

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.)

**RESPONSE TO
MOTION TO INTERVENE
[DE 16]**

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—and hereby respond to the Motion to Intervene filed on 10 June 2020 by Philip E. Berger, President *Pro Tempore* of the North Carolina Senate, and Timothy K. Moore, Speaker of the North

Carolina House of Representatives [DE 16].

Defendants do not take a position on the motion to intervene. Should the Court determine that the Proposed Intervenors should be permitted to proceed as part of this action, the Proposed Intervenors should be allowed to do so under the permissive intervention provisions of Rule 24(b).

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 State 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, moved to intervene in this action, asserting that defendants “are not adequate representatives of Proposed Intervenors’ interests,” and that “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.” [Memorandum in Support of Motion to Intervene, DE 17 at 12]

Mandatory intervention is not appropriate here. Proposed Intervenors claim that they have “the interest of the State in defending the constitutionality of the challenged laws.” DE 17 at 8. But the State itself is not a defendant in this lawsuit. The named defendants are the State Board of Elections, its members sued in their official capacities, the Department of Transportation and its Secretary sued in his official capacity, and the

Department of Health and Human Services and its Secretary sued in her official capacity—all for their connection to the enforcement of the statutory provisions challenged here. The Proposed Intervenors do not claim (nor could they) that they have any authority to direct the defense of the defendants here. At most, the Proposed Intervenors can press only the interests of the General Assembly in this lawsuit.

But it is not clear that those interests are significantly protectable to require the intervention of the Proposed Intervenors here. Indeed, this Court recently held, in a case challenging the constitutionality of a law requiring voters to present photo identification, that these same Proposed Intervenors “failed to demonstrate that they have a significantly protectable interest in likewise defending the constitutionality of S.B. 824 sufficient to warrant a right to intervene under Rule 24(a)(2).” *NC NAACP v. Cooper*, No. 18-cv-1034, DE 56 at 11 (M.D.N.C. June 3, 2019).

Defendants also dispute with the Proposed Intervenors’ contention that intervention is necessary or required under N.C. GEN. STAT. §§ 1-72.2 and 120-32.6. The interpretations of sections 1-72.2 and 120-32.6 that the Proposed Intervenors advance raise profound issues of state constitutional law, including separation of powers as guaranteed under the North Carolina Constitution. This is not the appropriate setting for those issues to be resolved, and the Court need not do so to resolve Proposed Intervenors’ Motion.

The Proposed Intervenors also challenge the ability of the current defendants to defend the case, as well as the ability of the Attorney General’s office to serve as counsel in the defense of the case. The Proposed Intervenors’ presentation of the conduct of the Attorney General’s office in this case and others is misleading.

First, the Proposed Intervenors appear to press a view of North Carolina law that *per se* finds inadequate defense of state statutes by executive branch officers and agencies. [DE 17 at 12] This is a remarkable assertion. It is also rebutted by the fact that—as this Court recently held—federal courts are only *requested* to allow the legislative branch to participate; the legislative branch is “not automatically entitled to intervene as of right.” *NC NAACP*, No. 18-cv-1034, DE 56 at 11 (citing N.C. R. Civ. P. 19(d) and N.C. GEN. STAT. § 1-72.2). Again, however, it is not necessary for this Court to rule on the Proposed Intervenors’ interpretation of these state statutes at this time.

Second, the Proposed Intervenors’ assertion that Defendants only have an “interest in the administration of state elections,” [DE 17 at 12] is wrong. *See, e.g., Judicial Watch, Inc. v. State of North Carolina*, No. 3:20-cv-211, DE 29 at 2–3 (State Board of Elections and its members rejecting argument by proposed intervenors that the State Board defendants have an interest only in elections-administration). The Attorney General is the officer authorized by the North Carolina Constitution and North Carolina statutes to represent the interests of North Carolina, its agencies and executive officers, and the people of the State. *Martin v. Thornburg*, 320 N.C. 533, 359 S.E.2d 472 (1987); N.C. GEN. STAT. § 114-2.

Finally, the Proposed Intervenors assert that there is “reason to question the resoluteness with which Defendants would defend” the laws being challenged in this case because Executive Director Bell and Attorney General Stein both suggested policy changes to the General Assembly in its consideration of legislative changes to elections laws. [DE 17 at 14] The Executive Director’s and Attorney General’s policy suggestions are not

material to the question of whether the Executive Director as a defendant and the Attorney General as counsel to the defendants would be able to adequately defend state law.

The Proposed Intervenors also claim that the positions that the Governor—who is not a party to this action—took in a separate litigation, involving an entirely different statute, somehow disqualify the State Board and its members from being able to defend the statutes challenged here, and in addition, disqualify the Attorney General, who represented the Governor in that separate action, from adequately representing the State Board and its members here. [DE 17 at 16] But a party does not become inadequate for purposes of intervention due to positions taken by a non-party in a separate case involving completely different legal issues. And certainly, a party does not become inadequate because its *lawyer* represented a different party that took different positions in a separate action involving completely different legal issues.

Nevertheless, the Defendants neither consent nor object to the Proposed Intervenors' motion under Rule 24(b), and defer to the Court's determinations regarding whether and in what capacity the Proposed Intervenors should be permitted to proceed as part of this action.¹

¹ As though the determination of adequacy of representation of interests is dependent on the quantity of litigation, as opposed to quality, the Proposed Intervenors claim that participation as amici would not adequately protect their interests because they would not be able to proffer evidence of their own. To support this contention, they claim that this Court granted the plaintiffs' preliminary injunction motion in *NC NAACP* because this Court struck the Proposed Intervenors' expert reports and the State Board members did not themselves offer expert reports rebutting the plaintiffs' experts. [DE 17 at 17] Defendants note that the Proposed Intervenors were able to introduce into evidence these same expert reports in the companion case in state court challenging the same statute in *Holmes v.*

This the 12th 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

Moore, No. 18-cvs-15292 (N.C. Super. Ct. Wake Cty.). And in *Holmes*, the North Carolina Court of Appeals ordered the trial court to grant the plaintiffs' motion for preliminary injunction, despite the introduction of these same expert reports. 840 S.E.2d 244, 266-67 (N.C. Ct. App. 2020).

CERTIFICATE OF SERVICE

I hereby certify that on this date I electronically served the foregoing **RESPONSE TO MOTION TO INTERVENE** with the Clerk of Court using the CM/ECF system, which will send notification of such to all counsel for record in this matter.

This the 12th day of June, 2020.

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