UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA

NORTH CAROLINA ALLIANCE FOR RETIRED AMERICANS,

Plaintiff,

v.

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, KAREN BRINSON BELL in her official capacity as Executive Director of the State Board of Elections,

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.

CASE NO. 1:23-cv-837

PROPOSED INTERVENORS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO INTERVENE

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INTRODUCTION AND STATEMENT OF THE NATURE OF THE MATTER

Federal Rule of Civil Procedure 24(a) gives a party a right to intervene where it "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, unless existing parties adequately represent that interest." And in cases challenging a state statute, North Carolina law declares that the Speaker of the North Carolina House of Representatives and the President Pro Tempore of the Senate —the Proposed Intervenors here—have just such an interest: they represent "the State of North Carolina" in equal measure with the executive branch and are thus possessed of the State's interest in defending the continued enforcement of its duly enacted laws.

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 of executive-branch named defendants—there, as here, the officials of the North Carolina State Board of Elections—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 plaintiff has challenged one of North Carolina's rules governing voting in elections held in the State: in this case, its laws requiring a state resident to have resided within the state for 30 days preceding an election before voting in that election. 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.* 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.

Proposed Intervenors have conferred with counsel for both the Plaintiff and the named Defendants regarding the relief requested in this motion. Both parties have stated that they do not oppose the motion.

STATEMENT OF FACTS

Plaintiff, the North Carolina Alliance for Retired Americans, filed this suit on October 2, 2023. Plaintiff's complaint alleges that North Carolina's requirement that a state resident must have "resided in the State of North Carolina and in the precinct in which the person offers to vote for 30 days next preceding an election" before voting in that election, N.C. GEN. STAT. § 163-55(a), violates Section 202 of the Voting Rights Act and the First and Fourteenth Amendments to the United States Constitution. Compl., Doc. 1 ¶¶ 45–59 (Oct. 2, 2023). Plaintiff seeks a declaration that the challenged requirement is invalid and a permanent injunction forbidding its enforcement. *Id.* at 19. Plaintiff's complaint names as defendants the Chair and members of the North Carolina State Board of Elections in their official capacities. *Id.* ¶¶ 19–20.

After Plaintiff filed suit, the matter was assigned to Magistrate Judge Webster under this Court's Standing Order 30. Plaintiff's counsel entered appearances and filed proof of service of process on October 11. Defendants' counsel entered appearances on October 12, but no substantive proceedings have occurred.

QUESTION PRESENTED

Whether Proposed Intervenors should be granted leave to intervene in this case under Federal Rule of Civil Procedure 24.

ARGUMENT

Under Federal Rule of Civil Procedure 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" that "may as a practical matter" be "impair[ed] or impede[d]" by the disposition of the action, and (3) shows that he is not "adequately represent[ed]" by "existing parties." FED. R. CIV. P. 24(a). All three of these requirements are satisfied here, and the Court should allow President Pro Tempore Berger and Speaker Moore to intervene as a matter of right. In the alternative, Proposed Intervenors should at the very least be allowed to intervene on a permissive basis.

I. Proposed Intervenors' Motion Is Timely.

There can be no question that Proposed Intervenors' request to intervene is timely: no substantive proceedings have yet occurred in the case, and Plaintiff only filed returned, executed summonses a few days ago. Courts assessing the timeliness of a motion under Rule 24 "assess three factors: first, how far the underlying suit has progressed; second, the prejudice any resulting delay might cause the other parties; and third, why the movant was tardy in filing its motion." *Alt v. United States E.P.A.*, 758 F.3d 588, 591 (4th Cir. 2014). Given the nascent stage of this litigation, all three factors show that this motion is timely. The underlying suit has progressed not at all.

Allowing intervention at the very outset of this case will not cause any prejudicial delay to the other parties. And given that the case is only two weeks old, there is no tardiness to explain.

II. This Litigation Threatens To Impair Proposed Intervenors' Significantly Protectable Interest in the Continued Enforcement of the Challenged Laws.

The second intervention factor is also satisfied, as a matter of binding Supreme Court precedent. As the Supreme Court explained in *Berger*, "States possess a legitimate interest in the continued enforcement of their own statutes," and "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." 142 S. Ct. at 2201 (cleaned up). And as *Berger* also held, Proposed Intervenors are included among those "duly authorized representatives," because "North Carolina has expressly authorized the legislative leaders to defend the State's practical interests in litigation of this sort." *Id.* at 2202.

N.C. GEN. STAT. § 1-72.2 provides 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" and, in equal measure with the executive branch, "constitute[s] the State of North Carolina" for purposes of defending the challenged state law. N.C. GEN. STAT. § 1-72.2(a). Moreover, Section 1-72.2 further provides that Proposed Intervenors "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.* § 1-72.2(b). Indeed, North Carolina law directs that in lawsuits of this kind, "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." *Id.* § 120-32.6(b). As *Berger* holds, these statues

plainly authorize Prospective Intervenors to "defend state laws 'as agents of the State.' " 142 S. Ct. at 2202 (quoting N.C. GEN. STAT. § 120-32.6(b)).

Berger's holding is dispositive here. Plaintiff's request to enjoin the enforcement of North Carolina's statutory and constitutional provisions governing voter residency plainly threatens to impair or impede the State's sovereign "interest in the continued enforcement of [its] own statutes." *Id.* at 2201 (cleaned up). And this interest is shared by Proposed Intervenors in equal measure with the named executive-branch defendants. For as a matter of state law—which this Court is bound to respect—North Carolina has chosen to "diffuse[e] its sovereign power among various branches and officials" by "expressly authoriz[ing] the legislative leaders to defend the State's practical interests in litigation." *Id.* at 2201, 2202.

III. Proposed Intervenors' Interest Is Not Adequately Represented by the Current Defendants.

Berger also eliminates any argument that Proposed Intervenors' interest in defending the challenged laws is adequately represented by the Board of Elections officials named as defendants. "The requirement of [inadequate representation] is satisfied if the applicant shows that representation of his interest *may be* inadequate." *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n.10 (1972) (emphasis added; quotation marks omitted); *accord United Guaranty Residential Ins. Co. of Iowa v. Philadelphia Sav. Fund Soc'y*, 819 F.2d 473, 476 (4th Cir. 1987). "[T]he burden of making this showing should be treated as minimal." *Trbovich*, 404 U.S. at 538 n.10 (quotation marks omitted). And while the courts "have suggested that a presumption of adequate representation [is] appropriate in certain classes of cases," *Berger* squarely holds that "a presumption of adequate representation is inappropriate when a duly authorized state agent seeks to intervene to defend a state law." 142 S. Ct. at 2204.

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 2205–06.

While the Board of Elections defendants have of course not yet begun to mount their defense in this case, the same structural incentives that undergirded the Supreme Court's conclusion in *Berger* that "different officials" are likely to advance "different interest and perspectives" apply equally here—including "the Board's overriding concern for stability and certainty." *Id.* at 2201, 2205. 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.* at 2205.

In short, Proposed Intervenors are entitled to intervene as a matter of right under Rule 24(a) under a direct application of the Supreme Court's binding decision in *Berger*.

IV. In the Alternative, the Court Should Grant Permissive Intervention.

For these reasons, Proposed Intervenors are entitled to intervene as a matter of right. But even if the Court were to disagree, it should grant 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)(1)(B). For the reasons discussed above, Proposed Intervenors' motion is timely. And it is also clear that Proposed Intervenors will present a defense "that shares with the main action a common question of law or fact," *id.*: whether the challenged laws are inconsistent with the Voting Rights Act and the First Amendment. At a bare minimum, then, the Court should grant permissive intervention.

CONCLUSION

The Court should allow Proposed Intervenors to intervene under FED. R. CIV. P. 24.

Dated: October 16, 2023

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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 2,110 words as measured by Microsoft Word.

/s/ Nicole J. Moss
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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that, on October 16, 2023, I electronically filed the foregoing Memorandum with the Clerk of the Court using the CM/ECF system which will send notification of such to all counsel of record in this matter.

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