IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

DEMOCRACY NORTH CAROLINA, THE LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, DONNA PERMAR, JOHN P. CLARK, MARGARET B. CATES, LELIA BENTLEY, REGINA WHITNEY EDWARDS, ROBERT K. PRIDDY II, WALTER HUTCHINS, AND SUSAN SCHAFFER,

Plaintiffs,

v.

THE NORTH CAROLINA STATE BOARD OF ELECTIONS; DAMON CIRCOSTA, in his official capacity as Chair of the State Board of Elections; STELLA ANDERSON, in her official capacity as Secretary of the State Board of Elections; KEN RAYMOND, in his official capacity as Member of the State Board of Elections; JEFF CARMON III, in his official capacity as Member of the State Board of Elections; DAVID C. BLACK, in his official capacity as Member of the State Board of Elections; KAREN BRINSON BELL, in her official capacity as Executive Director of the State Board of Elections; THE NORTH CAROLINA DEPARTMENT OF TRANSPORTATION; J. ERIC BOYETTE, in his official capacity as Transportation Secretary; THE NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES; MANDY COHEN, in her official capacity as Secretary of Health and Human Services,

Defendants,

and

PHILIP E. BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate, and TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives,

Proposed Intervenors.

Civil Action No. 20-cv-00457

PROPOSED INTERVENORS' BRIEF IN SUPPORT OF THEIR MOTION TO INTERVENE

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

Constitutions, Statutes, and Rules

Legislative Materials

Other Authorities

STATEMENT OF SUBJECT MATTER BEFORE THE COURT

"Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). Here, the laws of North Carolina could not be clearer in designating Proposed Intervenors as necessary and primary agents of the State in exercising the government authority of defending the laws of the State from attack in cases like this. This Court should honor the sovereign choice of the State of North Carolina and grant Proposed Intervenors' motion to intervene.

Under Article I, § 4 of the United States Constitution, the North Carolina General Assembly is the sole entity in the State authorized to prescribe the times, places, and manner of elections for federal office in the State. The General Assembly's task is particularly important this year, as the novel coronavirus presents novel questions about how to conduct an election during a global pandemic. And the General Assembly is hard at work seeking to answer those questions, which involve balancing interests in the integrity of elections, access to the polls, and poll worker and voter health. Bipartisan legislation to amend North Carolina election law in light of the COVID-19 pandemic known as H.B. 1169 was introduced in the North Carolina House of Representatives on May 22, passed that body by a 116-3 vote on May 28, and is currently pending in the Senate.

Plaintiffs in this action, however, are seeking to cut short this legislative process and wrest away the General Assembly's constitutional authority over prescribing the manner of elections in the State. On May 22, 2020—the same day H.B. 1169 was introduced—Plaintiffs filed this lawsuit, which challenges a panoply of North Carolina election laws alleged to be unconstitutional or otherwise unlawful in application during the COVID-19 pandemic. And on June 5, Plaintiffs filed a motion for a preliminary injunction seeking judicial sanction for their wish-list of reforms.

Defendants have their own views on the administration of elections during these unusual times. Defendant Karen Brinson Bell, the Executive Director of Defendant State Board of Elections, has twice sent letters to legislative leaders including Proposed Intervenors, President Pro Tempore Berger and Speaker Moore, requesting numerous statutory changes to address the impact of the COVID-19 pandemic on elections. Many of these changes are also sought by Plaintiffs in this action. Attorney General Josh Stein, whose office represents Defendants in this case, likewise has written to Proposed Intervenors and other legislators seeking changes similar to those sought by Plaintiffs.

This confluence of interests between Plaintiffs and Defendants—and the absence of any party in the case representing the constitutional authority of the General Assembly to set the ground rules for conducting elections—undermines the adequacy of the current parties for the effective conduct of this litigation. Fortunately, federal and state law work together to provide a solution to this problem. Federal Rule of Civil Procedure 24 grants a right to intervene in federal litigation to those whose substantial interests in the case are inadequately represented by the existing parties. Fourth Circuit case law makes clear that potential divergences of interest much less acute than that present in this case satisfy Rule 24's liberal standards. *See United Guaranty Residential Ins. Co. of Iowa v. Philadelphia Sav. Fund Soc.*, 819 F.2d 473 (4th Cir. 1987). And North Carolina law designates Proposed Intervenors as necessary agents of the State in litigation challenging the validity of State law and grants them final decision-making authority over the defense of that litigation. *See, e.g.*, N.C. GEN. STAT. § 120-32.6.

Under these provisions of federal and state law, Proposed Intervenors are entitled to intervene in this case. Proposed Intervenors therefore move to intervene as defendants, and they

request that this Court act on their request promptly so that they can participate fully in the response to Plaintiffs' request for a preliminary injunction.

QUESTION PRESENTED

Whether Proposed Intervenors should be granted leave to intervene in this case either as of right under Fed. R. Civ. P. 24(a) or permissively under Rule 24(b).

STATEMENT OF FACTS

Under a variety of legal theories, Plaintiffs assail a wide-ranging array of provisions of North Carolina election law which, they say, "in the context of the [COVID-19] pandemic, taken individually or in combination," violate federal law. Doc. 8, First Amend. Compl. at 75 (June 5, 2020). These provisions include:

- The requirement that requests for absentee ballots may not be "completed, partially or in whole, or signed by anyone other than the voter, or the voter's near relative or verifiable legal guardian." N.C. GEN. STAT. § 163-230.2(e). Members of multi-partisan teams ("MATs") trained and authorized by county boards of elections may also assist, *id.*, and a person in need of assistance "due to blindness, disability, or inability to read or write" may request the assistance of the person of his or her choice if "there is not a near relative or legal guardian available." *Id.* at § 163-230.2(e1).
- The requirement that absentee ballot requests be physically returned to county board of elections offices, and that the delivery must be made by the voter, the voter's near relative or legal guardian, a MAT member, the postal service, or a designated delivery service. *See* N.C. GEN. STAT. § 163-230.2(e)(4).

- The requirement that voters requesting an absentee ballot identify themselves with a North Carolina driver's license number, special identification card number, or the last four digits of their Social Security number. See N.C. GEN. STAT. § 163-230.2(a)(4), (f).
- The requirement that only a near relative, verifiable legal guardian, or MAT member may assist a voter with marking an absentee ballot. *Id.* at § 163-226.3(a)(4).
- The requirement that absentee ballots must be marked and sealed "[i]n the presence of two persons who are at least 18 years of age," or a notary public. *Id.* at § 163-231(a).
- The requirement that absentee ballots must be mailed at the voter's expense or delivered in person, by the voter or the voter's near relative or verifiable legal guardian. *Id.* at § 163-231(b)(1).
- The requirement that every precinct must be staffed by precinct assistants, a majority of whom must reside in the precinct itself. *Id.* at § 163-42(b).
- The "uniform hours" requirement for one-stop early voting sites within a county. *Id.* at § 163-227.6(c).
- The requirement that county boards of elections must provide public notice of alteration or consolidation of precincts at least 45 days before an election.
- The lack of a requirement that personal protective equipment be provided for use by poll workers or voters during in-person voting.

Plaintiffs have asserted their claims against the executive branch officials and agencies charged with administering the State's elections, and Defendants are represented in this litigation by members of the office of Attorney General Josh Stein. These officials also have been seeking changes to North Carolina election law similar to those sought by Plaintiffs. Defendant Brinson Bell, Executive Director of Defendant State Board of Elections, has written to lawmakers,

including Proposed Intervenors, on two separate occasions. *See CARES Act Request and Clarification to Recommendations to Address Election-Related Issues Affected by COVID-19*, Karen Brinson Bell, Ex. 2 to Decl. of Allison J. Riggs in Supp. of Pls. Mot. for a Prelim. Inj., Doc. 12-7 (April 22, 2020) ("Riggs Decl."); *Recommendations to Address Election-Related Issues Affected by COVID-19*, Karen Brinson Bell, Ex. 1 to Riggs Decl., Doc. 12-7 (Mar. 26, 2020). Writing on behalf of the State Board of Elections, Executive Director Bell called for laws that would, among other things:

- Expand options for absentee requests (i.e. allow requests by fax and email);
- Establish an online portal for absentee requests;
- Establish a fund to pay for postage for outbound and returned absentee ballots;
- Allow voters to use alternative personal identification in an absentee ballot requests, if unable to provide their driver's license number or last four digits of their Social Security number;
- Reduce or eliminate the witness requirement for absentee ballots;
- Temporarily modify restrictions on absentee-ballot assistance in care facilities;
- Eliminate the requirement that a majority of pollworkers reside in the precinct; and
- Modify one-stop site and hour requirements.

All of these proposals mirror claims for relief in this case.

Attorney General Stein also has proposed many of the same changes to lawmakers. *See* Letter from Attorney General Josh Stein, to Hon. Phil Berger et al. (May 29, 2020), Ex. A. His requests included:

- Relaxing identification requirements for absentee ballot requests;

- Allowing county boards to prefill ballot request forms, contrary to the current restriction of assistance to relatives, guardians, and MAT members;
- Providing prepaid postage on returned absentee ballots; and
- Repealing the uniform-hour requirements for one-stop voting sites.

While Plaintiffs, Defendants, and Attorney General Stein have expressed their own views, the General Assembly, the entity charged by the Constitution with prescribing the times, places and manners of elections, U.S. CONST. art. I, § 4, has been hard at work on legislation to address how North Carolina election law should be altered to address the COVID-19 pandemic. On May 22—the same day Plaintiffs' filed this lawsuit—H.B. 1169, "The Bipartisan Elections Act of 2020," was introduced in the House. The Bill is sponsored by two Democratic and two Republican legislators, and on May 28 it passed the House by a vote of 116–3. *See* H.B. 1169, 119th Leg., Reg. Sess. (N.C. 2020), *available at* https://bit.ly/2YckPfO. It has cleared three Senate committees and is calendared for a full vote on June 10, 2020. In its current form it would amend state law in numerous ways for the 2020 elections, including by, among other things:

- Allowing absentee ballot requests to be sent to a voter by mail, email, or fax, and posted in blank form online, H.B. 1169 Edition D at § 5(a), https://bit.ly/2YckPfO;
- Allowing absentee ballot requests to be submitted by email or fax, *id.* at § 2(a);
- Authorizing a new procedure of online request of absentee ballots, *id.* at § 7(a);
- Requiring only one witness for absentee voting, *id.* at § 1(a);
- Requiring the Department of Health and Human Services and the State Board of Elections to develop guidance for safe assistance of voters in care facilities by MATs, *id.* at § 2(b);
- Requiring only one assistant at each precinct to reside in the precinct and allowing precincts to employ assistants who reside elsewhere in the county, *id.* at § 1(b); and

- Appropriating over $26 million to the State Board of Elections "to prevent, prepare for, and respond to the coronavirus pandemic during the 2020 federal election cycle," to be used for a variety of measures, including investing substantial sums for maintaining and expanding clean and accessible one-stop early voting sites and election day voting, *id.* at §§ 11.1-11.3.

The Bill, of course, has not yet been enacted, and if and when it is it may have undergone amendment from its current form. But its existence demonstrates that the General Assembly is working in a bipartisan manner to address voting and the COVID-19 pandemic. Proposed Intervenors seek to intervene to defend North Carolina law and protect the constitutional prerogatives of the General Assembly.

ARGUMENT

I. Proposed Intervenors are Entitled to Intervene as of Right.

Under Rule 24(a), a court "must permit anyone to intervene who" (1) makes a timely motion to intervene, (2) has an "interest relating to the property or transaction that is the subject of the action," (3) is "so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest," and (4) shows that he is not "adequately represent[ed]" by "existing parties." FED. R. CIV. P. 24(a). Proposed Intervenors meet these requirements, particularly given the Fourth Circuit's "liberal" approach to intervention. *Feller v. Brock*, 802 F.2d 722, 729 (4th Cir. 1986). Indeed, the Fourth Circuit has authorized Proposed Intervenors to intervene in cases challenging North Carolina law, and this Court should do the

same. *See* Order, *North Carolina State Conference of NAACP v. Raymond*, No. 20-1092, Doc. 43 (March 27, 2020); Order, *ACLU v. Tata*, No. 13-1030, Doc. 43 (4th Cir. Jan. 14, 2014).[1]

A. Proposed Intervenors' Motion is Timely.

Proposed Intervenors have timely filed this motion. Plaintiffs filed the complaint on May 22, less than three weeks ago, *see* Doc. 1, Compl., and they amended it on June 5, less than a week ago. Plaintiffs' request for a preliminary injunction is only days old, as it also was filed on June 5. *See* Doc. 9, Mot. for Prelim. Inj.. Nothing else of substance has happened in the case. For the timeliness requirement of Rule 24, "[t]he most important consideration is whether the delay has prejudiced the other parties." *Spring Const. Co. v. Harris*, 614 F.2d 374, 377 (4th Cir. 1980). Proposed Intervenors have not delayed in presenting themselves to protect their interests at stake in this suit, and their intervention would not in any way impede the progress of the suit.

B. Proposed Intervenors Have a Significantly Protectable Interest in the Subject of the Suit.

Rule 24(a)(2)'s requirement of an "interest" in the "subject of the action" refers to "significantly protectable interest." *Teague v. Bakker*, 931 F.2d 259, 261 (4th Cir. 1991) (quoting *Donaldson v. United States*, 400 U.S. 517, 531 (1971)). Proposed Intervenors have two independent significantly protectable interests that entitle them to intervene: (1) the interest of the *State* in defending the constitutionality of the challenged laws; and (2) the interest of the *General Assembly* in defending its legislative enactments and authority, including its authority under

[1] Judge Biggs denied intervention to Proposed Intervenors in district court the *North Carolina State Conference of NAACP* case, *see* Mem. Op. and Order, *North Carolina State Conference of NAACP v. Cooper*, No. 18-1034, Doc. 56 (June 3, 2019); Mem. Op. and Order, *North Carolina State Conference of NAACP v. Cooper*, No. 18-1034, Doc. 100 (Nov. 7, 2019), but this denial is on appeal before the same panel that granted Proposed Intervenors' motion to intervene in the appeal of Judge Biggs' order granting a preliminary injunction. *See North Carolina State Conference of NAACP v. Berger*, No. 19-2273 (4th Cir.). For the reasons in their briefing in the *NAACP* case, Proposed Intervenors submit that Judge Biggs erred to the extent her reasoning and conclusions were inconsistent with those presented by Proposed Intervenors here.

Article I, §4 of the Constitution to "prescribe[ ]" the "Manner of holding Elections for Senators and Representatives." *See* U.S. CONST. art. I, §4, *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019) (treating interests of state and legislature as two separate interests).

1. The State of North Carolina has an interest in "defend[ing] the constitutionality of its statute[s]." *Bethune-Hill*, 139 S. Ct. at 1951. And since the "State of North Carolina" only can act through its authorized agents, the "State must be able to designate agents to represent it in federal court." *Id*. Further, it is within the State's sovereign prerogative to authorize members of the General Assembly to serve as those agents and therefore "to litigate on the State's behalf." *Id*.; *see also Karcher v. May*, 484 U.S. 72, 81 (1987); *Hollingsworth v. Perry*, 570 U.S. 693, 709–10 (2013).

Consistent with this authority, North Carolina law expressly, repeatedly, and emphatically designates Proposed Intervenors as agents of the State to defend the State's laws from attack in federal court in cases like this one. *See* N.C. GEN. STAT. § 120-32.6; N.C. GEN. STAT. § 1-72.2(b); N.C. GEN. STAT. § 114-2(10). Indeed, State law goes much further than merely designating Proposed Intervenors as its agents in this type of litigation by making clear that Proposed Intervenors are the State's *necessary* and *primary* agents for defense of its laws. "*Whenever* the validity or constitutionality of an act of the General Assembly . . . is the subject of an action in any State *or federal* court," North Carolina law provides, "the Speaker of the House of Representatives and the President Pro Tempore of the Senate, *as agents of the State through the General Assembly*, shall be *necessary parties*." N.C. GEN. STAT. § 120-32.6 (emphases added). And in "such cases, the General Assembly through the Speaker of the House of Representatives and President Pro Tempore of the Senate jointly shall possess *final decision-making* authority with respect to the defense of the challenged act of the General Assembly." N.C. GEN. STAT. § 120-32.6 (emphasis

added). The Attorney General is expressly directed to "abide by and defer to [this] final decision-making authority." N.C. GEN. STAT. § 114-2(10).

In sum, North Carolina has an "interest in the continued enforceability of" the numerous laws challenged here and the State may vindicate that interest through any officials it so designates. *Hollingsworth*, 570 U.S. at 709–10; *see Karcher*, 484 U.S. at 82. North Carolina has so designated Proposed Intervenors, which means that one of the interests at stake for the purposes of intervention are the interests of the State in defending its democratically enacted laws.

2. Proposed Intervenors have an additional significantly protectable interest entitling them to defend the laws challenged here: the interest of the General Assembly itself in defending its enactments and its legislative authority. *See Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2665 (2015); *cf. Bethune-Hill*, 139 S. Ct. at 1953–54. Proposed Intervenors represent both houses of the General Assembly in ensuring that their enactments are not "nullified." *Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. at 2665 (quotation marks omitted). And the laws Plaintiffs seek to nullify are not just any run-of-the-mill laws; rather, they are laws that govern the times, places, and manner of holding elections for Senators and Representatives, among other offices. The power to "prescribe" such matters is vested by the Constitution "in each State by the Legislature thereof." U.S. CONST. art. I, § 4. Plaintiffs are seeking to usurp this authority for themselves by asking the Court to impose upon the State Plaintiffs' preferred elections procedures "with respect to any election in the state during the COVID-19 pandemic." Am. Compl. at 76. Proposed Intervenors have a substantial interest in defending the General Assembly's authority from this frontal assault.

In the present public health emergency, the General Assembly's interest in its authority to legislate is only heightened. When a legislature "undertakes to act in areas fraught with medical

and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation, even assuming, arguendo, that judges with more direct exposure to the problem might make wiser choices." *Marshall v. United States*, 414 U.S. 417, 427 (1974). The General Assembly must be able to pass appropriate statutes to safeguard both the integrity of North Carolina's elections and the health of North Carolina's citizens. These are matters of grave importance to the State and its people, and the General Assembly has a substantial interest in defending its authority to address them.

C. The Disposition of this Case May Impair Proposed Intervenors' Significantly Protectable Interest.

The threat posed by this case to Proposed Intervenors' significant interests is stark and easily satisfies the Rule 24 requirement that Proposed Intervenors' ability to protect its interests may be impaired "as a practical matter." FED. R. CIV. P. 24(a)(2). Here, if the Court rules in Plaintiffs' favor, the State's and the General Assembly's interests in enforcing the duly enacted laws of the State will have been undermined and "completely nullified" with respect to the host of provisions that Plaintiffs seek to enjoin. See *Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. at 2665 (quotation marks omitted). And the General Assembly's constitutionally granted authority to prescribe elections regulations will have been eviscerated during this critical time.

D. The Existing Defendants Will Not Adequately Protect Proposed Intervenors' Interests.

"The requirement of [inadequate representation] is satisfied if the applicant shows that representation of his interest *may* be inadequate; and the burden of making that showing should be treated as minimal." *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972) (emphasis added; quotation marks omitted). This standard is satisfied, for example, when interests overlap but are not identical. *See United Guaranty Residential Ins. Co. of Iowa v. Philadelphia Sav. Fund Soc.*, 819 F.2d 473, 476 (4th Cir. 1987). Proposed Intervenors clear this low hurdle.

1. As an initial matter, this Court should hold that the executive branch officers and agencies named as defendants are inadequate representatives of the State's and General Assembly's interests as a matter of law. This conclusion flows directly from North Carolina law designating Proposed Intervenors as necessary and primary agents in defending the validity of the State's statutes. As explained above, North Carolina law provides that Proposed Intervenors are "necessary parties" in challenges to State statutes, and it grants them "final decision-making authority" in the litigation. N.C. GEN. STAT. § 120-32.6. In light of those provisions, it is not possible to hold that the State's and General Assembly's interests are being adequately represented if their necessary and primary defenders are not allowed to participate as parties in the case.

2. Even apart from these provisions of North Carolina law, Defendants are not adequate representatives of Proposed Intervenors' interests because both Defendants and Proposed Intervenors have unique interests. Defendants, on the one hand, are executive branch officers and agencies with an interest in the administration of state elections. In other litigation, this has prompted the State Board of Elections, a named defendant here, to explain that "a primary objective for the State Board is to expediently obtain clear guidance on what law, if any, will need to be enforced." State Defs.' Resp. to Pls.' Mot. for Prelim. Inj. at 13, *Holmes v. Moore*, 18-cvs-15292 (N.C. Super. Ct. Wake Cty., June 19, 2019), Ex. B. It stands to reason that the State Board and its officials will have a similar objective here, as it is the agency charged with administering the State's elections in accordance with law. *See* N.C. GEN. STAT. § 163-22.

Proposed Intervenors also have a unique interest not shared by Defendants—to defend the General Assembly's constitutional prerogative in prescribing the times, places, and manner of elections. This is an interest held exclusively by the General Assembly, not by the various executive branch officers and agencies that are named defendants in this action.

These diverging interests satisfy the "inadequacy of representation" requirement for intervention under binding Supreme Court and Fourth Circuit precedent. In *Trbovich*, the Secretary of Labor instituted an action to set aside an election of officers of the United Mine Workers of America. The union member whose complaint led the Secretary to sue sought to intervene in the action. The district court denied his motion to intervene and the court of appeals affirmed, but the Supreme Court reversed. The Court reasoned that, while the Secretary of Labor was charged with representing the union member's interest in the litigation, it also was charged with protecting the "vital public interest in assuring free and democratic union elections that transcends the narrower interest of the complaining union member." *Trbovich*, 404 U.S. at 539. Because of the presence of this additional interest and its potential to affect the Secretary's approach to the litigation it was "clear" to the Court "that in this case there is sufficient doubt about the adequacy of representation to warrant intervention." *Id*. at 538.

The Fourth Circuit's decision in *United Guaranty* follows and is of a piece with *Trbovich*. That case involved a suit seeking to nullify mortgage insurance policies held by various purchasers of mortgage loans originated by a mortgage company that allegedly lied in its applications for mortgage insurance. The trustee for the holder of the mortgage certificates representing the interest of the purchasers of the loans, The First National Bank of Maryland, was a party, but the largest purchaser, Philadelphia Savings Fund Society, sought to intervene to defend its own interests. The district court denied intervention based on adequacy of representation, but the Fourth Circuit reversed. The Bank, the Fourth Circuit reasoned, "ha[d] a broader interest in protecting all of the certificate holders than [did] Philadelphia's narrow interest in protecting its own mortgage certificates." *United Guaranty*, 819 F.2d at 476. Although Philadelphia's interests were a subset of the Bank's, the Bank's "multiple interests [had] the potential of dictating a different approach

to the conduct of the litigation." *Id*. at 475. The court therefore held that the Bank was not an adequate representative of Philadelphia's interests, and that Philadelphia was entitled to intervene.

The case for inadequate representation is even stronger here than in *Trbovich* and *United Guaranty*, for as just explained Proposed Intervenors have an interest in the General Assembly's prerogatives that is not represented by Defendants *at all*, which was not the case in *Trbovich* and *United Guaranty*. If the Secretary's representation was inadequate in *Trbovich*, and the Bank's in *United Guaranty*, it follows *a fortiori* that Defendants' representation is inadequate here.

3. For the foregoing reasons, Proposed Intervenors have shown inadequate representation even if there were absolutely zero reason to question the resoluteness with which Defendants would defend the laws being challenged in this case. But as it happens there is reason to question. Both Defendant Bell, the Executive Director of the State Board of Elections, and Attorney General Stein, head of the office representing Defendants, have both recently lobbied the General Assembly to change North Carolina law along some of the same lines as the relief Plaintiffs request in this suit.

In her letters, addressed to Proposed Intervenors among others, Executive Director Bell sought many of the same changes to North Carolina law as Plaintiffs seek here. She advocated repeal of absentee ballot request regulations to allow requests by mail; action to "[r]educe or eliminate the witness requirement for absentee ballots"; repeal of restrictions on assistance with requesting, completing, and returning absentee ballots; elimination of the "requirement that a majority of pollworkers reside in the precinct"; establishment of an online portal for absentee ballot requests; and modification of one-stop voting hours. *See CARES Act Request and Clarification to Recommendations to Address Election-Related Issues Affected by COVID-19*, Karen Brinson Bell, Ex. 2 to Riggs Decl., Doc. 12-7 (April 22, 2020); *Recommendations to Address Election-Related*

Issues Affected by COVID-19, Karen Brinson Bell, Ex. 1 to Riggs Decl., Doc. 12-7 (Mar. 26, 2020). Plaintiffs have asked the Court to rewrite North Carolina's laws in the same way.

Attorney General Stein has also taken the highly unusual step of lobbying the legislature for his preferred election policy reforms. Less than two weeks ago, and subsequent to the filing of the initial Complaint in this litigation, Attorney General Stein wrote a letter to legislative officials, including Proposed Intervenors, seeking changes to the State's elections laws similar to those sought by Plaintiffs here. *See* Letter from Attorney General Josh Stein, to Hon. Phil Berger et al. (May 29, 2020), Ex. A. Attorney General Stein proposed (among other things) relaxing restrictions on who can assist voters with completing mail-in absentee ballot request forms and abolishing the requirement that one-stop voting sites all maintain the same generous hours of operation. *Id.* These two features of North Carolina law, codified at N.C. GEN. STAT. § 163-226.3(a)(4) and § 163-227.6(c), respectively, are both challenged by Plaintiffs here. *See* Am. Compl. at 77.

Executive Director Bell's and Attorney General Stein's policy positions call into question the adequacy of their representation of the State's and General Assembly's interests in this case. To make matters worse, Attorney General Stein and Governor Cooper (who appoints the members of and controls the State Board of Elections, *see Cooper v. Berger*, 809 S.E.2d 98 (N.C. 2018); N.C. GEN. STAT. § 163-19) have a demonstrated history of inadequately defending laws that they oppose as a policy matter. In *North Carolina State Conference of the NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016), the Fourth Circuit struck down a statute that prescribed voter ID requirements and made other changes to North Carolina election laws. The State filed a cert petition and sought a stay from the Supreme Court before Governor Cooper and Attorney General Stein took office. Four Justices—the same number as required to grant cert—indicated that they would have granted a stay of the Fourth Circuit's mandate in whole or in part. *See North Carolina*

v. North Carolina State Conf. of NAACP, 137 S. Ct. 27 (2016). Yet after taking office Governor Cooper and Attorney General Stein actively sought to thwart the State's cert petition, with Attorney General Stein moving to dismiss the petition on the Governor's behalf. *See North Carolina v. North Carolina State Conference of NAACP*, 137 S. Ct. 1399, 1399 (2017); Press Release, Attorney General Josh Stein, AG Stein Moves to Dismiss Case on Voting Law (Feb. 21, 2017), Ex. C. Proposed Intervenors sought to intervene to save the petition, but the effort ultimately was for naught. In a statement respecting the denial of the petition, Chief Justice Roberts cited "the blizzard of filings" precipitated by the Governor's motion, and admonished that "[t]he denial of a writ of certiorari imports no expression of opinion upon the merits of the case." *Id*. at 1400 (quotation marks omitted). Governor Cooper meanwhile issued a press release celebrating the cert denial that put the final nail in the coffin of the North Carolina law he was charged with faithfully executing. *See* Governor Roy Cooper, Gov. Cooper Issues Statement on SCOTUS Voter Access (May 15, 2017), Ex. D.

All of this is not to say that there will be a repeat in this case. But given Executive Director Bell's and Attorney General Stein's letters, there certainly is a risk, and Rule 24 requires a showing only that the defendant's representation "*may* be inadequate, and the burden of making that showing should be treated as minimal." *Trbovich*, 404 U.S. at 538 n.10 (emphasis added). For the foregoing reasons, Proposed Intervenors easily clear this low bar here.

4. One final point bears emphasis, and that is that participating in this case as an amicus rather than as a party will not provide adequate protection for Proposed Intervenors' interests, because only as a party will Proposed Intervenors be guaranteed the right to participate fully in the development of a record in this case and, if necessary, file a notice of appeal. *See, e.g.*, *Feller v. Brock*, 802 F.3d 722, 730 (4th Cir. 1986); *Newport News Shipbuilding & Drydock Co. v. Peninsula*

Shipbuilders' Ass'n, 646 F.2d 117, 121–22 (4th Cir. 1981). The inadequacy of amicus status was brought into sharp focus in the *North Carolina Conference of NAACP* voter ID litigation. In that case, Judge Biggs denied Proposed Intervenors' motion to intervene and ordered that the expert reports they had proffered in opposition to the plaintiffs' preliminary injunction motion be stricken from the record. *See* Order, *North Carolina State Conference of NAACP v. Cooper*, No. 18-1034, Doc. 116 (Nov. 27, 2019). Because the defendants in that action—the members of the State Board of Elections, represented by the North Carolina Attorney General's office—did not themselves offer any expert reports in opposition to the preliminary injunction motion, that motion was decided on the basis of a record that included zero expert reports rebutting plaintiffs' many experts.

These events—along with the events surrounding the cert petition in the *McCrory* litigation—demonstrate why Proposed Intervenors must be able to intervene as a party and must be allowed to do so expeditiously. It is only as a party that Proposed Intervenors will be guaranteed the right to build a record and, if necessary, file a notice of appeal or a cert petition in this case. Proposed Intervenors therefore ask that their motion to intervene be granted on an expedited basis to allow them to participate with full party rights in opposing Plaintiffs' preliminary injunction motion.

II. Alternatively, Proposed Intervenors Should Be Allowed to Intervene Permissively.

This Court has previously permitted Proposed Intervenors to intervene under Rule 24(b) to defend North Carolina law. *See Carcaño v. McCrory*, 315 F.R.D. 176, 177 (M.D.N.C. 2016). Under Rule 24(b), the Court "may permit anyone to intervene who" files a timely motion and who "has a claim or defense that shares with the main action a common question of law or fact." FED. R. CIV. P. 24(b)(1)(B). The Court also "must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." *Id*. at 24(b)(3).

These requirements are satisfied here. Timeliness is measured by the same three criteria used for intervention as of right: "how far the suit has progressed," "the prejudice that delay might cause other parties," and the reason for the delay (if any) in the motion. *Students for Fair Admissions Inc. v. Univ. of North Carolina*, 319 F.R.D. 490, 494 (M.D.N.C. 2017). The purpose of this requirement is merely "to prevent a tardy intervenor from derailing a lawsuit within sight of the terminal." *Id*. (quoting *Scardelleti v. Debarr*, 265 F.3d 195, 202 (4th Cir. 2001)). As explained above, Proposed Intervenors have acted expeditiously, and their intervention threatens no prejudice to the parties.

Moreover, as shown in the Proposed Answer, Proposed Intervenors' defenses share with the "main action" questions of both law and fact. FED. R. CIV. P. 24(b)(2)(B). Plaintiffs claim that North Carolina voting laws violate federal constitutional and statutory requirements in light of the COVID-19 pandemic, and Proposed Intervenors deny those claims. These arguments present completely overlapping questions of fact and law, and Proposed Intervenors do not seek to inject any new claims into the case.

Proposed Intervenors therefore satisfy all requirements for permissive intervention, and the Court should grant their request to intervene. *See Feller*, 802 F.2d at 729 ("[L]iberal intervention is desirable to dispose of as much of a controversy involving as many apparently concerned persons as is compatible with efficiency and due process." (quotation marks omitted)).

CONCLUSION

This Court should expeditiously permit Proposed Intervenors to intervene as defendants.

Dated: June 10, 2020

Respectfully submitted,

/s/ Nicole J. Moss
COOPER & KIRK, PLLC
Nicole J. Moss (State Bar No. 31958)

COOPER & KIRK, PLLC
David H. Thompson*
Peter A. Patterson*

1523 New Hampshire Avenue, NW
Washington, D.C. 20036
(202) 220-9600
nmoss@cooperkirk.com
Local Civil Rule 83.1 Counsel for Proposed Intervenors

Brian W. Barnes*
Steven J. Lindsay*
1523 New Hampshire Avenue, NW
Washington, D.C. 20036
(202) 220-9600
dthompson@cooperkirk.com

Counsel for Proposed Intervenors
**Notice of Appearance Forthcoming*

CERTIFICATE OF WORD COUNT

Pursuant to Local Rule 7.3(d)(1), the undersigned counsel hereby certifies that the foregoing Memorandum, including body, headings, and footnotes, contains 5,629 words as measured by Microsoft Word.

/s/Nicole J. Moss
Nicole J. Moss

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that, on June 10, 2020, I electronically filed the foregoing Notice of Appearance with the Clerk of the Court using the CM/ECF system.

/s/ Nicole J. Moss
Nicole J. Moss