VIRGINIA:

IN THE CIRCUIT COURT OF SUFFOLK COUNTY

DEMOCRATIC PARTY OF VIRGINIA,

Plaintiff-Petitioner,

v.

BURDETTE J. LAWRENCE, in her official capacity as Suffolk County General Registrar; and BRENT ROWLANDS, EDWARD ROETTGER, AND ISAAC BAKER, in their official capacities as Suffolk County Electoral Board Members,

Defendants-Respondents.

MOTION FOR TEMPORARY INJUNCTION AND IN SUPPORT OF THE PETITION FOR WRIT OF MANDAMUS

At Law No._____

INTRODUCTION

Plaintiff the Democratic Party of Virginia ("DPVA") files this action and brings this motion to ensure that the voters of Suffolk County are given an adequate opportunity to exercise the franchise. This morning, the East Suffolk Precinct in Suffolk County polling location opened thirty-five minutes late due to electronic issues with the voting machines, depriving waiting voters of the opportunity to exercise the franchise. Virginia law anticipates that polling places will remain open for 13 hours on election day, Va. Code § 24.2-603, and contemplates processes for the casting of ballots after the traditional hours due to a court ordered extension of hours. *See* Va. Code § 24.2-653.2. It also charges Defendant-Respondents Burdette Lawrence, Brent Rowlands, Edward Roettger, and Isaac Baker ("Defendants") with authority for the "electoral process" at polling locations, including the hours they must remain open. Va. Code § 24.2-601.

I. DPVA is Entitled to a Temporary Injunction

While the Virginia Supreme Court has not determined which factors a court must consider when evaluating a motion for a temporary or preliminary injunction, circuit courts throughout

Virginia have consistently applied the four factors laid out by the Supreme Court in *Winter v. Nat'l Res. Def. Council, Inc.*, 129 S. Ct. 365 (2008). *See Fame v. Allergy & Immunology, P.L.C.*, 91 Va. Cir. 66 (2015) (noting lack of Virginia precedent and applying *Winter* factors); *Seniors Coal., Inc. v. Seniors Found., Inc.*, 39 Va. Cir. 344, 350 (1996) (noting a lack of Virginia precedent and applying federal law). In accordance with that test, Virginia courts considering motions for temporary or preliminary injunctions consider whether the plaintiff has established: (1) a likelihood of success on the merits, (2) likelihood of irreparable harm in the absence of preliminary relief, (3) that the balance of the equities tips in favor of relief, and (4) that an injunction is in the public interest. *Winter*, 555 U.S. at 20. *See also* Va. Code § 8.01-628 ("No temporary injunction shall be awarded unless the court shall be satisfied of the plaintiff's equity."). Here, each of these requirements is easily satisfied and the Court should issue the requested injunction.

A. DPVA is likely to succeed on the merits

Defendants' failure to keep the polls open risks disenfranchising Suffolk County voters, including DPVA's members, and accordingly harming DPVA's competitive prospects in today's election. The Virginia Constitution affirmatively guarantees "all men . . . the right of suffrage," Va. Const. art. I, § 6, and laws or policies affecting fundamental rights such as the right to vote are judged according to a "strict scrutiny" test; that is, the law or policy must be necessary to promote a compelling or overriding governmental interest. *King v. Virginia Birth-Related Neurological Inj. Comp. Program*, 22 Va. Cir. 156 (1990), aff'd, 242 Va. 404, 410 S.E.2d 656 (1991).

Here, voters will suffer disenfranchisement absent a continued opening of the polls until 7:35 and there is no compelling or overriding governmental interest in closing the polling location at 7 p.m. Voters, including members of Plaintiff DPVA, were disenfranchised by the delayed opening of the polling location this morning and absent relief from this Court have no recourse to mitigate that irreparable harm. Virginia law contemplates opening polls for extended hours in such

circumstances, providing an affirmative process for addressing how such ballots should be handled. *See* Va. Code § § 24.2-653.2. Indeed, due to a similar situation in Blackstone, Virginia a court in Nottoway County ordered polls there opened until 8 p.m. today. Exhibit B. Plaintiff is accordingly likely to succeed on the merits here.

B. Plaintiff will suffer irreparable harm absent relief

DPVA and its members will suffer disenfranchisement absent immediate action from this Court. That this injury is, by definition, irreparable, should be uncontroversial, as "once the election occurs, there can be no do-over and no redress." *League of Women Voters of N.C. v. North Carolina*, 769 F. 3d 224, 247 (4th Cir. 2014); *see also Thompson v. Smith*, 155 Va. 367, 387 (1930) (interference with the exercise of a "common fundamental personal right" constitutes irreparable injury, and "a suit for injunction will lie."). Indeed, courts regularly find the irreparable harm element met when voting rights are at stake. *See, e.g., Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) ("A restriction on the fundamental right to vote . . . constitutes irreparable injury."); *N.C. State Conference of the NAACP v. N.C. State Bd. of Elections*, No. 1:16CV1274, 2016 WL 6581284, at *8 (M.D.N.C. Nov. 4, 2016) ("Denying an eligible voter her constitutional right to vote and to have that vote counted will always constitute irreparable harm."); *Williams v. Salerno*, 792 F.2d 323, 326 (2d Cir. 1986) (finding "irreparable harm if [plaintiffs'] right to vote were impinged upon"). The can be little question DPVA will suffer irreparable harm absent relief.

C. The balance of the equities and the public interest tip in Plaintiffs' favor

As both the U.S. Supreme Court and the Virginia Supreme Court have long recognized, "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964); *see also Willcox*, 111 Va. at 860 ("However fair the general election may be, if at that election men have no choice but to vote for candidates who have been nominated by fraudulent

practices . . . the effect of the election must be the consummation of a fraud and the defeat of the will of the people."); *Booker*, 95 Va. at 367 ("Under our form of government, the perpetuity of our institutions and the preservation of the liberty of the people depend upon honest and fair elections; and the highest public policy requires that the laws should be so framed and administered as to secure fair elections."); *Boston Correll v. Herring*, 212 F. Supp. 3d 584, 615 (E.D. Va. 2016) (finding that "[t]he balance of equities . . . weighs heavily in favor" of plaintiff, because "[d]efendants are 'in no way harmed by issuance of an injunction that prevents the state from" violating the Constitution) (citation omitted).

Here, an injunction would provide Plaintiffs membership with an opportunity to exercise the franchise and would have little to no impact on Defendants, who would merely have to keep the polls open for an extra 35 minutes and comply with a process the law already contemplates. Va Code § 24.2-653.2. The public will be served by an injunction as even non-DPVA members will be able to vote who could not otherwise, and the balance of equities tips decisively in DPVA's favor.

II. The Court Should Issue a Writ of Mandamus.

Defendants have an affirmative legal duty to keep the polls open for a full 13 hours, and this Court should order them to comply with that duty through a writ of mandamus. For a writ of mandamus to issue (1) the petitioner must have "a clear right in the petitioner to the relief sought," (2) "there must be a legal duty on the part of the respondent to perform the act which the petitioner seeks to compel," and (3) "there must be no adequate remedy at law." *Bd. of Cty. Supervisors of Prince William Cty. v. Hylton Enters., Inc.*, 216 Va. 582, 584 (1976).

A. DPVA Has a Clear Right to the Relief Sought.

DPVA has indisputably demonstrated that closing the polls at 7 p.m. given the earlier delays violates the Virginia Constitution and settled Virginia statutory law. As set forth in both

their Complaint and above, the closing of the polls at 7 p.m. violates the affirmative right to vote and irreparably injures the voting rights of Party members who will be unable to vote absent relief from this court, and is in clear violation of Virginia law regarding the time polls must be open. Va. Code § 24.2-603. Because the closing of the polls is both unconstitutional and in violation of Virginia law, DPVA has a clear right to a writ directing Defendants to keep the polls open.

B. Defendants Have an Affirmative Legal Duty to Ensure the Polls are open for 13 hours.

Defendants have affirmative duties to act here from the text of the statutes at issue themselves. Because these duties are non-discretionary, mandamus is an appropriate remedy. See *Bd. of Cty. Supervisors of Prince William Cty.* , 216 Va. at 584 ("Mandamus is the proper remedy to compel performance of a purely ministerial duty, but it does not lie to compel the performance of a discretionary duty.").

Settled Virginia law places an affirmative duty on the officials named here to ensure that the polls remain open for 13 hours. Va. Code § 24.2-601; Va. Code § 24.2-603. Indeed, the law provides procedures for the counting of ballots cast after 7 p.m. in case the opening time needs to be extended to meet this requirement. *See* Va. Code § 24.2-653.2. Given the late opening detailed in Plaintiff's complaint and the accompanying affidavit, this Court must direct those officials to discharge this duty and keep the polls open until 7:35 pm, allowing voters to cast ballots consistent with Va. Code § 24.2-653.2

C. The Party Has No Adequate Remedy at Law.

The alternative remedy open to the Party—an action for an injunction—is not a remedy "at law." The inquiry here is not whether there is any alternative remedy, but whether there is an adequate alternative remedy "at law." An action for an injunction is not a remedy "at law," as it is well settled that ""a party must establish . . . irreparable harm and lack of an adequate remedy at

law, before a request for injunctive relief will be sustained." *Levisa Coal Co. v. Consolidation Coal Co.*, 276 Va. 44, 61 (2008) (quotation marks omitted). An action for injunctive relief plainly cannot be an "adequate remedy at law" when an injunction will not issue unless the movant establishes the "lack of an adequate remedy at law." *Id.* Accordingly, the Party has no adequate remedy at law and is entitled to a writ of mandamus.

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