

**IN THE 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

**MEMORANDUM OF LAW IN SUPPORT OF INTERVENOR  
REPUBLICAN PARTY OF VIRGINIA, INC.'S MOTION  
FOR AN ORDER TO SHOW CAUSE WHY  
DEFENDANTS SHOULD NOT BE HELD IN CONTEMPT**

Attorney General Mark Herring, the State Board of Elections, and Commissioner Christopher Piper (“Defendants”) are failing voters across the Commonwealth of Virginia.<sup>1</sup> By at least August 5, these Defendants had agreed to a Partial Consent Judgment and Decree (“Consent Decree”). On August 20, the Virginia Department of Elections issued guidance regarding the witness signature requirement in Virginia labeled as “Updated for Nov. and Ready.” The guidance

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<sup>1</sup> The Republican Party of Virginia, Inc. is required to file this motion to enforce the Consent Decree because of the failure of the League of Women Voters of Virginia to do so. Enforcement should have been pursued by the League of Women Voters of Virginia or its counsel, but Intervenors are unaware of any follow-up related to this matter to protect the rights of voters. The League of Women Voters of Virginia appears more concerned about obtaining relief and complaining about the failure of others in the newspaper than in implementing the requested relief.

advised local elections officials to issue instructions that a witness signature was required. On August 21, after oral argument, this Court approved the Consent Decree to protect the health and safety of voters in the Commonwealth, with the mandate that Attorney General Mark Herring, the State Board of Elections, and Commissioner Christopher Piper take proactive steps to advise members of the public regarding the elimination of the witness signature requirements.

Specifically, Defendants were to 1) issue guidance to city and county election officials that they were required to count absentee ballots missing a witness signature requirement; and 2) issue updated instructions to inform voters, or have city and county elections officials inform voters, that the witness signature requirement was no longer necessary. In addition, Defendant Commissioner Piper was supposed to have taken additional, reasonable steps to inform the public that the witness signature requirement would not be enforced. No clear guidance was ever issued, and no guidance retracting the “Updated and Ready for Nov.” document issued on August 20 came from the Department of Elections until September 4, 2020. As explained below, this guidance was incomplete and confusing to local elections officials. Although Intervenors opposed the relief granted by the Consent Decree on a number of grounds, the failure of Defendants now directly harms members of the Republican Party of Virginia by confusing them and potentially subjecting members from different areas of the Commonwealth to different rules.

In total, instead of fulfilling their obligations under the Consent Order, Defendants provided guidance to local election officials that caused them to send

out conflicting instructions to elderly voters making them believe a witness signature was still required; *See* Ex. A; they issued final guidance—marked as updated for November and ready—on August 20, 2020, 15 days after agreeing to the Consent Decree and one day prior to this Court’s scheduled hearing on the decree, stating absentee ballots required a witness signature, *see* Exhibit B; sent multiple guidance documents to local registrars between August 21 and September 4 without once mentioning the change in the witness signature requirement, *see* Ex. C; never issued any guidance to city and county election officials to count all absentee ballots missing a witness signature until incomplete guidance was sent on September 4, two weeks after entry of the Consent Decree and near the last day to order the printing of ballots and other materials, allowing the August 20 instructions to remain effective during critical election preparation time, *see* Ex. D; and failed to place now or ever any prominent notification on the Department of Elections website, *see* Ex. E. Their actions have sown voter confusion rather than assisting Virginia voters.

The Attorney General’s, the State Board of Elections’, and Commissioner Piper’s failure to protect and assist Virginia voters is not just the conclusion of Intervenors. As the Vice President of the League of Women Voters of Virginia stated after receiving her absentee ballot that still appeared to require a witness signature, “Why did we file a lawsuit?” she asked. ‘I was seeing orange when I got mine. I literally stood in the middle of the living room and screamed, ‘I don’t believe

this!”<sup>2</sup> The Intervenor’s motion should be granted, and the Defendants should be ordered to do their job by complying with the terms of the Consent Decree.

**I. ARGUMENT**

**A. This Court Has Authority to Enter an Order to Show Cause.**

This Court’s jurisdiction to enforce the Consent Decree is well-settled. There is a “long recognized, inherent jurisdiction of federal court to protect and enforce their orders and judgment.” *Colonia Williamsburg Found. V. Kittinger Co.*, 792 F. Supp. 1397, 1405 (E.D. Va. 1992), *aff’d*, 38 F.3d 133 (4th Cir. 1994); *see generally Thompson v. U.S. Dep’t of Hous. & Urban Dev.*, 404 F.3d 821, 833 (4th Cir. 2005) (“Federal courts are not reduced to approving consent decrees and hoping for compliance. Once entered, a consent decree may be enforced.”) (internal citations omitted). This Court must intervene to protect the integrity of this election and protect the voters that the officers of this Commonwealth have failed to protect.

**B. The Terms of the Consent Decree**

The Consent Decree approved by this Court imposed specific obligations on the Attorney General, the State Board of Elections, and Commissioner Piper. Specifically, the Consent Decree required, among other things:

1. Defendants shall issue guidance instructing all relevant city and county election officials to count all absentee ballots in the November Election that are otherwise validly cast but are missing a witness signature.

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<sup>2</sup> See Patricia Sullivan, Witnesses Aren’t Needed for Absentee Voting in Virginia. But the Instructions Sometimes Say Otherwise, Washington Post, available at: [https://www.washingtonpost.com/local/virginia-politics/virginia-absentee-ballot-instructions-confusing/2020/09/23/4ec4dfa8-fd1b-11ea-9ceb-061d646d9c67\\_story.html](https://www.washingtonpost.com/local/virginia-politics/virginia-absentee-ballot-instructions-confusing/2020/09/23/4ec4dfa8-fd1b-11ea-9ceb-061d646d9c67_story.html) (“Ballot Confusion Article”)

2. Defendants shall issue updated instructions to include with all absentee ballots as provided in Va. Code § 24.2-706—or issue guidance instructing all relevant city and county election official to modify or amend the printed instruction accompanying each absentee ballot—to inform voters that any absentee ballot cast in the November Election without a witness signature will not be rejected on that basis and specifically inform voters in bold print that they may disregard the witness signature line on the absentee ballot envelope if they believe they may not safely have a witness present while completing their ballot.
3. Defendant Commissioner of Elections shall take additional reasonable steps to inform the public that the witness requirement will not be enforced for the November Election for those absentee voters who believe they may not safely have a witness present while completing their ballot, and issue guidance instructing all relevant city and county election official to do the same.

The Defendants failed to fulfill their responsibilities under the Consent Decree.

**C. Defendants Ignored the Order of this Court Approving the Consent Decree**

Instead of working to protect the integrity of the election and the Commonwealth's voters, the Defendants ignored the terms of the Consent Decree.<sup>3</sup>

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<sup>3</sup> It is important to note that Defendants continue to ignore the will of the Virginia legislature that removed the witness signature requirement entirely. The failure to update the guidance and forms

1. *Defendants Failed to Issue Clear Guidance that the Witness Signature Was Not Required*

Defendants failed to issue clear guidance that a witness signature was no longer required for absentee ballots. Defendants agreed to the Consent Decree on August 5. On August 20, 15 days after Defendants agreed to the terms of the Consent Decree and one day before this Court’s hearing on the matter, Defendants issued guidance specifically stating under a heading, “How to Vote by Mail,” that Step 1 of voting by mail is to “Find a witness to watch you open Envelope A containing your ballot.” *See* Ex. B. Although the Department issued guidance related to other court decisions, generally on the same day those court orders were issued, *see* Ex. C at 2020-09-02 ES (Federal Court Order on Print Disabled Voters for November 2020 General and Special Elections) and 2020-09-03 ES (Court Decision on Candidacy of Kanye West and Michelle Tidball), the Department has not, to this day, issued a single advisory regarding the Consent Decree. As explained below, the incorrect guidance was only partially corrected on September 4, nearly a month after Defendants agreed to the Consent Decree.

The failure to issue clear guidance is readily acknowledged by the Board of Elections: “[i]t’s not as clear as it should be, no question about that,” Bob Brink, chair of the state board of elections, said of the commonwealth’s voter instructions. “We hope that [voters] will turn to a combination of the department’s instructions on our website and instructions to call their local registrars. I hope that will alleviate any

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distributed to the general public is even more egregious in light of this legislation—the first bill adopted in the General Assembly’s special session. *See* Exhibit F.

confusion.”<sup>4</sup> Local election officials were to be given the tools to advise the public, and Defendants failed to provide them. This failure is resulting in voter confusion and disenfranchisement, and the Defendants have done nothing to address it.

One 85-year-old voter referred to the instructions as “nutty.”<sup>5</sup> One 70-year-old voter stated, “despite my master’s degree and a lifetime of voting, I had to read the entire letter a couple of times to sort out this information.”<sup>6</sup> The Defendants’ failure is now putting these voters at risk, because, the 85-year-old voter still intends to have a witness sign her ballot simply because she doesn’t “want to take a chance.”<sup>7</sup> Further, voters who do not have anyone to serve as a witness may choose not to submit their ballot, because the instructions imply that it will not be counted. This is no way to run an election, and people are being put at risk because of the failure of Defendants to provide clear guidance to local election officials.

2. *Defendants Never Issued Updated Instructions Based on the Consent Decree*

As explained above, Defendants never issued updated absentee ballot instructions, providing only incomplete guidance on September 4, 2020, 30 days after agreeing to the Consent Decree and 14 days after this Court’s August 21 Order. This delay is inexcusable and is the sole reason for the voter confusion noted above.

To this day, the Department’s website does not include language on the absentee ballot instructions that a witness signature is not required. The only

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<sup>4</sup> See Ballot Confusion Article.

<sup>5</sup> See *id.*

<sup>6</sup> See *id.*

<sup>7</sup> See *id.*

location on the site making any mention of the removal of the requirement is under a section labeled Early Voting In-Person. *See* <https://www.elections.virginia.gov/casting-a-ballot/absentee-voting/>, last accessed 9/25/2020. No instructions appear under any section related to absentee by mail voting.

More significantly, the instructions issued by Defendants on September 4 updating the model instructions for voting an absentee ballot include only half of the material required by the Court's Order. The Court ordered Defendants to "to inform voters that any absentee ballot cast in the November Election without a witness signature will not be rejected on that basis." The revised instructions fail to include such information. The revision responds to the other portion of the Court's instruction to "specifically inform voters in bold print that they may disregard the witness signature line on the absentee ballot envelope if they believe they may not safely have a witness present while completing their ballot." The failure of Defendants to heed the first portion of the Court's Order is even more egregious considering that the Governor signed into a law a budget amendment completely eliminating the witness signature requirement for all voters. *See* Senate Bill 5120 "Acts of Assembly Chapter text," attached as Ex. F.

The General Registrar for Arlington County provided her own update to the Department's instructions, demonstrating the ease with which the Department could have provided proper guidance. Her guidance is attached as Ex. G. This hodge podge



of instructions was specifically addressed in the Consent Decree, and the Defendants ignored that provision.

Because of this failure to timely issue updated instructions, the Defendants were, and continue to be, in violation of the Consent Decree.

3. *Commissioner Piper Has Done Nothing to Inform the Public of the Elimination of the Witness Signature Requirement*

Commissioner Piper has failed to make any effort to implement the Consent Decree. The Court need look no further than the Commissioner's September 24, 2020 tweet after the Washington Post article alerting Defendants to voters' confusion over whether a witness signature is required. That tweet, available here <https://twitter.com/vaELECT/status/1309161974736072707/photo/1>, makes no mention of the elimination of the witness signature requirement. In addition, the Frequently Asked Questions about Absentee Voting form, available here [https://www.elections.virginia.gov/media/absentee-landing-page/FAQ\\_absentee\\_voting.pdf](https://www.elections.virginia.gov/media/absentee-landing-page/FAQ_absentee_voting.pdf), does not even mention the elimination of the witness signature requirement. And, as addressed above, the only part of the Department of Elections' website that does attempt to address the requirements of the Consent Decree does so in the wrong place. In addition, Commissioner Piper has made no effort to contact voters without access to the Internet. His failure is unacceptable, and this Court must intervene to protect the integrity of this election.

## II. CONCLUSION

The Defendants in this case have done very little to fulfill their obligations under the Consent Decree. Their less than half measures have increased voter

confusion, put elderly and immunocompromised voters at risk, and set local registrars and election officials up for failure. This Court must intervene to protect the integrity of the election, and it must do so as soon as possible. To disenfranchise voters because of the widespread incompetence of Defendants is unacceptable.

For the foregoing reasons, Intervenor, the Republican Party of Virginia, Inc., respectfully requests that the Court grant this motion.

Dated: September 25, 2020 Respectfully submitted,

*/s/ Christopher M. Marston*

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**CERTIFICATE OF SERVICE**

I certify that on September 25, 2020, the foregoing was filed on the Court's electronic case filing system. Notice of the filing was generated by the Court's electronic system. Copies of the filing are available on that system.

/s/ Christopher M. Marston  
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