No. 05-

IN THE SUPREME COURT OF THE UNITED STATES

MARYLAND STATE BOARD OF ELECTIONS, ET AL.,

Petitioner,

V.

JEFFREY COOLIDGE

Respondent.

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

BRIEF FOR PETITIONER

ID 10792
Counsel for Petitioner

QUESTIONS PRESENTED

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

II. Is Maryland's disfranchisement of a violent felon, predicated on his prior conviction of an infamous crime, a cruel and unusual punishment in violation of the Eighth Amendment?

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the petitioners are Janet Fallins, State Administrator of Elections; Board of Elections of the City of Baltimore; and Edward D. Jones, Election Director.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES v

OPINIONS BELOW ix

STATEMENT OF JURISDICTION x

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED xi

STATEMENT OF THE CASE 1

Procedural Background 1

Statement of Facts 2

SUMMARY OF ARGUMENT 3

ARGUMENT 6

I. **A STATUTORY PROVISION THAT PERMANENTLY DENIES THE RIGHT TO VOTE ONLY TO PERSONS WHO HAVE COMMITTED A SECOND OR SUBSEQUENT VIOLENT FELONY IS NOT A VOTING QUALIFICATION OR PREREQUISITE SUBJECT TO § 2 OF THE VOTING RIGHTS ACT, 42 U.S.C. § 1973** 6

A. The Criminal Exception of the Fourteenth Amendment prevents application of § 2 of the Voting Rights Act, 42 U.S.C. § 1973, to criminal voting disfranchisement 6

B. The Maryland criminal voting disfranchisement statute does not result in a denial or abridgement of the right to vote on account of race, color, or language 11

1. The Maryland statute was not intended to disfranchise African Americans 11

2. African Americans in Maryland have equal opportunity to participate in the political process 14

II. **MARYLAND'S DISFRANCHISEMENT OF A VIOLENT FELON, PREDICATED ON HIS PRIOR CONVICTION OF AN INFAMOUS CRIME, IS NOT A CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT.** 19

A. Even if Maryland's disfranchisement of Respondent and others similarly situated is punishment, it is not a violation of the Eighth Amendment because it does not violate evolving standards of decency 19

B. Maryland's statute that disfranchises felons is not cruel and unusual punishment under the Eighth Amendment because losing the opportunity to vote is not grossly disproportionate to the crimes of violence committed ... 22

C. Maryland's disfranchisement of a violent felon is not cruel and unusual punishment because it is a regulation rather than a punishment 24

CONCLUSION 26

APPENDIX A-1

TABLE OF AUTHORTITIES

Page

UNITED STATES SUPRMEME COURT CASES

Atkins v. Virginia,

536 U.S. 304, (2002) 5,20,22

Beacham v. Braterman,

396 U.S. 12 (1969) 9

Chisolm v. Roemer,

501 U.S. 380 (1991) 7

Davis v. Beason,

133 U.S. 333 (1890) 6

Fincher v. Scott,

411 U.S. 961 (1973) 9

Gregg v. Georgia,

428 U.S. 153 (1976) 22

Harmelin v. Michigan,

501 U.S. 957 (1991) 22,23

Hishon v. King & Spalding,

467 U.S. 69, (1984) 17

Hunter v. Underwood,

471 U.S. 222 (1985) .... passim

Lassiter v. Northampton County Bd. of Elections,

360 U.S. 45 (1959) 9

Marbury v. Madison,

5 U.S. 137, (1803) 10

Marphy v. Ramsey,

114 U.S. 15 (1885) 9

Richardson v. Ramirez,

418 U.S. 24 (1974) .... passim

Romer v. Evans,

517 U.S. 620 (1996) 6,7

Roper v. Simmons,

543 U.S. 551 (2005) 19,20

Stanford v. Kentucky,

492 U.S. 361 (1989) 22

Thornburg v. Gingles,

478 U.S. 30 (1986) 15

Trop v. Dulles,

356 U.S. 86 (1958) 19,20,23,24

Weems v. United States,

217 U.S. 349 (1910) 5,22

UNITED STATES COURTS OF APPEALS CASES

Farrakhan v. State of Washington,

338 F.3d 1009 (9th Cir. 2003) 9,16

Johnson v. Bush,

405 F.3d 1214 (11th Cir. 2005) 4,9,13

Muntaqim v. Coombe,

366 F.3d 102 (2d. Cir. 2004), *cert denied,* 543 U.S. 978 (2004), *vacated pending reh'g*, 396 F.3d 95 (2d Cir. 2004) 4,9,13

Wesley v. Collins,

791 F.2d 1255 (6th Cir. 1986) 9

UNITED STATES DISTRICT COURT CASES

Theiss v. State Administrative Bd. of Election Laws,

387 F.Supp 1038, 1042 (D.C. Md. 1974) 25

State v. Woodland,

654 A.2d 1314 (Md. 1995) 2

CONSTITUIONAL PROVISIONS:

United States Constitution:

Amendment XIV... 10

Maryland Constitution:

Art. I, § 5 (1851) 8,10

Art. I, § 4 (2002) 12

STATUTES:

Federal:

42 U.S.C. § 1973 11,13,14

Act of Mar. 2, 1867, ch. 153, 14 Stat. 428 8

Act of June 22, 1868, ch. 69, 15 Stat. 72 10

Annotated Code of Maryland:

Election Law § 3-102 (2005) 2,3,23,25

Criminal Law § 14-101 (2005) 3,23

PERIODICALS

Angela Behrens, *Voting—Not Quite a Fundamental Right? A Look at Legal and Legislative Challenges to Felon Disfranchisement Laws*, 89 Minn. L Rev. 231, 239 (2004) 21

Brian Pinaire et al., *Public Attitudes Toward the Disenfranchisement of Felons*, 30 Fordham Urb. L.J. 1519, 1521 (2003) 21

Pamela A. Wilkins, *The Mark of Cain: Disenfranchised Felons and the Constitutional No Man's Land*, 56 Syracuse L. Rev. 85, 137 (2005) 20

OPINIONS BELOW

The opinion of the court of appeals has not yet been officially reported. The opinion is set out at page 41 in the Transcript of Record. The order of the district court granting Petitioner's motion for summary judgment has also not been officially reported and is set out at page 27 in the Transcript of Record.

STATEMENT OF JURISDICTION

The final order of the court of appeals was entered on July 16, 2005. R. at 29. The petition for writ of certiorari was granted on October 14, 2005. This Court has jurisdiction of this matter pursuant to 28 U.S.C. § 1254 (2005).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following constitutional provisions and statutes are relevant and are set forth in the Appendix: United States Constitution Amendment VIII and XIV, 42 U.S.C. § 1973, and Maryland Code Election Law § 3-102 and Criminal Law § 14-101.

No. 05-

IN THE SUPREME COURT OF THE UNITED STATES

____

MARYLAND STATE BOARD OF ELECTIONS, ET AL.,

Petitioner,

V.

JEFFREY COOLIDGE

Respondent.

____

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

BRIEF FOR PETITIONER

STATEMENT OF THE CASE

Procedural Background

On November 4, 2004, Respondent, Jeffrey Coolidge, a convicted felon, filed Civil Action 4629572048 against the Petitioner, Maryland State Board of elections, et al., in the United States District Court for the District of Maryland. R. at

8-17. The Respondent brought the action under 42 U.S.C. § 1973, and the Eighth, Fourteenth, and Fifteenth Amendments to the U.S. Constitution to challenge his ineligibility to vote in Maryland. R. at 9. On February 23, 2005, the district court granted the Respondent's motion to dismiss and dismissed the action with prejudice. R. at 27.

On May 10, 2005, Respondent appealed the district court's decision to the United States Court of Appeals for the Fourth Circuit. R. at 29. The court of appeals affirmed in part and reversed in part in its decision of July 16, 2005. R. at 41. The Petitioner filed a petition for a writ of certiorari, which was granted on October 14, 2005. R. at 3.

Facts

Respondent, a self-identified African American, has been a resident of Baltimore his entire life and has a criminal record spanning two decades. R. at 10-11. In 1982, Respondent was convicted by a jury for possession with intent to distribute a controlled substance -- cocaine. *Id.* Under Maryland law, this crime was classified as an infamous crime. MD. CODE ANN., ELEC. LAW § 3-102(b)(2005); *State v. Woodland*, 654 A.2d 1314, 1316 (Md. 1995). During his probation period following his release from prison, Respondent was apprehended when police found cocaine in

his possession. R. at 11. On the basis of this arrest, Respondent was convicted for misdemeanor possession of a controlled substance. *Id.* In 2004, he was arrested and later convicted of robbery, *Id.* This offense is a crime of violence under Maryland law. MD. CODE ANN., CRIM. LAW § 14-101(a)(2005). As a consequence of this conviction, Respondent became ineligible to vote under § 3-102. R. at 12.

Under Maryland law, an individual who is convicted of any infamous crime and who is subsequently convicted of a violent felony permanently loses the right to vote. MD. CODE ANN., ELEC. LAW § 3-102(c); R. at 22. As of July 2005, there were over 200 crimes that were considered infamous, R. at 45-50, one of which is possession with intent to distribute a controlled substance. R. at 47. Because Respondent has been convicted of a crime of violence, and he was previously convicted of an infamous crime, he is now permanently ineligible to vote in Maryland under § 3-102(c). R. at 22.

SUMMARY OF THE ARGUMENT

The Court of Appeals improperly reversed in part the District Court's order to dismiss. The reversal was based in part on the Court of Appeal's misapplication of § 2 of the

Voting Rights Act, 42 U.S.C. § 1973, to Maryland's criminal disfranchisement statute.

Section 2 of the Fourteenth Amendment expressly allows exclusion of persons who have participated in a crime from the right to vote. As such, Maryland's criminal disfranchisement statute, which permanently denies the right to vote only to persons who have committed a second or subsequent violent felony, is not a voting qualification or prerequisite subject to § 2 of the Voting Rights Act, 42 U.S.C. § 1973.

The court of appeals correctly held that "[t]he Fourteenth Amendment immunizes felon disfranchisement laws from Voting Rights Act challenges in the absence of specific and clear evidence of intentional racial discrimination." R. at 35., (quoting *Muntaqim v. Coombe*, 366 F. 3d 102, 122 (2d Cir. 2004); *cert denied,* 543 U.S. 978 (2004), *vacated pending reh'g*, 396 F.3d 95 (2d Cir. 2004)); *Johnson v. Bush*, 405 F.3d 1214 (11th Cir. 2005). In the present case, there is no clear evidence of intentional racial discrimination. The Maryland law denying felons the right to vote is not a voting qualification or prerequisite resulting in a denial or abridgement of the right to vote on account of race. Even if the Fourteenth Amendment does not immunize criminal disfranchisement laws from Voting

Rights Act challenges, the political process is equally open to African Americans and there is no discriminatory result.

Maryland's disfranchisement of a violent felon is not cruel and unusual in violation of the Eighth Amendment because the statute is a regulation rather than a punishment, it does not violate evolving standards of decency, and it is not grossly disproportionate to the crimes of violence committed.

This Court has already determined that by asking "whether there is reason to disagree with the judgment reached by the citizenry and its legislators" an appropriate conclusion about the validity of a statute can be drawn. *Atkins v. Virginia*, 536 U.S. 304, 313 (2002). In addition, the Respondent's cruel and unusual claim must fail because this Court has determined that punishment for crimes should be graduated and proportioned to offenses committed. *Weems v. United States*, 217 U.S. 349, 367 (1910). Since Respondent has been convicted of a crime of violence after being convicted of an infamous crime, subjecting him to such regulation is not disproportionate to his crime of violence--robbery.

Denying felons the right to vote can be wholly considered a governmental regulation rather than punishment because Maryland's purpose in creating the statute accomplishes some legitimate governmental purposes—thus classifying it nonpenal.

Therefore, this Court should reverse the holding of the Court of Appeals and remand for dismissal of the action.

ARGUMENT

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

A. The Criminal Exception of the Fourteenth Amendment prevents application of § 2 of the Voting Rights Act, 42 U.S.C. § 1973, to criminal voting disfranchisement.

The court of appeals improperly applied 42 U.S.C. § 1973 by holding that it applies to felon disfranchisement laws. The court of appeal's decision runs counter to this Court's decision in *Romer v. Evans*, 517 U.S. 620 (1996), in which the Court stated, "to the extent *Davis* held that a convicted felon may be denied the right to vote, its holding is not implicated by our decision and is unexceptionable." *Romer*, 517 U.S. at 634; see *Davis v Beason*, 133 U.S. 333 (1890). *Davis* upheld an Idaho voting law that denied the right to vote based on conviction of certain crimes, unsound mind, or advocating resistance to laws of the territory. See *Davis*, 133 U.S. at 347. *Romer* went on to point out that as for the portions of *Davis* that "held that persons advocating a certain practice may be denied the right to vote, it is no longer good law," but "[t]o the extent *Davis* held that a convicted felon may be denied the right to vote, its

holding is not implicated by our decision and is unexceptionable." *Romer*, 517 U.S. at 634.

Contrary to this Court's decision in *Richardson v. Ramirez*, 418 U.S. 24 (1974), the court of appeals improperly determined that the Fifteenth Amendment's ban on discrimination in voting on account of race allows application of the Voting Rights Act to felony disfranchisement provisions. The court of appeals misapplies this Court's decision in *Chisolm v. Roemer*, 501 U.S. 380 (1991), to arrive at this conclusion. In *Chisolm*, this Court examined whether the election of judges was included in the term "representatives" in the Voting Rights Act and not whether criminals could be denied the right to vote. See *Chisolm*, 501 U.S. at 380.

In *Richardson*, the Court upheld the constitutionality of a California statute that excluded convicted felons from voting, even those who had completed their sentences and paroles. *Richardson*, 418 U.S. at 56. The Court examined the legislative history of the Fourteenth Amendment and the history of voter disfranchisement provisions in the state constitutions which were approved following enactment of the Fourteenth Amendment. Based on this examination, the court determined "that at the time of adoption of the Fourteenth Amendment, 29 states had provisions in their constitutions which prohibited, or

authorized the legislature to prohibit, exercise of the franchise by persons convicted of felonies or infamous crimes." *Richardson*, 418 U.S. at 48. Maryland was one of these states. MD. CONST., art. I, § 5 (1851). "Section 5 of the Reconstruction Act established conditions on which the former Confederate States would be readmitted to representation in Congress." *Richardson*, 418 U.S. at 48; see Act of Mar. 2, 1867, ch. 153, 14 Stat. 428. The Act provided that the states were to form constitutions:

> framed by a convention of delegates elected by male citizens of said State, twenty-one years old and upward, of whatever race, color, or previous condition, who have been resident in said State for one year previous to the day of such election, except as may be disenfranchised for participation in the rebellion or for felony at common law. . . .Act of Mar. 2, 1867, ch. 153, 14 Stat. 428.

The act further provided that prior to a state being readmitted to representation in Congress, the state would have to adopt the Fourteenth Amendment and have its constitution approved by Congress. *Richardson*, 418 U.S. at 49. The act of Congress readmitting Arkansas, the first state to be readmitted, provided that:

> the constitution of Arkansas shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the right to vote who are entitled to vote by the constitution herein recognized, except as a punishment for such crimes as are now felonies at common law. Act of June 22, 1868, ch. 69, 15 Stat. 7.

Similar language was found in the acts readmitting the other Confederate States. *Richardson*, 418 U.S. at 52. This Court upheld these provisions in *Richardson* and several other cases and summarily affirmed two decisions rejecting constitutional challenges to state laws disenfranchising convicted felons. *Richardson* 418 U.S. at 53., see also *Marphy v. Ramsey*, 114 U.S. 15 (1885); *Davis*, 133 U.S. at 333 ; *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45 (1959); *Fincher v. Scott*, 411 U.S. 961 (1973); *Beacham v Braterman*, 396 U.S. 12 (1969). There is no new justification to deviate from this course, which has been followed by all but one of the other circuits that have addressed this issue. See *Muntaqim v. Coombe*, 366 F. 3d at 122, *cert denied,* 543 U.S. 978 (2004), *vacated pending reh'g*, 396 F.3d 95 (2d Cir. 2004); *Wesley v. Collins*, 791 F.2d 1255 (6th Cir. 1986); *Johnson v. Bush*, 405 F.3d at 1214. (ruling that § 2 of the Fourteenth Amendment immunizes felon disfranchisement laws from Voting Rights Act challenges in the absence of specific and clear evidence of intentional racial discrimination); but see *Farrakhan v. State of Washington*, 338 F.3d 1009 (9th Cir. 2003) (holding that the Fourteenth Amendment does not immunize felon disfranchisement laws from Voting Rights challenges).

At the time of ratification of the Fourteenth Amendment, it was understood that a state could deny a criminal the right to vote. See Act of Congress June 22, 1868, ch. 69, 15 Stat. 72. Congress expressly allowed the former Confederate states to deny the right to vote to criminals. *Id.*, (readmitting Arkansas to representation in Congress). The former Confederate States had just fought a war with the U.S. government over, among other issues, the right to own slaves. If Congress expressly allowed the former Confederate states to deny the right to vote to criminals, surely it did not intend to deprive a state, such as Maryland, that did not secede from the Union the right to deny voting to criminals. Maryland's 1851 Constitution allowed the state to deny the right to vote to criminals. MD.CONST., art. I, § 5.

The Fourteenth Amendment, which has not been superseded by any subsequent amendment, allows denial of the right to vote "for participation in rebellion, or other crime." U.S. CONST. amend. XIV. Neither the Voting Rights Act, nor any other act, can supersede the Constitution. *Marbury v. Madison*, 5 U.S. 137, 138 (1803). States remain free to deny the right to vote to convicted felons.

B. The Maryland criminal voting disfranchisement statute does not result in a denial or abridgement of the right to vote on account of race, color, or language.

Section 2(a) of the Voting Rights Act, 42 U.S.C. § 1973, 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, or in contravention of the guarantees set forth in [42 U.S.C. § 1973b (f)(2)] as set forth in subsection b of this title.

Subsection (f)(2), to which Section 2(a) refers, prevents a state from abridging the right to vote to members of a language minority group. Taken together, these two sections prevent a state from denying or abridging the right of a U.S. citizen to vote if that denial or abridgement is based upon race, color, or language. The Maryland statute does not result in a denial or abridgement of the right to vote on account of race, color, or language.

1. The Maryland Statute was not intended to disfranchise Africans Americans.

If a state passes a law with the intent to disfranchise certain individuals convicted of crimes, but not others, it is unconstitutional. *Hunter v. Underwood*, 471 U.S. 222 (1985). To

prove discrimination, a plaintiff must introduce historical evidence that legislators deliberately passed the law to discriminate against Africans Americans. *Hunter*, 471 U.S. at 227. In *Hunter*, the Court held that Alabama's disfranchisement laws were enacted to intentionally discriminate on account of race. *Id.* The Alabama laws in question were part of the constitution that came out of Alabama's 1901 Constitutional Convention, which was part of a movement "to disenfranchise Africans Americans." *Hunter*, 471 U.S at 229. The president of the convention stated in his opening address that he intended "to establish white supremacy." *Id.* The *Hunter* Court found Alabama's law was enacted to intentionally discriminate based on specific and unrefuted testimony. *Id.* The Alabama law was written to allow disfranchisement for certain misdemeanors that were based on a list of crimes complied by a justice of the peace, who based the list on his records of cases involving Africans Americans. *Id.* at 232. The Court found that the Alabama law was enacted for the purpose of racial discrimination. *Id.* at 233.

The Maryland Constitution states that the state may "regulate or prohibit the right to vote of a person convicted of infamous or other serious crime . . . ." MD. CONST. art. I § 4. The Maryland disfranchisement law makes an individual

permanently not qualified to vote if he "has been convicted of theft or other infamous crime" and he has been "convicted of a second or subsequent crime of violence." As such, the disenfranchisement of Respondent is based not on his race in violation of 42 U.S.C. § 1973, but instead is solely based on his possession of cocaine and his conviction of a subsequent violent crime.

The Respondent was convicted of possessing cocaine for distribution (an infamous crime), was later convicted of possession of cocaine, and most recently was convicted of robbery (a violent crime). R. at 11. It is on this basis he is prevented from voting and not on the basis of his being black, as he claims. There is no evidence of intentional discrimination as required by this Court in *Hunter*, or as specifically required by the Second and Eleventh Circuits. See *Muntaqim v. Coombe*, 366 F. 3d at 122, *cert denied,* 543 U.S. 978 (2004), *vacated pending reh'g*, 396 F.3d 95 (2d Cir. 2004); *Johnson v. Bush*, 405 F.3d 1214 (11th Cir. 2005).

The Respondent claims that the Maryland law is directed at Africans Americans, R. at 14-15, but he puts forth no historical evidence to support this claim as required by *Hunter*. The statistics he provides have no date and do not include any information that connects them to the enactment of Maryland's

statute. R. 12-13. The Respondent certainly does not allege any evidence of a historical nature arguing why the legislation was passed originally or why the legislation was changed to its current state. All the Respondent states regarding the history of the legislation is that it was loosened in 1972 and again in 2002 to restore the right to vote to more individuals. The Alabama law, which was struck down by *Hunter* increased the number of crimes eligible for disfranchisement and increased the number of people disfranchised. *Hunter*, 471 U.S at 229. The Maryland law does not share the tainted history of the Alabama law. There is no evidence that the Maryland disfranchisement law was enacted to intentionally discriminate on account of race.

2. Africans Americans in Maryland have equal opportunity as that of other members of the electorate to participate in the political process.

Section 2 (b) of 42 U.S.C. § 1973, states that a violation of section 2 (a) "is established if, based on the totality of circumstances. . ." members of a class "have less opportunity than other members of the electorate to participate in the political process."

The court of appeals incorrectly relies on *Thornburg v. Gingles*, 478 U.S. 30 (1986), as justification for expanding the totality of the circumstances test to determine that a past conviction is barred as a prerequisite if it "interacts with surrounding circumstances to deny the right to vote on account of color." R. at 34. The decision in *Thornburg* is directed at the improper use of multimember districts and at-large voting schemes in North Carolina and is not directed at determining if a statute denying the right to vote of criminals is based on account of color. *Thornburg*, 478 U.S. at 30. The *Thornburg* decision has no impact on denying a criminal the opportunity to vote.

Even if a plaintiff may use the test from *Thornburg* and only show that a past conviction "interacts with surrounding circumstances to deny the right to vote on account of color," instead of the intentional discrimination requirement set forth in *Hunter*, the Maryland disfranchisement statute does not run afoul of the Voting Rights Act, because based on the totality of the circumstances, Africans Americans do not have less opportunity than other members of the electorate to participate in the political process. See *Thornburg*, 478 U.S. 30 (1986).

The Respondent claims that the Maryland statute violates 42 U.S.C. § 1973(b) because based on the totality of the

circumstances, it has the effect of denying Africans Americans the same opportunity to vote as other members of the electorate. R. at 15, 25. The Ninth Circuit, which is the only Circuit to hold that the Voting Rights Act can apply to felon disfranchisement statutes, does not hold that the disfranchisement statutes are in violation of the Voting Rights Act *per se*, only that "racial bias in the criminal justice system may very well interact with voter disqualifications to create the kinds of barriers to political participation on account of race that are prohibited by Section Two, rendering it simply another relevant social and historical condition to be considered where appropriate." *Farrakhan v. State of Washington*, 338 F.3d 1009, 1020 (9th Cir. 2003).

Based on *Farrakhan*, racial bias in the criminal justice system is just one more circumstance in the totality of the circumstances test. As such, to meet the requirements of *Farrakhan*, the Respondent must prove 1) racial bias in the criminal justice system; and 2) that under the totality of the circumstances said bias interacts with voter disqualifications to create the kinds of barriers to political participation on account of race that are prohibited by Section Two. *Id.*

The district court stated that the totality of the circumstances test might apply to Respondent's factual situation

but did not discuss it because the court held that the Voting Rights Act does not apply to the Maryland criminal disfranchisement statute and dismissed the case. R. at 25-27. A dismissal may be affirmed when it is clear as a matter of law that relief could not be obtained under any set of facts consistent with the allegations. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). Even if the unverified statistics and claims alleged by the Respondent are true, it is clear that, as a matter of law, relief could not be obtained. R. at 12-13. The Respondent's claims do not prove that the criminal justice system in Maryland is racially biased nor does he prove under the totality of the circumstances that Africans Americans have less opportunity than other members of the electorate to participate in the political process.

The Respondent claims that Africans Americans of voting age in Maryland are 3.9 times more likely than whites of voting age in Maryland to be permanently ineligible to vote. R. at 12. This is due to a higher percent of Africans Americans being convicted of crimes and not due to racial motives, nor the crimes delineated by the disfranchisement law. The concentration of Africans Americans in Maryland is over twice that of the United States. *Id*. The concentration of Africans Americans in Baltimore City is 5 times that of the United States

Id. The statistics do not prove that the Maryland criminal justice system is racially biased.

The Respondent claims that the set of crimes defined as infamous by Maryland law is skewed towards those that are committed more often by African Americans than by whites. R. at 13. According to the list of infamous crimes in Maryland, which is not a complete list, there are over 140 infamous crimes and over 13 crimes that are not infamous. R. 45-51. Neither the list nor the Respondent's claims or statistics give any indication of which crimes are more likely to be committed by Africans Americans.

The Respondent does not allege any evidence showing that Africans Americans are more likely to convict infamous crimes than non-infamous crimes, as required by *Hunter*. The Hunter Court found Alabama's law was written to allow disfranchisement for certain misdemeanors that were based on a list of crimes complied by a justice of the peace, who based the list on his records of cases involving Africans Americans. *Hunter*, 471 U.S at 232. The set of crimes defined as infamous by Maryland law is not skewed towards those that are committed more often by Africans Americans than by whites. Maryland's designation of crimes as infamous is not racially biased.

The Maryland disfranchisement statute does not result in a denial or abridgement of the right to vote on account of race, color, or language.

II. MARYLAND'S DISFRANCHISEMENT OF A VIOLENT FELON, PREDICATED ON HIS PRIOR CONVICTION OF AN INFAMOUS CRIME, IS NOT CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT.

In *Roper v. Simmons*, 543 U.S.551, 552 (2005), this Court held that the Eighth Amendment's prohibition against cruel and unusual punishment must be interpreted according to the Constitution's text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design. To apply these principles, it has been established that the necessity of referring to "the evolving standards of decency that mark the progress of a maturing society" is the proper test to determine which punishments are so disproportionate as to be "cruel and unusual." *Id.*, (quoting *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958)).

A. Even if Maryland's disfranchisement of Respondent and other similarly situated is punishment, it is not a violation of the Eighth Amendment because it does not violate the evolving standards of decency.

In *Trop*, this Court established that punishment may qualify as cruel and unusual if it violates "evolving standards of

decency that mark the progress of a maturing society." *Trop*, 356 U.S. at 101. *Trop* also provided guidelines for determining the meaning of punishment under the Eighth Amendment. *Id.* While any exact distinction between the terms 'cruel' and 'unusual' is unlikely, it may be argued that the any distinction of the term 'unusual' is to be given its ordinary meaning. *Id.* That meaning, of course, would include some type of punishment that is different from that which is generally done. *Id.*

Looking to individual state statutes is the most reliable way to determine what conduct might contradict evolving standards of decency. Pamela A. Wilkins, *The Mark of Cain: Disenfranchised Felons and the Constitutional No Man's Land*, 56 SYRACUSE L. REV. 85, 137 (2005)., see also *Atkins v. Virginia*, 536 U.S. 304 (2002); *Roper*, 542 U.S. at 561. Since analyzing statutes provides an objective rather than subjective test to determine the evolving standards of decency, courts should consider a review of legislative trends in the specific area of controversy. *Id.* This Court, in *Atkins,* determined a proper conclusion can be drawn in determining the appropriateness of controversial issues by asking "whether there is reason to disagree with the judgment reached by the citizenry and its legislators." 563 U.S. at 313.

Today, forty-eight states disfranchise convicted felons either temporarily or permanently. Brian Pinaire et al., *Public Attitudes Toward the Disenfranchisement of Felons*, 30 FORDHAM URB. L.J. 1519, 1521 (2003). Maine and Vermont are the only states that allow individuals to vote even while incarcerated. Angela Behrens, *Voting—Not Quite a Fundamental Right? A Look at Legal and Legislative Challenges to Felon Disfranchisement Laws*, 89 MINN, L REV. 231, 239 (2004). An overwhelming majority of states agree that felony disfranchisement is an appropriate form of regulating the voting process. *Id.*

Taken as a whole, the current view of felony disfranchisement in the United States shows that legislatures have determined that there are interests to be served in either temporarily or permanently denying the right to vote to prisoners, probationers, or even ex-felons. This objective determination that the majority of states do not think that disfranchisement is a form of cruel and unusual punishment support the proposition that any current standard of decency in the United States is not being violated by Maryland's statute.

The court of appeals seems to find artificial comfort in the fact that felon disfranchisement has been held to violate the European Convention on Human Rights. R. at 39. Chief Justice Rehnquist correctly recognized that the views of other

countries regarding punishment of their citizens should not influence or provide any support for this Court’s determination punishment in the United States. *Atkins*, 536 U.S. at 324., (Rehnquist, C.J., dissenting). While recognizing that some previous decisions have looked to international opinions to reinforce conclusions regarding evolving standards of decency, Chief Justice Rehnquist noted that this Court has since “rejected the idea that the sentencing practices of other countries could ‘serve to establish the first Eighth Amendment prerequisite, that a practice is accepted among our people.’” *Id.* at 325, (quoting *Stanford v. Kentucky*, 492 U.S. 361, 369 (1989)).

B. Maryland’s statute that disfranchises violent felons is not cruel and unusual punishment under the Eighth Amendment because losing the opportunity to vote is not grossly disproportionate to the crimes of violence committed.

In *Weems*, this Court explained “that it is a precept of justice that punishment for crime should be graduated and proportioned to [the] offense.” 217 U.S. at 367. Further, this proportionality guideline has been repeatedly applied in later cases interpreting the Eighth Amendment. *Atkins*, 536 U.S. at 311; see also *Gregg v. Georgia*, 428 U.S. 153 (1976).

According to this Court, the Eighth Amendment supports a narrow proportionality principle. *Harmelin v. Michigan*, 501

U.S. 957, 997 (1991). As a result, the court of appeals determined that it should not inquire too closely into the relationship between crime and punishment, but should ask whether permanent disfranchisement is "grossly disproportionate," *Id.* at 1001, to the crime that the Respondent committed. R. at 40.

Maryland's statute, § 3-102 (c), serves to permanently disfranchise an individual only if he has a prior conviction and has been convicted of a subsequent crime of violence defined in § 14-101 (a). MD. CODE ANN., ELEC. LAW § 3-102. These crimes of violence are serious offenses that include many crimes such as assault, kidnapping, and robbery. MD. CODE ANN., CRIM. LAW at § 14-101.

The disfranchisement of the Respondent and others similarly situated is proportionate to the crimes of violence they have committed. The Respondent, for example, has been convicted of robbery for which he received a sentence of five years in prison and five years of probation. R. at 11. Unlike the prohibitions in *Trop* that included stripping persons of the right to obtain business licenses, Maryland is not depriving the Respondent of any other rights of citizenship. Trop, 356 U.S. at 101.

Even this Court in *Richardson*, 418 U.S. at 55, noted that it may be that modern legislators could conclude that the

concept of disfranchisement is outdated and that ex-felons ought to be returned as fully participating citizens. But it is important to notice that this Court could not conclude that such disfranchisement is so grossly disproportionate to the crime as to be prohibited by the Eighth Amendment. *Id.*

C. Maryland's disfranchisement of a violent felon is not cruel and unusual punishment because it is a regulation rather than a punishment.

In *Trop*, 356 U.S. at 95, this Court discussed ways to determine whether a law is a penal law or a simple regulatory provision enacted by the legislature. It was determined that by analyzing the purpose of laws that serve as disabilities on citizens will help establish whether the law is penal in nature or regulatory, *Id.* at 96., and while it is true that some statutes can have both a penal and nonpenal effect, this Court has generally held that if the statute's purpose is to "impose a disability for the purposes of punishment--that is, to reprimand the wrongdoer, to deter others, etc.," the statute is considered penal. *Id.* However, if the statute imposes some disability on the offender, not to punish, but to accomplish some other legitimate governmental purpose then the disability can be classified as nonpenal. *Id.*

Maryland does not disfranchise all persons convicted of crimes. MD. CODE ANN., § 3-102. Instead the legislature imposes the disability only on those individuals that have committed a second crime of violence. *Id.* The statute attempts to regulate the voting process by eliminating certain violent criminals from the election process, thus helping to ensure fairer voting practices.

Courts have consistently upheld the states' interest and concluded that the disfranchisement of persons convicted of "infamous crimes" is not unconstitutional as inflicting cruel and unusual punishment provisions of the Constitution. *Theiss v. State Admin. Bd. of Election Laws*, 387 F.Supp 1038, 1042 (D.C. Md. 1974). Maryland's statute and others that disfranchise violent criminals cannot be classified as punishment since these statutes serve a greater purpose of preventing unfavorable effects on the outcome of elections.

It is clear that the standards of decency with respect to criminal sanctions have not been violated by the Maryland statute, and further, losing the right to vote is not grossly disproportionate to the felonies committed by Respondent.

CONCLUSION

For the foregoing reasons, the State of Maryland respectfully requests that this Court reverse the ruling of the court of appeals and remand this case for dismissal.

Respectfully submitted,

____

ID 10792
Counsel for Petitioner

APPENDIX

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 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 male inhabitants of such State, being twenty-one years of age, and citizens of the United States; or in any way abridges, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced…

Section 5. The Congress shall have the power to enforce, by

appropriate legislation, the provisions of this article.

42 U.S.C. § 1973, Voting Rights Act of 1965
(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 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section 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) of this section 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.

STATE OF MARYLAND

MD. CODE ANN., ELEC. LAW § 3-102 (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., CRIM. LAW § 14-101(a) (2005).

(a) "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.