

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

THOMAS CURTIN, et al.,

Plaintiffs,

v.

VIRGINIA STATE BOARD OF ELECTIONS,
et al.,

Defendants.

Civil Action No.

1:20-cv-00546 (RDA/IDD)

**MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF
IN SUPPORT OF DEFENDANTS**

Edgardo Cortés by and through his undersigned counsel, respectfully moves this Court for leave to file the amicus curiae brief in support of defendants, the Virginia State Board of Elections, Robert H. Brink, John O’Bannon, Jamilah D. Lecruise and Christopher E. Piper (the” Defendants”). A copy of the proposed Brief of Amicus Curiae Edgardo Cortés in Support of Defendants is lodged with the Court as Exhibit A. In support of the motion to file his amicus brief, Mr. Cortés submits the brief in support being filed contemporaneously herewith along with a supporting declaration attached hereto as Exhibit B. Cortés has obtained the consent of plaintiffs Thomas Curtin, Donna Curtin, Kelley Pinzon, Tom Cranmer, Carol D. Fox and Suzanne A. Spikes and Defendants.

WHEREFORE, Mr. Cortés respectfully requests that the Court enter an order substantially in the form herewith granting the motion and providing for any further relief that is just and proper.

Dated: May 26, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of May, 2020, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to all counsel of record.

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EXHIBIT A

**IN THE UNITED STATES DISTRICT COURT
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BRIEF OF *AMICUS CURIAE* EDGARDO CORTÉS IN SUPPORT OF DEFENDANTS

INTRODUCTION

Voting is a fundamental right of all American citizens, including citizens of the Commonwealth of Virginia. This fundamental voting right requires access to the polls by all eligible voters, including availability to vote by absentee ballot for those suffering from temporary illness or physical disability due to the COVID-19 pandemic. Pursuant to the state of emergency declared by Gov. Northam, and follow-on executive orders addressing the pandemic, the State Board of Elections issued guidance providing this critical access to voters by permitting and encouraging them to use excuse code 2A (disability and illness) to obtain absentee ballots due to COVID-19. This guidance has been in place since mid-March, and absentee ballots have been issued under it to tens of thousands of voters for the primary election scheduled for June 23, just weeks away.

Plaintiffs now ask this court for truly extraordinary relief, to disrupt this ongoing primary election in the midst of a global pandemic by issuing a preliminary injunction to change the guidance on absentee ballots. Not only do Plaintiffs seek to override and nullify the guidance for obtaining absentee ballots late in the game—with only weeks to the election—they also seek an order that will significantly burden election officials, requiring them to revisit ballots already cast and with little or no guidance on how to do so. In fact, the requested injunction would require election officials to ask voters the very question the Virginia legislature has instructed them not to ask – what the nature of their disability or illness is. As Edgardo Cortés explains in his declaration in support of the defendants, this injunction will cause severe disruption of the primary election, create great uncertainty and confusion among voters and election officials, and further tax the elections administration system during a global pandemic.

Not only is Plaintiffs' requested injunction ill-advised at this late stage, their showing falls well short of the heightened standard required to justify a mandatory injunction. When weighed against the severe disruption to an ongoing election and the potential confusion and disenfranchisement of registered voters, Plaintiffs' claims of theoretical voter dilution fail to meet the test to support a mandatory injunction. At bottom, what is at issue here is the mechanism by which registered voters exercise their fundamental right to vote during this unprecedented pandemic, not who is eligible to vote. Outside of mere speculation, Plaintiffs provide no evidence whatsoever that ineligible voters will obtain absentee ballots based upon the COVID-19 guidance they challenge. To the contrary, the Virginia Legislature has already debated the issue of whether any excuse should be required to obtain an absentee ballot in Virginia, and decided that no such excuse need be provided. This change takes full effect only eight days after the primary election at issue in this motion, the timing of which was decided before this pandemic took hold.

Plaintiffs' motion also fails to properly address the deference that must be afforded to government actions designed to protect public health during pandemics. As numerous courts have recognized, with the country in the midst of a pandemic, government orders which bear a substantial relation to protecting public health and which do not plainly and palpably invade an individual's fundamental rights beyond all question should be granted great deference by courts. Plaintiffs offer no evidence that justifies overturning this deference to actions taken pursuant to a validly issued declaration of emergency in Virginia.

Finally, and quite troubling standing on its own, is Plaintiffs' inexplicable delay in seeking relief here of two weeks after a motion to intervene in a similar case pending in the Western District of Virginia was denied. In that case, similarly situated voters—represented by

the same counsel—were denied substantially the same relief now requested of this court. Having failed to obtain the desired relief in that forum, Plaintiffs now seek a do-over in this court.

* * *

Because Plaintiffs’ eleventh-hour request for a preliminary injunction fails to meet the heightened burden for a mandatory injunction, fails to meet the balancing of interests and public policy prongs of the standard for all injunctions, and fails to provide any evidence justifying overturning the deference shown to government orders during a public health crisis, Plaintiffs’ motion for a preliminary injunction should be denied and eligible voters should continue to be afforded access to vote via absentee ballot due to COVID-19.

INTEREST OF *AMICUS CURIAE* EDGARDO CORTÉS

Edgardo Cortés’s unique perspective and experience will assist the court in deciding this preliminary injunction motion. Mr. Cortés served as Virginia’s first Commissioner of Elections from 2014 to 2018. Cortés Decl. ¶ 2.¹ He has served on various boards and commissions related to election access and infrastructure and was the chief election official in Fairfax County from 2009 to 2011. *Id.* ¶¶ 2-3. Through these various positions, he has gained “first-hand experience dealing with the requesting, approving, and sending of absentee ballots for elections in Virginia” and “personal knowledge regarding the responsibilities and requisite burdens placed on election officials in Virginia, including the requirements for and use of absentee ballots.” *Id.* ¶¶ 5-6. He is now a private citizen and registered Virginia voter in this District, who is concerned about contracting COVID-19, particularly since, as an asthmatic, he is in an at-risk category if he contracts COVID-19. *Id.* ¶¶ 17, 19-20. Like many voters, he is concerned that unless he can vote by absentee ballot using the government’s guidance regarding absentee ballots and COVID-19, he may not be able to vote at all. *Id.* ¶ 19.

¹ “Cortés Decl.” refers to the Declaration of Edgardo Cortés dated May 25, 2020, submitted as Ex. B.

Should Plaintiffs succeed in receiving a preliminary injunction, Mr. Cortés will be unable to use the absentee ballot he has already requested and will be disenfranchised. *Id.* Additionally, he is concerned about the severe disruption that a preliminary injunction could have on the ongoing primary and the chaos it would cause for election officials in Virginia. *Id.* ¶¶ 11-14.

ARGUMENT

Plaintiffs’ motion for a preliminary injunction must fail because it would upend the *status quo*, cause serious disruptions to an ongoing election, cause confusion as to proper exercise of the fundamental right to vote, and would almost invariably disenfranchise some voters. Under normal circumstances, plaintiffs face a high burden to persuade a court that an injunction is necessary. *See Noell Crane Sys. GmbH v. Noell Crane & Serv., Inc.*, 677 F. Supp. 2d 852, 876–77 (E.D. Va. 2009) (“[i]n Virginia, injunctions are an extraordinary remedy, and the decision whether to grant injunctive relief lies within the sound discretion of the court, taking into account the nature and circumstances of the case.”). However, this bar is raised even higher during a pandemic. *See Antietam Battlefield KOA v. Hogan*, No. CV CCB-20-1130, 2020 WL 2556496, at *5 (D. Md. May 20, 2020) (courts should overrule governmental decisions during a pandemic only when the orders have “no ‘real or substantial relation’ to protecting public health or that they are ‘beyond all question, a plain, palpable invasion of rights secured by the fundamental law.’” (quoting *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 27 (1905))).

I. Plaintiffs’ last-minute request for relief does not meet the standards for a mandatory injunction.

Plaintiffs have failed to satisfy the particularly heavy burden to obtain injunctions that would upend the *status quo*, particularly where, as here, the requested relief would cause serious disruption to an ongoing election and contravene strong public policy goals.

A. Legal Standards

1. Plaintiffs' request for a mandatory injunction is subject to a higher standard of proof.

Preliminary injunctions may be either mandatory (when the non-moving party is required to do something, changing the *status quo*) or prohibitory (when the non-moving party is prohibited from acting, so as to maintain the *status quo*). “Mandatory preliminary injunctive relief in any circumstance is disfavored, and warranted only in the most extraordinary circumstances.” *Taylor v. Freeman*, 34 F.3d 266, 270 n.2 (4th Cir. 1994) (citation omitted). Courts apply an “exacting standard of review” that is “even more searching” than a normal injunction analysis. *Pashby v. Delia*, 709 F.3d 307, 319 (4th Cir. 2013) (citations omitted). Because Plaintiffs seek to disrupt an election that is already in progress, their proposed injunction is clearly mandatory.

The Fourth Circuit defines the *status quo* as “the last uncontested status between the parties which preceded the controversy.” *Taylor*, 34 F.3d at 236. This best describes the state of affairs after the Commissioner of the Virginia Department of Elections (“ELECT”) and the State Board of Elections issued its guidance that fear of transmitting or catching COVID-19 qualified as a “disability or illness” sufficient to request an absentee ballot by mail. On March 16, the Commissioner recommended that localities “encourage voters to apply online for an absentee ballot. . . .” See ECF. No. 26, Ex. 3, Piper Decl. ¶ 17. The next day, ELECT’s absentee voting webpage included a message stating “[v]oting absentee in the upcoming May and June elections is strongly encouraged” and advising voters to select “2A My disability or illness” as their reason

for requesting an absentee ballot.² The message remains on ELECT’s website and social media pages today.

2. Plaintiffs’ request for a mandatory injunction must still satisfy the traditional requirements for an injunction.

To obtain injunctive relief, a party “must establish [1] that [they are] likely to succeed on the merits, [2] that [they are] likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in their favor, and [4] that an injunction is in the public interest.” *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 24 (2008). Courts frequently combine the third and fourth elements into one analysis. *See, e.g., Lecky v. Virginia State Board of Elections*, 285 F. Supp. 3d 908, 921–22 (E.D. Va. 2018). A plaintiff must prove all four factors to receive an injunction. *Real Truth About Obama, Inc. v. Fed. Election Comm’n*, 575 F.3d 342, 346-47 (4th Cir. 2009), *cert. granted, judgment vacated*, 559 U.S. 1089 (2010), and *adhered to in part sub nom. The Real Truth About Obama, Inc. v. F.E.C.*, 607 F.3d 355 (4th Cir. 2010)

Defendants’ Opposition Brief (ECF No. 26) shows that Plaintiffs’ likelihood of success on the merits is low, at best. Additionally, Plaintiffs make no effort to distinguish their voter dilution and disenfranchisement arguments in the context of the COVID-19 guidance, apart from voter dilution and disenfranchisement arguments made generally about absentee ballots, which courts have rejected outside the context of pandemics. *See, e.g., Landes v. Tartaglione*, No. CIV.A.04-CV-3164, 2004 WL 2397292, at *2 (E.D. Pa. Oct. 26, 2004), *aff’d*, 153 F. App’x 131 (3d Cir. 2005) (plaintiffs raised only “theoretical concern that absentee ballots *may* result in fraud and other problems”). Other courts have even rejected the very same argument made by the same counsel here. *Paher v. Cegavske*, No. 320CV00243MMDWGC, 2020 WL 2089813, at

² *See* <https://www.elections.virginia.gov/casting-a-ballot/absentee-voting/>.

*12 (D. Nev. Apr. 30, 2020) (“While Plaintiffs present this case as one about voter disenfranchisement due to purported vote dilution as a result of voter fraud; their claim of voter fraud is without any factual basis.”). Moreover, there is no legislative authority limiting the number of voters who may request an absentee ballot in Virginia, but there is authority allowing for absentee ballot voting—despite the potential risks argued by Plaintiffs. Plaintiffs have failed to show that they have a strong likelihood of succeeding on the merits, and they fail to meet the other prongs as well.

B. Granting an injunction so soon before the election would lead to severe disruption and administrative chaos.

1. Plaintiffs’ suit is untimely.

Plaintiffs’ suit comes in the midst of the June 23 primary election. The Commissioner first published guidance on COVID-19 and absentee balloting on March 17, following email guidance to the heads of the county election commissions on March 16. *See* ECF No. 26, Ex. 3, Piper Decl. at ¶ 17. That guidance was successfully implemented in town and city elections in Virginia on May 19, 2020. *See, e.g., Governor Moves Town Elections to Tuesday, May 19, Fauquier Times* (Apr. 24, 2020), https://www.fauquier.com/news/update-governor-moves-town-elections-to-tuesday-may-19/article_2d51415a-8574-11ea-ae63-6f240942ef29.html. There was a spike in the number of mail-in absentee ballots requested almost entirely from the 2A (illness and disability) category that voters were allowed to use over fears of COVID-19. *See, e.g., May 19, 2020 Town General Election Unofficial Results – Absentee Statistics*, Virginia Department of Elections (last accessed May 24, 2020), <https://results.elections.virginia.gov/vaelections/2020%20May%20Town%20General/Site/Statistics/Absentee.html>. Yet, despite the same ostensible harm, neither Plaintiffs nor any other parties

challenged the pandemic-related guidance for absentee ballots in this previous election, or identify evidence of the harms they postulate having occurred.

Instead, Plaintiffs waited until May 13 – 57 days after the guidance was issued and five days after absentee ballots had started to be mailed – to bring this suit. Tens of thousands of absentee ballots have already been sent to voters. *See* ECF. No. 26, Ex. 3, Piper Decl. ¶ 14. Plaintiffs’ request for an injunction comes literally *in the middle of voting* in an ongoing election – too late to avoid serious disruptions if an injunction is now belatedly issued.

2. Granting an injunction now would create severe disruption in the election and administrative chaos.

Plaintiffs have asked this court to order Defendants:

[T]o 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.

Compl. at 22. This part of the requested injunction alone would require Defendants to reach out to tens of thousands of Virginians to determine the reason they requested an absentee ballot. Plaintiffs make no accommodation for how to address voters who do not respond to an eleventh-hour inquiry or what to do with ballots that have already been cast under the pandemic-related guidance for absentee ballots. Having to sort out those issues on the fly in the middle of an election while thousands more ballots pour in will create administrative chaos in the election offices, and risks disenfranchisement of those who apply for, obtain, and file absentee ballots based on the current guidance.

Edgardo Cortés has first-hand experience dealing with the absentee balloting process in Virginia. Cortés Decl. ¶¶ 2-6. He personally attests, based on direct experience, that Plaintiffs’

requested injunction would disrupt the administration of this election. Cortés Decl. ¶¶ 11-12. This would create uncertainty and jeopardize the consistency and clarity needed to effectively administer an election. *Id.* ¶¶ 13-14. It would also raise the possibility of different rules for counting of absentee ballots depending on when they were mailed, or received, or applied for. *Id.* ¶ 14.

Not only would severe disruption ensue, but ELECT would be required by the proposed injunction to engage in exactly the kinds of enquiries that the Virginia legislature has explicitly eliminated from the absentee ballot statutes over concerns about privacy. *See* Cortés Decl. ¶ 13. Section 24.2-701 used to contain a provision requiring a voter requesting an absentee ballot due to disability or illness to state the nature of the disability or illness. The legislature explicitly stripped this requirement from the statute and replaced it with a requirement only to attest that one is disabled or ill. *See* VA LEGIS 620 (2013), 2013 Virginia Laws Ch. 620 (S.B. 967). Requiring ELECT to do what the legislature told it not to do would violate—not effectuate—Virginia law.

3. Plaintiffs’ ostensible reason for delay in filing this case is nothing more than forum-shopping.

Plaintiffs claim that their admittedly last-minute filing of this action is somehow justified because allegedly “circumstances have changed” since issuance of the guidance in mid-March. One of the main changed circumstances they highlight in their motion to expedite (ECF No. 16) and motion for a preliminary injunction (ECF No. 31) briefing is the “denial of intervention for Voter-Defendants in *League of Women Voters v. Virginia State Board of Elections*, No. 6:20-cv-00024 (W.D. Va. 2020), which intervention would have resolved [the issue in this case] and protected Voters’ fundamental rights.” Pl.’s Reply Mem. (ECF No. 31) at 15. While the court denied intervention, it permitted the voters in that case to participate as *amicus curiae* opposing

the consent decree and treated their proposed crossclaim as an amicus brief. *League of Women Voters*, ECF No. 55, at n.1 (W.D. Va. Apr. 29, 2020). Those voters' brief contained arguments similar to the ones raised here – that voters would be disenfranchised and/or have their vote diluted by an unnecessary and unlawful expansion of absentee voting in Virginia – and was filed by the same counsel who represent Plaintiffs in this case. *Id.*, ECF No. 22, Ex. 1.

Plaintiffs' stated reason for delay rings hollow. Plaintiffs' counsel took more than two weeks from the denial of intervention of different clients in *League of Women Voters* to file the complaint in this case, though it appears to be largely a copy-paste of sections from various filings in that case. Compare, e.g., *League of Women Voters*, ECF No. 37, 2-4 with Compl. (ECF No. 1) ¶¶ 29-38. Plaintiffs offer no explanation for this further delay, at a critical point in the current election process. It appears Plaintiffs waited for the ruling of the Western District of Virginia, and when they found the result unsatisfactory, they brought this suit, seeking a second bite at the same apple. Such conduct smacks of forum-shopping, which is disfavored in the Fourth Circuit. See *The Hipage Co. v. Access2Go, Inc.*, 589 F. Supp. 2d 602, 616 (E.D. Va. 2008) (“It is well established that courts disfavor ‘procedural fencing,’ such as forum shopping.”). Plaintiffs have no entitlement to a do-over, particularly where their delay causes increased disruption and uncertainty.

C. An injunction at this late stage of the election process would cause voter confusion and disenfranchisement.

An injunction issued now would also cause voter confusion and would create the very disenfranchisement about which Plaintiffs claim to be concerned. Mr. Cortés has already requested an absentee ballot under the guidance issued by the Commissioner. Cortés Decl. ¶ 19. He has stated that Plaintiffs provide no guidance on what would happen to the thousands of absentee ballots that have already been cast and the thousands more that are in voters' hands if

and when returned. *Id.* ¶ 14. If an experienced election official such as Mr. Cortes is uncertain of the effect of an injunction, a voter with no experience in absentee ballot administration is highly likely to be confused. In addition, he, like many voters requesting absentee ballots, worries that he could contract COVID-19 prior to in-person voting on June 23, which would prevent him from voting in person or risk infecting numerous others and violating quarantine orders for those with COVID-19. *Id.* ¶ 21. Plaintiffs' requested injunction would potentially prevent thousands of eligible voters from exercising their right to vote, causing the very disenfranchisement Plaintiffs claim they want to avoid.

Balanced against Plaintiffs' alleged harms, which essentially boil down to a concern that voters who were already registered may vote in a manner the legislature has not explicitly approved, the voter confusion and disenfranchisement that would almost surely result if Plaintiffs' request for an injunction were granted, far outweigh the speculative voter dilution and disenfranchisement effect hypothesized if Plaintiffs' requested injunction is not granted.

II. Plaintiffs' request for an injunction is contrary to the standards governing government action during a pandemic.

This case arises in the context of a global pandemic that has triggered a wide range of governmental actions, including unchallenged directives being implemented by the challenged guidance. In such extraordinary circumstances, responsive government orders and actions are treated with deference – a deference Plaintiffs have not and cannot overcome.

A. Courts show increased deference to government actions during pandemics.

Courts around the country have been deferring to the legislature and executive when reviewing state government actions to protect the health and safety of their citizens. In a case in Nevada brought by Plaintiffs' counsel and seeking virtually identical relief to that sought here, the court noted the public interest factor and balance of equities would tip in favor of the

government because of the interest in “protect[ing] the public during a public health crisis.” *Paher*, 2020 WL 2089813, at *12 (reviewing all mail-in ballot regulation under rational basis review). The court also rejected claims that the all mail-in regulations would violate legislative intent for in-person voting because the plan was “a one-off situation triggered by a pandemic.” *Id.* at *10.

Likewise, another court within this circuit recently held that it was not the place of the court to “‘usurp the functions of another branch of government’ in deciding how best to protect public health, as long as the measures are not arbitrary or unreasonable.” *Antietam Battlefield*, 2020 WL 2556496, at *5 (quoting *Jacobson*, 197 U.S. at 27). Under the standard applied there, a court should affirm a government order to protect the public health during a pandemic unless the plaintiff can show that there is “no ‘real or substantial relation’ to protecting public health or that [the order is] ‘beyond all question, a plain, palpable invasion of rights secured by the fundamental law.’” *Id.* In light of these decisions, Plaintiffs must meet a higher burden than normal to show entitlement to an injunction if review of the government’s order is appropriate at all.

B. Plaintiffs’ claims do not overcome this deference.

The governor of Virginia issued a valid executive order directing the Commissioner and the State Board of Elections to promulgate rules that would conform to the CDC’s guidelines to protect voters and election officials. Executive Order 56 (2020). This executive order was made pursuant to the declared state of emergency in Virginia. *Id.* Plaintiffs have not and cannot dispute that there is a legitimate public health crisis that necessitated the declaration of a statewide emergency from which the executive order regarding elections flows.

Should the Court even reach the decision of whether the guidance regarding absentee ballots is valid, Plaintiffs' claims fail to meet the high hurdle that would be required to reject government orders issued to address the effects of a pandemic. They have not and cannot show that guidance intended to minimize physical contact during an election has "no real or substantial relation to protecting public health" in the face of a highly contagious virus. *Antietam Battlefield*, 2020 WL 2556496, at *5. Nor do Plaintiffs' claims of possible voter disenfranchisement and dilution because of potential mailing issues prove "beyond all question, a plain, palpable invasion of rights secured by the fundamental law." *Id.* Plaintiffs have not made the necessary showing to defeat the deference shown to government orders protecting public health during a pandemic.

C. Inaction by the legislature on the new guidance does not defeat this deference.

Plaintiffs make much of the fact that the state legislature did not explicitly act on the new guidance. *See, e.g.*, Reply at 15 ("one of the biggest issues in this case is that the legislature did not act here"). They theorize that, because the legislature chose not to approve of the new guidance in a special session or in its Reconvene and Veto Session on April 22, 2020, the guidance is not valid. *Id.* at 15–16. But this analysis completely inverts the implication of the legislature's inaction. It is the legislature's *conscious* inaction that provides a stamp of approval. The interpretation of "disability or illness" was announced on March 16 and 17, and the legislature convened over a month later on April 22. As the Plaintiffs point out, there was plenty of time to course correct this decision, but the legislature saw no need to act. If it had been opposed to the change, it would have taken action.

Moreover, the legislature may well have not been compelled to affirmatively approve the new guidance because it had already gone further than the narrowly-tailored modification at

issue. On February 24 and 26 respectively, the Virginia Senate and House passed a bill allowing all voters to request an absentee ballot—without having to provide any reason at all—starting July 1.³ There was no reason to spend time validating an emergency declaration fully consistent with what the legislature’s recent enactment. The only discernable difference between the effect of the new guidance and the new law coming into effect is the date – a date the legislature chose without any consideration of COVID-19 and one that is eight days after the current election. Plaintiffs’ contention that the difference of eight days somehow suggests a legislative intent to prevent people from using COVID-19 as an excuse is pure speculation and wholly unsupported. Coupled with the fact that the legislature chose not to act on the new guidance, the decision to switch to no-excuse absentee voting on July 1 shows a legislative intent fully consistent with permitting the current guidance to stand. Put simply, the legislature need not place its stamp of approval on temporary guidance for which box to check during a pandemic when it had already debated and decided that no check boxes were needed at all.

CONCLUSION

For the forgoing reasons, Edgardo Cortés respectfully urges the Court to deny Plaintiffs’ motion for a preliminary injunction.

³ See Virginia’s Legislative Information System, <https://lis.virginia.gov/cgi-bin/legp604.exe?201+sum+HB1>

Dated: May 26, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of May, 2020, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to all counsel of record.

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DECLARATION OF EDGARDO CORTÉS

1. I am an adult U.S. citizen over eighteen years of age, am otherwise competent to testify, and have personal knowledge of the facts set out in this Declaration.

My Professional Experience with Elections in Virginia

2. I was Virginia's first Commissioner of Elections. I was appointed by Governor Terry McAuliffe on July 1, 2014 and I served in that position until 2018. During that time, I also served as the chairman of the Board for the Electronic Registration Information Center (ERIC) and as chairman of the U.S. Election Assistance Commission Standards Board. Additionally, I was a charter member of the Election Infrastructure Government Coordinating Council established by the U.S. Department of Homeland Security.

3. Prior to my role as the Commissioner of Elections, from 2005 to 2009, I served as Deputy Director of Policy and Grants at the U.S. Election Assistance Commission. From 2009 to 2011, I served as General Registrar in Fairfax County. From 2011 to 2014, I was employed at the national office of the Advancement Project, a non-partisan non-profit organization based in Washington, D.C.

4. As Commissioner of Elections, I led the Virginia Department of Elections in working with local election officials to ensure Virginia's election laws and regulations were implemented properly to serve the voters of the Commonwealth of Virginia. As General Registrar of Fairfax County, I was charged with maintaining accurate and current voter registration records as well as conducting fair, transparent, uniform elections in accordance with the Constitutions of the United States and the Commonwealth of Virginia.

5. My professional experience includes first-hand experience dealing with the requesting, approving, and sending of absentee ballots for elections in Virginia. I am familiar with the checks and balances involved in safeguarding the election process, while effectuating Virginia's statutory scheme for election conduct.

6. Given my extensive elections experience, both at the state and local levels, I have extensive personal knowledge regarding the responsibilities and requisite burdens placed on election officials in Virginia, including the requirements for and use of absentee ballots. I also have extensive personal knowledge as to the safeguards that have been put in place in Virginia, and particularly Fairfax County, to ensure that only eligible voters receive an absentee ballot.

Use of Absentee Ballots for COVID-19

7. I am providing this Declaration in the context of the extraordinary burdens placed on our election system and Virginia voters due to the COVID-19 pandemic. All elections are important and voting is a fundamental right of American citizens, including citizens of the Commonwealth of Virginia. This fundamental voting right requires access to the polls by all eligible voters, including availability to vote by absentee ballot for those suffering from temporary illness or physical disability due to the COVID-19 pandemic.

8. On March 12, 2020, Governor Ralph Northam declared a state of emergency in the Commonwealth due to the COVID-19 pandemic. On March 23, 2020, Governor Northam issued Executive Order 53 (the “Stay-at-Home Order”) which: ordered the closure of non-essential businesses, banned all gatherings of more than 10 people, closed all K-12 schools for the remainder of the academic year and urged residents to avoid non-essential travel outside the home, if and when possible.

9. On April 13, 2020, Governor Northam issued Executive Order 56, directing the Commissioner and the State Board of Elections to promulgate rules that would conform to the Centers for Disease Control and Prevention’s (the “CDC”) guidelines to protect voters and election officials. This executive order was made pursuant to the declared state of emergency in Virginia.

10. Pursuant to Executive Order 56, the State Board of Elections and Department of Elections provided guidance to Virginia voters to minimize the impact of COVID-19 on them during the properly declared and continuing state of emergency. In particular, registered voters were informed that they could elect reason code 2A on the already-prepared absentee ballots as a result of COVID-19.

Entering an Injunction Concerning Absentee Ballots at this Late Stage Will Disrupt the Election

11. I have read the Declaration of Christopher Piper¹ and share many of the concerns he expressed that the uniformity of the primary election on June 23, 2020 (the “Primary Election”) may be impaired should the preliminary injunction requested in this proceeding be granted, especially so at this late stage.

¹ The Declaration of Christopher Piper (the “Piper Declaration”) is filed as Exhibit 3 to ECF Document No. 26.

12. Additionally, I have reviewed the specific relief Plaintiffs seek in their motion and believe that if the preliminary injunction is granted it would, in fact, have severe detrimental effects on the Primary Election for reasons I explain below.

13. First, Plaintiffs ignore that on March 20, 2013, the Virginia Legislature specifically eliminated the requirement that a person applying for an absentee ballot with reason code 2A, disability or illness, disclose personal information regarding the nature of their disability or illness. Should the court grant Plaintiffs' preliminary injunction as requested, the court would require applicants to disclose the reasoning behind their choice and/or personal information, undermining the legislature's intent of providing privacy to these voters when making this election.

14. Further, the Plaintiffs do not take into account that the absentee voting process began more than three weeks ago, with absentee ballots being issued as of May 8, 2020. I echo Christopher Piper's fears that a change in the election process now would cause severe disruption, create great uncertainty and confusion and further tax the elections administration system. Plaintiffs do not discuss the effect of their proposed injunction on the thousands of votes that were already cast by absentee ballot – or the literally thousands of absentee ballots in voters' possession for completion and submission.

15. Finally, it should be noted that Plaintiffs appear to misapprehend the argument concerning voter dilution. Here, those voters who have requested to vote absentee are eligible voters and seek only to change the mechanism by which they vote, which is reasonable under the circumstances given the unknowns associated with the transmission and spread of COVID-19. The guidance does not in any way change any eligibility requirements for voters in Virginia. In my experience, the safeguards for absentee ballots already in place are sufficient to prevent any

voter fraud from occurring in connection with increased utilization of absentee ballots as a result of the COVID-19 state of emergency.

How My Voting Rights Would Be Impacted by this Injunction

16. I am married and live with my wife and two young children in Fairfax County, Virginia where I have been registered to vote since at least 2005.

17. I am a regular voter and have routinely voted in primary, general, and special elections since at least 2005.

18. My family and I have been rigorously complying with the Governor’s Stay-at-Home Order. As a result, my wife and I have ceased all work-related travel and have been teleworking from home. Our children have been home from school and day care. We have avoided non-essential travel and almost never go shopping in person—instead, we have been ordering grocery delivery or arranging for curbside pickup. My family and I have avoided contact with others in public venues for the past three months, to safeguard our health and avoid potential exposure to COVID-19.

19. To protect my family’s health as well as my own health, and to avoid exposing others to the risk of COVID-19, I do not believe that I should vote in person in the Primary Election, rather, I should vote by absentee ballot instead. In accordance with the guidance issued by Commissioner of Elections, due to the COVID-19 pandemic, I requested an absentee ballot via the Department of Elections Online Portal on May 24, 2020, choosing reason code “2A, My disability or illness.” I would not go to a polling place to vote in the Primary Election in person in the event I experience any COVID-19 symptoms.

20. I am an asthmatic, and thus am at higher risk for pneumonia or acute respiratory disease as a result of COVID-19. This has led my family and me to have followed the

prevention guidance issued by both the Virginia Department of Health and the CDC since the state of emergency was declared. Although currently the Stay-at-Home Order is scheduled to be lifted as of June 10, 2020, I intend to continue to follow the prevention guidance for the near future, including teleworking, social distancing, wearing a facemask and avoiding non-essential travel to minimize the risk of infection for myself and my family, and to minimize the potential for transmitting the disease to others should I become contagious, despite the safety measures I am implementing.

21. I am also concerned for my local community in Fairfax County if this absentee voting option is made unavailable or curtailed for the Primary Election. If my neighbors and fellow citizens are not able to vote absentee, I am concerned that there will be large crowds of voters who are unable to properly socially distance at polling sites, increasing the potential for further spread of COVID-19, particularly among poll workers and elections officials.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 25, 2020.



Edgardo Cortés

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

THOMAS CURTIN, et al.,

Plaintiffs,

v.

VIRGINIA STATE BOARD OF ELECTIONS,
et al.,

Defendants.

Civil Action No.

1:20-cv-00546 (RDA/IDD)

**ORDER GRANTING MOTION FOR LEAVE TO FILE AMICUS CURIAE
BRIEF IN SUPPORT OF DEFENDANTS**

Upon consideration of the Motion for Leave to File Amicus Curiae in Support of Defendants (the “Motion”) filed by Edgardo Cortés, the brief in support of the Motion and supporting declaration of Mr. Cortés, it is hereby;

ORDERED that the Motion is GRANTED, and the proposed amicus curiae brief of Edgardo Cortés shall be deemed filed.

Date: _____

Hon. Rossie D. Alston, Jr.
United States District Judge