

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

LEAGUE OF WOMEN VOTERS OF
VIRGINIA, *et al.*,

Plaintiffs,

v.

VIRGINIA STATE BOARD OF
ELECTIONS, *et al.*,

Defendants.

Case No.: 6:20-cv-00024-NKM

**BRIEF OF PROPOSED INTERVENORS, REPUBLICAN PARTY
OF VIRGINIA, INC., *ET AL.*, IN OPPOSITION TO PLAINTIFFS'
MOTION FOR PRELIMINARY INJUNCTION**

Patrick T. Lewis (pro hac vice
pending)
BAKER & HOSTETLER LLP
127 Public Square, Suite 2000
Cleveland, OH 44114-1214
216.621.0200 / Fax 216.696.0740
plewis@bakerlaw.com

Christopher M. Marston (VSB No. 65703)
chris@2562group.com
2652 Group LLC
P.O. Box 26141
Alexandria, VA 22313-6141
571.482.6790 / Fax 703.997.2549

Trevor M. Stanley (VSB No. 77351)
E. Mark Braden (pro hac vice pending)
Katherine L. McKnight (adm. pending)
Richard Raile (VSB No. 84340)
BAKER & HOSTETLER LLP
Washington Square, Suite 1100
1050 Connecticut Avenue, N.W.
Washington, DC 20036-5403
202.861.1500 / Fax 202.861.1783
tstanley@bakerlaw.com
mbraden@bakerlaw.com
kmcknight@bakerlaw.com
rraile@bakerlaw.com

*Counsel for Proposed Intervenors,
Republican Party of Virginia, Inc., et al.*

TABLE OF CONTENTS

Table of Authorities	iii
I. Introduction and Summary of Argument	1
II. Statement of Facts	4
A. Virginia’s absentee ballot witness requirement has long been a part of Virginia law and serves an important role in preventing and deterring absentee ballot fraud.	4
B. The Virginia absentee ballot witness requirement is well within the range of absentee ballot security measures states require.	5
C. Virginia’s policy responses to COVID-19 have focused on social-distancing, reducing large gatherings of people and election-related issues.	6
D. Plaintiffs’ limited evidence about voting-related risks relates to in-person voting, not absentee voting.	8
E. Plaintiffs’ evidence about election-related voting risks is sparse and unpersuasive.	10
F. Plaintiffs have no evidence – just mere speculation – that COVID-19 will render it unsafe to comply with the absentee ballot witness requirement in any election after June 23, 2020.	11
G. Proposed Intervenor are not harmed by the absentee signature requirement, but may be harmed by absentee ballot fraud.	14
III. Law and Argument	17
A. Standard of Review	17
B. Plaintiffs have failed to satisfy their burden to show that a preliminary injunction is needed for any election, especially any election after the June 23, 2020 Primary.	17
1. Plaintiffs are categorically not entitled to any relief directed to elections after the June 23, 2020 primary.	17

2.	Plaintiffs have not demonstrated that COVID-19 has made compliance with Virginia’s absentee ballot witness requirement a severe burden on their right to vote.	27
3.	Virginia’s witness-signature requirement is long-standing and serves an important, compelling state interest in preserving the integrity of its elections.	30
C.	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.	32
D.	The Public’s Interest In The Integrity Of Elections Outweighs Plaintiffs’ Speculative Claims Of Injury About Future Elections.	33
E.	Less Drastic Remedies Are Available For The June 23, 2020 Primary Than What Plaintiffs Demand.	34
IV.	Conclusion	35
	Certificate of Service.	36

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Amnesty Int’l USA v. Clapper</i> , 638 F.3d 118 (2d Cir. 2011)	19
<i>Anderson v. Celebrezze</i> , 460 U.S. (1983)	25, 27
<i>Arizonans for Fair Elections v. Hobbs</i> , No. CV-20-00658, -- F. Supp. 3d --, 2020 WL 1905747 (D. Ariz. Apr. 17, 2020).....	28
<i>Benson Hotel Corp. v. Woods</i> , 168 F.2d 694 (8th Cir. 1948)	24
<i>Bethea v. Deal</i> , No. CV216-140, 2016 WL 6123241 (S.D. Ga. Oct. 19, 2016)	29
<i>Burdick v. Takushi</i> , 504 U.S. 428 (1992)	27
<i>Burton v. City of Belle Glade</i> , 178 F.3d 1175 (11th Cir. 1999)	23
<i>Carcano v. McCrory</i> , 203 F. Supp. 3d 615 (M.D.N.C. 2016)	33
<i>Clapper v. Amnesty Int’l USA</i> , 568 U.S. 398 (2013)	19, 21, 22
<i>Crawford v. Marion County Elections Board</i> , 553 U.S. 181 (2008)	16, 28, 31
<i>Democratic National Committee v. Bostelmann</i> , slip op., Nos. 20-1538, 20-1539, 20-1545, 20-1546 (7th Cir. Apr. 3, 2020).....	28, 32
<i>Di Biase v. SPX Corp.</i> , 872 F.3d 224 (4th Cir. 2017)	17
<i>Eaglemed LLC v. Cox</i> , 868 F.3d 893 (10th Cir. 2017)	25

<i>Esshaki v. Whitmer</i> , No. 2:20-cv-10831, 2020 WL 1910154 (E.D. Mich. Apr. 20, 2020).....	30
<i>Eu v. San Francisco County Democratic Central Comm.</i> , 489 U.S. 214 (1989)	31
<i>Faircloth v. Finesod</i> , 938 F.2d 513 (4th Cir. 1991)	17
<i>Faulkner v. Virginia Dep’t of Elections</i> , No. CL 20-1546 (Va. Cir. Ct. Mar. 25, 2020)	30
<i>Fusaro v. Cogan</i> , 930 F.3d 241 (4th Cir. 2019)	27
<i>Gamza v. Aguirre</i> , 619 F.2d 449 (5th Cir. 1980)	33
<i>Gasner v. Bd. of Sup’rs of the Cty. of Dinwiddie, Va.</i> , 103 F.3d 351 (4th Cir. 1996)	19
<i>Hamdi v. Rumsfeld</i> , 542 U.S. 507.....	34
<i>Howell v. McAuliffe</i> , 292 Va. 320, 788 S.E.2d 706 (2016)	32
<i>Hutchinson v. Miller</i> , 797 F.2d 1279 (4th Cir. 1986)	33, 34
<i>Int’l Longshoremen’s Ass’n, Local 1291 v. Philadelphia Marine Trade Ass’n</i> , 389 U.S. 64 (1967).....	22
<i>Lecky v. Virginia State Board of Elec.</i> , 285 F. Supp. 3d 908 (E.D. Va. 2018).....	33
<i>Lee v. Virginia State Board of Elections</i> , 843 F.3d 592 (4th Cir. 2016)	28, 31
<i>Libertarian Party of Va. v. Alcorn</i> , 826 F.3d 708 (4th Cir. 2016)	27, 28
<i>Louis W. Epstein Family P’ship v. Kmart Corp.</i> , 13 F.3d 762 (3d Cir. 1994).....	23
<i>Mays v. Thurston</i> , No. 4:20-cv-341, 2020 WL 1531359 (E.D. Ark. Mar. 30, 2020).....	28

<i>McDonald v. Bd. of Election Comm’rs</i> , 394 U.S. 802 (1969)	30
<i>McLaughlin v. North Carolina Board of Elec.</i> , 65 F.3d 1215 (4th Cir. 1995)	27
<i>Pasadena City Bd. of Ed. v. Spangler</i> , 427 U.S. 424 (1976)	22
<i>Pashby v. Delia</i> , 709 F.3d 307 (4th Cir. 2013)	17
<i>Payne v. Travenol Labs., Inc.</i> , 565 F.2d 895 (5th Cir. 1978)	23
<i>Purcell v. Gonzalez</i> , 549 U.S. 1 (2006)	31
<i>Reardon v. LaRose</i> , No. 20CV-2105 (Franklin Co. C.P. Mar. 17, 2020).....	28
<i>Reynolds v. Sims</i> , 377 U.S. 533 (1964)	32
<i>Rizzo v. Goode</i> , 423 U.S. 362 (1976)	22
<i>Rosario v. Rockefeller</i> , 410 U.S. 752 (1973)	31
<i>Scotts Co. v. United Industries Corp.</i> , 315 F.3d 264 (4th Cir. 2002)	32
<i>Storer v. Brown</i> , 415 U.S. 724 (1974)	27
<i>Texas v. United States</i> , 523 U.S. 296 (1998)	21
<i>Toussaint v. McCarthy</i> , 801 F.2d 1080 (9th Cir. 1986), abrogated in part on other grounds by <i>Sandin v. Conner</i> , 515 U.S. 472 (1995).....	24, 26
<i>Veasey v. Abbott</i> , 830 F.3d 216 (5th Cir. 2016) (en banc)	16

<i>Washington State Grange v. Washington State Republican Party</i> , 552 U.S. 442 (2008)	26
<i>Whitmore v. Arkansas</i> , 495 U.S. 149 (1990)	19
<i>Winter v. Natural Resources Defense Council, Inc.</i> , 555 U.S. 7 (2008)	17

Statutes

Act of Apr. 1, 1948	4
Act of Mar. 22, 1975.....	4
Ala. Code § 17-9-30(b).....	5
Ark. Code § 7-5-409(4)(A)(v)	5
Cal. Elec. Code § 3019	6
Colo. Rev. Stat. §1-7.5-107.3	6
Fla. Stat. § 101.68.....	6
Ill. Comp. Stat. Ann. 5/19-8.....	6
Iowa Code § 53.18(2).....	6
Kan. Stat. § 25-1122(c)	5
Mass. Gen. Laws ch. 54 § 94	6
Mich. Comp. Laws § 168.766.....	6
Minn. Stat. § 203B.07(3).....	5
Minn. Stat. § 203B.121	6
Mont. Code § 13-13-241	6
N.C. Gen. Stat. § 163-231(a).....	5
Nev. Rev. Stat. 293.333	6
Ohio Rev. Code § 3509.05(A)	5
Ohio Rev. Code § 3509.06	6

Okla. Stat. tit. 26, § 14-108(A)	5
Ore. Rev. Stat. § 254.431	6
R.I. Gen. Laws § 17-20-2.1(d)(4).....	5
Utah Code Ann. § 20A-3-308.....	6
Va. Code Ann. § 24.2-508 (2019)	14
Va. Code § 24.2-516	14
Va. Code § 24.2-707(A).....	4, 5
Wash. Admin. Code 434-261-050	6
Wis. Stat. § 6.87	6

Rules

Fed. R. Civ. P. 65(d)	22, 23
-----------------------------	--------

Other Authorities

11A Charles A. Wright, <i>et al.</i> , Federal Practice & Procedure, Civil (3d ed.).....	24
1948 Regular Session, ch. 377.....	4
1975 Regular Session, ch. 515.....	4
Absentee Voting, Va Dep’t of Elections (visited Apr. 26, 2020)	8
Andrew C. Berry, D.O., Madhuri S. Mulekar, and Bruce B. Berry, M.D., <i>Wisconsin April 2020 Election Not Associated With Increase In COVID-19 Infection Rates</i>	11
CDC, Opening Up America Again.....	13
CDC, <i>Recommendations for Election Polling Locations, Coronavirus Diseases 2019 (COVID-19)</i>	9
David Wahlberg, <i>No bump in COVID-19 rates after Wisconsin’s April 7 election, study says</i> , Wisconsin State J., April 25, 2020.....	11
Dom Calicchio, <i>Wisconsin saw no coronavirus infection-rate spike after April 7 election, study says</i> , FoxNews.com, April 25, 2020.....	11

Executive Order 2020-51	6
Executive Order 2020-53	7
Executive Order 2020-55	7
FAQ, Executive Order 2020-55	13
Fergus Walsh, <i>Coronavirus: First patients injected in UK vaccine trial</i> , British Broadcasting Corp., Apr. 23, 2020	12
Gerald F. Seib, <i>Pence Says Coronavirus Could Be Largely Past by Early June</i> , Wall Street J. (April 22, 2020)	20
Governor Northam Announces Plans to Postpone Upcoming Virginia Elections In Response to COVID-19, Apr. 8, 2020	8
Jennifer Calfas et al., <i>U.S. Debates How Quickly It Can Reopen</i> , Wall Street J. (Apr. 26, 2020)	20
Leigh Ann Caldwell and Dartunorro Clark, <i>New election ordered in North Carolina House district after possible illegal activities</i> , NBC News (Feb. 21, 2019)	16
Newley Purnell and Max Colchester, <i>Some States Ease Lockdowns as Global Coronavirus Cases Near 3 Million</i> , Wall Street J. (April 27, 2020)	20
President Jimmy Carter and James Baker, et al. Report of the 2005 Commission on Federal Election Reform, The Center for Democracy and Election Management, American University (Sept. 2005)	16
Sierra Fox, <i>Reopening Virginia: Gov. Northam says state needs ample PPP, COVID-19 testing, before it's safe</i> , WRIC News, Apr. 21, 2020.	13

I. INTRODUCTION AND SUMMARY OF ARGUMENT

The COVID-19 pandemic undisputedly presents an historic challenge to the American people.¹ Public-health experts and policymakers have moved swiftly to adopt measures to protect the public and to adjust those measures as the threat evolves and our understanding of this “novel” virus grows. At both the state and national levels, officials are now building a framework to “re-open” the country, in phases, as the pandemic slows.

The Commonwealth of Virginia has seen its own share of measures to protect the public, including a host of provisions aimed at, or resulting in, making the 2020 elections more safe. For example, citizens of Virginia are living under a state of emergency and are required to stay at home except for a set of specified exceptions; absentee ballots may be requested by all registered voters—not just those who have pre-approved excuses—in order to decrease in-person voting numbers; and the primary elections originally scheduled for June 9 have been postponed until June 23, after the stay-at-home order expires.

In their preliminary-injunction motion, Plaintiffs ask this Court to enjoin Virginia’s 70-year-old statutory requirement that absentee ballots be witnessed. They claim their health would be unacceptably imperiled if someone witnesses them cast their absentee ballots, then signs the ballot envelope. They also claim the statute serves no purpose that justifies the alleged burden on the right to vote caused by complying with the witness requirement.

¹ For ease of reference this brief may also refer to COVID-19 as “coronavirus.”

But Virginia’s policymakers—including Governor Northam—recently considered and adjusted the absentee ballot provisions and deemed the witness requirement worth keeping. Those same policymakers considered whether to act further in the face of this pandemic, and they stayed their hand.

The Court should stay its hand, too. Though this trial has provoked fear on the part of many Virginia citizens, Plaintiffs have not shown that compliance with the witness requirement for the June 23, 2020 primary would pose an unreasonable health risk to them. Voters can comply fully with the witness requirement while social-distancing and taking appropriate precautions to limit risk (including the same precautions they take in obtaining groceries and other necessities). If the Court does enjoin the witness requirement for the June 23 primary, it should order a substitute measure of protection. Proposed Intervenor would propose that, if the Court feels it must act, that it consider a less drastic remedy. The Voter Defendant Intervenor suggest using Virginia’s E-Notary law to allow electronic witnessing (ECF No. 37 at 6) if a voter feels that he or she cannot safely comply with the witness requirement. Another alternative would be to permit the voter to write the last four digits of the voter’s SSN on the ballot envelope, which would provide at least minimal authentication of the voter who cast the absentee ballot.

Even if this Court is inclined to grant relief for the upcoming June primary elections, it should deny Plaintiffs’ request for an indefinite injunction to apply to the November elections and beyond. But it is unlikely that current conditions will continue unchanged for six months, and the Court lacks jurisdiction to resolve the

entirely hypothetical possibility that they will. COVID-19 did not even exist six months ago, and already public health officials and others, working around the clock, have a better grasp than they did just weeks ago about the nature of the virus and who is most at risk. Policymakers have time to consider this evolution and adjust, if necessary, any election rules before November. Furthermore, Plaintiffs' motion is nearly silent on the preliminary-injunction factors as they relate to November's elections. Plaintiffs failed to meet their evidentiary burden to support such an indefinite injunction, any dispute about an election after June is not ripe, and the Court lacks subject-matter jurisdiction to hear the dispute.

Finally, there is no merit in Plaintiffs' casual dismissal of Virginia's absentee witness requirement as (they claim) doing "little if nothing" to help ensure the integrity of Virginia elections. They are wrong about its value, and they are wrong about the risk of fraud. The Commonwealth has a compelling interest in deterring absentee ballot fraud and safeguarding the integrity of its elections. Proposed Intervenor also have a right to not have their votes diluted by fraud. The witness requirement serves an important role in furthering the objective of ensuring election integrity. Meanwhile, Plaintiffs have established no burden on the right to vote, even in the time of COVID-19, and Plaintiffs fail to establish that they or any other voter will be prevented from casting a vote.

For these reasons, Plaintiffs' Motion for Preliminary Injunction (ECF No. 16) ("**Pls' Motion**") should be denied.

II. STATEMENT OF FACTS

A. Virginia's absentee ballot witness requirement has long been a part of Virginia law and serves an important role in preventing and deterring absentee ballot fraud.

Virginia's witness requirement for absentee ballots has a long history. At least as far back as 1948, Virginia required absentee ballots to be opened and voted in the presence of a notary public. *See, e.g.*, Act of Apr. 1, 1948, Acts and Joint Resolutions of the General Assembly, 1948 Regular Session, ch. 377 (providing that ballots were not to be opened "except in presence of a notary public."). In 1975, the provision was amended to eliminate the notary requirement and to only require one witness. Act of Mar. 22, 1975, Acts and Joint Resolutions of the General Assembly, 1975 Regular Session, ch. 515 at 1074.

The longstanding witness requirement serves an important purpose: promoting and protecting the integrity of the electoral process by deterring absentee ballot fraud. The law's requirements are simple. "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.*

Thus, the basic elements of the requirement are simply that (1) there is a witness, and (2) that witness signs the ballot envelope. Notably, the statute says nothing about the distance between the voter and the witness. *See id.* And unsurprisingly, the statute also says nothing that would prevent now-commonplace social-distancing measures from being observed—masks, gloves, separate pens, hand sanitizer, and countless other precautions are all consistent with the statute.

B. The Virginia absentee ballot witness requirement is well within the range of absentee ballot security measures states require.

Plaintiffs suggest that Virginia’s absentee ballot requirements are uncommonly strict. That is not true. In reality, the rules for casting and verifying absentee ballots vary widely throughout the United States, and some states have much more protective rules than Virginia.

For example, some states require *two* witnesses, or notarization, where Virginia only requires one witness. *See* Ala. Code § 17-9-30(b); N.C. Gen. Stat. § 163-231(a); 17 R.I. Gen. Laws § 17-20-2.1(d)(4). At least one state requires notarization. *See* Okla. Stat. tit. 26, § 14-108(A). Another permits an absentee voter to obtain a signature from one attesting witness and also requires an official authorized to administer oaths to sign the initial application for the ballot. *See* Miss. Code. § 23-15-627 (an absent voter’s signature on a ballot application must be “sworn to and subscribed before” such an official). And several states require submission of a copy of an ID card or some other form of verification of registration, such as driver’s license numbers or Social Security numbers. *See* Ark. Code § 7-5-409(4)(A)(v); Kan. Stat. § 25-1122(c); Minn. Stat. § 203B.07(3); Ohio Rev. Code §

3509.05(A). *More than half* of the states impose *some* requirement to assure the integrity of absentee ballots, be it through the kinds of rules described above, or alternatives, like signature verification. *See, e.g.*, Cal. Elec. Code § 3019; Colo. Rev. Stat. §1-7.5-107.3; Fla. Stat. § 101.68; 10 Ill. Comp. Stat. Ann. 5/19-8; Iowa Code § 53.18(2); Mass. Gen. Laws ch. 54 § 94; Mich. Comp. Laws § 168.766; Minn. Stat. § 203B.121; Mont. Code § 13-13-241; Nev. Rev. Stat. 293.333; Ohio Rev. Code § 3509.06; Ore. Rev. Stat. § 254.431; Utah Code Ann. § 20A-3-308; Wash. Admin. Code 434-261-050; Wis. Stat. § 6.87.

C. Virginia's policy responses to COVID-19 have focused on social-distancing, reducing large gatherings of people and election-related issues.

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.

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

Next, on March 23, 2020, Governor Northam entered an executive order that closed the schools in Virginia through the rest of the academic year and barred gatherings of more than 10 people, closed dining establishments, and limited the

² Executive Order 2020-51 is available at: [https://www.governor.virginia.gov/media/governorvirginiagov/governor-of-virginia/pdf/eo/EO-51-Declaration-of-a-State-of-Emergency-Due-to-Novel-Coronavirus-\(COVID-19\).pdf](https://www.governor.virginia.gov/media/governorvirginiagov/governor-of-virginia/pdf/eo/EO-51-Declaration-of-a-State-of-Emergency-Due-to-Novel-Coronavirus-(COVID-19).pdf).

operation of certain businesses through April 23, 2020. (Va. Exec. Order 2020-53.)³

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.) This Executive Order did not, however, address elections.

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.)⁴ 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.) And like the other orders, it does not address voting.

³ Executive Order 2020-53 is available at: [https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-53-Temporary-Restrictions-Due-To-Novel-Coronavirus-\(COVID-19\).pdf](https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-53-Temporary-Restrictions-Due-To-Novel-Coronavirus-(COVID-19).pdf).

⁴ Executive Order 2020-55 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](https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-55-Temporary-Stay-at-Home-Order-Due-to-Novel-Coronavirus-(COVID-19).pdf).

On April 8, 2020, Governor Northam addressed voting when he postponed the Primary Election from June 9 to June 23.⁵ 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.”⁶ Importantly, Virginia will still permit in-person voting during the rescheduled June 23, 2020 Primary Election; absentee balloting is just one available voting option.⁷

D. Plaintiffs’ limited evidence about voting-related risks relates to in-person voting, not absentee voting.

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. Instead, Plaintiffs present only a few examples of poll workers or voters contracting coronavirus after voting *at the polls* as evidence that voting is risky. (Plaintiffs’ Brief in Support of Motion for Preliminary Injunction, ECF No. 17, at 6-7) (“**Pls’ Br.**”) They cited 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.) As shown below, this limited, anecdotal evidence is not useful to assess the risks posed even by in-person voting.

⁵ Governor Northam Announces Plans to Postpone Upcoming Virginia Elections In Response to COVID-19, Va. Gov Office, Apr. 8, 2020, <https://www.governor.virginia.gov/newsroom/all-releases/2020/april/headline-855995-en.html>.

⁶ Absentee Voting, Va Dep’t of Elections, <https://www.elections.virginia.gov/casting-a-ballot/absentee-voting/> (visited Apr. 26, 2020).

⁷ See *id.*

But this evidence does not address absentee voting at all, and 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. Hence, CDC’s guidance for election officials (that Plaintiffs cite) recommends that states “encourage voters to use voting methods that minimize direct contact with other people and reduce crowd size at polling stations.”⁸ 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.

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.

⁸ *Recommendations for Election Polling Locations*, Coronavirus Disease 2019 (COVID-19), U.S. Centers for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html> (visited Apr. 26, 2020).

And critically, Dr. Reingold did *not* opine that compliance with the witness requirement compelled a violation of six-foot social-distancing guidelines.

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 restocking their pantries; whether they do their own grocery shopping or receive at-home deliveries, they can and do wash their hands. 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.

E. Plaintiffs' evidence about election-related voting risks is sparse and unpersuasive.

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. A total of ten cases across the country is, on its own, weak evidence of a pattern. But without reporting how many total voters and poll-workers turned out in the elections Plaintiffs cited, the raw case count is meaningless as a tool to assess risk. Ten cases out of 1,000 people at the polls is one thing; ten cases out of 50,000 people, or 100,000 people, is another.

And 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.

Further, a recent study undercuts Plaintiffs' argument about Wisconsin's experience. The study,⁹ reported in the Wisconsin State Journal¹⁰ and Fox News,¹¹ 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.)

F. Plaintiffs have no evidence – just mere speculation – that COVID-19 will render it unsafe to comply with the absentee ballot witness requirement in any election after June 23, 2020.

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

⁹ 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>.

¹⁰ David Wahlberg, *No bump in COVID-19 rates after Wisconsin's April 7 election, study says*, Wisc. St. J., April 25, 2020, https://madison.com/wsj/news/local/health-med-fit/no-bump-in-covid-19-rates-after-wisconsins-april-7-election-study-says/article_b1aade1d-abec-5fc2-92fb-e1c64ccbc92f.html.

¹¹ Dom Calicchio, *Wisconsin saw no coronavirus infection-rate spike after April 7 election, study says*, FoxNews.com, April 25, 2020, <https://www.foxnews.com/politics/wisconsin-saw-no-coronavirus-infection-rate-spike-after-april-7-election-study-says>.

from COVID-19 passes. But Plaintiffs have produced no evidence to the Court, at all, to support such a broad and indefinite injunction.

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.) Tellingly, 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.) But news reports since Plaintiffs filed their Motion 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.¹² To be clear, we do not know if this vaccine will succeed, and it is not surprising that a learned doctor such as Dr. Reingold does not fully understand this novel coronavirus today. And that is the problem. Dr. Reingold and other medical professionals *will* know more in several months, and the current dearth of information, and constantly evolving facts, are hardly the basis the Court needs to permanently enjoin the witness signature rule today.

In addition, the public health orders from Governor Northam expire on June 10, 2020, almost two weeks before the June 23, 2020 Primary Election. Virginia's

¹² BBC, Coronavirus: First patients injected in UK vaccine trial, <https://www.bbc.com/news/health-52394485> (Apr. 23, 2020) (accessed on Apr. 27, 2020).

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?

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).

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.¹³ 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.¹⁴

In short, 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

¹³ CDC, Opening Up America Again, <https://www.whitehouse.gov/openingamerica/#phase-one> (visited Apr. 26, 2020.)

¹⁴ 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.)

Virginia in November 2020 will preclude them from voting, whether in-person at the polls or absentee.

G. Proposed Intervenors are not harmed by the absentee signature requirement, but may be harmed by absentee ballot fraud.

Proposed Intervenors will not be harmed by the enforcement of Virginia's witness requirement for absentee ballots. Proposed Intervenor, the Republican Party of Virginia, Inc. ("RPV"), is a major political party with a recognized power 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.

This absentee ballot witness requirement has long been part of Virginia law and in the RPV's experience, has not been identified as impacting any election outcomes. Notably, the individual Proposed Intervenors each believe they can readily comply with the witness requirement *without* compromising their safety.

Ms. Mildred Scott is a 91-year-old woman who lives alone in Roanoke County. (Declaration of Mildred H. Scott, attached as Exhibit A ("**Scott Decl.**") at ¶ 1, 2, 8.) She understands she is classified as a higher-risk for COVID-19 due to her age. (*Id.* ¶ 5.) She states that she complies with Governor Northam's orders, including the stay-at-home order. (*Id.* ¶ 6.) Nonetheless, she is confident she can find a witness to

sign her absentee ballot for the June 23, 2020 Primary, as she has several friends who live close by who are willing to help. (*Id.* ¶ 8).

Mr. Thomas Turner is a 30-year-old Black male who resides and votes in the City of Suffolk, in the third congressional district. (Declaration of Thomas N. Turner, Jr., attached as Exhibit B (“**Turner Decl.**”), ¶ 2.) Mr. Turner is also active in Virginia politics, serving as chairman of the Young Republican Federation of Virginia, which engages young voters, ages 18-40, in the political process and works to elect Republican candidates and to encourage its members to become officers of election. (*Id.* ¶ 3.) Like Ms. Scott, Mr. Turner intends to comply with social-distancing guidelines and is confident he can find a witness to sign his absentee ballot for the June 23, 2020 Primary, as he has work colleagues willing to do so. (*Id.* ¶ 8.) Significantly, none of the individual Proposed Intervenors believe that the witness requirement burdens their right to vote. (Scott Decl. ¶ 9; Turner Decl. ¶ 9.)

Nevertheless, Proposed Intervenors are very concerned about the risk of absentee ballot fraud. Ms. Scott served for a number of years as an officer of election in Roanoke County. (Scott Decl. ¶ 2.) Mr. Turner is active in politics. (Turner Decl. ¶ 3.) The RPV is a political party. They believe 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 Proposed Intervenors’ lawful votes. (Scott Decl. ¶ 10; *see also* Turner Decl. ¶ 10.)

These concerns are not merely conjectural. As early as 2005, absentee ballot fraud was identified as “the largest source of potential voter fraud” by a bipartisan study co-chaired by President Jimmy Carter and James Baker.¹⁵ 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.¹⁶ Given the rapid expansion of absentee balloting in Virginia due to COVID-19, Proposed Intervenors submit that now is *not* the time to eliminate long-standing anti-fraud safeguards in Virginia’s absentee ballot voting system.

¹⁵ 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>. Notably, this study garnered heated attention following its issuance, including a detailed “Response” from the Brennan Center, but that lengthy Response never questioned the study’s finding that absentee ballots are the largest source of potential voter fraud. Response to the Report of the 2005 Commission on Federal Election Reform (2005), <https://www.brennancenter.org/sites/default/files/analysis/Response%20to%20Carter-Baker%20Commission.pdf>.

¹⁶ 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.

III. LAW AND ARGUMENT

A. Standard of Review

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.*

B. Plaintiffs have failed to satisfy their burden to show that a preliminary injunction is needed for any election, especially any election after the June 23, 2020 Primary.

Here, 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. Because Plaintiffs cannot make this showing, their motion should be denied.

1. Plaintiffs are categorically not entitled to any relief directed to elections after the June 23, 2020 primary.

As an initial matter, in their motion for preliminary injunction, Plaintiffs request not only that the absentee witness requirement be enjoined 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.)

However, as outlined in Section II(F), *supra*, 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. All Plaintiffs provided was speculation.

Plaintiffs are not entitled to such an open-ended injunction for two reasons. First, any dispute 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. Second, even if the Court finds the dispute is ripe, Plaintiffs have failed to meet their evidentiary burden for an injunction.

a. Plaintiffs’ claims are not ripe.

The Court lacks jurisdiction to issue injunctive relief governing “any and all subsequent elections in Virginia,” as Plaintiffs demand. (Pl’s Br. at 35.) There is no constitutionally cognizable case or controversy over what (if any) modifications to Virginia election procedure will be constitutionally mandated in November 2020 and beyond due to COVID-19 because it is entirely speculative what the state of public health will then be. Plaintiffs’ effort to solve this problem by building in future contingencies into a proposed order is no solution at all; it only raises more problems. The issue is not ripe.

1. *Speculative Future Impact of COVID-19*. “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)).

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. *See, e.g.*, Newley Purnell and Max Colchester, Some States Ease Lockdowns as Global Coronavirus Cases Near 3 Million, the Wall Street Journal (April 27, 2020).¹⁷ The Vice President, meanwhile, predicts that “the coronavirus epidemic can be ‘largely in the past’ by early June.” Gerald F. Seib, Pence Says Coronavirus Could Be Largely Past by Early June, the Wall Street Journal (April 22, 2020).¹⁸

The Court need not take sides in this ongoing public-policy debate. The future of COVID-19 is unknown. Even the more pessimistic voices predict that “[s]ocial distancing will be with us through the summer” and do not purport to project the state of affairs as of *November 2020*, the next statewide Virginia election after June. Jennifer Calfas et al., U.S. Debates How Quickly It Can Reopen, The Wall Street Journal (Apr. 26, 2020).¹⁹ And 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. The Proposed Intervenors are aware of no such guidance or prediction. Certainly, the parties can all agree in hoping that COVID-19 will be safely behind us long before then.

And 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

¹⁷ https://www.wsj.com/articles/coronavirus-latest-news-04-27-2020-11587982265?mod=hp_lead_pos1.

¹⁸ <https://www.wsj.com/articles/pence-says-u-s-will-be-prepared-if-second-coronavirus-wave-hits-11587580040>

¹⁹ <https://www.wsj.com/articles/virus-fallout-continues-as-u-s-deaths-near-54-000-11587885746>

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.

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.

2. Plaintiffs Cannot Draft Their Way Around This Defect. Plaintiffs apparently propose to work around this ripeness problem with clever wordsmithing, suggesting that the proposed injunction apply “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.” (Pls’ Mot. at 2.) This only exposes the problem; it is no solution.

For one thing, courts cannot draft 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. A ripeness defect goes to “injury *in fact*,” *Clapper*, 568 U.S. at 410 (emphasis added), and clever verbiage on paper is no cure. For example, an unripe challenge to racial discrimination that is not shown to be ongoing and imminent, *see Rizzo v. Goode*, 423 U.S. 362, 372 (1976), could not become ripe merely by writing an injunction that bars racial discrimination “if racial discrimination occurs.”

Another flaw in this approach is that the language renders the proposed order hopelessly vague and unworkable. 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). For example, 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. *See, e.g., Burton v. City of Belle Glade*, 178 F.3d 1175, 1200 (11th Cir. 1999) (finding a proposed order

that a city not discriminate in future annexation decisions incompatible with the Rule’s specificity requirement); *Payne v. Travenol Labs., Inc.*, 565 F.2d 895, 898 (5th Cir. 1978) (finding an order forbidding discrimination in employment practices incompatible with the Rule’s specificity requirement).

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.” So when is this “safety” standard met? When the spread of COVID-19 slows? When a vaccine or other medical remedy emerges? When testing becomes more readily available? How readily available? When the death or new-infection rates fall substantially? How substantially is enough? None of these questions is answered or is answerable, and only by *future litigation*—i.e., a future lawsuit—could these issues be resolved.

In reality, this injunction is merely a restatement of Plaintiffs’ legal position that the Constitution forbids states from requiring voters “to choose between putting themselves and others in serious physical jeopardy and forfeiting their fundamental right to vote.” (Pls’ Br. at 28.) They want Virginia to follow the law (or, rather, their view of it), but that is not a reasonably specific injunctive mandate

that can be enforced via contempt. The injunction cannot simply bar Virginia from enforcing election laws in abstract circumstances where doing so would be dangerous.

Yet another problem with this approach is that Plaintiffs demand this relief as a *preliminary* injunction; they do not move now for a *permanent* injunction. A preliminary injunction, however, “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.). This case will not be ongoing for all future elections; it is highly unlikely that it will be ongoing after the June election, after which point it will become moot and a challenge regarding future elections will not yet be ripe. Because the preliminary injunction will only be in effect during the pendency of this case, its terms must be restricted to that temporal duration.

b. Plaintiffs have failed to meet their evidentiary burden for an injunction against future elections.

Ripeness aside, 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). In this case, Plaintiffs say the constitutional deficiency flows from the

immediate effects of the COVID-19 pandemic on Plaintiffs' ability to vote absentee in the June 23, 2020 Primary Election. Plaintiffs do not mount a facial challenge to the absentee witness requirement itself, independent of COVID-19.

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. Or stated more bluntly: a terrible blizzard may justify keeping the polls open later the night the blizzard occurs; it does not serve as a basis to permanently alter poll-hours for all future elections.

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 nothing more than sheer 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.

Plaintiffs may argue that their requested injunction is not impermissibly indefinite because it would terminate once COVID-19 no longer posed a threat to their health or safety. But such a framework fails for lack of definiteness, as set forth in Section III(B)(1)(a)(2) 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.

2. Plaintiffs have not demonstrated that COVID-19 has made compliance with Virginia’s absentee ballot witness requirement a severe burden on their right to vote.

Proposed Intervenor do not dispute that the right to vote is fundamental.

But nothing about Virginia’s absentee ballot witness statute offends that right.

The 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).

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”).

Recently, Virginia’s voter-ID requirement – criticized for placing a burden on voters to acquire and present a photo ID at the polls – was upheld as a permissible

burden on the right to vote, justified by Virginia’s “important regulatory interests” in prevention of voter fraud and preservation of voter confidence in the integrity of elections. *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). *Lee* vindicates the principle that 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.

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).

As argued *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. (*See supra* Section II(D).) 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 fast food drive-through.

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 *70 years*.

Plaintiffs cite a few cases from around the country where courts have granted COVID-19 related relief from election statutes. *Faulkner v. Virginia Dep't of*

Elections, No. CL 20-1546 (Va. Cir. Ct. Mar. 25, 2020) and *Esshaki v. Whitmer*, No. 2:20-cv-10831, 2020 WL 1910154 (E.D. Mich. Apr. 20, 2020) are distinguishable as those cases allowed plaintiffs to place petitions on the ballot with less than the normally required signatures due to COVID-19. The public health risk and difficulty associated with collecting enormous quantities of petition-signatures is a different question than the question presented here.

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 the right to vote; they do not have a right to vote absentee. Virginia has not eliminated in-person voting at the polls for the June 23, 2020 Primary Election, and Plaintiffs remain free to vote at the polls. The Commonwealth has successfully conducted an election during a pandemic before (in 1918, during the Spanish Flu); and it did so without the level of absentee balloting or degree of mitigation measures available in 2020.

3. Virginia's witness-signature requirement is long-standing and serves an important, compelling state interest in preserving the integrity of its elections.

Virginia has required that absentee ballots be witnessed, and that the witness sign the ballot envelope, since at least 1948. (*See* Section II(A), *supra*.) And Virginia is not alone; at least 10 other States require a witness signature. (*Id.*)

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”).

Plaintiffs argue the requirement is unnecessary, and that election integrity can be sufficiently served by requiring simply the voter’s name and address on the envelope, along with an attestation. (Pls’ Br. at 28.) But anyone could write in the voter’s name and address based on public records. The value in the witness requirement is that it provides a level of assurance that the voter cast the ballot, and provides some solemnity to the event of casting the ballot.

The General Assembly and the Governor recognize the value in the witness requirement. Governor Northam recently signed legislation that significantly reformed the requirements for absentee voting in Virginia. (*See* Pls’ Br. at 10.) Notably, while that legislation significantly reformed Virginia’s absentee ballot laws, the General Assembly chose to retain the witness requirement in full.

The oversight provided by Virginia’s absentee ballot witness statute is more critical now than in past years, not less. Plaintiffs’ own evidence reveals signs that a great many voters may be casting ballots absentee in Virginia this year. 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 Proposed Intervenor’s right to vote. 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, like Proposed Intervenor. 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.

The Court should deny the requested injunction.

C. 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.

Plaintiffs have also failed to show irreparable harm. 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, and the notion that they cannot do so is facially untenable when they have managed to retain a *whole team of lawyers to file this case* on their behalf. Plaintiffs have, therefore, failed to make the requisite showing of irreparable injury.

D. The Public’s Interest In The Integrity Of Elections Outweighs Plaintiffs’ Speculative Claims Of Injury About Future Elections.

Finally, 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). To the contrary, the “functional structure embodied in the Constitution, the nature of the federal court system, and the limitations inherent in the concepts both of limited federal jurisdiction and of the remedy afforded by section 1983” must also be considered. *Hutchinson v. Miller*, 797 F.2d 1279, 1282 (4th Cir. 1986), quoting *Gamza v. Aguirre*, 619 F.2d 449, 452 (5th Cir. 1980). 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. *Id.* at 1283. The public interest is served by respecting state control over electoral processes, and not by striking down a bedrock, 70-year-old Virginia statute on the

basis of the thin record before this Court, simply because the Nation finds itself in a crisis. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 579 (Scalia and Stevens, JJ., dissenting) (observing that Cicero’s maxim, *inter arma silent leges* – that in times of war, the law falls silent – is a view that “has no place in the interpretation and application” of our Constitution).

E. Less Drastic Remedies Are Available For The June 23, 2020 Primary Than What Plaintiffs Demand.

Finally, although the Court should deny Plaintiffs’ motion for preliminary injunction for all the reasons set forth herein, Proposed Intervenor recognize the Court may grant some relief directed to the June 23, 2020 Primary Election over their objection. If the Court is so inclined, Proposed Intervenor wish to respectfully suggest a less drastic alternative to striking down the absentee witness requirement in its entirety.

The Voter Defendant Intervenor suggested Virginia’s E-Notary law. The Court could instead provide that, for those absentee voters who find themselves unable to comply with the absentee witness statute due to concerns about health and safety arising out of COVID-19, those voters instead write in the last four digits of their social security number on the ballot envelope. Although this alternate remedy does not provide a true substitute to the witness requirement, it would at least provide some minimal safeguard against absentee ballot fraud. Voters could easily comply with this requirement without risking their health or safety.

IV. CONCLUSION

For the foregoing reasons, Proposed Intervenor respectfully request that the Court deny Plaintiffs' motion for preliminary injunction (ECF No. 16) in its entirety.

Dated: April 28, 2020

Respectfully submitted,

/s/ Christopher M. Marston

Christopher M. Marston (VSB No. 65703)
chris@2562group.com
2652 Group LLC
P.O. Box 26141
Alexandria, VA 22313-6141
571.482.6790 / Fax 703.997.2549

Trevor M. Stanley (VSB No. 77351)
E. Mark Braden (pro hac vice pending)
Katherine L. McKnight (adm. pending)
Richard Raile (VSB No. 84340)
BAKER & HOSTETLER LLP
Washington Square, Suite 1100
1050 Connecticut Avenue, N.W.
Washington, DC 20036-5403
202.861.1500 / Fax 202.861.1783
tstanley@bakerlaw.com
mbraden@bakerlaw.com
kmcknight@bakerlaw.com
rraile@bakerlaw.com

Patrick T. Lewis (pro hac vice pending)
BAKER & HOSTETLER LLP
127 Public Square, Suite 2000
Cleveland, OH 44114-1214
216.621.0200 / Fax 216.696.0740
plewis@bakerlaw.com

*Counsel for Proposed Intervenor,
Republican Party of Virginia, Inc.,
Mildred H. Scott, Vincent E. Falter, and
Thomas N. Turner, Jr.*

CERTIFICATE OF SERVICE

I certify that on April 28, 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.

/s/ Christopher M. Marston
Christopher M. Marston (VSB No. 65703)

EXHIBIT A

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

LEAGUE OF WOMEN VOTERS OF
VIRGINIA, *et al.*,

Plaintiffs,

v.

VIRGINIA STATE BOARD OF
ELECTIONS, *et al.*,

Defendants.

Case No.: 6:20-cv-00024-NKM

DECLARATION OF MILDRED H. SCOTT

My name is Mildred H. Scott. I am over the age of 18 and fully competent to make this declaration. I declare the following based upon my personal knowledge:

1. I am 91 years old and have been a registered voter in Virginia for over 40 years, having voted in virtually every state and federal election during that time. Voting and political participation are a core part of my values.

2. I currently live in Roanoke County, Virginia, in the 24179 zip code. I am registered to vote in Roanoke County and have resided and voted in this County for approximately 55 years.

3. I have served as an officer of election for Roanoke County for a number of elections.

4. I plan to vote in the Republican Primary to nominate a candidate for U.S. Senate on June 28, 2020, and to vote in November 3, 2020 General Election.

5. I am aware the U.S. Centers for Disease Control and Prevention have said that “older adults” are at a higher risk for COVID-19.

6. I am aware of and have been following public health recommendations and orders from the Governor to stay at home except for necessary activities.

7. I consider voting to be a necessary activity and am aware that Alena Yarmosky, a spokeswoman for Governor Northam has said that his orders do not apply to the operation of government and that includes participating in elections.

8. Despite living alone, I am confident that I can find a witness to sign an absentee ballot security envelope so that I can participate in these elections. I have several friends who live close by and are willing to witness my signature following social distancing guidelines.

9. I do not believe that a requirement to have a witness sign an absentee ballot security envelope burdens my right to vote.

10. I am, however, concerned that what the Plaintiffs are asking for in this lawsuit might hurt my right to vote. Having served as an officer of election, I believe that election integrity safeguards like the witness signature requirement are vital to fair and honest elections. Removing those safeguards may allow votes to be cast by individuals who are not entitled to cast them, which would dilute my vote.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 27, 2020, at Roanoke County, Virginia.

/s/ Mildred H. Scott
MILDRED H. SCOTT

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

LEAGUE OF WOMEN VOTERS OF
VIRGINIA, *et al.*,

Plaintiffs,

v.

VIRGINIA STATE BOARD OF
ELECTIONS, *et al.*,

Defendants.

Civil Action No.: 6:20-cv-00024-NKM

DECLARATION OF THOMAS N. TURNER, JR.

My name is Thomas N. Turner, Jr. I am over the age of 18 and fully competent to make this declaration. I declare the following based upon my personal knowledge:

1. I am a 30-year-old Black man and have been a registered voter in Virginia for over 11 years, having voted in every state and federal election during that time.
2. I currently live in the City of Suffolk, Virginia, in the 23434 zip code in the Third Congressional District. I am registered to vote in City of Suffolk and have resided and voted in this City since 2012, prior to that time, I resided in and was registered to vote in the City of Lynchburg.
3. I currently serve as chairman of the Young Republican Federation of Virginia, engaging young voters, ages 18-40, in the political process, working to elect Republican candidates, and encouraging Federation members to serve as officers of election.
4. I plan to vote in the Republican Primary to nominate a candidate for U.S. Senate and U.S. House of Representatives on June 23, 2020, and to vote in November 3, 2020 General Election.

5. I am aware of and have been following public health recommendations and orders from the Governor to stay at home except for necessary activities.

6. I work for the Circuit Court for the City of Suffolk and have been designated an essential employee, so necessary activities include work at the courthouse twice each week.

7. I consider voting to be a necessary activity and am aware that Governor Northam's spokeswoman for said that voting in an election is allowed under his orders.

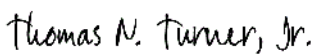
8. I have applied for an absentee ballot for the June 23, 2020 primary election and intend to have a colleague from work witness my ballot while observing social distancing and other public health recommendations.

9. I do not believe that a requirement to have a witness sign an absentee ballot security envelope burdens my right to vote.

10. I believe the witness signature requirement promotes the integrity of the vote and reassures me that I should have confidence in the results of the election.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April __, 2020, at Suffolk, Virginia.
4/27/2020

DocuSigned by:

C27D8B31887D418...
THOMAS N. TURNER, JR.