IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

ROGER SCHWEIKERT,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No. 3:16-CV-00072**
	)	
MARK R. HERRING, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

Defendants Mark R. Herring, in his official capacity as the Attorney General of Virginia, James B. Alcorn, Clara Belle Wheeler, and Singleton B. McAllister, in their official capacities as Chairman, Vice-Chairman, and Secretary, respectively, of the State Board of Elections (collectively, the Board), and Edgardo Cortés,[1] in his official capacity as the Commissioner of the Department of Elections, by counsel, state as follows in support of Defendants' Motion to Dismiss Plaintiff's Verified Class Action Complaint for Emergency Injunctive and Declaratory Relief.

BACKGROUND

In selecting presidential electors, Virginia utilizes a long-standing statewide selection method first adopted in 1800. 1799-1800 Va. Acts 3-4 (copy attached as Exhibit A). Under this system, as presently codified at Virginia Code § 24.2-202, each Virginia voter votes "for a number of electors which equals the whole number of senators and representatives to which the Commonwealth at that time is entitled." On the ballot for the presidential general election, each voter casts one vote for "electors for" one presidential candidate and the associated vice

[1] At various points, the Complaint refers to Mr. Cortés as "Edgardo Cortez." However, Defendants ask this Court to note that his name is properly spelled "Edgardo Cortés."

presidential candidate. Va. Code § 24.2-614. As Virginia is currently entitled to eleven representatives in the U.S. House of Representatives, as well as two senators in the U.S. Senate, thirteen presidential electors constitute the "electors for" each presidential and vice presidential candidate.

Through the general election, the presidential electors for the successful presidential and vice presidential candidates are elected as Virginia's Electoral College delegation. These presidential electors fulfill their constitutional and statutory duties at the Commonwealth's convening of electors, held at 12:00 noon on the first Monday after the second Wednesday in December. Va. Code § 24.2-203. In 2016, the convening of the electors will occur at 12:00 noon on Monday, December 19. *See* http://elections.virginia.gov/board/electoral-college/index.html.

Virginia's presidential elector selection process has met with judicial approval when challenged on grounds identical to those raised by Schweikert in the present case. In 1968, a group of Virginia citizens brought suit in the Eastern District of Virginia, challenging Virginia's presidential elector selection process. *Williams v. Virginia State Bd. of Elections*, 282 F. Supp. 622 (E.D. Va. 1968) (3 judge court), *aff'd*, 393 U.S. 320 (1969). As the District Court summarized the *Williams* Plaintiffs' claims, "[t]he inquiry is whether Article II, Section 1 considered alone or with Constitutional safeguards, permits the selection of the electors by a general election in which the entire electorate of the State may collectively vote at one time upon all of the electors." *Id.* at 624. Following a comprehensive review of Virginia's process, the District Court concluded that the Constitution requires that this inquiry be answered in the affirmative. *Id.* at 629 ("As Virginia's design for selecting presidential electors does not disservice the Constitution, we decline to place an injunction upon its effectuation.").

Specifically, the District Court concluded that Article II, Section 1 of the U.S. Constitution did not limit states to selecting presidential electors by district, because the very language of that Section "literally leaves to the State legislature the appointment of electors 'in such manner' as it may direct." *Id.* at 626. While the District Court noted that the Commonwealth's method of selecting presidential electors "must itself be free of Constitutional infirmity," the District Court concluded that the use of a statewide general election, described as the "unit rule," did not violate the Equal Protection Clause's one-person, one-vote principle. *Id.*

And while the *Williams* Plaintiffs further claimed that Virginia's system devalued the voting power of Virginia citizens in comparison to citizens of more populous states, the District Court concluded that "[d]isparities of this sort are to be found throughout the United States wherever there is a State numerical difference in electors." *Id.* at 628. However, as "this unevenness is directly traceable to the Constitution's presidential electoral scheme and to the permissible unit system," the District Court concluded that "the injustice cannot be corrected by suit, especially one in which but a single State is impleaded," especially where "[l]itigation of the common national problem by a joinder of all the States was evidentially unacceptable to the Supreme Court" in *Delaware v. New York*, 385 U.S. 895 (1966). *Id.* The United States Supreme Court summarily affirmed the District Court's ruling in *Williams*, without opinion. *See* 393 U.S. 320 (1969).

ARGUMENT

I. Case law upholding Virginia's system of selecting presidential electors requires dismissal of this case.

As detailed above, a three-judge District Court upheld Virginia's system of statewide presidential elector voting against constitutional challenge, and the United States Supreme Court affirmed without opinion. *See Williams v. Virginia State Bd. of Elections*, 282 F. Supp. 622

(E.D. Va. 1968) (3 judge court), *aff'd*, 393 U.S. 320 (1969). Summary affirmances by the Supreme Court "prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (per curiam); *see Bostic v. Schaefer*, 760 F.3d 352, 373 (4th Cir. 2014) (the Supreme Court's summary dispositions "qualify as 'votes on the merits of a case'" and "therefore 'prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided'" unless doctrinal developments in Supreme Court case law show that the summary disposition has lost its binding force). Here, counsel is not aware of any doctrinal developments in Supreme Court case law that undermine the summary affirmance of the constitutionality of Virginia's presidential elector system in *Williams*. To the contrary, the Supreme Court has strengthened its disposition of *Williams* by repeating that "the State legislature's power to select the manner for appointing electors is plenary." *Bush v. Gore*, 531 U.S. 98, 104 (2000) (per curiam) (citing *McPherson v. Blacker*, 146 U.S. 1, 35 (1892)). Accordingly, this Court is bound to reject Schweikert's assertion that Virginia's system is unconstitutional and must therefore dismiss this case.

If the Court deems it necessary or appropriate to address matters beyond the *Williams* decision, it will find that Schweikert's claims should be dismissed.

II. Schweikert's Complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1), because the Plaintiff does not have standing.

Article III of the U.S. Constitution "limits judicial authority to 'Cases' and 'Controversies.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559 (1992). To meet the constitutional requirement of a 'case' or 'controversy,' Schweikert, as the party invoking jurisdiction, "must include the necessary factual allegations in the pleading, or else the case must

be dismissed for lack of standing." *Bishop v. Bartlett*, 575 F.3d 419, 424 (4th Cir. 2009). To successfully demonstrate standing, the Plaintiff must show that:

> (1) [the party] has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Id., 575 F.3d at 423 (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180-81 (2000)).

There is also a prudential standing component, and when assessing this prudential component, "courts generally recognize three self-imposed constraints":

> First, when the asserted harm is "a generalized grievance" shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction….Second, "the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties."…Third, "a plaintiff's grievance must arguably fall within the zone of interest protected or regulated by the statutory provision or constitutional guarantee invoked in the suit."

Id., 575 F.3d at 423 (internal citations omitted).

a. Schweikert does not have standing as a presidential elector because he is not a presidential elector.

While Schweikert previously served as a presidential elector during the 2012 election, he acknowledges that he is not a presidential elector for the 2016 presidential election; by his own admission, he files this suit "as 'only' a Virginia qualified voter of the fifth district of Virginia." Compl. (ECF # 1) ¶ 2.[2] Where he is not a presidential elector, Schweikert cannot show that he

[2] Schweikert's acknowledgment that he is not a member of the class seems to make it unnecessary to do so, but the Court may take judicial notice of matters of public record, including the lists of presidential electors on the Virginia Department of Elections' official website at http://elections.virginia.gov/board/electoral-college/index.html. *See Philips v. Pitt County Mem. Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009); *Hall v. Virginia*, 385 F.3d 421, 424 n.3

has suffered a concrete injury, actual or imminent, based on Virginia's statutory provisions governing the actions of presidential electors. Furthermore, where Schweikert's claims regarding presidential electors rely entirely on the rights of others who are qualified presidential electors, he has failed to meet the requirements of prudential standing. A plaintiff "cannot rest his claim to relief on the legal rights or interests of third parties," *Bishop*, 575 F.3d at 423, such as qualified presidential electors, and accordingly, Schweikert does not have standing for his claims alleging violations of presidential electors' rights.[3]

Nor can Schweikert demonstrate standing with respect to any alleged injuries he may claim he suffered as a presidential elector in 2012. Not only is it impossible for Schwiekert to demonstrate any injury under Virginia's presidential elector process, as this process is constitutionally sound, but he also cannot demonstrate that any alleged injury in 2012 would be redressed by a favorable decision today.

b. Schweikert does not have standing as a voter because there is no constitutional right to vote for presidential electors by district.

While Schweikert alleges that Sections 24.2-202 and 24.2-203 of the Virginia Code violate his constitutional rights as a voter under the First and Fourteenth Amendment, he cannot successfully demonstrate an injury in fact in this context. The Supreme Court has consistently recognized states' plenary power to determine how presidential electors are

(4th Cir. 2004) (noting it was proper to take judicial notice of publicly available statistics "on the official redistricting website of the Virginia Division of Legislative Services").

[3] As Schweikert cannot demonstrate, nor has he alleged, that he is a presidential elector, he cannot qualify to serve as a class representative for his proposed class of presidential electors for all political parties. *See* Fed. R. Civ. P. 23(a) ("*One or more members of a class* may sue or be sued as representative parties on behalf of all class members…") (emphasis added). It is also extremely unlikely that Schweikert can "fairly and adequately protect the interests" of the proposed class, especially with respect to presidential electors representing other political parties, another prerequisite for class action litigation under the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 23(a)(4).

allocated, *see McPherson v. Blacker*, 146 U.S. 1, 25 (1892), *Bush v. Gore*, 531 U.S. 98, 104 (2000) (per curiam), and Virginia's unit rule itself has been found to be consistent with the Constitution, *Williams*, 282 F. Supp. 622, *aff'd*, 393 U.S. 320. Accordingly, Virginia's method of selecting and allocating presidential electors works no injury on Schweikert's constitutional rights, and he cannot demonstrate standing.

As Schweikert is not a presidential elector and cannot demonstrate injury as either a presidential elector or a voter, his lack of standing is fatal to all of his claims.

III. The Plaintiff's Complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6), because the Plaintiff has failed to state a claim upon which relief can be granted.

A Court evaluating a motion to dismiss under Rule 12(b)(6) must accept as true all of the factual allegations in a complaint, *Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999), but a complaint "must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A complaint's "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements" are insufficient to survive a motion to dismiss under Rule 12(b)(6). *Id.* at 678 (citing *Twombly*, 550 U.S. at 570). While a Plaintiff need not provide "detailed factual allegations" in an initial pleading, the pleading standard established in Rule 8 "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). When faced with "conclusory allegations that amount to mere formulaic recitations of the elements of a claim," the Court must "conduct a context-specific analysis to determine whether the well-pleaded factual allegations plausibly suggest an entitlement to relief." *Sarvis v. Judd*, 80 F. Supp. 3d 692, 697 (E.D. Va. 2015) (internal citations omitted).

Additionally, although courts have recognized that a Plaintiff's *pro se* status "means that his submissions should be held to less stringent standards than formal pleadings drafted by

lawyers…. Nevertheless, *pro se* status does not exempt a party from compliance with relevant rules of procedural and substantive law." *New v. Ashcroft*, 293 F. Supp. 2d 256, 257 (E.D.N.Y. 2003) (internal quotations and citations omitted).

a. Sections 24.2-202 and 24.2-203 do not exceed Virginia's constitutional authority

Article II, Section 1 of the U.S. Constitution vests state legislatures with the authority to determine how each state's presidential electors are selected. U.S. Const. art. II, § 1 ("Each state shall appoint, in such manner as the Legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress."). Courts have consistently recognized state legislatures' plenary power under Article II, Section 1 to determine their respective state's method of selecting presidential electors. *Bush v. Gore*, 531 U.S. at 104 ("[T]he State legislature's power to select the manner for appointing electors is plenary."); *McPherson v. Blacker*, 146 U.S. at 35 ("In short, the appointment and mode of appointment of electors belong exclusively to the States under the Constitution of the United States."). In fact, Virginia has utilized a statewide election system, a system found expressly constitutional in *Williams*, since 1800. *McPherson*, 146 U.S. at 31-32.

Schweikert alleges that Virginia Code §§ 24.2-202 and 24.2-203 exceed Virginia's constitutional authority, because the federal Constitution "preempts the States from regulating in certain areas that implicate exclusively federal interests." Compl. (ECF #1) ¶ 75. However, the states' power to determine the manner in which presidential electors are selected is a power explicitly granted by Article II, Section 1 of the Constitution, and as such §§ 24.2-202 and 24.2-203 can hardly be considered a regulatory intrusion into an exclusively federal interest.

Not only have federal courts long recognized state legislatures' plenary power to determine their respective state's method of selecting presidential electors, but indeed the federal

courts held that Virginia's method of selecting presidential electors is constitutional. *Williams*, 282 F. Supp. 622, *aff'ed*, 393 U.S. 320.

As Article II, Section 1 of the Constitution explicitly empowers state legislatures to determine a state's method of selecting presidential electors, Virginia's statutory framework for completing this task is certainly within the scope of her constitutional authority. The Plaintiff thus cannot succeed on his claim that §§ 24.2-202 and 24.2-203 exceed Virginia's constitutional authority.

b. Sections 24.2-202 and 24.2-203 do not violate the First or Fourteenth Amendments.

Schweikert alleges that Virginia's at-large election of all thirteen presidential electors violates voters' and electors' rights of freedom of speech and freedom of association under the First and Fourteenth Amendments by preventing voters from voting for a district-specific presidential elector, and by preventing presidential electors from representing a specific electoral district. However, courts have consistently concluded that there is no requirement that presidential electors be elected at the district level.[4]

[4] Nor, contrary to Schweikert's assertions, is there a constitutional requirement that presidential electors "have the qualifications requisite for electors of the most numerous branch of the State legislature" pursuant to the Seventeenth Amendment. *See, e.g.*, Compl. p. 36. The Seventeenth Amendment's language imposes requirements for those "electors" who participate in the election of a state's Senators *See, e.g., Tashjian v. Republican Party*, 479 U.S. 208, 212, 225 (1986) (In considering the impact of the Seventeenth Amendment's qualification provision in the context of primary elections, the Court recognized that this provision, which parallels Article I, Section 2 of the Constitution's Qualification Clause, applies to voter qualifications, and noted that "these provisions require only that 'anyone who is permitted to vote for the most numerous branch of the state legislature has to be permitted to vote' in federal legislative elections"). In fact, the word "elector" is used repeatedly in the U.S. Constitution to refer to the members of the electorate (*i.e.*, voters). *See* U.S. Const. art. I, § 2, cl. 1; U.S. Const. amend XVII. In general usage, the term "elector" can be used to refer to voters or presidential electors. *See Black's Law Dictionary* 558 (8th ed. 2004) (defining an "elector" as, among others, "1. A member of the electoral college chosen to elect the President and Vice President" and "2. A voter."). As such, Schweikert's suggestion that the Seventeenth Amendment imposes a previously unrecognized

The *Williams* plaintiffs raised identical arguments, alleging that presidential electors "cannot be selected…by a statewide general election as directed by the Virginia Statute," that this system was unfair because it "accords no representation among the electors to the minority of voters," and that "[a]n additional prejudice is found in the result of the system as between voters in different States." *Williams*, 288 F. Supp. at 623.

While the Constitution's framers "held the district plan more advisable," the *Williams* Court noted that "it was Jefferson who advised Virginia to switch to the general ticket" to avoid the dilution of Virginia's voting power through the continued use of district elections when other states had opted for the unit rule approach. *Id.* at 626. The *Williams* Court ultimately concluded that "it cannot not be safely said that the draftsmen of Article II, Section 1 believed that the electors must be chosen by congressional or other districts," *id.*, and that a district "method cannot be forced upon the State legislatures, for the Constitution gives them the choice, and the use of the unit method of tallying is not unlawful." *Id.* at 628. The *Williams* Court thus upheld Virginia's use of the statewide unit rule for selecting presidential electors.

Certainly, to the extent that Virginia's manner of selecting presidential electors entitles the Commonwealth's citizens to vote, "the right to vote as the legislature has prescribed is fundamental." *Bush*, 531 U.S. at 104. However, where Virginia has simply exercised its explicit constitutional authority, and has done so in a way that offers each individual voter an equal opportunity to vote for presidential electors, Schweikert's claim can be interpreted only as a claim that the Electoral College process authorized by the U.S. Constitution is, in fact, unconstitutional under the First and Fourteenth Amendments. In the context of challenges filed against the Electoral College writ large, federal courts have concluded that the judiciary "is not

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residency requirement on presidential electors constitutes a significant and unsupported overextension of the recognized reach of this constitutional provision.

empowered to strike the Constitution's text on the basis that it is offensive to itself or is in some way internally inconsistent. In other words, the electoral college cannot be questioned constitutionally because it is established by the Constitution." *Trinsey v. United States*, 2000 U.S. Dist. LEXIS 18387 at 8-9, 2000 WL 1871697 (E.D. Pa. 2000); *accord New v. Pelosi*, 2008 U.S. Dist. LEXIS 87447 at 3-6, 2008 WL 4755414 (S.D.N.Y. 2008), *aff'd* 374 Fed. Appx. 158, 159 (2d Cir. 2010); *New v. Ashcroft*, 293 F. Supp. 2d 256, 259 (E.D.N.Y. 2003).

Where federal courts have consistently concluded that the statewide general election of all of a state's presidential electors as a unit is constitutionally sound, and where under Virginia law all qualified voters are offered an equal opportunity to vote for the presidential candidate and presidential electors of their choice, it is apparent Schweikert's Complaint fails to state a claim that §§ 24.2-202 and 24.2-203 do not violate the First or Fourteenth Amendments.

c. Sections 24.2-202 and 24.2-203 do not violate the right to vote.

As the Supreme Court has indicated, "[t]he individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the Electoral College." *Bush v. Gore*, 531 U.S. at 104; *see also Trinsey*, 2000 U.S. Dist. LEXIS 18387 at 7 ("Neither the Constitution nor the 'one person, one vote' doctrine vests a right in the citizens of this country to vote for Presidential electors.") (internal citations omitted).[5] Once a state grants such a right, "the right to vote as the legislature has prescribed is

[5] While Schweikert cites *Correll v. Herring*, no. 3:16-cv-00467, 2016 U.S. Dist. LEXIS 89781 (E.D. Va. July 11, 2016), in support of his argument that presidential electors have a constitutional right to vote, *Correll* stands for no such principle. The *Correll* Plaintiff challenged a different Virginia law requiring delegates to political parties' national presidential nominating conventions to vote for the party candidate who was successful in that party's presidential primary election. The ruling in *Correll* that the Republican Party's allocation rules prevailed where they conflicted with state law to which the party had not agreed (*see id.* at 35-37) does not

fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter." *Bush* 531 U.S. at 104. Under Virginia's system, each voter receives an equal right to vote for one slate composed of a presidential and a vice presidential candidate and the thirteen designated presidential electors for these candidates.

While Schweikert alleges that the use of the statewide unit rule for allocating presidential electors results in the dilution of votes cast for other candidates,

> it is difficult to equate the deprivations imposed by the unit rule with the denial of privileges outlawed by the one-person, one-vote doctrine or banned by constitutional mandates of protection. In the selection of electors the rule does not in any way denigrate the power of one citizen's ballot and heighten the influence of another's vote.

Williams, 288 F. Supp. at 627. "The Supreme Court has consistently declined to extend the principle of 'one person, one vote' to the electoral college," and "courts have routinely rejected challenges to the electoral college under the Equal Protection Clause of the Fourteenth Amendment." *Pelosi*, 2008 U.S. Dist. LEXIS 87447 at 3-4 (further noting that the Supreme Court declined to hear Delaware's challenge to the Electoral College, which alleged that larger states "violated the Equal Protection Clause of the Fourteenth Amendment by using winner-take-all elections to choose state electors for the electoral college.").[6] And while "once the electoral

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extend beyond such internal party matters. A presidential elector, a state officer duly qualified and elected by Virginia's electorate, is not similarly situated to a convention delegate, who is selected by a political party and who serves only within the confines of a political party's national presidential nominating process. Moreover, the U.S. Constitution expressly gives state legislatures the authority to prescribe how presidential electors will be selected in Article II section 1. Accordingly, the District Court's analysis in *Correll*, concluding that "a State's interest in giving effect to primary votes cannot justify burdening the party's right to complete control over the selection of its Presidential and Vice-Presidential nominees," *id.* at 61, is immaterial to the constitutional claims Schweikert asserts.

[6] In fact, in some cases plaintiffs have claimed that it is the smaller states which derive an unconstitutional benefit from the Electoral College. For example, in *Pelosi*, the plaintiff argued that the Electoral College "favors states with smaller populations by granting to their citizens

slate is chosen, it speaks only for the element with the largest number of votes," the *Williams* Court recognized that "in a democratic society the majority must rule, unless the discrimination is invidious." *Williams*, 288 F. Supp. at 627.

As noted above, federal courts have routinely rejected challenges to the electoral college under the Equal Protection Clause, and, when considering such challenges, have noted that a federal court "lacks the power to grant the relief sought because the Court, 'as interpreter and enforcer of the words of the Constitution, is not empowered to strike the document's text on the basis that it is offensive to itself or is in some way internally inconsistent.'" *Pelosi*, 2008 U.S. Dist. LEXIS 87447 at 4-5 (quoting *Trinsey*, 2000 U.S. Dist LEXIS 18387, at 8-9). Where, as remains the case in Virginia, "[e]very citizen is offered equal suffrage and no deprivation of the franchise is suffered by anyone," *Williams*, 288 F. Supp. at 627, Schweikert's claim that §§ 24.2-202 and 24.2-203 violate the right to vote must fail.

d. The Plaintiff is not entitled to a declaratory judgment or injunctive relief

Counts V and VI of Schweikert's Complaint do not state unique legal claims, and instead simply list particular forms of relief that Schweikert requests in this case. *See Correll*, 2016 U.S. Dist. LEXIS 89781 at 62 n.27 ("neither Count IV nor Count V is an actionable count in its own right. Rather, both counts merely state prayers for a specific form of relief."). As described above, Schweikert's claims do not merit relief.[7]

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greater influence, per electoral vote, on the outcome of presidential elections than it grants citizens of larger states." 2008 U.S. Dist. LEXIS 87447 at 2.

[7] At pages 42-43 of the Complaint, Schweikert raises two issues regarding the response by the Department of Elections, which is not a party to this case, to Virginia Freedom of Information Act requests made by an unnamed "aide" or "legal researcher" for Schweikert: (i) the truth and/or adequacy of a response by Brooks Braun on August 19, 2016, and (ii) whether a website error message "may suggest" Virginia is blocking some citizens from access to public information, thereby violating the 14th Amendment's Equal Protection Clause. The latter suggestion of a constitutional claim fails to state a claim because the Supreme Court "has

CONCLUSION

Schweikert alleges that Virginia's method of selecting and allocating presidential electors violates the constitutional rights of both Virginia's voters and its presidential electors. However, Schweikert fails to demonstrate any constitutional right violated by Virginia's presidential election process, or to demonstrate standing to bring claims on behalf of the Commonwealth's presidential elector candidates. Given these failures, Schweikert's Complaint must be dismissed.

WHEREFORE, the Defendants, Mark R. Herring, in his official capacity as the Attorney General of Virginia, James B. Alcorn, Clara Belle Wheeler, and Singleton B. McAllister, in their official capacities as Chairman, Vice-Chairman, and Secretary, respectively, of the State Board of Elections, and Edgardo Cortés, in his official capacity as the Commissioner of the Department of Elections, request the Court dismiss the instant action with prejudice.

Respectfully submitted,

MARK R. HERRING
JAMES B. ALCORN
CLARA BELLE WHEELER
SINGLETON B. MCALLISTER
EDGARDO CORTÉS

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repeatedly made clear that there is no constitutional right to obtain all the information provided by FOIA laws." *McBurney v. Young*, 133 S. Ct. 1709, 1718 (U.S. 2013). And neither of these FOIA issues is properly within the supplemental jurisdiction of this Court because neither is "so related to the claims in [this] action … that they form part of the same case or controversy." 28 U.S.C. § 1367(a). Finally, Schweikert's passing discussion of FOIA issues fails to state a claim because neither the responding agency nor the requester are parties to this case.

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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that, on October 26, 2016, I am electronically filing the foregoing document with the Clerk of Court using the CM/ECF system and a copy of the foregoing document is being sent via overnight delivery to the following address:

Roger Schweikert
6209 Spring Hill Road
Ruckersville, Virginia 22968

/s/ Anna T. Birkenheier

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A C T S

PASSED AT A

GENERAL ASSEMBLY

OF THE

COMMONWEALTH

OF

VIRGINIA:

BEGUN AND HELD AT THE CAPITOL, IN THE CITY OF RICHMOND, ON MONDAY THE SECOND DAY OF DECEMBER, ONE THOUSAND SEVEN HUNDRED AND NINETY-NINE.

*
***
*

RICHMOND:

PRINTED BY MERIWETHER JONES, PRINTER TO THE COMMONWEALTH.

M.DCCC.

EXHIBIT
A

ACTS

OF THE

GENERAL ASSEMBLY.

CHAPTER I.

An ACT *to amend an Act, intituled, An Act for Appointing Electors to chooſe a Preſident and Vice-Preſident of the United States.*

[Paſſed, January 20th, 1800.]

Preamble.

WHEREAS, until ſome uniform mode for chooſing a Preſident and Vice-Preſident of the United States, ſhall be preſcribed by an amendment to the Conſtitution, it may happen under the law of this Commonwealth, for appointing Electors for that purpoſe, that a choice may take place contrary to the will of a majority of the United States, and alſo contrary to the will of a majority of the people of this ſtate, which would be inconſiſtent with the true intent and meaning of the Conſtitution of the United States; and although this Commonwealth is willing to accede to any reaſonable and proper amendment of the ſaid Conſtitution to remedy the ſaid evil, yet foraſmuch as it ought in the mean time to be counteracted by every Conſtitutional regulation within the power of the Legiſlature, until it ſhall be ſo removed:

Mode of election by commiſſioners.

SEC. I. *BE it enacted by the General Aſſembly*, That the perſons qualified to vote for Electors of a Preſident and Vice-Preſident of the United States, under the act, intituled, "An act for appointing Electors to chooſe a Preſident and Vice-Preſident of the United States," ſhall each vote hereafter for twenty-one Electors, in manner herein directed. The Governor, with the advice of Council, ſhall on or before the firſt day of Auguſt, in every year wherein ſuch election is to take place, appoint and commiſſion three perſons, in each county of this ſtate, for the purpoſe of executing this law, any two or more of whom ſhall be competent to act. Each perſon before he enters upon the duties herein enjoined, ſhall take and ſubſcribe the following oath: "I, A B, do ſolemnly ſwear, faithfully and truly to execute the office of a Commiſſioner under the "act, intituled, "An act to amend an act, intituled, an act for appointing Electors to "chooſe a Preſident and Vice-Preſident of the United States," that I will, to the beſt "of my ſkill and judgment, admit all perſons to vote entitled to do ſo, and reject all "who are not ſo entitled, and that I will make a fair return of the perſons voted for as "Electors, within my county, and of the number of votes given for each, according "to this act. So help me God." Which affidavit the magiſtrate adminiſtering the oath, ſhall return attested, to the clerk of the county court, to be by him filed; and the ſaid magiſtrate ſhall alſo give to ſuch Commiſſioner a certificate that he had taken the oath preſcribed by this act. It ſhall be the duty of the ſaid Commiſſioners, to attend at the ſeveral places for holding the ſaid elections, directed by law, and then and there to hold the ſame, in manner following. They ſhall receive of each perſon whom they ſhall adjudge to be entitled to a vote, a paper containing the names of twenty-one perſons for whom ſuch individual ſhall vote as Electors, on the back of which paper, ſhall alſo be written the name of the perſon voting, and as the votes are rendered, it ſhall be the duty of the ſaid Commiſſioners, to take an exact poll of the names of all voters. It ſhall be the duty of the clerk of each county, to attend at the ſaid election for the Electors of a Preſident and Vice-Preſident of the United States, with the liſt of the lands as taxed therein, to be uſed by the ſaid Commiſſioners as evidence towards aſcertaining the right of any perſon to a vote. If it ſhall appear to the ſaid Commiſſioners, that the perſons entitled to vote were prevented from attending by bad weather, or from any other cauſe, they are hereby impowered and required to keep the poll open for a term not exceeding two days. So ſoon as the poll is cloſed, the ſaid Commiſſioners ſhall ſubſcribe each ſheet upon which the ſame containing the names of all the voters ſhall be taken, and alſo obtain the ſubſcription of two or more credible perſons thereto, which poll thus ſubſcribed, it ſhall be their duty to file in the clerk's office of the ſaid county or corporation, within ten days of the time of holding the election, there to be recorded according to law. The ſaid Commiſſioners ſhall, within two days after the poll ſhall be cloſed, aſcertain the number of votes given for every perſon, who ſhall be ſo voted for as an Elector: *Provided*, That until the return ſhall be ſigned by the Commiſſioners holding the elections, the tickets ſo delivered in, ſhall be kept by one of the ſaid Commiſſioners, under the ſeal and ſuperſcription of more than one, and ſhall never be opened or examined by leſs than two of the ſaid commiſſioners. Every voter ſhall vote for one perſon reſiding in each electoral diſtricts

and in case any ticket shall contain two or more names of persons residing in the same district, the first of such names only shall be considered as duly voted for; and in like manner, if two or more persons shall be of the twenty-one first upon the poll, who shall reside in the same district, he who shall have the greatest number of votes shall only be duly elected. The said Commissioners shall, within three days after closing the poll as aforesaid, make out three copies of a return in the following form: "We, A B. &c. "Commissioners for holding the election of Electors for a President and Vice-President "of the United States, for the county, city, or borough (as the case may be) of "do hereby certify, that an election was held on the first Monday of November "for the said county, city, or borough, (as the case may be) pursuant to law, and that "the number of votes herein specified, opposite to the names of the several persons fol- "lowing, was given for such persons as Electors for the state of Virginia, of a President "and Vice President of the United States, namely, (here such list of persons and votes "is to follow). Given under our hands and seals, this day of one "thousand eight hundred ." Which returns, written in words and not in figures, shall be sealed and subscribed by the Commissioners holding the election. One of the said returns shall be delivered to some person among the twenty one who shall have therein the greatest number of votes, another shall be filed in the clerk's office of the county or corporation electing, and the third shall be transmitted to the Governor and Council, all of which shall be done within fifteen days after the same shall be made out; and the Governor and Council shall proceed to ascertain from the said returns, the twenty-one persons having the greatest number of votes throughout this state, and to advertise their names in such gazettes as they may think proper.

Provision in case of commissioners death, &c.

SEC. II. IF on account of death, sickness, or other cause, only one of the said Commissioners shall attend at the time and place for holding the said election, he is hereby impowered to associate with himself as a Commissioner, the High Sheriff, or any Magistrate of the county or corporation electing, who being qualified as before directed, shall be as competent to act as if he had been appointed by the Governor, with the advice of Council. It shall be the duty of the Sheriff of every county, and of the Serjeant of every corporation, entitled to elect, to attend the said Commissioners during the said election, and to remove force should any be offered. And if any Sheriff shall fail in his duty as aforesaid, or if any Commissioner shall refuse to take the poll, being required so to do, by a candidate or person qualified to vote, or shall take it contrary to this act, or shall make or sign a false return, or shall falsify the poll or tickets, by erasure or alteration, he or they so offending, shall for every such offence, forfeit and pay the sum of three hundred dollars, to be recovered with costs in an action of debt, before any court of record, by any person who will sue for the same. After the said return shall be made, it shall be the duty of the said Commissioners to seal up all the tickets or votes by them received in manner herein directed, and endorse their names upon the cover as aforesaid, which shall be preserved by one of the said Commissioners, and shall, if demanded under an order from the Governor, with the advice of Council, within six months of the said election, be forthwith delivered under the penalty before prescribed, in other cases of misconduct; but if the said tickets or votes shall not be so demanded within six months, the Commissioner holding the same shall no longer be considered as answerable for them. The Governor, with the advice of the Council, is hereby impowered to defray by order on the Treasury, all reasonable expenses which may attend the execution of this act, and also the expense which may be incurred in transmitting the said returns to the Executive wherever it shall appear that it was necessary to employ a special messenger for that purpose.

Mode of deciding the election.

SEC. III. *AND be it further enacted*, That the twenty-one persons having the greatest number of votes under this act, shall be the Electors of a President and Vice-President of the United States, for and on behalf of this state; *Provided*, they attend for that purpose at the time and place directed by law. But if it shall happen from death, sickness, or any other cause, or by reason of two or more persons having an equal number of votes so that neither appears to be elected, that twenty-one Electors do not attend on the day and at the place appointed before the hour of ten, qualified to vote for a President and Vice-President of the United States, on behalf of this state, it shall be lawful for the Senate and House of Delegates of this Commonwealth, and they are hereby impowered and required to appoint forthwith by joint ballot, any person or persons necessary to fill up any such vacancy or vacancies, until the number of twenty-one Electors, for the purpose aforesaid is completed, which Elector or Electors so appointed, shall be entitled to vote for a President and Vice-President of the United States, in the same manner as if he or they had been chosen in manner herein before prescribed.

Repealing clause.

SEC. IV. SO much of the first recited act or of any other act, as comes within the purview of this act, shall be, and the same is hereby repealed.

SEC. V. THIS act shall commence and be in force from and after the passing thereof.

CHAPTER II.

An ACT *laying Taxes for the Support of Government.*

[Passed, January 23d, 1800.]

Taxes on land slaves, &c.

SECTION I. BE *it enacted by the General Assembly*, That the public taxes for the year one thousand seven hundred and ninety-nine, shall be as follows, to wit:—On lands for every hundred dollars value, agreeably to the equalizing law, forty-eight cents; for every slave above the age of twelve years, except such as have been or