Record No. 160784

IN THE

SUPREME COURT OF VIRGINIA

William J. Howell, et al.,

***Petitioners*,**

v.

Terence R. McAuliffe, et al.,

***Respondents*,**

BRIEF OF FAIR ELECTIONS LEGAL NETWORK AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*

Pursuant to Rule 5:30 of this Court, *amicus curiae* the Fair Elections Legal Network ("FELN") respectfully files this brief in support of Respondents.[1] FELN is a national, non-partisan voting rights, legal support, and election reform organization. FELN's mission is to remove barriers to registration and voting for traditionally underrepresented communities. FELN works to improve overall election administration through administrative, legal, and legislative reform and strives to make the processes of voter registration, voting, and election administration as accessible as possible for every American, with a particular focus on how these processes affect student, youth, and minority voters.

FELN has an interest in this case because the April 22nd Executive Order restored voting rights to certain ex-felons, removing a barrier to electoral participation for more than 200,000 Virginians. The organization's work in Virginia and elsewhere has focused substantially on barriers that affect minority voters, many of whom have been re-enfranchised by the Executive Order now being challenged before this Court. FELN expends resources in the Commonwealth of Virginia and has since 2007

[1] Pursuant to Rule 5:30(b)(2), all parties have consented to the filing of this brief. Written consent from counsel for Petitioners and Respondents is being submitted along with this brief. *See* Appendix.

encouraged various state and local government entities and officials to create an election administration system that is accessible, equitable, efficient, and secure. It has also assisted other organizations and citizens in understanding the mechanics of the Commonwealth's election system and what is required to register and vote. FELN regularly provides legal and technical assistance, as well as informational materials, to voter mobilization organizations in Virginia, some of which are presently engaged in registering ex-felons who have been re-enfranchised by the April 22nd Executive Order.

FELN fully supports the arguments that Respondents make on the merits as to why the April 22nd Executive Order is lawful and justified. However, FELN submits this brief for the specific purpose of assisting the Court in understanding that the Virginia legislators and voters who filed the Verified Petition for Writs of Mandamus and Prohibition in the Supreme Court of Virginia do not have standing to challenge the April 22nd Executive Order.

SUMMARY OF ARGUMENT

It is well-settled in this Court that as a matter of first principle, a party must have standing before it can bring a case to this Court for resolution. As this Court has recognized, "standing requires the plaintiff to show that

he or she has suffered an 'injury in fact—an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.'" *Wilkins v. West*, 264 Va. 447, 459 (2002) (quoting *United States v. Hays*, 515 U.S. 737, 743 (1995) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)) (internal quotation marks omitted)). In other words, a person "must show that he has an immediate, pecuniary and substantial interest in the litigation, and not a remote or indirect interest." *Nicholas v. Lawrence*, 161 Va. 589, 593 (1933). "Merely advancing a public right or redressing a public injury cannot confer standing on a complainant." *Wilkins*, 264 Va. at 458 (citing *Virginia Beach Beautification Comm'n v. Bd. of Zoning Appeals of City of Va. Beach*, 231 Va. 415, 419 (1986)). "[T]he complainant must allege facts demonstrating a particularized harm to some personal or property right, legal or equitable, or imposition of a burden or obligation upon the petitioner different from that suffered by the public generally." *Friends of the Rappahannock v. Caroline County Bd. of Supervisors*, 286 Va. 38, 48-49 (2013) (citations and internal quotation marks omitted).

Here, Petitioners lack the concrete and particularized injury that is required to establish their standing and their suit must be dismissed. *See Harmon v. Sadjadi*, 273 Va. 184, 193 (2007) ("Our jurisprudence is clear

that when a party without standing brings a legal action, the action so instituted is, in effect, a legal nullity."). While Petitioners allege three separate bases for their standing to challenge the April 22nd Executive Order, none of these is sufficient. As demonstrated below, Petitioners do not have (1) standing as voters; (2) standing as legislators asserting an injury to the Virginia General Assembly; or (3) standing as competitors or candidates to challenge the April 22nd Executive Order.

First, Petitioners lack standing to allege a generalized injury to all voters from the April 22nd Executive Order. Virginia law has a statutory procedure for voters to challenge the qualifications of other voters. Petitioners have not followed that process, choosing instead to improperly file an original action in this Court. But Petitioners cannot circumvent that statutory procedure and proceed in this Court simply by making vague references to "vote dilution" and citing to inapposite malapportionment and racial gerrymandering case law. Petitioners have failed to explain why they have suffered or will suffer any concrete and particularized harm that differentiates them from the public at large or from any individual who opposes the April 22nd Executive Order but lacks a personal stake in whether or not the law is upheld.

Second, the legislator Petitioners lack standing to bring an action in their individual capacity alleging injuries to the legislative body based on the Governor purportedly exceeding his authority. As the U.S. Supreme Court has held, individual legislators may not claim an institutional injury and bring suit on behalf of a legislature. *Raines v. Byrd*, 521 U.S. 811 (1997). Indeed, the General Assembly itself has previously recognized this limitation, drafting legislation to authorize suit by individual legislators in some instances in the past. Of course, no such legislation was passed here and the legislator Petitioners do not—and could not—claim any authority to bring suit on behalf of the General Assembly.

Third, Petitioner Norment's claim that "he plans to run for re-election in 2019" (Petition 1 ¶ 1), cannot confer standing on him. Petitioner Norment does not allege what, if any, competitive disadvantage he faces as a result of the April 22nd Executive Order. Nor could he, given that the election is still more than three years away. Petitioner Norment's allegation that he is injured by the April 22nd Executive Order because "absent relief from this Court, he will be required to compete for re-election before an invalidly constituted electorate" in 2019 (Petition 15, 39), is the quintessential example of a "remote or indirect interest" that does not provide standing, *Nicholas*, 161 Va. at 593.

Because Petitioners lack standing on each of the three grounds they allege, their Petition for Writs of Mandamus and Prohibition should be dismissed.

ARGUMENT

I. Petitioners Lack Standing To Bring Suit Based on an Alleged Injury to All Voters.

Petitioners' primary standing argument is that they are injured as voters because the allegedly unlawful re-enfranchisement of thousands of ex-felons "dilute[s their] votes"; "unconstitutionally dilute[s their] right to suffrage, in violation of Article I, Section 6 [of the Virginia Constitution]"; and "threaten[s] the legitimacy of the November elections." (Petition 15-16.) Petitioners fundamentally misunderstand the concept of vote dilution and rely on inapposite precedent.

A. Petitioners Cannot Bring Suit in this Court To Challenge the Qualifications of Other Voters.

As a threshold matter, if Petitioners want to challenge the qualifications of other voters, they are in the wrong court. The plain language of VA. CODE ANN. §§ 24.2-431 to 24.2-433 provides the proper procedure by which Petitioners can challenge the lawfulness of other voters' registrations. That statute provides in relevant part:

> In addition to challenging a voter's registration before the general registrar, any three qualified voters may file with the

> circuit court of the county or city in which they are registered, a petition stating their objections to the registration of any person whose name is on the registration records for their county or city. However, no petition may be filed if the only objection raised is based on removal of residence from the precinct.

VA. CODE ANN. § 24.2-431. This statutory procedure mandates that petitioners provide 15 days' advance notice to the challenged registered voters, VA. CODE ANN. § 24.2-432, and the circuit courts' decisions are subject to an appeal as of right to this Court, VA. CODE ANN. § 24.2-433. Petitioners have not taken advantage of this procedure. Instead, they have improperly sought direct and extraordinary relief from this Court.

If Petitioners were entitled to bring suit in this Court simply by claiming vote dilution on the basis of the allegedly unlawful enfranchisement of other voters, then enacting VA. CODE ANN. §§ 24.2-431 to 433 would have been unnecessary and of no effect. As this Court has held, "[o]ne of the basic principles of statutory construction is that where a statute creates a right and provides a remedy for the vindication of that right, then that remedy is exclusive unless the statute says otherwise." *Sch. Bd. of City of Norfolk v. Giannoutsos*, 238 Va. 144, 147 (1989). Here, the General Assembly provided a right for voters to challenge the qualifications of other voters and that is the exclusive method by which

voters can do so. Petitioners cannot make an end run around the statutory procedure prescribed by the General Assembly.

B. Petitioners Rely on Inapposite Precedent.

Even assuming, however, that Petitioners' circumvention of the statutory procedure is proper, Petitioners cannot proceed in this Court without establishing their standing. Neither Petitioners nor their *Amici Curiae* Former Attorneys General of Virginia (hereinafter "Attorneys General *Amici*") have cited a single case holding that voters have a legally cognizable vote dilution injury arising from a challenge to the *procedure* by which newly-enfranchised voters are added to the rolls. No such precedent exists. In lieu of authority for that proposition, Petitioners and the Attorneys General *Amici* cite a host of redistricting and malapportionment challenges that are entirely inapposite to the procedural challenge at issue here.

Standing in redistricting cases is generally governed by the rule that only a voter who lives in a district has standing to challenge the way that district was drawn. *See, e.g., Wilkins*, 264 Va. at 460; *Jamerson v. Womack*, 26 Va. Cir. 145, 1991 WL 835368, at *1 (1991), *aff'd*, 244 Va. 506 (1992); *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1265 (2015); *United States v. Hays*, 515 U.S. 737, 745 (1995). Such a rule makes sense as only a voter who lives within a gerrymandered district is

harmed by the gerrymandering and there is a concrete injury that is particularized to voters in that district that can be redressed if the district is struck down as an unlawful racial gerrymander. *Alabama*, 135 S. Ct. at 1265; *Hays*, 515 U.S. at 745-46.

In redistricting cases, courts have generally rejected the concept of standing to bring a statewide claim and have required voters to bring gerrymandering claims on a district-by-district basis. *See Alabama*, 135 S. Ct. at 1265. As the U.S. Supreme Court has recognized, "[d]emonstrating the individualized harm our standing doctrine requires may not be easy in the racial gerrymandering context, as it will frequently be difficult to discern why a particular citizen was put in one district or another"; however, "[w]here a plaintiff resides in a racially gerrymandered district, . . . the plaintiff has been denied equal treatment because of the legislature's reliance on racial criteria, and therefore has standing to challenge the legislature's action." *Hays*, 515 U.S. at 744-45. As to other potential plaintiffs who might find the statewide redistricting plan objectionable, the Court found such individuals have "only a generalized grievance against governmental conduct of which he or she does not approve." *Id*. at 745.

Petitioners here fall in the latter category rather than the former. They have no particularized injury specific to the composition or boundaries

of their districts or precincts, but instead assert only a "generalized grievance" that the Governor should not have re-enfranchised ex-felons throughout the Commonwealth using the particular procedure that he did. The redistricting cases on which they rely do not support them.

The malapportionment cases are similarly inapt. *Reynolds v. Sims*, 377 U.S. 533 (1964), the landmark case that held legislative district malapportionment violated the Equal Protection Clause of the Fourteenth Amendment, and its progeny concern an entirely different type of harm from that alleged by Petitioners, namely the "dilution of the weight of a citizen's vote." *Id*. at 555; *see also, e.g., Davis v. Dusch*, 205 Va. 676, 677, 680 (1964); *Brown v. Sanders*, 159 Va. 28, 45-47 (1932). In malapportionment cases, the injury conferring standing is the imbalance between the population of an electoral district vis-à-vis another district. This imbalance results in "dilution" in the relative power of voters living in overpopulated districts to influence the makeup of an elected body. There is a concrete harm to those living in the overpopulated and therefore underrepresented district. *Reynolds*, 377 U.S. at 562-63. Here, by contrast, the procedure by which the Governor restored ex-felons' voting rights has no effect on Petitioners' right to reside in equally populated districts; the April 22nd Executive Order does not alter the weight of any

Virginia resident's vote or introduce any inequity or imbalance whatsoever between individual voters. *Cf. Evenwel v. Abbott*, 136 S. Ct. 1120, 1132 (2016) (holding that states are not required to equalize state legislative districts based upon numbers of eligible voters, rather than total population).

C. Petitioners Misunderstand the Concept of Vote Dilution.

It is unclear what Petitioners mean by their repeated references to "vote dilution" given that even after newly-enfranchised voters are added to the rolls, the one-person-one-vote doctrine still applies and there is no inequality among the districts. In general "the focus of a vote dilution challenge is on the *effectiveness* of" a vote that has been successfully cast. *Farrakhan v. Gregoire*, 590 F.3d 989, 1006 (9th Cir. 2010), *reh'g granted and aff'd,* 623 F.3d 990 (9th Cir. 2010) (en banc) (emphasis in original). In vote dilution cases, the basis of the injury conferring standing is an alleged violation of the Equal Protection Clause or Section 2 of the Voting Rights Act (or state-law equivalents), *see generally Thornburgh v. Gingles*, 478 U.S. 30 (1986), provisions whose purpose is, in part, to protect the "effectiveness" of one's vote. But here, Petitioners' claimed injury—the blanket, rather than enumerated, restoration of ex-felon voting rights—has no nexus to their right to an "effective" vote. Petitioners offer no

explanation for how the provisions they contend require enumeration were enacted to protect the "effectiveness" of their vote. Petitioners do not, and could not, contend that any of the newly eligible voters were *ineligible* to have restored voting rights. They simply object to the procedural mechanism by which the ex-felons' rights were restored. Accordingly, contrary to the Attorneys General *Amici*'s claims, this is not "a textbook claim of vote dilution." (Brief of Attorneys General *Amici* at 27.). This case bears no relation to a vote dilution case.

To the extent Petitioners are instead arguing that enfranchising more voters increases the size of the electorate, thereby diminishing the potential *impact* of their vote, the very precedent they cite rejects this proposition. In *Duncan v. Coffee County, Tennessee*, 69 F.3d 88 (6th Cir. 1995), the Sixth Circuit panel wrote: "Merely expanding the voter rolls is, standing alone, insufficient to make out a claim of vote dilution." 69 F.3d at 94. More importantly, this entire line of cases, including *Duncan*, *Sutton v. Escambia County Board of Education*, 809 F.2d 770, 771 (11th Cir. 1987), *Collins v. Town of Goshen*, 635 F.2d 954, 958-59 (2d Cir. 1980), *Creel v. Freeman*, 531 F.2d 286, 287 (5th Cir. 1976), and *Locklear v. North Carolina State Board of Elections*, 514 F.2d 1152, 1154 (4th Cir. 1975), implicates the *composition* of a district, *i.e.* whether there is a sufficient state interest to

justify allowing non-residents to vote in a particular election. *See Collins*, 635 F.2d at 959 (contrasting *Reynolds* vote dilution with the issue in these cases, "how suffrage should be granted among putative electors having different degrees of interest in the special body to be elected") (citation and quotation marks omitted). Again, Petitioners and Attorneys General *Amici* do not attack the Commonwealth's interest in enfranchising ex-felons and its right to do so, but only the procedure by which the Commonwealth's Administration accomplished its goals.

At bottom, Petitioners' theory of vote dilution here rests on a flawed assumption—that the potential impact of an individual voter decreases as the total size of the electorate increases. In reality, the margin of victory, *i.e.* the competitiveness of elections, can remain the same even as the overall size of an electorate increases. There can be a landslide in an election with a smaller electorate or in an election with a larger electorate, or a razor-thin margin regardless of the size of the electorate or turnout. An election can be won by 300 votes with an electorate of 10,000 voters; the same margin of victory could result from an election involving 100,000 or 1,000,000 voters. For example, in 2013, current Attorney General Mark Herring defeated his opponent Mark Obenshain by 165 votes out of 2,212,851 total votes cast and, in 2005, then-Attorney General now ex-

Governor Bob McDonnell won his race by 323 votes out of 1,943,250 total votes cast.[2] By comparison, Petitioner Norment won Senate District 3 last year by over 20,000 votes.[3] The size of the electorate has nothing to do with the relative competitiveness of elections and therefore has nothing to do with the relative potential impact of any one individual's vote. The relative impact of an individual vote turns on how competitive the race is, *not* how many total votes are cast.

The implications of such a flawed notion of vote dilution would obviously be far-reaching. If adopted, Petitioners' theory would also give them standing to challenge the lawfulness of any statutes, regulations, executive orders, and policies regarding United States citizenship under the auspices of a "vote dilution" injury. Standing doctrine could not possibly tolerate such an open-ended set of "cases or controversies" so divorced from personal stakes in the outcome of litigation. *See Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 217-19 (1974) (concluding that the "generalized interest of all citizens in constitutional governance" does not support standing); *see also Ariz. Christian Sch.*

[2] *See* Virginia Dept. of Elections, Elections Database,http://historical.elections.virginia.gov/elections/search/year_from:2000/year_to:2015/office_id:12/stage:General (last visited June 21, 2016).

[3] *See* Virginia Dept. of Elections, Elections Database, http://historical.elections.virginia.gov/elections/search/year_from:2009/year_to:2015/office_id:9/stage:General (last visited June 21, 2016).

Tuition Org. v. Winn, 563 U.S. 125, 145-46 (2011) ("Few exercises of the judicial power are more likely to undermine public confidence in the neutrality and integrity of the Judiciary than one which casts the Court in the role of a Council of Revision, conferring on itself the power to invalidate laws at the behest of anyone who disagrees with them."). Since Petitioners' alleged vote dilution is not in fact dilution such that it would establish a legally cognizable injury, their claimed standing as registered Virginia voters must be rejected.

II. Petitioners Howell and Norment Do Not Have Standing To Bring Suit Based on an Alleged Injury to the General Assembly.

Petitioners Howell and Norment also contend that they have standing because the General Assembly suffered an injury when Governor McAuliffe purportedly exceeded his constitutional authority to restore ex-felons' civil rights, violating the separation of powers, failing to faithfully execute the laws and infringing the Legislature's right to initiate constitutional amendments. (Petition 39.) As a general rule, the U.S. Supreme Court has held that individual legislators may not claim an institutional injury and bring suit on behalf of a legislature. *Raines v. Byrd*, 521 U.S. 811 (1997). In *Raines*, six members of Congress filed suit to challenge the constitutionality of the Line Item Veto Act. *Id*. at 814. As a threshold

matter, the Supreme Court analyzed whether the plaintiffs had sufficiently alleged an injury that was "personal, particularized, concrete, and judicially cognizable," *id*. at 820, and concluded that they did not have a personal stake in the litigation:

> the injury claimed by the Members of Congress here is not claimed in any private capacity but solely because they are Members of Congress. If one of the Members were to retire tomorrow, he would no longer have a claim; the claim would be possessed by his successor instead. The claimed injury thus runs (in a sense) with the Member's seat, a seat which the Member holds . . . as trustee for the constituents, not as a prerogative of personal power.

Id. at 821 (citation omitted). In reaching this conclusion, the Supreme Court contrasted *Powell v. McCormack*, 395 U.S. 486 (1969), in which a member of Congress sued to reverse his exclusion from the House of Representatives, since that was not an "institutional injury," but a personal one. 521 U.S. at 820-21. By contrast, the claimed injury in *Raines* was in fact "widely dispersed" and "necessarily [impacted] all Members of Congress and both Houses . . . equally." *Id*. at 829, 821. Accordingly, none of the individual plaintiffs could claim a "personal stake" in the suit. *Id.* at 830. Here too, the individual legislators—though they have leadership positions—do not have an individualized stake in the suit; the

claimed injury is to the General Assembly as an institution, not to its members.

Similarly, in *Kucinich v. Obama*, 821 F. Supp. 2d 110 (D.D.C. 2011), the court held that a group of ten members of the House of Representatives lacked standing to challenge alleged violations of the War Powers Resolution on the grounds that the claimed injury "impacts the whole of Congress—not solely the ten plaintiffs[ ] before the Court." *Id*. at 117-18. The court found that *Raines* was squarely on point:

> As there is nothing making this deprivation uniquely personal to the ten Members before the Court, the plaintiffs' argument, at its core, is exactly that expressed by the plaintiffs in *Raines*—that the President's actions have "'alter[ed] the constitutional balance of powers between the Legislative and Executive Branches,' to their detriment." *Chenoweth*, 181 F.3d at 116 (quoting *Raines*, 521 U.S. at 816, 117 S.Ct. 2312). And, "[s]imply put, *Raines* teaches that generalized injuries that affect all members of Congress in the same broad and undifferentiated manner are not sufficiently 'personal' or 'particularized,' but rather are institutional, and too widely dispersed to confer standing." *Kucinich*, 236 F.Supp.2d at 7.

Kucinich, 821 F. Supp. 2d at 118.[4]

[4] *Raines* did identify a narrow exception, which permits legislators to claim an institutional injury in certain circumstances. Under *Coleman v. Miller*, 307 U.S. 433 (1939), legislators may sue to challenge the unlawful nullification of their votes as legislators. In that case, twenty state legislators sued "as a bloc" to enjoin a law that would not have been enacted by a deadlocked state Senate of forty members but for the deciding and allegedly unlawful vote of the state's Lieutenant Governor.

In past circumstances, the General Assembly itself has recognized that individual legislators may not represent the body without authorization. Following Attorney General Herring's decision not to defend the Commonwealth's ban on same-sex marriage in 2014, the House of Delegates passed HB 706 to provide that a member of the General Assembly would have standing to represent the interests of the Commonwealth in a proceeding in which a provision of the Constitution of Virginia is contested or the constitutionality, legality, or application of a law established under legislative authority is at issue and the Governor and Attorney General choose not to defend the law. *See* Legislative Information System, H.B. 706 (2014 Session), http://lis.virginia.gov/cgi-bin/legp604.exe?141+sum+HB706. The bill was never enacted. *Id.*

Here, of course, Petitioners Howell and Norment have not obtained any authorization from the General Assembly to bring this suit, and whether

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Raines, 521 U.S. at 821-24 (citing *Coleman*, 307 U.S. at 436-38). The *Raines* Court explained that "legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified." *Id*. at 823. However, the *Coleman* exception has no application in this case because: (1) the legislator-petitioners have not sued as a bloc, just as two individual legislators; and (2) as in *Raines*, they "have not alleged that they voted for a specific bill, that there were sufficient votes to pass the bill, and that the bill was nonetheless deemed defeated." *Id*. at 824.

doing so would even suffice to confer standing would itself be a close question under the circumstances of this case. This Court should "attach some importance to the fact that [the Petitioners have] not been authorized to represent their respective Houses of [the General Assembly]." *Raines*, 521 U.S. at 829. Indeed, "there is no claim that [the General Assembly], as an institution, has asserted that its role in the constitutional process has been diminished," and "there is certainly nothing to suggest that the plaintiff legislators speak on behalf of [the General Assembly] as a whole." *Kucinich*, 821 F. Supp. 2d at 118 (quoting *Kucinich v. Bush*, 236 F. Supp. 2d 1, 12 (D.D.C. 2002) (quoting *Allen v. Wright*, 468 U.S. 737, 752 (1984))) (citations, quotation marks and alterations omitted).

Ultimately, this Petition for Writs of Mandamus and Prohibition is entirely different from a case like *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S. Ct. 2652 (2015), where the Supreme Court found that the Arizona Legislature had standing to bring a separation-of-powers claim because it was "an institutional plaintiff asserting an institutional injury, and it commenced this action after authorizing votes in both of its chambers." *Id*. at 2664.

Accordingly, Petitioners Howell and Norment have no standing to sue on behalf of any alleged injury to the Virginia General Assembly as an institution.

III. Petitioner Norment Does Not Have Standing To Challenge the April 22nd Executive Order Based on His Plans to Run for Reelection in November 2019.

Finally, Petitioner Norment contends he has standing because he intends to run for reelection in 2019. Petitioner Norment claims that he is injured by the April 22nd Executive Order because "he will be required to compete for re-election before an invalidly constituted electorate." (Petition 39.)[5]

Petitioner Norment appears to be alleging that he has so-called "competitor standing." *See Fulani v. Brady*, 935 F.2d 1324, 1327 (D.C. Cir. 1991) (recognizing concept of "competitor standing" in circumstances where "a defendant's actions benefitted a plaintiff's competitors, and thereby caused the plaintiff's subsequent disadvantage"). To establish so-called "competitor standing," a plaintiff must allege that he or she has suffered or will suffer a competitive disadvantage due to the challenged law, policy, or administrative decision. For example, in *LaRoque v. Holder*, 650 F.3d 777 (D.C. Cir. 2011), the candidate challenged the federal

[5] Petitioner Speaker Howell does not allege that he intends to run for reelection.

government's refusal to preclear a non-partisan election system, specifically alleging that he would suffer a competitive disadvantage from the preservation of a partisan election system. *Id*. at 783-84. The court held that "such *competitive injuries* in the electoral arena can confer Article III standing." *Id*. at 786 (emphasis added); *see also, e.g., Fulani v. League of Women Voters Educ. Fund*, 882 F.2d 621, 626 (2d Cir. 1989) (holding candidate had standing to challenge § 501(c)(3) status of the League of Women Voters following League's exclusion of candidate from presidential primary debates, which had "palpably impaired Fulani's ability to compete on an equal footing with other significant presidential candidates"); *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 36-37 (1st Cir. 1993) (holding that candidate had standing to challenge campaign finance regulations on the grounds that "the coerced choice between public and private financing . . . constitutes an injury of a kind sufficient to confer standing"); *Natural Law Party of the U.S. v. FEC*, 111 F. Supp. 2d 33, 44 (D.D.C. 2000) (concluding that "inability to compete on an equal footing" constitutes an injury in fact); *Common Cause v. Bolger*, 512 F. Supp. 26, 30–31 (D.D.C. 1980) (finding that congressional candidates had standing to challenge constitutionality of federal law which allegedly served to grant subsidies worth more than $50,000 to incumbent candidates).

Here, Plaintiff Norment has offered no allegation at all that he has suffered or will suffer any competitive disadvantage due to the Governor's method of re-enfranching ex-felons. Absent such an allegation, his claimed injury is entirely "conjectural" and "hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Petitioner Norment has not even alleged that the April 22nd Executive Order will have an "impact on the strategy and conduct of [his] political campaign" in 2019, *Vote Choice, Inc.*, 4 F.3d at 36-37, let alone hinder or hurt his chances of reelection. *Cf. Wittman v. Personhuballah*, 136 S. Ct. 1732, 1737 (2016) (dismissing appeal for lack of standing where there was no evidence that new districting plan would "flood[ ]" two intervenors' districts "with Democratic voters" and that "their chances of reelection [would] accordingly be reduced"); *id.* ("When challenged by a court (or by an opposing party) concerned about standing, the party invoking the court's jurisdiction cannot simply allege a nonobvious harm, without more.").

While Petitioners rely on *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005), that case actually demonstrates precisely why Petitioner Norment's allegations are so deficient. In *Shays*, the court found that candidates could challenge certain rules promulgated by the Federal Election Commission because under those rules they would face "*intensified*

competition" given that the rules allegedly "permit[ed] what [the Bipartisan Campaign Reform Act] prohibits" and thereby required the two Congressmen to "anticipate and respond to a broader range of competitive tactics than federal law would otherwise allow." *Id*. at 86 (emphasis in original). The court found that allegations they would face "additional competitors and additional tactics" was sufficient to confer standing. *Id*. Petitioner Norment has made no such allegation as to any concrete competitive harm he would face here.

In addition to the fatal failure to mention what competitive disadvantage Petitioner Norment would suffer, it is significant that this lawsuit is being brought *more than three years in advance* of when Petitioner Norment will appear on the ballot in November 2019. A candidate cannot bring suit on competitor standing grounds if the contest is in the future and the challenged law poses no immediate threat. In *McConnell v. FEC*, 540 U.S. 93 (2003), *overruled on other grounds by Citizens United v. FEC*, 558 U.S. 310 (2010), the Supreme Court rejected Senator Mitch McConnell's claim to competitor standing in a 2003 suit challenging provisions of the McCain-Feingold campaign finance reform act. Senator McConnell's assertion in 2003 that he would face the prospect of a competitive disadvantage "45 days before the Republican

primary election in 2008" was deemed "too remote temporally" to establish standing. *Id*. at 226.

Similarly, any hypothetical injury to Petitioner Norment could not possibly come to pass until the 2019 cycle and, in any event, he has not identified or even hinted at what competitive disadvantage he would face from the restoration of civil rights to ex-felons. At this time, three years out from the 2019 Virginia legislative elections, Petitioner Norment has no declared opponent and, if he were to run unopposed, there *per se* could not be any competitive disadvantage to confer competitor standing. This is not hypothetical. Last year, in 2015, 17 of Virginia's 40 Senators (42.5 percent) were elected in uncontested races and, in 2011, 2007 and 1995, Petitioner Norment himself ran unopposed.[6] Petitioner Norment has no present interest which is "concrete and particularized" and "actual or imminent." *Wilkins*, 264 Va. at 459.[7] He opposes the April 22nd Executive Order but ultimately lacks "a direct, immediate, . . . and substantial interest" in the outcome. *Virginia Beach Beautification Comm'n v. Bd. of Zoning Appeals*

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[6] *See* Virginia Dept. of Elections, Elections Database, http://historical.elections.virginia.gov/elections/search/year_from:1982/year_to:2015/office_id:9/stage:General (last visited June 21, 2016).

[7] According to a case Petitioners' brief cites, "Any concrete, particularized, *non-hypothetical* injury to a legally protected interest in sufficient." *Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1352 (11th Cir. 2005) (emphasis added).

of City of Va. Beach, 231 Va. 415, 420 (1986) (quoting *Nicholas*, 161 Va. at 593).

The cases on competitor standing underscore that it is insufficient to simply allege illegality in the campaign environment or the structuring of the electorate. Even assuming that competitor standing could be premised on the mere addition of newly-enfranchised voters, Petitioner Norment has not alleged any competitive disadvantage whatsoever from the April 22nd Executive Order and therefore has not identified any legally cognizable injury he will experience as a competitor in the 2019 Virginia Senate elections.

CONCLUSION

Amicus curiae FELN fully supports Respondents' arguments on the merits as to why the April 22nd Executive Order is lawful and proper. However, this Court need not reach the merits because Petitioners do not have standing to raise the lawfulness of the April 22nd Executive Order in this Court. The Court should dismiss the petition for writs of prohibition and mandamus.

Dated: June 27, 2016

Respectfully submitted,

Amicus Curiae Fair Elections Legal Network

By Counsel

/s/ Jan A. Larson

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**Pro hac vice* motions pending

CERTIFICATE OF SERVICE AND FILING

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

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APPENDIX: WRITTEN CONSENT TO FILE AMICUS BRIEF

Gaber, Mark P.

From: Michael W. Kirk [mkirk@cooperkirk.com]
Sent: Wednesday, June 15, 2016 4:39 PM
To: Amunson, Jessica Ring; Chuck Cooper
Subject: RE: Request for Written Consent to File Amicus in Howell, et al. v. McAuliffe, et al.

Hi Jessie –

We hope all is well with you as well, and we're sorry we're not on the same side with you in this case.

The parties have agreed to blanket consents covering all amici, and we communicated that agreement to the clerk's office this afternoon, so you may file your brief without seeking leave.

MWK

From: Amunson, Jessica Ring [mailto:JAmunson@jenner.com]
Sent: Wednesday, June 15, 2016 4:29 PM
To: Chuck Cooper; Michael W. Kirk
Subject: Request for Written Consent to File Amicus in Howell, et al. v. McAuliffe, et al.

Chuck and Michael:

I hope that all is well with both of you. I am writing to you in your capacity as counsel for Petitioners in the *Howell, et al. v. McAuliffe, et al.* case in the Supreme Court of Virginia. Pursuant to Rule 5:30, I am writing to seek your consent to file an *amicus* brief on behalf of Fair Elections Legal Network in support of Respondents.

Please let me know by return email whether Petitioners consent to the filing of the brief.

Best,
Jessie

Jessica Ring Amunson

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Gaber, Mark P.

From: Raphael, Stuart A. [SRaphael@oag.state.va.us]
Sent: Wednesday, June 22, 2016 3:32 PM
To: Amunson, Jessica Ring
Cc: Cox, Trevor S.
Subject: RE: Request for Written Consent to File Amicus in Howell, et al. v. McAuliffe, et al.

Thank you, Jessie. Yes, Respondents consent.

Best regards,

Stuart

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Please note our address has changed.

From: Amunson, Jessica Ring [mailto:JAmunson@jenner.com]
Sent: Wednesday, June 22, 2016 2:29 PM
To: Raphael, Stuart A.
Subject: Request for Written Consent to File Amicus in Howell, et al. v. McAuliffe, et al.

Stuart:

I am writing to you in your capacity as counsel for Respondents in the *Howell, et al. v. McAuliffe, et al*. case in the Supreme Court of Virginia. Pursuant to Rule 5:30, I am writing to seek your written consent to file an amicus brief on behalf of Fair Elections Legal Network in support of Respondents.

Please let me know by return email whether Respondents consent to the filing of the brief.

Best,
Jessie

Jessica Ring Amunson

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