IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

NORTH CAROLINA STATE CONFERENCE OF THE NAACP, et al., Plaintiffs, v. PATRICK LLOYD MCCRORY, in his official capacity as the Governor of North Carolina, et al., Defendants.	**DUKE INTERVENOR-PLAINTIFFS' MEMORANDUM REGARDING STANDING TO CHALLENGE THE REPEAL OF PRE-REGISTRATION** **Case No.: 1:13-CV-658**
LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, et al., Plaintiffs, v. THE STATE OF NORTH CAROLINA, et al., Defendants.	**Case No.: 1:13-CV-660**
UNITED STATES OF AMERICA, Plaintiffs, v. THE STATE OF NORTH CAROLINA, et al, Defendants.	**Case No.: 1:13-CV-861**

The Duke Intervenor-Plaintiffs ("Intervenors") submit this brief in response to the Court's questions about their standing to challenge the General Assembly's repeal of pre-registration at the recent hearing on the pending motions for preliminary injunction and 12(c) motion to dismiss.[1] As set forth in their Complaint and supported by the attached declarations of Louis Duke, Josue Berduo and Nancy Lund, Intervenors are suffering or imminently will suffer several legally cognizable injuries-in-fact as a result of the repeal of pre-registration, each of which independently confers standing. But even if the Court were to find that Intervenors could not individually challenge the repeal of pre-registration, in the Fourth Circuit it is sufficient that one of the *other* existing plaintiffs has standing to make that challenge. And, because at least one of the original plaintiffs is plainly injured by the repeal of pre-registration, Intervenors may rely on that injury to pursue their challenge to that provision.

I. THE INTERVENORS HAVE STANDING IN THEIR OWN RIGHT

To establish standing, a plaintiff must show that he has suffered a concrete, particularized injury in fact that is (1) actual or imminent; (2) "fairly traceable to the challenged action of the defendant"; and (3) is likely to be redressed by a favorable decision. *Friends of the Earth, Inc., v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000). Under this standard, Intervenors have standing to challenge the elimination of pre-registration on several independently sufficient grounds.

[1] The repeal of pre-registration is only one of several provisions of H.B. 589 that Intervenors challenge. No concerns have been raised about Intervenors' standing with regard to any other provision, therefore, this Brief addresses pre-registration only.

First, some Intervenors are being or imminently will be injured by the repeal of pre-registration, because they can no longer work to register voters through that program. Harm to a plaintiff's interest in registering voters confers standing. *Coal. for Sensible & Humane Solutions v. Wamser*, 771 F.2d 395, 399 (8th Cir. 1985); *cf. People Organized for Welfare & Emp't Rights (P.O.W.E.R.) v. Thompson*, 727 F.2d 167, 170 (7th Cir. 1984) (explaining that it "might be a persuasive basis for standing if P.O.W.E.R. had been trying to advance its goal [of improving the lot of the poor and the unemployed] by registering new voters itself," and that "[a]nyone who prevented it from doing that would have injured it"). Although interference with registration efforts is most typically a harm claimed by organizational plaintiffs, organizations only have standing (1) on their own behalf, provided they can meet the same standing test that applies to individuals; or (2) on behalf of their members, if their "members would have standing to sue as individuals." *White Tail Park, Inc. v. Stroube*, 413 F.3d 451, 458 (4th Cir. 2005). Thus, in *Wamser*, the organizational plaintiff had standing, but only "on the basis of" its individual members, who were injured by "the Board's refusal to appoint [them] as deputy registration officials . . . *preventing them from registering new voters*." 771 F.2d at 399 (emphases added). Under the doctrine of organizational standing, these members necessarily had standing to sue as individuals. By the same logic, the individual Intervenors must have standing to sue on the basis of the same injury-in-fact, and in their own names.

In support, the Complaint alleges that several Intervenors engage in extensive voter registration efforts. *See* Compl. ¶¶ 8, 9, 10, 11, 12, 15, 16, 17 (ECF No. 63). Nancy Lund further explains in her attached declaration that, prior to the repeal of pre-registration, those efforts included helping young people pre-register and that the repeal of that program has substantially hindered those efforts, Lund Decl. ¶¶ 5-6; Josue Berduo states that he will be supervising a non-partisan voter-registration effort this fall that would have included pre-registration efforts but for the repeal of that program, and that his "efforts to make registration and voting accessible to all young North Carolinians," are similarly hindered, Berduo Decl. ¶¶ 7-8, 13; and Louis Duke likewise states that the pre-registration program was an important tool in his voter-registration efforts and that its repeal has hindered those efforts, Duke Decl. ¶¶ 14-16, 18. Each has been injured by the elimination of pre-registration because they no longer can register voters through that program. As the invalidation of the law repealing pre-registration would plainly redress this injury, they have standing to challenge that law.

Second, several Intervenors will suffer imminent injury as a result of pre-registration's repeal, because it will require them to expend efforts registering voters who otherwise would have been registered. The expenditure of resources to respond to laws adverse to a party's interests constitutes an injury-in-fact. *See Fla. State Conf. of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1166 (11th Cir. 2008); *Frank v. Walker*, No. 11-CV-01128, 2014 WL 1775432, at *19 (E.D. Wis. Apr. 29, 2014); *Voting for Am., Inc. v.*

Andrade, 888 F. Supp. 2d 816, 827-28 (S.D. Tex. 2012), *rev'd and remanded on other grounds sub nom. Voting for Am., Inc. v. Steen*, 732 F.3d 382 (5th Cir. 2013).

It is undisputed that the pre-registration program was an enormously successful means of registering young North Carolinians. In its few years in existence, over 160,000 young voters used the program to register. Compl. ¶ 86; JA1433 (Levine Rpt. at 5).[2] As a result of its repeal, tens of thousands of young North Carolinians who would have automatically been added to the voter rolls when they became eligible will have to register through some other means (if they register at all). A portion of the voter-registration activity in which Intervenors engage will necessarily be diverted to assisting these young people register in the first instance. *See* Lund Decl. ¶ 6; Berduo Decl. ¶ 8. Because this diversion of effort is exactly the type of injury-in-fact discussed in *Browning* and *Frank*, and is caused by the elimination of and would be redressed by the re-implementation of pre-registration, all Intervenors involved in voter registration have standing to challenge the repeal of pre-registration.

Third, some Intervenors have been injured by the elimination of pre-registration because they will have to undertake greater efforts to get out the vote ("GOTV"). Consistent with the rule that the expenditure of additional resources to *register* voters constitutes an injury, the Seventh Circuit held in *Crawford v. Marion County Election* Board, 472 F.3d 949, 951 (7th Cir. 2007), *aff'd* 553 U.S. 181 (2008), that the Democratic

[2] To get a sense of the magnitude of that number, approximately 104,000 voters between the ages of 18 and 24 voted in the 2010 mid-term elections in North Carolina.

Party suffered a cognizable injury as the result of a law that "compell[ed] the party to devote resources to getting to the polls those of its supporters who would otherwise be discouraged by the new law from bothering to vote." *Id.*; *cf. Common Cause v. Bolger*, 512 F. Supp. 26, 30 (D.D.C. 1980) (candidates challenging incumbents were injured by congressional franking privilege because they were forced to raise additional funds).

The undisputed evidence in this case is that, the more provisions a state has that are unfriendly to young voters (and the elimination of pre-registration is certainly such a provision), the lower the turnout of young voters in that state. JA1437 (Levine Rpt. at 9); *see also* Duke Decl. ¶ 18 ("[T]he pre-registration program . . . went far to encourage all young voters—even those that had already aged out of the pre-registration program—to participate in the electoral process."); *id.* ¶ 19 (stating that the changes to North Carolina's elections law have made Duke and other young voters feel like their participation in North Carolina elections is unwelcome and that their ballots are less likely to be counted); Berduo Decl. ¶ 14 (same). Accordingly, the elimination of pre-registration will require Intervenors involved in GOTV activities, *see* Intv. Compl. ¶¶ 8-12, 14-17; Berduo Decl. ¶¶ 6-7, 10, to expend additional effort to get the same results. As this injury would be redressed by the invalidation of the laws that will suppress young voter turnout, Intervenors involved in GOTV efforts have standing.

Fourth, Intervenors have a cognizable legal interest in living in a State that does not intentionally discriminate against young voters; thus, under the same theory of standing endorsed by the majority in *Shaw v. Reno*, 509 U.S. 630, 650 (1993),

Intervenors may challenge the provisions of H.B. 589 that "cannot be understood as anything other than an effort to classify and separate voters by [age]," which "injures voters" by "reinforc[ing] . . . stereotypes and threaten[ing] to undermine our system of representative democracy by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole." 509 U.S. 630, 650 (1993). *See also id*. (stating that Justice Souter, in dissent, did "not adequately explain why these harms are not cognizable under the Fourteenth Amendment"). *Cf. Bolger*, 512 F. Supp. at 31 (finding standing where contributors and campaign workers were injured by tainted political process that was rendered unfair by use of the frank).

Intervenors allege that the provisions at issue—including the repeal of pre-registration—"are intended to and have the effect of denying or unreasonably infringing upon the voting rights of . . . young people." Compl. ¶ 25. The repeal of pre-registration in North Carolina has harmed the Duke Plaintiffs who are young voters, *see id.* ¶¶ 8-11, 13, 15, 17, by reinforcing stereotypes about those voters and signaling to elected representatives that the interests of young voters are less important than those of other voters. That injury plainly can be redressed only through the invalidation of the law repealing pre-registration.

Fifth, at least one Intervenor—Berduo—is injured by the repeal of pre-registration because he is a supporter of, participant in, and contributor to Senator Kay Hagan's campaign for reelection. In *Common Cause v. Bolger*, 512 F. Supp. 26 (D.D.C. 1980),

the D.C. Circuit considered a challenge to portions of the congressional franking statute. On the issue of standing, it found that:

> Contributors of "lawful amounts" of money to candidates for federal elective office, and "active participants" in these campaigns suffer injury regardless of the outcome of the election. The purpose of political campaigns is often as much to educate the public concerning certain issues as it is to elect a candidate who holds particular positions on these issues. The effectiveness of these contributions and campaign work will be substantially undercut by the funding subsidy of each incumbent. Plaintiffs do not claim that their injuries result from the outcome of elections but rather the fact that the political process is tainted and rendered unfair by the political use of the frank which the statute permits.

Id. at 31 (footnote omitted). The court also held that "'registered voters for candidates for federal elective office,' including challengers discriminated against by incumbents' [alleged] illegal use of the frank," had "alleged actual injury to themselves apart from electoral outcome, namely, that the franking statute places an unconstitutional burden on the congressional candidates of their choice, and thus on their right to associate freely for political purposes." *Id.* at 32; *see also Miller v. Moore*, 169 F.3d 1119, 1123 (8th Cir. 1999) (registered voters had standing where they contended that "pejorative ballot labels injure[d] them by greatly diminishing the likelihood that the candidates of their choice w[ould] prevail in the election").

Berduo's declaration affirms that he is "a strong supporter of Senator Kay Hagan and plan[s] to vote for her in the 2014 general election." Berduo Decl. ¶ 9. He has "made financial contributions to the Hagan campaign." *Id.* ¶ 11. And he plans to be actively involved in the Hagan campaign. *See id.* ¶¶ 10, 12. Thus, Berduo is being and will be injured because the effectiveness of these activities is undercut by the tainted and

unfair political process resulting from the repeal of pre-registration in violation of the 14th and 26th Amendments—and is particularly likely to hurt candidates like Senator Hagan, who has historically enjoyed considerable support from younger voters. As the re-institution of pre-registration would redress these injuries, Berduo has standing to challenge that program's elimination.

II. STANDING IS NOT REQUIRED FOR PERMISSIVE INTERVENORS

Because Intervenors were granted permissive intervention (*see* ECF No. 62 at 4), the Fourth Circuit does not require that they have standing independent from the original plaintiffs to challenge pre-registration's repeal. In *Shaw v. Hunt*, the Court explained that "a permissive intervenor without standing may continue to be a party so long as the suit is kept alive by a plaintiff." 154 F.3d 161, 166 (4th Cir. 1998); *see also id.* at 165 (explaining that the Supreme Court had declared that the rule that "governs permissive intervention[] 'plainly dispenses with any requirement that the intervenor shall have a direct personal or pecuniary interest in the subject of the litigation'") (quoting *S.E.C. v. U.S. Realty & Improvement Co.*, 310 U.S. 434, 459 (1940)).[3] This is because standing is meant to ensure that the Constitution's "case or controversy" requirement is met. When another plaintiff has standing to bring the claims or pursue the theories raised by an

[3] Several other circuits have also held that standing is not necessary for either permissive intervention or for intervention generally. *See, e.g.*, *San Juan Cnty. v. United States*, 503 F.3d 1163, 1172 (10th Cir. 2007) (en banc); *Ruiz v. Estelle*, 161 F.3d 814, 830 (5th Cir. 1998); *Associated Builders & Contractors v. Perry*, 16 F.3d 688, 690 (6th Cir. 1994); *Employee Staffing Servs., Inc. v. Aubry*, 20 F.3d 1038, 1042 (9th Cir. 1994); *Chiles v. Thornburgh*, 865 F.2d 1197, 1213 (11th Cir. 1989); *U.S. Postal Serv. v. Brennan*, 579 F.2d 188, 190 (2d Cir. 1978).

intervenor, all of the requirements of Article III (including injury in fact, causation, and redressability) are met within the confines of the case. *See, e.g., U.S. Postal Serv. v. Brennan*, 579 F.2d 188, 190 (2d Cir. 1978) ("The existence of a case or controversy having been established as between the Postal Service and the Brennans, there was no need to impose the standing requirement upon the proposed intervenor."); *King v. Christie*, 981 F. Supp. 2d 296, 308 (D.N.J. 2013) (agreeing with "the 'majority' view" that intervenors do not have independent standing requirements but may "piggyback" on an existing party's standing because "[i]n that circumstance the federal court has a Case or Controversy before it regardless of the standing of the intervenor") (internal quotation marks and citations omitted).

Unifour One (formerly Unifour OneStop Collaborative) ("Unifour")—one of the original plaintiffs—plainly has standing to challenge the repeal of pre-registration. Like an individual plaintiff, an organization asserting standing in its own right must establish that it has suffered an injury in fact; that the injury is fairly traceable to the challenged action of the defendant; and that it is likely that the injury will be redressed by a favorable decision. *See S. Walk at Broadlands Homeowner's Ass'n, Inc. v. OpenBand at Broadlands, LLC*, 713 F.3d 175, 182 (4th Cir. 2013). Unifour meets all of these requirements because, "as a result of losing pre-registration, . . . [Unifour] ha[s] lost 20% of [its] funding." JA59 (R. Michaux Decl. ¶ 21). This direct economic harm to Unifour from the repeal of pre-registration constitutes a classic injury in fact, *see generally Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 152 (1970) ("The first

question is whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise."), which would be redressed by the invalidation of the law that is causing the loss in funding.

Unifour also has standing for many of the same reasons that Intervenors have standing independently as individuals that are discussed *supra*. Unifour is heavily involved in voter-registration, voter-education, and GOTV efforts. JA54-55 (R. Michaux Decl. ¶¶ 6, 8, 10). Moreover, "[p]re-registering 16 and 17 year olds has been a main part of the work Unifour One has done in the last few years," JA59 (R. Michaux Decl. ¶ 20), and in 2012 the organization was able to "register and pre-register 1,100 high school students," JA55 (R. Michaux Decl. ¶ 8). The repeal of pre-registration therefore eliminates a means that Unifour extensively used to support its registration efforts, making those efforts more difficult; Unifour will surely expend resources registering voters who otherwise would have been registered through pre-registration, and will need to expend additional resources to get discouraged young voters to the polls; and some of Unifour's educational efforts will surely be diverted to education about the repeal of pre-registration. As each of these injures would be redressed by the re-institution of pre-registration, Unifour has standing to challenge that law.

CONCLUSION

For these reasons, Intervenors respectfully request that the Court find that they have standing to challenge the repeal of pre-registration and consider the merits of their Equal Protection and 26th Amendment challenges to that provision.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Edwin M. Speas, Jr., hereby certify that, on July 11, 2014, I filed a copy of the foregoing Duke Plaintiffs' Memorandum Regarding Standing To Challenge the Repeal of Pre-Registration using the CM/ECF system, which on the same date sent notification of the filing to the following:

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