NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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July 29, 2025

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RE: *L. Louise Lucas, et al. v. Charles Stimson, et al.*, Case No. CL-2025-9205

Dear Counsel:

This matter comes before the Court on Plaintiffs' Motion for Preliminary Injunction (the

"***Motion***") against the chairpersons of the governing boards of three public universities[1] prohibiting them from actions recognizing the board membership of certain gubernatorial appointees. Plaintiffs, who are all Members of the Senate of Virginia, assert that the General Assembly has refused to confirm those appointees such that the appointees must discontinue their service on their respective governing boards. Defendants contend that no such refusal has occurred and that the appointees are entitled to continue to serve until it does.

The Motion presents a matter of first impression, requiring the Court to determine whether the vote of a committee of the Senate of Virginia to not report a resolution confirming gubernatorial appointees to the Senate floor constitutes a refusal of the General Assembly to confirm the appointments, such that the appointees must immediately cease service in the offices to which they were appointed.

Plaintiffs have demonstrated their entitlement to a preliminary injunction prohibiting Defendants from taking actions to recognize the subject appointees as members of their respective governing boards. Sovereign immunity does not bar Plaintiffs' claims, which seek declaratory and injunctive relief based upon a self-executing provision of the Constitution of Virginia. Though this matter involves a dispute between the Executive and Legislative Departments of the Commonwealth, the question before the Court requires the interpretation of the relevant constitutional and statutory provisions; it is not a political question outside of the Court's purview. Plaintiffs have standing to assert their claims against Defendants.

As explained below, the Court is granting the Motion and will issue a preliminary injunction order consistent with this opinion.

FACTUAL FINDINGS[2]

Plaintiff L. Louise Lucas is President *Pro Tempore* of the Virginia Senate and Chair of the Senate Finance and Appropriations Committee. Plaintiffs Aaron R. Rouse, Russet W. Perry, R. Creigh Deeds, Adam P. Ebbin, Schuyler T. VanValkenburg, Jennifer D. Carroll Foy, Saddam

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[1] For ease of reference, and with utmost respect for the College of William and Mary, the Virginia Military Institute, and the Virginia Community College System, the Court will interchangeably refer to Virginia's public institutions of higher education as "universities."

[2] The facts pertinent to the Motion are not in dispute. The parties filed their Stipulation of Facts in Connection with Determination of Plaintiffs' Motion for Preliminary Injunction and, at the outset of the hearing on the Motion, confirmed that the Court could take judicial notice of, or admit into evidence, all of the evidentiary material filed in support of or opposition to the Motion as well as the George Mason University Board of Visitors Bylaws (https://bov.gmu.edu/wp-content/uploads/BOV-BYLAWS-2020-Approved-12-3-2020-APPENDIX-REVISED-2-7-22.pdf), the Manual of the Board of Visitors of the University of Virginia (https://bov.virginia.edu/sites/g/files/jsddwu1171/files/2023-10/2023%20revisions%20with%20newest%20members%20and%20sgh%20markup%20-%20August%2014%2C%202023.pdf), and the Virginia General Assembly Pocket Glossary (https://publications.virginiageneralassembly.gov/download_publication/116).

Azlan Salim, and Kannan Srinivasan are Members of the Virginia Senate and of the Senate Committee on Privileges and Elections (such committee, the "***Committee***").

Defendant Charles Stimson is the Rector of the George Mason University (GMU) Board of Visitors. Thomas E. Gottwald was the President of the Virginia Military Institute (VMI) Board of Visitors when this action was filed; the President of the VMI Board of Visitors is now Defendant Col. (Ret.) James P. Inman. Robert Hardie was Rector of the University of Virginia (UVA) Board of Visitors when this action was filed; the Rector of the UVA Board of Visitors is now Defendant Rachel Sheridan.[3]

On April 17, 2024, Governor Glenn Youngkin called the Virginia General Assembly into special session (the "***2024 Special Session***"). Subsequently, both houses of the General Assembly adopted House Joint Resolution 6001 (HJR 6001), the organizing resolution for the special session. Among other things, HJR 6001 authorizes the General Assembly to take up "(iv) the election of judges and other officials subject to the election of the General Assembly; or (v) appointments subject to the confirmation of the General Assembly."

On January 8, 2025, the General Assembly convened for its 2025 regular session. That session adjourned *sine die* on February 22, 2025.

On February 26, 2025, Governor Youngkin appointed: (1) Jonathan Hartsock and Stephen Reardon to the VMI Board of Visitors; and (2) Charles J. Cooper, William D. Hansen, and Maureen Ohlhaussen to the GMU Board of Visitors. Ms. Ohlhaussen has since been elected to the Executive Committee of the GMU Board of Visitors.

On April 2, 2025, the General Assembly conducted a reconvened session to consider the Governor's actions on legislation passed during the its 2025 regular session. The reconvened session adjourned *sine die* on April 2, 2025.

On April 11, 2025, Governor Youngkin appointed: (1) Kenneth Cuccinelli to the UVA Board of Visitors; (2) Caren Merrick to the GMU Board of Visitors; and (3) Jose J. Suarez to the VMI Board of Visitors.

On May 30, 2025, the Secretary of the Commonwealth forwarded a list of gubernatorial appointments, including (among others) the appointments of Jonathan Hartsock, Stephen Reardon, Charles J. Cooper, William D. Hansen, Maureen Ohlhaussen, Kenneth Cuccinelli, Caren Merrick, and Jose J. Suarez (together, the "***Disputed Appointees***"), to the General Assembly for confirmation. A week later, Senator Rouse introduced 2024 Special Session Senate Joint Resolution No. 6001 (SJR 6001) (the "***Confirming Resolution***") which, if approved by the General Assembly, would have confirmed the appointment of the Disputed Appointees to their respective governing boards. SJR 6001 was referred to the Committee on the same day.

[3] Each of governing boards at issue is referred to herein as a "***Board***."

The Committee is a standing committee of the Senate of Virginia, created by the Rules of the Senate. It is chaired by Senator Rouse and includes Senators Perry, Deeds, Ebbin, VanValkenburg, Carrol Foy, Salim, and Srinivasan among its 15 members.

On June 9, 2025, a quorum of the Committee (12 of its 15 members) convened and voted 8-4 to not report the Confirming Resolution to the Senate floor. The eight Senators who voted to not report the Confirming Resolution are Plaintiffs in this action.

Also on June 9, 2025, Senator Scott Surovell, Majority Leader of the Virginia Senate, wrote a letter to the chairpersons of the governing boards of 15 Virginia universities, including GMU, UVA, and VMI. Among other things, that letter reminded the recipients of the requirement that all members of those boards be confirmed by the General Assembly. *See* Letter from S. Surovell to Rectors of the Boards of Visitors of Virginia's Institutions of Higher Education dated June 9, 2025.

Following the Committee's vote, the Clerk of the Senate wrote to the Secretary of the Commonwealth informing the Secretary that the Committee failed to report the Confirming Resolution. That letter cited Article V, § 11 of the Constitution of Virginia in asserting that "[a]s a result of the failure to report [the Confirming Resolution] by the Senate Committee on June 9, 2025, their action is effective immediately." *See* Letter from S. Clarke Schaar to K. Gee dated June 10, 2025.

On June 11, 2025, Attorney General Jason S. Miyares wrote to the chairpersons of the governing boards of 15 Virginia universities, including GMU, UVA, and VMI, responding to a letter written to them by Senator Surovell.[4] The Attorney General asserted that "Senator Surovell incorrectly claims that 'the General Assembly has refused to confirm'" the Disputed Appointees. He further contended that "[t]his false statement appears designed to mislead you into thinking that the General Assembly as a whole has taken action when in fact it has not."

The Attorney General reminded the recipients of his letter (the "***Attorney General's Letter***") that he "is the chief executive officer of the Commonwealth's Department of Law and counsel to Virginia's public institutions of higher education." He further advised of his "Office's conclusion . . . that each of [the Disputed Appointees] remain members of the respective board of visitors." *See* Letter from J.S. Miyares to Rectors of the Boards of Visitors of Virginia's Institutions of Higher Education dated June 11, 2025.

On June 11, 2025, Senator Surovell wrote a letter to former Defendant and then-serving Rector of the UVA Board of Visitors Robert D. Hardie in response to a question posed by Rector Hardie about the status of one of the Disputed Appointees serving on the UVA Board of Visitors. In that letter, Senator Surovell asserted that the Disputed Appointee was "no longer eligible to serve as a member of the UVA Board of Visitors and must immediately cease all activities in that

[4] The letter from the Attorney General does not appear to be responding to the June 9, 2025 letter written by Senator Surovell described above but to a different letter written by Senator Surovell.

capacity." Letter from S. Surovell to R. Hardie dated June 11, 2025, at 1. The letter noted the Committee's 8-4 vote to not report the Confirming Resolution to the Senate floor and concluded that "[n]o further action on the resolution is possible by the Senate. It is dead." Senator Surovell further advised Rector Hardie that "[a]ny Board member who knowingly allows or participates in continued service by [the Disputed Appointee in question] following the General Assembly's refusal to confirm his appointment would be violating both the Constitution of Virginia and the Code of Virginia" and that "[s]uch conduct would constitute 'malfeasance and incompetence'" sufficient to subject them to removal by the Governor, under Code § 23.1-3100. *See* Letter from S. Surovell to R. Hardie dated June 11, 2025, at 2.

By letter dated June 12, 2025, Senator Ryan T. McDougle, Minority Leader of the Virginia Senate, and Mark D. Obenshain asked the Clerk of the Senate to correct her letter to the Secretary of Virginia to (1) "Clari[fy] that the Committee vote has no immediate legal effect on the status of the appointments [of the Disputed Appointees]"; (2) "Acknowledge[] that the constitutional conclusions in the June 10 letter were transmitted at the committee chair's direct and do not reflect [the Clerk's] independent legal judgment"; and (3) "Note[] the procedural avenues – reconsideration, discharge, or a House-originated resolution – through which the General Assembly may still confirm the appointments." *See* Letter from R.T. McDougle and M.D. Obenshain dated June 12, 2025, at 2.

In response, the Clerk of the Senate confirmed that she was directed by Senator Rouse to transmit her letter to the Secretary of the Commonwealth. The Clerk further opined that "there are still avenues of opportunity" to confirm the appointments of the Disputed Appointees. *See* Letter From S. Clarke Schaar to R.T. McDougle and M.D. Obenshain dated June 18, 2025.

Following the Clerk's response to Senators McDougle and Obenshain, Delegate Israel O'Quinn sent a letter to the Clerk of the House of Delegates indicating his intent to file, in the House, a resolution to confirm the appointment of the Disputed Appointees. *See* Letter from I. O'Quinn to G.P. Nardo dated July 18, 2025.

Neither the Senate nor the House of Delegates has conducted a floor vote on the Confirming Resolution. No effort to discharge the Committee or reconsider its decision on the Disputed Appointees has been formalized in the Senate and no resolution to confirm the Disputed Appointees has been filed in the House. The 2024 Special Session has not adjourned *sine die*.

ANALYSIS

Pursuant to the Constitution of Virginia,

> [t]he General Assembly may provide for the establishment, maintenance, and operation of any educational institutions which are desirable for the intellectual, cultural, and occupational development of the people of this Commonwealth. The governance of such institutions, and the status and powers of their boards of visitors or other governing bodies, shall be as provided by law.

Va. Const. Art. VIII, § 9.

The governing boards of the Commonwealth's institutions of higher education "shall at all times be under the control of the General Assembly." *See* Va. Code §§ 23.1-1500.1 (as to the GMU Board of Visitors), 23.1-2200.1 (as to the UVA Board of Visitors) & 23.1-2500.1 (as to the VMI Board of Visitors). The members of those boards are appointed by Governor, "subject to confirmation by the General Assembly." *See* Va. Code § 23.1-1300(A). The Constitution of Virginia provides that

> [n]o person appointed to any office by the Governor, whose appointment is subject to confirmation by the General Assembly, under the provisions of this Constitution or any statute, shall enter upon, or continue in, office after the General Assembly shall have refused to confirm his appointment . . . .

Va. Const. Art. V, § 11.

Plaintiffs allege that their Committee votes to not report the Confirming Resolution to the Senate floor for a vote defeated that resolution on behalf of the entire Senate. Because, as they allege, confirmation of a gubernatorial appointee requires the affirmative approval of both chambers of the General Assembly, the Senate's rejection of the Confirming Resolution, by and through the Committee to which consideration of the resolution was delegated, constitutes the refusal of the General Assembly to confirm the Disputed Appointees.

Plaintiffs contend the Executive Department has sought to "nullify the General Assembly's rejection of" the Disputed Appointees by advising the chairpersons of the governing boards of GMU, UVA, and VMI that the Disputed Appointees remain lawful members of those boards, entitled to all of the rights and responsibilities of any other member. Plaintiffs allege that Defendants have continued to recognize the Disputed Appointees as members of their respective Boards despite the General Assembly's refusal to confirm them.

Plaintiffs seek a declaratory judgment establishing, among other things, that the General Assembly refused to confirm the Disputed Appointees by virtue of the June 9, 2025 Committee vote, thereby immediately terminating the eligibility of the Disputed Appointees to serve on their respective Boards. Plaintiffs also seek a permanent injunction prohibiting Defendants from permitting the Disputed Appointees to serve on their respective Boards.

In the Motion, Plaintiffs seek a preliminary injunction prohibiting Defendants from permitting the Disputed Appointees to participate as members of their respective Boards. Defendants oppose the entry of a preliminary injunction, arguing that: (1) the doctrine of sovereign immunity bars Plaintiffs' claims, (2) the matter before the Court is a political question in which the courts should play no role, (3) Plaintiffs lack standing to assert their claims against the Defendants, and (4) Plaintiffs have failed to establish any of the four findings necessary to enter a preliminary injunction.

As explained below, the Court resolves each of Defendants' arguments in favor of Plaintiffs.

I. THE DOCTRINE OF SOVEREIGN IMMUNITY DOES NOT BAR THE CLAIMS AT BAR.

"It is an established principle of sovereignty, in all civilized nations, that a sovereign State cannot be sued in its own courts, or in any other, without its consent and permission." *Bd. of Pub. Works v. Gannt*, 76 Va. 455, 461 (1882). "The doctrine of sovereign immunity from suit, rooted in the ancient common law, was originally based on the monarchical, semireligious tenet that 'the King can do no wrong.'" *Hinchey v. Ogden*, 226 Va. 234, 240, 307 S.E.2d 891, 894 (1983) (quoting 72 Am. Jur. 2d. States, Territories, and Dependencies § 99 (footnotes omitted)). Now, " it is more often explained as a rule of social policy, which protects the state from burdensome interference with the performance of its governmental functions and preserves its control over state funds, property, and instrumentalities." *Id.*

Whether sovereign immunity applies to the Plaintiffs' claims is a threshold issue because "if sovereign immunity applies, the court is without subject matter jurisdiction to adjudicate the claim.…" *Afzall v. Commonwealth*, 273 Va. 226, 230, 639 S.E.2d 279, 281 (2007).

A. Sovereign immunity bars most suits against Defendants in their official capacity as chairpersons of the governing boards of public institutions of higher education.

Generally, "the sovereign is immune not only from actions at law for damages but also from suits in equity to restrain the government from acting or to compel it to act." *Hinchey*, 226 Va. at 239, 307 S.E.2d at 894 (citations omitted). This includes declaratory judgment actions. *See Afzall*, 273 Va. at 231, 639 S.E.2d at 282.

And because the Commonwealth can "function only through its servants, . . . certain of those servants must enjoy the same immunity in the performance of their discretionary duties as the [Commonwealth] enjoys." *Messina v. Burden*, 228 Va. 301, 309, 321 S.E.2d 657, 661 (1984) (quoting Note, Virginia's Law of Sovereign Immunity: An Overview, 12 U. Rich. L. Rev. 429 (1978)). "Governors, judges, members of state and local legislative bodies, and other high level governmental officials have generally been accorded absolute immunity…" *Messina v. Burden*, 228 Va. 301, 309, 321 S.E.2d 657, 661 (1984) (citing W. Prosser, *Handbook of the Law of Torts* § 132 at 987-988 (4th ed. 1971)). On a case-by-case basis, the Supreme Court of Virginia has extended sovereign immunity to "other governmental officials of lesser rank." *Id.*

Defendants, who are gubernatorial appointees confirmed by the General Assembly to sit on the governing boards of public universities, benefit from sovereign immunity for their official acts. *See Digiacinto v. Rector & Visitors of George Mason Univ.*, 281 Va. 127, 138, 704 S.E.2d 365, 371 (2011) (holding that GMU did not have sovereign immunity as to claims arising from Article I, § 14 of the Virginia Constitution, because that provision is self-executing); *Rector & Visitors of the Univ. of Va. v. Carter*, 267 Va. 242, 246, 591 S.E.2d 76, 79 (2004) (holding that UVA and its employees are entitled to sovereign immunity).

B. Sovereign immunity does not bar the claims at bar, which are for declaratory and injunctive relief based upon a self-executing provision of the Virginia Constitution.

Sovereign immunity is not all-encompassing. "[T]he General Assembly, acting in its capacity of making social policy, can abrogate the Commonwealth's sovereign immunity…" *All. to Save the Mattaponi v. Commonwealth Dep't of Envtl. Quality ex rel. State Water Control Bd.*, 270 Va. 423, 455, 621 S.E.2d 78, 96 (2005).

Sovereign immunity is waived where statutory language "'explicitly and expressly,' allows a private right of action and where a constitutional provision is 'self-executing.'" *Ibanez v. Albemarle Cty. Sch. Bd.*, 80 Va. App. 169, 190, 897 S.E.2d 300, 311 (2024) (citing *Gray v. Va. Sec'y of Transp.*, 276 Va. 93, 102, 662 S.E.2d 66, 71 (2008)). "[S]overeign immunity does not preclude declaratory and injunctive relief claims based on self-executing provisions of the Constitution of Virginia…." *Digiacinto*, 281 Va. at 137, 704 S.E.2d at 371 (citations omitted).

"If a constitutional provision is self-executing, no further legislation is required to make it operative." *Gray*, 276 Va. at 103, 662 S.E.2d at 71. A constitutional provision is self-executing if it: (1) says that it is; (2) is in the Bill of Rights (Article I of the Constitution of Virginia); (3) declares common law; (4) is prohibitory or negative in character; or (5) provides a sufficient rule to protect or exercise the right without additional legislation. *See Ibanez*, 80 Va. App. at 190, 897 S.E.2d at 311 (citing *Robb v. Shockoe Slip Found.*, 228 Va. 678, 681-82, 324 S.E.2d 674 (1985)).[5] Conversely, non-prohibitory provisions outside the Bill of Rights, consisting of "affirmative declaration[s] of . . . very broad public policy," are not self-executing. *Robb*, 228 Va. at 682, 324 S.E.2d at 676 (internal quotation marks omitted).

The constitutional provision at issue, Article V, § 11 of the Constitution of Virginia, provides that "[n]o person appointed to any office by the Governor, whose appointment is subject to confirmation by the General Assembly, under the provisions of this Constitution or any statute, shall enter upon, or continue in, office after the General Assembly shall have refused to confirm his appointment." It was enacted to "protect[] the confirmation power of the legislature"[6] by prohibiting a person from serving in office after the General Assembly's refusal of that person's gubernatorial appointment. It is negative in character. It provides a sufficient rule to protect the confirmation power of the General Assembly without additional legislation. Accordingly, Article V, § 11 of the Constitution of Virginia is self-executing. *See Ibanez*, 80 Va. App. at 190, 897 S.E.2d at 311 (2024) (citation omitted); *Digiacinto*, 281 Va. 127, 138, 704 S.E.2d 365, 371 (2011)

[5] "A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law." *Robertson v. Staunton*, 104 Va. 73, 77, 51 S.E. 178, 180 (1905) (citing Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union 120 (7th ed. 1903)).

[6] 1 Virginia Constitutional Law § 11.08.

(holding that Article I, § 14 of the Constitution of Virginia is self-executing because it is found in the Bill of Rights and sets forth a prohibition, stated in the negative).

Plaintiffs' claims for declaratory and injunctive relief, based upon the self-executing Article V, § 11 of the Constitution of Virginia, are not barred by the doctrine of sovereign immunity.

II. THE QUESTION BEFORE THE COURT IS NOT A POLITICAL ONE.

In a dispute between political entities, the Court's

> role is simply to ascertain whether the political entities have acted within the constitutional boundaries that limit the exercise of their governmental power. If so, then their policy decisions are subject to, and properly evaluated by, the political will of the people, and [the Court has] no authority to override such political decisions.

Elizabeth River Crossings OpCo, LLC v. Meeks, 286 Va. 286, 309, 749 S.E.2d 176, 187 (2013) (citing *Williamson v. Old Brogue, Inc.*, 232 Va. 350, 354, 350 S.E.2d 621, 624, 3 Va. Law Rep. 1325 (1986)); *see Commonwealth v. County Board*, 217 Va. 558, 581, 232 S.E.2d 30, 44 (1977)).

Here, the Court is asked to determine whether the General Assembly has properly refused to confirm the Disputed Appointees. If so, the Executive Department's insistence that the Disputed Appointees may continue to serve in their roles as members of the governing boards of public universities would constitute an act outside the constitutional boundaries that limit the exercise of that department's governmental power. If not, the insistence by members of the Virginia Senate that the Disputed Appointees be prohibited from serving in their roles as members of the governing boards of public universities would constitute an act outside the constitutional boundaries that limit the exercise of the Legislative Department's governmental power.

This is not, as Defendants argue, a "still evolving [political] dispute between the Executive Branch and members of the Legislative Branch about how to exercise the confirmation power and who should steer the policies of Virginia's public universities."[7] The applicable constitutional and statutory provisions set forth how the power to confirm the Disputed Appointees is to be exercised and who controls the policies of the Commonwealth's public universities. The question before the Court is whether the enacted procedures were followed and whether the result of those procedures was the General Assembly's failure to confirm the Disputed Appointees.

[7] Defs.' Memo. In Opp. to Pls.' Mot. for Prelim. Inj., at 11.

The Court must determine whether the actions taken by the General Assembly in this case meet the definition of a "refusal" as that term is used in the relevant constitutional and statutory provisions. That is the very sort of dispute that the courts are meant to address.[8]

The cases cited by Defendants are unpersuasive. In *Commonwealth v. Cty. Bd. of Arlington*, 217 Va. 558, 232 S.E.2d 30 (1977), the Virginia Supreme Court was "faced . . . with overwhelming indications of legislative intent concerning the concept of collective bargaining in the public sector" and concluded that

> [f]or this court to declare that the boards have the power to bargain collectively, when even the wisdom of incorporating the concept into the general law of the Commonwealth is the subject of controversial public and political debate, would constitute judicial legislation, with all the adverse connotations that term generates.

Cty. Bd. of Arlington, 217 Va. at 581, 232 S.E.2d at 44. Here, the Court is not being asked to declare that the General Assembly has the power to refuse confirmation of the Disputed Appointees[9] but to decide *whether it actually exercised that power*, granted by the Constitution of Virginia and statute.

In *Scott v. James*, 114 Va. 297, 76 S.E. 283 (1912), the Virginia Supreme Court considered a case brought by a citizen and taxpayer of the Commonwealth who sought to enjoin the re-submission of constitutional amendments to the people for a vote on the grounds that the General Assembly failed to comply with constitutional amendment procedures. *Scott*, 114 Va. at 298, 76 S.E. at 283. The Court held that

> the amending of the Constitution is the making of a permanent law for the people of the State by which they are to be governed in the future, and the courts cannot interfere to stop any of the proceedings while this permanent law is in process of being made.[10] If the amendment is not adopted, of course, no question will ever come before the court. If, upon completion of the proceedings, the validity of the amendment is assailed on the ground that the several provisions of the Constitution

[8] Indisputably, it is the function of the courts to determine whether the Constitution of Virginia or laws of the Commonwealth require or prohibit the performance of certain acts. *See Wise v. Bigger*, 79 Va. 269, 273 (1884); *William Penn Sch. Dist. v. Pa. Dep't of Educ.*, 642 Pa. 236, 275, 170 A.3d 414, 437 (2017). "[P]ure statutory interpretation is the prerogative of the judiciary." *Sims Wholesale Co. v. Brown-Forman Corp.*, 251 Va. 398, 404, 468 S.E.2d 905, 908 (1996).

[9] That legal principle is one of the few on which the parties agree.

[10] The circuit court opinion cited by Defendants, *McEachin v. Bolling*, 84 Va. Cir. 76 (Richmond 2011), addressed another attempt to interfere in a pending legislative process by enjoining the Lieutenant Governor from casting any tie-breaking votes during an upcoming General Assembly session. In that case, the court relied on *Scott* in concluding that the relief sought by the plaintiff would invade the province of the General Assembly and violate the separation of powers required by Article I, § 5 of the Virginia Constitution.

> have not been complied with, then the courts can pass upon the validity of the amendment.

Scott, 114 Va. at 304, 76 S.E. at 285. It further held that "courts will not, with few exceptions, enjoin the holding of an election or interfere, by its process of injunction, with the holding of an election." *Id.*

Here, Plaintiffs do not seek to interrupt the legislative process or enjoin the holding of an election; they seek to enforce the result of a legislative process that has, according to their theory, *already taken place*.

When it is alleged that gubernatorial appointees rejected by the General Assembly are improperly continuing in their appointed offices contrary to a constitutional prohibition, the courts must be able to adjudicate that dispute. Otherwise, in the hypothetical situation in which both houses of the General Assembly voted affirmatively to refuse an appointee's confirmation to the governing board of a Virginia public university and then adjourned *sine die*, the appointee could simply continue to serve on the theory that the power to remove him rests solely with the Governor.[11]

Article V, § 11 of the Virginia Constitution "protects the confirmation power of the legislature."[12] That protection is meaningless if it cannot, in appropriate cases, be enforced by the courts. This is such a case.

III. PLAINTIFFS HAVE STANDING TO ASSERT THEIR CLAIMS.

Standing to sue requires that Plaintiffs demonstrate: (1) a "distinct and particularized injury," that is, a "direct interest in the outcome of the controversy . . . separate and distinct from the interest of the public at large"; (2) that their injury is "traceable to the challenged actions of the" Defendants; and (3) that their injury is redressable by the Court. *See Layla H. v. Commonwealth*, 81 Va. App. 116, 134-35, 902 S.E.2d 93, 101-02 (2024) (citations and internal quotation marks omitted). "In its constitutional dimension, the concept of standing protects "separation-of-powers principles" and "prevent[s] the judicial process from being used to usurp the powers of the political branches."…" *Morgan v. Bd. of Supervisors*, 302 Va. 46, 58, 883 S.E.2d 131, 137 (2023) (quoting *Town of Chester v. Laroe Ests., Inc.*, 581 U.S. 433, 438, 137 S. Ct. 1645, 198 L. Ed. 2d 64 (2017)).

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[11] *See* Va. Code § 23.1-1300(C), (E) & (F).

[12] 1 Virginia Constitutional Law § 11.08.

A. Plaintiffs have demonstrated their "direct interest . . . in the outcome of the controversy that is separate and distinct from the interest of the public at large."

A party claiming standing must "demonstrate a direct interest, pecuniary or otherwise, in the outcome of the controversy that is separate and distinct from the interest of the public at large." *Goldman v. Landsidle*, 262 Va. 364, 373, 552 S.E.2d 67, 72 (2001). "In other words, not only must the injury be 'concrete,' it must also be 'particularized.'" *Layla H.*, 81 Va. App. at 134, 902 S.E.2d at 102 (2024) (citing *Morgan*, 302 Va. at 64-65, 883 S.E.2d at 141). "Merely advancing a public right or redressing a public injury cannot confer standing on a complainant." *Wilkins v. West*, 264 Va. 447, 458, 571 S.E.2d 100, 106 (2002) (citation omitted).

The Committee voted 8-4 to not report the Confirming Resolution to the Senate floor. Under Plaintiffs' interpretation of the relevant constitutional and statutory provisions, their Committee votes were sufficient to constitute the refusal of the General Assembly to confirm the appointments of the Disputed Appointees.[13] According to Plaintiffs, by continuing to recognize the Disputed Appointees as members of their respective Boards, on the advice of the Attorney General, Defendants are effectively nullifying the Plaintiffs' Committee votes.

As the United States Supreme Court held in *Coleman v. Miller*, 307 U.S. 433, 59 S. Ct. 972 (1939), legislators contending that their votes, sufficient to defeat certain legislative action, have been "overridden and virtually held for naught" demonstrate a "distinct and particularized" injury based upon their "plain, direct and adequate interest in maintaining the effectiveness of their votes."[14] Plaintiffs, whose votes were allegedly sufficient to refuse the confirmation of the Disputed Appointees and are being "overridden and virtually held for naught" by virtue of the continued service of the Disputed Appointees, similarly demonstrate such a "distinct and particularized" injury.

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[13] Eight of the Plaintiffs cast the deciding votes in the Committee that decided not to report the Confirming Resolution to the Senate floor for a vote. The ninth Plaintiff, Senator L. Louise Lucas, does not sit on the Committee but is the President Pro Tempore of the Virginia Senate and Chair of the Senate Finance and Appropriations Committee. She brings suit not because her vote is being nullified but "in her official capacity to protect the legislative prerogatives and constitutional authority of the Virginia Senate . . . ." Compl. ¶ 8. The legal basis for her assertion of standing and irreparable harm is distinct from that alleged by the eight Plaintiffs whose voted in Committee to not report the Confirmation Resolution to the Senate floor and was not briefed or argued by any party. Given the Court's decision as to the other eight Plaintiffs, Senator Lucas's standing and basis to assert irreparable harm is immaterial and the Court reserves a ruling on those issues until such time as they are properly before the Court.

[14] *See Coleman*, 307 U.S. at 438, 59 S. Ct. at 975 ("Here, the plaintiffs include twenty senators, whose votes against ratification have been overridden and virtually held for naught although if they are right in their contentions their votes would have been sufficient to defeat ratification. We think that these senators have a plain, direct and adequate interest in maintaining the effectiveness of their votes. . . . They have set up and claimed a right and privilege under the Constitution of the United States to have their votes given effect and the state court has denied that right and privilege."). *See also Biggs v. Cooper ex. Rel. County of Maricopa*, 341 P.3d 457, 461 (Ariz. 2014).

The cases cited by Defendants in their opposition are not applicable to the case at bar. In *Raines v. Byrd*, 521 U.S. 811, 117 S. Ct. 2312 (1997), the United States Supreme Court considered a case brought by six Members of Congress (four Senators and two Congressmen) who voted "nay" on the Line Item Veto Act passed by the 104th Congress (1995-1996). Plaintiffs in that case sued, claiming that the Act violated Article I of the United Sates Constitution by "unconstitutionally expand[ing] the President's power" and violating "the requirements of bicameral passage and presentment . . . ." *Raines*, 521 U.S. at 816, 117 S. Ct. at 2316. They alleged that passage of the Act injured them "directly and concretely . . . in their official capacities" by: (1) altering "the legal and practical effect of all votes they may cast on bills containing such separately vetoable items"; (2) divesting them "of their constitutional role in the repeal of legislation"; and (3) altering "the constitutional balance of powers between the Legislative and Executive Branches . . . ." Raines, 521 U.S. at 816, 117 S. Ct. at 2316. The federal district court denied defendants' motion to dismiss for lack of standing.

The United States Supreme Court noted that its "holding in *Coleman* [on which plaintiffs relied] stands (at most . . .) for the proposition that *legislators whose votes would have been sufficient to defeat (or enact) a specific legislative act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified*.…" *Raines*, 521 U.S. at 823, 117 S. Ct. at 2319 (emphasis added). It further noted that the claim of the appellees in *Raine* did not fall within its holding in *Coleman* because they had not alleged that "they voted for a specific bill, that there were sufficient votes to pass the bill, and that the bill was nonetheless deemed defeated." *Raines*, 521 U.S. at 824, 117 S. Ct. at 2320. In *Raines*, the plaintiff's votes "were given full effect. They simply lost that vote. Nor can [plaintiffs] allege that the Act will nullify their votes in the future in the same way that the votes of the *Coleman* legislators had been nullified." *Id.*

In contrast to the plaintiffs in *Raines*, Plaintiffs here allege that *they voted against the Confirmation Resolution* in committee, that *their votes were sufficient to defeat the Confirmation Resolution* in committee, that the defeat of the Confirmation Resolution in committee constitutes the refusal of the General Assembly to confirm the Disputed Appointees, and that *Defendants are nonetheless permitting and intending to permit the Disputed Appointees to participate as Board members*, consistent with the legal advice of the Attorney General.[15]

In *Va. House of Delegates v. Bethune-Hill*, 587 U.S. 658, 661, 139 S. Ct. 1945, 1949 (2019), the United States Supreme Court considered the standing of the Virginia House of Delegates and its Speaker to pursue the appeal of the decision of a three-judge panel of the Eastern District of Virginia declaring unconstitutional the racial gerrymandering of Virginia House districts after the Virginia Attorney General announced publicly and in a District Court filing that the Commonwealth would not pursue such an appeal. *See Va. House of Delegates*, 587 U.S. at 661, 139 S. Ct. at 1949. The Supreme Court held that the House lacked "authority to displace Virginia's Attorney General as the representative of the" Commonwealth and "as a single chamber

[15] At oral argument, Defendants' counsel confirmed that Defendants intend to proceed in accordance with the advice provided in the Attorney General's Letter, indicating that the Disputed Appointees should be afforded the full rights and responsibilities of Board members.

of a bicameral legislature, has no standing to appeal the invalidation of the redistricting plan separately from the State of which it is a part." *Id.* Plaintiffs here are not attempting to represent the Commonwealth, in lieu of the Attorney General or otherwise; their claims are based upon the personal harm allegedly resulting from the nullification of their Committee votes to refuse the confirmation of the Disputed Appointees.

In *Marshall v. Warner*, 64 Va. Cir. 389 (Richmond 2004), the Richmond Circuit Court considered a case brought by seven members of the General Assembly against the Governor, Lieutenant Governor, and Speaker of the House of Delegates challenging the constitutionality of a budget bill, then before the General Assembly, that provided for tax increases and the appropriation of those monies. Plaintiffs alleged that the budget violated the single object rule set forth in Article IV, Section 12 of the Virginia Constitution.[16] Defendants demurred, contending (among other things) that the plaintiffs lacked standing to test the constitutionality of the bill.

As grounds for standing, plaintiffs argued that: (1) they were injured as members of the House of Delegates by having to approve an unconstitutional bill or abstain; (2) they were injured as members of the House of Delegates because they would lose their funding if a constitutional budget bill failed to pass the House and Senate; and (3) they were injured as individual taxpayers. The bill at issue in *Marshall* had not even been voted on. The plaintiffs did not, and could not, allege standing in accordance with the holding in *Coleman*.

While both of the other cases cited by Defendants, *Hendrick v. Walters*, 865 P.2d 1232 (Okla. 1993) and *ACLU of Tennessee v. Darnell*, 195 S.W.3d 612 (Tenn. 2006), stand for the proposition that state legislators have no special standing status, and must satisfy the same requirements demanded of any other litigant, assertion of standing made by the eight Committee members is *not based upon their status as legislators* but upon the *nullification of their vote to refuse the confirmation of the Disputed Appointees*. That distinction would have been apparent to the Oklahoma Supreme Court, which cited *Coleman* in its opinion in *Hendrick*.

Interestingly, in *Hendrick*, the Oklahoma Supreme Court also cited to *Dennis v. Luis*, 741 F.2d 628, 630-31 (3rd Cir. 1984), in which the Third Circuit Court of Appeals held that eight members of the Virgin Islands Fifteenth Legislature had standing to challenge a gubernatorial appointment. At the time, the Virgin Islands Commissioner of Commerce was to be "appointed by the Governor, with the advice and consent of the Legislature . . . ." 3 V.I.C. § 332(b).

The legislature rejected the Governor's nomination. Notwithstanding that rejection, the Governor appointed the same nominee as "acting" Commissioner of Commerce. The legislators sued.

[16] "No law shall embrace more than one object, which shall be expressed in its title. Nor shall any law be revived or amended with reference to its title, but the act revived or the section amended shall be reenacted and published at length.…" Va. Const. Art. IV, § 12.

In concluding that the legislators had standing, the Third Circuit stated that

> [a]ccording to the legislators' allegations, the interest sought to be protected by this action is their unique statutory right to advise the Governor on executive appointments and to confer their approval or disapproval in this regard. Assuming these allegations to be true, we conclude that they allege a personal and legally cognizable interest peculiar to the legislators. The interest asserted is simply not a 'generalized interest of all citizens in constitutional governance. . . .' Since the right to advise and consent has been vested only in members of the legislature, and since only members of the legislature are bringing this action, the allegation that this right has been usurped by the Governor and [the disputed appointee] are sufficiently personal to constitute an injury in fact, thus satisfying the minimum constitutional requirements of standing.

Dennis v. Luis, 741 F.2d 628, 631 (3d Cir. 1984) (citing *Riegle v. Federal Open Market Committee*, 211 U.S. App. D.C. 284, 656 F.2d 873, 878-79 (D.C. Cir.), *cert. denied*, 454 U.S. 1082, 70 L. Ed. 2d 616, 102 S. Ct. 636 (1981); *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 483, 102 S. Ct. 752, 764 (1982) (quoting *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 217, 41 L. Ed. 2d 706, 94 S. Ct. 2925 (1794)).

In the case at bar, Plaintiffs' standing argument is grounded in the same foundation that supported standing in *Coleman* and *Dennis*. *Marshall*, *Hendrick*, and *Darnell* are inapposite.

B. Plaintiffs' alleged injury is directly traceable to the current and "certainly impending" actions of Defendants.

"A plaintiff must also show that her injury was caused by the defendant's actions." *Layla H.*, 81 Va. App. 134, 902 S.E.2d 102 (citing *Morgan*, 302 Va. at 64). The particularized harm alleged by plaintiff must "be fairly traceable to the challenged action of the defendant." *Morgan*, 302 Va. at 64, 883 S.E.2d at 141 (quoting *Mattaponi Indian Tribe v. Virginia Dep't of Env't Quality ex rel. State Water Control Bd.*, 261 Va. 366, 376, 541 S.E.2d 920 (2001); citing *Philip Morris USA Inc. v. Chesapeake Bay Found.*, Inc., 273 Va. 564, 574-75, 578-79, 643 S.E.2d 219 (2007)). For standing purposes, "[a]n allegation of future injury may suffice if the threatened injury is 'certainly impending,' or there is a "substantial risk that the harm will occur." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158, 134 S. Ct. 2334, 2341 (2014) (citing *Clapper v. Amnesty Int'l USA*, 568 U. S. 398, 409, 414, n. 5, 133 S. Ct. 1138, 1150, 185 L. Ed. 2d 264, 279) (internal quotation marks omitted).

Defendants are charged with presiding over meetings of the boards of visitors of GMU, UVA, and VMI. As the person presiding at those meetings, each Defendant is responsible for recognizing members who wish to speak and recognizing and announcing the votes of members. *See* Robert's Rules of Order § 42:2 & 45 (12th ed. 2020); GMU Bd. of Visitors, Art. XIII (requiring board meetings to be conducted in accordance with the Code and the bylaws and noting that any question not addressed by the bylaws will be resolved by reference to Robert's Rules); Manual of the Bd. of Visitors of the University of Virginia § 2.38 (providing that Robert's Rules provide

guidance for the conduct of board meetings). Each Defendant also has specific duties, under the bylaws applicable to their Board, that involve the granting of certain rights to members of their Board.

Among other things, the Rector of the George Mason University Board of Visitors: (1) determines who may be included in closed sessions of the board; (2) may notify members of special meetings of the board; (3) may exclude persons other than voting members from discussions of any matter; (4) nominates members to serve on standing committees; (5) appoints the chairperson and vice chairperson of each committee; and (6) chairs meetings of the Executive Committee. *See* GMU Bd. of Visitors Bylaws Art. II, §§ 3 & 6; Art. IV, §§ 6, 7; Art. V, §§ 1.

Among other things, the Rector of the University of Virginia Board of Visitors: (1) announces committee assignments and committee chairs; (2) determines the number of members to be appointed to each standing committee; (3) appoints the chairperson of each standing committee; (4) changes the membership of any standing committee at any time; (5) appoints board members to serve on the Health System Board; (6) appoints board members to serve on a Special Committee on the Nomination of a President when the office of the President becomes vacant or a vacancy is impending; and (7) may concur in the nomination of a board member to serve as Secretary of the board. Manual of the Bd. of Visitors of the University of Virginia §§ 2.31, 3.2, 3.27 & 4.12.

Among other things, the President of the Virginia Military Institute Board of Visitors: (1) determines whether to add to a meeting agenda items suggested by a member of the board; (2) may consider the request of a board to attend a board meeting virtually; (3) appoints members of the board to serve on standing committees in a voting capacity; (4) designates a chairman and vice chairman from among the board members appointed to each committee; and (5) directs the Secretary of the board in the providing of notice and preparing minutes of all board meetings. *See* VMI Bd. Of Visitors Bylaws Art. I, §§ 4(5), (4)(9), 5(1)(a), 6; Art. II, §§ 2(2).

Since the Committee's June 9, 2025 vote to not report the Confirming Resolution to the Senate floor, which Plaintiffs allege constitutes the General Assembly's refusal to confirm the Disputed Appointees, Defendants have permitted the Disputed Appointees to enjoy the full rights and responsibilities of Board members.[17] In one instance, a Disputed Appointee has been elected to the Executive Committee of their Board.

By the Attorney General's Letter, the Defendants (or, in some cases, their predecessors) were advised to continue to permit the Disputed Appointees to participate as members of the Boards with all of the rights and responsibilities of any other Board member. Defendants have acted in accordance with that advice and confirmed that they will continue to do so.

[17] See Defs.' Memo. In Opp. to Pls.' Mot. for Prelim. Inj., at 19 (noting that the Disputed Appointees "have been sitting on their respective boards for months . . .").

It is a near certainty, and certainly a greater than "substantial" risk, that Defendants will do exactly what they have done and promised to do in recognizing the Disputed Appointees as members of their respective boards. Defendants will continue to recognize the votes of Disputed Members, appoint them to committees, permit them to participate in closed sessions, and otherwise permit them the full rights and responsibilities with which the Attorney General opined they are fully vested. If Plaintiffs are correct and their eight Committee votes were sufficient to constitute a refusal by the General Assembly to confirm the Disputed Appointees, the "substantial risk" that the Defendants will continue to recognize the Disputed Appointees as members of their boards of visitors and afford them all the rights and responsibilities of board members would constitute an injury fairly traceable to the Defendants' actions.[18]

C. Plaintiffs personally would benefit in a tangible way from the Court's intervention.

Finally, "[s]tanding is limited to injuries where a court may reasonably be expected to find a remedy. Claims must be such that a plaintiff 'personally would benefit in a tangible way from the court's intervention.'" *Philip Morris USA, Inc. v. Chesapeake Bay Found., Inc.*, 273 Va. 564, 579, 643 S.E.2d 219, 227 (2007) (quoting *Warth v. Seldin*, 422 U.S. 490, 508, 95 S. Ct. 2197, 2210 (1975)). "A complete solution to the alleged injury is not required." *Id.* (citation omitted).

Enjoining the Defendants from recognizing the Disputed Appointees' votes, appointing the Disputed Appointees to committees, permitting their attendance in closed sessions, or otherwise recognizing them as board members might not be a complete solution to the Plaintiff's alleged injury, but would provide the Plaintiffs with a tangible benefit. The Court's intervention in this way would reverse the alleged nullification of Plaintiffs' Committee votes.

IV. PLAINTIFFS HAVE SATISFACTORILY DEMONSTRATED THEIR ENTITLEMENT TO A PRELIMINARY INJUNCTION.

Rule 3:26 governs motions seeking a preliminary injunction. "A court may issue a preliminary injunction only if it first determines that the movant will *more likely than not* suffer irreparable harm without the preliminary injunction." Va. Sup. Ct. R. 3:26(c) (emphasis added). Once the irreparable harm threshold is met,

> the court must determine whether the following factors support the issuance of a preliminary injunction: i. whether the movant has asserted a legally viable claim based on credible facts (not mere allegations) demonstrating that the underlying claim will *more likely than not* succeed on the merits; ii. whether the balance of hardships—that is, the harm to the movant without the preliminary injunction compared with the harm to the nonmovant with the preliminary injunction—favors

[18] Considered another way, if Defendants heeded the advice of Senator Surovell instead of the Attorney General and stopped recognizing the Disputed Appointees as members of their Boards, Plaintiffs' Committee votes would not be effectively nullified and Plaintiffs could demonstrate no injury traceable to Defendants' actions.

> granting the preliminary injunction; and iii. whether the public interest, if any, supports the issuance of a preliminary injunction. A preliminary injunction may be issued only if it is supported by factors (i) and (ii), and it is not contrary to the public interest in factor (iii).

Va. Sup. Ct. R. 3:26(d) (emphasis added).

A. Plaintiffs have demonstrated that they will *more likely than not* suffer irreparable harm absent the entry of a preliminary injunction.

In evaluating a request for a preliminary injunction, "irreparable harm" is a threshold matter. If the movant fails to demonstrate that they will more likely than not suffer irreparable harm, the Court never even considers the other three preliminary injunction factors. Va. Sup. Ct. R. 3:26(c).[19] "Generally, 'irreparable injury is suffered when monetary damages are difficult to ascertain or are inadequate.'" *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 22 F.3d 546, 551 (4th Cir. 1994) (quoting *Danielson v. Local 275*, 479 F.2d 1033, 1037 (2d Cir. 1973)).

As members of the Committee to which the Senate referred the Confirming Resolution, Plaintiffs cast votes sufficient to defeat the resolution and refuse confirmation of the Disputed Appointees on behalf of the General Assembly.[20] Notwithstanding the General Assembly's refusal to confirm the Disputed Appointees, Defendants intend to follow the legal advice of the Attorney General and continue to recognize the Disputed Appointees as members of their respective Boards. Doing so essentially nullifies the votes cast by Plaintiffs and holds them for naught; nullifying those votes, even briefly, constitutes irreparable harm. See *Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 2690 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). *See also Criser-Shedd v. Lilly (In re Lewis)*, 114 Va. Cir. 136, 147 (Waynesboro 2024) (holding that even the temporary failure to count votes constitutes irreparable injury for the purposes of a preliminary injunction); *Lynchburg Range & Training, LLC v. Northam*, 105 Va. Cir. 159, 164 (Lynchburg 2020) ("The Court also rules that the temporary violation of a constitutional right itself is enough to establish irreparable harm."). The injury suffered by Plaintiffs[21] if no preliminary injunction is granted cannot be compensated by an award of monetary damages.

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[19] Rule 3:26 was added as of August 4, 2024. However, even under "traditional chancery practice, lack of proof of irreparable harm [was] generally fatal." *Carbaugh v. Solem*, 225 Va. 310, 314, 302 S.E.2d 33, 35 (1983).

[20] Due to the nature of Plaintiffs' claims, the evaluation of irreparable harm is inextricably linked to the evaluation of Plaintiffs' likelihood of success on the merits because both factors are based on the correctness of Plaintiffs' interpretation of the applicable constitutional and statutory provisions, as opposed to the interpretation proposed by Defendants. The Court largely agrees with the Plaintiffs' interpretation. *See* Section IV(B), below.

[21] *See* Section III(A), above.

The nullification of Plaintiffs' votes constitutes irreparable harm whether the Disputed Appointees' continued service on the GMU, UVA, and VMI Boards would result in decisions with which the Plaintiffs agreed or disagreed. If the Disputed Appointees were appointed by the Governor and the General Assembly had not yet refused to confirm them, the fact that the Disputed Appointees had, would, or might lead their boards to make decisions with which Plaintiffs disagreed, or even those that Plaintiffs believed to be incredibly harmful to the institutions they represent, would be immaterial because there would have been no nullification of Plaintiffs' Committee votes; in that hypothetical situation, the "will of the people" as exercised by their elected representatives in accordance with constitutionally and statutorily prescribed procedures would have been followed. Here, the injury to Plaintiffs comes not from the decisions that have, will, or could be made by the GMU, UVA, and VMI boards with the Disputed Appointees as members but from the nullification of Plaintiffs' Committee votes and failure to acknowledge the "refusal to confirm" resulting thereby.

B. Plaintiffs have asserted a legally viable claim, based on credible facts, demonstrating that their underlying claim will *more likely than not* succeed on the merits.

Members of the governing boards of public institutions of higher education are appointed by the Governor, "subject to confirmation by the General Assembly." *See* Va. Code § 23.1-1300(A). No such person "shall enter upon, or continue in, office after the General Assembly shall have refused to confirm his appointment . . . ." Va. Const. Art. V, § 11.

Plaintiffs allege that the Committee's 8-4 decision to not report the Confirming Resolution for a Senate floor vote constituted the General Assembly's "refusal to confirm" the appointments of the Disputed Appointees. Thus, the viability of Plaintiffs' claim turns on the meaning of "refusal" as used in Article V, § 11 of the Virginia Constitution.

In *Craig v. Dye*, 259 Va. 533, 526 S.E.2d 9 (2000),[22] the Supreme Court of Virginia defined "[t]he verb 'refuse' . . . as a 'positive unwillingness to do or comply with' something demanded or expected." *Craig*, 259 Va. at 538, 526 S.E.2d at 12 (citing Webster's Third New International Dictionary 1910 (1993)). It further found that a "'refusal' is 'the denial or rejection of something offered or demanded.'" *Id.* (citing Black's Law Dictionary 1285 (7th ed. 1999)). "These definitions denote an element of intent, manifested by a volitional act." *Id.* (citing *Meeks v. Stevens*, 301 Ark. 464, 785 S.W.2d 18, 20 (Ark. 1990) (noting that definitions of term "'refuse' stress the active element of refusal[,] . . . expressing . . . a determination not to do a particular thing"); *Nebraska v. Medina*, 227 Neb. 736, 419 N.W.2d 864, 867 (Neb. 1988) ("'To refuse[]'. . . requires that a person understand what is being asked of him and then in some way manifest nonacceptance, nonconsent, or unwillingness.")).[23]

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[22] In *Craig*, the Supreme Court of Virginia construed a personal liability umbrella insurance policy provision provided that the insurer may not provide coverage if the insured "refuses" to perform certain duties. Craig, 259 Va. at 535, 526 S.E.2d at 10.

[23] At oral argument, neither party opposed the Court's adoption of the Virginia Supreme Court's definition of "refusal."

In committee, Plaintiffs' votes constituted the majority in the 8-4 vote to nor report the resolution confirming the Disputed Appointees to the Senate floor. According to Plaintiffs, that Committee action constituted the refusal of the General Assembly to confirm the appointment of the Disputed Appointees and triggered the effect of Article V, § 11 of the Constitution of Virginia. Their claim is legally viable and is more likely than not to succeed on the merits.

Like passing any other resolution, confirmation of a gubernatorial appointee requires the affirmative vote of a majority of each chamber of the General Assembly; it requires the affirmative vote of a majority of members of the House of Delegates *and* the affirmative vote of a majority of members of the Senate. The failure to secure an affirmative majority vote in either chamber means that the conditions necessary for confirmation have not occurred; it would constitute a refusal of the General Assembly to confirm the subject appointee.[24]

Here, then, the question is not whether the Committee could properly act on behalf of the entire General Assembly but whether it could properly act on behalf of a single chamber, the Senate. The answer to that question is found in the Rules of the Senate, adopted pursuant to the authority granted in Article IV, § 7 of the Constitution of Virginia.[25]

Under Senate Rules, the Clerk of the Senate must "refer all bills and resolutions to the appropriate standing Committee or the Committee on Rules . . . ." Va. Senate R. 8(d). Once referred to committee, that committee must consider each bill or resolution and *may*: (1) report it to the Senate (a) without amendment, (b) with recommendation that a committee amendment be adopted, or (c) with recommendation that it be referred to another committee, with or without amendment.[26] Reporting of a bill or resolution to the full Senate is not required. The failure to report is how some bills and resolutions fail to advance and "die in committee."[27]

Here, the Committee voted 8-4 to not report the Confirming Resolution to the Senate floor for a vote. Pursuant to pre-established, written rules of procedure, the Senate delegated initial

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[24] If either the Senate or the House were to conclusively and finally vote to refuse the confirmation of a particular appointment, that appointee could not be confirmed, even if the other chamber voted unanimously to do so.

[25] "Each house [of the General Assembly] shall select its officers and settle its rules of procedure." Va. Const. Art. V, § 11.

[26] *See* Va. Senate R. 20(m); 1 Virginia Constitutional Law § 10.11 ("All bills must be referred to a committee. Committees hear testimony on the bills from interested parties, examine the language of the bills to make edits, and determine whether a bill should advance or die in committee. Much of the work of reviewing and amending bills is done in committee and subcommittee. A bill must then be referred out of committee.").

[27] *See Alt. Koreamn Am. Presbytery v. Shalom Presbyterian Church of Wash., Inc.*, 84 Va. App. 1, 28 (2025) (referencing a 1784 bill dying "in committee"); 1 Virginia Constitutional Law § 10.11. *See also* Va. General Assembly Pocket Glossary (noting, among possible "Committee Actions," the "Failure to Report," which is defined as the rejection of a motion to report a bill to the full House and characterized as a "defeat" of the bill).

consideration of the Confirmation Resolution to the Committee, which rejected it, thereby defeating the resolution.[28]

To those familiar with the workings of the General Assembly, it may come as no surprise that 8 of 40 sitting Virginia Senators can refuse the confirmation of a gubernatorial appointee. It only requires the affirmative vote of 16 Senators to pass a bill[29] or confirm a gubernatorial appointee.[30] It only requires the affirmative vote of 11 Senators to reprimand a Senator; elect a Senator to, or remove a Senator from, a committee; or pass a resolution proposing to ratify and amend the United States Constitution.[31] Much of the work of the Virginia Senate can be accomplished by the affirmative vote of a minority of its 40 members.

The Committee's rejection of the Confirming Resolution reflects the "positive unwillingness" of the Senate – and, due to the nature of our bicameral legislature, of the General Assembly – "to do or comply with" the confirmation of the Disputed Appointees "demanded or expected" by the Governor. Certainly, the Senate has expressed a "determination not to" confirm the Disputed Appointees; because the House alone cannot confirm the Disputed Appointees, this determination results in a "refusal to confirm" by the General Assembly.

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[28] *See, e.g.,* ARTICLE: THE LEGISLATIVE GRAVEYARD: A REVIEW OF VIRGINIA'S 2022 REGULAR GENERAL ASSEMBLY SESSION, 26 Rich. Pub. Int. L. Rev. 1, 8 (noting that HB 903 (Virginia Green Infrastructure Bank) was "killed" in committee by a vote against reporting out); ARTICLE: THE APPEAL OF A REPEAL: ANALYZING VIRGINIA'S SELF-SABOTAGE OF SUCCESSFUL RE-ENTRY FOR DRUG FELONS, 22 Rich. Pub. Int. L. Rev. 1, 7 (noting, among three 2018 bills that failed to pass in the General Assembly, two bills that "failed to report" on close votes in committee); ANNUAL SURVEY OF VIRGINIA LAW: ARTICLE: ELECTION LAW, 47 U. Rich. L. Rev. 181, 183 ("In several previous sessions, legislators tried to change the law to require that voters without ID must instead vote a provisional ballot that would be subject to review by the electoral board 17 or to require photo ID to vote. 18 Those bills usually met the same fate - *defeat in the Democrat-led Senate Privileges and Elections Committee*."); LEGISLATIVE SUMMARY: NOTABLE BILLS OF THE 2011 GENERAL ASSEMBLY: HOUSE BILLS, 15 Rich. Pub. Int. L. Rev. 97, 11 (noting the SB 1237 was "defeated in the House Agriculture Committee").

[29] *See* Va. Const. Art. IV, § 11 (requiring the affirmative vote of the majority and at least "two-fifths of the members elected to the" Senate).

[30] *See* Va. Senate R. Appx, at 36 (noting that the passage of a resolution, other than on proposing a constitutional amendment, requires the affirmative vote of a majority of members voting but no fewer than 16 votes); Va. Const. Art. IV, § 11.

[31] *See* 1 Virginia Constitutional Law § 10.11 (noting that 21 Senators comprises a *quorum* sufficient for the Senate to do business); *See* Va. Senate R. 5 ("A majority of Senators shall constitute a quorum to do business . . . ."), 18(h) (requiring a majority vote to reprimand a senator), 20(a) (requiring "a majority vote of the members and voting" to remove a Senator from a committee), 53(b) (requiring "a majority vote of the Senators present and voting" to reprimand a Senator or refer an ethical issue to the Attorney General for appropriate action) & Appx.

The Senate's rejection of the Confirmation Resolution, by and through the vote of the Committee charged by the Senate with reviewing the resolution and determining whether it should advance or die in committee, constitutes the refusal of the General Assembly to confirm the Disputed Appointees. The fact that this happened, without any legislative attempt to resurrect the Confirmation Resolution in the Senate or to consider a similar resolution in the House[32] suggests that the General Assembly, as an entity, understands the Committee's rejection of the Confirmation Resolution to be the refusal of the General Assembly to confirm the Disputed Appointees.[33]

The refusal of the General Assembly to confirm the Disputed Appointees on June 9, 2025 marked the end of the Disputed Appointees' ability to continue serving on their respective Boards. The fact that the General Assembly's refusal may be reconsidered does not mean that the refusal was not a refusal. *See Ramizi v. Blinken*, 745 F. Supp. 3d 244, 264 (E.D.N.C. 2024) (so holding, in the context of the refusal of visa applications). Nothing in the definition of "refuse" adopted by the Supreme Court of Virginia in *Craig* denotes permanence.

The recent legislative practice of the General Assembly, as cited by Defendants, does not alter this analysis. Defendants argue that "inaction" by the Committee does not constitute refusal by the General Assembly. In the examples cited by Defendants, inaction by a committee of a chamber of the General Assembly – for instance, by simply removing the name of an appointee before reporting a confirmation resolution to the floor – without the General Assembly adjourning *sine die* did not stop the confirmation of gubernatorial appointees.

It may be that inaction by the General Assembly, while still in session, does not constitute a refusal to confirm gubernatorial appointees, but that is not the case before the Court. Here, in accordance with its rules, the Senate, through the Committee to which the Confirming Resolution was referred for consideration, *actively rejected* the resolution. The Committee did not take no action on the resolution, or carry it over, or pass it by indefinitely, or amend it to remove certain names; it *actively* voted to *not report the resolution, or any portion of it, to the Senate floor*.

Defendants also argue that a refusal to confirm "is triggered only by an active, completed refusal to confirm an appointee by a majority vote in both houses affirmatively refusing to confirm an appointee." Defs.' Memo. In Opp. to Pls.' Mot. for Prelim. Inj., at 15. That argument is undercut by Defendants' correct assertion that "the General Assembly is also understood to refuse confirmation when both houses vote to adjourn *sine die* without confirming a pending appointment" in the absence of evidence of contrary legislative intent. *Id.* (citing 1981-1982 Op. Va. Att'y Gen. 183, 1982 Va. AG LEXIS 186, at *1-2 (Feb. 8, 1982)). The argument also ignores

[32] Though Delegate Israel O'Quinn intends to file such a resolution. *See* Letter from Del. Israel O'Quinn to Hon. G. Paul Nardo dated July 18, 2025 (attached as Ex. E to the Declaration of Christopher G. Michel in Support of Defendants' Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction).

[33] Moreover, "[t]he practical construction given to a constitutional provision by public officials and acted upon by the people is likewise entitled to great weight." *Roanoke v. James W. Michael's Bakery Corp.*, 180 Va. 132, 143, 21 S.E.2d 788, 793 (1942) (citation omitted).

the definition of "refusal" adopted by the Virginia Supreme Court in *Craig*, which requires only an understanding of what is being requested and some manifestation of an unwillingness to comply with the request.

The Confirmation Resolution was a request to confirm the Disputed Appointees. The Senate understood that request and, through the Committee's decision to reject it, manifested an unwillingness to confirm the Disputed Appointees. The Senate rejected the Disputed Appointees and, by doing so, manifested the refusal of the General Assembly to confirm them.

C. The balance of hardships favors granting the preliminary injunction.

If no preliminary injunction is entered, the harm that will befall Plaintiffs is substantial. *See* Sections III(A) & IV(A), above.

On the other hand, the entry of a preliminary injunction will not harm Defendants at all. Each Defendant will continue to preside over meetings of their respective Boards. Each of the affected Boards will continue to meet and do business, just with fewer members.

Defendants have no cognizable interest in facilitating the continued service of gubernatorial appointees whose confirmation has been refused by the General Assembly. Arguably, the granting of a preliminary injunction in this matter benefits Defendants by providing them with clear direction regarding the recognition of the Disputed Appointees in light of competing instructions from the Attorney General and senior members of the General Assembly.

D. The entry of a preliminary injunction is not contrary to the public interest.

The public interest is always served by clarifying and enforcing the constitutional order. *See Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002) ("upholding constitutional rights surely serves the public interest…"); *G & V Lounge v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994) ("it is always in the public interest to prevent the violation of a party's constitutional rights.…"); *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013); *Llewelyn v. Oakland Cty. Prosecutor's Office*, 402 F. Supp. 1379, 1393 (E.D. Mich. 1975) ("the Constitution is the ultimate expression of the public interest…"); *Ohio Democratic Party v. Larose*, No. 20CV-5634, 2020 Ohio Misc. LEXIS 130, at *4 (Ct. Com. Pl. Sep. 16, 2020) ("The public interest is always served by clarifying and enforcing laws that enhance the opportunity to vote, in-person or absentee, and have all ballots secured and counted in determining the outcome of an election.").

Here, the public interest is served by protecting the power of the elected legislature to confirm or reject gubernatorial appointees, in accordance with Article V, § 11 of the Constitution of Virginia. The public interest is served by ensuring that the will of the voters is manifested, through ensuring the proper exercise of both the Governor's power to appoint and the General Assembly's power to confirm. Here, a preliminary injunction is necessary to do that.

Defendants argue that a preliminary injunction would interfere with the Boards' work and threaten disruption if the preliminary injunction were dissolved and the Disputed Appointees reinstated. Given the Court's analysis of the likelihood of success, this possible disruption is a lesser risk than the disruption that would occur if a preliminary injunction were not issued and the Boards later had to reverse decisions made while they were not properly constituted.

CONCLUSION

The Senate of Virginia delegated to its Committee on Privileges and Elections the responsibility of considering the resolution to confirm gubernatorial appointees to the governing boards of George Mason University, the University of Virginia, and the Virginia Military Institute and deciding whether (and how) to bring that resolution to the Senate floor for a vote. By voting 8-4 to not report the confirming resolution, the Senate Committee on Privileges and Elections rejected those appointees on behalf of the Senate.

Because confirmation of a gubernatorial appointee requires the majority vote of a quorum of each chamber of the General Assembly, the action of the Senate committee manifested the General Assembly's "positive unwillingness" to make the requested confirmations and constituted a refusal to confirm under the Constitution of Virginia. Accordingly, the Constitution of Virginia required the rejected appointees to immediately cease their participation on their respective boards. They have not done so.

Instead, following the legal advice of the Attorney General, the defendant Rectors of the George Mason University and University of Virginia Boards of Visitors and President of the Virginia Military Institute Board of Visitors have continued to recognize the rejected appointees as members of their respective governing boards. Moreover, they intend to continue to do so.

Defendants' actions, on the advice of the Executive Department, effectively nullify the committee votes of the Plaintiffs whose eight votes were sufficient to not report the confirming resolution to the Senate floor. Defendants' actions, past, present, and promised, demonstrate Plaintiffs' injury, which is particularized, distinct, traceable to Defendants' actions, and redressable by the Court. Therefore, Plaintiffs have standing to pursue their claims.

The doctrine of sovereign immunity does not bar Plaintiffs' claims, which seek declaratory and injunctive relief based upon a self-executing provision of the Constitution of Virginia. The question before the Court, involving the interpretation of applicable constitutional and statutory provisions, is just the sort of question courts were meant to answer.

Having demonstrated that it is more likely than not that they will suffer irreparable harm if no preliminary injunction is entered, that they are more likely than not to succeed on the merits of their claims, that the balance of hardships favor the entry of a preliminary injunction, and that the entry of a preliminary injunction is not contrary to the public interest, Plaintiffs have demonstrated

their entitlement to a preliminary injunction prohibiting Defendants from recognizing the rejected appointees as members of their respective university governing boards. Such an order will follow.

Sincerely,

Jonathan D. Frieden
Judge, Fairfax County Circuit Court