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. CL-20-622

PLAINTIFF'S REPLY TO BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

This case is an attempt by a local election official and interested party to ensure that the law passed by the Virginia General Assembly and signed by the Governor is followed, and not instructions by a state agency to contravene the law. While Defendants offer a number of justifications for issuing instructions to contravene Virginia Code § 24.2-709, none of them can overcome the central truth of this case: Defendants' instructions contravene Virginia Code § 24.2-709.

The Statute Passed by the General Assembly

After the COVID-19 pandemic had already gained a foothold in the United States, on March 11, 2020, the Virginia General Assembly passed a statute that made it acceptable to

deliver an absentee ballot after election day, if specific enumerated criteria were satisfied.

Virginia Code § 24.2-709 was amended to include a new subsection B that stated:

> 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. Acts of Assembly Ch. 288; codified at 24.2-709(B)(emphasis added).

The language is clear and unambiguous. An absentee ballot delivered after election day must have either 1) a postmark showing it was mailed on or before the date of the election, 2) an *official* indicia of confirmation of mailing *by the United States Postal service*, or, 3) an *official* indicia of confirmation of mailing by a "*delivery service*." There are no other exceptions.

Defendants make the squarely incorrect argument that the statute "does not address the situation that occurs when the return envelope has no postmark or the postmark is illegible." Opposition at 3 ¶ 5. The statute actually does address this event. The statue plainly makes it explicit that absentee ballots arriving contrary to the provisions of the code are not to be counted. There are no ambiguities. Virginia Code § 24.2-709(A) begins:

> A. **Any ballot returned to the office of the general registrar in any manner except as prescribed by law shall be void.** Absentee ballots shall be returned to the general registrar before the closing of the polls.

Virginia Code § 24.2-709(A) creates the presumption that ballots that do not comply with the requirements of the law are, contrary to the Defendants wishes, void. This explicit statutory requirement is fatal to Defendants' position. It leaves no room for creative and aspirational

attempts to circumvent the statute as Defendants have attempted to do with the Conflicting Instructions.

The Conflicting Instructions

Plaintiffs concede that two of the three instructions issued by the Defendants are in conformance with Virginia Code § 24.2-709 – namely that if the absentee ballots received by noon on the third day after election day includes an "Intelligent Mail barcode" that is used by the United States Postal Service to track mailing dates and shows a mailing date on election day or before, that ballot should be counted. The second instruction that Plaintiffs concede conforms with the law is the instruction that if the Intelligent Mail barcode shows the ballot is mailed after election day, then the ballot should not be counted. Those two instructions comply with Virginia Code § 24.2-709(B) because the data collected by the United States Postal Service are "official indicia of confirmation of mailing."

The third instruction, however, wholly contravenes the law and is the center of this dispute. Defendants third instruction would allow a ballot to be counted if it 1) arrives after election day and 2) does not contain any "other official indicia of confirmation of mailing by the United States Postal Service or other postal or delivery service."

Defendants would instead allow the voter to serve as the "official indicia of confirmation of mailing." In so doing, Defendants have created a third excuse for a late absentee ballot to be counted that the General Assembly *never passed* and conflicts with the exceptions that the Generally Assembly *did pass*. A signature of the voter and date of execution is neither an "official indicia of mailing" nor "by the United States Postal Service or other postal or delivery service." *Citing* Virginia Code § 24.2-709(B). The third instruction contravenes the statute and

therefore should be enjoined. The Defendants have no authority to write laws that the General Assembly declined to pass no matter how noble or fair-minded they may seem.

Defendants justify their departure from the Code of Virginia in the name of uniformity, fairness and holding a smooth election. In doing so, they turn the purpose of law – indeed even of the Virginia Constitution's anti-suspension clause (Va. Const., art. I, § 7) – on its head. Uniformity and fairness *are achieved by adherence to the rule of law*, not by state agencies substituting their own aspirations for the unambiguous language passed by the General Assembly and signed by the Governor. While Defendants cite fairness, one may just as easily refer to the goal of not having individuals cast ballots after election day as "fairness," a legislative purpose that is obvious reading the limited exceptions contained in § 24.2-709(B). "The primary objective of statutory construction is to ascertain and give effect to legislative intent." *Turner v. Commonwealth*, 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983).

Defendants Misinterpret the Law

Three cannons of statutory interpretation further support Plaintiffs' position.

First, words in a statute must be read using their ordinary meaning. Section 24.2-709(A) says that an absentee ballot that does not arrive as prescribed by law "shall be void." Then Section 24.2-709(B) establishes narrow exceptions for when it is permissible to count an absentee ballot that arrives after election day: if it is "postmarked on or before the date of the election" or it contains "other official indicia of confirmation of mailing" by the Post Office. "The term 'official' is defined as '[o]f or relating to an office or position of trust or authority,'..." *Lambert v. Commonwealth*, 65 Va.App. 682, 779 S.E.2d 871 (Va. App. 2015). See also, "Official," Black's Law Dictionary (10th ed.2014). "Official" is juxtaposed in Section 709(B) to

"the United States Postal Service" or other "postal or delivery service." "Courts apply the plain language of a statute unless the terms are ambiguous." *Tiller v. Commonwealth*, 193 Va. 418, 420, 69 S.E.2d 441, 442 (1952). Here the terms "postmarked" and "official indicia of confirmation of mailing by the United States Postal Service" are not ambiguous. "The plain, obvious, and rational meaning of a statute is to be preferred over any curious, narrow, or strained construction." *Turner* at 459. The statute permits late delivered ballots only if they have a postmark by the United States Post Office or other "delivery service," or else they are "void."

Defendants' Opposition offers an absurd interpretation of "official" where the voter herself can certify the date of mailing under oath without any official involvement of the Post Office or delivery service. If Defendants' strained statutory interpretation were correct, they could issue guidance allowing even a self-executed affidavit of mailing by the voter to accompany a late delivered absentee ballot. A Post-It Note attached with the mailing date might also satisfy Defendants' absurd statutory construction. While that outcome may be attractive to many, it simply is not what the General Assembly passed into law. Defendants' position has no limiting principle other than it was voted on by the State Board of Elections in the name of "fairness and uniformity." Indeed, following Defendants reasoning in their Opposition — "nothing in [§ 24.2-709] speaks to whether an absentee ballot that is received after close of polls without a postmark, or other indicia of the date of mailing, *may not* be counted"—it would be permissible for a regulation to allow for a voter to personally deliver a ballot three days after the election with no indication of when it was voted. Opposition at 6.

Second, the inclusion of one thing implies the exclusion of others. "The maxim '*Expressio unius est exclusio alterius*,' is especially applicable in the construction and interpretation of statutes." *Tate v. Ogg*, 170 Va. 95, 103, 195 S.E. 496 (1938). It is also

especially applicable here. The General Assembly passed House Bill 238 that upended decades of Virginia law requiring absentee ballots to be delivered by election day. To mitigate against the problem of ballots being submitted that were cast late, the legislation contained a list of three narrow and limited exceptions to the requirement, else the ballots would be "void" per § 24.2-709(A). The three exceptions were clear: the ballots have a USPS postmark on or before the date of election, or contain other "official indicia of confirmation of mailing" by the USPS or other delivery service. The inclusion of these three exceptions mean the *exclusion* of everything else. The Conflicting Instructions that ballots can be counted without these three items as long as the voter dates their own ballot did not make the list passed into law by the General Assembly. Allowing the voter to self-certify the date was not on the list of exceptions passed by the House Bill 238 and is therefore excluded.

The third and last cannon of statutory construction favoring Plaintiffs are that mandatory words impose a duty and permissive words allow discretion. The plain construction of § 24.2-709 establishes that late arriving absentee ballots are void unless they have satisfied one of three mandatory requirements. There is no permissive, flexible language in the statute such as "may." The language of § 24.2-709 is mandatory while Defendants mistakenly treat it as permissive.

Defendants' instructions conflict with the plain meaning of § 24.2-709 and should be enjoined. "An erroneous construction by those charged with its administration cannot be permitted to override the clear mandates of a statute." *Hurt v. Caldwell*, 222 Va. 91, 279 S.E.2d 138, 142 (1981). "When an agency's statutory interpretation conflicts with the language of the statute . . . the usual deference accorded to an agency's interpretation should be withheld." *University of Richmond v. Bell*, 543 F.Supp. 321, 327 (E.D.Va.1982).

Defendants Ignore Controlling Supreme Court Jurisprudence

Defendants' Opposition glaringly ignores entirely *Howell v. McAuliffe*, 788 S.E.2d 706 (Va. 2016), a case cited at length by Plaintiffs. The omission is most telling because the circumstances in *Howell* closely mirror those here, to the degree that *Howell* should control this case.

In *Howell*, the Governor sought to give the right to vote to those convicted of a felony. Rather than follow the Virginia Constitution's requirement that restoration of civil rights be done on an individualized basis, the Governor sought to grant blanket universal restoration of rights to every convicted felon.

The Virginia Supreme Court in *Howell* devoted significant attention to the impropriety of suspending election laws in its comprehensive discussion ruling against the executive branch. The Defendants' Opposition here characterized Plaintiffs' reliance on the Virginia Supreme Court's analysis in *Howell* as "colorful" and not germane to the "realities of governing and elections in the 21st Century." Opposition at 6.

To the contrary, the Supreme Court in *Howell* highlighted universal and timeless axioms of the American system of law, that laws should not be suspended or ignored because of exigencies or an urge to be "fair." What was true when George Mason wrote the Anti-Suspension provisions of the Virginia Declaration of Rights remains true today: Governments abuse their power when they suspend and ignore laws passed by legislatures. Laws are limits on the whims of bureaucrats, in this case the State Board of Elections and the Department of Elections. Laws limit bureaucrats so that power is limited. Laws define the powers of government to accept or reject absentee ballots and those laws must be followed.

Defendants may characterize the Plaintiffs' positions here as old fashioned and obsolete when there are "state experts" who know how to implement the Code better than the General Assembly. *Citing* Opposition at 6. But the tension between unrestrained power and the limiting role of democratically elected legislatures passing laws is a tension that is centuries old in the English-speaking world. It obviously continues today, and the Constitution of Virginia (Va. Const., art. I, § 7) and the Virginia Supreme Court in *Howell* both make clear on which side courts must fall.

Lastly, Plaintiffs are not seeking to have a statute declared unconstitutional. They are merely seeking to have instructions issued by a state agency declared in conflict with statutory law.

Defendants Actions Caused Any "Disruption" that may Occur

Defendants make much of the late date of these proceedings but have no one to blame but themselves. The General Assembly passed the amendment in March. The Board did not act to propose its regulation until August, waiting nearly a month before publishing it in the Virginia Register on August 31. Before it was even published, on August 14, the Defendants sent guidance to Plaintiff Reed and other election officials indicating the regulation had been "adopted" and should control their actions. Then, after receiving over 700 comments and being served with this suit, Defendants adopted a substantially amended regulation on October 20. Then today, they sent new guidance to election officials based on the adopted regulation.

Granting Plaintiffs relief would not "seriously disrupt an absentee voting period that has already begun," as the issue at hand relates only to ballots received after election day. In fact, had Defendants waited for this Court's decision, rather than issuing new guidance today, any minor disruption could have been avoided.

Defendants reliance on *Purcell* is also misplaced. As noted in their Opposition, the Supreme Court's caution about court orders close to election day relates to causing "voter confusion and consequent incentive to remain away from the polls." *Purcell v. Gonzales*, 549 U.S. 1, 4-5 (2006). Here, the regulation will not cause any such confusion—the statute and the instructions provided to voters already direct them to "Mail your ballot so that it is postmarked on or before Election Day…" Dept. of Elections Form ELECT-706.4-AB (https://www.elections.virginia.gov/formswarehouse/absentee/).

Plaintiffs are Entitled to a Preliminary Injunction

Plaintiffs are likely to succeed on the merits. Defendants ignore the clear conflict between their instructions and the statute, the heart of this case. Defendants arguments to the contrary, relying on a grant of authority to enact regulations are unpersuasive, particularly considering a key part of that authority—"Electoral boards and registrars … shall follow (a) the elections laws and (b) the rules and regulations of the State Board insofar as they do not conflict with Virginia or federal law." § 24.2-103.

Irreparable harm is manifest. Plaintiff Reed will be forced to confront the provision cited above—will he follow the regulations or the law? If he follows the law and this matter returns to court, it will be too late for effective relief—once ballots are counted, they cannot be "uncounted." No post-election relief is possible. No order by a court after the election can correct a result in which improperly cast votes were counted.

The balance of the equities and the public interest favor Plaintiffs. The only harm to Defendants or anyone else resulting from an injunction would be the need to issue new instructions to local election officials—instructions that have already been issued and revised as recently as today. Compared to the suspension of a validly enacted statute by an administrative

regulation, the equities clearly favor Plaintiffs. And the public interest in the rule of law is manifest.

Defendants Waive Any Emergency Basis for the Conflicting Instructions

Finally, Defendants do not assert and therefore waive any emergency powers basis for the Conflicting Instructions.

The Plaintiffs enjoy a likelihood of success on the merits, they will suffer if forced to act contrary to the law, and it is overwhelmingly in the public interest to uphold the law as written, and thus Defendants' Conflicting Instructions should be declared in conflict with Section 24.2-709(B) and enjoined.

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CERTIFICATE OF SERVICE

I hereby certify that on October 26, 2020, a true an accurate copy of this paper was emailed to Counsel for Defendants.

/s/ J. Christian Adams
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