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

Paul Goldman, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No. 3:22-CV-789-RCY**
	)	
Glenn Youngkin, Governor of Virginia, in his official capacity, et al.,	)	
	)	
Defendants.	)	

COMMONWEALTH DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Plaintiffs—registered voters and a failed candidate—challenge the Democratic firehouse primary for the ongoing special election in Virginia's Fourth Congressional District. They ask this Court to invalidate that ongoing election and, with it, the ballots of thousands of Virginians who have already voted. This Court lacks jurisdiction. The latest complaint alleges various unlawful acts that in Plaintiffs' own telling were undertaken not by any government officials, but by the Democratic Party of Virginia (DPVA) and its officers. Inasmuch as Plaintiffs allege any wrongdoing by any government official, they fail to allege any *ongoing* violation of federal law sufficient to overcome state sovereign immunity. They also lack standing, and their claims are moot, because this Court cannot provide them with any effectual relief given that they seek an order enjoining the printing of ballots that have already been printed and cast by thousands of Virginians. Their complaint also fails because they ask the Court to enjoin and redo an election that is currently underway. It is difficult to conceive of a judicial order that would more patently violate the well-established principle that federal courts must not interfere with state-election regulations in close proximity to the election.

Plaintiffs' claims also fail on the merits. The General Assembly has not unlawfully delegated any authority to DPVA; DPVA is not a state actor when it holds a caucus to choose its own party nominee. Plaintiffs also lack a liberty or property interest in standing as a candidate for public office or participating in an unassembled caucus. Their due process claims therefore lack merit. Plaintiffs' equal protection and First Amendment claims similarly fail, because the setting of the number and locations of voting sites for DPVA's caucus was not state action. Finally, Plaintiffs' barebones Voting Rights Act claim could not survive a motion to dismiss.

Plaintiffs also cannot establish any of the other requisites for a preliminary injunction. They

cannot show irreparable harm because their alleged harm, if any, has already occurred and the requested injunction would not prevent it. And the public interest clearly favors avoiding federal judicial intervention during an ongoing state election. This Court should deny Plaintiffs' motion.

BACKGROUND

I. Factual background

On November 8, 2022, the voters of Virginia's Fourth Congressional District reelected A. Donald McEachin to represent them in the U.S. House of Representatives. Second Amend. Compl. (SAC) ¶ 89 (ECF No. 12). On November 28, 2022, Congressman McEachin passed away. Declaration of Susan Beals (Decl.) ¶ 3. Virginia law provides that "[w]hen any vacancy occurs" in the House of Representatives, "the Governor shall issue a writ of election to fill the vacancy." Va. Code § 24.2-209. On December 12, 2022, Governor Glenn Youngkin issued a writ of election scheduling a special election to fill the Fourth Congressional District vacancy on February 21, 2023. SAC ¶ 5; Decl. ¶ 4 & Ex. 1. Time permitting, party nominations for "a special election" must be completed "at least 60 days before the election." Va. Code § 24.2-510(5). The writ of election specified that the last day to file as a candidate for the vacant seat was 60 days before the February 21, 2023 election—December 23, 2022. Decl. ¶ 5 & Ex. 1.

DPVA announced on December 13, 2022 that it would choose a nominee for the special election in a "firehouse primary" to be held on December 20, 2022. SAC ¶¶ 9, 10, 37–38, 110. Political parties in Virginia "have the right to determine the method by which a party nomination for [an] office shall be made," Va. Code § 24.2-509(A), and can choose to nominate a candidate for a special election through "methods other than a primary," *id.* § 24.2-510(5). An unassembled caucus, also known as a "firehouse primary," is one such method. Notwithstanding its name, a firehouse primary is not a primary election. Decl. ¶¶ 7–12; see SAC ¶ 10. It is a caucus or

convention to "provide for the nomination of [the party's] candidates," including "in case of any vacancy." Va. Code § 24.2-508; see Decl. ¶¶ 8–12; SAC ¶ 10; *cf.* Va. Code § 24.2-947.9 (referring to "[t]he caucus, mass meeting, convention, or other nominating event at which the party's nomination shall be finally determined pursuant to the rules and procedures of the party"). Although parties may choose to assemble their conventions or caucuses in a single location at a single time, others may choose to have an "unassembled" convention or caucus at multiple locations and at multiple times to facilitate broader political engagement. Decl. ¶ 9. Participants cast ballots in accordance with the rules established by the political party running the firehouse primary and at locations chosen by that party. SAC ¶¶ 9, 11, 21–22, 107; Decl. ¶ 8. Unlike a primary election that is administered by the State, an unassembled caucus or firehouse primary is run entirely by the political party without the involvement of state election officials. Decl. ¶¶ 8, 11–12; SAC ¶ 9 (distinguishing firehouse primary from "the normal state-run primary processes").

DPVA on December 13, 2022 issued a "call to caucus" (the Call) for the December 20, 2022 firehouse primary. SAC ¶¶ 9, 37–38, 110; see also Compl. Ex. 1 (ECF No. 6-1). The Call stated that anyone who wanted to participate as a candidate in the firehouse primary had to file certain paperwork and pay a fee to DPVA. SAC ¶¶ 44–45, 111–13. According to DPVA, four people qualified as candidates in the firehouse primary, including plaintiff Tavorise Marks. Decl. ¶ 13; SAC ¶¶ 51–53. On December 22, 2022, DPVA announced that current State Senator Jennifer L. McClellan won the firehouse primary with 84.81% of the 27,900 votes cast; Marks received 0.78% of the votes cast.[1] The Republican Party of Virginia held a convention on December 17, 2022, and chose Leon Benjamin as its candidate for the special election. Decl. ¶ 16.

[1] See Democratic Party of Virginia, *Sen. Jennifer L. McClellan Receives Democratic Nomination in VA-04* (Dec. 22, 2022), https://tinyurl.com/bddzb74v; see also Decl. ¶ 14 & Ex. 2.

The special election has been ongoing for ten days, and the two candidates on the ballot are McClellan and Benjamin. Decl. ¶ 17 & Ex. 3. Virginia law requires that, time permitting, voters be given access to "[a]bsentee voting in person" (Virginia's statutory term for early voting) at least 45 days before election day. Va. Code § 24.2-701.1(A). Consistent with that requirement, ballots for the special election were printed in advance of early voting, and early voting began on January 6, 2023. Decl. ¶¶ 17, 19. And, as of January 12, 2023, 4,323 citizens of the Fourth Congressional District have voted, and another 26,929 have requested absentee ballots. *Id.* ¶ 20. All told, 31,252 have either cast or requested ballots with McClellan's and Benjamin's names on them. *Ibid.*

II. Procedural background

On December 16, 2022, Paul Goldman filed a complaint challenging the constitutionality of DPVA's firehouse primary. See Compl. ¶¶ 146–63 (ECF No. 1). He alleged that he is a registered voter in the Fourth Congressional District, and that the number and location of voting sites deployed by DPVA amounted to vote "suppression" in violation of the First and Fourteenth Amendments. *Id.* ¶¶ 74, 146–63. He named as defendants Governor Youngkin; members of the State Board of Elections (the Board) including Chairman Robert Brink, Vice Chair John O'Bannon, Secretary Georgia Alvis-Long, Donald Merricks, and Angela Chiang; and Commissioner of Elections Susan Beals (the Commissioner) (collectively, the Commonwealth Defendants); and the Democratic Party of Virginia; its Chairwoman, Susan Swecker; and its Fourth Congressional District Committee Chairwoman, Alexsis Rodgers (collectively, the DPVA Defendants). *Id.* at 1. He asked the Court to enjoin preliminarily the firehouse primary and to enjoin preliminarily the Board members from "certifying" the winner of the firehouse primary. *Id.* at 20. He also filed a motion for a preliminary injunction, although he did not identify the conduct or defendants he wished to be enjoined. See First Mot. for Prelim. Injunction (ECF No. 2).

On December 21, 2022, the day after the firehouse primary, Goldman—through counsel—filed an amended complaint. See First Amended Compl. (FAC) (ECF No. 6). The FAC added six additional plaintiffs—Tavorise Marks, Tamia Douglas, Tina McCray, Julie "Michele" Pope, Richard Walker, and Jamale Pope—and two new claims under the Equal Protection Clause and § 2 of the Voting Rights Act of 1965, 52 U.S.C. § 10301(a). See FAC ¶¶ 51–69, 221–37. The FAC alleged that each plaintiff was a citizen of Virginia and had voted in the firehouse primary. See *id.* ¶¶ 51–72. It further alleged that Marks was a candidate in the firehouse primary. *Id.* ¶ 53. And it asked the Court to enjoin preliminarily the members of the Board from "certifying" the winner of the firehouse primary, and to order the Board to "conduct a constitutionally valid nomination process to pick the Democratic nominee for the Special Election." *Id.* at 29.

A week later, Plaintiffs' counsel moved to withdraw, see Mot. for Substitution of Counsel (ECF No. 9), and Plaintiffs' new counsel purported to file the SAC the next day. But see Fed. R. Civ. P. 15(a) (allowing only one amendment without "the opposing party's written consent or the court's leave"). The SAC added a new plaintiff—Dawnette Drumgoole—and alleges that she "was not able to vote in the firehouse primary due to lack of timely notice and inability to travel to the closest polling location with such short notice." SAC ¶ 72. Moreover, although the FAC alleged that plaintiffs Douglas and McCray voted in the firehouse primary, see FAC ¶¶ 60, 63, the SAC now alleges that neither voted because of "long line[s]" and other responsibilities, SAC ¶¶ 57, 60. Goldman also filed yet another motion for a preliminary injunction, asking the Court to prohibit the members of the Board from "certifying the name of the nominee chosen by the DPVA firehouse nomination process . . . before the name of any such nominee can be printed on the ballot." Second Mot. for Prelim. Injunction Remedy (A) (ECF No. 12) (hereinafter, Mot.).

Plaintiffs raise four claims. First, they argue that the statute authorizing DPVA to "make

its own rules and regulations" and "provide for the nomination of its candidates," Va. Code § 24.2-508, is an impermissible delegation of legislative power that violates the Due Process Clause of the Fourteenth Amendment, see SAC ¶¶ 137–38, 188–215. Second, Plaintiffs claim that the firehouse primary violates the First Amendment. Plaintiffs appear to argue that the number and location of the firehouse primary sites imposed an unconstitutional burden on their First Amendment right of association. See *id.* ¶¶ 147–55, 160–61, 216–22. Third, Plaintiffs argue that the number and location of the firehouse primary sites violates the Equal Protection Clause by imposing "unequal burdens on the ability to cast a vote due to [voters'] wealth, location, physical condition, family status, and any number of criteria which all contribute to putting [voters] in unequal categories." *Id.* ¶¶ 224–32. Finally, Plaintiffs argue that the firehouse primary violated § 2 of the Voting Rights Act (VRA) because DPVA chose its firehouse primary locations for the purpose of "mak[ing] it far harder for the minority voters of modest means" in "rural areas" to participate in the firehouse primary. *Id.* ¶¶ 233–40. Plaintiffs ask the Court to declare that alleged delegation unconstitutional, to enjoin the members of the Board from certifying a winner of the firehouse primary, and to order the Board to require DPVA to use a "constitutionally valid nomination process." See *id.* ¶¶ 203, 212–13, 221–22, 230–31, 238–39; see also *id.* at 29.

LEGAL STANDARD

A preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. National Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). To obtain a preliminary injunction, Plaintiffs must show that "(1) they are likely to succeed on the merits of their claim, (2) they are likely to suffer irreparable harm without an injunction, (3) the balance of equities tilts in their favor, and (4) issuing an injunction is in the public interest." *North Carolina State Conf. of the NAACP v. Raymond*, 981 F.3d 295,

302 (4th Cir. 2020). "*Each* of these four factors must be satisfied to obtain preliminary injunctive relief," making it "unnecessary to address all four factors when one or more ha[s] not been satisfied." *Henderson v. Bluefield Hosp. Co.*, 902 F.3d 432, 439 (4th Cir. 2018).

ARGUMENT

Plaintiffs are not entitled to the extraordinary remedy of a preliminary injunction because they are not likely to succeed on the merits of their claims.[2] See *infra* Sections I–III. Plaintiffs also will not suffer any irreparable harm without a preliminary injunction, and the public interest favors avoiding federal intervention into an ongoing state election. See *infra* Section IV.

I. This Court lacks jurisdiction to adjudicate Plaintiffs' claims against the Commonwealth Defendants

First, Plaintiffs' claims against the Commonwealth Defendants are unlikely to succeed because this Court lacks jurisdiction: the Commonwealth Defendants are shielded by sovereign immunity, Plaintiffs lack Article III standing, and Plaintiffs' claims are moot.

A. Sovereign immunity bars the claims against the Commonwealth Defendants

The Commonwealth Defendants—as officers of the Commonwealth of Virginia sued in their official capacities—are shielded by state sovereign immunity. The Constitution preserved the State's existing sovereign immunity. See *Alden v. Maine*, 527 U.S. 706, 712–13 (1999) (explaining that both the structure of the Constitution and the Eleventh Amendment preserve immunity). This immunity "denies to the federal courts authority to entertain a suit brought by private parties against a state without its consent." *Ford Motor Co. v. Department of Treasury of State of Ind.*,

[2] Plaintiffs filed the SAC without leave of this Court in violation of Rule 15(b). The same analysis, however, applies to both the FAC and the SAC. The SAC merely added a new plaintiff and alleges that two plaintiffs who were alleged to have voted in the FAC did not vote. See p.5, *supra*. The substantive allegations regarding the claims are identical between the two complaints. Compare FAC ¶¶ 1–46, 86–237, with SAC ¶¶ 1–46, 89–240.

323 U.S. 459, 464 (1945). Sovereign immunity extends not just to States, but also to their "agents and [ ] instrumentalities," *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429 (1997), including officials sued in their official capacities, *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989). "[A] suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. As such, it is no different from a suit against the State itself." *Ibid.* Thus, state officers sued in their official capacity are "entitled to Eleventh Amendment protection." *Lytle v. Griffith*, 240 F.3d 404, 408 (4th Cir. 2001). Here, Plaintiffs sued each of the Commonwealth Defendants solely in their official capacities as state officials. See SAC ¶¶ 76–82. Thus, each Commonwealth Defendant is entitled to Eleventh Amendment immunity barring all of Plaintiffs' claims.

Sovereign immunity is overcome only if Congress has validly abrogated the State's immunity, or if the State has voluntarily waived the immunity. See *Virginia Office for Protection & Advocacy v. Stewart*, 563 U.S. 247, 253 (2011); accord *Litman v. George Mason Univ.*, 186 F.3d 544, 549–50 (4th Cir. 1999). But Plaintiffs do not, and could not, allege that the Commonwealth waived its immunity or consented to be sued. Moreover, Plaintiffs fail to identify their causes of action, much less any cause of action for which Congress has abrogated Virginia's sovereign immunity. Plaintiffs presumably proceed under § 1 of the Enforcement Act of 1871, 42 U.S.C. § 1983. See, *e.g.*, *Pink v. Lester*, 52 F.3d 73, 74 (4th Cir. 1995) (Section 1983 "provides a cause of action for the deprivation of federal constitutional and statutory rights"); *Hughes v. Bedsole*, 48 F.3d 1376, 1383 n.6 (4th Cir. 1995) (a plaintiff "cannot bring a claim directly under the Fourteenth Amendment because it does not create a cause of action"); *McBride v. Dunn*, No. 2:07cv331, 2008 WL 11512373, at *10 (E.D. Va. Mar. 4, 2008) ("The First Amendment does not

create a private cause of action.").[3] But it has long been settled that Congress did not abrogate the States' sovereign immunity in the Enforcement Act.[4] *In re Sec'y of the Dep't of Crime Control & Pub. Safety*, 7 F.3d 1140, 1149 (4th Cir. 1993).

As explained below, Plaintiffs' claims against the Commonwealth Defendants also do not fall within the limited exception to sovereign immunity recognized in *Ex parte Young*, 209 U.S. 123 (1908), which in certain circumstances "permits a federal court to issue prospective, injunctive relief against a state officer to prevent ongoing violations of federal law," *Bland v. Roberts*, 730 F.3d 368, 390–91 (4th Cir. 2013). The Commonwealth Defendants were not directly involved with the challenged conduct, and Plaintiffs do not allege any ongoing violation of federal law.

1. The Commonwealth Defendants have nothing to do with the challenged conduct nor do they enforce the challenged statute

First, *Ex parte Young* is inapplicable, and this Court therefore lacks jurisdiction, because

[3] It is unclear whether Plaintiffs intend to bring their VRA claim under § 1983 or as a standalone claim. If they are invoking this Court's jurisdiction only through § 1983, but see pp.26–27, *infra* (§ 1983 cannot serve as a means to enforce the VRA), then sovereign immunity would apply because Congress did not abrogate the States' sovereign immunity in the Enforcement Act. If they are attempting to bring a standalone claim, but see p.27 n.7, *infra* (open question whether § 2 of the VRA furnishes a private right of action), the Commonwealth Defendants are still entitled to dismissal on the basis of sovereign immunity because Congress has not abrogated Virginia's sovereign immunity in the VRA. See *North Carolina State Conf. of NAACP v. Cooper*, 397 F. Supp. 3d 786, 799 (M.D.N.C. 2019) (no "Fourth Circuit or Supreme Court case hold[s] that [a] State's Eleventh Amendment immunity has been abrogated by the VRA such that the state is subject to suit under the VRA by a private actor"); *Kreiger v. Loudoun Cnty.*, No. 5:13cv073, 2014 WL 4923904, at *3 (W.D. Va. Sept. 30, 2014) (holding that the VRA does not "contain the requisite language abrogating the state's 11th Amendment sovereign immunity"), aff'd sub nom. *Kreiger v. Virginia*, 599 Fed. Appx. 112 (4th Cir. 2015).

[4] Insofar that Plaintiffs' request for a "declaratory judgment," see SAC at Remedy (B), is made pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201–02, it would still be barred because that act "is remedial only and neither extends federal courts' jurisdiction nor creates any substantive rights." *CGM, LLC v. BellSouth Telcoms., Inc.*, 664 F.3d 46, 55 (4th Cir. 2011). As a result, the Declaratory Judgment Act does not abrogate a state's sovereign immunity, see *Booth v. State of Maryland*, 112 F.3d 139, 146 (4th Cir. 1997), nor does it "create an independent cause of action," *Chevron Corp. v. Camacho Naranjo*, 667 F.3d 232, 244 (2d Cir. 2012).

no Commonwealth Defendant is directly involved in the challenged conduct or in enforcing the challenged statute. Rather, as Plaintiffs repeatedly allege, the "*Democratic Party of Virginia* . . . in its 'firehouse primary' scheme," not the Commonwealth Defendants, "created an unconstitutional burden on potential voters." SAC ¶ 1 (emphasis added); see also, *e.g.*, *id*. ¶ 30 (alleging "restrictions" were "imposed by the DPVA on Democratic voters"); *id*. ¶ 31 (noting "the burdens on constitutional rights imposed in the instant matter by the DPVA").

"The purpose of allowing suit against state officials to enjoin their enforcement of an unconstitutional statute is not aided by enjoining the actions of a state official not directly involved in enforcing the subject statute." *Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 331 (4th Cir. 2001). Therefore, to invoke the *Ex parte Young* exception, Plaintiffs must show (1) a "'special relation' between the officer being sued and the challenged statute;" and (2) that the officer has "acted or threatened" to enforce the statute. *McBurney v. Cuccinelli*, 616 F.3d 393, 399, 402 (4th Cir. 2010). These requirements ensure both that "the appropriate party is before the federal court, so as not to interfere with the lawful discretion of state officials," and that "a federal injunction will be effective with respect to the underlying claim." *South Carolina Wildlife Fed'n v. Limehouse*, 549 F.3d 324, 332–33 (4th Cir. 2008). These requirements are not met here.

No Commonwealth Defendant bears a "special relation" to the number and location of the sites where the firehouse primary took place, or even the decision to use a firehouse primary. Rather, as Plaintiffs allege, DPVA "chose . . . a 'firehouse primary' process." SAC ¶¶ 10, 106. DPVA set the rules for that primary. *Id*. ¶¶ 9, 44–46, 111–13. And DPVA independently determined the number of voting sites and decided upon their locations. *Id*. ¶ 11; *id*. ¶ 21 ("DPVA, through a subordinate entity, has unfettered discretion to decide to have as many or as few voting locations in any jurisdiction . . . *as it alone decides*." (emphasis added)); Mot. ¶ 28 ("[T]he 8 voting

locations [were] selected by the DPVA."). Simply put, DPVA alone was "responsible for overseeing the implementation of the firehouse primary." Mot. ¶ 58; see also *id*. ¶ 18 (challenging the "unfettered power claimed by the DPVA to set the time, place, conduct, and administration of the firehouse primary"). Moreover, the statute in question grants "*[e]ach political party* . . . the power to . . . provide for the nomination of its candidates, including the nomination of its candidates for office in case of any vacancy." Va. Code § 24.2-508 (emphasis added). The Code does not provide a role for any of the Commonwealth Defendants in setting the number of voting sites in a firehouse primary or selecting their locations. *Ibid*. Thus, the alleged injury is inflicted by DPVA's independent decisions, not by any act of the Commonwealth Defendants.

Plaintiffs' threadbare allegations do not show that the Commonwealth Defendants had any direct involvement with the firehouse primary or the challenged quantity and distribution of voting locations. With respect to Governor Youngkin, Plaintiffs allege only that he fulfilled his constitutional and statutory duty to issue a writ of election to fill a vacancy in the United States House of Representatives. U.S. Const. art. 1, § 2; Va. Code § 24.2-209; SAC ¶¶ 4–5. But Plaintiffs do not allege—nor could they—that the issuance of that writ had any effect on the number and location of the voting sites DPVA chose. Tellingly, Plaintiffs do not even seek any relief from Governor Youngkin. See SAC at p. 29 (Remedy). Because Plaintiffs do not seek any prospective injunctive relief from the Governor, the narrow *Ex parte Young* exception to sovereign immunity could not possibly apply. See, *e.g.*, *Waste Mgmt. Holdings*, 252 F.3d at 331.

Similarly, Plaintiffs do not identify any connection—legally or factually—between the members of the Board or the Commissioner and the details of DPVA's firehouse primary. Plaintiffs simply note the Board has general authority to ensure "legality and purity in all elections." SAC ¶ 83 (quoting Va. Code § 24.2-103). But federal courts do not have power under

Ex parte Young to compel a state officer to comply with state law. See *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984). And the only factual allegation with respect to the Board is the bare assertion that it "stays quiet" while the DPVA "arbitrarily trash[es] fundamental voting rights." *Id.* ¶ 211. Otherwise, Plaintiffs only mention the members of the Board in the relief sought, asking the Court to enjoin them "from voting to certify the winner of the 'firehouse primary' to the Special Election ballot." *Id.* ¶¶ 201, 213, 221, 230, 238, Remedy (A). This request is nonsensical as a matter of Virginia law and further highlights why the Commonwealth Defendants do not belong in this case. The members of the Board do not certify the winners of firehouse primaries. Decl. ¶ 12. Rather, in a firehouse primary, which is not a "primary" for purposes of state law, certification is the responsibility of the party chair of DPVA. Va. Code § 24.2-511 ("The state, district, or other appropriate party chairman shall certify the name of any candidate who has been nominated by his party by a method other than a primary."). Indeed, Plaintiffs themselves admit that "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 the DPVA shall 'certify'* the name of the winner" to the Board. Mot. ¶ 16 (emphasis added). Thus, Plaintiffs tacitly concede that the members of the Board and the Commissioner do not bear any relationship to DPVA's firehouse primary.[5]

Because the Commonwealth Defendants played no role in implementing DPVA's firehouse primary, including the number and location of voting sites, they do not bear a "special

[5] Plaintiffs have not sued the Board of Elections. They instead sued its members in their official capacities. To the extent Plaintiffs seek relief from the Board itself rather than the individual members of Board, their claim is plainly barred by sovereign immunity, see *Libertarian Party of Va. v. Virginia State Bd. of Elections*, No. 1:10-cv-615 (LMB/TCB), 2010 WL 3732012 (E.D. Va. Sept. 16, 2010), and they could not avail themselves of the *Ex parte Young* exception, see *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993).

relation" to those decisions, or the enforcement of Va. Code § 24.2-508. *McBurney*, 616 F.3d at 399. As a result, Plaintiffs' requested injunction against the Commonwealth Defendants would do nothing about the number and location of voting sites and instead would merely "interfere with the[ir] lawful discretion." *Limehouse*, 549 F.3d at 333–34. *Ex parte Young* does not apply.

2. Plaintiffs do not allege any ongoing violation of federal law by the Commonwealth Defendants

Plaintiffs have also failed to allege that the Commonwealth Defendants are engaged in an "ongoing violation" of federal law sufficient to trigger the *Ex parte Young* exception for prospective injunctive relief. *McBurney*, 616 F.3d at 399; see also *Antrican v. Odom*, 290 F.3d 178, 186 (4th Cir. 2002) ("[T]he *Ex parte Young* exception requires the allegation of an ongoing violation of federal law."). The exception "does not apply when the alleged violation of federal law occurred entirely in the past." *DeBauche v. Trani*, 191 F.3d 499, 505 (4th Cir. 1999); *Papasan v. Allain*, 478 U.S. 265, 277–78 (1986) (*Ex parte Young* "has been focused on cases in which a violation of federal law by a state official is ongoing as opposed to cases in which federal law has been violated at one time or over a period of time in the past.").

Here, Plaintiffs' alleged violations of federal law—the setting of the number and location of places used for voting in the firehouse primary—took place entirely in the past. And Plaintiffs seek an injunction preventing certification of the winner of the firehouse primary "before the name of any such nominee can be printed on the ballot." Mot. Remedy (A). But the nominating process for this special election has already occurred. See SAC ¶¶ 38, 54, 57, 60, 63, 66, 69, 72, 75. Senator McClellan is the DPVA candidate for the Fourth Congressional District special election, local election officials have printed ballots listing her as the DPVA candidate, and voters are casting special-election ballots with her name on them. Decl. ¶¶ 14, 17, 20 & Exs. 2, 3. Indeed, 4,323 Virginians have already voted with those ballots. *Id.* ¶ 20. Because the actions that Plaintiffs

challenge have already occurred—and the relief they seek cannot issue prospectively—the *Ex parte Young* exception does not apply. *McBurney*, 616 F.3d at 399.

B. Plaintiffs either lack standing to press their claims against the Commonwealth Defendants, or their claims are moot

Each Plaintiff lacks standing for an injunction against the Commonwealth Defendants because they cannot trace their alleged injury to anything that the Commonwealth Defendants did. "Standing is part and parcel of the constitutional mandate that the judicial power of the United States extend only to 'cases' and 'controversies.'" *Libertarian Party of Va. v. Judd*, 718 F.3d 308, 313 (4th Cir. 2013) (quoting U.S. Const. art. III, § 2). To establish "the 'irreducible constitutional minimum' of standing," Plaintiffs must show that they "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). Plaintiffs "bear the burden . . . of showing that the defendant's actual action has caused the substantial risk of harm," *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 n.5 (2013), and "[a]n injury sufficient to meet the causation and redressability elements of the standing inquiry must result from the actions of the respondent, not from the actions of a third party," *Doe v. Virginia Dep't of State Police*, 713 F.3d 745, 755 (4th Cir. 2013). None of the eight Plaintiffs named in the SAC meets these requirements.

First, several Plaintiffs alleged that they voted in the firehouse primary election, meaning that the alleged obstacles to the exercise of their franchise did not prevent them from voting. An injury in fact must be "'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo, Inc.*, 578 U.S. at 339. "For an injury to be 'particularized,' it 'must affect the plaintiff in a personal and individual way.'" *Ibid.* A "generalized grievance about the conduct of government" that is "plainly undifferentiated and common to all members of the public" is

insufficient to confer standing. *United States v. Richardson*, 418 U.S. 166, 176–77 (1974) (quotation marks omitted). Five Plaintiffs (Marks, Julie Pope, Walker, Jamele Pope, and Goldman) acknowledge that they voted in the firehouse primary, SAC ¶¶ 54, 63, 66, 69, 75, and thus were not personally injured by the complained-of conduct—*i.e.*, the number and location of the firehouse primary voting sites, *Spokeo, Inc.*, 578 U.S. at 339; see also *Lux v. Judd*, 651 F.3d 396, 400 (4th Cir. 2011) (holding that plaintiffs challenging a residency requirement lacked an injury in fact where the Virginia State Board of Elections "duly counted the signatures collected by [those plaintiffs]" and the law in question "did not prevent them from casting write-in votes for" their preferred candidate). They therefore do not have standing to pursue their claims.

Second, the remaining three Plaintiffs[6] fail to allege that they did not vote because of anything having to do with the locations or number of sites, or because of any act undertaken by the Commonwealth Defendants. The three Plaintiffs (Douglas, McCray, and Drumgoole) allege that they chose not to vote due to "job commitments," "family responsibility," and an "inability to travel" on "short notice," rather than because of the number or locations of sites. *Id.* ¶¶ 57, 60, 72. In any event, the Commonwealth Defendants had nothing to do with the number and location of voting sites; rather, as Plaintiffs allege, DPVA made all of those decisions. See pp.10–11, *supra*. This is fatal to their claims against the Commonwealth Defendants because "where an alleged injury is caused by a voluntary choice made by the Virginia [Political] Party and not the challenged state law [or conduct], plaintiffs do not establish causation" for purposes of Article III standing. *24th Senatorial Dist. Republican Comm. v. Alcorn*, 820 F.3d 624, 630 (4th Cir. 2016) (cleaned up); see also *Lowe v. Brink*, No. 3:22-cv-263, 2022 WL 2820541, at *4 (E.D. Va. July 19, 2022)

[6] It is unclear whether plaintiffs Douglas and McCray voted because the FAC alleges that they did, see FAC ¶¶ 60, 63, but the SAC reverses course to allege they did not, SAC ¶¶ 57, 60.

(holding that plaintiff failed to establish Article III causation in a suit against the chair of the Virginia State Board of Elections because when a "[party] Committee Chairman is responsible for overseeing the party's nomination process" under "Va. Code Ann. § 24.2-508," it is the "unilateral conduct of the [party] Committee Chairman [that] cause[s] [plaintiff's] injury"). This basic principle is why claims of this nature must be brought solely against the relevant political party officials, not government officials. See, *e.g.*, *Morse v. Republican Party*, 517 U.S. 186, 192 (1996) (exclusively seeking relief from the Republican Party and related committees).

Third, to the extent Marks pursues a separate claim as a "candidate" in the firehouse primary, he does not allege that he was injured by any of the rules governing candidates in the DPVA firehouse primary, much less by any actions taken by the Commonwealth Defendants. SAC ¶ 53. A candidate may, for example, have standing to enjoin a rule denying him access to the ballot. See *Nader v. Keith*, 385 F.3d 729, 735 (7th Cir. 2004). But Marks does not allege that he was denied access to the ballot. He appeared on the ballot in the firehouse primary and received 0.78% of the votes cast. See p.3, *supra*. Marks thus fails to allege an interest "particularized" to him as a candidate; the alleged interest is, instead, a "generally available grievance about government" that he shares in common with every voter and candidate in the congressional district. *Hollingsworth v. Perry*, 570 U.S. 693, 706–07 (2013).

Fourth, no Plaintiff has Article III standing to pursue a VRA claim because Plaintiffs fail to allege they are members of a class protected by the VRA. See SAC ¶¶ 51–75. When an alleged injury is based on racial discrimination, Article III limits standing "only to 'those persons who are personally denied equal treatment' by the challenged discriminatory conduct." *Allen v. Wright*, 468 U.S. 737, 755 (1984). In other words, the voter must demonstrate that he "personally[ ] has been injured" by the racial classification. *United States v. Hays*, 515 U.S. 737, 744 (1995). In VRA

cases, therefore, the plaintiff must establish membership in a racial or language group whose voting rights have been allegedly infringed based on race. See, *e.g.*, *Vaughn v. Lewisville Indep. Sch. Dist.*, 475 F. Supp. 3d 589, 595 (E.D. Tex. 2020); see also *Perry-Bey v. City of Norfolk*, 678 F. Supp. 2d 348, 363 (E.D. Va. 2009). Plaintiffs have not even attempted to make such a showing.

Finally, Plaintiffs "must not only establish an injury that is fairly traceable to the challenged conduct but must also seek a remedy that redresses that injury." *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 796 (2021). For injunctive relief, a plaintiff "must establish an ongoing or future injury in fact." *Kenny v. Wilson*, 885 F.3d 280, 287 (4th Cir. 2018). A plaintiff may not obtain injunctive relief "based only on events that occurred in the past, even if the past events amounted to a violation of federal law." *Hoepfl v. Barlow*, 906 F. Supp. 317, 320 (E.D. Va. 1995). This is so because "past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief." *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983). Plaintiffs lack standing to obtain an injunction because all the conduct they challenge—the setting of polling places and the holding of the firehouse primary—took place entirely in the past. Indeed, the SAC itself demonstrates that Plaintiffs are unlikely to face similar purported injuries in the future. First, Plaintiffs allege that the details of this firehouse primary were an aberration from DPVA's otherwise consistent practice. See SAC ¶ 109 ("[T]he DPVA has *always* had at least one polling location in every jurisdiction in the electoral district to be contested." (emphasis added)). Second, going forward, Plaintiffs allege that they will encounter the "normal state-run nomination process" of which they have no stated complaints. See *id.* ¶¶ 18–20, 117. Nor can they evade this principle by contending that "the need for Special Elections" is "a regular occurrence in Virginia" such that "the use of a firehouse primary nomination method is all but guaranteed to be used by the DPVA in the future." Mot. ¶ 21. The "mere possibility" of a future firehouse primary with the same

locations is "hardly the kind of non-speculative, imminent danger that can support injunctive relief." *Garey v. James S. Farrin, P.C.*, 35 F.4th 917, 923 (4th Cir. 2022). This Court therefore lacks jurisdiction to decide Plaintiffs' claims against the Commonwealth Defendants.

For similar reasons, Plaintiffs' claims cannot proceed because they are moot. "[A]t all stages of litigation, a plaintiff must maintain a personal interest in the dispute," and "if in the course of litigation a court finds that it can no longer provide a plaintiff with any effectual relief, the case generally is moot." *Uzuegbunam*, 141 S. Ct. at 796. Plaintiffs seek an order "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." Mot. Remedy A. This Court "can no longer provide [Plaintiffs] with any effectual relief," *Uzuegbunam*, 141 S. Ct. at 796, because they seek to enjoin acts that (a) have never taken place—members of the Board certifying the results of a firehouse primary—or (b) have already happened—printing ballots with McClellan's name on them. See pp.4, 12, *supra*. Because Plaintiffs seek to enjoin conduct that—if it happened at all—happened in the past, their request for injunctive relief will not alleviate any ongoing or future injury and is not a continuing case or controversy.

II. The *Purcell* principle bars Plaintiffs' request to enjoin an ongoing election

In addition, well-established prudential considerations foreclose a federal court from enjoining an ongoing state election. The Supreme "Court has repeatedly emphasized that federal courts ordinarily should not alter state election laws in the period close to an election—a principle often referred to as the *Purcell* principle." *Democratic Nat'l Comm. v. Wisconsin State Legis.*, 141 S. Ct. 28, 30 (2020) (Kavanaugh, J., concurring in denial of application to vacate stay) (citing *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam)). The rationale for the *Purcell* principle is straightforward: "When an election is close at hand, the rules of the road should be clear and settled

. . . because running a statewide election is a complicated endeavor." *Id.* at 31. *Purcell* instructs courts to avoid "judicially created confusion," *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (per curiam), by declining to issue injunctions that would "alter state election laws in the period close to an election," *Moore v. Harper*, 142 S. Ct. 1089, 1089 (2022) (Kavanaugh, J., concurring in denial of application for stay).

The Supreme Court has frequently invoked this principle to preclude injunctive relief, see *Democratic Nat'l Comm.*, 141 S. Ct. at 31 (collecting cases), including twice last year in cases where the elections were months away, see *Merrill v. Milligan*, 142 S. Ct. 879, 881 n.1 (2022) (Kavanaugh, J., concurring in grant of applications for stays); *Moore*, 142 S. Ct. at 1089. In *Wise v. Circosta*, the Fourth Circuit invoked *Purcell* to deny an injunction of a state voting regulation when, as here, early voting was already underway. 978 F.3d 93, 98–99, 103 (4th Cir. 2020). And the other federal courts of appeals have similarly invoked *Purcell* to stay district-court injunctions of state election laws in the months leading up to an election. See, *e.g.*, *League of Women Voters of Fla., Inc. v. Florida Sec. of State*, 32 F.4th 1363, 1371 (11th Cir. 2022); *Thompson v. Dewine*, 959 F.3d 804, 813 (6th Cir. 2020); *Short v. Brown*, 893 F.3d 671, 680 (9th Cir. 2018).

Purcell forecloses a preliminary injunction. The firehouse primary which Plaintiffs challenge took place almost four weeks ago. SAC ¶ 38; Decl. ¶ 14. The special election for which the nominating contest was held has been ongoing since January 6. Decl. ¶ 19. 4,323 Virginians have already cast ballots containing the name of DPVA's chosen candidate, and 26,929 others have requested absentee ballots to do the same. *Id.* ¶ 20. Election day is just over five weeks from today. *Id.* ¶ 4. *Purcell* and its progeny plainly foreclose this Court from "interven[ing] in the voting affairs of" Virginia "in the middle of an ongoing election." *Wise*, 978 F.3d at 103.

III. Plaintiffs' claims lack merit

Plaintiffs' claims also fail on the merits. Their due process claim fails because allowing

DPVA to structure its own nominating convention does not violate the Due Process Clause. Their First Amendment and equal protection claims fail because they have not identified any state action infringing their freedom of association or depriving them of equal protection of the laws. And their VRA claim is half-formed and deficient in numerous ways.

A. The statute recognizing DPVA's power to select its candidates through a means other than a primary does not violate the Due Process Clause

Plaintiffs contend that Virginia's statute authorizing political parties to determine the method by which they select their nominees is an unconstitutional delegation of legislative authority to DPVA in violation of the Due Process Clause. SAC ¶¶ 137, 159. But political parties such as DPVA have a fundamental First Amendment right to nominate their own candidates; permitting them to do so is not a "delegation" of state authority, much less an unconstitutional one. Plaintiffs' due process claim also fails because they were not deprived of a protected liberty or property interest.

Virginia Code § 24.2-508 provides that political parties may "make [their] own rules and regulations," "call conventions to . . . ratify a nomination, or for any other purpose," and "provide for the nomination of its candidates." This provision does not delegate legislative authority at all. Political parties "enjoy freedom of association protected by the First and Fourteenth Amendments." *Eu v. San Francisco Cnty. Democratic Central Comm.*, 489 U.S. 214, 224 (1989). "In no area is the political" party's right of association "more important than in the process of selecting its nominee." *California Democratic Party v. Jones*, 530 U.S. 567, 575 (2000). "A political party has a First Amendment right to . . . choose a candidate-selection process that will in its view produce the nominee who best represents its political platform." *New York State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 202 (2008). Indeed, the selection of a party's candidates is the "crucial juncture at which the appeal to common principles may be translated into concerted

action, and hence to political power in the community." *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 216 (1986). Although the General Assembly has authority to regulate DPVA's candidate-selection process, see *Jones*, 530 U.S. at 572, the Supreme Court has "vigorously affirm[ed] the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party 'select[s] a standard bearer who best represents the party's ideologies and preferences,'" *id.* at 575.

Plaintiffs' nondelegation argument gets these constitutional principles backwards. DPVA's capacity to choose its preferred candidate is not a state power "delegated" to the party; it is a core component of DPVA's right of free association. To be sure, the General Assembly could "insist" that DPVA choose its candidates exclusively "by primary election." *American Party of Tex. v. White*, 415 U.S. 767, 781 (1974). But "to say that the State can require" primary elections "is a far cry from saying that the Constitution demands it." *Lopez Torres*, 552 U.S. at 205; see also *id.* at 206–07 ("Selection by convention has been a traditional means of choosing party nominees. While a State may determine it is not desirable and replace it, it is not unconstitutional."). Here, the General Assembly has provided that "[t]he duly constituted authorities of the political party . . . shall have the right to determine the method by which a party nomination for that office shall be made." Va. Code § 24.2-509(A). That provision is not a delegation of legislative authority for purposes of the Due Process Clause; it instead represents a legislative choice not to constrain how a political party may exercise its right of free association. See *Lopez Torres*, 552 U.S. at 205.

In addition, Plaintiffs' nondelegation argument fails because they have not been deprived of a protected liberty or property interest. Federal law does not "place[] any general restraints on the delegation of state power to state administrators or generally require[] state power to be delegated according to well defined standards." *Geo-Tech Reclamation Indus., Inc. v. Hamrick*,

886 F.2d 662, 666 n.2 (4th Cir. 1989). Rather, state delegations implicate the Due Process Clause only if they give a private entity the power to deprive a third party of a liberty or property interest that the Due Process Clause protects without standards to guide the private entity's exercise of discretion. See *Rice v. Village of Johnstown*, 30 F.4th 584, 590 (6th Cir. 2022); *General Elec. Co. v. New York State Dep't of Labor*, 936 F.2d 1448, 1458–59 (2d Cir. 1991).

Here, Plaintiffs fail to identify any protected liberty or property interest. That failure alone is fatal to their due process claims. See *Hawkins v. Freeman*, 195 F.3d 732, 549 (4th Cir. 1999) ("Where no protected life, liberty or property interest exists, there can be no due process violation." (cleaned up)). Insofar as Plaintiff Marks contends that he enjoys a liberty or property interest to stand as a candidate, a person "can not possess a property interest in . . . federal office." *Cornett v. Sheldon*, 894 F. Supp. 715, 726 (S.D.N.Y. 1995); *Lopez Torres*, 552 U.S. at 205 ("None of our cases establishes an individual's constitutional right to have a 'fair shot' at winning the party's nomination."); *Fowler v. Adams*, 315 F. Supp. 592, 594–95 (M.D. Fla. 1970) (candidacy for House of Representatives is not a "property right"); *Wilson v. Birnberg*, 667 F.3d 591, 597–98 (5th Cir. 2012) (Due Process Clause does not protect right to stand for or hold public office); *Velez v. Levy*, 401 F.3d 75, 86 (2d Cir. 2005) (similar); *Burks v. Perk*, 470 F.2d 163, 165 (6th Cir. 1972) (similar).

Similarly, as to the remaining Plaintiffs, there is no liberty or property interest in participating in a party nomination process like the firehouse primary. The Fourth Circuit has recognized that even though the "right to vote in elections for national office is a fundamental one" and this right "includes any preliminary election integrally related to elections for national office," it does not include party nomination processes like caucuses or conventions. See *Bachur v. Democratic Nat'l Party*, 836 F.2d 837, 841 (4th Cir. 1987) ("In this case [plaintiff] does not claim that he was foreclosed from voting for a candidate of his choice; he seeks the right to vote for a

delegate of his choice."). The firehouse "primary" is not a primary election or other "preliminary election integrally related to elections for national office"; it is "a caucus or convention to provide for the nomination of its candidates, including the nomination of the party's candidates for office in case of any vacancy." See pp.2–3, *supra*. The Commonwealth Defendants are aware of no court that has extended the right to vote to such firehouse primaries, nor have Plaintiffs identified any.

Because permitting a party to choose candidates by caucus pursuant to its own internal procedures does not constitute a delegation of legislative authority under the Due Process Clause, and because Virginia Code § 24.2-508 does implicate any liberty or property interest protected by the Due Process Clause, Plaintiffs' due process claims against the Commonwealth Defendants fail.

B. DPVA's caucus did not involve state action and therefore did not violate the First Amendment or Equal Protection Clause

Plaintiffs' challenges under the First Amendment and Equal Protection Clause also fail as a matter of law, because DPVA's caucus did not involve state action. The Equal Protection Clause establishes an "essential dichotomy between discriminatory action by the State, which is prohibited by the Equal Protection Clause, and private conduct, 'however discriminatory or wrongful,' against which that clause 'erects no shield.'" *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 172 (1972). Similarly, the First Amendment prohibits only state action, not private conduct. See *White Coat Waste Project v. Greater Richmond Transp. Co.*, 35 F.4th 179, 189 (4th Cir. 2022) ("[C]ourts must ensure 'that constitutional standards' such as the First Amendment are only enforced 'when it can be said that the State is responsible for the specific conduct of which the plaintiff complains.'" (cleaned up) (quoting *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001))). "'Careful adherence to the "state action" requirement preserves an area of individual freedom by limiting the reach of federal law' and avoids the imposition of responsibility on a State for conduct it could not control." *National Collegiate Athletic Ass'n v.*

Tarkanian, 488 U.S. 179, 191 (1988). "[S]tate action may be found if, though only if, there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself.'" *Brentwood Acad.*, 531 U.S. at 295.

DPVA is a private entity under Virginia law, as Plaintiffs concede. SAC ¶ 139 ("[T]he DPVA is not a government entity."). And Plaintiffs do not allege that the Commonwealth has endorsed, adopted, or enforced the methods DPVA used to conduct its firehouse primary. Plaintiffs nonetheless argue that "a nomination process for an entity like the DPVA recognized as a major political party is considered 'state action'" and is subject to constitutional restrictions. *Ibid.*; see *id.* ¶ 174. Plaintiffs' argument is incorrect; it elides the critical difference between state-run primary elections and the "firehouse primary" at issue here, which is a party-run caucus.

Plaintiffs insist that because the Commonwealth has "delegated" the General Assembly's power to "provide for the nomination of candidates," Va. Const. art. II, § 4, everything DPVA does is necessarily state action, see Mot. ¶ 19; see also SAC ¶¶ 136–39, 189–93. But DPVA does not enjoy the right to select its own candidates by dint of a delegation of State power, but rather as an exercise of its First Amendment rights. See pp.20–21, *supra*. Plaintiffs rely on *Morse* and *Smith v. Allwright*, 321 U.S. 649, 653 (1944), for the proposition that "a nomination process for an entity like the DPVA recognized as a major political party is considered 'state action.'" SAC ¶ 139. But those cases held no such thing. *Morse* dealt with a purely statutory question—whether a political party's requirement that voters pay a registration fee to become a delegate to a state convention violated the VRA. It had no majority opinion, and Justice Breyer's concurring opinion—which "concurred in the judgments on the narrowest grounds," *Marks v. United States*, 430 U.S. 188, 193 (1977)—"did not declare that all party nomination processes constitute state action." *Marts v. Republican Party of Va., Inc.*, No. 5:17-cv-00022, 2018 WL 1595629, at *3 (W.D. Va. Mar. 31,

2018). Rather, Justice Breyer emphasized the narrowness of the judgment in light of the "limits imposed by" the state action doctrine. *Morse*, 517 U.S. at 239 (Breyer, J., concurring).

Smith also does not help Plaintiffs. *Smith* invalidated the Democratic Party of Texas's rule limiting voting in a statewide primary election to "white citizens of the State of Texas." 321 U.S. at 656. The Supreme Court held that because Texas's electoral process gave a privileged role to the Democratic Party, Texas "endorse[d], adopt[ed] and enforce[d] the discrimination" against black voters such that it became state action under the Fifteenth Amendment. *Id.* at 664; see *Lopez Torres*, 552 U.S. at 202–03 ("[T]he party's racially discriminatory action may become state action that violates the Fifteenth Amendment."). *Smith* and its progeny, however, "do not stand for the proposition that party affairs are public affairs." *Jones*, 530 U.S. at 573. The question instead is whether "the State has had a hand in" the alleged unconstitutional action. *Terry v. Adams*, 345 U.S. 461, 473 (1953) (Frankfurter, J.). "The vital requirement is State responsibility—that somewhere, somehow, to some extent, there be an infusion of conduct by officials, panoplied with State power, into any scheme" that allegedly violated the plaintiff's constitutional rights. *Ibid.* For example, a State may so closely regulate and "control[] the primary election machinery," *Smith*, 321 U.S. at 653 n.6, that "the party 'required to follow these legislative directions [is] an agency of the state in so far as it determines the participants in a primary election,'" *Terry*, 345 U.S. at 474 (Frankfurter, J.) (quoting *Smith*, 321 U.S. at 663).

This case does not involve a state-administered and funded primary election. Here, DPVA opted for a firehouse primary—which, as Plaintiffs concede, is run solely by the political party. SAC ¶¶ 9–11, 16–17, 21. Indeed, in "[a] firehouse primary[,]" unlike in an primary election, "the party operates and funds the entire process." *Miller v. Brown*, 503 F.3d 360, 362 n.3 (4th Cir. 2007); see SAC ¶ 10; see also Decl. ¶ 8. And again, Plaintiffs do not allege that the Commonwealth

Defendants had any role in choosing the number or location of voting sites which they challenge. They have failed to allege facts demonstrating that there was "an infusion of conduct" by the Commonwealth Defendants in running the firehouse primary sufficient to make DVPA's actions attributable to the Commonwealth. *Terry*, 345 U.S. at 473 (Frankfurter, J.). Because DPVA alone selected, funded, and operated this nominating contest, DPVA's caucus was not state action for purposes of either the Equal Protection Clause or the First Amendment.

If this Court concludes that the setting of the number and locations of the voting sites constituted state action, then the Commonwealth Defendants take no position on the merits of Plaintiffs' equal protection and First Amendment claims. Any injunction issued by this Court, however, could not run against the Commonwealth Defendants, who played no role whatsoever in designing the firehouse primary process by which DPVA chooses its nominee. See pp.10–12, *supra*. The party subject to an *Ex parte Young* injunction must have "ha[ve] some connection with the enforcement of the act" alleged to be unconstitutional. *Hutto v. South Carolina Ret. Sys.*, 773 F.3d 536, 550 (4th Cir. 2014) (cleaned up) (quoting *Ex parte Young*, 209 U.S. at 157). The injunction "cannot be applied to an action against any random state official" because "there must be a . . . nexus between the violation of federal law and the individual accused of violating that law." *Pennington Seed, Inc. v. Produce Exchange No. 299*, 457 F.3d 1334, 1342 (Fed. Cir. 2006). Instead, an injunction can "restrain only unlawful conduct and the persons responsible for conduct of that character." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 924 n.67 (1982). Any injunction issued here must run only against the DPVA Defendants.

C. Plaintiffs have not stated a claim under § 2 of the Voting Rights Act

Plaintiffs' VRA claim fails in numerous ways. First, Plaintiffs appear to invoke this Court's jurisdiction only through 42 U.S.C. § 1983, see p.8, *supra*, but it is "well-settled that § 1983 cannot serve as a means to enforce a statute that has its own comprehensive internal enforcement scheme,

as the Voting Rights Act clearly has," *Moseley v. Price*, 300 F. Supp. 2d 389, 396 n.11 (E.D. Va. 2004). Therefore, Plaintiffs' VRA claim fails as a matter of law.[7]

Second, Plaintiffs' allegations fall woefully short of stating a § 2 claim. Section 2 provides that no "voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. § 10301(a). Here, Plaintiffs appear to contend the defendants violated § 2 because "the 'firehouse primary' rules and procedures at issue . . . were drafted to intentionally discriminate against a class of minority voters . . . ." SAC ¶ 234. They also allege that the defendants intended to "make it far harder for the minority voters of modest means who dominate [jurisdictions] without a voting location to cast ballots" during the firehouse primary. *Id.* ¶¶ 235–36.

No test "govern[s] all VRA § 2 claims involving [such] rules." *Brnovich*, 141 S. Ct. at 2336. Evaluating such a claim "requires consideration of 'the totality of circumstances' in each case and demands proof that 'the political processes leading to nomination or election in the State or political subdivision are not *equally open* to participation' by members of a protected class '*in that its members have less opportunity* than other members of the electorate to participate in the political process and to elect representatives of their choice.'" *Id.* at 2332 (quoting 52 U.S.C. § 10301(b)). *Brnovich* identified certain "guideposts" that can help courts decide § 2 cases. *Id.* at 2338–40; see also *Texas Democratic Party v. Scott*, --- F. Supp. 3d ---, 2022 WL 3456915, at *9–

[7] It is an open question in the Fourth Circuit whether § 2 of the VRA furnishes a private right of action. See *Washington v. Finlay*, 664 F.2d 913, 926 (4th Cir. 1981); see also *Brnovich v. Democratic Nat'l Comm'n*, 141 S. Ct. 2321, 2350 (2021) (Gorsuch, J., concurring); *cf. Arkansas State Conf. NAACP v. Arkansas Bd. of Apportionment*, 586 F. Supp. 3d 893, 912–16 (E.D. Ark. 2022) (holding that § 2 does not create a private cause of action). The Court need not resolve this question in this case because, even if § 2 furnishes a private right of action, Plaintiffs have failed to state a claim under it.

10 (W.D. Tex. July 25, 2022) (using *Brnovich* guideposts). Most relevant here, the Supreme Court explained that courts should pay special attention to "[t]he size of any disparities in a rule's impact on members of different racial or ethnic groups." *Brnovich*, 141 S. Ct. at 2339. This is so because "the explicit language of the Voting Rights Act requires that alleged abridgement arise on account of race or color." *Perry-Bey v. City of Norfolk*, 678 F. Supp. 2d 348, 363 (E.D. Va. 2009). In other words, "the challenged standard, practice, or procedure must impose a discriminatory burden on members of [such] a protected class." *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 240 (4th Cir. 2014) (cleaned up).

To survive a motion to dismiss, Plaintiffs must allege facts sufficient to give rise to the inference that the Commonwealth Defendants discriminated against a discrete and identifiable protected class. Plaintiffs have failed to allege any facts even remotely sufficient to establish this prerequisite. Here, although Plaintiffs assert the firehouse primary harmed "minority voters," *e.g.*, SAC ¶ 234, Plaintiffs have failed entirely to identify the minority voters to whom they refer. Plaintiffs instead gesture generally at the discrimination against "minority voters of modest means." *Id.* ¶¶ 27–29, 236. But being of "modest means"—presumably a reference to socioeconomic status—is not a protected status under the VRA, which protects against "the denial or abridgment of the right to vote of any citizen who is a member of a protected class of *racial and language* minorities." *Thornburg v. Gingles*, 478 U.S. 30, 43 (1986) (emphasis added). Plaintiffs' claims of intentional discrimination are also entirely conclusory. Plaintiffs allege, for example, that "the 'firehouse primary' rules and procedures at issue in this matter were drafted intentionally to discriminate against minority voters." SAC ¶¶ 234–35. But their only allegation regarding such intentional conduct is that "[t]he DPVA can be presumed to have known that their scheme would make it far harder for the minority voters of modest means . . . to cast ballots." *Id.* ¶ 236.

"Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Were this Court to disagree and find Plaintiffs have adequately stated a claim under § 2 of the VRA, the Commonwealth Defendants take no position on whether the number and location of voting sites during DPVA's firehouse primary violated § 2 of the VRA. Any injunction regarding the location and number of polling places, however, could not run to the Commonwealth Defendants, who play no role whatsoever in administering DPVA's firehouse primary. See p.26, *supra*. Instead, any injunction could run only against the DPVA Defendants.

IV. Plaintiffs cannot satisfy the remaining *Winter* factors for a preliminary injunction

Plaintiffs also fail to satisfy the remaining three *Winter* factors. Plaintiffs cannot demonstrate the irreparable harm required to obtain a preliminary injunction because their alleged harm has already occurred and would not be prevented by the requested injunction. Plaintiffs allege irreparable harm from "an unconstitutional nomination process" destroying their "right to vote" and "right of association." Mot. ¶¶ 87–95. In other words, Plaintiffs merely reiterate their merits position as their argument for irreparable harm. As a threshold matter, that argument fails for the same reasons that Plaintiffs have not alleged a constitutional violation. See pp.20–26, *supra*. In addition, Plaintiffs simply "contend that any deprivation of a constitutional right automatically constitutes irreparable harm." *Lecky v. Virginia State Bd. of Elections*, 285 F. Supp. 3d 908, 921 (E.D. Va. 2018). "But this contention ignores an important part of the analysis courts must conduct in considering whether to grant a preliminary injunction, namely whether the party 'is likely to suffer irreparable harm in *the absence of preliminary relief*.'" *Ibid*. (quoting *Di Biase v. SPX Corp.*, 872 F.3d 224, 230 (4th Cir. 2017)). Plaintiffs cannot make that showing because, even "assuming these [P]laintiffs were denied the right to vote [or the right of association], that irreparable harm has already occurred": the firehouse primary has already happened and the general election ballots

are already printed and in use. *Ibid*. (denying motion for preliminary injunction); *see* p.18, *supra*.

Nor can Plaintiffs satisfy the last two *Winter* factors—the balance of equities and the public interest—which "merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009). "[T]he balance of equities is influenced heavily by *Purcell* and tilts against federal court intervention at this late stage." *Wise*, 978 F.3d at 103 (denying injunction pending appeal and commenting favorably on the district court's decision that "pursuant to *Purcell* . . . injunctive relief was inappropriate," even if "Plaintiffs were likely to succeed on [the merits]"). Thus, the same prudential considerations that foreclose a federal court from enjoining an ongoing election, see pp.18–19, *supra*, are also dispositive with respect to the last two *Winter* factors.

Plaintiffs muster only a conclusory claim that the balance of equities tips in their favor because (a) "the public interest is surely best served by a Court order ensuring that citizens are not denied their right to vote," Mot. ¶ 97, and (b) upending the results of the firehouse primary and even possibly "readjust[ing]" the date of the special election will—somehow—"increas[e] . . . public respect for our electoral system," *id*. ¶¶ 99–104. Not so. Rather, as the Supreme Court has cautioned, "[c]ourt orders affecting elections . . . can themselves result in voter confusion" and create an "incentive to remain away from the polls." *Purcell*, 549 U.S. at 4–5. That is why preliminary injunctions that "threaten to disrupt an orderly election" have "been consistently denied." *Perry v. Judd*, 471 Fed. Appx. 219, 227 (4th Cir. 2012). Here, disrupting a special election to overturn a completed nomination process would confuse voters, incent them not to participate, and destroy any semblance of an orderly election. As a result, the public interest and balance of equities strongly militate against issuing a preliminary injunction.

CONCLUSION

For the foregoing reasons, this Court should deny the Motion for Preliminary Injunction.

Dated: January 16, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on January 16, 2023, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to all parties of record.

/s/ Andrew N. Ferguson
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