

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 THE RESPONDENT

10854

Counsel for Respondent

**AMERICAN CONSTITUTION SOCIETY
MOOT COURT COMPETITION**

QUESTIONS PRESENTED

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

2. Is Maryland's 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?

LIST OF PARTIES TO THE PROCEEDINGS

Petitioners are the Maryland State Board of Elections; Janet Fallins, the state administrator of elections, in her official capacity; Board of Elections of the City of Baltimore; and Edward D. Jones, its Election Director, in his official capacity.

Respondent is Jeffrey Coolidge.

TABLE OF CONTENTS

QUESTIONS PRESENTED.....	i
LIST OF PARTIES TO THE PROCEEDINGS.....	ii
TABLE OF AUTHORITIES.....	iv
STATEMENT OF THE BASIS FOR JURISDICTION.....	vii
STATEMENT OF THE CASE.....	1
SUMMARY OF THE ARGUMENT.....	5
ARGUMENT.....	7
I. MARYLAND’S TWO-STRIKES FELON DISENFRANCHISEMENT SCHEME IS SUBJECT TO REVIEW UNDER THE VOTING RIGHTS ACT.....	7
A. Racial bias in the criminal justice system and the disparate impact of Maryland’s two-strikes permanent disenfranchisement regime against African-Americans evidence a violation of the Voting Rights Act.	7
B. The plain meaning of “voting qualification” in section 2 of the VRA includes felon disenfranchisement laws that have a disparate impact based on race; without ambiguity, application of a constitutional question canon of construction is improper.	11
C. Appliction of the Voting Rights Act to discriminatory felon disenfranchisment laws is within the scope of Congress’ power to enforce the Fourteenth and Fifteenth Amendments. .	15
II. MARYLAND’S PERMANENT DISENFRANCHISEMENT PROVISION VIOLATES THE “CRUEL AND UNUSUAL PUNISHMENT” PROHIBITION OF THE EIGHTH AMENDMENT.....	18
A. In Maryland, disenfranchisement is a “punishment,” and therefore subject to scrutiny under the Eighth Amendment prohibition of “cruel and unusual punishment”	18
B. Maryland’s permanent disenfranchisement of felons violates the Eighth Amendment prohibition of “cruel and unusual punishment” because it contravenes “evolving standards of decency” and because it is grossly disproportionate to Mr. Coolidge’s crimes.	23
CONCLUSION.....	29

TABLE OF AUTHORITIES

Page

CASES

<u>Adarand Constructors, Inc. v. Mineta</u> , 534 U.S. 103 (2001) . . .	29
<u>Allen v. State Board of Elections</u> , 393 U.S. 544 (1969)	15
<u>Atkins v. Virginia</u> , 536 U.S. 304 (2002)	25
<u>Austin v. United States</u> , 509 U.S. 602 (1993)	22, 23
<u>Bell v. Wolfish</u> , 441 U.S. 520 (1979)	18, 20, 23
<u>Carrington v. Rash</u> , 380 U.S. 89 (1965)	3, 19
<u>Chisom v. Roemer</u> , 501 U.S. 380 (1991)	8, 15
<u>City of Boerne v. Flores</u> , 521 U.S. 507 (1997)	15, 16
<u>City of Rome v. United States</u> , 446 U.S. 156 (1980)	11, 12
<u>Conn. Nat'l Bank v. Germain</u> , 503 U.S. 249 (1992)	13
<u>Dep't of Hous. & Urban Dev. v. Rucker</u> , 535 U.S. 125 (2002) . .	13
<u>Dillenberg v. Kramer</u> , 469 F.2d 1222 (9th Cir. 1972)	19
<u>Farrakhan v. Locke</u> , 338 F.3d 1009 (9th Cir. 2003)	9, 12
<u>Flemming v. Nestor</u> , 363 U.S. 603 (1960)	20, 21, 23
<u>Harmelin v. Michigan</u> , 501 U.S. 957 (1991)	26, 28
<u>Harper v. Virginia Bd. of Elections</u> , 383 U.S. 663 (1966) . . .	15
<u>Hunter v. Underwood</u> , 471 U.S. 222 (1985)	14
<u>Johnson v Bush</u> , 405 F.3d 1214 (11th Cir. 2005)	12, 13, 14
<u>Kennedy v. Mendoza-Martinez</u> , 372 U.S. 144 (1963)	18, 23
<u>McLaughlin v. City of Canton</u> , 947 F. Supp. 954 (D. Miss. 1995) .	26
<u>Mobile v. Bolden</u> , 446 U.S. 55 (1980)	7, 8
<u>Muntaqim v. Coombe</u> , 366 F.3d 102 (2d Cir. 2004)	12
<u>Nat'l Collegiate Athletic Ass'n v. Smith</u> , 525 U.S. 459 (1999) .	29

TABLE OF AUTHORITIES
(cont.)

	Page
<u>Nevada Dep't of Human Resources v. Hibbs</u> , 538 U.S. 721 (2003)	17
<u>Ramirez v. Brown</u> , 507 P.2d 1345 (Cal. 1973)	20
<u>Robinson v. California</u> , 370 U.S. 660 (1962)	25
<u>Roper v. Simmons</u> , 543 U.S. 551, 125 S.Ct. 1183 (2005)	23, 24
<u>Solem v. Helm</u> , 463 U.S. 277 (1983)	25, 27
<u>South Carolina v. Katzenbach</u> , 383 U.S. 301 (1966)	15, 16, 17
<u>Thornburg v. Gingles</u> , 478 U.S. 30 (1986)	7, 9
<u>Trop v. Dulles</u> , 356 U.S. 86 (1958)	18, 20, 23
<u>Weems v. United States</u> , 217 U.S. 349 (1910)	25
<u>Wesley v. Collins</u> , 791 F.2d 1255 (6th Cir. 1986)	12

STATUTES

U.S. Const. amend. XV	7
U.S. Const. amend. VII	18
U.S. Const. amend. XIV	14
Civil Rights Act of 1871, 42 U.S.C. § 1983 (2005)	2
Voting Rights Act of 1965, §2, 42 U.S.C. §§ 1973(a)-(b) (2005), <u>amended by</u> Pub. L. 97-205 (1982)	<u>passim</u>
Ala. Code § 15-22-36.1 (2003)	24
Del. Const. art. V, § 2	24
Md. Code Ann., Bus. Occ. & Prof. § 10-207 (West 2005)	22
Md. Code Ann., Crim. Law § 14-101(a) (West 2005)	2
Md. Code Ann., Elec. Law § 4-102 (West 2005)	26
Md. Code Ann., Elec. Law § 5-202 (West 2005)	26
Md. Code Ann., Elec. Law § 6-203 (West 2005)	26

TABLE OF AUTHORITIES
(cont.)

	Page
Md. Code Ann., Elec. Law, § 3-102 (West 2005)	2, 21
Md. Code Ann., Estates & Trusts §§ 13-206, 13-207 (West 2005)	22
Md. Code Ann., Health Occ. § 14-307 (West 2005)	22
Md. Code Ann., State Gov't § 18-102 (West 2005)	22
Neb. Rev. Stat. § 29-112 (2005)	24

OTHER AUTHORITIES

S. Rep. No. 97-417 (1982)	8, 9, 17
Mark E. Thompson, <u>Don't Do the Crime if you Ever Intend to Vote Again: Challenging the Disenfranchisement of Ex-Felons as Cruel and Unusual Punishment</u> , 33 Seton Hall L. Rev. 167, 192-193 (2002)	19
Pamela S. Karlan, <u>Convictions and Doubts: Retribution, Representation, and the Debate Over Felon Disenfranchisement</u> , 56 Stan. L. Rev. 1147, 1168 (2004)	24
<u>Special Project: The Collateral Consequences of a Criminal Conviction</u> , 23 Vand. L. Rev. 929, 1228 (1974)	27
The Sentencing Project, <u>Felony Disenfranchisement Laws in the United States</u> , Nov. 2001 at http://www.sentencingproject.org/pdfs/1046.pdf	25

STATEMENT OF THE BASIS FOR JURISDICTION

The judgment of the Fourth Circuit was entered on July 16, 2005. This court granted certiorari on October 14, 2005. The court has jurisdiction pursuant to 28 U.S.C § 1254(1).

STATEMENT OF THE CASE

In October of 2004, the state of Maryland permanently deprived Jeffrey Coolidge his right to vote. Record at 11-12. The events precipitating the permanent disenfranchisement of this lifelong resident of Baltimore began in 1982, when Mr. Coolidge was 19 years old. Record at 10. The police stopped Mr. Coolidge while he was driving his car because he fit the general description of another African-American man who was a robbery suspect. Record at 10. During their search of Mr. Coolidge, the police found ten grams of cocaine in his possession. Record at 10. Mr. Coolidge was not charged in relation to the robbery, but was indicted for "possession with intent to distribute a controlled substance." Record at 10-11. No suspect was ever charged in relation to the robbery investigation. Record at 10. Mr. Coolidge pled his case before a jury comprised of one African-American and eleven white members. Record at 11. The jury found him guilty and he received one year in prison and one year of probation. Record at 11. After completing his sentence in 1984, Mr. Coolidge continued to struggle with cocaine addiction. Record at 11. In 1985, after his release from a 6-month jail term for misdemeanor possession of a controlled substance, he enrolled in and successfully completed a two-year substance abuse program. Record at 11. For 17 years after his successful treatment, Mr. Coolidge resided in Baltimore without incident. Record at 11. He became involved in the political process, registering to vote in 1992 and voting in all presidential elections from that time until 2000.

In 2004, Mr. Coolidge went, unarmed, to a convenience store. Record at 11. He demanded \$150 from the cashier. Record at 11. She complied, and he left the store without further incident. Record at 11. As a result, Mr. Coolidge was convicted of robbery and sentenced to five years in prison and five years of probation. Record at 11. Maryland classifies robbery as a "crime of violence." Md. Code Ann., Crim. Law § 14-101(a) (West 2005). Because Mr. Coolidge had been convicted of an "infamous crime" in 1982, his robbery conviction automatically triggered Maryland's permanent disenfranchisement provision--section 3-102(c). Record at 12; Md. Code Ann., Elec. Law, § 3-102. Mr. Coolidge has been removed from the registry of voters and will be unable to vote in any election for the remainder of his life. Record at 12.

In hopes of recouping his right to vote, Mr. Coolidge brought a complaint in the United States District Court for the District of Maryland on November 4, 2004. Record at 17. Mr. Coolidge brought this action against Petitioners, Maryland State Board of Elections; Janet Fallins, the state administrator of elections, in her official capacity; Board of Elections of the City of Baltimore; and Edward D. Jones, its Election Director, in his official capacity. Record at 9. Mr. Coolidge sought declaratory and injunctive relief under the Fourteenth and Fifteenth Amendments, section 2 of the Voting Rights Act (VRA), 42 U.S.C. § 1973, the Eighth Amendment, and 42 U.S.C. § 1983. The District Court granted Petitioners' motion to dismiss under Fed. R. Civ. P. 12(b)(6) on all claims. Record at 27.

Mr. Coolidge appealed this dismissal to the United States Court of Appeals for the Fourth Circuit. Record at 28. The Fourth Circuit overturned the district court's decision regarding the VRA, holding that Maryland's felon disenfranchisement laws may be challenged under the VRA, when such disenfranchisement is based on past criminal convictions and those convictions "interact with political, economic, and social factors to deny the right to vote on account of race." Record at 30. The Fourth Circuit remanded for the District Court to consider Mr. Coolidge's claims of discrimination and vote denial on account of race under the VRA. Record at 41.

Additionally, the Fourth Circuit overturned the District Court's dismissal of Mr. Coolidge's claim under the Eighth Amendment, holding that permanent disenfranchisement is punishment and may be cruel and unusual in relation to Mr. Coolidge's crimes. Record at 41. The court remanded for the District court to determine whether this punishment was "cruel and unusual" in Mr. Coolidge's case. Record at 41. The Fourth Circuit observed that much of the disenfranchisement under section 3-102 is concomitant with the length of an individual's sentence, indicating an intent to punish. Record at 38. Additionally, the disenfranchisement scheme imposes lengthier disenfranchisement for certain violent felons--a more severe punishment for a more severe crime. Record at 38. The court also noted that the state's argument--that disenfranchisement is a legitimate regulation of the electoral process--is constitutionally invalid due to the prohibition in Carrington v.

Rash, 380 U.S. 89, 94 (1965) against excluding citizens from voting based on for whom, or for what, they might vote. Record at 39. The Court then held that Maryland's disenfranchisement provision was, indeed, a punishment within the purview of the Eighth Amendment. Record at 41. The court made two findings. First, given evidence of consistent change away from disenfranchisement of ex-offenders, Maryland's law may be counter to "evolving standards of decency," and it deserves scrutiny on these grounds. Record at 39. Second, under the theory of retribution, the punishment of permanent disenfranchisement seems arbitrarily harsh for unarmed robbery (with a prior conviction of possession of 10 grams of cocaine). Record at 41. Thus, Mr. Coolidge had stated a valid claim that the punishment was "grossly disproportionate" and therefore cruel and unusual to Mr. Coolidge. Record at 41. The court reversed the District Court's decision and remanded for consideration of the "proportionality" question as it applies to Mr. Coolidge.

SUMMARY OF THE ARGUMENT

Mr. Coolidge claims that a showing of disparate impact and racial bias in the criminal justice system has resulted in his denial of the right to vote on account of his race under section 3-102. This is a claim upon which relief can be granted, contrary to the judgment of the District Court. The Fourth Circuit correctly held that Maryland's felon disenfranchisement law "is not immune from suit under" the Voting Rights Act. Record at 41. This is so because section 3-102 is a voting qualification under a plain text reading of the VRA, which prohibits voting qualifications that result in vote denial on account of race. As there is no ambiguity in the text of section 2 of the VRA, there is no need to construe the VRA to be inapplicable to section 3-102. Mention of "other crimes" in section 2 of the Fourteenth Amendment is limited to the scope of that particular provision and does not grant states the right to disenfranchise felons in contravention of the VRA. Furthermore, applying the VRA to felon disenfranchisement laws is within the scope of Congress' power to enforce the Fifteenth Amendment. Ultimately, this court should affirm the Fourth Circuit's reversal of the District Court and remand for a determination of Mr. Coolidge's claims under the VRA.

The appellate court was also correct in its ruling that disenfranchisement under Maryland Code, Election Law, section 3-102 is a punishment. As such, section 3-102 is subject to scrutiny under the Eighth Amendment's prohibition of "cruel and unusual punishment." Permanent disenfranchisement under section

3-102 runs afoul of this prohibition in two ways. First, it is contrary to the standards of decency evinced by decades of legislative enactments around the country. Second, Mr. Coolidge has stated a valid claim that the provision imposes a punishment that is "grossly disproportionate" to the crimes he committed. The court should affirm the lower court's ruling that section 3-102 inflicts punishment. It should then rule that the permanent disenfranchisement component of section 3-102 is per se "cruel and unusual" because it violates current "standards of decency." In the alternative, the court should remand the case to the trial court for a particularized determination of the proportionality of Mr. Coolidge's crimes to the punishment of lifelong disenfranchisement.

ARGUMENT

I. MARYLAND'S TWO-STRIKES FELON DISENFRANCHISEMENT SCHEME IS SUBJECT TO REVIEW UNDER THE VOTING RIGHTS ACT.

A. Racial bias in the criminal justice system and the disparate impact of Maryland's two-strikes permanent disenfranchisement regime against African-Americans evidence a violation of the Voting Rights Act.

A state qualification, such as one based on former convictions, violates the Voting Rights Act if, when viewed under the "totality of the circumstances," it has the result of disproportionately denying the right to vote on account of race. Voting Rights Act of 1965, § 2, 42 U.S.C. §§ 1973(a)-(b) (2005) (VRA). Congress passed the VRA in order to enforce the Fifteenth Amendment's prohibition of the denial of the right to vote "on account of race, color, or previous condition of servitude." U.S. Const. amend. XV, § 1. States are prohibited under section 2 of the VRA from imposing any "voting qualification . . . which results in a denial" of the right to vote "on account of race or color." 42 U.S.C. § 1973(a). In response to this Court's decision in Mobile v. Bolden¹, 446 U.S. 55 (1980), superseded by statute, Voting Rights Act of 1982, Pub. L. No. 97-205, 96 Stat. 1074, as recognized in, Thornburg v. Gingles, 478 U.S. 30, 35 (1986), "Congress substantially revised section 2 to clarify that a violation could be proved by showing discriminatory effect alone and to establish as the relevant legal standard the 'results test' applied by this Court in White v. Regester," 412 U.S. 755 (1973). Thornburg v. Gingles, 478 U.S. 30, 35 (1986).

¹ The Court in Mobile v. Bolden held that a valid VRA claim requires showing of discriminatory intent.

In amending section 2 of the VRA, Congress recognized that Bolden's "intent test focuse[d] on the wrong question and place[d] an unacceptable burden upon plaintiffs in voting discrimination cases." S. Rep. No. 97-417, at 16 (1982) (S. Rep.). In acknowledgment of the momentous burden plaintiffs faced when required to prove discriminatory intent, Congress enacted the VRA "to protect voting rights that are not adequately protected by the Constitution itself." Chisom v. Roemer, 501 U.S. 380, 403 (1991) (holding that state judicial elections fall under the VRA "results" test in a vote dilution case). Congress found that "[e]lectorate devices . . . per se would not be subject to attack under section 2." S. Rep. at 16. See also Richardson v. Ramirez 418 U.S. 24, 53-55 (1974) (holding that criminal disenfranchisement provisions are not facially unconstitutional). Voting requirements are "vulnerable, [only] if, in the totality of circumstances, they resulted in the denial of equal access to the electoral process." S. Rep. at 16.

The results test is determined by analyzing the voting requirement in light of the "totality of the circumstances." 42 U.S.C. 1973(b). Congress laid out a number of "factors"² to be considered when reviewing the "totality of the circumstances." S. Rep. at 29 (1982). These factors are not all-inclusive and "there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other."

² The factors include a "history of official discrimination," racial polarization in elections, "discrimination in such areas as education, employment, and health," "lack of responsiveness" by elected officials to minority needs, "tenuous" policy rationale, and others relating to redistricting schemes and electoral representation.

S. Rep. at 19-20. This Court has said, "[t]he essence of a § 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." Gingles, 478 U.S. at 47; See also Farrakhan v. Locke, 338 F.3d 1009, 1012 (9th Cir. 2003), cert denied 125 S.Ct. 477 (2004); Record at 34.

The Fourth Circuit correctly found that Maryland's two strikes rule for permanent felon disenfranchisement "interacts with political and social conditions" to deny Mr. Coolidge's right to vote "on account of race." Record at 34. Conditions of racial bias surrounded Mr. Coolidge's 1982 traffic stop, prosecution, and conviction. The conflation of these racially biased events led directly to the effect of denying him the right to vote under section 3-102. Evidence of the racially disparate impact of section 3-102 shows that this problem affects not only Mr. Coolidge, but also affects other African-Americans who are subject to section 3-102.

African-Americans in Baltimore, Maryland are more likely to have contact with the police and more likely to be arrested than white residents of Baltimore. It comes as no surprise that the police stopped Mr. Coolidge in his car, considering that in Baltimore County, 32% of traffic stops involve at least one African-American. Record at 13. This is so despite that fact African-Americans make up 20.1% of the population of Baltimore County. Record at 12. African-Americans in Maryland are in contact with the police 75% more often than white residents.

Record at 13. Furthermore, African Americans living in Baltimore County and Baltimore City are apprehended and charged with crimes at disproportionately high rates. Record at 13.

Once stopped and arrested, African-American residents of Baltimore find that competent legal representation at trial is more difficult to secure and are more likely to be convicted than their white counterparts. Record at 13. As such, African-Americans plead guilty 35% more often than whites. Record at 13. When African-Americans in Baltimore County go to trial, they face juries with an average of one African-American juror for each fourteen white jurors. Record at 13. This is the case despite the fact that there is one African-American for every five residents of the county. Record at 13. Furthermore, Maryland law defines infamous crimes in a way that is skewed more towards those crimes committed by African-Americans than whites. Record at 13. The imprisonment rate of voting age African-American residents of Baltimore is 0.9%, with 54% of those serving sentences for violent crimes. Compare this to white Maryland residents, of which 0.25% are imprisoned, 50% of those for violent crimes. Record at 12.

As a result of the aforementioned racial bias faced by African-Americans, statistics show that African Americans represent a disproportionate number of disenfranchised felons under Maryland's two-strikes rule. Permanent disenfranchisement under section 3-102(c) affects 3.9% of African-Americans residing in Maryland, compared to 1.0% of white Maryland residents. Record at 12. The disparate impact of Maryland's felon

disenfranchisement provision, as shown by these statistics and exemplified by Mr. Coolidge's experience, show that Maryland's felon disenfranchisement law violates section 2 of the VRA.

- B. The plain meaning of "voting qualification" in section 2 of the VRA includes felon disenfranchisement laws that have a disparate impact based on race; without ambiguity, application of a constitutional question canon of construction is improper.**

The plain meaning of the text in section 2 of the VRA is the first step in reviewing whether it applies to section 3-102. Cf., City of Rome v. United States, 446 U.S. 156, 172-3 (1980). The specific text of section 2 of the VRA provides that States shall not impose any "voting qualification or prerequisite to voting" that results in vote denial on account of race. 42 U.S.C. § 1973(a). Maryland Election Law provides that Mr. Coolidge "is not qualified to be a registered voter" because he has committed the requisite two crimes under the "two strikes" rule. Md. Code Ann., Elec. Law § 3-102 (emphasis added). The felon disenfranchisement provision is a "qualification," and is therefore subject to the provisions in section 2 of the VRA. Under any ordinary reading of section 2, this "qualification" falls squarely under the plain text of the VRA.

There is no ambiguity in applying the VRA to Maryland's felon disenfranchisement law. The Fourth Circuit properly looked first to the plain meaning of the VRA, then finding "[w]here a prerequisite (like 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." Record at 34.

However, conflict has arisen among the circuit courts regarding whether section 2 of the Fourteenth Amendment precludes application of the VRA to felon disenfranchisement laws. The Fourth and Ninth Circuits have held that felon disenfranchisement provisions may be challenged under the VRA. Record at 41; Farrakhan, 338 F.3d at 1019-20. The Sixth Circuit did not specifically address the issue, but presumed that the VRA could apply to felon disenfranchisement laws, although deciding the case before them did not violate the VRA. Wesley v. Collins, 791 F.2d 1255, 1261 (6th Cir. 1986). The Eleventh and Second Circuit courts have withheld application of the VRA to criminal disenfranchisement laws, primarily because of trepidation over whether applying the VRA to felon disenfranchisement laws requires them to evaluate whether constitutional concerns arise. Johnson v Bush, 405 F.3d 1214 (11th Cir. 2005), cert. denied, 126 S.Ct. 650 (2005); Muntagim v. Coombe, 366 F.3d 102 (2d Cir. 2004), cert denied 125 S.Ct. 480 (2004), reh'g en banc granted, 396 F.3d 95 (2004). In looking first to an ordinary reading of the VRA, the Fourth and Ninth Circuits correctly find that the VRA may apply to discriminatory felon disenfranchisement laws.

As stated above, the Court should only apply a constitutional question canon of construction if there is ambiguity in the text of a statute. See Johnson, 405 F.3d at 1240 (Wilson, C.J., concurring in part and dissenting in part); cf. City of Rome, 446 U.S. at 172-3 (holding that the plain

meaning of § 5 of the VRA required them to reject application of a "saving construction" in order to avoid a constitutional inquiry). The Fourth Circuit agreed that "felon disenfranchisement laws clearly fall under the plain meaning of § 2 of the VRA" and that the plain meaning of a statute should be applied "unless it is ambiguous." Record at 35; Johnson, 405 F.3d at 1247-8 (Barkett, J., dissenting); See Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253 (1992); Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 134 (2002).

Petitioners fail in their attempt to create ambiguity by reading section 2 of the Fourteenth Amendment's mention of "other crimes" to have an affect on an ordinary reading of section 2 of the VRA. We are joined by the Fourth Circuit³ in criticizing the District Court's "overly broad reading" of section 2 of the Fourteenth Amendment. Record at 36. The Fourth Circuit found it "painfully ironic" that such a reading would limit the ability of Congress to prohibit discriminatory state qualifications to voting "despite the fact that the [Fourteenth] Amendment was drafted with the noble purpose of banishing racial prejudice from the face of our nation." Record at 36.

The historical context and a reading of the text of section 2 of the Fourteenth Amendment demonstrate that it is limited in its application. Section 2 of the Fourteenth Amendment was enacted as a penalty provision, adopted in order to encourage Southern states to allow former slaves to vote in elections. See

³ Circuit Judge Wilson also joins us in repudiating an overstatement of the "case for constitutional avoidance," based on a broad reading of section 2 of the Fourteenth Amendment. Johnson, 405 F.3d at 1239 (Wilson, C.J., concurring in part and dissenting in part)

Johnson, 405 F.3d at 1240 (Wilson, C.J., concurring in part and dissenting in part). Section 2 of the Fourteenth Amendment provides that state representation in Congress will be decreased based on the number of citizens who are disenfranchised. However, it exempts from reduction those disenfranchised for "participation in rebellion, or other crime." U.S. Const. amend. XIV, § 2. Congress used this provision as an incentive for the states to allow all citizens, regardless of race, the right to vote. Furthermore, the language of section 2 of the Fourteenth Amendment does not carve out a special right to disenfranchise criminals, but rather clarifies that the states' reserved rights under the Tenth Amendment are not affected in relation to felon disenfranchisement. Section 2 provides that "when the right to vote . . . is denied . . . or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced." U.S. Const. amend. XIV, § 2.

Ultimately, section 2 of the VRA applies to felon disenfranchisement laws with the same strength as would be applied to other voting qualifications enacted by states under their reserved powers. As such, "the Tenth Amendment cannot save legislation prohibited by the . . . Fourteenth Amendment." Hunter v. Underwood, 471 U.S. 222, 233 (1985). Because states are not permitted to enact felon disenfranchisement laws in a manner that violates the Fourteenth Amendment, it is inconsistent for the Court to allow states to enact those laws in violation of the VRA, a federal statute. Even if this Court finds that some

question arises, the mere fact that one must consider the Constitution does not imply that the Court must construe the VRA as inapplicable.

C. Application of the Voting Rights Act to discriminatory felon disenfranchisement laws is within the scope of Congress' power to enforce the Fourteenth and Fifteenth Amendments.

This Court has recognized that "the [Voting Rights] Act should be interpreted in a manner that provides 'the broadest possible scope' in combating racial discrimination." Chisom v. Roemer, 501 U.S. 380, 403 (1991); Allen v. State Board of Elections, 393 U.S. 544, 567 (1969). Broad measures used to combat discriminatory vote denial are necessary in light of this Court's recognition that "right to vote is fundamental because it preserves other rights." Harper v. Virginia Bd. of Elections, 383 U.S. 663, 667 (1966).

The VRA meets the standard for a valid enactment because it was created to combat the congressionally identified problem of racially discriminatory voting practices. In order to be a valid exercise of Congressional power of enforcement under the Fifteenth Amendment, legislation must be congruent and proportional to the "injury to be prevented or remedied and the means adopted to that end." City of Boerne, 521 U.S. at 520. This Court and lower courts have held on a number of occasions that provisions of the VRA are "congruent" and "proportional" to Congress' widespread findings of racial discrimination through manipulation of the election process. See e.g., South Carolina

v. Katzenbach, 383 U.S. at 308 (holding that certain provisions of the VRA, including prohibition of certain literacy requirements, "are an appropriate means for carrying out Congress' constitutional responsibilities" under § 2 of the Fifteenth Amendment."); cf., City of Boerne, 521 U.S. at 530 (comparing Congress's lack of general findings of "laws passed because of religious bigotry" in the Religious Freedom Restoration Act with the VRA's long congressional record of racially discriminatory election devices). Based on Congress' widespread findings of discrimination through voting mechanisms, discriminatory felon disenfranchisement laws should receive no less scrutiny than other voting requirements under the VRA.

Furthermore, this Court has held that "measures protecting voting rights are within Congress' power to enforce the Fourteenth and Fifteenth Amendments, despite the burdens those measures places on the states." City of Boerne v. Flores, 521 U.S. 507, 518 (1997), citing South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966). This Court has also found that "Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct." Nevada Dep't of Human Resources v. Hibbs, 538 U.S. 721, 727-28 (2003). Such a wide scope is necessary in order to capture elusive unconstitutional conduct, despite the fact that borderline constitutional conduct may be reached.

As recognized by Congress, states have a long history of using varied and ingenious methods of denying the vote based on

race. The broad scope of the VRA is bolstered by experience in the courts after passage of the Voting Rights Act of 1965. This Court recognized "the variety and persistence of . . . institutions designed to deprive Negroes of the right to vote." South Carolina v. Katzenbach, 383 U.S. at 310 (1966). Congress designed the VRA "to banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century." Id., 383 U.S. at 307. Furthermore, Congress found that "it was only after the adoption of the results test and its application by the lower federal courts the minority voters in many jurisdictions finally began to emerge from virtual exclusion from the electoral process" and acted "to restore the opportunity for further progress." S. Rep. at 30.

The Fourth Circuit was correct in stating that "Congress need not make specific findings on a case-by-case basis" because they have made "extensive findings . . . regarding widespread and ingrained racial discrimination in voting." Record at 36. As discussed above, Congress explicitly found that states created new ways to disenfranchise voters based on race, despite the clear prohibition of such conduct under the Fourteenth and Fifteenth Amendments. S. Rep. at 30. A broad-reaching mechanism is necessary in order to adequately combat discriminatory voting tactics. Even though the VRA extends to conduct that may be facially constitutional, it is a congruent and proportional response to the widespread and amorphous use of discriminatory tactics to deny the vote on account of race. Therefore,

application to felon disenfranchisement laws is within the scope of the VRA.

II. MARYLAND'S PERMANENT DISENFRANCHISEMENT PROVISION VIOLATES THE "CRUEL AND UNUSUAL PUNISHMENT" PROHIBITION OF THE EIGHTH AMENDMENT.

A. In Maryland, disenfranchisement is a "punishment," and therefore subject to scrutiny under the Eighth Amendment prohibition of "cruel and unusual punishment"

The Fourth Circuit correctly held that disenfranchisement in Maryland is a "punishment" and therefore subject to scrutiny under the Eighth Amendment prohibition against "cruel and unusual punishment." U.S. Const. amend VIII. A "punishment" is a restriction placed on a person without any legitimate nonpenal governmental purpose. Trop v. Dulles, 356 U.S. 86, 96 (1958). In order for the state to show that a statute is non-penal, the restriction must be "rationally assignable" to the legitimate purpose, and it must not be excessive in relation to that purpose. Bell v. Wolfish, 441 U.S. 520, 538 (1979) (citing Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963)).

Maryland's permanent disenfranchisement provision is not rationally assignable to the legitimate goal of regulating elections. Historically, the states have primarily attempted to rationalize their use of disenfranchisement to safeguard elections in two ways. First, they postulate that felons will do all manner of corrupt things, from voting for corrupt politicians to attempting to repeal or alter the criminal code. An extension of this line of reasoning is a general "quasi-metaphysical" argument that felon disenfranchisement preserves the "purity of

the ballot box." See Dillenberg v. Kramer, 469 F.2d 1222, 1224 (9th Cir. 1972) (citations omitted). Second, the states argue that felons are more likely to commit all types of election fraud. Both arguments fail.

The Court has unequivocally disallowed disenfranchisement based on the claim that felons may vote in immoral ways and thereby disturb the "purity of the ballot box." In Carrington v. Rash it declared: "'Fencing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible." 380 U.S. at 94 (citations omitted). This rule establishes that there is no such thing as a "wrong"⁴ vote, thereby undermining the basic assumption behind "ballot box purity" arguments. Therefore, protecting the "purity of the ballot box" is not a legitimate governmental purpose.

Petitioner's "election fraud prevention" justification of disenfranchisement rests on the premise that that felons are immoral people and are thus more likely to commit crimes that hamper the electoral process. This premise is dubious and unsupported at best, absurd and pernicious at worst. See Mark E. Thompson, Don't Do the Crime if you Ever Intend to Vote Again: Challenging the Disenfranchisement of Ex-Felons as Cruel and Unusual Punishment, 33 Seton Hall L. Rev. 167, 192-193 (2002) (demonstrating that the same logic would require burglars to

⁴ The district court correctly observed that excluding minors and mentally incompetent people from the franchise may be a legitimate regulation of the election process rather than a punishment. The exclusion of minors and incompetent people does not violate the standard in Carrington because those groups of people are not excluded based on the fear that they might use their votes in an intelligent, purposeful way in order to accomplish immoral ends (as is alleged of felons). On the contrary, these two groups are excluded because they don't have the capacity to make rational decisions about voting at all.

register as sex offenders). There is no logical connection between conviction of a crime like armed carjacking and the propensity to commit a crime such as bribery of election officials. Even if there were some connection, disenfranchising all felons is a remedy disproportionate to any actual threat to the democratic process. Technological advances have made voter fraud a relatively small threat in the modern era. See Ramirez v. Brown, 507 P.2d 1345, 1353-55 (Cal. 1973). Maryland could disenfranchise thousands of felons without preventing a single instance of election fraud. Thus, the permanent disenfranchisement provision violates the Bell test by being excessive in relation to its purported purpose. See Richardson v. Ramirez, 418 U.S. 24, 79 (1974) (Marshall, J., dissenting). The provision is sweepingly over-inclusive and cannot be "rationally assigned" to the problem it purports to solve. Because the state cannot show that section 3-102 is "rationally assignable" to a legitimate governmental purpose, we must conclude that the statute is penal⁵--it is a punishment.

The penal nature of section 3-102 is further demonstrated using the reasoning in Flemming v. Nestor, 363 U.S. 603 (1960). In a corollary to the "legitimate purposes" criterion, the Flemming court concluded that a statute punishes when "aimed at

⁵ In Trop, 356 U.S. at 96-96, the court stated that a hypothetical statute disenfranchising bank robbers would be a "nonpenal exercise of the power to regulate the franchise." Though this seems to preclude a finding that § 3-102 is penal, the court's pronouncement in Trop does not control here. The statement is dictum--poorly supported dictum at that. Any court wishing to pronounce a provision "nonpenal" must analyze whether the provision is backed by a "legitimate governmental purpose" as laid out in the Trop and Bell tests above. This passage from the Trop decision consists of a one-paragraph side note about a statute that does not exist, and is wholly devoid of any such analysis.

the person or class of persons disqualified" but does not punish where the "source of legislative concern" is the "activity or status from which the individual is barred." Id. at 613-614 (holding that denial of social security benefits to deported aliens was not "punishment" for bill of attainder purposes because it was a legitimate fiscal revision of social security). A similar analysis of section 3-102 reveals that it aims to punish.

In contrast to the statute in Flemming, Maryland's section 3-102 is a punishment because it targets repeat felons as a class of persons, and not at the regulation of an activity. The graduated scheme of section 3-102 demonstrates the Maryland Assembly's focus on penalizing of those convicted of crimes. A person who is once-convicted of an infamous crime loses the vote while serving her sentence; a subsequent such conviction extends the term of disenfranchisement for three years after the sentence. Md. Code Ann., Elec. Law § 3-102(b) (West 2005). Finally, a person convicted of "a second or subsequent crime of violence" loses the right to vote for life. Id. at § 3-102(c). Section 3-102 focuses on the severity of the crimes committed and correspondingly increases the length of disenfranchisement. The provision clearly takes aim at the class of persons who have committed certain combinations of crimes.

Section 3-102 is not aimed at regulating the activity of elections. The graduated scheme does not disenfranchise people with relation to their heightened risk of perpetrating election fraud (by imposing permanent disenfranchisement for repeat vote-

sellers, for example). Instead, it revokes the right to vote for life based on the "violence" of the crime committed--a factor without rational connection to election regulation.

Section 3-102 is also inconsistent with Maryland's bona fide regulation of activities. Maryland does not prohibit people convicted of infamous crimes or crimes of violence from, inter alia, serving as notaries public, Md. Code Ann., State Gov't § 18-102 (West 2005), serving as guardians and wards for trusts, Md. Code Ann., Estates & Trusts §§ 13-206, 13-207 (West 2005) or becoming licensed to practice law or medicine, Md. Code Ann., Bus. Occ. & Prof. § 10-207 (West 2005); Md. Code Ann., Health Occ. § 14-307 (West 2005). While most of these regulatory provisions require applicants to be "of good moral character" (save for guardians), ineligibility is not triggered by any specific criminal conviction. Also notably absent from these regulations is the punitive, anti-recidivist "two-strikes" logic of section 3-102. With section 3-102, Maryland is not regulating an activity, but rather imposing a disability on a specific class of persons. Under the Flemming test, the provision is therefore a punishment.

If this Court finds that section 3-102 serves even partially as a punishment, then it must treat the provision as a "punishment" for the purposes of Eighth Amendment analysis. See Austin v. United States, 509 U.S. 602, 610 (1993) (holding that civil forfeiture was "punishment" for purposes of Eighth

Amendment "excessive fines" clause)⁶. Even if this Court finds that the Maryland Assembly had some regulatory aims in passing the provision, it is undeniable that section 3-102 serves at least partially to punish recidivist offenders. According to the test in Austin, the provision is a punishment and therefore subject to the Eighth Amendment prohibition of "cruel and unusual punishment."

B. Maryland's permanent disenfranchisement of felons violates the Eighth Amendment prohibition of "cruel and unusual punishment" because it contravenes "evolving standards of decency" and because it is grossly disproportionate to Mr. Coolidge's crimes.

Initially, the meaning of the Eighth Amendment prohibition of "cruel and unusual punishment" is not static; instead, it draws "its meaning from the evolving standards of decency that mark the progress of a maturing society." Trop, 356 U.S. at 100-101. When a punishment violates the current standards of decency, it is unconstitutionally "cruel and unusual."

In its most recent application of the Trop rule, this Court reviewed current standards of decency using "enactments of legislatures that have addressed this question" as a starting point. Roper v. Simmons, 543 U.S. 551, _____, 125 S.Ct. 1183, 1192 (2005). In Roper, the Court examined the juvenile death penalty,

⁶ Some may argue that "punishment" in the context of "excessive fines" does not equate to "punishment" in the "cruel and unusual" context. The Austin court's analysis of the history and purpose of the Eighth Amendment, however, does not distinguish between the two parts of the Amendment. Austin, 509 U.S. at 608-611. Also, this court has referred to "punishment in the constitutional sense," implying that the term has the same meaning with respect to the entire document. Bell, 441 U.S. at 538; Flemming, 363 U.S. at 613. Additionally, this court has cross-cited "punishment" standards between constitutional provisions on a regular basis. See Austin, 509 U.S. at 610; Kennedy v. Mendoza-Martinez, 372 U.S. at 168; Flemming, 363 U.S. 603; Trop, 356 U.S. 86.

noting that 30 states either rejected the death penalty outright or excluded juveniles from it and that no states that had previously prohibited the penalty had reinstated it since the last Supreme Court pronouncement on the issue. Id. The Roper court emphasized the importance of the *consistency of the direction* of change in standards, rather than the speed of the change. Id. at 1193. Using this measure, the Court held that the juvenile death penalty violated current standards of decency. Id. at 1197.

Like the death penalty for juvenile offenders, permanent disenfranchisement of criminals has steadily lost support in the states for decades. Thirty years ago, 28 states disenfranchised certain kinds of criminals for life, and 20 of these states have now abandoned permanent disenfranchisement. Pamela S. Karlan, Convictions and Doubts: Retribution, Representation, and the Debate Over Felon Disenfranchisement, 56 Stan. L. Rev. 1147, 1168 (2004). No state has imposed lifetime disenfranchisement on criminals since 1959. Id. at n110. Additionally, a recent litany of legislative activity has restored the vote to ex-offenders around the country. Included was Delaware's legislature, which in 2000 exchanged its lifetime ban for a 5-year post-conviction waiting periods. Del. Const. art. V, § 2. In 2003, the Alabama legislature passed a law making it easier for ex-felons to regain the right to vote. Ala. Code § 15-22-36.1 (2003). In 2005, Nebraska enacted a 2-year waiting period for felon voting in lieu of its previous lifetime ban. Neb. Rev. Stat. § 29-112 (2005). In the past decade, other States have passed an extensive number

of similar enactments. See The Sentencing Project, Felony Disenfranchisement Laws in the United States, Nov. 2001 at <http://www.sentencingproject.org/pdfs/1046.pdf>.

This evidence demonstrates that the standards of decency regarding the denial of the vote to ex-offenders are changing consistently in opposition to permanent disenfranchisement. This trend is particularly indicative of a drastic shift in the standard for disenfranchisement because (to borrow a phrase from Justice Stevens) it is a "well-known fact that anticrime legislation [generally] is far more popular than legislation providing protection for persons guilty of violent crime." Atkins v. Virginia, 536 U.S. 304, 315 (2002) (noting the trend away from capital punishment of retarded persons). This Court should find that section 3-102 and all permanent disenfranchisement provisions violate "current standards of decency," thereby violating the Eight Amendment prohibition of "cruel and unusual punishment."

If the court does not invalidate all permanent disenfranchisement on "decency" grounds, it must still scrutinize the punishment for proportionality in relation to Mr. Coolidge's crimes. This Court has consistently recognized that "it is a precept of justice that punishment for crime should be graduated and proportioned to the offense." Weems v. United States, 217 U.S. 349, 367 (1910). See also Atkins, 536 U.S. at 311. Accordingly, no punishment is per se constitutional, even if it is seemingly minor. Solem v. Helm, 463 U.S. 277, 290 (1983); Robinson v. California, 370 U.S. 660, 667 (1962) ("Even one day

in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."). A punishment, such as permanent disenfranchisement, violates the Eighth Amendment "cruel and unusual punishment" prohibition when it is "grossly disproportionate" to the crime committed. Harmelin v. Michigan, 501 U.S. 957, 1005 (1991) (Kennedy, J., concurring). The Court should begin with a threshold analysis of whether the "gravity of the offense and the harshness of the penalty" indicate "gross disproportionality."⁷ Id.

Permanent disenfranchisement is an extremely severe punishment.

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, where voiceless at the ballot box the disenfranchised, the disinherited must sit idly by while others elect his civic leaders and while others choose the fiscal and governmental policies which will govern him and his family. Such a shadowy form of citizenship must not be imposed lightly....

McLaughlin v. City of Canton, 947 F. Supp. 954, 971 (D. Miss. 1995).

The harshness of disenfranchisement is evident in Maryland law. Mr. Coolidge is forever ineligible to run for office, Md. Code Ann., Elec. Law § 5-202 (West 2005); he may not participate in the forming of a political party, Id. at § 4-102; he may never even sign a petition, Id. at § 6-203. As the Fourth Circuit

⁷ Though Harmelin produced no majority opinion, we use as its holding "that position taken by those Members who concurred in the judgments on the narrowest grounds." Marks v. United States, 430 U.S. 188, 193 (1977). This analysis produces the rule articulated above. Hawkins v. Hargett, 200 F.3d 1279, 1282 (10th Cir. 1999). See Ewing v. California, 538 U.S. 11, 23-34 (2003). See also U.S. v. Bland, 961 F.2d 123, 129 (9th Cir. 1992).

correctly noted, he is "largely excluded from public life." Record at 38. The psychological effects on Mr. Coolidge of this exclusion from civil society will likely be severe. Civil disabilities deter ex-convicts' full socialization into society, and may rob these people of "any self-respect that [they] may have retained during incarceration." Special Project: The Collateral Consequences of a Criminal Conviction, 23 Vand. L. Rev. 929, 1228 (1974). For Mr. Coolidge, the threat of these adverse effects is real and present because between 1992 and his conviction, he actively participated in elections, voting in all presidential elections for which he was eligible. Record at 11. The notable absence of the right to vote (along with other derivative rights) will diminish his citizenship--and thereby his personhood--for the rest of his life, even when he is decades removed from his last conviction.

The severity of permanent disenfranchisement is disproportionate to the gravity of Mr. Coolidge's crimes. In determining the gravity Mr. Coolidge's offenses, the Court may use a number of factors, including "the harm caused or threatened to the victim or society," and the "absolute magnitude" of the crime. Solem, 463 U.S. at 292-293. Though any crime is a serious matter, Mr. Coolidge's permanent disenfranchisement resulted from his conviction for a robbery in which he did not display nor possess a weapon of any kind. He demanded money from the cashier of a convenience store, received it, and left without further incident. Because Mr. Coolidge was unarmed, he did not threaten the safety of anyone else in the vicinity.

Additionally, the sum total of his takings from the store was \$150--less than the value of an inexpensive television or bicycle. The absolute magnitude of the amount of money stolen was undeniably small.

The predicate offense that led to Mr. Coolidge's disenfranchisement under section 3-102--possession of 10 grams of cocaine--was also not a grave offense. While the jury found that Mr. Coolidge's possession of 10 grams of cocaine was indicative of that intent to dispense the drug, 10 grams is not much more than the quantity a user might buy for personal use. The relatively small quantity of drug made the absolute magnitude of the offense small. As to the threat to society, as Justice White noted, "while the collateral consequences of drugs such as cocaine are indisputably severe, they are not unlike those which flow from the misuse of other, legal substances" such as alcohol. Harmelin, 501 U.S. at 1023 (White, J., dissenting).⁸ The sentencing court clearly acknowledged that the threat and magnitude of his crime were not large, sentencing him to only one year of prison and one year of probation.

The courts saw fit to sentence Mr. Coolidge to a total of 6 years in prison for his two crimes. Mr. Coolidge has served that time, yet the state will relegate him to the lowest class of citizenship by denying him the right to vote for life. His punishment is grossly disproportionate to his crimes. Therefore,

⁸ The possession of cocaine in question in Harmelin was simple possession, rather than possession with intent to distribute. 501 U.S. at 1024. However, the defendant in that case possessed at least 650 grams of cocaine--at least 65 times the amount that Mr. Coolidge had. Id. Despite this astounding quantity of drug, Justice White still concluded that the "absolute magnitude" of Harmelin's crime was "not exceptionally serious." Id. at 1024.

Mr. Coolidge satisfies the Harmelin threshold inquiry for violations of the Eighth Amendment's prohibition of "cruel and unusual punishment."

The Court may remand this case to the district court for a final determination of the Eighth Amendment disproportionality question. This Court ordinarily does not "decide in the first instance issues not decided below." Nat'l Collegiate Athletic Ass'n v. Smith, 525 U.S. 459, 470 (1999). This is especially true where lower court review of the issue at hand would be particularly beneficial. See Adarand Constructors, Inc. v. Mineta, 534 U.S. 103, 109 (2001). This is such a case. The determination of whether permanent disenfranchisement is cruel and unusual turns on the specific facts surrounding Mr. Coolidge's crimes. Though there are some facts in the record that are pertinent to evaluating the gravity of the crimes, many potentially decisive facts may have been omitted. The trial court is best equipped to determine whether Mr. Coolidge's lifetime disenfranchisement is "cruel and unusual" within the meaning of the Eighth Amendment. This Court should affirm the Fourth Circuit's ruling that Maryland disenfranchisement is "punishment" and remand the case to the district court for a proportionality determination.

CONCLUSION

In affirming the decision below, this Court continues the legacy of the Voting Rights Act by prohibiting felon disenfranchisement laws that result in discrimination on account

of race. Ultimately, this decision will not prohibit states from enacting felon disenfranchisement laws in general, it prohibits only those which, combined with racial discrimination in surrounding social and historical factors, result in disparate impact based on race. This Court should affirm the Fourth Circuit's ruling and remand to the district court for consideration of Mr. Coolidge's claims under the VRA.

The Court should likewise affirm the Fourth Circuit's ruling that Maryland's disenfranchisement statute inflicts "punishment." This will subject this harsh sanction to necessary scrutiny under the Eighth Amendment prohibition of "cruel and unusual punishment," and thereby protect Respondent from punishments which contravene evolving standards of decency or which are grossly disproportionate to his crimes. The Court should declare that permanent disenfranchisement is "cruel and unusual" because it contravenes this country's standards of decency. In the alternative, the Court should remand to the district court for final "gross disproportionality" scrutiny of Mr. Coolidge's punishment.

APPENDIX

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

FEDERAL

U.S. Const. amend. VIII

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

U.S. Const. amend. XIV

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

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

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

U.S. Const. amend. XV

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

—

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

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

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or

political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

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

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable...

STATE OF MARYLAND

Md. Const. art. I, § 4

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

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

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

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

(i) has been pardoned; or

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

(2) is under guardianship for mental disability; or

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

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

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

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

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