

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.

**MOTION TO STAY, CONTINUE
THE TRIAL, OR ALLOW
PERMISSIVE INTERVENTION**

EXPEDITED CONSIDERATION
REQUESTED

NOW COME Defendants 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; and Jeff Carmon III, Wyatt T. Tucker Sr., and Stacy “Four” Eggers, IV, in their official capacities as Members of the State Board of Elections (collectively “State Board Defendants”), requesting that this Court stay the matter, continue the trial, or allow permissive intervention by the legislative leaders (“Proposed Intervenors”).

The Supreme Court recently granted certiorari on the issue of the proposed intervention by the Proposed Intervenors, and that issue will likely be resolved by the Supreme Court by around June 30, 2022. [D.E. 191-1]. Understanding the Court’s desire to resolve this case as expeditiously as possible, it is respectfully submitted that proceeding with the trial as scheduled, without the Proposed Intervenors, before the Supreme Court decides the issue creates a significant risk that a second trial would be necessary after the Supreme Court’s ruling, ultimately delaying final resolution.

In light of these circumstances, State Board Defendants respectfully request in the interest of efficiency and judicial economy that the Court either allow Proposed Intervenors to intervene permissively, stay the matter, or continue the trial pending the outcome of the appeal to the Supreme Court. The State Board Defendants take no position on which of these options would be most appropriate and welcome input from both Plaintiffs and Proposed Intervenors.

In further support, State Board Defendants show the following:

1. This matter was initially scheduled for trial during the January 4, 2021 Master Calendar Term. [D.E. 130].

2. On November 3, 2020, this Court issued a Text-Only Order stating, “[i]t appearing that the mandate has not been issued in this case, the jury trial scheduled for January 6, 2021 will therefore be continued to a date to be determined.” At the time, both appeals regarding the preliminary injunction and the denial of intervention were pending.

3. On February 16, 2021, the judgment issued on December 2, 2020 regarding the preliminary injunction from the United States Court of Appeals for the Fourth Circuit took effect and was entered in the docket of this Court. [D.E. 157].

4. On March 3, 2021, this Court issued a Notice that a bench trial was set for the January 3, 2022 Master Calendar Term. [D.E. 158].

5. On June 7, 2021, the Fourth Circuit, sitting en banc, affirmed this Court’s denial of Proposed Intervenors’ motion for intervention. [D.E. 160]. In that Opinion, the Fourth Circuit noted that “[a] district court trial on the merits, originally scheduled for January 2021, now has been postponed pending the resolution of this separate appeal

regarding intervention.” *Id.*, p. 13.

6. On November 24, 2021, the Supreme Court of the United States granted Proposed Intervenor’s petition for a writ of certiorari and agreed to review the en banc Fourth Circuit’s opinion affirming this Court’s denial of their motion to intervene in *Berger, et al. v. NC Conference of NAACP, et al.*, Case No. 21-248 (Nov. 24, 2021). [*See also* D.E. 191-1]. As the Supreme Court has determined that it should resolve this issue, it is respectfully submitted that this this matter should not proceed to trial on the current schedule with the current parties.

7. In light of the grant of certiorari, proceeding to trial in the current posture presents a significant risk of a waste of judicial effort and potential harm to the parties, whereas permissive intervention, a continuance, or a stay presents no harm.

8. First and foremost, if the case moves forward to trial without the participation of the Proposed Intervenor and the Supreme Court later determines that Proposed Intervenor should have been allowed to intervene, it is possible that a second trial could be required. In that event, the Court and the parties will be forced to expend substantial resources for an unnecessary trial. In addition to the burden upon court staff to undertake an in-person trial, the parties will undertake significant trial preparation, presentation, and expenditure while facing the prospect that a ruling from the Supreme Court would require all of these efforts to be expended a second time with additional parties.

9. The relief requested here is unlikely to affect the status quo. On September 17, 2021, the Superior Court of Wake County issued a permanent injunction of the same law challenged here in *Holmes, et al. v. Moore, et al.*, 18 CVS 15292. [D.E. 174-1]. While

the defendants have filed appeals in that matter, the parties have yet to settle the record on appeal or file briefs to the North Carolina Court of Appeals, and a final decision, including the likelihood of eventual review by the North Carolina Supreme Court, is likely many months away.

10. It is expected that the Supreme Court of the United States will decide the intervention issue this term – by around June 30, 2022. Therefore, if trial proceeds as scheduled, the Supreme Court could require a second trial after that date.

11. To avoid this possibility, however, trial could proceed on the current schedule with the participation of Prospective Intervenors. Such action would be consistent with both Rule 24 and this Court’s prior rulings. Rule 24(b)(3) provides that the reviewing “court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties’ rights.” And this Court’s prior rulings turned on a conclusion “that 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, p. 21 (issued June 3, 2019) (internal quotations omitted) (citing *One Wis. Inst., Inc. v. Nichol*, 310 F.R.D. 394, 399-400 (W.D. Wis. 2015); see also D.E. 100, p. 8].¹

¹ It is true that this Court further 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. [D.E. 56, pp. 21-22; D.E. 100, pp. 8-9]. But such concerns are now outweighed by the interests of judicial economy that permissive intervention would advance.

12. Given intervening events, conducting that same analysis now results in the opposite conclusion. Not only is this matter past discovery and dispositive motions, with only trial remaining, but there now exists the serious possibility that proceeding to trial now with the current parties “will hinder, rather than enhance, judicial economy, and will unnecessarily complicate and delay” resolution of the case. *Id.* Thus, rather than delay or prejudice coming from the inclusion of Proposed Intervenors, it is their *exclusion* that presents a greater risk of delay and prejudice to the parties, on top of the waste of judicial resources.

13. For these reasons, State Board Defendants respectfully submit that it would be in the interests of efficiency and judicial economy, and that no party would be harmed, if Proposed Intervenors were allowed to intervene permissively and participate in this case immediately. Such a result would ensure that the resolution of this case would not be further delayed if the Supreme Court, after trial, holds this summer that Proposed Intervenors should have been allowed to intervene. It would also allow this case to proceed toward final judgment immediately, without further delay. State Board Defendants further submit that this Court could instead choose to stay the case, or continue the trial, pending the outcome of proceedings before the Supreme Court.

14. Plaintiffs’ counsel was consulted and informed the undersigned that they oppose the relief sought.

15. Proposed Intervenors’ counsel was consulted and informed the undersigned that they “take no position on any motion to stay or continue the trial.” They further take the position that this court “has no jurisdiction to take any further action” on intervention

“since the denial of [Proposed Intervenors’] motion is on appeal.” In support of this position, they cite *Doe v. Pub. Citizen*, 749 F.3d 246, 257-59 (4th Cir. 2014).

16. State Board Defendants respectfully submit that this Court has jurisdiction to consider any matter other than the *motion* that is currently on appeal. State Board Defendants further observe that *Doe* involved an appeal from a final judgment, and so the Court of Appeals had primary jurisdiction over the case. It was in that context that the Court held that the district court lacked jurisdiction to decide an intervention motion. *See id.* Here, however, the pending appeal is merely from a collateral intervention motion, and it is this Court that has primary jurisdiction over the case.

17. However, if the Court believes that it lacks jurisdiction to address permissive intervention at this time, the Court could issue an indicative ruling pursuant to Rule 62.1(a)(3) stating that, if it had jurisdiction, it would allow for permissive intervention of the Proposed Intervenors, or order a stay or continuance.

18. Finally, if Proposed Intervenors are allowed permissive intervention, State Board Defendants would consent to a short delay to allow discovery if needed by either side, including expert discovery, but are prepared to proceed directly to trial should the Court deem that the more prudent course.

WHEREFORE, the State Board Defendants respectfully request that the Court either stay the matter, continue trial pending the outcome of proceedings before the Supreme Court, or allow Proposed Intervenors to participate as permissive intervenors.

Respectfully submitted this the 20th day of December 2021.

JOSHUA H. STEIN
Attorney General

/s/ Terence Steed
Terence Steed
Special Deputy Attorney General
N.C. State Bar No. 52809
E-Mail: tsteed@ncdoj.gov

Laura McHenry
Special Deputy Attorney General
N.C. State Bar No. 45005
lmchenry@ncdoj.gov

Mary Carla Babb
Special Deputy Attorney General
State Bar No. 25713
mcbabb@ncdoj.gov

N.C. Department of Justice
Post Office Box 629
Raleigh, NC 27602
Telephone: (919) 716-6567
Facsimile: (919) 716-6763

Counsel for the State Board Defendants

CERTIFICATE OF WORD COUNT

I hereby certify that pursuant to Local Rule 7.3(d)(1), the foregoing has a word count of less than 6,250 words not including the caption, signature block, and certification of word count. This document was prepared in Microsoft Word, from which the word count is generated.

Dated this 20th day of December, 2021.

/s/ Terence Steed
Terence Steed
Special Deputy Attorney General

RETRIEVED FROM DEMOCRACYDOCKET.COM

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.

ORDER

THIS MATTER coming on before the Court upon motion of the State Board Defendants to stay the matter, continue trial, or allow permissive intervention; and for good cause shown;

IT IS THEREFORE ORDERED THAT

_____ This matter is stayed pending the outcome of the related proceedings before the Supreme Court of the United States;

_____ The trial scheduled for January 24, 2021 is continued pending the outcome of the related proceedings before the Supreme Court of the United States; or

_____ Proposed Intervenors are allowed to participate as permissive intervenors.

This the ___ day of _____, 2021.

District Court Judge/Magistrate/Clerk