UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

Civil Action No. 1:20-cv-457

DEMOCRACY NORTH CAROLINA, *et al.*, Plaintiffs, v. THE NORTH CAROLINA STATE BOARD OF ELECTIONS; *et al.*, Defendants, and PHILIP E. BERGER, etc., *et al.*, Intervenors.	)	**STATE DEFENDANTS' RESPONSE TO POLITICAL COMMITTEES' MOTION TO INTERVENE [DE 32]**

NOW COME defendants—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 (collectively "the State

defendants")—and hereby respond to the Motion to Intervene filed on 18 June 2020 by the Republican National Committee ("RNC"), the National Republican Senatorial Committee ("NRSC"), the National Republican Congressional Committee ("NRCC"), and the North Carolina Republican Party ("NCRP") (collectively the "Political Committees"). [DE 32].

Plaintiffs filed this action on 22 May 2020. Through it, they challenge various provisions of North Carolina election law, alleging that in the context of the COVID-19 pandemic, those election law provisions infringe on their rights under the United States Constitution and federal statutes. Plaintiffs filed their First Amended Complaint [DE 8] and their Motion for Preliminary Injunction [DE 9] on 5 June 2020.

On 10 June 2020, President *Pro Tempore* of the North Carolina Senate, Phillip E. Berger, and Speaker of the North Carolina House of Representatives, Timothy K. Moore, (collectively "the legislative intervenors") moved to intervene in this action. [DE 16] The State defendants did not take a position on the legislative intervenors' motion. [DE 23] The Court granted the legislative intervenors' motion on 15 June 2020. [DE 26]

On 18 June 2020, plaintiffs, with the consent of the State defendants and the legislative intervenors, filed their Motion for Leave to File a Second Amended Complaint. [DE 27] The Court granted the motion that same day [DE 29], whereupon plaintiffs filed their Second Amended Complaint [DE 30] and their Amended Motion for Preliminary Injunction. [DE 31] Soon after, also on 18 June 2020, the Political Committees filed their Motion to Intervene. [DE 32]

For the following reasons, the State defendants oppose the Political Committees' motion.

ARGUMENT

I. THE POLITICAL COMMITTEES ARE NOT ENTITLED TO INTERVENE AS OF RIGHT PURSUANT TO RULE 24(a).

"[N]ot all parties with strong feelings about or an interest in a case are entitled, as a matter of law, to intervene." *United States v. North Carolina*, No. 13-861, 2014 U.S. Dist. LEXIS 14787, at *13 (M.D.N.C. Feb. 6, 2014). The Political Committees' "interest in protecting the integrity of the voting process and maintaining the rules that will guide their expenditure of funds to help elect Republican candidates" does not entitle them to intervene here. [*Corrected Memorandum in Support of the Republican Committees' Motion to Intervene*, DE 34 at 3] Under Rule 24(a), intervention will only be granted to those who submit a timely motion showing that (1) an existing party will inadequately protect an interest that (2) the intervenor has a cognizable interest in protecting. *See In re Sierra Club*, 945 F.2d 776, 779 (4th Cir. 1991). The Political Committees bear the burden of demonstrating all of Rule 24's requirements. *See Teague v. Bakker*, 931 F.2d 259, 260-61 (4th Cir. 1991).

The Political Committees assert that they have an interest in raising and spending funds to recruit and elect Republican candidates. But this interest is not cognizable in this challenge. First, it is not a unique interest. Indeed, both of the legislative intervenors are Republican elected officials who are themselves, on information and belief, members of or allied with two of the proposed intervenors, and also have an interest in electing

Republican candidates. Moreover, even if this interest were unique, it would not be cognizable. Accepting the Political Committees' argument would grant any other political group in North Carolina, or indeed of any citizen of North Carolina, with an interest in electing partisan candidates authority to intervene in any lawsuit involving the administration of election law ahead of an election. This boundless interpretation of "cognizable interests" would render the requirements under Rule 24(a) meaningless.

This may be why the Political Committees fail to cite cases that recognize interests in "litigation that might impose changes in voting procedures affecting candidates in a particular party" where a group affiliated with a different national political party is not a plaintiff. *See* DE 34 at 6 (invoking *Ohio Democratic Party v. Blackwell*, No. 2:04-CV-1055, 2005 U.S. Dist. LEXIS 18126 (S.D. Ohio Aug. 26, 2005) (allowing Republican Party and State of Ohio to intervene as defendants where Ohio Democratic Party and individual Democratic voters were plaintiffs)).

The Political Committees have also failed to show that the existing defendants do not adequately protect the Committees' interests. "[W]hen a statute comes under attack, it is difficult to conceive of an entity better situated to defend it than the government." *Stuart v. Huff*, 706 F.3d 345, 351 (4th Cir. 2013);[1] *North Carolina*, 2014 U.S. Dist. LEXIS 14787, *8. Therefore, where a proposed intervenor shares a common objective with the

[1] Though the legislative intervenors incorrectly interpret *Stuart* and North Carolina law as giving them the presumption of adequacy of representation of the State's interests (DE 37 at 1), here, because the Legislative intervenors are, on information and belief, members of or allied with the proposed intervenor groups and have the same interests in electing Republicans to office in North Carolina, the presumption of adequacy may also be applied to legislative intervenors.

State to defend the validity of the statute, to rebut this "presumption of adequacy," the proposed intervenor must show either collusion between the existing parties, adversity of interests between themselves and the State defendants, or nonfeasance on the part of the State defendants. *Stuart*, 706 F.3d at 350, 352-55; *North Carolina*, 2014 U.S. Dist. LEXIS 14787, *8.

In this action, of course, the existing parties defending the challenged laws include the State defendants. The "presumption of adequacy" described in *Stuart* unquestionably applies here. The Political Committees have made no effort at all to rebut that presumption and show either collusion between the existing parties, adversity of interests between themselves and the State Defendants, or nonfeasance on the part of the State Defendants, nor can they rebut that presumption. They have therefore failed to make the necessary showing to justify intervention. *Id.* at 351-52.

Indeed, it is clear that the existing parties more than adequately protect the Political Committees' interests. The Political Committees assert that "[t]hey have an interest in protecting the integrity of the voting process and maintaining the rules that will guide their expenditure of funds to help elect Republican candidates at all levels of Government." [*Corrected Memorandum in Support of the Republican Committees' Motion to Intervene*, DE 34 at 3] This asserted interest is no different from the interests of the State defendants. It does not entitle the Political Committees to intervene in this action.

The State defendants, whose duty it is to enforce the election laws of the State, adequately represent the interest of *every* North Carolinian—including those whom the Political Committees purport to represent—in the faithful execution of state law. The State

defendants individually and collectively are the proper defendants in these constitutional challenges to state statutes. *See Gen. Synod of the United Church of Christ v. Resinger*, 2014 U.S. Dist. LEXIS 144383, at *7–8 (W.D.N.C. Oct. 10, 2014) (noting that N.C. Supreme Court has held that the N.C. Attorney General has a duty "prescribed by statutory and common law" "to defend the State . . . in all actions in which the State may be a party)."

Finally, the Political Committees have failed to demonstrate that they have Article III standing to intervene, which is a requirement for intervention as of right as a defendant in a federal court. *See Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 731-32 (D.C. Cir. 2003). Article III of the Constitution limits the exercise of the federal judicial power to "Cases" and "Controversies." U.S. CONST. art. III, § 2, cl. 1. "Standing to sue is a doctrine rooted in the traditional understanding of a case or controversy." *Town of Chester v. Laroe Estates*, 137 S. Ct. 1645, 1650 (2017) (citation omitted). To intervene as a defendant-intervenor in a federal lawsuit, a party must have Article III standing. *See Fund for Animals*, 322 F.3d at 731-32; *see also Safe Streets All. v. Hickenlooper*, 859 F.3d 865, 912 (10th Cir. 2017); *South Dakota v. Ubbelohde*, 330 F.3d 1014, 1023 (8th Cir. 2003); *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 101 F.3d 503, 507 (7th Cir. 1996), *rev'd on other grounds*, 531 U.S. 159 (2001).

"To establish standing under Article III, a prospective intervenor—like any party—must show: (1) injury-in-fact, (2) causation, and (3) redressability." *Fund for Animals*, 322 F.3d at 732–33 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992), and *Sierra Club v. EPA*, 352 U.S. App. D.C. 191, 292 F.3d 895, 898 (D.C. Cir. 2002)).

The Political Committees have made no attempt at such a showing. They have asserted no injury that is not common to every North Carolina political party or advocacy group, or indeed, every North Carolina voter—an interest in the stability of the procedures in place for North Carolina elections and in avoiding voter confusion, expenditures of funds to educate voters on any changed election procedures and the undermining of voter confidence in the election.

The Political Committees' generalized interest in having the laws enforced does not give rise to an Article III injury. For nearly a century, the Supreme Court has held that citizens who bring lawsuits alleging that the government violated "a right to have the Government act in accordance with law" do not have Article III standing. *Lujan*, 504 U.S. at 575; *see Fairchild v. Hughes*, 258 U.S. 126, 129 (1922) (similar). This type of injury results in an "impact on [the party] . . . plainly undifferentiated and common to all members of the public." *United States v. Richardson*, 418 U.S. 166, 176-77 (1974) (internal quotations and citations omitted).

The Political Committees asserted interests in protecting the integrity of and confidence in the election are interests common to everyone in North Carolina. Injuries that apply to everyone in a state are "necessarily abstract" in nature, not concrete and particularized as Article III requires. *Schlesinger v. Reservists Comm. To Stop the War*, 418 U.S. 208, 220 (1974). When it comes to these types of abstract injuries, the Supreme Court has been clear: a mere interest in the "vindication of the rule of law" is not a legally cognizable interest that can support Article III standing. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 106 (1998). Here, the interest put forward by the Political

Committees are represented by parties already defending this action, and fail to confer Article III standing on them.

II. THE POLITICAL COMMITTEES ARE NOT ENTITLED TO PERMISSIVE STANDING PURSUANT TO RULE 24(b).

The Political Committees assert that they are eligible for permissive intervention under Rule 24(b)(2) because of their "interests in maintaining the current lawfully enacted structure of the competitive environment and their interest in fair elections." Rule 24(b)(2) provides:

> On timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on:
>
> (A) a statute or executive order administered by the officer or agency; or
> (B) any regulation, order, requirement, or agreement issued or made under the statute or executive order.

Clearly, the Political Committees are not federal or state agencies, and so they do not meet the requirements of Rule 24(b)(2).

Even if the Political Committees intended to seek permissive intervention pursuant to Rule 24(b)(1), they have failed to demonstrate that they meet its requirements. While they argue that they have "a claim or defense that shares with the main action a common question of law or fact," Rule 24(b)(1)(B), the Political Committees do not actually have a "claim or defense." Each of their purported claims is nothing more than a claim that the current law must continue to be enforced. But a "general ideological interest in seeing that [a State] enforces [its laws]" is not a "claim or defense." *Coal. to Defend Affirmative Action v. Granholm*, 501 F.3d 775, 782 (6th Cir. 2007); *see also* 25 Fed. Proc. L. Ed. § 59:376; *see also Allen Calculators, Inc. v. National Cash Register Co.*, 322 U.S. 137, 141-

42 (1944) (noting that permitting a "multitude" of interventions in a case "of large public interest" "may result in accumulating proofs and arguments without assisting the court").

Moreover, the Political Committees' potential defenses are indistinguishable from those that State and legislative intervenors are capable of raising. Courts routinely recognize that "defenses [that] are not unique" to the proposed intervenor "can be adequately represented by defendants" and do not justify permissive intervention; otherwise, "numerous third-parties [could] seek intervention on the same bases." *Hodes & Nauser, MDs, P.A. v. Moser*, No. 2:11-cv-02365, 2011 U.S. Dist. LEXIS 112186, at *12 (D. Kan. Sept. 29, 2011); *see also New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452, 472 (5th Cir. 1984) (*en banc*) (similar); *Menominee Tribe of Wis. v. Thompson*, 164 F.R.D. 672, 678 (W.D. Wis. 1996) (similar). As noted *supra*, the Political Committees have failed to rebut the presumption that existing parties to this action adequately represent the interests they put forward, which are interests common to all political parties and advocacy groups and to all voters in North Carolina.

The Political Committees do not point this Court to a single case in which a political committee has been granted permissive intervention where none of the parties are other political committees and where the defendants are defending the challenged statutes. Indeed, the Political Committees rely almost exclusively on *League of Women Voters of Virginia v. Virginia State Board of Elections* and *Democratic National Committee v. Bostelmann* to support their argument for permissive intervention. [DE 34 at 7-8] But this reliance is misplaced. In *League of Women Voters*, the State defendants had entered into a consent decree with the plaintiffs agreeing to the challenged statute's

nonenforcement altogether for the upcoming primary. No. 6:20-cv-00024, 2020 U.S. Dist. LEXIS 76765, at *14 (W.D. Va. April 30, 2020). Because the proposed intervenor continued to support the enforcement of the challenged statute, the court held that the proposed intervenor's permissive intervention would be helpful to allow for adversarial testing of the parties' proposed consent decree. *Id.* at *16. And in *Democratic National Committee*, the court specifically stated that the reason it was allowing for permissive intervention of the Republican political parties was to allow the representation of a "mirror-image" of the interests of the plaintiffs, as direct counterparts to the plaintiff Democratic National Committee. 20-cv-249-wmc, 2020 U.S. Dist. LEXIS 54269, at *14-15 (W.D. Wis. Mar. 28, 2020). No similar concerns exist in this case.

Finally, if the Political Committees are permitted to intervene, there may be no basis upon which to deny permissive intervention to any other political or advocacy groups—whether Democratic, Libertarian, Green Party, Constitution Party or other—that may seek to intervene in this action. The result would inevitably be to "unduly delay or prejudice the adjudication of the original parties' rights." *See* Rule 24(b)(3). That consideration alone demonstrates why permissive intervention is not appropriate here. This Court should, therefore, deny permissive intervention.

This result does not mean that the Political Committees' views cannot be heard: Failure to satisfy Rule 24's intervention standard does not preclude the Political Committees from seeking to be heard as *amici*. But the Court should not open the floodgates to potential intervenors and risk undue delay and prejudice to the adjudication of this action, a prompt resolution of which is in the interests of *all* North Carolinians, by

allowing the Political Committees' motion.

CONCLUSION

For the foregoing reasons, the motion to intervene should be denied.

This the 22nd day of June, 2020.

JOSHUA H. STEIN
Attorney General

/s/ Alexander McC. Peters
Alexander McC. Peters
N.C. State Bar No. 13654
Chief Deputy Attorney General
Email: apeters@ncdoj.gov

Kathryne E. Hathcock
N.C. State Bar No. 33041
Assistant Attorney General
Email: khathcock@ncdoj.gov

N.C. Dept. of Justice
Post Office Box 629
Raleigh, NC 27602
Telephone: (919) 716-6900
Facsimile: (919) 716-6763

CERTIFICATE OF WORD COUNT

Pursuant to Rule 7.3(d) of the Local Rules of Civil Practice, the undersigned hereby certifies that the foregoing memorandum does not exceed 6,250 words, exclusive of any cover page, caption, signature lines, certificate of compliance, and certificate of service, as reported by Microsoft Word.

This the 23rd day of June, 2020.

/s/ Alexander McC. Peters
Alexander McC. Peters
Chief Deputy Attorney General