In The

SUPREME COURT OF VIRGINIA

Record No. 160784

William J. Howell, et al.,

Petitioners,

v.

Terrence R. McAuliffe, in his official capacity as

Governor of Virginia, et al.,

Respondents.

BRIEF OF *AMICI CURIAE* DAVID GREEN AND BRIDGING THE GAP IN VIRGINIA, INC. IN SUPPORT OF RESPONDENTS AND IN OPPOSITION TO PETITION FOR WRITS OF MANDAMUS AND PROHIBITION

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INTEREST OF AMICI CURIAE

Counsel for the Petitioners and the Attorney General of Virginia, on behalf of the Respondents, have consented in writing to the filing of this Brief Amici Curiae on behalf of these parties, pursuant to Rule 5:30(b)(2).

Amicus curiae David Green is an individual African-American resident of the Commonwealth of Virginia. He successfully registered to vote because the April 22, 2016 Executive Order issued by Governor Terrence R. McAuliffe removed his individual disability (resulting from convictions in his past) that had heretofore prevented him from voting ("the Executive Order")(J.A. 1). Since the completion of his sentence and probation, now twelve years ago, Mr. Green has become a successful and responsible member of the Richmond, Virginia community. He is married, and works in the construction industry. Mr. Green applied to register to vote in June 2016. Mr. Green seeks to exercise the right to vote and participate in elections in the Commonwealth of Virginia. Mr. Green was convicted of a felony drug offense in 1990 and was subsequently convicted of other drug-related felonies, and completed his sentences in 2002. His probation was completed in 2004. He has paid court fines and fees in four jurisdictions and intends to pay any remaining fines and fees.

Amicus curiae Bridging the Gap in Virginia, Inc., is a 501c(3) non-profit, voluntary association based in Richmond, Virginia, dedicated to assisting the transition of formerly incarcerated individuals in reentry to civilian life. Those who work with and in Bridging the Gap in Virginia are directly affected by the result of this litigation, in that the Executive Order restored not only voting rights but also the right to serve on juries, to run for office and to serve as a notary public, all attributes of the transition sought by the association. The success of the mission of Bridging the Gap in Virginia would be directly affected by any action delaying or reversing the implementation of the Executive Order or imposing future restrictions (not specifically identified in the Virginia Constitution) on actions of the Governor in restoring rights of formerly incarcerated individuals, as sought by the writs of mandamus and prohibition.

Introduction

The right to vote is one of the most important rights in American democracy and felony disenfranchisement laws have long been used as a tool to restrict the right to vote from African Americans. Contrary to Petitioner's assertion, felony disenfranchisement in Virginia has always been inextricably connected to the state's long history of efforts to

discriminate against African Americans, and exclude them from the political process.

The lawmakers who first enacted the felony disenfranchisement provision knew that free African Americans were incarcerated at rates far in excess of whites. The lawmakers who expanded the scope of the provision to include petit larceny offenses did so as part of a package of voter suppression laws passed in reaction to the freeing of the slaves. The lawmakers who ratified the provision in 1902 did so as part of Virginia's pernicious Jim Crow Constitution. And the African American citizens of this Commonwealth who are convicted of crimes at rates exponentially greater than whites similarly charged are feeling the brunt of that history, with the permanent loss of the cherished right to vote.

At least that was the case until Governor McAuliffe's order restoring their right. To reverse that act – an act totally within the Governor's power and consistent with the constitution – is to turn back the clock, and consign another generation – 20% of this Commonwealth's African American population – to perpetual second-class citizenship. *Amici* respectfully urge this Court to deny the Petition.

Statement of the Case

A. Proceedings

A Verified Petition for Writs of Mandamus and Prohibition was filed as an original action by Petitioners in this Court on May 23, 2016, claiming they are injured by the implementation of the Executive Order restoring political rights to certain individuals who previously have been convicted of a felony. On June 1, 2016, the Court placed this matter on the docket for a special session on July 19, 2016. The Verified Petition contends that the taking of evidence is not required to resolve the question presented, which is the power of the Governor pursuant to the Constitution of Virginia to issue the Executive Order. The Respondents have opposed the Verified Petition and demurred to the relief requested.

These *Amici Curiae* file in support of the Respondents and urge the Court to deny and dismiss the Verified Petition.

B. The Executive Order

The Executive Order is the latest in a series of executive actions by Virginia Governors addressing the process for enfranchisement of person convicted of felonies. The history of those actions is relevant to the issue

presented, as none of the prior actions has been challenged as constitutionally infirm.

On May 29, 2013, Governor Robert McDonnell used his executive power to change the process by which individuals convicted of non-violent felonies would be considered for the restoration of most of their civil rights, including the right to vote.[1] Under the revised process, individuals convicted of non-violent felonies who had completed their full sentence, including any parole, and paid all required fines and restitution became eligible for an automatic restoration of their civil rights provided they had no pending felony charges.[2] This change had the practical effect of eliminating a number of restrictions on persons convicted of non-violent felonies, including a two year waiting period, the consideration of any misdemeanor charges and convictions as part of the restoration decision, and the Governor's own discretion regarding those applications.[3] It also

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[1] *See* Letter from Gov. Robert McDonnell to Secretary of the Commonwealth Kelly (May 29, 2013), https://web.archive.org/web/20130613005612/http://www.governor.virginia.gov/utility/docs/20130529124204967.pdf; *see also Governor McDonnell Announces Automatic Restoration of Voting and Civil Rights on Individualized Basis for Non-Violent Felons*, Office of Gov. McDonnell, https://web.archive.org/web/20130610014505/http://www.governor.virginia.gov/news/viewRelease.cfm?id=1829.

[2] *See* Letter from Gov. Robert McDonnell (May 29, 2013), *supra* note 1.

[3] *See Governor McDonnell Announces Automatic Restoration of Voting and Civil Rights on Individualized Basis for Non-Violent Felons*, *supra* note 1.

eliminated the application process for individuals who became eligible under the new criteria after they were announced.[4]

Following the implementation of the new criteria, the Virginia Department of Corrections was instructed to mail a monthly list of potentially eligible individuals to the Secretary of the Commonwealth for review and possible restoration of civil rights.[5] Individuals who met the new criteria prior to its announcement, however, were required to apply to the Secretary of the Commonwealth for consideration because the State then lacked a comprehensive list of individuals convicted of non-violent felonies that had completed their sentences and paid all fines and restitution.[6]

Governor McDonnell's amendments to the process were not "self-executing" because the record of each potentially eligible person was compared to the updated criteria.[7] If an individual was determined to be

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[4] *See id.*

[5] *See id.*

[6] *See* Dawnthea Price, *Felons slow to seek restoration of rights*, The Free Lance-Star (Fredericksburg, VA) (Sept. 18, 2013), http://www.fredericksburg.com/news/felons-slow-to-seek-restoration-of-rights/article_a07c07d3-91f6-5a9b-a398-27bea6219f50.html; *see also* Secretary of the Commonwealth, *Restoration of Voting Rights FAQs - Updated July 15, 2013* at 2, https://commonwealth.virginia.gov/media/1802/20130715-RORFINAL-Updated-FAQs.pdf.

[7] *See* Secretary of the Commonwealth, *Restoration of Voting Rights FAQs - Updated July 15, 2013* at 5, *supra* note 6.

eligible, a letter was mailed to that individual restoring his civil rights.[8] The process was automatic in that newly-eligible individuals did not need to apply for a restoration of their rights.

After he assumed office in January 2014, Governor McAuliffe undertook a series of executive actions to expand on those of the prior administration. In April 2014, he announced additional changes to the criteria used to determine if an individual is eligible for the restoration of their civil rights. This included removing drug crimes from the list of offenses that required a waiting period before an individual could apply for his rights to be restored and a reduction in the waiting period from five years to three years for individuals who had been convicted of a violent felony.[9] The Governor also, for the first time, instructed the Secretary of the Commonwealth to publish an enumerated list of the offenses that required a waiting period.[10] Governor McAuliffe then issued Executive Order Number 13, which instructed the Virginia State Police and

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[8] *See* Olympia Meola, *McDonnell to speed rights process for nonviolent felons*, Richmond Times-Dispatch (May 29, 2013), http://www.richmond.com/news/state-regional/virginia-politics/article_08d1b42c-c80c-11e2-8950-0019bb30f31a.html.

[9] *See Governor McAuliffe Announces Changes to Virginia's Restoration of Rights Policy*, Office of Gov. McAuliffe, https://governor.virginia.gov/newsroom/newsarticle?articleId=3880 (last visited May 25, 2016).

[10] *See id.*

Department of Corrections to share criminal history information with the Secretary of the Commonwealth for the purpose of determining eligibility for automatic restoration of rights.[11]

In December 2014, Governor McAuliffe announced additional changes to the restoration process. He streamlined the application process for individuals who had been convicted of a violent felony by reducing the length of the application form from thirteen pages to one and eliminating requirements such as notarization, community reference letters, and a letter to the governor.[12] And, in June 2015, the Governor eliminated the requirement that outstanding court costs and fees be paid before an individual's rights could be restored, analogizing the requirement to a poll tax.[13] He also introduced an option to add a notation to an individual's

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[11] Gov. Terry McAuliffe, Executive Order Number Thirteen (Apr. 21, 2014). https://governor.virginia.gov/media/3354/eo-13-sharing-of-criminal-history-record-information-for-determining-eligibility-for-automatic-restoration-of-rights-processada.pdf.

[12] *See Governor McAuliffe Announces The Restoration Of Civil And Voting Rights To Over 5,100 Virginians,* Office of Gov. McAuliffe, https://governor.virginia.gov/newsroom/newsarticle?articleId=7495 (last visited May 25, 2016); *see also* Restoration of Rights: Application for More Serious Offenses (as of Dec. 15, 2014). https://web.archive.org/web/20150102123831/https://commonwealth.virginia.gov/media/3530/revised-more-serious-application-12-15-14.pdf.

[13] *See Governor McAuliffe Announces New Reforms to Restoration of Rights Process* Office of Gov. McAuliffe,

criminal record to designate that their rights had been restored.[14] At Governor McAuliffe's direction, the state also has been developing a database of eligible individuals for more than two years.

Finally, by Executive Order, Governor McAuliffe restored voting rights to those who had served their sentences, obviating the need for them to apply for restoration. Although there were no individual orders naming each person restored, each affected citizen was offered the option of asking for an order memorializing the action.

Summary of the Argument

These Amici Curiae join the Respondents in advocating that the Petitioners lack standing to seek the relief demanded; that mandamus fails as a matter of law; and that the prohibition claim fails as a matter of law. Further, Mr. Green and Bridging the Gap in Virginia, Inc. join in supporting the Executive Order as necessary to correct almost two centuries of racial discrimination and fully authorized by and consistent with Article V, Section 12 and Article II, Section 1 of the Constitution of Virginia.

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https://governor.virginia.gov/newsroom/newsarticle?articleId=11651 (last visited May 25, 2016).

[14] *See Id.*

Argument

I. VIRGINIA'S FELONY DISENFRANCHISEMENT PROVISION DISCRIMINATES AGAINST AFRICAN AMERICANS.

Contrary to Petitioners' argument that this case is "not about" race, [15] the felony disenfranchisement provision of the Virginia Constitution, was intended to, and did, disenfranchise African Americans. Petitioners allege that there was no racial intent behind the initial adoption of Virginia's felony disenfranchisement provision because African Americans could not vote at the time the provision was originally enacted. To the contrary, from the time of its original enactment through all of its iterations, Virginia's felony disenfranchisement provision was deeply rooted in prejudice against African Americans. The Restoration of Rights Order is an important step in Virginia's constitutional guarantee of "free[dom] from . . . governmental discrimination upon the basis of . . . race."[16]

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[15] Pet'rs' Pet. at 9-10, 35-36. The Brief of Former Attorneys General of Virginia as Amici Curiae in Support of Petitioners also argues that disenfranchisement is not motivated by "racial aninus."

[16] Va. Const. art. I, § 11

A. **In 1830, felony disenfranchisement first entered the Virginia Constitution in an environment of fear that free African Americans would gain the right to vote and with the belief that few white Virginians would be affected by the provision.**

There is substantial historical evidence that the lawmakers who enacted the original felony disenfranchisement provision knew it could be used as a means of disqualifying free African American, if and when they gained the right to vote. The Virginia State Convention of 1829-1830, convened to revise the 1776 Constitution of Virginia, debated the question of whether to extend suffrage to all free residents of the state.[17] By the time of the 1829-1830 Convention, Virginia had a significant population of free African Americans and the impact of possibly large numbers of free African Americans voting in Virginia was not lost on legislators. One delegate to the 1829-1830 Convention noted that “the increase of free people of colour” in Virginia - from 12,866 in 1790 to 44,212 in 1829 - was “a subject of regret and alarm,” while other delegates pointed with concern to the fact that “free African Americans could vote for some members of the state legislature in states like North Carolina.”[18] In this environment, the

[17] Helen Gibson, *Felons and the Right to Vote in Virginia: a Historical Overview*, The Virginia Newsletter, Jan. 2015, at 2.

[18] Proceedings and Debates of the Virginia State Convention, of 1829-1830, to which are Subjoined, the New Constitution of Virginia, and the Votes of the People, 87 (Richmond: Printed by Samuel Sheperd & Co. for Ritchie & Cook, 1830)

1829-1830 Convention retained "both white supremacy and property qualifications" to vote in the revised Constitution.

The same Convention enacted the felony disenfranchisement provision and did so in an environment that presumed a connection between free African Americans and crimes. In reaching the conclusion that suffrage should not be extended to free African Americans, then-Governor of Virginia William Giles condemned the criminality of free African Americans and praised the moral character of white Virginians. *Gibson,* at 2.[19] He concluded that the low number of white Virginians in prison was evidence of the "highly honorable… present moral condition of the White population of Virginia." *Id.* Accordingly, the Governor viewed the "number of convictions of free coloured" – which he suggested was four times the rate of whites – as evidence of free African Americans' propensity for criminal behavior and the superiority of white Virginians. *Id.* In short, Virginia's felony disenfranchisement provision was adopted by lawmakers who (1) did not want free African Americans to vote, (2) believed that free African Americans had a greater propensity for criminal behavior than did whites, and (3) knew that free African Americans were imprisoned at rates far in excess of white Virginians.

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[19] Gibson *supra* note 17, at 2.

B. **Virginia lawmakers expanded the felony disenfranchisement provision after African Americans gained the right to vote with the explicit aim of suppressing African American voting power.**

After African Americans gained the right to vote after the Civil War, Virginia lawmakers swiftly amended the Constitution of Virginia to broaden the scope of the felony disenfranchisement provision. The actions of lawmakers were intended to exclude African Americans from access to the franchise. In an 1876 amendment to the Constitution, petit larceny was added to list of criminal convictions that excluded individuals from voting.[20] The addition of petit larceny was motivated by the pervasive notion that former slaves were prone to the crime.[21]

The expansion of the felony disenfranchisement provision was part of a series of legislative acts intended to deny African Americans the right to vote. After passing the petit larceny amendment, the General Assembly also established a policy that required poll workers to check criminal records of voters at the polls on Election Day.[22] Though facially neutral, the practice of checking criminal backgrounds at polling places was not applied uniformly and was selectively implemented and enforced at polling sites to

[20] Gibson, *supra* note 17, at 3.
[21] *Id.*
[22] *Id.*

deny African Americans the right to vote.[23] In the late 19th century, African American and white Virginians voted in separate lines.[24] Poll workers servicing the African American voting lines used lists of persons with felony convictions to create long wait times and discourage African Americans from voting.[25] In addition, newspapers published "list[s] of negroes convicted of petit larceny" and encouraged "Democratic challengers [to] examine [the list] carefully." Other, official lists – such as the "Official List of Colored Persons Convicted of Felony or Petit Larceny by the Hustings Court and Thereby Disenfranchised" – were also circulated and used to challenge black voters.[26]

C. The Constitution of 1902 was characterized by racially discriminatory efforts to further deny African Americans access to the franchise, including expansion of the felony disenfranchisement provision.

In 1902, Virginia held a constitutional convention for the express purpose of suppressing the vote of newly eligible African Americans. Felony disenfranchisement was expanded to achieve that goal. One delegate to the convention, R.L. Gordon, stated, "I told the people of my county before they sent me here that I intended, as far as in me lay, to

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[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] Gibson, *supra* note 17, at 3.

disenfranchise every negro that I could disenfranchise under the Constitution of the United States, and as few white people as possible."[27] While previous iterations of the felony disenfranchisement provisions alluded to infamous crimes, bribery, and treason, the 1902 Virginia constitution's disenfranchisement provision cast a much wider net, including Virginians convicted of "treason or of felony, bribery, petit larceny, obtaining money or property under false pretenses, embezzlement, forgery, or perjury."[28] That same convention approved a new suite of discriminatory constitutional provisions establishing poll taxes, literacy requirements, and a requirement that voters correctly answer any question asked by an election official.[29] The delegate who drafted the suffrage provisions, future U.S. Senator and Treasury Secretary Carter Glass, stated that the provisions "[do] not necessarily deprive a single white man of the ballot, but will inevitably cut from the existing electorate four-fifths of the negro voters…That was the purpose of this convention; that will be its achievement."[30] Glass also stated the purpose of the suffrage provisions was to "eliminate the darkey as a political factor in this State in less than

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[27] Matt Ford, *The Racist Roots of Virginia's Felon Disenfranchisement.* (Apr 27, 2016), http://www.theatlantic.com/politics/archive/2016/04/virginia-felon-disenfranchisement/480072

[28] *Id.*

[29] *Id.*

[30] *Id.*

five years, so that in no single county of the Commonwealth will there be the least concern felt for the complete supremacy of the white race in the affairs of government."[31]

By the time the next revision of the Virginia Constitution occurred in 1971, many of the state's facially discriminatory voting laws were rendered null and void pursuant to United States Supreme Court decisions. *See, e.g., Harper v. Virginia State Bd. Of Elections*, 383 U.S. 663 (1966) (invalidating Virginia's poll tax). But not all. Virginia's discriminatory literacy test for state elections remained in effect even after ratification of the 24th Amendment, which abolished literacy tests in federal elections. *See Virginia v. United States*, 420 U.S. 901 (1975), *aff'g*, 386 F.Supp. 1319 (D.D.C. 1975) (holding Virginia's literacy test unconstitutional). Virginia was one of only nine states that were entirely subject to the pre-clearance requirements of Section 5 of the Voting Rights Act, 42 U.S.C. §1973c(b)-(d), until that statute was rendered inoperable by the decision in *Shelby Cnty v. Holder*, 133 S. Ct. 2612 (2013). While Section 5 was in effect, the Department of Justice in the administrations of Presidents Nixon, Carter, Reagan, George H.W. Bush, Clinton, and George W. Bush, objected 33

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[31] *Summary of the Governor's Restoration of Rights Order Dated April 22, 2016*, 1, Office of the Governor https://commonwealth.virginia.gov/media/5843/restore_rights_summary_4-22.pdf

times to changes in voting requirements and practices in Virginia as retrogressive to the ability of racial minorities to participate in the political process.[32]

The vestiges of slavery, reconstruction and Jim Crow survive in Virginia's felony disenfranchisement provision today. As Governor McAuliffe's office cogently summarized, "despite the progress Virginia has made erasing the vestiges of slavery and segregation on so many fronts, this law continues to disenfranchise racial minorities and other citizens who have paid their debt to society and are otherwise qualified to vote."[33]

II. OVERTURNING THE RESTORATION OF RIGHTS ORDER WOULD PERPETUATE DISCRIMINATION AGAINST AFRICAN AMERICANS.

Felony disenfranchisement is inextricably tied to Virginia's history of state-sanctioned racial prejudice and its persisting effects in the Commonwealth's criminal justice system today. One in five African Americans in Virginia lacks the right to vote due to a felony conviction.[34] Virginia's criminal justice system fails to provide equal justice to racial minorities at every stage of the process, leading to the felony disenfranchisement provision's disproportionate impact on African

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[32] *Voting Determination Letters for Virginia*, U.S. Department of Justice, available at https://www.justice.gov/crt/voting-determination-letters-virginia

[33] *Summary of the Governor's Restoration of Rights Order*, *supra* note 31.

[34] *Id.*

Americans. Governor McAuliffe's decision to address the racial disparity through an executive order is an appropriate response to the crisis, and brings Virginia one step closer to "advanc[ing] the ideals of equality of all races and peoples."[35]

A. The felony disenfranchisement provision disproportionately affects African Americans in Virginia.

The racial disparities that persist across Virginia's criminal justice system, further compound the impacts of the felony disenfranchisement provision on Virginia's African American community. As of 2010, Virginia had disenfranchised 242,958 African Americans, or 20.4% of the Commonwealth's African American population because of prior felony convictions.[36] By comparison, the national average rate of disenfranchised African Americans is 7.7%.[37] Put another way, African Americans account for 45.9% of Virginia's disenfranchised population, despite constituting only

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[35] Governor McAuliffe Restores Voting and Civil Rights to Over 200,000 Virginians, https://governor.virginia.gov/newsroom/newsarticle?articleId=15008.

[36] Christopher Uggen, Sarah Shannon, and Jeff Manza *State-Level Estimates of Felon Disenfranchisement in the United States, 2010*, 17, The Sentencing Project (July 2012). http://sentencingproject.org/wp-content/uploads/2016/01/State-Level-Estimates-of-Felon-Disenfranchisement-in-the-United-States-2010.pdf

[37] *Id.*

19.4% of the Commonwealth's population.[38] Only two other states in the nation – Florida and Kentucky – have as high a rate of disenfranchisement for African Americans pursuant to felony disenfranchisement laws.[39] Underscoring the beneficial impact of Governor McAuliffe's order on the African American community, an estimated 78% of disenfranchised African American Virginians have completed their criminal sentences and are eligible to register to vote under McAuliffe's order.[40]

B. African Americans in Virginia are more likely to enter the criminal justice system than their white counterparts.

The disproportionate representation of African Americans entering the criminal justice system further illustrates the racial effects of the felony disenfranchisement provision. Though African Americans comprise approximately 20 percent of the population in Virginia, they comprise 47.4% of all arrests, 76.2% of all robbery arrests.[41]

Racial disparities in drug arrests and convictions in Virginia are dramatic. Nationally, the Department of Health and Human Services has

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[38] Gov. McAuliffe, *Analysis: Virginians Whose Voting Rights Have Been Restored Overwhelmingly Nonviolent, Completed Sentences More Than A Decade Ago*, May 11, 2016. http://governor.virginia.gov/newsroom/newsarticle?articleId=15207

[39] Jean Chung, *Felony Disenfranchisement: A Primer,* The Sentencing Project (May 2016), http://www.sentencingproject.org/wp-content/uploads/2015/08/Felony-Disenfranchisement-Primer.pdf

[40] State by State Data, *supra* note 36.

[41] *Id.* at 1.

estimated that African Americans constitute 13.3% of monthly drug users but 32.5% of arrests for drug-related offenses.[42] In Virginia, the disparities are even more dramatic. African Americans comprise 45% of all drug arrests in Virginia,[43] even though they constitute 20% of the population and research shows that African Americans use drugs at a slightly lower rate than do whites.[44] A 2008 report on drug arrests in America's largest cities noted that in Virginia Beach, arrests of African Americans for drugs increased from 170 per 100,000 in 1980 to 1,434 per 100,000 in 2003, an increase of 729%. By contrast, the drug arrest rate for whites decreased from 452 to 343 per 100,000, a 24% decrease.[45] These disparities are consistent with the staggering increase in drug related prosecutions and convictions since the start of the war on drugs. However, while some states have revised their policies to move away from overly punitive

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[42] Marc Mauer & Ryan S. King, *Schools and Prisons: Fifty Years After Brown v Board of Education*, at 3, The Sentencing Project (2004), http://proxy.baremetal.com/november.org/resources/Brown-Board.pdf

[43] *Crime in Virginia 2014*, Virginia Department of State Police, 73 (2015), http://www.vsp.state.va.us/downloads/Crime_in_Virginia/Crime_in_Virginia_2014.pdf

[44] *Virginia's Justice System: Expensive, Ineffective and Unfair,* Justice Policy Institute, 11-12 (Nov. 2013), http://www.justicepolicy.org/uploads/justicepolicy/documents/va_justice_system_expensive_ineffective_and_unfair_final.pdf

[45] Ryan S. King, *Disparity by Geography: The War on Drugs in America's Cities*, 11, The Sentencing Project (May 2008), http://www.sentencingproject.org/wp-content/uploads/2016/01/Disparity-by-Geography-The-War-on-Drugs-in-Americas-Cities.pdf

prosecution of drug related offenses, Virginia has recently dramatically increased enforcement of their drug laws, disproportionately and adversely impacting African Americans.[46]

In Virginia, as in the rest of the United States, African Americans disproportionately bear the brunt of the rapidly increasing imprisonment rate. In Virginia, African Americans are imprisoned at a rate of 1,386 per 100,000, while whites are imprisoned at a rate of 280 per 100,000.[47] In other words, the rate of incarceration in Virginia of African Americans is six times the rate of incarceration of white persons .[48] The racial disparity in prison rates is wider than it was during the 1902 Virginia constitutional convention, when a delegate boasted that African Americans were imprisoned at a rate five times greater than the rate white Virginians were imprisoned in the Jim Crow South.[49]

The disproportionate application of the criminal laws leads to a racially discriminatory application of the state's felony disenfranchisement provision. The situation of many disenfranchised Virginians is captured by the story of Mr. David Green. A life-long Virginian, Mr. Green, who is

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[46] *Virginia's Justice System, supra* note 44 at 4-5.
[47] *State by State Data, supra* note 36.
[48] *Id.*
[49] Ford, *supra* note 27.

African-American, was arrested for the distribution of cocaine shortly before his nineteenth birthday. Mr. Green served his sentence but lacked the support he needed after his release. He cycled in and out of prison for drug offenses before finally getting back on his feet in his early 30s. Now 44 years old, he is married and has been self-employed in the construction industry for more than seven years. Despite having become a productive member of society, his encounter with the criminal justice system when he was just 18 years old meant a lifetime ban on participating in the democratic process. He was able to register to vote only after Governor McAuliffe's Restoration of Rights Order.

C. Socio-economic disparities faced by African Americans further exacerbate the impact of the state's felony disenfranchisement provision.

Once African Americans enter the criminal justice system, Virginia erects hurdles that make conviction – and eventually disenfranchisement – more likely for them than for their white counterparts. For example, public defenders' representation is not free in Virginia. Defendants may be charged up to $1,235 per count for some felonies.[50] The result is that poor Virginians – who are disproportionately black - often forego legal defense,

[50] *Id.* at 6.

ultimately leading to more convictions and more disadvantageous plea bargains than would have been the case had they had representation.[51]

A recent study found that African Americans are sentenced more harshly than white defendants.[52] The study examined Virginia Circuit Court cases from 2006 through 2010 and, controlling for income and the seriousness of the crime, African Americans were sentenced to significantly more days in prison than whites.[53] According to the study, having a lower income also corresponded to a longer sentencing; however, the sentencing bias is larger for lower-income racial minorities than for lower-income white Virginians, even when controlling for race.[54] The study concluded that "[f]or a black man in Virginia to get the same [sentencing] treatment as his Caucasian peer, he must earn an additional $90,000 a year."[55]

In this regard, prior to Governor McAuliffe's Executive Order, the individualized application process for restoration of rights was itself disproportionately more burdensome for African Americans than for whites.

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[51] Approximately 11% of black households in Virginia live on an income of under $10,000/year, compared with just 4% of white households. American Factfinder U.S. Census Bureau, 2010-2014 American Community Survey. Tables B19001B and B19001A.

[52] David Colarusso, *Uncovering Big Bias with Big Data* (May 31, 2016), https://lawyerist.com/110584/big-bias-big-data/#results

[53] *Id.*

[54] *Id.*

[55] *Id.*

Having the help of an attorney to maneuver through the application process was obviously advantageous, an advantage lost to lower-income racial minorities.

D. Felony convictions in Virginia impose a lifetime voting ban for many low-level offenses.

In many cases, the threshold for committing a felony in Virginia is an alarmingly low bar. In announcing a bipartisan Rights Restoration Advisory Committee in March 2013, Virginia Attorney General Ken Cuccinelli stated:

> Ever since I was in the Virginia Senate, I have expressed a deep concern about unnecessarily ratcheting up several low-level offenses from misdemeanors to felonies - what I have called 'felony creep.' There are many people in our communities who have committed certain low-level, nonviolent offenses in the past, paid their debts to society, and then gone on to live law-abiding lives. There should be a way for willing individuals who want to regain their place in society to be forgiven, be given a second chance, and to pursue a path to regain their civil rights.[56]

For example, the threshold for grand larceny in Virginia – that distinguishes misdemeanors from felonies – is one of the lowest in the nation.[57] In Virginia, an individual who commits a fraud or theft involving anything valued at $200 or above can be charged with grand larceny, a

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[56] *Cuccinelli Creates Committee to Advise on Restoration of Rights Process*, Augusta Free Press (Mar. 12, 2013), http://augustafreepress.com/cuccinelli-creates-committee-to-advise-on-restoration-of-rights-process/

[57] *Virginia's Justice System,* supra *note 44.* (New Jersey also has a $200 grand larceny threshold).

felony.[58] The ease in which relatively minor crimes of theft can lead to permanent disenfranchisement harkens back to Virginia's earlier efforts to selectively focus on petit larceny as a means of disenfranchising African Americans.

E. Restoration of voting rights has beneficial, collateral effects consistent with Virginia's constitutional guarantees.

Virginia's Constitution guarantees "free[dom] from . . . governmental discrimination upon the basis of . . . race."[59] In addition to preventing an overwhelmingly African American segment of Virginia's population from exercising their fundamental right to vote, disenfranchisement "compounds the isolation of formerly incarcerated individuals from their communities," adding an additional challenge to an already difficult re-entry process.[60] From a policy perspective, ensuring that formerly incarcerated individuals are integrated into the fabric of their community makes sense because "individuals released in states that permanently disenfranchise are roughly ten percent more likely to reoffend than those released in states that restore the franchise post-release."[61]

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58 *Id.*
59 Va. Const. art. I, § 11
60 Chung, *supra* note 39.
61 Guy Padraic Hamilton-Smith and Matt Vogel, *The Violence of Voicelessness: The Impact of Felony Disenfranchisement on Recidivism*, BERKELEY LA RAZA L. JOURNAL (2012),

The impact of the Executive Order will most keenly be felt in predominately African-American areas of the state. The Executive Order may impair the ability of minority communities to elect representatives of their choice, particularly since Virginia state elections can be decided by slim margins of 5,000 to 6,000.[62] Because the criminal justice system disproportionately affects African-American and low-income communities, these historically disadvantaged communities stand to benefit significantly from the Governor's actions and have been the focus of voter registration drives. For example, a community organizer in Jackson Ward estimates that about three-quarters of the people she meets in this neighborhood had lost their right to vote.[63] Jackson Ward is a historically African-American neighborhood that has been the target of coordinated efforts to suppress the black vote for centuries.[64] A news article in 1889 described how voting precincts in Jackson Ward had lines with hundreds of African American voters waiting to cast their ballot, but that many, if not all, of these voters were subject to a campaign of intimidation through accusations of crimes

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http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1252&context=blrlj

[62] *Id.*

[63] *Id.*

[64] Sheryl Gay Stolberg, *Virginia at Center of Racially Charged Fight Over the Right of Felons to Vote,* N.Y. Times, June 5, 2016, http://www.nytimes.com/2016/06/06/us/virginia-at-center-of-racially-charged-fight-over-the-right-of-felons-to-vote.html?_r=0

such as petit larceny (which had recently been added to the list of crimes leading to disenfranchisement).[65]

While the Executive Order addressed only the voting rights of persons convicted of felonies, the importance of this step cannot be overstated. Allowing the Virginians affected by these rules an opportunity to participate in the political process and elect candidates and speak to other referenda that may appear on the ballot is an important step toward changing the draconian collateral consequences of felony convictions and the underlying racial disparities within Virginia's criminal justice system.

III. THE PLAIN LANGUAGE OF ARTICLE V OF THE VIRGINIA CONSTITUTION PLACES NO CONSTRAINTS ON THE POWER OF THE GOVERNOR TO "REMOVE POLITICAL DISABILITIES"

In interpreting the Constitution of Virginia, this Court is guided by familiar and simple rules of construction. This 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." *Harrison v. Day*, 200 Va. 439, 448, 106 S.E.2d 636, 644 (1959). If there are "no doubtful or ambiguous words or terms used, we are limited to the language of the

[65] Gibson, *supra* note 17, at 3-4.

section itself and are not at liberty to search for meaning, intent or purpose beyond the instrument." *Id.*[66]

In addition, the Court has held that "Constitutions are not esoteric documents and recondite learning ought to be unnecessary when we come to interpret provisions apparently plain. They speak for the people in convention assembled, and must be obeyed. It is a general rule that the words of a Constitution are to be understood in the sense in which they are popularly employed, unless the context or the very nature of the subject indicates otherwise." *Lipscomb v. Nuckols*, 161 Va. 936, 945, 172 S.E. 886, 889 (1934) (internal quotation marks and citation omitted) (quoting *Quesinberry v. Hull*, 159 Va. 270, 274, 165 S.E. 382, 383 (1932)).

With these principles as a guide, the argument of Petitioners that Article V, Section 12, contains implied constraints on the power of the Governor "to remove political disabilities consequent upon conviction" must be rejected. The first paragraph of Section 12 enumerates the powers of the Governor with respect to remission of fines and penalties, reprieves and pardons, and commutation of capital sentences, in addition to the

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[66] Of course, even when the language of a provision is plain, resort to extraneous evidence is appropriate to discern whether it was enacted with discriminatory intent. *See, e.g.*, *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977).

authority to remove political disabilities. This Section clearly states "The Governor shall have power" for these purpose and provides no role for the legislature in exercise of the power.

Petitioners argue that this power is exercisable only on an individualized basis. To the contrary, a plain reading of Article V, Section 12 does not support that conclusion. Indeed, the second paragraph of Section 12 contains a separate requirement for the Governor to report to the General Assembly "every case of fine or penalty remitted, of reprieve or pardon granted, and of punishment commuted, with his reasons" for so acting. Significantly, the second paragraph of Section 12 does not require such a communication and statement of reasons with respect to an action "to remove political disabilities consequent upon conviction". Thus, instead of supporting Petitioners' argument that action by the Governor is required to address each individual case or circumstance in removing such disabilities, the actual words of Section 12 suggest the opposite.

There can be no doubt that the power to act "to remove disabilities" reposes only with the Governor and that power is not limited by conditions or predicates.

IV. The Executive Order was a proper exercise of authority under Article V and consistent with Article II establishing qualifications for individual voters.

Although Petitioners cannot argue that Article V, Section 12 is so limited, they propose that limitations on the power of the Governor are necessarily implied by the separate requirements of Article II, Section 1, despite the lack in Article V of any reference to or incorporation of that separate section. In asserting that the Executive Order is *ultra vires,* Petitioners do not rely on Article V of the Constitution enumerating the powers of the executive branch, but rather on the provisions of Article II, Section 1, defining the qualifications of individual citizens for eligibility to vote. In addition to setting the requirements of age, residence and registration as predicates for eligibility, Section 1 states, “No person who has been convicted of a felony shall be qualified to vote unless his civil rights have been restored by the Governor or other appropriate authority.” Petitioners seize on the words “person” and “his” to assert that restoration of rights to such person by the Governor must be an individualized action. They assert that the singular noun and pronoun in this one sentence stating qualifications for individual voters must be grafted into Article V, Section 12 and limit the broad grant of authority there with respect to removal of political disabilities.

That analysis is incorrect. Article II, Section 1 and Article V, Section 12 can properly be read together to support the Executive Order. The two sections address different subjects, one the power of the Governor and the other the qualifications of individual voters.[67]

V. The Executive Order is consistent with and a logical extension of the orders and actions of previous Governors addressing the issue of re-entry and re-enfranchisement.

Petitioners assert that restoration of voting rights by the Executive Order was accomplished by what they characterize as a "blanket" order, which they contrast with an undefined "individual" decision they say is required. The *Amici* Commonwealth's Attorneys, filing in support of the Petitioners, are more specific in urging that the individual orders are required, one for each person affected. (Br. for Amici Commonwealth's Attorneys at p. 20.) Further, the Amici Commonwealth Attorneys describe and contrast the restoration procedure prior to the Executive Order with the

[67] This Court's decision in *Gallagher v. Commonwealth*, 284 Va. 444, 732 S.E.2d 22, (2012), does not support the Petitioners contention. In *Gallagher*, the Court dealt with "the interplay between" the Constitutional powers of the Governor under Article V, Section 12 and the General Assembly's exercise of its power under Article VI, Section 1. Specifically, the case resolve the potential conflict created by a Governor's restoration of all political and civil rights and the statutory grant of jurisdiction to circuit courts in Section 18.2-308.2 to restore rights to gun ownership. The Court found no conflict and construed Article V, Section 12 not to include the power to restore firearm rights.

new process, and they argue that the 'individualized' process then was superior.[68]

The issue before this Court is whether the action of Governor McAuliffe was constitutional, not whether it conformed to prior practices or is, as a matter of policy, better or worse than the procedures adopted by Governor McDonnell or at an earlier time by Governor McAuliffe. Properly construed, and in the context of earlier changes in the restoration process, the adjustments in the Executive Order do not raise questions of constitutional significance.

It is significant to note that a previous order of Governor McDonnell had established "automatic" restoration of rights for those with convictions for non-violent felonies.[69] The "automatic" process then established by Governor McDonnell, and not challenged here, was similar to that now adopted in the Executive Order for all those convicted of felonies, violent or

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[68] Much of the Commonwealth's Attorneys argument is a statement of the practical issues confronted by implementing the Executive Order and of the potential for errors in the process. Whatever notice the Court may make of those points, the question presented here is whether the action of Governor McAuliffe was valid under the Constitution of Virginia, not whether the Executive Order might require a change in other procedures as it is implemented by the Commonwealth's Attorneys or other state personnel.

[69] Exhibit 1 to the Amicus Brief of the Commonwealth's Attorneys.

non-violent,[70] with the exception only that an individual order was physically prepared for each of the subjects of the order. The availability of such an order is now optional and issued if requested by an individual.

An Opinion of the Attorney General interpreting Article II, Section 1, concluded that the use of a "blanket" order for restoration is proper. Although the Opinion, 1979-1980 Op. Va. Att'y Gen. 153 (J.A.58), interpreted a part of Section 1 not at issue here, that dealing with the definition of "other appropriate authority," its reasoning is applicable. The question presented was whether the "automatic restoration of civil rights" in other states satisfied the requirements of Section 1 that the qualification to vote has been restored "by the Governor or other appropriate authority." The Opinion adopted the construction that the phrase "other appropriate authority" included the President, other Governors, and pardoning boards of other states. Further, the Opinion stated the question presented was framed because of new statutes and procedures in other states creating "automatic restoration of rights." The Opinion then commented,

> The so-called automatic restoration of rights is automatic on a comparative basis only. … the states in question have

[70] Governor McAuliffe's office estimated that only 20% of those affected by his Order on April 22 had been convicted of violent felonies. Gov. McAuliffe Analysis, *supra* note 38.

> determined that the civil rights of a certain classification of persons are to be restored more or less routinely, without the necessity of individual determinations … Restoration of civil rights by statutory classifications is not different in principle from restoration of civil rights by duly authorized officials acting on an individual case basis.

The Attorney General found that such procedures in other states met the standard required by Article II, Section 1 for individual consideration, thus permitting that action to restore voting rights in Virginia. And, indeed, the automatic restoration of rights in Virginia for most of those convicted of felonies was already in place after 2013.

Petitioners and the Amici supporting them claim that Governor McAuliffe's Executive Order is a dramatic departure from previous practice in Virginia. In fact, the Executive Order is a logical and legal step in a process of changing the procedure for restoring voting rights to persons convicted of felonies.

CONCLUSION

For the foregoing reasons, the Verified Petition should be denied and dismissed.

Respectfully submitted,

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<u>Certificate of Service</u>

I hereby certify that on June 27, 2016, I caused the foregoing brief to be filed with the Clerk of this Court by means of the VACES, and ten bound copies thereof to be filed with the Clerk of the Court. I certify that I have caused the document to be mailed electronically to all counsel of record and counsel for parties appearing as *amicus curiae*. The foregoing brief complies with Rules 5:26 and 5:30 of the Rules of the Supreme Court of Virginia.

/s/
Rodney F. Page