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**

REPLY BRIEF IN SUPPORT OF
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

The Republican Party of Virginia ("RPV") and amici throw a kitchen sink of objections at Plaintiffs with the hope that something will land, suggesting that the COVID-19 pandemic is supposedly not as bad as predicted; asserting that requiring voters to jump through extra hoops to find a witness during the pandemic is not particularly burdensome; and papering the Court with broad claims of voter fraud and irrelevant examples, without ever showing how the witness requirement addresses these concerns. Evaluating the actual evidence of harm, however, and weighing it against the minimal (if any) value of the witness requirement, there is no contest. In the context of the pandemic, continued enforcement of the witness requirement will

unconstitutionally burden the right to vote of Plaintiffs and many thousands of other Virginians and cannot be justified by vague election integrity interests. The Court should grant Plaintiffs' preliminary injunction motion if it denies entry of the proposed consent decree.

I. The RPV and amici misframe the relevant legal standards and fail to rebut Plaintiffs' demonstration of significant harm, including through suggested workarounds such as a "voter-witness dance."

A. Courts evaluate the burden on voters in light of present circumstances, including in the context of pandemics and disasters.

The RPV and amici note that Plaintiffs do not challenge the witness requirement in a "COVID-less world," but rather in the context of the current pandemic. They are correct. Where they are wrong is in how this affects the Court's analysis. In reviewing right to vote claims, courts must assess the burdens imposed by a challenged voting restriction within the context of circumstances as they currently exist—regardless of whether those circumstances are unusual or abnormal. And several courts have already struck down various election administration procedures as unduly burdensome in the context of the current pandemic, particularly where complying with such procedures would conflict with a state's "stay-at-home" orders. *See, e.g.*, *Libertarian Party of Ill. v. Pritzker*, No. 20-cv-2112, 2020 WL 1951687, at *4 (N.D. Ill. Apr. 23, 2020) (finding that the "combined effect of . . . Illinois' stay-at-home order and the usual in person signature requirements [posed] a nearly insurmountable hurdle"); *Esshaki v. Whitmer*, No. 20-cv-10831, 2020 WL 1910154, at *1 (E.D. Mich. Apr. 20, 2020) (noting state's "insist[ence] on enforcing [ballot-access] requirements as if its Stay-at-Home Order . . . had no impact on the rights of candidates and the people who may wish to vote for them").

Indeed, although the RPV contests the relevance of the ongoing pandemic when assessing the constitutionality of Virginia's elections administration procedures, it recently argued precisely the *opposite* in state court. In fact, the RPV recently sought and obtained a

consent order extending a temporary injunction in state court against a Virginia statute providing for certain candidate selection deadlines for all non-primary districts through July 28, 2020, on the grounds that the statutory deadlines were unconstitutionally burdensome in the context of the pandemic. *See* Compl., *Seventh Cong. Dist. Republican Comm. v. Va. Dep't of Elections* ("*Seventh Cong. Dist.*"), No. CL20001640-00 (City of Richmond Circuit Ct. Apr. 7, 2020) (attached as Ex. A); *Id.* ¶ 73 (requesting injunction under *Anderson-Burdick* framework and arguing that the "fact that State Defendants are encouraging voters to vote absentee and not travel to the polls insinuates that it is contrary to the health of Virginians to come into close contact with others."); Plaintiff-Intervenor Republican Party of Va.'s Unopposed Mot. & Consent Order to Extend Temp. Injunction, *Seventh Cong. Dist.* (Apr. 20, 2020) (requesting and agreeing in consent order that injunction against Va. Code § 24.2-510 in Seventh District until July 28 be applied to all district committees using a non-primary method of selecting candidates) (attached as Ex. B). Having recently endorsed the claim that election procedures can impose particularly significant burdens in the context of the COVID-19 pandemic that take on constitutional significance, the RPV should be estopped from taking the opposite position in this case.[1] *See New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (the doctrine of judicial estoppel "protect[s] the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment.").

[1] In another recent state court case challenging Virginia's signature requirements for a prospective candidate to gain a place on the ballot as unduly burdensome in light of the pandemic, the RPV (which was a defendant along with the Commonwealth) took no position on relief, which was ultimately granted. *See Faulkner v. Va. Dep't of Elections*, No. CL 20-1546, Slip Op. at 2 (Va. Cir. Ct. Mar. 25, 2020) (previously filed in this case at ECF No. 17-3 at pp. 51–55) (granting emergency preliminary injunction against Virginia election statute to Republican candidate in which RPV took no position). If the RPV had no position on whether it is unduly burdensome for prospective Republican candidates to gather voter signatures during the pandemic, it is odd that RPV now takes the position here that gathering a witness signature poses no significant burden on *voters*.

In any event, when confronted with other natural disasters or emergencies, courts have not hesitated to enjoin election laws that, in the context of the emergency, would unconstitutionally burden individuals' right to vote. For example, a district court found that Florida's voter registration deadline unconstitutionally burdened the right to vote in light of Hurricane Matthew, which "foreclosed the only methods of registering to vote" during the final week of Florida's voter registration window, such that maintaining Florida's statutory registration deadline would "completely disenfranchise[] thousands of voters," amounting "to a severe burden on the right to vote." *Fla. Democratic Party v. Scott*, 215 F. Supp. 3d 1250, 1257 (N.D. Fla. 2016); *see also Ga. Coalition for the Peoples' Agenda, Inc. v. Deal*, 214 F. Supp. 3d 1344, 1345–46 (S.D. Ga. 2016) (granting preliminary injunction to extend statutory voter registration deadline for a Georgia county after a hurricane). Similarly, the federal court in the Eastern District of Virginia granted a preliminary injunction in 2016 extending Virginia's statutory voter registration deadline after the state voter registration website crashed on the final day of registration. Order, *New Va. Majority Educ. Fund v. Va. Dep't of Elections*, No. 1:16-cv-01319-CMH-MSN, Dkt. No. 10 (E.D. Va. Oct. 20, 2016) (granting preliminary injunction extending Virginia's statutory voter registration deadline after state voter registration website crashed on the final day of registration). And an appellate court in Pennsylvania upheld a decision postponing an election entirely in light of significant flooding because, "[w]ithout the court's action, some voters, by reason of the elements, would have incurred the discrimination of disenfranchisement." *In re Gen. Election-1985*, 531 A.2d 836, 839 (Pa. Commw. Ct. 1987).

The *Anderson*/*Burdick* framework is a "flexible standard," *Burdick v. Takushi*, 504 U.S. 428, 434 (1992), requiring courts to take a context-specific approach to its burden analysis. The scrutiny applied "will wax and wane with the severity of the burden imposed on the right to vote

in any given case; heavier burdens will require closer scrutiny, lighter burdens will be approved more easily." *Fish v. Schwab*, No. 18-3133, --- F.3d ----, 2020 WL 2050644, at *12 (10th Cir. Apr. 29, 2020). In the hurricane and technological failure cases described above, federal courts took for granted that the registration deadlines ordinarily did not raise significant constitutional concerns, but conducted their analysis in light of the unusual circumstances that rendered those deadlines particularly burdensome. In the circumstances present in these cases, the states' registration deadlines significantly burdened the right to vote such that the state's regulatory interest—which might justify the deadlines under normal times—were no longer constitutionally sufficient. As one court explained, "[o]f course, the State of Florida has the ability to set its own deadlines and has an interest in maintaining those deadlines. But it would be nonsensical to prioritize those deadlines over the right to vote, especially given the circumstances here." *Fla. Democratic Party*, 215 F. Supp. 3d at 1258.

Here, the toll of sickness and loss of life from the COVID-19 pandemic now dwarfs those of the natural disasters that, in Florida and Georgia, rendered those state's voter registration deadlines unduly burdensome. Indeed, the national death toll from COVID-19 now exceeds American lives lost in the Vietnam War.[2] Unfortunately, the "painful new reality is that we are constantly at risk of contracting a deadly virus and are experiencing previously unimagined safety measures to stop its spread." *Thakker v. Doll*, 1:20-CV-480, 2020 WL 1671563, at *7 (M.D. Pa. Mar. 31, 2020); *see also Faulkner*, Slip Op. at 2 ("the circumstances as they exist in the Commonwealth of Virginia . . . are not normal right now"); Chief Judge Michael Urbanski,

[2] *See, e.g.*, David Welna, *Coronavirus Has Now Killed More Americans Than Vietnam War*, NPR, Apr. 28, 2020, https://www.npr.org/sections/coronavirus-live-updates/2020/04/28/846701304/pandemic-death-toll-in-u-s-now-exceeds-vietnam-wars-u-s-fatalities.

Ltr. to Members of WDVA Bar, Apr. 16, 2020 ("In a few short weeks, the global pandemic has changed the way we live . . . .").

For this same reason, the RPV's argument that absentee voting is not a constitutional right, and that "Plaintiffs remain free to vote at the polls," ECF No. 44 at 30, misses the mark. Many if not most Virginians rightfully do not feel safe voting in person for the June primary.[3] This concern carries particular weight for older Virginians and Virginians who have preexisting conditions that put them at a higher risk for serious COVID-19 complications like Plaintiff Toogood and League members McGrady and Claar. *See* ECF No. 17-5 ¶¶ 5–6; ECF No. 17-6 ¶¶ 7–8. As Dr. Reingold explains, "geriatric patients are at the greatest risk of severe cases, long-term impairment, and death," as are "those with immunologic conditions and with other preexisting conditions, such as hypertension, certain heart conditions, lung diseases (e.g., asthma, COPD), diabetes mellitus, obesity, and chronic kidney disease." ECF No. 17-1 ¶ 7; *see also United States v. Edwards*, No. 6:17-CR-00003, 2020 WL 1650406, at *6 (W.D. Va. Apr. 2, 2020) (explaining that COVID-19 "presents a significant risk to those . . . with compromised immune systems"); *In re Poulios*, No. 2:09-CR-109, 2020 WL 1922775, at *1 (E.D. Va. Apr. 21, 2020) (noting that the "COVID-19 pandemic" can "result in catastrophic health consequences for [individuals] vulnerable to infection").

Despite amicus Individual Voters' assertion that other elections have been safe and the RPV's suggestion that voters merely need to wear appropriate protective gear and everything will be fine, they disregard the actual evidence. Indeed, although the Individual Voters amici

[3] Nor is it assured that in-person voting will be as accessible—let alone safe—in upcoming elections as in past years, as localities are having difficulty recruiting poll workers to work the polls on Election Day. *See e.g.*, Iles Decl., ECF No. 17-2 ¶ 3.

assert that, "weeks after the Wisconsin election" on April 7, which featured substantial in-person voting, "COVID-19 cases had not spiked," ECF No. 37 at 4, in fact, the opposite is true: Wisconsin state officials have reported that *at least 50 people* who voted in-person last month's primary have already tested positive for COVID-19.[4] And Dr. Reingold has specifically cited incidents like this as further evidence for his opinion that requiring individuals to come within six feet of others to whom they are not otherwise being exposed would increase their risk of infection." ECF No. 17-1 ¶ 17. Given the current environment, the right at stake is not the "right to vote absentee" but the right to vote at all without endangering one's health.

Because of the risk to our communities posed by the pandemic, the witness requirement imposes particularly severe burdens on Virginia voters—particularly those who are at a higher risk for health complications and death.

B. The RPV and amici fail to rebut Plaintiffs' demonstration of irreparable harm to Plaintiffs and Virginia voters, including through their suggested alternative practices.

The most remarkable aspect of Intervenor's and amici's responses is their disregard of the burdens placed on voters should the witness requirement stay in place. They discount the expert evidence of real health risks as well as Plaintiffs' unrebutted testimony that they face real risks by observing the witness requirement or in-person voting and will be disenfranchised if it is not removed. And in all of their proposals, they expect voters to bear extra burdens to exercise the franchise without regard to the costs and consequences or their limitations. Only one proposal—requiring the voter to write the last four digits of their social security number on the

[4] Associated Press, *The Latest: 52 positive cases tied to Wisconsin election*, Apr. 28, 2020, https://apnews.com/b1503b5591c682530d1005e58ec8c267.

ballot envelope—merits any serious consideration in the longer term. But even that proposal, if employed in the June primary, would likely create confusion and disenfranchise eligible voters.

Amici and the RPV collectively suggest a number of more "narrowly tailored" alternatives than elimination of the witness requirement for the June election for individuals who live alone. They casually suggest electronic notaries, videoconference witnessing, and a "voter-witness dance" with neighbors. ECF No. 37 at 6, 16–17; ECF No. 44 at 10, 29, 34. None of these are likely to solve the witness problem for many thousands of Virginians, and even for those who could employ these techniques, they impose additional burdens that increase the cost of voting for those individuals with no tangible benefit for election integrity interests. For one, many Virginians lack access to smartphones and/or broadband internet, making all of the proposed technological solutions nonstarters. A recent report by Virginia's Chief Broadband Adviser and a study from the Virginia Chamber of Commerce found that approximately 600,000 Virginians do not have broadband access,[5] and this disparity is not evenly distributed across the Commonwealth. Moreover, Virginians should not need to pay a notary to exercise their fundamental right to vote. *Cf.* U.S. Const. amend. XXIV ("The right of citizens of the United States to vote in any primary or other election . . . shall not be denied or abridged by . . . any State by reason of failure to pay any poll tax or other tax.").

Both RPV and the Individual Voters also propose a system which the latter refer to as a "voter-witness dance," wherein a voter finds a neighbor, knocks on their door, and engages in some sort of elaborate choreography to complete the witnessing of the ballot where neither

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[5] Va. Chamber of Commerce, *Increasing Support for Virginia's Broadband Needs: An Update from the Commonwealth's Chief Broadband Advisor, Evan Feinman*, Nov. 22, 2019, https://www.vachamber.com/2019/11/22/increasing-support-for-virginias-broadband-needs-an-update-from-the-commonwealths-chief-broadband-advisor-evan-feinman/.

person comes within six feet of the other. ECF No. 37 at 16. As an initial matter, this once again fails to consider that many Virginians do not live near another neighbor or know someone willing to come close enough to them to serve as a witness, may be experiencing symptoms or illness and thus quarantined, or may otherwise have accessibility issues. They also simply ignore the only scientific testimony in this case from Dr. Reingold that any such in-person exposure carries grave risks, and the evidence put forward by Plaintiffs and League members regarding the particular dangers for high-risk individuals like Plaintiff Toogood and older League members.

Even if the voter can find a witness who will agree to assist the voter in somehow meeting the requirement without coming within six feet of the voter, RPV and the Individual Voters miss two important points. First, "transmission of the virus can occur via environmental surfaces, [so] there is also risk of spread of the virus at any location where multiple individuals touch surfaces," Reingold Decl. ¶ 11, ECF No. 17-1, which would include here the ballot materials. Second, these parties do not explain how any "anti-fraud" interest is served by forcing voters to jump through these hoops only to end up with a witness who may not know the voter and cannot see the ballot materials themselves and link that person to them.

Finally, the RPV suggests another alternative where instead of finding a witness, voters who are unable to do so write the last four digits of their social security number on the witness signature line. ECF No. 44 at 34. While this or a similar proposal may be a viable alternative in a scenario where election officials have time to print absentee ballot envelopes to reflect this new requirement, this is not the case for the June primary. Requiring voters to provide a different type of information than that called for on the envelope will likely result in confusion for many voters, and lead to disenfranchisement for those who misunderstand the requirement. In contrast, allowing individuals who cannot safely find a witness to simply omit putting anything on the

witness signature line, while still attesting to the requirements with their signature under penalty of perjury, preserves election integrity and minimizes the risk of wrongful disenfranchisement during a public health crisis.

II. The RPV and amici ignore Virginia's other substantial election integrity protections, and fail to connect their sparse examples of voter fraud to the witness requirement or show how it outweighs the significant harm Plaintiffs and many thousands of Virginians will face absent preliminary relief.

Whatever the level of scrutiny applied when evaluating a voting restriction, in weighing that against the government interests affected by enjoining an election law, courts must consider "the *precise* interests put forward by the State," and take into account "the extent to which those interests make it necessary to burden the plaintiff's rights." *Price v. N.Y. State Bd. of Elections*, 540 F.3d 101, 108–09 (2d Cir. 2008) (internal citations and quotation marks omitted); *see also Ne. Ohio Coalition for the Homeless v. Husted*, 837 F.3d 612, 632 (6th Cir. 2016) ("none of the precise interests put forward by Ohio," including a generalized interest in "[c]ombatting voter fraud perpetrated by mail," was sufficient to overcome burden of ballot rejection due to technical errors). While the RPV and amici all repeatedly assert the general interest in preventing voter fraud, none of them ever explain how the witness requirement actually advances this interest or even how eliminating the requirement during the pandemic would harm voter integrity.

The most the RPV offers is an incorrect assertion that it "is undisputed that the witness requirement serves to deter fraudulent absentee balloting activity," and references to a "level of assurance" and "solemnity" to the event of casting a ballot. ECF No. 44 at 31. Plaintiffs have previously explained why the requirement has little-to-no anti-fraud value. ECF No. 17 at 27–30. The state elections board in South Carolina, which has a similar requirement, agrees, *see* ECF No. 17 at 28 and ECF No. 17-3 at 58–61, as it appears at least one chief election official of a major Virginia city does as well, *see* ECF No. 17-2 ¶ 9. It cannot be the case that preserving an

essentially ceremonial aspect of filling out a ballot in the middle of a pandemic outweighs the disenfranchisement of thousands of Virginia voters.

But that suggestion drives home the point that the RPV and amici have not been able to identify how the witness requirement actually advances the state's election integrity interests, and surely not that it outweighs the risks of disenfranchisement in maintaining it. Intervenors and amici trot out vague concerns and isolated examples of "voter fraud" from across the United States as a reason to deny Plaintiffs' motion and enforce the witness requirement during the pandemic. Much of this "evidence," however, consists of cobbled together accusations and incidents that have nothing to do with absentee voting. Especially bold is the list supposedly listing Virginians who are deceased but who remain on voting rolls by amicus Public Interest Legal Foundation ("PILF"), an organization which recently was forced to settle a voter intimidation and defamation lawsuit against it in Virginia after publishing similar lists of purportedly unlawfully registered voters based on PILF's faulty research and methodology. *See League of United Latin Am. Citizens – Richmond Region Council 4614 v. Pub. Interest Legal Found.*, No. 18-cv-00423 (E.D. Va.) (alleging PILF falsely accused eligible citizens of voting illegally and resulting in a settlement requiring PILF to apologize for incorrectly characterizing these individuals as "noncitizen felons").[6]

More importantly, none of these groups have connected any of these isolated incidents to the presence or absence of a witness requirement, and have not rebutted Plaintiffs' showing of only two single incidences of absentee voting misconduct in Virginia over the past couple of

[6] S. Coalition for Social Justice, *Voters Strike Back and Win Settlement and Apology in Challenge to Voter Intimidation in Virginia*, July 11, 2019, https://www.southerncoalition.org/voters-strike-back-and-win-settlement-in-virginia/.

decades. ECF No. 17 at 29. As recently explained by MIT Professor Charles Stewart and co-author Amber McReynolds, "[v]ote fraud in the United States is exceedingly rare, with mailed ballots and otherwise."[7] They noted, over the last 20 years, an average "one case per state every six or seven years" which "translates to about 0.00006 percent" of total mail votes cast in that period.[8] And even if there were some minimal incidences of voter misconduct relating to absentee voting, the RPV and amici have not shown that such rare instances would or could be prevented by Virginia's witness requirement, or that preventing those rare instances outweighs the harm of disenfranchising thousands of Virginia voters through enforcement of the witness requirement this year.

And just this week, the Tenth Circuit unanimously held that, although a state's "interest in counting only the votes of eligible voters is legitimate in the abstract," that interest is not a talisman justifying any restrictions on voting, and cannot suffice where the court did "not see any evidence that such an interest made it necessary to burden voters' rights here." *Fish*, 2020 WL 2050644, at *18 (affirming injunction against Kansas's documentary proof of citizenship requirement for voter registration). Like the record in this case, the record in *Fish* included only "incredibly slight evidence that [the state's] interest in counting only the votes of eligible voters is under threat," leading the Court to rule that the challenged restrictions were unconstitutionally burdensome. *Id.*; *see also Paher v. Cegavske*, No. 3:20-cv-00243-MMD-WGC, Slip Op. at 2, 12 (D. Nev. Apr. 30, 2020) (attached as Ex. C) (denying preliminary injunction to stop plan to implement mostly mail ballot elections for the upcoming June 9, 2020 Nevada primary, because

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[7] Amber McReynolds & Charles Stewart, *Let's put the vote-by-mail 'fraud' myth to rest*, The Hill, Apr. 28, 2020, https://thehill.com/opinion/campaign/494189-lets-put-the-vote-by-mail-fraud-myth-to-rest.

[8] *Id.*

state's interest in protecting the health and safety of voters far outweigh Plaintiffs' claimed burden on their right to vote that was premised on a speculative and baseless claim of potential voter fraud).

Finally, Intervenors and amici cite the recent decision by the Seventh Circuit to stay a district court decision in Wisconsin enjoining that state's witness requirement. *See Democratic Nat'l Comm. v. Bostleman*, No. 20-1538 (7th Cir. Apr. 3, 2020) (filed as ECF No. 50-2 in this case). But that decision, which Plaintiffs believe was wrongly decided as to Wisconsin's witness requirement, is nevertheless distinguishable on several grounds. First, the Seventh Circuit based its decision in part on the fact that the election was less than a week away, an issue not presented here. Slip Op. at 3. Second, the Court did not reverse the district court but rather stayed its ruling, and did so out of a concern that the district court did not properly conduct the *Anderson-Burdick* balancing test and evaluate the requirement's effect on voter fraud. *Id.* at 3–4.[9] Here, Plaintiffs recognize the need for the Court to conduct this balancing test before granting a preliminary injunction. They have shown that Virginia's witness requirement serves little to no purpose in advancing government interests in election integrity, and even if it did, the benefit it provides would be far outweighed by the substantial risk of disenfranchisement of thousands of Virginia voters.

Because the RPV and amici have failed to rebut the burdens caused by the witness requirement in the context of the pandemic and have not even shown how the requirement promotes election integrity, Plaintiffs are entitled to a preliminary injunction.

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[9] Further, the Seventh Circuit specifically noted that Wisconsin's Election Commission appeared to be issuing guidance to ease the witness requirement including by eliminating "the witness's physical signature." *Bostleman*, No. 20-1538, Slip Op. at 4.

III. Plaintiffs' claims are timely, not premature, and they have standing to bring them.

The Individual Voters also argue that Plaintiffs have brought their claims too close to the June primary to afford any relief. Meanwhile, the RPV asserts that any relief beyond the June primary is premature, notwithstanding that it has separately sought relief from a Virginia election statute through at least late July. The RPV also disregards the substance of the evidence Plaintiffs submitted that proves a substantial risk of irreparable harm to them absent relief. To read these briefs, everything is coming up roses and despite preexisting medical conditions and the advice of public health officials, Plaintiffs have plenty of options to safely vote in June and comply with the witness requirement. The facts in Virginia and the opinions of experts do not bear out these arguments. Plaintiffs have provided ample evidence that they face a substantial risk of imminent, irreparable harm, and are entitled to relief for the June primary and other future elections affected by COVID-19 (which will likely include at least the upcoming July special elections in Arlington and Smyth Counties).

First, amici Individual Voters and Honest Elections Project argue that Plaintiffs' relief should be barred under *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006). But amici fail to explain how relief sought more than a month and a half before the relevant election, and before absentee ballots even begin going out to voters, fits in with the cited cases. *Purcell* itself concerned a ruling striking down a state law within several weeks of the election, *id.* at 3, and the recent *Bostleman* order was issued five days before Wisconsin's April 7 election. Further, *Purcell* was concerned with ensuring courts weigh the risk of "voter confusion and consequent incentive to remain away from the polls," in ordering last minute changes to voting procedures. 549 U.S. at 7. But the concerns animating *Purcell* are exceptionally weak where, as here, election officials have shown they are entirely capable of and willing to timely inform voters of the change—in this

case, by agreeing to a proposed consent decree relieving some voters of the witness requirement for the June primary.

In contrast, the RPV does not argue that *Purcell* forbids relief for the June primary but rather that any injunction extending beyond the June primary is overbroad and the claims for those elections are not ripe. ECF No. 44 at 17–26. These arguments ignore several relevant facts and much of the evidence presented by Plaintiffs. For one, they completely disregard that two counties—Arlington and Smyth—are holding special elections in July,[10] a time period they have already conceded in their state litigation will be affected by COVID-19. *See* Ex. B. Moreover, they ignore and fail to rebut the expert testimony of public health expert and epidemiologist Dr. Reingold, who testified that "transmission of the virus will continue through the population until the development and widespread use of a vaccine and/or herd immunity," ECF No. 17-1 ¶ 12, neither of which are likely to occur until 2021, *id.* ¶¶ 13–15. Similarly, experts at the University of Virginia recognized by Virginia's Public Health Commissioner have identified mid-August as the most likely peak of transmission in Virginia, suggesting continued community transmission through the summer and into the fall. *See* ECF No. 35-1 ¶ 3. Therefore, it is the RPV who is engaging in speculation about future virus transmission, not Plaintiffs.

Similarly, though the RPV makes no real challenge to Plaintiffs' standing with respect to the June primary, it does do so with respect to future elections including the November election. Although RPV contends that Plaintiffs Toogood and Goff do not specifically allege they will vote in November, the Court can draw a reasonable inference that they will based on Erikka

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[10] *See* Arlington Cty., Voting and Elections, https://vote.arlingtonva.us/elections/ (last visited Apr. 30, 2020); Smyth Cty. Voter Registrar, http://www.smythcounty.org/voter_registrar/voter_reg.htm (last visited Apr. 30, 2020).

Goff's statement that she has "voted in virtually every state and federal election in which I have been able to vote," ECF No. 17-4 ¶ 4, and Seijra' Toogood's statement that she "cannot think of the last federal or state election in which I have not voted, as voting and political participation are a core part of my values," ECF No. 17-5 ¶ 3. And the League's declaration concerning Pat McGrady's intent to vote in future elections, hearsay or not, is still admissible in considering a preliminary injunction. ECF No. 17-6 ¶ 7-a; *TechINT Sols. Group, LLC v. Sasnett*, No. 5:18-CV-00037, 2018 WL 4655752, at *5 (W.D. Va. Sept. 27, 2018) ("The Fourth Circuit has determined that a district court ruling on a preliminary injunction 'may look to, and indeed in appropriate circumstances rely on, hearsay or other inadmissible evidence when deciding whether a preliminary injunction is warranted.'" (quoting *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 725–26 (4th Cir. 2016), *vacated and remanded on other grounds*, 137 S. Ct. 1239 (2017))).

RPV's and amici's arguments concerning Plaintiffs' timing and future injuries lack merit.

CONCLUSION

The RPV and amici seek to use broad assertions of voter fraud and minimizing the threat of COVID-19 to deny Plaintiffs' relief. But the actual evidence before the Court shows otherwise. The Court should grant Plaintiffs' preliminary injunction motion if it denies the proposed Partial Consent Judgment and Decree.

Dated: May 1, 2020

Respectfully submitted,

/s/ Davin M. Rosborough

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CERTIFICATE OF SERVICE

I certify that on May 1, 2020, I served a copy of the foregoing Reply Brief in Support of Plaintiffs' Motion for a Preliminary Injunction via filing with the Court's CM/ECF system, which sent copies of this document to Counsel of Record.

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