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

PAUL GOLDMAN, ***et al.,***	)	
Plaintiffs,	)	
v.	)	**Civil Action No. 3:22cv789**
GLEN YOUNGKIN, ***in his official capacity*****,** ***et al.,***	)	
Defendants.	)	

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DPVA DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Defendants Democratic Party of Virginia, Susan Swecker, Chairwoman of the Democratic Party of Virginia, in her official capacity, and Alexsis Rodgers, Chairwoman of the 4th Congressional District Democratic Committee Party, in her official capacity (collectively, the "DPVA"), by counsel, hereby submit this Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction.

The Honorable A. Donald McEachin ("Representative McEachin") was re-elected to his fourth term in the United States House of Representatives for the 4th Congressional District of Virginia ("4th CD") on November 8, 2022, but passed away just 20 days later. The DPVA, while mourning the loss of a pillar of their political party, embarked on the difficult task of choosing a nominee for a special election to fill the vacancy left by his untimely death. This undertaking was made even more challenging without knowing the date of the special election and the deadlines for choosing and certifying a nominee.

Yet the DPVA, without the benefit of state-funding, and with only 11 days from the time the deadlines and date for the special election were set, managed to secure the voting locations and volunteers needed to conduct an unassembled caucus, also known as a firehouse primary ("Firehouse Primary") that resulted in 27,900 votes. The 4th CD democratic voters voted overwhelmingly for Virginia State Senator Jennifer Leigh McClellan ("Sen. McClellan"), and the DPVA certified her as the democratic nominee to the Virginia Board of Elections ("VBE") in time for her name to appear on the ballot. Even in the face of such daunting odds, , the DPVA executed the will of the people in a manner consistent with the Constitution, the Voting Rights Act of 1965, and the Code of Virginia. On January 6, 2023, early voting began for the special election.

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Unfortunately, an individual plaintiff, and then six more (collectively, the "Plaintiffs") filed this present suit which seeks to overturn the will of the overwhelming majority of those 27,900 4th CD democratic voters who voted for Sen. McClellan in the Firehouse Primary, and to hinder the on-going and vital process of electing a United States Congressman to fill the vacant seat in the 4th CD. The Plaintiffs, all of whom voted in the Firehouse Primary, allege that the DPVA, through an apparent delegation of legislative authority granted by the Virginia General Assembly, created an unconstitutional burden on their and other unidentified potential voters' right to vote in the Firehouse Primary, despite their own admission of having voted and the Firehouse Primary that resulted in a clear winner.

Plaintiffs' Motion for Preliminary Injunction seeks to enjoin the VBE from certifying the name of the democratic nominee for a special election to fill the vacancy left by Representative McEachin in the 4th CD before the nominee's name can be printed on the ballot. Plaintiffs ask for extraordinary injunctive relief that would completely alter the status quo and deprive the 27,900 4th CD voters who voted in the Firehouse Primary and the thousands who have already cast their ballots beginning on January 6, 2023, of their fundamental political rights.

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Plaintiffs' Motion for Preliminary Injunction, and the underlying complaint, will not succeed on the merits because they are nonjusticiable as to DPVA. The Court lacks subject matter jurisdiction due to Plaintiffs' lack of standing because they did not suffer an injury-in-fact. Additionally, the Court lacks subject matter jurisdiction because the DPVA was not a state actor when conducting the Firehouse Primary and thus no viable federal claim exists to confer jurisdiction upon the Court. The Court also lacks subject matter jurisdiction because of the mootness of Plaintiffs' request for extraordinary injunctive relief, which the Court is unable to

provide due to the passage of time and the occurrence of the acts (i.e. printing the name of the democratic nominee on the ballot and the beginning of early voting) that they seek to enjoin.

Furthermore, Plaintiffs have failed to state a claim upon which relief can be granted under the *Purcell* principle, which bars Plaintiffs' request to enjoin an ongoing election.

In addition to the aforementioned deficiencies that eliminate Plaintiffs' likelihood for success on the merits, Plaintiffs cannot establish that they are likely to suffer irreparable harm without the injunction, as the Plaintiffs admitted that they were able to vote in the Firehouse Primary, or in the case of Tavorise Marks, were able to appear on the ballot as a nominee. Plaintiffs also cannot establish that the balance of equities and hardships is their favor when compared to the those of the DPVA and voters in the 4th CD who have already voted in both the Firehouse Primary and the special election. Furthermore, the Plaintiffs cannot show an injunction is in the public interest for these voters and those who have yet to vote, as well as the rest of the citizens of the United States of America, who have a vested interest in filling a vacant seat in the United States House of Representatives without undue delay. For the reasons stated herein, the Court should deny the Motion for Preliminary Injunction.

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I. BACKGROUND

A. PROCEDURAL BACKGROUND

This case was initiated on December 16, 2022 by the filing of a Petition for Declaratory Judgment and Request for Preliminary Injunction ("Complaint") by *pro se* Plaintiff Paul Goldman. ECF 1. On the same day, Paul Goldman filed a Motion for Hearing on a Preliminary Injunction ("1st Motion for Hearing"). ECF 2. On December 19, 2022, summonses were issued ("1st Summonses"). ECF 3.

On December 21, 2022[1], Elliot Bruce Bender, Esquire ("Attorney Bender") filed an Entry of Appearance as counsel for the Paul Goldman. ECF 4. On that same day, Attorney Bender also filed a Motion for Leave to File Amended Complaint ("Motion for Leave"). ECF 5. Attorney Bender then filed an Amended Complaint, wherein six additional plaintiffs joined the suit ("Amended Complaint"). ECF 6.

On December 22, 2022[2], Honorable United States District Judge Roderick C. Young issued an Order ("December 22nd Order") wherein he states that leave to file an amended complaint is not required because the 1st Summonses has not been executed or served, and that Plaintiff Paul Goldman's request for preliminary injunction in the Complaint "has been rendered unavailable with the passage of time…the Court finds that a hearing on the initially sought preliminary injunction is unnecessary at this time." ECF 8. Accordingly, the December 22nd Order directed the Clerk to "TERMINATE as MOOT the pending Motion for Hearing (ECF No.2) and Motion for Leave to File Amended Complaint (ECF No.5)." *Id.*

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On December 29, 2022, Attorney Bender filed a Motion for Substitution of Counsel ("Motion for Substitution") wherein he moved the Court to substitute John M. Janson, Esquire ("Attorney Janson") as counsel for Plaintiffs. ECF 9.

The following day on December 30, 2022, Attorney Janson filed an Entry of Appearance as counsel for Plaintiffs. ECF 10. On this same day, Attorney Janson then filed a Second Amended Complaint[3], wherein an eighth plaintiff was added ("2nd Amended Complaint"). ECF 11. Attorney Janson also submitted a Motion for Preliminary Injunction and Hearing on the Motion the same

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[1] The 4th CD Democratic Primary was held one day prior on December 20, 2021.
[2] Sen. McClellan was named the DPVA nominee for 4th CD Special Election on December 21, 2022.
[3] Plaintiffs have yet to obtain leave from the Court or written consent from the Defendants to file the 2nd Amended Complaint as required by Rule 15 of the Federal Rules of Civil Procedure.

day ("Motion for Preliminary Injunction"). ECF 12. A second set of summonses were issued on that day as well. ECF 14.

On January 3, 2023, the Court issued an Order ("January 3rd Order") wherein he granted the Motion for Substitution. ECF 15. The second set of summonses were returned, with all Defendants except for Governor of Virginia Glenn Youngkin ("Governor Youngkin") having been served. ECF 16.

On January 4, 2023, Plaintiffs filed a Second Motion for A Hearing ("2nd Motion for Hearing") wherein they moved for the Court to deem Governor Youngkin as served and more a hearing on the Motion for Preliminary Injunction to be held the next on January 5, 2023. ECF 17.

On January 10, 2023, the Court issued an Order ("January 10th Order") wherein he denied Plaintiffs' 2nd Motion for Hearing as moot and ordered a hearing on Plaintiffs' Motion for Preliminary Injunction to be held on January 18, 2022. ECF 23.

While the January 10th Order is clear that the January 18, 2022 hearing will be on Plaintiffs' Motion for Preliminary Injunction (ECF 12), the specific complaint that the Motion for Preliminary Injunction relates to is not specified. As it stands, Plaintiffs have yet to obtain leave from the Court or written consent from the Defendants to file the 2nd Amended Complaint as required by the Federal Rules of Civil Procedure. Fed. R. Civ. P. 15(a). Furthermore, the "Deadlines/Hearings" section on the United States District Court for the Eastern District of Virginia Case Management Electronic Case Filing system, attached as **Exhibit A**, indicates that the January 24, 2022 deadline for Defendants to file an answer relates to the Amended Complaint

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(ECF 6). (Exhibit A, at p.1.) Accordingly, this Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction treats the Amended Complaint (ECF 6) as the controlling complaint.[4]

B. FACTUAL BACKGROUND

The untimely death of Representative McEachin on November 28, 2022 left a vacancy in the United States House of Representatives for the 4th CD. As required by and pursuant to his authority under Article I, Section 2 of the Constitution of the United States of America, and Va. Code § 24.2-209, Governor Youngkin issued a writ of election to fill the vacancy ("Writ"), attached as **Exhibit B,** on December 12, 2022. (Amended Compl. ¶ 5.) In the Writ of Election, Governor Youngkin set a December 23, 2022 deadline for filing as a candidate, and a Special Election date of February 21, 2023 ("Special Election") (Exhibit B, ¶ 2.)

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The same evening the Writ was issued, the DPVA met and issued a "Call to Caucus to Nominate a Democratic Candidate for Congress in the 4th District" ("Call to Caucus"), attached as **Exhibit C**. The Call to Caucus provided for the Firehouse Primary to be held on Tuesday, December 20, 2022 from the hours of 6 AM to 7 PM at five locations throughout the 4th District. (Exhibit C, p. 1.) On December 14, 2022, DPVA added three additional polling places. (Amended Compl. ¶¶ 39,112.)

According to the Declaration of DPVA Shyam Raman, Executive Director of the DPVA, attached as **Exhibit D**, on December 13, 2022, the DPVA published notice of the locations where voters could cast their ballots. (Exhibit D, ¶ 3.) The DPVA was able to secure three additional voting locations on December 14, 2022. (*id.,* at ¶ 4.)

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[4] If the court intends to give any consideration to the 2nd Amended Complaint at this stage in the proceedings, DPVA respectfully requests an opportunity to file an additional brief.

Unlike state-run primaries, the Firehouse Primary was staffed solely by DPVA volunteers and was not funded by taxpayers. (*id.,* at ¶ 8.) Securing voting locations and volunteers was a challenge for the DPVA due to the time constraints imposed by the Writ and obtaining voting locations before the issuance of the Writ "was not possible because [the DPVA] could not provide the exact date that the unassembled caucus would need to be held." (*id.* at ¶¶ 5-6.)

Despite these challenges, the Firehouse Primary yielded a voter turnout that exceeded previous state-run primaries in the 4th CD with 27,900 votes cast. (*id.* at ¶¶ 7, 9-10.) Sen. McClellan received 23,661 votes, or 84.81% of the total votes. (*id.,* at ¶ 7.) In comparison, the late Honorable A. Donald McEachin was first nominated with a little over 15,000 total voters in the 2016 state-run democratic primary. (*id.,* at ¶ 9.)

On December 21, 2022, the DPVA certified Sen. McClellan as the democratic nominee to the VBE. (*id.* ¶ 10.) Early voting began on January 6, 2023, and as of January 13, 2023, at least 3,892 votes have been cast. (*id.* ¶¶ 11, 12.)

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II. LEGAL STANDARD

A. LAW APPLICABLE TO SPECIAL ELECTIONS

"When vacancies happen in the Representation from any state, the executive authority thereof shall issue writs of election to fill such vacancies." U.S. Const. art. I, § 2. "When any vacancy occurs in the representation of the Commonwealth of Virginia in the House of Representatives, or when a representative-elect dies or resigns, the Governor shall issue a writ of election to fill the vacancy." Va. Code § 24.2-209.

Under the Constitution of Virginia, "[t]he General Assembly shall provide for the nomination of candidates, shall regulate the time, place, manner, conduct, and administration of primary,

general, and special elections, and shall have power to make any other law regulating elections not inconsistent with this Constitution." Va. Const. art. II, § 4.

Virginia defines a political party as "an organization of citizens of the Commonwealth which, at either of the two preceding statewide general elections, received at least 10 percent of the total vote cast for any statewide office filled in that election." Va. Code § 24.2-101. A political party in Virginia has the power to make its own rules and regulations and "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. A political party in Virginia also "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).

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When nominating a candidate by methods other than a primary for a special election held at a time other than a general election, the nomination process shall be completed either "(i) at least 60 days before the election or (ii) within five days of any writ of election or order calling a special election to be held less than 60 days after the issuance of the writ or order." Va. Code § 24.2-510(5). When nominating a candidate for a vacancy by a special election, the party chairman shall certify the name of any candidate to the VBE "by the deadline to nominate the candidate." Va. Code § 24.2-511(C).

B. STANDARD FOR PRELIMINARY INJUNCTIONS

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. NRDC, Inc.*, 555 U.S. 7, 24, 129 S. Ct. 365, 376 (2008). The Court must adhere to the "fundamental principle that an injunction is an equitable remedy that does not issue as of course." *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 542, 107 S. Ct. 1396, 1402 (1987).

"A preliminary injunction may be characterized as being either prohibitory or mandatory." *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 235 (4th Cir. 2014). "Whereas

mandatory injunctions alter the status quo, prohibitory injunctions aim to maintain the status quo and prevent irreparable harm while a lawsuit remains pending." *Id. at* 224, 236 (4th Cir. 2014) (citations and internal quotation marks omitted). The 4th Circuit has defined the status quo as "the last uncontested status between the parties which preceded the controversy *Pashby v. Delia*, 709 F.3d 307, 313 (4th Cir. 2013).

To obtain injunctive relief, the burden is on the movant to establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter* v. *Natural Resources Defense Council, Inc*., 555 U. S. 7, 20, 129. If one of the factors laid out in Winters is clearly absent, the court need not consider all four. *See Henderson for Nat'l Lab. Rels. Bd. v. Bluefield Hosp. Co.*, LLC, 902 F.3d 432, 439 (4th Cir. 2018).

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III. ARGUMENT

A. PLAINTIFFS ARE UNLIKELY TO SUCCEED ON THE MERITS.

1. The Court Does Not Have Subject Matter Jurisdiction Over This Controversy Because Plaintiffs Have Not Suffered an Injury in Fact and Therefore Lack Standing.

Article III of the Constitution requires that federal courts only adjudicate "cases" and "controversies." U.S. Const. art. III, § 2. To be considered a case or controversy, a matter must be "of the sort traditionally amenable to, and resolved by, the judicial process." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102 (1998).

A plaintiff has standing if he has suffered an injury in fact that is both "fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 153-54 (4th Cir. 2000). There are three elements that need to be met to confer standing: (1) injury; (2) traceability,

sometimes called causation; and (3) redressability." *Lambert v. Democratic Party of Va.*, Civil Action No. 3:15CV61, 2015 U.S. Dist. LEXIS 105377, at *5 (E.D. Va. Aug. 11, 2015) (citing *Gaston Copper*, supra).

"To satisfy the injury-in-fact element, a plaintiff must show 'an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.'" *Lambert*, *supra* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). "This requirement is designed to filter out claims of highly attenuated injuries." *Id.* Specifically, as to preliminary injunctions, 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) "[A]n injunction cannot remedy [the plaintiff's] past injury." *Id.* at 321.

Plaintiffs cannot satisfy the injury-in-fact element as to the DPVA because, despite the alleged unconstitutional burdens or their rights under the Voting Rights Act of 1965 ("VRA") imposed by the Firehouse Primary, each individual plaintiff was able to exercise their right to vote. (Amended Compl. ¶¶ 54,57,60,63,66,69,72.) Plaintiffs do not allege that they themselves sought to vote early, or by mail and were denied, or that they are active-duty military members that could not vote, or that they suffered monetary damages in the form of travel costs, or that they waited in line for upwards of an hour. Instead, Plaintiffs allege that these were injuries suffered by unidentified voters generally. (Motion for Prelim. Injunc. ¶¶ 26-34.) These alleged injuries were not particularized to the Plaintiffs, but rather "conjectural or hypothetical" as to an unidentified segment of voters. *Lambert*, *supra* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

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Even if the Court chooses to adjudicate the Motion for Preliminary Injunction based on the allegations contained in the yet-to-be accepted Second Amendment Complaint that several of the individual plaintiffs were unable to vote[5], the Court should still find that Plaintiffs have not suffered an injury-in-fact. This is because the Plaintiffs have not "establish[ed] an ongoing or future injury in fact." *Kenny v. Wilson*, 885 F.3d 280, 287. Even if the manner in which the Firehouse Primary was conducted violated Federal Law and/or the constitutional rights of those individual Plaintiffs that were unable to vote, those injuries were in the past, and there are no allegations in any of the complaints that those individual Plaintiffs will also not be able to vote in the Special Election, or in any future DPVA-run primaries in the future. *Hoepfl v. Barlow*, 906 F.Supp. 317, 320 (E.D. Va. 1995).

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Plaintiffs lack Article III standing because they have not suffered an injury in fact in their claims against the DPVA.

2. The Court Does Not Have Subject Matter Jurisdiction Over This Controversy Because the DPVA is Not a State Actor and Thus No Viable Federal Claim Exists to Confer Jurisdiction Upon the Court.

The Equal Protection Clause prohibits the States from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Fourteenth Amendment protects individuals only against government action, unless the state has delegated authority to a private party, thereby making the actor a "state actor." *See Nat'l Collegiate Athletic Ass'n v. Tarkanian,* 488 U.S. 179, 195 (1988). The Due Process Clause limits the manner and extent to which a state legislature may delegate legislative authority to a private party acting as a

[5] The Second Amended Complaint alleges that Plaintiff Tamia Douglas, Plaintiff Tina McCray, and newly-added Plaintiff Dawnette Drumgoole were unable to vote in the Firehouse Primary. (Second Amended Compl. ¶¶ 57, 60, 71.)

state actor. *See, e.g., Yick Wo v. Hopkins,* 118 U.S. 356, 373-74 (1886). The "state-action doctrine distinguishes the government from individuals and private entities." *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019) See *Brentwood Academy* v. *Tennessee Secondary Sch. Ath. Ass'n*, 531 U.S. 288, 295-296, (2001).

There is an inherent difference between discriminatory state actions, which are prohibited by the Equal Protection Clause, and the actions of private entities, 'however discriminatory or wrongful,' against which the clause 'erects no shield.'" *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 172 (1972) (quoting *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948)).

The Fourth Circuit in *Haavistola v. Community Fire Co.*, 6 F.3d 211 (4th Cir. 1993), outlined three situations in which acts performed by a private entity constitutes "state action." *Id.* at 215. First, state action may occur when "there is a sufficiently close nexus between the state and the challenged action of the regulated entity such that those actions may be fairly treated as those of the state." *Id.* (quoting *Alcena v. Raine*, 692 F. Supp. 261, 267 (S.D.N.Y. 1988)). Second, state action may have been performed when a state "exercised coercive power or has provided such significant encouragement that the action must in law be deemed to be that of the state." *Id.* (quoting *Alcena*, 692 F. Supp. at 267). Third state action may have been performed by a private entity when it "has exercised powers that are traditionally the exclusive prerogative of the state." *Id.* (quoting *Alcena*, 692 F. Supp. at 267); *Marts v. Republican Party of Va., Inc.*, Civil Action No. 5:17-cv-00022, 2018 U.S. Dist. LEXIS 55455, at *7-8 (W.D. Va. Mar. 31, 2018).

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Plaintiffs allege that through Va. Code § 24.2-508, the General Assembly has delegated legislative power to the DPVA to conduct the Firehouse Primary in any manner of their choosing. (Motion for Prelim. Injunc. ¶ 18.) Plaintiffs admit that the DPVA is "not a government entity" but insists that it is "well settled that a nomination process [like the Firehouse Primary] is considered

'state action'…and must comply with the Constitution of the United States." (Amended Compl. ¶ 136) (Citing *Smith v. Allwright*, 321 U.S. 649, 653 (1944), *Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996)).

Plaintiffs rely heavily on *Smith v. Allwright*, 321 U.S. 649, 653 (1944), which held that government-run primary elections involved state action. The Supreme Court in *Smith* struck down the Democratic Party of Texas's rule limiting voting in a statewide primary election to "white citizens of the State of Texas." *Id.*. 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.

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However, Plaintiffs ignore the holding in In *Marts v. Republican Party of Va., Inc.*, Civil Action No. 5:17-cv-00022, 2018 U.S. Dist. LEXIS 55455 (W.D. Va. Mar. 31, 2018), wherein the Court held that "that state action occurs, if at all, in [the nomination process] only when the party's action arises in the context of a state-funded primary or its equivalent." *Id.* at *8.

Unlike the party primary in *Smith*, the Firehouse Primary, as Plaintiffs admit, was not a "normal state-run nomination process." (Amended Compl. ¶¶ 18-20) In this Firehouse Primary, unlike in a state-run primary election, "the party operates and funds the entire process." *Miller v. Brown*, 503 F.3d at 362 n.3 (4th Cir. 2007) (*See* Exhibit D, ¶ 8) The *Marts* Court rejected the argument that a party run nomination process is a state action, holding that the Court lacked jurisdiction to decide the case because:

> Perhaps, *if* the Party here were to interpret and apply its own discipline to preclude plaintiffs from participating in an ***open*** primary conducted and funded by the state, that would be a sufficient allegation of state action. But the plaintiffs have not alleged that they have been prevented from voting in any state-run primary, that the Party has attempted to prevent the plaintiffs from doing so, or that the discipline imposed plausibly includes such a prohibition. In the absence of any plausible

> contention that defendants have prevented, or are likely to seek to prevent plaintiffs from voting in a state-run primary, plaintiffs have not plausibly alleged state action.

Marts v. Republican Party of Va., Inc., Civil Action No. 5:17-cv-00022, 2018 U.S. Dist. LEXIS 55455, at *16-17 (W.D. Va. Mar. 31, 2018) (emphasis in original).

Plaintiffs apply their "state actor" theory of the case to each count in the Amended Complaint and Motion for Preliminary Injunction in an attempt to create subject matter jurisdiction so that this Court can adjudicate the alleged violations of the Equal Protection and Due Process clauses of the Fourteenth Amendment, the First Amendment, and the VRA. (Motion for Prelim. Injunc. ¶¶ 65, 68, 71-72.) However, the DPVA is a private entity, and in conducting the Firehouse Primary without funding or operational support from the Commonwealth, they did not achieve the status of a state actor and remained a private entity. Accordingly, this Court is left with no viable federal claim for which they have jurisdiction to resolve.

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3. The Court Does Not Have Subject Matter Jurisdiction Over This Controversy Because Plaintiffs' Claims are Moot.

Pursuant to Article III of the Constitution, "federal courts may adjudicate only actual, *ongoing* cases or controversies." *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990) (citing *Deakins v. Monaghan*, 484 U.S. 193, 199 (1988)) (emphasis added). As such, "federal Courts have 'no authority to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.'" *Incumaa v. Ozmint*, 507 F.3d 281,286 (4th Cir. 2007) (quoting *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992)). There are two exceptions to the mootness doctrine, and Plaintiffs may rely on the second exception, which "permits federal courts to consider disputes, although moot, that are 'capable of repetition, yet evading review.'" *Id.* at 288-89 (quoting *Fed. Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 462 (2007)). A plaintiff wishing to invoke this

exception, must show that there is a '"reasonable expectation that the same complaining party will be subject to the same action again."' *Id.* (quoting *Spencer v. Kemna*, 523 U.S. 1, 17 (1998).

The Motion for Preliminary Injunction seeks to enjoin the VBE from certifying the name of the democratic nominee for a special election to fill the vacancy left by Representative McEachin in the 4th CD before the nominee's name (Sen. McClellan) can be printed on the ballot. *See* Motion for Preliminary Injunction. However, there are two issues that render Plaintiffs' request moot. The first issue is that when a party nominee is chosen by a method other than a primary, the appropriate party chairman certifies the name of the candidate, not the VBE. Va. Code § 24.2-511. The other issue is that the ballots have already been printed with Sen. McClellan's name appearing, and early voting has already begun, with at least 3,892 already cast. (Exhibit D, ¶¶ 12-13) Plaintiffs, seemingly aware of the mootness of their claims, allege that 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" and the constitutional election law issues are "analytically capable of repetition but so far evad[e] review as the Defendants are fully aware." (Motion for Prelim. Injunc. ¶ 21).

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Plaintiffs' claim that the use of a firehouse primary is "all but guaranteed to be used by the DPVA in the future" fails to meet the "capable of repetition yet evading review" exception. *Id.* This claim assumes that the DPVA will use only a firehouse primary, when in reality, the Democratic Party of Virginia Party Plan ("Party Plan"), attached as Exhibit E, provides that a nominee for the United States House of Representatives "shall be made by primary, convention or caucus." (Exhibit E, Section 6.8). The DPVA has three options available under its Party Plan, and a firehouse primary is not guaranteed. Additionally, there are no allegations that a future firehouse

primary, should it occur, would have a limited number of voting locations and/or time constraints that would cause the same Plaintiffs to suffer the injuries alleged to suffer the same alleged injuries.

Accordingly, this Court lacks subject matter jurisdiction, as there is no ongoing case or controversy, and there is no reasonable expectation that Plaintiffs will be subject to the same action again.

4. Plaintiffs Have Failed to State a Claim Upon Which Relief Can Be Granted Under the *Purcell* Principle.

It is well-established that federal courts should not enjoin an ongoing state election, as 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)); see also *Andino v. Middleton*, 141 S. Ct. 9, 10 (2020) (Kavanaugh, J., concurring) ("By enjoining [a state voting regulation] shortly before the election, the District Court defied [the *Purcell*] principle and this Court's precedents.").

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The *Purcell* principle is simple: "When an election is close at hand, the rules of the road should be clear and settled . . . because running a[n] [ ] election is a complicated endeavor." *Democratic Nat'l Comm.*, 141 S. Ct. at 31. Much like in the present case, the Fourth Circuit in *Wise v. Circosta* invoked *Purcell* to deny an injunction of a state voting regulation when early voting was already underway. 978 F.3d 93, 98–99, 103 (4th Cir. 2020). The Supreme Court has recently invoked *Purcell* in cases where early voting had not begun and the elections were months away. See *Merrill v. Milligan*, 142 S. Ct. 879, 880 n.1 (2022) (Kavanaugh, J., concurring in grant of applications for stays); *Moore v. Harper*, 142 S. Ct. at 1089.

The present case is just the type of matter that the *Purcell* principle is meant to avoid. In the Firehouse Primary held on December 20, 2022, 27,900 votes were cast. (Exhibit D, ¶ 7). Sen. McClellan became the democratic nominee after receiving 84.81% of the votes in the Firehouse Primary, and her name has already been certified to the VBE on December 21, 2022. (*id*., at ¶¶ 7, 11.). Sen. McClellan's name is on the ballots, which have been printed, and early voting for the Special Election has already begun, with at least 3,800 votes already cast. (*id*., at ¶¶ 12-13.)

Purcell, and the cases that followed, set the precedent that this Court should refrain from "interven[ing] in the voting affairs of" Virginia "in the middle of an ongoing election." *Wise*, 978 F.3d at 103. Just as the *Wise* court did, this Court should deny the Motion for Preliminary Injunction.

Based on the foregoing, Plaintiffs are unlikely to succeed on the merits.

B. PLAINTIFFS ARE UNLIKELY TO SUFFER IRREPARABLE HARM IN THE ABSENCE OF PRELIMINARY RELIEF.

Plaintiffs claim that the "very circumstance of this matter demonstrates such [irreparable] harm." (Motion for Prelim. Injunc. ¶ 87). Plaintiffs claim that the right to cast effective vote were "destroyed in an unconstitutional process" and that the Firehouse Primary imposed burdens on their "rights protected by the 1st and 14th Amendments." (*Id*. at ¶¶ 87, 91). Further, as to Plaintiff Tavorise Marks, it is alleged that "his right of association with likeminded citizens [was] irreparably harmed by an unconstitutional nomination process. (*Id*. at ¶ 89)

Plaintiffs cannot claim that they will suffer irreparable harm if an injunction is not entered because, as Plaintiffs have already admitted that they were each able to exercise their right to vote. (Amended Compl. ¶¶ 54,57,60,63,66,69,72.) Even if, as discussed above, the Second Amended Complaint is to be considered, five out of the eight individual Plaintiffs were able to vote in the

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Firehouse Primary. (Second Amended Compl. ¶¶ 54, 57, 60, 63, 66, 71, 75). For those remaining three, they can still vote in the Special Election, and if their preferred candidate is not on the ballot, they still have the option to vote for them as a write-in candidate[6]. As to Plaintiff Tavorise Marks, his name appeared on the Firehouse Primary ballot, and thus he has suffered no actual harm, nor has he alleged that he would have obtained the nomination if the Firehouse Primary was conducted in any other manner. (Amended Compl. ¶ 53). Granting the preliminary injunction would not aid Plaintiff Tavorise Marks in becoming the democratic nominee.

The Plaintiffs have yet to suffer any recognizable harm, and thus they will not suffer irreparable harm in the absence of preliminary relief.

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C. THE BALANCE OF EQUITIES DOES NOT TIP IN PLAINTIFFS' FAVOR.

"When an election is close at hand, the rules of the road should be clear and settled . . . because running a[n] [ ] election is a complicated endeavor." *Democratic Nat'l Comm.*, 141 S. Ct. at 31. As such, the balance of equities does not tip in Plaintiffs' favor. The DPVA has acted within "the rules of the road" throughout the nomination process, and along with the countless volunteers who helped conduct the Firehouse Primary, made significant efforts to ensure that 27,900 4th CD voters were able to cast their vote. (*See* Exhibit D)

Furthermore, an injunction would cause great prejudice and injustice, not only to the DPVA and 4th CD voters, but to the Republican party and the voting public. The public has been casting

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[6] A recent example can be found in Virginia Delegate Nicholas J. (Nick) Freitas, who was re-elected to a third term as a write-in candidate after his party failed to file the required paperwork in time for his name to appear on the ballot. Jenna Portnoy, *Va. Del. Nicholas J. Freitas joins Republican race to challenge U.S. Rep. Abigail Spanberger,* Wa. Po. (December 2, 2019 at 4:44 p.m. EST) https://www.washingtonpost.com/local/virginia-politics/del-nick-freitas-joins-republican-race-to-challenge-rep-spanberger/2019/12/02/c20455d8-1528-11ea-a659-7d69641c6ff7_story.html

votes since January 6, 2023, with thousands of votes already cast, and both candidates have been advertising their candidacy. (Exhibit D, ¶¶ 12-13.) An injunction now would disrupt this orderly process, cause overwhelming and unnecessary confusion and delay, and would leave the citizens of Virginia without a Representative in the United States House of Representatives.

D. AN INJUNCTION IS NOT IN THE PUBLIC INTEREST.

"[I]n a broad sense, the public is potentially prejudiced as well, as [the state is] charged with ensuring the uniformity, fairness, accuracy, and integrity of [] elections." *Perry v. Judd*, 471 F. App'x 219, 227 (4th Cir. 2012). It is not in the public interest for the Court to enter an injunction at this juncture because the DPVA has chosen its candidate within the confines of the law and its Call to Caucus, and the relief Plaintiffs seek would disrupt the election at the last minute based on mere hypothetical allegations of harm and without an adequate legal basis.

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IV. CONCLUSION

For the foregoing reasons, Defendants Democratic Party of Virginia, Susan Swecker, Chairwoman of the Democratic Party of Virginia, in her official capacity, and Alexsis Rodgers, Chairwoman of the 4th Congressional District Democratic Committee Party, in her official capacity, by counsel, respectfully request that this Court deny Plaintiffs' Motion for Preliminary Judgment.

Respectfully submitted,

Democratic Party of Virginia, **Susan Swecker**, Chairwoman of the Democratic Party of Virginia, in her official capacity, and **Alexsis Rodgers**, Chairwoman of the 4th Congressional District Democratic Committee Party, in her official capacity

Date: January 16, 2023

By: /s/ Ariel L. Stein
Counsel

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CERTIFICATE

I hereby certify that on the 16th day of January, 2023, I caused the foregoing to be electronically filed with the Clerk of this Court using the CM/ECF system, which will then send a notification of such filing to all counsel of record.

By:________/s/ Ariel L. Stein_________
Ariel L. Stein
Counsel for Democratic Party of Virginia, Susan Swecker, Chairwoman of the Democratic Party of Virginia, in her official capacity, and Alexsis Rodgers, Chairwoman of the 4th Congressional District Democratic Committee Party, in her official capacity

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