

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

DEMOCRATIC PARTY OF VIRGINIA AND)
DCCC,)

Plaintiffs,)

v.)

Civil Case No. 3:21-cv-00756-HEH

ROBERT H. BRINK, in his official capacity as the)
Chairman of the Board of Elections, *et al.*,)

Defendants,)

v.)

REPUBLICAN PARTY OF VIRGINIA,)

Proposed Intervenor-Defendant)

**MEMORANDUM OF LAW IN SUPPORT OF THE MOTION TO INTERVENE
BY THE REPUBLICAN PARTY OF VIRGINIA**

On December 7, 2021, the Democratic Party of Virginia and the Democratic Congressional Committee (“DCCC”) (collectively, “Plaintiffs”) filed a complaint seeking declaratory and injunctive relief, asking this court to find that a provision of the Virginia Constitution that has stood for nearly half a century requiring Virginia voters to provide their social security numbers when registering to vote now violates the United States Constitution, the Civil Rights Act, and the Privacy Act, and that a Virginia statute that expands notice to voters and opportunities to cure defects in absentee ballots violates the United States Constitution.

The Republican Party of Virginia (“RPV”) is one of two major political parties in Virginia and is the “State Committee” for the Republican Party in the Commonwealth of Virginia, as defined by 52 U.S.C. § 30101(15). RPV’s mission is to elect Republican candidates

in local, county, state, and federal elections in the Commonwealth, and to represent Republican voters across the Commonwealth. Consistent with this mission, RPV is empowered by Virginia law to “provide for the nomination of its candidates, including the nomination of its candidates for office in case of any vacancy,” as well as “perform all other functions inherent in political party organizations.” Va. Code § 24.2-508(iii) & (v). Accordingly, RPV has a clear, substantial, and particularized interest in how elections are conducted and ensuring that elections in the Commonwealth are open, honest, and fair. In order to protect the fairness of this litigation, ensure the presentation of all proper evidence and arguments, and lend credibility to the disposition of this matter, applicants respectfully request that this Court allow RPV to intervene as a defendant in this matter in order to protect their interests in the subject matter of this litigation.

I. APPLICANTS ARE ENTITLED TO INTERVENE AS A MATTER OF RIGHT

Rule 24(a)(2) provides that on a timely motion, the Court must permit intervention by anyone who:

claims an interest relating 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)(2). The United States Court of Appeals for the Fourth Circuit has interpreted this rule to mean “federal courts must permit intervention when, on timely request . . . a proposed intervenor ‘can demonstrate (1) an interest in the subject matter of the action; (2) that the protection of this interest would be impaired because of this action, and (3) that the applicant’s interest is not adequately represented by existing parties to the litigation.’” *N.C. State Conference of NAACP v. Berger*, 999 F.3d 915, 927 (4th Cir. 2021) (quoting *Stuart v. Huff*, 706 F.3d 345, 349 (4th Cir. 2013)).

A. Intervention Is Timely

RPV's motion to intervene is timely. "Where a case has not progressed beyond the initial pleading stage, a motion to intervene is timely." *United States v. Commonwealth of Virginia*, 282 F.R.D. 403, 405 (E.D.Va. 2012). *See also RLI Ins. Co. v. Nexus Servs., Inc.*, Civil Action No. 5:18-CV-00066 (W.D.Va. 2018) (noting that a "case is still in its early stages, with only the initial pleadings filed and discovery recently commencing per the Joint Discovery Plan" for purposes of assessing a timely intervention). This case is still in its early stages. The Complaint was filed on December 7, 2021. Defendants have not filed a responsive pleading; to the contrary, on December 22, 2021, this Court granted a motion to extend the deadline for Defendants to file a responsive pleading to January 12, 2022. Order Granting in Part Defendant's Motion for Extension of Time, Case 3:21-cv-00756-HEH, Document 22 (Dec. 22, 2021). Discovery has not begun and no adjudication on the merits has taken place.

RPV's motion to intervene is made without any delay and does not cause prejudice to the existing parties. Should this Court allow RPV to intervene at this early stage, RPV will have an opportunity to assert its defenses and protect its interests without disrupting, delaying, or dragging out this litigation. (RPV's proposed Motion to Dismiss, which would be its first responsive pleading, is being filed concurrently with this motion and within the Court's deadline for the filing of responsive pleadings.) Therefore, RPV's motion to intervene is timely.

B. Republican Party of Virginia Has An Interest in The Subject Of This Litigation

RPV has a legally protectable interest in this litigation that is at least as legally protectable as that of Plaintiffs. Plaintiffs are the Democratic Party of Virginia and the DCCC. The Democratic Party of Virginia is the recognized state party committee for the Democratic Party in the Commonwealth of Virginia; the party's mission is electing Democrats. *See Compl.*

at ¶ 18. As such, its interest in this litigation is the mirror image of RPV's. *See generally Builders Ass'n of Greater Chicago v. Chicago*, 170 F.R.D. 435, 440-441 (N.D. Ill. 1996) ("Indeed, applicants' interest in this lawsuit is the mirror-image of the Builder Association's interest: The Association claims that its members are being injured by the M/WBE program, and applicants claim that their members will be injured by its invalidation. We find that this interest is sufficient to satisfy Rule 24(a)(2)." (footnote omitted)).

If plaintiffs have a recognized interest in challenging the social security number requirement to make it easier for Democrats to win elections, *see* Compl. at ¶ 18 (asserting that the full social security number requirement "mak[es] it harder for DPVA to succeed in its mission of electing Democrats to public office in elections up and down the ticket."), then RPV surely also has a recognizable interest in ensuring the integrity of the electoral process, which is the countervailing legal and policy interest. Likewise, if the statutory provisions relating to notice and curing of defective ballots "directly threaten[] DPVA's and its candidates' electoral prospects, and, indeed, DPVA's very mission," Compl. at ¶ 20, then RPV has an equal interest in ensuring that it and its candidates are not adversely impacted by Plaintiff's efforts to use the federal courts to overturn the will of the people of the Commonwealth of Virginia, as expressed in duly enacted legislation, or to disrupt the orderly management of elections by forcing Virginia to continue assisting voters who submitted invalid ballots for one week after the election. Compl. at ¶ 130.

Moreover, more generally, political parties have an interest in litigation concerning elections and election procedures. Political parties exist in large part to win elections. Winning elections requires playing by the applicable rules. Changes to those rules, such as those requested by the Plaintiffs, directly impact how political parties allocate resources and strategize in their

campaigns. “[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 Technologies v. Dudas*, 247 F.R.D. 510, 514 (E.D. Va. 2007) (quoting 7C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 1908 (2d ed. 1986)). Therefore, RPV has a legally recognizable interest in this litigation.

C. Republican Party of Virginia’s Interests Would Be Undermined If Plaintiffs’ Requested Relief Were Granted

The risks to RPV’s interests are clear. As they allege, Plaintiffs exist to elect Democratic candidates. A necessary corollary of this mission in partisan races, is preventing Republicans from being elected. As evident in the Complaint, Plaintiffs believe that the requested relief will help Democrats win elections in Virginia. The negative inference of this assertion is that it will cause RPV’s candidates to lose Virginia elections.

The Plaintiffs appear to have in mind an operation in which they would interpose themselves between prospective voters and the state, conveying incomplete state voter registration forms to selected voters and completed forms from the voters to the state. It is unlikely they would provide this service to those residing in Republican-heavy precincts, so their concern, though couched in universal terms, may be anything but universal in its application. Plaintiffs’ suggestion that a voting integrity measure such as an SSN requirement be removed from the state’s form in order to facilitate an increase in the number of Democrat voter registrations Plaintiffs can submit to the state understandably concerns the RPV.

Changes to the duly enacted rules that govern elections impact the allocation of party resources and campaign strategies. Changes that compel a change in campaign strategy inflict harm upon a legally recognized interest. *See generally Shays v. FEC*, 414 F.3d 76, 87 (D.C. Cir.

2005) (“Because Shays and Meehan have asserted equivalent injury — competition intensified by BCRA-banned practices — and thus face an equivalent need to adjust their campaign strategy, they too suffer harm to their legally protected interests.”).

D. RPV’s Interest Is Not Adequately Represented By Existing Parties To This Litigation

None of the existing parties to this litigation adequately represent RPV’s interests. The Plaintiffs clearly do not represent RPV’s interests, and in fact, are inherently adverse to the interests of the RPV and are asking the Court to change the law to advance their own interests at the expense of RPV candidates. The Plaintiffs want to elect Democrats. RPV wants to elect Republicans. While there are some exceptions, electing a Democrat usually means not electing a Republican, and vice versa. Therefore, the Plaintiffs do not and cannot adequately represent RPV’s interests in this litigation.

The Defendants in this matter also do not adequately represent RPV’s interests. Defendants are officials with the Virginia Board of Elections and the Virginia Department of Elections. In general, “[t]he requirements of the Rule are satisfied if the applicant shows that representation of his interest ‘may be’ inadequate; and the burden of making that showing should be treated as minimal.” *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n.10 (1972). However, the Court of Appeals for the Fourth Circuit has set a higher standard where proposed intervenors have the same goal as existing governmental defendants, finding that governmental parties have a presumption of adequacy. *Berger*, 999 F.3d at 931-934; *see also Stuart v. Huff*, 706 f3d 345 (4th Cir. 2013). This presumption is not absolute; rather, it is incumbent upon the application to show inadequacy.

Such inadequacy is present in this case. First, RPV and the state defendants have different interests. RPV seeks to elect Republican candidates. The state does not. Second, the

posture of this case distinguishes it from other matters where a private party claims inadequate representation based on differing interests. Specifically, the presence of a mirror-image plaintiff distinguishes this case from others, such as *Stuart*. The involvement of a mirror-image plaintiff means that one party is actively trying to harm the applicant's interests, while the other party is neutral with respect to that goal. No one is actively protecting RPV's interests.

For the foregoing reasons, no existing party in this litigation adequately represents RPV.

II. ALTERNATIVELY, THE COURT SHOULD GRANT PERMISSIVE INTERVENTION

Even if the applicant is not entitled to intervention as a right under Rule 24(a)(2), this Court should grant RPV permissive intervention under Rule 24(b). Under Rule 24(b), permissive intervention may be granted when there is a timely motion and the party seeking intervention "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(2). The Court must also "consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3).

For the reasons set forth above, this motion is timely. This action is still in its initial stages. To wit, the defendants have not filed a responsive pleading to the original complaint, and RPV is submitting its responsive pleading, a proposed Motion to Dismiss, concurrent with this filing.

RPV has a claim or defense that shares with the main action a common question of law. Plaintiffs claim that the social security number requirements of the Virginia Constitution violate the United States Constitution and relevant federal law. They also claim that notice and curing standards for absentee ballots violate the United States Constitution. RPV disagrees. RPV directly rejects these challenges, contending that Virginia's longstanding constitutional

requirement to provide a social security number and statutory enactments providing a means to cure defective ballots are consistent with the Constitution of the United States and relevant federal law. RPV further contends that the Plaintiffs' requested relief would undermine the interests of the applicant and its members – as suggested by Plaintiffs' statement of interest in this matter, which suggests that enjoining the challenged provisions will help them make sure Democrats win elections. Accordingly, the questions of law and fact are virtually identical to those presently pending in this case.

Finally, the inclusion of RPV as an intervenor will not unduly delay or prejudice the existing parties' rights. As described above, the RPV has sought timely intervention while this case is still at its initial stages. There is no indication that RPV's inclusion will add any delay beyond the norm for multiparty litigation. Nevertheless, to ensure that intervention does not result in undue delay, RPV commits to submitting all filings in accordance with the briefing schedule the Court imposes.

And although Plaintiffs may have to respond to additional arguments if intervention is granted, Plaintiffs "can hardly be said to be prejudiced by having to prove a lawsuit it chose to initiate." *Security Ins. Co. v. Schipporeit, Inc.*, 69 F.3d 1377, 1381 (7th Cir. 1995). In sum, "[a]t this early stage of the case, where even the named defendants are not yet required to answer, no prejudice to plaintiffs can be shown." *Marshall v. Meadows*, 921 F.Supp.1490, 1492 (E.D. Va. 1996).

In addition to the factors set forth in Rule 24(b), a Court deciding whether to grant permissive intervention may consider other factors, such as "the nature and extent of the intervenor's interest" and whether the intervenor will "significantly contribute to the full development of the underlying factual issues" and, by extension, the underlying legal arguments.

Perry v. Schwarzenegger, 630 F.3d 898, 905 (9th Cir. 2011) (quoting *Spangler v. Pasadena City Bd. of Ed.*, 552 F.2d 1326, 1329 (9th Cir. 1977)), vacated on other grounds, *Hollingsworth v. Perry*, 133 S.Ct. 2652 (2013). These additional considerations also strongly support permissive intervention.

Allowing RPV to intervene in this case will promote fairness in the law, and efficiency in this case by allowing the Court to consider all competing claims and interests at one time. This is particularly true where, as here, the party seeking intervention is the mirror-image of a party already in the case. *See generally Democratic National Committee, et. al. v. Bostelmann, et al.*, Opinion and Order, Case No. 3:20-cv-00249-wmc (Mar. 28, 2020) (granting permissive intervention to the Republican National Committee because “they are uniquely qualified to represent the ‘mirror-image’ interests of the plaintiffs, as direct counterparts to the DNC/DPW.”). Therefore, if the Court does not believe that RPV qualifies to intervene as a matter of right, it should grant permissive intervention.

CONCLUSION

The Court should grant RPV’s motion to intervene as defendants.

Dated: January 12, 2022

Respectfully submitted,

By: /s/David A. Warrington
David A. Warrington (VSB No. 72293)
Dhillon Law Group Inc.
2000 Duke Street, Suite 300
Alexandria, VA 22314
T: 703.328.5369

Harmeet K. Dhillon*
Michael A. Columbo*
Dhillon Law Group Inc.
177 Post Street, Suite 700
San Francisco, CA 94108
T: 415.433.1700

harmeet@dhillonlaw.com

mcolumbo@dhillonlaw.com

**Admission pro hac vice forthcoming*

*Counsel for Proposed Intervenor-Defendant
Republican Party of Virginia*

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing to all counsel of record in this action.

Dated: January 12, 2022

By: /s/David A. Warrington
David A. Warrington

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