

No 01-2006

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In the Supreme Court of the United States

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

V.

JEFFERY COOLIDGE,  
RESPONDENT

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

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**BRIEF FOR RESPONDANT**

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ACS Moot Court Competition ID # 10795

## QUESTIONS PRESENTED

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

## RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

### **FEDERAL**

#### **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 states 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 ages, 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 State 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**

**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.

**Md. Code Ann., Criminal Law § 5-601 (West 2005)**

In general

(a) Except as otherwise provided in this title, a person may not:

(1) possess or administer to another a controlled dangerous substance, unless obtained directly or by prescription or order from an authorized provider acting in the course of professional practice

**Md. Code Ann., Criminal Law § 5-602 (West 2005)**

Except as otherwise provided in this title, a person may not:

(1) manufacture, distribute, or dispense a controlled dangerous substance; or

(2) possess a controlled dangerous substance in sufficient quantity reasonably to indicate under all circumstances an intent to manufacture, distribute, or dispense a controlled dangerous substance.

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## STATEMENT OF FACTS

Respondent Jeffrey Coolidge is a resident and citizen of Baltimore, Maryland. (R. at 9:5.) In 1982, at the age of 19, Coolidge was stopped while driving his car by Baltimore County police. (R. at 10:11.) The two policemen were investigating a reported robbery allegedly committed by an African American man. (R. at 10:11.) Coolidge was stopped presumably because he shared physical characteristics with the alleged robber and upon conducting a search, the officers found cocaine. (R. at 10:11.) Coolidge was indicted for possession with intent to distribute a controlled substance. (R. at 10:12.)

An overwhelmingly white jury convicted Coolidge of the possession charge and he was sentenced to one year in prison. (R. at 10:12; 12:19.) Coolidge's conviction must be viewed in light of the racial bias evident in Maryland's judicial system; police in Metropolitan Baltimore target, apprehend, and charge African Americans at a disproportionately high rate. (R. at 13:26.) Additionally, the average Baltimore County jury is comprised of less than 7% African Americans even though the population of Baltimore County is 20.1%. (R. at 13:28.) Coolidge's conviction disqualified him from the voter registration eligibility, as it was a conviction for an *infamous crime* under Md. Code Ann., Election Law 3-102(b). (R. at 10:11-12.) Crimes defined as infamous by Maryland are skewed towards

those committed more by African Americans than by whites. (R. at 13:32.) This amounts to triple imprisonment rates for African Americans, as compared to the imprisonment rates for whites in Maryland. (R. at 12:20-21.) As a result, 3.9% of African Americans of voting age are permanently ineligible to vote, in comparison to only 1.0% of white Maryland residents.

In 1992 after having completed his sentences, Coolidge registered to vote in Baltimore for the first time. (R. at 11:15.) He dutifully voted in three consecutive Presidential elections beginning with the 1992 election. (R. at 11:15.)

In October, 2004, Coolidge was convicted of robbery and received a sentence of 5 years in prison and 5 years of probation. (R. at 11:17.) Upon receiving his sentence, Coolidge became permanently ineligible to vote in Maryland, under 3-102(c) because he had been convicted of a violent crime after having been previously convicted of an infamous crime. (R. at 12:18.) He was removed from the voter registry and will never be able to vote in Maryland. (R. at 12:18.)

#### **SUMMARY**

Laws which permanently disenfranchise citizens for committing a subsequent or additional felony are subject to review of the Voting Rights Act, 42 U.S.C. §1973 (hereinafter known as the VRA). In the face of intentional discrimination in

the criminal justice system and a history of barriers to voting, African Americans in Maryland and other like states are impermissibly restricted from the franchise.

In Maryland, African Americans are disproportionately targeted, apprehended, and prosecuted. They are tried by overwhelmingly white juries, despite being a fifth of the population. And the set of infamous crimes for which they are disenfranchised under Maryland Election Law § 3-102 is skewed towards crimes more often committed by African Americans. This intentional discrimination totality of circumstances interact with the disparate impact of felony disenfranchisement in Maryland to create a voting restriction based on race.

The VRA is clear in its per se application to voting qualifications which result in denial to vote on account of race. There is no need for a clear statement because there is no ambiguity in the statute, especially since Congress had the opportunity to include an exception for felon disenfranchisement in the 1982 amendments to § 1973 and declined to do so.

§ 2 of the Fourteenth Amendment does not preclude application of § 1973 to the felony disenfranchisement laws in question. The Supreme Court held that the express sanction granted to states for disenfranchisement due to "rebellion, or other crime" does not bar an equal protection review when there is intentional discrimination in the creation or operation of

the law. Additionally, Congress never intended § 2 of the Fourteenth Amendment to allow disenfranchisement for any felony.

Use of the VRA to review such felon disenfranchisement is also a congruent and proportional use of Congress' remedial authority under § 5 of the Fourteenth Amendment. Because the effect of intentional vote dilution within the totality of circumstances undermines the political access of all African Americans, striking down such laws is a prophylactic measure that will prevent such disempowerment for the entire class.

§ 3-102 is also unconstitutional on the basis of the Eighth Amendment. It is punishment subject to constitutional restrictions against cruel and unusual punishment. Not only does § 3-102 function primarily as punishment in its effect, there are indications that the Maryland Legislature envisioned the statute as a punitive measure for recidivist criminals.

As a punishment, felony disenfranchisement statutes like § 3-102 have lost their relevance on the world stage. Both individual states and the international community have begun to evolve and move away from the practice of denying criminals the ability to vote. This general consensus is an indication of the evolving standards of decency with regards to disenfranchisement statutes like § 3-102. As a result, the practice of permanent disenfranchisement now constitutes cruel and unusual punishment.

## ARGUMENT

I. FELONY DISENFRANCHISEMENT STATUTES LIKE MARYLAND'S § 3-102 ARE SUBJECT TO § 2 OF THE VOTING RIGHTS ACT BECAUSE THEY RESULT IN A DENIAL TO VOTE ON ACCOUNT OF RACE.

The VRA empowered Congress to restrict any racially-based barrier to voting. See South Carolina v. Katzenbach, 383 U.S. 301, 309 (1968) (holding the VRA constitutional as an extension of Congress' remedial power under the Fifteenth Amendment). The statutes in question disproportionately disenfranchise African Americans (R. at 12-13) while interacting with political, economic, and social discrimination, subjecting them to review under the VRA. Cf. Thornburg v. Gingles, 478 U.S. 30, 43 (1986) (holding that § 2 of the VRA prohibits States from imposing any voting qualification which interacts with "totality of circumstances" to close off equal participation by members of a protected class).

The core rationale for the Petitioners' claim that felon disenfranchisement is not subject to the VRA is the Court's interpretation of § 2 of the Fourteenth Amendment from Richardson v. Ramirez, 418 U.S. 24, 56 (1974) (viewing the phrase, "rebellion, or other crime" as an explicit protection of States' felony disenfranchisement laws). Additionally, the Petitioners argue that subjecting felon disenfranchisement to review by the VRA would create a constitutional conflict and upset the federal-state balance. See Muntaqim v. Coombe, 366

F.3d 102, 130 (2d Cir. 2004). However, because § 2 of the Fourteenth Amendment does not provide blanket protection of felon disenfranchisement from the VRA, there is no constitutional conflict and no need for a clear statement from Congress to do so. Cf. Farrakhan v. Washington, 338 F.3d 1009, 1015 (9th Cir. 2003) (subjecting Washington State's felony disenfranchisement to review by the VRA's totality of circumstances test). Furthermore, since Respondent only claims to review felony disenfranchisement laws which interact with "racial bias in criminal justice," this particular form of equal protection review does not overstep the bounds of Congress' § 5 remedial authority. See Johnson v. Bush, 405 F.3d 1214, 1244 (11th Cir. 2005) (Tjoflat, J., concurring).

A. Laws permanently disenfranchising citizens who have committed a second or subsequent violent felony, as in Maryland, intentionally deny the vote to African Americans, inviting the scrutiny of § 2 of the Voting Rights Act.

The scope of the VRA is broader than that of the Fourteenth or Fifteenth Amendments, as it precludes any "voting qualification or prerequisite to voting ... which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973 (a) (emphasis added). In 1982, Congress amended the VRA to give it more effective powers of review, noting that a violation may be established where "the totality of circumstances" reveal that

"the political processes leading to nomination or election ... are not equally open to participation by members of a [protected class] ... 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." 42 U.S.C. § 1973 (b) (2005). Congress determined that a "results" test was better equipped to deal with the more devious election devices that States used to create a discriminatory effect in the face of certain attendant circumstances. See Chisom v. Roemer, 501 U.S. 380, 394 (1991) (noting that § 2 of the VRA was amended in 1982 to restore the legal protections of minority voters' equal access to the political process).

On its face, it is perfectly clear that felon disenfranchisement is subject to review under the VRA. See Farrakhan, 338 F.3d at 1016. The plain meaning of § 2 of the VRA indicates that felon disenfranchisement is subject to the VRA since taking away the right to vote is undoubtedly a "voting qualification" and ex-felons are still considered to be citizens. See id. "Courts must presume that a legislature says in a statute what it means and means in a statute what it says there [and] . . . When the words of a statute are unambiguous, then, this first canon is also the last: "judicial inquiry is complete."" Connecticut Nat. Bank v. Germain, 503 U.S. 249, 254-55 (1991). The Supreme Court has clearly stated that felon

disenfranchisement cannot be used to deny the vote based on race. See Hunter v. Underwood, 471 U.S. 222, 233 (1985). Such disenfranchisement can be facially neutral yet have a disparate racial impact with attendant discrimination to justify VRA review. See Roemer, 501 U.S. at 394.

Because the question at hand does not involve whether *all* felon disenfranchisement is subject to VRA review, it is important to distinguish what sort of attendant circumstances are required in order to appropriately subject a felony disenfranchisement law to the scrutiny of the VRA. Cf. Nevada Department of Human Resources v. Hibbs, 538 U.S. 721, 737 (2003) (allowing a congruent and proportional response depending on the circumstances of the social problem).<sup>1</sup> In Maryland, African Americans are disenfranchised at a disproportionately high rate, over four times that of whites, under enforcement of § 3-102 of Maryland's Election Law. (R. at 12.) This form of disenfranchisement not only dilutes the African American vote but severely limits the political power of African American communities. See Jessie Allen, Symposium on Race, Crime, and Voting: Social, Political and Philosophical Perspectives on Felony Disenfranchisement in America, 36 Colum. Hum. Rts. L.

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<sup>1</sup> When responding to a Rule 12(b)(6) motion to dismiss, the court must view the claims presented in the light most favorable to the Plaintiff-Respondent, giving full weight to any factual allegations of discriminatory intent and result. See District 28, United Mine Workers of America v. Wellmore Coal Corp., 609 F.2d 1083 (4th Cir. 1979).

Rev. 1, 8-14 (2004). More importantly, there is intentional discrimination in Maryland's criminal justice system. (R. at 12, 13.) African Americans are targeted and apprehended by local police in Baltimore at a disproportionately high rate and are brought to trial in front of a jury which lacks equal representation of African Americans. (R. at 13.) Furthermore, there is inherent discrimination in § 3-102's categorization of infamous crimes, as they are skewed towards crimes committed more often by African Americans than by whites. (R. at 13.) This latter distinction is particularly akin to the unconstitutional Alabama law which disenfranchised citizens based on racially skewed felonies such as "moral turpitude." See Hunter, 471 U.S. at 227-33.

A record of historical discrimination needs to be combined with discriminatory intent and a disparate impact in order to subject a racially disparate voting restriction to VRA review. See Gingles, 478 U.S. at 39-42. In Maryland, among other states, felony disenfranchisement laws interact with political, economic, and sociological conditions to further deny African Americans the full benefit of the franchise. See id. (including factors such as, "past use of a poll tax, literacy test . . . historic discrimination in education, housing, employment, and health services . . . and other voting procedures that . . . lessen the opportunity of black voters to elect candidates of

their choice" among the circumstances which interact with vote dilution to show a violation of § 1973).

The combination of the disparate impact, intentional discrimination in the justice system, and the totality of circumstances surrounding the felony disenfranchisement laws in question satisfies a "results-plus" test of reviewability. Cf. Johnson, 405 F.3d at 1235 (Tjoflat, J., concurring) (requiring the showing of "something less than intent ... to discriminate, but something more than a mere disparate impact."). Such test satisfies the intentional discrimination required to show a violation of equal protection in Hunter, whereas the lower totality of circumstances standard found to be sufficient in Farrakhan was based primarily on discriminatory effects. See Hunter, 471 U.S. at 233; Farrakhan, 338 F.3d at 1016-17.

B. States do not have an absolute right to disenfranchise felons under § 2 of the Fourteenth Amendment.

The primary defense of states' right to disenfranchise felons has been § 2 of the Fourteenth Amendment. See U.S. Const. amend. XIV, § 2. In theory, "rebellion, or other crime," allows States to disenfranchise felons without triggering § 2's penalty of reduced Congressional representation. See Richardson, 418 U.S. at 43-45 ("The framers of the amendment . . . could hardly have intended the general language of § 1 to outlaw discrimination which § 2 expressly allowed without the

penalty of reduced representation.”). However, Hunter proclaimed that “§ 2 was not designed to permit the purposeful racial discrimination attending the enactment and operation” of felony disenfranchisement laws, showing some leniency towards allowing such challenges when there is a record of *intentional* discrimination. See Hunter, 471 U.S. at 233. Thus, the Supreme Court allows the VRA to be applied to felon disenfranchisement which is *either enacted or operated* with attendant discriminatory intent. See id.

Review of such felony disenfranchisement laws conforms with Hunter because of the intentional discrimination within the criminal justice system and totality of circumstances surrounding it. See id. There is the continued maintenance and *operation* of intentional discrimination even though there is not the same record attending the enactment of the felony disenfranchisement laws in Maryland. (R. at 12-13.) The state knows full well how their racially-biased criminal justice system interacts with felon disenfranchisement to create a disparate racial effect and maintains such discrimination through the unfettered operation of their laws. See Thornburg, 478 U.S. at 43-46.

Beyond the conformity of Respondent’s claim with Hunter, the blanket protection of felon disenfranchisement from Richardson has also been mitigated. See Hunter, 471 U.S. at

233; Farrakhan, 338 F.3d at 1016-17 (acknowledging no express protection for Washington's felony disenfranchisement law in § 2 of the Fourteenth Amendment). It is paradoxical to employ an ill-used phrase within § 2 of the Fourteenth Amendment to preclude review of the very thing which the amendment was created to remedy: racially-motivated barriers to voting. See id. at 76 (Marshall, J., dissenting). Whereas the Court in Richardson unreasonably trumps § 1 of the Fourteenth Amendment with a single phrase from § 2, a more cogent interpretation is to give both their full effect. See Laura Handelsman, Book Note, Giving the Barking Dog a Bite: Challenging Felon Disenfranchisement Under the Voting Rights Act of 1965, 73 Fordham L. Rev. 1875, 1926-28 (2005). Restricting the allowance of felony disenfranchisement in § 2 by the Equal Protection Clause of § 1 would not contradict § 2, but only qualify how it may be utilized. See Johnson, 405 F.3d at 1240-41 (Wilson, J., concurring and dissenting). This is in keeping with the framers' intent and a diverse body of constitutional law, since rarely are governmental rights sanctioned in an absolute fashion over the rights of its citizens. See Hunter, 471 U.S. at 233.

Congressional intent behind § 2 of the Fourteenth Amendment also favors the precedent from Hunter over that of Richardson. See Richardson, 418 U.S. at 74-77 (Marshall, T., dissenting). Representative Broomall, who crafted the language of § 2,

intended that "or other crime" should not mean any other crime, instead limiting it to "crimes of disloyalty related to the recent rebellion," such as treason.<sup>2</sup> Accordingly, most states that disenfranchised felons when the Fourteenth Amendment was written did so only for a narrow range of crimes that were on the level of rebellion. See One Person, No Vote: The Laws of Felon Disenfranchisement, 115 Harv. L. Rev. 1939, 1945-52 (2002).

C. Application of § 2 of the Voting Rights Act to the felony disenfranchisement laws in question is a proper use of Congress' remedial authority.

The use of the VRA to protect the right to vote has been consistently upheld as a constitutional use of the Fourteenth and Fifteenth Amendments' remedial authority. See Katzenbach, 383 U.S. at 309. The scope of this use turns on whether: 1) a clear statement from Congress is required to apply the VRA to felony disenfranchisement laws; and 2) the invalidation of such laws is congruent and proportional to the harm remedied. See City of Boerne v. Flores, 521 U.S. 507, 520 (1997); Muntauqim,

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<sup>2</sup> See Jason Morgan-Foster, The Transnational Discourse and Felon Disenfranchisement: Re-examining the Textual Premise of Richardson v. Ramirez, Tulsa J. Comp. & Int'l l. (forthcoming) 2006, citing Cong. Globe, 39th Cong., 1st Sess., 1263-64 (1866) ("Read in context, it is clear that the "past crimes" to which Broomall refers are crimes of rebellion, in particular treason. Without mentioning any other crimes, Broomall makes specific mention to treason on five more occasions in his speech before concluding with this language: "All parties agree that the people of these States, being thus disorganized for all State purposes, are still, at the election of the Government, citizens of the United States, and as such, as far as they have not been disqualified by treason, ought to be allowed to form their own State governments."" (emphasis added).

366 F.3d at 113-21 (requiring a clear statement because use of the VRA on felon disenfranchisement would upset federalism). Underlying both of these issues is whether the Respondent's use of the VRA upsets the delicate state-federal balance in the areas of election and criminal law. See id.

Petitioners claim that a clear Congressional statement is required in order to apply the VRA to felon disenfranchisement on the assumption that doing so would violate the established balance of federalism. See Gregory v. Ashcroft, 501 U.S. 452, 460, 467-78 (1991) (determining that the clear statement rule applies to legislation under the enforcement powers of § 5 of the Fourteenth Amendment). However, because there is no further alteration of the *established* state-federal balance from the application of the VRA in this case, a clear statement from Congress is not required. Baker v. Pataki, 85 F.3d 919, 938 (2d Cir. 1996). The Civil War Amendments sufficiently usurped the exclusive role of the States in administering elections whenever there were questions of racially-biased voting restrictions. See Farrakhan, 338 F.3d at 1018-21.

Furthermore, Chisom v. Roemer did not require a clear statement because the sweeping language of § 2 [of the VRA] inhibits interpretation of the statute in a manner that excludes laws such as those disenfranchising felons from its reach. See Roemer, 501 U.S. at 394-97 (deciding that the election of

judicial representatives was within the ambit of §2 the amended VRA). As shown in Section A, felon disenfranchisement is a "voting qualification" per § 2 of the VRA. See Farrakhan, 338 F.3d at 1016. Roemer is also more analogous to the case at hand because it dealt with the VRA and a similar question of States' rights, whereas Gregory addressed the unrelated Commerce Clause in its fact pattern and holding. See Baker, 85 F.3d at 938-39 (noting that Gregory requires a clear statement only when the statute was ambiguous). Thus, use of the VRA in this fashion would not be limited by the clear statement rule from Gregory purporting to address § 5 of the Fourteenth Amendment. See 501 U.S at 467-78.

Even if the clear statement would apply to application of the VRA to felon disenfranchisement, there is sufficient evidence that Congress did not want to preclude such use of the VRA. Cf. Farrakhan, 338 F.3d at 1014-15 (listing factors relevant to the totality of circumstances to explain Congress' intent). If such was their intention, then Congress would have excluded felony disenfranchisement laws from the reach of § 2 during the 1982 amendment process; that it did not then, and that Congress has not amended the VRA post-Roemer to exclude felony disenfranchisement laws from the statute's reach is clear evidence that Congress intended the VRA to apply to felony disenfranchisement laws. See Roemer, 501 U.S. at 396 (including

the election of judges to be encompassed by § 2 of the VRA because Congress did not state that it was not). As in a Sherlock Holmes novel, "Congress' silence in this regard can be likened to the dog that did not bark." Id., citing Harrison v. PPG Industries, Inc., 446 U.S. 578 602 (Rehnquist, J., dissenting).

Courts have also held that the VRA is congruent and proportional to the problem of racially-based disenfranchisement. See City of Boerne, 521 U.S. at 533-35 (contrasting the distinctly congruent and proportional act of the VRA with the unconstitutional Religious Freedom Reformation Act). This is because "Congress concluded that the unsuccessful remedies which it had prescribed in the past would have to be replaced by sterner and more elaborate measures in order to satisfy the clear commands of the Fifteenth Amendment." Katzenbach, 383 U.S. at 309. In this respect, Congress' use of its § 5 remedial authority must be supported by a "relevant history and pattern of constitutional violations." See Tennessee v. Lane, 541 U.S. 509, 521-22 (2004). Further, Congress is obligated to use such authority "where the laws [of states] are just and equal on their face, yet, by a systematic maladministration of them, or a neglect or refusal to enforce their provisions, a portion of the people are denied equal

protection under them.” United States v. Morrison, 529 U.S. 598, 625 (2000).

§ 5 also gives Congress the power to enforce affirmative constitutional rights outside the scope of the Fourteenth Amendment. See Hibbs, 538 U.S. at 727-28. This, “so-called prophylactic legislation . . . proscribes facially constitutional conduct in order to prevent and deter unconstitutional conduct.” Id. By extension, even if § 2 of the Fourteenth Amendment may affirmatively sanction felony disenfranchisement laws, Congress may proscribe those laws if they become unconstitutional through interaction with racial discrimination. See id. This is especially the case since voting is a fundamental right, which triggers a heightened level of scrutiny. See id. (comparing state gender discrimination, which is subject to heightened scrutiny, with voting right restrictions, being even a higher standard).

Application of the VRA to felony disenfranchisement laws like Maryland’s § 3-102 is a limited prophylactic measure. Cf. Lane, 541 U.S. 509, 521-22 (2004) (upholding Title II of the Americans with Disabilities act as a congruent and proportional use of Congress § 5 authority). It targets a specific unconstitutional result without resorting to blunt instrumentation, e.g. subjecting *all* felon disenfranchisement to review. See id. The “results-plus” review of felony

disenfranchisement laws is limited to those states in which discernible racial bias can be found in the criminal justice system, also meeting the standard of congruent and proportional utilized in Muntauqim. Cf. Muntauqim, 366 F.3d at 126 (requiring discriminatory purpose and a "history and pattern of unconstitutional . . . discrimination" in order to find application of the VRA to felon disenfranchisement congruent and proportional).

The unconstitutional harm which such review prevents also cannot be overstated. See Allen, *supra*, at 13-14. It leads to more intentional discrimination within society since African Americans are not able to proportionately elect legislators who will protect their interests and prevent against future discrimination. See City of Boerne at 532-35 (justifying prophylactic Congressional action to prevent future constitutional violations in the franchise). Applying the VRA to felon disenfranchisement remedies not only the invidious effect of racial bias in the criminal justice system, but emboldens the entire African American franchise by ensuring proportional voting power and equal protection. See Allen, *supra*, at 13-14. The same power was held to be congruent and proportional in striking down states' use of literacy tests, poll taxes, and other measures put in place to prohibit certain classes from voting. See City of Boerne, 521 U.S. at 518.

Since the felony disenfranchisement laws at bar are maintained with a similar record of intentional discrimination which interacts with a history of racial bias, it is only fitting that they too should be subject to review of the VRA.

II. MARYLAND'S § 3-102 FELONY DISENFRANCHISEMENT LAW VIOLATES THE EIGHTH AMENDMENT'S BAN ON CRUEL AND UNUSUAL PUNISHMENT.

The Eighth Amendment, which applies against the States by virtue of the Fourteenth Amendment, provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Harmelin v. Michigan, 501 U.S. 957, 962 (1991) (quoting in part Robinson v. California, 370 U.S. 660 (1962)). While some punishments have clearly been forbidden from the outset, Eighth Amendment jurisprudence remains unsettled as to the complete range of unacceptable punishments. See Weems v. United States, 217 U.S. 349, 368 (1910). This Court has typically recognized two categories of "cruel and unusual punishments; punishments that are inhumane and barbarous and punishments that are disproportionate to the offense committed. See Solem v. Helm, 463 U.S. 277, 284 (1983) (observing a proportionality component); see also Weems, 217 U.S. at 368; see generally Coker v. Georgia, 433 U.S. 584, 593 (1977) (recognizing two elements of excessive punishment).

A. Maryland Election Law §3-102 Functions as a Punishment For the Commission of Crime and is Thus Subject to Scrutiny Under the Eighth Amendment.

The Eighth Amendment is applicable to any penal sanction resulting as the consequence of certain conduct or crime. See Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-169 (1963) (enumerating the traditionally applied tests used in determining whether a sanction is penal). Where statutes have both penal and non-penal effects, the controlling nature will often depend on legislative intent. See Trop v. Dulles, 356 U.S. 86, 96-97 (1958) (resolving whether an expatriation statute is penal in nature as applied to a wartime deserter).

While the Trop decision has provided a basic framework for inquiry as to the purpose of a given statute, in many ways the decision's dicta on disenfranchisement statutes has been misapplied. See id. at 96-97 (1958). In its discussion of the standard of determination of whether a sanction is to be considered punishment, Trop makes use of a hypothetical felony disenfranchisement statute and proceeds to characterize this fictional sanction as a "nonpenal exercise to regulate." See Trop, 356 U.S. at 96-97; see also Pamela A. Wilkins, The Mark of Cain: Disenfranchised Felons and the Constitutional No Man's Land, 56 Syracuse L. Rev. 85, 101-03 (2005) (discussing the authoritative value of Trop dicta). Trop's metaphorical dicta has been relied on as controlling for voting disenfranchisement cases even though the true holding was a finding that expatriation as envisioned under the questioned statute amounted

to punishment. See Trop, 356 U.S. at 96-97. It is not language from the hypothetical that should be applied to Maryland's voting law, but rather Trop's reasoning as applied to the expatriation statute at issue in that case. See id.

With respect to Maryland Election Law § 3-102, three things must be determined: 1) whether the statute's operation will promote the traditional aims of punishment, 2) whether the behavior to which § 3-102 applies is already a crime, and 3) whether a sanction provided for within the statute is reasonably related to a legitimate governmental objective. See Bell v. Wolfish, 441 U.S. 520, 538-539 (1979) (quoting in part Mendoza-Martinez, 372 U.S. at 144 (1963)).

Maryland Election Law § 3-102 imposes a mandatory and permanent ban on voting for Maryland citizens convicted of both an infamous crime and a crime of violence. Md. Code Ann., Elec. Law § 3-102(b)(c) (West 2005). This statute is given force Maryland's Constitution, which provides the General Assembly the authority to "regulate or prohibit the right to vote of a person convicted of infamous or other serious crime." Md. Const. art. I, § 4. Though its language is arguably unclear, there are strong indications that the purpose of the statute is to punish those convicted of a certain class of crime with a harsher punishment. (R. at 43-44.) The harsher sanction can be seen as achieving the dual purposes of reprimanding the wrongdoer in the

surplus and deterring others from committing similar crimes; both of which clearly promoting two of the traditional aims of punishment. See Austin v. United States, 509 U.S. 602, 610 (1993) (reasoning that a sanction that "...can only be explained as also serving either retributive or deterrent purposes is punishment); Trop, 356 U.S. at 96.

Application of the Bell/Mendoza-Martinez inquiry supports a finding that if the behavior to which a statute applies is already a crime, then the sanction is likely punishment. See Mendoza-Martinez, 372 U.S. at 168-69. Under § 3-102, the loss of franchise provision is activated upon conviction of a crime, and as such, the statute can not be explained as serving a purely regulatory function; at the very least, it must serve more than one purpose. See Austin, 509 U.S. at 610 (recognizing that sanctions frequently serve multiple purposes). Because of the clear connection between criminal conviction and the application of § 3-102, the sanction operates in a punishing manner and is penal in nature. See Mendoza-Martinez, 372 U.S. at 168-69. Additionally, the legislative history of § 3-102 seems to indicate that the law was envisioned as an additional punishment measure against those committing multiple serious crimes. (R. at 44.)

In the case of Jeffrey Coolidge, §3-102(c) operates as a more severe punishment for the combination of his drug

possession and robbery convictions by linking the permanent ban on voting to his conviction of a subsequent crime of violence. (R. at 44.) It is the recidivist offender that the Maryland legislature seeks to permanently punish. (R. at 44.) § 3-102 is clearly penal in nature. 3-102 is effective upon conviction and it automatically provides for sanctions that punish well beyond the independent penalties available for either of Coolidge's crimes, and as such is punishment under the Mendoza-Martinez, inquiry. See 372 U.S. at 567.

Petitioners claim that since the Maryland legislature has the authority to regulate the voting process by excluding felons, a legitimate alternative purpose for § 3-102 exists. See generally Green v. Board of Elections, 380 F.2d 445, 451 (1967) (recognizing the need to insulate the voting process from threat of organized crime as a legitimate exercise of legislative authority). Though states do have regulatory interest in protecting the voting process from the undue and disproportionate influence of criminals, certain categories of crimes are of such minor significance that their inclusion for the purposes of disenfranchisement are questionable. See Green, 380 F.2d at 452.

§ 3-102, by virtue of the manner in which infamous crimes are defined and categorized, is not intended nor structured to purify the registered voting pool by eliminating the criminal

element from the equation. See id. Maryland defines an *infamous crime* as any felony, treason, perjury, or any crime “involving an element of deceit, fraud, or corruption.” Md. Code Ann., Elect. Law (West 2002).

In 1974, using this broad definition of an infamous crime, the Maryland Attorney General was able to produce a non-exhaustive list of over 500 infamous crimes. Md. Dept. of Legislative Services, Major Issues Review 1999-2002, (Md. 2002), available at <http://dls.state.md.us/>. It is quite unclear how the perpetrator of many of these crimes could have an effect on the registered voting pool. See Green, 380 F.2d at 452. The list of infamous crimes was compiled without any attempt to relate the severity of the crime to the need for the denial of the voting franchise. Md. Dept. of Legislative Services, supra. In order to address this lack of relational value in the structure of § 3-102, the 2001 Maryland Legislature conducted research and subsequently enacted substantial changes to the state’s voting qualification laws, ultimately restoring the franchise to convicted felons (with exception to those committing subsequent crimes of violence) who have completed their court-order sentences. (R. at 44.); Md. Dept. of Legislative Services, supra. By linking the restoration of the franchise to completion of penal sentences, the Maryland Legislature underscored the relationship of the voting sanction

to criminal sanctions. See Austin, 509 U.S. at 610; see also Trop, 356 U.S. at 96-98 (reasoning that where no other legitimate purpose for a sanction can be found, its purpose must be punishment).

B. Under evolving standards of decency, Maryland Election Law §3-102 because it bases the disfranchisement of a violent felon on a single prior conviction of an infamous crime is cruel and unusual in its application.

The prohibition against "cruel and unusual punishments," like other expansive language in the Constitution must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design. See Roper v. Simmons, 543 U.S. 551, 567 (2005). The interpretive process in which the "cruel and unusual" determination is made is necessarily pegged to "the evolving standards of decency that mark the progress of a maturing society." See Id. (quoting the Trop plurality opinion). The Court historically has shown a willingness to review punishments in light of current societal constructs. See Atkins v. Virginia, 536 U.S. 304, 310 (2002) (holding that formerly acceptable punishments can become unacceptable); accord Roper, 543 U.S. at 567; accord Trop, 356 U.S. at 101. Recently the Court reviewed the "current" constitutionality of capital punishment as applied to mentally retarded persons, a practice previously upheld as

constitutional. See Atkins, 536 U.S. at 310-13. After surveying the national consensus on states' practices, the Atkins Court found that the execution of the mentally retarded was "cruel and unusual" as measured by the society's evolving standards. See id. Because a consistent number of states, through legislative enactments and judicial practices, had expressed the opinion that the execution of the mentally retarded is an undesirable and unnecessary punishment, the Court reasoned that society as a whole had rejected this particular form of punishment. See id. In addition to surveying State's practices for evidence of evolving standards, the Court has also shown a willingness to refer to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of "cruel and unusual punishments." See Roper, 543 U.S. 551 at 576 (interpreting Trop, 356 U.S. at 102-103).

It is in this context of recognizing evolving standards of decency that a felon's permanent loss of franchise must be evaluated. See id. The right to vote is one of the hallmarks of American citizenship, deeply intertwined in how citizens define and shape their identity, and permanently losing the voting franchise represents one the harshest penalties available. See Wilkins, supra, at 86-87. The disenfranchised, often without any advance warning or opportunity for redress,

become marginalized socially and politically. See generally Trop, 356 U.S. at 101, (discussing the effects of losing particular rights of citizenship). Having repercussions similar to those found as a result of denationalization, disenfranchisement “destroys for the individual the political existence that was centuries in the development.” Id. at 101. A disfranchised person is forever kept under the shadow of his crime and rendered voiceless in society. See Wilkins, supra, at 86-87.

It is against this backdrop and in light of the evolving standards of decency, that the permanent loss of the franchise that has become especially unusual and cruel. See Atkins, 536 U.S. at 310-13. Disenfranchisement creates a class of permanently exiled outcasts who void of any opportunity to ever regain their full status as citizens; it effectively deprives a class of Americans access to one of the hallmarks of citizenship. See Nora V. Demleitner, Continuing Payment on One’s Debt to Society: The German Model of Felon Disenfranchisement as an Alternative, 84 Minn. L. Rev. 753, 775 (2000). The social and political effects of felony disenfranchisement statutes reach far beyond convicted criminals. See Allen, supra, at 7-8. Racial disparities in the criminal justice system mean that the loss of the voting franchise has a disparate effect on minority populations,

seriously compromising the strength of the African American political voice and weakening their ability to influence statewide elections. See id. Most justifications of the practice have been tied to sentencing philosophies such as rehabilitation, but disenfranchisement actually undercuts the rehabilitation of offenders by preventing full integration back into society. See Demleitner, supra, at 770-71. Academia has long recognized the destructive nature of permanent disenfranchisement, and the world's court of opinion has also resoundingly rejected the practice as without social utility or substantive correctional value. See Atkins, 536 U.S. at 310 (reasoning that widespread consensus lends to the determination of evolving standards); see also Demleitner, supra, at 783-90 (surveying the international consensus on felon voting rights).

Given the severity and far-reaching consequences of the loss of the voting franchise, it necessarily should be contemplated in relation to the crime committed. Wilkins, supra, at 101-03 (discussing four effects of loss of franchise). States have begun to do just this through a review of the necessity of disenfranchisement laws. (R. at 14.) A national pattern has developed toward the elimination of lifetime disenfranchisement provisions, with only eight states currently disenfranchising felons permanently. See One Person, No Vote: The Laws of Felon Disenfranchisement, 115 Harv. L. Rev. 1939,

1943-44 (2002). Sixteen states now suspend the right to vote only during the incarceration period and two states now even grant prisoners the franchise, all of which indicates that State Legislatures have begun to move away from permanent disenfranchisement. See One Person, No Vote: The Laws of Felon Disenfranchisement, *supra*, at 1942. Arguably there is an absence of States moving *toward* permanent disenfranchisement and that absence is great evidence that the permanent disenfranchisement of felons has become unusual, signaling a national consensus against the practice. See Atkins, 536 U.S. at 314-15.

The international community, as well, has also moved away from the permanent elimination of voting rights as a punishment, leaving Armenia and America as the only democratic nations that disenfranchise felons permanently. (R. at 14.) Many places of the world now view this form of punishment as unnecessary and unacceptable. See Hirst v. Kingdom, App. No. 74025/01 (Eur. Ct. H.R. Oct. 5, 2005).

It is no coincidence that Maryland has recently participated in this conversation on the appropriateness of denying felons that right to vote. (R. at 43-44.) The Maryland legislature has twice relaxed its election statutes to better reflect the current trend. Md. Dept. of Legislative Services, supra. The Court should view both the general national shift

away from disenfranchisement and the international community's universal rejection of the practice as evidence that § 3-102 has become truly unusual and cruel in its denial of a basic component of citizenship. See Atkins, 536 U.S. at 347.

**CONCLUSION**

For the foregoing reasons, the judgment of the United States Court of Appeals for the Fourth Circuit should be upheld.

Respectfully submitted,

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Attorneys for the Respondent