

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.

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/governorviriniagov/executive-actions/EO-55-Temporary-Stay-at-Home-Order-Due-to-Novel-Coronavirus-\(COVID-19\).pdf](https://www.governor.virginia.gov/media/governorviriniagov/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 securely¹⁰ 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
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VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND

SEVENTH CONGRESSIONAL DISTRICT
REPUBLICAN COMMITTEE, et al.,

Plaintiffs,

v.

VIRGINIA DEPARTMENT OF
ELECTIONS, et al.,

Defendants.

Civil Action No. CL20001640-00

**PLAINTIFF-INTERVENOR’S UNOPPOSED MOTION TO EXTEND TEMPORARY
INJUNCTION**

The Republican Party of Virginia, Inc. (“Plaintiff-Intervenor” or “RPV”), by counsel, respectfully files this motion to extend the temporary injunction issued by the Court to apply to all of its Congressional District Committees that have selected a non-primary method of nomination pursuant to §24.2-509 of the Code of Virginia.

On April 14, 2020, the Court enjoined Defendants from enforcing the provisions of §24.2-510 against Plaintiffs until 7:00 p.m., Tuesday, July 28, 2020. Ct.’s Order Granting Temporary Inj. p. 7. The Court’s findings of fact in that order as they relate to the Plan of Organization of the Republican Party of Virginia, Inc. (“Party Plan”), the actions of the Governor, and the mandates of the Code of Virginia apply equally to the situation of the five other committees that have made plans to nominate by convention. Only the specific details of those other committees’ meeting dates and preparations for a convention differ and not in any material way (e.g., each Committee made its nominating method decision at a properly called

meeting, adopted a call for convention at another such meeting, and posted its call to the RPV website; three other committees had scheduled conventions for May 30, while two also planned conventions for April 23).

The Court's findings of law and application of law to the facts should apply equally to each of the other committees, having turned primarily on the application of the same statute and executive actions to a committee operating under the same resulting constraints. Specifically, each of the committees must meet the June 9 deadline set by §24.2-510 in order for the Party's nominees to appear on the November 3, 2020 ballot and, in the current emergency situation, none of the committees can do so.

Counsel for Plaintiffs and Defendants have confirmed that their clients do not oppose this motion and an endorsed Consent Order is attached as Exhibit A.

For the foregoing reasons, RPV respectfully requests that the Court grant its motion to extend its temporary injunction to all of its Congressional District Committees that have selected a non-primary method of nomination.

Respectfully submitted,

REPUBLICAN PARTY OF VIRGINIA,
INC.



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Dated: April 20, 2020

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was electronically mailed on the 20th day of April, 2020, to the following:

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A handwritten signature in blue ink, appearing to read "Christopher M. West", is written above a horizontal line.

Counsel

VIRGINIA :

IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND

OMARI FAULKNER FOR VIRGINIA,)

-and-)

OMARI FAULKNER)

Plaintiffs,)

v.)

Civil Action No.:

VIRGINIA DEPARTMENT OF ELECTIONS)

-and-)

VIRGINIA STATE BOARD OF ELECTIONS)

ROBERT H. BRINK, Chairman of)

The State Board of Elections, in his)

official capacity, JOHN O'BANNON,)

Vice-Chairman of the State Board of Elections,)

in his official capacity,)

JAMILAH D. LECRUISE,)

Secretary of the State Board of Elections,)

In her official capacity,)

CHRISTOPHER E. "CHRIS" PIPER,)

Commissioner Of the State Board of Elections,)

in his official capacity)

JESSICA BOWMAN, Deputy Commissioner)

Of the State Board of Elections, in her)

official capacity.)

- and -)

THE REPUBLICAN PARTY OF VIRGINIA)

-and-)

Chairman Jack R. Wilson, in his capacity)

As Chairman of the Republican Party of)

Virginia)

Defendants.)

VERIFIED COMPLAINT

Plaintiffs, Omari Faulkner and his United States Senate campaign committee, Omari Faulkner For Virginia, a political committee registered with the Federal Election Commission, by counsel and pursuant to the First and Fourteenth Amendments to the United States Constitution, 42 U.S.C. § 1983, Section 8.01-620 of the Code of Virginia (the “Code”), and Rule 3:2 of the Rules of Supreme Court of Virginia, state the following verified complaint for declaratory judgment and permanent, preliminary, and emergency injunctive relief against the Virginia Department of Elections, the Virginia State Board of Elections, its Chairman, Vice-Chairman, Secretary, Commissioner, and Deputy Commissioner, the Republican Party of Virginia, and Chairman of the Republican Party of Virginia, Jack R. Wilson, in his official capacity, (together, “Defendants”) to restrain defendants, in this election only, from enforcing in full the candidate signature requirement for U.S. Senate candidates codified at Va. Code § 24.2-521(1).

PARTIES

1. Plaintiff Omari Faulkner resides in Bluemont, Virginia and is a member of the United States Navy Reserve. Mr. Faulkner is also a candidate for the Republican nomination for U.S. Senate. Mr. Faulkner filed his Statement of Candidacy with the Federal Election Commission on November 11, 2019. (Ex. A, Statement of Candidacy).

2. Plaintiff Omari Faulkner For Virginia is the official candidate committee for Mr. Faulkner’s bid for United States Senate. The campaign committee filed its Statement of Organization with the Federal Election Commission on November 11, 2019 and has the campaign ID number as C00726570. (Ex. B, Statement of Organization).

3. Defendant State Board of Elections, through the Virginia Department of Elections oversees “voter registration, absentee voting, *ballot access for candidates*, campaign finance disclosure and voting equipment certification in coordination with Virginia’s 133 local election offices.”¹ *See also* Va. Code § 24.2-103(A) (vesting the State Board of Elections, through the Department of Elections, with supervisory authority to obtain uniformity in election laws).

4. The State Board has the duty to receive both Declarations of Candidacy from candidates for United States Senate, as well as a Petition containing at least 10,000 signatures statewide, with at least 400 signatures from each congressional district. Va. Code §§ 24.2-522(C) 24.2-521(1). The State Board is then required to “transmit the material so filed to the state chairman of the party of the candidate.” Va. Code § 24.2-522.

5. The State Board of Elections also has the duty to prescribe various forms for the registration of voters and the conduct of elections. *See* Va. Code § 24.2-105. The State Board of Elections has prescribed Form SBE 506/521, the form that contains the signatures of voters to get a candidate’s name on the ballot.

6. Defendant Robert H. Brink is the Chairman of the State Board of Elections. He is sued in his official capacity.

7. Defendant John O’Bannon is the Vice-Chairman of the State Board of Elections. He is sued in his official capacity.

¹ *See* Department of Elections, *About the Agency* available at <https://www.virginia.gov/agencies/departments-of-elections/> (last visited March 19, 2020) (emphasis added).

8. Defendant Jamilah D. LeCruise is the Secretary of the State Board of Elections. She is sued in her official capacity.

9. Defendant Christopher E. "Chris" Piper is the Commissioner of the State Board of Elections. He is sued in his official capacity.

10. Defendant Jessica Bowman is the Deputy Commissioner of the State Board of Elections. She is sued in her official capacity.

11. Defendant Republican Party of Virginia ("RPV") is the State Party affiliate of the Republican National Committee.²

12. Defendant Jack Wilson is the Chairman of the Republican Party of Virginia and he is sued in that capacity only. As Chairman, Mr. Wilson is responsible for verifying the number of signatures and certifying to the State Board that the candidate had a sufficient number of signatures to obtain a position on the ballot. *See* Va. Code § 24.2-527(A).

JURISDICTION

13. This Court has jurisdiction over the subject matter of this Complaint pursuant to Sections 8.01-184 and 8.01-186 of the Code. This statute permits this Court to issue both declaratory judgments as well as grant injunctive relief to effectuate its declaratory judgment.

² *See, e.g.*, RPV Party Plan at 6, §A ¶ 5 (membership on the Republican Party of Virginia's State Central Committee includes the two Virginia representatives to the Republican National Committee. *See also id.* at 7, §C ¶ 3 (stating that the Republican Party of Virginia's State Central Committee has the authority to fill vacancies for Virginia's National Committee representative in the event a vacancy occurs before the next Republican National Convention) *available at* <https://virginia.gop/wp-content/uploads/2020/01/Party-Plan-Amended-December-2019.pdf> (last visited March 19, 2020).

14. Venue is appropriate in the City of Richmond Circuit Court because several officers of the Commonwealth are sued in their official capacity and those officers have offices within the City of Richmond. Va. Code § 8.01-261(2).

FACTS

15. Mr. Faulkner began his bid for the Republican nomination to represent Virginia in the United States Senate back in November of 2019.

16. Within weeks, Omari Faulkner for Virginia, contracted with an individual to run the campaign's signature gathering operation to obtain the necessary signatures pursuant to Va. Code § 24.2-521(1).

17. Beginning in approximately early January of 2020, the campaign committee assiduously and diligently began circulating petitions to obtain these signatures. These efforts were done so that Mr. Faulkner's name would appear on the Virginia's Republican Primary Ballot.

18. Just as the sun was rising on 2020 and heating the campaign trails, the menace that is COVID-19, also known as the Coronavirus, landed on the shores of the Commonwealth. Within the past week alone, there has been a steady and persistent cascade of emergency actions taken to combat COVID-19.

19. On March 11, 2020, the World Health Organization declared COVID-19 a global pandemic. (attached as Ex. H).

20. In response to the conflagration of cases and to combat COVID-19, on March 12, 2020 Governor Northam declared a State of Emergency. In his "Declaration Of A State Of Emergency Due To Novel Coronavirus (Covid-19)" (attached as Exhibit

C), Governor Northam declared that COVID-19 is public health threat because it is a communicable disease. (Ex. C at 1).

21. The following day, President Trump declared a national emergency.

22. Three days later on Monday, March 16, 2020, Governor Northam issued a directive stating that restaurants, fitness centers, and theatres either had to reduce capacity to 10 people or close. (attached as Ex. E). Governor Northam also banned all events with 100 or more persons.

23. Later, on Monday March 16, 2020, the Supreme Court of Virginia declared a judicial emergency. (attached as Ex. F). This order declared that a judicial emergency exists from March 16 to Monday April 6, 2020. (Ex. F at 1). The order further ordered that all non-emergency and non-essential court proceedings be suspended and that all deadlines are tolled for 21 days. Ex. F. at 2.

24. Then, on March 17, President Trump declared that for a period of 15 days, there should be no gatherings of 10 or more people.³

25. The White House in collaboration with the Center for Disease Control published guidelines for how people should conduct themselves through these next 15 days. Included within these guidelines is the recommendation that in areas where community spread of COVID-19 is present, “bars, restaurants, food courts, gyms, and other indoor and outdoor venues where groups of people congregate should be closed.” (attached as Ex. D). Additionally, people should avoid discretionary travel, including shopping trips and social visits. *Id.*

³ See The President’s Coronavirus Guidelines for America: 15 Days To Slow The Spread available at https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20_coronavirus-guidance_8.5x11_315PM.pdf (last visited March 19, 2020).

26. Finally, of specific importance, the Center for Disease Control has recommended that people maintain a safe social distance of *at least six feet*. (attached as Exhibit G). This is because contact with a person within six feet can cause transmission of COVID-19. Ex. G.

27. States have addressed COVID-19 and its impact on elections in various ways.

28. The State Defendants themselves have in fact started taking measures to limit human interaction in relation to the upcoming election. In recognizing the danger of coming into close contact with others, the Virginia Department of Elections “to protect [Voters’] health during COVID-19 outbreak” is strongly encouraging voters to vote absentee in the upcoming May elections. The Department is advising voters to choose reason “2A My disability or illness” for Absentee voting in the June 2020 elections due to COVID-19.”⁴

29. Seven states, Georgia, Louisiana, Alabama, Kentucky, Ohio, Maryland, and Connecticut, have all moved their election dates to later in the calendar. For example, Alabama’s primary runoff election was moved from March 31, 2020 to July 14, 2020.⁵ Additionally, Louisiana has moved their primary election from April 4, 2020 to June 20, 2020,⁶ while Georgia has moved its primary election from March 24, to May 19, 2020.⁷

⁴ See Va. Department of Elections, *Absentee Voting* available at <https://www.elections.virginia.gov/casting-a-ballot/absentee-voting/> last visited (March 19, 2020).

⁵ See *Supplemental State of Emergency: Coronavirus COVID-19* available at <https://governor.alabama.gov/newsroom/2020/03/supplemental-state-of-emergency-coronavirus-covid-19/> (last visited March 19, 2020).

⁶ See *Covid-19 And Elections Update* available at <https://www.sos.la.gov/Pages/NewsAndEvents.aspx#faq258> (last visited March 16, 2020).

Kentucky has moved its primary election from May 19 to June 23, 2020,⁸ while Maryland moved its primary election from April 28, 2020 to June 2, 2020.⁹ Connecticut moved its election from April 28 to June 2, 2020.¹⁰ Finally, the Ohio Department of Health canceled its March 17, 2020 primary election.¹¹

30. Then, prior to President Trump's declaration of a national emergency, and before Governor Northam's declaration of a state emergency, Governor Cuomo of New York took emergency action. On March 7, 2020, Governor Cuomo of New York issued Executive Order 202.2 which modified New York's petition signature requirement. New York reduced the number of signatures a candidate is required to obtain by 70%. *See Ex. I at 1.* Furthermore, Governor Cuomo suspended all signature gathering activity on March 17, 2020. *See id.*

31. Despite the steady drumbeat of warnings to maintain a safe social distance by the Governor, the President, the State Board of Elections, and the CDC, Mr. Faulkner

⁷ *See Secretary Of State Raffensperger Postpones The Presidential Preference Primary available at https://sos.ga.gov/index.php/elections/secretary_of_state_raffensperger_postpones_the_presidential_preference_primary* (last visited March 16, 2020).

⁸ *See Secretary Of State Moves To Delay May 19 Elections available at <https://kentucky.gov/Pages/Activity-stream.aspx?n=SOS&prId=300>* (last visited March 19, 2020).

⁹ *See Renewal Declaration of State Of Emergency and Existence of Catastrophic Health Emergency –COVID-19, available at <https://governor.maryland.gov/wp-content/uploads/2020/03/Renewal-of-State-of-Emergency.pdf>* (last visited March 19, 2020).

¹⁰ *See Executive Order No. 7G available at <https://portal.ct.gov/-/media/Office-of-the-Governor/Executive-Orders/Lamont-Executive-Orders/Executive-Order-No-7G.pdf>* (last visited March 19, 2020).

¹¹ *See In re: Closure of Poling Locations in the State of Ohio on Tuesday March 17, 2020 available at https://content.govdelivery.com/attachments/OHOOD/2020/03/17/file_attachments/1402754/Director%27s%20Order%20Closure%20of%20the%20Polling%20Locations.pdf* (last visited March 19, 2020).

has obtained 3,769 signatures statewide. Mr. Faulkner's campaign has also obtained the following amounts of signatures in each congressional district:

- a. CD 1: 242
- b. CD 2: 319
- c. CD 3: 690
- d. CD 4: 109
- e. CD 5: 262
- f. CD 6: 391
- g. CD 7: 374
- h. CD 8: 201
- i. CD 9: 168
- j. CD 10: 747
- k. CD 11: 267

32. Despite their diligence, Mr. Faulkner and his campaign are still 6,231 signatures shy of the statewide requirement and have at least 200 signatures in 9 congressional districts.

33. Because 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 prior to the deadline absent relief sought in this lawsuit.

34. At best, continued attempts to obtain signatures is challenging, and at worst is in direct conflict with directives from everyone in the public health community,

which only risks making a very serious situation worse and specifically exposes campaign staff to additional dangers.

35. Mr. Faulkner and his campaign must submit the requisite signatures by Thursday, March 26, 2020. Va. Code § 24.2-522(A). This is because Virginia's primary is scheduled for June 9, 2020 and the statute requires candidates to file their declaration of candidacies and petition signatures 75 days prior to the election. Va. Code § 24.2-522(A).¹²

36. When the State Board receives Mr. Faulkner's petition papers, the State Board is then required to "transmit the material so filed to the state chairman of the party of the candidate" within 72 hours of receipt. Va. Code § 24.2-522. In this case, the State Board must transmit this material to Jack Wilson, chairman of the Republican Party of Virginia.

37. Only the State Chairman is permitted to open the sealed containers containing the signed petitions. Va. Code § 24.2-522.

38. Then, the State Chairman of the Republican Party of Virginia must certify to the State Board that the Party reviewed the petitions and found that the requisite number of petitions was satisfied. Va. Code § 24.2-527. The State Chairman must provide the State Board with this certification by March 31, 2020, or seventy days before June 9, 2020. Va. Code § 24.2-527.

39. Mr. Faulkner would have been able to satisfy the signature requirement but for the unanticipated and unprecedented pandemic of COVID-19.

¹² See Upcoming Elections, Virginia Department of Elections *available at* <https://www.elections.virginia.gov/casting-a-ballot/calendars-schedules/upcoming-elections.html> (last visited March 19, 2020).

40. Absent an injunction, Mr. Faulkner's name will not appear on the ballot. This will violate his constitutional right to free speech and free association.

41. Defendants at all times are acting under the color of state law.

U.S. CONSTITUTIONAL LAW

42. The First Amendment declares in no uncertain terms that Congress shall make no law abridging the freedom of speech. U.S. Const. amend. I. *See also Citizens United v. FEC*, 558 U.S. 310, 336 (2010). This restriction against governmental power is applied to the states through the Fourteenth Amendment. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015).

43. "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *NAACP v. Alabama*, 357 U.S. 449, 460 (1958).

44. The Supreme Court has made clear, "whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters ... state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny" *Id.* at 460-61.

45. The right to "voluntary political association ... is an important aspect of the First Amendment freedom" that the Supreme Court "has consistently found entitled to constitutional protection." *Lefkowitz v. Cunningham*, 431 U.S. 801, 808 (1977).

46. A person's ability to exercise their rights guaranteed under the First Amendment is "[u]ndeniably enhanced by group association." *Buckley v. Valeo* 424 U.S. 1, 15 (1976) (quoting *NAACP v. Alabama*, 357 U.S. at 460).

47. Both the First and the Fourteenth Amendments therefore, guarantee the “freedom to associate with others for the common advancement of political beliefs and ideas...” *Id.*; see also *Anderson v. Celebrezze*, 460 U.S. 780, 787 (1983) (“[T]he right of individuals to associate for the advancement of political beliefs . . . rank[s] among our most precious freedoms.”).

48. Further, because the freedom of association enhances the effectiveness of the freedom of speech, the government cannot limit or dictate who an association chooses to associate with for the common advancement of the association’s beliefs. *Tashjian v. Republican Party*, 479 U.S. 208, 224 (1986) (emphasis added).

49. Although states are entrusted with administering their elections and imposing reasonable restrictions “in exercising their powers of supervision over elections ... the States may not infringe upon basic constitutional protections.” *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973).

50. “[Ballot] Access restrictions also implicate the right to vote because, absent recourse to referendums, voters can assert their preferences only through candidates or parties or both.” *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979).

51. In constitutional analysis, the primary concern of courts is “with the tendency of ballot access restrictions to limit the field of candidates from which voters might choose.” *Anderson v. Celebrezze*, 460 U.S. 780, 786 (1983).

52. “By limiting the choices available to voters, the State impairs the voters’ ability to express their political preferences.” *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979).

VIRGINIA LAW

53. Under Virginia law, Mr. Faulkner and his campaign are required to obtain 10,000 signatures statewide. Included within that 10,000 signatures is a requirement to obtain 400 signatures within each congressional district. Va. Code § 24.2-521(1).

54. Mr. Faulkner and his campaign are required to submit these signatures to the State Board of Elections on March 26, 2020. Va. Code § 24.2-522(A).

55. Then, within 72 hours of receipt, the State Board is required to “transmit the material so filed to the state chairman of the party of the candidate” who is Jack Wilson of the RPV. Va. Code § 24.2-522.

56. Only the State Chairman, Mr. Wilson, is permitted to open the sealed containers containing the signed petitions. Va. Code § 24.2-522.

57. Then, by March 31, 2020, the State Chairman of the Republican Party of Virginia must certify to the State Board that the Party reviewed the petitions and found that the requisite number of petitions was satisfied. Va. Code § 24.2-527.

CLAIMS

COUNT I

Violation of The First Amendment’s Free Speech And Association Clauses
1983 Action

58. Plaintiffs incorporate by reference paragraphs 1-57 as if fully restated herein.

59. It is impracticable for Mr. Faulkner and his campaign to complete their task of obtaining 10,000 signatures statewide and 400 signatures in each of Virginia’s eleven congressional districts given recent events. Given the impracticability of Mr.

Faulkner and his campaign to obtain signatures since the declaration of a State emergency, Mr. Faulkner seeks redress.

60. “No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.” *Wesberry v. Sanders*, 376 U.S. 1, 17, 84 S. Ct. 526, 11 L. Ed. 2d 481 (1964).

61. Ballot restrictions that severely burden the right to vote and associate violate the First Amendment to the U.S. Constitution. *See Storer v. Brown*, 415 U.S. 724, 728-29 (1974).

62. Accordingly, “[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms. If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties.” *Kusper v. Pontikes*, 414 U.S. 51, 59 (1973) (internal quotation marks and citations omitted).

63. Therefore, in recognizing that States must enact election codes for orderly, fair, and honest elections, courts reviewing challenges to ballot access cases impose a flexible standard. *Burdick v. Takushi*, 504 U.S. 428, 433-34 (1992). If the election regulation imposes a severe burden, then the regulation must survive strict scrutiny. *Id.* at 434. By contrast, if the election regulation imposes a light burden, rational basis or intermediate scrutiny applies. *Id.*

64. Under the current conditions created by COVID-19, including a declared state of emergency in our Commonwealth as well as a declared National emergency, Virginia’s signature requirement imposes a severe burden on Plaintiffs.

65. This burden is compounded because of the various government recommendations that individuals maintain at least six feet distance between them.

66. Virginia does not have a compelling justification to require Plaintiffs to continue circulating large numbers of petitions between now and March 26 when there are guidelines from the U.S. Government, Virginia government, and the Center for Disease Control recommending people to maintain a safe distance of six feet or more.

67. Furthermore, Virginia cannot claim a compelling justification when Virginia, recognizing the danger imposed by the communicable disease COVID-19, is encouraging voters to cast absentee ballots rather than go to the polls and vote. The fact that State Defendants are encouraging voters to vote absentee and not travel to the polls insinuates that it is contrary to the health of Virginians to come into close contact with others. Virginia cannot say that for the health of voters, do not vote in person but still demand that Plaintiffs still send volunteers out to neighborhoods and business and collect signatures in person.

68. In analogous situations, courts have extended voter registration deadlines in light of natural disasters, like hurricanes. *See Fla. Democratic Party v. Scott*, 215 F. Supp. 3d 1250 (N.D. Fla. 2016). In that court's analysis of the burden, the court noted that in the final week before voter registration closed, an estimated 100,000 people were expected to register. *Id.* at 1257. But because of Hurricane Matthew, these potential voters were forced to flee the State. *Id.* Thus, these potential voters could not vote because they were unregistered. *Id.* Florida's voter registration statute imposed a severe burden that it could not justify. *Id.*

69. Because the inability to register to vote meant these 100,000 people could not vote, the court ruled that was a severe burden. *Id.*

70. Florida could not justify its severe burden because, similar to here, several other states impacted by Hurricane Matthew either extended their voter registration deadlines or permitted voter registration on Election Day. *Id.* Accordingly, under the flexible approach explained in *Burdick*, the court ruled that under any standard, Florida could not justify its decision not to extend voter registration in light of Hurricane Matthew. *Id.* at 1257-58; *see also Ga. Coalition for the Peoples' Agenda, Inc. v. Deal*, 214 F. Supp. 3d 1344 (S.D. Ga. 2016) (ordering an extension of voter registration deadline due to Hurricane Matthew because the loss of the right to vote would be an irreparable harm and when balanced to administrative burden of extending registration deadline, the harm to voting rights outweighed the administrative burden).

71. Accordingly, Virginia does not have a compelling or even sufficiently important interest to justify maintaining its 10,000-signature requirement and 400-signature per congressional district requirement in light of the current public health emergency.

72. Absent an injunction, Mr. Faulkner will not appear on the ballot, a severe burden to his First Amendment rights. *See Fla. Democratic Party*, 215 F. Supp. 3d at 1257.

73. Additionally, because Mr. Faulkner and his campaign have obtained 3,769 signatures, he has demonstrated a sufficient modicum of support in the context of this election. *See Bowe v. Board of Election Comm'rs*, 614 F.2d 1147, 1152 (7th Cir. 1980) (“The ultimate question was said to be whether in the context of California politics, a

reasonably diligent candidate could be expected to be able to meet the requirements and gain a place on the ballot.”) (citing *Storer*, 415 U.S. at 742). Given the global pandemic that has seized our Commonwealth and our Nation, Mr. Faulkner and his campaign have demonstrated a modicum of support to merit a place on the ballot.

74. At all times, State Defendants were acting under the color of state law.

PRAYER FOR RELIEF

A. Declare Va. Code § 24.2-521(1) unconstitutional as applied to Senate candidates in this particular pending election.

B. Enjoin all Defendants from enforcing Va. Code § 24.2-521(1) in full against United States Senate candidates in this primary election.

C. Order that, to obtain a position on the partisan primary election ballot for U.S. Senate, candidates for the U.S. Senate must obtain 3,500 signatures statewide and 100 signatures in each of Virginia’s eleven congressional districts.

D. DEMAND FOR ATTORNEYS’ FEES: Pursuant to Rule 3:25 of the Rules of the Supreme Court of Virginia, Plaintiffs seek reasonable attorneys’ fees pursuant to 42 U.S.C. § 1988.

E. Award all other relief that this Court deems just and necessary.

Respectfully submitted, March 23, 2020

A handwritten signature in blue ink, consisting of a large, stylized 'J' followed by a smaller, more complex flourish.

Jason Torchinsky (VA Bar# 47481)
Jonathan P. Lienhard (VA Bar# 41648)
Shawn Sheehy (VA Bar# 82630)

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Counsel to Plaintiffs

VERIFICATION PURSUANT TO VIRGINIA CODE SECTION 8.01-4.3

I, Omari Faulkner have reviewed the factual averments in the Verified Complaint and I can swear under penalty of perjury that those factual averments are true and correct to the best of my knowledge.

A handwritten signature in black ink, appearing to read "Omari Faulkner", written over a horizontal line.

Omari Faulkner

VERIFICATION PURSUANT TO VIRGINIA CODE SECTION 8.01-4.3

I, Lisa Lisker, serve as the treasurer for Omari Faulkner for Virginia, Inc. I have reviewed the factual averments in the Verified Complaint and I can swear under penalty of perjury that those factual averments are true and correct to the best of my knowledge.



Lisa Lisker

Treasurer, Omari Faulkner for Virginia

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was this 23rd day of March 2020 served, by email and FedEx, postage pre-paid, upon the following:

<p>Carol Lewis & Heather Hays Lockerman Assistant Attorneys General 202 North 9th Street Richmond, VA 23219 (804) 692-0558 CLewis@oag.state.va.us HLockerman@oag.state.va.us</p> <p><i>On behalf of:</i></p> <p>VIRGINIA DEPARTMENT OF ELECTIONS</p> <p>-and-</p> <p>VIRGINIA STATE BOARD OF ELECTIONS ROBERT H. BRINK, Chairman of The State Board of Elections, in his official capacity, JOHN O'BANNON, Vice-Chairman of the State Board of Elections, in his official capacity, JAMILAH D. LECRUISE, Secretary of the State Board of Elections, In her official capacity, CHRISTOPHER E. "CHRIS" PIPER, Commissioner Of the State Board of Elections, in his official capacity JESSICA BOWMAN, Deputy Commissioner Of the State Board of Elections, in her official capacity.</p>	<p>Chris Marston 110 Shooters Ct. Alexandria, VA 22314 (571) 482-7690 chris@electioncfo.com</p> <p><i>Counsel to:</i></p> <p>THE REPUBLICAN PARTY OF VIRGINIA)</p> <p>-and-</p> <p>Chairman Jack R. Wilson, in his capacity As Chairman of the Republican Party of Virginia.</p>
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By: _____



Jason B. Torchinsky

**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

DECLARATION OF CHRISTOPHER E. PIPER

1. I am over the age of 18, competent to offer testimony, and have personal knowledge of the facts in this Declaration.

2. I am the Commissioner of the Virginia Department of Elections. As Commissioner, I am also the Chief Elections Office in the Commonwealth. I have been employed as the Commissioner since February 10, 2018 and, over the subsequent two years, I have overseen five statewide elections, as well as a number of special and local elections.

3. The State Board of Elections, through the Department of Elections (ELECT), is required to supervise and coordinate the work of the county and city electoral boards and of the registrars to obtain uniformity in their practices and proceedings and legality and purity in all elections.

4. ELECT creates and provides guidance to localities for localities to follow as they create ballots, set up polling places, determine the eligibility of voters, and determine whether an absentee ballot will count. The guidance ensures that local election officials across the Commonwealth are exercising uniformity in the conduct of elections. This guidance is regularly

updated to reflect changes in the Virginia Code as well as circumstances such as conducting an election during or proximate to a state of emergency. The guidance provided by ELECT comes in many forms, including in person and online training events, handbooks, policy documents, and regularly updated policy reviews of specific answers to questions posed by local election officials.

5. The upcoming June primary election, originally scheduled for June 9, has been postponed to June 23. Localities are required by Va. Code § 24.2-612 to have ballots ready for in person absentee voting and to mail absentee ballots to certain voters. Further, absentee ballots are required to be mailed to voters not later than 45 days before an election under the Uniformed and Overseas Citizens Absentee Voting Act (52 U.S.C. 20301 et seq.). Because a number of local general registrars' offices are not open on Saturday, May 9, these offices will begin issuing absentee ballots on May 8.

6. Thus, though Election Day—June 23—is more than 50 days away, voting in the election actually begins on the day that absentee ballots are made available to voters.

7. Virginia maintains multiple safeguards against voter fraud in the context of absentee voting. General registrars maintain lists of voters who applied for and returned absentee ballots, and that list is attested to by the secretary of the electoral board and delivered to the chief officer of election for each precinct. Absentee ballots are only accepted from voters whose names appear on the attested list. When signing their absentee ballot envelope, voters themselves must attest under penalty of perjury their identity, residence, and that they did not double vote. Any individual who double votes or otherwise improperly uses an absentee ballot faces severe criminal penalties for violating their attestation. Additionally, any willfully false

material statement or entry made by any person in completing their absentee ballot may be punishable as a Class 5 felony.

8. Additionally, current law requires that a voter who wishes to cast an absentee ballot by mail complete their ballot in the presence of a witness. After the voter marks the ballot and inserts it in the return envelope, the witness signs where indicated on the ballot return envelope.

9. While a political party may determine its method of nominating candidates for office, including by primary, it is the local electoral board that determines the persons who received the highest number of votes for nomination to an office, including by determining whether certain ballots were validly cast. The local electoral board then makes out abstracts and certificates of the votes cast and forwards certified copies to the State Board of Elections. In elections for members of the General Assembly, Governor, Lieutenant Governor and Attorney General, members of the United States Congress and electors of President and Vice President of the United States, and any officer shared by more than one county or city, or any combination thereof, the State Board of Elections then tabulates the returns and declares the nominee.

10. To the extent that a court order requires a change to absentee voting procedures, I will, within 12 hours of being notified of the order, issue guidance to local elections officials explaining the effect of the order on absentee voting during the June 23 primary. Additionally, ELECT will provide guidance and instructions to local elections officials to include with absentee ballots that are mailed to the voter.

11. In addition, ELECT will issue a press release regarding any changes as a result of the court order and will post relevant information on its website and social media accounts.

12. In order for ELECT and the State Board of Elections to comply with their obligation to ensure uniformity, legality, and purity in elections, a determination of the standards and procedures applicable to the June 23 primary election and to absentee voting in that primary is necessary. To the extent that there is a change, such expedient determination will ensure that ELECT and the State Board of Elections have sufficient time to publicize this change to the voters and to local elections officials. If such a determination is not quickly made, there may be challenges raised with respect to the uniformity in conducting the June 23 primary election.

13. If absentee voters are sent absentee ballots as required on May 9 and there is a later court ordered change to absentee ballot procedures, the uniformity of the June 23 primary election may be impaired. Additionally, a ruling issued after the start of absentee voting will sow voter confusion and impede the ability of election officials to ascertain which absentee ballots have been validly cast.

Safety for Voters, Poll Workers, and Others

14. As the Commissioner of the Department of Elections and as the Chief Elections Officer of Virginia, I believe that it is of extreme importance that we protect both the health and voting rights of those absentee voters who would otherwise have to violate social distancing requirements and jeopardize their well-being just to exercise their fundamental right to vote.

15. While certain personal protective equipment (PPE) is being secured for officers of election at polling locations, PPE has not been secured for voters who will be voting in person at the June 23, 2020 primary election. PPE is in short-supply worldwide and priority has been given to first responders and health care workers.

List Maintenance Responsibilities

16. On April 28, 2020, ELECT received a letter dated April 27, 2020 from the Public Interest Legal Foundation. The letter described alleged violations of section 8(a)(3) of the National Voter Registration Act of 1993 (52 U.S.C. 20507(a)(3)) and alleges that Virginians who had moved away or died were still included on Virginia's voter rolls.

17. Voter list maintenance is entirely unrelated to the witness requirement. The requirements relating to maintaining the Virginia voter rolls are provided under Article 2 of Chapter 4 of Title 24.2 of the Virginia Code. The procedures that a qualified voter must take in completing an absentee ballot are governed under Va. Code §§ 24.2-706 and 24.2-707. How a qualified voter casts their absentee ballot has no bearing on whether that voter is qualified to be registered and whether Virginia is required to remove them from the voter rolls.

18. Regardless of the unrelated nature of the claims relating to ELECT's voter list maintenance procedures, ELECT uses rigorous procedures to ensure that its voter list maintenance obligations are followed.

19. Under the 2018 Joint Legislative Audit and Review Commission (JLARC) report, JLARC found that "ELECT uses fairly comprehensive sources and robust procedures to maintain the [voter registration] list."¹

20. ELECT was a founding member of the Electronic Registration Information Center (ERIC), which is a multistate partnership that uses a sophisticated and secure data-matching tool to improve the accuracy and efficiency of state voter registration systems. Through participation

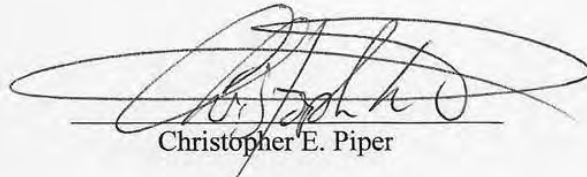
¹ Joint Legislative Audit and Review Commission, *Report to the Governor and General Assembly: Operations and Performance of Virginia's Department of Elections*, <http://jlarc.virginia.gov/pdfs/reports/Rpt508.pdf> (last accessed Apr. 29, 2020).

in ERIC, states can compare official data on eligible voters to keep voter rolls more complete and up-to-date.²

21. ELECT strives to make Virginia a national leader in the practices of list maintenance. ELECT does so by cooperating with many other states to maintain accurate voter lists, consulting with local elections officials, conducting an annual address match of Virginia's voters against records in the United States Postal Service's National Change of Address registry, and regularly conducting voter list maintenance with respect to felon records, records relating to mentally incapacitated adjudications, and death records.

In accordance with 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on: May 1, 2020


Christopher E. Piper

² The Annual List Maintenance Report also details the efforts that ELECT has taken to make Virginia a leader in the practices of voter list maintenance. Virginia Department of Elections, *Annual List Maintenance Report, Sept. 1, 2018-Aug. 31, 2019*, <https://www.elections.virginia.gov/media/formswarehouse/maintenance-reports/2019SBEListMaintenanceReport.pdf> (last accessed Apr. 29, 2020).

**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

**DECLARATION OF M. NORMAN OLIVER, MD, MA,
VIRGINIA HEALTH COMMISSIONER**

Human Services Secretary, Alex M. Azar II, declared a public health emergency. On February 7, I declared COVID-19 a Communicable Disease of Public Health Threat for Virginia. On March 12, Governor Northam declared a State of Emergency in the Commonwealth in response to the spread of COVID-19.

5. The virus that causes COVID-19 is both extremely contagious and potentially fatal. It spreads through close person-to-person contact or by contact with the respiratory droplets produced when an infected person coughs, sneezes or talks. There is also evidence that suggests, depending on the circumstances, the virus can survive on certain surfaces for hours if not days. Because asymptomatic patients may spread the virus, and there is a lag of several days between when a person becomes infected and the onset of symptoms, an infected person may spread the virus before becoming aware of the infection. Moreover, anecdotal reports suggest that some people infected with COVID-19 never become symptomatic, increasing the risk that they will unknowingly spread the virus.¹

6. Although many people with COVID-19 experience mild or moderate symptoms, others, particularly older patients and those with underlying health conditions such as diabetes, heart disease, and chronic lung conditions, experience much more severe outcomes, including death. Such patients often require hospitalization, intensive care, and intrusive ventilation. People who are young and/or physically fit are still susceptible to COVID-19, and even if they may not be as likely to experience symptoms that are severe, negative health outcomes—including death—are still possible. Those who are young and/or physically fit may also spread the virus even if they do not experience symptoms themselves.

¹ See World Health Organization, *Coronavirus Disease 2019 (COVID-19) Situation Report – 73* (Apr. 2, 2020), https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200402-sitrep-73-covid-19.pdf?sfvrsn=5ae25bc7_2

7 Because of the speed with which COVID-19 spreads in a community, and the significant portion of COVID-19 patients who require hospitalization, intensive care, and intrusive ventilation, outbreaks threaten to overwhelm healthcare systems, as demonstrated by the recent experiences of Italy, Spain, Seattle, Louisiana, and New York, among other places

8. As of April 30, 2020, there have been more than 3 million cases of COVID-19 reported worldwide and more than 230,000 deaths. In the United States, there have been more than 1 million reported cases and more than 60,000 deaths ²

9 There is currently no proven treatment or cure for COVID-19.

10 There is currently no vaccine to address COVID-19.

11. Over the last several weeks, Virginia has experienced a growing crisis related to the spread of COVID-19

12. Virginia recorded its first confirmed case of COVID-19 on March 7, 2020. It took 13 days to reach 100 cases and just ten days for that number to increase ten-fold to 1,000 cases. In the week from April 20, 2020 to April 27, 2020, there were 4,545 new cases in Virginia. As of April 30, 2020, there were 15,846 cases of COVID-19 across the Commonwealth. The number of reported cases likely undercounts the actual number of positive cases because of limitations in testing capacity

13. The number of fatalities continues to rise as well. Virginia reported its first death from COVID-19 on March 14, 2020. As of April 30, 2020, there have been 552 deaths in Virginia. Deaths are projected to continue to increase

14. Like other places, Virginia faces a significant strain on its healthcare system as a result of the spread of COVID-19. Without increasing hospital capacity, the Commonwealth will

² Johns Hopkins University of Medicine, *Coronavirus Resource Center* (last visited Apr 30, 2020), <https://coronavirus.jhu.edu/map.html>.

face a shortage of hospital beds, intensive care beds, and ventilators if the number of COVID hospitalizations exceeds 6,000. Such a shortage would mean that the healthcare system would be unable to provide adequate care to COVID-19 patients, as well as those suffering from other illnesses and injuries.

15 Faced with this novel and growing public health crisis, the Commonwealth has taken a number of escalating steps to combat the spread of COVID-19 and prepare its healthcare system for the coming increase of patients. In my capacity as State Health Commissioner, I have advised the Governor on the orders he has issued to protect the public and have also used the authority vested in me by the Code of Virginia to issue orders consistent with the needs of the declared Public Health Emergency.

16. The Governor and I have issued several orders to mitigate the spread of COVID-19 in the Commonwealth:

- On March 13, 2020, the same day he declared a State of Emergency in the Commonwealth, the Governor temporarily closed K-12 schools and limited the number of patrons in restaurants, fitness centers, and theaters to no more than ten per establishment.³
- On March 24, 2020, the Governor issued Executive Order 53, which extended school closures for the remainder of the school year and temporarily prohibited private and public gatherings of more than ten individuals. Executive Order 53 also directed that certain businesses close their doors to the public. Certain essential businesses (such as grocery stores) were permitted to exceed the ten-person limit, but were required to adhere to social distancing recommendations, enhanced sanitizing practices on

³ Office of the Governor, *Governor Northam Orders All Virginia K-12 Schools Closed for Minimum of Two Weeks* (Mar. 13, 2020), <https://www.governor.virginia.gov/newsroom/all-releases/2020/march/headline-854442-en.html>

common surfaces, and other appropriate workplace guidance from state and federal authorities while in operation.⁴

- On March 31, 2020, the Governor issued Executive Order 55, which imposed additional restrictions and extended the duration of the temporary gatherings restriction announced in Executive Order 53. Executive Order 55 directed all Virginians to stay at home except as needed to perform essential tasks.⁵
- On April 15, 2020, the Governor amended Executive Order 53 to extend certain measures through May 7, 2020.⁶

17 These restrictions are consistent with guidance from federal officials, who recommend maintaining person-to-person distances of at least six feet, prohibiting gatherings of more than ten people, limiting discretionary travel, and frequently washing hands and cleaning surfaces.⁷ They are also consistent with restrictions put in place in States and localities across the country.

18 In addition to these orders, the Governor and I have taken steps to prepare the healthcare system to care for COVID-19 patients

⁴ Executive Order 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)

⁵ 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](https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-55-Temporary-Stay-at-Home-Order-Due-to-Novel-Coronavirus-(COVID-19).pdf)

⁶ Amended Executive Order 53 is available at [https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-53-AMENDED---Temporary-Restrictions-Due-To-Novel-Coronavirus-\(COVID-19\).pdf](https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-53-AMENDED---Temporary-Restrictions-Due-To-Novel-Coronavirus-(COVID-19).pdf)

⁷ See Michael D. Shear, Trump Extends Social Distancing Guidelines Through End of April, N.Y. Times (Mar. 29, 2020), <https://www.nytimes.com/2020/03/29/us/politics/trump-coronavirus-guidelines.html> (“President Trump announc[ed] that all Americans must continue to avoid nonessential travel, going to work, eating at bars and restaurants, or gathering in groups of more than 10 for at least another month and perhaps until June”), see also Centers for Disease Control and Prevention, *Coronavirus 2019 (COVID-19) How to Protect Yourself* (last visited Apr. 23, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html>

- On March 20, 2020, the Governor issued Executive Order 52, which allowed hospitals to add bed space without having to comply with certificate-of-public-need and licensing requirements that would otherwise apply to such expansions.⁸
- On March 25, 2020, the Governor and I issued Order of Public Health Emergency Two, which temporarily banned elective surgery in the Commonwealth (subject to certain exceptions) to save personal protective equipment and hospital bed space in preparation for the uptick in resource use necessitated by the COVID-19 pandemic.⁹
- We also have begun preparations to build temporary hospitals that can absorb overflow should the number of COVID-19 patients exceed existing hospital capacity.

19. These actions are essential to mitigating the spread of COVID-19 and easing the strain on our healthcare system. Because COVID-19 spreads from person to person through close contact, maintaining distance between people and avoiding large crowds is critical. If people retain a distance of at least six feet, the virus is unable to spread from an infected person to an uninfected person. That reduces the overall number of positive cases within a geographic area, which in turn reduces the number of hospitalizations that become necessary and the number of intensive-care beds and ventilators required to treat patients.

20. In the absence of a vaccine, cure, or treatment for COVID-19, reducing person-to-person transmission is the most effective way of mitigating the outbreak and ensuring that the healthcare system is not overwhelmed. This is particularly important in rural areas of the Commonwealth, many of which do not have as many healthcare resources as areas that are more heavily populated.

⁸ Executive Order 52 is available at [https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-52-Increases-in-Hospital-Bed-Capacity-in-Response-to-Novel-Coronavirus-\(COVID-19\).pdf](https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-52-Increases-in-Hospital-Bed-Capacity-in-Response-to-Novel-Coronavirus-(COVID-19).pdf)

⁹ Order of Public Health Emergency Two is available at <https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/Order-of-Public-Health-Emergency-Two---Order-of-The-Governor-and-State-Health-Commissioner.pdf>.

21. Predicting the spread and mortality rate of a novel virus like COVID-19 is extremely difficult. The accuracy of any prediction model depends on the assumptions on which it relies—for example, the percentage of people who adhere to unprecedented social distancing guidelines and restrictions on gatherings and unnecessary travel. If a model assumes lower compliance with such restrictions than actually occurs, its predicted mortality rate may exceed the actual mortality rate. By contrast, if a model assumes greater compliance, it may underestimate mortality rates and likewise underestimate the extent to which an outbreak will tax the capacity of a healthcare system. In addition, because it was impossible to know how many people would be infected but asymptomatic in the absence of widespread testing, some models may have underestimated the number of infections, thereby overestimating the mortality rate.¹⁰ As the pandemic evolves and more information is learned, each model's estimates adjust.

22 The Commonwealth does not rely on a single model to set policy. Accordingly, the fact that one model may have adjusted its mortality predictions downward does not mean that public health officials have overestimated the dangers of COVID-19. While some models have revised their mortality estimates downward, others continue to predict new COVID-19 cases increasing over the next several weeks or months, resulting in a significant strain on the Commonwealth's healthcare system. For example, a model created by researchers at the University of Virginia that focuses on data specific to the Commonwealth suggests that even if social-distancing efforts continue through June 10, 2020, when Executive Order 55 is set to expire, all regions in Virginia would still reach a point at which the number of cases would

¹⁰ See Fareed Zakaria, *Why the Coronavirus Models Aren't Totally Accurate*, Wash. Post (Apr. 9, 2020) (describing how the same number of deaths among a larger number of infections results in a lower mortality rate).

exceed hospital surge capacity.¹¹ Even models that have been revised downward recognize the possibility that over 1,000 Virginians could die by August 2020.¹² Moreover, the same models that have recently revised their mortality estimates downward previously revised their estimates upwards, demonstrating that adjustments made over time have not uniformly suggested that initial predictions were too high.¹³

23. Regardless of adjustments, all models agree that the institution of social distancing measures greatly decreases the incidence and mortality of COVID-19. In fact, the University of Virginia model estimates that the reduction in activity since the Governor declared a State of Emergency has reduced transmission rates by roughly 50%—from 2.2 transmissions per infection before March 15, 2020, to 1.1 after March 15, 2020.¹⁴

24. To prepare for all possible scenarios, including the worst-case scenario, it is critical that officials consider a variety of models estimating the spread and mortality rate of COVID-19. This information has guided the Commonwealth's response to the COVID-19 pandemic, including the critical steps the Governor and I have taken to slow person-to-person transmission. Without such efforts, the uncontrolled spread of COVID-19 would lead to an explosion of cases, many more severe outcomes and fatalities, and an untenable burden on our healthcare system. For that reason, consistent and widespread adherence to the restrictions imposed by the Governor and myself is critical to protecting the public, especially vulnerable populations with weakened immune systems or underlying health conditions, from the novel and profound threat posed by COVID-19.

¹¹ See Univ. of Va., Biocomplexity Inst., *Estimation of COVID-19 Impact in Virginia* (April 13, 2020), <https://www.governor.virginia.gov/media/governorvirginiagov/governor-of-virginia/pdf/Combined-PPT-April-13.pdf>

¹² See IHME, *COVID-19 Projections*, Virginia (last visited Apr. 28, 2020), <http://covid19.healthdata.org/projections>

¹³ See IHME, *COVID-19 What's New For April 1, 2020* (last visited Apr. 23, 2020), http://www.healthdata.org/sites/default/files/files/Projects/COVID/Estimation_update_040120.pdf

¹⁴ *Supra* note 10

In accordance with 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing
is true and correct.

Executed on:

5/1/20


Dr. M. Norman Oliver,
Virginia Health Commissioner