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 Governor of North Carolina, *et al.*, Defendants.	1:13CV658
LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, *et al.*, Plaintiffs, *and* LOUIS M. DUKE, *et al.*, Plaintiffs-Intervenors, v. THE STATE OF NORTH CAROLINA, *et al.*, Defendants.	1:13CV660
UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF NORTH CAROLINA, *et al.*, Defendants.	1:13CV861

RESPONSE TO DUKE INTERVENOR-PLAINTIFFS' MEMORANDUM REGARDING STANDING TO CHALLENGE THE REPEAL OF PREREGISTRATION

Defendants submit this response to the Duke Intervenor-Plaintiffs' ("Intervenors") Memorandum regarding their standing to challenge the North Carolina General Assembly's repeal of preregistration under the 26th Amendment to the United States Constitution.

I. RELEVANT BACKGROUND INFORMATION

By order entered January 27, 2014, the Court allowed Intervenors to permissively intervene into *League of Women Voters of North Carolina v. North Carolina*, No. 1:13-cv-660 (M.D.N.C.) (hereinafter "*LWV*") (*LWV* D.E. 62). *LWV* has been consolidated for purposes of discovery with *United States v. North Carolina*, No. 1:13-cv-861 (M.D.N.C.) (hereinafter "*United States*") and *North Carolina State Conference of the NAACP v. McCrory*, No. 1:13-cv-658 (M.D.N.C.) (hereinafter "*NAACP*").

At issue here is a part of Session Law ("S.L.") 2013-381[1] repealing provisions of North Carolina law that permitted any person who was at least 16 years of age but who would not be 18 years of age by the date of the next general election to "preregister" to vote. *See* N.C. Sess. Laws 2013-381 (Part 12) (repealing N.C.G.S. 163-82.1(d)). Under prior law, these "preregistered" voters were then "automatically registered upon reaching the age of eligibility following verification of the person's qualifications and address. . ." N.C.G.S. § 163-82.1(d) (repealed effective September 1, 2013). The ability of persons who are not 18 years of age but who will be 18 by the date of the next general election to

[1] S.L. 2013-381 is referred to as "H.B. 589" in Intervenors' Memorandum.

register to vote before their eighteenth birthday was not affected by the General Assembly's repeal of preregistration. *See* N.C.G.S. § 163-82.4(d)(2)(a.) (2014) (requiring that North Carolina voter registration forms include the following question: "Will you be 18 years of age on or before election day?" and include "boxes for the applicant to check to indicate whether the applicant will be 18 years of age or older on election day."); N.C.G.S. § 163-59 (2014) ("Any person who will become qualified by age to register and vote in the general election for which the primary is held, even though not so qualified by the date of the primary, shall be entitled to register for the primary and general election prior to the primary and then to vote in the primary after being registered.").

In *United States*, the complaint makes no claims or allegations regarding preregistration or its repeal. (*United States* D.E. 1) Similarly, the *LWV* action, into which Intervenors have been allowed to intervene, does not make any claims or allegations regarding preregistration or its repeal. (*LWV* D.E. 1) While the *NAACP* Second Amended Complaint challenges the repeal of preregistration, its challenge is based on Section 2 of the Voting Rights Act, and the 14th and 15th Amendments to the United States Constitution, and is limited to the repeal's alleged effect on "young" minorities. (*NAACP* D.E. 52, ¶¶ 93, 109-147) Intervenors are the only parties to challenge the repeal of preregistration based on the 26th Amendment to the United States Constitution and as to its effect on non-minorities. (*LWV* D.E. 63, ¶¶ 8, 13, 14, 81-106)

II. THE INTERVENORS DO NOT HAVE STANDING IN THEIR OWN RIGHT TO CHALLENGE PREREGISTRATION UNDER THE 26TH AMENDMENT

Intervenors' Memorandum fails to show that they have standing on their own to assert their claims under the 26th Amendment in this action. As an initial matter, none of the Intervenors here have alleged that they have been injured because they were unable to register to vote as a result of the General Assembly's decision to repeal preregistration. Instead, Intervenors claim their injury arises from the fact that they have an "interest in registering voters" and that any "[h]arm to a plaintiff's interest in registering voters confers standing." (*LWV* D.E. 170, p. 3)

In support of this contention, Intervenors cite *Coal. For Sensible & Humane Solutions v. Wamser*, 777 F.2d 395, 399 (8th Cir. 1985). In *Wamser*, the court found that the Coalition for Sensible & Humane Solutions had standing to sue the Elections Board in the City of St. Louis, Missouri because the Board had refused to appoint individual coalition members as deputy registration officials thereby "preventing them from registering new voters." *Id.* at 399. Even if *Wamser* could be interpreted to create a blanket rule that any harm to an "interest in registering voters" constitutes an injury-in-fact, it is *preregistration*—not actual *registration*—that is at issue here.

Intervenors further contend that, as a result of being unable to preregister voters, they will be required "to expend efforts registering voters who otherwise would have been registered." (*LWV* D.E. 170, pp. 3-4) This "expenditure of resources," they say, constitutes an injury-in-fact. (*Id*. at p. 4) Intervenors cite three cases in support of this

argument.[2] In the first, *Fla. State Conf. of N.A.A.C.P v. Browning*, a group of organizations that conducted voter registration drives challenged a Florida Statute requiring that prospective voters in Florida provide a driver's license or social security number that matched up with the number assigned to the prospective voter in a state database as a precondition of registering to vote. 522 F.3d 1153, 1155 (11th Cir. 2008). The plaintiff organizations in *Browning* had standing, in their own right, to challenge the law because they had to "divert personnel and time to educating volunteers and voters on compliance with [the challenged provision] and to resolving problems with voters left off the registration rolls on election day." *Id.* at 1166.

Intervenors also cite *Frank v. Walker* in which four organizations challenged a Voter ID requirement under Section 2 of the Federal Voting Rights Act. 2014 WL 1775432, *19 (E.D. Wis. Apr. 29, 2014). In *Frank*, the district court found that the four organizations had standing because "[e]ach plaintiff devoted resources to educating its members and others whose interests it served about the law and to helping individuals obtain qualifying forms of ID." *Id.*

Finally, Intervenors cite *Voting for America, Inc. v. Andrade*, 888 F.Supp.2d 816 (S.D. Tex. 2012), in which two organizations that conducted voter registration efforts challenged a new Texas law affecting volunteer deputy registrars (VDRs), the only

[2] These cases, like *Wamser*, involve organizations and associations involved in voter registration and related activities who asserted standing to challenge various voting requirements. Here, all Intervenors are individuals, not organizations or associations. Intervenors have cited no cases in which individual voters were granted standing on the same bases that the organizational plaintiffs in the cases they cite were found to have standing.

individuals permitted to receive applications from prospective voters in Texas. *Id.* at 820. Among other changes, the new law barred non-Texans from serving as VDRs, barred VDRs from being compensated based upon the number of voter registrations the VDR successfully facilities, required the VDRs to undergo additional training, and prohibited them from making copies of voter registration forms they received. *Id.* at 826-27. The Texas district court found that the plaintiff organizations had alleged an injury-in-fact because the new law "makes it *impossible* for them to conduct voter registration drives and achieve their desired level of voter registration activity because it dramatically increases the administrative cost of conducting registration drives and *bans* them from using many common compensation and employment practices with their paid canvassers." *Id.* at 828 (emphasis added).

Here, unlike these cases, Intervenors have suffered no injury as a result of the repeal of preregistration. Their purported "injury" from the repeal of preregistration is not comparable with the injury of the organizational plaintiffs in the cases they cite. In those cases, the plaintiffs were challenging laws that prevented their members from registering certain voters altogether (i.e. those without driver's license or social security numbers that matched a state database) or from engaging in any voter registration activity at all (i.e. not being appointed as a "voter registrar" by an Elections Board or being prohibited from holding voter registration drives because the law imposed restrictions that made it "impossible" to do so). Nothing in Session Law 2013-381 prevents Intervenors from registering the *very same people* they could have registered before the law was enacted. The only difference is the *timing* in which they may do so. Before S.L.

2013-381, Intervenors could register any person who was at least 16 years old. Now, they must wait to register a person until he or she is old enough to be 18 years old, and eligible to vote, by the time of the next general election. However, both before and after the enactment of S.L. 2013-281, a prospective voter need only be registered once in order to vote.

Similarly, Intervenors' argument that they have been injured because they will be required "to expend efforts registering voters who otherwise would have been registered" fails to show that they have been injured because this has *always* been the case. Before the enactment of S.L. 2013-381, Intervenors had to wait until a person turned at least 16 years old to register him or her to vote. Under their logic, Intervenors would have also been harmed when the preregistration laws were in force because they still had to "expend efforts" to register 16 year-olds who might have otherwise already been registered to vote if the cut-off age for preregistration had been set at an age below 16. Unless North Carolina permitted "preregistration" beginning at birth, Intervenors—or anyone else engaged in voter registration activity—would always be required "expend efforts registering voters who otherwise would have been registered" because the law always has and always will have a cut-off age for when a person is permitted to register to vote. *Cf. Gaunt v. Brown*, 341 F.Supp. 1187, 1189 (S.D. Ohio 1972) (recognizing that the "[a]ge limit on voting necessarily must be arbitrary.")

Intervenors further argue that they have standing because they will have to "undertake greater efforts to get out the vote" and contend that the elimination of preregistration "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." (*LWV* D.E. 170, pp. 4-5) Similarly, Intervenors claim they "have a cognizable legal interest in living in a State that does not intentionally discriminate against young voters" and contend that the repeal of preregistration "cannot be understood as anything other than an effort to classify and separate voters by age." For these claims, Intervenors rely upon language in the United States Supreme Court's decision in *Shaw v. Reno*, 509 U.S. 630, 649 (1993), which held that "[a] plaintiff challenging a reapportionment statute under the Equal Protection Clause may state a claim by alleging that the legislation, though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification."

Although Defendants are unaware of any case applying *Shaw* outside the race or redistricting context as Intervenors seek to do here, even assuming such a claim is cognizable, Intervenors lack standing to assert it. In *United States v. Hays*, the United States Supreme Court found that the plaintiffs lacked standing to challenge the state of Louisiana's redistricting plan as an illegal racial gerrymander under *Shaw* because none of the plaintiffs lived in any of the challenged districts and, as such, they were asserting only a "generalized grievance against governmental conduct" that the Court has never recognized as "sufficient for standing to invoke the federal judicial power." 515 U.S. 737, 743 (citations omitted). Here, because Intervenors are all outside the age group directly affected by the repeal of preregistration, like the plaintiffs in *Hays*, their purported *Shaw* claims in this action are nothing more than a "generalized grievance

against governmental conduct of which [they] do not approve" and, as such, they lack standing to bring such a claim in these actions.

Finally, Intervenors contend that they have standing because "at least one Intervenor—Berduo—is injured by the repeal of preregistration because he is a supporter of, participant in, and contributor to Senator Kay Hagan's campaign for re-election" and the repeal of preregistration "is particularly likely to hurt candidates like Senator Hagan, who has historically enjoyed considerable support from younger voters." (*LWV* D.E. 170, pp. 7-8) This argument does nothing to support Intervenors' standing arguments because the repeal of preregistration does not and has not prevented anyone who will be 18 years of age by November 4, 2014, the date of this year's general election, and who is otherwise eligible to vote from registering to vote or from voting for Senator Hagan in the general election. *See* N.C.G.S. § 163-82.4(d)(2)(a.) (2014); N.C.G.S. § 163-59 (2014).

III. INTERVENORS NEED STANDING IN THEIR OWN RIGHT TO BRING THEIR CLAIMS CHALLENGING PREREGISTRATION UNDER THE 26TH AMENDMENT BECAUSE THESE CLAIMS HAVE NOT BEEN MADE BY ANY OF THE PLAINTIFFS IN THESE ACTIONS

Intervenors contend that even if they do not have standing in their own right to bring their claims under the 26th Amendment, no such standing is needed because they are "permissive intervenors" in these actions and "the Fourth Circuit does not require that they have standing independent from the original plaintiffs to challenge pre-registration's repeal." (*LWV* D.E. 170, p. 9) In support of this contention, Intervenors cite the Fourth Circuit's decision in *Shaw v. Hunt*, 154 F.3d 161 (4th Cir. 1998). They do not mention,

however, that the *Shaw* intervenors adopted the plaintiffs' complaint in that case, 154 F.3d at 163, and did not assert new claims as Intervenors do here. Intervenors have not cited any Fourth Circuit case holding that a permissive intervenor need not have standing in its own right to assert claims not asserted by at least one other plaintiff in the case.

Intervenors instead argue that they should be permitted to remain in the case because one of the original plaintiffs, Unifour One, "plainly has standing to challenge the repeal of pre-registration." Intervenors contend that Unifour One has standing based upon a single sentence in an affidavit filed in support of Plaintiffs' motion for a preliminary injunction in these actions claiming that the organization has lost 20 percent of its funding as a result of the repeal of preregistration. There is no evidence or allegation explaining why this funding loss occurred, however, certainly nothing in S.L. 2013-381 directly deprived Unifour One of any funding. To the extent this loss in funding resulted from the decision of a donor or other third-party to cut or withhold funds from the group, it is the result of "independent action" that is not "fairly traceable" to the General Assembly's repeal of preregistration in S.L. 2013-381. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (holding that there "must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court."). Further, Unifour One lacks standing based upon its alleged voter-registration, voter-education and GOTV activities for the same reasons Intervenors do not have standing based upon their involvement in these same activities as discussed above.

But even assuming Unifour One had standing to challenge the preregistration, Intervenors cannot "piggyback" on Unifour One's purported standing to challenge preregistration generally because Unifour One has made no claim in these actions challenging the repeal of preregistration under the 26th Amendment as Intervenors seek to do. Accordingly, Intervenors must have standing in their own right to bring these claims here. Because they do not, for the reasons discussed above, Intervenors' claims challenging the repeal of preregistration under the 26th Amendment should be dismissed.

IV. CONCLUSION

Because Intervenors do not have standing in their own right to assert their claims here challenging the repeal of preregistration under the 26th Amendment and cannot "piggyback" on Unifour One's standing to bring their new claims, Intervenors have failed to show that they have standing to bring their claims under the 26th Amendment and these claims should therefore be dismissed.

This the 18th day of July, 2014.

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CERTIFICATE OF SERVICE

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