IN THE SUPREME COURT OF VIRGINIA

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Richmond, VA 23218,

THOMAS K. NORMENT, JR.,
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WILLIAM CLEVELAND,
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M. BRETT HALL
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Coeburn, VA 24230,

WILLIAM H. SLEMP
P.O. Box 383
Dryden, VA 24243,

Petitioners,

v.

TERENCE R. MCAULIFFE, in his official capacity as Governor of Virginia,
Patrick Henry Building
1111 East Broad Street
Richmond, VA 23219,

No. _____

KELLY THOMASSON, in her official capacity as Virginia Secretary of the Commonwealth,
Patrick Henry Building
1111 East Broad Street, Fourth Floor
Richmond, VA 23219,

THE STATE BOARD OF ELECTIONS,
Washington Building
1100 Bank Street, First Floor
Richmond, VA 23219,

JAMES B. ALCORN, in his official capacity as the Chairman of the State Board of Elections,
Washington Building
1100 Bank Street, First Floor
Richmond, VA 23219,

CLARA BELLE WHEELER, in her official capacity as the Vice Chair of the State Board of Elections,
Washington Building
1100 Bank Street, First Floor
Richmond, VA 23219,

SINGLETON B. MCALLISTER, in her official capacity as the Secretary of the State Board of Elections,
Washington Building
1100 Bank Street, First Floor
Richmond, VA 23219,

THE VIRGINIA DEPARTMENT OF ELECTIONS,
Washington Building
1100 Bank Street, First Floor
Richmond, VA 23219,

EDGARDO CORTÉS, in his official capacity as the Commissioner of the Virginia Department of Elections, Washington Building
1100 Bank Street, First Floor
Richmond, VA 23219,

Respondents.

VERIFIED PETITION FOR WRITS OF MANDAMUS AND PROHIBITION AND MEMORANDUM IN SUPPORT OF VERIFIED PETITION

May 23, 2016

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VERIFIED PETITION FOR WRITS OF MANDAMUS AND PROHIBITION

Petitioners, by and through the undersigned attorneys and pursuant to VA. CONST. art. VI, § 1 and CODE § 8.01-644, respectfully petition this Court for the issuance of writs of mandamus and prohibition directed to Respondents, and in support thereof state:

1. Petitioners are all qualified voters who live and are registered to vote in the Commonwealth, and who plan to vote in the 2016 General Election. Petitioner Howell is also a Member, and the Speaker, of the Virginia House of Delegates. Petitioner Norment is a Member, and the Majority Leader, of the Senate of Virginia, and he plans to run for re-election in 2019.[1]

2. Petitioners have been injured by Respondents' implementation of Governor Terence R. McAuliffe's unconstitutional April 22, 2016 Executive Order purporting to restore political rights, including the right to vote, to "approximately 206,000" felons who have completed their sentences of incarceration and supervised release.

3. The 2016 General Election will occur on November 8, 2016. Absentee ballots must be made available "not later than" September 24. CODE § 24.2-612. And registrars have 30 days to take action on the Department of

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[1] Pursuant to CODE § 8.01-4.3 and Rule 5:7(b)(1), Petitioners have verified the allegations contained in this petition under penalty of perjury. Their verifications appear at the end of this petition and memorandum.

Elections' orders to cancel a registration. *Id.* § 24.2-404(A)(4). Accordingly, relief should be awarded by August 25 to ensure that ineligible voters do not unconstitutionally dilute Petitioners' votes and undermine the legitimacy of the election.[2]

4. Petitioners have a clear right to the relief they seek. Respondents have a legal duty to ensure that ineligible individuals are not registered to vote and that invalid voter registrations are cancelled. Petitioners have no adequate remedy at law.

5. The taking of evidence will not be necessary for the proper disposition of this petition.

WHEREFORE, Petitioners respectfully pray as follows:

That this Court will issue a writ of mandamus:

(a) Commanding the Department of Elections and Commissioner Edgardo Cortés, on or before August 25, 2016, to "[r]equire the general registrars to delete from the record of registered voters the name of any voter who . . . has been convicted of a felony . . . ," CODE § 24.2-404(A)(4), by cancelling the registration of all felons who have been invalidly registered under

[2] Petitioners will file a Motion for a Special Session and to Expedite in order to give the Court the opportunity to consider and decide the case in time to permit relief before the Governor's unconstitutional order affects the upcoming General Election.

the April 22 Executive Order or any subsequent similar order;

(b) Commanding the Department of Elections and Commissioner Cortés, on or before August 25, 2016, to "[r]equire the general registrars to enter the names of all registered voters into the [voter registration] system and to change or correct registration records as necessary," CODE § 24.2-404(A)(2), by refusing to register anyone whose political rights have purportedly been restored by the April 22 Executive Order or any subsequent similar order, and by canceling the registration of anyone who has registered pursuant to such orders;

(c) Commanding the Department of Elections and Commissioner Cortés, on or before August 25, 2016, to "[r]etain . . . information received regarding . . . felony convictions," CODE § 24.2-404(A)(6), by returning to the list of prohibited voters the name of any felon whose political rights have purportedly been restored by the April 22 Executive Order or any subsequent similar order;

(d) Commanding the State Board of Elections and Chairman James B. Alcorn, Vice Chair Clara Bell Wheeler, and Secretary Singleton B. McAllister, on or before August 25, 2016, to "institute procedures to ensure that" Commissioner Cortés and the Department of Elections carry out their duties under the Court's order, CODE § 24.2-404(C);

(e) Commanding Secretary Kelly Thomasson, on or before August 25, 2016, to maintain and provide to the Department of Elections accurate records of individuals whose political rights have been restored, by deleting and omitting from the records any felons whose political rights have not been restored pursuant to a valid, individualized order, CODE §§ 24.2-404(A)(9), 53.1-231.1; and

(f) Commanding the Governor to take care that the provision of the Constitution disqualifying felons from voting be faithfully executed, VA. CONST. art. V, § 7, and to order his subordinates to comply with the Court's order, *id.*;

And that this Court will issue a writ of prohibition:

(a) Prohibiting Governor McAuliffe from issuing further orders that restore political rights en masse and not on an individual basis;

(b) Prohibiting the Department of Elections and Commissioner Cortés from directing and permitting registrars to register unqualified voters pursuant to the April 22 Executive Order or any subsequent similar order;

(c) Prohibiting the State Board of Elections and Respondents Alcorn, Wheeler, and McAllister from directing and permitting registrars to register unqualified voters pursuant to the April 22 Executive Order or any subsequent similar order; and

(d) Prohibiting Secretary Thomasson from transmitting the names of unqualified felons to the Department of Elections to be recorded as qualified to vote pursuant to the April 22 Executive Order or any subsequent similar order.

MEMORANDUM IN SUPPORT OF VERIFIED PETITION FOR WRITS OF MANDAMUS AND PROHIBITION

INTRODUCTION

On April 22, 2016, Governor McAuliffe signed an executive order purporting to restore political rights (including the right to vote, to serve on a jury, and to seek and hold public office) for all 206,000 convicted felons in Virginia who have completed their prison sentences and supervised release. Governor McAuliffe also announced that he will issue similar orders every month going forward, thus effectively nullifying the Constitution of Virginia's general prohibition against voting by convicted felons who have completed their sentences of incarceration and supervision.

The Constitution of Virginia forbids this unprecedented assertion of executive authority. Governor McAuliffe's executive order defies the plain text of the Constitution, flouts the separation of powers, and has no precedent in the annals of Virginia history. The Governor simply may not, with a stroke of the pen, unilaterally suspend and amend the Constitution.

The Constitution has prohibited felons from voting since long before

the Civil War, and it currently provides that "*[n]o person* who has been convicted of a felony shall be qualified to vote unless *his* civil rights have been restored by the Governor or other appropriate authority." VA. CONST. art. II, § 1 (emphases added). The following sentence similarly provides that "no *person* adjudicated to be mentally incompetent shall be qualified to vote until *his* competency has been reestablished." *Id.* (emphases added). The text of these provisions calls for the restoration of voting rights on an *individual*, not blanket, basis. The Governor's unprecedented interpretation of his restoration power, by contrast, allows a narrow exception for special cases to swallow the general rule against voting by convicted felons.

As Governor Tim Kaine concluded in 2010, the Constitution does not permit blanket restoration orders but only allows the Governor to restore voting rights "in particular cases to named individuals for whom a specific grant of executive clemency is sought." Letter from Mark E. Rubin, Counselor to the Governor, to Kent Willis, ACLU of Virginia, at 2 (Jan. 15, 2010) ("Rubin Letter") (attached as Exhibit 1). Governor Kaine's Counselor explained that "[a] blanket order restoring the voting rights of everyone would be a rewrite of the law rather than a contemplated use of the executive clemency powers. And, the notion that the Constitution of the Commonwealth could be rewritten via executive order is troubling." *Id.*

Similarly, in 2013 a bipartisan committee led by Attorney General Ken Cuccinelli concluded that the Governor may remove political disabilities only after "individualized consideration and individualized grant of clemency." REPORT OF THE ATTORNEY GENERAL'S RIGHTS RESTORATION ADVISORY COMMITTEE: ALTERNATIVES TO A CONSTITUTIONAL AMENDMENT 3 (May 10, 2013) ("Bipartisan Report") (attached as Exhibit 2). The committee explained that "[a]ltering the public policy of the Commonwealth as regards the disenfranchisement of persons convicted of felonies clearly would be a legislative act, not an administrative act," and "a court likely would find it difficult to sustain a Governor's exercise of this clemency power in so sweeping a manner that the Constitution's general policy of disenfranchisement of felons is voided." *Id.* Like Governor Kaine, Governor Bob McDonnell accepted the conclusion that he lacked the power to issue a blanket restoration of political rights.

Other provisions of the Constitution confirm that Governor McAuliffe's action is antithetical to our constitutional order. Governor McAuliffe's executive order effectively suspends the Constitution's general prohibition against felon voting. But the Constitution provides that "all power of suspending laws, or the execution of laws, by any authority, without consent of the representatives of the people, is injurious to their rights, and ought not to be exercised." VA. CONST. art. I, § 7. Governor McAuliffe's blanket restoration order also

"change[s] the Constitution by executive order . . . ." Rubin Letter at 2. But the Constitution grants the Governor no role whatever in the amendment process, entrusting the amendment power instead to the General Assembly and the People themselves. VA. CONST. art. XII.

By seizing a lawmaking power that the People have denied to him, Governor McAuliffe has also violated the separation of powers, a "principle essentially and indispensably necessary to [our government's] existence as a free government." *Kamper v. Hawkins*, 3 Va. (1 Va. Cas.) 20, 24 (1793) (opinion of Tucker, J.). The separation-of-powers provisions of the Constitution (Article I, Section 5 and Article III, Section 1) date to the 1776 Constitution of Virginia, which was promulgated to throw off the oppressive yoke of King George III because he had imposed "a detestable and insupportable tyranny, *by putting his negative on laws the most wholesome and necessary for the public good*." VA. CONST. (1776) (emphasis added). Virginians drafted a Constitution that would forever prevent the Crown's abuses of executive authority, including specifically executive suspension of duly enacted laws and the granting of blanket clemency to all who had or might in the future disobey a particular law. This Court has recently recognized that the Governor's power to restore political rights must be construed narrowly in light of this history. *Gallagher v. Commonwealth*, 284 Va. 444, 451 (2012).

Governor McAuliffe's executive order transgresses these bedrock historical limitations on executive authority. If his order is lawful, there is nothing to prevent him or a future Governor from using the clemency power to suspend any law that he opposes on policy grounds. As Governor Kaine recognized, any "attempt to change the Constitution by executive order" purporting to grant a blanket restoration of voting rights "could set a dangerous precedent that would have negative consequences if applied under different circumstances by future Governors." Rubin Letter at 2.

Perhaps most telling, Governor McAuliffe's executive order has no precedent. Virginia's Governors have wielded the clemency power since 1776, yet for nearly a *quarter of a millennium*, not one of Virginia's previous 71 Governors has adopted Governor McAuliffe's sweeping expansion of it. Because the power "has received only this construction at the hands of successive governors, who, during many successive terms of office, and many years, have" failed to exercise the clemency power on a categorical basis, this Court should be "sustained by the contemporaneous construction which this charter has thus received." *Lewis v. Whittle*, 77 Va. 415, 422 (1883).

It is also important to emphasize at the outset what this case is *not* about. First, Governor McAuliffe has falsely suggested that Virginia's felon disenfranchisement provision was first introduced into the Constitution after

the Civil War for the purpose of disenfranchising African-Americans. *See infra* Part I.A.5. But Virginia has prohibited felons from voting since at least 1830—decades before African-Americans could vote. VA. CONST. art. III, § 14 (1830). And courts have uniformly rejected the argument that Virginia's prohibition on felon voting discriminates based on race. *E.g.*, *Howard v. Gilmore*, 205 F.3d 1333, 2000 WL 203984, at *1 (4th Cir. 2000) (unpublished). Simply put, the felon disenfranchisement provision of the Constitution of Virginia had nothing to do with disenfranchising African-Americans.

Second, this case is not about whether Virginians *should* allow all felons to vote, serve on juries and in public office, and take the first essential step towards obtaining the right to possess a firearm. Governor McAuliffe obviously thinks this is a good public policy. Governor Kaine also "disagree[d] with the current policy embodied in the Virginia Constitution that a felony conviction automatically leads to permanent disenfranchisement." Rubin Letter at 2. But Governor Kaine refused to restore felon voting rights en masse because he had "pledge[d] to uphold the Constitution when he took his oath of office in January 2006." *Id.*

STATEMENT

Governor McAuliffe's executive order purported to restore the political

rights of "approximately 206,000" felons. Commonwealth of Virginia Executive Department, Order for the Restoration of Rights at 1, Apr. 22, 2016, https://goo.gl/hc4CAl. His order applies to all felons who have completed their sentences of incarceration and periods of supervised release, regardless of the nature and number of crimes that the felons have committed, and regardless of whether the felons have paid outstanding restitution to their victims. *Id.* at 2.

These felons may now vote, serve on a jury, hold public office, and act as notaries public. *Id.* Already, a criminal defendant has argued that he has the right to have a felon sit on his jury under the Sixth Amendment fair cross-section requirement, Mark Bowes, *Attorneys for man accused of killing state trooper seek eligibility of convicted felons to serve on jury*, RICHMOND TIMES-DISPATCH (May 19, 2016), http://goo.gl/78HuKK, and a convicted felon has announced his candidacy for public office, Ned Oliver, *Ex-councilman Chuck Richardson, Richmond strip club owner enter mayoral race*, RICHMOND TIMES-DISPATCH (May 19, 2016), http://goo.gl/4s45SH.

Governor McAuliffe has also provided these individuals the essential first step towards having their firearm rights restored, because a felon "must first obtain an order from the Governor removing his political disabilities as a condition precedent to his right to petition the circuit court for restoration of

his firearm rights." *Gallagher*, 284 Va. at 453; *see also* CODE § 18.2-308.2(C).[3]

Governor McAuliffe has estimated that one out of every five felons covered by his order—about 40,000 people—committed at least one violent felony. Andrew Cain, *Administration says 42,000 violent felons had rights restored by McAuliffe*, THE NEWS VIRGINIAN (May 11, 2016), http://goo.gl/mQhgSD. He has vowed to issue new orders each month to all persons who complete their sentences and periods of supervised release. Sheryl Gay Stolberg & Erik Eckholm, *Virginia Governor Restores Voting Rights to Felons*, N.Y. TIMES (Apr. 22, 2016), http://goo.gl/cBq5g7.

Immediately after Governor McAuliffe issued his order, individuals who had previously been disqualified due to a felony conviction began to register to vote. Within less than a month, nearly 4,000 such individuals have already been registered. Andrew Cain, *So far 3,933 felons have registered to vote as a result of McAuliffe's order*, RICHMOND TIMES-DISPATCH (May 17, 2016), http://goo.gl/3UHFaS.

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[3] Governor McAuliffe apparently was not aware of this significant impact of his Executive Order, stating "I didn't think [my Executive Order] had anything to do with gun rights." Jenna Portnoy, *In Virginia, felon voting rights mean simpler path to gun ownership*, WASH. POST (May 20, 2016), https://goo.gl/uZeqkI.

Respondent Cortés is the Commissioner of the Respondent Department of Elections. The Commissioner and the Department have a duty to "[r]equire the general registrars to delete from the record of registered voters the name of any voter who . . . has been convicted of a felony . . . ." CODE § 24.2-404(A)(4). They also have a duty to "[r]equire the general registrars to enter the names of all registered voters into the system and to change or correct registration records as necessary." *Id.* § 24.2-404(A)(2). Finally, they have a duty to "[r]etain . . . a separate record for information received regarding . . . felony convictions." *Id.* § 24.2-404(A)(6). These duties are ministerial and non-discretionary. Respondents are not performing these statutory duties. Instead, the Department has removed from its list of voters disqualified by reason of a felony conviction the names of all individuals who are covered by the Governor's order, and the Commissioner has stated publicly that the Commonwealth's 133 general registrars have a duty to register otherwise unqualified voters pursuant to the April 22 Executive Order. Minutes of State Board of Elections Meeting at 2 (Apr. 28, 2016), http://goo.gl/jD7Joz.

Respondents Alcorn, Wheeler, and McAllister are members of the Respondent State Board of Elections. Collectively, they have a duty to "supervise and coordinate the work . . . of the registrars to obtain . . . legality and purity in all elections." CODE § 24.2-103(A). They also have a duty to ensure

that Commissioner Cortés and the Department of Elections perform their duties. *Id.* § 24.2-404(D). These duties are ministerial and non-discretionary. Respondents are not performing their statutory duties.

Instead, in a controversial and divided vote, the Board adopted a new voter registration form and regulations that limit registrars' ability to determine independently whether and how an applicant's political rights have been restored. Michael Martz, *Virginia election board adopts new voter registration form on party-line vote*, RICHMOND TIMES-DISPATCH (Apr. 29, 2016), http://goo.gl/YOC8CN. Respondents are acting and will continue to act in excess of their supervisory powers and in violation of their statutory duties by directing and permitting registrars to register unqualified voters pursuant to the April 22 Executive Order and subsequent similar orders.

Respondent Thomasson is the Secretary of the Commonwealth. She has provided the list of convicted felons who are covered by the Governor's order to the Respondent Department of Elections, and the list has been uploaded onto the Virginia Election Registration Information System (VERIS). This database, which the Department maintains under the direction of the Respondent State Board of Elections, contains a list of all registered voters, as well as separate lists of individuals who may not be qualified to vote as a result of felony convictions and individuals whose voting rights have been

restored. CODE § 24.2-404(A). Prior to April 22, 2016, all individuals listed in VERIS as having their voting rights restored had received clemency from the Governor on an individual basis. Now, individuals covered by the April 22 Executive Order are listed as having their voting rights restored.

General registrars for each of the 133 counties and cities in Virginia are required to verify the eligibility of applicants for registration. In the case of felons, this means verifying that the applicant's political rights have been restored. Generally, the registrar consults VERIS to determine whether the applicant is qualified. Previously, the individuals covered by the Governor's order would have appeared on the "prohibited voters" list due to their status as felons. Now, they do not.

These ongoing, coordinated efforts to register unqualified voters have diluted Petitioners' votes, created an illegitimate electorate, and threatened the legitimacy of the November elections. Time is of the essence in preventing and reversing thousands of invalid voter registrations.

ARGUMENT

I. PETITIONERS ARE ENTITLED TO A WRIT OF MANDAMUS.

For a writ of mandamus to issue, "[1] there must be a clear right in the petitioner to the relief sought, [2] there must be a legal duty on the part of the respondent to perform the act which the petitioner seeks to compel, and

[3] there must be no adequate remedy at law." *Board of Cty. Supervisors of Prince William Cty. v. Hylton Enters., Inc.*, 216 Va. 582, 584 (1976).

A. Petitioners Have a Clear Right to the Relief Sought.

Governor McAuliffe's blanket restoration order exceeds the Governor's power to restore an individual felon's political rights. VA. CONST. art. II, § 1; art. V, § 12. It also violates the Constitution by (1) unconstitutionally suspending the Constitution's voter qualification provision, in violation of Article I, Section 7; (2) unconstitutionally exercising the amendment power reserved to the General Assembly and the People, VA. CONST. art. I, § 2; art. XII, §§ 1, 2, and the lawmaking power, both in violation of Article I, Section 5 and Article III, Section 1; and (3) unconstitutionally diluting petitioners' right to suffrage, in violation of Article I, Section 6. Because the Governor's executive order is unconstitutional, Petitioners have a clear right to a writ directing Respondents to discharge their duty to ensure that convicted felons who have not received an individualized restoration of political rights are not registered to vote and to ensure that the registrations of felons who have already registered pursuant to that executive order are cancelled. The registration of these individuals injures Petitioners because it dilutes their votes.

1. The Text of the Constitution Permits the Governor To Restore Voting Rights Only on an Individualized Basis.

Although the People of Virginia have delegated most lawmaking power

to their representatives in the General Assembly, they have inscribed the qualifications for voting directly into the Constitution of Virginia. Article II, Section 1 of the Constitution provides (with emphasis added):

> Each voter shall be a citizen of the United States, shall be eighteen years of age, shall fulfill the residence requirements set forth in this section, and shall be registered to vote pursuant to this article. <u>No person who has been convicted of a felony shall be qualified to vote unless his civil rights have been restored by the Governor or other appropriate authority.</u> As prescribed by law, no person adjudicated to be mentally incompetent shall be qualified to vote until his competency has been reestablished.

The Governor is authorized to restore the voting rights of any convicted felon through an individualized grant of clemency, but he may not issue a blanket restoration of voting rights and thus effectively suspend the Commonwealth's general prohibition on felon voting. The Governor's contrary interpretation would allow the restoration power's "narrow exception to swallow the general rule" against felon disenfranchisement. *Cf. Dudas v. Glenwood Golf Club, Inc.*, 261 Va. 133, 139 (2001). "Given that [the Constitution] has enacted a general rule . . . , we should not eviscerate that legislative judgment through an expansive reading of a somewhat ambiguous exception." *Commissioner v. Clark*, 489 U.S. 726, 739 (1989).

Article II, Section 1 contemplates that rights must be restored on an individual basis because it refers to the restoration of *an individual's* voting rights: "No *person* who has been convicted of a felony shall be qualified to

vote unless *his* civil rights have been restored by the Governor or other appropriate authority." VA. CONST. art. II, § 1 (emphasis added). As the 2013 bipartisan committee emphasized, this language requires "individualized consideration and individualized grant of clemency." Bipartisan Report at 3.

This reading of the restoration provision is confirmed by the immediately succeeding sentence of Article II, Section 1, which concerns the restoration of the right to vote for persons previously adjudicated mentally incompetent. Both sentences have the same structure, providing that "no person . . . shall be qualified to vote [unless or until] his" rights have been restored or competency has been reestablished. Mental competency plainly must be evaluated on an individualized basis, and "[t]he presumption is that the same meaning attaches to a given word or phrase which is repeated in a Constitution, unless the contrary is made to appear, and hence the whole instrument should be examined to ascertain what that meaning is." *Pine v. Commonwealth*, 121 Va. 812, 93 S.E. 652, 656 (1917).

The Governor's power "to remove political disabilities," VA. CONST. art. V, § 12, must be read alongside Article II, Section 1, which provides that no individual "person" who has been convicted of a felony may vote unless "his" individual rights have been restored. That section makes clear that the general constitutional rule is that convicted felons may not vote. The Governor's

power to remove disabilities must be read as a limited exception that is only "exercisable on an individualized basis." Bipartisan Report at 3. Otherwise, the clemency exception would swallow the general default rule barring felon voting. As this Court has recognized, "[p]urpose, meaning and force must be accorded [all provisions] of the constitution . . . unless they be irreconcilably contradictory and repugnant." *Dean v. Paolicelli*, 194 Va. 219, 226 (1952).

This Court's recent unanimous decision in *Gallagher* strongly supports this textual analysis. In *Gallagher*, the Court held the Governor's power to remove political disabilities does *not* include the power to restore firearm rights. 284 Va. at 452. The Court reviewed the history of the clemency power and concluded that since the Founding, Virginians have always given a narrow clemency power to the Governor "as part of a general reaction against the unfettered exercise of executive power" by the King. *Id.* at 450–51. That history led the Court to interpret the restoration power narrowly, because Virginia's "constitutional history demonstrates a cautious and incremental approach to any expansions of the executive power, leading to the conclusion that the concerns motivating the original framers in 1776 still survive in Virginia." *Id.* at 451. It is hard to imagine a more dramatic "expansion[ ] of the executive power" than Governor McAuliffe's unprecedented executive order.

The *Gallagher* Court also emphasized that the restoration power must

be interpreted in light of the familiar principles that courts must "look to the Constitution of the State not for grants of power, but for limitations," that the Constitution "is a restraining instrument, and that the General Assembly of the State possesses all legislative power not prohibited by the Constitution." *Id.* at 452 (quotation marks omitted). This rule applies with even greater force here, where the Governor is trenching upon a core legislative function that the People have judged so important that they have retained it for themselves rather than delegating it to the General Assembly.

2. The Governor's Unprecedented Order Contradicts 240 Years of Executive Branch Practice.

From Patrick Henry and Thomas Jefferson to Tim Kaine and Bob McDonnell, every Governor of Virginia has understood the clemency power to authorize the Governor to grant clemency on an individualized basis only. Governor McAuliffe has admitted that "no Virginia governor has exercised the clemency power on a categorical basis . . . ." COMMONWEALTH OF VIRGINIA OFFICE OF THE GOVERNOR, SUMMARY OF THE GOVERNOR'S RESTORATION OF RIGHTS ORDER DATED APRIL 22, 2016 at 2 (Apr. 22, 2016), https://goo.gl/myLmtF ("Summary of Restoration"). This fact alone suffices to condemn his order, for often "the most telling indication of the severe constitutional problem with" governmental action "is the lack of historical precedent for" it. *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 505 (2010).

The unbroken practice of past Governors is highly probative of the meaning of the clemency power. The Commonwealth itself recently argued the clemency power must be construed in light of past Governors' consistent "practice." *Blount v. Clarke*, 782 S.E.2d 152, 155 (2016). This Court has likewise held that when a gubernatorial power "has received only [a single] construction at the hands of successive governors, who, during many successive terms of office, and many years, have [failed to take certain actions], we are sustained by the contemporaneous construction which this charter has thus received." *Lewis v. Whittle*, 77 Va. 415, 422 (1883).

Lewis held that the Governor's power to *appoint* certain officers did not include the power to *remove* those officers, in part because for the past 30 years, Governors had consistently declined to exercise the removal power. *Id.* If a mere 30 years of practice strongly supports a limited construction of the Governor's powers, then the unbroken *240-year* practice of Governors declining to exercise a blanket clemency power is well-nigh dispositive.

Not only have past Governors declined to issue blanket clemency orders, but two recent Chief Executives have studied the issue and expressly concluded that it would be *unconstitutional* for them to issue a blanket restoration of voting rights. As discussed, both Governors Tim Kaine and Bob McDonnell closely studied whether the Virginia Constitution permitted them

to issue blanket restoration orders, and both concluded that the Constitution prohibited them from doing so. Their analysis is particularly compelling because both were champions of felon re-enfranchisement who restored the rights of more felons than any governor before them. The General Assembly has also recently considered proposed constitutional amendments to grant felons automatic restoration of their voting rights, further confirming that the political branches have always understood that the Governor cannot unilaterally erase the Constitution's general prohibition against felon voting. *See, e.g.*, Errin Whack, *Va. panel announces findings on restoring voting rights of former felons*, WASH. POST (May 28, 2013), https://goo.gl/2wK3pG.

3. The Governor's Executive Order Violates the Separation of Powers.

The Constitution of Virginia contains two express separation-of-powers provisions. Article I, Section 5 provides that "the legislative, executive, and judicial departments of the Commonwealth should be separate and distinct . . . ." And Article III, Section 1 guarantees that "[t]he legislative, executive, and judicial departments shall be separate and distinct, so that none exercise the powers properly belonging to the others, nor any person exercise the power of more than one of them at the same time . . . ."

From the Eighteenth Century to the Twenty-First, this Court has rigorously enforced the separation of powers, declining to treat the divisions of

power as mere "parchment barriers." THE FEDERALIST NO. 48, at 308 (James Madison) (C. Rossiter ed., 1961). This separation has always been understood to be "one of the fundamental principles of our government," *Kamper v. Hawkins*, 3 Va. (1 Va. Cas.) 20, 24 (Gen. Ct. 1793) (opinion of Tucker, J.), and it remains today "an essential element of our constitutional system," *Advanced Towing Co., LLC v. Fairfax Cty. Bd. of Supervisors*, 280 Va. 187, 191 (2010). The Court robustly reaffirmed these principles in 2008, unanimously holding that the separation-of-powers guarantees in Article I, Section 5 and Article III, Section 1, do not simply declare Virginia policy but also provide a private cause of action for any individual injured by executive action that treads upon the separation of powers. *Gray v. Virginia Sec'y of Transp.*, 276 Va. 93, 106 (2008).

Governor McAuliffe's executive order violates the separation-of-powers provisions and several other provisions that implement the separation. Virginia's Bill of Rights provides that "all power of suspending laws, or the execution of laws, by any authority, without consent of the representatives of the people, is injurious to their rights, and ought not to be exercised." VA. CONST. art. I, § 7. The People have thus denied the Governor a suspension power, and they have provided instead that he "*shall* take care that the laws be faithfully executed." *Id.* art. V, § 7 (emphasis added). Yet Governor

McAuliffe's executive order effectively suspends, without the consent of the People or their representatives, the voter-qualification provision of the Constitution of Virginia.

Any pretense otherwise is belied by the fact that the Governor has not simply suspended the operation of the law for more than 200,000 unnamed individuals, but has also promised to issue similar orders on a rolling basis going forward. Not surprisingly, contemporary news accounts recognized the true import of Governor McAuliffe's executive order, reporting that his "action effectively overturns a . . . provision in the State's Constitution . . . ." Sheryl Gay Stolberg & Erik Eckholm, *Virginia Governor Restores Voting Rights to Felons*, N.Y. TIMES (Apr. 22, 2016), http://goo.gl/cBq5g7.

Nor can the Governor defend his actions by arguing that he has not formally suspended the law. "Ignoring or failing to implement a duly adopted regulation or statute has the same practical effect as actively issuing a directive suspending the enforcement of such law." Va. Op. Att'y Gen. 14-009 at 2 (May 30, 2014), http://goo.gl/b0rTWE. To permit the Governor to "issu[e] a directive that suspends or ignores" the law "would grant the Governor a suspending power that has been denied to the English King since at least 1689 and would render the 'take care' clause of the Virginia Constitution a mere nullity." Va. Op. Att'y Gen. 13-109 at 4 (Jan. 3, 2014),

http://goo.gl/PgIC78.

Governor McAuliffe has also effectively *amended* the Constitution, even though the People have decided that he should play no role whatsoever in the amendment process. The Constitution of Virginia contains two methods for altering the Constitution, both of which begin with the General Assembly and end with the People, and neither of which gives the Governor any role at all in the amendment process. VA. CONST. art. XII, §§ 1, 2. Thus, although the Governor may veto a bill that has passed a majority of both the House and Senate, *id.* art. V, § 6(b)(ii), he may *not* block a constitutional amendment that has passed a majority of each chamber, *id.* art. XII, § 1.

The People have decided that as a general rule, felons may not vote, but they have empowered the Governor to relieve deserving individual felons of that disability. Governor McAuliffe has rewritten that charter to provide that all convicted felons may vote, no matter their circumstance, once their prison sentence and period of supervision has come to an end. Governor McAuliffe is entitled to disagree with the policies of Virginia's Constitution, but he is not entitled to nullify those he dislikes. The Constitution requires him to "take care that the laws be faithfully executed," VA. CONST. art. V, § 7, and this duty applies to *all* laws.

The Chief Executive has unlawfully taken up the lawmaking power, too,

for the Executive Order is plainly an exercise of legislative, rather than executive, power. Rather than identify the felons whose political rights he intends to restore, Governor McAuliffe has crafted a set of rules, which an executive officer, the Secretary of the Commonwealth, is now applying to identify the individual felons who qualify for a restoration of rights. What is more, the law that Governor McAuliffe has purported to enact is *prospective* by virtue of the monthly follow-up orders he has stated he will issue. This is the very essence of legislative power. *Thompson v. Smith*, 155 Va. 367, 381 (1930) ("The legislature must declare the policy of the law and fix the legal principles which are to control in given cases; but an administrative body may be invested with the power to ascertain the facts and conditions to which the policy and principles apply." (quotation marks omitted)). As the 2013 bipartisan committee rightly concluded, a blanket restoration order is "a legislative act, not an administrative act." Bipartisan Report at 3.

Of course, the legislative power of "declar[ing] the policy of the law and fix[ing] the legal principles which are to control" felon disenfranchisement is not even vested in the General Assembly, as the People have retained that power for themselves. But that does not change the fundamental *nature* of the power: a lawmaking power that the Executive is categorically forbidden from exercising absent a lawful delegation from the legislature. *See Bell v.*

Dorey Elec. Co., 248 Va. 378, 380 (1994). If anything, it is even more alarming that Governor McAuliffe has taken a lawmaking power that the People have reserved to themselves by inscribing voter qualifications directly into the Constitution, presumably to preclude elected officials from reworking voter qualifications on the eve of an election.

Governor McAuliffe's violation of the separation of powers is laid bare by the fact that he has defended his revision of the Constitution by arguing that "once you have paid your debt to society, the judge, jury have determined what your sentence would be, once you complete that, why should you not be back in?"[4] Putting aside that many of these individuals have not paid the restitution they owe to their victims, the People of Virginia have determined that the deprivation of certain political rights *is part of the punishment* for those who commit felonies—unless the person receives an *individualized* restoration of their rights in light of their own special circumstances. The Governor disagrees with that policy, but he may not unilaterally rewrite this aspect of Virginia's penal laws.

The Governor's assertion of executive power has no limiting principle. If Governor McAuliffe can effectively erase the general disenfranchisement

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[4] PBS NewsHour, *Felons who've paid their debt deserve to vote, says Virginia Gov. McAuliffe*, PBS (Apr. 22, 2016), http://goo.gl/W0OzL5.

provision from the Constitution for all felons who have completed their terms of incarceration and supervision, what will stop him or a future Governor from utilizing the clemency powers to restore the voting rights of *all* convicted felons, including those who are still serving prison sentences? Indeed, such a Governor could nullify other policies established by law or by the Constitution. A Governor who disagrees with the Commonwealth's gun laws, for example, could issue a blanket pardon to all persons convicted of illegal possession or sale of firearms and follow up with similar monthly orders, thus effectively suspending the gun laws.

The requirement that the Governor restore political rights on an individualized basis is not a mere formality. Rather, it is itself a component of the separation of powers. When the Chief Executive must dispense clemency on a case-by-case basis, the public and the coordinate branches may hold him accountable for his choices in the political arena.

Past Governors have signed their names below the name of the individual they have granted clemency, so that the public may know whether they have restored the right to vote to someone who is a felon many times over, or has killed someone, or has not paid the restitution he owes to his victims. Past Presidents, from Gerald Ford to George H.W. Bush to Bill Clinton, know well the political costs of issuing controversial pardons to specific

named individuals. Governor McAuliffe seeks to escape that accountability. Indeed, although members of the public have requested that Governor McAuliffe release the underlying data about the felons whose rights have been restored, he has steadfastly refused to release that information.[5]

4. The History of the Relevant Provisions of the Constitution Makes Clear That the Governor May Not Suspend the Prohibition on Felon Voting.

The history of the relevant provisions of the Constitution of Virginia demonstrates that the Executive clemency provision was meant to be a narrow delegation of power in a system that otherwise sharply circumscribes Executive prerogatives. It therefore cannot be understood to include the power to suspend or excise the Constitution's general provision disqualifying persons convicted of a felony from voting, or, for that matter, any other law. "The purpose and object sought to be attained by the framers of the constitution is to be looked for, and the will and intent of the people who ratified it is to be made effective." *Dean*, 194 Va. at 226. In keeping with this principle of construction, and in recognition of Virginia's history of "cautious and incremental approach to any expansions of the executive power," this Court has

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[5] Laura Vozzella, *McAuliffe study: Nearly 80 percent of felons allowed to vote were non-violent*, WASH. POST (May 11, 2016), https://goo.gl/WFgeGZ.

held that the Governor's power to restore voting rights must be narrowly construed. *Gallagher*, 284 Va. at 451.

In particular, the Court has recognized that "as part of a general reaction against the unfettered exercise of executive power," the Executive clemency power in 1776 was even narrower than it is today: the Governor possessed the power to grant reprieves and pardons in some but not all cases, but only with the advice of the Council of State. *Id*. at 450–51. *See* VA. CONST. (1776). The Governor had no explicit power to remove any political disabilities attendant upon a felony conviction.

The history leading to the adoption of the 1776 Constitution leaves no doubt that the clemency power vested in the Governor could be exercised only on a case-by-case basis, and not in a way that would nullify any other law. That history begins not with King George's abuses against the Colonies, but centuries earlier, with the long line of abuses of the royal pardon, dispensation, and suspension prerogatives that ultimately gave rise to the English Bill of Rights of 1689, on which Virginia's Bill of Rights is modeled. *See* Va. Op. Att'y Gen. 13-109 at 3–4 (Jan. 3, 2014), http://goo.gl/PgIC78.

All three prerogatives claim ancient roots in England, but were a frequent source of conflict between the Crown and Parliament. As early as the Fourteenth Century, Parliament protested over *collective* pardons issued by

the Crown. When Richard II sought to put down the 1381 rebellion of Wat Tyler by promising a general pardon to all participants, Parliament "refused to ratify" it. 1 LUKE OWEN PIKE, A HISTORY OF CRIME IN ENGLAND 337 (1873).

English history is filled with episodes of abuse of pardons, individual and general, as devices to raise money or curry favor for the Crown or to sanction criminal activity for the benefit of those in power. *See, e.g.*, *id.* at 142 (practice of payment for pardons); *id.* at 225 (use of pardons to "maintain[ ] robbers and murderers"); *id.* at 247 (noting that, in the fourteenth century, whole "band[s]" of men could "harry the surrounding country, to burn, to rob, to hold to ransom, and to slay" and thereafter receive a pardon "in consideration of the good service rendered . . . to the king"); *id.* at 275 (use of "general pardons" to conceal specific offenses); *id.* at 295 (use of the pardon to curry favor with nobles).

Although the Stuart Kings committed numerous excesses that would inspire the English Bill of Rights of 1689, the foremost among them took the form of a collective pardon: King James II's Declaration of Indulgence of 1687. An act of favor to the King's fellow Catholics, the Declaration of Indulgence suspended England's ecclesiastical laws and removed all disabilities resulting from earlier or future convictions under those same laws. Like Gov-

ernor McAuliffe's April 22 Executive Order, the Declaration of Indulgence removed disabilities for "all nonconformists, recusants, and other our loving subjects" for violation of "the penal laws formerly made relating to religion and the profession or exercise thereof," without following the traditional procedure of issuing individual orders under seal or signature, declaring instead that "our royal pardon and indemnity shall be as good and effectual to all intents and purposes, *as if every individual person had been therein particularly named* . . . ." Declaration of Indulgence (1687), *reprinted in* SELECT DOCUMENTS OF ENGLISH CONSTITUTIONAL HISTORY 454 (G.B. Adams & H. M. Stephens eds., 1914) (emphasis added).

The prohibitions against suspensions and dispensations in the English Bill of Rights were a direct response to this abuse. SOURCES OF OUR LIBERTIES: DOCUMENTARY ORIGINS OF INDIVIDUAL LIBERTIES IN THE UNITED STATES CONSTITUTION AND BILL OF RIGHTS 225–26 (Richard L. Perry ed., 1959). More importantly, the Suspension Clause in the Constitution's Bill of Rights was adopted to prevent Virginia's Governors from utilizing their clemency powers to suspend the laws in the same manner as King James II. Edmund Randolph, a Founding Father and the Seventh Governor of Virginia, explained that Virginia's Suspension Clause was "suggested by an arbitrary practice of the king of England before the revolution of 1688." Edmund Randolph, *Essay*

on the Revolutionary History of Virginia (1774–1782), *reprinted in* 44 VA. MAG. HIST. & BIOGRAPHY 35, 46 (1936).

Having seen the abuses that persisted even under the English Bill of Rights, the People in Virginia's 1776 Constitution went *further* in circumscribing executive power. Indeed, the framers limited executive power to a greater extent than the federal Constitution did a decade later. 2 A.E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 641 (1974). The pardon power was no exception: whereas the United States Constitution gives the President a unilateral power to grant reprieves and pardons in all cases except impeachment, U.S. CONST. art. II, § 2, cl. 1, the Governor of Virginia could only exercise his pardon power with the advice of the Council of State. *Gallagher*, 284 Va. at 451; *see also Commonwealth v. Caton*, 8 Va. (4 Call) 5, 18 (1782) (noting that other limitations on the Governor's pardon power were adopted with the object "that, although . . . the laws should be mild, they ought to be rigidly executed," and that therefore "a power to pardon . . . ought never to be exercised without proper cause").

The 1870 Constitution for the first time authorized the Governor "to remove political disabilities consequent upon conviction for offences committed prior or subsequent to the adoption of this constitution." VA. CONST. art. IV, § 5 (1870). The history of this provision clearly demonstrates that the

framers intended the power to be limited to individual cases. The constitutional convention that adopted the 1870 Constitution instructed the Committee on the Pardoning Power to consider a provision authorizing the Governor to restore political rights, but only "when, in his opinion, *the facts of the case* warrant such a course." REPORT OF THE COMMITTEE ON THE PARDONING POWER, *in* DOCUMENTS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF VIRGINIA 129 (1867) (emphasis added).

The Committee on the Pardoning Power advised *against* adopting this provision, for fear that the Governor might "cause to be released, in times of heated political contests, criminals legally imprisoned, for the purpose of controlling elections, and thereby release them from punishment rightly imposed." *Id.* While the Convention ultimately rejected the Committee's recommendation, this exchange leaves little doubt that the Governor's clemency power has been carefully wrought to foreclose potential abuses—including the suspension for political purposes of the general constitutional provision disenfranchising felons.

The reference to the Governor's power to restore voting rights was added to the voter qualification clause, Article II, Section 1, in the 1971 Constitution, further confirming what history already made apparent: the Governor is empowered to restore voting rights *only* on an individualized basis.

See supra at 16–20 (discussing the text of the voter qualification provision).

As this Court recognized in *Gallagher*, "the concerns motivating the original framers in 1776 still survive in Virginia," 284 Va. at 451, leading to the conclusion that the Governor may not exercise his restoration power in a way that suspends the felon voting provision.

5. The Prohibition Against Felon Voting Was Not Adopted for the Purpose of Disenfranchising African-American Voters.

Governor McAuliffe has attempted to justify his executive order by claiming that Virginia's felon disenfranchisement provision was introduced into the Constitution after the Civil War in order to disenfranchise African-Americans. He told *The Nation* that "in 1901 and 1902 they put literacy tests, the poll tax and then disenfranchisement of felons into the state's constitution."[6] He told PBS that in "1901, 1902, they put in the poll tax. They put in literacy tests. And they had a horrible disenfranchisement for felons. So, what I did today was to erase 114, 115 years of a really, really repressive tactic . . . ."[7] He made similar suggestions to MSNBC and in his official

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[6] Joshua Holland, *Virginia Just Gave 200,000 People the Right to Vote*, THE NATION (Apr. 22, 2016), http://goo.gl/6xZaxS.

[7] PBS NewsHour, *supra* note 4.

Summary of his Restoration of Rights prepared for the media.[8]

Governor McAuliffe's historical account is false and provides no justification for his attempt to, as he put it, "erase" a provision of Virginia's Constitution. Virginia has disenfranchised felons since long before the Civil War or 1902, and long before African-Americans could vote. The prohibition could not have been adopted for the purpose of depriving African-Americans of the right to vote because it was first added to the Constitution in 1830, when only whites could vote. VA. CONST. art. III, § 14 (1830) (denying the vote to "any person convicted of any infamous offence"). The 1851 and 1864 Constitutions likewise allowed only whites to vote but denied the vote to any person convicted of "any infamous offence." VA. CONST. art. III, § 1 (1851); VA. CONST. art. III, § 1 (1864). At common law, "infamous offences" included not only felonies but more generally "treason, felony, and all offences founded in fraud, and which come within the general notion of the *crimen falsi* of the Roman law." *Barbour v. Commonwealth*, 80 Va. 287, 288 (1885).

In light of this history, the federal courts have rejected the claim that

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[8] MSNBC, *VA Governor restores voting rights to felons*, at 1:49 (Apr. 22, 2016), http://goo.gl/6nypLt (stating that "in 1901 and 1902, they put in our Constitution the poll tax, literacy tests, and horrible disenfranchisement for felons"); Summary of Restoration at 1 ("The Constitution of Virginia has prohibited felons from voting since the Civil War.").

Virginia's felon disenfranchisement provision was motivated by racial discrimination. The Fourth Circuit held that the provision could not have been adopted in order to disenfranchise African-Americans because "[t]he Commonwealth's decision to disenfranchise felons pre-dates the adoption of both [the Fourteenth and Fifteenth Amendments to the United States Constitution] as well as the extension of the franchise to African-Americans." *Howard v. Gilmore*, 205 F.3d 1333, 2000 WL 203984, at *1 (4th Cir. 2000) (unpublished). *See also Perry v. Beamer*, 933 F. Supp. 556, 558 (E.D. Va. 1996), *aff'd*, 99 F.3d 1130 (4th Cir. 1996) ("The Commonwealth of Virginia has long excluded convicted felons from the franchise. *See* VA. CONST. Art. 3, § 14 (1830).").

6. Petitioners Have a Clear Right To Compel Respondents To Comply With Their Statutory Duties.

For the foregoing reasons, Governor McAuliffe's executive order is unconstitutional and does not restore the political rights of any convicted felon. Respondents' failure to discharge their statutory and constitutional duties to keep convicted felons off of the voter registration rolls directly injures Petitioners, among other ways, by diluting their votes and infringing Petitioners' right of suffrage. Petitioners thus have a clear right to have this Court compel Respondents to comply with their statutory duties and to refrain from implementing the Governor's unconstitutional executive order.

The Constitution of Virginia guarantees "the right of suffrage" to those who satisfy its qualifications, art. I, § 6, and "[t]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise," *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). Thus "[a] plaintiff need not have the franchise wholly denied to suffer injury. Any concrete, particularized, non-hypothetical injury to a legally protected interest is sufficient." *Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1352 (11th Cir. 2005).

This Court has similarly held that a voter who lives in an electoral district whose district lines allegedly violate the Constitution of Virginia has standing to challenge the validity of that district, *Wilkins v. West*, 264 Va. 447, 460 (2002), no doubt in recognition of the broader principle that voters have standing when a law "dilute[s] voting power and diminish[es] the effectiveness of representation," *Jamerson v. Womack*, 26 Va. Cir. 145, 1991 WL 835368, at *1 (1991), *aff'd*, 244 Va. 506 (1992). And courts have consistently recognized that the unconstitutional over-expansion of the franchise injures qualified voters by diluting their vote. *See, e.g.*, *Duncan v. Coffee Cty.*, 69 F.3d 88, 94 (6th Cir. 1995); *Locklear v. North Carolina State Bd. of Elections*, 514 F.2d 1152, 1154 (4th Cir. 1975). Accordingly, Respondents' actions have infringed Petitioners' right of suffrage, and Petitioners have a clear right

to the requested relief.

Majority Leader Norment is further injured by Respondents' failure to carry out their statutory duties because absent relief from this Court, he will be required to compete for re-election before an invalidly constituted electorate. *LaRoque v. Holder*, 650 F.3d 777, 787 (D.C. Cir. 2011) (candidate has standing to challenge law that would require him "to compete in an 'illegally structured' [campaign] environment"); *Shays v. FEC*, 414 F.3d 76, 85 (D.C. Cir. 2005) (same). Majority Leader Norment and Speaker Howell are also injured because Governor McAuliffe's executive order trenches upon the General Assembly's role in initiating constitutional amendments.

Consistent with these principles, this Court has, in election law cases, granted an original petition for a writ of mandamus, in favor of both a voter, *Wilkins v. Davis*, 205 Va. 803 (1965), and a candidate for office, *Brown v. Saunders*, 159 Va. 28 (1932), upon a finding that the relevant election law violated the Constitution of Virginia. And this Court has not hesitated, in original mandamus actions, to issue judgments that nullify a Governor's unlawful executive order. *Jackson v. Hodges*, 176 Va. 89, 101 (1940); *Fugate v. Weston*, 156 Va. 107, 120 (1931). Here, too, Petitioners have a clear right to relief, and the Court should grant the mandamus petition.

B. Respondents Have a Legal Duty To Perform the Acts that Petitioners Seek To Compel.

"Mandamus is the proper remedy to compel performance of a purely ministerial duty, but it does not lie to compel the performance of a discretionary duty." *Board of Cty. Supervisors of Prince William Cty. v. Hylton Enters., Inc.*, 216 Va. 582, 584 (1976). Respondents have a legal duty to obey the Constitution, to prevent the registration of felons whose political rights have not validly been restored, and to require the cancellation of the registrations of felons who have been improperly registered to vote.

Each statute upon which Petitioners rely provides that Respondents "shall" perform the relevant duty. For example, Commissioner Cortés and the Department of Elections "shall . . . [r]equire the general registrars to delete from the record of registered voters the name of any voter who . . . has been convicted of a felony," CODE § 24.2-404(A)(4); *see also id.* § 24.2-404(A)(2) (Department of Elections "shall" require registrars to change or correct registrations); *id.* § 24.2-404(A)(6) (Department of Elections "shall" maintain a permanent record of information received concerning felony convictions); *id.* § 24.2-404(C) (State Board of Elections "shall" institute proceedings to ensure felons' invalid registration are cancelled); *id.* § 53.1-231.1 (Secretary of the Commonwealth "shall" maintain accurate records of individuals whose rights have been restored). Registrars are statutorily required to follow the

instructions issued by the State Board of Elections, the Department of Elections, and Commissioner Cortés, including specifically instructions related to ensuring that ineligible convicted felons are not permitted to vote. *Id.* §§ 24.2-103, 24.2-404(A)(4).

Mandamus relief is thus appropriate because the governing statutes require the relevant officials "to perform a prospective non-discretionary act." *Town of Front Royal v. Front Royal & Warren Cty. Indus. Park Corp.*, 248 Va. 581, 587 (1994). In *Town of Front Royal*, this Court held that an order stating that a local government "shall" take the relevant actions "expressly orders" the town to act, and thus "imposes a ministerial" rather than discretionary duty. *Id.* at 583, 585. The statutes here likewise require mandatory action: this is *not* a case where the official's duties "require[ ] the exercise of judgment and discretion . . . ." *Richlands Med. Ass'n v. Commonwealth*, 230 Va. 384, 388 (1985). The election officials simply have no discretion to decline to follow the law and to permit registration by felons whose rights have not been validly restored.

C. <u>Petitioners Have No Adequate Remedy at Law.</u>

The remedies open to petitioners—an action for an injunction or a writ of mandamus in Circuit Court—are neither "at law," nor are they "adequate."

The inquiry here is not whether there is *any* alternative remedy, but

whether there is an "adequate" alternative remedy "at law." As this Court has explained in the course of granting a voter's original petition for a writ of mandamus to compel an election official to perform his statutory duties, the mere fact that "a subordinate, local court was open to the petitioner" to seek a writ of mandamus does not mean that "he ought to have pursued his remedy in that court . . . ." *Clay v. Ballard*, 87 Va. 787, 13 S.E. 262, 263 (1891). Instead, "where the object is to enforce obedience to a public statute it has been invariably held that the writ is demandable of right." *Id.* Petitioners seek to enforce obedience to the Constitution and statutes of the Commonwealth, and they are authorized to seek that relief in this Court via mandamus.

Although Petitioners could seek injunctive relief from a Circuit Court, such an action is not a remedy "at law." It is well settled that "a party must establish . . . irreparable harm and lack of an adequate remedy at law, before a request for injunctive relief will be sustained." *Levisa Coal Co. v. Consolidation Coal Co.*, 276 Va. 44, 61 (2008) (quotation marks omitted). An action for injunctive relief plainly cannot be an "adequate remedy at law" when an injunction will not issue *unless* the movant establishes the "lack of an adequate remedy at law." *Id.*

Nor would a Circuit Court injunction remedy be "adequate." A remedy is "adequate" only if it is "equally as convenient, beneficial, and effective as

the proceeding by mandamus." *Cartwright v. Commonwealth Transp. Comm'r of Va.*, 270 Va. 58, 64 (2005) (quotation marks omitted). To be adequate, a remedy "*must reach the whole mischief*, and secure the whole right of the party in a perfect manner, at the present time and in the future, otherwise equity will interfere and give such relief and aid as the particular case may require." *McClaugherty v. McClaugherty*, 180 Va. 51, 68 (1942) (emphasis added) (quotation marks omitted). And in determining whether to issue the writ, "[c]onsideration must be given to the urgency that prompts the exercise of the discretion, the public interest and interest of other persons, the results that will occur if the writ is denied, and the promotion of substantial justice." *Goldman v. Landsidle*, 262 Va. 364, 370–71 (2001).[9]

Time is of the essence here. Governor McAuliffe issued his executive order with just enough time for his Administration to register thousands of felons prior to the November election—but not enough time for litigation challenging the order to proceed on a normal schedule through the circuit court and then on appeal to this Court. The November elections will occur less

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[9] A damages action (assuming one were available) is an action "at law," *Levisa Coal*, 276 Va. at 62, but it would not provide an adequate remedy because it cannot compensate Petitioners for the injury they will suffer if their votes are diluted in the November and other future elections. *See, e.g.*, *Moore v. Steelman*, 80 Va. 331, 339–40 (1885); *Montano v. Suffolk Cty. Legislature*, 268 F. Supp. 2d 243, 260 (E.D.N.Y. 2003).

than six months from today, and election officials will begin distributing absentee ballots "not *later than*" September 24. CODE § 24.2-612 (emphasis added). Indeed, relief is necessary by August 25 in order to provide the Commonwealth's 133 General Registrars with sufficient time before September 24 to cancel the registration of the thousands of felons who will have improperly registered to vote. *See id.* § 24.2-404(A)(4) (giving registrars 30 days to take action on the Department's orders to cancel a registration). Otherwise, potentially thousands of unqualified voters could cast absentee ballots, significantly complicating the counting process. *See id.* § 24.2-711 (setting forth procedures for discarding absentee ballots cast by unqualified voters).

Even the most expeditious proceedings in a Circuit Court may not conclude before the election (much less before absentee ballots are distributed). Even if a circuit court could reach a final decision before November, this Court would have little or no time to entertain an appeal and give this case the thoughtful deliberation that it deserves. *Cf. Town of Danville v. Blackwell*, 80 Va. 38, 42 (1885) (an "appeal from the final determination of the cause . . . might be, in the language of this court . . . 'too late,' and even then such an appeal would not bring up or secure the review of the order the effects of which the *mandamus* is invoked as a remedy for").

It is hard to imagine a greater "urgency that prompts the exercise of

the [Court's] discretion," *Goldman*, 262 Va. at 370–71, than the prospect that the 2016 election may be conducted with an electorate that includes tens, or even hundreds, of thousands of illegal voters. And because review by this Court after it is too late to correct the registration rolls could throw into the doubt the validity of elections that affect not simply the Commonwealth, but the entire country, "[t]he public interest and interest of other persons," *id.* at 371, are at their zenith.

Time is also of the essence because the Governor apparently has not devised a plan to remove illegal voters from the rolls. At a recent meeting of the Board of Elections, Commissioner Cortés was asked whether there is "a procedure in place" to remove felons from the voter rolls in the event Governor McAuliffe's order is invalidated. The Commissioner ignored the question, insisting that the Governor's order is valid. Minutes of State Board of Elections Meeting at 2 (Apr. 28, 2016), http://goo.gl/01dbur.

Thus "[e]ven if other more leisurely proceedings" are available, the other remedies will not be "equally convenient, beneficial and effective," as the writ provides a more "expeditious remedy . . . ." *Early Used Cars, Inc. v. Province*, 218 Va. 605, 610 (1977); *see also Richmond Ry. & Elec. Co. v. Brown*, 97 Va. 26, 32 S.E. 775, 777 (1899) ("[W]hatever may have been the result of repeated suits for damages, the remedy was not as convenient, as

beneficial, or as effective as the proceeding by mandamus."); *In re Hopeman Bros., Inc.*, 264 Va. 424, 427–28 (2002) (Lemons, J., dissenting) (no adequate remedy at law where the alternative remedy requires the parties seeking mandamus to "proceed to trial and then avail themselves of the right to appeal an adverse judgment at the conclusion of the consolidated and bifurcated cases," a process that might "take so long that some plaintiffs die before they might have benefited from an award"); *T.D. Bank NA v. Frey*, 83 Va. Cir. 68, 2011 WL 8947413, at *7 (2011) (no adequate remedy at law where suing on an underlying note "would most likely result in a lengthy and expensive litigation for the Petitioner").

Respondents will not suffer any prejudice if this Court were to resolve this controversy via mandamus. Mandamus relief is appropriate where "[n]o prejudice was suffered by any party, and harm rather than good would result from sending the parties back to try the same issue, to be raised by different pleadings." *May v. Whitlow*, 201 Va. 533, 538 (1960). In this case, all parties *benefit* from having this Court immediately and authoritatively decide the important constitutional questions presented in this case. And, it must be remembered, it is *Respondents* who changed the status quo on the eve of an election, forcing Petitioners to seek mandamus.

Finally, "the extraordinary nature of this litigation cannot be ignored as

a factor in the overall decision." *Abelesz v. OTP Bank*, 692 F.3d 638, 652 (7th Cir. 2012). It is imperative that the validity of Governor McAuliffe's executive order be finally resolved well in advance of the upcoming elections, lest the validity of the elections themselves be cast in doubt. This Court will eventually be presented with a petition to decide this case, either before or after the November elections, and the issues are of such a character that they should be decided by *this* Court, not the circuit courts.

In light of the foregoing, it should come as no surprise that it has long been the practice of this Court to decide, via a petition for writ of mandamus, important questions of election law, particularly when, as here, the question must be decided on an expedited basis. The Court has not hesitated to issue the writ, even shortly before an election, when the circumstances warrant such relief. For example, in *Brown v. Saunders*, this Court issued a writ of mandamus less than one month before an election, invalidating Virginia's district maps and requiring the Commonwealth to conduct the upcoming elections for the United States House of Representations on an at-large rather than county basis. 159 Va. 28, 31, 48 (1932). The petitioner in *Brown* was a candidate for office who filed an original petition in this Court less than sixty days prior to the election, and this Court issued the writ because Virginia's district maps violated the Constitution of Virginia. *Id.* at 31, 45–46.

Similarly, in *Wilkins v. Davis*, this Court issued a writ of mandamus enjoining Virginia's district maps because they violated the Virginia and Federal Constitutions. 205 Va. 803, 810 (1965). The petitioner in *Wilkins* was a voter and taxpayer who filed an original action in this Court, and the Court issued a writ of mandamus requiring the members of the State Board of Elections to conduct elections on an at-large basis until the General Assembly enacted a valid reapportionment act. *Id.* at 803, 814.

There is also authority suggesting that, for election-law challenges, proceeding via an application for an original writ of mandamus is preferable to seeking a declaratory judgment in the circuit court. In *Jamerson v. Womack*, a circuit court declined to issue a declaratory judgment declaring invalid Virginia's redistricting of two senatorial districts. 26 Va. Cir. 145, 1991 WL 835368, at *1 (1991), *aff'd*, 244 Va. 506 (1992). After rejecting the challenge on the merits, the court held that "more appropriate means of redress were available" because the petitioners could have sought a writ of mandamus. *Id.* at *3. The Court stated that "[t]he existence and equivalence of such a means of redress indicate that declaratory judgment is not needed as a means of challenging unconstitutional redistricting . . . ." *Id.*

Only this Court can authoritatively determine the validity of Governor McAuliffe's unprecedented, sweeping order purporting to restore voting

rights to more than 200,000 convicted felons. It is manifestly in the public interest for the Court to do so before the Governor's action is permitted to influence the November General Election.

II. PETITIONERS ARE ENTITLED TO A WRIT OF PROHIBITION.

For substantially all of the foregoing reasons, Petitioners are also entitled to a writ of prohibition. The writ of prohibition "commands the person to whom it is directed not to do something which . . . the court is informed he is about to do." *In re Commonwealth*, 278 Va. 1, 17 (2009) (quotation marks omitted). A writ of prohibition may serve to "suspend all action, and to prevent any further proceeding in the prohibited direction." *Id.* (quotation marks omitted). The writ is used to restrain a government actor "either when he has no jurisdiction or when he exceeds his jurisdiction . . . ." *In re Commonwealth*, 222 Va. 454, 461 (1981).

Governor McAuliffe's April 22 Executive Order is *ultra vires*. Governor McAuliffe has made clear that he will issue similar unconstitutional blanket restoration orders in the future. Respondents have a clear duty *not* to permit the registration of felons pursuant to those executive orders. This Court should thus issue a writ prohibiting Respondents from permitting felons who claim that their rights were restored by the April 22 Executive Order or similar

forthcoming orders to register. Respondents will be acting unlawfully and unconstitutionally should they permit the registration of voters pursuant to Governor McAuliffe's executive orders. Moreover, all of them will be acting outside their jurisdiction, because they have no power to permit the registration of voters where the Constitution and statutes of Virginia specifically prohibit them from doing so. By "exceeding the scope of [their] authority," these officials are acting *ultra vires*—that is, outside their "jurisdiction." *City of Arlington v. FCC*, 133 S. Ct. 1863, 1870 (2013).

CONCLUSION

For the foregoing reasons, as set forth in more detail on pages 2-4, we respectfully submit that the Court should enter a writ of mandamus requiring respondents to (1) require the cancellation of the registrations of all felons who have registered to vote pursuant to a blanket restoration order, and (2) refuse to permit the registration of felons who claim their rights have been restored pursuant to Governor McAuliffe's Executive Order or any other blanket restoration order. The Court should also enter a writ of prohibition prohibiting respondents from permitting the registration of felons who claim their rights have been restored by a blanket restoration order.

Dated: May 23, 2016

Respectfully Submitted,

William J. Howell
Thomas K. Norment, Jr.
William Cleveland
Marianne Gearhart
M. Brett Hall
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By Counsel

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* *Pro hac vice* application forthcoming

Verifications follow.

VERIFICATION

Pursuant to VA. CODE § 8.01-4.3, I verify under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

May 20, 2016
Date

W. J. Howell
William J. Howell

VERIFICATION

Pursuant to VA. CODE § 8.01-4.3, I verify under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

5/20/16
Date

Thomas K. Norment, Jr.

VERIFICATION

Pursuant to VA. CODE § 8.01-4.3, I verify under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

5-20-16
Date

William Cleveland
William Cleveland

VERIFICATION

Pursuant to VA. CODE § 8.01-4.3, I verify under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

5-20-16
Date

Marianne Gearhart
Marianne Gearhart

VERIFICATION

Pursuant to VA. CODE § 8.01-4.3, I verify under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

5/17/16
Date

M. Brett Hall

VERIFICATION

Pursuant to VA. CODE § 8.01-4.3, I verify under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

5/18/16
Date

William H. Slemp
William H. Slemp

EXHIBIT 1

COMMONWEALTH of VIRGINIA

Office of the Governor

Mark E. Rubin
Counselor to the Governor

January 15, 2010

Mr. Kent Willis
American Civil Liberties Union of Virginia
530 East Main Street
Suite 310
Richmond, Virginia 23219

Dear Kent:

This letter is in response to your letter of December 9th requesting that Governor Kaine use his executive power to grant a blanket restoration of voting rights to Virginians who have lost voting rights due to a felony conviction.

Governor Kaine supports the restoration of voting rights and has long supported efforts to change Virginia law so that a felony conviction is not a permanent disenfranchisement of those rights. Since his first days as Governor, he has worked to make the application process for restoration of voting rights simpler and has made the timely handling of these requests a high priority. As a result, Governor Kaine has restored voting rights to over 4,400 individuals since January 2006. This represents the greatest use of the restoration power by far of any Virginia Governor.

The question raised by your letter goes a step further – should the Governor use executive power in his last days in office to restore voting rights to an unknown number of unnamed individuals who have not applied to have their voting rights restored?

This specific question was raised less than two months before the Governor's term expires. It is a complex question to resolve within this short time period because it involves significant policy, legal and practical concerns. The question has more consequences than simply restoring voting rights because a restoration of rights also affects the ability of felons to serve on juries and to obtain concealed weapons permits. Nevertheless, the Governor has undertaken a very careful review of your proposal.

We conclude that a blanket restoration of rights within the context of current Virginia law would not be proper for two reasons. First, while the wording of the constitutional provision granting the powers of clemency and restoration of rights might be read to support the blanket use of these powers to benefit unnamed individuals, we think the better argument is that these

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powers are meant to apply in particular cases to named individuals for whom a specific grant of executive clemency is sought. A blanket order restoring the voting rights of everyone would be a rewrite of the law rather than a contemplated use of the executive clemency powers. And, the notion that the Constitution of the Commonwealth could be rewritten via executive order is troubling.

To be sure, the Governor disagrees with the current policy embodied in the Virginia Constitution that a felony conviction automatically leads to permanent disenfranchisement. But, he did pledge to uphold the Constitution when he took his oath of office in January 2006. His and others' efforts to persuade the General Assembly to change the current law and policy have been unsuccessful. To attempt to change the Constitution by executive order on the way out the door could set a dangerous precedent that would have negative consequences if applied under different circumstances by future Governors.

Second, the practical aspects of implementing a blanket restoration raise significant problems. Neither the information about voting registration nor the information concerning whether a felon has completed his sentence are completely available in centralized state records as they are in other states you cited as models. For example, information about whether a felon has complied with court orders including the payment of restitution to the crime victim or whether the individual has successfully met the terms of probation or parole supervision is only available in local court records. Without having this information available in centralized data bases, a blanket restoration of rights for those who have completed their sentences would place an unprecedented burden on local registrars to determine whether a felon is actually qualified to register. It could also lead to significant confusion in the election process with disputes about an individual's actual voting status. The risk of undermining the integrity of the election process is not one the Governor is willing to take as he leaves office.

While we will not issue a blanket restoration of rights to unnamed individuals, we do encourage you and others to take important steps to facilitate the important goal of restoration of felon's voting rights. First, encourage all who have lost their rights to apply for a restoration. Governor Kaine has publicly encouraged such applications in many public settings since 2006. In a state and nation where the majority of registered voters often choose not to vote, the desire of citizens who have paid their debt to society to rejoin civic life by participating in elections is laudable. Second, do all you can do to support a change in Virginia law so that lifelong voting disenfranchisement is not an automatic consequence of a felony conviction. Virginia is one of only two states that mandate such an extreme penalty. The Governor will be glad to continue to work with you to ultimately persuade the General Assembly that this distinction is one to erase.

Sincerely,

Mark E. Rubin

EXHIBIT 2

Report of the Attorney General's Rights Restoration Advisory Committee

Alternatives to a Constitutional Amendment

May 10, 2013

Kenneth T. Cuccinelli, II
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Ashley L. Taylor, Jr.
Troutman Sanders LLP
Former commissioner, United States Commission on Civil Rights

The Constitution of Virginia declares that "[n]o person who has been convicted of a felony shall be qualified to vote unless his civil rights have been restored by the Governor or other appropriate authority."[1] The policy choice by Virginians through their Constitution to deny the right to vote to persons convicted of certain criminal offenses has been in place in one form or another since the Constitution of 1830.[2] Questions of law have arisen in recent public policy discussions regarding the manner and extent to which the restoration of civil rights for persons convicted of felonies may be accomplished in Virginia. Attorney General Kenneth T. Cuccinelli, II appointed an advisory committee to consider these legal questions.

The Attorney General's Rights Restoration Advisory Committee examined Article II, § 1 as well as the constitutional provision setting forth the Governor's clemency powers.[3] The committee also considered alternatives that may be available within the existing framework of the Constitution of Virginia to restore the civil rights of individuals who, after having been convicted of certain nonviolent felonies, have completed their sentences and paid all fines and court-ordered restitution, if any.[4]

The committee reached the following conclusions:

1. The General Assembly cannot establish by statute a process for the automatic restoration of rights.

2. The Governor cannot institute by executive order an automatic, self-executing restoration of rights for all convicted felons in the Commonwealth of Virginia.

3. The Governor, however, may exercise his discretionary clemency power in a more expansive manner to restore civil rights on an individualized basis.

4. The General Assembly through the appropriation act may facilitate a permanent function under the Office of the Governor to assist the Governor in the exercise of his discretionary clemency power so that all those who apply can be given timely consideration to have their civil rights restored.

5. The Governor in the exercise of his discretionary clemency power may decide the policy details of the process his Office will use for the restoration of civil rights within the existing constitutional framework.

The Governor possesses the authority to consider new approaches to the restoration of rights that could include proactive outreach and educational efforts addressed to those Virginians who have returned to the community after felony convictions but have not yet applied to have their civil rights restored. The details for such new approaches would be within the discretion of the Governor under his clemency power, so long as Governor's action to remove political disabilities continues to be made on an individualized basis.

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[1] VA. CONST. art. II, § 1.

[2] VA. CONST. of 1830, art. III, § 14 (disqualifying from voting "any person convicted of any infamous offence"). *See* I A. E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 344-47 (1974).

[3] VA. CONST. art. V, § 12 ("The Governor shall have power ... to remove political disabilities consequent upon conviction for offenses committed prior or subsequent to the adoption of this Constitution").

[4] This report does not address whether the restoration of rights process utilized by the Governor should be revised as that is a policy question reserved to the Governor in the exercise of his discretionary clemency power.

1. The General Assembly cannot establish by statute a process for the automatic restoration of rights.

In 1999, an official advisory opinion of the Attorney General concluded that the General Assembly is not an "other appropriate authority" within the meaning of Article II, § 1 empowered to restore the voting rights of felons in Virginia.[5] The General Assembly in 1969 added to the proposed Constitution later presented to the voters for adoption the phrase "or other appropriate authority" to "make it clear that civil rights may be restored for felons by 'other appropriate authority' to include President, other governors, pardoning boards, etc."[6] In 1974, an opinion of the Attorney General construed the phrase to "include the President, other Governors, and pardoning boards which have such power."[7] Because the clemency power in Virginia is vested in the Governor, not the General Assembly, the legislature does not possess an independent power to restore civil rights to persons convicted of felonies other than through the process to amend the Virginia Constitution.[8]

2. The Governor cannot institute by executive order an automatic, self-executing restoration of rights for all convicted felons in the Commonwealth of Virginia.

When a Governor issues an executive order, he does so based upon the authority inherent in the constitutional duty of a Governor to "take care that the laws be faithfully executed."[9] The issuance of an executive order generally is considered appropriate whenever:

(i) The Code of Virginia expressly confers that authority upon the Governor;[10]

(ii) There is a genuine emergency that requires the Governor to issue an order to abate a danger to the public regardless of the absence of explicit authority;[11] or

(iii) The executive order merely is administrative in nature, as opposed to legislative.[12]

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[5] 1999 Op. Va. Att'y Gen. 48, 49-50. *See also* 1999 Op. Va. Att'y Gen. 50, 52 (circuit courts are not an "other appropriate authority" under Article II, § 1 "and may not be imbued with such authority either legislatively or through an executive order issued by the Governor.").

[6] *See* PROCEEDINGS AND DEBATES OF THE SENATE OF VIRGINIA PERTAINING TO AMENDMENT OF THE CONSTITUTION 104 (Ex. Sess. 1969). *See also* PROCEEDINGS AND DEBATES OF THE VIRGINIA HOUSE OF DELEGATES PERTAINING TO AMENDMENT OF THE CONSTITUTION 159 ("civil rights may be restored for felons by other appropriate authority which, of course, could include the President or Governor, pardoning boards, and so forth") (Ex. Sess. 1969).

[7] 1974-75 Op. Va. Att'y Gen. 197, 198.

[8] *See* VA. CONST. art. XII, § 1. Pursuit of a constitutional amendment is the path that would afford policy makers the greatest flexibility to fashion a change in how civil rights are restored in Virginia.

[9] VA. CONST. art. V, § 7.

[10] *See* Boyd v. Commonwealth, 216 Va. 16, 19, 215 S.E.2d 915, 917 (1975) (Governor acted within the limits of authority granted to him by Emergency Services and Disaster Law of 1973 when he issued executive order changing speed limit on grounds that a fuel shortage was a "disaster" within the meaning of the act). *See also* 1990 Op. Va. Att'y Gen. 1, 3; 1983-84 Op. Va. Att'y Gen. 180, 182; 1977-78 Op. Va. Att'y Gen. 5, 7-8.

[11] 1990 Op. Va. Att'y Gen. at 3.

Altering the public policy of the Commonwealth as regards the disenfranchisement of persons convicted of felonies clearly would be a legislative act, not an administrative act.[13] While the Constitution of Virginia does confer on the Governor the power "to remove political disabilities consequent upon conviction for offenses," a court likely would find it difficult to sustain a Governor's exercise of this clemency power in so sweeping a manner that the Constitution's general policy of disenfranchisement of felons is voided.[14]

The Governor's power to remove political disabilities is a matter left to his discretion and, unlike his other clemency powers, is not subject to a requirement to report to the General Assembly on the particulars for every exercise of the power and the reasons for exercising the same.[15] However, "'[i]t is ... an established canon of constitutional construction that no one provision of the Constitution is to be separated from all the others and to be considered alone, but that all the provisions bearing upon a particular subject are to be brought into view and to be so interpreted as to effectuate the great purpose of the instrument.'"[16] To harmonize and give effect to both Article II, § 1 and Article V, § 12, the Governor's power to remove political disabilities more properly is read to be exercisable on an individualized basis. After all, Article II, § 1 provides that "[n]o *person* who has been convicted of a felony shall be qualified to vote unless *his* civil rights have been restored by the Governor or other appropriate authority."[17]

3. The Governor, however, may exercise his discretionary clemency power in a more expansive manner to restore civil rights on an individualized basis.

As noted above, the Governor's discretionary power to remove political disabilities is not constrained by any requirement to report on the particulars for every exercise of the power and the reasons for exercising the same.[18] The Constitution accords to the Governor considerable latitude in how he may exercise this power to remove political disabilities so long as he makes some form of individualized consideration and individualized grant of clemency.

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[12] *Id*.

[13] *See* Whitehead v. H and C Dev. Corp., 204 Va. 144, 150, 129 S.E.2d 691, 695 (1963) ("[S]ubjects of a permanent or general character are to be considered legislative; while those which are temporary in operation and effect are administrative. Acts constituting a declaration of public purpose or policy are generally classified as involving the legislative power").

[14] *See* Jackson v. Hodges, 176 Va. 89, 93-94, 10 S.E.2d 566, 567 (1940) (Governor had no authority to increase the salary of the Secretary of the Commonwealth by executive order as it violated a constitutional provision that salaries of officers of the executive department were to be fixed by law and not increased or diminished during term of office). *See also* 2006 Op. Va. Att'y Gen. 36, 38-41 (an executive order that changes public policy on protected employment classes is beyond the scope of executive authority); 1941-42 Op. Va. Att'y Gen. 75 (Governor does not have the power to issue and enforce a proclamation requiring the observance of daylight savings time as that involves the exercise of a legislative, not executive, function).

[15] VA. CONST. art. V, § 12. *See* In re Phillips, 265 Va. 81, 87-88, 574 S.E.2d 270, 273 (2003) ("the power to remove the felon's political disabilities remains vested solely in the Governor, who may grant or deny any request without explanation, and there is no right of appeal from the Governor's decision").

[16] *See* Pierce v. Dennis, 205 Va. 478, 482, 138 S.E.2d 6, 9 (1964) (quoting City of Portsmouth v. Weiss, 145 Va. 94, 107, 133 S.E. 781, 785 (1926)).

[17] VA. CONST. art. II, § 1 (emphasis added).

[18] *See* authorities cited *supra* note 15.

4. The General Assembly through the appropriation act may facilitate a permanent function under the Office of the Governor to assist the Governor in the exercise of his discretionary clemency power so that all those who apply can be given timely consideration to have their civil rights restored.

Governor Robert F. McDonnell instituted a practice in his administration that complete applications for the restoration of civil rights received by his office are to be acted upon within 60 days. By making restoration of rights a priority, Governor McDonnell eliminated the backlog of pending applications that he inherited from his predecessor. As of April 12, 2013, Governor McDonnell had removed the political disabilities of 4,659 individuals, the highest number of any Governor in the past 70 years. The Secretary of the Commonwealth currently has two employees assigned to clemency matters, and she indicates that this staffing level is appropriate to process in a timely manner the applications received under the currently structured program.

The number of Virginians convicted of felonies who apply to have their rights restored is a relatively small percentage of the total number of persons with political disabilities by reason of felony convictions. Further refinements to the Governor's restoration of rights program to reach a broader number of persons may necessitate additional resources, and the General Assembly may exercise its legislative power to provide such resources through the appropriation act. Additionally, state personnel resources might be augmented by volunteers coordinated through, for example, the Virginia State Bar and faith-based organizations.

5. The Governor in the exercise of his discretionary clemency power may decide the policy details of the process his Office will use for the restoration of civil rights within the existing constitutional framework.

Individuals are more likely to take the initiative to avail themselves of a process if (i) notice of the process is given to them,[19] (ii) the process is designed so that it is easy to use, and (iii) there is a level of confidence that the process will be uniform in its application as regards like situated persons. Whether to revise further the restoration of rights process utilized by the Office of the Governor, and what form that revised process might take, are policy questions reserved to the Governor in the exercise of his discretionary clemency power. New approaches to the restoration of rights within the scope of the Governor's authority could include proactive outreach and educational efforts addressed to those Virginians who have returned to the community after felony convictions but have not yet applied to have their civil rights restored. The details for such new approaches would be within the discretion of the Governor under his clemency power, so long as Governor's action to remove political disabilities continues to be made on an individualized basis.

Alternative Approaches Discussed

Since 1982, attempts to amend the Virginia Constitution on the subject of the restoration of rights have proven unsuccessful. The committee considered a number of alternative approaches to the subject

[19] *See* VA. CODE ANN. § 53.1-231.1 (2009) (as recommended by the State Crime Commission in its 2003 report on the Restoration of Civil Rights, this section requires the Director of the Department of Corrections to notify felons on completion of sentence, period of probation or parole, or suspension of sentence of the processes available for the restoration of civil rights and voting rights).

that would not require a constitutional amendment. The committee discussed one alternative approach—admittedly innovative and untried in Virginia—in which the General Assembly would designate within the executive branch an agency to spearhead the rights restoration process on behalf of the Governor. This could be implemented by assigning the duties to an existing state agency. The agency would be led by a director appointed by the Governor, subject to confirmation by the General Assembly to give the legislative branch an additional role in the process. Guided by policies articulated by the Governor, this agency would do what is not practical now: lead a statewide, proactive outreach and educational effort to encourage individuals to apply for a restoration of their civil rights. Indeed, this type of executive agency approach would help ensure continuity and also make it easier to coordinate the energies of the many faith-based and other community groups with a proven interest in assisting deserving individuals who wish to become fully contributing members of society. This type of executive approach should be able to reach many who may feel they are not in a position to get a Governor's attention. After processing applications received, this agency could formulate recommendations for the Governor who would make the decision on whether to remove political disabilities for each individual applicant. On balance, the committee found this alternative approach to be an intriguing idea with a great deal of practical appeal.

The Committee also discussed a second alternative approach that would augment the staff of the Secretary of the Commonwealth to handle the envisioned outreach and educational effort. The benefit of keeping the restoration of rights process with the Secretary of the Commonwealth is that this office also currently provides staffing for the Governor on other clemency matters involving grants of reprieves and pardons, and remissions of fines and penalties.[20]

[20] *See* VA. CODE ANN. § 2.2-402(A) (Supp. 2012) (among the statutory duties of the Secretary of the Commonwealth is to "render to the Governor, in the dispatch of executive business, such services as he requires").