IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
No. 1:23-CV-862

DEMOCRATIC NATIONAL COMMITTEE; NORTH CAROLINA DEMOCRATIC PARTY, Plaintiffs, v. NORTH CAROLINA STATE BOARD OF ELECTIONS; KAREN BRINSON BELL, in her official capacity as Executive Director of the North Carolina State Board of Elections; ALAN HIRSCH, in his official capacity as Chair of the North Carolina State Board of Elections; JEFF CARMON, in his official capacity as Secretary of the North Carolina State Board of Elections; STACY EGGERS IV, KEVIN N. LEWIS, and SIOBHAN O'DUFFY MILLEN, in their official capacities as members of the North Carolina State Board of Elections, Defendants.	**MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE BY PRESIDENT PRO TEMPORE BERGER AND SPEAKER MOORE**

INTRODUCTION AND STATEMENT OF NATURE OF THE MATTER

Proposed Intervenors, 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 (the "Proposed Intervenors") seek to intervene as defendants on behalf of the General Assembly to defend North Carolina

Senate Bill 747 ("S.B. 747"), challenged by Plaintiffs here.[1] The Proposed Intervenors have a clear interest in upholding the validity of state statutes designed to regulate election activity and protect election integrity in the state. Despite the allegations in the Complaints being largely aimed at the General Assembly's enactment of S.B. 747, Plaintiffs chose not to sue Proposed Intervenors, who are in the best position to defend the validity of the law in question.

North Carolina law expressly permits intervention by the President *Pro Tempore* of the Senate and the Speaker of the House of Representatives on behalf of the General Assembly as a matter of right in any action challenging a North Carolina statute. N.C. Gen. Stat. §§ 1-72.2, 120-32.6. The Supreme Court recently held that in light of this "chosen means of diffusing its sovereign powers among various branches and officials," Proposed Intervenors have a right to intervene "in federal litigation challenging state law." *Berger v. North Carolina State Conference of the NAACP*, 597 U.S. ---, 142 S. Ct. 2191, 2201 (2022). Given the state statutes "authoriz[ing] the legislative leaders to defend the State's practical interests in litigation of this sort," they are possessed of the State's significant and legally protected interest in in "the continued enforcement of [its] own statutes." *Id.* at 2201, 2202 (cleaned up). And since "North Carolina has authorized different agents to defend its practical interests precisely because, thanks to how it has structured its government, each may be expected to vindicate different points of view on the State's behalf," the presence

[1] Two sets of plaintiffs filed similar lawsuits challenging S.B. 747 [1:23-cv-861 at D.E. 1; 1:23-cv-862 at D.E. 1]. Proposed Intervenors seek to intervene in both cases.

of executive-branch named defendants—there, as here, the officials of the North Carolina State Board of Elections and officials on two county boards of election—does not adequately represent the legislative branch's unique interests in defending the challenged laws. *Id.* at 2204.

Berger controls Proposed Intervenors' motion to intervene in this case. Here, as in *Berger*, the plaintiffs have challenged S.B. 747 which was recently passed by the General Assembly to address constituent concerns regarding election management and deadlines to ensure that elections are being conducted in a fair, non-partisan manner. Proposed Intervenors' interest in the case is the same as in *Berger*: defending the continued enforcement of those challenged state laws. And as in *Berger*, because the legislative branch "may be expected to vindicate different points of view on the State's behalf" than the existing, executive branch defendants, its interest in the case is not adequately represented. *Id.* at 2204. Just like in *Berger*, then, "North Carolina's legislative leaders are entitled to intervene in this litigation," *id.*, at 2206, and this Court should grant their motion to intervene. Thus, Proposed Intervenors are entitled to intervene as a matter of statutory right and as a matter of right under Federal Rule of Civil Procedure 24(a), or, in the alternative, to intervene permissively under Rule 24(b).

On the afternoon of October 13, 2023, Proposed Intervenors conferred with counsel for both the Plaintiffs and the North Carolina State Board of Elections Defendants regarding the relief requested in this motion. On the same day, Counsel for the North

Carolina State Board of Elections Defendants consented to the relief requested. Counsel for Plaintiffs responded on October 16, indicating that they take no position on the motion.

STATEMENT OF FACTS

On October 10, 2023, the North Carolina General Assembly overrode the Governor's Veto of S.B. 747 which was a 43-page bill designed to make various changes to North Carolina's election laws. The purpose of S.B. 747 was to address constituent concerns regarding election management and deadlines to ensure that elections are being conducted in a fair, non-partisan manner. Shortly after the veto-override, Plaintiffs Voto Latino, the Watauga County Voting Rights Task Force, Down Home North Carolina, Sophie Jae Mead, and Christina Barrow, filed a Complaint [1:23-cv-0861 at D.E. 1] seeking a declaration, under the United States Constitution and 42 U.S.C. § 1983, that the portions of S.B. 747 governing same day voter registration are unconstitutional. On the same day, The Democratic National Committee (the "DNC") and the North Carolina Democratic Party ("NCDP") collectively the ("DNC Parties") filed a complaint [1:23-cv-0862 at D.E. 1] on the same grounds challenging both the same day registration provisions of S.B. 747 and the provisions governing poll observers. The DNC Parties also challenged the same day registration and poll observer provisions under two sections of the North Carolina Constitution, the Voting Rights Act, and the Help Americans Vote Act ("HAVA").[2] On October 10, 2023, the DNC Parties also filed a Motion for Preliminary Injunction.

[2] Other provisions of S.B. 747 remain unchallenged.

STATEMENT OF THE QUESTION PRESENTED

Should the Court grant the Proposed Intervenors Motion to Intervene under Federal Rule of Civil Procedure Rule 24 either as of right or as permissive intervention?[3]

ARGUMENT

The Court should grant Proposed Intervenors Motion to Intervene and allow them to intervene as defendants in this matter to defend S.B. 747. Proposed Intervenors are entitled to intervention as of right under Rule 24(a) or, in the alternative, because the Court finds that they satisfy the requirements of permissive intervention under Rule 24(b). The Court should also allow Proposed Intervenors to appear at any hearings necessary to defend S.B. 747 that may be scheduled before the Court can rule on the instant motion.

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

Federal Rule of Civil Procedure 24(a) requires a court to permit anyone to intervene who, (1) "[o]n timely motion," (2) "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest," (3) "unless existing parties adequately represent that interest." *Berger*, 142 S. Ct. at 2200–01 (quoting Fed. R. Civ. P. 24(a)); *Teague v. Bakker*, 931 F.2d 259, 260-61 (4th Cir. 1991). "Liberal intervention is desirable" to ensure that cases include "as many apparently concerned

[3] In the event the Court schedules a hearing on the DNC Parties' Motion for Preliminary Injunction, Proposed Intervenors request expedited consideration of this motion and to be allowed to participate in the hearing.

persons as is compatible with efficiency and due process." *Feller v. Brock*, 802 F.2d 722, 729 (4th Cir. 1986)(citations omitted).

A. Proposed Intervenors' Motion is Timely.

Courts look to three factors to determine whether a motion to intervene is timely: (1) "how far the underlying suit has progressed"; (2) any "prejudice" that granting the motion would cause to the other parties; and (3) any justification for any delay in filing the motion by a proposed intervenor. *Alt v. U.S. E.P.A.*, 758 F.3d 588, 591 (4th Cir. 2014). Proposed Intervenors meet each factor. Plaintiffs filed the Complaint October 10, 2023, only six days ago. No named defendants have responded with an answer or substantive motion. The Proposed Intervenors have expeditiously sought intervention, and no prejudice will result from allowing their intervention during the pleading stage of litigation, especially because no defendant has filed any answer or substantive motions yet. *See Carcano v. McCrory*, 315 F.R.D. 176, 178 (M.D.N.C. 2016) (granting the motion to intervene of Senator Berger and Speaker Moore when the motion was filed 9 days after the Complaint and had not progressed past the pleadings stage); *League of Women Voters of N.C. v. North Carolina*, No. 1:13CV660, 2014 WL 12770081, at *2 (M.D.N.C. Jan. 27, 2014) (finding motion to intervene in a voting rights case timely because it was filed "well before the scheduling order's ... deadline for amendments to pleadings").

B. Significant Protectable Interests.

"States possess a legitimate interest in the continued enforce[ment] of [their] own statutes" which "federal courts should rarely question that a State's interests will be

practically impaired or impeded if its duly authorized representatives are excluded from participating in federal litigation challenging state law…" *Berger,* 142 S.Ct. at 2194-95. The Proposed Intervenors as leaders in the state branch who enacted the law, have a significant, protectable interest in the enforcement of a duly enacted state statute, enacted according to the express command of the people of North Carolina. *Id* at 2206.

In fact, the State of North Carolina has expressly authorized intervention in such cases:

> the Speaker of the House of Representatives and the President Pro Tempore of the Senate, as agents of the State, by and through counsel of their choice, including private counsel, shall jointly have standing to intervene on behalf of the General Assembly as a party in any judicial proceeding challenging a North Carolina statute . . . .
> N.C. Gen. Stat. § 1-72.2.

The U.S. Supreme Court recently applied this statutory provision to permit intervention by the same Proposed Intervenors to defend the constitutionality of another North Carolina statute. *Berger*, 142 S. Ct. at 2200-01. The Supreme Court recognized that state law affirmatively authorized the legislative leadership to intervene as the state's agents to protect legal challenges against the state's laws, giving them a significant protectable interest that may be impaired whenever a state statute is challenged. *See Id*.

Even before *Berger,* courts around the country had recognized the right of state legislatures to intervene as of right, due to the protectable interests in defending election related laws. *See Robinson v. Ardoin,* Nos. 22-211-SDD-SDJ, 22-214-SDD-SDJ, 2022 WL 1154607, at *3 (M.D. La. Apr. 19, 2022) (granting legislators' motion for intervention as of right after finding elements of Rule 24(a) met, including finding a legitimate interest

that "leaders of the legislative bodies that enacted the challenged maps have an interest in participating in a process where the various policy choices and judgments that went into creating the maps will be scrutinized."); *Nairne v. Ardoin,* No. 22-178-SDD-SDJ, 2022 WL 1559077, at *2 (M.D. La. May 17, 2022) (granting legislators' motion for intervention as of right after finding elements of Rule 24(a) met, including finding a legitimate interest of "defend[ing] the merits of the redistricting plans passed by the Legislature."); *Swenson v. Bostelmann,* No. 20-cv-459, 2020 WL 8872099, at *1 (W.D. Wis. June 23, 2020) (granting state legislature intervention as of right in election law-related case reasoning that "the Legislature has an interest in the continued enforceability of its laws"); *see also Miss. State Conf. of N.A.A.C.P. v. Barbour,* No. 3:11-cv-00159, 2011 WL 1327248, at *2-3 (S.D. Miss. Apr. 1, 2011) (finding that the Mississippi House of Representatives Apportionment and Elections Committee, which had voted on and approved a district apportionment plan that was the subject of the plaintiff's challenge, had the right to intervene in redistricting case); *Karcher v. May,* 484 U.S. 72, 77 (1987) (recognizing that "presiding officers" of state legislature had authority to intervene in lawsuit challenging state legislation); *cf. League of United Latin Am. Citizens, Council No. 4434 v. Clements,* 884 F.2d 185, 188 (5th Cir. 1989) (noting that parties who play a "part in creating or revising the election scheme" meet the "real party in interest" test).

Consistent with the opinions above, in *Berger*, the Supreme Court recognized that "the State has made plain that it considers the leaders of the General Assembly 'necessary parties' to suits like this one [challenging a state statute]." *Id.* at 2203 (citing § 120–

32.6(b)). The Court held "where a State chooses to divide its sovereign authority among different officials and authorize their participation in a suit challenging state law, a full consideration of the State's practical interests may require the involvement of different voices with different perspectives." *Id.* at 2203.[4] Moreover, the Court in *Berger,* even found that the interest in defending the election law was separate from the State Board of Election's interest. *Id*. at 2205. The facts and the law in the instant case warranting intervention are no different than those raised in *Berger.* Thus, *Berger* definitively resolves the question of the Proposed Intervenors' significantly protectable interest and its potential impairment, in favor of intervention.

C. Interests Not Adequately Represented.

A presumption of adequate representation "'is inappropriate when a duly authorized state agent seeks to intervene to defend a state law." *Berger*, 142 S. Ct. at 2204. Proposed Intervenors satisfy the inadequate representation requirement on a mere showing that representation of its interests "'"may be' inadequate" and the burden of showing that is minimal. *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972); accord *In re Sierra Club*, 945 F.2d 776, 779–80 (4th Cir. 1991). The Proposed Intervenors satisfy that low burden here.

[4] Under constitutional challenges, neither parties nor the court can substitute their "own social or economic beliefs for the judgment of legislative bodies, who are elected to pass the laws." *Ferguson v. Skrupa*, 372 U.S. 726, 730, 83 S. Ct. 1028, 1031, 10 L. Ed. 2d 93 (1963). *See also Dobbs v. Jackson Women's Health Org.,* 142 S. Ct. 2228, 2284, 213 L. Ed. 2d 545 (2022*); Board of Trustees of Univ. of Ala. v. Garrett,* 531 U.S. 356, 365–368, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001).

Berger further explains why Proposed Intervenors easily satisfy the "minimal" showing that their interest in defending the challenged laws is not adequately represented by the existing defendants. *Trbovich*, 404 U.S. at 538 n.10. "North Carolina has authorized different agents to defend its practical interests precisely because, thanks to how it has structured its government, each may be expected to vindicate different points of view on the State's behalf." *Berger*, 142 S. Ct. at 2204. After all, "when a State chooses to allocate authority among different officials who do not answer to one another, different interests and perspectives, all important to the administration of state government, may emerge." *Id.* at 2201. While those different officials may have " 'related' state interests, . . . they cannot be fairly presumed to bear 'identical' ones." *Id.* at 2204. Refusing to allow intervention in these circumstances would thus "evince disrespect for a State's chosen means of diffusing its sovereign powers among various branches and officials" and "risk turning a deaf federal ear to voices the State has deemed crucial to understanding the full range of its interests." *Id.* at 2201. It would also "encourage plaintiffs to make strategic choices to control which state agents they will face across the aisle in federal court," in an effort to "select as their defendants those individual officials they consider most sympathetic to their cause or most inclined to settle favorably and quickly." *Id.* In light of these considerations, *Berger* holds, it "follows quickly" that "North Carolina's legislative leaders are entitled to intervene." *Id.* at 2205, 2006.

Circumstances surrounding this case aptly "illustrates how divided state governments sometimes warrant participation by multiple state officials in federal court."

Id. at 2206. The Attorney General whose office is responsible for providing a defense to the majority of defendants in these cases has publicly denounced S.B. 747. *See* **Exhibits 1 and 2**. Two days after S.B. 747 was first introduced in Committee, Attorney General Stein publicly criticized the provisions of S.B. 747 challenged here and called the bill "anti-voter." (**Exhibit 1**). Attorney General Stein continued his public criticisms, criticizing S.B. 747 on his campaign website on August 24, 2023, calling it a "voter suppression effort" designed by "far-right politicians" to "put[] up barriers to the ballot box." (**Exhibit 2**). These are not the comments of someone looking to mount an adequate defense of S.B. 747.

The other named defendants in the Voto Latino suit are county board of elections members for Durham and Watauga counties who have not yet filed an answer or substantive pleading (the "County Boards"). At this juncture, Proposed Intervenors are unsure who will be representing these entities, or if these entities openly oppose S.B. 747 like Attorney General Stein. If so, they cannot possibly represent the Proposed Intervenors interests adequately.

If the other named defendants (or even the North Carolina State Election Board Defendants) take a neutral position on defending these laws, that would also fail to adequately represent the Proposed Intervenors' position. *Berger* provides a good example of how this could occur. In that litigation against members of the North Carolina State Board of Elections, those similarly situated executive agency officials took the position that they basically did not care what the outcome of the lawsuit was, so long as they received guidance from the court on how to apply the law. *Berger*, 142 S. Ct. at 2199

(noting that "the Board [of elections members] did not oppose the motion on timeliness grounds . . . Nor did the Board produce competing expert reports. Instead, it supplied a single affidavit from its executive director and stressed again the need for clarity about which law to apply . . . .") If the County Boards or North Carolina State Election Board adopts the same "we do not care what the law is; just tell us what it is" position like it did in *Berger*, they would not adequately represent the interests that Proposed Intervenors seek to represent in this case.

And even if *arguendo,* the officials in this case purport to defend S.B. 747, they are not legislative leaders like the Proposed Intervenors here, who would vigorously mount a defense to the law they passed. Under this analysis, that fact alone renders them inadequate representatives. Indeed, state law specifically contemplates the distinction between the representatives of the executive branch and it's boards, like the North Carolina State Election Board, and legislative branch:

> 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
> N.C. Gen. Stat. § 1-72.2(a).

This is further laid out in the next section of that statute: "

> The Speaker . . . and the President Pro Tempore of the Senate, as agents of the State, shall jointly have 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*.

While the North Carolina State Board of Elections defendants have of course not yet begun to mount their defense in this case, many of the same structural incentives—including, critically, "the Board's overriding concern for stability and certainty," *id.*—apply equally here. Just as in *Berger*, then, Proposed Intervenors are entitled to intervene and advance their distinct interest in "defending the law vigorously on the merits without an eye to crosscutting administrative concerns." *Id.*

Proposed Intervenors intend to offer a vigorous defense of S.B. 747. As such, the Court should grant the Motion to Intervene and allow Proposed Intervenors to intervene and defend S.B. 747.

II. In the Alternative, Permissive Intervention is Warranted.

While the Proposed Intervenors respectfully submit they are entitled to intervene as of right, in the alternative, the Court should grant them permissive intervention. 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)(2)(B).

An applicant for permissive intervention need not show a significant protectable interest or inadequacy of representation. Rather, the applicant need only show that (1) the intervention request is timely filed, (2) the applicant "has a claim or defense that shares with the main action a common question of law or fact," and (3) the intervention will not "unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(1)(B).

The Proposed Intervenors satisfy each of those here. First, for the same reasons detailed above, the Proposed Intervenors' Motion is timely. Second, the Proposed Intervenors will present a defense "that shares with the main action a common question of law or fact" —namely, that S.B. 747 is a constitutionally permissible method of regulating the state's interests in election integrity and administration. Third, no undue delay or prejudice will result from allowing the Proposed Intervenors to intervene at this extremely early stage in litigation. Because all of these factors are met permissive intervention is proper here, in the alternative. *See Carcano*, 315 F.R.D. 176, 179 (M.D.N.C. 2016) (because the defenses of the proposed intervenors largely overlap with the factual issues present in the action, and would not significantly complicate proceedings, intervention was warranted); *see also People for Ethical Treatment of Animals, Inc. v. Stein,* No. 1:16CV25, 2019 WL 9662884, at *3 (M.D.N.C. May 14, 2019) (holding the same); *Priorities USA v. Benson*, 448 F. Supp. 3d 755, 764, 766-67 (E.D. Mich. 2020) (granting legislatures' permissive intervention when the legislature seeks to intervene in a challenge to an election law in order to protect and defend enacted law of the state); *Hunter v. Bostelmann*, No. 21-cv-512, 2021 WL 3856081, at *1-2 (W.D. Wis. Aug. 27, 2021) (granting permissive intervention by Wisconsin Legislature in redistricting case where the legislature was responsible for drawing legislative districts); *see also League of Women Voters of Mich. v. Johnson*, 902 F.3d 572, 580 (6th Cir. 2018) (holding district court abused its discretion in denying a permissive intervention of legislators).

CONCLUSION

For these reasons, the Proposed Intervenors respectfully request that the Court grant their Motion to Intervene, and to participate in any hearings schedule by the Court prior to the ruling on this motion.

Respectfully submitted, this the 16th day of October, 2023.

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.3(d), I hereby certify that this brief contains 3518 words as counted by the word count feature of Microsoft word.

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CERTIFICATE OF SERVICE

I hereby certify that I filed the forgoing document using the Court's CM/ECF System which will send notification to all counsel of record.

This the 16th day of October, 2023.

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