

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

CARROLL BOSTON CORRELL, JR.,)	
on behalf of himself and others,)	
	Plaintiff,	
v.)	Case No. 3:16-cv-00467
)	
MARK R. HERRING, et al.,)	
	Defendants.	

**DEFENDANTS’ MEMORANDUM IN OPPOSITION
TO MOTION FOR TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION**

Defendants¹ state as follows in opposition to the Plaintiffs’ Motion for Temporary Restraining Order and Preliminary Injunction (the Motion) (Docket # 4).

INTRODUCTION

Virginia law gives political parties the freedom to choose whether to have a presidential primary and how to allocate delegates based on the result of the primary. The Commonwealth requires only that, where a party chooses to have the state conduct a primary to determine its presidential candidate, the results of the primary must mean something. Here, the Republican Party of Virginia (RPV) voluntarily chose to have a state-run primary, and both the national and state Republican Party have determined that delegates will be bound on the first ballot. The Commonwealth invested considerable financial and administrative resources in holding a primary, and more than one million citizens of Virginia invested their time and their votes in the primary electoral process. In this case, one delegate – who was elected a delegate knowing the

¹ The Defendants, all in their official capacities, are Mark R. Herring, Attorney General of Virginia; Marc Abrams, Winchester Commonwealth’s Attorney; James B. Alcorn, Chairman of the Virginia State Board of Elections (the Board); Clara Belle Wheeler, Vice Chair of the Board; Singleton McAllister, Secretary of the Board; and Edgardo Cortés, Commissioner of Elections. The Complaint and subsequent filings by the Plaintiff misspell Commissioner Cortés’s name.

party rules and even knowing the primary results – has brought suit after the primary, seeking an order that would undo the party’s choices and vitiate the Commonwealth’s and the voters’ investment.² The Court need not and should not grant injunctive relief.

SUMMARY

This case was unduly delayed until after the Commonwealth had conducted the 2016 Republican presidential primary and less than a month remained before the Republican National Convention. That delay prejudices the Court, the Commonwealth, and the voting public, so preliminary injunctive relief is barred by laches. Indeed, Correll’s lawsuit seeks to change the rules of an election not just right before an election, which would be troublesome enough, but *after the election has already taken place*. Delaying the lawsuit until after the primary occurred prejudiced the Commonwealth by calling into question the integrity of the primary process and threatening to deprive the Commonwealth of the benefit of its financial and administrative investment in conducting the primary. Delaying the lawsuit until after the primary occurred also prejudices the public by threatening the unprecedented effect of retroactively rendering the votes of more than one million Virginians meaningless.

None of the four essential factors favor awarding preliminary injunctive relief.

- 1) Plaintiff’s suit is not likely to succeed on the merits.
 - a) A case or controversy requires injury, and Correll has failed to show

² The decision in this case will be the third time this year that federal courts have decided lawsuits styled as being against the Commonwealth but the object of which is to override the choices of the Republican Party of Virginia. *See 24th Senatorial Dist. Republican Comm. v. Alcorn*, 820 F.3d 624, 2016 U.S. App. LEXIS 7028 (4th Cir. Va. Apr. 19, 2016) (affirming dismissal of a challenge seeking a caucus, rather than the primary selected pursuant to the RPV rules); *Parson v. Alcorn*, no. 3:16-cv-00013, 2016 U.S. Dist. LEXIS 5679 (E.D. Va. Jan. 15, 2016) (declining to order preliminary injunctive relief against the RPV’s choice to require each primary voter to sign a form with the statement “My signature below indicates that I am a Republican”). *Parson* was voluntarily dismissed after the RPV withdrew the statement.

injury. There is no credible threat of prosecution of delegates for actions some of them *may* take at the Republican National Convention in Cleveland, Ohio. Correll does not ask the Court to find he has a right to vote his conscience in contravention of party rules, and no such right exists because delegates, like any other party member, are bound to the rules of the party. With respect to state law, Correll offers only speculative assertions that injury may result if the Republican National Convention changes the party's rules in ways that contradict Virginia law. The possibility of legal action by Donald Trump is insufficient for standing. *See infra* p. 20.

b) Correll's challenge to the binding of delegates is foreclosed by the choices of the Republican Party, to which he is bound contractually and has forfeited any right to challenge. Both the Republican National Committee (RNC) and the Republican Party of Virginia chose to require delegates to be bound on the first ballot. Correll's agreement that he would be bound was part of qualifying to be a delegate. Because the purported injury was caused by the choices of private actors and cannot be redressed by a ruling against the Commonwealth, Correll has failed to show the traceability and redressability elements of standing, and the Court lacks subject matter jurisdiction. *See infra* pp. 20-24.

c) Correll has failed to show that he has standing to assert the rights of the national or state Republican Party. *See infra* pp. 25-26.

d) Under the *Anderson-Burdick* framework, which Plaintiff's brief fails to reference or apply, Virginia Code § 24.2-545(D) does not impose a severe burden on constitutional rights and is justified by important state interests. *See infra* pp. 26-28.

e) Under the standard for facial challenges, which Plaintiff's brief also omits, Plaintiff's claims necessarily fail because Virginia Code § 24.2-545(D) is not unconstitutional in all circumstances. *See infra* p. 26.

2) Correll has not shown he is likely to suffer irreparable harm without preliminary relief. As discussed with respect to the injury element of standing, Correll has not shown the requisite irreparable harm.

3) The balance of equities does not tip in Correll's favor. Before his election as a delegate, Correll knew the party's rules and knew the primary results. He stood for election anyway, yet now seeks to undo the party's and the voters' choices. Equity does not favor granting him relief. On the other hand, great cost would result to the Commonwealth and the public by rendering the primary results meaningless and by forcing the Commonwealth to ignore the party's choices at the behest of a party member who does not agree with those choices.

4) An injunction is not in the public interest. Because of the great cost to the Commonwealth and the public of disregarding the primary results, an injunction is not in the public interest.

STANDARDS OF REVIEW

A. Preliminary Injunctive Relief

“A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.” *Winter v. Natural Resources Defense Council*, 555 U.S. 7, 20 (2008); accord *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 236 (4th Cir. 2014). Preliminary injunctive relief is “an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.” *Winter*, 555 U.S. at 22.

The bar for Plaintiff's Motion is even higher, for two reasons. First, where a preliminary injunction would alter the status quo, it is “mandatory, which ‘in any circumstance is disfavored.’” *League of Women Voters of N.C.*, 769 F.3d at 235 (quoting *Taylor v. Freeman*, 34

F.3d 266, 270 n. 2 (4th Cir. 1994)). Plaintiff seeks an injunction that would give delegates the “freedom to vote their conscience” (e.g., 1st Am. Compl., Docket # 20, ¶¶ 45, 52), which would alter the law and change the status quo and therefore is mandatory in nature. Second, “[f]or election cases in particular, preliminary injunctions are ‘disfavored’ and require the movant to ‘satisfy an even heavier burden of showing that the four factors listed above weigh heavily and compellingly in movant's favor.’” *Stop Hillary PAC v. FEC*, no. 1:15-cv-1208, 2015 U.S. Dist. LEXIS 177928 at 6 (E.D. Va. Dec. 21, 2015) (unpublished) (quoting *Cornwell v. Sachs*, 99 F. Supp. 2d 695, 704 (E.D. Va. 2000)).

B. Constitutional Challenges to State Election Laws

Plaintiff’s Memorandum of Points and Authorities (Docket # 5) disregards entirely the controlling decisional framework and standard of review for constitutional challenges to state election laws, as repeatedly articulated and applied by the Supreme Court, the Fourth Circuit, and this Court.

Constitutional challenges to state election laws are judged under the *Anderson-Burdick* test established by *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992). To apply *Anderson-Burdick*, the court must assess “the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate” and then weigh that “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.’” *Pisano v. Strach*, 743 F.3d 927, 932-33 (4th Cir. 2014) (quoting *Burdick*, 504 U.S. at 434) (internal quotation marks omitted). A burden on constitutional rights “must be justified by relevant and legitimate state interests ‘sufficiently weighty to justify the limitation.’” *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 191 (2008) (citation omitted).

Plaintiff's Memorandum assumes that strict scrutiny applies. *See* Docket # 5 at 9 & 11 (arguing that Virginia must show a compelling interest and narrow tailoring). But *Clingman v. Beaver*, 544 U.S. 581 (2005), makes clear that the standard depends on the extent of the burden on constitutional rights:

Regulations that impose severe burdens on associational rights must be narrowly tailored to serve a compelling state interest. However, when regulations impose lesser burdens, "a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions."

544 U.S. at 586-87 (citing *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997)).

As *Clingman* held, "not every electoral law that burdens associational rights is subject to strict scrutiny"; as Supreme Court cases more recent than those touted by Plaintiff "have clarified, strict scrutiny is appropriate only if the burden is severe." *Clingman*, 544 U.S. at 592 (citing *California Democratic Party v. Jones*, 530 U.S. 567, 582 (2000), and *Timmons*, 520 U.S. at 358); accord *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 451-52 (2008).

The Fourth Circuit and this Court likewise have made clear that *Anderson-Burdick* provides the controlling decisional framework, whether the rights asserted stem from the First Amendment, the Fourteenth Amendment, or a combination of the two. *See, e.g., Sarvis v. Alcorn*, no. 15-1162, 2016 U.S. App. LEXIS 11094 at 14-16 (4th Cir. June 20, 2016); *Pisano*, 743 F.3d at 932-33; *Sarvis v. Judd*, 80 F. Supp. 3d 692, 697 (E.D. Va. 2015), *aff'd as Sarvis v. Alcorn*, 2016 U.S. App. LEXIS 11094, *supra*.

The *Anderson-Burdick* test recognizes that "[c]ommon sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; '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.'"

Burdick, 504 U.S. at 433 (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)). “Hence, States may enact ‘comprehensive and sometimes complex election codes’ notwithstanding the fact that ‘[e]ach provision of these schemes . . . inevitably affects – at least to some degree – the individual’s right to vote and his right to associate with others for political ends.’” *Sarvis*, 80 F. Supp. 3d at 698 (quoting *Anderson*, 460 U.S. at 788). *Anderson-Burdick*’s flexible framework also reflects respect for states’ “broad power” over elections, which is an “enduring tenet of our constitutional order.” *Sarvis*, 2016 U.S. App. LEXIS 11094 at 12 (citation omitted).

C. Facial Challenges

A plaintiff “can only succeed in a facial challenge by ‘establish[ing] that no set of circumstances exists under which the Act would be valid,’ *i.e.*, that the law is unconstitutional in all of its applications.” *Wash. State Grange*, 552 U.S. at 449 (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). “Facial challenges are disfavored for several reasons,” including that they involve “factually barebones records,” “run contrary to the fundamental principle of judicial restraint” in constitutional rulings, and “threaten to short circuit the democratic process.” *Id.* at 450-51 (internal quotation marks omitted). If a statute is constitutional in “at least some” circumstances, that is “fatal” to a facial challenge. *Id.* at 457 (internal quotation marks omitted).

THE STATUTE AT ISSUE

Virginia law permits political parties “to determine the method by which the state party will select its delegates to the national convention to choose the party’s nominees for President and Vice President,” and a political party may select these delegates by either a presidential primary “or another method determined by the party.” Va. Code § 24.2-545(A).

Where a party opts to select delegates or a presidential nominee by state-run primary, Virginia law prescribes distinct delegate allocation processes. *See id.* If a party determines “that its delegates and alternates will be selected pursuant to the primary, the slate of delegates and

alternates of the candidate receiving the most votes in the primary shall be deemed elected by the state party unless the party has determined another method for allocation of the delegates and alternates.” *Id.* Alternatively, “[i]f the party has determined to use another method of selecting delegates and alternates,” the delegates that the party selects are bound, for the first ballot at the party’s national convention, to vote for the candidate receiving the most votes in the primary election, unless they are released by that candidate. *Id.*

Accordingly, where a party avails itself of the option to hold a state-run primary election to select delegates, Virginia law specifically authorizes the party to determine the “method of allocation of delegates.” *Id.* Only where a party chooses to select a candidate, rather than its delegates, by primary, are the party’s delegates bound to the prevailing candidate for the first ballot at the party’s nominating convention.

ARGUMENT

I. The Motion should be denied because preliminary injunctive relief is barred by laches.

Laches is an affirmative defense to equitable relief that has two elements: “(1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense.” *Perry v. Judd*, 840 F. Supp. 2d 945, 953 (E.D. Va. 2012), *affirmed by* 471 Fed. Appx. 219 (4th Cir. 2012). “Laches can serve as a defense to First Amendment claims.” *Id.* Laches “applies with particular force in the context of preliminary injunctions against governmental action, where litigants try to block imminent steps by the government.” *Id.* at 950 (citations omitted); *accord Marcellus v. Va. State Bd. of Elections*, no. 3:15-cv-481, 2015 U.S. Dist. LEXIS 120584 at 17-18 (E.D. Va. Sept. 9, 2015).

In an election context, the basis for laches may also include prejudice to the public. The Commonwealth and the State Board of Elections, whose members are named here as Defendants

in their official capacities, “are charged with ensuring the uniformity, fairness, accuracy, and integrity of Virginia elections,” which “is a state interest the Supreme Court has repeatedly credited.” *Perry v. Judd*, 471 Fed. Appx. 219, 227 (4th Cir. 2012). Lawsuits seeking changes to elections at the last minute disrupt the electoral process, and “[t]he Supreme Court has repeatedly expressed its disapproval of such disruptions.” *Id.* “Indeed, the Fourth Circuit has characterized the disapproval of eleventh hour changes to an otherwise orderly election process as ‘not just caution lights to lower federal courts; they are sirens.’” *Marcellus*, 2015 U.S. Dist. LEXIS 120584 at 18 (quoting *Perry*, 471 Fed. Appx. at 228). And the Supreme Court has applied a similar principle against the federal courts “intervening in the internal determinations of a national political party, on the eve of its convention.” *O’Brien v. Brown*, 409 U.S. 1, 4 (1972) (per curiam) (staying an appeals court ruling regarding the seating of delegates).

A. Delaying a challenge to Virginia Code § 24.2-545(D) until after the primary was unjustified and does not show diligence.

Virginia Code § 24.2-545(D) has existed in its present form since 2011, a full year prior to the 2012 presidential election. *See* 2011 Va. Acts ch. 584 (the most recent modification). This section has provided for the binding of delegates since its original enactment in 1999. *See* 1999 Va. Acts. ch. 972 (Va. Code § 24.2-545(D)’s original enactment). Any political party that believed Virginia law infringed its rights with respect to the selection or allocation of delegates could have challenged the law after it became effective in 1999, after its most recent modification in 2011, or at any other time. The national and state Republican parties have waited years and have not done so.³

³ The opportunity to bring a challenge much earlier is particularly clear given that the Republicans have written their rules and made related decisions over several years leading up to 2015. The RNC adopted the National Republican Rules (Docket # 17-3, *see infra* note 4) on August 27, 2012, and amended them over the next two years. The RPV made its choices
(footnote continued on next page)

“Bringing lawsuits on the eve of pending elections disrupts the electoral process.” *Miller v. Brown*, 462 F.3d 312, 320 (4th Cir. 2006). Presumably motivated by the same concern, the National Republican Rules⁴ require each state party to determine the rules by which delegates will be selected and bound by October 1, 2015, the year before the national convention. See National Republican Rules, *supra* note 4, at Rule 16(d)(12):

No delegates or alternate delegates shall be elected, selected, allocated, or bound pursuant to any Republican Party rule of a state or state law which materially changes the manner of electing, selecting, allocating, or binding delegates or alternate delegates or the date upon which such state Republican Party holds a presidential primary, caucus, convention, or meeting for the purpose of voting for a presidential candidate and/or electing, selecting, allocating, or binding delegates to the national convention if such changes were adopted or made effective after October 1 of the year before the year in which the national convention is to be held. . . .

Plaintiff appears to be asking the Court to disregard Rule 16(d)(12)’s sensible timing restriction on material changes to the manner of binding delegates, thereby threatening the ability of the very delegates whose rights he supposedly represents to have their votes counted at the Republican National Convention. The Court should not intervene at this late date in the affairs of the Convention. See *O’Brien v. Brown*, 409 U.S. 1, 4 (1972) (per curiam). Moreover, if the Republican National Committee, the RPV, or any other proper plaintiff was uncertain about the operation of state law, or if the party had some complaint that its rights were being infringed by state law, it could have clarified or challenged the law in 2015. Instead, the RPV purposefully availed itself of the option to hold a state-run presidential primary election to select a candidate.

regarding whether to have a primary and how to select delegates to the 2016 Republican National Convention in the summer and fall of 2015. See *infra* at p. 21-22.

⁴ “National Republican Rules” refers to The Rules of the Republican Party As Adopted by the 2012 Republican National Convention, Tampa, Florida (Aug. 27, 2012, as amended through Aug. 8, 2014), available at https://s3.amazonaws.com/prod-static-ngop-pbl/docs/Rules_of_the_Republican+Party_FINAL_S14090314.pdf, and filed in this case by Plaintiff as Docket # 17-3.

With respect to Correll himself, this challenge to being bound on the first ballot is also too late. Correll knew of the applicable law and party rules in the fall of 2015, and expressly agreed that his vote as a delegate would be bound by the results of the primary, yet chose to become a delegate anyway. *See infra* p. 22-23. Republican officials in charge of the Tenth Congressional District issued the call for a district convention on January 8, 2016.⁵ Correll should have challenged being bound within the party and/or in court prior to the primary. The Tenth District then held its convention on April 16, 2016. *See Ex. D-4, supra* note 5. By then, Correll knew that Trump had finished first in the primary, yet Correll still stood for election as a delegate. Correll then waited more than two months to bring this lawsuit, until June 24, 2016, a mere 25 days prior to the start of the Republican National Convention and 32 days prior to the Democratic National Convention. *See* 1st Am. Compl., Docket # 20, ¶ 32; Compl., Docket # 1, ¶ 32. This Court has applied laches on very similar timelines. *See Marcellus*, 2015 U.S. Dist. LEXIS 120584 at 23 (“Plaintiffs waited 88 days, until August 17, 2015, to file their Complaint . . . just 25 days prior to the September 11 ballot approval date, and 32 days prior to the absentee ballot availability deadline”).

No doubt Correll will claim that he was diligent and point to his efforts to obtain “an advisory opinion” concerning application of Virginia Code § 24.2-545(D) from the Department of Elections. *See* 1st Am. Compl., Docket # 20, ¶¶ 25, 29. But Correll, a licensed Virginia attorney, is deemed to have known that Virginia law does not empower the Department of Elections to render advisory opinions, nor give any legal weight to the guidance that helpful

⁵ *See* Ex. D-4 (Tenth Congressional District Call, available at <http://vagop10.org/wp-content/uploads/2016/01/10th-District-Republican-Convention-2016-Call-Final.pdf>). The Tenth is the district from which Correll is a delegate, and Correll appears to have been a member of the local party committee in charge of that district. *See* 1st Am. Compl., Docket # 20, ¶ 5.

Department staff may attempt to provide.⁶ Nor could Correll have had any reasonable expectation that Commonwealth's Attorney Abrams would "respond to requests for legal opinions about potentially criminal conduct which we may or may not prosecute." Ex. D-1 (Abrams Declaration) at Ex. B (Letter from Marc Abrams to Plaintiff (June 8, 2016)). A Commonwealth's Attorney's responsibilities do not generally include the provision of guidance to individuals who inform the Commonwealth's Attorney that they anticipate they may become criminal defendants. *See* Ex. D-1 (Abrams Decl.) ¶ 8.

B. The delay in challenging Virginia Code § 24.2-545(D) causes prejudice.⁷

The delay in filing this lawsuit caused an extremely abbreviated litigation schedule. Plaintiff seeks a hearing and decision in less than a month after the date of bringing suit, despite the Fourth Circuit's warning that "[p]roviding only thirty days for briefing, argument, and decision of a novel constitutional question before the courts is troublesome." *Miller*, 462 F.3d at 320. That abbreviated litigation schedule burdens the Court, the Defendants, the Delegates who seek to intervene in this matter, *see* Docket #23, 24, and any other parties who may wish to oppose Plaintiff's lawsuit.

Failing to challenge the binding of delegates until after the Republican presidential primary causes significant financial and administrative prejudice to the Commonwealth. The Commonwealth gives political parties the option of a state-run primary, at significant expense to the Commonwealth and its localities. *See* Va. Code § 24.2-545(F); Ex. D-2 (Cortés Declaration)

⁶ *See King v. Empire Collieries Co.*, 148 Va. 585, 590, 139 S.E. 478, 479 (1927) (unless the legislature makes an exception, "ignorance of the law is no excuse, and everyone is conclusively presumed to know the law," and a litigant "is estopped from denying such knowledge"); *accord United States v. Moore*, 586 F.2d 1029, 1033 (4th Cir. 1978) ("The rule that 'ignorance of the law will not excuse' ... is deep in our law.") (quoting *Lambert v. California*, 355 U.S. 225, 228 (1947)).

⁷ This section includes issue 2 in the Court's June 28 Order (Docket # 15).

¶¶ 8-10 (the March 1, 2016 Republican and Democratic presidential primaries together cost the Commonwealth and its localities \$5.7 million). There are 133 localities in Virginia, each of which has a General Registrar, an Electoral Board, and many officers of election volunteering at polling places, all of whom work to protect the integrity of the electoral process and make the primary a fair and meaningful event. *See* Ex. D-2 (Cortés Declaration) ¶¶ 4-7. The Commonwealth does not spend millions of dollars and expend numerous hours of public officials' time for the purpose of mere public opinion polls; the Commonwealth spends millions of dollars and expends numerous hours of public officials' time for the purpose of holding meaningful primary elections. By requesting a remedy that would allow all Republican delegates to disregard the primary vote and "vote their conscience," Plaintiff seeks to render the Commonwealth's financial and administrative investment a waste and deprive the Commonwealth of the consideration for the Commonwealth's expenditure of resources in holding the primary. The Commonwealth gives political parties the option of a state-run primary and has a legitimate governmental interest in ensuring the fairness and effectiveness of that process. *See N.Y. State Bd. of Elections v. Lopez-Torres*, 552 U.S. 196, 202-03 (2008) (a party has First Amendment rights in its membership and candidate selection processes, but where the State gives the party a role in the election process, "the State acquires a legitimate governmental interest in ensuring the fairness of the party's nominating process, enabling it to prescribe what that process must be.").

Delaying this lawsuit until after the March 1, 2016 Republican presidential primary also causes great prejudice to the public – specifically, the more than one million Virginia voters who participated in that primary. *See* Ex. D-2 (Cortés Decl.) ¶ 11 & Ex. A (2016 March Republican Presidential Primary Official Results, showing 1,025,452 votes cast). Granting the requested

preliminary injunction would retroactively change the rules for the election so as to discount the participation of all of the voters who voted in the Republican presidential primary. The public has a “strong interest in exercising the ‘fundamental political right’ to vote.” *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (*per curiam*) (citation omitted). And the Commonwealth “indisputably has a compelling interest in preserving the integrity of its election process” because “[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy.” *Id.* Often, as in *Purcell*, courts refrain from changing the rules for an election shortly before the election because of the *potential* to confuse voters and cause them to feel disenfranchised. Here, the problem is *actual*, not potential – if Correll succeeds, more than one million Virginians will have their votes tossed out after the fact. There is no greater way to undermine the integrity of the electoral process and to destroy voter confidence than to cancel more than a million votes because one person – who knew the applicable state law, who expressly agreed that his vote would be bound pursuant to the party rules, and who knew the primary results at the time he stood for election as delegate – decided at the last minute that he believes the candidate who received the most votes is “unfit” and that he “will not vote” for that candidate. *See* 1st Am. Compl., Docket # 20, ¶ 21.

II. Injunctive relief should be denied because Correll has failed to show standing.

Article III of the United States Constitution “limits the jurisdiction of federal courts to ‘Cases’ and ‘Controversies.’” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559 (1992). To successfully demonstrate standing, Plaintiff must show that:

“(1) [the party] has suffered an ‘injury in fact’ that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.”

Bishop v. Bartlett, 575 F.3d 419, 423 (4th Cir. 2009) (quoting *Friends of the Earth, Inc. v.*

Laidlaw Env'tl. Servs., Inc., 528 U.S. 167, 180-81 (2000)).

There is also a prudential standing component, and when assessing this prudential component, “courts generally recognize three self-imposed constraints”:

First, “when the asserted harm is ‘a generalized grievance’ shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction.” Second, “the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.” Third, “a plaintiff’s grievance must arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit.”

Bishop, 575 F.3d at 423 (internal citations omitted).

Correll has not shown that he (or any other delegate) has suffered an injury in fact, that the alleged injury is traceable to the Defendants’ challenged actions, that a favorable decision against the Defendants would redress his alleged injury, or that he has standing to assert whatever rights or claims the national or state Republican party might be able to assert. Accordingly, Correll cannot demonstrate standing.

A. Correll has failed to show the requisite injury, and the purported injury is not traceable to the actions of the Defendants.

1. The inability to vote his conscience

The most frequently mentioned, purported injury in the Complaint is that Correll and other delegates have been denied the “freedom to vote their conscience.” *See, e.g.*, 1st Am. Compl., Docket # 20, ¶¶ 45, 52. That is not a legally cognizable injury, given that the national and state Republican parties have bound Correll and other Republican delegates. *See infra* pp. 20-24. The purported injury is also speculative – an injury that may be caused by upcoming decisions related to the Republican National Convention. *See* 1st Am. Compl., Docket # 20, ¶ 23 (“The rules governing voting at the Republican National Convention will not be set in their final form until shortly before the first ballot.”). Correll also fails to acknowledge that it was not the

Defendants, but rather the party's choices with respect to delegate selection and allocation, that bound his vote. *See infra* pp. 20-24.⁸

2. Criminal prosecution⁹

Correll claims the impending injury that he may face criminal prosecution under Virginia Code § 24.2-1017 if he does not vote for Donald Trump on the first ballot.¹⁰ In a pre-enforcement challenge like this one, a case and controversy that is ripe for adjudication exists, and Correll has adequately alleged an injury, only if there is a “credible threat of prosecution.” *Holder v. Humanitarian Law Project*, 561 U.S. 1, 15 (2010) (citation omitted); *accord N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 710 (4th Cir. 1999). Correll has failed to show a credible threat.

First, Correll does not even speculate that the State Board of Elections or the Commissioner will take prosecutorial action if he does not vote as bound under Virginia Code § 24.2-545(D). Nor can he; neither the State Board nor the Commissioner are authorized to pursue criminal prosecutions in the electoral context. *See* Va. Code §§ 24.2-103, -104, -1019.

⁸ The Court asked the parties to address the proposition that a delegate is entitled to vote his conscience at a national convention. *See* Docket # 15 at PageID# 83 (issue 6). If party rules do not give delegates the right to vote their conscience, that proposition is inconsistent with the well-established right of a voluntary association, such as the RPV, to adopt rules, which are construed and enforced by courts as a contract between the members. *See infra* note 15. With respect to whether the ability to vote as permitted by party rules is a First Amendment right (Docket # 15 at PageID# 82), the Commonwealth's position is that a party's ability to establish and enforce party rules is part of the First Amendment right to associate. But associational rights do not always take precedence over state law. *See infra* note 11. The *Anderson-Burdick* test is used to adjudicate where state law burdens constitutional rights, including the right to associate.

⁹ This section addresses issues 1, 4, & 5 in the Court's June 28 Order (Docket # 15).

¹⁰ Correll's case presupposes, without factual basis, that there will be material changes to the party delegate binding rules for the Republican National Convention and that those changes will conflict with Virginia Code § 24.2-545(D). Correll acknowledges that advocates for adding a “Conscience Clause” do not yet have the votes. *See* Correll Decl., Docket # 17-6, ¶ 24. The Court should not intervene in the Convention's affairs at this late date by granting the requested injunctive relief. *See O'Brien v. Brown*, 409 U.S. 1, 4 (1972) (per curiam).

Second, although the Attorney General and Commonwealth's Attorney Abrams are authorized to investigate and prosecute violations of election law (*see* Va. Code §§ 24.2-104 & -1019), Correll has not shown that the Attorney General or Commonwealth's Attorney would have jurisdiction.

The unlawful act at issue – the “crime” – alleged by Correll is his vote for someone other than Donald Trump at the Republican National Convention, in violation of Virginia Code §24.2-545(D). Correll and other delegates will cast their vote in Cleveland, Ohio. *See* 1st Am. Compl., Docket # 20, ¶ 32.

The traditional view of criminal jurisdiction in Virginia requires that the crime occur within the Commonwealth. Virginia Code § 19.2-239 defines the jurisdiction of the circuit courts of Virginia in criminal cases and provides that “[t]he circuit courts, except where otherwise provided, shall have exclusive original jurisdiction for the trial of all presentments, indictments and informations for offenses committed *within their respective circuits*”. *See also Farewell v. Commonwealth*, 167 Va. 475, 479, 189 S.E. 321, 323 (1937) (“[The crime] must take place within this State to give our courts jurisdiction. . . . Every crime to be punished in Virginia must be committed in Virginia.”) (emphasis added); *Curtis v. Commonwealth*, 13 Va. App. 622, 629, 414 S.E.2d 421, 425 (1992) (stating that, generally, charges may be tried only in the circuit courts having territorial jurisdiction over the locations in which the crimes occurred and in which venue is laid). In recent years, faced with border-crossing matters such as Internet crime and international child custody disputes, Virginia courts have established room “to prosecute an offense not fully executed in Virginia but resulting in immediate harm within the Commonwealth.” *Foster-Zahid v. Commonwealth*, 23 Va. App. 430, 440, 477 S.E.2d 759, 764 (Va. App. 1996). In such cases where actual physical presence is unnecessary, Virginia still

must be the place where evil results. *See id.* at 440-441, 477 S.E.2d at 764 (discussing cases).

In this case, so long as the delegates are bound pursuant to the National Republican Rules and the RPV's decision, no evil results in the Commonwealth. The Virginia Code recognizes that the State's investment in conducting a primary, the voters investment in voting, and the State's interest in protecting the meaning and integrity of the presidential primary electoral process are all respected so long as the delegates are bound either proportionally or winner-take-all. Virginia Code § 24.2-545(D) acknowledges this point by providing an option for political parties to choose either proportional or winner-take-all delegate binding. The Commonwealth has not located any record of Virginia Code § 24.2-545(D) being interpreted and applied against a party or a delegate in recent elections. This accords with the Commonwealth's consistent approach to respect the parties' decision-making and constitutional rights.¹¹ The Office of the

¹¹ The parties' rights are not unlimited. *See, e.g., N.Y. State Bd. of Elections v. Lopez-Torres*, 552 U.S. 196, 202-03 (2008) (a party has First Amendment rights in its membership and candidate selection processes, but where the State gives the party a role in the election process, "the State acquires a legitimate governmental interest in ensuring the fairness of the party's nominating process, enabling it to prescribe what that process must be"). But Virginia's General Assembly has long demonstrated a respect for political parties' rights. In 1985, through Senate Joint Resolution No. 92, Virginia's Senate and House of Delegates established a joint legislative subcommittee to review and evaluate proposed revisions to election laws "to assure that changes made accomplish the primary goals of full citizen participation and continued public confidence in the electoral process..." 1985 Va. Acts at 1647-48 (attached as Ex. D-3). The Subcommittee's 1987 report, which proposed that Virginia adopt a non-binding presidential preference primary in place of party caucuses, discusses the state interest in avoiding encroaching on parties' delegate selection processes unnecessarily. *See* REPORT OF THE JOINT SUBCOMMITTEE STUDYING CERTAIN REVISIONS IN ELECTION LAWS (1987), available at [http://leg2.state.va.us/dls/h&sdocs.nsf/By+Year/SD201987/\\$file/SD20_1987.pdf](http://leg2.state.va.us/dls/h&sdocs.nsf/By+Year/SD201987/$file/SD20_1987.pdf) (attached as Ex. D-5). (The Court may take judicial notice of such Virginia public records. *See Philips v. Pitt Cty. Mem. Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009); *Hall v. Virginia*, 385 F.3d 421, 424 n.3 (4th Cir. 2004)). In 1987, political parties were not permitted by Virginia law to hold closed presidential primary elections. The subcommittee report therefore concluded that *Democratic Party of the U.S. v. Wisconsin*, 450 U.S. 107 (1981), required a non-binding delegate selection process. *Id.* at 6. But with the adoption of Virginia Code § 24.2-545 in 1999, the General Assembly simultaneously authorized political parties to hold a closed presidential primary election and to bind delegates to parties' national conventions for the first ballot. The measured
(footnote continued on next page)

Attorney General and Commonwealth's Attorney Abrams agree that there would be serious difficulties in prosecuting a delegate pursuant to Virginia Code §§ 24.2-545(D) & -1017. *See* Ex. D-1 (Abrams Decl.) ¶ 11. Indeed, Abrams has declared that “in the exercise of my prosecutorial discretion as provided by Virginia law, I do not intend to prosecute Mr. Correll or any other Republican delegate for their conduct at the 2016 Republican National convention in Ohio.” *Id.*

3. Potential civil litigation by Donald Trump

Correll alleges that “Donald Trump is known to be litigious” and mentions unspecified “news reports” that Trump has been “involved in at least 3,500 legal actions.” *See* 1st Am. Compl., Docket # 20, ¶ 31. Based on those allegations, Correll expresses concern that voting against Trump at the convention may subject him to retaliatory litigation by Trump or his associates. *Id.*

The Fourth Circuit has held that a party candidate, like any other party member, is bound by the rules of the party whose nomination he seeks. *See 24th Senatorial Dist. Republican Comm. v. Alcorn*, 820 F.3d 624, 2016 U.S. App. LEXIS 7028 at 12, 19 (4th Cir. Va. Apr. 19, 2016) (quoting *Gottlieb v. Economy Stores, Inc.*, 199 Va. 848, 856, 102 S.E.2d 345, 351 (Va. 1958)). Accordingly, the Commonwealth does not see any basis for Donald Trump to sue Correll or other Republican delegates who adhere to the party rules, but the Commonwealth has no interest in any such intra-party dispute that may arise. Regardless, speculation that a private person may bring litigation falls far short of the clear showing of actual or imminent injury and of irreparable harm that are required for an injunction.

consideration included in the subcommittee report, as well as the subsequent statutory modification in line with the report's conclusions, further shows that Virginia Code § 24.2-545 respects parties' associational rights.

B. The Republican Party's choices are responsible for Republican delegates being bound, so the causation and redressability elements of standing are absent.

Both the National Republican Rules and a determination of the State Central Committee of the RPV, to which Correll was required to agree to qualify for election as a delegate, bind Republican delegates on the first ballot at the 2016 Republican National Convention.

The rules of a voluntary association are contractual in nature and are construed and enforced by courts as a contract between the members. *24th Senatorial Dist. Republican Comm.*, 2016 U.S. App. LEXIS 7028 at 12, 19 (quoting *Gottlieb v. Economy Stores, Inc.*, 199 Va. 848, 856, 102 S.E.2d 345, 351 (1958)). As a member of the RPV, Correll is bound by its rules and the decisions of its leaders pursuant to those rules. *See id.* Where the injury asserted by a member of a political party is caused by the party's voluntary choice, the injury is not traceable to the State and cannot be redressed by a ruling against the State; accordingly, the litigant lacks standing, so the court lacks subject matter jurisdiction. *See id.* at 10-12; *Marshall v. Meadows*, 105 F.3d 904, 906-07 (4th Cir. 1997).

The Rules of the Republican Party expressly require that delegates be bound in cases such as this one, and they also allow state law to bind delegates. Rule 16(a)(1) provides:

Any statewide presidential preference vote that permits a choice among candidates for the Republican nomination for President of the United States in a primary, caucuses, or a state convention must be used to allocate and bind the state's delegation to the national convention in either a proportional or winner-take-all manner, except for delegates and alternate delegates who appear on a ballot in a statewide election and are elected directly by primary voters.

National Republican Rules, Docket # 17-3, at PageID# 178. At the Republican Party of Virginia's request, the Commonwealth conducted a statewide presidential primary on March 1, 2016. Over 1 million Virginians voted in that Republican primary, and Donald Trump finished

in first place with 34.8% of the vote.¹² According to Rule 16(a)(1) of the National Republican Rules, those primary results “must be used to allocate and bind the state’s delegation to the national convention in either a proportional or winner-take-all manner.” *Id.*

Rule 16 of the National Republican Rules also permits state law to bind the delegates to the primary results. Rule 16(b) (Order of Precedence) provides as follows:

Delegates at large and their alternate delegates and delegates from Congressional districts and their alternate delegates to the national convention shall be elected, selected, allocated, or bound in the following manner:

- (1) In accordance with any applicable Republican Party rules of a state, insofar as the same are not inconsistent with these rules; or
- (2) To the extent not provided for in the applicable Republican Party rules of a state, in accordance with any applicable laws of a state, insofar as the same are not inconsistent with these rules; or
- (3) By a combination of the methods set forth in paragraphs (b)(1) or (b)(2) of this rule; or
- (4) To the extent not provided by state law or party rules, as set forth in paragraph (e) of this rule.

National Republican Rules, Docket # 17-3, at PageID# 178. Here, there is no inconsistency between state law and the RPV’s rules because the RPV chose not to address in its rules how to bind delegates. Thus, state law and the RPV’s choices combine, under Rule 16(b)(3), to bind the delegates. Timing of the presidential primary may also play a role in the binding of delegates, under Rule 16(c)(2). *See id.*

The State Republican Rules¹³ do not expressly address allocation of delegates or the method of choosing delegates. The State Republican Rules do provide, in Article VIII § L, that

¹² *See* Ex. D-2 (Cortés Decl.) ¶ 11 & Ex. A to the Cortés Decl.

¹³ The Republican Party of Virginia’s rules are its Plan of Organization, *available at* <http://www.virginia.gov/rpv-state-party-plan/> (as amended April 29, 2016) and filed in this case as Docket # 17-1.

“Procedures concerning Conventions at which delegates and alternates to National Conventions are elected shall comply with the applicable Rules of the National Republican Party.” *See* State Republican Rules, Docket # 17-1, at PageID# 129-30.

Rather than address delegate allocation and the method of choosing delegates in the State Republican Rules, the RPV decided how to select its delegates by a vote of the State Central Committee on June 27, 2015. That vote determined that a primary would be held in which voters would vote for candidates rather than slates of delegates, that delegates would be chosen at post-primary conventions, and that those delegates would be bound on the first ballot to the results of the statewide primary. *See* Docket # 17-2 at PageID# 153 (“The Republican Party of Virginia’s State Central Committee voted on June 27, 2015 to use the March 1, 2016 Presidential Primary to allocate Delegates and Alternate Delegates to the 2016 Republican National Convention on a proportional basis.”). On September 19, 2015, the RPV State Central Committee passed a resolution acknowledging that using proportional allocation based on the primary to bind the delegates was “[i]n order to comply with the national Rules of the Republican Party.” Docket # 17-2 at PageID# 154.

The RPV gave prospective delegates, including Correll, clear warning of its decision that delegates would be bound. *See* Letter from RPV Chairman John Whitbeck (September 23, 2015) in Docket # 17-2 at PageID# 164:

The 13 At-Large Delegates and At-Large Alternate Delegates will be bound on the first ballot at the Republican National Convention based on the statewide results of the March 1, 2016 Republican Presidential Primary using proportional allocation. The Delegates and Alternate Delegates elected at the Congressional District Conventions will also be bound on the first ballot at the Republican National Convention based on the statewide results of the March 1, 2016 Republican Presidential Primary using proportional allocation.

And, in submitting himself for election as a delegate, Correll signed a “Declaration and Statement of Qualifications” which required his agreement that he “acknowledge, understand,

and agree that if elected, my vote on the first ballot for President at the Republican National Convention will be bound by the results of the March 1, 2016 Virginia Presidential Primary.” See Declaration and Statement of Qualifications, in Docket # 17-2 at PageID# 161.¹⁴ Correll’s request for an injunction to relieve him of being bound on the first ballot is foreclosed by application of the party’s rules, which are contractually binding on Correll as a matter of Virginia law¹⁵; by waiver, through Correll’s Declaration and Statement of Qualifications; and by the equitable doctrine of unclean hands, in that Correll misled the Republican Party and the Commonwealth to their detriment by agreeing that he would be bound by the primary results, then bringing this suit after the primary had taken place and he had been elected.¹⁶

Correll may attempt to preserve his lawsuit by asserting that he did not agree to forego a challenge to state law and claiming inconsistency between state law and the Republican Party rules. That is unavailing for three reasons. First, Correll has not shown that he has any standing to assert the rights of the national or state Republican Party. See *infra* p. 25-26. Second, there may not be a conflict between state law and the party rules. Because of the RPV’s choices to have a primary but not to select delegates pursuant to the primary, the third sentence of Virginia Code § 24.2-545(D) applies. The State Republican Rules do not contradict that operation of state law, and Rules 16(a)(1) & 16(b) of the National Republican Rules permit such an

¹⁴ Plaintiff and Defendants agreed, through counsel, on June 30, 2016 at 10:39 am to stipulate that Correll signed the “Declaration and Statement of Qualifications.”

¹⁵ See *24th Senatorial Dist. Republican Comm.*, 2016 U.S. App. LEXIS 7028 at 12, 19 (quoting *Gottlieb v. Economy Stores, Inc.*, 199 Va. 848, 856, 102 S.E.2d 345, 351 (1958)).

¹⁶ See *Smithfield Foods, Inc. v. United Food & Commer. Workers Int’l Union*, 593 F. Supp. 2d 840, 847 (E.D. Va. 2008) (“The well-recognized doctrine of unclean hands prevents a plaintiff from obtaining equitable relief, if the plaintiff has been ‘guilty of any inequitable or wrongful conduct with respect to the transaction or subject matter sued on.’”) (quoting *WorldCom, Inc. v. Boyne*, 68 Fed. Appx. 447, 451 (4th Cir. 2003)); accord *Cline v. Berg*, 273 Va. 142, 147, 639 S.E.2d 231, 233-234 (2007).

allocation. *See supra* at p. 20-21. Third, interpretation of the Republican rules is not a necessary task for the Court. Whether the delegates are bound winner-take-all through the interaction of state law and Republican Party rules, or whether the delegates are bound proportionally as the RPV's State Central Committee voted, the delegates are bound on the first ballot to the results of the primary. That suffices to deny injunctive relief because the delegates are bound by the voluntary choices of private actors—namely, the choices embodied in the National Republican Rules, the choices of the RPV with respect to implementing state law and the National Republican Rules, and Correll's own choice to expressly and in writing “acknowledge, understand, and agree that if elected, my vote on the first ballot ... will be bound by the results of the March 1, 2016 Virginia Presidential Primary. . .”. Docket # 17-2 at PageID# 161. Correll therefore has not shown and cannot show standing.¹⁷

¹⁷ The Court directed the parties to address whether Virginia Code § 24.2-545(D) is alleged to interfere with the ability to vote as permitted by party rules. Docket # 15 at PageID# 81 (issue 3). The Commonwealth sees no conflict between the statute and the party rules. *See supra* at 20-21. Correll's position is unclear. Correll has submitted his personal understanding of the National Republican Rules, in which he claims that a clerical correction rule (Rule 37) and a rule barring a delegation majority from claiming to speak for the entire delegation (Rule 38) somehow amount to unbinding delegates. *See* Correll Decl., Docket # 17-6, ¶¶ 19-20. That theory is inconsistent with the RPV's view in the September 19, 2015, resolution and with the language of Rule 16 of the National Republican Rules, as even Correll cannot avoid acknowledging (*see id.* ¶ 21). Correll's theory also seems inconsistent with the effort to change the rules to add a “Conscience Clause.” *See id.* ¶¶ 22-27. Correll's statement that Rule 16 “is not even among the Temporary Rules of the 2016 Convention” (*id.* ¶ 21) is misleading because it suggests the unsupported view that only some rules are actual rules, rather than acknowledge that the reference to “temporary rules” in Rule 42 (Docket # 17-3 at PageID# 188) merely denotes the section of the Rules that concerns the actual “Proceedings of National Convention” (*id.* at 19). In any event, the Court need not engage in interpretation of party rules—it is plain that the RPV has acted to bind Virginia Republican delegates pursuant to the RPV's reading of the National Republican Rules, that Correll agreed in seeking election as a delegate to bind his vote to the primary results, and therefore that Correll cannot carry his burden to show any injunctive relief is warranted.

C. Correll (and other delegates) have not shown standing to assert the rights of the RPV, the Republican National Committee, or the Republican National Convention.

Correll does not allege or argue that he has been authorized or empowered to act on behalf of the RPV, the RNC, or the 2016 Republican National Convention. Yet his requested relief asks the Court to override the RPV's choice of candidate nomination method and the National Republican Rules' requirement that delegates be bound either proportionally or winner-take-all.

While Correll's Complaint purports to speak on behalf of all delegates for the Republican national convention, he offers no evidence to demonstrate that the political parties did not freely and voluntarily select their presidential candidate nominating methods. Instead, he asks this Court to disregard the associational rights of the political parties in favor of delegates' alleged right to "vote their conscience." As discussed above, Virginia law permits political parties to nominate delegates for national conventions in various ways. Where a political party nominates delegates by primary, the political party can determine an alternate method for allocating delegates. Va. Code § 24.2-545(D). But if a party does not nominate its delegates by primary, the delegates "shall be bound to vote on the first ballot at the national convention for the candidate receiving the most votes in the primary. . . ." *Id.* With respect to the 2016 presidential primary election, the RPV chose the second alternative. Correll offers no evidence to suggest that the RPV did so in error, or that he is authorized to request on behalf of either the national or state Republican party that the Court order a modification to the delegate allocation method.

Correll cannot assert whatever rights the national or state Republican party may have with respect to delegate selection and allocation, and he has failed to show standing. *See Bishop*, 575 F.3d at 423 ("[T]he plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.") (quoting *Warth v.*

Seldin, 422 U.S. 490, 499 (1975)); accord *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 474 & n.10 (1982). With respect to any rights or relief after the 2016 Republican National Convention, Correll further lacks standing because he has not claimed or shown that he will be a delegate in the future.

D. A facial challenge to Virginia Code § 24.2-545(D) necessarily fails because the statute is constitutional where its operation is consistent with party rules.

As stated above, Correll “can only succeed in a facial challenge by ‘establish[ing] that no set of circumstances exists under which the Act would be valid,’ *i.e.*, that the law is unconstitutional in all of its applications.” *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). If a statute is constitutional in “at least some” circumstances, that is “fatal” to a facial challenge. *Id.* at 457 (internal quotation marks omitted).

Virginia Code § 24.2-545(D) is constitutional where its operation is consistent with party rules, as it is in this case. Plaintiff therefore has failed to carry his burden to show that his lawsuit is likely to succeed on the merits.

III. The Court need not reach the constitutional merits, but if it is necessary to do so, then the Plaintiff cannot succeed on the merits.

The Plaintiff has failed to demonstrate that the challenged statutory provision imposes a burden on his associational rights, much less that this burden qualifies as severe under the *Anderson/Burdick* test. As a basis for his assertion that Virginia Code § 24.2-545(D) suffers a constitutional defect, Correll relies on *Democratic Party of the United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981) and *Cousins v. Wigoda*, 419 U.S. 477 (1975). Correll’s reliance on those cases is misplaced. Correll inaccurately casts Virginia Code § 24.2-545(D) as a means by which the Commonwealth unilaterally binds political parties’ delegates, and from which political parties have no relief. To the contrary, Section 24.2-545(D) provides parties with

almost unlimited latitude in determining the method by which their delegates will be allocated.

In both *Cousins* and *Wisconsin*, a political party or its delegates challenged state laws which imposed a single method of delegate selection or allocation on political parties. In the present case, Virginia law gives parties the choice of possible delegate and candidate nomination methods, and also grants political parties the option to determine the allocation of their delegates. Va. Code § 24.2-545(D).¹⁸ As a result, Virginia’s political parties are not subject to the type of rigid statutory limitations on delegate selection methods that the *Cousins* and *Wisconsin* courts concluded violate parties’ associational rights. Instead, a Virginian political party could hold a closed primary to select its delegates for its national convention, and establish the alternative delegate allocation method of its choosing.

While political parties undoubtedly hold constitutionally protected associational rights, states retain a constitutional right to regulate the conduct of elections. *E.g.*, *N.Y. State Bd. of Elections v. Lopez-Torres*, 552 U.S. 196, 202-03 (2008); *Storer v. Brown*, 415 U.S. 724, 730 (1974). And *Anderson/Burdick* recognizes that burdens on constitutional rights may be justified in the election context by “relevant and legitimate state interests” that are “sufficiently weighty.” *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 191 (2008) (citation omitted).

In this case, the Commonwealth has chosen to provide parties with a wide range of permitted methods for nominating delegates for national conventions. Where a political party chooses a state-run presidential primary election, and selects a candidate through that state-run primary election, the Commonwealth binds the political party’s delegates to the prevailing presidential candidate for the national convention’s first ballot. This is hardly an unreasonable

¹⁸ Virginia law also permits political parties to impose limitations on participation in the party’s presidential primary election. Va. Code § 24.2-545(A). Accordingly, Virginia’s political parties are the masters of their own fate with respect to candidate and delegate selection methods.

burden to impose on political parties in this limited circumstance, and it is narrowly tailored to achieve the State's interest. Virginia has an interest in ensuring that, where a political party selects a state-funded primary election, thereby necessitating the expenditure of significant state and local funds and administrative effort to coordinate a statewide election, and by this choice intimates that the Virginia's voters will determine the state party's candidate, the political party (or one of its members) does not subsequently cancel out this effort. Virginia achieves that interest in a narrow way – by binding the delegates (on the first ballot only) to the result of the primary that the party chose. That is a limited burden, not a severe one, and it is a far less significant burden than those imposed by the state laws in *Wisconsin* and *Cousins*. Were a political party able to reconsider its nomination selection after the fact, the primary election day would be little more than the first Tuesday in March.

Virginia does not unilaterally bind a political party's delegates, or impose a required process for their selection. Instead, Virginia law offers political parties a range of options, and imposes a limited burden on parties' associational rights only where the party avails itself of a state-run presidential primary. Where a political party voluntarily pursues this statewide election, the Commonwealth's imposition of limits to ensure that the requisite state and local administrative effort is not later nullified hardly constitutes a severe burden on a political party's associational rights. Instead, this law qualifies as a "reasonable, nondiscriminatory restriction[]" that is justified by legitimate and important and "important regulatory interests." *Clingman v. Beaver*, 544 U.S. 581, 586-87 (2005).

CONCLUSION

The Court should deny preliminary injunctive relief based on laches and because Plaintiff has failed to make a clear showing of each of the four factors required for a preliminary

the Commissioner of Elections.

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202 North 9th Street
Richmond, Virginia 23219
Telephone: (804) 692-0558
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CERTIFICATE OF SERVICE

I certify that, on July 1, 2016, I am electronically filing the foregoing document with the Clerk of Court using the CM/ECF system, which will serve such filing on counsel of record:

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/s/

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

CARROLL BOSTON CORRELL, JR.,)	
on behalf of himself and others)	
	Plaintiff,	
v.)	Case No. 3:16-cv-00467
)	
MARK R. HERRING, et al.)	
	Defendants.	

DECLARATION OF MARC ABRAMS

Pursuant to 28 U.S.C. § 1746, I, Marc Abrams, declare as follows:

1. I am over the age of 18, competent to offer testimony, and have personal knowledge of the facts in this Declaration.

2. I am the Commonwealth’s Attorney for the City of Winchester. A Commonwealth’s Attorney is an elected, local constitutional officer. *See* Va. Const. art. VII § 4 (“There shall be elected by the qualified voters of each county and city . . . an attorney for the Commonwealth. . .”).

3. I was elected Commonwealth’s Attorney in November 2015. I ran as an Independent and defeated the one other candidate, Carroll Boston Correll, Jr., the Plaintiff in this action. At the time of the November 2015 election, I was serving as Acting Commonwealth’s Attorney, a position to which I was appointed when the prior Commonwealth’s Attorney, Alex Iden, became a circuit court judge earlier in 2015. My election was for the remaining two years of Mr. Iden’s term; the next time I will stand for election will be in November 2017.

4. Over a period of 27 years prior to 2015, I had served as Assistant Commonwealth’s Attorney and Deputy Commonwealth’s Attorney, under two Commonwealth’s Attorneys, one Democrat and one Republican. My focus has always been on doing the people’s

work, not politics. In 2015, I was honored to receive the Warren Von Schuch Award from the Commonwealth's Attorney Services Counsel, after having been nominated for the award by three different Commonwealth's Attorneys. The award is based on years of service, contribution to the legal community and service to the community at large, and the award has been called the highest honor given to a non-elected prosecutor in Virginia.

5. A Commonwealth's Attorney is part of the law enforcement department in his or her jurisdiction. Virginia law charges Commonwealth's Attorneys with prosecuting felonies and gives them discretion with regard to misdemeanors and other offenses. *See Va. Code*

§ 15.2-1627:

The attorney for the Commonwealth and assistant attorney for the Commonwealth shall be a part of the department of law enforcement of the county or city in which he is elected or appointed, and shall have the duties and powers imposed upon him by general law, including the duty of prosecuting all warrants, indictments or informations charging a felony, and he may in his discretion, prosecute Class 1, 2 and 3 misdemeanors, or any other violation, the conviction of which carries a penalty of confinement in jail, or a fine of \$500 or more, or both such confinement and fine. . . .

6. On June 2, 2016, I received a request from Mr. Correll seeking a legal opinion regarding whether a vote on the first ballot at the National Convention against the candidate receiving the most votes in the most recent Virginia Republican presidential primary would be in violation of Virginia Code § 24.2-545(D). A true and correct copy of Mr. Correll's request is attached as Exhibit A.

7. Virginia Code § 24.2-545(D) is not itself a criminal statute, but Virginia Code § 24.2-1017 provides that "Any conduct made unlawful by this title, for which no punishment has been otherwise provided, shall be a Class 1 misdemeanor."

8. Commonwealth's Attorneys are not charged by law with providing advisory opinions to the public on whether certain behavior would constitute a criminal offense, and in my

experience, it has not been the general practice in the Winchester Commonwealth's Attorneys Office for prosecutors to provide such opinions.

9. On June 8, 2016, I responded to Mr. Correll's request. A true and correct copy of my response is attached as Exhibit B.

10. I am not aware of any instance in which the State Board of Elections, the Virginia Department of Elections, or any Virginia prosecutor has brought a criminal action or otherwise taken action to enforce Virginia Code § 24.2-545(D) against a political party or against any individual delegate to a political party's national convention.

11. Given that [i] Mr. Correll was elected a delegate outside Winchester, Virginia, [ii] the voting of Republican delegates will occur outside Winchester, Virginia (at the 2016 Republican National Convention in Cleveland, Ohio), and [iii] any "harm" that might be considered to occur related to how delegates vote would occur at the Convention in Cleveland, Ohio, I do not believe that my office has jurisdiction to prosecute an individual delegate if they do not vote for the candidate who received the most votes in the March 1, 2016 Republican presidential primary. Moreover, in the exercise of my prosecutorial discretion as provided by Virginia law, I do not intend to prosecute Mr. Correll or any other Republican delegate for their conduct at the 2016 Republican National Convention in Ohio.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on:

6/30/2016



Marc Abrams

From: beau@correllfirm.com [<mailto:beau@correllfirm.com>]

Sent: Thursday, June 02, 2016 12:16 PM

To: mabrams@ca.winchesterva.com

Subject: Request for Legal Opinion

Mr. Marc Abrams
Commonwealth's Attorney, City of Winchester
24 Rouss Avenue, Suite 200
Winchester, VA 22601

June 2, 2016

RE: REQUEST FOR LEGAL OPINION

Dear Marc,

I hope this letter finds you well. The Department of Elections suggested I reach out to you regarding a legal opinion on an election law statute.

I was elected to be a National Delegate to attend to Republican National Convention in Cleveland. (Source: <http://www.virginia.gop/virginia-national-delegates-to-the-gop-convention/>) I wish to learn whether a vote on the first ballot at the National Convention **against** the candidate receiving the most votes in the most recent Virginia Republican presidential primary would be in violation of state law.

Specifically, please confirm whether such a vote would be in violation Va. Code § 24.2-545(D), "...delegates and alternates shall be bound to vote on the first ballot at the national convention for the candidate receiving the most votes in the primary unless that candidate releases those delegates and alternates from such vote." Specifically, I am requesting whether such action is in violation of state law rather than party rules as they exist at the time of the convention.

Also, please inform me whether there are penalties, if any. For example, would such an act be a Class 1 misdemeanor as provided under Va. Code § 24.2-1017 (Penalties when not specifically provided elsewhere) or subject a delegate to criminal penalties under another section of the Code?

Thank you for your attention in this matter.

Respectfully,

Carroll "Beau" Correll, Jr.
CORRELL LAW FIRM, PLC

Ex. A to Abrams Decl.



CITY OF WINCHESTER
OFFICE OF THE COMMONWEALTH'S ATTORNEY
24 ROUSS AVE. SUITE 200, WINCHESTER, VA 22601
(540) 722-7940 FAX: (540) 665-9087

DEREK C. ASTON
Senior Asst. Commonwealth's Attorney
HEATHER D. HOVERMALE
Assistant Commonwealth's Attorney
VIRGINIA L. VILE
Assistant Commonwealth's Attorney

MARC H. ABRAMS
Commonwealth's Attorney

MATTHEW J. OCCHUZZO
Assistant Commonwealth's Attorney
KEITH R. BUZZY
Assistant Commonwealth's Attorney

June 8, 2016

Carroll "Beau" Correll, Jr., Esquire
Correll Law Firm, PLC
10 W. Boscawen St. #26
Winchester VA 22601
email: beau@correllfirm.com
540-535-2005

Dear Beau:

I'm writing in response to your email dated June 2, 2016 and entitled "REQUEST FOR LEGAL OPINION".

My office generally does not respond to requests for legal opinions about potentially criminal conduct which we may or may not prosecute subject to a few exceptions, including but not be limited to a few statutorily defined exceptions such as "conflict of interest opinions". However, as you are aware the first rule of statutory construction dictates that we are to interpret words of a statute using the ordinary meaning of the language in the statute. The plain meaning of the statute you cite, Va. Code. §24.2-545(D) would appear clear.

I refer you to consult private counsel for an opinion as to issues such as jurisdiction, venue, potential penalties, etc.

Sincerely,

A handwritten signature in black ink, appearing to read "Marc H. Abrams".

Marc H. Abrams,
Commonwealth's Attorney

Ex. B to Abrams Decl.

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

CARROLL BOSTON CORRELL, JR.,)	
on behalf of himself and others)	
	Plaintiff,	
v.)	Case No. 3:16-cv-00467
)	
MARK R. HERRING, et al.)	
	Defendants.	

DECLARATION OF EDGARDO CORTÉS

Pursuant to 28 U.S.C. § 1746, I, Edgardo Cortés, declare as follows:

1. I am over the age of 18, competent to offer testimony, and have personal knowledge of the facts in this Declaration.

2. I am the Commissioner of Elections for the Commonwealth of Virginia. I have been the Commissioner since July 1, 2014. The Commissioner is the chief state election official of the Commonwealth and serves as the agency head of the Virginia Department of Elections (the Department). Va. Code § 24.2-102. The Department employs the Commonwealth’s elections staff and is charged with carrying out the duties imposed by the State Board of Elections.

3. Prior to becoming Commissioner of Elections, I was General Registrar of Fairfax County from August 2009 to August 2011. I also formerly worked for the United States Election Assistance Commission, overseeing implementation of the National Voter Registration Act.

4. When a political party elects to hold a presidential primary election pursuant to Va. Code § 24.2-545(A), the State Board of Elections and the Department coordinate statewide administration of presidential primary elections.

5. General registrars in each of Virginia's 133 localities coordinate local administration of elections, including presidential primary elections.
6. Significant staff time, at both the state and local level, is also required. Local general registrars' offices must prepare ballots and voting equipment, train officers of election to staff each locality's polling places, and overseeing the voting process on Election Day.
7. The Department's personnel must review the ballots designed by each local general registrar's office, and provide guidance to local officials both prior to, on, and after Election Day.
8. The administration of a presidential primary election requires the expenditure of state and local funds.
9. The costs of presidential primary elections are shared by the Commonwealth and localities.
10. Virginia localities report their expenses to the Department in order to receive reimbursement from the Commonwealth. The total expenses to Virginia's localities for the 2016 dual-party presidential primary election, totaled \$5.7 million, a 76% increase from 2012. Based on available funds, by June 30, 2016, the Commonwealth will have reimbursed localities for 61% of those expenses. The remaining 39% of the expenses will be borne by the localities.
11. Attached as Exhibit A is a true and correct printout of the Department webpage that shows the official results of the March 1, 2016 Republican presidential primary in Virginia. The address of the webpage is <http://results.elections.virginia.gov/vaelections/2016%20March%20Republican%20Presidential%20Primary/Site/Presidential.html> . As shown, there were 1,025,452 votes cast in the 2016 Republican presidential primary in Virginia.

12. I am not aware of any instance in which the State Board of Elections, the Department, or any Virginia prosecutor has brought a criminal action or otherwise taken action to enforce Virginia Code § 24.2-545(D) against a political party or against any individual delegate to a political party's national convention.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: 6/30/16


Edgardo Cortés

00493418

Washington Building First Floor
 1100 Bank Street,
 Richmond, VA 23219
 Phone (804) 864-8901
 Toll Free (800) 552-9745
 Fax (804) 371-0194
 Email: info@elections.virginia.gov



★ VIRGINIA ★
 DEPARTMENT *of* ELECTIONS

2016 March Republican Presidential Primary

Official Results

[Virginia Department of Elections](#) > [Election Results](#) > [2016 March Republican Presidential Primary](#)

President

Candidate	Votes	Percent
Marco Rubio Republican	327,918	31.98%
Lindsey Graham (Withdrawn) Republican	444	0.04%
Ben Carson Republican	60,228	5.87%
Rand Paul Republican	2,917	0.28%
Mike Huckabee Republican	1,458	0.14%
Ted Cruz Republican	171,150	16.69%
Donald Trump Republican	356,840	34.80%
Jim Gilmore Republican	653	0.06%

Ex. A to Cortes Decl.

Chris Christie (Withdrawn) Republican	1,102	0.11%
Jeb Bush Republican	3,645	0.36%
Rick Santorum (Withdrawn) Republican	399	0.04%
John Kasich Republican	97,784	9.54%
Carly Fiorina (Withdrawn) Republican	914	0.09%

President (CD - 01)

Candidate	Votes	Percent
Marco Rubio Republican	36,536	31.76%
Lindsey Graham (Withdrawn) Republican	51	0.04%
Ben Carson Republican	7,369	6.41%
Rand Paul Republican	313	0.27%
Mike Huckabee Republican	182	0.16%
Ted Cruz Republican	17,949	15.60%
Donald Trump Republican	40,904	35.56%
Jim Gilmore Republican	70	0.06%
Chris Christie (Withdrawn) Republican	138	0.12%

Jeb Bush Republican	445	0.39%
Rick Santorum (Withdrawn) Republican	44	0.04%
John Kasich Republican	10,926	9.50%
Carly Fiorina (Withdrawn) Republican	107	0.09%

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President (CD - 02)

Candidate	Votes	Percent
Marco Rubio Republican	27,395	32.06%
Lindsey Graham (Withdrawn) Republican	32	0.04%
Ben Carson Republican	5,276	6.17%
Rand Paul Republican	293	0.34%
Mike Huckabee Republican	128	0.15%
Ted Cruz Republican	10,524	12.32%
Donald Trump Republican	34,025	39.82%
Jim Gilmore Republican	44	0.05%
Chris Christie (Withdrawn) Republican	92	0.11%
Jeb Bush Republican	297	0.35%

Rick Santorum (Withdrawn) Republican	35	0.04%
John Kasich Republican	7,240	8.47%
Carly Fiorina (Withdrawn) Republican	67	0.08%

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President (CD - 03)

Candidate	Votes	Percent
Marco Rubio Republican	11,198	31.59%
Lindsey Graham (Withdrawn) Republican	29	0.08%
Ben Carson Republican	2,502	7.06%
Rand Paul Republican	174	0.49%
Mike Huckabee Republican	52	0.15%
Ted Cruz Republican	5,306	14.97%
Donald Trump Republican	13,185	37.19%
Jim Gilmore Republican	38	0.11%
Chris Christie (Withdrawn) Republican	47	0.13%
Jeb Bush Republican	152	0.43%
Rick Santorum (Withdrawn) Republican	22	0.06%

John Kasich Republican	2,700	7.62%
Carly Fiorina (Withdrawn) Republican	47	0.13%

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President (CD - 04)

Candidate	Votes	Percent
Marco Rubio Republican	27,228	28.77%
Lindsey Graham (Withdrawn) Republican	36	0.04%
Ben Carson Republican	6,277	6.63%
Rand Paul Republican	230	0.24%
Mike Huckabee Republican	126	0.13%
Ted Cruz Republican	16,050	16.96%
Donald Trump Republican	39,241	41.47%
Jim Gilmore Republican	81	0.09%
Chris Christie (Withdrawn) Republican	89	0.09%
Jeb Bush Republican	250	0.26%
Rick Santorum (Withdrawn) Republican	19	0.02%
John Kasich Republican	4,938	5.22%

Carly Fiorina (Withdrawn) Republican	59	0.06%
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President (CD - 05)

Candidate	Votes	Percent
Marco Rubio Republican	24,276	24.86%
Lindsey Graham (Withdrawn) Republican	29	0.03%
Ben Carson Republican	7,153	7.33%
Rand Paul Republican	258	0.26%
Mike Huckabee Republican	147	0.15%
Ted Cruz Republican	19,660	20.14%
Donald Trump Republican	38,377	39.31%
Jim Gilmore Republican	51	0.05%
Chris Christie (Withdrawn) Republican	89	0.09%
Jeb Bush Republican	308	0.32%
Rick Santorum (Withdrawn) Republican	43	0.04%
John Kasich Republican	7,174	7.35%
Carly Fiorina (Withdrawn)	68	0.07%

Republican		
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President (CD - 06)

Candidate	Votes	Percent
Marco Rubio Republican	28,341	27.02%
Lindsey Graham (Withdrawn) Republican	49	0.05%
Ben Carson Republican	8,348	7.96%
Rand Paul Republican	307	0.29%
Mike Huckabee Republican	201	0.19%
Ted Cruz Republican	24,236	23.11%
Donald Trump Republican	35,849	34.18%
Jim Gilmore Republican	54	0.05%
Chris Christie (Withdrawn) Republican	118	0.11%
Jeb Bush Republican	328	0.31%
Rick Santorum (Withdrawn) Republican	45	0.04%
John Kasich Republican	6,932	6.61%
Carly Fiorina (Withdrawn) Republican	70	0.07%

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President (CD - 07)

Candidate	Votes	Percent
Marco Rubio Republican	48,212	35.17%
Lindsey Graham (Withdrawn) Republican	36	0.03%
Ben Carson Republican	7,063	5.15%
Rand Paul Republican	342	0.25%
Mike Huckabee Republican	147	0.11%
Ted Cruz Republican	24,509	17.88%
Donald Trump Republican	43,936	32.05%
Jim Gilmore Republican	119	0.09%
Chris Christie (Withdrawn) Republican	155	0.11%
Jeb Bush Republican	380	0.28%
Rick Santorum (Withdrawn) Republican	43	0.03%
John Kasich Republican	12,038	8.78%
Carly Fiorina (Withdrawn) Republican	108	0.08%

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President (CD - 08)

Candidate	Votes	Percent
Marco Rubio Republican	31,636	44.09%
Lindsey Graham (Withdrawn) Republican	55	0.08%
Ben Carson Republican	1,739	2.42%
Rand Paul Republican	223	0.31%
Mike Huckabee Republican	45	0.06%
Ted Cruz Republican	7,142	9.95%
Donald Trump Republican	15,556	21.68%
Jim Gilmore Republican	41	0.06%
Chris Christie (Withdrawn) Republican	87	0.12%
Jeb Bush Republican	416	0.58%
Rick Santorum (Withdrawn) Republican	29	0.04%
John Kasich Republican	14,694	20.48%
Carly Fiorina (Withdrawn) Republican	93	0.13%

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President (CD - 09)

Candidate	Votes	Percent
Marco Rubio Republican	17,995	21.13%
Lindsey Graham (Withdrawn) Republican	26	0.03%
Ben Carson Republican	6,157	7.23%
Rand Paul Republican	198	0.23%
Mike Huckabee Republican	223	0.26%
Ted Cruz Republican	15,896	18.66%
Donald Trump Republican	40,423	47.46%
Jim Gilmore Republican	49	0.06%
Chris Christie (Withdrawn) Republican	68	0.08%
Jeb Bush Republican	217	0.25%
Rick Santorum (Withdrawn) Republican	26	0.03%
John Kasich Republican	3,849	4.52%
Carly Fiorina (Withdrawn) Republican	44	0.05%

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President (CD - 10)

Candidate	Votes	Percent
..

Marco Rubio Republican	44,534	37.04%
Lindsey Graham (Withdrawn) Republican	55	0.05%
Ben Carson Republican	5,408	4.50%
Rand Paul Republican	323	0.27%
Mike Huckabee Republican	100	0.08%
Ted Cruz Republican	18,875	15.70%
Donald Trump Republican	35,299	29.36%
Jim Gilmore Republican	50	0.04%
Chris Christie (Withdrawn) Republican	133	0.11%
Jeb Bush Republican	458	0.38%
Rick Santorum (Withdrawn) Republican	50	0.04%
John Kasich Republican	14,821	12.33%
Carly Fiorina (Withdrawn) Republican	121	0.10%

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President (CD - 11)

Candidate	Votes	Percent
Marco Rubio Republican	30,567	39.12%

Lindsey Graham (Withdrawn) Republican	46	0.06%
Ben Carson Republican	2,936	3.76%
Rand Paul Republican	256	0.33%
Mike Huckabee Republican	107	0.14%
Ted Cruz Republican	11,003	14.08%
Donald Trump Republican	20,045	25.65%
Jim Gilmore Republican	56	0.07%
Chris Christie (Withdrawn) Republican	86	0.11%
Jeb Bush Republican	394	0.50%
Rick Santorum (Withdrawn) Republican	43	0.06%
John Kasich Republican	12,472	15.96%
Carly Fiorina (Withdrawn) Republican	130	0.17%

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Legend



Showing a summary of results.



Showing partial race results. Click for full race results.



This office has multiple contested seats.



This locality has a local contest.



This locality does not have a local contest.

ACTS
OF THE
GENERAL ASSEMBLY
OF THE
COMMONWEALTH OF VIRGINIA

1985 SESSION

which met at the State Capitol, Richmond

Convened Wednesday, January 9, 1985

Adjourned sine die Saturday, February 23, 1985

Reconvened Wednesday, April 3, 1985

Adjourned sine die Wednesday, April 3, 1985

VOLUME II

CHAPTERS 521-621
RESOLUTIONS
APPENDIX
INDEX

COMMONWEALTH OF VIRGINIA
RICHMOND
1985

Ex. D-3

A.,

1985]

ACTS OF ASSEMBLY

1647

Finance and the House Committee on Appropriations to study methods of acquiring and maintaining a technologically current inventory of higher education instructional equipment and alternatives for the equitable distribution thereof.

Agreed to by the Senate, February 4, 1985
Agreed to by the House of Delegates, February 20, 1985

WHEREAS, the effectiveness of higher education institutions is influenced greatly by faculty and student access to technologically current educational equipment; and

WHEREAS, substantial amounts of college and university educational equipment has been acquired with funds appropriated for building construction and renovation; and

WHEREAS, no systematic method has been developed to finance the replacement of unusable and obsolete equipment in the institutions of higher education; and

WHEREAS, the inadequacies of the present equipment inventory threaten the excellence of academic programs, inhibit faculty recruitment, and represent fixed asset investment of major proportions; and

WHEREAS, the tuition and fee policies adopted in 1984 and by earlier sessions of the General Assembly require significant increases in tuition and fees if the equipment deficiency were overcome by a large increase in general fund appropriations; and

WHEREAS, the nature and extent of the deficiencies vary widely among educational institutions, requiring statewide assessment and solution of the problems; now, therefore, be it

RESOLVED by the Senate, the House of Delegates concurring, That a joint subcommittee composed of members of the Senate Committee on Finance and the House Committee on Appropriations is requested to study economical, efficient, and expeditious methods of financing the orderly replacement of obsolete and unusable equipment at the Commonwealth's institutions of higher education. The joint subcommittee shall examine alternatives for ensuring that such resources are equitably distributed among the institutions to protect and advance excellence in higher education. The joint subcommittee shall be composed of ten members, five of whom shall be appointed by the Senate Committee on Privileges and Elections from the membership of the Senate Committee on Finance, and five of whom shall be appointed by the Speaker of the House from the membership of the House Committee on Appropriations.

The joint subcommittee shall complete its work and make its recommendations to the Governor and General Assembly no later than November 15, 1985.

All direct and indirect costs of this study are estimated to be \$22,045.

SENATE JOINT RESOLUTION NO. 92

Requesting the establishment of a joint subcommittee of the Senate and House Committees on Privileges and Elections to study certain revisions in the election laws.

Agreed to by the Senate, February 4, 1985
Agreed to by the House of Delegates, February 20, 1985

WHEREAS, it is the policy of this Commonwealth to assure every citizen the opportunity to register and vote and to promote citizen participation in the electoral process; and

WHEREAS, it is essential that all citizens continue to have full confidence in the integrity, impartiality, and efficiency of the Commonwealth's electoral process; and

WHEREAS, changes have been proposed to revise various features of the registration and voting provisions of the Constitution and statutory law which should be reviewed in relation to each other and to the end that revisions in the Commonwealth's election system will promote citizen participation and assure continued confidence in the electoral process; now, therefore, be it

RESOLVED by the Senate, the House of Delegates concurring, That a joint subcommittee be established (i) to review and evaluate proposals for revisions in the registration and election provisions of the Constitution and statutes to assure that changes made accomplish the primary goals of full citizen participation and continued public confidence in the electoral process, (ii) to verify that changes proposed accord with federal statutes such as the Voting Rights Act, and (iii) to consider related matters and revisions which might further these primary goals and also simplify and streamline election procedures and provisions.

The joint subcommittee shall consist of eleven members who shall be appointed in the following manner: four members from the Senate Committee on Privileges and Elections appointed by that Committee, and seven members of the House Committee on Privileges and Elections appointed by the Speaker of the House.

The joint subcommittee shall complete its work in time to submit recommendations, if any, to the 1986 Session of the General Assembly.

The direct and indirect costs of this study are estimated to be \$16,500.

SENATE JOINT RESOLUTION NO. 95

On the 150th Anniversary of the Town of Bridgewater.

Agreed to by the Senate, January 30, 1985

Agreed to by the House of Delegates, February 8, 1985

WHEREAS, the Town of Bridgewater, by an act of the General Assembly on February 7, 1835, was established as a municipal corporation of the Commonwealth; and

WHEREAS, the Town of Bridgewater has endured and prospered for 150 years and, on Thursday, February 7, 1985, officially commences a year of sesquicentennial celebration; now, therefore, be it

RESOLVED by the Senate, the House of Delegates concurring, That the Town of Bridgewater is hereby commended for its endeavor to honor its forebears, its history, and its heritage; and, be it

RESOLVED FURTHER, That the General Assembly, on behalf of the citizens of this Commonwealth, offers its best wishes for continued prosperity to the Town of Bridgewater; and, be it

RESOLVED FINALLY, That the Clerk of the Senate prepare a copy of this resolution for presentation to the Mayor and the residents of Bridgewater as a tribute to the unrivaled example of community spirit that exists today in the Town of Bridgewater.

SENATE JOINT RESOLUTION NO. 96

Expressing gratitude to the Virginia business community for its support of the 1984 meeting of the Southern Legislative Conference of the Council of State Governments.

**Call for the
The Tenth District Convention
Of the Republican Party of Virginia
Issued January 8, 2016**

Pursuant to the Plan of Organization Republican Party of Virginia, I, Jo A. S. Thoburn, Chairman of the Tenth Congressional District Republican Committee of the Republican Party of Virginia, do hereby call a Tenth District Convention to be held at 10:00 o'clock a.m. on Saturday, April 16, 2016, at Stone Bridge High School, 43100 Hay Road, Ashburn, Virginia, 20147.

Registration shall begin at 8:30 o'clock a.m. and close at 10:00 o'clock a.m. EDT. Everyone in line at 10:00 o'clock a.m., the said closing time, may still be registered if otherwise eligible.

Convention Committee meetings shall begin no later than 8:30 o'clock a.m., and shall be held at the convention site, but preliminary meetings may be held at such times and dates as may be designated by the Temporary Convention Committee Chairmen.

The purpose of the 10th District Convention shall be:

- i) To elect a Chairman of the 10th Congressional District Republican Committee.
- ii) To elect three members to the Republican Party of Virginia State Central Committee.
- iii) To elect three Delegates and three Alternate Delegates to the Republican National Convention in Cleveland, Ohio, beginning on July 18, 2016.
- iv) To nominate one Elector to be voted for in the Presidential Election of November 8, 2016.

Qualifications for Participation

All legal and qualified voters, regardless of race, religion, color, national origin or sex, under the laws of the Commonwealth of Virginia, who are in accord with principles of the Republican Party and who if requested express in open meeting orally or in writing as may be required, their intent to support all of its nominees for public office in the ensuing election, may participate as members of the Republican Party of Virginia in its Mass Meetings, Conventions or Primaries in their respective districts. Each delegate must present a valid, non-expired photo identification issued by the Commonwealth of Virginia, one of its political subdivisions, or the United States.

Composition of Convention

The District Convention shall be composed of delegates and alternate delegate of the respective units they represent. Representation shall be based on the total number of Republican votes cast in each county and city in the last gubernatorial and presidential election combined. Each unit is allowed one (1) Delegate Vote for each 250 Republican votes cast or major portion thereof. Each unit shall be entitled to at least one (1) Delegate vote. Each county or city shall be entitled to at least one delegate vote. The delegates and alternates shall be elected in county and city mass meetings, party canvasses or conventions held no earlier than February 1, 2016, and no later than March 30, 2016.

A delegation to this convention may have no more than five (5) delegates and five (5) alternates per delegate vote. No delegate may have less than one-fifth of a vote. Delegations shall vote full vote unless otherwise directed by the mass meeting, party canvass, or convention by which they were elected, said direction to be included in the certification of delegates. The number of delegates to which each city or county shall be entitled is as follows:

Clarke	28
Fairfax	333
Frederick	144
Loudoun	463
Manassas	41
Manassas Park City	10
Prince William	106
Winchester	31
Military Delegation	1
TOTAL	<u>1,157</u>

Revisions

In the event that the redistricting process requires technical or conforming changes to the Call, the District Chairman is authorized to revise the Call to make any such technical or conforming changes. The District Chairman must promptly notify the District Committee of any such conforming changes.

Military Provision Declaration

Military Members who declare via email to the chairman@vagop10.org, not later than March 3, 2016, that because of the obligations of their official military orders, they are unable to attend their convention, and that in lieu of selecting delegates to represent them from their respective Unit they instead wish to be represented by the Military Delegation, shall be entitled to representation via the Military Delegation. Such e-mail declaration shall include attached a signed statement of intent and affirmation of their official military orders precluding their attendance, and their email address for correspondence. The Chairman or his designee shall respond via email to each Military Member to confirm the receipt of each email declaration.

Candidate Preference Ballot

Military Members shall be entitled to cast a Candidate Preference Ballot to convey their ordered candidate preferences for each office (first choice, second choice, third choice, etc). The Ballot shall be available at the Official Committee website (www.vagop10.org) and at the RPV website, and shall be emailed to each declared Military Member within seven (7) days of the receipt of (i) the Member's declaration, or (ii) the filing deadline for candidates for office, whichever is later. The Chairman or his designee shall respond via email to each Military Member to confirm the receipt of each emailed returned ballot. The deadline to return the ballot shall be March 25, 2016.

Delegate Certification deadline of the Call

The Chairman of the Tenth Congressional District Republican Committee or his designee shall be responsible for ensuring the complete set of returned Candidate Preference Ballots are delivered to the permanent chairman of the Convention, once elected, for tallying the ballots in a manner designed to cast a vote in each round of balloting (as determined by the Rules adopted by the Convention) for the then-eligible candidate with the highest preference expressed on each Candidate Preference Ballot. The Chairman of the Tenth Congressional District Republican Committee or his designee shall also provide, upon the request of any candidate on the ballot, the names of qualified Military Members who submitted Candidate Preference Ballots.

Voting

The Chairman of the Credentials Committee or his designee shall cast the votes of the Military Delegation in proportion to the count of the Candidate Preference Ballots as specified pursuant to paragraph, and shall tabulate results in accordance with the Republican Voting Strength of the Military Delegation.

Committees/Rules

Members of the Temporary Convention Arrangements, Credentials, Nominations, Elections, Tellers, Resolutions and Rules Committees shall be appointed by the 10th District Republican Committee Chairman and shall meet in advance of the Convention

(at the discretion of the Temporary Chairman of each such Committee and the District Chairman) to perform their duties subject to ratification by the delegates present and voting at the Convention. The State Party Plan, the Call of the Convention, and the Rules adopted by the Convention shall take precedence in governing the Convention. Robert's Rules of Order, Newly Revised, shall also govern insofar as they do not conflict with the State Party Plan, the Call of the Convention, and the Convention Rules.

Resolutions must be submitted in their entirety to the Chairman of the Resolutions Committee not later than noon on Saturday, April 2, 2016. All resolutions and the accompanying business of each resolution shall be conducted after the candidate speeches and before the reporting of the balloting totals. Resolutions or amendments from the floor are not permitted and any motion to propose any resolution is out of order.

Candidate Filing Requirements and Election Procedures

Chairman of the 10th Congressional District Republican Committee. All Candidates who desire to be nominated at the 10th District convention described herein for the position of Chairman of the 10th Congressional District Republican Committee shall pre-file in writing their intention for candidacy for said office including a non-refundable \$1500.00 pre-filing fee, in the form of a check made out to the 10th District Committee, with the District Chairman, Jo Thoburn, 1406 Crowell Road, Vienna, VA, 22182, not later than 12:00 noon EST, on Saturday, January 23, 2016. Actual receipt is required. Postmarks do not govern. Only those who so pre-file may stand for election at this District Convention. The winning candidate will be chosen by election of the convention delegates based on a majority vote of greater than 50%.

State Central Committee Members. All Candidates who desire to be nominated at the 10th District Convention described herein for the position of State Central Committee shall pre-file in writing their intention for candidacy for said office including a non-refundable \$250.00 pre-filing fee, in the form of a check made out to the 10th District Committee, with the District Chairman Jo Thoburn 1406 Crowell Road, Vienna, VA, 22182, not later than 12:00 noon EST, on Saturday, January 23, 2016. Actual receipt is required. Postmarks do not govern. Only those who so pre-file may stand for election at this District Convention. The three (3) winning candidates will be chosen by election of the convention delegates based on the candidates receiving the top three (3) number of votes.

Delegates and Alternate Delegates to the Republican National Convention and

Elector to the Electoral College. All Candidates who desire to be nominated at the 10th District Convention described herein for the positions of Delegate and Alternate Delegate to the Republican National Convention in Cleveland, Ohio, beginning on July 18, 2016, and / or Elector to the Electoral College, shall pre-file in writing their intention for candidacy for said offices, including a non-refundable \$250.00 pre-filing fee, in the form of a check made out to the 10th District Committee, with the District Chairman Jo Thoburn 1406 Crowell Road, Vienna, VA, 22182, not later than 12:00 noon, on Saturday, January 23, 2016.. All candidates for Delegate and Alternate Delegate to the Republican National Convention shall also include a non-refundable \$250.00 pre-filing fee, in the form of a check made out to the 10th District Committee. Actual receipt is required. Postmarks do not govern. Only those who so pre-file for Delegate, Alternate Delegate, and Elector may stand for election or nomination at this District Convention. Election for Delegate and Alternate Delegate to the Republican National Convention shall determined as follows. The winning Delegate candidates will be chosen by the top three (3) vote totals, and the winning Alternate Delegates candidates will be chosen by the fourth, fifth, and sixth vote totals. The winning candidate for Elector will be chosen by election of the convention delegates based on the candidate receiving the highest number of votes.

Certification of Delegates

The delegates and alternate delegates to Tenth District Convention so elected shall be certified in writing with their respective names, mailing addresses, email addresses, and telephone numbers, over the signatures of the permanent chairman and the permanent secretary of the county or city mass meeting, convention or party canvass, as well as the signature of the current unit chairman. Units shall also provide the above information in an in the format to be provided by the 10th District Secretary via email to chairman@vagop10.org and gerrygunn.esq@gmail.com. **THE CERTIFICATION MUST BE DELIVERED AND RECEIVED AT LEAST FOURTEEN (14) DAYS (NOT LATER THAN APRIL 2, 2016) PRIOR TO THE CONVENING OF THE DISTRICT CONVENTION TO BOTH THE DISTRICT CHAIRMAN AND THE DISTRICT SECRETARY.** Said certification shall be sent to the address listed herein. After the filing deadline of the certification, no change may be made except, notwithstanding the foregoing, a certified alternate may be made a delegate.

A voluntary, non-refundable registration fee of \$20.00 is requested for each delegate and alternate to the convention. **CHECKS (MADE PAYABLE TO THE 10TH DISTRICT REPUBLICAN COMMITTEE) FOR SAID REGISTRATION FEE MUST ACCOMPANY THE CERTIFICATION FOR EACH DELEGATION SENT TO THE DISTRICT CHAIRMAN, ALONG WITH THE NAMES OF DELEGATES AND ALTERNATES WHO HAVE PAID SAID REGISTRATION FEE.** These fees are subject to the limits and prohibitions of the Federal Election Campaign

Act.

A paper copy of the call posted on the unit website and the RPV website containing the published Call of the Mass Meeting, Convention or Party Canvass, called for the purpose of selecting delegates and alternates to the 10th District Convention, shall accompany the certification. Certification shall be conveyed as required herein on properly executed forms, provided by the District Chairman to:

Jo Thoburn
Chairman, 10th Congressional District Republican Committee
1406 Crowell Road
Vienna, VA 22182

AND

Gerry Gunn
Secretary, 10th District Republican Committee
3212 Dominy Court
Oakton, VA 22124

In witness whereof, I have set my hand this 8 day of January, 2016.



Jo Thoburn
Chairman, 10th Congressional District
Republican Committee

**REPORT OF THE
JOINT SUBCOMMITTEE STUDYING**

Certain Revisions In Election Laws

**TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA**



Senate Document No. 20

**COMMONWEALTH OF VIRGINIA
RICHMOND
1987**

MEMBERS OF THE JOINT SUBCOMMITTEE*

Hunter B. Andrews, Chairman

V. Earl Dickinson, Vice-Chairman

John C. Buchanan

Mary A. Marshall

Clinton Miller

Wiley F. Mitchell, Jr.

William T. Parker

C. Jefferson Stafford

John Watkins

William T. Wilson

STAFF

Legal and Research

Mary R. Spain, Staff Attorney

Robert J. Austin, Ph.D., Research Associate

Joyce Crone, Secretary

Administrative and Clerical

Office of the Clerk, Senate of Virginia

* The Honorable Owen B. Pickett served as Vice-Chairman of the Joint Subcommittee until his resignation from the House of Delegates following his election to the House of Representatives in November 1986.

Report of the Joint Subcommittee Studying
Certain Revisions in Election Laws
Pursuant to Senate Joint Resolution No. 26
To
The Governor and the General Assembly of Virginia
Richmond, Virginia
January, 1987

To: The Honorable Gerald L. Baliles, Governor of Virginia,
and
The General Assembly of Virginia

The Joint Subcommittee continued its consideration of election law revisions during 1986 in accordance with Senate Joint Resolution No. 26. See, Appendix A. That resolution directed the Subcommittee to complete the study it began in 1985 of issues concerning the primary and nomination processes in Virginia and authorized the Subcommittee to consider other election law revisions that were brought to its attention.

From the outset, the focus of the study has been the presidential nomination and primary process. Consideration has been given as well to a number of proposals concerning other aspects of the nomination process, federal legislation with an impact on Virginia election procedures and suggested changes in election procedures in the Commonwealth.

The Subcommittee met June 10, 1986, to organize and to review the scope of its study. A public hearing was held August 12, 1986, to solicit views on the proposals carried over from the prior year's study and circulated in Senate Document No. 19 (1986) and to hear suggestions for other election law revisions. The Subcommittee held a working session October 14, 1986, and reviewed all topics brought before it to that time.

A second public hearing was scheduled to allow further public response to a series of draft legislative proposals on those matters viewed as of most immediate concern. The second public hearing on November 20, 1986, was followed by a December 15, 1986, working session and the preparation of this Report.

This Report does not address every proposal or item brought to the Subcommittee's attention. For example, the Subcommittee reviewed carry-over legislation but presents no recommendations on these matters, which are under consideration by either the House or Senate Committee on Privileges and Elections. Had there been a conflict between the recommendations in this Report and any carry-over bill, this Report would have addressed the problem. Since no conflicts are anticipated, the Subcommittee defers on these matters to the standing Committees on Privileges and Elections. With regard to other specific suggestions for election law revisions, the Subcommittee acted favorably on only two matters: implementation of the new federal Uniformed and Overseas Citizens Absentee Voting Act blank ballot requirements and revision of the statutory provisions on

defaced ballots. These changes are discussed below. Matters considered, but not recommended, are not reviewed in this Report, but materials on the wide variety of issues considered by the Subcommittee are retained and available in the Subcommittee's files at the Division of Legislative Services.

The Report is divided into the following segments:

- I. Presidential Preference Primary
- II. Implementation of Federal Blank Ballot Legislation
- III. Defaced Ballots
- Appendix A. Senate Joint Resolution No. 26
- Appendix B. Table on Southern Regional Primary
- Appendix C. Proposed Bill to Establish a 1988 Presidential Preference Primary
- Appendix D. Proposed Bill to Implement Federal Blank Ballot Legislation
- Appendix E. Proposed Bill on Defaced Ballots

I. Presidential Preference Primary

A. Background and Rationale

In January 1986, this Subcommittee recommended that Virginia join other southern states in establishing a March southern regional presidential primary and caucus schedule. The impetus for this proposal came from the Southern Legislative Conference. Alabama, Florida and Georgia had synchronized their primaries in March 1984. The SCL, with the endorsement of the Southern Governors' Association, determined to build on this beginning. It has promoted the southern regional primary by working at the state level and with due regard for individual state nominating procedures and state laws.

In April 1986, the General Assembly endorsed the southern regional primary concept and enacted Code § 24.1-162.1. That statute set March 12, 1988, the second Saturday in March, as the caucus date for Virginia's political parties to begin their national convention delegate selection process in 1988. In its 1986 Report, the Subcommittee recommended a continuation of its study focusing on nominating processes and left open the question of Virginia's adopting a presidential primary.

Since early 1986, the southern regional primary concept has taken hold. At present, Alabama, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, Missouri, North Carolina, Oklahoma, Tennessee, and Texas have adopted the March 8, 1988, primary. In Arkansas, Senate Bill No. 3 has been prefiled this year to

establish a March 8, 1988, primary. South Carolina has not adopted a primary, but the Democratic Party has announced a March 12, 1988, caucus date while the Republican party has not announced its date. West Virginia was the only state in 1986 to reject the early primary date, and legislation for a March primary date will be reintroduced at its 1987 legislative session. See, Appendix B.

In sum, twelve southern states have set a March 8, 1988, primary; South Carolina and Virginia have March 12, 1988, caucuses scheduled; and Arkansas and West Virginia will consider the matter in 1987.

For several reasons, the Subcommittee proposes that Virginia adopt a March 8, 1988, non-binding presidential preference primary in place of the March 12, 1988, caucus date.

- 1) The main purpose of the regional primary concept is to give this area impact on the presidential nomination process and the early March date is an essential feature to bring candidates to the area at the outset of their campaigns. This early date allows the region to have an important initial impact on the presidential candidate selection process.

Concurrently, the early date makes a non-binding advisory primary appropriate so that the state political parties will retain flexibility to evaluate the progress of the campaign as they proceed to select their national convention delegations.

- 2) The non-binding presidential preference primary involves the least interference with the political parties' right to conduct their affairs. Virginia has not had a presidential primary, and it has given the parties the option, for the most part, to decide whether or not to select candidates for state and local offices by the primary, convention, caucus, or other method. The 1986 March caucus legislation, to a degree, limited the parties' choice of procedures in selecting their national presidential convention delegations. This limitation was designed to involve the least interference with party activities and yet assure Virginia a place in the March regional primary and caucus event. By adopting a non-binding presidential preference primary, however, there is no state control imposed on the parties' delegate selection processes, and even the limited state regulation imposed in 1986 can be avoided.
- 3) The outcome of a statewide presidential preference primary will be readily understood. A comparison of the 1986 March caucus legislation and the recommended 1987 primary legislation yields the conclusion that a statewide presidential preference primary will produce a sharper picture of which candidates Virginia voters prefer than will a first round series of caucuses where the process is, of necessity, more complex. The parties and candidates will benefit from a statewide polling of the electorate. Virginia's participation in the regional primary will coincide with and be comparable to the other southern states, excepting South Carolina. Voter participation in the political processes will be encouraged.

Objections to a non-binding presidential preference primary focus on two aspects of the proposal: its cost and the fact that the results are not binding. With regard to costs, the State Board of Elections provided the Subcommittee its estimate of \$91,533 for the cost to the state. The cost to a locality will depend on the population and the number of precincts in the locality. The State Board of Elections provided the Subcommittee two measures for estimating local costs. First, it estimated a cost of \$6,000 for a hypothetical locality of 17,000 population and nine precincts. The Board also gave the Subcommittee sample data for 16 localities of various sizes based on actual costs of the November 1986 election that showed a range of costs (e.g. \$2,350 for Amelia - five precincts; and \$93,673 for Fairfax County - 163 precincts). The Board is compiling data from all localities and will make further information available early in the 1987 Session. A preliminary staff estimate is \$1 million to \$1.5 million total cost to the state and localities. Here the decision must be whether these costs are reasonable in light of the potential influence to be gained by participating in the regional primary. It is the Subcommittee's judgment that the Commonwealth will increase its influence on the presidential nomination process and that voter participation will be stimulated by Virginia's cooperation in the regional primary effort. These substantial, if intangible, benefits justify the cited costs.

The determination that a non-binding or advisory primary will best serve Virginia's interests is based primarily on the early date of the primary. In addition; Virginia does not have a system of party registration and voters select the party primary in which they will participate at the primary election. Virginia is an "open" primary state and can bind party delegations to the results of the primary only to the extent permitted by the party rules. See, Democratic Party of the U. S. v. Wisconsin, 450 U.S. 107 (1981).

It is the Subcommittee's conclusion that a non-binding primary will have substantial impact on the parties and that the parties can themselves adopt rules to provide for delegations that will be responsive to the wishes of the electorate. The Subcommittee considered a draft statute that would bind the party delegations to the outcome of the primary on a proportional basis for the first ballot at the national convention provided national party rules did not prohibit such a requirement. The Subcommittee chose, instead, to leave to the political parties the decision how best to execute the expressed preference of the electorate.

B. Proposed Legislation

Draft legislation to implement the Subcommittee's recommendation for a presidential preference primary is printed in Appendix C.

The proposed bill contains the following key features:

- o The bill establishes a March 8, 1988, presidential preference primary. Based on 1988 experience, the General Assembly will be able to determine whether similar legislation should be adopted for future presidential elections.

o The bill requires a primary for each major political party. All registered voters will be able to participate in the primary and to vote in only one party's primary election. No evidence of party affiliation is required by the bill beyond the act of choosing to participate in a particular party's primary.

o The bill provides three routes for candidates' names being placed on the primary ballot: (i) candidates who have become eligible by January 5, 1988, for matching payments from the federal Presidential Primary Matching Payment Account; (ii) candidates who are certified for the primary by the state political party chairman prior to January 5, 1988, and who are determined to be nationally recognized candidates by the party; and (iii) candidates who petition for a place on the ballot and file petitions by December 14, 1987, with approximately 13,000 signatures of registered voters (one-half of one percent of the state's registered voters), the same petition requirement as for governor or other statewide office.

o There are no filing fees required and the costs of the primary are to be paid by the localities as is the case for other statewide elections and primaries.

o The date for any other March primary is changed to March 8 (municipal primaries would otherwise be held March 1, 1988) and the date for the May general election is postponed one week to May 10, 1988, to preserve the usual time interval between the March primary and May general councilmanic elections.

o The legislation adopted in 1986 to set a March 12, 1988, caucus date is repealed.

II. Implementation of Federal Blank Ballot Legislation

A. Background and Rationale

In 1986, Congress enacted the Uniformed and Overseas Citizens Absentee Voting Act to recodify the Federal Voting Assistance Act of 1955 and Overseas Citizens Voting Rights Act of 1975. The new legislation contains one major new procedure to provide blank ballots to voters overseas who, because of remote location and slow mail, are unlikely to be able to obtain, vote, and return printed state absentee ballots within the time available prior to an election.

The Act takes effect for elections held in 1988 and thereafter, and the blank ballot provisions in the Act apply to general elections (not primaries or special elections) for President, Vice President, and members of Congress.

The Subcommittee's concern, from its first discussions of the blank ballot concept, has been the opportunities created for multiple voting and fraud. Under the Act, federal blank ballots will be available in various overseas locations, and an overseas voter may vote a blank ballot and then a regular state absentee ballot, and the burden is ultimately on the states to assure that only one ballot is counted for that voter.

Under the Act, states are given the option of designing and providing a state blank absentee ballot in place of the federal write-in absentee ballot. If the federal administrator of the Act approves the state ballot and the state ballot is made available at least 60 days before the deadline in the state for the receipt of an absentee state ballot, the federal ballots will not be valid for elections in the state.

Subcommittee members and the State Board of Elections received a letter from Henry Valentino, Director of the Federal Voting Assistance Program, suggesting that Virginia provide a special write-in ballot for overseas voters 90 or more days before an election. He also sent a copy of a Georgia statute as a model for state write-in absentee ballot legislation.

The Subcommittee endorses legislation patterned after the Georgia law and submission of this legislation, after enactment, to the federal administrator for approval.

The advantages of the proposal are that (i) an application must be made for a state blank ballot and ballots will become available only if the application is valid and (ii) only one ballot will be sent to an applicant, thereby, reducing opportunities for multiple voting.

B. Proposed Legislation

The Subcommittee's draft statute is printed in Appendix D.

Briefly summarized, the Subcommittee's bill provides:

- o Qualified overseas voters may apply 90 days prior to a federal election for a special blank absentee ballot.
- o A special blank absentee ballot shall be sent or, if it is already printed and available, a regular state absentee ballot shall be sent to a qualified applicant.
- o The special ballot will allow the overseas voter to vote by writing in his party or candidate preference for the office.
- o The federal write-in absentee ballot will not be valid in Virginia.

III. Defaced Ballots

A. Background and Rationale

During its hearings, the Subcommittee heard testimony concerning a contested election in 1985 in Stafford County. One aspect of the case involved the issue of when a voter's ballot should not be counted. The ballot in question had been marked for one candidate, that mark had been marked through and the word "mistake" written by the box, and the voter had marked the box by the other candidate's name. The court held the voter intended to vote for the latter candidate, but disallowed the ballot because it had been defaced, presumably by the handwriting on it.

The present law on defaced ballots is found in several Code sections, §§ 24.1-129, 24.1-130, 24.1-143, and 24.1-273. The first section now provides that a ballot shall be counted if the voter's intent is clear "provided that it is not defaced." The word "defaced" is not defined in Title 24.1. Extraneous markings on the ballot of any type could be argued to deface the ballot. Section 24.1-130 now requires a voter to turn in a defaced ballot to an officer for another ballot and requires the voter to take an oath he did not intentionally deface the first ballot. A false oath is deemed perjury. Section 24.1-143 requires defaced ballots to be sealed with other ballots and election materials after the election. Section 24.1-273 relates to the willful and fraudulent defacing of election materials and sets a criminal penalty for such actions.

The Subcommittee concluded that the primary standard to determine whether a ballot should be counted ought to be the voter's intent. If his intent is clear, his ballot should be counted; if it is not, the ballot should be set aside and not counted. Willful and fraudulent actions to deface or misuse a ballot are prohibited and subject to punishment under § 24.1-273. Inadvertent mistakes on a ballot or extraneous writings can be cured by the voter asking for a second ballot. If he fails to obtain a second ballot, his ballot should be counted even if he has extra markings on it, so long as his intent is clear.

B. Proposed Legislation

A draft bill is set out in Appendix E to amend §§ 24.1-129 and 24.1-130.

The bill deletes the requirements that defaced ballots are not to be counted and that voters must turn in defaced ballots and swear that the defacing was not intentional.

The bill leaves intact current law that ballots are to be counted if the intent of the voter is clear and that willful and fraudulent defacing of ballots is a crime.

Respectfully submitted,

Hunter B. Andrews, Chairman
V. Earl Dickinson, Vice-Chairman
John C. Buchanan
Mary A. Marshall
Clinton Miller
Wiley F. Mitchell, Jr.
William T. Parker
* C. Jefferson Stafford
John Watkins
William T. Wilson

* **DISSENTING STATEMENT OF C. JEFFERSON STAFFORD**

I dissent from the report insofar as the recommendation concerning a non-binding primary is concerned. I do not believe that a primary is justified in light of the costs involved, and I do not believe that there is enough sentiment for a primary in the Commonwealth to warrant the holding of a non-binding primary.

SENATE JOINT RESOLUTION NO. 26

Requesting the joint subcommittee of the Senate and House Committees on Privileges and Elections to continue to study certain revisions in the election laws.

Agreed to by the Senate, March 3, 1986

Agreed to by the House of Delegates, February 27, 1986

WHEREAS, the joint subcommittee of the Senate and House Committees on Privileges and Elections established pursuant to 1985 Senate Joint Resolution No. 92 has concluded its study and reported on a number of revisions in the election laws; and

WHEREAS, several matters relating to the nomination and primary processes are still under consideration by the joint subcommittee; now, therefore, be it

RESOLVED by the Senate, the House of Delegates concurring, That the joint subcommittee be continued to complete its studies of matters relating to the nomination and primary processes and such other revisions in the election laws as may come to its attention.

The joint subcommittee shall complete its work prior to November 15, 1986.

The direct and indirect costs of this study are estimated to be \$13,200.

SOUTHERN REGIONAL PRIMARY
STATUS

<u>State</u>	<u>1984 Method*</u>	<u>Timing Prior to 1986 Legislation</u>	<u>1988 Method*</u>	<u>1988 Current Timing</u>
Alabama	Primary	2nd Tuesday, March	Primary	March 8
Arkansas**	Caucus(R) Caucus(D) Primary(D)	Date undetermined March 17th Last Tuesday in May	Caucus(R) Caucus(D) Primary(D)	** May 31
Florida	Primary	2nd Tuesday, March	Primary	March 8
Georgia	Primary	2nd Tuesday, March	Primary	March 8
Kentucky	Caucus	2nd Tuesday, March	Primary	March 8
Louisiana	Primary	1st Saturday, April	Primary	March 8
Maryland	Primary	2nd Tuesday, May	Primary	March 8
Mississippi	Caucus	1st Tuesday after 1st Monday, June	Primary	March 8
Missouri	Caucus	2nd Tuesday in March	Primary	March 8
North Carolina	Primary	1st Tuesday after 1st Monday, May	Primary	March 8
Oklahoma	Caucus(D) Caucus(R)	2nd Tuesday, March Undertermined	Primary	March 8
South Carolina	Caucus(D) Caucus(R)	2nd Tuesday, June Date undetermined	Caucus	March 12
Tennessee	Primary	2nd Tuesday, March	Primary	March 8
Texas	Primary(R) Caucus(D)	1st Saturday, May 1st Saturday, May	Primary	March 8
Virginia	Caucus(D) Caucus(R)	4th Saturday, March Date undetermined	Caucus	March 12
West Virginia***	Primary	2nd Tuesday, May	Primary	May 10

* For "Caucus," this chart shows the date of the start of the caucus process.

** Senate Bill No. 3 prefiled to establish March 8 primary.

*** In 1984, was 1st Tuesday in June in West Virginia; for 1988, it is to be the second Tuesday in May. Legislation is being reintroduced in 1987 for a March 8 primary.

2 SENATE BILL NO. HOUSE BILL NO.

3 A BILL to amend the Code of Virginia by adding in Chapter 7
4 of Title 24.1 an article numbered 5.1, consisting of
5 sections numbered 24.1-202.1 through 24.1-202.10, and
6 to repeal § 24.1-162.1 of the Code of Virginia,
7 relating to the 1988 Presidential Preference Primary
8 and to the date for selecting delegations to national
9 political party presidential nominating conventions.

10

11 Be it enacted by the General Assembly of Virginia:

12 1. That the Code of Virginia is amended by adding in
13 Chapter 7 of Title 24.1 an article numbered 5.1, consisting
14 of sections numbered 24.1-202.1 through 24.1-202.10, as
15 follows:

16 Article 5.1.

17 1988 Presidential Preference Primary Election.

18 § 24.1-202.1. Short title.--This article may be cited
19 as the 1988 Presidential Preference Primary Act.

20 § 24.1-202.2. Presidential preference primary; date of
21 primary.--On Tuesday, March 8, 1988, each registered voter
22 of the Commonwealth shall be given an opportunity to
23 participate in the presidential primary of the political
24 party, as defined in § 24.1-1(7), of his choice and to
25 express his preference for the presidential candidate of
26 that political party.

27 § 24.1-202.3. Nomination by State Board of
28 Elections.--A. The State Board of Elections shall meet at

1 the offices of the Board in Richmond on Tuesday, January 5,
2 1988, and shall nominate as presidential primary candidates
3 all candidates affiliated with a political party who have
4 become eligible to receive payments from the Presidential
5 Primary Matching Payment Account as provided in § 9033 of
6 the U. S. Internal Revenue Code of 1954, as amended.

7 B. The Board shall nominate, in addition, as
8 presidential primary candidates for each political party
9 those candidates certified to it on or before 5:00 p.m.,
10 Monday, January 4, 1988, by the state chairman of the
11 political party in accordance with this subsection. Each
12 political party shall provide by rule for a committee to
13 determine the names of all candidates of the party for the
14 office of president of the United States whose candidacy is
15 generally advocated or recognized in the national news media
16 throughout the United States to be placed on the ballot.
17 The committee shall have sole discretion to determine that a
18 candidacy is generally advocated or recognized in the
19 national news media throughout the United States. The
20 committee shall make its determination prior to January 4,
21 1988, and the state party chairman shall certify only those
22 names determined by the committee.

23 § 24.1-202.4. Nomination by petition.--Any person
24 seeking the nomination of the national political party for
25 the office of President of the United States, or any group
26 organized in this Commonwealth on behalf of, and with the
27 consent of such person, may file with the State Board of
28 Elections petitions signed by qualified voters equal in

1 number to one-half of one percent of the number of voters
2 registered in the Commonwealth as of January 1, 1987,
3 including at least 200 qualified voters from each
4 congressional district in the Commonwealth who attest that
5 they intend to participate in the primary of the same
6 political party as the candidate for whom the petitions are
7 filed. Such petitions shall be filed by the petitioners
8 with the Board no later than 5:00 p.m. on Monday, December
9 14, 1987, with a letter of consent signed by such candidate.
10 Such petitions may be circulated beginning only on and after
11 July 1, 1987.

12 The petitions shall state the name of the candidate for
13 nomination and the name and address of the chairman of any
14 such group organized to circulate petitions authorized under
15 this section.

16 The petitions shall be on a form prescribed by the
17 Board. The petition shall list the social security number
18 and resident address of each such qualified voter, and each
19 voter signature shall be witnessed by a person who is
20 himself a qualified voter and is a resident of the same
21 congressional district as the voter whose signature is
22 witnessed, and whose affidavit to that effect appears on
23 each page of the petition.

24 The Board shall forthwith determine the sufficiency of
25 petitions filed with it and shall immediately communicate
26 its determination to the chairman of such group organized to
27 circulate petitions.

28 § 24.1-202.5. Notification to candidates.--The State

1 Board of Elections shall forthwith contact each person who
2 has been nominated by the Board or by petition and notify
3 him in writing that, upon receipt of his declaration of
4 candidacy filed with and received by the Board on or before
5 Wednesday, January 20, 1988, his name will be printed as a
6 candidate of a specified political party on the Virginia
7 presidential preference primary ballot. The Board shall
8 prescribe the form for the declaration of candidacy. A
9 candidate who participates in the Virginia presidential
10 preference primary of a particular party shall have his name
11 placed on the presidential general election ballot only if
12 nominated by that political party. The Board shall send a
13 copy of this article to each candidate with the notice
14 specified above.

15 § 24.1-202.6. Filing requirements; fees; costs of
16 election; notice; final registration date.--The requirements
17 for filings and fees for primary candidates in Article 5 of
18 this chapter shall not be applicable to candidates for
19 nomination to the office of president at the 1988
20 presidential primary.

21 The costs of the primary shall be paid as provided in §
22 24.1-96.

23 On Wednesday, January 20, 1988, the State Board of
24 Elections shall order the holding of the 1988 presidential
25 primary, and it shall give notice of the primary as provided
26 in § 24.1-177 and such other notice as the Board deems
27 appropriate.

28 Notwithstanding any other provision of law, the final

1 day for registration shall be thirty-one days before the
2 March 8, 1988, primary and the registration books shall be
3 closed until March 9, 1988.

4 § 24.1-202.7. Ballots; voting.--The names of all
5 candidates in the presidential preference primary of each
6 political party shall appear at an appropriate place on the
7 ballot or voting machine in alphabetical order. In addition
8 the State Board of Elections shall provide a category on the
9 ballot or voting machine allowing voters in each political
10 party to vote an "uncommitted" status. The voter shall be
11 able to cast his ballot for one of the presidential
12 candidates of one political party or for an "uncommitted"
13 status. In the event of the death or withdrawal of a
14 candidate prior to the primary, votes cast for such
15 candidate shall be counted as votes for the "uncommitted"
16 status.

17 § 24.1-202.8. Certification of primary results.--Upon
18 completion and certification of the primary results on or
19 before March 28, 1988, by the State Board of Elections, the
20 Board shall certify the results to the state chairman of
21 each political party. Such certification shall be final,
22 and there shall be no recount or contest of the results of
23 the primary.

24 § 24.1-202.9. March primary date
25 1988.--Notwithstanding the provisions of § 24.1-174 or any
26 other provision of law, primaries for the nomination of
27 candidates for offices to be voted on at the May 1988
28 general election shall be held on Tuesday, March 8, 1988.

1 § 24.1-202.10. May general election date 1988, final
2 registration date.--Notwithstanding the provisions of §
3 24.1-1(5)(a) or of any other provision of law, May 10, 1988,
4 shall be the date for the May 1988 general election.
5 Notwithstanding any other provision of law, the final day
6 for registration shall be thirty-one days before the May 10,
7 1988, general election, and the registration books shall be
8 closed until May 11, 1988, in any county or city in which an
9 election in held.

10 2. That § 24.1-162.1 of the Code of Virginia is repealed.

11

2 SENATE BILL NO. HOUSE BILL NO.

3 A BILL to amend the Code of Virginia by adding a section
4 numbered 24.1-228.3, relating to procedures for voting
5 with special write-in absentee ballots by certain
6 absentee voters.

7

8 Be it enacted by the General Assembly of Virginia:

9 1. That the Code of Virginia is amended by adding a section
10 numbered 24.1-228.3, as follows:

11 § 24.1-228.3. Procedures for voting with special
12 write-in absentee ballot by qualified absentee voters.--A.
13 Notwithstanding any other provisions of this article, a
14 qualified absentee voter, who is eligible for an absentee
15 ballot under § 24.1-227 (2) and qualified under subsection C
16 of this section, may apply not earlier than ninety days
17 before an election for a special write-in absentee ballot.
18 This ballot shall be only for presidential electors and
19 United States senator or representative in Congress.

20 B. The application for a special write-in absentee
21 ballot may be made on the Federal Post Card Application form
22 or on a form prescribed by the State Board of Elections.

23 C. In order to qualify for a special write-in absentee
24 ballot, the voter must state that he or she is unable to
25 vote by regular absentee ballot or in person due to overseas
26 military service or due to living in isolated or extremely
27 remote overseas areas. This statement may be made on the

Ex. D-5

1 Federal Post Card Application or on a form prepared by the
2 State Board of Elections.

3

4 D. Upon receipt of said application and pursuant to §
5 24.1-229, the electoral board shall issue one ballot, either
6 (i) the special write-in absentee ballot which shall be
7 prescribed and provided by the State Board of Elections, or
8 (ii) if available, the printed ballot. The special write-in
9 absentee ballot shall permit the voter to vote by writing in
10 (i) a party preference for each office, (ii) the name of a
11 specific candidate for each office, or (iii) except for
12 president or vice-president of the United States, the name
13 of the person whom the voter prefers for each office.

14

2 SENATE BILL NO. HOUSE BILL NO.

3 A BILL to amend and reenact §§ 24.1-129 and 24.1-130 of the
4 Code of Virginia, relating to marking ballots and
5 defaced ballots.

6

7 Be it enacted by the General Assembly of Virginia:

8 1. That §§ 24.1-129 and 24.1-130 of the Code of Virginia
9 are amended and reenacted as follows:

10 § 24.1-129. Place and manner of marking ballot;
11 handicapped and elderly voters.--The qualified voter shall
12 take the official ballot and retire to the voting booth. A
13 voter may be accompanied into the voting booth by his child
14 age twelve or younger. A handicapped or elderly voter, as
15 defined in § 24.1-97, may be handed a ballot outside the
16 polling place but within 150 feet thereof by one of
17 the officers and in his presence but in a secret manner,
18 mark and return the same to such officer who shall proceed
19 as provided in § 24.1-131.

20 After entering the voting booth, the qualified voter
21 shall mark immediately preceding the name of each candidate
22 he wishes to vote for a check (✓) or a cross (X or +) mark
23 or a line (-) in the square provided for such purpose,
24 leaving the square preceding the name of each candidate he
25 does not wish to vote for unmarked. Any ballot marked so
26 that the intent of the voter is clear shall be counted

1 provided that it is not defaced .

2 At all elections except primary elections it shall be
3 lawful for any voter to place upon the official ballot in
4 his own handwriting the name of any person other than the
5 listed candidates for that office and to vote for such
6 person by marking the same by a check (✓) or cross (X or +)
7 mark or a line (-) immediately preceding the name
8 inserted. No ballot with a name or names placed thereon not
9 in conformance herewith shall be counted for such person.

10 No write-in vote will be counted when it is apparent to
11 the officers of election that a voter has voted for the same
12 person for the same office more than one time.

13 § 24.1-130. Defacing ballots accidentally.--Should any
14 ballot be unintentionally or accidentally defaced , or in
15 any such a way that it is rendered unfit for voting by such
16 voter, he shall may deliver such defaced ballot to the
17 officer of election and receive another upon taking an oath
18 that the defacement of the ballot first delivered to him was
19 not done for the purpose of defacing such official ballot.
20 Any person swearing falsely to such fact shall be deemed
21 guilty of perjury .

22

