IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

Tavorise Marks,
Tamia Douglas,
Tina McCray,
Julie "Michele" Pope,
Richard Walker,
Jamale Pope,
Paul Goldman,
Dawnette Drumgoole,

Plaintiffs,

v.

Civil No. 3:22cv789

Glenn Youngkin, Governor of Virginia, in his official capacity,

Robert Brink, Chairman of the State Board of Elections, in his official capacity,

John O'Bannon, Vice Chair of the State Board of Elections, in his official capacity,

Georgia Alvis Long, Secretary of the State Board of Elections, in her official capacity,

Susan Beals, Commissioner of the State Board of Elections, in her official capacity,

Donald Merricks, member of the State Board of Elections, in his official capacity,

Angela Chiang, member of the State Board of Elections, in her official capacity,

Democratic Party of Virginia

Susan Swecker, Chairwoman of the Democratic Party of Virginia, in her official capacity,

Alexsis Rodgers, Chairwoman of the 4th Congressional District Democratic Committee, in her official capacity,

Defendants.

MOTION FOR PRELIMINARY INJUNCTION AND HEARING ON THE MOTION

Now comes Plaintiffs, submitting this Motion for Preliminary Injunction and asking for an immediate hearing on this Motion for the good and sufficient reasons discussed herein.

INCONVENIENT TRUTHS

1. "[W]e think it clear…that the location of polling places constitutes a standard, practice or procedure with respect to voting." *Perkins v Matthews*, 400 U.S. 379, 3987 (certain quotation marks omitted."

2. "The accessibility, prominence…prior notice of the polling place's location all have an effect on a person's ability to exercise his franchise." *Id.*

3. Ironically, the greater than 70% margin of victory in the firehouse primary conducted by the Democratic Party of Virginia (hereinafter "DPVA") emphasizes the importance of the constitutional principles at stake in this matter.

4. Too often the weighty constitutional issues requiring review get submerged by partisan concerns, claims of irregularities costing one candidate a win, indeed we have a spectacle where candidates and their attorneys were willing due to partisan concerns subject this country to a constitutional crisis by publicly claiming the constitution said one thing while in private admitting the opposite to be true. See **Final Report**, *Select Committee to Investigate the January 6th Attack on the United States Capitol* (2022).

5. Accordingly this may be the rare situation where the pure principles of constitutional law, at the state and federal level, are cited solely in a search for the truth, whoever inconvenient.

6. The Constitution of Virginia unambiguously tasks the General Assembly (hereinafter "GA") with the ultimate responsibility for a constitutionally sound nomination process.

7. "The 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." Article II, Section 4.

8. Accordingly, there is no inherent power given to any political party to conduct a nomination process, much less conduct such a process in any manner, under any rules, as it may arbitrarily decide to choose.

9. There is indeed no mention of any specific political party in the Constitution of Virginia.

10. In the case of *White-Battle v Democratic Party of Virginia*, 323 F. Supp. 2d 696, (E.D. Va. 2004), the Court had occasion to discuss when a non-public entity might be considered a state actor for purposes of U.S. Code 1983.

11. State action exists "when the state has delegated traditionally and exclusively public function to a private party" citing *Mentavlos v Anderson*, 249 F. 3d 301, 313 (4th Cir. 2001)(which in turn had quoted from *Andrews v Federal Home Loan Bank*, 998 F. 2d 214, 217 (4th Cir. 1993).

12. When the issue of state action is raised more generally in constitutional litigation regarding voting and related rights, the U.S. Supreme has made plain the reasons the DPVA is considered a "state actor" in those circumstances herein. *Smith v. Allwright*, 321 U.S. 649 (1944), *Morse v Republican Party of Virginia*, 517 U.S. 186 (1996).

13. The DPVA, therefore, is defined as a "Party" for purposes herein by operation of state law as regards the firehouse primary process at issue. Va. Code Section 24.2 101.

14. The DPVA is one of only two political associations deemed a "Party" under this state statute (the other being the Republican Party of Virginia.)

15. The DPVA is therefore granted special privileges as regards its nominees as compared to the nominees of minor parties, or independent candidates, all of whom can only qualify for a General Election or Special Election ballot by submitting petitions containing the number of qualified signatures required by Va. Code Section 24. 2 506.

16. For example, the Democratic nominee chosen in the firehouse primary nomination process at issue automatically gets placed on the ballot for the February 21, 2023, Special Election once the chair of DPVA shall "certify" the name of the winner to the Virginia State Board of Elections (hereinafter "Board"). Va. Code Section 24.2 511.

17. By contrast, the nominee of a minor party such as say the Green party or the Libertarian party, or an individual running independent of any party, can only have his or name listed on this ballot by submitting petitions containing the valid signatures of at least 1,000 voters qualified to vote in that upcoming contest. Va. Code Section 506.A.2.

18. The unfettered power claimed by the DPVA to set the time, place, conduct, and administration of the firehouse primary at issue solely flows from a grant of legislative power contained in Va Code Section 24. 2 508 et seq.

19. Accordingly, the DPVA, whether acting directly or through a subordinate entity conducting the firehouse primary process at issue becomes a "state actor" and thus subjects itself to the strictures of the state action doctrine.

20. For if this were not true, then any federal constitutional protections applying to a nomination process directly created by a state legislature could be evaded merely by the GA delegating the power to a non-public entity normally not subject to such federal constitutional application. *Allwright*, supra and *Morse,* supra.

21. Moreover, as the need for Special Elections are a regular occurrence in Virginia, and therefore the use of a firehouse primary nomination method is all but guaranteed to be used by the DPVA in the future, explains why the constitutional issues herein fit neatly into that general category of important constitutional election law issues which are analytically capable of repetition but so far evading review as the Defendants are fully aware. See *Federal Election Commission v Wisconsin Right to Life, Inc.*, 551 U.S. 449, 462 (2007).

22. Such a future special election next year is right now inevitable, and the use of a firehouse primary process likewise to be expected, such nomination process to be played out among tens of thousands of citizens who voted, or where eligible to vote in the 4th CD process at issue herein.

23. As Plaintiffs discuss below, every aspect of the public interest therefore cries out for resolving as many of the constitutional infirmities that are at issue here can be corrected prior to the next special election cycle.

UNDISPUTED LAW AND FACTS

24. The grant of legislative power to the DPVA, however well intentioned, lacks any of the necessary criteria, standards, or guardrails long required by constitutional law. See, e.g., *General Electric v. New York State Dept. of Labor,* 936 F. 2d 1448 (2nd Cir. 1991), *Eubank v. City of Richmond*, 226 U.S. 137, 144 (1912), and *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)

25. This apparently made the DPVA believe had been granted a delegation of unfettered public power to conduct a state sanctioned firehouse nomination process pursuant to whatever rules, procedures, and constitutional burdens on the right to vote that it wanted to impose.

26. Accordingly, DPVA, operating the firehouse primary through a subordinate entity, chose a process which refused to allow early voting.

27. The process refused to allow voting by mail.

28. The process required all voters to personally travel to one of the 8 voting locations selected by the DPVA in order to cast a ballot.

29. At many of these locations, there existed lines at many times requiring voters to wait upwards of an hour to cast their vote.

30. All but an exceedingly small percentage of voters could walk to these voting locations.

31. The overwhelmingly number had to travel to a voting location by some form of mobile transportation.

32. The DPVA had thus reason to know, as did the GA when granting this delegation of authority, that any number of citizens would have no other option but to pay for the cost of bus fare, cab fare, or other fares in order to exercise their right to vote.

33. Given the travel time required to reach a voting location and return home, the DPVA knew, as did the GA.

34. The process totally disenfranchised all those serving on active military duty either overseas or in a military installation out of state.

35. This process initially had voting locations in only 5 of the 15 jurisdictions in the 4th Congressional District (hereinafter "4th CD").

36. A day or two later the number of voting locations was increased to 8.

37. This still left a majority of the jurisdictions without a location.

38. In such large jurisdictions as Chesterfield County and Henrico County, the process provided only one voting location.

39. In the City of Richmond, there were two voting locations.

40. Upon information and belief, the DPVA claims the fairness of the firehouse primary process at issue should be judged by a comparison to the 2016 state run primary in the 4th CD.

41. Plaintiffs are not sure what to make of this media claim.

42. In the 2016 primary, Richmond cast roughly 34.4% of the total vote.

43. In the recently completed firehouse primary, the 2 voting locations in Richmond accounted for upwards of 47% of the vote.

44. This is a huge increase in terms of the percentage of total voter turnout.

45. As pointed out in *Matthews*, supra, certain aspects of the process, such as notice, the travel time, the cost of such travel for certain citizens, the need to stand in line in November for lengthy periods of time, and the fact there were only 8 voting locations in an electoral district stretching from Richmond to the North Carolina border will fall disproportionally on different voters.

46. In the seminal case of *Harper v. Virginia Board of Elections*, 383 U.S. 663, (1966), the U.S. Supreme Court ruled that imposing a $1.50 "poll tax" violated the U.S. Constitution since "it makes the affluence of the voter or payment of any fee an electoral standard." Id at 666.

47. *Harper* concluded "wealth or fee paying has…no relation to voting qualifications (and thus) the right to vote is too precious, too fundamental, to be so burdened or conditions." Id at 670.

48. While *Harper* involved a cost burden on the ability to register to vote, the constitutional logical would surely apply to similar burden on the ability of a registered voter to exercise his or her right to vote especially in the 4th C.D. which was created as a majority minority congressional district.

49. As indicated *supra*, the grant of legislative power at issue lacks the necessary standards, criteria or guardrails, such failure clear on its face. See, e.g., *General Electric v. New York State Dept. of Labor,* 936 F. 2d 1448 (2nd Cir. 1991), *Eubank v. City of Richmond*, 226 U.S. 137, 144 (1912), and *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)

50. DPVA says its subordinate entity did the best it could with the nomination process on account of the narrow available to conduct a firehouse primary on account of the date of the Special Election set by the Governor.

51. The narrow time frame referenced results from a change to the election law enacted in 2011. Chapter 599 of the Session Laws of the 2011 Session of the General Assembly.

52. This law, upon information and belief, had the full support of the DPVA.

53. Moreover, this statutory change received the backing of every Democratic member of the GA.

54. Therefore the DPVA has long been on notice of the problem they know admit attends this change now codified in Va Code Section 24.2 510.5.

55. Moreover, Mr. McEachin died on November 29, 2022.

56. The DPVA at all times knew the Governor would be required to call a Special Election to fill the vacancy.

57. Yet the DPVA appears to not have considered the potential constitutional burden on the right to vote by failing to thoughtfully plan a firehouse primary.

58. Indeed, it doesn't appear the DPVA gave the matter any consideration until the subordinate entity responsible for overseeing the implementation of the firehouse primary met on December 13th, roughly two weeks later.

59. There is nothing in state law having prevented the DPVA itself, or any subordinate entity, from making plans for the inevitable special election or for either entity to have prepared contingency plans should such a special election, however tragically, become necessary.

60. The DPVA has subordinate entities in all 15 jurisdictions of the 4th CD for many years.

61. Accordingly, the DPVA, both over the years and in the period prior to the Governor's Writ of Election, had amble time to consider all the legal and other ramifications of a firehouse primary process in the instant situation.

62. Instead, on December 13th, they choose initially to only have 5 voting locations in the entire 4th CD.

63. A day or two later, 3 more voting locations were announced.

64. The Board, acting through its members, likewise has had many years to consider the legal and other implications of the grant of legislative power given to the DPVA to conduct a state sanctioned nomination process.

65. *Allwright*, supra, *Morse,* supra, *Mentavlos,* supra, put Virginia election officials on notice that a firehouse primary process must protect the political rights of the citizenry as provided by the U.S. Constitution and the Voting Rights Act of 1965.

66. The right to vote is a "fundamental political right." *Yick Wo v. Hopkins, supra* at 370.

67. Indeed the right to vote has been deemed "preservative of other basic civil and political rights" and thus any potential "infringement of the rights of citizens to vote must be carefully and meticulously scrutinized." *Reynolds v. Sims*, 377 U.S. 533, 561, 562 (1964).

68. The Supreme Court in *Williams v. Rhodes*, 393 U.S. 23 (1968), went further, saying the right to cast an effective vote wasn't merely covered by the 14th Amendment, but it also

includes the First Amendment right "to associate for the advancement of political beliefs." *Id.* at 30.

69. In such circumstances, the normal presumption of constitutionality provided to state legislative enactments is of no moment, as such a presumption cannot be the basis for deciding issues involving fundamental political rights. *Kramer v. Union Free School District*, 359 U.S. 621, 628 (1969).

70. The seminal case of *Anderson v. Celebrezze*, 460 U.S. 780 (1983), along with *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989), were cited as offering a more appropriate judicial review standard. *Dixon*, *supra* at 780.

71. The delegation of such formidable power must satisfy the Due Process Clause of the 14th Amendment to the United States Constitution, enacted to prevent government abuse of power. See, e.g, *DeShaney v. Winnebago County*, 489 U.S. 189 (1989).

72. It must satisfy the Equal Protection Clause of the 14th Amendment to the United States Constitution. *Harper*, supra.

73. The Due Process Clause limits the manner and extent to which a state legislature may delegate legislative authority to a private party. See, e.g., *Yick Wo*, *supra*.

74. It is well settled that the state, or the state operating as through a "state actor" has a weighty burden to justify imposing such a burden. *Anderson*, *supra*.

75. But this burden, difficult to justify under normative circumstances, is impossible to justify under the circumstances herein.

PRELIMINARY INJUNCTION IS JUSTIFIED

76. "A preliminary injunction is an extraordinary remedy." *Real Truth About Obama v. Federal Election Commission*, 575 F. 3d 342 (4th Cir. 2009).

77. The Fourth Circuit applies the standards articulated in *Winter v. Natural Resources Defense Council Inc,* 129 S. Ct 365 (2008) in deciding whether or not to grant a motion for a preliminary injunction. *Real Truth*, *supra* at 345.

78. The *Winter* standard consists of four distinct factors. *Id.*

79. This requires the plaintiff to establish "[1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Id.* at 346 citing *Winter*.

80. All four requirements must be met. *Id.*

81. As to the first requirement, Plaintiff has demonstrated far more than a likelihood of success on the merits.

82. The delegation of authority from the General Assembly contains no legislatively defined criteria or standards limiting the power of the DPVA in the process under review.

83. Plaintiffs are unaware of any previous use of a firehouse primary process, in Virginia or anywhere else in the nation, where such process required the voters in the majority of their home jurisdictions in a congressional district to travel outside their jurisdiction to cast a vote in person at a voting location in another jurisdiction.

84. Additionally, the firehouse primary process in question totally disenfranchises all active duty military personnel serving overseas or at a military installation outside the state, totally disenfranchises all those voters who lack mobile transportation or who can't afford to pay for such mobile transportation and totally disenfranchises all the many thousands and thousands of people in the 4th CD who by virtue of age, or other infirmity want to vote but are unable to personally go to a voting location to exercise their right to vote.

85. Therefore, the actions of the DPVA, exercising public power traditionally and exclusively considered the power of the state by the Constitution of Virginia, as applied in this instant through an unconstitutional delegation of power, imposed such burdens on the constitutional right to vote and related core political rights as to make it extremely unlikely if not impossible for the firehouse process in question to satisfy the balancing test in *Anderson v Celebreeze*, supra, at page 789, as reaffirmed in *Burdick v Takushi*, 504 U.S. 428, 438. (1992).

86. Accordingly, for the reasons set forth, the Court must conclude Plaintiff is likely to succeed on the merits.

87. As to the second prong, that being the likelihood of the Plaintiff suffering irreparable damage, the very circumstance of this matter demonstrates such harm.

88. The right to vote, indeed the right to cast an effective vote, is destroyed in an unconstitutional process.

89. As to candidate Marks, his right of association with likeminded citizens is irreparably harmed by an unconstitutional nomination process.

90. The same is true for the right of association for district voters.

91. As indicated previously, the firehouse primary process at issue imposes unprecedented burdens on the rights protected by the 1st and 14th Amendments, and therefore if not corrected, will lead to irreparable harm from an unconstitutional nomination process.

92. There can only be one Democratic nominee on the ballot in the upcoming Special Election.

93. The Democratic nominee is all but guaranteed victory, a circumstance requiring consideration in this litigation. See *Terry v Adams*, 343 U.S. 461 (1953).

94. Once the nominee of the firehouse primary is certified to the ballot, the damage to Plaintiffs becomes irreparable.

95. Since Plaintiff is likely to win on the merits, a failure to issue a preliminary injunction means this case would proceed as normal, and should Plaintiffs prevail, there would exist no sufficient remedy, as money damages while available, would not be sufficient.

96. Accordingly, the second prong of the *Winter* standard has been met.

97. As go the third prong, when the equities are properly weighed, the public interest is surely best served by a Court order ensuring that citizens are not denied their right to vote, indeed not denied their right to cast an effective vote during the nomination process and thus, in effect, the general election as well. *Williams*, supra.

98. Thus, the third prong of the *Winter* test is satisfied.

99. Focusing on the final prong, a preliminary injunction is manifestly in the public interest.

100. Given the growing public skepticism toward our election process, a failure to grant a preliminary injunction only risks heaping more fuel on that fire.

101. In that connection, the interests of the DPVA, along with the defendant members of the Board of Elections, and the Governor, not to mention the ultimate winner of the Democratic nomination at issue would clearly be better protected by increasing, not decreasing, public respect for our electoral system.

102. There is sufficient time for the DPVA to do the process in accordance with the Constitution and still have a nominee with sufficient time to campaign effectively in the February 21 election.

103. Moreover, at all times this Court retains the power to ensure such a constitutional nomination process is conducted, even if that means the February 21, 2023, must be readjusted.

104. The public interest is manifestly best served by the public knowing the nomination process conducted by the DPVA, whose nominee is almost certain to become the next member of Congress from the 4th C.D., is chosen by a method that protects the constitutional rights of the citizenry.

105. Accordingly, the 4th prong of the *Winter* test has been met.

106. Therefore, as required, Plaintiff has met all four of the required parts of the *Winter* standard.

107. The *Winter* standard having been easily met, a preliminary injunction, to ensure the protection of the most fundamental voting rights in our system, the right to vote being the protector of other rights, should be issued in this matter.

REMEDY

For the reasons stated above, based upon fact and law, comes now Plaintiff asking this Honorable Court for the following relief:

(A) Issue a preliminary injunction thereby enjoining the members of the Virginia Board of Elections from certifying the name of the nominee chosen by the DPVA firehouse nomination process on December 20, 2022, as required by state law before the name of any such nominee can be printed on the ballot.

(B) Order a hearing at the earliest convenience given the Holiday day schedule on the matters raised in this Motion.

Respectfully submitted,
Paul Goldman

By: _____/s/_____
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CERTIFICATE

I hereby certify that on the 29th day of December, 2022, I electronically filed the above Entry of Appearance with the Clerk of the United Stated District Court for the Eastern District of Virginia using the CM/ECF system.

_____/s/_____
John M. Janson