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 VERIFIED PETITION FOR WRITS OF MANDAMUS AND PROHIBITION

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MOTION TO DISMISS

Respondents, Governor Terence R. McAuliffe, et al., by counsel and pursuant to Rule 5:7(b)(6), move to dismiss the Verified Petition for Writs of Mandamus and Prohibition. Petitioners lack standing, have failed to state a claim for relief, have failed to join necessary parties, and have failed to show that the Governor lacks authority to issue the orders in question.

ANSWER

Respondents, in the alternative, answer the allegations in the Verified Petition, paragraph for paragraph, as follows:

1. Admitted, except that Respondents do not know that each Petitioner plans to vote in the 2016 General Election or that Senator Norment plans to run for re-election in 2019.

2. Denied.

3. Respondents admit that the 2016 General Election will occur on November 8, 2016, and that the statutory 45-day deadline for the availability of absentee ballots is Saturday, September 24, 2016. The Department of Elections traditionally sets the deadline as the preceding Friday, in this case September 23. The remaining allegations are denied.

4. Denied.

5. Respondents admit that the taking of evidence is unnecessary

with regard to the validity of the Governor's actions. If the case proceeds, discovery may be needed regarding Petitioners' alleged standing.

6. Any remaining allegations not expressly admitted are denied.

7. As of June 20, 2016, 7,620 citizens have registered to vote based on the orders at issue in this case ("Restored Voters").

8. Petitioners lack standing, have failed to state a valid legal claim, have failed to join necessary parties, have failed to show that the Governor exceeded his authority, and are not entitled to the remedies they seek.

9. To the extent Petitioners seek relief not cognizable through mandamus or prohibition, the claims are barred by sovereign immunity.

Accordingly, the Court should dismiss the Verified Petition.

BRIEF IN SUPPORT OF MOTION TO DISMISS

INTRODUCTION

Petitioners barely mention Article V, § 12 of the Constitution of Virginia, but it empowers the Governor "to remove political disabilities consequent upon conviction for offenses committed prior or subsequent to the adoption of this Constitution." That language plainly authorizes the group restoration-of-rights actions at issue here; the text is unqualified and commits the restoration-of-rights power solely to the Governor's discretion. If the Court reaches the merits, therefore, the Governor's actions should be

upheld. But Petitioners' case has fatal procedural defects. Petitioners lack standing because they allege no concrete and particularized injury to any cognizable legal interest. A writ of prohibition cannot be used against the Executive Branch. And prohibition and mandamus are both barred because they cannot be used to undo acts that are already done, cannot be used to control executive discretion, and cannot be used when, as in this case, Petitioners have an adequate remedy at law.

STATEMENT OF THE CASE

On April 22, 2016, Governor McAuliffe issued an Order for the Restoration of Rights,[1] ordering:

> the removal of the political disabilities consequent upon conviction of a felony . . . from all those individuals who have, as of this 22nd day of April 2016, (1) completed their sentences of incarceration for any and all felony convictions; and (2) completed their sentences of supervised release, including probation and parole, for any and all felony convictions.[2]

The Order restores the rights to vote, to hold public office, to serve on a jury, and to act as a notary public. It does not restore firearm rights.[3]

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[1] JA 1.

[2] Order at 2 (JA 2).

[3] *Id*. *See* Va. Code Ann. § 18.2-308.2(C) (Supp. 2015) (setting forth procedure for person whose rights are restored by the Governor to apply to the circuit court to restore firearm rights); *Gallagher v. Commonwealth*, 284

In issuing the order, the Governor explained, among other things:

- "disenfranchisement disproportionately affects racial minorities and economically disadvantaged Virginians";
- "all individuals who have served the terms of their incarceration and any periods of supervised release deserve to re-enter society on fair and just terms, including to participate in the political and economic advancement of Virginia";
- "the restoration of civil rights has been noted to achieve substantial benefits for those individuals who have felt long-exiled from mainstream life"; and
- "democracy is strengthened by having more citizens involved in the political process."[4]

A 2012 study estimated the total number of disenfranchised felons in Virginia, as of 2010, to be 451,471.[5] The Order applied to approximately 206,000 people.[6] On May 31, 2016, the Governor issued a similar order for persons meeting the criteria as of April 30, 2016.[7]

Petitioners claim that these orders are unconstitutional. They argue

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Va. 444, 452, 732 S.E.2d 22, 26 (2012) ("The jurisdiction to restore firearm rights . . . is vested solely in the circuit courts.").

[4] Order at 1 (JA 1).

[5] Christopher Uggen & Sarah Shannon, *State-Level Estimates of Felon Disenfranchisement in the United States*, *2010*, at 16 (Sentencing Project, 2012), *available at* http://goo.gl/214Vz1.

[6] *Id*.

[7] Governor Terence R. McAuliffe, Order for the Restoration of Rights (May 31, 2016), *available at* https://goo.gl/B0FsqO.

that the Governor may remove political disabilities only "on an individual basis," not "en masse."[8] The lead petitioners are William J. Howell, Speaker of the House of Delegates, and Thomas K. Norment, Jr., Majority Leader of the Senate. Four citizens joined in their capacity as "qualified voters" who plan to vote in the November 2016 general election.[9]

Petitioners seek a writ of mandamus to compel Respondents to cancel "the registrations of all felons who have registered to vote pursuant" to the orders and to "refuse to permit the registration of felons who claim their rights have been restored" by the orders.[10] They want the Court to "[c]ommand[] the Governor to take care that the provision of the Constitution disqualifying felons from voting be faithfully executed . . . ."[11] They also seek a writ of prohibition to stop "Governor McAuliffe from issuing further orders that restore political rights en masse and not on an individual basis," and to prevent State election officials from allowing registrars to register persons whose rights were restored by the Order or by any similar

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[8] Pet. at 4.

[9] *Id*. at 1.

[10] *Id*. at 50.

[11] *Id*. at 4.

order.[12]

We will use the term "Restored Voters" to identify those citizens whose political disabilities were removed by the Governor's orders and who thereafter have properly registered to vote in the November 2016 general election. As of June 20, 2016, 7,620 such citizens had registered to vote.[13] Under the National Voter Registration Act,[14] States must "complete, not later than 90 days prior to the date of a primary or general election for Federal office, any program the purpose of which is to systematically remove the names of ineligible voters from the official lists of eligible voters."[15] For the November 8, 2016 general election, that 90-day period commences on August 10, 2016.

ARGUMENT

I. Petitioners have suffered no harm to any cognizable legal interest and lack standing to bring this action.

"'[T]he point of standing is to ensure that the person who asserts a position has a substantial legal right to do so and that his rights will be

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[12] *Id*.

[13] Answer ¶ 7.

[14] 52 U.S.C. §§ 20501-20511.

[15] 52 U.S.C. § 20507(c)(2)(A).

affected by the disposition of the case.'"[16] "Thus, it is not sufficient that the sole interest of [a] petitioner is to advance some perceived public right or to redress some anticipated public injury when the only wrong he has suffered is in common with other persons similarly situated."[17] As the U.S. Supreme Court recently summarized: "a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'"[18]

The law of standing serves a crucial separation-of-powers function in our republican form of government by "prevent[ing] the judicial process from being used to usurp the powers of the political branches."[19] The standing inquiry should be "especially rigorous" when, as here, the Court is

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[16] *Gray v. Va. Sec'y of Transp*., 276 Va. 93, 102 n.5, 662 S.E.2d 66, 71 n.5 (2008) (quoting *Cupp v. Bd. of Supervisors of Fairfax Cty.*, 227 Va. 580, 589, 318 S.E.2d 407, 411 (1984)).

[17] *Id*. (quoting *Va. Beach Beautification Comm'n v. Bd. of Zoning Appeals*, 231 Va. 415, 419, 344 S.E.2d 899, 902 (1986)).

[18] *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). Although federal precedents are plainly not binding here, this Court has often found them highly persuasive. *See, e.g.*, *Wilkins v. West*, 264 Va. 447, 460, 571 S.E.2d 100, 107 (2002) (applying formula from *United States v. Hays*, 515 U.S. 737 (1995), to contiguousness and compactness challenges); *Goldman v. Landsidle*, 262 Va. 364, 371, 552 S.E.2d 67, 71 (2001) (applying federal standard in rejecting State-taxpayer standing).

[19] *Spokeo*, 136 S. Ct. at 1547 (quoting *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1146 (2013)).

asked "to decide whether an action taken by one of the other two branches" of Government is "unconstitutional."[20]

"[W]hen the complaint is challenged by a demurrer raising the issue of standing, a plaintiff has no legal standing to proceed in the case if its factual allegations fail to show that it actually has a 'substantial legal right' to assert."[21] Petitioners' bare allegations here are insufficient.

A. Petitioners lack standing as voters.

Petitioners cannot demonstrate standing by baldly asserting that allowing Restored Voters to participate in the November election will "unconstitutionally dilute" Petitioners' votes and "undermine the legitimacy of the election."[22] First, the claimed injury is not concrete or particularized to them; it is no different from the generalized grievance rejected for lack of standing in *Goldman v. Landsidle*.[23] In *Goldman*, the petitioners sought to

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[20] *Clapper*, 133 S. Ct. at 1147 (quoting *Raines v. Byrd*, 521 U.S. 811, 819-20 (1997)). *See also Raines*, 521 U.S. at 833 (Souter, J., concurring) (discussing "separation-of-powers principles underlying our standing requirements" and cautioning about intervention in an "interbranch controversy about calibrating the legislative and executive powers").

[21] *Deerfield v. City of Hampton*, 283 Va. 759, 764, 724 S.E.2d 724, 726 (2012) (quoting *Kuznicki v. Mason*, 273 Va. 166, 171, 639 S.E.2d 308, 310 (2007)).

[22] Pet. ¶ 3.

[23] 262 Va. at 364, 552 S.E.2d at 67.

mandamus the Comptroller to stop him from releasing office-expense reimbursements to members of the General Assembly without requiring proof that such expenses had been incurred. The Court held that the petitioners could not allege standing merely "as citizens and taxpayers."[24] Their alleged injury was "shared with several million persons" and was "comparatively minute and indeterminable."[25] The petitioners "ha[d] not demonstrated . . . a direct interest in the proceedings different from that of the public at large."[26] No such direct interest is pleaded here either.[27]

Second, Petitioners have identified no "justiciable interest"[28] or

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[24] *Id*. at 371, 552 S.E.2d at 71.

[25] *Id*. at 372, 552 S.E.2d at 70 (quoting *ASARCO Inc. v. Kadish*, 490 U.S. 605, 613 (1989)).

[26] *Id*. at 374, 552 S.E.2d at 73. *See also Friends of the Rappahannock v. Caroline Cty. Bd. of Supervisors*, 286 Va. 38, 48, 743 S.E.2d 132, 137 (2013) ("[T]he complainant must allege facts demonstrating a particularized harm to 'some personal or property right, legal or equitable, or imposition of a burden or obligation upon the petitioner different from that suffered by the public generally.'") (quoting *Va. Marine Res. Comm'n v. Clark*, 281 Va. 679, 687, 709 S.E.2d 150, 155 (2011)); *Barry v. Landsidle*, No. HQ-841, 2001 WL 9363670, at *4 (Richmond Cir. Ct. Aug. 10, 2001) (no taxpayer standing to challenge Governor's computations for phase-out of car-tax).

[27] *See also Friends of the Rappahannock*, 286 Va. at 49, 743 S.E.2d at 137 (holding that plaintiff is "required to plead facts sufficient to claim particularized harms to rights not shared by the general public"); *Deerfield*, 283 Va. at 764, 724 S.E.2d at 726-27 (same).

[28] *Charlottesville Area Fitness Club Operators Ass'n v. Albemarle Cty. Bd. of Supervisors*, 285 Va. 87, 98, 737 S.E.2d 1, 7 (2013).

"legally protected interest"[29] that gives them standing. The claimant must show "*a substantial legal right* . . . and that his rights will be affected by the disposition of the case."[30] In *Grisso v. Nolen*, for instance, this Court held that an ex-husband who reconciled and cohabitated with his former wife after their divorce had no standing to bring an action requesting her reburial in accordance with her express wishes; the divorce terminated their legal relationship and made him "a legal stranger" to her.[31] As a result, "he had no cognizable interest" that gave him standing.[32]

Petitioners may feel as passionately about their claims as the plaintiff in *Grisso*, but they likewise have no cognizable legal interest here. They do not have a viable "vote dilution" claim because Virginia (like all other States) apportions its voting districts by *total* population, not by *voting*

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[29] *Id*. at 110 n.3, 737 S.E.2d at 14 n.3 (Kinser, C.J., concurring) (quoting *Wilkins*, 264 Va. at 459, 571 S.E.2d at 106).

[30] *Westlake Props. Inc. v. Westlake Pointe Prop. Owners Ass'n Inc*., 273 Va. 107, 120, 639 S.E.2d 257, 265 (2007) (quoting *Cupp*, 227 Va. at 589, 318 S.E.2d at 411) (emphasis added); *accord Spokeo*, 136 S. Ct. at 1548 (requiring "invasion of a legally *protected interest*") (quoting *Lujan*, 540 U.S. at 560); *Linda R. S. v. Richard D.*, 410 U.S. 614, 619 (1973) ("[I]n American jurisprudence at least, a private citizen lacks a *judicially cognizable interest* in the prosecution or nonprosecution of another.") (emphasis added).

[31] 262 Va. 688, 694-95, 554 S.E.2d 91, 95 (2001).

[32] *Id*. at 696, 554 S.E.2d at 95.

population.[33] As the Supreme Court recently explained in *Evenwel v. Abbott*, because election districts are apportioned by total population, elected "representatives serve *all* residents, not just those eligible or registered to vote."[34] Thus, a vote-dilution claim cannot be used to challenge a State's failure to equalize total *voting* population across voting districts.[35] By the same token, the participation of residents in their own jurisdiction's elections cannot give rise to a vote-dilution claim because the districts are apportioned based on total population (including residents who are disqualified from voting), not based on voting population.[36]

Nor may Petitioners manufacture standing by relying on the *per se* rule in *Wilkins v. West* that, in redistricting cases, a voter has standing to challenge his *own* district as a racial gerrymander, or as a violation of the contiguity and compactness requirements of the Virginia Constitution.[37] *Wilkins* made clear that a "person who does not live in such a district does

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[33] Va. Const. art. II, § 6.

[34] 136 S. Ct. 1120, 1132 (2016) (emphasis added).

[35] *Id*. at 1132-33.

[36] Petitioners' authorities are inapposite because they predated *Evenwel* and involved dilution claims based on *nonresidents* voting in a jurisdiction's elections. *See Duncan v. Coffee Cty.*, 69 F.3d 88, 91 (6th Cir. 1995); *Locklear v. N.C. State Bd. of Elec.*, 514 F.2d 1152, 1154 (4th Cir. 1975).

[37] Pet. at 38 (discussing *Wilkins*, 264 Va. at 460, 571 S.E.2d at 107).

not suffer such harm and is not entitled to the inference of harm"; he may show standing only through specific evidence of "individualized injury."[38] So even if *Wilkins* applied, it would not support Petitioners' *statewide* challenge. Moreover, the *per se* rule in *Wilkins* does not extend beyond redistricting cases. It provides no license to sue the government over *any* election practice with which the voter may disagree. Accepting Petitioners' relaxed theory of standing here would open the floodgates to election-law litigation in what is already a crowded field.[39]

Finally, conferring standing on Petitioners in this case would improperly circumvent the limited cause of action the General Assembly crafted to permit voters to remove allegedly unqualified persons from the voting rolls. Code § 24.2-431 permits "any three qualified voters" to file a petition with the circuit court in "the county or city in which they are registered . . . stating their objections to the registration of any person

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[38] 264 Va. at 460, 571 S.E.2d at 107. *Jamerson v. Womack* likewise involved a compactness challenge brought by voters who lived in the districts at issue. 244 Va. 506, 509, 423 S.E.2d 180, 181 (1992).

[39] The non-Virginia precedents Petitioners cobble together do not advance their argument. *See Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1352 (11th Cir. 2005) (holding that plaintiff had standing where she was "unable to vote in her new home precinct" after State officials refused to accept her "federal registration form to notify the state of a change in her address"); *Duncan*, 69 F.3d at 91 (discussing requirements for one-person-one-vote challenge).

whose name is on the registration records for their county or city."[40] The petitioners must give 15 days' notice to persons whose names they seek to remove from the rolls, and the case must be given preference on the docket.[41] The Code provides an appeal of right to this Court from the circuit court's decision, and preferential treatment on this Court's docket as well.[42]

The Code thus requires a minimum of *three* voters to challenge the registration of another person in the same county or city. Petitioners have plainly evaded that requirement. Like the plaintiffs in *Charlottesville Area Fitness*, Petitioners are improperly "attempting to challenge governmental action in a manner not authorized by statute and to create rights through" a mandamus action "that they do not have under" the voter-registration laws.[43] Indeed, "'[when] a statute creates a right and provides a remedy for the vindication of that right, then that remedy is exclusive unless the statute

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[40] Va. Code Ann. § 24.2-431 (2011).

[41] *Id*. § 24.2-432 (2011).

[42] *Id*. § 24.2-433 (2011).

[43] 285 Va. at 103, 737 S.E.2d at 10.

says otherwise.'"[44]

Whether standing exists, of course, does not depend on the availability of another vehicle to reach the merits. "'[T]he assumption that if [plaintiffs] have no standing to sue, no one would have standing, is not a reason to find standing.'"[45] Nonetheless, Code § 24.2-431 provides precisely the right vehicle; Petitioners simply have failed to use it.

B. Senator Norment lacks standing as a candidate.

Speaker Howell does not plead that he intends to run for re-election, but Senator Norment does. Senator Norment claims standing on the theory that, if Restored Voters participate in his next election in 2019, "he will be required to compete for re-election before an invalidly constituted electorate."[46] To the extent Senator Norment claims standing as a voter, his claim fails as set forth above; to the extent he claims standing as a candidate, his claim is indistinguishable from the theory of standing that the

[44] *Concerned Taxpayers of Brunswick Cty. v. Cty. of Brunswick*, 249 Va. 320, 330, 455 S.E.2d 712, 717 (1995) (quoting *Vansant & Gusler, Inc. v. Washington*, 245 Va. 356, 360, 429 S.E.2d 31, 33 (1993)).

[45] *Clapper*, 133 S. Ct. at 1154 (quoting *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 489 (1982)).

[46] Pet. at 39.

Supreme Court recently rejected in *Wittman v. Personhuballah*.[47]

Wittman held that neighboring congressmen lacked standing to challenge the three-judge court's finding that Virginia's Third Congressional District was a racial gerrymander. The congressmen claimed injury on the ground that the court-ordered remedial plan altered their own districts and that, "unless the Enacted Plan is reinstated, 'a portion of the[ir] 'base electorate' will necessarily be replaced with 'unfavorable Democratic voters,' thereby reducing the likelihood of the Representatives' reelection."[48] But the Court said that "the party invoking the court's jurisdiction cannot simply allege a nonobvious harm, without more," and that the congressmen had failed to offer any facts to show that the court-ordered remedial district would jeopardize their reelection.[49]

Senator Norment's claim suffers from the same deficiency. Senator Norment was re-elected in 2015 with 69.71% of the vote, receiving over 20,000 more votes than his challenger.[50] He has not alleged that his

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[47] 136 S. Ct. 1732 (2016).

[48] *Id*. at 1737.

[49] *Id*.

[50] Va. Public Access Project (VPAP), State Senate Dist. 3, General Election: Nov. 3, 2015, *available at* http://goo.gl/dOUIn4 (JA 261). He also outspent his challenger $1,996,601 to $18,904. *Id*.

election in 2019 will likely be so close that the participation of Restored Voters will impugn his victory, let alone threaten his reelection chances. His claim is too "remote" and "indirect" to qualify.[51]

C. Speaker Howell and Senator Norment lack standing as legislators.

Nor do Speaker Howell and Senator Norment have standing as legislators. The U.S. Supreme Court expressly addressed that basis for standing in *Raines v. Byrd*, where "six Members of Congress" challenged the Line Item Veto Act.[52] They claimed that "the Act causes a type of institutional injury (the diminution of legislative power), which necessarily damages all Members of Congress . . . ."[53] The Court held that the legislators lacked standing because (1) they "alleged no injury to

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[51] *Va. Beach Beautification Comm'n*, 231 Va. at 419, 344 S.E.2d at 902. Petitioners' authorities again are distinguishable because they involve particularized, concrete injuries not alleged here. *See LaRoque v. Holder*, 650 F.3d 777, 786 (D.C. Cir. 2011) (holding that candidate seeking to run under nonpartisan election system suffered particularized injury from the greater expense and reduced chance of success of having to compete in a partisan system); *Shays v. FEC*, 414 F.3d 76, 83, 85-86 (D.C. Cir. 2005) (holding that two congressmen running for reelection had standing to challenge FEC rules that violated federal election laws designed to protect candidates like them from soft-money attack ads).

[52] 521 U.S. at 814.

[53] *Id*. at 821 ("[A]ppellees' claim of standing is based on a loss of political power, not loss of any private right, which would make the injury more concrete.").

themselves as individuals"; (2) "the institutional injury they allege[d] is wholly abstract and widely dispersed"; and (3) "their attempt to litigate this dispute at this time and in this form is contrary to historical experience."[54]

Petitioners lack standing here for the same reasons. Their claim that the "executive order trenches upon the General Assembly's role in initiating constitutional amendments"[55] is likewise "wholly abstract and widely dispersed" across the entire legislature.[56] The claim is not particularized to them; any other legislator could bring it. And Petitioners have not cited (nor have we located) any Virginia precedent that would confer standing for this type of claim. To the contrary, when legislators sued the Governor in 2004 to declare an appropriations bill unconstitutional, the circuit court dismissed the action for lack of standing, citing *Raines.*[57]

II. Petitioners fail to state a claim for mandamus or prohibition.

Mandamus and prohibition are called "extraordinary writs" for good reason. Mandamus "should never issue unless the petitioner's right to it is

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[54] *Id*. at 829.

[55] Pet. at 39.

[56] *Raines*, 521 U.S. at 829.

[57] *Marshall v. Warner*, 64 Va. Cir. 389, 391-92 (Richmond 2004).

clear."[58] It applies "only where there is a clear and specific legal right to be enforced, or a duty which ought to be and can be performed," and it is "never granted in doubtful cases."[59] Prohibition "issues only in cases of extreme necessity."[60] These writs are subject to numerous additional limitations that also make them unavailable here as a matter of law.

A. Neither extraordinary writ is available to undo restoration-of-rights orders that already have issued.

Mandamus "'is applied prospectively only; it will not be granted to undo an act already done.'"[61] "[I]t lies to compel, not to revise or correct action, however erroneous it may have been."[62] Prohibition similarly "will [not] lie to undo acts already done."[63]

That requirement alone bars Petitioners' claims. Petitioners seek to prevent Respondents from effectuating the Governor's restoration-of-rights

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[58] *Hall v. Stuart*, 198 Va. 315, 323, 94 S.E.2d 284, 290 (1956) (quoting *Kidd v. Moore*, 152 Va. 139, 148, 146 S.E. 287, 289 (1929)).

[59] *Id*.

[60] *Supervisors of Bedford v. Wingfield*, 68 Va. (27 Gratt.) 329, 333 (1876).

[61] *In re Commonwealth*, 278 Va. 1, 9, 677 S.E.2d 236, 239 (2009) (quoting *Richlands Med. Ass'n v. Commonwealth*, 230 Va. 384, 387, 337 S.E.2d 737, 740 (1985)).

[62] *Id*. (quoting *Bd. of Supervisors v. Combs*, 160 Va. 487, 498, 169 S.E. 589, 593 (1933)).

[63] *Id*. at 17, 677 S.E.2d at 243 (citation and quotation marks omitted).

orders, but that requires nullifying those orders. Ordering Respondents to act as if the orders do not exist will not work. That artifice would repeal the rule that mandamus and prohibition cannot undo acts already done.

B. Petitioners have an adequate remedy at law that solves the necessary-party problem.

Mandamus and prohibition also may not be used when, as here, Petitioners have an adequate remedy at law.[64] As shown above, Code § 24.2-431 allows three or more voters to challenge the registration of a Restored Voter by their local registrar; Code § 24.2-432 gives that action preference on the trial docket; and Code § 24.2-433 allows a direct *appeal of right* to this Court, where the case also must be placed on the privileged docket. This Court held in *Powell v. Smith* that the statutory predecessor to § 24.2-431 was "a plain, adequate and complete remedy" for a plaintiff seeking to purge unqualified voters from the rolls.[65]

In fact, using Code § 24.2-431 would provide a *superior* mechanism because it would solve the problem that necessary parties in this case are absent: the hundreds of thousands of citizens whose political disabilities

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[64] *Id*. at 8, 677 S.E.2d at 239 (mandamus cannot be granted when there is another "specific and adequate remedy") (citation and quotation omitted); *Supervisors of Bedford*, 68 Va. at 333 ("[B]efore [prohibition] can be granted, it must appear that the party aggrieved has no remedy in the inferior tribunals.").

[65] 152 Va. 209, 211, 146 S.E. 196, 196 (1929).

have been removed by the Governor's orders. A case should not proceed "unless all necessary parties are properly before the court."[66] An absent party is necessary when that party "is in the actual enjoyment of the subject matter, or has an interest in it, either in possession or expectancy, which is likely either to be defeated or diminished by the plaintiff's claim . . . ."[67]

The persons whose political disabilities the Governor has removed are necessary parties because Petitioners seek to "impair or impede" their rights by reimposing those very disabilities.[68] Although the absence of missing parties does not automatically defeat subject-matter jurisdiction, the case must be dismissed under Rule 3:12(c) unless the Court determines "in equity and good conscience" that the case may proceed.[69]

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[66] *Asch v. Friends of Cmty. of Mt. Vernon Yacht Club*, 251 Va. 89, 91, 465 S.E.2d 817, 818 (1996); *see also Commonwealth ex rel. Fair Hous. Bd. v. Windsor Plaza Condo. Ass'n*, 289 Va. 34, 50, 768 S.E.2d 79, 86 (2014) (dismissing appeal for failure to join owners of individual parking spaces whose rights would be adversely affected).

[67] *Asch*, 251 Va. at 90-91, 465 S.E.2d at 818 (quoting *Raney v. Four Thirty Seven Land Co.*, 233 Va. 513, 519-20, 357 S.E.2d 733, 736 (1987)); *see also* Va. Sup. Ct. R. 3:12(a).

[68] Va. Sup. Ct. R. 3:12(a).

[69] Va. Sup. Ct. R. 3:12(c); *Michael E. Siska Revocable Trust v. Milestone Dev., LLC*, 282 Va. 169, 179-81, 715 S.E.2d 21, 26-27 (2011) (describing application of Rule 3:12(c)); *see also Marble Techs., Inc. v. Mallon*, 290 Va. 27, 32, 773 S.E.2d 155, 157 (2015) (finding no abuse of discretion in permitting case to proceed).

But one of the factors warranting dismissal is when "the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder."[70] Petitioners plainly would have an adequate remedy under § 24.2-431.

Indeed, had Petitioners pursued an action under that statute, the persons targeted for disenfranchisement would be given 15 days' notice and an opportunity to be heard.[71] That solves the necessary-party problem. Petitioners would not need to proceed against *all* Restored Voters to obtain a ruling on the merits; a decision by this Court in an appeal of right from any one of such actions would have *stare decisis* effect, settling the question once and for all. In short, proceeding under Code § 24.2-431 is not just an *adequate* remedy at law; it is the superior remedy, and the *only* remedy that the legislature has authorized.

C. The writs may not be used to control the Executive Branch actions at issue here.

1. Prohibition restrains only inferior judicial tribunals, not Executive Branch officials.

Petitioners' request for a writ of prohibition fails for the independent reason that "the writ of prohibition is a proceeding between *courts* bearing

[70] Va. Sup. Ct. R. 3:12(c).

[71] Va. Code Ann. § 24.2-432.

the relation of supreme and inferior."[72] Accordingly, a writ of prohibition "*does not lie from a court to an executive officer*."[73]

2. Mandamus may not be used to command the Governor to comply with his take-care duties.

Determining whether, when, and how to grant clemency is committed solely to the Governor's discretion and cannot be controlled through mandamus. "When a public official is vested with discretion or judgment, his actions are not subject to review by mandamus."[74] "[I]t is well settled that *mandamus* will not lie to compel the performance of any act or duty necessarily calling for the exercise of judgment and discretion on the part of the official charged with its performance . . . ."[75]

Invoking the "take care" clause of Article V, § 7, Petitioners ask this Court to command "the Governor to take care that the provision of the

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[72] *Burch v. Hardwicke*, 71 Va. (30 Gratt.) 24, 39 (1878) (emphasis altered); *see also Burch v. Hardwicke*, 64 Va. (23 Gratt.) 51, 59 (1873) ("The same restriction of the writ [of prohibition] to judicial proceedings—to *courts* alone—has been distinctly and repeatedly sanctioned by this court.").

[73] *Burch*, 71 Va. at 39.

[74] *Richlands Med. Ass'n*, 230 Va. at 386, 337 S.E.2d at 739. *See also Moreau v. Fuller*, 276 Va. 127, 135, 661 S.E.2d 841, 845 (2008) ("Mandamus is an extraordinary remedy that . . . does not lie to compel the performance of a discretionary duty.") (punctuation and citations omitted).

[75] *Richlands Med. Ass'n*, 230 Va. at 386-87, 337 S.E.2d at 739 (quoting *Thurston v. Hudgins*, 93 Va. 780, 783, 20 S.E. 966, 967-68 (1895)).

Constitution disqualifying felons from voting be faithfully executed."[76] But this Court's decision in *Allen v. Byrd* bars that claim.[77]

The Court in *Allen* held that the Governor cannot be mandamused to comply with a mandatory duty that requires the exercise of executive discretion, adding that the Governor could not be mandamused to comply with his "take care" obligations either.[78] *Allen* involved a statute providing that any vacancies in State office "shall be filled by the Governor" until a successor may be appointed.[79] The petitioner sought to compel the Governor to appoint two interim Justices to fill vacancies on this Court. The Court held that, even though the statute's use of the word "shall" imposed a mandatory duty, mandamus was improper:

> It does not necessarily follow that because a duty imposed is mandatory that it is also ministerial. For example, the Governor "shall take care that the laws be faithfully executed." It seems to us perfectly clear that whether the function be a mandatory duty or a discretionary power, it is in either event an executive function, requiring in its performance the exercise of executive discretion.[80]

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[76] Pet. at 4 (citation omitted).

[77] 151 Va. 21, 144 S.E. 469 (1928).

[78] *Id*. at 25, 144 S.E. at 470.

[79] *Id*. at 24, 144 S.E. at 469 (quoting Va. Code Ann. § 332 (1924)).

[80] *Id*. at 25, 144 S.E. at 470.

Commanding the Governor to comply with his "take care" obligations not only would conflict with *Allen*, it also would violate the separation of powers. Under the Virginia Constitution, the "legislative, executive, and judicial departments shall be separate and distinct, so that none exercise the powers properly belonging to the others . . . ."[81] The clemency power in Article V, § 12 unquestionably belongs to the Governor, and the "judiciary [does not] have any proper constitutional role in a decision to grant executive clemency."[82] Indeed, the power to remove political disabilities has long been understood to be an "absolute" executive power.[83] It would disrespect and invade the province of the Executive Branch if the Judicial Branch "commanded" the Governor to carry out his "take care" obligations at the request of two members of the Legislative Branch.

III. The Governor has the power to remove political disabilities on a group basis.

If the Court reaches the merits, it should hold that the Governor's actions are constitutional under the plain language of Article V, § 12, a provision Petitioners hardly mention. Put in terms of mandamus,

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[81] Va. Const. art. III, § 1; *see also* Va. Const. art. I, § 5.

[82] *Montgomery v. Commonwealth*, 62 Va. App. 656, 670, 751 S.E.2d 692, 698 (2013).

[83] 1914 Op. Va. Att'y Gen. 38, 38-39 (JA 56-57).

Petitioners lack "a clear and specific legal right"[84] to have a court command the Executive Branch to ignore the Governor's restoration-of-rights orders.

A. The Governor's actions are presumed valid and must be upheld if possible.

The Court should begin with the presumption that the Governor's actions are valid. Indeed, this Court has recognized at least since 1872 that gubernatorial acts of clemency are entitled to a liberal construction and must be upheld whenever possible. In *Lee v. Murphy*, the Court upheld the Governor's putatively invalid "commutation" by re-characterizing it as a valid "conditional pardon" that the prisoner had accepted.[85] The Court said:

> We 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.[86]

And in *Blount v. Clarke*, this Court recently upheld an act of clemency by Governor McDonnell by re-characterizing it as a "partial pardon," even though the Governor had called it a "commutation" that ran afoul of *Lee*.[87] The Court rejected the argument that the Governor was bound by the label

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[84] *Hall*, 198 Va. at 323, 94 S.E.2d at 290.

[85] 63 Va. (22 Gratt.) 789, 802 (1872).

[86] *Id*. at 801.

[87] 291 Va. 198, __, 782 S.E.2d 152, 157-58 (2016).

he used, explaining that, "as recognized in *Lee*, . . . courts should . . . 'effectuate rather than defeat the intention of the State.'"[88] Thus, any doubt about the validity of the Governor's actions must be resolved in his favor.

B. The plain text of the Constitution supports the Governor's actions.

This Court said in *Blount* that in construing constitutional provisions, "if there are 'no doubtful or ambiguous words or terms used, we are limited to the language of the section itself and are not at liberty to search for meaning, intent or purpose beyond the instrument.'"[89] "[T]he Court is 'not permitted to speculate on what the framers of [a] section might have meant to say, but are, of necessity, controlled by what they did say.'"[90]

That rule is dispositive here.

1. Article V, § 12 authorizes the Governor's actions.

The plain-meaning rule resolves Petitioners' claim. As *Blount* said, "[t]he words of Article V, Section 12 are unambiguous."[91] They read:

> The Governor shall have power . . . to remove political disabilities consequent upon conviction for

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[88] *Id*. at __, 782 S.E.2d at 157.

[89] *Id*. at __, 782 S.E.2d at 155 (quoting *Harrison v. Day*, 200 Va. 439, 448, 106 S.E.2d 636, 644 (1959)).

[90] *Id*. (quoting *Harrison*, 200 Va. at 448, 106 S.E.2d at 644).

[91] *Id*. at __, 782 S.E.2d at 155.

> offenses committed prior or subsequent to the adoption of this Constitution.[92]

No words of limitation prohibit the Governor from restoring rights on a group basis; no text requires that he restore rights one person at a time.

Moreover, because the power to remove political disabilities resulting from conviction is committed solely to the Governor, that power may not be controlled or restricted by *either* the Legislative Branch or the Judicial Branch. For instance, the Governor has the power to remove the political disabilities of felons who have not yet paid their fines.[93] To conclude otherwise would mean that, by imposing fines for offenses, the legislature could prevent the Governor from effectuating his clemency power.[94] As the Attorney General said more than a century ago, because the restoration power is "'expressly given to'" the Governor, it "is altogether free from the interference of the other branches of the government.'"[95] "So long as the power is vested in [the Governor] . . . *no other branch of the government can control its exercise*."[96] This Court in *In re Phillips* likewise ruled in 2003

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[92] Va. Const. art. V, § 12.

[93] 1914 Op. Va. Att'y Gen. at 38 (JA 56).

[94] *Id*. at 39.

[95] *Id*. (quoting *Cooley on Constitutional Limitations* 158 (7th ed. 1903)).

[96] *Id*. (quoting *Cooley*, *supra*, at 158) (emphasis added).

that "[t]he power to remove [a] felon's political disabilities remains vested *solely* in the Governor . . . . [T]here is no right of appeal from the Governor's decision," and the Governor may act "without explanation."[97]

The second paragraph of Article V, § 12 also undermines Petitioners' position. Unlike the three other forms of clemency specified in the first paragraph, for which the Governor is required at each regular session of the General Assembly to communicate the "particulars of every case," the reporting requirement does not apply to the removal of political disabilities.[98] If the Governor were required to communicate the details of "every case" in which he restored political rights, presumably Petitioners would insist that the language supported their argument. But the removal of political disabilities is plainly not subject to the reporting requirement.

2. The phrase "his civil rights" in Article II, § 1 does not limit the Governor's power under Article V, § 12.

Petitioners argue that political rights must be restored on an individual

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[97] 265 Va. 81, 87-88, 574 S.E.2d 270, 273 (2003) (emphasis added).

[98] *Compare* Va. Const. art. V, § 12 ("The Governor shall have power [1] to remit fines and penalties . . . ; [2] to grant reprieves and pardons . . . ; [3] *to remove political disabilities* . . . ; and [4] to commute capital punishment.") (emphasis added), *with id*. ("He shall communicate to the General Assembly, at each regular session, particulars of every case [1] of fine or penalty remitted, [2] of reprieve or pardon granted, and of [4] punishment commuted, with his reasons for remitting, granting, or commuting the same.").

basis because Article II, § 1 defines the felony-disqualification rule in terms of whether a "person" has had "his" civil rights restored.[99] There are at least three fatal flaws in that argument.

First, whether a person has had *his* civil rights restored says nothing about *how* those rights got restored—individually or collectively. As shown above, the restoration power is controlled exclusively by Article V, § 12 and nothing in that provision prevents the Governor from restoring rights on a group basis. Indeed, *every* person whose rights the Governor has restored on a group basis has had *his* political rights restored. There is no conflict between Article II, § 1 and Article V, § 12.

Second, Petitioners ignore the long-settled rule of construction that, "[i]n the absence of a contrary indication, the masculine includes the feminine (and vice versa) and the singular includes the plural (and vice versa)."[100] That rule is "simply a matter of common sense and everyday linguistic experience."[101] The General Assembly codified that rule for

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[99] Pet. at 18.

[100] Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 129 (2012) (JA 250).

[101] *Id*. at 130 (JA 251).

interpreting provisions of the Virginia Code.[102] A leading treatise advises that the "best drafting practice, in fact, is to use the singular number."[103] And this Court too has applied that rule to avoid absurd results.[104]

If Petitioners' reading of *his* were taken seriously, the Governor could not restore the rights of multiple persons or of women. Their theory would throw a wrecking ball at other constitutional protections as well:

- Article I, § 11's guarantee that "no person shall be deprived of *his* life, liberty, or property without due process of law" would not protect women or groups of citizens;[105]
- Article I, § 12's protection for "any citizen [to] freely speak, write, and publish *his* sentiments" would not extend to speech by multiple citizens or by any woman;[106] and
- Article III, § 1's prohibition on "*any person* exercis[ing] the power of more than one" branch of government would nonetheless permit *multiple persons* to violate the separation of

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[102] *See* Va. Code Ann. § 1-216 (2014) ("A word used in the masculine includes the feminine and neuter."); *id*. § 1-227 (2014) ("A word used in the singular includes the plural and a word in the plural includes the singular.").

[103] Scalia & Garner, *supra*, at 130 (JA 251).

[104] *Leonard v. Bd. of Veterinary Med.*, Record No. 141764, 2015 Va. Unpub. LEXIS 11, at *3 (Oct. 8, 2015) (rejecting argument that "regulations' use of the plurals 'patients' and 'animals' prohibits the Board from disciplining [veterinarian] for her treatment of a single animal" because "[g]eneral principles of statutory interpretation dictate that the distinction between plural and singular is of no import").

[105] Va. Const. art. I, § 11 (emphasis added).

[106] Va. Const. art. I, § 12 (emphasis added).

powers.[107]

Petitioners' argument based on *his* is not even plausible. And even if it passed the blush test, Petitioners still could not succeed because the Court should adopt a construction that *upholds* the Governor's actions, not one that would invalidate them.[108]

Third, Petitioners' argument that the word *his* requires individualized restoration orders cannot be squared with the provision in Article II, § 1 permitting group restoration-of-rights orders by "other appropriate authority." The phrase "other appropriate authority" includes "the President of the United States, other governors, and pardoning boards with such authority,"[109] and also States that restore felons' rights "automatically."[110] "In 38 states and the District of Columbia, most ex-felons automatically gain

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[107] Va. Const. art. III, § 1 (emphasis added).

[108] *Blount*, 291 Va. at __, 782 S.E.2d at 157 ("*Lee* . . . recognized that the same interpretation of the law as applied to acts of the king should apply to that of the Governor: 'if the king's grant admits of two interpretations, one of which will make it utterly void and worthless, and the other will give it a reasonable effect, then the latter is to prevail . . . .") (quoting *Lee*, 63 Va. at 799).

[109] 1 A.E. Dick Howard, *Commentaries on the Constitution of Virginia* 345-46 (1974) (JA 186-87).

[110] 1979-80 Op. Va. Att'y Gen. 153, 154 (JA 58-59).

the right to vote upon the completion of their sentence."[111]

When persons have been convicted of felonies in other States that restore their political rights automatically, or by class-based clemency, the Commonwealth treats them as qualified to vote in Virginia. As the Attorney General of Virginia opined in 1980, restoration of civil rights by operation of the law of another State "is no different in principle from restoration of civil rights by duly authorized officials acting on an individual case basis. Each constitutes a determination by the sovereign power of the state that the civil rights of certain persons are restored."[112] The Governors of Kentucky and Iowa restored the rights of hundreds of thousands of felons through class-based executive orders; although those orders were rescinded by their successors, the rescission orders were not retroactive to persons whose rights already had been restored.[113]

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[111] Nat'l Conf. of State Legislators, *Felon Voting Rights* (Apr. 25, 2016), *available at* http://goo.gl/fQFF7V.

[112] *Id*. at 154 (JA 59).

[113] *See* Governor of Iowa (Thomas J. Vilsack), Executive Order No. 42 (July 4, 2005), *available at* http://goo.gl/MERxaT, *rescinded by* Governor of Iowa (Terry E. Branstad), Executive Order No. 70 (Jan. 14, 2011), *available at* http://goo.gl/YmEUEd; Governor of Kentucky (Steven L. Beshear), Executive Order No. 2015-871, *Relating to the Restoration of Civil Rights for Convicted Felons* (Nov. 24, 2015), *available at* http://goo.gl/McOvT7, *rescinded by* Governor of Kentucky (Matthew E. Bevin), Executive Order No. 2015-052 (Dec. 22, 2015), *available at* http://goo.gl/BlfWCZ.

It would be incongruous to treat the Governor's actions here as invalid because he did not restore rights on an individualized basis when Virginia recognizes as fully valid automatic or collective restoration mechanisms in other jurisdictions. Whether the Governor removes disabilities individually or by a class-based order, his actions represent a valid "determination . . . that the civil rights of certain persons are restored."[114]

3. The mental competency analogy is inapposite.

Petitioners also are wrong to claim support from the sentence in Article II, § 1 that, "[a]s prescribed by law, no person adjudicated mentally incompetent shall be qualified to vote until his competency has been reestablished." Restoring mental competency is different from removing disabilities resulting from convictions. The phrase "[a]s prescribed by law" means that the General Assembly determines the procedure courts follow to determine whether a person's mental competency has been restored. The Governor is not responsible for judging the mental competency of *any* citizen, let alone a group of them; that process is vested in the courts.[115] Petitioners' argument actually backfires. The phrase "as prescribed by law"

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[114] 1979-1980 Op. Va. Att'y Gen. at 154 (JA 59).

[115] *See* Va. Code Ann. § 64.2-2012 (2012).

is used in the sentence addressing mental competency, but *not* in the sentence addressing disabilities resulting from convictions. That usage confirms that the Governor's power to remove disabilities resulting from convictions is *not* subject to legislative control.[116]

C. History does not advance Petitioners' argument.

Petitioners rely on history to argue that the Governor must restore rights one person at a time, but they misunderstand both the history of the clemency power and the legal significance of that history.

1. History cannot negate the plain language of Article V, § 12, and the powers entrusted to the Governor cannot be lost by nonuse.

Petitioners' starting assumption is wrong; history cannot undo the plain language of Article V, § 12. Because the text of that section authorizes group clemency, it does not matter if past governors exercised that power or not. As this Court said in *Blount*, "the question here is not one of practice[,] . . . rather it is purely one of constitutional interpret-

[116] *See* 1914 Op. Va. Att'y Gen. at 38 (JA 56) ("[T]he Governor's power to remove political disabilities is unqualified . . . . The legislature has seen fit to prescribe the rules and regulations under which the power of the Governor to remit fines may be exercised, but the legislature has properly refrained from passing any law with reference to how the power given the Governor to remove political disabilities may be exercised.").

ation."[117] Thus, if the words of Article V, § 12 are unambiguous—and *Blount* said they are—then the Court is "not at liberty to search for meaning, intent or purpose beyond the instrument."[118] To put it another way, because the text of Article V, § 12 allows the Governor to grant clemency on a categorical or group basis, that power cannot be lost "because of nonuse."[119]

2. The framers and ratifiers of the Constitution of 1870 understood that clemency could be granted on a group basis and they declined to impose any case-by-case limitation.

To the extent history is relevant, it undercuts Petitioners' position. Events surrounding the Constitution of 1870—which confirmed the Governor's power "to remove political disabilities consequent upon conviction for offences"[120]—show that the framers and ratifiers were well aware that the Governor could grant group clemency.

First, the convention and referendum took place in the shadow of repeated acts of group clemency by Presidents Lincoln and Johnson. In

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[117] 291 Va. at __, 782 S.E.2d at 158.

[118] *Id*. at __, 782 S.E.2d at 155 (quoting *Harrison*, 200 Va. at 448, 106 S.E.2d at 644).

[119] *Bowsher v. Synar*, 478 U.S. 714, 727 n.5 (1986).

[120] Va. Const. art. IV, § 5 (1870) (JA 26, 38).

December 1863, President Lincoln issued a conditional group pardon to rebels who swore a loyalty oath to the United States.[121] President Johnson issued similar conditional group pardons in May 1865 and September 1867.[122] On Christmas Day, 1868, President Johnson *unconditionally* pardoned and restored the political rights of "every person who, directly or indirectly, participated in the late insurrection or rebellion," without any loyalty oath.[123]

The convention that drafted Virginia's Constitution of 1870 convened on December 3, 1867, after repeated conditional group pardons, and the Virginia electorate ratified the Constitution on July 6, 1869, a little more than seven months after President Johnson's unconditional group pardon.[124] The framers and ratifiers of the 1870 Constitution therefore were acutely aware that the executive power, unless limited by the

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[121] Proclamation No. 11, 13 Stat. 737 (Dec. 8, 1863) (JA 282). Lincoln also granted amnesty to "all soldiers now absent from their respective regiments without leave" who return to service. Executive Order No. 1, 13 Stat. 775 (Mar. 10, 1863) (JA 280).

[122] Proclamation No. 37, 13 Stat. 758 (May 29, 1865) (JA 286); Proclamation No. 3, 15 Stat. 699 (Sept. 7, 1867) (JA 289).

[123] Proclamation No. 15, 15 Stat. 711, 712 (Dec. 25, 1868) (JA 291-92) (emphasis added).

[124] J.N. Brenaman, *A History of Virginia Conventions* 74, 78 (1902) (JA 121, 125).

constitution itself, included the power to restore rights on a collective basis.

Second, the framers knew how to impose a case-by-case requirement if they wanted to eliminate group clemency, and they plainly chose not to. The convention proposed in Article III, § 1, Clause 4, to disenfranchise anyone who had engaged in insurrection, after having previously sworn an oath of office as a federal or State official, unless the legislature, "by a vote of three-fifths of both houses, remove the disabilities incurred by this clause from *any person* included therein by *a separate vote in each case*."[125] Although the electorate rejected that disenfranchisement provision altogether,[126] its adoption by the convention shows that the delegates knew how to require case-by-case clemency when they wanted it. They imposed no such condition on the Governor's power to remove political disabilities on a group basis or by categorical directive.

Third, the possibility was explicitly raised at the convention by the Committee on the Pardoning Power that the Governor might use his power

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[125] 7 Francis Newton Thorpe, *Federal and State Constitutions* 3876 (1909) (emphasis added) (JA 36); *see also* William Van Schreeven, *The Conventions and Constitutions of Virginia, 1776-1966*, at 11-12 (1967) (JA 128-29).

[126] *See* 1 A.E. Dick Howard, *Commentaries on the Constitution of Virginia* 15-16 (1974) (JA 160-61); Van Schreeven, *supra*, at 12 (JA 129); Brenaman, *supra*, at 78-79 (JA 125-26).

to remove political disabilities to "release[], in times of heated political contests, criminals legally imprisoned, for the purpose of controlling elections, and thereby release them from punishment rightly imposed."[127] The Committee recommended against giving the Governor the restoration-of-rights power.[128] But the convention rejected that advice. It enacted the provision as proposed, without any case-by-case restriction.

Petitioners try to put the Committee's rejected advice in the least damaging light by saying that the Committee's charge described the restoration power as allowing the Governor to restore rights "when, in his opinion, the facts of the case warrant such a course."[129] But that misses the forest for the trees: as then-Solicitor General William Taft advised in 1892, group clemency is warranted *because* the facts of the case have "the *same* application to *ten thousand* or *a hundred thousand cases*."[130]

Petitioners simply ignore that, because the idea of group clemency was clearly in the framers' minds, the fact that the convention did *not* restrict the Governor's restoration-of-rights power plainly shows their intent

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[127] Report of the Committee on the Pardoning Power, in *Documents of the Constitutional Convention of the State of Virginia* 129 (1867) (JA 116).

[128] *Id*.

[129] Pet. at 34 (quoting Committee on the Pardoning Power, *supra*, at 129).

[130] 20 Op. Att'y Gen. 330, 331 (1892) (JA 40-41) (emphasis added).

not to limit it.[131] What the Supreme Court of Kentucky said in upholding the group-clemency power of Kentucky's governor applies equally here:

> Without doubt, the framers of our constitution were cognizant that the pardoning power could potentially be used to issue general pardons to persons falling within a specified class, yet declined to expressly prohibit such discretion. In light of these debates, this Court can only conclude that, if the framers sought to prohibit general pardons, they would have so stated in the language of the provision.[132]

D. Federal precedent amply supports group clemency.

Although those who framed and ratified the 1870 Constitution thus were well aware of group clemency under federal law, federal precedent carries independent legal weight as well. In 1883, this Court recognized in *Edwards v. Commonwealth* that "the effect of the governor's pardon must be determined *by the same rules* which apply to a pardon by the British crown or *by the president of the United States*," except to the extent "that

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[131] The period of the Civil War and Reconstruction was not the first time group clemency was recognized in Virginia. After Bacon's Rebellion, the King granted a group pardon to "any person or persons" who, before January 16, 1676, committed any "treasons, murders, [or] fellonies" in support of Bacon's uprising. 1680 Va. Acts ch. 1, *reprinted in* 2 William Waller Hening, *Statutes at Large; Being a Collection of the Laws of Virginia From the First Session of the Legislature, in the Year 1689*, 458, at 459 (1823) (JA 70-71). A blanket pardon was warranted in light of "how many of [the King's] good subjects were drawne into [Bacon's Rebellion] and seduced from their allegiance," but who had since demonstrated "dutifull behaviour . . . repenting for the same." *Id*. at 459 (JA 71).

[132] *Fletcher v. Graham*, 192 S.W.3d 350, 358-59 (Ky. 2006).

certain restrictions are here imposed upon the exercise of the pardoning power which are not found in the laws of England or of the United States."[133] The Court repeated that principle in 1938,[134] as did Professor Howard in his *Commentaries on the Constitution of Virginia*.[135]

While it is true that Virginia's early history reflected a more restrictive approach to the Governor's pardoning powers,[136] and that the current provisions of Article V, § 12 contain some limitations not found in the Federal Constitution,[137] the Governor's clemency power should be construed under *Edwards* as co-extensive with the President's unless the Constitution restricts it. That is what it means to say, as our Constitution does, that "[t]he chief executive power of the Commonwealth shall be

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[133] 78 Va. 39, 44 (1883) (emphasis added).

[134] *Wilborn v. Saunders*, 170 Va. 153, 161, 195 S.E. 723, 726 (1938).

[135] 2 Howard, *supra*, at 646 (JA 221).

[136] *Gallagher*, 284 Va. at 450-52, 732 S.E.2d at 25-26.

[137] One limitation is that the Governor may not restore firearm rights, although he can remove the disability that prevents a court from doing so. *Id*. at 452, 732 S.E.2d at 26. Another is that the Governor may not grant a pardon or reprieve until "after conviction." *Edwards*, 78 Va. at 43; *cf*. *Ex Parte Garland*, 71 U.S. (4 Wall.) 333, 380 (1866) (President may pardon offense "at any time after its commission"). Yet another prevents the Governor from "commuting" a term-of-years sentence, though he can achieve the same result by a "partial pardon." *Blount*, 291 Va. at __, 782 S.E.2d at 158.

vested in [the] Governor."[138] Beginning with the assumption that the "chief executive power," includes the same clemency powers exercised by the President comports with *Lee v. Murphy*, where this Court said that the clemency power "must reside [somewhere]; and by common consent of all the States it is vested in the executive department."[139] "If the chief magistrate can be trusted with the power of absolute and unconditional pardon, he is certainly a safe depositary of the qualified power."[140]

Federal precedent unequivocally supports group clemency. It "was early assumed that the [President's] power included the power to pardon specified classes or communities wholesale . . . ."[141] With Shays Rebellion still a recent memory, Hamilton's "principal argument[ ]" supporting executive clemency in *The Federalist No. 74* was the need for group pardons: "In seasons of insurrection or rebellion, there are often critical moments, when a well timed offer of pardon to the insurgents or rebels may

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[138] Va. Const. art. V, § 1.

[139] 63 Va. at 797.

[140] *Id*.

[141] Cong. Research Serv., *The Constitution of the United States of America: Analysis & Interpretation* 488 (interim ed. 2014) (JA 256).

restore the tranquility of the commonwealth . . . ."[142] He was prescient. In 1795, President Washington granted a group pardon to participants in the Whiskey Rebellion.[143] In 1780, President Adams issued a group pardon to insurrectionists in three Pennsylvania counties.[144] In 1807, President Jefferson issued a group pardon to deserters who returned to army service within four months.[145] President Madison followed that example twice in 1812 and once in 1814.[146] In 1815, Madison granted a group pardon to pirates who helped defend New Orleans in the War of 1812.[147] In 1830, President Jackson granted a group pardon to deserters.[148]

General pardons during the Civil War and Reconstruction were described at length above.[149] The Supreme Court upheld the validity of President Lincoln's conditional general pardon in *United States v.*

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[142] *The Federalist No. 74* at 502 (Alexander Hamilton) (Jacob E. Cooke ed. 1961) (JA 112).

[143] 1 Messages and Papers of the Presidents 173 (James D. Richardson ed., 1897) [hereinafter Messages and Papers] (JA 264).

[144] *Id*. at 293-94 (JA 265-66).

[145] *Id*. at 413 (JA 267).

[146] 2 *Messages and Papers* 497, 499, 528 (JA 270-72).

[147] *Id*. at 543-44 (JA 273-74).

[148] 3 *Messages and Papers* 1062 (JA 278).

[149] *See* notes 121-123 *supra* and accompanying text.

Padelford,[150] and it upheld the validity of President Johnson's general pardon in *United States v. Klein*[151] and *Armstrong v. United States*.[152]

The President has granted blanket clemency numerous times since Reconstruction.[153] No fewer than a third of all Presidents have issued group pardons to specified classes of individuals who were not individually named in the instrument.[154]

In short, without clear support in the text of the Virginia Constitution

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[150] 76 U.S. (9 Wall.) 531, 542 (1869).

[151] 80 U.S. (13 Wall.) 128, 147-48 (1871).

[152] 80 U.S. (13 Wall.) 154, 156 (1871).

[153] *See*, *e.g.*, 20 Op. Att'y Gen. 330 (1892) (JA 40) (opinion by then-Solicitor General William Taft that the President could issue a general pardon to persons in the Utah Territory who were guilty of polygamy); Proclamation No. 42, 27 Stat. 1058 (Jan. 4, 1893) (JA 293) (general pardon by President Harrison to persons violating anti-polygamy laws); Proclamation No. 29, 32 Stat. 2014 (July 4, 1902) (JA 297) (general pardon by President Theodore Roosevelt to persons participating in Philippine insurrections); Proclamation, 43 Stat. 1940 (Mar. 5, 1924) (JA 299) (general pardon by President Coolidge to World-War-I deserters); Proclamation 3001, 17 Fed. Reg. 11833, 11835-36 (Dec. 24, 1952) (JA 301-03) (general pardon by President Truman to persons court-martialed or dishonorably discharged for desertion in the years before the Korean War); Proclamation 4483, 91 Stat. 1719 (Jan. 21, 1977) (JA 304) (general pardon by President Carter to persons violating the Military Selective Service Act during the Vietnam conflict).

[154] Charles Shanor & Marc Miller, *Pardon Us: Systematic Presidential Pardons*, 13 Fed. Sent'g Rep. 139, 140 (2000-2001) (JA 241-42) (listing 16 Presidents who granted class-based pardons).

itself, the Court should not withhold from the Virginia Governor a clemency power unquestionably possessed by the President of the United States.[155]

E. Petitioners' two principal authorities are unpersuasive.

The primary authority on which Petitioners rely is a private letter from Governor Kaine's former counsel, on the Governor's "last days in office," that does not cite any legal authority for his conclusion that "blanket" restoration orders are not permitted.[156] It was not an opinion of the Attorney General,[157] did not address the points above, and is not entitled to any deference.[158] The 2013 Report of the Attorney General's Rights Restoration Advisory Committee[159] is similarly unpersuasive. It too was not a formal opinion of the Attorney General and did not address any of the

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[155] Decisions of courts in other States do not help Petitioners either. *See Fletcher*, 192 S.W.3d at 358 (upholding governor's blanket pardon under Kentucky constitution); *Iowa ex rel. Allison v. Vilsack*, No. EQCV018185 (Iowa Dist. Ct. Oct. 27, 2005) (upholding Iowa governor's blanket restoration-of-rights order), *available at* https://goo.gl/aEnHiW.

[156] Letter from Mark E. Rubin, Counselor to the Governor, to Kent Willis, ACLU of Va. (Jan. 15, 2010) (JA 3).

[157] *See* Va. Code Ann. § 2.2-505 (2014).

[158] Indeed, even a contrary formal opinion of the Attorney General from 1932 was insufficient to vitiate the Governor's powers under Article V, § 12. *See Blount*, 291 Va. at __, 782 S.E.2d at 165 (Kelsey, J., dissenting) (arguing that majority's decision was "inconsistent with the longstanding view of the Attorney General of Virginia").

[159] JA 5.

arguments presented here. The committee's only authority for its conclusion involved matters far removed from the clemency power.[160]

Given the plain language of Article V, § 12, and the deference owed to the Governor's actions, Petitioners may not hang the heavy weight of their challenge on the slender reeds of those two contrary views.[161]

F. Whether to grant group clemency is a policy decision committed to the Governor's judgment and discretion.

Whether to exercise the clemency power individually or collectively is necessarily a policy judgment for the chief executive. In 1892, then-Solicitor General Taft described the considerations informing the President's decision, rejecting as a mere "formality" the argument that the President must dispense clemency on a case-by-case basis.[162] Apropos of this case, Taft explained that since the President can "grant, by separate acts of pardon," clemency to "a thousand such offenders," he exercises the same power when "by public proclamation he extends a pardon to ten

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[160] *See id*. at 3 n.14 (JA 8).

[161] Because the Governor properly exercised his constitutional authority to restore voting rights, Petitioners' suggestion is also meritless that the Governor violated Article I, § 7 by "suspending laws" in doing so. Article V, § 12 either confers group clemency power or it does not; the analysis is not advanced by asking if the Governor has "suspended" that section.

[162] 20 Op. Att'y Gen. at 331 (JA 41).

thousand offenders, without naming them, but describing them."[163]

The same consideration informed Governor McAuliffe's decision to pursue a categorical approach here. The beneficiaries satisfy the Governor's decision criteria: all have completed their sentences and any term of supervised release. The Constitution does not require the Governor to offer "particular grounds" for one recipient compared to another;[164] the Governor may restore rights "without explanation."[165] Even so, Governor McAuliffe explained that "all individuals who have served the terms of their incarceration and any periods of supervised release deserve to re-enter society on fair and just terms, including to participate in the political and economic development of Virginia."[166]

Petitioners and their amici rely on inadmissible news stories about errors that occurred in implementing the Governor's restoration-of-rights directives, when a number of felons who have not completed their sentences, or who remain under supervised release, were inadvertently

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[163] *Id*.

[164] *Id*.

[165] *In re Phillips*, 265 Va. at 87-88, 574 S.E.2d at 273.

[166] JA 1.

placed in the database of Restored Voters.[167] Although some administrative errors have occurred, the Secretary of the Commonwealth represents that she has taken steps to correct them.

But the risk of such administrative error is not a legal argument against the Governor's constitutional power to grant clemency on a class-wide basis. Whether to proceed individually or by class-wide order comes with trade-offs, and the decision is a policy judgment for the chief executive. In 1864, President Lincoln had to clarify his 1863 general conditional pardon because it failed to exclude Confederate prisoners-of-war.[168] That mistake obviously did not restrict Lincoln's clemency powers or limit those of future presidents. Executive judgment is required to determine whether the circumstances warrant a categorical approach, and whether the benefits outweigh the risks of error. And that judgment is properly committed to the sole discretion of the elected chief executive, whether the Governor of Virginia or the President of the United States.

G. The Constitution does not require the Governor to ration his clemency power.

Petitioners have no textual support for their claim that restoring voting

[167] *E.g.*, JA 356-66. Such newspaper articles are inadmissible. Va. Sup. Ct. R. 2:802.

[168] *See* Proclamation No. 14, 13 Stat. 741 (Mar. 26, 1864) (JA 285); *Klein*, 80 U.S. at 141.

rights is some kind of "narrow exception" to a "general rule" of felon disenfranchisement, and that the narrow exception must be enforced so it does not "swallow the rule."[169] Article II, § 1 and Article V, § 12 do not make felon disenfranchisement irrevocable, let alone limit the percentage of felons who may have their rights restored. To the contrary, those provisions plainly entrust the Governor with the power to restore voting rights as he sees fit.

Petitioners also have no limiting principle to their claim that a governor must somehow ration his clemency power to stay within the "narrow exception" they posit. Of the estimated 451,471 disenfranchised felons in Virginia (as of 2010),[170] how many and what percentage may have their rights restored under Petitioners' theory? Did Governor McDonnell violate the "narrow exception" when he implemented "an automatic restoration of rights process for non-violent felons,"[171] touting the elimination of his own "subjectivity" as a reason for criteria-based

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[169] Pet. at 6, 17.

[170] *See supra* note 5.

[171] Letter from Governor Robert F. McDonnell to Secretary of the Commonwealth Janet V. Kelly at 2 (May 29, 2013), *available at* https://goo.gl/u789nP.

restoration?[172] A moment's reflection shows Petitioners' theory to be unprincipled and unworkable. Indeed, since this Court has held that a Governor's restoration-of-rights decision requires no explanation and is not subject to judicial review,[173] the murky limit Petitioners advocate has no legal basis and would never work.

IV. Petitioners fail to state a claim for striking voters from the rolls.

Because Petitioners lack standing and fail to state a claim, they are not entitled to relief striking Restored Voters from the rolls for the November 2016 election. But Petitioners would not be entitled to that relief even if their claims had merit. First, courts have inherent authority to avoid disrupting elections, particularly when "an impending election is imminent and a State's election machinery is already in progress."[174]

Second, the Governor would be entitled to cure any defect in a restoration-of-rights order by issuing individualized orders, particularly for those Restored Voters who have already registered for the November 2016

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[172] Secretary of the Commonwealth, *Governor McDonnell Announces Process for Automatic Restoration of Voting and Civil Rights for Non-Violent Felons* (May 29, 2013), *available at* https://goo.gl/xc21RQ.

[173] *In re Phillips*, 265 Va. at 87-88, 574 S.E.2d at 273 ("[T]he power to remove the felon's political disabilities remains vested solely in the Governor, who may grant or deny any request without explanation, and there is no right of appeal from the Governor's decision.").

[174] *Reynolds v. Sims*, 377 U.S. 533, 585 (1964).

election. Courts generally permit the branch of State government with primary jurisdiction to remedy the deficiency before ordering relief. That is why, when courts invalidate legislative apportionments, "judicial relief becomes appropriate only [after] a legislature fails to reapportion . . . in a timely fashion after having had an adequate opportunity to do so."[175] The Governor, who has exclusive authority to restore voting rights, would be entitled to the same respect. Petitioners challenge only his *method* of restoring political rights, not his power to restore them. So even if Petitioners were right that group clemency may not be used, the Governor deserves an opportunity to issue individualized orders. The Governor has authorized us to represent that he will do that if necessary. But it is not required under the plain terms of Article V, § 12.

CONCLUSION

The verified petition should be dismissed.

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[175] *Id*. at 586; *see also Personhuballah v. Alcorn*, No. 3:13-cv-678, 2016 U.S. Dist. LEXIS 2054, at *6, 2016 WL 93849, at *2 (E.D. Va. Jan. 7, 2016) (describing the opportunity given the General Assembly to correct the unconstitutional congressional district before the court imposed its own remedy).

Respectfully submitted,

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CERTIFICATE OF SERVICE AND FILING

I certify under Rule 5:26(h) that on June 27, 2016, this document was filed electronically with the Court through VACES, and ten printed copies were hand-delivered to the Clerk's Office in compliance with Rule 5:26(e). This brief complies with Rule 5:26(b) because the portion subject to that rule does not exceed 50 pages. A copy was electronically mailed to:

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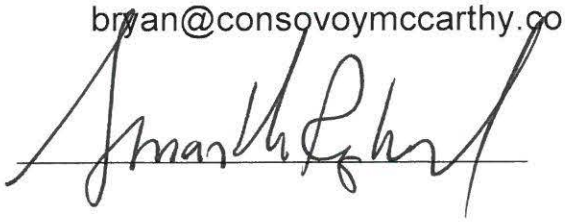

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