

IN THE CIRCUIT COURT FOR STAFFORD COUNTY

SUSAN B. STIMPSON,	)	
Plaintiff	)	
	)	
v.	)	Case No. CL15000668
	)	
JAMES B. ALCORN, et al.	)	
Defendants.	)	

**THE COMMONWEALTH’S MEMORANDUM IN OPPOSITION TO
MOTION FOR INJUNCTIVE RELIEF**

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 (the Board) and the Virginia Department of Elections (collectively, the Commonwealth) hereby oppose Plaintiff’s Motion for Injunctive Relief (the Motion).

SUMMARY

Injunctive relief should be denied for the following reasons:

1) The Board correctly applied Virginia law in directing that elections officials accept absentee ballot applications with electronic signatures. *See* Exhibit A (Decl. of Clerk) at p.7 of Ex. 6) (draft meeting minutes setting forth the discussion and Board action). The Board’s instructions exercise authority under Uniform Electronic Transactions Act (UETA), Va. Code §§ 59.1-479 *et seq.*; further fulfill Va. Code § 24.2-701(A)’s charge to “implement a system that enables eligible persons to request and receive an absentee ballot application electronically through the Internet”; and follow a 2014 official opinion of the Attorney General of Virginia.

2) Basic premises critical to Plaintiff’s case – that the Board made a “regulation” that was a “change” in the law – are false. The Board did not adopt a regulation; it issued instructions to elections officials based on existing law. Although the Board’s supervisory

authority binds elections officials, the Board's guidance does not have "the force of law" and so is not a regulation. Furthermore, the Board's instructions do not change the law; to the contrary, the Board's instructions accord with a 2014 Attorney General opinion and prior Board guidance.

3) The Board did not act arbitrarily and capriciously. And the Board and Department may answer questions from legislators, just like for any other person.

4) Notice of the Board's action was not constitutionally flawed. The Department provided prompt notice of the Board's instructions by email to all general registrars and electoral board members and to state party officials. The public received notice through the open meeting itself, the publicly-posted meeting materials, and the draft meeting minutes. The Fourteenth Amendment does not bar the Commonwealth from giving a direct answer to the person who asked a question, nor require the Commonwealth to give direct notice to other individuals.

5) Contrary to Plaintiff's unsupported claims, the Board operated publicly and in compliance with the Virginia Freedom of Information Act (FOIA), Va. Code §§ 2.2-3700 *et seq.* The public and the Board received the meeting agenda and materials concurrently, and draft meeting minutes were timely posted on the Board's official website.

6) Plaintiff has failed to join necessary parties – the general registrars and local electoral boards who accept and process absentee ballot applications and who count the ballots. The requested relief cannot be granted, and this action cannot proceed, in their absence.

7) Equity does not favor granting relief. Plaintiff's claim of disadvantage is speculative and insufficient. Any disadvantage that may exist is the result of Plaintiff's own failings and lack of diligence. And the relief requested is largely impermissible and moot.

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

SUMMARY OF ABSENTEE BALLOT LAW AND PROCESS

Virginia law permits those who cannot vote in person on the day of an election to vote by absentee ballot. *See* Va. Code § 24.2-700. A voter must complete an application for an absentee ballot. Va. Code § 24.2-701(A). Absentee ballot applications can be submitted up to 12 months before an election, *id.*, so no period during the year is free of absentee ballot applications.

The General Assembly specifically charged the Board with ensuring that absentee ballots can be submitted electronically and gave the Board control over the form of electronic applications for absentee ballots. Va. Code § 24.2-701(A) provides that the Board “shall implement a system that enables eligible persons to request and receive an absentee ballot application electronically through the Internet” and also states that “[e]lectronic absentee ballot applications shall be in a form approved by the State Board.”

A voter can submit an absentee ballot application by mail, electronically, by fax, or in person. *See* Va. Code § 24.2-701(B)(1) & (2). Although the Board has some role in the application process, local general registrars are the main channel for distributing and receiving absentee ballot applications. *See* Va. Code § 24.2-701(A) (“The State Board shall furnish each general registrar with a sufficient number of applications for official absentee ballots. The registrars shall furnish applications to persons requesting them.”); Va. Code § 24.2-701(B)(2) (“Any other application [other than in-person] may be made by mail, electronic or telephonic transmission to a facsimile device if one is available to the office of the general registrar or the office of the State Board if a device is not available locally, or other means.”).

Va. Code § 24.2-701(C) sets forth information that must appear on an absentee ballot application. The signature requirement is found in § 24.2-701(A), however (“Unless the applicant is disabled, all applications for absentee ballots shall be signed by the applicant...”).

STANDARD OF REVIEW FOR INJUNCTIVE RELIEF

Plaintiff's Brief (at 3) asks the Court to apply the four-factor test that federal courts apply for preliminary injunctions, 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 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, 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 federal test, the Supreme Court 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." *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)). Plaintiff seeks an injunction that would alter the electoral process by requiring elections officials to reject absentee ballot applications with electronic

signatures. (Motion ¶¶ 1-2.) Plaintiff also asks that the Court require elections officials to reject and not count absentee ballots submitted by those who obtained the ballot through an application with an electronic signature. (Motion ¶¶ 3-5.) That is extraordinary, mandatory injunctive relief.

ARGUMENT

I. The Board correctly applied Virginia law when it instructed general registrars to accept electronically signed absentee ballot applications.

A. Accepting electronic signatures is authorized by statute.

Plaintiff's Brief (at 4-5) advances an interpretation of the Uniform Electronic Transactions Act that would prohibit the use of electronic signatures where UETA is not expressly mentioned in other sections of the Code of Virginia. The plain language of UETA confirms that no express mention is required and permits the Board to accept electronic signatures. Moreover, Va. Code § 24.2-701(A) encourages and allows the Board's action.

UETA applies to the use of electronic signatures in "transactions." Va. Code § 59.1-481. A "transaction" is "an action or set of actions occurring between two or more persons relating to the conduct of business, commercial, or governmental affairs." Va. Code § 59.1-480(16). A voter submitting an application for an absentee ballot to a general registrar clearly is an action between two or more people relating to the conduct of governmental affairs, and therefore within the scope of UETA.

UETA gives broad authorization and approval to electronic signatures: "If a law requires a signature, or provides for certain consequences in the absence of a signature, an electronic signature satisfies the law." Va. Code § 59.1-485(d). UETA authorizes electronic signatures wherever a signature is statutorily required, and Va. Code § 24.2-701(A) requires a voter to sign an absentee ballot application, so UETA authorizes electronic signatures on such applications.

UETA specifically authorizes public bodies to accept, and to specify the type, manner,

and format, of electronic signatures. Va. Code § 59.1-496(a) (“public bodies of the Commonwealth may (i) accept the electronic filing of any information required or permitted to be filed with such public body and (ii) prescribe the methods of executing, recording, reproducing, and certifying electronically filed information”); Va. Code § 59.1-496(b)(2) (“Public bodies of the Commonwealth may specify the type of electronic signature required, the manner and format in which the electronic signature must be affixed to the electronic record”).

It is true that the General Assembly has mentioned UETA elsewhere in Virginia elections law, making acceptance of electronic signatures mandatory in those circumstances. See Va. Code § 24.2-416.7; Va. Code § 24.2-423. But Plaintiff’s interpretation of that fact ignores the plain language of UETA and would vitiate UETA’s purpose. UETA exists to establish a general rule that allows electronic signatures wherever another law requires signatures. See Va. Code § 59.1-485(d) (“If a law requires a signature, or provides for certain consequences in the absence of a signature, an electronic signature satisfies the law.”). Requiring specific approval of electronic signatures in each other section of the Code that mentions signatures contradicts UETA’s plain language and would defeat a basic purpose of UETA.¹

Finally, Va. Code § 24.2-701(A) specifically requires the Board to “implement a system that enables eligible persons to request and receive an absentee ballot application electronically through the Internet.” By clarifying that it was acceptable to use a computer to sign an absentee

¹ *Expressio unius est exclusio alterius* does not help Plaintiff. That maxim applies to lists of items in a statute; it does not determine how a general statute like UETA interacts with other parts of the Code of Virginia. In any event, courts do not employ such rules where statutes are clear and unambiguous. See *Va. Marine Res. Comm’n v. Chincoteague Inn*, 287 Va. 371, 394, 757 S.E.2d 1, 13 (2014) (“In construing statutes, courts are charged with ascertaining and giving effect to the intent of the legislature. That intention is initially found in the words of the statute itself, and *if those words are clear and unambiguous, we do not rely on rules of statutory construction* or parol evidence, unless a literal application would produce a meaningless or absurd result.”) (quoting *Crown Cent. Petroleum Corp. v. Hill*, 254 Va. 88, 91, 488 S.E.2d 345, 346 (1997)) (emphasis added). UETA’s words are clear, unambiguous, and controlling.

ballot application, as opposed to a pen, the Board further effectuated that statutory direction. Section 24.2-701(A) also provides that “[e]lectronic absentee ballot applications shall be in a form approved by the State Board,” which, along with Va. Code § 59.1-496, authorizes the electronic signature requirements included in the Board’s instructions.

B. The Board’s acceptance of electronic signatures on absentee ballot applications follows a 2014 official opinion of the Attorney General.

The Board’s instructions did not write upon a blank slate. In 2014, in response to a local electoral board’s questions, the Attorney General issued an official opinion addressing the Board’s authority to instruct general registrars to accept mailed voter registration applications bearing electronic signatures.² The opinion concluded that no law requires the acceptance of a mailed, electronically signed voter registration application, but that the Board is not precluded from directing that general registrars accept such applications. The opinion addressed an almost identical factual scenario and affirmed the Board’s authority, and thus strongly supports the Board’s similar guidance regarding absentee ballot applications.³

During its 2015 Session, the General Assembly did not overturn the Attorney General’s interpretation of Virginia law, signaling legislative acquiescence in that interpretation.⁴

In light of the plain language of UETA, the authorization for electronic absentee ballot

² 2014 Op. Va. Att’y Gen. 48, 2014 Va. AG LEXIS 47, *available at* http://www.ag.virginia.gov/files/13-111_Hinshaw.pdf (copy included as Exhibit C).

³ The opinion concerned mailed, not electronic, voter registration applications. Va. Code § 24.2-418, which provides for the “application for registration” to vote, is silent on electronic signatures – just like § 24.2-701, which provides for the application for absentee ballots. As a result, the opinion addressed the Board’s authority to instruct general registrars to accept electronically signed applications where no law requires the acceptance of such applications with electronic signatures.

⁴ *Beck v. Shelton*, 267 Va. 482, 492, 593 S.E.2d 195, 200 (2004) (“The legislature is presumed to have had knowledge of the Attorney General’s interpretation of the statutes, and its failure to make corrective amendments evinces legislative acquiescence in the Attorney General’s view.”).

applications in Va. Code § 24.2-701(A), and the 2014 Attorney General opinion affirming the Board's authority, it is clear that the Board's instructions for registrars to accept electronically signed absentee ballot applications are consistent with Virginia law and not *ultra vires*.

II. The Board did not engage in regulatory action under the Virginia Administrative Code or the Virginia Administrative Process Act.

Count 2 of the Complaint (¶¶ 29-37) alleges that the Board violated its own procedures for regulations, based on the false premise that the Board took regulatory action. The Board issued instructions, however, not a regulation.

Va. Code § 24.2-103(A) sets forth the Board's powers and duties. It provides that the Board "shall make rules and regulations and issue instructions and provide information consistent with the election laws to the electoral boards and registrars to promote the proper administration of election laws." The Board was "issu[ing] instructions," not "mak[ing] regulations," in directing registrars to accept electronically signed absentee ballot applications.

A regulation is action that, on its own, has "the force of law." 1 V.A.C. 20-10-10. Instructions, on the other hand, are directions concerning the application of existing law or policy. The Board's general supervisory authority, and its ability to bring enforcement actions under Va. Code § 24.2-103(C) & (D), requires compliance by subordinate elections officials, but the validity of instructions depends on whether those instructions correctly apply existing law.

Other matters and actions from the Board's May 13 meeting show the practical distinctions between regulations and instructions. On May 13, the Board also considered amendments to the Voter Registration Form and regulations. *See* Ex. A (Clerk Decl.) at pp. 5-6 of Ex. 6 (minutes). The Board released those proposed amendments for public comment and followed all other applicable regulatory procedures. But with respect to electronically signed absentee ballot applications, which the Board considered immediately after the proposed voter

registration amendments, the Board simply received a question, considered the recommendations and advice of the Department and legal counsel, and adopted a motion to direct registrars as to the Board's position. *Id.* at p.7 of Ex. 6. The Board knows how to promulgate regulations, which it was not doing with respect to electronically signed absentee ballot applications.

Because the Board did not engage in regulatory action with respect to electronically signed absentee ballot applications, the provisions of the Virginia Administrative Code governing the Board's regulatory processes do not apply, and Plaintiff's claim that the Board violated its own procedures governing the enactment of regulations fails.⁵

III. The Board did not act in an arbitrary and capricious manner, and there is no basis to invalidate Board instructions based on the identity of the requester here.

A. The Board acted within its authority and in accordance with past agency action.

Section I, *supra*, demonstrates that the Board acted within its authority and correctly applied Virginia law. Action that correctly applies statutes and follows an official opinion of the Attorney General is not arbitrary and capricious.⁶

The Board's May 13 interpretation and instructions also fit with past Board instructions

⁵ Plaintiff's Complaint and Brief do not cite the Virginia Administrative Process Act (APA), which authorizes agencies to make regulations. Va. Code § 2.2-4000. Article 2 of the APA prescribes the process by which regulatory action may be taken. *See* Va. Code § 2.2-4006 *et seq.* However, certain regulatory actions are exempt from the APA's requirements. *See* Va. Code § 2.2-4002. In particular, Va. Code § 2.2-4006(B)(8) provides that regulatory action related to "the conduct of elections or eligibility to vote" is exempted from the provisions of the APA. The acceptance of electronically signed absentee ballot applications falls within this exemption. Even if the Board had made a regulation on May 13, which it did not, the Board would not have been required to do so through the APA's regulatory process.

⁶ *See School Bd. of the City of Norfolk v. Wescott*, 254 Va. 218, 224, 492 S.E.2d 146, 150 (1997) (a decision is "arbitrary and capricious" when it is "willful and unreasonable" and taken "without consideration or in disregard of facts or law or without determining principle") (quoting BLACK'S LAW DICT. 105 (6th ed. 1990)); *City Council v. Wendy's of W.Va.*, 252 Va. 12, 18, 471 S.E.2d 469, 473 (1996) (if it was possible for "objective and reasonable persons to reach different conclusions," then the action "was reasonable, not arbitrary and capricious").

to election officials. On September 25, 2013, the Board advised general registrars to accept electronically signed mailed voter registration applications, applying UETA. See Exhibit B (Cortés Decl.) at ¶ 2 & Ex. 1. The Board did not take regulatory action in 2013; instead, the Board instructed registrars as to what they should do, pursuant to the Board’s duty to “supervise and coordinate the work of the county and city electoral boards and of the registrars to obtain uniformity in their practices and proceedings and legality and purity in all elections.” Va. Code § 24.2-103(A). The Board’s 2013 guidance was issued in a format very similar to that used for the May 13 instructions. Compare Ex. B (Cortés Decl.) at Exs. 1 & 2.⁷

B. The Board’s direction to general registrars is not invalid because of the identity of the person who asked for guidance.

Matthew Moran, Communications Director for William J. Howell, Speaker of the House of Delegates, contacted the Department to ask whether electronically signed absentee ballot applications were acceptable. The Department brought that question to the Board at the May 13 meeting. See Ex. A (Clerk Decl.) at ¶ 7 & pp. 2-5 of Ex. 4 (the Department’s memorandum).

Plaintiff alleges that the Board’s action at the meeting was based on “improper legislative pressure” because the request for guidance was submitted on behalf of the Speaker, because the Board gave “quick approval,” and because the Board did not provide notice to any other candidates. See Plaintiff’s Brief at 11. Plaintiff’s claim is meritless.

The Board is statutorily required to “supervise and coordinate the work of the county and city electoral boards and of the registrars to obtain uniformity in their practices and legality and purity in all elections.” Va. Code § 24.2-103(A). As a result, the Board and Department are

⁷ The Department was created in 2014 as part of a reorganization of staffing to the Board. See 2014 Va. Acts ch. 542, available at <http://lis.virginia.gov/cgi-bin/legp604.exe?131+ful+CHAP0542>. Accordingly, the Board’s instructions are now disseminated by the Commissioner of Elections, the head of the Department, or his staff.

frequently contacted by campaigns, parties, and local election officials for guidance and must provide that guidance to ensure consistent, proper elections procedures. There is no basis to exclude sitting legislators and their staff from those who can seek guidance. Indeed, in the very case cited in Plaintiff's Brief, the Virginia Court of Appeals affirmed that legislators have the same right to comment as other citizens. *See Loudoun Hosp. Ctr. v. Stroube*, 650 S.E.2d 879, 890 (Va. Ct. App. 2007) ("In Virginia, legislators, as well as others, are permitted to comment to the Commissioner on proposed projects."). The same principle applies to the right to ask questions.

In this case, when confronted with a question, the Board considered the question at its next regular, public meeting and provided an answer that comports with statutes, an Attorney General opinion, and similar agency guidance in the past. Plaintiff does not clarify why she believes that answering the question should have taken longer. Regarding notice, as explained in section IV & V, *infra*, the Board and the Department handled this matter in accordance with the Constitution and FOIA and were not required to contact Stimpson. There is no basis to conclude that legislative influence "taint[ed] the administrative process," *Stroube*, 650 S.E.2d at 890, and Plaintiff offers no authority for invalidating guidance based on who asked a question.

IV. There is no constitutional or statutory deficiency in the notice of the Board's action.

The Complaint's allegations concerning the Board and notice are false and misleading.

A. The Board provided notice of this matter to the public, both prior to, and following, the May 13 meeting.

The allegation that "[t]he Board did not ... otherwise publicize its action" regarding electronically signed absentee ballot applications (Compl. ¶ 50) is false. Through the Department, the Board provided same-day notice of the Board's instructions by email to all general registrars and local electoral board members, and by phone to representatives of the Republican and Democratic state parties. *See* Ex. B (Cortés Decl.) at ¶ 3 & Ex. 2.

The allegation that the Board has not “noted the change on its Internet site” (Compl. ¶ 52) is also false. Before expiration of the time period permitted by law, the Board posted draft meeting minutes on its website. *See* Ex. A (Clerk Decl.) at ¶ 9. Va. Code § 2.2-3707.1 provides that draft meeting minutes must “be posted as soon as possible but no later than ten working days after the conclusion of the meeting.” The Board posted draft minutes on the morning of May 27, which was the ninth working day after the May 13 meeting. *See* Ex. A (Clerk Decl.) at ¶ 9.

B. Special notice to the Plaintiff was not required.

It is true that the Board did not provide the Plaintiff with special notice of the Board’s instructions, but the Complaint’s emphasis on that fact is misleading because the Board was under no obligation to do so.

Plaintiff alleges that the lack of specific notice to her of the Board’s instructions violates the Equal Protection Clause of the Fourteenth Amendment. *See* Compl. Count Four; Plaintiff’s Brief at 11-12. That claim has fatal flaws.

First, Plaintiff assumes, erroneously, that the Board made a “substantive change” to the law. In fact, the Board simply interpreted existing law. *See* section I, *supra*. That alone is fatal to Plaintiff’s claim because “ignorance of the law is no excuse” and Stimpson, like everyone else, is “conclusively presumed to know the law.” *King v. Empire Collieries Co.*, 148 Va. 585, 590, 139 S.E. 478, 479 (1927). Indeed, Plaintiff “is estopped from denying such knowledge,” *id.*, and so cannot contend to this Court that she was unaware that Virginia law permits acceptance of absentee ballot applications with electronic signatures.

Second, Plaintiff alleges and assumes that “Plaintiff’s opponent has been granted a substantial and unjust advantage in reaching potential absentee voters.” (Compl. ¶ 64.) As explained in section VII(A), *infra*, that assertion is speculative and unprovable. Without damage caused by the Commonwealth to a “substantial legal right” of Plaintiff, Plaintiff lacks standing.

See Westlake Props. v. Westlake Pointe Prop. Owners Ass'n, 273 Va. 107, 120, 639 S.E.2d 257, 265 (2007). Plaintiff has no substantial legal right to complain about qualified voters exercising their right to vote by absentee ballot or about the Board's instructions to elections officials.

Third, Plaintiff's claim fails under Equal Protection Clause analysis.

Stimpson does not allege that a fundamental right was infringed or that she was treated in a discriminatory manner due to membership in a protected class. Instead, Plaintiff's Brief (at 11-12) asserts simply that "Plaintiff and Howell are and were similarly situated at all relevant times" and that the "discriminatory treatment" of notifying Howell's campaign but not Stimpson's "was not justified by any legitimate governmental purpose."

As the wording in Plaintiff's Brief suggests, "rational basis" scrutiny applies. Under that lowest level of scrutiny, any legitimate basis on which a reasonable official could distinguish between Howell and Stimpson is sufficient to defeat Plaintiff's constitutional claim. *See, e.g., Finn v. Virginia Retirement Sys.*, 259 Va. 144, 155, 524 S.E.2d 125, 131 (2000) ("a classification will not be invalidated merely because it results in some inequality or some discrimination. Rather, the rational basis test is satisfied if the legislature could have reasonably concluded that the challenged classification would promote a legitimate state purpose.") (citations and quotation marks omitted). Rational basis scrutiny is deferential because "the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others," and states "are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality." *Id.* (quoting *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961)).

Here, the basis for the Department's distinction in notice is eminently reasonable and obvious: the Department provided direct notice to a staffer from the Howell campaign because

that staffer was the person who sought guidance. Stimpson and her staff did not ask. It is reasonable to communicate directly with the person who asks a question. It is unreasonable to burden the Department by restricting its communications solely to public notices or by requiring the Department to guess and also notify everyone else who might really want to know the answer. Accordingly, the distinction is justified by the Commonwealth's rational, reasonable interest in providing direct guidance in response to specific inquiries.

Finally, it bears emphasis that the Board gave general public notice and that the Board's guidance applies equally to and benefits all Virginia voters, regardless of their candidate of choice, by facilitating eligible voters' electronic applications for absentee ballots.

V. The Board complied with FOIA.

"On information and belief," Count Five of the Complaint wrongly alleges that the Board violated FOIA. To the contrary, (i) the final agenda for the May 13 meeting, which included electronic signatures on absentee ballot applications as an item, was sent to Board members and posted publicly on May 12, *see* Ex. A (Clerk Decl.) at ¶ 6; (ii) the final version of the Board "Working Papers" containing the memo from Deputy Commissioner Elizabeth Howard on the issue was sent to Board members and posted publicly on May 13 prior to the meeting, *id.* at ¶ 7 & Ex. 4; and (iii) staff disclosed during the public meeting that the Howell campaign had asked the question, *id.* at p.7 of Ex. 6.

Va. Code § 2.2-3707(F) requires that "agenda packets" and all non-exempt "materials furnished to members of a public body for a meeting shall be made available for public inspection at the same time such documents are furnished to the members of the public body."

Staff provided the initial agenda to the Board and the public concurrently, on May 1. Staff also provided the final agenda to the Board and the public concurrently, on May 12. *See*

Ex. A (Clerk Decl.) at ¶¶ 4 & 6.

Staff provided the Working Papers, including Deputy Commissioner Elizabeth Howard's memo regarding electronically signed absentee ballot applications, to the Board and the public concurrently on May 13, prior to the meeting. See Ex. A (Clerk Decl.) at ¶ 7 & Ex. 4.

FOIA would have required posting the Howell request publicly only if it was provided to the Board, but it was not part of the meeting materials. See Ex. A (Clerk Decl.) at ¶ 8.⁸

Accordingly, the Board has complied with FOIA. Even if the Board fell short of FOIA compliance, however, that would provide no basis to invalidate the Board's action.⁹

VI. Plaintiff has failed to join 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).

⁸ FOIA provides a procedure in Va. Code § 2.2-3704 by which Plaintiff could request a record of the question posed by the Howell campaign, but, as of this writing, Stimpson has not done so. As a candidate for elective office, Stimpson had another avenue to obtain information. With respect to instructions or information that the State Board provides to local electoral boards and general registrars, § 24.2-103(A) requires the Board to provide copies to a requesting political party or candidate within three days of receipt of a request. Again, however, Stimpson has not used that process to request information.

⁹ Va. Code §§ 2.2-3713(D) & 2.2-3714 set forth the remedies available under FOIA, and those exclusive remedies do not include overturning an action of a public body. A court may not add additional types of remedies. See *Charlottesville Area Fitness Club Operators Ass'n v. Albemarle County Bd. of Supervisors*, 285 Va. 87, 102-03, 737 S.E.2d 1, 9 (2013) (statutes abrogating sovereign immunity must be strictly construed). Notably, in 2015, the General Assembly considered, but did not pass, a bill that would have amended FOIA to allow a court to invalidate a public body's action if a certain type of violation occurred. See HB1646 (2015), at <http://lis.virginia.gov/cgi-bin/legp604.exe?151+ful+HB1646>.

“[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”).

This action cannot proceed, and the Court cannot grant the requested relief, because Plaintiff has failed to join the relevant general registrars and electoral boards. These officials are necessary parties because they are responsible for processing absentee ballot applications:

The general registrar shall note on each application received whether the applicant is or is not a registered voter and notify the secretary of the electoral board. In reviewing the application for an absentee ballot, the general registrar and electoral board shall not reject the application of any individual because of an error or omission on any record or paper relating to the application, if such error or omission is not material in determining whether such individual is qualified to vote absentee.

Va. Code § 24.2-706. The Board does not have the authority to review these applications and cannot accept or deny any absentee ballot applications submitted by voters.

Electoral boards are also responsible for tallying the ballots in the June 9, 2015 primary election and the November 3, 2015 general election. Pursuant to Va. Code § 24.2-711, officers of election in local precincts count voted absentee ballots. Local electoral boards select and oversee local officers of election, and, in an election for statewide office, ascertain the locality’s results and provide them to the Board for inclusion in the statewide certification of results. *See* Va. Code § 24.2-109 (“The electoral board shall perform the duties assigned by this title

including, but not limited to, the preparation of ballots, the administration of absentee ballot provisions, the conduct of the election, and the ascertaining of the results of the election.”).

Plaintiffs ask the Court to enjoin the acceptance of electronically signed applications for absentee ballots, or, alternatively, the counting of absentee ballots requested by electronically signed application. (Motion ¶¶ 3-5.) The officials responsible for processing absentee ballot applications and ascertaining election results, electoral boards and general registrars, are necessary parties to a suit seeking to enjoin such activities in an imminent election. Further, this Court is unable to grant the relief sought without affecting the duties of the local electoral boards and general registrars. This action cannot proceed in their absence.

VII. Equity does not favor relief for Plaintiff, whose claim of disadvantage is speculative and unprovable, whose failures or lack of diligence are responsible for any disadvantage that may exist, and who seeks relief with serious legal defects.

A. Plaintiff’s speculative, unprovable claims of disadvantage are insufficient, and the relief requested cannot be awarded.

Given that the primary election has not occurred and that it cannot be known how voters who have applied for absentee ballots will vote, the disadvantage that Plaintiff asserts is necessarily speculative. It simply is not the case that absentee ballot applications “represent[] votes.” (Plaintiff’s Brief at 13.) Speculation and belief are an insufficient basis for the extraordinary remedy of temporary injunctive relief, much less for an injunction that would interfere with an imminent election and even disenfranchise voters. See Motion ¶¶ 3-5 (seeking to compel denial of “voting privileges” or to bar the counting of certain ballots).

Nor will Plaintiff’s speculation about a disadvantage be provable after the votes are in. By law, a voter’s vote is secret. VA. CONST., art. II § 3 (“Secrecy in casting votes shall be maintained”); see also Va. Code § 24.2-607(A) (making it unlawful “to hinder, intimidate, or interfere with any qualified voter so as to prevent the voter from casting a secret ballot”). Once

the votes are counted, it cannot be known how voters who submitted electronically signed absentee ballot applications voted. And neither Virginia law nor the Constitution would permit election officials to try to trace votes to specific applications or to disqualify votes based on a retroactive reversal of the Board's interpretation of Virginia law, as the Motion seeks.

The requested relief has other fatal flaws too. The deadline for applications for absentee ballots for the June 9 primary was 5:00 pm on June 2. *See* Va. Code § 24.2-701(B)(2). It is therefore too late to award any relief related to applications for the June 9 primary (*see* Motion ¶¶ 1, 3-5). There is no need for emergency relief related to any other election. Finally, ¶ 6 of the Motion requests relief that is vague, overbroad, and based on an error of law (*see* § I, *supra*).

B. Plaintiff is responsible for any disadvantage that does exist.

Even assuming that a disadvantage exists, the disadvantage is traceable to Plaintiff's own failings, not to the Board instructing elections officials regarding how the Board interprets existing law. Plaintiff failed to understand existing law regarding electronic signatures. *See* Stimpson Affid. ¶ 3 ("it was and has been my understanding that Virginia law only allows absentee ballot applications with physical signatures"). Plaintiff either was not prepared or lacked the technical capability to do what existing law allows with respect to electronic signatures.¹⁰ Plaintiff failed to turn her opponent's website to her own advantage.¹¹ Plaintiff

¹⁰ Plaintiff offers no specifics and no evidence to explain why it took "several days" (Stimpson Affid. ¶ 5) for her campaign to offer an electronic signature option.

¹¹ There is no screen for voter intent in applying for an absentee ballot through the Howell website, so Stimpson has been free to use it. As Brian Schoenemann, former Secretary of the Fairfax County Electoral Board, wrote in a May 22 blog post, "If I were her, I'd direct all of my voters who want an AB [absentee ballot] and want to get it without going through a time consuming process to use Bill Howell's system.... He paid money for a system that can help her with her own ABs. She should be trumpeting that to her supporters.... Instead of complaining, use it to your advantage." <http://bearingdrift.com/2015/05/22/absentee-ballot-changes-are-right-for-virginia-wont-impact-voter-fraud/> (last visited June 2, 2015).

failed to monitor the open, properly-conducted Board proceedings. Last but not least, Plaintiff failed to pose questions about Virginia election law to obtain any needed clarifications herself.

A plaintiff whose conduct is responsible for the problem of which she complains is not entitled to equitable relief. *See, e.g., McNeir v. McNeir*, 178 Va. 285, 290, 16 S.E.2d 632, 633 (1941) (“a plaintiff must come in with clean hands, that is, he must be free from reproach in his conduct”). Even if Plaintiff’s failures reflect only a lack of diligence, the result is the same: Plaintiff is responsible for any disadvantage she now suffers and is not entitled to the extraordinary equitable remedy of a temporary injunction. *See, e.g., Chesapeake & O. R. Co. v. Willis*, 200 Va. 299, 306, 105 S.E.2d 833, 839 (1958) (“Equity aids the vigilant”).

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

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”). In short, there is a strong public interest in not disrupting elections at the last minute.

There likewise is a strong public interest in not denying qualified voters’ right to vote. *E.g., Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 667 (U.S. 1966) (voting is a “fundamental political right, because [it is] preservative of all rights”) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)).

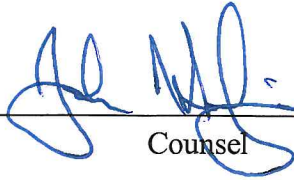
Plaintiff's assertion that the Board would suffer no harm from injunctive relief ignores that there will be significant harm to the election process and voters if injunctive relief is awarded. Plaintiff has requested that the Court enjoin the Board from accepting electronically signed absentee ballot applications, or, where such an application has already been accepted, from counting a ballot submitted by a voter who electronically signed an application. Those qualified voters would be denied the opportunity to vote as a result. Further, to effectuate such relief, the Board would be required to direct general registrars not to count valid absentee ballots, in violation of the Code of Virginia.¹² Where a plaintiff seeks a last-minute injunction that would interfere with ongoing election processes and disenfranchise certain voters, the public interest weighs strongly against 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. Plaintiff 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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By:  _____
Counsel

¹² Va. Code § 24.2-707 enumerates the information which a valid absentee ballot must contain, and outlines certain non-material omissions. The material omissions that can invalidate a voted absentee ballot are set forth in 1 V.A.C. 20-70-20.

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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on June 3, 2015, I am sending the foregoing for filing by overnight delivery, serving a copy on Plaintiff's counsel by mail, and also sending copies to Plaintiff's counsel and to court staff by electronic mail to email addresses that have previously been used to communicate regarding this case:

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