

IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND

JOSEPH D. MORRISSEY, Plaintiff	)	
and JANE DOE and JOHN DOE, Purported Plaintiffs ¹	)	
	)	
v.	)	Case No. CL1500144800
	)	
SUSAN SWECKER, <i>et al.</i>	)	
Defendants.	)	

THE COMMONWEALTH’S MEMORANDUM IN OPPOSITION TO
MOTION FOR PRELIMINARY INJUNCTION

Defendants James B. Alcorn, Clara Belle Wheeler, and Singleton McAllister, in their official capacities as Chairman, Vice-Chairman, and Secretary, respectively, of the State Board of Elections (SBE), hereby oppose Plaintiff’s Motion for Preliminary Injunction.

SUMMARY

Injunctive relief should be denied for the following reasons:

1) Morrissey has failed to provide evidence to support his Motion and has not even alleged a sufficient factual basis for relief. If 222 of the required 250 signatures were accepted, Morrissey must show at least 28 improperly rejected voter signatures to have any kind of claim. His filings to date claim only 7 improperly rejected signatures and assert that “Upon information and belief” sufficient others will be found. (Plaintiffs Mem. Supp. at 7-8.)

2) The Commonwealth has not treated like candidates unequally. Candidates seeking a political party’s nomination in a primary are different than candidates seeking access to the general election ballot. A primary election is a different stage of the election process, involving the First Amendment rights of political parties and the application of party rules. All

¹ There is no reason to believe that Jane and John Doe are specific individuals who seek injunctive relief. The Complaint itself admits that each Doe merely “represents *one or more* real persons Plaintiff’s [sic] believe will be located.” (Complaint ¶¶ 11 & 12, emphases added.) The Commonwealth is filing a motion for identification or dismissal of the Does.

candidates at each stage of the election process are treated alike.

3) The Democratic Party of Virginia (DPVA) has a well-established First Amendment right to control its own internal governance, which it does through party rules that are enforceable as a contract under Virginia law. Morrissey is bound by such rules as a DPVA member and by his voluntary decision to affiliate with DPVA to participate in its nominating process. Any objection Morrissey has to the party rules, which do set forth an appellate process, is between Morrissey and the DPVA; the Commonwealth is not involved.

4) The Commonwealth has not denied Morrissey access to the ballot or due process. Access to the general election ballot is straightforward and easy to achieve. By submitting the same number of signatures (250) in June, Morrissey (like any other qualified person) may appear on the general election ballot. If signatures are still a problem, Virginia law grants an administrative appeal with the State Board of Elections at that time.

5) In suing the State Board of Elections, Morrissey has sued the wrong party. He seeks to enjoin ballot printing, but the SBE does not print ballots for this election. Local electoral boards print the ballots, and this case may not proceed without those necessary parties.

6) Morrissey and his counsel may not assert the purported rights of unidentified voters, whose existence is not even alleged with certainty.

7) Virginia law permits candidates to obtain the list of registered voters, allowing them to pre-check signatures, but Morrissey, an experienced candidate and former legislator, failed to do so. Equity aids the vigilant. Morrissey's lack of diligence is largely responsible for his situation, so he is ineligible for the extraordinary equitable remedy of a temporary injunction.

8) Given the above defects in Morrissey's case and the impact that injunctive relief would cause on the election process, the public interest does not favor injunctive relief.

SUMMARY OF VIRGINIA ELECTION PROCESS

Candidates for elected office must meet certain requirements to appear on an election ballot. A candidate can qualify to have his name on the ballot for a general or special election in one of two ways: either as the nominee of a political party or independently.² All candidates must file statements of qualification and economic interest.

Chapter 5 of Title 24.2 of the Code of Virginia contains the statutory requirements for candidates. Article 2 describes the process applicable to candidates other than major party candidates, including the petition requirements in § 24.2-506. A non-major party candidate must file a petition containing the signatures of a specific number of qualified voters, based on the office sought, in order to have his name on the ballot for a general or special election. Va. Code § 24.2-506(A). The candidate can appeal a determination that the filed petition did not contain the required number of signatures. Va. Code § 24.2-506(C). For candidates seeking election to the General Assembly, the appeal is filed with the SBE.

Candidates for political party nomination are not governed by the provisions of Article 2. Rather, Article 3 governs the nomination of candidates by political parties. Va. Code § 24.2-509(A) grants authority for a political party to determine the method of nominating its candidates, whether through a primary or some other method, such as a convention, fire house primary, or mass meeting. If a candidate is chosen by a political party as its nominee through a non-primary method, the candidate need not file a petition with signatures of qualified voters. If the nominee will be chosen by a primary, the provisions of Article 4 apply.

Article 4, which governs primaries, requires a candidate to file a declaration of candidacy, identifying the political party of which the candidate is a member, and a petition of

² A non-major party candidate may appear on the ballot as an independent candidate or as the nominee of a “recognized political party” (as defined in Va. Code § 24.2-613).

signatures of qualified voters. A General Assembly candidate must file his declaration and petition with the chairman of the appropriate political party committee. “Only a person meeting all of the qualifications and fulfilling all the requirements of a candidate, and who has complied with the rules and regulations of his party, shall have his name printed on the ballot provided for the primary election.” Va. Code § 24.2-525. The authority to certify that a candidate has satisfied petition signature requirements is vested solely in the candidate’s political party. See Va. Code § 24.2-527. The appropriate political party chairman is to “certify that a review of the filed candidate petitions found the required number of signatures of qualified voters for that office to have been met.” *Id.* Va. Code § 24.2-527 does not provide for oversight by the SBE or impose an appeal process. The candidate has voluntarily embraced the party in his declaration of candidacy, and the party’s rules govern the party’s determination of whether a candidate has qualified to appear on the ballot for a primary election.

STANDARD OF REVIEW FOR INJUNCTIVE RELIEF

Plaintiff’s Motion is styled as seeking a “Preliminary Injunction,” and Plaintiff asks the Court to apply the four-factor test that federal courts apply for such relief, under which a plaintiff must make a clear showing that (1) plaintiff is likely to succeed on the merits; (2) plaintiff will likely suffer irreparable harm absent preliminary relief; (3) the balance of hardships weighs in plaintiff’s favor; and (4) the injunction is in the public interest. *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 236 (4th Cir. 2014) (citing *Winter v. Natural Resources Defense Council*, 555 U.S. 7, 20 (2008)).

Virginia law allows for “temporary injunctions,” and the federal test has not been adopted by either the General Assembly or the Supreme Court of Virginia. Va. Code § 8.01-628 provides that “No temporary injunction shall be awarded unless the court shall be satisfied of the

plaintiff's equity.” The Supreme Court of Virginia, applying “well established principles,” has stated that “the granting of an injunction is an extraordinary remedy and rests on sound judicial discretion to be exercised upon consideration of the nature and circumstances of a particular case.” *Levisa Coal Co. v. Consolidation Coal Co.*, 276 Va. 44, 60, 662 S.E.2d 44, 53 (2008). When asked to adopt the four-factor federal test, the Supreme Court of Virginia chose to express no view. *Id.* at 60 n.6., 662 S.E.2d 53 n.6.

Although the Virginia standard is controlling and not identical to the federal test, the four factors in *Winter* and subsequent federal cases may help guide the exercise of “judicial discretion” and illuminate “the nature and circumstances of [the] particular case,” so as to determine whether the “extraordinary remedy” of a temporary injunction should be granted.

A mandatory injunction, which disturbs the status quo ante, “in any circumstance is disfavored” under the federal test advanced by Plaintiff. *League of Women Voters of N.C.*, 769 F.3d at 236 (quoting *Taylor v. Freeman*, 34 F.3d 266, 270 n.2 (4th Cir. 1994)). Here, Morrissey seeks an injunction “requiring Defendants to recognize the validity of the signature of Jane Doe and John Doe on the petition and requiring Morrissey’s name to be placed on the ballot.” (Complaint ¶¶ 91, 99-100, 107, 111.) That is mandatory injunctive relief. *See id.*

ARGUMENT

I. Morrissey has provided no evidence to support an award of temporary injunctive relief and has failed even to make sufficient allegations.

Morrissey has not provided any evidence to support his Motion. He has not even *alleged* a sufficient factual basis for relief. According to the Complaint (¶ 64) and news reports, 222 of the required 250 signatures were accepted. Morrissey therefore must show at least 28 improperly rejected voter signatures or any legal claim he might wish to make is futile. But Morrissey’s filings to date claim only that there are “seven qualified voters who apparently had

their signatures wrongfully denied” and that “Upon information and belief, there are at least twenty six more.” (Mem. Supp. at 7-8.) The “extraordinary remedy” of temporary injunctive relief – particularly to halt an election process – cannot be given without sufficient evidence.

It is no answer for Morrissey to seek some indefinite period of time to supplement and substantiate his claims. See Complaint ¶¶ 7, 91, 100, 107, 111, & Prayer for Relief (seeking to enjoin the printing of ballots until appropriate review and evidence can be presented). The election process is well underway, and the deadline mandated by law for printing and mailing ballots is imminent.³ And in the week since Morrissey’s Complaint was filed, he has submitted no evidence and made no supplementary allegations.⁴

II. Morrissey’s claim is not likely to succeed on the merits because he has not been denied an adequate opportunity to appear on the ballot and because the Commonwealth is not engaging in improper unequal treatment.

A. The Commonwealth has broad authority in regulating elections.

The Constitution of Virginia provides that “[t]he General Assembly shall provide for the nomination of candidates, shall regulate the time, place, manner, conduct, and administration of primary, general, and special elections, and shall have power to make any other law regulating elections not inconsistent with this Constitution.” Va. Const. art. II § 4. The United States Constitution expressly recognizes state legislatures’ right to regulate elections, even for federal offices. See U.S. Const. art. I § 4 (“The Times, Places and Manner of holding elections for

³ See Va. Code §§ 24.2-507 & 24.2-510 (setting the second Tuesday in June, which is June 9, 2015, as the deadline for general election candidates to be determined); Va. Code § 24.2-612 (describing the ballot process in April, which culminates in printed absentee ballots being available “not later than 45 days prior to any election,” or April 25).

⁴ Moreover, Virginia law requires that a temporary injunctions be for a fixed duration, not an indefinite time to allow “appropriate review.” See Va. Code § 8.01-624 (“When any court ... shall grant a temporary injunction ... such court shall prescribe in the injunction order the time during which such injunction shall be effective and at the expiration of that time such injunction shall stand dissolved unless, before the expiration thereof, it be enlarged.”).

Senators and Representatives, shall be prescribed in each State by the Legislature thereof.”). The Supreme Court long ago said that it “cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections.” *Smiley v. Holm*, 285 U.S. 355, 366 (1932). And the Court has confirmed that the States’ “broad power” to regulate elections for federal offices “is matched by state control over the election process for state offices.” *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451 (2008).

B. Signature requirements are a well-established means of achieving important state interests.

The State has important interests in a fair and orderly electoral process. See *Storer v. Brown*, 415 U.S. 724, 730 (1974) (“there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes”). It is well-settled that signature requirements are a constitutional way of supporting those important interests. *E.g.*, *Amarasinghe v. Quinn*, 148 F. Supp. 2d 630, 636 (E.D. Va. 2001) (noting that “[t]he Supreme Court has consistently held that a state may require a candidate for public office to demonstrate their support among potential voters in order to qualify for a place on the ballot” and upholding Virginia’s signature requirement against a challenge by a candidate who had fallen short); *Wood v. Quinn*, 104 F. Supp. 2d 611, 616 (E.D. Va. 2000) (citing numerous Fourth Circuit and Supreme Court cases upholding signature requirements).

Morrissey objects to what he claims is impermissible unequal treatment among candidates – namely, that Virginia law gives general election candidates an administrative appeal of right to the State Board of Elections but does not provide such an appeal to candidates seeking a party’s nomination in a primary. But that objection fails to meet the Supreme Court’s requirements and ignores the different stages of the election process.

C. Merely identifying differences between parties or candidates in election law is insufficient to state a claim unless there is a real lack of adequate opportunity for ballot access.

The Supreme Court has established a high, practical bar for challenges claiming that election procedures are unfair or discriminatory. A litigant must show a lack of opportunity to appear on the general election ballot, and Morrissey has not met that standard.

In *American Party of Texas v. White*, 415 U.S. 767 (1974), litigants challenged the constitutionality of Texas law that imposed different requirements on different parties regarding their methods of nomination, including that only some parties and candidates needed to submit signatures. 415 U.S. at 780.⁵ The Supreme Court responded that appellants' burden to show discrimination "is not satisfied by mere assertions" of differing requirements. *Id.* at 781. The Court was "unwilling to assume" that meeting Texas's different requirements "imposes a substantially greater hardship on minority party access to the ballot." *Id.* at 783. The Court concluded that Texas "affords minority political parties a real and essentially equal opportunity for ballot qualification" and that "[n]either the First and Fourteenth Amendments nor the Equal Protection Clause of the Fourteenth Amendment requires any more." *Id.* at 787-88. Those claiming to be discriminated against had failed to show a real lack of opportunity for ballot access, so their challenge to Texas's differing requirements failed.

In *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196 (2008), the Supreme Court confronted another challenge to an election system, this time based on alleged disparities between candidates. Candidates unhappy with New York's hybrid system for selecting party

⁵ See 415 U.S. at 772-73 (statewide primaries required for "major parties"), 773-74 (parties whose candidate for governor received more than 2% but less than 200,000 votes may use primaries or conventions), 774 (parties who polled less than 2%, such as those who brought the case, required to use conventions and to provide signed petitions if the convention did not evidence the required support), 775 ("unaffiliated nonpartisan or independent candidates" required to qualify by submitting an application or petition with the requisite signatures).

nominees for Supreme Court Justice, along with voters who supported those candidates and a public interest group, sued. They “contended that New York’s election law burden the rights of challengers seeking to run against candidates favored by party leadership, and deprived voters and candidates of their rights to gain access to the ballot and to associate in choosing their party’s candidates.” *Id.* at 201. Lower courts granted an injunction and held that there was a constitutional right to a “realistic opportunity to participate in [a political party’s] nominating process, and to do so free from burdens that are both severe and unnecessary.” *Id.* at 202. The Supreme Court reversed, finding “no support in our precedents” for a claim that the Constitution imposes a requirement that candidates “have a fair chance of prevailing in their parties’ candidate-selection process.” *Id.* at 204. The Court said that election competitiveness interests “are well enough protected so long as all candidates have an adequate opportunity to appear on the general-election ballot.” *Id.* at 207. The Court declined to “enter the morass” of trying to make elections sufficiently fair or competitive. *Id.* at 209.

The common theme in *American Party of Texas* and *Lopez Torres* is that, unless a litigant can show a real lack of adequate opportunity to access the general election ballot, courts should not use the Constitution to tinker with state election law to address perceived unfairness in differing treatment of parties or candidates. Morrissey has a free and fair opportunity to gain access to the general election ballot, and his claim that the DPVA nomination process is unfair fails to meet the standard required by the Supreme Court.

D. The Commonwealth treats candidates alike at the different stages of the election process.

Morrissey’s Complaint conflates the different stages of the election process. For reasons explained in the next section below, all candidates for major political parties’ nominations are treated alike by Virginia law – all party candidates are subject to the rules of the party whose

nomination they seek, and none receives an appeal to the State. *See* Va. Code § 24.2-521 (setting signature requirements for primary candidates); Va. Code § 24.2-525 (“Only a person meeting all the qualifications and fulfilling all the requirements of a candidate, and who has complied with the rules and regulations of his party, shall have his name printed on the ballot provided for the primary election.”).⁶ At the general election stage, all candidates are also treated alike – they must submit the exact same number of signatures as are required to qualify for a party primary (250), and any candidate may take an administrative appeal if they fall short in their petition to appear on the general election ballot. *See* Va. Code § 24.2-506(A)(3) & (C).⁷

III. The Commonwealth allows the parties to control their nomination processes out of respect for the constitutional rights of the parties, and Morrissey has shown no right to override the DPVA’s rules, by which he is bound.

State election regulations may be found invalid if they impose a “severe burden” on political parties’ associational rights. Where a State tries to control party governance or to force a party to include or exclude non-members from the nomination process, courts generally have found a severe burden that will be ruled unconstitutional if there is no compelling state interest or the law is not narrowly tailored. *See, e.g., Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214 (1989) (striking down California’s ban on primary endorsements and imposition of eligibility requirements and term limits on party officers). The limits on states’

⁶ Party nominees need not submit signatures for the general election – and therefore do not need an appeal regarding signatures under Va. Code § 24.2-506 – because the party (in prior elections) and the nominee (in qualifying for the primary) already have made a showing of voter support.

⁷ In support of his equal protection claim, Morrissey’s Complaint (at ¶¶ 80-81) cites *El-Amin v. State Bd. of Elections*, 721 F. Supp. 770 (E.D. Va. 1989), and an unnamed 2012 state case, which appears to be *Ryan v. Showalter* (Richmond Cir. Ct. case no. CL12-3277-3). Both cases show how Morrissey is confusing primary and general election ballot access, and neither case applies here or provides support for Morrissey’s equal protection claim. *El-Amin* concerned a different deadline, for financial disclosure statements (for which Virginia law allows an extension, *see* § 24.2-503), and general election ballot access. *See* 721 F. Supp. at 770-71. *Ryan* also concerned general election ballot access (for the City of Richmond’s mayoral race), and Virginia law has changed since *Ryan*. *See* 2013 Va. Acts ch. 684 (amending § 24.2-506).

otherwise broad authority to regulate elections stem from parties' well-established rights under the First Amendment. *E.g.*, *California Democratic Party v. Jones*, 530 U.S. 567, 575 (2000) (reaffirming "the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party 'selects a standard bearer who best represents the party's ideologies and preferences'"). Allowing parties to control the details of their nomination process, without the interference of an imposed appeal for those unhappy with party committee decisions, reflects a longstanding and permissible legislative judgment respecting parties' rights.

Political parties are voluntary associations. The rules of a voluntary association are contractual in nature and are construed and enforced by Virginia courts as a contract between the members.⁸ Morrissey is bound by such rules as a DPVA member and by his voluntary participation in the DPVA nominating process.⁹ In this case, the DPVA's rules do provide an appellate process, but invoking that process requires Morrissey to have persuaded at least one member of the nominating committee to make the appeal on his behalf, which he apparently failed to do. *See* Ex. A at 16 (Art. 7 § 7.6 of the September 2013 DPVA Plan, which provides: "Any member of a nominating committee may appeal any decision, action or failure to act by the committee..."). If Morrissey objects to the DPVA's rules, that is between Morrissey and the DPVA; the Commonwealth is not involved. Morrissey has shown no basis for overriding the DPVA's rules, however. Morrissey voluntarily embraced the DPVA in filing to be a candidate in the DPVA primary, and he is bound by the DPVA rules. Mere desire to be labeled a

⁸ *Gottlieb v. Economy Stores, Inc.*, 199 Va. 848, 856, 102 S.E.2d 345, 351 (Va. 1958) ("The constitution and by-laws adopted by a voluntary association constitutes a contract between the members, which, if not immoral or contrary to public policy, or the law, will be enforced by the courts.") (quoting *Bradley v. Wilson*, 138 Va. 605, 612, 123 S.E. 273, 275 (Va. 1924)); *see also Amalgamated Clothing Workers v. Kiser*, 174 Va. 229, 236, 6 S.E.2d 562, 564-65 (Va. 1939).

⁹ *See* Ex. B (a copy of the Certificate of Candidate Qualification filed by Morrissey, with certain personal information redacted, in which he chooses the "Democratic Primary").

Democrat – the only difference between being a party candidate and an independent candidate – fails to justify overriding DPVA’s rules.

Moreover, Morrissey’s claim of a “right to have his name on the [primary] ballot” (Complaint ¶ 93) has no basis in the law. See *Amarasinghe v. Quinn*, 148 F. Supp. 2d 630, 635 (E.D. Va. 2001) (“the Supreme Court held that a right to appear on a ballot is not a ‘fundamental right’”) (citing *Clements v. Fashing*, 457 U.S. 957, 960-61 (1982)); *Wood v. Quinn*, 104 F. Supp. 2d 611, 614 (E.D. Va. 2000), *aff’d*, 230 F.3d 1356 (4th Cir. 2000) (unpublished), *cert. denied*, 532 U.S. 1021 (same).¹⁰ Given the absence of a “severe burden” on constitutional rights, strict scrutiny does not apply. *E.g.*, *Clingman v. Beaver*, 544 U.S. 581, 586-87, 592 (2005).

IV. The Commonwealth has not denied Morrissey ballot access or due process.

Access to the general election ballot is straightforward and easy to achieve. By submitting the same number of signatures (250) in June, Morrissey (or any other qualified person) may appear on the general election ballot. See Va. Code § 24.2-506(A)(3). If signatures are still a problem, Virginia law gives any candidate an administrative appeal with the State Board of Elections at that time. Va. Code § 24.2-506(C). Morrissey has no claim that the Commonwealth is denying him access to the ballot. Indeed, Virginia’s election process effectively gives a candidate like Morrissey two bites at the apple – a candidate who fails to qualify for a party primary ballot due to a shortage of voter signatures may again circulate petitions during the approximately two-month period before the deadline to qualify for general

¹⁰ Citizens likewise have no right to participate in a party primary. *E.g.*, *Balsam v. Secretary of the State of New Jersey*, 2015 U.S. App. LEXIS 5641 at 8 (3d Cir. April 8, 2015) (unpublished) (“while ‘a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction,’ no court has ever held that that right guarantees participation in primary elections”) (citation omitted). Only those who are qualified under state law and party rules may participate. See, *e.g.*, *Nader v. Schaffer*, 417 F. Supp. 837 (D. Conn.) (three-judge panel), *aff’d*, 429 U.S. 989 (1976) (upholding a closed primary system).

election ballot access.

Nor can Morrissey claim that the Commonwealth has denied him an appeal – he simply has not reached the stage of the election process where an appeal occurs. Va. Code § 24.2-506 does not engage until the deadline for petitions for the general election ballot, on June 9, 2015.

V. The State Board of Elections does not print the ballots at issue, and this case cannot proceed in the absence of the responsible local officials, who are necessary parties.

The Supreme Court of Virginia has adopted a broad definition of a “necessary party”:

Where an individual is in the actual enjoyment of the subject matter, or has an interest in it, either in possession or expectancy, which is likely either to be defeated or diminished by the plaintiff's claim, in such case he has an immediate interest in resisting the demand, and all persons who have such immediate interests are necessary parties to the suit.

Asch v. Friends of the Cmty. of Mt. Vernon Yacht Club, 251 Va. 89, 90-91, 465 S.E.2d 817, 818 (1996); *Raney v. Four Thirty Seven Land Co.*, 233 Va. 513, 519-20, 357 S.E.2d 733, 736 (1987).

“[A] court lacks the power to proceed with a suit unless all necessary parties are properly before the court” because “[a necessary party’s] interests in the subject matter of the suit, and in the relief sought, are so bound up with that of the other parties, that their legal presence as parties to the proceeding is an absolute necessity, without which the court cannot proceed.” *Asch*, 251 Va. at 91 (quoting *Bonsal v. Camp*, 111 Va. 595, 597-98, 69 S.E. 978, 979 (1911)). *Accord Siska Trust v. Milestone Dev.*, 282 Va. 169, 177, 715 S.E.2d 21, 25 (2011) (“[A] court cannot render a valid judgment when necessary parties to a suit are not before the court”; the absence of necessary parties calls into question “the ability to render complete relief in the case”).

Applying these principles, this action cannot proceed, and no judgment can be rendered in Morrissey’s favor, because of his failure to join the electoral boards of the six localities covered by the 16th Senatorial District: Chesterfield County, Dinwiddie County, Hopewell City, Petersburg City, Prince George County, and Richmond City. The electoral boards of these

localities are necessary parties to this case because they are the entities given authority to print the ballots at issue, under Va. Code § 24.2-612 (“Each electoral board shall have printed the number of ballots it determines will be sufficient”). The SBE only has authority to print ballots under § 24.2-612 in circumstances (certain federal and statewide elections) not applicable here.

Though the SBE is involved in the ballot approval process, the electoral boards are responsible for the multi-step ballot printing process. This includes preparing ballot proofs, Va. Code § 24.2-612; contracting with or employing a printer to print the ballots, Va. Code § 24.2-616; being present at the printing, Va. Code § 24.2-617; receiving and certifying the number of ballots, Va. Code § 24.2-618; and sealing the ballots, Va. Code § 24.2-619.¹¹

Morrissey seeks injunctive relief enjoining the printing of the ballots for the 16th Senate District Democratic Party primary election, scheduled for June 9, 2015. As the government entities responsible for ballot printing, the electoral boards have an undeniable interest in a proceeding seeking to enjoin the printing of the ballots for this election. The electoral boards’ statutory duties mean that their legal presence as parties is an absolute necessity. Further, this Court is unable to grant relief in Morrissey’s favor without affecting the statutory duties of the local electoral boards. This action cannot proceed in their absence.

VI. Morrissey may not assert the rights of the purported voters listed as anonymous co-plaintiffs Jane Doe and John Doe.

There is reason to doubt that the two anonymous co-plaintiffs named in the Complaint, Jane Doe and John Doe, are specific, real individuals. The Complaint itself admits that each Doe merely “represents *one or more* real persons Plaintiff’s [*sic*] *believe* will be located.” (Complaint

¹¹ Morrissey charges the State Board of Elections with “abdicat[ing] its oversight responsibilities” (Mem. Supp. at 3) citing SBE’s general powers and duties in Va. Code § 24.2-103. SBE’s general authority under that section is not a blank check to override either political parties’ constitutional rights or local electoral boards’ specific statutory responsibilities.

¶¶ 11 & 12, emphases added.)

If the Does are not specific, real individuals who have decided to bring this case, then they and any counts claiming to assert their rights should be dismissed – a plaintiff, or an attorney, may not invent co-plaintiffs in an attempt to bolster a case. *See, e.g., Warth v. Seldin*, 422 U.S. 490, 499 (1975) (a plaintiff “generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties”).

On the other hand, if the anonymous co-plaintiffs are specific, real individuals, the Court should order their identification pursuant to Va. Code § 8.01-15.1.

Along with this brief, the Commonwealth is filing a Motion for Identification or Dismissal of the Doe Plaintiffs, which discusses the anonymity issue in more detail.

VII. The equities do not favor Morrissey, who slept on his rights rather than seize a clear opportunity to avoid signature problems.

Virginia law permits candidates to obtain voter lists, present and past. *See* Va. Code § 24.2-405(A) (“The State Board shall furnish, at a reasonable price, lists of registered voters for their districts to ... (ii) candidates for election or political party nomination to further their candidacy ...”); Va. Code § 24.2-406 (A) (“The State Board shall furnish, at a reasonable price, lists of persons who voted at any primary, special, or general election held in the four preceding years to (i) candidates for election or political party nomination to further their candidacy ...”). Among other things, this allows candidates to pre-check petition signatures themselves.

Morrissey, an experienced candidate and former legislator, inexplicably failed to exercise his right to obtain a voter list and to check his petition signatures. Moreover, Morrissey waited until near the end of the period for submitting petitions and signatures. *See* Va. Code § 24.2-522(A) (“Declarations of candidacy, petitions, and receipts indicating the payment of filing fees shall be filed not earlier than noon of the ninety-second day and not later than 5:00 p.m. of the

seventy-fifth day before the primary”, which is March 9 – 26, 2015); Complaint ¶ 47 (Morrissey first attempted to get the DPVA to approve his signatures on March 23).

“Equity aids the vigilant, not those who sleep on their rights.” *Chesapeake & O. R. Co. v. Willis*, 200 Va. 299, 306, 105 S.E.2d 833, 839 (1958). Morrissey was far from vigilant, and his lack of diligence is responsible for his signature problems. Injunctive relief is inappropriate.

VIII. The public interest does not favor granting injunctive relief.

Although the public has no interest in enforcing an invalid law, *see Newsom v. Albemarle County Sch. Bd.*, 354 F.3d 249, 261 (4th Cir. 2003), the public has a strong interest in upholding the valid enactments of its representatives. *E.g., Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers). Indeed, the State suffers irreparable harm as a matter of law when its enactments are declared unconstitutional and enjoined. *Id.* (“any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury”) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)). Given the fatal defects in Morrissey’s case, discussed *supra*, the public interest weighs in favor of denying injunctive relief.

Immediate relief at this time also would have a significant impact on the processes of the six impacted localities, which already are engaged in the process of preparing and printing ballots for the upcoming primary. General registrars must mail out requested absentee ballots no later than 45 days before the election, on April 25, 2015. *See* Va. Code § 24.2-612. The Supreme Court of the United States has cautioned that “[i]n awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles,” and may structure relief such that it avoids a disruption of the electoral

process. *Reynolds v. Sims*, 377 U.S. 533, 585 (1964); accord *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam) (when immediate relief will impact an upcoming election, a court must consider “in addition to the harms attendant upon issuance or nonissuance of an injunction, considerations specific to election cases and its own institutional procedures”). Where, as in this case, an injunction would prevent local officials from engaging in necessary preparations for the mandatory April 25 deadline to mail absentee ballots, the impact on the electoral process also weighs against last-minute injunctive relief.

CONCLUSION

In light of the nature and circumstances of this case, the Court should deny the request for the “extraordinary remedy” of temporary injunctive relief. Morrissey is not likely to succeed on the merits, and equity and the public interest do not favor granting relief.

Respectfully submitted,

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CLARA BELLE WHEELER
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CERTIFICATE OF SERVICE

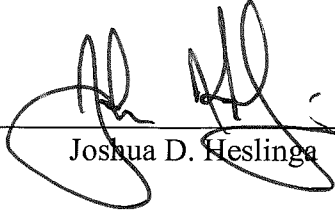
THIS IS TO CERTIFY that on April 13, 2015, I am filing the foregoing document with the Clerk of Court by hand and am sending copies to counsel for the other parties by mail and by electronic mail to email addresses that have previously been used by such counsel to communicate regarding this case:

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