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August 27, 2009

VIA ELECTRONIC MAIL

James Alcorn, Esquire
Virginia State Board of Elections
Washington Building, First Floor
1100 Bank Street
Richmond, VA 23219

RE: Voter Residency for Registration Purposes Proposed Regulations
– Democratic Party of Virginia Comments

Dear Mr. Alcorn:

On behalf of the Democratic Party of Virginia (DPVA), we ask that you provide these comments to the State Board of Elections, for consideration in advance of the Board's meeting on August 28.

We sincerely appreciate the opportunity the Board has given the public to provide input on the residency regulations the Board was required to promulgate under legislation passed by the General Assembly earlier this year¹. We were particularly pleased to participate in the Residency Task Force, which has recommended draft regulations for the Board's consideration. The Task Force included representatives of both major political parties, registrars from around the state, and organizations devoted to voting rights. These varied perspectives resulted in lively discussion and produced a draft that incorporates many improvements to the current application of residency requirements in Virginia.

Following is a brief discussion of the key provisions of the draft, as well as two suggested amendments.

Key Provisions of Draft Regulations

We want to highlight some of the key provisions of the draft regulations, which we believe are essential to carrying out the General Assembly's mandate for uniform application of residency requirements:

- Section 1 provides that domicile requires both intent, and factual circumstances to support that intent. The Task Force agreed that it is not enough for an applicant to simply want to vote in a particular place; he must also demonstrate through actions that he considers that place to be his home. By the same token, registrars should presume that applicants are domiciled where they claim to be under penalty of perjury, and should not subject an application to additional scrutiny

¹ "The State Board shall promulgate rules and regulations to ensure the uniform application of the law for determining a person's residence." Code of Virginia, § 24.2-404(D)

if it appears to be legitimate on its face. We strongly support the authority of a registrar to look into the circumstances of an applicant's life that bear on establishing domicile. However, this scrutiny can only be applied in the uniform manner required by law if it takes place for every applicant (which is not practically possible) or if it is limited to applications that are inherently suspect or about which the registrar has received a complaint. Much of the remainder of the proposed regulations focus on what should and should not be considered inherently suspect, and how registrars should handle additional scrutiny.

- Section 2 makes it clear that the duration of an individual's lease is not a proper factor in determining domicile, and specifically that college students and military families need not intend to remain in their current locations after their respective graduations and tours of duty.
- Section 4 makes it clear that a location should be judged not by the nature of its building, but by the applicant's actual use of that building. Likewise, a homeless person's residency is based on his actual sleeping location
- Section 5 provides that registrars should not make presumptions about residency merely on the basis that an applicant is or is not a government or military employee, sailor, school student or employee, occupant of student or faculty housing, non-felon inmate, patient, commuter, or occupant of federal land. Applicants in any of these categories may or may not be eligible to vote in Virginia, and consideration should be based on their individual intent and circumstances and not presumed from their labels. In other words, being in one of these categories is not inherently suspect.
- Sections 11 and 12 differentiate applications that are either incomplete as a matter of law or that fail to provide enough information to indicate the location at which the applicant intended to register from applications that have apparent discrepancies which can be clarified by informal means. In the former case, the applications should be properly denied because the registrar cannot add information to a form that has already been submitted. In the latter case, the registrar may simply need to check another reference source, obtain clarification on confusing handwriting, or the like, and then proceed with the registration.
- Section 13 differentiates between situations in which the registrar cannot determine the location at which the applicant *desires to register* (as in Section 11) and the location at which he *is eligible to register*. The latter case is based on situations that are inherently suspect, such as information that may be contradictory, or addresses that are likely to be temporary or non-residential. For example, an applicant who lists residence and mailing addresses in different parts of the state or country should be expected to provide an explanation if requested, but there are many potentially legitimate explanations for this apparent discrepancy.
- Section 14 lays out the questions to ask in the case of the apparent discrepancies covered in Section 13. These questions should be limited to ensuring that the applicant will not be registered in more than one jurisdiction, and that the applicant understands that any previous registration will be cancelled. Section 15 provides a uniform approach for handling responses to the questions asked in Section 14.

Suggested Revisions to Draft Regulations

In the closing minutes of the Task Force's nearly seven-hour meeting on August 10, there was a somewhat rushed discussion of Section 2. The Task Force agreed to a rewrite of the section, to take the emphasis off of whether applicants planned to move from the locality on a fixed date in the future. Unfortunately, the Task Force inadvertently neglected to remove a corresponding reference to fixed date in subsection 14(b), so **we request that the Board strike subsection 14(b)** before adopting the regulations.

The final point of discussion at the meeting was whether applicants should be excluded from registering to vote if they plan to move from the locality in the "immediate future." Although we appreciated the concern that a small number of applicants may come to Virginia to participate in the campaign leading up to an election and intend to leave immediately thereafter, we ultimately concluded that the standard of "immediate future" would not be uniformly applied. After all, the Task Force was created to try to eliminate ambiguity about how to apply existing standards, and there is ample evidence that registrars around the state sometimes interpret the same words and phrases very differently.

In a closely divided vote, the Task Force removed the reference to "immediate future." As a result, some members said that they could no longer support the entire draft, and in fact voted against it. We regret this, and in particular we were pleased that we were able to find so much common ground with the representatives of the Republican Party of Virginia. Although RPV voted against the final proposal, we recognize that the final vote should not be taken as a statement of their opposition against every element of the draft. Indeed, it is possible that the Task Force could have almost unanimously adopted the proposal if the "immediate future" provision remained. In an effort to reach consensus on the underlying issue of how to prevent registration by prospective voters who are truly transient, **we offer the suggestion that the Board add a new subsection between 2(b) and 2(c)**, as follows:

"A person who dwells in a precinct for the primary purpose of registering to vote or voting there has not established the intent required to establish domicile there."

This provision would exclude individuals, such as campaign operatives, who are present in a locality for the express purpose of padding the vote for their favored candidates or issues. We offer this suggestion in a good faith effort to form consensus with our colleagues on the Task Force.

The "Unlimited Time" Doctrine

Finally, we cannot ignore the fact that the Supreme Court of Virginia has interpreted domicile to require the intent to remain in a locality for "an unlimited time." The Court gave no rationale for this interpretation, which was initially made in *State-Planters*, a 1940 case² involving the application of the estate tax. We must respectfully conclude that the "unlimited time" doctrine is unworkable in the present context. If this standard is applied literally, it would disenfranchise any prospective voter who has plans to move from his or her locality on a fixed date in the future. In addition to most college students, this would include non-students who plan to move on fixed dates related to employment contracts, lifecycle events, or retirement.

² *State-Planters Bank & Trust Co. v. Commonwealth*, 174 Va. 289, 295, 6 S.E.2d 629, 641 (1940)

In *Dunn*, a 1972 case³, the U.S. Supreme Court ruled that state laws requiring a period of residency *prior* to voting (other than a nominal administrative period to close the registration books and prepare for the election) violated the right to free travel found in the U.S. Constitution. The Court explained that these “durational residency requirements” penalize prospective voters who have exercised the right to change their residences – i.e. to travel. It stands to reason that the same logic would apply to voters who are penalized because they plan to exercise this right *after* they vote. As the Court put it, states cannot require individuals to choose between the right to travel and right to vote.

Therefore, we believe that *Dunn* supersedes *State-Planters* and relieves the Board of the burden of trying to reconcile the unworkable doctrine of “unlimited time.” We offer this analysis⁴ in recognition of the fact that the Task Force was unable to find any uniform way of applying the doctrine literally or without torturing the language.

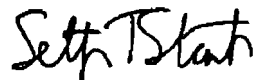
Conclusion

Although we are a partisan organization, we do not discriminate along party lines when it comes to voting rights. Our primary concern is that each person legally entitled to vote in Virginia be given the opportunity to do so. We trust that we share this position with each member of the Board, and with every other participant in this discussion.

We believe that the proposed regulations will significantly improve the process by which registration applications are considered, and will reduce barriers to voting by groups of applicants who have previously been subjected to standards that are at best inconsistent across the state and at worst manifestly unfair.

Thank you again for the opportunity to participate in this process. We look forward to commenting at the Board’s meeting on August 28, as well.

Very truly yours,



Seth T. Stark, Esquire
General Counsel, DPVA



Craig T. Fifer
Vice Chair for Technology
and Communications, DPVA

cc: The Hon. Timothy Kaine, Governor
Richard J. Cranwell, Chairman DPVA

³ *Dunn v. Blumstein*, 405 U.S. 330 (1972)

⁴ We are grateful to Professors Richard G. Niemi, Michael J. Hanmer, and Thomas H. Jackson, whose comments to the Task Force and forthcoming journal article provided a fresh focus on *Dunn*.