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

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.

Case No. 6:20-cv-00024-NKM

PLAINTIFFS' CONSOLIDATED BRIEF
IN OPPOSITION TO MOTIONS TO INTERVENE

Movants Ferguson, Burchett, and Crickenberger (together, "Individual Voters"), and Republican Party of Virginia and its officials ("RPV"), seek to intervene in this time-sensitive election matter in which the Plaintiffs' right to vote is on the line. Not mentioning the public health crisis once, they never explain how the resolution of this case will affect their own votes or interests differently from how it will affect from the public generally. This is because Movants' asserted interest in electoral integrity generally, and vague concerns of vote dilution, do not justify intervention. And while the RPV may have associational interests in who may be *eligible* to participate in its primary, this case does not implicate voter eligibility, but rather concerns *administrative procedures* that, absent relief, will disenfranchise indisputably eligible Virginia voters. Thus, because Movants do not "stand to gain or lose by the direct legal operation of the district court's judgment" in any particularized way, *Teague v. Bakker*, 931 F.2d 259, 261 (4th Cir. 1991), they are not entitled to intervene.

As detailed below, federal courts have repeatedly rejected efforts of individual voters and political parties and officials whose personal right to vote is not at stake to intervene in a case by asserting generalized interests in election integrity. And in the few instances where individuals have made the same non-specific, fact-free assertions that their votes will somehow be diluted by non-qualified voters participating in an election, courts have rejected those asserted interests as too abstract and speculative to support intervention. This Court should do the same here.

Movants also seek to permissively intervene in the case, citing the benefits of bringing together all interested parties for one resolution of the relevant issues. But Movants have no specific interests in this case, and allowing intervention would justify participation by any Virginia voter in any election-related case. And despite their agreement to participate in an expedited briefing schedule, in light of the proposed partial consent decree just filed by Plaintiffs

and Defendants, Movants will likely use their party status, should it be granted, to try to block that order and delay resolution of Plaintiffs' preliminary injunction motion. The same is true for the Individual Voters' cross-claim, which will only be live (to the extent it is at all) for the June primary, due to the Virginia General Assembly's recent changes to absentee voting laws beginning July 1. Instead, the Court can gain the benefit of Movants' views through participation as amici curiae—to which Plaintiffs consent—without the downsides of delay, prejudice, and confusion. *See Stuart v. Huff*, 706 F.3d 345, 355 (4th Cir. 2013).

The Court should deny Movants' efforts to intervene.

ARGUMENT

Rule 24 of the Federal Rules of Civil Procedure provides the standards governing intervention, whether as a matter of right or permissive. Fed. R. Civ. P. 24. Movants cannot satisfy either standard, and their participation in this case would prejudice Plaintiffs by delaying relief and by adding additional confusion and uncertainty to this time-sensitive case. Because Movants have no substantial interests in this case different from that of the general public, they cannot justify intervention and can adequately express their views as amici curiae.

I. The Court should deny intervention as a matter of right because Movants lack any significantly protectable interest and instead assert only generalized interests shared by the public at large—interests adequately protected by existing Defendants.

Rule 24(a)(2) allows intervention as a matter of right "if the movant can demonstrate '(1) 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.'" *Stuart*, 706 F.3d at 349 (quoting *Teague*, 931 F.2d at 260–61). Each of these elements is required for intervention as a matter of right, but Movants satisfy none of them.

A. Movants assert only generalized interests shared by the public at large and interests not directly implicated by this case.

To demonstrate they have an interest in the action sufficient to intervene, movants must establish a "'significantly protectable interest,'" *Teague*, 931 F.2d at 261 (quoting *Donaldson v. United States*, 400 U.S. 517, 531 (1971)), and that "failure to allow intervention would impair that interest," *Lee v. Virginia Bd. of Elections*, No.3:15CV357-HEH, 2015 WL 5178993, at *2 (E.D. Va. Sept. 4, 2015) (citing I*n re Richman*, 104 F.3d 654, 659 (4th Cir. 1997)). In other words, the intervenors must have an interest that is "contingent on the outcome of other litigation," meaning that they must "stand to gain or lose by the direct legal operation of the district court's judgment." *Teague*, 931 F.2d at 261. A "'general interest in the subject matter of pending litigation does not constitute a protectable interest within the meaning of Rule 24(a)(2).'" *RLI Ins. Co. v. Nexus Services, Inc.*, No. 5:18-CV-00066, 2018 WL 5621982, at *3 (W.D. Va. Oct. 30, 2018) (quoting *Dairy Maid Dairy, Inc. v. United States*, 147 F.R.D. 109, 111 (E.D. Va. 1993)).

Here, Movants have not shown specific interests in this case such that they "stand to gain or lose" depending on the outcome. The Individual Voters cite a broad interest in the "fundamental right to vote" and vague concerns about vote dilution due to voter fraud, with the RPV expressing similar concerns about "election integrity." ECF No. 23 at 3, 6; ECF No. 29 at 1–2. These generalized interests and amorphous concerns in ensuring the integrity of the electoral process shared broadly by all members of the public are not "unique to the proposed intervenor," *Wis. Educ. Ass'n Council v. Walker*, 705 F.3d 640, 658 (7th Cir. 2013), and are thus not "sufficiently specific . . . to be cognizable" for intervention, *Sokaogon Chippewa Cmty. v. Babbitt*, 214 F.3d 941, 948 (7th Cir. 2000). And the other interests cited by Movants are not affected by this case in any way, with some of them based on fundamental misunderstandings of

constitutional law—namely, Individual Voters claiming a "right to vote under the *Purcell* Principle" and individual rights under the Elections Clause. *See* ECF No. 23 at 8-10.

1. Movants' broad interests in election integrity and the right to vote are the shared by all Virginia voters and are not the type of specific interests that mandate intervention.

Courts have repeatedly held that individual voters' and voting-related organizations' broad interests in election integrity do not support intervention under Rule 24(a). *See Common Cause Ind. v. Lawson*, No. 117CV03936TWPMPB, 2018 WL 1070472, at *4–5 (S.D. Ind. Feb. 27, 2018) (in organizational plaintiff's challenge to voter registration law under the National Voter Registration Act, denying intervention to organization whose mission includes election integrity and ensuring voter roll list maintenance laws are followed); *One Wisconsin Inst., Inc. v. Nichol*, 310 F.R.D. 394, 397 (W.D. Wis. 2015) (legislators, voters, and local election officials denied intervention in challenge to various Wisconsin election laws); *Veasey v. Perry*, No. 2:13-cv-00193, slip op. at 1–2 (S.D. Tex. Dec. 11, 2013) (finding "True the Vote's interests are generalized" and denying intervention in voter identification lawsuit) (attached as Exhibit A); *United States v. Florida*, No. 4:12-cv-285, slip op. at 3 (N.D. Fla. Nov. 6, 2012) (attached as Exhibit B); *Wisc. Right to Life Political Action Comm. v. Brennan*, No. 09-CV-764-VIS, 2010 WL 933809, at *3 (W.D. Wis. Mar. 11, 2010). This is because "generalized, public policy interests are insufficient to create [the] direct, substantial interest required." *Wisc. Right to Life*, 2010 WL 933809, at *3; *see also Hollingsworth v. Perry*, 570 U.S. 693, 706 (2013) (intervenor's interest in "vindicat[ing] the constitutional validity of a generally applicable California law" was a "'generalized grievance' . . . insufficient to confer standing").

For example, in *United States v. Florida*, the court held that the interest of organizations and their members in ensuring confidence in the election process through accurate voting rolls are generalized interests that are "the same for the proposed intervenors . . . as for every other

registered voter in the state" and thus "plainly do not afford a voter—or an organization with members who are voters—a *right* to intervene under Rule 24(a)." No. 4:12-cv-285, slip op. at 3. And in *One Wisconsin Institute*, the court rejected proposed intervenor's "asserted interest in fraud-free elections" as insufficient to justify intervention as of right because such interest was "really just the proposed intervenors' agreement with the policy underlying the challenged legislation." *One Wisconsin Inst.*, 310 F.R.D. at 397. The court explained that such an "[a]bstract agreement with the position of one side or another is not the type of 'direct, significant, and legally protectable' interest that gives rise to a right to intervene." *Id.* (citation omitted).

The same is true here. Without any showing that the Individual Voters or RPV members will be deprived of the right to vote—as Plaintiffs and the League's members will be if the witness requirement remains in place—their generalized interest in election integrity cannot support intervention. But this is all that Movants offer—vague assertions about having a "compelling interest in ensuring the integrity of the election(s) at issue in this litigation," ECF No. 29 at 5, and seeking to preserve "vital safeguards against voting fraud," ECF No. 23 at 4. Yet these interests are shared by all Virginia voters and the public at large. Allowing intervention on such a basis would allow "anyone with an interest—however broad or universal—to intervene in any lawsuit in which the government is a party" and the case touches upon voting. *Sokaogon Chippewa Cmty.*, 214 F.3d at 948. Regardless, as Plaintiffs have already demonstrated, the witness requirement does not advance the Commonwealth's interests in election integrity—interests already served by numerous other protections and disincentives. *See* ECF No. 17 at 26–30. And Movants have made no argument let alone showing that the 39 other states that do not have a witness requirement run elections with any less integrity. *Cf.* ECF No. 17 at 28 & n.58.

Not only do Movants share no interests different from the public at large, courts have rejected intervention based on a lack of significantly protectable interests even where proposed intervenors possessed a more direct connection to the action at issue. For example, in *North Carolina State Conference of NAACP v. Cooper*, 332 F.R.D. 161, 168 (M.D.N.C. 2019), the court denied intervention to state representatives in a case challenging the constitutionality of a voter identification law, holding that the movants "failed to demonstrate that they have a significantly protectable interest in likewise defending the constitutionality of S.B. 824 sufficient to warrant a right to intervene under Rule 24(a)(2)." *See also One Wisconsin Inst., Inc.*, 310 F.R.D. at 397.

In *Maryland Restorative Justice Initiative v. Hogan*, 316 F.R.D. 106 (D. Md. 2016), proposed intervenors were "family members of persons who were killed by Juvenile Offenders" and intervened in a case in which Plaintiffs challenged the constitutionality of certain sentences awarded to juveniles. *Id.* at 108. The Court denied intervention, holding that despite their direct connection to the issue at hand, movants "will not be deprived of any rights in this case" and thus "have not demonstrated a 'significantly protectable' interest, as required for intervention of right." *Id.* at 115.

And in *Edwards v. Beck*, No. 4:13CV00224 SWW, 2013 WL 12146739 (E.D. Ark. June 6, 2013), despite consent to intervention from the defendants, the court denied intervention to an anti-abortion group that provided counseling to pregnant women and had advocated for passage of the challenged abortion-related law because the group had not shown that overturning the law would harm its mission or services. *Id.* at *2–*3. Movants here lack even the sort of connection to the particular issue being litigated than these groups whose motions were denied.

Moreover, Movants' vague concerns about vote dilution also fail to raise significantly protectable interests that justify intervention. The vote-dilution cases cited by Movants arising in the "one-person, one-vote" context like *Reynolds v. Sims*, 377 U.S. 533 (1964), concern malapportioned legislative districts in which a district's "weight is in a substantial fashion diluted when compared with votes of citizens living on other parts of the State," *id.* at 568. Plaintiffs' claims do not implicate legislative apportionment or even voter eligibility but rather voting procedures. Movants have not alleged that the application or removal of the witness requirement will favor or disfavor any particular area of the state or even one particular political party. And in the few cases where individuals or groups have alleged vote dilution based on a fear of non-eligible voters voting, courts routinely have rejected such arguments as reliant on speculation and abstract principles.

In *Daughtrey v. Carter*, 584 F.2d 1050, 1055 (D.C. Cir. 1978), for example, the plaintiffs were individuals who alleged dilution of their votes due to alleged voting by non-citizens. While recognizing that the "actual number of such persons is unknown," they alleged that "the number may be in the thousands." *Id.* The D.C. Circuit affirmed the district court's dismissal for lack of standing, holding that because the plaintiffs had not alleged that their votes were or would be "diluted in any particular election. . . or geographical area" or that "they are an identifiable group of voters whose votes are disfavored Vis-a-vis those of some other group," and because "the dilution of voting rights they have alleged is so diffuse, minute, and indeterminable," their injures were "too speculative to support standing." *Id.* at 1056.

Similarly, in *American Civil Rights Union v. Martinez-Rivera* ("*ACRU*"), 166 F. Supp. 3d 779, 787 (W.D. Tex. 2015), the court considered a claim by the plaintiff organization based on the dilution of its members' votes due to one county allegedly failing to properly engage in voter

registration list maintenance by supposedly including ineligible voters. Because the plaintiffs provided no way of telling "how many, if any, ineligible voters will actually vote, and historically, at least in Texas, there is little indication that many will," the court held that "any injury would be entirely speculative." *Id.* at 803; *see also Pub. Interest Leg. Found., Inc. v. Bennett*, No. 4:18-CV-00981, 2018 WL 2722331, at *4 (S.D. Tex. June 6, 2018).

Here, Movants provide even less than the plaintiffs in *Daughtrey* and *ACRU*. They do not argue, let alone provide any facts or evidence, for their concern that eliminating the witness requirement during a pandemic will result in voter fraud. And they certainly make no effort to quantify such assertions or otherwise show how such assertions are more than speculative, or demonstrate that such unlawful voting would disfavor their candidates of choice or even suggest that it would influence any particular election outcome.

Finally, Movants are likely to assert that they should be granted intervention to oppose entry of the partial consent decree. But in *Dillard v. Chilton County Commission*, 495 F.3d 1324, 1333 (11th Cir. 2007), the Eleventh Circuit rejected such an argument where the movants asserted "only the generalized incompatibility of the consent decree with the rights of all citizens in the county to be free of judicial interference, unauthorized by § 2 of the Voting Rights Act, with the democratically selected form of local governance." Because this was "not a form of injury particularized to the Intervenors, but is rather an undifferentiated harm suffered in common by all citizens of the county," the court reversed the district court's grant of intervention. *Id.* Likewise here, the presence of the consent decree does not change Movants' lack of particularized interest in this case.

Because Movants have not established that they have anything to gain or lose regarding their votes and because their generalized interests are insufficient to support intervention, they fail to meet the "significantly protectable interest" test.

2. Movants' other asserted interests are also entirely unaffected by this case.

Movants offer some additional reasons for why they have sufficient interests to intervene in this case. None of those interests are at all affected by this case, however, because the case will have no bearing on them however it resolves, and because these supposed interests asserted are based on flawed legal grounding.

For movant RPV, it has asserted two related interests other than its broad interest in election integrity, arguing that it has a substantial interests in its own primary election, as well as in "the 'structur[e] of th[e] competitive environment' of an election" faced by its candidates. ECF No. 29 at 4–5 (quoting *Shays v. F.E.C.*, 414 F.3d 76, 85 (D.C. Cir. 2005)).

As to the former, the cases cited by RPV concern *eligibility* to participate in a party's primary—*i.e.*, party members versus all registered voters, *see Tashjian v. Republican Party of Conn.*, 479 U.S. 208 (1986), and *Clingman v. Beaver*, 544 U.S. 581 (2005)—or the party's national convention—those selected by the Party or those chosen through an open primary process, *see Democratic Party of U.S. v. Wisc. ex rel. La Follette*, 450 U.S. 107, 108 (1981). For that reason, these cases all directly implicate the associational rights of the parties and their members under the First Amendment. *See generally id.* By contrast, this case concerns the administrative *procedures* by which eligible voters—and under Virginia law, all registered voters may exercise their fundamental right to vote in either party's primary—can participate. Therefore, unlike the primary and convention eligibility cases cited by RPV, Plaintiffs' claims challenging the state's election administration procedures do not implicate the parties' associational rights in any way. And whether or not Plaintiffs' votes are counted due to the

existence of the witness requirement do not infringe on any rights of the RPV—it has made no allegation, nor could it, that enjoining the witness requirement would somehow harm the RPV's candidates or disfavor Republican candidates in the general election.

As to the latter interest, suspending the witness requirement during a pandemic will have no effect on the structuring of the competitive environment of the primary, instead affecting only the standards for whether certain ballots are counted—a prerogative of the Commonwealth and its officers, not a political party. *See* 1 Va. Admin. Code 20-70-20. It is Defendant Virginia State Board of Elections that sets standards that "tightly regulate[]" the "form of ballots used in Virginia elections," *Marcellus v. State Bd. of Elections*, 849 F.3d 169, 172 (4th Cir. 2017), not the RPV. In *Shays*, the case relied upon by RPV, the court found that members of Congress facing reelection had standing to challenge regulations weakening campaign finance laws because these regulations created additional competition for them and more avenues for them to be attacked in the campaign. *Id.* at 85–86. By contrast, counting absentee ballots without witness signatures will have no particular impact on the RPV. It has not even alleged, let alone offered a factual basis, that enjoining the witness requirement during the pandemic will offer any particular advantage or disadvantage to one Republican candidate or another in the RPV primary, or one political party over another in the general election. Because the presence or absence of the witness requirement does nothing to change the structure of the competitive environment in a way from which the RPV stands to gain or lose, RPV has no significantly protectable interest in this case.

As for Individual Voters, the additional interests they assert not only suffer from the same generalized grievance problem as their election integrity and vote dilution arguments, but also from a misunderstanding of constitutional law. As to their argument that Plaintiffs' lawsuit

undermines their "right to vote under the *Purcell* principle," it lacks merit for several reasons. For one, there is no substantive right under *Purcell* that can support standing (for intervention or otherwise). And no court has ever found a substantive right under *Purcell* to freeze elections procedures, let alone to do so regardless of whether such procedures violate federal constitutional or statutory guarantees. Rather, *Purcell* simply stands for the principle that, when weighing the equities as an election draws closer, a court should "weigh, in addition to the harms attendant upon issuance or nonissuance of an injunction, considerations specific to election cases and its own institutional procedures." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). Movants lack any particular interest in the timing of an order expanding Virginians' ability to vote beyond that of other voters and that of the Commonwealth.

Moreover, in *Purcell*, the relevant order enjoining a voter identification requirement occurred less than a month before the general election and days before early voting began. Likewise, in *Republican National Comm. v. Democratic National Comm.*, 19A1016, 2020 WL 1672702, at *1 (U.S. Apr. 6, 2020), the Supreme Court stayed an injunction entered just five days before an election that would have extended the time to submit an absentee ballot, counseling against "alter[ing] the election rules on the eve of an election."

Here, the Court has set a hearing on Plaintiffs' preliminary injunction motion for May 4—over seven weeks before the relevant election—and has stated its plans to issue a decision by the end of that week. And the Plaintiffs and Defendants filed their Motion for Entry of a Partial Proposed Consent Judgment and Decree on April 27, over eight weeks before the election. Even if Movants had some particular interest above and beyond other voters under *Purcell*, that interest would not be affected by a ruling a full month-and-a-half before a primary election.

Individual Voters' argument that Plaintiffs' requested relief violates the Elections Clause of the U.S. Constitution, U.S. Const. art. I, § 4, cl. 1, runs even farther afield. The Elections Clause confers powers on states, to the extent Congress chooses not to legislate in the field. Under the Elections Clause, the "States possess a broad power to prescribe the 'Times, Places and Manner of holding Elections for Senators and Representatives,' Art. I, § 4, cl. 1, which power is matched by state control over the election process for state offices." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451 (2008) (citation & internal quotation marks omitted). To the extent the Commonwealth believes the requested relief interferes with those powers, it can defend them itself. But the Elections Clause certainly creates no significantly protectable interest in the Individual Voters. And once again, if it did, that interest would be one shared by all Virginia voters, which is insufficient to support intervention.

Finally, to the extent Individual Voters rely on their cross-claim as a basis for intervention—alleging a violation of their right to vote due to the Commonwealth's interpretation of the absentee "disability or illness" excuse—they must "demonstrate Article III standing" because they seek "additional relief beyond that which the plaintiff requests." *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017). They cannot do so here for several independent reasons.[1]

First, unlike Plaintiffs—who will be disenfranchised by operation of the witness requirement during the pandemic—the Individual Voters have not offered any facts indicating a burden on their right to vote by other Virginia registered voters having an opportunity to vote via absentee ballot. Nor have they otherwise shown how an expansion of absentee eligibility criteria "violates the due process clause of the Fourteenth Amendment of the U.S. Constitution," Dkt.

[1] Should the Individual Voters nonetheless be allowed to intervene and present a cross-claim, Plaintiffs intend to more fully brief at the appropriate time why such claim is meritless and the Court lacks jurisdiction to hear it.

No. 22-1 at 13, having not identified harm to any of their own "'liberty' or 'property' interests," to the extent they intend to raise a procedural due process claim. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).

Second, the Individual Voters lack standing for similar reasons to why they lack a significant interest in this case—their general interest in election integrity and vague fear of vote dilution is insufficient to establish a "substantial risk" of harm, *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014), as "[a]llegations of *possible* future injury are not sufficient," *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (internal quotation marks & citations omitted) (emphasis added). As in the cases cited in the previous section, the Individual Voters do not plead any facts indicating that their votes will be diluted or otherwise "disfavored Vis-a-vis those of some other group," *Daughtrey*, 584 F.2d at 1056, and thus "any injury would be entirely speculative," *ACRU*, 166 F. Supp. 3d at 803.

Third, based on their places of residence in Appomattox and Bedford Counties, *see* ECF No. 23 at 1–2, two of the Individual Voters reside in Virginia's Fifth Congressional District and one resides either in the Fifth or Sixth Congressional District, *see* Va. Code § 24.2-302.2. The Sixth district has no primary on June 23 for either party, and the Fifth district has only a Democratic primary.[2] Yet the Individual Voters have not alleged they intend to vote in the Fifth district Democratic primary, only vaguely alleging an intent to "vote in the next election." ECF No. 23 at 1–2. It is unclear whether this "next election" is a May local election (which is unaffected by this lawsuit), the June 23 Democratic primary for the Fifth district, or the November general election. Of course, Virginia will institute a "no-excuse" absentee requirement as a matter of state law starting July 1, 2020, and thus for the November election,

[2] Va. Dep't of Elections, *Certified Candidates in Ballot Order for June 9 Primary Elections*, https://www.elections.virginia.gov/media/castyourballot/candidatelist/June-2020-Primary-Candidates-List-(3).pdf (last visited Apr. 28, 2020).

meaning that the Individual Voters will not participate in an election affected by the State's interpretation of the "disability or illness" absentee excuse unless they participate in the Fifth district Democratic primary.[3] But because they have not alleged such an intent, the Individual Voters lack standing to bring their cross claim as well as lacking any basis to intervene.

B. Movants have not overcome the strong presumption that Defendants are adequately representing the interest in election integrity they assert.

In the Fourth Circuit, a movant seeking to intervene as a defendant alongside the government in a challenge to the constitutionality of a state statute must make a "very strong showing" of inadequacy of representation. *Stuart*, 706 F.3d at 351. This is because in "matters of public law litigation that may affect great numbers of citizens, it is the government's basic duty to represent the public interest," *id.*, and because intervention in such cases places a "severe and unnecessary burden on government agencies as they seek to fulfill" these duties, *id.* at 352. Further, "the prospect of a deluge of potential intervenors" could compel the government "to modify its litigation strategy to suit the self-interested motivations of those who seek party status, or else suffer the consequences of a geometrically protracted, costly, and complicated litigation." *Id.* at 351. To "rebut the presumption of adequacy," Movants "must show either collusion between the existing parties, adversity of interests between themselves and the State Defendants, or nonfeasance on the part of the State Defendants." *N.C. State Conf. of NAACP*, 332 F.R.D. at 169. They cannot do so here.

Here, Defendants have not failed to defend the case and thereby engaged in nonfeasance or a "clear dereliction of duty," *Chiglo v. City of Preston*, 104 F.3d 185, 188 (8th Cir. 1997). Rather, Defendants have taken a different approach to defending the same interests asserted by

[3] *See* 2020 Va. H.B. 1, *available at* https://lis.virginia.gov/cgi-bin/legp604.exe?201+ful+HB1ER; Press Release, Officer of the Governor, "Governor Northam Signs Sweeping New Laws to Expand Access to Voting" (Apr. 12, 2020), https://www.governor.virginia.gov/newsroom/all-releases/2020/april/headline-856055-en.html.

Movants. And "disagreement over how to approach the conduct of the litigation is not enough to rebut the presumption of adequacy." *Stuart*, 706 F.3d at 353; *see also Saldano v. Roach*, 363 F.3d 545, 555 (5th Cir. 2004) ("Simply because the [intervenor] would have made a different [litigation] decision does not mean that the Attorney General is inadequately representing the State's interest."); *N.C. State Conf. of NAACP*, 332 F.R.D. at 170 ("the Court is unpersuaded by Proposed Intervenors' contention that there is adversity of interests because State Defendants will not employ the same approach to the litigation as would the General Assembly."); *Va. Uranium, Inc. v. McAuliffe*, No. 4:15-CV-00031, 2015 WL 6143105, at *3 (W.D. Va. Oct. 19, 2015).

While Movants may disagree with Defendants' decision to agree to seek a partial consent decree, this litigation decision made in the interests of simultaneously preserving Virginians' right to vote, election integrity, and public health also does not amount to collusion or adversity of interests. In *Stotts v. Memphis Fire Dept.*, 679 F.2d 579 (6th Cir. 1982), the Sixth Circuit affirmed the denial of a motion by white firefighters to intervene in a case where plaintiffs and the City of Memphis entered into a consent decree to resolve racial discrimination claims against the fire department. It noted that even though the "objectives of the City and some non-minorities may have diverged when the City agreed to a reasonable consent decree which embodied an affirmative action plan," the "*legally protected interests* of the City and non-minorities did not" because the proposed intervenors did "not have a legally protected interest in promotions which could only occur as the result of presumptively discriminatory employment practices." *Id.* at 583–84 (emphasis added). The agreement to seek a consent decree did not amount to collusion or adversity of interests in the legal sense, but rather a decision made to

resolve a legal issue in a manner that represented the public interest in preventing racial discrimination.

As in *Stotts*, the proposed partial consent decree was negotiated after Plaintiffs were forced to file this action and seek preliminary relief due to a lack of action from the Commonwealth to preserve their constitutional rights during this pandemic. Far from collusive, it represents an attempt to preserve both the right of Virginians to vote and public health and still maintaining the integrity of the June 23 primaries (like the 39 other states that have no witness requirement). And as in *Stotts*, Movants have no legally protected interest in the denial of other Virginians of the right to vote during the pandemic, and this proposed consent decree in no way affects their right to vote. And while the RPV suggests that the Commonwealth's dual interests of both election integrity *and* public health may create an adversity of interests, ECF No. 29 at 7, the fact that the Commonwealth wears multiple hats is not sufficient to demonstrate adversity when there is still a substantial overlap of the ultimate goals of preserving the right to vote and ensuring election integrity. *See, e.g., Md. Restorative Justice Initiative*, 316 F.R.D. at 113 (rejecting an adversity-of-interests argument based on the fact that "the Attorney General has many constitutional and statutory duties, including, in criminal cases, 'a responsibility to seek justice'").

Movants apparently do not trust the Commonwealth to defend this lawsuit. But it is the state Attorney General who is "charged with the duty to represent the State in defense of its existing laws," and a disagreement as to how to defend this case is insufficient to supplant this role. *N.C. State Conf. of NAACP*, 332 F.R.D. at 169. And while Movants may have a "fervent desire to protect the statute, 'stronger, more specific interests do not adverse interests make.'" *United States v. North Carolina*, No. 1:13CV861, 2014 WL 494911, at *3 (M.D.N.C.

Feb. 6, 2014) (quoting *Stuart*, 706 F.3d at 353). Movants have not made the strong showing of nonfeasance, collusion, or adversity of interests necessary to overcome the presumption of adequacy of representation.

II. The Court should deny permissive intervention because Proposed-Intervenors will only complicate and delay the case and their views can be sufficiently shared through amicus curiae participation.

Federal Rules of Civil Procedure 24(b) permits intervention in the court's discretion "when a movant 'has a claim or defense that shares with the main action a common question of law or fact.'" *Lee*, 2015 WL 5178993, at *4 (quoting Fed. R. Civ. P. 24(b)). In evaluating permissive intervention, however, "the court must consider 'whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.'" *Stuart*, 706 F.3d at 349 (quoting Fed. R. Civ. P. 24(b)(3)). In *Stuart*, the Fourth Circuit affirmed the district court's denial of permissive intervention for this very reason, agreeing that adding multiple intervenors would "complicate the discovery process and consume additional resources of the court and the parties." *Id.* at 355 (internal citation & quotation marks omitted). Instead, the Fourth Circuit and courts within it have repeatedly counseled that amicus curiae participation offers a way for movants to "present their views" without consuming additional time and resources of the court and parties. *Id.*; *see also Lee*, 2015 WL 5178993, at *5. These "alternative avenues of expression reinforce[] our disinclination to drive district courts into multi-cornered lawsuits by indiscriminately granting would-be intervenors party status and all the privileges pertaining thereto." *Id.*

Courts have also recognized that these concerns about intervenors complicating election-related litigation in the months leading up to an election create an additional disincentive for allowing intervention. *See, e.g.*, *N.C. State Conf. of NAACP*, 332 F.R.D. at 172 ("The nature of

the claims at issue and the imminence of the election require a swift resolution on the merits to bring certainty and confidence to the voting process."). Rather, in "cases like this one, where a group of plaintiffs challenge state legislation, the court should evaluate requests to intervene with special care, lest the case be swamped by extraneous parties who would do little more than reprise the political debate that produced the legislation in the first place." *One Wisconsin Inst.*, 310 F.R.D. at 397.

Here, permitting intervention would only serve to delay and complicate resolution of this case and lead to greater risk of confusion close to the election. While Movants have agreed to the aggressive briefing schedule set by this Court, this participation in preliminary injunction briefing is unlikely to mark the end of their pre-primary efforts. Indeed, the Individual Voters have lodged a counterclaim concerning who counts as an eligible absentee voter—an issue that will only remain live before the June 23 primary due to Virginia's recent legislative changes to absentee ballot rules. And now that Plaintiffs and Defendants have also sought entry of a partial consent decree, Movants will undoubtedly seek to challenge entry of that decree and prevent resolution of this issue well in advance of the primary. Allowing Movants to participate as amicus curiae, to which Plaintiffs consent, will allow Movants to express their views of the case without hindering a timely resolution before the election.

Therefore, in the interests of preventing delay and prejudice to Plaintiffs' rights and unduly complicating this litigation, the Court should deny permissive intervention as well.

CONCLUSION

For the foregoing reasons, Plaintiffs request that the Court deny Individual Voters' and the RPV's motions to intervene.

Dated: April 28, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on April 28, 2020, I served a copy of the foregoing Consolidated Brief in Opposition to Motions in Intervene via filing with the Court's CM/ECF system, which sent copies of this document to Counsel of Record.

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