IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA; A. PHILIP RANDOLPH INSTITUTE; UNIFOUR ONESTOP COLLABORATIVE; COMMON CAUSE NORTH CAROLINA; GOLDIE WELLS; KAY BRANDON; OCTAVIA RAINEY; SARA STOHLER; and HUGH STOHLER, *Plaintiffs*, v. THE STATE OF NORTH CAROLINA; JOSHUA B. HOWARD, in his official capacity as a member of the State Board of Elections; RHONDA K. AMOROSO, in her official capacity as a member of the State Board of Elections; JOSHUA D. MALCOLM in his official capacity as a member of the State Board of Elections; PAUL J. FOLEY, in his official capacity as a member of the State Board of Elections; MAJA KRICKER, in her official capacity as a member of the State Board of Elections; and PATRICK L. MCCRORY, in his official capacity as the Governor of the State of North Carolina, *Defendants*.	Civil Action No. 1:13-CV-00660-TDS-JEP

REPLY IN SUPPORT OF MOTION TO INTERVENE AS PLAINTIFFS BY LOUIS M. DUKE, CHARLES M. GRAY, ASGOD BARRANTES, JOSUE E. BERDUO, AND BRIAN M. MILLER

Defendants do not argue that the Duke Plaintiffs' Motion to Intervene is untimely, nor do Defendants dispute that the Duke Plaintiffs possess an interest in the subject matter of this action or that denial of the Motion would impede the Duke Plaintiffs' ability to protect their interest. *See* Fed. R. Civ. P. 24(a)(2); Mot. to Intervene 4 (ECF No. 29) (discussing applicable legal standard). Instead, Defendants' argument against intervention as a matter of right is based entirely on the contention that the Duke Plaintiffs' interests in the litigation are adequately represented by the existing plaintiffs. According to Defendants, the Duke Plaintiffs and the existing plaintiffs purportedly have the same "ultimate objective," except for the Duke Plaintiffs' challenge to HB 589's elimination of preregistration, which Defendants assert is "futile."

Defendants' arguments are based on fundamental misapprehensions of the Duke Plaintiffs' allegations, the governing law, and the challenged HB 589. For the reasons that follow, the Court should reject Defendants' opposition and permit the Duke Plaintiffs to intervene as a matter of right or, in the alternative, grant their motion for permissive intervention.

I. ARGUMENT

A. THE DUKE PLAINTIFFS HAVE SATISFIED RULE 24(A)(2)'S REQUIREMENTS FOR INTERVENTION AS A MATTER OF RIGHT

Defendants fundamentally misunderstand the nature of the claims in this case when they assert that "the Duke Plaintiffs seek the same ultimate objective as the existing plaintiffs: to have HB 589 declared unconstitutional and unenforceable," Defs.' Resp. 5

(ECF No. 42). Neither the Duke Plaintiffs nor the existing plaintiffs seek the wholesale invalidation of HB 589: instead, they challenge certain specifically-identified provisions of that law. Defendants' imprecision is no negligible thing: their entire argument that the Duke Plaintiffs have failed to demonstrate inadequacy of representation and, thus, are not entitled to intervention as a matter of right, depends on this flawed starting premise.

As explained in the Motion to Intervene, the existing plaintiffs cannot possibly represent the Duke Plaintiffs' interests adequately, because the existing plaintiffs do not challenge two of the provisions that the Duke Plaintiffs specifically seek to have enjoined and invalidated: voter ID and the elimination of preregistration. *See generally* LVW Compl. (ECF No. 1); Mot. to Intervene 10. Thus, even if the existing plaintiffs are successful on *all* of their claims, their representation of the Duke Plaintiffs' interests would necessarily be inadequate, because it cannot result in the Duke Plaintiffs' "ultimate objective" —which includes declaratory and injunctive relief barring the implementation of the voter ID requirements and repeal of preregistration. Proposed Compl. 22-23 (ECF No. 29-1). Not surprisingly, none of the cases that Defendants cite hold that an intervenor and an existing plaintiff share the same ultimate objective when a ruling in favor of the latter would not provide the intervenor with the ultimate end that it seeks. And because the Duke Plaintiffs and the existing plaintiffs have different ultimate objectives, the presumption that the existing plaintiffs adequately represent the Duke Plaintiffs' interests does not apply. *Cf. Stuart v. Huff*, 706 F.3d 345, 349 (4th Cir. 2013) (explaining that presumption of adequacy applied "because the [proposed intervenor] and the existing

defendants share '*precisely* the same goal: to uphold the Act as constitutionally permissible'") (emphasis added); *Va. V. Westinghouse Elec. Corp.*, 542 F.2d 214, 216 (4th Cir. 1976) (holding presumption of adequacy arose where proposed intervenor "seeks no relief other than that which [the existing plaintiff] seeks for itself" and proposed complaint was "nearly identical" to those submitted by the existing plaintiffs); *Jones v. Koons Auto., Inc.*, 752 F. Supp. 2d 670, 691 (D. Md. 2010) (allowing intervention as of right and declining to apply a presumption of adequate representation where the intervenor did not share a "common objective" with the parties).

Defendants attempt to avoid this inevitable result by making two arguments—one explicitly targeting the Duke Plaintiffs' challenge to HB 589's elimination of preregistration, and the other implicitly addressing their challenge to the voter ID provisions. Neither has merit.

First, Defendants' argument that the Duke Plaintiffs' Twenty-Sixth Amendment claim is "futile" rests on a selective and patently incorrect reading of both the Proposed Complaint and HB 589. Defendants assert that Part 12 of HB 589, despite being titled "Elimination of Preregistration," does not in fact eliminate the State's preregistration program, or in any way "limit the registration of individuals less than 18 years of age." Defs.' Resp. 9. This argument is either disingenuous or evidences an alarming lack of familiarity with a law that the State Board of Elections is charged with enforcing. In fact—and contrary to Defendants' characterization—"preregistration" is not a term applied to the process by which "citizens less than 18 years of age can register to vote

before an election so long as they will be at least 18 years old on election day." *Id*. at 10. What Defendants are describing is simply registration. *Pre*registration, as it was expressly defined under North Carolina law, permitted otherwise qualified voters who were "at least 16 years of age *but will not be 18 years of age by the date of the next election*" to complete and submit a registration form with the confidence that they would "be automatically registered upon reaching the age of eligibility." N.C. Gen. Stat. § 163.82.1(d) (repealed) (emphasis added). The program was meant to facilitate and encourage the participation of North Carolina's young voters, who historically have the lowest voter-registration rate of any age group, and it was highly successful: more than 160,000 young people used the program to register. Proposed Compl. ¶¶ 76-77, 81.

The very first line of Part 12 explicitly repealed North Carolina's preregistration program. *See* HB 589, Pt. 12, §12.1(a) ("G.S. 163.82.1(d) is repealed."). The rest of Part 12 discussed by Defendants in their response is not some innocent effort to "clarif[y] and simplif[y] the registration process" through semantics, Defs.' Resp. 9; it deletes the term "preregistration" from the remainder of the statute to reflect HB 589's explicit and complete elimination of that program.

Defendants' argument is also ill-founded in that it rests on an incorrect understanding of the Duke Plaintiffs' Twenty-Sixth Amendment claim. Defendants appear to believe that claim is limited to HB 589's elimination of preregistration. Even a cursory review of the Proposed Complaint, however, demonstrates that the claim is based on and includes all of the "*challenged provisions . . .* [that] have the purpose and[] effect

of abridging or denying the right to vote of . . . North Carolinians on account of their age." Proposed Compl. ¶ 100 (emphasis added). Each of the provisions that the Duke Plaintiffs challenge—and their disproportionately detrimental impact on young voters—is discussed and identified under the heading, "The Law's Challenged Provisions," incorporated by reference into the Twenty-Sixth Amendment claim. *Id*. at ¶¶ 41-83, 97.

Thus, in addition to the elimination of preregistration (*id*. at ¶¶ 76-83), the Duke Plaintiffs' Twenty-Sixth Amendment claim encompasses their challenge to HB 589's voter ID requirements (*id*. at ¶¶ 41-48), reduction in early voting (*id*. at ¶¶ 49-58), elimination of same-day voter registration (*id*. at ¶¶ 59-67), elimination of out-of-precinct provisional voting (*id*. at ¶¶ 68-72), and the removal of the discretion of local boards of elections to keep the polls open for one extra hour on election day (*id*. at ¶¶ 73-75). For the reasons set forth in the Proposed Complaint, each of these provisions is indicative of the General Assembly's intention to abridge or infringe the rights of North Carolina's young voters on account of their age.

As for the Duke Plaintiffs' challenge to the voter ID provisions, Defendants' response fails even to acknowledge that the existing plaintiffs do not challenge these provisions. Instead, Defendants implicitly argue that the Motion to Intervene should be considered in light of both the complaint filed in this action by the League of Women Voters ("LWV") Plaintiffs *and* the complaint filed in a *different* action challenging HB 589, brought by the North Carolina Chapter of the NAACP. *See* Defs.' Resp. 5-6; *North Carolina State Conference of the NAACP v. McCrory*, Case No. 1:13-CV-00658-TDS-

JEP (M.D.N.C. Aug. 12, 2013) (the "NAACP Action"). Unlike the instant action, the NAACP Action does include a challenge to HB 589's voter ID provisions (on behalf of African-American voters only), but the fact remains that it is a *separately pending* action—and one that this Court has thus far expressly declined to consolidate with the present action for any purpose other than discovery. *See* Dec. 13, 2013 Order at 2 (ECF No. 41). Not surprisingly, Defendants cite no authority for the nonsensical proposition that the Court should evaluate the Duke Plaintiffs' Motion by comparing their ultimate objectives to those of plaintiffs in a separately-pending lawsuit. Thus, the Duke Plaintiffs' challenge to HB 589's voter ID provisions is, by itself, reason enough to find that the existing plaintiffs do not and cannot adequately protect the Duke Plaintiffs' interests.

But even if the Court *could* consider challenges brought by different plaintiffs, in a different complaint, filed in a separately pending action, the Duke Plaintiffs have met their burden of demonstrating inadequate representation as required under Rule 24(a)(2). Defendants' reliance on *Stuart v. Huff*, is misplaced. The court in *Stuart* required "a more exacting showing of inadequacy" of representation expressly because "the proposed intervenor share[d] the same objective as a government party." 706 F.3d at 351. Here, the Duke Plaintiffs' objective is diametrically opposed to Defendants', the only government parties in the lawsuit. Thus, while the proposed defendants in *Stuart* were required to make "a 'very strong showing'" that the existing government defendant would inadequately represent their interests, the Duke Plaintiffs need only show that the

representation of their interest by the existing, non-government plaintiffs "'*may* be inadequate; and the burden of making that showing should be treated as *minimal*.'" *Id.* (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)) (first emphasis added).

The Duke Plaintiffs easily make this showing. As evidenced most obviously by their reliance on the Twenty-Sixth Amendment, it is beyond dispute that the Duke Plaintiffs will present unique and different arguments that will be material to determining the legality of the challenged provisions. *See Grutter v. Bollinger*, 188 F.3d 394, 400-401 (6th Cir. 1999). It is also "conceivable that there would be a divergence in litigation strategies" between the groups of plaintiffs, even to the provisions that all challenge, because they represent different interests. *Cooper Techs., Co. v. Dudas*, 247 F.R.D. 510, 515 (E.D. Va. 2007). For example, it is foreseeable that the existing plaintiffs—who have no specific interest in the ways in which the challenged provisions infringe on the rights of young voters—would not advocate as zealously for the invalidation of the challenged provisions with specific reference to those interests. *See id.* It is also unlikely that the existing plaintiffs can be relied upon to inform the Court of the impact of its decisions on the particular section of North Carolina's electorate represented by the Duke Plaintiffs. *Id.*[1]

[1] Other important differences make Defendants' reliance on *Stuart* misplaced. For example, in *Stuart*, the proposed defendant-intervenors did not file their motion to intervene until after the

In sum, for all of the reasons discussed, the Duke Plaintiffs have more than demonstrated that the existing plaintiffs are unlikely to adequately represent their interests. And, because Defendants do not dispute that the Duke Plaintiffs have otherwise met the standard for intervention as a matter of right, the motion should be granted.

B. IN THE ALTERNATIVE, THE COURT SHOULD GRANT THE DUKE PLAINTIFFS' REQUEST FOR PERMISSIVE INTERVENTION

The sole reason that Defendants give for opposing the Duke Plaintiffs' intervention under Rule 24(b)'s standard for permissive intervention is Defendants' entirely conclusory assertion that "[a]llowing [intervention] will only complicate the discovery process and waste resources of the court and parties." Defs.' Resp. 12.

In fact, permitting the Duke Plaintiffs to intervene will have precisely the opposite effect. The Duke Plaintiffs have reviewed the scheduling order issued by the Court on December 13, 2013 and are willing to abide by the discovery and briefing deadlines set forth in that order, if they are granted permission to intervene.[2] The Duke Plaintiffs

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Court had already issued a preliminary injunction enjoining implementation of a significant portion of the challenged Act. 706 F.3d at 348. And, not only did the proposed intervenors and the existing defendant share "precisely the same goal," *id*. at 349, the proposed intervenors failed even to establish that they could have offered the court a different perspective on the challenged Act. *See id*. at 352-53 (rejecting adversity of interest argument where defendant "pressed [the] exact argument during the preliminary injunction hearing" that intervenor would have offered and district court had already issued order upholding provision for which intervenor would have advocated). As discussed, neither is true of the Duke Plaintiffs and the existing plaintiffs.

[2] In the interest of complying with the Court's deadline for the amendment of pleadings, the Duke Plaintiffs will submit an Amended Proposed Complaint by January 8, 2014, which will add a few additional individual named plaintiffs and make minor, non-substantive revisions to the Proposed Complaint. The substance of the Duke Plaintiffs' claims will remain the same.

would coordinate with the existing plaintiffs in their discovery efforts, so as to streamline the process to the extent possible, conserving the resources of the parties and, ultimately, the Court. There is therefore no reason to deny permissive intervention in this case. *See, e.g., Dudas*, 247 F.R.D. at 516.

If, however, the Duke Plaintiffs are denied permission to intervene and forced to file their own separate suit, the separate discovery and briefing tracks that will result will be inefficient and inconsistent with basic principles of judicial economy. Indeed, this case perfectly illustrates why "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) (quoting *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967)).

In sum, given the early stage of litigation, the fact that the Duke Plaintiffs' claims and the instant action clearly have questions of law and fact in common, and that Defendants have not argued that intervention will unduly delay or prejudice the adjudication of the original parties' rights, *see* Fed. R. Civ. P. 24(b)(1)(B), the Court should permit the Duke Plaintiffs to intervene under Rule 24(b), even if it finds that they are not entitled to intervention as a matter of right.

II. CONCLUSION

For the reasons stated above and in the Motion to Intervene, the Duke Plaintiffs respectfully request that the Court grant their Motion and issue an order permitting them to intervene as a matter of right under Rule 24(a)(2) or, in the alternative, under Rule 24(b).

Dated: January 6, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this date I served a copy of the foregoing **REPLY IN SUPPORT OF MOTION TO INTERVENE AS PLAINTIFFS BY LOUIS M. DUKE, CHARLES M. GRAY, ASGOD BARRANTES, JOSUE E. BERDUO, AND BRIAN M. MILLER** to be made by electronic filing with the Clerk of the Court using the CM/ECF System, which will send a Notice of Electronic Filing to all parties with an e-mail address of record, who have appeared and consent to electronic service in this action.

This the 6th day of January, 2014.

/s/ Edwin M. Speas, Jr.
Edwin M. Speas, Jr.