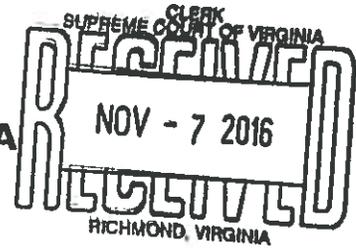


**COPY**

**IN THE  
SUPREME COURT OF VIRGINIA**



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**RECORD NO.**

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**JAMES O. WALPOLE, JR.**

***Appellant***

**v.**

**J. KIRK D. SHOWALTER, IN HER OFFICIAL CAPACITY AS  
GENERAL REGISTRAR FOR THE CITY OF RICHMOND,  
VIRGINIA AND THE OFFICE OF THE GENERAL REGISTRAR  
FOR THE CITY OF RICHMOND, VIRGINIA**

***Appellee***

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**BRIEF OF APPELLANT**

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## **TABLE OF CONTENTS**

TABLE OF AUTHORITIES .....	iii
NATURE OF THE CASE AND MATERIAL PROCEEDING BELOW....	1
FACTS .....	4
ASSIGNMENT OF ERROR .....	9
ARGUMENT.....	9
Standard of Review .....	9
Introduction .....	10
I. Constitutional and Statutory Provisions .....	12
II. The Circuit Court erroneously applied the notice requirements of Virginia law resulting in the improper denial of appellant’s right to register to vote.....	14
III. Appellant has demonstrated significant efforts to register to vote and this case presents extraordinary circumstances to grant immediate requested relief.....	19
CONCLUSION .....	20
CERTIFICATE .....	22

## TABLE OF AUTHORITIES

### Cases

<i>Ambrogi v. Koontz</i> , 297 S.E.2d 660 (Va. 1982).....	17
<i>Greidinger v. Davis</i> , 988 F.2d 1344 (4 <sup>th</sup> Cir. 1993) .....	10
<i>Harper v. State Board of Elections</i> , 383 U.S. 663 (1966) .....	10
<i>Martz v. Rockingham Cty.</i> , 69 S.E. 321(1910) .....	17
<i>New Virginia Majority v. Virginia Department of Elections</i> 1:16- cv-01319 (E.D.Va., Oct. 20, 2016) .....	2
<i>Paugh v. Henrico Area Mental Health &amp; Developmental Servs.</i> , 743 S.E.2d 277(Va. 2013).....	17, 18
<i>Pitts v. Black</i> , 608 F. Supp. 696 (S.D.N.Y. 1984).....	10
<i>Reynolds v. Sims</i> , 377 U.S. 533 (1964) .....	10
<i>Virginia Electric &amp; Power Co. v. Citizens for Safe Power</i> , 284 S.E.2d 613 (1981) .....	18
<i>Virginia Marine Resources Commission v. Chincoteague Inn</i> , 287 Va. 371(2014).....	9

### Constitutional Provisions

Va. Const. art. I. § 1.....	12
Va. Const. art. II. § 2.....	12, 19
Va. Const. art. II. § 4.....	12
Va. Const. art. V. § 12 .....	1

**Statutes**

Va. Code § 24.2-103..... 13, 19

Va. Code § 24.2-114 (9) .....13, 15, 16

Va. Code § 24.2-400..... 12

Va. Code § 24.2-418..... 12

Va. Code § 24.2-422..... 4,9,15

Va. Code § 24.422 (A) .....1, 4, 13, 14

Va. Code § 24.2-422 (B) ..... 14

**Other Authorities**

1 VAC 20-40-30 ..... 13

2004 Va. Op. Atty. Gen. No. 04-030..... 19

## **NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW**

On October 28, 2016, the Appellant, James O. Walpole, Jr., appealed the denial of his application to register to vote to the Circuit Court for the City of Richmond. He now appeals the November 4, 2016 final judgment of that court by right pursuant to Virginia Code Section 24.2-422(A).<sup>1</sup> App'x at 1.

The Appellant is a sixty-six year old U.S. citizen residing in the City of Richmond, Virginia. App'x at 8. He became eligible to vote in September 2016 for the first time in over three

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<sup>1</sup> Due to the time-sensitive nature and legal significance of the right to vote issues presented in this case, Appellant files this appeal on November 7, 2016— – three days after the circuit court ruling. Appellant's counsel immediately ordered an expedited copy of the transcript as reported by the court reporter at the November 4, 2016 hearing at the Circuit Court for the City of Richmond. The earliest counsel could obtain the transcript was November 7, 2016—one day before Election Day. As a result, this petition lacks direct citation to the transcript record. However, the transcript will be filed with this Court and Appellee's counsel will be served with a copy as soon as possible on November 7, 2016. Pursuant to Rule 1:4 (a) of the Local Rules of the Virginia Supreme Court of Virginia. Appellant's counsel gives her assurance as an officer of the court that it is accurate to the best of her recollection and filed in good faith and not for delay.

decades, after Governor McAuliffe restored his civil rights pursuant to Va. Const. art. V. § 12. App'x at 2-3.

With the assistance of an employee of the Virginia Department of Elections ("Department of Elections"), Mr. Walpole timely submitted a voter registration application on October 6, 2016, a week and a half before the original October 17, 2016 registration deadline and over two weeks before the extended deadline, October 21, 2016. *See New Virginia Majority v. Virginia Department of Elections* 1:16-cv-01319 (E.D.Va., Oct. 20, 2016) (extending Virginia's voter registration deadline to October 21, 2016). App'x at 4. Though it would have been after the registration deadline, the Department of Elections employee instructed Mr. Walpole to wait three weeks before checking the status of his registration application. App'x at 8-11. As instructed, Mr. Walpole awaited his application status at the mailing address he provided to the Office of Registrar on his voter registration application. App'x at 8-11. However, even at the filing of this appeal, Mr. Walpole still has not received a

mailed notice from the Office of the Registrar informing him that his application was denied. App'x at 8-11.

Appellees and the Department of Elections failed to properly instruct Mr. Walpole how to register to vote as a homeless person and, though there was sufficient time to do so, did not inform him through prompt written notice that his voter registration application had been denied. As Mr. Walpole was not notified of this denial in a timely manner, he was prevented from curing or appealing his registration application denial before the voter registration deadline. Had he been "promptly" informed of his denial, he would have properly re-registered and secured his eligibility to vote in the general election on this Tuesday, November 8, 2016—his first voter eligibility in over three decades due to his recent restoration of rights by Governor Terence R. McAuliffe. App'x at 8-11.

Upon considering Mr. Walpole's appeal of that denial, the lower court held that an applicant is responsible for determining whether his voter registration application was denied, and curing the application or filing an appeal, regardless of whether the

general registrar provides him with actual or constructive notice of that denial. The lower court erred in its ruling concerning the process and timing of a registration denial and appeal: the court mistakenly ruled that the General Registrar's Office has ten days to notify an applicant whose registration application is denied. That is an incorrect interpretation of Virginia Code Section 24.2-422(A). The plain language of that statute clearly states that the petitioner that has ten days to appeal the denial or complete a new registration application. Under Virginia Code Section 24.2-114(9), the General Registrar must "promptly" notify the applicant if his application is denied, and fulfill the notice requirements specified in Virginia Code Section 24.2-422. The Appellee General Registrar's Office failed to satisfy this requirement with regard to Mr. Walpole's voter registration application denial. As a result, Mr. Walpole will be disenfranchised absent intervention by this Court.

The lower court denied Mr. Walpole petition for appeal of the denial of his voter registration application. Mr. Walpole now appeals that decision.

## **FACTS**

Mr. Walpole was convicted of two felonies that left him without the ability to vote for over three decades. On or about September 2, 2016, Mr. Walpole's right to vote was restored by Governor Terence McAuliffe. App'x at 2-3. As a homeless person, the residency field of the registration application was confusing for Mr. Walpole. Soon after his voting rights were restored, Mr. Walpole accordingly made numerous attempts to seek assistance with his application to register to vote in time for the November 8, 2016 election. App'x at 8-11. Those attempts included seeking out the advice of employees at the Appellee General Registrar's Office, the Department of Elections, and the Office of the Secretary of the Commonwealth ("SOC"). App'x at 4, 8-11,

Finally, on October 6, 2016, Mr. Walpole went to the Department of Elections office and explained that he lives in the City of Richmond but is currently homeless. The employee assisted Mr. Walpole by filling-in "homeless" in the mandatory residence field of the application; instructed him to include a

mailing address; and to check the box that states that he is including a mailing address because he is homeless. He did so and submitted his application. App'x at 8-11. The employee told him to wait three weeks (on or about October 27, 2016) to check on the status of his application. App'x at 8-11. The employee repeated this advice after Mr. Walpole pointed out that the voter registration deadline was October 17, 2016—only 11 days later.<sup>2</sup> App'x at 8-11.

As instructed, exactly three weeks later on October 27, 2016, having received no status update, Mr. Walpole telephoned the Department of Elections employee who had previously assisted him and requested the status of his application. App'x at 8-11. It was only then that Mr. Walpole received verbal confirmation that his registration application had been denied on the basis that he failed to provide a valid residential address. App'x at 8-11. To date, Mr. Walpole has yet to receive written notice of his registration denial at the mailing address he

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<sup>2</sup> As noted above, the registration deadline was later extended to October 21, 2016 by order of the United States District Court for the Eastern District of Virginia, Alexandria Division.

provided on his registration application, and the Appellees did not object to this fact during the lower court hearing. App'x at 8-11.

On the next business day, October 28, 2016, Mr. Walpole went to the Appellee General Registrar's Office and requested a written denial of his application. App'x at 8-11. The notice, which was dated October 28, 2016, listed his failure to provide a valid residential address as the reason for the denial. App'x at 7. Mr. Walpole also obtained the official petition form at the Appellee General Registrar's Office to appeal the denial. App'x at 6. The same day, Mr. Walpole appealed his voter registration denial to the Circuit Court for the City of Richmond and paid the \$10 appeal fee. App'x at 6-7. Mr. Walpole filed with the circuit court a copy of his voter registration application marked "denied missing address 10/13/16," along with his supporting affidavit, on November 3, 2016. App'x at 5, 14.

On November 4, 2016, the lower court heard Mr. Walpole's petition for appeal. At the hearing, the Appellees provided Mr. Walpole with a written answer to his petition. App'x at 16-19.

Appellees argued that denial was proper because Mr. Walpole did not indicate on his voter registration application if he had been convicted of a felony or judged mentally incapacitated and disqualified to vote. Appellees, however, did not address the actual reason for denial listed on the October 28, 2016 denial letter: that he did not provide a valid residence address. App'x at 16-19.

During the lower court hearing, Mr. Walpole provided the court and Appellees' counsel with copies of a letter written by the Commissioner of the Department of Elections to Appellant's counsel that supported Mr. Walpole's reliance on Department of Elections staff that resulted in the his voter registration denial. App'x at 20.

The circuit court denied Appellant's petition, ruling the Appellee General Registrar's Office had ten days to notify the denial Mr. Walpole's registration application, beginning from October 13, 2016 ending past the registration deadline. The practical effect of the lower court's ruling is that an applicant must appeal or complete a new application in the absence of

actual or constructive notice of that denial, either of which would prevent him from exercising his fundamental right to vote in the upcoming November 8 election. This is precisely what happened to Mr. Walpole—despite his qualifications as a voter. Mr. Walpole filed his notice of appeal promptly after the November 4, 2016 ruling. App'x at 23-25.

### **ASSIGNMENT OF ERROR**

1. The lower court erroneously interpreted Virginia Code Section 24.2-422 as permitting a general registrar to wait ten days after rejecting a voter registration application before mailing the required written notice of that rejection.

### **ARGUMENT**

#### **Standard of Review**

The First Assignment of Error implicates the fundamental right to vote, which encompasses the right for a qualified, eligible U.S. resident to register to vote and, as required by Virginia law, be promptly notified if his registration is denied, the reason for such denial, and be allowed to file a timely appeal or complete a new registration application. The standard of review is *de novo*. *Virginia Marine Resources Commission v. Chincoteague Inn*, 287 Va. 371, 380 (2014).

## INTRODUCTION

This petition deals with a serious and substantial matter of importance to every citizen of Virginia. There can be no dispute that the right to vote is a fundamental right. *Reynolds v. Sims*, 377 U.S. 533, 562 (1964); *Harper v. State Board of Elections*, 383 U.S. 663, 666 (1966). "The right to vote . . . is the essence of a democratic society," *Reynolds*, 377 U.S. at 555, and exercise of that right is "preservative of other basic civil and political rights," *Id.* at 562.

Any restriction which "substantially burdens" the right to vote is unconstitutional unless it is narrowly tailored to fulfill a compelling state interest. See, e.g., *Greidinger v. Davis*, 988 F.2d 1344, 1354 (4th Cir. 1993). "The statewide disenfranchisement of homeless individuals is not necessary to promote any compelling state interest . . ." *Pitts v. Black*, 608 F. Supp. 696, 709 (S.D.N.Y. 1984) (challenge to New York State election law forbidding homeless individuals from registering to vote).

To be excluded from voting is to lose a voice in representative democracy, and with it, a role in the election of those who make the laws that govern our daily lives. To be excluded from the right to register to vote, as Mr. Walpole was as a homeless person, a member of a particularly vulnerable population, despite extraordinary efforts to seek help from state and local elections' staff is disheartening. App'x at 8-15.

Homeless citizens have faced numerous obstacles to registering. Although it has been well established that homeless individuals do not need to live in a traditional residence to register to vote, many homeless individuals still encounter obstacles when attempting to register, as Mr. Walpole did despite following the instructions of the election officials and providing an adequate mailing address to receive timely notice.

With the substantial number of individuals who are homeless residing in Virginia, including newly enfranchised citizens reentering our society, the issues raised in this appeal are extremely time-sensitive and of great importance to voters and prospective voters throughout the Commonwealth.

## **I. CONSTITUTIONAL AND STATUTORY PROVISIONS**

Article 2 Section 1 of the Constitution of Virginia sets forth the “Qualifications of Voters” in the Commonwealth of Virginia. As relevant to this petition, it requires that a voter be a resident of the Commonwealth of Virginia and of the precinct in which he or she desires to vote, and states that “[r]esidence, for all purposes of qualification to vote, requires *both domicile and a place of abode.*” Va. Const. art. I. § 1 (emphasis added).

Article 2, Section 2 of the Constitution of Virginia provides for the “Registration of Voters.” As set forth therein, “[t]he General Assembly shall provide by law for the registration of all persons otherwise qualified to vote who have met the residence requirements contained in this article, and shall ensure that the opportunity to register is made available.” Va. Const. art. II. § 2; Va. Code Ann. § 24.2-400; Va. Code Ann. § 24.2-418.

“The General Assembly shall establish a uniform system for permanent registration of voters pursuant to this Constitution, including provisions for appeal by any person denied registration...” Va. Const. Art. II, § 4

Pursuant to Virginia Code Section 24.2-103, the Virginia Administrative Code establishes that for the determination of residency for voter registration “[a] homeless person will be considered a resident in the location where the homeless person usually sleeps at night.” 1 VAC 20-40-30.

Notably, Virginia Code Section 24.2-114(9) mandates that a general registrar shall *promptly* notify a person whose registration is denied and such notice shall be in writing and provide a reason for denial.

Virginia Code Section 24.422(A) provides that “[a] person denied registration shall have the right to appeal . . . to the circuit court of the county or city in which he offers to register by filing with the clerk of the court, *within ten days after the denial*, a petition in writing to have his right to register determined.” (Emphasis added).

Further, the statute provides that “[t]he petitioner may file his petition using a form proscribed by the State Board, which shall be used by the general registrar to notify an applicant of the denial his application to register and of the reasons for the

denial.” Va. Code Ann. § 24.422(A). The form must inform the applicant denied registration that he has the right to appeal to the circuit court in which he offers to register; provide the name and address of the clerk of such circuit court “(to be supplied by the General Registrar)”; state that a ten dollar filing fee is required when filing such petition; and provide space for an applicant to state the facts supporting his right to register. *Id.*

Virginia Code Section 24.2-422(B) provides that “[t]he general registrar shall send a new application for registration to the applicant with the form prescribed in subsection A. Further, “[t]he general registrar shall advise the applicant that he may complete and return the new application, in lieu of filing an appeal, if the reason stated for denial is that the applicant has failed to sign the application or failed to provide a required item of information on the application.” *Id.*

**II. The Circuit Court erroneously applied the notice requirements of Virginia law resulting in the improper denial of Appellant’s right to register to vote.**

The primary issue in this case is that the General Registrar

failed to provide Appellant with prompt written notice that his voter registration application was denied as required by Virginia Code Sections 24.2-422 and 24.2-414(9). Had Appellant received notice, he would have re-registered promptly.

Appellant registered on October 6, 2016, as is supported by his voter registration application receipt, dated October 6, 2016. App'x at 4. Had he received proper notice, he would have had ample opportunity to correct his voter registration status before the October 21, 2016 deadline. As a direct result of Mr. Walpole following the instructions of the Department of Elections' employee on how to address homelessness in the registration application, he was deprived of his right to timely register to vote before the registration deadline. App'x at 8-11.

The lower court erroneously interpreted Virginia Code Section 24.2-422 to mean that only after a general registrar has rejected an application does it then require her to notify the applicant within ten days of that denial. That interpretation is incorrect and unreasonable. Instead, the law requires a general registrar to provide notice of denial and to inform the applicant

of his affirmative rights to appeal; the applicant then has ten days after such denial to appeal or complete a new registration form. Further, a general registrar is required to provide *prompt* notification of denial under § 24.2-114(9).

In this instance, the lower court reasoned that because Mr. Walpole's October 6, 2016 application was denied on October 13, 2016, the Appellee General Registrar's Office had ten days to notify him. Disregarding the fact that Mr. Walpole never received written notification at his mailing address, the lower court reasoned that the Appellee General Registrar's Office had until October 23, 2016 to notify Mr. Walpole that his application had been rejected—which would have been two days past the *extended* registration deadline (though the Registrar did not notify Mr. Walpole by that deadline either).

The lower court's interpretation of the applicable statutes would produce absurd results for prospective voters. The practical effect would possibly permit voter registration applications to languish in bureaucratic limbo until such applications are processed. Starting from the date an

application is denied, only then would a general registrar be required to notify that applicant within ten days. This incorrect application of the statute would produce unreasonable results and would unnecessarily disenfranchise prospective voters without the opportunity to correct their registration status.

Individuals without actual or constructive notice simply cannot cure or appeal their voter registration denials within ten days if they are unaware of the denial. To interpret Virginia's election laws otherwise is contrary to the clear language and intention of the statutes, which is to provide ample opportunity to appeal or cure registration status.

"When a statute is susceptible to more than one construction, 'courts will give that construction to it which will be the more reasonable.'" *Paugh v. Henrico Area Mental Health & Developmental Servs.*, 743 S.E.2d 277, 283 (Va. 2013) (quoting *Martz v. Rockingham Cty.*, 69 S.E. 321, 322 (1910)); see also *Ambrogi v. Koontz*, 297 S.E.2d 660, 664 (Va. 1982) (explaining that "a statute should, if possible, be given a reasonable construction which will effect rather than defeat a legislative

purpose"). Courts further "presume that the General Assembly does not intend the application of a statute to lead to irrational consequences." *Paugh*, 743 S.E.2d at 283 (quoting *Virginia Electric & Power Co. v. Citizens for Safe Power*, 284 S.E.2d 613, 615 (1981)). Mr. Walpole simply could not fix what he was not aware of—that the Department of Elections' employee's instructions were incorrect, and as a result, his voter registration, and the rights that flow from that registration, will be denied. Had Mr. Walpole been promptly notified, he would have corrected his voter registration and have been properly added to the voter rolls, thus enabling him to vote on November 8, 2016. App'x at 8-11. To interpret the statute otherwise would produce unreasonable delay and irrational results for prospective voters.

Mr. Walpole's opportunity to register to vote was foreclosed by Appellees' failure to promptly provide him with written notification of his voter registration denial and right to cure or appeal at his provided mailing address. The Virginia Constitution is explicitly clear: "The General Assembly shall

provide by law for the registration of all persons otherwise qualified to vote who have met the residence requirements contained in this article, and *shall ensure that the opportunity to register is made available.*" Va. Const. art. II. § 2 (emphasis added). The lower court erred when it misconstrued the statute and Mr. Walpole's right to prompt written notice to have the opportunity to cure his voter registration status.

**III. Appellant has demonstrated significant efforts to register to vote and this case presents extraordinary circumstances to grant immediate requested relief.**

As demonstrated by Mr. Walpole's supporting affidavit and by the letter written by the Commissioner of the Virginia State Department of Elections to Appellant's counsel on behalf of Mr. Walpole, he underwent extraordinary efforts to seek assistance from the Appellee General Registrar's Office, the Department of Elections, and the SOC—all of which employ individuals presumably trained to instruct citizens in election law procedure—to ensure that as a homeless individual, he was registered to vote. Va. Code Ann. § 24.2-103. *See also* 2004 Va. Op. Atty. Gen. No. 04-030. App'x at 8-11, 20.

Individuals who are homeless often lack the resources to educate themselves about how to get to the polls on Election Day. As a homeless person and as a newly enfranchised citizen, Mr. Walpole took several measures to seek education, instruction, and assistance from government employees to register to vote and to be able to cast a ballot on Election Day, November 8, 2016. App'x at 8-11. Mr. Walpole satisfies all of the requirements to become a qualified, registered voter pursuant to the provisions of the Virginia Constitution and statutory law.

### **CONCLUSION**

Virginia law requires General Registrars to provide prompt notice in writing to an applicant if his voter registration denied. That written notice must contain the reason for such denial, and inform him of his right to appeal or to complete a new registration form. After the Department of Elections instructed Mr. Walpole to fill out his voter registration application incorrectly, the Appellee General Registrar's Office failed to provide Mr. Walpole with prompt written notice of his denial,

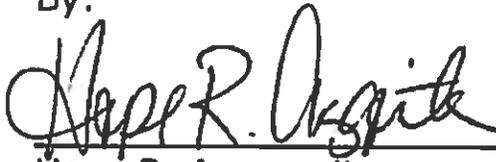
and as a direct result, foreclosed his opportunity to timely complete his voter registration.

For the reasons stated herein, Appellant respectfully requests that this Court reverse the judgment of the lower court and order the Appellees to expeditiously take appropriate action to immediately register Mr. Walpole to vote and add him to the polls books to ensure he can cast a vote on November 8, 2016.

Respectfully submitted,

JAMES O. WALPOLE, JR.

By:



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## **CERTIFICATE OF COMPLIANCE AND SERVICE**

I hereby certify compliance and service with Va. Sup. Ct. R. 5:26, however, ask the Court to excuse for good cause the requirement that an electronic version, in Portable Document Format (PDF) in the manner prescribed by the VACES Guidelines and User's Manual, using the Virginia Appellate Courts eBriefs System (VACES), be filed with the clerk of this Court and served on opposing counsel, due to the time-sensitive nature of the issues presented in this case.

I hereby certify:

1. On November 7, 2016, ten printed copies of this Appellant's Brief, and ten copies of the Appendix, were filed by hand-delivery with the Clerk of the Court.
2. On November 7, 2016, a printed copy of this Appellant's Brief was hand delivered and sent electronically to counsel of record for Appellee:

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3. This petition for appeal contains 3,701 words and less than fifty pages.
4. Appellant waives the right to oral argument.

A handwritten signature in black ink, reading "Hope R. Amezquita". The signature is written in a cursive style and is positioned above a horizontal line.

Hope R. Amezquita  
*Counsel for Appellant*