STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
18 CVS 014001

COMMON CAUSE, et al.,

Plaintiffs,

v.

DAVID LEWIS, IN HIS OFFICIAL CAPACITY AS SENIOR CHAIRMAN OF THE HOUSE SELECT COMMITTEE ON REDISTRICTING, et al.,

Defendants.

PLAINTIFFS' OPPOSITION TO MOTION TO INTERVENE

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INTRODUCTION

The Court should deny the motion to intervene. Proposed Intervenors—a group of six registered Republican voters—fall far short of meeting their burden to show that intervention is warranted. Most notably, Proposed Intervenors do not and cannot establish that the existing Legislative Defendants do not adequately represent Proposed Intervenors' interests. Proposed Intervenors and Legislative Defendants seek the same outcome—to uphold the 2017 Plans—and would make the same legal arguments in defense of the plans. Indeed, Proposed Intervenors have filed a proposed Answer with defenses that are literally copied-and-pasted from Legislative Defendants' Answer.

Moreover, there is a strong presumption against intervention where private parties seek to defend the constitutionality of legislation that government officials are already defending as parties to the case. Legislative Defendants are vigorously defending the constitutionality of the 2017 Plans here. Nor can Proposed Intervenors satisfy the other two factors required to intervene as of right. Their asserted interest in having a representative who shares their policy goals would not be directly affected by a judgment on the merits in this case, but rather would be implicated (if at all) only by the speculative details of remedial plans developed post-judgment.

For similar reasons, the Court should not grant permissive intervention. Proposed Intervenors' interests, goals, and legal arguments perfectly align with those of Legislative Defendants, so there would be no benefit to intervention. The costs of intervention, by contrast, could be substantial. Adding six new defendants would complicate discovery, consume judicial resources, and threaten delay where there is no time to spare. While Plaintiffs would not object to amicus briefs by Proposed Intervenors, there is no basis for them to intervene as parties.

BACKGROUND

Plaintiffs Common Cause, the North Carolina Democratic Party, and 38 individual North Carolina voters filed this lawsuit on November 13, 2018, and filed an Amended Complaint on December 7, 2018. Plaintiffs allege, *inter alia*, that North Carolina's 2017 state House and state Senate districting plans (the "2017 Plans") violate the North Carolina Constitution by discriminating against Plaintiffs based on their political views, their political affiliations, and their voting histories.

In line with prior redistricting challenges in North Carolina state courts and Rule 19(d), Plaintiffs named as defendants the Speaker of the House Timothy K. Moore, President Pro Tempore of the Senate Philip E. Berger, Senior Chairman of the House Select Committee on Redistricting David R. Lewis, and Chairman of the Senate Standing Committee on Redistricting Ralph E. Hise, Jr. (collectively, the "Legislative Defendants"). Plaintiffs also named as Defendants the State of North Carolina, the State Board of Elections, and the State Board's members (collectively, the "State Defendants").

On November 20, 2018, Plaintiffs moved to expedite the case. On December 14, 2019, Legislative Defendants removed the case to federal court. On January 2, 2019, after expedited briefing, the federal court remanded the case. On January 23, 2019, this Court ordered the parties to meet and confer regarding a case schedule, and to submit proposals by January 29, 2019 if the parties could not reach agreement. Plaintiffs and Legislative Defendants each submitted proposed schedules to the Court on January 29, 2019, and the State Defendants indicated in a filing that they did not object to Plaintiffs' proposal.

The day after the parties submitted their proposed schedules, and more than 2.5 months after this suit was filed, Proposed Intervenors filed the instant Motion to Intervene. Two of the

six Proposed Intervenors are former Republican candidates for the General Assembly (Reid and Lowery) and two others are Republican Party officials (Elmore and Woodard). Proposed Intervenors seek to intervene on the basis that this suit threatens an asserted "right to . . . a representative who shares their policy preferences." Mot. to Intervene ("Mot.") ¶ 3.

ARGUMENT

North Carolina Rule of Civil Procedure 24 governs intervention. As Proposed Intervenors recognize, North Carolina Rule of Civil Procedure 24 and Federal Rule of Civil Procedure 24 are "substantially the same," and thus "the holdings of the federal circuit courts are instructive" on the propriety of intervention in state court. Mot. ¶ 17 (quoting *Virmani v. Presbyterian Health Servs. Corp.*, 127 N.C. App. 629, 648, 493 S.E.2d 310, 322 (1997), *aff'd in part, rev'd in part*, 350 N.C. 449, 515 S.E.2d 675 (1999)); *see also Alford v. Davis*, 131 N.C. App. 214, 218, 505 S.E.2d 917, 920 (1998) (following Fourth Circuit precedent on intervention under Rule 24). Both state- and federal-court precedent make clear that Proposed Intervenors are not entitled to intervene as of right under Rule 24(a), and that permissive intervention under Rule 24(b) is not warranted either.

I. Proposed Intervenors May Not Intervene As of Right Under Rule 24(a)

A. No Statute Expressly Authorizes Intervention Under Rule 24(a)(1)

Rule 24(a)(1) allows for intervention as of right "[w]hen a statute confers an unconditional right to intervene." N.C. R. Civ. P. 24(a)(1). Proposed Intervenors contend that the Declaratory Judgment Act provides them an unconditional right to intervene because they "have an interest that is affected by a declaration of the constitutionality of the 2017 Plans." Mot. ¶ 22. But the Declaratory Judgment Act does not even mention intervention, and it certainly does not confer an unconditional right to intervene upon any party that claims any

interest in the outcome of a litigation. *Cf.* N.C. Stat. § 1-72.2 (giving certain legislative officials "standing to intervene on behalf of the General Assembly" in "cases challenging a North Carolina statute"). Unsurprisingly, Proposed Intervenors do not cite a single case that has ever held that the Declaratory Judgment Act affords a statutory right to intervene under Rule 24(a)(1).

Nor does the provision of the Declaratory Judgment Act that Proposed Intervenors cite even apply to them here. Section 1-260 describes the parties who *must be joined* in an action for a declaratory judgment. *E.g.*, *Town of Morganton v. Hutton & Bourbonnais Co.*, 247 N.C. 666, 669, 101 S.E.2d 679, 682 (1958). Courts have interpreted § 1-260 narrowly to cover only those necessary parties who are "so vitally interested in the controversy involved that a valid judgment cannot be entered in the action ... without [their] presence as a party." *State ex rel. Edmisten v. Tucker*, 312 N.C. 326, 343, 323 S.E.2d 294, 306 (1984). Proposed Intervenors do not remotely satisfy that standard. They claim only an interest in this lawsuit that is no different from the interest of any other North Carolina voter. Indeed, under Proposed Intervenors' theory, every registered voter in North Carolina (more than 6.5 million in total) would have an unconditional right to intervene in this case. That cannot be correct.

B. Proposed Intervenors Have Not Met Their Burden to Establish a Right to Intervene Under Rule 24(a)(2)

In the absence of a statute conferring a right to intervene, a "prospective intervenor [under Rule 24(a)(2)] must show that (1) it has a direct and immediate 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." *Virmani v. Presbyterian Health Servs. Corp.*, 350 N.C. 449, 459, 515 S.E.2d 675, 683 (1999). The would-be intervenor "bears the burden of demonstrating that these three requirements have been met." *Charles Schwab & Co. v. McEntee*, 225 N.C. App. 666, 673, 739

S.E.2d 863, 867 (2013). Proposed Intervenors have not met their burden to establish that any of these factors are met here, let alone all three.

1. Proposed Intervenors Do Not Have a Significantly Protectable Interest in this Litigation

An intervenor cannot have just any interest in the outcome of the litigation, but rather must have a "significantly protectable" interest in the case. *Alford*, 131 N.C. App. at 218, 505 S.E.2d at 920. Proposed Intervenors lack any such interest in this case. Contrary to their repeated suggestions, Proposed Intervenors do not assert the "same right" as the Individual Plaintiffs. Mot. ¶ 25. Individual Plaintiffs do not assert a legal "right to . . . representatives who share their own policy and political views." *Id.* ¶ 2. Individual Plaintiffs assert, *inter alia*, the right to not have the General Assembly *intentionally discriminate* against them based on their political views, political affiliations, and voting histories. If, under a non-discriminatory map, Individual Plaintiffs' districts do not elect Democrats, then that is democracy and so be it.

In contrast, Proposed Intervenors' asserted right—to have "a representative who shares their policy preferences" (Mot. ¶ 3)—is not a "significantly protectable" interest for purposes of intervention. *Alford*, 131 N.C. App. at 218, 505 S.E.2d at 920. If it were, then nearly half the population's rights would be violated in every election. Proposed Intervenors' failure to assert a "significantly protectable" interest alone requires rejection of their intervention request under Rule 24(a)(2).

2. A Judgment Regarding the Constitutionality of the 2017 Plans Would Not Directly Impair Proposed Intervenors' Asserted Interests

Even if their asserted interest were protectable, Proposed Intervenors have not shown that it is "a direct and immediate interest" that they would "either gain or lose by the direct operation and effect of the judgment." *Virmani*, 350 N.C. at 459, 515 S.E.2d at 682-83. That is because

Proposed Intervenors, unlike Individual Plaintiffs, do not assert a right to non-discriminatory maps, but instead a right to specific electoral outcomes. Their asserted interest thus is "indirect" and "contingent." *Id.* (internal quotation marks omitted). It would be "only after the liability . . . has been determined," *Strickland v. Hughes*, 273 N.C. 481, 487, 160 S.E.2d 313, 317 (1968), when remedial plans are developed, that any particular Proposed Intervenor would gain or lose—depending on the details of the remedial plans. Because Proposed Intervenors' asserted interest is contingent on speculative events occurring after judgment, they cannot intervene as of right. *See Strickland*, 273 N.C. at 489, 160 S.E.2d at 319; *Alford*, 131 N.C. App. at 218-19, 505 S.E.2d at 921.

3. Proposed Intervenors' Interests Are Adequately Represented by Legislative Defendants

The third Rule 24(a)(2) factor—whether Proposed Intervenors' interests are adequately represented by existing parties—manifestly precludes intervention as of right. Legislative Defendants more than adequately represent Proposed Intervenors' interests. Legislative Defendants are government actors defending the constitutionality of the challenged legislation, and their interests perfectly align with those of Proposed Intervenors. Proposed Intervenors barely even attempt to meet their burden to show otherwise. *See Harvey Fertilizer & Gas Co. v. Pitt Cty.*, 153 N.C. App. 81, 90-91, 568 S.E.2d 923, 929 (2002).

"When the party seeking intervention has the same ultimate objective as a party to the suit, a presumption arises that its interests are adequately represented." *Stuart v. Huff*, 706 F.3d 345, 349 (4th Cir. 2013) (internal quotation marks omitted). That presumption "can only be rebutted by a showing of adversity of interest, collusion, or nonfeasance." *Id.* (internal quotation marks omitted). It is undisputed that Proposed Intervenors share the "same ultimate objective" as Legislative Defendants—to uphold the 2017 Plans. And Proposed Intervenors

have not even alleged adversity of interest, collusion, or nonfeasance—much less made the "strong showing" required to rebut the presumption of adequacy of representation that arises in these circumstances. *Id.* at 352. Proposed Intervenors' failure even to allege the factors necessary to overcome the presumption of adequate representation alone dooms their intervention as of right.

Nor could Proposed Intervenors credibly allege or show adversity of interest, collusion, or nonfeasance with respect to Legislative Defendants. Proposed Intervenors do not identify any legal or factual argument that they intend to make that Legislative Defendants will not. To the contrary, as shown below, each and every one of Proposed Intervenors' affirmative defenses in their proposed Answer is a carbon copy or a near carbon copy of one of Legislative Defendants' affirmative defenses:

Proposed Intervenors' Affirmative Defenses	**Corresponding Affirmative Defense from Legislative Defendants' Answer**
1. "Plaintiffs' Amended Complaint fails to state a claim upon which relief can be granted and should be dismissed pursuant to Rule 12(b)(6)."	10. "Plaintiffs' Amended Complaint fails to state a claim upon which relief can be granted and should be dismissed pursuant to Rule 12(b)(6) …."
2. "Plaintiffs' politically-biased theory of liability is a non-justiciable political question and therefore the Amended Complaint should be dismissed pursuant to Rule 12(b)(l)."	15. "Plaintiffs' politically-biased, standardless theory of liability, is non-justiciable under any provision of the North Carolina Constitution, including Article I, Sec. 19, Article I, Sec. 10, and Article I, Secs. 12 and 14."
3. "Plaintiffs request that the Court grant them a right to reside or vote in districts that are drawn to favor their preferred political party at the expense of their non-preferred political party. Such a request if granted violates the First and Fourteenth Amendments to the United States Constitution and Article I, Sections 10,72, 14, and 19 of the North Carolina Constitution."	5. "Plaintiffs request that the Court grant them a right to reside or vote in districts that are drawn to favor their preferred political party at the expense of their non-preferred political party. Such a request if granted violates the First and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 12, 14, and 19 of the North Carolina Constitution."

4. "The North Carolina Constitution allows the General Assembly to consider partisan advantage and incumbency protection in the application of its discretionary redistricting decisions. *Stephenson v. Bartlett*, 355 N.C. 35, 562 S.E.2d 377, 390 (2002). Plaintiffs' requested relief violates the First and Fourteenth Amendments to the United States Constitution and Article I, Secs. 10, 72,74, and 19 of the North Carolina Constitution."	7. "The North Carolina Constitution allows the General Assembly to consider partisan advantage and incumbency protection in the application of its discretionary redistricting decisions. *Stephenson v. Bartlett*, 355 N.C. 35, 562 S.E.2d 377, 390 (N.C. 2002) ... Any court order prohibiting the Legislative Defendants from considering partisan advantage and incumbency protection would violate the First and Fourteenth Amendments to the United States Constitution and Article I, Secs. 10, 12, 14, and 19 of the North Carolina Constitution."
5. "Plaintiffs' politically-biased theory of liability, if adopted by this Court, would effectively bypass the People and adopt a judicial amendment of the North Carolina Constitution in violation of Article XIII."	12. "Plaintiffs' standardless, politically-biased theory of liability, if adopted by this Court, will operate as an illegal judicial amendment of the North Carolina Constitution in violation of Article XIII of the North Carolina Constitution."
6. "Plaintiffs' requested relief, to redraw legislative districts without any consideration of party affiliation, violates of the separation of powers doctrine, in Article I, Section 6 of the North Carolina Constitution."	14. "In order to achieve political gain, plaintiffs are asking this Court to usurp the constitutional authority of the General Assembly to draw legislative districts in violation of the separation of powers doctrine, adopted by the People in Article I, Sec. 6 of the North Carolina Constitution."
7. "Plaintiffs' [sic] are requesting that the Court 'punish' and 'burden' the Legislative Defendants, Republican candidates, and Republican voters in the same way plaintiffs contend that the General Assembly has 'punished' or 'burdened' Democratic voters. Plaintiffs' request for equitable relief should therefore be denied because plaintiffs have unclean hands."	18. "Plaintiffs' [sic] are requesting that the Court 'punish' and 'burden' the Legislative Defendants, Republican candidates, and Republican voters in the same way plaintiffs contend that the General Assembly has 'punished' or 'burdened' Democratic voters. Plaintiffs' request for equitable relief should therefore be denied because plaintiffs have unclean hands."

It is plain that Proposed Intervenors and Legislative Defendants have no divergent interests.

And the presumption against intervention is at its apex in the context of this case. Private parties that seek to intervene to defend the constitutionality of state laws must make an especially "strong showing" of inadequate representation where, as here, government actors already are defending the challenged laws. *Stuart*, 706 F.3d at 352. That is because "it is among the most elementary functions of a government to serve in a representative capacity on behalf of its people," and "the need for government to exercise its representative function is perhaps at its apex where . . . a duly enacted statute faces a constitutional challenge." *Id.* at 351. "In such cases, the government is simply the most natural party to shoulder the responsibility of defending the fruits of the democratic process." *Id.*

Courts thus routinely deny intervention to private parties seeking to defend legislation when government actors are already defending the legislation. *See, e.g.*, *Stuart*, F.3d at 352-54; *Makhteshim Agan of N. Am., Inc. v. Nat'l Marine Fisheries Serv.*, 2018 WL 5846816, at *4-5 (D. Md. Nov. 8, 2018); *Va. Uranium, Inc. v. McAuliffe*, 2015 WL 6143105, at *3 (W.D. Va. Oct. 19, 2015). Courts have applied this principle in the election-law context specifically, denying intervention to individuals seeking to defend election laws where government officials are already defending the laws. *See, e.g.*, *United States v. North Carolina*, 2014 WL 494911, at *3 (M.D.N.C. Feb. 6, 2014); *Lee v. Va. Bd. of Elections*, 2015 WL 5178993 (E.D. Va. Sept. 4, 2015); *cf. City of Greensboro v. Guilford Cty. Bd. of Elections*, 2015 WL 12752936, at *1 (M.D.N.C. Oct. 30, 2015) (allowing voters to intervene as defendants only because the county board of elections had stated it would "remain neutral on the substantive issued raised in the complaint"). Proposed Intervenors do not address this body of case law, and they admit that their goal is "to defend the constitutionality of the Plans," Mot. ¶ 32, just like Legislative Defendants.

Proposed Intervenors' sole inadequacy argument is that their interests purportedly are "more personal and fundamental than those of the Legislative Defendants." Mot. ¶ 27. But courts have rejected this exact argument in analogous circumstances. In *Stuart*, for instance, the would-be intervenors argued that their interests in defending the relevant law were "stronger" and "more specific" than the government's interests. 706 F.3d at 354. The Fourth Circuit rejected this argument, explaining that "stronger, more specific interests do not adverse interests make—and they surely cannot be enough to establish inadequacy of representation since would-be intervenors will nearly always have intense desires that are more particular than the state's." *Id.* The district court in *United States v. North Carolina* similarly rejected the argument that private parties could intervene to defend North Carolina's election laws because they had a more "particularized interest and fervent desire to protect the statute." 2014 WL 494911, at *3. Proposed Intervenors' nearly identical argument should be rejected as well.

In short, because Proposed Intervenors "concede that they share the same ultimate objective as the existing defendants and . . . those defendants are represented by a government [actor]," Proposed Intervenors have no right to intervene. *Stuart*, 706 F.3d at 354.

II. This Court Should Deny Permissive Intervention Under Rule 24(b)

Proposed Intervenors also fail to meet their burden to justify permissive intervention. As numerous courts have held, the fact that the existing defendants adequately represent the putative intervenors' interests weighs strongly against permissive intervention. *See, e.g.*, *Charles Schwab*, 225 N.C. App. at 675-76, 739 S.E.2d at 869; *Makhteshim*, 2018 WL 5846816, at *6; *Va. Uranium, Inc.*, 2015 WL 6143105, at *4. Indeed, "[w]here . . . intervention as of right is decided based on *the government's* adequate representation, the case for permissive intervention diminishes or disappears entirely." *Va. Uranium, Inc.*, 2015 WL 6143105, at *4 (emphasis

added) (quoting *Tutein v. Daley*, 43 F. Supp. 2d 113, 131 (D. Mass. 1999)); *see Stuart*, 706 F.3d at 355. In these circumstances, allowing permissive intervention would provide little benefit, if any, "to existing litigants, the courts, or the process." *Stuart*, 706 F.3d at 355 (internal quotation marks omitted); *accord North Carolina*, 2014 WL 494911, at *5.

On the flip side, permitting intervention would "unduly delay or prejudice the adjudication of the rights of the original parties." *Virmani*, 350 N.C. at 460, 515 S.E.2d at 683 (quoting Rule 24(b)). Time is of the essence in this case of significant public import, and adding six new defendants—more than 2.5 months after the case was filed, after discovery has already begun, and after the court has set a trial date—would significantly risk disrupting the proceedings and prejudicing Plaintiffs and the public at large. *See Charles Schwab*, 225 N.C. App. at 675-76, 739 S.E.2d at 869. At a minimum, it "would necessarily complicate the discovery process and consume additional resources of the court and the parties." *Stuart*, 706 F.3d at 355. All of these costs would result in "little, if any, corresponding benefit to the existing parties." *North Carolina*, 2014 WL 494911, at *5. Permissive intervention should be denied in these circumstances.

Notably, denying intervention "does not leave [Proposed Intervenors] without recourse." *Stuart*, 706 F.3d at 355. Proposed Intervenors "retain the ability to present their views in support of the [2017 Plans] by seeking leave to file amicus briefs." *Id.* "While a would-be intervenor may prefer party status to that of a friend-of-court, the fact remains that amici often make useful contributions to litigation." *Id.* Allowing permissive intervention would not provide "any benefit . . . which allowing the Proposed Intervenors the opportunity to participate as *amici curiae* would not." *Lee*, 2015 WL 5178993, at *5.

***

WHEREFORE, Plaintiffs request that the Court deny the Motion to Intervene. However, should the Court grant the Motion to Intervene, Plaintiffs respectfully request that all measures be taken to ensure that the intervention does not delay the proceedings in this case.

Respectfully submitted this the 4th day of February, 2019

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**Pro Hac Vice motions pending*

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing *by email and by U.S. mail*, addressed to the following persons at the following addresses which are the last addresses known to me:

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This the 4th day of February, 2019.

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