UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA

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.*	No. 1:18-cv-01034

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO STAY, CONTINUE TRIAL OR PERMIT INTERVENTION

Plaintiffs hereby oppose the State Board Defendants' motion requesting that this Court stay the case, continue the trial, or allow permissive intervention (D.E. 192), and state as follows:

1. In the month since the Supreme Court granted certiorari in *Berger v. N.C. State Conference of NAACP*, No. 21-248 (Nov. 24, 2021), the parties have been working diligently to prepare for trial in January 2022 on the schedule that this Court ordered in March 2021. During that time, Proposed Intervenors have not requested a stay or continuance from this Court, nor have they requested expedited review by the Supreme Court. Yet now, on the eve of trial, Defendants—acting alone and without even the support of Proposed Intervenors—have moved for a stay, a continuance, or, most remarkably, for the Court to permit Proposed Intervenors to

intervene.

2. Defendants' motion is procedurally improper, substantively meritless, and should be denied.

3. Plaintiffs are aware of no case in which a *party* to a lawsuit has moved for permissive intervention on behalf of a proposed intervenor—much less a case where, as here, a party has requested that the Court grant intervention *over the proposed intervenor's objection to the motion*. That is simply not how intervention works. Indeed, Defendants' motion is more akin to a motion for joinder under Rule 20, or even an interpleader action under Rule 22, but it does not remotely satisfy either of those rules' requirements.

4. Defendants' request is also untimely. The Supreme Court granted certiorari on November 24, 2021. In the time since certiorari was granted, the parties have continued diligently preparing for trial, including by serving pre-trial witness and exhibit disclosures, and meeting and conferring regarding the scope and schedule of resolving pre-trial issues. Yet Defendants waited almost a month—until the eve of trial and just a few days before the Christmas holiday—to file this motion. There have been no recent developments in the Supreme Court or elsewhere to justify their untimely request.

5. The Court can and should deny Defendants' motion based on the foregoing fatal procedural deficiencies. But there are also strong reasons to deny the

motion on the merits. Defendants' primary argument—that *if* the Supreme Court reverses the *en banc* Fourth Circuit, then this Court *might* be required to retry the case—is entirely speculative and does not support granting any of the relief that Defendants request. *See* Mot. ¶ 7 ("it is *possible* that a second trial could be required" (emphasis added)). To begin, there is a substantial likelihood that the Supreme Court will resolve the circuit split over Rule 24's adequacy prong by adopting this Court's and the *en banc* Fourth Circuit's measured approach, under which state officials are afforded a presumption that they adequately represent the state's interests. And even if the Supreme Court adopts a different standard for determining adequacy of representation, Proposed Intervenors are still unlikely to demonstrate that Defendants are not adequately representing North Carolina's interests in light of the Attorney General's defense of the challenged law at all stages of this litigation.

6. Beyond that, even if the Supreme Court ultimately decides that Proposed Intervenors are entitled to intervene in this litigation, there would still be *zero* basis for any court to order a retrial. Despite knowing that the case has been set for trial in January 2022 since March 2021, Proposed Intervenors have litigated the intervention issue—both in the Fourth Circuit and in the Supreme Court—without any urgency or apparent interest in participating in the upcoming trial. Since the *en banc* Fourth Circuit affirmed this Court's denial of Proposed Intervenors' second intervention motion on June 7, 2020, Proposed Intervenors have taken no steps to

expedite proceedings to ensure that the issue could be considered by the Supreme Court before trial. They took 73 days to file their petition for certiorari; they did not object to Defendants' request for an extension of time to respond; they took the full 14 days to submit their reply brief; they did not ask the Supreme Court to expedite consideration of the petition; and they did not request an expedited briefing schedule or expedited oral argument. Nor have they requested that this Court—or any other court—stay proceedings or continue trial pending the outcome of Supreme Court review. And even now, Proposed Intervenors *take no position* on Defendants' request for a stay or continuance, and they *oppose* Defendants' request to admit them as permissive intervenors. *See* Mot. ¶ 15. In short, Proposed Intervenors would have no basis to demand a retrial, when they have taken no steps to protect their ability to participate in the upcoming trial. Moreover, Defendants' motion identifies not a single instance when the Supreme Court has previously ordered this kind of extraordinary remedy in a similar circumstance.

7. On the other hand, permitting intervention now will completely derail trial. Defendants admit that this Court has already "found that the inclusion of Proposed Intervenors may result in additional burdens to the Court from unnecessary contentions, distractions, and found that Plaintiffs would likely suffer prejudice by responding to multiple defendants and litigation strategies." Mot. at 4 n.1 (citing D.E. 56 at 21-22). Those findings remain true today. Moreover, as this Court held,

"the addition of Proposed Intervenors as a party in this action will hinder, rather than enhance, judicial economy, and will unnecessarily complicate and delay the various stages of this case, to include discovery, dispositive motions, and trial." D.E. 56 at 21 (quotation marks omitted). Indeed, Defendants go so far as to suggest that permitting Proposed Intervenors to act as parties at this stage would require the Court to reopen discovery ("including expert discovery") on the eve of trial. Mot. ¶ 18. Defendants argue that these *very real* burdens on Plaintiffs and the Court are outweighed by the *hypothetical* burden of a retrial. *See* Mot. ¶ 11-12. But, as demonstrated, the prospect of a retrial is extremely unlikely, regardless of how the Supreme Court ultimately resolves the circuit split over the intervention standard. Accordingly, the balance of the equities remains the same as when this Court denied Proposed Intervenors' second motion to intervene: decidedly against intervention.

8. Finally, granting any relief that would significantly delay the upcoming trial would unduly prejudice Plaintiffs. The Court scheduled this case to go to trial now to ensure that Plaintiffs' voting rights claims could be adjudicated prior to the 2022 elections. Defendants suggest that there is no longer any urgency because the state court in *Holmes. v. Moore*, 18 CVS 15292 (Sup. Ct. Wake Cnty.), has permanently enjoined S.B. 824, the law challenged here. But that case remains pending on appeal, and either the North Carolina Court of Appeals or the North Carolina Supreme Court could dissolve the injunction at any time prior to the 2022

election—an outcome that Defendants are actively pursuing in the state courts. Plaintiffs are not parties to that litigation and have no ability to protect their interests or affect the outcome of the state court proceedings. And, notably, Defendants have not given any assurance that S.B. 824 would not be enforced in the 2022 elections in the event that the state-court injunction is lifted while Plaintiffs await a rescheduled trial. Plaintiffs deserve their day in court. The rights of North Carolina voters are too important to leave unprotected in, and unadjudicated before, the upcoming federal and statewide elections. There are no grounds for delay presented in this motion.

WHEREFORE, Defendants' motion should be denied.

Respectfully submitted this 27th day of December, 2021.

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CERTIFICATE OF WORD COUNT

The undersigned counsel hereby certifies that the foregoing document complies with the word limit in Local Rule 7.3(d)(1), as measured by Microsoft Word.

/s/ James W. Cooper
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CERTIFICATE OF SERVICE

I hereby certify that on this date I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system which will send notification of such to all counsel of record in this matter.

Dated: December 27, 2021

/s/ James W. Cooper
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