

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

THE CONSTITUTION PARTY OF	)	
VIRGINIA, et al.,	)	
	)	
Plaintiffs,	)	Civil Action No. 3:20-cv-349 (JAG)
	)	
v.	)	
	)	
VIRGINIA STATE BOARD OF ELECTIONS,	)	
et al.,	)	
	)	
Defendants.	)	

**MEMORANDUM IN SUPPORT OF  
DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT**

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## **INTRODUCTION**

Plaintiffs request that this Court entirely enjoin the enforcement of Virginia Code §§ 24.2-506(1), 24.2-506(2), and 24.2-543 as those provisions relate to the petition signature requirements for independent and minor party candidates for the United State Senate, United States House of Representatives, Vice President, and President of the United States for the November 2020 General Election. Plaintiffs further allege that Virginia Code §§ 24.2-506(1), 24.2-506(2), and 24.2-543 violate the First and Fourteenth Amendments to the United States Constitution as applied to independent and minor party candidates who wish to appear on the November 2020 General Election ballot. Plaintiffs fail to show any outstanding genuine dispute as to any material fact or that they are entitled to the specific relief requested as a matter of law. As a result, the Defendants' Motion for Summary Judgment should be granted.

## **BACKGROUND**

Virginia law establishes several requirements that must be met before an individual wishing to appear as an independent or minor party congressional or national candidate on a ballot may have her name printed on the ballot. Only a person meeting all the qualifications and fulfilling all the requirements of a candidate may have their name printed on the November 2020 General Election ballot. Va. Code § 24.2-504.

Independent or minor party congressional candidates may appear on a ballot if they file the required qualification forms and required number of petition signatures signed by qualified Virginia voters. *Id.* at § 24.2-505 et seq. The number of petition signatures required to appear as a candidate for the United States Senate is 10,000, including 400 signatures from each congressional district. *Id.* at § 24.2-506(1). The number of petition signatures required to appear as a candidate for House of Representatives is 1,000. *Id.* at § 24.2-506(2).

Likewise, independent groups of qualified voters are permitted to select the names of electors

to be printed on official ballots to be used in the selection of electors for President and Vice-President. *Id.* at § 24.2-543. The qualified voters must submit petition signatures of at least 5,000 qualified voters, including at least 200 signatures from each congressional district. *Id.* at § 24.2-543(A).

Candidates for federal office who wish to appear on the November 2020 General Election ballot were permitted to begin collecting petition signatures on January 1, 2020. *Id.* at §§ 24.2-506(A) and 24.2-543.<sup>1</sup> Congressional candidate petitions were required to be filed with the State Board of Elections on or before June 9 at 7 p.m. *Id.* at § 24.2-505(A) (requiring candidate declarations to be filed with the State Board of Elections); *id.* at § 24.2-507 (requiring candidate declarations and petitions to be filed together). Presidential and vice presidential candidate petitions are required to be filed with the State Board of Elections on or before August 21, 2020 at noon. *Id.* at § 24.2-543(A).

All petition signatures gathered are required to be witnessed by the individual circulating the petition who must sign a sworn affidavit on each petition page. *Id.* at §§ 24.2-506(A) and 24.2-543(A). A petition shall be rendered invalid for a number of reasons, including if “[t]he circulator has not signed the petition affidavit and provided his current address; . . . [t]he circulator is a minor or a felon whose voting rights have not been restored; . . . [t]he circulator has not signed the petition he circulated in the presence of a notary; . . . [t]he circulator has not had a notary sign the affidavit for each petition submitted; [or a] person other than the circulator signed the petition affidavit[.]” 1 VAC 20-50-20.

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<sup>1</sup> The only exception to this rule is for presidential candidates who wished to appear on the ballot for the March presidential primary. These candidates could begin collecting signatures in 2019 as their petition signatures were due to be filed in December 2019.

**UNDISPUTED MATERIAL FACTS**

**Executive Orders issued in March 2020**

1. In light of the COVID-19 pandemic, Commonwealth officials began taking public health safety precautions to protect the public in early March. Exhibit A.

2. On March 12, 2020, Governor Ralph S. Northam declared a state of emergency. Executive Order Fifty-One (2020) (Northam), attached as Exhibit B.

3. Under Executive Order Fifty-One, the Governor directed state and local governments to render appropriate assistance to prepare for the potential spread of COVID-19, to alleviate any conditions resulting from the situation, and to implement recovery and mitigation operations and activities so as to return impacted areas to pre-event conditions as much as possible. See *id.*

4. The Governor and State Health Commissioner jointly announced a public health emergency relating to the COVID-19 virus on March 25, 2020. Order of Public Health Emergency Two (2020) (Northam & Oliver), attached as Exhibit C.

5. Under Order of Public Health Emergency Two, which prohibited certain surgical hospitals from providing procedures and surgeries requiring personal protective equipment, which if delayed, would not be anticipated to cause harm to the patient by negatively affecting the patient's health outcomes, or leading to disability or death. See *id.*

6. On March 30, 2020, the Governor issued a temporary stay at home order to curb the spread of the COVID-19 virus. Executive Order Fifty-Five (2020) (Northam), attached as Exhibit D.

7. Executive Order Fifty-Five—

a. Required all individuals in Virginia to remain at their place of residence except for certain circumstances, including engaging in outdoor activity, provided individuals comply with social distancing requirements;

b. Limited all public and private in-person gathers of more than 10 individuals; and



c. Remained in effect until June 10, 2020. See *id.*

8. Executive Order Sixty-One and Order of Public Health Emergency Three: Phase One Easing of Certain Temporary Restrictions Due to Novel Coronavirus (COVID-19) took effect on May 15, 2020. Executive Order Sixty-One and Order of Public Health Emergency Three (2020) (Northam & Oliver), attached as Exhibit E.

9. Under Phase One—

a. General guidelines for “safer at home” included continued social distancing, continued teleworking, and continued use of face coverings in public; and

b. Non-essential businesses like restaurants and salons reopened with limited capacity.

See *id.*

10. Executive Order Sixty-Five and Order of Public Health Emergency Six: Phase Two Easing of Certain Temporary Restrictions Due to Novel Coronavirus (COVID-19) took effect on June 5, 2020. Executive Order Sixty-Five and Order of Public Health Emergency Six (2020) (Northam & Oliver), attached as Exhibit F.

11. Under Phase Two—

a. General recommendations included social distancing, teleworking, and requiring individuals to wear face coverings in indoor public settings;

b. The maximum number of individuals permitted in a social gathering increased from 10 to 50 people; and

c. Restaurant and beverage establishments were permitted to offer indoor dining at 50 percent occupancy. See *id.*

12. Executive Order Sixty-Seven and Order of Public Health Emergency Seven: Phase Three Easing of Certain Temporary Restrictions Due to Novel Coronavirus (COVID-19) took effect

on July 1, 2020. Executive Order Sixty-Seven and Order of Public Health Emergency Seven (2020) (Northam & Oliver), attached as Exhibit G.

13. Under Phase Three—

a. General recommendations include social distancing, teleworking, and requiring individuals to wear face coverings in indoor public settings;

b. The maximum number of individuals permitted in a social gathering increased from 50 to 250 people;

c. Restaurant and beverage establishments are permitted to offer indoor and outdoor dining at 100 percent occupancy, provided physical distancing is observed; and

d. Entertainment venues are permitted a capacity of 1,000 persons. See *id.*

14. The executive orders issued by the Governor did not prohibit the circulation of petition signatures in order to qualify as a candidate on the November 2020 General Election ballot. See Executive Order Fifty-One (2020) (Northam), Order of Public Health Emergency Two (2020) (Northam & Oliver), Executive Order Fifty-Five (2020) (Northam), Executive Order Sixty-One and Order of Public Health Emergency Three (2020) (Northam & Oliver), Executive Order Sixty-Five and Order of Public Health Emergency Six (2020) (Northam & Oliver), and Executive Order Sixty-Seven and Order of Public Health Emergency Seven (2020) (Northam & Oliver).

15. During the COVID-19 pandemic, the Virginia State Board of Elections has not issued any communication, regulation, or guidance that prohibited the requirement that candidates obtain petition signatures in order to qualify as a candidate on the November 2020 General Election ballot. See Green Party of Virginia (GPVA) Disc. Resp., Admis. Resp. # 1 (Exhibit H); Liberterian Party of Virginia (LPVA) Disc. Resp., Admis. Resp. # 1 (Exhibit I); Independent Green Party of Virginia (IGPVA) Disc. Resp., Admis. Resp. #1 (Exhibit J); Constitution Party of Virginia (CPV) Disc. Resp., Admis. Resp. # 1 (Exhibit K).

16. The executive orders issued by the Governor during the COVID-19 pandemic encouraged social distancing and proper hygiene in shared spaces and interpersonal interactions. *See* GPVA Disc. Resp., Interrog. Resp. # 19; LPVA Disc. Resp., Interrog. Resp. # 19; IGPVA Disc. Resp., Interrog. Resp. # 19; CPV Disc. Resp., Interrog. Resp. # 19.

**Commonwealth Defendants do not dispute that there are unique difficulties in obtaining petition signatures during Spring 2020.**

17. The Commonwealth Defendants have not objected to a reasonable reduction in signatures or a reasonable extension of deadlines in suits filed by candidates prior to the expiration of the filing deadline.<sup>2</sup>

- a. In *Faulkner v. Va. Dep't of Elections*, No. CL20001456, 2020 Va. Cir. LEXIS 70 (Richmond City Cir. Ct. March 25, 2020), the signature requirement was reduced from 10,000 to 3,500 statewide for a United States Senate candidate. *See* Exhibit L.
- b. In *Lean on McLean v. Showalter*, No. CL20001959, 2020 Va. Cir. LEXIS 74 (Richmond City Cir. Ct. May 18, 2020), the signature requirement was reduced from 500 to 150 citywide and the filing deadline was extended from June 9 to June 23 for Richmond mayoral candidates. *See* Exhibit M.
- c. In *Alberto v. Cochran*, No. CL20000997, 2020 Va. Cir. \_\_\_\_ (Roanoke City Cir. Ct. June 4, 2020), the signature requirement was reduced from 125 to 50 citywide and the

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<sup>2</sup> However, in *Jeffrey v. Cochran*, No. CL20001140, 2020 Va. Cir. \_\_\_\_ (Roanoke City Cir. Ct. June 23, 2020) both the Commonwealth Defendants and the General Registrar for the City of Roanoke objected to the relief requested by a candidate for Roanoke City mayor. The plaintiff in that case did not file that action until eight days after the filing deadline for petition signatures had passed. The Court denied both the Petition for Preliminary Injunction and the Motion for a Rehearing filed by plaintiffs. *See* Exhibit O. Similarly, in *Webb v. Va. State Bd. of Elections*, CL20002459, 2020 Va. Cir. \_\_\_\_ (Richmond City Cir. Ct.), the Commonwealth Defendants objected to the relief requested by a candidate for United States House of Representatives. The plaintiff in that case did not file that action until June 10, 2020. The Court denied plaintiff's requested relief.

filing deadline was extended from June 9 to June 23 for City of Roanoke City Council candidates. See Exhibit N.

d. In *Richmond for All v. Va. Dep't of Elections*, No. CL20002432, 2020 Va. Cir. \_\_\_\_ (Richmond City Cir. Ct. June 9, 2020), the signature requirement was reduced from 125 to 50 and the filing deadline was extended from June 9 to June 23 for City of Richmond City Council candidates and School Board candidates. See Exhibit P.

18. The petition signature filing requirement was not entirely eliminated in any of the above cases. See Exhibits L-N and P.

19. The requirement that a petition circulator witness the voter sign the petition was not eliminated in any of the above cases. See *id.*

20. The requirement that a petition circulator sign an affidavit on the submitted petitions was not eliminated in any of the above case. See *id.*

21. All of these cases were decided on or before the petition signature filing deadline for the respective candidates seeking relief from the petition signature requirements. See *id.*

### **Partial Consent Judgment and Decree with former Plaintiff Mitchell Bupp**

22. Mitchel Bupp, an independent candidate for United States House of Representatives, was a Plaintiff in this case. Pls.' First Am. Compl. p. 1.

23. On June 30, 2020, a settlement conference was held between Plaintiffs, including Bupp, and the Commonwealth Defendants. Order Regarding Procedures for Settlement Conference p. 1, dkt. # 26.

24. Following the settlement conference, on July 2, 2020, this Court entered a Partial Consent Judgment and Decree that ordered the following:

- a. Bupp is required to submit 35% of the total petition signatures required under Virginia Code § 24.2-506(2) to appear as a United States congressional candidate on the ballot for the November 2020 General Election;
- b. The filing deadline for Bupp to submit his petition signatures to the Department of Elections is extended from June 9, 2020 to July 31, 2020 at 7:00 p.m.;
- c. Petition circulators gathering petition signatures for Bupp may witness the signature of a registered voter over the internet so long as the circulator can actually see the voter sign the form. The original form must be returned to the circulator so that the circulator may sign the affidavit, and the original form must be returned to the Department of Elections; and
- d. Bupp's claims in this case are dismissed with prejudice. Partial Consent J. and Decree p. 2, dkt. # 29.

### **November 2020 General Election**

25. The general election for members of the United States Senate and House of Representatives, as well as the President and Vice President, will be held on November 3, 2020.

26. In order to appear on the November 2020 General Election ballot, independent and minor party congressional candidates were required to file the statutorily mandated number of petition signatures no later than 7:00 p.m. on June 9, 2020. Va. Code § 24.2-507(1).

27. In order to appear on the November 2020 General Election ballot, independent and minor party candidates for President and Vice President are required to file the statutorily mandated number of petition signatures no later than noon on August 21, 2020. *Id.* at 24.2-543(A).

28. The ballot preparation process may begin as soon as August 22, 2020. Piper Decl. ¶ 26, Exhibit Q.

29. Absentee ballots must be made available as soon as printed ballots are available, but in any event no later than 45 days before the November 2020 General Election. See Va. Code §§ 24.2-612 and 24.2-701.

**Plaintiffs failed to exercise reasonable diligence in collecting petitions signatures and in filing this current action**

30. The majority of Plaintiffs have made no attempts to gather any petition signatures to support their efforts to appear on the November 2020 General Election ballot. See GPVA Disc. Resp., Interrog. Resp. # 2; IGPVA Disc. Resp., Interrog. Resp. # 2; CPV Disc. Resp., Interrog. Resp. # 2.

31. Some Plaintiffs and other candidates have gathered signatures, thus demonstrating that it is not “impossible” to collect petition signatures. See LPVA Disc. Resp., Interrog. Resp. # 2 (detailing signature gathering January through March); LPVA Disc. Resp. p. 28-31 (spreadsheet that indicates that LPVA was able to collect petition signatures the week of March 23 and June 15); Tr. of June 19, 2020 Hr’g p. 34 (testimony of Plaintiff Tittle in which she states that she has collected 20-25 petition signatures).

32. The LPVA Plaintiffs were aware that certain candidates were seeking judicial relief from the petition filing requirements as early as March 25, 2020. See GPVA Disc. Resp., Interrog. Resp. # 5.

33. Plaintiffs filed this action on May 15, 2020. Pls.’ Compl. for Injunctive, Declaratory, and Other Relief (Pls.’ Compl.), dkt. # 1.

34. Plaintiffs filed their First Amended Complaint for Injunctive, Declaratory, and Other Relief on June 5, 2020. Pls.’ First Am. Compl. for Injunctive, Declaratory, and Other Relief (Pls.’ First Am. Compl.), dkt. #6.

35. Plaintiffs did not serve the Commonwealth Defendants with either the original Complaint or the First Amended Complaint until June 8, 2020. Piper Decl. ¶ 19.

36. Plaintiffs did not file their Motion for Preliminary Injunction and/or Temporary Restraining Order until June 8, 2020. Pls.' Mot. For Prelim. Inj. and/or Temp. Restraining Order and Attached Mem. of Law in Supp. (Pls.' PI/TRO), dkt. # 7.

37. A hearing was held on Plaintiffs' Motion for Preliminary Injunction and/or Temporary Restraining Order on June 19, 2020—ten days after congressional petition signatures were due.

### **Moving forward during the pandemic**

38. Public health experts have provided guidance on how best to interact with others during the different phases of the shutdown in the Commonwealth. *See* Commonwealth of Virginia, *Coronavirus (COVID-19) in Virginia* (last accessed June 5, 2020, 5:22 PM), <https://www.virginia.gov/coronavirus/>.

39. On July 1, 2020, the Commonwealth entered Phase Three permitting many restrictions on activities of individuals to be lifted and much greater movement. Executive Order Sixty-Seven and Order of Public Health Emergency Seven (2020) (Northam & Oliver), attached as Exhibit G; see also GPVA Disc. Resp., Admis. Resp. # 3-4; LPVA Disc. Resp., Admis. Resp.# 3-4; IGPVA Disc. Resp., Admis. Resp. # 3-4; CPV Disc. Resp., Admis. Resp. # 3-4.

40. If Plaintiffs do not obtain the required number of petition signatures, they may still pursue election via write-in campaigns. See Va. Code § 24.2-644.

### **STANDARD OF REVIEW**

Summary judgment is appropriate where “the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P.

56(a). “[A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of ‘the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,’ which it believes demonstrate the absence of a genuine issue of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). However, “once the moving party makes such a showing, the non-moving party “may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial.” *Hughes v. Bedsole*, 48 F.3d 1376, 1381 (4th Cir. 1995) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986)).

## ARGUMENT

### **A. The Commonwealth Defendants’ interest in maintaining the integrity of Virginia elections outweighs any burden to Plaintiffs in collecting petition signatures.**

The undisputed facts and the law show that any burden to Plaintiffs in collecting a reasonable amount of petition signatures is outweighed by the interests of the Commonwealth Defendants in maintaining the integrity of elections in the Commonwealth. As a result, Plaintiffs are not entitled to the relief that they request.

#### ***1. Standard of review under the Anderson/Burdick test.***

The Supreme Court has developed a two-prong balancing test, established in *Anderson v. Celebrezze*, 460 U.S. 780 (1983) and modified in *Burdick v. Takushi*, 504 U.S. 428 (1992), for evaluating the constitutionality of state election laws. “Rather than conducting separate, crosscutting analyses of electoral restrictions under the rubrics of associative rights, expressive rights, due process, or equal protection, the Supreme Court has articulated a single framework for evaluating the constitutionality of state election laws ‘based...directly on the First and Fourteenth Amendments.’” *Sarvis v. Alcorn*, 80 F. Supp. 3d 692, 697-98 (E.D. Va. 2015) (citing *Anderson*, 460 U.S. at 787 n.7, and *Pisano v. Strach*, 743 F.3d 927, 934 (4th Cir. 2014)). Under this test,



a court considering a challenge to a state election law must weigh “the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the Plaintiff seeks to vindicate” against the “precise interests put forward by the State as justifications for the burden imposed by its rule,” taking into consideration “the extent to which those interests make it necessary to burden the Plaintiff’s rights.”

*Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789; citing *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 213-14 (1986)).

The extent to which a challenged law burdens a litigant’s First and Fourteenth Amendment rights determines the applicable standard of review. State laws imposing a severe burden upon a litigant’s protected rights face strict scrutiny review, and must be “narrowly drawn to advance a state interest of compelling importance.” *Pisano*, 743 F.3d at 933. “On the other hand, ‘if a law imposes only modest burdens, then a State’s important regulatory interest will usually be enough to justify reasonable, nondiscriminatory restrictions.’” *Id.* (quotation and citations omitted). In such cases, a state’s interest “need only be ‘sufficiently weighty to justify the limitation’ imposed on the party’s rights.”” *Sarvis*, 743 F. Supp. 3d at 698 (quotation and citations omitted). Accordingly, under the *Anderson/Burdick* test, the degree of applicable judicial scrutiny is dependent upon the magnitude of the burden associated with the challenged state law; as “restrictions become more severe,” greater judicial scrutiny applies. *Clingman v. Beaver*, 544 U.S. 581, 603 (2005) (O’Connor, J., concurring).

**2. *Virginia’s petition signature requirements are a constitutional method of regulating ballot access.***

Virginia’s petition signature requirements are constitutional and rationally tied to Virginia’s legitimate interest in protecting the integrity of its elections. In *Wood v. Quinn*, the Court addressed the petition signature requirement for an independent candidate who was unable to gather the required 400 signatures in each congressional district in the Commonwealth in order to appear as a United States Senate candidate on the ballot. *See* 104 F. Supp. 2d at 612. In that case, the Court noted that the provision in question, Virginia Code § 24.2-506—the same provision challenged by

the congressional Plaintiffs—satisfied rational basis scrutiny, as it did not make it “virtually impossible” for an independent candidate for the United States Senate to access the ballot in Virginia. *Id.* at 615.

In weighing any burden to the plaintiff against Virginia’s interests to determine whether they justified the imposition of the barrier, the Court noted that, “[i]t is . . . beyond question that states have an important interest in regulating ballot access.” *Id.* at 616. The Court further acknowledged that the petition signature requirement “weeds out those individuals who, for whatever reason, are unable or unwilling to mount a campaign sufficient to capture the imaginations of voters across Virginia.” *Id.* Ultimately, the Court determined that, “Virginia’s 10,000-signature threshold for independent candidates . . . passes constitutional muster under the rational basis standard” and that “the 400-per-district requirement [was not] so grossly excessive as to violate rational basis review.” *Id.* at 616-17. The Court concluded by noting that, while measures other than the petition signature requirement possibly could be imposed, “[w]hether to explore such alternatives is a decision for the Virginia General Assembly, [and] the Court cannot overturn portions of Virginia’s ballot access system that satisfy rational basis scrutiny simply because independent candidates prefer a lesser burden.” *Id.* at 617.

Similarly, in *Amarasinghe v. Quinn*, an independent candidate for the United States House of Representatives failed to meet the petition signature threshold under Virginia Code § 24.2-506 and sought to challenge the petition signature requirement as unconstitutional. *See* 148 F. Supp. 2d 630, 632 (E.D. Va. 2001). In that case, the Court found that, “[t]he signature requirement of collecting 1000 qualified voter signatures in order to appear on the ballot for House of Representatives bears a rational relationship to Virginia’s legitimate interests in regulating ballot access” and that it could not “say that the 1000 qualified voter signature requirement is so excessive as to violate any of the plaintiff’s constitutional rights.” *Id.* at 636.

**3. *Plaintiffs fail to demonstrate that the appropriate remedy is to entirely eliminate the statutorily mandated petition signature requirement.***

**a. *Plaintiffs demonstrated a lack of diligence in seeking to obtain signatures and in seeking to obtain relief from this Court.***

Plaintiffs request that this Court entirely eliminate the petition signature requirement in order for their names to be printed on the November 2020 General Election ballot. Most of the plaintiff candidates provide no evidence that they have demonstrated any effort to comply with the statutory requirements, and, in fact, have shown an entire lack of diligence in attempting to seek relief from the petition signature requirement. Further, while they make claims that they have been “completely prevented” from obtaining petition signatures, their assertions about what was required under the executive orders issued during the COVID-19 pandemic are both incorrect and not based on any official guidance. Additionally, their assertions that they were “completely prevented” from seeking petition signatures, and, thus should be entitled to not submit any petition signatures whatsoever, is undercut by the fact that at least one independent or minor party gathered the required amount of petition signatures and that major party candidates were required to submit the same amounts of petition signatures months ago.

**b. *Plaintiffs demonstrated a lack of diligence in seeking to obtain signatures and in seeking to obtain relief from this Court.***

Plaintiffs have demonstrated a lack of diligence in their efforts not only to fulfill their statutory duties in order to appear on the ballot but also to seek relief from those statutory requirements. Plaintiffs provide minimal evidence that they attempted to collect any petition signatures during the period between January 1, 2020, when petition signatures could begin to be collected, and March 12, when Executive Order Fifty-One declaring a state of emergency went into

effect.<sup>3</sup> Further, Plaintiffs waited until June 8—eighty-eight days after the state of emergency was declared—to serve the Commonwealth Defendants or to file a motion for preliminary injunction. Even after belatedly serving the Commonwealth Defendants, Plaintiffs failed to diligently pursue their claims. Under the Pretrial Order entered on June 24, 2020, discovery responses were due to be served no later than July 1, 2020. June 24 Pretrial Order, dkt. # 25. Plaintiffs did not serve any discovery responses on July 1. Rather, Plaintiffs delayed and did not serve discovery responses on behalf of the GPVA until late in the evening on July 2, did not serve discovery responses on behalf of the LPVA until July 3, and did not serve discovery responses on behalf of the CPV and the IGPVA until late in the evening on July 5. See emails attached as Exhibit R. While Plaintiffs claim that the entire elimination of the petition signature requirement is vital to protecting their interest in appearing on the ballot, their consistent lack of diligence in vindicating that interest indicates otherwise..

**c. The evidence undercuts Plaintiffs assertions that COVID-19 completely prevented petition circulators from obtaining petition signatures.**

Additionally, Plaintiffs claim that they were “completely prevented” from obtaining petition signatures. That claim is not objectively reasonable. First, nothing in the executive orders issued by Governor Northam since March 12, 2020 made petition circulation illegal. While Plaintiffs attempt to assert that the executive orders “*implicitly* prohibited the gathering of petition signatures,” there is

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<sup>3</sup> See GPVA Disc. Resp., Interrog. Resp. # 3 (“the GPVA Plaintiffs did not have an opportunity to collect signatures prior to the onset of the pandemic and the shutdown orders related thereto . . . Dianne Blais gathered 307 signatures between February and March 17, 2020.”); CPV Disc. Resp., Interrog. Resp. # 3 (“The CPV Plaintiffs did not have an opportunity to collect signatures prior to the onset of the pandemic and the shutdown orders related thereto.”); IGPVA Disc. Resp., Interrog. Resp. # 3 (“The IGPVA Plaintiffs did not have an opportunity to collect signatures prior to the onset of the pandemic and the shutdown orders related thereto.”); LPVA Disc. Resp. p. 28-31 (spreadsheet that indicates a number of petition signatures gathered).

no language in the executive orders that prohibits the gathering of petition signatures.<sup>4</sup> In fact, David Foster, candidate for United States House of Representatives, collected sufficient signatures prior to the June 9 petition signature filing deadline to qualify to appear on the November 2020 General Election ballot. See Piper Decl. at ¶¶ 15-17. The LPVA admits that it was able to collect 720 petition signatures the week of March 23 and 680 signatures the week of June 15.<sup>5</sup> Plaintiff Blais admits that she was able to collect some amount of signatures required.<sup>6</sup> Additionally, major party candidates nominated by primary were required to file their petition signatures months ago,<sup>7</sup> and those candidates are subject to the same petition signature number requirements as independent and minor party candidates.<sup>8</sup> The ability of other independent and minor party candidates to collect sufficient petition signatures, as well as the ability of major party candidates to collect petition signatures underlines the fact that there were adequate methods available to collect petition signatures, despite Plaintiffs' assertions to the contrary.

Plaintiffs repeatedly state that they based their conclusion that they were barred from seeking petition signatures on their own interpretations of news articles, public health reports, and government guidelines.<sup>9</sup> Plaintiffs do not assert that they relied upon or even sought formal guidance from either the Commonwealth Defendants or the Governor regarding the implications of the

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<sup>4</sup> See GPVA Disc. Resp., Interrog. Resp. # 19; LPVA Disc. Resp., Interrog. Resp. # 19; IGPVA Disc. Resp., Interrog. Resp. # 19; CPV Disc. Resp., Interrog. Resp. # 19.

<sup>5</sup> LPVA Disc. Resp. p. 28-31 (spreadsheet that indicates a number of petition signatures gathered).

<sup>6</sup> GPVA Disc. Resp., Interrog. Resp. # 3.

<sup>7</sup> Major party congressional candidates to be nominated by primary were required to file their petitions by March 26, 2020. Va. Code § 24.2-522(A). Major party national candidates to be nominated by primary were required to file their petitions by December 12, 2020. *Id.* at § 24.2-545.

<sup>8</sup> *Id.* at § 24.2-521(B) (relating to required number of petition signatures for congressional candidates); *Id.* at § 24.2-545(B) (relating to required number of petition signatures for national candidates); see also *Faulkner v. Va. Dep't of Elections*, No. CL20001456, 2020 Va. Cir. LEXIS 70 (Richmond City Cir. Ct. March 25, 2020), at Exhibit L.

<sup>9</sup> See GPVA Disc. Resp., Interrog. Resp. # 5, Req. for Prod. Resp. # 3; LPVA Disc. Resp., Interrog. Resp. # 5, Req. for Prod. Resp. # 3; IGPVA Disc. Resp., Interrog. Resp. # 5, Req. for Prod. Resp. # 3; CPV Disc. Resp., Interrog. Resp. # 5, Req. for Prod. Resp. # 3.

executive orders on their ability to gather petition signatures. Plaintiffs' own subjective fears and interpretations of the COVID-19 pandemic are not enough to force a waiver of the statutory requirements that the General Assembly enacted. The standards governing elections integrity must be reasonable and enforced uniformly and consistently, if there is to be stability in the elections administration. The alternative would allow any individual's subjective feelings and interpretation of the law govern the way in which elections in the Commonwealth are run, thereby causing chaos on the ballot.

The Commonwealth Defendants recognize that it may be reasonable to decrease the number of petition signatures required for federal candidates to less than one-hundred percent of the statutorily required number. However, it would be unreasonable to lower the presidential and vice-presidential signature requirement to the same extent as the requirement was lowered in prior litigation.<sup>10</sup> Candidates required to file petition signatures by June 9 were facing an imminent deadlines that gave them little time to benefit from the easing of restrictions during Phases One and Two. These candidates did not benefit at all from even further decreased restrictions in Phase Three. Further, more than six weeks remain until the August 21 deadline.

***4. While the COVID-19 pandemic creates unusual circumstances, Commonwealth Defendants still have a compelling interest in maintaining the integrity of Virginia elections.***

As previously acknowledged, the COVID-19 pandemic has created an unprecedented set of circumstances that has required the Commonwealth to take precautionary steps to protect the safety of the public and to declare a public health emergency. That does not diminish the Commonwealth's compelling interests in ensuring the integrity of elections.

Requiring independent and minor party candidates to collect signatures prior to accessing the ballot has been repeatedly upheld as constitutional by the highest courts in the land:

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<sup>10</sup> See part 4 *supra*.

The Supreme Court has held unequivocally that states may require independent or so-called ‘minor party’ candidates to demonstrate a *modicum of support* among potential voters in order to qualify for a place on the ballot. This line of authority rests upon the state interests recognized in *Clements* -- in protecting the integrity of political processes from frivolous or fraudulent candidacies, in ensuring that election processes are efficient, in avoiding voter confusion caused by an overcrowded ballot, and in avoiding the expense and burden of run-off elections.

*Wood*, 104 F. Supp. 2d at 615 (internal citations and quotations omitted); see also *Jeness*, 403 U.S. at 442 (“There is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization’s candidate on the ballot ...”); *Johnstone v. Lamone*, 401 F. Supp. 3d 598, 604 (D. Md. 2019) (“As the Supreme Court has repeatedly maintained, states have a valid interest in requiring candidates and political parties to show some amount of support before putting them on the ballot.”), *aff’d* 801 Fed. Appx. 116 (4th Cir. 2020).

Further, “as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.” *Storer v. Brown*, 415 U.S. 724, 730 (1974). In regulating elections, “the State understandably and properly seeks to prevent the clogging of its election machinery, avoid voter confusion, and assure that the winner is the choice of a majority, or at least a strong plurality, of those voting, without the expense and burden of runoff elections.” *Id.* at 732.

Commonwealth Defendants are charged with overseeing elections administration in order to ensure uniformity, legality, and purity in all elections. Va. Code § 24.2-103(A). The petition signature requirements under Virginia Code §§ 24.2-506 and 24.2-543 do just that—they allow local election officials, and the Commonwealth Defendants overseeing them, to ensure that each petition signature has been validly signed by a qualified Virginia voter and help to deter any fraudulent submission of signatures. The challenged petition signature provisions are statutes enacted by the General Assembly in order to safeguard the integrity of Virginia elections and impose some level of

responsibility on candidates to demonstrate their legitimacy. Nothing in the Virginia Code authorizes the Commonwealth Defendants to waive or modify those requirements without judicial or legislative intervention.

Accordingly, the Commonwealth Defendants have worked with candidates for offices throughout the Commonwealth to reach accommodations via judicial intervention that balance the Commonwealth Defendants' compelling interests relating to election integrity and relevant statutory requirements with candidates' interests in ballot access. For example, in *Faulkner v. Va. Dep't of Elections*, a potential Republican candidate for United States Senate was granted a reduction in the signature requirement by 65% on March 25, 2020. *See* March 25, 2020 Order, No. CL20001456, 2020 Va. Cir. LEXIS 70 (Richmond City Cir. Ct. March 25, 2020). A potential candidate for Richmond mayor was granted a reduction in the petition signature requirement from 500 total signatures of qualified voters citywide, including at least 50 signatures of qualified voters in each of Richmond's 9 districts, to at least 150 signatures of qualified voters citywide, including at least 10 signatures of qualified voters in each of Richmond's 9 districts, on May 18, 2020. *See* May 18, 2020 Order, *Lean on McLean v. Showalter*, No. CL20001959, 2020 Va. Cir. LEXIS 74 (Richmond City Cir. Ct. May 18, 2020). In *Alberto v. Cochran*, a potential candidate for Roanoke City Council was granted a reduction in the petition signature requirement from 125 total signatures of qualified voters citywide to at least 50 signatures of qualified voters citywide on June 4, 2020. *See* June 4, 2020 Order, No. CL20000997, 2020 Va. Cir. \_\_\_\_ (Roanoke City Cir. Ct. June 4, 2020). Finally, potential candidates for Richmond City Council and school board were granted a reduction in the petition signature requirement from 125 total signatures of qualified voters citywide to at least 50 signatures



of qualified voters citywide on June 9, 2020. *See* June 9, 2020 Order, *Richmond for All v. Va. Dep't of Elections*, No. CL20002432, 2020 Va. Cir. \_\_\_\_ (Richmond City Cir. Ct. June 9, 2020).<sup>11</sup>

With respect to the orders that have been entered in the above-mentioned cases, we would note that each of the orders was entered on or before the applicable petition signature deadline. The Plaintiffs in those cases sought relief prior to the expiration of the pertinent filing deadline. Further, Plaintiffs should have been on notice that other candidates were actively seeking judicial relief from the relevant petition signature requirements for other offices.<sup>12</sup> Finally, it is of note that in none of those cases was the petition signature requirement entirely eliminated.

The Commonwealth Defendants have attempted to be reasonable in cooperating in judicial actions brought by potential candidates to reduce petition signature requirements. However, the interests of the Commonwealth Defendants in maintaining election integrity have not simply evaporated because of the COVID-19 pandemic. The Commonwealth Defendants are still charged under the Virginia Code with overseeing elections in the Commonwealth in order to “promote election uniformity, legality, and purity.” Va. Code § 24.2-103(A). Arguably, the need for close attention to election regulation is even more pressing during these times, as the COVID-19 pandemic also creates challenges for elections administration and new elections legislation has gone into effect

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<sup>11</sup> Local candidates, such as mayoral, city council, and school board candidates, are required to follow the same filing requirements as independent or minor party candidates, as their party affiliation is not listed on the ballot. Va. Code § 24.2-613(B).

<sup>12</sup> The LPVA, in its responses to Defendants’ Interrogatories, Requests for Production, and Requests for Admission, states that a news article “informed the LPVA Plaintiffs that a state court limited the signature requirement to an amount already collected pre-pandemic.” Plaintiffs do not include the date the article was published or a link to the article, but presumably they are referring to the article “GOP candidate sues Virginia election officials, says coronavirus thwarted efforts to get ballot signatures” by Graham Moomaw, which may be found online at <https://www.virginiamercury.com/2020/03/24/gop-candidate-sues-virginia-election-officials-says-coronavirus-thwarted-efforts-to-get-ballot-signatures/> (last accessed July 6, 2020). That article was published on March 24, 2020. As such, notice that other candidates were seeking judicial relief from the petition signature requirements was available as early as March 24, and yet plaintiffs did not seek their preliminary injunction until June 8.

as of July 1, 2020. The Commonwealth Defendants have a statutory duty to ensure the fair, efficient, legal, and uniform administration of elections, but Plaintiffs ask this Court to entirely dispense with a safeguard that enables the Commonwealth Defendants to do so.

### **CONCLUSION**

The Plaintiffs fail to demonstrate that requiring a minimum amount of petition signatures to qualify as a candidate burdens their rights under the First and Fourteenth Amendments in a manner that outweighs the Commonwealth Defendants' compelling interest in maintaining the integrity of Virginia elections. As such, the Plaintiffs are not entitled to the relief they seek as a matter of law.

WHEREFORE, the Defendants, the Virginia State Board of Elections, Robert H. Brink, John O'Bannon, and Jamilah D. LeCruise, in their official capacities as Chairman, Vice-Chairman, and Secretary, respectively, of the Virginia State Board of Elections, and Christopher E. Piper and Jessica Bowman, in their official capacities as Commissioner and Deputy Commissioner, respectively, of the Virginia Department of Elections, request the Court grant the Defendants' Motion for Summary Judgment.

Respectfully submitted,

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