UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA

NORTH CAROLINA STATE CONFERENCE OF THE NAACP, CHAPEL HILL—CARRBORO NAACP, GREENSBORO NAACP, HIGH POINT NAACP, MOORE COUNTY NAACP, STOKES COUNTY BRANCH OF THE NAACP, WINSTON-SALEM—FORSYTH COUNTY NAACP, *Plaintiffs*, *v.* ROY ASBERRY COOPER III, in his official capacity as the Governor of North Carolina; ROBERT CORDLE, in his official capacity as Chair of the North Carolina State Board of Elections; STELLA ANDERSON, in her official capacity as Secretary of the North Carolina State Board of Elections; KENNETH RAYMOND, JEFFERSON CARMON III, and DAVID C. BLACK, in their official capacities as members of the North Carolina State Board of Elections, *Defendants* and VOTER INTEGRITY PROJECT NC, INC., *Proposed Defendant-Intervenor.*	Case No. 1:18-CV-1034 **PROPOSED DEFENDANT-INTERVENOR'S MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF THE MATTER BEFORE THE COURT

In this litigation, Plaintiffs challenge North Carolina Senate Bill 824 (hereinafter, "S.B. 824") under the Voting Rights Act of 1965 as well as the Fourteenth and Fifteenth Amendments of the United States Constitution. Plaintiffs challenge the portions of S.B. 824 that implement North Carolina's constitutional amendment requiring photographic identification to vote but, importantly, that is not all that Plaintiffs challenge here. Plaintiffs also challenge the portions of S.B. 824 that increase the number of permissible at-large observers. *See* Complaint (Doc. 1) at ¶¶ 5, 35, 80, 86, 107-110, 112-14, 124, 126, 129-31, 138-39, 142-43. Despite a flurry of filings in this case, Plaintiffs' challenges to the observer provisions of S.B. 824 have largely remained undefended by the present Defendants or any other party.

It is precisely these observer provisions that form the basis for this motion. The Voter Integrity Project NC, Inc. (VIP-NC) has a strong interest in the preservation of the increase of the number of at-large observers established by S.B. 824 because they operate an observer program. *See* Declaration of Jay DeLancy, ¶ 17 (attached as Exhibit 1.) "VIP-NC believe[s] that observers are a critical element to ensure the integrity of our democratic process." *Id*. ¶ 16. VIP-NC's interest will be affected by the resolution of this matter. Defendants are not adequately defending Plaintiffs' challenges to the increase of at-large observers.

This case raises the important constitutional question of whether the Voting Rights Act can terminate the power of a state to increase the number of poll observers. VIP-NC

suggests that such an application of the Voting Rights Act would be wholly beyond constitutional limits. *See* VIP-NC's Proposed Answer at 37-39. No Defendant has raised this constitutional concern.

VIP-NC's motion is distinct from the motions to intervene brought by Philip E. Berger and Timothy K. Moore (hereinafter, "Proposed Legislative Intervenors"), which this Court has denied previously. The motions of the Proposed Legislative Intervenors were premised on the assertion of "two independent significantly protectable interests…(1) the interest of *the State* in defending the constitutionality of S.B. 824; and (2) the interest of *the Legislature* in defending the constitutionality of S.B. 824." Doc. 61 at 12. Rather, VIP-NC bases this motion on its own interests as a voter integrity organization that seeks to defend S.B. 824's increase of the number of at-large observers. This key difference separates this motion from those filed by the Proposed Legislative Intervenors, and likewise from the present appeal of the denial of the motion to intervene that is before the U.S. Court of Appeals for the Fourth Circuit.

QUESTION PRESENTED BY THIS MOTION

Whether VIP-NC may intervene in this case as of right pursuant to Fed. R. Civ. Pro. 24(a) or, in the alternative, permissively pursuant to Fed. R. Civ. Pro. 24(b)?

STATEMENT OF FACTS

In November 2018, the people of North Carolina voted affirmatively to create a constitutional requirement that photographic identification is required for in-person voting. VIP-NC and individuals associated with it supported this constitutional

requirement and worked for its passage. *See* Declaration of Jay DeLancy, ¶¶ 8-12. On December 5, 2018, the North Carolina General Assembly passed S.B. 824, "An Act to Implement the Constitutional Amendment Requiring Photographic Identification to Vote." S.B. 824 sets forth various provisions of law including, relevant to the present motion, provisions regarding the number of at-large observers. Specifically, S.B. 824 amended North Carolina law on voting place observers to provide that "[t]he chair of each political party in the State shall have the right to designate up to 100 additional at-large observers who are residents of the State who may attend any voting place in the State." N.C.G.S. § 163-45(a).

Shortly after S.B. 824 became law, the Plaintiffs filed this suit against the Governor of North Carolina and members of the North Carolina State Board of Elections. Count One of Plaintiffs' Complaint alleges, in part, "On information and belief, the provisions of S.B. 824 that expand the number of poll observers and the numbers of people who can challenge ballots will have disparate impact on African American and Latino citizens of North Carolina" in violation of Section 2 of the Voting Rights Act. Complaint, ¶ 107.

Count Two of Plaintiffs' Complaint alleges that "[t]he provisions of S.B. 824 that impose voter-identification requirements, that expand the number of poll observers and the number of people who can challenge ballots were enacted with the intention of suppressing the number of voters cast by African Americans and Latinos" and therefore are in violation of the Fourteenth Amendment and 42 U.S.C. § 1983. Complaint, ¶ 126.

Count Three of Plaintiffs' Complaint asserts that,

> The provisions of S.B. 824 that impose voter-identification requirements, that expand the number of poll observers and the number of people who can challenge ballots will, independently and collectively, result in the denial or abridgement of the right to vote of African American and Latino voters in North Carolina, including members of the Plaintiff organizations on account of race or color in violation of the Fifteenth Amendment to the U.S. Constitution.

Complaint, ¶ 138.

On September 17, 2019, Plaintiffs' sought a preliminary injunction of "the provisions of SB 824 that impose voter-identification requirements, expand the number of poll observers, and loosen eligibility requirements for people who can challenge ballots." Doc. 72 at 2. In Defendants' Response in Opposition to Plaintiffs' Motion for Preliminary Injunction, they fail to mention—much less defend—the provisions of S.B. 824 that expand the number of observers. *See* Doc. 97.

On December 31, 2019, this Court issued its opinion on the Plaintiffs' motion for preliminary injunction. This Court found that,

> Plaintiffs have satisfied each element required to support the issuance of a preliminary injunction with respect to their claims that S.B. 824's voter-ID (both in-person and absentee) and ballot-challenge provisions were impermissibly motivated, at least in part, by discriminatory intent. Those provisions will be enjoined pending trial. In contrast, the evidence in the record does not sufficiently demonstrate that S.B. 824's provision expanding the number of at-large poll workers allotted to both political parties warrants an injunction at this time. Finally, because Plaintiffs have not yet demonstrated that they would be likely to succeed on the merits of their § 2 results-only claims, no injunction will be issued on that independent basis.

Doc. 120 at 58.

Shortly after this Court preliminarily enjoined portions of S.B. 824, the State Board informed county boards about the decision. *See* Karen Brinson Bell, Numbered Memo 2020-01 Regarding Preliminary Injunction of Photo ID (Jan. 3, 2020), available at https://s3.amazonaws.com/dl.ncsbe.gov/sboe/numbermemo/2020/Numbered%20Memo%202020-01_Preliminary%20Injunction%20of%20Photo%20ID.pdf. Nowhere in that memorandum did the State Board inform election officials that the Court did not grant the Plaintiffs' motion as to the increase of at-large observers.

The State appealed this Court's preliminary injunction order. (Doc. 123.) On March 9, 2020, the State filed its opening brief in the Fourth Circuit. In that 48-page brief, the State mentioned S.B. 824's provision regarding at-large observers only once, as an aside in a footnote. Brief of Defendants-Appellants at 13 n. 7, *North Carolina State Conference of the NAACP, et al. v. Raymond*, No. 20-1092 (4th Cir. Mar. 9, 2020). Indeed, Defendants' brief has a section entitled "S.B. 824's Substantive Provisions" that lacks *any* reference to the number of at-large observers. *Id.* at 5-12.

ARGUMENT

In this Circuit, "liberal intervention is desirable to dispose of as much of a controversy 'involving as many apparently concerned persons as is compatible with efficiency and due process.'" *Feller v. Brock*, 802 F.2d 722, 729 (4th Cir. 1986) (internal citations omitted.). This motion is compatible with both efficiency and due process. VIP-NC seeks to intervene in this case in order to protect its interests in fostering and increasing poll observers across North Carolina. Plaintiffs' attempts to invalidate the

increase of at-large poll observers included within S.B. 824 directly affects VIP-NC's interests. Defendants do not adequately represent VIP-NC's interests and have presented no public defense of the provisions of S.B. 824 which affect VIP-NC's interests. Granting VIP-NC's motion will not duplicate efforts but will rather allow an efficient resolution of *all* of Plaintiffs' claims.

VIP-NC seeks to assert interests that have, heretofore, been practically ignored by the Defendants. The public filings of the Defendants are focused on their defense of the voter ID provisions under challenge. Importantly, Plaintiffs seek to invalidate *more* than the voter ID provisions of S.B. 824. The at-large observer provisions that are at issue in the case merit a robust defense as well. VIP-NC intends to do just that, by marshalling its expertise and experience on the issue both in terms of observers in North Carolina and across the nation. Further, VIP-NC intends to present the Court with relevant scholarship pertaining to the myriad benefits of observers that will not likely be presented absent VIP-NC's participation. *See* Peter K. Schalestock, *Election Law: Monitoring of Election Processes by Private Actors*, 34 Wm. Mitchell L. Rev. 563, 590 ("Private monitoring and enforcement can help identify errors and misconduct in elections, increasing the level of integrity beyond what government resources can provide."). Likewise, a review of the Defendants' Answer compared with VIP-NC's Proposed Answer demonstrates that VIP-NC is presenting important defenses—including constitutional defenses implicating federalist concerns—that have not been presented by the Defendants. *See* VIP-NC's

Proposed Answer at 37 (raising an affirmative defense regarding the constitutionality of Plaintiffs' interpretation of the Voting Rights Act).

If intervention is granted, VIP-NC intends to participate in this case on the schedule that has been established for the existing parties; will avoid unnecessary delays or duplication of efforts in areas satisfactorily addressed and represented by the existing Defendants, to the extent possible; and will coordinate all future proceedings with the existing Defendants, to the extent possible.

I. The Court Should Grant Intervention as of Right.

Federal Rule of Civil Procedure 24(a)(2) provides for intervention as of right to an applicant that, on timely motion, "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." Fed. R. Civ. P. 24(a)(2). The Fourth Circuit has stated that intervention as of right is appropriate "if the applicant can demonstrate: (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).

VIP-NC's motion satisfies each requirement. VIP-NC has an interest in Plaintiffs' challenges to the expansion of poll observers found in S.B. 824. This interest will be

necessarily impaired as Plaintiffs seek to invalidate those provisions of S.B. 824. Further, VIP-NC's interests are not adequately represented by any Defendant.

A. VIP-NC Has an Interest in the Increase of Poll Observers.

Rule 24 requires that a movant "claim[] an interest relating to the property or transaction that is the subject of the action, and [be] so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest…." Fed. R. Civ. P. 24(a)(2).

VIP-NC's mission includes promoting election integrity in North Carolina. As part of that mission, VIP-NC seeks to promote and increase the participation of poll observers. *See* Declaration of Jay DeLancy at ¶¶ 16-17. VIP-NC believes that observers are a critical element to ensure the integrity of our democratic process. *See* Declaration of Jay DeLancy at ¶ 16. To that end, VIP-NC established a Forensic Observer Program and has dedicated a portion of its website as a resource for current and future observers. *See* VIP's Forensic Observer Program, https://voterintegrityproject.com/observers/. The site featured several eyewitness testimonials on activities that suggested fraud and it provided incident reporting forms that would help election investigators follow up with actionable documentation. *See* Declaration of Jay DeLancy at ¶ 17. VIP-NC and individuals associated with VIP-NC have dedicated considerable time to recruiting, educating, and training individuals to serve as election observers. *See* Declaration of Jay DeLancy at ¶ 19.

B. VIP-NC's Interests Will be Impaired if Plaintiffs Prevail in this Action.

Plaintiffs are seeking to have the provision of S.B. 824 that increases the number of at-large observers nullified as violative of the Voting Rights Act and/or the Constitution. Plaintiffs' challenge, therefore, is directly at odds with VIP-NC's mission of increasing, recruiting, and training polling place observers. VIP-NC's stated mission of promoting election integrity will be affected if the important constitutional concerns regarding Plaintiffs' claims are not considered by this Court. Because of the precedential effect of the decision, an adverse resolution of the action would impair VIP-NC's ability to protect its interests in the future.

C. Existing Parties Will Not Adequately Protect VIP-NC's Interests.

Absent the opportunity to intervene, VIP-NC's interests almost certainly will not be adequately represented. When, as here, "a State statute is challenged and a proposed intervenor shares a common objective with the State to defend the validity of the statute, the proposed intervenor 'must mount a strong showing of inadequacy' to be entitled to intervention of right." *United States v. North Carolina*, No. 1:16CV425, 2016 U.S. Dist. LEXIS 174103, at *8 (M.D.N.C. Dec. 16, 2016) (citing *Stuart v, Huff*, 706 F.3d 350, 352 (4th Cir. 2013)). The presumption of adequacy is rebuttable, however, by "show[ing] collusion between the existing parties, adversity of interests between themselves and the Defendants, or nonfeasance on the part of the Defendants." *United States v. North Carolina*, No. 1:16CV425, 2016 U.S. Dist. LEXIS 174103, at *8 (M.D.N.C. Dec. 16, 2016).

As is explained above, Defendants have hardly mentioned Plaintiffs' claims regarding the at-large observers much less presented a defense of those provisions. Looking to Defendants' Answer provides no further illumination of their position. *See* Answer at ¶¶ 5, 35, 80, 86, 107-110, 112-14, 124, 126, 129-31, 138-39, 142-43. The lack of a defense entirely is more than a disagreement about "reasonable litigation decisions," *Stuart v. Huff*, 706 F.3d at 355, and supports a finding of nonfeasance on the part of the Defendants and an adversity of interests between VIP-NC and Defendants.

Additionally, even if they do raise some defense, the Defendants are unlikely to defend against these allegations as strongly as VIP-NC due to Defendants' positions as public officials. As public officials, Defendants may feel restrained from asserting certain defenses—such as an as-applied challenge to the Voting Rights Act—in order to avoid even more hostile attacks from allies of the Plaintiffs. In contrast, VIP-NC is unrestrained and thus can provide this Court with the full range of potential constitutional and factual defects in the Complaint without fear of negative publicity or the impact on other official duties. Indeed, the United States Supreme Court has held that where, as here, the Defendants and the proposed intervenor have different interests or functions as parties, such differences can change their conduct and approaches to the litigation. *Trbovich v. UMW*, 404 U.S. 528, 539 (1972).

At the most basic level, Plaintiffs argue that election transparency is racially discriminatory. That is preposterous and Defendants should be saying so. It is also unconstitutional to expand the Voting Rights Act this far, and Defendants should be

saying so. As is evidenced in VIP-NC's Proposed Answer, it will argue that Plaintiffs' application of Section 2 of the Voting Rights Act utilizes an impermissible and unconstitutional disparate impact theory that is not supported either by the language of the Voting Rights Act or the critically important cases interpreting those provisions. Plaintiffs rely on a disparate impact statistical analysis borrowed from a different, and currently dormant, provision of the Voting Rights Act, namely Section 5 preclearance standards. *See* 52 U.S.C. § 10304 and Complaint at ¶¶ 7, 106-07. Statistical disparate impact tests are not adequate to make a claim under Section 2. Instead, a plaintiff must demonstrate some causal nexus between the challenged voting practice and actual electoral harms that have impaired the ability of minorities to elect candidates of their choice or to participate equally in the political process. Plaintiffs' Section 2 analysis is an incorrect and imagined repackaging of the Section 5 standard that was struck down by the Supreme Court in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013).

In addition, VIP-NC can provide a unique perspective on the implications of Plaintiffs' claims given VIP-NC's efforts to find and train observers itself. VIP-NC understands the impact of observers in a way Defendants cannot. VIP-NC will ensure that discovery of Plaintiffs' observer claims is conducted so that the Court is presented with the full panoply of evidence needed to resolve Plaintiffs' claims. Further, VIP-NC has experience recruiting, educating, and training observers. Declaration of Jay DeLancy, ¶ 19. *See also id*. ¶ 20. Defendants cannot offer this perspective.

D. VIP-NC's Motion Is Timely.

First, Rule 24 requires that a motion to intervene be timely filed. Fed. R. Civ. P. 24(a). In determining timeliness, the court "assess[es] 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. U.S. E.P.A.*, 758 F.3d 588, 591 (4th Cir. 2014). The Fourth Circuit has found that "[t]he determination of timeliness is committed to the sound discretion of the trial court" and that "discretion in this regard is 'wide.'" *Id* (internal citations omitted.)

"The most important consideration in reviewing a motion to intervene is whether the existing parties will suffer prejudice if the motion is granted." *Scott v. Bond,* 734 Fed. App'x. 188, 191 (4th Cir. 2018). *See also* 7C Wright, Miller & Kane, Federal Practice & Procedure: Civil § 1916, at 541-49 (3d ed. 2007). In *Scott*, the proposed intervenor sought to intervene after the existing parties "filed their letter notifying the court that they had reached a proposed settlement." *Scott v. Bond,* 734 F. App'x at 191. The Fourth Circuit has noted that "the timeliness requirement is intended to prevent an intervenor from 'derailing a lawsuit within sight of the terminal.'" *Id.*

While the Complaint in this case was filed in December 2018, "[m]ere passage of time is but one factor to be considered in light of all the circumstances." *Spring Constr. Co. v. Harris*, 614 F.2d 374, 377 (4th Cir. 1980). This case is not within sight of the terminal. Discovery is still ongoing and the trial date is set for January 2021. VIP-NC seeks to intervene on a very narrow question before this Court, the observer provisions.

Considering all the circumstances here, including the factors unrelated to VIP-NC that are likely to upset the current schedule, below, VIP-NC's motion will not prejudice the parties.

Defendants have appealed this Court's order granting, in part, Plaintiffs' motion for a preliminary injunction. That appeal is still in its infancy, with Defendants' opening brief filed on March 9, 2020 and Plaintiffs' response brief due April 8, 2020. The date for an oral argument has not yet been set and it is not clear when a decision will be issued.

Further, the Proposed Legislative Intervenors have appealed the denial of their motion to intervene. Oral argument is tentatively set for the week of May 5, 2020. Notably, Proposed Legislative Intervenors requested expedited consideration of their appeal, which Plaintiffs opposed. In that opposition, Plaintiffs stated that they "will not object to any reasonable continuance of discovery deadlines to enable Proposed Intervenors' to fully participate in discovery." Appellees' Response in Opposition to Appellants' Motion to Expedite Appeal at 13, No. 19-2273 (filed January 22, 2020). In light of this position, it strains imagination for Plaintiffs to say that they would *now* be prejudiced by VIP-NC's entry in the case.

In sum, VIP-NC meets the criteria governing intervention as of right as interpreted in the Fourth Circuit and urges the Court to grant its motion under Fed. R. Civ. P. 24(a)(2).

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

In the alternative, VIP-NC requests the Court grant permissive intervention pursuant to Federal Rule of Civil Procedure 24(b)(1)(B), on the grounds that VIP-NC has claims and defenses that share common questions of law and fact with the main action.

Permissive intervention is left to the discretion of the district court, and is appropriate when the intervention request is timely, the would-be intervenor "has a claim or defense that shares with the main action a common question of law or fact" and granting intervention will not unduly delay or prejudice the original parties in the case. Fed. R. Civ. P. 24(b)(1)(B) and 24(b)(3). *See United States v. North Carolina*, No. 1:16CV425, 2016 U.S. Dist. LEXIS 174103, at *9 (M.D.N.C. Dec. 16, 2016). For the reasons stated above, VIP-NC's motion is timely and allowing VIP-NC to intervene would not cause any undue delay or prejudice.

"In determining whether to allow permissive intervention, courts may consider whether such intervention will 'contribute to full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented.'" *Students for Fair Admissions v. Univ. of N.C.*, 319 F.R.D. 490, 496 (M.D.N.C. 2017) (quoting *Spangler v. Pasadena City Bd. of Educ.*, 552 F.2d 1326, 1329 (9th Cir. 1977)). VIP-NC's intervention will do just that.

As for the requirement of a common question of law or fact, VIP-NC's defense minimally shares a common question of law; to wit, whether increasing the number of poll observers violates the Voting Rights Act or the U.S. Constitution.

As a nonprofit organization with special interests in election integrity in North Carolina, VIP-NC should be permitted to intervene permissively as similarly situated organizations have been granted permission in similar litigation. *See*, *Kobach v. United States Election Assistance Comm'n*, 2013 U.S. Dist. LEXIS 173872 (D. Kan. Dec. 12, 2013) (granting the motion to intervene as defendants of several nonprofit groups). Further, district courts have allowed organizations like VIP-NC to intervene in challenges to election laws. In *Florida v. United States*, the district court allowed organizations with "a special interest in the administration of Florida's elections laws" to intervene permissively in an action wherein Florida sought preclearance of changes to its election laws. *See* 820 F. Supp. 2d 85, 86-87 (D.D.C. 2011). Here, VIP-NC has a special interest in the administration of state and federal election laws and this case undoubtedly involves the administration of both state and federal election laws. Thus, permissive intervention is appropriate.

CONCLUSION

For the foregoing reasons, the Court should grant VIP-NC's Motion to Intervene as of right or, in the alternative, permissively.

Dated: March 26, 2020

Respectfully Submitted,

/s/ Kaylan L. Phillips
Kaylan L. Phillips
Public Interest Legal Foundation
32 E. Washington St., Suite 1675
Indianapolis, Indiana 46204
Tel: 317-203-5599
Fax: 888-815-5641
kphillips@publicinterestlegal.org
Counsel for Proposed Defendant-Intervenor

/s/ Timothy R. Haga
Timothy R. Haga (NC Bar 33963)
PO Box 37083
Raleigh NC 27627
Tel: 919-341-5774
tim@hagalawnc.com
Local Civil Rule 83.1 Counsel for Proposed Defendant-Intervenor

CERTIFICATE OF WORD COUNT

Pursuant to Local Rule 7.3(d)(1), the undersigned counsel hereby certifies that the foregoing Memorandum contains 3764 words as measured by counsel's word processing program.

/s/ Kaylan L. Phillips
Kaylan L. Phillips
Public Interest Legal Foundation
32 E. Washington St., Suite 1675
Indianapolis, Indiana 46204
kphillips@publicinterestlegal.org

CERTIFICATE OF SERVICE

I certify that on March 26, 2020, I caused the foregoing to be filed with the United States District Court for the Middle District of North Carolina via the Court's CM/ECF system, which will serve all registered users.

/s/ Kaylan L. Phillips
Kaylan L. Phillips
Public Interest Legal Foundation
32 E. Washington St., Suite 1675
Indianapolis, Indiana 46204
kphillips@publicinterestlegal.org