

VIRGINIA: IN THE CIRCUIT COURT OF FAIRFAX COUNTY

VIRGINIA INSTITUTE FOR PUBLIC POLICY, INC.

Plaintiff

Civil Action No. CL 2021 - 14420

vs.

SCOTT O. KONOPASEK, et al.

Previous Chancery No. CH

Defendant

FRIDAY MOTIONS DAY - RESPONSE/OPPOSITION TO MOTION

Title of Motion(s) to which Response is filed: MOTION FOR DECLARATORY AND INJUNCTIVE RELIEF

Responding Party: DEFENDANTS, SCOTT O. KONOPASEK, ET AL.

DATE TO BE HEARD: 10-29-21 @ 2:00 PM (SPECIALLY SET by J. DEVINE)

Time Estimate (combined, no more than 30 minutes): 30

RESPONSE by: ALEXANDER FRANCUZENKKO

COOK, CRAIG & FRANCUZENKO, PLLC

Printed Attorney Name/ Responding Party Name

Firm Name

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CERTIFICATIONS

- I certify that I have in good faith conferred or attempted to confer with other affected parties in an effort to resolve the subject of the motion without Court action; and, I have read, and complied with, each of the Instructions for Responding Party on the reverse side of this form.

[Signature]

Responding Party/Counsel of Record

CERTIFICATE OF SERVICE

I certify on the 27TH day of OCTOBER, 2021, a true copy of the foregoing Response was mailed [checked] faxed [unchecked] delivered to all counsel of record pursuant to the provisions of Rule 4:15(e) of the Rules of the Supreme Court of Virginia.

[Signature]

Responding Party/Counsel of Record

INSTRUCTIONS FOR RESPONDING PARTY

PARTIES/MOTION PAPERS: If you receive notice of a motion set for the Two Week Docket, you must file a memorandum of points and authorities of five (5) pages or less in response. Such memorandum or any other pleading in opposition to a Two Week Motion, accompanied by the Court's green colored Response/Opposition to Motion – Friday Motions Day form, must be received by the Clerk of the Court no later than 4:00 p.m. on the Friday preceding the date of the hearing, or the Court may treat the matter as uncontested. If either party believes it necessary to file a memorandum exceeding five double-spaced pages, then the parties must utilize the Briefing Schedule procedure: contact opposing counsel or the opposing party and by agreement conduct a telephone conference call with the Calendar Control Judge, (703) 246-2221; or, if agreement is not possible, give advance notice of an appearance before the Calendar Control Judge to establish a Briefing Schedule.

As files for One Week Motions are normally received by the Judges on Thursday afternoon, any written response filed to a One Week Motion, without the Court's prior approval, may not be received by the Judge prior to the hearing. Where the responding party to a One Week Motion wishes to file a response, and further wants to assure that it will be timely received by the Judge, the parties should continue the motion, by agreement, to a Two Week Docket or, absent agreement, contact the Calendar Control Judge.

Each side should bring a draft proposed order to Court on the day of the hearing, as the ruling must be reduced to an order that day, absent leave of Court. Cases may only be removed from the docket by the Court or by counsel for the moving party or the moving party. One Week Motions may be removed from the docket up until 4:00 p.m. on the Thursday preceding the hearing date, by contacting the Motions Clerk: (703) 246-4355. Two Week Motions may not be continued or removed from the docket after 4:00 p.m. on the Friday preceding the hearing date, without leave granted by the Judge assigned to hear the motion, for good cause shown.

If a hearing on any motion must take longer than thirty (30) minutes, the moving and responding parties, or their counsel, should appear before the Calendar Control Judge to request a hearing for a day other than a Friday. See, "Motions Requiring More than 30 Minutes" in "Friday Motions Docket Procedures" on the Court's website at <https://www.fairfaxcounty.gov/circuit/sites/circuit/files/assets/documents/pdf/civil-friday-motions-docket-procedures.pdf>

CERTIFICATE OF SERVICE: Pursuant to Rule 4:15(e), a motions pleading shall be deemed served when it is actually received by, or in the office of, counsel of record through delivery, mailing, or facsimile transmission; not when it is mailed or sent.

INFORMATION FOR RESPONDING PARTY

CONCILIATION PROGRAM: The Fairfax Circuit Court strongly encourages use of conciliation procedures to resolve motions. The Fairfax Bar Association's Conciliation Program conducts conciliation without charge by experienced litigators, who meet in person or by telephone with all interested parties. To request conciliation, fax a Request for Conciliation form to the Fax Hotline, (703) 273-1274; e-mail a request for conciliation to: ffxconciliation@aol.com; or leave a voice mail message at (703) 627-1228. You will be contacted before the hearing date by a representative of the Conciliation Program.

VIRGINIA:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

VIRGINIA INSTITUTE)
 FOR PUBLIC POLICY, INC.,)
)
 Plaintiff,)
)
 v.)
)
 SCOTT O. KONOPASEK, *et al.*,)
)
 Defendants.)
 _____)

CL2021-14420

DEFENDANT SCOTT KONOPASEK’S OPPOSITION TO PLAINTIFF’S MOTION FOR DECLARATORY AND INJUNCTIVE RELIEF

COMES NOW, Scott O. Konopasek, (“Defendant”), in his official capacity as Director of the Office of Elections and General Registrar for Fairfax County, by counsel, Alexander Francuzenko, Esq., Christopher T. Craig, Esq., John David Coker Esq., and the law firm of Cook Craig & Francuzenko, PLLC, and states as follows in opposition to Plaintiff’s Complaint for Declaratory and Injunctive Relief:

ARGUMENT

This matter focuses solely upon Virginia’s absentee ballot application statute. Not the ballot itself, or the election. Specifically, Plaintiff alleges Defendant violated Va. Code § 24.2-706(C) by sending absentee ballots to voter applicants who failed to include the last four digits of their Social Security Number (“SSN”) on their ballot applications. Unfortunately, under that same statute Plaintiff lacks standing to bring this action, and the relief sought cannot be granted. But even if Plaintiff had standing, and the relief sought was available, Plaintiff has no

“likelihood of prevailing on the merits,” falling short of that critical injunction requirement.

Defendant therefore asks this Court to dismiss this matter, with prejudice.

STANDING

Under Va. Code §24.2-706, the General Assembly of Virginia provided great clarity as to who has proper party standing to challenge the Registrar’s absentee ballot procedures.

Specifically, Va. Code §24.2-706 (C) says:

The circuit courts shall have jurisdiction to issue an injunction to enforce the provisions of this section upon the application of (i) any aggrieved voter, (ii) any candidate in an election district in whole or in part in the court's jurisdiction where a violation of this section has occurred, or is likely to occur, or (iii) the campaign committee or the appropriate district political party chairman of such candidate.

For this reason alone, this action must be dismissed.

Furthermore, under time-honored Supreme Court of Virginia precedent, a party only has standing if, “it can show an immediate, pecuniary, and substantial interest in the litigation, and not a remote or indirect interest.” *Westlake Properties, Inc. v. Westlake Pointe Prop. Owners Ass'n, Inc.*, 273 Va. 107, 120 (2007) (internal citations omitted). “The concept of standing concerns itself with the characteristics of the person or entity who files suit. The point of standing is to ensure that the person who asserts a position has a substantial legal right to do so and that his rights will be affected by the disposition of the case.” *Cupp v. Bd. of Supr's of Fairfax County*, 227 Va. 580, 589 (1984).

Here Plaintiff is a Virginia nonstock corporation qualified as tax exempt under Section 501(c)(3) of the Internal Revenue Code. Though its mission is, “dedicated to promoting and fostering individual liberty, dynamic entrepreneurship, economic growth, the rule of law, and adherence to constitutional limits” (Compl. ¶ 5), Plaintiff is not listed among the class of the

persons and entities upon which the statute bestows standing to bring an action such as the one presented in this matter. As such, the Court must dismiss this action.

Plaintiff claims it will suffer irreparable harm in that, “[it] has a unique interest in the 2021 General Election because it opposes the school bond question that will appear on the ballot.” (Compl. ¶ 26). However, even under *Westlake* Plaintiff failed to show an immediate interest and instead proffered only an indirect interest in which it claims it will have to, “devote additional time and resources. . . to discussion, planning, and cataloging. . .” *Id.* at 28. Under the *Cupp* analysis, Plaintiff further fails to show a substantial legal right to bring suit under the applicable statute, which only grants standing to three specific parties: voters, candidates or their campaign committee in the applicable district, or the appropriate political party district chairman.

MOOTNESS

Beyond a lack of standing, Plaintiff also failed to state a claim upon which the relief requested can be granted. Specifically, Plaintiff asks this Court to enjoin the Fairfax County Registrar from sending absentee ballots to applicants who failed to list a portion of their SSN on their application. But that relief cannot be granted as the statutorily required period of time within which the Registrar may mail absentee ballot to voters closed October 22, 2021, at 5:00 P.M. *See* Va. Code § 24.2-701(B)(2). Therefore, any order enjoining the Registrar as requested would be a nullity, and moot on its face.

The Supreme Court stated in 2012 that, “[w]henver it appears or is made to appear that there is no actual controversy between the litigants, or that, if it once existed, it has ceased to do so, it is the duty of every judicial tribunal not to proceed to the formal determination of the apparent controversy, but to dismiss the case.” *E.C. v. Virginia Dept. of Juvenile Justice*, 283 Va. 522, 530 (2012) (internal citations omitted). The Court went on to hold, “It is not the office

of courts to give opinions on abstract propositions of law, or to decide questions upon which no rights depend, and where no relief can be afforded. Only real controversies and existing rights are entitled to invoke the exercise of their powers.” *Id.* In 2006 the Court held that, “[m]ootness, however it may have come about, simply deprives us of our power to act; there is nothing for us to remedy, even if we were disposed to do so. . . we acknowledge there may be narrow circumstances in which a court may decide a case despite the absence of an actual, ongoing dispute—like when the underlying controversy is one capable of repetition, yet evading review.” *Virginia Dept. of State Police v. Elliott*, 48 Va. App. 551, 555 (2006) (internal citations omitted).

Given that the Registrar is no longer charged with mailing absentee ballots, no actual controversy exists, the relief sought cannot be granted,¹ and this Court should dismiss the matter.

PLAINTIFF IS NOT LIKELY TO PREVAIL ON THE MERITS

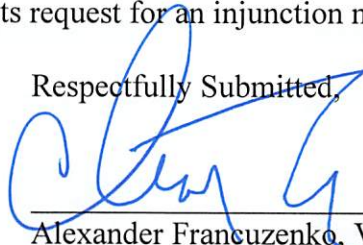
Beyond these procedural deficiencies preventing this Court from reaching the merits, Plaintiff misreads the statute by ignoring the discretion provided to the Registrar by the General Assembly. In doing so, Plaintiff betrays its likelihood of prevailing in the merits.

Under the statute, “[a]pplications for absentee ballots shall contain the following information: The applicant's printed name and the last four digits of the applicant's social security number.” Va. Code § 24.2-701(C)(1). “In reviewing the application for an absentee ballot, the general registrar *shall not reject* the application of any individual because of an *error or omission on any record or paper relating to the application, if such error or omission is not material* in determining whether such individual is qualified to vote absentee.” Va. Code § 24.2-706(B) (emphasis added).

¹ Note that nothing in Plaintiff's motion suggests that this matter falls into a “narrow circumstance. . . that is capable of repetition. . .”, or that the alleged irreparable harm will continue. *Va. Dept of State Police* at 554-55.

The very statute that Plaintiff alleges is being violated includes both an exception to the listed requirements for the absentee ballot applications and provides the Registrar with the discretion to judge materiality. Specifically, without further statutory guidance Defendant Registrar must decide what is *material* when “determining whether such individual is qualified to vote absentee.” *Id.* For example, the Registrar need not rely on SSN information for identity verification when Defendant can verify the applicant’s name and address and compare his or her signature to the voter’s signature on file within the Registrar’s Office. Had the General Assembly preferred *not* to grant the Registrar such discretion, it could have written § 24.2-706(B) to prevent such discretion that is afforded to the Registrar. Indeed, nowhere in the Code does the statute direct the Registrar to refrain from mailing an absentee ballot to an applicant that failed to include the SSN. As statutes must be strictly construed, Plaintiff is not likely to prevail on the legal merits of its complaint and therefore its request for an injunction must be denied.

Respectfully Submitted,




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CERTIFICATE OF SERVICE

I HEREBY certify that on this 27TH day of October 2021, I sent a copy of the foregoing to the following parties via e-mail and ~~courier~~ *Regular mail: CC*

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