

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
Lynchburg Division**

LEAGUE OF WOMEN VOTERS OF VIRGINIA *et al.*,

Plaintiffs,

v.

VIRGINIA STATE BOARD OF ELECTIONS *et al.*,

Defendants.

Case No. 6:20-cv-00024-NKM

**BRIEF OF THE PUBLIC INTEREST LEGAL FOUNDATION AND LANDMARK
LEGAL FOUNDATION AS *AMICI CURIAE***

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INTRODUCTION

In 2018, according to reports and court documents, a James City, Virginia man submitted an absentee ballot application in the name of his deceased wife so that he could cast a second vote in the 2018 General Election.¹ This failed attempt was presumably possible because the man's wife remained registered to vote after her death. Research conducted by proposed *amicus curiae* Public Interest Legal Foundation ("PILF") and attached to this brief indicates that such an occurrence is not rare. In fact, PILF's research reveals thousands of active registrants in Virginia who are almost certainly deceased, according to verifiable death records.

Plaintiffs ask this Court to invalidate Virginia's requirement that absentee ballots be voted and signed in the presence of a witness. Va. Code § 24.2-707(A). That requirement is not "ineffectual," as Plaintiffs claim. (Doc. 17 at 10.) Rather, it fosters trust in the absentee voting process and deters those who might attempt to cast a ballot in someone else's name. Simply put, it is another layer of protection against absentee ballot fraud. If that layer is removed, as Plaintiffs desire, the James City man's scheme will become more tempting and easier to accomplish.

Attached to this brief is research submitted by PILF to the Virginia Department of Elections. PILF's research reveals potential errors and inaccuracies on Virginia's voter rolls. While election officials alone are the final judge of voter eligibility and are perfectly capable of replicating PILF's research, PILF believes this Court should be aware of potential problems with the voter rolls that could be exploited under the absentee ballot system Plaintiffs seek.

¹ Steve Roberts Jr., *Court docs: James City man indicted on voter fraud charges*, The Morning Call, April 9, 2019, <https://www.mcall.com/va-vg-richard-dohmen-indicted-0409-story.html> (last accessed April 28, 2020). Official court records can be found by using the Virginia Judiciary's Online Case Information System 2.0 at <https://eapps.courts.state.va.us/ocis/landing/false>. The case numbers are CR19028447-00 and CR19028448-00.

Additionally, Plaintiffs have not demonstrated their entitlement to preliminary injunctive relief under Supreme Court and Circuit precedent. Obligating an absentee voter to obtain a witness signature does not place an undue burden on the right to vote in violation of the First and Fourteenth Amendments. Rather, it helps protect the integrity of the absentee ballot voting process. *Amici* therefore respectfully urge the Court to deny Plaintiffs' request for a preliminary injunction (Doc. 17) and deny the parties' motion for consent judgment and decree (Doc. 35).

ARGUMENT

I. PILF's Voter Roll Research and Submission of Findings to the Virginia Department of Elections.

As part of its organizational mission, PILF analyzes voters rolls across the Nation to assess their health. In October 2019, PILF purchased a copy of Virginia's statewide voter roll.² Then, at considerable expense, using detailed methodologies and matching techniques (described *infra* and in the attached letter) PILF flagged registrations that are potentially inaccurate, outdated, or no longer valid. In Virginia, these registrations include the following: (1) registrations belonging to likely deceased individuals; (2) registrations apparently listing a commercial address as a residence; and, (3) persons apparently registered twice across state lines. On April 27, 2020, PILF sent a letter to the Virginia Department of Elections that describes PILF's methodology and findings and asks the Department to investigate and take corrective action where necessary.³ Exhibit A (hereafter, the "Letter"). PILF also submitted unredacted spreadsheets containing the voter registration data described in the Letter. The portion of that data pertaining to potentially deceased registrants is attached as Exhibit B.

² See <https://www.elections.virginia.gov/candidatepac-info/client-services/> (last accessed April 28, 2020).

³ Election officials are the final judge of voter eligibility. PILF merely asks election officials to do what is permissible under state and federal law to investigate the leads PILF submits.

II. PILF Matched 11,600 Registrants to a Verifiable Record of Death.

PILF’s research indicates that there are potentially 11,600 deceased individuals with an active registration in Virginia. Letter at 1; Exhibit B. In a normal election, each of those potentially deceased individuals presents an opportunity for confusion and even fraud. Surviving spouses, relatives, or caretakers, may not—like the James City man—resist the temptation to request an absentee ballot in the name of the deceased,⁴ which can be done online⁵ and through the mail.⁶ In the election proposed by the Plaintiffs—where absentee ballots can be cast without a witness—the temptation to cast an absentee ballot in the name of a deceased family member may become even greater. Were someone to succeed in doing so, it would cancel out the legitimate vote of another Virginian.⁷

It is possible that surviving spouses and relatives may not need to even make a request to receive an absentee ballot for a deceased registrant. Virginia’s absentee ballot application explains, “You can apply to vote absentee as early as *one year* before the election. Ballots are

⁴ To request an absentee ballot, the applicant must provide the last four digits of the registrants Social Security number, among other personal information. *See* Application Form accessible at link in note 6. However, this is information surviving spouses and family members would know or could easily access.

⁵ <https://www.elections.virginia.gov/casting-a-ballot/absentee-voting/> (last accessed April 28, 2020).

⁶ <https://www.elections.virginia.gov/media/formwarehouse/absentee-voting/applications/SBE-701-Absentee-Ballot-Application-Rev7-17-long.pdf> (last accessed April 28, 2020). According to the Application Form, applicants can opt to have their ballots sent to them via email.

⁷ Those handling absentee ballots will sometimes try to match signatures on ballot envelopes with those on the voter rolls. While signature matching programs are admirable, they are often inefficient at detecting fraud. *See* Times Staff Writers, *A ‘Modern’ Democracy That Can’t Count Votes*, Los Angeles Times, December 11, 2000, <https://www.latimes.com/archives/la-xpm-2000-dec-11-mn-64090-story.html> (last accessed April 24, 2020) (“I don’t have much faith in that process,” says Melody Rose, an assistant professor of political science at Portland State University. ‘I can forge my husband’s signature perfectly.’”).

available 45 days before most elections.”⁸ Such a generous window for absentee ballot requests increases the likelihood that a registrant will apply to vote absentee, but later die prior to the election. If the registrant is not removed from the voter roll, an absentee ballot would likely be sent *automatically* to the applicant’s residence.

In order to ensure a high degree of confidence, PILF matched voter roll data against the federally maintained cumulative Social Security Death Index (SSDI), and where possible, against the SSDI *and* printed obituaries and other public notices. Letter at 2. Over 65 percent of registrants matched against the SSDI apparently died in September 2019 or earlier, with some dates of death reaching back decades. Letter at 2.

The true number of deceased registrants is likely even higher because PILF analyzed only registrants with *active* registrations. However, concerns about fraud remain even for deceased registrants with an *inactive* registration because all an inactive registrant (or someone pretending to be her) must do to return to active status is provide a current address. Va. Code § 24.2-428.2(1). Unscrupulous actors could exploit such a scheme as well.

III. PILF Invites the Court to Appoint an *Amicus Curiae* to Verify PILF’s Research.

PILF’s research can be replicated. PILF hopes that replication can resolve any doubts concerning ambiguities in the data. PILF believes its data are correct but invites the Court to verify it. PILF welcomes efforts to verify and improve upon its work so that the Court is working with the most accurate and up-to-date data when rendering a decision in this matter. For example, PILF invites the Court to appoint its own *amicus curiae* to perform this function, if the

⁸ Instructions, Virginia Absentee Ballot Application Form, <https://www.elections.virginia.gov/media/formwarehouse/absentee-voting/applications/SBE-701-Absentee-Ballot-Application-Rev7-17-long.pdf> (last accessed April 24, 2020) (emphasis added).

Court believes it is warranted, and PILF is happy to work with any such designee to assist in cataloging the numbers of deceased registrants that could pose risks under the Plaintiffs' requested absentee voting scheme.

If the Court does not appoint an *amicus curiae*, PILF requests that the Court take judicial notice of the attached findings that were derived from government records. Federal Rule of Evidence 201 allows the Court to take judicial notice of facts that "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2). Given that the source of many of PILF's findings are government records (the SSDI and Virginia's official voter roll), those findings "can be accurately and readily determined." *Id.* Use of the Court's judicial notice powers is therefore appropriate.

IV. Requiring a Witness Signature When Validating an Absentee Ballot Does Not Amount to an Unconstitutional Burden.

Virginia's requirement that a voter completing an absentee ballot obtain a witness signature guards against fraud. Requiring verification of identity ensures a safe and honest election. It is a minimal burden that is especially necessary because of the increasing likelihood that large numbers of absentee ballots are expected to be cast in both the primary and the general elections. Plaintiffs' arguments under the First and Fourteenth Amendments must therefore fail.

A. Reasonable Limitations on the Voting Process Are Not Unconstitutional.

States regulate the time, place and manner of their elections. U.S. Const. art. I § 4, cl. 1. The right to vote in any way is not absolute. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). And to achieve the necessary objective of a fair, orderly and honest election, states enact comprehensive and sometimes complex election codes. These provisions affect—at least to some degree—the individual's right to vote. *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983). Reasonable and nondiscriminatory restrictions are justifiable because of a state's important

regulatory interests in ensuring a fair and honest election. *Id.* Voting regulations, therefore, do not automatically trigger strict scrutiny—even when they affect the right to vote. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997).

Thus, courts must determine the burden the regulation places on voters when setting the standard of review. “While a rational basis standard applies to state regulations that do not burden the fundamental right to vote, strict scrutiny applies when a state’s restriction imposes ‘severe’ burdens.” *NE Ohio Coal. for Homeless v. Husted*, 696 F.3d 580, 592 (6th Cir. 2012). In less severe cases, courts apply the flexible *Anderson-Burdick* standard:

Under this test,

A court considering a challenge to a state election law must weigh “the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate” against “the precise interests put forward by the State as justifications for the burden imposed by the rule,” taking into consideration “the extent to which those interests make it necessary to burden the plaintiff’s rights.”

Burdick 504 U.S. at 434 (*quoting Anderson*, 460 U.S. at 789). There is thus no ‘litmus test’ to separate valid from invalid voting regulations. And courts must balance the burden placed on voters against the state’s asserted justifications and “make the ‘hard judgment’ that our adversary system demands.” *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 190 (2008). Any burden should be “justified by relevant and legitimate state interests ‘sufficiently weighty to justify the limitation.’” *Crawford*, 553 U.S. at 191 (*quoting Norman v. Reed*, 502 U.S. 279, 288-289 (1991)).

The absentee ballot witness requirement—by Plaintiffs’ own admission—does not trigger strict scrutiny. (Doc. 17 at 2.) Thus, the relevant and legitimate state interest of preventing absentee ballot fraud should be weighed against the burden of requiring a witness signature.

B. The Requirement Places a Minimal, But Necessary Burden on Absentee Voters.

The Court should not circumvent the legislature and abolish a rule the Commonwealth considers necessary to the absentee ballot process. Recent actions by the Virginia legislature illuminate the importance the Commonwealth places on the witness signature requirement. During its most recent session, the legislature removed a traditional voter protection that had survived judicial review—the photo identification requirement for in-person voting. *Governor Northam Signs Sweeping New Laws to Expand Access to Voting*, April 12, 2020.⁹ The legislature also eliminated the requirement of needing an excuse for absentee mail voting. *Id.* Importantly, it did not remove the absentee ballot witness requirement. A reasonable conclusion can therefore be drawn that, even during a period where the Virginia legislature has abolished other voter protections, it continues to consider the witness signature requirement an important necessity in protecting the integrity of the voting process.

Second, requiring a witness signature reduces the chances for voter fraud. A comprehensive study, headed by former President Jimmy Carter and former Secretary of State James Baker concluded that “absentee ballot remains the largest source of potential voter fraud.” Report of the Commission on Federal Election Reform, *Building Confidence in U.S. Elections*, Sept. 2005.¹⁰ Absentee ballots are particularly vulnerable as they are unsecured and often mailed to the wrong person or address. The witness signature deters fraud by reducing the opportunities for vote buying and reduces the chances that a voter will be subject to undue pressure. In short, it

⁹ Available at <https://www.governor.virginia.gov/newsroom/all-releases/2020/april/headline-856055-en.html> (last accessed April 26, 2020).

¹⁰ Available at <https://www.legislationline.org/download/id/1472/file/3b50795b2d0374cbef5c29766256.pdf> (last visited April 26, 2020).

places another layer of protection and accountability into a process that is particularly vulnerable to fraud.

Finally, the Plaintiffs overstate the burden requiring a witness signature places on the voter. (Doc. 17 at 16.) They assert that living alone and having a witness sign an absentee ballot will automatically violate social distancing guidelines and expose them to transmission of COVID-19. (Doc. 17 at 9.) To them, it is a binary choice—either do not vote or unduly expose oneself to the virus. They make no allowance for commonsense practices that greatly reduce the chance of transmission.

It is possible to maintain social distance and still complete the witness signature requirement. Individuals can communicate and complete the absentee ballot while wearing protective face masks. A witness can be in the same room as the voter, maintain a distance of six feet and still observe the signature process. Voters and witnesses can also use different pens to complete and sign the ballot. Other basic sanitation procedures can further reduce the remote chance of transmission.

These burdens are minimal and necessary, despite Plaintiffs' protestations. They are offset by the benefits of protecting the vulnerable absentee ballot process from fraud. As a result, the absentee witness requirement does not violate the *Anderson-Burdick* test.

CONCLUSION

Inaccurate voter rolls create risks for the franchise. Those risks are heightened when safeguards—like Virginia's witness requirement—are stripped away. For that reason, the research discussed herein merits consideration and further investigation by election officials and this Court alike. Moreover, the minimal burden of obtaining a witness signature does not rise to an unconstitutional level in light of the state's important interest in deterring absentee ballot

fraud. This Court should accordingly deny Plaintiffs' request for a preliminary injunction and the parties' motion for a consent judgment and decree.

Dated: April 28, 2020.

Respectfully submitted,

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