

COMMONWEALTH OF VIRGINIA

FILE

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WAYNESBORO CIRCUIT COURT
TWENTY-FIFTH JUDICIAL CIRCUIT

November 4, 2024

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In Re: Jennifer Lewis, Ann Criser-Shedd, Christopher Graham, Andrea Jackson and Gregory Fife,
Plaintiffs v. Curtis G. Lilly, II, Chairman of the Waynesboro Board of Elections and Scott Mares,
Vice-Chairman of the Waynesboro Board of Elections, Defendants.
CL24000440-00

Dear Counsel:

This election-related suit, filed fifteen days before the 2024 general election, concerns whether two of the three members of the Waynesboro Board of Elections may refuse to certify the City of Waynesboro

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OF THE CITY OF WAYNESBORO ON

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general election results based on their position that the use of electronic voting machines constitutes “secret voting” as prohibited by Article II, Section III of the Constitution of Virginia. Notably, the present suit was filed in response to a prior suit filed by those two members on October 4, 2024, with the case number CL24000417-00 (hereinafter “First Suit”). Those members, Defendants here, assert that they cannot, in good faith, certify the voting results provided by electronic voting machines because they are not allowed to examine the program counting the votes recorded on the ballots, nor the ballots themselves. The First Suit, though it prompted the filing of the present suit, is not before the Court.¹

BACKGROUND

On October 21, 2024, Jennifer Lewis, Ann Criser-Shedd, Christopher Graham, Andrea Jackson and Gregory Fife (hereinafter “Plaintiffs”), registered voters residing in the City of Waynesboro, filed the present Complaint in which they request mandamus, declaratory, and injunctive relief prohibiting Curtis G. Lilly, II and Scott Mares (hereinafter “Defendants”) from refusing to certify the votes from the City of Waynesboro following the November 5, 2024, general election. Mr. Lilly is the Chairman, and Mr. Mares is the Vice-Chairman, of the Waynesboro Board of Elections (hereinafter “WBE”). The WBE is the local electoral board for the City of Waynesboro.

It is undisputed that the Defendants have “publicly stated that [they] will refuse to certify the results of the November 2024 General Election under the current legal and administrative regime.” Compl. at ¶¶21-22, 69, 86. Defendants assert in the First Suit that, without court intervention or being allowed to compare physical ballots to the machine-generated results, they “shall refuse to certify the 2024 election.” Compl. at ¶¶74-77, 86. Defendants have taken an oath to uphold the Constitutions of the United States and Virginia in the discharge of their statutory duties. Compl. at ¶¶41-43.

The Complaint lays out the statutory voting framework and highlights Defendants’ election-related duties. On election day, precinct-level “officers of elections” manage the voting process at each local precinct, which includes inspection of electronic voting machines before polls open and monitoring the voting process. Compl. at ¶¶47-48. After the polls close, the election officers obtain printed “return sheets”² and compile a statement of results that the officers must affirm are complete, true and correct. Compl. at ¶49. The return sheets are provided to the WBE members, who must meet to ascertain the results of the election at or before 5:00pm the day after the election. Compl. at ¶51. Under Virginia Code § 24.2-675, “[a]s soon as the [local] electoral board determines the persons who have received the highest number of votes for any office, the secretary shall make out an abstract of the votes . . . The abstracts shall be certified and signed by the electoral board.”³ Compl. at ¶¶52-53. The certified abstracts must then be mailed or delivered by hand to the Virginia State Board of Elections (hereinafter “VSBE”), where they are compiled with the voting results of other jurisdictions. Compl. at ¶54. Ultimately, in relation to presidential

¹ The First Suit named Susan Beals, Commissioner of the Virginia Department of Elections and John O’Bannon, Chairman of the State Board of Elections, as defendants. The defendants were served on October 15, 2024, therefore the deadline for defendants to file responsive pleadings has not yet passed.

² “Return sheets” or “returns” are vote summaries printed by the electronic voting machines.

³ An “abstract” is a document prepared by the secretary of the local electoral board that summarizes the votes cast for each candidate in a particular election.

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elections, the certified results are provided to the electoral college, who report Virginia's statewide general election results to Congress.

Plaintiffs assert that Defendants' duty to certify the City of Waynesboro election results is ministerial, that they have no discretion over the certification process, and therefore that the Board members must certify facially valid election results whether they have faith in the accuracy of electronic voting machines or not. Compl. at ¶75. Notably, electronic voting machines are expressly authorized by the Constitution of Virginia and mandated by the Code of Virginia. Compl. at ¶¶67-68. Plaintiffs further assert that, if the abstracts are not certified by the WBE, votes cast by residents of the City of Waynesboro will not be reported, infringing upon Plaintiffs' fundamental right to vote. Compl. at ¶¶84, 95-96, 113.

Plaintiffs seek three distinct forms of relief. First, Plaintiffs urge the Court to issue a Writ of Mandamus ordering Defendants to: i) Ascertain the general election results; ii) Create the abstracts based on the return sheets; and iii) Certify, sign and transmit the certified abstracts to the VSBE. Second, Plaintiffs request a declaratory judgment providing that: i) Defendants' refusal to certify the general election results would infringe on Plaintiffs' constitutional rights; and ii) Defendants' refusal to certify the general election results would be an unconstitutional act that Defendants do not have the authority to take. Third, Plaintiffs request a temporary injunction compelling Defendants to certify the general election results.

Plaintiffs argue that the WBE is only responsible for tabulating the return sheets, not for verifying the accuracy of the votes, a duty that is instead statutorily entrusted to the precinct-level officers. Pl. Memorandum in Support at p. 3-5 (hereinafter "Memorandum"). Plaintiffs further argue that there is no statutory allowance for the VSBE to open and record uncertified results, meaning uncertified votes would go uncounted. Memorandum at p. 5. Plaintiffs also assert standing lies because each Plaintiff has a right to have elections in the City of Waynesboro conducted consistent with Virginia law, and more generally that Virginia residents have standing to challenge a Virginia public official's failure to comply with the Constitution of Virginia. Memorandum at p. 8.

Further, Plaintiffs claim that they are entitled to a declaratory judgment because there is an actual case in controversy concerning whether Defendants must certify the general election results, the refusal will materially interfere with Plaintiffs' right to vote, and that Defendants have no legal justification for their stated course of action. Memorandum at p. 8-10. Second, Plaintiffs address the individual factors courts consider when granting injunctions, arguing that each of the factors weigh in their favor. Memorandum at p. 10-13. Relatedly, Plaintiffs assert that this is "that rare, meritorious case" under which Rule 3:26(e) allows courts to grant an injunction even where it is not clear that a plaintiff will succeed on the merits. Memorandum at p. 10-11. Third, Plaintiffs claim that a Writ of Mandamus is proper because Defendants' statutory duty to certify the abstracts is ministerial and mandatory, and moreover that Defendants' public statements and the assertions made in the First Suit amount to a clear refusal to perform that duty. Memorandum at p. 13-15.

Defendants' Memorandum in Opposition to Plaintiffs' Motion for a Temporary Injunction (hereinafter "Opposition") does not address Plaintiffs' requests for declaratory or mandamus relief.⁴ After

⁴ The Court acknowledges that given the short timeline between the filing of this case and election day, that neither Plaintiffs or Defendants had an abundance of time to draft and submit their respective briefs.

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agreeing that Defendants “have publicly stated in affidavits that they are unable to certify the election under the [current statutory] conditions”, the following arguments are made. Opposition at p. 1.

Defendants contend that they are not able to fulfill their oaths to the Virginia Constitution and to faithfully carry out all of their statutory duties as electoral board members because those duties conflict. Opposition at p. 2-3. Defendants point out that they have taken an oath to faithfully and impartially uphold the Virginia Constitution and Code, but that they are also under the authority and administration of the Virginia Department of Elections (hereinafter “ELECT”) and the VSBE. *Id.* Defendants argue that Virginia Code § 24.2-624 provides the WBE members the authority to open the ballot boxes after the close of the polls “for the purpose of counting the ballots therein.” Opposition at p. 3. Defendants further argue that Virginia Code § 24.2-667 mandates that “[a]t the conclusion of determining the votes cast on voting devices and paper ballots, the officers of elections shall verify that all required data has been accurately entered . . .” *Id.* On these grounds, Defendants conclude that these code sections, when read together, “suggest that the legislative intent was to permit election officers to open ballot boxes and inspect their contents to ensure the accuracy of the data entered on the returns before sending the ballot boxes to the clerk.” Opposition at p. 3-4. Defendants assert that ELECT, in barring Defendants from reviewing the contents of the ballot boxes and comparing the ballots to the printed electronic voting machines results, are preventing them “from performing their constitutional and statutory duties.”⁵ Opposition at p. 4. As such, Defendants assert that if anyone is infringing on Plaintiffs’ right to vote, it is ELECT. Opposition at p. 3.

Second, Defendants address the individual injunction factors, arguing that they weigh against such relief. Defendants argue that the “success on the merits” factor weighs in their favor because “the Virginia Constitution and its attendant statutes have . . . imposed requirements that the Defendants must meet, and that are in place for the protection of voters themselves, whose interests Defendants represent.” Opposition at p. 4. Defendants do not address Plaintiffs’ Rule 3:26(e) argument. Defendants also argue that Plaintiffs will experience no irreparable injury because the VSBE can certify the Waynesboro results under Virginia Code § 24.2-679(A), or otherwise may demand corrections for any mistakes or irregularities in the returns of election officers under Virginia Code § 24.2-672. Opposition at p. 5. In sum, Defendants assert that, if the voting results are not reported it will be because the VSBE fails to certify them, regardless of whether the WBE does, and only then would Plaintiffs be at risk of disenfranchisement. *Id.* Finally, Defendants aver that denial of Plaintiffs’ request for an injunction would be in the public interest because the public has an undeniable interest in fair and transparent elections. *Id.* Defendants conclude that “it is undeniable that there is a significant number of voters who have lost faith in the election process, and their perception of corruption in the process has much the same effect as if there were verifiable corruption in the process . . .” *Id.*

On October 29, 2024, the parties appeared before this Court to present evidence and argument of counsel. Evidence was submitted through the testimony of three witnesses, Mr. Edgardo Cortés and the two Defendants.

⁵ Defendants state that they “are not claiming the right to inspect individual ballots or determine whether one ballot or another is invalid such that it cannot be cast. What the Defendants are requesting is . . . that they have the opportunity to ensure that the vote totals provided by the voting machine match the totals on the paper ballots after the closing of the polls.” Opposition at p. 4, fn. 2. Defendants also do not dispute that their “role is ministerial.” *Id.*

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Mr. Cortés has over twenty years of election experience. He has been a part of the U.S. Election Assistance Commission, has served as General Registrar for Fairfax County and was also the ELECT Commissioner from 2014 to 2018. The ELECT Commissioner is the senior election official in the Commonwealth of Virginia. Mr. Cortés' testimony detailed the election process generally, but he also testified as to what would likely happen in the event the WBE refused to certify the general election results, a scenario not directly addressed by the Virginia Code. In particular, the Court asked Mr. Cortés whether Virginia Code § 24.2-678 would allow the VSBE to obtain the Waynesboro general election results if the abstracts remained uncertified by the WBE ten days after election day, and whether uncertified abstracts could be counted by the VSBE. Mr. Cortés had never faced that issue but testified that, while the VSBE could send law enforcement to collect uncertified abstracts ten days after the election under Virginia Code § 24.2-678, there is no statutory authority that allows the VSBE to count or report uncertified abstracts.

In Mr. Cortés' view, the WBE's refusal to certify would lead to one of two outcomes. First, the reporting of results could be delayed until Waynesboro's election results were certified by the existing WBE members, or otherwise the results would be certified once the objecting WBE members were replaced with members who would fulfill their statutory duties. Second, if the objecting members could not be replaced by the reporting deadline, the VSBE may not be able to report the uncertified Waynesboro general election results at all. At best, the result would be a delay in reporting of votes. At worst, every Waynesboro voter would be effectively disenfranchised. Mr. Cortés expanded on the "cascading" effect a delay would have, explaining that if the VSBE is unable to certify a locality's votes by the deadline, it impacts a candidate's ability to request a recount or dispute results and ultimately could impact the ability of the electoral college, in relation to the presidential election, to meet within the required timeframe. Mr. Cortés also testified extensively about the safeguards the VSBE employs when vetting and procuring electronic voting machines, the logic and accuracy testing performed on them, as well as the risk-limiting audits performed periodically.

Mr. Lilly has been a WBE member for three years and Chairman for approximately one year. Before becoming a WBE member, he served as a precinct-level officer of elections. Mr. Lilly testified that he has had concerns about machine-printed ballots since 2004. While a WBE member, Mr. Lilly has never previously refused to certify abstracts based on machine-printed ballots in prior elections and has, in fact, certified the results of multiple elections predating the 2024 general election.

Mr. Mares has been involved in election work on and off for approximately twenty years and has served as Vice-Chairman of the WBE for three years. Mr. Mares has a Bachelor of Science in electronics engineering and technology and is currently employed in the IT field. While Mr. Mares testified that it was "possible" that an electronic voting machine could be programmed to work as designed during a test, but perform differently on election day, he also unequivocally testified that he has "never had a suspicion that [something bad] is happening [with the electronic voting machines]."

In their closing arguments, Plaintiffs asserted that "individual beliefs are no match for the laws of the Commonwealth." Plaintiffs further argued that Defendants' mistrust of electronic voting machines is unfounded, that their duty to certify election results is ministerial, and that their refusal to certify the 2024 general election results is a plain and improper attempt to move this Court to challenge the existing voting regime established by the Virginia General Assembly.

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Defendants' closing argument counters that Plaintiffs' position would force Mr. Lilly and Mr. Mares to certify potentially inaccurate results and would "require [them] to lie." Moreover, Defendants again assert that the VSBE has the authority to unilaterally certify Waynesboro's uncertified abstracts under Virginia Code § 24.2-679 and therefore that Defendants' intended course of action will cause Plaintiffs no harm.

ANALYSIS

A. Writ of Mandamus

Plaintiffs request a Writ of Mandamus ordering Defendants to certify the 2024 election abstracts. Defendants did not contest Plaintiffs' standing to request a Writ of Mandamus. However, the Court must still make a determination as to the Plaintiffs' standing, as without standing the Court may not grant Plaintiffs the relief they seek. "As a general rule, without 'a statutory right, a citizen or taxpayer does not have standing to seek mandamus relief . . . unless he [or she] can demonstrate a direct interest, pecuniary or otherwise, in the outcome of the controversy that is separate and distinct from the interest of the public at large.'" *Howell v. McAuliffe*, 292 Va. 320, 330 (2016) (quoting *Goldman v. Landside*, 262 Va. 364, 373 (2001)). See also *Harrison v. Barksdale*, 127 Va. 180, 188 (1920) ("it has been uniformly held that mandamus will lie, at the suit of a private individual, although the latter is without any special or pecuniary interest which is affected, to enforce a public ministerial duty imposed on the respondent by statute."). These general requirements of standing apply to applications for Writs of Mandamus and Prohibition. *Id.*

Plaintiffs allege standing as registered voters of the City of Waynesboro who have or will cast a ballot in the 2024 general election. Each Plaintiff will directly be affected by the WBE's failure to certify the abstracts of votes cast. Applying the *Howell* holding, the Court concludes that each of the Plaintiffs have standing as voters in the City of Waynesboro and will be directly affected by the actions, or inaction, of the WBE's failure to certify the abstracts of votes cast in the City of Waynesboro.

"Mandamus is an extraordinary remedy employed to compel a public official to perform a purely ministerial duty imposed upon him by law." *City of Hampton v. Williamson*, 302 Va. 325, 331 (2023) (quoting *Richlands Med. Ass'n v. Commonwealth*, 230 Va. 384, 386, (1985)). "To compel performance of a purely ministerial duty, there must be no other adequate remedy at law and 'a clear and unequivocal duty imposed by law upon the officer to perform the act.'" *Id.* (quoting *May v. Whitlow*, 201 Va. 533, 537, (2008)). "A ministerial act is 'one which a person performs in a given state of facts and prescribed manner in obedience to the mandate of legal authority without regard to, or the exercise of, his own judgment upon the propriety of the act being done.'" *Id.* (citations omitted). In short, Mandamus does not lie to compel a public official to perform a discretionary act. *Id.*

Further, Mandamus will not issue if the petitioner has an adequate remedy at law. *Howell*, 292 Va. 351 at fn. 17 (2016). Defendants did not contend that Plaintiffs have any available legal remedies. Indeed, failure to certify Plaintiffs' legally cast votes deprives Plaintiffs of their state constitutional right to vote. Virginia Constitution Art. I § 6. Therefore, Plaintiffs have no adequate remedy at law.

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The issue the Court must resolve is whether the certification of the election abstracts is a ministerial act or one in which the WBE may exercise discretion. Defendants don't deny that their role is ministerial. Opposition at p. 4, fn. 2. Rather, Defendants contend that their role is to ensure that the vote totals provided by the voting machines match the total ballots cast after the closing of the polls. The Supreme Court of Virginia in *Hall v. Stuart*, in construing the predecessor statute to Virginia Code § 24.2-671 (outlining the duties of the electoral board after the polls close), held that the electoral board's duties are "limited to ascertaining the person who received the greatest number of votes on the face of the returns after correcting any irregularities or informalities that appeared therein . . . Their duty is to take the returns as made to them from the different voting precincts, add them up, and declare the result. Questions of illegal voting, and fraudulent practices, are to be passed upon by another tribunal." *Hall v. Stuart*, 198 Va. 315, 323 (1956) (citations omitted).

The WBE is not obligated, or permitted, to count all the ballots at each precinct but rather they are to total the results reported from precinct-level officers of elections and report the results on the abstracts. As Mr. Cortés testified, the corrections of irregularities by the local board of elections are generally limited to correcting transposition errors in the statement of returns provided by the precinct-level election officers. Va. Code § 24.2-671. The VSBE job description of the local board of elections states: "The Electoral Board's signatures on the certification of results following the canvass is the ultimate declaration of the truth, accuracy and dependability of the vote totals being submitted to the Commonwealth and is thus the foundation of the democratic process."⁶

Based on the parameters set by Virginia Code § 24.2-671, the VSBE's description is an overstatement of the electoral board's role. The electoral board is to train and oversee the precinct-level election officers and ensure that the numbers from each voting precinct in its jurisdiction are reported accurately. Electoral board members are not the individuals to contest the tabulations of the results. They are simply to confirm the numbers, certify and sign the abstracts and transmit the same to the VSBE. When it comes to certification, the electoral board members are merely scribes for the data produced by the voting machines and reported by the local election officers.

Defendants point to Virginia Code § 24.2-624, which states in relevant part that "[the ballot] containers shall not be opened until the close of the polls and shall then be opened for the purposes of counting the ballots therein," to support their contention that the Code of Virginia permits election officers to manually count ballots. The Court acknowledges that this statutory provision, in isolation, may appear at odds with the remaining provisions of the Code regarding voting equipment and systems. *See* Va. Code § 24.2-625.1 *et seq.*; Va. Code § 24.2-654 (requiring officers of elections upon closing of the polls, to lock and seal the voting equipment and ascertain the vote given at the election and declare the results of the election). However, Virginia Code § 24.2-624 does not distinguish between a paper ballot, machine-readable ballot and printed ballot. *See* Va. Code § 24.2-101 (defining each of the aforementioned ballots). Machine-readable ballots would not need to be removed from the box when the polls close, as the ballots are scanned into a machine capable of reading the ballots and tabulating results. Paper ballots must be manually counted. Printed ballots may be either machine-readable ballots or paper ballots. Therefore, the reconciliation of the apparently anomalous language in Virginia Code § 24.2-624 is apparent. Ballot boxes

⁶ *See* <https://www.elections.virginia.gov/media/formwarehouse/local-administration/electoral-board/Electoral-Board-Job-Description.pdf> (Electoral Board Job Description, Va. Dept. of Elections, accessed November 1, 2024.)

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containing paper ballots are opened when the polls close for counting purposes. Printed ballots or machine-readable ballots are tabulated by the voting machines as they are cast and are therefore counted mechanically.

Both the Constitution of Virginia, in Article II, Section 3, and the Code of Virginia contemplate the use of voting machines to record and count votes cast. Virginia Code § 24.2-626 mandates that the governing body of each county and city provide for the use of electronic voting systems approved by the VSBE, at every precinct and for all elections. Further, the Code of Virginia addresses the security of the voting equipment (Va. Code § 24.2-625.1), the approval process for such voting systems (Va. Code § 24.2-629), the requirements applicable to the custodians charged with programming, testing and calibration of the voting systems and the criminal penalties that apply to such vendors or technicians that fail to perform their duties honestly and faithfully (Va. Code § 24.2-632). In short, local boards of elections are required to use electronic voting systems, and because of this mandate, they must tabulate the results of the votes cast as reflected by the voting systems. As succinctly stated by the Virginia Supreme Court in *Hall*, in relation to the electoral board's duties, "questions of illegal voting, and fraudulent practices, are to be passed upon by another tribunal", not the electoral board. *Hall*, 198 Va. at 323.

The Court therefore concludes that the duty of the WBE to certify the election results is a ministerial duty. Accordingly, the Court grants Plaintiffs' Writ of Mandamus. The Defendants are ordered to: i.) ascertain the results of the 2024 general election in Waynesboro from the returns delivered by officers of elections; ii.) amend any returns of the officers of elections as provided for in Virginia Code § 24.2-672; iii.) complete the abstracts of votes cast in the 2024 general election based on the returns delivered by the officers of elections; and iv.) certify and sign the abstracts of votes as mandated by Virginia Code § 24.2-675.

Pursuant to Virginia Code § 8.01-648, the Court declines to award Plaintiffs costs.

B. Preliminary Injunction

Although the Court's decision granting Plaintiffs' Writ of Mandamus grants Plaintiffs the relief they request, that is to compel the WBE to certify the abstracts of votes cast to the VSBE, the Court will address the Plaintiffs' request for a preliminary injunction, in the event the appellate court should determine that the Court's decision granting the Writ of Mandamus was erroneous.

Rule 3:26 of the Rules of the Supreme Court of Virginia provides the elements that must be satisfied prior to the Court granting a preliminary injunction.

Rule 3:26 states in relevant part:

(c) **Threshold Requirement for Preliminary Injunctions.** — A court may issue a preliminary injunction only if it first determines that the movant will more likely than not suffer irreparable harm without the preliminary injunction.

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(d) Additional Requirements for Preliminary Injunctions. — If the irreparable harm threshold has been met, the court must determine whether the following factors support the issuance of a preliminary injunction:

- i. Whether the movant has asserted a legally viable claim based on credible facts (not mere allegations) demonstrating that the underlying claim will more likely than not succeed on the merits;
- ii. Whether the balance of hardships — that is, the harm to the movant without the preliminary injunction compared with the harm to the nonmovant with the preliminary injunction — favors granting the preliminary injunction; and
- iii. Whether the public interest, if any, supports the issuance of a preliminary injunction.

A preliminary injunction may be issued only if it is supported by factors (i) and (ii), and it is not contrary to the public interest in factor (iii).

(e) Exceptional Cases. — Notwithstanding subsection (d)(i), in rare cases in which the likely irreparable harm to the movant is severe and any corresponding harm to the nonmovant is slight, a preliminary injunction may be issued upon a clear showing that the underlying claim has substantial merit warranting interim relief, even if the court cannot determine at the time that the movant will likely succeed on the merits.

With the above analytical framework in mind, the Court will address each of the Rule 3:26 factors.

1) Will Plaintiffs more likely than not suffer irreparable harm without a preliminary injunction?

Plaintiffs argue that, without the Defendants' certification of their votes, Plaintiffs' votes will not be certified to the VSBE and therefore will not be counted. In response, Defendants contend that their failure to certify the votes cast in the City of Waynesboro will not cause Plaintiffs irreparable harm because ultimately the VSBE is charged with ascertaining the results of the election. Va. Code § 24.2-679(A). Mr. Cortés testified that, in his experience, he is not certain how the VSBE would handle a scenario where a local board of elections fails to certify the abstracts of votes cast in the jurisdiction. The Virginia Code requires that the VSBE examine "certified abstracts" from the localities to ascertain the results of the election. *Id.* Key to this statutory provision is the use of the term "certified abstracts." Frankly, the Code of Virginia does not address, fully, the scenario presented in this case. The closest the Code gets to equipping the State Board with authority to force localities to produce their abstracts of votes cast is found in Virginia Code § 24.2-678. This section provides that should the VSBE not receive the abstracts of votes for any county or city, "within 10 days after any election, . . . shall dispatch a law enforcement officer to obtain a copy of the abstract from the official having charge thereof. That official shall immediately, on demand of the officer, make out and deliver to him the copy required, and the officer shall deliver the abstract to the State Board without delay." Va. Code § 24.2-678. However, this code section does not

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address the scenario where the local board of elections has not certified the abstracts of votes. Law enforcement may be dispatched to obtain a copy of an abstract, but the VSBE is only authorized to review “certified abstracts.” The best the law enforcement officer could do is compel production of an uncertified abstract if the local board has refused to certify the results. Uncertified abstracts are of no use to the VSBE.

Mr. Cortés identified two courses that the VSBE could take without certified abstracts from all localities in the Commonwealth. First, the VSBE could certify the results without the votes from the missing locality, but that would inevitably result in an election contest filed by the candidates for office, since not all the votes were counted in the final result. Second, the VSBE would be forced to delay certification until the issue of the missing certified abstracts is resolved. The consequence of the latter scenario could result in the delay in seating the winning candidates to the office to which they were elected.

Even if the Plaintiffs’ votes are ultimately counted, the United States Supreme Court has held that even temporary deprivations of constitutional rights results in irreparable harm. *See Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 2690 (1976). Further, the other alternative, i.e. that the VSBE certifies the results without Waynesboro’s votes, would result in the disenfranchisement of all of Waynesboro’s voters. No legal remedy is available to Plaintiffs to vindicate the infringement of the right for their vote to be counted.⁷ Therefore, the Court finds that absent a preliminary injunction, Plaintiffs will suffer irreparable harm.

2) Have Plaintiffs asserted a legally viable claim, demonstrating that the underlying claim will more likely than not succeed on the merits?

Defendants admit that they have vowed not to certify the results of Waynesboro’s election absent their ability to hand count the votes cast. However, for the reasons set forth *supra*, the Virginia Constitution and Code of Virginia contemplates and mandates the use of voting machines to count votes. Therefore, Plaintiffs are likely to succeed on the merits of their claim or, stated in the inverse, the Defendants are not likely to succeed on the merits of their claim in the First Suit.

3) Balance of hardships – Without an injunction, will Plaintiffs be harmed more than the harm to Defendants in granting an injunction?

If Plaintiffs’ votes are not ultimately counted by the VSBE due to the WBE failing to certify the results of the election, or otherwise if their votes are counted late, resulting in a delay in seating elected officials to the offices to which they were elected, this will result in considerable harm to Plaintiffs. Namely, that they will be disenfranchised from their right to vote, because a vote cast that is not counted is no vote at all. On the other hand, Plaintiffs are only demanding that the Defendants perform their duties as members of the local electoral board. The harm to Defendants in granting Plaintiffs’ injunction is slight, in particular due to the fact that both Defendants have previously certified multiple election results during

⁷ Virginia Code § 24.2-1005.2 provides for a civil penalty to be imposed upon “any person acting under the color of law who, contrary to an official policy or procedure, fails to . . . or who willfully fails or refuses to tabulate, count, or report the vote of a qualified voter . . .” However, this statute does not provide a private right of action to impose the civil penalty contemplated therein, nor is the fine paid to the affected voter, but instead is paid to the Voter Education and Outreach Fund. Therefore, this code section does not grant the Plaintiffs an adequate remedy at law.

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their terms on the electoral board. If the Defendants, in good faith and in good conscience, cannot certify the results due to their contention that they cannot truthfully attest that the results are accurate (due to their inability to hand count the votes), then they can resign their positions instead of violating their conscience and sincerely held beliefs.

4) *Whether the public interest, if any, supports the issuance of a preliminary injunction.*

Due to the impact of the WBE failing to certify the results of Waynesboro's election, which includes elections for city council, and the fact that the VSBE cannot certify statewide results without certified abstracts from the City of Waynesboro, strong public interest, whether Republican, Democrat, independent or third party, supports the issuance of a preliminary injunction.

The Court finds, based on the application of Rule 3:26 factors, and pursuant to Virginia Code § 8.01-628, that the Plaintiffs are entitled to a preliminary injunction. The Court enjoins Defendants from violating the Plaintiffs' constitutional right to have their legally cast votes counted. The Defendants are ordered to certify and sign the abstracts of votes based on the facially valid returns provided by the officers of elections as mandated by Virginia Code § 24.2-675. This injunction by no means limits Defendants' abilities to make corrections for irregularities or informalities in the returns of the officers of elections which can be cured by amending or correcting the returns. Va. Code § 64.2-672. This preliminary injunction shall remain in effect through the WBE's certification of the abstracts of votes cast in the 2024 general election and the delivery of the certified abstracts to the VSBE. Va. Code § 8.01-624.

The Court, given the nature of the case and the grounds for the preliminary injunction, waives the bond requirements of Virginia Code § 8.01-631.

CONCLUSION

The Court is appreciative of good citizens of the City of Waynesboro that volunteer to serve as officers of elections and to serve as members of the Waynesboro Electoral Board. These citizens volunteer many hours in often thankless service to the Commonwealth and the Republic. It is through the tireless and faithful efforts of these citizens within the electoral process that we may maintain hope in the continuation of our great Republic. Further, the Court acknowledges the solemnity that the Defendants have taken in their oath to the Constitution of the United States and the Commonwealth of Virginia.⁸ However, the concerns that the Defendants raise regarding the security and accuracy of the electoral process are best raised via the legislative process, where the legislative and executive branches approve of any necessary changes. The personal beliefs of members of a local board of elections cannot derail the electoral process for the entire Commonwealth.

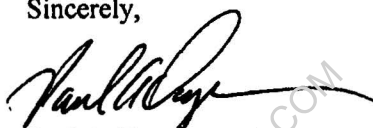
The Court directs Ms. Gorton to prepare an appropriate Order implementing the Court's ruling herein. The Order should incorporate this letter opinion by reference. As the entry of an Order in this case

⁸ As the Court is compelling Defendants to certify the election results, against their belief that such certification is contrary to their oath of office, perhaps the Defendants will find some solace in the old legal maxim, "*actus me invito factus non est meus actus*" (an act done, by me, against my will is not my act)." See Legal Maxims, Black's Law Dictionary (12th Ed. 2024).

Thomas Hendell, Esquire
Lyndsay A. Gorton, Esquire
Keith J. Harrison, Esquire
John Powers, Esquire
Matthew Fogelson, Esquire
Thomas Ranieri, Esquire
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is time sensitive, pursuant to Rule 1:13 of the Rules of the Supreme Court of Virginia, the Court waives Mr. Ranieri's endorsement of the Order. Mr. Ranieri shall file any objections to the Court's Order within twenty-one days of the date of this letter.

Sincerely,

A handwritten signature in black ink, appearing to read "Paul A. Dryer", with a long horizontal flourish extending to the right.

Paul A. Dryer
Judge

PAD/jak

cc: Nicole A. Briggs, Clerk of Court

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