

**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 TO AMEND
PARTIAL CONSENT JUDGMENT AND DECREE**

Plaintiffs and Defendants (collectively, the "Consent Parties") respectfully request that this Court approve the attached second amendment to the partial consent judgment and decree that this Court entered on August 21, 2020, concerning the application of the absentee ballot witness requirement during the November 3, 2020 elections (the "November consent decree"), as amended on December 23, 2020, to cover two special elections that occurred on January 5, 2021.

Specifically, the Consent Parties seek to extend the terms of the November Consent Decree to a special election being held on March 23, 2021, for the 38th district of the Virginia State Senate to fill the seat of Senator Chafin, who passed away from the effects of COVID-19 last month.¹ Such a modification is proper under this Court’s inherent equitable powers. *See, e.g., Nehmer v. U.S. Dep’t of Veterans Affs.*, 494 F.3d 846, 860 (9th Cir. 2007) (explaining that a “district court has the inherent authority . . . to modify a decree.”); *see also Earth Island Inst., Inc. v. S. Cal. Edison*, 166 F. Supp. 2d 1304, 1309 (S.D. Cal. 2001) (“The Court’s power to modify the Consent Decree is derived from principles of equity and exists independent from any express authorization within the Decree”); *Feeling v. Kelly*, 152 F.R.D. 670, 675 (D.D.C. 1994) (modification of consent decree appropriate under the court’s “inherent powers”).

Plaintiffs have standing to seek this relief because Plaintiff League of Women Voters of Virginia (the “League”) has at least five members who live in the 38th district, most if not all who are likely to vote in the March 23 special election including by absentee ballot. *See* Decl. of Debora Wake ¶ 2 (attached as Ex. B). As the Fourth Circuit has held, organizational plaintiffs may “have associational standing to sue ‘on behalf of [their] members when [their] members would otherwise have standing to sue in their own right.’” *Sierra Club v. U.S. Dep’t of the Interior*, 899 F.3d 260, 282 (4th Cir. 2018) (*quoting Friends of the Earth, Inc. v. Laidlaw Env’t Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000)). For League members who live alone and are practicing social distancing and/or isolating, they are part of the “substantial and discrete class of Virginia’s electorate” for whom having to closely interact with an individual outside of their household during an

¹ Va. Dep’t of Elections, *Upcoming Elections*, <https://www.elections.virginia.gov/casting-a-ballot/calendars-schedules/upcoming-elections.html> (last updated Feb. 10, 2021); Laura Vozzella, *Virginia State Senator Dies of Covid-19*, Wash. Post (Jan. 2, 2021), https://www.washingtonpost.com/local/virginia-politics/virginia-state-senator-dies-of-covid-19/2021/01/01/6e3a574c-4ca2-11eb-a9f4-0e668b9772ba_story.html.

unprecedented wave of COVID-19 infections “creates a burden . . . [that] is not justified . . . in face of the risk posed by COVID-19.” Mem. Op., ECF No. 109 at 15.

For example, League member Dr. Frances Steigerwald lives by herself and is a registered voter in the 38th Senate district in Dublin, Virginia, is 74 years old, has diabetes, hypertension, and an auto-immune disease, and wants to vote in the March 23 special election by absentee ballot. Decl. of Frances Steigerwald ¶¶ 1–2, 5 (attached as Ex. C). She does not have family near where she lives, avoids close contact with other people due to her medical risks, and does not even conduct in-person grocery shopping, retrieving groceries instead through contactless curbside pickup. *Id.* ¶ 3. Without the relief requested, she will face a serious risk to her health and believes she will not be able to safely vote in the March 23 special election. *Id.* ¶ 5. Dr. Steigerwald is not alone in this situation based on the League’s knowledge of its members’ and other voters’ concerns. Wake Decl. ¶¶ 4–5. Because the League has members who reside in the 38th district who intend to vote absentee in the March 23 special election but face irreparable harm to either their health or vote if the witness requirement is not enjoined, it has associational standing. *See Sierra Club*, 899 F.3d at 282.

On the merits, the same reasons why the Court approved the November consent decree and the first amendment support this limited extension, *see* ECF No. 109 at 12; ECF No. 126, and doing so would vindicate the public interests of ensuring access to the ballot, protecting election integrity, and promoting public health during the COVID-19 pandemic. Specifically, in approving the November consent decree, the Court found that the proposed removal of the witness requirement for Virginians who could not safely comply was fair, reasonable, adequate, and in the public interest because “even with the available arsenal of conceivable precautions one could take to reduce risk of contracting the virus,” without altering the witness requirement, “many would be

dissuaded from exercising their vote both because of the risk of illness and the efforts involved in mitigating that risk—especially those who are elderly, immunocompromised, or otherwise at grave risk from the virus.” ECF No. 109 at 18. And given that the June primary, November election, and January 5 special elections proceeded smoothly under the terms of the previous consent decrees without an increase in fraud, to the knowledge of the Defendants, there is no countervailing reason not to extend the previous consent decree for these upcoming elections. Indeed, in light of the serious COVID-19 crisis and the extended vaccine timeline, the amendment is necessary to serve those same interests.

Less than six months after approving the November consent decree, Virginia’s cases have more than quadrupled to over 530,000 cases, with more than 22,000 hospitalizations, and over 6,900 deaths,² and the seven-day average of new daily cases throughout January were more than triple the number of any seven-day stretch before the November election.³ As such, on December 10, 2020, Governor Northam issued Executive Order 72, expanding “measures to stem the spread of the virus throughout the Commonwealth” including by instituting a modified stay-at-home order and prohibiting “public and private in-person gatherings of more than 10 individuals who do not live in the same residence” except for religious services and educational instruction.⁴ He did so due to the “surge” in new cases and the fact that “[a]ll five health regions are experiencing increases in new COVID-19 cases, positive tests, and hospitalizations,” and because “socialization

² Va. Dep’t of Health, *COVID-19 in Virginia: Summary*, <https://www.vdh.virginia.gov/coronavirus/covid-19-in-virginia/> (last visited Feb. 10, 2021).

³ Va. Dep’t of Health, *Case Measure: Cases by Date Reported*, <https://www.vdh.virginia.gov/coronavirus/key-measures/> (last updated Feb. 10, 2021).

⁴ Va. Exec. Order No. 2020-72 (Dec. 10, 2020) at 1, 12, [https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-72-and-Order-of-Public-Health-Emergency-Nine-Common-Sense-Surge-Restrictions-Certain-Temporary-Restrictions-Due-to-Novel-Coronavirus-\(COVID-19\).pdf](https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-72-and-Order-of-Public-Health-Emergency-Nine-Common-Sense-Surge-Restrictions-Certain-Temporary-Restrictions-Due-to-Novel-Coronavirus-(COVID-19).pdf).

with persons outside of your household and sustained activities in indoor settings contribute significantly to the transmission of the virus.”⁵ On January 27, 2021, Governor Northam extended much of this Executive Order, noting that as of January 25, 2021, “Virginia’s seven-day moving average of new COVID-19 cases is still more than 4,000 per day,” “Virginia’s PCR percent test positivity rate is at 12.5 percent—an increase from 11.1 percent approximately one month ago,” the “statewide rate of COVID-19 ICU hospitalizations (6.1 per 100,000) is well above the threshold of concern (3.5 per 100,000),” and that therefore Virginians must “avoid gatherings with anyone outside [their] household,” “physically distance from others, [and] stay home when possible”⁶ The same reasons motivating approval of the consent decree for the November 2020 elections and its extension to the January 5, 2021 special elections therefore support its extension for the 38th State Senate district special election on March 23, 2021.

This amendment 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 allow all qualified Virginians living in the 38th district to vote and protect their health.

Dated: February 10, 2021

/s/ Davin M. Rosborough
Davin M. Rosborough (VSB # 85935)
Dale E. Ho*
Sophia Lin Lakin*
Theresa J. Lee*
Adriel I. Cepeda-Derieux*

Respectfully submitted,

MARK R. HERRING
Attorney General of Virginia
By: /s/ Carol L. Lewis
CAROL L. LEWIS (VSB #92362)
MICHELLE S. KALLEN (VSB # 93286)

⁵ *Id.* at 1.

⁶ Va. Exec. Order Am. No. 2021-72 (Jan. 27, 2021) at 1, [https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-72-AMENDED-and-Order-of-Public-Health-Emergency-Nine-Common-Sense-Surge-Restrictions-Certain-Temporary-Restrictions-Due-to-Novel-Coronavirus-\(COVID-19\).pdf](https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-72-AMENDED-and-Order-of-Public-Health-Emergency-Nine-Common-Sense-Surge-Restrictions-Certain-Temporary-Restrictions-Due-to-Novel-Coronavirus-(COVID-19).pdf).

American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Tel.: (212) 549-2500
drosborough@aclu.org
dho@aclu.org
slakin@aclu.org
tlee@aclu.org
acepedaderieux@aclu.org

Vishal Agraharkar (VSB #93265)
Eden Heilman (VSB #93554)
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF AMERICA, INC.
701 E. Franklin Street, Suite 1412
Richmond, Virginia 23219
Phone: (804) 644-8080
Fax: (804) 649-2733
vagraharkar@acluva.org
eheilman@acluva.org

Attorneys for Plaintiffs

*Admitted *pro hac vice*

HEATHER HAYS LOCKERMAN (VSB
#65535)
CALVIN C. BROWN (VSB #93192)
Office of the Attorney General
202 North Ninth Street
Richmond, Virginia 23219
804-692-0558 (telephone)
804-692-1647 (facsimile)
clewis@oag.state.va.us

*Attorneys for Robert H. Brink, John O'Bannon,
Jamilah D. LeCruise and Christopher E. Piper in
their official capacities, and the Virginia State
Board of Elections*

CERTIFICATE OF SERVICE

I certify that on February 10, 2021, I served a copy of the foregoing Joint Motion to Amend Partial Consent Judgment and Decree via filing with the Court's CM/ECF system, which sent copies of this document to Counsel of Record.

/s/ Davin M. Rosborough
Davin M. Rosborough (VSB # 85935)
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Tel.: (212) 549-2500
drosborough@aclu.org

Counsel for Plaintiffs