

IN THE  
Supreme Court of the United States

MARYLAND STATE BOARD OF ELECTIONS ET AL.,  
PETITIONERS,

v.

JEFFREY COOLIDGE,  
RESPONDENTS.

---

On Petition for a Writ of Certiorari to the  
United States Court of Appeals for the Fourth Circuit

---

Brief for the Petitioner

---

Team #10726

## QUESTIONS PRESENTED

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

**TABLE OF CONTENTS**

**QUESTIONS PRESENTED** ..... **ii**

**TABLE OF CONTENTS** ..... **iii**

**TABLE OF AUTHORITIES** ..... **v**

**BASIS FOR JURISDICTION** ..... **ix**

**STATEMENT OF THE FACTS** ..... **1**

**SUMMARY OF THE ARGUMENT** ..... **3**

**ARGUMENT** ..... **5**

**I. The VRA does not Apply to Section 3-102.** ..... **5**

    A. Congress did not have the authority to bar felon disenfranchisement statutes in enforcing the VRA. .... **6**

        1. Absent Congressional finding of discrimination, Section 3-102 is immune from the VRA. .... **7**

        2. The failure of this application to differentiate between discriminating and non-discriminating states renders it overbroad and unconstitutional. .... **9**

        3. The Fourth Circuit’s remedy is overbroad and unconstitutional because it lacks a sunset clause. .... **10**

    B. Section Two of the Fourteenth Amendment Prohibits the Application of the VRA to Section 3-102. .... **10**

        1. A statute may not override a Constitutional provision. .... **10**

        2. The doctrine of Constitutional avoidance bars interpreting the VRA against Section 3-102 unless such an interpretation is unavoidable. .... **11**

        3. Such an interpretation is neither unavoidable nor possible. .... **12**

    C. The VRA cannot be interpreted to alter the federal-state balance of power since Congress failed to clearly state its intent to do so. .... **17**

**II. Maryland’s disenfranchisement of a violent felon, predicated on his prior convictions of an infamous crime, does not violate the Eight Amendment. . . . . 18**

A. The Eight Amendment does not reach nonpenal provisions like Maryland’s felon disenfranchisement law. . . . . 18

    1. Felon disenfranchisement has historically been held nonpenal by the federal courts. . . . . 18

    2. Courts have recognized felon disenfranchisement laws serve legitimate regulatory purposes. . . . . 20

    3. The Fourteenth Amendment affirmation of felon disenfranchisement precludes an Eighth Amendment challenge. . . . . 20

B. Even if Section 3-102 is construed as a penal statute, it is neither cruel nor unusual. . . . . 21

    1. Modern societal standards in the U.S. permit the disenfranchisement of violent felons. . . . . 21

    2. Section 3-102 respects the norms and principles protected by the Eighth Amendment. . . . . 25

C. Maryland’s disenfranchisement of violent felons is reasonable and proportional. . . . . 25

    1. Section 3-102 must be upheld unless ‘grossly disproportionate.’ . . . . 26

    2. The Fourth Circuit erred in declaring Maryland’s Election Law 3-102(c) arbitrarily harsh. . . . . 28

    3. States may diverge in their degree of severity when dealing with criminals. . . . . 29

**CONCLUSION . . . . . 30**

## TABLE OF AUTHORITIES

### Cases

<u>Atascadero State Hospital v. Scanlon</u> , 473 U.S. 234 (1985) .....	17
<u>Atkins v. Virginia</u> , 535 U.S. 304 (2002).....	<i>passim</i>
<u>Baker v. Patake</u> , 85 F.3d 919 (2d. Cir. 1996).....	11
<u>Chisom v. Roemer</u> , 501 U.S. 380 (1991) .....	13
<u>City of Boerne v. Flores</u> , 521 U.S. 507 (1990)...	6, 7, 8, 10
<u>City of Rome v. U.S.</u> , 446 U.S. 156 (1980) .....	10
<u>Coker v. Georgia</u> , 433 U.S. 584 (1977) .....	26
<u>Cross v. Newport News</u> , 228 S.E. 113 (Va. 1976) .....	16
<u>Eward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. &amp; Constr. Trades Council</u> , 485 U.S. 568 (1988) .....	12
<u>Ewing v. California</u> , 538 U.S. 1181 (2003) .....	26, 27
<u>Farrakhan v. Locke</u> , 987 F.Supp. 1304 (N.D. Ga. 1997) .....	19, 21
<u>Farrakhan v. Washington</u> , 338 F.3d 1009 (9 <sup>th</sup> Cir. 2003) .....	6
<u>Fincher v. Scott</u> , 352 F. Supp. 117 (D.N.C. 1972).....	23
<u>Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savs. Bank</u> , 527 U.S. 627 (1999) .....	7
<u>Green v. Bd. of Elections of New York</u> , 380 F.2d 445 (2d Cir. 1967) .....	19
<u>Gregg v. Georgia</u> , 428 U.S. 153 (1976) .....	22
<u>Gregory v. Ashcroft</u> , 501 U.S. 452 (1991) .....	17, 18
<u>Harmelin v. Michigan</u> , 501 U.S. 957 (1991) .....	<i>passim</i>
<u>Johnson v. Bush</u> , 405 F.3d 1214 (11 <sup>th</sup> Cir. 2005) ...	5, 12, 13

<u>Koons Buick Pontiac GMC, Inc., v. Nigh,</u> 543 U.S. 50 (2004)	.....17
<u>Kronlund v. Honstein,</u> 327 F.Supp 1304 (E.D. Wash. 1971)	.....19, 20
<u>Lambert v. Barrett,</u> 78 S.E. 586 (Va. 1913)	.....16
<u>Lassiter v. Northampton County Bd. of Elections,</u> 360 U.S. 45 (1959)	.....20
<u>Muntaqim v. Coombe,</u> 366 F.3d 102 (2d Cir. 2004)	.....5, 18
<u>Oregon v. Mitchell,</u> 400 U.S. 112 (1970)	.....6, 8
<u>Owens v. Barnes,</u> 711 F.2d 25 (3 <sup>rd</sup> Cir. 1983)	.....7
<u>Richardson v. Ramirez,</u> 418 U.S. 24 (1974)	....7, 11, 20, 21
<u>Romer v. Evans,</u> 517 U.S. 620 (1996)	.....21
<u>Roper v. Simmons,</u> 125 U.S. 1183 (2005)	..... <i>passim</i>
<u>Rummel v. Estelle,</u> 445 U.S. 263 (1980)	.....26, 27, 28
<u>Shepherd v. Trevino,</u> 575 F.2d 111 (5 <sup>th</sup> Cir. 1978)	.....20
<u>Solid Waste Agency of N. Cook County v. U.S Army</u> <u>Corps of Engineers,</u> 531 U.S. 159 (2001)	.....17
<u>South Carolina v. Katzenbach,</u> 383 U.S. 301 (1966)	.7, 9, 10
<u>Shepherd v. Trevino,</u> 575 F.2d 1110 (5 <sup>th</sup> Cir. 1978)	.....20
<u>Solem v. Helm,</u> 463 U.S. 277 (1983)	.....26
<u>Thornburg v. Gingles,</u> 478 U.S. 40 (1987)	.....13
<u>Trop v. Dulles,</u> 356 U.S. 86 (1958)	.....19, 21, 25
<u>U.S. v. Delaware &amp; Hudson,</u> 213 U.S. 366 (1909)	.....11
<u>U.S. v. Morrison,</u> 529 U.S. 598 (2000)	.....9
<u>U.S. v. Will,</u> 449 U.S. 200 (1980)	.....16
<u>Wesley v. Collins,</u> 791 F.2d 1255 (6 <sup>th</sup> Cir. 1986)	....6, 13
<u>Weems v. United States,</u> 217 U.S. 341 (1910)	.....26

**Federal Statutes**

Voting Rights Act of 1965, 42 U.S.C. § 1973 .....*passim*  
Civil Rights Act of 1871, 42 U.S.C. § 1983 .....1

**Maryland Statutes**

Md. Code Ann., Election Law §3-102(c) .....1  
Md. Code Ann., Election Law §3-102(b) .....1, 3, 5  
Md. Code Ann., Criminal Law §14-101(a) .....1, 5

**Constitutional Provisions**

U.S. Const., amend VIII .....*passim*  
U.S. Const., amend X..... 11  
U.S. Const., amend XIV .....*passim*  
U.S. Const., amend XV.....2  
U.S. Const., article VI §2 .....10

**Other Material**

Steven Carbo et al., *Democracy Denied: The Racial History and Impact of Disenfranchisement Laws in the United States*(2003) .....5, 18  
Brian DeBose, *Black Caucus Shows Constituent Changes*, Washington Times (May 6, 2005) .....14  
H.R.Rep. No. 89-439 (1965) .....15  
Marc Mauer, "Race, Poverty and Felon Disenfranchisement," *Poverty & Race* (July/August 2002) ..... 15  
Brian Pinaire et. al, *Barred from the Vote: Public Attitudes Toward the Disenfranchisement of Felons*, 30 Fordham Ur. L.J. 1519 (2003) .....23  
Lawrence Tribe, *American Constitutional Law* §6-25 (2d. ed. 1988) .....18

The Sentencing Project, "Felony Disenfranchisement  
Laws in the United States" (Mar. 2005) .....22

The Sentencing Project, "Public Attitudes  
Towards Felon Disenfranchisement in the  
United States" (2002) .....23

The Sentencing Project, "Summary of Changes to  
State Felon Disenfranchisement Laws 1865-2003" .....25

S.Rep. No. 97-417 (1982) .....14

S.Rep. No 295, 97<sup>th</sup> Cong. 2d Sess. 27 .....15

S.Rep. No. 89-162 (1965) .....15

## **BASIS FOR JURISDICTION**

The judgment of the Court of Appeals was entered on July 16, 2005. The Maryland State Board of Elections' petition for a writ of certiorari was granted on October 14, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## **STATEMENT OF THE FACTS**

In 1982, Plaintiff Jeffrey Coolidge (hereinafter "Coolidge") was arrested and convicted for possession with intent to distribute a controlled substance. He was released in 1984 after serving a one year prison sentence. While on probation, he was again indicted and convicted for possession of one gram of cocaine, receiving a sentence of six months in jail. In 2004, Coolidge robbed a convenience store, threatening to assault the clerk behind the cash register. This time he was indicted and convicted of robbery. In the state of Maryland, robbery is considered a crime of violence. Md. Code Ann., Criminal Law §14-101(a). As a result, Coolidge received a five year prison term and five years of probation. Record at 10-12. Under Maryland Election Law, Coolidge was barred from voting by virtue of committing a second or subsequent crime of violence. Md. Code Ann., Election Law § 3-102(c).

Coolidge challenged his ineligibility to vote in Maryland, bringing an action in the District Court of Maryland against the Maryland State Board of Elections, the State Administrator of Elections, and the Board of Elections of the City of Baltimore. Id. at 9. Coolidge made his case under 42 U.S.C. §1983, the Eighth Amendment to the Constitution, the Voting Rights Act (VRA), and the

Fourteenth and Fifteenth Amendments to the U.S. Constitution. Id. at 20. Coolidge advanced three arguments. In response to these claims and pursuant to Fed. R. Civ. P. 12(b)(6), defendants filed a motion for dismissal, which the District Court granted. Id. at 21.

On appeal, the Fourth Circuit affirmed the District Court's decision on the first claim, while reversing the decision on claims two and three above. The Court agreed that the Fifteenth Amendment claim was properly dismissed, since Coolidge failed to allege intentional discrimination. Id. at 33. With respect to the second claim, however, court below found that §2 of the Voting Rights Act applied to Maryland's felon disenfranchisement laws. As a consequence, the court ruled that that Maryland's Election law §3-102 interacted with political and social conditions that resulted in Plaintiff's denial of vote on account of race. With respect to the third claim, the Fourth Circuit concluded that felon disenfranchisement was an arbitrarily harsh punishment in violation of the Eighth Amendment of the U.S. Constitution. Id. at 41. The Maryland State Board of Elections now appeals to the Supreme Court in order to reverse the Fourth Circuit's decision.

## SUMMARY OF THE ARGUMENT

The state of Maryland, in the exercise of its Fourteenth Amendment authority, crafted a moderate law to protect the integrity of its elections by disenfranchising infamous felons. Md. Election Law §3-102(b). In striking that law, the court below misstated and misapplied this Court's precedents.

First, the Fourth Circuit held that the VRA requires that any felon, no matter how infamous, be allowed to exercise full voting rights regardless of the Fourteenth Amendment. This violates this Court's teachings on the VRA as well as the rules of statutory construction.

To uphold the Fourth Circuit would require overriding Section Two of the Fourteenth Amendment. It would require a reading of the VRA contrary to its drafters' stated intent, as well as Congress and the courts' practice since. It would require this Court to dramatically increase federal power relative to the states absent a clear statement of Congress' intent to do so. It would require this Court to interpret the VRA to repeal a statute by implication, though *sub silencio* repeal is disfavored. It would require this Court to interpret silence about a broadly accepted practice to imply condemnation, where courts have previously interpreted such silence to suggest acceptance.

It would require this Court to exempt the VRA from its decisions mandating that statutes passed under Congress' Fourteenth Amendment enforcement power be narrowly tailored, congruent and proportional. Finally, it would require this Court to ignore the plain language of the VRA: that a state law is only barred if it abridges the right to vote "on account of race or color."

The court below misinterpreted this Court's Eighth Amendment jurisprudence and ignored the plain text of that Amendment. A law violates the Eighth Amendment only if it is a cruel and unusual punishment. Since no court could find a law with similar analogues in 48 of the 50 states in the Union unusual, the Eighth Amendment by its text permits Section 3-102(b). Moreover, this Court has recognized felon disenfranchisement laws are nonpenal; instead, they regulate and protect the integrity of a state's elections.

Even if this Court subjects Section 3-102(b) to Eighth Amendment scrutiny, precedent sets out only a narrow burden of proportionality for a non-capital penalty. A punishment less severe than the similar punishments meted out by 47 of Maryland's 49 sister states cannot, under the evolving standards of our common morality, be disproportionate.

## ARGUMENT

I. The VRA does not Apply to Section 3-102.

Maryland's statute is considered moderate even by opponents of felon disenfranchisement laws. See Steven Carbo et al., *Democracy Denied: The Racial History and Impact of Disenfranchisement Laws in the United States* 7 (2003) (finding Alabama, Arizona, Delaware, Florida, Indiana, Iowa, Kentucky, Mississippi, Nebraska, Nevada, Tennessee, Virginia, Washington, and Wyoming have the most restrictive disenfranchisement laws). Maryland bars a resident from voting if he commits election fraud, is under guardianship for a mental disability, or is serving a sentence for an infamous crime (or for a second or subsequent infamous crime, his sentence plus a three year waiting period). Md. Code Ann., Election Law §3-102(b). A resident may also be disenfranchised for a second or subsequent crime of violence, whether or not his first crime was violent. Record at 42-44. See Md. Code Ann., Criminal Law §14-101(a) (delineating "crimes of violence").

The Circuits are split on whether Section Two of the VRA applies to felon disenfranchisement. The Second and Eleventh Circuits have held it does not. Johnson v. Bush, 405 F.3d 1214 (11<sup>th</sup> Cir. 2005); Muntaqim v. Coombe, 366 F.3d 102 (2d Cir. 2004). The Ninth Circuit has held it does, as

has the Fourth in this case. Farrakhan v. Washington, 338 F.3d 1009 (9th Cir. 2003). The Sixth Circuit has held the VRA permits such laws even if it applies to them. Wesley v. Collins, 791 F.2d 1255 (6th Cir. 1986).

Congress would have lacked the authority to bar Section 3-102 even had they intended to. The drafters of the VRA neither demonstrated discrimination in Maryland's felon disenfranchisement policy nor crafted a congruent and proportional remedy, and did not clearly state their intention to alter the federal-state balance of power.

A. Congress did not have the authority to bar felon disenfranchisement statutes in enforcing the VRA.

A remedy for a violation of the Civil War Amendments must be "congruent" and "proportional." City of Boerne v. Flores, 521 U.S. 507, 520 (1990). This applies equally to the VRA. Oregon v. Mitchell, 400 U.S. 112 (1970).

Section Five of the Fourteenth Amendment allows Congress to "enforce this Amendment by appropriate legislation." (Congress' Fifteenth Amendment authority is "virtually identical" to and "mirrors" its Fourteenth Amendment authority. Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356, 373 (2001), Mixon v. Ohio, 193 F.3d 389, 398-99 (6<sup>th</sup> Cir. 1999)). However, the Fourteenth Amendment also permits felon disenfranchisement.

It would be absurd for a Fourteenth Amendment power to invalidate other sections of the same Amendment. Thus, states are "within their Constitutional authority" to disenfranchise felons, and felons' right to vote is not a "fundamental" right. Richardson v. Ramirez, 418 U.S. 24 (1974), Owens v. Barnes, 711 F.2d 25, 27 (3rd Cir. 1983).

Moreover, while Congress may restrict practices not prohibited by the Fourteenth and Fifteenth Amendments, that power is not absolute. See South Carolina v. Katzenbach, 383 U.S. 301 (1966), Boerne, 521 U.S. 507. In the instant case, Congress failed to create a record of discriminatory use of felon disenfranchisement statutes, to distinguish between states with a history of discriminatory use and those with no such history, and to provide a sunset date or mechanism for its putative prophylactic remedy.

1. Absent Congressional finding of discrimination, Section 3-102 is immune from the VRA.

To justify prophylactic legislation based on remedying discrimination, Congress must set forth a record of discrimination by "identify[ing] conduct transgressing... the substantive provisions of the Amendments" and then "tailor its legislative scheme to remedying or preventing such conduct." Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savs. Bank, 527 U.S. 627, 639 (1999). Under

this principle, practices not explicitly forbidden by the Constitution are presumed to be non-discriminatory until Congress demonstrates they are discriminatory. Only then may Congress use its Section Five power. Congress made no findings about felon disenfranchisement laws, and so would have overstepped its authority by enacting legislation to remedy discrimination it had not shown to exist.

The legislative findings requirement applies to the VRA. In Oregon, Justice Black distinguished an amendment to the VRA barring literacy tests from an impermissible amendment reducing the voting age thusly: "Congress had before it a long history of discriminatory use of literacy tests..." but "made no legislative findings" that the age requirement was used to discriminate. 400 U.S. at 130, 132.

The court below admitted Congress must make specific findings, and even noted a similar lack of specific findings was seen as a critical flaw by this Court in Boerne. Record at 36. Rather than concluding that Congress would have exceeded its enforcement power by barring felon disenfranchisement laws, the Fourth Circuit asserted that:

In documenting violations, Congress need not make specific findings on a case-by-case basis. Rather, the extensive findings it has made regarding widespread and ingrained racial discrimination in voting ... motivate the full coverage of the Act without the necessity of findings specific to felon disenfranchisement. Record at 36.

After a rhetorical paeon to the importance of the right to vote, but without citing authority for its revolutionary extension of Congressional enforcement power, the Fourth Circuit concluded its discussion of the VRA. Record at 37.

Section Five does not provide Congress a blank check to invalidate state laws. Laws may be struck only to prevent or deter discrimination. Otherwise, states' role as administrators of elections and, since protecting the integrity of the ballot box protects the polity at large, states' police power would both be eviscerated.

2. The failure of this application to differentiate between discriminating and non-discriminating states renders it overbroad and unconstitutional.

A prophylactic remedy is overbroad if it "applies uniformly throughout the nation," rather than only where necessary to prevent discrimination. U.S. v. Morrison, 529 U.S. 598, 626 (2000). The Morrison court noted that sections of the VRA had been upheld in Katzenbach because they had been tailored to discriminating states, and held the Violence Against Women Act's failure to differentiate rendered it unconstitutional. Id. at 626-27. In this case, the Fourth Circuit applies its restriction regardless of discrimination, suggesting even the 29 states which had felon disenfranchisement statutes before African-Americans were allowed to vote could be found discriminatory.

3. The Fourth Circuit's remedy is overbroad and unconstitutional because it lacks a sunset clause.

The Boerne Court found the lack of a sunset mechanism was a serious flaw in the Religious Freedom Restoration Act (RFRA). 521 U.S. at 532. The Court contrasted RFRA's infinite length with time-limited sections of the VRA which had been upheld. Id. at 533, citing Katzenbach, supra, and City of Rome v. U.S., 446 U.S. 156 (1980) (provisions which sunset after five and seven years, respectively).

In the matter *sub judice*, there is no sunset mechanism in the Congressional remedy because there is no explicit remedy. The Fourth Circuit, in usurping Congress' legislative power, also suggested no sunset provision. As a result, it failed to "ensure Congress' means are proportionate to ends legitimate under" Section Five, and is "so out of proportion... that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." Boerne, 521 U.S. at 532-533.

B. Section Two of the Fourteenth Amendment Prohibits the Application of the VRA to Section 3-102.

1. A statute may not override a Constitutional provision.

It is a basic tenet of law that no statute can override a Constitutional provision. U.S. Const., Article VI §2. In the instant case, however, a finding for

Respondents would require that the VRA do just that:  
eviscerate the right guaranteed states by Section Two of  
the Fourteenth Amendment to protect the integrity of their  
ballot box by barring particular groups of infamous felons.

The Constitution enumerates few other state powers.  
State powers are generally derived from the Tenth  
Amendment, which reserves powers not given the federal  
government "to the States... or to the people." Our  
Constitutional structure and states' history of exercising  
this right suggest it is very strongly guaranteed.

It is unthinkable that Congress intended to permit and  
prohibit felon disenfranchisement within the same  
Amendment. See Richardson, 418 U.S. 24; Baker v. Pataki, 85  
F.3d 919, 928-29 (2d. Cir. 1996). The Fourth Circuit relied  
on inferred authority which was neither intended nor  
envisioned by the Framers of the Fourteenth Amendment.

2. The doctrine of Constitutional avoidance bars  
interpreting the VRA against Section 3-102 unless  
such an interpretation is unavoidable.

To protect Constitutional supremacy, Courts erected a  
safe zone around Constitutional provisions, holding that  
ambiguous statutory language should be interpreted to avoid  
any Constitutional issues, even if those issues would not  
necessarily render the statute unconstitutional. U.S. v.  
Delaware & Hudson, 213 U.S. 366, 408 (1909) ("[W]here a

statute is susceptible of two constructions, by one of which ... constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter"). Indeed, precedent requires a finding of Congress' "manifest intent" before this Court adopts a Constitutionally questionable construction of a statute. See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988).

The Eleventh Circuit emphasized the canon of Constitutional avoidance in refusing to construe the VRA to constrain the power granted the states by Section Two of the 14th Amendment. Johnson, 405 F.3d 1214.

3. Such an interpretation is neither unavoidable nor possible.

a. The VRA's Plain Language Permits Section 3-102.

The VRA forbids only a "voting qualification or prerequisite to voting or standard, practice, or procedure ... which results in a denial or abridgement of the right of any citizen ... to vote on account of race or color." 42 U.S.C. § 1973(a). Because the relationship of recidivist violent felons' disenfranchisement to their race or color is severely attenuated, felon disenfranchisement statutes are beyond the scope of Section Two of the VRA.

For felon disenfranchisement to be forbidden by the VRA,

any disproportionate impact would have to "result" from the state's qualification of the right to vote on account of race or color. Wesley, 791 F.2d at 1262. However, felons' disenfranchisement does not result from race - every voter may vote *ab initio*, and only a conscious decision to violate the law by which a citizen "assume[s] the risk of detention and punishment" may result in a felon's disenfranchisement. Id. Consequently, the plain language of the VRA does not forbid felon disenfranchisement, and so challenging § 3-102 under the VRA cannot succeed.

Respondents may argue that because of the overrepresentation of African-Americans in Maryland's criminal justice system, their right to vote is being denied or abridged on account of race in violation of the VRA. However, this is insufficient to establish a violation. Johnson, 405 F.3d at 1240, citing Chisom v. Roemer, 501 U.S. 380, 383 (1991) ("certain," but not all, "practices... that result in the denial or abridgement of the right to vote are forbidden [despite] the absence of proof of discriminatory intent"). Insufficient, too, is the allegation that racial inequality is caused by the "interaction of social and historical conditions" with Maryland's political practices. Cf. Thornburg v. Gingles, 478 U.S. 40, 47 (1987). The drafters of the 1982 amendments

set out factors to determine whether such interaction results in a VRA violation, including: history of official discrimination; racial polarization; ongoing effects of discrimination affecting political access; racial appeals in campaigns; minorities getting elected; responsiveness to minority concerns; and policies underlying the law at issue. S. Rep. No. 97-417 at 28-29 (1982).

Section 3-102 was liberalized just three years ago, in a state which immediately thereafter elected an African-American Lieutenant Governor and currently has leading African-American candidates for the U.S. Senate from both parties as well as two Congressmen and a leading candidate for Lieutenant Governor. Consequently, no history of discrimination since the amended Section 3-102 was passed can be alleged, racial polarization is limited, and minorities are elected to public office at a relatively high rate compared to the rest of the country. Maryland also boasts the single county with the greatest concentration of African-American wealth nationwide, Prince George's county. See Brian DeBose, *Black Caucus Shows Constituent Changes*, Washington Times (May 6, 2005).

b. The intent of the framers of the VRA was not to preclude felon disenfranchisement statutes.

The drafters of the 1982 amendments to the VRA intended

that Section Two would preclude a facially neutral state law only if, based on the "totality of the circumstances," the challenged law "results" in dilution of the voting power of a minority group on account of race. S.Rep. No. 205, 97th Cong. 2d Sess. 27, reprinted in 1982 U.S. Code Cong. & Ad. News 177 (hereafter "Senate Report"). They were silent as to the impact of this amendment on felon disenfranchisement statutes. However, the framers of the VRA itself were quite explicit: both the House and Senate Judiciary Committees stated in 1965 that the VRA was *not* intended to bar felon disenfranchisement statutes. S.Rep. No. 89-162, at 24 (1965), reprinted in 1965 U.S.C.C.A.N. 2508, 2562 (joint views of Senators Thomas J. Dodd, Hart, Long, Kennedy, Bayh, Burdick, Tydings, Dirksen, Hruska, Fong, Scott, and Javits); H.R.Rep. No. 89-439, at 25-26 (1965) (reprinted in 1965 U.S.C.C.A.N. 2437, 2457).

Recently, too, Congress has rejected attempts to increase felon franchise. See Marc Mauer, "Race, Poverty and Felon Disenfranchisement," *Poverty & Race* (July/August 2002), available at [http://www.prrac.org/full\\_text.php?text\\_id=759&item\\_id=7794&newsletter\\_id=63&header=Criminal+Justice](http://www.prrac.org/full_text.php?text_id=759&item_id=7794&newsletter_id=63&header=Criminal+Justice) (noting that a bi-partisan amendment to allow felons to vote in federal elections was defeated 63-31 in 2002). Neither the 107th

Congress which considered this amendment, nor the 89th Congress which passed the VRA, nor the 97th Congress which amended it showed disapproval of felon disenfranchisement, let alone intent to eviscerate states' traditional right to use it to protect the integrity of their elections.

c. The VRA cannot repeal Section 3-102 *sub silencio*.

Courts do not favor "repeal by implication" unless the statutes are "irreconcilable." Cross v. Newport News, 228 S.E. 113, 116 (Va. 1976), Lambert v. Barrett, 78 S.E. 586, 587 (Va. 1913). See also United States v. Will, 449 U.S. 200 (1980). In this case, the Fourth Circuit interpreted the VRA to implicitly repeal statutes in 48 states.

Will does set out one circumstance where repeal by implication is permissible: where intent to repeal is unambiguous. 449 U.S. 221, 224. In the case of felon disenfranchisement statutes, however, Congress' intent, where it is clear, seems to have been to protect states' rights to enact such statutes. See infra § I(B) (3) (b).

d. Congress' silence with regards to felon disenfranchisement implies acceptance.

Where a particular practice is widespread, Congress can be expected to bar it explicitly if they intend to bar it. Given the ubiquity of felon disenfranchisement statutes and the 1965 Reports' explicitly endorsement of the

practice, the 1982 Amendments' silence is revealing. Courts have analogized similar silences to the dog that didn't bark in "The Hound of the Baskervilles" - finding that Congress' silence demonstrates satisfaction with the status quo, just as the dog's silence demonstrated he was accustomed to the murderer being in the house. See Koons Buick Pontiac GMC, Inc., v. Nigh, 543 U.S. 50 (2004) (inferring in the absence of evidence Congress intended to alter the limits for violations of the Truth in Lending Act that Congress' intent was to continue the status quo).

C. The VRA cannot be interpreted to alter the federal-state balance of power since Congress failed to clearly state its intent to do so.

Courts will only interpret ambiguous statutory language to allow for "federal encroachment on a traditional state power" if Congress clearly states its intent to alter that balance. Solid Waste Agency of N. Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159, 173 (2001). Federal courts may not interpret a statute to "upset the usual balance of federal-state power" unless Congress' intent to do was "unmistakably clear." Gregory v. Ashcroft, 501 U.S. 452, 461 (1991), Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242 (1985). In this case, states' discretion to restrict felons' voting rights is "well established" and there is no "affirmative

intention" to bar Section 3-102 in the text of the VRA. Muntaqim, 366 F.3d at 112, 126. As a result, striking it would be a judicial overreach, undermining federalism by giving "state-displacing power to mere Congressional ambiguity." Gregory, 501 U.S. at 464 (citing Lawrence Tribe, American Constitutional Law § 6-25, p. 480 (2d. ed. 1988)). This rule applies as well to Fourteenth Amendment litigation. Gregory, 501 U.S. at 467-68.

The Second Circuit noted that states' discretion to disenfranchise felons is well established. It is also near-universally exercised: 48 of the 50 states ban felons from voting at some point or another. See Carbo, supra. Thus, reading an assertion of power into this ambiguity would dramatically and impermissibly decrease state's rights.

II. Maryland's disenfranchisement of a violent felon, predicated on his prior convictions of an infamous crime, does not violate the Eight Amendment.

Courts have consistently ruled that statutes like Section 3-102 are nonpenal and beyond the reach of the Eighth Amendment. Even if this Court elects to conduct such an analysis, the universality of felon disenfranchisement precludes it from being found cruel and unusual.

A. The Eight Amendment does not reach nonpenal provisions like Maryland's felon disenfranchisement law.

1. Felon disenfranchisement has historically been held nonpenal by the federal courts.

The Eighth Amendment to the Constitution requires that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." Yet disenfranchisement is not a form of punishment subject to Eight Amendment scrutiny. The Supreme Court has long established that laws prohibiting criminals from voting are a "nonpenal exercise of the power to regulate the franchise." Trop v. Dulles, 356 U.S. 86, 96 (1958). Lower courts have consistently followed this premise, ruling that disenfranchisement laws are regulatory in nature and not subject to Eight Amendment analysis. See Green v. Bd. of Elections of New York, 380 F.2d 445, 450 (2d Cir. 1967), Kronlund v. Honstein, 327 F.Supp. 71, 73 (E.D. Wash. 1971), Farrakhan v. Locke, 987 F.Supp. 1304, 1314 (N.D. Ga. 1997).

In Trop, Justice Marshall explained that a statute is considered nonpenal if "it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose." Trop, 356 U.S. at 96. The Trop court used this case as an example, finding that when a felon loses his liberty and right to vote, the latter is a nonpenal exercise of a state's legitimate power to regulate the franchise. Id. Under Trop, statutes like Section 3-102 are passed to protect electoral integrity, not punish. Id.

2. Courts have recognized felon disenfranchisement laws serve legitimate regulatory purposes.

States have a legitimate interest in preserving the integrity of their electoral process. See Kronlund, 327 F.Supp. at 71. States may protect the electoral system by forbidding individuals with a proven anti-social behavior from voting. Id.; see also Shepherd v. Trevino, 575 F.2d 1110, 1115 (5th Cir. 1978) (holding states have a legitimate interest in excluding ex-felons from the franchise). Moreover, States may reasonably fear that individuals guilty of a felony on top of other infamous crimes may have a tendency to disrupt the electoral system. Id. The Constitution empowers States to consider prior criminal records in regulating the franchise. See Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 51 (1959) (addressing voting standards within States' jurisdiction). These legitimate state interests are protected by Section 3-102.

3. The Fourteenth Amendment affirmation of felon disenfranchisement precludes an Eighth Amendment challenge.

In Richardson v. Ramirez, this Court found dispositive the affirmative sanction of felon disenfranchisement found in Section 2 of the Fourteenth Amendment. Richardson, 418 U.S. at 54. The Court held that the express language in the Constitution sanctioning this practice was of "controlling

significance" with respect to constitutional challenges of felon disenfranchisement provisions, since it would be absurdly inconsistent to hold that what the Constitution recognizes under the Fourteenth Amendment, it prohibits under the Eight Amendment. Farrakhan v. Locke, 987 F.Supp. at 1314. Additionally, the Supreme Court has held that "exclusion of convicted felons from the franchise violates no constitutional provision," Richardson, 418 U.S. at 53, aff'd Romer v. Evans, 517 U.S. 620, 634 (1996) (recognizing states' right to deny convicted felons the vote).

B. Even if Section 3-102 is construed as a penal statute, it is neither cruel nor unusual.

1. Modern societal standards in the U.S. permit the disenfranchisement of violent felons.

Trop v. Dulles announced that the Eight Amendment must draw its meaning from the "evolving standards of decency that mark the progress of a maturing society." 356 U.S. at 101. Recently, the Supreme Court reaffirmed that "cruel and unusual punishments" must be judged by modern standards. Roper v. Simmons, 125 U.S. 1183, 1190 (2005). Legislation enacted by the country's legislatures is the clearest and most objective evidence of contemporary value standards. Atkins v. Virginia, 535 U.S., 304, 312 (2002). This is because "in a democratic society legislatures, not courts, are constituted to respond to the will and consequently the

moral values of the people." Gregg v. Georgia, 428 U.S. 153, 175-176 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.). The prevalence of felon disenfranchisement statutes as well as public attitudes demonstrate modern standards do not regard them as either cruel or outmoded.

Forty-eight states and the District of Columbia prohibit inmates from voting while incarcerated for a felony. Only Maine and Vermont allow prisoners to vote. See The Sentencing Project, "Felony Disenfranchisement Laws in the United States" (Mar. 2005) *available at* <http://www.sentencingproject.org/pdfs/1046.pdf>. Thirty-six states prohibit felons on parole from voting; thirty-one states restrict felons on probation. Id. Thirteen states (including the District of Columbia) disenfranchise ex-felons in some way or other after they complete their sentences. Florida, Kentucky, Iowa, and Virginia bar all ex-felons from voting, a restriction much more severe than Maryland's law. Id. Moreover, no "national consensus," as required by this Court's Eighth Amendment jurisprudence, can exist against a policy enacted by 48 states. See Atkins, 535 U.S. 304. In Roper, only a bare majority of the Court was able to find a type of capital sentence rejected in 29 states was cruel and unusual; Justice O'Connor wrote in dissent, implying a national consensus should not be

found where any state had made an affirmative policy judgment in opposition consensus. 543 U.S. at 575 (O'Connor, J., dissenting). Roper and Atkins represent two of the least unusual punishments ever struck on Eighth Amendment grounds, and both were rejected by a majority of states with a clear national trend towards rejection.

Consequently, lower courts have ruled consistently that the great number of states with disenfranchisement laws forbids the conclusion that this is a "cruel and unusual punishment." See, e.g., Fincher v. Scott, 352 F. Supp. 117, 120 (D.N.C. 1972), aff'd 411 U.S. 961 (1973).

In addition, there is no consensus among the people of the nation that laws like Maryland's are cruel. Forty-four percent of the nation's population believes violent ex-felons should not vote at all. See The Sentencing Project, "Public Attitudes towards Felon Disenfranchisement in the United States" (2002) available at <http://www.sentencingproject.org/pdfs/ManzaBrooksUggenSummary.pdf>. Similarly, in a national survey, 44.2% believed that felons who had served their time should not return to society with the full rights and privileges of a citizen. See Brian Pinaire et. al, *Barred from the Vote: Public Attitudes Toward the Disenfranchisement of Felons*, 30 Fordham Urb. L.J. 1519, 1547 (2003).

In evaluating national consensus against the death penalty for juveniles, the Court in Roper v. Simmons found a national consensus due to the “consistency of the direction of the [legislative] change.” Roper, 125 U.S. at 1193, citing Atkins, 536 U.S. at 315. The Court emphasized that in the previous decade, no state that had prohibited capital punishment for juveniles reinstated it, while several others outlawed it. Id. The Atkins Court similarly found persuasive the fact that no state had recently moved to allow executing the mentally retarded, while sixteen banned the practice. Atkins, 536 U.S. at 315-316.

This sort of trend is noticeably absent in the case of felon disenfranchisement laws. As recently as 1990, Florida passed a law permanently disenfranchising all felons. In 1993, Colorado disenfranchised parolees and Nebraska disenfranchised all felons for non-pardoned out-of-state convictions. In 1995, Pennsylvania imposed a five-year post-prison voting ban. In 1998, Utah amended its constitution to disenfranchise individuals incarcerated for a felony. In 1999, Oregon disenfranchised inmates. Most recently, Massachusetts and New Hampshire voted to strip incarcerated felons of any voting privileges. See “Summary of Changes to State Felon Disenfranchising Laws 1865-2003,” The Sentencing Project. Contrary to the clear repudiation

discerned in Atkins and Roper, the direction states have taken regarding felon disenfranchisement laws shows they are well within community standards of morality.

2. Section 3-102 respects the norms and principles protected by the Eighth Amendment.

Maryland exercised its constitutional power within the limits of "civilized treatment" guaranteed by the Eight Amendment. Trop at 100. The Trop Court held that the use of denationalization as punishment was unconstitutional. Id. at 101. The Court reasoned that denationalization belies the "cardinal principles" of the Constitution. Id. at 102. In contrast, Section 3-102 cannot be considered "cruel and unusual." Section Two of the Fourteenth Amendment specifically grants states the power to deny criminals the right to vote. One can hardly argue a provision contained in the language of the Constitution violates its principles. Felon disenfranchisement is the law in 48 out of 50 states, and is neither cruel nor unusual.

C. Maryland's disenfranchisement of violent felons is reasonable and proportional.

The Supreme Court has recognized that in a noncapital context, "*successful* challenges to the proportionality of particular sentences are *exceedingly rare*." Harmelin v. Michigan, 501 U.S. 957, 1001 (1991) citing Rummel, 445 U.S. at 272 (emphasis added). Consequently, the Court has only

struck down punishments in radical circumstances – where the punishment is “barbaric” or “excessive” in relation to the crime committed. Coker v. Georgia, 433 U.S. 584, 592 (1977). This Court has struck a mandatory life sentence for overtime parking, a sentence of twelve to twenty years at hard labor for falsifying public records, and a life sentence without parole for a bounced check as “grossly disproportionate.” Rummel v. Estelle, 445 U.S. 263, 273 (1980), Weems v. United States, 217 U.S. 341, 381 (1910), Solem v. Helm, 463 U.S. 277, 279 (1983). Unlike these punishments, Section 3-102 is reasonable and proportional as a matter of law.

1. Section 3-102 must be upheld unless ‘grossly disproportionate.’

To successfully challenge a non-capital sentence, a convict must prove it “grossly disproportionate.” Harmelin at 1000 (1991). Otherwise, non-capital sentences are due broad judicial deference.

The Eighth Amendment contains only “a narrow proportionality principle that applies to non-capital sentences.” Ewing v. California, 538 U.S. 1181, 1184 (2003) citing Harmelin, 501 U.S. at 996-97. This principle does not “require strict proportionality between crime and sentence.” Id. at 1186. Accordingly, in Ewing, the Court

upheld California's "Three Strikes and You're Out" law, whose sentencing pattern was similar to Section 3-102. Id. at 1182. According to this sentencing structure, if a defendant committed a second "serious" or "violent" felony, the sentence doubled. A defendant who committed a subsequent "serious" or "violent" felony received an indeterminate term of imprisonment. Id. at 1183.

In analyzing proportionality, the Ewing Court relied on the guidance elicited by Justice Kennedy in his concurring opinion in Harmelin v. Michigan. Id. at 1187. First, the Court recalled the longstanding tradition of deferring to legislatures regarding policy decisions, finding that selecting sentencing rationales is a "policy choice" that belongs to the legislature, not the courts. Id. See, e.g., Rummel v. Estelle, 445 U.S. 263, 275 (1980) (declaring penological judgments are legislative, not judicial).

Otherwise, debate about felon franchisement should take place in the legislature - the body with the responsibility for making such choices. Ewing at 1189. Neither the Fourth Circuit nor the Supreme Court sits as a "superlegislature" to second-guess Maryland's electoral system and voting requirements. Id. Maryland's decision to ban certain repeat offenders from voting deserves the same deference this

Court granted California's "three strikes" law, and must stand unless it is grossly disproportionate.

2. The Fourth Circuit erred in declaring Maryland's Election Law 3-102(c) arbitrarily harsh.

This Court has held the "Eighth Amendment does not require the adoption of any one penological theory." Ewing at 1187, citing Harmelin, 501 U.S. at 998 (Kennedy, J., concurring in part and concurring in the judgment). Instead, a sentence may have various justifications, including incapacitation, deterrence, retribution and rehabilitation. Id. Consequently, courts defer to legislatures' penological theories, and the theory adopted by the state does not alter the proportionality analysis. The court below recognized this principle, but asserted that Section 3-102 can only be justified as retribution and is, therefore, "arbitrarily harsh." Record at 41.

This assertion is erroneous on several grounds. First, Section 3-102 fulfills non-retributive functions. The statute targets recidivism by specifically disqualifying repeat offenders. Targeting recidivists serves a deterrent purpose. Estelle, 445 U.S. at 1144-45. Just as the "three strikes" law did, Section 3-102 deters by targeting recidivists. Moreover, this Court has recognized a threat to electoral integrity may result from allowing felons to

vote. Section 3-102 incapacitates them and neutralizes the threat. Second, even assuming *arguendo* that the purpose of Maryland's sentence is retribution, the Eight Amendment does not require increased scrutiny for retributive sentences. Third, the Court offered no supporting evidence to prove this statute is "arbitrarily harsh." The court below jumped to this conclusion, ignoring the deference usually granted to state legislatures on these issues.

3. States may diverge in their degree of severity when dealing with criminals.

The fact that Maryland's felon disenfranchisement law is more severe than some other states' does not make it disproportionate. Our federal structure contemplates - and embraces - a range of criminal sentences. Harmelin, 501 U.S. at 999. Indeed, Section 3-102 is moderate compared to other similar laws. See infra §II(B)(1). Section 3-102's moderation further proves that the sentence is not "grossly disproportionate." However, even if Section 3-102 were more severe than other similar laws, it would not render it "grossly disproportionate." Id. at 1000. The Constitution tolerates different sentences, and the wisdom to decide sentencing laws is left to the legislature of each state. In their wisdom, Maryland's legislature crafted a

reasonable, moderate remedy which is well within its rights under the Constitution and this Court's precedents.

**CONCLUSION**

For the foregoing reasons, the State of Maryland respectfully requests that this Honorable Court overturn the judgment of the Fourth Circuit Court of Appeals and reinstate the judgment of the District Court.

Respectfully submitted,

MARYLAND STATE BOARD OF  
ELECTIONS 151 West Street,  
Suite 200 Annapolis, MD  
21401;

JANET FALLINS, STATE  
ADMINISTRATOR OF ELECTIONS  
151 West Street, Suite 200  
Annapolis, MD 21401;

BOARD OF ELECTIONS OF THE  
CITY OF BALTIMORE Charles L.  
Benton Bldg., Room 129 417 E.  
Fayette Street Baltimore MD  
21202-3432;

EDWARD D. JONES, ELECTION  
DIRECTOR Charles L. Benton  
Bldg., Room 129 417 E.  
Fayette Street Baltimore MD  
21202-3432

.

---

TEAM 10726