VIRGINIA:

IN THE CIRCUIT COURT OF RICHMOND CITY

The Republican Party of Virginia,

Plaintiff,

v.

Christopher E. Piper, in his official capacity as the Commissioner of the Department of Elections; the Department of Elections; the Virginia State Board of Elections, Robert H. Brink, in his official capacity as Chairman and member of the Virginia State Board of Elections; John O'Bannon, in his official capacity as Vice Chair and member of the Virginia State Board of Elections; Jamilah D. LeCruise, in her official capacity as Secretary and member of the Virginia State Board of Elections; Donald W. Merricks, in his official capacity as member of the Virginia State Board of Elections; and Angela Chiang, in her official capacity as member of the Virginia State Board of Elections,

Defendants.

PROPOSED INTERVENOR-DEFENDANTS' MOTION FOR LEAVE TO INTERVENE AND MEMORANDUM IN SUPPORT THEREOF

At Law No. CL21003848-00

Proposed Intervenor-Defendants, Terry McAuliffe and the Democratic Party of Virginia, by and through the undersigned attorneys, for their Motion for Leave to Intervene under Virginia Rule of Court 3:14 and Memorandum in Support Thereof, allege as follows:

I. INTRODUCTION

Because of his landslide victory in the June 2021 Democratic primary, Terry McAuliffe is the duly elected Democratic nominee for Governor in the upcoming general election. Virginia law therefore requires that McAuliffe be listed on the ballot as the Democratic nominee for Governor. There is no legal basis for the Republican Party's eleventh-hour demand that the Court now act to

defy the clear choice of the hundreds of thousands of Virginians who voted for McAuliffe in the primary, and deprive millions of Virginians of electing their choice of Governor in November.

The Republican Party's extraordinary request is based entirely on their contention that the declaration of candidacy that McAuliffe submitted to be included on the primary ballot in March 2021 did not include his signature. But as Proposed Intervenor-Defendants explain in their contemporaneously filed motion to dismiss and demurrer, there is no requirement under Virginia law that the declaration of candidacy be signed by the candidate. *See* Va. Code § 24.2-520. The relevant statute is clear: the candidate must file a declaration of candidacy on a form prescribed by the State Board that includes (1) the name of the candidate's political party; (2) a designation of the office for which he is a candidate; and (3) a statement that, if defeated in the primary, his name is not to be printed on the ballots for that office in the succeeding general election. *Id*. The law requires that this declaration shall be "acknowledged before some officer who has the authority to take acknowledgements to deeds, or attested by two witnesses who are qualified voters of the election district." *Id*. The Republican Party does not argue that any of these requirements were not met. Instead, it invents an additional requirement, not in the law itself. For good reason, another judge in this same district quickly rejected a preliminary injunction motion based on the same argument in a similar case filed last week.

It also cannot be ignored that the primary election is long over. Hundreds of thousands of Democratic voters participated in that primary, and McAuliffe won. Decidedly. Virginia law therefore requires that McAuliffe, as the winner of the most votes in the primary, be listed on the general election ballot. *Id.* § 24.2-535. The Court has no statutory authority to second-guess the acceptance of McAuliffe's primary declaration by the relevant officials, particularly months after those voters exercised their right to choose their nominee, nor to deny the millions of

Commonwealth voters who intend to vote for McAuliffe their choice of gubernatorial candidate in the coming November election.

McAuliffe and the Democratic Party of Virginia are entitled to intervene as defendants in this case. McAuliffe seeks to protect his statutory right to be included on the ballot as the duly elected Democratic nominee for Governor, as well as the rights of the millions of voters who would have their choice for Governor denied, should the Republican Party's cynical attempt to win the election by judicial order succeed. Similarly, the Democratic Party of Virginia seeks to protect its right and the rights of its affiliated voters to have their chosen nominee appear on the general election ballot. For each of these reasons, McAuliffe and the Democratic Party of Virginia easily meet the legal standard for intervention under Virginia Rule of Court 3:14, which requires only that they assert claims or defenses that are "germane to the subject matter of the proceeding." Recognizing this, courts regularly permit candidates and the parties with whom they affiliate to intervene as defendants in cases in which their access to the ballot are challenged. The motion to intervene should be granted.

II. LEGAL STANDARD

Under Virginia Rule of Court 3:14, any party "may by leave of court file a pleading to intervene as a plaintiff or defendant to assert any claim or defense germane to the subject matter of the proceeding." To successfully intervene, a party need only "assert some right involved in the suit." *Commonwealth v. Guill*, 89 Va. Cir. 323 (2014); *see also Layton v. Seawall Enters.*, *Inc*., 231 Va. 402, 406 (1986).

III. ARGUMENT

McAuliffe and the Democratic Party indisputably meet the standard for intervention: they have rights that are involved in this suit. *Guill*, 89 Va. Cir. at 323. First, McAuliffe has his own

statutory right to be placed on the ballot as Democratic nominee for Governor, as the clear and certified winner of the Democratic primary. Second, McAuliffe and the Democratic Party of Virginia are entitled to assert the interests of the Virginians who supported McAuliffe in the June Primary, and the rights of the Virginians who intend to vote for him in the upcoming November General Election, whose fundamental voting rights will be violated if the Republican Party is granted its requested relief. Finally, McAuliffe and the Democratic Party of Virginia have an interest in this suit that gives them the right to intervene, based on its threat to their electoral prospects.

A. McAuliffe has a statutory right to be included on the ballot as the Democratic nominee for Governor as the winner of the Democratic primary.

The people of the Commonwealth spoke in casting their primary ballots in overwhelming support for McAuliffe as the Democratic nominee for Governor. As a result, the State Board declared McAuliffe the duly elected Democratic nominee for Governor, as required under Va. Code § 24.2-534. Because he won the Democratic primary, McAuliffe is entitled, under Virginia law, to be placed on the ballot for the November general election. Va. Code § 24.2-535 ("Any candidate for party nomination to any office who receives a plurality of the votes cast by his party *shall be the nominee of his party* for that office *and his name shall be printed on the official ballots* used in the election for which the primary was held.") (emphases added). The Republican Party's lawsuit seeks to deprive McAuliffe of that right. McAuliffe therefore has a statutory interest, at stake in this case, to be listed on the ballot for the general election for Governor. He should therefore be permitted to intervene.

B. McAuliffe and the Democratic Party of Virginia are entitled to assert the rights of the voters who supported McAuliffe in the primary and will support him in general election.

McAuliffe and the Democratic Party of Virginia also are entitled to assert the rights of the voters who supported McAuliffe in the Democratic primary, and who intend to support him in the general election. Those rights are also affected by this litigation and will be violated if the Republican Party's requested relief is granted.

First, an organization like the Democratic Party of Virginia can assert the rights of its members by showing that (1) at least one of its members has standing, (2) the interests at stake are germane to the organization's purpose, and (3) neither the claim nor the relief requires participation of the organization's individual members. *See Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977); *see also Chesapeake Bay Found., Inc. v. Commonwealth ex rel. Va. State Water Control Bd.*, 46 Va. App. 104, 116, 616 S.E.2d 39, 45 (2005) (adopting *Hunt*). Here, the Party's members, most of whom supported McAuliffe in the primary and intend to support him in the general election, will suffer harm to their fundamental right to vote if their votes in the primary are disregarded and if McAuliffe, their preferred candidate and duly elected nominee, is not included on the general election ballot.

Courts have repeatedly recognized that political parties are entitled to vindicate the voting rights of their members. *See e.g.*, *Sandusky Cnty. Democratic Party v. Blackwell*, 387 F.3d 565, 573-74 (6th Cir. 2004) (holding Ohio Democratic Party had standing on behalf of its members who would vote in the upcoming election); *Bay Cnty. Democratic Party v. Land*, 347 F. Supp. 2d 404, 422 (E.D. Mich. 2004) (holding county Democratic Party had standing to represent rights of Democratic voters); *Democratic Nat'l Comm. v. Reagan*, 329 F. Supp. 3d 824, 831 (D. Ariz.), *aff'd*, 904 F.3d 686 (9th Cir. 2018), *reh'g en banc granted*, 911 F.3d 942 (9th Cir. 2018), *rev'd on*

other grounds and remanded sub nom. Democratic Nat'l Comm. v. Hobbs, 948 F.3d 989 (9th Cir. 2020) (en banc) (holding plaintiffs DNC, DSCC, and Arizona Democratic Party had representational standing to challenge claims on behalf of their constituents); *Fla. Democratic Party v. Hood*, 342 F. Supp. 2d 1073, 1079 (N.D. Fla. 2004) (holding Florida Democratic Party "has standing to assert, at least, the rights of its members who will vote in the November 2004 election"); *Miller v. Blackwell*, 348 F. Supp. 2d 916, 920 (S.D. Ohio 2004) (holding Ohio Democratic Party had standing on behalf of its members); *Democratic Party of Ga., Inc. v. Crittenden*, 347 F. Supp. 3d 1324, 1337 (N.D. Ga. 2018) (holding Democratic Party of Georgia had standing to sue on behalf of its members).

The threatened violation of the fundamental rights of these voters and members of the Democratic Party of Virginia is plainly directly germane to the Party's purpose and core mission of electing Democratic candidates elected to state, local, and federal office. *See Hunt*, 432 U.S. at 343. Courts have similarly held that candidates for office, like McAuliffe, have standing to assert the rights of the voters that support them. *See e.g.*, *Bay Cnty. Democratic Party*, 347 F. Supp. 2d at 422 ("[P]olitical parties and candidates have standing to represent the rights of voters."); *see also Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 587 (5th Cir. 2006) (holding candidate and state party alike have associational standing to represent rights of the voters who support the candidate).

Likewise, the Democratic Party of Virginia and McAuliffe have an interest in this litigation that entitles them to intervene to assert the fundamental voting rights of their members and supporters which are germane to and threatened by this suit.

C. McAuliffe and the Democratic Party of Virginia have an interest in defending their political interests.

Finally, McAuliffe and the Democratic Party of Virginia independently have a right to intervene in this matter because it threatens their electoral prospects, an injury that courts have routinely recognized in endorsing the competitive standing doctrine, which holds that political parties and candidates suffer cognizable harm when their electoral prospects are threatened. *See, e.g., Benkiser*, 459 F.3d at 586–87 & n.4 (holding political party has standing because "threatened loss of [political] power is still a concrete and particularized injury sufficient for standing purposes"); *Schulz v. Williams*, 44 F.3d 48, 53 (2d Cir. 1994) (holding political party representative has standing because his party may "suffer a concrete, particularized, actual injury—competition on the ballot from candidates that ... were able to avoid complying with the Election Laws and a resulting loss of votes") (internal quotation marks omitted); *Fulani v. Hogsett*, 917 F.2d 1028, 1030 (7th Cir. 1990) (finding third-party presidential candidate had standing because the allegedly improper placement of the major-party candidates on the ballot resulted in "increased competition" that required "additional campaigning and outlays of funds" and resulted in lost opportunities to obtain "press exposure" and win the election). Relatedly, the Democratic Party of Virginia and McAuliffe have "competitive standing" when a suit threatens "potential loss of an election." *Owen v. Mulligan*, 640 F.2d 1130, 1132–33 (9th Cir. 1981) (holding local candidate and Republican Party officials had standing to sue based on "potential loss of an election" and "to prevent their opponent from gaining an unfair advantage in the election process").

Thus, the threatened injury to their electoral prospects provides yet another independent basis by which the Democratic Party of Virginia and McAuliffe have clear, cognizable interests in this case and should be permitted to intervene to defend those interests.

IV. CONCLUSION

For the foregoing reasons, McAuliffe and the Democratic Party of Virginia satisfy the requirements for intervention under Virginia Rule of Court 3:14, because they both assert various rights and defenses germane to this suit. Therefore, their motion for leave to intervene as defendants should be granted.

Dated: August 27, 2021

Respectfully submitted,

Jeffrey Breit
Jeffrey Breit, VA Bar No. 18876
Breit Cantor
Towne Pavilion Center II
600 22nd Street, Suite 402
Virginia Beach, VA 23451
jeffrey@breitcantor.com

Aria Branch, VA Bar No. 83682
PERKINS COIE LLP
700 Thirteenth Street, N.W., Suite 800
Washington, D.C. 20005-3960
Telephone: 202.654.6200
Facsimile: 202.654.6211
ABranch@perkinscoie.com

Attorneys for Proposed Intervenor-Defendants

CERTIFICATE OF SERVICE

I hereby certify that I today caused true and correct copies of Proposed Intervenor-Defendants' Motion for Leave to Intervene was served on all parties by filing same through the Virginia Judiciary E-Filing System (VJEFS).

Dated: August 27, 2021

Jeffrey Breit

Jeffrey Breit, VA Bar No. 18876
Breit Cantor
Towne Pavilion Center II
600 22nd Street, Suite 402
Virginia Beach, VA 23451
Tel: 757-670-3888
jeffrey@breitcantor.com

Attorney for Proposed Intervenor-Defendants