

STATE OF NORTH CAROLINA
COUNTY OF DUPLIN

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

2020 OCT 12 A 9:18

ADRAIN ARNETT, in his individual capacity,
and in his capacity as Chairman of the Duplin
County Republican Party, and NORTH
CAROLINA REPUBLICAN PARTY

20-CV-570

Plaintiffs,

v.

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; JEFF CARMON III, 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,

Defendants.

**MEMORANDUM OF LAW IN SUPPORT
OF NORTH CAROLINA DEMOCRATIC
PARTY'S MOTION TO INTERVENE AS
DEFENDANT**

Proposed Intervenor North Carolina Democratic Party seeks to participate as an intervening defendant in the above captioned action under North Carolina Rule of Civil Procedure 24.

INTRODUCTION

In this case, Plaintiffs Adrain Arnett and the North Carolina Republican Party (together, the "NCGOP") ask this Court to rewrite the statutorily prescribed procedures for challenging absentee ballots—creating a brand new challenge process that has not previously existed, which would impose substantial delays on the counting process—and they do so after over 420,000 North

Carolina voters have already cast their absentee ballots.¹ Specifically, the NCGOP requests a judicial decree inventing a brand new challenge process that would enable it to (1) lodge challenges to the approvals or disapprovals of absentee ballots during county absentee meetings and continuing through election day; (2) stop the counting process while challenges made during this illicit challenge process are adjudicated by the county board; and (3) further delay the counting of ballots (and ultimate conclusion of the election) by permitting appeals of the adjudication of those challenges by the county board during the period during and after election day.

Through these requests for relief, propelled by claims that have no credible basis in facts or law, the NCGOP threatens to disenfranchise lawful North Carolina voters and to thoroughly impede the timely counting of ballots, undermining the very integrity of the election and setting the stage for bad faith actors to make unwarranted claims about the reliability and finality of the state's elections results. The NCGOP's unfounded, last-minute efforts to enlist the judiciary in their attempt to rewrite the procedures for ballot challenges threatens considerable injury to the Proposed Intervenor North Carolina Democratic Party, as well as its candidates, members, and voters.

For the reasons set forth below, the North Carolina Democratic Party is entitled to intervene in this case as a matter of right under Rule 24(a) of the North Carolina Rules of Civil Procedure. Such intervention is needed not only to ensure the fairness of the approaching election, but also to safeguard its own and its members' substantial and distinct legal interests, which will otherwise be represented inadequately in this litigation. In the alternative, the North Carolina Democratic

¹ By the time this Court reads this motion, the number will likely be notably higher. *See* N.C. St. Bd. of Elections, <https://www.ncsbe.gov/> (State Board of Elections website reporting, as of October 8, 2020, that over 1.2 million North Carolina voters have already requested, and 420,695 have already cast, absentee ballots for the November general election).

Party should be granted permissive intervention under Rule 24(b). Granting this motion to intervene will not unduly prejudice or delay the adjudication of the NCGOP's rights or rights of the North Carolina State Board of Elections.

BACKGROUND

County elections officials began mailing absentee ballots out to voters for the November election over a month ago, on September 4, 2020.² Shortly thereafter, voters began returning those ballots to their bipartisan county boards of elections, which started meeting to approve those ballots (which will ultimately be counted on election night) on Tuesday, September 29.³ As of October 1, the county boards had already approved the absentee ballots of about 300,000 voters.⁴ As of October 8, over 120,000 more North Carolina voters had cast their absentee ballots, bringing the total number of absentee ballots cast to 420,695.⁵ Hundreds of thousands more are anticipated in the coming weeks, in an unprecedented presidential-year general election—the first that this country has ever held in the middle of a pandemic. Over 1.2 million North Carolina voters have already requested absentee ballots and many more are expected to do so before the deadline for such requests on October 27.⁶

² See Pam Fessler, *Voting Season Begins: North Carolina Mails Out First Ballots*, NPR (Sept. 4, 2020), available at <https://www.npr.org/2020/09/04/909597279/voting-season-begins-north-carolina-mails-out-first-ballots>.

³ *More Than 300,000 North Carolina Voters Have Successfully Cast Ballots By Mail*, N.C. St. Bd. of Elections (Oct. 1, 2020), available at <https://www.ncsbe.gov/news/press-releases/2020/10/01/more-300000-north-carolina-voters-have-successfully-cast-ballots>.

⁴ *Id.*

⁵ See *supra* at n.1.

⁶ *Absentee By-Mail Ballot Request Deadline*, N.C. St. Bd. of Elections, available at <https://www.ncsbe.gov/news/events/absentee-mail-ballot-request-deadline>.

The NCGOP did not initiate this action until October 5. And when it did, it did so in such a way that it appeared calculated to garner as little attention as possible, filing a 15-page “Verified Complaint; Motion for Temporary, Preliminary, and Permanent Injunction; and Motion for Expedited Discovery” in the Superior Court of Duplin County (the “Complaint”). The NCGOP does not appear to have widely publicized the suit (if at all). But despite its low profile, the Complaint seeks extraordinary relief based on a contorted and unsustainable reading of North Carolina law. Specifically, the Complaint alleges that N.C. Gen. Stat. § 163-89(a), which prescribes the periods designated by the General Assembly when challenges to absentee ballots may occur (during election day and for certain ballots, a period extending after election day) violates the equal protection guarantees of the North Carolina Constitution. Compl. ¶¶ 41-50. It further alleges that the North Carolina Constitution mandates a process by which the NCGOP may lodge challenges to absentee ballots before election day, may have those challenges adjudicated before election day, and permit those adjudications to be appealed before election day. Compl. ¶ 3. It demands that the Court enjoin *all* processing of absentee ballots until counties allow the NCGOP to send its operatives into county elections offices to stand over the shoulders of elections workers as they process and prepare absentee ballots to be considered during county board meetings. Compl. ¶ 32. And it bases all of its claims and requests for relief on the same implausible theory of widespread voter fraud that court after court has rejected in recent months and weeks in similar cases brought almost exclusively by Republican Party entities, attempting to force states to change their elections procedures to better suit the GOP’s policy preferences.

The NCGOP named as defendants the North Carolina State Board of Elections and its current board members (collectively, the “State Board”). On October 7, the State Board filed an emergency motion for recommendation of exceptional case designation, which the NCGOP

opposed. Under Rule 2.1 of the General Rules of Practice for the Superior and District Courts, on October 8, 2020, the Chief Justice of the Supreme Court of North Carolina designated this case as exceptional and assigned it to this Court. The North Carolina Democratic Party's motion to intervene promptly followed.

ARGUMENT

A. The North Carolina Democratic Party's Motion to Intervene is timely.

The first question that courts ask when considering motions to intervene is whether the motion is timely. *See* N.C. R. Civ. P. 24(a), (b). In this case, the North Carolina Democratic Party's motion indisputably is. "In considering whether a motion to intervene is timely, the trial court considers '(1) the status of the case, (2) the possibility of unfairness or prejudice to the existing parties, (3) the reason for the delay in moving for intervention, (4) the resulting prejudice to the applicant if the motion is denied, and (5) any unusual circumstances.'" *Hamilton v. Freeman*, 147 N.C. App. 195, 201, 554 S.E.2d 856, 859 (2001) (quoting *Proctor v. City of Raleigh Bd. of Adjust.*, 133 N.C. App. 181, 183, 514 S.E.2d 745, 746 (1999)).

This case is still in its infancy—the NCGOP's papers were filed just days ago. This motion to intervene followed shortly after. There have not yet been any substantive rulings. Indeed, this case was assigned to this Court just three days ago. The North Carolina Democratic Party is prepared to litigate this case from the beginning and there will be no prejudice or possibility of unfairness to the NCGOP if intervention is granted.

In contrast, if the North Carolina Democratic Party is not permitted to intervene, it and its members, candidates, and voters all stand to be irreparably harmed by the NCGOP's inappropriate attempt to create a brand new challenge process for absentee ballots a month into the voting process, and transparent efforts to slow—and even halt—the timely processing and counting of

ballots. Thus, the motion is not just timely, but the unusual circumstances surrounding this case itself further weigh strongly in favor of granting intervention.

B. The North Carolina Democratic Party is entitled to intervene under the Declaratory Judgment Act.

Rule 24 of the North Carolina Rules of Civil Procedure mandate that intervention be granted where a statute confers a right to intervene. N.C. R. Civ. P. 24(a) (requiring permission be granted to intervene when a statute confers an unconditional right to intervene); N.C. R. Civ. P. 24(b) (allowing permission to intervene when a statute confers a conditional right to intervene). Because the NCGOP seeks a declaratory judgment, the North Carolina Democratic Party maintains an unconditional right to intervene under North Carolina's Declaratory Judgment Act. N.C. Gen. Stat. § 1-260 ("When declaratory relief is sought, all persons *shall be made parties* who have or claim any interest which would be affected by the declaration") (emphasis added).

As described in more detail below, the North Carolina Democratic Party has a weighty interest in avoiding the last-minute changes to the carefully crafted procedures governing ballot challenges that the NCGOP demands, as well as a clear and substantial interest in protecting against the disenfranchisement of lawful voters and ensuring that the NCGOP's efforts do not unduly delay the counting of ballots in this election. Each of these interests are interests which stand to be "affected by the declaration" sought by the NCGOP and thus each entitles the North Carolina Democratic Party to intervention.

C. The North Carolina Democratic Party is entitled to intervene as of right under Rule 24(a).

For the reasons set forth below, the North Carolina Democratic Party easily meets all of the requirements for intervention as of right. A party may seek intervention as of right under Rule 24(a)(2) of the North Carolina Rules of Civil Procedure “where (1) the movant has an interest relating to the property or transaction; (2) denying intervention would result in a practical impairment of the protection of that interest; and (3) there is inadequate representation of that interest by existing parties.” *Alford v. Davis*, 131 N.C. App. 214, 218, 505 S.E.2d 917, 920 (1998). Because Rule 24 is analogous to Rule 24 of the Federal Rules of Civil Procedure, North Carolina courts look to federal courts’ interpretations of the rule’s federal counterpart for guidance. *See Harvey Fertilizer & Gas Co. v. Pitt Cnty.*, 153 N.C. App. 81, 87, 568 S.E.2d 923, 927 (2002). “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).

1. The North Carolina Democratic Party has a direct interest in preventing expanded and indiscriminate challenges to absentee ballots, and a ruling in NCGOP’s favor will impair and impede that interest.

To have a right to intervene, a movant “must have a legal interest in the subject matter of the litigation of such direct and immediate character that they will gain or lose by direct operation of the judgment.” *Nw. Bank v. Robertson*, 25 N.C. App. 424, 426, 213 S.E.2d 363, 365 (1975). The North Carolina Democratic Party, which is constituted to elect Democratic candidates in North Carolina, has a direct and immediate interest in ensuring that North Carolina voters—millions of whom are registered Democrats and can be expected to cast their ballots for Democratic candidates—remain able to submit their absentee ballot without incurring partisan challenges that

are not authorized by state law. *See* Ex. A, Affidavit of Wayne Goodwin, at ¶¶ 3-6 (“Goodwin Aff.”).

As has been widely reported, Democrats currently hold a commanding advantage among voters who have submitted their absentee ballot.⁷ The NCGOP’s strategy to overcome this deficit by dramatically expanding the window for absentee ballot challenges—recognizing the mathematical truism that if more Democrats vote by absentee ballot, more absentee ballot challenges will disproportionately burden Democrats—strikes directly at the interests and mission of the North Carolina Democratic Party. Indeed, unless the NCGOP disproportionately lodges challenges against *Republican voters*, this outcome is inevitable. If successful, the NCGOP’s gambit will result in the disenfranchisement of Democratic voters, which, in turn, will directly weaken the electoral prospects of Democratic candidates.

Courts have routinely concluded that interference with a political party’s electoral prospects constitutes a direct injury that satisfies Article III standing, which goes even beyond the direct interest needed for intervention under Rule 24(a)(2) in this case. *See, e.g., Owen v. Mulligan*, 640 F.2d 1130, 1132 (9th Cir. 1981) (holding “the potential loss of an election” is sufficient injury to confer Article III standing); *see also Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 586–87

⁷ *See, e.g.,* Paul Woolverton, *More than 1 million requests: North Carolina mail-in balloting shatters records*, Citizen Times (Oct. 2, 2020), available at <https://www.citizen-times.com/story/news/local/2020/10/02/north-carolina-voters-cast-record-number-votes-mail/3592636001> (noting that “[f]ar more Democrats than Republicans have been asking to vote early by mail” in North Carolina); Adam Levy, Ethan Cohen, & Liz Stark, *Democrats Lead in Florida and North Carolina Ballot Returns*, CNN (Oct. 8, 2020), available at <https://www.cnn.com/2020/10/08/politics/democrats-lead-early-ballot-returns-florida-north-carolina/index.html>, (noting that “Democrats make up 52% of the votes returned so far” in North Carolina, which is “up more than 10 points” compared to the same time in 2016); Amy Gardner & Josh Dawsey, *Early Surge of Democratic Mail Voting Sparks Worry Inside GOP*, Wash. Post (Sept. 29, 2020), available at https://www.washingtonpost.com/politics/gop-mail-ballots/2020/09/29/131a06fc-0263-11eb-b7ed-141dd88560ea_story.html (quoting a GOP pollster who described Democrats’ absentee voting margins as “stunning”).

(5th Cir. 2006) (recognizing “harm to [] election prospects” constitutes “a concrete and particularized injury”); *cf. Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017) (noting an intervenor by right only needs “Article III standing in order to pursue relief that is different from that which is sought by a party with standing”).

Moreover, the disruptive and disenfranchising effects of the NCGOP’s action would require the North Carolina Democratic Party to divert critical resources to address the threat to its members and candidates. *See Goodwin Aff.* ¶¶ 5-7. This represents a separate legally protected interest that is jeopardized by the NCGOP’s claims. *See, e.g., Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007) (concluding “new law injure[d] the Democratic Party by compelling the party to devote resources” that it would not have needed to devote absent the new law), *aff’d*, 553 U.S. 181 (2008); *Democratic Nat’l Comm. v. Reagan*, 329 F. Supp. 3d 824, 841 (D. Ariz. 2018) (finding standing where law “require[d] Democratic organizations . . . to retool their [get-out-the-vote] strategies and divert [] resources”), *rev’d on other grounds sub nom. Democratic Nat’l Comm. v. Hobbs*, 948 F.3d 989 (9th Cir. 2020) (en banc). To combat the NCGOP’s newly requested challenge process, the North Carolina Democratic Party will have to organize a sizeable portion of its own membership to monitor NCGOP activities during absentee ballot processing at county elections offices, attend biweekly absentee meetings to hear challenges brought before the county board, assist voters in responding to frivolous and unsubstantiated challenges, and monitor NCGOP appeals of those challenge decisions. *See Goodwin Aff.* ¶¶ 6-7; N.C. Gen. Stat. § 163-89(e) (providing that “any voter whose ballots have been challenged may, either personally or through an authorized representative, appear before the board at the hearing on the challenge and present evidence as to the validity of the ballot”).

Finally, if the NCGOP succeeds in its scheme to enlarge the opportunities for its members to challenge absentee ballots beyond what North Carolina law allows, and then prevents the counting of those ballots while those “challenges” make their way through an the appellate process that the NCGOP demands, it will not only threaten lawful voters with disenfranchisement, it will delay the counting of ballots, injecting unnecessary and unwarranted uncertainty into the elections process. The Court cannot and should not ignore that this challenge has been brought in the context of a concerted, national effort to lay the groundwork for broad distrust of elections results. This threatens not only the prospects of the candidates in the election, and the voting rights of lawful voters who will be wrongfully challenged in this unauthorized process, but also public faith in the elections process itself. As the official state committee of one of the nation’s two major parties, the North Carolina Democratic Party has a strong and particularized interest in resisting that outcome, as well.

In sum, each of the above-discussed interests provides a strong basis for permitting intervention by the North Carolina Democratic Party.

2. The State Board does not adequately represent the North Carolina Democratic Party’s interests.

The North Carolina Democratic Party’s requirement to show its interests are inadequately represented by the State Board “is satisfied if [it] shows that representation of its interest ‘may be’ inadequate; and the burden of making that showing should be treated as minimal.” *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972). Federal courts have “often concluded that governmental entities do not adequately represent the interests of aspiring intervenors.” *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 736 (D.C. Cir. 2003); accord *Citizens for Balanced Use v. Mont. Wilderness Ass’n*, 647 F.3d 893, 899 (9th Cir. 2011) (“[T]he government’s representation of the public interest may not be ‘identical to the individual parochial interest’ of a particular group

just because 'both entities occupy the same posture in the litigation.'") (quoting *WildEarth Guardians v. U.S. Forest Serv.*, 573 F.3d 992, 996 (10th Cir. 2009)). That is the case here, where the North Carolina Democratic Party has specific interests and concerns—from its overall electoral prospects to the most efficient use of its limited resources to promote get-out-the-vote-efforts—that neither the State Board nor any other party in this lawsuit shares.

The North Carolina Democratic Party's interests in this case—in which the NCGOP asks this Court to rewrite the State Board's challenge procedures for absentee ballots—cannot adequately be represented by the State Board, whose stake in this lawsuit is defined solely by its statutory duty to implement the electoral process. *See* N.C. Gen. Stat. § 163-22. The State Board's mission, unlike the North Carolina Democratic Party's, is not to protect the interests of Democratic voters who submit an absentee ballot. Rather, the State Board is charged with a variety of administrative duties, including, in appropriate circumstances, establishing procedures for the pre-processing of absentee ballots. *See* N.C. Gen. Stat. § 163.230.1(g). While the State Board has appropriately refrained from establishing procedures that are precluded by statute as the NCGOP demands, it would not suffer any injury to its mission if a court ordered it to do otherwise.

Moreover, on certain issues presented by this lawsuit, the State Board and the North Carolina Democratic Party have directly adverse interests. For example, the Complaint contains a North Carolina Public Records Act claim alleging that the State Board has refused to provide prompt access to absentee ballot container-return envelopes. Compl. ¶¶ 35-40. While the North Carolina Democratic Party certainly does not agree with the NCGOP's baseless demand that county boards cease all processing of absentee ballots until their public records requests are fulfilled, the North Carolina Democratic Party and the NCGOP are in a similar position: the North

Carolina Democratic Party has made its own public records requests for container-return envelopes in order to support its efforts to assist voters whose ballots are rejected by a county board.

As a result, the interests of the State Board and the North Carolina Democratic Party are directly adverse on this claim: while the State Board is likely to argue for a highly deferential interpretation of “reasonable time” for inspection under the Act, the North Carolina Democratic Party will advocate for an interpretation of the Act that recognizes the need for highly expedited disclosure of these records—albeit an interpretation that falls far short of the extreme and counterproductive interpretation advanced in the NCGOP’s Complaint. Because the North Carolina Democratic Party’s legal and equitable interests are not represented by either party, and because the Court’s adjudication of this claim will directly impact the North Carolina Democratic Party’s own public records requests for the exact same type of record, the State Board does not adequately represent the North Carolina Democratic Party’s interests in the litigation.

Finally, the North Carolina Democratic Party and the State Board are adverse to each other in separate litigation regarding the same procedures implicated by this case—*i.e.*, the procedures applicable to the processing and rejection of absentee ballots, as set out in the State Board’s Memo 2020-19. *Compare, e.g.*, Compl. ¶¶ 22-25, 29 (discussing perceived infirmities with Memo 2020-19) with Compl., *DSCC et al. v. North Carolina State Board of Elections, et al.*, No. 20 CV 9947 (Wake Cnty. Super. Ct. Sept. 8, 2020) (alleging that procedures set forth in Memo 2020-19 for correcting errors on absentee ballot container envelopes are arbitrary in certain respects and constitutionally inadequate). To the extent that the State Board may attempt to negotiate or settle with the NCGOP regarding the procedures for processing absentee ballots in this case—in particular, whether and when a third party may challenge certain errors occurring on absentee ballot envelopes, such as issues with the witness signature—the terms of such settlement would

directly impact the North Carolina Democratic Party's claims in the *DSCC* matter. The North Carolina Democratic Party cannot reasonably rely upon the State Board to protect the North Carolina Democratic Party's interests in fair procedures for counting absentee ballots when the North Carolina Democratic Party is currently suing the State Board over the contents of those same procedures.

D. In the alternative, the North Carolina Democratic Party requests that the Court grant it permission to intervene under Rule 24(b).

The Court has the discretion to grant permissive intervention where, as here, "an applicant's claim or defense and the main action have a question of law or fact in common." N.C. R. Civ. P. 24(b)(2). "In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." *Id.*

The North Carolina Democratic Party surely meets the requirements of permissive intervention. *First*, the North Carolina Democratic Party will inevitably raise common questions of law and fact with the State Board in defending this lawsuit and the elections process. *Second*, given the early stage of this litigation—it was filed only days ago—intervention will not unduly delay or prejudice the rights of the original parties. The North Carolina Democratic Party is prepared to proceed in accordance with any litigation schedule imposed in this action, and its intervention will only serve to contribute to the full development of the factual and legal issues before the Court.

CONCLUSION

For these reasons, the North Carolina Democratic Party respectfully requests that the Court grants its motion to intervene as a matter of right under N.C. R. Civ. P. 24(a), or, in the alternative, permit it to intervene under N.C. R. Civ. P. 24(b). If granted permission to intervene under either

provision, the North Carolina Democratic Party has submitted a proposed Answer to the NCGOP's Complaint in accordance with N.C. R. Civ. P. 24(c).

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Dated: October 12, 2020

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*Motion for admission *pro hac vice* pending

Respectfully submitted,

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