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

THE CONSTITUTION PARY OF VIRGINIA, et al., Plaintiffs, v. VIRGINIA STATE BOARD OF ELECTIONS, et al., Defendants.	**Case No. 3:20-cv-00349 (JAG)** **PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR PRELIMINARY INJUNCTION AND/OR TEMPORARY RESTRAINING ORDER**

INTRODUCTION

Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction and/or Temporary Restraining Order (the "Opposition") completely disregards the unavoidable fact that it was partly *illegal*, against the advice of the Commonwealth, Federal Government, and all public health agencies, and personally *dangerous* for Plaintiffs to gather petition signatures for 89 of the 160 days they were allotted to do so. Defendants callously argue that nothing prevented Plaintiffs from gathering signatures for the first 71 days, but those days were in fact winter – a time when no one typically gathers petition signatures due to weather and a time when no one could possibly foresee the unprecedented pandemic awaiting them in March. Further, Defendants' erroneous interpretation of the doctrine of laches presents Plaintiffs with an impossible dilemma. If Plaintiffs filed suit immediately when they felt their constitutional rights

might have been violated, Defendants would argue, as they do now for the presidential candidate Plaintiffs, that the action is premature because Plaintiffs could not possibly know whether they would actually have been able to gather enough signatures. But if they filed suit after diligently exhausting all other options, as Plaintiffs have done in this case, then Defendants would claim that constitutes inexcusable delay thus barring Plaintiffs from receiving any relief. As if that position was not already untenable, Defendants go on to argue that Plaintiffs mere presence on the ballot would cause them harm, not as a result of any administrative troubles, but rather would somehow confuse Virginians and even keep Virginians away from the polls – an insincere argument that cannot justify the deprivation of constitutional rights.

Plaintiffs are entitled to a preliminary injunction placing their names on the ballot for the November 2020 general election for at least four reasons: 1) Virginia's statutory scheme cannot survive constitutional scrutiny in light of an unprecedented global pandemic which robbed Plaintiffs of their entire signature-gathering season; 2) Plaintiffs will suffer irreparable harm to their First and Fourteenth Amendment rights if they are denied preliminary relief and excluded from the ballot; 3) the balance of the hardships undoubtedly weighs in Plaintiffs favor because the Defendants have presented no evidence they will suffer any harm at all and instead make only conclusory, generic, and insincere claims about voter confusion; and 4) Preliminary relief is in the public interests because greater choice, diversity of ideas, and the protection of First and Fourteenth Amendment rights does not confuse, but benefits all Virginians. Accordingly, Plaintiffs respectfully request that this Court grant their Motion for a Preliminary Injunction and/or Temporary Restraining Order (the "Motion"), and allow them, for this election only, to appear on the ballot without having to place their own lives or those of the public in needless danger.

ARGUMENT

I. Plaintiffs Are Entitled to Preliminary Relief

As argued in their Motion, to obtain preliminary relief, Plaintiffs must show that (1) they are likely to succeed on the merits; (2) they will likely suffer irreparable harm absent an injunction; (3) the balance of hardships weighs in their favor; and (4) the injunction is in the public interest. *League of Women Voters of North Carolina v. North Carolina*, 769 F.3d 224, 236 (4th Cir. 2014).

A. Plaintiffs Have a Strong Likelihood of Success on the Merits

Defendants are correct when they argue that a preliminary injunction is an extraordinary remedy, but they fail to acknowledge that these are extraordinary times. In the current environment, there is simply no safe way for Plaintiffs, many of whom are in high risk categories for COVID-19, to gather signatures without putting their lives, or the lives of the public, in unnecessary danger. As a result, Plaintiffs will be completely excluded from the ballot. This total exclusion cannot survive constitutional scrutiny. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

a. Plaintiffs' Claims Are Not Barred by the Doctrine of Laches

As a preliminary matter, Plaintiffs' claims are not barred by the doctrine of laches because Plaintiffs were diligent in bringing their claims and Defendants cannot possibly argue that they have been prejudiced by any delay. *Perry v. Judd*, 471 Fed. Appx. 219, 224 (4th Cir. 2012).

First, Defendants argue that a lack of diligence is somehow demonstrated by the fact that twenty-three independent or minor party candidates for the U.S. Congress filed petition signatures on or before the June 9, 2020, deadline. Opposition, pg. 7. The mere fact that some

people gathered signatures in contravention of the advice from the medical community and in violation of the Governor's stay-at-home orders, does not speak to whether or not Plaintiffs were diligent in bringing their case. Further, the Defendants are conflating separate issues, because the mere fact that some candidates submitted signatures does not mean they were able to gather *enough* signatures to qualify for the ballot. Defendants provide evidence of only one independent candidate who was able to collect enough signatures to qualify for the ballot, and while mentioning that eleven Independent Green Party candidates and one Green Party candidate filed signatures, they neglect to state that no candidate associated with Plaintiffs was able to gather *enough* signatures to qualify for the ballot.[1] The truth, as argued in Plaintiffs' Supplemental Brief regarding Laches, is that the Plaintiffs exhausted all options available to them, including petitioning the governor and the Defendants for relief, before being forced to come together and file one suit for purposes of judicial economy, when it became evident that no one capable of granting them relief was going to do so.[2] Plaintiffs should not be punished for this diligence.

Second, Defendants completely misinterpret the doctrine of laches by arguing that *any* harm resulting to the Defendants as a result of Plaintiffs' requested relief bars relief under the doctrine. Opposition pg. 7. A correct reading of the doctrine holds that the prejudice must be "caused by detrimental reliance on [Plaintiffs'] conduct." *White v. Daniel*, 909 F.2d 99, 102 (4th Cir. 1990). This detrimental reliance was found in *Perry* because the plaintiffs delay resulted in

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[1] *See* Declaration of Christopher E. Piper ¶ 12.

[2] Plaintiff the Libertarian Party of Virginia twice, on April 21 and May 4, 2020, requested the Governor's assistance in relieving the signature requirement. *See* Declaration of Nick Dunbar, Ex. A, B. Plaintiff Mitchell Bupp emailed Defendants requesting relief from the signature requirement. *See* Amended Complaint ¶ 50. Plaintiff the Green Party of Virginia appealed for waivers of the signature requirement directly to the Governor via three petitions for waiver emailed to the Governor on March 26, 2020.

the defendants planning being thrown into confusion and would necessitate the reprinting of ballots. 471 Fed.Appx. at 226-7. Likewise, in *Curtin v. Va. State Bd. of Elections,* prejudice was present when plaintiffs delayed in filing suit over the Governor's executive order allowing absentee voting by all registered voters because the Court found that by the time of oral argument 90,000 had already applied for absentee voting and 13,000 had already submitted absentee ballots. *Curtin v. Virginia State Bd. of Elections,* No. 120CV00546RDAIDD, 2020 WL 2817052, at *5 (E.D. Va. May 29, 2020). No such detrimental reliance exists here.

Defendants carry the burden of demonstrating prejudice as a result of laches and they have not done so. *Costello v. United States,* 365 U.S. 265, 282 (1961). Defendants cite no harm resulting from Plaintiffs filing their Motion on June 8, 2020, and instead provide conclusory statements of law regarding voter confusion and protecting the integrity of the election process. Opposition pg. 7-9. This is because Defendants cannot possible show harm resulting from Plaintiffs' Motion being heard on June 19, 2020, when: 1) state primaries will not take place until June 23, 2020, and 2) the Defendants are holding a meeting on July 7, 2020, to discuss the granting of waivers to those candidates who failed to qualify for the ballot by the June 9, 2020, deadline – the exact type of relief the Plaintiffs are seeking here.[3][4] Indeed, Defendants interpretation of laches puts the Plaintiffs in an impossible position. If they file too early, Defendants will argue, as they do now for the presidential candidate Plaintiffs, that the action is

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[3] Brufke, JulieGrace. (June 13, 2020). *Virginia GOP to pick House nominee after candidate misses filing deadline*. The Hill. (https://thehill.com/homenews/campaign/502583-virginia-gop-to-pick-house-nominee-after-candidate-misses-filing-deadline)

[4] Defendants are holding a meeting on July 7, 2020, a month after Plaintiffs filed their Motion, to discuss granting waivers to independent candidates for office who failed to qualify by the June 9, 2020, deadline. This likewise invalidates Defendants claim that they are unable to provide the relief requested by the Plaintiffs. *See* Virginia Code § 24.2-506 outlining the appeal process.

premature. (Opposition, pg. 15).[5] If they file after exhausting all other options, but before the deadline, Defendants will argue that laches bars their requested relief. Such a reading of the law does not comport with the doctrine of laches, and thus Plaintiffs' claims should not be barred by the doctrine.

b. Virginia's Statutory Scheme Cannot Withstand Constitutional Scrutiny as Currently Applied

Under the *Anderson-Burdick* analytic framework established by the Supreme Court, this Court must first consider the "character and magnitude" of the asserted injury to Plaintiffs' First and Fourteenth Amendment rights and then analyze the "precise interests" put forth by the Defendants as justification for the burden imposed by their rule. *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). Under this standard, laws that impose "severe" burdens are subject to strict scrutiny and must be narrowly tailored to advance a state interest of compelling importance. *Burdick*, 504 U.S. at 434 (internal citations omitted).

Contrary to the misdirection provided by the Defendants, the present case does not ask this Court to determine whether or not Virginia's signature requirements for independent candidates for office constitute a severe burden to First and Fourteenth Amendment rights in a normal election year. This case merely requests that this Court acknowledge that Virginia's law

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[5] Public events, the type of which are the primary means by which independent candidates can gather petition signatures, continue to be cancelled in Virginia due to COVID-19. NBC12 Newsroom. (June 13, 2020). *Library of Congress cancels public events until September*. (https://www.nbc12.com/2020/06/13/library-congress-cancels-public-events-until-september/). AP (May 27, 2020) *Virginia Beach Cancels July Fourth Fireworks Over COVID-19. (https://www.nbcwashington.com/news/local/virginia-beach-cancels-july-fourth-fireworks-over-covid-19/2313783/*); AP (May 1, 2020) *Fall festival canceled in Virginia due to virus concerns*. (https://www.wtvr.com/news/coronavirus/fall-festival-canceled-in-virginia-due-to-virus-concerns).

requiring Plaintiffs to gather signatures during an ongoing pandemic, when doing so literally puts their lives and the lives of the public in danger, breaks the law, goes against the advice of every public health official, and thus constitutes a severe burden to Plaintiffs' constitutional rights. Plaintiffs have been given a choice: place their lives at risk and break the law or follow the advice of the Governor and public health officials and be excluded from the ballot. This choice imposed on the Plaintiffs cannot survive constitutional scrutiny.

Further, Defendants provide no compelling evidence to justify requiring Plaintiffs to violate the orders of the Governor, potentially placing everyone's lives at risk. Instead, Defendants make conclusory statements of law concerning voter confusion, as if having more choices on the ballot would somehow render Virginians incapable of casting a vote for their chosen candidate. Opposition pp. 10-11. Plaintiffs do not hold such a low view of Virginians, and as discussed *infra*, believe that greater choice on the ballot can only benefit the public. Likewise, the Defendants' claim that waiving the signature requirement for this election cycle would lead to a "cluttered ballot" is speculative and in no way compelling enough to justify a severe burden on First and Fourteenth Amendment rights. *Burdick*, 504 U.S. at 434

B. Plaintiffs Will Suffer Irreparable Harm Absent an Injunction

Defendants claim that Plaintiffs' harm is speculative is simply incorrect. As alleged in their Amended Complaint, none of the Plaintiffs will qualify for the 2020 general election ballot if their request for preliminary relief is denied. The Supreme Court has clearly stated that, "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Similarly, in *Council of Alternative Political Parties v. Hooks*, the Third Circuit held that the irreparable injury prong was met

because "if the plaintiffs lack an adequate opportunity to gain placement on the ballot . . . this infringement on their rights cannot be alleviated after the election." 121 F.3d 876, 883 (3d Cir. 1997); *Anderson*, 460 U.S. at 787 (recognizing harm to voters First Amendment rights of association when they are unable to vote for the candidates they support). Thus, there is no debate as to whether Plaintiffs' will suffer irreparable harm absent an injunction in their favor.

C. The Balance of Hardships Weighs in Plaintiffs' Favor and an Injunction Is in the Public Interest

As the Third Circuit noted in an analogous case, "[i]n the absence of legitimate, countervailing concerns, the public interest clearly favors the protection of constitutional rights…" *Council of Alternative Political Parties*, 121 F.3d at 883-84. Defendants put forward five reasons detailing why the balance of the equities and public interests tip in their favor, but they all boil down to the same vague, unsupported, and hypothetical justification: confusion. Opposition pg. 16-19.

Defendants argue that Plaintiffs' requested relief will result in voter, election official, and candidate confusion. This claim is patently untrue. Plaintiffs are seeking only to invalidate the signature requirements found in Va. Code §§ 24.2-506(1), 24.2-506(2), and § 24.2-543, in light of signature gathering being made impossible by the ongoing pandemic and government orders in response thereto.[6] As Defendants admit, candidates are still required to file a declaration of candidacy to appear on the ballot, and that deadline for candidates for the U.S. House and Senate has already passed. Opposition, pg. 4. Thus, there is no "intense confusion" as election officials "grapple with who is qualified to appear on the ballot." Opposition pg. 17. If Plaintiffs' relief is

[6] See Amended Complaint, Dkt. No. 6.

granted, Defendants would already know precisely who is qualified for those offices: anyone who filed a declaration of candidacy. Likewise, the claim that the candidates themselves would be confused is equally dismissed for the same reason. Further, the idea that Virginians would be confused by having more candidates on the ballot, as if more choice would somehow render a Virginian at the ballot box unable to determine who they showed up to vote for, is without merit and insulting to Virginians.[7] Not to mention the fact that it has *never happened*, not even before the challenged signature requirements were put into place.[8]

In reality, greater choice at the ballot box is undeniably in the public interest. Plaintiffs are candidates from national and local political parties with significant support from voters at home and throughout the nation. Indeed:

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[7] The 2003 California Gubernatorial recall election is an instructive example. In that election 240 candidates turned in filing papers and 135 qualified to appear on the ballot. The election went forward without a hitch resulting in the election of Arnold Schwarzenegger. PBS (August 14, 2003) *California Certifies 135 Candidates in Recall Election*. (https://www.pbs.org/newshour/politics/politics-july-dec03-recall_08-14). Plaintiffs strongly believe that Virginians are just as capable of conducting an election.

[8] State control of the ballot was foreign to the founders of America. *See* Richard Winger, "History of U.S. Ballot Access Law for New and Minor Parties," The Encyclopedia of Third Parties in America, Vol. 1 (2000); *see also* A. Ludington, American Ballot Laws, 1888-1910 (1911). The invention of the state ballot originated in the late nineteenth century. *See id*. Before that, voters and their supporters could bring their own ballot to the voting polls. *See id*. Most states adopted the state ballot and employed free and open ballot access to be as inclusive as many voter options as possible, with few ballot access restrictions, during most of the first half-century of state ballots. *See id*. State control of the ballot was foreign to the founders of America. *See* Richard Winger, "History of U.S. Ballot Access Law for New and Minor Parties," The Encyclopedia of Third Parties in America, Vol. 1 (2000); *see also* A. Ludington, American Ballot Laws, 1888-1910 (1911). The invention of the state ballot originated in the late nineteenth century. *See id*. Before that, voters and their supporters could bring their own ballot to the voting polls. *See id*. Most states adopted the state ballot and employed free and open ballot access to be as inclusive as many voter options as possible, with few ballot access restrictions, during most of the first half-century of state ballots. *See id*.

> "Any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents. All political ideas cannot be channeled into the programs of our two major political parties. History has amply proved the virtue of political activity by minority, dissident groups, which innumerable times have been in the vanguard of democratic thought and whose programs were ultimately accepted....The absence of such voices would be the symptom of grave illness in our society."

Sweezy v. New Hampshire, 354 U.S. 234, 250–51, (1957). The collective efforts of outsider candidacies are widely credited as creating the most significant and beneficial reforms in American political history as the "fertile" bed of new ideas. *See Anderson*, 460 U.S. at 780; *see also Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 185 (1979) ("The States' interest in screening out frivolous candidates must be considered in light of the significant role that third parties have played in the political development of the Nation.")

Accordingly, preliminary relief will benefit the public because it will protect the First Amendment rights of Virginia voters to cast their votes effectively and to associate with candidates and parties they support. "Injunctions protecting First Amendment freedoms are always in the public interest." *American Civil Liberties Union of Il. v. Alvarez*, 679 F.3d 583, 589 (7th Cir. 2012) (quoting *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006) (footnote omitted)).

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request this Court grant their Motion for a Preliminary Injunction/Temporary Restraining Order.

Respectfully submitted this the 18th day of June 2020,

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Certificate of Service

I hereby certify that on this the 18th day of June, 2020, I will file the foregoing with the Court's CM/ECF system, which will provide electronic service of this document to all counsel of record.

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