UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

VIRGINIA VOTER'S ALLIANCE and DAVID NORCROSS, Plaintiffs, v. ANNA J. LEIDER, in her official capacity as General Registrar for the City of Alexandria, Defendant.	)	No. 16-394-LMB/MSN

BRIEF IN SUPPORT OF THE
MOTION OF THE LEAGUE OF WOMEN VOTERS OF VIRGINIA
TO INTERVENE

Proposed intervenor the League of Women Voters of Virginia (the "League") seeks to protect the interests of individual voters and ensure that no voter in the City of Alexandria has their registration improperly or illegally canceled in advance of the 2016 General Election as a result of the Plaintiffs' request for court-ordered voter "list maintenance." No such court-ordered action is appropriate under—much less required by—the National Voter Registration Act ("NVRA"), a federal statute designed to make it *easier* for voters to obtain and maintain their registration to vote. The League thus respectfully moves to intervene in this matter and file the attached League of Women Voters of Virginia Brief in Support of Motion to Dismiss Count I (Exhibit A hereto), hereby lodged with the Court.

I. The Vital Interests of the League in Protecting Voting Rights and Voter Registration.

The League is a nonprofit, nonpartisan membership organization that has been conducting voter registration drives and voter education and outreach in Virginia for decades. The League has a strong interest in promoting and protecting the registration of voters in the City of Alexandria. The League likewise has a strong interest in opposing the aggressive—and potentially unlawful—list-maintenance strategies that Plaintiffs would have the Court order as relief in Count I of the Complaint. To be sure, the League has at least as much interest as the Plaintiffs with respect to the relief requested in Count I of the Complaint.

II. The Court Should Grant the Motion to Intervene.

"[L]iberal intervention is desirable to dispose of 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); *Town of Davis v. W. Virginia Power & Transmission Co.*, 647 F. Supp. 2d 622, 629 (N.D. W. Va. 2007) (quoting the same).

a. The Court Should Grant the Motion to Intervene as of Right.

Federal Rule of Civil Procedure 24(a) provides:

> [o]n timely motion, the court must permit anyone to intervene who:
> . . .
> (2) 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.

The League satisfies the Rule's requirements for intervention as of right.

i. The Motion to Intervene Is Timely.

"In order to properly determine whether a motion to intervene in a civil action is sufficiently timely, a trial court in this Circuit is obliged to assess three factors: first, how far the

underlying suit has progressed; second, the prejudice any resulting delay might cause the other parties; and third, why the movant was tardy in filing its motion." *Alt v. Env. Protection Agency*, 758 F.3d 588, 591 (4th Cir. 2014).

Where, as here, a case has not progressed beyond the initial pleading stage, a motion to intervene is timely. *United States v. Virginia*, 282 F.R.D. 403, 405 (E.D. Va. 2012) ("Here, the Motion to Intervene was filed in a timely manner. The United States filed its Complaint on January 26, 2012. The Petitioners filed their motion on March 2, 2012—before the initial pleading stage had finished. Where a case has not progressed beyond the initial pleading stage, a motion to intervene is timely.").

Furthermore, "[t]he most important consideration in deciding whether a motion for intervention is untimely is whether the delay in moving for intervention will prejudice the existing parties to the case." 7C Charles Alan Wright & Arthur Miller, Fed. Prac. & Proc. Civ. § 1916 (3d ed. 2015). Here:

- the Registrar consents to the requested intervention;
- no other parties have intervened, and the Registrar's motion to dismiss has yet to be heard;
- discovery just started and the case is still in its earliest stage;
- intervention will cause no delay in the case; and
- intervention will impose no extra burden on the Plaintiffs.

Indeed, should the Court properly dismiss Count I of the Complaint for failure to state a claim for relief under the NVRA, the League would no longer seek to participate in the case, unless (a) Plaintiffs were to file an amended complaint again seeking to compel the Registrar to more aggressively conduct list maintenance, risking the unlawful cancellation of valid voter

registrations, or (b) if Plaintiffs appealed the dismissal of Count I. Intervention will thus in no way prejudice the Plaintiffs.

ii. The League's Interests Will Be Impaired If the Alexandria Voting Rolls Are Improperly or Illegally Purged.

For the reasons set forth in the attached Brief, the interests of the League in protecting registration and voting rights are threatened by the court-ordered "voter list maintenance" that Plaintiffs seek to compel in Count I. The threat is particularly grave when the requested relief could itself violate the NVRA. 1/ Any court-ordered action that would result in eligible voters' registrations being put at risk by unnecessary, improper or unlawful purges of the voting rolls would directly harm the interests of the League and its longstanding efforts to promote and maintain lawful voter registration. This potential harm is particularly great in light of the upcoming 2016 General Election.

iii. The Registrar May Not Adequately Protect the League's Interests.

In determining whether existing parties "adequately represent" the interests of the League, "[t]he requirement of the Rule is 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 Am.*, 404 U.S. 528, 538 n.10 (1972); *see also United Guaranty Residential Ins. v. Phila. Sav. Fund Soc'y*, 819 F.2d 473, 475 (4th Cir. 1987).

Plainly, Plaintiffs and the League have different views regarding the interpretation and application of the NVRA. To the extent Plaintiffs have standing to pursue Count I, the League has a similar interest in ensuring that the NVRA is properly applied consistent with its intended purpose: to protect (rather than impair) the rights of voters to obtain and maintain their registration.

1/ The NVRA specifically provides for a private right of action. 52 U.S.C. § 20510(b).

The defendant Registrar is a public servant with limited resources and broad responsibilities. As set forth in the City's press release regarding the most recent re-appointment of the Registrar, "[t]he registrar's statutory responsibilities include operating a local office and voter registration services, maintaining voter registration records, certifying candidates for local office, and providing local administration of elections." Alexandria Electoral Board Re-Appoints Registrar of Voters, May 19, 2015, www.alexandriava.gov/84878. As courts recognize in considering requests to intervene in cases where there are only governmental defendants, public officials have different responsibilities and interests than private parties and advocacy groups. *See, e.g., Trbovich*, 404 U.S. 538-39; *United States v. Virginia*, 282 F.R.D. at 405-6; *Cooper Technologies, Co. v. Dudas*, 247 F.R.D. 510, 515 (E.D. Va. 2007); *Nish and Goodwill Services, Inc. v. Cohen*, 191 F.R.D. 94, 97-98 (E.D. Va. 2000). For example, in considering the request of advocacy groups for the visually impaired to intervene in a case involving interpretation of the Randolph–Sheppard Act and its applicability to contracts for military mess hall services in a suit brought against the Secretary of Defense and the Army, the court reasoned:

> From a strategical standpoint, because the government interests in the case are not identical in many respects to the interests of blind business vendors, the government Defendants are likely to take a different approach to the litigation than Applicants. For example, the government must focus their attention on the national security of all citizens of the United States. Yet, the interests of blind business vendors are often distinct from those of the public at large—and it is only this small visually challenged segment of the population that Applicants, for the most part, seek to protect.
>
> Furthermore, Applicants correctly highlight the government's lower threshold of familiarity with the Act—as compared to advocacy groups such as the several Applicants that have tracked the Act's legislative development over the years. Sole representation by the government, therefore, may not be as zealous and effective as representation strengthened by Applicants' calculated intervention.

Nish, 191 F.R.D. at 98.

While the interests of the League and the Registrar are aligned with respect to the requested dismissal of Count I, should Count I proceed past the pleading stage, the Registrar has distinct governmental interests—including managing an office, stewarding limited public resources, and running elections—that may affect her approach in defense of the litigation. The interests of the League in this case, on the other hand, are focused entirely on the proper interpretation and application of the NVRA and the protection and preservation of the right to vote. Whether this litigation actually infringes those interests is not the question before the Court on this motion to intervene. "Rather, the Court must determine whether the Complaint simply implicates the significant, yet unrepresented interests of a voiceless group who wishes to intervene." *United States v. Virginia*, 282 F.R.D. at 405-06.

As the League has satisfied all the requirements for intervention as of right, its motion should be granted.

b. The Court Should Grant Permissive Intervention.

In the alternative, the Court should allow permissive intervention. Rule 24(b)(1)(B) permits intervention on timely motion when a person "has a claim or defense that shares with the main action a common question of law or fact." As discussed above, and in the attached Brief, the League asks the Court to deny Plaintiffs' request to compel the Registrar to conduct processes for list maintenance beyond what the Registrar and the Commonwealth of Virginia currently do and beyond what is required by the NVRA. Indeed, the relief requested in Count I could potentially *violate* the NVRA. The League's request for dismissal of Count I thus presents the same issues of law and fact presented in the main action. As also discussed above, intervention will not "unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3).

For example, in *Florida v. United States*, 820 F. Supp. 2d 85 (D.D.C. 2011), Florida sought preclearance for changes to its voting laws (including restrictions on voter registration requirements) under Section 5 of the Voting Rights Act. Numerous advocacy groups were "granted leave to intervene permissively as defendants" because they each had "a special interest in the administration of Florida's election laws." *Id.* at 86-87. The League has a similar special interest in the proper interpretation and application of the NVRA in this case, and its voice should be heard.

CONCLUSION

The Court should grant the League's motion to intervene as of right or, in the alternative, grant permissive intervention.

Respectfully submitted,

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Dated: June 10, 2016

CERTIFICATE OF SERVICE

I certify that on the 10th day of June, 2016 the foregoing was filed via the Court's CM/ECF filing system which will send a notification of filing to the following counsel of record:

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EXHIBIT A

UNITED STATES DISTRICT COURT
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VIRGINIA VOTER'S ALLIANCE and DAVID NORCROSS, Plaintiffs, v. ANNA J. LEIDER, in her official capacity as General Registrar for the City of Alexandria, Defendant.	)	No. 16-394-LMB/MSN

LEAGUE OF WOMEN VOTERS OF VIRGINIA
BRIEF IN SUPPORT OF MOTION TO DISMISS COUNT I

Intervenor the League of Women Voters of Virginia (the "League") respectfully submits this Brief in Support of Motion to Dismiss Count I. The League joins in the Rule 12(b)(6) arguments for dismissal of Count I made by the Registrar, and further states the following:

Introduction

The National Voter Registration Act ("NVRA") was passed to make it easier for citizens to obtain and maintain their registration to vote. Section 20507 of the NVRA was designed as a shield to protect voters from losing their registration and ability to vote, but Plaintiffs erroneously seek to use this section as a tool to potentially disenfranchise properly registered voters in the City of Alexandria.

The NVRA

As the Third Circuit explained in *Welker v. Clarke:*

> One of the NVRA's central purposes was to dramatically expand opportunities for voter registration and to ensure that, once registered, voters could not be removed from the registration rolls by a failure to vote or because they had changed addresses.

239 F. 3d 596, 598-99 (3d Cir. 2001). The NVRA provides robust protections against the erroneous removal of voters from the registration rolls for federal elections. These protections generally bind any state actor seeking to cancel voter registrations. Indeed, a lawfully registered voter "has a personal right to have his name remain on a register or voting list for the period prescribed by law. A voter may not be deprived of this right without some procedure that," at a minimum, "complies with the requirements of due process." 29 C.J.S. Elections § 77 (2016).

While it is possible to divest a voter from their "personal right to . . . remain on a register or voting list," the NVRA permits such action only in limited circumstances. *See* 29 C.J.S. Elections § 77; 52 U.S.C. § 20507. Specifically, the NVRA provides that "the name of a registrant may not be removed from the official list of eligible voters except" where:

- the registrant requests to be removed, § 20507(a)(3)(A);
- required by State law by reason of criminal conviction or mental incapacity, § 20507(a)(3)(B);
- the registrant has died, § 20507(a)(4)(A); or
- the registrant's residence has changed, § 20507(a)(4)(B), but *only where* the registrant:
    - confirms in writing that the registrant has moved to a place outside of the registrar's jurisdiction, § 20507(d)(1)(A); or
    - fails to respond to written notice (including a postage pre-paid response card) from the registrar *and* fails to vote in two successive federal general elections after the date of the notice, § 20507(d)(1)(B).

Section 20507(a)(4) does require the registrar to "conduct a general program that makes a reasonable effort" to remove from official lists the names of voters ineligible by reason of death or change in residence. But the statute expressly provides that "[a] State may meet" the requirement simply by establishing a program using change-of-address information supplied by the Postal Service. 52 U.S.C. § 20507(c)(1)(A). Moreover, the "general program" under § 20507(a)(4)(a) must comply with the other provisions of the statute, and (b) cannot include the systematic removal of ineligible voters within 90 days of any federal election, § 20507(c)(2)(A).

Count I Fails to State a Claim under the NVRA

Turning the statute on its head, Plaintiffs point to the registration removal protection provisions of the NVRA, and then ask the Court to order the Registrar to execute "voter list maintenance programs to ensure that only eligible voters are registered to vote in the City of Alexandria." Compl. ¶ 1. There is no requirement in the NVRA for the Registrar "to ensure that only eligible voters are registered to vote in the City of Alexandria," and no claim under the NVRA for the unspecified relief requested in Count I. Moreover, with the General Election looming on November 8, 2016, no program of systematic removal of ineligible voters can take place in Alexandria after August 10, 2016. 52 U.S.C. § 20507(c)(2)(A).

Plaintiffs' effort to disregard the plain and specific requirements of the NVRA must be rejected. In construing the NVRA, like any other federal statute, "the court applies the plain meaning of the statutory language, unless there is a clearly expressed legislative intent to the contrary, or 'when a literal application would frustrate the statute's purpose or lead to an absurd result.'" *Project Vote/Voting For Am., Inc. v. Long*, 752 F. Supp. 2d 697, 705 (E.D. Va. 2010), *affirmed* 682 F.3d 331 (4th Cir. 2012). Section 20507(a)(4) only requires the State to conduct a "general program" that makes a "reasonable effort" to remove from the official lists voters

ineligible by reason of death or change in residence. There is no question that Virginia conducts a "general program" for precisely that purpose. *See, e.g.*, Va. Code § 24.2-427. Virginia's program follows the direction in NVRA § 20507(c)(1)(A), thereby satisfying the requirements of § 20507(a)(4). *See* Va. Code § 24.2-428. Plaintiffs do not and cannot allege that the Registrar has violated any aspect of Virginia's general program adopted in compliance with the NVRA.

Unable to plead any violation of the express requirements of § 20507(a)(4), Plaintiffs attempt to read into the statute into a requirement "to remove the names of ineligible voters" generally. Pls.' Opp'n to Mot. to Dismiss (Dkt. 15) 5. But the statute imposes no such requirement. Further, as well argued by the Registrar, there are no actual alleged facts, as opposed to conclusory contentions, in the Complaint even suggesting, much less plausibly establishing, any non-compliance with the NVRA by the Registrar. Rather, it appears that Count I rests entirely on two thin factual allegations:

First, Plaintiffs make the vague and unsubstantiated assertion that "[a]ccording to publicly available data disseminated by the United States Census Bureau and the federal Election Assistance Commission, voter rolls maintained by the Defendant for the City of Alexandria have contained at various times over the past few election cycles either more registrants than eligible voting-age citizens or an implausibly high number of registrants." Compl. ¶ 11. As an initial matter, this allegation lacks the specific facts necessary to draw any cognizable conclusion. No specific census or registration data are identified as the supposed reference points, no specific comparison is made between census data and registration data, and no timeframe other than "the last few election cycles" is stated. Similarly, there are no specific allegations *at all* as to what Plaintiffs mean by an "implausibly high number of registrants" or when there were supposedly

such an "implausibly high number of registrants" on the voting rolls in Alexandria. Such a vaporous allegation provides no foundation for a viable claim of violation of the NVRA.

Moreover, it is simply wrong to assume that a large number of registrants—even an amount exceeding the voting age population—on its own supports a plausible claim for violation of the NVRA. 1/ The NVRA is specifically designed to restrict and slow down the removal of ineligible voters from the rolls to ensure that eligible voters do not improperly lose their registration and their ability to vote. Under the NVRA, when a registrant moves away from Alexandria, unless that registrant either (1) specifically requests to be removed from the rolls, § 20507(a)(3)(A), or (2) responds to the written notice sent by the Registrar confirming that they no longer reside in Alexandria, § 20507(d)(2), the registrant *cannot be removed* from the official voting lists for two federal general elections after the date of the statutory notice, § 20507(d)(1), a period of anywhere from two to four years *after* the notice is sent. Furthermore, for the 90-day period leading up to a federal election, there can be no systematic removal of voters from the rolls, including removal based on change of address. § 20507(c)(2)(A); *see also Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1346 (11th Cir. 2014). Under the NVRA, it is thus expected that there will be many registrants who have, in fact, moved away from a jurisdiction yet remain on the jurisdiction's voting list for years. Moreover, under Virginia law, voters who have left Alexandria but remain in the Commonwealth may still legally vote in their old precincts for certain periods of time. Va. Code § 24.2-401.

1/ Plaintiffs' reliance on *Judicial Watch v. King* to oppose dismissal for failure to state a claim is misplaced. Pls.' Opp'n 8-10. The court in *Judicial Watch* did not rule that the plaintiffs had met their Rule 8 pleading burden merely by referencing a comparison between census data and registration data. 993 F. Supp. 2d 919, 921-23 (S.D. Ind. 2012). Rather, the Court was instead determining whether plaintiffs had satisfied the requirement of providing written notice of the claimed NVRA violation before bringing a civil action for relief. *Id.*; 52 U.S.C. § 20510(b). While the ruling in the *ACRU* case does lend support to Plaintiffs' position, *see* Pls.' Opp'n 6-8, and Ex. 1 thereto at 16-17, the League respectfully submits that the Western District of Texas simply got it wrong on this point, for all the reasons discussed above.

Given this consequence of the registration protection provisions of the NVRA, in a jurisdiction with high voter participation and a relatively transient population, like Alexandria, it is entirely plausible that the number of registrants could exceed the eligible voting age population. Such a situation could just as easily be the result of *compliance* with the NVRA as a supposed violation. Stopping short of the line between possibility and probability, paragraph 11 is not a "plain statement" possessing enough heft to "sho[w] that the pleader is entitled to relief." *Bell Atlantic v. Twombly*, 550 U.S. 544, 557 (2007); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.").

Second, Plaintiffs contend that the Registrar has somehow failed to comply with her duties under the NVRA because she allegedly makes no effort to use data "obtained from jury excusal forms." Compl. ¶ 17. But the NVRA makes no mention of—much less requires—use of data obtained from jury excusal forms or the like as part of a registrar's duty to conduct a "general program that makes a reasonable effort to remove the names of ineligible voters … [who have died or moved]." Indeed, reliance solely on Postal Service change-of-address data is expressly sufficient. § 20507(c)(1). Moreover, Plaintiffs themselves allege that the only purpose of using "jury excusal forms" would be to identify "Alexandria residents who self-identify as non-citizens or non-residents …" Compl. ¶ 17. 2/ By Plaintiffs' own allegation, the forms would not reveal death or change of residence and therefore could not be used under § 20507(a)(4). Thus, the jury excusal form allegation likewise provides no basis to draw any plausible inference of a violation of the NVRA.

2/ It is unclear what Plaintiffs mean when they allege that jury excusal forms would identify "Alexandria residents who self-identify … as non-residents of the City of Alexandria."

Count I Fails to State a Claim under HAVA

Plaintiffs also points to the Help America Vote Act ("HAVA"), and its requirement that local officials perform computerized list maintenance on a regular basis. 52 U.S.C. § 21083(a)(2)(A). They do so in an attempt to argue that the Registrar has a "federal obligation to maintain accurate and current voter rolls which contain the names of only eligible voters residing in the City of Alexandria." Compl. ¶ 8. Not so. Removal of registrants is governed by the NVRA, as HAVA itself expressly recognizes. 52 U.S.C. § 21083(a)(2)(A)(1) ("if an individual is to be removed from the computerized list, such individual shall be removed in accordance with the provisions of the National Voter Registration Act"); *see also Project Vote/Voting for Am., Inc. v. Long*, 682 F. 3d 331, 338 (4th Cir. 2012) ("HAVA explicitly states that 'nothing in this [Act] may be construed ... to supersede, restrict, or limit the application of ... The National Voter Registration Act,'" and "HAVA cannot restrict or limit the application of the NVRA's . . . requirement[s]."). For the reasons addressed above, there is no alleged violation of the NVRA. Given the express provisions of HAVA deferring to the NVRA, there is thus no alleged violation of HAVA.

CONCLUSION

For the reasons stated above, the Court should dismiss Count I for failure to state a claim.

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