

United States District Court  
for the Western District of Virginia  
Lynchburg Division

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**League of Women Voters of Virginia; Katherine D. Crowley; Erikka Goff; and Seijra Toogood,,**

*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.*

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**Civ. No. 6:20-cv-00024**

**Brief in Support of Motion to Intervene**

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On April 17, 2020, Plaintiffs League of Women Voters of Virginia, Katherine D. Crowley, Erikka Goff, and Seijra Toogood filed a *Complaint for Injunctive and Declaratory Relief*. (Doc. 1). Plaintiffs seek an order from this Court eliminating the witness requirements for absentee voting. (*Id.*)

Plaintiffs’ requested relief violates Voters’ fundamental right to vote. Accordingly, Sheila DeLappe Ferguson, Sandy Burchett, and Diane Crickenberger (collectively “Voters”) timely request to intervene in this action to protect their fundamental Constitutional right to vote as registered voters in Virginia elections.

**Background on Proposed Intervenors**

1. Sheila DeLappe Ferguson is a resident of Appomattox County, Virginia. She is a registered and eligible voter with a political party. Ms. Ferguson intends to vote in the next election. She has been a resident of Virginia for 56 years.

2. Sandy Burchett is a resident of Appomattox County, Virginia. She is a registered and eligible voter with a political party. Ms. Burchett intends to vote in the next election. She was a reading tutor in the County for 10 years.

3. Diane Crickenberger is a resident of Bedford County, Virginia. She is a registered and eligible voter with a political party. Ms. Crickenberger intends to vote in the next election. She is a business owner.

### **Argument**

Intervention is permitted if a movant meets the requirements of Fed. R. Civ. P. 24. As shown below, Voters meet these requirements and should be permitted to intervene.

#### **I. The voters are intervenors by right.**

Fed. R. Civ. P. 24(a) provides that:

on timely motion, the court **must** permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest, unless existing parties adequately represent that interest.

(emphasis added). Thus, there are three primary criteria that the movant must show to qualify for intervention of right: timeliness, an interest in the action, and the possibility that the action would, as practical matter, impair the movant’s ability to protect that interest. There is also an exception, under which the court is not required to permit intervention where “existing parties adequately represent [the movant’s] interest.” Here, Voters meet all three primary criteria, and the exception does not apply.

#### **A. Voters’ motion is timely.**

Voters’ Motion is made within a reasonable time. “Rule 24 is silent as to what constitutes

a timely application and the question must therefore be answered in each case by the exercise of the sound discretion of the court.” *Black v. Cent. Motor Lines, Inc.*, 500 F.2d 407, 408 (4th Cir. 1974). “The most important consideration is whether the delay has prejudiced the other parties.” *Spring Constr. Co. v. Harris*, 614 F.2d 374, 377 (4th Cir. 1980).

Here, Plaintiffs filed their Complaint on April 17, 2020. The Voters have moved to intervene less than a week later, and before any Answer has been filed. Thus, there has been no delay, nor any prejudice.

**B. Voters have an interest in this action.**

There can be no doubt that Voters have an interest in this action. The federal right to vote is fundamental, *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 667 (1966), and well-established: “Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections” and to have that vote counted. *Reynolds v. Sims*, 377 U.S. 533, 554 (1964). “The right to vote can neither be denied outright, nor destroyed by alteration of ballots, nor diluted by ballot-box stuffing.” *Id.* at 555 (internal citations omitted). “And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.” *Id.* The right to vote inheres in, and is protected by, the First and Fourteenth Amendments of the U.S. Constitution. Virginia also recognizes the right to vote. *See Va. Const. Art. II, § 1* (detailing the qualifications of voters).

The requested relief would violate Voters’ fundamental right to vote, thereby creating a valid interest in this action.

**C. The requested relief impairs and impedes Voters' ability to protect their interests.**

Voters' ability to protect their interest would be impaired or impeded by disposition of Plaintiffs' action. Plaintiffs have requested that this Court eliminate the witness requirement for absentee ballots. This requested relief violates Voters' fundamental right to vote by violating: (1) controlling legislation and stripping vital safeguards against voting fraud, (2) the right to vote under the *Purcell* principle, and (3) the Voters' right to have, and to vote in, federal elections with the manner of election chosen by the legislature. *See* Part II.A.

But without intervention, Voters have no ability to protect their interests. And if Plaintiffs were to succeed in obtaining their requested relief, Voter's interests would be significantly impaired and impeded. For this reason, Voters should be permitted to defend their fundamental right to vote in the present action.

**D. The "adequately represented" exception does not apply.**

The "adequately represent[ed]" exception in Rule 24(a) has nothing to do with the skill or diligence of the attorneys who would be representing the parties generally sharing the same side of the case as the parties seeking to intervene. Instead, under this prong, it must simply be "shown that representation of its interest 'may be' inadequate." *United Guar. Residential Ins. Co. v. Phila. Sav. Fund Soc'y*, 819 F.2d 473, 475 (4th Cir. 1987) (citing *Trbovich v. UMW*, 404 U.S. 528, 538, n. 10 (1972)). Moreover, "the burden of making this showing should be treated as 'minimal.'" *Id.* at 475.

Most importantly, in explaining *Trbovich*, the Fourth Circuit said:

*Trbovich* recognized that when a party to an existing suit is obligated to serve *two distinct interests*, which, although related, are not identical, another with *one of those interests* should be entitled to intervene. ... The test used by the Court in that case

was to inquire whether each of the dual interests may “always dictate precisely the same approach to the conduct of the litigation.”

*United Guar.*, 819 F.2d at 475 (quoting *Trbovich*, 404 U.S. at 459) (emphasis added).

These circumstances apply here. First, Voters are representing their own interests, not the interests of the Commonwealth or the Department of Elections. That interest is their own fundamental right to vote. *See* Part I.B. Second, while State Defendants have not yet answered, State Defendants will be responsible for defending Virginia’s statutes and regulations as well as any interests the State Defendants may have with respect to administrative procedures in the conduct of elections. These are different interests than Voters represent. But, even if the individual rights of Voters are added to the interests being represented by State Defendants, they are still representing multiple interests, whereas Voters are representing only one. Thus, it is no slight to Defendants or their counsel to note that, while some of State Defendants’ efforts may at times be useful or beneficial to Voters, “they may not always dictate precisely the same approach to the conduct of the litigation.” *Trbovich*, 404 U.S. at 539. Third, State Defendants’ position regarding the interpretation of “[m]y disability or illness” is adverse to Voters’ position. Because State Defendants’ unlawful interpretation is unconstitutional in violation of the First and Fourteenth Amendments to the U.S. Constitution and Article I, section 4, clause 1 of the U.S. Constitution, Voters seek to assert a cross claim against State Defendants in their Answer to Plaintiffs’ Complaint for Injunctive and Declaratory Relief.

Thus, this final prong is met as well.

## **II. In the alternative, the voters meet all the requirements for permissive intervention.**

Even if this Court determines that Voters cannot intervene as of right, Voters qualify for

permissive intervention. Fed. R. Civ. P. 24(b) provides that on “timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact.” “In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties’ rights.” *Id.* at 24(b)(3).

**A. The Voters’ defenses and claims share a common question of law with the main action.**

If permitted to intervene, Voters would make at least the following defenses and claims—all of which share a common question of law with the main action.

**1. The requested relief violates controlling legislation and strips vital safeguards against voting fraud.**

The Virginia Legislature has enacted detailed legislation governing how elections are to be conducted—with vital safeguards against voting fraud—in Va. Code § 24.2 (titled “Elections”). In asking this Court to remove the witness requirements, Plaintiffs have requested that this Court eliminate one of these vital safeguards. Since the requested relief dispenses with current statutory protections against illegal voting found in absentee voting law, the requested relief is a cognizable dilution of the votes of eligible, registered voters such as intervenor Voters.

This violation of Voters’ right to vote by dilution is made clear in *Reynolds* and *Bush*. In *Reynolds v. Sims*, 377 U.S. 533 (1964), the Supreme Court held that “the right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.” 377 U.S. at 554. “[A]n individual’s right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State,” *id.* at

568. And in *Bush v. Gore*, 531 U.S. 98 (2000), the Supreme Court highlighted the fact that the Florida Supreme Court’s order lacked the necessary “safeguards” to assure confidence in the outcome.<sup>1</sup> 531 U.S. 98, 109 (2000) (per curiam). That mandate to maintain “safeguards” to assure confidence in the election is particularly relevant here. Under *Reynolds* and *Bush* it is readily seen that vote dilution cannot be justified, as would occur here if the witness requirement were removed.

Similarly, the Seventh Circuit recently stayed an injunction by the U.S. District Court for the Western District of Wisconsin because it had given inadequate attention to the interest in preventing voter fraud by eliminating the witness requirement for absentee-ballot signatures: “This court is concerned with the overbreadth of the district court’s order, which categorically eliminates the witness requirement applicable to absentee ballots and gives no effect to the state’s substantial interest in combating voter fraud.” *Democratic National Committee v. Bostelmann*, slip op. 3,<sup>2</sup> Nos. 20-1538, 20-1539, 20-1545 & 20-1546 (7th Cir. Apr. 3, 2020) (citing *Griffin v. Roupas*, 385 F.3d 1128, 1130 (7th Cir. 2004)).<sup>3</sup>

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<sup>1</sup>As *Bush* put it, adequate “safeguards” are mandatory, *id.* at 109:

[W]e are presented with a situation where a state court with the power to assure uniformity has ordered a statewide recount with minimal procedural safeguards. When a court orders a statewide remedy, there must be at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied.

<sup>2</sup>The slip opinion could not be found on LEXIS but is available at [https://moritzlaw.osu.edu/electionlaw/litigation/documents/DNC\\_v\\_Bost\\_BL-30.pdf](https://moritzlaw.osu.edu/electionlaw/litigation/documents/DNC_v_Bost_BL-30.pdf).

<sup>3</sup>Though the district-court order in *Bostelmann*, Nos. 3:20-cv-00249-wmc, 3:20-cv-00278-wmc, 3:20-cv-00284-wmc, 2020 U.S. Dist. LEXIS 57918 (W.D. Wisc. Apr. 2, 2020), granted some election-related relief based on COVID-19 concerns, other courts have not. *See, e.g., Williams v. DeSantis*, No. 1:20-cv-00067 (N.D. Fla. Mar. 17, 2020), *available at*

**2. The requested relief violates the right to vote under the *Purcell* Principle.**

The requested relief also violates what has come to be called the *Purcell* Principle. *See, e.g.,* Richard L. Hasen, *Reining in the Purcell Principle*, 43 Fl. St. U. L. Rev. 427 (2016). That Principle is named for *Purcell v. Gonzalez*, 549 U.S. 1 (2006). The Principle is anchored in the right to vote and its potential for debasement. *Id.* at 4 (citing *Reynolds*, 377 U.S. at 555). Among its critiques of the Ninth Circuit for staying a voter-identification requirement near an election, the Court held in *Purcell* that such near-election court orders *themselves* risk debasement and dilution of the right to vote because “[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase.” 549 U.S. at 4-5. So the general rule is that no court order altering election procedures near an election is permissible because it violates the right to vote.

On April 6, 2020, the U.S. Supreme Court issued an opinion in *Republican National Committee v. Democratic National Committee*, No. 19A1016, 2020 U.S. LEXIS 2195 (U.S. Apr. 6, 2020) (per curiam), *slip op. available at* [https://www.supremecourt.gov/opinions/19pdf/19a1016\\_o759.pdf](https://www.supremecourt.gov/opinions/19pdf/19a1016_o759.pdf), again applying that Principle, which it summarized thus:

This Court has repeatedly emphasized that lower federal courts should ordinarily

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<https://www.clearinghouse.net/chDocs/public/VR-FL-0173-0003.pdf>; *Mays v. Thurston*, 2020 U.S. Dist. LEXIS 54498, No. 4:20-cv-341 (E.D. Ark. voluntarily dismissed Mar. 31, 2020); *League of Women Voters of Ohio v. LaRose*, No. 2:20-cv-01638 (S.D. Ohio Apr. 3, 2020), *available at* [https://moritzlaw.osu.edu/electionlaw/litigation/documents/LWVO\\_v\\_Larose\\_57.pdf](https://moritzlaw.osu.edu/electionlaw/litigation/documents/LWVO_v_Larose_57.pdf). The Supreme Court of New Mexico recently rejected an all-mail-in-ballot plan, instead ordering that absentee-ballot applications be mailed to registered voters so they could apply, in *State ex rel Riddle v. Oliver*, No. S-1-SC-38228 (Ariz. Apr. 16, 2020) (order available at [https://cms.nmcourts.gov/uploads/files/News/38228%20Final%20Order%20\(4-16-20\).pdf](https://cms.nmcourts.gov/uploads/files/News/38228%20Final%20Order%20(4-16-20).pdf)).



not alter the election rules on the eve of an election. See *Purcell v. Gonzalez*, 549 U. S. 1 (2006) (per curiam); *Frank v. Walker*, 574 U. S. 929 (2014); *Veasey v. Perry*, 574 U. S. \_\_\_ (2014).

2020 U.S. LEXIS 2195, at \*\*2-3. This *RNC* case stayed a lower-court order allowing voters to mail absentee ballots after election day. *RNC* recited various problems that the lower-court order posed and said they “underscore[] the wisdom of the *Purcell* principle, which seeks to avoid this kind of judicially created confusion.” *Id.* at \*\*3. A crucial point was that the lower-court order “fundamentally alters the nature of the election.” *Id.*

Here, as in *RNC*, the *Purcell*-Principle should apply as applicable: “[W]hen a lower court intervenes and alters the election rules so close to the election date, our precedents indicate that this Court, as appropriate, should correct that error.” Slip op. 3.

**3. The requested relief violates the Voters’ right to have, and to vote in, federal elections with the manner of election chosen by the legislature.**

Though this election involves federal candidates, the requested relief is not the “Manner” of election “prescribed . . . by the Legislature,” as required by the U.S. Constitution. Article I, § 4, cl. 1 provides:

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

U.S. Const. art. I, § 4, cl. 1.

Candidates for federal office are on the Primary ballot. See [https://www.elections.virginia.gov/media/castyourballot/candidatelist/June-2020-Primary-Candidates-List-\(4\)-1.pdf](https://www.elections.virginia.gov/media/castyourballot/candidatelist/June-2020-Primary-Candidates-List-(4)-1.pdf) (Virginia Dep’t of Elections, “Certified Candidates in Ballot Order for June 23, 2020 Primary Elections”). So the Primary must be conducted in the Legislature’s prescribed manner. But the requested

relief is not at all what the Legislature chose and is contrary to controlling legislation.

Virginia law requires that absentee voters, *inter alia*, open and mark their ballots in the presence of a witness. Va. Code § 24.2-707(A). It also requires that voters enclose their ballots in the provided envelope, seal the envelope, and “fill in and sign the statement printed on the back of the envelope in the presence of a witness, who shall sign the same envelope[.]” *Id.*

The requested relief seeks to eliminate these requirements, thereby seeking to conduct the election in a manner not authorized by the Legislature and contrary to the Legislature’s choices. They seek to eliminate safeguards against vote fraud that the Legislature chose. *See* Part II.A.1. So the requested relief violates Article I, § 4, cl. 1, including a violation of the Voter’s right to have, and to vote in, such an election as the U.S. Constitution prescribes.

**4. State Defendants’ unlawful interpretation of “disability or illness” violates Voters’ fundamental right to vote.**

Voters’ also seek to bring a cross claim against State Defendants, which shares a common question of law with the main action. State Defendants have issued guidance, contrary to Virginia law, that any “Voters may choose reason ‘2A My disability or illness’ for absentee voting in the May and June 2020 elections due to COVID-19.”<sup>4</sup> This interpretation allows all voters to vote absentee, even if they do not have a disability or illness.

State Defendants’ arbitrary and capricious misinterpretation of “[m]y disability or illness” requirement to obtain an absentee ballot to include all voters, even if they do not have a disability, violates the due process clause of the Fourteenth Amendment of the U.S. Constitution.

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<sup>4</sup>Va. Dep’t of Elections, *Absentee Ballots*, <https://www.elections.virginia.gov/casting-a-ballot/absentee-voting/> (last visited Apr. 22, 2020).

Additionally, for the same reasons shown above (Part II.A.1-3), State Defendants' unlawful interpretation of "[m]y disability or illness" requirement to obtain an absentee ballot to include all voters violates the Voters' fundamental right to vote by: (1) acting contrary to controlling legislation and stripping vital safeguards against voting fraud, thereby diluting and debasing Voters' right to vote, (2) violating the *Purcell* principle, and (3) violating the Voters' right to have, and to vote in, federal elections with the manner of election chosen by the legislature under Article I, section 4, clause 1 of the U.S. Constitution.

**B. Voters' Motion is timely.**

As discussed above, this Motion is made in a timely manner—less than one week after Plaintiffs filed their Complaint. No delay and no prejudice results from the filing of Voters' Motion. *See* Part I.D.

**C. Voters' intervention will not cause any undue delay or prejudice.**

No undue delay or prejudice will result from Voters' intervention. Indeed, no Answer has been filed. So there has been and will be no delay to this case, nor is there any prejudice to either party.

**Conclusion**

For these reasons, Voters' Motion to Intervene should be granted.

Date: April 23, 2020

Respectfully Submitted,

\_\_\_\_\_/s/  
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## Certificate of Service

I hereby certify that the foregoing document was served electronically on April 23, 2020, upon the following counsel via the United States District Court for the Western District of Virginia, electronic filing system:

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