IN THE SUPREME COURT OF VIRGINIA

RECORD NO. _____

KANYE WEST and KANYE 2020,
Defendant-Intervenors and Petitioners,

v.

MATTHAN WILSON and BRYAN WRIGHT,
Plaintiffs-Respondents,

and

THE VIRGINIA STATE BOARD OF ELECTIONS; ROBERT H. BRINK, in his official capacity as Chair of the Virginia State Board of Elections; JOHN O'BANNON, in his official capacity as Vice-Chair of the Virginia State Board of Elections; JAMILAH D. LeCRUISE, in her official capacity as Secretary of the Virginia State Board of Elections; and THE VIRGINIA DEPARTMENT OF ELECTIONS,
Defendants-Respondents.

PETITION FOR APPEAL

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ASSIGNMENTS OF ERROR

1. The Circuit Court erred in granting Plaintiffs' Injunction Motion because Plaintiffs had no private right of action to remove Petitioner West from the ballot.

   This error was preserved by being raised in Intervenors' Demurrer, filed September 3, 2020 (the "Demurrer"), at ¶ 2-3.

2. The Circuit Court erred by granting Plaintiffs' motion for temporary injunction and for writ of mandamus (the "Injunction Motion") where Plaintiffs failed to allege a viable free-association or right-to-vote claim.

   This error was preserved by being raised in Intervenors' Demurrer, filed September 3, 2020 (the "Demurrer"), at ¶ 7-8.

3. The Circuit Court erred in granting Plaintiffs a writ of mandamus that seeks to undo the Virginia State Board of Elections' decision to certify Mr. West on the ballot.

   This error was preserved by being raised in Intervenors' Demurrer at ¶ 2-3, 7-8.

4. The Circuit Court erred in granting Plaintiffs' Injunction Motion because Plaintiffs lacked standing to bring their claims or to seek mandamus relief.

   This error was preserved by being raised in Intervenors' Demurrer at ¶ 3, 7-8.

5. The Circuit Court erred by granting Defendants' motion to expedite the hearing on Plaintiffs' Injunction Motion where doing so deprived Petitioners of any opportunity for discovery or to present evidence in their defense prior to the Circuit Court's entry of a final order removing West from the ballot.

   This error was preserved by being raised during the September 3, 2020 Hearing on the Injunction Motion (the "Transcript") at 7:11-13:1, 61:8-63:8.

6. The Circuit Court erred by granting Plaintiffs' Injunction Motion where they failed to meet their evidentiary burden for the issuance of either injunctive relief or the extraordinary remedy of a writ of mandamus.

   This error was preserved by being raised in Intervenors' Demurrer at ¶ 6-10 and during the September 3, 2020 hearing, at, e.g., Tr. 63:2-66:15, 69:5-15.

STATEMENT OF THE CASE

Petitioner Kanye West is an independent candidate for President of the United States. Petitioner Kanye 2020 is his campaign committee. Defendants certified West to the Virginia general election ballot in August 2020.

On September 1, 2020, at 5:37pm, Plaintiffs, two of the thirteen electors for West nominated in his candidate petitions, brought a Verified Complaint and claimed they did not intend to serve as his presidential electors when they signed written and notarized oaths agreeing to so serve. Plaintiffs sought not just to resign as West's electors, but to remove West from the ballot based on their own experiences and two alleged issues they raised with respect to the notaries who notarized the elector oaths. They alleged a violation of Virginia's ballot-access statutes, and violations of their fundamental right to vote under Article I, Section 6 of the Virginia Constitution and their right to free speech under the First Amendment and Article I, Section 12 of the Virginia Constitution.

On September 2, 2020, at 12:19pm, Plaintiffs filed a Motion for Temporary Injunction and In Support of the Writ of Mandamus (the "Injunction Motion") seeking an injunction barring West from the ballot and for a writ of mandamus to issue to Defendants, the Virginia State Board of Elections and State Department of Elections, to implement that relief. Only 34 minutes later, at 12:53, Defendants

filed a Motion for Emergency Hearing seeking an expedited hearing on the matter due to the fact balloting is scheduled to begin September 19, 2020.

On September 3, 2020, at approximately 10:00am, Petitioners filed a motion to intervene, a motion seeking the recusal of the Attorney General from representing Defendants, and a Demurrer.

On September 3, 2020, at 2:30pm, the Circuit Court held a hearing on the Injunction Motion. At the hearing, the Circuit Court granted Defendants' Motion for Emergency Hearing over Petitioners' objection. In particular, Petitioners pointed out that they had no opportunity to obtain witnesses or to marshal evidence in their defense, and that it offended due process for a court to decide whether to remove a duly qualified candidate from the ballot in such a perfunctory fashion. The Circuit Court heard the testimony of Plaintiff Matthan Wilson and considered the arguments of counsel during a hearing that concluded at 3:39pm.

Approximately one hour later, and less than 48 hours after Plaintiffs filed their Verified Complaint, the Circuit Court entered the Order, over Petitioners' objection, granting the Injunction Motion, ordering Mr. West removed from the ballot, and issuing a writ of mandamus to Defendants ordering them to "not permit Kanye West's name to be printed on ballots for the November 2020 general election." Order 2. Petitioners filed a notice of appeal the next business day, on September 8, 2020.

STATEMENT OF FACTS

A. West's Petition and Applicable Legal Framework

Under Virginia law, independent and third-party presidential candidates gain access to Virginia's ballot by submitting candidate petitions to Defendant, Virginia State Board of Elections ("VSBOE"), by noon on the 74th day before the election. Va. Code § 24.2-543(A). The petition must be signed by 5,000 electors and accompanied by notarized oaths of 13 identified electors who are pledged to vote for the independent candidate for President and Vice-President identified on the form. *Id.*

On August 21, 2020, Kanye 2020 timely filed West's petition and the notarized oaths of 13 electors. Elector Oaths are completed on Form ELECT-543 (11/2019) prescribed by the Virginia Department of Elections. The form, titled "Oath for Electors for President and Vice-President; Independent and Third-Party," states on its fourth line: "Who uses this form | Third Party Groups or independent candidates not affiliated with the Democratic Party or Republican Party." *See e.g.,* Verified Compl. at Ex. F. The elector prints his or her name, address, phone number, and email on the Elector Oath form, and then signs the following oath:

> Pursuant to Va. Code § 24.2-543(A), I do hereby swear that if elected, I will cast my electoral college ballot for the candidates for President and Vice-President named in the accompanying petition, or as the party may direct in the event of death, withdrawal, or disqualification of the party nominee.

Id. The Elector Oath is then acknowledged before a notary. *Id.*

The VSBOE is charged with the responsibility of reviewing candidacy petitions to ensure they contain a sufficient number of signatures of qualified voters. Va. Code § 24.2-506(B). On August 28, 2020, the Chair of the Democratic Party of Virginia, Susan Swecker, wrote to the VSBOE Chair demanding that the VSBOE decline to certify West as a candidate on the ballot, claiming that Plaintiffs and nine other West electors' oaths were not valid. Injunction Mot. 6. The VSBOE, however, certified West's petitions and approved West to be placed on the ballot. *Id.*

B. Plaintiffs' Allegations

In their Injunction Motion, Plaintiffs allege—almost entirely through perfunctory affidavits—various challenges to the validity of their own Elector Oaths and those of other West electors. Plaintiffs allege that their Elector Oaths, and those of a third elector, were procured through fraudulent means, and they allege various defects in the notarial acknowledgments of several other Oaths.

1. Plaintiff Matthan Wilson

Wilson, the only witness to testify at the September 3, 2020 hearing, is a high school government teacher in Suffolk. Tr. 20, 30:9-13. He testified that on August 11, he was approached by three individuals who were looking for registered voters. *Id.* 22:4-10. Wilson conceded that the individuals were "friendly" and did nothing "untoward or threatening or inappropriate..." *Id.* 29:15-20. During

the course of a several-minute conversation (*id.* 22:22–23:3), Wilson admitted that he told them he "thought it would be great to get everyone involved" in presidential politics, and mentioned "independent candidates." *Id.* 30:14–21. At the end of the discussion, Wilson testified that he signed the Elector Oath (Tr. 21:13–20) and that he had read the document before he signed it. *Id.* 25:4–8.

Wilson then claims he was contacted by a newspaper roughly a week after he signed his Elector Oath (Tr. 27:1–5) and after that, he had two conversations with someone named "Jessica" who represented she worked for "an advocacy group for elections." Tr. 35:21–36.17. Wilson claims that in these conversations, he denied that he had agreed to serve as an elector for Mr. West and alleged he did not realize that by signing the Elector Oath, he was agreeing to so serve. "Jessica" then wanted him to "speak with an attorney, fill out an affidavit and have [his] name removed of the list of electors." Tr. 37:12–15. An attorney spoke with him a week later. *Id.* 37:16–38:9. His affidavit was attached to the Virginia Democratic Party's August 28 letter to the VSBOE. Injunction Mot. Ex. B.

At the hearing, Wilson claimed that the three individuals he spoke with on August 11 never told him that, by signing the Elector Oath, he was agreeing to serve as an elector for Mr. West. Rather, he claims the individuals told him that by signing he would be placed "into a pool so that they could be chosen as electors for the State of Virginia." Tr. 22:4–10. When asked how he could sign an oath that

committed him to vote "for the candidate for president...named in the accompanying petition" without realizing he was committing to a specific candidate, he could only say that he thought it meant he was pledging to vote for the winning candidate. *Id.* 25:17–26:9. Similarly, when questioned about the top of the form where it states it is for use by "third party groups or independent candidates not affiliated with the Democratic Party or the Republican Party," Wilson claimed he did not understand that he was "being singled out just for an independent third party." Tr. 32:22–33:16.

Wilson's story is contradicted by the Affidavit of Joseph Durell, which was attached to Petitioners' Demurrer. Demurrer at Ex. 1. The Circuit Court declined to consider the Demurrer at the hearing (Tr. 6:18–21), but in his Affidavit, Mr. Durell, one of the individuals who spoke with Wilson, testified that Wilson was "explicitly" told he was being asked to serve as an elector for Mr. West. Durell Aff. ¶ 7. Wilson even informed one of Durell's colleagues that he was a "government teacher" and felt it was "great to involve independent candidates"—statements Wilson corroborated on the stand. *Id.* ¶ 9*; compare* Tr. 30:14-21.

2. Plaintiff Bryan Wright

Wright did not testify at the hearing, but submitted only a conclusory affidavit in which he, too, claimed his agreement to serve as an elector for Mr. West was procured under false pretenses. Specifically, Wright claims he was told

he was signing a "petition" to get Mr. West on the Virginia ballot, but was not told the document he signed was an Elector Oath. Injunction Mot. Ex. D, Wright Aff., ¶ 3. He claimed he was "surprised" when his signature on the oath was notarized, but did not question it. *Id.* ¶ 4. In his affidavit, Wright asserts that he seeks the "withdrawal of my oath as an elector for Kanye West..." *Id.* ¶ 8.

Mr. Durell likewise contradicts Wright's account. Mr. Durell confirmed that Mr. Wright was not told he was signing a "petition," that it was "explicitly described" that he was agreeing to serve as an elector for Mr. West, and that Wright "was particularly enthusiastic about supporting Mr. West and his campaign in whatever way he could." Durell Aff. ¶ 6-7.

3. Samantha Durant

Like Wright, Samantha Durant did not testify at the hearing but only submitted an affidavit. Durant claims she was approached by representatives and asked to sign "a 'petition' to get an independent candidate on the ballot," and that she signed her Elector Oath not understanding she was agreeing to serve as an elector for West's campaign. Injunction Mot. Ex. E, Durant Aff., ¶¶ 3-4, 6. Durant also denies that her signature was notarized in her presence, although she does not dispute the authenticity of her signature. *Id.* at ¶ 5. Durant, like Wilson and Wright, sought as relief the "withdrawal of [her] oath as an elector for Kanye West..." *Id.* ¶ 8.

4. Objections to Notarial Acknowledgments on Elector Oaths

Finally, Plaintiffs lodged a hodge-podge of objections to the notarial acknowledgments set forth in several other Elector Oaths.

Plaintiffs note that eight Elector Oaths (of McCrary, Wright, Swider, Cupp, Brown, Cutler, Wilson, and Durant) were notarized by Bria Fitzgerald, who herself had agreed to serve as an elector for Mr. West. Injunction Mot. 9. Plaintiffs argued that Fitzgerald had an improper "beneficial interest" in the Elector Oaths because, if Mr. West were to win Virginia, Fitzgerald would receive $50 plus mileage reimbursement from the Commonwealth for her service as an elector. *Id.* at 9-10.

Plaintiffs also dispute that the notary who notarized Fitzgerald's Elector Oath, Desiree Rios, has a current notarial commission. Injunction Mot. 10 & Ex. N. Although the notarial stamp Ms. Rios used indicated her commission was current through 2023, Plaintiffs attached a printout from the Secretary of the Commonwealth's "Notary Search" web site indicating her commission expired in 2018. Injunction Mot. at Ex. O. However, that website includes a prominent disclaimer that "the Secretary of the Commonwealth of Virginia...does not guarantee the accuracy, reliability, or timeliness of such information" and that information "may be incorrect or not current." *Id.*

Finally, Plaintiffs argue that two Elector Oaths—of Hunter-Moore and Saunders—are invalid because the elector's name was allegedly not written in the

notary block on the Oath form. Injunction Mot. at 11. Notably, in the case of Ms. Hunter-Moore, her name was written in the notarial block but appears to have been crossed-out. Injunction Mot. at Ex. Q. The alleged omission is not a "material omission" requiring disqualification on a petition in Virginia. *See* 1 Va. Admin. Code § 20-50-20(B).

STATEMENT OF JURISDICTION

This Court has jurisdiction under Code § 8.01-670(A) because the court below granted all relief Plaintiffs sought in their complaint, including a writ of mandamus. *Ragan v. Woodcroft Village Apartments*, 255 Va. 322, 327 (1998). Alternatively, this Court has jurisdiction under Code § 8.01-670(B) because the court below issued an injunction and writ of mandamus in response to Plaintiffs' motion for temporary injunctive relief. Without prejudice to their right to challenge the decision below under Code § 8.01-670(A), Appellants are providing a copy of the proceedings as required in proceedings under Code § 8.01-670(B).

AUTHORITIES AND ARGUMENT

A. Plaintiffs Have Neither a Private Right of Action nor a Remedy Under the Commonwealth's Election Code (Assignment of Error No. 1)

Plaintiffs have no cause of action under Code §§ 24.2-543(A) and 24.2-504, the statutory bases for their first and most prominent cause of action. Compl. ¶¶ 60–66. These sections set ballot-access requirements, but do not provide for private rights or remedies for persons who oppose the candidates of persons who

utilize these provisions. The Circuit Court erred in entertaining and issuing relief on these claims without explanation, and this Court reviews the error under the *de novo* standard. *Michael Fernandez, D.D.S., Ltd. v. Comm'r of Highways*, 842 S.E.2d 200, 202 (Va. 2020). Just two weeks ago, this Court vacated an injunction issued in the absence of a private right of action, *Stoney v. Anonymous*, No. 200901, 2020 WL 5094625, at *3 (Va. Aug. 26, 2020), and this case is no different.

1. There Is No Private Right

"This Court has made abundantly clear that when a statute, such as the VRAA, is silent on the matter of a private right of action, one will not be inferred unless the General Assembly's intent to authorize such a right of action is 'palpable' and shown by 'demonstrable evidence.'" *Michael Fernandez, D.D.S., Ltd.*, 842 S.E.2d at 202 (quoting *Cherrie v. Virginia Health Servs., Inc.*, 292 Va. 309, 315 (2016)). Here, Code §§ 24.2-543(A) and 24.2-504 do not vest an express right of action in anyone, let alone in individual voters. Section 24.2-543(A) empowers voters who are not members of a political party to place their preferred candidates on the ballot, and Section 24.2-504 provides that no one who does not meet "all the requirements of a candidate shall have his name printed on the ballot for the election." There is no provision in these sections, or ancillary to them, that expressly identifies a right of action.

Nor is there any basis to infer a right of action. The statute plainly sets a relationship between an aspiring candidate, the candidate's supporters, and Virginia's election administrators. The Elections Code establishes an administrator, comprising both a Board of Elections and Department of Elections, Code §§ 24.2-102, 24.2-103, and the provisions at issue set required showings an aspiring candidate or the candidate's supporters must make to these administrators, *id.* §§ 24.2-543(A) and 24.2-504. The Elections Code also identifies multiple election offenses and provides various means for enforcing them. *See id.* §§ 24.2-1000–24.2-1019. This Court does "not infer a private right of action when the General Assembly expressly provides for a different method of judicial enforcement." *Cherrie*, 292 Va. at 316, 787 S.E.2d at 858. Here, private citizens are authorized to lodge complaints with Commonwealth Attorneys over alleged election misconduct. Code § 24.2-1019. This necessarily implies that private citizens lack the right to enforce requirements of the Elections Code in private actions in the Circuit Courts. Nothing in the Code suggests otherwise.

No parade of horribles need be imagined to see why the Code does not vest elections authority in private citizens; the parade of horribles is *this case*. Plaintiffs demanded immediate relief from the court below, without a serious hearing and affording no opportunity for Mr. West to investigate the allegations and identify witnesses to undercut Plaintiffs' bald allegations of fraud. Even a weekend-long

pause in the case was denied, and Mr. West was left with no witnesses in a highly unfair and kangaroo-court-like proceeding based on facts that are highly unlikely to be proven true and legal theories with only the thinnest precedential support. Plaintiffs apparently did not go to any Commonwealth Attorney with their concerns but demanded that a court substitute its judgment for the judgment of state election officials and prosecutors, which the statute simply does not contemplate. As a result, without this Court's intervention, an Independent candidate showing the support of more than 5,000 Virginia qualified voters will be kicked off the ballot, all because two voters apparently prefer a different candidate. That is simply not fair, and nothing in the Code allows it.

2. The Remedy Afforded Below Is Not the Statutory Remedy

Worse still, the court below and Plaintiffs ignore that the remedy for Plaintiffs is not to eject Mr. West from the ballot but to withdraw as electors. As noted, their agreement to participate as electors is a simple contract, and, if they believe it was procured through misrepresentation, their recourse is to a common-law claim against Mr. West's campaign or its agents for fraudulent inducement and rescission, not against Virginia's elections administrators to eject Mr. West from the ballot.

The statute does not contemplate otherwise. Indeed, it provides a very different outcome where electors withdraw, for whatever reason, from their positions. A provision not cited to the court below reads:

> The electors shall convene at the capitol building in the capital city of the Commonwealth at 12:00 noon on the first Monday after the second Wednesday in December following their election. *Those electors present shall immediately fill, by ballot and by a plurality of votes, any vacancy due to death, failure or inability to attend, refusal to act, or other cause.*

Code § 24.2-203 (emphasis added). Stated otherwise, the statutory scheme appreciates that persons identified as electors may not follow through with their duties, whether because of "death, failure or inability to attend, refusal to act, *or other cause*"—including a belief of being induced on improper terms—and the remedy is for the remaining electors to designate replacements. Nothing in the statute provides that, if electors withdraw for any reason, a candidate formerly certified can be ejected from the ballot in a court proceeding.

This, again, makes far more sense than the scheme implemented in the court below. Even if the electors listed pursuant to Section 24.2-543 fail to fulfill their ministerial duties, they are, in reality, expendable. It is the showing of support among the voters—at least 5,000 of them—that signals that a candidate has sufficient backing to be worth placement on the ballot. *See* Va. Code § 24.2-543(A) and (B). To give any one of 13 electors the power to renege on their

appointment, claim fraud in an expedited proceeding with no serious evidence or counter-presentation, and derail an entire candidacy (without even meeting the common law requisites of fraudulent inducement) would mean that a few persons can frustrate the will of more than 5,000, at will. The Code does not contemplate this, and the remedy imposed below, even if there were a right of action, is erroneous: the remedy (if any) should have been to excuse Plaintiffs from their duties and command appointment of new electors in the event that Mr. West prevails in the Commonwealth vote.

B. There Is No Impingement on the Rights to Vote or Associate (Assignment of Error No. 2)

The Circuit Court also erred in entertaining and issuing final relief, without explanation, on claims asserting that Mr. West's candidacy impinges Plaintiffs' rights to vote and associate. Both errors are plagued by legal defects and are subject to review *de novo*. *Palmer v. Atl. Coast Pipeline, LLC*, 293 Va. 573, 577 (2017).

1. There Is No Impingement on the Right to Vote

No plausible impingement on the right to vote is alleged, much less proven. As an initial matter, the prominent thrust of Plaintiffs' complaint, that they were tricked into agreeing to participate in the Electoral College as electors for Mr. West, has nothing to do with the right to vote. There is no right to vote in the Electoral College, for a candidate of one's choosing or otherwise. Just last term,

the Supreme Court held that the electors' function in voting for presidential candidates in the Electoral College does not "connote independent choice." *Chiafalo v. Washington*, 140 S. Ct. 2316, 2325 (2020). Electors exercise a ministerial function and can lawfully be told for whom to vote. *Id.* at 2324–2328.

Further, Plaintiffs' alleged confusion about the terms of their agreement to participate as electors is irrelevant to any alleged right to vote, either in the Electoral College or in the election. As to the Electoral College, Plaintiffs testified that they thought they agreed to vote for the winner of Virginia's statewide vote, and, in fact, that is what they *did* agree to: only if Mr. West were to prevail statewide would Plaintiffs participate as electors. *Chiafalo* holds that this agreement can be enforced. 140 S. Ct. at 2325, 2328. Any confusion about the terms of participation is immaterial: Plaintiffs say they believed that there would be a scenario in which they would participate in the Electoral College and be obliged to vote for Mr. West even if he did not win Virginia, but that will never happen—with or without the injunction below. Their misunderstanding pertains solely to a circumstance that will never arise and that Plaintiffs say they do not *want* to arise.

As to the act of voting in the election, Plaintiffs remain free, with or without the injunction below, to vote for the candidate of their choosing. The statute regulating Plaintiffs' participation in the College makes clear that the candidate

identified on the petition is the candidate for whom "the electors are required to vote *in the Electoral College*," Code § 24.2-543(A) (emphasis added), not the candidate they must support in the *election*. Plaintiffs' agreement does not restrict their right to vote in the election, and the injunction and writ of mandamus below do not lift any such restriction.

Perhaps for these reasons, Plaintiffs' complaint and briefing below did not focus on the alleged confusion regarding the terms of their participation as electors (even though this was the focus of their allegations). Instead, they advanced the remarkable theory that Plaintiffs' right to vote contains, not only the right to cast a vote for candidates of Plaintiffs' choice, but to *hinder others* from voting for the candidates of their choice. *See* Compl. ¶¶ 74–81. In other words, Plaintiffs contend that, unless Mr. West is *excluded* from the ballot, Plaintiffs lack the right to vote for candidates who are not Mr. West.

But Mr. West's presence on the ballot does not require Plaintiffs to vote for Mr. West, and Plaintiffs have no right to prevent (or hinder) others from voting for Mr. West. Plaintiffs' briefing below did not explain this asserted connection between the right to vote and the right to impinge on others' right to vote, nor did the Circuit Court's order. Plaintiffs' allegation (Pls' TRO Br. 19) that Mr. West's name "will serve to injure voters both by diluting their voting power and diminishing the effectiveness of representation" is a *non-sequitur*: Plaintiffs' right

to vote is not diluted because other voters, who also have the right to vote, choose differently. Nor is there any basis to assume that voters who check the box by Mr. West's name have made "a false 'choice.'" *Id.* Nor, for that matter, is the alleged "fraud" pertaining to electors germane to the support Mr. West has shown among the Commonwealth's citizens; Mr. West was required to present signatures of "at least 5,000 qualified voters and include signatures of at least 200 qualified voters from each congressional district," Code § 24.2-543(A), and there is zero evidence that Mr. West's showing on this point is defective. Whatever may have occurred as to *electors*, there is no basis to assume that Mr. West lacks support among potential *voters*, whose right to vote is equally important as Plaintiffs' right to vote. Thus, the only right to vote being impinged—and quite severely—is the right of these thousands of Virginia residents, and others, to vote for the candidate of *their* choice.[1]

2. There Is No Impingement on Plaintiffs' Rights to Speak or Associate

Plaintiffs' right-to-speak and right-to-associate claim fares no better. They identify no impingement on either the right to speak or to associate. They are free to advocate for candidates of their choosing who are not Mr. West and free to

[1] Plaintiffs' assertion that their own right to vote requires suppression of other voters is without precedent. Plaintiffs cited below cases like *Burdick v. Takushi*, 504 U.S. 428 (1992), and *Anderson v. Celebrezze*, 460 U.S. 780 (1983), which involve *restrictions* on ballot access and write-in vote and (correctly) identify these as burdens on the right to vote. Plaintiffs have the import of these cases exactly backwards.

associate for any political purpose. *See, e.g.*, *Minnesota State Bd. for Cmty. Colleges v. Knight*, 465 U.S. 271, 288 (1984) (finding no impingement on First Amendment rights in the absence of restriction on speech or association). Plaintiffs' agreement to be electors does not restrict their ability to speak or associate in any forum, except the Electoral College itself—where they *admit* they agreed to vote for the statewide winner who would, if they participate at all, be Mr. West. In any event, Plaintiffs have no right to the Electoral College as "a government audience for their…views." *Knight*, 465 U.S. at 286.

Nor is there any compelled speech or association. As to speech, the only speech even arguably compelled is a vote in the Electoral College, and the Supreme Court's *Chiafalo* decision does away with any colorable argument that Plaintiffs have the right to vote for the candidate of their choice in the Electoral College. Indeed, they admit that they *agreed* to vote for the statewide winner, and they will only participate if the winner is Mr. West.

As to association, Plaintiffs suggest that they are required to associate with Mr. West's campaign, Compl. ¶ 86, but this is not accurate: they are listed as electors and have no obligation to participate in the campaign. Nor is there a meaningful association with the campaign's speech. The Electoral College is not an expressive association, it does not exist for the expression of the *electors'* views, and the only publicly understood meaning of participating in the college is

the ministerial exercise of the obligation to cast a vote for the statewide vote-winner. Thus, this connection lacks the expressive element necessary to establish a compelled association claim. *See, e.g.*, *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 64–65 (2006). Reasonable onlookers do not understand electors to be expressing their own views but the views of the majority of voters in the state. *See id.* at 65.

Finally, Plaintiffs pay short shrift to the fact that they signed agreements governing their terms of participation in the Electoral College, and those agreements are presumptively enforceable. *Chiafalo*, 140 S. Ct. at 2325, 2328. Even if there were a potential free-speech or free-association violation in being tricked into participating in the Electoral College on undisclosed terms (there is not), the issue would turn on Plaintiffs' ability to plead and prove fraudulent inducement under the common law, which is a difficult burden to meet and was not met here. "Under Virginia law, fraud, whether actual or constructive, is never presumed and must be strictly proved as alleged," under a heightened burden of proof requiring "clear and convincing evidence." *Sweely Holdings, LLC v. SunTrust Bank*, 296 Va. 367, 381–82 (2018) (quotation and edit marks omitted). All elements must be clearly alleged and proven, and one element is reasonable reliance. *Id.*

Here, the Circuit Court did not hold Plaintiffs to this standard, and they failed to establish reasonable reliance or materiality. Plaintiffs had only to read or ask for relevant documents to understand the terms to which they consented, and, as discussed, the omissions were not material, since they concerned a scenario that would never occur and which Plaintiffs do not wish to occur—participation in the Electoral College with a duty to vote for someone who did not win Virginia's statewide vote. Because Plaintiffs did not, and could not, establish fraudulent inducement, their agreements remain enforceable. Their free-speech and association claims are without merit.

C. Mandamus Cannot Lie to Undo the Official Action of VSBOE in Qualifying Mr. West To The Virginia Ballot. (Assignment of Error No. 3)

The end goal of Plaintiffs' lawsuit is to undo the VSBOE's official act of certifying Mr. West's petition and qualifying him as a candidate for President on the November 2020 general election ballot. That is precisely the relief the Circuit Court granted—it enjoined Defendants from placing West on the ballot and ordered his removal. *See* Order. "[T]he determination whether mandamus lies as an extraordinary remedy [is a] question[] of law subject to de novo review upon appeal." *Moreau v. Fuller*, 276 Va. 127, 133 (2008).

But it is axiomatic that "mandamus is applied prospectively only and will not be used to undo an act already done; it lies to compel, not to revise or correct

action, however erroneous the action may have been..." *Morrissette v. McGinniss,* 246 Va. 378, 382 (1993). In *Morrissette*, a county voter registrar certified that the proponents of a referendum had failed to collect the required number of petition signatures to qualify for the ballot, and plaintiff sought a writ of mandamus to compel the registrar to "amend and correct her certification to show that the required number of qualified voters had signed the petitions" and to require the county to hold a referendum. *Id.* at 434-35. This Court held that the plaintiff was not entitled to the issuance of a writ because the acts complained of (i.e., the registrar failing to properly certify the petitions and the county board failing to hold the referendum) had already been performed by the time the mandamus petition was filed "and could not be undone by mandamus." *Id.* at 435. *See also In re Commonwealth of Va.*, 677 S.E.2d 236, 239 (Va. 2009) ("it is also well settled that mandamus does not lie to compel an officer to undo what he has done in the exercise of his judgment and discretion, and to do what he had already determined ought not be done") (quotation omitted).

So too here. Mr. West was qualified to be on the ballot by the administrative agency charged with qualifying candidates to the ballot, and Plaintiffs cannot use mandamus—especially on a hyper-expedited basis only a few weeks before balloting is set to begin—to undo that result and oust Mr. West from the ballot.

The Circuit Court erred by issuing a writ of mandamus and its judgment should be reversed.

D. Plaintiffs Lack Standing to Bring Their Claims or Seek Mandamus Relief (Assignment of Error No. 4)

The Circuit Court erred in granting the Injunction Motion and issuing a writ of mandamus to remove Mr. West from the ballot for the additional reason that Plaintiffs lack standing to assert their claims. The question whether Plaintiffs have standing is a question of law "subject to de novo review upon appeal." *Moreau v. Fuller*, 276 Va. 127, 133 (2008). The "general requirements of standing apply to applications for writs of mandamus and prohibition." *Howell v. McAuliffe*, 292 Va. 320, 330 (2016).

"The concept of standing concerns itself with the characteristics of the [individuals] who file[] suit." *Westlake Properties, Inc. v. Westlake Pointe Prop. Owners Ass'n, Inc.*, 273 Va. 107, 120 (2007) (internal quotation marks and citations omitted). "It is not enough to simply 'tak[e] a position and then challeng[e] the government to dispute it.'" *Park v. Northam*, No. 200767, 2020 WL 5094626, *4 (Va. Aug. 24, 2020) (quotation omitted). In other words, "to establish their standing to seek mandamus relief, the petitioners had to identify a specific statutory right to relief or a direct – special or pecuniary – interest in the outcome of this controversy that is separate from the interest of the general public." *Id.* In *Park*, this Court observed that "although the petitioners assert the

respondents have transgressed several statutes, they do not claim any of those statutes 'give them a legally enforceable right to have a court compel the [respondents] to perform [their] duties in the manner they request." *Id.* at *4 n.1, quoting *Goldman v. Landsidle*, 262 Va. 363, 372–73 (2001).

Rather, "[t]o have standing to challenge governmental action, a party must allege facts indicating he or she has suffered a 'particularized' or 'personalized' injury due to the action." *Id*. (quoting *Wilkins v. West,* 264 Va. 447, 460 (2002)). "[T]o establish ... standing to seek mandamus relief, [a] petitioner[] ha[s] to identify a specific statutory right to relief or a direct—special or pecuniary—interest in the outcome of this controversy that is separate from the interest of the general public." *Park, supra,* at *6.

Simply stated, Plaintiffs cannot do so here. At most, the only "particularized" or "personal" injury that Plaintiffs claim to have suffered was being identified as an elector when they did not want to be. But as set forth in Section B, *supra*, Plaintiffs have no statutory right to relief from the relevant provisions of Virginia's election code. Rather, Plaintiffs can simply resign—at any time—from being an elector. And for the reasons stated in Section A, Plaintiffs have likewise not alleged a viable claim under the Virginia or U.S. Constitutions, either. They simply raise the generalized grievance that if Mr. West is included on the ballot, his inclusion "will serve to injure voters by diluting their voting power

and diminishing the effectiveness of representation" – without saying how it could conceivably do so. Injunction Mot. at 19. The sole case Plaintiffs cite, *Jamerson v. Womack*, 26 Va. Cir. 145, 145 (Richmond Cty. 1991), was a challenge to a redistricting plan by plaintiffs who alleged the shape of the district impaired the effectiveness of their representation. But the configuration of a single-member district is a far cry from the inclusion of a third-party candidate on the ballot and, for that, Plaintiffs have cited no cases holding that such inclusion causes injury.

The lack of any injury is confirmed by the scant trial record. In their affidavits and in Wilson's hearing testimony, Plaintiffs never identified a *single* way in which their free-speech, free-association, or right to vote was injured. And while the Complaint makes certain perfunctory, conclusory allegations that West's presence on the ballot would somehow impair those interests, it is nothing more than "general and conclusory speculation, offered without any factual support" and insufficient as a matter of law to establish standing. *Park*, 2020 WL 5094626, *4, *citing Lafferty v. School Bd. of Fairfax Cty.*, 293 Va. 351, 361 (2017).

E. The Circuit Court Erred By Expediting The Hearing On Plaintiffs' Injunction Motion And Granting Final Relief In Under 48 Hours, While Depriving Petitioners Of A Meaningful Opportunity To Mount A Defense. (Assignment of Error No. 5)

The Circuit Court, over Petitioners' objection, conducted a hearing at 2:30pm on September 3 on Plaintiffs' Injunction Motion—a mere 26 hours after Plaintiffs filed it, and less than 48 hours after Plaintiffs filed their Verified

Complaint. With so little notice, Petitioners were deprived of the opportunity to call witnesses, take discovery, timely notice their Demurrer for hearing, or meaningfully mount a defense to the case—and for those reasons, requested a continuance until September 8. Tr. 8:20-9:11. Indeed, until the hearing, Petitioners were not even parties to the case despite the fact it was Mr. West's right to be a candidate on the Virginia ballot that was at stake. "The Circuit Court's decision to deny a continuance is reviewed for abuse of discretion." *Haugen v. Shenandoah Valley Dep't of Soc. Servs*., 274 Va. 27, 34 (2007).

The Circuit Court's decision to grant an expedited hearing on Plaintiffs' Injunction Motion, and to deny Petitioners' requests for a continuance, was an abuse of discretion that prejudiced Petitioners. *Id.* (quoting *Rosenberger v. Commonwealth*, 159 Va. 935, 957 (1932)). In *Haugen*, this Court held a lower court abused its discretion by denying an imprisoned parent a continuance to participate in a hearing to terminate that parent's parental rights—precisely because the impact of the judgment was "grave, drastic, and irreversible." *Id.* at 35. So too here: on less than 48 hours' notice, the Circuit Court entered a final judgment and writ of mandamus removing Mr. West from the presidential ballot, well after he had been certified to that ballot by the VSBOE.

A reasonable amount of time is required to prepare a defense, particularly when the issuance of a final, mandatory injunction is at stake. A "mandatory

injunction will not be granted upon a preliminary hearing except in cases of strong and imperious necessity, where the right to the injunction is clear." *Virginian Ry. Co. v. Echols*, 117 Va. 182, 184 (1915). *See also Dean v. Virginia High School League, Inc.,* 83 Va. Cir. 333 (Norfolk City 2011). In *Echols*, this Court confirmed that when entering a mandatory injunction that disposed of the case on the merits, the "proper procedure" was to allow the case to "mature[] upon proper pleadings" and to gather evidence, with proper notice. 117 Va. at 184-185.

Petitioners recognize that the impending election and commencement of Virginia's early-voting period on September 19 compelled prompt action. But neither Plaintiffs nor Defendants made any showing that holding the hearing on September 8 and allowing Petitioners a fair opportunity to marshal evidence and legal argument in their defense was required. And given the drastic nature of the relief granted upon the public (i.e., having a qualified candidate removed from the ballot), the equities weighed in favor of Circuit Court granting the continuance to allow this matter to be decided upon the merits. The Circuit Court's failure to afford Petitioners any time to mount a defense deprived Petitioners of their due process rights and itself warrants reversal.

F. Plaintiffs Failed To Establish the Standards for Injunctive Relief and Mandamus (Assignment of Error No. 6)

The decision below erred in concluding that Plaintiffs were entitled to injunctive relief and a writ of mandamus. This Court reviews these errors for

abuse of discretion. *Stoney v. Anonymous*, No. 200901, 2020 WL 5094625, at *2 (Va. Aug. 26, 2020). The Circuit Court here committed multiple errors, which alone and cumulatively merit reversal.

First, the Circuit Court did not find, and could not have found, essential elements necessary to issuing injunctive relief. An injunction may only be issued if the plaintiff "establish[es] the 'traditional prerequisites, i.e., irreparable harm and lack of an adequate remedy at law.'" *Levisa Coal Co. v. Consolidation Coal Co.*, 276 Va. 44, 61 (2008). Here, there is no plausible irreparable harm: Plaintiffs will only be required to vote in the Electoral College for Mr. West if Mr. West wins the statewide vote—and, in that case, they admit that they *agreed* to vote for the winner of the statewide vote. There is no harm at all, much less irreparable harm. Moreover, Plaintiffs have not shown why a common-law action for fraudulent inducement is not an adequate remedy for whatever harm they believe they may somehow experience.

Second, this case fails equally under the requisite mandamus elements: "(1) The existence of a clear right in plaintiff or the relator to the relief sought, (2) The existence of a legal duty on the part of respondent or defendant to do the thing which the relator seeks to compel, (3) The absence of another adequate remedy at law." *Richmond-Greyhound Lines, Inc. v. Davis*, 200 Va. 147, 152 (1958) (quotations, edit marks, and alterations omitted). On the first element, there

is no right at all for private citizens to oust aspiring candidates from the ballot or control the content of the ballot in any way—much less a *clear* right. On the second element, no duty exists enforceable through mandamus unless it is "purely ministerial" and free from "discretion or judgment," *id.* at 152, 104 S.E.2d at 816 (quotation marks omitted); *Ancient Art Tattoo Studio, Ltd. v. City of Virginia Beach*, 263 Va. 593, 597 (2002), and any duty to exclude candidates on the basis of alleged misconduct is not ministerial. This alleged duty requires an extensive exercise of judgment. It is—at best—unclear what occurred between Plaintiffs and alleged representatives of the West campaign, and only an exercise of judgment after an extensive investigation would reveal grounds for removing Mr. West from the ballot (assuming that is even legally permissible). The very fact that the Circuit Court entertained evidence on this question defeats the claim that the state officials' role here was purely ministerial. And, on the third element, there again has been no showing that Plaintiffs do not have an adequate remedy to excuse them from any duty to participate in the Electoral College.

Third, the Circuit Court erred in its treatment of the evidence, which amounted to an arbitrary tilting of the record in only one direction. As set forth in the statement of facts, above, the court considered multiple affidavits of persons who were not present in court, and which were hearsay, and yet declined to consider an affidavit contradicting Plaintiffs' testimony. It was error to consider

hearsay before issuing a writ of mandamus and an injunction—all relief Plaintiffs sought—and double error to commit that error only for the benefit of one side.

Further, the court signaled a remarkable willingness to make assumptions about public notaries, who were involved in vetting the signatures of persons who now claim to have been induced by fraud. "A Notary's duty is to screen the signers of important documents — such as property deeds, wills and powers of attorney — for their true identity, their willingness to sign without duress or intimidation, and their awareness of the contents of the document or transaction." Andy Johnson, What is a Notary and What Do Notaries Do? Notary.net (April 3, 2020).[2] Under Virginia law, a notary's signature "indicates…that the signature on the document was voluntarily affixed by the individual for the purposes stated within the document." Code § 47.1-2. In Virginia, a notary public is "a public official whose powers and duties are defined by statute."[3] The law provides many forms of civil and criminal liability against notaries who fail in their duties. *Id.* §§ 47.1-26–47.1-30. Yet the court below was willing to assume, with no testimony, that notaries who witnessed Plaintiffs and

[2] https://notary.net/what-is-a-notary-and-what-do-notaries-do/ (last visited Sept. 8, 2020).

[3] A Handbook for Virginia Notaries Public at 3, Office of the Sec'y of the Commonwealth (Dec. 15, 2017) (available at: https://www.commonwealth.virginia.gov/media/governorvirginiagov/secretary-of-the-commonwealth/pdf/2017-December-15-revised-Handbook-.pdf) (last visited Sept. 9, 2020).

other electors sign the relevant forms failed, at risk of *personal* liability, to fulfill their official duty to determine that Plaintiffs were acting with proper volition and apprehension of the documents' significance. The court also was apparently willing to assume such improprieties as improper financial interests and lapsed notary terms. At a minimum, the Court should have required that these notaries public be subpoenaed to explain their understanding of what occurred; assuming gross error on the part of these public officials twists the burden of proof beyond recognition.

Moreover, as described above, the court failed to consider the many respects in which Plaintiffs' evidentiary showing was defective, as described above in the statement of facts. All that aside, the court apparently failed to consider the likelihood that any misunderstanding was the result of miscommunication and not outright fraud. Wilson, after all, represented that he understood the obligation to be to vote for whichever candidate won the statewide vote, and it is eminently plausible that he was told his obligation would be to vote for Mr. West if he won the statewide vote, but the other contingencies—i.e., the contingency of voting for *other* candidates—was lost in translation. And it is facially unreasonable for Wright to have assumed he was signing a "petition" when, in fact, the document he signed—and had notarized in his presence—was titled an "Oath of Elector."

CONCLUSION

For these reasons, this Court should grant review to correct the errors of the Circuit Court below.

Dated: September 8, 2020

Respectfully submitted,

KANYE WEST and KANYE 2020,
Petitioners,

By: /s/ Trevor M. Stanley

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(*) *Application for Pro Hac Vice Admission Forthcoming*

CERTIFICATE PURSUANT TO RULE 5:17(I) OF THE RULES OF THE SUPREME COURT OF VIRGINIA

The undersigned hereby certifies:

(1) The Petitioners are KANYE WEST and KANYE 2020.

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(b) Defendants, THE VIRGINIA STATE BOARD OF ELECTIONS; ROBERT H. BRINK, in his official capacity as Chair of the Virginia State Board of Elections; JOHN O'BANNON, in his official capacity as Vice-Chair of the Virginia State Board of Elections; JAMILAH D. LeCRUISE, in her official capacity as Secretary of the Virginia State Board of Elections; and THE VIRGINIA DEPARTMENT OF ELECTIONS.

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(2) On this 8th day of September 2020, one copy of this Petition for Appeal was served, via email and via Federal Express Standard Overnight Delivery, upon all opposing counsel. There are no parties unrepresented by counsel.

(3) This Petition for Appeal does not exceed 35 pages, exclusive of the cover page, table of contents, table of authorities, and this Certificate.

(4) Petitioners desire to state orally to a panel of this Court the reasons why the Petition for Appeal should be granted. Petitioners would prefer in-person, but have no objection to a conference telephone call given COVID-19 concerns and the need for expedition in this appeal.

Dated: September 8, 2020

Respectfully submitted,

KANYE WEST and KANYE 2020,
Petitioners,

By: /s/ Trevor M. Stanley

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