IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

DEMOCRATIC PARTY OF VIRGINIA AND DCCC,	)	
Plaintiffs,	)	
v.	)	**Case No. 3:21-CV-00756-HEH**
ROBERT H. BRINK, JOHN O'BANNON, JAMILAH D. LECRUISE, AND CHRISTOPHER E. PIPER, in their official capacities,	)	
Defendants,	)	
PUBLIC INTEREST LEGAL FOUNDATION,	)	
Proposed Intervenor-Defendant.	)	

PUBLIC INTEREST LEGAL FOUNDATION'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO INTERVENE

INTRODUCTION

The Public Interest Legal Foundation ("the Foundation") requests that the Court grant it leave to intervene as a Defendant as of right pursuant to Federal Rule of Civil Procedure 24(a)(2). The Foundation has a direct and tangible interest in this litigation that will be necessarily impaired if Plaintiffs prevail, and that interest is not adequately represented by any Defendant. Alternatively, the Foundation requests the Court grant permissive intervention pursuant to Federal Rule of Civil Procedure 24(b)(1)(B), on the grounds that the Foundation has claims and defenses that share common questions of law and fact with the main action.

In the alternative, the Foundation asks the Court to delay disposition of this motion or any other ruling in or injunctive of this matter until after January 18, 2022.

The Foundation brings particularized experience to this case that will allow the issues to be more thoroughly developed and provide this court additional insight into the questions of the case, insight the Defendants are unlikely to present. As a nonprofit organization with special interests in the administration of election laws, the Foundation should be permitted to intervene permissively as similarly situated organizations have been granted permission in similar litigation. *See*, *Kobach v. United States Election Assistance Comm'n*, 2013 U.S. Dist. LEXIS 173872 (D. Kan. Dec. 12, 2013). Indeed, the Foundation has been permitted to intervene in other election administration cases in which it has an interest. *See Luna v. Cegavske*, No. 2:17-CV-2666 JCM (GWF), 2018 U.S. Dist. LEXIS 131557, at *1-2 (D. Nev. Aug. 6, 2018). *See also League of Women Voters of the United States v. Newby*, 195 F. Supp. 3d 80, 88 (D.D.C. 2016).

If intervention is granted, the Foundation will participate in this case on the schedule that will be established for the existing parties; will avoid unnecessary delays or duplication of efforts in areas satisfactorily addressed and represented by the existing Defendants, to the extent possible; and will coordinate all future proceedings with the Defendants, to the extent possible.

ANALYSIS

I. Movant is Entitled to Intervention as of Right.

When considering a motion to intervene as of right under Federal Rule of Civil Procedure 24, the court considers whether the movant "claims an interest related to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(c). The movant must demonstrate "(1)

an interest in the subject matter of the action; (2) that the protection of this interest would be impaired because of the action; and (3) that the applicant's interest is not adequately represented by existing parties to the litigation." *Stuart v. Huff*, 706 F.3d 345, 349 (4th Cir. 2013) (*citing Teague v. Bakker*, 931 F.2d 259, 260-61 (4th Cir. 1991)). The Foundation's motion satisfies each requirement.

A. The Motion Is Timely.

First, Rule 24 requires that a motion to intervene be timely filed. *See* Fed. R. Civ. Pro. 24(a). The trial court has sound discretion in deciding timeliness under Rule 24. *See Alt v. United U.S. Enviro. Protection Agency*, 758 F.3d 588, 591 (4th Cir. 2014). When assessing the timeliness of a motion to intervene, courts consider "first, how far the underlying suit has progressed; second, the prejudice any resulting delay might cause the other parties; and third, why the movant was tardy in filing its motion." *Alt*, 758 F.3d at 591.

Here, there has been exceptionally little time since the Foundation became aware of this case and of its interest in it. The initial complaint was filed on December 7, 2021. (Doc. 1) No scheduling order has been set, no discovery has been undertaken, no trial date has been set, and Defendants have not filed an answer. The Foundation's motion is timely because it was filed as soon as possible— just over a week after the case was initiated.

Furthermore, The Foundation's expertise in the subject matter could serve to expedite the Court's deliberative process. In evaluating the Foundation's motion to intervene in another case in the District of Nevada, the magistrate judge determined that the Foundation's intervention would not cause delay but rather would expedite the matter:

> The Foundation also seeks to raise constitutional defenses to Plaintiff's claims that have not been raised by Defendants and which they may choose not to raise. Although the Court may not reach the constitutional questions in deciding this case, permitting the issues to be briefed by the Foundation and responded to by Plaintiffs

> will not cause any undue delay or prejudice the rights of the existing parties. Should the Court determine that the constitutional questions must be addressed, the fact that they have already been briefed will serve to expedite rather than delay a final decision in this action.

Luna v. Cegavske, No. 2:17-cv-02666-JCM-GWF, 2017 U.S. Dist. LEXIS 209485, at *21-22 (D. Nev. Dec. 20, 2017). *See also Luna v. Cegavske*, No. 2:17-CV-2666 JCM (GWF), 2018 U.S. Dist. LEXIS 131557 (D. Nev. Aug. 6, 2018) (adopting magistrate's recommendation). Because the Foundation is seeking intervention so early in the proceedings, there could not be any disruption or delay in the case or prejudice to the parties, and the Foundation's expertise could actually serve to expedite the process, should the motion be granted.

B. The Movant has a Protected Interest in this Action.

Second, Rule 24 requires that a movant "claim[] an interest relating to the property or transaction that is the subject of the action, and [be] so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest…." Fed. R. Civ. P. 24(a)(2). "[I]n cases challenging various statutory schemes as unconstitutional or as improperly interpreted and applied, the courts have recognized that the interests of those who are governed by those schemes are sufficient to support intervention." *Cooper Techs., Co. v. Dudas*, 247 F.R.D. 510, 514 (E.D. VA 2007) (citing 7C CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE; FEDERAL PRACTICE & PROCEDURE: CIVIL § 1908 (2d ed. 1986)). Here, public interest supports intervention.

The Foundation's charitable mission includes working to protect the integrity of citizens' votes from dilution or abridgment, ensuring that voter qualification laws and election administration procedures are followed, helping alert states to problems with their voter rolls, and providing assistance to states that seek to enforce their constitutional mandate to determine the rules and law pertaining to their state elections. Even more particular to this dispute, the

Foundation has a particular interest in ensuring state election administration laws are enforced and expounding on the justifications and relationship to best election practices of these laws. For example, Plaintiff's challenge will necessarily implicate the compelling state interests behind certain election administration procedures. The Court deserves to hear the full catalog of these interests, unimpaired by any restraint in defending them.

C. This Action Threatens to Impair Movant's Interests.

The interests of the Foundation will be directly and adversely impacted by this case. Plaintiffs seek to find two provisions of Virginia's election laws unconstitutional and illegal: the requirement that Virginians submit their social security number to register to vote, and the absentee ballot procedure. Ensuring election integrity and a state's ability to determine its elections is part of The Foundation's mission, and that mission will be uniquely harmed by this case.

The first voting requirement at issue in this case is an election integrity measure used by Virginia to determine who voter registrants are and if they are registered multiple times in the state. Additionally, using a unique identifier such as a social security number is a way to ensure that those with the same or similar names are not accidentally purged from the voter rolls. The Foundation directly relies on the existence of social security numbers in state voter registration databases to conduct the Foundation's own work. The existence of a social security number allows the Foundation to validate duplicate or improper registrations and provide these findings to election officials. Without the data, the Foundation's ability to help improve election administration will be directly impacted. This reliance on a social security number makes it easier for both the Commonwealth as well as the Foundation to detect defects or deadwood on the voter rolls. The Foundation has spent a significant amount of resources studying voter rolls, and working with states to clean up their voter rolls. *See Public Interest Legal Found. v. Boockvar*, Case No. 1:20-cv-01905 (M.D. Pa. 2020); *Public Interest Legal Found. v. Voye*, Case No. 2:20-cv-00279

(W.D. Pa. 2020). If this provision of the law were to be found illegal, the Foundation would have to devote additional resources to Virginia to make up for not having that data point in the voter rolls.

Next, the process for receiving absentee ballots was created by Virginia to allow certain voters an alternative method of voting from going to the polls. It is a process created for and by Virginia, under that state's authority to conduct its elections. It is well established that there is no individual right to vote absentee. The Foundation will need to devote additional resources to make up for the loss of state authority in Virginia and wherever else litigation is brought or merely threatened if Plaintiffs prevail. In other words, the Foundation seeks to protect its mission from the misapplications of federal law that will directly affect the Foundation's activities both in Virginia and across the country. The Foundation is not a curious observer of this subject matter. Rather, the Foundation is an invested actor. Its interest here is sufficient to support intervention.

D. Existing Parties Will Not Adequately Protect the Foundation's Interests.

Absent the opportunity to intervene, the Foundation's interests almost certainly will not be adequately represented. A prior case in the Western District of Virginia in 2020 was a warning that existing Defendants will not adequately defend the election integrity laws of the Commonwealth. In *League of Women Voters of Virginia, et al., v. Virginia State Bd. Of Elections, et al.*, Case No. 6:20-cv-00024 (W.D. Va. 2020), the Virginia State Board of Elections, Robert Brink, John O'Bannon, Jamilah LeCruise, and Christopher Piper were sued over Virginia's witness signature requirement for absentee ballots and were represented by the Attorney General's Office of Virginia. United States District Judge Norman K. Moon in a telephonic hearing on April 24, 2020, was reduced to asking the Attorney General's office whether they ever intended to file a

responsive pleading. The lawyer for the Commonwealth, astonishingly, did not know.[1] In fact, three days later, the defendants filed a joint motion with plaintiffs to enter a partial consent judgment and decree that altered the rules of the statewide primary election for June 2020. The Foundation fears the instant case will follow the same pattern and the intervenor will be unable to brief the Court as a party (or even via an amicus brief) if it is not allowed to intervene now.[2]

Additionally, even if the Defendants do defend the case, they are unlikely to defend against these allegations as strongly as the Foundation. Defendants may be inclined to enter into a swift consent decree, rather than robustly defend the laws of the Commonwealth.

Worse still, Defendants have a recent history of issuing illegal election administration guidance to county election officials plainly contrary to Virginia law. A Virginia Circuit Court on October 28, 2020, enjoined the State Board of Elections and Defendants from issuing contra-legal instructions to county election officials regarding late arriving absentee ballots lacking postmarks in *Reed v. Virginia Department of Elections*, Case No. CL-20-622, Circuit Court of Frederick County (Circuit Court Judge William W. Eldridge, IV).

A fully briefed and robust defense of Virginia's laws will benefit the Court's analysis of the claims and the public's understanding of the case. Indeed, the United States Supreme Court has held that where, as here, the defendants and the proposed intervenor have different interests or functions as parties, such differences can change their conduct and approaches to the litigation.

[1] The Foundation will obtain the full transcript of this telephonic hearing if the Court wishes further briefing but is not currently in possession of the transcript.

[2] Again, the Foundation asks in the alternative that this Court delay any action in this case until at least January 18, 2022.

See Trbovich v. UMW, 404 U.S. 528, 539 (1972). Different defenses and approaches justify intervention.[3]

In sum, the Foundation meets the criteria governing intervention as of right as interpreted in the Fourth Circuit and urges the Court to grant its motion under Fed. R. Civ. P. 24(a)(2).

II. In the Alternative, the Court Should Grant Permissive Intervention.

If the Court determines that the Foundation is not entitled to intervene as of right, it should grant permissive intervention under Fed. R. Civ. P. 24(b)(1)(B). Permissive intervention is left to the discretion of the district court, and is appropriate when the intervention request is timely, the would-be intervenor "has a claim or defense that shares with the main action a common question of law or fact," and granting intervention will not unduly delay or prejudice the original parties in the case. Fed. R. Civ. P. 24(b)(1)(B) and 24(b)(3). For the reasons stated above, the Foundation's motion is timely and allowing the Foundation to intervene would not cause any delay or prejudice.

As for the requirement of a common question of law or fact, the Foundation's defense shares a common question of law: whether Virginia's ability to determine its election laws includes a requirement for a social security number for voter registration and the handling of absentee ballots. In *Florida v. United States*, the district court allowed organizations with "a special interest in the administration of Florida's elections laws" to intervene permissively in an action wherein Florida sought preclearance of changes to its election laws, including voter registration protections. *See* 820 F. Supp. 2d 85, 86-87 (D.D.C. 2011). Here, the Foundation has a special interest in the administration of Virginia election laws, particularly the inclusion of a social security number to assist list maintenance obligations of the Commonwealth as well as list maintenance assistance

[3] The Foundation respectfully requests an opportunity to update or amend its Motion should additional pleading be filed that provide additional examples of how the Defendants are not adequately protecting the Foundation's interests.

provided by the Foundation across the United States. There is a clear nexus between the Foundation's work and the legal question of this case, since the Foundation's mission is to engage in such legal disputes. Thus, permissive intervention is appropriate.[4]

CONCLUSION

For the foregoing reasons, the Court should grant the Foundation's Motion to Intervene as of right or, in the alternative, permissively.

Respectfully submitted,

/s/ J. Christian Adams

J. CHRISTIAN ADAMS, VSB No. 42543
Public Interest Legal Foundation
1555 King Street, Suite 200
Alexandria, Virginia 22314
Telephone: (703) 963-8611
adams@publicinterestlegal.org

Counsel for Intervenor-Defendant Public Interest Legal Foundation

[4] It should be noted that any involvement by the Foundation could be limited in scope – such as memoranda to assist the court in significant or dispositive matters, or passive participation in discovery such as attending depositions and providing Defendants the Foundation's observations – and therefore would not unduly complicate or impair a speedy resolution to this matter.

CERTIFICATE OF SERVICE

I hereby certify that on December 15, 2021, a true and correct copy of the foregoing memorandum of law in support of its motion to intervene have been served via CM/ECF to:

Haley Costello-Essig
Marc E. Elias
Elisabeth C. Frost
John Geise
Joel J. Ramirez
Kathryn E. Yukevich
Elias Law Group LLP
10 G Street NE, Ste 600
Washington, D.C. 20002
HEssig@elias.law
Melias@elias.law
Efrost@elias.law
Jgeise@elias.law
Jramirez@elias.law
Kyukevich@elias.law
Counsel for Plaintiffs Democratic Party of Virginia and DCCC

s/ J. Christian Adams
_____
J. CHRISTIAN ADAMS