



COMMONWEALTH of VIRGINIA

Office of the Attorney General

Jason S. Miyares
Attorney General

February 16, 2024

202 North Ninth Street
Richmond, Virginia 23219
804-786-2071
Fax 804-786-1991
Virginia Relay Services
800-828-1120
7-1-1

The Honorable C. Todd Gilbert
Minority Leader, Virginia House of Delegates
General Assembly Building, Room 1401
201 North 9th Street
Richmond, Virginia 23218

Dear Leader Gilbert:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issue Presented

You inquire whether Code § 24.2-509(A) operates to prohibit a political party from selecting methods other than a state-run primary as a means of nominating a candidate for office.

Response

It is my opinion that, under § 24.2-509(A), a political party may not select a nomination method that *de facto* requires covered voters to be physically present to participate or that otherwise has the practical effect of excluding their participation.

Applicable Law and Discussion

Virginia law recognizes that political parties in the Commonwealth may “provide for the nomination of [their] candidates, including the nomination of [their] candidates for office in case of any vacancy.”¹ More specifically, the “duly constituted authorities” of each party “shall have the right to determine the method by which a party nomination” for an elected office occurs.² A political party may choose to nominate its candidate through a state-run primary, which is conducted and funded by the Commonwealth according to state law.³ Alternatively, a party may nominate its candidate “by methods other than a primary.”⁴ When a party opts out of a state-run primary, the party must use one of the alternate

¹ VA. CODE ANN. § 24.2-508 (2016).

² Section 24.2-509(A) (Supp. 2023). State party leaders are responsible for choosing the method by which candidates for the United States Senate or for any statewide office are made, while local party officials make the choice for other offices. *Id.*

³ See §§ 24.2-512 to –538 (2016 & Supp. 2023).

⁴ Section 24.2-510 (Supp. 2023).

methods authorized by the party, as set forth in the party plan.⁵ Historically, other “[o]ptions include (but are not limited to) a party convention; a mass meeting, also known as a ‘caucus’; and a party canvass or unassembled caucus, also known as a ‘firehouse primary.’”⁶

In addition to a primary, which is open to “[a]ll persons qualified to vote,”⁷ the current plans for the Democratic and Republican parties in Virginia authorize the parties to nominate their candidates for certain offices via a more limited party canvass, caucus, or convention.⁸ “A party canvass resembles a primary but is party-run and closed to non-members.”⁹ In comparison, “[c]onventions and [caucuses] occur at a single location and are similar to legislative assemblies governed by parliamentary procedures.”¹⁰ A convention differs from a caucus in that, while a convention will “require Party members to elect delegates to participate in the nomination process,” a caucus does “not involve representative delegates.”¹¹ Regardless of which alternative method is chosen, once chosen, the alternative methods must be “conducted according to the [pertinent] provisions of the appropriate party plan.”¹²

Although “[a] party can use any method available to it by law and by its party plan to select its nominees[,]”¹³ choosing a selection process is a “political privilege subject to regulation by the legislature.”¹⁴ Accordingly, “[c]ase law makes it clear that the rights of political parties to nominate ‘whomever they want, however they want,’ is not absolute.”¹⁵ Indeed, courts recognize that regulation of the nomination process is linked to “a strong governmental interest in widening participation in the

⁵ See 2003 Op. Va. Att’y Gen. 99, 100-01 (“If the primary method is selected, the conduct of the primary is subject to the provisions of the applicable election statutes. If a nonprimary method of nomination is selected, one of the alternate methods of nomination provided by the party plan must be used.”) (footnotes omitted) (citing Ops. Va. Att’y Gen.: 1986-1987 at 204, 1977-1978 at 139, 140; 1970-1971 at 133, 133-34; *id.* at 181, 182; 1968-1969 at 90).

⁶ *Parson v. Alcorn*, 157 F. Supp. 3d 479, 485 (E.D. Va. 2016) (internal quotation marks omitted) (quoting *Miller v. Brown*, 503 F.3d 360, 362 (4th Cir. 2007)).

⁷ Section 24.2-530 (2016).

⁸ See DEMOCRATIC PARTY OF VIRGINIA, *Democratic Party of Virginia Party Plan* (rev’d Dec. 4, 2021), §§ 12.1 to 12.4, <https://vademocrats.org/wp-content/uploads/2022/02/DPVA-Party-Plan-1.pdf> (generally permitting candidates for statewide office, the U.S. House of Representatives, the General Assembly, or constitutional and other local office to be nominated via convention or caucus); REPUBLICAN PARTY OF VIRGINIA, *Plan of Organization* (amended Dec. 9, 2013), Article VIII, §§ C to E, <https://virginia.gop/assets/uploads/2024/01/Party-Plan-Amended-December-9-2023.pdf> (generally permitting candidates for the U.S. House of Representatives, the General Assembly, or constitutional and other local office to be nominated via mass meeting, party canvass or convention).

⁹ *Fitzgerald v. Alcorn*, 285 F. Supp. 3d 922, 950 (W.D. Va. 2018), *aff’d sub nom.* 6th Cong. Dist. Republican Comm. v. Alcorn, 913 F.3d 393 (4th Cir. 2019) (discussing these methods in light of the applicable party plan).

¹⁰ *Id.*

¹¹ *Id.*

¹² 1987-1988 Op. Va. Att’y Gen. 355.

¹³ 1977-1978 Op. Va. Att’y Gen. 139, 140.

¹⁴ 1986-1987 Op. Va. Att’y Gen. 204, 205.

¹⁵ 1995 Op. Va. Att’y Gen. 164, 166 (quoting *Lightfoot v. Eu*, 964 F.2d 865, 871 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1280 (1993)).

democratic process”¹⁶ and they have upheld statutes generally favoring a primary over other nominating methods.¹⁷

Your inquiry specifically involves the application of newly effective provisions of § 24.2-509(A). Based on legislation introduced by Delegate Dan Helmer in 2021,¹⁸ the General Assembly amended § 24.2-509(A) to add language that prohibits a party from selecting a particular nomination method when the method does not meet certain participation rule requirements.¹⁹ Per the amendment, as of January 1, 2024,²⁰ a party may not select a nomination method

if such method will have the practical effect of excluding participation in the nominating process by qualified voters who are otherwise eligible to participate in the nominating process under that political party’s rules but are unable to attend meetings because they are (i) a member of a uniformed service, as defined in § 24.2-452, on active duty; (ii) temporarily residing outside of the United States; (iii) a student attending a school or institution of higher education; (iv) a person with a disability; or (v) a person who has a communicable disease of public health threat as defined in § 32.1-48.06 or who may have come in contact with a person with such disease.^[21]

You ask whether this language operates to preclude a political party from using nominating methods other than a state-run primary.

The “primary objective” in construing a statute is “to ascertain and give effect to legislative intent[.]”²² Legislative intent, in turn, must be gathered from the words used in the statute,²³ and “[w]hen a statute’s language is plain and unambiguous, courts are bound by the plain meaning of that language.”²⁴ Nevertheless, when applying statutory language, courts “consider ‘the evil sought to be corrected by the legislature’ when it adopted the pertinent language.”²⁵

¹⁶ *Id.* at 167.

¹⁷ *Id.* (citing *Lightfoot*, 964 F.2d at 871). Indeed, with respect to jurisdictions where closed primaries are held, the Supreme Court has “considered it ‘too plain for argument,’ for example, that a State may require parties to use the primary format for selecting their nominees, in order to assure that intraparty competition is resolved in a democratic fashion.” *Cal. Democratic Party v. Jones*, 530 U.S. 567, 572 (2000) (quoting *Am. Party of Texas v. White*, 415 U.S. 767, 781 (1974)). *See also* *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 205 (2008) (“To be sure, we have, as described above, permitted States to set their faces against ‘party bosses’ by requiring party-candidate selection through processes more favorable to insurgents, such as primaries.”).

¹⁸ *See* H.B. 2020 (Va. 2021).

¹⁹ 2021 Va. Acts ch. 474 (Sp. Sess. I).

²⁰ *Id.*

²¹ This Opinion refers to these categories of voters collectively as “covered voters.” I further note that the statute’s prohibitory language does not apply when a political party is “selecting a candidate for a special election or nominating a candidate pursuant to § 24.2-539, or in the event that no candidate files the required paperwork by the deadline prescribed in § 24.2-522.” Section 24.2-509(A).

²² *City of Hampton v. Williamson*, ___ Va. ___, ___, 887 S.E.2d 555, 558 (2023) (quoting *Cuccinelli v. Rector & Visitors of the Univ. of Va.*, 283 Va. 420, 425 (2012)).

²³ *Id.*; 2006 Op. Va. Att’y Gen. 101, 102.

²⁴ *Woods v. Mendez*, 265 Va. 68, 74-75 (2003).

²⁵ *GEICO Advantage Ins. Co. v. Miles*, 301 Va. 448, 455 (2022) (quoting *So. Ry. Co. v. Commonwealth*, 205 Va. 114, 117 (1964)).

Per its terms, the statute, as amended, prohibits a party from using a nominating process that has the “*practical effect* of excluding participation” by five enumerated categories of qualified voters.²⁶ Section 24.2-509(A) does not contain a *per se* prohibition against any particular method of nominating candidates. Rather, the focus of the prohibition is the “practical effect” of a particular method, if chosen. Accordingly, whether § 24.2-509(A) prohibits a particular nominating method depends on whether the process chosen, in practice rather than in theory, excludes participation by the covered voters.²⁷

I note that the new language of § 24.2-509(A) was enacted in the wake of the COVID-19 pandemic and the ensuing restrictions imposed on public gatherings. One effect of the amendment is to ensure a party selects a nomination method that does not have the practical effect of excluding those qualified voters, who despite otherwise being eligible to participate under party rules, would be unable to participate because of such restrictions. The statute, however, has broader effect in that it considers not only health-related concerns, but also other reasons that eligible participants might not be able to participate in a nominating process.

Participation in each of the above alternative nominating contests—party canvass, caucus, and convention—historically has depended on the participants’ personal attendance and physical presence: voters in a party canvass must physically cast their votes at designated locations and caucuses, and conventions often require attendance in person in a designated place and on a given date until a winner is declared. In amending § 24.2-509(A), the General Assembly afforded protection to voters whose physical presence is more likely to be rendered impractical due to their falling within one of the enumerated classes; accordingly, the new terms of the statute make clear that a political party may not use a nomination method that limits their participation by requiring them to be physically present at a designated location.²⁸

Section 24.2-509(A) encompasses more than simply physical presence: it forbids those nomination processes that have the “practical effect of excluding” covered voters from participation. To illustrate, I will comment on the first category of covered voters—active-duty members of the uniformed services—whose duty requirements can create substantial limitations on the ability to participate (or even communicate) with a party conducting its own nomination process. For example, an effort to allow participation remotely or through some form of absentee ballots necessarily would have to account for and allow participation of those serving in combat zones or deployed on submarines. I note that with regard to state-run primaries, the Department of Defense (DOD) and the Virginia Department of Elections make extraordinary efforts to address these challenges, including providing notice to servicemembers about voting options, expanded absentee ballot request deadlines, and an ability to request an absentee ballot electronically.²⁹ A political party’s failure to address these challenges in a like manner when nominating a

²⁶ Section 24.2-509(A) (emphasis added).

²⁷ I note that the respective political parties are responsible for funding any mechanisms that may be necessary to ensure their chosen alternative method comports with the law. *See Fitzgerald*, 285 F. Supp. 3d at 949 (“Virginia funds and conducts primaries and the Party funds and conducts other nomination methods.”).

²⁸ Ultimately, however, determining whether the law precludes the use of a specific method in nominating a candidate to fill a given vacancy would require an interpretation of the applicable party plans governing that method and a review of the attendant factual circumstances, and making such a determination is beyond the scope of an Opinion of this Office. The authority of this Office to render advisory opinions is limited to questions of law. *See, e.g.*, 2001 Op. Va. Att’y Gen. 73, 76. This Office is not authorized to opine on the construction of party rules, 1987-1988 Op. Va. Att’y Gen. at 358, or on matters that require factual determinations, *see, e.g.*, 2003 Op. Va. Att’y Gen. 95, 97.

²⁹ *See* U.S. DEP’T OF DEFENSE, FEDERAL VOTING ASSISTANCE PROGRAM (FVAP), *How to Vote Absentee in the Military*, <https://www.fvap.gov/military-voter/overview> (last visited Feb. 16, 2024); VA. DEP’T OF ELECTIONS,

candidate through an alternate method could have the practical effect of excluding participation by military personnel, in violation of § 24.2-509(A).³⁰

I must note an additional challenge specific to participation by active-duty members of a uniformed service. The DOD currently limits their ability to “engage in partisan political activity.”³¹ Per DOD Directive 1344.10, partisan political activity includes any “[a]ctivity supporting or relating to candidates representing . . . State political parties”;³² and “member[s] of the Armed Forces on active duty shall not . . . [p]articipate in partisan political fundraising activities . . . rallies, conventions . . . , management of campaigns, or debates, either on one’s own behalf or on that of another, without respect to uniform or inference of official sponsorship, approval, or endorsement.”³³ Participation beyond “mere attendance” and spectatorship at a convention is thus prohibited.³⁴ Accordingly, a nominating method—including a convention—that, by virtue of this regulation, operates to preclude participation by active-duty service members in the nominating selection process contravenes § 24.2-509(A): its “practical effect” is to exclude covered voters, irrespective of physical capacity.³⁵

In sum, as of January 1, 2024, political parties are prohibited by § 24.2-509(A) from using a nominating method to the extent the method, in effect, excludes participation of covered voters. Consequently, any nomination process, including a convention, that precludes them from participating in the nominating process—whether by requiring the voter’s physical presence at a designated location or other factor—is impermissible. As with many state laws regulating candidate nomination processes, current § 24.2-509(A) thus “enhance[s] the democratic character of the election process” by ensuring that eligible covered voters have access to candidate nomination procedures.³⁶

Military & Overseas, <https://www.elections.virginia.gov/casting-a-ballot/military-overseas/> (last visited Feb. 16, 2024). See also FVAP’s Virginia-specific guidance at <https://www.fvap.gov/guide/chapter2/virginia> (last visited Feb. 16, 2024). Regardless of where service personnel are stationed or deployed, they can thus obtain information about voting options and deadlines from these federal and state websites. I additionally note that Virginia’s Uniform Military and Overseas Voters Act also provides specific requirements for uniformed-service voters in state-run elections, including publication of election notices and timeliness of ballot applications from overseas military personnel. See VA. CODE ANN. §§ 24.1-451 to -470 (2016 & Supp. 2023).

³⁰ A party-run process similarly would need to address accessibility for voters with a disability. Notably, the Virginia Department of Elections offers guidance on how to address these issues in the context of conducting a state-run election. See VA. DEP’T OF ELECTIONS, 2023 *General Registrar and Electoral Board Handbook*, ch. 5 (Sept. 2023), [https://www.elections.virginia.gov/media/grebhandbook/2023-updates/5_Accessibility_final_\(2023\).pdf](https://www.elections.virginia.gov/media/grebhandbook/2023-updates/5_Accessibility_final_(2023).pdf). A party-run process that fails to address these issues could be found to have the practical effect of excluding participation by these voters.

³¹ Terri Moon Cronk, *Service Members, Civilians Bound by DOD Rules During Election Campaigns*, U.S. DEP’T OF DEFENSE (Sept. 8, 2020) (stating that “DOD policy for service members is contained in [DOD] Directive 1344.10”), <https://tinyurl.com/j99ya48b>.

³² U.S. DEP’T OF DEFENSE, Directive No. 1344.10, *Political Activities by Members of the Armed Forces* at § E2.5 (Feb. 19, 2008), <https://tinyurl.com/472zwyfa>.

³³ *Id.* at § 4.1.2.1.

³⁴ See *id.* (“Participation includes more than mere attendance as a spectator.”); see also *id.* at § 4.1.1.9 (authorizing attendance at political events, including conventions, when not in uniform).

³⁵ I discuss this scenario only to provide an example of how an alternative nomination method may run afoul of § 24.2-509(A); I caution that different problems may arise with respect to the effect of a particular method on a given class of covered voters. Analysis of all potential scenarios is beyond the scope of an Opinion. See *supra* note 28.

³⁶ See *Lightfoot*, 964 F.2d at 873.

Honorable C. Todd Gilbert
February 16, 2024
Page 6

Conclusion

Accordingly, it is my opinion that, under Code § 24.2-509(A), a political party may not select a nomination method, including a convention, that *de facto* requires covered voters to be physically present to participate or that otherwise has the practical effect of excluding their participation.

With kindest regards, I am,

Very truly yours,

A handwritten signature in blue ink, appearing to read "Jason S. Miyares". The signature is stylized with a large initial "J" and a long horizontal stroke.

Jason S. Miyares
Attorney General