

**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

[PROPOSED] AMENDMENT TO PARTIAL CONSENT JUDGMENT AND DECREE

1. Whereas the Plaintiffs and Defendants (collectively, the "Consent Parties") in this action incorporate by reference the Partial Consent Decree and its Addendum approved and entered by this Court on August 21, 2020 (the "November consent decree"), governing the operation of Virginia's absentee ballot witness requirement for the elections held on November 3, 2020. ECF Nos. 110-1, 110-2.

2. Whereas in approving the November consent decree, this Court found, among other things, that:

- a. “[B]ased on the strength of Plaintiffs’ case and the quality of the counsel representing the parties to the agreement, as well as the other factors for consideration, the proposed consent decree is “fair, adequate, and reasonable.” ECF No. 109 at 12;
- b. “[E]ven 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.” *Id.* at 18;
- c. “In addition to droplet transmission when an infected individual sneezes, coughs, and the like, . . . the evidence in the record demonstrates that the virus can be “aerosolized,” meaning that contagious particles of the virus can remain airborne for periods of time waiting to be inhaled by an unwitting host.” *Id.* (internal citation omitted).

3. Whereas the November election proceeded smoothly under the terms of the November consent decree without any substantiated instances of fraud related to the witness signature requirement.

4. Whereas the Court also noted in approving the November consent decree that Virginia’s COVID-19 numbers had reached “above 110,000 confirmed or probable cases, over 9,000 hospitalizations, and over 2,400 deaths.” *Id.* at 3-4.

5. Whereas, less than four months later, Virginia’s cases have more than doubled to over 288,000 cases, with more than 16,000 hospitalizations, and almost 4,500 deaths,¹ and new daily cases are approximately triple the number of any seven-day stretch before the November election.²

6. Whereas 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. 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 with persons outside of your household and sustained activities in indoor settings contribute significantly to the transmission of the virus.”

7. Whereas special elections are being held on January 5, 2021, for the Second and Ninetieth districts for the Virginia House of Delegates (collectively, the January Special Elections”).³

8. Whereas Plaintiff League of Women Voters of Virginia has members living in the districts holding the January Special Elections including those who plan to vote by absentee ballot and have valid concerns for their safety if they are required to find a witness and thus interact with others in order to cast their ballot.

¹ Va. Dep’t of Health, “COVID-19 in Virginia: Summary,” <https://www.vdh.virginia.gov/coronavirus/covid-19-in-virginia/> (last updated Dec. 15, 2020).

² Va. Dep’t of Health, “Case Measure: Total Cases by Date Reported,” <https://www.vdh.virginia.gov/coronavirus/key-measures/> (last updated Dec. 15, 2020).

³ Va. Dep’t of Elections, “Upcoming Elections,” <https://www.elections.virginia.gov/casting-a-ballot/calendars-schedules/upcoming-elections.html> (last visited Dec. 15, 2020).

9. Whereas, despite the initial deployment of a vaccine, the vast majority of Virginians including many of those at-risk of developing severe cases of COVID-19 will not have received their full vaccinations in the next two months.

10. Whereas the Consent Parties agree that an expeditious resolution of this matter for the January Special Elections, in the manner encompassed by the terms of the November Consent Decree as altered by this Amendment, 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.

11. Whereas Defendants agree not to enforce the witness requirement for the January Special Elections for absentee voters who believe they may not safely have a witness present while completing their ballot.

12. 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 January Special Elections.

13. 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.

14. Whereas the Court finds that it has subject matter jurisdiction over the Consent Parties and that the Amendment to the November Consent 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.

15. Whereas Plaintiffs made a sufficiently strong showing on the merits of the claim, as shown in their briefing and argument on their motion for preliminary injunction for the November election and that strong showing continues to apply for purposes of the January Special Elections due to the worsening public health crisis and thus further supports the fairness, adequacy, and reasonableness of this Amendment to the Partial Consent Judgment and Decree.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED FOR THE REASONS STATED ABOVE IN PARAGRAPHS 1-15 AND AS INCORPORATED THROUGH THE NOVEMBER CONSENT DECREE THAT:

1. For the January Special Elections, 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 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 January Special Elections 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 January Special Elections 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 January Special Elections 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. 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

/s/ Davin M. Rosborough
Davin M. Rosborough (VSB # 85935)
Dale E. Ho*
Sophia Lin Lakin*
Theresa J. Lee*
Adriel I. Cepeda-Derieux*
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Phone: (212) 549-2500
drosborough@aclu.org
dho@aclu.org
slakin@aclu.org
tlee@aclu.org
acepedaderieux@aclu.org

Vishal Agraharkar (VSB #93265)

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

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

*their official capacities, and the Virginia State
Board of Elections*

Attorneys for Plaintiffs

**Admitted Pro Hac Vice*