

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

LEAGUE OF WOMEN VOTERS OF VIRGINIA; KATHERINE D. CROWLEY; SEIJRA TOOGOOD; GAYLE HARDY; CAROL D. PETERSEN; and TRACY SAFRAN,

Plaintiffs,

v.

VIRGINIA STATE BOARD OF ELECTIONS; ROBERT H. BRINK, JOHN O'BANNON, and JAMILAH D. LECRUISE, in their official capacities as Chairman, Vice-Chair, and Secretary of the Virginia State Board of Elections, respectively; and CHRISTOPHER E. PIPER, in his official capacity as Commissioner of the Virginia Department of Elections,

Defendants,

REPUBLICAN PARTY OF VIRGINIA,

Intervenor-Defendant.

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

JOINT MOTION FOR ENTRY OF PARTIAL CONSENT JUDGMENT AND DECREE

Plaintiffs and Defendants (collectively, the “Consent Parties”) seek approval of a partial consent judgment and decree that would vindicate the public interests of ensuring access to the ballot, protecting election integrity, and promoting public health during the COVID-19 pandemic. Specifically, the agreement would stop enforcement for the November 3, 2020 General Election of the requirement that Virginia absentee voters have another individual observe them removing their absentee ballot from the envelope and then have that individual sign as a witness (the “witness

requirement”) for voters who believe they may not safely have a witness present while completing their ballot. In support of their motion, the Consent Parties rely upon the attached proposed Partial Consent Judgment and Decree and accompanying Brief in Support of Joint Motion for Entry of a Partial Consent Judgment and Decree.

This agreement represents a fair, adequate, and reasonable arrangement which will benefit all parties while serving the public interest. The Consent Parties therefore request that the Court enter this agreement, which will provide certainty well in advance of the November 3, 2020 General Election while allowing all qualified Virginians to vote and protect their health.

Dated: August 5, 2020

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CERTIFICATE OF SERVICE

I certify that on August 5, 2020, I served a copy of the foregoing Joint Motion for Entry of Partial Consent Judgment and Decree via filing with the Court's CMECF system, which sent copies of this document to Counsel of Record.

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LECRUISE, in their official capacities as
Chairman, Vice-Chair, and Secretary of
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of Elections,**

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Intervenor-Defendant.

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

PARTIAL CONSENT JUDGMENT AND DECREE

1. Whereas Virginia law requires that every voter filling out an absentee ballot must open, mark, and refold their ballot in the presence of a witness, and then have the witness sign their ballot envelope (the “witness requirement”), as stated in Va. Code § 24.2-706 and § 24.2-707 and as interpreted by 1 Va. Admin. Code 20-70-20(B).

2. Whereas on March 12, 2020, Virginia Governor Ralph S. Northam issued Executive Order 51 (EO 51) in which he declared a state of emergency in Virginia in response to

the spread in Virginia of a respiratory illness (COVID-19) caused by a novel coronavirus—an order that remains in effect.

3. Whereas the virus that causes COVID-19 may be transmitted from person-to-person through close contact via inhalation of respiratory droplets when an infected person breathes, talks, coughs or sneezes; through inhalation of such droplets that become aerosolized and remain suspended in the air; and through contact with surfaces or objects on which the virus is present, followed by touching one’s own mouth, nose, or even eyes. The CDC has also confirmed that people infected with the virus may transmit it to others without showing symptoms themselves.

4. Whereas COVID-19 can cause severe consequences, including long-term illness and death, and the virus threatens to infect and harm any individual no matter their age or medical background. COVID-19 is particularly dangerous and sometimes fatal for older individuals, individuals with obesity, individuals with compromised immune systems, individuals with preexisting heart and respiratory conditions including hypertension and asthma, and individuals with various other conditions.

5. Whereas the Virginia Department of Health (“VDH”) continues to urge Virginians to do their “part to help stop the spread of COVID-19 by staying at home as much as possible,” and federal guidelines state: “[e]veryone [s]hould . . . avoid close contact” by “stay[ing] home as much as possible” and “put[ting] 6 feet of distance between yourself and people who don’t live in your household.” Centers for Disease Control and Prevention, *Coronavirus Disease 2019 (COVID-19): How to Protect Yourself & Others*, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html> (last visited Aug. 4, 2020).

6. Whereas the witness requirement necessitates that any individual who lives alone

and wishes to vote an absentee ballot will need to either invite another person into their home or travel outside their home to meet a witness. Then, the individual must have the witness watch while they open their ballot envelope, fill out their ballot, close and sign the envelope, and finally exchange the envelope back and forth with the witness to obtain their signature. This situation requires that individuals who live alone and are isolating or practicing social distancing per public health recommendations come into close contact with another individual, and increase the likelihood that those involved will contract COVID-19 and transmit it to others. For this reason, the witness requirement creates a health risk to the general public.

7. Whereas in-person voting also creates a risk to individual voters and to public health, as voting in person involves waiting in line with other voters, interacting with poll workers, and touching voting equipment—some of this in an indoor environment—which also creates significant risk of virus transmission.

8. Whereas as of July 29, 2020, there have been well over 4 million cases and over 150,000 deaths from COVID-19 in the United States, and over 87,000 cases and over 2,100 deaths from COVID-19 in Virginia alone. After declining in late May and into June, the number of daily new COVID-19 cases has once again been steadily rising in Virginia, as in most of the country.

9. Whereas an effective, widely available vaccine for COVID-19 will almost certainly not be available by November 3, 2020, and the significant weight of scientific evidence confirms that COVID-19 will likely continue to transmit widely in the community absent a vaccine or herd immunity, and that herd immunity will not occur anytime in the near future.

10. Whereas on April 17, 2020, Plaintiffs League of Women Voters of Virginia, Katherine D. Crowley, Erikka Goff, and Seijra Toogood filed a complaint against the above-named Defendants challenging enforcement during the ongoing public health crisis caused by the spread

of a novel coronavirus, SARS-CoV-2, of Virginia's witness requirement. Among other relief requested, the Complaint sought to enjoin enforcement of the witness requirement for as long as public health officials continue to recommend social distancing practices due to the risk of community transmission of COVID-19. ECF No. 1 at 33.

11. Whereas on April 21, 2020, the same Plaintiffs filed a motion for preliminary injunction requesting this Court prohibit the above-named Defendants from enforcing the witness requirement for all Virginia voters for the primary election to be held on June 23, 2020 ("June Primary"), and for 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. Plaintiffs' motion further requested that Defendants be ordered to issue guidance instructing election officials to count otherwise validly cast absentee ballots missing a witness signature and to conduct a public information campaign in conjunction with city and county election officials about the elimination of the requirement.

12. Whereas those same Plaintiffs and Defendants reached a proposed partial consent decree and judgment (the "first consent decree") that they submitted to the Court for approval on April 27, 2020, governing the operation of the witness requirement for the June Primary. *See* ECF Nos. 35, 35-1, 36. After full briefing on this motion and a hearing, this Court approved the first consent decree which, among other things: (a) prohibited enforcement of the witness requirement for the June Primary for Virginia voters who did not believe they could safely comply; (b) required Defendants to issue guidance instructing all relevant city and county election officials to count all absentee ballots in the June primary that are otherwise validly cast but missing a witness signature; (c) required Defendants to prepare updated voting instructions to accompany the absentee ballots informing voters that any absentee ballot cast in the June Primary without a witness signature will

not be rejected on that basis and specifically inform voters in bold print that they may disregard the witness signature line on the absentee ballot envelope if they believe they may not safely have a witness present while completing their ballot; and (d) requiring Plaintiffs to withdraw their preliminary injunction motion and disclaiming Plaintiffs' right to seek attorneys' fees up to that point in the litigation. ECF No. 68.

13. Whereas in granting the first consent decree, the Court found that: "Plaintiffs' case alleges a probable violation of federal law—that is, applying the witness requirement during this pandemic would impose a serious burden on the right to vote, particularly among the elderly, immunocompromised, and other at-risk populations. Weighed against those risks, the present record reflects the likelihood that the burden would not be justified by the witness requirement's purpose as an anti-fraud measure. Thus, the Court finds that the partial settlement in the proposed consent decree is fair, adequate, and reasonable given the strength of the Plaintiffs' case, and that entering it is not against the public interest, illegal, or the product of collusion." ECF No. 69 at 1.

14. Whereas the June Primary proceeded smoothly under the terms of the first consent decree without an increase in fraud, to the knowledge of the Defendants.

15. Whereas on June 19, 2020, the Court granted Plaintiffs' motion to dismiss Erikka Goff as a Plaintiff, ECF No. 80, and on July 17, 2020, the Court granted Plaintiffs' motion to file a second amended complaint, which added new Plaintiffs Gayle Hardy, Carol D. Petersen, and Tracy Safran, *see* ECF Nos. 83, 84.

16. Whereas discovery produced in this case by Defendants shows that during the May 2020 local elections in Virginia, for which the witness requirement was still in full effect and which occurred after the COVID-19 pandemic began, both the rate and number of absentee ballots rejected for lack of a witness signature climbed substantially.

17. Whereas on July 24, 2020, Plaintiffs League of Women Voters of Virginia, Katherine D. Crowley, Seijra Toogood, Gayle Hardy, Carol D. Petersen, and Tracy Safran filed a Motion for Preliminary Injunction requesting this Court prohibit Defendants from enforcing the witness requirement for all Virginia voters for the November election and for 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. Plaintiffs' motion further requested that Defendants be ordered to issue guidance instructing election officials to count otherwise validly cast absentee ballots missing a witness signature and conduct a public information campaign in conjunction with city and county election officials about the elimination of the requirement.

18. Whereas pursuant to Va. Code § 24.2-612, absentee voting must be available 45 days prior to the November 3, 2020 General Election ("the November Election"), or Saturday, September 19, 2020. For localities whose general registrar's offices are closed on Saturday, absentee ballots must be available on Friday, September 18, 2020.

19. Whereas in light of the data that supports the Plaintiffs' concerns for their safety if they are required to interact with others in order to cast their ballot in the November Election, Plaintiffs and Defendants (collectively, the "Consent Parties") agree that an expeditious resolution of this matter for the November general election, in the manner encompassed by the terms of this Consent Decree, is in the best interests of the health, safety, and constitutional rights of the citizens of the Commonwealth of Virginia, and therefore in the public interest.

20. Whereas the Consent Parties further agree that no eligible voter should have to choose between casting a ballot that will count and placing their own health at risk.

21. Whereas Defendants agree not to enforce the witness requirement for the November Election for absentee voters who believe they may not safely have a witness present while completing their ballot.

22. Whereas Plaintiffs agree to withdraw their July 24, 2020 Motion for Preliminary Injunction upon entry of this Partial Consent Judgment and Decree.

23. Whereas the Consent Parties agree that entry of this Consent Decree does not affect the viability of Plaintiffs' claims under the First and Fourteenth Amendments to the Constitution, or Section 2 of the Voting Rights Act, with respect to enforcement of the witness requirement in any subsequent elections after the November Election.

24. Whereas Plaintiffs agree to a waiver of any entitlement to damages, fees, including attorneys' fees, expenses, and costs, that may have accrued as of the date of the entry of this order, with respect to the claims raised by Plaintiffs in this action, provided, however, that Plaintiffs reserve their rights to seek costs and attorneys' fees on their claims in the event of material non-compliance by Defendants with the terms and conditions of this Consent Decree.

25. Whereas the Court finds that it has subject matter jurisdiction over the Consent Parties and that the Partial Consent Judgment and Decree is fair, adequate, and reasonable, and not illegal, a product of collusion, or against the public interest because such agreement preserves the constitutional right to vote of Plaintiffs and other Virginia voters while promoting public health during a pandemic and does so without harming the integrity of Virginia's elections. The agreement also gives appropriate weight to Defendants' expertise and public interest responsibility in the area of election administration.

26. Whereas Plaintiffs made a sufficiently strong showing on the merits of the claim, as shown in their complaint and motion for preliminary injunction, to further support the fairness, adequacy, and reasonableness of this Partial Consent Judgment and Decree.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED FOR THE REASONS STATED ABOVE IN PARAGRAPHS 1-26 THAT:

1. For the November Election, Defendants shall not enforce the requirement, as stated in Va. Code § 24.2-706 and § 24.2-707, that absentee voters have another individual present to witness the voter open, mark, and refold their ballot, and then have that that individual sign the absentee ballot envelope next to the voter's statement and signature, for voters who believe that they may not safely comply.

2. Defendants shall issue guidance instructing all relevant city and county election officials to count all absentee ballots in the November Election that are otherwise validly cast but are missing a witness signature.

3. Defendants shall issue updated instructions to include with all absentee ballots as provided in Va. Code. § 24.2-706—or issue guidance instructing all relevant city and county election officials to modify or amend the printed instructions accompanying each absentee ballot—to inform voters that any absentee ballot cast in the November Election without a witness signature will not be rejected on that basis and specifically inform voters in bold print that they may disregard the witness signature line on the absentee ballot envelope if they believe they may not safely have a witness present while completing their ballot.

4. Defendant Commissioner of Elections shall take additional reasonable steps to inform the public that the witness requirement will not be enforced for the November Election for those absentee voters who believe they may not safely have a witness present while completing

their ballot, and issue guidance instructing all relevant city and county election officials to do the same.

5. Plaintiffs will withdraw their motion for a preliminary injunction.

6. In accordance with the terms of this Consent Decree, the Consent Parties shall each bear their own fees, expenses, and costs incurred as of the date of this Order, with respect to all claims raised by Plaintiffs against the Defendants.

United States District Judge

Dated: _____, 2020

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**BRIEF IN SUPPORT OF JOINT MOTION
FOR ENTRY OF PARTIAL CONSENT JUDGMENT AND DECREE**

Plaintiffs and Defendants (collectively, the “Parties”) seek approval of a partial consent judgment and decree that would vindicate the public interests of ensuring access to the ballot, election integrity, and promoting public health during the COVID-19 pandemic, just as did the consent decree approved by this Court for the June 23 primaries. *See* ECF Nos. 68, 69. Indeed, the substantive terms are nearly identical to that prior agreement that the Court approved as “fair, adequate, and reasonable given the strength of the Plaintiffs’ case, and . . . not against the public interest, illegal, or the product of collusion.” ECF No. 69 at 1. It did so because enforcing “the witness requirement during this pandemic would impose a serious burden on the right to vote, particularly among the elderly, immunocompromised, and other at-risk populations,” which, “[w]eighed against those risks, . . . would not be justified by the witness requirement’s purpose as an anti-fraud measure.” *Id.* The only relevant difference are the facts on the ground. Those facts make this consent decree even more vital for the public interest than the previous one.

When this Court approved the first partial consent decree on May 5, a little over 20,000 Virginians had contracted COVID-19 and over 700 had died from it. ECF No. 88-4 at 4. As of August 4, those numbers have climbed to over 94,000 cases and over 2,200 deaths.¹ Notably, since that time, the June 23 primaries “proceeded smoothly under the terms of the first consent decree without an increase in fraud, to [election officials’] knowledge.” ECF No. 95-1 ¶ 14.

The vast weight of scientific evidence firmly shows that COVID-19 will still be transmitting in the community on November 3, 2020 at significant rates. Recognizing this, federal court granted a preliminary injunction against South Carolina’s witness requirement for its June primary shortly after this Court entered the first consent decree, finding a “strong likelihood that

¹ *See* Va. Dep’t of Health, *COVID-19 Cases in Virginia*, <https://www.vdh.virginia.gov/coronavirus/covid-19-daily-dashboard/> (last updated Aug. 4, 2020).

the burdens placed upon them by the Witness Requirement far outweigh the imprecise, and . . . ineffective, state interests of combating voter fraud and protecting voting integrity.” *Thomas v. Andino*, 3:20-CV-01552-JMC, --- F. Supp. 3d ----, 2020 WL 2617329, at *21 (D.S.C. May 25, 2020).

Ultimately, the proposed agreement to halt enforcement of the witness requirement for voters who believe they may not safely have a witness present while completing their ballot for the November 3 general election represents a limited, fair, adequate, and reasonable arrangement. It reflects sound public health judgment and the need for safe participation in exercising the fundamental right to vote. The Parties therefore request that the Court enter this agreement, which will provide certainty well in advance of the November 3 election while allowing all qualified Virginians to vote and protect their health.

FACTUAL BACKGROUND

On March 12, 2020, Virginia Governor Ralph S. Northam declared a state of emergency in Virginia in response to the spread of a respiratory disease (COVID-19) caused by a novel coronavirus known as SARS-CoV-2—an order that remains in effect.² In conjunction with the loosening of some restrictions, the Virginia Department of Health (“VDH”) continues to urge Virginians to do their “part to help stop the spread of COVID-19 by staying at home as much as possible,”³ and urges all Virginians to “practice social distancing” and encourages those aged 65

² Va. Exec. Order No. 2020-51 (Mar. 12, 2020), [https://www.governor.virginia.gov/media/governorvirginiagov/governor-of-virginia/pdf/co/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/co/EO-51-Declaration-of-a-State-of-Emergency-Due-to-Novel-Coronavirus-(COVID-19).pdf).

³ Va. Dep’t of Health, *Prevention Tips*, <https://www.vdh.virginia.gov/coronavirus/prevention-tips/> (last visited Aug. 4, 2020).

and older to self-quarantine.⁴ Similarly, federal guidelines state: “[e]veryone [s]hould . . . avoid close contact” by “stay[ing] home as much as possible” and “put[ting] 6 feet of distance between yourself and people who don’t live in your household.”⁵

On April 17, during the ongoing public health crisis caused by the novel coronavirus, Plaintiffs filed this action challenging the enforcement of the absentee ballot witness requirement (as stated in Va. Code § 24.2-706 and § 24.2-707 and as interpreted by 1 Va. Admin. Code 20-70-20(B)), under the First and Fourteenth Amendments of the U.S. Constitution and Section 2 of the Voting Rights Act. Among other relief requested, the Complaint sought to enjoin enforcement of the witness requirement for as long as public health officials continue to recommend social distancing practices due to the risk of community transmission of COVID-19. ECF No. 1 at 33.

On April 21, 2020, Plaintiffs filed a motion for preliminary injunction requesting this Court to prohibit the above-named Defendants from enforcing the witness requirement for all Virginia voters for the primary election to be held on June 23, 2020 (“June Primary”), and for 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. *See* ECF No. 17. Plaintiffs’ motion further requested that Defendants be ordered to issue guidance instructing election officials to count otherwise validly cast absentee ballots missing a witness signature and conduct a public information campaign in conjunction with city and county election officials about the elimination of the requirement.

⁴ Va. Dep’t of Health, *Disease Prevention*, <https://www.vdh.virginia.gov/coronavirus/frequently-asked-questions/disease-prevention/> (last visited Aug 4, 2020).

⁵ Ctrs. for Disease Control & Prevention, *Coronavirus Disease 2019 (COVID-19): How to Protect Yourself & Others*, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html> (last visited Aug. 4, 2020).

On April 27, 2020, Plaintiffs and Defendants filed a motion for entry of a partial consent decree and judgment in which the parties agreed, pending court approval, to: (a) prohibit enforcement of the witness requirement for the June Primary for Virginia voters who did not believe they could safely comply; (b) require Defendants to issue guidance instructing all relevant city and county election officials to count all absentee ballots in the June Primary that are otherwise validly cast but missing a witness signature; (c) require Defendants to prepare updated voting instructions to accompany the absentee ballots informing voters that any absentee ballot cast in the June Primary without a witness signature will not be rejected on that basis; and (d) require Plaintiffs to withdraw their preliminary injunction motion and disclaim Plaintiffs' right to seek attorneys' fees up to that point in the litigation. ECF No. 35-1. The Court granted permissive intervention to the Republican Party of Virginia ("RPV"), ECF No. 60, which opposed entry of the consent decree, ECF No. 58.

After briefing and oral argument, the Court granted the motion and entered the partial consent decree and judgment. ECF Nos. 68, 69. In finding that the consent decree was fair, adequate, and in the public interest, the Court held that based on the record before it, there existed "a probable violation of federal law" which "further speaks to the strength of Plaintiffs' case." ECF No. 69 at 13. The Court explained that in the context of the pandemic, the witness requirement would "force a large class of Virginians to face the choice between adhering to guidance that is meant to protect not only their own health, but the health of those around them, and undertaking their fundamental right—and, indeed, their civic duty—to vote in an election," but the "Constitution does not permit a state to force such a choice on its electorate." *Id.* at 16. It further found that the witness requirement created a "substantial burden on the right to vote [that] has not been justified by countervailing, demonstrated interests in the witness requirement," particularly

because the “record does not demonstrate that it is especially effective in preventing voter fraud.” *Id.* at 17. The Court also found the agreement served the public interest “during the worst pandemic this state, country, and planet has seen in over a century,” *id.* at 21, and was not collusive, *id.* at 22–26. Finally, although the Court allowed the RPV to intervene and present its views, it was “not convinced” that the consent decree imposed any duties or obligations on RPV that gave it a right to block the agreement. *Id.* at 26–28.

Following the entry of the consent decree, Plaintiffs sought discovery from the Defendants, including concerning data from the elections held this year compared to 2016 and 2018. For the towns and cities across Virginia that held local elections at the end of May this year, the witness requirement was still in place, in contrast to the June 23 Primary which was subject to the consent decree. In those May elections, the number of absentee ballots rejected for lack of a witness requirement rose, from 9 in 2016 and 25 in 2018 to 653 this year. *See* ECF No. 88-2 at 17–19. If Virginians vote in November at similar levels to 2016, vote absentee at the same rate in November as they did in May, and absentee ballots are rejected at the same rate as in May, there is a risk that more than 16,000 Virginia voters could have their absentee ballots rejected for lack of a witness signature. *Id.* at 19–20. This number includes only those individuals who attempt to vote absentee despite not having a witness, and not individuals discouraged from or fearful to vote for this reason.

On July 24, 2020, Plaintiffs filed a Motion for Preliminary Injunction requesting this Court prohibit Defendants from enforcing the witness requirement for all Virginia voters for the November election and for 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. ECF Nos. 87, 88. Plaintiffs’ motion further requested that Defendants be ordered to issue guidance instructing election officials to count otherwise validly cast absentee

ballots missing a witness signature and conduct a public information campaign in conjunction with city and county election officials about the elimination of the requirement. *Id.*

With their brief in support, Plaintiffs submitted expert testimony from a highly qualified epidemiologist explaining the risks of enforcing the witness requirement for individuals who live by themselves and the risk of COVID-19 continuing through November, and from a University of Virginia public policy professor who offered evidence as to the significant negative effect of the witness requirements on many categories of Virginia voters during the pandemic. ECF Nos. 88-1, 88-2. They also submitted declarations from the Chief Election Officer of one of Virginia’s largest cities and a former Chief Election Officer of another Virginia city as to the impact and effectiveness of the witness requirement. ECF Nos. 88-5, 88-6. Plaintiffs also included declarations from all five individual plaintiffs, the President of the League of Women Voters of Virginia, six League members, and another Virginia voter—all testifying as to the severe burdens the witness requirement has created during the pandemic. ECF Nos. 88-3, 88-7, 88-8, 88-9, 88-10, 88-11, 88-12, 88-13, 88-14, 88-15, 88-16, 88-17, 88-18.

ARGUMENT

A “consent decree has elements of both judgment and contract,” *Smyth ex rel. Smyth v. Rivero*, 282 F.3d 268, 280 (4th Cir. 2002). When “considering whether to enter a proposed consent decree, a district court should be guided by the general principle that settlements are encouraged.” *United States v. North Carolina*, 180 F.3d 574, 581 (4th Cir. 1999); *see also Stovall v. City of Cocoa, Fla.*, 117 F.3d 1238, 1240 (11th Cir. 1997) (“District courts should approve consent decrees so long as they are not unconstitutional, unlawful, unreasonable, or contrary to public policy.”). This policy “to encourage settlements ‘has particular force where, as here, a government actor committed to the protection of the public interest has pulled the laboring oar in constructing

the proposed settlement.” *United States v. E.I. du Pont de Nemours and Co.*, No. 5:16-CV-00082, 2017 WL 3220449, at *11 (W.D. Va. July 28, 2017) (quoting *United States v. Cannons Eng’g Corp.*, 899 F.2d 79, 84 (1st Cir. 1990)).

Nonetheless, the Court “must satisfy itself that the agreement ‘is fair, adequate, and reasonable’ and ‘is not illegal, a product of collusion, or against the public interest.’” *North Carolina*, 180 F.3d at 581 (quoting *United States v. Colorado*, 937 F.2d 505, 509 (10th Cir. 1991)). It need not, however, “inquire into the precise legal rights of the parties nor reach and resolve the merits of the claims or controversy” because “it is precisely the desire to avoid a protracted examination of the parties’ legal rights that underlies entry of consent decrees.” *Bragg v. Robertson*, 83 F. Supp. 2d 713, 717 (S.D. W. Va. 2000), *aff’d sub nom. Bragg v. W. Va. Coal Ass’n*, 248 F.3d 275 (4th Cir. 2001).

The Parties meet all of the necessary requirements and have reached an agreement under circumstances that serves the public interest.

I. The Court has Jurisdiction over the Partial Consent Judgment and Decree.

A “consent decree must spring from and serve to resolve a dispute within the court’s subject-matter jurisdiction.” *Loc. No. 93, Int’l Ass’n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501, 525 (1986). In terms of the subject-matter of this action, Plaintiffs’ claims squarely raise the sort of constitutional issue this Court is equipped to decide: whether state election practices burden the fundamental right to vote. *See, e.g., Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (citing *Anderson v. Celebrezze*, 460 U.S. 780, 788–89 (1983)).

In terms of Article III standing, Plaintiffs have provided substantial evidence that they will be injured by the operation of the witness requirement during the November 3 election if the witness requirement remains in place. Therefore, they have established “a substantial risk” of harm, *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014), that can be remedied with

respect to the November election by waiving the witness requirement for voters who believe they may not safely have a witness present while completing their ballot.

Moreover, the substance of the agreement comes squarely within the scope of the case. Plaintiffs' preliminary injunction sought relief from the witness requirement for the November election and any future elections affected by the spread of COVID-19. The agreement provides such relief for the November election for voters who believe they may not safely have a witness present while completing their ballot. The Court has subject-matter jurisdiction over this proposed consent decree.

II. The Proposed Consent Decree is Fair, Adequate, and Reasonable.

The district court has discretion in determining whether a proposed consent decree is fair, adequate, and reasonable, but in doing so, it "must assess the strength of the plaintiff's case." *North Carolina*, 180 F.3d at 581. This review "does not require the court to conduct a trial or a rehearsal of the trial," but "to ensure that it is able to reach an informed, just and reasoned decision." *Id.* (internal citations and quotations omitted). This review should take into account "the extent of discovery that has taken place, the stage of the proceedings, the want of collusion in the settlement and the experience of plaintiffs' counsel who negotiated the settlement." *Id.* (internal citations and quotations omitted). Overall, courts must judge the fairness of the compromise "by weighing the plaintiff's likelihood of success on the merits against the amount and form of the relief offered in the settlement" but they "do not decide the merits of the case or resolve unsettled legal questions." *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981) (internal citation omitted).

As to the stage of the case, it has progressed beyond where it was when the Court entered the first partial consent decree, and has allowed the parties an opportunity to begin conducting discovery. That discovery has yielded some useful information, including comparative numbers

of ballots rejected for a lack of witness signature in local elections in 2016, 2018, and 2020—evidence that led Plaintiffs’ expert Dr. Holbein to opine that the witness requirement would result in over 16,000 Virginians having their absentee ballot rejected in November, putting aside the many other Virginians who would not attempt to vote at all due to the requirement and risk to their health. ECF No. 88-2 at 17–20. Nonetheless, the Court has already noted that because much of the necessary evidence comes from government reports and orders, public health policies, and expert declarations, “there is little indication this is a case for which the length or amount of discovery . . . will be particularly relevant to the strength of Plaintiffs’ case.” ECF No. 69 at 11.

And as before, with the November election approaching, with absentee voting beginning on September 19, the issues raised still demand time-sensitive resolution. Similarly, many of the concerns raised by Plaintiffs—including the severity of COVID-19 in Virginia and the anticipated risks associated with the witness requirement as applied to certain voters in Virginia for the November election—are matters of public record or offered through testimony of Plaintiffs’ epidemiologist and political participation experts. *See* ECF Nos. 88-1, 88-2.

Nonetheless, and as with the prior consent decree, this consent decree still only seeks partial relief and resolution of this action as it relates to Plaintiffs’ preliminary injunction, making some of these factors less weighty than they would be in the case of a final consent decree akin to a permanent injunction. *See* ECF No. 69 at 12 (noting that “the limited nature of the settlement agreement’s relief weighs in favor” of its fairness, adequacy, and reasonableness). Moreover, the Parties have each compromised in their positions in order to reach this agreement in recognition of the strength of Plaintiffs’ constitutional claim and the interest of the Commonwealth in (i) ensuring that all eligible Virginians need not jeopardize their health or public health to vote,

(ii) protecting election integrity, and (iii) that resolution well before the general election will best equip election officials to carry out their duties.

As to the strength of Plaintiffs' case, on an even more limited record, the Court noted "the clear strength of the Plaintiffs' case," ECF No. 69 at 19, and the "probable violation of federal law" put forward, *id.* at 13. In their current preliminary injunction briefing (ECF No. 69), Plaintiffs have put even more evidence that enforcing the witness requirement during this pandemic may lead to disenfranchisement of a significant number of qualified Virginians, risks to public health, or both. That evidence includes:

- A detailed report from a highly qualified epidemiologist explaining the risks of enforcing the witness requirement for individuals who live alone, the risks of voting in person during the pandemic, and the inevitability of COVID-19's continuing transmission through this year, *see* ECF No. 88-1;
- Another thoroughly researched report from a University of Virginia professor explaining how the witness requirement will discourage voting from groups that already face barriers to voting, as well as evidence quantifying the potential for rejected ballots due to the witness requirement in November, *see* ECF No. 88-2;
- Declarations from the League about its members and from the individual Plaintiffs who provided credible testimony about how the witness requirement would burden their ability to vote in November and force them to put their health at risk, *see* ECF Nos. 88-3, 88-7, 88-8, 88-9, 88-10, 88-11, 88-12, 88-13, 88-14, 88-15, 88-16, 88-17, 88-18;
- Declarations from current and former Election Directors of Virginia cities as to the impact of the witness requirement during the pandemic, confusion created by the requirement, disenfranchisement of voters who cannot comply, and strength of existing mechanisms to prevent voter fraud in the absentee balloting process, *see* ECF Nos. 88-5, 88-6; and
- Statistical evidence from the Census Bureau and Virginia voter registration statistics that details the scale of the witness requirement's potential impact on Virginians who live alone, and particularly on older Virginians, Virginians with disabilities, Black Virginians, and Virginians with poverty-level incomes, *see* ECF No. 88-2 at 13–15.

Given the likely impact of the witness requirement on many Virginia voters during the November election, Plaintiffs had a real chance of success on their preliminary injunction motion regardless of how the Court weighed the efficacy of the witness requirement in promoting election integrity.

But the Court has already found that lifting or loosening the witness requirement was unlikely to harm election integrity, *see* ECF No. 69 at 18–19, and, indeed, the State Defendants are unaware of any issues of this kind in the June Primary when hundreds of thousands of Virginians voted.

Additionally, the fairness and reasonableness of the proposed decree is reflected in the concessions each Party made that nonetheless resulted in an agreement that will benefit all Parties and all Virginians. In their preliminary injunction, Plaintiffs sought an injunction against the witness requirement as to all Virginians not only for the November election but for all future elections affected by community transmission of COVID-19. ECF No. 87 at 2. Plaintiffs will continue to seek such relief as this litigation moves forward. They also requested attorneys’ fees in their operative complaint and would have likely sought those if they prevailed—an amount that the Court correctly noted would not be “an insignificant sum.” ECF No. 69 at 12. But the proposed consent decree provides Plaintiffs relief only for the November election and is targeted to the subset of Virginia voters who believe they may not safely have a witness present while completing their ballot and waives the right to any fees and costs. Nonetheless, it confers on Plaintiffs the right to vote in November that they would have otherwise been threatened or heavily burdened, and does so for many other Virginians, including some members of the League.

On Defendants’ side, though they have agreed not to enforce the witness requirement for the November election for voters who believe they cannot have a witness present while completing their ballot, they avoid the possibility of a broader preliminary injunction that would apply to the entirety of the witness requirement for a longer time period, as well as the risk of owing significant attorneys’ fees. They also gain the valuable benefit of having certainty as to the absentee ballot requirements well in advance of the election, and with sufficient time to incorporate appropriate instructions and provide guidance to local election officials. Additionally, they gain the substantial

benefit—as do all Virginians—of avoiding public health consequences of larger numbers of qualified voters seeking to vote at the polls in November. As Plaintiffs’ preliminary injunction brief detailed, evidence and research has already found evidence of COVID-19 transmission occurring at the polls in other states. This includes 71 people who voted in-person in the Wisconsin primary who were diagnosed with COVID-19 shortly after. Reingold Decl. ¶ 21. As experts found after performing a multi-factor regression analysis and accounting for other potential causes, the April primary election likely accounted for approximately 700 more COVID-19 cases in Wisconsin.⁶

Further supporting the fairness and adequacy of the settlement, the Parties are each ably represented by experienced counsel. *See* ECF No. 69 at 10–11 (finding “the American Civil Liberties Union and American Civil Liberties Union of Virginia have provided fair and adequate legal counsel in representing Plaintiffs” and the “same can be said for the representation provided to the State Defendants in this case by the Virginia Office of the Attorney General”); *see also Carcano v. Cooper*, No. 1:16CV236, 2019 WL 3302208, at *6 (M.D.N.C. July 23, 2019). And “when a settlement has been negotiated by a specially equipped agency, the presumption in favor of settlement is particularly strong.” *Md. Dep’t of the Env. v. GenOn Ash Mgt., LLC*, No. CIV. PJM 10-0826, 2013 WL 2637475, at *1 (D. Md. June 11, 2013). Here, this presumption applies because the Parties are the Virginia State Board of Elections and Commissioner of the Department of Elections—each of which has specialized experience in safely administering elections in Virginia.

⁶ See also Dr. Chad D. Cotti, et al., *The Relationship between In-Person Voting and COVID-19: Evidence from the Wisconsin Primary* at 14, NBER Working Paper No. 27187, <https://www.nber.org/papers/w27187.pdf> (last updated June 2020).

Because the proposed partial consent decree achieves a fair compromise that benefits all Parties and the public interest, it meets the criteria of fairness, adequacy, and reasonableness.

III. The Proposed Consent Decree is in the Public Interest, and not Illegal or Collusive.

The public interest “favors permitting as many qualified voters to vote as possible.” *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247–48 (4th Cir. 2014) (citations and internal quotation marks omitted). It also favors “safeguarding public health.” *Pashby v. Delia*, 709 F.3d 307, 331 (4th Cir. 2013). Each of these interests is advanced by this agreement. As the Court held in approving the first consent decree, an agreement “that permits the State Defendants to avoid the likely unconstitutional application of a state law . . . is neither unlawful, nor against the public interest.” ECF No. 69 at 21. Moreover, the evidence “points to the conclusion that adherence to the witness signature requirement” would increase the risk of COVID-19 transmission. *Id.*

Many voters in Virginia who live alone are able to both comply with social distancing protocols and have an individual witness their absentee ballot, and are unable to vote in-person, meaning that they would not be able to cast a vote or have their vote counted in November without this consent decree’s elimination of the witness requirement for these individuals. And this protection of the right to vote will happen without harming election integrity, especially “when considering all of the other means of combatting voter fraud integrated into the absentee-voting system.” ECF No. 69 at 18. Aside from the witness requirement, a plethora of other Virginia laws ensure proper absentee voting including provision of identifying information, a signed attestation confirming identity, eligibility, and lack of double-voting, and a check of the ballot against the list of ballot requests, *see, e.g.*, Va. Code § 24.2-706, 1 Va. Admin. Code 20-70-20(B)(2)-(6), Va. Code § 24.2-710, and penalize malfeasance, *see, e.g.*, Va. Code §§ 24.2-1004(B), 24.2-1012, 24.2-1016. Regardless, this proposed consent decree does not eliminate the witness requirement altogether and the witness signature line will remain on the ballot envelope, but does provide

targeted relief to the subset of voters who believe they may not safely have a witness present while completing their ballot.

The proposed consent decree also serves public health in that it promotes the continuation of social distancing as recommended by the Governor and state and federal public health officials. In light of the seriousness of the COVID-19 health crisis, Governor Northam has declared a State of Emergency that continues to this day, VDH continues to urge Virginians to do their “part to help stop the spread of COVID-19 by staying at home as much as possible,” asks all Virginians to “practice social distancing,” and encourages those aged 65 and older to self-quarantine.⁷ Similarly, federal guidelines state: “[e]veryone [s]hould . . . avoid close contact” by “stay[ing] home as much as possible” and “put[ting] 6 feet of distance between yourself and people who don’t live in your household.”⁸ The CDC’s guidance on elections specifically warns that “[t]he more an individual interacts with others, and the longer that interaction, the higher the risk of COVID-19 spread,” and “[e]lections with only in-person voting on a single day are higher risk for COVID-19 spread because there will be larger crowds and longer wait times.”⁹ And as of August 3, VDH reported that there were over 93,000 cases and over 2,200 deaths in the State.¹⁰

Moreover, this agreement is neither illegal nor collusive. The agreement is necessary to protect the constitutional rights of Virginia’s voters and “violations of federal rights justify the imposition of federal remedies.” *Common Cause Ind. v. Marion Cty. Election Bd.*, No. 1:17-CV-01388-SEB-TAB, 2018 WL 3770134, at *2 (S.D. Ind. Aug. 9, 2018). The Court “has the authority

⁷ See *supra* notes 3–4.

⁸ See *supra* note 5.

⁹ Ctrs. for Disease Control & Prevention, *Considerations for Election Polling Locations and Voters*, <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html> (last visited Aug. 4, 2020).

¹⁰ See Va. Dep’t of Health, *COVID-19 Cases in Virginia*, <https://www.vdh.virginia.gov/coronavirus/covid-19-daily-dashboard/> (last visited Aug. 4, 2020).

to approve a settlement that modifies state law. Federal courts have broad power to remedy violations of the federal Constitution.” *Dillard v. City of Foley*, 926 F. Supp. 1053, 1065 (M.D. Ala. 1995) (citing *Missouri v. Jenkins*, 495 U.S. 33, 57 (1990) and *Dillard v. Crenshaw County*, 831 F.2d 246, 248 (11th Cir. 1987)).

Finally, this agreement was the product of a good-faith negotiation. It was only after Plaintiffs sought and received discovery and filed a preliminary injunction motion supported by extensive evidence for November and future elections that negotiations resulted in this agreement. Nor is there any concern here about “elected state officials seek[ing] to bind their successors as to a matter about which there is substantial political disagreement,” *Carcano*, 2019 WL 3302208, at *6, as this agreement only covers the November 2020 general election. As the Court already found, this hard-fought partial settlement does “not remotely resemble” cases in which prior courts have rejected settlements as collusive. ECF No. 69 at 23.

The proposed Partial Consent Judgment and Decree therefore serves the public interest and is neither illegal nor collusive.

IV. Intervenor-Defendant Republican Party of Virginia Lacks Standing to Block Entry of This Consent Decree.

As this Court previous recognized, “while an intervenor is entitled to present evidence and have its objections heard at the hearings on whether to approve a consent decree, it does not have power to block the decree merely by withholding its consent.” *Local No. 93, Intern. Ass’n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland* (“*Local No. 93*”), 478 U.S. 501, 528–29 (1986) (internal citations omitted). Of course, if an intervening party has an independent claim, then a consent decree “cannot dispose of the valid claims of nonconsenting intervenors.” *Id.* at 529. But here, the RPV has no claims. And even though the proposed consent decree does not alter any rights of the RPV, “consent decrees can alter the state law rights of third parties . . . where the

change is necessary to remedy a violation of federal law.” ECF No. 69 at 28 (quoting *State v. City of Chicago*, 912 F.3d 979, 988 (7th Cir. 2019) (internal citations and quotations omitted)).

In fact, it is even more clear than during consideration of the last consent decree that the RPV has no concrete or particularized injuries due to this proposed consent decree. Last time, the RPV incorrectly argued that their associational rights to control the conduct of the primary election were affected, notwithstanding that the Commonwealth controls voter qualifications and the Party controls the method of candidate selection, whereas the witness requirement was and remains an election administration procedure. But with the June primary out of the way, the RPV does not even have that associational interest to assert here, given that it is a general election. And, as was true before, the proposed consent decree does not “bind the RPV to take or not to take any action,” and it “does not reference the RPV or any other political party whatsoever.” *Id.* at 27. “It imposes no legal duties or obligations’ on the RPV and ‘only the parties to the decree can be held in contempt of court for failure to comply with its terms,’” and it “does not purport to resolve or otherwise extinguish any claims that the RPV might have.” *Id.* at 27–28 (quoting *Local No. 93*, 478 U.S. at 529–30).

Rather, the RPV’s own communications make it clear that its concerns are not unique to it or capable of actual injury from entry of the consent decree, but rather generalized interests in election integrity. For example, the day after this Court entered the first partial consent decree, RPV Chairman Jack R. Wilson, III sent out a fundraising email stating that “Virginia’s liberal courts sided with the ACLU” and “[a]nti-fraud measures will not be required for absentee ballots for the June 23 primary,” but there was still time to “prevent the ACLU and the liberal Attorney General from making voter fraud easier for the November election.” (attached as Ex. A). Similarly, the day the Court allowed the RPV to intervene in the case, the RPV posted on Twitter that it was

“fighting the ACLU in court over their attempts to delegitimize our elections. We need your help to protect election integrity.” (attached as Ex. B).

CONCLUSION

As before, the Plaintiffs and Defendants have negotiated an agreement that serves the public interests of election integrity, access to the ballot, and protecting public health. They have done so based on an even more complete factual record than last time, and in the context of a pandemic that continues to get worse. Because this decree meets all of the necessary requirements and considering that “settlements are encouraged” as a matter of public policy, *North Carolina*, 180 F.3d at 581, the Parties request that the Court approve the Partial Consent Judgment and Decree.

Dated: August 5, 2020

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CERTIFICATE OF SERVICE

I certify that on August 5, 2020, I served a copy of the foregoing Brief in Support of Joint Motion for Entry of Partial Consent Judgment and Decree via filing with the Court's CM/ECF system, which sent copies of this document to Counsel of Record.

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EXHIBIT A

From: Jack Wilson <info@rpv.org>
Date: May 6, 2020 at 5:03:14 PM EDT
Subject: The Court Made a Decision on Voter Fraud
Reply-To: info@rpv.org

You're not going to like this...

Email not displaying correctly? [View it](#) in your browser.



- I'll be blunt: Virginia's liberal courts sided with the ACLU. Anti-fraud measures **will not be required** for absentee ballots for the June 23 primary.

But there is still time! Because of you, Republican Party of Virginia was able to prevent the ACLU and the liberal Attorney General from making voter fraud easier for the November election... **for now**

The fight is not over!

Liberals are trying to take away election protections for November because that's the only way they can defeat President Trump. **The Republican Party of Virginia is heading back to court against the ACLU.** [Can you chip in to help cover the court costs?](#)

Contribute to Fight Back

A handwritten signature in black ink, appearing to read "Jack R. Wilson, III".

Jack R. Wilson, III
Chairman
Republican Party of Virginia

**P.S. - Grassroots activists like you are the last line of defense
between Democrats and vulnerable Virginia families.**

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Jack Wilson
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Richmond, VA 23219



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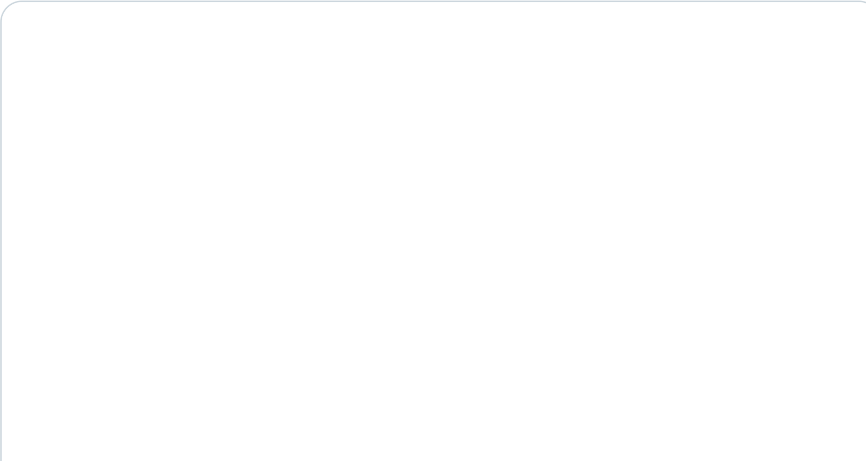
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EXHIBIT B



Virginia GOP
@VA_GOP

The Republican Party of Virginia is fighting the ACLU in court over their attempts to delegitimize our elections. We need your help to protect election integrity



Protect Elections

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