

Docket No. 05-0000

In the Supreme Court of the United States

**MARYLAND STATE BOARD OF ELECTIONS, ET AL.,
PETITIONERS,**

v.

**JEFFREY COOLIDGE,
RESPONDENT.**

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

BRIEF FOR THE PETITIONERS

**By his counsel,
ID# 10678**

QUESTIONS PRESENTED.

- 1) Is a statutory provision that permanently denies the right to vote only to persons who have committed a second or subsequent violent felony a voting qualification or prerequisite subject to § 2 of the Voting Rights Act, 42 U.S.C. § 1973, because it results in a denial of the right to vote on account of race?

- 2) Is Maryland's disfranchisement of a violent felon, predicated on his prior conviction of an infamous crime, a cruel and unusual punishment in violation of the Eight Amendment?

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The opinion of the court of appeals (R. at 29-41) is reported at -- F.3d -- (4th Cir. 2005). The opinion of the district court (R. at 20-27) is reported at -- F. Supp. 2d -- (D.Md. 2005).

JURISDICTION.

The judgment of the court of appeals was entered on July 16, 2005. The petition for a writ of certiorari was granted on October 14, 2005. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Maryland Election Law § 3-102 (Bender 2005) provides that an individual is not qualified to be a registered voter if the "has been convicted of theft or other infamous crime," § 3-102(b)(1), or "has been convicted of a second or subsequent crime of violence," § 3-102(c). The Voting Rights Act (VRA), 42 U.S.C. § 1973(a), requires that no voting provision shall be "imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color" The Eighth Amendment to the Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

STATEMENT OF THE CASE.

In 1982, Respondent Jeffrey Coolidge, who identifies as African-American, was convicted of cocaine possession with intent to distribute, an infamous crime under what is now Md. Code Ann., Election Law § 3-102(b). (Compl. ¶¶ 10-12, R. at 10-11.) In 2004, Respondent was convicted of robbery, which is currently characterized as a crime of violence under Md. Code Ann., Criminal Law § 14-101(a). (Compl. ¶ 17, R. at 11.) Upon sentencing, Respondent became ineligible to vote under § 3-102(c) because he has been convicted of a crime of violence and was previously convicted of an infamous crime. (Id.)

Mr. Coolidge filed his complaint in the United States District Court for the District of Maryland on November 4, 2004. The Maryland State Board of Elections, represented by the Assistant Attorney General of Maryland, and the City of Baltimore, represented by the City Attorney of Baltimore, moved to dismiss Mr. Coolidge's complaint; the motion was granted on February 23, 2005. (R. at 20-27.)

The Court of Appeals for the Fourth Circuit reversed the District Court on both grounds, holding that ex-felon disfranchisement laws such as Maryland Election Law § 3-102(c) may be subject to the Voting Rights Act (VRA) and that § 3-102(c) imposes a "cruel and unusual punishment" banned by the Eighth Amendment. (R. at 29-41.) The court of appeals found that

the application of the VRA to state felon disfranchisement laws was well within Congress's power granted by the Reconstruction Amendments. The court found Respondent's § 2 claim to be valid, stating that Maryland's use of past criminal convictions as a basis for disfranchisement interacted with social and historical conditions to deny the right to vote on account of race.

The court also found the "purpose of felon disfranchisement is to punish convicted criminals . . . [and] surely meant as part of the overall sentence." (R. at 37-38.) The court found that although ex-felon disfranchisement "is not cruel and unusual in itself," it may be disproportionate to the underlying crime and thus deserving of judicial scrutiny. (Id. at 39.) Considering "evolving standards of decency," the court held that "[a]ppellant states a valid claim that [disfranchisement under § 3-102(c)] is cruel and unusual as applied to him." (Id. at 41.)

SUMMARY OF ARGUMENT.

Maryland Election Law § 3-102(c) violates neither the VRA, 42 U.S.C. § 1973, nor the Eighth Amendment to the Constitution. This Court should, therefore, reverse the court of appeals decision on both grounds and remand for further proceedings.

A. Voting Rights Act.

1. The VRA cannot be applied to state disfranchisement provisions without raising a serious constitutional issue. In enacting § 2 of the VRA, Congress made no clear statement that

it intended to shift the balance of power from the states to the federal government, and thus the application of § 2 of the VRA to § 3-102(c) would amount to an abuse of Congressional power.

2. Even if the Court affirms the application of § 2 of the VRA to § 3-201(c), Respondent fails to demonstrate that in the totality of circumstances Maryland's felon disfranchisement law denies the right to vote because of race. Respondent does not proffer specific instances of discrimination, but rather bases his claim on insufficient statistics and conjecture.

B. Eighth Amendment.

1. Section 3-102(c) cannot violate the Eighth Amendment to the Constitution's ban on "cruel and unusual punishment" because it does not impose a punishment. This Court has routinely found the collateral consequences of sentencing to be civil regulations, not subject to the Eighth Amendment. Section 3-102(c) likewise falls within this category of civil regulations.

2. Even if this Court holds that § 3-102(c) imposes a criminal punishment, such a punishment does not fit into the "extremely rare" species of punishment that is so grossly disproportionate to Respondent's crime as to be cruel and unusual. In reversing the court of appeals, this Court should defer to the Maryland Legislature's prerogative to both regulate the franchise and impose deter recidivists.

ARGUMENT.

I. RESPONDENT HAS FAILED TO PRESENT A VALID § 2 CLAIM UNDER THE VOTING RIGHTS ACT (VRA).

A. The application of the VRA to § 3-102(c) raises serious constitutional issues, and without a Congressional statement of intent, such an application exceeds Congress's enforcement power under the Reconstruction Amendments.

To bring an equal protection claim under the Reconstruction Amendments, a party must allege intentional discrimination by a state actor. Washington v. Davis, 426 U.S. 229, 240, 242 (1976). The Voting Rights Act (VRA), however, in its amended form, requires not intentional discrimination, but only that the provision in question is "imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . ." 42 U.S.C. § 1973(a) (emphasis added). Thus, the Court employs a "results" test, providing that a state actor, who has not engaged in purposeful race discrimination, may still violate § 2 of the VRA if the "totality of circumstances" reveals a racially disproportionate "result." 42 U.S.C. § 1973(b) Thornburg v. Gingles, 478 U.S. 30, 35. (1986). The amended § 2, therefore, substantially broadened the scope of the VRA beyond that of the Fifteenth Amendment, which it was designed to enforce.

The application of § 2 to state provisions thus makes it possible for a state actor to be in violation of the VRA, which

was designed to enforce the Constitution, without actually violating the Constitution itself. Such an application of the VRA to statutes that do not themselves violate the Constitution would raise a serious question as to whether Congress exceeded its enforcement power under those amendments. When the court of appeals applied § 2 to Maryland's race-neutral ex-felon disfranchisement law, Md. Election Law § 3-102(c), it spurred such a question by altering the traditional balance of power between the states and the federal government. This Court should reverse the court of appeals and find that this application of the VRA is inconsistent with our federal system.

It is well settled that in certain situations, Congress may enforce the substantive provisions of the Reconstruction Amendments by regulating conduct that does not directly violate them. See South Carolina v. Katzenbach, 383 U.S. 301 (1966); Katzenbach v. Morgan, 384 U.S. 641 (1966); City of Rome v. United States, 446 U.S. 156 (1980). By meddling in an area reserved to the states, however, such "prophylactic" regulations may conflict with the federalist principles that organize our government. The outer boundaries of Congress's authority must be strictly observed to avoid a harmful increase in federal power.

This Court has articulated two overlapping requirements that must be satisfied in order to establish the constitutionality of such legislation. First, "there must be a

congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.” City of Boerne v. Flores, 521 U.S. 507, 520 (1997). Second, Congress must also identify a history and pattern of impermissible state transgressions upon the Constitution. Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 368. (2001).

1. The application of the VRA to § 3-102(c) is not a congruent and proportional remedy to racial discrimination in voting, because Congress has not identified a pattern of constitutional violations in Maryland.

Three courts of appeals have recently split over whether the VRA applies to state felon disfranchisement laws. See Farrakhan v. Locke, 338 F.3d 1009 (9th Cir. 2003), reh’g denied, 359 F.3d 1116 (9th Cir. 2004), cert. denied, 123 S.Ct. 477 (2004)(in favor of application); Muntaqim v. Coombe, 366 F.3d 102 (2d Cir. 2004)(opposed), cert. denied, 123 S.Ct. 480 (2004), vacated pending reh’g, 396 F. 3d 95 (2d Cir. 2004); and Johnson v. Bush, 405 F.3d 1214 (11th Cir. 2005)(opposed). The court of appeals below expressed a preference for Eleventh Circuit Judge Barkett’s dissenting analysis in favor the application. (R. at 35.) This Court, however, should be skeptical since that dissent fails to consider its grave implications on federal-state power.

In Muntaqim v. Coombe, the Second Circuit noted how Congress chose a blunt tool in attempting to remedy the problem of racial discrimination by subjecting all facially neutral voting provisions to § 2 on account of yielding disproportionate

results. 366 F.3d 102, 124 (2d Cir. 2004). Based on the standard set out in City of Boerne, 521 U.S. at 531, which struck down a statute that was out of proportion to the supposed remedy or preventive objective, the Muntaqim court found that

The link between the injury to be prevented by Congress -- namely, the use of various dilution schemes by certain states to avoid the strictures of the VRA -- and Congress's supposed remedy -- namely, the prohibition of any felon disenfranchisement law enacted at any time in any state that 'results' in the abridgement of the right to vote on account of race -- is too attenuated.

366 F.3d at 125. The court of appeals's application of the VRA to § 3-102(c) creates this similarly over-broad effect. As a result of the court's decision, § 2 reaches far beyond only those statutes that violate the spirit of the Reconstruction Amendments, if not the actual text. Thus, the extension of § 2 to include state statutes such as § 3-102(c) does not meet the necessary standard of congruence and proportionality set forth in City of Boerne.

In addition, Congress has never identified a history and pattern of unconstitutional discrimination through felon disenfranchisement, the issue at hand, which would support the probation of statutes such as Maryland's felon disenfranchisement provision. See Garrett, 531 U.S. 356, 368 (2001). The legislative record contains no documentation by Congress of racial discrimination in Maryland, let alone discrimination that rises to the level of constitutional violations. In fact, in

Baker v. Cuomo, the Second Circuit noted that "the only consideration of felon disfranchisement statutes in the entire history of the Voting Rights Act . . . is Congress' explicitly announced intention to exclude such statutes from the § 1973(c) tabulation of prohibited tests and devices." 58 F.3d 814 (2d Cir. 1995). Thus, the second requirement necessary to ensure the constitutionality of prophylactic legislation cannot be met either. It becomes clear that the application of § 2 of the VRA to § 3-102(c) would disturb the balance of power between the states and the federal government as conceived by this Court.

2. The absence of a clear statement by Congress indicating that it intended to alter the balance between the States and the Federal Government renders the application of § 2 to § 3-102(c) an abuse of Congressional power.

Felon disfranchisement provisions are not like other voting requirements, but are a widespread historical practice expressly sanctioned by the Fourteenth Amendment. Richardson v. Ramirez, 418 U.S. 24, 54 (1974). These disfranchisement provisions are thus presumptively constitutional. This aspect of the court of appeals's decision alone raises serious constitutional concerns as to applying the VRA to a class of exempted voting provisions that the Fourteenth Amendment maintains beyond its reach.

When interpreting statutes that risk altering the federal-state balance, the Court has applied the "clear statement" rule: "[i]f Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its

intention to do so unmistakably clear in the language of the statute.” Gregory v. Ashcroft, 501 U.S. 452, 460-61 (1991). In the absence of a clear statement, courts should interpret a statute to avoid a constitutionally questionable result. Because the application of § 2 of the VRA to § 3-102(c) raises a constitutional issue that implicates the clear statement rule, only an unmistakably clear statement that Congress intended to apply the VRA to felon disenfranchisement laws should permit such application by the Court. Yet, Congress neither made such a statement in 1965 when it first passed the VRA, nor during its amendment in 1982. The Eleventh Circuit found that “[i]nstead of a clear statement from Congress . . . the legislative history indicates just the opposite -- that Congress never intended the Voting Rights Act to reach felon disenfranchisement provisions.” Johnson v. Bush, 405 F.3d 1214, 1232 (11th Cir. 2005).

The only references to felon disenfranchisement made in the Congressional reports from 1965 indicate that neither house of Congress intended to include felon disenfranchisement within the statute’s scope. Id. at 1233. Similarly, upon examining the Congressional Statements made in 1982 during the amendment of § 1973, the Johnson court found no declaration of Congress’s intent to extend the VRA to felon disenfranchisement provisions in either the plain text or the legislative history of the amendment. Furthermore, as the Second Circuit noted in Muntaqim,

"considering the prevalence of felon disenfranchisement in every region of the country since the Founding, it seems unfathomable that Congress would silently amend the Voting Rights Act in a way that would affect them." 366 F.3d at 123-4. Thus, since the clear statement rule cannot be satisfied, the court of appeals erred in applying § 2 of the VRA to § 3-102(c).

B. Respondent fails to demonstrate that the totality of circumstances surrounding his disenfranchisement amounts to a denial of the right to vote on account of race, and therefore cannot maintain a valid § 2 claim.

Even if this Court determines that Maryland's felon disenfranchisement statute is subject to the requirements of the VRA, that is, if § 2 is construed in such a way that its application to state disenfranchisement provisions does not raise serious constitutional problems, Respondent still bears the burden of maintaining a claim under § 2. Thornburg v. Gingles, 478 U.S. 30, 46 (1986).

According to the statute itself, a violation of the VRA is established if:

[B]ased on the totality of the circumstances, it is shown that political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a [particular race or color] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

42 U.S.C. § 1973(b) (emphasis added). In Gingles, the Court expanded upon this "totality of circumstances" test, stating

that “[t]he essence of a [Voting Rights Act] claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.” 478 U.S. at 47. To determine whether the totality of circumstances reveals such an interaction of the voting law with social and historical conditions, the Court turned to the Senate Judiciary Committee Majority Report, which accompanied the 1982 Amendments to the VRA. The report identifies “typical factors” to be considered when employing a totality of circumstances analysis, including:

The history of voting-related discrimination in the jurisdiction; the extent to which voting in the jurisdiction is racially polarized; the extent to which the jurisdiction has used discriminatory voting practices in the past; the extent to which members of the minority group have been excluded from the candidate slating processes in the jurisdiction; the extent to which minority groups in the jurisdiction bear the effects of past discrimination in areas such as education, employment and health; the extent of the use of racial appeals in political campaigns within the jurisdiction; and the extent to which members of the minority group have been elected to public office in the jurisdiction.

Muntaqim, 366 F.3d at 114 n.14. Courts have also considered whether there is a lack of responsiveness by elected officials to the particularized needs of the minority group, and whether the policy underlying the state or political subdivision’s use of such voting procedure is tenuous. Gingles, 478 U.S. at 37.

The Report also makes clear that these nine factors are neither "comprehensive nor exclusive," though they indicate the scope and depth of the fact-intensive inquiry required in order to satisfy the totality of the circumstances test. Id. at 45. Though these specific factors need not be proved, courts are required to evaluate the effect of voting provisions on voting opportunities "on the basis of objective factors." Id. at 44 (quoting S.REP. No. 97-417, at 27 (1982), as reprinted in 1982 U.S.C.C.A.N. 177, 205). Furthermore, the Report states that "the question whether the political processes are 'equally open' depends upon a searching practical evaluation of the 'past and present reality,'" Id. at 45 (quoting S.REP. No. 97-417, at 30 (1982), as reprinted in 1982 U.S.C.C.A.N. 177, 208), and on a "functional" view of the political process. Id. at 45 (quoting S.REP. No. 97-417, at 30 n.120 (1982), as reprinted in 1982 U.S.C.C.A.N. 177, 20). Thus, although the exact standard used to identify § 2 violations is not fixed, it demands an objective inquiry of both past and present circumstances; only then can it be determined that the voting provision interacts with social and historical conditions. The burden lies with Respondent to prove vote denial under this standard. This Court, however, should reverse the court of appeals decision because Respondent has not proffered compelling evidence to maintain a § 2 claim.

1. Respondent's reliance on statistical disparities is insufficient to establish that, in the totality of circumstances, § 3-102(c) violates VRA.

With the exception of a flimsy allegation of institutional bias, discussed infra, Respondent's bases his entire claim on statistical disparities. Before the court of appeals, Respondent argued that disparities in the felony conviction rates of blacks in relation to their presence in the population of Baltimore County and the state of Maryland result in a racially disparate rate of disfranchisement under § 3-102(c). First, the Court has held that studies based on statistical disparities are notoriously unreliable. See McCleskey v. Kemp, 481 U.S. 279 (1987). Secondly, Respondent merely alleges a nexus between two phenomena without demonstrating that this nexus is the result of racial bias. Although the "results test" of the amended VRA eliminates the need to prove intentional discrimination, it does not eliminate the requirement for a causal connection between a particular action and the discriminatory result. Causation cannot be inferred from impact alone, and the mere identification of disparities does not point to a social or historical condition that interacts with § 3-102(c).

Furthermore, five courts of appeals have indicated that "a bare statistical showing of disproportionate impact on a racial minority does not satisfy the § 2 'results' inquiry." Smith v. Salt River Agric. Improvement and Power Dist., 109 F.3d 595, 595

(9th Cir. 1997); see also Ortiz v. City of Phila. Office of the City Comm'rs, 28 F.3d 306, 314-15 (3d Cir. 1994); Salas v. Sw. Tex. Junior Coll. Dist., 964 F.2d 1542, 1556 (5th Cir. 1992); Irby v. Va. State Bd. of Elections, 889 F.2d 1352, 1358-59 (4th Cir. 1989); Wesley v. Collins, 791 F.2d 1255, 1262 (6th Cir. 1986). A causal connection may be shown where the discriminatory impact of a challenged voting practice is attributable to racial discrimination in the surrounding social and historical circumstances. Respondent, however, has simply pointed out disparities without providing any social or historical analysis. This Court should thus reverse the court of appeals because Respondent cannot meet his burden under the totality of circumstances test by relying on statistics alone.

2. Respondent fails to present specific instances of racial discrimination in Maryland that meets the standard for specific evidence required by this Court.

In City of Boerne v. Flores, the Court criticized Congress' findings of religious discrimination, which it used to justify enacting the Religious Freedom Restoration Act of 1990, finding the examples of specific discrimination to be "anecdotal" and ultimately unpersuasive. 521 U.S. at 531. The Court found that the string of weak examples lacked cohesion, and it called for generalized findings to establish a pattern of widespread discrimination. Id. Yet, the Court, while preferring generalized findings, does not mandate a record of specific instances of

discrimination. The Court's issue is not with specific findings per se, but rather the quality of the findings presented.

In the case at bar, Respondent produces only one allegation of specific discrimination: "Racial discrimination in traffic stops, in prosecution, and at trial in Baltimore County played a prominent role in Coolidge's 1982 arrest and conviction."

(Compl. ¶ 30, R. at 13.) This evidence is similarly "anecdotal" as it contains no objective facts or details that establish an instance of racial bias. The single allegation results in a factual record that is even more scant than the one criticized in City of Boerne. In that case, at least a number of diverse examples were cited: autopsies performed on Jewish individuals and Hmong immigrants in violation of their religious beliefs as well as zoning regulations and historic preservation laws, which adversely effected churches and synagogues. The Court characterized this evidence by stating that: "It is difficult to maintain that they are examples of legislation enacted or enforced due to animus or hostility to the burdened religious practices or that they indicate some widespread pattern of religious discrimination in this country." Id. Since the evidence presented by Respondent is even less indicative of discrimination than the examples which failed to convince the Court in City of Boerne, he has established an insufficient basis to pass the totality of circumstances test required for a

§ 2 claim. Accordingly, this Court should reverse the court of appeals and dismiss the claim.

3. Respondent fails to produce evidence regarding the totality of circumstances for the entire jurisdiction of Maryland, and thus cannot establish a § 2 violation.

Finally, in his complaint, Respondent produces various statistics indicating racial disparity in Baltimore County and Baltimore City. The challenged voting provision, however, is a state statute, not a local ordinance. Therefore, Respondent must demonstrate that §3-102(c) interacts with social and historical circumstances to result in racial discrimination statewide. According to the Senate Report, "Respondent must either prove such intent, or, alternatively, must show that the challenged system of practice, in the context of all the circumstances in the jurisdiction in question, results in minorities being denied equal access to the political process." Wesley v. Collins, 791 F.2d 1255, 1260 (6th Cir. 1986)(emphasis added).

Of course, specific instances of § 3-102(c) interacting with social or historical conditions in Baltimore County or Baltimore City are relevant insofar as they evidence a larger statewide issue. But, without evidence of racial discrimination in other counties and cities in Maryland, the Court cannot examine the totality of the circumstances at play in the state. Just as in City of Boerne, this Court should not be persuaded by evidence that fails to establish a widespread pattern of

discrimination. 521 U.S. at 531. Because Respondent rests his claim on statistics from too narrow a jurisdiction and does not identify a clear pattern of actual discrimination therein, this Court should reverse the court of appeals and find that Respondent does not allege a valid claim under the VRA.

II. THE COURT OF APPEALS ERRED IN HOLDING THAT MARYLAND'S ELECTION LAW § 3-102 VIOLATES THE EIGHTH AMENDMENT.

A. Maryland Election Law § 3-102(c) is a civil regulation of the franchise -- not a punishment within the meaning of the Eighth Amendment.

The Eighth Amendment to the Constitution, which applies to the states through the Fourteenth Amendment, prohibits the imposition of "cruel and unusual punishments" on convicted criminals. Wilson v. Seiter, 501 U.S. 294, 297 (1991), (citing Robinson v. California, 370 U.S. 660, 666 (1962)). Thus, as a threshold matter, which both lower courts recognized here, Respondent must establish that Maryland's ex-felon disfranchisement statute in fact punishes, which would bring § 3-102(c) under the Eighth Amendment's purview. The court of appeals erred in finding that Respondent met his burden.

It is well established that "if the pain inflicted is not formally meted out as a punishment by the statute or the sentencing judge," the Court requires a higher level of evidence before it will conduct an Eighth Amendment analysis. Wilson, 501 U.S. at 299 (harsh prison conditions, if not intended as punitive, not subject to Eighth Amendment); see also Ingraham v.

Wright, 430 U.S. 651 (1977)(corporal punishment in school not a punishment for Eighth Amendment purposes). When analyzed within the framework provided in this Court's punishment jurisprudence, § 3-102(c) does not provide a criminal punishment for Eighth Amendment purposes. Rather, § 3-102(c), like all felon disenfranchisement statutes, is merely a civil regulation, among the many collateral consequences that apply to convicted felons outside the sentencing process. In this manner, § 3-102(c)'s voting restriction is no more punitive than deportation of illegal aliens, see United States v. Hung Chang, 134 F. 19, 25 (1904)(deportation not punitive for constitutional purposes), occupational restrictions, see De Veau v. Braisted, 363 U.S. 144 (1960)(prohibiting a union member from collecting dues after his criminal conviction does not constitute punishment), or forfeiture of property, see United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984)(forfeiture of firearm collection held nonpunitive though concurrent to criminal charges).

In Smith v. Doe, a case arising under this Court's Ex Post Facto Clause jurisprudence, the Court similarly determined that Alaska's Sex Offender Registration Act (SORA) was non-punitive and thus valid for Ex Post Facto Clause purposes. Like all "Megan's Laws," SORA was designed to protect the public against convicted sex offenders imprisoned or residing in the state. The

Act required John Doe I in Smith to register his name, address, place of employment, and conviction details, among other personal information. Id. at 90. SORA then mandated that all sex offender data be maintained by the Alaska Department of Public Safety and available to the public. Id. at 91. Applying the “so-called Kennedy-Ward Test,” id. at 107 (Souter, J., concurring), the Court concluded that the Alaska Legislature intended to enact a civil regulation. Id. at 97-106 (citing Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-169 (1963), and U.S. v. Ward, 448 U.S. 242, 248-249 (1980)) (together the “Kennedy-Ward Test”). Because both SORA and § 3-102(c) impose lifelong restrictions on repeat offenders, the analysis employed in Smith should inform the Court’s judgment here.

1. The Kennedy-Ward Test.

The Smith Court summarized the two essential prongs of the Kennedy-Ward test¹:

[1] If the intention of the legislature was to impose punishment, that ends the inquiry. [2] If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive, we must further examine whether the statutory scheme is ‘so punitive either in purpose or effect as to negate [the State’s] intention to deem it civil. [Kansas v. Hendricks, 521 U.S. 346, 361 (1967)] [internal citations omitted] . . . ‘Only the clearest proof’ will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty.’ Hudson v. United States, 522 U.S. 93, 100 (1997).

¹ The Kennedy-Ward factors “have their earlier origins in cases under the Sixth and Eighth Amendments.” Smith, 538 U.S. at 97.

538 U.S. at 92 (internal citations omitted). Determining “whether a statutory scheme is civil or criminal ‘is first of all a question of statutory construction.’” 538 U.S. at 93 (quoting Kansas v. Hendricks, supra). This inquiry requires research of available legislative history or the statute’s label in the state code (e.g. “Criminal Laws” or “Election Laws”). Id. at 93. To ascertain an Act’s purpose and effect, the Smith Court turned to the factors set forth in Kennedy v. Mendoza-Martinez, supra, succinctly outlined in Hudson v. United States:

(1) ‘[w]hether the sanction involves an affirmative disability or restraint’; (2) ‘whether it has historically been regarded as a punishment’; (3) ‘whether it comes into play only on a finding of scienter’; (4) ‘whether its operation will promote the traditional aims of punishment-retribution and deterrence’; (5) ‘whether the behavior to which it applies is already a crime’; (6) ‘whether an alternative purpose to which it may rationally be connected is assignable for it’; and (7) ‘whether it appears excessive in relation to the alternate purpose assigned.’

522 U.S. 93, 99–100 (1997) (citing Kennedy, 372 U.S. at 168–69). This Court treats these factors as guideposts, not rigid points for analysis. United States v. Ward, 448 U.S. at 249.

Examining SORA’s legislative history, the Court found that the Alaska Legislature primarily intended to create a civil regulation to protect the public from sex offenders. Smith, 538 U.S. at 93. In examining the purpose and effect of SORA under several of the Kennedy factors, the Court also found SORA neither restricted convicted sex offenders unreasonably, nor

provided for a sanction historically regarded a punishment, nor imposed requirements (i.e. lifelong registration) that appear excessive compared to the nonpunitive goal of protecting the public. Id. at 97-105. Furthermore, the Court found that SORA's consequential punitive effects, such as deterrence or retribution, and its application to past criminal acts (i.e. sex offenses), do not make a law with primary civil purposes punitive for constitutional purposes. The Court noted that any painful consequences felt by having to register as a sex offender stem "not from the Act's registration and dissemination provisions, but from the fact of the conviction, already a matter of public record." Id. at 101.

2. Section 3-102(c) does not impose a punishment under the Kennedy-Ward Test.

Although the statute's label in the Maryland Code may not be dispositive, § 3-102(c) is found in the "Maryland Election Law." The other parts of that statute list other factors that may restrict one's voting ability, such as being 18 years of age (§ 3-102(a)(2)), county of residence (§ 3-102(a)(3)), or mental capacity (§ 3-102(b)(2)). On its face, therefore, Maryland appears to consider felon disfranchisement under § 3-102(c) as another civil regulation of the right to vote.

An examination of the effects of the law under the Kennedy factors should bolster the Court's judgment that § 3-102(c) is a civil regulation. Similar to the SORA in Smith, the underlying

behavior to which § 3-102(c) applies -- committing an infamous crime followed by a second or subsequent violent crime -- is criminal. Furthermore, it may seem at first blush that permanent disfranchisement on some repeat felons has a deterrent or retributive effect on these recidivists -- typically, functions of penal law. If Smith is any guide, however, it is permissible for Maryland's voting law to have a subsidiary relationship to the criminal law. As the Court said of SORA, "any number of government programs might deter crime without imposing punishment. 'To hold the mere presence of a deterrent purpose renders such sanctions "criminal" . . . would severely undermine the Government's ability to engage in effective regulation.'" Smith, 538 U.S. at 102 (citing Hudson, 522 U.S. at 105).

Meanwhile, § 3-102(c) imposes no affirmative disabilities on recidivists like Respondent. Unlike John Doe I in Smith, Respondent need not periodically check in with local authorities about his whereabouts or vital statistics; rather, he may "move where [he] wish[es] and . . . live and work as other citizens, with no supervision." Smith, 538 U.S. at 101. For that same reason, permanent disfranchisement of some recidivists should not appear excessive compared to the law's primary purpose -- regulating voting. Just as in Smith, the stigma Respondent feels from § 3-102(c) originates not from his inability to vote, but his underlying conviction for a violent crime. Id. This Court

should, therefore, reverse the court of appeals's judgment that § 3-102(c) constitutes a punishment for Eighth Amendment purposes, and leave Maryland's primary civil regulation intact.

B. Even if the Court deems ex-felon disfranchisement as a punishment, it is does not fall into that rare species of punishment that is so grossly disproportionate to the crime as to be unconstitutional.

1. A punishment violates the Eighth Amendment only if it is an "extreme sentence" that is "grossly disproportionate" to the underlying crime.

Should this Court decide that permanent felon disfranchisement constitutes a punishment for Eighth Amendment purposes, it must still determine whether § 3-102(c) imposes a grossly disproportionate sanction on Respondent, prohibited by the Constitution as "cruel and unusual." The court of appeals incorrectly found that Respondent met his requisite burden here.

In Ewing v. California, the plurality opinion reiterated the core principle of the Court's modern Eighth Amendment jurisprudence -- that the Eighth Amendment contains a "narrow proportionality principle" that "applies to noncapital sentences." 538 U.S. 11, 20 (2003). Beginning in Rummel v. Estelle, 445 U.S. 263 (1980), and culminating with Ewing, the Court endeavored to design a comprehensive test to determine whether a given non-capital punishment falls within the "narrow" class of punishments that are "grossly disproportionate" to the crime for which they are imposed. The test, as propounded by Justice Kennedy in his concurring opinion in Harmelin v.

Michigan, has two components. 501 U.S. 957, 1001 (1991)(Kennedy, J., concurring). First, the party challenging the punishment must raise an inference of gross proportionality by balancing four factors, none of which are dispositive: “[1] the primacy of the legislature, [2] the variety of legitimate penological schemes, [3] the nature of our federal system, and [4] the requirement that proportionality be guided by objective factors.” Id. Underscoring this analysis is the principle that “the Eighth Amendment does not require strict proportionality between crime and sentence.” Id. Second, and only if he raises the inference of disproportionality, the challenger may substantiate his claim by engaging in an intra- and interjurisdictional comparison that “validate[s] an initial judgment that a sentence is grossly disproportionate to a crime.” Id. at 1005.

The Court applied the Harmelin factors in Ewing to evaluate California’s “Three Strikes and You’re Out” law, a sentencing scheme used in California, which imposes harsher sentences on recidivists. Ewing, 538 U.S. at 14. As the plurality noted, Mr. Ewing, the Petitioner in that case, was “no stranger to the criminal justice system.” Id. at 18. Between 1984 and 2000, California convicted him of a series of felonies and misdemeanors, including theft (in 1984), felony grand theft auto (in 1988), and several burglaries (in 1993) among other crimes.

Id. After serving a six-year sentence, Mr. Ewing, then on parole, stole nearly \$1,200 worth of golf equipment in 2000. Id. California subsequently prosecuted Mr. Ewing as a recidivist under its three-strikes law, and he was ultimately sentenced to 25 years to life. Id. at 20. Using the Harmelin test, the Court found that the sentence was “not grossly disproportionate and therefore [did] not violate the Eighth Amendment’s prohibition on cruel and unusual punishments.” Id. at 30-31.

Similar to Mr. Ewing, Respondent has a substantial criminal history. Maryland convicted Respondent of two infamous crimes in the 1980’s and an armed robbery in 2004. Because of this second violent felony, Maryland imposed the stricter permanent voting restriction on him. The parallels between the “three-strikes” law applied to Mr. Ewing and § 3-102(c) applied to Respondent should influence the Court to reach a similar result here.

2. Disfranchisement is not “grossly disproportionate” where Respondent is a repeat-felon who has been convicted of a subsequent infamous crime.

i. The states are the primary regulators of criminal and voting restrictions.

It can hardly be ignored that felon disfranchisement is a controversial topic, recently more prominent in our national discourse following the 2000 Presidential Election when a large number of Floridians were improperly removed from Florida’s voter rolls because their surnames matched those of convicted felons. See U.S. Comm’n on Civil Rights, Voting Irregularities

in Florida, ch. 5 (2001). Arguably, improperly applied disfranchisement regulations, as well as disfranchisement schemes generally, deserve public scrutiny after such mishaps. Such scrutiny, however, should not come from the courts.

In Ewing, the plurality likewise noted substantial public criticism about California's three-strikes law. 538 U.S. at 27. The Court, however, appreciated what the court of appeals failed to heed here -- "[t]his criticism is appropriately directed at the legislature, which has primary responsibility for making . . . difficult policy choices . . . [and this Court does] not sit as a 'superlegislature' to second-guess these policy choices." Id. at 28. Rather, the Court held that "[it] is enough that the State of California has a reasonable basis for believing that dramatically enhanced sentences for habitual felons 'advance[s] the goals of [its] criminal justice system in any substantial way.'" Id. at 28 (quoting Solem v. Helm, 463 U.S. 277, 297, n.22 (1983)). Moreover, this Court has held that our federal system leaves matters of criminal law enforcement, United States v. Lopez, 514 U.S. 549, 560, n.3 (1995), and election law, Carrington v. Rash, 380 U.S. 89, 91 (1965), primarily to state regulation and not the federal government. For the federal judiciary to intervene in such matters would upset the state-federal balance intended by the Framers.

Here, the interests of federalism grant Maryland wide discretion to regulate criminal conduct and voting. By finding that § 3-102(c) may have violated the Eighth Amendment, the court of appeals impermissibly acted as a “superlegislature” and unnecessarily upset the balance between federal and state power.

ii. The Constitution mandates no single penalogical theory.

Additionally, in finding that “§ 3-102(c) cannot be justified as anything but retribution . . . [which] is arbitrarily harsh,” the court of appeals improperly overruled the Maryland General Assembly’s policy choice in favor of its subjective preference for a different penalogical scheme. (R. at 40-41.) Besides encroaching on Maryland’s prerogative to regulate criminal and election law, the court overlooks other plausible rationales behind § 3-102(c) -- rationales permissible under the Constitution and this Court’s jurisprudence.

As Justice Kennedy noted succinctly in Harmelin, “the Eighth Amendment does not mandate adoption of any one penalogical theory.” 501 U.S. at 999. Applying this principle in Ewing, the Court found that the California three-strikes law’s enhanced sentencing structure could advance the penalogical goals of incapacitation of, retribution for, and deterrence against career criminals. 538 U.S. at 25-26. Furthermore, the plurality noted, “[r]ecidivism has long been recognized as a legitimate basis for increased punishment.” Id. at 25.

Like California's three-strikes law, § 3-102(c) places different restrictions on repeat non-violent versus repeat violent felons, like Respondent. As the court of appeals correctly noted, "§ 3-102(c) operates as a 'two-strikes' rule for disfranchisement." (R. at 40.) Therefore, contrary to the court of appeals' findings, § 3-102(c), by punishing violent recidivists more harshly than non-violent offenders, not only exacts retribution but attempts to deter career criminals (and would-be career criminals) from committing future crimes. Its only difference from a traditional three-strikes law stems from its failure to incapacitate via higher prison sentences. When the Maryland General Assembly amended § 3-102 in 2002, it thus made a judgment that insulating the franchise from career criminals while simultaneously deterring them from committing future crime could be achieved under § 3-102(c)'s permanent disfranchisement provision. "Nothing in the Eighth Amendment prohibits [Maryland] from making that choice. To the contrary, [this Court's] cases establish that 'States have a valid interest in deterring . . . habitual criminals.'" Ewing, 538 U.S. at 25 (quoting Parke v. Raley, 506 U.S. 20, 27 (1992)).

Lastly, the court of appeals cites no authority (nor is Petitioner aware of any) to support its finding that permanent disfranchisement is "arbitrarily harsh." (R. at 41.) Rather, the court merely notes that "Appellant [Respondent] would only be

temporarily disfranchised, if he had no prior conviction; he receives the harsher, permanent sanction simply because of his single prior conviction for possession of 10 grams of cocaine.” (Id.) The court restates the obvious. Maryland has the prerogative to place harsher regulations on recidivists than it does on first-time offenders. Because Respondent has committed a second violent crime and has shown an inability to conform his conduct to the law, Maryland may disfranchise him. Neither this Court nor the court of appeals should substitute its policy preferences for those of the Maryland General Assembly.

iii. Although intra- and interjurisdictional comparisons regarding Petitioner’s sentence are unnecessary and inappropriate, such comparisons should not lend support to Respondent’s attack.

Because a comparison of Respondent’s crime with his disfranchisement has not led to an inference of gross proportionality, intra- and interjurisdictional comparisons are useless as a matter of law. The court of appeals improperly entertained these comparisons, which may have tainted its decision to strike down § 3-102(c) as applied to Respondent. (Record at 39.) Even if this Court employed a comparative analysis, the statistics supplied by Respondent neither suggest uneven application of punishments to convicted criminals within Maryland nor as between Maryland and other states. Respondent proffered no facts in his complaint, which would allow the court of appeals to find a trend among the states away from

disfranchisement policies.² Furthermore, although Respondent claims that 12 states, including Maryland, have relaxed their disfranchisement policies since 1997 (Compl. ¶ 14, R. at 14), Respondent does not account for why any of these states relaxed, but did not completely disavow, felon disfranchisement as a policy choice. This Court can only infer that these state legislatures found value in retaining the restrictions.³ This Court should respect that policy choice, and be wary of using “‘the aegis of the Cruel and Unusual Punishment Clause’ to cut off the normal democratic processes.” Atkins v. Virginia, 536 U.S. 304, 323 (2002) (Rehnquist, C.J. dissenting) (quoting Gregg v. Georgia, 428 U.S. 153, 175-76 (1976)(plurality opinion)).

CONCLUSION.

The judgment of the court of appeals should be reversed.

Respectfully submitted,

/s/

Attorneys for Petitioner, ID 10678

Date: January 23, 2005

² Section 3-102(c) applies equally to all felons with similar criminal histories to Respondent’s. Maryland also temporarily disfranchises felons who have committed infamous crimes, including non-violent crimes. See Md. Election Law § 3-102(b).

³ Maryland legislators passed H. 535/S. 184 to “liberaliz[e] [its] prior, very strict disfranchisement law.” (93 Op. Att’y Gen 5, R. at 44.) The Court may infer that legislators favored retaining permanent disfranchisement for some repeat offenders.