

No. 05-

---

**IN THE  
SUPREME COURT OF THE UNITED STATES**

---

**Maryland State Board of Elections  
ET AL., Petitioners,**

**v.**

**Jeffrey Coolidge,  
Respondent.**

---

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

---

**BRIEF FOR PETITIONER**

---

**Team # 10889**

**Attorneys for Petitioner**

QUESTIONS PRESENTED

- I. 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?
  
- II. 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?

**PARTIES TO THE PROCEEDINGS**

Pursuant to Supreme Court Rule 24.1(b) the undersigned counsel of record certify that the following listed parties have an interest in the outcome of this case:

**PETITIONERS:**

Maryland State Board of Elections  
Janet Fallins, State Administrator of Elections  
Board of Elections of the City of Baltimore  
Edward D. Jones, Election Director.

**RESPONDENT:**

Jeffrey Coolidge

**TABLE OF CONTENTS**

QUESTIONS PRESENTED . . . . . i

PARTIES TO THE PROCEEDINGS . . . . . ii

TABLE OF CONTENTS . . . . . iii

TABLE OF AUTHORITIES . . . . . vi

OPINIONS BELOW . . . . . ix

STATEMENT OF JURISDICTION . . . . . ix

CONSTITUTIONAL, STATUTORY, AND  
REGULATORY PROVISIONS INVOLVED . . . . . ix

STATEMENT OF THE CASE . . . . . 1

SUMMARY OF THE ARGUMENT . . . . . 3

ARGUMENT . . . . . 5

**I. Section 2 OF THE VOTING RIGHTS ACT, 42 U.S.C. § 1973  
DOES NOT APPLY TO FELON DISFRANCHISEMENT  
STATUTES AND THUS SHOULD NOT BE APPLIED TO  
MARYLAND ELECTION LAW § 3-102. . . . . 5**

A. Baker Decision . . . . . 6

B. Farrahkan Decision . . . . . 7

C. Muntaqim Decision . . . . . 9

D. Johnson Decision . . . . . 9

E. Section 2 was never intended to  
apply to felon disfranchisement . . . . . 12

1. The Act was established to combat  
devices used to prevent the equal  
right to vote . . . . . 13

2. The VRA was established to combat  
new voting restriction devices . . . . . 14

3.	The prevalent use of felon disenfranchisement . . . . .	14
4.	Since the 1982 amendment to the VRA, Congress has passed legislation making it easier for States to disenfranchise voters. . . . .	15
F.	Felon disenfranchisement is constitutionally authorized by the Fourteenth Amendment . . . . .	15
G.	Applying § 2 of the VRA to felon disenfranchisement would question the constitutionality of the VRA . . . . .	17
H.	Even in its broadest reading of the VRA's scope, Mr. Coolidge has not established a claim of vote denial . . . . .	18
1.	The claim of disparities in the arrest and conviction rates of blacks in Maryland in general and Baltimore in particular are not by themselves convincing . . . . .	19
2.	The actual statistics proffered are not reliable . . . . .	21
3.	Mr. Coolidge's claim that he was personally a victim of racial bias is without merit . . . . .	22

**II. MARYLAND'S DISFRANCHISEMENT OF A VIOLENT FELON PREDICATED ON A PRIOR CONVICTION FOR AN INFAMOUS CRIME IS NOT CRUEL AND UNUSUAL PUNISHMENT . . . . . 23**

A.	The history of the Eighth Amendment does not contemplate felon disenfranchise as cruel and unusual . . . . .	23
B.	The Founding Fathers did not intend the Eighth Amendment to apply to felon disenfranchisement . . . . .	25
C.	The Supreme Court has never held felon disenfranchisement to violate	

the Eighth Amendment . . . . .	26
D. Maryland Election Law §3-102 does not violate the Eighth Amendment . . . . .	28
CONCLUSION . . . . .	29

**TABLE OF AUTHORITIES**

**UNITED STATES SUPREME COURT CASES**

Board of Trustees of University of Alabama v. Garrett,  
531 U.S. 356 (2001) . . . . . 11

City of Boerne v. Flores,  
521 U.S. 507 (1997) . . . . . 11

Dunn v. Blumstein,  
405 U.S. 330 (1972) . . . . . 25

Elder v. Holloway,  
510 U.S. 510 (1994) . . . . . 5

Estelle v. Gamble,  
429 U.S. 97 (1976) . . . . . 24

Ewing v. California,  
538 U.S. 11 (2003) . . . . . 24,27

Gregg v. Georgia,  
428 U.S. 153 (1976) . . . . . 23,24

Gregory v. Ashcroft,  
501 U.S. 452 (1991) . . . . . 7,9

Harmelin v. Michigan,  
501 U.S. 957 (1991) . . . . . 24,27

Hunter v. Underwood,  
471 U.S. 222 (1985) . . . . . 11,16

McClesky v. Kemp,  
481 U.S. 279 (1987) . . . . . 19,21

N.L.R.B. v. Catholic Bishop of Chicago,  
440 U.S. 490 (1979) . . . . . 7

Richardson v. Ramirez,  
418 U.S. 24 (1974) . . . . . 15,16,17,28,29

Robinson v. California,

370 U.S. 660 (1962) . . . . .	26
<u>Rummel v. Estelle,</u> 445 U.S. 263 (1980) . . . . .	24,27
<u>Solem v. Helm,</u> 463 U.S. 277 (1983) . . . . .	26
<u>South Carolina v. Katzenbach,</u> 383 U.S. 301 (1966) . . . . .	12
<u>Thornburg v. Gingles,</u> 478 U.S. 30 (1986) . . . . .	8
<u>Trop v. Dulles,</u> 356 U.S. 86 (1958) . . . . .	23,24,25,26,28
<u>Weems v. United States,</u> 217 U.S. 349 (1910) . . . . .	26
<u>Wilkerson v. Utah,</u> 99 U.S. 130 (1879) . . . . .	23

**UNITED STATES COURT OF APPEALS CASES**

<u>Baker v. Pataki,</u> 85 F.3d 919 (2d Cir. 1996) . . . . .	6,7,15
<u>Farrahkan v. Washington,</u> 338 F.3d 1009 (9 <sup>th</sup> Cir. 2003) . . . . .	6,8,18
<u>Farrahkan v. Washington,</u> 359 F.3d 1116 (9 <sup>th</sup> Cir. 2004) . . . . .	15
<u>Irby v. Virginia State Board of Elections,</u> 889 F.2d 1352 (4 <sup>th</sup> Cir. 1989) . . . . .	20
<u>Johnson v. Governor Of the State Of Florida,</u> 405 F.3d 1214 (11 <sup>th</sup> Cir. 2005) . . . . .	6,9,10,11,12
<u>Muntaqim v. Coombe,</u> 366 F.3d 102 (2d Cir. 2004) . . . . .	6,9,14
<u>Ortiz v. City of Philadelphia Office of the City Comm'rs,</u> 28 F.3d 306 (3d Cir. 1994) . . . . .	20
<u>Salas v. Southwest Texas Junior College,</u> 964 F.2d 1542 (5 <sup>th</sup> Cir. 1992) . . . . .	20

<u>Smith v. Salt River Project Agricultural Improvement and Power District,</u> 109 F.3d 586 (9 <sup>th</sup> Cir. 1996) . . . . .	20
<u>Wesley v. Collins,</u> 791 F.2d 1255 (6 <sup>th</sup> Cir. 1986) . . . . .	20

**UNITED STATES DISTRICT COURT CASES**

<u>Farrahan v. Locke,</u> 987 F.Supp. 1304 (E.D.Wash. 1997) . . . . .	7,8
<u>Thiess v. State Board,</u> 387 F.Supp. 1038 (D.C.Md. 1974) . . . . .	28,29

**CONSTITUTIONAL PROVISIONS**

U.S. Const. Amend. VIII . . . . .	R. at 5
U.S. Const. Amend. XIV . . . . .	R. at 5
U.S. Const. Amend. XV . . . . .	R. at 5
Md. Const. Art. I, §4 . . . . .	R. at 7

**FEDERAL STATUTES AND REGULATIONS**

Voting Rights Act, 42 U.S.C. §1973 . . . . .	R. at 5-6
Civil Rights Act, 42 U.S.C. §1983 . . . . .	R. at 6
National Voter Registration Act Pub. L. No. 103-31, 107 Stat. 77 (1993) . . . . .	x,15

**STATE STATUTES AND REGULATIONS**

Md. Code Ann., Election Law §3-102 (Bender 2005) . . . . .	R. at 7
Md. Code Ann., Criminal Law §14-101(a) (Bender 2005) . . . . .	R. at 7

**OPINIONS BELOW**

The opinion of the United States Court of Appeals for the Fourth Circuit is not reported, but it is reproduced in the Record at pages 29-41. Likewise, the opinion of the United States District Court for the District of Maryland is not reported, but it is also reproduced in the Record at pages 20-27.

**STATEMENT OF JURISDICTION**

This Court has subject matter jurisdiction pursuant to 28 U.S.C. §1331 Federal Question as this matter arises under §2 of the Voting Rights Act, 42 U.S.C. §1973; Civil Rights Act, 42 U.S.C. §1983; and the United States Constitution.

**CONSTITUTIONAL, STATUTORY, AND  
REGULATORY PROVISIONS INVOLVED**

The Eighth Amendment to the United States Constitution is reproduced in pertinent part in the Record at page 5.

The Fourteenth Amendment to the United States Constitution is reproduced in pertinent part in the Record at page 5.

The Fifteenth Amendment to the United States Constitution is reproduced in pertinent part in the Record at page 5.

The Voting Rights Act of 1965, 42 U.S.C. §1973 is reproduced in pertinent part in the Record at pages 5-6.

The Civil Rights Act of 1871, 42 U.S.C. §1983 is reproduced in pertinent part in the Record at page 6.

National Voter Registration Act Pub. L. No. 103-31, 107 Stat. 77 (1993) reads in pertinent part:

(3) On request of the chief State election official of a State or other State official with responsibility for determining the effect that a conviction may have on an offender's qualification to vote, the United States attorney shall provide such additional information as the United States attorney may have concerning the offender and the offense of which the offender was convicted.

The Maryland Constitution, Article 1, §4 is reproduced in the Record at page 7

Maryland Code Annotated, Election Law §3-102 is reproduced in the Record at page 7.

## STATEMENT OF THE CASE

### **I. Statement of Facts**

Respondent Jeffrey Coolidge, a forty-two year old African American, is a twice convicted felon. R. At 10. Mr. Coolidge's life of crime began at the age of nineteen years old. Id. Responding to a report of a robbery by a man fitting Mr. Coolidge's description, the police stopped Mr. Coolidge and through a search discovered a large amount of cocaine. Id. Mr. Coolidge was indicted, convicted, and sentenced to one year in prison and one year probation for possession with the intent to distribute a controlled substance. Id. at 10-11. Under Maryland law this constituted an infamous crime and resulted in his disfranchisement upon conviction. Id. at 11.

While on probation, Mr. Coolidge was apprehended and charged with misdemeanor possession of cocaine and received six months in jail. Id. This crime was not an infamous crime. Id. Mr. Coolidge completed all sentences and seven years later, in 1992, registered to vote. Id. He voted in the next three Presidential Elections. Id.

In 2004, Mr. Coolidge entered a convenience store, threatened the clerk, and robbed the store of \$150 before fleeing. Id. Several hours later he was identified through the security camera in the store and apprehended. Id. Mr. Coolidge was indicted for robbery, a crime of violence, and was convicted by a jury and

sentenced to five years in prison and five years probation. Id. Pursuant to Maryland Election Law §3-102, Mr. Coolidge was permanently disfranchised and removed from the registry of voters. Id. at 12.

## **II. Nature of the Proceedings**

Mr. Coolidge filed a civil complaint against the Maryland State Board of Elections; Janet Fallins, State Administrator of Elections; Board of Elections of the City of Baltimore; and Edward D. Jones, Election Director. R. at 8-10. Mr. Coolidge alleged three claims for relief. First, Mr Coolidge alleges that by enforcing Maryland's disfranchisement law, Defendants have denied him the Equal Protection of the laws in violation of the Fourteenth Amendment of the U.S. Constitution. Id. at 14-15 Second, Mr. Coolidge alleges because Maryland's disfranchisement law as enforced, disfranchises African Americans at a disproportionately high rate, it violates the Voting Rights Act, 42 U.S.C. §1973. Id. at 15. Finally, permanent disfranchisement is cruel and unusual punishment thereby violating the Eighth Amendment of the U.S. Constitution. Id. at 8-17.

The claims were brought in the United States District Court for the District of Maryland. The Defendant's filed a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Id. At 18. The District Court granted the Defendant's Motion. Id. at 20-27. Judgment was entered on February 23, 2005.

Id. Mr. Coolidge then filed a timely appeal to the United States Court of Appeals for the Fourth Circuit. Id. at 28.

Alleging the same three claims, the Court of Appeals dismissed the Equal Protection claim stating a failure to allege intentional discrimination. Id. at 41-51. On the remaining two claims however, the Court of Appeals reversed the District Court's order of dismissal. Id. The appellees filed a petition for a writ of certiorari based on the Voting Rights Act claim and the Eighth Amendment claim. Id. at 1-2. On October 14, 2005, a writ of certiorari was granted by the United States Supreme Court on Questions 1 and 2 as presented by the petition. Id. at 3.

#### **SUMMARY OF THE ARGUMENT**

##### **I. The Scope of the Voting Rights Act does not extend to felon disfranchisement.**

Congress did not provide a clear statement that the Voting Rights Act was intended to apply to felon disfranchisement statutes. In addition, there is no record in the legislative history to prove they intended the Act to apply to these statutes.

Felon disfranchisement has been in existence throughout the history of this country and is expressly provided for in the Fourteenth Amendment. Based on the long standing practice of felon disfranchisement in the country, it seems difficult to believe Congress would not include felon disfranchisement in the scope of the Voting Rights Act if they intended it to apply to state felon

disfranchisement statutes like the one at issue in Maryland.

Extending the scope of the Voting Rights Act to state felon disfranchisement provisions would question the constitutionality of the Voting Rights Act. Since the right to disfranchise is granted to the states by the Fourteenth Amendment, the Voting Rights Act would infringe on the states constitutionally granted powers.

Finally, the Supreme Court and many circuit courts have found that statistics alone are inherently unreliable and do not prove racially discriminate impact. Without an independent finding that Maryland's disfranchisement statute has a discriminatory impact through its application, the Voting Rights Act cannot apply.

## **II. Felon disfranchisement not "cruel and unusual."**

The purpose of the Eighth Amendment's prohibition on cruel and unusual punishment was never intended to encompass the disfranchisement of a violent felon. The Supreme Court has only found cruel and unusual punishment as it relates to punishments that are in gross disproportion to the crime committed.

The practice of disfranchising felons was known to the drafters of the Eighth Amendment and the continued use of such laws points clearly to their acceptance throughout the country. In addition, the clause empowering states to disfranchise felons is included in the Fourteenth Amendment. Congress would not have created an exception for felon disfranchisement if the Eighth Amendment already banned them.

Finally, disfranchisement is not permanent. The Respondent in this case may apply for and receive a pardon to restore his voting rights. In addition, this disfranchisement is only in Maryland and a handful of states. The Respondent still has the right to vote in a majority of other states and he could choose to relocate to one of these states and regain his ability to vote.

### ARGUMENT

"Whether a federal right was clearly established at a particular time is a question of law, not 'legal facts,' and must be resolved *de novo* on appeal." Elder v. Holloway, 510 U.S. 510, 511 (1994). The case presents two questions of law: (1) does §2 of the Voting Rights Act, 42 U.S.C. §1973 apply to state disfranchisement laws; and (2) whether a statute permanently disfranchising a convicted felon is cruel and unusual punishment.

**I. §2 OF THE VOTING RIGHTS ACT, 42 U.S.C. §1973 DOES NOT APPLY TO FELON DISENFRANCHISEMENT STATUTES AND THUS SHOULD NOT BE APPLIED TO MARYLAND ELECTION LAW §3-102.**

The Respondent (hereinafter "Mr. Coolidge") argues Maryland Election Law §3-102 denied him the right to vote based on his race by permanently disfranchising him upon his conviction of a subsequent violent crime. Accordingly, Mr. Coolidge argues §2 of the Voting Rights Act, 42 U.S.C. §1973 (hereinafter "the VRA") can

and should be applied to Maryland Election Law §3-102.

Three circuits have addressed the question with two circuits holding application of the VRA was not appropriate and one authorizing the application of the VRA. See Baker v. Pataki, 85 F.3d 919 (2d Cir. 1996) (en banc panel allowing district court's decision not to apply §2 to stand); Farrahkan v. Washington, 338 F.3d 1009 (9<sup>th</sup> Cir. 2003) (§2 applies to disfranchisement); Johnson v. Governor Of the State Of Florida, 405 F.3d 1214 (11<sup>th</sup> Cir. 2005) (sitting en banc held the VRA's prohibition against voting qualifications on account of race did not apply to felon disfranchisement).

A second claim in the 2<sup>nd</sup> Circuit was decided in 2004. Muntaqim v. Coombe, 366 F.3d 102 (2d Cir. 2004) followed the precedent of Baker and held §2 does not apply. A request to rehear the case en banc was granted, however to this date a decision on the rehearing has not been issued.

#### **A. Baker Decision**

In 1996, the Court of Appeals for the 2<sup>nd</sup> Circuit addressed whether §2 of the VRA applied to felon disfranchisement. Sitting en banc, the ten judge panel was evenly divided thus affirming the order of the district court dismissing the §1973 claims. The court held "such an application would raise serious constitutional questions regarding the scope of Congress' authority to enforce the

Fourteenth and Fifteenth Amendments, and would alter the usual constitutional balance between the States and the Federal Government.” Baker v. Pataki, 85 F.3d 919, 922 (2d Cir. 1996).

“Because it is **not** unmistakably clear that, in amending §1973 in 1982 to incorporate the ‘results’ test, Congress intended that the test be applicable to felon disfranchisement statutes, we conclude that §1973 does not apply...” Id. at 922. (emphasis added). Applying the “results” test would raise questions concerning the scope of Congress’ power to enforce the Fourteenth and Fifteenth Amendments. “In these circumstances, Catholic Bishop requires a clear statement by Congress in support of the statutory interpretation posing the constitutional question, a statement manifestly lacking in this case.” Id. At 930.

N.L.R.B. v. Catholic Bishop of Chicago, 440 U.S. 490 (1979) established the clear statement rule. The court held “there must be present the affirmative intention of the Congress clearly expressed in favor of that statutory interpretation.” Id. at 500. See also Gregory v. Ashcroft, 501 U.S. 452 (1991). Applying this precedent to the VRA, the Baker Court reasoned that the constitutional balance would be altered if the VRA was applied to New York’s felon disfranchisement statute without a clear statement of intent.

## **B. Farrahkan Decision**

In Farrakhan v. Locke, 987 F.Supp. 1304 (Dist Ct ED Wash 1997), the court believed the VRA “should be interpreted in a manner that provides the broadest possible scope in combating racial discrimination.” Id. at 1307.

The plaintiffs argued because the felon disfranchisement law disproportionately removed minorities from the voting population and denied the right to vote to felons who are the disproportionate minority, a case for vote denial and vote dilution had been made. Id. The court allowed the vote denial claim but dismissed the claim for vote dilution.

On appeal to the Court of Appeals for the 9<sup>th</sup> Circuit, that court affirmed in part, reversed in part, and remanded the case. On the vote denial and vote dilution claims the court held:

[W]hen felon disfranchisement results in denial of the right to vote or vote dilution on account of race or color, Section 2 affords disfranchised felons the means to seek redress.” Farrakhan v. Washington, 338 F.3d 1009, 1016 (9<sup>th</sup> Cir. 2003).

In addition the court determined racial bias in the criminal justice system is an additional factor to be considered when applying the totality of the circumstances test set forth in the VRA. “When examining the totality of the circumstances, courts must consider how the practice in question interacts with social and historical conditions to cause 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). The court found that the district court’s failure to consider racial bias in Washington’s criminal justice system was error.

### **C. Muntaqim Decision**

For a second time, the 2<sup>nd</sup> Circuit had the opportunity to evaluate the VRA’s applicability to felon disfranchisement statutes. A three judge panel held:

“...in light of recent Supreme Court decisions that have clarified the scope of Congress’ enforcement power under the Reconstruction Amendments, the application of the Voting Rights Act to felon disfranchisement statutes such as that of New York would infringe upon the states’ well-established discretion to deprive felons of the right to vote.” Muntaqim v. Coombe, 366 F.3d 102, 104 (2004).

The court based their decision on precedent from the Supreme Court instructing lower courts not to construe statutes that would upset the constitutional balance without an unmistakably clear statement from Congress that the statute to be interpreted in that manner. See Gregory v. Ashcroft, 501 U.S. 452 (1991).

Finding that §2 of the VRA does not apply, the Court later agreed to rehear the case en banc, but have yet to do so. It is important to note, the 2<sup>nd</sup> Circuit has allowed the decision to stand until it issues an opinion on the rehearing en banc.

### **D. Johnson Decision**

In Johnson v. Governor Of the Of State Florida, 405 F.3d 1214 (2005) a class action was filed on behalf of all Florida citizens who had been convicted of a felony and completed all terms of their incarceration, probation, and parole but were still barred from voting under the State's disfranchisement law.

The court found "[d]espite its broad language, §2 does not prohibit all voting restrictions that may have a racially disproportionate effect." Johnson at 1228. Emphasizing "[f]elon disfranchisement laws are *unlike other voting qualifications*. These laws are deeply rooted in this Nation's history and are a punitive device stemming from criminal law." Id. (emphasis added). All but two states have some form of felon disfranchisement provision. In addition, twenty-nine out of thirty-six states had disfranchisement laws at the time the Fourteenth Amendment was passed. "The prevalence of these laws before African-Americans were granted the right to vote indicates that states have historically maintained these laws for race-neutral reasons." Id.

Next the court evaluated whether the VRA was intended to apply to felon disfranchisement provisions. It is clear from a reading of the VRA that there is no express intent to apply it to felon disfranchisement. "The Fourteenth and Fifteenth Amendments to the United States Constitution grant Congress the power to enforce those amendments' substantive provisions *by appropriate legislation*." Id. at 1230 (emphasis added). The court believed the

plaintiff's interpretation of the VRA's scope presented a serious constitutional question. "The only issue here is our concern over whether Congress would exceed its authority if we were to apply Section 2 to Florida's felon disenfranchisement law." Id.

Congress' power must be appropriate and that power is not absolute.

As stated in City of Boerne v. Flores, "there must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." City of Boerne v. Flores, 521 U.S. 507, 520 (1997). Even though Congress has the power to prohibit activities not specifically prohibited by the Fourteenth Amendment, it does not extend to constitutionally protected activities. "This is not to say that a state's felon disenfranchisement provision can never be challenged." Johnson at 1230. In Hunter v. Underwood, the court made clear that "states cannot use disenfranchisement provisions to discriminate intentionally on the basis of race." 471 U.S. 222, 233 (1985). In Hunter, it was determined the intent behind the provision was discriminatory thereby violating the Fourteenth Amendment.

In addition to the congruence and proportionality requirements, the Supreme Court has held "for Congress to enact proper enforcement legislation, there must be a record of constitutional violations." Board of Trustees of University of Alabama v. Garrett, 531 U.S. 356, 368(2001). The plaintiffs argued that it would be unreasonable for Congress to list every type of

voting discrimination when they enacted the VRA. The Johnson Court disagreed stating “[g]iven the widespread existence of felon disfranchisement laws throughout this Nation’s history and the fact that many states had such laws on their books when the VRA was enacted, we find no merit in this argument.” Johnson at 1231.

For the above reasons, the Johnson Court decided “the plaintiffs’ interpretation of the VRA raises grave constitutional concerns. For the plaintiffs’ interpretation to be correct, we must look for a clear statement of Congress that it intended such a constitutionally-questionable result.” Johnson at 1232. “Instead of a clear statement from Congress indicating that the plaintiffs’ interpretation is correct, the legislative history indicates just the opposite - that Congress never intended the Voting Rights Act to reach felon disfranchisement provisions.” Id.

Based on the opinions in the three Circuits that have reviewed the issue, this Court should not apply §2 of the VRA to Maryland’s Election Law §3-102 for four reasons: (1) the VRA was not intended to apply to state felon disfranchisement; (2) felon disfranchisement is expressly provided for in the Fourteenth Amendment; (3) if applied, the constitutionality of the VRA would be entered into issue; and (4) even under the minority view of the 9<sup>th</sup> Circuit, Mr Coolidge has failed to state a claim upon which relief can be granted under the VRA.

**E. §2 Of The VRA Was Never Intended To Apply To Felon**

## Disenfranchisement

The enactment of the Voting Rights Act of 1965 "reflected Congress' firm intention to rid the country of racial discrimination in voting." South Carolina v. Katzenbach, 383 U.S. 301, 315 (1966). Felon disenfranchisement statutes were not included in the VRA as a discriminatory device. Reviewing (1) the text of the VRA; (2) its legislative history; (3) the history of felon disenfranchisement; and (4) subsequent legislation by Congress, it is apparent that Congress did not intend the Voting Rights Act to apply to felon disenfranchisement.

### **1. The VRA was established to combat devices used to prevent the equal right to vote.**

Felon disenfranchisement statutes such as Maryland Election Law §3-102 do not prevent the equal right to vote. Voting rights are revoked from those individuals who through their own intentional actions have forfeited that right.

Mr. Coolidge did receive the equal opportunity to vote and he exercised that right in the 1992, 1996, and 2000 Presidential Elections. This occurred after he was convicted of an infamous crime and served his sentence. In April of 2004 he voluntarily chose to commit a violent crime. It was the commission and conviction of this crime that forfeited his right to vote in any further elections in Maryland. The state of Maryland affords all

of its citizens the equal opportunity to participate in the voting process and only permanently disfranchises those who after multiple opportunities, like Mr. Coolidge, refuse to abide by the law.

**2. The VRA was established to combat new voting restriction devices.**

Devices such as literacy and good moral character tests were used in states as a new method to evade the mandate of the Fifteenth Amendment. Felon disfranchisement statutes were not established for this purpose. "The prevalence of felon disfranchisement before the Civil War indicates that felon disfranchisement laws in most states were not enacted to evade the Reconstruction Amendments." Muntaqim v. Coombe, 366 F.3d 102, 123 (2d Cir. 2004).

Here Mr. Coolidge asks this Court to invalidate not only a state statute but a provision to the Constitution of the State of Maryland. It is obvious Maryland's practice of felon disfranchisement was not passed as a "device" to get around the Fourteenth and Fifteenth Amendments and deny African Americans the equal opportunity to vote.

**3. The prevalent use of felon disfranchisement.**

It is unlikely Congress would “declare war” on voting discrimination devices and forget to include a device as common as felon disfranchisement. The VRA was amended in 1982 and Congress had a second chance to add felon disfranchisement to the scope of the act. They did not do so and, as in 1965, there was no mention of any intent to do so in the legislative history of the amendment.

**4. Since the 1982 amendment to the VRA, Congress has passed legislation making it easier for States to disfranchise voters.**

In 1993, Congress enacted the National Voter Registration Act (NVRA) Pub. L. No. 103-31, 107 Stat. 77 (1993), which justified revoking the registration of a voter who is a convicted felon. It also instructed prosecutors to notify state election officials when a felon was convicted and disfranchisement applied. “It’s thus crystal clear that felon disfranchisement wasn’t one of the practices about which Congress was concerned.” Farrakhan v. Washington, 359 F.3d 1116, 1121 (2004) (Kozinski, J. dissenting).

**F. Felon disfranchisement is constitutionally authorized by the Fourteenth Amendment**

“The legitimacy of felon disfranchisement is affirmed in the text of the 14<sup>th</sup> Amendment itself.” Baker v. Pataki, 85 F.3d 919, 929 (2d Cir. 1996). §2 of the Fourteenth Amendment states in part “...except for participation in rebellion or other crime...” In

Richardson v. Ramirez, the Supreme Court reviewed the history that surrounded the adoption of §2 of the Fourteenth Amendment.

States seeking readmission into the Union after the Civil War were required to submit for approval its proposed state constitution. Many of these included an exception to disfranchise felons. The Court found "[t]his convincing evidence of the historical understanding of the 14<sup>th</sup> Amendment is confirmed by the decisions of this Court which have discussed the constitutionality of provisions disfranchising felons." Richardson v. Ramirez, 418 U.S. 24, 53 (1974). Having determined that §2 allows an exception for disfranchising felons, the Court stated "we may rest on the demonstrably sound proposition that §1 could not have been meant to bar outright a form of disfranchisement which was expressly exempted..." Id. at 55.

In Hunter v. Underwood, 471 U.S. 222, 105(1985) an action was brought challenging a provision in the Alabama State Constitution allowing the disfranchisement of those convicted of crimes involving moral turpitude. The Court held the provision violated the Equal Protection Clause of the Fourteenth Amendment. The Court found there was discriminatory intent and held that "§2 was not designed to permit the purposeful racial discrimination attending the enactment and operation of §182 which otherwise violates §1 of the 14<sup>th</sup> Amendment. Nothing in our opinion in Richardson v. Ramirez suggests the contrary." Hunter v. Underwood, 471 U.S. 222, 233

(1985).

Based on the clear language in §2 of the Fourteenth Amendment allowing the disfranchisement for "other crime," the State of Maryland is permitted to institute a felon disfranchisement statute. Permanent disfranchisement in Maryland can only occur after a second or subsequent felony conviction and that second or subsequent offense must be a crime of violence. The Maryland Criminal Law Code §14-101(a) defines a "crime of violence" as one of fourteen different offenses. Mr. Coolidge contends 54% of African Americans that are currently incarcerated have been convicted of violent crimes compared to 48% of whites currently incarcerated. These numbers are hardly disparate. Mr. Coolidge was convicted of robbery. There is no evidence that the crime of robbery was selected as a crime of violence simply to discriminate against African Americans. The opportunity to affect all classes of individuals is equally distributed.

**G. Applying §2 of the VRA to felon disfranchisement would question the constitutionality of the VRA**

"Felon disfranchisement is a very widespread historical practice that has been accorded *explicit constitutional recognition* in §2 of the Fourteenth Amendment." Richardson v. Ramirez, 418 U.S. 24, 54(1974) (emphasis added).

Under the Maryland state constitution, Article 1, Section 4,

"[t]he General Assembly by law may regulate or prohibit the right to vote of a person convicted of infamous or other serious crime ...". Clearly Maryland expressly allows permanent disfranchisement. This provision gets its authority from §2 of the Fourteenth Amendment to the U.S. Constitution which allows States to enact disfranchisement for "rebellion or other crime." Unlike literacy tests and other devices, disfranchisement statutes do not prevent the equal right to vote. Mr Coolidge was afforded the equal right to vote (and still is, in some states) but chose to commit multiple felonies and forfeit that right.

The VRA has established itself as one of the most important pieces civil rights legislation ensuring the equal opportunity to vote for all citizens. By impermissibly expanding the scope of the VRA and applying it to Maryland Election Law §3-102 the constitutionality of the VRA would be called into question.

**H. Even in the broadest reading of the VRA's scope, Mr. Coolidge has not established a claim of vote denial**

In Farrakhan v. Washington, the 9<sup>th</sup> Circuit became the only circuit to apply §2 of the VRA to felon disfranchisement holding "racial bias in the criminal justice system may very well interact with voter disqualifications to create the kinds of barriers to political participation on account of race that are prohibited by Section 2, rendering it simply another relevant social and

historical condition to be considered *when appropriate*." Farrahkan v. Washington, 338 F.3d 1009, 1020 (9<sup>th</sup> Cir. 2003) (emphasis added).

The evidence proffered by Mr. Coolidge to prove racial bias creating a racially discriminatory impact by Maryland's felon disenfranchisement provision is not adequate. Even using the broadest possible reading of the VRA's scope, the evidence fails to meet its burden of proof. Mr. Coolidge offers statistical data purporting to show that through the criminal justice system, African Americans have been subjected to bias on a disparate level. In addition, Mr. Coolidge alleges he personally has been a victim of that racial bias.

Mr. Coolidge's evidence is insufficient in three ways. First, standing on their own, statistics do not prove whether or not the racial bias exists. Second, Mr. Coolidge's proffered statistics are ambiguous and unreliable. Third, Mr. Coolidge's claim he was personally a victim of racial bias is without merit.

**1. The claim that disparities in the arrest and conviction rates of African Americans in Maryland in general Baltimore in particular are not by themselves convincing.**

Mr. Coolidge alleges African Americans have less of an opportunity to participate in the electoral process than whites. "Studies based on statistical disparities are notoriously unreliable." See McClesky v. Kemp, 481 U.S. 279 (1987). In

McClesky, the court evaluated statistical data showing disparities in the application of the death penalty between African American and white offenders. The court found even though the study "indicates a discrepancy that appears to correlate with race, [a]pparent disparities in sentencing are an inevitable part of our criminal justice system." Id. at 312.

The question of reliability of statistics standing alone has been questioned by many other courts. See Smith v. Salt River Project Agricultural Improvement and Power District, 109 F.3d 586 (9<sup>th</sup> Cir. 1996) (bare statistical showing of disproportionate *impact* on a racial minority does not satisfy the §2 'results' inquiry); Ortiz v. City of Philadelphia Office of the City Comm'rs, 28 F.3d 306, 315 (3d Cir. 1994) (rejecting a §2 challenge based purely on a showing of racially disparate statistics); Irby v. Virginia State Board of Elections, 889 F.2d 1352 (4<sup>th</sup> Cir. 1989) (no §2 violation despite a statistical disparity between blacks in the population and their representation on the school board); Salas v. Southwest Texas Junior College, 964 F.2d 1542 (5<sup>th</sup> Cir. 1992) (§2 claim rejected despite statistical disparity between white and Hispanic voter turnout); Wesley v. Collins, 791 F.2d 1255 (6<sup>th</sup> Cir. 1986) (rejected challenge to state disenfranchise law relying primarily on disparities in white and minority felony-conviction rates).

The only evidence Mr. Coolidge can produce to show alleged discriminatory impact is a haphazard collection of statistics.

They do not prove actual discrimination. It would not be permissible to conclude from the data that African Americans are more likely to commit violent crimes, conversely, it can not be permitted to interpret the statistics to prove African Americans must be discriminated against simply because a greater percentage of them have been convicted of these violent crimes.

**2. The actual statistics proffered are not reliable.**

The statistical studies in McClesky were subjected to extensive analysis which included 230 variables that could explain the disparities on grounds other than race. The statistics proffered by Mr. Coolidge have no such characteristics supporting their reliability. Many of the statistics failed to make equal comparisons.

For example, Mr. Coolidge cites that of African-Americans of voting age who are permanent residents of *Baltimore*, 0.9% are in prison. R. at 12. He compares that number with *all white Maryland* residents and claims 0.25% of those are in prison. Id. By including *all white citizens in Maryland*, the white statistics are diluted thus showing a greater disparity in the numbers.

In addition, he cites that African Americans are in contact with police 75% more often than whites but does not explain what that means. R. at 13. Does that number include African Americans that report crimes or have contact with police for clearly non-

criminal reasons? There is no evidence that Mr. Coolidge considered any other variables other than race that, if the statistics are true, could provide other reasons besides race to explain the disparities.

**3. Mr. Coolidge's claim that he was personally a victim of racial bias is totally without merit.**

Mr. Coolidge claims that as a result of racial bias in his original conviction for an infamous crime, the arrest and conviction was discriminatory. It follows, he argues, that but for that conviction he would only have one violent conviction on his record and would not have an infamous conviction. Accordingly, he would not have been permanently disfranchised. Referring to the facts surrounding that arrest, it is clear he was not a victim of racial bias. Mr. Coolidge was apprehended police who were investigating reports of a robbery by an African-American man of similar build. R. at 10. While searching him, they found 10 grams of cocaine. Id. The police had a report of a robbery that was perpetrated by an "African-American man of similar build." Id. It was reasonable for the police to stop Mr. Coolidge because he matched the exact description they were given: he was an African-American, he was male, and he had a similar build.

Besides questionable statistics Mr. Coolidge provides no other evidence that he was subjected to any racial bias in the criminal justice system. Mr. Coolidge does not dispute that fact that he was in possession of the cocaine and thus guilty of that infamous crime. In addition, he was caught on video committing the robbery of the convenience store thus subjecting him to permanent disfranchisement. Mr. Coolidge has not suffered any personal racial bias in the criminal justice system. He has only suffered from a litany of bad personal choices.

**II. MARYLAND'S DISFRANCHISEMENT OF A VIOLENT FELON PREDICATED ON A PRIOR CONVICTION FOR AN INFAMOUS CRIME IS NOT CRUEL AND UNUSUAL PUNISHMENT**

Felon disfranchisement is not cruel and unusual punishment in violation of the Eighth Amendment for the following reasons: (1) the historical record of the Eighth Amendment does not discuss felon disfranchisement; (2) cruel and unusual was never intended to apply to felon disfranchisement; (3) court findings of Eighth Amendment violations are not comparable to disfranchisement; and (4) Maryland Election Law §3-102 in particular is neither cruel nor unusual.

**A. The history of the Eighth Amendment does not contemplate felon disfranchisement as cruel and unusual.**

This Court first addressed the clause prohibiting cruel and

unusual punishment in Wilkerson v. Utah, 99 U.S. 130 (1879), upholding shooting as a constitutional form of execution. "The phrase [barring cruel and unusual punishment] in our Constitution was taken directly from the English Declaration of Rights of 1688" Trop v. Dulles, 356 U.S. 86, 100 (1958). The purpose was to prohibit the state from imposing sentences that torture or utilize other barbarous practices which are unknown or uncommon. See Gregg v. Georgia, 428 U.S. 153 (1976); Estelle v. Gamble, 429 U.S. 97 (1976). "While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards." Trop v. Dulles, 356 U.S. 86, at 100 (1958).

In addition to prohibiting certain methods of punishment "[t]he Eighth Amendment ... contains a 'narrow proportionality principle' that 'applies to noncapital sentences.'" Ewing v. California, 538 U.S. 11, 20 (2003) (quoting Harmelin v. Michigan, 501 U.S. 957, 996-97 (1991)). Under this narrow proportionality principle, the Eighth Amendment "does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime." Id. at 23.

In the context of an Eighth Amendment challenge to a state statute, this Court has held that specification of punishment is purely a matter of legislative prerogative and the Court owes deference to the policy decisions of the state legislatures. See

Gregg v. Georgia, 428 U.S. 153 (1976); Rummel v. Estelle, 445 U.S. 263 (1980). “[T]he requirements of the Eighth Amendment must be applied with an awareness of the limited role to be played by the courts” thus when assessing a punishment selected by a democratically elected legislature against the constitutional measure, the court will presume its validity. Gregg v. Georgia, 428 U.S. 153, 174-175 (1976).

**B. The Founding Fathers did not intend the Eighth Amendment to Apply to Felon Disfranchisement.**

The Fourteenth Amendment specifically provides for the disfranchisement of individuals for convictions of “rebellion or other crimes”. The power to regulate the franchise was reserved within the states by the Fourteenth Amendment. “States have the power to impose voter qualifications, and to regulate access to the franchise in other ways.” Dunn v. Blumstein, 405 U.S. 330, 336 (1972).

Under the Eighth Amendment “[f]ines, imprisonment, and even execution may be imposed depending upon the enormity of the crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect.” Trop v. Dulles, 356 U.S. 86, at 100 (1958). Felon disfranchisement is the constitutionally enumerated power, with the specificity required by Trop. The Founding Fathers provided the states with a mechanism to impose civil disabilities

in order to create a potentially severe, yet humane punishment which does not subject convicted felons to the indignities of physical imprisonment or torture.

State laws disfranchising felons have been in existence since before the drafting of The Bill of Rights and they remain today. The Maryland Constitution when adopted included a provision to disfranchise. The provisions for felon disfranchisement in the U.S. Constitution, and numerous state constitutions, are evidence that disfranchisement as a form of punishment has never been uncommon or unusual to the history of this country.

**C. The Supreme Court has never held felon disfranchisement to violate the Eighth Amendment.**

Although the Supreme Court has reviewed Eighth Amendment challenges in a number of state and federal convictions, this Court has adjudged only four punishments to be within the prohibition of the Eighth Amendment.

In Weems v. United States, 217 U.S. 349 (1910), the Court invalidated under the Eighth Amendment a sentence of fifteen years in chains at hard labor for the nonviolent crime of falsifying a public document. Seventy-three years later in Solem v. Helm, 463 U.S. 277 (1983) the Court invalidated a sentence of life imprisonment without the possibility of parole imposed under a South Dakota law against a nonviolent recidivist whose final crime

was writing a bad check with the intent to defraud. Paying particular attention to the impossibility of parole the court found the sentence to be disproportionate to the crime. See also Trop v. Dulles, 356 U.S. 86 (1958) (expatriation); Robinson v. California, 370 U.S. 660 (1962) (imprisonment for narcotics addiction).

In contrast to these cases, the Supreme Court has rejected Eighth Amendment challenges in the following cases:

- A life sentence, under a Texas recidivist statute for successive convictions of (1) fraudulent use of a credit card to obtain \$80 worth of goods or services, (2) a forged check in the amount of \$28.36, and (3) obtaining \$120.75 by false pretenses. Rummel v. Estelle, 445 U.S. 263 (1980).
- A life sentence, without the possibility of parole, for possession of more than 650 grams of Cocaine. Harmelin v. Michigan, 501 U.S. 957 (1991).
- A twenty-five year to life sentence imposed under a California recidivist statute for the offense of felony grand theft (i.e., stealing three golf clubs worth approximately \$1,200). Ewing v. California, 538 U.S. 11 (2003).

Although mandatory sentencing for multiple felony convictions may result in a permanent loss of liberty, which is undoubtedly a fundamental right, these recidivist statutes do not constitute cruel and unusual punishment. Maryland's Election Law §3-102 is a recidivist statute. Only after several felony convictions, the

determining one being a violent felony, is the right to vote forfeited. This law is congruent with those upheld by the Supreme Court to punish violent criminals and deter crime. Clearly disfranchisement of a violent felon is not as cruel and unusual as a life sentence for writing a bad check. Applying these principles requires a conclusion that this is not a case in which the sentence is "grossly disproportionate" to the crimes committed.

**D. Maryland Election Law §3-102 does not violate Eighth Amendment.**

The United States District Court for the District of Maryland specifically addressed Maryland Election Law §3-102 finding no constitutional infirmity in the disfranchisement of convicted persons. Thiess v. State Board, 387 F.Supp. 1038, 1042 (D.C.Md. 1974). Additionally, the Supreme Court has observed that disfranchisement statutes are not per se unconstitutional and held that a statute disfranchising felons in California was authorized by §2 of the Fourteenth Amendment. Richardson v. Ramirez, 418 U.S. 24 (1974).

Only Trop v. Dulles would appear to buttress Mr. Coolidge's contention that political disfranchisement is unconstitutional as cruel and unusual. However in Trop, Chief Justice Warren concluded "the Eighth Amendment forbids Congress to punish by taking away citizenship." 356 U.S. at 103. However, unlike the penalty of expatriation, the penalty of disfranchisement is one specifically

recognized by the Fourteenth Amendment, an amendment enacted subsequent to the Eighth Amendment. See Richardson v. Ramirez, 418 U.S. 24, 54 (1974). Importantly, Chief Justice Warren's words in Trop suggest a marked difference in severity between total political expatriation and the more limited deprivation of the right to vote." Thiess v. State Board, 387 F.Supp. at 1042.

Relying on Richardson v. Ramirez, the court in Theiss noted "it may be that modern legislators should conclude that the concept of disfranchisement is outmoded..." 387 F.Supp. at 1042. There is a vast difference between encouraging legislators to change a practice some conclude is outdated and improperly using the courts to strike down states laws on the opinion they are unconstitutional.

The history surrounding felon disfranchisement supports the contention that the practice is not uncommon in the United States and therefore not unusual. Finally, when considered in light of Maryland's goal of dealing harshly with repeat violent offenders, Coolidge's punishment is not extremely disproportionate to the offense committed. For the reasons set forth above this court must hold that felon disfranchisement is not cruel and unusual and reverse the Court of Appeals decision.

#### **CONCLUSION**

Upholding the decision of the circuit court would be in conflict with other circuit courts, the VRA itself, and most importantly the United States Constitution.

**I. VRA should not be applied to state felon disfranchisement.**

Two circuits holding en banc have determined the scope of the VRA does not reach state felon disfranchisement provisions. The only circuit that has not agreed with that interpretation flatly refused to rehear the case en banc. Additionally, there is no support favoring Congress' intent for the VRA to apply to felon disfranchisement. The plain text of the VRA does not provide for it and the legislative history does not support that view. Also, subsequent legislation by Congress contradicts the contention the VRA was intended to apply to disfranchisement. Finally, the Fourteenth Amendment provides for felon disfranchisement.

**II. Felon disfranchisement not cruel and unusual.**

The Eighth Amendment's prohibition on cruel and unusual punishment has never been applied to bar disfranchisement. It is inconceivable that the Eighth Amendment would permit a sentence of execution but would cringe at the thought of a violent felon losing the right to vote as the consequence of his repeated crimes. Mr. Coolidge's claim that his loss of voting power is cruel could be true to him personally. However, based on the application of felon disfranchisement by all but two states, it cannot be described as

unusual in the constitutional sense.

For the foregoing reasons, was ask this Honorable Court to vacate the decision of the Fourth Circuit and allow the dismissal by the District Court to stand.

Respectfully submitted,

Team # 10889

Attorneys for the Petitioner