

No 05-

In the Supreme Court of the United States

**MARYLAND STATE BOARD OF ELECTIONS
ET AL., PETITIONERS**

V.

**JEFFERY COOLIDGE,
RESPONDENT**

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

BRIEF FOR RESPONDENT

Team 10750
Counsel of Record

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 denial of the right to vote on account of Race?
2. Is Maryland's disfranchisement of a violent felon, predicated on his prior conviction of an infamous crime, a cruel and unusual punishment in violation of the Eighth Amendment to the Constitution of the United States?

Parties to the Proceeding

Petitioners are the Maryland State Board of Elections, Janet Fallins, the Board of Elections of the City of Baltimore, and Edward D. Jones. Respondent is Jeffrey Coolidge.

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Brief for the Respondent

Jeffery Coolidge, by and through his counsel, submits his Brief. For the reasons stated below, the judgment of the United States Court of Appeals for the Fourth Circuit—that § 3-102 of the Maryland Election Law constitutes cruel and unusual punishment and is a violation of the Voting Rights Act—should be affirmed.

Opinions Below

The opinion of the court of appeals is unpublished, but is reprinted at R29-41.¹ The decision of the district court is also unpublished, but it is reprinted at R20-28.

Jurisdiction

The panel decision of the court of appeals was entered on July 16, 2005. A petition for writ of certiorari was granted on October 14, 2005. This court has jurisdiction under 28 U.S.C. §1254(1).

Constitutional and Statutory Provisions Involved

See Appendix.

¹ Citations to American Constitution Society Moot Court Competition Record are designated as R followed by the page number or page range of the record referenced.

Statement of the Case

Respondent Jeffrey Coolidge, a resident of Baltimore, Maryland, was arrested in April 2004 after entering a convenience store and robbing \$150 from a clerk. R-11. Though he threatened to assault the store clerk when demanding the money, he did not use or display a weapon. R-11. Respondent was convicted of robbery the following October and sentenced to a term of five years in prison, followed by five years of probation. R-11. Pursuant to § 3-102 of the Maryland Election Code, respondent was removed from the registry of voters and permanently disenfranchised. R-12. Under § 3-102, permanent disenfranchisement extends to those convicted of a violent crime after previously being convicted of an "infamous crime," as defined by the state. R-45.

Twenty-three years prior to his robbery conviction, when respondent was 19 years old, he was arrested when police discovered 10 grams of cocaine in his possession after pulling him over in the course of an unrelated robbery investigation. R-10. Respondent was convicted of possession with intent to distribute a controlled substance and sentenced to one year of prison and an additional year of probation. R-10-11. The crime for which respondent was convicted is considered an "infamous crime" by the state. R-47. Because Maryland considers robbery a crime of violence, respondent's conviction of both an "infamous

crime" and a violent crime sufficed to disenfranchise him under § 3-102. Though respondent was arrested and reimprisoned for possessing one gram of cocaine during his probationary period following his first conviction, this offense is considered a misdemeanor under Maryland law, and as such, did not implicate § 3-102. R-11. In the time between his release from prison for the misdemeanor conviction and his arrest and conviction for robbery, respondent successfully completed treatment for his cocaine addiction. He also registered to vote, participating in the 1992, 1996, and 2000 presidential elections. R-11.

Respondent brought suit in the District Court for the District of Maryland in November 2004 on the grounds that §3-102 is a voting qualification that improperly infringes on his right-and on the rights of others similarly situated-to vote on account of race. R-16. Respondent presented statistics demonstrating that the state of Maryland denies African Americans the right to vote four times more than it denies white citizens the right to vote through its felon disenfranchisement provisions; that it convicts African Americans of infamous and violent crimes at a rate disproportionate to their share of the population; and more general statistics showing pervasive discrimination in other areas of the justice system. R-15. In light of these facts, Respondent alleged that the state's enforcement of § 3-102 was unconstitutional. He thus asked the

district court to permanently enjoin petitioners from enforcing § 3-102, as it violates § 2 of the Voting Rights Act of 1965 as amended in 1982, 42 U.S.C. § 1973, the Fourteenth Amendment, and the Fifteenth Amendment. Respondent also claimed that § 3-102 violates the Eight Amendment in imposing a cruel and unusual punishment. R-16.

The District Court granted petitioners' motion to dismiss as to all claims, and respondent appealed to the United States Court of Appeals for the Fourth Circuit on his Voting Rights Act and Eighth Amendment claims. R-28. The Fourth Circuit reversed the District Court's holding as to both claims, and remanded for further proceedings in light of its finding that § 2 of the Voting Rights Act is applicable to Maryland's felon disenfranchisement laws. R-41. This Court granted Petitioners' petition for a writ of certiorari.

Summary of Argument

This Court should uphold the Fourth Circuit's holding that § 3-102 of the Maryland Election Code is a "voting qualification" that has the result of abridging the right of Jeffery Coolidge and other African Americans to vote and consequently is a violation of § 2 of the Voting Rights Act. The unambiguous language of the VRA supports this. There is no clear statement requirement requiring the Congress to explicitly

state the statute's application to felon disenfranchisement. Further, the Voting Rights Act is not unconstitutional because it does not infringe on the states' right to non-discriminatory felon disenfranchisement. Finally, because of the egregious methods the states have used to deny voting based on race, the Voting Rights Act is a proper use of the Congress's Enforcement Power under the Fifteenth Amendment.

The Court must also uphold the Fourth Circuit's correct determination that Section 3-102 is unconstitutional under the Eighth Amendment. Because petitioners have advanced no legitimate, nonpenal alternative purpose for permanent disenfranchisement, the severe disability the statute imposes on an individual must be considered a "punishment." As a punishment, the § 3-102 is "cruel and unusual" because the harshness of the penalty it imposes is grossly disproportional to the severity of the crimes that trigger its application. Additionally, the clear national and international consensus rejecting the use of permanent disenfranchisement as a punishment indicates that it is incongruous with society's evolving standards of decency.

Argument

I. This Court Should Review Petitioners' Motion to Dismiss with Great Deference to Respondent's Claims

On a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the Court must "assume the truth of the material facts as alleged in the complaint." *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 325 (1991); see also, *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960) (stating on motion to dismiss Court "not concerned with the truth of the allegations . . . by proof. The sole question is whether the allegations entitle them to make good on their claim"). Further, the complaint "should not be dismissed for failure to state a claim unless it appears *beyond doubt* that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (emphasis added; footnote omitted). Accordingly, this Court should show great deference to Coolidge's claims, given the liberal pleading requirements embodied in the Federal Rules of Civil Procedure, *Conley*, 355 U.S. at 47-48, and should only dismiss if there is no federal law that can support this civil action.

II. Maryland Election Code § 3-102 Is an Impermissible Violation of § 2 of the Voting Rights Act.

Maryland felon disenfranchisement law has a disparate impact on African Americans. Whereas only 1.0% of white Marylanders are permanently ineligible to vote because of Maryland's felon disenfranchisement statute, Md. Code Ann., Elec. Law § 3-102 (West 2005), 3.9% of African Americans are permanently denied the franchise. R-15. This disparate impact represents a violation of §2 of the Voting Rights Act, 42 U.S.C. § 1973 ("VRA").² Petitioners argue that the VRA is unconstitutional, but these arguments do not comport with this Court's precedents: The VRA is not a violation of § 2 of the Fourteenth Amendment, U.S. Const. amend. XIV, § 2, nor is it outside of the scope of Congress's enforcement powers under § 2 of the Fifteenth Amendment, U.S. Const. amend. XIV, § 2.

A. The VRA Applies to Felon Disenfranchisement.

The VRA prohibits "voting qualification[s]" that result in a denial of the right to vote of any citizen on account of race. 42 U.S.C. § 1973(a). In response to this Court's interpretation of the prior text of § 1973 in *City of Mobile v. Bolden*, 446 U.S. 65 (1980) (holding that VRA required discriminatory intent in voting), in 1982 the Congress amended § 2 of the VRA to not require a showing of discriminatory intent, instead finding disparate impact sufficient. Coolidge's complaint clearly falls

² Section 2 of the VRA is codified as amended at 42 U.S.C. § 1973. This brief will refer to both § 2 and § 1973.

within the boundaries of the Congress's amendments under the "totality of the circumstances" test required by statute. 42 U.S.C. § 1973(b). This Court has held that the totality of the circumstances to be considered by a district court when applying the VRA must look to the "social and historical conditions [that] cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives," describing these conditions as "the essence of [the] § 2 claim." *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986).

This claim is before this court on a 12(b)(6) motion to dismiss. It is not appropriate then, for this court to weigh the factors and assess the totality of the circumstances, but rather only dismiss if no set of facts would allow the claim to proceed. This stringent standard has not been met, and the Respondent could, through discovery, find facts that would merit a potential claim under the VRA.

A finding of discrimination in voting by felon disenfranchisement would be consistent with this Court's precedent in *Hunter v. Underwood*, 477 U.S. 222, 223 (1985), which invalidated as unconstitutional § 182 of the Alabama Constitution which disenfranchised those convicted of a "crime of moral turpitude," on the basis that § 182 was passed with discriminatory intent. There is no question that § 182 would have been found to be a "voting qualification or prerequisite"

that had the result of denying African Americans the right to vote "on account of race" under § 2 of the VRA. This kind of discrimination is fairly encompassed within the plain text of § 2 and Congress intended to protect African Americans against such discrimination by the states.

Further, this Court has read the totality of the circumstances test broadly, see *Thornburg*, 478 U.S. at 64-65 (reading VRA to require mere correlation to race rather than determination based on race), and the facts alleged by the Respondent speak to the totality of these circumstances. R-12 to 13. Racial discrimination in the justice system, in traffic stops, and especially in the denial of the voting franchise are among the circumstances that the district court must consider in totality, with "no requirement that any particular number of factors be proved." S. Rep. 97-417, at 29 (1982). Based on this fact specific inquiry, the motion to dismiss should be denied, and this case should be remanded to the district court for consideration of the totality of the circumstances. It is inappropriate here for this Court to engage in such a fact specific inquiry when these facts have not been developed through discovery.

1. The Clear Statement Rule of *Gregory* Does Not Apply to the VRA.

In response to the arguments that the VRA applies to felon disenfranchisement, Petitioners argue that the VRA should be construed narrowly. Petitioners base this argument on the clear statement rule of *Gregory v. Ashcroft*, 501 U.S. 452, 467 (1991), which does not apply to this case.

This argument fails because the clear statement requirement only applies when a statute is ambiguous. *Id.* at 470. Since the VRA encompasses felon disenfranchisement with discriminatory effect, there is no ambiguity. Nevertheless, if this Court reaches a different conclusion, and finds the statute to be ambiguous, the Court should apply the established cannon that remedial statutes should be liberally construed, rather than the clear statement rule. See *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 543 (1994); *Peyton v. Rowe*, 391 U.S. 54, 65 (1968); *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967).

The clear statement requirement of *Gregory* is "attenuated when Congress acts pursuant to its powers to enforce the Civil War Amendments." *Gregory*, 501 U.S. at 468. Whereas the Age Discrimination in Employment Act (ADEA) at issue in *Gregory* was enacted pursuant to Congress's commerce power, *Id.* at 464, the VRA is enacted pursuant to its enforcement power under § 2 of the Fifteenth Amendment. Consequently federalism does not limit the ability of Congress to enact the VRA to combat voting discrimination in general, and discriminatory felon

disenfranchisement in particular. This result is reinforced by *Chisom v. Roemer*, a VRA case decided the same day as *Gregory*, which does not invoke the clear statement requirement. 501 U.S. 380 (1991); *Id.* at 412 (Scalia, J. dissenting) (dispensing with plain statement rule for VRA); see also *City of Rome v. United States*, 446 U.S. 156, 177 (1980) (rejecting clear statement and endorsing broad necessary and proper clause reading of *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819)).

The clear statement rule of *Gregory* does not apply. Because there is at least one set of facts that Coolidge could prove that would be consistent with a VRA violation, the motion to dismiss should be denied, and the case remanded to the district court for discovery.

2. The Fourteenth Amendment does not Immunize Discriminatory Felon Disenfranchisement.

Petitioners argue that § 2 of the Fourteenth Amendment reserves to the state the right to disenfranchise felons, relying on *Richardson v. Ramirez*, 418 U.S. 24 (1974), and they conclude that as applied to felon disenfranchisement, the VRA is invalid. This argument was rejected by this court in *Hunter v. Underwood*. 471 U.S. at 233 (holding that § 2 of Fourteenth Amendment not designed to permit racial discrimination). Petitioners' argument fails for this reason: Although the Fourteenth Amendment guarantees to the states the ability to

disenfranchise felons without discrimination, it does not reserve to the states the ability to disenfranchise felons with disparate impact on the basis of race. Although the states would be able to temporarily disenfranchise criminals based on their power under § 2 of the Fourteenth Amendment if the disenfranchisement did not result in racial discrimination, it is within Congress's enforcement power under § 2 of the Fifteenth Amendment to limit the states' ability to have racially disparate voting qualifications.

B. The VRA is a Congruent and Proportional Remedy to the Injury of Denials of the Right to Vote to Racial Minorities.

Whether the VRA is within the scope of Congress's enforcement powers under § 2 of the Fifteenth Amendment is *not* properly before the Court. When this court has considered the scope of the enforcement power in the past, it has clearly indicated this in the question presented. See, e.g., *Tennessee v. Lane*, 539 U.S. 941, 941 (2003) (mem.) (granting certiorari on question of Congress's enforcement power); *Nev. Dept. of Human Resources v. Hibbs*, 536 U.S. 638, 638 (2002) (mem.) (same); *City of Boerne v. Flores*, 519 U.S. 926, 926 (1996) (mem.) (same). In this petition, the question presented by Petitioner did not implicate Congress's enforcement power, rather it asks the Court to construe the meaning of § 2 of the VRA, R-2, and consequently this question should not be decided by this Court until properly

presented on a petition for certiorari. The Court should assume that the VRA is within the power of Congress.

If the Court believes that the question of the limits of the enforcement power of Congress is encompassed by the question presented to the Court, then it must reach the same result: The VRA is a congruent and proportional remedy for the injury of voting discrimination in violation of § 1 of the Fifteenth Amendment. As Congress's enforcement power under § 2 of the Fifteenth Amendment is coextensive with its enforcement power under the Fourteenth Amendment, see *City of Rome v. United States*, 446 U.S. 156, 207 n.1 (1980) (Rehnquist, J. dissenting), the proper test is the *Boerne* congruence and proportional test. *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997) ("There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."). The crux of the congruence and proportional test is to try to determine if Congress is "enact[ing] so-called prophylactic legislation that proscribes facially constitutional conduct in order to prevent and deter unconstitutional conduct," that is, Congress is acting validly within its enforcement power, or if it is impermissibly "attempt[ing] to substantively redefine the States' legal obligations." *Nev. Dept. of Human Resources v. Hibbs.*, 538 U.S. 721, 727-28 (2003) (quoting *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 88 (2000)).

Even though Maryland's statute is not an unconstitutional violation of the Fourteenth or Fifteenth Amendments, it can still be regulated by Congress under the enforcement power. Compare, *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45 (1959) (upholding facial constitutionality of literacy tests) with *South Carolina v. Katzenbach*, 386 U.S. 301 (1966) (upholding Congress's power to ban literacy tests). The VRA has consistently been described as a model exercise of Congress's enforcement powers. See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997) ("We have also concluded that other measures protecting voting rights are within Congress's power to enforce the Fourteenth and Fifteenth Amendments, despite the burdens those measures placed on the States.").

1. The Court Should Show Great Deference To the Congress's Determinations Because of the Strict Scrutiny this Classification Involves.

In assessing whether a remedy is congruent and proportional to the injury identified by the Congress, the Court looks to the nature of the fundamental right protected or the nature of the classification to determine the level of scrutiny the alleged unconstitutional behavior would receive by the Court. See, *Tennessee v. Lane*, 541 U.S. 509, 533-34 (2004) (access to courts); *Hibbs*, 538 U.S. at 728 (gender classification); *Board of Trustees v. Garrett*, 531 U.S. 356, 366 (2001) (disability

discrimination); *Kimel*, 528 U.S. at 646 (age). When considered against the level of scrutiny that would be applied, a higher standard is applied to statutes that purport to enforce constitutional guarantees only triggering rational-basis review-*Garrett*, *Kimell*-as compared to the more deferential standard applied to those guarantees which receive intermediate or strict scrutiny review-*Lane*, *Hibbs*.

2. The General Evidence of Voting Discrimination and Specific Evidence of Discriminatory Felon Disenfranchisement Support Congress's Passing the VRA.

In this case, the VRA seeks to enforce two protections that get the strictest scrutiny: the fundamental right to vote, see *Bush v. Gore*, 531 U.S. 98, 104 (2000); *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). and classification based on race, see *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003). Accordingly, the evidence in the Congressional record does not need to meet the high standard required in *Garrett* and *Kimmell*; this case is akin to *Hibbs* and *Lane*: The lack of congressional findings in the record relating specifically to discriminatory felon disenfranchisement are not sufficient to limit Congress's enforcement power. Rather, the broad findings of racial discrimination in voting are sufficient for Congress to exercise its ability to proscribe otherwise constitutional behavior. See, *Hibbs*, 538 U.S. at 729-30 (finding general findings of

employment discrimination by states against women, and lack of parental leave for fathers, sufficient to guarantee 12 weeks of leave for spousal illness). In *Hibbs*, Congress made no specific findings regarding discrimination in leave for spousal illness; the Court relied on general findings by Congress. This is analogous to the findings the Congress has made for the VRA: the general findings are sufficient to identify the injury for which the specific application of the VRA to felon disenfranchisement is congruent and proportional.

Further, in *Hibbs*, this Court relied on a history of discrimination cases in this Court as evidence that the remedy was congruent and proportional. *Id.* at 729; see also *Lane*, 541 U.S. at 524-25 (relying on Supreme Court cases for evidence of unconstitutional treatment of disabled). This Court's decision in *Hunter v. Underwood*, shows the unconstitutional applications that the states have used felon disenfranchisement statutes for. 477 U.S. at 223. *Hunter*, and other cases like it, speak to the a specific evil that Congress sought to remedy with the VRA: unconstitutional denial of voting rights to African Americans through disenfranchisement of felons. When combined with the general findings of the Congress of discrimination in voting there is no doubt that this remedy is congruent and proportional.

This court has stated, and has reaffirmed, that when a constitutional injury has occurred, the power of the Congress to enforce constitutional guarantees is the same as the Necessary and Proper Clause. *Boerne*, 521 U.S. at 525 (citing *The Civil Rights Cases*, 109 U.S. 3, 13-14 (883)) (stating that Congress has enforcement power to pass all laws "necessary and proper for counteracting such laws as the States may adopt or enforce"); see also *Katzenbach*, 383 U.S. at 326 (equating Congress's enforcement power with Necessary and Proper Clause analysis in *M'Culloch*). Discrimination based on race is one of the most fundamental constitutional injuries, with three constitutional amendments addressing the area specifically, U.S. Const. amends. XIII-XIV, and consequently this Court should show Congress the deference it deserves when it has determined that a remedy is necessary and proper.

Although this Court has limited Congress's enforcement power in the past decade when Congress has attempted to redefine the states' legal definitions, *Hibbs*, 538 U.S. at 728, it has affirmed that the enforcement power of Congress allows Congress to identify a constitutional injury and act to prevent that injury by prohibiting the states from engaging in facially constitutional behavior. *Id.* at 721-22; see also *Lane*, 541 U.S. at 518. Discriminatory felon disenfranchisement, as found in *Hunter v. Underwood*, and general discrimination in voting make

the VRA a congruent and proportional injury, and valid enforcement action under § 2 of the Fifteenth Amendment.

III. Permanent Disenfranchisement under § 3-102 of the Maryland Code is Unconstitutional, as it is in Violation of the Eighth Amendment's Prohibition of "Cruel and Unusual" Punishment

Before reaching the question of whether a statutory provision is unconstitutionally cruel and unusual under the Eighth Amendment, U.S. Const. amend. VIII, it must first be demonstrated that the statute actually functions as a "punishment," rather than a nonpenal government regulation. *Wilson v. Seiter*, 501 U.S. 294, 300 (1991). Assuming the satisfaction of this threshold requirement, the constitutional inquiry proceeds by examining whether the penal statute applies sanctions that are disproportionate to the severity of the crime and inconsistent with evolving standards of decency. *Roper v. Simmons*, 125 S.Ct. 1183, 1190 (2005). The Fourth Circuit correctly found that § 3-102 of the Maryland code imposes a penal disability so disproportionate to the underlying offenses, as to be cruel and unusual.

A. Section 3-102 of Maryland's Election Code Implicates the Eighth Amendment Because it is "Punishment" Rather than a Nonpenal Election Regulation

Whether a statute is penal depends on whether it "imposes a disability for the purpose of punishment" and not "some other legitimate governmental purpose." *Trop v. Dulles*, 356 U.S. 86,

96 (1958). This nonpenal "alternative purpose" must be "rationally" connected to the effects of the statute. *Bell v. Wolfish*, 441 U.S. 520, 538 (1979). But even a "clear legislative classification" will not suffice to render a statute nonpenal if the purpose of the statute is consistent with the "purposes of punishment," such as "reprimand[ing] the wrongdoer" and deterrence. *Id.*; *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963). Because petitioners have advanced no legitimate, nonpenal purpose for permanent disenfranchisement, it is clear that the severity of the disability inflicted by § 3-102 was intended to be penal in nature.

1. Permanent Disenfranchisement Imposes a Severe Disability

The severity of the imposed disability is relevant to the determination of a statute's penal nature. *Trop*, 356 U.S. at 96 n.18. The disability in this case is particularly great, as it involves the permanent denial of a right consistently held by this Court as fundamental in importance. *Bush v. Gore*, 531 U.S. 98, 104 (2000); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 676 (1966); *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). Although the permanently disenfranchised felon retains other rights, such as the freedom of speech, the right to vote has been regarded by this Court as "preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). The effects of permanent disenfranchisement are not abstract, they are real and

immediate in impact. The loss of the right to vote affects a person's ability to voice support for such issues as minimum wage, public health care, and school-related initiatives. That a person may never weigh in on these matters for the rest of his life using his vote, inflicts a disability that is penal in its proportions.

2. Petitioners' Nonpenal Alternative Objectives for Permanent Disenfranchisement are Not Compelling

That Maryland has a right to establish "qualifications for the exercise of the franchise," is not in dispute—this has been regarded as a "historic function of the States." *Carrington v. Rash*, 380 U.S. 89, 91 (1965). Additionally, this Court has clearly acknowledged that the states have a "legitimate and valid" interest in preserving the "integrity of the electoral process." *Rosario v. Rockefeller*, 410 U.S. 752, 761 (1973). The validity of this state interest, however, does not mean that the methods the state uses to accomplish it are necessarily nonpenal, in light of the potential severity of the results.

The argument that permanently disenfranchising felons protects the integrity of the electoral process takes on two forms. The first argument is that the state has a legitimate interest in protecting the electoral process from the influence of fraud or other crime. *Green v. Bd. of Elections of New York*, 380 F.2d 445, 451 (2d Cir. 1967). This argument is vastly

undermined by the fact that there exists a large swath of nonviolent election-related crimes under the Maryland code that would not result in permanent disenfranchisement even after multiple such offenses. R-50. Though the statute disenfranchises a person for "buying or selling votes," R-7, it does not do so for false voter registration or perjury on campaign finance reports. R-50. Were the state's true purpose to regulate the electoral process in such a way to protect it from undue criminal influence, it would have tailored § 3-102 to prevent those crimes that present actual threats to the process.

The second argument is that the state has a legitimate interest in excluding those who, through repeated criminal convictions, have demonstrated that they lack the *judgment* to respect the legal order and should thus not participate in creating and shaping it. An analogy is drawn to the practice of excluding minors and the mentally disabled in order to substantiate this point. Minors lack this judgment as a virtue of the immaturity and suggestibility that comes with youth, whereas for the mentally disabled, this is the result of a medical condition. The analogy is highly tenuous, however. Felons do not necessarily possess either of the characteristics of these two populations—and even if they did, they would be disqualified from voting on that basis without requiring the provisions of this statute. As such, the crux of the argument

rests on a fear of what choices felons might make at the ballot box—namely that they would vote for initiatives and candidates that are lenient on crime. This Court, however, has stated in no ambiguous terms that “‘fencing out’ from the franchise a sector of the population because of the way they may vote is constitutionally impermissible.” *Carrington*, 380 U.S. at 94. With no credible nonpenal alternative purpose for permanently disenfranchising felons, this statute cannot be regarded as anything but penal.

3. The Statute’s History and Text Evidence a Clear Purpose to Chastise and Deter Recidivist Felons

The Attorney General of Maryland has acknowledged that the statute is ambiguous, but that its purpose can be inferred from its legislative history. This Court has also held that when the legislative intent of a penal statute is not “conclusive,” the statute may be examined on its face for guidance as to its purpose. *Mendoza-Martin*, 372 U.S. at 169. The statute in both its legislative background and text exhibits a clear purpose to chastise and deter recidivists felons.

According to Maryland’s attorney general, the legislature’s passage of the law represented a “liberalization” of attitude toward felons. R-43. Whereas the state previously extended disenfranchisement to all individuals with multiple “infamous crimes,” now the second crime must involve an element of

violence. R-43. This legislative action is telling. Since the state considered permanent disenfranchisement a grave infliction, it amended the statute so that it would reach only the most serious recidivists—those that employ violence in their crimes. A nonpenal rationale distinguishing why nonviolent recidivist felons are more capable of participating in the electoral process than violent recidivists is absent. A penal rationale, on the other hand, is not: because violent recidivists felons are regarded as especially heinous offenders, they “deserve” harsher treatment that will serve as both chastisement and as deterrence against further criminal behavior.

Though the statute speaks in the language of “qualification,” the presence of felons is in stark contrast with the other disqualified groups for whom a nonpenal justification is clearly evident. R-42. As stated in the preceding section, children are disqualified because of the immaturity inherent in their age and mentally disabled people because of their medical status. Additionally, individuals must meet a minimum period of residency in a county before they can vote. R-42. The temporary nature of the restrictions imposed on these groups underscores their nonpenal nature: once the particular characteristic that disqualifies them fades, so does their ineligibility. No similar nonpenal justification is

assignable to violent recidivists who have already been freed from prison—and their disqualification never expires.

The imposition of a severe disability, the absence of an alternative nonpenal justification for it, and the statute's history and text all clearly indicate that § 3-102 is a punishment and not simply an election regulation.

B. As a Punishment, Permanent Disenfranchisement is "Cruel and Unusual" in its Disproportional Nature to the Offense Committed and in its Dissonance with Evolving Standards of Decency

Since it is clear that § 3-102 is a "punishment," it is subject to the purview of the Eighth Amendment. Though the Court has struggled to establish a concrete set of criteria by which to adjudge a punishment as cruel and unusual, it has consistently held that the proper metric to use in approaching such an inquiry rests in principles of proportionality and evolving standards of decency. *Roper*, 125 S.Ct. at 1190. Subjecting § 3-102 to both general analyses reveals that the Fourth Circuit correctly determined that it is unconstitutional.

1. Permanent Disenfranchisement Under § 3-102 is Disproportionate to the Punishments that Trigger its Execution

This Court has made clear that disenfranchisement is not per se unconstitutional, given that § 2 of the Fourteenth Amendment expressly allows for the practice. *Richardson v. Ramirez*, 418 U.S. 24, 42 (1974). However, no decision by this Court has found that permanent disenfranchisement is similarly

permissible. As such, to determine if the punishment conflicts with the protections of the Eighth Amendment, it must be determined whether the punishment evokes "excessiveness" when compared to the offense committed. *Trop*, 356 U.S. at 100. The Court has stated a preference for using objective factors in making a finding that a punishment is disproportional—namely, courts should compare "the gravity of the offense and the harshness of the penalty." *Solem v. Helm*, 463 U.S. 277, 290-91 (1983). The Eighth Amendment does not mandate "strict proportionality between crime and sentence." *Ewing v. California*, 538 U.S. 11, 23 (2003) (plurality opinion). However, punishments that are "grossly" out of proportion with the crime committed are unconstitutional. *Id.* at 23; *Solem*, 463 U.S. at 288; *Gregg v. Georgia*, 428 U.S. 153, 174 (1976) (plurality opinion).

The Court has tempered the proportionality analysis by stating that state legislatures are entitled to a certain degree of deference, given the "substantive penological judgment" inherent in sentencing and the Eighth Amendment's lacking of a mandate for the "adoption of any one penological theory." *Harmelin v. Michigan*, 501 U.S. 957, 998-99 (1991) (Kennedy, J. concurring); *Ewing*, 538 U.S. at 23 (adopting Kennedy concurrence). There is an expectation, however, that the justification for harsher punishment advanced by the state be

founded upon a "legitimate basis," and not a "pretext." *Ewing*, 538 U.S. at 25. States can draw upon the traditional aims of the criminal justice system for such justification. These include "incapacitation, deterrence, retribution, or rehabilitation." *Id.* In *Ewing*, for example, the Court found that prolonged or permanent incarceration, though harsh in nature, was not a disproportionate punishment for three-time recidivists, since incapacitation by incarceration was a legitimate and rationale response to repeat felons who posed a threat of additional criminal behavior if left free to roam the community. *Id.*

Permanent disenfranchisement is so "grossly" out of proportion with a great number of the crimes to which it is applied, however, that there exists no valid penal justification that can save Maryland's current statutory scheme. Section § 3-102 finds little support in the "traditional aims" of the criminal justice system. Firstly, unlike in *Ewing*, the "incapacitation" of recidivists in this context is irrelevant because the person has been freed from jail and has reentered society. Secondly, it would require stretch of the imagination to consider the punishment "rehabilitative," since it forever stigmatizes an individual and prevents his full reintegration into the community by denying him the most fundamental type of say in that community's democratic governance: the vote. An 18-year-old who commits a violent felony in addition to an

"infamous crime," for example, will remain unfit to vote in the state's eyes even after 50 years with a spotless criminal record. Thirdly, a "deterrence" justification is also weak given that Petitioners have provided no explanation for how permanent disenfranchisement would advance the this goal in a manner not already accomplished by the threat of re-imprisonment.

What is left is purpose based on "retribution," a justification that closely toes the borders of disproportional and proportional punishment. Because § 3-102's sanctions are reserved for a class of felons society deems most reprehensible, it is a fair inference that the purpose of this statute is largely retribution. Significantly, this Court has acknowledged that, though not forbidden, retribution "is no longer the dominant objective of the criminal law." *Williams v. New York*, 337 U.S. 241, 248 (1949); *Gregg*, 428 U.S. at 184. Even when it is used, it should not be "unnecessary and wanton." *Gregg*, 428 U.S. at 173. But in the case of § 3-102, it is both. Under the law, permanent disenfranchisement attaches after the commission of a violent felony when an individual has been previously convicted of an "infamous crime," as defined by Maryland law. R-42. The spectrum of types of criminal conduct that Maryland considers "infamous," however, affords the statute a wide and arbitrary application. The same consequences experienced by a drug possession felon who then commits first degree murder, for

example, are visited upon a drug possession felon who, like Respondent, subsequently commits unarmed robbery. The results in the latter case exemplify the "harshness" of the penalty in relation to the "gravity" of the offense. Petitioners have not successfully demonstrated why permanent disenfranchisement is a necessary punishment for unarmed robbery or why it should apply with equal force to vastly unequal crimes.

Petitioners argue that because this Court in *Ewing* declared it constitutional to imprison an individual for a life-sentence under a "three-strikes" statutory scheme, thereby totally depriving him of liberty, it would be inconsistent for the Court to now hold that permanent denial of just one fundamental right is unconstitutional. This reading of the case, however, overlooks several key issues. This Court reached its conclusion in *Ewing* in light of its decisions in *Rummel v. Estelle*, 445 U.S. 263 (1980), and in *Solem*. In *Rummel*, the Court held that it was not unconstitutionally disproportional to impose a life sentence with the possibility of parole for felony theft, given two previous convictions for fraud and forgery. 445 U.S. at 285. In *Solem*, however, the court held that the imposition of a life sentence was unconstitutionally disproportional when no possibility of parole was afforded to a felon convicted of similar felonies as the defendant in *Rummel*. 462 U.S. at 281. The difference between these cases is the possibility of parole-

that is, an independent mechanism that could address proportionality concerns.

Justice O'Connor discusses *Rummel* and *Solem* at length in *Ewing*, and in considering what similar mechanisms California has in place to guard against grossly disproportionate punishment—she found two. First, California allows for certain lesser felonies to be dropped to misdemeanor status at the prosecutor's or trial judge's discretion in order to avoid the "three strikes" penalty, after considering the nature of the defendant's circumstances. *Ewing*, 538 U.S. at 17. Second, regardless of the type of felony charged, a trial judge has discretion to vacate a previous felony, even if it was violent felony, if he feels the defendant's circumstances are outside the spirit of the "three-strikes" law. *Id.* Maryland has no such viable proportionality safeguard, even though permanent felony disenfranchisement attaches to crimes that run the gamut from unarmed robbery to multiple rapes or murders.

Because Petitioners have advanced no "legitimate basis" for increasing punishment, permanent disenfranchisement is largely a form of retribution. As retribution, it is grossly disproportional to a great number of the crimes that implicate it and no viable mechanism by which to avoid this disproportional effect exists.

2. Section 3-102 Offends "Evolving Standards of Decency"

In addition to considering principles of proportionality between the offense and the penalty, this Court “draw[s]” the Eight Amendment’s “meaning from the evolving standards of decency that mark the progress of a maturing society.” *Trop*, 356 U.S. at 100-101. To determine society’s “evolving standards,” this Court has looked to “evidence of national consensus” and the actions of the international community *Roper*, 125 S.Ct. at 1192, 1198. Though such findings are not “controlling,” they are “instructive” to the overall analysis. *Id.* at 1198. In *Roper*, for example, the Court stated that the United States was the “only country in the world . . . to give official sanction to the juvenile death penalty.” *Id.* Additionally, the Court pointed to the fact that thirty states had banned capital punishment for minors as indicative of a “national consensus” against the practice. *Id.* at 1192. The same number of states banned capital punishment for the mentally disabled when the Court struck down this punishment as unconstitutional. *Atkins v. Virginia*, 536 U.S. 304, 313 (2002).

This case presents a similarly strong national condemnation of what is regarded as an excessive punishment. Thirty-seven states do not allow the permanent disenfranchisement of felons. Maryland, though among the thirteen states that retain the practice, has been relaxing the provisions of its statute. R-43.

The United States stands only with Armenia on the international stage as the only democratic countries that practice permanent disenfranchisement of felons. As in *Roper* and *Atkins*, there is a palpable national and international consensus that the permanent disenfranchisement of felons is cruel and unusual.

Furthermore, the constitutional history of our nation has "evolved" in such a way as to expand, rather than constrict voting rights. Indeed, the adoption of the Fifteenth Amendment (prohibiting restrictions based on race, color, and previous conditions of servitude), Nineteenth Amendment (prohibiting restrictions based on sex), Twenty-Fourth Amendment (prohibiting poll taxes), and the Twenty-Sixth Amendment (lowering the voting age to eighteen) demonstrate a pattern of increasing accessibility to the ballot box, not of raising arbitrary barriers.

Conclusion

For the foregoing reasons this Court should affirm the decision of the Fourth Circuit and deny Petitioners' motion to dismiss.

Respectfully submitted,

Team 10750

Appendix: 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 (Bender 2005)

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

- (1) has been convicted of theft or other infamous crime, unless the individual:
 - (i) has been pardoned; or
 - (ii) 1. in connection with a first conviction, has completed the court-ordered sentence imposed for the conviction, including probation, parole, community service, restitutions, and fines; or
 2. in connection with a subsequent conviction, has completed the court-ordered sentence imposed for the conviction, including probation, parole, community service, restitutions, and fines, and at least 3 years have elapsed since the completion of the court--ordered sentence imposed for the conviction, including

probation, parole, community service, restitutions,
and fines;

(2) is under guardianship for mental disability; or

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

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

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

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

(1) abduction;

(2) arson in the first degree;

(3) kidnapping;

(4) manslaughter, except involuntary manslaughter;

(5) mayhem;

(6) maiming, as previously proscribed under former Article 27, §§ 385 and 386 of the Code;

(7) murder;

(8) rape;

(9) robbery under § 3--402 or § 3--403 of this article;

(10) carjacking;

(11) armed carjacking;

(12) sexual offense in the first degree;

(13) sexual offense in the second degree;

(14) use of a handgun in the commission of a felony or other crime of violence;

(15) an attempt to commit any of the crimes described in items

(1) through (14) of this subsection;

(16) assault in the first degree;

(17) assault with intent to murder;

(18) assault with intent to rape;

(19) assault with intent to rob;

(20) assault with intent to commit a sexual offense in the first degree; and

(21) assault with intent to commit a sexual offense in the second degree.