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LOUDOUN COUNTY, VIRGINIA

VIRGINIA:

IN THE CIRCUIT COURT OF LOUDOUN COUNTY

COMMONWEALTH OF VIRGINIA)

v.)

CARL BENJAMIN NETT)

Case Nos. CR 25-767 through 772

RESPONSE TO MOTION TO DISMISS

Comes now the Attorney for the Commonwealth, Special Prosecutor, and in response to the defendant's motion to dismiss the suspension action, says the following.

Clarification as to the Nature of the Law Supporting Suspension

The Commonwealth and the defendant have both cited and referenced the "REENROLLED" version of Senate Bill 648 (SB648). Each party has characterized the bill as enacting a new statute in the Code of Virginia relating to suspension from office. This is not an accurate characterization of the bill.

The language contained in the bill passed by the General Assembly and signed by the Governor relating to suspension (Section 2 subsections 1-5) will not appear in Virginia Code §15.2-1535.1. This entire section was the Second Enactment Clause of Chapter 1022 of the 2026 Acts of Assembly. It is the law of the Commonwealth of Virginia, but it will not appear in the Code of Virginia. Hereafter, the Commonwealth will site the new as the Second Enactment Clause.

Introduction

At the 2026 session of the General Assembly a law was enacted related to suspension from office applicable to the defendant. As noted above the Second Enactment Clause of Chapter 1022 of the 2026 Acts of Assembly mandates the suspension from office of certain public officials. (Chapter 1022 of The Acts of Assembly - 2026 Reconvened Session as it appears in the General Assembly website is Attached).

The legislation which created this statute was signed by the Governor with an emergency enactment clause which provided that its provisions became effective on April 22, 2026. The

pertinent language of the bill is as follows:

"Notwithstanding any provision of law to the contrary, in the event of a criminal proceeding against an officer of any town in Planning District 8 with a population between 8,000 and 10,000..., alleging the commission of a felony offense, the Court having jurisdiction over such offense shall enter an order suspending such officer pending the resolution of such proceeding."

Based on the mandatory language of the Second Amendment Clause, the Commonwealth filed a motion to suspend Benjamin Nett pursuant to its provisions.

Removal of Carl Benjamin Nett

The provisions of the Second Enactment Clause apply to Carl Benjamin Nett because

- 1) Purcellville is in Planning District 8 and has a population of 8,929 under the 2020 census; and
- 2) Mr. Nett is an elected member of the Purcellville Town Council; and
- 3) Mr. Nett has been indicted for several pending felony offenses in Loudoun Circuit Court.

Under subsection (2) of the Second Enactment Clause *"the Court having jurisdiction over such offense shall enter an order suspending such officer pending resolution of the proceeding..."*

The language of this law is clear and unambiguous. It leaves no discretion to the Court. Thus, unless there is some other bar to its implementation, the Court is required to suspend Mr. Nett from office pending trial of the criminal charges against him.

Response to Defendant's Bill of Attainder Defense

In response to the Commonwealth's motion, the defendant filed an opposition and Motion to Dismiss. The primary claim in that opposition is a claim that the law is unconstitutional. The defendant asserts that the law constitutes a *Bill of Attainder*, which is prohibited under the United States Constitution and the Virginia Constitution.

The sole question presented by the opposition is whether the Second Enactment Clause is a Bill of Attainder. If the law is a Bill of Attainder, the Court will be required to rule that the General Assembly has enacted a law which is unconstitutional. If the law is not a Bill of

Attainder, the Court will be required to suspend Benjamin Nett pending trial on the two (2) felony prosecutions against him.

Standard of Review - Constitutionality of the Second Enactment Clause

A well-settled tenet of statutory construction is that every statute and every act of assembly is presumed to be constitutional. The importance of this rule is emphasized by the principle that if a law can be construed in a manner as to render its terms constitutional, the Court is *required* to do so.

The cases citing this proposition are legion, and it is helpful to reiterate the law and the principles which support it.

"[D]uly enacted laws are presumed constitutional." Chianelli v. Commonwealth, 64 Va. App. 632, 642 (2015);

Bowman v. Virginia State Entomologist, 128 Va. 351, 375 (1920) ("Every statute is presumed to have been enacted in accordance with the constitutional requirements until the contrary is made to appear.");

Laurels of Bon Air, LLC v. Med. Facilities of Am. LIV Ltd. P'ship, 51 Va. App. 583, 613 (2008) ("All statutes enacted by the General Assembly are presumed to be constitutional."). See Tanner v. City of Va. Beach, 277 Va. 432, 438 (2009). "We are required to resolve any reasonable doubt concerning the constitutionality of a law in favor of its validity. Thus, if a statute or ordinance can be construed reasonably in a manner that will render its terms definite and sufficient, such an interpretation is required." *Id.* at 438-39 (citations omitted).

The acts of the General Assembly are presumed to be constitutional, and the Court of Appeals "will not invalidate a statute unless that statute clearly violates a provision of the United States or Virginia Constitutions." Marshall v. N. Va. Transp. Auth., 275 Va. 419, 427 (2008) (citations omitted). "[E]very reasonable doubt regarding the constitutionality of a legislative enactment must be resolved in favor of its validity." *Id.* at 428 (citations omitted).

Although Congress may act only pursuant to a grant of enumerated power, United States v. Comstock, 560 U.S. 126, 133 (2010), the General Assembly is not so limited, Harrison v. Day, 201 Va. 386, 396 (1959) ("The Constitution of the State is not a grant of legislative powers to the General Assembly, but is a restraining instrument only, and, except as to matters ceded to the federal government, the legislative powers of the General Assembly are without limit."). Thus, "unless [a] statute clearly violates a provision of the United States or Virginia Constitutions[,] the General Assembly has the power to enact it." Marshall, 275 Va. at 427.

What is a Bill of Attainder?

As the Supreme Court of the United States noted in United States v. Brown, 381 U.S. 437 (1965), a leading case on Bills of Attainder, what began as a narrow legal action in the

seventeenth and eighteenth century, an Act of Parliament which sentenced specified persons to death, has grown into a constitutional prohibition encompassing a broad range of legislative actions, related to "legislative punishment" without "due process." The constitutional and judicial journey of that prohibition is set forth comprehensively in Brown, and that case is attached hereto for reference.¹

Rather than reviewing that journey, the issue before this Court can best be addressed by referring to the portion of United States v. Brown, 381 U.S. 437, pages 441 through 449, and by acknowledging the parameters of Bills of Attainder as they presently exist under constitutional jurisprudence.

Today, the constitutional prohibition of Bills of Attainder can be summarized by referring to the language in Brown quoting another leading Supreme Court case in Bills of Attainder, United States v. Lovett, 328 U.S. 303 (1946):

"[L]egislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial² are bills of attainder prohibited by the Constitution. ... This permanent proscription from any opportunity to serve the Government is punishment, and of a most severe type"

United States v. Brown, 381 U.S. 437, 448-449 (1965).

Applying this definition to the present statute three questions are raised. Answering any of the three in the negative will defeat the defendant's argument and uphold the constitutionality of the statute.

- 1) Does the statute apply to "named individuals or to easily ascertainable members of a group?"
- 2) Does the statute inflict punishment?

¹ While is beyond the authority of this Court to overrule Supreme Court precedent, the Commonwealth preserves that right to challenge that prior precedent. The Commonwealth asserts that the language of the Bill of Attainder Clause should be limited to a strict construction of that phrase and asserts for the record that it does not apply to a "Bill of Pains and Penalties."

² A full judicial trial is not required. This phrase, used in Lovett, speaks to the element of due process

3) Is that punishment inflicted without due process?

Named Individuals or to Easily Ascertainable Members of a Group

The Commonwealth concedes that the law does focus on a narrowly defined group of individuals. It applies to town officials in Planning District 8 with a 2020 population of 8,000 to 10,000 persons who have been (or will be in the future) charged with a felony offense. The language of the law applying to towns appears to apply to a single town, Purcellville. That being said, it does not apply only to Benjamin Nett. Any "official" indicted for a felony offense would be subject to its provisions. In fact, Kwasi Fraser falls under the law at this time, and it would apply to any official subsequently charged with a felony offense. It is narrow scope, but not exclusive.

The defendant has suggested in his opposition that this narrow scope is the key factor in his argument that the law is a Bill of Attainder. That focus is misguided. Stated simply, indicted public officials do not qualify as a "group." However even if the Court were to find that this law applies to "easily ascertainable members of a group," this is but one component of the Bill of Attainder analysis. The Supreme Court case of Communications Assn. v. Douds, 339 U.S. (1950), cited more fully below makes this clear. In Douds the section of law in question, a provision of the National Labor Relations Act, was directed towards members of the Communist Party. This is the same group that was subject of the provisions of the Labor-Management Reporting and Disclosure Act of 1959 that the Supreme Court found to be a Bill of Attainder in United States v. Brown, 381 U.S. 437, 448-449 (1965). In Douds even though the act related to the same easily ascertainable members of a group, the law was not a Bill of Attainder because the remaining elements of the Attainder analysis had not been found. Thus, regardless of whether the Court in this case agrees with the Defendant that the first element exists, the law passes constitutional muster if the other two elements do not exist.

Does the Law Inflict Punishment?

This is where the defendant's argument clearly fails. Unlike the other Attainder cases where an ascertainable group is *permanently barred or prohibited* from employment or office

because of their status, this law is limited to a *temporary suspension from office*;

It is noteworthy that the Second Enactment Clause limits the temporary suspension to a serious triggering event, the existence of a criminal felony charge. The law does not apply to misdemeanor prosecutions. The reason is clear; conviction of a felony offense is an *automatic* disqualification from holding office in the Commonwealth of Virginia. Thus, the law's temporary suspension from office while a felony prosecution unfolds is consistent with legislative and constitutional restrictions unique to a serious felony prosecution.

While the provisions of the law are triggered by a felony prosecution, if the suspended individual is acquitted of the pending felony charge, the suspension ends. The office is not withheld from the individual unless and until there is a felony conviction, as the law only imposes a temporary suspension until the resolution of the felony charges.

It is the temporary nature of the suspension that distinguishes this statute from every other case that has found a legislative act unconstitutional under the Bill of Attainder Clause.

This distinction places this aspect of the statute in line with the Supreme Court's holding in Communications Assn v. Douds, 339 U.S. (1950). In Douds the Court found that a provision of the National Labor Relations Act which denied benefits and imposed restrictions on certain persons associated with the Communist Party was not a Bill of Attainder. The holding was grounded on the language in the act that permitted a restricted person from executing an affidavit disavowing restricting status and activity.

This holding is persuasive because although the National Labor Relations Act created an initial prohibition or restriction, subsequent actions created an avenue to lift or exonerate a person from such prohibition or restriction.

The temporary suspension under the Second Enactment Clause which will be automatically lifted upon acquittal of the felony charge is akin to the avenue that the Douds Court cited which placed the provisions of the National Labor Relations Act outside the constitutional restrictions of a Bill of Attainder.

It is noteworthy that all of the cases where the Supreme Court has held that an legislative

provision was a Bill of Attainder related to a *total and permanent bar or prohibition*. None relate to a temporary suspension status which potentially evaporates at the conclusion of the triggering event - the felony prosecution. In fact, it would be a far reaching extension of constitutional jurisprudence for the Court to hold that a *temporary suspension from office* is the type of "punishment," prohibited under the Bill of Attainder Clause.

Due Process

Although this third consideration (due process) has been separated from the second (punishment) for the purposes of argument, they really must be read together, because the temporary suspension that the defendant asserts is unconstitutional punishment under this law only occurs when there has been judicial intervention and when there has been due process. The suspension is triggered when an accused has been charged with a felony offense.

Under the laws of the Commonwealth, a criminal felony charge can only be initiated

- 1) Through judicial intervention by a neutral and detached judicial body (grand jury) or judicial official (a Judge or Magistrate); and
- 2) By a finding of probable cause by such judicial officer.

"Probable Cause in the criminal context is found when there is reasonable ground to believe that the crime has been committed and the accused is the person who committed it. It is defined as that degree of proof that raises a strong suspicion in the mind that a crime has been committed and the defendant committed that crime." Moore v. Commonwealth, 218 Va. 388, 391 (1977).

This is a critical distinction from every other instance where a legislative act has been invalidated as a Bill of Attainder. Under the Second Enactment Clause the status that triggers a temporary suspension from office *does not occur without due process* and substantive judicial intervention. It does not occur without a neutral judicial officer making a probable cause determination, and, significantly, once charges are initiated it is that same due process that allows a charged defendant to challenge the initiation and the legitimacy of felony prosecution.

Thus, it is the temporary nature of the suspension under the Second Enactment Clause *coupled with* the due process already afforded an accused felon that clearly distinguishes this legislative act from any other instance where the Supreme Court has found a legislative act to be

an unconstitutional Bill of Attainder.

The power of the General Assembly to impose restrictions upon individuals charged with a felony offense is unquestioned. Fundamental rights such as liberty, freedom of movement, second amendment (gun) rights, and even freedom of speech may be limited and curtailed upon an individual once he is charged with a felony offense, and before his case has been adjudicated. All of these restrictions come by virtue of a finding of probable cause that the individual has committed a serious crime (a felony) by a neutral and detached judicial officer, with all of the due process protections attendant to that status. The suspension provision at issue under the present law is no different, and just as loss of liberty pending trial is not punishment without due process, and just as loss of the right to carry a gun pending trial is not punishment without due process, suspension from office pending the adjudication of a felony offense is not punishment without due process.

Conclusion

Extending the scope of Attainder to instances where an individual or group has been afforded due process, when that due process triggers a temporary restrictions on rights no different than the restrictions typically imposed on accused felons, would be an unprecedented and far-reaching expansion of the constitutional scope of Attainders. There is a reason that the Supreme Court has not extended it thus.

WHEREFORE, the Attorney for the Commonwealth files this as his opposition to defendant motion to dismiss as unconstitutional Bill of Attainder.



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Certificate Of Delivery

I hereby certify that a true copy of the forgoing Notice and Motion for Joinder was emailed to Ryan Campbell on May 5, 2026.


Eric L. Olsen

VIRGINIA ACTS OF ASSEMBLY - 2026 RECONVENED SESSION

CHAPTER 1022

An Act to suspend certain officers, require a study, adopt a remedial plan, and establish meeting requirements of town councils in certain towns and to amend the Code of Virginia by adding in Article 6 of Chapter 15 of Title 15.2 a section numbered 15.2-1535.1, relating to members of local governing body; continuing personal interest in certain transactions; emergency.

[S 648]

Approved April 22, 2026

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding in Article 6 of Chapter 15 of Title 15.2 a section numbered 15.2-1535.1 as follows:

§ 15.2-1535.1. Members of governing body; continuing personal interest in certain transactions.

Any member of a governing body in any locality, who has been employed by any governmental agency that is a component part of and which is subject to the ultimate control of that governmental body of which he is a member, shall be deemed to have a continuing personal interest, as defined in § 2.2-3101, in that agency for a period of two years following the termination of such employment.

2. § 1. Notwithstanding any provision of law to the contrary, in the event of a criminal proceeding against an officer of any town in Planning District 8 with a population between 8,000 and 10,000 according to the latest United States decennial census alleging the commission of a felony offense, the court having jurisdiction over such offense shall enter an order suspending such officer pending the resolution of such proceeding and any related proceeding under § 24.2-231, 24.2-232, 24.2-233, 24.2-234, or 24.2-234.1 of the Code of Virginia. If such offense originates in district court, such court shall have authority to issue an order pursuant to this section of this act. Upon transfer to circuit court or if such offense originates in circuit court, such circuit court shall enter an order pursuant to this section of this act on the record. The presiding court may dissolve such order if the final outcome of the felony offense is an acquittal, nolle prosequi, or dismissal, including if the offense was deferred and dismissed after a finding of facts sufficient to justify a finding of guilt.

During a suspension pursuant to this enactment, the court may appoint some suitable person to act in the officer's place.

§ 2. Any town in Planning District 8 with a population between 8,000 and 10,000 according to the latest United States decennial census shall procure a study to evaluate the condition and status of the town's debt, infrastructure, utilities, and other significant liability risks, to be performed by a public institution of higher education with a student population of at least 15,000 students in consultation with a chief administrative officer of a locality in Planning District 8 with a population of at least 500,000 according to the latest United States decennial census. The study shall make recommendations about prioritizing and identifying the needs of the town as well as any recommendations as to amendments to the town's charter. The study shall conclude no later than July 1, 2027.

§ 3. Any town in Planning District 8 with a population between 8,000 and 10,000 according to the latest United States decennial census for which a study is conducted pursuant to § 2 of this act shall adopt a plan consistent with the study to address such town's needs in a fiscally appropriate manner that does not jeopardize the town's bond rating.

§ 4. In any town in Planning District 8 with a population between 8,000 and 10,000 according to the latest United States decennial census, the town council shall only take votes on matters that have been (i) properly published at least three days prior to the vote as part of a town council agenda or (ii) otherwise approved as additional agenda items or as amendments to existing agenda items by a three-fourths vote of all the members of the council at the start of the meeting. Any resident of the town shall have standing in the general district court of the county in which the town is located to challenge a town council vote in conflict with this section or the provisions of § 2.2-3112 of the Code of Virginia, and such case shall take precedence on the docket. Any prevailing resident filing such case shall be entitled to attorney fees.

§ 5. In any town in Planning District 8 with a population between 8,000 and 10,000 according to the latest United States decennial census, any full-time town manager shall be a resident of the Commonwealth of Virginia unless the town council of such town has waived such requirement by a majority vote of the town council.

3. That an emergency exists and this act is in force from its passage.

4. That the provisions of the second enactment of this act shall expire on July 1, 2028.