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 **REPLY IN FURTHER SUPPORT OF MOTION OF THE REPUBLICAN PARTY OF VIRGINIA, *ET AL.*, TO INTERVENE**

I. INTRODUCTION

The Republican Party of Virginia, Inc. ("RPV") and three Republican voters moved to intervene in this lawsuit, filed by three Democratic voters and an ideologically allied nonprofit group, that seeks to enjoin a Virginia election-integrity statute for the June 23, 2020 Primary Election and future elections. Only ten days into this case, the Defendants, represented by the Democratic Attorney General, agreed to enter into a consent decree enjoining the statute for the Primary Election.[1] The parties now oppose the Proposed Intervenors' intervention, arguing both that (1) the Proposed Intervenors lack a "particularized" interest in the litigation and (2) the Defendants will adequately represent their interests.

[1] Attorney General Herring already has issued a press release touting his office's achievement in reaching an agreement with Plaintiffs. *See*, https://oag.state.va.us/media-center/news-releases/1703-april-28-2020-herring-reaches-agreement-to-promote-safe-absentee-voting-by-mail (accessed on Apr. 29, 2020).

The parties effectively advocate that only Democrats should have a say in how the Republicans' June 23 primary is conducted, and that while Plaintiffs have standing to vindicate their right to vote, Proposed Intervenors may not vindicate theirs. This is not a defensible position, and the Court must grant intervention.

II. PROPOSED INTERVENORS' INTERESTS SUPPORT INTERVENTION

Proposed Intervenors have three distinct interests that warrant intervention—the administration of its nominating process, the competitive environment in which its nominees seek election, and the specific interest of the Party and its members in the protection that election integrity measures provide to the right to an effective vote.

A. Virginia statutes and long-standing precedent support RPV's Interest in its own nominating process.

Plaintiffs contend that RPV's associational rights are not implicated by this litigation, because associational rights supposedly only extend to "eligibility to participate in a party's primary" and not the "administrative procedures" under which that election is conducted. This is not the law.

Under Virginia state law, "the duly constituted authorities of the state political party shall have the right to determine the method by which a party nomination for a member of the United States Senate or" other office is made. Va. Code. Ann. § 24.2-509(A). Political parties, including RPV, also have "the power to... (iii) provide for the nomination of its candidates... and (v) perform all other functions inherent in political party organizations." Va. Code Ann. § 24.2-508. This right is not just statutory but also constitutionally protected under the First and

Fourteenth Amendments as inherent in the party's associational rights. *See Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 224 (1986) (striking down statute regulating eligibility to participate in Republican Party primary, holding that "[t]he Party's determination of the boundaries of its own association, and of the structure which best allows it to pursue its political goals, is protected by the Constitution").

Thus, RPV may choose a primary election method defined by the provisions of the Code or a party-run method; its choice is not between whatever Plaintiffs suggest a primary election should be and a party-run method. Plaintiffs cite no support for their proposed distinction that eligibility to participate in a primary is a protected interest and procedures for the administration of the primary are not. The distinction is a false one because the Republican Party's authority to govern "procedures" for voter eligibility to participate in its primaries has been repeatedly upheld. The Fourth Circuit, for instance, struck down the VSBOE's interpretation of Virginia's open-primary statute as-applied to the Republican Party's right to regulate the requirements for a voter to cast a ballot in such primary. *Miller v. Brown*, 503 F.3d 360, 371 (4th Cir. 2007). RPV also prevailed in *Parson v. Alcorn*, 157 F. Supp. 3d 479 (E.D. Va. 2016), where the court upheld a procedural requirement that voters sign an affirmation prior to participating in a presidential primary. *Id*. at 496 (citing *Tashjian*, 479 U.S. at 217). Whether the voter is required to execute an affiliation affirmation or comply with a witness requirement to be

eligible to vote in the primary is immaterial; the RPV has the right to defend the process by which voters are eligible to participate.

Indeed, but for RPV, there would be no statewide primary. None of the Parties or the other proposed intervenors have alleged that they chose a primary as a nominating method. Contrary to Plaintiffs' assertion that the RPV has an interest only in the eligibility of voters to participate in its primary, the Party has an interest in the procedures by which eligible voters (or ineligible voters) are allowed to participate.

B. RPV has an interest in the competitive environment faced by its candidates in the November General Election.

Plaintiffs misunderstand the competitive environment interest outlined in *Shays*. Noting that standards for ballot counting are set by the Commonwealth, not political parties, they claim that this does not impact the competitive environment, but these standards are no different from the campaign finance regulations challenged in *Shays*. *Shays* holds that candidates facing competition intensified by a statutorily-banned practice permitted by an administrative regulation forces them to adjust their campaign strategy, "suffer[ing] harm to their legally protected interests." *Shays v. Federal Election Comm'n*, 414 F.3d 76, 87 (D.C. Cir. 2005). Here, candidates faced with absentee votes that will be counted despite a statute that would prohibit their counting will also have to adjust their campaign strategies. Additionally, the lack of a witness signature requirement will likely cause some voters who would have voted in person in order to avoid the minor inconvenience of finding a witness to vote by absentee ballot, depriving the

candidate of the opportunity to attempt to influence that voter's decision in the days leading up to election day. The RPV has standing to defend these interests.

C. Proposed Intervenors' interest in protecting election integrity and the right to cast an effective ballot is no less important than Plaintiffs' interest in casting their ballots.

The parties assert that Proposed Intervenors lack a sufficiently particularized interest in protecting their right to vote against fraud, and therefore are "generalized" interests that do not support intervention. This argument is without merit for two reasons.

First, the parties insist that Proposed Intervenors must satisfy Article III standing requirements in order to be entitled to intervene. It is true that "courts remain divided...on the question of whether an intervenor must establish Article III standing." 13A Charles A. Wright et al., *Federal Practice & Procedure*, § 3531, at 51 (3d ed. 2008). The Fourth Circuit does not appear to have ruled on whether a party must have Article III standing to intervene as of right. *See, e.g.*, *N. Carolina State Conference of NAACP v. Cooper*, 332 F.R.D. 161, 165 (M.D.N.C. 2019) ("Plaintiffs fail to cite any Fourth Circuit case requiring that, in addition to satisfying the Rule 24 requirements, an intervenor-defendant must also establish Article III standing. . . . Nor could this Court find a Fourth Circuit case setting forth such a requirement."). However, the Fourth Circuit has made clear that "a party who lacks standing can nonetheless take part in a case as a permissive intervenor." *Shaw v. Hunt*, 154 F.3d 161, 165 (4th Cir. 1998) (citing *S.E.C. v. United States Realty & Improvement Co.*, 310 U.S. 434, 459 (1940)). And in *Cooper*, the district court "decline[d] to impose such a requirement on the Proposed

Intervenor-Defendants in this action." 332 F.R.D. at 165. This Court should likewise decline to impose such a standard on the Proposed Intervenors, particularly under the unique equitable circumstances of this case where the Proposed Intervenors are the only parties defending the application of the statute to the June 23, 2020 Primary Election.

Intervention is also appropriate under the principle articulated in *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 n.9 (1977), cited by Defendants (Dkt. 49, at 4 n.4), that where "one individual [member] plaintiff...has demonstrated standing," a court "need not consider whether the other [member and organization] plaintiffs ... ha[ve] demonstrated standing." Here, at a minimum, the RPV has demonstrated its standing as a state political party. Having done so, the individual voter Proposed Intervenors should have standing as well.

Second, the parties argue that the Proposed Intervenors' interest in protecting their fundamental right to vote against fraud is too "general" to support intervention, because that interest is broadly shared. True, that is a broad interest, but so is Plaintiffs'. Plaintiffs subjected this dispute over election mechanics—deciding what procedures should govern political party primaries and Virginia elections—to judicial scrutiny. They cannot seriously contend that this is a private affair only between themselves and the government defendants they decided to name, seeking only to vindicate their private rights. In claiming that they alone have an interest in the answer to that question, Plaintiffs are asking for special treatment.

The right to vote is a fundamental right, and the Supreme Court has said that "the right of suffrage can be denied by debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). This proposition is not just applicable in legislative apportionment or voter eligibility claims as Plaintiffs suggest, but to any injury that dilutes a citizen's vote, including the casting of illegal votes. *See, e.g.*, *Bush v. Gore*, 531 U.S. 98, 105 (2000) (applying the principle to recount procedures); *Ex parte Siebold*, 100 U.S. 371 (1879) (applying the principle to ballot box stuffing); *Burson v. Freeman*, 504 U.S. 191, 199 (1992) (applying the principle to find "a compelling interest in ensuring that an individual's right to vote is not undermined by fraud in the election process.").

There is "no question" that deterring voter fraud and preventing harm to "public confidence in the integrity of the electoral process" are important interests, as Plaintiffs concede. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 196–97 (2008); Compl. at para. 85. And "[i]f the state has a legitimate interest in preventing that harm from occurring, surely a voter who alleges that such harm has befallen him or her has standing to redress the cause of that harm." *Judicial Watch, Inc. v. King*, 993 F. Supp. 2d 919, 924 (S.D. Ind. 2012) (finding standing where non-profit organization alleged that the confidence of its registered voters in the integrity of the electoral process was undermined by the Defendants' failure to comply with the list maintenance requirements of the NVRA). Applicants clearly match this description. Their concrete and particularized interest in the security

and integrity of the Republican Primary Election and the General Election in which Republican candidates will compete will be harmed if Virginia's longstanding absentee voter witness requirement is not enforced.

The right of Proposed Intervenors not to have their votes made less effective by the likely increase in fraudulent votes is no less significant than the potential for the few voters who might be unable to vote due to the witness signature requirement. Proposed Intervenors have demonstrated that the risk of impermissible votes is much higher in the absentee voting process than in the in-person voting process. Dkt. 28. Ex. A ¶ 85 n.8. Additionally, research by *Amici Curiae* Public Interest Legal Foundation and Landmark Legal Foundation further demonstrates the increased risk in eliminating the witness signature requirement due to deceased registrants who may have a standing absentee ballot application on file. Dkt. 48. at 7.

Plaintiffs' claim that Proposed Intervenors have not argued that the witness requirement advances the Commonwealth's interest in election integrity, particularly as it relates to practices in other states, is erroneous. Proposed Intervenors detail the ways in which different states combine different election integrity measures in their absentee ballot process in the Proposed Answer submitted with their Motion to Intervene. Dkt. 28, Ex. A ¶ 8, n.3-7. And in Proposed Intervenors' opposition to Plaintiffs' motion for preliminary injunction, Proposed Intervenors in fact did explain how the witness requirement advances election integrity and deters voter fraud.

III. DEFENDANTS DO NOT ADEQUATELY REPRESENT PROPOSED INTERVENORS' INTERESTS

A. Proposed Intervenors' interests diverge from Defendants' warranting intervention of right.

The Fourth Circuit distinguishes between two types of cases in which intervention is sought where the government is a defendant—those "where the proposed intervenor shares the same objective as a government party" and those "where the existing party and proposed intervenor seek divergent objectives." *Stuart v. Huff*, 706 F.3d 345, 351-352 (4th Cir. 2013). In the first type, intervenors "must mount a strong showing of inadequacy" of representation by the government agency. *Id*. at 352. In the second type, "there is less reason to presume that the party (government agency or otherwise) will adequately represent the intervenor." *Id*. at 352.

The Parties argue that this is a case of the first type, suggesting that any differences between Defendants and Proposed Intervenors are not over the ultimate objective, but mere difference in litigation strategy. However, Defendants already have shown in this litigation that their ultimate objective diverges from Proposed Intervenors'. In joining Plaintiffs in proposing the Partial Consent Judgment and Decree, Dkt. 35, Defendants conceded that they believe the statute they are charged with defending is unconstitutional as applied to the June 23 Primary. *See, e.g.*, Brief in Support of Joint Motion For Entry Of Partial Consent Judgment And Decree at 7, Dkt. 36 (Apr. 27, 2020). Proposed Intervenors argue the opposite in their Opposition to the Plaintiffs' Motion for Preliminary Injunction, Dkt. 44, specifically, that the statute is constitutional. This is exactly the opposite of the situation in

Stuart where "[b]oth the government agency and the would-be intervenors want the statute to be constitutionally sustained." *Stuart*, 706 F.3d at 352. *See also Ansley v. Warren*, 1:16-cv-54, 2016 WL 3647979, at *2-3 (W.D. N.C. July 7, 2016) (denying intervention where defendant and proposed intervenors both sought to defend the constitutionality of a statute, noting that proposed intervenors may renew their motion "if it becomes apparent at some point in the future that the State no longer intends to defend the constitutionality" of the statute); *United States v. North Carolina*, 1:13-cv-861, 2014 WL 494911, at *4 (M.D.N.C. Feb. 6, 2014) (denying intervention as of right where proposed intervenor and government agency defendant both sought to uphold a statute).

Plaintiffs argue that Defendants' decision to enter into a consent decree is "a different approach to defending the same interests" as Proposed Intervenors. Dkt. 40 at 14. However, opposite positions on the constitutionality of a statute, even in an as-applied challenge, are not simple differences in litigation strategy as illustrated in the cases cited by *Plaintiff*. *Stuart*, 706 F.3d at 353 (finding that the Attorney General's office and proposed intervenors did not have an adversity of interest because both sought to defend the constitutionality of the law); *Saldane v. Roach*, 363 F.3d 545 (5th Cir. 2004) (holding, in a criminal case, that the Texas Attorney General and a District Attorney shared an identical interest "to see that justice is done" despite disagreement about a resentencing decision); *N.C. State Conf. of NAACP v. Cooper*, 1:18CV1034 , 2019 WL 5840845 (M.D.N.C. Nov. 7, 2019) (finding a difference of approach and not interest where defendant and proposed

intervenors both shared the same objective of defending the constitutionality of state law); and *Va. Uranium, Inc. v. McAuliffe*, 4:15-CV-00031, 2015 WL 6143105 (W.D. Va. Oct. 19, 2015) (holding that motions to dismiss by defendants and proposed intervenors both opposing injunctive relief, but not briefed to the same extent or along the same argument do not create adversity of interest).

Notably, courts in these cases repeatedly found that the State defendants were actively and often "vigorously" defending the constitutionality of the laws at issue. In *Cooper*, the state defendant moved to dismiss the suit and "filed an expansive brief opposing Plaintiffs' motion for preliminary injunction on the merits." *Cooper* at *2-3. In *North Carolina*, the court found a similarity with *Stuart* because, as there, the state "defended the statute vigorously." North Carolina at *4. Here, there is no such evidence of defense, let alone a vigorous one.

While Proposed Intervenors appreciate the time sensitive nature of this matter, and the Parties' expedited effort to resolve their dispute, the Parties cannot have it both ways: claiming Defendants are vigorously defending the constitutionality of a statute while at the same time asking the Court to bless an agreement with private parties to waive its application.

B. Alternatively, divergent interests warrant permissive intervention.

Even if Defendants' position on the as-applied constitutional challenge to the statute does not support intervention as of right, the Court should find it sufficient to support permissive intervention. *See S.C. Coastal Conservation League v. Pruitt*, 2-18-cv-3302018 WL 2184395, at *9 (D.S.C. May 11, 2018) (granting permissive

intervention under Fed. R. Civ. Pro. 24(b) after noting a likely difference in interests between government and intervenor, despite pursuing the same ultimate objective in the case). As noted in IV, *infra*, Proposed Intervenors' permissive intervention would not cause delay or prejudice under Rule 24(b)(3).

Defendants' reliance on *Virginia Uranium* and *Lee* to suggest that permissive intervention should be denied is misplaced. Dkt. 49 at 8. The *Virginia Uranium* Court cited four cases in support of its Rule 24(b)(3) analysis. *Virginia Uranium, Inc. v. McAuliffe*, 4:15-CV-00031, 2015 WL 6143105 (W.D. Va. Oct. 19, 2015). Defendants' position relies on *Tutein v. Daley*, 43 F.Supp.2d 113 (D. Mass. 1999), a case in which proposed intervenor "wishe[d] to present the same defense as" the defendant and where proposed intervenor was already a party to another proceeding in which it could pursue the same interest. *Id.* at 131-132. Neither of those factors applies here.

Likewise, the opinion in *Lee*, from which Defendants draw a brief quotation, holds that "[a] court does not err in exercising its discretion by denying a motion to intervene *when undue delay exists* without a corresponding benefit to the process, the litigants, or the court, especially *where an existing party zealously pursues the same ultimate objectives* as a movant." *Lee v. Va. State Bd. of Elections*, 3:15CV357, 2015 WL 5178993, at *4 (E.D. Va. Sept. 4, 2015) (emphasis added) (citing *Stuart*, 706 F.3d at 355.). Defendant ignores two necessary conditions—undue delay and zealous pursuit of the same objective. In *Lee*, the court was faced with three differently situated groups of intervenors and noted that adding three groups of

intervenors would likely lead to delay. *Id*. at *4-5. The *Lee* Court also found that Defendants, who had already filed a motion to dismiss were adequately representing the proposed intervenors. *Id*. at *3-4. Here, no such delay will be caused and the Defendants, rather than filing a motion to dismiss, have filed a Joint Motion to Approve Consent Judgement. Dkt. 35.

Additionally, Proposed Intervenors provide a benefit to the process and the Court, advancing arguments not otherwise made by the Parties. These include arguments advanced in their already-filed Opposition to Motion for Preliminary Injunction, Dkt. 44, and in their planned filing of a brief in Opposition to Motion to Approve Consent Judgment, including a potential remedy that is more narrowly tailored to any infirmity the Court may find in the statute based on today's public health concerns.

IV. INTERVENTION WILL NOT LEAD TO DELAY, PREJUDICE, OR CONFUSION

The Parties assert, despite Proposed Intervenors acknowledged commitment to meet the Court's expedited briefing schedule, without explanation or analysis, that intervention "may unduly delay this litigation in a manner that could jeopardize absentee voting for the June Primary[,]" and "delay and complicate resolution of this case and lead to greater risk of confusion close to the election." Dkt. 49 at 11; Dkt. 40 at 19.

This Court has made clear its intention to resolve issues related to the June 23 Primary by the week of May 4, which the Parties acknowledged at the Court's first status conference will be sufficient to carry out all absentee voting activity on

schedule. Proposed Intervenors have agreed to abide by all expedited briefing deadlines and are grateful to the Court for permission to participate in briefings and the May 4 hearing. For these reasons, Proposed Intervenors submit that there is no risk to the Primary posed by Proposed Intervenors' intervention. Dkt. 41. To the extent that other proposed intervenors may have claims or present issues that may cause delay or prejudice, that is no reason to deny Proposed Intervenors' intervention.

With regard to subsequent elections at issue in this case, the Parties have offered no reason to believe that Proposed Intervenors' intervention will cause any prejudice or delay and Proposed Intervenors again commit to working on whatever schedule this Court sets in other phases of the litigation.

V. CONCLUSION

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

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on April 29, 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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