UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA

NORTH CAROLINA STATE CONFERENCE OF THE NAACP, CHAPEL HILL – CARRBORO NAACP, GREENSBORO NAACP, HIGH POINT NAACP, MOORE COUNTY NAACP, STOKES COUNTY BRANCH OF THE NAACP, WINSTON SALEM – FORSYTH COUNTY NAACP,

Plaintiffs,

v.

ROBERT CORDLE, in his official capacity as Chair of the North Carolina State Board of Elections; STELLA ANDERSON, in her official capacity as Secretary of the North Carolina State Board of Elections; KENNETH RAYMOND, JEFFERSON CARMON III, and DAVID C. BLACK, in their official capacities as members of the North Carolina State Board of Elections,

Defendants,

and

PHILIP E. BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate, and TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives,

Proposed Intervenors.

CASE NO. 1:18-cv-01034-LCB-LPA

PROPOSED INTERVENORS' MEMORANDUM IN SUPPORT OF THEIR RENEWED MOTION TO INTERVENE

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STATEMENT OF THE MATTER BEFORE THE COURT

The Plaintiffs in this litigation challenge the validity of North Carolina Senate Bill 824 ("S.B. 824"), legislation that implemented the state constitutional requirement that citizens of North Carolina be required to show photo identification when voting in person. The fate of Plaintiffs' challenge likely will depend upon the success or failure of their intentional discrimination claim, as their disparate impact and undue burden claims are difficult if not impossible to reconcile with binding precedent. *See Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008); *Lee v. Virginia State Bd. of Elections*, 843 F.3d 592 (4th Cir. 2016). And yet in the seven months that have elapsed since the filing of this case and a parallel case in state court, the State Board of Elections has not once defended S.B. 824 against the charge that it was designed to discriminate against racial minorities. In this case, the State Board has not offered any substantive defense of S.B. 824, instead unsuccessfully seeking to have the litigation stayed pending the outcome of the state case. In the state case, the State Board moved to dismiss every claim *except* the intentional discrimination claim, and it failed to mount *any* substantive defense to the plaintiffs' preliminary injunction motion. Indeed, in response to the preliminary injunction motion the State Board made clear that it has a primary objective simply of obtaining guidance from the courts on the constitutionality of S.B. 824, not of defending its constitutionality. The State Board's failure to defend S.B. 824 against the charge of racial discrimination should come as no surprise, as the Board is controlled by Governor Cooper, who has expressed the belief that the law "was designed to suppress the rights of minority . . . voters," Gov. Roy Cooper Objections and Veto Message, Ex. A attached to Mot. to

Intervene, Doc. 8.1 at 2 (Dec. 14, 2018) ("Doc. 8.1"), and who is actively supporting a separate challenge to North Carolina's voter ID regime.

This Court has denied one motion by Proposed Intervenors to intervene, but in so doing the Court indicated that it would "entertain a renewed motion" in the event that it became "apparent" that the State Board would "decline[] to defend the instant lawsuit." Mem. Op. and Order, Doc. 56 at 23 (June 3, 2019) ("Doc. 56"). In the aftermath of the preliminary injunction proceedings in the state court action, it has now become apparent that the State Board will decline to defend adequately, if at all, the key claim in this lawsuit, and thus Proposed Intervenors hereby file this renewed motion to intervene. The State of North Carolina unquestionably has a paramount interest in the validity of its laws, and state law expressly appoints Proposed Intervenors as agents of the State to defend that interest in litigation. Proposed Intervenors should be allowed to intervene to vindicate the State's and the General Assembly's interest in the validity of S.B. 824.

QUESTION PRESENTED BY THIS MOTION

Whether Proposed Intervenors should be granted leave to intervene in this case as of right under Federal Rule of Civil Procedure 24(a) or, alternatively, permissively under Rule 24(b).

STATEMENT OF FACTS

I. Pursuant to a Constitutional Mandate, the North Carolina General Assembly Passed One of the Most Lenient Voter ID Laws in the Nation.

As discussed in Proposed Intervenors' prior briefing, the General Assembly passed S.B. 824 pursuant to a constitutional mandate, and in so doing enacted one of the most

lenient voter ID laws in the United States. *See* Proposed Intervenors' Mem. in Supp. of their Mot. to Intervene, Doc. 8 at 2–5 (Jan. 14, 2019) ("Doc. 8") (discussing the legislative history of S.B. 824 and its specifics).

The General Assembly has twice since amended S.B. 824. First, on March 14, 2019, Governor Cooper signed into law a new bill that postponed the implementation of S.B. 824 until the March 2020 primaries while ensuring that "all implementation and educational efforts set forth in [S.B. 824] during 2019 by the State and counties shall continue." 2019 N.C. Sess. Laws 4, Ex. A at 1. On June 3, 2019, the Governor signed House Bill 646, which increased the time during which educational institutions and government employers can have their IDs approved to qualify as voter ID and relaxed certain requirements for approval. *See* 2019 N.C. Sess. Laws 22, Ex. B.

II. Plaintiffs File the Instant Suit, and the Court Denies Without Prejudice Proposed Intervenors' Motion to Intervene on the Basis of the Facts as They Existed in January 2019.

On December 20, 2018—the day after S.B. 824 became law—Plaintiffs filed this suit against the Governor and the members of the North Carolina State Board of Elections. Plaintiffs' suit alleges that S.B. 824 will disproportionately impact African-American and Latino voters in violation of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973; intentionally discriminates against African-American and Latino voters, in violation of Section 2 and the Fourteenth and Fifteenth Amendments of the United States Constitution; and will unduly burden the right to vote, in violation of the Fourteenth Amendment. *See* Compl., Doc. 1 ¶¶ 105–46 (Dec. 20, 2018).

On January 14, 2019, Proposed Intervenors moved to intervene in this case. Mot. to Intervene, Doc. 7 (Jan. 14, 2019). When Proposed Intervenors filed that motion, the Governor was still a Defendant in this case, no State Board of Elections existed, and both this suit and the state-court litigation in *Holmes v. Moore*, No 18-cv-15292 (N.C. Super. Ct.), were in their infancy. Neither the Governor nor the State Board members opposed the motion to intervene, *see* Gov. Cooper's Resp. to Mot. to Intervene, Doc. 34 (Feb. 12, 2019); State Board Defs.' Resp. to Mot. to Intervene, Doc. 36 (Feb. 14, 2019), but Plaintiffs did, arguing that "[t]he Executive Branch Defendants individually and collectively have a duty to defend S.B. 824 against constitutional attacks" and claiming that they would do so, Pls.' Opp. to Mot. to Intervene, Doc. 38 at 6 (Feb. 19, 2019).

On June 3, 2019, this Court denied Proposed Intervenors' motion to intervene. Doc. 56. The Court initially found that Proposed Intervenors need not independently establish Article III standing. *Id.* at 5. The Court then went on to deny Proposed Intervenors' request to intervene as of right, largely because the Court concluded that Defendants were "presently defending the challenged legislation" and there was not "sufficient evidence in the record" to "rebut[]" the presumption that State Defendants will adequately represent Proposed Intervenors' interests." *Id.* at 11, 14. The Court also denied Proposed Intervenors' alternative request for permissive intervention, relying again on lack of "evidence in the record" as to Defendants' ability to defend S.B. 824. *Id.* at 21–22. But this Court noted that this order was not necessarily its final word on the matter, stating that "should it become apparent during the litigation that State Defendants no longer intend to defend this lawsuit, the Court will entertain a renewed Motion to Intervene by Proposed Intervenors." *Id.* at 23.

III. Following Proposed Intervenors' Filing of Their Initial Motion to Intervene, Defendants Fail to Fully Defend S.B. 824.

Defendants' behaviors in both this case *and* the *Holmes* case—which have largely developed since Proposed Intervenors filed their motion to intervene in January—indicate that they are not mounting a meaningful defense to all the claims that the plaintiffs in the two cases raise.

A. Defendants' Actions in This Case Indicate That They Are Not Mounting a Full Defense of S.B. 824.

While the Governor and the State Board members both filed motions to dismiss in this case, neither motion defended the constitutionality of S.B. 824. The State Board members' motion simply argued that this Court should defer to the state court in the ongoing *Holmes* litigation. *See* State Bd. Defs.' Mem. in Supp. of Their Mot. to Dismiss or, in the Alternative, Mot. to Stay, Doc. 43 at 6–13 (Feb. 28, 2019). Indeed, in their reply brief the State Board clarified their preference that this Court "retain jurisdiction over the lawsuit and stay the proceedings pending resolution of the state court litigation" rather than order outright "dismissal." State Bd. Defs.' Reply in Supp. of Their Mot. to Dismiss or, in the Alternative, Mot. to Stay, Doc. 52 at 9 (Apr. 11, 2019) (quotation marks omitted).

Similarly, although the Governor moved to dismiss himself from the lawsuit, he did not move to have the case dismissed. Gov. Cooper's Mem. in Supp. of Mot. to Dismiss or, in the Alternative, for a Stay, Doc. 45 at 6–17 (Feb. 28, 2019) ("Doc. 45"). The Governor explained that he "s[ought] dismissal of all claims *against him* on immunity grounds as well as on the separate grounds that he is not a proper party." Reply in Supp. of Gov. Cooper's Mot. to Dismiss, Doc. 53 at 2 (Apr. 11, 2019) (emphasis added). Indeed, the

Governor's briefing made it clear that he was not seeking dismissal of the challenge to S.B. 824 altogether: he believes the State Board members "are the proper parties" to the lawsuit. *Id.* at 9.

This Court denied the State Board members' motion to stay and granted the Governor's motion, dismissing the Governor from the case. Mem. Op. and Order, Doc. 57 at 23 (July 2, 2019). In this case, then, the sole remaining named Defendants are the five members of the State Board, who are represented by the North Carolina Attorney General.

B. Defendants' Actions in *Holmes v. Moore* Indicate That They Are Not Mounting a Full Defense of S.B. 824.

The State Board of Elections is a defendant in the *Holmes* litigation, and, along with the State of North Carolina, it is being represented by the same litigation team from the Attorney General's office as are the State Board members in this case. Proposed Intervenors in this case are named defendants in the *Holmes* case (often called the "legislative defendants" in that case). The *Holmes* plaintiffs—six individual North Carolina voters—filed their complaint and an accompanying motion for a preliminary injunction on December 19, 2018, alleging that S.B. 824 violates North Carolina's Constitution in six ways. *Holmes v. Moore*, No 18-cv-15292 (N.C. Super. Ct.), Compl. (Dec. 19, 2019), Ex. 1 attached to Doc. 45, Doc. 45-1 ¶ 6 (Feb. 28, 2019). Most notably, that complaint's first claim alleges that S.B. 824 is racially discriminatory and thus violates the North Carolina Constitution's guarantee of equal protection. *Id.* ¶¶ 173–78. The *Holmes* litigation has progressed significantly: following briefing and a decision on a state-law jurisdictional issue, the case was transferred to a three-judge panel. The parties then

fully briefed a motion to dismiss, engaged in extensive discovery, fully briefed the plaintiffs' motion for a preliminary injunction, and argued the motion to dismiss and motion for a preliminary injunction before the three-judge panel.

The State Board's litigation choices in *Holmes* demonstrate its unwillingness to fully defend S.B. 824. *First*, in *Holmes* the State Board did not move to dismiss the state constitutional racial-discrimination claim—the claim that is analogous to Count II in the instant case. State Defs.' Br. in Supp. of the Mot. to Dismiss, Ex. C at 1 (May 17, 2019). In other words, had the Proposed Intervenors not been named defendants in *Holmes*, there would have been *no argument that the Complaint should have been dismissed in its entirety*. And the comparative length of the briefing indicates which Defendants took seriously their obligation to defend S.B. 824: the State Board's briefing in support of its partial motion to dismiss totaled twenty-four pages, while the Proposed Intervenors' briefing in support of their complete motion to dismiss totaled 113 pages. *See id.* at 13; *see also* State Defs.' Reply in Supp. of Their Mot. to Dismiss, Ex. D at 11 (June 25, 2019); Leg. Defs.' Br. in Supp. of Their Mot. to Dismiss, Ex. E at iii (May 17, 2019); Leg Defs.' Reply in Supp. of Their Mot. to Dismiss, Ex. F at i (June 25, 2019). There is no need to take our word for the fact that the State Board declined to fully defend the law: the plaintiffs in the *Holmes* litigation highlighted this failure on the very first page of their brief in opposition, arguing that "State Defendants, for their part, do not dispute that Plaintiffs' Complaint states a claim for intentional discrimination*, effectively conceding* that Count I sufficiently alleges that the General Assembly enacted in SB 824 a law intended to target voters of color." Pls.' Opp. to Defs.' Mots. to Dismiss, Ex. G at 2 (June 21, 2019) (emphasis

added). The State Board in reply denied making any concession, but still declined to assert that the racial discrimination claim lacks merit. *See* Ex. D at 8 n.3.

Second, while perhaps standing alone the State Board's failure to move to dismiss the intentional discrimination claim could be viewed simply as a tactical decision, the State Board's actions in response to the *Holmes* plaintiffs' preliminary injunction motion make clear that the State Board does not intend to vigorously defend S.B. 824 on the merits. The *Holmes* plaintiffs supported their preliminary injunction motion with nineteen affidavits, including affidavits from the plaintiffs themselves, other North Carolina voters, North Carolina legislators, county board of elections members, and expert witnesses. Declaration of Nicole Frazer Reaves, Ex. H ¶ 9-C (July 19, 2019) ("Reaves Decl."). While Proposed Intervenors fought for the right to depose these affiants to subject their assertions to cross examination, the State Board declined to support Proposed Intervenors in this fight and instead would have been content to allow the affidavits to go untested. *See* Email from Olga Vysotskaya, Special Deputy Atty. Gen., North Carolina, to Kellie Myers, Trial Court Administrator, Wake County, North Carolina, Ex. I at 1 (May 21, 2019, 12:07 PM, EST). After Proposed Intervenors earned the right to depose the plaintiffs' witnesses, *see* Order Denying Pls.' Emergency Mot. for a Protective Order and Granting Leg. Defs.' Mot. to Extend, Denying Leg. Defs.' Mot. to Strike, and Rescheduling Mots. Hearing at 2–3 (May 24, 2019), Ex. J, the State Board did not notice or subpoena a single deponent—while Proposed Intervenors did so and took eighteen depositions, Reaves Decl. ¶ 9-A. The attorneys for the State Board did not appear at a quarter of the depositions taken by the plaintiffs. *See* Tr. of Dep. of Keegan F. Callanan at 3:2–4:2 (June 21, 2019), Ex. K; Tr. of

Dep. of Linda Devore at 3:2–4:3 (June 20, 2019), Ex. L. And when they did appear for depositions, the attorneys for the State Board at times did not have any questions and were generally passive participants. *See, e.g.*, Tr. of Dep. of Isela D. Gutierrez Vol. II at 83:13–16; 162:8 (June 7, 2019), Ex. M (asking no questions of an individual whose affidavit was submitted by the plaintiffs in support of their motion for a preliminary injunction and who had been subpoenaed by Proposed Intervenors). Similarly, while the plaintiffs and Proposed Intervenors engaged in multiple rounds of written discovery requests, the State Board has made no written discovery requests. Reaves Decl. ¶ 9-B.

Third, the State Board's briefing on the preliminary injunction motion indicated why the Board was indifferent to deposing the plaintiffs' witnesses, as the State Board's response brief did not contest the plaintiffs' likelihood of succeeding on the merits. Rather than vigorously defending S.B. 824, the State Board indicated that it had "a primary objective . . . to expediently obtain clear guidance on what law, if any, will need to be enforced." State Defs.' Resp. to Pls.' Mot. for Prelim. Inj., Ex. N at 13 (June 19, 2019). "With that in mind," the State Board explained, "if the Court is inclined to issue an injunction at this stage, the State Board requests that it be granted some flexibility in making technical preparations that will allow it to implement the law in the event the injunction were later vacated." *Id*. The State Board's response and subsequent supplemental brief therefore were focused not on the merits but rather on advising the three-judge panel on how it could craft injunctive relief in a manner that would permit the State Board "some flexibility to account for the possibility of enforcing the law in the future." *Id*.; *see also* State Defs.' Supp. Br., Ex. O (July 1, 2019). In support of this

response, the State Board offered a sole affiant: Karen Brinson Bell, the newly appointed executive director of the State Board of Elections, who spoke only as to implementation of S.B. 824 that had begun and potential issues going forward. *See* Aff. of Karen Brinson Bell, Ex. P (June 18, 2019); Reaves Decl. ¶ 9-B. The State Board did not offer any affiants defending S.B. 824's constitutionality, but Proposed Intervenors offered seven—three experts; former Senator Joel Ford, an African American Democrat who was a primary sponsor of S.B. 824; and three county board of elections officials. Reaves Decl. ¶ 9-C.

The *Holmes* plaintiffs seized upon the State Board's refusal to oppose a preliminary injunction: a leading argument in their reply brief was that the "State Defendants do not dispute that Plaintiffs are likely to succeed on the merits of their claims." Reply in Supp. of Pls.' Mot. for Prel. Inj., Ex. Q at 1 (June 24, 2019). And while at argument the Board once again insisted that it was not conceding the validity of any claims, it also did not argue that the intentional discrimination claim lacked merit, and it focused its argument on the preliminary injunction motion on the implementation issues discussed in its brief. Oral Argument at 2:50:34–3:10:31, *available at Judges hear latest challenge to voter ID*, WRAL.COM (June 28, 2019, 6:05 PM), https://www.wral.com/judges-hear-latest-challenge-to-voter-id/18479653/ ("Oral Argument").

ARGUMENT

I. Proposed Intervenors Are Entitled To Intervene as of Right.

Under Federal Rule of Civil Procedure 24(a), a court "must permit anyone to intervene who" (1) makes a timely motion to intervene, (2) has "interest relating to the property or transaction that is the subject of the action," (3) is "so situated that disposing

of the action may as a practical matter impair or impede the movant's ability to protect its interest," and (4) shows that he is not "adequately represent[ed]" by "existing parties." FED. R. CIV. P. 24(a). As the Fourth Circuit has noted regarding intervention as of right, "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) (quotation marks omitted).[1]

A. Proposed Intervenors' Motion is Timely.

Three criteria determine whether a motion to intervene is timely: (1) "how far the underlying suit has progressed"; (2) the "prejudice" that granting the motion would cause to the other parties; and (3) the reason for the delay—if any—in filing the motion. *Alt v. U.S. E.P.A.*, 758 F.3d 588, 591 (4th Cir. 2014). This suit has progressed very little since Plaintiffs filed their complaint. The Governor succeeded in having himself dismissed from the suit, and the State Board members filed an unsuccessful motion to stay the case—and the Court has in no way considered the merits of the issues this case implicates. And because the case has not substantially progressed, granting Proposed Intervenors' motion to intervene would not prejudice the parties. What is more, there has been no delay in filing this motion: the Court denied Proposed Intervenors' initial motion to intervene around six weeks ago, and Proposed Intervenors filed the instant motion shortly after the major new

[1] Proposed Intervenors respectfully continue to believe that they were entitled to intervene as of right based on the arguments made in their prior briefing to the Court, *see* Doc. 8; *see also* Proposed Intervenors' Reply to the Resps. to Their Mot. to Intervene, Doc. 48 (Mar. 5, 2018) ("Doc. 48"), and hereby reserve the right to challenge the Court's rejection of those arguments on appeal.

developments in the *Holmes* case demonstrating Defendants' failure to adequately defend S.B. 824.

B. Defendants Have Declined to Defend S.B. 824, so Proposed Intervenors Have a Significantly Protectable Interest in the Subject of this Suit.

Proposed Intervenors have a "significantly protectable" interest in the enforcement of a constitutionally valid law that the General Assembly enacted at the people of North Carolina's express command. *Donaldson v. United States*, 400 U.S. 517, 531 (1971). Proposed Intervenors have two independent significantly protectable interests that entitle them to defend S.B. 824: (1) the interest of *the State* in defending the constitutionality of S.B. 824; and (2) the interest of *the Legislature* in defending the constitutionality of S.B. 824. *See Virginia House of Delegates v. Bethune-Hill*, 139 U.S. 1945, 1951 (2019) (treating these as two separate interests). The Supreme Court's decision in *Bethune-Hill*, which postdates this Court's denial of Proposed Intervenors' initial motion to intervene, has clarified the existence of Proposed Intervenors' significantly protectable interests.

As an initial matter, no party has disputed that the State itself has an interest in defending the validity of its laws, so the only question is whether Proposed Intervenors can assert that interest—which they undoubtedly have the right to do. Indeed, North Carolina law expressly authorizes Proposed Intervenors, on behalf of the General Assembly, to defend the constitutionality of legislation as "agents of the State." N.C. GEN. STAT. § 1-72.2(b); *see id.* § 120-32.6(b); *see also* Doc. 8 at 7–8 (discussing the legislative scheme in more detail). And the Supreme Court's recent decision in *Bethune-Hill* confirms that these sorts of laws allow a legislature to represent the State's interests in court, explaining that

"[s]ome States" "have authorized" one or both houses of the legislature "to litigate on the State's behalf." *Bethune-Hill*, 139 U.S. at 1951; *see also id.* (pointing to an Indiana statute similar to North Carolina's as an example of a statute that "authorize[s]" a legislative body "to litigate on the State's behalf"); Brief of State Appellees 47–48, *Bethune-Hill*, 139 S. Ct. 1945 (No. 18-281), 2019 WL 410765, at *47–48 (quoting N.C. GEN. STAT. § 120-32.6(b) as "providing that the state legislature 'shall be deemed the State of North Carolina' for purposes of defending the constitutionality of state law").

And if anything the legislature—*not* the Attorney General—has primacy in defending the State under North Carolina law: if the General Assembly "employs counsel in addition to or other than the Attorney General," the legislative litigants may "designate the counsel employed by the General Assembly as lead counsel in the defense" and the General Assembly's counsel "shall possess final decision-making authority with respect to the representation, counsel, or service for the General Assembly." N.C. GEN. STAT. § 120-32.6(c). And this interest in representing the State is not dependent in any way on whether the executive branch is involved in defending the State as well; North Carolina law does not suggest any such limitation. Instead, North Carolina law provides that "[*w*]*henever* the validity or constitutionality of an act of the General Assembly . . . is the subject of an action in any . . . federal court," Proposed Intervenors, "as agents of the State through the General Assembly, *shall be necessary parties* . . . ." *Id*. (emphasis added). The State's interest in defending the law, which Proposed Intervenors have a full right to vindicate, is a "significantly protectable" interest that alone suffices to support intervention as of right.

And Proposed Intervenors have a second significantly protectable interest entitling them to defend S.B. 824: the interest of the General Assembly itself in defending the constitutionality of S.B. 824. *See Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2665 (2015); *cf. Bethune-Hill*, 139 U.S. at 1953–54. Proposed Intervenors respectfully believe that given the fact that they represent both houses of the Legislature this interest in ensuring that their enactments are not "nullified," *Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. at 2665, is a significantly protectable interest, regardless of whether the State Board members are robustly defending the law, and they preserve all arguments to this effect for the purposes of appeal, *see* Doc. 8 at 7–10; Doc. 48 at 7–8. And analysis of the State Board members' efforts more properly should be considered under the adequacy of representation factor, not this factor. At any rate, it is clear that the State Board is not fully defending the constitutionality of S.B. 824 in numerous ways, and thus Proposed Intervenors have a significantly protectable interest in defending their legislative enactment under any potentially applicable standard.

First, the executive branch has declined to robustly and fully defend S.B. 824 in this suit. As discussed previously, *see supra* Statement of Facts Section III-A, the Governor has succeeded in extricating himself from this case, and the only remaining Defendants, the State Board members, have not defended this lawsuit on the merits. Instead, the only challenge they have mounted to Plaintiffs' complaint is a request for this case to be stayed on abstention grounds—a request that this Court denied. The State Board members have in no way challenged the merits of Plaintiffs' allegations; they did not move to dismiss the complaint under Rule 12(b)(6), and the time for them to do so has expired.

Second, the State Board has declined to adequately defend S.B. 824 in the *Holmes* litigation in North Carolina state court, and there is no reason to believe that its approach in this case will be any different. As discussed previously, *see supra* Statement of Facts Section III-B, the State Board's unwillingness to robustly defend S.B. 824 has permeated its behavior in the *Holmes* litigation. As an initial matter, the State Board has not moved to fully dismiss the complaint and has failed to mount a challenge to the intentional-discrimination claim—a fact that the *plaintiffs* used to support their argument that the *Holmes* case must continue. This is especially problematic because the intentional-discrimination claim is the key claim in both *Holmes* and the instant suit: it is the claim that prevailed against the State's prior voter ID law. *See North Carolina State Conf. of NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016).

And it is a particularly difficult claim for the State Board to defend, because of the Governor's control of the State Board and because of the Attorney General and Governor's longstanding opposition to such laws. The Governor's ability to control the policies embraced by the State Board is required by the North Carolina Constitution, as he has previously argued and as the Supreme Court of North Carolina has recognized. *See Cooper v. Berger*, 809 S.E.2d 98, 115–16 (2018). This means that the Governor's control of the State Board is a *necessary component* of the State Board's current structure. This control, paired with the Governor's opposition to voter ID, likely explains the State Board's reticence to wholeheartedly defend S.B. 824. When vetoing S.B. 824, the Governor stated that he believed that the law was "*designed* to suppress the rights of minority, poor and elderly voters." Doc. 8.1 at 2 (emphasis added). And the Governor is actively supporting

Plaintiff North Carolina NAACP's state-court challenge to the constitutional amendment requiring voter ID. He has filed an amicus brief in support of the invalidation of the amendment, criticizing it for its alleged "disproportionate[] impact" on "racial minorities." Br. of Gov. Roy Cooper as Amicus Curiae at 17, attached to Mot. for Leave to File Amicus Curiae Br. by Gov. Roy Cooper (July 12, 2019), *North Carolina State Conference of the NAACP et al. v. Moore et al.*, COA 19-384 (N.C. Ct. App.), Ex. R.

It therefore should come as no surprise that the State Board has assiduously *refused* to defend the merits of the intentional discrimination claim. Indeed, nothing in the State Board members' recently filed Answer suggests that they plan to vigorously defend the intentional discrimination claim. *See* State Bd. Defs.' Answer and Defenses, Doc. 59 ¶ 147 (July 15, 2019) (raising no affirmative defenses); *see also id.* ¶¶ 96–104 (stating that that the State Board members "lack . . . knowledge or information sufficient to form a belief as to the truth or falsity" of paragraphs including allegations of racial discrimination). The State Board also did not seriously engage in discovery—failing to fight for discovery in the first place and then failing to notice a single deposition. The State Board likewise *did not oppose entry of an injunction preventing S.B. 824 from going into effect*—a clear indicator that it is declining to robustly defend S.B. 824. Put another way, had Proposed Intervenors *not* been named defendants in *Holmes*, there would have been *no* discovery, *no* full motion to dismiss, and the Court could have entered an *unopposed* preliminary injunction barring S.B. 824 from going into effect.

It is clear from the record in this and the *Holmes* litigation that the State Board members have declined to adequately defend S.B. 824. Proposed Intervenors have a

significantly protectable interest in defending the constitutionality of S.B. 824 and are entitled to intervene as of right under Rule 24(a)(2).

C. The Court's Disposition of This Case Will Impair Proposed Intervenors' Significantly Protectable Interest.

Intervention is required under Rule 24(a) where "the disposition of a case would, as a practical matter, impair the applicant's ability to protect his interest." *Spring Const. Co. v. Harris*, 614 F.2d 374, 377 (4th Cir. 1980). The disposition of this case will certainly impair Proposed Intervenors' established significant interest in defending the constitutionality of S.B. 824. The Court need only look to the State Board's behavior in the *Holmes* litigation: it failed to engage in discovery, failed to seek dismissal of all claims, and failed to oppose a preliminary injunction. Assuming the State Board members take such an approach in the instant litigation (and there is no reason to believe they will not), barring intervention, the Court may very well be faced with a trial on a least some claims that are unopposed on the merits and a request to enjoin S.B. 824 that is unopposed. If the Court grants this relief, the State's interest in the validity of its laws will have been undermined. The General Assembly's efforts to pass S.B. 824 will have been "completely nullified." *Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. at 2665 (quotation marks omitted). And its continuing authority to enact voting laws will be burdened—itself a significantly protectable interest. *See Francis v. Chamber of Commerce of U.S.*, 481 F.2d 192, 195 n.8 (4th Cir. 1973) (noting that stare decisis, which would attach to an adverse appellate ruling in the case, "by itself may furnish the practical disadvantage required under [Rule] 24(a)").

The grant of amicus status to Proposed Intervenors will in no way cure the imminent impairment to Proposed Intervenors' interests: an amicus cannot engage in discovery, seek dismissal of a claim, or oppose a preliminary injunction. Given the litigation decisions the State Board made in *Holmes*, without Proposed Intervenors' involvement in this suit it is likely that *no* party will take these actions—and the disposition of this case will impair Proposed Intervenors' significant interest in defending S.B. 824, because without intervention, no party will fully defend the law from all the challenges raised against it.

D. The Existing Defendants Will Not Adequately Protect Proposed Intervenors' Significantly Protectable Interest.

"The requirement of [inadequate representation] is satisfied if the applicant shows that representation of his interest *may be* inadequate." *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972) (emphasis added; quotation marks omitted); *accord United Guaranty Residential Ins. Co. of Iowa v. Philadelphia Sav. Fund Soc'y*, 819 F.2d 473, 476 (4th Cir. 1987). "[A]nd the burden of making that showing should be treated as minimal." *Trbovich*, 404 U.S. at 538 n.10.

Proposed Intervenors clear this hurdle. The State Board members have not opposed the racial-discrimination allegations raised against S.B. 824, which indicates that they will not fully defend S.B. 824. What is more, the State Board has indicated that it has "a primary objective . . . to expediently obtain clear guidance on what law, if any, will need to be enforced." *See* Ex. N at 13. Given this state of affairs, Proposed Intervenors and the State Board members cannot be said to have the same "ultimate objective," *see* Doc. 56 at 16, and thus there is no reason to deny intervention. Defendants are not adequately protecting

Proposed Intervenors' significantly protectable interest; therefore, Proposed Intervenors have a right to intervene under Rule 24(a).[2]

II. Alternatively, Proposed Intervenors Satisfy the Minimal Requirements for Permissive Intervention.

This Court has previously permitted Proposed Intervenors to intervene under Rule 24(b) to defend North Carolina law. *See, e.g.*, *Carcaño v. McCrory*, 315 F.R.D. 176, 177 (M.D.N.C. 2016); *see also* Mem. Order, *People for the Ethical Treatment of Animals v. Stein*, 1:16-cv-00025, Doc. 92 (M.D.N.C. May 14, 2019), Ex. S (allowing private parties to intervene to defend a North Carolina law also being defended by the Attorney General). Under Rule 24(b), the Court "may permit anyone to intervene who" files a timely motion and who "has 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). Intervention must also not deprive the Court of subject-matter jurisdiction. *See Carcaño*, 315 F.R.D. at 178 n.2.

Timeliness is measured by the same three criteria used for intervention as of right. *Students for Fair Admissions Inc. v. Univ. of North Carolina*, 319 F.R.D. 490, 494 (M.D.N.C. 2017). As explained above, *see supra* Argument Section I-A, Proposed Intervenors meet these criteria.

And as shown in the Proposed Answer, Proposed Intervenors' defenses share with the "main action" questions of both law and fact. FED. R. CIV. P. 24(b)(1)(B). Proposed

[2] Proposed Intervenors continue to believe that the present and past activities of the Governor and Attorney General support the contention that Defendants will not adequately protect Proposed Intervenors' interests and hereby preserve those arguments for the purposes of appeal. *See* Doc. 8 at 11–16; Doc. 48 at 8–10.

Intervenors directly respond to Plaintiffs' claims, *see supra* Statement of Facts Section II, by arguing that S.B. 824 does not display discriminatory intent, and will neither unduly burden the right to vote nor have a disparate impact on minority voters—and thus S.B. 824 fully complies with the Constitution and the Voting Rights Act. These arguments present completely overlapping questions of fact and law. And because the legal questions are ones of federal law, intervention will not deprive the Court of subject-matter jurisdiction.

What is more, given the current state of facts, it is clear that Proposed Intervenors will enhance, not hinder, the timely adjudication of this case, *see* Doc. 56 at 21, and permissive intervention should be granted. Proposed Intervenor's actions in *Holmes* indicate that the Court will benefit from their involvement in this case. Proposed Intervenors were responsible for the robust motion to dismiss in *Holmes*—arguing that *all* of the plaintiffs' claims were insufficiently pleaded. And Proposed Intervenors were also responsible for the comprehensive opposition to the *Holmes* motion for a preliminary injunction—fighting for and taking extensive discovery from the plaintiffs, developing a factual record in support of S.B. 824, fully opposing the motion for a preliminary injunction, and strongly arguing in support of S.B. 824 at the *Holmes* hearing. *See supra* Statement of Facts Section III-B. The State Board, by contrast, was content to allow Proposed Intervenors to take the lead on these matters. *See, e.g.*, Oral Argument at 2:51:40–2:52:08. The Court will benefit from the robust arguments that Proposed Intervenors bring to the table. Indeed, allowing Proposed Intervenors to intervene is crucial to ensure that the Court is able to fairly adjudicate this case. Our system is an adversarial system, and if there

is no robust response to Plaintiffs' arguments, the Court will not be exposed to the best arguments against Plaintiffs' positions.

Proposed Intervenors therefore satisfy all requirements for permissive intervention (which should be granted "liberal[ly]" *see Feller*, 802 F.2d at 729), and the Court should grant their request to intervene.

CONCLUSION

Proposed Intervenors have a significantly protectable interest in S.B. 824. Because Defendants have declined to adequately defend the law, this Court must allow Proposed Intervenors to intervene under Rule 24(a) or, at a minimum, under Rule 24(b).

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Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Pursuant to Local Rule 7.3(d)(1), the undersigned counsel hereby certifies that the foregoing Memorandum, including body, headings, and footnotes, contains 6,049 words as measured by Microsoft Word.

/s/ Nicole J. Moss
Nicole J. Moss

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that, on July 19, 2019, I electronically filed the foregoing Memorandum and accompanying exhibits with the Clerk of the Court using the CM/ECF system which will send notification of such to all counsel of record in this matter.

/s/ Nicole J. Moss
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