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

LEAGUE OF WOMEN VOTERS OF VIRGINIA, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Case No. 6:20-cv-00024**
	)	
VIRGINIA STATE BOARD OF ELECTIONS, et al.,	)	
	)	
	)	
Defendants.	)	

MEMORANDUM OF POINTS AND AUTHORITIES
IN OPPOSITION TO MOTION TO INTERVENE

The Defendants oppose the motions to intervene filed by Sheila DeLappe Ferguson, Sandy Burchett, and Diane Crickenberger (Ferguson Intervenors) and by the Republican Party of Virginia, Inc., Vincent E. Falter, Mildred H. Scott, and Thomas N. Turner, Jr. (RPV Intervenors) (all seven collectively referenced as the Movants) for two reasons. *First*, the Movants lack standing to intervene. To allow the Movants to intervene without showing an injury in fact would have the staggering effect of opening the door for any voter to intervene based on a change in elections procedures. *Second*, the Movants do not (and cannot) show that they are entitled to intervene as of right or that their intervention should be permitted. The Fourth Circuit has been clear that "where a proposed intervenor's ultimate objective is the same as that of an existing party, the party's representation is presumptively adequate . . . ." *Stuart v. Huff*, 706 F.3d 345, 350 (4th Cir. 2013). The Movants contend—and the Defendants take the Movants at their word—that their objective is to assure the fundamental right to vote and to ensure the integrity of the election. "[W]here the party who shares the intervenor's objective is a government agency,

the intervenor has the burden of making a *strong showing* of inadequacy." *Id.* (emphasis added). Because no such showing has been made here, intervention is inappropriate.

BACKGROUND

The Defendants are charged with "supervis[ing] and coordinat[ing] the work of the county and city electoral boards and of the registrars to obtain uniformity in their practices and proceedings and legality and purity in all elections." Va. Code § 24.2-103(A). As such, the Defendants have a significant, statutory interest in ensuring that elections are conducted consistently by all localities from the day that absentee ballots are made available to qualified voters through the day the final election results are certified. Ballots are to be made available to qualified absentee voters 45 days prior to the election. Va. Code § 24.2-612. Along with the ballots, absentee voters will receive instructions regarding how to mark and return their absentee ballots so that they are considered valid. Va. Code § 24.2-706(4). Under Virginia Code §§ 24.2-706 and 24.2-707, a voter who wishes to cast an absentee ballot by mail is required to complete their ballot in the presence of a witness and have the ballot signed by the witness.

On March 30, 2020, Governor Ralph Northam issued an Executive Order ordering Virginians to stay at home except for a limited number of circumstances. The Governor stated that, "[w]e are in a public health crisis, and we need everyone to take this seriously and act responsibly …. Our message to Virginians is clear: stay home."[1] Under Virginia Code § 24.2-603.1 and Executive Order Fifty-Six (Amended), the congressional primary election in Virginia originally scheduled for June 9 was postponed to June 23.[2] Accordingly, the date for ballots to be made available to be made available to qualified absentee voters is Saturday, May 9, 2020,

[1] Press Release, Ralph Northam, Governor of Virginia, Governor Northam Issues Statewide Stay at Home Order (Mar. 30, 2020), https://www.governor.virginia.gov/newsroom/all-releases/2020/march/headline-855702-en.html.
[2] Va. Exec. Order No. 2020-56 (Amended) (Apr. 24, 2020), https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-56-AMENDED---Postponing-June-9,-2020-Primary-Election-to-June-23,-2020-Due-to-Novel-Coronavirus-(COVID-19).pdf.

unless the relevant general registrar's office is not open on that date, in which case, for that locality, it shall be May 8, 2020. See *id.*; see also Va. Code § 24.2-612.

STANDARD

Federal Rule of Civil Procedure 24 sets forth two methods for a nonparty to intervene: (1) intervention as of right under Rule 24(a); and (2) permissive intervention under Rule 24(b). Movants seek both types of intervention.

As recognized by the Fourth Circuit, intervention must be permitted as a matter of right under Rule 24(a) if a 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." *Teague v. Bakker*, 931 F.2d 259, 260-61 (4th Cir. 1991).

The Fourth Circuit has also recognized that, if intervention of right is not warranted, a court *may* still allow a movant "to intervene permissively under Rule 24(b), although in that case 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.

ARGUMENT

I. Movants lack standing to intervene in this case.

As an initial matter, Movants lack standing to interpose themselves in the case. As the D.C. Circuit explained, "[i]ntervenors become full-blown parties to litigation, and so all would-be intervenors must demonstrate Article III standing." *Old Dominion Elec. Coop. v. Fed. Energy Regulatory Comm'n*, 892 F.3d 1223, 1233 n.2 (D.C. Cir. 2018) (noting "our settled precedent that all intervenors must demonstrate Article III standing"). And "where a party tries to intervene as another defendant," it makes sense to "require[] it to demonstrate Article III standing,"

because "otherwise any organization or individual with only a philosophic identification with a defendant—or a concern with a possible unfavorable precedent—could attempt to intervene and influence the course of litigation. . . . The standing inquiry for an intervening-defendant is the same as for a plaintiff: the intervenor must show injury in fact, causation, and redressability." *Crossroads Grassroots Policy Strategies v. Fed. Election Comm'n*, 788 F.3d 312, 316 (D.C. Cir. 2015) (citations omitted); see also *Mausolf v. Babbitt*, 85 F.3d 1295, 1300 (8th Cir. 1996) ("We conclude that the Constitution requires that prospective intervenors have Article III standing to litigate their claims in federal court.").[3]

The Movants fail to show that removal of the witness requirement will cause them any injury in fact.[4] While the Movants allege that removal of the witness requirement could potentially lead to dilution of their votes if individuals fraudulently vote absentee, they have not provided any substantive evidence to corroborate the allegation. Accordingly, Movants have not shown any injury in fact that would give them standing to intervene in this case.

The issue of standing is particularly important in a case like this one where one group of proposed intervenors seeks to inject an unrelated cross-claim into the litigation.[5] Permitting intervention and the proposed cross-claim here would allow Movants to sidestep Article III

---

[3] See also *Waterkeeper All., Inc. v. Wheeler*, 330 F.R.D. 1, 6 (D.D.C. 2018) ("Prospective defendant-intervenors must also demonstrate Article III standing by establishing injury in fact, causation, and redressability."); *Campaign Legal Ctr. v. Fed. Election Comm'n*, No. CV 19-2336 (JEB), 2019 WL 6051549, at *2 (D.D.C. Nov. 15, 2019) ("The standing inquiry for an intervening defendant is the same as for a plaintiff: the intervenor must show injury in fact, causation, and redressability."); *cf. Ruiz v. Estelle*, 161 F.3d 814, 830 (5th Cir. 1998) ("we hold that Article III does not require intervenors to independently possess standing where the intervention is into a subsisting and continuing Article III case or controversy and the ultimate relief sought by the intervenors is also being sought by at least one subsisting party with standing to do so").

[4] The individual voter Plaintiffs, by contrast, have asserted that they will be hindered from casting absentee ballots in light of the witness requirement due to concerns for their individual health and safety. And, because the individual voter Plaintiffs have standing, the Court need not consider the League of Women Voters of Virginia Plaintiff's standing. *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 (1977) (holding because "one individual plaintiff . . . has demonstrated standing," the Court "need not consider whether the other individual and corporate plaintiffs have standing to maintain the suit"). The Movants, by contrast, have only speculatively asserted that they will be injured if the witness requirement is enjoined and other qualified voters are permitted to cast absentee ballots without endangering their health and safety during the COVID-19 pandemic.

[5] *See infra* § II.B.

standing barriers that would otherwise prevent them from bringing those claims as plaintiffs. And the implications of allowing Movants to intervene on their theories in a case relating to elections are staggering. Effectively, it would recognize that any voter could intervene in a suit involving election procedures.

We would also note that the Plaintiffs and Defendants have requested that this Court enter a partial consent judgment and decree that would end the litigation in this case with respect to the June primary. Other courts have explained that, when original parties no longer seek to pursue litigation, "[i]t is clear that an intervenor, whether permissive or as of right, must have Article III standing in order to continue litigating if the original parties do not do so." *Mangual v. Rotger-Sabat*, 317 F.3d 45, 61 (1st Cir. 2003); see also *Chiles v. Thornburgh*, 865 F.2d 1197, 1213 (11th Cir. 1989) ("We therefore hold that a party seeking to intervene need not demonstrate that he has standing in addition to meeting the requirements of Rule 24 *as long as there exists a justiciable case and controversy between the parties already in the lawsuit.*") (emphasis added). To the extent that the Movants wish to continue litigation regarding the witness requirement for the June primary as applied to voters who believe they may not safely have a witness present while completing their ballot, the Movants must demonstrate that they have Article III standing to do so. To allow otherwise would permit a party not subject to the original case to use it as a vehicle to pursue its own objectives.

II. Movants are not entitled to either form of intervention.

Even if Movants had standing to intervene, they fail to meet the requirements for intervention as of right, and permissive intervention should likewise be denied. "Intervention is a procedural device that attempts to accommodate two competing policies: efficiently administrating legal disputes by resolving all related issues in one lawsuit, on the one hand, and

keeping a single lawsuit from becoming unnecessarily complex, unwieldy or prolonged, on the other hand." *United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 69 (2d Cir. 1994). Protecting litigation from becoming unnecessarily complex, unwieldy, or prolonged is particularly important in a case involving an upcoming election where the burdens associated with adding more parties—including a party seeking to file a crossclaim—is especially painful. Movants' arguments supporting both forms of intervention do not establish why they will be insufficiently supported by the Defendants. The motion should therefore be denied.

A. Movants are not entitled to intervention as of right under Rule 24(a).

The Movants assure the Court that their interest is to ensure the integrity of Virginia's election. Protecting these interests is squarely within Defendants' roles, and no one is better equipped to ensure the integrity of Virginia's elections than Defendants. "Where parties share the same ultimate objective, differences in litigation strategy do not normally justify intervention." *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003); see also *Saldano v. Roach*, 363 F.3d 545, 555 (5th Cir. 2004) ("Simply because the [Movants] would have made" or may at some point would like to make "a different decision does not mean that the Attorney General is inadequately representing the State's interest—and hence, the [Movants'] claimed interest[.]").

As required by Virginia Code § 24.2-103(A), the interest of the Defendants is to "supervise and coordinate the work of the county and city electoral boards and of the registrars to obtain *uniformity* in their practices and proceedings and *legality and purity in all elections*." (emphasis added). Further, "[t]he Board is charged with carrying out Virginia's election laws." *Miller v. Brown*, 462 F.3d 312, 321 (4th Cir. 2006). Under Virginia's elections laws, "[a]ny person who is registered to vote and is a qualified voter shall be entitled to vote in the precinct where he resides." Va. Code § 24.2-400. Accordingly, the Defendants, in their duties with

respect to ensuring the legality of elections and ensuring that any qualified voter be entitled to vote, are required to ensure that all qualified voters are capable of having their ballots counted.

To the extent that the Movants may be interested in advancing different arguments than the Defendants in order to meet that objective, these differences would be nothing more than a "reasonable litigation decision[ ] made by the Attorney General with which [the prospective intervenors] disagree." *Stuart*, 706 F.3d at 354–55. "Such differences of opinion cannot be sufficient to warrant intervention as of right," and "the harms that the contrary rule would inflict upon the efficiency of the judicial system and the government's representative function are all-too-obvious." *Id.* at 355; see also *United States v. South Bend Cmty. Sch. Corp.*, 692 F.2d 623, 627 (7th Cir. 1982) ("[T]hat a proposed intervenor might . . . [take] a different view of the applicable law does not mean that the [government does] not adequately represent its interests in the litigation." (quotation marks omitted)).

The Movants fail to make the more exacting showing of inadequacy required in the context of a government party. *Stuart*, 706 F.3d at 351 ("[J]oin[ing] our fellow courts of appeals in holding that the putative intervenor must mount a strong showing of inadequacy [when the government is a party]). The Fourth Circuit has been clear that not requiring intervenors to make a strong showing of inadequacy "would place a severe and unnecessary burden on government agencies as they seek to fulfill their basic duty of representing the people in matters of public litigation." *Id.*

The Defendants—represented by the Commonwealth's Attorney General—are ideally placed to robustly protect the propriety of Virginia's elections.[6] As stated by the Commonwealth's Attorney General, Mark Herring, "[f]ree and fair elections are at the core of

[6] See also *American Nat. Bank & Tr. Co. of Chicago v. City of Chicago*, 865 F.2d 144, 148 (7th Cir. 1989) (rejecting argument that proposed intervenor could "make any concrete showing of inadequacy of representation" by arguing that "because of certain political considerations, [defendant] may be less than zealous in the defense of this cause").

our democracy and no Virginian should have to choose between their health and exercising their right to vote."[7] If the interest of the Movants is to protect the integrity of Virginia elections, as is the interest of the Commonwealth, the Movants fail to demonstrate the inability of the Defendants to protect that interest.[8]

B. Permissive intervention should be rejected for this same reason.

Permissive intervention should be denied for the same reason there is no basis for intervention as of right. See *Virginia Uranium, Inc. v. McAuliffe*, No. 4:15-CV-00031, 2015 WL 6143105, at *4 (W.D. Va. Oct. 19, 2015) ("[W]here . . . intervention as of right is decided based on the government's adequate representation, the case for permissive intervention diminishes or disappears entirely.") (quoting *Tutein v. Daley*, 43 F.Supp.2d 113, 131 (D. Mass. 1999)). Even if the Movants could establish the elements of permissive intervention, permissive intervention is inappropriate if this Court concludes that intervention would not provide an appreciable "benefit to the process, the litigants, or the court," *Lee v. Virginia Bd. of Elections*, 2015 WL 5178993, at *4 (E.D. Va. Sept. 4, 2015), or would "unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3).

When "intervention as of right is decided based on the government's adequate representation, the case for permissive intervention diminishes or disappears entirely." *Tutein*, 43 F. Supp. 2d at 131 (citation omitted); see generally *Hoots v. Pennsylvania*, 672 F.2d 1133, 1136 (3d Cir. 1982) (Where "the interests of the applicant in every manner match those of an existing party and the party's representation is deemed adequate, the district court is well within its

[7] Press Release, Ralph Northam, Governor of Virginia, Governor Northam Announces Plans to Postpone Upcoming Virginia Elections in Response to COVID-19 (Apr. 8, 2020), https://www.governor.virginia.gov/newsroom/all-releases/2020/april/headline-855995-en.html.

[8] To the extent the Movants-individual voters assert a broad "right to vote" as the interest justifying their intervention, see ECF 23 at 3, Defendants are best equipped to protect the right to vote (just as they are best equipped to protect election integrity). Accepting the Movants-individual voters' position that simply invoking the broad "right to vote" is sufficient to merit intervention as of right, could set the stage for any voter have a right to intervene in any elections case.

discretion in deciding that the applicant's contributions to the proceedings would be superfluous and that any resulting delay would be 'undue.'"). As established above, the interest of the Defendants in this action is to defend the integrity of elections and protect the right to vote in the Commonwealth, which the Movants have also asserted as their interest. ECF 29, at 1–2; ECF 23 at 3. The Movants have shown no reason why the representation by the Defendants of that interest would be inadequate. As such, intervention by the Movants is unnecessary and should be denied. Further, Ferguson Voters seek to inject into this litigation a cross-claim against the Defendants with respect to an absentee voting requirement that is wholly unrelated to the witness requirement. Rule 24(b)(3) requires that the intervenor "claim[] 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." The reasons that qualify a voter to cast an absentee ballot are unrelated to how a ballot is marked.[9] To permit litigation of that unrelated claim would not be germane to the issue in this case—the witness requirement—and would cause delay that could increase voter and election official confusion a little more than a week before absentee ballots for the June primary must be mailed to voters. Therefore, the cross-claim would not provide "benefit to the process, the litigants, or the court" and gives further reason to deny the motion to intervention of the Ferguson Voters. And, for the reasons discussed above, Ferguson Voters should not be permitted to sidestep Article III standing requirements by intervening as defendants.

* * *

[9] The reasons for which a voter may cast an absentee ballot are governed under Va. Code §§ 24.2-700, 24.2-701, 24.2-701.1, and 24.2-703. The procedures that an individual must take in completing an absentee ballot are governed under Va. Code §§ 24.2-706 and 24.2-707.

It bears noting that the Movants are not without a medium to raise their concerns. To the extent that the Movants will at some point represent a perspective distinct from the Defendants' and may be helpful to this Court's resolution of this matter, that perspective may brought to bear through the filing of a brief amicus curiae. Indeed, "[n]umerous cases," including in the Fourth Circuit, "support the proposition that allowing a proposed intervenor to file an amicus brief is an adequate alternative to permissive intervention." *McHenry v. Comm'r*, 677 F.3d 214, 227 (4th Cir. 2012) (citing cases); see also *Stuart*, 706 F.3d at 355.

CONCLUSION

For these reasons, the Movants' motions to intervene should be denied. *First*, Movants have failed to demonstrate injury in fact and therefore lack standing to intervene. *Second*, the Movants share the same objective as the Defendants: protecting the integrity of Virginia elections and the right to vote. The Movants have not demonstrated why the Defendants will not adequately protect that interest, and, thus, have not shown that they meet the requirements to intervene as of right. *Third*, for the same reasons that the Movants should not be permitted to intervene as of right, the Movants fail to meet their burden for permissive intervention. Further, permissive intervention may unduly delay this litigation in a manner that could jeopardize absentee voting for the June primary. Finally, to the extent they have a unique perspective the Movants may raise their arguments in an amicus brief.

For the reasons stated above, the Defendants would request that the Movants' motions to intervene be dismissed.

MARK R. HERRING
Attorney General of Virginia

/s/ Carol L. Lewis

CAROL L. LEWIS (VSB #92362)
MICHELLE S. KALLEN (VSB #93286)
HEATHER HAYS LOCKERMAN (VSB #65535)
Office of the Attorney General
202 North Ninth Street
Richmond, Virginia 23219
804-692-0558 (telephone)
804-692-1647 (facsimile)
clewis@oag.state.va.us
Attorneys for Robert H. Brink, John O'Bannon, Jamilah D. LeCruise and Christopher E. Piper in their official capacities, and the Virginia State Board of Elections

CERTIFICATE OF SERVICE

Pursuant to Local Rule 7(g)(3), I hereby certify that on April 28, 2020, I will file this document electronically through the Court's CM/ECF system, which will effect service on all counsel who have appeared.

/s/ Carol L. Lewis

Carol L. Lewis
Counsel for Defendants, *for Robert H. Brink, John O'Bannon, Jamilah D. LeCruise and Christopher E. Piper in their official capacities, and the Virginia State Board of Elections*