

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

Tavorise Marks,
Tamia Douglas,
Tina McCray,
Julie “Michele” Pope,
Richard Walker,
Jamale Pope,
Paul Goldman,

Plaintiffs,

v.

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

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

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

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

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

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

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

Democratic Party of Virginia

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

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

Defendants.

Civil No.: 3:22cv789

AMENDED COMPLAINT

As permitted by Rule 15 of the Federal Rules of Civil Procedure, the Plaintiffs, through counsel, file this Amended Complaint, seeking such declaratory, injunctive, and other relief as detailed below.

THE IMPORTANCE OF THE CONSTITUTION PRINCIPLES RAISED HEREIN

1. The Democratic Party of Virginia (hereinafter “DPVA”) in its “firehouse primary” scheme has created an unconstitutional burden on potential voters in the 15 jurisdictions of the 4th Congressional District (“hereinafter “4th CD”). See *Harper v Virginia Board of Elections*, 383 U.S 663 (1966).
2. The political rights protected by the First Amendment are applicable to the states through the 14th Amendment to the Constitution of the United States. *Gitlow v New York*, 268 U.S. 652 (1925).
3. Due to the untimely death on November 29, 2022 of A. Donald McEachin, 4th CD Congressmen, the Constitution of the United States required such vacancy be filled by an election, not appointment. Article I, Section II.
4. By law, the required Writ of Special Election can only be called by the Governor of Virginia. Virginia Code Section 24.2-209.
5. Governor Youngkin issued the Writ on December 12, 2022.
6. The General Assembly of Virginia controls the manner, conduct, administration and other necessary rules and procedures for the nomination process in any state election. Article II, Section V of the Constitution of Virginia.

7. However, the General Assembly has decided to delegate said authority to choose the nomination process for a Democratic nominee in such Special Election to the DPVA.

Virginia Code Section 24.2-508 et seq.

8. Such delegation of legislative authority to conduct this nomination process in the 4th CD to a non-governmental entity requires the nomination process and procedures created by the DPVA to meet the same strictures of the Constitution as if the General Assembly had proclaimed this process and procedures directly. See *Allwright, infra*, and *Morse, infra*.

9. The DPVA uses a document entitled The Call to Caucus (hereinafter “Call”) to announce the relevant procedures for the process chosen to pick the Democratic nominee when such nominations will not be made through the normal state-run primary processes.

Virginia Code Section 24.2-508, 510. Exhibit 1.

10. The Call indicated the DPVA, through the subordinate 4th Congressional District Democratic Committee chose what is generically known as a “caucus” but is specifically known in Virginia politics as a “firehouse primary” process. Virginia Code Section 24.2-681 et. seq.

11. As in all such “firehouse primary” processes, the DPVA, through a subordinate entity, chooses to have a certain number of voting locations in the electoral district to be contested, in this case the 4th CD.

12. In the instant case, the “firehouse primary” process required all voters to cast their votes in person.

13. There is no provision for early voting.

14. There is no provision for mail in ballots.

15. Active-duty military members serving overseas or at bases not in Virginia are effectively denied their right to vote.

16. The grant of legislative power to the DPVA does not provide any specific authority or guidelines or standards instructing the DPVA how it may restrict voting rights in a “firehouse primary.”

17. The grant of legislative power to the DPVA does not provide any specific authority or guidelines or specific standards instructing the DPVA on how it may limit the number of voting locations where a citizen can cast his or her vote in a nomination process for an electoral district the size of a congressional district.

18. In a normal state-run nomination process, every jurisdiction in the 4th CD has at least three voting locations.

19. In a normal state-run nomination process, the 15 jurisdictions in the 4th CD have well over 200 separate voting locations.

20. In a normal state-run nomination process, every voter is assigned a voting location, that is to say precinct location, generally within walking or short driving distance if they choose not to vote by mail.

21. But as the DPVA reads its grant of power to conduct a state sanctioned nomination process, the DPVA, through a subordinate entity, has unfettered discretion to decide to have as many or as few voting locations in any jurisdiction within the congressional district, and to have as many or as few such combined locations in the district as it alone decides.

22. The Call in the nomination process at issue has many rules and procedures, in particular though, the rule that establishes voting locations to be in only 7 of the 15

jurisdictions in the 4th CD, denied voters in the other 8 jurisdictions the right to cast their ballot in their home jurisdiction.

23. Such a traveling requirement is apparently unprecedented in any such election in Virginia.

24. At all times, the leaders of the DPVA knew the majority of the Democratic voters eligible to participate in their “firehouse primary” processes were nonwhite.

25. At all times, the leaders of the DPVA knew the majority of the Democratic voters eligible to participate in their “firehouse primary” process was female, with the largest group being Black females from working-class families.

26. At all times, the leaders of the DPVA knew a significant percentage of the Democrats wanting to vote were elderly citizens, working women with childcare responsibilities, and citizens of modest means who did not have a car and thus might not be able to bear the cost necessary to take public transportation to a voting location in another city or county a good distance from their home precinct.

27. At all times, the leaders of the DPVA knew the rules and procedures in the Call imposed, in effect, the very wealth burden ruled unconstitutional in *Harper, supra*.

28. At all times the leaders of the DPVA knew the rules and procedures in the Call created a “firehouse primary” process certain to impose on a significant number of voters an unconstitutional burden on their core political rights protected by the First Amendment.

29. The basis for the assertion in Paragraph 27, *supra*, flows from the fact the DPVA had not long ago swore, in a legal filing with this very District Court in Richmond Division of the Eastern District, to their belief equivalent type measures affecting the right to vote unconstitutionally burdened voters, especially minority voters of modest means. See *Lee v.*

Virginia State Board of Election, et al, 155 F. Supp. 3rd, 572 (Va. District 215), *affirmed*, 843 F. 3d 592 (2016).

30. While in *Lee* the DPVA seemed to blame Republicans for the unconstitutional restrictions, presumably they would not claim such restrictions are constitutionally okay when imposed by the DPVA on Democratic voters.

31. As Plaintiff proves *infra*, the burdens on constitutional rights imposed in the instant matter by the DPVA are indeed unconstitutional, as the DPVA's own logic declared not that long ago.

32. Of the 15 independent cities or counties in the 4th CD nomination process in this instant matter, only 7 were allocated a location where a voter can personally cast his or her ballot.

33. Thus eight, or the majority of the jurisdictions in the 4th CD, have no voting location for a resident of said county or independent city to cast a ballot.

34. Upon information and belief, Plaintiff is unaware of any such state sanctioned process in Virginia or American history where the majority of jurisdictions in the electoral district at issue were not allocated at least one voting location.

35. The 4th CD, in terms of geography, extends from Richmond to roughly the North Carolina border.

36. On its face, allocating only eight voting locations to an electoral district the geographic size of the 4th CD is constitutionally flawed.

37. Moreover, the actual addresses of only five of the voting locations were revealed to the public on Tuesday, December 13, 2022, as this was the date of the Call.

38. The date of the "firehouse primary" is December 20, 2022, a week later.

39. Upon information and belief, the addresses of the other three voting locations were only revealed to the public on December 14 or 15, 2022.

40. In the seminal case of *Harper*, the Court outlawed imposing a \$1.50 “poll tax”, declaring it violated the U.S. Constitution since “it makes the affluence of the voter or payment of any fee an electoral standard.” *Id.* at 666.

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

42. The cost of traveling required by the nomination at issue is far more than the Poll tax, especially on voters of modest means.

43. The cost and inconvenience imposed on potential voters in the 8 jurisdictions without a voting location and in certain larger jurisdiction like Chesterfield County, exceeds the cost and inconvenience, claimed unconstitutional by DPVA in *Lee, supra*.

44. The Call imposed certain other restrictions on those wanting to run as a candidate in the “firehouse primary.”

45. The Call also imposed a filing fee and signature requirements on would be candidates.

46. The Call failed to provide a method for a citizen to qualify for the ballot as a candidate without paying the filing fee. See *Lubin v. Parish*, 415 U.S. 719 (1974) (such a method is required).

JURISDICTION AND VENUE

47. This Court has jurisdiction over the subject matter and parties pursuant to 28 U.S.C. 1331, as this case involves questions of federal law.

48. Venue is proper in, and Defendants are subject to, the personal jurisdiction of this Court because Defendants are citizens of Virginia, operate in their official capacities in the Eastern District of Virginia, and all or most of the events giving rise to this action occurred in this District.

49. Plaintiffs likewise reside in this District.

50. The seat of government for the Commonwealth of Virginia is in this District.

PARTIES

51. Plaintiff Tavorise Marks is a citizen of the Commonwealth of Virginia.

52. He is registered voter at 620 Okuma Drive, Chester, Virginia, 23836.

53. He is also a candidate for the Democratic nomination in the “firehouse primary” election in this instant matter. His name will be listed on the ballot.

54. He actively attempted to exercise his voting and related constitutional rights during the election process and voted in the “firehouse primary.”

55. Plaintiff Tamia Douglas is a citizen of the Commonwealth of Virginia.

56. She is a registered voter at 2108 Berry Street, Hopewell, Virginia, 23860.

57. She voted in the “firehouse primary.”

58. Plaintiff Tina McCray is a citizen of the Commonwealth of Virginia.

59. She is a registered voter at 19407 Braebrook Drive, S. Chesterfield, Virginia 23834.

60. She voted in the “firehouse primary.”

61. Plaintiff Julie “Michele” Pope is a citizen of the Commonwealth of Virginia.

62. She is a registered voter at 416 Hidden Valley Road, Chester, Virginia 23821.

63. She voted in the “firehouse primary.”

64. Plaintiff Richard Walker is a citizen of the Commonwealth of Virginia.

65. He is registered to vote at 2507 5th Avenue, Richmond, Virginia 23222.

66. He voted in the “firehouse primary.”

67. Plaintiff Jamele Pope is a citizen of the Commonwealth of Virginia.

68. She is a registered voter at 10518 Oakside Drive, N. Chesterfield, Virginia 23237.

69. She voted in the “firehouse primary.”

70. Paul Goldman is a citizen of the Commonwealth of Virginia.

71. He is registered to vote at 4414 Grove Avenue, Richmond, Virginia 23221.

72. He voted in the “firehouse primary.”

73. Glenn Youngkin is the Governor of the Commonwealth of Virginia. He is a citizen of the Commonwealth of Virginia. His office is in Richmond. He is being sued in his official capacity.

74. Defendant Robert Brink is the Chair of the State Board of Elections. He is a citizen of the Commonwealth of Virginia. His office is in Richmond, Virginia. He is being sued in his official capacity.

75. Defendant John O’Bannon is the Vice Chair of the State Board of Elections. He is a citizen of the Commonwealth of Virginia. His office is in Richmond, Virginia. He is being sued in his official capacity.

76. Defendant Georgia Alvis Long is the Secretary of the State Board of Elections. She is a citizen of the Commonwealth of Virginia. Her office is in Richmond, Virginia. She is being sued in her official capacity.

77. Defendant Donald Merricks is a member of the State Board of Elections. He is a citizen of the Commonwealth of Virginia. His office is in Richmond, Virginia. He is being sued in his official capacity.

78. Defendant Angela Chiang is a member of the State Board of Elections. She is a citizen of the Commonwealth of Virginia. Her office is in Richmond, Virginia. She is being sued in her official capacity.

79. Defendant Susan Beals is the Commissioner of the Virginia Department of Elections. She is a citizen of the Commonwealth of Virginia. Her office is in Richmond, Virginia. She is being sued in her official capacity.

80. The Virginia State Board of Elections (“hereinafter State Board”) is tasked by state law to ensure “legality and purity in all elections” and to “ensure that major risks to election integrity are...addressed as necessary to promote election uniformity, legality and purity.” Va. Code 24.2-103(A).

81. The Virginia Department of Elections is the operational arm used by the State Board to ensure that the State Board is fulfilling its duty to ensure the integrity, purity, and uniformity of state elections.

82. The Defendant Democratic Party of Virginia is designated as one of two political organizations recognized as political party for purposes of Virginia Code Section 24.2-508 et seq.

83. The DPVA is headquartered in Richmond.

84. Defendant Susan Swecker is the Chairwoman of the Democratic Party of Virginia. She is a citizen of the Commonwealth of Virginia. Her office is in Richmond. She is being sued in her official capacity.

85. Defendant Alexis Rodgers is the Chairwoman of the 4th Congressional District Democratic Committee and is designated the Legislative 4th District Chair by the Call to Caucus. She is a citizen of the Commonwealth of Virginia. She resides in this District. She is being sued in her official capacity.

STATEMENT OF FACTS

86. On November 8, 2022 The Honorable A. Donald McEachin, a member of the House of Representatives in the Congress of the United States from the 4th Congressional District of the Commonwealth of Virginia, was reelected to another term.

87. The 4th CD consists of 15 different distinct counties and independent cities.

88. 244,972 residents eligible to vote from the district cast ballots on that Election Day in 2022.

89. 159, 044 of them voted for Mr. McEachin running as a Democrat.

90. The least number of votes he received from any jurisdiction in the 4th CD came from the City of Emporia, where 840 citizens voted to him.

91. Most sadly and untimely, the Honorable A. Donald McEachin died on November 29, 2022.

92. This therefore left a vacancy in the Office of Member of the House of Representatives for the 4th CD.

93. This vacancy is required to be filled by the Constitution of the United States in a public election process. Article I, Section 2.

94. The Governor of Virginia issues the necessary Writ of Election. Virginia Code Section 24.2-209.

95. Virginia Code Section 24.2-683 details the substance of said Writ.

96. The Writ issued by the Governor set the Special Election for February 21, 2023.

97. This in turn required the DPVA to have chosen the Democratic nominee for the Special Election by a certain date. Virginia Code Section 24.2-510.5.

98. At all times since the premature death of Congressman McEachin, the DPVA knew they would be required to soon conduct a nomination process.

99. There is nothing in Virginia law requiring the DPVA to refrain from having a contingency already in place for a fair and constitutional nomination process should a vacancy occur in this office or requiring the DPVA from refraining to begin creating such a fair and constitutional process until the Governor officially issues the required Writ of Election.

100. On December 13, 2022, the 4th Congressional District Democratic Committee, a subordinate entity of the DPVA, issued the Call, *supra*.

101. According to Virginia law, the DPVA had been granted unfettered legislative authority to conduct said nomination process. Virginia Code Section 24.2-508.

102. As required by the procedures of the DPVA, the Committee met to write the Call to Caucus, the name used by the DPVA for the document issued by this Committee outlining the conduct of the nomination process for the electoral district to be contested (the 4th CD seat).

103. The DPVA chose what the political community dubs a “firehouse primary” process.

104. The process has various procedures and requirements as regards how a Democrat may cast his or her ballot for their congressional nominee.

105. Upon information and belief, the DPVA has previously always chosen to conduct said “firehouse primary” on a Saturday.

106. Upon information and belief, the DPVA has always had at least one polling location in every jurisdiction in the electoral district to be contested.

107. On December 13, 2022, the 4th CD Committee, operating for the DPVA, issued the Call to Caucus. (See “Exhibit 1).

108. It required anyone wanting to have their name listed on the nomination ballot as a candidate to pay a mandatory filing fee equal to 2% of the annual salary of a member of the House of Representatives.

109. This amounted to \$3,480.00.

110. Every candidate would also need to submit petitions containing at least the signatures of 150 qualified 4th CD registered voters saying they wanted the named candidate to be allowed to be on the nomination ballot.

111. The addresses of the initial five locations are contained in the Call.

112. A day or two after December 13, 2022, three more locations were added: one in Chesterfield County, one in Surry County, and one in Charles City County.

113. Thus, seven jurisdictions were allocated voting locations: The City of Richmond was given two voting locations, while Brunswick County, Charles City County, Chesterfield County, Henrico County, Surry County, and the City of Petersburg each were allocated one.

114. As the DPVA and its subordinate 4th CD entity knew, this total of eight precincts is less than 3% of the voting locations provided in the normal state-run Democratic primary nomination process.

115. The Democratic constituency in the 4th CD, by and large consists of working-class voters, especially non-white women with families making a modest wage.

116. Colonial Heights, where Mr. McEachin got 1,618 votes, has NO voting location.

117. Dinwiddie County, where Mr. McEachin got 3,639 votes, has NO voting location.

118. Emporia City, where Mr. McEachin got 840 votes, has NO voting location.

119. Greensville County, where Mr. McEachin got 1,527 votes, has NO voting location.

120. Hopewell City, where Mr. McEachin got 2,692 votes, has NO voting location.

121. Prince George County, where Mr. McEachin got 4,163 votes, has NO voting location.

122. Southampton County, where Mr. McEachin got 1,166 votes, has NO voting location.

123. Sussex County, where Mr. McEachin got 1,689 votes, has NO voting location.

124. Thus, 17,7334 citizens who voted for Mr. McEachin in their home precinct two months ago are not being permitted to vote in their home locality, not to mention their normal voting location.

125. The decision to have only 8 voting locations is apparently based not only on unknown, arbitrary criteria, but the allocation between these 7 localities seems to have considerable arbitrariness as well.

126. Charles City County, where Mr. McEachin got 1,585 votes, was awarded a voting location.

127. Yet Colonial Heights, Dinwiddie County, Hopewell City, Prince George County and Sussex County, where Mr. McEachin received *more* votes, *did not*.

128. Surry County, where Mr. McEachin got 1,659 votes, was awarded a voting location.

129. But again, the localities cited in Paragraph No. 127 *supra*, did not.

130. As the DPVA itself conceded in *Lee*, the voting rights of these voters are most negatively impacted by any rules and procedures placing extra burdens on their ability to exercise their core political rights, the right to vote being acknowledged as perhaps the most precious of all rights by not only the DPVA, but countless U.S. Supreme Court cases. See e.g. *Williams, infra*.

131. Indeed, as stated in one of the most famous U.S. Supreme Court cases, “the political franchise of voting” in a free society is a most “fundamental political right, because preservative of all rights.” *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

132. Given only 8 voting locations, it is reasonable to assume there is likely to be extensive lines at certain locations which will need to be added to record travel times for many voters.

THE LAW OF THE CASE

133. Article II, Section 4 of the Constitution of Virginia gives the State Legislature full power to determine the process for nominating the candidates to run in the Special Election at issue in this instant matter.

134. The General Assembly has delegated certain powers regarding the elective process to the DPVA, such as delegation to “(iii) provide for the nomination of candidates, including the nomination of its candidates for office in case of any vacancy.” Virginia Code Section 24.2-508.

135. This statute granting the DPVA the legislative power to conduct the nomination process for this Special Election contains no restriction or specific criteria or detailed standard, indeed totally unfettered except for the timelines discussed in Virginia Code Section 24.2-510.5.

136. It is well settled that a nomination process for an entity like the DPVA recognized as a major political party is considered “state action” and, thus even though the DPVA is not a government entity, the nomination process so chosen must comply with the Constitution of the United States. *Smith v. Allwright*, 321 U.S. 649 (1944), *Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996).

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

138. *Reynolds*, a seminal case on the rights of citizens in state legislative elections, further said the constitutionally protected right to vote includes the right to cast an effective vote. *Id.* at 565.

139. The Supreme Court in *Williams v. Rhodes*, 393 U.S. 23 (1968), went further, saying the right to cast an effective vote was not merely covered by the 14th Amendment, but it also includes the First Amendment right “to associate for the advancement of political beliefs.” *Id.* at 30.

140. When a state such as Virginia, either directly through a statutory enactment, or indirectly through statutory enactment delegating legislative power to a private organization such as a political party, allows such a statutory scheme to burden protected constitutional

rights, the state can only justify the ensuring state action by showing the scheme is necessary to support a compelling state interest. *Id.*

141. In such circumstances, the normal presumption of constitutionality provided to state legislative enactments is not applicable, as such a presumption cannot be the basis for deciding issues involving fundamental political rights. *Kramer v. Union Free School District*, 359 U.S. 621, 628 (1969).

142. For example, *Harper*, supra ruled even a \$1.50 poll tax placed too heavy a burden for the First Amendment to bear, as even this small amount weighed down the right to vote through an impermissible wealth factor.

143. “Wealth...is not germane to one’s ability to participate intelligently in the electoral process.” *Id.* at 668.

144. *Harper* declared the wealth burden imposed unconstitutional based on the Equal Protection Clause of the 14th Amendment to the Constitution of the United States. *Id.* at 670.

145. Admittedly *Harper* involved a wealth burden placed on the right to register to vote.

146. But conceptually, it makes little constitutional sense to say the Constitution prohibits such burdens on those who want to vote and then turn around and say wealth burdens are constitutionally permitted when the same citizen tries to exercise his or her right to vote in a state sanctioned primary process.

147. Especially when the state sanctioned nomination process is considered determinative of the outcome of the general election due to political circumstances of the electoral district at issue. See *Terry v Adams*, 345 U.S. 461 (1953).

148. The Fourth Circuit had occasion to discuss the matter of restrictions on political rights in *Dixon v. Md. State Administrative Board of Election Laws*, 878 F. 2d 776 (4th Cir. 1989).

149. The Court found there must be both a 14th Amendment analysis and a First Amendment analysis to ensure a state statutory scheme does not unconstitutionally infringe on certain political rights protected by the U.S. Constitution. *Id.*

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

151. While Plaintiff believes “strict scrutiny” as in *Harper, supra* is the proper standard of review for the “firehouse primary” scheme in this instant, fail badly under *Anderson*.

152. *Anderson* employed a balancing test requiring the government to meet a far higher burden than mere “rationality” while not being required to scale the “strict scrutiny” hurdle.

153. The statute granting the power to the DPVA to act under the color of law to impose their “firehouse primary” scheme in a state sanctioned nomination process is facially unconstitutional as it contains no guidelines whatsoever, thus leading to the unacceptable burdens on fundamental political rights at issue in this instant matter.

154. The General Assembly could not directly pass a nomination scheme providing only eight voting locations in the 4th CD, leaving a majority of the jurisdictions without a voting location.

155. Accordingly, the DPVA likewise had no such authority.

156. It is well settled that the type of delegation of public power to a private entity by a state legislature is unconstitutional when it so utterly lacks the required minimal standards, criteria, or guidelines, thus rendering the statutory scheme facially flawed and unconstitutional as applied by the DPVA as their scheme violates the voting rights of the Democrats in the 4th CD. See, e.g., *General Electric v. New York State Dept. of Labor*, 936 F. 2d 1448 (2nd Cir. 1991), *Eubank v. City of Richmond*, 226 U.S. 137, 144 (1912), and *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

157. Plaintiff Marks is a candidate in the primary.

158. As such, his right of association and his ability to join with citizens of like mind to win the election, have been unconstitutionally denied by the “firehouse primary” process at issue.

159. It is well settled that “voters can assert their preferences only through candidates or parties or both.” *Anderson, infra*, at 787.

160. While there is no constitutional right to be a candidate, the rights of voters, which can in a nomination process only be expressed through backing a candidate, are thus severely impacted whenever their association rights are debased, much less suppressed. See *Bullock v Carter*, 405 U.S. 134 (1972).

161. The Fourth Circuit has been clear that the severity of the burden imposed in terms of impact is an important consideration in evaluating burdens imposed on the right to vote and whether there is an element of intentionality. *Hendon v N.C. State Board of Elections*, 710 F. 2d 177 (4th Cir.).

162. There is of course no litmus test in these matters and the balancing of various factors are normally required. See *Anderson, infra*.

163. The Supreme Court, however, has made clear the rights of all voters, from the humblest to the most storied, the rights of all groups, from the least powerful to the most powerful, are to be treated equally as this is needed for our democratic system to retain the confidence of the people. *Harper, infra*.

164. While a candidate may not have a constitutional right to run, he or she surely has a constitutional right to exercise their right of association, in conjunction with likeminded individuals, to compete on a level constitutional playing field.

165. The DPVA has a subordinate branch of the party in every one of the 15 jurisdictions in the 4th CD.

166. State law recognizes the DPVA as one of two “parties” in the state.

167. This designation gives the DPVA to have special privileges in this Special Election process, as compared to other groups of people who want to associate to put a candidate on the Special Election ballot in February.

168. For example, all independent and “minor party” candidates (all parties but the DPVA and the Virginia Republican Party) must submit at least 1,000 valid signatures of qualified voters to be on the ballot.

169. Accordingly, the DPVA has voluntarily accepted the privileges of being a specially chosen political organization under state law and thus requiring the DPVA to abide by known constitutional strictures is a burden they have readily accepted.

170. In this connection, the grant of legislative power to run a state sanctioned nomination process, especially when the winner of the process is all but certain to win, should require the DPVA to have a polling location in all jurisdictions, as the DPVA has a presence in all those jurisdictions, and regularly conducts party business in such jurisdictions.

171. The DPVA, by accepting the power and privilege under state law, has held itself out to the General Assembly and the people of being capable, indeed willing, to conduct a constitutionally sound process.

172. The DPVA has never claimed they are unable to pay for the required nomination process.

173. In the alternative, if the DPVA intends to claim it lacks the money to do it right, then their use of public power to conduct a state sanctioned nomination process they know will violate the Constitution surely cannot be condoned.

174. In terms of intentionality, Section II of the Voting Rights Act of 1965 is impacted by totality of the circumstances in this instant matter.

175. The “purpose of Section 2 of the VRA is to prevent voter dilution and preclude racial discrimination in voting.” *Holloway v. City of Virginia Beach*, 531 F. Supp. 3d 1015, 1026 (ED. Va).

176. “Section 2 requires proof only of a discriminatory intent.” *Id.* at 1044 .

177. Thus, as the *Holloway* opinion stated, the “essence” of the claim under Section 2 is that an “electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by [minority] and white voters to elect their preferred representatives.” *Id.* (citation omitted).

178. This is not a situation, as in *Harper*, *Dixon*, or *Holloway*, *supra*, where the office involved is one only of importance to Virginia, or a locality therein.

179. In this instant matter, the election cycle is aimed at electing a member of the U.S. House of Representatives.

180. Every member therefore wields potentially huge power, not over merely over domestic affairs, but in regards for example whether not merely Virginians but Americans from every state may be sent into harm's way.

181. Yet in the "firehouse primary" process at issue, active military members overseas cannot vote in the one election that matters, as the General Election is likely to be a mere formality.

182. The absurdly short time limit operative in the instant matter comes from a state law the Democrats have long supported.

183. Indeed, when the key statute in question was last amended in 2011, every single Democratic member of the General Assembly supported that restrictive amendment. See Chapter 599 of the Session Laws.

184. "Representative democracy in any populous unit of governance is unimaginable without the ability of citizens to ban together" to promote their views. *California Democratic Party v. Jones*, 530 U.S. 567, 574 (2000).

UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE POWER

185. Plaintiffs incorporate by reference preceding paragraphs 1 through 184.

186. Even a cursory reading of the statute and statutory scheme at issue exposes the utter failure of the General Assembly to provide the minimum guardrails required. See, e.g., *Eubank*, *General Electric*, and *Yick Wo*.

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

188. It must satisfy the Equal Protection Clause of the 14th Amendment to the United States Constitution, also, indeed the *Harper* test since the scheme will require residents in the majority of jurisdictions to spend time and money to travel or their voting rights will be suppressed.

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

190. Since *Allwright* had already answered the “state action” issue, the failure of the Virginia statutes to provide any, much less sufficient, limitation on the Party’s authority, runs afoul of the Due Process Clause.

191. Accordingly, the statutory scheme is facially defective.

192. But assuming, *arguendo*, the statute is deemed not facially defective, it has been used and applied by the DPVA in a most unconstitutional voter suppression fashion.

193. The rights act issue, that of the right to vote and the right of association for political purposes, are among our core political rights. *Meyer v. Grant*, 488 U.S. 414 (1988).

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

195. Plaintiffs concede the state, whether operating directly or indirectly, have legitimate compelling interests to take such constitutional measures as needed to ensure fair and free elections.

196. But in order to justify laws burdening core political rights, the state must show that these laws are necessary to protect such compelling interests.

197. Plaintiffs believe the proper judicial standard for determining whether the state has met this burden, as applied in this case, is the one “strict scrutiny” standard of *Harper*.

198. But even if the lesser *Anderson* standard is used, there is no possible justification limiting the number of voting locations eight such locations, in but seven of the 4th CD's 15 jurisdictions, was necessary to protect said interest.

199. Plaintiffs ask that the Court enjoin the members of the Virginia State Board of Election, operating in their representative capacity, from voting to certify the winner of the "firehouse primary" to the Special Election ballot.

200. Plaintiffs ask that the Court order the members of the Virginia State Board of Elections, acting in their representative capacity, to ensure the DPVA conduct a constitutionally valid nomination process to pick the Democratic nominee for the Special Election.

201. Plaintiffs ask the Court to take such other action as it deems required, including the awarding of monetary damages, litigation costs and attorney fees.

COUNT TWO: VIOLATION OF THE DUE PROCESS CLAUSE

202. Plaintiffs incorporate by reference paragraphs 1 through 201, *supra*.

203. The 14th Amendment, of which the Due Process Clause is part, incorporates certain of rights provided to citizens by the Bill of Rights, such rights among them found in the First Amendment. *Palko v. Connecticut*, 302 U.S. 319. 324 (1937).

204. The 14th Amendment limits the nature of the delegation of power the General Assembly of Virginia could give a private entity such as the Democratic Party of Virginia. See, e.g., *General Election*, *supra*.

205. It is axiomatic that a General Assembly cannot authorize a private party to do indirectly what the government is constitutionally prohibited to do directly. *Allwright*, *supra*.

206. Therefore, in the context of the instant matter, the General Assembly could not give the Democratic Party of Virginia the power to suppress if not eradicate the vote of countless number of citizens by virtue of a scheme having only 8 voting locations.

207. Accordingly, Plaintiffs are challenging the constitutionality of the statutory scheme, 24.2-508 being the main culprit, as both unconstitutional on its face and unconstitutional as applied.

208. Therefore, Plaintiff's rights guaranteed under the Due Process Clause of the 14th Amendment to the United States Constitution are being violated, as DPVA is claiming it has been delegated power to arbitrarily trash fundamental voting rights while the Virginia State Board of Elections stays quiet.

209. Plaintiffs ask that the Court declare the statutory scheme unconstitutional.

210. Plaintiffs ask that the Court enjoin the members of the Virginia State Board of Election, operating in their representative capacity, from voting from certifying the winner of the "firehouse primary" to the Special Election ballot.

211. Plaintiffs ask that the Court order the members of the Virginia State Board of Elections, acting in their representative capacity, to ensure the DPVA conduct a constitutionally valid nomination process to pick the Democratic nominee for the Special Election.

212. Plaintiffs ask the Court to take such other action as it deems required, including the awarding of monetary damages, litigation costs and attorney fees.

COUNT THREE: VIOLATION OF THE FIRST AMENDMENT

213. Plaintiffs incorporate by reference paragraphs 1 through 212, *supra*.

214. The First Amendment protects “core political” rights including the right to vote and the right to cast an effective vote. *Meyer, supra, Reynolds, supra.*

215. The “state action” doctrine applies in this instant matter. *Allwright, supra.*

216. Given that the core political rights being infringed are among our most protected political rights, the state will need to overcome the highest possible strict scrutiny to demonstrate the scheme is absolutely necessary to protect a compelling state interest. *Meyer v. Grant*, 486 U.S. 414 (1988).

217. Indeed, this is true even if the less stringent *Anderson* standard is employed.

218. Plaintiffs further ask that the Court enjoin the member of the Virginia Board of Elections from certifying the nominee for a place on the Special Election general election ballot.

219. Plaintiffs ask that the Court order the members of the Virginia State Board of Elections, acting in their representative capacity, to ensure the DPVA conduct a constitutionally valid nomination process to pick the Democratic nominee for the Special Election.

220. Plaintiffs further ask the Court to award such other relief as it deems necessary including monetary damages, litigation costs, and attorney fees as may be appropriate.

COUNT FOUR: VIOLATION OF THE EQUAL PROTECTION CLAUSE

221. Plaintiffs incorporate by reference paragraphs 1 through 220, *infra.*

222. The Plaintiffs right to vote and other political rights at issue are protected by the Equal Protection Clause of the United States Constitution. *Harper, supra.*

223. The rights of all the Democrats in the 4th CD are entitled to equal protection, and this includes not merely access but the right to cast an effective ballot. *Williams v. Rhodes*, 393 U.S. 23 (1968).

224. In the instant matter, eight jurisdictions have no voting location, 6 have 1 voting location, and the City of Richmond has 2 voting locations.

225. As already shown herein, the rights of the voters are subjected to vastly unequal burdens on the ability to merely cast a vote due to their wealth, location, physical condition, family status and any number of criteria which all contribute to putting them in unequal categories depending on whether they live in one jurisdiction or another.

226. As a matter of equal protection law, requiring some voters to leave their home county or city in order to cast a ballot while allowing others the convenience of voting in their locality creates unequal classes of voters without any showing that such classification is necessary to protect a compelling state interest. See, e.g., *Anderson*.

227. Plaintiffs therefore ask that the Court enjoin the members of the Virginia Board of Elections from certifying the winner of the “firehouse primary” to the Special Election ballot.

228. Plaintiffs ask that the Court order the members of the Virginia State Board of Elections, acting in their representative capacity, to ensure the DPVA conduct a constitutionally valid nomination process to pick the Democratic nominee for the Special Election.

229. Plaintiffs further ask the Court to award such other relief as it deems necessary, including monetary damages, litigation costs, and attorney fees as may be appropriate.

COUNT FIVE: VIOLATION OF SECTION 2 OF THE VOTING RIGHTS ACT

230. Plaintiffs incorporate by reference paragraphs 1 through 229, *infra*.

231. Section 2 of the Voting Rights Act is violated if the “firehouse primary” rules and procedures at issue in this matter were drafted to intentionally discriminate against a class of minority voters in this biracial Congressional District voting electorate.

232. The intention of the voting scheme at issue, operated by the DPVA under the color of law, was to make it harder for the voters in these jurisdictions to cast their ballot, indeed the scheme presents such voters with unprecedented burdens on their right to vote.

233. The DPVA can be presumed to have known that their scheme would make it far harder for the minority voters of modest means who dominate in these rural areas without a voting location to cast ballots.

234. This violates Section 2 of the Voting Rights Act. Holloway, *supra*.

235. Plaintiffs ask that the Court enjoin the members of Virginia Board of Elections from certifying the nominee for a place on the Special Election general election ballot.

236. Plaintiffs ask that the Court order the members of the Virginia State Board of Elections, acting in their representative capacity, to ensure the DPVA conduct a constitutionally valid nomination process to pick the Democratic nominee for the Special Election.

237. Plaintiffs ask the Court to award such other relief as it deems necessary, including monetary damages, litigation costs, and attorney fees as may be appropriate.

REMEDY

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

- (A) Issuance of a preliminary injunction enjoining the members of the Virginia Board of Elections from certifying to the Special Election ballot the nominee chosen by the DPVA nomination process in the Call to Caucus at issue herein;
- (B) Issuance of a declaratory judgment finding Va. Code Section 24.2-508 as facially unconstitutional or in the alternative as unconstitutional as applied in this instant matter on the grounds it constitutes an unconstitutional delegate of legislative authority and/or a violation of the First Amendment; and
- (C) Order the members of the Virginia Board of Elections, acting in their representative capacity, to ensure the DPVA conduct a constitutionally valid nomination process to pick the Democratic nominee for the Special Election.
- (D) Or, in the alternative, order the Plaintiffs to develop a constitutionally valid nomination process to choose the Democratic nominee in the Special Election.
- (E) Such other relief including monetary damages, litigation costs and attorney fees as may be deemed appropriate.

Respectfully submitted,
Paul Goldman

By: _____/s/_____
Counsel

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CERTIFICATE

I hereby certify that on the 21st day of December, 2022, I electronically filed the above Entry of Appearance with the Clerk of the United States District Court for the Eastern District of Virginia using the CM/ECF system.

/s/
Elliott B. Bender

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