UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
CIVIL ACTION NO. 1:18-cv-01034

NORTH CAROLINA STATE CONFERENCE OF THE NAACP, et al., Plaintiffs, v. DAMON CIRCOSTA, in his official capacity as Chair of the North Carolina State Board of Elections, et al., Defendants.	**STATE BOARD DEFENDANTS' RESPONSE TO PROPOSED DEFENDANT-INTERVENOR'S MOTION TO INTERVENE**

Defendants Damon Circosta, Stella E. Anderson, David C. Black, Ken Raymond, and Jefferson Carmon III, in their official capacities as members of the North Carolina State Board of Elections ("State Board Defendants"), through undersigned counsel, oppose the motion to intervene filed by the Voter Integrity Project NC, Inc. ("VIP-NC") [DE 133].

ARGUMENT

VIP-NC seeks to intervene as a defendant as a matter of right under Rule 24(a)(2) of the Federal Rules of Civil Procedure, or, in the alternative, with the Court's permission under Rule 24(b)(1). VIP-NC claims to have an interest in defending the provisions of S.B. 824 that increase the number of poll observers that the state's political parties may appoint to monitor voting. It also asserts that intervention is particularly needed so that it can defend these provisions against Plaintiffs' claim under the Voting Rights Act. [DE

134 at 5–6, 14–15] VIP-NC fails to show, however, that either mandatory or permissive intervention is appropriate in these circumstances.

I. VIP-NC Is Not Entitled to Intervene as of Right.

To succeed on its request for intervention as of right pursuant to Rule 24(a)(2), VIP-NC must move for intervention in a timely manner, and demonstrate that it has "(1) an interest in the subject matter of the action; (2) that the protection of this interest would be impaired because of the action; and (3) that the applicant's interest is not adequately represented by existing parties to the litigation." *Teague v. Bakker*, 931 F.2d 259, 260–61 (4th Cir. 1991). The would-be intervenor has the burden of showing each required element for intervention. [DE 56 at 6 (citing *Arista Records, LLC v. Doe No. 1*, 254 F.R.D. 480, 481 (E.D.N.C. 2008))] VIP-NC fails to meet that burden.

First, VIP-NC's motion is untimely. Second, VIP-NC fails to show that it would suffer from an impairment of any significantly protectable interest if it cannot intervene. Finally, it also fails to show that its identified interests are represented inadequately by the State Board Defendants.

A. The motion is untimely.

A motion for intervention must be "timely." Fed. R. Civ. P. 24(a). "[T]imeliness is to be determined from all the circumstances. And it is to be determined by the court in the exercise of its sound discretion[.]" *NAACP v. New York*, 413 U.S. 345, 366 (1973). If a motion is not timely, there is no need for the court to address the other factors that determine a party's right to intervene. *See id*. at 369.

In determining the timeliness of a motion to intervene, courts "look at how far the suit has progressed, the prejudice which delay might cause other parties, and the reason for the tardiness in moving to intervene." *Gould v. Alleco,* Inc., 883 F.2d 281, 286 (4th Cir. 1989).

VIP-NC provides no excuse for its tardiness in seeking intervention. Plaintiffs filed this action nearly a year and a half ago, on December 20, 2018. [DE 1] From the very outset of this litigation, Plaintiffs challenged S.B. 824's increase in the number of poll observers. [DE 1 at 3, 12, 22, 24, 29–36] VIP-NC could have sought to intervene when Plaintiffs first filed this lawsuit or in the months that followed, but did not do so.

Moreover, this lawsuit has progressed significantly since it was filed. This Court has ruled on motions to dismiss and motions to intervene, the Fourth Circuit has heard two appeals concerning those motions to intervene and is considering a third, this Court has granted in part Plaintiffs' motion for a preliminary injunction, the parties are in the midst of an appeal from that order, and discovery has now been ongoing for some time.

Under these circumstances, "[t]he tardiness of [VIP-NC's] motion is the strongest reason supporting its denial." *Gould,* 883 F.2d at 286.

B. VIP-NC does not have a significant protectable interest that would be impaired without intervention.

VIP-NC also fails to show that it has a protectable interest that would be impaired absent intervention, for multiple reasons.

First, VIP-NC does not have an interest in this lawsuit sufficient to justify intervention. VIP-NC argues that its organizational mission "includes promoting election

integrity in North Carolina," and that this interest would be impaired if it cannot intervene in this action. [DE 134 at 12–13] Specifically, VIP-NC argues that the time and effort that it has spent on "recruiting, educating, and training individuals to serve as election observers" would be threatened if this case proceeds without it. [DE 134 at 12] But under North Carolina law, VIP-NC plays no role at all in the appointment of poll observers. State law reserves that task to recognized political parties and any unaffiliated candidates who earn a place on the ballot. *See* N.C. Gen. Stat. § 163-45(a). Because VIP-NC plays no role in selecting poll observers, it does not have an interest in defending S.B. 824 sufficient to justify intervention.

Second, even assuming that VIP-NC has an interest in defending S.B. 824's poll-observer provisions, that interest will not be impaired.

Notwithstanding VIP-NC's claims to the contrary, the State Board Defendants have defended S.B. 824's poll-observer provisions. The State Board Defendants opposed Plaintiffs' motion for preliminary injunction that sought to block enforcement of those provisions. *See* Ex. 1, T pp 41, 160–61. Indeed, as VIP-NC admits, even in its absence from the lawsuit, "the Court did not grant the Plaintiffs' motion as to the increase of at-large observers." [DE 134 at 9] Likewise, the Court also held that Plaintiffs had not shown a likelihood of success on the merits of their Voting Rights Act claim, which VIP-NC asserts that it must intervene to defend. [DE 120 at 47–53][1] Because the State Board

[1] VIP-NC criticizes the State Board Defendants for addressing the poll observer provision only in a footnote it their brief before the Fourth Circuit seeking reversal of the preliminary injunction. [DE 134 at 9] Since that provision was not enjoined, of course, there was no need to brief its validity on appeal.

Defendants have already successfully defended the very claims and provisions that VIP-NC seeks to intervene to defend, VIP-NC cannot show that any interest it has will be impaired absent intervention.

In sum, because the State Board Defendants continue to defend S.B. 824 and VIP-NC's purported interests, VIP-NC has failed to demonstrate that it has a significantly protectable interest sufficient to warrant intervention as of right, or that any interest it argues it has in this litigation is impaired. As this Court has already correctly observed, where would-be intervenors show no protectable interest, or a significant impairment to any interest they may have in a lawsuit, intervention as of right is not warranted. [DE 56 at 12 (citing *One Wisconsin Inst., Inc. v. Nichol*, 310 F.R.D. 394, 397 (W.D. Wis. 2015); *Am. Ass'n of People with Disabilities v. Herrera*, 257 F.R.D. 236, 252 (D.N.M. 2008))] VIP-NC's motion should therefore be denied for failure to show an impairment to a protectable interest.

C. The existing Defendants are adequately representing the would-be intervenors' asserted interests.

Similarly, VIP-NC also fails to show, as it must, that the State Board Defendants inadequately represent any interest it has concerning S.B. 824's poll-observer provisions. As VIP-NC concedes, where "a State statute is challenged and a proposed intervenor shares a common objective with the State to defend the validity of the statute," the government's representation is presumed to be adequate. [DE 134 at 13 (citing *United States v. North Carolina*, No. 1:16CV425, 2016 U.S. Dist. LEXIS 174103, at *8 (M.D.N.C. Dec. 16, 2016))] That is so because "when 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). To overcome the presumption, a proposed intervenor must mount "a strong showing" of inadequacy of representation. *Id*. Mere differences in litigation strategies do not suffice, because "to permit private persons and entities to intervene in the government's defense of a statute upon only a nominal showing would greatly complicate the government's job." *Id*.

VIP-NC appears to argue that, even though the poll-observer provision was not enjoined, the State should have devoted more of its limited briefing space to opposing the preliminary injunction on this issue. [DE 134 at 14] But Plaintiffs themselves barely mentioned this provision in their brief for a preliminary injunction, [*see* DE 91], a fact that they acknowledged at the preliminary injunction hearing, *see* Ex. 1, T pp 40–41. The Court recognized as much during the hearing, noting that Plaintiffs "haven't mentioned [the observer provision] today," and "barely mentioned" it in their brief. Ex. 1, T p 40. Under these circumstances, it was reasonable for the State Board Defendants to focus their written and oral arguments on the provisions of S.B. 824 that were in dispute. VIP-NC's disagreement with these "reasonable litigation tactics" is insufficient to show inadequacy in the existing representation. *Stuart*, 706 F.3d at 352.

As in *Stuart*, the proposed intervenors here attempt to show nonfeasance by the State Board or adversity of interest in connection with defense of S.B. 824's poll-observer provisions. *Compare* DE 134 at 13–15 *with Stuart*, 706 F.3d at 352. Yet, again, the State Board Defendants have already defended these provisions successfully on a motion for preliminary injunction, in VIP-NC's absence. [*See* DE 120 at 46–47] The

court should therefore find that "rather than making the necessary strong showing, appellants have demonstrated merely that they disagree with the Attorney General's reasonable litigation tactics." *Stuart*, 706 F.3d at 352. VIP-NC fails to make the requisite showing of inadequate representation.

For these reasons, VIP-NC has failed to show it is entitled to intervene under Rule 24(a)(2).

II. VIP-NC Fails to Show That Permissive Intervention Is Appropriate.

VIP-NC also seeks permissive intervention under Fed. R. Civ. P. 24(b)(1)(B). [DE 134 at 18–19] Rule 24(b)(1) provides that permissive intervention may be allowed upon timely motion by anyone who "has a claim or defense that shares with the main action a common question of law or fact." The decision on whether to grant permissive intervention "lies within the sound discretion of the trial court." *Smith v. Pennington*, 352 F.3d 884, 892 (4th Cir. 2003). In exercising its discretion, the trial court should consider whether "intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3).

For the reasons discussed above, VIP-NC's motion to intervene is untimely. The Court should deny the motion on that basis alone.

Intervention is also unwarranted because it would prejudice the adjudication of the parties' rights. Adding new parties to this case would "hinder, rather than enhance, judicial economy" and "unnecessarily complicate and delay" the remaining stages of this case. *One Wis. Inst.*, 310 F.R.D. at 399, 400. Allowing VIP-NC to intervene would complicate this case unnecessarily: For instance, VIP-NC apparently seeks to intervene

in part so that it can challenge the constitutionality of the Voting Rights Act. [DE 134 at 14–15] Letting VIP-NC inject extraneous issues like that one into this case would "place additional burden on the Court in expending unnecessary judicial resources on such contentions." [DE 56 at 21] Complicating this case in this manner is especially unnecessary given that the State Board Defendants have already successfully defended the poll-observer provisions against plaintiffs' Voting Rights Act claim at the preliminary injunction stage.

Permitting intervention "would only distract from the pressing issues in this case[,]" not promote their efficient resolution. [DE 100 at 9] VIP-NC has failed to show that its motion for permissive intervention under Rule 24(b) should be granted.

CONCLUSION

For the foregoing reasons, the Court should deny VIP-NC's motion to intervene as of right or, in the alternative, permissively.

Respectfully submitted this 15th day of April, 2020.

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CERTIFICATE OF WORD COUNT

Pursuant to Local Rule 7.3(d)(1), the undersigned counsel hereby certifies that the foregoing STATE BOARD DEFENDANTS' RESPONSE TO PROPOSED DEFENDANT-INTERVENOR'S MOTION TO INTERVENE, including body, headings, and footnotes, contains 1,957 words as measured by Microsoft Word.

/s/ Paul M. Cox
Paul M. Cox
Special Deputy Attorney General

CERTIFICATE OF SERVICE

I hereby certify that I have this day electronically filed the foregoing State Board Defendants' Response with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all counsel and parties of record.

This 15th day of April, 2020.

/s/ Paul M. Cox
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Special Deputy Attorney General