

No. 05-

**In The
Supreme Court of the United States**

MARYLAND STATE BOARD OF ELECTIONS
ET AL., PETITIONERS,

V.

JEFFERY COOLIDGE,
RESPONDENT.

On Writ of Certiorari to the United States Court Of Appeals for
the Fourth Circuit

BRIEF FOR PETITIONER MARYLAND STATE BOARD OF ELECTIONS

ID Number - 10634
Counsel for Petitioner

Questions Presented

1. Is a statutory provision that permanently denies the right to vote only to persons who have committed a second or subsequent violent felony a voting qualification or prerequisite subject to § 2 of the Voting Rights Act, 42 U.S.C. § 1973, because it results in a denial of the right to vote on account of race?
2. Is Maryland's disfranchisement of a violent felon, predicated on his prior conviction of an infamous crime, a cruel and unusual punishment in violation of the Eighth Amendment?

Parties to the Proceeding in the Court Below

Petitioner State Board is an agency of the State of Maryland with its principal offices at 151 West Street, Suite 200, Annapolis, Maryland. It is charged under Maryland law to supervise elections conducted in Maryland, ensure compliance with the requirements of state and federal election laws, and certify the results of elections within the State.

Petitioner Fallins is the State Administrator of Elections, charged under Maryland law with supervising the operations of local boards of elections and performing other duties delegated to the State. She is the chief election official for the State of Maryland. Fallins is a defendant in her official capacity.

Petitioner City Board is an agency of the City of Baltimore with its principal offices at Charles L. Benton Bldg., Room 129, 417 E. Fayette Street, Baltimore, Maryland. It is charged under Maryland law to conduct federal, state, and municipal elections in the City of Baltimore, under the supervision of State Board.

Petitioner Jones is the Election Director of the City of Baltimore. He manages the operations of City Board and is the chief election official of the City of Baltimore. Jones is a defendant in his official capacity.

Respondent Coolidge is an individual resident and citizen of Baltimore, Maryland. He resides at 3 Clinton Street, #26, Baltimore, Maryland.

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The opinion of the United States Court of Appeals for the Fourth Circuit is set forth in the Record at 29. The order of the United States District Court for the District of Maryland granting the Maryland State Board of Election's motion to dismiss for the failure of Mr. Coolidge to state a claim on which relief can be granted is set forth in the record at 20.

Statement of Jurisdiction

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on July 16, 2005. The jurisdiction of this court is invoked pursuant to 28 U.S.C § 1254(1) to review a civil judgment. This Court granted the Petition for a Writ of Certiorari on October 14, 2005.

Constitutional and Statutory Provisions Involved

FEDERAL

U.S. Const. art. I, § 1.

All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

U.S. Const. art. II, § 1.

The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and, together with the Vice President, chosen for the same term, be elected, as follows:

Each state shall appoint, in such manner as the Legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

The Congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States.

No person except a natural born citizen, or a citizen of the United States, at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty five years, and been fourteen Years a resident within the United States.

U.S. Const. art. III, § 1.

The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

U.S. Const. amend. VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. amend. X.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

U.S. Const. amend. XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. But when the right to vote at any election...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...

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. Const. amend. XV.

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude

Section 2. The Congress shall have the power to enforce this article by appropriate legislation.

U.S. Const. amend. XIX.

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of sex.
Congress shall have power to enforce this article by appropriate legislation.

Voting Rights Act of 1965, 42 U.S.C. § 1973

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision 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, or in contravention of the guarantees set forth in Section 4(f)(2), as provided in subSection (b).

(b) A violation of subSection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subSection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this Section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

STATE OF MARYLAND

Md. Const. art. I, § 4.

The General Assembly by law may regulate or prohibit the right to vote of a person convicted of infamous or other serious crime or under care or guardianship for mental disability.

Md. Code Ann., Election Law § 3-102 (Bender 2005)

(b) Exceptions.- An individual is not qualified to be a registered voter if the individual:

(1) has been convicted of theft or other infamous crime, unless the individual:

(i) has been pardoned; or

(ii) 1. in connection with a first conviction, has completed the court-ordered sentence imposed for the conviction, including probation, parole, community service, restitutions, and fines; or
2. in connection with a subsequent conviction, has completed the court-ordered sentence imposed for the conviction, including probation, parole, community service, restitutions, and fines, and at least 3 years have elapsed since the completion of the court--ordered sentence imposed for the conviction, including probation, parole, community service, restitutions, and fines;

(2) is under guardianship for mental disability; or

(3) has been convicted of buying or selling votes.

(c) Same-Second or subsequent crime of violence- Notwithstanding subSection (b) of this Section, an individual is not qualified to be a registered voter if the individual has been convicted of a second or subsequent crime of violence, as defined in § 14-101 of the Criminal Law Article.

Md. Code Ann., Criminal Law § 14-101(a) (Bender 2005)

"Crime of violence" defined. ---- In this Section, "crime of violence" means:

(1) abduction; (2) arson in the first degree; (3) kidnapping; (4) manslaughter, except involuntary manslaughter; (5) mayhem; (6) maiming, as previously proscribed under former Article 27, §§ 385 and 386 of the Code; (7) murder; (8) rape; (9) robbery under § 3--402 or § 3--403 of this article; (10) carjacking; (11) armed carjacking; (12) sexual offense in the first degree; (13) sexual offense in the second degree; (14) use of a handgun in the commission of a felony or other crime of violence; (15) an attempt to commit any of the crimes described in items (1) through (14) of this subSection; (16) assault in the first degree; (17) assault with intent to murder; (18) assault with intent to rape; (19) assault with intent to rob; (20) assault with intent to commit a sexual offense in the first degree; and (21) assault with intent to commit a sexual offense in the second degree.

Statement of the Case

The Maryland legislature passed Md. Code Ann., Election Law § 3-102 (Bender 2005) pursuant to centuries of United States history that placed laws regulating voting qualifications firmly within the sphere of state sovereignty. During the founding period, the overwhelming majority of the states either had felon disenfranchisement laws or had state constitutions explicitly authorizing such laws. Today, all but two states regulate the franchise based on previous criminal records.

Under § 3-102, Maryland has created a three-tiered set of voting qualifications pertaining to felons committing infamous crimes. In the first tier, a person who has committed a "theft or other infamous crime" may register or re-register to vote upon completion of their sentence. § 3-102(b) (1); Record at 43. In

the second tier, a person who has committed a second infamous crime may register or re-register to vote three years after the completion of their sentence. § 3-102(b) (2); Record at 43. Finally, in the third tier, the statute invokes permanent disenfranchisement only when a person's second crime is not only an infamous offense, but also a violent felony, such as armed robbery, rape, or murder, § 3-102(c); Record at 43.

The Attorney General periodically publishes a list of infamous crimes and violent felonies. Under infamous crimes, the statute includes many crimes traditionally considered to be white-collar crimes, such as commercial fraud and embezzlement. See MD §§18-201-18-306, §8-701; Record at 45, 49. Notably, the statute also includes hate crimes under this category. See §10-301-304; Record at 49.

Respondent Coolidge, an African-American resident of Baltimore, was convicted of his first infamous crime two decades ago for possession of cocaine with intent to distribute. This is an infamous crime under § 3-102(b). Two years later, during his probation, he was convicted of misdemeanor possession of cocaine, which is not an infamous crime. Two years ago, Coolidge was convicted of robbery for threatening to assault a store clerk if the clerk did not give him money from register. Under § 3-102, robbery is a violent offense. Only at this point, did the statute remove his name from the registry of voters permanently. After two decades of breaking Maryland's laws, the appellant now alleges that Congress intended to give him a vote in how the laws are made under § 2 of the Voting Rights Act of 1965. He also

alleges that this long-standing, regulatory statute violates the Eighth Amendment.

The District Court dismissed the case, holding that Coolidge had no cognizable claims under the Fourteenth, Fifteenth, or Eighth Amendments or under § 2 of the Voting Rights Act, 42 U.S.C. § 1973.

Summary of Argument

The Constitution protects Maryland's authority to disenfranchise recidivist, violent felons in Election Law § 3-102 under the state legislature's right to regulate the franchise. § 2 of the Voting Rights Act does not govern felon disenfranchisement provisions either on its face or based on intent as adduced from legislative history. Indeed, the legislative history indicates that Congress specifically intended to preserve states' rights to create such voting qualifications. Furthermore, such an extension of the Voting Rights Act would violate Congress' enforcement powers under the Fourteenth and Fifteenth Amendments because Congress did not establish legislative findings of unconstitutionally discriminatory uses of felon disenfranchisement. Additionally, striking down felon disenfranchisement statutes would not be congruent or proportional to the purported harm, given the positive functions that it serves. Thus, the Court should hold that § 3-102 of Maryland Election Law should not be subject to § 2 of the Voting Rights Act.

Maryland's statute does not enter the sphere of the Eighth Amendment because the Court has repeatedly affirmed that felon disenfranchisement is a non-penal law. Even if the Court were to find that this statute is penological, the statute does not violate the clearly disproportional standard because Maryland legislators carefully tailored it to the nature of the crime. The statute reserves permanent disenfranchisement only for those felons who commit a violent felony after already having committed

an infamous crime. § 3-102 does not violate the evolving standards doctrine because numerous states still have such laws on the books. Furthermore, any changes to felon disenfranchisement laws are adequately dealt with through the proper political channels, as demonstrated by the recent liberalizations of § 3-102. Thus, the Court should hold that § 3-102 does not abridge the Eighth Amendment, leaving the respondent with no cognizable claim.

Argument

I. STATE FELON DISENFRANCHISEMENT PROVISIONS SHOULD NOT BE SUBJECT TO THE VOTING RIGHTS ACT OF 1965 BECAUSE CONGRESS DID NOT MANIFEST ITS CLEAR INTENT THAT THE VOTING RIGHTS ACT APPLY TO STATE FELON DISENFRANCHISEMENT LAWS AND SUCH AN APPLICATION WOULD VIOLATE CONGRESS' ENFORCEMENT POWERS UNDER THE 14TH AND 15TH AMENDMENT.

The Court should apply the clear statement rule of intent to prevent the Voting Rights Act of 1965 from governing state felon disenfranchisement provisions to preserve the proper concern for unwarranted and unintended attacks on state sovereignty. Under this Court's clear precedent in *Gregory v. Ashcroft*, 501 U.S. 452 (1991), and its progeny, the Court should necessitate a clear statement of legislative intent before subjecting state felon disenfranchisement provisions to the Voting Rights Act. It should do so because such an application of the Voting Rights Act would greatly alter the federal-state constitutional balance by undermining a state's right to determine voting qualifications within constitutional limits, by encroaching on state's

penological powers, and by overturning a practice that has been recognized as a legitimate exercise of state power for centuries.

Congress has failed to indicate, either through the plain wording of the statute, or the legislative history, that they intended to subject state felon disenfranchisement provisions to the stringencies of the Voting Rights Act. Indeed, the legislative history that does exist indicates Congress' desire to carve out an exception to the Voting Rights Act specifically preventing it from applying to state felon disenfranchisement provisions. Because Congress did not affirmatively and unambiguously state their intention to apply the Voting Rights Act to state felon disenfranchisement provisions, the Court should not sweep state felon disenfranchisement provisions under the auspices of the Voting Rights Act.

Even arguendo abdicating the necessity of clear congressional intent, extending the Voting Rights Act to state felon disenfranchisement provisions would violate Congress' enforcement powers under the 14th and 15th Amendments. In *Boerne v. Flores*, 521 U.S. 507 (1997), and its progeny, this Court set forth the clear standard that Congress can only act under its enforcement powers when it first produces legislative findings specifically identifying a history of constitutional violations and then constructs a proportional remedy to these violations. Congress has not produced any legislative findings indicating a history felon disenfranchisement provisions being used to unlawfully discriminate against minorities, and even if they had, overturning all state felon disenfranchisement provisions would

not be a proportionate and congruent remedy given the important regulatory and/or penological functions felon disenfranchisement serves. Therefore, applying the Voting Rights Act to state felon disenfranchisement provisions would be an unconstitutional extension of Congress' enforcement powers.

A) The Court should overturn the application of § 2 of the Voting Rights Act to the Maryland State Felon Disenfranchisement Provision because it fails the proper application of the clear statement of intent standard.

- i) To apply the Voting Rights to MD. Code Ann., Election Law § 3-102, Congress must make a clear statement of their intent that the Voting Rights Act apply to state felon disenfranchisement provisions because such an application would greatly alter the state-federal constitutional balance.

The clear statement rule should be applied to necessitate a clear statement of Congress' intent that the Voting Rights Act governs felon disenfranchisement. The "clear statement rule", a rule of statutory interpretation articulated by the Court in *Gregory v. Ashcroft*, 501 U.S. 452 (1991), states that " If congress intends to alter the usual constitutional balance between states and the federal government, it must make the intention to do so unmistakably clear" *Id.* at 460-1 (internal citations omitted). The Court broadly applied this rule "in traditionally sensitive areas, such as legislation affecting the federal balance ... to ensure that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Gregory* 530 U.S. at 461. In the absence of such a rule, the Court rightly feared that the weight of federal legislation would be used to overpower states

rights and create an overly intrusive federal government in cases where Congress itself did not clearly intend to do so. In this instance, such fears of the imperious use of federal supremacy to undermine state sovereignty in the face of ambiguous intentions are particularly appropriate. The application of the clear statement rule to necessitate an unambiguous congressional statement before allowing the Voting Rights Act to govern felon disenfranchisement is especially apt because such an application would greatly alter the current federal-state constitutional balance in favor of the federal government. Because felon disenfranchisement encapsulates the fundamental areas of states rights under the constitution, such as determining the qualifications of its electorate and regulating its criminal justice system, and because it is a long standing practice recognized within the domain of state sovereignty, applying the Voting Rights Act to state felon disenfranchisement provisions would strongly tilt the federal-state constitutional balance in favor of the federal government.

Application of the Voting Rights Act to govern state felon disenfranchisement provisions would greatly alter the federal-state constitutional balance in favor of the federal government because it encroaches on the state's right to determine the composition of their own electorate. According to Article I of the U.S. Constitution, "States have the primary responsibility for regulating the times, places, and manner of conducting federal elections." *U.S. Const. art. 1, § 4, cl. 1.* Indeed, in *Oregon v. Mitchell*, 400 U.S. 112 (1970) the Court clearly noted,

"No function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the constitution the qualifications of their own voters for state, county and municipal offices" *Id.* at 125 (Black, J). To the extent that subjecting state felon disenfranchisement provisions to the Voting Rights Act would encroach on this fundamental state right, it would undoubtedly shift the federal-state constitutional balance.

Furthermore, if the Court interprets the statute as criminal justice regulation or penological device, the application of the Voting Rights Act to state felon disenfranchisement provisions would change the federal balance by undermining the states' right to determine the implementation of their own criminal justice system. In *United States v. Lopez*, 514 U.S. 549 (1995), the Court stated that "it is indisputable that under our federal system, the states possess primary authority for defining and enforcing the criminal law." *Id.* at 560. To the extent that felon disenfranchisement is used as a criminal justice regulation or penological sanction, then the application of the VRA would thus undermine the states' plenary police power.

Finally, applying the Voting Rights Act to state felon disenfranchisement provisions would shift the federal-state constitutional balance because felon disenfranchisement has a long and uninterrupted history of being used as a legitimate exercise of state power. The 14th Amendment unequivocally allows the states to disenfranchise felons. *Infra* 18 Even placing this

aside, felon disenfranchisement was enacted in 11 of the original colonies and in 29 of 36 states before the implementation of the 14th Amendment almost 150 years ago. It currently exists in 48 of 50 states and has consistently been recognized as within the states' power. Given the long standing history of felon disenfranchisement, to interpret the Voting Rights Act to overturn the states ability to disenfranchise felons would undoubtedly expand federal power vis-à-vis states' rights

As aforementioned, if the application of legislation would alter the state-federal constitutional balance, the Court should necessitate an "unmistakably clear" intent to do so. Because the application of the Voting Rights Act to state felon disenfranchisement provisions would undermine states' traditional ability to set their electorate and regulate their criminal justice system, the Court should necessitate an unmistakably clear statement of Congress' intent to alter the federal-state balance by including felon disenfranchisement.

- ii) Congress did not establish an affirmative intention that the Voting Rights Act should apply to state felon disenfranchisement provisions, either through the construction of the statute or the legislative history.

Congress has given no affirmative indication, let alone the necessary clear statement, either through the plain-text of § 2 of the Voting Rights Act or through its legislative history, that Congress intended the Voting Rights Act to apply to felon disenfranchisement provisions. The wording of § 2 of the Voting Rights Act does not dispositively establish the intent of Congress to prohibit felon disenfranchisement. As the respondent

correctly notes, the Court will interpret the intent of the statute based on its plain meaning, and thus forgo the necessity of a clear legislative statement of intent to include a group, where the meaning of the statute is clear and unambiguous. With this consideration in mind, the *Gregory* Court set a low threshold for seeing sufficient ambiguity in the statutory language to trigger the requirement of a clear statement of legislative intent. In *Gregory*, the Court noted that the use of word "employee" in the *Age Discrimination in Employment Act of 1967*, despite its plain meaning, injected sufficient ambiguity into the statute to necessitate a clear statement of Congress' intent to include appointed judges. See *Gregory* 501 U.S. at 455.

In the present case, the wording of Section 2 at least meets this threshold of ambiguity. As the Second Circuit Court of Appeals noted in *Muntaqim v. Coombe*, 366 F.3d 102 (2nd Cir. 2004), "[I]t is exceedingly difficult to discern what § 2 of the Voting Rights Act means." A significant portion of this confusion stems from the 1982 amendments. Despite the seemingly broad language of the amendments, it is clear that Congress did not intend to prohibit every voting restriction that may have disproportionate effect based on race. See e.g. *Chisom v. Roemer*, 501 U.S. 380 (1991), 383 stating "Congress amended Section 2 of the Voting Rights Act [to] make clear that certain practices that result in the denial or abridgement of the right to vote are forbidden even though the absence of proof of discriminatory intent protects them from constitutional challenge" (emphasis added). This ambiguity in the language of the Voting Rights Act is

particularly acute with regard to the continuing usage of the phrase "on account of" in Section 2 of the Voting Rights Act. The amendments prohibit "voting qualification[s], or prerequisite[s] or standard[s], practice[s], or procedure[s]...which result in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color," 42 U.S.C. § 1973 (a) (emphasis added), but it does not specify what qualifies as "on account of." Based solely on the wording of the statute itself, felon disenfranchisement is unlike some other voting qualifications in that its prohibition does not occur "on account of race" but rather on account of a conscious decision on the part of a person to commit a crime. See *Richardson v. Ramirez* 418 U.S. 24 (1974) at 48-50. Therefore, the general ambiguity of the statute is certainly enough to trigger the necessity of a clear statement, and the text of the statute itself may affirmatively indicate an exclusion of felon disenfranchisement.

The prevalence of state felon disenfranchisement statutes at the time of congressional consideration of the Voting Rights Act indicates that Congress would have affirmatively stated their intent to include felon disenfranchisement in § 2 if it had such an intent. The consideration of the Voting Rights Act and amendments took place at a time when felon disenfranchisement statutes were in use in the vast majority of states. The Second Circuit Court of Appeals noted in *Muntaqim*, "[T]here is no doubt that when congress passed the Voting Rights Act, and amendments, its members were aware of the nearly universal use of felon disenfranchisement." *Muntaqim*, 366 F.3d at 123. Given the

knowledge of such widespread implementation of the practice, Congress undoubtedly knew that overturning felon disenfranchisement provisions would enact a huge change in regulatory and penological practices of the states. *In Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 343 (1999), the Court stated that "it tests the limits of reason to suggest that despite [their] silence [on the issue], members of Congress intended to enact what would arguably be the single most significant change in the method of conducting the decennial census since its inception." Similarly, here, it would test the limits of reason to suggest that Congress intended to overturn a centuries old practice performed by virtually all of the states without a clear legislative statement of intent to do so.

Congress did not make the requisite "clear statement" to indicate the intent to subject state felon disenfranchisement laws to the Voting Rights Act. A clear statement of intent is notably absent from the legislative history, despite unmistakably clear statement that it intended to wipe out literacy tests, educational-attainment requirements, etc... See e.g. 1965 U.S.C.C.A.N. 2508. Indeed, the only mentions of felon disenfranchisement in the legislative history of the debate over the 1965 Voting Rights Act explicitly affirm the idea that Congress specifically intended to carve an exception to bar the Voting Rights Act from applying to felon disenfranchisement provisions. The Senate Judiciary Committee report, in a joint statement by Senators Dodd, Hart, Long, Kennedy, Bayh, Burdick, Tydings, Dirksen, Hruska, Fong, Scott and Javits, took particular

efforts to note that even the clause prohibiting any requirement of good moral character to vote "would not result in the proscription of the frequent requirement of the states and political subdivisions that an applicant for voting or registration for voting be free of a conviction of a felony." S. REP. No. 162, 89th Cong., 1st Sess., pt. 3, at 24 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2508, 2562. On the floor of the Senate, Senator Tydings reaffirmed this conclusion when he stated that the law would not prevent states from imposing "A requirement that an applicant for voting be free of conviction of a felony, [as] these grounds for disqualification are objective, easily applied, and do not lend themselves to fraudulent manipulation." 11 Cong. Rec S8366 (1965). The House Judiciary reports corresponds to this idea perfectly in noting that the Voting Rights Act "does not proscribe a requirement of a State or any political subdivision of a state that an applicant for voting or registration for voting be free of conviction of a felony." H.R. Rep. No. 439, 89th Cong., 1st Sess. 25-26 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2457.

Subsequent Congressional legislative history also supports the conclusion that Congress did not attempt to include felon disenfranchisement under the auspices of the Voting Rights Act. First, There is no evidence that Congress intended to overturn this specific exception and extend the Voting Rights Act to felon disenfranchisement provisions when it amended the Voting Rights Act in 1982. *See e.g. Johnson v Bush*, 405 F.3d 1214 (11th Cir. 2005), noting that "there is simply no discussion of felon

disenfranchisement in the legislative history surrounding the 1982 Amendments [to the Voting Rights Act]". Furthermore, subsequent actions of Congress under other voting statutes "suggest that Congress did not intend to sweep felon disenfranchisement laws within the scope of the Voting Rights Act." *Id.* at 1234. For example, in the 1993 National Voter Registration Act (NVRA), 42 U.S.C. §§1973, Congress made it easier for states to disenfranchise felons by instructing federal prosecutors to inform state election officials of persons with felony convictions so that they could be stricken from the roles, and in the Help America Vote Act of 2002, 42 U.S.C. § 15483, Congress specifically requires that state election officials actually do purge felons from the roles. These acts would not make sense if congress had intended or understood the Voting Rights Act to cover felon disenfranchisement.

As illustrated by the legislative history of the VRA and subsequent voting statutes, it is evident that Congress has not met its burden under the clear statement rule to unmistakably indicate intent that the Voting Rights Act applies to state felon disenfranchisement provisions. Even arguing abdicating the clear statement rule, the bulk of the legislative history makes it evident Congress specifically intended to carve out an exception for felon disenfranchisement and actively intended to exclude felon disenfranchisement from consideration under the Voting Rights Act. Therefore, in light of serious federalism concerns and the intent of the Congress, this Court should not apply the Voting Rights Act to State felon disenfranchisement provisions.

- B) The inclusion of felon disenfranchisement under the auspices of the Voting Rights Act would exceed Congress' enforcement powers under the 14th and 15th Amendments.

To insert a prohibition on felon disenfranchisement into the Voting Rights Act would transform this otherwise constitutional, and indeed, crucial legislation into one that exceeds Congressional enforcement power. Congress enacted the Voting Rights Act under its powers to enforce the 14th and 15th Amendments in order to eliminate voting practices that were racially discriminatory. *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966). In *Boerne v. Flores*, 521 U.S. 507 (1997), the Court introduced a clear, rigorous standard by which to judge legislation enacted under the enforcement powers. This Court stated that "Congress may exercise its enforcement powers under the reconstruction amendments only when it responds to a pattern of constitutional violations with a congruent and proportional remedy." *Boerne*, 521 U.S. at 520. In *Board of Trustees v. Garrett*, 531 U.S. 356, (2001) this Court further elucidated this standard noting that for a legislative remedy not to exceed constitutional authority, Congress must first "identify the history and pattern of unconstitutional discrimination it seeks to redress" and then it must craft a "congruent and proportional remedy" to remedy or prevent that particular unconstitutional discrimination. *Id.* at 358.

In this instance, construing the Voting Rights Act to include a ban on felon disenfranchisement would exceed Congress' authority to enforce the reconstruction amendments because Congress has made no legislative findings about the purported

unconstitutional harm of felon disenfranchisement, and banning all state felon disenfranchisement provisions (the likely outcome of a ruling in the respondent's favor) would not be a congruent and proportional remedy even if such a harm were established.¹

Subjecting state felon disenfranchisement provisions to regulation under § 2 of the Voting Rights Act would exceed Congress' enforcement authority because Congress failed to develop an adequate legislative record demonstrating a "history and pattern" of "unconstitutional discrimination" through state felon disenfranchisement provisions. *Garrett*, 531 U.S. at 368. While Congress made clear findings about the history and pattern of unconstitutional discrimination through acts or conditions it actually sought to exclude such as literacy tests and educational attainment requirements, "there was a complete absence of congressional findings that felon disenfranchisement laws were used to discriminate against minority voters." *Johnson*, 405 F.3d at 1231. Indeed, as Judge Mahoney wrote in *Baker v. Pataki*, 85 F.3d 919 (2d Cir. 1996), "not only has Congress failed ever to make a legislative finding that felon disenfranchisement is a pretext or proxy for racial discrimination; it has effectively determined that it has not." *Id* at 929 (writing for an equally divided court).

¹Note, this argument does not seek to call into question the general constitutionality of the Voting Rights Act under the enforcement powers. It seeks to call into question the constitutionality of the appellant's construction of the act including felon disenfranchisement provisions. As noted by the 2nd circuit in *Muntaqim* "The question before the court is not whether Congress exceeded its authority when it enacted the Voting Rights Act; rather it is whether Congress would exceed its authority if it were applied to state felon disenfranchisement statutes." At **54.

While the Voting Rights Act certainly extends to prohibit instances where there is clear racial animus in the law's construction, it cannot constitutionally do so in cases where there is no preliminary finding of unconstitutional discrimination. Thus, the Court correctly extended the Voting Rights Act to cover the clear intentional discrimination evident in the misdemeanor disenfranchisement statute at issue in *Hunter v. Underwood*, 471 U.S. 222 (1985). However, this application is not appropriate in disparate impact cases where there is no invidious legislative intent. The *Boerne* Court explains,

If Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be superior paramount law, unchangeable by ordinary means. It would be on a level with ordinary legislative acts, and, like other acts . . . alterable when the legislature shall please to alter it." *Id.* at 529 (internal citations omitted).

To decide that the Voting Rights Act did enable Congress to reinterpret the meaning of the 14th and 15th Amendments could set the groundwork for the dismantling of what is undoubtedly one of the most important pieces of civil rights legislation ever.

Furthermore, even assuming *arguendo* that the burden of establishing a history and pattern of unconstitutional discrimination was met, the prohibition of state felon disenfranchisement provisions under the Voting Rights Act would not be a "proportional and congruent remedy." § 2 of the Voting Rights Act applies to all districts nation-wide. Furthermore, there is almost certainly an overrepresentation of minorities in the prison system (and thus the disenfranchised population) of each state. Therefore, if the felon disenfranchisement statutes

at issue today were subject to prohibition under the Voting Rights Act discriminatory effects provision, it would logically lead to overturning all felon disenfranchisement provisions around the country, including those that prohibit violent criminals from voting while in prison. It is certainly questionable whether overturning all felon disenfranchisement laws would be a proportional and congruent response to a discriminatory effect of the law, especially in light of the longstanding legitimacy accorded to the law, the non-discriminatory reasons for enacting most of the laws, and legitimate election regulatory and penological purposes that such laws serve. *Johnson*, 405 F.3d at 1230. For the foregoing reasons, the Court should hold that Coolidge does not have a cognizable claim under § 2 of the Voting Rights Act.

II. MARYLAND'S DISENFRANCHISEMENT OF VIOLENT FELONS, PREDICATED ON THEIR PRIOR CONVICTION OF AN INFAMOUS CRIME, DOES NOT ABRIDGE THE EIGHTH AMENDMENT BECAUSE IT IS A VOTING REQUIREMENTS STATUTE, RATHER THAN A PENOLOGICAL ONE. IN THE ALTERNATIVE, IT DOES NOT CONTRAVENE THE EIGHTH AMENEMENT BECAUSE IT DOES NOT VIOLATE AMERICAN NORMS OF CIVILIZED TREATMENT.

The Fourth Circuit erred in its holding that Maryland's regulatory power does not enable the state to decline to extend the franchise to felons who have repeatedly committed infamous - and even violent - crimes. Both the history of the United States and a long line of Court cases have demonstrated that felon disenfranchisement laws are regulatory, rather than penological. They fit within states' broad discretion to determine the factors

of voter eligibility. This power extends up to the limits placed on it by specific prohibitions in the Constitution e.g. no State shall prevent racial minorities qua racial minorities from voting under the Fourteenth and Fifteenth Amendments. Thus, the Eighth Amendment does not come into play because the statute is not directly penological in nature.

Even if the Court does analyze the law as penological, it does not violate the Eighth Amendment because it does not offend American norms of civilized treatment. American history is full of such laws and they continue to exist in all but two of the states. Furthermore, by linking permanent disenfranchisement only to those felons who commit a violent felony after already having committed an infamous crime, the statute is not grossly disproportionate to the egregious and recidivistic nature of the crimes. As the recent liberalizations in Maryland's law demonstrate, any changes to these statutes are best suited to the political process, rather than the judiciary, when, as is the case here, there is no direct conflict with the Constitution. For these reasons, this Court should overturn the Fourth Circuit Court of Appeals' decision that the plaintiff had a cognizable claim under the Eighth Amendment.

- A. The statute does not extend into the sphere governed by the Eighth Amendment because it is regulatory, rather than penological in nature. The Constitution authorizes the states to determine rational qualifications for voting, including the use of felony convictions as a disqualifier.

The Court of Appeals erred in holding that Maryland's law abridges the Eighth Amendment because the Court and common understanding interprets felon disenfranchisement laws as

regulatory, rather than penological. It is a long-held tradition that the states may impose rational qualifications for voters, including that prospective voters must not have committed felonies. The Constitution only restricts the states' broad latitude when states create a qualification that directly violates a Constitutional provision. For example, the Fifteenth Amendment excludes race from the category of permissible factors for qualification, the Nineteenth Amendment does the same for gender. *Supra* vi, vii. These prohibitions set the parameters within which the states may work. In stark contrast, § 2 of the Fourteenth Amendment explicitly authorizes the states to disenfranchise felons. *Supra* vi. This language indicates that the Constitution permits felony convictions as a legitimate reason to disqualify some citizens from voting.

The Court has repeatedly affirmed that the Constitution does not guarantee a general right to vote and that it permits states to determine voting requirements so long as they do not directly conflict with specific Constitutional requirements. *Minor v. Happersett*, 88 U.S. 162 (1875) held that the privileges and immunities clause of §1 of the Fourteenth Amendment did not change the baseline Constitutional norm that voting is not a fundamental right of citizenship. *Id.* at 171.² The *Minor* Court explained that, at the time the states ratified the Constitution, the state constitutions each had different voting regulations that the Constitution left in place by allowing the states to

² Although *Minor's* holding denying women the vote has been superseded by the subsequent Nineteenth Amendment, the case's general analysis of the Constitutional boundaries over states' right to determine voting qualifications remains relevant.

determine the qualifications for their electors.³ Furthermore, none of the Amendments have changed this basic aspect of federalism, except to set some additional, outer parameters. In *Pope v. Williams*, 193 U.S. 621 (1904), the Court stated that "the Federal Constitution does not confer the right of suffrage upon any one, and the conditions under which that right is to be exercised are matters for the States alone to prescribe, subject to the conditions of the Federal Constitution...." *Id.* at 633 (upholding Maryland's residency requirements for voting). These cases set out the general principle that voting is not a fundamental right of citizenship and that the states may proscribe voting as long as the qualifications do not violate an explicit Constitutional provision.

The pervasive use of felonies as a disqualifier for voting throughout the history of the United States indicates that this mode of voter selection is permissible under the Constitution. Between 1776 and 1821, eleven state constitutions either banned felons from voting or authorized the legislatures to create such regulations in the future. By the time of the Fourteenth and Fifteenth Amendments, 29 of the 36 states had such laws. The proportion of states with such laws is even higher now: forty-eight of fifty states prohibit some felons from voting. Thus, practices like that at issue here, have occurred throughout American history, including at pivotal moments in the expansion of civil rights. During these periods of time, the state statutes, and, indeed, the language of the Constitution itself,

³ See U.S. CONST., art. I, § 4.

assumed that barring felons from voting was a legitimate exercise of state discretion over voting qualifications. The lack of protest to these laws in the courts until quite recently indicates how deeply ingrained this norm is in our system of jurisprudence.

When felon disenfranchisement did enter the Court's orbit, the Court repeatedly affirmed that it fits within the boundaries of permissible state discretion over voting requirements. Indeed, in *Trop v. Dulles*, 356 U.S. 86 (1958), the Court used felon disenfranchisement statutes as an example of a non-penological law to differentiate it from the loss of citizenship at issue in *Trop*. Warren explains that "because the purpose of the [felon disenfranchisement] statute is to designate a reasonable ground of eligibility for voting, this law is sustained as a nonpenal exercise of power to regulate the franchise." *Id.* at 96-97. In the landmark *Richardson* case, the Court affirms, "Residence requirements, age, previous criminal record (*Davis v. Beason*, 133 U.S. 333, 345-347) are obvious examples indicating factors which a State may take into consideration in determining the qualifications of voters." *Id.* at 53 (quoting *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45, 51 (1959), internal quotations omitted). As these cases demonstrate, the Court has affirmed that disqualifying felons from voting is a rational exercise of the states' control over voter eligibility.

Rather than serving a penological purpose, felon disenfranchisement is just one factor in a broad array of qualifications that various states ask of its voters. As

mentioned in *Richardson*, these include residency, age, and mental capacity, as well as previous criminal records. *Id.* Maryland imposes all of these restrictions on its voter pool. Indeed, the Maryland Constitution specifically mentions both people "convicted of infamous or other serious crime" and those "under care or guardianship for mental disability." (M.D. CONST. art. I, § 4.) This language indicates that the commission of infamous crimes is but one of numerous bases that Maryland uses to determine eligibility. The District Court explained persuasively, "It can hardly be a punishment to situate Plaintiff with so many Americans who have committed no crimes." Record at 27.

Contrary to the contentions in Fourth Circuit's opinion, the Court has continued to allow states to choose to extend the franchise only to those citizens whom the state can expect to uphold the basic laws. The Circuit Court of Appeals erred in its contention that the Court meant to extend *Carrington v. Rash*, 380 U.S. 89 (1965) to prohibit states from using previous criminal records as factor in eligibility. Record at 39. Indeed, the Court affirmed a felon disenfranchisement statute nine years later as a Constitutionally permissible restriction on the franchise in the seminal *Richardson* case. In *Richardson*, the Court confirmed that the states have a legitimate interest in refusing to extend the franchise to those whose views would threaten the infrastructure of the states' laws, from bigamists to repeat felons. *Richardson*, 418 U.S. at 53. The fact that this case came after *Carrington* indicates that the Court purposely distinguished felon

disenfranchisement as continuing to be within the states' power to proscribe.

Indeed, the case at hand demonstrates precisely the reasons why the *Richardson* Court affirmed that states could look at people's previous criminal records as a factor in extending the franchise. The Second Circuit elucidated this point:

[I]t can scarcely be deemed unreasonable for a state to decide that perpetrators of serious crimes shall not take part in electing the legislators who make the laws, the executives who enforce these, the prosecutors who must try them for further violations, or the judges who are to consider these cases,

Green v. Bd of Elections of the City of New York, 380 F.2d 445, 451 (2nd Cir. 1967). The recent changes in the Maryland statute make it even more tailored to this concept. It restricts the right to vote only to those felons committing particularly egregious crimes (i.e. "infamous" crimes). Furthermore, it only permanently cuts off the franchise for recidivist felons, whose second felony is not only an infamous crime, but also a violent one. Thus, the statute is tailored to the state's legitimate concern as outlined in *Green* and affirmed in *Richardson*. The respondent, Coolidge, is an example of precisely why the state has a rational interest in prohibiting repeat felons from voting: he has a two-decade long criminal record, with repeated drug convictions escalating into an armed robbery. For the above reasons, the Supreme Court should uphold Maryland's law as a legitimate exercise of the state's discretion in determining voting eligibility, given that it does not directly violate the Constitution.

B. Even if the Court finds the law to be penological in nature, it does not violate the Eighth Amendment because it is not grossly disproportionate to the crime nor does it violate evolving standards of decency.

Even if the Court analyzes Md. Code Ann., Election Law § 3-102 as penological, it still does not reach the high Constitutional threshold necessary to violate the Eighth Amendment, particularly for non-physical punishments. The District Court argued compellingly, that "the Richardson [C]ourt made clear, the Fourteenth Amendment granted states positive authority to restrict voting by criminals *after* the Eighth Amendment was adopted." Record at 27. This specific authorization demonstrates that felon disenfranchisement statutes do not violate the Eighth Amendment because they have been sanctioned in a subsequent Amendment. The *Trop* Court places the Constitutional bar at the point where the government has instituted "the total destruction of the individual's status in organized society..." *Trop*, 356 U.S. at 101 (emphasis added). The Court made this statement in response to the complete revocation of citizenship and all of its rights for those who deserted during wartime. In contrast, the issue at hand does not involve the "total destruction" of the plaintiff's status; indeed, it allows the plaintiff numerous avenues through which to exercise the rights of citizenship, such as the freedom of assembly, the right to make contracts, or interstate travel.⁴ Most importantly, it does not leave him stateless as the violation in *Trop* did, so that he remains free to travel under the protection of his United States

⁴As aforementioned, the Court has repeatedly affirmed that voting is not part of these fundamental rights of citizenship. *Supra* 18-20.

passport. Thus, the statute does not abrogate the plaintiff's status as an American to the extent necessary to violate the Eighth Amendment under *Trop's* standard for non-physical punishments.

The Maryland statute declining to extend the franchise to repeat offenders of infamous and indeed violent crimes does not violate the Eighth Amendment under the grossly disproportionate standard because it is tied to serious and recidivist crimes. In *Ewing v. California*, 538 U.S. 11 (2003), the Court emphasized the background norm of deference to a state's penological choices because "the Constitution does not mandate adoption of any one penological theory."⁵ *Id.* at 25. In discussing what type of non-capital punishment would fall under the grossly disproportionate standard, the *Ewing* Court gave the example of a hypothetical situation where "a legislature made overtime parking a felony punishable by life imprisonment." *Id.* at 11 (internal quotations omitted). Thus, the grossly disproportionate standard under *Ewing* appears to be reserved for those punishments that are clearly an outrageously harsh response to the crime committed. In contrast to these rare outliers, the Maryland statute reserves lifetime exclusion from the franchise for those recidivist criminals who, not only commit more than one infamous crime, but whose second crime is of a violent nature. Especially given the continued history of such statutes and the way that this statute is

⁵ The *Ewing* Court upheld Maryland's Three-Strikes Law, which involves an even greater permanent restriction on criminals.

tailored to egregious crimes, it does not reach the threshold of a clearly disproportionate punishment.

Indeed, the Court's precedents support the type of distinctions made in the Maryland statute because Maryland tailors harsher penalties to more egregious crimes. For example, while striking down an Oklahoma statute that mandated sterilization of habitual criminals, the Court made the explicit caveat that the Constitution does not require things different in fact or opinion to be treated in law as though they were the same. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 540 (1942).⁶ The *Skinner* Court struck down the law in great part because it distinguished between embezzlement and other forms of larceny, such that it treated similar crimes differently. In contrast, Maryland's statute makes rational distinctions at two levels: for disenfranchisement to come into play at all, the criminal must commit an infamous crime; and for it to become permanent he must commit a second, violent crime. Notably, unlike the statute in *Skinner*, § 3-102 does not exclude traditionally white-collar crimes, such as embezzlement and commercial fraud. See §§18-201-18-306, §8-701; Record at 45, 49. Thus, Maryland has distinguished between types and frequency of crimes so that § 3-102 is proportional to the severity of the crime.

Maryland Statute § 3-102 also does not violate the evolving standards of decency Eighth Amendment Doctrine because it is not an outlier in the American justice system. Currently, forty-eight

⁶ Although *Skinner* applies the Equal Protections Clause Doctrine, rather than Eighth Amendment Doctrine, this caveat helps to elucidate how to ascertain whether a particular penological statute is proportional.

states have felon disenfranchisement laws and thirteen have permanent felon disenfranchisement laws. Even more tellingly, during Congressional debate on the Help America Vote Act in 2002, the Senate voted against an Amendment that prohibited permanent felon disenfranchisement for federal elections by a resounding margin of 63 nays to 31 yeas.⁷ This vote indicates that there continues to be strong support for states to retain their discretion in this arena, even where it intersects with federal elections. While international trends may be instructive where there is no clear trend or where the practice is declining in the United States, they should not be used to override broad American support for a practice. Even while holding that the Eighth Amendment might bar this law, the Fourth Circuit rejected the evolving standards doctrine as an avenue to the application of the Eighth Amendment in the case. Their opinion notes, "It would be premature to conclude that a State could never impose the punishment of permanent disenfranchisement." Record at 39. For the foregoing reasons, the Court should hold that § 3-102 does not violate the Eighth Amendment either under the grossly disproportionate or evolving standards of decency doctrines.

C. Furthermore, the Court should uphold Maryland's law because voting regulations are traditionally an area best suited to state legislative action, rather than judicial activism.

Finally, the Court should uphold Maryland's law because laws on voting eligibility are best suited to the state legislative domain, where, as is the case here, they do not directly violate

⁷ 23 Democrats joined 40 Republicans in this bipartisan rejection of such a proposal. 148 CONG. REC. S797-98 (2002) (proposed amendment 2879 to S. 565).

the Constitution or fall within the reach of a legitimate Congressional statute. This theory is supported by the principles of separation of powers and federalism inherent in the structure of the Constitution. To preserve the separation of powers, the Constitution gives Congress the power to create the laws, the Executive the power to execute the laws, and the Court the power to adjudicate the laws. The Vesting Clauses of Articles I, II, and III indicate that the founding generation wanted to keep the powers of each separate.⁸ During the ratification debates, Federalist # 47 emphasized the danger of the accumulation of all of the power in one branch and reassured the ratifiers that no one branch would gain tyrannous control over the political process. The principles of federalism, expressed by the Tenth Amendment, reserve the powers that the Constitution does not give to the federal government or exclude from the states to the states and to the people. In the case at hand, the original Constitution reserved voting qualifications as a matter for the state legislatures to determine, except where it directly violated the Constitution. Felon disenfranchisement does not clearly violate any Constitutional provision; indeed, § 2 of the Fourteenth Amendment explicitly authorizes it. The Court should uphold Maryland's discretion to decline to extend the franchise to repeat felons under the principles of separation of powers and federalism because the Constitution directly places this power with the state legislatures.

⁸ U.S. CONST. art. I, § 1, cl. 1; art. II, § 1; art. III, § 1.

John Hart Ely's representation-reinforcement theory of the Constitution supports a less activist Court role in situations, such as the one, where there is no clear Constitutional violation and the political process appears to be working. See JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (2001). Indeed, the evolution of Maryland's statute demonstrates that Maryland's legislature remains open to change on these types of statutes. As the Record demonstrates, the legislative history of § 3-102 indicates that the current law is in fact a liberalization of the State's attitude toward the disenfranchisement of felons." Record at 43. These changes indicate that Maryland's legislation is not part of the category subject to more suspicious judicial review where the interests of certain citizens are not represented at all in the political process. The political avenues to issues relevant to felons' interests must not be blocked given that this liberalization occurred so recently. Notably, Maryland's legislature made this amendment favorable to felons after the Senate's robust rejection of a proposed Amendment to the Help America Vote Act that would have prohibited states from keeping more stringent felon disenfranchisement laws. For the foregoing reasons, the Court should uphold Maryland's statute, thereby affirming that felon disenfranchisement statutes are within the domain of the state legislatures.

Conclusion

For the foregoing reasons, the Court should overturn the Fourth Circuit Court of Appeals' ruling and dismiss Coolidge's

claims under § 2 of the Voting Rights Act and under the Eighth Amendment.