Nos. 16-1270 and 16-1271

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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

Plaintiffs-Appellants,

v.

WAKE COUNTY BOARD OF ELECTIONS,

Defendant-Appellee.

CALLA WRIGHT; WILLIE J. BETHEL; AMY T. LEE; AMYGAYLE L. WOMBLE; BARBARA VANDENBERGH; JOHN G. 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.

On Appeal from the United States District Court
for the Eastern District of North Carolina

PLAINTIFFS-APPELLANTS' MEMORANDUM OF LAW IN OPPOSITION TO PROPOSED DEFENDANTS-INTERVENORS' MOTION TO INTERVENE

PLAINTIFFS-APPELLANTS Raleigh Wake Citizens Association, *et al.*, and PLAINTIFFS-APPELLANTS Calla Wright, *et al.*, by and through their undersigned counsel, respectfully submit this memorandum of law in opposition to proposed Defendant-Intervenors' Motion to Intervene.

I. Statement of the Case

Plaintiffs initially sued the State of North Carolina in August 2013 over the method of election at issue in this case. *Wright v. North Carolina*, No. 5:13-cv-607, ECF No. 1 (E.D.N.C. Aug. 22, 2013) (Complaint). The very parties now seeking to intervene were sued in their official capacities in 2015 when they enacted a second statute employing the same constitutionally infirm districts. *Raleigh Wake Citizens Ass'n v. Wake Cnty. Bd. of Elections*, No. 5:15-cv-156, ECF No. 1 (E.D.N.C. Apr. 9, 2015) ("*RWCA*") (Complaint). Only now—when the cases are near final resolution and time is of the essence for implementing a remedy to protect Plaintiffs' constitutional rights to an equal vote—have Movants changed their position, seeking to intervene in the litigation to block such relief.

After three years of complex litigation in two cases, this Court awarded judgment to Plaintiffs on July 1, 2016. For nearly three years, Movants have actively resisted and strenuously objected to their participation in these cases. In seeking intervention now, Movants omit several highly significant and relevant events from their recitation of the procedural history of this case.

On November 19, 2013, the *Wright* plaintiffs moved to amend their complaint to substitute Governor Patrick McCrory, President Pro Tempore of the North Carolina Senate Phillip Berger and Speaker of the North Carolina House of Representatives Thomas Tillis, each in his official capacity, as defendants—two of the three are movants in the instant case. Because Sen. Berger and Rep. Tillis presided over the North Carolina Senate and North Carolina House, respectively, when S.L. 2013-110 was enacted on June 13, 2003, Plaintiffs sought to add them as parties in order to enjoin the Defendants from executing or enacting constitutional violations found in S.L. 2013-110 and in any subsequent legislation. The Attorney General's Office, defending the case, and on their behalf as their counsel, actively resisted joinder of the President Pro Tempore of the Senate and the Speaker of the House. This Court agreed with them, holding:

> neither Proposed Defendant had a special duty to enforce the challenged Session Law, and thus neither is amenable to suit. The North Carolina Constitution clearly assigns the enforcement of laws to the executive branch. N.C. Const. art. III, § 5. The General Assembly retains no ability to enforce any of the laws it passes. *Cf. id*. And

> Proposed Defendants are merely members of North Carolina's General Assembly.

Wright v. North Carolina, 787 F.3d 256, 262 (4th Cir. 2015).

In their Motion, Movants complain that they were removed from *RWCA* because of Plaintiffs' "voluntary dismissal," and thus were "never afforded an opportunity to participate in the case as party defendants." Mot. at 4. This is incorrect. The RWCA case was filed on April 9, 2015. *RWCA*, No. 5:15-cv-156, ECF No. 1 (Complaint). On May 27, 2015, this Court ruled that legislative leaders were not proper Defendants in the Wright case. *Wright*, 787 F. 3d at 262. Given that the claims in *RWCA* were nearly identical to those in *Wright* (except for the racial gerrymandering claim relating to one district in *RWCA*), on June 5, 2015, Plaintiffs honored the Fourth Circuit's ruling and voluntarily dismissed, without prejudice, Movants as defendants. *RWCA*, No. 5:15-cv-156, ECF No. 21 (June 5, 2015) (Notice of Voluntary Dismissal). Nothing stopped Movants from seeking to intervene in *RWCA* at that time.

On October 15, 2015, Plaintiffs in the then-consolidated RWCA and Wright actions gave notice to certain state legislators and legislative staff pursuant to Rule 45(a)(4) of the Federal Rules of Civil Procedure of their intent to serve subpoenas on legislators and legislative staff. On October 20, 2015, counsel for the legislators informed counsel for Plaintiffs that he was authorized to accept service of all subpoenas to the legislative movants. The next day, Plaintiffs served the

subpoenas on the legislators, through counsel in the North Carolina Attorney General's Office. *See RWCA*, No. 5:15-cv-156, ECF No. 42 at 3 (Nov. 4, 2015) (Memo in Support of Motion to Quash). On November 4, 2015, the legislators moved to quash the subpoenas in their entirety, claiming legislative privilege and immunity. *Id*. at 5. As further discussed below, each of these factual omissions in the Motion to Intervene is relevant to this Court's analysis.

II. Argument

The timeliness of a motion to intervene is a threshold issue, *NAACP v. New York*, 413 U.S. 345, 365 (1973), and intervention, both of right and by permission, can occur only "[o]n timely motion." Fed. R. Civ. P. 24(a)–(b). Timeliness is determined with reference to "three factors: first, how far the underlying suit has progressed; second, the prejudice any resulting delay might cause the other parties; and third, why the movant was tardy in filing its motion." *Alt v. United States EPA*, 758 F.3d 588, 591 (4th Cir. 2014). "As timeliness is a cardinal consideration of whether to permit intervention," the Fourth Circuit first considers the timeliness of any motion to intervene. *Houston Gen. Ins. Co. v. Moore*, 193 F.3d 838, 839 (4th Cir. 2014) (internal quotations omitted).

Beyond the timeliness requirement, applicants to intervene as of right must satisfy an additional three requirements: (1) the applicant must have an interest in the subject matter of the underlying action; (2) the denial of the motion to

intervene would impair or impede the applicant's ability to protect its interest; and (3) the applicant's interest must not be adequately represented by the existing parties to the litigation. *Id.* at 839.

Permissive intervention is appropriate only (1) where the applicant's claim or defense and the main action have a question of law or fact in common, and (2) where intervention would not "unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(1)(B); *McHenry v. C.J.R.*, 677 F.3d 214, 222 (4th Cir. 2012); *see also Stuart v. Huff*, 706 F.3d 345, 350 (4th Cir. 2013) (noting that, with little corresponding benefit to existing parties, "[a]dditional parties can complicate routine scheduling orders, prolong and increase the burdens of discovery and motion practice, thwart settlement, and delay trial"). Even where both criteria are met, whether to grant permissive intervention remains in the court's discretion. *McHenry*, 677 F.3d at 222. In making its decision on whether to deny permissive intervention, it is appropriate for the court to consider whether "[a]ny benefit that the Proposed Intervenors could bring to the litigation may be achieved as *amici,* without necessitating" further involvement. *See United States v. North Carolina*, No. 1:13-cv-861, 2014 WL 494911, at *5 n.2 (M.D.N.C. Feb. 6, 2014); *see also Stuart II*, 706 F.3d at 355 (concluding that those denied intervention "retain the ability to present their view in support of the Act by seeking leave to file amicus briefs").

The standards for intervention on appeal are even more exacting, and because of that, intervention on appeal is rare. "[I]ntervention on appeal will be granted only under exceptional circumstances." *Spring Const. Co. v. Harris*, 614 F.2d 374, 377 n.1 (4th Cir. 1980); *see also Houston,* 193 F.3d at 840 ("There is considerable reluctance on the part of the courts to allow intervention after the action has gone to judgment and a strong showing will be required of the applicant.") (citing 7C Wright, Miller & Kane, *Federal Practice and Procedure: Civil 2d* § 1916, at 444-45 (West 1986)*; Hutchinson v. Pfeil*, 211 F.3d 515, 519 (10th Cir. 2000) ("A court of appeals may, but only in an exceptional case for imperative reasons, permit intervention where none was sought in the district court.") (citing *Hall v. Holder*, 117 F.3d 1222, 1231 (11th Cir. 1997)); *Bates v. Jones*, 127 F.3d 870, 873 (9th Cir. 1997) ("Intervention at the appellate stage is, of course, unusual and should ordinarily be allowed only for imperative reasons."); *Planned Parenthood of the Heartland v. Heineman*, 664 F.3d 716, 718 (8th Cir. 2011) (motion to intervene after judgment is entered "will be granted only upon a strong showing of entitlement and of justification for failure to request intervention sooner."). Indeed, "motions for intervention after judgment ordinarily fail to meet this exacting standard and are denied." 7C Wright, Miller & Kane, *Federal Practice and Procedure: Civil 2d* § 1916, at 444-45.

Finally, even in the cases cited in Movants' Motion, intervention occurred at the district court, not appellate, level. *See Hollingsworth v. Perry*, 133 S. Ct. 2652, 2660 (2013); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 55-56 (1997); *Karcher v. May*, 484 U.S. 72, 75 (1987). Thus, these cases do not address or support intervention on appeal given the untimeliness of the pending Motion.

a. The Motion Is Plainly Not Timely

Ultimately, this Court need not go any further than the threshold question: whether this Motion was timely filed. It was not. Using the three factors considered in a timeliness analysis, *see Alt*, 758 F.3d at 591, nothing explains or excuses Movants' tardiness, and the Motion should be thus denied.

When looking at the first factor—"how far the underlying suit has progressed"—it is clear that that this complex litigation has proceeded far enough toward resolution that the Motion cannot possibly be deemed timely. The first complaint was filed on August 22, 2013, nearly three years prior to the filing of the intervention motion. *See, e.g., Gould v. Alleco, Inc.,* 883 F.2d 281, 286 (4th Cir. 1989) (denying a motion to intervene in the appellate stage after "[t]wo years of extensive litigation"). This case has involved two separate appeals to the Fourth Circuit, extensive discovery, and a trial. Just as in *Gould*, where movants also waited until "the last possible moment" to seek intervention, "[t]he tardiness of the motion is the strongest reason supporting its denial." *Id.*

The second factor—"the prejudice any resulting delay might cause the other parties"—also weighs against finding the Motion timely. Movants claim, with absolutely no supporting facts or argument, that intervention would not prejudice the parties. Mot. at 11. Plaintiffs vehemently disagree with that contention to the extent that intervention is allowed to delay implementation of a remedy. Plaintiffs have obtained a favorable ruling and now are entitled to the declaratory and injunctive relief necessary to protect their rights. Any further resistance to or slowing of implementation of a constitutional remedy, including via further appeals and stays pending appeal, could prevent Defendant from administering a constitutional remedy for the November 2016 elections. "Intervention at such a late stage [may] unduly delay[] enforcement of the remedy to which [the plaintiffs are] entitled." *P.A.C.E. v. Kansas City Mo. Sch. Dist.*, 267 F. App'x 487, 489 (8th Cir. 2008).

Finally, on the third factor—"why the movant was tardy in filing its motion"—Movants provide absolutely no reason for delay and make no showing as to why their tardiness is excusable. Movants knew about the litigation in 2013, when they resisted involvement as parties in the litigation. *See Wright*, No. 14-1329, ECF No. 33 at 24-29 (June 30, 2014) (Brief of Appellees). Additionally, they knew about the litigation in 2015, when they were named as Defendants in the RWCA case. *See RWCA*, No. 5:15-cv-156, ECF No. 1 (Apr. 9, 2015) (Complaint).

The fact that Movants were voluntarily dismissed as defendants following this Court's *Wright* ruling did not prevent them from seeking to intervene after that dismissal, given that they were aware of the litigation.[1] The only plausible explanation for why they have only decided to seek involvement now is because they disagreed with this Court's July 1 ruling, and that does not save the untimeliness of the Motion. For all these reasons, the Motion should be rejected as untimely.

b. Movants Are and Have Been Adequately Represented in this Litigation

Beyond plainly failing to satisfy the timeliness requirement, Movants also fail to make the requisite showing that they are not adequately represented by the current parties to the litigation. Both Defendant Wake County Board of Elections throughout the course of litigation and the Attorney General's office as counsel for the State defendants in the earlier *Wright* litigation amply defended the interests of Movants, and thus Movants cannot satisfy all the elements to intervene as of right.

Defendant Wake County Board of Elections has presented a vigorous defense of the statute, in both the trial court litigation and on appeal. Counsel for Defendant plainly stated that it would fully "defend the Constitutionality of those

[1] Notwithstanding Movants' apparent claim that they were never notified by this Court of the Notices of Constitutional Challenge to State Statutes timely filed by Plaintiffs-Appellants, Mot. at 4, it is plain that Movants were aware of this litigation—which has been the subject of substantial media coverage—and actively declined participation until the last possible minute.

districts in order to avoid any possible legal exposure that it may have caused by the actions of the General Assembly, and also to try to avoid a result that would make it easier for plaintiffs down the road to bring a suit against the Wake County Board of Elections." *RWCA*, No. 5:15-cv-156, ECF No. 63, vol. I, at 13 (12/16/15 Trial Tr.) (attached as App. A). That is, Defendant had every incentive to avoid liability for the unconstitutionality of the statutes, and did everything it could to avoid such a finding. Indeed, even just days ago, the District Court noted that "the Wake County Board of Elections has defended the constitutionality of the redistricting plans as a legal and institutional matter." *RWCA*, No. 5:15-cv-156, ECF No. 78 at 3 (July 8, 2016) (Order). Thus, Movants have no grounds for asserting that Defendant has not adequately defended the challenged laws.

Movants were also adequately and robustly defended by their counsel, the North Carolina Attorney General, in the early stages of the *Wright* case. In resisting Plaintiffs' proposed amendment to the Complaint and defending the District Court's ruling on appeal, the Attorney General explained why Movants were not proper parties to the litigation:

> *Ex parte Young* makes clear that the state officials plaintiffs sought to substitute as defendants would not be proper parties to this case. . . . It is telling that plaintiffs do not describe a single way in which any of the three state officials they sought to make defendants in this action have even the slightest connection with the enforcement of the legislation they challenge. At most, they assert that *the General Assembly* enacted the statute.

> None of the three proposed new defendants are the General Assembly, nor can any of them act for the General Assembly. President *Pro Tempore* Berger and Speaker Tillis are members of the General Assembly. While they have certain duties and obligations as presiding officers of the two chambers in the General Assembly, neither has any authority to enact laws on behalf of the General Assembly. The General Assembly is, of course, the legislative branch of government—its task is to enact laws, not to enforce them. Pursuant to the constitutionally-mandated separation of powers, *see* N.C. Const. art. I, § 6, the role of enforcement falls to the executive branch.

Wright, No. 14-1329, ECF No. 33 at 26 (June 30, 2014) (Brief of Appellees) (internal citations omitted). On behalf of the Movants, the Attorney General explained why Movants were unnecessary to any remedy that Plaintiffs might eventually be due, saying: "It is the Wake County Board of Elections, which is supervised by the State Board of Elections, that is required to execute the provisions of S.L. 2013-110. *See* N.C. Gen. Stat. § 163- 22(a) & -33. The State Board of Elections, not the Governor, appoints the members of the Wake County Board of Elections. *See* N.C. Gen. Stat. § 163-22(c)." *Wright*, No. 14-1329, ECF No. 33 at 27 (June 30, 2014) (Brief of Appellees). These enthusiastic and ultimately successful arguments make clear that the Movants' interests were adequately represented in the earlier stage of the litigation.

Movants have had years to seek intervention in this litigation, and have chosen not to do so. Even now, they offer no actual reasons why Defendant's

representation has been inadequate. Waiting until now to express unspecified discontent with the adequacy of representation at best "amount[s] to a ninth-inning-with-two-outs intervention attempt." *In re Uponor, Inc., F1807 Plumbing Fitting Products Liab. Litig.*, 716 16 F.3d 1057, 1065 (8th Cir. 2013). Intervention requires a stronger showing than this.

c. The Legislative Intervention Statute Does Not Provide the Interest Necessary for Intervention as of Right

The statute upon which Movants rely for establishing a legally cognizable interest in the litigation does not mandate that intervention be allowed in federal court. The North Carolina General Assembly passed N.C. Gen. Stat. § 1-72.2 in the summer of 2013, and it provided that:

> 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.

Id. The statute by its explicit language requires intervention to proceed pursuant to the North Carolina Rules of Civil Procedure. *Id*. But different procedural rules and constitutional standing requirements apply in federal court than in state courts. Rule 24 of the North Carolina Rules of Civil Procedure provides for intervention under an "unconditional right," such as that established by state law, as in N.C. Gen. Stat. § 1-72.2. N.C. R. Civ. P. 24(a). Rule 24 of the Federal Rules of Civil

Procedure does not require that intervention be allowed on such a state law basis. Fed. R. Civ. P. 24.

Moreover, it is not clear that Movants possess Article III standing to pursue this appeal. While the Court in *Hollingsworth* did comment in *dicta* that states could designate agents to represent their interests, 133 S. Ct. at 2664, the Court also reemphasized that standing still requires a showing that the legal rights or obligations of the proposed intervenors are affected by the litigation, and as in *Hollingsworth*, where "the District Court had not ordered [intervenors] to do or refrain from doing anything," a case or controversy did not exist. *Id*. at 2662. Because the latter was central to their holding that the intervenors in *Hollingsworth* did not have standing to pursue the appeal, that is the rule of law that must be consistently applied here. Since this Court in *Wright* concluded that Movants are not required to be ordered to do or not do anything as part of any relief granted in this case, and therefore are not proper parties amenable to suit, following the *Hollingsworth* rule, they do not have legal rights or obligations sufficient to establish standing.

d. Permissive Intervention Also Should Be Denied

Here, as with the analysis under Fed. R. Civ. P. 24(a), this Court should deny permissive intervention because the Motion is not timely. Allowing Movants' intervention as Defendants-Intervenors, if it affords any rights different

from *amicus* participation, will merely slow down the appeals stage of this litigation, unduly delaying implementation of the remedy to which Plaintiffs are entitled. Moreover, given the breadth of discretion afforded to this Court in considering permissive intervention, this Court should also take into account that Movants do not come to the Court with clean hands in this instance. Movants strongly resisted involvement in the Wright case. Even though they were named defendants in *RWCA*, they declined to intervene in the trial court proceedings in that case. In both cases, and in numerous other cases in North Carolina in recent years,[2] state legislators, including Movants, vigorously resisted complying with discovery requests, instead choosing to hide behind the cloak of legislative privilege. There has been no indication in the course of this litigation that Movants would have adopted a different position on legislative privilege here. Thus, equitable concerns, which this Court is entitled to consider in its permissive intervention analysis, warrant denial of the Motion. *See Spangler v. Pasadena Bd. of Educ.*, 552 F.2d 1326, 1329 (9th Cir. 1977) (citing *Hines v. Rapides Parish School Bd.*, 479 F.2d 762, 765 (5th Cir. 1973)).

[2] *City of Greensboro v. Guilford Cnty. Bd. of Elections*, No. 1:15-cv-559, ECF No. 77 (M.D.N.C. June 6, 2016) (Opp. to Motion to Compel); *id.*, ECF No. 79 (June 9, 2016) (Motion to Quash); *League of Women Voters of N.C. v. North Carolina*, No. 1:13-cv-660, ECF No. 57 (M.D.N.C. Jan. 20, 2014) (Motion to Quash); *id.*, ECF No. 72 (Feb. 10, 2014) (Opp. to Motion to Compel).

e. *ACLU of N.C. v. Tata* Is Distinguishable Because Defendant Here Is Seeking Further Review and Movants Here Previously Actively Asserted Their Right Not to Be Litigants in this Case

Movants rely on *American Civil Liberties Union of N.C. v. Tata*, No. 13-1030 (4th Cir. 2014), to support their right to intervene here. Mot. at 10. While in *Tata* a panel of this Court did allow the Speaker of the North Carolina House of Representatives and the President Pro Tempore of the North Carolina to intervene on appeal, there are two important distinguishing factors between that case and this one.

First, in *Tata*, the defendants had not yet sought further review of the Fourth Circuit opinion, despite the fact that the time for filing a petition for writ of certiorari had nearly run. *See Tata*, No. 13-1030, ECF No. 40 at 4-5 (May 9, 2014) (Motion to Intervene). And, indeed, the intervenors in that case were the only parties to file a petition for writ of certiorari. *See id.*, ECF No. 46 (July 15, 2014) (Notice of Filing of Cert. Petition). That is not the case here. Defendant-Appellee filed a petition for rehearing en banc before Movants even sought intervention, and Movants represent in their Motion that at this point they merely want to join on that petition for rehearing. Mot. at 11. Thus, unlike in *Tata*, the appeals process will proceed here, even without intervention, and Movants are being adequately represented by the existing Defendant.

Second, this case is distinguishable from *Tata* because Movants have resisted involvement in this case earlier and *Tata* did not involve state legislators responsible for the challenged law actively asserting legislative privilege and resisting production of relevant factual information. As discussed above, the North Carolina Attorney General's Office, representing the State of North Carolina and the interests of state legislators, actively resisted amendment of the *Wright* complaint to include the very officers now seeking intervention here. State legislative leaders also moved to quash subpoenas seeking relevant information on the "merits of the consolidated cases." Mot. at 8 n.2. Movants want to have their cake and eat it, too: oppose involvement and resist discovery in litigation challenging unconstitutional local bills, but then step in when unsatisfied with the outcome of the case. None of these factual, equitable factors were present in *Tata*, and these factors here weigh heavily against allowing the intervention requested here.

III. Consideration of this Motion by a Single, Randomly Assigned Judge Is Inappropriate in this Case

While Plaintiffs represented to Movants that they did not oppose expedited review of this Motion, Plaintiffs do oppose Movants' invocation of Fourth Circuit Court of Appeals Local Rule 27(e) (Panel Assignments and Emergency Motions) to request a single, randomly-assigned judge hear this motion. As a primary matter, Movants did not inform Plaintiffs that they would be seeking such

extraordinary action as part of the expedited review. *See* App. B, Email from Thomas Farr to Anita Earls et al. (July 14, 2016). Moreover, that rule establishes a "strong presumption that the Court will act, in all but routine procedural matters, through panels or *en banc*." 4th Cir. Rule 27(e). The rule further holds that "[a]pplication to a single judge should be made only in exceptional circumstances where action by a panel would be impractical due to the requirements of time." *Id.*

Movants have requested that the motion be assigned to a judge selected at random. Mot. at 12. The Fourth Circuit panel that has been assigned to this case for over two years and heard two appeals in the matter has substantial time invested in and familiarity with the case. Movants have established no grounds for setting aside the "strong presumption" of typical case management by the assigned panel in favor of random assignment of a single judge. The Court also has before it Plaintiffs-Appellants' Motion to Issue the Mandate, so it is not "impractical due to the requirements of time" for the panel to consider the Motion to Intervene as well. Review of this motion should follow normal procedure and be conducted by the long-assigned panel.

CONCLUSION

For all the foregoing reasons, Plaintiffs-Appellants respectfully request that this Court deny the Motion to Intervene.

Respectfully submitted this 19th day of July, 2016.

/s/ Allison J. Riggs
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CERTIFICATE OF SERVICE

I certify that on July 19, 2016, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

RALEIGH WAKE CITIZENS ASSOCIATION, et al.	)	
Plaintiffs,	)	
	)	
vs.	)	**Case No. 5:15-CV-00156**
WAKE COUNTY BOARD OF ELECTIONS,	)	
Defendant.	)	

CALLA WRIGHT, et al.	)	
Plaintiffs,	)	
	)	
vs.	)	**Case No. 5:13-CV-00607**
THE STATE OF NORTH CAROLINA, et al.	)	
Defendant.	)	

BENCH TRIAL - DAY 1
BEFORE CHIEF DISTRICT JUDGE JAMES C. DEVER III
DECEMBER 16, 2015; 9:00 A.M.
RALEIGH, NORTH CAROLINA

FOR THE PLAINTIFFS:

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Proceedings recorded by mechanical stenography, transcript produced by computer.

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Based on the evidence we'll proffer in the next few days, plaintiffs will respectfully ask this Court to find that the enacted plan and specifically District 4 violate the equal protection guarantees of both the Federal and State Constitution and to permanently enjoin these laws.

Thank you, Your Honor.

THE COURT: Thank you, ma'am.

Mr. Marshall, would you like to give an opening?

MR. MARSHALL: Thank you, Your Honor. If you don't mind, I'd just like to stand at the table.

THE COURT: That's fine.

MR. MARSHALL: I have Jessie Thaller-Moran and Matt Tynan to assist me today, over the next couple days. Also from our client, the Wake County Board of Elections, I think all three Board members are here, Brian Ratledge, Mark Ezzell, I think Ellis Boyle is here as well.

I want to thank the Court first of all for agreeing to expedite this trial. We had mentioned earlier that one of the key goals of my client was to have this case heard as quickly as possible so they could get some finality as to the legality of the districts at issue. Also I want to thank the Court for your patience as I'm trying to navigate my role in exactly what it is the Board of Elections is going to be doing here at trial today.

On that point, this is, as you know, an action

alleging unlawful actions by the North Carolina General Assembly. There are no allegations that the Wake County Board of Elections did anything improper or anything unlawful, because they had nothing to do with the drawing of the district, so the Wake County Board of Elections' position today is that they don't have a political position on what the districts should be or whether they should or should not have been withdrawn or administratively what they should be, but they do have to administer the districts, and as the sole defendant they are in a position where they're forced to defend the Constitutionality of those districts in order to avoid any possible legal exposure that it may have caused by the actions of the General Assembly, and also to try to avoid a result that would make it easier for plaintiffs down the road to bring a suit against the Wake County Board of Elections any time there's a small population deviation or claims of partisanship in districts, especially if the Board of Elections is going to be the only defendant in the future as well.

So with that background, I just want to talk briefly about what we may expect to hear over the next couple days. What you won't hear is any testimony from Republican members of the General Assembly. As you know, there have been assertions of legislative privilege to that regard, and again because I'm not representing the political interests of the General Assembly in this matter, only the interests of the Board of

Elections, we really are going to be trying this case largely just through cross-examination, and the best way to explain what we'll be doing ultimately is just testing the sufficiency of the evidence, the factual evidence the plaintiffs are going to put forward, and we're going to test that sufficiency against the governing legal standards in one person one vote cases and racial gerrymandering cases, and frankly, Your Honor, most of that work I will probably do at closing argument in the form of a legal argument, but throughout the course of the trial we will be cross-examining the experts and certainly some of the other witnesses as well just to test the sufficiency of that evidence.

What you will hear, I believe, and you and I might be in a similar position here because without having done discovery, a lot of this testimony I'll also be hearing for the first time, but what's been projected, I think, given the witness list and what we've heard in opening is we will see a rerun, so to speak, of a lot of the arguments put forward during the legislative debate over both of these redistricting plans. There are several democratic legislators that will testify about their opposition to the bill, and I've read the legislative transcripts and the Court probably has as well, there's no doubt that the opposition to this bill is eloquent, it's passionate and it's very sincere, and our position is that that opposition is more appropriate for the political sphere

Allison Riggs

From: Farr, Thomas A. <thomas.farr@ogletreedeakins.com>
Sent: Thursday, July 14, 2016 11:41 AM
To: Anita Earls; Allison Riggs; George Eppsteiner; CMARSHALL@brookspierce.com
Cc: Strach, Phillip J.; McKnight, Michael D.
Subject: Motion to Intervene by Speaker Moore and President pro Tem Berger

Importance: High

Dear Anita and Charles

We have been retained by Speaker Moore and President Pro Tem Berger to represent them in further proceedings in Raleigh Wake Citizens Association v. Wake County Board of Elections and Wright v. Wake County Board of Elections.

We will be filing a motion to intervene with the fourth circuit later today.

We are also asking that the court expedite its ruling on our intervention motion.

If possible, we would like to know your position on our motion to intervene and our request to expedite ruling on the motion by 4 PM , so that we can advise the court.

Please respond to me, Phil and Michael if possible.

Thanks very much.

Tom Farr

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