UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
Lynchburg Division

LEAGUE OF WOMEN VOTERS OF VIRGINIA; KATHERINE D. CROWLEY; SEIJRA TOOGOOD; GAYLE HARDY; CAROL D. PETERSEN; and TRACY SAFRAN, **Plaintiffs,** **v.** **VIRGINIA STATE BOARD OF ELECTIONS; ROBERT H. BRINK, JOHN O'BANNON, and JAMILAH D. LECRUISE, in their official capacities as Chairman, Vice-Chair, and Secretary of the Virginia State Board of Elections, respectively; and CHRISTOPHER E. PIPER, in his official capacity as Commissioner of the Virginia Department of Elections,** **Defendants,** **REPUBLICAN PARTY OF VIRGINIA,** **Intervenor-Defendant.**	**Case No. 6:20-cv-00024-NKM-RSB**

PLAINTIFFS' RESPONSE TO COURT'S ORDER TO RESPOND (ECF NO. 120)

In response to the Court's inquiries in its December 18 Order and as detailed further below, with respect to Issue 2, Plaintiffs have standing to seek the relief requested through the Amended Consent Decree in two independent ways. The League has associational standing because of affected League of Women Voters of Virginia ("League") members who are likely to vote in the January 5, 2021 special elections, and organizational standing due to the diversion of League resources from other organizational priorities to educate voters about a reinstated witness

requirement for both the January and February special elections. In terms of Issue 3, despite one general thematic statement in the complaint's introduction and a statement as to one aspect of injunctive relief referring only to 2020 elections, Plaintiffs request both declaratory and injunctive relief without limitation to the 2020 elections so long as "emergency orders by Virginia or federal authorities regarding COVID-19 transmission are in effect and/or while public health officials continue to recommend social distancing practices due to risk of community transmission of COVID-19." ECF No. 84 at 34 ¶¶ A, B1. Plaintiffs understand that Defendants intend to respond to Issue 1 concerning absentee ballot instructions, and defer to their answer due to their superior knowledge and access.

I. Regarding Issue 2, Plaintiffs Have Associational Standing to Pursue Claims Regarding the January 2021 Special Elections and Organizational Standing to Pursue Claims Regarding the January and February 2021 Special Elections.

When organizations seek injunctive relief, they may ground standing on at least two theories. First, organizational plaintiffs may "have associational standing to sue 'on behalf of [their] members when [their] members would otherwise have standing to sue in their own right.'" *Sierra Club v. U.S. Dep't of the Int.*, 899 F.3d 260, 282 (4th Cir. 2018) (*quoting Friends of the Earth, Inc. v. Laidlaw Envt'l Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000)). Second, when challenged practices "perceptibly impair[]" an organization's ability to carry out some of its activities and thus its mission, leading to a "consequent drain on the organization's resources," "there can be no question that the organization has suffered injury in fact" and not merely a "setback to the organization's abstract social interests." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982); *see also League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 9 (D.C. Cir. 2016) (noting irreparable harm based on legal barriers that "ma[de] it more difficult for [the organization] to accomplish their primary mission of registering voters"). The League has standing

to seek relief for the January special elections under both theories, and for the February special elections based on organizational standing.

The League has at least six members who live in the 90th House of Delegates District, and at least three members who live in the 2nd District. *See* Decl. of Debora Wake ¶ 2 (attached as Ex. A). Most if not all of those members are likely to vote in the January special elections, some of them by absentee ballot. *Id.* And for those who live alone and are practicing social distancing and/or isolating, they are part of the "substantial and discrete class of Virginia's electorate" for whom having to closely interact with an individual outside of their household during an unprecedented wave of COVID-19 infections "creates a burden . . . [that] is not justified . . . in face of the risk posed by COVID-19." Mem. Opinion, ECF No. 109 at 15.

For example, League member Barbara Sears lives by herself in the 90th District, is recovering from cancer and has a weakened immune system due radiation and chemotherapy she underwent earlier this year, and wants to vote in the January 2021 special election by absentee ballot. Decl. of Barbara Sears ¶ 5 (attached as Ex. B). She avoids close contact with other people due to these risks and does not even conduct in-person grocery shopping. *Id.* ¶ 3. The waiver of witness-requirement enforcement for the November election was vital to her ability to safely vote, and the same remains true for January. *Id.* Without the relief requested, she will face a serious risk to her health not to mention difficulty finding someone appropriate to witness her absentee ballot in the limited timeframe before the election and once her absentee ballot arrives. *Id.* ¶¶ 4–5. And Ms. Sears is certainly not alone in this situation based on the League's knowledge of its members' and other voters' concerns. Wake Decl. ¶ 4; Sears Decl. ¶ 6. Because the League has members who reside these districts and intend to vote absentee in the January special elections but face irreparable harm to either their health or vote if the witness requirement is not enjoined, it has

associational standing at least for purposes of the January special elections. *See Sierra Club*, 899 F.3d at 282.

The League also has organizational standing to seek relief for both the January and February elections because absent relief, it will need to divert scarce resources from mission-critical and time-sensitive programs to educate voters in the affected districts and counties about the reinstatement of the witness requirement. *See Havens Realty*, 455 U.S. at 379; *League of Women Voters of U.S.*, 838 F.3d at 9. Based on the worsening rates of COVID-19 transmission and the League's experience in November, many Virginia voters will likely want to vote absentee in the January and February special elections. *See* Wake Decl. ¶ 5. And because the witness requirement was not enforced in the November election, many voters will likely not be aware that it is reinstated for the January and February special elections. *Id.* ¶ 6. For these reasons, it is particularly important to the League's mission that it conduct education campaigns about the need to find a witness if the consent decree is not amended. *Id.* Despite not having a record of dues-paying members in Southampton or King George County, the League exists to educate voters and encourage voting across the Commonwealth, so would have to undertake education campaigns directed to voters in those counties as well as to voters in the affected House of Delegates districts. *Id.* ¶ 8.

If the League has to conduct these education efforts, however, it will divert from and harm its efforts regarding other important and time-sensitive priorities. Specifically, the General Assembly session begins in January and the League's efforts to advocate for legislative priorities are already well underway, including advocating for long-term changes to the witness requirement, use of drop boxes, and curing of absentee ballots. Wake Decl. ¶ 7. Additionally, the South Hampton Roads local league is trying to organize candidate forums for the upcoming elections on

a tight timeline, and any time it will have to spend educating voters about a reinstated witness requirement will make forum-planning efforts more difficult and strain resources. *Id.* These resource diversions will harm other organizational priorities of the League and thus are "perceptibl[e] impair[ments]" and not merely a "setback" to the League's "abstract social interests." *Havens Realty*, 455 U.S. at 379. Additionally, opportunities lost to advocate for passage of priority legislation during the General Assembly's part-year session are opportunities lost forever with respect to 2021 elections and thus an irreparable harm. *See League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) ("once the election occurs, there can be no do-over and no redress"); *cf. League of Women Voters of Fla. v. Browning*, 863 F. Supp. 2d 1155, 1167 (N.D. Fla. 2012) ("when a plaintiff loses an opportunity to register a voter, the opportunity is gone forever").

Because both the specific League members and the League itself will be harmed by the enforcement of the witness requirement for the January and February special elections and because the relief requested would remedy that harm, the League has standing to pursue claims relating to these special elections.

II. Regarding Issue 3, Construing their Complaint to Do Justice as Rule 8(e) Requires, Plaintiffs Adequately Seek Injunctive and Declaratory Relief Beyond 2020 Elections.

As this Court has held, pleadings "'must be construed so as to do justice,' and '[a]n overly restrictive reading of a complaint is inconsistent with th[is] mandate.'" *King v. S & S Foods, LLC*, No. 6:14-CV-00014, 2014 WL 6609115, at *4 (W.D. Va. Nov. 20, 2014) (quoting Fed. R. Civ. P. 8(e) and *Starks v. Perloff Bros., Inc.,* 760 F.2d 52, 55 (3d Cir. 1985)). The Court correctly notes that one paragraph in the introduction section of Plaintiffs' second amended complaint and one sub-paragraph of the injunctive relief request refer only to 2020 elections, but other paragraphs seeking declaratory and injunctive relief more broadly refer to elections occurring while

emergency orders and social distancing guidance are in effect due to COVID-19, and thus extend beyond the 2020 elections. Reading the complaint "so as to do justice," Fed. R. Civ. P. 8(e), and incidental to the injunctive and declaratory relief requested beyond 2020, Plaintiffs have sufficiently pled an entitlement to relief beyond just 2020 elections.

In the Second Amended Complaint, the Plaintiffs requested, among other relief: (1): a declaration that "Virginia's enforcement of the witness requirement . . . while emergency orders by Virginia or federal authorities regarding COVID-19 transmission are in effect and/or while public health officials continue to recommend social distancing practices due to risk of community transmission of COVID-19" is unconstitutional, ECF No. 84 at 34 ¶ A; (2) an injunction "[p]rohibiting Defendants from enforcing the witness requirement . . . while emergency orders concerning COVID-19 are in place and/or while public health officials continue to recommend social distancing practices due to risk of community transmission of COVID-19," *id.* ¶ B2; and (3) "other and further relief as this Court deems just and proper in the circumstances," *id.* at 35 ¶ E. These requests are sufficient to allow for the requested relief for several independently sufficient reasons.

First, "district courts whose equity powers have been properly invoked . . . have discretion in fashioning injunctive relief." *United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 495 (2001); *see also Dixon v. Edwards*, 290 F.3d 699, 710 (4th Cir. 2002) ("When a district court grants an injunction, the scope of such relief rests within its sound discretion."). Plaintiffs properly requested an injunction against enforcement of the witness requirement and other relief the Court deems proper not just for 2020 elections, but so long as emergency orders and public-health recommendations concerning social distancing practices due to COVID-19 are in effect. Although the specific request for an injunction regarding instructions to local election officials inadvertently

refers only to 2020 elections, Plaintiffs' invocation of broader injunctive relief and its request for any other relief the Court deems just and proper is sufficient to allow for entry of the amendment to the consent decree in the Court's discretion. *See Dixon*, 290 F.3d at 710.

Moreover, by agreeing to the amended partial consent decree, Defendants have not taken issue with Plaintiffs seeking relief beyond 2020. Indeed, all parties including the Intervenor-Defendants agreed to a scheduling order that sets the trial in this case for May 2021. *See* ECF No. 77. Had any of the parties believed that Plaintiffs sought relief limited to 2020 elections, it is reasonable to believe none would have agreed to such a schedule.

Second, in addition to one of the two portions of Plaintiffs' injunctive relief request, Plaintiffs' request for declaratory relief was not restricted to 2020. Other than the unavailability of "contempt proceedings" to enforce it, a "declaratory judgment . . . has the same effect as an injunction in fixing the parties' legal entitlements," *Badger Catholic, Inc. v. Walsh*, 620 F.3d 775, 782 (7th Cir. 2010), and the "practical effect of the two forms of relief [are] be virtually identical," *Samuels v. Mackell*, 401 U.S. 66, 73 (1971). And when governmental parties are defendants in a case, the Court should presume that they will "adhere to the law as declared by the court." *Comm. on Jud. of U.S. H.R. v. Miers*, 542 F.3d 909, 911 (D.C. Cir. 2008); *see also id.* (explaining that the court has "long presumed" that because "officials of the Executive Branch" will adhere to a declaratory judgment, such a judgment "is the functional equivalent of an injunction"). By virtue of their agreement to the amended consent decree and their status as State Executive Department officials, it is clear that the relief requested in the Second Amended Complaint is sufficient to allow the Court to bind Defendants.

Finally, the "court should freely give leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a)(2). The "general policy embodied in the Federal Rules favoring resolution of cases

on their merits" also supports freely allowing amendments. *Davis v. Piper Aircraft Corp.*, 615 F.2d 606, 613 (4th Cir. 1980). As such, the Fourth Circuit has directed that "absence of prejudice, though not alone determinative, will normally warrant granting leave to amend." *Id.* Here, if the Court concludes that the operative complaint does not sufficiently invoke the Court's authority to grant the requested relief, Plaintiffs respectfully seek leave to amend the complaint to remove the two limiting references to the 2020 elections and substitute language similar to that in paragraphs A and B.1 of the relief requested. No other parties would face prejudice due to this amendment as they have already agreed to a schedule that contemplates relief beyond the 2020 elections, and discovery is still open.

For each of these independent reasons, Plaintiffs believe they have requested sufficiently broad relief to allow the Court to enter the amended consent decree if it determines the amendment is fair, reasonable, adequate, and in the public interest.

Dated: December 21, 2020

Respectfully submitted,

/s/ Davin M. Rosborough
Davin M. Rosborough (VSB # 85935)
Dale E. Ho*
Sophia Lin Lakin*
Theresa J. Lee*
Adriel I. Cepeda-Derieux*
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Tel.: (212) 549-2500
drosborough@aclu.org
dho@aclu.org
slakin@aclu.org
tlee@aclu.org
acepedaderieux@aclu.org

Vishal Agraharkar (VSB #93265)
Eden Heilman (VSB #93554)

AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF AMERICA, INC.
701 E. Franklin Street, Suite 1412
Richmond, Virginia 23219
Phone: (804) 644-8080
Fax: (804) 649-2733
vagraharkar@acluva.org
eheilman@acluva.org

Attorneys for Plaintiffs

*Admitted *pro hac vice*.

CERTIFICATE OF SERVICE

I certify that on December 21, 2020, I served a copy of the foregoing Plaintiffs' Response to the Court's Order to Respond via filing with the Court's CM/ECF system, which sent copies of this document to Counsel of Record.

/s/ Davin M. Rosborough
Davin M. Rosborough (VSB # 85935)
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Tel.: (212) 549-2500
drosborough@aclu.org

Counsel for Plaintiffs