

VIRGINIA

IN THE CIRCUIT COURT OF THE COUNTY OF FREDERICK

Thomas P. Reed,

and

Robert Hess,

Plaintiffs,

v.

Virginia Department of Elections, and  
Jamilah D. Lecruise, John O'Bannon, and  
Robert H. Brink, in their official capacity as  
members of the Virginia State Board of  
Elections,

Defendants.

Case No. 20-628

ORIGINAL RECEIVED & FILED  
FREDERICK COUNTY CIRCUIT COURT  
DATE: 10-9-2020 P.M.

**MOTION FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF AND  
MEMORANDUM IN SUPPORT**

Comes now the Plaintiffs, by Counsel, and make this Motion for Declaratory Judgment and Injunctive relief, supported by the following Memorandum in Support of the motion, asks this court for an Order and Judgment:

1. Declaring that any instructions issued by Defendants that absentee and mail ballots received after election day should be counted even if they lack a legible postmark conflicts with Virginia statutes including Virginia Code § 24.2-709(B).
2. Declaring that a postmark on or before election day is required to accept and count an absentee or mail ballot that is received after election day pursuant to Virginia Code § 24.2-709(B).
3. Declaring that data from the Intelligent Mail Barcode (IMb) is an official indicia of mailing by the United States Postal Service and can be used to verify that an absentee

ballot was mailed on or before the date of the election in the case of a missing or illegible traditional postmark.

4. Enjoining the Defendants from issuing any instructions in conflict with Virginia Code § 24.2-709(B) in regards absentee or mail ballots requiring a postmark from on or before election day to be counted.

### MEMORANDUM IN SUPPORT

This case is about state officials not following explicit Virginia statutory requirements related to the upcoming election. The Defendants have dispensed with statutory language passed by the General Assembly and signed into law that requires absentee or mail ballots received after election day must have a postmark from on or before election day to be counted. The Defendants have replaced the procedures contained in the law regarding absentee ballot procedures with their own version of absentee ballot procedures. In doing so, employees of a state agency have replaced the laws enacted by the duly elected representatives of the citizens of the Commonwealth of Virginia and thereby violated the Virginia Constitution's Anti-Suspension provisions. Article I, Section 7 of the Constitution of Virginia. This Court should enjoin the Defendants from issuing any further instructions regarding the standards for accepting and counting absentee ballots that are in conflict with Virginia code.

Plaintiffs rely on certainty in election administration. Plaintiff Thomas P. Reed is a member of the Frederick County board of elections, the three-member body tasked by Virginia law with administering elections in Frederick County. Plaintiff Robert Hess is the chairman of the Winchester City Republican Party and is responsible for a variety of election-related matters including training observers and candidates as to what the actual procedures are for the processing and counting of absentee and mail ballots under Virginia law. Both parties have been injured and impaired in the execution of their duties because the Defendants have issued guidance that squarely conflicts with explicit terms of Virginia Code § 24.2-709(B).

**I. The Law - § 24.2-709(B).**

Virginia statutes explicitly require absentee ballots received by election officials to have a postmark from on or before election day in order to be counted. The statute states:

Notwithstanding the provisions of subsection A, any absentee ballot (i) returned to the general registrar after the closing of the polls on election day but before noon on the third day after the election and (ii) *postmarked on or before the date of the election* shall be counted pursuant to the procedures set forth in this chapter if the voter is found entitled to vote. For purposes of this subsection, a postmark shall include any other official indicia of confirmation of mailing by the United States Postal Service or other postal or delivery service.

Virginia Code § 24.2-709(B) (emphasis added). Permitting absentee ballots to be received and counted after election day is a marked and significant change to Virginia election law. This change passed the General Assembly in March of 2020, Acts of Assembly Ch. 288, and became effective as law on July 1, 2020. As part of House Bill 238, the legislation altered what had been longstanding Virginia election requirements – namely that an absentee ballot had to be received by election officials on or before election day.

**II. The Defendant's Conflicting Instructions**

At a meeting on August 4, 2020, the Defendants took up a regulatory action, "Processing Absentee Ballots with Missing or no Postmark" and adopted a motion "that the Board approve the Department's proposal for regulatory action related to processing absentee ballots with missing or no postmarks." August 4 Meeting Minutes (attached as Ex. A to Complaint) proposing an amendment to 1 Va. Admin. Code 20-70-20. Material Omissions from Absentee Ballots.

The amendment from August 4, 2020 added paragraph 11 to section C, the list of immaterial omissions. The list of immaterial omission are errors that would not render a ballot invalid. Specifically, the amendment's language was "The ballot is received by the general

registrar's office by noon on the third day after the election pursuant to § 24.2-709 of the Code of Virginia, **but does not have a postmark, or the postmark is missing or illegible.**" Board Memo (attached as Ex. B to Complaint) (emphasis added).

On August 13, 2020, the Defendants sent out an "Official ELECT Advisory." (ELECT is the shorthand reference employees of the Department use for the agency). The August 13, 2020 advisory went to general registrars and local electoral boards, including to Plaintiff Reed, with the subject "New Regulations Adopted by State Board of Elections." The August 13 Advisory listed, *inter alia*, an amendment to the Material Omission from Absentee Ballots regulation, noting, "The effect of the amendment is if a General Registrar receives an absentee ballot in the mail after Election Day but before noon on Friday that does not have a postmark, or the postmark is missing or illegible, **the ballot can be counted. The missing or illegible postmark is not a material omission.**" Memo (attached as Ex. C to Complaint) (emphasis added).

The August 13 memo went further and listed as an action item:

If your office receives an absentee ballot in the mail after Election Day but before 12:00 p.m. noon on the Friday after the election, and the postmark is missing or illegible on the mailed ballot envelope, **the ballot can still be counted if there is no other reason to reject the ballot.** This does not apply for ballots that are delivered by the voter to the General Registrar's office. Ballots delivered by the voter must still be received by the General Registrar by the time the polls close on Election Day.

*Id.* (emphasis added).

### III. Injunction Standards

"[U]nless a party is entitled to an injunction pursuant to a statute, a party must establish the 'traditional prerequisites, *i.e.*, irreparable harm and lack of an adequate remedy at law' before a request for injunctive relief will be sustained." *Levisa Coal Co. v. Consolidation Coal Co.*, 662 S.E.2d 44, 53 (Va. 2008). Whether to enter the injunction "rests on sound judicial discretion to be exercised upon consideration of the nature and circumstances of a particular case." *Id.*

#### IV. Argument

##### A. Defendants' Conflicting Instructions Violate the Virginia Constitution.

The suspension of an election related statute is strikingly similar to the central issues before the Virginia Supreme Court in *Howell v. McAuliffe*, 788 S.E.2d 706 (Va. 2016). In *Howell*, the Governor of Virginia sought to issue a blanket Executive Order that:

removed the political disabilities of approximately 206,000 Virginians who had been convicted of a felony but who had completed their sentences of incarceration and any periods of supervised release, including probation and parole. The civil rights restored by the Executive Order were the rights to vote, to hold public office, to serve on a jury, and to act as a notary public.

*Howell*, 788 S.E.2d at 710. The Governor sought to give the franchise by edict to a subset of voters. The Virginia Supreme Court held in *Howell* that executive action contrary to the Virginia Constitution was not permitted and granted a writ of mandamus. *Howell*, 788 S.E.2d at 724.

In Virginia, the Legislative power is supreme to any act by an agency employee or even the Governor himself. "The dominant role in articulation of public policy in the Commonwealth of Virginia rests with the elected branches." *Howell*, 788 S.E.2d at 710. Indeed, Virginia, perhaps given her historic role in advancing the rule of law both in the Colonies and across the English speaking world, enacted Article I, Section 7 of the Constitution of Virginia which provides: "That all power of suspending laws, or the execution of laws, by any authority, without consent of the representatives of the people, is injurious to their rights, and ought not to be exercised."

The tumults associated with the exercise of unrestrained power were the ingredients that animated the entire separation of the colonies from England and seven years of the Revolutionary War. Prohibitions on a government's power to suspend or rewrite laws absent legislative action was no historical sideshow, but rather "an essential pillar of a constitutional republic." *Howell*, 788 S.E.2d at 720.

The Virginia Declaration of Rights drafted by George Mason had an anti-suspension provision in Section 7. Virginia delegates to the ratification convention to the United States Constitution were troubled that the draft Constitution did not contain an anti-suspension provision. Even though the United States Congress has never enacted an anti-suspension provision, the Virginia Constitution has maintained one through successive Constitutions. *See* Va. Const. art. I, § 7 (1830); Va. Const. art. I, § 7 (1851); Va. Const. art. I, § 7 (1864); Va. Const. art. I, § 9 (1870); Va. Const. art. I, § 7 (1902); Va. Const. art. I, § 7 (1971). *See generally*, *Howell*, 788 S.E.2d at 720-22.

The Rule of Law is superior to the rule of men in the Commonwealth.

The Virginia Supreme Court noted that two circumstances that constitute the impermissible suspension of the laws. First, when an official in the executive branch sets “aside a generally applicable rule of law based solely upon his disagreement with it.” *Howell*, 788 S.E.2d at 722. The second is “its expansive scope and generality.” *Id.* The Conflicting Instructions to count absentee ballots received after the election even without a postmark sets aside a generally applicable rule of law because the Defendants disagree with it, and, is expansive and generally applicable. The Conflicting Instructions should therefore be enjoined.

#### **B. Defendant’s Conflicting Instructions Conflict with Virginia Statute**

“It is equally well established . . . that if the language of a statute is clear and unambiguous, a regulatory interpretation . . . that is in conflict with the plain language of the statute cannot be sustained.” *GMC v. Dep’t of Taxation*, 268 Va. 289, 293 (2004) (citing *Carr v. Forst*, 249 Va. 66, 71 (1995)). Virginia statute explicitly requires absentee ballots received by election officials to have a postmark from on or before election day in order to be counted. Virginia Code § 24.2-709(B). Defendant’s amendments to 1 Va. Admin. Code 20-70-20 and the


Conflicting Instructions conflict with this requirement because they require acceptance of absentee ballots that do not have a postmark. Defendant's regulation and Conflicting Instructions therefore cannot be sustained.

**V. Conclusion**

Absent injunction relief, Plaintiffs will endure irreparable injuries for which they have no adequate remedy at law. *See* Complaint ¶¶ 21-22. For the foregoing reasons, this Court should enter a declaratory judgment and enjoin Defendants from issuing any regulations and instructions or guidance that conflict with Virginia Code § 24.2-709(B) in regards to absentee or mail ballots requiring a postmark from on or before election day to be counted.



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