

No. 05-

In the Supreme Court of the United States

MARYLAND STATE BOARD OF ELECTIONS
ET AL., PETITIONERS,

v.

JEFFREY COOLIDGE,
RESPONDENT.

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

PETITION FOR A WRIT OF CERTIORARI

TEAM #10827
AMERICAN CONSTITUTION SOCIETY
MOOT COURT COMPETITION

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?

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STIPULATIONS

1. All documents contained in this Record are to be used for Moot Court purpose only. They are not to be cited or used as a reference in any other context.
2. The two Questions Presented are the two issues on appeal.
3. No other issues are presented in this appeal. In particular, the parties will not argue standing, jurisdiction, or ripeness.
4. Competitors should note the procedural posture of the case. They should take care to argue only matters appropriately before the Supreme Court at this stage.
5. The facts and statistics presented in the Complaint are entirely fictional. Competitors should not do research to confirm, refute, or supplement them.
6. All statutory and case law of the State of Maryland cited within this Record is true and accurate to the best of the authors' knowledge as of October 14, 2005. However, the Opinion of the Attorney General, construing "second or subsequent" crime of violence, is fictional. Competitor may

cite to it as Record at 42-44. Competitors may research Maryland law further.

7. Timothy Abbott addressed the first question presented and Michelle Rutherford addressed the second question presented.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1331, as this action arises under the Civil Rights Act, 42 U.S.C. § 1983; § 2 of the Voting Rights Act, 42 U.S.C. § 1973, and the United States Constitution.

RELEVANT STATUTES & RULES

FEDERAL

U.S. Const. Amend. VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. Amend. XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. But when the right to vote at any election...is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced..

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. Const. Amend. XV.

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude

—

Section 2. The Congress shall have the power to enforce this article by appropriate legislation.

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

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure 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, or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) 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. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Civil Rights Act of 1871, 42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive

relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable...

STATE OF MARYLAND

Md. Const. art. I, § 4.

The General Assembly by law may regulate or prohibit the right to vote of a person convicted of infamous or other serious crime or under care or guardianship for mental disability.

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

(b) Exceptions.- An individual is not qualified to be a registered voter if the individual:

(1) has been convicted of theft or other infamous crime, unless the individual:

(i) has been pardoned; or

(ii) 1. in connection with a first conviction, has completed the court-ordered sentence imposed for the conviction, including probation, parole, community service, restitutions, and fines; or
2. in connection with a subsequent conviction, has completed the court-ordered sentence imposed for the conviction, including probation, parole, community service, restitutions, and fines, and at least 3 years have elapsed since the completion of the court--ordered sentence imposed for the conviction, including probation, parole, community service, restitutions, and fines;

(2) is under guardianship for mental disability; or

(3) has been convicted of buying or selling votes.

(c) Same-Second or subsequent crime of violence- Notwithstanding subsection (b) of this section, an individual is not qualified to be a registered voter if the individual has been convicted of a second or subsequent crime of violence, as defined in § 14-101 of the Criminal Law Article.

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

"Crime of violence" defined. ---- In this section, "crime of violence" means:

(1) abduction; (2) arson in the first degree; (3) kidnapping; (4) manslaughter, except involuntary manslaughter; (5) mayhem; (6) maiming, as previously proscribed under former Article 27, §§ 385 and 386 of the Code; (7) murder; (8) rape; (9) robbery under § 3--402 or § 3--403 of this article; (10) carjacking; (11) armed carjacking; (12) sexual offense in the first degree; (13) sexual offense in the second degree; (14) use of a handgun in the commission of a felony or other crime of violence; (15) an attempt to commit any of the crimes described in items (1) through (14) of this subsection; (16) assault in the first degree; (17) assault with intent to murder; (18) assault with intent to rape; (19) assault with intent to rob; (20) assault with intent to commit a sexual offense in the first degree; and (21) assault with intent to commit a sexual offense in the second degree.

STATEMENT OF THE CASE

On November 4, 2004, the Respondent, a convicted felon, filed a federal question action alleging violations by the Maryland State Board of Elections et al. of § 2 of the Voting Rights Act, 42 U.S.C. § 1973, and the Eighth, Fourteenth, and Fifteenth Amendments of the United States. U.S. Const. amend. VIII, U.S. Const. amend. XIV, U.S. Const. amend. XV. The Appellants moved to dismiss pursuant to Fed. R. Civ. P. 12(b)(6).

On February 23, 2005, the District Court for the District of Maryland granted the motion to dismiss on all causes of action. The Respondent appealed to the United States Court of Appeals for the Fourth Circuit. The Court of Appeals affirmed the dismissal of the Fourteenth and Fifteenth Amendment claims, and reversed the dismissal on the claims regarding violation of the Voting Rights Act and violation of the Eighth Amendment finding for Respondent and holding that § 3 of the Voting Rights Act is applicable Maryland's election law and that permanent felon disenfranchisement is a cruel and unusual punishment as applied to the Respondent. *ACS Moot Ct. R.* 37, 41.

This appeal followed, with certiorari granted on October 14, 2005. *ACS Moot Ct. R.* 3.

STATEMENT OF FACTS

In 1982, Respondent Jeffrey Coolidge was convicted by a jury of possession of cocaine with intent to distribute and sentenced to one year in prison and one year of probation. *ACS Moot Ct. R.* 10-11. In 1984, during his one-year probationary period, Coolidge was convicted for misdemeanor possession of a controlled substance and received a sentence of six months in jail. *ACS Moot Ct. R.* 11. In October 2004, Coolidge was convicted of robbery and sentenced to 5 years in prison and 5 years of probation. *Id.*

Under Maryland law, Coolidge's conviction for possession with intent to distribute is considered an infamous crime as determined by Md. Code Ann., Election law §3-102(b) (Bender 2005). *ACS Moot Ct. R.* 11. Coolidge's conviction of robbery is considered a violent felony under Md. Code Ann., Criminal Law §14-101(a) (Bender 2005). *Id.*

Maryland Election Law §3-501 establishes qualifications for voter registration. Code Ann., Election law §3-102(b) (Bender 2005). Coolidge's conviction of an infamous crime followed by his conviction of a violence crime made him ineligible to vote under Maryland's voter qualification scheme. *ACS Moot Ct. R.* 12. This state regulation caused Coolidge to become removed from the registry of voters after his last sentencing. *Id.*

SUMMARY OF ARGUMENT

I. The Voting Rights Act does not apply to Maryland's felony disfranchisement law. Section 2 of the Fourteenth Amendment expressly provides for felony disfranchisement. Because the Voting Rights Act (VRA) is meant to enforce the Fifteenth Amendment, it cannot be read to limit the Fourteenth Amendment's scope. And, legislative history of the VRA supports this view. Furthermore, federal statutes should not be read as limiting the scope of constitutional amendments, particularly those affecting the federal-state balance of power, unless they expressly do so.

Even if the VRA does apply to Maryland's felony disfranchisement law, the Maryland Election Law §3-102 does not violate the Act. The Maryland legislature did not enact this law to enforce bias against a minority group. Any statistical disparity in its effects are merely incidental. Courts have consistently required more than correlation from challenges to election laws under the VRA. Even if all of Coolidge's allegations are assumed to be true, Coolidge still cannot prove that any effects of § 3-102 on African Americans are causative.

As a result, Coolidge has not made a sufficient showing for a section 2 violation under the VRA and has failed to state a claim on which relief can be granted.

II. The court below erroneously concluded that "the express purpose of felon disenfranchisement is to punish convicted criminals." *ACS Moot Ct. R.* 37. Maryland's Election law §3-102 is a statute approved by the State Legislature for the sole purpose of regulating the voting process. In passing the statute, the legislature indicated it was enacted to "distinguish the qualifications for voter registration." 2002 Maryland Laws Ch. 305 (H.B. 535). As such, the statute clearly serves a legitimate state purpose other than that of punishment. The statute also fails to meet standard penological goals of "incapacitation, deterrence, retribution, or rehabilitation" set out in *Ewing v. California*. 538 U.S. 11, 25. As such, Election Law §3-102 cannot be considered a punishment.

Even if considered a punishment by the court, the court below also erroneously held that felon disenfranchisement is cruel and unusual as determined by the evolving standards of decency test set out by the *Trop* court. *Trop v. Dulles*, 356 U.S. 86. While only 13 states still practice the "most extreme form" of permanent disenfranchisement (*Id.*), another 36 states disenfranchise felons for a set period of time, meaning that overall, 96% of states disenfranchise felons for a given period of time. <http://www.righttovote.org/state.asp>. Felon disenfranchisement is clearly in line with current standards of decency regarding punishment.

When placed under a test for gross disproportionality, the punishment of disenfranchisement fails to significantly outstrip the crimes committed by repeat felony and violent offenders.

ARGUMENT

Both of the Respondent's claims are questions of law, and should be decided on a *de novo* standard of review.

The Supreme Court has ruled that where the issue under review is a question of law applied to individual facts regarding the interpretation of the Eighth Amendment, *de novo* review is generally the appropriate standard. The Supreme Court has ruled that a decision as to "whether the forfeiture is excessive under the Eighth Amendment is a question of law we review *de novo*." *U.S. v. Bajakajian*, 524 U.S. 321, 335. District courts, in deciding whether the punishment imposed in a particular case was cruel or unusual have reviewed claims independently. See, e.g., *State v. Hurbenca*, 669 N.W.2d 668, 674-75 (Neb. 2003).

The Supreme Court has also held that though States have broad discretion "with respect to the imposition of criminal penalties," when a constitutional issue such as the Eighth Amendment's prohibition against cruel and unusual punishment is raised, *de novo* is the appropriate standard of review. *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 433.

In light of Supreme Court and other judicial precedent, the petitioners seek *de novo* review of question regarding violation of the Eighth Amendment prohibition against cruel and unusual punishment.

I. A STATUTORY PROVISION THAT PERMANENTLY DENIES THE RIGHT TO VOTE ONLY TO PERSONS WHO HAVE COMMITTED A SECOND OR SUBSEQUENT VIOLENT FELONY IS NOT A VOTING QUALIFICATION OR PREREQUISITE SUBJECT TO §2 OF THE VOTING RIGHTS ACT, 42 U.S.C. §1973

Maryland's felon disenfranchisement law (§3-102) does not violate the section 2 of the Voting Rights Act (VRA). First, the VRA cannot apply to §3-102 because such an application would violate the Fourteenth and Fifteenth Amendments. Second, such an application clashes with both the legislative history of the VRA and accepted canons of statutory interpretation. Third, §3-102 would not violate the VRA even if the VRA were applied to felon disenfranchisement statutes.

A. EXTENDING THE VOTING RIGHTS ACT OF 1965 TO FELON DISENFRANCHISEMENT WOULD VIOLATE THE FOURTEENTH AND FIFTEENTH AMENDMENTS

The Civil War Amendments expressly sanction felon disenfranchisement, and as a result, application of the VRA to Maryland's felon disenfranchisement statute would be unconstitutional. Under the Fourteenth Amendment, any state may abridge a citizen's voting rights for "participation in rebellion, or other crimes." U.S. Const. Amend. XIV §2. The Fifteenth Amendment is silent on felon disenfranchisement but only bars states from abridging the right to vote "on account of race, color or previous condition of servitude." U.S. Const. Amend XV §1.

Although opponents of felon disenfranchisement contend that the Fifteenth Amendment repeals Section 2 of the Fourteenth

Amendment, prior courts have found no historical evidence to support this counterintuitive claim. See, e.g., *Johnson v. Bush*, 405 F.3d 1214, 1229, FN29 (11th Cir. 2005). The Supreme Court reached the same conclusion, ruling that the Fourteenth Amendment allows states to “exclude from the franchise convicted felons[.]” *Richardson v. Ramirez*, 418 U.S. 24, 55-56 (1974). Although the Equal Protection Clause might appear to limit the ability of states to impose voting rights limitations, Section 2 of the Fourteenth Amendment “was intended by Congress to mean what it says.” *Id.* at 43. Congress’s specific mention of felon disenfranchisement in the Fourteen Amendment, therefore, gives this practice a special status under the VRA.

Since the VRA gives enforcement power to the Civil War Amendments, it carries with it their delegation to the states of exclusive control over felon voter registration criteria. Indeed, the VRA adopts wording strikingly similar to the Civil War Amendments, prohibiting “denial or abridgement of the right to vote of any citizen of the United States to vote on account of race or color.” 42 U.S.C. §1973(a).

It has been argued that courts should not use the VRA to limit the scope of those very protections - because Congress enacted the VRA to defend voting rights in an era of widespread abuses. But, the Supreme Court rejected that argument in 1991 when it interpreted the VRA as a restatement and implementation of the Civil War Amendments. *Chisom v. Roemer*, 501 U.S. 380, 392

(1991); see also House Report (Judiciary Committee) N. 439, 89th Cong., 1st Sess. (June 1, 1965) reprinted in 1965 U.S. Code Cong. 7 Admin News 2437. The VRA inherited the Fourteenth Amendment's explicit delegation the states of the power to regulate voting rights on the basis of criminal records.

Maryland properly exercised this power, authorized by the VRA and affirmed in *Richardson, supra*, when it limited voter registration on the basis of multiple felony convictions. See 93 Op. Att'y Gen. 5; Md. Code Ann., Election Law §3-102 (Bender 2005). Extending the VRA to interfere with §3-102 would unmoor the VRA from its legislative foundations and set it in conflict with an explicit constitutional authorization.

B. EXPANSIVE READINGS OF THE VRA VIOLATE CANONS OF STATUTORY INTERPRETATION AND THREATEN THE FEDERAL-STATE BALANCE OF POWER

Even assuming that the Civil War Amendments give constitutional authorization for felon disenfranchisement, any application of the VRA to states' felon disenfranchisement laws would exceed congressional enforcement powers under the Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment. Furthermore, the language and origins of the VRA show that an overbroad interpretation would distort Congress's intent. Two guidelines for statutory interpretation, as well as legislative history, buttress this conclusion.

1. THE VRA DOES NOT PROVIDE THE CLEAR STATEMENT REQUIRED TO TIP THE BALANCE OF STATE AND FEDERAL POWER IN FAVOR OF CONGRESS

Application of the VRA to felon disenfranchisement statutes would violate the clear statement rule and infringe upon rights assigned to the states by the Constitution. According to the “clear statement” canon of statutory interpretation, courts should only permit a statute to alter the “usual constitutional balance between the States and the Federal Government” when Congress has expressed an “unmistakably clear” intent to make this drastic change. *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991). Justices White and Justices Stevens both observed that this rule “applies with full force to legislation enacted to enforce the Fourteenth Amendment.” *Id.* at 479. Historically, states maintained primary authority for criminal and election law. *Muntaqim v. Coombe*, 366 F.3d 102, 116 (2d Cir. 2004). In the case of §3-102, an expanded VRA would disrupt Maryland’s ability to regulate its voter rolls, a long held state function.

Since *Gregory*, courts have repeatedly applied the clear statement rule to evaluate whether the VRA extends to individual states’ felon disenfranchisement statutes. The Second Circuit ruled that the VRA failed to make an “unmistakably clear” statement on this key question and urged courts to steer clear of infringing on states’ rights. *Id.* at 122. Critics of the clear statement rule argue that it has fallen into disuse since *Chisom*, but nothing in that decision indicates that the majority did not apply the rule. See *Baker v. Pataki*, 85 F.3d 919, 931 (2d Cir. 1996) (quoting *Chisom*, 501 U.S. at 411 (Scalia, J.,

dissenting)). In the last two years, both the Eleventh and Second Circuits have applied the clear statement rule to the VRA and looked to VRA's legislative history in determining that Congress's intent was not unmistakably clear. *See, e.g., Johnson*, 405 F.3d at 1229.

2. CONGRESS DID NOT INTEND THE VOTING RIGHTS ACT TO REACH FELON DISENFRANCHISEMENT PROVISIONS

Legislative history shows Congress in fact intended to exclude felony disenfranchisement statutes from VRA protection. For example, drafters in the Senate and the House used identical language to call attention to VRA exemptions: states could continue to require citizens to be "free of conviction of a felony or mental disability." S. Rep. 89-162, 1965 U.S.C.C.A.N. 2508, 2562; H.R.Rep. No. 89-439, 1965 U.S.C.C.A.N. 2437, 2457. These statements reflect Congress's awareness of the widespread nature of felon disenfranchisement statutes at the time - and Congress's desire to leave these statutes untouched. The drafters designed the VRA "primarily to enforce" the Civil War Amendments and expressed no reservations about their explicit deference to felon disenfranchisement. House Report (Judiciary Committee) N. 439, 89th Cong., 1st Sess. (June 1, 1965) *reprinted in* 1965 U.S. Code Cong. 7 Admin News 2437.

Since the passage of the VRA, Congress has consistently approved states' right to bar felons from registering to vote. For instance, Congress amended the VRA in 1982 - but added no

language disapproving of this widespread practice. *Chisom*, 501 U.S. at 384. For this reason, the Second Circuit found it “unfathomable” that Congress would amend the VRA to undermine countless statutes and simply not notify the affected states. *Muntaqim*, 366 F.3d at 123-24.

Critics of felon disenfranchisement doubtless will find ambiguity in the 1982 amendment, but later bills give an even clearer picture of congressional intent. In 1993, Congress affirmatively recognized the validity of felony disenfranchisement by listing felony conviction as a lawful reason for cancellation of a voter’s registration under the National Voter Registration Act. 42 U.S.C. §1973gg-6(a)(3). In 1999, 2000, and 2001, Congress rejected bills seeking to bar felon disenfranchisement. Voting Restoration Act, H.R. 2830, 107th Cong. (2001); Civic Participation Act of 2000, S. 2666, 106th Cong. (2000); Civic Participation and Rehabilitation Act of 1999, H.R. 906, 106th Cong. (1999). In short, Congress’s words and actions weigh strongly against an expansive construction of the VRA.

3. CONSTRUCTIONS THAT STRETCH THE VRA BEYOND THE HARM THAT IT WAS DESIGNED TO ADDRESS ARE UNLAWFUL EXPANSIONS OF FEDERAL POWER

Even if Congress did intend to expand the VRA to invalidate countless state statutes, such an incursion into states’ rights would exceed the enforcement powers under the Fourteenth and Fifteenth Amendments. The Supreme Court has carefully limited

these powers by permitting Congress to exercise them only when addressing a "pattern of constitutional violations on the part of the States" with a congruent and proportional remedy. *Nev. Dep't of Human Re. v. Hibbs*, 538 U.S. 721, 728 (2003). In the case of Maryland, however, Congress has not made a finding of voting rights violations - but even if it had, the remedy proposed by the Respondent fails the second prong of the *Nev. Dep't of Human Re.* test because this remedy is so poorly tailored to the harm.

The legislative history of the VRA reveals little evidence of a congressional record of voting rights violations in Maryland. The Eleventh Circuit has noted that Congress had made no finding that states' felon disenfranchisement laws were a discriminatory tool. *Johnson*, 405 F.3d at 1231. The Second Circuit even argued that Congress had made a determination to the contrary. *Baker*, 85 F.3d at 929; *Muntaqim*, 366 F.3d at 118-126. In the absence of such a finding, Congress cannot use enforcement powers to apply the VRA to §3-102. *Oregon v. Mitchell*, 400 U.S. 112, 130.

Furthermore, the remedy proposed by the Respondent is neither congruent nor proportional to the evils the VRA was directed against. At the time of the VRA's enactment, literacy tests, not felon disenfranchisement, spurred Congress into action. *Chisom*, 501 U.S. at 411. Certainly, Congress was confronted with ample evidence of overtly discriminatory voting restrictions - but the remedy desired by the Respondent in no way corresponds

with these injuries. See *Muntaqim*, 366 F.3d at 125. Instead, Respondent would strike down countless state statutes bearing no similarity to the VRA's original target, dilution schemes.

The existence of overtly discriminatory voting restrictions in select states thirty years ago does not justify invalidating countless modern election laws. In Maryland, longstanding voting regulations affecting perpetrators of crimes ranging from misrepresenting crab meat to carjacking would suddenly fall under federal control. See, e.g., Md. Code Ann. §§21-341(a), 3-405. Admittedly, it would be more expedient to grant Congress enforcement powers without this limitation - but the "congruent and proportional" rule clearly dictates that the VRA remain closely tailored to a specific constitutional violation. And, the application of the VRA to statutes like § 3-102 does not pass this sensible test.

C. EVEN IF THE VRA APPLIES TO FELON DISENFRANCHISEMENT STATUTES,
MARYLAND'S STATUTE (§ 3-102) IS RACIALLY NEUTRAL

Assuming the court disregards the precedent set in *Richardson v. Ramirez*, 418 U.S. 24, the wealth of statistics offered by the Respondent still falls well short of a showing of pervasive and systematic racial bias. Two conditions must be met for a successful showing of a Section 2 violation under the VRA: 1.) evidence of discrimination; and 2.) a causal connection between that discrimination and abridged voting rights. *Ortiz v. City of Philadelphia*, 28 F.3d 306, 310 (3d Cir. 1994). The Respondent

bears the burden of proof in proving this causal connection, and the statistics submitted to this court do not establish it. The VRA provides the "totality of circumstances" test as a means to evaluate causation, but even under this more flexible standard, § 3-102 is racially neutral and unconnected to voting patterns.

1. RESPONDENT'S STATISTICS PROVE NEITHER RACIAL DISCRIMINATION IN THE MARYLAND CRIMINAL JUSTICE SYSTEM NOR CAUSATION BETWEEN THAT DISCRIMINATION AND ABRIDGED VOTING RIGHTS

Respondent's statistics only establish correlation between race and disenfranchisement, not the required causation. And, mere correlation between a racial group and disenfranchised felons does not indicate that the disenfranchisement occurred on account of race. *Muntaqim*, 366 F.2d at 116. Respondents have submitted no evidence showing that African-Americans are disproportionately apprehended for committed crimes. Instead, they have relied on a poor proxy: traffic stops. *ACS Moot Ct. R.* 10. No evidence, however, connects this figure to actual arrests, so it is impossible to say how this aggressive traffic monitoring actually affects the rest of the criminal justice system.

Assuming that traffic citations are a reliable proxy for apprehensions, Respondent's statistics still fail to show a significant discriminatory impact. In Baltimore County, about 32% of traffic stops involve at least one African-American. *Id* at 12. Since African Americans represent nearly 28% of the statewide population, this percentage is well within reasonable

limits - especially given that Baltimore County is at the crossroads of the state. In short, the Respondent has presented a heap of statistics, but together, they do not form a pattern.

Furthermore, the Respondent has presented no evidence that African Americans in Maryland are prosecuted or sentenced in a different way from other groups. For instance, it is asserted that drug-related offenses account for 25% of African Americans in Maryland prisons and only 9% of white prisoners. *ACS Moot Ct. R. 13*. But, these statistics merely point to a disproportion in the type of crimes committed - not that governmental action is the cause. In order to meet the causality requirement, Respondent must present compelling proof that that prosecution and sentencing is racially charged. See *Muntaqim*, 366 F.3d at 117. Evidence that African Americans receive harsher sentencing for the same crime would be sufficient, for example - but such evidence is entirely absent.

2. EVEN IF MARYLAND'S FELONY DISENFRANCHISEMENT STATUTE IS DISCRIMINATORY, IT DOES NOT MEET THE HIGH THRESHOLD SET IN THE "TOTALITY OF THE CIRCUMSTANCES" TEST

Maryland Election Law §3-102 does not deny minorities the right to vote based on the totality of circumstances. Under this standard, Respondents must prove that an interaction of §3-102 with "social and historical conditions" caused an "inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Thornburg v.*

Gingles, 478 U.S. 30, 47 (1986). However, the Third, Fourth, Fifth, and Sixth Circuits have all determined that this test requires more than a statistical showing of racial disparity. See, e.g., *Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 595 (9th Cir. 1997). As show above, this higher standard is not met by the Respondent's heavily statistical evidence.

Thus, Maryland's felony disfranchisement law does not violate the Voting Rights Act because §3-102 does not deny Respondent the right to vote because of his race, based on the applicable "totality of circumstances" test.

II. MARYLAND'S ELECTION LAW §3-102 IS NOT CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AMENDMENT.

A. MARYLAND'S SYSTEM OF DISENFRANCHISEMENT IS NOT A PUNISHMENT, BUT A REGULATORY MECHANISM USED TO DETERMINE VOTER ELIGIBILITY AND PROTECT THE VOTING PROCESS.

In order to be violative of the Eighth amendment as a cruel and unusual punishment, a statute must first be considered a punishment. *Trop v. Dulles*, 356 U.S. 86 (1958), 96, *Slade v. Hampton Rds. Reg'l Jail*, 407 F.3d 243, 251. The determination of whether or not a statute is penal is based upon the purpose and legislative intent of the statute. *Trop*, 356 U.S. 86, 96; *U.S. v Salerno*, 481 U.S. 739, 747; *Kansas v. Hendricks*, 521 U.S. 346, 361; *See also, Hudson v. U.S.*, 522 U.S. 93, 99.

1. THE STRUCTURE OF ELECTION LAW §3-102 COMBINED WITH THE LEGISLATIVE PURPOSE SHOW THAT THE LAW WAS MEANT TO REGULATE THE FRANCHISE, THEREFORE THE STATUTE CANNOT BE CONSIDERED A PUNISHMENT

In addition to distinguishing the purpose as that of enacting a statute to "distinguish the qualifications for voter registration", 2002 Maryland Laws Ch. 305 (H.B. 535) Maryland's legislature evinces their intent to create a regulatory mechanism by creating a broad range of crimes categorized as infamous. The Supreme Court has previously upheld a state's right to exclude some felons from the franchise while granting it to others. *Richardson v. Ramirez*, 418 U.S. 24, 55. *See also, Shepherd v. Trevino*, 575 F.2d 1110, 1114. However, in addition to following this requirement on a base level, Maryland's broad categorization of infamous crimes supports their intention to

keep *all* persons exhibiting moral turpitude from affecting the voting process to their advantage. Maryland's approach contrasts with that of other states whose statutes have been invalidated because they did not include crimes whose nature clearly indicated a threat of illicit influence to the electoral process. *Stephens v. Yeomans*, 327 F.Supp. 1182, 1188 (court held that statute listing larceny, theft, and murder as disenfranchising crimes while conspicuously leaving fraud, embezzlement, and extortion off of the list did not prove an adequate non-penal purpose).

By including commercial and corporate offenses as infamous crimes as well as criminal offenses such as fraud, counterfeiting, extortion, and embezzlement along with election law offenses, Maryland makes clear that their statute is *not* an arbitrary way in which to further punish violent criminals. Md. Code Ann., Election Law Sec. 3-102 (Bender 2005). The list of infamous crimes indicates that Maryland seeks to restrict individuals whose actions have foreshadowed the possibility of direct corruption of the electoral process and a disregard for the rule of law in general.

2. EVEN IF THE MARYLAND'S STATED LEGISLATIVE INTENT IS NOT ALONE SATISFACTORY TO DETERMINE THE STATUTE'S REGULATORY CHARACTER, THE STATUTE DOES NOT MEET THE STANDARDS OF A PUNISHMENT AS DETERMINED BY FEDERAL COURTS

If a statute does not evince a clear legislative intent to punish it should be analyzed as to its penal or regulatory character under standards set out by the court in *Kennedy v Mendoza-Martinez*. 372 U.S. 144, 169. The *Mendoza-Martinez* court noted seven guideposts for assessing the penal nature of a statute: 1. whether 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 alternative purpose assigned. *Id.*

Though disenfranchisement clearly presents a restraint, it has not been explicitly regarded as a punishment in the history of United States. The constitutional provision for disenfranchisement in the Fourteenth Amendment mentions nothing of its use as punishment. U.S. Const. amend. XIV, §2. As voting rights have been given to different groups of individuals, regulation of the franchise has rested squarely with the states. Jamie Fellner & Marc Mauer, Human Rights Watch & The Sentencing Project, *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States* 1 (1998).

Maryland's election law also fails to meet the fourth criterion for punishment set out by the *Mendoza-Martinez* court

by failing to any of the traditional aims of punishment, namely "retribution and deterrence." 372 U.S. 144, 169. In *Ewing v California* Justice O'Conner listed penological justifications for a statute as, "incapacitation, deterrence, retribution, or rehabilitation." *Ewing v California*, 538 U.S. 11, 25. That disenfranchisement is not a punishment comes from Respondent's assertions, here and in similar cases, that the effects of disenfranchisement do not serve any of these goals. As Maryland's disenfranchisement statute does not serve to rehabilitate, deter, incapacitate, or exact retribution, it cannot be a punishment. See also, *King v City of Boston*, Not Reported in F.Supp.2d, 2004 WL 1070573 D.Mass., May 13, 2004.

3. MARYLAND'S LAW SERVES A LEGITIMATE STATE INTEREST BY REGULATING
VOTER QUALIFICATIONS, PROTECTING THE VOTING PROCESS AND THE
INTEGRITY OF THE SOCIETAL MORAL CODE

One of the most commonly applied aspects of the *Mendoza-Martinez* court's criteria is the sixth requirement that a statute have no other attributable purpose other than to punish. 372 U.S. 144, 168-169. As further elucidated by the Supreme and Circuit Courts, if a statute imposes a disability not to punish, but to accomplish another legitimate governmental purpose it is considered to be non-penal. *U.S. v Salerno*, 481 U.S. 739, 759; *Slade*, 407 F.3d 243, 251. Numerous courts have taken the view that disenfranchisement is exactly the type of non-penal regulatory mechanism that accomplishes a legitimate governmental

purpose. See *Trop v. Dulles*, 356 U.S. 86, 96; *Green v. Bd of Elections*, 380 F.2d 445; *Shepherd v. Trevino*, 575 F.2d 1110, 1115 (5th Cir.1978); *Kronlund v. Honstein*, 327 F.Supp. 71, 74 (N.D.Ga.1971). Maryland's use of its election law as a regulatory mechanism is a common method by which states attempt to protect the voting process.

4. MARYLAND'S STATUTE REGULATES THE ELECTORAL PROCESS AND PROTECTS STATE LAW AGAINST ILLICIT INFLUENCE

A State's right to regulate the franchise receives wide judicial support. In *Davis v. Beason*, 133 U.S. 333 (1890), the Supreme Court upheld the authority of the Idaho legislature to proscribe voter qualifications. Justice Field, writing for the Court, cited with approval a territorial statute indicating that "no person under guardianship, *non compos mentis*, or insane, nor any person convicted of treason, felony, or bribery in this territory, or in any other state or territory in the Union, unless restored to civil rights ... is permitted to vote at any election," *Id.* at 346-47 (quoting *Murphy v. Ramsey*, 114 U.S. 15 (1885), which upheld a Congressional statute excluding polygamists and bigamists from voting or holding office).

Chief Justice Rehnquist roots the explicit sanction of the disenfranchisement of felons in Sec.2 of the Fourteenth Amendment noting that while the practice may be outmoded, it is up to the state legislatures to decide. *Richardson*, 418 U.S. 24, 54-55.

In an exercise of constitutionally guaranteed state's rights, Maryland seeks to do nothing more than regulate the franchise in a way that benefits and protects its law-abiding citizens from the influence of persons who would undermine both the electoral system and the rule of law. Maryland has a legitimate state interest in preventing persons of "proven anti-social behavior" from having an influence on orderly society. *Kronlund*, 327 F.Supp. 71, 73. See also, *Richardson*, 418 U.S. 81 (Marshall, J., dissenting). In light of their prior convictions and high propensity for recidivism, felons have an arguable predisposition to "repeal or emasculate provisions of the criminal code." *Richardson*, 418 U.S. 24, 81 (Marshall, J. dissenting). The Second Circuit's reasoning for upholding New York's disenfranchisement statutes in *Green* (380 F.2d 445) echoes Judge Friendly's thoughts in *Sheperd* that "a state properly has an interest in excluding from the franchise persons who have manifested a fundamental antipathy to the criminal laws of the state or of the nation by violating those laws sufficiently important to be classed as felonies." 575 F.2d 1110, 1115. If a state chooses to maintain the strength of its social contracting by disallowing participation by those who have violated the social contract, this is a state's prerogative and not a place for federal judicial intervention.

5. REGULATION OF THE ELECTORAL PROCESS IS SIMILAR IN EFFECT AND IMPOSITION TO REGULATIONS REQUIRING REGISTRATION OF CONVICTED SEX OFFENDERS.

States pass similarly constitutionally regulations for protecting the community from persons of proven "anti-social behavior" when they require the registration of sex-offenders. The Supreme Court has upheld a state's right to require convicted sex-offenders to register with the state noting that "protecting the public from sex offenders is the law's primary interest." *Smith v. Doe*, 538 U.S. 84, 97. In addition to finding that sex-offender registration falls short of the *Mendoza-Martinez* standards for penalty, the *Smith* court also focused on the fact that the statute's requirement was clearly an exercise of regulatory power intended to protect the public. *Id* at 94. Felon disenfranchisement in general and as explicitly exercised by the State of Maryland is clearly another exercise of regulatory power intended to protect the public.

While the feeling of punishment to the disenfranchised ex-felon may be just as real as the feeling of punishment to the sex-offender forced to register with his local community, neither *feeling* of punishment should override the regulatory nature of election statutes or sex-offender registration, nor should these feelings threaten a state's right to regulate a vital community process. A State's ability to regulate its own electoral process and protect its citizens should not be arbitrarily interfered with by laudable assertions that a justifiable regulatory mechanism is penal in nature.

B. IF CONSIDERED A PUNISHMENT, PERMANENT DISENFRANCHISEMENT IS NOT CRUEL AND UNUSUAL. IT IS PROPORTIONAL, FAIR, AND IN LINE WITH CURRENT SOCIETAL

STANDARDS OF DECENCY FOR PUNISHMENT OF PERSONS CONVICTED ON AN INFAMOUS
CRIME AND A SUBSEQUENT VIOLENT CRIME

1. FELON DISENCFRANCHISEMENT IS IN LINE WITH CURRENT SOCIETAL
STANDARDS OF DECENCY REGARDING PUNISHMENT

The court's evolving standards of decency doctrine traces its origins to *Trop v. Dulles* in which a plurality of the Court concluded that "[t]he [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." 356 U.S. 86, 101. The proposition that application of the Eighth amendment was to evolve with society, was later explicitly endorsed by all of the members of the Court except Justices White and Stewart in *Furman v. Georgia*, 408 U.S. 238 (1972). See *id.* at 242 (Douglas, J., concurring); *id.* at 269-70 (Brennan, J., concurring); *id.* at 327 (Marshall, J., concurring); *id.* at 383 (Burger, C.J., dissenting) (joined by Blackmun, Powell, and Rehnquist, JJ.). It is evident that the evolving standards of decency doctrine currently serves as a guiding factor in deciding Eighth Amendment cases. See, e.g., *Atkins*, 536 U.S. at 311-12; *Penry v. Lynaugh*, 492 U.S. 302, 330-31 (1989); *Stanford v. Kentucky*, 492 U.S. 361, 369 (1989); *Thompson v. Oklahoma*, 487 U.S. 815, 821 (1988); *McCleskey v. Kemp*, 481 U.S. 279, 300 (1987); *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981); *Gregg v. Georgia*, 428 U.S. 153, 172-73 (1976); *Estelle v. Gamble*, 429 U.S. 97, 102 (1976).

Arguably a measure of society's progress and evolving standards can be taken from the laws present in a majority of its states. Five states, AL, FL, IA, KY, VA, permanently

disenfranchise all felons, and another 8 states, AZ, DE, MS, NV, TN, WA, WY including Maryland, permanently disenfranchise some felony convictions. <http://www.righttovote.org/state.asp>. This means that more than a quarter of all states have some form of permanent disenfranchisement. Another 36 states disenfranchise felons for a set period of time, either the duration of their incarceration, or, more commonly, until they have completed probation or parole. *Id.* Overall, 96% of states disenfranchise felons for a given period of time.

The United States standard for how felon disenfranchisement is to be regarded in light of Eighth Amendment prohibition against cruel and unusual punishments is clearly a standard that embraces the use of disenfranchisement as a regulatory mechanism or punishment.

2. MARYLAND'S MANDATORY DISENFRANCHISEMENT AFTER A SECOND CONVICTION FOR A VIOLENT FELONY IS A PROPORTIONAL AND FAIR PUNISHMENT.

Historically, the Supreme Court has interpreted the Eighth Amendment to prohibit a sentence that was disproportionate to the offense. *See Weems v. United States*, 217 U.S. 349, 367. The court has also made clear that, in non-capital cases, "successful challenges to the proportionality of particular sentences should be *exceedingly rare*." *Rummel v. Estelle*, 445 U.S. 263, 272 (emphasis added). *See also, Hutton v. Davis*, 454 U.S. 370, 374. The last statement we have from the Supreme Court on proportionality is, admittedly, a fractured one. *Harmelin v. Michigan*, 501 U.S. 957. However, Justice Kennedy's opinion in

the case contains the proportionality requirement asked for by a majority of the court and a narrow construction of the proportionality test set out in *Solem v. Helm* (463 U.S. 277). See *Hawkins v. Hargett*, 200 F.3d 1279 (10th Cir 1999); *McCullough v. Singletary*, 967 F.2d 530, 535 (11th Cir. 1992); *United States v. Bland*, 961 F.2d 123, 129 (9th Cir. 1992); *McGruder v. Puckett*, 954 F.2d 313, 316 (5th Cir. 1992). After *Harmelin*, narrow proportionality can be construed as requiring a showing of "gross disproportionality" between the sentence and the crime before a court is required to undergo a comparative analysis. See *Hawkins*, 200 F.3d 1279, 1282.

While *permanent* disenfranchisement is arguably harsh, its application in the Maryland statute is certainly not *grossly disproportional* to the crimes committed by persons convicted of violent felonies after previous convictions for infamous crimes. The court is by no law or case bound to undergo a comparative analysis of Coolidge's crimes as compared with his disenfranchisement. Evidence that the statute is not "grossly disproportionate" comes from the structure of the statute itself. The three levels of disenfranchisement in the Maryland law allow for a punishment on par with the level of crime(s) committed. Recent amendments to the law by the State Legislature limit application of permanent disenfranchisement to persons convicted of a *violent* felony after a previous infamous crime conviction, making the statute less harsh. *ACS Moot Ct. R.*, 43. A 2002 amendment to §3-102 removed the application of permanent

disenfranchisement for non-violent offenders convicted of two infamous crimes. 2002 H.B. Sess. 535, 2002 S.B. Sess. 184.

Other legal caveats present in Maryland's judicial system allow for discretion in sentencing, this gives some judicial leeway to the application of permanent disenfranchisement. See *State v. Broadwater*, 562 A.2d 420 (Statute interprets 'conviction' to mean sentencing on all counts for a crime and does not consider each sentence, from the same crime, a separate conviction. This prevents a person from experiencing immediate permanent disenfranchisement owing to one criminal proceeding.). See also, *U.S. v Slatkin*, 984 F.Supp. 916 (conversion of Maryland misdemeanor into federal felony pursuant to Assimilative Crimes Act would not deprive defendant of right to vote).

3. THE EIGHTH AMENDMENT HAS BEEN READ TO BAR UNNECESSARILY PAINFUL OR BARBAROUS METHODS OF PUNISHMENT THAT COMPLETELY DEBILITATE A PERSON'S LIBERTY

The Eight Amendment's guarantee against "cruel and unusual" punishment has been most commonly read to bar unnecessarily painful or barbarous methods of punishment. See *O'Neil v. Vermont*, 144 U.S. 323, 339 (Field, J., dissenting). Supreme Court decisions deeming punishments cruel and unusual have been in situations where the punishment constituted a complete destruction of a person's liberty. See *Weems*, 217 U.S. 340 (12 years in chains at hard and painful labor); *Trop v. Dulakes*, 356 U.S. 78 (expatriation); *Robinson v. California*, 370 U.S. 660 (imprisonment for narcotics addiction). In *Trop* the court

asserted that the "total destruction of the individual's status in organized society" via expatriation was cruel and unusual. 356 U.S. at 101-102.

Respondents will here assert that the right to vote is commensurate with citizenship and that disenfranchisement therefore equally destroys an individual's "status in organized society." This is, however, in a system of voluntary participation in the electoral process, a fallacious contention. If the right to vote were commensurate with citizenship two things would follow. First, the United States would follow the lead of other countries that equate voting with citizenship and require that its citizens vote in order to maintain their citizenship. Secondly, the percentage of American citizens who choose not to vote in federal elections would have relinquished, voluntarily, their rights to citizenship, or at least would have experienced some loss of this sort. We know that this is not the case; if individuals who chose not to vote experienced the fate of "ever-increasing fear and distress" (*Trop* at 102) as do the victims of expatriation, they would surely be driven to the polls in ever-increasing numbers. While this aspect of our electoral system is not necessarily a salutary quality, it is the state of the franchise in our system nonetheless. If respondent wishes to assert that voting is commensurate with citizenship, they would have to undertake a massive sea-change in the way our country exercises the right to vote.

Punishments that the Supreme Court has reviewed and found to be not "grossly proportionate" include a life sentence without the possibility of parole for possession of 672 grams of cocaine (*Harmelin*, 501 U.S. 957) and a life sentence for a three-time criminal. *Rummel v. Estelle*, 445 U.S. 263. The permanent loss of liberty that accompanies the loss of voting rights is in no way comparable to the loss of liberty accompanying incarceration without possibility of release for the remainder of one's life. The Supreme Court has also considered the potential "cruel and unusual" aspect of mandatory sentencing requirements in general. In a landmark case upholding the State of California's three-strikes law, the Supreme Court found that a mandatory life-sentence for the theft of golf clubs valuing \$1800 was not an unconstitutional violation of the Eighth Amendment protection against cruel and unusual punishment. *Ewing*, 538 U.S. 1181.

Even allowing that mandatory punishments may be cruel, the Supreme Court has determined that they are not, in fact, unusual or outside of the norm. *Rummel*, 445 U.S. 263, 279-280. Though Maryland is one of only thirteen states with *permanent* disenfranchisement statutes, the Supreme Court has held that the novelty of a punishment does not alone demonstrate its inefficiency, or unconstitutionality. *Trop*, 356 U.S. 86, 111. Maryland's disenfranchisement statute is neither an exercise in gross disproportionality nor an unusual punitive measure outside the boundaries of societal norms.

Finally, numerous courts, including the Supreme Court have concluded that disenfranchisement is not a violation of constitutional protections against "cruel and unusual" punishment. *See Richardson*, 418 U.S. at 26-27. *See also, Emery v. State of Montana*, 580 P.2d 445 (Mont. 1978) (holding felon disenfranchisement not violative of Montana's State Constitution). Disenfranchisement of felons has been found to constitute *no* constitutional infirmity and should therefore remain a mechanism by which states are allowed to regulate the franchise and remove from the voter registration rolls those criminals who have shown a blatant disregard for the social contract and the rule of law.

CONCLUSION

For the foregoing reasons, Maryland requests that the Judgment of the Court of Appeals be reversed and that the case be remanded with instructions to the District Court to dismiss the case against all defendants.