UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-1270

RALEIGH WAKE CITIZENS ASSOCIATION; JANNET B. BARNES; BEVERLEY S. CLARK; WILLIAM B. CLIFFORD; BRIAN FITZSIMMONS; GREG FLYNN; DUSTIN MATTHEW INGALLS; AMY T. LEE; ERWIN PORTMAN; SUSAN PORTMAN; JANE ROGERS; BARBARA VANDENBERGH; JOHN G. VANDENBERGH; AMYGAYLE L. WOMBLE; PERRY WOODS,

Plaintiffs - Appellants,

v.

WAKE COUNTY BOARD OF ELECTIONS,

Defendant - Appellee

No. 16-1271

CALLA WRIGHT; WILLIE J. BETHEL; AMY T. LEE; AMYGAYLE L. WOMBLE; JOHN G. VANDENBERGH; BARBARA VANDENBERGH; AJAMU G. DILLAHUNT; ELAINE E. DILLAHUNT; LUCINDA H. MACKETHAN; WILLIAM B. CLIFFORD; ANN LONG CAMPBELL; GREG FLYNN; BEVERLEY S. CLARK; CONCERNED CITIZENS FOR AFRICAN-AMERICAN CHILDREN, d/b/a Coalition of Concerned Citizens for African-American Children; RALEIGH WAKE CITIZENS ASSOCIATION,

Plaintiffs - Appellants,

v.

WAKE COUNTY BOARD OF ELECTIONS,

Defendant - Appellee

Appeals from the United States District Court for the Eastern District of North Carolina, at Raleigh. James C. Dever III, Chief District Judge. (5:15-cv-00156-D; 5:13-cv-00607-D)

MOTION TO INTERVENE OF PROPOSED DEFENDANTS-INTERVENORS TIM MOORE, NORTH CAROLINA SPEAKER OF THE HOUSE OF REPRESENTATIVES AND PHIL BERGER, PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE

Pursuant to Local Rule of Appellate Procedure 12(e), and under the authority granted them in N.C. Gen. Stat. § 1-72.2, Tim Moore, North Carolina Speaker of the House of Representatives, and Phil Berger, President Pro Tempore of the North Carolina Senate, on behalf of themselves, and their members ("Movants"), and on the factual and legal grounds set forth below, hereby move for leave to intervene as party Defendants in the above-captioned consolidated cases.

Background

In 2013, plaintiffs Calla Wright and others filed suit challenging the North Carolina General Assembly's redistricting plan for electing the Wake County School Board ("Wright case"). In 2015, plaintiffs Raleigh Wake Citizens Association ("RWCA") and others filed suit challenging the North Carolina

General Assembly's redistricting plan for electing the Wake County Board of Commissioners ("RWCA case"). Plaintiffs in the Wright case named as defendants the Wake County Board of Elections and the State of North Carolina. Plaintiffs in the RWCA case named as defendants the Wake County Board of Elections, Chad Barefoot, in his official capacity as a North Carolina State Senator; Phil Berger, in his official capacity as President Pro Tempore of the North Carolina Senate; and Tim Moore, in his official capacity as Speaker of the North Carolina House of Representatives.

In the Wright case, defendants Wake County Board of Elections and the State of North Carolina, on November 4, 2013, moved to dismiss plaintiffs' complaint on both procedural and substantive grounds. (D.E. 27, 28, 29 in Case 13-607) The district court granted the motions and plaintiffs appealed. On May 27, 2015, this Court affirmed the dismissal of the State of North Carolina as a defendant on procedural grounds. (D.E. 43 in Case 13-607) Movants were not named as defendants in the Wright case and were not represented by counsel in the Wright case.

In the RWCA case, on June 5, 2015, plaintiffs voluntarily dismissed defendants Barefoot, Berger, and Moore from the case. (D.E. 21 in Case No. 15-156) The same day, plaintiffs filed an Amended Complaint naming the Wake County Board of Elections as the sole defendant. (D.E. 22 in Case No. 15-156)

Defendants Barefoot, Berger, and Moore never filed a responsive pleading in the RWCA case, and because of the voluntary dismissal, were never afforded an opportunity to participate in the case as party defendants.

On October 1, 2015, the district court consolidated the Wright case with the RWCA case. (D.E. 53 in Case No. 13-607) The consolidated cases were tried in December 2015 and the district court entered its final judgment and decision on February 26, 2016. (D.E. 82 in Case No. 13-607)

Plaintiffs appealed the district court's decision on March 14, 2016. (D.E. 84 in Case No. 13-607) On March 28, 2016, the Wright case appellants filed a Notice of Constitutional Challenge to State Statute. The Notice informed this Court that the appeal challenged the constitutionality of a state statute and "neither the State of North Carolina nor any of its agencies, officers, or employees remains a party to this appeal." (Doc. 28 in Case No. 16-271) In addition, on March 28, 2016, the RWCA case appellants filed a Notice of Constitutional Challenge to State Statute. The Notice informed this Court that the appeal challenged the constitutionality of a state statute, and "neither the State of North Carolina nor any of its agencies, officers, or employees is a party to this appeal." (Doc. 28 in Case No. 16-1270) Upon the filing of these Notices, there are no entries on the docket of these cases in this Court reflecting notice by this Court to the North Carolina Attorney General regarding the lack of representation of the State in a case challenging the

constitutionality of a state statute. See Fed. R. App. P. 44(b) (when a party questions the constitutionality of a state statute and gives notice under Rule 44, "the clerk must then certify that fact to the attorney general of the State.") In any event, the North Carolina Attorney General took no action to defend the constitutionality of the challenged statutes in these cases in this Court.

On July 1, 2016, this Court entered its opinion reversing, in part, the district court's decision. (Doc. 51 in Case No. 16-1270) In its opinion, this Court noted that the defendant Wake County Board of Elections "expressly disclaimed any stake in representing the political interests of the General Assembly . . . and essentially passed on defending the General Assembly's redistricting." (Doc. 51 at 22-23) The Court also stated that the "legislative proponents" claimed legislative immunity, which the Court characterized as "refus[ing] to defend their actions." (Doc. 51 at 23)

Argument

I. Movants Should be Allowed to Intervene as of Right.

The United States Supreme Court has recognized that policies underlying intervention in the federal district courts under the Federal Rules of Civil Procedure may be applicable in the appellate courts as well. *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO, Local 283 v. Scofield*, 382 U.S. 205, 217 n.10 (1965). Under the

Federal Rules of Civil Procedure, a movant may intervene as of right when the movant claims "an interest" in the subject of the action which may "as a practical matter impair or impede the movant's ability to protect its interest" unless "existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2). Under these standards, Movants plainly warrant intervention.

First, Movants have an obvious interest in the action in that they have been granted standing under North Carolina law to defend North Carolina General Statutes under circumstances such as this case. Indeed, the standing rises to the level of Article III standing to intervene in the above-captioned matter. "[S]tate legislators have standing to contest a decision holding a state statute unconstitutional if state law authorizes legislators to represent the State's interests." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 65 (1997). As the Supreme Court explained in *Hollingsworth v. Perry*, "[n]o one doubts that a State has a cognizable interest 'in the continued enforceability' of its laws that is harmed by a judicial decision declaring a state law unconstitutional. To vindicate that interest or any other, a State must be able to designate agents to represent it in federal court. That agent is typically the State's attorney general. But state law may provide for other officials to speak for the State in federal court." 133 S. Ct. 2652, 2664 (2013); *see also Karcher v. May*, 484 U.S. 72, 82 (1987); *INS v. Chadha*, 462 U.S. 919, 930 n.5, 939-40 (1983).

North Carolina law does so provide:

> The Speaker of the House of Representatives and the President Pro Tempore of the Senate, as agents of the State, shall jointly have standing to intervene on behalf of the General Assembly as a party in any judicial proceeding challenging a North Carolina statute or provision of the North Carolina Constitution.

N.C. Gen. Stat. § 1-72.2 (emphasis supplied). In the present case, intervention is proper because state law authorizes Movants to become a party to *any* judicial proceeding challenging a North Carolina statute and because Movants have a significant interest that directly involves questions of law or fact in common with the litigation.

Next, this Court's decision as a practical matter will impair or impede the Movants' ability to protect their interest in upholding the constitutionality of the statutes challenged here. In particular, Movants have a vital interest in defending the legislation the North Carolina General Assembly enacted and which it deems constitutional.[1] Prior to this procedural phase of these cases, the policy decisions regarding redistricting for School Board and County Commissioners in Wake County had been upheld and affirmed by the district court. However, this Court's July 1, 2016 decision, reversing the district court's February 2016 order finding the

[1] *See generally, e.g., United States v. Nixon*, 418 U.S. 683, 703 (1974) ("In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others."); *US West v. Public Utilities Comm'n*, 505 N.W.2d 115, 123 (S.D. 1993) (courts must read statutes as constitutional whenever possible). Similar principles apply to state legislatures.

challenged redistricting plans lawful, now threatens to nullify the duly enacted districts and thereby undermine the State's "interest 'in the continued enforceability' of its laws." *Hollingsworth*, 133 S. Ct. at 2664. Thus, the denial of this motion to intervene would significantly impair Movants' ability to protect North Carolina's interests.

Next, Movants are not adequately represented by existing parties in the case. In its decision, this Court recognized that the defendant Wake County Board of Elections "expressly disclaimed any stake in representing the political interests of the General Assembly . . . and essentially passed on defending the General Assembly's redistricting." (Doc. 51 at 22-23) Obviously, it cannot represent the General Assembly because, as the United States Supreme Court has consistently recognized, redistricting involves inherently political choices. The Wake County Board of Elections is tasked simply with administering the General Assembly's decisions. Moreover, Movants have never been represented in this matter by the North Carolina Attorney General, either at the district court or appellate level.[2] Thus, Movants' interests are not adequately represented, and they should be allowed to intervene as of right.

[2] While the North Carolina Attorney General's office represented several legislators in connection with subpoenas issued to the legislators, it has not represented Movants on the merits of the consolidated cases.

Moreover, intervention is perfectly appropriate for the purpose of appeal. *Hollingsworth*, 133 S. Ct. at 2666 (recognizing that "standing to defend on appeal in place of an original defendant" is proper where, as here, the intervenors "possess 'a direct stake in the outcome'."); *see also* Local Rule of Appellate Procedure 12(e) (a "motion for leave to intervene must be filed with the Court of Appeals" where the intervenor did not appear as an intervenor in the lower court proceeding); *Yniguez v. State of Ariz.*, 939 F.2d 727, 731 (9th Cir. 1991) (citing *Aid Soc'y. of Alameda County v. Brennan*, 608 F.2d 1319, 1328 (9th Cir.1979), *cert. denied*, 447 U.S. 921, 100 S.Ct. 3010, 65 L.Ed.2d 1112 (1980)) ("post-judgment intervention for purposes of appeal may be appropriate if the intervenors . . . meet traditional standing criteria"). N.C. Gen. Stat. § 1-72.2 affords the General Assembly "'such a stake in the outcome of an appeal that a live Article III case or controversy remains for appellate resolution.'" *Yniguez v. State of Ariz.*, 939 F.2d 727, 731 (9th Cir. 1991) (citing *Brennan*, 608 F.2d at 1328 n.6).

The United States Supreme Court has recognized that intervention by third parties on appeal serves the public interest. *Scofield*, 382 U.S. at 215. "Permitting intervention also insures fairness to the would-be intervenor" and:

> [t]he rights typically secured to an intervenor in a reviewing court—to participate in designating the record, to participate in prehearing conferences preparatory to simplification of the issues, to file a brief, to engage in oral argument, to petition for rehearing in the appellate court or to this Court for certiorari—are not productive of delay nor do they cause complications in the appellate courts.

Id. Movants desire to ensure the filing of a petition for writ of certiorari to the United States Supreme Court to review the decision of this Court, and any other appellate action to secure the interests of the General Assembly and the citizens of the State in upholding duly passed legislation. Permitting Movants to participate in this appeal as party defendants will not delay or "cause complications" in this Court and should therefore be allowed.

Finally, this Court has permitted intervention by the leadership of the North Carolina General Assembly in a case in a similar procedural posture. In *American Civil Liberties Union of North Carolina v. Tata*, No. 13-1030 (2014), this Court allowed the Speaker of the North Carolina House of Representatives and the President Pro Tempore of the North Carolina Senate to intervene for the first time on appeal. Intervention was allowed there, as here, after this Court had issued its opinion and judgment on the merits of the appeal. A copy of the order allowing intervention in the referenced case is attached.

II. Movants Should be Allowed Permissive Intervention.

In any event, non-parties are generally allowed to intervene permissively in matters where the non-parties have "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). In addition, permissive intervention by a government officer may be allowed where a party's claim or defense is based on any "regulation, order, [or] requirement"

"administered by" the officer seeking intervention. Here, Movants represent the North Carolina General Assembly which has final administrative authority over the composition of the districts challenged in this litigation and struck down by this Court. Moreover, as explained below, allowing intervention by Movants will not "unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3).

Request for Expedited Review

This motion is timely and will not prejudice existing parties. "'Timeliness is to be determined from all the circumstances.'" *Fiandaca v. Cunningham*, 827 F.2d 825, 833 (1st Cir. 1987) (quoting *NAACP v. New York*, 413 U.S. 345, 366 (1973)). Among the factors to be considered in determining whether a motion is timely are: (1) the length of the time the intervenor knew or should have known of his interest in this case, (2) the prejudice to the original party caused by the delay, (3) the resulting prejudice to the intervenor if the motion is denied, and (4) any unusual circumstances. *United States v. City of Chicago*, 796 F.2d 205, 209 (7th Cir. 1986) (citing *South v. Rowe*, 759 F.2d 610, 612 (7th Cir.1985)). Here, no deadlines for appealing the decision of this Court have passed as of the filing date of the instant motion. Moreover, Movants are willing to join the Petition for Rehearing En Banc filed by the existing defendant, and thus Movants' intervention will not delay these proceedings.

Nonetheless, due to the quickly approaching November election for the Wake County School Board and Wake County Board of Commissioners, Movants request that the Court expedite its resolution of this motion so that Movants may take any action necessary, including the possible filing of an application for a stay with this Court and the United States Supreme Court, to ensure that the November elections proceed under districts duly enacted by the North Carolina General Assembly.

Therefore, this motion is filed as an emergency motion with the Clerk of Court requesting single judge action pursuant to Local Rule 27(e), which allows that "in exceptional circumstances where action by a panel would be impractical due to the requirements of time" an application for single judge action may be made if "action by a panel is not feasible." Under such circumstances, Local Rule 27(e) states that "the clerk will assign the matter to a judge selected at random."

Movants' counsel contacted counsel for the plaintiffs and defendant about this motion. Counsel for Movants is informed that plaintiffs oppose the motion to intervene but do not oppose Movants' request for expedited consideration of the motion as long as they are afforded an opportunity to submit an opposition brief. As of this filing, defendant's counsel has not responded with its position on Movants' motion and request for expedited consideration.

Conclusion

For the foregoing reasons, Movants' motion to intervene should be allowed.

This the 14th day of July, 2016.

OGLETREE, DEAKINS, NASH
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CERTIFICATE OF SERVICE

I hereby certify that on July 14, 2016, I electronically filed the foregoing with the clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system.

All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

Dated: July 14, 2016

OGLETREE, DEAKINS, NASH
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FILED: May 12, 2014

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 13-1030
(5:11-cv-00470-F)

AMERICAN CIVIL LIBERTIES UNION OF NORTH CAROLINA; DEAN DEBNAM; CHRISTOPHER HEANEY; SUSAN HOLLIDAY, CNM,MSN; MARIA MAGHER

Plaintiffs - Appellees

v.

ANTHONY J. TATA, in his official capacity as Secretary of the North Carolina Department of Transportation; JAMES L. FORTE, in his official capacity as Commissioner of the North Carolina Division of Motor Vehicles

Defendants - Appellants

and

MICHAEL GILCHRIST, in his official capacity as Colonel of the North Carolina State Highway Patrol

Defendant

NATIONAL LEGAL FOUNDATION

Amicus Supporting Appellant

ORDER

Upon consideration of submissions relative to the motion to intervene filed by Thom Tillis, North Carolina Speaker of the House of Representatives, and Phil Berger, President Pro Tempore of the North Carolina Senate, the court grants the motion.

Entered at the direction of Judge Wynn with the concurrence of Chief Judge Traxler, acting as a quorum of the panel pursuant to 28 U.S.C. § 46(d).

For the Court

/s/ Patricia S. Connor, Clerk