V I R G I N I A:

IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND

A. DONALD McEACHIN, Senator of Virginia	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No.: CL _____
	)	
WILLIAM T. BOLLING,	)	
Lieutenant Governor of the Commonwealth of	)	
Virginia	)	
	)	
Defendant.	)	

PLAINTIFF A. DONALD McEACHIN'S MEMORANDUM IN SUPPORT OF MOTION FOR TEMPORARY INJUNCTION

Facts

Plaintiff A. Donald McEachin is an elected member of the Senate of Virginia ("Senate"). As a result of the November, 2011 election, the Senate will be evenly split down party lines; twenty Democrats and twenty Republicans will comprise the Senate as of January 11, 2012. In contravention of the Virginia Constitution, Defendant William T. Bolling, the Lieutenant Governor of Virginia, has publicly announced that he should be counted among other Senators. He has taken the position that he gives the Republicans a majority in the Senate, allowing them to organize the Senate unilaterally and to adopt their own version of the Rules of the Senate. The Lieutenant Governor also intends to vote on any matters before the Senate in which there is a tie vote, regardless of several restrictions in the Constitution.

In response, Plaintiff has filed a Complaint seeking a declaration that the Lieutenant Governor has no constitutional right to cast a tie-breaking vote on matters in three areas: (1) matters that require an affirmative vote of a "majority of the members elected to each house" or a

"majority of the elected membership" including, but not limited to, provisions in Va. Const. art. IV, § 6; Va. Const. art. IV, § 11; Va. Const. art. VI, §7; Va. Const. art. IX, § 1; Va. Const. art. X, § 9(b); and Va. Const. art. XII, § 1; (2) matters that pertain to the organization of the Senate, the election of Senate officers or the adoption of the Rules of the Senate; and (3) appointments, including confirmation of appointments made by the Governor. The Lieutenant Governor's right to vote on general legislation is not at issue.

Argument

I. STANDARD FOR TEMPORARY INJUNCTION.

While the Supreme Court of Virginia has not yet decided a case that delineates the standards to be applied in granting or denying a preliminary injunction, circuit courts have routinely adopted the standards used by the federal courts. To obtain a preliminary injunction, a plaintiff must "establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of the equities tips in his favor, and that an injunction is in the public interest." Winter v. NRDC, Inc., 555 U.S. 7, 20, 129 S. Ct. 365, 374 (2008). The Fourth Circuit expressly adopted this test, concluding that the "balance-of-hardship test" in Blackwelder Furniture Co. of Statesville v. Seilig Manufacturing Co., 550 F.2d 189 (4th Cir. 1977) "stands in fatal tension" with Winter. Real Truth About Obama, Inc. v. Fed. Election Comm'n, 575 F.3d 342, 346 (4th Cir. 2009), *vacated and remanded on other grounds*, 130 S. Ct. 876 (2010), *reissued in relevant part*, 607 F.3d 355 (4th Cir. 2010)). See also Kalos v. Greenwich Ins. Co., 404 Fed. Appx. 792, 793 (4th Cir. 2010).

Subsequently, this circuit court adopted the Winter four part test. Strong Found. Youth Initiative LLC v. Ashford, No. CL09-4538, 2009 Va. Cir. LEXIS 140, *1 (Richmond Cty. Nov. 4, 2009). Citing Real Truth About Obama, Judge Spencer listed the four factors, applied them to

the facts, and denied the defendant's motion to vacate an order granting a preliminary injunction. Id. at *2.

II. THE MOTION FOR A TEMPORARY INJUNCTION SHOULD BE GRANTED.

Under the Winter test, Plaintiff's motion for a temporary injunction should be granted. Plaintiff is likely to succeed on the merits at trial because Defendant is not authorized by the Virginia Constitution to break all tie votes. In the absence of temporary injunctive relief, Plaintiff is likely to suffer an irreparable harm. Plaintiff has a constitutional right and privilege to vote in the Senate and to have those votes be given effect. See Coleman v. Miller, 307 U.S. 433, 438, 59 S. Ct. 972, 975 (1938). Should Defendant cast wrongful tie-breaking votes, he would irreparably deny Plaintiff and his colleagues that right. Id. The balance of the equities tips in Plaintiff's favor and a temporary injunction serves the public interest by preventing the Defendant from casting unconstitutional votes and passing measures and legislation that may later need to be repealed and redone. Because Plaintiff satisfies all of the Winter requirements, this Court should enter a temporary injunction and prohibit Defendant from voting to break ties in the above described scenarios.

A. Plaintiff Is Likely to Succeed on the Merits at Trial.

After the 1995 election, which was the last time the Senate was equally divided, the Senators, including then freshman Senator Bolling, settled the Rules that would govern themselves and agreed to procedures for sharing power. Because no such deal has been struck this year, Plaintiff seeks a declaratory judgment from this Court. Consistent with the intent of the declaratory judgment statutes, Plaintiff seeks a declaration of his rights as a Senator before they mature. Liberty Mut. Ins. Co. v. Bishop, 211 Va. 414, 421, 177 S.E.2d 519, 524 (1970). A declaratory judgment would "guide [the] parties in their future conduct in relation to each other,

thereby relieving them from the risk of taking undirected action incident to their rights, which action, without direction, would jeopardize their interests." Id.

The Virginia Constitution provides that the Lieutenant Governor "shall have no vote except in case of an equal division." Va. Const. art. V, § 14. However, an equal division in the Senate does not necessarily empower the Lieutenant Governor to vote. In an analogous situation involving a county board of supervisors, the Virginia Supreme Court held that the designated tie-breaker "was not by his designation as such made a *member* of the board of supervisors . . . ." Smiley v. Commonwealth, 116 Va. 979, 985, 83 S.E. 406, 408 (1914) (emphasis added). Pursuant to an act of the General Assembly, the supervisors of a county could appoint a superintendent of roads "by the vote of a majority of all the supervisors of the county." Id. at 980, 83 S.E. at 407. The plaintiff and his opponent each received three of the six board members' votes and the tie-breaker, designated pursuant to section 832 of the Virginia Code, cast a vote for the plaintiff's opponent. Id. at 981, 83 S.E. at 407. Pursuant to section 832, "in any case in which there shall be a tie vote on any question, . . . the person to be designated as hereinafter provided, shall give the casting vote and thereby decide the question." Id.

Although section 832 referred to "any case" and "any question," the Supreme Court held that it did not apply to the appointment of the superintendent of roads. Id. at 984, 83 S.E. at 408. The language of the act permitting the board of supervisors to appoint a superintendent of roads was clear, and when a charter uses "language evincing an intention to depart from the rule of the common law that a majority of a quorum present is sufficient, . . . a majority of the entire board or council must concur in voting upon the proposition before it." Id. at 983, 83 S.E. at 407 (quoting Dillon Mun. Corp. § 530 (5th ed.)). See also Hammer v. Commonwealth *ex rel.* Hoover, 169 Va. 355, 365, 193 S.E. 496, 500 (1937) ("The conclusion is inevitable that by using

the language it did, the legislature intended that there should be no valid election, unless five councilmen voted in favor of one nominee."). Like the tie-breaking mayor in Hammer, Lieutenant Governor Bolling "takes nothing beyond the powers expressly conferred or necessarily implied from the language used." Id. Thus, the Lieutenant Governor does not have carte blanche authority to break any tie vote.

In fact, certain bills, like the appointment of a superintendent of roads in Smiley, must be approved by "the affirmative vote of a majority of all the *members elected* to each house . . . ." Va. Const. art. IV, § 11 (emphasis added). Those bills include any bill which

> creates or establishes a new office, or which creates, continues, or revives a debt or charge, or which makes, continues, or revives any appropriation of public or trust money or property, or which releases, discharges, or commutes any claim or demand of the Commonwealth, or which imposes, continues, or revives a tax . . . .

Id. See also Va. Const. art. IV, § 6 (to extend reconvened session); Va. Const. art. VI, § 7 (to select justices of the Supreme Court of Virginia and judges of courts of record); Va. Const. art. IX, § 1 (to increase the size of the State Corporation Commission); Va. Const. art. X, § 9(b) (to pledge the full faith and credit of the Commonwealth for capital projects); Va. Const. art. XII, § 1 (to propose amendments to the Constitution). In all such measures, the Lieutenant Governor has no role. The measure simply fails if it does not receive the affirmative vote of at least 21 elected Senators. Moreover, the appendix to the present Rules of the Senate enforces the Constitution's provisions that certain measures require the support of at least 21 elected members of the Senate.

There is nothing in the Constitution that gives the Lieutenant Governor a role in the Senate's responsibility to select its officers and settle its Rules. Rather, "[e]ach house shall select its officers and settle its rules of procedure. . . . Each house shall judge of the election, qualification, and returns of its members, may punish them for disorderly behavior, and, with the

concurrence of two-thirds of its elected membership, may expel a member." Va. Const. art IV, § 7. Where the Constitution does not set forth the requirements of a certain vote, it is up to the Senate through its own Rules to determine the procedures for such vote and whether the Lieutenant Governor may cast a tie-breaking vote. 1979-1980 Op. Att'y Gen. Va. 178. As the Attorney General noted, "[t]he Virginia Constitution provides that each house shall 'settle its rules.'" Id. (citing 1977-1978 Op. Att'y Gen. Va. 31, 33 ("It must remain the responsibility of the General Assembly to settle and enforce its own rules of procedure.")). Because the Constitution does not address the number of votes required to select officers, organize committees, or make or confirm appointments, such matters are determined by the Rules of the Senate to be decided by the *elected* Senators. It is noteworthy that under the current Rules of the Senate, motions to amend or suspend the rules require the affirmative vote of two-thirds of the elected Senators. Senate Rules, art. XV, § 48. Thus, the Lieutenant Governor should not play a role in deciding the Rules of the Senate.

Several Virginia Attorneys General have issued opinions clarifying the Lieutenant Governor's role in the Senate. In 1980, Republican Attorney General Marshall Coleman concluded that "the Lieutenant Governor is not a member of the Senate for purposes of Article IV § 11," which provides that no bills dealing with certain subject matters (largely financial) shall be passed except by affirmative vote of a majority of all the members elected to each house. 1980-1981 Op. Att'y Gen. Va. 97. In 1996, Republican Attorney General James S. Gilmore, III confirmed that "the Lieutenant Governor may not vote on bills and resolutions encompassed within the constitutional provisions [which require the affirmative vote of a "majority vote of all members."]." 1996 Op. Att'y Gen. Va. 31.

Attorney General Coleman's opinion should be "given great weight when the General Assembly has not contradicted it." Id. (citing County Board v. Brown, 229 Va. 341, 347, 329 S.E.2d 468, 472 (1985)). Given the fact that the General Assembly, despite introducing over 20 amendments to the Constitution, has taken no action to contradict the opinion, it should be regarded as "decisive." Id.

Previous Lieutenant Governors have recognized the limited nature of their role in the Senate. In the 1977 session, the Lieutenant Governor ruled that the affirmative vote of a majority of the members elected to the Senate was required to adopt an amendment to a joint resolution offered to amend the Constitution of Virginia. J. Sen. Va., at 232–34 (1977). And, at the 1991 session, the Lieutenant Governor ruled that a majority of the members elected was required to adopt a motion to reconsider a vote by which the Senate had agreed to House amendments to a tax bill. J. Sen. Va., at 769–70 (1991).

Similarly, previous Governors have recognized that Lieutenant Governors cannot cast tie-breaking votes on all matters. When it appeared that Democratic Lieutenant Governor Don Beyer Jr. might break tie votes regarding the approval of judges, Republican Governor George Allen threatened to block the installation of any judge so approved. Jeff E. Schapiro, *Lacking Votes, Democrats Could Fight GOP with the Law*, Richmond Times-Dispatch, Nov. 13, 2011. Governor Allen's reasoning was that only "members elected" to the legislature could select judges under the Virginia Constitution. Id.

More importantly, previous Lieutenant Governors have recognized their limited voting privileges even in matters that did *not* require a "majority" of the Senate's approval. In 1994, the Lieutenant Governor ruled that "final adoption of a resolution nominating a person to be elected to the Workers' Compensation Commission required a majority vote of the members elected to

each house." 1996 Op. Att'y Gen. Va. 31 (citing J. Sen. Va., at 1549–50 (1994)). The Virginia Code makes no mention of a majority vote; it requires "the joint vote of the two houses of the General Assembly" to choose a member of the Commission. Va. Code Ann. § 65.2-200 (2011). For all these reasons, it is likely that Plaintiff will succeed on the merits.

B. Plaintiff Will Suffer Irreparable Harm in the Absence of Temporary Relief.

Plaintiff will suffer irreparable harm in the absence of temporary relief. Plaintiff has good reason to believe that Defendant intends to exercise unconstitutional authority. Defendant has made it clear that he intends to vote to break ties in the Senate on matters outside the scope of his Constitutional authority. He recently said "[t]here is absolutely no doubt in my mind that I can vote on [the matter of Senate organization] should it result in a tie vote." Laura Vozzella, *Virginia Democrats Look to Courts to Stop GOP Senate Takeover*, Wash. Post, Nov. 21, 2011.

Such conduct violates Plaintiff's rights. In reviewing the Kansas Senate's vote to ratify the Child Labor Amendment, the United States Supreme Court determined that the Lieutenant Governor's tie-breaking vote denied the Senators' right to have their votes given effect. Their "votes against ratification [had] been overridden and virtually held for naught" and the Court concluded that the Senators had "a plain, direct and adequate interest in maintaining the effectiveness of their votes." Coleman v. Miller, 307 U.S. 433, 438, 59 S. Ct. 972, 975 (1939), *abrogated as stated in* Tucson Women's Ctr. v. Ariz. Med. Bd., No. CV-09-1909-PHX-DGC, 2009 U.S. Dist. LEXIS 113948, at *12–13 (D. Ariz. Nov. 24, 2009). Plaintiff and his colleagues in the Virginia Senate are no different from the Kansas Senators. They, too, have a right to have their votes given effect and Defendant's purported tie-breaking vote in these matters would deny them that right.

Should the temporary injunction be denied and Defendant cast such a vote, it is not clear what could be done to return the Senate to the status quo. Indeed, avoiding such irreparable harm and preserving the relative positions of the parties until a trial on the merits can be held is the very purpose of a temporary injunction. Capital Tool & Mfg. Co., Inc. v. Maschinenfabrik Herkules, 837 F.2d 171, 172 (4th Cir. 1988).

C. The Balance of Equities Tips in Favor of an Injunction.

Granting a temporary injunction places a low burden on Defendant. Because he has no explicit constitutional authority to cast a vote in these three types of matters, a temporary injunction will not cause him any harm. For Defendant, the most serious harm would be that he has to wait for the court to hear the merits of this matter before casting a tie-breaking vote.

On the other hand, there is a very high possibility of serious harm to Plaintiff if the temporary injunction is denied. As described above, Senators have a right to have their votes given effect and that right would be irreparably denied by Defendant's wrongful assertion of a tie-breaking vote. Moreover, Plaintiff has a strong interest in preventing Defendant from exercising unconstitutional authority. Plaintiff, like every other officer of the Commonwealth, swore to support the Constitution of Virginia to the best of his ability. Va. Code Ann. § 49-1 (2011). Thus, the balance of the equities tips in favor of Plaintiff.

D. An Injunction is in the Public Interest.

The public has an undeniable interest in ensuring the constitutionality of elected officials' conduct. Indeed, every citizen has the right "to require that the Government be administered according to the law." Fairchild v. Hughes, 258 U.S. 126, 129, 42 S. Ct. 274, 275 (1922). The legislative process is no exception. The very purpose of a congressional body is to afford citizens some power in their government through representation. The notion that any one person,

even a Lieutenant Governor, may impede congressional representation simply defies logic. Certainly, the public interest is served by protecting these sacred and central democratic ideals.

In addition, the public has an interest in maintaining the separation of powers between the executive and legislative branches of government. The Virginia Constitution provides that "[t]he legislative, executive, and judicial departments shall be separate and distinct, so that none exercise the powers properly belonging to the others, nor any person exercise the power of more than one of them at the same time; . . . ." Va. Const. art. III, § 1. There can be no doubt that Defendant is properly a member of the executive branch. In general, should the Governor be removed from office or "in the case of his disqualification, death, or resignation, the Lieutenant Governor shall become Governor." Va. Const. art. V, § 16. The Lieutenant Governor is "of course, one of the officers of the Executive Department." 1927-1928 Op. Att'y Gen. Va. 180. And Lieutenant Governor Bolling is, in particular, a member of the Governor's cabinet, having been appointed Chief Jobs Creation Officer by Governor McDonnell. In that capacity, he is responsible for coordinating the Commonwealth's economic development programs across numerous state agencies.

Despite the 20-20 split in the Senate, Defendant proclaimed "[m]ake no mistake about it – there is a Republican majority in the state Senate" and predicted that "[h]aving a majority will make it easier to get our agenda through the next two years." Anita Kumar, *What a Republican Senate Means for Virginia*, Wash. Post, Nov. 9, 2011. The only explanation for Defendant's statements is that he believes that he should be counted as a member of the Senate.

Defendant is not a member of the Senate, nor should he be counted as one when determining a majority party. Rather, the Senate consists of "*not more than forty* and not less than thirty-three members, who shall be elected quadrennially by the voters of the several

senatorial districts . . . ." Va. Const. art. IV, § 2 (emphasis added). Although he is the President of the Senate and has the power to break ties under certain circumstances, Va. Const. art. V, § 14, Defendant is not one of the forty elected members of the Senate. "For all other purposes, the Constitution treats the Lieutenant Governor as part of the Executive Branch." 1980-1981 Op. Att'y Gen. Va. 97. To count him as a member of the legislative branch is unconstitutional: "to treat the Lieutenant Governor as a member of the Senate would at the present time give the Senate 41 members, something *prohibited* by Art. IV, § 2." Id. (emphasis added). If Defendant were counted as a Senator for purposes of determining the majority and organizing the Senate, he would effectively act as a member of the Senate while he is serving as Lieutenant Governor, an executive department position, in violation of the Constitution of Virginia.

Having distinct branches of government has been a cornerstone of our system of government, for "even before the birth of this country, separation of powers was known to be a defense against tyranny." Loving v. United States, 517 U.S. 748, 756, 116 S. Ct. 1737, 1743 (1996) (citing Montesquieu, The Spirit of the Laws 151–52 (T. Nugent trans. 1949); William Blackstone, 1 Commentaries *146-147, *269-270). Further, "freedom is imperiled if the whole of the legislative, executive, and judicial power is in the same hands." Id. (citing The Federalist No. 47, pp. 325-326 (J. Madison) (J. Cooke ed. 1961)). Allowing Defendant to act as a member of both the executive and legislative departments flies in the face of these sound and long followed principles.

Conclusion

For the foregoing reasons, Plaintiff requests that this Court enter an injunction order that prohibits Defendant from casting a tie-breaking vote in (1) matters that require an affirmative vote of a "majority of the members elected to each house" or a "majority of the elected

membership"; (2) matters that pertain to the organization of the Senate, the election of Senate officers or the adoption of the Rules of the Senate; and (3) appointments, including confirmation of appointments made by the Governor until a full hearing on the merits can be held, and to take other action required to enforce the Court's temporary injunction.

Respectfully submitted,

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