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*.	**Civ. No. 6:20-cv-00024** **Reply Brief in Support of Motion to Intervene**

Reply Brief in Support of Motion to Intervene

On April 23, 2020, Proposed Intervening Voter Defendants[1] Sheila DeLappe Ferguson, Sandy Burchett, and Diane Crickenberger filed a Motion to Interevene—seeking to defend their fundamental right to vote. Doc. 22. On April 28, 2020, Plaintiffs and Commonwealth Defendants each filed an Opposition to Voter Defendants' Motion. Doc. 40, 49.[2] Voter Defendants now timely file this reply.

Argument

Voter Defendants have met all of the requirements of Fed. R. Civ. 24, and should be

[1] While intervention has not yet been granted, "Proposed Intervening Voter Defendants" will simply be referred to as "Voter Defendants" throughout this brief for length and clarity.

[2] Where applicable, Voter Defendants will refer to Plaintiffs and Commonwealth Defendants collectively as the "parties."

permitted to intervene. Indeed, Voter Defendants should be given an opportunity to be heard on their significant harms. First, before this case was filed, Commonwealth Defendants harmed Voter Defendants by implementing their unlawful interpretation of "[m]y disability or illness." This unlawful interpretation gave rise to Plaintiffs' claims, as many more people would be seeking absentee ballots and would have to comply Anti-Fraud Witness Requirement. And, the Commonwealth Defendants' directly adverse position to Voter Defendants also gave rise to their crossclaim. Second, after this case was filed, Commonwealth Defendants took another step to harm Voter Defendants—by not defending the Commonwealth's statutes and cementing the violation of Voter Defendants fundamental right to vote in their proposed consent decree. While the Commonwealth Defendants' job is to comply with and defend Commonwealth law, they have done neither. Accordingly, Voter Defendants are the only ones defending their rights.

Voter Defendants deserve to be heard and to have their rights protected, which can only be done through intervention. Granting intervention does not change the current scheduling order and does not delay this case, but it does give Voter Defendants an opportunity to protect their fundamental right to vote.

The parties suggestion that Voter Defendants be allowed to file an amicus brief, rather than be granted leave to intervene (Doc. 40, Pageid#435, Doc. 49, Pageid#1265), is in direct contradiction to the plain language of Fed. R. Civ. P. 24. Intervention, *not leave to file an amicus brief*, is proper if the movant meets the requirements of Fed. R. Civ. P. 24. As shown below, Voters meet both the requirements for intervention as of right and permissive intervention, so their Motion should be granted.

I. The voters are intervenors by right.

A. Voters' motion is timely.

The parties do not argue that Voter Defendants' motion is untimely. Thus, this factor is conceded. Voter Defendants have timely intervened in this action.

B. Voters have an interest in this action.

Plaintiffs argue that Voter Defendants do not have a personal interest in this case. Doc. 40, Pageid#420. The parties also argue that Voter Defendants cannot satisfy standing requirements. Doc. 40, Pageid#429-30, Doc. 49, Pageid# 1258. Both are wrong. For the reasons detailed below, Voter Defendants' harms are sufficient to establish both a personal interest in this case and standing.

Voter Defendants established that the requested relief violates their right to vote by removing safeguards against fraudulent votes that dilute legal votes. The substantial risk and high likelihood of illegal votes is the very harm for which that safeguard was instituted by the General Assembly. But the requested relief removes this vital safeguard, thereby creating a cognizable violation of Voters Defendants' right to vote. Doc. 37, Pageid#398-403.

Harm. Voter Defendants have a cognizable, imminent harm. The harm is cognizable because the safeguard that will be removed was designed by the General Assembly to protect against fraudulent votes that dilute Voter Defendants' votes. Voter Defendants explained that the fundamental right to vote can be denied in a variety of ways, and *one* of those is debasement by vote dilution resulting from inadequate safeguards to prevent illegal votes. Doc. 37, Pageid#399-403. And the harm of removing of a vital safeguard that the General Assembly imposed to prevent illegal voting creates a substantial risk of such vote dilution, which is a cognizable harm.

Id. Voter Defendants described the safeguard for absentee voting (the Anti-Fraud Witness Requirement) (Doc. 37, Pageid#383-384), but that will be gone with the requested relief. The result of removing the General Assembly's safeguard is a substantial risk of vote fraud, making it highly likely that illegal voting will occur. Contrary to the parties assertions (Doc. 40, Pageid#424-25, Doc. 49, Pageid#1259), Voter Defendants need not prove that it will occur, the harm is well established and the removal of the General Assembly's safeguard suffices to make that harm cognizable. If a voter is 1 in 10 legal votes, her vote is worth 1/10 of the whole, but if an extra 10 illegal votes are allowed, her vote is debased to 1/20 of the whole—that is debasement by vote dilution. A substantial vote dilution risk caused by removal of a safeguard is a cognizable harm, but "'a substantial risk that the harm will occur,'" suffices for standing. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014). And that substantial risk of harm was the precise harm that *Bush v. Gore*, 531 U.S. 98 (2000), held that the Florida Supreme Court had imposed by its lack of required "safeguards" to assure the integrity of the election and prevent vote dilution. *Id.* at 102; *see* Doc. 37, Pageid# 400-402 (discussing this and identifying the precise harm of removing necessary "safeguards"). And based on that lack of safeguards to prevent vote dilution, the Court halted the vote counting. The Supreme Court didn't wait until proven vote dilution happened, nor was it required to, and it didn't require the plaintiffs (who were *voters*, and political committees, and candidates) to *prove* actual vote dilution because the lack of safeguards and a resulting substantial risk of vote dilution was a sufficient and cognizable harm. And it is no answer to say that *Bush* was a one-time-only decision, because that opinion relied on a vote-dilution analysis *already well established* that applies here, and the *Bush* analysis has been cited by courts since then. *See, e.g.*, *Northeast Ohio Coalition v. Husted*, 696

F.3d 580, 592, 598 (6th Cir. 2012).[3]

The cognizable harm of vote dilution by lack of safeguards is an *imminent* injury. On May 8, 2020, when the absentee ballots (without the Anti-Fraud Witness Requirement) are mailed to active, registered voters, the harms of sending unlawful ballots and of voter confusion occur, *see, e.g.*, *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (confusion harm),[4] because recipients will think that they may lawfully vote those ballots without a witness signature when those ballots are not lawful. A second harm occurs when voters actually mail or deliver those absentee ballots, because then the violation of Voters Defendants' right to vote actually occurs, given the lack of General Assembly-prescribed safeguards that result in the cognizable risks of (a) vote fraud and debasement and dilution of Voter Defendants' right to vote and (b) an election without public confidence that it is legitimate. A third harm occurs when those unlawful absentee ballots are counted, which seals the vote-dilution and legitimacy harms in place, absent a new election under proper safeguards. Voters need not await some after-election evidence of illegal voting and consequent vote dilution and seek a new election.

Though Voter Defendants' harm is fully cognizable as a matter of law, given the removal of a vital safeguard against vote fraud that the General Assembly has found to be necessary in Virginia, the problem with absentee ballots is readily documented. Virginia history is riddled with examples of voter fraud. Voter Defendants presented a sampling of the absentee voter fraud

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[3] Defendants say there is no personal interest in this case because they are not being "deprived the right to vote[.]" Doc. 40, Pageid#422. But that misunderstands the harm claimed.

[4] Plaintiffs argue that *Purcell* is not applicable because this case will be decided 7 weeks before the election (Doc. 40, Pageid#428), but they fail to acknowledge that the Court's decision is set to come just 4 days before absentee ballots will be sent out. These last minute changes are exactly the type of harm *Purcell* prohibits.

issues in the Commonwealth starting as early as the 1960s and continuing until more recently. Doc. 37, Pageid#382-383. And voter fraud issues have also occurred all of the county. The following are some examples. First, vote buying, coercion, and fraud within the absentee voting process occurred in Rio Grande Valley Texas, where several "politiqueras" workers charged with collecting ballots directly from voters–were arrested under charges of buying votes for specific candidates.[5] The *New York Times* reports that vote buying and fraud became commonplace among Rio Grande Valley politiqueras and many came to expect payment for votes. *Id.* One worker estimated that over 2,000 votes were bought in 2012 elections. *Id.* In *U.S. v. Brown,* Noxubee County, Mississippi absentee ballots were required to be notarized, so a group of notaries was sent to steal ballots from mailboxes and fill them out fraudulently. 494 F. Supp. 2d 440, 457 (2007). In the 2018 North Carolina election for the 9th Congressional District,[6] multiple arrests[7] were made over an election fraud network of individuals who reportedly altered, forged, and/or collected ballots from voters. Additionally, *The Daily Signal* reported on 15 elections thrown out because of mail-in voting fraud.[8] In some cases, blank

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[5] Manny Fernandez, *Texas Vote-Buying Case Casts Glare on Tradition of Election Day Goads*, The New York Times, Jan. 12, 2014, https://www.nytimes.com/2014/01/13/us/politics/texas-vote-buying-case-casts-glare-on-tradition-of-election-day-goads.html (last visited Apr. 27, 2020).

[6] Philip Elliott, Why North Carolina's Election Fraud Hurts American Democracy, Time USA Magazine, February 22, 2019, https://time.com/5535292/north-carolina-election-fraud/ (last visited Apr 27, 2020).

[7] Richard Gonzales, North Carolina GOP Operative Faces New Felony Charges That Allege Ballot Fraud, National Public Radio, July 30, 2019, https://www.npr.org/2019/07/30/746800630/north-carolina-gop-operative-faces-new-felony-charges-that-allege-ballot-fraud (last visited Apr 27, 2020).

[8] Fred Lucas, *15 Election Results That Were Tossed Over Fraudulent Mail-In Ballots,* The Daily Signal (2020),

ballots were stolen from mailboxes and filled out by fraudsters for a specific candidate. *Id.* In other cases, voters were offered "assistance" as a ruse to fill out mail-in ballots for a different candidate than the voter instructed. *Id.*

Second, mail-in ballots can be filled out in private by someone other than the voter or someone subjecting to undue influence. In Oregon, a survey found that 5% of polled voters admitted that someone else filled out their ballot.[9]

Third, absentee ballots have been filled out fraudulently for ineligible, false, impersonated, or duplicate voter registrations. *Investor's Business Daily* reports there are about 3.5 million more registered voters than living adults in the United States as of 2015.[10] This data comes from the "Judicial Watch's Election Integrity Project [which] looked at data from 2011 to 2015 produced by the U.S. Census Bureau's American Community Survey, along with data from the federal Election Assistance Commission." *Id.* According to the Oregon Catalyst, this is exemplified in the case of a voter in Oregon who plead guilty to voter fraud after casting multiple ballots in the name of his deceased son.[11] It was also exemplified in the Commonwealth

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https://www.dailysignal.com/2020/04/21/15-election-results-that-were-thrown-out-because-of-fraudulent-mail-in-ballots/ (last visited Apr 27, 2020).

[9] *A 'Modern' Democracy That Can't Count Votes*, Los Angeles Times, December 11, 2000, https://www.latimes.com/archives/la-xpm-2000-dec-11-mn-64090-story.html (last visited Apr. 27, 2020).

[10] *U.S. Has 3.5 Million More Registered Voters Than Live Adults — A Red Flag For Electoral Fraud*, Investor's Business Daily, August 16, 2017, https://www.investors.com/politics/editorials/u-s-has-3-5-million-more-registered-voters-than-live-adults-a-red-flag-for-electoral-fraud/ (last visited Apr 27, 2020).

[11] *Oregon AG gets guilty plea voter fraud case*, Oregon Catalyst, September 18, 2010, https://oregoncatalyst.com/3510-oregon-ag-gets-guilty-plea-voter-fraud-case.html (last visited Apr 27, 2020).

when a Virginia man attempted to cast ballots for both himself and his deceased wife.[12]

In sum, the harm Voters claim is concrete, imminent, and well-established in controlling law.

Causation. Voters' cognizable harm of vote dilution is readily traceable to requested relief, because it seeks to strip the vital legislated safeguard, the lack of which creates the cognizable substantial risk of vote dilution by illegal votes.

Redressability. The requested relief will redress the injury because it will prevent the removal of the Anti-Fraud Witness Requirement, which is the source of Voters Defendants' harm of vote dilution.

In sum regarding standing, all elements are readily met and were self-evident in Voters Defendants' Motion to Intervene (Doc. 22) and Opposition to Plaintiffs' Preliminary Injunction Motion (Doc. 37). So Voters have standing.

Plaintiffs attempt to dismiss Voter Defendants' right as a generalized interest. Doc. 40, Pageid#420-426. But this attempt cannot be reconciled with the Supreme Court's conclusion that "[t]he right to vote is personal," and includes protection against dilution and disenfranchisement. *Reynolds v. Sims*, 377 U.S. 533, 555, 561 (1964). And disenfranchisement is a severe burden that is personal to the person disenfranchised.[13] So voters experiencing it have standing to challenge government action that disenfranchises them, including by posing a substantial risk of doing so. Voter Defendants have established a *personal interest*, not a generalized grievance. So this case

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[12] Doc. 37, PageID#383.

[13]Disenfranchisement is a severe burden. *See, e.g., League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 244 (4th Cir. 2014); *Ne. Ohio Coal. for the Homeless v. Husted,* 696 F.3d 580, 597 (6th Cir. 2012).

is not like Plaintiffs' cited cases. Doc. 40, Pageid#421. Moreover, Voter Defendants' standing discussion shows why their harm is a personal interest and not a generalized grievance. *See supra* at 2-8.

Allowing voter intervention is not uncommon. In fact, Voters have been permitted to intervene in many cases. *See, e.g., Reynolds*, 377 U.S. 433; *Democratic Nat'l Comm. v. Republican Nat'l Comm.*, 543 U.S. 1304 (2004); *Spencer v. Pugh*, 543 U.S. 1301 (2004); *Abrams v. Johnson*, 521 U.S. 74 (1997); *Lopez v. Montery County*, 519 U.S. 9 (1996); *United States v. Mississippi*, 444 U.S. 1050 (1980); *Wise v. Lipscomb*, 434 U.S. 1329 (1977); *Bullock v. Carter*, 405 U.S. 134 (1972); *Gore v. Harris*, 772 So. 2d 143 (Fla. 2000); *Ward v. Columbus County*, 782 F. Supp. 1097 (E.D.N.C. 1991); *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224 (4th Cir. 2014); *Bates v. Jones*, 127 F.3d 870 (9th Cir. 1997); *Marks v. Stinson*, 19 F.3d 873 (3d Cir. 1994); *N.C. State Conference of the NAACP v. McCrory*, 182 F. Supp. 3d 320 (M.D.N.C. 2016); *Navajo Nation v. Ariz. Indep. Redistricting Comm'n*, 230 F. Supp. 2d 998, 1000 (D. Ariz. 2002); *Shaw v. Hunt*, 861 F. Supp. 408 (E.D.N.C. 1994); *Goines v. Heiskell*, 362 F. Supp. 313 (S.D. W. Va. 1973). Likewise, here intervention is both proper and necessary.

In sum, Voters do have standing to bring their vote-dilution claim and they have established a personalized harm.

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

Without intervention, Voter Defendants have no ability to protect their personal interests. And if Plaintiffs were to succeed in obtaining their requested relief, Voter's interests would be significantly impaired and impeded. So this prong is satisfied.

D. The Commonwealth Defendants are directly adverse to Voter Defendants.

Voter Defendants need only "show[ ] 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)). "The burden of making this showing should be treated as 'minimal.'" *Id*. at 475. While Voter Defendants acknowledge that when the government is a defendant, they must make a "strong showing" of inadequacy of representation, *Stuart v. Huff*, 706 F.3d 345, 352 (4th Cir. 2013), this burden can be met by "showing of adverse interests, collusion, or nonfeasance" *id*. at 350. Voter Defendants have shown both adverse interests and nonfeasance.

Voter Defendants have more than satisfied this minimal burden. In fact, it is difficult to comprehend a more "'strong showing' of inadequacy of representation" (*see* Doc. 40, Pageid# 431; *see also* Doc. 49, Pageid#1262) than this case. Defendants are not just inadequately representing Voter Defendants, they are taking a position directly adverse to Voter Defendants' personal interest. First, Commonwealth Defendants have submitted a Joint Motion for Entry of Partial Consent Judgment and Decree (Doc. 35), so Commonwealth Defendants are not even attempting to defend Voter Defendants' interest. Second, Commonwealth Defendants' position regarding the interpretation of "[m]y disability or illness" is directly adverse to Voters Defendants' position. This interpretation is unconstitutional and violates Voter Defendants' right to vote, so Voter Defendants seek to bring their cross claim against Commonwealth Defendants.[14] Moreover, the Commonwealth Defendants refusal to defend this case should be

[14] For the reasons in Part I.B, Voter Defendants have standing to bring their cross claim. Plaintiffs argue that based on their places of residence, Voter Defendants do not have a primary on June 23rd. Doc. 40, Pageid#430 But there is also a statewide Republican June 23rd primary for Senate. *See* https://www.elections.virginia.gov/media/castyourballot/candidatelist/June-2020-

considered nonfeasance—which is also sufficient to show inadequacy of representation. *See Stuart*, 706 F.3d at 350.

Plaintiffs attempt to shoehorn this clear adversity and nonfeasance into a "different approach." Doc. 40, Pageid#431. But the Commonwealth Defendants aren't defending the laws at all.[15] And because Voter Defendants have a legally protected interest in this case (*see* Part I.B), they have a right to defend against the requested relief. Thus, Plaintiffs' reliance on *Stotts v. Memphis Fire Dept.*, 679 F.2d 579 (6th Cir. 1982) is misplaced (as proposed intervenors in that case did not have a protected interest).

Thus, this adversity between Commonwealth Defendants and Voter Defendants satisfies this prong.

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).[16]

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

The parties do not attempt to rebut that the Voter Defendants' defenses share a common question of law with the main action. Thus, they have conceded this factor as to Voter

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Primary-Candidates-List-(4)-1.pdf at 3.

[15] Commonwealth Defendants argue that they are "best equipped to protect" Voter Defendants' right to vote. Doc. 49, Pageid#1263. But Commonwealth Defendants aren't defending that right, their consenting to the very harm that violates Voter Defendants' fundamental right to vote.

[16] Commonwealth Defendants argue that permissive intervention should also be denied when "intervention as of right is decided based on the government's adequate representation[.]" Doc. 49, Pageid#1263. But as shown, Commonwealth Defendants' position is directly adverse to Voter Defendants, so Voter Defendants are not adequately represented. *See* Part I.D.

Defendants' defenses.

Likewise, Plaintiffs do not attempt to rebut that Voter Defendants' claims share a common question of law with the main action, so Plaintiffs have conceded this factor as to Voter Defendants' claims.

Commonwealth Defendants, on the other hand, attempt to argue that Voter Defendants' cross claim is "wholly unrelated to the witness requirement." Doc. 49, Pageid#1264. But Commonwealth Defendants fail to acknowledge that the claim of who can obtain an absentee ballot is directly related to if that ballot is properly cast. Moreover, the crossclaim arises out of the same facts, same code sections, same fundamental rights, and same case law as Plaintiffs' claims, so they clearly share a common question of law.

B. Voters' Motion is timely.

The parties do not argue that Voter Defendants' motion is untimely. Thus, this factor is conceded. Voter Defendants' have timely intervened in this action.

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

Plaintiffs claim that delay will result if Voter Defendants are permitted to intervene. Doc. 40, Pageid#435. But Plaintiffs acknowledge that Voter Defendants "have agreed to the aggressive briefing schedule set by this Court[.]" Doc 40, Pageid#435. And Voter Defendants' requested brief in response to the proposed consent decree will be filed less than two days from now. So no delay or prejudice will result as to Plaintiffs claims.

And Voter Defendants' crossclaim needs to be resolved before the primary election, so as to avoid violations of their fundamental right to vote. So that claim will also be resolved without delay and in a swift manner. Moreover, the parties only submitted a "partial" consent decree, so

this case will remain active even if the consent decree is approved. So the crossclaim does not delay resolution of Plaintiffs' claims, nor the case as whole. There is also no prejudice to either party.

Finally, Voter Defendants' crossclaim would not complicate this litigation, as the claims are directly related. And all arguments are based on the same code sections, same case law, and same fundamental rights.

So Voter Defendants' intervention would not cause any delay or prejudice.

Conclusion

For these reasons, this Court should grant intervention as of right or, in the alternative, permissive intervention.

Date: April 29, 2020

Respectfully Submitted,

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Certificate of Service

I hereby certify that the foregoing document was served electronically on April 29, 2020, upon all counsels of record via the United States District Court for the Western District of Virginia, electronic filing system.

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