**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF VIRGINIA**
**LYNCHBURG DIVISION**

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

# INTERVENOR REPUBLICAN PARTY OF VIRGINIA, INC.'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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Intervenor Republican Party of Virginia, Inc. ("Intervenor" or "RPV") respectfully submits the following proposed findings of fact and conclusions of law as to Plaintiffs' motion for preliminary injunction:

## I. PROPOSED FINDINGS OF FACT

### A. The history and content of the absentee-ballot witness requirement.

1. Virginia's absentee voter witness requirement has a decades-long history. It has existed in its current form since 1975. Act of Mar. 22, 1975, Acts and Joint Resolutions of the General Assembly, 1975 Regular Session, ch. 515 at 1074.

2. When a registrar receives an absentee ballot application and verifies that the individual properly completed the application and is a registered voter in the jurisdiction, the registrar mails to the individual:

a. A sealed envelope containing the unmarked ballot;

b. An envelope for resealing the marked ballot with a "Statement of Voter," and spaces for the voter to sign and date and for a witness to sign. The "Statement of Voter" informs voters, among other things, that their signature certifies "subject to felony penalties for making false statements," their name, legal residence, that they received the ballot after requesting it, that they opened the ballot envelope "in the presence of the witness" but without assistance, that they sealed the ballot in the envelope, and that they "have not voted and will not vote in this election at any other time or place";

c. A pre-addressed envelope to mail the ballot to the general registrar; and

d. Instructions for completing the ballot and envelope statement and returning the ballot. Va. Code § 24.2-706(B).

3. "On receipt of a mailed absentee ballot, the voter shall, in the presence of a witness, (i) open the sealed envelope marked "ballot within" and (ii) mark and refold the ballot, as provided in §§ 24.2-644 and 24.2-646, without assistance and without making known how he marked the ballot, except [by reason of blindness, disability, or inability to read or write] as provided by § 24.2-704." Va. Code § 24.2-707(A). Then, the voter seals, completes, and signs the ballot envelope, which is then signed by the witness. Finally, the voter encloses the ballot envelope in a return envelope addressed to the general registrar. *Id.*

**B. The Commonwealth's recent "Sweeping" and "Landmark" reforms to absentee voting maintained the witness requirement.**

4. The absentee voter witness requirement has stood the test of time, through both Republican and Democratic administrations, including in early April 2020 when the Democratic General Assembly and Democratic Governor implemented "sweeping" reforms to absentee voting in Virginia.

5. Until then, Va. Code § 24.2-700 included a requirement that voters have some excuse to justify requesting an absentee ballot. Plaintiffs acknowledge that "[d]uring the 2020 legislative session, the Virginia General Assembly passed and the Governor signed a number of voting reforms, including an expansion of absentee voting to make all registered voters eligible to use this process without an excuse." (Complaint, ECF No. 1, at 26; see also Pls' Br. at 10.)

6. These recent reforms to the absentee-voting process, which the Office of the Governor described—on April 12, 2020—as "sweeping" and a "landmark," left the decades-old witness requirement undisturbed. Thus, in the context of a wide-ranging set of reforms aimed at expanding ballot access, the General Assembly looked at the law with the challenged witness requirement and left it intact.

**C. The Commonwealth's response to COVID-19.**

7. Virginia, like most states, has taken certain temporary, emergency actions to respond to the threat posed by COVID-19. These measures have focused on encouraging social-distancing and reducing gatherings of people but have also addressed election-related issues.

8. First, Governor Ralph Northam declared a state of emergency on March 12, 2020. (Va. Exec. Order 2020-51.) The declaration of emergency expires on June 10, 2020. (*Id.* at 2.)

9. Next, on March 23, 2020, Governor Northam entered an executive order that closed schools in Virginia through the rest of the academic year and barred gatherings of more than 10 people, closed dining establishments, and limited the operation of certain businesses through April 23, 2020, (Va. Exec. Order 2020-53.), a date later extended to May 8, 2020. That Order required certain categories of businesses (*e.g.*, beauty salons, racetracks, and bowling alleys) to close entirely; allowed other categories of businesses (*e.g.*, restaurants) to operate with a limit on ten people inside the establishment; and permitted 13 categories of business—ranging from grocery stores to office supply stores to liquor stores—to remain open as "essential" businesses. (*Id.* ¶¶ 3-5.)

10. On March 30, 2020, Governor Northam signed Executive Order 2020-55, the so-called "stay at home order," that directed Virginians to stay at home except to engage in a wide range of activities permitted by that order, including obtaining food or beverages, seeking medical attention, taking care of other individuals, engaging in outdoor activities, volunteering with organizations that provide charitable or social services, or traveling to work. (Executive Order 2020-55, ¶ 1.) The Executive Order directs people to practice social-distancing by, among other things, staying at least "six feet" apart. (*Id.*). This order, like the emergency declaration, expires on June 10, 2020. (*Id.* at 3.)

11. On April 8, 2020, Governor Northam addressed voting when he postponed the Primary Election from June 9 to June 23. The Virginia Department of Elections also identified COVID-19 as a valid reason for voters to choose "2A My disability or illness" to request an absentee ballot and stated that "voting absentee in the coming May and June elections is strongly encouraged."

12. Virginia will still permit in-person voting during the rescheduled June 23, 2020 Primary Election, in addition to absentee voting.

**D. Plaintiffs present limited evidence focused on the risks of voting at the polls, not by absentee ballot.**

13. Plaintiffs have not produced evidence that Virginia's policy response is not enough and that compliance with the witness requirement would result in the further spread of COVID-19.

14. Plaintiffs have presented only a few examples of poll workers or voters contracting coronavirus after voting at the polls as evidence that voting by mail is

risky. (Plaintiffs' Brief in Support of Motion for Preliminary Injunction, ECF No. 17, at 6-7) ("Pls' Br.").) Plaintiffs cite the case of a Chicago poll worker who died from COVID-19, that of two poll workers in Broward County, Florida, who tested positive for coronavirus, and assertions that Milwaukee, Wisconsin's April 7 primary resulted in seven coronavirus infections (six voters and one poll worker). (*Id.* at 6-7, nn.21-23; Reingold Decl. ¶ 17.) But this limited evidence is anecdotal and not useful to assess the risks posed even by in-person voting.

15. Plaintiffs' evidence does not address absentee voting. That is important, because voting in-person at a polling place is not comparable to voting absentee from home. Polling places expose voters to a closed and potentially crowded public space and require multiple interactions with the public. CDC's guidance for election officials (cited by Plaintiffs) recommends that states "encourage voters to use voting methods that minimize direct contact with other people and reduce crowd size at polling stations." Likewise, the thrust of the stay-at-home Executive Order 2020-55 is to discourage crowds (limiting any gatherings to ten persons) and unnecessary person-to-person contact (instead encouraging people to stay six feet apart.) (*Id.* at ¶¶ 1-3.) It is not reasonable to compare the risk to a voter of standing in line at a crowded public polling place in Milwaukee to the risk posed by one person witnessing a voter's signature.

16. Dr. Reingold, for example, asserts that "requiring individuals to have someone they are not otherwise being exposed to come into close enough proximity to witness their ballot would place them at increased risk of infection"—an opinion

he supports with the example of alleged transmission in Milwaukee polling places. (Reingold Decl. at ¶ 17.) Dr. Reingold has not studied Virginia's absentee-ballot procedure to assess the required proximity between voter and witness, nor has he reported any medical evidence of coronavirus transmission through absentee voting. And critically, Dr. Reingold did not opine that compliance with the witness requirement compelled a violation of six-foot social-distancing guidelines.

17. A voter can comply with the witness requirement without coming within six feet of the witness. The witness can observe the act of voting the ballot from more than six feet away and can sign the sealed ballot envelope afterward from a safe distance. Any concern about the witness touching the ballot envelope can be mitigated if the voter places the envelope in the mailbox straight away and then washes his or her hands. This is the same procedure health-conscious persons living alone during the COVID-19 quarantine employ to protect themselves after, for example, restocking their pantries; whether they do their own grocery shopping or receive at-home deliveries, they wash their hands.

18. Even if COVID-19 can be transmitted at polling places, evidence of such transmission does not provide evidence of risk associated with absentee voting and compliance with Virginia's witness requirement.

19. Setting aside the key distinctions between in-person and absentee voting, Plaintiffs' evidence of the COVID-19 risk of voting in person does not show a material risk of coronavirus infection posed by voting. Further, it is not clear whether these ten individuals caught coronavirus at the polls. The New York

Times article Dr. Reingold relies upon, for example, stated that the Wisconsin officials they quoted did not say how the coronavirus cases were traced to the polls.

20. Further, a recent study undercuts Plaintiffs' argument about Wisconsin's experience. The study[1] compared Wisconsin's growth rate in COVID-19 cases before and after the April 7 primary, and the rate for the three most populous counties (including Milwaukee). The researchers "did not find any significant increase in the rate of new COVID-19 cases following the April 7, 2020 election post-incubation period, for the state of Wisconsin or its three major voting counties, as compared to the U.S." (Study at 7.) Indeed, they reported a decrease in the rate of new cases in Milwaukee County following the primary date. (*Id.* at 6.)

**E. Plaintiffs offer only speculative evidence as to elections after the June 23 primary.**

21. Plaintiffs ask the Court to enjoin the witness requirement for not only the June 23, 2020 Primary Election, but also for all "future" elections until any threat from COVID-19 passes. But Plaintiffs have produced no evidence to the Court to support such a broad and indefinite injunction.

22. Plaintiffs produced no evidence as to what prevailing health conditions would be in Virginia in November 2020 or any subsequent date, let alone what potential impact those conditions would have on Plaintiffs' ability to vote in those elections.

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[1] Andrew C. Berro, D.O., Madhuri S. Mulekar, Ph.D., and Bruce B. Berry, M.D., *Wisconsin April 2020 Election Not Associated With Increase In COVID-19 Infection Rates*. Unpublished manuscript, https://bloximages.chicago2.vip.townnews.com/madison.com/content/tncms/assets/v3/editorial/6/47/647a9bf3-0646-5f61-913c-1d0a584824a5/5ea336829248d.pdf.pdf.

23. Plaintiffs' witness, Dr. Reingold, repeatedly refers to the coronavirus as a "novel virus" about which the medical community is still learning. (Reingold Decl. ¶¶ 7, 15-16.) He anticipates that the country "can expect resurgences of COVID-19 . . . throughout 2020 and into 2021 across the United States," but does not opine about how many resurgences, how bad they will be, or where and specifically when they will strike. (*Id.* ¶ 15.) He is unable to even say whether coronavirus transmission is affected by the weather. (*Id.* ¶ 16.) He believes a vaccine will not be available until, possibly, the end of 2021 due to issues including the length of time it takes to conduct a human trial of any potential drug. (*Id.* ¶ 13.)

24. News reports since Plaintiffs filed their Motion for Preliminary Injunction indicate that human trials have already begun and a team of doctors from Oxford believe a vaccine may be available as early as September this year.[2]

25. The public health orders from Governor Northam expire on June 10, 2020, almost two weeks before the June 23,2020 Primary Election. Virginia's policies, indeed, are short-term and subject to change. None of Governor Northam's Executive Orders are in effect beyond June 10, 2020. The FAQs published by the Governor's office for Executive Order 2020-55 highlight the "quickly-changing" nature of the policy response to COVID-19:

> Q. Will this order be changed?

[2] BBC, Coronavirus; First patients injected in UK vaccine trial, https://www.bbc.com/news/health-52394485 (Apr. 23, 2020) (accessed on Apr. 27, 2020).

> A. Governor Northam, in consultation with State Health Commissioner Oliver, may adjust this order or issue new orders as needed, given the quickly-changing public health situation.

(FAQ, Executive Order 2020-55, at https://www.virginia.gov/coronavirus/faq/ (visited Apr. 26, 2020).)

26. Further, the CDC has issued a three-phased plan titled "Opening Up America Again" that calls for a gradual, data-driven re-opening of the country.[3] At a virtual townhall meeting on April 21, 2020, Governor Northam announced his intentions to follow the CDC's plan, even expressing the hope that by July, the virus would be "in the rearview mirror," while cautioning that large public gatherings this summer may not be feasible.[4]

27. On balance, COVID-19 is not yet well understood. Policymakers are taking short, deliberate steps as they develop and refine their public-health strategies. While Virginia's orders in the past have focused on getting residents to stay home, the thrust of policymaking going forward is to re-open the country. Plaintiffs have not provided evidence to this Court to suggest that prevailing health conditions in Virginia in November 2020 will preclude them from voting, whether in-person at the polls or absentee.

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[3] CDC, Opening Up America Again, https://www.whitehouse.gov/openingamerica/#phase-one (visited Apr. 26, 2020.)

[4] Sierra Fox, *Reopening Virginia: Gov. Northam says state needs ample PPP, COVID-19 testing, before it's safe,* https://www.wric.com/news/virginia-news/reopening-virginia-gov-northam-says-state-needs-ample-ppe-covid-19-testing-before-its-safe/ (Apr. 21, 2020, visited Apr. 26, 2020.)

**F. The role of the witness requirement in preventing voter fraud.**

28. Intervenor is a major political party with a recognized authority to "provide for the nomination of its candidates . . .," and "perform all other functions inherent in political party organizations" is recognized in statute. Va. Code Ann. § 24.2-508 (2019). The RPV adopted a direct primary and timely notified the Virginia State Board of Elections of its choice pursuant to Va. Code § 24.2-516. The Board then ordered the holding of a Republican Primary for U.S. Senate and U.S. House of Representatives in the second and third congressional districts.

29. RPV represents that in RPV's experience, the absentee ballot witness requirement has not been identified as impacting any election outcomes. (*See* Intervenor's Brief in Opposition to Motion for Preliminary Injunction, ECF No. 44, at 14) ("RPV Br.").)

30. RPV is a political party. It believes that election integrity safeguards like the witness requirement are vital to fair and honest elections, and that removing the safeguard may allow votes to be cast by persons not entitled to cast them, thereby diluting the lawful votes of Intervenor's members and undermining the integrity of the Republican primary and the general election in which Republican candidates must run. (Scott Decl. ¶ 10; *see also* Turner Decl. ¶ 10.)

31. These concerns are not merely conjectural; they are substantial and bipartisan. As early as 2005, absentee ballot fraud was identified as "the largest source of potential voter fraud" by a bipartisan study co-chaired by former President

Jimmy Carter and former Secretary of State James Baker.[5] *See also*, Brennan Center for Justice, *The Truth About Voter Fraud* at 34 n.16 (2007) (opposing photo identification laws for voters because they "do not address the absentee voting process, where fraud through forgery or undue influence, often directly implicating candidates or their close associates, is far more of a threat"). The lead opinion in *Crawford v. Marion County Elections Board*, 553 U.S. 181, 195-96 (2008) (plurality op.) described "fraudulent voting" that was "perpetrated using absentee ballots." *See also Veasey v. Abbott*, 830 F.3d 216, 239, 256 (5th Cir. 2016) (en banc) (noting that "record evidence shows that the potential and reality of fraud is much greater in the mail-in ballot context than with in-person voting" and that the district court credited expert testimony "showing mail-in ballot fraud is a significant threat . . . .") On February 21, 2019, the North Carolina Board of Elections ordered a new election in a congressional race after investigating allegations that the winning candidate had engaged in "ballot harvesting" of absentee ballots in violation of state law.[6]

32. Given the rapid expansion of absentee balloting in Virginia due to COVID-19, it is risky and unwise to eliminate long-standing anti-fraud safeguards in Virginia's absentee ballot voting system, including the June 23 primary, but

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[5] Building Confidence in U.S. Elections, Report of the Commission on Federal Election Reform, the Center for Democracy and Election Management, American University (Sept. 2005), p. 46, https://www.legislationline.org/download/id/1472/file/3b50795b2d0374cbef5c29766256.pdf.

[6] Leigh Ann Caldwell and Dartunorro Clark, *New election ordered in North Carolina House district after possible illegal activities*, NBC News (Feb. 21, 2019), https://www.nbcnews.com/politics/congress/republican-candidate-mark-harris-calls-new-election-north-carolina-disputed-n974176?cid=public-rss_20190221.

especially with regard to elections beyond June, as it is inherently unknowable what the public-health situation will look like by the time of the November 3 general election.

## II. PROPOSED CONCLUSIONS OF LAW

33. Plaintiffs do not mount a facial attack on the constitutionality of the witness requirement. There is no dispute that the witness requirement is facially valid. Rather, Plaintiffs make an as-applied challenge under the *Anderson-Burdick* framework, seeking a preliminary injunction for the June 23, 2020 primary election, but also for "any and all subsequent elections in Virginia until such time as in-person interactions required by compliance with the witness requirement no longer pose a risk to public health and safety." (Pls' Br. at 35.)

34. In order to demonstrate entitlement to a preliminary injunction, Plaintiffs must demonstrate the following four factors: "(1) [they are] likely to succeed on the merits, (2) [they are] likely to suffer irreparable harm, (3) the balance of hardships tips in [their] favor, and (4) the injunction is in the public interest." *Pashby v. Delia*, 709 F.3d 307, 320 (4th Cir. 2013), *citing Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008). Each element must be satisfied "as articulated." *Id.* Plaintiffs' motion for preliminary injunction fails as a matter of law, for the reasons explained below.

### A. Plaintiffs have not satisfied their burden of showing a likelihood of success on their unripe claim.

35. Plaintiffs seek to enjoin the enforcement of a Virginia statute on Constitutional grounds. "Statutes are presumed constitutional." *Faircloth v. Finesod*, 938 F.2d 513, 516 (4th Cir. 1991). Furthermore, the grant of a preliminary injunction is an "extraordinary remedy intended to protect the status quo and prevent irreparable harm during the pendency of a lawsuit." *Di Biase v. SPX Corp.*, 872 F.3d 224, 230 (4th Cir. 2017). Accordingly, Plaintiffs

must "make a clear showing" that they are likely to succeed on the merits. *Pashby*, 709 F.3d at 321.

36. Plaintiffs are not likely to succeed on the merits as to the June 23 primary and for "any and all subsequent elections in Virginia" for two reasons. First, any disputes about elections several months or years away that hinge on unknowable future contingencies, like the future state of the COVID-19 epidemic, are not ripe. The Court therefore lacks subject-matter jurisdiction to review such disputes.

37. Second, even if the Court finds the dispute is ripe, Plaintiffs have failed to meet their evidentiary burden for an injunction, because they have not demonstrated a severe burden on their right to vote from the witness requirement that outweighs Virginia's important interests in preventing voter fraud and protecting the integrity and legitimacy of the electoral process.

*1. Plaintiffs' motion is unripe as to any election after June.*

38. "An allegation of a possible future injury does not satisfy the requirements of Article III of the Constitution." *Gasner v. Bd. of Sup'rs of the Cty. of Dinwiddie, Va.*, 103 F.3d 351, 361 (4th Cir. 1996). The Supreme Court has "repeatedly reiterated that 'threatened injury must be *certainly impending* to constitute injury in fact,' and that '[a]llegations of possible future injury' are not sufficient" to establish a ripe controversy. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)) (emphasis and edit marks in original). The Supreme Court has further emphasized that it is insufficient to establish even an "objectively reasonable likelihood" of future harm; rather, the injury must be certain and impending. *Id.* at 410 (quoting and rejecting the standard of *Amnesty Int'l USA v. Clapper*, 638 F.3d 118, 134 (2d Cir. 2011)).

39. Here, there is no certain and impending harm even *alleged* (or capable of being plausibly alleged or shown) beyond June 2020. Plaintiffs challenge Virginia's absentee ballot witness requirement as applied under the "spread of COVID-19." (Pls' Mot. at 1.) But it is entirely speculative whether or to what degree COVID-19 will spread beyond the next few months. Plaintiffs acknowledge that the Virginia Governor's stay-at-home order is set to last only "until June 10" (Pls' Br. at 8), which signals the Virginia executive branch's uncertainty as to conditions beyond that date. The myriad of state and federal guidance documents and orders are being continually updated, virtually on a day-to-day basis, and the necessity over stay-at-home orders, even applied *at present*, is hotly contested. Some states are already easing restrictions; and those choices are subject to criticism.

40. The Court need not take sides in this ongoing public-policy debate. The future of COVID-19 is unknown. Plaintiffs have failed to identify a single governmental guidance document, or a guidance document from any reputable research or public-policy institution, purporting to predict the impact of COVID-19 as of November 2020 or beyond.

41. Even if COVID-19 exists in some form in November 2020, there is no way to assess at this time the constitutionally significant issues of degree and harm it may entail. By that point, the impact may simply be more limited. Or else, there may be a better medical response, such as a vaccine or effective treatment. The general population may have developed "herd immunity," limiting the disease's

reach, impact, or severity. And there may be factors calling for a different type of injunction than Plaintiffs envision (assuming one is merited at all), such as one incorporating future testing capabilities that may emerge or updated social-distancing guidance. Besides that, the General Assembly and Governor may, with the guidance of this Court's forthcoming ruling as to the June election, legislate a solution. The Court does not know and has no way to know how any of these contingencies will turn out.

42. Plaintiffs therefore fall well short of establishing that an injury in future elections is "certainly impending." *Clapper*, 568 U.S. at 409. It is too early to know, beyond June 2020, "whether the problem [Plaintiffs] present[] will ever need solving." *Texas v. United States*, 523 U.S. 296, 302 (1998). This is not a case where Plaintiffs contend that a procedure will, in all events violate the Constitution. (Nor would Plaintiffs have any hope of succeeding on such a facial challenge.) Rather, Plaintiffs contend that because of present circumstances, the witness requirement should be invalidated as applied. Because it is unknowable whether future circumstances will match present circumstances, the question is not ripe.

43. Courts cannot draft injunctions around ripeness. If the injunction must (as Plaintiffs propose) hinge on contingencies, then that is itself powerful evidence that there is no live case or controversy. Rule 65(d) requires that an injunction "state its terms *specifically*," Fed. R. Civ. P. 65(d)(1)(B) (emphasis added), which means it must "be specific and reasonably detailed," *Pasadena City Bd. of Ed. v. Spangler*, 427 U.S. 424, 439 (1976). That, in turn, serves the role of putting the

parties bound on notice of what acts constitute "contempt." *See Int'l Longshoremen's Ass'n, Local 1291 v. Philadelphia Marine Trade Ass'n*, 389 U.S. 64, 76 (1967). An injunction that states "only an abstract conclusion of law," *id.* at 74, or "that merely enjoins a party to obey the law," *Louis W. Epstein Family P'ship v. Kmart Corp.*, 13 F.3d 762, 771 (3d Cir. 1994), fails this standard.

44. Plaintiffs' proposal that the injunction last until the witness requirement "no longer pose[s] a risk to public health and personal safety," (Pls' Mot. at 2), fails under Rule 65(d). There is no way for Virginia officials to know what level of safety is sufficient to extinguish the proposed mandate. There is always *some* degree of danger of the type Plaintiffs purport to identify; interaction with a witness can, for example, spread the flu, which carries a small risk of death, or some other contagious disease. Plaintiffs have not provided a metric for acceptable "safety."

45. Another problem renders Plaintiffs' motion at least partly unripe. A preliminary injunction "is preliminary to a hearing on the merits" and "does not involve a final determination on the merits," *Benson Hotel Corp. v. Woods*, 168 F.2d 694, 696 (8th Cir. 1948), and therefore "remains in effect until a final judgment is rendered." 11A Charles A. Wright, *et al.,* Federal Practice & Procedure Civil § 2947 (3d ed.). Because any preliminary injunction will only be in effect during the pendency of this case, its terms must be restricted to that temporal duration.

*2. Plaintiffs have not demonstrated that Virginia's witness requirement creates a severe burden on their right to vote.*

46. Plaintiffs have not provided any evidence to support an injunction that extends beyond the June 2020 primary election. It is axiomatic that "injunctive relief against a state agency or official must be no broader than necessary to remedy the constitutional violation." *Toussaint v. McCarthy*, 801 F.2d 1080, 1086 (9th Cir. 1986), *abrogated in part on other grounds by Sandin v. Conner*, 515 U.S. 472 (1995). *See also Eaglemed LLC v. Cox*, 868 F.3d 893, 905 (10th Cir. 2017).

47. Application of the Anderson-Burdick balancing test requires the Court to weigh the burden on a voter's fundamental right to vote against the state's justification for the challenged statute. *See Anderson v. Celebrezze*, 460 U.S. at 780, 789 (1983) (requiring a court to "first consider the character and magnitude of the asserted injury to the rights . . . the plaintiff seeks to vindicate," then "identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule."). Since the burden is caused by the virus, the prevailing public-health conditions must be examined for each election being challenged to weigh the "character and magnitude" of COVID-19-related burdens imposed on a voter's right to vote in that election. Because public-health conditions around COVID-19 are fast-changing and unpredictable, it is impossible for the Court to conduct an *Anderson-Burdick* balancing test for an election several months or even a year into the future.

48. Any remedy the Court chooses to grant, therefore, should be confined to the June 23, 2020 primary election. Plaintiffs have shown no likelihood of

success on the merits of their claims as applied to future elections. They offer only speculation, which is insufficient to strike down an election statute. *See Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 454 (2008). Indeed, the two voter-Plaintiffs, Ms. Goff and Ms. Toogood, do not even state in their declarations that they desire to vote in any election after June 23, 2020, and Ms. Wake's declaration makes but a single inadmissible, hearsay reference to a voter who claims to "hope" to vote absentee in future elections. (Wake Decl. at ¶ 7(a).) These omissions place Plaintiffs' standing to even raise a challenge to future elections in doubt. Granting Plaintiffs an indefinite injunction on all future elections violates the principle espoused in *Toussaint* that injunctions should be narrowly tailored to cure the constitutional violation.

49. It is no answer that an injunction is not impermissibly indefinite because it would terminate once COVID-19 no longer posed a threat to Plaintiffs' health or safety. Such a framework fails for lack of definiteness, as set forth above. It also impermissibly flips the presumption of constitutionality that Virginia's absentee ballot statute enjoys, by rendering the statute unconstitutional until proven otherwise. It would also violate the *Anderson-Burdick* framework because it would require the Defendants to prove, to lift the injunction against the witness statute, that COVID-19 no longer makes compliance "a risk to public health and personal safety." (Pls' Br. at 35.) *Anderson-Burdick* looks at not just the mere existence of a risk to health, but the magnitude of that risk.

50. Intervenor does not dispute that the right to vote is fundamental. But nothing about Virginia's absentee ballot witness statute offends that right.

51. The witness requirement statute more than satisfies the *Anderson-Burdick* test. In general, that test has been formulated as follows in this Circuit:

> In short, election laws are usually, but not always, subject to ad hoc balancing. When facing any constitutional challenge to a state's election laws, a court must first determine whether protected rights are severely burdened. If so, strict scrutiny applies. If not, the court must balance the character and magnitude of the burdens imposed against the extent to which the regulations advance the state's interests in ensuring that "order, rather than chaos, is to accompany the democratic processes." *Storer v. Brown*, 415 U.S. 724, 730 (1974). "The results of this evaluation will not be automatic; . . . there is 'no substitute for the hard judgments that must be made.'"
>
> *Anderson*, 460 U.S. at 789–90 (quoting *Storer*, 415 U.S. at 730).

*McLaughlin v. North Carolina Board of Elec.*, 65 F.3d 1215, 1221 (4th Cir. 1995).

52. As recognized in *Fusaro v. Cogan*, 930 F.3d 241 (4th Cir. 2019), a case Plaintiffs cite, "if the challenged election law 'imposes only 'reasonable, non-discriminatory restrictions" on First and Fourteenth Amendment rights, then 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Id.* at 257, *quoting Burdick v. Takushi*, 504 U.S. 428, 434 (1992). *See*

*also Libertarian Party of Va. v. Alcorn*, 826 F.3d 708, 717 (4th Cir. 2016) (holding that statutes imposing only "modest" burdens are "usually justified by a state's important regulatory interests").

53. Modest, non-discriminatory burdens on voting rights, like Virginia's absentee ballot witness statute, are justified and warranted as means to preserve election integrity and deter fraud. *See Lee v. Virginia State Board of Elections*, 843 F.3d 592, 606-07 (4th Cir. 2016), *quoting Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008).

54. Courts around the country have applied similar analysis to deny injunctions to bedrock election statutes on the grounds that COVID-19 renders their enforcement unconstitutional. *See, e.g., Democratic National Committee v. Bostelmann,* slip op. at 3, Nos. 20-1538, 20-1539, 20-1545, 20-1546 (7th Cir. Apr. 3, 2020) (staying district court opinion that enjoined enforcement of Wisconsin's absentee signature requirement, finding district court gave "no effect to the state's substantial interest in combating voter fraud"); *Arizonans for Fair Elections v. Hobbs*, No. CV-20-00658, -- F. Supp. 3d --, 2020 WL 1905747 (D. Ariz. Apr. 17, 2020) (finding that "the relief [plaintiffs] are seeking in this case is profound – the displacement of a bedrock component of Arizona law," and declining to do so even in the midst of COVID-19); *Reardon v. LaRose*, No. 20CV-2105 (Franklin Co. C.P. Mar. 17, 2020) (unreported) (declining to issue TRO to enjoin Ohio's primary election based on COVID-19 fears); *Mays v. Thurston,* No. 4:20-cv-341, 2020 WL 1531359, *2 (E.D. Ark. Mar. 30, 2020) (denying request for injunction expanding the time period

for state election officials to receive absentee ballots due to COVID-19). *See also Bethea v. Deal*, No. CV216-140, 2016 WL 6123241, *2 (S.D. Ga. Oct. 19, 2016) (declining to extend voter-registration deadline in Georgia due to a hurricane).

55. As noted *supra*, Plaintiffs have not established, even for the June 23, 2020 Primary Election, that enforcement of the statute will impose any meaningful burden on their right to vote. Although Plaintiffs express concern about the risk of contracting COVID-19 simply by having their absentee ballots witnessed, they do not take into consideration the use of social-distancing measures to mitigate that risk. A witness need not stand within six feet of a voter. The act of witnessing does not require the voter to venture into a crowded public space and face a significant risk of COVID-19 exposure. The voter and witness both can take basic precautions to avoid coronavirus infection for the brief period the witness needs to touch the ballot envelope to sign it. These are all the same types of precautions voters take when they collect their mail, buy groceries or products at a drug store, or get take-out from their local restaurant.

56. Plaintiffs present no evidence that any material number of voters will be unable to vote due to this requirement; the Declaration of Stephanie Iles, an election official in Norfolk, only cited a single voter who attempted to cast an absentee ballot without a witness, claiming the voter could not get a witness due to COVID-19. (Iles Decl. ¶ 6.) But Virginia's absentee witness requirement has been on the books for many decades.

57. Plaintiffs cite a few cases from around the country where courts have granted COVID-19 related relief from election statutes. *Faulkner* and *Esshaki* are distinguishable as those cases allowed candidate plaintiffs access to the ballot with fewer petition signatures than normally required due to COVID-19. *Faulkner v. Virginia Dep't of Elections*, No. CL 20-1546 (Va. Cir. Ct. Mar. 25, 2020); *Esshaki v. Whitmer*, No. 2:20-cv-10831, 2020 WL 1910154 (E.D. Mich. Apr. 20, 2020). The public health risk and difficulty associated with collecting enormous quantities of petition signatures is a different question than the question presented here.

58. Finally, it is settled law that there is no constitutional right to an absentee ballot absent limited circumstances not present here. *See McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 807 (1969) (declining to apply heightened scrutiny where it was only the claimed right to an absentee ballot, and not the franchise itself, at issue). Stated differently, citizens have a constitutional right to vote; they do not have a constitutional right to vote absentee.

*3. Virginia's witness-signature requirement is long-standing and serves an important, compelling state interest in electoral integrity.*

59. Plaintiffs concede that the absentee witness statute is a ballot-integrity measure. (Pls' Br. at 27-29.) A "State indisputably has a compelling interest in preserving the integrity of its election process." *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 231 (1989), *citing Rosario v. Rockefeller,* 410 U.S. 752, 761 (1973). It is undisputed that the witness requirement serves to deter fraudulent absentee balloting activity. Deterrence of voter fraud and the promotion of public confidence in the integrity of a state's elections have been

recognized by both the Fourth Circuit and the Supreme Court as sufficiently weighty justifications to justify laws, like photo identification laws, that burden the right to vote. *See, e.g,*, *Lee*, 843 F.3d at 606-07; *Crawford*, 553 U.S. at 198-199 (plurality op.) *See also Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) ("Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government").

60. Fraud pertaining to absentee ballots is a long-time, recognized problem, with a "ballot harvesting" scandal involving alleged absentee ballot fraud leading to the vacatur of a U.S. House race in North Carolina just last year. This risk of fraud, in turn, directly impacts the right to vote and the integrity of elections. If persons are able to cast absentee ballots who are not authorized to do so, the effect is to dilute the votes of lawful voters. Vote dilution is a violation of the fundamental right to vote. *See Reynolds v. Sims*, 377 U.S. 533, 554 (1964); *Howell v. McAuliffe*, 292 Va. 320, 335, 788 S.E.2d 706 (2016). Notably, when a Wisconsin district court enjoined that state's absentee ballot witness statute, the Seventh Circuit stayed the injunction within days and, in doing so, specifically criticized the district court for giving "no effect to the state's substantial interest in combating voter fraud." *Bostelmann*, *supra* at 3.

61. In light of the enduring and important interests in electoral security and integrity, Plaintiffs have not shown a likelihood of success on the merits on their *Anderson-Burdick* challenge.

**B. Plaintiffs have made no showing that they are likely to suffer irreparable harm if they are required to comply with the witness-signature requirement for absentee ballots.**

62. Plaintiffs have also failed to show irreparable harm, nor that the balance of hardships tips in their favor. Plaintiffs speculate they will not be able to vote, but speculation is insufficient to warrant the issuance of a preliminary injunction. *See, e.g.*, *Scotts Co. v. United Industries Corp.*, 315 F.3d 264, 283 (4th Cir. 2002) (requiring a plaintiff to make a "clear showing of irreparable harm" that "must be neither remote nor speculative, but actual and imminent") (internal quotation omitted); *Carcano v. McCrory*, 203 F. Supp. 3d 615, 649 (M.D.N.C. 2016) (holding that "speculation about potential future industries is insufficient" to satisfy the irreparable harm prong). They fail to allege, much less to show, that they will be unable to find even one person to watch from afar as they vote and complete the witness requirement. Moreover, the use of separate pens, wearing cloth face coverings and gloves, hand-washing, and other precautions makes any putative burden minimal. Plaintiffs have, therefore, failed to make the requisite showing of irreparable injury.

63. Voting in compliance with the absentee-voter witness requirement is fully compatible with social-distancing and other protective measures that are now commonplace in our society. The health risks of COVID-19 are real (though it is unclear how long they will persist). But when understood in light of the appropriate precautions, the witness requirement simply does not create the likelihood of irreparable harm that would justify injunctive relief.

**C. The public's interest in the integrity of elections outweighs plaintiffs' speculative claims of injury about future elections.**

64. The public interest is not served by the issuance of the proposed injunction. While Plaintiffs accurately state that their right to vote is a fundamental matter, that is not the end of the analysis. *Lecky v. Virginia State Board of Elec.*, 285 F. Supp. 3d 908, 921 (E.D. Va. 2018).

65. In our constitutional system, "the electoral process is to be largely controlled by the states and reviewed by the legislature," with states retaining primary authority to regulate their own elections. *Hutchinson v. Miller*, 797 F.2d 1279, 1283 (4th Cir. 1986). The public interest is served by respecting state control over electoral processes, and not by striking down a bedrock, decades-old Virginia statute on the basis of the thin record before this Court.

66. Any potential for injury arising from future elections, especially those coming after the June 23 primary, is inherently speculative, for the reasons explained above. And because Plaintiff has not demonstrated that compliance with the witness requirement is incompatible with social distancing and other COVID-19-related precautions, the public's interest in the continuity of elections demands that relief, if any, must be of a much narrower scope. An overbroad injunction of indefinite length that suspends a venerable and important aspect of the Commonwealth's elections laws is not in the public interest.

67. Recognizing that the June 23, 2020 primary election may present different circumstances than those of "any and all" future elections does not change this analysis. Less drastic remedies, such as inclusion of the last four digits of a

Social Security number, (RPV Br. at 34), are available as to potential claims of injury arising from the June 23, 2020 primary, rendering the Plaintiffs' requested relief improper.

## CONCLUSION

Intervenor, the Republican Party of Virginia, Inc., respectfully requests that the Court adopt the foregoing Proposed Findings of Fact and Conclusions of Law.

Dated: May 1, 2020

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that on May 1, 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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