

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

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

Plaintiffs,

v.

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

Defendants.

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

**AMENDED ANSWER OF INTERVENOR-
DEFENDANT REPUBLICAN PARTY OF
VIRGINIA, INC.**

Intervenor-Defendant Republican Party of Virginia, Inc., by counsel, submits the following Answer to Plaintiffs' Second Amended Complaint (Doc. 84).

1. To the extent this paragraph states factual allegations, Intervenor-Defendant lacks knowledge or information sufficient to form a basis as to the truth of these allegations. To the extent this paragraph states a legal conclusion, no response is required.

2. This paragraph is a legal conclusion to which no response is required.

3. Intervenor-Defendant admits to the factual allegations in the first two sentences.

Intervenor-Defendant notes in response to the third sentence that Governor Northam's order provides that it "will remain in place until June 10, 2020, unless amended or rescinded."¹

Intervenor-Defendant further notes that the Richmond Times Dispatch attributed to Governor

Northam's spokeswoman Alena Yarmosky a statement that "the order doesn't apply to 'the

operation of government,' which she said includes operating in and participating in elections."²

¹ Va. Executive Order No. 2020-55,

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

² Mel Leonor, *Northam administration urges Virginians to vote absentee by mail; GOP questions timing of 'stat-at-home' order*, Richmond Times Dispatch, Mar. 31, 2020,

4. This paragraph is a legal conclusion to which no response is required.

5. The 2018 Current Population Survey speaks for itself, the remainder of this paragraph consists of legal conclusions to which no response is required.

6. This paragraph is a legal conclusion to which no response is required.

7. Intervenor-Defendant admits to the statistical allegations in the first sentence.

Intervenor-Defendant denies other factual allegations.

8. Most of this paragraph is a legal conclusion to which no response is required.

Intervenor-Defendant admits that Virginia is one of only 11 states that require an individual submitting an absentee ballot to have a witness sign their ballot envelope, but notes that because absentee voting presents a higher risk of fraud than in-person voting, states impose a number of different integrity measures. Some states require a copy of the voter's ID be returned with the absentee ballot,³ or require both a copy of the voter's ID and notary or witness signature on the returned absentee ballot.⁴ Some states require proof of identification at the absentee ballot application phase,⁵ some use signature matching to verify absentee ballot applications and/or

https://www.richmond.com/news/virginia/northam-administration-urges-virginians-to-vote-absentee-by-mail-gop-questions-timing-of-stay-at/article_a2db7528-2afa-5d5a-b018-826c97f984fb.html.

³ See ARK. CODE ANN. §7-5-409(b)(4)(A)(v) (2018).

⁴ See ALA. CODE § §17-9-30(b), 17-11-7 (2019).

⁵ WISC. STAT. §6.87 (2019) (unless specifically exempted, absentee ballot applicant must include proof of identification with the application), S.D. CODIFIED LAWS §12-19-2(2019) (requiring an absentee ballot application be accompanied by either a copy of the applicant's ID or a notarized oath), KAN. STAT. ANN. §25-1122(b),(c) (2018) (requiring that a person applying in person for an absentee ballot show a valid ID, and that an absentee ballot application returned by mail include either a valid Kansas driver's license number or a copy one of the specified alternative forms of identification).

returned absentee ballot,⁶ and some have implemented various other rules designed to ensure electoral integrity in the absentee voting process.⁷

9. Intervenor-Defendant denies that Plaintiffs are entitled to the relief requested in this paragraph.

PARTIES

10. Intervenor-Defendant lacks knowledge or information sufficient to form a basis as to the truth of these allegations.

11. Intervenor-Defendant lacks knowledge or information sufficient to form a basis as to the truth of these allegations.

12. Intervenor-Defendant lacks knowledge or information sufficient to form a basis as to the truth of these allegations.

13. Intervenor-Defendant lacks knowledge or information sufficient to form a basis as to the truth of these allegations.

14. Intervenor-Defendant lacks knowledge or information sufficient to form a basis as to the truth of these allegations.

⁶ See TENN. CODE ANN. §2-6-202(g) (2018) (Upon receipt by mail of the absentee ballot, the administrator shall open only the outer envelope and compare the voter's signature on the application with the voter's signature on the appropriate registration record.), MICH. COMP. LAWS §168.761 (2019) (The qualified voter file must be used to determine the genuineness of a signature on an application for an absent voter ballot.); see also TEX. ELEC. CODE ANN. §87.027 (2019) (providing for the use of a signature verification committee), KY. REV. STAT. ANN. §117.085(6) (2019) (requiring that the absentee ballot return envelope be signed by two witnesses if the voter signs the envelope with a mark instead of a signature).

⁷ See, e.g., OKLA. STAT. TIT. 26, §14-108.1 (2019) (absentee ballot return envelopes must include an affidavit which the voter must sign and which must be witnessed by a notary, notary publics must maintain a log of all absentee ballot application for a single election for two years, and may not notarize more than 20 absentee ballot affidavits without the written approval of the secretary of the county election board).

15. Intervenor-Defendant denies that Plaintiffs are entitled to the relief requested in this paragraph.

16. Intervenor-Defendant denies that Plaintiffs are entitled to the relief requested in this paragraph.

17. Intervenor-Defendant denies that Plaintiffs are entitled to the relief requested in this paragraph.

18. Intervenor-Defendant denies that Plaintiffs are entitled to the relief requested in this paragraph.

19. Intervenor-Defendant denies that Plaintiffs are entitled to the relief requested in this paragraph.

20. Admitted.

21. Intervenor-Defendant lacks knowledge or information sufficient to form a basis as to the truth of these allegations.

22. Intervenor-Defendant lacks knowledge or information sufficient to form a basis as to the truth of these allegations.

23. Admitted.

24. Admitted.

25. Admitted.

26. Admitted.

27. Admitted.

JURISDICTION AND VENUE

28. Intervenor-Defendant admits that Plaintiff purports to bring this action under 42 U.S.C. §§ 1983 and 1988 and 52 U.S.C. § 10302.

29. Admitted.

30. Admitted.

31. Admitted.

FACTS

Transmission of COVID-19 and Public Health Guidelines

32. Admitted.

33. Admitted.

34. Admitted.

35. Admitted.

36. Admitted.

37. Admitted.

38. Intervenor-Defendant lacks knowledge or information sufficient to form a basis as to the truth of these allegations.

39. Admitted.

40. Admitted.

41. The CDC's recommendations, which include minimizing direct contact and reducing crowd size at polling stations, speak for themselves. The factual allegations in the second sentence are admitted.

42. The conclusory statement in the first sentence is denied as none of the other factual allegations claim that COVID-19 was contracted at a polling place. The remaining factual allegations are admitted.

43. To the extent this paragraph states a legal conclusion, no response is required. To the extent this paragraph states a factual allegation, Intervenor-Defendant lack knowledge or information sufficient to form a basis as to the truth of these allegations.

COVID-19 in Virginia

44. Intervenor-Defendant admits that COVID-19 cases present a serious health issue in Virginia. Intervenor-Defendant lacks knowledge or information sufficient to form a basis as to the truth of these allegations.

45. The contents of statements issued by the Virginia Department of Health speak for themselves.

46. Intervenor-Defendant lacks knowledge or information sufficient to form a basis as to the truth of these allegations.

47. The contents of the Governor's statements speak for themselves.

48. The contents of the Governor's statements speak for themselves. Intervenor-Defendant admits that schools in Virginia are closed indefinitely.

49. The contents of the Governor's statements speak for themselves.

50. The contents of the Governor's statements speak for themselves.

51. The contents of the Governor's statements speak for themselves.

52. Admitted.

53. Intervenor-Defendant lacks knowledge or information sufficient to form a basis as to the truth of these allegations.

54. Admitted.

55. The contents of statements issued by the Virginia Department of Elections speak for themselves.

56. The contents of the Governor's statements speak for themselves. Intervenor-Defendant admits that the election originally scheduled for June 9, 2020, is now set to take place on June 23, 2020.

57. This Court's orders speak for themselves.

COVID-19's Impact on African American Virginians in Light of Ongoing and Historical Discrimination

58. Intervenor-Defendant lacks knowledge or information sufficient to form a basis as to the truth of these allegations.

59. Intervenor-Defendant lacks knowledge or information sufficient to form a basis as to the truth of these allegations.

60. To the extent the paragraph states factual allegations, Intervenor-Defendant lacks knowledge or information sufficient to form a basis as to the truth of these allegations.

61. The contents of the Governor's statement speak for themselves. To the extent this paragraph states factual allegations, Intervenor-Defendant lacks knowledge or information sufficient to form a basis as to the truth of these allegations.

62. To the extent the paragraph states factual allegations, Intervenor-Defendant lacks knowledge or information sufficient to form a basis as to the truth of these allegations.

63. To the extent this paragraph states factual allegations, Intervenor-Defendant lacks knowledge or information sufficient to form a basis as to the truth of these allegations. To the extent this paragraph states a legal conclusion, no response is required.

Virginia's Absentee Voting Process and Witness Requirement

64. The contents of Va. Code § 24.2-700 speak for themselves; the remainder of this paragraph are legal conclusion to which no response is required.

65. Admitted.

66. The contents of statements issued by the Department of Elections speak for themselves.

67. Admitted.

68. The contents of Va. Code §§ 24.2-701 and 24.2-709 speak for themselves.

69. The contents of Va. Code § 24.2-701 speak for themselves.

70. The contents of Va. Code § 24.2-706 speak for themselves.

71. The contents of Va. Code § 24.2-707 speak for themselves.

72. The contents of Va. Code § 24.2-707 speak for themselves.

73. The contents of Va. Code § 24.2-711 speak for themselves.

74. The contents of 1 VA. Admin. Code 20-70-20(B) speak for themselves.

75. The contents of 1 VA. Admin. Code 20-70-20(B) speak for themselves; the remainder of this paragraph are legal conclusions to which no response is required.

76. The contents of Va. Code § 24.2-711.1 speak for themselves; the remainder of this paragraph are legal conclusions to which no response is required.

Virginia's witness requirement will deny large numbers of Virginians the right to vote yet provides only marginal benefits for election integrity

77. Admitted.

78. Intervenor-Defendant denies that voters “have no safe means to have an individual witness and sign their ballot envelope.” Intervenor-Defendant admits the other factual allegations in this paragraph.

79. Denied.

80. Intervenor-Defendant lacks knowledge or information sufficient to form a basis as to the truth of these allegations.

81. Intervenor-Defendants admits to the statistics regarding registered voters and election turnout. Intervenor-Defendant lacks knowledge or information sufficient to form a basis as to the truth of the remainder of the allegations in this paragraph.

82. Intervenor-Defendant denies that those who vote in person or find a witness for an absentee ballot necessarily risk their health as it is possible to do either while observing social distancing and other safeguards. The 2018 Current Population Survey speaks for itself. Intervenor-Defendant denies that applying the Survey's population percentage to the population of registered voters or the voters who wish to participate in either the primary or general election is a valid statistical approach.

83. To the extent this paragraph states a legal conclusion, no response is required. To the extent this paragraph states factual allegations; Intervenor-Defendant lacks knowledge or information sufficient to form a basis as to the truth of these allegations.

84. Intervenor-Defendant lacks knowledge or information sufficient to form a basis as to the truth of these allegations.

85. The contents of statements made by the CDC speak for themselves.

86. The first sentence of this paragraph consists of legal conclusions to which no response is required. Reports issued by Maryland and North Carolina speak for themselves.

87. This paragraph consists of legal conclusions to which no response is required.

88. This paragraph consists of legal conclusions to which no response is required.

89. Intervenor-Defendant admits that protecting election integrity and preventing improper use of absentee ballots are valid government interests. Controls on the absentee ballot process are among the most important safeguards for election integrity because of the broad, bipartisan and nonpartisan, consensus that the occurrence of vote fraud is highest among votes

cast by mail.⁸ Intervenor-Defendant denies that maintaining the witness requirement during this pandemic fails to serve that interest. To the extent this paragraph states other legal conclusion, no response is required.

⁸ See, e.g., “Absentee ballots remain the largest source of potential voter fraud.” Building Confidence In U.S. Elections, *Report of the Commission on Federal Election Reform* (Sept. 2005), at 46, https://web.archive.org/web/20070609115256/http://www.american.edu/ia/cfer/report/full_report.pdf (accessed Apr. 22, 2020).

“Voter fraud is rare, but when it does happen, it more often involves absentee ballots than anything else.” Rick Hasen, “New Texas Bill Aimed at Absentee Ballot Fraud Could Violate First Amendment By Criminalizing Some Discussions of Candidates (Jul. 26, 2017), <https://electionlawblog.org/?p=94065> (accessed Apr. 23, 2020).

“Voter fraud is real (but rare) and usually involves absentee ballots.” Rick Hasen, “Absentee Ballot Fraud Alleged in Palm Beach County,” (Aug. 5, 2016), <https://electionlawblog.org/?p=94065> (accessed Apr. 22, 2020).

“[A]lmost all the cases of real fraud with the potential to affect elections involves absentee ballot fraud or election official misconduct: in both ways you could actually verify the fraudulent votes and cast them in sufficient enough numbers to affect elections.” Rick Hasen, “Remember That Rare Case of Impersonation Fraud Where a Woman Got Her Son to Vote for Her Husband?,” (Jun. 7, 2015), <https://electionlawblog.org/?p=73253> (accessed Apr. 22, 2020).

“It is no surprise that in going back to the 1980s I couldn’t find a single example where an election was arguably stolen with [] impersonation fraud. In contrast, I could find examples just about every year somewhere in the country of absentee ballot fraud schemes used to try to swing (sometimes successfully) an election.” Rick Hasen, “Good Example of Why Large Scale Impersonation Voter Fraud is So Hard to Pull Off,” (Nov. 2, 2014), <https://electionlawblog.org/?p=67807> (accessed Apr. 22, 2020).

“[West Virginia Secretary of State Mac] Warner said [that with absentee voting] there are increased opportunities, for... ‘irregularities’ to happen.” Kim Rafferty, “More room for voter fraud with absentee ballots, says W.Va. secretary of state (Apr. 20, 2020), <https://www.whsv.com/content/news/569795061.html> (accessed Apr. 23, 2020).

“[W]hen there has been significant voter fraud in recent U.S. elections, it has been through the absentee ballot process, not in-person voting.... No such problem has yet developed in the western states (Washington, Oregon, and Colorado) that now use VBM for all their elections, but we still ought to be concerned about the potential for fraud that VBM introduces.” Richard Pildes, “How Democrats Should Reform Elections in the States,” *The American Prospect* (Jan. 22, 2020), <https://prospect.org/power/democrats-reform-elections-states/> (accessed Apr. 23, 2020).

90. Denied. Virginia’s absentee ballot procedures work together to achieve the valid government interest in protecting election integrity. Likewise, other states have a combination of absentee ballot procedures, some similar to Virginia’s, others different, to vindicate their interest in protecting election integrity.

On the issue of voter fraud, Dr. Pastor pointed to absentee ballots as the largest source of potential voter fraud. Robert A. Pastor, Testimony before the U.S. Commission on Civil Rights, briefing, 624 Ninth Street, NW, Room 540, Washington, D.C., Oct. 13, 2006, transcript, p 114. (<https://www.usccr.gov/pubs/docs/voterfraud102408.pdf>).

Rick Hasen stated that the most common type of election fraud in the United States involves absentee ballots. Stephanie Saul and Reid J. Epstein, “Trump Is Pushing a False Argument on Vote-by-Mail Fraud. Here Are the Facts,” *New York Times* (Apr. 11, 2020), <https://www.nytimes.com/article/mail-in-voting-explained.html> (accessed Apr. 22, 2020).

A nationally coordinated investigation conducted by two dozen journalism students from across the country, and centered at the Walter Cronkite School of Journalism and Mass Communication at Arizona State University in Phoenix, found that “though in-person voter fraud is virtually non-existent, absentee ballot fraud and voter registration fraud are much more common.” Damon Eris, Study: In-person Voter Fraud is Virtually Non-Existent” (Aug. 29, 2012), <https://ivn.us/2012/08/29/study-in-person-voter-fraud-is-virtually-non-existent/> (accessed Apr. 23, 2020).

It has been widely believed “that absentee voting is much more susceptible to illegal activity than voting in person at the polling place.” Sal H. Lee, Judicial Review of Absentee Voting Laws: How Courts Should Balance State Interests Against the Fundamental Right to Vote Going Forward, 105 IOWA L. REV. 799, 805 (2020) (citing William T. McCauley, Comment, Florida Absentee Voter Fraud: Fashioning an Appropriate Judicial Remedy, 54 U. MIAMI L. REV. 625, (2000)). (<https://ilr.law.uiowa.edu/assets/Uploads/ILR-105-2-Lee.pdf>)

“The GAO’s survey of election officials found that while most states and jurisdictions have laws and procedures for addressing the potential for fraud in mail-in absentee voting, some officials remain concerned that fraud still can be committed. They worry about someone other than the qualified voter voting in his or her place, multiple voting by an absentee voter casting a ballot by mail and in person, and intimidation of an absentee voter casting his or her ballot at home, without the supervision of election officials. Overall, the absentee mail-in ballot process is the feature most vulnerable to voter fraud within the decentralized, patchwork U.S. electoral system, at least in theory. This is not to say that there is a lot of evidence of absentee ballot fraud but rather that the potential for fraud is greatest in this area because of a lack of uniformly strong security measures in place in all states to prevent fraud.” Lori Minnite and David Callahan, *Securing the Vote: An Analysis of Election Fraud* (2003), at 26, http://www.michiganelectionreformalliance.org/EDR_Securing_the_Vote.pdf (accessed Apr. 23, 2020).

91. Intervenor-Defendant admits that there are other safeguards that work in conjunction with the witness signature requirement to vindicate the government interest in protecting election integrity, and otherwise deny the allegations of Paragraph 87.

92. The contents of Va. Code § 24.2-710 speak for themselves, presenting one of the safeguards that work together to vindicate the government interest in protecting election integrity.

93. The contents of Va. Code § 24.2-706 speak for themselves, presenting one of the safeguards that work together to vindicate the government interest in protecting election integrity.

94. The contents of Va. Code § 24.2-1004 speak for themselves, presenting one of the safeguards that work together to vindicate the government interest in protecting election integrity.

95. The contents of Va. Code § 24.2-1016 speak for themselves, presenting one of the safeguards that work together to vindicate the government interest in protecting election integrity.

96. The contents of Va. Code § 24.2-1012 speak for themselves, presenting one of the safeguards that work together to vindicate the government interest in protecting election integrity.

97. Denied.

98. This paragraph consists of legal conclusions to which no response is required.

CLAIMS FOR RELIEF

COUNT I

99. This paragraph states a legal conclusion to which no response is required.

100. Denied.

101. Denied.

102. Denied.

COUNT II

103. Section 2 of the Voting Rights Act speaks for itself.

104. This paragraph consists of legal conclusions to which no response is required.

105. Denied.

106. Denied.

107. Denied.

ADDITIONAL DEFENSES

104. Plaintiffs have failed to state a claim upon which relief can be granted.

105. Plaintiffs lack standing to pursue some or all of their claims.

106. Plaintiffs' claims are barred, in whole or by part, by the doctrines of estoppel, waiver, and/or laches.

107. Intervenor-Defendant reserves the right to assert additional affirmative defenses uncovered during the course of discovery and otherwise in this litigation.

PRAYER FOR RELIEF

Intervenor-Defendant denies that Plaintiffs are entitled to their requested relief, and pray that this Court dismiss the Complaint with prejudice, at Plaintiffs' cost, and grant to Intervenor-Defendant such other and further relief to which it is entitled at law or in equity.

Dated: July 31, 2020

Respectfully submitted,

/s/ Christopher M. Marston

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Counsel for Intervenor-Defendant

CERTIFICATE OF SERVICE

I hereby certify that on __, I caused the foregoing to be filed with the United States District Court for the Western District of Virginia via the Court's CM/ECF system, which will serve all registered users.

Counsel for Intervenor-Defendant