

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 RESPONDENT

QUESTIONS PRESENTED

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

PARTIES TO THE PROCEEDINGS

Respondent, Mr. Jeffrey Coolidge, originally filed claims in the United States District Court for the District of Maryland against Petitioners Maryland State Board of Elections, Janet Fallins, the State Administrator of Elections, in her official capacity, the Board of Elections of the City of Baltimore, and Edward D. Jones, its Election Director, in his official capacity.

(R. at 9.)

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CITATIONS OF THE OPINIONS BELOW

The Opinion and Order of the District Court appear in the Record at pages 20 to 27, and the opinion of the Fourth Circuit Court of Appeals appears in the Record at pages 29 to 41.

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. § 1973; and the United States Constitution. Venue is proper because all defendants reside and are found within this District, within the contemplation of 28 U.S.C. § 1391(b).

CONSTITUTIONAL PROVISIONS AND STATUTES

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

Background

Mr. Jeffrey Coolidge, who identifies himself as African American, was born in the City of Baltimore, and has resided there for all of his 42 years. (R. at 10.) The City of Baltimore is predominantly African American, and is geographically, though not politically, part of the larger, predominantly-white, County of Baltimore. (R. at 12.) In 1982, at 19 years of age, Mr. Coolidge was arrested in Pikesville, Maryland, in Baltimore County, after police, who had stopped and searched him, found a controlled substance. (R. at 12.)

From arrest to sentence, Mr. Coolidge's journey through Maryland's criminal justice system highlights the racial disparities bias in that system. To begin with, the arresting officers were investigating reports of a robbery by an African American man of similar build, and stopped Mr. Coolidge while he was driving on the streets of Pikesville. (R. at 10.) In fact, no suspect was ever charged in the robbery, and Mr. Coolidge was indicted for possession with intent to distribute a controlled substance, an "infamous crime" as that term is defined under Maryland law. (R. at 10-11.)

At his trial, Mr. Coolidge was convicted by a jury comprised of one African American and eleven white members, and sentenced to one year in prison and one year of probation. (R. at 11.) Despite

the population ratio in Baltimore County of one African American for every five residents, juries in Baltimore County have on average one African American for every 14 white jurors. (R. at 13.) After his release, Mr. Coolidge, still addicted to drugs, was arrested and convicted of misdemeanor drug possession, which is not an "infamous crime" in Maryland. (R. at 11.) Subsequently, he underwent successful treatment for his addiction, and returned home to Baltimore. (R. at 11.)

Mr. Coolidge resumed his residence in Baltimore and, for nineteen years, lived without contact with the criminal justice system. (R. at 11.) After his successful treatment, and his move back home, Mr. Coolidge registered to vote for the first time, and voted in the 1992, 1996, and 2000 Presidential elections. (R. at 11.) In 2004, Mr. Coolidge was accused of the robbery of a convenience store. He was convicted of robbery, a crime of violence in Maryland, and received a sentence of 5 years in prison and 5 years of probation. (R. at 11.) Upon sentencing, his name was immediately removed from the voter registry. (R. at 12.) Now he is now permanently ineligible to vote in Maryland because he was convicted of a crime of violence after his earlier drug offense. (R. at 12.)

Felon disfranchisement laws are becoming archaic around the world and in the United States. (R. at 14.) Denying prisoners the right to vote is a violation of the European Convention on Human

Rights, and very few western democracies practice felon disfranchisement. (R. at 14.) Only 13 states in this country permanently disfranchise some criminals. 37 do not. Since 1997, 12 states have reversed course and relaxed their felon disfranchisement laws. (R. at 14.) Maryland relaxed its disfranchisement laws twice, in 1972 and again in 2002.

Proceedings Below

As set forth more fully in the complaint, (R. at 8-16), in 2004, Mr. Coolidge brought an action in the District Court for the District of Maryland against petitioners seeking relief under various constitutional and statutory provisions. (R. at 9.) Mr. Coolidge argued that Maryland Election Law § 3-102(c) constitutes a voting qualification that violates the Voting Rights Act and the Fourteenth and Fifteenth Amendments, as applied to him and others similarly situated. He also argued that the law is a cruel and unusual punishment, in contravention of the Eighth and Fourteenth Amendments. (R. at 16.) The State argued that § 3-102(c) is intended to protect the electoral process from the inappropriate influence of criminals. (R. at 38.)

In his complaint to the District Court, Mr. Coolidge set forth the statistical disparities in the racial make-up of Maryland's prison population and electorate, including the disparity in the percentages of African Americans and whites currently in prison,

currently serving sentences for violent crimes, and currently ineligible to vote. (R. at 12-13.)

The District Court granted the Petitioners' motions to dismiss for failure to state claims upon which relief can be granted, finding that § 2 of the Voting Rights Act cannot be constitutionally applied to Maryland Election Law § 3-102(c), and that felon disfranchisement is not a cruel and unusual punishment and is authorized by the text of the Fourteenth Amendment. (R. at 26-27.) On appeal, the Fourth Circuit reversed as to both the Voting Rights Act claim and the Eighth Amendment claim. (R. at 41.) Specifically, the Fourth Circuit found that § 2 is applicable to § 3-102(c) because § 2 of the Fourteenth Amendment, which implicitly authorizes states to disenfranchise felons, does not foreclose the VRA's application, and because such an application would not exceed Congress's broad enforcement power under the Reconstruction Fifteenth Amendments. (R. at 35-36.) In addition, the appellate court reversed the lower court's dismissal on the Eighth Amendment claim. (R. at 41.) This Court granted certiorari. (R. at 3.)

SUMMARY OF ARGUMENT

Section 2 of the Voting Rights Act, as amended in 1982, contemplated eradicating all forms of discrimination in voting. Although the Fourteenth Amendment allows for disfranchisement for "rebellion and other crime," Congress desired to override that possibility where racial discrimination interacted with voting

qualifications, including disfranchisement, to result in the denial of the right to vote.

An analysis of the plain statement rule of statutory construction reveals that Congress intended the Voting Rights Act to apply, and that the Voting Rights Act does not impermissibly intrude into state authority to regulate voting, as that intrusion was realized with the ratification of the Reconstruction Amendments. The enforcement provisions of the Reconstruction Amendments give teeth to its substantive provisions, and Congress has broad authority to enact legislation to protect these rights. The VRA is a congruent and proportional response to ensure that the scourge of racism does not rear its ugly head in voting.

A lifetime ban on voting predicated on conviction of an infamous, but victimless, crime is cruel and unusual punishment within the meaning of the Eighth Amendment. Permanent disfranchisement of felons serves impermissible government aims, namely, silencing the collective voice of otherwise bona fide citizens because of unsubstantiated fears of their political ideologies.

Almost three-fourths of the state legislatures in the United States, as well as the vast majority of nations in the world, refuse to permanently ban felons from the polls. A lifetime of disfranchisement inflicts unnecessary pain that is too severe for a person's youthful addiction to narcotics.

ARGUMENT

I. SECTION 2 OF THE VOTING RIGHTS ACT APPLIES TO STATE FELON DISFRANCHISEMENT LAWS BECAUSE SUCH AN APPLICATION IS WITHIN CONGRESS'S ENFORCEMENT POWERS UNDER THE RECONSTRUCTION AMENDMENTS AND IS NOT OTHERWISE PRECLUDED BY ANY CONSTITUTIONAL PROVISION OR PRINCIPLE OF FEDERALISM.

Section 2 of the Voting Rights Act applies to Maryland's felon disfranchisement law. Federal legislation routinely preempts state law when it falls within the scope of one of Congress's enumerated powers, and does not otherwise violate the Constitution or principles of federalism. *South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *City of Boerne v. Flores*, 521 U.S. 507 (1997).

Section 2 of the Voting Rights Act, as amended in 1982 (hereinafter VRA), provides that "No voting qualification or prerequisite to voting...shall be imposed or applied by any State ...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...." Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 42 U.S.C. § 1973(a) (2000)). This Court has afforded Congress the widest latitude in combating racial discrimination. *Chisom v. Roemer*, 501 U.S. 380, 403 (1991).

Section 2 of the VRA can constitutionally be applied to Maryland's felon disfranchisement law and other state felon disfranchisement laws that result in the denial of the right to vote on account of race or color for three reasons. First, although the Fourteenth Amendment recognizes the states' ability to

disfranchise felons in limited conditions, Congress retains power to prohibit felon disfranchisement laws that deny the vote on account of race or color. See *Hunter v. Underwood*, 471 U.S. 222 (1985); *Farrakhan v. Washington*, 338 F.3d 1009, 1016 (9th Cir. 2003). Second, the “plain statement” rule does not apply to the application of the VRA to disfranchisement laws where congressional intent is clear, and state sovereignty in the area of voting was limited by the Reconstruction Amendments. See *Gregory v. Ashcroft*, 501 U.S. 452 (1991); *City of Rome v. United States*, 446 U.S. 156, 173 (1980). Finally, § 2 of the Voting Rights Act is “appropriate legislation” enacted to enforce the provisions of the Reconstruction Amendments because it is a “congruent and proportional” remedy to identified voting discrimination. *City of Boerne v. Flores*, 521 U.S. 507 (1997); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

- A. Congress retains power to prohibit felon disfranchisement laws that deny the vote on account of race or color despite the Fourteenth Amendment’s limited recognition of the states’ ability to disfranchise.

Felon disfranchisement laws generally are unaffected by the protections of the VRA, but come under the coverage of § 2 of the VRA when they are intertwined with racial discrimination. *Hunter v. Underwood*, 471 U.S. 222 (1985); *Coolidge v. Maryland*, (R. at 35) (4th Cir. 2005); *Farrakhan v. Washington*, 338 F.3d 1009, 1016 (9th Cir. 2003).

Section 2 of the Fourteenth Amendment provides for the apportionment of United States Representatives among the states, and also states that when a state denies the franchise to any of its male citizens "... except for participation in rebellion, or other crime, the basis of representation therein shall be reduced ..." U.S. Const. amend. XIV. Despite the acknowledgement of the state practice of disfranchisement, the text of § 2 of the Fourteenth Amendment, as interpreted by this Court, shows that there is no shield for disfranchisement laws. In *Hunter v. Underwood*, 471 U.S. 222 (1985), this Court invalidated an Alabama State constitutional provision which was enacted with the intent to disfranchise African Americans, stating "... [W]e are confident that § 2 [of the Fourteenth Amendment] was not designed to permit ... purposeful racial discrimination ... which otherwise violates § 1 of the Fourteenth Amendment." *Hunter*, 471 U.S. at 233 (1985) (brackets added).

Other authorities have found that § 2 of the Fourteenth Amendment does not shield disfranchisement laws that have the effect of racial discrimination. *Farrakhan v. Washington*, 338 F.3d 1009, 1016 (9th Cir. 2003); *Coolidge v. Maryland*, Rec. at 35 (4th Cir. 2005). In his dissent in *Johnson v. Bush*, and with reference to the decision in *Hunter*, Circuit Judge Wilson expressed disbelief that § 2 of the Fourteenth Amendment allows states to disenfranchise at will, and wrote that § 2 "is a right only by

implication, and therefore does not conflict with Congress's power to limit criminal disenfranchisement." *Johnson v. Bush*, 405 F.3d 1214, 1240-41 (11th Cir. 2005) (Wilson, J., dissenting).

Ignoring the clear holding in *Hunter*, the majority opinion in *Johnson v. Bush* found that a state's discretion to disenfranchise felons is "fixed by the text of § 2 of the Fourteenth Amendment ..." *Johnson*, 405 F.3d at 1214. See also *Muntaqim v. Coombe*, 366 F.3d 102, 122 (2004), *cert. denied*, 125 S. Ct. 480 (2004), *rehearing en banc granted*, 396 F.3d 95 (2004) (§ 2 of Fourteenth Amendment protects disfranchisement). The opinion relied on *Richardson v. Ramirez*, 418 U.S. 24 (1974), where this Court held that a state does not violate the Fourteenth Amendment when it distinguishes among felons and non-felons for purposes of voting. In so holding, the *Ramirez* Court relied on that fact that "... [section] 1, in dealing with voting rights as it does, could not have been meant to bar outright a form of disenfranchisement which was expressly exempted from the less drastic sanction of reduced representation which [section] 2 imposed for other forms of disenfranchisement." *Richardson*, 418 U.S. at 55 (brackets added).

Despite the meaning assigned by the Eleventh Circuit to the holding in *Ramirez*, § 2 of the Fourteenth Amendment cannot be read to shield disfranchisement laws that are intertwined with racial discrimination. That section addresses representative apportionment, not felon disfranchisement. Thus, any

acknowledgement of the ability of states to deny the franchise to felons is implicit, and at most shows that Congress may not have anticipated that in the future felon disfranchisement laws would interact with societal factors to dilute or deny the vote on account of race. As the *Hunter* decision shows, states are not given a blank check to disfranchise at will. The *Ramirez* decision was confined to distinctions between felons and non-felons, and did not address the perplexing interplay of race and disfranchisement.

Lending further support to the textual argument is Mr. Coolidge's case involves the Fifteenth Amendment, which was ratified two years after the Fourteenth Amendment. The amendment indicates a clear nationwide objective to protect African Americans from all forms of discrimination in voting.

B. The "plain statement" rule does not apply to § 2 of the Voting Rights Act.

The "plain statement" rule for statutory construction is inapplicable here. The plain statement rule applies if congressional intent to give a statute a particular meaning is ambiguous and that interpretation of the statute would lead to tension between federal and state authority. *Gregory v. Ashcroft*, 501 U.S. 452 (1991); *Nat'l Labor Relations Bd. v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979). This ensures that "[I]n traditionally sensitive areas ... the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision'." *Gregory v. Ashcroft*, 501 U.S.

452, 461 (1991) (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971)); *Muntaqim*, 366 F.3d at 115.

The first prerequisite, congressional ambiguity, is not implicated here. In the absence of ambiguity, the plain statement rule is not applied. *Salinas v. United States*, 522 U.S. 52, 60 (1997); *City of Rome*, 446 U.S. at 172. Thus, in *City of Rome*, the City challenged § 5 of the VRA, which required it to prove to the Attorney General of the United States or a federal district court that its planned electoral changes did “not have the purpose and [would] not have the effect of denying or abridging the right to vote on account of race or color.” *City of Rome*, 446 U.S. at 172. The City argued that requiring it to show that its changes would have no discriminatory effect called into question Congress’s enforcement powers, and that a plain statement was required to extend § 5 in this direction. Because of § 5’s unambiguous language, however, this Court disagreed, and declined to require a plain statement. Instead, the Court proceeded directly to the question of whether extending § 5 to the City would exceed congressional authority. *Id.* at 172.

Similar treatment of the plain statement rule has been accorded outside the voting rights context. In *Salinas v. United States*, the Court was asked to interpret the federal bribery statute. *Salinas* argued that absent a plain statement from Congress that the phrase “[w]hoever ... corruptly ... accepts or agrees to

accept *anything of value...*" applied to bribes not involving federal funds, the statute should not be construed to include his receipt of goods with no connection to federal monies. *Salinas*, 522 U.S. at 59. The Court found the text "anything of value" susceptible to only one meaning, namely, that the statute applied equally to those bribes involving and those not involving federal funds. In so finding, the Court noted that the "principle [articulated in *Gregory*] did not apply when a statute was unambiguous," and that "[a] statute can be unambiguous without addressing every interpretive theory offered by a party." *Salinas*, 522 U.S. at 60.

Applying the same principles, this Court reached the opposite conclusion in *Gregory v. Ashcroft*, and assigned a meaning to an ambiguous provision in the Age Discrimination in Employment Act (ADEA). It noted that a different interpretation would unduly interfere with a state's sovereign right to fix the qualifications of its own public officials. *Gregory*, 501 U.S. at 473. Missouri state judges challenged the State's age-mandated retirement law and the State argued that the judges fell under the "appointees...on a policy making level" exception enumerated in the ADEA. The *Gregory* Court acknowledged that the statute's exceptions did not exclude judges, and that the ambiguous phrase "'appointee at a policy making level'... is an odd way for Congress to exclude judges." Despite these setbacks, the Court found that state judges were

excluded from the ADEA's coverage, stating that "it must be plain to anyone reading the Act that it covers judges." *Id.* at 467. See also *National Labor Relations Board v. Catholic Bishop of Chicago*, 440 U.S. 490, 507 (1979) (declining to construe the National Labor Relations Act to confer jurisdiction of the NLRB over lay faculty at church-operated schools in order to avoid sensitive First Amendment questions).

Similarly, the second prerequisite of the plain statement rule, that application of § 2 of the VRA to felon disfranchisement laws would alter the state-federal balance, is absent. Where state sovereignty in the area of voting is limited by the Reconstruction Amendments, Congress will be afforded liberal discretion, at the expense of the states, to fashion a remedy. *Oregon v. Mitchell*, 400 U.S. 112 (1970); *City of Rome v. United States*, 446 U.S. 156 (1980).

Section 5 of the Fourteenth Amendment is "a positive grant of legislative power," *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966), and, therefore, gives Congress broad authority to enforce the substantive provisions of the amendment. *Flores*, 521 U.S. at 517; *City of Rome*, 446 U.S. at 176. Interestingly, despite the concern for state sovereignty expressed by the *Gregory* Court, that opinion also noted that "[a]s long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States [and] may legislate in areas traditionally regulated by

the States.” *Gregory*, 501 U.S. at 460 (brackets added). Indeed, the Reconstruction Amendments were designed to alter the balance between the federal and state governments, intruding on the latter by the former. In *Oregon v. Mitchell*, Justice Black, in discussing the effects of the Reconstruction Amendments on federalism, found that “the amendments were unquestionably designed to condemn and forbid every distinction, however trifling, on account of race. *Oregon v. Mitchell*, 400 U.S. at 126-27 (opinion of Black, J.).

It must be plain to anyone reading § 2 that “No voting qualification or prerequisite...” includes felon disfranchisement laws that result in denial of the right to vote on account of race. To begin, Congress, in proposing the Fifteenth Amendment, intended that federal power would intrude into voting, an area states traditionally regulated. The mere fact that Congress did not list felon disfranchisement laws in the statute does not render the statute ambiguous. In contrast to the ADEA, § 2 of the VRA contains no list of exceptions, evincing an intent that the section apply across the board. Such an interpretation is consistent with Congress’s intent to prohibit racially discriminatory voting practices. *Baker v. Pataki*, 85 F.3d 919 (2d Cir. 1996) (en banc) (opinion of J. Feinberg).

The second prerequisite of the plain statement rule is also conspicuously absent. As with the provisions of the VRA analyzed in *City of Rome*, § 2 is part of a larger scheme of legislation

intended to enforce the Reconstruction Amendments wherewith Congress retains plenary authority to enforce. Since Congress was acting within its enumerated powers, it retained plenary authority to enforce the provisions of the Fifteenth Amendment as against Maryland. Though states can arguably disfranchise felons, generally, when such disfranchisement combines with racial bias in the criminal justice system to deny the right to vote on account of race, Congress can "impose its will on the states."

- C. Section 2 of the Voting Rights Act is "appropriate legislation" enacted to enforce the provisions of the Reconstruction Amendments.

Section 2 of the VRA is "appropriate legislation" within the meaning of the enforcement provisions of the Reconstruction Amendments. "Appropriate" legislation includes not only prohibitions on state conduct that directly violates the judicially-defined substantive provisions of the Reconstruction Amendments, but also "prophylactic" or remedial legislation that may, in its legitimate operation, prohibit otherwise constitutional behavior by the states. *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Tennessee v. Lane*, 541 U.S. 509 (2004); *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721, 727 (2003). Congressional legislation passed pursuant to this "prophylactic" authority will be upheld if it is "congruent and proportional" to the injury it seeks to prevent. *Flores*, 521 U.S. at 520. Of note, this Court has consistently upheld prophylactic legislation in the area of voting

rights. See, e.g., *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986) (no intent need be proved to show a violation of VRA); *City of Rome*, 446 U.S. at 176 (upholding VRA's preclearance requirement that municipality prove any voting changes would have no discriminatory effect); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (rejecting challenge to VRA provisions); *Katzenbach v. Morgan*, 384 U.S. 641 (1966) (upholding VRA's prohibition on New York's use of literacy test); *Oregon v. Mitchell*, 400 U.S. 112 (1970) (upholding VRA's nationwide ban on literacy tests); *Chisom v. Roemer*, 501 U.S. 380 (1991).

In 1997, the seminal case of *City of Boerne v. Flores* enunciated a structure for determining what is "appropriate legislation," requiring that laws be "congruent and proportional" responses to the injury Congress intends to remedy or prevent. In probing "congruence," the Court stated that the "appropriateness of remedial measures must be considered in light of the evil presented," *Flores*, 521 U.S. at 530, while "proportionality" is gauged by an analysis of whether the law can be "understood as responsive to, or designed to prevent unconstitutional behavior," *Id.* at 532.

RFRA was defective because it did not merely prevent or remedy an injury, but redefined the substantive guarantees of the Fourteenth Amendment, and, thus, was neither "congruent" nor "proportional" to the purported congressional goal of remedying

violations of individuals' free exercise of religion. *Id.* at 529. Interestingly, RFRA lacked "congruence" because the congressional record which supported its enactment, unlike those compiled for the VRA, lacked examples of modern instances of generally applicable laws passed because of racial discrimination. *Id.* at 530. Further, because of its broad coverage of all state and local actors, RFRA was out of "proportion" to its remedial or preventive object. *Id.* at 532.

Subsequent decisions of this Court have applied the congruence and proportionality test enunciated in *Flores*. See, e.g., *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000) (invalidating congressional abrogation of state sovereign immunity in Age Discrimination in Employment Act suits); *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001) (invalidating same for Americans with Disabilities Act suits). In particular, these decisions, and *Flores* itself, point to the VRA as an example of a congruent and proportional remedy to a documented injustice. *Flores*, 521 U.S. at 530-31; *Garrett*, 531 U.S. at 373. Accord *Muntaqim v. Coombe*, 366 F.3d at 121.

Pursuant to its enforcement powers, Congress rightfully enacted the VRA, and amended it in 1982, to rid the country of racial discrimination in voting, and remedy the egregious effects of institutionalized discrimination in an area traditionally regulated by the states. Moreover, upholding the constitutionality

of § 2's application to Maryland's felon disfranchisement scheme will be consistent with this Court's lengthy history of upholding prophylactic legislation in its voting rights jurisprudence. Finally, as this Court's precedents, including *Flores* itself, indicate, Congress compiled a record of examples of generally applicable laws passed because of racial discrimination.

II. MARYLAND'S DISFRANCHISEMENT OF A VIOLENT FELON, PREDICATED ON HIS PRIOR CONVICTION OF AN INFAMOUS CRIME, IS A CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT

Maryland's disfranchisement of a violent felon, predicated on his prior conviction of an infamous crime, is barred as a cruel and unusual punishment in violation of the Eighth Amendment. This holding is compelled by the Constitution's incorporation of "evolving standards of decency," and reaffirms the duty of the government to respect the dignity of all persons, even those convicted of infamous and heinous crimes. *Trop v. Dulles*, 356 U.S. 86, 99 (1956). Permanent disfranchisement for the conviction of drug possession also violates the Eighth Amendment because it is disproportionate to the crime.

Cruel and unusual punishments are repugnant to the Constitution of the United States, and include "those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted, and those practices condemned by the common law in 1789." *Ford v. Wainwright*, 477 U.S. 399, 405 (1986). However, physical punishments are not the only

sanctions prohibited by the Eighth Amendment. *Trop v. Dulles*, 356 U.S. at 86; *Johnson v. Phelan*, 69 F.3d 144, 150-51 (7th Cir. 1995).

- A. Maryland's felon disfranchisement law is a "punishment" within the meaning of the Eighth Amendment because it imposes a disability that is not reasonably related to a legitimate governmental objective.

As a threshold matter, this Court must consider whether permanent felon disfranchisement is a "punishment," within the meaning of the Eighth Amendment. A punishment imposes a disability or harm that is not reasonably related to a legitimate non-punitive governmental objective. *Trop*, 356 U.S. at 102; *Slade v. Hampton*, 407 F. 3d 243, 251 (4th Cir. 2005); *Davis v. Bowen*, 825 F.2d 799, 800 (4th Cir. 1987).

The *Trop* Court articulated the framework for analyzing whether a punishment is "penal," that is, subject to analysis under the Eighth Amendment's ban on cruel and unusual punishment, *Trop*, 356 U.S. at 96. The first consideration is the purpose of the statute. If the statute "imposes a disability for the purpose of punishment, that is, to reprimand the wrongdoer, or to deter others, it has been considered penal". *Id.* at 96. On the other hand, "a statute is considered non-penal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose". *Id.* at 96. In *Trop*, this Court held that the denationalization of a person for desertion is cruel and unusual punishment, prohibited by the Eighth Amendment, and not merely a civil penalty. *Id.*

A disability is "reasonably related" when it is (1) rationally related to a legitimate governmental purpose, and (2) not excessive in relation to that purpose. *Bell v. Wolfish*, 441 U.S. 520, 561 (1979); *Hamilton v. Lyons*, 74 F.3d 99 (5th Cir. 1996). A legitimate government purpose refers to the rationales the government advances in good faith that benefit the public. See *Kelo v. City of New London, Conn.*, 125 S. Ct. 2655 (2005); *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984).

A state may not place unreasonable blanket restrictions on the franchise and casually deprive a class of citizens the right to vote. *Carrington v. Rash*, 380 U.S. 89 (1965). In *Carrington*, this Court decried unreasonable restrictions on the right to vote and struck down a Texas law that disenfranchised all military servicemen permanently without regard to whether they were bona fide residents of the state or otherwise qualified. *Carrington*, 380 U.S. at 89. Texas offered two non-punitive objectives, that it was "immunizing their elections from the concentrated balloting of military personnel, whose collective voice may overwhelm a small local civilian community," and "protecting the franchise from infiltration by transients" because it "can reasonably assume that those servicemen who fall within the constitutional exclusion will be within the State for only a short period of time." *Carrington*, 380 U.S. at 94. The Court declared that fencing out a class of

voters because of their politics was an impermissible governmental objective.

The Court observed that Texas's draconian, sweeping law targeted military personnel only, and not other classes of transients such as "students at colleges and universities, patients in hospitals and other institutions, and civilian employees of the United States Government." *Carrington*, 380 U.S. at 94. The presumption created against military personnel was sweeping and "incapable of being overcome by proof of the most positive character." By virtue of the military uniform they wore, servicemen and women were subject to absolute disfranchisement. This Court trumpeted the right to choose, a right which it has zealously protected from state abridgement. *Id.* at 94.

In other jurisdictions, reasonable, non-punitive government objectives have been affirmed. *Slade v. Hampton*, 407 F.3d 243 (4th Cir. 2005). In *Slade*, a Virginia jail charged pretrial detainees \$1.00 per day, which, according to the Fourth Circuit, served the reasonable non-punitive government objective of defraying the costs of general jail purposes. *Slade v Hampton*, 407 F.3d at 244. Likewise, suspending retirement benefits for prisoners is not a punishment, but merely serves the legitimate government policy goal of "conserving scarce resources where a prisoner's basic economic needs are provided from other public sources." *Davis v. Bowen*, 825 F.2d 799, 800 (4th Cir. 1987).

Although permanent disfranchisement is not precisely corporal punishment or physical mistreatment, this form of punishment is "the harshest civil sanction imposed by a democratic society," *McLaughlin v. City of Canton, Miss.*, 947 F. Supp. 954 (S.D.Miss. 1995), and "more primitive than torture, for it destroys for the political existence", *Trop*, 356 U.S. at 102. In fact, when the disenfranchised is "brought beneath its axe," he is "severed from the body politic and condemned to the lowest form of citizenship, where voiceless at the ballot box the disenfranchised, the disinherited must sit idly by while others elect his civic leaders ..." *McLaughlin*, 947 F. Supp. at 954. Permanent disfranchisement can be compared to the consequence of denaturalization wherewith the person who has completed the terms of his incarceration must suffer a lifetime of "civic death." There is instead: [T]otal destruction of the individual's status in organized society. *Trop*, 356 U.S. at 102.

Maryland's practice of permanent disfranchisement is akin to the unreasonable blanket restrictions on the franchise that this Court invalidated in *Carrington*. Without regard to whether Mr. Coolidge and others similarly situated are worthy of the franchise, Maryland casually deprives them this right. The objectives Maryland set forth were unreasonable and punitive, especially in light of Maryland's unsubstantiated conclusions that felons don't deserve the right to vote and that any influence they exert would not be

appropriate. (R. at 38.) This Court's decision in *Carrington* forecloses any claim by Maryland and all the states of the Union that they have legitimate governmental objectives in fencing bona fide voters from exercising their civic duty for fear of their anticipated political leanings. (R. at 38.)

Finally, Maryland's draconian, sweeping law is unworkable because it targets only certain felons who are more likely, because of bias in the criminal justice system, to be African Americans. The presumption created against felons is even more troublesome and far-sweeping because felons like Mr. Coolidge, who have had no contact with the criminal justice system for lengthy periods of time, are incapable of overcoming this blanket deprivation "by proof of the most positive character." (R. at 11.) By virtue of his past youthful drug addiction, (which he overcame), Mr. Coolidge, as opposed to other convicted robbers is subject to absolute lifetime disfranchisement. This Court should restore Mr. Coolidge from the lowest form of citizenship and zealously protect his right to vote in future local, state and national elections.

B. Objective indicia reveal that felon disfranchisement laws violate the Constitution's "evolving standards of decency."

The Supreme Court has emphasized that the "evolving standards of decency that mark the progress of a maturing society" govern whether a practice is cruel and unusual in today's society. *Trop*, 356 U.S. at 101. To wit, legislative judgments and the consensus

among civilized nations in the international community serve as objective indicia whether a practice comports with the "evolving standards of decency". *Enmund v. Florida*, 458 U.S. 782, 789 (1982).

1. Objective indicia among the several States demonstrate that felon disfranchisement is cruel and unusual

In determining whether a punishment is cruel and unusual and therefore contrary to the Constitution's well-established "evolving standards of decency," the Court reviews how the collective states treat the punishment and considers any trends in state legislative action. *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989); *Roper v. Simmons*, 543 U.S. 551 (2005). For the Supreme Court has recognized that the "laws enacted by the Nation's legislatures provide the 'clearest and most reliable objective evidence of contemporary values'." *Penry*, 492 U.S. at 331.

Thus, in *Atkins*, when the Court contemplated whether the death penalty was a cruel and unusual punishment for the mentally retarded, it looked to the States. It found that the practice was rare. *Atkins v. Virginia*, 536 U.S. 304 (2002). The Court considered legislative enactments in finding a national consensus against executing the mentally retarded. that a national consensus has developed against it. *Atkins*, 536 U.S. at 315.

Similarly, on both occasions when the Court struggled with the question of whether the death penalty was a cruel and unusual punishment for juveniles, it looked to the States. *Penry*, 492 U.S.

at 331; *Roper*, 543 U.S. at 551 (2005). In *Roper*, this Court inquired into the actions of the Nation's legislatures, the "clearest and most reliable objective evidence of contemporary values" on the executions of juveniles convicted of murder. The Court found that twelve (12) States rejected the death penalty altogether while eighteen (18) states precluded juveniles from execution by express provision or judicial interpretation. *Roper*, 125 S. Ct. at 1192. In contrast, in 1989, when *Penry* was decided, only sixteen states prohibited capital punishment completely or excluded the mentally retarded. These numbers were insufficient evidence of a national consensus against executing the mentally retarded. *Penry*, 492 U.S. at 334.

Likewise, when the Court was faced with the question of whether the Eighth Amendment precluded execution for the rape of an adult female, it looked to the States. In 1925, 18 States, the District of Columbia, and the Federal Government authorized capital punishment for the rape of an adult female. In 1977, the Court observed that "[a]t no time in the last 50 years have a majority of the States authorized death as a punishment for rape." *Coker v. Georgia*, 433 U.S. 584 (1977). The Court observed that in light of the legislative decisions in almost all of the States, it would be difficult to support a claim that the death penalty for rape is an indispensable part of the States' criminal justice system and consequently banned capital punishment for convicted rapists.

Maryland is out of step with the national consensus. Only 13 states permanently disfranchise some criminals and, since 1997, (R. at 14.), the trend has been for states to relax their disfranchisement laws. In fact, in 12 States, including the state of Maryland the number of persons exposed to disfranchisement schemes has been reduced. Indeed the consistent change toward abolition of permanent felon disfranchisement is astounding. The gap between states that permanently disfranchise some criminals and the majority of states, which do not, is rapidly widening.

Not only do the trends confirm that American society disfavors permanent disfranchisement of felons, the raw numbers provide additional objective evidence. Today, 37 states staunchly refuse to permanently disfranchise anyone convicted of a crime. (R. at 14.) In fact, the number and percentage of states rejecting permanent disfranchisement is greater than the numbers that rejected capital punishment of both juveniles and the mentally retarded. If this Court can ban a practice disfavored by only 30 states, it can surely give effect to the policy choice of 37 states. With felon disfranchisement, an even more clear and durable consensus has emerged.

2. Objective indicia among civilized nations demonstrate that felon disfranchisement is cruel and unusual.

The rule that sovereign democracies follow is a ripe and useful source that can confirm the "evolving standards of decency"

in our time. This Court has looked around the globe to civilized nations when faced with contemporary issues. In considering the punishment of denaturalization, the *Trop* Court found that "the civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime." *Id.*

Likewise, in *Atkins*, the Supreme Court noted that the world community overwhelmingly disapproved the imposition of the death penalty for crimes committed by mentally retarded offenders. *Atkins*, 536 U.S. at 316. In *Coker*, the Supreme Court noted that the legislative decisions in most of the countries around the world prohibited a death sentences for those convicted of raping an adult woman. *Coker*, 433 U.S. at 584.

Here, there is ample evidence that felon disfranchisement is a relic in the international community. In fact, relatively few western democracies practice disfranchisement of felons. In 13 countries, including Japan, South Africa, Canada, and France, even prisoners may vote. Many others like India and Brazil, have broad policies of allowing convicts to vote upon their release from prison. The sole democratic nation that disfranchises persons with former felony convictions permanently is Armenia, a satellite of the former U.S.S.R. (R. at 14.)

Finally, denying prisoners the right to vote is a violation of the European Convention on Human Rights. *Hirst v. United Kingdom*, App. No. 74025/01 (Eur. Ct. H.R. Oct. 5, 2005). The US Supreme

Court should stand with beacons of democracy and not with Armenia by ruling that the permanent disfranchisement of felons is punishment in contravention of our Constitution. Then perhaps the "disfranchisement of nonincarcerated criminals" will no longer be a "uniquely serious problem in the United States." *Kane v. Winn*, 319 F. Supp. 2d 162 (2004).

In conclusion, the objective evidence demonstrate that both the state government and international community have repudiated permanent felon disfranchisement.

C. Permanent disfranchisement for the conviction of drug possession also violates the Eighth Amendment because it is disproportionate to the crime.

Permanent disfranchisement for the conviction of drug possession violates the Eighth Amendment because it is a disproportionate and severe punishment. Disproportionate punishment is cruel and unusual within the meaning of the Eighth Amendment if it makes "no measurable contribution" to acceptable penal goals or is "grossly out of proportion to the severity of the crime." *Coker*, 433 U.S. at 592.

First, Mr. Coolidge's punishment serves no penological purpose. The "unnecessary and wanton infliction of pain," *Whitley v. Albers*, 475 U.S. 312, 319 (1986), or the "gratuitous infliction of pain," *Gregg v. Georgia*, 428 U.S. 153, 173, 183, (1976), implicates the Cruel and Unusual Clause. See also *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981); *Hope v. Pelzer*, 536 U.S. 730,

122 S. Ct. 2508, 2514 (2002). Pain is unnecessary and wanton if "it is not formally meted out as punishment by the statute or the sentencing judge." *Wilson v. Seiter*, 501 U.S. 294 (1991). Identified penological aims are deterrence, rehabilitation or retribution. See *Duckworth v. Franzen*, 780 F.2d 645, 652 (7th Cir. 1985) (holding "[t]he infliction of punishment is a deliberate act intended to chastise or deter.") Therefore, strip searching a male prisoner in front of female officers, would not rise to the level of an Eighth Amendment violation if conducted for a legitimate penological purpose. See *Johnson v. Phelan*, 69 F.3d 144, 150-51 (7th Cir. 1995).

Secondly, Mr. Coolidge's punishment is excessive within the meaning of the Eighth Amendment. The "Eighth Amendment forbids extreme sentences that are 'grossly disproportionate' to the crime." *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991); *Ewing v. California*, 538 U.S. 11 (2003). See also *Weems v. United States*, 217 U.S. 349, 367 (1910) (holding twelve years of *carpena modena* was disproportionate punishment for one act of falsifying a business record); *Roberts v. Collins*, 544 F.2d 168 (4th Cir. 1976) (holding that punishment that exceeded the original maximum penalty was disproportionate after defendant pleaded to lesser included offense). This Court has held that imprisoning a man for a term of 90 days for his addiction to narcotics was excessive

and therefore disproportionate within the meaning of the Eighth Amendment. *Robinson v. California*, 370 U.S. 660 (1962).

Felon disfranchisement is disproportionate and gratuitous. It is not an appropriate form of punishment that can meet the penological aims of deterrence, rehabilitation or retribution, but rather, gratuitous pain that pervades long after he is outside the purview of the criminal justice system. It does not contribute to rehabilitation, but rather forces him to "civic death" as others elect his civic leaders. Neither is the victim vindicated, especially in light of his victimless "infamous crime." Lastly, there is no specific deterrence because he has *permanently* lost his right to vote. Permanent disfranchisement is grossly disproportionate to the severity of Mr. Coolidge's crimes. In fact, he would not be permanently disfranchised if, as a youth, he was not addicted to narcotics.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Fourth Circuit and allow Mr. Coolidge to proceed on his claims under the Voting Rights Act and the Eighth Amendment to the United States Constitution.

Respectfully Submitted,

Team 10637