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

DEMOCRATIC PARTY OF VIRGINIA and DCCC,

Plaintiffs,

v.

ROBERT H. BRINK, in his official capacity as the Chairman of the Board of Elections; JOHN O'BANNON, in his official capacity as Vice Chair of the Board of Elections; JAMILAH D. LECRUISE, in her official capacity as the Secretary of the Board of Elections; and CHRISTOPHER E. PIPER, in his official capacity as the Commissioner of the Department of Elections,

Defendants.

Civil Action No. 3:21-CV-756

PLAINTIFFS' OPPOSITION TO THE REPUBLICAN PARTY OF VIRGINIA'S MOTION TO INTERVENE

Plaintiffs Democratic Party of Virginia ("DPVA") and DCCC, by and through counsel, file this Opposition to the Republican Party of Virginia's ("RPV") Motion to Intervene (ECF No. 27, RPV's "Motion"). For the reasons set forth below, Plaintiffs respectfully request that the Court deny the Motion.

INTRODUCTION

RPV seeks intervention as of right, but it demonstrates none of the factors required to establish such a right. RPV falls short on all fronts, failing to demonstrate that (1) it has a particularized, legally protectable interest in this action that will be directly affected by its outcome; (2) the protection of this interest would be impaired because of this action; or (3) its

interest is not already adequately represented by the existing parties. RPV's position is not meaningfully different from those of the proposed intervenors in *Lee v. Virginia Board of Elections*, No. 3:15-cv-357-HEH, 2015 WL 5178993, at *2 (E.D. Va. Sept. 4, 2015) (Hudson, J.), in which the Democratic Party of Virginia and two Democratic voters challenged Virginia's voter identification requirement. *Lee v. Va. Bd. of Elections*, No. 3:15-cv-357-HEH, ECF No. 36, at ¶¶ 8-11 (E.D. Va. Aug. 14, 2015). The proposed intervenors included a Republican candidate for office and current elected official. *Lee*, 2015 WL 5178993, at *1. The Court correctly found that the proposed intervenors failed to establish a right to intervene and also declined to allow permissive intervention. *Id.* at *4. This Court should reach the same conclusion here.

First, RPV fails to satisfy the first two requirements of intervention of right, which demand that it demonstrate it has a particularized, legally protectable interest in this action that will be directly affected and possibly impaired by its outcome. The interests that it asserts are its claims that (1) RPV is the "mirror-image" of Plaintiffs, and (2) RPV has an interest in the "integrity of the electoral process" and "the orderly management of elections." Mot. at 3, 4, ECF No. 28. RPV makes no attempt to explain *how* its "mirror-image" interests would be impaired if Virginians could register to vote without having to provide their full social security number (putting the Commonwealth in line with nearly every other state in the union), or if all voters whose absentee ballots were flagged for rejection for technical defects had the same notice and opportunity that Virginia already provides some voters to cure those defects, increasing the chance that ballots cast by lawful voters are not rejected and are actually counted in Virginia's elections. As for RPV's asserted interests in election integrity or the orderly management of elections, these are precisely the types of generalized, non-specific interests routinely rejected by federal courts (including this Court in *Lee*, as well as several others in this Circuit).

But, perhaps most importantly, RPV's interests are already more than ably represented in this case by the Defendants, who are Virginia state officials represented by the Virginia Attorney General's Office. As the Fourth Circuit has recognized, when the original named defendant is a government agency—or state official—and shares the same objective as the proposed intervenors, adequacy of representation is presumed and intervention as of right is generally improper. *See, e.g.*, *Lee*, 2015 WL 5178993, at *2 (quoting *Stuart v. Huff*, 706 F.3d 345, 351-52 (4th Cir. 2013)). RPV makes no meaningful effort to rebut this presumption. Nor could it. The Commonwealth has made clear its intent to vigorously defend this litigation; in fact, it has already filed a motion to dismiss the Complaint in its entirety. *See* Defs.' Mot. to Dismiss, ECF No. 30.

For similar reasons, the Court should also deny permissive intervention under Rule 24(b). RPV adds little to this case beyond procedural complexity. Its interests are already represented, and its proposed defenses of and policy justifications for the challenged laws are virtually identical to those advanced by the current Defendants. RPV's participation would not assist the Court in expeditiously deciding this matter; instead, it would needlessly burden the Court and the litigants.

BACKGROUND

At issue in this action are two aspects of Virginia law that burden Plaintiffs' and thousands of Virginians' constitutional rights: (1) the requirement that Virginians provide their full social security number to register to vote (the "Full SSN Requirement"), and (2) the Commonwealth's inequitable notice and cure procedures for absentee ballot envelopes with technical defects (the "Inequitable Notice and Cure Process").

The problems caused by the Full SSN Requirement start before an eligible Virginian has even registered to vote. By requiring citizens of the Commonwealth to disclose their entire, nine-digit SSN in an age where exposure of that highly private information raises significant security concerns, Virginia not only burdens the individual right to vote, but significantly impairs Plaintiffs'

First Amendment free speech and associational rights, severely hindering their ability to successfully assist Virginians who would vote for and support Plaintiffs' candidates in registering to vote. Compl. ¶¶ 2–7, 18, 21–23, 27-30, 36-74, 95–109, 139–143, ECF No. 1. By contrast, the problems caused by the Inequitable Notice and Cure Process begin after a voter casts an absentee ballot. Under Virginia's current regime, only certain voters whose ballots are flagged for rejection due to a technical defect are given notice and a meaningful opportunity to cure the defect to ensure their votes are counted. Other voters are denied the same notice and opportunity, and the result is often their disenfranchisement. These provisions unconstitutionally burden the right to vote. *Id.* ¶¶ 8–14, 19–23, 75-94, 133-137. In addition, Plaintiffs allege that the Full SSN Requirement violates federal law, specifically the Civil Rights Act's Materiality Provision, and the Privacy Act, *id.* ¶¶ 2-7, 18, 21-23, 27-56, 58-74, 110-124, and the Inequitable Notice and Cure Process violates procedural due process, *id*. ¶¶ 8-14, 19-23, 75-94, 125-132.

RPV moved to intervene on January 12, 2022. It alleges it has an interest in this litigation as the "mirror-image" of Plaintiffs, and due to its interests in the "integrity of the election process," and "the orderly management of elections." Mot. at 3, 4, ECF No. 28.

LEGAL STANDARD

Intervention as of right under Federal Rule of Civil Procedure 24(a)(2) is permitted when the motion is timely and the proposed intervenor demonstrates each of the following: (1) it has a particularized, legally protectable interest in the action that will be directly affected by its outcome; (2) the protection of this interest would be impaired because of the action; and (3) the interest is not adequately represented by existing parties to the litigation. *See Stuart*, 706 F.3d at 349. When a proposed intervenor shares their ultimate objective with that of an existing party, the existing party's representation is presumptively adequate and rebuttable only if the intervenor can show clearly adverse interests, collusion, or nonfeasance. *See id.* at 351–52. This burden is heightened

when the existing party with whom the intervenor shares their ultimate objective is a government agency. *See id.* at 352.

Permissive intervention under Rule 24(b) is allowed at the Court's discretion only when the proposed intervenor establishes: "(1) that their motion is timely; (2) that their claims or defenses have a question of law or fact in common with the main action; and (3) that intervention will not result in undue delay or prejudice to the existing parties." *RLI Ins. Co. v. Nexus Servs., Inc.*, No. 5:18-cv-00066, 2018 WL 5621982, at *5 (W.D. Va. Oct. 30, 2018). Even if the potential intervenor satisfies the requirements of Rule 24(b), permissive intervention is just that—permissive—and the decision to allow permissive intervention lies "within the sound discretion of the trial court." *Id.* (quoting *Smith v. Pennington*, 352 F.3d 884, 892 (4th Cir. 2003)).

ARGUMENT

I. RPV is not entitled to intervene as of right.

RPV bears the burden of establishing that it meets all three factors necessary to create a right to intervene, yet it fails to establish any of them. *See Virginia v. Westinghouse Elec. Corp.*, 542 F.2d 214, 216 (4th Cir. 1976) ("All three tests must be met if [the proposed intervenor] is to prevail."). In its motion, RPV identifies three interests in this litigation: (1) an undefined "legally protectable interest" that is the "mirror image" of Plaintiffs' interests due to RPV's status as a state party committee, (2) an interest in "ensuring the integrity of the electoral process," and (3) an interest in "elections and election procedures." Mot. at 3, 4, ECF No. 28. None is sufficient to justify intervention as of right. In particular, RPV fails to explain how any interests that it does not share with the general population are actually threatened in this litigation, nor can it overcome the presumption that the government Defendants who are already defending this action—indeed, have

already filed a motion to dismiss Plaintiffs' Complaint—adequately represent its interests. The Court should deny RPV's motion to intervene.

A. RPV does not show it has a legally protectable interest sufficient to support intervention.

RPV's primary argument for intervention is that, by virtue of its status as a state political party committee, it has a "legally protectable interest" that is "the mirror image" of Plaintiffs in this litigation, but it never explains what this interest actually is. Mot. at 3, 4, ECF No. 28. *Plaintiffs'* interest is in ensuring that they can help as many eligible Virginians as possible to register to vote, that eligible Virginia voters (including those who would associate with the Democratic Party and support its candidates for election) are not impeded in their right to register to vote, and that lawfully registered voters receive an adequate opportunity to cure technical defects on their absentee ballot envelopes to save them from rejection. *See* Compl. ¶¶ 18–23. One would assume that RPV shares a similar interest in registering voters and helping them vote. But that is an interest that would support intervention as a *plaintiff*, which RPV is not seeking. And RPV fails to actually articulate what it views its interest to be, other than to return to the vague phrase "mirror image," and gesture towards general concerns about election integrity.

The true "mirror image" of Plaintiffs' interest would be an interest in making it *harder* for eligible Virginians to register to vote, or in rejecting ballots of lawful voters for technical errors without giving those voters notice of the issue and an opportunity to cure. But the Fourth Circuit has been clear that such an interest is *not* legally protectable. *See Wise v. Circosta,* 978 F.3d 93, 100 (4th Cir. 2020) (explaining that an interest in preventing other individuals from voting is not cognizable under the Equal Protection Clause). Nor does RPV explain how removing the Full SSN

Requirement or providing lawful voters notice and a cure opportunity when their ballots are flagged for rejection due to technical defects would hurt the prospects of the Republican Party.

Surely, Virginians who would support Republican candidates are among those who may remain unregistered because of concerns about privacy or identity theft, and whose ballots may be rejected without the voters' knowledge or opportunity to save them from rejection. Thus, the only logical means by which RPV's "interests" could be negatively implicated by this action to prompt its intervention as a defendant is if it had made the calculus that, on balance, these restrictions exclude voters more likely to support Democratic voters from the franchise. Because this interest is not legally protectable, *see id*., it cannot support intervention.[1]

RPV's generalized interests in election integrity and election procedure fare no better; it is well settled that a proposed intervenor's interest must be distinct from an interest shared by the

[1] RPV cites to two cases in support of the proposition that its interest in this litigation is the "mirror" of DPVA's, neither of which are applicable or binding on this Court. The first, *Builders Association of Greater Chicago v. Chicago*, 170 F.R.D. 435 (N.D. Ill. 1996), was a challenge brought by an association of general contractors in the Chicago area that alleged its members had been injured by the City's M/WBE program, which required that a certain portion of money spent on construction go to minority-owned or women-owned businesses. Intervention was granted to a number of women and minority-focused associations of general contractors who held the "mirror-image" of the plaintiff's interests in that case. *Id.* at 440. Such a dispute over finite resources is inapplicable to a voting rights case, where a zero-sum conception of resources is not only nonsensical, but antithetical to fundamental democratic values. The second, *Democratic National Committee v. Bostelmann*, No. 20-CV-249-WMC, 2020 WL 1505640, at *5 (W.D. Wis. Mar. 28, 2020), *modified on reconsideration*, 451 F. Supp. 3d 952 (W.D. Wis. 2020), involved a dispute over a variety of Wisconsin election laws in the lead up to the 2020 general elections. There, the district court exercised its discretion to permit the Republican National Committee ("RNC") and the Republican Party of Wisconsin ("RPW") to intervene under Rule 24(b), noting, without discussion, that they held the "mirror-image interests" of the Democratic plaintiffs. *Id.* at *5. But even that status was insufficient to entitle either of the Republican intervenors to intervention *as of right*. *Id.* at *4 (holding RNC and RPW were not entitled to intervene as of right because their interests were adequately represented by state defendants). Moreover, that case was decided on a highly expedited timetable in the weeks leading up to a presidential primary—one of the first held during the onset of the pandemic. *See Bostelmann*, 451 F. Supp. 3d 957-60. There are myriad reasons why the district court may have decided that it made sense, as a discretionary matter, to allow intervention there that are not similarly present here given the markedly different

broader public. *See, e.g.*, *Lee*, 2015 WL 5178993, at *3 n.7 (finding Virginia voters' asserted interest in the integrity of the Commonwealth's elections "too generalized to grant intervention as of right" in litigation challenging Virginia's voter identification law). RPV's purported interests in "ensuring the integrity of the electoral process," and in "elections and election procedures" are all vague interests that any member of the public could articulate in this or any other election law case. Mot. at 4–5, ECF No. 28. Without more, such interests cannot support intervention.[2]

RPV appears to recognize this fatal flaw and suggests that—as a political party—its interest in "election integrity" is distinguishable and unique from the general public in the context of election law cases, but this again misses the mark. *See* Mot. at 4–5, ECF No. 28. Courts around the country have denied intervention by Republican Party committees in election law disputes where, like here, they failed to establish an interest sufficient to intervene. *See, e.g.*, *Common Cause R.I. v. Gorbea*, No. 1:20-cv-00318-MSM-LDA, 2020 WL 4365608, at *3 n.5 (D.R.I. July 30, 2020) (explaining a previous denial of Republican National Committee and Rhode Island Republican Party's motion to intervene); *Democracy N.C. v. N.C. State Bd. of Elections*, No. 1:20CV457, 2020 WL 6591397, at *1 (M.D.N.C. June 24, 2020) (denying Republican National Committee, the Republican Party committees dedicated to election of Senate and U.S. House candidates, and North Carolina Republican Party's motion to intervene in voting rights case); *One Wis. Inst. Inc. v. Nichol*, 310 F.R.D. 394, 399 (W.D. Wis. 2015) (denying intervention to Republican officials and voters); *Am. Ass'n of People with Disabilities v. Herrera*, 257 F.R.D. 236,

circumstances. For the reasons explained in Part II, *infra*, RPV's unarticulated "mirror" interests are also insufficient to support permissive intervention.

[2] RPV also points to cases outside the election context, but these too do not offer it any support. *Cooper Techs., Co. v. Dudas*, for example, concerned a patent dispute in which the outcome bore directly on the intervenors' rights related to the specific patent at issue, not amorphous interests possessed by the general public. *See* 247 F.R.D. 510, 514–15 (E.D. Va. 2007). Such a specific, tangible interest is not present here.

259 (D.N.M. 2008) (denying intervention motions by Republican entities seeking to defend restrictive election law). Each of these intervenors asserted similar interests to those that RPV asserts here.

In sum, RPV's status as a political party does not give it a particularized, legally protectable interest in election integrity. Without concrete allegations regarding their interest in the instant litigation, RPV is not entitled to intervene as of right in this matter and its motion should be denied.

B. RPV fails to articulate how its interests would be impaired by this action.

In addition to failing to articulate a legally protectable interest, RPV's assertion that the "risks" to its interests from this litigation are "clear" is based on conclusory statements and generalized assertions that are neither factually nor legally sufficient to carry RPV's burden. Mot. at 5–6, ECF No. 28. RPV appears to simply conclude that if "Plaintiffs believe that the requested relief will help Democrats win elections in Virginia," then the requested relief must hurt Republican candidates' electoral prospects *Id.* at 5. But RPV ignores that Plaintiffs' asserted interests in this litigation are in ensuring that eligible Virginia voters are able to participate and have their votes counted in the Commonwealth's elections. Compl. at ¶¶ 18-23. Any relief Plaintiffs obtain would apply equally to voters of all political persuasions; if Republicans are successful in persuading those voters to support their platform, the relief may also help Republicans win elections in Virginia. The same is true if (as is almost certainly the case) some would be Republican voters are unwilling to provide their Full SSN Requirement to register to vote, or otherwise lawful Republican voters are having their ballots rejected for technical reasons and not given notice or the opportunity to save their ballots from rejection. RPV is unable to articulate why the mere fact that more eligible Virginians would register to vote and more lawful

voters would have the opportunity to have their ballots counted would in and of itself harm the Republican Party or its candidates.

Instead of connecting these dots, RPV ventures into non sequiturs. It claims that its interests will be harmed because Plaintiffs will run "an operation" in which Plaintiffs would "interpose themselves between prospective voters and the state, conveying incomplete voter registration forms to selected voters and completed forms from the voters to the State." Mot. at 5, ECF No. 28. This assertion is largely incomprehensible, but RPV appears to be describing Plaintiffs' voter registration efforts. Both Plaintiffs and RPV regularly engage with potential voters to facilitate their registration. There is nothing—as RPV's Motion could be read to suggest—untoward about a political party engaging in such activity with its supporters (or likely supporters); indeed, that engagement is among the parties' core First Amendment rights. *See, e.g.*, *Voting for Am., Inc. v. Steen*, 732 F.3d 382, 389 (5th Cir. 2013); *Democracy N.C. v. N.C. State Bd. of Elections*, 476 F. Supp. 3d 158, 223 (M.D.N.C. 2020), *reconsideration denied*, No. 1:20CV457, 2020 WL 6591396 (M.D.N.C. Sept. 30, 2020); *Project Vote v. Blackwell*, 455 F. Supp. 2d 694, 700 (N.D. Ohio 2006).

C. RPV's purported interests are adequately represented by the existing parties.

Even if RPV's interests in defending the challenged laws were sufficiently threatened to satisfy the first two requirements for intervention as of right—and, for the reasons discussed, they are not—RPV still fails to establish that it has a right to intervene, because its interests are adequately represented by the existing Defendants. The Defendants are Virginia state officials represented by the Virginia Attorney General's Office, and they are vigorously defending this lawsuit. *See* Defs.' Mot. to Dismiss, ECF No. 30 (moving to dismiss Plaintiffs' complaint on five separate grounds). As this Court previously recognized, in voting rights cases where a government entity is the defendant, a proposed intervenor must make a "strong showing of inadequacy" to

establish a right to intervention. *See Lee*, 2015 WL 5178993, at *2 (denying a motion to intervene brought by Virginia officeholders, registrars, and voters in a lawsuit challenging Virginia's voter identification laws) (quoting *Stuart*, 706 F.3d at 351). RPV cannot meet that high bar here.

Attempting to rebut this presumption, RPV offers only that it supports the election of Republican candidates while the state does not, and that Plaintiffs are its "mirror-image," but it provides no explanation for how these facts reflect inadequacy of representation. *See* Mot. at 6–7, ECF No. 28. At most, RPV's implication seems to be that it should be permitted to intervene because the Commonwealth may not litigate this case in a way that explicitly protects the interests of *Republican* candidates for office. But this fails to sustain RPV's burden of proving inadequacy. Faced with similar arguments from the proposed intervenors in *Lee*, this Court properly denied intervention. 2015 WL 5178993, at *3 (rejecting intervention when proposed intervenor merely argued that they should be allowed to intervene to make arguments that they did not believe the Attorney General was likely to make). Other courts have done the same. *See, e.g.*, *Arizonans for Fair Elections v. Hobbs*, 335 F.R.D. 269. 275 (D. Ariz. 2020) (denying intervention as of right to state legislators who sought to intervene in a case where a state actor was already defending, because the proposed intervenors failed to demonstrate anything more than a potential disagreement over "the best way to approach litigation") (citation omitted); *Miracle v. Hobbs*, 333 F.R.D. 151, 156 (D. Ariz. 2019) (denying intervention as of right because a proposed intervenor "must do more than allege—and superficially at that—partisan bias to meet" the standard).

For all these reasons, the Court should deny RPV's request to intervene as of right pursuant to Rule 24(a).

II. RPV's motion for permissive intervention should be denied.

RPV's alternative request that it be granted permissive intervention under Rule 24(b) is equally unwarranted. Permissive intervention "lies within the sound discretion of the trial court,"

Smith, 352 F.3d at 892 (citation omitted), but there are three circumstances in which permissive intervention should be denied. First, "where . . . intervention as of right is decided based on the government's adequate representation, the case for permissive intervention diminishes or disappears entirely." *Va. Uranium, Inc. v. McAuliffe*, 2015 WL 6143105, at *4 (W.D. Va. Oct. 19, 2015) (quoting *Tutein v. Daley*, 43 F.Supp.2d 113, 131 (D. Mass. 1999)). Second, when there would be no appreciable "benefit to the process, the litigants, or the court," denial is appropriate. *Lee*, 2015 WL 5178993, at *4. Third, permissive intervention is inappropriate if it would "unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). Each circumstance applies here.

First, as discussed, RPV has utterly failed to defeat the presumption that Defendants are able to adequately represent any purported interest it may have in the instant litigation. *See* Sec. I.C, *supra*. Second, RPV's claim that allowing it to intervene will allow the Court to "consider all competing claims and interests at one time," is hardly persuasive—RPV has failed to articulate a single unique legal issue or interest that it brings to the instant matter. Accordingly, and third, RPV's intervention in this matter is far more likely to cause confusion, delay, and unnecessary complications, all while raising no new questions of law. *See* Fed. R. Civ. P. 24(b)(3). Rule 24(b), therefore, counsels against permitting RPV to intervene in this case.

CONCLUSION

For these reasons, pursuant to Rule 24(a) and Rule 24(b), the Court should deny RPV's motion to intervene.

Dated: January 26, 2022

Respectfully Submitted:

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CERTIFICATE OF SERVICE

I hereby certify that on January 26, 2022, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing to all parties.

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