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

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

REPLY IN SUPPORT OF JOINT MOTION
FOR ENRY OF PARTIAL CONSENT JUDGMENT AND DECREE

Intervenor Republican Party of Virginia (RPV) seeks to politicize defendants' effort to ensure that all eligible absentee voters, regardless of political party, have a safe and fair opportunity to vote in Virginia's upcoming June primary.

In an effort to obtain certainty and turn their focus to the upcoming elections, defendants—election officials tasked with conducting Virginia's elections—negotiated and agreed to the terms of the proposed consent decree. The agreement would resolve the most urgent aspect of this case well before the June primary with sufficient time to implement any change. In the election officials' judgment, the proposed consent decree is narrowly crafted to maintain election integrity while, at the same time, ensuring that all qualified voters in Virginia—Republicans, Democrats and Independents alike—need not jeopardize their health to vote.

I. The Republican Party of Virginia misrepresents the terms of the proposal

RPV's objections misrepresent the parties' proposal in three key respects. First, defendants have not simply capitulated to the terms of the plaintiffs' preliminary injunction. Second, the proposal says nothing of the constitutionality of the witness requirement. And third, the proposal imposes no obligations on RPV.

1. RPV asserts that defendants "simply agreed to enjoin [the witness requirement] for the June 23, 2020 Primary Election." RPV Opposition to Motion for Partial Consent Judgment, ECF 58 (RPV Opp.) 10; see RPV Opp. 18 (representing the proposal as "striking down a bedrock, 70-year-old Virginia statute"). That is not what the proposal does.

The proposed consent decree would suspend enforcement of the witness requirement for a *limited* group of voters (those who may not safely have a witness present while completing their ballot) and for a *single* election (Virginia's June 23 primary). Proposed Partial Consent Judgment and Decree, ECF 35-1 (proposal or consent decree). The proposal is thus significantly narrower than the relief plaintiffs sought in their motion for a preliminary injunction, which asked this Court to enjoin defendants from enforcing the witness requirement as to (i) "*all Virginia voters* for the June 23 primaries," and (ii) "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 personal safety." Mot. for Prelim. Inj., ECF 16 at 2 (emphases added). The terms of the proposal are narrower both in scope and time than the relief plaintiffs originally sought.

2. RPV claims that "[i]n joining Plaintiffs in proposing the Partial Consent Judgment and Decree, . . . Defendants conceded that they believe the statute they are charged with defending is unconstitutional as applied to the June 23 Primary." Reply to Response to Motion to

Intervene, ECF 54 (RPV Reply) at 9. That is also not true. The proposal says nothing about the constitutionality of §§ 24.2-706 or 24.2-707. Nor is the Court required to find an underlying violation of law to approve the proposed consent decree.

a. RPV argues the consent decree should also be denied "because it asks this Court to exercise federal judicial power to enjoin a state statute without a finding that the statute violates federal law." RPV Opp. 15. RPV cites no case—and defendants are aware of none—setting forth the broad rule that a court must make an independent finding of unconstitutionality before accepting a proposed consent decree. Indeed, the main case on which RPV itself relies specifically states that "[i]f a court accepts a decree, *it need not decide the merits*." *Kasper v. Bd. of Election Comm'rs of the City of Chicago*, 814 F.2d 332, 338 (7th Cir. 1987) (emphasis added).[1] The fact that no such finding is required makes sense because, otherwise, consent decrees would be indistinguishable from final judgments. See generally *Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501, 519 (1986) (consent decrees

[1] The other decisions on which RPV relies, RPV Opp. 15–17, likewise do not stand for the broad proposition that the Court's role in evaluating a proposed consent decree is to assess *the underlying merits of the case*. Instead, these decisions stand for the well-established proposition that a court must determine whether or not *the proposed consent decree* is itself illegal. *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 846 (5th Cir. 1993) (in considering a consent decree, a court should "examine [the consent decree] carefully to ascertain not only that it is a fair settlement but also that it does not put the court's sanction on and power behind a decree that violates Constitution, statute, or jurisprudence") (quoting *United States v. City of Miami, Fla.*, 664 F.2d 435, 441 (5th Cir. 1981) (Rubin, J.)); *PG Pub. Co. v. Aichele*, 705 F.3d 91, 117 (3d Cir. 2013) ("the District Court did not err in refusing to enter *a consent decree that would violate a valid state law*") (emphasis added); *League of Residential Neighborhood Advocates v. City of Los Angeles*, 498 F.3d 1052, 1055–56 (9th Cir. 2007) (agreement was "invalid and unenforceable under state law" because consent decree itself violated municipality's zoning law); *League of Women Voters of Michigan v. Benson*, No. 2:17-CV-14148, 2019 WL 8106156, at *2 (E.D. Mich. Feb. 1, 2019) (relying heavily on *Lawyer v. Department of Justice*, 521 U.S. 567, 579 (1997), where the United States Supreme Court affirmed a "[t]he district court's approv[al of a] consent decree over the objection of an individual plaintiff who argued that the district court could not enact a remedial district plan without first explicitly finding that the current district was unconstitutional.").

"have attributes both of contracts and of judicial decrees, a dual character that has resulted in different treatment for different purposes") (internal quotation marks and citation omitted). And if a defendant must both confess liability and obtain an independent judicial finding of illegality before a court may accept a proposed consent decree, few defendants would ever agree to enter into such arrangements.

b. RPV itself recently asked a court to exercise judicial power to enjoin a state election statute in light of COVID-19. In *Seventh Congressional District Republican Committee, et al. v. Virginia Department of Elections*, RPV asked a state trial court to extend relief to all of its congressional district committees that selected a non-primary method of nomination because "in the current emergency situation, none of the committees" could meet the June 9 deadline under Va. Code § 24.2-510 for the RPV's nominees to appear on the November 3, 2020 ballot.[2] *Seventh Cong. District Republican Committee, et al. v. Virginia Dep't of Elections, et al.* – Plaintiff-Intervenor's Unopposed Motion to Extend Temporary Injunction, attached as Exhibit A. In another case, a potential Republican candidate for the United States Senate recently sought relief from state law, explaining that "[b]ecause of the current health crisis in Virginia, particularly because COVID-19 is a communicable disease, Mr. Faulkner and his campaign are unlikely to be able to obtain the necessary signatures [to qualify as a candidate on the June 23 primary ballot under Va. Code 24.2-521(1)]." *Omari Faulkner for Virginia, et al. v. Virginia Dep't of Elections, et al.* – Verified Complaint, attached as Exhibit B, at ¶ 33. Faulkner asked the court to enjoin the election officials from enforcing that provision in full against United States Senate candidates for the June primary. RPV was named as a defendant in *Faulkner* and raised

[2] RPV also sought to extend the relief at issue modifying the method for nominating congressional candidates in June by entering into an Unopposed Motion to Extend Temporary Injunction with both original parties to that suit.

no objection to judicial modification of that statutory requirement relating to how a person could qualify to appear on the June 23 primary ballot as a United States Senate candidate. RPV argues today, contrary to its silent acquiescence to Court modification of a statute just a month ago in *Faulkner*, that election officials in Virginia should be powerless to respond to the pandemic without legislative action.

3 RPV objects that the proposed consent decree would "impose obligations or duties on RPV." RPV Opp. 7. That is simply wrong. The proposed consent decree does not require RPV to do, or refrain from doing, anything.

Although RPV begins with the Supreme Court's statement that "a court may not enter a consent decree that imposes *obligations* on a party that did not consent to the decree," *Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501, 529 (1986) (emphasis added), it then shifts to summarily assert that "where the proposed consent decree would alter the *rights* of the objecting party, the court should not approve the decree," RPV Opp. 7–8 (emphasis added). In any event, no infringement on RPV's "rights" justifies rejecting the consent decree.

First, RPV claims it "has both a statutory and constitutionally protected interest in the conduct of its own primary." RPV Opp. 9.[3] Defendants do not dispute that, under current Virginia law, political parties have a significant interest in *the method* by which their candidates are nominated for office because Virginia law gives political parties the right to determine the

[3] Despite asserting that the consent decree violates its constitutional interests, RPV fails to identify any constitutional interest at stake and sets forth no argument as to constitutional interests impacted by the parties' proposal. Any argument that the consent decree violates RPV's constitutional rights is thus waived.

method of nomination.[4] But when a party chooses, that primary is run by and paid for by the Commonwealth and its localities and the political party is constrained to follow the processes set forth by the State.[5] See Declaration of Christopher E. Piper, attached as Exhibit C, at ¶ 9 (describing the local and State Board of Elections' process); Va. Code Ann. § 24.2-103(A) (mandating "uniformity" in elections).

Second, RPV claims that the consent decree "would force the RPV to undertake a different primary election process than the one prescribed by statute[.]" RPV Opp. 9. That is not true. Section 24.2-509 does not give RPV a statutory entitlement to a particular primary "process" and it certainly does not entitle RPV to the witness requirement. By statute, RPV may select the "method" of nomination, and the proposed consent decree would have no impact on RPV's ability to do so. The consent decree has no impact on the "method" of the primary. It would not switch RPV's selection under § 24.2-509 from a primary to one of the other "methods" of nomination; that is, the selection does not impact the manner in which the primaries are conducted, such as by requiring RPV district committees to switch their chosen method of nomination from primary to convention or party canvass.

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[4] Va. Code Ann. § 24.2-509 ("Party to determine method of nominating its candidates for office"); Va. Code Ann. § 24.2-508 (in delineating the powers of political parties "[e]ach political party shall have the power to . . . provide for the nomination of its candidates, including the nomination of its candidates for office in case of any vacancy"); *6th Cong. Dist. Republican Comm. v. Alcorn*, 913 F.3d 393, 398 (4th Cir. 2019) (noting that RPV "allows for four different methods of nomination: a primary, a party canvass, a convention, and a mass meeting").

[5] See, *e.g.*, Va. Code Ann. §§ 24.2-700 (establishing the criteria for eligibility to vote absentee – regardless of the type of election); 24.2-525 (in addition to meeting her party's requirements, a party nominee must also meet all requirements and qualifications imposed by the Commonwealth on all candidates); 24.2-529 ("The primary ballots for the several parties taking part in a primary shall be composed, arranged, printed, delivered, and provided in the same manner as the general election ballots except that at the top of each official primary ballot shall be printed in plain black type the name of the political party and the words 'Primary Election.'"); 24.2-532 (designating electoral boards as the entity who determines which primary candidate "received the highest number of voters for nomination to any such office").

Third, RPV suggests that, because of the consent decree, it would be forced to "accept a risk of fraudulent or otherwise unauthorized voting in that primary." RPV Opp. 9. RPV's suggestion relies on the flawed premise that permitting a subset of absentee voters—those who cannot safely obtain a witness—to vote without a witness would increase fraud. There is simply no evidence that the terms of the consent decree will lead to fraud.

a. Just yesterday, a federal district court in Nevada rejected a similar "vote dilution" fraud argument to the one RPV advances here. See RPV Opp. 10 ("The vote-dilution risk posed by eliminating a key election integrity measure is one of the interests RPV seeks to vindicate."). In *Paher v. Cegavske*, a group of voters (represented by the same counsel as amici prospective voters in this case) challenged Nevada's implementation of an all-mail election in response to the COVID-19 pandemic. No. 3:20-cv-243, (D. Nev. Apr. 30, 2020), ECF 57. Like RPV here, those voters insisted that the alleged elimination of voter fraud protections, will result in voter fraud. *Id.* at 13–14. The court firmly rejected those claims, finding that claim of "voter fraud is without any factual basis." *Id.* at 12. The court reasoned that the voters' "overarching theory that having widespread mail-in votes makes the Nevada election more susceptible to voter fraud seems unlikely where [Nevada's] Plan essentially maintains the material safeguards to preserve election integrity." *Id.* at 13–14. Likewise here, the consent decree maintains Virginia's material safeguard to preserve election integrity.

b. A plethora of other Virginia laws protect against fraud in absentee voting. Voter malfeasance can trigger harsh criminal penalties. See Va. Code § 24.2- 1004(B) ("Any person who intentionally (i) votes more than once in the same election . . . is guilty of *a Class 6 felony*.") (emphasis added); § 24.2-1016 ("Any willfully false material statement or entry made by any person in any statement, form, or report required by this title shall constitute the crime of election

fraud and be punishable as *a Class 5 felony*.") (emphasis added); § 24.2-1012 ("Any person who knowingly aids or abets or attempts to aid or abet a violation of the absentee voting procedures . . . shall be guilty of *a Class 5 felony*" and "[a]ny person attempting to vote by fraudulently signing the name of a qualified voter shall be guilty of forgery and shall be guilty of *a Class 4 felony*.") (emphases added). Voters are required to provide identifying information, § 24.2-706, and absentee ballots include a signed attestation confirming identity, eligibility, and absence of double-voting, *id.* Absentee ballots also include a check of the ballot against the list of ballot requests. § 24.2-710.

There is no reason to believe that, for the subset of voters at issue in the proposed consent decree (those who may not safely meet the witness requirement) in a single election (the June primary), these measures will fail to deter fraud.

II. Defendants have reasonably concluded the proposal balances the interests at issue in this case

RPV has previously emphasized the deference that should be accorded to government officials during a public health crisis. Brief in Opposition to Motion for Preliminary Injunction, ECF 44 (RPV PI Opp.) 1–2. Virginia's election officials considered the pandemic's evolution in the Commonwealth and deemed it necessary to enter into the consent decree. This recommendation is consistent with the state of the pandemic in the Commonwealth. See Executive Order 55;[6] see also Declaration of M. Norman Oliver, MD, MA, Virginia Health Commissioner, attached as Exhibit D (Oliver Decl.), at ¶¶ 16, 22; Declaration of Bryan Lewis, Research Associate Professor, University of Virginia, attached as Exhibit E (Lewis Decl.), at ¶¶ 8–10.

[6] Executive Order 55 is available at https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-55-Temporary-Stay-at-Home-Order-Due-to-Novel-Coronavirus-(COVID-19).pdf.

RPV now asks this Court to disregard that decision and rely instead, on RPV's unsubstantiated and non-Virginia specific information about the pandemic. RPV PI Opp. 10–11. But the burdens of weighing the strengths of Fox News (see RPV PI Opp. 11) or CNN articles (see Brief in Opposition to Motion for Preliminary Injunction (Amici PI Opp.), ECF 37 at n.2) should not be placed on the Court when the government officials tasked with responding to the COVID-19 pandemic do exactly that. See Oliver Decl. ¶¶ 15–16 (describing measures taken in response to the pandemic); Lewis Decl. ¶¶ 6–10 (same).

1. RPV emphasizes the importance of deference to the legislature, RPV Opp. 17, but it looks to one statute only (the witness requirement) and ignores the remainder of the Virginia Code.

The Virginia General Assembly clearly did not contemplate a once-in-a-century global pandemic when crafting § 24.2-707(1).[7] The legislature did, however, recognize the need to defer to executive officials in an emergency. See Va. Code Ann. §§ 44-146.14(a), -146.16 (granting executive branch authority to act during emergencies for purpose of "protect[ing] the public peace, health, and safety, and . . . preserv[ing] the lives and property and economic well-being of the people of the Commonwealth," especially during a "[d]isaster," which includes a "communicable disease of public health threat"); § 32.1-2 (declaring that "the protection, improvement and preservation of the public health and of the environment are essential to the general welfare of the citizens of the Commonwealth" and directing the State Board of Health

[7] Any suggestion that the legislature had a global pandemic in mind when it amended this statute is misplaced. HB1 (which relates to no-excuse absentee voting), for example, was prefiled on November 18 of last year. It had to go through committee hearings and pass both Houses and was considered and approved by the Governor in addition to thousands of other bills. See Virginia's Legislative Information System, https://lis.virginia.gov/cgi-bin/legp604.exe?201+sum+HB1. To presume that the legislature could have predicted that the witness requirement would endanger voter health for the June primary is to presume that the legislature can predict all potential future events: it is simply not reasonable.

and the State Health Commissioner, assisted by the State Department of Health, to develop a comprehensive public health program). The legislature's decision to delegate emergency management to the executive branch makes sense because emergencies, including the current pandemic, present unanticipated threats to the lives of the people and necessitate urgent and changeable responses. See generally *People ex rel. Barmore v. Robertson*, 134 N.E. 815, 819 (Ill. 1922) ("Legislatures cannot anticipate all the contagious and infectious diseases that may break out in a community.").

As election officials housed in the executive branch, defendants (with advice of some of the Nation's leading epidemiologists, doctors, and economists), carefully weighed the benefits of preserving the witness requirement against the health risks to the Commonwealth caused by the current emergency and made the decision to provide clarity for this one election in a circumscribed form. RPV claims that "COVID-19 is not yet well understood"[8] and "[p]olicymakers are taking short, deliberate steps as they develop and refine their public-health strategies." RPV PI Opp. 3. One of these steps is the decision to resolve the most immediate aspect of this case on the terms set forth in the proposed consent judgment.

2. RPV summarily asserts that "Defendants are aligned with Plaintiffs" and faults defendants for entering into the consent decree quickly. RPV Opp. 13–15. In a typical case, the speed of agreement may fairly raise judicial concern. But this case involves an upcoming election and time is of the essence. An inference of collusion simply does not make sense where

[8] Although much may still be learned about COVID-19, it is unquestionably true that the risks for the community gets worse as more people become ill. Intervenor suggest "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." RPV Reply at 4. To the extent that factual assertion is true, and to the extent that voters for whom it is unsafe to meet the witness requirement nevertheless interact with people to fulfill that requirement, the risk extends far beyond those voters because the nature of infection is such that as these people become infected, they infect others. See Oliver Decl. ¶¶ 5–6.

there is an obvious, good-faith explanation for why agreement was reached quickly.[9] Likewise, defendants have not "capitulated." RPV Opp. 10. The proposed consent decree does not resolve the entire case. Defendants sought resolution only of the most pressing portion of the litigation: the upcoming June election.

* * *

RPV sets forth two alternatives to the relief set forth in the consent decree: use of social security numbers and Virginia's E-Notary Law. See RPV Opp. 18–20; RPV PI Opp. 2, 34. Defendants are not opposed to exploring other options to resolve this dispute, so long as all eligible voters have a fair opportunity to vote safely and securely[10] and the current dispute is resolved quickly. As Amici-Prospective Voters recognized, "election officials" should be allowed "to focus on conducting the election, not defending suits like this." Amici PI Opp. at 1.

CONCLUSION

No Virginian should be placed in the tenuous position of having to choose between their health and their right to vote during this pandemic. The proposed consent decree reflects an appropriate balance between the interest in election integrity and the health and safety of the people of the Commonwealth. The proposed consent decree should be approved.

[9] Similarly, that "RPV sees no evidence that Defendants have defended the relevant statute" or that the record contain no "evidence that Defendant even considered employing any such alternative methods of verification," RPV Opp. 10, 13, reflects only that the case was recently filed and that defendants need certainty as to how the election will proceed.

[10] The E-Notary option may not be accessible to voters in the Commonwealth who do not have access to broadband. Declaration of Evan Feinman, attached as Exhibit F, at ¶ 6 ("we now know that there are hundreds of thousands of Virginians without residential access to broadband, and that many thousands of Virginians lack residential access to cellular service sufficient to engage in simultaneous video exchanges").

Respectfully Submitted,

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CERTIFICATE OF SERVICE

Pursuant to Local Rule 7(g)(3), I hereby certify that on May 1, 2020, I will file this document electronically through the Court's CM/ECF system, which will effect service on all counsel who have appeared.

/s/ Michelle S. Kallen
Michelle S. Kallen

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