

In the Supreme Court of the United States

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MARYLAND STATE BOARD OF ELECTIONS  
ET AL., PETITIONERS

v.

JEFFREY COOLIDGE,  
RESPONDENT.

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

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**BRIEF FOR JEFFREY COOLIDGE, RESPONDENT**

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## **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?

**LIST OF PARTIES**

The state petitioners are two Maryland agencies and two Maryland officials: 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, Baltimore Board of Elections Director, in his official capacity.

Respondent is the named plaintiff: Jeffrey Coolidge, a resident and citizen of Baltimore, Maryland.

**OPINIONS BELOW**

The opinion of the court of appeals appears in the record. (R. 29-41) The opinion and order of the district court appears in the record. (R. 8-27)

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## **JURISDICTION**

The Fourth Circuit Court of Appeals' judgment was entered on July, 16, 2005. The petition for writ of certiorari was granted on October 14, 2005. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

## **RELEVANT CONSTITUTIONAL AND STAUTORY PROVISIONS**

U.S. Const. amend. VIII

U.S. Const. amend. XIV

U.S. Const. amend. XV

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

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

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

## STATEMENT OF THE CASE

This case arises from Maryland's permanent revocation of Mr. Coolidge's ability to participate in the most fundamental of democratic processes – the right to vote. Mr. Coolidge, 42 years of age, is a life-long citizen of Baltimore, Maryland. (R. 10) Mr. Coolidge first registered to vote in 1992 and subsequently voted in the 1992, 1996 and 2000 Presidential elections. (R. 11) By operation of Maryland law, Mr. Coolidge was denied the right to vote in the 2004 Presidential election. (R. 12) In fact, Mr. Coolidge will never again vote in any Presidential or state sanctioned political election.

Maryland's election law, MD. CODE ANN., Election Law § 3-102(c) (2005), permanently disfranchises persons convicted of a second or subsequent crime of violence, as defined by Maryland's criminal code, after a first conviction of an infamous crime. Maryland recognizes, as crimes of infamy, misconduct that ranges from false advertising to first degree murder. (R. 45-51)

Mr. Coolidge first ran afoul of Maryland law in 1982 at the age of 19. (R. 10) He was pulled over during a police investigation of a robbery by an African American male matching Mr. Coolidge's description. (R. 10) Baltimore County police arrested Mr. Coolidge for possession of 10 grams of cocaine

after a warrant-less search of his car. (R. 10) Mr. Coolidge was charged with intent to distribute a controlled substance, which was an infamous crime at the time according to Maryland law. (R. 11) Mr. Coolidge was convicted by a jury of his peers that contained one African American. (R. 10) The other eleven jurors were white. (R. 10)

In April 2004, while purchasing a newspaper, he threatened to assault a convenience store clerk if she did not give him all the cash in the open drawer. (R. 11) Mr. Coolidge made off with \$150 and was apprehended several hours later. (R. 11) Mr. Coolidge did not brandish a weapon during the robbery and police did not find a weapon upon his arrest. (R. 11) Mr. Coolidge was convicted of robbery in October 2004, receiving a sentence of 5 years in prison and 5 years probation. (R. 11) Robbery is a crime of violence under Maryland law, MD. CODE ANN., Criminal Law § 14-1019(a) (Bender 2005). Additionally, Mr. Coolidge was removed from the voter registry after his sentencing for the robbery conviction. (R. 12)

Mr. Coolidge sought relief from Maryland's denial of his right to vote in the federal district court for the district of Maryland. (R. 18) The action claimed violations of 42 U.S.C. § 1983, 42 U.S.C. 1973, as well as the Eighth, Fourteenth and Fifteenth Amendments to the U.S. Constitution. (R. 20-23) The

district court dismissed Mr. Coolidge's claims on Maryland's motion pursuant to Fed. R. Civ. P. 12(b)(6) (R. 27). The United States Fourth Circuit Court of Appeals reversed and remanded for trial the § 1973 and Eighth Amendment claims. (R. 41) Maryland sought and was granted certiorari in this court. (R. 3)

### **SUMMARY OF ARGUMENT**

Jeffrey Coolidge has been disfranchised on account of his race as an African American. Jeffrey Coolidge has been permanently disfranchised on account of his race as an African-American. Section 2 of the Voting Rights Act of 1965(VRA), prohibits any voting qualification that results in the denial of the voting right to a citizen on account of race. The institutional racial bias in Maryland's criminal justice system leads to the conviction of a much greater number of African Americans than whites. As a result, a disproportionate number of Maryland's African Americans are disfranchised. Accordingly, Maryland's electoral law violates of § 2 of the VRA.

The Fourth Circuit Court of Appeals correctly held that § 2 of the Fourteenth Amendment does not bar application of the VRA to felon disfranchisement laws. The emphasis of the District Court on the holding of this Court in *Ramirez v. Richardson* is unwarranted. In *Ramirez*, the Court concluded that the drafters of the Fourteenth Amendment intended to confer a

constitutionally sanctioned position on states' felon disenfranchisement. History of the Amendment, however, clearly refutes the *Ramirez* conclusion. The Court's conclusion, even if presumably correct, is inconsistent with modern suffrage jurisprudence and should be reconsidered by the Court.

As a result of modern trends in criminal justice, many relatively minor offenses have been labeled as felonies, punishable by long prison sentences. Furthermore, the deep-rooted racial bias in the law enforcement and criminal justice system creates a context in which a disproportionately larger number of African Americans are convicted of felonies. Felon disenfranchisement laws, thus, take away the voting rights of a large block of the population that is disproportionately African American in composition. All the Court's previously established criteria for overturning a prior decision are satisfied with respect to the Court's decision in *Ramirez*. That decision should be consequently overruled.

Moreover, Congress enacted the VRA to effectuate the Fifteenth Amendment guarantee that no citizen would be denied the right to vote *on account of race*. Thus, even if the Fourteenth Amendment allowed the states to deny voting rights to certain citizens, i.e., felons, Fifteenth Amendment abolished that power. Accordingly, the VRA can be constitutionally applied

to felon disfranchisement laws, because they discriminately deny voting rights to African Americans.

The Circuit Court correctly found Maryland's § 3-102 to be a punishment. Disfranchisement, in Maryland, is imposed as an additional sanction after a criminal conviction. The Maryland law serves no legitimate regulatory purpose. Because voting is a fundamental right, permissible restrictions by the states on the franchise are narrow. Historically, the courts and Congress have viewed disfranchisement as punishment. Enacting statutes, allowing the re-entry into the nation the former Confederate states allowed for disfranchisement of persons convicted of common law felonies or rebellion as punishment. The Maryland attorney-general's opinion in the record implies the punitive nature of § 3-102. (R. 44) Maryland's disfranchisement law is punishment.

Maryland's permanent disfranchisement of Mr. Coolidge is cruel and unusual punishment in violation of the Eighth Amendment. Mr. Coolidge's punishment is grossly disproportionate when measured against his minor criminal conviction. This Court has held unconstitutional punishments that stripped Americans of their citizenship for far more serious crimes or condemned a person to "forever live under the cloud" of his crime after incarceration. Permanent felon

disfranchisement is inconsistent with evolving standards of decency as 37 states allow for felons to eventually recover their right to vote and few democracies in the international community restrict in any manner felon's right to vote.

## ARGUMENT

### **I. MARYLAND FELON DISFRANCHISEMENT STATUTE IS A VOTING QUALIFICATION SUBJECT TO § 2 OF THE VOTING RIGHTS ACT BECAUSE IT RESULTS IN A DENIAL OF THE RIGHT TO VOTE ON ACCOUNT OF RACE.**

Congress enacted the VRA in 1965 to rid the country of racial discrimination in voting. *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966). Section 2 of the VRA provides in pertinent part that no voting qualification shall be imposed by any state in a manner which results in the denial of any citizen's right to vote on account of race. 42 U.S.C. § 1973(2) (amended 1982). It also provides that a violation of § 2 is established if, based on the totality of circumstances, it is shown that the political processes are not equally open to participation by members of a class of citizens. *Id.* Under § 2, a plaintiff needs to establish two elements: (1) the existence of a voting qualification or practice, and (2) that results in a denial or abridgement of the right to vote on account of race.

*Chisom v. Roemer*, 501 U.S. 380, 394 (1991). No proof of discriminatory intent is required. *Id.*

**A. Maryland's Felon Disfranchisement Law Is A Voting Qualification Within The Scope Of § 2(a) Of The VRA.**

An electoral law is a voter qualification subject to regulation by § 2, if it results in a discriminatory effect on minorities' participation in the political process. *Holder v. Hall*, 512 U.S. 874, 917-18 (1994). Because of Maryland's election law, 4% of eligible African American voters are permanently disfranchised compared to 1% whites. (R. 12) Voter qualifications that abridge the voting rights of minorities fall within the scope of the VRA. *Farrakhan v. Washington*, 338 F.3d 1009(9th Cir. 2003). Thus, Maryland's election law is a voting qualification subject to § 2 of the VRA.

**B. Maryland's Felon Disfranchisement Law Causes Disproportionate Disfranchisement Of African Americans Because of Discriminatory Practices of Maryland's Criminal Justice System.**

**1. Racial bias in Maryland's criminal justice system is a critical factor to consider in the totality of circumstances analysis required by § 2 of the VRA.**

Evidence of racial bias in the criminal justice system is one of the factors to be considered in determining a violation of § 2 of the VRA. *Farrakhan*, 338 F.3d at 1020. In enacting the VRA, Congress intended "to give the Act the broadest possible scope." *Allen v. State Bd. of Elections*, 393 U.S. 544, 567 (1969). This Court has emphasized its intent to effectuate the legislative intent when deciding cases under the VRA. *Thornburg v. Gingles*, 478 U.S. 30, 51 (1986). The Senate Report indicates that in drafting § 2(b) Congress adopted the Court's analysis in *White v. Regester*, 412 U.S. 755 (1973). S. Rep. No. 97-417, at 30 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 205. In *White*, the Court stressed that the totality of circumstances analysis calls for a "searching practical evaluation of the past and present reality" with evidence of race discrimination outside the electoral process to be taken into consideration. See *White* 412 U.S. 755.

Furthermore, In *Thornburg*, the Court held that the § 2 totality of circumstances analysis involves an inquiry into whether "a certain electoral law . . . interacts with *social and historical conditions* to cause an inequality" in the

exercise of voting rights by minorities. *Thornburg*. 478 U.S. at 47(emphasis added). Following the Court's direction, a variety of external factors such as lower socio-economic status and past and continuing unemployment and illiteracy have been considered by Circuit Courts in finding facially neutral voting laws invalid under the § 2 of the VRA. See e.g., *Old Person v. Brown*, 312 F.3d 1036 (9th Cir.2002); *Salas v. S.W. Tex. Junior Coll. Dist.*, 964 F.2d 1542, 1556 (5th Cir. 1992); *Ortiz v. City of Philadelphia Office of the City Comm'ers*, 28 F.3d 306, 310-16 (3d Cir. 1994); *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1574 (11th Cir. 1984).

**2. The criminal justice systems in Maryland disproportionately targets African Americans for conviction.**

Maryland disfranchises African Americans at a rate four times higher than its white population. (R. 12) Of African-Americans of voting age in Maryland, 3.9% are permanently disfranchised, whereas only 1% of its white residents are so disfranchised. (R. 12) The rate of crime committed by African-Americans does not account for this disparity. (R. 12)

The extremely disparate rate of the disfranchisement of African Americans is the direct result of their higher prosecution and conviction by Maryland's criminal justice

system. African American residents of Maryland and Baltimore come into contact with the police 75% more often than whites. (R. 13) A disproportionately larger number of traffic stops involve African Americans. (R. 13) Furthermore, police in Baltimore apprehends African Americans at a disproportionately high rate. (R. 13) The subsequent synergy between the racial bias of the criminal justice system and felon disfranchisement laws leads to the denial of voting rights to an extremely large number of African Americans.

African Americans in Maryland are prosecuted at a much higher rate than whites. (R. 13) Moreover, African Americans receive competent legal representation at trial less than the white citizens. (R. 13) As a result, they plead guilty 35% more than whites. (R. 13) Consequently, Maryland convicts African Americans at substantially higher rates than its white residents. (R. 13)

The composition of juries in Maryland is disproportionately white. (R. 13) For instance, African Americans consist 20% of the residents of Baltimore County, there is only one African American juror for every fourteen white jurors. (R. 13) Similarly, while African American population in Baltimore is two times that of whites, the number of African Americans jurors is half of that of white jurors. (R. 13) The combination of all

these disparities leads to a strikingly disproportionate rate of conviction of African Americans in Maryland.

**3. Harsh Sentencing Guidelines Exacerbate the Impact of Racial Bias of Maryland's Criminal Justice System.**

The sentencing guidelines for drug-related offenses mandate the same prison term (5 year) for 5 grams of crack cocaine that they do for 500 grams of powder cocaine. David Yellen, *Reforming Cocaine Sentencing: The New Commission Speaks*. 8 Fed. Sent. R. 54 (1995). As most crack offenders are African American, and most powder cocaine offenders are white, African Americans bear a heavily disproportionate share of those harsh minimum penalties. *Id.* Low-level crack cocaine offenders, mostly African American, receive arbitrary severe sentences, compared to high-level powder cocaine offenders, mostly white. *Crack Cocaine Sentencing Policies: Unjustified and Unreasonable*, available at <http://www.sentencingproject.org/pdfs/1003.pdf> (last visited on January 18, 2006) [hereinafter *Sentencing Project*]. Twenty five percent of imprisoned African Americans in Maryland are serving sentences for drug-related offenses whereas only 9% of white prisoners are serving sentences for such crimes. (R. 12-13) This is the case despite evidence that there is no significant difference in the rate of drug offenses among whites and African Americans. See *Sentencing Project, supra*.

Mr. Coolidge has been disfranchised for life on account of his race. Maryland's Felon disfranchisement law is supposedly a racially neutral law. However, laws do not function in the abstract. They are applied in the context of social realities which dictate their effects. Being an African American was the determining factor in bringing about Mr. Coolidge's first conviction for possession of a small amount of cocaine. (R. 10) That conviction set the stage for his life-long disfranchisement pursuant to § 1-302 of Maryland's electoral law. (R. 11) By disfranchising Mr. Coolidge on account of his race, Maryland disfranchisement law violates § 2 of the VRA.

**C. The Appellate Court's Holding that § 2 of the Fourteenth Amendment Cannot be Used to Shield Felon Disfranchisement Laws from the Reach of the VRA Should Be Affirmed.**

The Fourteenth Amendment was enacted with the main purpose of guaranteeing the voting rights of the emancipated slaves. In *Richardson v. Ramirez*, 418 U.S. 24, 43 (1974) (6-3 decision), this Court concluded that disfranchisement of felons by states was sanctioned by the Constitution because of the "other crime" language in § 2 of the Fourteenth Amendment. It therefore found disfranchisement laws not to be subject to Equal Protection challenge. *Id.* The divided Court concluded that the framers of the Fourteenth Amendment could not have intended to prohibit in

§ 1 of that Amendment, that which was expressly exempted from sanction by § 2 of the Amendment. *Id.* The Court however, added that this would not be the case if "it can be shown that the language of § 2 . . . was intended to have a different meaning than would appear from its face." *Id.*

Even though the Court has not previously addressed the issue of felon disfranchisement, its decision in *Ramirez* has been used by some courts in holding that § 2 of the VRA could not be applied to felon disfranchisement laws. As a result, the Court's misreading of § 2 of the Fourteenth Amendment has shielded the disfranchisement laws from constitutional challenge in direct defiance of the spirit of the Fourteenth and Fifteenth Amendments. Neither historical analysis, nor modern notions of a democratic society which recognizes the critical importance of the participation of *all* its citizens in the political process, support the Court's interpretation of the § 2 of the Fourteenth Amendment.

**1. The drafters of the Fourteenth Amendment did not intend § 2 to be an affirmative sanction of felon disfranchisement by the Constitution.**

The Court's analysis of the intent of the framers of the § 2 is unsound. William W. Van Alstyne, *The Fourteenth Amendment, The "Right" to Vote and the Understanding of the Thirty-Ninth*

*Congress*, Sup. Ct. Rev. 33, 43-44 (1965). The legislative history of the Thirty-Ninth Congress makes it clear that contrary to the Court's conclusion, the two sections of the Amendment do not share a unitary underlying purpose. *Id.* The two sections started as two wholly separate Amendments but were ultimately ratified as a single package Amendment because of political exigencies. *Id.* Furthermore, as Justice Marshall noted in his dissent in *Ramirez*, § 2 was in essence a political maneuver by the Republican faction to protect their hegemony in Congress by lowering the number of southern states' representatives. *Ramirez*, 418 U.S. at 74. The *Ramirez* majority indeed admitted that, "the framers of the Amendment were primarily concerned with the effect of reduced representation upon the States, rather than with the two forms of disfranchisement." *Id.* at 43. The Court seemingly gave controlling significance to the framers' intents, but its assessment of those intentions was clearly misguided. Lawrence H. Tribe, *American Constitutional law*, § 13-16, 1094 (2d ed. 1988).

***2. The Court's reading of § 2 of the Fourteenth Amendment is out of step with today's societal values and realities.***

The society's conception of who should be able to vote has changed profoundly since 1868. Even if the *Ramirez's* interpretation of the intent of the drafters of § 2 is accepted as correct, the Court has emphasized that it is not bound by the political theories of a particular era. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 669 (1966). Section 2, also sanctioned disfranchisement of women and those under twenty-one year of age. A line of reasoning similar to that of the Court's in *Ramirez* would have perpetuated those practices. In the words of Justice Marshall, "such discriminations are not forever immunized from evolving standards of equal protection." *Richardson v. Ramirez*, 418 U.S. 24, 74 (1974) (dissenting opinion).

*a. The Court opinion in Ramirez has been a clear departure from the view espoused by it in its prior and subsequent decisions.*

This Court has repeatedly noted that states cannot impose burdens on the right to vote, where such burdens are expressly prohibited in other constitutional provisions. *Williams v. Rhodes*, 393 U.S. 23, 29 (1968). Moreover, in a subsequent decision, *Hunter v. Underwood*, 471 U.S. 222 (1985), the Court held that states cannot use felon disfranchisement as a tool to

discriminate on the basis of race. It stated that nothing in the *Ramirez* decision suggested otherwise. *Id.* at 233.

*b. Felon disfranchisement offends the contemporary standards of justice.*

Disfranchisement is a relic of medieval times when virtually all felonies were punishable by death. 4 William Blackstone, *Commentaries* 98 (1919). The historic roots of the concept of felony lie in the idea of forfeiture, where a felon was considered to have forfeited all rights. 2 Fredrick Pollock & Fredrick William Maitland, *The History of English Law* 465 (2d ed. 1909). Disfranchisement might have been a justifiable punishment in an era when a felon was considered to have forfeited the right to live, but this concept has no legitimate place in today's notions of fairness and justice. In *Tennessee v. Garner*, 471 U.S. 1(1985), the Court reversed its position on the constitutionality of state laws authorizing the use of deadly force against fleeing felons. It observed, "[a]lmost all crimes formerly punishable by death no longer are or can be. And while in earlier times the gulf between the felonies and the minor offences was broad and deep, today the distinction is minor and often arbitrary." *Id.* Many crimes classified as misdemeanors or nonexistent when the Fourteenth Amendment was ratified, are now listed as felonies. *Id.* Furthermore, the scope

of offenses classified as felonies have substantially broadened since 1974 when *Ramirez* was decided.

*c. Disfranchisement rates have grown exponentially since Ramirez because of new sentencing and law enforcement policies.*

A far greater number of individuals are now disfranchised as compared to early 1970's. Ryan S. King & Mark Mauer, *The Vanishing Black Electorate: Felony Disfranchisement in Atlanta, Georgia*, available at <http://www.sentencingproject.org/pdfs/atlanta-report.pdf> (2004) (last visited on December 28, 2005) [hereinafter *The Vanishing Electorate*]. Harsher sentencing laws and the national "war on drugs" have given rise to an explosion in incarcerations, in the absence of any corresponding increase in the crime rates. Jamie Fellner & Mark Mauer, *Losing the Vote: The Impact of Felony Disfranchisement Laws in the United States*, 11, available at <http://www.sentencingproject.org/pdfs/9080.pdf> (1998) [hereinafter *The Impact*] (last visited on December 28, 2005). Presently, 4.7 million adults, or over 2% of the eligible voting population are disfranchised. *Id.* Based on the Department of Justice's estimate, 5% of today's children will serve time during their lifetime and would be disfranchised. *Id.* at 12. No conceivable goal of disfranchisement laws could justify the mass denial of voting rights to such a significant segment of the

population, especially in a society that regards the right to vote a fundamental right of all its citizens. *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964).

African Americans bear the greatest burden of those policies. *The Impact, supra*. African American males make up 12% of the U.S. population and 36% of the total disfranchised population. *Id.* They are disfranchised at a rate seven times the national average. *Id.* In their effect, disfranchisement laws are the modern day equivalents of Jim Crow legislations in denying the African Americans the right to vote. Jim Crow laws did not survive. Felon disfranchisement laws should be similarly abandoned.

*d. Emerging national and international  
jurisprudential trends demand that the Court  
reconsider its decision in Ramirez.*

This Court has established criteria that it considers when overruling its prior decisions. In *Lawrence v. Texas*, 539 U.S. 558 (2003), the Court overturned an earlier holding in *Bowers v. Hardwick* 478 U.S. 186(1986), that upheld the constitutionality of Georgia's statute criminalizing sodomy. In its decision, the Court paid heed to the emerging recognition of the right involved, the trend in states practices involving the issue, criticism of the previous decision by scholars and professional

organizations, and the dominant practices of the world community. *Lawrence* 539 U.S. at 569–78. Similar criteria were relied on in *Atkins v. Virginia*, 536 U.S. 304, 316 (2002), by the Court in overturning its prior decision on the issue of death penalty and mentally retarded criminals.

There is ample evidence that the Court's holding in *Ramirez* on the issue of felon disfranchisement is out of step with the trends set by states, courts outside the United States, and public and professional opinions. A national momentum for reform of disfranchisement laws has been growing. Since 1997, nine states have scaled back or repealed at least aspects of their disfranchisement laws. See *The Vanishing Electorate*, *supra*. The National Commission on Federal Election Reform, co-chaired by Presidents Ford and Carter, unanimously recommended restoration of voting rights of ex-felons. *Id.* Similar positions have been advocated by the American Correctional Association, the American Law Institute, national Advisory Commission on Criminal Justice Standards and Goals, and National Commissioners on Uniform State laws. *Id.*, Andrew L. Shapiro, *Challenging Disfranchisement Under the Voting Rights Act: A New Strategy*, 103 Yale L. J. 537, 561 n.127 (1993). A study of public attitude toward felon disfranchisement found that 80% of public support restoring voting rights of ex-felons. Jeff, Manza, Clem Brooks, Christopher Uggen, *Public Attitudes Towards Felon*

*Disfranchisement in the United States*, available at <http://www.sentencingproject.org/pdfs/ManzaBrooksUggenSummary.pdf> (last visited on January 17, 2006).

Similarly, international developments have been all in the direction of reinstating the voting rights of people with felony convictions. (R. 14) In 2004, the European Court of Human Rights found the denial of voting rights to imprisoned persons in England and Wales a violation of human rights. See *The Vanishing Electorate*, *supra*. The constitutional courts of Canada, Israel, and South Africa have all upheld the voting rights of their prisoners. *Id.*

Rejecting the constitutional sanctity of felon disfranchisement would be "founded on reason and truth" and would "[give] to the individual no more than that which the Constitution Guarantees him." *Mapp v. Ohio*, 367 U.S. 643 (1961) (emphasizing the right to be free of police intrusion). "To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment." *Id.* By rejecting felon disfranchisement laws, the Court would give individuals no more than which the Constitution guarantees - the fundamental right to vote.

**2. Even if sanctioned by § 2 of the Fourteenth Amendment, felon disfranchisement laws do not survive the Fifteenth Amendment.**

Congress enacted the VRA to effectuate the Fifteenth Amendment's guarantee that "no citizen's right to vote shall be denied or abridged on account of race, color, or previous condition of servitude." *South Carolina v. Katzenbach*, 383 U.S. 301, 337 (U.S. 1966) (quoting U. S. Const. Amend. XV). The Fifteenth Amendment gave no special authorization for disfranchisement even of those who had committed the most serious crimes. Gabriel J. Chin, *Reconstruction, Felon Disfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?* 92 Geo. L.J. 259, 315 (2004) [hereinafter *Chin*]. The Court has recognized this point in *United States v. Reese*, 92 U.S. 214 (1875). In *Reese* it held that before the Fifteenth Amendment, "it was as much within the power of a State to exclude citizens of the United States from voting on account of race, as it was on account of age, property, or education. Now it is not." *Id.* History of the Amendment is in full support of that notion. George Boutwell, a member of the Committee on Reconstruction, which drafted the Fourteenth Amendment, and a principal drafter of the Fifteenth Amendment, wrote: "By virtue of the Fifteenth Amendment the last sentence of section two of

the Fourteenth Amendment is inoperative wholly." *Chin* at 272.

"[I]t is time for the Court to declare that [§ 2 of the Fourteenth Amendment] is dead and apply the Constitution in effect now, rather than the version that prevailed before the Fifteenth Amendment granted African Americans the right to vote." *Id.* at 316. Thus, even if § 2 of the Fourteenth Amendment sanctioned felon disfranchisement, it was superseded by the Fifteenth Amendment. The VRA, enacted by Congress to enforce the Fifteenth Amendment's guarantee of equal voting rights, could be constitutionally applied to felon disfranchisement laws.

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

**A. Maryland's Felony Disfranchisement Sanction's Only  
Legitimate Purpose Is Punishment Because No Regulatory  
Objective Is Legally Viable.**

**1. *Maryland's disfranchisement law is punitive because  
its sanction is imposed only after a criminal  
conviction.***

This Court has found statutes punitive, and subject to Eighth Amendment protections, even where the obvious legislative intention was a civil purpose. The Court in *Austin v. United States*, 509 U.S. 602, 610 (1993), and again in *United States v. Bajakajian*, 534 U.S. 321 (1998), held that civil forfeiture was punishment and therefore subject to Eighth Amendment protections. *Id.* Because civil forfeiture served not only remedial purposes, it also served to further states' retributive and deterrence objectives. 509 U.S. at 610. In *Bajakajian*, the Court reasoned that the forfeiture served as an *additional sanction* when imposing sentence on a person convicted of a crime. 534 U.S. at 325. Forfeiture is imposed at the culmination of criminal proceeding that requires a conviction of an underlying felony. *Id.* at 325. By revoking Mr. Coolidge's voting rights, Maryland's § 3-102 law operates similarly.

In *Austin*, the Court determined that forfeiture constituted punishment at the time of the Eighth Amendment's ratification and does so today. 509 U.S. at 611-22. Significant to the *Austin* Court, was the fact that Congress sought to impose the forfeiture penalty upon people "significantly involved" in criminal enterprise. *Id.* at 619. Likewise, by requiring a conviction for a same or second crime of violence, Maryland seeks forfeiture of the voting rights of citizens arguably "significantly involved" in criminal enterprise. As seen in

*Austin*, a legislative punitive intent brings the law within the scope of the Eighth Amendment protections.

**2. Maryland's disfranchisement law is penal when analyzed through various tests formulated by the Court.**

This Court has previously noted that the concept of punishment permeates the division between civil and criminal law. *Austin*, 509 U.S. at 610 (citing *United States v. Halper* 490 U.S. 435, 447-448 (1989)). Punishment for a crime should be "graduated and proportionate" to the offense committed. *Weems v. United States*, 217 U.S. 349, 367 (1910). In several cases the Court has delineated factors to consider when inquiring whether a statute is penal. Some of the factors this Court suggested include whether the sanction: involves an affirmative disability or restraint, has historically been regarded as punishment, whether it comes into play on finding of scienter, whether its operation promotes the traditional aims of punishment such as retribution and deterrence, and whether the behavior to which it applies is already a crime. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 169(1963) (deciding whether statute that divested citizenship of claimants for acts committed during war violated the Fifth and Sixth Amendments). The Court also held that absent conclusive evidence of intent by Congress, these factors are to be applied to the statute on its face. *Id.* at 169.

The Court further acknowledged statutory label is not determinative in *United States v. Ward*, 448 U.S. 242 (1980) (deciding whether a statute's monetary penalty for violation of reporting requirement was Fifth Amendment violation of the right against self-incrimination). Even if the legislative body expressly or implicitly indicates a statute as civil, its purpose or effect can still be so punitive as to negate legislative intent. *Id.* at 248-49. Although neither *Mendoza-Martinez* nor *Ward* involved Eighth Amendment claims, this Court stated that the *Mendoza-Martinez* factors have their origins in cases under both the Sixth and Eighth amendments. *Smith v. Doe*, 538 U.S. 84, 97 (2003).

Maryland's Election law offers no discernible legislative intent on its face. The Maryland attorney general claimed that the current Election Law was intended to liberalize the prior stricter disfranchisement law. 93 Op. Att'y Gen. 5 (2003); (R. 44) However, he noted that the legislature recognized the seriousness of violent felonies when enacting Maryland's disfranchisement law. (R. 44) Looking at the pertinent *Mendoza-Martinez* factors, Maryland's § 3-102 statute on its face appears to be punishment. Section 3-102 affirmatively deprives persons convicted of a violent felony after a first conviction for an "infamous crime" from ever exercising their right to vote. See MD. CODE ANN., Election Law § 3-102 (2005).

Historically, this Court has recognized disfranchisement as punishment. When deciding felony disfranchisement under the Equal Protection Clause of the Fourteenth Amendment, this Court traced various congressional acts that readmitted the former Confederate States to the union, quoting statutes that allowed for disfranchisement as punishment for those convicted under common law felonies. *Richardson v. Ramirez*, 412 U.S. 24, 48-53 (1974). The Congressional Act that readmitted Arkansas provided "the constitution of Arkansas will never be amended . . . to deprive any citizen . . . the right to vote . . . except as a punishment for crimes as are now felonies at the common law." *Id.* at 51. Further, in a prior decision, the federal district court in Maryland recognized § 3-102 as punishment when it stated it could not conclude that disfranchisement decreed by Maryland is a *punishment* grossly disproportionate to the crime committed. *Thiess v. State Admin. Bd. of Election Law Md.*, 387 F.Supp. 1038, 1042 (D. Md. 1974).

Other *Mendoza-Martinez* factors seem just as conclusive. It is understood that in order to gain a conviction for a violent felony, *scienter* must necessarily be proved. Courts have recognized that disfranchisement is a punitive measure that serves as retribution and deterrence. In a felony disfranchisement action based on alleged Equal Protection and VRA claims, a federal court held that felons are not

disfranchised on any "immutable characteristic such as race," but for their conscious decision to commit an act to which they assumed the risks of detection and punishment. *Wesley v. Collins*, 605 F.Supp 802, 813 (M.D. Tenn. 1985). In Maryland, the behavior that leads to the disfranchisement sanction, conviction of a violent felony, is already a crime. Under the *Mendoza-Martinez* factors the law is punitive.

**3. *The only effect of Maryland's disfranchisement law is punitive because under modern suffrage jurisprudence none of the asserted regulatory purposes are satisfactory.***

The right to vote is a fundamental right. *Reynolds v. Sims*, 377 U.S. 533 (1963). Thus, this Court has narrowed permissible restrictions on the voting franchise. *Id.* In *Reynolds*, the Court held that the Constitution undeniably protects the right of qualified citizens to vote and attempts to deny and restrict the right of suffrage are impermissible. *Id.* at 555. The Court has also held because the right to vote is fundamental, denying suffrage must be the result of a compelling state interest, not "merely a legitimate state interest." *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 626-27 (1969).

In a felony voter disfranchisement case, the Fifth Circuit observed that felons have "breached the social contract" and

thus questioned their ability to vote responsibly. *Shephard v. Trevino*, 575 F.2d 1110, 1115 (5<sup>th</sup> Cir. 1978). Yet, when Tennessee enacted durational residency requirements with the purpose that long term residents were more likely to vote "intelligently" this Court held that purpose not only elusive, but unjustifiable. *Dunn v. Blumstein*, 405 U.S. 330, 356 (1972). The VRA, in pertinent part states that citizens may not be denied the right to vote for failure to pass a "test or device" defined to include: literacy, educational achievement or knowledge of a particular subject, good moral character, proof of qualifications by voucher of registered voters or members of any other class. 42 U.S.C. 1973 (1965) (amended 1994). If felony voter disfranchisement cannot be supported under regulatory civil purposes, the only logical conclusion is that its purpose is punitive.

## **B. Maryland's Permanent Disfranchisement Of Felons**

### **Constitutes Cruel And Unusual Punishment Of Felons**

**Because It Is Not Compatible With Evolving Standards Of Decency And Is Grossly Disproportionate To The Crime Committed.**

**1. *Maryland's disfranchisement of Mr. Coolidge qualifies as grossly disproportionate punishment under this Court's prior assessments.***

Mr. Coolidge's fate is inconsistent with the reasoning of this Court's prior Eighth Amendment decisions. The Court noted in *Ewing*, that the "Eighth Amendment does not require strict proportionality between crime and punishment [but] forbids only extreme sentences that are grossly proportionate to the crime." *Ewing v. California*, 538 U.S. 11(2003) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1001 (Kennedy, J., concurring in part and concurring in judgment)).

In *Trop v. Dulles*, 356 U.S. 86, 101 (1958), Court held that citizenship could not be divested as a penalty for a soldier's desertion during a time of war in part because the sanction would destroy the individual's status in the national and international political community. Although Mr. Coolidge still maintains his citizenship, he suffers a similar "civic death" because he has lost his membership status in the political community. Loss of citizenship was found to be too cruel and unusual a punishment for a *treasonous crime*. *Id.* Mr. Coolidge is given a similar punishment for a *minor drug possession and theft convictions*.

Similarly, in *Weems v. United States*, 217 U.S. 349 (1909), this Court struck down a prisoner's punishment of "cadena temporal" for falsifying a public document. *Id.* at 366 (punishment included 15 years imprisonment with hard labor,

constantly in chains, and permanent surveillance after release). The Court reasoned that the defendant would have suffered a perpetual limitation of his liberty because after his incarceration was over he still would be "forever under the shadow" of his crime. *Id.* Similarly, Mr. Coolidge, will forever live under a modern "cadena temporal." He is perpetually expelled from the political community. This Court referred to the right to vote as a fundamental matter in a democratic society because it preserves all other rights. *Reynolds v. Sims*, 377 U.S. 533, 562 (1964). Just as the defendant in *Weems* could not escape the "cloud of his crime," Mr. Coolidge is branded forever a lesser citizen deprived of participation in the most civic of community functions.

If the policy goal of Maryland's disfranchisement of Mr. Coolidge is retribution, then his punishment is disproportionately harsh in comparison with his crime. His infamous crime was possession of 10 grams of a controlled substance with intent to distribute. His subsequent conviction of a violent felony was for robbery, although no weapon was used during the crime or found at the time of his arrest. In 37 other states Mr. Coolidge's punishment for the same conduct would allow him to regain his fundamental right to vote. (R. 11) As a result of Maryland's blanket disfranchisement law, Mr. Coolidge

received the same penalty for his lesser crimes as if he had been convicted of two or more homicides.

***2. Maryland's permanent disfranchisement of felons is not compatible with evolving standards of decency.***

The *Trop* Court elaborated that the Eighth Amendment must draw its meaning from "the evolving standards of decency that mark the progress of a maturing society. 356 U.S. at 101. Excessive punishment claims are not decided by standards that prevailed at the time of the Eighth Amendment's enactment, but by current conventions. *Atkins v. Virginia*, 536 U.S. 304, 311 (2002). In *Atkins* this Court held that proportionality review under evolving standards should, to the maximum extent possible, be informed by "objective factors." *Id.* at 312. The *Atkins* Court also gave credence to accepted practice in the "world community" and national polling data. *Id.* at 316. The clearest and most reliable evidence of contemporary values is evidenced by legislation enacted by federal and state legislatures. *Id.* at 312.

*a. National trends are decidedly incompatible with permanent disfranchisement.*

In an earlier time, when this Court upheld permanent disfranchisement in *Richardson v. Ramirez*, 418 U.S. 24 (1977),

over half the states had laws in effect that permanently disfranchised ex-felons. See Angela Behrens, Christopher Uggen & Jeff Manza, *Ballot Manipulation and the "Menace of Negro Domination": Racial Threat and Felon Disfranchisement in the United States, 1850-2002*, 109 Am. J. Soc. 559, 562-64 (2003). Currently only thirteen states permanently disfranchise some ex-felons including Maryland. (R. 14) As many as twelve states have relaxed their disfranchisement laws since 1997. (R. 14)

In holding the death penalty for the mentally retarded unconstitutional, this Court noted that 30 states had prohibited the death penalty for the mentally insane, including 12 that had no death penalty. See *Atkins* 536 U.S. at 313-15. Similarly, when holding the death penalty for minors unconstitutional, this Court emphasized that 30 states prohibited the sanction for minors, including 12 with no death penalty. See *Roper v. Simmons*, 125 S. Ct. 1183, 1192 (2005). If 30 states disallowing the death penalty for both the mentally retarded and minors was sufficient to establish the prevailing trends; then the fact that 37 states currently disallow permanent felony disfranchisement should provide even stronger guidance that evolving standards disfavor this practice.

*b. International norms do not support felony disfranchisement.*

As noted before, the international trend is to allow prisoners to vote. This list includes modern democracies such as Japan, South Africa, Canada, and France among others (R. 14) Among democratic nations, only Armenia permanently disfranchises some felons. (R. 14) The Canadian Supreme Court struck down disfranchisement of all prisoners stating that the "government offered no credible theory about why it should be allowed to deny a fundamental democratic right as a form of state punishment." *See Id. (citing Suave v. Canada, [1992] 2 S.C.R. 438).*

### **Conclusion**

The judgment of the court of appeals should be affirmed.  
Respectfully submitted.