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

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.	)	

INTERVENOR-DEFENDANT'S REPLY
TO PARTIES' RESPONSE TO MOTION TO INTERVENE

Putative Intervenor-Defendant Public Interest Legal Foundation ("the Foundation" or "movant") replies to Plaintiffs' and Defendants' responses (ECF No. 25 and 24, respectively)[1] to the Foundation's motion to intervene (ECF No. 5).

INTRODUCTION

Plaintiffs' response devotes less attention to the legal arguments regarding intervention and instead spends inordinate attention attacking the Foundation itself. This is unfortunate, particularly in Virginia where the Virginia Supreme Court has devoted so much productive emphasis on the importance of professionalism in the practice in this Commonwealth.[2] Plaintiffs' references to

[1] For clarification, when case documents from this case are cited, only the ECF number is listed. If the movant is referring to another case's filing, the case number as well as the ECF number will be listed within the parenthetical.
[2] See e.g., the Harry L. Carrico Professionalism Course required by Part Six, § IV, ¶ 13.1, Rules of the Supreme Court of Virginia. While it is true the those who are granted *pro hac vice* status presumably did not participate

unrelated litigation involving the Foundation are an inaccurate and discourteous attack that suggests that the Foundation is unworthy to benefit from a federal statutory right. (*See* ECF No. 25, PageID# 20-21, 27.) The extent of Plaintiffs' inaccurate characterization of the *LULAC*[3] record and the emphasis Plaintiffs have placed upon it, unfortunately, requires a response.

As part of its organizational mission, the Foundation has published reports regarding voter list maintenance programs. Those reports advocate for practices that will keep the rolls current and accurate—one of the stated purposes of the NVRA. 52 U.S.C. § 20501(b)(4).

Plaintiffs selectively quote from a complaint in a case that never reached any finding on the merits and present allegations from the complaint as if they were adjudicated facts. (ECF No. 25, PageID# 20.) Allegations in a complaint in another unrelated matter have been inappropriately dragged into this case. All the worse, the complaint relied on so heavily by Plaintiffs was settled without any court making factual findings or conclusions, entering any judgment, or dispositive disposition adverse to the Foundation.

Still worse for Plaintiffs are the facts regarding the origin of the dispute they have dragged into this case. Then, the Foundation republished public government documents and made reasonable inferences about them. These documents listed thousands of registrants the Commonwealth of Virginia had removed from the voter rolls as listed – on the face of the document – as "declared non-citizens." Of the 5,500 individuals listed on the non-citizen cancellation reports created by the Virginia Department of Elections, three were shown to be citizens who were removed from the voter rolls as non-citizens by state election officials. (*See*

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firsthand in this important training as a requirement of admission in Virginia, the emphasis the course places on treating opposing parties and counsel appropriately and the value to the judicial process in confining arguments to the legal merits of a dispute is one that should transcend the origin state of admission. Restraint in argument by refraining from attacks, even when ample (and glaring) opportunity to do so exists, is a characteristic that has made the practice of law in Virginia distinct from other states.

[3] *League of United Latin Am. Citizens – Richmond Reg'l Council 4614 v. Pub. Interest Legal Found.*, No. 1:18-cv-00423, (E.D. Va., filed Apr. 12, 2018).

Doc. 164 at 14, *LULAC* (filed May 22, 2019).) Instead of taking action against the Commonwealth for improper cancellation, these *three* filed a complaint against the Foundation. For those unfamiliar with the highly charged ideological battles of election litigation, this is par for the course.

As part of a settlement, the Foundation's President, *offered* to apologize to the three wrongly cancelled voters (again, cancelled by the Commonwealth as "declared non-citizens") for relying to its detriment on government-created records so stating they were cancelled as "declared non-citizens" because no citizen, in the view of those with the Foundation, should ever have his or her registration cancelled as a non-citizen. Indeed, the fact that citizens lost their right to vote when they were cancelled by state election officials was, and remains, outrageous.

Next, it was also county election officials, not the Foundation, who improperly published voter records containing Social Security numbers in the first instance. These records were available both at the county election office as well as to anyone who requested them. The Foundation republished the county government records as they were first published by the county government. When the county government discovered they made a mistake and contacted the Foundation, the Foundation promptly removed public access to these same government records. To the Plaintiffs apparently, no good deed or act of cooperation deserves mercy or reasonable understanding. Every perceived mistake by an ideological foe – even if a government innocently was to blame in the first place - is an opportunity to scald a foe.

Nothing about the *LULAC* litigation affects the Foundation's entitlement to intervene under Rule 24 and *LULAC* is therefore wholly irrelevant. The Democratic Party of Virginia, or those representing them have, over the years, been accused of all manner of shenanigans, chicanery,

ethical lapses and political skullduggery.[4] But those allegations have absolutely nothing to do with their right to bring this lawsuit.

ARGUMENT

The Foundation satisfies the requirements for both permissive intervention and intervention as of right under the federal rules. Because the bulk of the parties' objections concern intervention as of right, and because the Foundation's motion may be decided on permissive intervention grounds alone, the Foundation begins there.

I. The Foundation Complied with Local Rule 7.

Plaintiffs deny their counsel received the Foundation's pre-filing request for consent. (ECF No. 25 n.2.) This is plainly incorrect. The Foundation has attached a copy of an email dated December 14, 2021, in which Foundation counsel Maureen Riordan contacted Plaintiffs' counsel, Mr. Marc Elias, requesting Plaintiffs' position on the Foundation's motion to intervene. Exhibit A. The email included the ECF No. for this matter. Mr. Elias responded to that email by asking "which court and District," to which Ms. Riordan immediately replied, "Eastern District Virginia." Mr. Elias failed to answer that email.

II. The Court Should Permit Intervention.

"The decision to grant or deny permissive intervention 'lies within the sound discretion of the trial court.'" *N.C. State Conf. of the NAACP v. Cooper*, 332 F.R.D. 161, 171 (M.D.N.C. 2019). Permissive intervention is appropriate when the proposed intervenor "has a claim or defense that shares with the main action a common question of law or fact," as long as the intervention does not cause delay or prejudice. Fed. R. Civ. P. 24. "[L]iberal intervention is desirable to dispose of

[4] *See White-Battle v Democratic Party of Virginia*, 323 F. Supp. 2d 696 (E.D. Va. 2004); *Lambert v. Democratic Party of Va.*, Civil Action No. 3:15CV61, 2015 U.S. Dist. LEXIS 105377 (E.D. Va. Aug. 11, 2015).

as much of a controversy involving as many apparently concerned persons as is compatible with efficiency and due process." *Feller v. Brock*, 802 F.2d 722, 729 (4th Cir. 1986).

First, Plaintiffs make a cursory argument that "PILF's intervention in this matter is far more likely to cause confusion, delay, and unnecessary complications, all while raising no new questions of law." (ECF No. 25, PageID# 231-232.) However, Plaintiffs' conclusory allegation is not supported with any reasoning. More importantly, Plaintiffs do not delineate how they would be prejudiced by the addition of an intervenor defendant or what extra effort they would have to expend in litigating this case due to the intervention.

But both Plaintiffs' and Defendants' primary arguments against permissive intervention deal with Defendants' ability to represent movant's interest. (ECF No. 24, PageID# 213-14; ECF No. 24, PageID# 231-32.) The parties refer to their responses to movant's intervention as of right that the Foundation has not proven "that Defendants are unable to adequately represent any purported interest PILF may have." (ECF No. 25, PageID# 231.) However, no party addresses Defendants' recent, inadequate defenses of similar suits, as outlined by the Foundation in its memorandum of law. (ECF No. 6, PageID# 127-28.) 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. The case was filed on April 17, 2020, and the defendants filed a joint motion with the plaintiffs to enter a partial consent judgment and decree ten days later. (Case No. 6:20-cv-00024, ECF No. 1 and 35.) Another incident the Foundation brought up that was unanswered was the fact that the State Board of Elections were recently enjoined from issuing illegal election administration guidance to county election officials in *Reed*

v. Virginia Department of Elections, Case No. CL-20-622, Circuit Court of Frederick County (Circuit Court Judge William W. Eldridge, IV).

And these instances are not anomalies. In *New Virginia Majority Ed. Fund, et al., v. Va. Dep't of Elections, et al.*, Case No. 3:20-cv-801 (E.D. Va. 2020), Defendants actually filed a brief agreeing with Plaintiffs' Temporary Restraining Order the same day the complaint was filed (Case No. 3:20-cv-801, ECF No. 2 and 4, PageID # 15). The case was resolved the next day due to Defendant's agreement with Plaintiffs (Case No. 3:20-cv-801, ECF No. 11). There is ample history of late of Defendants not defending state election statutes, and the Foundation has a justified concern that its interests would not be represented if it is not a party to the case.[5]

The parties attempt to frame the Foundation's concern as a "difference of opinion among lawyers over the best way to approach a case" (ECF No. 25, PageID # 230 and ECF No. 24, PageID # 211), misses the mark. The Foundation is not concerned about what litigation tactics Defendants will employ to defend the case—the Foundation is concerned base on previous cases that Defendants will not employ any *at all*. Though Defendants cite Virginia statute in an attempt to bolster their claim that they will carry out the election laws (ECF No. 24, PageID# 211), the fact of the matter is Defendants' recent actions demonstrate a pattern of reluctance (or refusal) to do so.[6] In the *Reed* case relied on by the Foundation, a state court went so far as to enjoin the Department of Elections from issuing instructions to counties *contrary to the plain language* of

[5] Indeed, one of Plaintiffs' counsel previously represented counsel for Defendants. *See* Jenna Portney, *Virginia Democrats Lose Lawsuit Over Voter ID*, THE WASHINGTON POST, May 19, 2016, https://www.washingtonpost.com/local/virginia-politics/virginia-democrats-lose-lawsuit-over-voter-id/2016/05/19/1c5d2d3a-1dfb-11e6-b6e0-c53b7ef63b45_story.html; Ben Pershing, *Herring Team Confident, but Obenshain Thinks Attorney General Vote Could Swing His Way*, THE WASHINGTON POST, Nov. 18, 2013, https://www.washingtonpost.com/local/virginia-politics/herring-team-still-confident-of-ag-race-victory-obenshain-thinks-results-could-swing-his-way/2013/11/18/a47f4538-506f-11e3-9fe0-fd2ca728e67c_story.html.

[6] Plaintiffs' argument that movant is not "likely to provide a 'benefit to the process, the litigants, or the court'" (ECF NO. 25, PageID# 231) ignores the fact that the Court would not have the benefit of hearing all sides argued if Defendants once again refuse to defend the law.

absentee ballot statutes. Any presumption that Defendants are *able* to represent movant means nothing if Defendants are *unwilling* to do so. If actions speak louder than words, Defendants' interests are not always to defend the laws of the Commonwealth, which is precisely why the Foundation should be granted intervention.

III. The Court Should Grant Intervention as of Right.

A movant has the right to intervene if the movant demonstrates "(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)).

In response to movant's argument that it is due intervention of right, Plaintiffs and Defendants argue that Defendants can adequately represent movant's interests, as described and addressed above in Part II. Plaintiffs also assert that "PILF's generalized interest in election integrity or ensuring that state elections laws are enforced" (ECF No. 25, PageID# 223), and "PILF's purported interest in accessing highly sensitive voter information" (ECF No. 25, PageID# 227) such as Social Security numbers are insufficient to support intervention as of right. Neither assertion is an accurate representation of the Foundation's interests.

First, the Foundation's interest in this case is not a trite, generalized interest, but a specific one, particular to this case. As stated in its motion, the Foundation is a nonprofit organization dedicated to election integrity. It relies heavily on the presence of a Social Security number in a voter registration file to conduct its work. It exists to assist states and others to aid the cause of

election integrity and promote reasonable and effective voter list maintenance practices. That is its very mission. If Plaintiffs prevail—and key measures to ensure clean voter rolls and common-sense ballot procedures are undone—the Foundation's work will become more difficult and costly. Plaintiffs claim that the Foundation's interests "are vague interests that any member of the public could articulate in this or in any other election law case," (ECF No. 25, PageID# 224), but such a characterization ignores the fact that the Foundation's very mission is different from "any member of the public." The Foundation will need to devote additional resources to its work to make up for the loss of state authority in Virginia were Plaintiffs to prevail; whereas, "any member of the public" would not incur such damages, as such a person is likely not in the business of supporting the enforcement of election integrity laws, as the Foundation is. The Foundation brings a unique perspective and interest to this suit that the current Defendants do not share. *See Kobach v. United States Election Assistance Comm'n*, 2013 U.S. Dist. LEXIS 173872 (D. Kan. Dec. 12, 2013). The Foundation's interest here is sufficient to support intervention.[7]

Second, Plaintiffs misunderstand the Foundation's argument regarding the importance of Social Security numbers. To be clear, the Foundation has not received Social Security numbers when it has requested Virginia's voter roll. The Foundation understands that consulting Social Security numbers is vital to effective and accurate voter list maintenance. For example, when Social Security numbers are maintained in registration records, election officials can easily cross-reference those records with the Social Security Death Index. Social Security data also provides a tool to identify duplicate registration records. The presence of this tool allows the data tools used

[7] It should be noted that Plaintiffs' response contained another incorrect factual statement. The movant's motion to intervene in *League of Women Voters of the United States v. Newby*, 195 F. Supp. 3d 80, 88 (D.D.C. 2016) **was not "unopposed,"** as Plaintiffs claims. (ECF NO. 25, PageID# 225.) It was opposed by at least the League of Women Voters, as indicated in the motion to intervene in that case. (Case. No. 1:16-cv-00236, ECF No. 24.)

by the Foundation to be more effective. Because Social Security numbers are unique (unlike names, addresses, and dates of birth), their use creates results that are highly accurate. As one of the few organizations working with states to clean up voter rolls, the Foundation recognizes the importance of this data. The Foundation's experience and expertise in this area further supports intervention.

CONCLUSION

Therefore, for the foregoing reasons, Intervenor-Defendant requests that its motion to intervene be granted.

Respectfully submitted,

/s/ J. Christian Adams

J. CHRISTIAN ADAMS, VSB No. 42543
Public Interest Legal Foundation
1729 King Street, Suite 350
Alexandria, Virginia 22314
Telephone: (703) 963-8611
adams@publicinterestlegal.org
Counsel for Intervenor-Defendant Public Interest Legal Foundation

CERTIFICATE OF SERVICE

I hereby certify that on January 4, 2022, a true and correct copy of the foregoing reply and its attachments have been served via CM/ECF to all counsel of record in the case.

/s/ J. Christian Adams
J. CHRISTIAN ADAMS, VSB No. 42543