

In the Supreme Court of the United States

Docket No. 05

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 RESPONDENTS

ID # 10778

Table of Contents

Questions Presented..... vi
Jurisdictional Statement..... vi
Statement of Case..... 1
Statement of Facts..... 1
Summary of Argument..... 3
 Question 1..... 3
 Question 2..... 4
Argument..... 5
 Standard of Review..... 5
 Question 1..... 5
 I. Introduction..... 5
 II. The Application of the Voting Rights Act..... 6
 A. The federal government’s jurisdiction under the VRA
 applies to state felon disenfranchisement provisions as
 they are included in the plain meaning of § 2 of the
 statute..... 6
 B. Section 2 of the Fourteenth Amendment does not foreclose
 an application of the Voting Rights Act to felon
 disenfranchisement provisions. 8
 C. The application of the Voting Rights Act to Maryland’s
 felon disenfranchisement law does not exceed Congress’
 enforcement power under the Fourteenth and Fifteenth
 Amendments and would not upset the balance of power between
 the federal government and the states..... 11
 III. The Totality of Circumstances Test..... 16
 A. This court should not set a standard for evaluation of
 discrimination in a *de novo* proceeding with no facts before
 it..... 16
 B. If the court were to set a standard for evaluation of
 discrimination, it should adopt the totality of
 circumstances test..... 16
 C. Under the totality of circumstances test, Maryland’s
 three-tiered mechanism for felon disenfranchisement
 interacts with political and social conditions in the state
 to deny plaintiff’s right to vote on account of race..... 18
 Question 2..... 21
 I. Introduction..... 21
 II. Punishment v. Regulation..... 21
 A. Felon disenfranchisement laws are punitive..... 21
 B. The Fourteenth Amendment does not establish an
 “affirmative sanction” for all felon disenfranchisement..... 23
 III. “Cruel and Unusual” 24

A. Maryland's felon disenfranchisement laws are "barbaric"	24
B. Maryland's disenfranchisement laws are excessive	26
1. Maryland's permanent disenfranchisement laws do not contribute to the goals of punishment	26
2. Maryland's disenfranchisement laws are grossly disproportionate to the crimes	28
Conclusion	30

Table of Authorities

Cases

Bass v. E.I. Dupont de Nemours & Co., 324 F.3d 761 (4th Cir. 2003)
Board of Trustees of University of Alabama v. Garrett, 531 U.S. 356 (2001)
Carrington v. Rash, 380 U.S. 89 (1965)
Chisom v. Roemer, 501 U.S. 380 (1991)
City of Boerne v. Flores, 521 U.S. 507 (1997)
Coker v. Georgia, 433 U.S. 584 (1977)
Conley v. Gibson, 355 U.S. 41 (1957)
District 28, United Mine Workers of America v. Wellmore Coal Corp., 609 F.2d 1083 (4th Cir. 1979)
Ewing v. California, 538 U.S. 11 (2002)
Farrakhan v. Locke, 338 F.3d 1009 (9th Cir. 2003)
Farrakhan v. Washington, 338 F.3d 1009 (9th Cir.2003)
Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999)
Green v. Board of Elections of New York, 380 F.2d 445 (1967)
Gregory v. Ashcroft, 501 U.S. 452 (1991)
Harmelin v. Michigan 501 U.S. 957 (1991)
Hishon v. King & Spalding, 467 U.S. 69 (1984)
Hunter v. Underwood, 471 U.S. 222 (1985)
Johnson v. Bush, 405 F.3d 1214 (11th Cir. 2005)
Johnson v. Governor of Florida, 353 F.3d 1287 (11th Cir.2003)
Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000)
Oregon v. Mitchell, 400 U.S. 112 (1970)
Marbury v. Madison, 5 U.S. 137 (1803)
Muntaqim v. Coombe, 366 F.3d 102 (2d Cir.2004)
Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003)
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Smith v. Salt River Project Agric. Improvement & Power Dist., 109 F.3d 586 (9th Cir.1997)
Tennessee v. Lane, 541 U.S. 509 (2004)
Thornburg v. Gingles, 478 U.S. 30 (1986)
Trop v. Dulles, 356 U.S. 86 (1958)

US Constitution

Amendment VIII
Amendment XIV
Amendment XV

Statutes

Md. Code Ann., Election Law § 3-102
Voting Rights Act, 42 U.S.C. § 1973

Rules

Fed R. Civ. P. 12(b)(6)

Miscellaneous

Act of June 25, 1868, ch. 70, 15 Stat. 73. cited in 115 Harv. L.Rev. 1939 at 1961

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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 [VRA], 42 U.S.C. § 1973, because it results in a denial of the right to vote on account of race?
2. Is Maryland's disenfranchisement of a violent felon, predicated on his prior conviction of an infamous crime, a cruel and unusual punishment in violation of the Eighth Amendment?

Jurisdictional Statement

This Court has jurisdiction under 28 U.S.C. § 1331, as the action arises under the Voting Rights Act, 42 U.S.C. § 1973; the Civil Rights Act, 42 U.S.C. § 1983; and the United States Constitution.

Statement of Case

Plaintiff Jeffrey Coolidge (Coolidge) brings this suit against the Maryland State Board of Elections ("State Board"); Janet Fallins (Fallins); the Board of Elections of the City of Baltimore, (City Board); and Edward D. Jones (Jones), for declaratory and injunctive relief under 42 U.S.C. § 1973, U.S. Const. amend. VII, XIV, and XV, 42 U.S.C. § 1983. Coolidge requests that the court: a) declare that Maryland's permanent disenfranchisement laws violate the above laws; and b) enjoin the defendants from enforcing that law. In District Court, summary judgment was granted in favor of the defendants. This motion was reversed in the Court of Appeals.

Statement of Facts

Coolidge, an African American, resides in Baltimore, Maryland. When he was nineteen years old, he was pulled over by Baltimore County police on suspicion of robbery. During the search, the police found ten grams of cocaine. Although Coolidge was never charged with the robbery he was pulled over for, he was convicted of possession with intent to distribute a controlled substance by a jury of eleven Caucasians and one African American. He was sentenced to one year in prison and one year of probation.

Coolidge served his prison sentence. However, he was apprehended by Baltimore City police during his probationary

period when the police found one gram of cocaine in his possession. He was convicted of possession of a controlled substance, and received six months in jail. After his release from prison, Coolidge underwent treatment for addiction to cocaine, which was successfully completed two years later.

In 1992, Coolidge registered to vote for the first time and voted in the 1992, 1996, and 2000 Presidential elections.

In 2004, Coolidge was convicted of a \$150 robbery. Coolidge was not armed. He was sentenced to five years in prison and five years probation.

After this conviction, he became permanently ineligible to vote under Maryland's election laws. An individual is ineligible to vote when they have been convicted of an infamous crime and a second or subsequent violent crime. Maryland classifies Coolidge's conviction of possession with intent to distribute as an infamous crime and his conviction of robbery is classified as a crime of violence.

The clear evidence of disparate racial discrimination perpetuated by the statute is reflected in the statistics concerning voting. Of African Americans of voting age in Maryland, 0.8% are currently in prison, of which 48% are serving sentences for violent crimes. Only 0.25% of white Maryland residents are in prison, of which 50% are serving sentences for such crimes. Of African Americans of voting age in Maryland,

3.9% are permanently ineligible to vote under Md. Code Ann., Election Law § 3-102(c). Only 1.0% of white Maryland residents of voting age are permanently ineligible to vote.

Among African Americans in prison in Maryland, 25% are serving sentences for drug-related crimes, while only 9% of white prisoners are serving sentences for such crimes. African Americans in Maryland are in contact with the police 75% more often than white residents. African American defendants in Baltimore plead guilty 35% more often than whites. Juries in the County of Baltimore have on average 1 African American juror for every 3 white jurors, even though the population of the county has 1 African American resident for every 5 residents.

Summary of Argument

Question 1

The plain meaning of the Voting Rights Act demonstrates that it applies to state felon disenfranchisement provisions. Section 2 of the Fourteenth Amendment does not foreclose an application of the Voting Rights Act to Maryland's felon disenfranchisement provision. The application of the Voting Rights Act to felon disenfranchisement laws does not exceed Congress' enforcement power under the Fourteenth and Fifteenth Amendments and would not upset the federalist balance. This court should not set a standard for evaluation of discrimination in a *de novo* proceeding where no facts have been determined. If

this Court were to decide on a standard, it should adopt the Voting Rights Act's totality of circumstances test. Under this test, Maryland's three-tiered mechanism for felon disenfranchisement interacts with political and social conditions in the state to deny plaintiff's right to vote on account of race.

Question 2

Maryland's disenfranchisement laws are punitive, and therefore subject to the Eighth Amendment, because they do not serve a legitimate governmental goal. Even though states have historically had the authority to regulate voting qualifications, these qualifications must be reasonable in relation to their purpose. *Carrington v. Rash*, 380 U.S. 89, (1965). Common justifications for felony disenfranchisement, such as the estimated voting trends of felons and protection of the integrity of the voting process, are not valid governmental goals.

Maryland's permanent felon disenfranchisement laws are also cruel and unusual. According to the more lenient standards established in other jurisdictions, both nationally and internationally, Maryland's disenfranchisement laws are barbaric. Additionally, Maryland's permanent felon disenfranchisement laws are also excessive because they do not contribute to an acceptable goal of punishment. An examination

of the severity of the crime, the sentences imposed for similar crimes in the same jurisdiction, and the sentence imposed in other jurisdictions demonstrate that Maryland's disenfranchisement laws are grossly disproportionate to the Coolidge's crime.

Argument

Standard of Review

Under Federal Rules of Civil Procedure, dismissal of a civil action is appropriate where plaintiff has failed to state a claim upon which relief can be granted. Fed R. Civ. P. 12(b)(6). The Court should review a dismissal under Rule 12(b)(6) *de novo*, using the same legal standards as the District Court. *Bass v. E.I. Dupont de Nemours & Co.*, 324 F.3d 761, 764 (4th Cir. 2003). The court must take the facts alleged in the complaint in the light most favorable to the respondent, assuming for the moment that the factual allegations in the complaint are true. *District 28, United Mine Workers of America v. Wellmore Coal Corp.*, 609 F.2d 1083, 1085 (4th Cir. 1979). Dismissal is proper only when it is clear as a matter of law that respondent could not obtain relief under any set of facts consistent with the allegations. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

Question 1

I. Introduction

The analysis of the VRA has two main sections. The first section is a demonstration that the VRA applies to state felon disenfranchisement provisions. This first section in turn has two components. The first component is the argument that § 2 of the Fourteenth Amendment does not foreclose an application of the VRA to Maryland's felon disenfranchisement provision. The second component is the argument that the application of the VRA to felon disenfranchisement laws does not exceed Congress' enforcement power under the Fourteenth and Fifteenth Amendments and would not upset the federalist balance. The second section is an argument that this court should not set a standard for evaluation of discrimination in a *de novo* proceeding where no facts have been determined. If this Court were to decide on a standard, it should adopt the VRA's totality of circumstances test. Under this test, Maryland's three-tiered mechanism for felon disenfranchisement interacts with political and social conditions in the state to deny plaintiff's right to vote on account of race.

II. The Application of the Voting Rights Act

A. The federal government's jurisdiction under the VRA applies to state felon disenfranchisement provisions as they are included in the plain meaning of § 2 of the statute.

Plaintiff has a cognizable claim under the VRA. Section A of the VRA states that "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[.]" 42 U.S.C. § 1973(a). The plain meaning of the statute is that Maryland should not be able to use past criminal convictions as a basis for the disenfranchisement of individuals where such convictions interact with political, economic and social factors to deny the right to vote on account of race.

Maryland's election law stipulates that a citizen permanently loses the right to vote if [s]he is convicted of an infamous crime and a subsequent violent crime. Md. Code Ann., Election Law § 3-102. Under § 3-102 of the statute, conviction of a violent crime and prior conviction of an infamous crime are voting qualifications within the contemplation of § 2 of the Voting Rights Act. As a result of discrimination at all stages of the criminal justice system in Maryland, from the detention of infamous crimes through sentencing, African Americans are disenfranchised under §3-102 at a disproportionately high rate. Thus, Maryland's statutory provision that permanently denies the right to vote to persons who have committed a second or subsequent violent felony is 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.

B. Section 2 of the Fourteenth Amendment does not foreclose an application of the Voting Rights Act to felon disenfranchisement provisions.

The Fourteenth Amendment stipulates that a state that infringes the right to vote will be subject to reduction of its representation. However, a clause in the amendment provides an exemption for the denial of the right to vote to those who engage in "rebellion, or other crime." U.S. Const. amend. XIV, §2.

There are two responses to the argument that the Fourteenth Amendment thus provides an affirmative sanction to all felon disenfranchisement laws. The first is that the VRA governs felon disenfranchisement laws in spite of the Fourteenth Amendment's affirmative sanction. *Farrakhan v. Locke*, 338 F.3d 1009, 1014-15 (9th Cir. 2003). The Fourteenth Amendment exemption should apply to general felon disenfranchisement laws, but the Voting Rights Act should apply to those laws "that result in racial discrimination." *Hunter v. Underwood*, 471 U.S. 222, 233 (1985). In *Hunter*, the Court held that a provision of the Alabama Constitution that disenfranchised persons convicted of crimes involving moral turpitude violated the Fourteenth

Amendment because its enactment was motivated by a desire to discriminate against blacks. That decision also established that felon disenfranchisement statutes have often been used to deny the vote on account of race. *Id.* at 232. Judge Barkett of the Eleventh Circuit has supported *Hunter's* finding by pointing out that there is a significant difference between felony disenfranchisement laws "generally and the narrow subset of such laws that result in racial discrimination." *Johnson v. Bush*, 405 F.3d 1247 (11th Cir. 2005) (Barkett, J., dissenting).

Petitioner will undoubtedly point out that this Court has ruled that states may deprive felons of the right to vote without violating the Fourteenth Amendment. *Richardson v. Ramirez*, 418 U.S. 24, 54-55 (1974). But the legislative history of the Voting Rights Act indicates that a broad application of the law is necessary to combat the evolving sophistication and insidiousness in the forms of racial discrimination in voting. Specifically, the Senate Report states: "(E)ven after apparent defeat, registers seek new ways and means of discriminating. Barring one contrivance too often has caused no change in result, only in methods." S.Rep. No. 89-439, at 10 (1965). There is a Constitutional basis for this interpretation of the statute. Congress has the power to remedy unconstitutional state action through its Fourteenth Amendment, § 5 enforcement power "even if in the process [the enforcement power] prohibits

conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy' previously reserved to the States." *City of Boerne v. Flores*, 521 U.S. at 518 (1997)

Moreover, the historical context of the Fourteenth Amendment suggests that the § 2 exception for criminal disenfranchisement laws was meant to be narrow. Before Reconstruction, the number of crimes that resulted in imprisonment and disenfranchisement was much smaller. George P. Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia*, 46 UCLA L. Rev. 1895, 1906 (1999). In the Readmission Acts, Congress provided conditions for various states to return to the Union. The Acts all contained provisions with language similar to: "The constitutions...shall never be so amended or changed to deprive any citizen or class of citizens the right to vote...except as punishment for such crimes as are now felonies at common law." Act of June 25, 1868, ch. 70, 15 Stat. 73. (cited in 115 Harv. L.Rev. 1939 at 1961) (emphasis added). The framers of the 14th amendment never intended for the "rebellion or other crimes" exception to apply beyond the classification of serious crimes as defined in 1870. Since then the list of crimes falling under the felony disenfranchisement laws has expanded so dramatically that the scope of this once "exception" now goes well beyond the its originally intended scope.

The second component of this analysis about the relevance of the Fourteenth Amendment's affirmative sanction of criminal disenfranchisement is that the Fifteenth Amendment's ban on discrimination in voting on account of race is an independent constitutional basis for the application of the Voting Rights Act to Maryland's felony disenfranchisement provisions. Section 2 of the Fifteenth Amendment says that Congress can enforce the amendment with "appropriate legislation." This Court has found that §2 of the VRA was coextensive with the 15th amendment in the context of judicial elections, an enforcement power that is analogous to the power Congress is exercising in this situation. *Chisom v. Roemer*, 501 U.S. 380, 383 (1991). The Fifteenth Amendment contains no exception for felon disenfranchisement. In fact, its legislative history indicates that Congress considered, but rejected, such provisions. Cong. Globe, 40th Cong., 3d Sess. 1012-13, 1041 (1869). Thus, the Fifteenth Amendment provides an independent constitutional basis for the application of the Voting Rights Act to Maryland's electoral law.

C. The application of the Voting Rights Act to Maryland's felon disenfranchisement law does not exceed Congress' enforcement power under the Fourteenth and Fifteenth Amendments and would not upset the balance of power between the federal government and the states.

The application of the Act to Maryland's felon disenfranchisement law does not exceed Congress' enforcement power under the Fourteenth and Fifteenth Amendments. This Court has said that Congress may enforce, but not expand Constitutional rights. *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 728 (2003); *Tennessee v. Lane*, 541 U.S. 509, 520 (2004). Congress' enforcement authority is at its most expansive when protecting against discrimination based on suspect classifications or when protecting fundamental rights. To carry out the basic objectives of the Fourteenth and Fifteenth Amendments, Congress may enact "prophylactic legislation proscribing practices that are discriminatory in effect, if not in intent." *Id.* at 520.

But despite the strength of Congress's remedial enforcement power, it is not without limits. In the context of this case, there are three specific tests that must be met in order to determine that Congress has not over-stepped its bounds. The first test is that a finding of constitutional violations must precede the legislative remedy. *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356, 368 (2001); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 89 (2000). However, this does not mean that Congress has to make specific findings on a case-by-case basis. *Oregon v. Mitchell*, 400 U.S. 112, 118 (1970). The VRA is entitled to a broad reading because Congress

has chronicled extensive state violations of the right to vote. *Johnson v. Bush*, 405 F.3d 1214 (11th Cir. 2005) (Wilson, concurring). In 1965, when first enacting the VRA, Congress documented various violations of the Fifteenth Amendment in electoral practices. It does not matter that the VRA's legislative record does not contain specific examples of discrimination based on felon status. The legislative record must show a pattern of state constitutional violations, not that the right at issue be abridged in a particular way. *City of Boerne*, 521 U.S. 507. Congress could not be expected to identify every potential discriminatory voting qualification that would be subject to the VRA, given the "increasing sophistication with which the states were denying racial minorities the right to vote." *Farrakhan*, 338 F.3d at 1014. Congress has found that racial discrimination in voting has a long history in our country. The remedy that Congress chose to respond to the pattern of state discrimination is to prohibit voting discrimination in whatever form it takes. When voting interacts with proof of racial bias in criminal justice, Congress is well within its power to prohibit the resultant discrimination.

The second prong of the test that must be met to determine that Congress has not over-stepped its bounds is that the legislative remedy must be congruent and proportional to the

harm suffered. *City of Boerne*, 521 U.S. at 530. The government has the burden of demonstrating a compelling governmental interest and show that the law is the least restrictive means of furthering its interest. The Court concluded in *City of Boerne* that the Religious Freedom Restoration Act was not motivated by a valid Congressional purpose because there was little in the legislative record to indicate that there was widespread religious discrimination in this country. *Id.* at 531. But the holding in *City of Boerne* did not pertain to Congress' enforcement power vis-à-vis the states. The holding was a prohibition on Congress' attempt to seize the power to define constitutional standards of review from the Court. In essence, the case was a reaffirmation of *Marbury v. Madison's* central holding that judicial review is necessary to maintain the supremacy of the Constitution over other legislative acts. *Marbury v. Madison*, 5 U.S. 137 (1803).

Moreover, despite the ruling in *City of Boerne*, the application of the Voting Rights Act to deter or remedy constitutional violations is a legitimate exercise of legislative discretion "even if in the process [the enforcement power] prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy' previously reserved to the States." *City of Boerne*, 521 U.S. at 518. It is only when Congress alters the Constitutional meaning of a

rights, that Congressional action will be barred because it is not "enforcing" the liberties outlined in § 1 of the Fourteenth Amendment. *Id* at 519. So despite the articulation of the congruence and proportionality test, the Court continues to state that Congress' power under § 5 of the Fourteenth Amendment is "a broad power indeed." *Tennessee*, 124 S. Ct. at 1985.

The Voting Rights Act was specifically designed to ensure that racial discrimination did not taint the electoral process. In a series of recent cases, the Court has singled out the Voting Rights Act as a statute that satisfies the "congruence and proportionality" test for "appropriate legislation." *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 640 (1999) (distinguishing Patent Remedy Act from VRA); *City of Boerne*, 521 U.S. at 526 (distinguishing Religious Freedom Restoration Act from VRA). Thus, the application of the Voting Rights Act to Maryland's felon disenfranchisement law, which clearly results in racial discrimination, is a congruent and proportional legislative remedy to rectify the serious harm inflicted on African Americans in the state of Maryland.

The petitioner could argue that the Supreme Court in *Gregory* set a requirement that Congress articulate a "plain statement" when it intends to alter the state-federal balance of power. *Gregory v. Ashcroft*, 501 U.S. 452, 468 (1991). However, the Voting Rights Act explicitly meets this standard because the

criminal disenfranchisement statutes fall directly within the VRA's statutory language prohibiting "qualification or prerequisite to voting...which results in denial of the right...to vote on account of race..." Moreover, the Court's ruling in *Chisom* provides an answer to the claim that a plain statement is required. *Chisom*, 501 U.S. at 383. In *Chisom*, the Court applied the VRA to state judicial elections. And because that application is at least as much of an intrusion of federal authority into state affairs as its application to felon disenfranchisement statutes, the Court would not have to apply the plain statement rule in this case.

III. The Totality of Circumstances Test

A. This court should not set a standard for evaluation of discrimination in a *de novo* proceeding with no facts before it.

The Court is being asked to rule on a motion to dismiss in a *de novo* proceeding. It would be inappropriate for the Court to weigh in on the standards of evaluation of discrimination before there have been findings of facts. This Court should allow the case to proceed to trial on the merits so the district court can make factual findings.

B. If the court were to set a standard for evaluation of discrimination, it should adopt the totality of circumstances test.

The totality of circumstances test asks us to look at the effects or results of racial discrimination, as opposed to imposing a burden to demonstrate intent. Support for this test can be found in Congress' decision to amend § 2 of the Voting Rights Act in 1982 so that a plaintiff could establish a violation without proving discriminatory intent. *Chisom*, 501 U.S. at 383-84. When Congress amended the law, it stated that the intent test was "unnecessarily divisive in that it involved charges of racism on the part of individual officials or entire communities [and] placed an inordinately difficult burden of proof on plaintiffs and asked the wrong question." *Chisom*, 501 U.S. at 394. Instead of the intent standard, courts should consider whether voting practices "accommodate or amplify the effect that...discrimination has on the voting process." *Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 595-96 (9th Cir. 1997). Thus, a plaintiff can challenge voting qualifications under a results-based test.

Petitioner may argue that while § 2 of the Voting Rights Act does not require a demonstration of racially biased intent, it also requires more than a mere demonstration of effects. *Johnson v. Governor of Florida*, 353 F.3d 1287 (11th Cir. 2003). It requires a demonstrable causal connection showing that racial bias caused the alleged vote denial or abridgement. If this causation requirement is adopted, the above statistical evidence

on voting disparities is sufficient to establish that the denial of the right to vote was caused by race.

But more importantly, the Eleventh Circuit case does not stand for the proposition that the practice of felony disenfranchisement must "by itself" cause the discriminatory result. *Farrakhan*, 338 F.3d at 1014-15. Demanding "by itself" causation would defeat the interactive and contextual totality of the circumstances analysis that requires a broad, functionally-focused review of the evidence to determine whether a challenged voting practice interacts with surrounding racial discrimination in a meaningful way or whether the practice's disparate impact "is better explained by other factors independent of race." *Smith*, 109 F.3d at 595-96. Moreover, the "by itself" causation standard would effectively read an intent requirement back into the VRA, in direct contradiction of the clear command of the 1982 Amendments. Instead of the intent standard, courts should consider whether voting practices "accommodate or amplify the effect that...discrimination has on the voting process." *Id.* at 595-96.

C. Under the totality of circumstances test, Maryland's three-tiered mechanism for felon disenfranchisement interacts with political and social conditions in the state to deny plaintiff's right to vote on account of race.

In the totality of circumstances, Maryland's three-tiered mechanism for felon disenfranchisement interacts with political and social conditions in the state of Maryland to deny plaintiff's right to vote on account of race. Where a prerequisite, such as a past conviction, interacts with surrounding circumstances to deny the right to vote on account of color, that prerequisite is barred by §2 of the Voting Rights Act on its face. 42 U.S.C. §1973(b). According to the Court in the *Thornburg* case, that provision establishes a violation "if, based on the totality of circumstances, it is shown that [members of protected classes] have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." S. Rep. No. 97-417 (1982); *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986). The totality of circumstances test depends only on a showing of disparate racial impact, not intentional discrimination. *Muntaqim v. Coombe*, 366 F.3d 102, 124 (2d Cir.2004). Thus, the defendant's argument that the Maryland electoral law has alternative purposes and effects is irrelevant if it can be demonstrated that the effect of the law is to produce racial disparities in the voting process.

The "totality of circumstances" test established by *Thornburg v. Gingles* applies to the factual situation underlying plaintiff's claim, as "the essence of a [VRA] § 2 claim is that

a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Thornburg*, 478 U.S. at 47. An inquiry of this sort requires courts to consider how a challenged voting practice interacts with external factors to result in the denial of the right to vote on account of race or color. *Farrakhan*, 338 F.3d at 1014-15.

The relevant facts in the respondent's complaint demonstrate that Maryland elections law has the effect of denying plaintiff the right to vote on account of his race. It reaches this effect by combining his initial, race-inflected conviction for an "infamous crime" with a second conviction for a violent felony to deprive him forever of the right to vote. The set of crimes defined as infamous by Maryland is skewed towards those that are committed more often by African Americans than by whites. Maryland convicts African Americans of infamous crimes at a rate disproportionate to their share of the population. Maryland convicts African Americans of violent crimes at a rate disproportionate to their share of the population. As a result of discrimination at all stages of the criminal justice system, from the detention of infamous criminals through sentencing, African Americans are disenfranchised at a disproportionately high rate. In the

totality of circumstances, Maryland's three-tiered mechanism for felon disenfranchisement interacts with political and social conditions in the State of Maryland to deny his right to vote on account of race.

Question 2

I. Introduction

The Eighth Amendment prohibits "cruel and unusual *punishments.*" U.S. Const. art. VIII (emphasis added).

Therefore, in order for Maryland's disenfranchisement laws to violate the Eighth Amendment, they must be both punitive in nature and cruel and unusual.

II. Punishment v. Regulation

A. Felon disenfranchisement laws are punitive

While the punitive nature of felon disenfranchisement laws are demonstrated by the fact that the period of disenfranchisement is usually closely related to the prison sentence that an individual receives, ultimately the determination of whether a measure is penal or regulatory is based on its purpose. A measure is penal if it imposes a disability for the purpose of punishment and it is regulatory if the purpose is to accomplish another legitimate governmental goal. *Trop v. Dulles*, 356 U.S. 86 (1958). Commonly stated purposes for felon disenfranchisement include: 1) preventing the

election of undesirable candidates; and 2) protecting the integrity of the voting process.

Denying voting rights to ex-offender because they might vote for undesirable candidates is not a legitimate governmental goal. While it is unlikely that such a candidate would be able to win an election, these actions by a state are prohibited. The *Carrington* Court determined that such "'fencing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible." *Carrington*, 380 U.S. at 94.

Similarly, the protection of the voting process is not a legitimate governmental goal of Maryland's felon disenfranchisement laws. To be sure, Maryland does have an interest in protecting this process, however, Maryland has not shown how its felon disenfranchisement laws achieve this goal. Any contention that ex-offenders lack the moral character necessary to vote is not legitimate, as 42 U.S.C. §1973aa specifically prohibits any voting prerequisite that requires a potential voter to show acceptable moral character. 42 U.S.C. § 1973aa (2005). This might be a legitimate governmental goal for those individuals whose crimes were related to voting, however, Maryland provides no justification for why the crimes Coolidge was convicted of makes him a threat to the voting process. An argument could be made that Coolidge - and others who are

permanently disenfranchised - have shown a repeated disregard for the law and that it is this relationship with the law that makes them more of a threat. But this cannot be the case when one considers that had Coolidge been convicted of his crimes in opposite order, he would still be allowed to vote. There is no reasonable connection between protecting the voting process and the crimes that Coolidge was convicted of.

Even if there was a connection between protecting the integrity of the voting process and those crimes that Maryland has chosen for qualification for permanent disenfranchisement, this would still not be legitimate since permanently denying individuals the right to vote is excessive to such a goal. The *Slade* Court determined that an action is regulatory if it is not excessive in relation to the purpose. *Slade v. Hampton Roads Regional Jail*, 407 F.3d 243 (2005). Given the narrow protection offered by felon disenfranchisement laws, this could be achieved by less onerous means than complete denial of the right to vote; for example, by additional monitoring of ex-offenders when they participate in voting.

B. The Fourteenth Amendment does not establish an "affirmative sanction" for all felon disenfranchisement

In *Richardson*, the court said that the Fourteenth Amendment provided an affirmative sanction for felon disenfranchisement. *Richardson*, 418 U.S. at 24. However, this argument was

explicitly rejected by the United States Court of Appeal for the Fourth Circuit in this case, stating that §2 of the Fourteenth Amendment did not “permit[] *any and all* disenfranchisement.” Record at 37 (emphasis in original). This is supported by the decision in *Hunter*, which implies that the constitutionality of felon disenfranchisement is only presumptive and that states still must show some legitimate purpose for the disenfranchisement. *Hunter*, 105 S.Ct. 1916.

III. “Cruel and Unusual”

Coker states that the Eighth Amendment prohibits punishments that are “barbaric” or “excessive in relation to the crime committed.” *Coker v. Georgia*, 433 U.S. 584, 592 (1977).

A. Maryland’s felon disenfranchisement laws are “barbaric”

Whether a punishment is barbaric is determined by whether it violates civilized standards. In *Trop*, the court found that “the words of the [Eighth] Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency...” *Trop*, 356 U.S. at 100.

Looking to the civilized standards established by other states, Maryland’s felon disenfranchisement laws are barbaric. The court in *Atkins* stated that the “clearest and most reliable [indication of these standards is the] legislation enacted by the country’s legislatures.” *Atkins v. Virginia*, 536 U.S. 304,

311 (2002). Since 1997, 12 states' legislatures have amended their felon disenfranchise laws to be more lenient. Of the states that disenfranchise felons, only 13 do so after their prison sentences and probation terms have expired. These amendments show a national trend away from permanent disenfranchisement, which has been followed by Maryland itself. In 2002, Maryland amended its felon disenfranchisement laws to allow the restoration of the right to vote to some individuals who previously were permanently prohibited. Record at 14. This trend is analogous to the trend that influenced the *Roper* Court in their decision that the application of the death penalty to juveniles violated the Eighth Amendment. *Roper v. Simmons*, 125 S.Ct. 1183 (2005).

In addition to analyzing the civilized standards established by the other states, it is appropriate to examine how those standards have evolved internationally. See *Id.*; *Atkins*, 536 U.S. 304; *Trop*, 356 U.S. 86. The practice of felon disenfranchisement is rare in western democracies, where in 13 countries, even individuals who are incarcerated may vote. Most other countries restore the right to vote to individuals upon completion of their prison sentences. Among democratic nations, only the United States and Armenia disfranchises individuals on a permanent basis. Additionally, felon disenfranchisement has been held to violate the European Convention on Human Rights.

Hirst v. United Kingdom, App. No. 74025/01 (Eur. Ct. H.R. Oct. 5, 2005). Record at 14. While these statistics are not binding to this court, they are persuasive evidence that felon disenfranchisement laws are not consistent with evolutionary standards of decency.

B. Maryland's disenfranchisement laws are excessive

A punishment is excessive if it: a) does not contribute to an acceptable goal of punishment; and b) "is grossly out of proportion to the severity of the crime. A punishment might fail the test on either ground." *Coker*, 433 U.S. at 592.

1. Maryland's permanent disenfranchisement laws do not contribute to the goals of punishment

Acceptable goals of punishment include: incapacitation, deterrence, retribution, and rehabilitation. *Ewing v. California*, 538 U.S. 11 (2002).

Maryland's permanent disenfranchisement laws do not contribute to the goal of incapacitation, which is meant to prevent an ex-offender from committing future crimes. Permanent disenfranchisement will only prevent ex-offenders from committing voter related crimes, and, more specifically, only those requiring the person to vote. Previous analysis showed that the prevention of such crimes through permanent disenfranchisement was unlikely given that there is no

relationship between the crimes Coolidge was convicted of and the violation of the integrity of the voting process.

Not only do Maryland's permanent disenfranchisement laws not contribute to the goal of incapacitation, they also do not contribute to deterrence. The possibility of jail sentences and fines serve as deterrence for individuals who are considering committing a crime. An ex-offender is experienced with these consequences and will use that experience when determining whether to commit a subsequent crime. It is, therefore, unlikely that an ex-offender who is not deterred by repeat incarceration and fines will be deterred by the loss of their right to vote. Karlan, Pamela S., Convictions and Doubts: Retribution, Representation, and the Debate Over Felon Disenfranchisement, Stanford Public Law and Legal Theory Working Paper Series, January 20, 2004.

Maryland's permanent disenfranchisement laws also do not contribute to the goal of rehabilitation, which seeks to return the ex-offender to a normal life. Justice Brennan, while speaking about expatriation, said that "It is perfectly obvious that [expatriation] constitutes the very antithesis of rehabilitation, for instead of guiding the offender back into the useful paths of society it excommunicates him and makes him, literally, an outcast." *Trop*, 356 U.S. at 111 (1957) (Brennan, J., concurring). This analysis is applicable to

disenfranchisement, which prohibits Coolidge from any meaningful participation in the political process and alienates him from society. Even though these consequences may be less extreme than the consequences of expatriation, they are still counter to the goal of reintegrating the ex-offender into society.

Finally, Maryland's permanent disenfranchisement laws do not contribute to the goal of retribution. While disenfranchisement can be retribution, that retribution is valid only if it is proportionate to the crime. See Brief for The National Black Police Association et al. as Amici Curiae Supporting Petitioners for Writ of Certiorari, *Johnson v. Bush*, (No. 05-212), 2005 WL 2651615. The proceeding discussion illustrates that permanent disenfranchisement laws are disproportionate to Coolidge's crimes.

2. Maryland's disenfranchisement laws are grossly disproportionate to the crimes

A punishment is excessive if it is grossly disproportionate to the crime. Proportionality questions have traditionally been limited to capital and physical punishments, however, the Eighth Amendment does have a "narrow proportionality principle that applies to non capital sentences." *Ewing*, 538 U.S. at 20 (citing *Harmelin v. Michigan* 501 U.S. 957 (1991) (Kennedy, A., concurring) (internal quotations omitted)).

The *Ewing* Court adopted the *Solem* factors for determining whether a punishment violates the Eighth Amendment because it was so disproportionate to the crime. These factors included: "(i) the gravity of the offense...; (ii) the sentences imposed... in the same jurisdiction; and (iii) the sentences imposed... in other jurisdictions." *Ewing v. California*, 538 U.S. at 22 (quoting *Solem v. Helm*, 463 U.S. 277, 292 (1983)). The difficulty in determining and balancing these considerations is evidence that a trial is needed to further consider these issues.

Considering the severity of the crime and the punishment, permanent disenfranchisement is grossly disproportional to Coolidge's crimes. Coolidge's first conviction was for possession with the intent to distribute, which occurred while he was addicted to cocaine. His second conviction was considered violent even though no weapon was used and no one was injured. While these crimes are serious, they do not justify the application of such a harsh punishment. District Judge Wingate articulated the severity of the punishment of disenfranchisement:

Disenfranchisement is the harshest civil sanction imposed by a democratic society. When brought beneath its axe, the disenfranchised is severed from the body politic and condemned to the lowest form of citizenship... Such a shadowy form of citizenship must not be imposed lightly; rather, only when the circumstances and the law clearly direct.

McLaughlin v. City of Canton, Miss., 947 F.Supp. 954, 971 (1995). This description suggests that the consequences of

disenfranchisement are disproportionate to Coolidge's crimes.

An examination of the sentences imposed in the same jurisdiction also shows that Maryland's disenfranchisement laws are grossly disproportionate. These laws arbitrarily qualify all individuals who have been convicted of a broad classification of crimes for permanent disenfranchisement. Therefore, the conviction of far more serious crimes - including child abuse and murder - lead to the same punishment received by Coolidge for possession with intent to distribute and robbery.

Finally, the sentences imposed in other jurisdictions further illustrate that Maryland's disenfranchisement laws are grossly disproportionate. In 1967, the *Green* Court considered this factor when determining that permanent disenfranchisement did not violate the Eighth Amendment based on the number of states that permanently disenfranchised felons at that time. Again, there is a national trend away from permanent disenfranchisement, which has resulted in far fewer states that currently permanently disenfranchise felons. *Green v. Board of Elections of New York*, 380 F.2d 445 (1967)

Conclusion

Respondent is asking this Court to affirm the ruling on this case in the United States Court of Appeals for the Fourth Circuit, and allow the case to proceed to a trial on the merits.