instruments in the national legal system?

The United States is the only UN State not to have ratified the CRC.¹ The United States played an active role in drafting the Convention by proposing the original text for seven of the drafted articles and offering commentary on the additional articles.² On February 16, 1995, then-Secretary of State Madeline Albright signed the Convention. The treaty, however, has not been ratified by United States Senate despite heavy involvement in its crafting.³

The United States has ratified the Optional Protocols to the CRC on children in armed conflict and the sale of children.⁴

B. Does the CRC take precedence over national law?

Both United States treaties and federal law are afforded the same weight in the United States court system.⁵ Under the Supremacy Clause of the United States Constitution, treaties entered into by the United States and all federal laws are considered the “supreme law of the land.”⁶ When a treaty and federal law cover the same subject, courts endeavour to construe them so as to give meaning to both. If the court cannot reconcile the federal law and the treaty, the one enacted later in time will control, assuming the treaty is self-executing. A self-executing treaty is one that becomes judicially enforceable automatically upon ratification.⁷ Alternatively, a non-self-executing treaty requires legislation to be judicially enforceable.⁸

¹ See UN Treaty Database. Available at:

https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en; http://www.unicef.org/media/media_78732.html.

² Jenni Gainborough & Elisabeth Lean, *Convention on the Rights of the Child and Juvenile Justice*, 7 *The Link* 1, 1 (2008) available at

<http://www.cwla.org/programs/juvenilejustice/thelink2008summer.pdf>

³ See <http://www.bettercarenetwork.org/faqs/>.

⁴ See UN Treaty Database. Available at:

https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-b&chapter=4&lang=en;

https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-c&chapter=4&lang=en.

⁵ 74 Am. Jur. 2d *Treaties* § 13.

⁶ U.S. CONST. art. IV § 2.

⁷ http://www.law.cornell.edu/wex/self_executing_treaty.

⁸ *Id.*

If the United States ratified the CRC Federal courts would have the power to determine which provisions are self-executing. When determining whether a treaty is self-executing, courts look to various indicators including: “i) the purposes of the treaty and the objectives of its creators; ii) the existence of domestic procedures and institutions appropriate for direct implementation; iii) the availability and feasibility of alternative enforcement methods; and iv) the immediate and long-range social consequences of self or non-self-execution.”⁹

C. Has the CRC been incorporated into national law?

The Senate has not yet approved a resolution ratifying the CRC, and so the treaty has no independent legal authority in the United States.

D. Can the CRC be directly enforced in the courts?

The United States Constitution provides that the President “shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur.”¹⁰ A two-thirds majority (67 senators), must vote in favour of the treaty during a Senate floor vote for ratification of the instrument. Until this process has been completed, the CRC creates no domestic legal rights that are enforceable in United States courts.

E. Are there examples of domestic courts using or applying the CRC or other relevant international instruments?

The CRC has been cited in United States cases involving the deportation of a child's parents, the death penalty for children under the age of 18 and life imprisonment of children.¹¹ In *Martinez-Lopez v. Gonzales*, the petitioner argued that his deportation violated the CRC.¹² The Fifth Circuit rejected this argument finding that because the United States has not ratified the CRC, the petitioner had no enforceable rights under the CRC.

In *Oliva v. U.S. Dept. of Justice*, the petitioner challenged his removal from the United States on the basis that he was denied rights under the CRC.¹³ The petitioner argued that despite the United States’ failure to ratify the treaty, the treaty had the force of international law because every country besides the United States and Somalia has ratified the treaty. The Sixth Circuit avoided applying the CRC by finding that another statute governed the case at hand. Similarly, in *Ayala-Caballero v. Coleman*, the Ninth Circuit refused to decide whether the CRC had the effect of federal law.¹⁴

⁹ 74 Am. Jur. 2d Treaties § 2.

¹⁰ U.S. CONST. art. 2 § 2.

¹¹ See <http://www.crin.org/node/32247>

¹² *Martinez-Lopez v. Gonzales*, 454 F.3d 500 (5th Cir. 2006).

¹³ *Oliva v. U.S. Dept. of Justice*, 433 F.3d 229 (6th Cir. 2005).

¹⁴ *Ayala-Caballero v. Coleman*, 58 Fed. Appx. 669 (9th Cir. 2002).

In *Beharry v. Reno*, however, the court found that certain provisions of the CRC carried the force of customary international law.¹⁵ The court agreed with petitioner that provisions of the CRC calling for the necessary protection of the family and the best interests of the child have widespread international acceptance.¹⁶ Because these longstanding ideals are found in legal regimes throughout the world, the court found these provisions sufficiently customary so as to carry the force of international law.¹⁷ The court was careful to point out that other sections of the CRC (i.e. those related to the application of the death penalty) do not carry the force of customary international law.¹⁸

II. What is the legal status of the child in the United States?

A. Can children and/or their representatives bring cases in domestic courts to challenge violations of children's rights?

The United States has no comprehensive federal regime of “children’s rights.”¹⁹ Nor is there any “model” or “uniform” statutory framework for such rights throughout the individual states.²⁰ Laws incorporating rights similar to those established by the CRC are found scattershot throughout state law and include such rights as the right of children to foster care placement²¹ or legislative protection for the rights of child crime victims.²² Where federal courts have adopted such rights, it has been under the umbrella of substantive due process.²³ Minors, through their “next friend” or their guardians, may initiate actions in state civil courts to enforce these rights. The types of actions and the process by which they are brought to court is generally a matter of state statutory and common law.²⁴

Children’s Ombudspersons exist in various forms across the United States. Full details of these offices and the services that they provide are available from the American Bar Association²⁵ and the National Conference of State

¹⁵ *Beharry v. Reno*, 183 F. Supp. 2d 584 (E.D.N.Y. 2002), rev’d on other grounds, 329 F.3d 51 (2d Cir. 2003).

¹⁶ *Id.* at 600.

¹⁷ *Id.*

¹⁸ *Id.* at 601.

¹⁹ Howard Davidson, *Children’s Rights and American Law: A Response to What’s Wrong With Children’s Rights*, 20 EMORY INT’L L. REV. 69, 72 (2006). Available at: <http://improvechildadvocacy.org/Portals/0/PDF/Davidson,%202020%20EmoryIntlLRev%2069.pdf>.

²⁰ *Id.*

²¹ N.J. STAT. § 9:6B-4 (2002) (listing the rights of children placed outside the home); R.I. GEN. LAWS § 42-72-15 (1998) (creating a children’s bill of rights for children under the supervision of the state).

²² 725 ILL. COMP. STAT. 115/1-4 (2005) (creating a bill of rights for children “to ensure the fair and compassionate treatment of children involved in the criminal justice system”).

²³ Davidson, *supra* note 5, at 71.

²⁴ *Id.*

²⁵ American Bar Association, *State Children’s Ombudsmen in the United States: State contacts 2011*. Available at: http://www.americanbar.org/content/dam/aba/administrative/child_law/2011_contacts_for_state_childr

Legislatures.²⁶

B. If so, are children of any age permitted to bring these cases by themselves in their own name/on their own behalf, or must the cases be brought by or with the assistance of a representative?

In the United States, cases must be brought by a representative: either a parent or a guardian ad litem.²⁷ Because children lack legal capacity, they must obtain adult representation.²⁸ Typically, in the absence of parents, the court will appoint a guardian ad litem, who is charged with representing the best interests of the child, to cases involving minors.²⁹

C. In the case of infants and young children, how would cases typically be brought?

In the case of infants and young children, the parents or guardians can bring a lawsuit on behalf of the minor in the manner mentioned above. The parent or representative is charged with pursuing claims related to the child.³⁰ Each state has rules governing the appointment of a legal guardian or representative. Courts generally have discretion to accept or reject the appointment of the guardian.³¹

In federal court, Rule 17 of the Federal Rules of Civil Procedure (FRCP) lays out who may sue on behalf of a child. A guardian, committee, conservator or fiduciary may sue on the minor's behalf.³² Additionally, the FRCP requires the court to appoint a next friend or guardian ad litem for a minor who is unrepresented.³³

D. Would children or their representatives be eligible to receive free or subsidised legal assistance in bringing these kinds of cases?

Children's Ombudsman Offices have been established in over twenty-two states to assist in providing children's services. These offices investigate complaints and protect the interests and rights of children and families.³⁴ Otherwise, there are various services that provide assistance in bringing cases on behalf of children. For example, in Miami, Florida, the Legal

[ens_ombudsmen.authcheckdam.pdf](#).

²⁶ National Conference of State Legislatures, *Children's Ombudsman Offices / Office of the Child Advocate*. Available at: <http://www.ncsl.org/research/human-services/childrens-ombudsman-offices.aspx>.

²⁷ See 67A C.J.S. Parent and Child § 337.

²⁸ See Donald T. Kramer, *Legal Rights of Children*, Part IV, § 12.1.

²⁹ 67A C.J.S. Parent and Child § 337.

³⁰ See 67A C.J.S. Parent and Child § 337.

³¹ 43 C.J.S. Infants § 329.

³² Federal Rules of Civil Procedure 17. Available at http://www.law.cornell.edu/rules/frcp/rule_17.

³³ *Id.*

³⁴ See National Conference of State Legislators, "Children's Ombudsman Offices / Office of the Child Advocate", August 2012. Available at: <http://www.ncsl.org/issues-research/human-services/childrens-ombudsman-offices.aspx>.

Services of Greater Miami helps children vindicate their rights.³⁵

E. Are there any conditions or limits on children or chosen legal representatives bringing cases (e.g. would a child's parents or guardian have to agree to a case being brought)?

A child's right to sue in the United States is entirely dependent on the decision of the guardian or representative to move forward with litigation. It is generally the law that the statute of limitations on a child's claim does not begin to run until the child reaches the age of eighteen.³⁶ However, sometimes the appointment of a guardian or representative triggers the statute of limitations and deprives the minor of the benefits of tolling statutes.³⁷

Parents or guardians who commence suits for children may settle out of court only if the settlement is reviewed and approved by a judge.³⁸ While settlement of lawsuits is encouraged by the courts, judicial review of minors' settlements is required to ensure that the child's best interests are being served by the settlement.³⁹ Any money recovered through settlement or litigation belongs to the child and generally cannot be used until the child achieves the age of legal majority.

III. How can children's rights violations be challenged before national courts?

A. If there is a potential violation of the Constitution or other principles established in domestic law, or with the CRC or other relevant ratified international instruments, how can a legal challenge be brought?

Challenges to children's constitutional violations are brought the same way as any other case, namely through a parental representative or guardian ad litem. The parent or guardian can initiate a lawsuit in United States civil courts pursuant to the rules of civil procedure of that particular jurisdiction. Civil actions can seek remedies such as damages and injunctions. Civil cases can be brought anywhere so long as the court has jurisdiction over the parties and the matter.

Federal courts have limited jurisdiction and require both personal jurisdiction and subject-matter jurisdiction.⁴⁰ If the federal court lacks either one, the case must be dismissed. Personal jurisdiction gives the court power over the defendant. Subject-matter jurisdiction means the federal court has jurisdiction over the particular case at issue.

State courts, on the other hand, have exclusive jurisdiction over anything that

³⁵ See <http://www.lsgmi.org/>.

³⁶ 1 A.L.R.6th 407.

³⁷ *Id.*

³⁸ 67A C.J.S. Parent and Child § 277.

³⁹ *Id.*

⁴⁰ *Id.*

falls outside federal jurisdiction.⁴¹ For example, state courts have exclusive jurisdiction over cases where there is no federal question and no diversity of citizenship. There may be instances when state court and federal court jurisdiction is concurrent and the plaintiff may choose in which forum to bring the case.⁴²

B. What powers would courts have to review these violations, and what remedies could they offer?

Constitutional challenges to federal or state laws, or claims involving violations of ratified treaties, may be brought in either state or federal courts.⁴³ American courts offer a variety of remedies including money damages, injunctive relief and declaratory judgments. The Supreme Court has the power to strike down any law or action that contravenes the federal constitution, including its rights provisions.⁴⁴

C. Would such a challenge have to directly involve one or more individual child victims, or is it possible to challenge a law or action without naming a specific victim?

A case challenging children's rights violations must directly involve one or more individual child victims.⁴⁵ In the United States plaintiffs must have standing to sue. In federal courts, the doctrine of standing is governed by Article III of the United States Constitution, which limits the jurisdiction of federal courts to "cases and controversies."⁴⁶ There can be no case or controversy if the plaintiff lacks standing to sue. Most states have similar standing requirements requiring that the action not be merely conjectural or hypothetical.

There are three elements to standing: injury, causation and redressability.⁴⁷ The plaintiff must show that there has been an "injury in fact" and that the injury is "concrete, particularised, and actual or imminent."⁴⁸ The causation element requires that the injury be caused by the defendant's actions.⁴⁹ Lastly, a favorable decision must be able to redress the injury.⁵⁰ The individual elements conferring standing may differ from state to state and may not be as strictly enforced as the standing requirements in federal courts.⁵¹

⁴¹ 21 C.J.S. Courts § 275.

⁴² 21 C.J.S. Courts § 276.

⁴³ See generally David Sloss, *Constitutional Remedies for Statutory Remedies*, 89 IOWA L. REV. 355 (2004).

⁴⁴ *Marbury v. Madison* [1803] 5 US 137. Available at <http://www.law.cornell.edu/supremecourt/text/5/137>.

⁴⁵ See U.S. CONST. art III, § 2.

⁴⁶ U.S. CONST. art. III § 2.

⁴⁷ See 32A Am. Jur. 2d Federal Courts § 591.

⁴⁸ 35A C.J.S. Federal Civil Procedure § 60; *See also* <http://law2.umkc.edu/faculty/projects/ftrials/conlaw/caseorcontroversy.htm>.

⁴⁹ 35A C.J.S. Federal Civil Procedure § 60.

⁵⁰ *Id.*

⁵¹ See e.g. 1A C.J.S. Actions § 102; 39 Fla. Jur. 2d Parties § 2; Texas Practice Guide: Civil

D. Is any form of collective action or group litigation possible, with or without naming individual children?

The United States has class-action procedures available to litigants. In federal courts, class action lawsuits are governed by Rule 23 of the FRCP.⁵² Class action suits may also be brought in state courts. Rule 23 of the FRCP requires that the class of plaintiffs share certain characteristics, namely commonality, typicality, numerosity and adequacy.⁵³ Many states have adopted similar requirements for class action lawsuits.

E. Are non-governmental organisations permitted to file challenges to potential children's rights violations or to intervene in cases that have already been filed?

As discussed above, a plaintiff must have standing in order to bring a suit in either state or federal courts. Generally, third parties unable to establish harm resulting from an alleged violation will not be permitted to pursue an action on behalf of an injured party.

Although the requirements for intervention in a state court action vary according to the rules of procedure in the relevant jurisdiction, state rules of civil procedure are generally modeled after the FRCP.⁵⁴ Rule 24 of the FRCP provides the framework under which third parties may intervene in a federal action. In general, a party may be permitted to permissively intervene upon a timely motion when expressly given such a right by federal statute or when the party has a claim or defense that shares a common question of law or fact with the main action.⁵⁵ A motion to intervene must be served on the parties involved in the pending litigation as provided for by Rule 5 of the FRCP.⁵⁶ The motion must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought.⁵⁷

IV. Practical considerations

A. Venue: In what courts could a case be filed (e.g. civil, criminal, administrative, etc.)? What would the initial filing process entail?

A case could be brought in state or federal courts depending on the type of claim. Cases involving questions arising under federal law qualify for federal

Appeals § 3.3; 3 Carmody-Wait N.Y. 2d § 19:9

⁵² Federal Rule of Civil Procedure 23. Available at http://www.law.cornell.edu/rules/frcp/rule_23.

⁵³ *Id.*

⁵⁴ Duke University Research Guides, *Court Rules*. Available at: <http://law.duke.edu/lib/researchguides/courtr/>.

⁵⁵ Federal Rule of Civil Procedure 24. Available at http://www.law.cornell.edu/rules/frcp/rule_24.

⁵⁶ *Id.*

⁵⁷ *Id.*

jurisdiction.⁵⁸ For example, federal court would be an appropriate forum for challenges based on children's constitutional violations. If the CRC is eventually ratified, challenges based on treaty violations could be brought in federal court. Another basis for federal jurisdiction involves cases with diversity of citizenship between the plaintiff and defendant and damages plead in excess of \$75,000.⁵⁹ Cases could also be brought in state family courts if the particular jurisdiction provides for this type of jurisdiction.

If the CRC is ratified, the United States Congress could establish administrative courts to hear cases of alleged violations. Pursuant to its Article III powers, Congress can establish inferior courts to handle special types of cases.⁶⁰ These courts could adjudicate violations of the CRC in a timely fashion without clogging up the federal court system. These courts would likely be very specialised and allow the judges to focus on a narrow set of issues.

B. Legal aid / Court costs: Under what conditions would free or subsidised legal aid be available to child complainants or their representatives through the court system (i.e. would the case have to present an important legal question or demonstrate a likelihood of success)? Would child complainants or their representatives be expected to pay court costs or cover other expenses?

As a general rule, neither federal nor state courts provide litigants with subsidised legal assistance in non-criminal cases. However, both court systems provide mechanisms under which a plaintiff may proceed *in forma pauperis*.⁶¹ The standards used in state courts for determining when a plaintiff may proceed *in forma pauperis* vary from state to state.⁶² Federal district courts typically require a plaintiff seeking *in forma pauperis* status to submit an application detailing the hardships underlying the indigency.⁶³ The status is usually granted by a judge without a hearing, entitling the litigant to a waiver of normal costs. However, the litigant is still responsible for other costs incurred in bringing the action, such as attorney's fees, deposition and expert witness fees. The court may allow a successful plaintiff to recover attorney's fees from the defendant under fee-shifting statutes, which cover, amongst other things, civil rights and environmental cases.⁶⁴

C. Pro bono / Financing: If legal aid is not available, would it be possible for child complainants or their representatives to obtain legal

⁵⁸ See 28 U.S.C. § 1331.

⁵⁹ See 28 U.S.C. § 1332.

⁶⁰ U.S. CONST. art III, § 1; James Pfander, *Article I Tribunals, Article III courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643 (2004).

⁶¹ 8 Fed. Proc., L. Ed. § 20:371; See also 98 A.L.R. 2d 292.

⁶² 98 A.L.R. 2d 292.

⁶³ United States District Court for the District of Columbia, *Proceedings in Forma Pauperis*. Available at: <http://www.dcd.uscourts.gov/dcd/pfppnp>.

⁶⁴ Martin A. Schwartz, 'Attorney's fees in civil rights cases - October 2009 term', 19 October 2011, 27(1) *Touro Law Review*, available at: <http://digitalcommons.tourolaw.edu/cgi/viewcontent.cgi?article=1041&context=lawreview>.

assistance from practicing lawyers on a pro bono basis, through a children's rights organisation, or under an agreement that does not require the payment of legal fees up front?

The American Bar Association (ABA) recommends that attorneys in the United States perform at least 50 hours of pro bono service per year.⁶⁵ Several state bar associations are considering mandating such pro bono service, including New York and California.⁶⁶ Additionally, American law schools are increasingly providing pro bono services through various student-staffed legal clinics.⁶⁷ The ABA Standing Committee on Pro Bono and Public Service and its project, the Center for Pro Bono, are a national source of information, resources and assistance to support, facilitate and expand the delivery of pro bono legal help.⁶⁸ The ABA also maintains a directory of legal clinics that work on children's rights.⁶⁹

Contingency fees and alternative fee arrangements that do not require the payment of legal fees up front are generally governed by individual state bar associations. However, the majority of states prohibit contingency fee arrangements in domestic matters, such as divorce or an alimony proceeding, in criminal cases, or in the sale or purchase of a business.⁷⁰ Where such fee arrangements are permitted, some states place a cap on the percentage that a lawyer may retain from any resulting award.⁷¹

D. Timing: How soon after a violation would a case have to be brought? Are there any special provisions that allow young adults to bring cases about violations of their rights that occurred when they were children?

A case would have to be brought within a specified period referred to as the statute of limitations. The statute of limitations to bring a lawsuit would depend on the particular violation alleged and also on whether the case was brought in state or federal court. Typically, most jurisdictions "toll" the statute of limitations for violations that occurred when the plaintiff was a minor.⁷² This means the statute of limitations does not start running until the minor reaches the age of majority.

E. Evidence: What sort of evidence is admissible/required to prove a

⁶⁵ American Bar Association Model Rule 6.1. Available at:

http://www.americanbar.org/groups/probono_public_service/policy/aba_model_rule_6_1.html.

⁶⁶ See

http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202596770850&Pro_Bono_Mandate_Gain_s_Steam&slreturn=20130530203316.

⁶⁷ See

<http://www.usnews.com/education/best-graduate-schools/top-law-schools/articles/2013/06/17/c-consider-law-schools-with-in-house-firms-incubators>.

⁶⁸ See http://www.americanbar.org/groups/probono_public_service.html.

⁶⁹ See <http://apps.americanbar.org/litigation/committees/childrights/directory-legal-clinics.html>

⁷⁰ Ronald D. Rotunda and John S. Dzienkowski, Legal Ethics: The Lawyer's Deskbook on Professional Responsibility § 1.5-3.

⁷¹ 49 A.L.R. 6th 505: Court Rules and Rules of Professional Conduct Limiting Amount of Contingent Fees or Otherwise Imposing Conditions on Contingent Fee Contracts.

⁷² Donald T. Kramer, Legal Rights of Children § 11:3 Statutes of limitations and tolling periods.

violation? Are there particular rules, procedures or practices for dealing with evidence that is produced or presented by children?

There are no specific rules that deal with evidence produced or presented by children. Federal courts are governed by the Federal Rules of Evidence (FRE). State courts adopt their own codes of evidence, with many states adopting provisions that mirror the FRE. There are special rules of evidence, namely Rules 412–15 that apply in child molestation cases but these rules deal with the evidence that can be presented against a person accused of child molestation, rather than with evidence presented by children.

There are a few provisions in the FRE that are meant to assist with the use of child witnesses. For example, under Rule 603, a witness must take an oath to testify truthfully. Because minors may not be able to understand the oath, it is enough to demonstrate the child understands what truthfulness is and the penalties associated with lying.⁷³ Additionally, under Rule 611, the court usually does not allow leading questions on direct examination. However,⁷⁴ in the case of children, the court should generally allow leading questions.

F. Resolution: How long might it take to get a decision from the court as to whether there has been a violation?

The time it takes a court to reach a decision is largely indeterminate. Courts have no strict deadlines for decisions, and the judge's decision could come at any time. The median time from filing to disposition of the case vary widely from jurisdiction to jurisdiction. In 2012, the national average for United States District Courts was 7.2 months in criminal felony cases.⁷⁵ In 2012 the median time for civil actions was 8.2 months.⁷⁶ In civil cases that go to trial, the median time for disposition in 2012 was 25.7 months.⁷⁷

G. Appeal: What are the possibilities for appealing a decision to a higher court?

In the federal system, decisions by the United States District Courts are appealed to the United States Circuit Court of Appeals for the jurisdiction.⁷⁸ In a limited number of cases, appeals from the United States Circuit Court of Appeals are brought before the United States Supreme Court.⁷⁹

In the state system, decisions made at the trial court level (the exact name of

⁷³ Federal Rule of Evidence, Rule 603, available at http://www.law.cornell.edu/rules/fre/rule_603.

⁷⁴ Federal Rule of Evidence, Rule 611, available at http://www.law.cornell.edu/rules/fre/rule_611.

⁷⁵ Statistics available through the United States Courts website. Statistics pages are available at: <http://www.uscourts.gov/Statistics/FederalCourtManagementStatistics.aspx>.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ See the website of the United States Courts:

<http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/CourtofAppeals.aspx>.

⁷⁹ <http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/SupremeCourt.aspx>.

the trial level court varies from state to state) are appealed to the intermediate, appellate court. Losing parties at the appellate level can appeal the decision to the highest state court. In limited circumstances, parties have the right to appeal decisions by the highest state court to the United States Supreme Court. For example, the parties may file a petition for certiorari to the United States Supreme Court to review a decision by the highest state court on a federal issue (i.e. one involving the Constitution or application of federal law).⁸⁰

The ability to appeal a decision varies from state to state. Some appeals occur “as of right” meaning that the appellate court has to review the lower court’s decision. Other times, the appeal is permissible but not required, as with certiorari review. Under certiorari review, the appellate court decides whether it wants to take the appeal. Appellate courts typically employ various standards of review including de novo, abuse of discretion, reversible error and harmless error.

H. Impact: What are the potential short-term and long-term impacts of a negative decision? Is there a possibility for political backlash or repercussions from a positive decision?

Negative decisions may be problematic since the United States is a common law jurisdiction. Case law is important in United States courts because some courts carry binding authority. However, not all courts bind other courts.

In both the state and federal systems, the highest court’s decisions are binding on all lower decisions. For example, the United States Supreme Court decisions are binding on all lower federal courts. Intermediate appellate court decisions are binding on lower trial courts in the same jurisdiction.⁸¹ Decisions made at the trial level in the United States District Courts do not have binding precedential effect.⁸² Additionally, decisions from the federal system are generally not binding on the state courts, and state court decisions are not binding on federal courts.

I. Follow up: What other concerns or challenges might be anticipated in enforcing a positive decision?

While equitable or declaratory judgments are available in certain narrow instances, the favoured remedy in American civil litigation is monetary relief.⁸³ Enforcement of damage awards can be problematic and litigants may need to return to court to obtain a court order for payment. Even when a victorious plaintiff has secured a writ of execution, there is no guarantee that

⁸⁰ See the website of the United States Courts:

<http://www.fjc.gov/federal/courts.nsf/autoframe?OpenForm&nav=menu4d&page=/federal/courts.nsf/page/95DD73D9F1AE13C985256827006D9594?opendocument>.

⁸¹ 21 C.J.S. Courts § 209.

⁸² 21 C.J.S. Courts § 212.

⁸³ Daphna Lewinsohn-Zamir, *Can’t Buy Me Love: Monetary vs. In-Kind Remedies*, 2013 U. ILL. L. REV. 151 (2013) (“Indeed, monetary compensation is the most common form of redress for rights violations.”).

the defendant will have sufficient assets to satisfy the judgment, leading to the possibility that any positive decision involving damages could be pyrrhic at best.

This report is provided for educational and informational purposes only and should not be construed as legal advice.