

IN THE
SUPREME COURT OF VIRGINIA

WILLIAM J. HOWELL, et al.

PETITIONERS,

V.

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

RESPONDENTS.

**BRIEF OF NEW VIRGINIA MAJORITY AND ADVANCEMENT PROJECT,
TRAM NGUYEN, JON LISS, AND JUDITH A. BROWNE DIANIS AS
AMICI CURIAE IN SUPPORT OF RESPONDENTS**

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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES.....	iii
INTERESTS OF <i>AMICI CURIAE</i>	1
FACTUAL BACKGROUND.....	3
SUMMARY OF ARGUMENT.....	6
ARGUMENT.....	8
I. The Virginia Constitution Upholds The Governor’s Executive Order.....	8
II. Petitioners’ Vote Dilution Claim Lacks Merit.....	14
III. Petitioner’s Requested Remedy Would Further Disenfranchise African-American Voters.....	17
A. The Commonwealth’s Long History of Disenfranchising African-American Voters Makes the Executive Order Necessary to Promote Democracy.....	18
B. To Rescind the Executive Order would Cause Significant Harm to Newly Eligible African-American Voters.....	21
1. Richie Cannady.....	23
2. Louise Benjamin.....	25
3. Viola Marie Brooks.....	26
C. Petitioners’ Requested Relief would Severely Harm the More than 200,000 Newly Eligible Voters.....	28

CONCLUSION.....	31
CERTIFICATE OF SERVICE.....	32
APPENDIX.....	35

TABLE OF AUTHORITIES

CASES

<i>313 Freemason v. Freemason Assocs.</i> , 59 Va. Cir. 407, 412 (Cir. Ct. 2002) (quoting <i>City of Richmond v. Grand Lodge of Va.</i> , 174 S.E. 846 (1932)).....	10
<i>Bethune-Hill v. Virginia State Bd. of Elections</i> , 141 F. Supp. 3d 505 (E.D. Va. 2015).....	16
<i>Blair v. Commonwealth</i> , 66 Va. 850 (1874).....	13
<i>Collins v. City of Norfolk</i> , 883 F.2d 1232 (4th Cir. 1989), cert. denied, 498 U.S. 938 (1990).....	16
<i>Gaffney v. Gaffney</i> , 45 Va. App. 655, 667, 613 S.E.2d 471(2005).....	9
<i>Graham v. Angelone</i> , 73 F. Supp.2d 629 (E.D. Va. 1999).....	12
<i>Harper v. Virginia Board of Elections</i> , 383 U.S. 663, 86 S.Ct. 1079 (1966).....	20
<i>In re Phillips</i> , 265 Va. 81,87-88, 574 S.E.2d 270 (2003).....	11, 12
<i>Jackson v. Fidelity & Deposit Co. of Md.</i> , 269 Va. 303, 608 S.E.2d 901(2005).....	9
<i>Jackson v. Hodges</i> , 176 Va. 89 (1940).....	11
<i>Lee v. Murphy</i> , 63 Va. 789 (1872).....	13
<i>McDaniels v. Mehfoud</i> , 702 F. Supp. 588 (E.D. Va. 1988).....	16
<i>Purcell v. Gonzalez</i> , 549 U.S. 1, 4 (2006) (citing <i>Reynolds v. Sims</i> , 377 U.S. 533 (1964)).	29
<i>Thornburg v. Gingles</i> , 478 U.S. 30 (1986).....	17

Wilborn v. Saunders, 170 Va. 153 (1938).....12, 13

Yick Wo v. Hopkins, 118 U.S. 356, 370, 6 S.Ct. 1064, 30 L.Ed. 220
(1886).....15

STATUTES

52 U.S.C. § 10301 *et seq.*.....15, 16, 20, 30

52 U.S.C. § 20507(b)(1).....30

52 U.S.C. § 20507(c)(2)(A).....30

Va. Code § 24.2-428.....29

CONSTITUTIONAL PROVISIONS

Va. Const. art. II, § 1.....4,8

Va. Const. art. I, § 6.....14, 15

Va. Const. art. V, § 12.....*passim*

OTHER

Advancement Project, *Virginia Civil Rights Restoration Guide*, 4 (2013).....3

Andrew Cohen, *The Vote in Virginia*, The Brennan Center for Justice (Apr. 25, 2016).....18

Commonwealth of Virginia Executive Department, *Order for the Restoration of Rights*, 1 (April 22, 2016).....*passim*

Dawnthea Price, *Felons slow to seek restoration of rights*, The Free Lance-Star (September 18, 2013).....3

Jean Chung, *Felony Disenfranchisement: A Primer*, The Sentencing Project (May 2016).....15, 21

Matt Ford, *The Racist Roots of Virginia’s Felon Disenfranchisement*, The Atlantic (Apr. 27, 2016).....18, 19

Office of Governor Terry McAuliffe, *Analysis: Virginians Whose Voting Rights Have Been Restored Are Overwhelmingly Nonviolent, Completed Sentences More Than a Decade Ago* (May 11, 2016).....14

Office of Governor Terry McAuliffe, *Summary of the Governor’s Restoration of Rights Order Dated April 22, 2016*..... 19

Sari Horwitz & Jenna Portnoy, *About 200,000 Convicted Felons in Virginia Will Now Have the Right to Vote in November*, The Washington Post (Apr. 22, 2016).....20

Statement of Carter Glass, Report of the Proceedings and Debate of the Constitutional Convention, State of Virginia, 3076 (1906)..... 19

Virginia Department of Elections, *Upcoming Elections*.....29

INTERESTS OF *AMICI CURIAE*

New Virginia Majority and Advancement Project (collectively, “*Amici*”), by and through counsel of record, Travis Williams, submit this brief as *amici curiae* in support of Respondent, Governor Terence R. McAuliffe.

New Virginia Majority (NVM) is a progressive organization whose mission is to transform Virginia through mass organizing, leadership development, and strategic communications. NVM aims to create a Virginia that is democratic, just and sustainable by organizing communities of color, women, workers, LGBT (lesbian, gay, bisexual, and transgender) communities, youth, and progressives. The organization has visited over 900,000 voters and has trained hundreds of canvassers and volunteer leaders. NVM has also trained several poll monitors and staffed regional command centers to respond to citizens’ questions. Since Governor McAuliffe’s April 22, 2016 Executive Order (hereinafter referred to as “Executive Order”) was announced, NVM’s voter registration drive registered approximately 3,000 people relieved of their political disabilities.

Advancement Project is a national multi-racial civil rights organization. Rooted in the great human rights struggles for equality and justice, Advancement Project exists to fulfill the United States’ promise of a caring, inclusive, and just democracy. Advancement Project has a

particularly strong record of success in federal and state court challenges to laws, policies, and procedures that make it harder for citizens to vote. Advancement Project's Ending Lifetime Disenfranchisement in Virginia Program has done groundbreaking work since 2003 to end the disenfranchisement of people who were convicted of a felony in the Commonwealth of Virginia. Those efforts include publishing guides about the rights restoration process, leading clemency assistance workshops, and training advocates to assist disenfranchised citizens. Some of the citizens who have benefitted from this work include Richie Cannady, Louise Benjamin, and Viola Marie Brooks, whose stories of jubilation when their rights were restored, and anguish when hearing about Petitioners' challenge, are all depicted in Part III.B. of this brief. All of these efforts were done in partnership with Virginia advocates, such as NVM.

NVM and Advancement Project have both invested time and resources to increase access to the ballot box. Both organizations have the expertise and experience to illustrate that the Executive Order is constitutional and critical to ensure that our democracy is inclusive of historically disenfranchised people of color.

FACTUAL BACKGROUND

Virginia is one of four states that permanently disenfranchise previously convicted persons.¹ Former governors have issued orders that lessened the grip of second-class citizenship.² For example, Governor McDonnell issued an order that gave 350,000 convicted non-violent felons the ability to become eligible to have their rights restored.³

On April 22, 2016, Governor McAuliffe signed an Executive Order that removed political disabilities from individuals who had upon that date, completed their sentences of incarceration for felony convictions and completed their sentences of supervised release, including probation and parole.⁴ The order restored their: (1) right to vote, (2) right to hold public office, (3) right to serve on a jury, and (4) right to act as a notary public. The order did not restore the right to ship, transport, possess, or receive firearms. The Governor signed the Executive Order under Article V, Section

¹ Advancement Project, *Virginia Civil Rights Restoration Guide*, 4 (2013).

² Dawnthea Price, *Felons slow to seek restoration of rights*, The Free Lance-Star (September 18, 2013), available at http://www.fredericksburg.com/news/felons-slow-to-seek-restoration-of-rights/article_a07c07d3-91f6-5a9b-a398-27bea6219f50.html.

³ *Id.*

⁴ Commonwealth of Virginia Executive Department, *Order for the Restoration of Rights*, 1 (April 22, 2016), available at http://commonwealth.virginia.gov/media/5848/order_restoring_rights_4-22-16.pdf.

12 of the Virginia Constitution. This section empowers the Governor “to remove political disabilities consequent upon conviction.”

The Executive Order restores the civil rights of approximately 206,000 Virginians previously disenfranchised by Article II, Section 1 of the Virginia Constitution. This section denies individuals convicted of a felony the right to register to vote unless the Governor or other appropriate authority restores their civil rights. The Governor signed this order to remove the “unforgiving stigmatization of persons who have committed past criminal acts,” who are disproportionately “racial minorities and economically disadvantaged Virginians.”⁵

The order would benefit newly registered voters like Mr. Cannady, Ms. Benjamin, and Ms. Brooks. For example, Mr. Cannady is an African-American man who grew up in the District of Columbia and whose father was active in the Civil Rights Movement. He has witnessed the benefit of the right to vote through his family’s work during the 1960s and 70s. Mr. Cannady made a mistake, but paid his debt to society. He fully completed his sentence and has been a tax-paying, law-abiding citizen for many years. He was “elated” about the Executive Order. He believes, as do Ms. Benjamin and Ms. Brooks, that restoring their right to vote will help make

⁵ *Id.*

them feel whole again and complete Americans. The freedom to register and vote brought hope to these three individuals, but Petitioners dashed to the courthouse to rescind their freedom.

On May 23, 2016, William J. Howell, Speaker of the Virginia House of Delegates, Thomas K. Norment, Jr., Senate Majority Leader, and four additional individuals filed a petition for writs of mandamus and prohibition and a memorandum in support of their petition. Petitioners argue that the Governor could only restore voting rights on a case-by-case basis and that the Executive Order dilutes their votes. Petitioners request that this Court command various state agencies and officials to take measures to remove the civil rights of citizens who benefitted from the Executive Order.

On June 1, 2016, this Court issued an order expediting the briefing schedule and scheduling a special hearing for this matter on July 19, 2016.

SUMMARY OF ARGUMENT

The Governor acted within his constitutional powers to restore voting rights to persons with felony convictions. Article V, Section 12 of the Virginia Constitution vests the Governor with the power to remove political disabilities, including disenfranchisement due to felony convictions. The Constitution does not limit how the Governor exercises this power. A plain reading of the Constitution requires this Court to uphold the Executive Order.

Petitioners argue that the Executive Order would dilute their votes without sufficient evidence. They offer that it is injurious to add persons to the voter rolls. This claim would effectively negate every expansion to the franchise. This affront to the principles of democracy upon which this nation was founded serves as a thinly-veiled attempt to prevent qualified voters from going to the polls due to racially-charged political calculations.

The right to vote is a fundamental privilege of a United States citizen—it preserves all other rights. The Executive Order restores that right to over 200,000 people who have served their time. The order holds a particularly special meaning for African-Americans. One in five African-Americans has been disenfranchised because of a felony conviction. Virginia's history is rife with voter suppression tactics such as poll taxes

and literacy tests to disenfranchise African-Americans, including several versions of the Constitution at issue. While some of those measures were eradicated, the felon disenfranchisement persists to silence legions of voters of color from having a voice in their communities. The stirring experiences of newly eligible voters registering to vote by the Executive Order illuminates how important the order is for the African-American community, and by extension, our democracy. Mr. Cannady, like many other newly eligible voters, would be severely harmed if this Court issues a writ of mandamus that rescinds their fundamental right to vote.

Petitioners have claimed a clear right to relief sought based on their errant belief that the Executive Order is unconstitutional. However, the Executive Order is in fact constitutional and Petitioners have failed to meet the requirements for a writ of mandamus to issue.

Amici seek to address the argument that no harm would result if this Court grants Petitioners' proposed remedy. *Amici* also argue that the Virginia Constitution provides authority for Governor McAuliffe's Executive Order and that Petitioners failed to demonstrate the existence of vote dilution. For these reasons, we ask this Court to deny Petitioners' writ of mandamus and prohibition.

ARGUMENT

I. THE VIRGINIA CONSTITUTION UPHOLDS THE GOVERNOR'S EXECUTIVE ORDER

The Virginia Constitution vests the Governor with plenary power to “remove political disabilities”—including, but not limited to, deprivation of the right to vote—from all persons with felony convictions. Va. Const. art. V, § 12. Petitioners argue that the language in Article II, Section 1 requires the Governor to review applications to restore rights on a case-by-case basis. Petitioners rely on the following portion of Article II, Section 1:

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’ reliance on Article II, Section 1 is misplaced. Article II, Section 1 discusses the qualifications of *voters*, and does not limit the powers of the *Governor*. This is plainly obvious by the drafters’ choice of language. The relevant clause of Article II, Section 1 begins with the phrase, “No person,” rather than the term, “No Governor.” The drafters clearly intended this provision to apply broadly to citizens of Virginia, rather than specifically to the Governor. Had the drafters wanted to restrict the powers of the Governor, they would have written such limitations into Article V, which controls the Governor’s extensive ability to restore rights. Petitioners look to Article II, Section I for guidance on the restoration

process, which is wholly described in Article V, Section 12 (hereinafter referred to as “Section 12”), attempting to confuse this Court. Simply put, there is nothing in Article II, Section 1 that limits the Governor’s clemency powers.

Accordingly, Section 12 states that the Governor holds the exclusive power to remove political disabilities:

The Governor shall have the power to remit fines and penalties, under such rules and regulations as may be prescribed by law; to grant reprieves and pardons after conviction except when the prosecution has been carried on by the House of Delegates; to remove political disabilities consequent upon conviction for offenses committed prior or subsequent to the adoption of this Constitution; and to commute capital punishment.

Id.

As evidenced by the plain language of the Constitution, the Framers of Section 12 chose not to limit the Governor’s authority “to remove political disabilities.” *Id.* Section 12 broadly grants the Governor authority “to remit fines and penalties,” and then provides that it may be qualified by “such rules and regulations as may be prescribed by law.” *Id.* This language is not found in the clause about removal of political disabilities. The fact that they chose to limit certain Section 12 powers of the Governor but not others reflects a purposeful distinction that Virginia courts must respect. See generally *Jackson v. Fidelity & Deposit Co. of Md.*, 269 Va. 303, 312, 608 S.E.2d 901, 906 (2005); *Gaffney v. Gaffney*, 45 Va. App. 655, 667, 613

S.E.2d 471, 477 (2005) (affirming Virginia courts will not construe a provision to contain implied limitations to express powers).

Similarly, Section 12 explicitly requires that the Governor “shall communicate to the General Assembly, at each regular session, particulars of every case of fine or penalty remitted, of reprieve or pardon granted, and of punishment commuted, with his reasons for remitting, granting or commuting the same.” Va. Const. art. V § 12. While Section 12 tends to contemplate an individualized *reporting process*, those limitations do not extend to the Governor’s power to remove political disabilities. This crucial distinction affirms that the Framers could have constrained how the Governor exercises his authority to restore the voting rights of persons with felony convictions, but chose not to because they intended for that power to be construed broadly.

To bolster this point, Virginia’s statutory construction provides that provisions of the same section be read consistently, whenever possible. A Virginia Circuit Court held: “Under the usual and elementary canons of Virginia statutory construction, ‘the language of a statute must be construed so as to give that language some meaning where it is possible to do so, without doing violence to the clear intent and purpose of the enactment.’” *313 Freemason v. Freemason Assocs.*, 59 Va. Cir. 407, 412 (Cir. Ct. 2002)

(quoting *City of Richmond v. Grand Lodge of Va.*, 174 S.E. 846 (1932)). Clearly, the Framers intended to grant the Governor exclusive power to affect political disabilities.

Whether to restore voting rights on an individual case-by-case basis or through a class-wide Executive Order is for the Governor alone to decide. This Court clarified that the Governor holds the exclusive authority to remove political disabilities. See *In re Phillips*, 265 Va. 81,87-88, 574 S.E.2d 270, 273 (2003). In the few cases that recognized narrow limits on the Governor's power, the courts pointed to an express constitutional limitation, which does not exist here. See, e.g., *Jackson v. Hodges*, 176 Va. 89 (1940) (rejecting Governor's attempt to raise salary of Secretary of Commonwealth where state constitution expressly set yearly salary).

Though Virginia law recognizes a limited role for the legislature and courts in restoring rights for persons with felony convictions, it does not curb or dictate how the Governor *may* exercise his broad authority to do so. For example, in *In re Phillips*, this Court emphasized that whatever processes the General Assembly may provide, "the decision whether to remove a petitioner's political disabilities still rests solely in the Governor, who may grant or deny any request without explanation." 265 Va. at 87. The same unqualified power to "grant or deny any request without

explanation” that this Court recognized in *Phillips* strongly supports the Governor’s power to issue an Executive Order to grant an across-the-board restoration of rights.

Moreover, the Governor’s broad power to restore voting rights is part of and consistent with the Governor’s broad clemency power. Judicial recognition of the Governor’s exclusive authority over restoration of voting rights matches the judicial recognition of the Governor’s general clemency powers. See *Graham v. Angelone*, 73 F. Supp.2d 629, 631 (E.D. Va. 1999) (refusing to hear review of denial of clemency petition because “Virginia does not place any limitations or conditions on the ‘power’ vested in Governor to commute capital punishment sentences”); *Wilborn v. Saunders*, 170 Va. 153, 161 (1938) (“The power to the Governor as applies to the conditional pardon now under consideration, is not restricted by any constitutional or statutory provision To hold otherwise, would place a restriction or limitation upon the chief executive of the State in the exercise of clemency, which has not been done by congressional mandate or an act of the legislature.”).

In addition, courts have not limited how the Governor exercises his power to grant clemency and pardons. See *Blair v. Commonwealth*, 66 Va. 850 (1874) (upholding Governor’s grant of clemency before a conviction

was entered); *Lee v. Murphy*, 63 Va. 789, 792 (1872) (“The power of granting conditional pardons must reside somewhere; and by common consent of all the States it is vested in the executive department.”). In *Wilborn*, this Court held that the Governor may revoke a pardon, even if the condition of the pardon occurred after the period in which the original sentence would have expired. In proclaiming the unbound authority of the Governor to place conditions on grants of clemency, the court stated: “The authority to suspend the operations of laws is a privilege of too high a nature to be committed to many hands, or to those of any inferior offices of the state. If the chief magistrate can be trusted with the power of absolute and unconditional pardon, he is certainly a safe depository of the qualified power.” 170 Va. at 158.

Courts should be very reluctant to issue a mandamus unless the public interest sought to be protected is clearly defined and present, which it is not in this case. Petitioners have neglected to meet their burden of proof in that they do not have a clear right to any relief. Accordingly, this Court should deny their request for a writ of mandamus.

II. PETITIONERS' VOTE DILUTION CLAIM LACKS MERIT

Petitioners offer that the Executive Order dilutes their votes. They argue that the mere existence of additional voters caused them injury. Under this theory, any addition of new voters would dilute their votes, whether through restoration or mass voter registration efforts. Petitioners seek to limit the numbers of eligible citizens to participate in the electoral process for their own political gain. 45.9% of the 206,000 people whose rights were restored by the Executive Order are African-American,⁶ a group that is generally perceived to vote Democratic, in opposition to Petitioners' political sentiments. The law, however, protects the rights of citizens to vote for the candidates of their choice, without recognition of partisan affiliations. Accordingly, Petitioners advance an unsupported vote dilution theory that lacks a basis in law.

Indeed, petitioners erroneously rely on Article I, Section 6 of the Virginia Constitution for its vote dilution claim, which states:

That all elections ought to be free; and that all men, having sufficient evidence of permanent common interest with, and attachment to, the community, have the right of suffrage, and cannot be taxed, or deprived of, or damaged in, their property for public uses, without their own consent, or that of their representatives duly elected, or

⁶ See Office of Governor Terry McAuliffe, *Analysis: Virginians Whose Voting Rights Have Been Restored Are Overwhelmingly Nonviolent, Completed Sentences More Than a Decade Ago* (May 11, 2016), available at <http://governor.virginia.gov/newsroom/newsarticle?articleId=15207>.

bound by any law to which they have not, in like manner, assented for the public good.

Va. Const. art. 1, § 6. Petitioners do not offer any plausible case law or statutory authority for the vote dilution claim. Article I, Section 6 conveys the right to vote to Virginia citizens. A right that is “fundamental” and “preservative of all rights.” *Yick Wo v. Hopkins*, 118 U.S. 356, 370, 6 S.Ct. 1064, 30 L.Ed. 220 (1886). Article I, Section 6 does not support this vote dilution claim.

Vote dilution traditionally applies to districting cases and violations of the Voting Rights Act of 1965 (VRA)⁷. A state or political subdivision violates Section 2 of the VRA when, *inter alia*, it adopts a practice or procedure that dilutes the voting strength of voters of color such that they have less opportunity to participate in the franchise. Here, the addition of the re-enfranchised voters does not provide petitioners with less of an opportunity to participate. In fact, it diminishes the dilutive effect that Virginia’s felon disenfranchisement laws have imposed on African-American voters for more than a century.⁸

⁷ 52 U.S.C. § 10301.

⁸ See Jean Chung, *Felony Disenfranchisement: A Primer*, The Sentencing Project (May 2016), available at <http://www.sentencingproject.org/publications/felony-disenfranchisement-a-primer/>.

Petitioners' claim is particularly troubling considering that vote dilution has been a strategy repeatedly used to weaken the power of the African-American vote in the Commonwealth. Several cases involving Section 2 of the VRA have dismantled attempted schemes to dilute the votes of Virginia's African-American communities. See, e.g., *Collins v. City of Norfolk*, 883 F.2d 1232 (4th Cir. 1989), cert. denied, 498 U.S. 938 (1990); see also *McDaniels v. Mehfoud*, 702 F. Supp. 588 (E.D. Va. 1988).

In addition, Petitioners offer no evidence to support a vote dilution claim. Vote dilution claims require extensive proof. As a federal district court explained:

In order to prove a § 2 violation, a plaintiff must satisfy three prerequisites: compactness, political cohesiveness, and bloc voting. "First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." *Thornburg v. Gingles*, 478 U.S. 30, 50, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986). "Second, the minority group must be able to show that it is politically cohesive." *Id.* at 51, 106 S.Ct. 2752. "Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed—usually to defeat the minority's preferred candidate." *Id.* These final two factors are often referred to collectively as "racial polarization." Once these prerequisites have been satisfied, the court evaluates the plaintiff's evidence based on the totality of the circumstances. The totality of circumstances must be considered with a focus on whether the minority group in question was denied "equal political opportunity." *Johnson v. De Grandy*, 512 U.S. 997, 1014, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994).

See, Bethune-Hill v. Virginia State Bd. of Elections, 141 F. Supp. 3d 505, 515-16 (E.D. Va. 2015). Petitioners' lack of evidentiary proof demands that this Court find their claims of vote dilution without merit.

Normally, such claims require courts to consider the relative treatment of various voting blocs to assess whether an individual has been harmed. *See e.g., Thornburg v. Gingles*, 478 U.S. 30, 56-58 (1986). This typically involves extensive statistical evidence. *Id.* Petitioners have failed to submit specific statistical evidence to prove that their votes would in fact be unconstitutionally diluted. This is surprising given that they have requested such extraordinary relief in the form of a writ of mandamus. Thus, Petitioners' lack of evidence renders their vote dilution claim meritless, preposterous and blind to the dilutive effect that felon disenfranchisement laws have had on the votes of African-American citizens in this Commonwealth. Accordingly, Petitioners have not met their burden of proof and this Court should deny the writ of mandamus.

III. PETITIONERS' REQUESTED REMEDY WOULD FURTHER DISENFRANCHISE AFRICAN-AMERICAN VOTERS

Regardless of whether the felon disenfranchisement law was enacted with a discriminatory intent, it resulted in a vastly disproportionate impact on people of color, stripping entire neighborhoods of a voice in their own communities for decades. African-Americans are 19.4% of Virginia's

population, per the 2010 Census, yet they comprise 45.9% of the 206,000 people that were disenfranchised prior to the Executive Order.⁹ One in five members of Virginia's African-American voting-age population was disenfranchised as a result of the felon disenfranchisement law.¹⁰ Rescinding the restoration of voting rights could reinstate these stark racial disparities in ballot access.

**A. THE COMMONWEALTH'S LONG HISTORY OF
DISENFRANCHISING AFRICAN-AMERICAN VOTERS
MAKES THE EXECUTIVE ORDER NECESSARY TO
PROMOTE DEMOCRACY**

The history of the Commonwealth is wrought with vehement efforts to disenfranchise voters of color. Given the statistics above, our discussion will focus on those efforts that have targeted Virginia's African-Americans. The 1902 Virginia Constitutional Convention gave rise to many voter suppression tactics aimed at destroying African-Americans' political power, including a poll tax, literacy test, and complicated registration requirements.¹¹ In fact, political suppression of African-Americans was the

⁹ See *Id.*; Andrew Cohen, *The Vote in Virginia*, The Brennan Center for Justice (Apr. 25, 2016), available at <https://www.brennancenter.org/analysis/vote-virginia>.

¹⁰ See Office of Governor Terry McAuliffe, *supra* note 6.

¹¹ See Matt Ford, *The Racist Roots of Virginia's Felon Disenfranchisement*, The Atlantic (Apr. 27, 2016), available at <http://www.theatlantic.com/politics/archive/2016/04/virginia-felon-disenfranchisement/480072/>.

“central purpose of the [1902] convention.”¹² Delegate Carter Glass plainly stated: “This plan will eliminate the darkey as a political factor in this State in less than 5 years, so that in no single county . . . will there be the least concern felt for the complete supremacy of the white race in the affairs of government.”¹³ Delegate Glass’s comments were an explicit reference to Virginia lawmakers’ scheme to systematically eradicate African-Americans from the state’s electorate. Furthermore, Delegate 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 disenfranchise every negro that I could disenfranchise under the Constitution of the United States, and as few white people as possible.”¹⁴

Virginia’s Jim Crow voter suppression laws reigned for decades. Many of the laws were “swept away in a Second Reconstruction of sorts during the civil-rights movement of the 1950s and 1960s.”¹⁵ Felon disenfranchisement, however, persisted. A.E. Dick Howard, University of

¹² *Id.*

¹³ See Statement of Carter Glass, Report of the Proceedings and Debate of the Constitutional Convention, State of Virginia, 3076 (1906); See also Office of Governor Terry McAuliffe, *Summary of the Governor’s Restoration of Rights Order Dated April 22, 2016*, available at https://commonwealth.virginia.gov/media/5843/restore_rights_summary_4-22.pdf.

¹⁴ See Ford, *supra* note 10.

¹⁵ *Id.*

Virginia legal scholar and a lead draftsman of the 1971 Virginia Constitution, describes the Executive Order restoring voting rights as “[burying] the last ghost” of the 1902 racist voter suppression efforts.¹⁶

Petitioners argue that racial animus was removed from the felon disenfranchisement provision during the 1968 Constitutional Convention. No evidence supports that assertion. The disenfranchisement provision was largely overshadowed by more pressing voting rights issues of the day. The priority of the Convention was to amend certain sections of the Constitution to comply with the Voting Rights Act prohibition against prohibitive registration procedures, literacy tests, and poll taxes. See, *Harper v. Virginia Board of Elections*, 383 U.S. 663, 86 S.Ct. 1079 (1966). No one discussed Virginia’s penal interests in continuing felony disenfranchisement, and, therefore, did not remove the discriminatory taint of the original passage of its felony disenfranchisement laws. While Petitioners argue that the “ghost” was buried, it has continued to haunt the African-American community due to Virginia’s extremely archaic restoration process prior to the Executive Order.

¹⁶ See Sari Horwitz & Jenna Portnoy, *About 200,000 Convicted Felons in Virginia Will Now Have the Right to Vote in November*, The Washington Post (Apr. 22, 2016), available at https://www.washingtonpost.com/news/post-nation/wp/2016/04/22/about-200000-convicted-felons-in-virginia-will-now-have-the-right-to-vote-in-november/?utm_term=.7c3c9aa04bac.

Felon disenfranchisement sharply contradicts democratic principles of inclusion and equality. In what scholars have termed “The Age of Mass Incarceration,” we have seen a dramatic rise in the disenfranchised U.S. population, which grew from 1.17 million in 1976 to 5.85 million in 2010.¹⁷ According to a 2016 report by The Sentencing Project, over 7% of Virginia’s adult population had been disenfranchised due to a felony conviction.¹⁸ It is against traditional notions of fair play to deprive such a large segment of the population of their fundamental right to vote. Before the Executive Order, Virginia was only one of four states that maintained a stringent felon disenfranchisement law. Instead of keeping Virginia in a silo of shame, the Executive Order simply helped steer the Commonwealth in line with the overwhelming majority of the nation.

**B. TO RESCIND THE EXECUTIVE ORDER WOULD CAUSE
SIGNIFICANT HARM TO NEWLY ELIGIBLE AFRICAN-
AMERICAN VOTERS**

To fully understand the implications of this case, this Court must recognize that the power to vote holds a particularly great meaning for the African-American community, which has faced a barrage of obstacles to the ballot box for hundreds of years. Time and time again, African-Americans have been told that they do not deserve a vote. Petitioners’

¹⁷ See Chung, *supra* note 7.

¹⁸ *Id.*

challenge to the Executive Order demonstrates yet another attempt to prevent African-Americans from exercising their rights.

The following stories of people who benefit from the restoration of voting rights illustrate the harm that would ensue if this Court does not uphold the Executive Order. For example, the son of a preacher who was present when Dr. King told the government at the historic March on Washington in 1963 to “Let Freedom Ring” knows what it means to leave prison but to have his vote still locked behind prison bars. There’s the African-American woman who escaped the scourge of a drug-ravished community to a new life where she volunteers for a community center and is excited to finally become a newly registered voter. There is also the African-American woman who attempted several times to go through the individualized application process, but faced too many barriers during that process. Under that process, people often had to secure old, paper court records from counties where they no longer lived. The individualized approach that Petitioners champion would continue the arbitrary, often discriminatory, burdensome process to regain voting rights, which negatively impacts the poor, elderly, disabled, and people of color.

1. RICHIE CANNADY

Richie Cannady is an African-American man who grew up in the District of Columbia in a household that was active in the Civil Rights Movement. Cannady Decl. ¶ 2, 10. His father was a minister who often took him to marches and rallies for civil rights, including the historic March on Washington where Dr. Martin Luther King, Jr. delivered his “I Have a Dream” speech. Mr. Cannady was too young to completely understand the importance of Dr. King’s speech, but remembers the masses of people that drove from all over the country and slept on the lawns overnight to hear Dr. King speak.

The efforts people made to travel to Washington, D.C. must be considered in light of how difficult it was for African-Americans to travel at the time. Mr. Cannady remembers traveling to North Carolina to visit his family and not being able to stop at any of the local establishments. Instead, whenever Mr. Cannady and his family had to relieve themselves, they would have to pull alongside the highway. That was nearly 50 years ago, but now he faces another barrier that disproportionately impacts the African-American community—the disenfranchisement of people who have been convicted of a felony.

Mr. Cannady acknowledges he did something wrong, but he has paid his debt in full. After being released from prison, Mr. Cannady moved to Richmond to start anew. He completed his restitution in January of 2011, but remembers how difficult it was to find employment because of the stigma attached to his conviction. Cannady Decl. ¶ 7. Luckily, after persistent efforts, the owner of a restaurant, Mama J's Kitchen, decided to give Mr. Cannady a chance, and he has been working there as a chef ever since.

When Mr. Cannady found out he had his rights restored, he called his family because he was so "elated." Cannady Decl. ¶ 8. He registered to vote soon thereafter. Cannady Decl. ¶ 4. Mr. Cannady is a taxpaying, law-abiding citizen and believes that he deserves forgiveness. He believes it is important for people who have been involved in the criminal justice system or who have struggled in other ways to have a say in who represents them. Regaining the power to vote would not only help him feel "whole again," but is also important for him to feel like a true American. Cannady Decl. ¶ 9, 11.

Mr. Cannady's rights were severely restricted when he was in prison, and he believes those restrictions should be lifted when people re-enter society. A few of Mr. Cannady's co-workers will also benefit from the

Executive Order. He believes the Petitioners' attempt to prevent him and his co-workers from voting is shameful and a terrible game of politics. Mr. Cannady plans on voting in the next election, and if possible, plans on being the first person in line. Cannady Decl. ¶ 5.

2. LOUISE BENJAMIN

Louise Benjamin is an African-American woman who had a difficult upbringing. Benjamin Decl. ¶ 2. When she was young, Ms. Benjamin had to find a way to support herself because her parents suffered from drug use. This meant that Ms. Benjamin sometimes had to resort to illegal means to support herself, which were the only means available to her. As a result, Ms. Benjamin has never been able to vote. Benjamin Decl. ¶ 6.

When Ms. Benjamin found out that she was finally eligible to vote, she was “overwhelmed with tears.” Benjamin Decl. ¶ 8. She registered to vote immediately. Benjamin Decl. ¶ 4. Not being able to vote made her feel like she was a nobody, and the Executive Order empowered her to feel like she “could finally get [her] life on track and be somebody.” Benjamin Decl. ¶ 8. She believes that gaining her right to vote for the first time ever will open up many opportunities for her. Ms. Benjamin wants to earn her GED, go to college, and make a difference in her community. Benjamin Decl. ¶ 9.

Ms. Benjamin wants to support the young people that live in her community. She has already started volunteering at her local recreation center--Calhoun Community Center. She often hands out snacks and is known by many of the young people in her community. She has also been active in informing other community members about the Executive Order, particularly the homeless community that visits a local food pantry. Benjamin Decl. ¶ 11.

When Ms. Benjamin found out about the Petitioners' challenge to the Executive Order, she felt like they were trying to take away her hopes and dreams. She felt as if the second chance she was given was being taken away. This ordeal depresses her and has made her cry on a few occasions. During the June 14, 2016 Primary Election, Ms. Benjamin attempted to vote for the first time, but was told she would have to wait until this case was resolved. Benjamin Decl. ¶ 13. Ms. Benjamin just wants a chance to vote for once in her life. She plans on voting in the next General Election. Benjamin Decl. ¶ 5.

3. VIOLA MARIE BROOKS

Viola Marie Brooks has never been able to vote, but has made several attempts to go through the individualized restoration of rights process. Ms. Brooks is an African-American woman, 54 years of age, and

has lived in the Richmond area for at least the last 16 years. Brooks Decl. ¶ 1, 2. She lives in a dwelling that has vestiges of slavery, including a backyard shack where slaves once lived. She is an active member of her local church.

Ms. Brooks has attempted to register to vote several times, the first time nearly 20 years ago. Over and over, she has been instructed to go to the local courthouse to go through the individualized process to have her rights restored, but has been denied each time. Ms. Brooks is passionate about making sure that people have access to jobs and also wants to make sure that our next generation doesn't have to go through what she went through, which is why the right to vote is so important to her.

Like Mr. Cannady and Ms. Benjamin, Ms. Brooks was overjoyed to learn that her rights were restored. When she was told by a young woman outside of the Department of Motor Vehicles that she could register to vote, she registered immediately and just recently received an official letter confirming her voter registration, which she holds proudly. Brooks Decl. ¶ 4. Ms. Brooks acknowledges that she made a mistake, but she has paid her debt in full. She is a changed person and wants to have the same opportunities as other members of our society. However, because of her

conviction, she still faces many obstacles trying to access gainful employment and housing.

The Petitioners' challenge causes Ms. Brooks mental distress. Ms. Brooks feels as if people don't believe in her and others like her, and she has expressed that she often feels overlooked. She wants people to give her and others a chance and is anxious to tell others about the Executive Order. Ms. Brooks looks forward to being able to walk over to the Fifth Street Baptist Church to vote for the first time in her life on November 8, 2016. Brooks Decl. ¶ 5.

Mr. Cannady, Ms. Benjamin, and Ms. Brooks are just a few of the hundreds of thousands of newly eligible voters who would be stripped of their voice in our democracy if this Court does not uphold the Executive Order.

C. PETITIONERS' REQUESTED RELIEF WOULD SEVERELY HARM THE MORE THAN 200,000 NEWLY ELIGIBLE VOTERS

The timing of Petitioners' unconscionable and unsupported proposed remedy will confuse and injure persons lawfully registered to vote in the Commonwealth. Under the Executive Order thousands of newly restored citizens registered to vote. The Petitioners seek to delete qualified voters as a remedy to their erroneous claims. This would require election officials

to remove newly registered voters from the rolls. This constitutes a voter purge just before they can vote.

The United States Supreme Court recognized that Courts must consider the timing of a challenge to the electoral method if it cannot resolve it prior to the election. The need to collect evidence and find the facts should be considered as an additional rationale to deny Petitioners requested relief. See, *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (citing *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)).

The timing of this proposed action would cause great harm. The Commonwealth has two scheduled elections: 1) a special election for town council in Wytheville on August 23, 2016¹⁹; 2) the general election on November 8, 2016. If this Court grants Petitioners' request just before either election, there would be mass confusion for election officials and persons with felony convictions currently eligible to vote. Election administrators would have a difficult time canceling registration forms and notifying persons affected before both election days.

The Virginia Department of Elections has a statutory process it follows in order to "delete" persons from the voter rolls that is costly and time consuming. See Code of Virginia, § 24.2-428 (costs of list

¹⁹ Virginia Department of Elections, *Upcoming Elections*, available at <http://elections.virginia.gov/media/calendars-schedules/special.html>.

maintenance are approximately \$300,000 per year). Virginia's procedures are extensive and consistent with federal law. Under federal law, a jurisdiction must complete its purge procedures at least ninety days before a primary or general election for federal office. 52 U.S.C. § 20507(c)(2)(A). Section 8 of the NVRA provides that these procedures must "be uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965 (52 U.S.C. § 10301 *et seq.*)." 52 U.S.C. § 20507(b)(1). Moreover, to purge thousands of reinstated persons would cause chaos and confusion amongst the electorate and elected officials.

Since Petitioners have not met the burden of proving injury and vote dilution the Court should not grant their request for relief to unlawfully remove eligible voters from the voter rolls.

CONCLUSION

For the reasons above, *amici* respectfully request that this Court deny Petitioners' petition for writ of mandamus and prohibition.

Dated: June 27, 2016

Respectfully Submitted,
Sabrina S. Khan*
Oscar D. Lopez*

By Counsel,

/s/ Travis Williams
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**Pro hac vice application forthcoming*

CERTIFICATE OF SERVICE

I certify that on the 27 day of June, 2016, I caused the foregoing to be filed with the Clerk of the Court via VACES, and I hereby certify that I have caused the document to be mailed electronically to all counsel of record listed herein.

Respectfully Submitted,

Sabrina S. Khan*
Oscar D. Lopez*

By Counsel,

/s/ Travis Williams
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APPENDIX

DECLARATION OF RICHIE CANNADY

My name is Richie Cannady. I am over the age of 18 and fully competent to make this declaration. Under penalty of perjury, I state the following:

1. I reside at 2420 Lamb Avenue in Richmond, Virginia. My telephone number is (214) 918-4469. I am 62 years of age.
2. My race/ethnicity is African-American.
3. I believe my voting rights were restored as of April 22, 2016.
4. Currently, I am registered or believe that I am registered to vote.
5. I intend to vote in the next General Election on November 8, 2016.
6. I have wanted to participate in the democratic process for many years and I believe it is important to exercise my fundamental right to vote.
7. I did something wrong and I have paid for it. I completed my restitution in 2011.
8. When I found out I was eligible to vote, I was elated because I am a taxpaying, law-abiding citizen and I should have the right to dictate who represents me.
9. When I found out that there was a challenge to my right to vote, I thought it was really sad and shameful. Being able to vote is an important part of being American.
10. It is important for me to have the right to vote because my family was active in the Civil Rights movement and I experienced discrimination when I was growing up.
11. I want to vote because I don't believe a person can be silent when they are struggling so much. When I came out of prison, I had very little, and I have been trying ever since to make myself whole again.

Pursuant to Va. Code Ann. § 8.01-4.3, I declare under penalty of perjury that I have read the foregoing and that the facts stated in it are true and correct.

/s/ Richie Cannady
Signature

Richie Cannady
Printed Name

Date: June 19, 2016

DECLARATION OF LOUISE BENJAMIN

My name is Louise Benjamin. I am over the age of 18 and fully competent to make this declaration.

Under penalty of perjury, I state the following:

1. I reside at 317 Calhoun Street in Richmond, Virginia. My telephone number is (804) 309-5815.
2. My race/ethnicity is African-American.
3. I believe my voting rights were restored as of April 22, 2016.
4. Currently, I am registered or believe that I am registered to vote in Richmond, Virginia.
5. I intend to vote in the next General Election on November 8, 2016.
6. I had never been registered to vote in the Commonwealth of Virginia before April 22, 2016.
7. I have wanted to participate in the democratic process for many years and I believe it is important to exercise my fundamental right to vote.
8. I was overwhelmed with tears when I found out that I could register. I felt like I could finally get my life back on track and be somebody.
9. I thought I would finally be able to get my GED and go back to college.
10. I want to work with youth in my community.
11. When I found out I could register, I advocated for other people in my community.
12. When I found out my right to vote was being challenged, I was very hurt because I have changed and the challenge could take away my right to be somebody.
13. When I tried to vote for the first time in my life on June 14th, I was denied. I was told I was denied because this case was still pending in court. I was devastated.

Pursuant to Va. Code Ann. § 8.01-4.3, I declare under penalty of perjury that I have read the foregoing and that the facts stated in it are true and correct.

/s/Louise Benjamin
Signature

Louise Benjamin
Printed Name

Date: June 19, 2016

DECLARATION OF VIOLA MARIE BROOKS

My name is Viola Marie Brooks. I am over the age of 18 and fully competent to make this declaration.

Under penalty of perjury, I state the following:

1. I reside at 2108 Third Avenue in Richmond, Virginia. My telephone number is (804) 519-7501. I am 54 years of age.
2. My race/ethnicity is African-American.
3. I believe my voting rights were restored as of April 22, 2016.
4. Currently, I am registered or believe that I am registered to vote.
5. I intend to vote in the next General Election on November 8, 2016.
6. I had never registered to vote in the Commonwealth of Virginia before April 22, 2016.
7. I have wanted to participate in the democratic process for many years and I believe it is important to exercise my fundamental right to vote.
8. When I found out I had my right to vote restored, I was grateful because I want to have the same opportunities that others do. It has been difficult to get a job and access other opportunities like public housing.
9. When I found out about the challenge to my right to vote, I thought it was wrong. I made a mistake and I paid for it, and I am a changed person. This is a miserable situation to be in that causes a lot of mental distress.
10. Having the right to vote will make me feel like somebody.

Pursuant to Va. Code Ann. § 8.01-4.3, I declare under penalty of perjury that I have read the foregoing and that the facts stated in it are true and correct.

/s/ Viola Marie Brooks
Signature

Viola Marie Brooks
Printed Name

Date: June 19, 2016