IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
LYNCHBURG DIVISION

LEAGUE OF WOMEN VOTERS OF VIRGINIA, *et al.*, Plaintiffs, v. VIRGINIA STATE BOARD OF ELECTIONS, *et al.*, Defendants.	Case No.: 6:20-cv-00024-NKM **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO INTERVENE**

I. INTRODUCTION

On April 17, the League of Women Voters of Virginia and four Virginia voters brought this action for declaratory and injunctive relief against Virginia's election officials in order to enjoin Va. Code. Ann. § 24.2-707(A) for the June 23, 2020, primary election and future elections. That statute requires that absentee ballots be marked in the presence of a witness and that the witness sign the sealed envelope containing the marked ballot. The relief sought by Plaintiffs goes too far, seeking to eliminate absentee voting protections designed to protect the integrity of Virginia elections for all voters.

The Republican Party of Virginia, Inc. ("**RPV**"), MG Vincent E. Falter, USA (ret), Mildred H. Scott, and Thomas N. Turner, Jr. (collectively, "**Applicants**"), respectfully move this Court to intervene in this case to vindicate their unique interest in the integrity of the Republican Primary Election initiated by RPV to nominate candidates, and in the integrity of the General Election in which those

Republican candidates will compete. These interests are not adequately represented by existing parties to this case, and the relief Plaintiffs seek would materially impair that interest.

Finally, Applicants' intervention will not disrupt these proceedings. Applicants are prepared to comply with the Court's deadlines related to Plaintiffs' pending Motion for Preliminary Injunction (Dkt. 16) and all future deadlines set by the Court.

II. BACKGROUND OF APPLICANTS

Applicants each have strong and unique interests in this matter. The RPV is a major political party in Virginia and seeks to intervene on its own behalf, as well as on behalf of its candidates and party members. The power of a political party, such as RPV, to "provide for the nomination of its candidates…," and "perform all other functions inherent in political party organizations" is recognized in statute. Va. Code Ann. § 24.2-508 (2019). In exercising those powers, RPV adopted a direct primary and timely notified the Virginia State Board of Elections ("**Board**") of its choice pursuant to Va. Code § 24.2-516. The Board then ordered the holding of a Republican Primary for U.S. Senate and U.S. House of Representatives in the second and third congressional districts, now scheduled for June 23, 2020. The conduct of that Primary Election is a subject of this lawsuit.

Applicants Gen. Falter, Ms. Scott, and Mr. Turner are registered Virginia voters, members of the RPV, and intend to vote in the June 23, 2020 Republican Primary Election and in the 2020 General Election. Many have been voters for quite

some time in the Commonwealth, and Ms. Scott served as an officer of election in Roanoke County for years.

Finally, Applicant Mr. Turner is also the chairman of the Young Republican Federation of Virginia and, in such capacity, spends considerable time organizing get-out-the-vote and other efforts to encourage young voters to vote and to support Republican candidates throughout the Commonwealth.

III. LAW AND ARGUMENT

A. Applicants Are Entitled To Intervene As A Matter Of Right

Under Rule 24(a)(2) of the Federal Rules of Civil Procedure, intervention as a matter of right is appropriate when, upon a "timely motion," a party:

> 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.

Fed. R. Civ. P. 24(a)(2). The Fourth Circuit has interpreted the rule to require that an applicant timely "demonstrate: (1) that they have an interest in the subject matter of the action; (2) that the protection of this interest would be impaired because of the action; and (3) that the applicant's interest is not adequately represented by existing parties to the litigation." *Teague v. Bakker*, 931 F.2d 259, 260-61 (4th Cir. 1991). As outlined below, Applicants meet these requirements.

1. Applicants' Request To Intervene Is Timely

Applicants motion is certainly timely. "Where a case has not progressed beyond the initial pleading stage, a motion to intervene is timely." *United States v. Commonwealth of Virginia*, 282 F.R.D. 403, 405 (E.D. Va. 2012) (citing *Scardelletti*

v. Debarr, 265 F.3d 195, 203 (4th Cir.2001)). The Complaint was filed on April 17, 2020, and Applicants filed this motion a mere 7 days later, and prior to April 28, the date on which the Plantiffs have requested the Defendants' response to their motion for a preliminary injunction. (Pls.' Mot. for Expedited Briefing at 1). Defendants have not yet responded to the complaint on file, a hearing is not yet scheduled, and no adjudication on the merits has taken place.

The passage of time is only one element of the timeliness inquiry. "The most important consideration is whether the delay has prejudiced the other parties." *Spring Constr. Co, Inc. v. Harris*, 614 F.2d 374 (4th Cir. 1980). Applicants' intervention is made without any delay and causes no prejudice to the existing parties. Should this court allow Applicants to intervene at this early stage, they will have an opportunity to assert their defenses and protect their interests without disrupting, delaying, or protracting the litigation. Applicants are prepared to meet the expedited briefing schedule requested by Plaintiffs. Therefore, this Motion is timely and will not cause delay or prejudice any of the existing parties.

2. Applicants Have An Interest In This Litigation That Is Not Adequately Represented By Existing Parties

Applicants each have vital interests in the subject matter of this litigation. Because those interests are not adequately represented by existing parties, they must be permitted to intervene to vindicate those interests.

First consider the RPV, which seeks to intervene both on its own behalf and in a representative capacity on behalf of its nominees, candidates, and members. As set forth above, the RPV elected to have a Primary Election to nominate candidates

for the U.S. House of Representatives (CD-2 and CD-3) and the U.S. Senate. That a political party has an interest in its own primary election is axiomatic. *Clingman v. Beaver*, 544 U.S. 581 (2005); *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986); *see also Democratic Party of the United States v. Wisconsin*, 450 U.S. 107 (1981). And just as surely, RPV has a vital interest in the conduct of the 2020 General Election at which its nominated candidates will compete for office.

Additionally, RPV, particularly on behalf of its candidates, has a substantial interest in any change, such as one to absentee voting rules, to the "structure[e] of th[e] competitive environment" of an election. *Shays v. F.E.C.*, 414 F.3d 76, 85 (D.C. Cir. 2005). If Plaintiffs' relief is granted, RPV and its candidates will face "a broader range of competitive tactics than [state] law would otherwise allow." *Id.* at 86. Eliminating the witness signature requirement would "fundamentally alter the environment in which [they] defend their concrete interests (e.g., […] winning reelection)." *Id.*; *see also id.* at 87 (holding that political candidates have a legally cognizable interest in preventing electoral "competition [becoming] intensified by [statutorily]-banned practices"). Because RPV's candidates "actively seek [election or] reelection in contests governed by challenged rules," they have an interest in "demand[ing] adherence" to those requirements. *Id.* at 88; *see also Nader v. F.E.C.*, 725 F.3d 226, 228-9 (D.C. Cir. 2013).

Each of the Applicants also has a compelling interest in ensuring the integrity of the election(s) at issue in this litigation. Plaintiffs seek to enjoin a statute that serves to mitigate the risk of absentee ballot fraud. If unauthorized

ballots are cast due to fraud, they dilute the votes of legal voters, like the individual Applicants and other Republican voters the RPV represents here. Vote dilution is a violation of the fundamental right to vote. *See Reynolds v. Sims*, 377 U.S. 533, 554 (1964); *Howell v. McAuliffe*, 292 Va. 320, 335, 788 S.E.2d 706 (2016). RPV also seeks to vindicate this interest on behalf of its candidate and members.

These vital interests are not adequately represented by the existing parties to this action. Certainly they are not represented by Plaintiffs, who seek relief that Applicants oppose.

Nor are Applicants' interests adequately represented by the Defendants. Ordinarily, "the burden on the applicant of demonstrating a lack of adequate representation 'should be treated as minimal.'" *Teague*, 931 F.2d at 262 (citing *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)). Applicants recognize that in the Fourth Circuit, intervenors must make a "strong showing" that government agency defendants will inadequately represent their interests. *Stuart v. Huff*, 706 F.3d 345, 352 (4th Cir. 2013). But central to *Stuart's* holding was the proposed-intervenors' concession that the government defendants in that case shared "the same ultimate objective as the existing defendants" and that they merely disagreed with "the Attorney General's reasonable litigation tactics." *Id.*

Applicants have a strong basis to believe their interests are not adequately represented. To begin, at this juncture it is not clear whether the Defendants will even defend the statute or will do so aggressively. And, if they chose not to, there would be no litigant before this Court to defend it.

Further, Applicants and Defendants do not share the same ultimate objectives, and it is unreasonable to believe they would. The Defendants are obligated to serve "two distinct interests," which the Fourth Circuit has recognized are grounds to permit intervention to a party who is only obligated to serve one such interest. *United Guaranty Residential Ins. Co. v. Philadelphia Sav. Fund Soc'y,* 819 F.2d 473, 475 (4th Cir. 1987). Specifically, the Defendants have a generalized interest in election-administration that may come into tension with a defense of the statute in question. Further, the Defendants also have an interest in advancing the Governor's public health goals. It is exactly the conflict between these two goals that underly the Plaintiffs' claim. While Applicants share great concern for the public health, meeting the Governor's goals is not their ultimate objective. This conflict makes this case much more like *Trbovich*, in which the Secretary of Labor had to "serve two distinct interests," and intervenor only served one. 404 U.S. at 538. In *Stuart*, the intervenors "concede[d] that they share[d] the same ultimate objective as the existing defendants and where those defendants are represented by a government agency." 706 F.3d at 352. Because of the differing interests of Applicants and Defendants, the rule in *Teague* should be decisive in this case.

B. In The Alternative, Applicants Should Be Granted Permissive Intervention

Alternatively, this Court should permit Applicants to intervene pursuant to Rule 24(b) of the Federal Rules of Civil Procedure. Rule 24(b) provides for permissive intervention where a party timely files a motion and "has a claim or

defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). "In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3).

The arguments set forth in Part I, *infra*, establish that Applicants meet the criteria for permissive intervention, which should be liberally granted. "[T]he Fourth Circuit generally recognizes that liberal intervention is desirable to dispose of as much of a controversy involving as many apparently concerned persons as is compatible with efficiency and due process." *Pinnacle Bank v. Bluestone Energy Sales Corp.*, Civil Action No. 7:15CV00149, 2017 WL 6915289 (W.D. Va. Nov. 24, 2017) (internal quotation marks omitted), citing *Feller v. Brock*, 802 F.2d 722, 729 (4th Cir. 1986); *see also Baker Packing Co. v Andrews Farming, Inc.*, Civil Action No. 7:17CV00395, 2016 WL 8777364 (W.D. Va. Nov. 23, 2016).

IV. CONCLUSION

For the reasons set forth above, Applicants respectfully request that their Motion be granted, and that this honorable Court allow Applicants to intervene as defendants in order to protect their interest in the subject matter of this litigation.

Dated: April 24, 2020

Respectfully submitted,

/s/ Christopher M. Marston

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CERTIFICATE OF SERVICE

I certify that on April 24, 2020, the foregoing was filed on the Court's electronic case filing system. Notice of the filing was generated by the Court's electronic system. Copies of the filing are available on that system.

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