IN THE

SUPREME COURT OF VIRGINIA

Record No. 160784

WILLIAM J. HOWELL, et al.,
Petitioners,

v.

TERENCE R. MCAULIFFE, in his official capacity as Governor of Virginia, et al.,
Respondents.

MOTION FOR AN ORDER REQUIRING RESPONDENTS TO SHOW CAUSE WHY THEY SHOULD NOT BE HELD IN CONTEMPT FOR VIOLATING THE WRIT OF MANDAMUS

August 31, 2016

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INTRODUCTION

Petitioners respectfully request that the Court order Respondents to show cause why they should not be held in contempt for defying the writ of mandamus that this Court issued on July 22, 2016.

The Court struck down three executive orders restoring political rights to all felons who had completed their terms of incarceration and supervised release, holding that the Governor had unconstitutionally suspended the felon-disenfranchisement provision of Article II, Section 1 for "an indiscriminately configured class of approximately 206,000 convicted felons, without any regard for their individual circumstances and without any specific request by individuals seeking such relief." *Howell v. McAuliffe*, ___ Va. ___, ___, slip op. at 27 (July 22, 2016) ("Order"). Governor McAuliffe immediately denounced this Court's decision, vowing to accomplish *precisely the same result* simply by issuing individual restoration orders for *precisely the same* class of approximately 206,000 felons, again without any regard for their individual circumstances and without any specific request by individuals seeking such relief.

The Governor thus reads this Court's decision as permitting him to suspend the Constitution's general rule disenfranchising felons so long as he does so with 206,000 restoration orders rather than three. He is wrong.

This Court did not reduce the suspension clause of the Constitution to a printing requirement. The Court held instead that the suspension clause is an "essential pillar of a constitutional republic," *id.* at 22, whose protections do not depend upon how many reams of paper and autopen machines the Governor deploys to work his will.

On Monday, August 22, 2016, Governor McAuliffe announced that he had issued individual restoration orders to the approximately 13,000 felons who had registered to vote pursuant to his earlier unconstitutional executive orders, notwithstanding this Court's order cancelling their registrations. The Governor also announced that he will issue new restoration orders to the remaining approximately 200,000 felons who meet the same criteria set forth in his invalidated April 22 executive order—that is, those who have completed their terms of incarceration and supervised release. In making these two announcements, the Governor emphatically reaffirmed his opposition to the Constitution's felon disenfranchisement provision, calling upon "the General Assembly to pass a constitutional amendment to permanently repeal" it. Press Release, Governor Terry McAuliffe, *Governor McAuliffe Announces Process for Case-by-Case Restoration of Former-Felons' Civil Rights* (Aug. 22, 2016), goo.gl/Wi2FJL ("Aug. 22 Memorandum") (attached as Exhibit 1). Nor did he disguise his determination

to unilaterally suspend that provision in the meantime, vowing that he "is committed to doing everything in his power to restore the rights of Virginians who have completed their sentences." *Id*.

There is no substantive difference between the Governor's current actions and his three executive orders suspending Article II, Section 1, that this Court invalidated in its mandamus decision. "Instead of simply announcing that any felon whose sentence is complete is eligible to vote, the administration now will mail a notice to that effect to each one. The administration will review each record, but only to confirm that the individual has completed the sentence and any supervised release. McAuliffe will not individually sign the orders or make use of an autopen, but an image of his signature will be printed on each letter, spokesman Brian Coy said." Laura Vozzella, *McAuliffe restores voting rights to 13,000 felons*, WASH. POST (Aug. 22, 2016), goo.gl/wu2mrw.

The Governor has openly declared his resolve to evade the Court's order. The same day that the Court issued the writ, Governor McAuliffe proclaimed that "the Virginia Supreme Court has placed Virginia as an outlier in the struggle for civil and human rights" and announced that he simply "cannot accept" the Court's ruling. Press Release, Governor Terry McAuliffe, *Governor McAuliffe Statement on the Virginia Supreme Court Decision on*

the Restoration of Civil Rights (July 22, 2016), goo.gl/lq9PJG ("July 22 Press Release"). He later denounced the Court's ruling as the "political decision" of a "very political" Court. Facebook, Florida Democratic Party, *Live: The Florida Breakfast* at 20:35 (July 28, 2016), goo.gl/DTn3vg ("Florida Breakfast"); YouTube, Bold Global Media, *VA Governor Terry McAuliffe defends his decision to restore the voting rights of 206k felons* at 00:50 (July 30, 2016), goo.gl/BqLIT1 ("Bold Global Media Interview"). He claimed that the Court issued an "almost unfathomable" decision that "absolutely makes no sense" because the Court was "scared" of the General Assembly. Graham Moomaw, *Gov. Terry McAuliffe says Supreme Court conservatives were 'scared' to buck General Assembly on felon voting*, RICHMOND TIMES-DISPATCH (Aug. 15, 2016), goo.gl/dOdG4n. And he announced that he and the other Respondents will evade the Court's decision prohibiting him from restoring the rights of this "indiscriminately configured class" of over 200,000 felons, stating: "At the end of the day, you've got to do what you've got to do. . . . [B]y two weeks [from now], all 206,000 [felons] will have their rights back." C-SPAN, *Virginia Delegation Breakfast* at 34:58 (July 25, 2016), goo.gl/z8LBkn (Virginia Breakfast").

In announcing last week his new plan to unilaterally re-enfranchise 206,000 felons, Governor McAuliffe again expressed his disdain for this

Court's decision. He claimed that "the Court dismissed the clear text of the Constitution," and instead based its holding solely on "the way things have always been done in the Old Dominion." YouTube, Fox News 10, *FNN: Virginia Governor Reinstates Voting Rights to 13,000 Felons* at 3:55 (Aug. 22, 2016), goo.gl/HpeHkZ. The Governor even suggested that the Court's ruling was comparable to requiring children to attend segregated schools, assigning seats on buses on the basis of race, prohibiting interracial marriage, and imposing a poll tax. *Id*. at 4:15. And most importantly, while claiming to be acting in conformity with this Court's decision, the Governor emphasized that he "remain[s] resolute in [his] commitment," *id.* at 5:05, to override the Constitution's felon disenfranchisement provision by again restoring voting rights to approximately 206,000 felons who have completed their sentences and periods of supervised release, notwithstanding this Court's order prohibiting Respondents from doing just that: "We will proceed with the restoration of civil rights . . . , but let me put this in plain English. We will proceed. I will not stand down and allow discriminatory state laws to destroy the lives and families and destabilize our communities." *Id*. at 5:10.

Governor McAuliffe is entitled to disagree with our Constitution and with this Court's rulings interpreting it, but "[i]t is not for him to set himself above the law and go his own way because he deems the law's requirements

to be unwise or its restraints vexatious. In such manner does a government of laws become a government of men." *Board of Supervisors of Hanover Cty. v. Bazile*, 195 Va. 739, 745 (1954).

Pursuant to Rule 5.4, Petitioners have informed Respondents of the intended filing of this motion. Counsel for Respondents stated that they do not consent to this motion.

STATEMENT OF FACTS

I. This Court Held That Governor McAuliffe Unconstitutionally Suspended the Law When He Restored the Voting Rights of 206,000 Felons.

On April 22, 2016, Governor McAuliffe signed an executive order purporting to restore certain political rights for all 206,000 convicted felons in Virginia who had then completed their prison sentences and supervised release. Governor McAuliffe signed similar *en masse* restoration orders on May 31, 2016, and June 24, 2016.

On May 23, 2016, Petitioners challenged Governor McAuliffe's unprecedented assertion of executive authority by filing in this Court an original petition for writs of mandamus and prohibition. Petitioners argued that the Governor's restoration, done without regard to a felon's individual circumstances, suspended and nullified the Constitution's general rule prohibiting felons from voting.

On July 22, 2016, this Court granted the petition for a writ of mandamus and held that the Constitution's anti-suspension and voter-disqualification provisions preclude the Governor from exercising his clemency power on a categorical basis. The Court held that the text of the Constitution prohibits *en masse* restorations, an interpretation supported by the uninterrupted practice of prior governors who refused to restore rights on a categorical basis. Order at 14–22. The Court further held that it "need not rely solely on the interpretative inference that arises from the uninterrupted disuse of governmental power," because "Governor McAuliffe's assertion of 'absolute' power to issue his executive order runs afoul of the separation-of-powers principle protected by Article I, Section 7 of the Constitution of Virginia." *Id.* at 22 (citation omitted).

The Court highlighted two "modern examples of the kind of regal excesses" that Article I, Section 7—the suspension clause—prohibits: (1) issuing "a single, categorical order restoring voting rights to *all* felons," and (2) issuing "*categorical, absolute pardons to everyone* convicted of [the Governor's] disfavored crime." *Id.* at 29 (second emphasis added). The Court held what history and logic dictate: the Governor may not suspend the law—period—regardless of whether he does so by issuing a single pardon or

hundreds of thousands of "pardons to everyone" subject to his "disfavored" law. *Id.*

The Court explained that the suspension clause inquiry turns on "[t]he practical effect" of the Governor's actions, *id.* at 1, and the practical effect is precisely the same regardless of whether the Governor issues one or over 200,000 restoration orders. The Court held that Respondents may not "rewrite the general rule of law and replace it with a categorical exception" for the indiscriminately configured class of over 200,000 felons. *Id.* at 28.

Finally, the Court held that the Governor may not restore a felon's rights "without any specific request by individuals seeking such relief." *Id.* at 27. The requirement that clemency be extended only to those who seek it ensures that the exercise of the Executive's power is based upon consideration of the merits of each individual felon.

The Court issued a writ of mandamus requiring Respondents to comply with their "prospective duty to ensure that only qualified voters are registered to vote." *Id.* at 31. The Court held that Respondents' statutory duties required them to refuse to register, and to cancel the registration of, felons "whose political rights were purportedly restored by Executive Orders issued on April 22, 2016, May 31, 2016, and June 24, 2016." *Id.* at 32.

II. Respondents Have Defied This Court's Decision and Restored Once Again the Rights of All Felons Who Were the Subject of the Court's Mandamus Order.

The same day that this Court ruled that Governor McAuliffe may not suspend the voter-disenfranchisement provision of the Constitution for all 206,000 felons, Governor McAuliffe stated that he "cannot accept" the Court's decision, and he vowed to "sign [restoration] orders until I have completed restoration for all 200,000 Virginians." July 22 Press Release. In the days that followed, Governor McAuliffe repeatedly reaffirmed his commitment to restoring voting rights to all felons who have completed their terms of incarceration and supervised release, notwithstanding the Court's order prohibiting such a broad-based restoration as an unconstitutional suspension of Article II, Section 1 of the Constitution. Governor McAuliffe stated:

> [O]n Friday you saw a 4 to 3 decision. Sad. Decision reminded me of *Bush v. Gore*. A tangled thing. It is clear in this Constitution that I have the rights. And they came up with this.
>
> But you know what? At the end of the day you've got to do what you got to do.
>
> And let me tell you this. 13,000 folks have already registered. Let me tell you this: by the end of this week, I will have restored the rights of all 13,000 of those individuals. Boom!
>
> And by two weeks, all 206,000 will have their rights back folks.

Virginia Breakfast at 34:40.

In other remarks, Governor McAuliffe similarly declared:

> As you saw the other day, the Supreme Court, very political, 4–3—let me say, Florida, it reminded me of *Bush v. Gore* again—a very conservative Court, said the Governor doesn't have the authority to do this, even though the Constitution says, "the governor has the right to restore his rights." I don't know how complicated that is, but it is what it is.
>
> So I've taken the step myself folks, and I'll be back tomorrow in Virginia, and I will begin the process, I will individually sign all of these rights to get these peoples' rights back, and we'll get all 206,000 of these.

Florida Breakfast at 20:35. *See also* Bold Global Media Interview at 0:50 ("Unfortunately it was a political decision by the Court, 4–3 decision, so I have said I will take actions myself. They've said I can't do them *en masse*, I have to do them individually, so I'm beginning the process expeditiously to sign 206,000 orders myself, individually, to get these people their rights."); Graham Moomaw, *Gov. Terry McAuliffe says Supreme Court conservatives were 'scared' to buck General Assembly on felon voting*, RICHMOND TIMES-DISPATCH (Aug. 15, 2016), goo.gl/dOdG4n (Gov. McAuliffe stating that the Court was "scared" and issued an "almost unfathomable" decision).

Following the Court's decision, the Secretary of the Commonwealth "led a thorough review of the individuals who had their voter registration canceled" pursuant to this Court's order, but the sole purpose of the review was "to determine whether each individual meets the Governor's standards

for restoration of rights . . . .” Aug. 22 Memorandum. The Governor’s August 22 Memorandum pledged to restore the rights of precisely the same indiscriminately configured class of approximately 206,000 convicted felons covered by his April, May, and June restoration orders: “individuals who have been convicted of a felony and are no longer incarcerated or under active supervision by the Department of Corrections (DOC) or other state agency.” *Id*.; *compare* Commonwealth of Virginia Executive Department, Order for the Restoration of Rights at 2, Apr. 22, 2016, goo.gl/hc4CAl (purporting to restore civil rights to “all those individuals who have, as of this 22nd day of April 2016, (1) completed their sentences of incarceration for any and all felony convictions; and (2) completed their sentences of supervised release, including probation and parole for any and all felony convictions”).

On August 15, Governor McAuliffe approved the restoration of voting rights for the approximately 13,000 felons this Court had ordered removed from the rolls. Aug. 22 Memorandum.[1] Respondents printed individual restoration orders with a replica of the Governor’s signature under the seal of the Commonwealth, and mailed them to those individuals on August 19, along with a voter registration form. *Id*. Respondents then removed those

[1] The Governor’s announcement noted that “[c]ertain individual cases remain under review,” presumably because Respondents have not yet confirmed that they satisfy the Governor’s criteria for restoration. *Id*.

individuals from the prohibited voter lists maintained by the Secretary of the Commonwealth and the Department of Elections. *Id*.

Respondents' August 22 Memorandum described the process for identifying and re-enfranchising the remaining approximately 200,000 individuals who satisfy the criteria first announced by the Governor in his invalidated April 22 executive order. The Secretary of the Commonwealth "will conduct a thorough review of each of these individuals, checking their records" at various state agencies, but once again the sole purpose of the review will be "to ensure that the individual meets the Governor's standards for restoration of rights." *Id.* The Secretary will then recommend that "the Governor . . . restore the rights of individuals who have been determined to meet his standards," and the Governor will make the final decision to restore the individual's rights. The Secretary will then "issue and mail personalized restoration orders." *Id*.

The August 22 Memorandum further states that "[i]n addition to confirming completion of incarceration and supervised release, the [Secretary of the Commonwealth] considers factors such as active warrants, pre-trial holds, and other concerns that may be flagged by law enforcement." *Id*. But it is unclear what impact, if any, such "concerns" may have on the ultimate decision because the Memorandum states that such individuals will

merely "be held from our streamlined consideration process for further review." *Id*.

In any event, it is clear that consideration of these factors will not materially alter the scope of the suspension of Article II, Section 1, effected by the Governor's new process, for the Memorandum expressly states that "[t]he difficulty of this administrative undertaking is not an excuse . . . for leaving hundreds of thousands of people disenfranchised." *Id*. As Governor McAuliffe has repeatedly stated since this Court ruled last month, the purpose, scope, and effect of his new process is precisely the same as the purpose, scope, and effect of the April, May, and June restoration orders struck down by this Court: to override the command of Article II, Section 1, by restoring voting rights to over 200,000 convicted felons who have completed their prison sentences and periods of supervised release.

ARGUMENT

I. Respondents Are Defying the Writ By Restoring the Rights of the Same Class of Over 200,000 Felons Who Were the Subjects of the Governor's Prior Unconstitutional Restoration Orders.

After this Court issued its mandamus order, Respondents cancelled the registration of approximately 13,000 felons who had registered to vote pursuant to the Governor's invalid restoration orders of April, May, and June 2016. But this token compliance cannot mask the fact that they are defying

this Court's decision by issuing and giving effect to 206,000 new restoration orders that have precisely the same purpose, precisely the same scope, precisely the same effect, and accomplish precisely the same unconstitutional suspension of Virginia's felon-disenfranchisement law.

The Court's suspension clause decision did not turn on the form or number of the Governor's restoration orders. Instead, the Court looked to "[t]he practical effect" of the Governor's actions. Order at 1. The Court held that the felon-disenfranchisement provision of Article II, Section 1 embodies a general rule against felon voting, and that the Governor's "express power to make exceptions to a general rule of law does not confer an implied power to change the general rule itself." *Id.* at 28. The Governor's April, May, and June restoration orders, the Court held, were therefore unconstitutional because they had the effect of "rewrit[ing] the general rule of law and replac[ing] it with a categorical exception." *Id.*

"The practical effect" of Governor McAuliffe's August 22 decision to issue over 200,000 individual restoration orders is precisely the same: his newly announced process will effectively suspend Virginia's general constitutional prohibition against felon voting for over 200,000 felons. In both scenarios, the Governor has "effectively reframe[d] Article II, Section 1 to

say" what he wants it to say rather than what the People of Virginia actually inscribed in their Constitution. *Id.* at 1.

The Court identified two characteristics that typically accompany the unlawful suspension of the law. *See id.* at 26. *First*, the Court held that "[t]he most obvious" characteristic of an illegal suspension of the law is present "when an executive sets aside a generally applicable rule of law based solely upon his disagreement with it." *Id.* Governor McAuliffe has left no doubt that his decision to issue 206,000 individual restoration orders, no less than his invalid *en masse* restoration orders, stems from his "disagreement with the voter-disqualification provision in Article II, Section 1 of the Constitution of Virginia." *Id.*

Indeed, the very day of the Court's decision, Governor McAuliffe announced that he would restore the voting rights to all 206,000 felons covered by the invalidated April, May, and June executive orders because he disagrees with the felon-disenfranchisement requirement of Article II, Section 1 of the Constitution. And on August 22, the Governor reaffirmed his strong opposition to the felon disenfranchisement provision in the course of announcing his renewed effort to negate it: "While Virginians continue to wait for the General Assembly to pass a constitutional amendment to permanently repeal this policy, the Governor is committed to doing

everything in his power to restore the rights of Virginians who have completed their sentences." Aug. 22 Memorandum. Simply put, because the Governor believes that, notwithstanding the felon disenfranchisement requirement of Article II, Section 1, Virginia should automatically restore the voting rights of all felons who have completed their sentences, he announced that he will issue over 200,000 executive orders that unilaterally suspend that constitutional provision.

Second, the Court held that the other characteristic of an unlawful suspension of the law is its "expansive scope and generality." Order at 26. The Court acknowledged that the line between an unconstitutional suspension and a lawful exercise of the dispensation power granted by the clemency provisions is "elusive," but the Court held that Governor McAuliffe's restoration orders crossed the line because he sought to "supersede [the felon-disenfranchisement rule] for an indiscriminately configured class of approximately 206,000 convicted felons . . . ." *Id.* at 27. There can be no question that the Governor's current effort crosses the same line because it has the same purpose, scope, and effect as the restoration orders that this Court struck down.

The Court provided two "modern examples of the kind of regal excesses" that the anti-suspension provision prohibits. *Id.* at 29. First, the

Court held that it would be unlawful for a Governor "to issue a single, categorical order restoring voting rights to *all* felons." *Id*. Second, and most relevant here, the Court held that it would be equally unlawful for a Governor to "suspend unilaterally the enforcement of any criminal law . . . based solely on his personal disagreement with it, simply by issuing *categorical, absolute pardons to everyone* convicted of his disfavored crime." *Id.* (emphasis added). In other words, "a single, categorical order" and thousands of individual "pardons to everyone" are *equally unconstitutional*. *Id.*

The Court's historical analysis of the suspension clause—that "essential pillar of a constitutional republic," *id.* at 22—also rebuts Respondents' efforts to circumvent it. After a detailed survey of the English origins of the suspension clause, the Court explained that by the time of the American Revolution, Englishmen recognized that "a suspending power is not, cannot be a legal prerogative, *in any circumstances*, *or under any pretense whatsoever*, because the tendency of the exercise of such a prerogative is destructive to the Constitution." *Id.* at 25 (emphasis added) (quoting PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 73 (2014)). This "view was shared by many legal commentators" who expressly declined to draw a distinction between suspensions accomplished through one or thousands of separate orders. *Id.* at 26.

After endorsing the views of these early commentators on the suspension power, the Court held that whether an executive action unconstitutionally suspends the law depends upon "the extent to which the law is abrogated," *not* "the quality of the prerogative exercised." *Id.* at 27 (quoting 6 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 217 (1924)). The Court's historical analysis thus makes clear that the Constitution prohibits all unilateral executive suspensions of the law, including one accomplished by the issuance of hundreds of thousands of individual clemency orders.

II. Respondents Have Defied the Writ By Restoring the Rights of Felons Who Have Not Sought To Have Their Rights Restored.

The Court held that the Governor's April, May, and June restoration orders were ultra vires not only because they were issued "without any regard for [the felons'] individual circumstances," but also because they were issued "*without any specific request by individuals seeking such relief*." Order at 27 (emphasis added); *see also id.* at 2, 15 (emphasizing the need for an application). The Court recognized that the requirement of a request ensures that the Governor is actually considering the "individual circumstances" of each felon, as the Constitution requires. *See, e.g.*, *id.* at 14, 18, 21, 27 (emphasizing the requirement that the Governor consider the "individual" or "particular" circumstances of each felon subject to executive clemency). The Court emphasized that previous Governors have issued restoration orders

"to specific felons who requested that their civil rights be restored," *id.* at 14, and that Governor Kaine expressly recognized that the clemency power may only be exercised "in particular cases to named individuals for whom a specific grant of executive clemency is sought," *id.* at 15 (quoting JA at 4). *See also id.* at 2 (the Governor may not grant clemency "to a class of unnamed felons without regard for the nature of the crimes or any other individual circumstances *relevant to the request*" (emphasis added)).

Respondents have again violated this requirement. They have issued and are giving effect to nearly 13,000 individual restoration orders "without any specific request by [those] individuals seeking such relief," and they are in the process of issuing hundreds of thousands more without any application requirement. *Id.* at 27. In so acting, Respondents are not complying with their "prospective duty to ensure that only qualified voters are registered to vote." *Id.* at 31.

* * * * *

As this Court noted in its mandamus decision, there is no "single, precisely calibrated definition of what constitutes an unlawful executive suspension of laws," nor is it always clear when a gubernatorial action crosses "that forbidden line" between lawful clemency and unlawful suspension. Order at 26, 28. But this contempt petition does not present a

difficult question of line drawing. This case is not difficult because it is the *same case* that the Court just decided: the Governor lacks authority to restore the rights of "an indiscriminately configured class of approximately 206,000 convicted felons, without any regard for their individual circumstances and without any specific request by individuals seeking such relief." *Id.* at 27.

III. Respondents' Sham Compliance with the Court's Order Invalidating the Governor's April, May, and June Executive Orders Does Not Preclude a Contempt Citation.

Respondents may not excuse their defiance of this Court's mandamus order by claiming that they are not enforcing the April, May, and June orders that are specifically mentioned in the Court's opinion, but are instead implementing the Governor's newly announced process, for that process has precisely the same purpose, scope, and effect as the invalidated orders: to suspend Article II, Section 1 by restoring political rights to over 200,000 convicted felons.

The Court commanded Respondents to carry out their "prospective duty to ensure that only qualified voters are registered to vote." Order at 31. The Court made clear that compliance with this duty requires Respondents to refrain from registering voters whose rights were restored by an unconstitutional suspension of the felon-disenfranchisement law. To this

end, the Court commanded that Respondents "shall" comply with their many statutory duties that impose that prospective duty upon them. Order at 31–32.

To be sure, the Court *also* made clear that compliance with these statutory duties requires Respondents to refuse to enforce the April, May, and June restoration orders. But Respondents' obligations are plainly not limited to negating those particular executive orders. To take an extreme example, Respondents could not, without violating the Court's order, issue and implement a new executive order, dated September 1, that repeated verbatim the text of the April 22 order. Yet both the purpose and the effect of Respondents' actions are to reinstitute the April 22 order.

This Court's prior decisions confirm that Respondents may not so easily evade the writ. In *Board of Supervisors of Hanover County v. Bazile*, 195 Va. 739 (1954), the Court held a respondent in contempt in a situation materially indistinguishable from this case. *Bazile* concerned George Weems, the Treasurer of Hanover County, who refused to conduct his government business in the county seat. In earlier proceedings, the Court issued a writ of mandamus against Weems "commanding him to remove the records, equipment and furnishings of the treasurer's office from the town of Ashland [where Weems was conducting business] to the space assigned

him at the county seat of Hanover County, Virginia, where he shall maintain the Treasurer's Office . . . ." *Id.* at 742.

Weems responded to the Court's mandamus order by "establish[ing] what may be termed a token treasurer's office at the county seat," but he nonetheless "continued to maintain the real treasurer's office at Ashland for all practical purposes as it was before the mandamus was issued." *Id.* at 743 (emphasis added). Weems argued that he was in full compliance with the Court's writ because he had initially moved all of the records and equipment to the county seat, and because he still retained certain supplies and documents there. *Id.* at 744. But the Court flatly rejected this argument and sanctioned Weems. Notwithstanding the respondent's "token" compliance with the Court's order, the Court held that "[t]he mandamus so issued has not been obeyed in letter or in spirit. On the contrary, the record before us shows a deliberate and studied purpose to evade the requirements of the order of this court." *Id.* at 742–43.

Just as Weems did not comply with the Court's mandamus order when he established a Potemkin treasurer's office in the county seat, Respondents have not complied with this Court's order by revoking the April, May, and June executive orders and then reissuing and implementing new orders that have the same purpose, scope, and effect. As this Court unanimously

recognized in *Bazile*, Respondents' "token" compliance with the Court's order is irrelevant because their actions both before and after the Court's mandamus order are, "for all practical purposes," identical. *Id.* at 743. By "evad[ing] the requirements of the order of this court," Respondents have violated their "duty . . . to obey the law as declared by this court." *Id.* at 743, 745.

Other decisions of this Court likewise confirm that parties may not evade a Court order by adopting a strained reading that entirely vitiates the substance of the Court's decree. In *French v. Pobst*, for example, this Court held that a government official who is ordered to pay money improperly in his possession "cannot escape his liability by showing that he does not have the identical money that came into his hands." 203 Va. 704, 710 (1962). Just as the commissioner in *French* could not evade the Court's order by taking an implausibly narrow reading of that order, Respondents cannot evade liability by claiming that the Court's decision requires no more than that they nullify the April, May, and June orders. This Court should thus reject Respondents' attempt to read this Court's order in a manner "that is so limited as to be ineffective in preventing the harm contemplated by the ordinance." *Tran v. Gwinn*, 262 Va. 572, 584–85 (2001).

Courts outside Virginia also routinely hold that parties may be held in

contempt when they evade a court order by instituting under a new name the same course of conduct that the court has enjoined. In one leading decision, the Supreme Court of the United States held that defendants could be found in contempt when they essentially re-adopted the labor practices that the Court had earlier enjoined. *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 192 (1949). The *McComb* Court held that the defendants could not avoid sanctions by claiming "that they have an immunity from civil contempt because the plan or scheme which they adopted was not specifically enjoined." *Id.* To permit such conduct, the Court held, "would give tremendous impetus to [a] program of experimentation with disobedience of the law . . . ." *Id.*

IV. This Court May Enforce Its Mandamus Order Through Contempt Proceedings.

Virginia law provides that "obedience to the writ [of mandamus] may be enforced by process of contempt." CODE § 8.01-652; *see also id.* § 18.2-456. In addition to this statutory authority, "[t]he power of courts to punish for contempt is inherent and an important and necessary arm in the proper discharge of the functions committed to them by fundamental law." *Nicholas v. Commonwealth*, 186 Va. 315, 321 (1947).

Consistent with this authority, this Court has recognized on numerous occasions that it may enforce its mandamus orders through contempt

proceedings. *See, e.g.*, *Bazile*, 195 Va. at 745; *Rinehart & Dennis Co. v. McArthur*, 123 Va. 556, 96 S.E. 829, 831 (1918); *Cromwell v. Cromwell*, 95 Va. 254, 28 S.E. 1023, 1023 (1897). And, of course, "the fact that the [mandamus] decree was final did not render the court powerless to enforce it by contempt proceedings." *Rinehart & Dennis*, 96 S.E. at 832; *see also Bazile*, 195 Va. at 740 (considering contempt proceeding brought 14 months after the Court issued the writ of mandamus).

CONCLUSION

The Court should order Respondents to show cause why they should not be held in contempt for violating the writ of mandamus issued in this case on July 22, 2016. In the alternative, the Court should enter an order enforcing its prior judgment and prohibiting Respondents from registering any of the felons whose rights were purportedly restored by the orders issued, without application from the felon, under the process announced by the Governor on August 22. *See Riggs v. Johnson Cty.*, 73 U.S. (6 Wall.) 166, 187 (1867) ("[I]f the power is conferred to render the judgment or enter the decree, it also includes the power to issue proper process to enforce such judgment or decree."); *cf. Russell Cty. Dep't of Soc. Servs. v. O'Quinn*, 259 Va. 139, 142 (2000) (courts have authority "to enter necessary orders to implement or enforce a declaratory judgment entered by the court"). At a bare minimum,

the Court should authorize Petitioners to conduct discovery to determine in detail the purpose, scope, and effect of Respondents' conduct in response to this Court's order. *See Bazile*, 195 Va. at 743 (describing the extensive discovery conducted to determine whether Respondent had contemptuously violated this Court's original writ of mandamus); *see also* Order at 43 (Mims, J., dissenting) (Rule 5:7(d) provides "a mechanism for taking evidence" in mandamus proceedings).

Dated: August 31, 2016

Respectfully Submitted,

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EXHIBIT 1

For Immediate Release: August 22, 2016
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Governor McAuliffe Announces Process for Case-by-Case Restoration of Former-Felons' Civil Rights

~Governor restores rights of nearly 13,000 Virginians who had previously registered to vote~

RICHMOND – Governor Terry McAuliffe today announced that he and his team have begun restoring the civil rights of former Virginia felons in compliance with an order by the Virginia Supreme Court.

Speaking at a press conference at the Virginia Civil Rights Memorial in Richmond, the Governor announced that he has already restored the rights of nearly 13,000 Virginians who had previously registered to vote before the court's ruling stripped them of their rights.

The Governor also announced the detailed process he will use to evaluate the cases of individuals who may qualify to have their rights restored based on the objective criteria he has established.

"Restoring the rights of Virginians who have served their time and live, work and pay taxes in our communities is one of the pressing civil rights issues of our day," **said Governor McAuliffe**. "I have met these men and women and know how sincerely they want to contribute to our society as full citizens again.

"The process I have announced today fully complies with the Virginia Supreme Court's order and the precedent of governors before me. It also reflects the clear authority the Governor possesses to use his own discretion to restore rights of people who have served their time.

"The history of civil rights in Virginia has at times been a difficult one. Opponents have often succeeded in delaying or undermining efforts to move our Commonwealth forward – but in the end progress has always prevailed. This time will be no different.

"It is my hope that the approach we announced today marks the end of the partisan battles that have been waged over this issue so that every Virginian leader can play a role in welcoming these individuals back to society and building a Commonwealth of greater justice, equality and opportunity for every family."

Today the administration launched a new web portal (www.commonwealth.virginia.gov/ror (http://www.commonwealth.virginia.gov/ror)) for Virginians to access more information about the process and how it impacts them.

The McAuliffe administration also shared the following memo with Commonwealth's Attorneys, members of the Virginia General Assembly and local elections officials across the Commonwealth. That memo is below:

Governor McAuliffe's Restoration of Rights Policy

August 22, 2016

Restoring the rights of individuals who have served their time and reentered society is the right thing to do. Virginia's felon disenfranchisement policy is rooted in a tragic history of voter suppression and marginalization of minorities, and it needs to be overturned. While Virginians continue to wait for the General Assembly to pass a constitutional amendment to permanently repeal this policy, the Governor is committed to doing everything in his power to restore the rights of Virginians who have completed their sentences.

The Constitution of Virginia grants the Governor the sole authority to restore the rights of individuals who have been convicted of a felony. While it is our position that the Governor's April 22nd action was clearly constitutional by any reasonable standard, he will proceed with individual restorations in accordance with the Virginia Supreme Court's order and the precedent of governors before him.

Today, the Governor is announcing next steps to proceed with individually restoring the rights of persons who have served their time and completed supervised release. This process is fair and transparent and fully complies with the restrictions outlined in the July 22nd Supreme Court decision. These actions stem from Governor McAuliffe's belief in the power of second chances and his determination that our Commonwealth will no longer treat these individuals like second class citizens.

It is the Governor's hope that this will be the last phase of this battle over the civil rights of these individuals, and that opponents of these actions will recognize his clear authority as well as the morality behind it. As we have seen, there are some in our society who believe people who commit felonies should lose their rights forever, despite having served the sentence that a judge and jury imposed for their crime. And there are others who believe a subjective evaluation of the severity of a person's crime should determine whether that individual is worthy to have his or her rights restored. As his actions demonstrate, Governor McAuliffe has faith in our criminal justice system and its ability to impose different sentences on different individuals in relation to the particular nature and circumstances of their offenses. After offenders serve those sentences, he believes they should have equal access under the law to have their rights restored. If a person is judged to be safe to live in the community, he or she should have a full voice in its governance.

Any action of this size and historic nature is difficult to perform without some administrative

error. As the information below demonstrates, identifying these individuals (some of whom have been disenfranchised for decades) and restoring their rights is a significant undertaking of numerous state agencies that maintain information in different ways. The process we designed includes a multi-step review to ensure that the individuals being considered for restoration fully meet the Governor's criteria. However, it is possible that there will be discrepancies from time to time, and we will work to fix them as soon as they are identified. The difficulty of this administrative undertaking is not an excuse, however, for leaving hundreds of thousands of people disenfranchised.

The Governor's process moving forward is outlined below.

STEP 1: Re-restoring the rights of individuals who had their voter registration canceled as a result of the Virginia Supreme Court's decision:

- Following the July 22nd Supreme Court decision, the Department of Elections and Secretary of the Commonwealth (SOC) quickly complied with the Court's order for the Secretary of the Commonwealth to delete from the records any individuals who had their rights restored under these orders, and for the Department of Elections to cancel the voter registration of any individual whose rights were restored under these orders. All individuals who registered to vote pursuant to Governor McAuliffe's April 22, May 31 and June 24 orders were mailed a cancellation notice from the Department of Elections.

- Since then, the SOC led a thorough review of the individuals who had their voter registration canceled to determine whether each individual meets the Governor's standards for restoration of rights and provided a recommendation to the Governor.

- On August 15, Governor McAuliffe approved the restoration of rights of nearly 13,000 people. Certain individual cases remain under review.

- Individual restoration orders were printed with the Governor's signature under the Seal of the Commonwealth and mailed on Friday, August 19, to those newly restored individuals.

- Individuals whose rights were restored on or after August 15 have been updated in the SOC's database and communicated to the Department of Elections to remove those individuals from the prohibited voter list.

- SOC will release the names of newly restored individuals monthly. The list will be made available by request. The full list will also be included in Senate Document 2 (SD2) as it has been historically.

STEP 2: Restoring the rights of other qualified individuals.

- SOC is giving priority consideration to individuals who request restoration of their civil rights. Those wishing to expedite restoration of their own rights may contact the SOC through the website www.commonwealth.virginia.gov/ror (http://www.commonwealth.virginia.gov/ror).

- In addition, the Secretary of the Commonwealth's office has identified individuals who may meet the Governor's standards for restoration: individuals who have been convicted of a felony and are no longer incarcerated or under active supervision by the Department of Corrections (DOC) or other state agency.

- Prioritizing by date since release from supervision and starting with those who have been released from supervision the longest, SOC will conduct a thorough review of each of these individuals, checking their records with Virginia State Police, DOC, State Compensation Board, Department of Juvenile Justice, Department of Criminal Justice Service, and Department of Behavioral Health and Developmental Services to ensure the individual meets the Governor's standards for restoration of rights.\

- In addition to confirming completion of incarceration and supervised release, the SOC considers factors such as active warrants, pre-trial hold, and other concerns that may be flagged by law enforcement. Individuals in these circumstances or any with concerns about the accuracy of information analyzed from law enforcement will be held from our streamlined consideration process for further review.

- Upon completion of its review, SOC will make recommendations to the Governor to restore the rights of individuals who have been determined to meet his standards.\

- The Governor will review SOC's analysis of each individual's record and will make the final decision on proposed candidates for restoration of rights.

- Upon the Governor's approval, SOC will issue and mail personalized restoration orders.

- SOC will release the names of newly restored individuals monthly. The list will be made available by request. The full list will also be included in Senate Document 2 (SD2) as it has been historically.

If you know of individuals who wish to have their rights restored, please have them submit a request on the Secretary of the Commonwealth's website www.commonwealth.virginia.gov/ror (http://www.commonwealth.virginia.gov/ror). Individuals without internet access can call the SOC at 804-692-0104 or mail-in a contact form.

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GOVERNOR TERRY MCAULIFFE

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The Administration (/the-administration/)

Constituent Services (/constituent-services/)

Policy Priorities (/policy-priorities/)

Newsroom (/newsroom/)

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Integrity Commission (/integrity-commission/)

AT YOUR SERVICE

ConnectVA (https://www.connectva.org)

eVA website (https://logi.epro.cgipdc.com/Public/rdPage.aspx?rdReport=Public.PublicLandingPage&rdRnd=60061)

Expenditures (http://datapoint.apa.virginia.gov/exp/exp_checkbook_agency.cfm?AGYCODE=121)

State Agencies (https://www.virginia.gov/government/state-employees/agency-directory)

Cities & Counties (http://www.virginia.org/citiestownsandcountiesrelatedlinks/)

Elected Officials (http://www.virginia.gov/government)

SITE RESOURCES

Website Feedback (https://governor.virginia.gov/email-the-webmaster/)

Web Privacy Policy (/web-policy)

Accessibility (http://www.w3.org/WAI/WCAG1A-Conformance)

Site Map (/site-map/)

Unsubscribe from email lists (//governor.virginia.gov/unsubscribe)

STAY CONNECTED

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Common Ground for Virginia
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804-786-2211

Email the Governor (https://governor.virginia.gov/constituent-services/Communicating-with-the-governors-office)

CERTIFICATE OF SERVICE

I hereby certify that on the 31st of August, 2016, I emailed the foregoing to the Clerk of the Court and to the following counsel of record:

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On that same day, I also mailed an original and ten copies of the foregoing via overnight Federal Express delivery to the Clerk of the Court.

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