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.

RESPONSE TO PETITIONERS' MOTION FOR AN ORDER TO SHOW CAUSE

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September 12, 2016

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INTRODUCTION AND SUMMARY

This Court has consistently held for more than a century that the extreme sanction of contempt is not available to enforce a court's opinion declaring the parties' rights, but only to coerce compliance with a court's express commands or to punish a party for disobeying those commands. Inexplicably, Petitioners do not mention that rule in asking the Court to take the unprecedented step of holding the Governor of Virginia and senior Executive Branch officers in contempt of the Court's declaratory rulings.

The Governor's recent restoration-of-rights orders were issued on an individualized basis after a case-by-case review process that comports with the Court's opinion in this case and is similar to the process used by Governor McDonnell. But particularly given that contempt lies only for violating a court's express commands—not its declaratory statements—Petitioners' motion is truly baseless. The Governor himself was not commanded to take any action and, therefore, may not be held in contempt for violating any such command. And the other Respondents did exactly what the Court ordered them to do: cancel voter registrations of persons claiming the right to vote under the three blanket orders that the Court invalidated, correct applicable databases, return affected persons to the prohibited-voter list, and require general registrars not to register persons

claiming eligibility to vote under those invalidated orders. Those Respondents complied with the Court's commands weeks before the August 25 deadline. Accordingly, Petitioners' contempt request is neither well-grounded in fact nor supported in law.

What Petitioners really want is to extend the declaratory rulings in *Howell* to invalidate new restoration-of-rights orders issued by the Governor in spite of the individualized, case-by-case review process he has followed. Petitioners' claim is procedurally barred because the Court's judgment has become final and cannot be altered or enlarged to address new claims that were neither raised nor litigated before. And even if the Court could reach the merits of those new claims, they have no merit.

The Governor did not use an "autopen" to sign 206,000 restoration orders for everyone covered by the invalidated blanket orders. Even if the Governor had done that, it would not have violated the holding in *Howell*, let alone qualify for contempt. For as Justice Powell explained: "the majority acknowledge[d] that the Governor could use many individual orders to achieve the mass restoration of rights he sought to accomplish under the Executive Order."[1] Yet the Governor chose a different course.

Following the July 22 ruling, the Governor took several weeks to

[1] *Howell v. McAuliffe*, slip op. at 50 (Powell, J., dissenting) ["Op."].

determine the best approach, announcing a lengthy, multi-agency evaluation and individualized case-by-case review process. The Governor first considered those individuals who had previously registered to vote in reliance on the three blanket orders that the Court had invalidated. The Governor individually restored rights to 12,521 of those persons, comprising most but not all of the people who had previously registered. On September 2, the Governor removed the political disabilities of an additional 6,957 persons, all of whom had requested to have their rights restored, and he did so, again, through individualized orders after a case-by-case review process. The Governor's case-by-case review process continues, but he has not—contrary to Petitioners' assertion—raced to restore the rights of 206,000 felons before the November 8 election.

The Governor's individualized, case-by-case review process comports with *Howell*. While thousands of the individuals covered by the Governor's recent, individualized orders actually requested to have their rights restored, Petitioners are wrong that the Constitution of Virginia requires people to apply as a precondition of clemency. Petitioners' other suggestions for limits on the Governor's clemency power likewise have no textual basis in the Constitution. Indeed, the absence of any limiting principle shows that Petitioners' theories are unworkable. And Petitioners'

request to invalidate new voter registrations would also lead to electoral chaos in the weeks remaining before the general election.

Because their suggestion that the Respondents are in contempt is meritless, Petitioners' show-cause motion should be denied.

STATEMENT OF FACTS

This Court's July 22 opinion declared invalid the Governor's blanket restoration-of-rights orders dated April 22, May 31, June 24, 2016.[2] Although Petitioners sought mandamus against the Governor,[3] the Court did not order the Governor to take any particular action or to refrain from taking any action. Instead, at pages 31-32 of the majority opinion, in five numbered paragraphs, the Court commanded the other Respondents to take very specific steps. The Court ordered the Department of Elections and the Commissioner of Elections, Edgardo Cortés: to cancel the registrations of all felons who had registered to vote under the three invalidated blanket orders; to direct general registrars to refuse to register persons based on those blanket orders; and to return the names of such persons to the prohibited-voter list.[4] The Court ordered the State Board of

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[2] Op. at 30.

[3] Pet. at 4 ¶ (f); *see* Op. at 5.

[4] Op. at 31-32 (¶¶ 1-3).

Elections and its members to institute procedures to ensure that the Department and the Commissioner carried out those directives.[5] And the Court ordered the Secretary of the Commonwealth, Kelly Thomasson, to correct her official records to show that the persons covered by the three blanket orders did not have their rights restored.[6]

Those Respondents faithfully complied, completing their work weeks before the August 25 deadline. Commissioner Cortés details in his declaration (Exhibit A) how he and the Department complied. On August 10, 2016, the State Board of Elections approved a resolution confirming that the Commissioner and the Department had complied and requiring the Commissioner to continue to apprise the Board of any issues that arise with regard to implementing the Court's order. (Exhibit B.) And Secretary Thomasson details in her declaration (Exhibit C) how and when her office complied.

Under Rule 1:1, the 21-day period for the Court to alter or amend its judgment expired on Monday August 15, 2016 (21 days after the Court issued an amended opinion on July 25). The mandate, containing the five numbered paragraphs described above, issued the next day, on Tuesday,

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[5] *Id.* at 32 (¶ 4).

[6] *Id.* (¶ 5).

August 16, 2016.

Petitioners cite various inadmissible newspaper stories and YouTube videos purporting to recount the Governor's criticisms of the July 22 ruling immediately after it issued, and in the days that followed.[7] They argue that the Governor said that, within two weeks of the July 22 ruling, he would use an "autopen" to sign individualized restoration-of-rights orders for each and every person covered by his invalidated blanket orders.

But that is not what happened.

On August 22, the Governor described the individualized, case-by-case-review process that would be followed to determine whether to remove political disabilities. To be eligible for consideration, a felon must have completed the term of his sentence and any supervised release. The Secretary of the Commonwealth has been tasked with recommending eligible candidates, overseeing a multi-agency review process to vet them, providing information about them and their offenses to the Governor, and making a recommendation for action.

The Governor prioritized for initial review those persons who had actually registered in reliance on his prior, invalidated orders. He next

[7] Respondents object to Petitioners' unauthenticated hearsay submissions. Va. Sup. Ct. R. 2:802, 2:901.

prioritized for review those who have requested to have their rights restored, and those who have waited the longest since completing their sentence.[8]

The Governor said that, on August 15, he had individually restored the rights of 12,521 people who had previously registered to vote under the three invalidated blanket orders. More than 2,800 of those individuals had requested to have their rights restored. The Governor declined to restore the rights of more than 300 persons, in the initial group he considered, who were the subject of active warrants or awaiting trial on a criminal offense.[9]

On September 2, 2016, also after following the case-by-case review process described above, the Governor issued individualized orders removing the disabilities of another 6,957 persons.[10] All of those individuals had requested to have their political disabilities removed.[11]

The review process is ongoing and will continue well into 2017.[12] The Secretary, upon request, will release the names monthly of all persons

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[8] Ex. C, Thomasson Decl. ¶¶ 8-10, 13, 15.

[9] *Id*. ¶¶ 8, 10-11.

[10] *Id.* ¶ 14.

[11] *Id.*

[12] *Id*. ¶ 15.

whose rights are restored, and those restoration actions will also be submitted to the General Assembly in the Governor's annual clemency report.[13]

ARGUMENT

I. Petitioners' motion for a show-cause order should be denied because no Respondent has violated the mandamus order.

We assume that Petitioners are advocating that Respondents be held in civil contempt, not criminal contempt.[14] Even limited to civil contempt, Petitioners' motion has no merit.

A. A party may not be held in contempt except for violating a court's express commands.

This Court has consistently held that a party may be found in

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[13] *Id*.

[14] Civil contempt is used to coerce compliance with a court's commands; criminal contempt is used to punish a person for intentionally disobeying a court's commands. *See, e.g.*, *Leisge v. Leisge*, 224 Va. 303, 307, 296 S.E.2d 538, 540 (1982). Proceedings to impose criminal contempt for conduct occurring outside the presence of the Court require a plenary hearing, prosecuted by the appropriate Commonwealth's Attorney, with the full panoply of due process rights afforded each defendant, including criminal-defense counsel. *See, e.g.*, *Scialdone v. Commonwealth*, 279 Va. 422, 442-46, 689 S.E.2d 716, 727-29 (2010); *Eddens v. Eddens*, 188 Va. 511, 522 n.2, 50 S.E.2d 397, 403 n.2 (1948) ("[C]riminal contempt proceedings are prosecuted in the name of the Commonwealth against the contemnor."); Va. Code Ann. § 18.2-456 (2014); *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 833-34 (1994) (discussing federal due-process requirements for criminal contempt involving "out-of-court disobedience to complex injunctions").

contempt only for violating a court's *express commands*, not for taking action allegedly inconsistent with a court's *declaratory rulings*. In 1962, in *French v. Pobst*,[15] the Court noted a split of authorities in other jurisdictions but made clear that, in Virginia, only the violation of a court's express command could support a contempt finding:

> There is a conflict of authority on the question whether a decree or order which merely declares the rights of the parties without an express command or prohibition may be the basis of a contempt proceeding. 12 Am. Jur., Contempt, § 24 at p. 406; Anno., 29 A.L.R. 134. *We conclude that the better and safer rule is that there must be an express command or prohibition*.[16]

The Court traced that violation-of-express-command requirement to its 1822 decision in *Taliaferro v. Horde's Administrator*,[17] where it said that "[t]he process for contempt lies for disobedience of what *is* decreed, not for what *may be* decreed."[18]

The Court applied that rule again in 1977, in *Winn v. Winn*.[19] *Winn*

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[15] 203 Va. 704, 127 S.E.2d 137 (1962).

[16] *Id*. at 710, 127 S.E.2d at 141 (emphasis added).

[17] 22 Va. (1 Rand.) 242 (1822).

[18] *French*, 203 Va. at 710, 127 S.E.2d at 141 (quoting *Taliaferro*, 22 Va. at 247).

[19] 218 Va. 8, 235 S.E.2d 307 (1977).

involved alleged noncompliance with the spirit of a marital settlement agreement that had been incorporated into the divorce decree. The Court held that, because the husband was literally in compliance with the decree, he could not be found in contempt: "[a]s a general rule, 'before a person may be held in contempt for violating a court order, the order must be in definite terms as to the duties thereby imposed upon him and the command must be expressed rather than implied.'"[20]

In 2007, in *Petrosinelli v. People for the Ethical Treatment of Animals, Inc.*, the Court held that the trial judge abused his discretion in imposing contempt sanctions on an attorney who subpoenaed a witness for a deposition in one case in a manner that the trial judge believed violated an order barring the attorney from discovery in a parallel case.[21] Noting that "the 'judicial contempt power is a potent weapon,'"[22] the Court pointed to *Taliaferro* as showing that "our centuries-old jurisprudence has long provided that 'contempt lies for disobedience of what is decreed, not for

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[20] *Id.* at 10, 235 S.E.2d at 309 (quoting *Wood v. Goodson*, 485 S.W.2d 213, 217 (Ark. 1972)).

[21] 273 Va. 700, 708-09, 643 S.E.2d 151, 155-56 (2007).

[22] *Id*. at 706, 643 S.E.2d at 154 (quoting *Int'l Longshoremen's Ass'n, Local 1291 v. Phila. Marine Trade Ass'n*, 389 U.S. 64, 76 (1967)).

what may be decreed.'"[23] The attorney could not be held in contempt because he "was never explicitly prohibited by a court order from issuing the . . . subpoena. Mere implication of a duty cannot form the basis of a contempt judgment."[24]

The Court twice applied that "centuries-old jurisprudence" again in 2014. In *DRHI, Inc. v. Hanback*,[25] the Court overturned a contempt ruling against a developer whom the trial judge believed breached a final decree requiring payment to the seller of "$70,000 for each additional approved lot" developed on the land. The developer later acquired adjoining land that enabled it to receive approval for 15 additional lots on the combined parcels, with 5.5 lots on the seller's former property.[26] The trial court found the developer in contempt for not paying the seller $350,000 (5 times $70,000).[27] This Court ruled that it was an abuse of discretion to find the developer in contempt because the earlier decree "was not an enforceable judgment in favor of [the seller], and no finite amount of damages was

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[23] *Id*. at 706-07, 643 S.E.2d at 154 (quoting *Taliaferro*, 22 Va. at 247).

[24] *Id*. at 709, 643 S.E.2d at 156 (citing *Winn*, 218 Va. at 10-11, 235 S.E.2d at 309).

[25] 288 Va. 249, 765 S.E.2d 9 (2014).

[26] *Id.* at 250, 765 S.E.2d at 9.

[27] *Id.* at 250-51, 765 S.E.2d at 10-11.

identified."[28] The Court applied the same principles in *Shebelskie v. Brown*, stating "[i]t is the violation of a court's order . . . that is the proper subject of contempt, not implications arising from other circumstances of the case."[29]

B. None of the Respondents violated the Court's express commands.

Petitioners do not mention the controlling legal authority embodied in that "centuries-old jurisprudence"[30]—but the violation-of-express-command requirement is fatal to their request that any respondent be held in contempt of this Court's July 22 mandamus order.

1. Governor McAuliffe was not ordered to take any action and violated no command of the Court.

Although this Court's July 22 opinion invalidated the three blanket restoration-of-rights orders, the Court did not order the Governor to take any action or to refrain from taking any action.[31] The mandamus was directed instead to the Secretary of the Commonwealth, the Commissioner

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[28] *Id.* at 255, 765 S.E.2d at 13.

[29] 287 Va. 18, 32 n.9, 752 S.E.2d 877, 885 n.9 (2014) (following *Petrosinelli*).

[30] *Petrosinelli*, 273 Va. at 706, 643 S.E.2d at 154.

[31] Op. at 30-32.

of Elections, and the State Board of Elections and its members.[32] Because there was no command to the Governor that could have been violated, he obviously cannot be held in contempt.

2. Commissioner Cortés and the Department of Elections faithfully complied with the Court's mandamus order.

Paragraph 1 of the mandamus order commanded Commissioner Cortés and the Department of Elections to "cancel the registration of all felons who have been invalidly registered [to vote] under Executive Orders issued on April 22, 2016, May 31, 2016, and June 24, 2016."[33] Paragraph 2 ordered them to require that Virginia's general registrars "refus[e] to register anyone whose political rights have purportedly been restored by Executive Orders issued on April 22, 2016, May 31, 2016, and June 24, 2016, and . . . cancel[] the registration of anyone who has registered pursuant to such orders."[34] And paragraph 3 ordered them to "return[] to the list of prohibited voters the name of any felon whose political rights have purportedly been restored by Executive Orders issued on April

[32] *Id.* at 31-32.

[33] *Id*. at 31.

[34] *Id.* at 32.

22, 2016, May 31, 2016, and June 24, 2016."[35]

The Commissioner and the Department "moved expeditiously to comply with the requirements of the Court."[36] On July 26, two business days after the ruling, the Department provided initial guidance to the general registrars; by July 29, five business days after the ruling, the Department "finished updating the prohibited-voter database to reflect that the 213,874 individuals covered by Governor McAuliffe's three restoration-of-rights orders did not have their rights restored."[37] Also on July 29, the Department directed that general registrars refuse to register anyone whose voter rights had been purportedly restored by the three invalidated orders.[38]

By August 4—three weeks before the Court-imposed deadline of August 25[39]—the Department completed the process of canceling the 12,832 affected voters' registrations, notifying them the next day.[40] On

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[35] *Id*.

[36] Ex. A, Declaration of Edgardo Cortés ¶ 8 & Ex. 1 at 2.

[37] *Id*. ¶¶ 8-9.

[38] *Id.* ¶ 9 & Ex. 1 at 2-3, 6.

[39] Op. at 31-32 (¶¶ 1-3).

[40] Ex. A, Cortés Decl. ¶ 10.

August 10, two weeks before the deadline, Commissioner Cortés provided a detailed accounting of the Department's compliance actions to the State Board of Elections.[41] The Board thereafter adopted a resolution that "the Board is satisfied that the Department and the Commissioner have carried out their duties to comply with the Supreme Court's July 22 Order."[42]

The Commissioner also attests under penalty of perjury that "the Department and I have complied with the Supreme Court's order, and I am not aware of any further actions the Department and I could take to comply more fully."[43]

3. The Board of Elections and its members faithfully complied with the Court's mandamus order.

Paragraph 4 of the mandamus order commanded the State Board of Elections and its members—Chairman Alcorn, Vice Chair Wheeler, and Secretary McAllister—"'to institute procedures to ensure that' the Department of Elections and Commissioner Cortés carry out their duties under this Court's order."[44] Those respondents were ordered to do so by

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[41] *Id*. Ex. 1 at 2-3.

[42] Ex. B, Declaration of Rose Mansfield ¶¶ 4-5 & Ex. 1 (Resolution).

[43] Ex. A, Cortés Decl. ¶ 14.

[44] Op. at 32 ¶ 4 (quoting Va. Code Ann. § 24.2-404(C) (Supp. 2016)).

the same deadline, "on or before August 25, 2016."[45]

As noted, the Board of Elections convened and resolved on August 10 that the Commissioner and the Department had complied with the mandamus order.[46] The Board further directed the Department to "continue to advise the Board on this matter on issues that may arise with implementation of the Order."[47]

4. Secretary Thomasson faithfully complied with the Court's mandamus order.

Paragraph 5 of the mandamus order commanded the Secretary of the Commonwealth to "maintain and provide to the Department of Elections accurate records of individuals whose political rights have been lawfully restored, by deleting and omitting from the records any felons whose political rights were purportedly restored by Executive Orders issued on April 22, 2016, May 31, 2016, and June 24, 2016."[48] She was required to comply "on or before August 25, 2016."[49]

Secretary Thomasson fully complied by the morning of July 27, five

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[45] *Id*.

[46] Ex. B, Mansfield Decl. ¶¶ 4-5 & Ex. 1 (Resolution).

[47] *Id.*

[48] Op. at 32.

[49] *Id*.

business days after the Court's order, and nearly a month before the deadline.[50] She too attests under penalty of perjury that she is "not aware of any further actions I could take to comply more fully."[51]

In short, none of the Respondents violated any command of the Court. So none is in contempt.

C. Petitioners' authorities are inapposite.

Petitioners' cases fall well short of supporting their arguments. *French v. Pobst* alone (Mot. at 23) shows that Petitioners' contempt theory is meritless. *French* is the case, discussed above, where the Court held that an order merely declaring rights—but not commanding action—cannot support a contempt citation.[52] Petitioners do not mention that part of *French*. Nor do they mention that *French* actually applied that rule to overturn the trial court's contempt finding; contempt was improper because, although the trial court had declared that the special commissioner owed certain funds, he had not been commanded to tender payment.[53]

Petitioners similarly misplace their reliance on *Board of Supervisors*

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[50] Ex. C, Decl. of Kelly Thomasson ¶ 6.

[51] *Id*. ¶ 7.

[52] 203 Va. at 710, 127 S.E.2d at 141.

[53] *Id*. at 710, 127 S.E.2d at 141-42.

of Hanover County v. Bazile[54] (Mot. at 21-23). *Bazile* involved a clear and willful violation of a court order without any parallel here. The Court there mandamused the Hanover County treasurer to maintain the treasurer's office at the county seat in Hanover, not at his own private law office in Ashland. The treasurer willfully disobeyed that order by maintaining only a "token" office in Hanover while continuing to conduct the treasurer's business at his law office in Ashland, something that violated the literal language of the Court's command:

> The order of this court was that the respondent maintain the treasurer's office at the county seat of Hanover county. It is not difficult for respondent to understand what that means and nothing less than that will constitute obedience to the order of this court and only compliance therewith will render him immune from contempt proceedings.[55]

Unlike the treasurer in *Bazile*, the Governor was not ordered to take any action by this Court. And the other respondents here plainly and fully complied with the Court's July 22 directives.

Finally, *Tran v. Gwinn*[56] (Mot. at 23) supports Respondents, not Petitioners. The Court there invalidated the trial court's injunction because

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[54] 195 Va. 739, 80 S.E.2d 566 (1954).

[55] *Id.* at 748, 80 S.E.2d at 572.

[56] 262 Va. 572, 554 S.E.2d 63 (2001).

it was too general and amounted to an order essentially enjoining the defendant "from violating the law."[57] That sweeping injunction violated "[a] 'first principle of justice,'" that an injunction "not be so vague as to 'put the whole conduct' of a defendant at the 'peril of a summons for contempt.'"[58] This Court followed that principle here in spelling out in its mandate the precise actions it required Respondents to take, all of which have been faithfully completed.

So not only do Petitioners' best authorities actually undercut their position; Petitioners do not even mention the long line of cases embodying the Court's violation-of-express-command requirement—*Winn*, *DRHI*, *Petrosinelli*, and *Shebelskie*. Those cases are dispositive here.

II. Petitioners may not litigate a new lawsuit in the guise of a contempt action.

Petitioners seek to capitalize on certain language in the majority's opinion that they contend suggests that the Governor's *subsequent*, individualized restoration-of-rights orders should now be questioned. We address in Part III why the Governor's individualized orders are proper.

But the Court should not even reach Petitioners' arguments because this case has become final and is not subject to being reopened. The

[57] *Id.* at 584, 554 S.E.2d at 70.

[58] *Id.* (quoting *Swift & Co. v. United States*, 196 U.S. 375, 396 (1905)).

narrow exception to finality that enables a court to use its contempt powers to enforce a prior decree may not be expanded to litigate brand new claims in a concluded case.

Rule 1:1 provides that "[a]ll final judgments, orders, and decrees, irrespective of terms of court, shall remain under the control of the trial court and subject to be modified, vacated, or suspended for twenty-one days after the date of entry, and no longer."[59] Rule 1:1 is "applicable to *all* proceedings,"[60] including, therefore, those in which this tribunal acts as a court of original jurisdiction.

Rule 1:1 reflects a finality principle that this Court has long applied to its own original jurisdiction. As the Court said in *Bazile*, "the mandamus of this court . . . has been fully and finally adjudicated . . . and this court's order on the subject *cannot be altered, modified, enlarged or diminished in any manner or degree* . . . ."[61] *Bazile* cited *Miller v. Turner* for that principle, where this Court similarly said that "the rights of the parties . . . were the subject of litigation before this court at the former hearing, which is irrevocable and finally disposes of this question . . . . [T]he whole subject

[59] Va. Sup. Ct. R. 1:1.

[60] Va. Sup. Ct. R. Part I (capitalization altered, emphasis added).

[61] 195 Va. at 749-50, 80 S.E.2d at 573 (emphasis added) (citing *Miller v. Turner*, 111 Va. 341, 341, 68 S.E. 1007, 1008 (1910)).

had been fully adjudicated and cannot be reopened."[62]

The Court's judgment in this case likewise has become final and is not subject to being altered, modified, or expanded. This Court issued its opinion on July 22, and an amended opinion on July 25. The 21-day period under Rule 1:1 elapsed on Monday, August 15, 2016, and the Court issued its mandate on Tuesday, August 16, 2016. So Petitioners' request to enlarge the ruling comes too late.

This Court, like any other court, obviously retains the authority to enforce through contempt a failure to obey its express commands. As the Court said in *Eddens v. Eddens*, "the fact that the decree ha[s] become final [does] not deprive the court of the power and authority thereafter to enforce its mandate by a contempt proceeding. Final decrees are frequently enforced in this manner."[63] Enforcement of a mandamus order by contempt is also provided by Code § 8.01-652.[64]

But a proceeding to enforce a court's express command through a contempt proceeding is "not . . . a procedure in the cause, which was ended, but a procedure *beyond* the cause for the enforcement of the

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[62] *Miller*, 111 Va. at 341, 68 S.E. at 1008.

[63] 188 Va. 511, 521, 50 S.E.2d 397, 402 (1948).

[64] Va. Code Ann. § 8.01-652 (2015).

decree."[65] As *Bazile* shows, the narrow exception to finality that enables a court to enforce its decrees is not a license to reopen a judgment in the hope of getting something different or better; the mandamus judgment remains "finally adjudicated" and "cannot be altered, modified, [or] enlarged . . . in any manner or degree."[66]

Petitioners may not circumvent that limitation and conjure jurisdiction where it does not exist. They are attempting to use this contempt proceeding to enlarge the previous ruling to challenge new actions taken by the Governor since the judgment, challenges based on arguments that were neither raised nor litigated before. And they are seeking to use a concluded case, over which this Court has lost jurisdiction, as a free-wheeling platform to take discovery to challenge the Governor's current and future actions.[67] Such maneuvers in a contempt proceeding are plainly inappropriate and should be rejected.

III. If the Court reaches the merits, it should find that the Governor's actions are proper.

The Court should not reach the merits of Petitioners' arguments

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[65] *Eddens*, 188 Va. at 521, 50 S.E.2d at 402.

[66] *Bazile*, 195 Va. at 750, 80 S.E.2d at 573.

[67] Contrary to their new position, Petitioners previously pleaded that the "taking of evidence will not be necessary for the proper disposition of this petition." Pet. ¶ 5.

because no Respondent is in contempt and the Court lacks jurisdiction to reopen the case. But if the Court reaches the merits, it should find that the Governor's new restoration-of-rights orders, issued on an individualized basis after case-by-case review, satisfy *Howell*.

A. The Governor's individualized, case-by-case approach comports with the majority opinion in *Howell.*

Although Petitioners impugn the Governor's intentions, his actions show that he is pursuing the case-by-case approach that *Howell* says is required. The majority said that: "All agree that the Governor can use his clemency powers to mitigate a general rule of law *on a case-by-case basis*."[68]

Notably, the Governor did *not* use an "autopen" to issue 206,000 restoration-of-rights orders within two weeks of the July 22 ruling. (Mot. at 8.) Even if he had done that, it would not have violated the Court's individualized-order requirement. Indeed, Petitioners themselves assured the Court in their reply brief that invalidating the Governor's blanket orders "would not in any way preclude the Governor from exercising his authority to issue valid individualized restoration orders."[69] And as Justice Powell observed in her dissenting opinion, joined by Justice Goodwyn, "the

[68] Op. at 28 (emphasis added).

[69] Pet'rs' Reply at 17-18.

majority acknowledges that the Governor could use many individual orders to achieve the mass restoration of rights he sought to accomplish under the Executive Order."[70] Yet that was not the Governor's approach.

Instead, he is proceeding in incremental steps. As the Secretary of the Commonwealth attests, the Governor directed her office to conduct a thorough review of the 12,832 individuals whose voter registration had been canceled and to provide him with recommendations.[71] To be eligible for removal of political disabilities, the individual had to have completed any term of incarceration and active supervision.[72] Following a multi-agency review of those candidates,[73] the Secretary provided her recommendations to the Governor, adding, at the Governor's request, a summary of information about each of those individuals, including their criminal history, the dates their sentencing obligations were satisfied, and "any other relevant information provided by the reviewing State agencies."[74]

On August 15, 2016, after reviewing that information, Governor

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[70] Op. at 50 (Powell, J., dissenting).

[71] Ex. C, Thomasson Decl. ¶ 8.

[72] *Id*.

[73] *Id*. ¶ 9.

[74] *Id*. ¶ 10.

McAuliffe restored the rights of 12,521 individuals.[75] Notably, that group was smaller than the original group of 12,832 individuals who had previously registered in reliance on the now-invalidated blanket orders. The Governor's discretionary criteria resulted in his not removing the political disabilities of 311 felons who were the subject of an active warrant or awaiting trial on a criminal offense.[76]

The Governor acted within his executive discretion in prioritizing formerly-registered voters for review and restoration, given their demonstrated commitment to rejoining the polity. He also acted within his executive authority in declining on a discretionary basis to grant clemency in multiple instances.

In addition, on August 22, the Governor outlined his plan, going forward, to prioritize for review those persons who have requested the removal of their political disabilities, and those who have been free from incarceration and State supervision the longest.[77] And he announced that the names of any and all persons whose political disabilities are removed

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[75] *Id*. ¶ 11.

[76] *Compare id*. ¶ 8 (12,832 registered individuals under prior invalidated orders), *with id*. ¶¶ 10-11 (political disabilities removed of 12,521 persons after individualized review).

[77] *Id*. ¶ 15 & Ex. 1 at 2.

will be released upon request on a monthly basis and also included in his annual clemency report to the General Assembly.[78]

The Governor has not imposed a schedule or deadline for what is an ongoing deliberative process. It is plain, however, that of the 213,874 persons covered by the group restoration-of-rights orders invalidated in the July 22 ruling, only a small fraction will have their rights restored, following case-by-case review, before the October 17, 2016 deadline to register for the November 8, 2016 general election.[79]

The Governor's approach to processing restoration-of-rights cases is different in detail but consonant with past practice. In 2002, Governor Warner instituted an objective system for restoring rights to non-violent felons, increasing by more than an order of magnitude the number of persons whose rights had been restored by Governor Gilmore.[80] That

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[78] *Id*.

[79] *See* Va. Code Ann. §§ 24.2-414, 24.2-416 (2011).

[80] *Compare* S. Doc. No. 2 at 8-23 (Va. 2002) (listing 89 persons whose disabilities were removed in 2001 by Gov. Gilmore), *available at* http://goo.gl/s0VfTo, *with* S. Doc. No. 2 at 17-268 (Va. 2006) (listing approximately 1,500 persons whose disabilities were removed by Gov. Warner in 2005), *available at* http://goo.gl/Yie3PF.

expanded policy continued under Governor Kaine.[81] Governor McDonnell further liberalized Governor Warner's criteria for restoring the rights for non-violent felons, and he ultimately dispensed entirely with any application requirement.[82] Governor McDonnell touted that he had removed "[t]he Governor's subjectivity" entirely from the review process.[83] And he nearly doubled the number of persons whose disabilities were removed.[84]

Governor McDonnell's approach passed muster, said the Commonwealth Attorneys supporting Petitioners, because

> Governor McDonnell's staff conducted an individualized review of whether each non-violent felon satisfied the Governor's criteria. Only after the Governor's staff confirmed that the individual satisfied the Governor's criteria did Governor

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[81] *See, e.g.*, S. Doc. No. 2 at 28-385 (Va. 2010) (listing approximately 1,500 persons whose disabilities were removed by Gov. Kaine in 2009), *available at* http://goo.gl/0lCwq8.

[82] Ex. C, Thomasson Decl. ¶ 17. *See also* Secretary of the Commonwealth, *Governor McDonnell Announces Process for Automatic Restoration of Voting and Civil Rights for Non-Violent Felons* (2013) ("With the Governor's announced changes the following prior components of the restoration process for non-violent felons are eliminated: . . . Application process"), *available at* http://goo.gl/Zpf3m9.

[83] *Governor McDonnell Announces Process for Automatic Restoration*, *supra* note 82.

[84] *See* S. Doc. No. 2 at 16-495 (Va. 2014) (listing in excess of 3,500 persons whose disabilities were removed by Gov. McDonnell in 2013), *available at* http://goo.gl/kE9sjK.

> McDonnell send that person an individualized letter restoring their rights.[85]

While Governor McAuliffe has expanded the pool of eligible persons to include those who committed violent offense but who are no longer incarcerated (or under active supervision), and to those who had not paid all of their monetary obligations, the review process is at least as individualized as Governor McDonnell's. And Governor McAuliffe has retained discretion *not* to restore rights to certain persons, such as those under "the subject of an active warrant or awaiting trial on another offense."[86]

The majority in *Howell* was careful not to make any definitive rulings on the requirements for the Governor's exercise of his restoration-of-rights power when he acts on an individualized basis. And the Court's discussion of the Suspension Clause[87] does not show that the Governor's new approach, which now considers "individual circumstances,"[88] is improper. The Court described two examples of actions offending the Suspension Clause: issuing "categorical, absolute pardons to everyone convicted of [a

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[85] Commonwealth Attorneys' Amicus Br. in Supp. of Pet'rs at 22.

[86] Ex. C, Thomasson Decl. ¶ 10.

[87] Va. Const. art. I, § 7.

[88] Op. at 27.

Governor's] disfavored crime," and "a single, categorical order restoring rights to *all* felons."[89] The Governor's new approach does not come close to that. It is the "case-by-case basis" that the Court said "[a]ll agree" is permissible.[90]

B. The Virginia Constitution does not condition the Governor's clemency power on receiving a request from the recipient.

Thousands of people whose political disabilities the Governor recently removed specifically requested to have their rights restored.[91] And the Governor has also prioritized for consideration going forward those eligible felons who request to have their rights restored.[92]

Petitioners insist, however, that the Governor may not restore the rights of any *other* felons unless they "actually sought to have their rights restored."[93] Petitioners did not assert that claim in their petition for mandamus, and that contention was neither briefed nor argued. Although Petitioners cite isolated language in the majority opinion to support their

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[89] *Id*. at 29.

[90] *Id.* at 28.

[91] Ex. C, Thomasson Decl. ¶ 11 ("over 2,800"), ¶ 14 (6,957).

[92] *Id*. ¶ 15.

[93] Mot. at. 18 (capitalization altered).

new-found argument, no court should be stampeded into deciding such an important legal question in the guise of a contempt action.

Petitioners' new legal claim is also meritless. For starters, there is no text in the Constitution requiring that a felon request clemency before the Governor is allowed to act. Article V, § 12 empowers the Governor "to remove political disabilities consequent upon conviction for offenses committed prior or subsequent to the adoption of this Constitution."[94] There is no requirement to apply. Article II, § 1 states 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."[95] Again, there is no requirement to apply. The phrase "unless his civil rights have been restored by the Governor" may not be rewritten to read "unless *upon application to the Governor* his civil rights have been restored." That no application requirement was intended is also supported by scholarly commentary in 1969, shortly before the new Constitution's ratification, recognizing that "the governor may grant a pardon on *his own initiative.*"[96]

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[94] Va. Const. art. V, § 12.

[95] Va. Const. art. II, § 1.

[96] William F. Stone, Jr., *Pardons in Virginia*, 26 Wash. & Lee L. Rev. 307, 313 (1969) (emphasis added). Stone went on to describe then-Governor Godwin's clemency procedures, which happened to require an application

Only a handful of other States have constitutions that say anything about *applying* for clemency. Kentucky's Constitution provides that, in granting clemency, the Governor "shall file with each *application* therefor a statement of the reasons for his decision thereon, which application and statement shall always be open to public inspection."[97] The Kentucky Supreme Court has read that text to make "patently clear that there are two basic constitutionally mandated requirements . . . : 1) that the movant file an application for clemency with the Governor; and 2) that the Governor file with each application a statement of the reasons for his decision."[98] Kentucky's high court made clear, however, that the "application" requirement is also satisfied when someone other than the recipient applies.[99]

Kentucky's provision is unique; we found no other State constitution with such an application requirement. Nine other State constitutions

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by "the prisoner, his counsel, a member of his family, or by any interested person." *Id*. at 313-14.

[97] Ky. Const. § 77 (emphasis added).

[98] *McQueen v. Patton*, 948 S.W.2d 418, 419 (Ky. 1997).

[99] *Fletcher v. Graham*, 192 S.W.3d 350, 365 (Ky. 2006); *see also id*. at 376 (Cooper, J., dissenting in part) ("Section 77 requires that a pardon be premised upon a personal application therefor, and only one of the pardoned defendants . . . personally applied for a pardon.").

expressly authorize the legislature to prescribe the manner of applying for clemency, but even that permissive language does not suggest that a prior application is a mandatory prerequisite to receiving clemency.[100]

And unlike those States with constitutions permitting the legislature to regulate the application procedure, the framers of Virginia's 1870 Constitution specifically removed the General Assembly from the process

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[100] *See* Ill. Const. art. V, § 12 ("The manner of applying therefore may be regulated by law."); Me. Const. art. V, § 11 ("subject to such regulations as may be provided by law, relative to the manner of applying for pardons"); Mo. Const. art. IV, § 7 ("subject to provisions of law as to the manner of applying for pardons"); Nev. Const. art. 5, § 14(1) ("subject to such regulations as may be provided by law relative to the manner of applying for pardons"); N.Y. Const. art. IV, § 4 ("subject to such regulations as may be provided by law relative to the manner of applying for pardons"); N.C. Const. art. III, § 5(6) ("subject to regulations prescribed by law relative to the manner of applying for pardons"); Ohio Const. art. III, § 11 ("subject, however, to such regulations, as to the manner of applying for commutations and pardons, as may be prescribed by law"); Wis. Const. art. 5, § 6 ("subject to such regulations as may be provided by law relative to the manner of applying for pardons"); Wyo. Const. art. 4, § 5 ("but the legislature may by law regulate the manner in which the remission of fines, pardons, commutations and reprieves may be applied for"); *cf.* Neb. Const. art. IV, § 13 ("The Board of Parole may advise the Governor, Attorney General and Secretary of State on the merits of any application for remission, respite, reprieve, pardon or commutation but such advice shall not be binding on them."); Okla. Const. art. VI, § 10 ("It shall be the duty of the [Parole] Board to make an impartial investigation and study of applicants for commutations, pardons or paroles, and by a majority vote make its recommendations to the Governor of all deemed worthy of clemency . . . . The Governor shall have the power to grant, after conviction and after favorable recommendation by a majority vote of the said Board, commutations, pardons and paroles . . . subject to such regulations as may be prescribed by law").

of regulating the manner in which the Governor exercises his clemency authority. The 1776, 1830, 1851, and 1864 Constitutions all used the phrase—unless "the law shall otherwise particularly direct"—to make the Governor's power to grant clemency expressly subject to regulation by the General Assembly.[101] The framers of the 1870 Constitution deleted that language,[102] and it was left out of the 1902 and current constitutions as well. Indeed, shortly after the 1870 Constitution was ratified, this Court confirmed in *Blair v. Commonwealth* that the removal of that phrase had the effect of "freeing the executive power from the control of the legislature, to which the old constitution subjected it."[103]

Nor does the history of the clemency power in Virginia support Petitioners' claim that a felon must apply for clemency before the Governor

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[101] Va. Const. (1776) (JA 20); Va. Const. art. IV, § 4 (1830) (JA 22); Va. Const. art. V, § 5 (1851) (JA 23); Va. Const. art. V, § 5 (1864) (JA 24).

[102] Va. Const. art. IV, § 5 (1870) (JA 25); Va. Const. art. V, § 73 (1902) (JA 27-28); Va. Const. art. V, § 12 (1971) (JA 29).

[103] *Blair v. Commonwealth*, 66 Va. (25 Gratt.) 850, 859 (1874). *See also* Op. at 60 n.5 (Powell, J., dissenting) ("[I]t appears the convention sought to expand and unleash the Governor's clemency powers, despite being amply warned that the Governor might use those powers categorically or for ill ends.") (citing *Blair*); 2 A.E. Dick Howard, *Commentaries on the Constitution of Virginia* 642 (1974) ("In 1870 . . . a potentially significant legislative control on the Governor's pardoning power was deleted: the power to grant reprieves and pardons was no longer subject to the exception, as 'the law shall otherwise particularly direct.'").

may grant it. Past governors have granted pardons and removed political disabilities at the request of *other* persons, including various government officials.[104] And although the ten days to respond to Petitioners' show-cause motion has not permitted a comprehensive review of the voluminous clemency records, we found no documentary evidence to contradict the statement of the 1969 commentator, cited above, that "the governor may grant a pardon on *his own initiative.*"[105] Indeed, various reported examples

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[104] *See, e.g.*, Stone, *supra* note 96, at 313-14; S. Doc. No. 3, at 50 (Va. 1908) ("Rauzy Ball, received December 17, 1907, *by B. J. Wysor*. This prisoner was convicted January, 1902 . . . on charge of murder, and given eighteen years in the penitentiary, and later pardoned by Governor Montague. Political disabilities removed December 19, 1907, as the prisoner has conducted himself well since his release, and gives every indication of becoming a useful and law-abiding citizen.") (emphasis added), *reprinted in Journal of the Senate of the Commonwealth of Virginia* (1908); H. Doc. No. 9, at 45 (Va. 1912) ("Henry Hare. Convicted September 14, 1899, in the county court of Giles of felony and sentenced to two years in the penitentiary. Political disabilities removed October 14, 1910, *upon request of the member of the legislature from Giles county and the Attorney-General of Virginia*, who are familiar with the case.") (emphasis added), *reprinted in Journal of the House of Delegates of Virginia* (1912); S. Doc. No. 2, at 26 (Va. 1954) ("Sisk, Charles D. – Convicted in September, 1941 in the Madison County Circuit Court of murder and sentenced to seventeen years in the penitentiary. *Relying upon the recommendations made to me by prominent and reputable citizens*, who are familiar with the conduct of this man since his release, granted removal of political disabilities on September 30, 1952.") (emphasis added), *reprinted in List of Pardons, Commutations, Reprieves and Other Forms of Clemency: Report to the General Assembly by the Governor* (1954).

[105] Stone, *supra* note 96, at 313.

suggest instances in which Governors acted on their own initiative.[106] And of course, Governor McDonnell in 2013 provided automatic restoration orders to hundreds of nonviolent felons without asking them to apply.[107] Petitioners have never attacked Governor McDonnell's approach, and they should not be heard to change positions now.

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[106] *See, e.g.*, S. Doc. No. 13, at 52 (Va. 1922) ("Keen, A. M.—Convicted April, 1918, in circuit court of Buchanan county of malicious wounding, and sentenced to serve two years in the penitentiary. Granted removal of political disabilities July 30, 1921, in order to give him another chance to become a good citizen."), *reprinted in Journal of the Senate of the Commonwealth of Virginia* (1922); H. Doc. No. 10, at 58 (Va. 1928) ("Wade, Ernest—Convicted in April, 1909, in the Lynchburg corporation court of second degree murder and sentenced to eighteen years in the penitentiary, being conditionally pardoned on December 22, 1915. Granted removal of political disabilities on May 20, 1927, this man being out of the penitentiary for eleven and one-half years and investigation showing that he had been working and conducting himself as he should."), *reprinted in Journal of the House of Delegates of Virginia* (1928); S. Doc. No. 9, at 49 (Va. 1930) ("Treulich, Ralph—Convicted in July, 1927, in the Newport News corporation court, of grand larceny and sentenced to two years in the penitentiary. Granted removal of political disabilities on November 2, 1929, upon the reliable information that this man has conducted himself as an industrious and law-abiding citizen since his release from the penitentiary."), *reprinted in Journal of the Senate of the Commonwealth of Virginia* (1930); S. Doc. No. 2, at 14 (Va. 1960) ("Elder, Wallace D.—Convicted July 11, 1933 in the Roanoke City Hustings Court of carbreaking and sentenced to one and ½ years. In view of this man's record as a law-abiding citizen since his release in 1934, granted removal of political disabilities, July 15, 1958."), *reprinted in List of Pardons, Commutations, Reprieves and Other Forms of Clemency: Report to the General Assembly by the Governor* (1960).

[107] Ex. C, Thomasson Decl. ¶ 17; *Governor McDonnell Announces Process for Automatic Restoration*, *supra* note 82.

C. Separation-of-powers principles and the presumptions of validity and regularity preclude Petitioners' request to open up facially valid clemency orders.

Petitioners' challenge should also be rejected because it would violate the presumptions of validity and regularity, as well as the separation of powers, to open up for scrutiny individualized restoration-of-rights orders that are facially valid. The three blanket orders invalidated in *Howell* were *facially* invalid because, the Court held, the Governor may not grant clemency on a blanket, categorical basis. But each of the individualized orders at issue here names a specific person; each is regular on its face.

As a starting point, therefore, the orders are presumptively valid. *Lee v. Murphy* teaches that the Court "must presume it was [the Governor's] intention to exercise just such powers as are vested in him by the constitution; and we should give his official acts a fair and liberal interpretation, so as to make them valid if possible."[108] In addition to that presumption of validity, the orders are also "entitled to a presumption of

[108] 63 Va. (22 Gratt.) 789, 801 (1872). The Governor said when issuing the orders that he sought to act "in accordance with the Virginia Supreme Court's order" and to "fully compl[y] with the restrictions outlined in the July 22nd Supreme Court decision." Ex. C, Thomasson Decl. Ex. 1 at 1.

regularity."[109] "The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties."[110] Under that presumption, the "validity of the reasons stated in the orders, or the basis of fact on which they rest will not be reviewed by the courts."[111]

That presumption of validity has even greater force when, as in this case, to pierce the facial validity of the order would require the judicial branch to disrespect a "'coequal and independent'" branch of government.[112] "Because of the respect due to a coequal and independent department . . . courts properly resist calls to question the good faith with which another branch attests to the authenticity of its internal acts."[113]

Petitioners have not come close to justifying the extraordinary and unprecedented step of piercing individualized restoration orders that are

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[109] *Branham v. Commonwealth*, 283 Va. 273, 282, 720 S.E.2d 74, 79 (2012) (citing *United States v. Chemical Found., Inc.*, 272 U.S. 1, 14-15 (1926)).

[110] *Chemical Found.*, 272 U.S. at 14-15.

[111] *Id.* at 15.

[112] *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2576 (2014) (quoting *Marshall Field & Co. v. Clark*, 143 U.S. 649, 672 (1892)).

[113] *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1433 (2012) (Sotomayor, J., concurring).

valid and regular on their face.

D. Petitioners' policy disagreements with Governor McAuliffe do not justify trampling upon his constitutional prerogatives.

Petitioners' attack on Governor McAuliffe's new approach seems grounded in policy differences, not the Constitution. On the same day this contempt motion was filed, Senator Norment introduced S.J. Res. 223, proposing a constitutional amendment that, in addition to stripping the Governor of his power to remove political disabilities, would permanently deny the restoration of voting rights to those who committed violent felonies and those who have not paid their financial obligations.[114] For "nonviolent" felons, a status to be defined only by the General Assembly, voting rights would be automatically restored upon completion of the sentence and payment of all fines and restitution.[115]

Petitioners should not be permitted to use this contempt motion as a vehicle to claim that their policy preferences are somehow constitutionally mandated. They are free to disagree with Governor McAuliffe's judgment that persons convicted of violent felonies should be eligible to have their voting rights restored, on an individualized basis, once they have fully

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[114] http://lis.virginia.gov/cgi-bin/legp604.exe?171+ful+SJ223.

[115] *Id*.

completed their terms of incarceration and supervised release. But the Constitution does not mandate irrevocable disenfranchisement of violent felons who have completed their sentences. Indeed, previous governors have granted clemency and restored rights on various occasions to hundreds if not thousands of persons who committed violent offenses.[116] Governors Wilder, Allen, and Gilmore, for instance, made no distinction in eligibility based on whether the crime was violent or non-violent.

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[116] *See, e.g.*, S. Doc. No. 3, at 49 (Va. 1908) ("Nicholas Albino, received March 27, 1906, presented by self; sentenced June term (1902), Corporation Court of Norfolk, Va., Judge A. R. Hanckel. Crime, manslaughter; one year in penitentiary. Political disabilities removed."), *reprinted in Journal of the Senate of the Commonwealth of Virginia* (1908); S. Doc. No. 5, at 68 (Va. 1910) ("John C. Quillen, convicted September, 1906, Circuit Court of Scott county, murder; five years in the penitentiary. Disabilities removed November 21, 1908. This prisoner has conducted himself well since his release from prison and gives every indication of proving himself a worthy citizen."), *reprinted in Journal of the Senate of the Commonwealth of Virginia* (1910); H. Doc. No. 9, at 53 (Va. 1918) ("Maximillian Hirsh—Convicted October, 1909, in circuit court of county of Rockingham, of murder and sentenced to serve nine years in the penitentiary. Political disabilities removed January 8, 1918, on satisfactory evidence of good conduct since release from custody."), *reprinted in Journal of the House of Delegates of Virginia* (1918); S. Doc. No. 2, at 115 (Va. 1942) ("Bottom, Linwood H.—Convicted in February, 1925 in the Richmond Hustings Court of murder—first degree—and sentenced to twenty years in the penitentiary. In view of the fact that an investigation of this man's conduct, since his release, shows that he has been an industrious, law-abiding citizen and is making every effort to rehabilite himself, granted removal of political disabilities on December 23, 1941."), *reprinted in List of Pardons, Commutations, Reprieves and Other Forms of Clemency: Report to the General Assembly by the Governor* (1942).

Petitioners are likewise free to believe that voting rights should not be restored unless and until every last red cent has been paid of all court-ordered fines and restitution. But nothing in the Constitution compels a penny pinching approach that can be "disproportionately disadvantageous to poor people."[117] Applied to voting rights, Senator Norment's policy preference would permanently disenfranchise the indigent. Our Constitution does not codify that choice. In fact, the Attorney General opined more than a hundred years ago "that the Governor may remove political disabilities without remitting the fine imposed for such felony."[118]

E. Petitioners have no limiting principle supporting their effort to collaterally attack facially valid restoration-of-rights orders.

The Court should also be troubled by Petitioners' suggestion that facially valid, individually issued restoration-of-rights orders may be collaterally attacked by any citizen who thinks that his own policy preferences are supported by dicta selectively plucked from the majority opinion in *Howell*. That reading of *Howell* would open a Pandora's box, not only for future Governors whose orders might be attacked by any unhappy

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[117] Peter Vieth, *A Fine Plan: Court to Back Rule for Realistic Payment of Tickets, Costs*, Va. Lawyers Weekly (May 16, 2016), *available at* http://valawyersweekly.com/2016/05/16/a-fine-plan/.

[118] 1914 Op. Va. Att'y Gen. 38, 39 (JA 57).

voter, but for the judicial branch in light of the liberal standard that *Howell* established for voter standing.

Those dangers, of course, can be mitigated if the Court makes good on the limiting principle that the majority already recognized. The Court "emphasiz[ed] that our standing conclusion rests heavily on the unprecedented circumstances" of the prior blanket orders.[119]

The Court should firmly grasp that limiting principle to avoid the otherwise ineluctable slide down a slippery slope. To follow Petitioners' nudge in that direction would force the Court to confront countless questions that Petitioners conspicuously avoid answering:

- Is there a quota to how many people may have their rights restored on an individualized basis? Is the quota different for violent and nonviolent offenders, for people who do not request clemency, or for persons who have not paid their fines?
- Were the orders issued by Governors Warner and Kaine invalid because they increased by tenfold the number of persons whose disabilities were restored compared to previous Governors?
- Were Governor McDonnell's orders invalid for doubling the number of rights restorations by his two predecessors?
- Is a Governor barred from using objective criteria (an approach followed by Governors Warner, Kaine, and McDonnell) in determining whether to remove political disabilities?
- Must the Governor use only subjective criteria? What if the

[119] Op. at 11.

subjective criteria become inconsistent or arbitrary?

- Is there a minimum time the Governor must spend deliberating before granting clemency?

- How does one police such restrictions—found nowhere in the text of the Constitution—in light of this Court's holding in *In re Phillips* that the restoration power is "vested in the Governor," who may act "without explanation," and from whose decision there is "no right of appeal"?[120]

- Must Governors now give reasons for restoring rights in particular cases, something that has not been done in modern times?[121]

- May Governors be deposed by any voter who wants to find out why the Governor did or did not grant clemency?

- Will Governors be haled into Court to explain themselves?

Petitioners offer no rationale to show where it all ends.[122] They warn about "a government of laws becom[ing] a government of men." (Mot. at 6.) But that admonition weighs heavily against imposing unprecedented and unprincipled limitations on the Governor's clemency power that cannot

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[120] 265 Va. 81, 87-88, 574 S.E.2d 270, 273 (2003).

[121] *See* Pardon Reports collected at http://leg2.state.va.us/DLS/h&sdocs.nsf/Search+All/?SearchView&SearchOrder=4&query=Pardons.

[122] And it does not stop with restoration of rights. If the Governor opposes the death penalty, is his commutation of capital punishment a suspension of the law? If the Governor believes drug sentences are overly-harsh, is his pardoning drug offenders with stiff sentences a suspension of the law? Are only Governors who support high fines for toll-runners allowed to remit those fines?

be found in the text of the Constitution itself.

Having categorically ended the possibility of blanket clemency orders in Virginia, barring a constitutional amendment, the Court's work is done. It need not and should not go any further.

F. Petitioners have not demonstrated a clear entitlement to mandamus relief against the Governor.

Even if the Court could treat Petitioners' show-cause motion as a new mandamus action, Petitioners could not meet the threshold requirement to show "a clear and specific legal right to be enforced, or a duty which ought to be and can be performed."[123] Because the Governor's actions comply with *Howell*, a fortiori, he has not violated any clear legal right belonging to Petitioners. Moreover, mandamus does not lie against a Governor to force compliance with what Petitioners claim are his take-care obligations.[124] Indeed, a breach of the separation of powers would occur were the judicial branch to use mandamus to control the chief executive in the discharge of his executive duties.[125]

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[123] *Hall v. Stuart*, 198 Va. 315, 323, 94 S.E.2d 284, 290 (1956).

[124] *Allen v. Byrd*, 151 Va. 21, 25-27, 144 S.E. 469, 470 (1928); *accord Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 499 (1867) (holding that mandamus does not lie against the President to enforce his take-care obligations).

[125] *Johnson*, 71 U.S. at 499.

IV. The precipitous action urged by Petitioners would lead to electoral chaos and disrupt the upcoming election.

The relief Petitioners request—that the Court invalidate facially valid restoration-of-rights orders and cancel new voter registrations based on them—would also lead to electoral chaos in the remaining weeks before the general election. Assuming invalid restoration orders could be easily identified, the Department would need a 10- to 14-day period to effect the cancellations in VERIS, the database of voter information maintained by the Department.[126] It took 13 days to implement the order in *Howell*.[127] If a new ruling were to invalidate rights restorations for which the recipient did not apply, however, it would also implicate hundreds if not thousands of *earlier* orders, including those issued during previous administrations.

Because the machinery of the election is already in motion, the relief Petitioners request would lead to serious disruption. As Respondents have made clear from the outset, August 10 was the 90-day deadline after which the National Voter Registration Act (NVRA) prohibits Virginia from "systematically remov[ing] the names of ineligible voters from the official lists of eligible voters."[128] There is an exception, it is true, for "the removal

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[126] Ex. A, Cortés Decl. ¶ 16.

[127] *Id*. ¶ 10.

[128] 52 U.S.C. § 20507(c)(2)(A).

of names from official lists of voters" if such removal is "provided by State law, by reason of criminal conviction."[129] And the systematic removal of names in response to a State-court decree might qualify under that exception. But such systematic removal would likely be challenged on the ground that it goes beyond the exception—removals not based on new criminal convictions but on account of procedural irregularities in the manner in which voters' rights have been restored. It is impossible to predict with certainty how a federal court would resolve that controversy. But the mere pendency of such litigation would be disruptive.[130]

Moreover, September 24 is the 45-day deadline, under the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA),[131] by which date Virginia's general registrars must make absentee ballots available to overseas citizens who request them.[132] That is the *latest* date that

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[129] *See id*. § 20507(c)(2)(B) & (a)(3)(B).

[130] The Court avoided exposing Virginia to such litigation by issuing its decision in *Howell* on July 22, enabling the Department to complete the systematic removal of voters before the NVRA's August 10 deadline. *See* Ex. A, Cortés Decl. ¶ 10.

[131] 52 U.S.C. §§ 20301-20311.

[132] *See* 52 U.S.C. § 20302(a)(8)(A) ("Each State shall . . . (8) transmit a validly requested absentee ballot to an absent uniformed services voter or overseas voter—(A) except as provided in subsection (g), in the case in which the request is received at least 45 days before an election for Federal office, not later than 45 days before the election."). The deadline is

absentee ballots must be available; registrars with approved materials may make them available for absentee voting at an earlier date.[133]

As Commissioner Cortés explains, if a registered voter whose rights have been restored mails in an absentee ballot, and the identifying envelope remains with the ballot, it may be possible to identify and set aside that vote if the Court invalidates the voter's registration before the election. But if that voter's ballot is separated from the identifying envelope, or if he votes absentee in person, then it will be impossible to identify and set aside the vote.[134] The Department is rightfully concerned about the risk of "differential treatment of the affected voters' votes."[135] The possibility of such disparate treatment could well expose Virginia to disruptive litigation.[136]

September 23 if the registrar's office is closed on Saturday, September 24. *See* Ex. A, Cortés Decl. ¶ 17.

[133] Ex. A, Cortés Decl. ¶ 17.

[134] *Id.* ¶ 19.

[135] *Id*.

[136] *See Bush v. Gore*, 531 U.S. 98, 105-06 (2000) (per curiam) ("The recount mechanisms implemented in response to the decisions of the Florida Supreme Court do not satisfy the minimum requirement for non-arbitrary treatment of voters necessary to secure the fundamental right . . . . [T]he standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single county . . . .").

With voting underway, a mass invalidation of voter registrations would also introduce additional uncertainty and disruption into the election process, not only for voters but for registrars and other elections officials. In addition to causing confusion about the status of restored voters, the cancellations would require updates to VERIS that would hamper registrars' ongoing operations during their most demanding season.[137]

Reynolds v. Sims instructs that when, as here, the "State's election machinery is already in progress," courts should strive to "avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree."[138] The Governor's recently issued individualized restoration orders comply with the Court's opinion in *Howell*. But even assuming as a thought experiment that a majority of this Court disagreed, the remedy plainly would not be what Petitioners request: an order disenfranchising thousands of voters (who will have tried in good faith to register twice for the same election), and causing electoral chaos in the weeks preceding the

[137] Ex. A, Cortés Decl. ¶ 18.

[138] 377 U.S. 533, 585 (1964).

Presidential election.[139]

CONCLUSION

Petitioners' motion for a show-cause order should be denied.

Respectfully submitted,

TERENCE R. MCAULIFFE
KELLY THOMASSON
STATE BOARD OF ELECTIONS
JAMES B. ALCORN
CLARA BELLE WHEELER
SINGLETON B. MCALLISTER
VIRGINIA DEPARTMENT OF ELECTIONS
EDGARDO CORTÉS

By: _____
STUART A. RAPHAEL (VSB NO. 30380)
Solicitor General of Virginia

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[139] In light of Petitioners' complaints about the Governor's comments immediately following the July 22 decision, their delay until August 31 to mention their objections, and until September 1 to file this motion, also causes prejudice to the Commonwealth amounting to laches. *Stewart v. Lady*, 251 Va. 106, 114, 465 S.E.2d 782, 786 (1996). "Laches . . . applies with particular force . . . where litigants try to block imminent steps by the government." *Perry v. Judd*, 840 F. Supp. 2d 945, 950 (E.D. Va.), *aff'd*, 471 F. App'x 219 (4th Cir. 2012) . Particularly in the election context, courts routinely apply laches to deny relief when granting it would, as in this case, create "instability and dislocation in the electoral system." *White v. Daniel*, 909 F.2d 99, 104 (4th Cir. 1990); *see also Perry*, 471 F. App'x at 227-28 ("The Supreme Court has repeatedly expressed its disapproval of such disruptions . . . . Consistent with such admonitions from the Supreme Court, we decline to disrupt an orderly election process by granting Movant's belated request for relief.").

MARK R. HERRING
Attorney General of Virginia

MATTHEW R. MCGUIRE
(VSB NO. 84194)
Assistant Attorney General

TREVOR S. COX (VSB NO. 78396)
Deputy Solicitor General

Office of the Attorney General
202 North Ninth Street
Richmond, Virginia 23219
sraphael@oag.state.va.us
(804) 786-7240
(804) 371-0200 (fax)

CERTIFICATE OF SERVICE AND FILING

I certify that on September 12, 2016, an electronic copy of this document was sent by email to the Clerk of the Court, ten printed copies were hand-delivered to the Clerk's Office, and a copy was sent by email and overnight delivery to:

Haley N. Proctor, Esquire
Charles J. Cooper, Esquire
Michael W. Kirk, Esquire
David H. Thompson, Esquire
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Counsel for Petitioners

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.

DECLARATION OF EDGARDO CORTÉS

Pursuant to Virginia Code § 8.01-4.3, I, Edgardo Cortés, declare as follows:

1. I am the Commissioner of the Virginia Department of Elections. I have served in that capacity since July 1, 2014.

2. I have personal knowledge of the facts in this Declaration.

3. As Commissioner of Elections, I am the chief state election official for the Commonwealth of Virginia and serve as agency head of the Department of Elections. Among other responsibilities, I coordinate the Department's compliance with the National Voter Registration Act (NVRA) and work with the Department to maintain the Virginia Election and

Registration Information System (VERIS), a database that stores data on voters and assists general registrars across the Commonwealth in determining whether an individual who attempts to register to vote is legally prohibited from doing so.

4. On April 22, 2016, Governor McAuliffe issued an order restoring the political rights—including voting rights—of all felons who, as of that day, had completed their sentences of incarceration and any sentences of supervised release, including probation and parole. On May 31, 2016, the Governor issued a second, similar order restoring the rights of felons who had completed their sentences of incarceration and supervision between April 22 and April 30, 2016. On June 24, 2016, the Governor issued a third order restoring the rights of felons who had completed their sentences of incarceration and supervision between May 1 and May 31, 2016.

5. The number of attributed individuals covered by Governor McAuliffe's three restoration-of-rights orders was 213,874. The number of those individuals who subsequently registered to vote was 12,832.

6. The Department of Elections and I were among the respondents in *Howell v. McAuliffe*, a case challenging the constitutionality of Governor McAuliffe's restoration-of-rights orders.

7. On July 22, 2016, the Supreme Court of Virginia declared invalid the Governor's three restoration-of-rights orders of April 22, May 31, and June 24, 2016. *Howell v. McAuliffe*, No. 160784, 788 S.E.2d 706, 2016 Va. LEXIS 107, 2016 WL 3971561 (July 22, 2016). The Court ordered the respondents other than Governor McAuliffe to take the following actions:

> (1) The Department of Elections and Commissioner Edgardo Cortés, on or before August 25, 2016, consistent with his 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)(3), shall cancel the registration of all felons who have been invalidly registered under Executive Orders issued on April 22, 2016, May 31, 2016, and June 24, 2016.
>
> (2) The Department of Elections and Commissioner Cortés, on or before August 25, 2016, shall "[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 Executive Orders issued on April 22, 2016, May 31, 2016, and June 24, 2016, and by canceling the registration of anyone who has registered pursuant to such orders.

(3) The Department of Elections and Commissioner Cortés, on or before August 25, 2016, shall "[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 Executive Orders issued on April 22, 2016, May 31, 2016, and June 24, 2016.

(4) 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, "shall institute procedures to ensure that" the Department of Elections and Commissioner Cortés carry out their duties under this Court's order, Code § 24.2–404(C).

(5) Secretary Kelly Thomasson, on or before August 25, 2016, shall maintain and provide to the Department of Elections accurate records of individuals whose political rights have been lawfully restored, by deleting and omitting from the records any

felons whose political rights were purportedly restored by Executive Orders issued on April 22, 2016, May 31, 2016, and June 24, 2016. See Code §§ 24.2–404(A)(9), 53.1–231.1.

Id., slip op. at 31-32, 2016 Va. LEXIS 107, at *54, 2016 WL 3971561, at *16.

8. The Department and I moved expeditiously to comply with the Supreme Court's order. On July 26, 2016, I provided general registrars around the Commonwealth with guidance about the Supreme Court's order and notified them that the Department would send cancellation letters to the affected individuals.

9. On July 29, 2016, the Department finished updating the prohibited-voter database to reflect that the 213,874 individuals covered by Governor McAuliffe's three restoration-of-rights orders did not have their rights restored. Also on July 29, the Department provided guidance to registrars regarding how to process pending registrations for felons affected by the Supreme Court's order, and advised that the Department would finish processing the cancellation of impacted voters' registrations by August 8, 2016.

10. The Department completed the process of cancelling the 12,832 impacted voters' registrations on August 4, 2016—three weeks

ahead of the deadline imposed by the Supreme Court. After this process was completed, the Department also worked with local general registrars to address any questions raised at the local level regarding the registration status of potentially impacted individual voters, and to ensure the cancellation of any impacted voters' registration. The Department and I strived to move expeditiously to cancel all invalid registrations in advance of the NVRA's 90-day deadline before the November 8, 2016 general election—August 10, 2016.

11. On August 5, 2016, letters informing affected voters that their registration had been canceled were delivered to the U.S. Postal Service for first-class mailing. I also provided information to the general registrars regarding the Department's compliance with the Supreme Court's order and directions for processing information provided through VERIS.

12. On August 6, 2016, the Department resumed its regular processing of felon data provided to registrars through VERIS.

13. On August 10, 2016, the Board of Elections held a meeting to discuss compliance with the Supreme Court's order. In advance of the meeting, I prepared a memorandum summarizing the actions taken by the Department and me in response to the order. Attached as Exhibit 1 is a true and accurate copy of the memorandum I provided to the Board. At the

meeting, I also provided the Board with an oral report on our compliance efforts.

14. I believe that the Department and I have complied with the Supreme Court's order, and I am not aware of any further actions the Department and I could take to comply more fully.

15. On August 15, 2016, Governor McAuliffe restored the rights of 12,521 individuals from among the 12,832 whose registrations had been cancelled. As of 9:00 o'clock a.m. on September 9, 2016, 4,151 of those 12,521 individuals had re-registered to vote.

16. If the Court were to invalidate the registration of voters whose rights were restored by Governor McAuliffe on or since August 15, 2016, the Department would require a 10- to 14-day period, including two weekends, to effect the cancellations in VERIS. Having weekends to implement the changes in VERIS are necessary to minimize system slowdowns that would impede the day-to-day work of registrars across the Commonwealth. That period of time is also necessary to identify and correct inadvertent mistakes caused by registrars' using VERIS while changes are being implemented.

17. Voters will soon begin casting votes for the November 8, 2016 election. Under the Uniformed and Overseas Citizens Absentee Voting Act

(UOCAVA), registrars are required to make absentee ballots available to certain groups of citizens by September 24, 2016 (or by September 23, if a registrar's office is closed on Saturday, the 24th). We have identified at least one person who has registered to vote in reliance on a recent individualized restoration-of-rights order issued by Governor McAuliffe, and who has requested an absentee ballot under UOCAVA. In addition, registrars who have the necessary ballot materials may choose to make absentee ballots available to all voters even earlier than that deadline.

18. Once voting is underway, a mass invalidation of voter registrations would introduce a substantial risk of uncertainty and disruption into the election process, not only for voters but for registrars and other elections officials. In addition to causing confusion about affected voters' status, the cancellations would require updates to VERIS that would hamper registrars' ongoing operations during their most demanding season.

19. Cancelling voter registrations after absentee ballots are available—or without sufficient time to effect the cancellations before absentee ballots are available—could also lead to differential treatment of the affected voters' votes. If a registered voter whose rights have recently been restored mails in an absentee ballot, and the identifying envelope

remains with the ballot, it may be possible to identify and set aside that vote if the Court invalidates the voter's registration before the election. But if that voter's ballot is separated from the identifying envelope, or if the voter votes absentee in person, then it will be impossible to identify and set aside that vote.

20. In some cases, invalidating restoration-of-rights orders could also introduce uncertainty about whether candidates in elections occurring November 8, 2016 are eligible to hold the offices they seek—both because candidates themselves may have had their political rights removed (including the right to hold office), and because their petitions to appear on the ballot may have been signed by individuals whose voting rights have been removed. At this late date, the composition of the election ballots would be very difficult or impossible to change in advance of the UOCAVA deadline. The Department is currently in the process of reviewing and approving for printing the final election ballots submitted by localities.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 9, 2016

Edgardo Cortés

★ VIRGINIA ★
DEPARTMENT *of* ELECTIONS

Memorandum

To: James Alcorn, Chairman
Clara Belle Wheeler, Vice Chair
Singleton McAllister, Secretary

From: Edgardo Cortés, Commissioner

Date: August 10, 2016

Re: Compliance with Supreme Court of Virginia Order in *Howell v. McAuliffe*

Background:

The Supreme Court of Virginia issued an opinion and associated writ of mandamus (http://www.courts.state.va.us/opinions/opnscvwp/1160784.pdf) in the matter of *Howell v. McAuliffe* after the close of business on Friday, July 22, 2016. The Commissioner of Elections, the Department of Elections, the State Board of Elections, and all three members of the State Board of Elections were named respondents in the suit, which challenged the Governor's authority to issue a single order restoring civil rights to an entire class of individuals with felony convictions. The Supreme Court, in a 4-3 vote, found the Governor's Executive Orders issued on April 22, 2016, May 31, 2016, and June 24, 2016 unconstitutional and directed the Respondents to take five remedial actions in its order:

(1) The Department of Elections and Commissioner Edgardo Cortés, on or before August 25, 2016, consistent with his 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)(3), shall cancel the registration of all felons who have been invalidly registered under Executive Orders issued on April 22, 2016, May 31, 2016, and June 24, 2016.

(2) The Department of Elections and Commissioner Cortés, on or before August 25, 2016, shall "[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 Executive Orders issued on April 22, 2016, May 31, 2016, and June 24, 2016, and by canceling the registration of anyone who has registered pursuant to such orders.

(3) The Department of Elections and Commissioner Cortés, on or before August 25, 2016, shall "[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 Executive Orders issued on April 22, 2016, May 31, 2016, and June 24, 2016.

(4) 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, "shall institute procedures to ensure that" the Department of Elections and Commissioner Cortés carry out their duties under this Court's order, Code § 24.2-404(C).

(5) Secretary Kelly Thomasson, on or before August 25, 2016, shall maintain and provide to the Department of Elections accurate records of individuals whose political rights have been lawfully restored, by deleting and omitting from the records any felons whose political rights were purportedly restored by Executive Orders issued on April 22, 2016, May 31, 2016, and June 24, 2016. See Code §§ 24.2-404(A)(9), 53.1-231.1.

Compliance with the Supreme Court Order:

The Commissioner of Elections and the Department of Elections moved expeditiously to comply with the requirements of the Court order in a transparent manner, while minimizing the impact to local election office operations. The Commissioner and Department of Elections completed carrying out the duties specified in the Court order on August 8, 2016, more than 2 weeks prior to the deadline established by the Court. Below is a timeline and details regarding the steps taken to comply with the Court order:

Friday, July 22, 2016: Supreme Court of Virginia issues order.

Saturday, July 23, 2016: Commissioner Cortés sent a statewide email to registrars indicating the Department was reviewing the Court order and would provide guidance as soon as possible. A copy of the email is attached.

Tuesday, July 26, 2016: Commissioner Cortés sent statewide guidance to registrars, including notice that the Department of Elections would send cancellation letters to impacted individuals. A copy of the email is attached.

Wednesday, July 27, 2016: Commissioner Cortés received notice from the Secretary of the Commonwealth that she had complied with her requirements under the Court order and that appropriate records were transferred to the Department of Elections.

Friday, July 29, 2016: The Department of Elections completed the process of returning a total of 213,874 individuals to the list of prohibited voters. The Department of Elections provided guidance to registrars on how to properly process pending registrations for individuals impacted by the Court's order. The communication from the Commissioner also indicated the Department of Elections was processing the appropriate

cancellations and would complete the process by August 8, 2016. A copy of the email is attached.

Thursday, August 4, 2016: The Department of Elections completed cancelling the voter registration records of 12,832 individuals, as directed by the Court order. Data was sent to the printer for preparation of cancellation letters. Commissioner Cortés sent a statewide email to registrars reiterating guidance provided on July 26 and 29. Notice was posted on the Virginia Townhall website that a State Board of Elections meeting was scheduled for Wednesday, August 10, 2016 and Commissioner Cortés provided additional notice via statewide email to registrars. A copy of both emails is attached.

Friday, August 5, 2016: Commissioner Cortés sent a statewide guidance email to registrars containing direction on processing information provided to localities via the Virginia Election and Registration Information System (VERIS) and cancelling pending absentee ballot requests. The email also provided information on the Department of Elections' compliance with the Court order. Cancellation letters were delivered to the U.S. Postal Service for first-class mailing. Commissioner Cortés sent a statewide email on behalf of the Secretary of the Commonwealth to provide information to registrars regarding the rights restoration process. A copy of both emails is attached.

Saturday, August 6, 2016: The Department of Elections resumes regular processing of felon data provided to registrars via VERIS. Commissioner Cortés and the Department of Elections complete compliance with the three Supreme Court Order directives which apply to Commissioner Cortés and the Department of Elections.

Cortes, Edgardo (ELECT)

From: The official communication list for the General Registrars of the Commonwealth <GRLIST@LISTLVA.LIB.VA.US> on behalf of Cortes, Edgardo (ELECT) <Edgardo.Cortes@ELECTIONS.VIRGINIA.GOV>
Sent: Saturday, July 23, 2016 9:42 AM
To: GRLIST@LISTLVA.LIB.VA.US
Subject: Re: [GRLIST] Guidance Please

The Department is currently reviewing the Supreme Court's decision to determine how best to ensure compliance with the Court's directives. We will provide specific guidance regarding the appropriate course of action for general registrars under this order as soon as possible to guarantee there is statewide uniformity.

Edgardo Cortés
Commissioner
Virginia Department of Elections
edgardo.cortes@elections.virginia.gov
804-864-8903 direct

From: Showalter, Kirk - General Registrar [mailto:Kirk.Showalter@Richmondgov.com]
Sent: Friday, July 22, 2016 6:57 PM
To: Cortes, Edgardo (ELECT)
Cc: GRLIST@LISTLVA.LIB.VA.US; Mash, Martin (ELECT)
Subject: Guidance Please

Given the Supreme Court's ruling, please provide guidance as soon as possilbe as to what we should do with those voters who were registered via the blanket felon restoration order as well as with those who have applied givein the 4/22 restoration date on their application, but for whom there is no current record in VERIS or on the Secretary of the Commonwealth's website of restoration. Especially on the latter, should I hold them or deny them? If I should hold them, how long should they be held?

J. Kirk Showalter
General Registrar
City of Richmond
CERA, VREO
(804) 646-5950

Cortes, Edgardo (ELECT)

From: Cortes, Edgardo (ELECT)
Sent: Tuesday, July 26, 2016 11:31 AM
To: GRLIST@LISTLVA.LIB.VA.US
Cc: EBLIST@LISTLVA.LIB.VA.US
Subject: OFFICIAL ELECT COMMUNICATION: Compliance with Supreme Court Order

Importance: High

The Department of Elections is currently working to comply with the Supreme Court's order issued late Friday. This work will entail updating VERIS in ways that will affect certain hoppers and other processes. The Department expects this update to be completed by the middle of next week. To facilitate compliance with the Supreme Court's order, until further notice from the Department of Elections you are directed to:

- Hold any voter registration applications received in your office that indicates an applicant was previously convicted of a felony until ELECT has completed updating the prohibited voter list. ELECT will provide further guidance at that time.
- Do not process any records in the felon hoppers until directed to do so by ELECT. The various processes running in VERIS are impacting these hoppers, and processing records locally during the update may negatively impact our ability to comply with the Court's order.
- Do not alter or cancel any records for individuals you believe were registered due to the Governor's restoration of rights orders issued on or after April 22, 2016. Again, the VERIS processes currently running are working with these specific records and making changes to those records at the local level in the middle of our processes may negatively impact our ability to comply with the Court's order. Pursuant to the Court's order, ELECT will be cancelling the registration of all voters the court has ordered be removed from the voter registration rolls, and will send cancellation letters to these voters.

While we will attempt to time these processes to minimize the impact on your local work, you may see some performance issues in VERIS this week as we get everything accomplished. We will issue additional guidance as we move forward with complying with the Court order by the August 25th deadline.

Edgardo Cortés
Commissioner
Virginia Department of Elections
edgardo.cortes@elections.virginia.gov
804-864-8903 direct

Cortes, Edgardo (ELECT)

From: Cortes, Edgardo (ELECT)
Sent: Friday, July 29, 2016 4:50 PM
To: GRLIST@LISTLVA.LIB.VA.US
Cc: EBLIST@LISTLVA.LIB.VA.US
Subject: OFFICIAL ELECT COMMUNICATION: Updated Status and Guidance related to Court Order

Good afternoon,

The Department of Elections continues to work diligently to comply with the July 22 Supreme Court order. As directed by the Court's order, we have now completed the process of moving all individuals covered by the order back to the prohibited voter list.

The following guidance addresses the implementation of the Court's order that ELECT direct general registrars to "refus[e] to register anyone whose political rights have purportedly been restored by Executive Orders issued on April 22, 2016, May 31, 2016, and June 24, 2016." Now that the prohibited voter list has been updated, you may begin processing any pending applications for individuals that indicated a prior felony conviction on their registration application. You must process the application and make your determination regarding eligibility based on the information contained in the prohibited voter list in VERIS. If VERIS indicates an individual applicant has an existing felony conviction and has not had his or her rights restored, then you must deny the application for voter registration in accordance with state law. The court order only applied to the Executive Orders issued on April 22, 2016, May 31, 2016, and June 24, 2016. If an individual's felony conviction record indicates a restoration of rights prior to April 22, 2016 and there is no subsequent felony record associated with that individual, then you should register the individual, assuming all other eligibility requirements have been met.

The cancellation and notification to voters the Court has ordered removed from the registration rolls will be completed by August 8, 2016.

We will continue to provide guidance and updates as we move forward with this process. Please let me know if you have any questions.

Edgardo Cortés
Commissioner
Virginia Department of Elections
edgardo.cortes@elections.virginia.gov
804-864-8903 direct

Cortes, Edgardo (ELECT)

From: Cortes, Edgardo (ELECT)
Sent: Thursday, August 04, 2016 12:20 PM
To: GRLIST@LISTLVA.LIB.VA.US; EBLIST@LISTLVA.LIB.VA.US
Subject: FW: OFFICIAL ELECT COMMUNICATION: Updated Status and Guidance related to Court Order

Everyone – we are currently working to comply with the July 22 Supreme Court order and will send everyone a copy of the cancellation letter and further directions as things are finalized. Per the emails I sent July 26th and 29th (see below), this is an ongoing process and you will see many things in your hoppers and reports as we run the various VERIS processes. We will provide updates, additional information, and further instructions as we have them. We have worked to keep everyone informed throughout this process and ask that you remain patient as we work to comply with the court order, well in advance of the court-imposed deadline. Thank you.

Edgardo Cortés
Commissioner
Virginia Department of Elections
edgardo.cortes@elections.virginia.gov
804-864-8903 direct

From: Cortes, Edgardo (ELECT)
Sent: Friday, July 29, 2016 4:50 PM
To: GRLIST@LISTLVA.LIB.VA.US
Cc: EBLIST@LISTLVA.LIB.VA.US
Subject: OFFICIAL ELECT COMMUNICATION: Updated Status and Guidance related to Court Order

Good afternoon,

The Department of Elections continues to work diligently to comply with the July 22 Supreme Court order. As directed by the Court's order, we have now completed the process of moving all individuals covered by the order back to the prohibited voter list.

The following guidance addresses the implementation of the Court's order that ELECT direct general registrars to "refus[e] to register anyone whose political rights have purportedly been restored by Executive Orders issued on April 22, 2016, May 31, 2016, and June 24, 2016." Now that the prohibited voter list has been updated, you may begin processing any pending applications for individuals that indicated a prior felony conviction on their registration application. You must process the application and make your determination regarding eligibility based on the information contained in the prohibited voter list in VERIS. If VERIS indicates an individual applicant has an existing felony conviction and has not had his or her rights restored, then you must deny the application for voter registration in accordance with state law. The court order only applied to the Executive Orders issued on April 22, 2016, May 31, 2016, and June 24, 2016. If an individual's felony conviction record indicates a restoration of rights prior to April 22, 2016 and there is no subsequent felony record associated with that individual, then you should register the individual, assuming all other eligibility requirements have been met.

The cancellation and notification to voters the Court has ordered removed from the registration rolls will be completed by August 8, 2016.

We will continue to provide guidance and updates as we move forward with this process. Please let me know if you have any questions.

Edgardo Cortés
Commissioner
Virginia Department of Elections
edgardo.cortes@elections.virginia.gov
804-864-8903 direct

From: Cortes, Edgardo (ELECT)
Sent: Tuesday, July 26, 2016 11:31 AM
To: GRLIST@LISTLVA.LIB.VA.US
Cc: EBLIST@LISTLVA.LIB.VA.US
Subject: OFFICIAL ELECT COMMUNICATION: Compliance with Supreme Court Order
Importance: High

The Department of Elections is currently working to comply with the Supreme Court's order issued late Friday. This work will entail updating VERIS in ways that will affect certain hoppers and other processes. The Department expects this update to be completed by the middle of next week. To facilitate compliance with the Supreme Court's order, until further notice from the Department of Elections you are directed to:

- Hold any voter registration applications received in your office that indicates an applicant was previously convicted of a felony until ELECT has completed updating the prohibited voter list. ELECT will provide further guidance at that time.
- Do not process any records in the felon hoppers until directed to do so by ELECT. The various processes running in VERIS are impacting these hoppers, and processing records locally during the update may negatively impact our ability to comply with the Court's order.
- Do not alter or cancel any records for individuals you believe were registered due to the Governor's restoration of rights orders issued on or after April 22, 2016. Again, the VERIS processes currently running are working with these specific records and making changes to those records at the local level in the middle of our processes may negatively impact our ability to comply with the Court's order. Pursuant to the Court's order, ELECT will be cancelling the registration of all voters the court has ordered be removed from the voter registration rolls, and will send cancellation letters to these voters.

While we will attempt to time these processes to minimize the impact on your local work, you may see some performance issues in VERIS this week as we get everything accomplished. We will issue additional guidance as we move forward with complying with the Court order by the August 25th deadline.

Edgardo Cortés
Commissioner
Virginia Department of Elections
edgardo.cortes@elections.virginia.gov
804-864-8903 direct

Cortes, Edgardo (ELECT)

From: Cortes, Edgardo (ELECT)
Sent: Thursday, August 04, 2016 5:56 PM
To: GRLIST@LISTLVA.LIB.VA.US; EBLIST@LISTLVA.LIB.VA.US
Subject: SBE Meeting 08-10-16

Good afternoon,

The State Board of Elections will be meeting next Wednesday, August 10, 2016 at 10:30am (http://townhall.virginia.gov/L/ViewMeeting.cfm?MeetingID=24812). The meeting will be held in the General Assembly Building, Room C. An agenda will be posted tomorrow but will include the July 22nd order from the Supreme Court of Virginia.

As a reminder, to receive automatic updates regarding SBE board meetings, regulatory actions, and other items posted on the Virginia Townhall website, you can sign up here: http://townhall.virginia.gov/L/Register.cfm

Edgardo Cortés
Commissioner
Virginia Department of Elections
edgardo.cortes@elections.virginia.gov
804-864-8903 direct

Cortes, Edgardo (ELECT)

From: Cortes, Edgardo (ELECT)
Sent: Friday, August 05, 2016 4:27 PM
To: 'GRLIST@LISTLVA.LIB.VA.US'; 'EBLIST@LISTLVA.LIB.VA.US'
Subject: OFFICIAL ELECT COMMUNICATION: Department of Elections compliance with Supreme Court order
Attachments: Cancellation letter 08-04-16.pdf

Good afternoon,

I am pleased to let you know that as of Monday, August 8th, the Commissioner and Department of Elections will have fully carried out our duties specified in the July 22 order issued by the Supreme Court of Virginia – more than 2 weeks prior to the deadline established by the Court. Below is confirmation of the steps we have taken and additional guidance and information that you may need related to our actions.

- As directed by the Supreme Court's order and noted last week, we completed the process of moving all individuals covered by the Governor's Executive Orders back to the prohibited voter list on July 29th. A total of 213,874 DOB and SSN combinations linked to approximately 3.1 million records were impacted by this process. This includes individuals who may have more than one DOB or SSN listed in records of various state agencies. This process was completed after the Secretary of the Commonwealth complied with the Supreme Court's order to provide to the Department of Elections accurate records of individuals whose political rights have been lawfully restored, by deleting and omitting from the records any felons whose political rights were purportedly restored by Executive Orders issued on April 22, 2016, May 31, 2016, and June 24, 2016.
- As directed by the Supreme Court's order, guidance was provided to local registrars on July 29th explaining the process to ensure general registrars "refus[e] to register anyone whose political rights have purportedly been restored by Executive Orders issued on April 22, 2016, May 31, 2016, and June 24, 2016." Please refer to that guidance if you have questions related to processing pending or incoming registration applications.
- As directed by the Supreme Court's order, the voter registration records of 12,832 individuals were cancelled by the Department of Elections this week. This process was completed today. A copy of a generic version of the cancellation letter is attached for your reference. The letters were delivered to the USPS today and voters will begin to receive them early next week. The letters were sent via first-class mail. Correspondence records will be added to the VERIS records by ELECT.
- The E&V reports will provide you a list of individuals in your locality that were cancelled so that you can pull any appropriate records from your card files or other filing systems. Records for cancelled voters must be retained in accordance with the Library of Virginia retention schedule.
- The Department of Elections is preparing guidance that will be provided early next week regarding the disclosure of the list of cancelled voters. This will allow you to respond to any requests within the established FOIA deadlines. We want to ensure uniformity and compliance with state and federal laws regarding release of this information. We also aim to make any required disclosures as easy as possible for registrars to reduce any potential impact on your workload.
- There were almost 70 pending absentee ballot requests for voters whose registration was cancelled. Localities that had cancelled voters with an absentee application pending will receive specific instructions from the VERIS team on properly cancelling those pending absentee requests in the system.
- The State Board of Elections will meet on Wednesday, August 10, 2016 at 10:30am in Room C of the General Assembly Building. They will receive a report from me detailing our actions in response to the Court's order so they can ensure that the Commissioner and Department of Elections have carried out

our duties under the Supreme Court's order. This is the only item on the agenda, which is available on the Virginia Townhall website: http://townhall.virginia.gov/L/ViewMeeting.cfm?MeetingID=24812. All regular business items will be addressed at the August 30, 2016 board meeting.

- Beginning Monday, August 8th, registrars can process their felon hoppers using their normal procedures.
- Individuals that have questions about rights restoration should contact the Secretary of the Commonwealth's office at 804-692-0104.

Please let me know if you have additional questions related to this matter. Thank you.

Edgardo Cortés
Commissioner
Virginia Department of Elections
edgardo.cortes@elections.virginia.gov
804-864-8903 direct

COMMONWEALTH of VIRGINIA
DEPARTMENT OF ELECTIONS

Edgardo Cortés
Commissioner

Elizabeth L. Howard
Deputy Commissioner

August 4, 2016

[Voter name]
[Address 1]
[Address 2]
[City], VA [Zip]

Dear [Voter Name]:

This notice is to inform you that your voter registration has been cancelled in compliance with a court order issued by the Supreme Court of Virginia on July 22, 2016. The court ruled that the Executive Orders issued by Governor Terence R. McAuliffe on April 22, 2016, May 31, 2016, and June 24, 2016, restoring the civil rights to more than 206, 000 Virginians, were unconstitutional. The court directed 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 who had been restored under these orders.

Governor McAuliffe has said that he plans to review the records of the nearly 13,000 individuals who, like you, registered to vote after having their rights restored. He is putting in place a process to review records and individually restore the rights of each of these individuals who meet the eligibility criteria in a way that is fair and transparent and complies with the court order. Please be on the look-out for another piece of mail from the Secretary of the Commonwealth with an update on the restoration of your civil rights and instructions for registering to vote again.

If you have any questions or concerns regarding the cancellation of your voter registration please contact the Virginia Department of Elections at info@elections.virginia.gov or (804) 864-8901. If you have any questions regarding rights restoration please contact the Restoration of Rights Office for the Secretary of the Commonwealth at (804) 692-0104.

Sincerely,

Edgardo Cortés
Commissioner

Cortes, Edgardo (ELECT)

From: Cortes, Edgardo (ELECT)
Sent: Friday, August 05, 2016 5:24 PM
To: 'GRLIST@LISTLVA.LIB.VA.US'
Cc: 'EBLIST@LISTLVA.LIB.VA.US'
Subject: Message from the Secretary of the Commonwealth

Below is a message the Secretary of the Commonwealth has asked me to share with you.

Edgardo Cortés
Commissioner
Virginia Department of Elections
edgardo.cortes@elections.virginia.gov
804-864-8903 direct

Dear Registrars,

I wanted to provide you with an update on the Governor's restoration of rights efforts. Our first priority has been compliance with the Supreme Court's Order, which the Secretary of the Commonwealth's Office has completed. I understand that there are questions and concerns about our process going forward. No final decisions have been made on future plans.

To clarify what was communicated to your listserve earlier, we are not instructing anyone to contact our office for a "phone interview" as part of any new process. While individuals are welcome to contact our office, there is no formal phone interview process in place. We continue to encourage individuals who seek to have their civil rights restored or who have questions about the status of their civil rights restoration to contact our office at 804-692-0104 or 855-575-9177.

We are also working with our IT team to put the searchable database feature back on our website and I anticipate that will be up early next week. As you know, individuals who had their rights restored prior to the April 22 order were not affected by the Court's opinion and the status of their civil rights has not changed. The database can be used by individuals or registrars to alleviate any confusion.

Please let me know if you have other specific questions or areas of concern that we can help address.

Best,
Kelly

Kelly Thomasson
Secretary of the Commonwealth
1111 E. Broad Street, 4th Floor | Richmond, VA 23219
804.663.7761 direct | kelly.thomasson@governor.virginia.gov
https://commonwealth.virginia.gov/

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.

DECLARATION OF CATHERINE ROSE MANSFIELD

Pursuant to Virginia Code § 8.01-4.3, I, Catherine Rose Mansfield, declare as follows:

1. I am the Clerk of the Virginia State Board of Elections (the "Board"). I have served in that capacity since August 2011.

2. I have personal knowledge of the facts in this Declaration.

3. As Clerk, I am responsible for providing members of the Board with the agenda and working papers before each Board meeting, preparing minutes of the Board's meetings, and maintaining the Board's official records.

4. At the Board's August 10, 2016 meeting, following a report by Commissioner of Elections Edgardo Cortés and related discussion, the Board adopted a resolution regarding its compliance with the Supreme Court of Virginia's July 22, 2016 order in *Howell v. McAuliffe*.

5. Attached as Exhibit 1 is a true and accurate copy of the resolution adopted by the Board.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 12, 2016

Catherine Rose Mansfield

Catherine Rose Mansfield

RESOLUTION OF THE STATE BOARD OF ELECTIONS

REGARDING THE JULY 22, 2016 SUPREME COURT OF VIRGINIA ORDER

WHEREAS, on April 22, 2016, May 31, 2016, and June 24, 2016, Governor McAuliffe issued Executive Orders to restore the voting rights of 213,874 individuals who had been convicted of a felony but who had completed their sentences of incarceration and periods of supervised release; and

WHEREAS, while those Executive Orders were in effect, 12,832 individuals whose rights had been restored registered to vote in the Commonwealth; and

WHEREAS, on July 22, 2016 the Supreme Court of Virginia, in the matter of *Howell v. McAuliffe*, issued an Order granting the Writ of Mandamus requested by the Petitioners, invalidating the Governor's Executive Orders and any restoration of rights they granted, and setting forth five remedial actions to be taken by the Respondents; and

WHEREAS, the Court's order requires that "[t]he State Board of Elections and Chairman James B. Alcorn, Vice Chair Clara Bell[e] Wheeler, and Secretary Singleton B. McAllister, on or before August 25, 2016, 'shall institute procedures to ensure that' the Department of Elections and Commissioner Cortés carry out their duties under this Court's order, Code § 24.2-404(C)"; and

WHEREAS, Commissioner Cortés has reported to this Board on the steps taken by the Department of Elections to comply with the Order and the Board finds that such actions are fully compliant with the Order and provide the requisite and necessary procedures to continue compliance, now, therefore,

BE IT RESOLVED that based on the report of the Commissioner, the Board is satisfied that the Department and the Commissioner have carried out their duties to comply with the Supreme Court's July 22 Order, and

BE IT RESOLVED FURTHER that the Department shall continue to advise the Board on this matter on issues that may arise with implementation of the Order.

Adopted.

Chair.

Singleton B. McAllister
Secretary

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.

DECLARATION OF KELLY THOMASSON

Pursuant to Virginia Code § 8.01-4.3, I, Kelly Thomasson, declare as follows:

1. I am the Secretary of the Commonwealth for the Commonwealth of Virginia. I have served in that position since April 15, 2016, before which I had served as Deputy Secretary of the Commonwealth since January 2014.

2. As the Secretary of the Commonwealth, I oversee the process by which the Governor restores the political rights of individuals. My office maintains a database containing information on individuals whose rights have been restored by the Governor. This database was built by the

McDonnell administration and houses electronic restoration-of-rights data from recent Governors, including some data going back to the 1980s. When the system was built in 2012, a process was put in place for the database to communicate nightly updates to the Department of Elections database (VERIS) with information on individuals who had been granted their civil rights in order for changes to be made to the prohibited voter list.

3. On April 22, 2016, Governor McAuliffe issued an order restoring the political rights of all formerly convicted felons who, as of that day, had completed their sentences of incarceration and any sentences of supervised release, including probation and parole. On May 31, 2016, the Governor issued a second, similar order restoring the rights of former felons who had completed their sentences of incarceration and supervision between April 22 and April 30, 2016. On June 24, 2016, the Governor issued a third order restoring the rights of former felons who had completed their sentences of incarceration and supervision between May 1 and May 31, 2016. Following the issuance of each order, I worked with my staff to add or modify records in the office's restoration-of-rights database to reflect that the individuals we attributed to the order had had their rights restored.

4. On July 22, 2016, the Supreme Court of Virginia declared invalid the Governor's three restoration-of-rights orders of April 22, May 31,

and June 24, 2016. *Howell v. McAuliffe*, No. 160784, 788 S.E.2d 706, 2016 Va. LEXIS 107, 2016 WL 3971561 (July 22, 2016). The Court ordered me "on or before August 25, 2016" to "maintain and provide to the Department of Elections accurate records of individuals whose political rights have been lawfully restored, by deleting and omitting from the records any felons whose political rights were purportedly restored by [the] Executive Orders . . . ." *Id.*, slip op. at 32 ¶ 5, 2016 Va. LEXIS 107, at *54 ¶ 5, 2016 WL 3971561, at *16 ¶ 5.

5. The Supreme Court also ordered the Department of Elections and Commissioner of Elections Edgardo Cortés to cancel the voter registration of any felons who had registered to vote after having their rights restored by one of the executive orders. *Id.*, slip op. at 31-32 ¶¶ 1-2, 2016 Va. LEXIS 107, at *54 ¶¶ 1-2, 2016 WL 3971561, at *16 ¶¶ 1-2. An initial review identified 12,832 such individuals.

6. To comply with the Supreme Court's order, I worked with my staff to update our database to reflect that the individuals covered by the three executive orders did not have their rights restored. My office completed that process on the morning of July 27, 2016. Later that day, I reported to Commissioner Cortés, among others, on the actions taken by my office.

7. I believe I have complied with the Supreme Court's order, and I am not aware of any further actions I could take to comply more fully.

8. Following compliance with the Supreme Court's order, Governor McAuliffe directed my office to conduct a thorough review of the 12,832 individuals whose voter registration had been canceled, and to provide him with a recommendation regarding whether those individuals (each of whom had previously applied to register to vote) should have their rights restored on an individual basis. The Governor instructed me, in forming my recommendation, to determine whether those persons satisfied certain initial threshold criteria—namely, that he or she had been released from incarceration and had completed any term of active supervision.

9. To determine whether an individual satisfied the Governor's discretionary criteria, my office submitted the name of each formerly convicted felon for review by a number of State agencies, including the Department of Corrections; the Department of Juvenile Justice; the State Police; the Department of Criminal Justice Services; the Department of Behavioral Health and Developmental Services; and the Compensation Board, which maintains information about inmates at local jails.

10. After receiving and processing information about each individual from those agencies, my office determined which of those were

eligible to have their rights restored under the Governor's criteria. At his request, I then provided the Governor with a summary of information about each of those individuals. That summary included, among other things, the individual's name, date of birth, locality, and criminal history status. The Governor was also made aware of any other relevant information provided by the reviewing State agencies. As a result of that review, the Governor exercised his discretion not to remove the disabilities of a number of individuals who were the subject of an active warrant or awaiting trial on another offense. The records of these individuals may receive further review at a later date.

11. On August 15, 2016, after reviewing information about each of the individuals who had their voter registration canceled by the Supreme Court's July 22 order, Governor McAuliffe restored the rights of 12,521 individuals. Of the 12,521 newly restored individuals, over 2,800 had personally contacted our office to request restoration of their rights, either before or after the Supreme Court's July 22 order. In our judgment, the remainder demonstrated their personal interest in having their rights restored by attempting to exercise those rights and registering to vote after the Governor's April 22, May 31, or June 24 orders.

12. Individual restoration orders were printed with the Governor's signature under the Lesser Seal of the Commonwealth and mailed on August 19, 2016 to the newly restored individuals. My staff updated our office's database to reflect that those individuals had had their rights restored. I also communicated to the Department of Elections that those individuals should have their names removed from the "prohibited voter" list in VERIS.

13. On August 22, 2016, the Governor announced his plans for an individualized review of other persons eligible to have their rights restored under his discretionary criteria. The process has the same components as were followed in restoring the rights of the 12,521 individuals on August 15, 2016:

- individual determination of eligibility by my office after consultation with and review by relevant State agencies;
- presentation to the Governor of eligible individuals' names, with relevant information about each person's individual circumstances;
- individualized review and consideration by the Governor; and
- issuance of individual restoration-of-rights orders.

14. The process of review and restoration of rights to eligible individuals is ongoing. On September 2, the Governor, following the case-by-case review process discussed above, issued individualized restoration-of-rights orders to 6,957 persons. All of those individuals had previously requested to have their political disabilities removed.

15. No timeframe has been adopted for reviewing the eligibility of other formerly convicted felons, but the process will be ongoing, well into 2017. Individuals who contact our office and request restoration of their rights will be prioritized for review. The Governor also intends to review the records of individuals who may meet the criteria, even if they don't apply. These records will generally be reviewed in order of release date from State supervision, starting with those released the longest. My office will prepare on a monthly basis, and release on request, the names of any newly restored individuals. The full list will also be included in the Governor's annual report to the General Assembly on clemency actions.

16. These and other aspects of Governor McAuliffe's restoration-of-rights policy are described in Exhibit 1, which is a true and correct copy of the policy as publicly announced on August 22, 2016. The policy is also available at http://goo.gl/tppBiU.

17. When I started as Deputy Secretary of the Commonwealth in January 2014, I became very familiar with the process followed by Governor McDonnell's administration. We retained all of Governor McDonnell's restoration-of-rights staff and continued the same policies and procedures for many months. The policy implemented by Governor McDonnell in July 2013, and carried into our administration, provided for automatic restoration of rights for nonviolent felons who completed their sentences and paid their fines. That policy provided for automatic restorations without requiring recipients to apply for the removal of their political disabilities.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 9, 2016

Kelly Thomasson

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.
- 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 . Individuals without internet access can call the SOC at 804-692-0104 or mail-in a contact form.