
In The
Supreme Court of the United States

OCTOBER TERM, 2005

MARYLAND STATE BOARD OF ELECTIONS ET AL.,
Petitioners,

v.

JEFFREY COOLIDGE,
Respondent.

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT*

PETITIONER'S BRIEF ON THE MERITS

TEAM 10699

Attorneys for Petitioner

QUESTIONS PRESENTED

- I. 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?

- II. 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 Eight Amendment?

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OPINIONS BELOW

The order of the United States District Court for the District of Maryland dismissing Respondent's claims is unreported but appears in the transcript of the Record at pages 20-27. The decision of the United States Court of Appeals for the Fourth Circuit appears in the transcript of the Record at pages 29-41. The Record is reproduced in full at Appendix A.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit rendered judgment on July 16, 2005. *R.* at 29. Petition for certiorari was timely filed with this Court and was granted. *R.* at 2. This Court has the necessary jurisdiction under 28 U.S.C. § 1254(1) (2000).

STANDARD OF REVIEW

The procedural posture of this case requires all parties to assume that Respondent's allegations are true. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). The Court reviews the decision of the court of appeals *de novo*. *Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 466 (1992).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the United States Constitution provides, in relevant part, that “when the right to vote . . . is denied to any of the male inhabitants of such States, being twenty-one years of age, and citizens of the United States, or in any way abridges, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced.” U.S. Const. amend. XIV, § 2. The Fifteenth Amendment to the Constitution provides, in relevant part, that “[t]he right of citizens . . . to vote shall not be denied . . . by any State on account of race” U.S. Const. amend. XV. The Eighth Amendment to the Constitution provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. Const. amend. VIII. Federal Statute 18 U.S.C. § 1973, Maryland Election Law §§ 3-102, 3-501 are also relevant to the disposition of this appeal. All are reproduced in full at page 5 of the Record.¹

¹ “Briefs may not exceed 30 pages, excluding the preliminary materials (Rule 24.1(a)-(g)).” ACS Competition Rule 6 (c). Therefore, no appendix is included.

STATEMENT OF THE CASE

STATEMENT OF MATERIAL FACTS

Respondent Jeffrey Coolidge is a resident of Baltimore, Maryland, who has been disenfranchised under Maryland Election Law, § 3-102 (hereafter “§ 3-102”,) which permanently denies the right to vote to persons convicted of an “infamous crime” and subsequently convicted of committing a “violent felony.” Md. Code Ann., Election Law § 3-102 (Bender 2003).

In 1982, Coolidge was convicted of possession of a controlled substance with the intent to distribute, which qualified as an “infamous crime” under Maryland law. *R.* at 11. In 1984, he was arrested and convicted of drug possession, which, although serious, is not an “infamous crime” in Maryland *R.* at 11. In 2004, Coolidge threatened to assault a convenience store clerk and demanded money, for which he was convicted of robbery, a “crime of violence” under Maryland law. *R.* at 11; Md. Code Ann., Criminal Law § 14-101(a). Under § 3-102, Coolidge is permanently ineligible to vote because of his criminal actions spanning over two decades. *R.* at 12. Coolidge does not deny his guilt for these offenses.

Coolidge is African-American. He utilized 42 U.S.C. § 1983 to bring suit against the Maryland State Board of Elections, *et al.*, in the United States District for the District of Maryland. He sought a declaratory judgment that, since § 3-102 applies

disproportionately to African Americans, his permanent disenfranchisement under § 3-102 constitutes a voting qualification that denies him the right to vote on account of race, in violation of 42 U.S.C. § 1973, also known as the Voting Rights Act (hereafter "the VRA.") *R.* at 16. He also claimed that application of § 3-102 deprived him of equal protection of the law under the Fourteenth and Fifteenth Amendments. *R.* at 15.

The VRA provides that "[n]o voting qualification . . . shall be imposed by any State . . . in a manner which results in a denial or abridgement of the right of any citizen . . . to vote on account of race" 42 U.S.C § 1973(a) (2005). Section 2, subsection (b), of the VRA provides for what is commonly referred to, and which Petitioner will hereafter refer to, as a "results test" - a violation under subsection (a) is established if:

. . . based on the totality of circumstances, it is shown that the political processes leading to nomination or election . . . 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.

Id. Coolidge does not allege that Maryland has used § 3-102 as a pretext for intentional race discrimination. Rather, he alleges that the crimes defined as "infamous" under Maryland law are skewed toward those disproportionately committed by African Americans. *R.* at 13. However, Coolidge admits that the only

crimes that *trigger* disenfranchisement are “violent felonies.” *R.* at 15. Coolidge also admits that about half of all African Americans imprisoned in Maryland are incarcerated for committing violent felonies, which is the same proportion for White prisoners. *R.* at 12, 13. Coolidge alleges that § 3-102 fails the “results test” of the VRA because it combines with tenuously related racial disparities in the Maryland criminal justice system to ultimately disenfranchise proportionately more African Americans than Whites. *R.* at 14-15. Although he alleges systemic racial disparities in Maryland’s criminal justice system, he does not allege that such disparities are the product of race discrimination as official policy.

Coolidge sought a permanent injunction preventing the enforcement of § 3-102. *R.* at 16. He also sought a declaratory judgment that permanent disenfranchisement constitutes cruel and unusual punishment under the Eighth Amendment. *R.* at 16.

COURSE OF THE PROCEEDINGS

The district court granted Maryland’s motion for dismissal for failure to state a claim upon which relief can be granted, pursuant to Fed. R. Civ. P. 12(b)(6). *R.* at 20. The Court dismissed Coolidge’s equal protection claim since he failed to allege intentional discrimination as required. *R.* at 20. The district court then dismissed Coolidge’s VRA claim because, first, as the court concluded, § 2 of the Fourteenth Amendment

precluded application of the VRA "results test" to § 3-102. *R.* at 26, second, because Congress failed to enter congressional findings into the legislative record evidencing the need for such legislation and, third, because Congress failed to make a "clear statement" that it intended to infringe on the traditional authority of the state to disenfranchise felons. *R.* at 26.

The district court then dismissed Coolidge's Eighth Amendment claim because, first, felon disenfranchisement cannot be considered "punishment," thereby precluding applicability of the Eighth Amendment. *R.* at 27. It also ruled that criminal disenfranchisement is "an ordinary regulation contemplated by the Constitution" and, therefore, it was neither "cruel" nor "unusual." *R.* at 27.

Coolidge appealed to the United States Court of Appeals for the Fourth Circuit. *R.* at 28. Reviewing the district court's dismissal of Coolidge's claims *de novo*, the court of appeals reversed the district court's dismissal of Coolidge's claims, concluding that § 2 of the Fourteenth Amendment did not preclude application of the "results test" to § 3-102. *R.* at 33-41. The court also held that despite the lack of congressional findings pertaining to criminal disenfranchisement, Congress had the authority to apply § 2 of the VRA to § 3-102. *R.* at 36. The court of appeals then reversed the district court's Eight

Amendment ruling, concluding that felon disenfranchisement did indeed constitute punishment, and that Coolidge advanced a valid claim that such punishment was cruel and unusual under the Eighth Amendment. *R.* at 41.

Petitioner, the State of Maryland, appeals to this honorable Court, which granted *certiorari* for two issues: whether Maryland's disenfranchisement statute is subject to the VRA "results test," and whether Coolidge's permanent disenfranchisement constitutes cruel and unusual punishment under the Eighth Amendment. The dismissal of Coolidge's equal protection claim in the district court below is not an issue before this Court.

SUMMARY OF THE ARGUMENT

In 1982, Congress amended § 2 of the VRA to include a "results test," and effectively overruled by statute this Court's decision in *City of Mobile v. Bolden*, 446 U.S. 55, 62 (1980) (plurality opinion), where this Court held that a claim under § 2 of the VRA required a showing of discriminatory intent. *Chisom v. Roemer*, 501 U.S. 380, 403 (1991). According to this Court, "[t]he essence of a § 2 claim [using the "results test"] is that a certain electoral law . . . interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and White voters to elect their preferred representatives." *Thornburg v. Gingles*, 478 U.S. 30,

47 (1986).² The court of appeals therefore concluded that Coolidge advanced a cognizable claim under the VRA "results test" since he claimed that systemic racial disparities in Maryland's criminal justice system combined with § 3-102 to effectively deny him the right to vote on account of race. *R.* at 14-15.

For three reasons, the court of appeals erred in concluding that the VRA "results test" applies to § 3-102. First, Congress never intended for the "results tests" to apply to state felon disenfranchisement laws. This is evidenced by comments made by Congress when enacting the VRA, as well as Congress' obvious interest in exempting such laws from the "results test." Second, even if Congress did so intend, such application is precluded by § 2 of the Fourteenth Amendment, which exempts from its mandate the disenfranchisement of citizens "for participation in rebellion, or other crime," U.S. Const. amend XIV, § 2. Under the court of appeals' reasoning, Congress may render § 2 of the Fourteenth Amendment meaningless by stripping felon

²As explained by the Second Circuit in *Muntaqim v. Coombe*, a plaintiff may assert two different types of claims under subsection (b) of the VRA: "vote denial" and "vote dilution" claims. 366 F.3d 102, 105 (2d Cir. 2004), *rehearing en banc granted*. Vote denial occurs, as the term denotes, when the ability to vote is denied on account of race, while vote dilution occurs when a voting practice diminishes "the force of minority votes that were duly cast and counted." *Id.* Although the record contains demographic statistics for Baltimore and Baltimore County, Respondent clearly did not raise a vote dilution claim. Respondent's claim is one of vote denial, which he repeats throughout his complaint, and courts have generally treated identical challenges to other disenfranchisement statutes as such. *See Id.* (treating an identical challenge to Florida's felon disenfranchisement law as a vote denial claim.)

disenfranchisement statutes of the special statutes § 2 obviously confers unto them. Third, if Congress indeed intended to apply the VRA "results test" to such laws, it exceeded its constitutional authority. Under this Court's decision in *City of Boerne v. Flores*, and its progeny, such application of the VRA would be "so out of proportion" to the law's supposed objective of protecting voting rights, that it would amount to a substantive expansion of the protections provided by the Reconstruction Amendments, rather than being merely remedial or preventative. 521 U.S. 507, 532 (1997). Therefore, the Court should reverse the court of appeals lest it give Congress a blank check under the enabling clauses of the Reconstruction Amendments.

The court of appeals also erred in concluding that application of Maryland's statute to Coolidge constituted cruel and unusual punishment under the Eighth Amendment. First, the court of appeals erroneously concluded that Maryland's permanent disenfranchisement of Coolidge constituted punishment. Whether a state practice constitutes punishment is governed by the intent of the state legislature. Maryland has a prospective interest in denying recidivist and violent felons the franchise. Therefore, the Maryland legislature, in disenfranchising Coolidge, was acting in a regulatory rather than a punitive manner.

Even if Coolidge's permanent disenfranchisement constitutes punishment, it certainly is not cruel and unusual under the Eighth Amendment because it is not "grossly excessive," and, thus, the Court should defer to Maryland's policy decision in disenfranchising Coolidge.

For the aforementioned reasons, Coolidge's constitutional claims were appropriately dismissed by the district court, and this Court should reverse the court of appeals' ruling to the contrary.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN CONCLUDING THAT MARYLAND'S FELON DISENFRANCHISEMENT LAW IS SUBJECT TO THE VRA "RESULTS TEST."

The court of appeals erred in reversing the district court's dismissal of Coolidge's claims. In reversing, the court of appeals erroneously held that neither congressional intent, the Fourteenth and Fifteenth Amendments, nor this court's federalism jurisprudence, foreclosed application of the VRA "results test" to § 3-102. *R.* at 41.

This Court should reverse for several reasons. First, the court failed to ascertain whether Congress intended for the VRA "results test" to apply to state disenfranchisement laws. Not only did Congress not so intend, but the mere plausibility of this conclusion would have prohibited the court, per the "avoidance doctrine," from adjudicating the serious constitutional issues it addressed. Second, regardless of

congressional intent, § 2 of the Fourteenth Amendment specifically exempts felony disenfranchisement laws from its mandate. Third, application of the "results test" to § 3-102 would amount to an expansion of substantive rights under the Reconstruction Amendments, thereby exceeding Congress' power to enact legislation that is merely remedial.

A. Congress Did Not Intend To Apply The VRA "Results Test" To State Felon Disenfranchisement Laws.

In deciding that state felon disenfranchisement laws are subject to the "results test," the court of appeals ignored Congress' intent to the contrary. Additionally, since felon disenfranchisement laws have generally been viewed as beyond the reach of federal regulation, the VRA cannot be applied to § 3-102 because the VRA lacks a "clear statement" that Congress intended to so alter the usual balance between the states and the federal government.

1. The court of appeals erroneously assumed that Congress intended to subject state felon disenfranchisement laws to the VRA "results test."

In concluding that the VRA applied to § 3-102, the court of appeals relied solely on its analysis of whether § 2 of the Fourteenth Amendment foreclosed this conclusion.³ R. at 34-37. The court concluded that although the Fourteenth Amendment

³ Section § 2 of the Fourteenth Amendment provides, in relevant part, that a state's representation in the House shall be reduced when the right to vote is abridged to individuals otherwise qualified to vote "except" when those individuals are denied the right to vote "for participation in rebellion, or other crime" U.S. Const. amend XIV, § 2.

seemingly exempts from its mandate state disenfranchisement laws, “[t]he historical evidence . . . renders logical the application of the Voting Rights Act to felon disenfranchisement provisions.” *Id.* at 35. This conclusion ignores legislative intent.

In 1965 both Judiciary Committees stated that provisions of the VRA should not affect felon disenfranchisement laws. *Muntaqim v. Coombe*, 366 F.3d 102, 108-09 (2d Cir. 2004), *Rehearing en banc granted*, (citing S. Rep. No. 89-162, at 24 (1965)). Indeed, all states have felon disenfranchisement laws, and state representatives certainly did not desire to fundamentally handicap such a well-seated penological mechanism in their respective states. *Id.*

The primary purpose of the 1982 amendment was to overrule by statute this Court’s decision in *Mobile v. Bolden*, where the Court established that a party must show that the challenged voting practice was implemented with a discriminatory purpose. *Chisom*, 501 U.S. at 403 (citing *Bolden*, 446 U.S. at 62 (1980)). “Congress amended the Act in 1982 in order to relieve plaintiffs of the *burden of proving discriminatory intent*” *Id.* (emphasis added). The amendment merely made it easier for parties to successfully challenge electoral mechanisms that already were open to challenge before *Bolden*. Therefore, the 1982 amendment merely reserved the exception for felon

disenfranchisement laws carved out of the VRA in 1965. See *Farrakhan v. Washington*, 359 F.3d 1116, 1121 (9th Cir. 2004) (Kozinski, Circuit Judge, dissenting from denial of rehearing en banc) (arguing "there is no evidence that Congress had changed its mind about the legitimacy of felon disenfranchisement when it enacted section 2").

Although this is the only reasonable interpretation of congressional intent, this court should rule for petitioner even if there are other plausible interpretations. Reading the VRA to cover felon disenfranchisement laws requires courts to confront several unsettled constitutional questions. Under this Court's "doctrine of avoidance,"

. . . when deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice . . . [i]f one of them would raise a multitude of constitutional problems, the other should prevail-whether or not those constitutional problems pertain to the particular litigant before the Court.

Clark v. Martinez, 125 S.Ct. 716, 724 (2005). Thus, this Court should hold that the court of appeals erred by even engaging in constitutional analysis since an attempt to discern legislative intent would have precluded adjudication of such issues.

2. Congress may not subject § 3-102 to the VRA "results test" because the statute lacks a "clear statement" that Congress so intended.

Under this Court's precedent, "[i]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985)). "[T]he requirement of a clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Gregory*, 501 U.S. at 461.

Although Congress' intent is made clear by an examination of the legislative record, the *statutory* language of § (2)(b) of the VRA is ambiguous as to whether it applies to state felon disenfranchisement laws. Therefore, lower courts have applied this clear statement rule in concluding that the VRA does not cover state felon disenfranchisement laws. *See, e.g., Muntaqim*, 366 F.3d at 115 (applying "clear statement" requirement). This is so because such application of the VRA would "infringe upon the states' traditional authority over its own elections . . ." and because "under our federal system, the States possess primary authority for defining and enforcing the criminal law." *Id.* at 122. Indeed, this Court has never held that the VRA may be applied to such laws and, with the exception of the Ninth Circuit in *Farrakhan v. Washington*, 388 F.3d 1009, 1016 (9th Cir.

2003), all of the circuit courts that have addressed the issue have concluded that it does not. In addition to *Muntaqim*, see *Wesley v. Collins*, 791 F.2d 1255 (6th Cir. 1986); *Johnson v. Florida*, 405 F.3d 1214 (11th Cir. 2005) (en banc) (all concurring with this proposition in virtually identical cases). Thus, application of the VRA “results test” in this context would alter the usual federal-state balance. Therefore, if Congress intended such a result, it was required to manifest a clear statement to that effect. It did not. Therefore, this Court should conclude that Congress did not intend to subject § 3-102 to the VRA results test, and that the court of appeals erred in assuming otherwise.

B. Section 2 of the Fourteenth Amendment Precludes Application Of The VRA “Results Test” To § 3-102.

The court of appeals erred in concluding that § 2 of the Fourteenth Amendment does not preclude application of the “results test” to § 3-102.

Congress enacted the VRA to enforce the Fifteenth Amendment. *Chisom*, 501 U.S. at 383.⁴ The Fifteenth Amendment provides in relevant part that “[t]he right of citizens . . . to vote shall not be denied . . . by any State on account of race . . .” U.S. Const. amend. XV. However, the Fifteenth Amendment must be read in light of the Fourteenth Amendment, § 2 of which provides, in relevant part, that “when the right to vote . . .

⁴ “Congress shall have the power to enforce this article by appropriate legislation.” U.S. Const. amend XV, § 2.

is denied to any of the male inhabitants of such States, being twenty-one years of age, and citizens of the United States, or in any way abridges, *except for participation in rebellion, or other crime*, the basis of representation therein shall be reduced." U.S. Const. amend. XIV, § 2. (emphasis added). This exemption from reduced representation should be read to also protect such laws from congressional regulation. As this Court has noted, the Fourteenth Amendment "could not have been meant to bar outright a form of disenfranchisement which was expressly exempted from the less drastic sanction of reduced representation" *Richardson v. Ramirez*, 418 U.S. 24, 41 (1974).

Section 2 obviously signals the Framers' intent to elevate state felon disenfranchisement laws to a special status. Subjecting such laws to the blunt instrument that is the "results test" would entitle those laws to no more congressional deference than all other voting practices. This would strip felon disenfranchisement laws of the special status to which they are obviously entitled under the text of the Fourteenth Amendment, thereby rendering that text meaningless.

Of course, a State's felon disenfranchisement law should not serve as an absolute safe harbor for discriminatory intent. This Court has already held that "§ 2 was not designed to permit . . . *purposeful* discrimination." *Hunter v. Underwood*, 471 U.S.

222, 233 (1985) (emphasis added). However, Coolidge does not allege intentional race discrimination in law enforcement or in Maryland's criminal justice system (discussed more thoroughly below.) Therefore, assuming Coolidge's allegations are true, such evidence should be considered, as a matter of law, insufficient for the purposes of challenging a state felon disenfranchisement law under the VRA.

C. Congress Cannot Apply The VRA "Results Test" To § 3-102 Without Exceeding Its Authority Under § 2 Of The Fifteenth Amendment.

The Reconstruction Amendments were designed to infringe on state autonomy to some degree and, therefore, Congress may prohibit state practices "even if in the process it . . . intrudes into legislative spheres of autonomy previously reserved to the States."⁵ *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997). However, Congress' power is not unlimited, but rather "extends only to enforcing the provisions of [those amendments.]" *Id.* at 519. In other words, Congress' power is merely "remedial rather than substantive" *Id.* at 520. Thus, although Congress may enact prophylactic legislation that

⁵ As was the case in *Boerne*, a vast majority of this Court's decisions addressing Congress' power under the Reconstruction Amendments deal with the Fourteenth, and not the Fifteenth, Amendment. However, this Court has "always treated the nature of the enforcement powers conferred by the Fourteenth and Fifteenth Amendments as coextensive." *Lopez v. Monterey County* 525 U.S. 266, 294 (1999). Therefore, this Court should consider precedent addressing Congress' enforcement power under the Fourteenth Amendment as squarely on point in this case.

invariably affects state action that is not unconstitutional, if the effect of the law is "so out of proportion" to the objective of protecting a constitutional right, the law can be understood only as an attempt to work a "substantive change in constitutional protections" rather than being merely remedial or preventative. *Id.* at 529. In order for a law enacted under the Reconstruction Amendments to be sustained, there must be a "congruence and proportionality between the injury to be prevented or remedied and the means adapted to that end." *Id.* at 520.

An examination of this Court's case law indicates that "the injury to be prevented" is defined primarily by the prevalence of the unconstitutional conduct the law is designed to stem, and the likelihood that the law will actually prevent constitutional violations in most of the instances in which it is applied. See *Kimel v. Florida Board of Regents*, 528 U.S. 62, 88 (2000); *Boerne*, 521 U.S. at 530 (both focusing on the fact that the federal law at issue prohibited very little conduct likely to be held unconstitutional). Evidence in the legislative record of actual constitutional violations targeted by the federal law has always weighed heavily in this Court's case law. *Id.* Ultimately, the "constitutional propriety of [the] legislation . . . must be judged with reference to the historical experience it reflects .

. . .'" *Id.* at 525, 530 (quoting *South Carolina v. Katzenback*, 383 U.S. at 308 (1966)).

1. The VRA "results test" as applied to state felon disenfranchisement laws will prevent little if any unconstitutional state conduct.

The VRA must serve only to enforce, rather than expand, the rights provided by the Fifteenth Amendment. Although the VRA prohibits state practices that, regardless of the state's intent, result in a denial of the right to vote, it does so as a prophylactic means of preventing unconstitutional state practices, rather than for preventing disparate results *per se*. To avoid crossing the line separating permissible remedial legislation from that which expands substantive rights, it must be inferable that application of the VRA in most instances in which it is applied would actually prevent unconstitutional state conduct - the intentional denial of the right to vote on account of race *through the use of felon disenfranchisement laws*.⁶

In enacting the VRA, Congress made no findings that felon disenfranchisement laws were a primary target of the

⁶ The "injury prevented" is usually identified with specificity. Although Respondent will likely argue that the Court should examine the proportionality of the remedy in this case in light of the *general* history of race discrimination in voting, this would not be consistent with this Court's precedent. For example, in *College Savings Bank v. Florida Prepaid Postsecond Expense Educ. Board*, 527 U.S. 666 (1999), this Court struck down a federal law that allowed patentees to sue a state that infringed their patents, in order to protect patentees' property rights under the Fourteenth Amendment. The Court identified the injury to be prevented not as the denial of property rights generally, but as state denial of the property interest conferred via patent issuance.

legislation. The lack of support for the court of appeals' conclusion in the congressional record, combined with the historical use of felon disenfranchisement laws, leads invariably to the conclusion that the VRA "results test" is a remedy "so out of proportion" with one of its supposed objectives.

The asymmetry of applying the prophylactic "results test" to state felon disenfranchisement laws is made clear upon comparing such laws to other state practices that the Court has held may be regulated with prophylactic laws. In *Boerne*, the Court cited the regulation of literacy tests at issue in *Katzenback* as an example of legislation that was "proportionate and congruent." 383 U.S. at 355. Such a ban was permissible because literacy tests were a "particular type of voting qualification" that had a "long history" as a "notorious" means of race discrimination in voting. *City of Boerne*, 521 U.S. at 533.

The "historical experience" felon disenfranchisement laws "reflect" demonstrates why Congress may not sweep up such laws in its wide prophylactic net. Unlike literacy tests, felon disenfranchisement laws do not have a "long history as a notorious means" to deny minorities the right to vote. *Id.* at 355. Additionally, unlike literacy tests, felon disenfranchisement laws have existed since well before the Civil War, when states obviously did not need such laws to deny Blacks

the right to vote. R. Gregory Jerald, *Modern Day Discrimination or a Valid Exercise of States' Rights?: The Circuit Split As To Whether The Federal Voting Rights Act Applies To State Felon Disenfranchisement Statutes*, 7 Fla. Coastal L. Rev. 141, 148 (2005). Additionally, such laws have not only survived the general evolving consensus that race discrimination is socially unacceptable, but have actually become more common, as all fifty States now disenfranchise felons in some way. *R.* at 14.

To be sure, felon disenfranchisement laws were, shortly after the Civil War, used as a pretext for racial discrimination. *Id.* at 149. But such abuse of felon disenfranchisement laws, it is fair to say, represents a relatively small part of the much longer history of such laws as a legitimate penological and electoral practice.

Nor does Maryland's use of felon disenfranchisement give rise to the suspicion of unconstitutionality. Coolidge alleges that offenses defined as "infamous" in Maryland are "skewed" toward those disproportionately committed by Blacks. *R.* at 13. Even if this is true, "infamous crimes" are only predicate crimes – they do not actually trigger disenfranchisement. The only "infamous" crimes that currently trigger disenfranchisement in Maryland are "violent felonies." *Id.* at 13, 44. This means that the offenses that African Americans disproportionately commit in Maryland, namely drug offenses, no longer trigger disenfranchisement in

Maryland. *R.* at 12-13. Conversely, the only offenses that do trigger disenfranchisement are violent felonies, for which Coolidge admits Black and White convicts are incarcerated in equal proportions.⁷ *R.* at 15.

Even in the literacy test context Congress avoided overbreadth by limiting the ban to states where the abuse of literacy tests was most problematic. *Id.* The ban was also temporary – the provision was terminable in as little as five years, depending on the progress demonstrated by the targeted states. *Katzenbach*, 383 U.S. at 331. Although legislation is not required to contain these exact types of provisions, “limitations of this kind tend to ensure Congress’ means are proportionate to ends [that are] legitimate under § 5 [of the Fourteenth Amendment.]” *City of Boerne*, 521 U.S. at 533. By contrast, the VRA “results test” applies without any suggestion that Congress intended “to ensure [that its] means are proportionate to its ends.”

In response, Coolidge may respond by citing this Court’s precedent upholding congressional enactments pursuant to the Reconstruction Amendments. For example, in *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003), this court upheld the Family and Medical Leave Act (FMLA) requiring employers,

⁷ Respondent claims that African Americans are convicted of “infamous crimes” disproportionate to their share of the population. However, Respondent does not provide information as to whether the same is true for crimes *not* considered “infamous crimes.” If his statement applies also to non-infamous crimes, this allegation if true means nothing.

including states, to grant employees, both men and women, leave time to care for their children or ill family members. *Id.* at 729. The FMLA was passed to protect the equal protection rights of women by entitling men to enjoy the same leave time as women, employers were less likely to discriminate against women in their hiring practices. *Id.* However, the applicability of the FMLA is very narrow - it applied only to "one aspect of the employment relationship (family leave)" rather than "every aspect of state . . . operations," as did "the statutes at issue in *City of Boerne, Kimel, and Garrett.*"⁸ *Id.* at 738. Similarly, Title II of the Americans with Disability Act (ADA), which this Court upheld in *Tennessee v. Lane*, was also a carefully tailored statute. 541 U.S. 509 (2004). Title II provided that no individual, by virtue of a disability, be excluded from enjoying a state service and thereby required states to accommodate the physically handicapped by removing "architectural and other barriers to accessibility" to public facilities (consistent with n. 5, *supra*, the Court treated the right at issue as only the right to access the legal system via courthouses, even though law concerned all public facilities). *Id.* at 531 In doing so, the states required to provide only "reasonable modifications" and only to those eligible for the service being provided. *Id.* Additionally, Congress was careful to exempt the states when

⁸ Indeed, the opinion recites a long but nevertheless non-exhaustive list of variables limiting the FMLA's applicability. *Id.* at 739. For example, the statute exempted from its coverage elected state officials, their staffs, and appointed policymakers. *Id.*

compliance would "impose an undue financial or administrative burden" *Id.*

Therefore, this Court's recent precedent upholding prophylactic regulation actually serves to highlight the constitutional deficiency of § 2 of the VRA, as Maryland can only wish that Congress had enacted § 2 with the same consideration for state autonomy. However, it did not and Congress may not apply the blunt instrument of the VRA "results test" to a practice with merely an attenuated connection, at most, to the historical problem it seeks to remedy.

2. Given the excessively broad remedy provided by the VRA "results test" application of the "results test" to § 3-102 is unconstitutional.

As was the case in *Boerne*, given the comparison here between the remedy's broad sweep and the virtual non-existence of an "injury prevented," the VRA's "results test," if applied to state felon disenfranchisement laws, "could be understood only as an attempt to work a "substantive change in constitutional protections" rather than being merely remedial or preventative. *Id.*, at 529. Even if the Reconstruction Amendments may be read to include this expansive conveyance of substantive rights, the *Boerne* Court emphasized that it is the province of this Court, not the legislature, to make that decision – *i.e.*, "to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803)).

II. Maryland's Felon Disenfranchisement Law, As Applied, Does Not Constitute Cruel And Unusual Punishment

The Fourth Circuit erroneously held that Maryland's permanent disenfranchisement of Coolidge constituted cruel and unusual punishment under the Eighth Amendment. First, the permanent disenfranchisement of repeat criminals should not be considered punishment for the purposes of Eighth Amendment analysis. Further, even if is punishment, it is not "cruel and unusual" under the Eighth Amendment.

A. Maryland's felon disenfranchisement statute does not constitute punishment under the Eight Amendment.

The unconstitutionality of § 3-102 depends, in part, on the Coolidge's ability to prove that its application constitutes a punishment as defined under this Court's Eighth Amendment precedent. *Bell v. Wolfish*, 441 U.S. 520, 538-39 (1979). Whether a particular state penal practice is a punishment is primarily a matter of statutory construction, with deference paid to legislative intent. *Kansas v. Hendricks*, 521 U.S. 346, 359, 361 (1997). If the legislative intent is ambiguous, the Court asks "whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it]." *Kennedy v. Mendoza-Martinez*, 372 U.S. at 168-169.

An examination of the Maryland Constitution, in conjunction with its enacting statute, demonstrates that the Maryland

legislature, in enacting § 3-102, intended to regulate and protect the integrity of the state franchise, rather than establish a punishment. The language of the Maryland constitution expressly refers to the state's *regulation* of the right to vote. Md. Const. art. I § 4. Additionally, § 3-102 is a part of Maryland's election code, not its penal code, *R.* at 42, and the provision providing for the disenfranchisement of violent felons is situated adjacent provisions establishing the eligibility of minors and the mentally incompetent to vote, thereby providing for the distribution of voting rights concomitant with the civic competence and responsibility of various groups. *R.* at 42-43.

These limitations are a reflection of Maryland's interest in protecting the integrity of the franchise. Maryland restricts the under-aged and the mentally incompetent from voting based on the policy conclusion that they are not fully competent to decide important issues confronting society. Aliens, too, are not allowed to vote, based on a reasonable belief that they do not possess the loyalty necessary to vote. *See* Md. Const., art. 1, § 1, § 7; Md. Code Ann., Election Law §3-102 (b),(a)(2). Likewise, repeat felons, Maryland has concluded, should not be entrusted with the more sensitive powers of citizenry. Felons, especially recidivist and violent felons like Coolidge, are

justifiably perceived to be less trustworthy and less concerned with the welfare of society than law-abiding citizens.⁹

B. Maryland's Disenfranchisement Of Respondent, If Punishment, Is Not Cruel And Unusual Under The Eighth Amendment.

If this Court does conclude that felon disenfranchisement is a punishment, it should still find that it is not "cruel and unusual" under the Eighth Amendment.

The specific analysis this Court currently applies to adjudicate Eighth Amendment claims was recently articulated in *Ewing v. California* 538 U.S. 11 (2003), as well as the preceding cases *Rummel v. Estelle*, 445 U.S. 263 (1980); *Solem v. Helm*, 463 U.S. 277 (1983) and *Harmelin v. Michigan*, 501 U.S. 957 (1991). Culminating in *Ewing*, this Court's Eighth Amendment jurisprudence first considers the "four principles of proportionality review" that provide a federalism-conscious backdrop for the second step in the analysis, a determination of whether the challenged sentence is grossly disproportionate to the crime committed. If so, the state imposed punishment cannot withstand Eighth Amendment scrutiny.

For the reasons set forth below, the above analysis compels this Court to reverse court of appeals' ruling that Maryland's

⁹ Respondent will likely reply that, in principle, Maryland's denial of the right to vote to felons on the basis of social trustworthiness is analogous to a state's disenfranchisement of African Americans using roughly similar reasoning – that a certain group of people are inherently incompetent to responsibly handle full citizenship. The difference is that, here, the state reaches this conclusion not because of caprice and invidious, irrational prejudice, but rather on philosophical grounds that have to do with very real abuses of citizenship by repeat criminals.

permanent disenfranchisement of Coolidge constitutes cruel and unusual punishment.

1. The "four principles of proportionality review" counsel great deference to Maryland's decision to permanently disenfranchise Coolidge.

The "four principles of proportionality review are: [1] the primacy of the [state] legislature, [2] the variety of legitimate penological schemes, [3] the nature of our federal system, and [4] the requirement that proportionality review be guided by objective factors" 538 U.S. at 23. These principles cumulatively form the final and ultimate guiding principle of proportionality analysis, which is that "[t]he Eighth Amendment does not require strict proportionality between crime and sentence . . . rather it forbids only extreme sentences that are grossly disproportionate to the crime." *Id.*

First, this Court has a "tradition of deferring to state legislatures in making and implementing . . . important policy decisions [that is] long standing." *Id.* at 24; *Rummel*, 445 U.S., at 290. Further, this deference is due, even when the effectiveness of the state's policy choice is unproven. *Ewing*, 538 U.S., at 24. This tradition is particularly relevant here where the Court deals with Maryland's policy choices regarding both its electoral law and criminal law, two areas of regulation traditionally considered within the province of the states. Additionally, although Coolidge may attack the

effectiveness of § 3-102 in protecting the integrity of the franchise, such is the policy choice Maryland has made, and this Court should not substitute its own.

The penological philosophy underlying § 3-102 is entitled to an equal amount of deference. “[T]he Constitution does not mandate adoption of any one penological theory.”¹⁰ *Id.* at 25. In permanently disenfranchising repeat criminals, Maryland has chosen a utilitarian approach that does not center on the wholesale denial of a convict’s physical freedom. Rather, Maryland focuses on protecting the perceived integrity of the franchise by limiting it only to those who have agreed to fulfill their end of the social contract – *i.e.*, to not consistently break the law and demonstrate contempt for the civic institutions that comprise Maryland’s social fabric, such as the democratic process. Nevertheless, Maryland may just as successfully invoke a retributive justification for § 3-102, as it is not unreasonable to conclude that felon disenfranchisement would add yet another incentive for potential criminals to obey the law.

The general nature of our federalist system, the third guiding principle, also counsels great deference to Maryland’s choices. Federalism allows states to serve as laboratories in experimenting with social policies. Additionally, state laws are

¹⁰ In *Ewing* this Court recited a non-exhaustive list of examples of four penological theories, namely incapacitation, deterrence, retribution, and rehabilitation. *Id.*

a codification of the population's values. Indeed, § 3-102 reflects the evolving values of the people of Maryland. In 2002, Maryland liberalized its felon disenfranchisement laws, in part due to the lobbying efforts of those seeking to restore the franchise to felons. The changes wrought in the disenfranchisement statutes exemplify the success of the federal system employed. There may be times when the judiciary is called upon to act when the political system does not move in tandem with society's evolving notions of decency. This is not one of them.

The fourth principle of proportionality review is the requirement that such review be dictated by "objective factors." *Ewing*, 538 U.S., at 23. Maryland's permanent disenfranchisement of Coolidge does not lend itself to objective comparison with plausible alternative impositions. For example, it is impossible to conclude that a hefty fine or mandatory psychological counseling are objectively more severe impositions than disenfranchisement.¹¹ This comparison is entirely subjective. Additionally, unlike prison terms set for a number of years, the severity of disenfranchisement cannot be quantified, yet another reason to defer to the decision of Maryland in this case.

2. In light of Coolidge's extensive criminal record, his permanent disenfranchisement under § 3-102 is not a "grossly disproportionate" penalty.

¹¹ Of course, the death penalty or life imprisonment is not a "plausible" alternatives – they are more severe.

The record shows that Coolidge is a recidivist criminal with a history of violence. He was first convicted in 1984 of possession with intent to distribute an illegal narcotic. *R.* at 11-12. During his probationary period, he was convicted of possession of cocaine. *R.* at 13. In 2004, Coolidge was arrested for the third time and convicted for robbing a convenience store and threatening to assault its operator. *R.* at 16.

Coolidge has obviously proven to be a continued threat to society. For the aforementioned reasons, this Court should rule that Maryland's application of § 3-102 to Coolidge, in light his long record of serious crime, is not cruel and unusual under the Eighth Amendment and accordingly reverse the contrary decision of the court of appeals.

CONCLUSION

For the foregoing reasons, this Court should rule that the court of appeals erred in reversing the district court's dismissal of Coolidge's claims. Maryland's felon disenfranchisement statute is not subject to § 2 of the VRA, nor can it be, consistent with Congress' limited remedial power under the Reconstruction Amendments. Further, as a matter of law, Maryland's permanent disenfranchisement of Coolidge does not constitute cruel and unusual punishment under the Eight Amendment. Therefore, this Court should reverse the court of appeals.

Respectfully Submitted,

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