United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

August 3, 2023

Lyle W. Cayce
Clerk

No. 19-60662
consolidated with
No. 19-60678

Dennis Hopkins, *individually and on behalf of a class of all others similarly situated*; Herman Parker, Jr., *individually and on behalf of a class of all others similarly situated*; Walter Wayne Kuhn, Jr., *individually and on behalf of a class of all others similarly situated*; Bryon Demond Coleman, *individually and on behalf of a class of all others similarly situated*; Jon O'Neal, *individually and on behalf of a class of all others similarly situated*; Earnest Willhite, *individually and on behalf of a class of all others similarly situated*,

Plaintiffs—Appellees,

versus

Secretary of State Delbert Hosemann, *in his official capacity*,

Defendant—Appellant,

Appeal from the United States District Court
for the Southern District of Mississippi
No: 3:18-CV-188

Before King, Jones, and Dennis, *Circuit Judges*.

James L. Dennis, *Circuit Judge*:

In this class action, Plaintiffs, representing persons who have been convicted of certain crimes and have completed the terms of their sentences, challenge their disenfranchisement by two provisions of Article XII of the Mississippi Constitution of 1890. The first provision, Section 241, mandates permanent, lifetime disenfranchisement of a person convicted of a crime of any one of "murder, rape, bribery, theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement or bigamy."[1] The second, Section 253, provides for a discretionary, standardless scheme for the Mississippi Legislature to restore the right to vote to disenfranchised persons on an individualized basis by a two-thirds vote of all members of each house of the Legislature.

Plaintiffs sued Mississippi's Secretary of State (the "Secretary"), contending that Section 241 violates the Eighth Amendment's prohibition on cruel and unusual punishment and the Fourteenth Amendment's guarantee of equal protection under the law. They also claim that Section 253 violates the Fourteenth Amendment's guarantee of equal protection of the laws and the First Amendment guarantee of freedom of speech. The Secretary responded that Plaintiffs lack Article III standing, that their claims are barred by the doctrine of state sovereign immunity, and that all of their claims fail on their merits.

For the reasons explained below, we hold that Plaintiffs are entitled to prevail on their claim that, as applied to their class, disenfranchisement for life under Section 241 is unconstitutional cruel and unusual punishment

[1] The Mississippi Secretary of State, the defendant here, is required by statute to treat additional crimes that the Mississippi Attorney General deems to be a species of the common law crimes listed in Section 241. *See* Miss. Code. § 23-15-151. For instance, timber larceny, armed robbery, and larceny under a lease agreement are all deemed by the Attorney General as disenfranchising crimes though they are not expressly listed in Section 241.

within the meaning of the Eighth Amendm

Constitution, which was adopted in reaction to the expansion of black suffrage and other political rights during Reconstruction. *See Harness v. Watson*, 47 F.4th 296, 300 (5th Cir. 2022) (en banc). After wresting control of state government from black leaders and their Republican allies through a campaign of violence and electoral fraud, Mississippi's white political leadership

in enacting Section 241 the Convention aimed to "obstruct the exercise of the franchise by the negro race" by including as disenfranchising offenses only those "to which its weaker"—by which the court meant "black"—"members were prone.").

The possibility that the disenfranchisement provisions might ensnare not only black men but also poor white males caused concern at the Convention. So, in an effort to mitigate the fear that the disenfranchisement provisions would also affect whites, the Convention ratified several "escape" clauses. For example, to reduce the impact of literacy tests on poor white males, the Convention enacted the "Understanding Clause," a provision that allowed a voter to pass a "constitutional interpretation test" by giving a "reasonable interpretation" of the state constitution. The Franchise Committee justified this "Understanding Clause" on the grounds that it would "exclude . . . [n]o white man who has sense enough to go to the mill," and urged that the clause would "secure[] a white basis upon which to erect a permanent State government." *Don't Like It But Takes It*, The Clarion-Ledger (Jackson) 1 (Oct. 9, 1890).

Another of the escape clauses was the suffrage restoration provision

Sections 241 and 253 continue to be part of the Mississippi Constitution and over the years they have been remarkably effective in achieving their original, racially discriminatory aim. In 2017, 36% of voting-age citizens in Mississippi were black. Yet, according to data provided by the Mississippi Administrative Office of the Courts, of the nearly 29,000 Mississippians who were convicted of disenfranchising offenses and have completed all terms of their sentences between 1994 and 2017, 58%—or more than 17,000 individuals—were black. Only 36% were white. The discretionary legislative re-enfranchisement permitted by Section 253 does little to alleviate this disproportionate burden, and, as a practical matter, legislative suffrage is exceedingly rare: between 2013 and 2018, the Mississippi Legislature restored the right to vote to only eighteen individuals.

B. The Secretary's Role in Enforcement of Sections 241 and 253

Federal law requires that each state designate a chief election official who is "responsible for coordination" of the state's duties under the National Voter Registration Act ("NVRA"). 52 U.S.C. § 20509; *see also* Voluntary Guidance on Implementation of Statewide Voter Registration Lists, Election Assistance Comm'n, 70 Fed. Reg. 44593-02, 44594 (Aug. 3, 2005) ("The chief State election official is the highest ranking State official who has, as a primary duty, the responsibility to ensure the lawful administration of voter registration in Federal elections."). In Mississippi, the Secretary of State performs this role. Miss. Code § 23-15-211.1(1). The Secretary is charged by state law with establishing the instructions and application form for voter registration. *Id*. §§ 23-15-39(1), 23-15-47(3). Each municipality's clerk, in her capacity as the local registrar of voters, is in turn required to "use [the] voter registration applications . . . prescribed by the Secretary of State" when registering voters. *Id*.§ 23-15-35(1).

The current Mississippi voter registration application form, as adopted by the Secretary, states that individuals convicted of certain crimes in a Mississippi state court are not eligible to register to vote. The form requires an applicant to affirm, on penalty of perjury, that he or she has either "never been convicted of voter fraud or any other disenfranchising crime" or has had their voting rights restored. The Secretary is also tasked by state statute with "implementing and maintaining" an electronic information processing system containing a "centralized database of all registered voters in the state." *Id*. § 23-15-165(1). This system, referred to as the Statewide Elections Management System ("SEMS"),5i5"7.7051659 0 TD-.0007 Tc050565 Tws upd.1(a)9t

C. Proceedings Below

In 2018, six permanently disenfranchised Mississippi citizens filed this putative class-action lawsuit in federal district court, asserting five federal constitutional challenges to Sections 241 and 253. Plaintiffs, who were convicted of various crimes and have completed all terms of their sentences, sued the Secretary in his official capacity, requesting declaratory and injunctive relief for claimed violations of the First, Eighth, and Fourteenth Amendments of the United States Constitution. Dennis Hopkins, a grandfather and founder of a local peewee football team, has been disenfranchised since 1998 when he was convicted of grand larceny. Herman Parker Jr., a public employee with over a decade of service working for the Vicksburg Housing Authority, is disenfranchised for life because he was convicted of grand larceny

The parties filed timely cross-petitions with this court seeking permission to file an interlocutory appeal. This court granted both petitions and consolidated the appeals.

II. Legal Standard

We review an order on summary judgment *de novo*, applying the same standard as applicable to the district court. *Castellanos-Contreras v. Decatur Hotels, LLC*, 622 F.3d 393, 397 (5th Cir. 2010). Summary judgment is appropriate where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

III. Discussion

On appeal, Plaintiffs argue that: (1) the district court properly held that Article III standing was satisfied as to all claims, (2) the *Ex parte Young* exception to sovereign immunity allows all claims to be brought against the Secretary; (3) Section 241's lifetime voting ban infringes on the fundamental right to vote, is therefore subject to strict scrutiny, and cannot satisfy such demanding review; (4) Section 241's lifetime disenfranchisement violates the End chlEmendment's prohibition on cruel and unusual punishment because it is punitive and contrary to contemporary standards of decency; (5) Section 253, the suffrage restoration provision, violates the Equal Protection Clause because it authorizes legislators to arbitrarily restore (or not restore) the right to vote to some citizens rather than others, its enactment in 1890 was motivated by racial animus, and it disproportionately impacts black Mississippians today; and (6) Section 253 violates the First Emendment because legislators are given the power to exercise "unfettered discretion" in

determining who can express their constitutionally-protected political views by voting.[2]

In response, the Secretary contends that (1) Plaintiffs lack Article III standing and sovereign immunity bars their claims; (2) the Supreme Court's decision in *Richardson v. Ramirez*, which upheld California's permanent felon

challenges to Section 241, as well as the equal protection and First Amendment challenges to Section 253.

Article III of the Constitution limits the exercise of federal judicial power to "Cases" and "Controversies." *See Spokeo, Inc. v. Robins*, 578 U.S. 330, 337 (2016) (citing U.S. Const. art. III, § 2). The doctrine of standing "is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

To establish Article III standing, (1) Plaintiffs must have suffered an "injury in fact" that is "concrete and particularized" and "actual or imminent"; (2) "the injury has to be fairly traceable to the challenged action of the defendant"; and (3) "it must be likely . . . that the injury will be redressed by a favorable decision." *Id.* at 560–61 (cleaned up). Plaintiffs, as the party invoking federal jurisdiction, "bear[] the burden of establishing these elements." *Id.* at 561. Furthermore, "'a plaintiff must demonstrate standing for each claim he seeks to press' and 'for each form of relief' that is sought." *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008) (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006)). We review questions of standing *de novo*. *Nat'l Rifle Ass'n of Am., Inc. v. McCraw*, 719 F.3d 338, 343 (5th Cir. 2013).

statutory duties managing a statewide computerized election management system and his designation as the state's chief elections officer established that "Plaintiffs' injuries are sufficiently traceable to and redressable by" the Secretary. The Secretary disagrees, arguing that because he merely provides information to local officials who administer elections regarding disqualified voters, Plaintiffs' injuries cannot be traced to nor redressed by him.

The district court disagreed, as do we. Plaintiffs' injuries stemming from Section 241 are fairly traceable to the Secretary. Designated by federal law as Mississippi's chief election officer, the Secretary is tasked with developing mail voter application forms, 52 U.S.C. § 20508(a)(2), and, under Mississippi law, is responsible for establishing the instructions and application form for voter registration. *See* Miss. Code §§ 23-15-39(1), 23-15-47(3). The current Mississippi voter registration application and form, as established by the Secretary, states that a person convicted of any disenfranchising crime in a Mississippi court is ineligible to vote and requires that an applicant affirm that they have never been convicted of such a crime on penalty of perjury. Municipal clerks are statutorily required to use an application form evidencing a disenfranchising conviction to deny registration as "prescribed by the Secretary." *Id.* § 23-15-35(1).

On this basis alone, Plaintiffs' injuries are fairly traceable to the Secretary's actions. By requiring individuals to declare, on penalty of perjury, that they have not been convicted of disenfranchising crimes, the voter registration application that the Secretary developed prohibits individuals convicted of disenfranchising crimes from lawfully completing the application form that is needed in order to vote. *See Tex. Democratic Party v. Abbott*, 978 F.3d 168, 178 (5th Cir. 2020) (Secretary's duty to design mail-in-ballot sufficient to confer standing on voters denied the right to vote by mail because of age).

But the Secretary's duties do not end there. The Secretary is also tasked with "implementing and maintaining" the SEMS database. Miss. Code § 23-15-165(1). SEMS "constitute[s] the official record of registered voters in every county of the state," and therefore plays an essential component in purging from the voter rolls individuals convicted of a disenfranchising crime. *Id*. For example, SEMS is updated quarterly with a list of individuals convicted of disenfranchising offenses. *Id.* § 23-15-151. And the Secretary has the statutory responsibility to train local elections officials to use SEMS to filter out disenfranchised individuals from the SEMS voter database. *Id.* § 23-15-211(4). Indeed, local elections commissioners can only be certified as such after attending the Secretary's annual training, in which he instructs them to purge the voter rolls. *Id.* §§ 23-15-211(4)-(5). Though local officials may be the ones to ultimately remove ineligible voters from their voter rolls, they do so based on an eligibility determination made by the Secretary and in accordance with training from his office. The Secretary's conduct need not be the proximate cause of a voter's disenfranchisement in order for the denial of the right to vote to be fairly traceable to him. *Bennett v. Spear*, 520 U.S. 154, 168–69 (1997). When a voter is removed from the voter rolls by a local official acting on information and instructions provided by the Secretary and in accordance with training from his office, the voter's injury is fairly traceable to the Secretary.

Because of these duties, the Secretary is also in a position to redress Plaintiffs' alleged injuries. Were the Secretary enjoined from enforcing Section 241, as Plaintiffs seek, he could amend Mississippi's voter registration form to allow disenfranchised class members to register, cease entering the names of citizens disqualified under Section 241 into SEMS or, alternatively, train local election officials to disregard that information in SEMS in maintaining their local voter rolls.

In sum, "the Secretary of State ha[s] a role in causing the claimed injury and is in a position to redress it at least in part. That is enough to confer standing to the voter plaintiffs to sue the Secretary." *Tex. Democratic Party*, 978 F.3d at 178. *See also Harness v. Hosemann*, 988 F.3d 818, 821 (5th Cir. 2021) (finding standing to sue the Secretary for enforcing Section 241), *reh'g en banc granted, opinion vacated*, 2 F.4th 501 (5th Cir. 2021), *and on reh'g en banc affirmed sub nom*. *Harness v. Watson*, 47 F.4th 296 (5th Cir. 2022).

2. Section 253

Plaintiffs also challenge Section 253 of Mississippi's Constitution,

suffrage restoration bill under Section 253. True, the Secretary will enforce any suffrage bill the Legislature happens to pass. But Plaintiffs' issue is not with the enforcement of any particular suffrage bill or suffrage bills generally, but with the Legislature's caprice in failing to enact them in the first place. Thus, the injury Plaintiffs complain of—the legislative process for restoration of the franchise—is not fairly traceable to the Secretary but instead is "the result of the independent action of some third party not before the court." *Lujan,* 504 U.S. at 560 (cleaned up). Accordingly, although Plaintiffs have established standing as to their claims against Section 241, they lack standing as to their claims against Section 253.

B. Sovereign Immunity

There is one final jurisdictional matter: Eleventh Amendment sovereign immunity, which the Secretary contends bars Plaintiffs' challenge to Section 241. The Eleventh Amendment generally precludes private suits against nonconsenting states in federal court. *City of Austin v. Paxton*, 943 F.3d 993, 997 (5th Cir. 2019). Sovereign immunity extends to suits against state officials that are, in effect, a suit against a state. *Id.* (citing *Edelman v. Jordan*, 415 U.S. 651, 663–69 (1974)). However, under the equitable exception to Eleventh Amendment immunity established in *Ex parte Young*, 209 U.S. 123, 155–56 (1908), a plaintiff may bring suit for injunctive or declaratory relief against a state official, in her official capacity, to "enjoin enforcement of a state law that conflicts with federal law." *Air Evac EMS, Inc. v. Tex. Dep't of Ins.*, 851 F.3d 507, 515 (5th Cir. 2017). Our court has observed that there is a "significant[] overlap" between the "Article III standing analysis and *Ex parte Young* analysis." *City of Austin*, 943 F.3d at 1002 (quoting *Air Evac EMS, Inc.*, 851 F.3d at 520).

Whether the Secretary is subject to suit under the *Ex parte Young* exceptions first depends upon whether the "complaint alleges an ongoing

violation of federal law and seeks relief properly characterized as prospective." *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*

Because Plaintiffs have standing to pursue their Section 241 claims and because the *Ex parte Young* exception to state sovereign immunity applies, we have jurisdiction over Plaintiffs' appeal. We therefore proceed to the merits of their challenges to Section 241.

U.S. Const. amend. XIV, § 2. Thus, Section 2 of the Fourteenth Amendment imposes a penalty of reduced congressional representation on states that deny or abridge the right to vote for reasons other than "participation in rebellion, or other crime." *Id.*

immaterial. The Court clearly was of the opinion that California's constitutional and statutory scheme—which permanently disenfranchised individuals convicted of "infamous crimes"—fell within the "other crime" exception found in Section 2 of the Fourteenth Amendment. *See id.* at 54–55. The Court thus necessarily rejected an argument that the "other crime" exception applied only to temporary disenfranchisement.

In sum, as an "inferior court," U.S. Const. art. III, § 1, we are bound by the Supreme Court's decision in *Richardson*, *see Ballew*, 668 F.3d at 782, and therefore must conclude that Section 241 of Mississippi's Constitution does not violate the Equal Protection Clause by burdening this fundamental right.[4]

D. Eighth Amendment Challenge to Section 241

Plaintiffs contend that permanent disenfranchisement by Section 241 is cruel and unusual punishment that violates the Eighth Amendment. Section 241 disenfranchisement begins upon a person's conviction of a Section 241 offense and continues for the rest of his life. The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. "To determine whether a punishment is cruel and unusual, courts must look beyond historical conceptions to 'the evolving standards of decency that mark the progress of a maturing society' . . . 'The standard itself remains the same, but its applicability must change as the basic mores of society change.'" *Graham v. Florida*, 560 U.S. 48, 58 (2010) (first quoting *Estelle v. Gamble*, 429 U.S. 97, 102 (1976); then quoting *Kennedy v. Louisiana*, 554 U.S. 407, 418 (2008)). The district court failed to apply this standard to Section 241, concluding in error that Section 2 of the Fourteenth Amendment placed the practice of permanent felon disenfranchisement

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Plaintiffs also point to the Ninth Circuit's treatment of felon disenfranchisement in *Harvey v. Brewer*, 605 F.3d 1067 (9th Cir. 2010), in which the plaintiffs challenged an Arizona statute that permanently disenfranchised convicted felons. The plaintiffs sought to "escap[e] *Richardson*'s long shadow" by contending that the "other crime" exception in Section 2 "only permit[ted] disenfranchisement for common-law felonies" and did not apply to statutory felonies. *Id.* at 1071, 1073–74 (9th Cir. 2010) (O'Connor, J., sitting by designation). The Ninth Circuit acknowledged that the plaintiffs' proposed reading of Section 2 was "in extreme tension with *Richardson*" given that the Supreme Court upheld a permanent felon disenfranchisement scheme without evincing any "concern with whether any particular felony was one recognized at common law." *Id.* at 1074, 1078 (quoting *Richardson*, 418 U.S. at 56). Nevertheless, since neither the Ninth Circuit nor the Supreme Court "ha[d] directly addressed this precise question"—the types of crimes within the ambit of Section 2's "other crime" exception—the court considered (and rejected) the merits of plaintiffs' argument. *Id.* at 1074. By contrast, Plaintiffs here ask this court to adopt a construction of Section 2 that is not merely in tension with *Richardson* but instead directly conflicts with that decision's holding. That we cannot do.

beyond the reach of the Eighth Amendment. We reverse the district court's entry of summary judgment for the Secretary. For the reasons hereinafter assigned, we instead render judgment for the plaintiffs declaring that permanent disenfranchisement inflicted by Section 241 of Article XII of the Mississippi Constitution is cruel and unusual punishment in violation of the Eighth Amendment.

1. *Richardson* Applied Only Equal Protection Precepts and Therefore Does Not Foreclose Plaintiffs' Eighth Amendment Claim

Before engaging in the Eighth Amendment analysis, we point out that the district court erred by omitting entirely to perform that assessment in the present case. Relying on the Supreme Court's decision in *Richardson*, the district court concluded that Plaintiffs' Eighth Amendment claim failed because it would be "internally inconsistent for the Eighth Amendment to prohibit criminal disenfranchisement while § 2 of the Fourteenth Amendment permits it." *Harness v. Hosemann*, No. 3:17-CV-791, 2019 WL 8113392, at *11 (S.D. Miss. Aug. 7, 2019). That was error. *Richardson* held only that permanent disenfranchisement did not violate the Equal Protection Clause of the Fourteenth Amendment by burdening a fundamental right without adequate justification. The Court did not consider or decide whether a permanent ban on felons' voting after they completely served their sentences violates the Eighth Amendment's prohibition on cruel and unusual punishment.

The Supreme Court has "rejected the view that the applicability of one constitutional amendment pre-empts the guarantees of another . . . The proper question is not which Amendment controls but whether either Amendment is violated." *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 49–50 (1993). Though *Richardson* contemplated that felon disenfranchisement was implicitly authorized by Section 2 of the Fourteenth

Amendment, "provisions that grant Congress or the States specific power to legislate in certain areas . . . are always subject to the limitation that they must not be exercised in a way that violates other specific provisions of the Constitution." *Williams v. Rhodes*, 393 U.S. 23, 29 (1968); *see also Soldal v. Cook Cnty., Ill.*, 506 U.S. 56, 70 (1992) ("Certain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands."). Indeed, this fundamental principle of constitutional construction has been applied by the Supreme Court in circumstances squarely analogous to the case at bar. In *Hunter v. Underwood*, 471 U.S. 222, 227–29 (1985), the Court held that a provision of Alabama's Constitution that disenfranchised persons convicted of crimes "involving moral turpitude" violated the Equal Protection Clause in Section 1 of the Fourteenth Amendment because of the provision's racially discriminatory origins and impact. The Court explained that, despite the "implicit

Miss. Dep't of Corr., 911 F.2d 1167, 1168 (5th Cir. 1990). Although the Thirteenth Amendment may authorize the state to impose work obligations on prisoners, "there are circumstances in which prison work requirements can constitute cruel and unusual punishment" in violation of the Eighth Amendment. *Ray v. Mabry*, 556 F.2d 881, 882 (8th Cir. 1977) (holding that prisoner stated an Eighth Amendment claim when he alleged that he was forced to work "90 to 120 hours per week;" "that he cannot do the hard labor assigned to him because he is physically disabled;" and "that he is constantly cursed and threatened by prison supervisors"); *see also Williams v. Henagan*, 595 F.3d 610, 622 n.18 (5th Cir. 2010) ("Prison work conditions may however, amount to cruel and unusual punishment.").

The district court erred in concluding that Section 2 of the Fourteenth Amendment's implicit authorization of permanent disenfranchisement settles all constitutional questions about the practice. Fundamental tenets of constitutional jurisprudence and on-point Supreme Court precedent makes clear that Section 2 does not override all other constitutional protections. Although the Fourteenth Amendment has been interpreted to implicitly authorize felon disenfranchisement, disenfranchisement schemes established under this authority must still be consonant with other constitutional commands, including those embodied in the Eighth Amendment. The protections to individual liberty and dignity afforded by each provision of the Constitution do not evaporate when one provision permits states to legislate in a certain field. "Obviously we must reject the notion that [Section 2], gives the States power to impose burdens on the right to vote, where such burdens are expressly prohibited in other constitutional provisions." *Rhodes*, 393 U.S. at 29.

Furthermore, *Richardson* only addressed an equal protection challenge to permanent disenfranchisement. It did not examine or rule upon an Eighth Amendment claim, as the present case requires. Whether a

being incorporated through the Fourteenth Amendment. To the contrary, "incorporated Bill of Rights protections 'are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.'" *McDonald v. City of Chicago*, 561 U.S. 742, 765 (2010) (quoting *Malloy v. Hogan*, 378 U.S. 1, 10 (1964)); *see also Timbs v. Indiana*, 139 S. Ct. 682, 687 (2019) ("Thus, if a Bill of Rights protection is incorporated, there is no daylight between the federal and state conduct it prohibits or requires."); *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008) (applying the Eighth Amendment through the Fourteenth by looking to the "norms that currently prevail," not "the standards that prevailed when the Eighth Amendment was adopted in 1791"). The dissent's novel theory of constitutional law is unsupportable.

The dissent's citations to generic canons of statutory interpretation are also meritless. The dissent argues that we allow the Eighth Amendment's "general" prohibition on cruel and unusual punishment to override Section Two's "specific" authorization of felon disenfranchisement as punishment. As an initial matter, we do not adopt the dissent's characterization of the Eighth Amendment as a "general" provision that must yield to the implicit authorization of felon disenfranchisement in Section 2 of the Fourteenth Amendment. Were that true, then no constitutional challenge to a state's felon disenfranchisement law would be possible, a result that is plainly incompatible with the Supreme Court's decision in *Hunter*. The dissent acknowledges that constitutional grants of power to legislate in a certain area "are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution." *Post* at 57 (quoting *Williams v. Rhodes*, 393 U.S. 23, 29 (1968)). Our reading employs *this* canon of constitutional interpretation. It is the interpretive method that the Supreme Court has expressly instructed the lower courts to follow. And it is the one the Court has applied to an analogous question of whether felon

disenfranchisement may violate a substantive constitutional right. The answer to that question is clear: a state's felon disenfranchisement law may violate the Constitution, Section Two notwithstanding. *See Hunter*, 471 U.S.

they shall have been duly convicted." Act of February 23, 1870, ch. 19, 16 Stat.

Though there is historical evidence that some members of the 1890

preemption." *Planned Parenthood of Houston and Se. Tex. v. Sanchez*, 403 F.3d 324, 342 (5th Cir. 2005).[7]

Neither the Secretary nor the dissent seriously engage with Plaintiffs' argument that the Readmission Act determines Section 241's purpose. The Secretary asserts that Plaintiffs' reliance on the Readmission Act to determine the Convention's intent is "self-defeating" and "illogical" because the Act permits disenfranchisement as punishment, and therefore ultimately undermines Plaintiffs' Eighth Amendment claim—an argument the dissent echoes. This argument attacks the wrong part of the analysis, failing to address the threshold question: whether Section 241's disenfranchisement inflicts a punishment in the first place. As to that question, the Readmission Act's authorization of disenfranchisement as punishment that the Secretary relies on supports Plaintiffs' position that the law is punishment. The Secretary and dissent also argue that the plain text of Section 241's criminal disenfranchisement provisions evinces no intention to punish and appears alongside nonpunitive regulations like age, competency, and residency requirements. We are unconvinced, however, that the disenfranchisement provisions' mere placement alongside regulatory franchise provisions is strong evidence that the former were not intended as punishment. "The location and labels of a statutory provision do not by themselves transform a [criminal] remedy into a [civil] one." *Smith*, 538 U.S. at 94 (2003); *see also Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 702 (1995) (legislators can intend one provision of a law

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there is a national consensus against a practice). In *Penry v. Lynaugh*, for example, the Court held that the execution of the "mentally retarded" did not violate the Eighth Amendment. 492 U.S. 302, 334 (1989). The Court reasoned that the laws of sixteen states and the federal government[10] precluding the execution of this vulnerable class of persons were insufficient to show a national consensus against this practice. *Id.* at 334. Thirteen years after *Penry*, the Court revisited that decision in *Atkins*. Again, the Court considered whether a national consensus existed against capital punishment for the "mentally retarded," this time focusing primarily on the development of any consistent trends since *Penry*

the "consistency of the direction of change." *Id.* at 566. Thus, the shift in state laws between *Stanford* and *Roper*, though smaller in number, was nonetheless "significant" because, as in *Atkins*, "the same consistency of direction of change ha[d] been demonstrated." *Id.* at 565, 566.

With regard to lifetime felon disenfranchisement, at the time the Supreme Court decided *Richardson* in 1974, twenty-seven states permitted the practice as applied to felons whose offenses were unrelated to elections or good governance and who had completed all terms of their sentences. *See* Appendix. Currently, only eleven do. Since *Richardson*, sixteen states have stopped the practice of imposing lifetime disenfranchisement on felons who have served their sentences for offenses unrelated to elections or governance. *See* Appendix. That is the exact number of states that changed their laws to reject the execution of the "mentally retarded" between *Penry* and *Atkins*. And it is more than threefold the total number of states that abolished the juvenile death penalty in the timespan between *Stanford* and *Roper*. The evidence clearly demonstrates "consistency [in] the direction of change," and a repudiation of permanent felon disenfranchisement. *Roper*, 543 U.S. at 566 (quoting *Atkins*, 536 U.S. at 315); *see also* Amicus Brief of the District of Columbia, et al., *Community Success Initiative v. Moore*, No. 331PA21 at 4–9 (N.C. Aug. 17, 2022) (discussing the "clear and growing consensus among states" against permanent disenfranchisement). That a trend in abandoning a punishment has proven so durable and long-lasting demonstrates that society has truly turned away from that punishment. In this way, the steady rejection of permanent felon disenfranchisement over nearly half a century is as much, or even more, consistent than the change in the punishment laws considered in *Atkins* and *Roper.*

In sum, the objective barometers of society's standards—namely, the rejection of permanent felon disenfranchisement for offenses unrelated to elections and good governance by a clear majority of states and the

consistency in the trend toward abolition of the practice—provide sufficient evidence of a national consensus against punishing felons by permanently barring them from the ballot box even when they have completed all terms of their sentences.

The Secretary counters that there can be no national consensus against permanent felon disenfranchisement because many states disenfranchise felons for some period of time, such as during their period of incarceration or until completion of parole or probation. It is true that almost all states disqualify felons from voting at least while they are incarcerated or under supervision, Maine and Vermont being the exceptions. The dissent makes the same argument, asserting that there can be no national consensus when the states disenfranchise felons in such diverse ways. But this case does not concern the validity of temporary felon disenfranchisement laws, or the disenfranchisement of the incarcerated, or any other particular mode of disenfranchisement not contained in Section 241. In the present case, we are concerned solely with Mississippi's practice of punishing felons who have completed all terms of their sentences by *permanently* disenfranchising them for life. And objective evidence makes clear that a supermajority of states reject this practice.

The Secretary also emphasizes that Section 241 only permanently disenfranchises for the categories of felonies enumerated therein and that therefore individuals who commit felonies not included under Section 241 are not disqualified from voting. But, having already determined that the state permanently disenfranchises as punishment, *see supra* part III.D.2, the fact that the state chooses not to exact this punishment against all felons is immaterial to our current analysis of whether a national consensus against this punishment exists. We need not, as the Secretary apparently invites us to do, go felony-by-felony, asking whether there is a national consensus against permanent disenfranchisement as a punishment for each specific

vote constitutes cruel and unusual punishment under the Supreme Court's precedents and our own reasoning. And to determine whether this punishment is proportional to Plaintiffs' offenses, it is first necessary to assess the importance of the right that Plaintiffs are denied. *See Atkins*, 563

Turning to the culpability of Plaintiffs' class, we observe that Section 241's punishment applies equally to all members of the class, regardless of their underlying crime or the class member's individual mental state during the commission of the crime. Section 241 disenfranchises murderers and

the government touches his life. That Mississippi denies this most precious right permanently, despite the felon's sentence having been served, is disproportionate and inconsistent with the consensus against permanent disenfranchisement among state legislatures. The punishment of permanent disenfranchisement also contravenes the Eighth Amendment's proportionality principle because it lacks a nexus with any legitimate penological justification. *See Miller*, 567 U.S. 460, 489 (2012); *Graham*, 560 U.S. at 71. Thus, insofar as it applies to those who have fulfilled all terms of their sentences, Section 241 is proscribed by the Eighth Amendment's advancing standards of decency under the Constitution.

VII. Conclusion

"No right is more precious in a free country" than the right to vote. *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). "Other rights, even the most basic, are illusory if the right to vote is undermined." *Id.* This right is not only fundamental to the democratic ordering of our society, it is also expressive of the dignity of American citizenship—that each person is an equal participant in charting our nation's course. *Reynolds*, 377 U.S. at 533; *Bush v. Gore*, 531 U.S. 98, 104 (2000) ("[O]ne source of [the right to vote's] fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter.").

Mississippi denies this precious right to a large class of its citizens, automatically, mechanically, and with no thought given to whether it is proportionate as punishment for an amorphous and partial list of crimes. In so excluding former offenders from a basic aspect of democratic life, often long after their sentences have been served, Mississippi inflicts a disproportionate punishment that has been rejected by a majority of the states and, in the independent judgment of this court informed by our precedents, is at odds with society's evolving standards of decency. Section

241 therefore exacts a cruel and unusual punishment on Plaintiffs. Accordingly, we REVERSE the district court's grant of summary judgment to the Secretary on Plaintiffs' Eighth Amendment claim and RENDER

			17-3-10 (2000)		
Alaska	*Ak. Const. art. V § 2; Ak. Code § 15.05.030 (1960)*	Arizona	*Ariz. Const. art. 7 sec. 2; Ariz. Stat. 13-905, 13-909-12 (2000)*	Arizona	*Ariz. Rev. Stat. § 13-908(A); Ariz. Rev. Stat. 13-907(A)*
Arizona	*Ariz. Const. art. 7 § 2; Ariz. Rev. Stat. § 16-101(5)*	California	*Cal. Const. art. 2 sec. 4; Cal. Penal Code 4852.01, 4852.17, 4853 (2000)*	Delaware	*Del. Const. art. 5 sec. 2*
Arkansas	*Ark. Const. art. 3 § 6 (1947)*	Delaware	*Del. Const. art. 5 sec. 2, 7; 15 Del. Code sec. 1701, 5104 (2000)*	Florida	*Fla. Const. art. VI, § 4; Fla. Stat. § 944.292(1); Fla. Const. art. IV, § 8 (a), (c)*
California	*Cal. Const. art. 2 § 3 (1972); Elec. Code §§ 310, 321, 383, 389, 390; Ramirez v. Brown, 507 P.2d 1345, 1347 (Cal. 1973)*	Florida	*Fla. Stat. 97.041, 944.292, 944.293; Fla. Const. art. 6 sec. 4 (2000)*	Iowa	*Iowa Const. art. 2 sec. 5*
Connecti-cut	*Conn. Rev. Stat. 9-46 (1973)*	Iowa	*Iowa Const. art. 2 sec. 5; Iowa Code sec. 48A.6 (2000)*	Kentucky	*Ky. Const. sec. 145*

Florida*	*Fla. Const. art. VI §. 4 (1973); Fla. Code 97.041(5)*	Kentucky	*Ky. Const. sec. 145; Ky. Stat. 116.025 (2000)*	Mary-land*	*Md. Elec. Code sec 3-102*
Georgia	*Ga. Const. art. II § 2-701 (1945)*	Maryland	*Md. Const. art. 1 sec. 4; Md. Code art. 33, sec. 3-102 (2000)*	Massa-chusetts*	*Ma. Const. art 3; Ma. Gen. L. 51 sec. 1*
Idaho	*Idaho Const. art. 6 § 3 (1947); Idaho Code 34-402 (1949)*	Massa-chusetts*	*Ma. Const. art 3; Ma. Gen. L. 51 sec. 1 (2000)*	Missis-sippi	*Miss. Const. art. XII § 241*
Iowa	*Iowa Const. art. 2 § 2*	Missis-sippi	*Miss. Const. sec. 241; Miss Code 23-5-35 (1972)*	Missouri*	*Mo. Rev. Stat. § 115.133.2*
Kentucky	*Ky. Const. art. 145 (1955)*	Missouri	*Mo. Stat. 115.113 (2000)*	Nebraska	*Neb. Rev. Stat. § 29-112; § 32-313*
Louisiana	*La. Const. art. 8 § 6 (1968)*	Nebraska	*Neb. Stat. 32-313 (2000); Ways v. Shively, 264 Neb. 250 (2002)*	New Jer-sey*	*N.J. Stat. 19:4-1*
Mary-land*	*Md. Const.*				

Missis-sippi	*Miss. Const. § 241; Miss Code 23-5-35 (1972)*	New Mexico	*N.M. Stat. sec. 31-13-1 (2000)*	Wyoming	*W.S. Ann. 6-10-106; W.S. 7-13-105(a), (b); Wyo. Const. art. 4, § 5.*
Missouri	*Mo. Rev. Stat. 111.021 (1969)*	New York	*N.Y. Const. art. 2 sec. 3; N.Y. Code 5-106 (2000)*		
Nebraska	*Neb. Const. art. VI § 2; Neb. Rev. Stat. 29-112, 29-113 (1974)*	Ohio*	*Ohio Stat. 2961.01, 3599.39 (2000)*		
Nevada	*Nev. Const. art. 2 § 1; Nev. Rev. Stat. 213.090, 213.155*	Tennes-see	*Tenn. Code 40-29-105 (2000)*		
New Hamp-shire	*N.H. Const. art. 11 (1970); N.H. Rev. Stat. 607-A-2 (1974)*	Virginia	*Va. Const. art. 2 sec. 1; Va. Code 53.1-231.2 (2000)*		
New Jer-sey*	*N.J. Rev. Stat. 19:4-1 (1971)*	Washing-ton	*Wash. Const. art. 6 sec. 3; RCW 9.94A.637 (2000); Madison v. State, 161 Wash. 2d 85 (2007).*		
New Mexico	*N.M. Const. art. VII § 1 (1973)*	Wyoming	*Wyo. 6-10-106; 7-13-105 (2000)*		

New York	*N.Y. Elec. Law 152 (1964)*	
North Dakota	*N.D. Const. art. V § 127 (1960)*	
Oklahoma	*Okla. Const. art. III § 1 (1974)*	
Rhode Island	*R.I. Const. art. Am. XXXVIII (1973)*	
South Carolina	*S.C. Const. art. 2 sec. 7; S.C. Code 23-62 (1962, 1975 Supp)*	
Tennessee	*Tenn. Const. art. 4 sec. 2 ; Tenn. Code 2-205 (1971);*	
Texas	*Tex. Const. art. 16 sec. 2; Tex. Rev. Stat. art. 5.01 (1967)*	
Utah*	*Utah Const. art. IV sec. 8 (1971)*	
Virginia	*Va. Const. art. II sec. 2; Va. Code 24.1-42 (1973)*	
Washington	*Wash. Const. art. 6 sec. 3 (1974);*	

Wyoming	*Wyo. Const. art. 6 sec. 6 (1957); Wyo. Stat. 6-4 (1957); Wyo. Stat. 7-311 (1957)*

Edith H. Jones, *Circuit Judge*, dissenting:

The panel decision holds that Section 241 of the Mississippi Constitution, recently upheld in this court against another challenge,[1] now fails the test of Eighth Amendment scrutiny, incorporated by the Fourteenth Amend-

> view. And if they do not do so, their failure is some evidence, at least, of the fact that there are two sides to the argument.

Richardson v. Ramirez, 418 U.S. 24, 55, 94 S. Ct. 2655, 2671 (1974). In other words: go and convince the state legislatures. Do the hard work of persuading

reflects a long tradition in this country, and before that, in British law, and

II.

To begin with, *Richardson v. Ramirez* controls this case. Its holding did not rest on which part of Section One was invoked by the plaintiffs, but "on the demonstrably sound proposition that [Section One], 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 Two] imposed for other forms of disenfranchisement." *Id.* at 55, 2671. This is far from the only language in the opinion that has applicability beyond the Equal Protection Clause. *See Richardson*, 418 U.S. at 43, 94 S. Ct. at 2665 ("[T]hose who framed and adopted the Fourteenth Amendment could not have intended to prohibit outright in [Section One] . . . that which was expressly exempted from . . . [Section Two] of the Amendment."); *id.*

Wheat.) 316, 406 (1819). All of its provisions "should be interpreted in a way that renders them compatible, not contradictory." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 180 (2012) ("READING LAW"). Yet the majority's interpretation renders the Section Two proviso meaningless. It is useless for the Fourteenth Amendment to authorize felon disenfranchisement if the practice is made illegal by the Eighth. The canon against surplusage warns us against such unnatural readings. *Id.*

It is true that "provisions that grant Congress or the States specific power to legislate in certain areas . . . are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution." *Williams v. Rhodes*, 393 U.S. 23, 29, 8 S. Ct. 5, 9 (1968). For example, a state may not disenfranchise felons with racially discriminatory intent. *Hunter v. Underwood*, 471 U.S. 222, 233, 105 S. Ct. 1916, 1922 (1985).[5]

provision and a specific provision, the specific provision prevails." READING LAW at 183. "While the implication of a later enactment will rarely be strong enough to repeal a prior provision,

Amendment. Felon disenfranchisement is neither cruel, nor unusual, nor a punishment.

A.

First, the majority incorrectly concludes that Mississippi's felon disenfranchisement law is a "punishment" for Eighth Amendment purposes. The majority correctly recites the two-part test for determining whether something is a "punishment" under the meaning of the Constitution. *See Smith v. Doe*, 538 U.S. 84, 92, 123 S. Ct. 1140, 1147 (2003). Courts initially ascertain whether "the intention of the legislature was to impose punishment." *Smith*, 538 U.S. at 92, 123 S. Ct. at 1147. If so, "that ends the in-

disenfranchisement is nonpenal.[7] Only the Eleventh Circuit has departed from this categorical holding. *Thompson v. Alabama*, 65 F.4th 1288, 1304 (11th Cir. 2023) (charging the other circuits with "a misreading of *Trop*."). I am inclined to agree with the majority of circuits that *Trop* assumes disenfranchisement cannot be punishment. But even the Eleventh Circuit's reasoning cannot offer comfort to the majority. That court still concluded after applying the relevant test that Alabama's disenfranchisement law, which has a history and structure very similar to that of Mississippi's, was nonpenal. *Id.* at 1308.

Considering the text and structure of Section 241 demonstrates that it was not intended as a penal measure. The majority gives short shrift to these considerations, which ought to have been its primary focus. *Doe*, 538 U.S. at 92, 123 S. Ct. at 1147. To reiterate its language, this constitutional provision states that a mentally capable person:

> who is a citizen of the United States of America, eighteen (18) years old and upward, who has been a resident of this state for one (1) year, and for one (1) year in the county in which he offers to vote, and for six (6) months in the election precinct or in the incorporated city or town in which he offers to vote, and who is duly registered as provided in this article, and who has

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identifying constitutional "punishments" is the same for the Ex Post Facto Clause, the Eighth Amendment, and the Double Jeopardy Clause. *Does 1-7 v. Abbott*, 945 F.3d 307, 313 (5th Cir. 2019).

[7] *Simmons v. Galvin*, 575 F.3d 24, 43 (1st Cir. 2009) ("The Supreme C-.0h328t018 Tm.001 Ty4,et[(wh

> never been convicted of murder, rape, bribery, theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement or bigamy, is declared to be a qualified elector.

MISS. CONST. Art. 12, § 241. This provision does not so much as hint at a punitive intent toward felons any more than it implies an intent to punish non-citizens, short-term residents of Mississippi, those unregistered to vote, or those under the age of eighteen. It does not even single out felons for disqualification from the franchise—it merely defines the franchise in such a way as to exclude them from its bounds.[8] Moreover, Section 241 is part of the Mississippi Constitution's Article 12, which outlines the procedures for elections, not the punishment of criminals. By its own terms, Section 241 is a nonpenal exercise of Mississippi's regulatory authority over the franchise.

The majority opinion attempts to shift focus by pointing to language from the Readmission Act. That act barred Mississippi from depriving "any citizen or class of citizens" of the right to vote "except as a punishment." Act of February 23, 1870, ch. 19, 16 STAT. 67. The majority opinion worries that, if this court does not classify disenfranchisement as punishment, it would call into question whether Mississippi was properly readmitted to the Union, because Mississippi would therefore be depriving a class of citizens of the right to vote for a reason other than punishment. Hence, the majority concludes, any felon disenfranchisement that occurs in Mississippi is *per se* punitive for Eighth Amendment purposes.

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[8] Compare Mississippi's Section 241 with a portion of the Alabama Constitution recently upheld as a nonpenal regulation of the franchise: "No person convicted of a felony involving moral turpitude, or who is mentally incompetent, shall be qualified to vote until restoration of civil and political rights or removal of disability." ALA. CONST. Art. VIII, § 177. The Eleventh Circuit found this text sufficient to indicate "a preference that [Alabama's] felon disenfranchisement provision be considered civil instead of criminal." *Thompson*, 65 F.4th at 1305.

But the Readmission Act is not a license to find that the intent of Section 241 was *per se* penal. Indeed, the Eleventh Circuit was briefed on the substantially identical text of Alabama's Readmission Act, yet nevertheless held that the Alabama Constitution's disenfranchisement provision was non-penal. *Thompson*, 65 F.4th at 1305. Simply put, the question whether Mississippi violated the Readmission Act is separate from the issue before us and involves a completely different set of interpretive questions. We are not obliged to interpret the word "punishment" to mean the same thing in the Eighth Amendment as in the Readmission Act—unlike our obligation to use the same definition for the Ex Post Facto Clause and the Eighth Amendment. It could well be that "punishment" in the Act merely means "consequence of a crime," rather than "punitive." But the proper interpretation of the Readmission Act is not before us. All this court may do is apply the definition of "punishment" used for Eighth Amendment purposes to the law at hand.

When the provision's text and structure are considered, and precedent is consulted, it becomes obvious that Section 241 is not intended as a punishment. The majority disregards these sources, choosing instead to rely on the text of the Readmission Act—which ironically was meant to *recognize* the very authority this court now repudiates. Punitive intent cannot be found on these facts.[9]

B.

The majority seemingly establishes a categorical rule that permanent felon disenfranchisement is cruel and unusual punishment. True, there is a passing mention that Mississippi's law is unconstitutional "as applied to

[9] The majority forbears analysis of the second prong of the test—whether the provision is so punitive as to negate the state's intention. I need not address that prong either. But I found no compelling arguments from the plaintiffs as to why Section 241 ought to be considered "punishment."

Plaintiffs and their class." But the majority opinion immediately proceeds to apply the test used to determine whether a punishment is *categorically* cruel and unusual. *See United States v. Farrar*, 876 F.3d 702, 717 (5th Cir. 2017). And its language and reasoning are hardly constrained to the facts of the case.

If courts were allowed to interpret "cruel and unusual" in line with the original meaning of those terms, there is no question that felon disenfranchisement would be neither cruel nor unusual. But in *Trop,* the Supreme Court held that the "Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." 356 U.S. at 101, 78 S. Ct. at 598. In cases involving categorical rules against a type of punishment, this involves two steps. First, courts consider "objective indicia of society's standards, as expressed in legislative enactments and state practice, to determine whether there is a national consensus against the sentencing practice at issue." *Graham v. Florida*, 560 U.S. 48, 61, 130 S. Ct. 2011, 2022 (2010) (quotation marks omitted), *as modified* (July 6, 2010). Second, courts "determine, in the exercise of our own independent judgment, whether [the practice] is a disproportionate punishment." *Roper v. Simmons*, 543 U.S. 551, 564, 125 S. Ct. 1183, 1192 (2005). This assessment includes consideration of "the severity of the punishment in question," "the culpability of the offenders at issue in light of their crimes and characteristics," and "whether the challenged . . . practice serves legitimate penological goals." *Graham*, 560 U.S. at 67.

In applying this line of cases, the majority stretches precedent beyond the breaking point. As this court has recognized, categorical analysis has only been used to declare a narrow and we

to life-without-parole." *Farrar*, 876 F.3d at 717.[10]

intricacies of these laws, such as which felonies they cover and the procedures for the restoration of voting rights. A reasonably clever lawyer could find a dozen ways to divvy up states and find a national consensus against any particular practice.

Even worse, the majority opinion fails to offer a defensible bright line. If the importance of voting rights makes Section 241 cruel and unusual, then why would any form of post-incarceration disenfranchisement be constitutional? For that matter, why would disenfranchisement *during* incarceration be constitutional? To point to the length of the disenfranchisement does not resolve the matter, because in the vast majority of states, a felon can be incarcerated for life—and thereby forfeit, for life, his right to vote.

In an effort to avoid some of these problems, the majority does not quite hold that Mississip

The argument that criminals who served their prison sentences have paid their debt to society offers no analytical safe harbor. The consequences of committing a felony rarely end at the prison walls. Many felons are subject to considerable limits on their freedom to move about and work during probation. Sexual offenders are often required to register for the protection of those around them. *Cf. Smith v. Doe*

United States Court of Appeals

FIFTH CIRCUIT