
No. 05-

In the
Supreme Court of the United States

January Term 2006

MARYLAND STATE BOARD OF ELECTIONS
ET AL., PETITIONERS,

v.

JEFFREY COOLIDGE,
RESPONDENT.

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

BRIEF FOR RESPONDENT

Team No. 10524

QUESTIONS PRESENTED

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

Petitioners

Maryland State Board of Elections;
Janet Fallins, State Administrator of Elections;
Board of Elections of the City of Baltimore;
Edward D. Jones, Election Director

Respondent

Jeffrey Coolidge

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STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered, and the petition for a writ of certiorari was granted. The Court has subject matter jurisdiction as the action arises under the Civil Rights Act, 42 U.S.C. § 1983; § 2 of the Voting Rights Act, 42 U.S.C. § 1973; and the United States Constitution. The jurisdiction of this Court rests on 28 U.S.C. § 1331.

CONSTITUTIONAL PROVISIONS AND STATUTES

FEDERAL

U.S. Constitution, Amendment VIII.

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

U.S. Constitution, Amendment 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. Constitution, Amendment 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 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 4(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section 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) of this section 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. 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

Coolidge's Disfranchisement

This case presents a conflict between the criminal justice system that imposes a penological scheme that deprives a felon of his right to vote, and the civil rights that demand that a citizen should not be stripped of his opportunity to fully participate in society. Respondent, Mr. Jeffrey Coolidge, is a 42 year old African American man and a lifelong resident of Baltimore, Maryland who is forever prohibited from voting or registering to vote in any local, state or federal election in Maryland. (R. at 10.)

In 1982, at the age of 19, Mr. Coolidge was a victim of racial profiling when he was stopped by the police while driving his car on city streets because they had been investigating reports of a robbery by an African American man of similar build. (R. at 10.) The police searched him and found him in possession of 10 grams of cocaine. (R. at 10.) Mr. Coolidge was not charged for the robbery nor was he a suspect; however, Mr. Coolidge was indicted and convicted for possession with intent to distribute a controlled substance. (R. at 10.) Racial discrimination similarly played a part in his conviction as his jury was comprised of one African-American and eleven white members. (R. at 11.) He was sentenced to one year in prison and one year of probation. (R. at 11.) Maryland Election Law §3-102 denied Mr. Coolidge the right to

vote while in prison and on probation because his conviction was an infamous crime under Maryland law. (R. at 11.)

Mr. Coolidge suffered from a drug problem that continued to plague him after he served his sentence. While on probation, he was found in possession of 1 gram of cocaine and convicted for a misdemeanor possession and sentenced to another 6 months in jail. (R. at 11.) In 1985, after his release, Mr. Coolidge sought treatment for his addiction and successfully completed a program in two years. (R. at 11.) For nine years following, he was a sober law abiding resident with all the privileges of citizenship. He registered to vote for the first time in 1992, and voted in the 1992, 1996, and 2000 elections. (R. at 11.)

In April 2004, Mr. Coolidge entered a convenience store and purchased a newspaper. (R. at 11.) When the clerk opened the drawer, Mr. Coolidge insisted on having all the cash in the drawer and verbally threatened harm, but he not display a weapon or engage in an overt act of violence. (R. at 11.) Though he stole \$150 from the store and was subsequently arrested, the police did not find a weapon when they arrested him. (R. at 11.) He was convicted and indicted for robbery. According to Maryland law, robbery is a violent crime; however, the fact that Mr. Coolidge did not employ a weapon was a mitigating factor and he was sentenced to 5 years imprisonment and probation, well below the maximum penalty of 15 years. (R. at 11.)

Mr. Coolidge was a registered voter in Baltimore, but under Maryland law, as a result of his second conviction, his name was struck from the roll of voters and he did not vote in the 2004 Presidential election. (R. at 12.) Mr. Coolidge is now permanently ineligible to register or vote. (R. at 12.)

Maryland Election Law

Maryland imposes a three-tiered system for felon disenfranchisement that corresponds to the frequency and severity of the crime. (R. at 21.) According to election laws, a person that commits an infamous crime for the first time may not register to vote until he has been pardoned or completed his sentence, including probation, parole, community service, and fines. Md Code Ann., Election Law §3-102(b)(1)(ii) (Bender 2005) (R. at 7.) All felonies, violent or otherwise are infamous crimes according to Maryland law. (R. at 22.) According to a list issued by the Attorney General, an infamous crime can be one of a myriad of unrelated crimes, including, but not limited to, false advertising in consumer loans, misrepresentation of kosher products, racing horse under false name, rape, kidnapping, and murder. (R. at 45-51.) Under the second tier of the scheme, if there is a conviction of a second or subsequent infamous crime that is not a violent felony, the individual must complete his sentence and is subjected to a three year waiting period before he is allowed to register to vote. Md Code Ann., Election Law § 3-102(b)(1)(ii)(2) (Bender

2005) (R. at 7.) The third tier distinguishes second or subsequent offenders who commit violent felonies. If the individual is convicted of a second or subsequent felony that is a crime of violence, defined by §14-101 of Maryland's criminal code, they are permanently disqualified to be a registered voter. Md Code Ann., Election Law § 3-102(c) (Bender 2005) (R. at 7.)

In the last 30 years, Maryland has twice amended its disfranchisement laws. (R. at 14.) In 1972, it eliminated mandatory disfranchisement and in 2002, Maryland restored the right to vote to those who committed a second infamous crime, unless it was a crime of violence. (R. at 14.) The 2002 amendment signaled a liberalization of the state's attitude toward disfranchisement of felons and comports with the burgeoning trend to reverse the effect of disfranchisement. (R. at 42-44). Only 13 states have chosen to permanently disfranchise some criminals, and the other 37 states only disfranchise felons for at most the terms of their sentences. Thus, upon completion of sentence, the citizen is eligible to register to vote. (R. at 14.) Since 1997, 12 states have relaxed their disfranchisement of criminals.

Findings on the effect of Race on Disfranchisement

Jeffrey Coolidge is trapped in a system of disfranchisement with a discriminatory effect. Felon disfranchisement in Maryland disproportionately deprives African Americans of the right to vote. The population of Maryland is approximately 27.9% African

American, and African Americans make up 64.3% of the total population of Baltimore. (R at 12.) Of African Americans of voting age in Maryland, 3.9% and of those, 4.3% in Baltimore are permanently ineligible to vote under Md. Code. Ann., Election Law section 3-102(c). (R. at 12.) In sharp contrast, only 1.0% of white Maryland residents of voting age are permanently ineligible to vote. (R. at 12.)

In Maryland, African Americans are more likely to be in contact with the police than whites. (R. at 13.) African Americans in Maryland are in contact with the police 75% more often than white residents. (R. at 13.) In Baltimore County for example, 32% of traffic stops involve at least one African-American motorist. (R. at 13.) Local police and prosecutors apprehend and charge African Americans at a disproportionately high rate. African Americans receive competent legal representation at trial less often than white Maryland residents as is clear from the fact that African American defendants in Baltimore plead guilty 35% more often than whites. (R. at 13.) The jury system is not free from bias either as juries in Baltimore County have on average 1 African American for every 14 white jurors, even though the population of the city has 2 African American residents every 3 residents. (R. at 13.)

SUMMARY OF ARGUMENT

This Court should uphold the opinion of the United States District Court of Appeals for the Fourth Circuit because Jeffrey Coolidge has been permanently denied the right to vote on account of his race in violation of the Voting Rights Act of 1965. Further this Court should uphold the opinion of the Fourth Circuit because Maryland Election Law § 3-102(c) is a violation of the Eighth Amendment prohibition against cruel and unusual punishment.

First, Maryland's felon disfranchisement statute is a voting qualification under the plain meaning of § 2(a) of the Voting Rights Act (VRA) because the Act prohibits all States from imposing *any* voting qualifications which result in a denial or abridgement of the right to vote of *any citizen*. When considered with the totality of the circumstances as § 2(b) requires, the effect of the Maryland statute is discriminatory on the basis of race. African Americans are disproportionately disfranchised in the State of Maryland and there is pervasive racial bias in Maryland's criminal justice system that leads to disproportionate arrests and incarceration of African Americans. Further, the economic effects of past and present discrimination against African Americans still works against them in Maryland, and in the rest of the country. Finally, application of discriminatory felon disfranchisement laws to the Voting Rights Act is within Congress' power to enforce the Fourteenth and Fifteenth Amendments and thus,

there is no Constitutional violation created by applying the Voting Rights Act to the Maryland election law.

Second, Mr. Coolidge's claim that Maryland Election Law § 3-102(c) is a violation of the Eighth Amendment prohibition against cruel and unusual punishment is justified on three grounds. First, felon disfranchisement expressly punishes convicted criminals by denying them the right to vote and is a condition that has no regulatory purpose for the franchise. Felon disfranchisement is intentional disqualification that has not legitimate purpose because a state cannot deny an otherwise eligible citizen the right to vote out of fear of how that individual might vote. Second, permanent disfranchisement is cruel and unusual because it fails to comport with the principle that punishment should adhere to a standard of decency that is acceptable to society. Permanent disfranchisement is not a limited deprivation of a right but a severe punishment that permanently denies the franchise to those who have effectively paid their debt to society. The Maryland election law exercises an extreme punishment that is disproportionate to Mr. Coolidge's crime because it is a retributive response to disfranchise him on the basis of his prior conviction of an infamous crime. For these reasons, the opinion of the Fourth Circuit must be upheld.

ARGUMENT

I. THE MARYLAND STATUTE MANDATING PERMANENT DISFRANCHISEMENT FOR CERTAIN TYPES OF FELONS VIOLATES THE VOTING RIGHTS ACT BECAUSE IT IS A VOTING QUALIFICATION THAT DENIES AFRICAN AMERICANS THE RIGHT TO VOTE BASED ON THEIR RACE.

This court should uphold the opinion of the United States District Court of Appeals for the Fourth Circuit because Jeffrey Coolidge has been impermissibly denied the right to vote by Md. Code Ann., Election Law § 3-102(c) under the Voting Rights Act of 1965, 42 U.S.C. § 1973. There are three factors that lead to this conclusion. First, felon disfranchisement is plainly a voting qualification under the Voting Right Act (VRA). Second, under the totality of the circumstances analysis required by § 2(b) of the VRA, the Maryland felon disfranchisement law discriminates on the basis of race in effect. Finally, the VRA is within Congress' power to enforce the Fourteenth and Fifteenth Amendments and serves the purpose of strengthening the Amendments' protection of the right to vote free from discrimination on the basis of race. For these reasons, this Court should hold that the Maryland permanent felon disfranchisement statute is a voting qualification under the VRA that discriminates on the basis of race and deny the motion to dismiss.

A. Felon disfranchisement is a voting qualification under the Voting Rights Act.

Maryland's felon disfranchisement statute creates a discriminatory voting qualification under the Voting Rights Act

(VRA), and thus, this Court should uphold the opinion of the Fourth Circuit. Section 2 of the VRA prohibits states from imposing any voting qualifications or prerequisites that result in disfranchisement on the basis of race. This section of the VRA is interpreted broadly and can be established with proof of discriminatory results alone.

Congress enacted the VRA with the broad purpose of ridding the country of racial discrimination in voting. *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966). The Supreme Court has long held that the VRA should be interpreted in a manner that provides "the broadest possible scope" to combat racial discrimination. *Allen v. State Board of Elections*, 393 U.S. 301, 306 (1966). The plain and clear text of the VRA reflects Congress' intent that the Act prohibit discrimination in voting qualifications based on the effect and not just intent. Section 2(a) prohibits all States from imposing *any* voting qualifications or prerequisites to voting which result in a denial or abridgement of the right to vote of *any citizen* who is a member of a protected racial class. 42 U.S.C. § 1973 (1982) (emphasis added). The literal and broad interpretation of the VRA was upheld by the Supreme Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986) and stems from the 1982 amendment of the Act that followed the controversial case of *Mobile v. Bolden*, 446 U.S. 55 (1980). The *Mobile* Court concluded that the VRA, like the Fifteenth Amendment,

required plaintiffs to prove that there was a discriminatory intent behind a voting qualification or requirement that had a discriminatory effect. *Id.* In the 1982 Amendment, enacted only two years after *Mobile* was decided, Congress made it unmistakably clear that "a violation of § 2 [of the VRA] could be established by proof of discriminatory results alone." *Chisom v. Roemer*, 501 U.S. 380, 404 (1991).

Under the plain meaning of the VRA, Md. Code Ann., Election Law § 3-102(c) is a voting qualification. Mr. Coolidge has been permanently deprived of the right to vote in Maryland because he does not meet the qualifications required by that state to be a registered voter, namely, because he is a felon who was convicted of an "infamous" crime followed by a crime of violence.

B. Under the "totality of the circumstances," the Maryland felon disfranchisement law results in a denial of the right to vote based on race.

The motion to dismiss should be denied because, under the "totality of the circumstances," the Maryland felon disfranchisement law results in a denial of the right to vote due to race. The Voting Rights Act (VRA) prohibits states from imposing voting qualifications or prerequisites in a manner that results 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, §2(a). A §2 violation is established if the "totality of the circumstances" show that people of color have less of an

opportunity than whites to participate in the political and electoral process. *Id.* at §2(b). To determine the "totality of the circumstances," a plaintiff must show that impermissible racial discrimination has occurred. The Supreme Court has adopted a list of "objective factors" to consider when analyzing the totality of the circumstances which were derived from the Senate Report accompanying the 1982 Amendment to the VRA. *Gingles*, 478 U.S. at 44. In addition to disproportionate disfranchisement, the most pertinent of these factors is the "extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate in the political process." *Id.* at 44-45. The Court has stressed that these objective factors are neither comprehensive nor exclusive. *Id.*

In *Farrakhan*, the Ninth Circuit followed Congress' and the Supreme Court's direction and held that evidence of racial bias in the criminal justice system should be included in a totality of the circumstances analysis because it "may very well interact with voter disqualifications to create the kinds of barriers to political participation on account of race that are prohibited by § 2 [of the VRA]." *Farrakhan*, 338 F.3d at 1020. Thus, the "totality of the circumstances" analysis can include a liberal group of factors that may contribute to a racially discriminatory effect.

In the present case, Mr. Coolidge has demonstrated that the totality of the circumstances reflects the presence of impermissible discrimination on the basis of race in Maryland's felon disfranchisement law. The facts strongly show that African Americans are disproportionately disfranchised in Maryland, and like in *Farrakhan* they are disproportionately arrested and incarcerated due to biases in the criminal justice system. Finally, African Americans still face the troubling economic effects of past and present societal discrimination.

African Americans are disproportionately disfranchised due to the Maryland felon disfranchisement law. African Americans make up 64.3% of the total population of Baltimore and 4.3% of these citizens are permanently ineligible to vote under Md. Code. Ann., Election Law § 3-102(c). (R. at 12.) In fact, 3.9% of African Americans of voting age in Maryland are permanently ineligible to vote. *Id.* In sharp contrast, only 1.0% of white Maryland residents of voting age are permanently ineligible to vote. *Id.*

Jeffrey Coolidge, like many African Americans, still experience the harsh economic effects of past and present discrimination in vital public areas such as education, employment, and healthcare. Nationally, the economic effects of the enslavement of and fierce discrimination against African Americans still permeates our society. 24.4% of African Americans live in poverty in this country whereas only 8.3% of white

Americans live in poverty. United States Census Bureau, *Income, Poverty, and Health Insurance Coverage in the United States: 2004* (2005). Further, African Americans do not have the same access as whites to a quality public education, leading to increased high school drop-outs and decreased access to higher education among African Americans. United States Census Bureau, *Educational Attainment: 2000* (2003). And in Maryland, while only 5% of white people in Maryland live in poverty, over 14% of African Americans live below the poverty line, and many others live just above it. United States Census Bureau Maryland (2004), <http://quickfacts.census.gov/qfd/states/24000.html>

Pervasive racial bias in the criminal justice system is yet another factor that must be factored into the totality of the circumstances analysis of the Voting Rights Act. As the *Farrakhan* Court held, "simply because Congress did not specifically identify racial bias in the criminal justice system as a relevant factor in identifying a § 2 violation does not mean that it should be excluded from a totality of circumstances analysis." 338 F.3d at 1021. African Americans in Maryland are in contact with the police 75% more often than white residents. (R. at 13.) In Baltimore County for example, 32% of traffic stops involve at least one African-American motorist. *Id.* Not surprisingly, it was racial discrimination in traffic stops played a key role in Mr. Coolidge's 1982 arrest and conviction. *Id.*

In Maryland, African Americans receive competent legal representation at trial much less often than white Maryland residents, and 35% more African Americans pleading guilty than whites in Baltimore. (R. at 13) Further, the jury system is also biased as juries in Baltimore County have on average 1 African American for every 14 white jurors, even though the population of the city has 2 African American residents for every 3 residents. (R. at 13)

Viewing the totality of the circumstances, the voter qualification under Md. Code Ann., Election Law §3-102(c) is overwhelmingly discriminatory. Because of this discriminatory effect, the Maryland election law violates §2(b) of the VRA.

C. The Voting Rights Act as applied to felon disfranchisement in this case is within Congress's power to enforce the Fourteenth and Fifteenth Amendments because there is a racially discriminatory effect.

The Voting Rights Act (VRA) as applied to Maryland's felon disfranchisement law is within Congress's power to legislate for two reasons. First, Congress has the power under the Fourteenth and Fifteenth Amendments to make laws that prevent pervasive patterns of discrimination such as voting requirements that have a discriminatory effect on the basis of race. Second, while § 2 of the Fourteenth Amendment allows for general disfranchisement for those who participate in "acts of rebellion, or other crimes," it does not allow for disfranchisement laws that have a discriminatory effect on the basis of race. For these reasons,

the VRA is within Congress' power to enforce both the Fourteenth and Fifteenth Amendments as applied to felon disfranchisement laws that have a discriminatory effect on the basis of race, like the Maryland election law.

1. Congress has the power under the Fourteenth and Fifteenth Amendments to make laws to prevent voting requirements that have a discriminatory effect on the basis of race.

The Voting Rights Act (VRA) is within Congress' power to legislate as applied to felon disfranchisement laws because under the Fourteenth and Fifteenth Amendments, Congress has the power to prevent voting requirements that have a discriminatory effect on the basis of race. To enforce these Amendments, Congress must prove that the legislation they enact is a congruent and proportional response to a pattern of constitutional violations. *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997) (holding that Religious Freedom Restoration Act was not appropriate legislation under § 5 of the Fourteenth Amendment because Congress did not document any widespread pattern of religious discrimination in the U.S. and therefore the legislation was not remedial or preventative).

The VRA was established with the central purpose of enforcing the Fourteenth and Fifteenth Amendment to the Constitution of the United States. *Chisom*, 501 U.S. at 383. The Fifteenth Amendment provides that U.S. Citizens' right to vote shall not be denied by the United States or by any State on account of race. U.S. Const.

amend. XV, § 1. Section 2 of the Fifteenth Amendment and section 5 of the Fourteenth amendment grant Congress the power to legislate to enforce them. To show that a legislative act pursuant to the Fourteenth and Fifteenth Amendment is congruent and proportional to combat a violation of either Amendment, Congress must first identify a "history and pattern of unconstitutional...state transgressions." *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 368 (2001) (holding that Americans with Disabilities Act did not validly abrogate states' sovereign immunity because the Congressional record failed to show that Congress identified a pattern of irrational State discrimination in employment against the disabled). *See also Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 89 (2000) (holding that Age Discrimination Employment Act did not validly abrogate the states sovereign immunity because, again, Congress did not identify a pattern of age discrimination by the States that rose to the level of a Fourteenth Amendment violation). Congress may enact "prophylactic" legislation as long as there is a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end," *City of Boerne*, 521 U.S. at 520, and when there is a history and pattern of unconstitutional discrimination. *Garrett*, 531 U.S. 368.

The VRA is within Congress' power as applied to Maryland's felon disfranchisement statute because it is both congruent and proportional to the injury to be prevented or remedied and the means adopted to that end, and there is a strong history and pattern of unconstitutional discrimination that it seeks to redress. There is a pervasive pattern and history of disfranchisement on the basis of race in this country. The Supreme Court has confirmed that the VRA itself is within Congress's power to enforce the Fourteenth and Fifteenth Amendments. *See Chisom*, 501 U.S. at 383. Congress would not exceed its authority if the VRA were applied to felon disfranchisement in this case.

Maryland's felon disfranchisement law has the effect of permanently eliminating the right to vote on the basis of race, and for this reason, it is congruent and proportional to this country's history of racial discrimination in voting rights. The Ninth Circuit agreed that felon disfranchisement is within Congress' power under the VRA in *Farrakhan v. Washington*, 388 F.3d 1009 (2003) (holding that evidence of racial bias in the criminal justice system should not have been excluded from a totality of the circumstances analysis under § 2(b) of the VRA). Two circuits have held that the VRA does not apply to felon disfranchisement statutes. *Muntaqim v. Coombe*, 366 F.3d 102 (2d Cir. 2004); *Johnson v. Bush*, 405 F.3d 1214 (11th Cir. 2005). In both cases, the Court

held that felon disfranchisement laws are immune from VRA challenges because Congress did not have clear and specific intent to include felon disfranchisement when it enacted the VRA, nor was there a long history of felon disfranchisement with a discriminatory effect or intent that Congress sought to cure by the VRA. See *Muntaqim*, 366 F.3d at 122-124; *Johnson*, 405 F.3d at 1228-32. In *Johnson*, an ex-convict challenged the Florida Constitution's felon disfranchisement provision as a violation of the Fourteenth and Fifteenth Amendments, and the VRA. The majority held that felon disfranchisement law could not be applied to the VRA because, at the time that Congress enacted the Act and its subsequent amendments, there were no congressional findings that felon disfranchisement laws were historically used to discriminate against minority voters. The Court reasoned that without such a record, there was no proof that the VRA, as applied to felon disfranchisement, was congruent and proportional to a pattern of constitutional violation. Thus, the Court held that application of § 2 of the VRA to Florida's felon disfranchisement law would likely exceed Congress's enforcement powers under the Fourteenth and Fifteenth Amendments. *Johnson*, 415 F.3d at 1231.

The *Johnson* Court's analysis of the congruency and proportionality test is flawed. There is no requirement that Congress make factual findings into every potential application of a civil rights statute passed pursuant to its powers to enforce

the Fourteenth and Fifteenth Amendments. *Id.* at 1249. Congress would not have been able to identify all of the means of discriminatory voting qualifications that would be subject to the VRA because of the "increasing sophistication with which the states were denying racial minorities the right to vote." *Id.*, citing *Farrakhan*, 338 F.3d at 1014. The Court's approach in *Johnson* renders statutes passed pursuant to Congress' civil rights enforcement powers "little more than stale documents, applicable only to those forms and patterns of discrimination evident at the time of passage and explicitly considered by Congress, irrespective of the breadth of the plain statutory text." *Id.*, at 1250. Thus, the Fourteenth and Fifteenth Amendments give Congress authority to act prophylactically to prevent further and unpredictable means of discrimination from being used by states. See *Nev. Dep't of Human Res. V. Hibbs*, 538 U.S. 721, 727-28 (2003). The VRA applies not only to existing discriminating procedures, but to any "voting practices and procedures that have discriminatory effects [and] perpetuate the effects of past purposeful discrimination." *Gingles*, at 45, citing S. Rep., at 40, U.S. Code Cong. & Admin. News 1982, p. 218.

For the preceding reasons, Maryland's felon disfranchisement law is governed by the VRA because it permanently disfranchises certain types of felons with the effect of discriminating on the basis of race. Further, this application of the VRA is a

permissible use of Congress' enforcement powers under the Fourteenth and Fifteenth Amendments.

2. Section 2 of the Fourteenth Amendment does not allow for disfranchisement laws that have a discriminatory effect.

This Court should uphold the Fourth Circuit Court's opinion because section 2 of the Fourteenth Amendment creates an exception for Maryland's disfranchisement laws. Section 2 of the Fourteenth Amendment does not allow for felon disfranchisement laws that have a discriminatory effect on the basis of race. Section 2 of the Fourteenth Amendment allows for disfranchisement pursuant to "participation in acts of rebellion, or other crime," U.S. Const. XIV, § 2, but does not allow for felon disfranchisement that results in voter discrimination on the basis of race. *Richardson v. Ramirez*, 418 U.S. 24 (1974). In *Richardson* the Supreme Court rejected a non-racial Equal Protection challenge to the felon disfranchisement provision in California's Constitution based on section 2 of the Fourteenth Amendment's clear exception for disfranchisement for participation in "other crime[s]." However, in *Hunter v. Underwood*, 471 U.S. 222 (1985), the Supreme Court found that a provision of the Alabama Constitution that disfranchised persons convicted of crimes involving "moral turpitude" violated the Fourteenth Amendment because its enactment was motivated by a desire to discriminate against African Americans. In *Hunter*, the Court made it clear that § 2 of the Fourteenth Amendment was not designed to permit purposeful racial

discrimination because discrimination of that sort is prohibited by § 1 of the Amendment. *Id.* at 233.

Felon disfranchisement laws that have a discriminatory effect on the basis of race, such as the Maryland law at issue in this case, are not permitted by § 2 of the Fourteenth Amendment. Therefore, this Court should uphold the judgment of the Fourth Circuit.

II. MARYLAND ELECTION LAW § 3-102(c) VIOLATES THE EIGHTH AMENDMENT BECAUSE PERMANENT DISFRANCHISEMENT OF FELONS SERVES NO LEGITIMATE STATE PURPOSE, FAILS TO MEET A STANDARD OF DECENCY, AND IS A DISPROPORTIONATE EXERCISE OF PUNISHMENT.

Maryland Election Law § 3-102(c) is a violation of the Eighth Amendment prohibition against cruel and unusual punishment because it permanently denies franchise as punishment to those felons that have already paid a debt to society. Mr. Coolidge's claim is justified on three grounds. First, permanent disfranchisement of felons has no legitimate state purpose but to penalize felons. *See Slade v. Hampton Rds. Reg'l Jail*, 407 F.3d 243, 251 (4th Cir. 2005). Second, it does not comport with the principle that punishment should adhere to a standard of decency that is acceptable to society. *See Furman v. Georgia*, 408 U.S. 238, 277 (1972). Finally, it is an extreme punishment that disproportionately affects those convicted of infamous crimes in Maryland. *See Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (Kenney, J., concurring).

- A. Maryland Election Law § 3-102(c) constitutes punishment because it penalizes convicted criminals and serves no legitimate government purpose.

Maryland election law expressly punishes convicted criminals by denying them the right to vote, a disability that has no regulatory purpose for the franchise. There are two reasons that felon disfranchisement is punishment. First, Election Law § 3-102(c) is deliberately administered to penalize those convicted of infamous crimes in Maryland by making them ineligible to vote. *See Wilson v. Seiter*, 501 U.S. 294, 300 (1991). Second, disfranchisement serves no legitimate government purpose for felon except as a penal measure. *See Carrington v. Rash*, 380 U.S. 89, 94 (1965). This Court should hold that Maryland Election Law 3-102(c) is punishment governed by the Eighth Amendment.

1. Felon disfranchisement is deliberately administered for a penal purpose.

Felon disfranchisement is punishment because it is expressly intended to punish convicted criminals by denying them the right to vote. A statute that imposes a disability as a means to reprimand the wrongdoer and deter others is penal if its sole purpose is punishment and it does not accomplish any other legitimate government purpose. *Trop v. Dulles*, 356 U.S. 86, 96 (1958); *Slade v. Hampton Rds. Reg'l Jail*, 407 F.3d 243, 251 (4th Cir. 2005). In *Trop*, the Supreme Court incorrectly reasoned that denying felons the right to vote was not a penal measure because its purpose was not to punish but to regulate the franchise by

designating a reasonable ground of eligibility for voting. *Id.* at 97. Since *Trop*, lower courts have followed the Court's erroneous interpretation and struck down challenges to felon disfranchisement on the grounds that it is legitimate exercise of state power that ensures that people with "certain characteristics abstain from certain activities." See *Green v. Bd. of Elections of N.Y.*, 380 F.2d 445, 450 (2d Cir. 1967); *Beachman v. Bratterman*, 300 F. Supp. 182, 184 (D. Fla. 1969). Though courts have insisted that felon disfranchisement is not punishment, there is no justification for withholding the right to vote except as a deliberate effort to punish convicted criminals by stripping them of the privilege of citizenship. See *Dillenburg v. Kramer*, 469 F.2d 1222, 1224 (9th Cir. 1972).

Here, Maryland's three tiered system of election law correlates the period of disfranchisement with the term of the sentence and is meant to be part of the overall punishment. (R. at 37-38.) Mr. Coolidge was eligible to vote following completion of his first sentence, but is permanently disfranchised as a result of his second felony conviction, a deliberate act to punish him by preventing him from engaging in the political process.

2. Felon disfranchisement serves no legitimate purpose.

Felon disfranchisement is punishment because there is no legitimate state reason, other than as a penal measure, to preclude felons from registering to vote. A legitimate purpose

does not intentionally disqualify a class of persons from an activity or status but has an alternative purpose to which the restriction is rationally connected. *Flemming v. Nestor*, 363 U.S. 603, 613-614 (1960); *Slade v. Hampton Rds. Reg'l Jail*, 407 F.3d 243, 251 (4th Cir. 2005)(citing *Bell v. Wolfish*, 441 U.S. 520, 538 (1979)). The state's contention that disfranchisement is intended to protect the electoral process from the inappropriate influence of criminals is not legitimate because a state cannot deny an otherwise eligible citizen the right to vote out of fear of how that individual might vote. *Carrington v. Rash*, 380 U.S. 89, 94 (1965) (holding that Texas could not prevent a member of the armed services from voting because "fencing out" a segment of the population from the franchise is constitutionally impermissible).

In spite of the Court's ruling in *Carrington*, lower courts have continued to rely on the misconstrued notion that felon disfranchisement serves a legitimate purpose because it prevents anti-social behavior from affecting the ballot box; this rationale mistakenly assumes that felons would vote irresponsibly or elect candidates that would decriminalize their activities. *See e.g. Green v. Bd. of Elections of N.Y.*, 380 F.2d 445, 451 (2d Cir. 1967) (reasoning that the heavy incidence of recidivism and the prevalence of organized crime was sufficient to prevent perpetrators of crimes from taking part in electing those who might later consider their cases.) *Kronlund v. Honstein*, 327 F.

Supp. 71, 73 (D. Ga. 1971) (reasoning that felons were akin to idiots and the insane because they exhibited anti-social behavior that precluded them from engaging in the political process); *Otsuka v. Hite*, 414 P.2d 412, 417 (Cal. 1966) (acknowledging the presumption that a felony conviction is indicative of "moral turpitude that makes one unfit to exercise the privilege of suffrage"). The lower courts have discredited the Supreme Court's ruling in *Carrington* by sustaining disfranchisement with the "quasi-metaphysical invocation that the state has an interest in the purity of the ballot box." *Dillenburg v. Kramer*, 469 F.2d 1222, 1224 (9th Cir. 1972).

Mr. Coolidge, a recovering addict and convicted felon, is not incapable of making informed decisions and his actions do not suggest anti-social behavior that would pose a threat to the electoral process. Mr. Coolidge's prior conviction for possession of cocaine was a non-violent offense. Though his subsequent conviction for robbery was characterized as a violent offense, he received a lesser sentence because there was no weapon involved. (R. at 11.) The state argues disfranchisement cannot be punishment because other citizens, including minors and mentally incompetent individuals, cannot vote. (R. at 27.) Mr. Coolidge is neither a minor nor is he mentally incapable, and has previously been able to vote. His participation in three elections sufficiently demonstrates that he does not possess a propensity for immorality

that would preclude him from voting responsibility. In conclusion, felon disfranchisement serves no legitimate state purpose but to punish convicted criminals. Therefore, it is subject to the requirements of the Eighth Amendment.

- B. Maryland Election Law § 3-102(c) is cruel and unusual punishment because it fails to meet the standard of decency under *Furman v Georgia*.

Permanent disfranchisement is cruel and unusual because it is a punishment that does not comport with society's evolving standard of decency and dignity. A criminal punishment violates the Eighth Amendment if by its severity it is degrading to human dignity, if it is arbitrarily imposed, unnecessarily excessive, or if it is a form of punishment that contemporary society would find unacceptable. *Furman v. Georgia*, 408 U.S. 238, 271-280 (1972). Furthermore, punishments that are outside the bounds of traditional penalties of imprisonment and fines are constitutionally suspect. *Trop v. Dulles*, 356 U.S. 86, 100 (1958). In *Trop*, a soldier lost his citizenship and was ineligible to apply for a passport because of his prior conviction for wartime desertion. *Id.* at 88. The Court found that expatriation was barred by the Eighth Amendment because it exceeded the standards of decency that mark the progress of a maturing society by "stripping the citizen of his status in the national political community." *Id.* at 101.

Lower courts have relied on *Trop* to justify disfranchisement as a penalty that meets the standard of decency by minimizing the difference in severity between permanent disfranchisement and expatriation. See e.g. *Theiss v. State Admin. Bd. of Election Law of Md.*, 387 F. Supp 1038, 1042 (D. Md. 1974); *Fincher v. Scott*, 352 F. Supp 117, 119-120 (D. N.C. 1972). In *Theiss*, Maryland election law prohibited the plaintiff from voting because of his two prior convictions of forgery and burglary. *Theiss*, 387 F. Supp at 1041. The court predicated its holding on *Trop* and erroneously reasoned that permanent disfranchisement was acceptable because it, unlike expatriation, was a "limited deprivation" of rights that did not offend society's standards. *Id.* at 1042. The court in *Theiss* failed to recognize that permanent disfranchisement has the same effect as expatriation because the severity of the punishment effectively strips a citizen of his political existence in the community by preventing him from voting. *Theiss v. State Admin. Bd. of Election Law of Md.*, 387 F. Supp 1038, 1042 (D. Md. 1974) (citing *Trop v. Dulles*, 356 U.S. 86, 101 (1958)). Permanent disfranchisement has also been justified as acceptable because courts have relied on the premise that "a great number of states exclude felons from the franchise." *Green v. Bd. of Elections of N.Y.*, 380 F.2d 445, 451 (1967); *Fincher v. Scott*, 352 F. Supp 117, 120 (D. N.C. 1972).

In the present case, Election Law § 3-102(c) which permanently denies the franchise to those who have effectively paid their debt to society offends the *Trop* principle that punishment comport with evolving standards of decency. The standard in *Green* and *Fincher* has changed as is evident by Maryland's recent amendments to its election laws (R. at 14, 43), and the 12 states that have relaxed their disfranchisement of criminals, including those that have ceased permanent felon disfranchisement(R. at 14). Furthermore, that 80% of Americans support restoration of voting rights for ex-felons who have completed their sentences demonstrates that permanent disfranchisement is a punishment that American society no longer finds acceptable. Rebecca Perl, *The Last Disfranchised Class*, *The Nation*, November 24, 2003. Permanent disfranchisement is an excessive and outmoded measure that is not a limited disability, as the *Theiss* court noted, but a restriction that deprives eligible citizens of their right to vote and strikes at the heart of representative government. *Richardson v. Ramirez*, 418 U.S. 24, 77 (1974) (Marshall, J., dissenting). In sum, Mr. Coolidge's permanent disfranchisement fails to meet the standard of decency required of punishments under the Eighth Amendment.

C. Permanent disfranchisement of Mr. Coolidge violates the Eighth Amendment because it is a disproportionate exercise of punishment.

Election Law § 3-102(c) is disproportionately exercised against Mr. Coolidge because it is a retributive response to disfranchise him on the basis of his prior conviction of an infamous crime. *See e.g. Allen v. Ellisor*, 664 F.2d 391, 397 (4th Cir. 1981) (noting the unreasonableness of a classification that disfranchised all former felons regardless of their crimes); *Stephens v. Yeomans*, 327 F. Supp 1182, 1188 (D. N.J. 1971) (commenting on a haphazard classification of felonies that allowed defrauders, embezzlers, and kidnapers to vote but disfranchised thieves.) The Eighth Amendment forbids extreme punishments which by their length or severity are grossly disproportionate to the crime. *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (Kenney, J., concurring). The proportionality of punishment is determined by considering the primacy of the legislature, the variety of legitimate penological schemes, the nature of the federal system, and the requirement that a review of proportionality be guided by objective factors. *Harmelin*, 501 U.S. at 1001. Proportionality is further contingent on the relationship between the gravity of the offense and the harshness of the penalty. *Solem v. Helm*, 463 U.S. 277, 292 (1983); *Ewing v. California*, 538 U.S. 11, 28 (2003). In *Ewing*, the Court evaluated California's the three strikes law and held that a mandatory life sentence was not a grossly disproportionate punishment to a felony conviction because the purpose of the statute was to deter and incapacitate repeat

offenders. The Court weighed the gravity of the plaintiff's offense by his long history of felony recidivism.

Election Law § 3-102(c) permanently disenfranchises Mr. Coolidge because of a single prior conviction of an infamous crime, disproportionate punishment for his crimes. Unlike *Ewing*, § 3-102(c) is not a proportional response to deter criminal behavior because a criminal is unlikely to be dissuaded to act by the threat of losing his right to vote. Furthermore, Maryland's disenfranchisement scheme, like those in *Allen* and *Stephens*, is predicated on a broad classification of infamous crimes that do not warrant the harsh penalty of permanent disenfranchisement i.e. beverage misrepresentation, racing a horse under a false name. (R. at 49.) In sum, felon disenfranchisement is cruel and unusual because it punishes Mr. Coolidge for his criminal history. Once Mr. Coolidge serves the remaining time of his sentence, he will forever be ineligible to register to vote in an election.

CONCLUSION

For the reasons set forth above, Respondent respectfully requests that the Court uphold the opinion of the Fourth Circuit Court. The Maryland felon disenfranchisement law is a voter qualification that violates the Voting Rights Act because it has the discriminatory effect of disenfranchising based on race. In addition, the Respondent's permanent disenfranchisement is an unconstitutional violation of the Eighth Amendment.