

No. 05-

In the Supreme Court of the United
States

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*

BRIEF FOR PETITIONERS

Team 10799

QUESTIONS PRESENTED

1. Is a statutory provision that permanently denies the right to vote only to persons who have committed a second of 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

IN THE SUPREME COURT OF THE UNITED STATES

MARYLAND STATE)
BOARD OF ELECTIONS)
151 West Street, Suite 200)
Annapolis, MD 21401;)
)
JANET FALLINS,)
STATE ADMINISTRATOR OF ELECTIONS)
151 West Street, Suite 200)
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)
BOARD OF ELECTIONS OF)
THE CITY OF BALTIMORE)
Charles L. Benton Bldg., Room 129)
417 E. Fayette Street)
Baltimore, MD 21202-3432;)
)
EDWARD D. JONES,)
ELECTION DIRECTOR)
BOARD OF ELECTIONS OF)
THE CITY OF BALTIMORE)
Charles L. Benton Bldg., Room 129)
417 E. Fayette Street)
Baltimore, MD 21202-3432,)
)
Petitioners,)
)
v.)
)
JEFFREY COOLIDGE)
3 Clinton Street, #26)
Baltimore, MD)
)
Respondent.)

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George Brooks, Felon Disenfranchisement: Law, History, Policy, and Politics, 32 FORDHAM URB. L.J. 851 (2005) 19

CASE HISTORY

Coolidge v. Maryland, No. 4629572048 (D.Md. Feb. 23, 2005).

Coolidge v. Maryland, No. 05-6257 (4th Cir. July 16, 2005).

BASIS FOR JURISDICTION

This court has subject matter jurisdiction under 28 U.S.C. § 1331, as this action arises under the Civil Rights Act, 42 U.S.C. § 1983; § 2 of the Voting Rights Act, 42 U.S.C. § 19731 and the United States Constitution.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

FEDERAL

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. 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.

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.

Civil Rights Act of 1871, 42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable...

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

In 1982, when Respondent Jeffrey Coolidge was 19 years old, two policeman found him carrying ten grams of cocaine. (R. 10.) Coolidge was indicted for possession with intent to distribute a controlled substance and convicted. (R. 10 - 11.) Under Maryland law, this crime was an infamous crime within the contemplation of what is now Md. Code Ann., Election Law § 3-102(b) (Bender 2005). Coolidge was released in 1984, but was again apprehended in possession of cocaine, and sentenced to six more months in jail. (R. 11.) He was released again in 1985. Id.

Coolidge registered to vote for the first time in 1992. Id. He voted in the 1992, 1996, and 2000 Presidential elections. Id. In April 2004, after robbing a convenience store, Coolidge was indicted and convicted of robbery, and sentenced to five years in prison and five years of probation. Id. Robbery is a crime of violence under Md. Code Ann., Criminal Law § 14-101(a) (Bender 2005). Thus, under Md. Code Ann., Election Law 3-102 (Bender 2005), Coolidge became permanently ineligible to vote when he was sentenced. (R. 12.)

Coolidge then brought suit in Maryland District Court against the Maryland State Board of Elections, the Board of Elections of the City of Baltimore, and their directors, alleging (1) violations of the Fourteenth and Fifteenth Amendments because crimes giving rise to disfranchisement in Maryland are committed more often by African Americans than by whites and Maryland discriminates in its conviction of African Americans; (2)

violation of § 2 of the Voting Rights Act of 1965 ("VRA") as amended in 1982, 42 U.S.C. § 1973, because discrimination at all stages of the criminal justice system results in African American disfranchisement under § 3-102 at a disproportionately high rate; and (3) cruel and unusual punishment. (R. 14 - 16.) The defendants moved to dismiss the suit, and the District Court granted the motion on all three claims. (R. 21.)

Coolidge then appealed to the United States Court of Appeals for the Fourth Circuit. (R. 28.) The Fourth Circuit dismissed his first claim, but upheld the VRA claim and the cruel and unusual punishment claim. (R. 30.) The Defendants then petitioned for Writ of Certiorari to the United States Supreme Court, which was granted on October 14, 2005. (R. 3.)

Summary of the Argument

I. Under Gregory v. Ashcroft, 501 U.S. 452, 460 (1991), "[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."

Application of the VRA to felon disfranchisement statutes would put the language of the VRA in direct conflict with § 2 of the Fourteenth Amendment. In addition, Congress' power to enact legislation like the VRA is limited by the congruence and proportionality test described in City of Boerne v. Flores, 521 U.S. 507 (1997). Because Congress made no finding of historical discrimination in felon disfranchisement statutes when enacting

the VRA, application of the VRA to felon disfranchisement statutes fails that test. Thus, application of the VRA to felon disfranchisement statutes would alter the usual constitutional balance between the States and the Federal Government, and would require a clear statement from Congress indicating intent to do so. Congress made no such statement. The VRA does not govern felon disfranchisement statutes.

II. Laws providing for the disfranchisement of felons are exercised under a state's broad power to regulate voting. As such, disfranchisement is a "punishment" invoking the Eighth Amendment. But even if criminal disfranchisement is a punishment, it is not cruel and unusual in light of its history, the weight of precedent, or the evolving standards of human decency.

ARGUMENT

I. MARYLAND'S STATUTE THAT PERMANENTLY DENIES THE RIGHT TO VOTE TO PERSONS WHO HAVE COMMITTED A SUBSEQUENT VIOLENT FELONY IS NOT A VOTING QUALIFICATION SUBJECT TO § 2 OF THE VOTING RIGHTS ACT, 42 U.S.C. § 1973, BECAUSE SUCH AN INTERPRETATION WOULD ALTER THE USUAL CONSTITUTIONAL BALANCE OF POWER, AND CONGRESS MADE NO STATEMENT THAT SUCH WAS ITS INTENT.

It is an established rule of statutory interpretation that "federal courts should not construe a statute to create a constitutional question unless there is a clear statement from Congress endorsing this understanding." Muntaqim v. Coombe, 366 F.3d 102, 113 (2d Cir. 2004) (quoting Johnson v. Bush, 353 F.3d 1287, 1315 (11th Cir. 2003) [Johnson I] (Kravitch, J., dissenting)). In Gregory, the Court stated it thus: "If 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.” 501 U.S. at 460. Because “Congress, like this Court, is bound by and swears an oath to uphold the Constitution,” the courts should “not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it. DeBartolo Corp. v. Florida Gulf Coast Trades Counc., 485 U.S. 568, 575 (1988).

The clear statement requirement “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. Thus, to explain why the Voting Rights Act does not apply to Maryland’s felon disfranchisement law, this brief will first address whether such application would alter the usual constitutional balance, and then examine whether Congress made a clear statement endorsing that application. The answer to the first question is yes, and the answer to the second is no.

A. Applying The Voting Rights Act To State Felon Disfranchisement Statutes Would Alter The Usual Constitutional Balance Between The States And The Federal Government.

1. The Scope Of The Voting Rights Act

The Fourteenth Amendment to the Constitution provides, in § 1, that “[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.” Section 5 of the Amendment adds: “Congress shall have power to enforce, by appropriate legislation, the provisions of this article. In accordance with § 5, in an effort to eliminate

racially discriminatory voting practices, Congress enacted the Voting Rights Act of 1965, and amended it in 1982.

The Voting Rights Act, 42 U.S.C. § 1973, as amended, provides in relevant part:

(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 . . .

(b) A violation of subsection (a) of this section is established if, based on the totality of the circumstances, it is shown that [members of protected classes] have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

42 U.S.C. § 1973. Courts have had considerable difficulty determining how to apply § 1973. Johnson v. Bush, 405 F.3d 1214, n. 30 (11th Cir. 2005) [Johnson II]; see also Muntaqim, 366 F.3d at 116 - 118 (quoting Goosby v. Town Bd., 180 F.3d 476, 499 (2d Cir. 1999) (Leval, J., concurring)) ("Unfortunately, it 'is exceedingly difficult to discern what [§ 1973] means.'"). The "on account of race or color" language in part (a) implies that a voting qualification that results in a denial of rights is only invalid if it does so because of race or color. However, the language of part (b), added in 1982, implies that a showing of discrimination is no longer necessary for a voting qualification to be held invalid.

But the language of part (b), alone, proves too much. For example, Respondent claims 3.9% of African Americans of voting age in Maryland are permanently ineligible to vote, while only 1% of whites in Maryland are permanently unable to vote. (R. 12.)

This is a difference of less than 3%. If such a difference, absent any showing of discrimination, is enough to establish a disparity under the "totality of the circumstances" test, there is nothing to show that, if the African American population is younger on average than the white population, the VRA should not be applied to the voting age. Or, if fewer African Americans are residents where they live than whites, there would be nothing to stop a claim that the VRA should apply to residence requirements. The age and residence requirements, like felon disfranchisement requirements, were in place long before the Fourteenth and Fifteenth Amendments were added to the Constitution, were enacted without discriminatory intent, aid considerably in the administration of the voting system, and should be protected from application of the VRA. Thus, the language in part (b) cannot be isolated from the meaning of part (a).

Reading § 1973 as a whole, courts have found that "Congress did not wholly abandon its focus on purposeful discrimination when it amended the Voting Rights Act in 1982." Muntagim, 366 F.3d at 117; see also Nipper v. Smith, 39 F.3d 1494, 1515 (11th Cir. 1994); League of United Latin Am. Citizens v. Clements, 999 F.2d 831, 850 (5th Cir. 1993). In one of the more detailed opinions to examine this, the court in Muntagim decided that "a plaintiff must allege that racial discrimination has caused either vote denial or vote dilution; however, a plaintiff need not allege that the specific rule or qualification at issue was itself motivated by racial bias. Muntagim, 366 F.3d at 118. Thus, it appears that if the Voting Rights Act applied to state

felon disfranchisement statutes, Respondents' claim of discrimination in all stages of the criminal process, resulting in a disproportionate number of disfranchised minorities, would survive summary judgment.

2. Interpreting the Voting Rights Act to Prohibit State Felon Disfranchisement Statutes Would Put it in Direct Conflict With the Language of the Fourteenth Amendment.

Section 1973 should not prohibit all voting restrictions that may have a racially disproportionate effect. Johnson II, 405 F.3d at 1228; see also Chisom v. Roemer, 501 U.S. 380, 383 (1991) ("Congress amended § 2 of the Voting Rights Act to make clear that *certain* practices and procedures 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). And, felon disfranchisement laws are afforded a more special place in United States history than most other voting qualifications. See Richardson v. Ramirez, 418 U.S. 24, 53 (1974) ("Residence requirements, age, previous criminal record are obvious examples indicating factors which a State may take into consideration in determining the qualifications of voters.") (internal citations omitted). Felon disfranchisement laws can be traced back to medieval times, and they made their way to colonial America via England. R. Gregory Jerald, *Comment: Modern Day Discrimination or a Valid Exercise of States' Rights?: The Circuits Split as to Whether the Federal Voting Rights Act Applies to State Felon Disenfranchisement Statutes*, 7 FL. COASTAL L.J. 141, 147 - 48

(2005). When the Fourteenth Amendment was ratified, "29 of the 36 States had provisions in their constitutions which prohibited, or authorized the legislature to prohibit, exercise of the franchise by persons convicted of felonies or infamous crimes. Muntaqim, 366 F.3d at 123. Today, all but two states have some form of criminal disfranchisement provision.

Finally, the states' discretion to exclude "felons from the vote has an affirmative sanction in § 2 of the Fourteenth Amendment" Richardson, 418 U.S. at 54. Section 2 provides:

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

By expressly exempting from sanction disfranchisement grounded on a prior felony conviction, § 2 shows that such disfranchisement is constitutional. See Richardson, 418 U.S. at 43 ("[T]hose who framed and adopted the Fourteenth Amendment could not have intended to prohibit outright in § 1 of that Amendment that which was expressly exempted from the lesser sanction of reduced representation imposed by § 2 of the Amendment."). Thus, interpreting part (b) of the VRA to deny the states the discretion to disfranchise felons would put the language of § 2 of the Fourteenth Amendment and part (b) of the VRA in direct conflict. It would also alter the constitutional balance of

power, because it would allow a congressional statute to take away a right given to the states by the Constitution.¹

3. Congress' Power To Enact Legislation Under § 5 Of The Fourteenth Amendment Is Limited By The Congruence And Proportionality Test.

Respondents may argue that the above conflict does not substantially alter the constitutional balance, because "Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct." Nevada Dep't of Human Resources v. Hibbs, 538 U.S. 721, 727 - 28 (2003). However, Congress' power to enact legislation under § 5 of the Fourteenth Amendment is limited by the congruence and proportionality test.

In City of Boerne, 521 U.S. at 520 (1997), the Supreme Court held that "Congress may exercise its enforcement powers under the [Fourteenth and Fifteenth Amendments] only when it responds to a pattern of constitutional violations with a congruent and proportional remedy." Muntaqim, 366 F.3d at 120. Applying this idea, the Court held that the Religious Freedom Restoration Act of 1993 ("RFRA") was inappropriate because, during its enactment, Congress did not document any "widespread pattern of religious discrimination in this country." City of Boerne, 521 U.S. at 531. Additionally, the Court deemed the RFRA "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent,

¹ This is not to say that the states have the right to use disfranchisement provisions to discriminate intentionally on the basis of race. The Supreme Court outlawed such intentional discrimination in Hunter v. Underwood, 471 U.S. 222 (1985).

unconstitutional behavior." Id. at 532. Similarly, in Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356, 368 (2001), the Court explained that Congress could not enact § 5 legislation unless it first identified "a history and pattern of unconstitutional . . . state transgressions." Finally, in Oregon v. Mitchell, 400 U.S. 112, 130, (1970), superceded by U.S. Const. Amend. XXVI, the Court held that Congress could not amend the VRA to lower the voting age from 21 to 18, because "Congress made no legislative findings that the 21-year-old vote requirement was used by the States to disenfranchise voters on account of race."

Applying the congruence and proportionality test to the VRA, it is clear that in order for the VRA to apply to state felon disfranchisement statutes, Congress would have had to establish a record of constitutional violations under such statutes.² It did no such thing. Johnson II, 405 F.3d at 1231; Muntaqim, 366 F.3d at 125. And, without an established record of constitutional violations, it follows that the "remedy" of eliminating altogether a state's ability to institute felon disfranchisement laws is incongruent to the putative problem. Thus, applying the VRA to felon disfranchisement statutes would alter the usual constitutional balance of power between the States and the Federal Government.

² This does not mean that Congress needs to have set up, in advance, the legislative findings to support any possible future application of the VRA. However, because felon disfranchisement laws were explicitly authorized by the Fourteenth Amendment and in widespread existence when the VRA was enacted, it is reasonable to expect that if Congress expected the VRA to apply to such laws, it would have laid the foundation.

B. Congress Did Not Make A Clear Statement Of Intent To Alter The Constitutional Balance When It Enacted The Voting Rights Act Of 1965 Or When It Amended The Voting Rights Act In 1982.

Since the application of the VRA to felon disfranchisement would seriously alter the usual constitutional balance between the States and the Federal Government, this brief next addresses whether Congress made its intent to alter the balance "unmistakably clear in the language of the statute." Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985). It did not.

The language of the VRA itself clearly lacks any reference to felon disfranchisement statutes. Further, Congress' reasoning and statements in enacting, and then amending, the VRA, are set forth in detail in Johnson II, 405 F.3d at 1232 - 1234. Johnson II shows that, in 1965, "the act was intended to reach voting tests and other practices, such as districts designed by states to minimize minority voting." Id. at 1232. However, Congress did not intend to reach felon disfranchisement statutes.

In fact, there are only two references to felon disfranchisement made in the reports to the 1965 act. In those two references, both Judiciary Committees made clear that § 4(c) of the Voting Rights Act - which bans any "test or device" that limits the ability to vote to those individuals with "good moral character" - does not prohibit felon disenfranchisement statutes. Baker v. Pataki, 85 F.3d 919, 929 (2d Cir. 1996) (citing S. Rep. No. 89-162, at 24 (1965); H. R. Rep. No. 89-439, at 25 - 26 (1965)). Thus, the Judiciary Committees had felon disfranchisement statutes clearly in mind when they considered

the Voting Rights Act, and did nothing to bring them under control of the Voting Rights Act.

Additionally, "despite the amendment of the VRA in 1982, "neither the plain text nor the legislative history [of the amendments] plainly declares Congress' intent to extend the Voting Rights Act to felon disfranchisement provisions."
Muntaqim, 366 F.3d at 113 (quoting Johnson I, 353 F.3d at 1317); see Johnson I, 353 F.3d at 1317 - 18 (Kravitch, J., dissenting) (noting that "the Senate Report [in 1982], which goes into great detail on legislative intent, made no mention of felon disfranchisement provisions"); Farrakhan v. Washington, 359 F.3d 1116, 1121 (9th Cir. 2004) (Kozinski, J., dissenting from denial of rehearing in banc) ("There is . . . no evidence that Congress had changed its mind about the legitimacy of felon disenfranchisement when it enacted [part (b) of § 1973].").³

Additionally, despite obvious court confusion over this issue for at least a decade, Congress has made no effort to clarify its intent. In order to read into the VRA an intent to apply to felon disfranchisement statutes, and thus seriously alter the constitutional balance, "[t]o require Congress to make

³ Respondents may claim that Chisom, a case in which the Supreme Court did not apply the clear statement rule before determining that the results test of § 1973 applies to the election of state judges, shows that the clear statement rule does not apply when determining application of the VRA. However, the Supreme Court's "failure, without so much as a reference to the plain statement rule, to apply the rule in Chisom" cannot stand against the "unequivocal language in Gregory that the plain statement rule does apply in the context of legislation passed pursuant to the enforcement clauses of the [Fourteenth and Fifteenth Amendments]." Muntaqim, 366 F.3d at 128 - 29 (quoting Baker, 85 F.3d at 932 (Mahoney, J.)).

its intentions clear would not impose an unreasonable or unrealistic burden on Congress, or one that Congress is not accustomed to meeting." Muntaqim, 366 F.3d at 123.

Thus, because application of the VRA to Maryland's felon disfranchisement statute would affect the constitutional balance between the Federal Government and the States, and because Congress, in enacting the VRA, made no clear and plain statement that it should apply to felon disfranchisement statutes, the VRA should not be held to govern state felon disfranchisement statutes.

II. THE MARYLAND LAW DOES NOT VIOLATE THE EIGHTH AMENDMENT'S PROSCRIPTION OF CRUEL AND UNUSUAL PUNISHMENT, BECAUSE IT IS NOT "PUNISHMENT" AND IF IT WAS, IT WOULD NOT BE CRUEL AND UNUSUAL.

For a law to violate the Eight Amendment's prohibition of cruel and unusual punishment, the law must first qualify as a "punishment." Green v. Board of Elections, 380 F.2d 445 (2d Cir. 1967). The law must then be shown to be cruel and unusual at its passage, or by the "evolving standards of decency." Roper v. Simmons, 125 S.Ct. 1183, 1190 (2005). Neither is the case with felon disfranchisement. First, disfranchisement is not a punishment, but an act of state regulation. Second, if the law was a punishment, it would not be cruel and unusual in its historical context, by the weight of precedent, or by today's standards. In fact, the law is explicitly permitted by the United States Constitution, U.S. CONST. amend. XIV, § 2, and the law does not violate subsequent constitutional amendments.

A. The Disfranchisement Law Is Not A "Punishment," But An Exercise Of The State's Right To Regulate Voting.

1. The Legislative Purpose Of The Law Is Not To Punish, But To Regulate.

In determining whether a law is a "punishment," the Court has examined the purpose of the statute, rather than the effect. Trop v. Dulles, 356 U.S. 86, 96 (1958). Courts have long recognized that states have broad powers to regulate voting. See Lassiter v. Northampton County Board of Elections, 360 U.S. 45 (1959). Many of these courts offer the ability to restrict voting ability based on age and residence along with criminal record as examples of this broad power. See id. at 51 ("Residence requirements, age, previous criminal record are obvious examples indicating factors which a State may take into consideration in determining the qualifications of voters.") (citation omitted). These qualifications are not to punish those affected, but are policy expressions of the basic competencies for franchise.⁴ This Court has agreed:

The point may be illustrated by the situation of an ordinary felon. A person who commits a bank robbery, for instance, loses his right to liberty and often his right to vote. If, in the exercise of the power to protect banks, both sanctions were imposed for the purpose of punishing bank robbers, the statutes authorizing both disabilities would be penal. But because the purpose of the latter statute is to designate a reasonable ground of eligibility for voting, this law is sustained as a nonpenal exercise of the power to regulate the franchise.

Trop, 356 U.S. at 96 (1958) (citations omitted).

⁴ Respondent may argue that past criminal acts do not adequately address competency, because many felons are competent. But no voter regulation is perfect; 16 and 17 year olds may be more competent than many adults. Still, such requirements are within the province of the states.

Additionally, that the law in question is positioned in the "Election Law" section of the Maryland code, while not dispositive, is telling of the legislature's intent to enact the law as a regulation rather than punishment. Md. CONST. art. I, § 4. The law only references criminal law to define a "crime of violence." Such a cross-reference does not take away from its regulatory aspect, the law merely borrows a criminal law definition that the state has decided appropriately defines those who should be permanently ineligible to vote.

2. That State's Cannot "Fence Out" Certain Individuals Because Of The Way They May Vote Does Not Bear On Whether This Statute Constitutes Punishment.

As the court below acknowledged, the Second Circuit has also expressed that felon disfranchisement is not punishment. (R. 39) (citing Green v. Bd. Of Elections of N.Y., 380 F.2d 445, 451 (2d Cir. 1967)). The court below asserted that the justification cited by Green "no longer suffices" in light of Carrington v. Rash, 380 U.S. 89 (1965), because Carrington held that "fencing out" certain individuals because of the way they may vote is a violation of Fourteenth Amendment. But Carrington was decided two years before Green, so Green had the benefit of this precedent. Also, Carrington was inapposite to punishment and the Eighth Amendment. Carrington did not, therefore, address or alter disfranchisement's non-penal status. If Maryland's regulation violates the principle in Carrington, respondent has an equal

protection claim, not an Eighth Amendment claim.⁵ Finally, the Constitution explicitly permits criminal disfranchisement, thus setting this case apart from Carrington, which addressed disfranchisement of military personnel. See Carrington, 380 U.S. 89; See also Richardson, 418 U.S. at 54 (“[T]he exclusion of felons from the vote has an affirmative sanction in § 2 of the Fourteenth Amendment, a sanction which was not present in the case of the other restrictions on the franchise which were invalidated in the cases on which respondents rely.”)

3. Length Of Disfranchisement Does Not Affect The Statute’s Practice As Non-Penal.

That disfranchisement is sometimes coterminous with the sentence does not affect its status as non-penal. In determining voting standards, a state may declare that when person reaches a certain age or level of independence, the person obtains right to vote. Similarly, after a certain period, states may consider a felon eligible to vote. This period of time could reasonably relate to the sentence, severity, or frequency of the crime. Arguments that a regulation is ill thought out, unnecessary, or bad policy belong in the legislatures of the state.

4. Evolving Standards Of Decency Are Misplaced In This Part Of The Analysis.

Importantly, evolving standards of decency, while relevant to determining whether a punishment is cruel and unusual, see Roper, 125 S.Ct. 1183, do not determine whether something is punishment in the first place. Therefore, that disfranchisement

⁵ Equal protection is not at issue in this appeal. Moreover, the Supreme Court has precluded such claims. See Richardson v. Ramirez, 418 U.S. 24 (1974).

is an area of state regulation, not a matter of punishment, remains unaffected by such an analysis.

B. If Felon Disfranchisement Was "Punishment" It Would Not Be Cruel And Unusual Either In Its Historical Context, Or According To Contemporary Standards Of Human Decency.

1. Felon Disfranchisement Was Favored When The Eighth Amendment Was Drafted.

In determining whether a punishment is "cruel and unusual" this Court has examined the Eighth Amendment's "history, tradition, precedent," and contextual purpose. Roper, 125 S.Ct. 1183 at 1190. The Court has also examined the "evolving standards of decency." Id. This analysis demonstrates that felon disfranchisement, even if it is permanent, is not cruel and unusual punishment.

It seems clear that felon disfranchisement was not considered cruel and unusual when the Eighth Amendment was adopted. Felon disfranchisement has its roots in Greek and Roman law, and was directly carried over to the United States from English law. See George Brooks, Felon Disenfranchisement: Law, History, Policy, and Politics, 32 Fordham Urb. L.J. 851, 852-853 (2005). Eleven states had adopted laws permitting felon disfranchisement by 1821, approximately half of the states in existence at that time. Id. at 853. By the time the Fourteenth Amendment was adopted, 29 states permitted or required felon disfranchisement. Richardson, 418 U.S. at 49. When states were readmitted to the union under the Reconstruction Act after the Civil War, they were forbidden to discriminate between voters on the basis of race, but explicitly granted the right to disfranchise criminals. Id. at 49. Historical acceptance is also

supported by the express validation of the practice in the Fourteenth Amendment. U.S. CONST. amend. XIV, § 2, and the history surrounding the Fourteenth Amendment's adoption. See Richardson, 418 U.S. at 42-50. Notably, no conditions are placed on the length of disfranchisement in the constitution or the Reconstruction Acts.

2. This Court Has Consistently Upheld This Practice.

Over one hundred years of precedent affirm a state's ability to disfranchise criminals. The Supreme Court has consistently upheld the constitutionality of felon disfranchisement, and even stated that the "exclusion of convicted felons from the franchise violates no constitutional provision." Richardson, 418 U.S. at 54. (citing Lassiter, 360 U.S. 45). Earlier decisions also concluded that criminal disfranchisement was constitutionally permissible. See Murphy v. Ramsey, 114 U.S. 15 (1885) (affirming the right of states to disfranchise bigamists); Davis v. Beason, 133 U.S. 333 (1890) (same).

3. Evolving Standards Of Decency Do Not Demonstrate That Criminal Disfranchisement Is Cruel And Unusual By A National Consensus.

Standards of decency do not demonstrate criminal disfranchisement to be cruel and unusual. First, criminal disfranchisement is a mild practice relative to practices the Court has determined to be cruel and unusual. Most cases involve the exercise of the death penalty. See e.g., Thompson v. Oklahoma, 487 U.S. 815 (1988) (prohibiting execution of criminals under the age of 16); Atkins v. Virginia, 536 U.S. 304 (2002) (prohibiting the execution of the "mentally retarded"); Enmund v.

Florida, 458 U.S. 782 (1982) (prohibiting execution for felony murder when the defendant did not attempt, intend, or in fact kill). The case most analogous to today's decision involved the complete expatriation of a citizen. Trop, 356 U.S. 86. There, the Court focused on the result of leaving a person without a country:

His very existence is at the sufferance of the country in which he happens to find himself In short, the expatriate has lost the right to have rights. . . . It subjects the individual to a fate of ever-increasing fear and distress. He knows not what discriminations may be established against him, what proscriptions may be directed against him, and when and for what cause his existence in his native land may be terminated. . . . It is no answer to suggest that all the disastrous consequences of this fate may not be brought to bear on a stateless person. The threat makes the punishment obnoxious.

Id. at 102. The elements that make expatriation so repulsive are simply not present in the case of disfranchisement. Expatriation is so repulsive because it removes any guarantee of rights. Disfranchisement on the other hand, is limited in scope to voting and certain related activities such as running for office. The disfranchised felon may not be deported, and it is a far cry from the "total destruction" of the individual's status. Id. at 101. Moreover, expatriation was not adopted by the government until 1940, thus weakening the practice through a historical lens. Id. at 101 n.32.

The modern state of the law does not suggest a consensus against felon disfranchisement. In cases involving capital punishment, the Court has surveyed state law to determine whether

there was a consensus against a particular form of punishment. See e.g., Roper, 125 S.Ct. 1183 at 1190 (citing Atkins, 536 U.S. 304 et. al.). Roper and Atkins are the two most recent application of this practice. Both cases focus on the number of states prohibiting and permitting the practice, the momentum at which the practice has been adopted or abandoned, and the frequency at which the practice is actually exercised in states where it is permitted. See Roper, 125 S.Ct. at 1189-1193; Atkins, 536 U.S. at 315-317. In Atkins, the Court noted that execution of the "mentally retarded" was expressly prohibited in 34 states. Strikingly, 18 of those states had prohibited that practice in the 11 years leading up to the case. The 14 states that prohibited the death penalty were included in this count. Atkins, 536 U.S. at 346. Finally, the court stressed that in those states where execution of the "mentally retarded" was technically allowed, it was rarely practiced. Atkins, 536 U.S. at 347 ("[E]ven among those States that regularly execute offenders and that have no prohibition with regard to the mentally retarded, only five have executed [a mentally retarded offender]. The practice, therefore, has become truly unusual, and it is fair to say that a national consensus has developed against it."). In Roper, the Court found that, while 20 states permitted the execution of juvenile, it was a rare practice even in those states; only 3 had executed a juvenile in the previous 10 years. Roper, 125 S.Ct. at 1192.

In contrast, all 50 states permit criminal disfranchisement.(R. 14.) And in 13 of those states,

disfranchisement may be permanent. Id. Importantly, the exercise is frequently practiced in those states that have such a law. Also, that 12 states have "relaxed" their disfranchisement laws falls short of the widespread abandonment in Atkins and Roper.

Moreover, that the claim pertains to disfranchisement rather than capital punishment affects the analysis. As the Roper court explained, "Because the death penalty is the most severe punishment, the Eighth Amendment applies to it with special force." Roper, 125 S.Ct. at 1194. Therefore Court decisions regarding capital punishment represent the Court's strictest application of the Eighth Amendment.

4. International Law, While Instructive In Some Cases, Is Not Determinative, Particularly When There Is No National Consensus.

In some recent Eighth Amendment cases, the Court has considered international opinion instructive on whether a punishment is cruel and unusual. See e.g., Roper, 125 S.Ct. at 1198 ("[T]he Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of 'cruel and unusual punishments.'" (citation omitted). But in all cases in which the Court has conducted this inquiry, it first found a national consensus stronger than the one in this case. See Roper, 125 S.Ct. at 1192; Trop, 356 U.S. 86. Actually favoring international law, instead of using it to buttress an existing national consensus, would evoke the criticisms expressed by Justice O'Connor in her dissent in Roper:

Because I do not believe that a genuine national consensus against the juvenile death

penalty has yet developed, and because I do not believe the Court's moral proportionality argument justifies a categorical, age-based constitutional rule, I can assign no such confirmatory role to the international consensus described by the Court.

Roper, 125 S.Ct. at 1215 (Justice O'Connor, dissenting).

5. Criminal Disfranchisement Is Expressly Validated By The Constitution.

Finally, the criminal disfranchisement is not cruel and unusual punishment because it is expressly permitted in the Fourteenth Amendment, which was adopted subsequent to the Eighth Amendment. This Court has adopted the plain meaning interpretation of § 2 of the Fourteenth Amendment, and has held that it expressly authorizes criminal disfranchisement. See Richardson, 418 U.S. at 54. Since this was passed after the Eighth Amendment, the Court should favor the subsequent specific authorization over a general possible proscription. And, of course, the Constitution cannot be unconstitutional.

In sum, felon disfranchisement is not punishment, but the exercise of state regulation. Felon disfranchisement has been accepted by the Court since this country's establishment. That disfranchisement is exercised in so many states, and exercised so frequently demonstrates that this is not a cruel and unusual practice. This is especially true considering that other cases surveying state law involved capital punishment, thus invoking the strictest application of the Supreme Court's Eighth Amendment jurisprudence. Finally, since criminal disfranchisement is expressly permitted by the Fourteenth Amendment it cannot be cruel and unusual.

CONCLUSION

Therefore, we urge this Court to overrule the Fourth Circuit's ruling and grant the Motion to dismiss, because the VRA does not apply to Maryland's § 3-102 and because felon disfranchisement statutes are not cruel and unusual punishment.

Respectfully Submitted,

Team 10799