

THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
Case No. 1:20-cv-00876

NORTH CAROLINA A. PHILIP)
RANDOLPH INSTITUTE, et al.,)
)
Plaintiffs,)
)
v.)
)
THE NORTH CAROLINA STATE)
BOARD OF ELECTIONS, et al.,)
)
Defendants.)

**PROPOSED INTERVENORS’
MEMORANDUM OF LAW IN SUPPORT
OF THEIR MOTION TO INTERVENE**

NOW COME Philip E. Berger, President Pro Tempore of the North Carolina Senate, and Timothy K. Moore, Speaker of the North Carolina House of Representatives (“the Proposed Intervenors”), to provide this Memorandum of Law in support of their motion to intervene.

STATEMENT OF THE MATTER BEFORE THE COURT

In this action, Plaintiffs challenge the constitutionality of N.C.G.S. § 163-275(5), a statute which imposes criminal penalties on voting by North Carolina residents who are on parole, probation or post-release supervision for a felony conviction. More specifically, Plaintiffs contend that section 163-275(5) (“Subsection 5”) is void for vagueness in violation of the Due Process Clause of the Fourteenth Amendment and is a product of alleged intentional racial discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. (DE-36 at 58-61) Plaintiffs seek to have the law declared unconstitutional and to have Defendants enjoined from enforcing the statute. (*Id.* at 63) Plaintiffs brought this action against the North Carolina State Board of Elections (“NCSBE” or “State Board Defendants”) and against dozens of North Carolina District Attorneys (“DA Defendants”). No legislators are named as defendants in this action, but Plaintiffs’ assertions that Subsection 5 is unconstitutionally vague and discriminatory challenge

the enforcement of a statute enacted by the General Assembly. The Proposed Intervenors have, at the very least, a strong interest in being heard as to the constitutionality of the General Assembly's duly enacted legislation. *See* N.C. Gen. Stat. §§ 1-72.2(a) & 120-32.6(b). The Proposed Intervenors therefore seek permissive intervention.

STATEMENT OF FACTS

The North Carolina Constitution forbids a person convicted of a felony from voting “unless that person shall be first restored to the rights of citizenship in the manner prescribed by law.” N.C. Const. art. VI, § 2(3). To enforce this provision, N.C.G.S. § 163-275(5)¹ makes it a felony “[f]or any person convicted of a crime which excludes the person from the right of suffrage, to vote at any primary or election without having been restored to the right of citizenship in due course and by the method provided by law.”

Plaintiffs allege that Subsection 5 is unconstitutionally vague and discriminatory. (DE-36 ¶¶ 96-113). In doing so, Plaintiffs focus on 16 people, none of whom is a party to this action, who faced criminal charges under this statute. (*Id.* ¶ 4) Plaintiffs assert injuries on behalf of nonparties with criminal convictions who may be unsure of their eligibility to vote, and fear prosecution if they vote unlawfully. Plaintiffs also allege that as a result of the “vagueness” of Subsection 5, “some ineligible individuals have incurred criminal liability by mistakenly voting prior to sentence completion, while many other eligible voters have refrained from voting because of a fear of prosecution[.]” (*Id.* ¶ 102) Thus, Plaintiffs contend that Subsection 5 “does not pass constitutional muster under the Due Process Clause.” (*Id.*)

Plaintiffs seek to enjoin the State Board Defendants and the DA Defendants from enforcing Subsection 5. In addition, Plaintiffs criticize the communication practices of the NCSBE and other

¹ Formerly N.C.G.S. § 163A-1389.

agencies, such as the district attorneys, state courts, and more, for allegedly failing to provide sufficient notice of Subsection 5. *Id.* ¶¶ 64, 67-74.

To support their claims, Plaintiffs also make numerous factual allegations concerning the General Assembly. For example, Plaintiffs support their constitutional challenge to Subsection 5 by making allegations concerning the statute's enactment by the General Assembly in 1899 and concerning subsequent amendments and other legislative actions in later years. (DE-36 ¶¶ 2, 35-39, 43) Plaintiffs also appear to contend that by not further amending Subsection 5 in specific ways over the years, the General Assembly has set the stage for the enforcement of an allegedly unconstitutionally vague and discriminatory law. (*See Id.* ¶¶ 2, 42-44, 108)

ARGUMENT

Although Plaintiffs do not assert claims against the General Assembly, they nonetheless challenge the constitutionality of an act of the General Assembly. As noted above, the Amended Complaint alleges that Subsection 5 is unconstitutionally vague and discriminatory and has been since its enactment more than a century ago. Moreover, Plaintiffs criticize the General Assembly's failure to "meaningfully change" the statute since 1899. (*See* DE-36 ¶ 2)

The current defendants in this action are fully able to defend Subsection 5. The Proposed Intervenor has a statutorily-vested, strong interest in being heard as to the constitutionality of the General Assembly's duly enacted statutes. Thus, Rule 24, which courts interpret liberally to authorize intervention, supports the permissive intervention sought herein.

A. The Standard for Permissive Intervention.

In the Fourth 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 quotations omitted).

Rule 24 allows for permissive intervention, “[o]n timely motion” where the movant “has a claim or defense that shares with the main action a common question of law or fact.” Fed. R. Civ. P. 24(b)(1)(B). The “decision to grant or deny permissive intervention lies within the sound discretion of the trial court.” *Smith v. Pennington*, 352 F.3d 884, 892 (4th Cir. 2003) (internal quotations omitted). “In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties’ rights. Fed. R. Civ. P. 24(b)(3). Additionally, intervention must also not deprive the Court of subject-matter jurisdiction. *Carcaño v. McCrory*, 315 F.R.D. 176, 178 n.2 (M.D.N.C. 2016).

B. The Proposed Intervenors Motion to Intervene is Timely.

In assessing whether a motion to intervene is timely, “a trial court in [the Fourth Circuit] is obliged to assess 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. United States EPA*, 758 F.3d 588, 591 (4th Cir. 2014). “The purpose of the [timeliness] requirement is to prevent a tardy intervenor from derailing a lawsuit within sight of the terminal.” *Scardelletti v. Debarr*, 265 F.3d 195, 202 (4th Cir. 2001).

Here, the Proposed Intervenors filed this motion just weeks after Plaintiffs filed the operative complaint and before all the named defendants filed their responsive pleadings. Thus, the suit has only begun and has not progressed far at all. Relatedly, because the underlying action is still in the pleadings stage, allowing this permissive intervention and accepting the Proposed Intervenors’ Proposed Answer will not cause any delay to the other parties. Lastly, because the matter remains in the pleadings stage, this motion is not tardy. Accordingly, based on the three factors stated above, this motion is timely.

C. The Defenses of the Proposed Intervenors Share Common Factual and Legal Questions with the Main Action.

The root of Plaintiffs' challenge to Subsection 5 is their assertion that the statute is vague and discriminatory. So all legal and factual issues in this action will emanate from Plaintiffs' allegations of vagueness and discrimination. Thus, the defenses in this action will all share common core factual and legal questions regarding the legality of the statute as enacted and applied. Therefore, the defenses of the Proposed Intervenors will necessarily share common factual and legal issues with those of the other defendants: namely, that Plaintiffs will not be able to show that the General Assembly enacted this statute with discriminatory intent, or that the statute is unconstitutionally vague.

D. Intervention Will Not Cause Delay or Prejudice Any Party Nor Will it Deprive This Court of Subject Matter Jurisdiction.

The intervention sought herein will not cause any delay in these proceedings. As explained above, this matter is in its infancy. Moreover, since the Proposed Intervenors have complied with Rule 24(c) and attached their Proposed Answer to their Motion to Intervene, if this Court allows the requested relief, this motion would have no effect on the timeline of this matter. Thus, the intervention sought herein will not cause any delay.

The intervention sought herein will also not prejudice any party to this action. The Proposed Intervenors are not pursuing cross-claims against any of the named defendants, nor are they asserting counter-claims against Plaintiffs. Moreover, while some of the defenses of the Proposed Intervenors overlap with those of the State Board Defendants (and are expected to overlap with those of the DA Defendants), many of these overlapping defenses will likely not require individualized responses from Plaintiffs. Additionally, the unique defenses presented by the Proposed Intervenors do not insert any new legal or factual issues into the case. In short, this

intervention will not add any new legal claims to this litigation nor will it raise legal issues, which are not already part of this litigation. Therefore, this intervention will not prejudice any party.

Lastly, the intervention requested herein will have no effect on this Court's subject-matter jurisdiction over this action. Plaintiffs are challenging the constitutionality of Subsection 5 under the United States Constitution and as such are presenting a federal question, which of course is properly adjudicated in this Court. The proposed intervention would not change any aspect of the nature of the claim being made and thus would not impact this Court's jurisdiction.

CONCLUSION

For the reasons explained herein, this Court should allow the permissive intervention of the Proposed Intervenors. The motion to intervene is timely, the Proposed Intervenors' defenses share common legal and factual questions with the main action, and this intervention will not cause any delay of this case or prejudice any other party. Therefore, the Proposed Intervenors satisfy all requirements for permissive intervention and this Court should allow their request for the same.

This the 19th day of April, 2021.

JOSHUA H. STEIN
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CERTIFICATE OF WORD COUNT

Pursuant to Local Rule 7.3(d)(1), the undersigned counsel hereby certifies that the foregoing Memorandum, including body, headings, and footnotes, contains less than 6,250 words as measured by Microsoft Word.

This the 19th day of April, 2021.

/s/ Orlando L. Rodriguez
Orlando L. Rodriguez
Special Deputy Attorney General
Attorney for the Proposed Intervenors

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record for the parties who are registered with CM/ECF.

This the 19th day of April, 2021.

/s/ Orlando L. Rodriguez
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