

**United States District Court
for the Eastern District of Virginia
Alexandria Division**

Thomas Curtin, Donna Curtin, Suzanne A. Spikes, Kelley Pinzon, Tom Cranmer, and Carol D. Fox,

Plaintiffs,

v.

Virginia State Board of Elections; Robert H. Brink, in his official capacity as Chairman of the Board, **John O'Bannon**, in his official capacity as Vice Chair of the Board, and **Jamilah D. Lecruise**, in her official capacity as Secretary of the Board; and **Christopher E. Piper**, in his official capacity as Commissioner of the Virginia Department Of Elections,

Defendants.

Civ. No. _____

**Verified Complaint for Declaratory
and Injunctive Relief**

Verified Complaint for Declaratory and Injunctive Relief

Plaintiffs Thomas Curtin, Donna Curtin, Suzanne A. Spikes, Kelley Pinzon, Tom Cranmer, and Carol D. Fox (collectively “Voters”) complain against Defendants’ interpretation allowing persons without disability or illness to vote absentee even though they are not actually ill or disabled (the “Plan”) as follows:

Introduction

1. This is a civil action for declaratory and injunctive relief arising under the First and Fourteenth Amendments and Article I, Section IV, clause 1 of the Constitution of the United States, as well as 42 U.S.C. Section 1983. It concerns the constitutionality of Defendants’s interpretation of “disability or illness.”

Jurisdiction and Venue

2. This action arises under 42 U.S.C. § 1983, the First and Fourteenth Amendments to the Constitution of the United States, and Article I, Section IV, clause 1 of the Constitution of the United States.

3. This Court has jurisdiction over all claims pursuant to 28 U.S.C. §§ 1331 and 1343(a). It also has jurisdiction pursuant to the Declaratory Judgment Act as codified at 28 U.S.C. §§ 2201 and 2202.

4. Venue is proper under 28 U.S.C. § 1391(b) because a substantial part of the events giving rise to the claim occurred or will occur in this District.

Parties

5. Thomas Curtin is an eligible and registered voter, who is qualified to and intends to vote in the upcoming primary of the political party of his choice. He is a resident of Fairfax County, Virginia. Mr. Curtin, a veteran who served as an Infantry officer in the United States Army for 20 years, has resided in Virginia since 1978 with his family. Since serving his country in the United States Army, Mr. Curtin has worked in the private sector as a Realtor. Mr. Curtin is passionate about the right to vote and actively participates in the political process, serving as Secretary of the Fairfax County Republican Committee. He intends to vote in person.

6. Donna Curtin is an eligible and registered voter, who is qualified to and intends to vote in the upcoming primary of the political party of her choice. She is a resident of Fairfax County, Virginia. Mrs. Curtin has resided in Virginia since 1978 with her family. Mrs. Curtin serves her community as a seasonal administrative assistant with the Fairfax County Office of Elections, specializing in absentee voting for the past 12-13 years. In this role, Mrs. Curtin has organized

all aspects of the Central Absentee Precinct (“CAP”) where all mail-in ballots are adjudicated prior to and on election day. This includes developing instructional materials for and training the CAP election officers in proper ballot processing procedures. Mrs. Curtin is passionate about election integrity and actively participates in the political process, serving as Recording Secretary for the Republican Women of Clifton. She qualifies to vote absentee and intends to do so for the upcoming primary.

7. Suzanne A. Spikes is an eligible and registered voter, who is qualified to and intends to vote in the upcoming primary of the political party of her choice. She is a resident of Fairfax County, Virginia. Ms. Spikes immigrated to the United States (to Virginia) in 1983 from Belgium and became a United States citizen in 1989. Mrs. Spikes cherishes her right to vote and actively participates in the political process, volunteering as a precinct captain and canvassing in support of her favored candidates and positions. She intends to vote in person.

8. Kelley Pinzon is an eligible and registered voter, who is qualified to and intends to vote in the upcoming primary of the political party of her choice. She is a resident of Fairfax County, Virginia. Mrs. Pinzon is a Texas native who has resided in Virginia for over twenty years with her family. She works with the Fellowship of Christian Athletes and is on staff with her church, including the children’s ministry. Mrs. Pinzon is passionate about the right to vote and actively participates in the political process, volunteering as a precinct captain (Burke district) in efforts to organize voting and to canvass support for those issues and candidates she supports. She intends to vote in person.

9. Tom Cranmer is an eligible and registered voter, who is qualified to and intends to vote in the upcoming primary of the political party of his choice. He is a resident of Fairfax County, Vir-

ginia. Mr. Cranmer has resided in Virginia for thirty years with his wife (Linda), and they raised two children here. Mr. Cranmer worked as a treasurer and corporate planner for Mobil Oil for thirty years and is a fellow with the American Center for Democracy. Mr. Cranmer is passionate about the right to vote and actively participates in the political process, previously serving as chair of the Dranesville District of the Fairfax County Republican Committee and serving as an election chief. He is qualified to vote absentee and intends to do so for the upcoming primary.

10. Carol D. Fox is an eligible and registered voter, who is qualified to and intends to vote in the upcoming primary of the political party of her choice. She is a resident of Prince William County, Virginia. Ms. Fox has lived in Virginia nearly her entire life. She previously served her community as a middle school teacher in Prince William County for 40 years. Ms. Fox cherishes her right to vote and believes that her rights to a safe and fair election are at risk. She intends to vote in person.

Facts

Virginia Election Law

11. Virginia law allows a few limited categories of persons to vote absentee, including *inter alia*, “[a]ny duly registered person with a disability, as defined in § 24.2-101, who is unable to go in person to the polls on the day of election because of his disability, illness, or pregnancy[.]” Va. Code § 24.2-700(4).

12. “‘Person with a disability’ means a person with a disability as defined by the Virginians with Disabilities Act (§ 51.5-1 et seq.)” Va. Code § 24.2-101. Under the Virginians with Disabilities Act, “‘[p]erson with a disability’ means any person who has a physical or mental impairment that substantially limits one or more of his major life activities or who has a record of

such impairment.” Va. Code § 51.5-40.1.

13. “‘Physical impairment’ means any physical condition, anatomic loss, or cosmetic disfigurement that is caused by bodily injury, birth defect, or illness.” *Id.*

14. “‘Mental impairment’ means (i) a disability attributable to intellectual disability, autism, or any other neurologically handicapping condition closely related to intellectual disability and requiring treatment similar to that required by individuals with intellectual disability or (ii) an organic or mental impairment that has substantial adverse effects on an individual’s cognitive or volitional functions, including central nervous system disorders or significant discrepancies among mental functions of an individual.” *Id.*

15. “‘Otherwise disabled person’ means any person who has a physical, sensory, intellectual, developmental, or mental disability or a mental illness.” *Id.*

16. “[A]ll applications for absentee ballots shall be signed by the applicant who shall state, subject to felony penalties for making false statements pursuant to § 24.2-1016, that to the best of his knowledge and belief the facts contained in the application are true and correct[.]” Va. Code 24.2-702.

17. “Any willfully false material statement or entry made by any person in any statement, form, or report required by this title shall constitute the crime of election fraud and be punishable as a Class 5 felony.” Va. Code § 24.2-1016.

18. The Virginia General Assembly recently expanded the limited absentee voting categories to allow any registered voter to vote absentee.¹ However, this change does not take effect

¹ See Virginia’s Legislative Information System, *2020 Session*, § 24.2-700, available at <https://lis.virginia.gov/cgi-bin/legp604.exe?201+ful+HB1ER>. Pursuant to Bluebook standards, all websites herein were last visited on May 13, 2020.

until July 1, 2020.

19. The Virginia General Assembly did not expand the limited absentee voting categories for the June 23, 2020, primary. In doing so, the General Assembly determined that the limited categories for absentee voting were necessary for the upcoming primary elections.

20. Despite the legislative changes not taking effect until July 1, 2020, Defendants have issued guidance, contrary to Virginia law, that any “Voters may choose reason ‘2A My disability or illness’ for absentee voting in the May and June 2020 elections due to COVID-19.”² This interpretation of “disability or illness” allows all voters to vote absentee, even if they do not have a disability or illness.

21. The Plan directs and encourages voters to make a false statement, punishable as a Class 5 felony. *See* Va. Code §§ 24.2-701, 1016.

22. The Commissioner of Elections has limited emergency authority “to designate alternative methods and procedures to handle [] applications and ballots” if there is an emergency “that will not allow sufficient time for the distribution and handling of absentee ballot applications and absentee ballot [for qualified voters.]” Va. Code § 24.2-713. This emergency authority has not been triggered since there is sufficient time to distribute and handle absentee ballots and applications. The Virginia Republican and Democratic primaries are scheduled to take place on June 23, 2020. Both Republicans and Democrats have federal candidates on the ballot.³

² Va. Dep’t of Elections, *Absentee Voting*, <https://www.elections.virginia.gov/casting-a-ballot/absentee-voting/>.

³ Va. Dep’t of Elections, *Certified Candidates in Ballot Order for June 23, 2020 Primary Elections*, [https://www.elections.virginia.gov/media/castyourballot/candidatelist/June-2020-Primary-Candidates-List-\(4\)-1.pdf](https://www.elections.virginia.gov/media/castyourballot/candidatelist/June-2020-Primary-Candidates-List-(4)-1.pdf).

COVID-19

23. While the COVID-19 pandemic has been a significant concern for the American people, policymakers quickly adopted measures to protect the health and safety of the public. Likewise, Virginia implemented many provisions aimed at protecting the public and lowering the curve.

24. On March 12, 2020, Governor Ralph Northam declared a state of emergency.⁴ He later closed schools, limited gatherings to no more than 10 people, closed dining establishments (with the exception of delivery and take-out services), closed all entertainment business, etc.⁵ But he allowed all “[e]ssential retail businesses” to remain open including:

Grocery stores, pharmacies, and other retailers that sell food and beverage; products or pharmacy products, including dollar stores, and department stores with grocery or pharmacy operations; Medical, laboratory, and vision supply retailers; Electronic retailers that sell or service cell phones, computers, tablets, and other communications technology; Automotive parts, accessories, and tire retailers as well as automotive repair facilities; Home improvement, hardware, building material, and building supply retailers; Lawn and garden equipment retailers; Beer, wine, and liquor stores; Retail functions of gas stations and convenience stores; Retail located within healthcare facilities; Banks and other financial institutions with retail functions; Pet and feed stores; Printing and office supply stores; and Laundromats and dry cleaners.⁶

This executive order is set to expire on June 10, 2020. *Id.*

25. Then, on March 30, 2020, Governor Northam issued the “stay at home” order, instructing to Virginians to stay home as much as possible, but allowing travel for:

Obtaining food, beverages, goods, or services as permitted in Executive Order 53; Seeking

⁴ Va. Exec. Order 2020-51, available at [https://www.governor.virginia.gov/media/governorvirginiagov/governor-of-virginia/pdf/eo/EO-51-Declaration-of-a-State-of-Emergency-Due-to-Novel-Coronavirus-\(COVID-19\).pdf](https://www.governor.virginia.gov/media/governorvirginiagov/governor-of-virginia/pdf/eo/EO-51-Declaration-of-a-State-of-Emergency-Due-to-Novel-Coronavirus-(COVID-19).pdf).

⁵ Va. Exec. Order 2020-53, available at [https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-53-SECOND-AMENDED-Extension-of-Temporary-Restrictions-Due-To-Novel-Coronavirus-\(COVID-19\).pdf](https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-53-SECOND-AMENDED-Extension-of-Temporary-Restrictions-Due-To-Novel-Coronavirus-(COVID-19).pdf).

⁶ *Id.*

medical attention, essential social services, governmental services, assistance from law enforcement, or emergency services; Taking care of other individuals, animals, or visiting the home of a family member; Traveling required by court order or to facilitate child custody, visitation, or child care; Engaging in outdoor activity, including exercise, provided individuals comply with social distancing requirements; Traveling to and from one's residence, place of worship, or work; Traveling to and from an educational institution; Volunteering with organizations that provide charitable or social services; and Leaving one's residence due to a reasonable fear for health or safety, at the direction of law enforcement, or at the direction of another government agency.⁷

This executive order is also set to expire on June 10, 2020. *Id.*

26. He also encouraged “social distancing of at least six feet from any other person[.]” *Id.*

Social distancing and good hygiene practices are the most effective ways to stop transmission of the virus.⁸ Social distancing means “deliberately increasing the physical space between people to avoid spreading illness. Staying at least six feet away from other people lessens [the] chances of catching COVID-19.”⁹

27. On April 23, 2020, Governor Northam postponed the election from June 9th to June 23rd.¹⁰ In-person voting is available for the June 23rd primary.

⁷ Va. Exec. Order 2020-55, available at [https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-55-Temporary-Stay-at-Home-Order-Due-to-Novel-Coronavirus-\(COVID-19\).pdf](https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-55-Temporary-Stay-at-Home-Order-Due-to-Novel-Coronavirus-(COVID-19).pdf).

⁸ See *Coronavirus disease (COVID-19) advice for the public*, World Health Organization, <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/advice-for-public>; *Stop the Spread of Germs*, Center for Disease Control and Prevention (“CDC”), <https://www.cdc.gov/coronavirus/2019-ncov/downloads/stop-the-spread-of-germs.pdf>.

⁹ *Coronavirus, Social and Physical Distancing and Self-Quarantine*, John Hopkins Medicine, <https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus/coronavirus-social-distancing-and-self-quarantine>.

¹⁰ Va. Exec. Order 2020-56, available at [https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-56-AMEN-DED---Postponing-June-9,-2020-Primary-Election-to-June-23,-2020-Due-to-Novel-Coronavirus-\(COVID-19\).pdf](https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-56-AMEN-DED---Postponing-June-9,-2020-Primary-Election-to-June-23,-2020-Due-to-Novel-Coronavirus-(COVID-19).pdf).

28. These protective measures have been effective. The curve is flattening, the spread of the virus is being controlled, the fatality rate is decreasing rapidly, testing is more readily available and widespread, and the death rate is much lower than originally expected.¹¹ COVID-19 related deaths have decreased by over 90% since mid-April.¹² As a result, the United States has started re-opening.¹³ And the existing protective measures have been adjusted as knowledge of the virus increases and the risk has lowered.

29. Many states have already relaxed their stay-at-home orders including reopening *inter alia* retail businesses, restaurants, gyms, beaches, salons; and restarting elective medical procedures.*Id.* And many of the states that have not yet re-opened, have established plans to do so this month. *Id.*

30. Virginia's stay at home order is set to expire on June 10th. *Id.* And elective surgeries and dental procedures were allowed to resume on May 1st. *Id.*

31. Expanding absentee balloting is unnecessary to combat COVID-19. The same social distancing and good hygiene practices— which are effective for preventing the spread of the virus when going out for essential services, like grocery shopping and other essential services—

¹¹ See *This is where all 50 states stand on reopening*, CNN.com, <https://www.cnn.com/interactive/2020/us/states-reopen-coronavirus-trnd/>; see also *Provisional Death Counts for Coronavirus Disease (COVID-19)*, CDC, <https://www.cdc.gov/nchs/nvss/vsrr/covid19/index.htm>; *COVIDView*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/covidview/index.html> (last visited May 7, 2020); *Coronavirus death rate may be lower than previously thought*, LiveScience.com, <https://www.livescience.com/death-rate-lower-than-estimates.html> (showing that in March, the death rate was around just .0066).

¹² *Provisional Death Counts for Coronavirus Disease (COVID-19)*, CDC, <https://www.cdc.gov/nchs/nvss/vsrr/covid19/index.htm>.

¹³ *This is where all 50 states stand on reopening*, CNN.com, <https://www.cnn.com/interactive/2020/us/states-reopen-coronavirus-trnd/>.

are also an effective way to prevent the spread of the virus for in-person voting.

32. Voters are able to vote in-person while social distancing and taking appropriate precautions (i.e. wearing gloves, wearing a mask, sanitizing hands, not touching one's face, etc.) to protect themselves and others from the virus.

33. There has been no established causal link between in-person voting and the contracting of COVID-19.

34. Weeks after the Wisconsin election, COVID-19 cases had not spiked.¹⁴

Absentee Ballot Fraud

35. Virginia history, past and present, is riddled with examples of voter fraud. Evidence of voter fraud in the Commonwealth starts as early as the 1960's when a federal probe resulted in mail ballot fraud charges.¹⁵ There were similar allegations in the 1970s and 1980s. *Id.*

36. In 2004, 15 individuals were convicted of voter fraud after conspiring to manipulate the elections in Appalachia through various unlawful means, including buying votes, stealing absentee ballots, and forging ballots.¹⁶

37. In 2016, there was an FBI investigation after 20 voter applications were made under the

¹⁴ *Two weeks after election, COVID-19 cases have not spiked in Wisconsin but experts urge caution about conclusions*, Milwaukee Journal Sentinel, <https://www.jsonline.com/story/news/2020/04/22/covid-19-hasnt-spiked-after-wisconsin-election-experts-urge-caution/2997394001/>.

¹⁵ Laurence Hammack, *Trial Begins Form Mayor Charges Election Violations*, THE ROANOKE TIMES, July 19, 2006, available at: https://www.roanoke.com/archive/trial-begins-for-former-mayor-charged-with-election-violations/article_e018b5b2-86c8-5c10-90b1-0b0dd05685a5.html.

¹⁶ Laurence Hammack, *Ex-Mayor to Plead Guilty in Fraud Case*, THE ROANOKE TIMES, Nov. 9, 2006, available at: https://www.roanoke.com/archive/ex-mayor-to-plead-guilty-in-vote-fraud-case/article_a5bb2cd8-a966-559a-ac3c-ffd955dc520b.html.

names of dead people.¹⁷

38. Most recently, in 2018, a man committed voter fraud when he attempted to cast absentee ballots for both himself and his deceased wife.¹⁸

Absentee Balloting Issues

39. Vote buying, coercion, and fraud occurs with absentee voting.¹⁹

40. In *U.S. v. Brown*, absentee ballots were required to be notarized and notaries were sent to steal ballots from mailboxes and fill them out fraudulently, largely targeting impoverished minorities. 494 F. Supp. 2d 440, 457 (2007).

41. Absentee ballots can be filled out in private by someone other than the voter or by voters subject to undue influence. An Oregon survey found 5% of polled voters admitted someone else

¹⁷ Graham Moomaw, *Investigation Launched After Dead People Are Registered to Vote In Harrisonburg*, Richmond Times-Dispatch, Sept. 29, 2016, available at: https://www.richmond.com/news/virginia/investigation-launched-after-dead-people-are-registered-to-vote-in/article_e008ce00-0365-57a2-95c0-4d9aa70012f9.html.

¹⁸ See Steve Roberts, Jr., *Court Docs: James City Man Indicted on Voter Fraud Charges*, THE MORNING CALL, April 9, 2019, available at <https://www.mcall.com/va-vg-richard-dohmen-indicted-0409-story.html>.

¹⁹ See, e.g., *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 191-197 (citing the Report of “the Commission on Federal Election Report, chaired by former President Jimmy Carter and former Secretary of State James A. Baker III” which highlighted that fraud occurs in U.S. elections and that “it could affect the outcome of a close election”); Fernandez, *Texas Vote-Buying Case Casts Glare on Tradition of Election Day Goads*, N.Y. Times, Jan. 12, 2014, <https://www.nytimes.com/2014/01/13/us/politics/texas-vote-buying-case-casts-glare-on-tradition-of-election-day-goads.html>; P. Elliott, *Why North Carolina’s Election Fraud Hurts American Democracy*, Time USA Mag. Feb. 22, 2019, <https://time.com/5535292/northcarolina-election-fraud/>; R. Gonzales, *North Carolina GOP Operative Faces New Felony Charges That Allege Ballot Fraud*, NPR, July 30, 2019, <https://www.npr.org/2019/07/30/746800630/north-carolina-gop-operative-faces-new-felonycharges-that-allege-ballot-fraud>; F. Lucas, *15 Election Results That Were Tossed Over Fraudulent Mail-In Ballots*, Daily Sig. (2020), <https://www.dailysignal.com/2020/04/21/15-election-results-that-were-thrown-out-because-of-fraudulent-mail-in-ballots/>.

filled out their ballot.²⁰

42. Absentee ballots have been filled out fraudulently for ineligible, false, impersonated, or duplicate voter registrations.²¹

43. The Heritage Foundation has been able to compile *A Sampling of Recent Election Fraud Cases from Across the United States* with 1,285 cases of documented voter fraud in recent years.²² While this number is already high, it does not reflect *all* instances of voter fraud—as it does not include cases that were reported but never investigated or prosecuted.

44. With a significant increase in absentee ballots, many applicants may never receive their ballot or may receive it too late. *See Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 140 S. Ct. 1205, 1210 (2020) (Ginsberg, J. dissenting) (“The surge in absentee-ballot requests has overwhelmed election officials, who face a huge backlog in sending ballots.”).

²⁰ A ‘Modern’ Democracy That Can’t Count Votes, Los Angeles Times, Dec. 11, 2000, <https://www.latimes.com/archives/la-xpm-2000-dec-11-mn-64090-story.html>.

²¹ *See, e.g., U.S. Has 3.5 Million More Registered Voters Than Live Adults — A Red Flag For Electoral Fraud*, Investor’s Business Daily, Aug. 16, 2017, <https://www.investors.com/politics/editorials/u-s-has-3-5-million-more-registered-voters-than-live-adults-a-red-flag-for-electoral-fraud/>; *Oregon AG gets guilty plea voter fraud case*, Oregon Catalyst, Sept. 18, 2010, <https://oregoncatalyst.com/3510-oregon-ag-gets-guilty-plea-voter-fraud-case.html>; Steve Roberts, Jr., *Court Docs: James City Man Indicted on Voter Fraud Charges*, THE MORNING CALL, April 9, 2019, available at <https://www.mcall.com/va-vg-richard-dohmen-indicted-0409-story.html>.

²² *See* <https://www.heritage.org/voterfraud>. *See also* K. Samalis-Aldrich & H. von Spakovsky, *Database Swells to 1,285 Proven Cases of Voter Fraud in America*, Daily Signal, May 9, 2020, <https://www.dailysignal.com/2020/05/09/databaseswells-to-1285-proven-cases-of-voter-fraud-in-america/>; The Heritage Foundation, *Standards for Absentee Ballots and All-Mail Elections: Doing It Right...and Doing It Wrong*, https://www.heritage.org/sites/default/files/2020-05/FS_188_NEW.pdf; H. von Spakovsky & J. Adams, *COVID-19 and Ebola: What We Can Learn from Prior Elections*, <https://www.heritage.org/election-integrity/report/covid-19-and-ebola-what-we-can-learn-prior-elections> (how Wisconsin and Liberia held safe elections in pandemics); H. Spakovsky, *Potential for Fraud Is Why Mail-In Elections Should Be Dead Letter*, Apr. 10, 2020, <https://www.heritage.org/election-integrity/commentary/potential-fraud-why-mail-elections-should-be-dead-letter>.

45. In Wisconsin, election workers were not prepared for the significant increase in absentee ballots. Several bins containing undelivered ballots were found after the election, either “on their way to voters or already filled out and on their way back to clerks.”²³

46. Further, there were reports that over 9,000 voters who requested a ballot by mail never received one.²⁴ There were also reports of voters requesting a ballot, and instead receiving envelopes full of ballots, empty envelopes, ballots sent to wrong addresses, or no response at all.²⁵

47. Reports documented workers putting in 110 hour weeks resulting in an overworked workforce and a systemic failure to maintain accuracy without falling behind. *Id.* One County Clerk described there being “no way humanly possible” to keep up with amount of ballot requests. *Id.* The head of the Milwaukee Election Commission described the situation as “chaos” and “not an appropriate environment to be administering an election.” *Id.*

48. Charles Stewart at the Massachusetts Institute of Technology says that the root of the problem was the fact that “[t]his system was designed for a world in which 5% of voters voted by mail, not for a system in which 70% of voters voted by mail . . . [s]o something has to give, and the thing that ends up giving is probably the accuracy of the request for the ballot.” *Id.*

²³ Patrick Marley, Alison Dirr & Mary Spicuzza, *Wisconsin is discovering problems with absentee ballots, including hundreds that were never delivered*, Milwaukee Journal Sentinel, April 8, 2020, <https://www.jsonline.com/story/news/politics/elections/2020/04/08/wisconsin-election-3-tubs-ballots-found-mail-processing-center/2971078001/>.

²⁴ Nick Corasaniti & Stephanie Saul, *Inside Wisconsin’s Election Mess: Thousands of Missing or Nullified Ballots*, The New York Times, April 9, 2020, <https://www.nytimes.com/2020/04/09/us/politics/wisconsin-election-absentee-coronavirus.html>.

²⁵ Daphne Chen et al., *‘They should have done something’: Broad failures fueled Wisconsin’s absentee ballot crisis, investigation shows*, Milwaukee Journal Sentinel, 2020, <https://www.jsonline.com/story/news/2020/04/21/wisconsin-absentee-ballot-crisis-fueled-multiple-failures/5156825002/>.

49. Similarly, in Idaho, the election has been “fraught with problems.”²⁶ Many ballots had errors, resulting in more than 7,000 reissued ballots. *Id.*

50. And election officials could not keep up with requests, as they received tens of thousands ballot requests and “had only a few people to handle them.” *Id.* “The influx of absentee ballot requests far exceeded what officials originally estimated for the state primary[,]” putting county election officials under considerable pressure and resulting in errors. *Id.*

51. In Ohio, pressure to vote absentee put a strain on their system, resulting in “voter confusion, accounts of effective voter disenfranchisement and rock-bottom voter turnout.”²⁷ Even with over a month to prepare for the shift, “neither the state nor its people were ready.” *Id.* Delays were exacerbated by slow mail service. *Id.* And thousands of voters did not receive their ballot in time to vote. *Id.* It is likely that voter concern and confusion deterred people from voting. *Id.*

52. In existing all-mail voting states, a large number of mailed ballots does not present as much of an issue because they have automated systems, barcodes, methods of tracking boxes, etc. and had several years to plan and implement their new system. *Id.*; *see also* Declaration of Judy Flaig, attached as Ex. A. However, other states, like Virginia, lack the necessary infrastructure and equipment to process the influx of mailed ballots. *Id.*

53. A significant increase in absentee balloting is a burden that current election officials will not be able to bear, which is sure to result in mistakes being made. *See* Declaration of Judy Flaig,

²⁶ Hayley Harding, *Ada County had to reissue 7,000 ballots for May primary. Here’s how things went wrong*, Idaho Statesman, May 3, 2020, <https://www.idahostatesman.com/news/politics-government/state-politics/article242373146.htm>.

²⁷ Stephen Stromberg, *Ohio’s election was a mess. It would be a disaster at the national level*, The Washington Post, May 8, 2020, <https://www.washingtonpost.com/opinions/2020/05/08/ohios-election-was-mess-it-would-be-disaster-national-level/>.

attached as Ex. A. An expansion of absentee balloting would require significantly more funding and staffing in order to administer ballots with accuracy. *Id.*

54. In Virginia, the number of voters voting by mail is roughly 5-10% for normal elections. *Id.* A sudden dramatic increase in absentee ballots, would be a logistical nightmare and increases the risk of disenfranchisement. *Id.*

55. Virginia does not have the necessary equipment, infrastructure, or processes to deal with a dramatic increase in absentee ballots. *Id.* Nor does it have a reliable way to track ballots. *Id.*

56. Virginia Election Offices will not have enough staff, space, or secure storage to deal with a large influx of absentee ballots. *Id.*

57. The lack of secure storage risks boxes being misplaced, lost, or tampered with. *Id.*

58. Human error exists in all elections, especially in Virginia where almost all of the absentee process is done by hand. *Id.* These errors would be sure to increase if an elections office is overwhelmed with applications and ballots. *Id.*

59. The United States Postal Service (USPS) is not equipped to deal with a significant increase of absentee ballots. USPS has requested additional federal funding as they have been stretched thin to the brink of breakdown.²⁸ There is yet to include any funding appropriations for USPS operations to respond to the surge in absentee voting.

60. In Virginia, there have already been issues with USPS and ballots showing up after the election or being lost. *See* Declaration of Judy Flaig, attached as Ex. A. These issues would certainly increase if there were a sudden increase of absentee ballots. *Id.*

²⁸ Nicholas Fandos & Jim Tankersly, *Coronavirus Is Threatening One of Government's Steadiest Services: The Mail*, *The New York Times*, 2020, <https://www.nytimes.com/2020/04/09/us/politics/coronavirus-is-threatening-one-of-governments-steadiest-services-the-mail.html>.

61. Surveys have shown that Americans are concerned with an increase in fraud if mail in voting is implemented nationwide and that some fear their vote may not be counted.²⁹

62. On a national scale, data from federal Election Assistance Commission reports that from 2012 to 2018 over 28 million mail in ballots—nearly one in five mail in ballots cast—went missing.³⁰

63. Absentee voting is also far more expensive and complicated than in-person voting. Recently the Brennan Center estimated costs of “maintaining in-person voting” nationally as \$271.4 million. The total estimated cost to provide all Americans with a “vote by mail option” was between \$982 million and \$1.4 billion.³¹

64. States that have moved to “all-mail elections took many years to get there . . . putting too much strain on an entirely new system is sure to result in breakdowns and failures.” *Id.* The same breakdowns and failures would occur here with a swift transition to many more absentee ballots.

65. And with the increased costs of absentee voting versus in person voting, Virginia Election Offices may not be able to afford to administer additional absentee ballots. *See Declaration*

²⁹ *See, e.g., Battleground Survey of African Americans*, BlackPAC, <https://drive.google.com/file/d/1gFfhsgiwgnSNQv3p0CchJJ2AGSJ76Irg/view>; *Most Support Voting By Mail But Have Fraud Concerns*, Rasmussen Reports (2020), https://www.rasmussenreports.com/public_content/politics/general_politics/april_2020/most_support_voting_by_mail_but_have_fraud_concerns?fullbrowser;

³⁰ *See* Mark Hemingway, *28 Million Mail-In Ballots Went Missing in Last Four Elections*, Real Clear Politics, 2020, https://www.realclearpolitics.com/articles/2020/04/24/28_million_mail-in_ballots_went_missing_in_last_four_elections_143033.html.

³¹ Lawrence Norden et al., *Report: Estimated Costs of Covid-19 Election Resiliency Measures* Brennan Center for Justice (2020), <https://www.brennancenter.org/our-work/research-reports/estimated-costs-covid-19-election-resiliency-measures>; *see also* M. Mindy Moretti, *In Focus This Week: What are costs of voting by mail?* Electionline.org (2020), <https://electionline.org/electionline-weekly/2020/04-23/> (finding that absentee voting is more expensive than in person voting).

of Judy Flaig, attached as Ex. A.

Claims

Count I

The Plan Violates the Fundamental Right to Vote by Direct Disenfranchisement. (42 U.S.C. § 1983; U.S. Const. amends. 1 and 14)

66. Plaintiffs re-allege and incorporate by reference all of the allegations contained in all of the preceding paragraphs.

67. The right to vote, with the included right to have one's vote counted, is protected by the First and Fourteenth Amendments and is fundamental, *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 667 (1966), and well-established: "Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections" and to have that vote counted. *Reynolds v. Sims*, 377 U.S. 533, 554 (1964).

68. "The right to vote can neither be denied outright, nor destroyed by alteration of ballots, nor diluted by ballot-box stuffing." *Id.* at 555 (internal citations omitted). "And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Id.*

69. "[T]he striking of the balance between discouraging fraud and other abuses and encouraging turnout is quintessentially a legislative judgment" *Griffin v. Roupas*, 385 U.S. 1128, 1131 (7th Cir. 2004). "[S]tates that have more liberal provisions for absentee voting may well have different political cultures One size does not fit all." *Id.*

70. Voting fraud connected to absentee ballots is well-established as a cognizable harm, along with the related needs to protect election integrity and safeguard voter confidence. *See, e.g., Crawford*, 553 U.S. at 192-97 (citing and relying on, *inter alia*, the Report of "the Commis-

sion on Federal Election Report, chaired by former President Jimmy Carter and former Secretary of State James A. Baker III”); *see also Griffin*, 385 U.S. at 1130-31 (absentee ballot problems that require the legislature to balance).

71. In the present circumstances, the General Assembly is planning to move to a no-excuse, absentee-ballot scheme on July 1, but it expressly decided *not* to make that change applicable to the primary now scheduled for June 23. That means that the General Assembly has consciously balanced the competing interests and determined that *for Virginia in this* election, it is necessary that one actually be disabled or ill to qualify for absentee-ballot voting. One likely concern was the risk of disenfranchisement with a too-short time to phase in the new plan and a resulting sudden glut of absentee ballots.

72. By choosing not to make this primary election subject to the relaxed requirements for absentee ballots, the General Assembly chose to make its July 1 change effective for the *November* general election, allowing the Post Office and election officials time to calculate and fulfill anticipated staffing needs so as to more efficiently handle the sudden increase without this disenfranchisement risk.

73. Due to the sudden surge in absentee ballots that will result from the Plan, many voters will be disenfranchised because requested ballots never arrive or arrive too late and filled-out ballots get lost or are delayed in the return process. *See supra* ¶¶ 48-50.

74. Under the balancing required by the *Burdick* test, *Burdick v. Takushi*, 504 U.S. 428 (1992), applied in *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008), the many people who will be disenfranchised by the sudden surge in mail votes under the Plan weighs heavily against the Plan under the current situation, making it a severe burden that cannot be justified by

a fear of in-person voting amidst COVID-19 fears when voting is an essential governmental activity and essential activities are approved for the public with appropriate safeguards that will be implemented at the polls. *See supra* ¶¶ 28-39.

75. Due to this widespread disenfranchisement caused by not abiding by the General Assembly's balancing, the Plan violates the right to vote by direct disenfranchisement.

Count II

The Plan Violates the Fundamental Right to Vote by Vote-Dilution Disenfranchisement. (42 U.S.C. § 1983; U.S. Const. amends. 1 and 14)

76. Plaintiffs re-allege and incorporate by reference all of the allegations contained in all of the preceding paragraphs.

77. The Plan also violates the Voters' right to vote by vote-dilution disenfranchisement. The General Assembly, exercising its quintessential balancing prerogative, determined that absentee ballots should only go to those who are truly ill or disabled in Virginia *for this election*. That indicates a concern that in Virginia for this election, the risk of illegal voting by absentee ballots did not justify allowing no-excuse absentee balloting. That is the General Assembly's judgment in exercising its prerogative to balance voting access and election integrity.

78. Given the General Assembly's retention of the current absent-ballot plan for this election, there is a cognizable risk of ballot fraud from improperly qualified absentee voters. Because illegal votes dilute legal votes, this violates the rights of Voters and all voters due to vote-dilution disenfranchisement.

Count III

The Plan Violates Article I, Section 4, Clause 1 of the U.S. Constitution.

79. Plaintiffs re-allege and incorporate by reference all of the allegations contained in all of the preceding paragraphs.

80. The expansion of absentee voting to those not qualified under the General Assembly’s controlling statute violates Voters’ right to have, and to vote in, a federal election where the “Manner” of election is “prescribed . . . by the Legislature,” as required:

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

U.S. Const. art. I, § 4, cl. 1.

81. Candidates for the office of U.S. Representative are on the ballot for the June 23 primary. *See supra* ¶ 26. So the June 23 primary must be conducted in the General Assembly’s prescribed manner.

82. But the expansion of absentee balloting to those not actually disabled or ill is not what the General Assembly prescribed, being contrary to controlling legislation. *See supra* ¶¶ 16-21.

83. This expansion of who qualifies for absentee balloting overrides and displaces the General Assembly’s controlling balancing of ballot access and election integrity and so violates Article I, § 4, cl. 1, including by violating Voters’ right to have, and to vote in, an election conducted as the U.S. Constitution mandates.

Count IV
The Plan Violates the Due Process Clause
of the Fourteenth Amendment of the U.S. Constitution.

84. Plaintiffs re-allege and incorporate by reference all of the allegations contained in all of the preceding paragraphs.

85. Defendants have issued guidance that “Voters may choose reason ‘2A My disability or illness’ for absentee voting in the May and June 2020 elections due to COVID-19.” This interpretation allows all voters to vote absentee, even if they do not *currently* have a disability or ill-

ness.

86. Because the original language requires that one *currently* have a disability or illness, it is arbitrary and capricious to redefine it to mean that might *become* disabled or ill. And it is nonsensical and speculative to say that one *has* a disability or illness because (i) one *might* get COVID-19, (ii) that the illness might be *caused* by voting with prescribed safeguards for such essential activity (social distancing, wearing a mask, sanitizing hands, not touching one's face, etc.), and (iii) one would be among the statistically few to get the virus or to have more than a mild case.

87. The interpretation violates the Due Process Clause of the Fourteenth Amendment.

Prayer for Relief

88. Declare that the Plan violates the fundamental right to vote by direct disenfranchisement under the First and Fourteenth Amendments of the U.S. Constitution;

89. Declare that the Plan violates the fundamental right to vote by vote-dilution disenfranchisement under the First and Fourteenth Amendments of the U.S. Constitution;

90. Declare that the Plan violates Article I, § 4, cl. 1 of the U.S. Constitution;

91. Declare that the Plan violates the due process clause of the Fourteenth Amendment of the U.S. Constitution;

92. Issue a preliminary and permanent injunction that orders relief including:

- A.** Prohibiting Defendants from implementing their unlawful interpretation of “disability or illness” and from allowing persons without disability or illness to vote absentee,
- B.** Ordering Defendants to issue guidance instructing Virginia voters that they may

only vote absentee if they qualify under the statutory categories and definitions,

- C. Ordering Defendants, in coordination with city and county election officials, to conduct a public information campaign informing Virginia voters that they may only check “disability or illness” if they are disabled, ill, or pregnant, as statutorily defined,
- D. Order Defendants, in coordination with city and county election officials, to contact any Virginia voters who claimed a disability or illness (1) for the first time and (2) whose absentee application was submitted after Defendants issued guidance using their unlawful interpretation of “disability or illness,” to (i) inquire whether the voter marked the box according to Defendants’ unlawful guidance, and (ii) if so, inform the voter may only vote absentee if they qualify under the statutory categories and definitions;

93. Award Voters their costs and attorneys fees under 42 U.S.C. § 1988 and any other applicable authority; and

94. Grant any and all other such relief as this Court deems just and equitable.

Date: May 13, 2020

Respectfully Submitted,

_____/s/_____

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** Pro Hac Vice forthcoming*