

**VIRGINIA:**

**IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND**

<b>Matthan Wilson, et al.,</b>	)	
	)	
<b>Plaintiffs,</b>	)	
	)	
v.	)	<b>Case No. CL20004252-00</b>
	)	
<b>The Virginia State Board of Elections, et al.,</b>	)	
	)	
<b>Defendants.</b>	)	

**RESPONSE TO  
COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF  
AND PETITION OF WRIT OF MANDAMUS**

Defendants the Virginia State Board of Elections (SBE); Robert H. Brink, John O’Bannon, and Jamilah D. LeCruise, all in their official capacities as Chair, Vice-Chair, and Secretary, respectively, of SBE, and the Virginia Department of Elections (ELECT) (collectively the Commonwealth Defendants) respond as follows to the Motion for Declaratory and Injunctive Relief (Complaint) filed by Plaintiffs Matthan Wilson and Bryan Wright.

**INTRODUCTION**

The Commonwealth of Virginia, including the state elections officials and entities named as Defendants, *does not tolerate any type of election fraud*. Similarly, this Court has had little patience for keeping candidates on the ballot who have used underhanded and fraudulent tactics to “steal a spot on the ballot.” *See Democratic Party of Virginia v. Piper, et al.*, Case No. CL18-4061, Ltr. Op. at p. 11, (Richmond City Cir. Ct. September 6, 2018) (“The Court finds that the balance of equities tips overwhelmingly in favor of Plaintiff. [The Candidate] has lied to the Commonwealth, cheated the electorate, and attempted to steal a spot on the ballot. [The

Candidate's] sophomoric attempts to defraud the Commonwealths electoral system leave her with no equitable leg to stand on.") (attached as **Ex. A.**).

Since August 21, 2020 when West appeared to qualify for the Ballot, serious allegations have been made that the qualification papers of West's purported electors, including Plaintiffs, were obtained fraudulently and/or contained attestations in violation of Virginia law. At the same time that these allegations were coming to light, local election officials were actively moving forward with preparing for the state and federal absentee ballot mailing deadline. These local officials were already quite concerned that they lacked sufficient time to mail all necessary ballots out to voters on or before September 19, 2020 as required by the Uniformed and Overseas Citizens Absentee Voting Act, the Military and Overseas Voter Empowerment Act, and Virginia Code § 24.2-612.

Should this Court determine that any of the qualification papers of West's purported electors were obtained fraudulently, that any of the elector oaths were improperly attested and/or that other material errors exist in these papers, whether due to fraud or other reasons, and that such requires his disqualification, the Commonwealth Defendants will work with local election officials to effect West's disqualification from the ballot. The remedies to this situation are varied depending upon how quickly the Court is able to rule.

#### **STANDARD OF REVIEW**

Plaintiff asks the Court to apply the four-factor test that federal courts apply for such relief, under which a plaintiff must make a clear showing that (1) plaintiff is likely to succeed on the merits; (2) plaintiff will likely suffer irreparable harm absent preliminary relief; (3) the balance of hardships weighs in plaintiff's favor; and (4) the injunction is in the public interest. *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 236 (4th Cir. 2014) (citing *Winter v. Natural Resources Defense Council*, 555 U.S. 7, 20 (2008)).

Virginia law allows for “temporary injunctions,” and neither the General Assembly nor the Supreme Court of Virginia has adopted the federal test. Virginia Code § 8.01-628 provides that “No temporary injunction shall be awarded unless the court shall be satisfied of the plaintiff’s equity.” The Supreme Court, applying “well established principles,” has stated that “the granting of an injunction is an extraordinary remedy and rests on sound judicial discretion to be exercised upon consideration of the nature and circumstances of a particular case.” *Levisa Coal Co. v. Consolidation Coal Co.*, 276 Va. 44, 60, 662 S.E.2d 44, 53 (2008). When asked to adopt the federal test, the Supreme Court expressed no view. *Id.* at 60 n.6., 662 S.E.2d at 53 n.6.

With respect to mandamus, a petitioner for a writ of mandamus must demonstrate: (1) a clear right to the relief sought; (2) a legal duty of part of the respondent to act; and (3) the lack of an adequate remedy at law. *Bd. of Cty. Sup’rs, of Prince William Cty. v. Hylton Enters., Inc.*, 216 Va. 582, 584 (1976). Furthermore, the respondents’ legal duty to act must be ministerial, not discretionary. *Id.*

## **ARGUMENT**

The “nature and circumstances” of this case involves rapidly evolving facts. On the one hand, there are qualification papers – which, on their face, appeared to be appropriately attested to and notarized. On the other hand, the Plaintiffs have provided this Court with evidence in the nature of signed Oaths, appropriately attested to and notarized affidavits, and media reports that draw into question the legal sufficiency of West’s qualification as a presidential candidate. Under these circumstances, which are more fully explained below, Defendants urge the Court to quickly make any appropriate finding, as permitted under Virginia law, to resolve this legal and factual dilemma.

## **I. Background**

### **A. The ballot qualification process**

To qualify as an independent candidate for president in Virginia, the candidate must file petitions containing 5,000 signatures of registered voters, 200 from each congressional district. *See* Va. Code § 24.2-543. Listed on the petitions are the names of the thirteen electors who swear an oath that they “will, if elected, cast [their] ballot for the candidates for President and Vice President named in the petition[s concurrently filed with the SBE].” Virginia law requires that the oath of the electors be “subscribed and notarized.” *See id.* An independent presidential candidate must file these documents with the SBE on or before the seventy fourth day prior to the election - which, in 2020, was Friday August 21. *See id.*

Along with the petition pages containing the requisite number of signatures, the candidate must also file a form entitled “Oath for Electors for President and Vice-president; Independent and Third Party.” This form is also known internally as ELECT-543. The Department ensures that the submitted Oath form contains all the necessary information: her name and contact information as directed on the form and the dated signature of the elector following the “oath” printed on the form. The notary must fully complete the “Notary only” section of the form, including stamping the form with her notary stamp and providing her signature, registration number and commission expiration date.

### **B. The qualification of West.**

In reviewing the electoral oath forms from the West campaign, the Department determined that all thirteen forms were facially valid. All of the information required of the electors had been filled in. The elector had signed and dated the oath. Finally, each oath included the notary’s signature, date, notary public registration number and a commission expiration date that was later than the date of the oath. *See* Compl. Ex. F-Q.

However, Plaintiffs present evidence of concerning deficiencies in all thirteen elector oaths, based on sworn statements of the electors and alleged violations of Virginia Code Title 47.1 which governs the practice of notaries in Virginia. *See* Compl. A determination of whether or not a crime was committed by a notary and whether or not a individual was guilty of misconduct in notarizing document is reserved solely to the courts. *See* Va. Code § 47.1-28 (classifying certain notary misconduct as crimes). Additionally, the General Assembly reserved to the Courts the determination of the validity of a document notarized by a notary with an alleged conflict of interest. *See id.* at § 47.1-30 (providing that a document notarized by notary who has a conflict of interest is not “automatically be void for such reason, but shall be voidable in the discretion of any court of competent jurisdiction”). Accordingly, the Commonwealth Defendants request that the Court expeditiously resolve the questions presented by the Plaintiffs as to the validity of the qualification documents and their impact on West’s qualification so that ballot printing may begin.

## **II. Safeguarding the voters.**

Should this court determine that the notary oaths were false and fraudulently attested to and, therefore, should be invalidated and West removed as a qualified candidate, then the Commonwealth Defendants will work with their local counterparts to effect disqualification of West.

The date by which the ballot printing process must begin for some localities has already passed. *See* Declaration of Donna Patterson, General Registrar, Virginia Beach at ¶¶ 6-8 (Patterson Decl.), while any remaining localities will send their ballot proofs to the printer no later than September 4.

With the unique conditions that we are facing during this election, a pandemic, an unprecedented number of requests for absentee ballots, and a general unease regarding the election, it is safe to say that each day on which ballot printing is delayed risks disenfranchising voters who requested mail-in ballots, particularly military service members and overseas voters. *See Ex. B (Nichols Decl.)*.

Should this Court ultimately determine, *after* ballots have been printed, that West should not be qualified for the ballot, Virginia Code § 24.2-612.1 gives elections officials the authority to address the matter by creating a list noting the disqualification, which is then posted in each polling place, made available to the public, and posted on the relevant official election information website. *See Ex. B (Nichols Decl.)*.

The Commonwealth Defendants are committed to ensuring ballot integrity and will take swift action in the event any candidate on any ballot becomes disqualified. Here, Commonwealth Defendants would effectuate that disqualification forthwith.

### **CONCLUSION**

If this Court determines that West did not actually qualify for the ballot and orders relief, the Defendants stand ready to work with local election officials to ensure that the election moves forward in accordance with the court's order. Commonwealth Defendants are committed to ensuring the absolute integrity of the Commonwealth's election processes within the dictates of the law as expressly set forth by statute or as interpreted by this Court.

Respectfully submitted,

By: /s/ Heather Hays Lockerman  
Heather Hays Lockerman  
*Senior Assistant Attorney General*

Mark R. Herring  
*Attorney General*

Erin B. Ashwell (VSB No. 79538)  
*Chief Deputy Attorney General*

Donald D. Anderson (VSB No. 22114)  
*Deputy Attorney General*

Heather Hays Lockerman (VSB No. 65535)  
*Senior Assistant Attorney General*  
Office of the Attorney General  
202 North Ninth Street  
Richmond, Virginia 23219  
(804) 786-0067 – Telephone  
(804) 786-2650 – Facsimile  
hlockerman@oag.state.va.us

**CERTIFICATE OF SERVICE**

I hereby certify that on September 2, 2020, a true and accurate copy of this paper was sent via electronic mail to the following:

Aria Branch  
Marc E. Elias  
PERKINS COIE LLP  
700 Thirteenth Street, N.W., Suite 600  
Washington, D.C. 20005-3960  
ABranch@perkinscoie.com  
[MElias@perkinscoie.com](mailto:MElias@perkinscoie.com)

Jeffrey A. Breit  
Justin M. Sheldon  
Breit Cantor Grana Buckner, PLLC  
Towne Pavilion Center II  
600 22nd Street, Suite 402  
Virginia Beach, Virginia 23451  
Jeffrey@breitcantor.com  
JSheldon@breitcantor.com

By:           /s/ Heather Hays Lockerman            
Heather Hays Lockerman