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**
	)	
GLENN YOUNGKIN, *in his official capacity, et al.*,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM IN SUPPORT OF DPVA DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT

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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, respectfully submit this Memorandum in Support of their Motion to Dismiss Plaintiffs' Second Amended Complaint (hereinafter, the "SAC"). For the reasons stated herein, the Court should dismiss the Plaintiffs' SAC for lack of standing and mootness pursuant to Federal Rule of Civil Procedure 12(b)(1) and for failure to state a claim upon which relief may be granted pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

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, known colloquially as a firehouse primary ("Caucus") 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, the Code of Virginia, and its own fundamental First Amendment rights. On January 6, 2023, early voting began for the special election ("Special Election").

Despite the DPVA's efforts, an individual plaintiff, and then seven 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 Caucus, and to hinder the on-going and vital process of electing a United States Congressman to fill the vacant seat in the 4th CD. Specifically, Plaintiffs are asking the Court to: (1) enjoin the members of the Virginia Board of Elections ("VBE") from certifying to the Special Election ballot the nominee chosen by the Caucus (2) issue a declaratory judgment finding Va. Code § 24.2-508 facially unconstitutional or as applied in the Caucus (3) order the VBE to ensure that the DPVA conduct a constitutionally valid nomination process to choose the Democratic nominee for the Special Election (4) or in the alternative, order the DPVA to develop a constitutionally valid nomination process to choose its nominee for the Special Election.

The Court must dismiss this action because it lacks subject matter jurisdiction to hear this case. Plaintiffs lack Article III standing because the majority of them voted in the Caucus and did not suffer an injury-in-fact. As to those plaintiffs that did not vote, their alleged injuries are not traceable to the DPVA and cannot be redressed by the Court under the *Purcell* principle. Plaintiffs also lack Article III standing because Plaintiffs' claims are moot and their alleged injuries are not capable of repetition.

The Court must also dismiss this action because Plaintiffs have failed to state a claim upon which relief can be granted and will not succeed on the merits. Plaintiffs have failed to state a claim that Virginia Code § 24.2-508 is an unconstitutional delegation of legislative authority.

Plaintiffs have also failed to state a claim that the DPVA their constitutional rights under the First and Fourteenth Amendment, as the DPVA was at no point a state actor. Plaintiffs have also failed to state a claim under § 2 of the Voting Rights Act, as they have insufficiently pled the requirements under the Act.

This Court should dismiss Plaintiffs' SAC for lack of jurisdiction and because the claims therein are without merit.

BACKGROUND

I. 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 A,** on December 12, 2022. SAC. ¶ 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. Exhibit A, ¶ 2.

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 B**. The Call to Caucus provided for the Caucus 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 B, p. 1. On December 14, 2022, DPVA added three additional voting locations. SAC. ¶¶ 39,115.

According to the Declaration of DPVA Shyam Raman, Executive Director of the DPVA, attached as **Exhibit C**, on December 13, 2022, the DPVA published notice of the locations where

voters could cast their ballots. Exhibit C, ¶ 3. The DPVA was able to secure three additional voting locations on December 14, 2022. *id.*, at ¶ 4.

Unlike state-run primaries, the Caucus 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 Caucus, with 27,900 votes cast, yielded a voter turnout that exceeded previous state-run primaries in the 4th CD. *id*. at ¶¶ 7, 9-10. Sen. McClellan received 23,661 votes, or 84.81% of the total votes. *id.*, at ¶ 7. In comparison, Representative 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.

II. 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 the first Amended Complaint, wherein six additional plaintiffs joined the suit ("FAC"). 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.*

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 the SAC, wherein an eighth plaintiff was added. ECF 11. Attorney Janson also submitted a Motion for Preliminary Injunction and Hearing on the Motion the same day ("Motion for Preliminary Injunction"). ECF 12. A second set of summonses were issued on that day as well. ECF 14.

[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.

The SAC was, for the most part, consistent with the FAC. However, it added a new plaintiff, Dawnette Drumgoole, and alleged that, "due to lack of timely notice and inability to travel to the closest polling location with such short notice" she was unable to vote in the Caucus. SAC ¶ 72. Additionally, in direct contradiction to the FAC wherein Plaintiffs alleged that plaintiffs Douglas and McCray voted in the Caucus, see FAC ¶¶ 60, 63, the SAC now states that neither voted because of "long line[s]" and other responsibilities. SAC ¶¶ 57, 60.

Plaintiffs raise four claims in the SAC. Their first claim is that Va. Code § 24.2-508, the statute authorizing DPVA to "make its own rules and regulations" and "provide for the nomination of its candidates," is an impermissible delegation of legislative power that violates the Due Process Clause of the Fourteenth Amendment. See SAC ¶¶ 137–38, 188–215. Their second claim is that the Caucus violated the First Amendment. Specifically, Plaintiffs argue that the number and location of the Caucus sites imposed an unconstitutional burden on their First Amendment right of association. See *id*. ¶¶ 147–55, 160–61, 216–22. Plaintiffs then argue that the amount and locations of the Caucus sites violated the Equal Protection Clause by imposing "unequal burdens on the ability to cast a vote due to 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 allege that the Caucus violated § 2 of the Voting Rights Act ("VRA") because the DPVA chose its Caucus locations for the purpose of "mak[ing] it far harder for the minority voters of modest means" in "rural areas" to participate in the Caucus. *id.* ¶¶ 233–40. Plaintiffs ask the Court to declare that alleged delegation unconstitutional, to enjoin the members of the VBE from certifying a winner of the Caucus, and to order the VBE to require the DPVA to use a "constitutionally valid nomination process." See *id*. ¶¶ 203, 212–13, 221–22, 230–31, 238–39; see also *id*. at 29.

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 for a hearing on the Motion for Preliminary Injunction to be held the next day 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.

After receiving briefs in opposition to Plaintiffs' Motion for Preliminary Injunction, a hearing was held on January 18, 2023 ("Injunction Hearing"). At the Injunction Hearing, Plaintiffs orally added a new prayer for relief, albeit the functional equivalent of Remedies (A), (C), and (D), for the Court to enjoin the ongoing Special Election and hold the Caucus again. Jan. 18, 2023 Hr'g Tr. 9 (ECF No. 30) (hereinafter, Tr.). See SAC. At Remedy (A), (C), and (D) The Court denied the Motion for Preliminary Injunction on the grounds that Plaintiffs had not "shown good cause to upset the 'bedrock tenet of election law' that district courts should ordinarily not take it upon themselves to upend state election processes… and the Court should allow the Special Election to proceed." See Memorandum Opinion (ECF No. 32) (hereinafter, Op.) (quoting *Merrill v. Milligan*, 142 S. Ct. 880 (2022). The Court, while not providing a full analysis of the *Winter* factors for the issuance of preliminary injunctions, concluded that Plaintiffs failed to show a likelihood of success on the merits and irreparable harm. See *id.* 15. See *Winter* v. *Natural Resources Defense Council, Inc*., 555 U. S. 7, 20, 129 (2006).

ARGUMENT

I. THE COURT SHOULD DISMISS THE SAC FOR LACK OF SUBJECT MATTER JURISDICTION PURSUANT TO RULE 12(B)(1) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

A. The Rule 12(b)(1) Standard.

A court should grant a Rule 12(b)(1) motion "if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law." *Richmond, Fredericksburg & Potomac R.R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991). The plaintiff bears the burden of proving that the court has subject matter jurisdiction. *See Evans v. B.F. Perkins Co.*, 166 F.3d 642, 647 (4th Cir. 1999). A presumption exists "that a case lies outside its limited jurisdiction unless and until jurisdiction has been shown to be proper." *United States v. Poole*, 531 F.3d 263, 274 (4th Cir. 2008).

In a Rule 12(b)(1) motion, the moving party can demonstrate a lack of subject matter jurisdiction by "contend[ing] that a complaint simply fails to allege facts upon which subject matter jurisdiction can be based," or by "contend[ing] that the jurisdictional allegations of the complaint were not true." *24th Senatorial Dist. Republican Comm. v. Alcorn*, 820 F.3d 624, 629 (4th Cir. 2016)(cleaned up). The court considers the pleadings "as mere evidence on the issue," and may look to other evidence, such as the declarations and exhibits appended to the motion and the defendant's response thereto. *See Richmond, Fredericksburg & Potomac R.R. Co.*, 945 F.2d at 768.

B. Plaintiffs Lack Standing to Bring This Action.

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). "While each of the three prongs of standing should be analyzed distinctly, their proof often overlaps. Moreover, these requirements share a common purpose — namely, to ensure that the judiciary, and not another branch of government, is the appropriate forum in which to address a plaintiff's complaint." *id.*

"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 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) "[A]n injunction cannot remedy [the plaintiff's] past injury." *id.* at 321. In order for an injury to meet the causation and redressability requirements for standing, the injury "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).

Consistent throughout the iterations of Plaintiffs' complaints is that plaintiffs Goldman, J.M. Pope, J. Pope, Walker, and Marks all voted in the Caucus. See FAC. ¶¶ 54, 63,66,69,72. See SAC ¶¶ 54, 61, 66, 69, 75. Additionally, both the FAC and SAC admit that plaintiff Marks was listed on the Caucus ballot. See FAC ¶ 53. See SAC ¶ 53. However, while the FAC initially alleged that plaintiffs Douglas and McCray voted in the Caucus, the SAC contends that they did not due to long lines and other commitments. *See* FAC. ¶¶ 57,60. *See* SAC ¶¶ 57,60. Additionally, in the SAC, newly added plaintiff Drumgoole allegedly was unable to vote in the Caucus due to a lack of timely notice and an inability to travel based on said lack of timely notice. See SAC ¶ 72.

The Court has already acknowledged that the five plaintiffs that voted in the Caucus "have shown no injury in fact." Op. 9-10. There are no allegations that these specific plaintiffs sought to vote early, or by mail, 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, but instead, Plaintiffs allege that these were injuries suffered by voters generally. (Motion for Prelim. Injunc. ¶¶ 26-34.) Because these plaintiffs voted in the Caucus, the injuries were instead "conjectural or hypothetical" as to an unidentified segment of voters. *Lambert*, *supra* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). The same logic applies to plaintiff Marks in the event that he argues a distinct claim in his capacity as a candidate in the Caucus, as he admittedly appeared on the ballot. See SAC. ¶ 53

The Court also deemed the alleged injuries to plaintiffs Douglas, McCray, and Drumgoole, to be "speculative at best" and not "clearly traceable to Defendants' conduct." Op.10. Plaintiff

Douglas claims she was unable to vote due to "her secondary job commitment." SAC. ¶ 57. Plaintiff McCray claims that she was unable to vote due to "her family responsibility." *id*. ¶ 60. Plaintiff Drumgoole claims that she was unable to vote due to her "inability to travel to the closest polling location with such short notice." *id*. ¶ 72. These plaintiffs did not vote in the Caucus because of personal scheduling issues, and not due to any actions of the DPVA. Presumably, the 27,900 voters who in voted in the Caucus had their own work, family, or other personal commitments, but they still managed to cast their ballot. Thus, these alleged injuries do not confer standing on to the non-voting plaintiffs, as the injuries are "plainly undifferentiated and common to all members of the public." *United States v. Richardson*, 418 U.S. 166, 176–77 (1974) (quotation marks omitted).

Plaintiffs also lack Article III standing under their VRA claim, as they fail to establish that they are protected members of a class under the VRA. See SAC. ¶¶ 51-75. The Voting Rights Act creates a private cause of action permitting plaintiffs to file suit if they are an "aggrieved person." See 42 U.S.C. § 1973a. *Perry-Bey v. City of Norfolk*, 678 F. Supp. 2d 348, 362 (E.D. Va. 2009). For racial discrimination-based injuries, a plaintiff must show that he "personally[ ] has been injured" by the racial discrimination. *United States v. Hays*, 515 U.S. 737, 744 (1995). A plaintiff has Article III standing if he or she is "'personally denied equal treatment' by the challenged discriminatory conduct." *Allen v. Wright*, 468 U.S. 737, 755 (1984). Because Plaintiffs have failed "to allege that [they are] a member of a minority group and that [their] right to vote has been abridged on account of [their] race or color" they have not suffered "a constitutional injury in fact." *Perry-Bey*, 678 F. Supp. 2d 348, 363 (E.D. Va. 2009).

The Plaintiffs also lack standing because the relief they seek cannot redress their alleged injuries. See *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 796 (2021). The Plaintiffs seek injunctive

relief, but cannot "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). The alleged violations – the limited locations and number of voting sites for the Caucus – all occurred in the past and there is nothing this Court can do to redress that.

Plaintiffs seek several remedies that, if granted, would halt the ongoing Special Election. See SAC. At Remedy (A), (C), and (D). Federal Courts have repeatedly emphasized that they "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 *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.

In the Caucus held on December 20, 2022, 27,900 votes were cast. Exhibit C, ¶ 7. Sen. McClellan became the democratic nominee after receiving 84.81% of the votes in the Caucus, and her name was already 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.

Plaintiffs ask this Court to stop the VBE from printing ballots with Sen. McClellan's name on them, to order the VBE to ensure that the DPVA conduct a new Caucus that is constitutionally valid, and/or to order the DPVA to develop a new constitutionally valid process to determine its candidate, but this is just the type of judicial election interference that the *Purcell* principle is meant to avoid. See SAC. At Remedy (A), (C), and (D).

This Court has already ruled that it will not "upset the 'bedrock tenet of election law' that district courts should ordinarily not take it upon themselves to upend state election processes." Op. 15. (Quoting *Merrill*, 142 S. Ct. at 880). The Court has made it abundantly clear that it will not disrupt the ongoing election. As such, Plaintiffs lack redressability until the conclusion of the Special Election, but they lack it afterwards as well. The relief requested cannot possibly redress any injury they allegedly suffered. See, e.g., *Miller v. Brown*, 462 F.3d 312, 320 n.6 (4th Cir. 2006) (noting that, "[a]fter the election," "redressing the plaintiffs' injuries would be impossible").

Based on the foregoing, Plaintiffs lack Article III standing and the SAC should be dismissed.

C. 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)). "[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.

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.'" *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 Court has already ruled that it cannot provide Plaintiffs with any effectual relief due to the *Purcell* principle. See p.12-13, *supra*. Thus, the Court can only consider this dispute if it finds that there is a reasonable expectation that the same Plaintiffs will be subject to the same acts by the DPVA again in the future. *See Wisconsin Right to Life, Inc.*, 551 U.S. 449, 462 (2007)) quoting *Spencer* 523 U.S. 1, 17 (1998). This Court has opined that it is "not entirely convinced by Defendants' claim that the present circumstance is not of the sort that is capable of repetition yet evading review." Op. 10. However, other federal courts have been convinced otherwise in regard to special elections. Given the "infrequency and unpredictable nature of special elections for U.S. House seats," however, it is unlikely that Plaintiffs will be subjected to similar conduct in future election cycles. See *Hall v. Secretary, Alabama*, 902 F.3d 1294, 1298 (11th Cir. 2018) (rejecting application of "capable of repetition yet evading review" exception because the election was a special election).

The SAC itself also defeats this exception to the mootness doctrine. Plaintiffs allege that manner in which this Caucus was conducted was different than past DPVA-run unassembled caucuses. See SAC ¶¶ 108-109. Plaintiffs even admit that that in the future they will vote in the

"normal state-run nomination process" of which they have no qualms with. See *id*. ¶¶ 18–20, 117. By their own admission, the Caucus was different than those conducted in the past, so it is an abstract and hypothetical conclusion that each individual plaintiff will face the same alleged burdens in the future.

Based on the foregoing, Plaintiffs claims are moot and therefore they lack standing.

II. THE COURT SHOULD DISMISS THE SAC BECAUSE PLAINTIFFS HAVE FAILED TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

A. The Rule 12(b)(6) Standard.

A motion to dismiss made pursuant to Rule 12(b)(6) seeks dismissal of a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). A motion to dismiss pursuant to Rule 12(b)(6) tests the sufficiency of a complaint. *Republican Party of N.C. v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992). With all complaints filed in Federal Court, a complaint must state facts sufficient to "'give the defendant fair notice of what the ... claim is and the grounds upon which it rests[.]'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The facts pled must "raise a right to relief above the speculative level" above being merely "conceivable." *Twombly*, 550 U.S. at 544, 545, 570. The complaint must assert facts that are more than "merely consistent with" the other party's liability, and not just "labels and conclusions, and a formulaic recitation of the elements of a cause of action." *id.* at 545–55, 557.

B. Virginia Code § 24.2-508 Does Not Violate the Due Process Clause.

The Due Process Clause of the Fourteenth Amendment provides that "no State shall … deprive any person of life, liberty, or property without due process of law." The Clause "was intended to prevent government from abusing its power, or employing it as an instrument of oppression." *Deshaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 196 (1989). (internal citations and quotations omitted). In this case, 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.

The statute in question, Virginia Code § 24.2-508, provides that 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." 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.

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).

The Virginia statutes provide time limitations for when a nomination process must be completed and how the political party must certify their candidate, but do not dictate the manner

in which a political party nominates its candidates, because doing so would infringe on the political party's own constitutional rights. 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). There is no other function of a political party "more important than in the process of selecting its nominee." *California Democratic Party v. Jones*, 530 U.S. 567, 575 (2000). The selection of a political 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).

The General Assembly does have the authority to "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. However, 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,'" *Jones*, 530 U.S. 575 (2000).

Even though Virginia has the authority to require that political parties hold primary elections, it "is a far cry from saying that the Constitution demands it." *New York State Bd. Of Elections v. Lopez Torres*, 552 U.S. 196, 205 (2008). Virginia Code § 24.2-508 is not a delegation of authority, but rather represents the General Assembly's legislative intent not to "infringe upon the party's associational rights." *Id*. at 206. This Court has already recognized that "[c]ontrary to Plaintiffs' characterization of this as an unconstitutional delegation of legislative authority," the DPVA's decision to hold the Caucus "is a protected exercise of [its] First Amendment Rights." Op. 10.

Plaintiffs have also failed to allege that they have been deprived of a protected liberty or property interest. Federal law does not "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). State delegations to private entities violate the Due Process Clause 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). "Where no protected life, liberty or property interest exists, there can be no due process violation." *Hawkins v. Freeman*, 195 F.3d 732, 549 (4th Cir. 1999).

Although 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.").

Plaintiffs have continuously referred to the Caucus as a "firehouse primary," but it is not the same nomination process as a primary. Additionally, those plaintiffs who did not vote are not foreclosed from voting for a candidate of their choice and may still vote for their preferred candidate by writing-in the name on the ballot. This is not unheard of in Virginia, and 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.

Based on the foregoing, Virginia Code § 24.2-508 is not violative of the Due Process Clause.

C. There Was No State Action and Therefore There Was No Violation of the First Amendment or Equal Protection Clause.

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 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).

The same analysis applies to the First Amendment, which 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). The judicial obligation is to "'preserve an area of individual freedom by limiting the reach of federal law' and avoid the imposition of responsibility on a State for conduct it could not control," *Tarkanian*, 488 U.S. at 191. 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).

Plaintiffs acknowledge that DPVA is "not a government entity," but attempt to form a basis for their Equal Protection and Due Process claims by alleging that the DPVA was a state actor engaged in a state action when it conducted the Caucus. SAC ¶ 139. 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.

However, in reliance on *Smith*, Plaintiffs ignore the material factual differences between that state-endorsed party primary and this Caucus. 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), 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. In a nomination process like the Caucus, and 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).

In the present matter, the state had no hand in the Caucus. See *Terry v. Adams*, 345 U.S. 61, 473 (1953) (Frankfurter, J.). The Caucus "was fully volunteer organized, and not tax-payer funded like state-run primaries" Exhibit C, ¶ 8. Plaintiffs admit that the Caucus is run solely by the political party. SAC ¶¶ 9–11, 16–17, 21. Furthermore, the Court has already determined that the Caucus was "structured, operated, and funded wholly by the DPVA, not the state, [and] there is no basis for arguing that the DPVA's conduct can be attributed to the Commonwealth Defendants in any way." Op. 11.

Based on the foregoing, the DPVA was not a state actor when conducting the Caucus, and thus cannot be said to have violated Plaintiffs' Constitutional rights under the First and Fourteenth Amendment.

D. Plaintiffs Have Failed to State a Claim Under § 2 of the Voting Rights Act.

Section 2 of the VRA 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). Plaintiffs claim that the Caucus rules and procedures "were drafted to intentionally discriminate against a class of minority voters in this

biracial Congressional District voting electorate" and that the DPVA knew and/or intended to "make it far harder for the minority voters of modest means who dominate [jurisdictions] without a voting location to cast ballots." SAC ¶¶ 234 -236.

To show a § 2 violation of the VRA, it "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." *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2332 (2021) (quoting 52 U.S.C.§ 10301(b) (emphasis added)). 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. The emphasis on race and ethnicity is due to "the explicit language of the Voting Rights Act [which] requires that alleged abridgement arise on account of race or color." *Perry-Bey*, 678 F. Supp. 2d 348, 363 (E.D. Va. 2009).

Plaintiffs provide mere labels and conclusions by alleging that the Caucus impacted "minority voters" and "minority voters of modest means." SAC ¶¶ 27–29, 234, 236. These pleadings are deficient for several reasons, beginning with the fact that socioeconomic status (i.e. voters of modest means) is not a protected class under the VRA. The Court also acknowledge that Plaintiffs have "fail[ed] to allege sufficient facts to support an inference that the Defendants discriminated against an identifiable protected class" under the VRA. Op. 11

The Court does reference one conclusory allegation made by Plaintiffs in their VRA claim: the DPVA "can be presumed to have known that their scheme would make it far harder for minority voters of modest means who dominate in these rural areas without a voting location." *id.* (quoting

SAC ¶ 236). However, this pleading is also insufficient, as it represents a "[t]hreadbare recital[] of the elements of a cause of action, supported by mere conclusory statements..." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Furthermore, this allegation is not supported by publicly available census data. According to the data table produced by the U.S. Census Bureau in 2020 titled "Race for the Population 18 Years and Over" for the eight jurisdictions without voting locations, attached as **Exhibit D**, the total number of the voting age population who identified as black or African American alone was 39,443 people.[3] In these same eight jurisdictions without voting locations, In comparison, the data table produced by the U.S. Census Bureau in 2020 titled "Race for the Population 18 Years and Over" for the seven jurisdictions that had voting locations, attached as **Exhibit E**, the total number of the voting age population who identified as black or African American alone was 241,453 people. [4] Richmond on its own has 32,721 more black or African Americans in its voting age population than the eight jurisdictions without voting locations. Additionally, while 57.11% of the voting age population in the eight jurisdictions without voting locations identified as white alone, only 53.39% of the voting age population in the seven jurisdictions with voting locations identified as white alone.

This data shows that there was no "scheme [that] would make it far harder for minority voters" to vote in Caucus, but rather that the "scheme" allowed for the most possible members of a protected class to participate in the political process and to elect representatives of their choice. SAC ¶ 236. See *Brnovich*, 141 S. Ct. at 2332. More importantly, this data is relevant to show that

[3] This does not include people identifying as other minority groups or as more than one race.
[4] This does not include people identifying as other minority groups or as more than one race.

the facts pled by Plaintiffs were not conceivable and were at best, speculative. See *Twombly*, 550 U.S. 544, 545, 570 (2007).

CONCLUSION

For the foregoing reasons, this Court should dismiss the Second Amended Complaint.

Respectfully submitted,

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

Date: January 31, 2023

By: /s/ Ariel L. Stein
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CERTIFICATE

I hereby certify that on the 31st 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, and Alexsis Rodgers.