

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Norfolk Division

VIRGINIA STATE CONFERENCE OF )  
NATIONAL ASSOCIATION FOR THE )  
ADVANCEMENT OF COLORED )  
PEOPLE BRANCHES, et al., )  
 )  
Plaintiffs, )  
 )  
v. ) Civil Action No. 2:08 CV 508 – RAJ  
 )  
TIMOTHY M. KAINE, et al., )  
 )  
Defendants, )  
 )  
and )  
 )  
ALBEMARLE COUNTY REPUBLICAN )  
COMMITTEE, et al., )  
 )  
Putative Intervenor– )  
Defendants. )

**MEMORANDUM OF PUTATIVE INTERVENOR–DEFENDANTS  
IN SUPPORT OF THEIR MOTION TO DISMISS AND  
IN OPPOSITION TO PLAINTIFFS’ MOTION FOR PRELIMINARY INJUNCTION**

The Putative Intervenor–Defendants (together, the “Intervenor–Defendants”), by counsel, respectfully submit this Memorandum of Law in Support of their Motion to Dismiss and in Opposition to Plaintiffs’ Motion for Preliminary Injunction. The Intervenor–Defendants have intervened for the purpose of protecting their constitutional rights and other interests with respect to Paragraph G of the Complaint’s Prayer for Relief. Paragraph G of the Complaint must be dismissed, and the motion for a preliminary injunction must be denied, insofar as the relief requested is an extension of poll hours on November 4. This Court lacks jurisdiction to extend poll hours. And extension of poll hours would violate the Intervenor–Defendants’ constitutional rights and disrupt the administration of the national election in Virginia.

Even if Plaintiffs have asserted a legitimate claim with respect to the Commonwealth's administration of this election in Richmond, Norfolk and Virginia Beach—and Intervenor–Defendants do not have sufficient information at this time regarding the merits of Plaintiffs' allegations at this preliminary stage of the litigation—extending poll hours later than the time prescribed by the General Assembly is not a constitutional remedy.

### **INTRODUCTION**

The Intervenor–Defendants oppose Plaintiffs' request for an order extending polling hours set by the General Assembly in Section 24.2-603 of the Code of Virginia. The Court has no jurisdiction to order Virginia precincts to remain open after the 7:00 p.m. hour established by the General Assembly for all voters of Virginia. The Constitutions of the United States and Virginia assign exclusive authority to establish uniform rules of election to the General Assembly, not a court, and a uniform poll closing rule applicable to all voters must be enforced. Furthermore, an order extending poll hours in the three jurisdictions targeted in Plaintiffs' lawsuit would permit some voters of Virginia to vote after the close of the election in other jurisdictions. That would violate the Equal Protection and Due Process rights of the Intervenor–Defendants, their respective members, and the candidates they have nominated whose names appear on the ballot.

Plaintiffs' Complaint is ambiguous as to whether it seeks to keep polls open late in the three cities which are the subject of the Complaint's attention and the analysis of Dr. Mebane, or in all jurisdictions of the Commonwealth. The Introduction of the Complaint summarizes the objective of the action:

Specifically, Plaintiffs request this Court to issue an order requiring, among other things, the cities of Norfolk, Richmond, and Virginia Beach to ... (2) to extend voting hours for the November 4, 2008 General Election to 9:00 pm so to provide voters with more time to exercise their franchise.

Complaint at p. 3. However, Paragraph G of the Prayer for Relief does not limit its request to the three cities discussed throughout the Complaint:

G. Require Defendants [state election officials] to extend voting hours for the November 4, 2008 General Election to 9:00 p.m. so to provide voters with more time to exercise their franchise[.]

Complaint at p. 26, ¶ G.

Assuming that Plaintiffs seek late poll hours in the three targeted cities (Richmond, Norfolk and Virginia Beach), and not other jurisdictions, Plaintiffs' selection of three localities to the exclusion of others implicates profound constitutional rights of the Intervenor-Defendant political party committees, their members and candidates. The conduct of a national election would be subject to varying rules and procedures selected arbitrarily – and strategically – by these Plaintiffs. At bottom, Plaintiffs' requested remedy would alter the neutral and uniform administration of polling places based upon Plaintiff's strategic criteria, and might advantage some political parties and candidates vis-à-vis others based upon the selection criteria. The effect would be to afford the candidates predominantly preferred in the selected jurisdictions “extra innings” not afforded to opposing candidates in jurisdictions where they are the preferred choice of voters. This unequal treatment violates the Equal Protection Clause and subjects the fundamental right to vote to arbitrary election rules.

If, on the other hand, Plaintiffs seek to keep *all* precincts open throughout the Commonwealth as a remedy for alleged problems in the three targeted cities, the Complaint's allegations and motion for preliminary injunction wholly fail to justify such an extraordinary alteration of election administration in *other* jurisdictions of Virginia. Plaintiffs present no evidence regarding administrative deficiencies in other cities and counties. And they do not address the inherent disruption such a late change in the rules of election would visit upon the

entire Commonwealth. For example, officers of election who were planning to work polls from 5:30 a.m. until 7:30 or 8:00 p.m. might balk at serving until 10:00 p.m. or later, leaving precincts understaffed. The Commonwealth and local electoral boards cannot be expected to recruit replacements at this late date. In short, extension of precinct hours is simply not a remedy that this Court can constitutionally order, it is not justified, and it would disrupt an important national election with eleventh hour changes.

“Interference with impending elections is extraordinary, and interference with an election after voting has begun is unprecedented.” *See Southwest Voter Registration Education Project v. Shelley*, 344 F.3d 914, 919 (9th Cir. 2003) (en banc) (internal quotation omitted). Plaintiffs’ request for late poll hours does not present “extraordinary” justifications for changing polling hours and the must be dismissed for several reasons:

- (1) The Court lacks jurisdiction to extend precinct hours established by state statute, a duty constitutionally reserved to the General Assembly by the U.S. Constitution and the Constitution of Virginia;
- (2) Extension of precinct hours in jurisdictions selected strategically by Plaintiffs would disrupt the conduct of and orderly and uniform election process;
- (3) Extension of precinct hours in jurisdictions selected strategically by Plaintiffs would discriminate against all other voters of the Commonwealth who are required to present themselves to vote no later than 7 p.m., and thereby dilute their votes;
- (4) Extension of precinct hours in jurisdictions selected strategically by Plaintiffs would afford certain candidates preferred in the selected jurisdictions an unfair electoral advantage while discriminating against other candidates who do not enjoy strong support

in the affected jurisdictions and whose supporters in other areas will be prevented from voting after 7 p.m.;

- (5) Current law provides an adequate remedy for any alleged or perceived difficulty voters experience at any precinct in Virginia – i.e., each registered voter who arrives at the precinct before 7 p.m. is entitled to join the line and vote, even if s/he votes after 7 p.m.;
- (6) Current law provides an adequate remedy for any alleged or perceived difficulty for senior citizens or disabled citizens – i.e., each registered voter who is over the age of 65 or disabled is entitled to vote at curbside, outside the precinct, and avoid standing in line;
- (7) Plaintiffs have failed to meet the substantial burden required to justify emergency injunctive relieve under Virginia law as to late poll openings in selected cities or anywhere else in the Commonwealth.

### **ARGUMENT**

#### **1. The Virginia Election Laws Adopted by the General Assembly Must Be Enforced.**

This court lacks jurisdiction to abrogate the unambiguous election law that requires polls everywhere in Virginia to close at 7:00 p.m. The power to establish the rules of this year’s presidential and congressional elections is vested exclusively in the General Assembly. The General Assembly is vested with authority to establish election rules and procedures for U.S. House elections by Article I, for the U.S. Senate election by the 17<sup>th</sup> Amendment, and for the election of President by Article II of the U.S. Constitution. Additionally, the Constitution of Virginia, Art. 2, Section 4, states in relevant part that, “[t]he General Assembly shall provide for the nomination of candidates, shall regulate the time, place, manner, conduct, and administration of primary, general, and special elections, and shall have power to make any other law regulating elections not inconsistent with this Constitution.”

No federal or state statute grants the Court the power to alter fair and impartial rules once established by the state legislature:

[T]here are a few exceptional cases in which the Constitution imposes a duty or confers a power on a particular branch of a State's government. This is one of them. Article II, § I, cl. 2, provides that "each State shall appoint, in such Manner as the *Legislature* thereof may direct," electors for President and Vice President. (emphasis added). Thus, the text of the election law itself ... takes on independent significance.

*Bush v. Gore*, 531 U.S. 98, 112-13 (2000) (Rehnquist, C.J., concurring)(rejecting Florida courts' power to alter rules prescribed by the Florida legislature); *McPherson v. Blacker*, 146 U.S. 1 (1892) (Article II "conveys the broadest power of determination" and "leaves it to the legislature exclusively to define the method" of appointment of electors).

Here, the General Assembly has provided uniform times for precincts to be open across Virginia. The General Assembly enacted the following uniform rule for all localities, all precincts and all voters in Virginia:

At all elections, the polls shall be open at each polling place at 6:00 a.m. on the day of the election and closed at 7:00 p.m. on the same day except as provided for central absentee voter precincts pursuant to subsection F of § 24.2-712.

Va. Code Ann. § 24.2-603.

Section 24.2-603 further prescribes uniform procedures for closing all precincts in the Commonwealth. At 6:45 p.m. an election officer must step outside the precinct and announce that the polls will close at 7:00 p.m. In fact, the polls do not actually "close" at 7:00 p.m.; more precisely, the polls remain "open" for each qualified voter who arrives at the precinct and joins the line by 7:00 p.m. Only voters who arrive at the precinct after 7:00 p.m. are ineligible to vote:

At 6:45 p.m. an officer of election shall announce that the polls will close in fifteen minutes. The officers of election shall list the names of all qualified voters in line before the polling place at 7:00 p.m. and permit those voters and no others to vote after 7:00 p.m.

Va. Code Ann. § 24.2-603.

The General Assembly also has adopted uniform rules prescribing:

- No more than 5,000 registered voters in each precinct, Va. Code § 24.2-307;
- At least one voting machine for each 750 registered voters in a precinct, Va. Code § 24.2-627(A);
- At least one voting booth for casting marksense paper ballots for each 425 registered voters, Va. Code § 24.2-627(B);
- At least one optical scan tabulator in each precinct where voter cast ballots on marksense paper ballots, Va. Code § 24.2-627(B);
- At least one voting booth for casting of paper ballots in each precinct, Va. Code § 24.2-609; and
- Each precinct must be located in an adequate facility, preferably a public building with access for disabled voters and located within the jurisdiction's boundaries, Va. Code § 24.2-310.

This statutory scheme discharges the General Assembly's constitutional obligations and provides minimum procedural guarantees for all voters who present themselves at a polling place prior to the deadline established by the General Assembly for closing the polls on Election Day. *See Fredericksburg Auto Auction, Inc. v. Com.*, 14 Va. Cir. 244 (Cir. Ct. Fredericksburg 1988) ("Statutes enacted by the General Assembly and signed into law by the Governor are presumptively valid."). There is no allegation that the Commonwealth's State Board of Elections or the local electoral boards in the targeted cities have violated these long-standing rules. In fact, Dr. Mebane's Declaration admits that the ratios of machines to voters fall within

the statutory requirements. Nor is there any allegation that these rules facially discriminate against any voters.

Instead, Plaintiffs allege that they are entitled to a *more equal distribution* of the resources that have been deployed. Plaintiffs may be entitled to relief in the form of a redistribution of voting machines or officers of election among precincts. But the law does not permit this Court to countermand the General Assembly's prescribed time to close the polls as a remedy here.

**2. Disparate Precinct Hours for Different Voters Based Upon Criteria Selected by Plaintiffs Violates the Equal Protection & Due Process Clauses of the U.S. Constitution.**

The Due Process and Equal Protection Clauses of the U.S. Constitution further require the General Assembly to establish uniform procedures for all voters of Virginia. See *Bush v. Gore*, 531 U.S. 98, 104 (2000) (“The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise.”); *Democratic Party of Virginia v. State Board of Elections*, 1999 Va. Cir. LEXIS 551 (Cir. Ct. Richmond 1999) (Hughes, J.)<sup>1</sup> (enjoining “[voter] eligibility requirements [that] have the disparate impact including what complainants call a process of ‘stigmatization, intimidation and separation’ of the voters. The evidence shows the pilot [voting procedures] will differentiate voters -- those required to provide identification or sign a form to vote and others on which no such requirements will exist.”).

A court order that alters uniform rules of election established by the legislature, and that affords some voters a greater opportunity to vote than other similarly situated voters in the state, is unconstitutional. This is especially true where, as here, the disparate treatment results from the

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<sup>1</sup> Petition for appeal refused by the Supreme Court of Virginia, October 22, 1999.

selection criteria of a private litigant who has cherry-picked his preferred jurisdictions for extra voting privileges. *Bush v Gore*, 531 U.S. at 106-109 (Vice President Gore could not cherry-pick a handful of jurisdictions and recount voters' ballots solely in those jurisdictions).

An early "one person, one vote" precedent struck a state election rule as unconstitutional because it accorded arbitrary and disparate treatment to voters in its different counties. *Gray v. Sanders*, 372 U.S. 368 (1963). The Supreme Court again enforced this principle in the context of the Presidential selection process in *Moore v. Ogilvie*, 394 U.S. 814 (1969), where the Court invalidated a county-based procedure that diluted the influence of citizens in larger counties in the nominating process. The Court observed that "the idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government." *Id.* at 819.

The facts here are remarkably similar to the facts in *Bush-Cheney 2000, et al. v. Baker*, 34 S.W.3d 410 (Mo. App. E.D. 2000) (a true and correct copy of the opinion is attached hereto as Exhibit 1 and made part hereof by reference). In *Baker*, the Missouri Court of Appeals struck down the order of a trial court judge who ordered that certain polling stations in St. Louis be held open past the statutory deadline for closing the polls set forth in the Missouri Election Code. The Missouri counterpart to the Virginia Election Law § 24.2-603 at issue in *Baker* provides:

Polls, hours to be open. - The election judges shall open the polls at six o'clock in the morning and keep them open until seven o'clock in the evening. At seven o'clock in the evening, all voters at the polls, including any in line to vote, shall be permitted to vote.

34 S.W.3d at 412.

Like Plaintiffs here, the petitioners in *Baker* requested a local court to order the polls in selected St. Louis precincts to continue admitting voters after 7 p.m. The petitioners claimed to be acting on behalf of a voter who:

has not been able to vote and fears he will not be able to vote because of the long lines at the polling places/machine breakdowns in St. Louis, Missouri, that have lasted for several hours. The petition further alleged that “numerous” other voters in the City of St. Louis had been unable to exercise their constitutional right to vote due to the Board’s failure to properly provide enough voting booths, voting rolls, and all other supplies and equipment necessary and appropriate for the polling places.

*Id.* at 411.

The trial court in *Baker* granted the petition and ordered that the polls remain open for three additional hours, until 10:00 p.m., only in the city of St. Louis. On appeal, the Missouri Court of Appeals unanimously struck down the ruling and ordered the polls closed immediately. The court based its ruling on two grounds.

First, it held that the trial court “lack[ed] jurisdiction to extend the hours of voting established by state statute.” *Id.* at 412. The court stated that “unless Constitutionally infirm, the courts of this state are obligated to follow and apply the law as written by the legislature... It is obviously within the legislature’s power to specify the hours in which voters are to cast their ballots.” *Id.*

Second, the court held that the district court lacked the authority to allow voters who did not abide by the rules set forth by the legislature to take part in the election:

[P]ursuant to the second sentence of the statute, anyone in line when the polls close must be permitted to vote. Although the lines may be long and the number of working machines less than desirable, **anyone in line at seven o’clock will eventually be permitted to vote no matter how late the hour and their vote will count.** If any voters in line at seven o’clock are unwilling or unable to stay and vote, their inconvenience will not be lessened by extending the hours in which new voters can join the line. Extending the hours of voting simply permits voting by persons not entitled to vote due to their failure to come to the polls on time.

*Id.* at 412 (emphasis added).

Finally, the Missouri Court of Appeals instructed that “commendable zeal to protect voting rights must be tempered by the corresponding duty to protect the integrity of the voting process.” *Baker*, 34 S.W.3d at 413. The court explained:

Courts should not hesitate to vigorously enforce the election laws so that every properly registered voter has the opportunity to vote. But equal vigilance is required to ensure that only those entitled to vote are allowed to cast a ballot. Otherwise, the rights of those lawfully entitled to vote are inevitably diluted.

*Id.* (emphasis added).

The concern for the dilution of lawful votes is not a new one. The Supreme Court voiced similar concerns more than forty years ago in *Reynolds v. Sims*: “The right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.” 377 U.S. 533, 555 (1964).

For these reasons, courts in other jurisdictions consistently have rejected judicial extension of statutory polling hours. *See, e.g., Southerland v. Fritz*, 955 F. Supp. 760 (E.D. Mich. 1996) (upholding the statutory polling deadline despite complaints of broken voting machines because it was not for the court to substitute its judgment for the legislature); *Republican Party of Ark. v. Kilgore*, 350 Ark. 540, 98 S.W.3d 798 (2002) (holding that trial court had no jurisdiction to circumvent the law established by the legislature and therefore could not extend the polling hours beyond those prescribed by the statute); *Armantrout v. Bobon*, 349 Mo. 667, 162 S.W.2d 867, 872 (Mo. 1942) (Missouri Supreme Court held that allegations that voters stood in long lines for a great length of time and that some voters went home without voting were insufficient to suspend an election contest).

An order by this Court modifying the established time and rules codified by the Virginia General Assembly for the conduct of this election would (1) violate the U.S. Constitution and Constitution of Virginia which vest power to set polling hours in the General Assembly, (2)

discriminate in favor of some voters, granting them greater voting rights than others based upon the Plaintiffs' strategic selection criteria in violation of Equal Protection and Due Process standards, and (3) dilute the votes of other voters.

**3. Extending Polling Hours Would Substantially Interfere with the Orderly Conduct of the Election.**

The issuance of an emergency order directing certain jurisdictions to keep polls open past the mandatory closing time of 7:00 p.m. will substantially interfere with the conduct of the election. At a minimum, a court order will confuse election officers who have been trained to mark and close the lines at their precincts promptly at 7 p.m. A court order at this late hour will sow confusion over issues such as: Which jurisdictions and precincts are affected? Are all officers of election (many are senior citizens) be required to stay past the 7 p.m. hour or may some be relieved at 7 p.m.? Will there be any alteration in the requirements for tabulating precinct results or delivering election materials to the Clerk of Court office? How will all voters in affected jurisdiction or precincts be provided fair and uniform notice that they have extra time to vote (if at all)? If a voter in one jurisdiction misunderstands a court order to apply to her jurisdiction, and arrives at a precinct at 8 p.m. only to find that she is too late, will she have any recourse due to inadequate notice of the court's order?

If a court orders an extension of poll hours and that order is on appeal a day or two before the election, how are the State Board of Elections and local electoral boards supposed to adequately train lay election officers? If an appellate court later overturns a court order extending poll hours, confusion may arise among lay election officers over which order is controlling. An appellate court decision rendered the day before the election may not be adequately communicated to lay election officers before they open polls at 5:30 a.m. on election day.

Because such an order would be unprecedented in Virginia, lay election officers may not know that voters appearing at the precinct after 7 p.m. would not be permitted to vote on voting machines. In response to the *Bush-Cheney 2000 v. Baker*, federal and state laws were amended to prohibit any voter casting a regular ballot after 7 p.m., by court order or otherwise. The Help America Vote Act and Virginia law require that all ballots cast after the close of the polls pursuant to a court order must be cast as provisional ballots, and must be kept separate from the other provisional ballots cast throughout the day—so that the ballot can be discarded after the election if, upon appeal, the decision to keep polls open late is overturned. *See* 42 U.S.C. 15482(C); Va. Code § 24.2-653(C). If a large number of voters appear after 7 p.m.—voters who were not anticipated—the precinct may run out of provisional ballots. What would they do in this case? Many, many questions will arise regarding implementation of an unprecedented court order extending poll hours.

Additionally, an extension of precinct hours will complicate precinct vote tallying and reporting. Virginia Election law provides that the officers of election shall proceed to count the vote only after the polls are closed:

As soon as **the polls** are closed, the officers of election shall lock each voting and counting device against further voting. They shall then proceed to ascertain the vote given at the election and continue without adjournment until they declare the results of the election. They shall seal the devices.

Va. Code Ann. § 24.2-654.

The wording in the statute is significant. It provides that the officers shall proceed to ascertain the vote only after “polls” are closed. The choice of the plural “polls” means that counting can begin only after **all polls** are closed throughout the Commonwealth. Thus, the issuance of an injunction extending poll hours even in the three jurisdictions targeted by Plaintiffs will stop the counting of ballots statewide, and will substantially delay the processing

and reporting of election results, and may cause a greater number of errors given the late hour that tabulation will occur. Any such delay risks negatively impacting the entire election process and creating doubt and uncertainty among officers of election, the electorate and the candidates who otherwise would factor election results into their decisions regarding concessions and post-election processes.

**4. Use of Paper Ballots in Lieu of Voting Machines Also Countermands The Rules Set by the General Assembly & Will Disrupt the Election.**

Plaintiffs also request in Paragraph G of the Complaint that the Court alter Virginia election law by allowing “each and every voter who opts to vote by paper ballot” to do so. Complaint, Par. G, p. 26. Several years ago, this was the law of Virginia. However, the General Assembly amended the law in 2006 to limit the use of traditional paper ballots to the following circumstances:

The official paper ballot shall be used by a voter to cast his vote **only in one of the following circumstances:**

1. The official paper ballot is the only ballot in use in the precinct.
2. The official paper ballot is used by voters voting outside the polling place pursuant to § 24.2-649.
3. The voter is casting a provisional ballot.
4. The voter is provided an official paper ballot or copy thereof pursuant to § 24.2-642 when voting equipment is inoperable or otherwise unavailable.
5. The official absentee paper ballot voted in accordance with (§ 24.2-700 et seq.).
6. The voter is provided an official paper ballot for a presidential election pursuant to § 24.2-402.

Va. Code § 24.2-646.1.

The General Assembly imposed these limits in order to promote uniformity in elections and alleviate the complications inherent in accounting for and tabulating multiple universes of

ballots in each precinct. Allowing each voter who so chooses to vote on paper would countermand the unambiguous rules established by the General Assembly. And it would disrupt the administration of the election in two profoundly significant ways. First, it would complicate the administration of each precinct for election officials who would have to track two kinds of ballots. Second, it would significantly slow election administration. It would burden election officials with extra steps in processing each voter who chooses a paper ballot: they would have to account for a paper ballot on a log (because all paper ballots must be carefully accounted for), hand the voter a paper ballot, and then accompany the voter to a paper ballot box for placement of the ballot. This requires more time and attention by an election officer than admitting a voter to an electronic voting booth. Tabulating votes post-election would be error prone because election officials would be required to tally half of their votes on machine print-outs and half on paper. Thus the requested relief would both complicate and slow the administration of elections.

**5. There is No Legal Basis to Issue an Emergency Injunction.**

Finally, plaintiffs have clearly failed to meet the substantial burden required to justify an emergency injunction. An “[i]njunction is an extraordinary remedy, available only in equity.” *Wright v. Castles*, 349 S.E.2d 125, 129 (Va. 1986). To obtain an injunction, plaintiffs must prove that they would suffer irreparable harm if the injunction were not granted and that they do not have an adequate remedy at law. *Id.* In ruling on a motion for a temporary injunction, this Court must consider (1) the likelihood Plaintiffs will succeed on the merits; (2) the likelihood of irreparable harm to Plaintiffs if the temporary injunction is denied; (3) the likelihood of harm to the Defendant if the injunction is granted; and (4) the public interest. *See Rum Creek Coal Sales, Inc. v. Caperton*, 926 F.2d 353, 359 (4th Cir. 1991); *Terry v. Wilder*, 29 Va. Cir. 418, 421 (Cir. Ct. Richmond 1992). However, under the “balancing of hardships” analysis, the most important

factors are the potential harm to the movant in denying an injunction and the potential harm to the defendant from granting an injunction. *Blackwelder Furniture Co. v. Seilig Manuf. Co.*, 550 F.2d 189, 196 (4<sup>th</sup> Cir. 1977).

Plaintiffs have not and cannot satisfy this burden. The General Assembly has provided an adequate remedy at law: **every qualified voter who is in line at the polling place before 7:00 p.m. shall be allowed to vote.** For this same reason, plaintiffs are unable to show irreparable harm. The effort required to arrive at the polling place or to wait in line for 45 minutes has never been recognized by a court to constitute irreparable harm. It is an ordinary occurrence at many elections, in Virginia and across the country. And, in any event, keeping a precinct open late would not obviate the need for many voters to stand in line. (Senior citizens and disabled voters are not required to stand in line; they may vote outside the precinct, in the comfort of their vehicle, upon request. Va. Code § 24.2-649.) Lines after 7 p.m. could be longer than lines before 7 p.m. because voters would be required to complete provisional ballots. And lines and wait times could be exacerbated if large numbers of voter opt for paper ballots as requested by Plaintiffs.

By contrast, the public interest would be irreparably harmed by a judicial extension of polling hours in one or more jurisdictions selected strategically by one interest group. The Virginia statute establishing the polling hours for the entire state serves a vital purpose: to give all Virginia voters fair notice of the time in which they may cast their vote on Election Day and equal opportunity to all voters to cast a ballot. Altering those uniform rules harms the public interest embodied in the rules and procedures adopted by the General Assembly. It is patently unfair to all other voters in all other localities of Virginia. And, as noted above, the violation of

other voters' constitutional rights under the Due Process and Equal Protection Clauses of the U.S. Constitution constitutes irreparable harm to them.

At their most fundamental level, temporary restraining orders serve to preserve, not alter, the status quo. *See Fredericksburg Auto Auction, Inc. v. Com.*, 14 Va. Cir. 244 (Cir. Ct. Fredericksburg 1988). However, here the Plaintiffs urge this Court to make an eleventh-hour and potentially outcome-determinative alteration to Virginia law.

However, there is a more narrowly tailored alternative form of relief. In the event that the Court determines that Plaintiffs' allegations of unfair distribution of election resources is meritorious – and Intervenor–Defendants express no opinion as to the merits at this early stage of the litigation – the Court might be able to order a redistribution of election equipment among precincts in the localities targeted by Plaintiffs. Intervenor–Defendants defer to the Court's judgment as to the justification and feasibility of that remedy.

### **CONCLUSION**

The administration of a Presidential election is a complex and challenging task for any state elections office. In an election as contested as this Presidential election, every difficulty, disturbance and mistake, real or imagined, is subjected to extraordinary media, political and legal scrutiny. Regardless of whether voters are inconvenienced by long lines, voting machine breakdowns, mistakes in poll books, confusing ballots, or some combination of difficulties, **the Virginia General Assembly provided a remedy for every qualified voter who arrives at the precinct prior by 7:00 p.m.: the voter will be permitted to vote.** Va. Code Ann. § 24.2-603.

Intervenor–Defendants respectfully request that this Court deny Plaintiffs' request to extend the time of closing of the polls, enforce the clear and unambiguous directive of Virginia Code § 24.2-603, and respect the Equal Protection and Due Process rights of all voters of

Virginia. As for the distribution of voting machines among precincts in the target cities, Intervenor–Defendants defer to the Court’s judgment based upon a review of all evidence.

ALBEMARLE COUNTY REPUBLICAN COMMITTEE, CHRISTIAN SCHOENEWALD, REPUBLICAN PARTY OF NORFOLK, PAMELA BROWN, MICHAEL WADE, ROANOKE CITY REPUBLICAN COMMITTEE, ADAM BOITNOTT, SECOND CONGRESSIONAL DISTRICT REPUBLICAN COMMITTEE, GARY BYLER, THIRD CONGRESSIONAL DISTRICT REPUBLICAN COMMITTEE, JON ONDRAK, and CHERLYN STARLET STEVENS

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**CERTIFICATE OF FILING AND SERVICE**

I certify that on November 3, 2008, I filed this Memorandum electronically with the Clerk of Court using the CM/ECF System, which will provide notice of this filing to all persons indicated on the filing receipt. In addition, I sent a copy of this Memorandum via facsimile to:

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