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 is 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.

MOTION TO DISMISS AND DEMURRER OF INTERVENOR-DEFENDANTS TERRY McAULIFFE AND DEMOCRATIC PARTY OF VIRGINIA

At Law No. CL21003848-00

Introduction

Intervenor Defendants Terry McAuliffe and the Democratic Party of Virginia, by and through their undersigned attorneys, hereby move to dismiss the Republican Party's complaint for lack of subject matter jurisdiction pursuant to Va. Code § 8.01-276, and demur to the Republican Party's complaint pursuant to Va. Code § 8.01-273.

The Republican Party seeks to improperly use this Court to deprive Virginia's voters of their right to select their next Governor. After a landslide victory in the Democratic Primary, Terry McAuliffe, the former Governor of Virginia, is the duly elected Democratic nominee for Governor

in the upcoming general election. Under Virginia law, his name *must* be included on the general election ballot. Va. Code § 24.2-535. Virginians are entitled to the opportunity to vote for him.

The Republican Party's complaint is based on a legal lie. They argue that the Court should order McAuliffe's name removed from the general election ballot because, they contend, McAuliffe's declaration of candidacy in the *primary* did not include his signature. Taking the allegations in the complaint as true for the purposes of this demurrer and motion to dismiss only (as is proper under this Court's rules), the Republican Party's own allegations establish that it has no right to relief, much less the extraordinary relief it seeks here: effectively retroactively invalidating the hundreds of thousands of ballots cast for McAuliffe in the primary, which is long since over, and denying the Democratic Party's and Democratic voters' clear choice for the Party's nomination for Governor access to the ballot.

Nothing in the Virginia Code requires a candidate to sign the declaration of candidacy for nomination by primary. The Code requires such a candidate "to file a written declaration of candidacy on a form prescribed by the State Board." Va. Code § 24.2-520. As evidenced by the Republican Party's own Exhibit A, McAuliffe did so. *See* Compl. Ex. A. The Code requires that the declaration "include the name of the political party of which the candidate is a member, a designation of the office for which he is a candidate, and 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." Va. Code § 24.2-520. The form at issue included each of those elements. *See* Compl. Ex. A. And the declaration must be "attested by two witnesses who are qualified voters of the election district." Va. Code § 24.2-520. Here, that form was so attested. *See* Compl. Ex. A. The Virginia Code contains no further requirement that the candidate sign the declaration of candidacy. *See* Va. Code § 24.2-520.

Even if there were a technical defect with the declaration of candidacy—and there is not—it would provide no basis for removing McAuliffe's name from the general election ballot and preventing Virginia's voters from choosing him as their next Governor. The declaration of candidacy is a prerequisite for placement on the ballot in the primary election, not the general election, and the primary election has already concluded. *See id.* §§ 24.2-520, -525. Placement on the general election ballot is simpler: the winner of the primary—McAuliffe—must be listed. *Id.* § 24.2-535.

In fact, the Court has no power to hear this suit at all. "[S]ubject matter jurisdiction exists in the courts only when it has been granted by a constitution or statute." *Virginian-Pilot Media Cos. v. Dow Jones & Co.*, 280 Va. 464, 467–68 (2010). Nothing in the Virginia Code authorizes an adverse political party to challenge the declaration of candidacy of another party's candidate, nor authorizes a court to hear such a challenge. The Republican Party relies on the declaratory judgment statutes and the Court's mandamus authority. But "the declaratory judgment statutes may not be used to attempt a third-party challenge to a governmental action when such a challenge is not otherwise authorized by statute." *Charlottesville Area Fitness Club Operators Ass'n v. Albemarle Cnty. Bd. of Supervisors*, 285 Va. 87, 100 (2013) (quoting *Miller v. Highland County*, 274 Va. 355, 371–72 (2007)). And mandamus authority does not allow the enforcement of duties that require investigation and judgment—like the sufficiency of a document—or the setting aside of acts previously done. *Umstattd v. Centex Homes, G.P.*, 274 Va. 541, 545–46 (2007); *In re Commonwealth's Atty'y for Roanoke*, 265 Va. 313, 319 n.4 (2003)).

The Court should therefore dismiss the Republican Party's complaint or sustain the Intervenor Defendants' demurrer.

Factual Background[1]

McAuliffe launched his campaign for Governor on December 9, 2020. Compl. ¶ 21. On March 8, 2021, to secure his place on the Democratic primary ballot, McAuliffe delivered the filing fee, declaration of candidacy, and at least 2,000 signatures, including at least fifty from each congressional district throughout the Commonwealth, to the Virginia State Board of Elections. *Id.* ¶¶ 47, 49, 50; Va. Code § 24.2-522(C). The Republican Party alleges that McAuliffe did not sign his declaration of candidacy. Compl. ¶ 47; *see also* Compl. Ex. A. But it admits that the declaration of candidacy and accompanying materials were accepted by the Board and transmitted to the chairman of the Democratic Party of Virginia for review. *Id.* ¶¶ 48, 50; *see* Va. Code § 24.2-522. The chairman then certified that McAuliffe had filed his declaration of candidacy and the required number of petition signatures. Compl. ¶ 52; s*ee* Va. Code § 24.2-522(A). Three months later, on June 8, 2021, McAuliffe won the Democratic primary in a landslide, securing over 62% of all votes cast and more than three times the number of votes of his next closest competitor. *See* Virginia Dep't of Elections, 2021 June Democratic Primary Official Results, https://results.elections.virginia.gov/vaelections/2021%20June%20Democratic%20Primary/Site/Statewide.html.

The Republican Party filed this lawsuit nearly six months after McAuliffe submitted his declaration of candidacy, nearly three months after McAuliffe won the Democratic primary, and just days before the State Board of Elections recommends ballots be ordered (on September 3, 60 days before the general election, Virginia Dep't of Elections, GREB Handbook § 10.4, https://www.elections.virginia.gov/media/grebhandbook/2020-individual-chapters/10_Election_

[1] For purposes of this motion and demurrer, Intervenor-Defendants rely upon the facts as they are alleged in the Republican Party's complaint. If the case proceeds, Intervenor-Defendants will demonstrate that those allegations are materially false in many respects.

Day_Prep_(2020).pdf), and weeks before they must be printed and when in-person absentee voting begins (on September 17, 45 days before the general election, Va. Code § 24.2-612).

Legal Standard

Under Va. Code § 8.01-276, a party may move at any point to dismiss a complaint for lack of subject matter jurisdiction. "In order for a court to have the authority to adjudicate a particular case upon the merits," the Court must have subject matter jurisdiction. *Pure Presbyterian Church of Washington v. Grace of God Presbyterian Church*, 296 Va. 42, 49 (2018). Subject matter jurisdiction "can only be acquired by virtue of the Constitution or of some statute." *Id.* (quoting *Humphreys v. Commonwealth*, 186 Va. 765, 772–773 (1947)). "Once a Court determines that it lacks subject matter jurisdiction, 'the only function remaining to the court is that of announcing the fact and dismissing the cause.'" *Pure Presbyterian Church of Washington*, 296 Va. at 50 (quoting *Ex parte McCardle*, 74 U.S. 506, 514 (1868)).

On a demurrer, the Court considers the legal sufficiency of the facts alleged in a complaint. Va. Code § 8.01-273; *Hubbard v. Dresser, Inc.*, 271 Va. 117, 119 (2006). While a demurrer "accept[s] as true all facts properly pleaded in the bill of complaint and all reasonable and fair inferences that may be drawn from those facts," *id.* (quoting *Glazebrook v. Bd. of Supervisors of Spotsylvania Cnty.*, 266 Va. 550, 554 (2003)), it does not "admit the correctness of the pleader's conclusions of law," *Yuzefovsky v. St. John's Wood Apartments,* 261 Va. 97, 102 (2001). A demurrer shall be granted if the plaintiff's pleading fails to state a cause of action or fails to state facts upon which relief can be granted. Va. Code § 8.01-273; *Hubbard*, 271 Va. at 122 (demurrer must be granted when a pleading fails to provide "sufficient definiteness to enable the court to find the existence of a legal basis for its judgment").

Argument

I. Motion to Dismiss: The Court lacks subject matter jurisdiction because no statute or constitutional provision authorizes review.

The Court has no jurisdiction over this dispute. "[S]ubject matter jurisdiction exists in the courts only when it has been granted by a constitution or statute." *Virginian-Pilot Media Cos. v. Dow Jones & Co.*, 280 Va. 464, 467–68 (2010). This is a "basic constitutional principle" that ensures the separation of powers. *Id.* at 467. As grounds for jurisdiction, the Republican Party relies solely on the Declaratory Judgment Act, Va. Code §§ 8.01-184, -186, and the grant of authority to the circuit courts to issue writs of mandamus "in other cases in which it may be necessary to prevent the failure of justice and in which mandamus may issue according to the principles of common law," *id.* § 17.1-513. *See* Compl. ¶¶ 9, 10. Neither suffices to support the Court's jurisdiction in this case.

A. The Declaratory Judgment Act

The Republican Party principally relies on the Declaratory Judgment Act as the basis for the Court's jurisdiction. *See* Compl. ¶ 9. But "the declaratory judgment statutes may not be used to attempt a third-party challenge to a governmental action when such a challenge is not otherwise authorized by statute." *Charlottesville Area Fitness Club Operators Ass'n*, 285 Va. at 100 (quoting *Miller*, 274 Va. at 371–72). Rather, a party may bring a declaratory judgment action only if some other statute authorizes a private right of action. *See id.* In the absence of such a statute, there is no "justiciable controversy," and "the circuit courts [do] not have authority to exercise jurisdiction." *Id.* at 97.

Nothing in the Virginia Code authorizes the Republican Party to bring a lawsuit challenging the declaration of candidacy of another party's nominee. Virginia Code § 24.2-520 simply prescribes the requirements for a declaration of candidacy—it does not authorize a private

suit by a third party to challenge whether those requirements were met. Nor do any of the other code provisions the Republican Party cites do so. *See* Va. Code §§ 24.2-504, -525(A) (specifying whose name may be printed on a ballot); *id.* § 24.2-512 (requiring that primaries be conducted in accordance with Virginia law); *id.* § 24.2-522(A) (setting deadlines for filing and transmitting a declaration of candidacy); *id.* § 24.2-527 (requiring party chairs to make a certification). In contrast, where the General Assembly wished to authorize election-related litigation, it did so expressly. *See, e.g.*, Va. Code §§ 24.2-804 to -814 (authorizing lawsuits by unsuccessful candidates challenging election results in limited circumstances and prescribing special procedures for such lawsuits).

Without a separate, statutory cause of action, the Republican Party is "using the declaratory judgment statute 'to attempt a third-party challenge to a governmental action when such a challenge is not otherwise authorized by statute.'" *Charlottesville Area Fitness Club Operators Ass'n*, 285 Va. at 100–01. That is precisely what Virginia law prohibits. *See id.* The Republican party is a "stranger[] to" the Board of Elections' decision to accept McAuliffe's declaration of candidacy and place McAuliffe's name on the general election ballot, and it seeks to use the declaratory judgment statutes to "'bring into being' a relationship with the Board that does not exist." *Id.* at 101. The Declaratory Judgment Act does not authorize suit under such circumstances.

B. Mandamus

The Republican Party also relies on the mandamus statute, but the relief it seeks is not available via mandamus, for at least two reasons. First, mandamus is limited to "compel[ling] a public official to perform a *purely ministerial duty* imposed by law." *Umstattd*, 274 Va. at 545 (emphasis added). Where a duty "involves the necessity on the part of the officer to make some investigation, to examine evidence and form his judgment thereon, mandamus will not be awarded to compel performance of the duty." *Id.* at 546. The relief that the Republican Party seeks in

mandamus does not involve a purely ministerial duty in this sense. The Republican Party asks the Court to issue a writ of mandamus ordering Defendants to "not permit McAuliffe's name to appear on the ballot *until he has been properly determined* to 'fulfill all the requirements of a candidate.'" Compl. at p.18 (emphasis added). Such relief would unavoidably require Defendants to "make some investigation, to examine evidence and form [a] judgment thereon"—precisely what mandamus does not allow. *Umstattd*, 274 Va. at 546.

Second, "neither prohibition nor mandamus will lie to undo acts already done." *In re Commonwealth's Att'y*, 265 Va. at 319 n.4. But according to the Republican Party, the alleged illegality was complete long ago. Defendants already accepted McAuliffe's declaration of candidacy, Compl. ¶¶ 47–49, already transmitted it to the state party, *id.* ¶ 50, already tabulated the returns from the Democratic primary, *id.* ¶ 56, and already declared McAuliffe the winner and the Democratic nominee, *id.* The Republican Party asks the Court to "reverse[] or enjoin[]" these past actions. Compl. ¶ 62. Mandamus cannot provide such retrospective relief. *In re Commonwealth's Atty.*, 265 Va. at 319 n.4. And even if such relief were available via mandamus, it would barred by laches, given the Republican Party's failure to challenge McAuliffe's declaration of candidacy until months after it was submitted, and after the Democratic primary had already been held. *See Princess Anne Hills Civil League, Inc. v. Susan Constant Real Est. Tr.*, 243 Va. 53, 58 (1992).

II. Demurrer: The Republican Party's complaint fails to state a cause of action.

A. The Virginia Code does not require declarations of candidacy for nominations by primary to be signed by the candidate.

The General Assembly set forth detailed requirements for a declaration of candidacy for nomination by primary in the Virginia Code, and nowhere did it require that the candidate sign

that document. The entire legal premise of the Republican Party's suit—that a declaration of candidacy must be signed by the candidate to be valid—is therefore false.

Under Virginia Code § 24.2-520, a declaration of candidacy for nomination by primary must include (1) "the name of the political party of which the candidate is a member," (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." Va. Code § 24.2-520. And it must also be (4) *either* "acknowledged before some officer who has the authority to take acknowledgments to deeds, *or* attested by two witnesses who are qualified voters of the election district." *Id.* (emphasis added). Nowhere does the statute require that the declaration of candidacy be signed by the candidate if it is attested by two qualified voter witnesses. *See id.* In contrast, the Code provision governing the distinct declarations of candidacy that *independent* candidates—rather than candidates for nomination by primary—are required to file expressly states that such declarations "shall be signed by the candidate." Va, Code § 24.2-505(A).[2] Had the General Assembly desired to impose such a requirement on candidates for nomination by primary, it could easily have done so.

The declaration of candidacy form that the Republican Party attached to its complaint meets each of the requirements applicable to declarations of candidacy for nomination by primary. *See* Compl. Ex. A. It meets the first three requirements: it states that McAuliffe is running in the Democratic primary, it states that he is running for the office of Governor, and it contains the

[2] "Any person, *other than a candidate for a party nomination or a party nominee*, who intends to be a candidate for any office to be elected by the qualified voters of the Commonwealth at large or of a congressional district shall file a declaration of candidacy with the State Board, on a form prescribed by the Board, designating the office for which he is a candidate. The written declaration shall be attested by two witnesses who are qualified voters of the Commonwealth or of the congressional district, or acknowledged before some officer authorized to take acknowledgements to deeds. *The declaration shall be signed by the candidate*." Va. Code § 24.2-505(A) (emphasis added).

required statement about defeat in the primary. *See id*. And it meets the second prong of the fourth requirement: it is attested to by two witnesses who are qualified voters in Virginia. *See id.* The statute requires no more. *See* Va. Code § 24.2-520. The entire premise of the Republican Party's complaint—that McAuliffe submitted an inadequate declaration of candidacy—is therefore false.

In arguing that a declaration of candidacy for nomination by primary must also be signed by the candidate, the Republican Party relies on a handbook published by the Department of Elections. *See* Compl. ¶ 4 (citing Va. Dep't of Elections, GREB Handbook § 16.2.1.2, https://www.elections.virginia.gov/media/grebhandbook/2020-individual-chapters/16_Candidate_Processing_(2020).pdf). But the Department of Elections handbook is not the law—only the Virginia Code is. The courts "alone shoulder the duty of interpreting statutes because 'pure statutory interpretation is the prerogative of the judiciary.'" *Fitzgerald v. Loudoun Cnty. Sheriff's Off.*, 289 Va. 499, 505 (2015). So "[a]n agency's 'legal interpretations of statutes' [are] accorded no deference" by Virginia courts. *Commonwealth ex rel. Va. State Water Control Bd. v. Blue Ridge Env't Def. League, Inc.*, 56 Va. App. 469, 481 (2010), *aff'd*, 283 Va. 1 (2012).

If anything, the contrast between the language of the handbook and the language of the statute only confirms that the statute does not require a candidate's signature on a declaration of candidacy for nomination by primary. The handbook quotes the statutory language for the requirements that the statute actually imposes, but abruptly stops quoting to add the additional requirement that the candidate sign:

> Va. Code §24.2-505 requires that the declaration be "on a form prescribed by the board, designating the office for which he is a candidate," witnessed by two qualified voters or "acknowledged before some officer authorized to take acknowledgements," and signed by the candidate.

GREB Handbook at 16.2.1.2. If the quoted statutory requirements actually required a candidate's signature, the drafters of the handbook would not have felt obliged to add the additional language,

which appears nowhere in the statute. And if the General Assembly had wanted to impose a candidate-signature requirement on candidates for nomination by primary, it too could easily have added it, as it did for independent candidates, *see* Va. Code § 24.2-505(A). Courts, however, are "not free to add language, nor to ignore language, contained in statutes." *SIGNAL Corp. v. Keane Fed. Sys., Inc.*, 265 Va. 38, 46 (2003).

B. Regardless, McAuliffe must be included on the general election ballot as the winner of the Democratic primary.

The Republican Party's effort to use an alleged defect in McAuliffe's declaration of candidacy to remove him from the general election ballot also fails for an additional reason: a declaration of candidacy is not a prerequisite for McAuliffe's place on the general election ballot. McAuliffe is entitled to be named on the general election ballot for a simpler reason: he is the certified winner of the Democratic primary, and the winner of a party primary "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." Va. Code § 24.2-535 (emphasis added); Compl. ¶ 56.

The requirement of a declaration of candidacy for nomination by primary relates to placement on the primary ballot, not the general election ballot. *See* Va. Code §§ 24.2-520, -525. The primary election has already occurred, the results have already been certified, and the time for a challenge to those results has already long passed. *See* Compl. ¶ 56; Va. Code § 24.2-808 (requiring that a court challenge to a primary election be filed within 10 days of the election). No such challenge was brought, and the Republican Party could not have brought one—only "one or more of the unsuccessful candidates" in the challenged election may do so. Va. Code § 24.2-807. There is no basis for the Republican Party to now—almost three months later—contest the results of another party's primary.

In arguing otherwise, the Republican Party seizes on the statutory term "candidate," contending that McAuliffe never became a "candidate" because of the alleged defect in his declaration of candidacy. Compl. ¶¶ 36–55. The statutory text refutes this argument, because it does not make status as a "candidate" contingent on the filing of a declaration of candidacy. To the contrary, the Virginia Code imposes just two "requirement[s] of candidacy": to be a candidate, one must file "a written statement under oath, on a form prescribed by the State Board, that he is qualified to vote for and hold the office for which he is a candidate," Va. Code § 24.2-501, and "a written statement of economic interests," *id.* § 24.2-502. The Republican Party does not allege that McAuliffe failed to file either document. He is therefore a "candidate" within the meaning of the Virginia Code.

Unlike the "requirement[s] of candidacy" described by Virginia Code §§ 24.2-501 and -502, filing a declaration of candidacy for nomination by primary is not a prerequisite for being a "candidate" in the first place. It is just something that a "candidate" must do, if he wants to be nominated by primary. *See id.* § 24.2-520 ("A candidate for nomination by primary for any office shall be required to file a written declaration of candidacy . . . ."). Thus, if McAuliffe's declaration of candidacy were deficient—and it was not, as explained above—that would simply make McAuliffe a "candidate" who failed to comply with Va. Code § 24.2-520. It would not mean that he was never a "candidate" at all under the Virginia Code. McAuliffe would therefore still be the "candidate" who won his party primary, and whose name "shall be printed on the official ballots used in the election for which the primary was held." *Id.* § 24.2-535.

C. The right to vote of Republican Party voters is not implicated.

While the Republican Party's complaint is based entirely on an alleged, non-existent technical deficiency in McAuliffe's declaration of candidacy, Count I of the Republican Party's complaint attempts to turn that alleged deficiency into a violation of the constitutional right to vote

on behalf of its members. Compl. ¶¶ 65–71. The Republican Party's theory is that Republican votes will be diluted because the wrongful inclusion of McAuliffe on the ballot will divert votes to him. Compl. ¶ 69. Courts across the country have repeatedly rejected vote dilution claims of this sort. As the Third Circuit explained in a decision rejecting vote dilution claims based on the allegation that Pennsylvania was illegally counting votes that had been cast too late as a matter of state law, "vote dilution under the Equal Protection Clause is concerned with votes being weighed differently." *Bognet v. Sec'y Commw. of Pa.*, 980 F.3d 336, 355 (3d Cir. 2020), *cert. granted, judgment vac. as moot sub nom. Bognet v. Degraffenreid*, 209 L. Ed. 2d 544 (Apr. 19, 2021). There is no vote dilution if "[e]very qualified person gets one vote and each vote is counted equally in determining the final tally." *Baten v. McMaster*, 967 F.3d 345, 355 (4th Cir. 2020), *as amended* (July 27, 2020). An "alleged violation of state law that does not cause unequal treatment" therefore cannot give rise to a vote dilution claim. *Bognet*, 980 F.3d at 355. The alleged injury here is inadequate for the same reason: Republican votes will count equally with all other votes, so the inclusion of McAuliffe on the ballot cannot support a vote dilution claim.

This makes sense. Nothing about McAuliffe being on the ballot prevents the Republican Party's members from voting for whomever they chose for governor, and their votes will count equally with all other votes. McAuliffe will win the governor's race if, and only if, more Virginia citizens vote for him than for any of his opponents. It is the Republican Party via this lawsuit—not McAuliffe—who is trying to prevent Virginians from voting for the candidate of their choice. In other words, the only violation of the right to vote implicated by this case is what would happen if the Republican Party were to be successful in its effort to effectively cancel the hundreds of thousands of votes cast in the Democratic primary and deny the millions of Virginia voters who intend to vote for McAuliffe in the general election their right to do so. *Reynolds v. Sims*, 377 U.S.

533, 555 (1964) ("The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."); *see also Anderson v. Celebrezze*, 460 U.S. 780, 787 (1983) (explaining that ballot access always implicates the constitutional rights of the voters who support affected or excluded candidates).

To accept the Republican Party's argument would not only turn long-standing voting rights doctrine on its head, it would convert every alleged violation of an elections related statute into a constitutional vote dilution claim. Courts have repeatedly refused to do so. *See Minn. Voters All. v. Ritchie*, 720 F.3d 1029, 1031–32 (8th Cir. 2013) (affirming Rule 12(b)(6) dismissal of vote-dilution claim based on similar theory as one Republican Party raises here); *see also Partido Nuevo Progresista v. Perez*, 639 F.2d 825, 827–28 (1st Cir. 1980) (per curiam) (rejecting challenge to purportedly invalid ballots because "case does not involve a state court order that *dis*enfranchises voters; rather it involves a . . . decision that *en*franchises them—plaintiffs claim that votes were 'diluted' by the votes of others, not that they themselves were prevented from voting"); *Donald J. Trump for President, Inc., v. Boockvar*, 493 F. Supp. 3d 331, 414-415 (W.D. Pa. 2020) (rejecting Trump Campaign's equal protection challenge to poll-watcher restrictions grounded in vote-dilution theory because restrictions did not burden fundamental right or discriminate based on suspect classification); *Republican Party of Pa. v. Cortés*, 218 F. Supp. 3d 396, 406–07 (E.D. Pa. 2016) (rejecting requested expansion of poll-watcher eligibility based on premise that voter fraud would dilute plaintiffs' votes). This Court should do the same.

D. The Republican Party's freedom of speech and association are not implicated.

The Republican Party also alleges (in Count II) a violation of the freedom of speech and association, contending that Defendants have "[f]orc[ed] voters to associate with an illegitimate

and unqualified candidate in the 2021 general election." Compl. ¶ 74. There is no factual or legal basis for this contention. No one is being forced to associate with anyone by virtue of McAuliffe's place on the general election ballot, much less the Republican Party or its voters. Voters are free to vote for whomever they would like. If a candidate's mere presence on a ballot constituted forced association with voters, then states could never print ballots. That is not the law. And, in any event, any association with McAuliffe is the opposite of forced—he is the nominee that the Democratic voters *chose*, through the procedures provided under Virginia law.

Once again, it is the Republican Party's lawsuit—not McAuliffe's presence on the ballot—that threatens associative and expressive rights. And the rights that are being threatened are those of the Democratic Party and its members, as a result of this lawsuit. Not the Republican Party, which has manufactured its claims in an attempt to win the election, not by persuading the voters, but by attempting to convince this Court to deny millions of those voters the opportunity to vote for the candidate that hundreds of thousands of Democratic primary voters chose as the Party's gubernatorial nominee. In other words, "[t]he relief plaintiffs seek will therefore *decrease* [voters'] expression of political speech rather than increase it, worsening plaintiffs' injury rather than redressing it." *Townley v. Miller*, 722 F.3d 1128, 1134 (9th Cir. 2013).

E. There is no cause of action for violating the election law.

Finally, the Republican Party alleges a claim for the violation of Virginia's statutory election law in Count III. Compl. ¶¶ 77–84. The numerous fatal problems with this claim have already been explained above. The Virginia Code provides no private right of action to bring such a claim. *Supra* Part I.A. The complaint fails to state a claim for violation of an election law, because the Virginia Code does not require candidates to sign the declaration of candidacy for nomination by primary. *Supra* Part II.A. And there is no basis for prospective relief, which is all the Complaint seeks, Compl. at 16–17, because a proper declaration of candidacy is not a prerequisite to

McAuliffe's right to be named on the general election ballot as the winner of the Democratic primary. *Supra* Part II.B.

Conclusion

For the reasons set forth above, Intervenor-Defendants Terry McAuliffe and the Democratic Party of Virginia respectfully request that this Court grant this motion and sustain this demurrer, and dismiss the Republican Party's complaint.

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 Motion to Dismiss and Demurrer of Intervenor-Defendants Terry McAuliffe and Democratic Party of Virginia was served on all parties by filing same through the Virginia Judiciary E-Filing System (VJEFS).

Dated: August 27, 2021

By: *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

Attorney for Proposed Intervenor-Defendants