

IN THE SUPREME COURT OF THE UNITED STATES

**MARYLAND STATE
BOARD OF ELECTIONS,
et. al.,
Defendants-Petitioners**

v.

**JEFFREY COOLIDGE,
Plaintiff-Respondent**

#05-1207

BRIEF FOR RESPONDENT

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Questions Presented for Review

1. Does a statutory provision permanently denying the right to vote only to persons who have committed a second or subsequent violent felony fall under the regulation of § 2 of the Voting Rights Act, 42 U.S.C. § 1973, because it results in the denial of voting rights based on race?

2. Does Maryland's disenfranchisement of a felon, based on a conviction of a violent crime and a prior conviction of an infamous crime, constitute a cruel and unusual punishment in violation of the Eighth Amendment?

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Jurisdictional Authority

The plaintiff's claims directly concern federal questions under 42 U.S.C. § 1973, 42 U.S.C. § 1983, and the Eighth Amendment to the U.S. Constitution, and were thus properly originally brought in federal district court under 28 U.S.C. § 1331. Certiorari was properly granted by this Court under 28 U.S.C § 1254.

Statement of the Facts

In 1982, Jeffrey Coolidge – a nineteen year-old African-American resident of Baltimore, Maryland – was pulled over by police officers searching for an African-American who had committed a robbery. Although Coolidge was never charged in relation to any robbery, a police search during the traffic stop uncovered ten grams of cocaine. Subsequently, a jury of one black and eleven white individuals convicted Coolidge of possession with intent to sell and sentenced him to one year in prison and one year of probation. While on probation, he was again arrested for possession of one gram of cocaine and sentenced to an additional six months in prison. Following his second release in 1985, he successfully underwent treatment to overcome his addiction to cocaine.

Nearly twenty years later, Coolidge was arrested for stealing \$150 from a convenience store in April 2004 and was charged with and convicted of robbery. Coolidge's 2004

conviction triggered application of Maryland's felon disenfranchisement statute – Md. Code Ann. Election Law § 3-102 – under which he lost his eligibility to vote. Section 3-102 mandates that citizens convicted of “crimes of violence” like robbery who have previously been convicted of any “infamous crime” – such as possession with intent to sell – be barred for life from voting.

Statement of the Case

In 2005, Jeffrey Coolidge brought suit in the United States District Court for the District of Maryland against the 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 Jones (Baltimore's Election Director, in his official capacity) for injunctive relief against enforcement of § 3-102. He sought relief under 42 U.S.C. § 1983 (the Civil Rights Act of 1873), 42 U.S.C. § 1973 (the Voting Rights Act of 1965), and the Eighth, Fourteenth, and Fifteenth Amendments to the U.S. Constitution.

The defendants filed a motion to dismiss, which was granted by the District Court. The District Court agreed with Maryland's arguments that Coolidge's Fourteenth Amendment claim was precluded by his failure to show any state intent to discriminate through its felon disenfranchisement statute. The District Court also held that Coolidge's Fifteenth Amendment claim failed due to his inability to demonstrate that Maryland had denied him of his right to vote strictly due to his race. The Court dismissed the Eighth Amendment claim for a number of reasons, but primarily on the grounds that losing the right to vote did not qualify as a "punishment". Finally, the district court ruled that Coolidge's claim under the Voting Rights Act (VRA) could not prevail because felon disenfranchisement is

protected by the Fourteenth Amendment. It also found that the VRA could not be applied to felon disenfranchisement because such an application would not be "congruent and proportional" to the Constitutional violations targeted by the statute, as required by *City of Boerne v. Flores*, 521 U.S. 507 (1997).

Coolidge appealed the ruling of the District Court on the Voting Rights Act and Eighth Amendment claims. The U.S. Court of Appeals for the Fourth Circuit reversed the judgment of the District Court, and remanded both claims for trial. Finding that the Fourteenth Amendment did not shield felon disenfranchisement from the reach of the VRA, the Fourth Circuit asserted that application of the VRA to § 3-102 would be well within the enforcement power granted to Congress by the Fifteenth Amendment. Additionally, the court held that permanent disenfranchisement does constitute a "punishment" which, although not "cruel and unusual" on its face, was "grossly disproportionate" to Coolidge's crime under *Harmelin v. Michigan*, 501 U.S. 957 (1991), and thus violated the Eighth Amendment. The Fourth Circuit remanded to the District Court to determine whether Coolidge was disenfranchised "on account of race," as required by the VRA. The defendants appealed and certiorari was granted by this Court.

Summary of the Argument

Maryland Election Law § 3-102 violates the VRA because it interacts with discrimination in the criminal justice system to result in African Americans having less opportunity to participate in the state's political process than other groups. The VRA is applicable to felon disenfranchisement, since the law contains a 'clear statement' of its application and it is a congruent and proportional use of Congress's enforcement powers under the Fifteenth Amendment, in that it enforces an existing constitutional right without modifying it. The fact that the Fourteenth Amendment itself mentions felon disenfranchisement does not make its contemporary practice absolutely constitutional.

Further, the Eighth Amendment applies to felon disenfranchisement due to its punitive purpose and the lack of a legitimate alternate purpose, as well as its practical application. Both on its face and in a proportional analysis, broad permanent felon disenfranchisement violates the Eighth Amendment's ban on cruel and unusual punishment.

Argument

I. The Voting Rights Act May Be Applied to the Felon Disenfranchisement Laws of the State of Maryland

A. Maryland's Election Law § 3-102 Violates the Voting Rights Act

The Voting Rights Act (VRA) prohibits states from establishing any "standard, practice, or procedure" ... "which results in a denial or abridgement of the right of any citizen ... to vote on account of race or color." 42 U.S.C. § 1973(a) (2000). A violation of this Act is established when, under "the totality of the circumstances," it is shown that elections "are not equally open to participation" by racial minorities, in that minorities "have less opportunity than other members of the electorate to participate in the political process." § 1973(b).

This Court has clarified the meaning of this statute. In 1986, *Thornburg v. Gingles* explained that state voting practices violate the VRA when they interact with "social and historical conditions" to create unequal opportunities for "black and white voters to elect their preferred representatives." 478 U.S. 30, 47 (1986). More recently, in *Chisom v. Roemer*, the Court emphasized that violations of the VRA turn on the *results* of state voting practices, not on the *intent* of those who enact them. 501 U.S. 380 (1991). Under *Chisom*, a violation of the VRA can be established regardless of whether legislators or local officials had any discriminatory intent in drafting a statute or ordinance. *See* 501 U.S. 380, 394 (1991).

Through its interaction with the prevailing "social and historical conditions" in Maryland, Election Law § 3-102 is clearly in violation of the VRA. As is the case in many states,

there is pervasive racial discrimination in Maryland's criminal justice system. African Americans are apprehended by police and prosecuted at a disproportionately high rate. In Baltimore, African Americans receive lower quality legal representation at trial than their white counterparts, while being judged by predominantly white juries in a predominantly black city. As a result of these "social conditions," § 3-102's denial of voting rights to persons having committed a "second or subsequent violent felony" results in African Americans having less opportunity to participate in Maryland's political process than other citizens: 3.9% of African-American residents of voting age in Maryland are permanently ineligible to vote due to § 3-102, compared with only 1.0% of the white population. Record 12.

Allowing the VRA to be applied to § 3-102 would not be a novel ruling. The Ninth Circuit recently ruled that felon disenfranchisement laws in Washington State may be analyzed under the VRA's "totality of the circumstances" test. See *Farrakhan v. Washington*, 338 F.3d 1009, 1017 (9th Cir. 2003).

B. Section Two of the Fourteenth Amendment Does Not Bar the Application of the VRA to Felon Disenfranchisement

Some argue that felon disenfranchisement is constitutionally protected, thus stripping Congress of any authority to regulate state use of the practice. This argument rests on Section Two of the Fourteenth Amendment, which states

that, "when the right to vote at any election ... is denied to any of the male inhabitants of [a] State ... or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced." U.S. Const. amend. XIV, § 2.

This Court has not ruled whether section two prevents the VRA from restricting laws like § 3-102. However, it has ruled that Section Two forecloses claims that such laws violate felons' Fourteenth Amendment equal protection rights. In *Richardson v. Ramirez*, this Court concluded that since the Fourteenth Amendment shields states that take the vote from felons from losses in Congressional representation, Congress could not have meant for the amendment to invalidate such practices. 418 U.S. 24 (1974). Subsequently, however, this Court found that felon disenfranchisement is not absolutely protected by the Constitution. In *Hunter v. Underwood*, restrictions on felons' voting rights were found to violate equal protection, regardless of Section Two, when such policies were motivated by racial discrimination. 471 U.S. 222, 227-28 (1985).

Since this Court last considered the relevance of Section Two of the Fourteenth Amendment, lower courts have gone beyond the holdings in *Richardson* and *Hunter* to hold that Section Two also prevents the application of the VRA's "results" test to felon disenfranchisement. The Second and Eleventh Circuits have

concluded that since *Hunter* required a showing of discriminatory intent to invalidate felon disenfranchisement under the equal protection clause, the same must be true for such laws under a VRA analysis. See *Muntaqim v. Coombe*, 366 F.3d 102, 122 (2d Cir. 2004); *Johnson v. Governor of Fla.*, 405 F.3d 1214, 1223 (11th Cir. 2005). This is a plausible reading of precedent and the Constitution, but ultimately an unsatisfying one.

1. Section Two of the Fourteenth Amendment Must Be Placed in Context with the Rest of the Amendment and the Subsequent Passage of the Fifteenth Amendment

The approach of the Second and Eleventh Circuits is inadequate because it fails to place Section Two of the Fourteenth Amendment in proper context with the rest of the Constitution and the historical circumstances in which it was drafted. When the Fourteenth Amendment was ratified in 1868, Section Two was intended to induce Southern states to enfranchise African Americans by threatening the South with reduced representation in Congress and the Electoral College. Gabriel Chin, *Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?* 92 Geo. L.J. 259, 259 (2004). When this approach failed, the Fifteenth Amendment was ratified in 1870, forbidding outright the denial of the right to vote "on account of race, color, or previous condition of servitude." *Id.* at 260-61; U.S. Const. amend. XV, § 1. While the text of the

Fourteenth Amendment alone might be said to authorize felon disenfranchisement clearly and unambiguously, the subsequent passage of the Fifteenth Amendment makes such a reading impossible. On its face, Section Two of the Fourteenth Amendment authorizes states to purposefully disenfranchise large swathes of their populations, as long as these states accept reduced representation. However, such a trade-off has clearly been forbidden since the passage of the Fifteenth Amendment. The only way to avoid this paradox is to read section two of the Fourteenth Amendment with its original purpose in mind: protecting and enhancing the voting rights of America's minorities. George Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia*, 46 UCLA L. Rev. 1895, 1901 (1999).

Mindful of the inherent difficulties of a strict reading of Section Two, the Ninth Circuit has ruled differently than the Second and Eleventh Circuits. In *Farrakhan v. Washington*, it held that while felon disenfranchisement does not itself violate the equal protection clause, it may run afoul of the VRA when the practice results in racial discrimination. See 338 F.3d 1009, 1016 (2003). Ultimately, this is the right approach. The determination of felon disenfranchisement's constitutionality should not be grounded in Section Two of the Fourteenth Amendment, which authorizes states to trade off voting rights

for reduced representation. Instead, it should rest on the later Fifteenth Amendment, by which Congress is granted authority to restrict voting practices that result in racial discrimination.

C. Application of the VRA Would Constitute a Congruent and Proportional Use of Congress's Enforcement Powers under the Fifteenth Amendment

Another argument against applying the VRA to felon disenfranchisement is that such an application would go beyond Congress's constitutional powers to enforce the Fifteenth Amendment. Despite the powers given to Congress by Section Two of the Fifteenth Amendment, the power to establish voting standards are reserved to the States under the Constitution. U.S. Const. art. 1, §2, cl. 1. In *City of Boerne v. Flores*, this Court ruled that when Congress exercises a grant of power under the Fourteenth Amendment, there must be "must be a *congruence* and *proportionality* between the injury to be prevented or remedied and the means adopted to that end." 521 U.S. 507, 520 (1997) (emphasis added). In other words, Congress may not enact legislation that modifies or expands the substantive nature of a constitutional right; rather, it may simply enforce that right through actions tailored to remedy or prevent further violations of the Constitution. *Id.* at 520.

The VRA has generally been held up as a model of congruence and proportionality. *See, e.g. Board of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356, 373 (2001). However, some

courts have concluded that application of the VRA to felon disenfranchisement laws would violate the *Boerne* test. In *Muntaqim v. Coombe*, the Second Circuit stressed two reasons why such a use of the VRA would be inappropriate. 366 F.3d 102, 122. First, the Second Circuit viewed the VRA's results-based analysis to be incongruent with Congress's enforcement powers and out of proportion with the harm caused by the racial impact of denying felons the vote. *Id.* at 125. Second, it held that Congress has not provided requisite documentary evidence of the use of felon disenfranchisement as a discriminatory tool to justify application of the VRA to such practices. *Id.* at 125-26.

1. Although State Regulation of Voting Is Generally Constitutional, Congress May Still Limit State Power

Despite these arguments, the *Boerne* test poses no problems for the application of the VRA in this case. Congress's grant of power under the Fifteenth Amendment clearly includes restricting *all* voting practices – including felon disenfranchisement – that have discriminatory effects on racial minorities. In *City of Boerne* and additional cases, this Court has repeatedly held that Congress's enforcement powers may be used to prohibit conduct which is not itself unconstitutional and which would intrude into "legislative spheres of autonomy previously reserved to the States." 521 U.S. 507, 518 (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976)). See also *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 737 (U.S. 2003). Although felon

disenfranchisement is generally constitutional and is normally left to the discretion of the states, the practice may still be limited under the Fifteenth Amendment.

2. Application of the VRA Would Be Similar to Other Practices Already Held Congruent and Proportional

Moreover, the application of the VRA to laws like § 3-102 has more similarities to practices that have been upheld under *Boerne* and its progeny than to those that have been ruled unconstitutional. First, in *Boerne* the Religious Freedom Restoration Act was found to be "out of proportion" because its "sweeping coverage ensure[d] its intrusion at every level of government, displacing laws . . . of almost every description and regardless of subject matter." 521 U.S. 507, 532. Conversely, application of the VRA to restrictions on felon voting would only impact one type of statute, and only at the state level of government. Second, while Title I of the Americans with Disabilities Act was found not to satisfy *Boerne*, in *Tennessee v. Lane* this Court was more willing to enforce Title II of that Act because it protected the "basic constitutional guarantee" of securing access to courts. 541 U.S. 509, 523-34 (2004). Similarly, the VRA in this case protects another equally important constitutional guarantee: the Fifteenth Amendment's protection against racial discrimination in voting. Given the considerable importance of the Fifteenth Amendment's guarantees, even a stringent application of the VRA

to felon disenfranchisement laws cannot be said to be so out of proportion with the goal of protecting voting rights "that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *City of Boerne v. Flores*, 521 U.S. 507, 532.

3. Congress and the Courts Have Already Adequately Demonstrated a Pattern of Constitutional Violations

While the VRA's congressional record does not specifically touch on felon disenfranchisement, this is not fatal under the standards set forth by *Boerne*. *Johnson v. Governor of Fla.*, 405 F.3d 1214, 1243 (11th Cir. 2005) (Wilson, dissenting). Under *Boerne*, Congress is not required to set out all possible violations of its remedial statutes, but rather must demonstrate a pattern of constitutional violations. See *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 89 (2000); *Board of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356, 368 (2001). As this Court has recognized, the VRA is *the* model of how Congress can fulfill this requirement. *Id.* at 373. Moreover, this Court has in the past relied on its own rulings to demonstrate a pattern of constitutional violations and in *Hunter* precisely found that felon disenfranchisement has been used in a discriminatory fashion. *Tennessee v. Lane* 541 U.S. 509, 525; *Hunter v. Underwood* 471 U.S. 222. Consequently, the application of the VRA to § 3-102 would be congruent and proportional to Congress's authority under the Fifteenth Amendment.

D. Application of the VRA Would Not Violate the 'Clear Statement' Rule of Gregory v. Ashcroft

Finally, some courts have also held that allowing the VRA to limit states' restrictions on felons' voting rights would be improper because Congress never clearly stated that the Act was to be put to that use. *Muntaqim v. Coombe*, 366 F.3d 102, 127. This need for a "clear statement" was spelled out in *Gregory v. Ashcroft*, where this Court held that when an Act will upset the usual constitutional balance of federal and state powers, it must be "unmistakably clear in the language of the statute" that Congress intended that result. 501 U.S. 452, 461 (1991) (citing *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989)).

1. Application of the VRA Would Not Change the Balance of Federal and State Powers

The contention that the "clear statement" rule would not allow application of the VRA to § 3-102 is unfounded for two reasons. First, limiting states' right to disenfranchise felons to ensure compliance with the VRA would not alter the balance of federal and state powers. The ratification of the Fourteenth Amendment in 1868 and the Fifteenth in 1870 shifted the balance of power between the States and the federal government. See *Oregon v. Mitchell*, 400 U.S. 112, 126-27 (1970). As has already been explained, the VRA operates congruently and proportionally within that grant of power. Additionally, the Fourteenth Amendment does not provide any special constitutional protection

to the state practice of disenfranchising felons which the VRA would disturb.

2. The "Clear Statement" Rule Is Inapplicable Since the VRA Is Unambiguous

Second, even if the VRA did disturb the balance of state and federal powers, the *Gregory* "clear statement" rule only applies when the statute itself is unclear. *Baker v. Pataki*, 85 F.3d 919, 939 (2nd Cir. 1996) (Feinberg, J. dissenting), (citing *Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991)). There is no ambiguity in the VRA itself; the only ambiguity that exists stems from its application to a state practice to which it has not yet been applied. Ambiguity is not created simply because a statute is applied in a manner Congress did not explicitly anticipate; rather, this merely demonstrates the breadth of the statute in question. See *Sedima v. Imrex Co.*, 473 U.S. 479, 499 (1985). If the VRA is applicable to "practices" like vote dilution through gerrymandering, as has been found in cases like *Thornburg v. Gingles*, the text of the statute provides no indication why it would not also be applicable to laws restricting felons' voting rights. 478 U.S. 30 (1986).

Consequently, since application of the VRA wouldn't upset the balance of federal and state power and since the statute is unambiguous, the "clear statement" rule is inapplicable in this circumstance.

II. Maryland's Scheme of Felon Disenfranchisement Violates the Eighth Amendment Ban on Cruel and Unusual Punishment.

A. Under Maryland Election Law §3-102, the disenfranchisement of felons, and Jeffrey Coolidge in particular, constitutes a form of "punishment" subject to the restrictions of the Eighth Amendment.

1. The disenfranchisement of Jeffrey Coolidge under Maryland law is "punishment" due to its failure to advance any legitimate alternate purpose.

The argument that the Eighth Amendment does not apply to felon disenfranchisement, since it is merely a condition and not a punishment, was rightly rejected by the Court of Appeals in its application of this Court's prior decisions. The Eighth Amendment does not apply to conditions inflicted enacted for a non-punitive purpose or upon those not convicted of crimes. See *Ingraham v. Wright*, 430 U.S. 651, 671 (1977) (finding cruel and unusual punishments clause does not apply to schoolchildren subject to physical discipline). For a given deprivation based on a criminal conviction not to be considered a punishment, the Court has required some legitimate "alternative purpose" of the state. This test was set forth in *Trop v. Dulles*, where the Court held that expatriation based on a conviction was indeed a punishment. 356 U.S. 86, 97 (1958) (plurality opinion). See also *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 476 (1977) (discussing the alternative purpose test); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 169 (1963) (employing alternative purpose test). According to the *Trop* decision, the issue is

whether a condition is punitive in its nature, defined as where a legislature's intent is "to reprimand the wrongdoer, deter others, etc." 356 U.S. at 96.

In requiring a non-penal regulation be *enacted* to "accomplish some other legitimate government purpose," *Trop* requires more than an incidental alternative purpose, but an express primary goal. 356 U.S. at 96. Recently, the Fourth Circuit focused on this "express" alternate purpose standard in requiring prison regulations to be narrowly tailored to serve the alternative purpose, and not be "excessive in relation to the alternative purpose assigned." *Slade v. Hampton Roads Regional Jail*, 407 F.3d 243, 250 (4th Cir. 2005) (interpreting *Bell v. Wolfish*, 441 U.S. 520 at 538 (1979)).

In addition to *Slade's* narrowness standard, statutes regulating the franchise are held to a particularly high constitutional standard. The Court has explained that the general presumption of constitutionality that applies to most statutes comes from their passage by a democratically elected legislature. See *Kramer v. Union Free School Dist.*, 395 U.S. 621, 627-28 (1969). But when the democratic process itself is in question, this presumption is turned on its head. *Id.* Therefore, the *Kramer* Court set forth an "exacting standard of precision . . . [for] statutes which selectively distribute the franchise." *Id.* at 632.

The statute in question serves no purpose other than punishment, as any claimed legitimate non-punitive purposes are merely pretextual. Since the beginning of its use in America, felon disenfranchisement has been used to punish and deter criminal behavior as part of the punishment of "civil death". See Robin L. Nunn, Note, *Lock Them up and Throw away the Vote*, 5 Chi. J. Int'l L. 763, 765 (2005).

While the presence of a historically punitive purpose does not preclude an alternative legitimate purpose, those claimed by the State fail to meet the standards set forth under *Trop* and *Slade*. Petitioners point out language in the *Trop* decision itself that cites felon disenfranchisement as an example of a nonpunitive law. See 356 U.S. at 96-97. This dictum in the plurality decision in *Trop* should have little bearing on the Court's decision in this case. Though it has been cited in successive cases, the decision never actually evaluated the legitimacy of the "alternative purpose" of felon disenfranchisement, but merely says it is "to designate a reasonable ground of eligibility for voting within the power to regulate the franchise." *Id.* at 97.

The State claims that felon disenfranchisement legitimately seeks to protect the electoral process from the inappropriate influence of criminals. But the crimes Mr. Coolidge has been convicted of do not demonstrate any such threat to the electoral

process. Even if the prevention of electioneering were a legitimate state interest served by disenfranchisement, it would have to be narrowly tailored per *Slade* and meet the "exacting standard of precision" requirement specified in *Kramer*. The statute is overinclusive by including those who do not pose a risk of electioneering. Further, several convictions *not* included as infamous crimes are just as (or more) likely to lead to "improper influence." For example, "interference with race horse" is included on the list, but prostitution is not. Record 45. The statute is also underinclusive as it fails to address other ways these individuals could affect elections. In *Stephens v. Yeomans*, the District Court of New Jersey relied on this argument in rejecting the State's claimed purpose of purity of the electoral process, citing the failure of the classification of crimes for disenfranchisement to specifically relate back to that purpose. 327 F.Supp 1182, 1188 (D.N.J. 1971).

In addition to the claim that ex-felons might corrupt the electoral process via illicit or fraudulent activity, Many localities have claimed that ex-felons have shown a disregard for the law, and thus may vote subversively or irresponsibly, and use this a justification for denying ex-felons the vote. See Mark E. Thompson, Comment, *Don't Do the Crime If You Ever Intend to Vote Again: Challenging the Disenfranchisement of Ex-Felons as Cruel and Unusual Punishment*. 33 Seton Hall L. Rev. 167, 190

(2002). A statute that seeks to address this "problem" is unconstitutional under the equal protection clause, as it essentially denies voting privileges to individuals based on how they might vote. See *Carrington v. Rash* 380 U.S. 89, 94 (1965) (overturning Texas' disenfranchisement of members of the armed forces living off-base on grounds that they would vote differently than other community residents). In *Carrington*, the Court rejected "fencing out" a sector of the population because of the way they may vote, saying "'the exercise of rights so vital to the maintenance of democratic institutions', cannot constitutionally be obliterated because of a fear of the political views of a particular group of bona fide residents." *Id.* (quoting *Schneider v. New Jersey*, 308 U.S. 147, 161 (1939)). Disenfranchisement on the basis that ex-felons may vote "irresponsibly" is the same thing, as it focuses on the behavior of an individual within the voting booth, in violation of the *Carrington* principle.

2. Under a practical analysis, the disenfranchisement of those convicted of certain crimes clearly qualifies as a "punishment".

Some members of the Court have refused to embrace a purposive analysis in considering whether a condition is a punishment and have stuck to a simpler, more pragmatic definition of punishment. For example, in denying that a prisoner's exposure to secondhand smoke was a punishment, Justice Thomas defined punishment as a legal deprivation "of

some of the normal rights of a citizen on the ground that he has violated a rule of law . . . provided that the deprivation is carried out by the recognized legal authorities of the state, that the rule of law clearly specifies both the offense and the attached penalty." *Helling v. McKinney*, 509 U.S. 25, 38 (1993) (dissenting).

Under this "stricter" practicality standard, felon disenfranchisement has an *easier* time qualifying as punishment than under the alternative purpose test. The right to vote is normally granted to adult citizens and is denied here solely on the basis of one's criminal convictions. Election Law §3-102 imposes the penalty for disenfranchisement based on the combination of infamous crimes and crimes of violence. The State Board of Elections, certainly a recognized legal authority of the state, carries out the penalty.

Petitioner claims that disenfranchisement cannot practically be considered a punishment since many other citizens are routinely denied the right to vote, including minors, short-term residents, and mentally incompetent persons. Since these individuals were never convicted of a crime, Petitioner alleges, the denial of the right to vote cannot be considered a punishment. In *Otsuka v. Hite*, the California Supreme Court dismissed this argument. 64 Cal.2d 596 (1966) (analyzing felon disenfranchisement's constitutionality). It agreed that a denial

of the right to vote to these other groups is not punishment, but pointed out that the denial there is based on the idea that they are "unfit to vote because they are lacking in the minimal understanding and judgment necessary to exercise the franchise. A different rationale must be invoked for excluding without distinction all persons who have ever been convicted of 'infamous crimes,' including those who possess the requisite mental and educational qualifications." *Id.* at 602-603.

B. The Disenfranchisement of Jeffrey Coolidge Based on His Prior Felony Convictions is "Cruel and Unusual" and thus Prohibited by the Eighth Amendment.

If felon disenfranchisement is considered a punishment, it must be cruel and unusual to violate the Eighth Amendment. The Court has established a dual standard for determining whether a given punishment is cruel¹ under the Eighth Amendment, analyzing a punishment against both an "objective" standard of decency and a "subjective" standard of excessiveness. The "objective" standard measures whether a punishment itself violates standards of decency, regardless of its application in a particular case. The "subjective" standard, however, examines whether a punishment is proportional to the particular conviction. *See, e.g. Roper v. Simmons* 543 U.S. 551, 125 S.Ct. 1183, 1191-2

¹ The ban on "unusual" punishments is often incorporated into the cruelty analysis, which examines the penalties in other jurisdictions. *See, e.g., Furman v. Georgia*, 408 U.S. 238, 276 (1972) (Brennan, J., concurring) (using "unusual" as a term to assist in determining whether a punishment is cruel). *But see, e.g., Harmelin v. Michigan*, 501 U.S. 957, 994-95 (1991) (finding that a punishment that may be cruel but is not unusual is not unconstitutional).

(2005); *Rhodes v. Chapman*, 452 U.S. 337 (1981); *Gregg v. Georgia*, 429 U.S. 875 (1976).

1. Felon disenfranchisement violates the objective standard of decency set forth by the Eighth Amendment.

The objective standard requires a punishment to meet the "evolving standards of decency that mark the progress of a maturing society." *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 1190 (2005) (quoting *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958)). The idea that the cruelty standard is a dynamic one, and not stuck to the framers' ideas of cruelty in 1789 is not a new one, going as far back as 1910, where in *Weems v. United States*, the Court held that "cruelty" "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." 217 U.S. 349, 378 (1910). See also *Estelle v. Gamble*, 429 U.S. 97 (1976) (endorsing evolving notion of decency).

In determining whether a punishment meets these prevailing standards, courts have tended to embrace an *ad hoc* approach, looking at a variety of factors particularly relevant to the punishment in question. See *Furman v. Georgia* 408 U.S. 238, 281 (1972) (Brennan, J., plurality, summarizing the various factors used). In his plurality opinion in *Furman*, Justice Brennan synthesized these factors and boiled them down to four questions: 1) Is the severity of the punishment degrading to human dignity? 2) Is the punishment arbitrarily imposed? 3) Is

the punishment excessive in the sense that it is unnecessary? 4) Would contemporary society find the punishment unacceptable? *Id.*

Under this analysis, permanent disenfranchisement of ex-felons fails to meet the objective standard. In *Thiess v. Bd. of Elections*, 387 F. Supp. 1038, 1042 (D.Md. 1974), the District Court for Maryland held that losing the right to vote was not so severe as to be considered cruel. The court in *Thiess* erred, though, in failing to look at the effects of disenfranchisement beyond disenfranchisement itself, which show that it is degrading, arbitrarily imposed, unnecessarily excessive, and unacceptable to contemporary society.

The most basic effect of disenfranchisement is the inability to vote. This is particularly cruel as it prevents ex-felons from ever being able to vote to change the very laws that have punished them. The centrality and fundamentality of the right to vote has been repeatedly recognized by this Court. *See, e.g. Harper v. Va. State Bd. Of Elections*, 383 U.S. 663, 676 (1966) ("the right to vote is . . . precious, . . . fundamental"); *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) ("The right to vote freely for the candidate of one's choice is of the essence of a democratic society...."); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (the right to vote is fundamental as "preservative of all rights"). The lifelong "scarlet letter" that an individual and his community members are reminded of at

each election keeps the ex-felon from one of the most basic forms of participation in civil society, with no possibility for redemption, despite his completion of a court-ordered sentence, denying him basic dignity.

Psychologically, disenfranchisement leads to a feeling of perpetual alienation, as it sends a message to the ex-felon that, regardless of his rehabilitation, he will never be fully accepted as a part of the community. This leads to a deterioration of self-esteem, which is a likely contributor to recidivist behavior. See George P. Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia*, 46 UCLA L. Rev. 1895, 1907 (1999); Andrew L. Shapiro, *Challenging Criminal Disenfranchisement under the Voting Rights Act: A New Strategy*, 103 Yale L.J. 537, 562 (1993); Howard Itzkowitz & Lauren Oldak, Note, *Restoring the Ex-Offender's Right to Vote: Background and Developments*, 11 Am. Crim. L. Rev. 721, 732 (1973).

The increased likelihood of recidivism is a major detriment to the community as a whole. While the link between disenfranchisement and recidivism is not conclusive, there is no opposing claim that disenfranchisement does anything to either reduce recidivism or deter first-time offenses. As such, this case is significantly different from *Ewing v. California*, 538 U.S. 11 (2003), where the Court held that lifetime imprisonment

of a recidivist thief was not cruel, since it had a protective function for society. Disenfranchisement actually frustrates the goals of society, since it prevents felons from ever fully being rehabilitated.

Largely in recognition of these various effects, the majority of states do not find permanent felon disenfranchisement to be acceptable. The Court has said that the "clearest and most reliable objective indicator" of contemporary values is "the legislation enacted by the country's [various] legislatures." *Atkins v. Virginia*, 536 U.S. 304, 311 (2002). When the Second Circuit considered the constitutionality of felon disenfranchisement in 1964, it relied heavily on the fact that, at that time, 42 states had felon disenfranchisement laws. *Green v. Bd. of Elections of the City of New York*, 380 F.2d 445, 451 (1964). The change since then has been quite significant. Now, only 13 states have any sort of permanent felon disenfranchisement. Since 1997 alone, twelve states have relaxed their felon disenfranchisement laws. Record 14. This remarkable transition is analogous to the patterns relating to the juvenile death penalty observed by the Court in *Roper*, 125 S. Ct. at 1192-93. There, the fact that the number of states expressly prohibiting the juvenile death penalty had more than doubled from 14 to 30 since the Court's decision in *Stanford v. Kentucky*, 492 U.S. 361 (1989), played a strong role in the

Court's determination that the punishment was indeed cruel and unusual. *Id.* The analogous trend here should have a similar impact.

2. The disenfranchisement of Jeffrey Coolidge as a result of his felony convictions is a disproportionately unjust punishment, prohibited by the Eighth Amendment.

Jeffrey Coolidge's disenfranchisement is excessively cruel in relation to the crimes of which he was convicted. This violates what the *Weems* court called the basic "precept of justice that punishment for crime should be graduated and proportioned to offense." 217 U.S. at 367. The Eighth Amendment "prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed." *Solem v. Helm*, 463 U.S. 277, 284 (1983).

Solem set forth a balancing test for examining a punishment's proportionality, incorporating three factors. 436 U.S. at 291-92. The first is the gravity of the offense compared to the severity of the penalty, looking at the degree of harm caused or threatened to the victim or society. The second looks at penalties imposed within the same jurisdiction for crimes of similar gravity. The final factor looks to penalties imposed in other jurisdictions for the same crime, which provides information about proportionality, as well as the prevailing standards of decency and the "unusualness" surrounding a punishment. *Id.*

Coolidge's disenfranchisement is a disproportionate punishment under this analysis. Since the right to vote is a fundamental one, depriving one of it for his entire lifetime is an extremely severe penalty, especially since it is *in addition* to a prison term already served (here, six years). Record 11. While the crimes that Mr. Coolidge was convicted of are serious, they do not pose such grave harm to society to justify a punishment of this severity.

The arbitrary classification of crimes as "infamous," thus leading to disenfranchisement on a second conviction, makes it difficult to compare the penalties for similar crimes in Maryland. However, far more serious crimes do not result in disenfranchisement if they have only led to one conviction. Someone who has been convicted of murder or rape one time, or second-degree assault seven or eight times, although likely having caused far greater harm to society, maintains his right to vote. Record 51. If the crimes considered "infamous" by the state were particularly related to electoral impropriety, perhaps this disparity could be excused. However, as discussed above, this is not the case.

Finally, in looking at other jurisdictions, the unusual nature of permanent felon disenfranchisement is quite apparent. As discussed above, only 13 states continue to disenfranchise felons after their release from prison. Record 14. Prior court

decisions have long looked at international comparisons in Eighth Amendment cases, as well. See, e.g. *Roper*, 125 S.Ct. at 1198-99 (discussing "the overwhelming weight of international opinion against the juvenile death penalty"); *Atkins v. Virginia* 536 U.S. 304, 317 (2002) (considering "the world community's" disapproval of executing convicted mentally retarded persons); *Enmund v. Florida*, 458 U.S. 782, 796-797 (1982) (examining international restrictions on the doctrine of felony murder); *Trop*, 356 U.S., at 102-103 (referring to the "virtual unanimity" of the "civilized nations of the world" in rejecting statelessness as proper punishment). Felon disenfranchisement is quite rare in western democracies, and the United States is the only democratic nation that permanently disenfranchises felons. Record 14. Thirteen countries, including Japan, South Africa, and Canada, even allow those in prison to vote. Record 14. While these international practices are certainly not binding on this Court, they should be given strong persuasive effect in showing the unusual nature of felon disenfranchisement and its cruelty under contemporary societal standards.

Conclusion

Maryland's disenfranchisement of Jeffrey Coolidge violates the applicable standards of the Voting Rights Act, 42 U.S.C. § 1973, and the Eighth Amendment to the U.S. Constitution. As

such, we ask that you affirm the decision of the Court of Appeals in remanding this case for trial on the merits.