**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF VIRGINIA**
**Richmond Division**

| | | |
|---|---|---|
| **Democratic Party of Va., et al,** | ) | |
| | ) | |
| **Plaintiffs,** | ) | |
| | ) | |
| **v.** | ) | **Civil Action No. 3:21-CV-756** |
| | ) | |
| **Robert H. Brink, et al.,** | ) | |
| | ) | |
| **Defendants.** | ) | |

**DEFENDANTS' MEMORANDUM OF LAW IN RESPONSE TO THE PUBLIC INTEREST LEGAL FOUNDATION'S MOTION TO INTERVENE**



The Movant does not (and cannot) show that it is entitled to intervene as of right or that its intervention should be permitted. The Fourth Circuit has been clear that "where a proposed intervenor's ultimate objective is the same as that of an existing party, the party's representation is presumptively adequate." *Stuart v. Huff*, 706 F.3d 345, 350 (4th Cir. 2013). The Movant contends—and the Defendants take the Movant at its word—that its objective is to protect the integrity of the vote and to ensure that Virginia's election laws are followed. ECF 6, at 4-5. "[W]here the party who shares the intervenor's objective is a government agency, the intervenor has the burden of making a *strong showing* of inadequacy." *Stuart*, 706 F.3d at 350. (emphasis added). Because no such showing has been made here, intervention is inappropriate.

**STANDARD**

Federal Rule of Civil Procedure 24 sets forth two methods for a nonparty to intervene: (1) intervention as of right under Rule 24(a); and (2) permissive intervention under Rule 24(b). Movant seeks both types of intervention.

As recognized by the Fourth Circuit, intervention must be permitted as a matter of right under Rule 24(a) if a movant can 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." *Teague v. Bakker*, 931 F.2d 259, 260-61 (4th Cir. 1991).

The Fourth Circuit has also recognized that, if intervention of right is not warranted, a court *may* still allow a movant "to intervene permissively under Rule 24(b), although in that case the court must consider 'whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.'" *Stuart*, 706 F.3d 345, 349 (4th Cir. 2013).

**ARGUMENT**

Movant fails to meet the requirements for intervention as of right, and permissive intervention should likewise be denied. "Intervention is a procedural device that attempts to accommodate two competing policies: efficiently administrating legal disputes by resolving all related issues in one lawsuit, on the one hand, and keeping a single lawsuit from becoming unnecessarily complex, unwieldy or prolonged, on the other hand." *United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 69 (2d Cir. 1994). Protecting litigation from becoming unnecessarily complex, unwieldy, or prolonged is particularly important in cases involving elections. Movant's arguments supporting both forms of intervention do not establish why its interests will be insufficiently supported by the Defendants. The motion should therefore be denied.



**A. Movant is not entitled to intervention as of right under Rule 24(a).**

The Movant provides a laundry list of its interests that are essentially identical to those of the Defendants:

- protect the integrity of the vote;

- ensure that elections laws and administrative processes are followed;
- ensure correct voter rolls;
- enforce constitutional and legislative provisions designed to ensure fair and pure elections; and
- ensure that election best practices are followed.

ECF 6, at 4-5. Protecting these interests is squarely within Defendants' roles, and no one is better equipped to ensure the integrity of Virginia's elections than Defendants. "Where parties share the same ultimate objective, differences in litigation strategy do not normally justify intervention." *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003); see also *Saldano v. Roach*, 363 F.3d 545, 555 (5th Cir. 2004) ("Simply because the [movant] would have made" or may at some point make "a different decision does not mean that the Attorney General is inadequately representing the State's interest—and hence, the [movant's] claimed interest[.]"). *Stuart*, 706 F.3d at 353.



As required by Virginia Code § 24.2-103(A), the interest of the Defendants is to "supervise and coordinate the work of the county and city electoral boards and of the registrars to obtain *uniformity* in their practices and proceedings and *legality and purity in all elections*." (emphasis added). Further, "[t]he Board is charged with carrying out Virginia's election laws." *Miller v. Brown*, 462 F.3d 312, 321 (4th Cir. 2006). Under Virginia's elections laws, "[a]ny person who is registered to vote and is a qualified voter shall be entitled to vote in the precinct where he resides." Va. Code § 24.2-400. Accordingly, the Defendants, in their duties with respect to ensuring the legality of elections and ensuring that any qualified voter be entitled to vote, are required to ensure that all qualified voters are capable of having their ballots counted.

To the extent that the Movant may be interested in advancing different arguments than the Defendants in order to meet that objective, these differences would be nothing more than a "reasonable litigation decision[ ] made by the Attorney General with which [the prospective

intervenors] disagree." *Stuart*, 706 F.3d at 355. "Such differences of opinion cannot be sufficient to warrant intervention as of right," and "the harms that the contrary rule would inflict upon the efficiency of the judicial system and the government's representative function are all-too-obvious." *Id.* at 355; see also *United States v. South Bend Cmty. Sch. Corp.*, 692 F.2d 623, 627 (7th Cir. 1982) ("[T]hat a proposed intervenor might . . . [take] a different view of the applicable law does not mean that the [government does] not adequately represent its interests in the litigation." (quotation marks omitted)).

Finally, the Movant fails to make the more exacting showing of inadequacy required in the context of a government party. *Stuart*, 706 F.3d 345, 351 (4th Cir. 2013) ("[J]oin[ing] our fellow courts of appeals in holding that the putative intervenor must mount a strong showing of inadequacy [when the government is a party]). The Fourth Circuit has been clear that not requiring intervenors to make a strong showing of inadequacy "would place a severe and unnecessary burden on government agencies as they seek to fulfill their basic duty of representing the people in matters of public litigation." *Id.*



The Movant alleges that it should be permitted to intervene because it has "particularized experience" that will assist the Court. ECF 6, at 2. It is difficult, however, to imagine that any experience possessed by the Movant exceeds that possessed by the Defendant Virginia election officials. Later, Movant asserts vague and unsubstantiated allegations that Defendants are or may be somehow "restrained" in their defense of this case and will not defend against the Plaintiffs' allegations "as strongly" as Movant. *Id*. at 4-5. Such speculative reasoning is insufficient to establish that the Defendants—represented by the Commonwealth's Attorney General—are

ideally placed to robustly protect the uniformity, legality and purity in all of Virginia's elections.[2] If the interest of the Movant is to protect the integrity of Virginia elections, as is the interest of the Commonwealth, the Movant fails to demonstrate the inability of the Defendants to protect that interest.

**B. Permissive intervention should be rejected for this same reason.**

Permissive intervention should be denied for the same reason there is no basis for intervention as of right. See *Virginia Uranium, Inc. v. McAuliffe*, No. 4:15-CV-00031, 2015 WL 6143105, at *4 (W.D. Va. Oct. 19, 2015) ("[W]here . . . intervention as of right is decided based on the government's adequate representation, the case for permissive intervention diminishes or disappears entirely.") (quoting *Tutein v. Daley*, 43 F.Supp.2d 113, 131 (D. Mass. 1999)). Even if the Movant could establish the elements of permissive intervention, permissive intervention is inappropriate if this Court concludes that intervention would not provide an appreciable "benefit to the process, the litigants, or the court," *Lee v. Virginia Bd. of Elections*, 2015 WL 5178993, at *4 (E.D. Va. Sept. 4, 2015), or would "unduly delay or prejudice the adjudication of the original parties' rights," Fed. R. Civ. P. 24(b)(3).



When "intervention as of right is decided based on the government's adequate representation, the case for permissive intervention diminishes or disappears entirely." *Tutein*, 43 F. Supp. 2d at 131 (citation omitted); see generally *Hoots v. Pennsylvania*, 672 F.2d 1133, 1136 (3d Cir. 1982) (Where "the interests of the applicant in every manner match those of an existing party and the party's representation is deemed adequate, the district court is well within its discretion in deciding that the applicant's contributions to the proceedings would be superfluous

[2] See also *American Nat. Bank & Tr. Co. of Chicago v. City of Chicago*, 865 F.2d 144, 148 (7th Cir. 1989) (rejecting argument that proposed intervenor could "make any concrete showing of inadequacy of representation" by arguing that "because of certain political considerations, [defendant] may be less than zealous in the defense of this cause").

and that any resulting delay would be 'undue.'"). As established above, the interest of the Defendants in this action is to defend the integrity of elections and protect the right to vote in the Commonwealth, which the applicants have also asserted as their interest. ECF 6, at 4-5. The Movant has shown no reason why the representation by the Defendants of that interest would be inadequate. As such, intervention by the Movant is unnecessary and should be denied.

* * *

It bears noting that the Movant is not without a medium to raise its concerns. To the extent that the Movant would at some point represent a perspective distinct from the Defendants' and may be helpful to this Court's resolution of this matter, that perspective may brought to bear through the filing of a brief amicus curiae. Indeed, "[n]umerous cases," including in the Fourth Circuit, "support the proposition that allowing a proposed intervenor to file an amicus brief is an adequate alternative to permissive intervention." *McHenry v. Comm'r*, 677 F.3d 214, 227 (4th Cir. 2012) (citing cases); see also *Stuart*, 706 F.3d at 355.



**CONCLUSION**

For these reasons, the Movant's motion to intervene should be denied. *First*, the Movant shares the same objective as the Defendants: protecting the integrity of Virginia elections and the right to vote. The Movant has not demonstrated why the Defendants will not adequately protect that interest, and, thus, has not shown that it meets the requirements to intervene as of right. *Second*, for the same reasons that the Movant should not be permitted to intervene as of right, the Movant fails to meet its burden for permissive intervention. *Finally*, to the extent it has a unique perspective, the Movant may raise its arguments in an amicus brief.

For the reasons stated above, the Defendants request that the Movant's motion to intervene be dismissed.

Respectfully submitted,

ROBERT H. BRINK
JOHN O'BANNON
JAMILAH D. LECRUISE
CHRISTOPHER E. PIPER

By: */s/ Heather Hays Lockerman*
Counsel

Mark R. Herring
Attorney General of Virginia

Erin B. Ashwell
Chief Deputy Attorney General

Donald D. Anderson
Deputy Attorney General

Heather Hays Lockerman (VSB #65535)*
Senior Assistant Attorney General

Carol L. Lewis (VSB #92362)*
Assistant Attorney General
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.

**CERTIFICATE OF SERVICE**

I hereby certify that on December 29, 2021, I electronically filed a true and accurate copy of the foregoing with the Court's CM/ECF system, which will then send a notification of such filing to the parties.

*/s/ Heather Hays Lockerman*
Heather Hays Lockerman (VSB #65535)
Senior Assistant Attorney General
Office of the Attorney General
202 North 9th Street
Richmond, Virginia 23219
804-786-0067 (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