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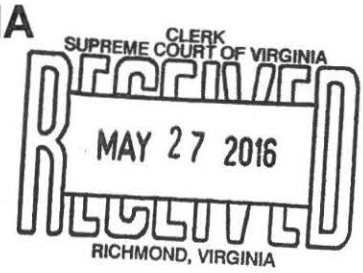
SUPREME COURT OF VIRGINIA



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 A SPECIAL SESSION AND EXPEDITED CONSIDERATION

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INTRODUCTION

Respondents oppose Petitioners' request to require the briefing in this case to be completed by June 6 and to set this case for argument that week. Petitioners took a full month to prepare and file their petition and 50-page brief; Respondents and the Court should not be stampeded into acting in only two weeks' time. Respondents do not oppose Petitioners' request for a special session, if the Court thinks one is needed, but the exigent circumstances suggested by Petitioners do not exist.

Exigent circumstances are not presented here for two reasons. First, Petitioners are not likely to succeed on the merits. They lack standing and their claims are facially defective. Second, in the unlikely event that the Court were to reach the merits and agree with Petitioners, the remedy would not be to exclude newly registered voters from the voting rolls for the November 2016 general election, but to permit the Governor to issue individualized restoration-of-rights orders, which he is prepared to do if necessary. Either way, there is no emergency that requires that this case be accelerated.

BACKGROUND

On April 22, 2016, Governor McAuliffe invoked his power under Article 5, § 12 of the Virginia Constitution to remove the political disabilities

of "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."[1] The Order indicated that it would restore the political rights of "approximately 206,000 Virginians" who had been "permanently disenfranchised from participating in political life due to prior felony convictions even after completing their court-ordered sentences."[2] The website for the Office of the Governor stated in a Frequently Asked Questions page that restoration of rights in the future would not be automatic but that "the Governor will continue to review eligibility and restore rights on an ongoing basis."[3]

One month later, on May 23, 2016 (four days ago), Petitioners filed their petition for writs of mandamus and prohibition. The lead petitioners are William J. Howell, Speaker of the House of Delegates, and Thomas K. Norment, Majority Leader of the Senate. Four other petitioners are listed solely in their capacity as "qualified voters" who plan to vote in the 2016

[1] Order for the Restoration of Rights (Apr. 22, 2016), *available at* http://commonwealth.virginia.gov/media/5848/order_restoring_rights_4-22-16.pdf.

[2] *Id.*

[3] Office of the Governor, *Restoration of Rights*, at http://commonwealth.virginia.gov/judicial-system/restoration-of-rights/.

general election.[4] Petitioners contend that the Governor's restoration-of-rights order is unconstitutional. They claim that the Governor may restore political rights only "on an individual basis," not "en masse."[5]

Petitioners state that, as of May 17, nearly 4,000 citizens had registered to vote in reliance on the Governor's Order.[6] Petitioners seek a writ of mandamus to compel Respondents to order local registrars to delete the names of such persons and to "[c]ommand[] the Governor to take care that the provision of the Constitution disqualifying felons from voting be faithfully executed."[7] They also seek a writ of prohibition "[p]rohibiting Governor McAuliffe from issuing further orders that restore political rights en masse and not on an individual basis," and prohibiting State election officials from allowing registrars to register anyone to vote whose rights were restored by such an order.[8]

Under Rule 5:7(b), Respondents have 21 days—until June 13, 2016—to respond, unless the time is shortened. Respondents anticipate

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[4] Pet. ¶ 1.

[5] Pet. at 4.

[6] Mem. Supp. at 12.

[7] Pet. at 4.

[8] *Id.*

filing a demurrer. The undersigned understands that several third parties intend to file amicus curiae briefs. Under Rule 5:30(d), those briefs are due by June 13 as well.

On May 24, Petitioners moved this Court to schedule a special session to hear argument, or, alternatively, to accelerate the briefing and to hear argument during the week of June 6. Petitioners contend that the case must be decided by "no later than August 25" because "[a]bsentee ballots must be made available no later than September 24, 2016," and General Registrars may take 30 days to delete the names after being ordered to do so.[9]

Respondents do not mention it, but under the National Voter Registration Act (NVRA),[10] States must "complete, not later than 90 days prior to the date of a primary or general election for Federal office, any

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[9] Pet'rs' Mot. ¶¶ 4-5. Pursuant to the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), 52 U.S.C. § 20301 *et seq*., and Virginia law, absentee ballots must be available not later than 45 days prior to a federal election. *See* 52 U.S.C. § 20302(a)(8); *see also* Va. Code Ann. § 24.2-612 (Supp. 2015). For the November 8, 2016 general election, that deadline falls on Saturday, September 24. Because some general registrars' offices are not open on Saturdays, the Department of Elections traditionally sets the deadline as the preceding Friday, in this case September 23. On that date, previously requested absentee ballots are mailed, and ballots are also available for in-person absentee voting.

[10] 52 U.S.C. § 20501 *et seq.*

program the purpose of which is to systematically remove the names of ineligible voters from the official lists of eligible voters."[11] For the November 8, 2016 general election, that 90-day period commences on August 10, 2016.

ARGUMENT

I. Respondents do not oppose Petitioners' request for a special session, if the Court is amenable, but setting this case for argument during the week of June 6 would impose unfair and asymmetrical burdens on Respondents, Amici, and the Court.

Respondents have no objection should the Court wish tentatively to schedule a special session to consider this case. But the Court may wish to postpone setting the case for argument until it is satisfied it is warranted. Because Petitioners lack standing and their claims are without merit, the Court may be better served by reserving the option to dismiss the petition by *per curiam* order.

Respondents oppose setting the case for argument during the week of June 6. Petitioners took a full month to prepare and file their petition and the accompanying 50-page brief. Under Rule 5:7(b)(5), our response, and the briefs of amici, would normally be due 21 days later, on June 13. Allowing only 10 business days for the Respondents to consult with counsel and prepare their brief, and for the Court to prepare for argument,

[11] 52 U.S.C. § 20507(c)(2)(A).

is not reasonable or equitable. Moreover, setting the case now for argument during the week of June 6 would deprive the Court of its normal opportunity to review the issues in a case to determine if oral argument is even warranted. Indeed, as shown below, this case lacks merit.

II. No exigent circumstances warrant accelerating this case.

We will use the term "Restored Voters" to identify those citizens whose rights were restored by the Governor's Order and who thereafter have registered or will register to vote in the November 2016 general election. Petitioners challenge only the *method* of restoring their political rights; they do not dispute that the Governor has the power to restore them. Petitioners argue only that the Governor must do so "on an individual basis," rather than "en masse."[12]

Petitioners argue that exigent circumstances exist only by assuming that (1) they will succeed on the merits, and (2) the Court will have to purge the Restored Voters from the voter rolls in time for the November 2016 election. Because both assumptions are wrong, no exigent circumstances warrant accelerating this case.

[12] Pet. at 4.

A. Petitioners are unlikely to succeed on the merits.

Respondents' forthcoming demurrer and brief in response will develop these arguments further, but the petition is fatally deficient: Petitioners lack standing and they have failed to state a claim upon which relief can be granted.

1. Petitioners lack standing.

"The 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 affected by the disposition of the case."[13] This Court has cited with approval and relied upon cases by the Supreme Court of the United States in addressing standing in election-related cases.[14]

None of the three bases for standing asserted by Petitioners is valid.

First, they do not have standing as individual voters. *Goldman v. Landsidle* addressed "whether 'citizens' and 'taxpayers' have standing to

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[13] *Westlake Props. v. Westlake Pointe Prop. Owners Ass'n*, 273 Va. 107, 120, 639 S.E.2d 257, 265 (2007).

[14] *See Wilkins v. West*, 264 Va. 447, 459, 571 S.E.2d 100, 107 (2002) ("The Supreme Court [has] concluded that the plaintiffs did not have standing to maintain the challenge because standing requires the plaintiff to show that he or she has suffered an 'injury in fact'—an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.' *United States v. Hays*, 515 U.S. 737, 743 (1995) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).").

seek a writ of mandamus against the Commonwealth challenging the application of certain statutes when their alleged injury is no different from that incurred generally by the public at large."[15] This Court held that "in the absence of a statutory right, a citizen or taxpayer does not have standing to seek mandamus relief against the Commonwealth unless he can demonstrate a direct interest, pecuniary or otherwise, in the outcome of the controversy that is separate and distinct from the interest of the public at large."[16] Petitioners' claim as voters is just as diffuse and undifferentiated as a claim by a "citizen" or "taxpayer."

Significantly, Virginia has established a statutory remedy that creates a *limited* form of citizen standing to seek the exclusion of unqualified voters.

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[15] *Goldman v. Landsidle*, 262 Va. 364, 367, 552 S.E.2d 67, 68 (2001); *see also Va. Beach Beautification Comm'n v. Bd. of Zoning Appeals*, 231 Va. 415, 419, 344 S.E.2d 899, 902 (1986) ("[I]t is not sufficient that the sole interest of the 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."); *Ex parte Levitt*, 302 U.S. 633 (1937) ("The motion papers disclose no interest upon the part of the petitioner other than that of a citizen and a member of the bar of this Court. That is insufficient. It is an established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public.").

[16] *Goldman*, 262 Va. at 373, 552 S.E.2d at 72.

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 whose name is on the registration records for their county or city."[17] 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.[18] 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.[19] Petitioners have eschewed that statutory remedy. But unless they follow it, they have no standing to complain about the registration of Restored Voters in their *own* districts, let alone in other districts throughout Virginia.

Second, Senator Norment lacks standing to complain that having Restored Voters in his district will hurt his candidacy when he "run[s] for re-election in 2019,"[20] because he has not alleged any facts that come close

[17] Va. Code Ann. § 24.2-431 (2011).

[18] Va. Code Ann. § 24.2-432 (2011).

[19] Va. Code Ann. § 24.2-433 (2011).

[20] Pet. ¶ 1.

to showing that.[21] The Majority Leader won his 2015 re-election with a vote share of 70% (35,520 votes) over the Democratic challenger.[22] Without something more to show a meaningful risk to his re-election opportunity, he lacks standing. Indeed, the U.S. Supreme Court held this week in *Wittman v. Personhuballah* that something more tangible is needed when incumbents baldly assert that "their districts will be flooded with Democratic [or Republican] voters and their chances of reelection will accordingly be reduced."[23] And in any case, since Senator Norment's next election is not until 2019, he presents no reason to accelerate this case now.

Third, neither Speaker Howell nor Senator Norment has standing as a legislator to sue the Governor and other respondents. In *Raines v. Byrd*, the U.S. Supreme Court held that members of Congress did not have standing to bring suit to challenge the Line Item Veto Act.[24] The Court

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[21] Speaker Howell does not plead that he intends to run for re-election or that he fears that allowing Restored Voters to vote will hurt his re-election chances.

[22] 2015 November General Election Results, Va. Dep't of Elections (Nov. 6, 2015), http://results.elections.virginia.gov/vaelections/2015%20November%20General/Site/GeneralAssembly.html.

[23] 2016 U.S. LEXIS 3353, at *10, 2016 WL 2945226, at *4 (U.S. May 23, 2016).

[24] 521 U.S. 811, 813 (1997).

explained that the Congress members had "not been singled out for specially unfavorable treatment as opposed to other Members of their respective bodies. Their claim is that the Act causes a type of institutional injury (the diminution of legislative power), which necessarily damages all Members of Congress and both Houses of Congress equally."[25] The same undifferentiated grievance is presented here. Indeed, the claimed institutional injury here is more remote than the Congress members' objection to the Line Item Veto Act; the power to restore voting rights at issue here is "vested *solely* in the Governor," who may remove political disabilities "without explanation."[26] So even more so than in *Raines*, "the institutional injury they allege is wholly abstract and widely dispersed . . . ."[27]

2. The mandamus claim fails as a matter of law.

Mandamus is an extraordinary remedy and "[i]n doubtful cases, the writ will be denied."[28] Petitioners' mandamus claim fails as a matter of law

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[25] *Id.* at 821.

[26] *In re Phillips*, 265 Va. 81, 87, 574 S.E.2d 270, 273 (2003) (emphasis added).

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

[28] *In re Commonwealth*, 278 Va. 1, 8, 677 S.E.2d 236, 239 (2009) (quoting *Gannon v. State Corp. Comm'n*, 243 Va. 480, 482, 416 S.E.2d 446, 447 (1992)).

for three independent reasons.

First, mandamus "is applied prospectively only; it will not be granted to undo an act already done."[29] "[I]t lies to compel, not to revise or correct action, however erroneous it may have been."[30] Accordingly, Petitioners cannot use mandamus to undo the Governor's restoration-of-rights order.

Second, mandamus is not available because Petitioners have an adequate remedy at law.[31] As noted above, Code § 24.2-431 allows three citizens to challenge the inclusion of a Restored Voter on the voting rolls for their locality; Code § 24.2-432 gives that action preference on the trial court docket; and Code § 24.2-433 allows a direct *appeal of right* to this Court, where the case must also be placed on the privileged docket. That procedure is far better. It gives notice to the Restored Voters whose voting rights Petitioners seek to take away, thereby avoiding the procedural problem in this case arising from the absence of those indispensable parties whose voting rights are being challenged. And the opinion of this Court in that type of proceeding would have *stare decisis* effect, settling the

[29] *Id.* at 9, 677 S.E.2d at 239 (quoting *Richlands Med. Ass'n v. Commonwealth*, 230 Va. 384, 387, 337 S.E.2d 737, 740 (1985)).

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

[31] *Id.* (mandamus cannot be granted when there is another "specific and adequate remedy") (quoting *Gannon*, 243 Va. at 482, 416 S.E.2d at 447).

merits of the question. Petitioners, therefore, plainly have an adequate remedy at law. Indeed, in *Powell v. Smith*, this Court refused to grant mandamus to a petitioner seeking to purge voter registrations because the statutory mechanism now found in Code § 24.2-431 was "a plain, adequate and complete remedy."[32]

Finally, mandamus cannot be used, as Petitioners would like, to compel the Governor "to take care that the provision of the Constitution disqualifying felons from voting be faithfully executed."[33] This Court's decision in *Allen v. Byrd* precludes that maneuver.[34] Even though the statute at issue there provided that the Governor "shall" appoint temporary Justices to fill vacancies on this Court, the Court held that mandamus could not be used:

> 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.[35]

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[32] 152 Va. 209, 211, 146 S.E.2d 196, 196 (1929).

[33] Pet. at 4.

[34] 151 Va. 21, 144 S.E. 469 (1928).

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

Petitioners attempt here what *Allen*'s hypothetical scenario forbids: using mandamus to compel a Governor to comply with his take-care obligations. Such "an executive function . . . can neither be controlled nor directed by mandamus."[36]

3. The prohibition claim fails as a matter of law.

The claim for a writ of prohibition is even more deficient. Like mandamus, "prohibition . . . will [not] lie to undo acts already done,"[37] nor where (as here) Petitioners have an adequate remedy at law.[38] But Petitioners' claim fails for an even more fundamental reason: "the writ of prohibition is a proceeding between *courts* bearing the relation of supreme and inferior, and . . . it *does not lie from a court to an executive officer*."[39]

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[36] *Id.* at 26, 144 S.E. at 470.

[37] *In re Commonwealth*, 278 Va. at 17, 677 S.E.2d at 244.

[38] *Supervisors of Bedford v. Wingfield*, 68 Va. (27 Gratt.) 329, 333 (1876) ("[L]ike all other extraordinary remedies, prohibition is to be resorted to only in cases where the usual and ordinary forms of remedy are insufficient to afford redress. And it issues only in cases of extreme necessity; and, before it can be granted, it must appear that the party aggrieved has no remedy in the inferior tribunals.").

[39] *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.").

4. The plain text of Article V, § 12 empowers the Governor to restore rights en masse and the Governor's actions are presumed constitutional.

Assuming that the Court reaches the merits, the Governor's actions are plainly within his constitutional authority. "The words of Article V, Section 12 are unambiguous."[40] It provides: "The Governor shall have power . . . to remove political disabilities consequent upon conviction for offenses committed prior or subsequent to the adoption of this Constitution . . . ."[41] There are no words of limitation that prohibit the Governor from ordering the removal of disabilities by categorical directive. Where, as here, "there are 'no doubtful or ambiguous words or terms used, [Virginia courts] are limited to the language of the section itself and are not at liberty to search for meaning, intent or purpose beyond the instrument.'"[42]

Thus, it is immaterial that the Governor has not previously issued categorical restoration-of-rights orders. In *Blount*, Governors since 1872 had issued more than 1,600 "commutations" to shorten a term-of-years

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[40] *Blount v. Clarke*, 291 Va. 198, __, 782 S.E.2d 152, 155 (2016).

[41] Va. Const. art. V, § 12.

[42] *Blount*, 291 Va. at __, 782 S.E.2d at 155.

sentence,[43] even though all Justices agreed that the Constitution, as construed in *Lee v. Murphy*,[44] did not permit that; nevertheless, the Court upheld the Governor's action by re-characterizing the "commutation" as a "partial pardon."[45]

That was entirely appropriate. It comported with the rule in *Lee* that the Court should give the Governor's actions a liberal construction and the benefit of the doubt, upholding those actions whenever possible:

> 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.[46]

Given the plain language of Article V, § 12, and the deference afforded the Governor's actions, Petitioners' challenge cannot succeed.[47] The best authority they cite (over and over again) is a private letter from Governor Kaine's former counsel, on "his last days in office," that does not

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[43] *Id.* at __, 782 S.E.2d at 165 (Kelsey, J., dissenting).

[44] 63 Va. (22 Gratt.) 789 (1872).

[45] *Blount*, 291 Va. at __, 782 S.E.2d at 158 (majority op.); *id.* at __, 782 S.E.2d at 159 (Kelsey, J., dissenting).

[46] 63 Va. at 801.

[47] Because the Governor properly exercised his exclusive constitutional authority to restore voting rights, Petitioners' suggestion is meritless that he somehow violated Article I, § 7 by "suspending laws" in doing so.

cite any legal authority for its conclusion that "blanket" restoration orders are not permitted.[48] It was not a formal opinion of the Attorney General.[49] And in *Blount*, even a longstanding, formal opinion of the Attorney General that the Governor lacked the power to commute a term-of-years sentence was insufficient to invalidate the Governor's act of clemency.[50]

B. Even if Petitioners prevailed, the *remedy* would not require purging the voter rolls.

Even if the Court determined that Petitioners have legal standing and that the Governor may restore rights only on an individual basis, the remedy would not require purging the voting rolls. Indeed, Petitioners give no thought at all to the nearly 4,000 Restored Voters who, now that they have served their time, seek to exercise perhaps the most essential and

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[48] Letter from Mark E. Rubin, Counselor to the Governor, to Kent Willis, ACLU of Va. (Jan. 15, 2010), Mem. in Supp. at Ex. 1.

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

[50] 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, see 1932 Op. Atty. Gen. at 102"). For the same reason, the 2013 Report of the Attorney General's Rights Restoration Advisory Committee, Mem. in Supp. Ex. 2, is immaterial. It too was not a formal opinion of the Attorney General. It addressed a slightly different question: whether the Governor could "institute by executive order an automatic, self-executing restoration of rights for all convicted felons in the Commonwealth of Virginia." *Id.* at 2. And the committee's citations in footnote 14 involved matters far removed from the clemency power, which the Constitution entrusts solely to the Governor. *See id.* at 4 n.14.

fundamental right of citizenship.

As the Supreme Court made clear in its seminal one-person-one-vote case, *Reynolds v. Sims*, election cases require courts to exercise equitable judgment when awarding relief to ensure that elections are not disrupted:

> [W]here an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid. In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles. With respect to the timing of relief, a court can reasonably endeavor 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.[51]

In addition to avoiding any order that would disrupt an election, courts generally try to allow the branch of State government that has primary jurisdiction in the matter to remedy the problem before imposing court-ordered relief. Thus, since "legislative reapportionment is primarily a matter for legislative consideration and determination[,] . . . judicial relief becomes

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

appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so."[52] The Governor, who has exclusive authority to restore voting rights, would be entitled to commensurate respect. Indeed, "the power conferred upon the Governor by the Constitution . . . to remove political disabilities . . . is an absolute power . . . ."[53]

So even in the unlikely event that the Court invalidated the Governor's restoration-of-rights order in this case, the Court presumably would afford the Governor the opportunity to protect the Restored Voters' right to vote in the November 2016 election by allowing him to issue individualized restoration 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.

Accordingly, since the remedy in this case would not require purging any voting rolls for the upcoming election, Petitioners' sense of urgency is misguided, and their request that the Court act in only two weeks' time is unwarranted.

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[52] *Id.* at 586; *see also Personhuballah v. Alcorn*, No. 3:13-cv-678, 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).

[53] 1914 Op. Va. Att'y Gen. 38, 38-39.

CONCLUSION

Because Petitioners lack standing and have failed to state a claim, and because they would not be entitled to purge the voter rolls even if they win, there is no urgency that requires expedited consideration here. Respondents do not object to the Court's scheduling a special session, if the Court thinks that is appropriate. We do object to Petitioners' request that the briefing be completed by June 6 and that argument be set that week. Having had a month to prepare their petition and their 50-page brief, Petitioners should not be permitted to impose unreasonable burdens on Respondents, nor to stampede the Court into hearing a case that, upon consideration of the forthcoming demurrer, the Court may well wish to dismiss by *per curiam* order.

Respectfully submitted,

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