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## The Limits of Executive Clemency: How the Virginia Supreme Court Blocked the Restoration of Felons' Political Rights in *Howell v. McAuliffe*

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# THE LIMITS OF EXECUTIVE CLEMENCY: HOW THE VIRGINIA SUPREME COURT BLOCKED THE RESTORATION OF FELONS' POLITICAL RIGHTS IN *HOWELL v.* *MCAULIFFE*

ALEXANDER PRINGLE\*

**Abstract:** On July 22, 2016, the Supreme Court of Virginia found Virginia Governor Terence McAuliffe's actions restoring full political rights to 206,000 Virginians convicted of a felony unconstitutional. At the same time, the court issued a writ of mandamus ordering Commonwealth officials to remove these convicted felons from the voting rolls and return their names to the list of prohibited voters. Governor McAuliffe had restored the political rights of these released felons en masse, via a single Executive Order on April 22, 2016, eschewing the typical case-by-case review process for restoration of voting rights. The majority in the case held that the Governor's Executive Order of April 22, 2016, along with subsequent orders, had violated article I, section 7 of the Virginia Constitution by illegally suspending the execution of laws without consent of the representatives of the people. The dissenting justices, applying a different interpretation, argued that the petitioners in the case lacked standing to pursue their claim, and that even if they had such standing, Governor McAuliffe's actions would have been proper based on the plain reading of the Virginia Constitution. This comment argues that Justice Powell's dissent most faithfully interprets the Virginia Constitution. It contends that given the contested nature of the historical record and the plain meaning of the constitutional language, the Virginia Supreme Court erred in finding Governor McAuliffe's actions unconstitutional.

## INTRODUCTION

On April 22, 2016, Governor Terence McAuliffe of Virginia issued an Executive Order which restored the full political rights of 206,000 disenfranchised Virginia citizens, including the right to hold public office, vote, act as a notary public, and serve on a jury.<sup>1</sup> The affected citizens had previously been convicted of felonies in the Commonwealth of Virginia, but had completed their sentences by the time of the Executive Order.<sup>2</sup>

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<sup>1</sup> *Howell v. McAuliffe*, 788 S.E.2d 706, 710 (Va. 2016).

<sup>2</sup> *Id.* See generally Marc Mauer, *Felon Voting Disenfranchisement: A Growing Collateral Consequences of Mass Incarceration*, 12 FED. SENT'G REP. 248, 248 (2000) ("In the most extreme case,

On May 23, 2016, the Speaker of the Virginia House of Delegates, the Majority Leader of the Virginia Senate, and four registered voters filed a petition with the Virginia Supreme Court against Governor McAuliffe and his administration.<sup>3</sup> Their petition for writs of mandamus and prohibition sought to void the new voter registrations, prevent any future registrations by the convicted felons, and bar Governor McAuliffe from issuing any future class-based restorations of voting rights.<sup>4</sup>

After entertaining briefs and arguments, the Virginia Supreme Court on July 22, 2016 found that Governor McAuliffe's Executive Order of April 22, 2016 had violated article I, section 7 and article II, section 1 of the Virginia Constitution.<sup>5</sup> Specifically, the majority found that the petitioners had adequate standing to pursue the case as aggrieved parties, that the respondents had adequately represented all necessary parties in the case, that the Governor's actions had violated the Virginia Constitution, and that writs of mandamus and prohibition were appropriate remedies.<sup>6</sup> In their dissents, both Justice William Mims and Justice Cleo Powell contested the standing of the petitioners to bring the case.<sup>7</sup> Justice Powell argued further that a plain reading of the language of the Virginia Constitution revealed that Governor McAuliffe's Executive Order did not violate the Virginia Constitution, and asserted that the majority had used a novel statutory construction to find such a violation.<sup>8</sup>

offenders in 14 states can lose the right to vote for life as a result of a felony conviction . . . . Thus, for example, an 18-year-old convicted of felony drug possession in Virginia who is sentenced to a treatment program which he successfully completes is disenfranchised for life even though he may not have spent a day in jail.”)

<sup>3</sup> *Howell*, 788 S.E.2d at 711.

<sup>4</sup> *Id.* See generally *Mandamus*, BLACK'S LAW DICTIONARY (10th ed. 2014) (“[M]andamus [is] . . . [a] writ issued by a court to compel performance of a particular act by a lower court or governmental officer or body, usu. to correct a prior action or failure to act.”); *Prohibition*, BLACK'S LAW DICTIONARY (10th ed. 2014) (“[P]rohibition [is] . . . [a]n extraordinary writ issued by an appellate court to prevent a lower court from exceeding its jurisdiction or to prevent a nonjudicial officer or entity from exercising a power.”).

<sup>5</sup> VA. CONST. art. I, § 7 (“[A]ll power of suspending laws, or the execution of laws, by any authority, without consent of the representatives of the people, is injurious to their rights, and ought not to be exercised.”); *id.* art. II, § 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.”); see *Howell*, 788 S.E.2d at 724.

<sup>6</sup> See *Howell*, 788 S.E.2d at 715–16, 724–25. The petitioners in *Howell v. McAuliffe* claimed that as Virginia citizens, “their votes ha[d] been diluted by the unconstitutional addition of 206,000 disqualified voters to the statewide electorate.” *Id.* at 715. In this way, they had suffered a redressable injury and therefore should have standing before the court. See *id.* The court agreed, holding that “petitioners in this case have standing to assert that their voting rights have been harmed by an allegedly unconstitutional manipulation of the electorate.” *Id.* See generally *Standing*, BLACK'S LAW DICTIONARY, (10th ed. 2014) (“[S]tanding [is] . . . [a] party's right to make a legal claim or seek judicial enforcement of a duty or right.”).

<sup>7</sup> See *Howell*, 788 S.E.2d at 730 (Mims, J., dissenting); *id.* at 740 (Powell, J., dissenting).

<sup>8</sup> See *id.* at 740 (Powell, J., dissenting).

Part I of this comment summarizes the factual and procedural history of *Howell v. McAuliffe*. Part II discusses the majority's opinion that the Governor's Executive Order violated article I, section 7 of the Virginia Constitution by effectively inverting the voter disqualification provision in article II, section 1. Part III agrees with the majority's finding of sufficient standing to decide the case, but sides with Justice Powell's dissent as to the constitutionality of Governor McAuliffe's executive orders. Part III also argues that Justice Powell's dissent is simultaneously most faithful to the plain meaning of the Virginia Constitution and protects the interests of a historically oppressed minority.

### I. THE RELEVANT PROCEDURAL HISTORY OF THE CHALLENGE TO GOVERNOR MCAULIFFE'S ORDER AND THE SECTIONS OF THE VIRGINIA CONSTITUTION IN DISPUTE

On April 22, 2016, Virginia Governor Terence McAuliffe restored by executive order the full political rights of 206,000 Virginia citizens who had been previously convicted of a felony.<sup>9</sup> Although the affected citizens had completed their criminal sentences, including periods of probation and parole, they had been stripped permanently of their right to vote pursuant to article II, section 1 of the Virginia Constitution.<sup>10</sup> McAuliffe's Executive Order specifically restored the right to vote, the right to serve on a jury, the right to hold public office, and the right to act as a notary public.<sup>11</sup>

Governor McAuliffe simultaneously revealed that he would continue to issue comparable executive orders at the end of each month restoring the rights to convicted felons who had newly completed their sentences, including probation and parole.<sup>12</sup> Following through with this pledge, Governor McAuliffe

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<sup>9</sup> *Howell v. McAuliffe*, 788 S.E.2d 706, 710 (Va. 2016) (majority opinion).

<sup>10</sup> VA. CONST. art. II, § 1; *Howell*, 788 S.E.2d at 710, 716. Eligible voters in Virginia must be citizens at least eighteen years of age, fulfill the residency requirement, and be registered to vote. VA. CONST. art. II, § 1. In addition, the section provides specifically that “[n]o person who has been convicted of a felony shall be qualified to vote unless his civil rights have been restored by the Governor or other appropriate authority.” *Id.* Historically, this provision has functionally removed the right to vote from any citizen of Virginia who has committed a felony. *See Howell*, 788 S.E.2d at 716. The Governor possesses the ability to restore voting rights to people who have been convicted of felonies. *Id.* This has traditionally been done on a case-by-case basis, with individual reviews conducted on the particular details of a case. *Id.*

<sup>11</sup> *Howell*, 788 S.E.2d at 710. Howell invalidated Governor McAuliffe's executive order. *Id.* at 706; *see also Governor McAuliffe Restores Voting and Civil Rights to Over 200,000 Virginians*, VIRGINIA.GOV (Apr. 22, 2016), <https://governor.virginia.gov/newsroom/newsarticle?articleId=15008> [<https://perma.cc/3AD5-VUCH>] (“The civil rights restored by this Order are: (1) the right to vote; (2) the right to hold public office; (3) the right to serve on a jury; and (4) the right to act as a notary public.”).

<sup>12</sup> *Howell*, 788 S.E.2d at 711. The Governor is not able to issue pardons prospectively—that is, he is not able to issue pardons for convictions that have not yet occurred. *Id.* Rather he is only empowered to issue pardons for convictions as they occur. *Id.* Thus Governor McAuliffe would have to issue

issued executive orders on May 31, 2016, and again on June 24, 2016, restoring political rights to such Virginians.<sup>13</sup>

Opponents quickly challenged Governor McAuliffe's actions, claiming that his orders "defie[d] the plain text of the Constitution, flout[ed] the separation of powers, and ha[d] no precedent in the annals of Virginia history."<sup>14</sup> Led by Speaker of the Virginia House of Delegates William J. Howell, a group of petitioners composed of registered Virginia voters filed a lawsuit against Governor McAuliffe and several other parties.<sup>15</sup> They argued that the governor had overstepped the bounds of his constitutionally granted authority.<sup>16</sup> As a result, they requested writs of mandamus and prohibition from the Virginia Supreme Court to revoke any voter registrations that had been completed as a result of Governor McAuliffe's order, halt any additional registrations, and bar the governor from issuing any future executive orders that would restore the voting rights en masse to newly released convicted felons who had completed their sentences.<sup>17</sup>

The respondents replied to the suit by filing a motion to dismiss and a response to the petition.<sup>18</sup> The motion was predicated on the following assertions: that the petitioners did not have the standing required to petition the court; that they had neglected to join necessary parties; and that they had not sufficiently demonstrated that the executive orders at issue were beyond the scope of the governor's legal authority.<sup>19</sup> The respondents further contended that the petition failed to state a claim upon which relief could be granted and that the Governor's actions were in fact constitutional under the plain language of article V, section 12 of the Virginia Constitution.<sup>20</sup>

On July 22, 2016, the Virginia Supreme Court found Governor McAuliffe's actions to be in violation of the Virginia Constitution.<sup>21</sup> The majority found that Governor McAuliffe's executive orders violated article I, section 7 and article II, section 1 of the Virginia Constitution.<sup>22</sup> The majority not-

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pardons each month to restore the political rights of the Virginia citizens who had been convicted of a felony and had completed their sentences in the past month. *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* The other parties were the Secretary of the Commonwealth, the Virginia Department of Elections, and the State Board of Elections. *Id.*

<sup>16</sup> *See id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 711–12.

<sup>20</sup> *Id.*; see VA. CONST. art. V, § 12 ("The Governor . . . shall communicate to the General Assembly, at each regular session, particulars of every case of fine or every penalty remitted, of reprieve or pardon granted, and of punishment commuted, with his reasons for remitting, granting, or commuting the same.").

<sup>21</sup> *Howell*, 788 S.E.2d at 724.

<sup>22</sup> VA. CONST. art. I, § 7; *id.* art. II, § 1; *Howell*, 788 S.E.2d at 724. Article I, section 7 of the Virginia Constitution restricts the governor's ability to suspend laws passed by the Virginia General

ed that Governor McAuliffe's categorical use of his executive clemency power exceeded his authority under article V, section 12, which, when read in historical context and considering past practice, required him to communicate to the General Assembly the details of every case involving clemency and his reasons for each pardon.<sup>23</sup> They also noted that his categorical use of his clemency power, even if it were allowed by article V, section 12, also violated article I, section 7 of the Virginia Constitution, which denies the Governor the power to suspend laws or the execution of laws without the legislature's consent.<sup>24</sup> The majority further found that the petitioners had sufficient standing to bring the petition and that all necessary parties had been adequately represented.<sup>25</sup> Accordingly, the majority issued the writs of mandamus and prohibition, and ordered the Governor and his administration to remove the affected citizens from the voting rolls and ensure that only qualified voters be registered to vote.<sup>26</sup>

Two Justices filed dissents in the case.<sup>27</sup> Justice William Mims wrote a dissent focused entirely on the petitioner's lack of standing for a writ of mandamus.<sup>28</sup> He noted that previous precedent had established that petitioners requesting a writ of mandamus were required to have either a statutory right of action or a particularized injury different from that of the rest of the public.<sup>29</sup> Analyzing the facts of the case, he found that the majority had inappropriately applied previous precedent from *Wilkins v. West*, failing to note the distinction between an injury to a single electoral district as opposed to an injury to the entire commonwealth.<sup>30</sup> Justice Mims concluded that, although the record was currently insuf-

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Assembly. VA. CONST. art. I, § 7. The provision states “[t]hat all power of suspending laws, or the execution of laws, by any authority, without consent of the representatives of the people, is injurious to their rights, and ought not to be exercised.” *Id.* The anti-suspension provision was present in the first Virginia Constitution, adopted in 1776, and has been included in every subsequent version, including the current one, enacted in 1971. *Howell*, 788 S.E.2d at 720–21. Historically the provision was created to curb what was then considered to be one of the most abhorrent practices of the English monarchy, namely the royal suspension of acts of Parliament. *See id.* at 721–22. The focus of the provision was to ensure that the Governor of Virginia would not be able to simply suspend laws passed by the General Assembly and, by doing so, disregard the rights of Virginia citizens. *See id.* at 720–21.

<sup>23</sup> *See* VA. CONST. art. V, § 12; *Howell*, 788 S.E.2d at 719.

<sup>24</sup> *See* VA CONST. art. I, § 7; *id.* art. V, § 12; *Howell*, 788 S.E.2d at 720.

<sup>25</sup> *Howell*, 788 S.E.2d at 715.

<sup>26</sup> *Id.* at 724–25.

<sup>27</sup> *Id.* at 725 (Mims, J., dissenting); *id.* at 730 (Powell, J., dissenting).

<sup>28</sup> *Id.* at 725 (Mims, J., dissenting).

<sup>29</sup> *See id.* at 725–27; *Goldman v. Landside*, 552 S.E.2d 67, 72 (Va. 2001) (finding that to have standing in a suit requesting a writ of mandamus against the Commonwealth of Virginia, a Virginia citizen or taxpayer must possess either a “statutory right” to bring suit or, in the absence thereof, to be able to “demonstrate a direct interest” separate and distinct from the public interest).

<sup>30</sup> *Howell*, 788 S.E.2d at 727–29 (Mims, J., dissenting); *see Wilkins v. West*, 571 S.E.2d 100, 107 (Va. 2002) (ruling that residents in gerrymandered districts had suffered a particularized injury—their voting power had been diluted and weakened *relative* to that of citizens of other Virginia districts—and therefore had standing.).

ficient to establish standing, he would have allowed the parties additional time to produce evidence of standing before issuing a final decision.<sup>31</sup>

Justice Cleo Powell, joined by Justice S. Bernard Goodwyn, took a broader view in her dissent.<sup>32</sup> Justice Powell largely agreed with Justice Mims' reasoning, finding that the petitioners lacked standing to pursue a writ of mandamus.<sup>33</sup> Justice Powell went beyond Justice Mims' dissent, however, finding that Governor McAuliffe's actions were fully within the bounds of the Constitution of Virginia and that therefore no injury had occurred.<sup>34</sup> Justice Powell noted specifically that the executive orders had not violated article I, section 7, because to the extent that they conflicted with article II, section 1, they did so in a manner prescribed in the Constitution.<sup>35</sup> Justice Powell argued that because article II, section 1 expressly provided for a method of restoration for these rights, and because it included no explicit restrictions on how this power could be used, the logical inference was that no such restrictions existed.<sup>36</sup> She found further support in what she viewed as the textually unrestricted nature of the Governor's clemency powers.<sup>37</sup>

## II. A DIVIDED COURT: PROPER STANDING AND CONSTITUTIONAL VIOLATIONS OR A LACK OF STANDING AND NO CONSTITUTIONAL VIOLATIONS

In the majority opinion written by Chief Justice Donald W. Lemons, the Supreme Court of Virginia found that Governor McAuliffe's executive orders had violated the Virginia Constitution.<sup>38</sup> Justice William Mims wrote a solo dissent focusing almost entirely on the issue of standing, finding that the petitioners lacked standing based on the court's past precedent.<sup>39</sup> Justice Cleo Powell wrote a dissent, joined by Justice S. Bernard Goodwyn, which focused on the petitioner's lack of standing and on the plain reading of the contested statute.<sup>40</sup>

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<sup>31</sup> *Howell*, 788 S.E.2d at 730 (Mims, J., dissenting).

<sup>32</sup> *See id.* at 731 (Powell, J., dissenting).

<sup>33</sup> *Id.*

<sup>34</sup> *See id.* at 740.

<sup>35</sup> *See* VA. CONST. art. I, § 7; *id.* art. II, § 1; *Howell*, 788 S.E.2d at 734–35 (Powell, J., dissenting).

<sup>36</sup> *See* VA. CONST. art. II, § 1; *Howell*, 788 S.E.2d at 734, 736 (Powell, J., dissenting).

<sup>37</sup> *See Howell*, 788 S.E.2d at 737 (Powell, J., dissenting).

<sup>38</sup> *Howell v. McAuliffe*, 788 S.E.2d 706, 710 (Va. 2016) (majority opinion).

<sup>39</sup> *Id.* at 725 (Mims, J., dissenting).

<sup>40</sup> *Id.* at 730, 740 (Powell, J., dissenting).

### A. The Majority Opinion

The majority found that Governor McAuliffe's executive orders had violated the Virginia Constitution.<sup>41</sup> Applying the precedent in *Wilkins v. West*, the court asserted that the petitioners had demonstrated sufficient standing to pursue a writ of mandamus.<sup>42</sup> The petitioners in the present case had asserted that their voting rights were threatened by an unconstitutional manipulation of the electorate, specifically the unconstitutional addition of 206,000 disqualified voters to the Virginia voter rolls.<sup>43</sup> The court noted that failing to decide the dispute on grounds of standing would be "an inexcusable failure on our part to fulfill our duty to interpret and apply Virginia law in a case where the parties are 'actual adversaries' and the legal issues have been 'fully and faithfully developed.'"<sup>44</sup> The court similarly found that all necessary parties had been joined or adequately represented in the suit and that therefore this was no basis to dismiss the action.<sup>45</sup>

The court then determined that the Governor's executive orders had violated article I, section 7 and article II, section 1 of the Virginia Constitution.<sup>46</sup> The court began by considering whether article II, section 1 allowed for the kind of blanket issuing of clemency that Governor McAuliffe granted in his executive orders.<sup>47</sup> Considering the historical factors motivating the constitutional provision's adoption, past governors' interpretations of its meaning, and the actions of previous General Assemblies, the court concluded that article II, section 1 did not confer this blanket power upon the governor.<sup>48</sup> In reviewing the historical record and past practices, the court argued that it did not support Governor McAuliffe's argument that his clemency powers, contained in article V, section 12, were unrestrained and absolute, thus allowing him to issue such sweeping orders.<sup>49</sup> The court reasoned that the plain text of article V, section

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<sup>41</sup> *Id.* at 724 (majority opinion).

<sup>42</sup> *Id.* at 713–16; *Wilkins v. West*, 571 S.E.2d 100, 107 (Va. 2002).

<sup>43</sup> *Howell*, 788 S.E.2d at 712.

<sup>44</sup> *Id.* at 715 (quoting *Cupp v. Bd. of Supervisors*, 318 S.E.2d 407, 411 (Va. 1984)).

<sup>45</sup> *Id.* at 716.

<sup>46</sup> VA. CONST. art. I, § 7; *id.* art II, § 1; *Howell*, 788 S.E.2d at 716–19, 724.

<sup>47</sup> *See* VA. CONST. art. II, § 1; *Howell*, 788 S.E.2d at 716.

<sup>48</sup> VA. CONST. art. II, § 1; *Howell*, 788 S.E.2d at 716–19, 724.

<sup>49</sup> VA. CONST. art. V, § 12; *Howell*, 788 S.E.2d at 710, 719–20. Previous governors of Virginia had considered the scope of their executive clemency power to be limited to use on a case-by-case basis. *See Howell*, 788 S.E.2d at 716–17. None of the previous seventy-one Virginia Governors to serve before Governor McAuliffe had ever issued a blanket clemency order. *See id.* at 716. Previous governors had investigated the question, however. *Id.* In 2010, Governor Tim Kaine considered issuing an executive order similar to the one Governor McAuliffe eventually issued and asked Counselor to the Governor, Mark Rubin, to review the legality of such a proposal. *Id.* Rubin's review came to the simple conclusion that a blanket use of the governor's clemency power to restore voting rights was not authorized by article II, section 1. VA. CONST. art. II, § 1; *Howell*, 788 S.E.2d at 716. Rubin concluded that the power could be exercised only "in particular cases to named individuals for whom a



12, when read in combination with article II, section 1, established that the executive clemency power was meant to be limited.<sup>50</sup> The court noted that such an interpretation simultaneously remained faithful to the views of the original framers of the Virginia Constitution and to the interpretation of the previous governors.<sup>51</sup>

The court noted, however, that it need not decide the case purely on past practice and interpretation of executive clemency powers.<sup>52</sup> The court concluded that article I, section 7 had been included in the Virginia Constitution to prevent exactly the sort of use of executive power that Governor McAuliffe exerted in this case.<sup>53</sup> The court cited that the framers had been concerned about past abuses by English kings and had sought a protection in the constitution against the suspension of duly enacted laws by an unbridled executive.<sup>54</sup> The court reasoned that if the suspension clause was but a mere truism against Governor McAuliffe's executive clemency power, then the governor would possess an unlimited power to suspend any criminal law with which he disagreed.<sup>55</sup> The court concluded that this was exactly the kind of power the framers sought to keep from the Virginia executive.<sup>56</sup>

### B. Justice Mims' Dissent

In his solo dissent, Justice William Mims focused on whether the petitioners had adequate standing to pursue their claims.<sup>57</sup> Justice Mims began his analysis by recognizing the limited role of the judiciary and the fundamental importance of standing, underscoring the bedrock principle that the court did not have the authority to consider the merits of the case unless it first had jurisdiction over it.<sup>58</sup> Based on past precedent of the court, he explained, standing could be derived from two places: a right provided in statute or a particularized injury "separate and distinct" from any interest of the public.<sup>59</sup> Finding no statutory right to be present in the case, he instead looked for a particular injury.<sup>60</sup>

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specific grant of executive clemency is sought." *Howell*, 788 S.E.2d at 716. Citing this advice, Governor Kaine declined to issue such an executive order. *Id.* at 717.

<sup>50</sup> See VA. CONST. art II, § 1; *id.* art. V, § 12; *Howell*, 788 S.E.2d at 720.

<sup>51</sup> *Howell*, 788 S.E.2d at 718–19.

<sup>52</sup> *Id.* at 720.

<sup>53</sup> See VA. CONST. art. I, § 7; *Howell*, 788 S.E.2d at 720–21.

<sup>54</sup> *Howell*, 788 S.E.2d at 720–22.

<sup>55</sup> *Id.* at 723.

<sup>56</sup> *Id.* at 724.

<sup>57</sup> *Id.* at 725–30 (Mims, J., dissenting).

<sup>58</sup> *Id.* at 725–26.

<sup>59</sup> *Id.* at 726–27; *Wilkins v. West*, 571 S.E.2d 100, 107 (Va. 2002); *Goldman v. Landsidle*, 552 S.E.2d 67, 72 (Va. 2001).

<sup>60</sup> See *Howell*, 788 S.E.2d at 727 (Mims, J., dissenting).

Justice Mims disapproved of the court's reliance on *Wilkins* as a precedent for allowing the petitioners to proceed.<sup>61</sup> Mims compared the two cases and found *Wilkins* to be inapposite; he noted that whereas *Wilkins* had involved racially gerrymandered districts, which meant that the votes of individuals in one district might be worth less than those in another, the facts before the court in *Howell* involved a single entity, namely the entire Commonwealth of Virginia.<sup>62</sup> Justice Mims concluded that this meant that every voter would suffer equal harm as a result of 206,000 people being added to the voter rolls, and as a result no one could show an injury greater than that of any other voter.<sup>63</sup> Justice Mims left the door open, however, for further action; he held that although the record before the court did not support standing, it was possible that more evidence could allow for standing to be demonstrated.<sup>64</sup> As a result, he concluded by stating he would not have dismissed the suit but instead would have allowed the parties to develop more evidence and provide additional briefing on the issue of standing.<sup>65</sup>

### C. Justice Powell's Dissent

Justice Cleo Powell's dissent built upon Justice Mims', finding not only that the petitioners lacked standing, but also that McAuliffe's executive orders had not violated the Virginia Constitution.<sup>66</sup> Like Justice Mims, Justice Powell found that the petitioners did not have the requisite standing to pursue the case.<sup>67</sup> Justice Powell interpreted the decision in *Wilkins* narrowly, construing it to provide a right of action only in cases involving residency in a racially gerrymandered district.<sup>68</sup> Absent this factor, the petitioners would have to demonstrate an actual injury.<sup>69</sup> Concluding that the petitioners could not prove a specific injury distinct from other Virginia voters, Justice Powell concluded that they lacked standing.<sup>70</sup>

Unlike Justice Mims, Justice Powell went on to consider the underlying constitutional claims.<sup>71</sup> She noted that article I, section 7 should be read as a generalized check on executive power, whereas article V, section 12 should be read as a specific grant of authority to restore voting rights to convicted fel-

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<sup>61</sup> *Id.* at 727–28.

<sup>62</sup> *Id.* at 728–29.

<sup>63</sup> *Id.* at 729.

<sup>64</sup> *Id.* at 730.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 730–40 (Powell, J., dissenting).

<sup>67</sup> *Id.* at 731.

<sup>68</sup> *Id.* at 732.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 733.

ons.<sup>72</sup> Based on canons of construction and past precedent, she concluded that article V, section 12, being a specific grant of authority, should be given priority over the general restriction of article I, section 7.<sup>73</sup> Justice Powell argued that Governor McAuliffe's use of his power to restore felons' voting rights was exactly the type of action contemplated by article V, section 12 and therefore was an exception to the general restrictions of article I, section 7.<sup>74</sup>

After concluding that McAuliffe's executive orders did not abrogate article I, section 7, Justice Powell analyzed the relationship between article II, section 1 and article V, section 12 and found them to be complementary.<sup>75</sup> A plain reading, she said, revealed that article II, section 1 removed felons' voting rights until they had been restored.<sup>76</sup> Article V, section 12 gave the governor the ability to restore political rights without any explicit limitations.<sup>77</sup> Therefore, Justice Powell concluded, the two provisions when read together gave the governor unfettered authority to restore felons voting rights.<sup>78</sup> Rather than deferring to the supposed intentions of the framers or the past practices of the governor or General Assembly, Justice Powell found that the canons demanded instead a plain reading of the language.<sup>79</sup> Because article V, section 12 prescribed no specific limitations, and article II, section 1 expressly allowed for restoration with no restrictions, Justice Powell urged that the correct conclusion was the governor possessed an unrestrained power.<sup>80</sup> Accordingly, Justice Powell found the governor had not violated the constitution in issuing his executive orders.<sup>81</sup>

### III. THE COURT SHOULD NOT VALUE HISTORICAL INTERPRETATIONS OVER THE PLAIN READING OF THE STATUTE AND SHOULD CONSIDER THE EFFECTS OF ITS RULING

Striking a balance between deference to the intent of the framers of the Virginia Constitution and a faithful reading of its plain language, Justice Powell's dissent is more convincing than the majority's opinion on the substantive issues at stake in *Howell v. McAuliffe*.<sup>82</sup> Justice Powell gave primary weight to the plain reading of article V, section 12, arguing that the cannons of construc-

<sup>72</sup> VA. CONST. art. I, § 7; *id.* art. V, § 12; *Howell*, 788 S.E.2d at 734 (Powell, J., dissenting).

<sup>73</sup> VA. CONST. art. I, § 7; *id.* art. V, § 12; *Howell*, 788 S.E.2d at 734–35 (Powell, J., dissenting).

<sup>74</sup> VA. CONST. art. I, § 7; *id.* art. V, § 12; *Howell*, 788 S.E.2d at 736 (Powell, J., dissenting).

<sup>75</sup> VA. CONST. art. I, § 7; *id.* art. II, § 1; *id.* art. V, § 12; *Howell*, 788 S.E.2d at 736–37 (Powell, J., dissenting).

<sup>76</sup> VA. CONST. art. II, § 1; *Howell*, 788 S.E.2d at 735 (Powell, J., dissenting).

<sup>77</sup> VA. CONST. art. V, § 12; *Howell*, 788 S.E.2d at 737 (Powell, J., dissenting).

<sup>78</sup> *Howell*, 788 S.E.2d at 740 (Powell, J., dissenting).

<sup>79</sup> *See id.* at 737.

<sup>80</sup> VA. CONST. art. II, § 1; *id.* art. V, § 12; *Howell*, 788 S.E.2d at 740 (Powell, J., dissenting).

<sup>81</sup> *Howell*, 788 S.E.2d at 740 (Powell, J., dissenting).

<sup>82</sup> *See Howell v. McAuliffe*, 788 S.E.2d 706, 730–40 (Va. 2016) (Powell, J., dissenting).

tion weighed in favor of what the framers had written, rather than of what the majority believed the framers had intended.<sup>83</sup> Justice Powell indicated that the historical record is far from clear as to the intent of the framers, noting that although some of the governor's clemency powers are expressly limited in the constitution, his powers to remove political disabilities are not.<sup>84</sup> As she mentions, this demonstrates that the framers were aware of methods to restrict this power, as they had restricted others, and had, for whatever reason, chosen not to include similar language for the restoration of political rights.<sup>85</sup> Although one could guess as to what the framers intended, what they wrote is clear and Justice Powell is correct to give greater weight to what they wrote, rather than what some believe they intended.<sup>86</sup>

Justice Powell also has the weight of public policy on her side.<sup>87</sup> As the American Civil Liberties Union (ACLU) noted in its amicus brief filed in *Howell*, “[t]he right to vote is a fundamental right afforded to all citizens.”<sup>88</sup> This right, the U.S. Supreme Court underscored in *Reynolds v. Sims*, “is the essence of a democratic society,” and its exercise is “preservative of other basic civil and political rights . . . .”<sup>89</sup> In other words, the right to vote is the right from which all other rights of democratic citizenship stem.<sup>90</sup> When citizens lose this right, they lose their most powerful form of influence in a representative republic: the ability to choose who will make the laws that “govern our daily lives.”<sup>91</sup> Justice Powell appropriately recognized that Governor McAuliffe's executive orders safeguard these rights.<sup>92</sup>

According to the Sentencing Project, criminal disenfranchisement laws and policies affect more than 5,850,000 Americans nationwide, and hundreds of thousands of people in Virginia.<sup>93</sup> In fact, Virginia has one of the most severe felony disenfranchisement laws in the United States.<sup>94</sup> In the vast majority of states—thirty-eight states and the District of Columbia—most felons' voting

<sup>83</sup> See VA. CONST. art. V, § 12; *Howell*, 788 S.E.2d at 733–36 (Powell, J., dissenting).

<sup>84</sup> See *Howell*, 788 S.E.2d at 737 (Powell, J., dissenting).

<sup>85</sup> See *id.*; Brief on Behalf of Law Professors as Amici Curiae in Support of Respondents at 8–10, *Howell*, 788 S.E.2d 706 (No. 160748).

<sup>86</sup> See *Howell*, 788 S.E.2d at 739 (Powell, J., dissenting).

<sup>87</sup> See Brief on Behalf of ACLU & ACLU of Va. as Amici Curiae in Support of Respondents at 22, *Howell*, 788 S.E.2d 706 (No. 160748) [hereinafter Brief on Behalf of ACLU]; Brief of the Va. State Conference of the NAACP as Amicus Curiae in Support of Respondents at 5, *Howell*, 788 S.E.2d 706 (No. 160748) [hereinafter Brief on Behalf of the NAACP].

<sup>88</sup> Brief on Behalf of ACLU, *supra* note 87, at 9.

<sup>89</sup> *Reynolds v. Sims*, 377 U.S. 533, 555, 562 (1964).

<sup>90</sup> See Brief on Behalf of ACLU, *supra* note 87, at 9–10.

<sup>91</sup> *Id.* at 10.

<sup>92</sup> *Id.* at 9–10.

<sup>93</sup> *Id.* at 10 (citing *State-by-State Data*, THE SENT'G PROJECT, <http://www.sentencingproject.org/the-%20facts/#detail?state1Option=U.S.%20Total&state2Option=Virginia> [https://perma.cc/DU9U-5KRN]).

<sup>94</sup> Brief on Behalf of ACLU, *supra* note 87, at 11.

rights are automatically restored when they complete their sentence.<sup>95</sup> In contrast, prior to Governor McAuliffe's April 22nd order, Virginia was one of only four states that permanently removed voting rights for a single felony conviction.<sup>96</sup> Virginia is also a historical outlier; from 1997 until 2014, twenty-three states took steps to relax their disenfranchisement laws.<sup>97</sup> In contrast, although numerous reforms have been proposed in Virginia, the Commonwealth has consistently failed to adopt them.<sup>98</sup>

This failure to reform sharply highlights Virginia's long history of racial discrimination and intentional suppression of minority voting rights.<sup>99</sup> Virginia's strict felony disenfranchisement laws have led to staggering racial disparities in political disenfranchisement.<sup>100</sup> Before McAuliffe's April 22 order, more than twenty percent of African-American Virginians of voting age were disenfranchised.<sup>101</sup> This number is staggeringly high: nationwide, 1.8 % of the non-Black voting-age population and 7.7% of the Black voting-age population are disenfranchised.<sup>102</sup> This disparity, argues the National Association for the Advancement of Colored People (NAACP), stems from the fact that Virginia's criminal justice system disproportionately targets African-Americans.<sup>103</sup> Due to factors like over-policing of African-American neighborhoods and racial bias, African-Americans are consistently arrested and prosecuted more frequently and sentenced more harshly than non-minorities.<sup>104</sup>

Beyond its discriminatory racial impact, Virginia's felony disenfranchisement policy also undermines the rehabilitative goal of the criminal justice system.<sup>105</sup> Decreasing recidivism and crime via successful reintegration of felons back into society is a widely accepted objective of criminal justice reformers.<sup>106</sup> The initial phases of the reintegration process are vitally important to preventing recidivism.<sup>107</sup> According to social science research, voting correlates with decreased rates of arrest and incarceration.<sup>108</sup> As the ACLU brief notes, former offenders "released in states that permanently disenfranchise at least some individuals with a felony conviction are 'roughly ten percent more likely to reoffend than those released in states that restore the franchise post-

<sup>95</sup> *Id.* at 10.

<sup>96</sup> Brief on Behalf of the NAACP, *supra* note 87, at 3.

<sup>97</sup> *Id.*

<sup>98</sup> *Howell v. McAuliffe*, 788 S.E.2d 706, 717 (Va. 2016).

<sup>99</sup> Brief on Behalf of the NAACP, *supra* note 87, at 4.

<sup>100</sup> *Id.*; see Brief on Behalf of ACLU, *supra* note 87, at 11.

<sup>101</sup> Brief on Behalf of ACLU, *supra* note 87, at 11.

<sup>102</sup> *Id.*; *State-by-State Data*, *supra* note 93.

<sup>103</sup> Brief on Behalf of the NAACP, *supra* note 87, at 4.

<sup>104</sup> *Id.* at 4–5.

<sup>105</sup> Brief on Behalf of ACLU, *supra* note 87, at 12–13.

<sup>106</sup> *Id.* at 28–29.

<sup>107</sup> *Id.* at 29.

<sup>108</sup> *Id.* at 30.

release.”<sup>109</sup> Large-scale disenfranchisement also excludes large numbers of individuals from the community, creating entire classes of people who are forced to live on the edges of society; this hinders police efforts to build collaborative partnerships relations with the community and prevent crime.<sup>110</sup>

In contrast to Justice Powell’s dissent, Chief Justice Lemons’ majority arrives at an overly formalistic decision, substituting their interpretation of historical context for the plain meaning of the text of article V, section 12 and ignoring the real, damaging policy effects of its ruling.<sup>111</sup> Although the majority may find the past practices of Virginia Governors and General Assemblies persuasive, these past interpretations are not definitive.<sup>112</sup> Indeed, as the majority concedes, “[past] observations do not preclude us from recognizing a novel executive power that no prior Governor ever believed existed.”<sup>113</sup> The U.S. Supreme Court has laid the groundwork for this assertion, claiming, “[l]ong settled and established practice” has never been considered to be “binding on the judicial department.”<sup>114</sup> The majority’s faithfulness to these past interpretations causes it to ignore the plain meaning of the language of article V, section 12 and to substitute its own judgment for that of the clear written text.<sup>115</sup>

## CONCLUSION

Governor McAuliffe’s Executive Order of April 22, 2016, was intended to restore the political rights of convicted felons who had served their sentences. In finding Governor McAuliffe’s actions unconstitutional the majority gave too much deference to the past practices and interpretations of previous governors of the commonwealth and failed to properly consider the broad effects of its ruling. Given the conflicted nature of the historical record and the clear and unambiguous nature of the language of the Virginia Constitution, Justice Powell was correct to weigh on the side of finding Governor McAuliffe’s actions constitutional. Giving controlling effect to the past interpretations of the statutes in this case caused the majority to favor a convoluted interpretation of the statute rather than simply accepting its plain reading.

Although no previous governor had sought to use his power in such a way, the Virginia Constitution gave Governor McAuliffe the ability to restore political rights to convicted felons en mass, to return to Virginia citizens their right to vote once they had served their sentence. By preventing such action,

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<sup>109</sup> *Id.* (quoting Guy Padraic Hamilton-Smith & Matt Vogel, *The Violence of Voicelessness: The Impact of Felony Disenfranchisement on Recidivism*, 22 BERKELEY LA RAZA L.J. 407, 427 (2012)).

<sup>110</sup> *Id.* at 30–31.

<sup>111</sup> VA. CONST. art. V, § 12; Howell v. McAuliffe, 788 S.E.2d 706, 723–24 (Va. 2016).

<sup>112</sup> *See Howell*, 788 S.E.2d at 716–21.

<sup>113</sup> *Id.* at 717.

<sup>114</sup> *The Pocket Veto Case*, 279 U.S. 655, 689–90 (1929).

<sup>115</sup> *See* VA. CONST. art. V, § 12; *Howell*, 788 S.E.2d at 719–20; *id.* at 740 (Powell, J., dissenting).

the majority left hundreds of thousands of Virginia citizens disenfranchised and deprived of their most powerful tool to preserve their civil and political rights. Given Virginia's long and troubled history with voter disenfranchisement and the corrosive effects of felon disenfranchisement on the African-American community, the decision leaves in place one of Virginia's most shameful and counterproductive policies. Based on the plain reading of the Virginia Constitution and the laudable social goal of Governor McAuliffe, the Virginia Supreme Court was wrong to find his actions unconstitutional.