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,

vs.

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.

Civil Action No. 20-cv-457

PLAINTIFFS' OPPOSITION TO PROPOSED INTERVENORS' MOTION TO INTERVENE

INTRODUCTION

The General Assembly seeks intervention in this case in order to represent "(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." Proposed Intervenors' Br. in Supp. of their Mot. to Intervene ("Proposed Intervenors' Br."), ECF No. 17, at 8 (emphasis in original). Its intervention is necessary, it claims, to defend against a "frontal assault" to these asserted interests, because "Plaintiffs are seeking to usurp [its] authority [to regulate the time, place, and manner of elections under Article I, Section 4 of the U.S. Constitution] 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.'" *Id.* at 10.

The General Assembly's arguments do not demonstrate an interest in this case, but rather a broader grievance with principles of federalism. Under those principles, Plaintiffs have a right to seek relief from federal courts for constitutional violations committed by states, *Obergefell v.*

Hodges, 135 S. Ct 2584, 2605 (2015); federal courts have a duty to define "what the law is," *Marbury v. Madison*, 5 U.S. 137, 177 (1803); and "the federal judiciary is supreme in the exposition of the law of the Constitution," *Cooper v. Aaron*, 358 U.S. 1, 18 (1958); *see also* U.S. Const. art. VI ("This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land . . .").

State legislatures unquestionably hold the right to pass legislation, but they do not have the right to pass *unconstitutional* legislation. *See* U.S. Const. amend. XIV, § 1 ("No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."). What is more, the Supreme Court has already indicated that state legislatures do not invariably have an interest in defending statutes in federal court. *Cf. Hollingsworth v. Perry*, 570 U.S. 693, 707 (2013) (holding that proponents of

California's Proposition 8 could not represent the state on appeal where they "have no role—special or otherwise—in the *enforcement* of Proposition 8" once it was duly enacted (emphasis added)); *see also Planned Parenthood of Wis. v. Kaul*, 942 F.3d 793, 798 (7th Cir. 2019) (denying legislature's motion to intervene).

Given the General Assembly's failure to identify a cognizable interest in this case, the Court should deny its Motion to Intervene.

FACTUAL BACKGROUND

The North Carolina General Assembly, through the Speaker of the House and President Pro Tempore, has moved to intervene in this case as of right or, in the alternative, with permission from the Court, in order to defend the statutes challenged by Plaintiffs as unconstitutional if enforced during the COVID-19 pandemic. It asserts three grounds for intervention: to represent the State's interests and its own interests, Proposed Intervenors' Br., ECF No. 17, at 8; and "to participate fully in the development of a record in this case and, if necessary, file a notice of appeal," *id.* at 16. It also expresses concern that Defendants will not adequately

represent these interests, because Defendant Brinson Bell and the Attorney General have contacted the General Assembly to advocate for certain changes that the General Assembly contends are identical to the relief sought by Plaintiffs. *See id.* at 14–16.

ARGUMENT

I. The General Assembly is not entitled to intervene as of right.

The General Assembly does not satisfy the requirements to intervene as of right in this matter. A party seeking to intervene under Federal Rule of Civil Procedure 24(a) must demonstrate "(1) timeliness, (2) an interest in the litigation, (3) a risk that the interest will be impaired absent intervention, and (4) inadequate representation of the interest by the existing parties." *Scott v. Bond*, 734 F. App'x 188, 191 (4th Cir. 2018). Here, although the General Assembly's motion is timely, it does not meet the remaining factors for intervention because it has no cognizable interest in this case and the current Defendants adequately represent the interests it asserts.

A. The General Assembly has no identifiable interest.

A proposed intervenor must hold a "significantly protectable interest" in the litigation it moves to join. *JLS, Inc. v. Pub. Serv. Comm'n of W.Va.*, 321 F. App'x 286, 289 (4th Cir. 2009) (quoting *Teague v. Bakker*, 931 F.2d 259 (4th Cir. 1991)). This exists when an intervenor "stand[s] to gain or lose by the direct legal operation" of the judgment in the case. *Teague*, 931 F.2d at 261. Two provisions of North Carolina law discuss the General Assembly's role in litigation challenging the constitutionality of state laws. The first, N.C. Gen. Stat. § 120-32.6, provides that in cases challenging the validity or constitutionality of a state law in state or federal court, the Speaker of the House and President Pro Tempore of the Senate "shall be deemed to be a client of the Attorney General" and "shall possess final decision-making authority with respect to the defense of the challenged act of the General Assembly or provision of the North Carolina Constitution." N.C. Gen. Stat. § 120-32.6(b); *see also id.* § 114-2(10). Additionally, "the General Assembly shall be deemed to be the State of North Carolina *to the extent provided in G.S. 1-72.2(a)* unless waived pursuant to

this subsection." N.C. Gen. Stat. § 120-32.6(b) (emphasis added). In turn, N.C. Gen. Stat. § 1-72.2(a) states:

> It is the public policy of the State of North Carolina that in any action in any federal court in which the validity or constitutionality of an act of the General Assembly or a provision of the North Carolina Constitution is challenged, *the General Assembly, jointly through the Speaker of the House of Representatives and the President Pro Tempore of the Senate, constitutes the legislative branch* of the State of North Carolina; the Governor constitutes the executive branch of the State of North Carolina; that, when the State of North Carolina is named as a defendant in such cases, *both the General Assembly and the Governor constitute the State of North Carolina* . . . .

Id. § 1-72.2(a) (emphases added). The statute also grants the Speaker and President Pro Tempore "standing to intervene *on behalf of the General Assembly* as a party in any judicial proceeding challenging a North Carolina statute or provision of the North Carolina Constitution." *Id.* § 1-72.2(b) (emphasis added).

However, and contrary to Proposed Intervenors' assertions otherwise, these provisions of state law are not dispositive of the issue before the Court: Even when state statutes grant this authority to state legislatures, they merely "inform the Rule 24(a)(2) calculus" and the legislatures must still satisfy Rule 24(a)'s requirements.

Planned Parenthood of Wis., 942 F.3d at 797 (quoting *Pub. Serv. Co. of N.H. v. Patch*, 136 F.3d 197 (1st Cir. 1998)); *see also Dept. of Fair Empl't. & Hous. v. Lucent Tech., Inc.*, 642 F.3d 728, 741 (9th Cir. 2011).

The Supreme Court's recent decision in *Virginia House of Delegates v. Bethune-Hill* offers further clarity as to when a state legislature holds an interest in federal litigation challenging a state law. There, the Virginia House of Delegates intervened in a federal case challenging the constitutionality of the state's redistricting plan, and later sought to represent the state on appeal after the Attorney General declined to appeal the district court's ruling in favor of the plaintiffs. The Supreme Court held that the House did not have standing to represent the state in federal court because Virginia law designated the Attorney General as the state's representative in federal court. 139 S. Ct. 1945, 1951–52 (2019). It also rejected the House's reliance on *Karcher v. May*, 484 U.S. 72 (1987), where the Court had recognized that "the New Jersey Legislature had authority under state law to represent the State's interests . . . ." *Bethune-Hill*, 139 S. Ct. at 1952 (quoting *Karcher*,

484 U.S. 72). The Court observed, "the Court in *Karcher* noted no New Jersey statutory provision akin to Virginia's law vesting the Attorney General with exclusive authority to speak for the Commonwealth in civil litigation." *Id.*

The Court further held that the House did not have standing to represent itself on appeal. It distinguished *Arizona State Legislature v. Arizona Indep. Redistricting Commission*, 135 S. Ct. 2652 (2015), where the Court recognized the Arizona Legislature's standing to challenge a referendum that "*permanently* deprived" the Legislature of its constitutionally provided authority to conduct redistricting. *Bethune-Hill*, 139 S. Ct. at 1954 (emphasis in original). The Arizona Legislature had also satisfied the standing requirement because the state constitution charged both chambers with redistricting, and both chambers had joined the litigation. *Id.* By contrast, in *Bethune-Hill*, only the House of Delegates had intervened in the trial court, though the Virginia constitution vested both chambers with the responsibility of redistricting. *Id.* at 1953. "[A] single House of a bicameral legislature lacks capacity to assert

interests belonging to the legislature as a whole." *Id.* at 1953-54.

Although the Fourth Circuit has not decided whether intervenor-defendants must prove standing, *see N.A.A.C.P., Inc. v. Duplin Cty.*, No. 7:88-CV-00005-FL, 2012 WL 360018, at *3 (E.D.N.C. Feb. 2, 2012), *Bethune-Hill* is instructive, especially given that the General Assembly is seeking intervention in part so that it can "file a notice of appeal" if this Court rules in favor of Plaintiffs on the merits and, presumably, if the existing Defendants decline to do so. Proposed Intervenors' Br., ECF No. 17, at 16. Under the reasoning articulated by the *Bethune-Hill* Court, the North Carolina General Assembly does not have a cognizable interest in this case, either to represent the State's interests or its own.

First, North Carolina law does not grant the General Assembly the authority to intervene in cases like this to represent the State's interests. N.C. Gen. Stat. § 1-72.2(b). That role belongs instead to the Attorney General, who has a duty "to appear for the State in any other court or tribunal in any cause or matter, civil or criminal, in which the State

may be a party or interested." *Id.* § 114-2(1). Additionally, when, as here, a suit challenges the constitutionality of a state statute, "both the General Assembly and the Governor constitute the State of North Carolina". *Id.* § 1-72.2(b). Thus, the General Assembly cannot represent the State without the Governor, who is not a party to this suit and who has not moved to intervene. Just as the Virginia House of Delegates could not single-handedly defend the state's redistricting map where state law had assigned redistricting to both chambers of the state legislature, so here the North Carolina General Assembly cannot speak for the State without the Governor.

Second, this case does not seek to permanently deprive the General Assembly of its "right" under Article I, Section 4 of the U.S. Constitution to enact laws governing the time, place, and manner of elections. Regardless of the result of this litigation, it will continue to have the authority and ability to pass election laws that do not violate the federal and state constitutions. *See Bethune-Hill*, 139 S. Ct. at 1954. Accordingly, the General Assembly does not stand to "gain or

lose" its interest in legislating by direct legal operation of the judgment in this case. *Teague*, 931 F.2d at 261.

Finally, with respect to any asserted interest on the part of the General Assembly to defend the constitutionality of the laws it has passed, the Supreme Court has suggested that lawmakers have no special interest in defending laws after their enactment. *Cf. Hollingsworth*, 570 U.S. at 707 (holding that group responsible for adoption of California's Proposition 8 could not represent the state on appeal where it lacked the necessary "personal stake" in the proceedings because its role had ended with proposition's adoption and because state law did not give it the authority to represent the state); *Planned Parenthood of Wis.*, 942 F.3d at 798 ("The regulations PPWI challenges are also 'concededly enacted' (the Legislature notes that some have existed for decades), and so the Legislature-as-legislature has no interest in this case under Article III or Rule 24."). Instead, as noted, that interest belongs to the State as a whole.

Throughout its brief, the General Assembly repeatedly emphasizes its interest in enacting election laws. Plaintiffs agree that the General Assembly has an interest in

legislating—but not in litigating. That role falls on executive officials—in this case, the Attorney General—who are tasked with enforcing and defending the laws passed by the General Assembly. *See* N.C. Gen. Stat. § 114-2(1). Because it has failed to assert any cognizable, actionable interest in this case, the General Assembly's Motion to Intervene must be denied.

B. Even if the General Assembly had a cognizable interest, it would not be impaired by denial of its Motion to Intervene.

Even if one assumes that the General Assembly has identified an actionable interest (which it has not), it has not articulated how that interest will be impaired if its request for intervention is denied. It bears reiterating that this case will not alter the General Assembly's underlying authority to regulate the time, place, and manner of elections. This Court, by exercising its powers under the U.S. Constitution to interpret federal law and enjoin state laws that do not conform to its requirements, will not "usurp" the General Assembly's prerogative to pass these laws if it grants Plaintiffs' requested relief, because states have no interest in passing and enforcing unconstitutional laws. The

General Assembly therefore cannot make the showing of impairment needed to intervene as of right.

C. The existing Defendants adequately represent the interests asserted by the General Assembly.

The General Assembly has also failed to show that the Defendants and the Attorney General will not adequately represent the State's interests. When a proposed intervenor and an existing party have the same goal, a presumption of adequate representation attaches, "which can only be rebutted by a showing of adversity of interest, collusion, or nonfeasance." *Stuart v. Huff*, 706 F.3d 345, 349 (4th Cir. 2013) (internal quotation marks omitted); *Commonwealth of Va. v. Westinghouse Elec. Corp.*, 542 F.2d 214, 216 (4th Cir. 1976). When the existing party is a government agency, "a very strong showing of inadequacy is needed to warrant intervention." *Huff*, 706 F.3d at 349 (internal quotation marks omitted). Disagreements over litigation strategy are insufficient. *Id.* at 355 ("In sum, appellants have done little more than identify reasonable litigation decisions made by the Attorney General with which they disagree. Such differences of opinion cannot be sufficient to warrant intervention as of right, for, as already discussed, the harms

that the contrary rule would inflict upon the efficiency of the judicial system and the government's representative function are all-too-obvious."); *see also Planned Parenthood of Wis.*, 942 F.3d at 808 (Sykes, J., concurring) ("[A] mere disagreement over litigation strategy is not enough to show inadequacy of representation.").

Here, the General Assembly suggests that Defendants will collude with Plaintiffs and fail to provide a vigorous defense of the challenged statutes because Defendant Brinson Bell—one of several Defendants—and their legal representative, Attorney General Stein, previously advocated for policy changes that are similar to Plaintiffs' requested relief. However, the General Assembly offers no evidence suggesting that Defendants have colluded with Plaintiffs or that the Attorney General will not rigorously uphold the duty of that office to defend the State's enactments.

The General Assembly cites a handful of years' old news articles about Attorney General Stein's successful motion to dismiss the State's petition for certiorari in an entirely different matter, which sought review of the Fourth Circuit Court of Appeals' finding that North Carolina's voter ID law

was unconstitutional. The General Assembly's reliance on a years-old voter ID matter is irrelevant here and, in any event, reflects only a disagreement over litigation strategy insufficient to overcome the presumption of adequacy.

Moreover, Defendants' conduct—Defendant Brinson Bell and Attorney General Stein's efforts to persuade the General Assembly to modify the State's election laws in light of COVID-19—demonstrates deference to and respect for the General Assembly's lawmaking role. And the General Assembly has not identified any past conduct by Defendant Brinson Bell or other Defendants that would support the conclusion that they will collude with Plaintiffs. The fact that Defendant Brinson Bell sought to honor the traditional democratic process by taking her concerns to lawmakers indicates a likelihood she will continue to honor that process by defending the challenged statutes. Absent stronger evidence of collusion, adversity of interest, or nonfeasance, the presumption of adequate representation remains unrebutted and the General Assembly's motion must fail.

As Proposed Intervenors have failed to articulate a cognizable interest in this action or to show that the current

Defendants would not adequately represent that interest, the motion to intervene by right should be denied.

II. Permissive intervention is not warranted.

Permissive intervention would also be inappropriate in this case. A motion to intervene under Rule 24(b) must not "unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). In this case, allowing the General Assembly to intervene would cause undue delay and prejudice to Plaintiffs and Defendants.

First, any arguments raised and discovery requested by the General Assembly is likely to be duplicative of Defendants'. The General Assembly expresses a desire to develop a record in the case, but does not specifically identify how it expects its discovery requests will differ from those that can be anticipated from Defendants, or what specific information it plans to seek. At most, it raises general, unsubstantiated concerns that Defendants will not vigorously defend the challenged statutes.

Second, time is of the essence in this case. The November General Election is now less than five months away, and Plaintiffs have sought a preliminary injunction and expedited

review of their motion. ECF No. 9. Adding another, redundant and unnecessary party to this case will only delay the Court's decision on Plaintiffs' pending Motion for Preliminary Injunction. For the same reasons set forth in Plaintiffs' memorandum in support of that motion, ECF No. 10 at 12, any such delay could have catastrophic consequences for the fall general election, and there is an immediate need to start preparing for this election. Any delay therefore risks severe prejudice to all parties, as well as the voters of this State, as it will make it more difficult (or potentially impossible) for Defendants to adapt to any changes ordered by the Court and to properly prepare for the fall general election in accordance with any relief the Court may see fit to grant—a result that ultimately harms voters. By contrast, the General Assembly cannot articulate any concrete harm it will suffer if it is denied intervention in this case. Its request for permissive intervention should therefore also be denied.[1]

[1] Should the Court decide to grant permissive intervention, Plaintiffs respectfully request that it limit discovery that can be taken by the General Assembly to exclude the taking of any discovery prior to the Court's hearing on Plaintiffs' Motion for Preliminary Injunction, as well as any discovery that may be duplicative of Defendants' requests. "When granting an application for permissive

CONCLUSION

For the foregoing reasons, the General Assembly has not met its burden in showing that it is entitled to intervene as of right, or that its asserted interests merit permissive intervention. Plaintiffs therefore respectfully request that the Court deny its Motion to Intervene.

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intervention, a federal district court is able to impose almost any condition, including the limitation of discovery." *Columbus-America Discovery Grp. v. Atlantic Mut. Ins. Co.*, 974 F.2d 450, 469 (4th Cir. 1992).

Dated: June 12, 2020.

Respectfully Submitted,

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CERTIFICATE OF WORD COUNT

Pursuant to Local Rule 7.3(d)(1), the undersigned counsel hereby certified that the foregoing Memorandum in Support of Plaintiffs' Opposition to Proposed Intervenors' Motion to Intervene contains 3323 words (including headings and footnotes) as measured by Microsoft Word.

/s/ Allison J. Riggs
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CERTIFICATE OF SERVICE

I certify that on the 12th day of June, 2020, the foregoing Memorandum in Support for Plaintiffs' Opposition to Proposed Intervenors' Motion to Intervene was served upon the parties through the Court's ECF system.

/s/ Allison J. Riggs
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