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STATEMENT OF THE CASE

I. Nature of the Case and Material Proceedings Below

Plaintiff-Appellant Jeremy Wade Smith ("Mr. Smith") appeals from summary judgment granted to the Commonwealth, the Defendant-Appellee, in the City of Richmond Circuit Court. (JA at 20, 368, 469).[1] Mr. Smith brought claims for breach of contract requesting specific performance, violation of the Due Process and Takings Clauses of the Virginia Constitution, a permanent injunction, and a hearing on expungement from the sex offender registry. (JA at 7-16). These claims relate to Mr. Smith's 1999 plea agreement with the Commonwealth, which the Commonwealth breached by applying subsequent statutory amendments against Mr. Smith, depriving him of vested contractual rights. (JA at 1). This appeal was granted as to five assignments of error.

II. Statement of the Facts

a. Background Facts

On February 9, 1999, a grand jury indicted Mr. Smith (DOB 5/26/1975) with rape. (JA at 174). The relationship was consensual and the girl was 14 when the incident happened, on May 15, 1997. (JA at 204). Through the relationship, Mr. Smith fathered a child. (JA at 196, 205).

[1] Citations to the Joint Appendix shall be made parenthetically in the brief, as shown here.

On June 8, 1999, the Commonwealth and Mr. Smith (represented by Charles Cosby, Esq.) executed a written plea agreement whereby the Commonwealth agreed to reduce the charge to carnal knowledge of a minor in violation of Virginia Code § 18.2-63 (1998 Cum. Supp.). (JA at 18, 368). The written agreement did not explicitly mention the sex offender registration requirements or limitations, but the existing law required registration and reregistration "as a part of the sentence imposed upon conviction" for both rape and carnal knowledge of a minor. Va. Code § 19.2-298.1(a)-(b) (1998 Cum. Supp.). (JA at 18). Carnal knowledge of a minor had lesser registration obligations than rape, as discussed below.

At the plea and sentencing hearing later the same day, the court agreed to the recommended sentence, which included ten years' incarceration suspended for eighteen years, though it said it was "hard pressed" not to order actual incarceration. (JA at 205-06). The Commonwealth reminded the court that Mr. Smith would have to register as a sex offender, and Mr. Crosby stated that Mr. Smith understood this requirement. (JA at 206). The sentencing order notes the registration requirement. (JA at 19, 368).

b. Registration Laws in 1999

On June 8, 1999, the sex offender registration laws appeared in the then-existing Va. Code §§ 19.2-298.1 to -298.4 (1998 Cum. Supp.). They are briefly summarized as follows:

1. **Mr. Smith's offense not a "sexually violent offense":** Rape was classified as a "sexually violent offense," but carnal knowledge of a minor (Va. Code § 18.2-63 (1998 Cum. Supp.)) was not classified as such unless the defendant had two previous offences, which Mr. Smith did not. Va. Code § 19.2-298.1(a) (1998 Cum. Supp). (JA at 174, 260-61).

2. ***Automatic*** **expungement from registry:** Mr. Smith's name and information were to be automatically removed from the registry, and his registration requirements terminated, ten years following his initial registration.[2]

[2] Under then-existing Va. Code § 19.2-298.2 (1998 Cum. Supp.), the registration requirements continued only for ten years from the date of the initial registration, except a person convicted of a "sexually violent offense" had to reregister for life. Under then-existing Va. Code § 19.2-298.3(b) (1998 Cum. Supp.), "[t]he name of any person required to register under § 19.2-298.1 and all identifying information **shall be removed** from the Registry by the Department of State Police . . . **at the end of the period for which the person is required to register** under § 19.2-298.2," (emphasis added) and the person (other than one convicted of a "sexually violent offense") had a right to petition the circuit court for such removal any time ten years after his initial registration. Therefore, § 19.2-298.3(b) mandated the Department of State Police to remove Mr. Smith from the registry ten years following his initial registration.

3. **Ten-day deadline for registration and reregistration:** Initial registration was required within ten days. Reregistration was required ten days following a change of residence, annually for non-"sexually violent offenses," and every ninety days for "sexually violent offenses." Va. Code § 19.2-298.1 (1998 Cum. Supp). Failure to reregister was a Class 6 felony if convicted of a "sexually violent offense," and a Class 1 misdemeanor for a non-"sexually violent offense." Va. Code § 18.2-472.1 (1998 Cum. Supp).

4. **Limited registry information:** The registrant had to provide only his or her name and aliases, the date and locality of the conviction, fingerprints, a photograph, date of birth, social security number, current address, and a description of the offense or offenses. Va. Code § 19.2-298.1(d)-(e) (1998 Cum. Supp).

Mr. Smith has complied with these registration requirements imposed under the law "as a part of the sentence" pursuant to his plea of guilt, Va. Code § 19.2-298.1(b) (1999 Cum. Supp.), as well as the additional registration requirements imposed on him by the Commonwealth since 2008, which are the subject of this action. (JA at 262). Mr. Smith was released from supervised probation in 2001. (JA at 382). His civil rights were restored by the Governor on August 31, 2010. (JA at 269). For many

years he has also been the sole custodian and sole provider for his daughter born from the relationship. (JA at 300, 355, 365).

c. Alteration of Registration Laws

After nine years of registration and Mr. Smith's compliance with the terms of his plea agreement, including the implicit registration requirements incorporated therein, the Commonwealth unilaterally altered the registration laws effective July 1, 2008. 2008 Va. Acts Ch. 877. (JA at 124, 159-60). This was done to secure continued federal funding for law enforcement programs. (JA at 188). The amended registration laws have been enforced against Mr. Smith to his detriment *inter alia* as follows:

1. **Reclassification of offense, resulting in new obligations:** Carnal knowledge of a minor is now classified retroactively as a "sexually violent offense." Va. Code § 9.1-902(e)(2). (JA at 162, 176, 181). As a result, Mr. Smith is now subject to quarterly instead of annual reregistration, subject to registration **for life**, subject to a felony (instead of a misdemeanor) for failure to reregister, and is prohibited from entering school or other specified property without special permission. Va. Code §§ 9.1-904(A), -907, -908; 18.2-370.5., -472.1. (JA at 161-165).

2. ***No expungement*** **from registry:** Those convicted of "sexually violent offenses," including Mr. Smith whose offense was retroactively

reclassified, cannot seek expungement from the registry. (JA at 162). Expungement is no longer automatic for any registrant, and a person convicted of a non-"sexually violent offense" must wait fifteen or twenty-five years before petitioning for expungement. Va. Code §§ 9.1-908, -910.

3. **Increased registration information required:** In addition to the registration information previously required, the registrant must also provide a DNA sample; e-mail information; instant message, chat or other Internet communication names; palm prints; information about his place of employment; motor vehicle, watercraft, and aircraft information; and information about any institution of higher learning the person is attending. Va. Code §§ 9.1-903(b), 906.

4. **Deadlines for reregistration shortened:** Reregistration deadlines are reduced from ten days to three days, and reregistration is also required after a change in employment, vehicle ownership, and within **thirty minutes** of a change in e-mail, instant messaging, chat, or Internet communication identification. Va. Code § 9.1-903(b), (e)-(g).

d. Procedural History

Mr. Smith filed this action against the Commonwealth in the City of Richmond Circuit Court on February 25, 2010, with service on the Attorney General on May 20, 2010. (JA at 1, 36). The Virginia Department of State

Police ("State Police") demurred twenty-two days after service on June 11, 2010, and Mr. Smith subsequently moved for default judgment. (JA 30, 56). The motions were argued on September 13, 2010. (JA at 73-107). The State Police moved orally to amend its demurrer and moved for leave to file a late response. (JA a 92-93, 99-100). By order dated October 14, 2010, the Court granted the Commonwealth leave to file a late response, and the remaining motions were denied or overruled. (JA at 119). The Commonwealth was directed to file its answer by October 19, 2010, and the State Police did so. (JA at 119, 121).[3]

On or about January 26, 2012, Mr. Smith moved for summary judgment in this case. (JA at 133). On or about February 2, 2012, the State Police moved for summary judgment. (JA at 185). The motions were argued on April 13, 2012. (JA at 293-364). On June 21, 2012, the Circuit Court entered its opinion and order, finding in favor of the Commonwealth on all claims, granting summary judgment to the Commonwealth, denying Mr. Smith's motion for summary judgment, and dismissing Mr. Smith's counts and claims with prejudice. (JA at 469).

[3] In a separate legal action, the Richmond Circuit Court on November 9, 2011, granted Mr. Smith permission to enter the City of Richmond Public Schools and a specified day care to tend to his children and participate in their activities, both pursuant to Va. Code § 18.2-370.5. (JA at 271-73).

ASSIGNMENTS OF ERROR

I. The Circuit Court erred in denying Mr. Smith's motion for summary judgment as to Count I (Breach of Contract – Request for Specific Performance) and granting summary judgment to the Commonwealth on that Count, because the sex offender registration requirements and limitations effective in 1999 were material terms of Mr. Smith's contract with the Commonwealth that the Commonwealth breached by unilaterally imposing higher registration requirements on him in violation of the common law of Virginia. (Preserved at JA at 469; see also JA at 141-44, 231-32, 236-42, 298-318, 455-69).

II. The Circuit Court erred by interpreting the post-conviction legislative amendments as applicable to Mr. Smith in derogation of his vested contractual rights, in violation of Virginia Code § 1-239 and Article I, § 11 of the Virginia Constitution. (Preserved at JA at 469; see also JA at 141-142, 232-33, 242-49, 318-22, 455-69).

III. The Circuit Court erred in denying Mr. Smith's motion for summary judgment as to Count II (Unconstitutional Taking) and granting summary judgment to the Commonwealth on that Count, because depriving Mr. Smith of his common law contractual rights under his plea agreement without just compensation constituted an unconstitutional taking in violation of Art I (Declaration of Rights) § 11 of the Virginia Constitution. (Preserved at JA at 469; see also JA at 231-33, 248, 452-55).

IV. The Circuit Court erred in denying Mr. Smith's motion for summary judgment as to Count III (Due Process Violation) and granting summary judgment to the Commonwealth on that Count, because depriving Mr. Smith of his common law contractual rights under his plea agreement without a hearing and depriving Mr. Smith of the benefit of his bargain constituted a deprivation of property without due process in violation of Art I (Declaration of Rights) § 11 of the Virginia Constitution. (Preserved at JA at 469; see also JA at 231-33, 248, 321-22, 452-55).

V. The Circuit Court erred in denying Mr. Smith's motion for summary judgment as to Count IV (Permanent Injunction) and Count V

(Petition for Expungement Hearing) and granting summary judgment to the Commonwealth on those Counts on the basis that there was no contractual or constitutional violation, because those violations have been established. (Preserved JA at 469; see also JA at 147-150, 249, 322-326).

STANDARD OF REVIEW

In an appeal from a grant or denial of summary judgment, this Court reviews the application of law to undisputed facts *de novo*. St. Joe Co. v. Norfolk Redev. & Hous. Auth., 283 Va. 403, 407, 722 S.E.2d 622, 635 (2012). Conclusions of fact based on a summary judgment record have no binding effect whatsoever in the context of appellate review. Commercial Bus. Sys. v. Halifax Corp., 253 Va. 292, 296, 484 S.E.2d 892, 894 (1997). Where facts are in dispute, they are to be taken in the light most favorable to the non-moving party. Wilby v. Gostel, 265 Va. 437, 440, 578 S.E.2d 796, 797 (2003). Summary judgment can be granted if a party is entitled to judgment as a matter of law. Va. Sup. Ct. R. 3:20. "The filing of cross-motions for summary judgment does not, in itself, resolve the question whether material facts remain genuinely in dispute." Ashland v. Ashland Inv. Co., 235 Va. 150, 154, 366 S.E.2d 100, 103 (1988). Instead, the facts must be viewed independently with respect to each motion in the light most favorable to the non-moving party. Cen. Nat'l Ins. Co. v. Va. Farm Bureau Mut. Ins. Co., 222 Va. 353, 356, 282 S.E.2d 4, 6 (1981).

AUTHORITIES AND ARGUMENTS

I. The Circuit Court erred in denying Mr. Smith's motion for summary judgment as to Count I (Breach of Contract – Request for Specific Performance) and granting summary judgment to the Defendant on that Count, because the sex offender registration requirements and limitations effective in 1999 were material terms of Mr. Smith's contract with the Commonwealth that the Commonwealth breached by unilaterally imposing higher registration requirements on him in violation of the common law of Virginia.

a. Mr. Smith's plea agreement is a contract incorporating the registration laws existing at the time it was entered.

The Circuit Court erred in denying Mr. Smith's motion for summary judgment. Plea agreements are contracts between the criminal defendant and the Commonwealth, governed by Virginia contract law. In Virginia, plea agreements implicitly, by operation of law, incorporate all pertinent statutes existing at the time the contract is created, making those laws part of the contractual terms. These points were clearly established in Wright v. Commonwealth, 275 Va. 77, 81-82, 655 S.E.2d 7, 10 (2008). See also Williston on Contracts §§ 30:19, :23 (4th ed.).

In Wright, a grand jury indicted Wright of capital murder, and a plea agreement reduced the charge to first degree murder with an agreed sentence of life imprisonment. The court accepted the plea agreement but also imposed a statutorily mandated period of post-release supervision and suspended incarceration, which was not mentioned in the plea agreement.

Wright challenged this post-release supervision and suspended incarceration, asking the court to enter a sentence consistent with the plea agreement. Wright, 275 Va. at 79, 655 S.E.2d at 8. This Court held that the statutes mandating the post-release supervision and suspended incarceration "constituted a part of Wright's plea agreement as though they were incorporated therein . . . . [T]his principle of contract law applies to plea agreements." Id. at 81-82, 655 S.E.2d at 10. This Court quoted Paul v. Paul, 214 Va. 651, 653, 203 S.E.2d 123, 125 (1974): "The law effective when the contract is made is as much a part of the contract as if incorporated therein." In fact, the Court held that the trial court *followed* the plea agreement *by* imposing the additional terms, because these additional terms were implicitly part of Wright's agreement even if he did not realize it. Wright, 275 Va. at 82, 655 S.E.2d at 10.[4]

[4] For more Virginia cases finding existing law to be part of a contract, see, e.g., Buchanan v. Doe, 246 Va. 67, 72, 431 S.E.2d 289, 292 (1993); Marriott v. Harris, 235 Va. 199, 215, 368 S.E.2d 225, 233 (1988); Harbour Gate Owners' Ass'n, Inc. v. Berg, 232 Va. 98, 105, 348 S.E.2d 252, 257 (1986); Paul v. Paul, 214 Va. 651, 653, 203 S.E.2d 123, 125 (1974); Maxey v. Amer. Cas. Co., 180 Va. 285, 290, 23 S.E.2d 221, 223 (1942); Citizens Mut. Bldg. Ass'n v. Edwards, 167 Va. 399, 404, 189 S.E. 453, 455 (1936); S.H. Hawes & Co. v. William R. Trigg Co., 110 Va. 165, 190, 65 S.E. 538, 548 (1909), *modified on other grounds sub nom.* United States v. Ansonia Brass & Copper Co., 218 U.S. 452 (1910); Union Cent. Life Ins. Co. v. Pollard, 94 Va. 146, 153, 26 S.E. 421, 422 (1896); Esparza v. Commonwealth, 29 Va. App. 600, 606, 513 S.E.2d 885, 888 (1999).

In light of Wright, Mr. Smith's 1999 plea agreement with the Commonwealth was a contract implicitly incorporating the law existing at the time. The then-existing sex offender registration laws were undoubtedly pertinent to the plea agreement. The plea agreement bound Mr. Smith contractually to enter a plea of guilt to a crime for which registration was required. Va. Code § 19.2-298.1(a)-(b) (1998 Cum. Supp.). Acceptance of that plea by the court upon finding it was voluntarily and knowingly made would compel the court to impose registration upon Mr. Smith "as a part of [his] sentence," regardless of the other terms of the plea agreement or sentence. Va. Code § 19.2-298.1(b) (1999 Cum. Supp.). Thus, by entering the contract voluntarily and knowingly and abiding by its terms through the plea hearing, Mr. Smith was subjecting himself to the registration laws as they existed at the time. See also Williston §§ 30:19, :23.

The criminal court's factual finding that Mr. Smith entered the plea agreement "voluntarily" and "knowingly" (JA at 19, 368) means Mr. Smith knew and understood the registration laws existing at the time and was willing to accept those requirements to be imposed "as a part of [his] sentence." This knowledge, understanding, and acceptance of the registration laws is also shown through the plea and sentencing hearing and in Mr. Smith's subsequent conduct. First, in conjunction with this plea

agreement, Mr. Smith was represented by experienced and able counsel, Mr. Charles Cosby, Esq. (JA at 19, 368). At the hearing the attorney for the Commonwealth unilaterally noted that Mr. Smith would have to register as a sex offender. (JA at 206). Mr. Crosby, an officer of the court, stated to the court, "Yes, [Mr. Smith] understands that." (JA at 206). The court responded, "All right. You will register as a sex offender." (JA at 206). Neither Mr. Smith nor his counsel objected to this, and this requirement was explicitly stated in the sentencing order. Secondly, since his conviction, Mr. Smith has complied with the registration laws. (JA at 262, 270, 368).

The Commonwealth tries to vitiate Mr. Smith's contractual rights with respect to registration in several unconvincing ways. It points to the fact that the plea agreement contains an integration clause, arguing that this negates any claim of implicit terms. (Petition Response at 8). The clause, however, only negates claims of other *oral or written* agreements, which Mr. Smith does not raise. (JA at 18, 368). It does not and cannot negate the operation of the law, by which law existing at the time is implicitly incorporated into a written contract, including plea agreements. As stated, these registration requirements were to be "a part of the sentence imposed upon conviction," very similar to Wright. Va. Code § 19.2-298.1(b) (1999 Cum. Supp.).

The Commonwealth also argues the type of plea agreement in Wright was different, being a plea agreement under Rule 3A:8(c)(1)(C) rather that (c)(1)(B). (Petition Response at 6-7). The type of the plea agreement did not affect the Court's determination in Wright. The Court used general principles of contract law to resolve the issue. Wright, 275 Va. at 79, 81-82, 655 S.E.2d at 8-10; see also Williston §§ 30:19, :23. Moreover, just as in Wright, the additional terms imposed here were a statutorily mandated part of the sentence. Va. Code § 19.2-298.1(b) (1999 Cum. Supp.). The Commonwealth asserts in a convoluted argument, however, that Mr. Smith's only recourse under Rule 3A:8(c)(1)(B) for the Commonwealth's breach is to withdraw his guilty plea. It suggests that Mr. Smith's decision not to withdraw his plea somehow shows that he did not intend the statutory terms to be part of his plea agreement at the time the contract was made. Alternatively, the Commonwealth says it is "illogical" to conclude the Commonwealth had contractual obligations beyond the explicit requirements of the contract. (Petition Response at 6-7 & n.7).

This extraordinary argument fails in numerous respects. First, the incorporation of statutory terms into the contract occurs by operation of the law, not by the intent of the parties. Williston §§ 30:19. Wright makes this clear by imposing the additional terms of the sentence without analyzing

the actual intent of the parties. 275 Va. at 79, 81-82, 655 S.E.2d at 8-10. Neither Mr. Smith's intent—nor the Commonwealth's intent, for that matter—is of import to this analysis of implicit terms. If it was, this would also be a factual question for the jury. Second, this Court has found that the *right* to withdraw the plea of guilt under the predecessor to Rule 3A:8(c)(1)(B) terminates when the sentence is imposed, and the court has *discretion* to permit the withdrawal of the guilty plea only to correct a manifest injustice up to twenty-one days after the order is entered. Lilly v. Commonwealth, 218 Va. 960, 963, 243 S.E.2d 208, 210 (1978). Thus, Mr. Smith has no avenue to withdraw his plea. Third, the express language of Rule 3A:8(c)(2) confers a *right* upon Mr. Smith to withdraw his plea, but it does not *limit him* to that remedy. Fourth, the Commonwealth is suggesting that Mr. Smith try to hit "reset" on his plea agreement and subject himself to renewed criminal liability after a decade of complying with his heavy obligations under the contract, all because the Commonwealth chose to breach the implicit contractual terms a decade later. That would be a manifest injustice to Mr. Smith tantamount to unjust enrichment, and it fails to resolve the due process and other claims.

The Commonwealth further tries to distinguish Wright by suggesting that the additional terms in Wright were only incorporated into the plea

agreement because the plea agreement already contained express provisions regarding incarceration. (Petition Response at 7).This is contrary to well-established law. Williston §§ 30:19. To support this unprecedented narrow view, the Commonwealth suggests that the Wright Court accepted the incorporation of the additional terms to "insure the defendant what is reasonably due him."[5] (Petition Response at 7). The unsupported assumed premises upon which this argument is based are that Mr. Smith is not "reasonably due" the benefit of his bargain, and the Commonwealth is free to make this determination nine years after the agreement was created.

The Commonwealth also tries to introduce a distinction into Virginia contract law between collateral consequences and material consequences,

[5] The Commonwealth cites to Wright, 275 Va. at 82, 655 S.E.2d at 10, for this quote, but this language only appears within a parenthetical to a "see also" citation in support of the proposition that "[t]he law effective when the contract is made is as much a part of the contract as if incorporated therein." Id. at 81, 655 S.E.2d at 10 (quoting Paul, 214 Va. at 653, 203 S.E.2d at 125 (alteration in original)). The quote is taken from United States v. Baldacchino, 762 F.2d 170, 179 (1st Cir. 1985), which was in turn references Santobello v. New York, 404 U.S. 257, 262 (1971). Both Baldacchino and Santobello were concerned about insuring the rights of the *criminal defendant*, not the government (hence the "see also" citation in Wright). None of these three cases—Wright, Baldacchino, or Santobello—support the proposition that the Commonwealth may avoid statutory incorporation merely because it determines nine years after the contract was made that Mr. Smith is not getting what is "reasonably due him." Baldacchino and Santobello are not properly used as a shield to allow the Commonwealth to alter contractual terms after the fact, but rather as a sword for the criminal defendant to prohibit such unilateral alterations.

citing cases involving *ex post facto* and a similar analysis. (Petition Response at 7). This pseudo-distinction is discussed in more detail below, but this would be an unprecedented narrow view of the law of statutory incorporation. Williston §§ 30:19. The cases cited are not on point, as those cases do not raise contract claims. Kitze v. Commonwealth, 23 Va. App. 213, 217, 475 S.E.2d 830, 832 (1996); Wilson v. Flaherty, 2011 U.S. Dist. Lexis 66272 *11-12 (2011).This distinction between civil and punitive consequences of a conviction is not relevant to the issue of statutory incorporation under a contract analysis. In fact, equity generally treats all consequences of a contract as "material" consequences, applying the maxim "equity regards as done what ought to be done." Bauserman v. Digiulian, 224 Va. 414, 419, 297 S.E.2d 671, 674 (1982); see also Atwood v. Shenandoah V. R. Co., 85 Va. 966, 992, 9 S.E. 748, 757 (1889) ("The true meaning of this maxim is, that equity will treat the subject-matter of a contract, as to collateral consequences and incidents, in the same manner as if the final acts contemplated by the parties had been executed exactly as they ought to have been, not as they might have been executed.").[6]

[6] The issue of collateral versus material consequences may be more relevant to the issue of the scope of the damages, which is simply not before the Court. Cf. Wash. & O. D. Ry. v. Westinghouse Elec. & Mfg. Co., 120 Va. 620, 642-643 (1917)

b. Amending the law and enforcing the amendment against Mr. Smith to his detriment constitutes a breach of the contract under common law.

Because the plea agreement is a contract between the criminal defendant and the Commonwealth incorporating the laws existing at the time, including in this case the then-existing sex offender registration laws, the analysis must next consider whether the Commonwealth breached the implicit terms of the contract. Comparing the implicit terms of the plea agreement (i.e., the registration requirements and limitations as they existed in June 1999) with the Commonwealth's treatment of Mr. Smith today demonstrates a breach, including *inter alia*:

1. In 1999, Mr. Smith agreed to plead guilty to a crime that was not a "sexually violent offense," when he was in fact charged with a crime classified as a "sexually violent offense." Nine years later, the offense to which Mr. Smith pled guilty was reclassified as a "sexually violent offence," and the registry shows Mr. Smith as "Violent: Yes." (JA at 21, 122, 159-63).

2. In 1999, Mr. Smith agreed to plead guilty to a crime for which he was required to register only for ten years, at which point his obligations would terminate and the Commonwealth's agent was to automatically remove Mr. Smith from the registry. See footnote 2, *supra*. Now, more than thirteen years later, Mr. Smith still appears on the registry, still has to

reregister, and under the law as it is being enforced, will appear on the registry and be required to reregister for life. Moreover, even if the law did not reclassify his offense as a "sexually violent offense," it eliminated automatic removal from the registry and increased the time before Mr. Smith could petition for expungement from ten years to fifteen years. Va. Code §§ 9.1-908, -910. (JA at 159-63).

3. In 1999, Mr. Smith agreed to plead guilty to a crime for which he was required to reregister annually under the penalty of a misdemeanor, and for which he had to provide very limited information. Va. Code §§ 18.2-472.1, 19.2-298.1(d)-(e) (1998 Cum. Supp). Now Mr. Smith is required to reregister quarterly, or within three days (instead of ten) or even within *thirty minutes* of certain events, under the threat of a felony charge. Additionally, he has to provide substantially more information to the registry. Va. Code §§ 9.1-903(b), 906, 18.2-472.1.

4. Until the reclassification of his offense, Mr. Smith was able to enter schools and other facilities without special permission. (JA at 163). Now Mr. Smith has had to and in the future will have to secure special permission from the courts and/or certain facilities to enter the facilities. Va. Code § 18.2-370.5. (JA at 163). This is a heavy burden considering his

participation in the care and education of two minor children for whom he is the either sole custodian or actively involved as a father. (JA at 271-73).

The enforcement of these amended registration laws against Mr. Smith clearly imposes higher duties and greater consequences on Mr. Smith than what the implicit terms of his contract with the Commonwealth specify. Additionally the Commonwealth has specifically refused to comply with one of the affirmative duties incorporated into the plea agreement, namely the automatic removal of Mr. Smith from the registry ten years following his registration. (JA at 169).

These actions constitute a breach of contract under the common law. First, this conduct constitutes an attempt to unilaterally amend the contract. Unilateral amendment of a contract is not valid and the attempt to do so constitutes a breach of the contract. Carlucci v. Duck's Real Estate, Inc., 220 Va. 164, 167, 257 S.E.2d 763, 765 (1979); see also Barron v. NetVersant-N. Va., Inc., 68 Va. Cir. 247, 253 (Fairfax 2005) (finding that a unilateral alteration of an employment contract was a material breach). Contracts generally are not unilaterally revocable and modifiable. Keith v. Lulofs, 283 Va. 768, 772, 724 S.E.2d 695, 698 (2012) ("[W]ills, unlike contracts, generally are unilaterally revocable and modifiable."). In fact, this

Court has call this "[a] basic principle of contract law." High Knob Assocs. v. Douglas, 249 Va. 478, 489 n.10, 457 S.E.2d 349, 355 n.10 (1995).

Second, at least with respect to removing Mr. Smith from the registry, the Commonwealth has refused to perform. "[W]here there has been a total refusal on the part of one of the contracting parties to perform the contract on his part the other may elect to sue at once, without waiting for the time of performance to arrive." Mut. Reserve Fund Life Ass'n v. Taylor, 99 Va. 208, 213, 375 S.E. 854, 855-56 (1901); Lee v. Mutual Reserve Fund Life Asso., 97 Va. 160, 163, 33 S.E. 556, 557 (1899). "[I]t is not necessary that there be an unequivocal or positive expression of abandonment if the acts and conduct of the obligor evince an intent wholly inconsistent with the intention to perform its contract." Bd. of Supers. v. Ecology One, Inc., 219 Va. 29, 33, 245 S.E.2d 435, 427-28 (1978). "[W]hen one party claims that the other party has surrendered a right guaranteed by the contract, the party asserting such modification must prove either passage of valuable consideration, estoppel *in pais*, or waiver of the right." Stanley's Cafeteria, Inc. v. Abramson, 226 Va. 68, 73, 306 S.E.2d 870, 873 (1983).

Third, enforcing the 2008 registration laws for a "sexually violent offense" against Mr. Smith after the Commonwealth reduced the charge to a non-"sexually violent offense" as part of the 1999 plea agreement

deprives Mr. Smith of the benefit of his bargain. Parties to a contract are entitled to the benefit of their bargain. See, e.g,, Judicial Inquiry & Review Comm'n of Va. v. Elliott, 272 Va. 97, 119, 630 S.E.2d 485, 496 (2006) ("When the Commonwealth offers a citizen immunity from prosecution in exchange for his cooperation and the citizen abides by the terms of the agreement, 'due process requires that the government provide him with the benefit of his bargain.'" (quoting Lampkins v. Commonwealth, 44 Va. App. 709, 722, 607 S.E.2d 722, 729 (2005)); Ulloa v. QSP, Inc., 271 Va. 72, 86, 624 S.E.2d 43, 52 (2006); Williston § 30:23.

The fact that the Commonwealth passed these amendments to secure federal funds pursuant to the Adam Walsh Child Protection and Safety Act (JA at 122) does not excuse the Commonwealth's enforcement of these amendments against Mr. Smith to his detriment. This conduct of the federal government at best constitutes the legal act of an independent third party making the Commonwealth's prior contract with Mr. Smith unfavorable to the Commonwealth. See South Dakota v. Dole, 483 U.S. 203 (1987) (finding it lawful for Congress to attach conditions to the receipt of federal funds).[7] This, however, is insufficient as a legal excuse for

[7] It is notable that in Dole the Supreme Court emphasized that the imposition of conditions upon the receipt of federal funds gives the states a choice and must be clear enough so that the states will know the

breaching the contract. Gunnell v. Nello L. Teer Co., 205 Va. 28, 33-34, 135 S.E.2d 104, 108 (1964) (collecting authorities).

The Circuit Court in the matter, relying upon an eclectic assortment of nonbinding cases and construing facts unfavorably to Mr. Smith, found "that there was no breach of contract involved in this case." (JA at 468). The analysis of Circuit Court, however, by and large looked more toward whether the breach, if any, constituted a material breach (JA at 467-68), and those arguments are addressed below. It is appropriate, however, to address here three points of the Circuit Court's opinion.

First, the Circuit Court opined that the plea agreement "held no promise or vested right that the law would not change subsequent to [Mr. Smith's] plea." (JA at 468). The Circuit Court here relied upon In re Lowe, 130 Cal. App. 4th 1405 (2005). This argument overlooks the fact that under the reasoning of Wright v. Commonwealth, the plea agreement implicitly incorporates Va. Code § 1-239 and Art. I, § 11 of the Virginia Constitution, which prohibits the Commonwealth from altering contracts. Therefore, the contract *did* contain a term prohibiting changes to the contract via amendments to the law. Additionally, if the Commonwealth is free to alter

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consequences of accepting the federal funds. Dole, 483 U.S. at 207. The Commonwealth here chose to breach its contract with Mr. Smith and similarly situated individuals. This action is a consequence of that decision.

contracts at will, contractual promises of the Commonwealth would be inherently illusory. The Commonwealth would never be bound to adhere to her promises, invalidating all such contract. American Agricultural Chem. Co. v. Kennedy & Crawford, 103 Va. 171, 176, 48 S.E. 868, 870 (1904) ("[W]here the consideration for the promise of one party is the promise of the other party, there must be absolute mutuality of engagement, so that each party has the right to hold the other to a positive agreement. Both parties must be bound or neither is bound."). As a general rule of law, amendments to statutes previously incorporated into a contract do not affect the implicit terms of the contract, namely the statute as it existed prior to the modification. Williston § 30:23. Third, in Virginia, the right to modify a contract unilaterally will not be presumed but must be explicitly provided for in the contract. See Prince George Sewerage & Water Co. v. Bexley Ltd. P'ship, 247 Va. 372, 377, 442 S.E.2d 654, 657 (1994).

Second, the Court asserted that there was no breach because the only support for Mr. Smith's position "is his own claims that when he entered into the plea agreement he did so knowing that by operation of law they [sic] would be subject to the sex offender registry for a period of ten years and eligible for expungement thereafter." (JA at 468).This erroneously construes the evidence unfavorably to Mr. Smith, but more to

the point, Mr. Smith's state of mind with respect to particular statutes in no way affects the incorporation of those terms into the contract by operation of the law, and it also does not affect the fact that a subsequent violation of the terms, whether implicit or explicit, constitutes a breach. Wright, 275 Va. at 79, 81-82, 655 S.E.2d at 8-10; see also Williston §§ 30:19, :23. Its effect on whether the breach is a material is discussed below.

Finally, the Circuit Court opined that the plea agreement was not breached because the crime Mr. Smith committed has not changed even though the status of that crime has changed relative to the registry requirements. (JA at 468) This takes far too narrow a view of the statutory terms incorporated into the plea agreement. "[T]he law effective when the contract is made is as much a part of the contract as if incorporated therein. . . . [T]his principle of contract law applies to plea agreements." Wright, 275 Va. at 81-82, 655 S.E.2d at 10 (citations omitted) (internal punctuation omitted); see also Williston §§ 30:19. The law at the time of the contract defined the term "sexually violent offense" to the exclusion of Mr. Smith's crime, and it established the relative rights of Mr. Smith with respect to registration, which was imposed "as a part of his sentence." The definition of the term "sexually violent offense," then, being pertinent to the contract,

is a part of the contract, and the enforcement of an alteration in the statutory definition to Mr. Smith's detriment constitutes a breach.

This principle is distinct from the due process issues in McCabe v. Commonwealth, 274 Va. 558, 567, 650 S.E.2d 508, 513 (2007), which the Circuit Court references. (JA at 468). McCabe involved no contract with the Commonwealth, and therefore the criminal defendant had to rely upon a statutory interpretation inconsistent with the plain meaning of the statutory terms. The McCabe Court rejected this interpretation. This case, however, does not involve an interpretation of a statute per se, but the interpretation of the *implicit terms of a contract*, and Mr. Smith advocates for the plain meaning of the implicit contractual terms. Modifications to the statute are simply irrelevant or parole evidence. Williston §§ 30:23. Whereas in McCabe the statutory framework in existence at the time of the conviction was not preserved, the incorporation of the prior statutory framework into the contract in this case by operation of law makes enforcement of the amended law a breach of that contract. Williston §§ 30:23.

c. The breach of the contract in this case was a material breach, as it defeated an essential purpose of the contract.

Having addressed the issue of whether the conduct of the Commonwealth constitutes a breach of contract, the next issue must be

whether this conduct constitutes a material breach. A material breach "is a failure to do something that is so fundamental to the contract that the failure to perform that obligation defeats an essential purpose of the contract." Horton v. Horton, 254 Va. 111, 115, 487 S.E.2d 200, 204 (1997). Thus, the material breach analysis does not look to whether the consideration actually rendered by the breaching party is sufficient to support the agreement or otherwise "fair" despite the breach, but rather whether the breach resulted in the loss of a "significant benefit" to the non-breaching party under the contract terms. Countryside Orthopaedics, P.C. v. Peyton, 261 Va. 142, 154, 541 S.E.2d 279, 286 (2001); see also Williston 63:3. Contracts may have more than one essential purpose. See Mathews v. PHH Mortg. Corp., 283 Va. 723, 732, 724 S.E.2d 196, 200 (2012).

As the First Circuit has noted, these purposes can be either objectively essential purposes, namely "those elements of a contract that are made necessary by the very nature of the [specific] contract," or they can be subjectively essential purposes, "terms . . . deemed to be essential by the contracting parties." Servicios Comerciales Andinos, S.A. v. GE Del Caribe, 145 F.3d 463, 470-71 (1st Cir. P.R. 1998).

Securing the legal limitations on registration applicable in 1999 for a non-"sexually violent offense" was an essential purpose and a significant

benefit of Mr. Smith's plea agreement, both objectively and subjectively. The record sufficiently demonstrates this. Mr. Smith was charged with rape, a felony that was and is classified as a "sexually violent offense." (JA at 122). Under the plea agreement, Mr. Smith agreed to waive his Constitutional and statutory trial rights by pleading guilty to carnal knowledge of a minor, a different felony not classified as a "sexually violent offense." (JA at 19, 260-61 368). By operation of the law, he was also consenting to all of the criminal and civil detriments that would be imposed upon him "as a part of the sentence." Va. Code § 19.2-298.1(b) (1998 Cum. Supp.). In exchange, the charge was reduced from rape, a sexually violent offense, to carnal knowledge of a minor, which was not a "sexually violent offense." (JA at 19, 368). Additionally, the Commonwealth would recommend (or at least not oppose) a sentence of ten years' incarceration suspended for eighteen years, an obligation for Mr. Smith to provide for the care of his daughter (who is now in Mr. Smith's sole custody), and supervised probation. (JA at 19, 368). Mr. Smith was also securing by his plea of guilt his Constitutional right to be free from subsequent prosecution for the same conduct under the Double Jeopardy Clause, and other incidental rights. (JA 307-08).

While the Court need not analyze all of the purposes of the contract, it can easily see that securing the limitations on registration effective in 1999 for a non-"sexually violent offense" was an essential purpose of the contract, whether viewed objectively or subjectively.

Viewed objectively, the reduction in the charge from one felony to another felony is not explained by any of the explicit terms of the contract, because those terms do not necessitate a reduction in charge. They can be provided to Mr. Smith without a reduction. [8] The only implicit terms of the contract affected by the reduction in the charge are the limitations on the registration requirements, making these limitations the objective explanation for the reduction in charge. Moreover, viewing the great difference between the registration requirements for a non-"sexually violent offence" even in 1999 and those for a "sexually violent offence" in 1999 (including *inter alia* temporary placement on the registry with automatic removal after ten years as opposed to permanent placement on the registry), leads inevitably to the conclusion that these lesser registration requirements were a "significant benefit" of the contract to Mr. Smith.

[8] To be clear, in June 1999, rape did not carry a mandatory minimum incarceration period, thereby permitting the Commonwealth to give Mr. Smith ten years incarceration suspended for eighteen years without reducing the charge from rape to carnal knowledge of a minor. Va. Code § 18.2-61 (1998 Cum. Supp.).

The evidence before the Court on whether the lesser registration requirements were subjectively an essential purpose of the contract is limited, but very telling. First, the subjective intent of the Commonwealth or its agents is not significant, but even if it is, the Commonwealth cannot claim that registration laws were not within its contemplation when the conviction secured by the plea agreement was the only precondition to enforcement of those laws against Mr. Smith. Moreover, the agent of the Commonwealth at the plea and sentencing hearing (held the same day the contract was made) unilaterally raised the issue of registration to ensure the court's order reflected Mr. Smith's obligation to register. (JA at 206). Mr. Smith's intent, while it could ultimately be a jury question, is sufficiently manifest in that he made the plea agreement knowingly and voluntarily and with advice of counsel. (JA at 19, 368). His attorney even specifically noted to the court that Mr. Smith understood his registration obligations under the law. (JA at 206). Therefore, the original, limited registration requirements were subjectively essential terms of the contract.

As an alternative to the First Circuit's approach to determining the materiality of a breach, the Restatement (Second) of Contracts § 241 describes five factors that may be applied to determine materiality of the breach: (1) the extent to which the injured party will be deprived of the

benefit which he reasonably expected; (2) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived; (3) the extent to which the party failing to perform or to offer to perform will suffer forfeiture; (4) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances; and (5) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing. See Bizmark, Inc. v. Air Prods. Inc., 427 F. Supp. 2d 680, 691-92 (W.D. Va. 2006); RW Power Partners, L.P. v. Virginia Elec. & Power Co., 899 F. Supp. 1490, 1496-98 (E.D. Va. 1995); see also Horton v. Horton, 254 Va. 111, 116, 487 S.E.2d 200, 204 (1997).

In this case, the application of these factors mandates the conclusion that the breach of the contract was material. Mr. Smith reasonably expected to be subject to the lesser registration requirements existing at the time, and his attorney confirmed that he understood his obligations. (JA at 20, 206, 368). The imposition of higher obligations therefore deprived Mr. Smith of a benefit he reasonably expected. Mr. Smith cannot be adequately compensated for the breach, as discussed in more detail below, making the breach that much more significant. Mr. Smith suffers the imposition of

registration obligations and burdens for the rest of his life under the threat of a felony and the loss of the right to be removed from the registry, which is clearly tantamount to a forfeiture. It is unlikely that the Commonwealth will voluntarily cure its failure, given its opposition to this action. (JA at 169). The Commonwealth has breached the standards of good faith and fair dealings by using the threat of a felony to impose higher registration requirements on Mr. Smith in order to secure federal funding. See RW Power Partners, 899 F. Supp. at 1498 ("Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party. . ." (quoting Restatement (Second) of Contracts § 205 cmt. (1981))).

The Circuit Court's opinion in this matter is significantly in error. Not only does the Circuit Court construe the evidence in a light unfavorable to Mr. Smith and draw inferences unfavorable to Mr. Smith in granting the Commonwealth's motion for summary judgment, but it suggests that Mr. Smith would have to demonstrate that the lesser registration requirements were "clearly considered and contemplated as an integral part of or inducement to enter the agreement." (JA 467). This unprecedented standard looks only to whether the terms were subjectively contemplated, substitutes "integral part of or inducement to enter" for "essential purpose,"

and appears to raise the burden of proof to clear and convincing evidence. It ignores that objectively these limitations were essential elements, fails to consider whether the registration limitations were an "essential purpose" or a "significant benefit" to Mr. Smith, and applies the wrong standard for even trial, let alone summary judgment.

The Circuit Court then opines that Mr. Smith "did not have a specific inducement related to the registry that was the primary benefit of the plea," asserting that the benefit of the plea agreement was "not being charged with rape and receiving no active jail time." (JA 467-68). This erroneously permits the Commonwealth to breach an "essential term" of the contract that provides "significant benefit" to Mr. Smith so long as it is not a "specific inducement" *and* the "primary benefit" of the plea agreement. Additionally, as argued above, the only objectively meaningful consequence of the reduction in charge was the consequential reduction in registration requirements, making the limited registration requirements a "specific inducement" to agree to plead guilty to the lesser charge.

The Court next argues that "the registration was only collaterally related to the plea." (JA at 468). This confuses the distinction between the *collateral consequences of the conviction* for purposes of the *ex post facto* analysis or an attack on the validity of the plea agreement, with the issue of

material breach of a valid contract.[9] The fact that the registration requirements are a civil consequence of a criminal conviction does not exclude these terms from a contractual plea agreement (as argued above) or make the breach of these terms an immaterial breach in a breach of contract action. As demonstrated above, the lesser registration requirements were objectively and subjectively essential purposes of the contract and a reasonably expected material benefit of the contract.

Finally, the Circuit Court found "the only support for the Petitioner's position is his own claims that when he entered into the plea agreement he did so knowing that by operation of law they would be subject to the sex offender registry for a period of ten years and eligible for expungement thereafter." (JA at 468). This is both factually and legally erroneous. First,

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[9] In the case cited, Roe v. Farwell, 999 F. Supp. 174, 182 (D. Mass. 1998), the court looked at the validity of the contract and determined that an understanding of the collateral consequences *of the conviction* was not necessary to the *validity* of the contract. It did not hold, as the Circuit Court held, that a plea agreement could not be breached by enforcement of terms different than the terms of the plea agreement. Moreover, a careful reading of Farwell shows that the law challenged in Farwell was not a law existing at the time the plea agreement was made, so there was no contractual violation of implicit terms of the contract, as there is in this case.

It is well worth noting in this case, unlike Roe v. Farwell and many of the other previous challenges to the sex offender registry requirements, Mr. Smith is not proceeding under an assumed or fictitious name. Mr. Smith is not trying to hide his crime, shameful as that crime was. His only interest is to secure the terms of the plea agreement he made with the Commonwealth.

as a matter of fact, the documented representation of Mr. Smith's attorney at the plea and sentencing hearing that Mr. Smith understood his registration obligations, the fact that Mr. Smith did not object to the registration obligation then, and the fact that he has complied with the registration law, all go beyond "his own claims" that he understood the import of the reduction as it relates to his registration obligations. As a matter of law, Mr. Smith's subjective state of mind and his understanding of the terms is irrelevant if the term breached is objectively an essential term, as these terms are. Moreover, even subjectively it is not necessary that Mr. Smith understanding the precise terms incorporated or a precise legal understanding *that* they are incorporated, so long as he understands generally that by pleading guilty, he would secure the lesser registration requirements. As argued above, the evidence supports this conclusion that the lesser registration requirements were subjectively an essential term of the contract for Mr. Smith.

d. Specific performance and an award of damages for the breach to date is an appropriate remedy in this instance.

Because the Commonwealth has materially breached its contract with Mr. Smith, this Court must determine whether the appropriate remedy lies solely in money damages or instead in the specific performance and monetary damages as requested by Mr. Smith. Specific performance is an

equitable remedy, which may be considered by the trial court where the remedy at law is inadequate and the nature of the contract is such that specific enforcement of it will not result in great practical difficulties. Chattin v. Chattin, 245 Va. 302, 306-307, 427 S.E.2d 347, 350 (Va. 1993) (citing Thompson v. Commonwealth, 197 Va. 208, 212-13, 89 S.E.2d 64, 67 (1955)); see also Williston § 67:8. Although specific performance is not a matter of absolute right, when the contract sought to be enforced has been proven by competent and satisfactory evidence, and there is nothing to indicate that its enforcement would be inequitable to a defendant, but will work injury and damage to the other party if it should be refused, in the absence of fraud, misapprehension, or mistake, relief will be granted by specific enforcement. Id. (quoting Haythe v. May, 223 Va. 359, 361, 288 S.E.2d 487, 488 (1982)). A remedy at law is not adequate if it is partial. Instead, it must reach the end intended, and actually compel a performance of the duty in question. Id. at 307. It is further inadequate if the rights under the contract are unique. See Thompson v. Commonwealth, 197 Va. 208, 213, 89 S.E.2d 64, 67 (1955). In an award of specific performance, the court may also award monetary damages for the injury previously sustained as a result of the breach. Moore v. Chesapeake & O. R. Co., 159

Va. 703, 746-48, 167 S.E. 351, 366 (1932); Turney v. Smith, 213 Va. 723, 725, 196 S.E.2d 3, 5 (1973).

In this case, monetary damages are inadequate to remedy *inter alia* the continued publication of Mr. Smith's information on the registry, his continued obligations to reregister, the obstructions he will continue to face in caring for his children, and the likelihood of further amendments to the registration law. While Mr. Smith is entitled to monetary damages for the breach to date, these circumstances require the equitable remedy of specific performance. The Commonwealth will suffer no great difficulty in giving Mr. Smith his due under this contract, at least by comparison to the difficulties Mr. Smith has and will sustain as a result of the breach.

II. The Circuit Court erred by interpreting the post-conviction legislative amendments as applicable to Mr. Smith in derogation of his vested contractual rights, in violation of Virginia Code § 1-239 and Article I, § 11 of the Virginia Constitution.

As argued above, Mr. Smith's plea agreement is a contract incorporating the registration law as it existed in June 1999.

The Constitution of Virginia, Art. I (Declaration of Rights), § 11, provides in relevant part, "[T]he General Assembly shall not pass any law impairing the obligation of contracts . . . ." To secure this right of the people, Virginia Code § 1-239 provides:

> No new act of the General Assembly shall be construed to repeal . . . or in any way whatever to affect . . . any right accrued, or claim arising before the new act of the General Assembly takes effect; except that the proceedings thereafter held shall conform, so far as practicable, to the laws in force at the time of such proceedings.

These provisions each prohibit the Court from interpreting statutes as applying retroactively where such an interpretation would impair a vested right of a citizen, including a contractual right.[10] A vested right is "a right so fixed, that *it is not dependent* on any future act, contingency, or decisions to make it *more secure*." Kennedy Coal Corp. v. Buckhorn Coal Corp., 140 Va. 37, 45, 124 S.E. 482, 484 (1924) (emphasis added).

Contrary to the Commonwealth's assertions and the Circuit Court's opinion, there can be no doubt that Mr. Smith's implicit and explicit rights under the plea agreement, including most particularly his right to be automatically removed from the registry ten years after his initial registration, were vested rights for purposes of Code § 1-239 and Article 1, § 11. Once the court accepted Mr. Smith's plea of guilt, Mr. Smith had rendered substantial consideration for the substantive benefits of the plea agreement, including the limited registration requirements and the

[10] Kennedy Coal Corp. v. Buckhorn Coal Corp., 140 Va. 37, 124 S.E. 482 (1924); Garraghty v. Virginia, Dep't of Cors., 52 F.3d 1274, 1281 (4th Cir. 1995) (emphasis added) (internal citation omitted) (citing Shiflet v. Eller, 228 Va. 115, 319 S.E.2d 750, 753 (1984); White's Admix v. Freeman, 79 Va. 597 (1884); Mosby v.St. Louis Mut. Ins. Co., 72 Va. (31 Gratt) 629 (1879)).

contractual right to be removed from the registry after ten years pursuant to then-existing Va. Code § 19.2-298.3. Once he had registered (within thirty days of his conviction (JA at 20, 368)), he had completed the only other condition precedent to being automatically removed from the registry ten years later.[11] This right to be removed simply was not dependent on a future act, contingency, or decisions to make that right *more secure*. Certainly an abridgment of that right did not make it more secure.

The Commonwealth simply misstates the law existing at the time when it asserts that Mr. Smith had to petition the Court for removal from the registry. [R. at 375]. The law commanded the Commonwealth's agent to remove Mr. Smith's information from the registry automatically ten years following his initial registration.[12]

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[11] Compliance with the registry requirements is not itself a condition precedent to the termination of the registration obligations under the law. Va. Code §§ 19.2-298.2, -298.3(b) (1998 Cum. Supp.).

[12] See footnote 2, above. Moreover, even if such a petition is necessary for Mr. Smith to be removed from the registry, Mr. Smith has a contractual right to file such a petition under the logic of Wright v. Commonwealth. The Commonwealth's argument to the contrary, based on Commonwealth v. Shaffer, 263 Va. 428, 432, 559 S.E.2d 623, 626 (2002), advocating that a petition for removal is a procedural remedy that can be altered at will, is unpersuasive for several reasons. First, in Shaffer, the "right" at issue was no right at all, but a privilege. Here, we have a true right—a contractual right. Second, this right to file the petition after ten years is a vested right, because it was not dependent on a future act, contingency, or decisions to make the right *more secure*. Certainly the abridgment of that right by statutory amendment did not make it more secure. Third, because this

The Commonwealth misses the point when it argues that because the Va. Code § 9.1-901(c) asserts that the relevant amendments to the registration law apply retroactively, Virginia Code § 1-239 and Article 1, § 11 of the Virginia Constitution somehow does not apply. (Petition Response at 9). Article 1, § 11 of the Virginia Constitution affirmatively prohibits laws that impair the obligation of contracts, and Virginia Code § 1-239 directs the courts not to accept an interpretation that would have that effect. See, e.g., Shoosmith v. Scott, 217 Va. 290, 292, 227 S.E.2d 729, 731 (1976); Booth v. Booth, 7 Va. App. 22, 27, 371 S.E.2d 569, 571 (1988).

The Commonwealth also misconstrues Morency v. Commonwealth, 274 Va. 569, 649 S.E.2d 682 (2007), when it suggests that Mr. Smith has "fail[ed] to complete the 'vested rights' analysis." (Petition Response at 10). In Morency, this Court found that an order that the plaintiff be removed from

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involves a vested right, Virginia Code §1-239 and the Virginia Constitution prohibit interpreting a later amendment as impairing that vested right. Arguing (as the Commonwealth does [R. at 151-53]) that the procedure was abolished, therefore no mechanism exists, posits an impairment of the right. Fourth, Virginia Code §1-239 addresses the situation where procedure has changed. It states the procedure used should comply with contemporary procedure "*so far as practicable*." This implies the old procedure (or some variation) must be used where the new procedure (or lack thereof) would violate the vested right. Fifth and finally, the Commonwealth cannot argue that no procedure exists. Va. Code § 9.1-910 still permits petitions for removal from the registry. In short, even if the former law required a petition for expungement from the registry to be filed, Mr. Smith has a vested right to file that petition under the procedure of the current Va. Code § 9.1-910.

the sex offender registry did not give a vested right to the plaintiff because the circuit court lacked the legal authority to make such an order. Id. at 575-77, 649 S.E.2d at 684-86. The court could relieve the plaintiff of his obligations to register, and this was the extent of the plaintiff's vested right. Id. It could not expunge the plaintiff from the registry under the procedure employed, so the right to be expunged was not a vested right. Morency simply requires a careful analysis of the limits of vested rights. In this case, the limits of the vested rights are concurrent with the registration requirements and limitations as they existed in June 1999, when the agreement was entered. Notably, the expungement sought in this case pursuant to Va. Code § 19.2-298.3 is different from the relief sought in Morency, which involved Va. Code § 19.2-298.4.

The Commonwealth further erroneously argues that Mr. Smith cannot rely on the continuation of civil statutes. (Petition Response at 10). This overstates the law, which merely provides that procedural remedies granted by statute do not *in themselves* create vested rights. Id. at 576, 649 S.E.2d at 685 (construing Commonwealth v. Shaffer, 263 Va. 428, 432-33, 559 S.E.2d 623, 626 (2002)). Mr. Smith is in fact relying on his *contract* with the Commonwealth, which implicitly incorporated the statutes existing at the time. These are not statutory rights or mere procedural remedies, as

in Allen v. Mottley Constr. Co., 160 Va. 875, 888, 170 S.E. 412, 417 (1933), and Commonwealth v. Shaffer, 263 Va. 428, 432 559 S.E.2d 623, 626 (2002). Instead these are substantive contractual rights. Insofar as the remedy of an expungement hearing has been abolished or altered, Virginia Code § 1-239 dictates the solution: "[T]he proceedings [after the alteration takes effect] shall conform, so far as practicable, to the laws in force at the time of such proceedings." This implies the old procedure (or some variation) must be used where the new procedure (or lack thereof) would violate the vested right. Va. Code § 9.1-910 still permits petitions for removal from the registry, and the procedure used under Va. Code § 9.1-910 should be adapted insofar as necessary to prevent the alteration of the law from impairing Mr. Smith's vested rights.

In light of the Virginia Code § 1-239 and Article I, § 11 of the Virginia Constitution, the Circuit Court was not free to interpret the amendments to the registration law as impairing Mr. Smith's vested rights pursuant to his plea agreement. Rather, the only interpretation of the contract available to the Court is the interpretation consistent with the law existing in June 1999. Specific performance of the contract pursuant to that interpretation, damages for refusal to abide by that interpretation to date, and a

permanent injunction against further application of amended laws to the contract are the appropriate remedies.

III. The Circuit Court erred in denying Mr. Smith's motion for summary judgment as to Count II (Unconstitutional Taking) and granting summary judgment to the Defendant on that Count, because depriving Mr. Smith of his common law contractual rights under his plea agreement without just compensation constituted an unconstitutional taking in violation of Art. I (Declaration of Rights) § 11 of the Virginia Constitution.

The Virginia Constitution, Article I (Declaration of Right), § 11, was recently amended by the citizens of this Commonwealth effective January 1, 2013, to provide in relevant part (with emphasis added):

> [T]he General Assembly shall pass no law whereby private property, **the right to which is fundamental**, shall be damaged or taken except for public use. **No private property shall be damaged or taken for public use without just compensation to the owner thereof.** No more private property may be taken then necessary to achieve the stated public use. Just compensation shall be no less than the value of the property taken, lost profits and lost access, and damages to the residue caused by the taking.

This is an extension of the previous Constitutional guarantee, which provided, "[T]he General Assembly shall not pass . . . any law whereby private property shall be taken or damaged for public uses without just compensation, the term 'public uses' to be defined by the General Assembly." Per Kitchen v. City of Newport News, 275 Va. 378, 657 S.E.2d 132 (2008), this provision is self-executing.

This provision makes no distinctions in the types of private property. Contractual rights are private property and may not be taken by the Commonwealth without just compensation, and then only for public uses. See Lynch v. United States, 292 U.S. 571, 579 (1934); Omnia Commercial Corp. v. United States, 261 U.S. 502, 508 (1923). Here, the Commonwealth deprived Mr. Smith of his contractual rights, as stated above, allegedly for the benefit of the public.[13] They did so without providing Mr. Smith compensation, thereby violating the Virginia Constitution, Article I, § 11. Summary judgment should be granted to Mr. Smith on this claim. This claim, being in the alternative to the primary claim for specific performance of the contract (with damages through the date of performance), would mandate the award of past and prospective damages damages for the unlawful taking in event the primary claim fails.

[13] The Commonwealth failed to present even a scintilla of evidence that the deprivation of the contract rights actually benefits the public. With respect to federal funding, no evidence was presented or argued that the statute could not be amended in such a way so as honor the plea agreements of Mr. Smith and those who are similarly situated while still satisfying the conditions to secure federal funding. The Adam Walsh Child Protection and Safety Act, Pub. Law 109-248 § 125, 120 Stat. 587, 598 (2006) (codified at 42 U.S.C. § 16925), indicates that only good faith effort toward substantial compliance is necessary to preserve federal funding, and it directs the Attorney General of the United States to take into consideration "a demonstrated inability to implement certain provisions that would place the jurisdiction in violation of its constitution."

IV. The Circuit Court erred in denying Mr. Smith's motion for summary judgment as to Count III (Due Process Violation) and granting summary judgment to the Defendant on that Count, because depriving Mr. Smith of his common law contractual rights under his plea agreement without a hearing and depriving Mr. Smith of the benefit of his bargain constituted a deprivation of property without due process in violation of Art I (Declaration of Rights) § 11 of the Virginia Constitution.

The Virginia Constitution, Article I (Declaration of Rights), § 11, provides in relevant part, "[N]o person shall be deprived of his life, liberty, or property without due process of law . . . ." This Court has stated, "All the authorities agree that due process of law requires that a person shall have reasonable notice and a reasonable opportunity to be heard before an impartial tribunal, before any binding decree can be passed affecting his right to liberty or property." Ward Lumber Co. v. Henderson-White Mfg. Co., 107 Va. 626, 631, 59 S.E. 476, 479 (1907) (quoting Violett v. City of Alexandria, 92 Va. 561, 567, 23 S.E. 909, 911 (1896). The requirements of due process similarly apply whenever a state is depriving a person of property rights. See, e.g., Goss v. Lopez, 419 U.S. 565, 573 (1974). Where an individual has been deprived of property without due process, he may bring a common law action to recover damages on that basis. Graham v. Mitchell, 529 F. Supp. 622, 625-26 (E.D. Va. 1982).

This Court has contemplated an analogous situation in Judicial Inquiry and Review Comm'n of Va. v. Elliott, 272 Va. 97, 630 S.E.2d 485 (2006). Elliott involved a disciplinary action against a judge after the judge allegedly failed to comply with the terms of an alleged agreement related to alleged ethics violations. Through the alleged agreement, the Judicial Inquiry and Review Commission agreed not to file a complaint with this Court concerning the alleged ethics violations provided the judge comply with various conditions. Id. at 106, 630 S.E.2d at 489. The judge asserted that the Commission repeatedly attempted to alter its agreement with him unilaterally, imposing different terms than those provided in the agreement. Id. at 115, 630 S.E.2d at 494. This Court likened the agreement to a "form of immunity agreement offered by the Commonwealth to a citizen who is a potential defendant in a criminal investigation." Id. at 119, 630 S.E.2d at 496. It noted, "When the Commonwealth offers a citizen immunity from prosecution in exchange for his cooperation and the citizen abides by the terms of the agreement, '*due process requires that the government provide him with the benefit of his bargain*.'" Id. (emphasis added) (quoting Lampkins v. Commonwealth, 44 Va. App. 709, 722, 607 S.E.2d 722, 729 (2005)). This Court, applying basic rules of contract law and interpretation,

found that there was an enforceable agreement that was not breached by the judge. Id. at 119-124, 630 S.E.2d at 496-499.

Here, Mr. Smith had an agreement with the Commonwealth incorporating the registration law as it existed at the time. The Commonwealth unilaterally altered the registration law and imposed the amended requirements against Mr. Smith, in derogation of his contractual rights. This deprived Mr. Smith of the benefit of his bargain and was in violation of Article I, § 11 of the Virginia Constitution. This Court should grant summary judgment to Mr. Smith on this claim and reverse the Circuit Court's grant of summary judgment to the Commonwealth. The appropriate remedy is specific performance of the contract and damages for the deprivation of due process through the period of performance.

The Circuit Court erred in equating this case, where the Commonwealth deprived Mr. Smith of contractual (i.e., property) rights without a hearing or consideration, with McCabe v. Commonwealth, 274 Va. 558, 274 Va. 558 (2007), in which the only interest at issue was a liberty issue. (JA at 452-55). The plaintiff in McCabe had no property right. He had no contract with the Commonwealth. Mr. Smith's due process claim here is based on the deprivation of his contractual, property rights. (JA at

313, 321-22). The Circuit Court simply failed to analyze this aspect of the Commonwealth's due process violation.

V. The Circuit Court erred in denying Mr. Smith's motion for summary judgment as to Count IV (Permanent Injunction) and Count V (Petition for Expungement Hearing) and granting summary judgment to the Defendant on those Counts on the basis that there was no contractual or constitutional violation, because those violations have been established.

The Circuit Court dismissed Mr. Smith's request for a permanent injunction and his petition for an expungement hearing on the grounds that no contractual or Constitutional violation has been established. (JA at 469). As argued herein, those violations have been clearly established.

The issuance of an injunction is appropriate in this case, especially so as to prevent further violations of Mr. Smith's contractual rights through the recent or any future amendment of law. Mr. Smith's contractual rights to be removed from the registry, be relieved of his registry obligations, and not be classified has having committed a "violent sexual offense" with all of the civil disabilities that attach to that classification, are unique and personal to him, having *pretium affectionis*,[14] and monetary damages would not be

[14] "An enhanced value placed on a thing by the fancy of its owner, growing out of an attachment for the specific article and its associations; sentimental value." Blacks Law Dictionary 1226 (8th ed.). Just as a wedding ring may have both monetary value and *pretium affectionis*, Mr. Smith's contractual rights—including especially avoiding the disabilities

enough to make him whole under the circumstances. See Levisa Coal Co. v. Consolidation Coal Co., 276 Va. 44, 61-62, 662 S.E.2d 44, 53-54 (2008). In light of the history of the Commonwealth applying amendments to the registration law retroactively, Mr. Smith also faces a likelihood of repeated future litigation to protect his contractual rights in this matter absent an injunction. See Bowyer v. Creigh, 24 Va. (3 Rand) 25, 27 (1825).

Moreover, the petition for an expungement hearing is appropriate in light of Mr. Smith's contractual right to have such a hearing in the event the Commonwealth's agent fails to remove Mr. Smith from the registry. Va. Code § 19.2-298.3(b) (1998 Cum. Supp.). The procedure for that hearing should be the same procedure used for Va. Code § 9.1-910 hearings, except insofar as such a hearing would impair Mr. Smith's vested rights. See Va. Code § 1-239. This Court should reverse the Circuit Court's decision on these counts and grant Mr. Smith's motion for summary judgment on these matters.

CONCLUSION

For the reasons stated above, Mr. Smith asks this Court to reverse the Circuit Court's grant of summary judgment to the Commonwealth, and direct the Circuit Court to grant summary judgment to Mr. Smith on these

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attached with "sexually violent offences" related to involvement in his daughters' school activities—has both practical and sentimental value.

claims, specific performance of the contract, a permanent injunction, expungement from the registry, and monetary damages, to permit any further proceedings necessary on this matter, and all such further and additional relief that may be appropriate.

Respectfully Submitted,

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CERTIFICATE

I hereby certify, that pursuant to Rule 5:26(h) that this brief complies with the Requirements of Rules 5:26, 5:27, 5:6, including inter alia:

a. This brief does not exceed 50 pages, as calculated pursuant to Rule 5:26(b):

b. This brief was filed with the Court within 40 days after the certificate of appeal was issued.

c. One electronic PDF version of this brief on a CD-ROM was hand filed with the Clerk, along with fifteen printed copies of the brief.

d. Three copies of this brief were hand delivered to opposing counsel at the following address:

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