UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

MARY T. THOMAS, *et al.*,

Plaintiffs,

v.

MARCI ANDINO, *et al.*,

Defendants.

Case No.: 3:20-cv-01552-JMC

PLAINTIFFS' OPPOSITION TO MOTION TO INTERVENE OF THE SOUTH CAROLINA REPUBLICAN PARTY

Movant the South Carolina Republican Party ("SCRP" or "Movant"), seeks to intervene in this time-sensitive election matter in which individual Plaintiffs' right to vote is on the line. Not mentioning the public health crisis once, it never explains how the resolution of this case will affect its own interests differently from how it will affect the public generally. This is because Movant's asserted interest in electoral integrity generally does not justify intervention. And while SCRP may have associational interests in who may be *eligible* to participate in its primary, this case does not implicate voter eligibility, but rather concerns ballot-access restrictions that, absent relief, will disenfranchise tens of thousands of indisputably eligible South Carolina voters—including Republicans. Thus, because Movant does not "stand to gain or lose by the direct legal operation of the district court's judgment" in any particularized way, it is not entitled to intervene. *Teague v. Bakker*, 931 F.2d 259, 261 (4th Cir. 1991).

As detailed below, federal courts have repeatedly rejected efforts of political parties and officials whose personal right to vote is not at stake to intervene in a case by asserting generalized interests in election integrity. This Court should do the same.

Movant also seeks to permissively intervene in the case, citing the benefits of bringing together all interested parties for one resolution of the relevant issues. But SCRP has no specific interests in this case. Instead, the Court can gain the benefit of Movant's views through participation as *amici curiae*—to which Plaintiffs consent—without the downsides of delay, prejudice, and confusion. *See Stuart v. Huff*, 706 F.3d 345, 355 (4th Cir. 2013).

ARGUMENT

Rule 24 of the Federal Rules of Civil Procedure provides the standards governing intervention, whether as a matter of right or permissive. Fed. R. Civ. P. 24. Movant cannot satisfy either standard, and its participation in this case would prejudice Plaintiffs by delaying relief to this time-sensitive case. Because the Movant has no substantial interests in this case different from that of the general public, it cannot justify intervention and can adequately express its views as amici curiae.

I. The Court should deny intervention as a matter of right because SCRP lacks any significantly protectable interest and instead asserts only generalized interests shared by the public at large—interests adequately protected by existing Defendants.

Rule 24(a)(2) allows intervention as a matter of right "if the movant can demonstrate '(1) an interest in the subject matter of the action; (2) that the protection of this interest would be impaired because of the action; and (3) that the applicant's interest is not adequately represented by existing parties to the litigation.'" *Stuart*, 706 F.3d at 349 (quoting *Teague*, 931 F.2d at 260–61). Each of these elements is required for intervention as a matter of right; Movant satisfies none of them.

A. Movant asserts only generalized interests shared by the public at large and interests not directly implicated by this case.

To demonstrate it has an interest in the action sufficient to intervene, a movant must establish a "'significantly protectable interest,'" *Teague*, 931 F.2d at 261 (quoting *Donaldson v.*

United States, 400 U.S. 517, 531 (1971)), and that "'the denial of the motion to intervene would impair or impede the [] ability to protect its interest.'" *S.C. Elec. & Gas Co. v. Whitfield*, No. 18-cv-01795-JMC, 2018 WL 3470660, at *3 (D.S.C. July 18, 2018) (quoting *Houston Gen. Ins. Co. v. Moore*, 193 F.3d 838, 839 (4th Cir. 1999)). In other words, the intervenors must have an interest that is "contingent on the outcome of other litigation," meaning that they must "stand to gain or lose by the direct legal operation of the district court's judgment." *Teague*, 931 F.2d at 261. A "petitioner-intervenor must demonstrate more than a general interest in the subject matter of the litigation [for] intervention [to] be allowed." *Alexander v. Hall*, 64 F.R.D. 152, 157 (D.S.C. 1974). *See RLI Ins. Co. v. Nexus Servs., Inc.*, No. 5:18-CV-00066, 2018 WL 5621982, at *3 (W.D. Va. Oct. 30, 2018) ("'general interest in the subject matter of pending litigation does not constitute a protectable interest within the meaning of Rule 24(a)(2)'" (quoting *Dairy Maid Dairy, Inc. v. United States*, 147 F.R.D. 109, 111 (E.D. Va. 1993))).

Here, SCRP has not shown specific interests in this case such that they "stand to gain or lose" depending on the outcome. Rather, it cites vague concerns on "maintaining ballot integrity and preventing voter fraud." ECF No. 11, at 3. These generalized interests and amorphous concerns in ensuring the integrity of the electoral process shared broadly by all members of the public are not "unique to the proposed intervenor," *Wis. Educ. Ass'n Council v. Walker*, 705 F.3d 640, 658 (7th Cir. 2013), and are thus not "sufficiently specific . . . to be cognizable" for intervention, *Sokaogon Chippewa Cmty. v. Babbitt*, 214 F.3d 941, 948 (7th Cir. 2000).

1. SCRP's broad interest in election integrity and the right to vote are the shared by all South Carolina voters and are not the type of specific interests that mandate intervention.

Courts have repeatedly held that individual voters' and voting-related organizations' broad interests in election integrity do not support intervention under Rule 24(a). *See Common Cause Ind. v. Lawson*, No. 17-cv-03936, 2018 WL 1070472, at *4–5 (S.D. Ind. Feb. 27, 2018)

(in organizational plaintiff's challenge to voter registration law under the National Voter Registration Act, denying intervention to organization whose mission includes election integrity and ensuring voter roll list maintenance laws are followed); *One Wis. Inst., Inc. v. Nichol*, 310 F.R.D. 394, 397 (W.D. Wis. 2015) (legislators, voters, and local election officials denied intervention in challenge to various Wisconsin election laws); Order Denying Intervention of True the Vote, *Veasey v. Perry*, No. 2:13-cv-00193, at 1–2 (S.D. Tex. Dec. 11, 2013) (finding that the "election integrity" organization's "interests are generalized" and denying intervention in litigation challenging a voter identification law), *aff'd* 577 F. App'x 261 (5th Cir. 2014); *United States v. Florida*, No. 4:12-cv-285, 2012 WL 13034013, at *2-3 (N.D. Fla. Nov. 6, 2012); *Wis. Right to Life Political Action Comm. v. Brennan*, No. 09-CV-764-VIS, 2010 WL 933809, at *3 (W.D. Wis. Mar. 11, 2010). This is because "generalized, public policy interests are insufficient to create [the] direct, substantial interest required." *Wis. Right to Life*, 2010 WL 933809, at *3; *see also Hollingsworth v. Perry*, 570 U.S. 693, 706 (2013) (intervenor's interest in "vindicat[ing] the constitutional validity of a generally applicable California law" was a "'generalized grievance' . . . insufficient to confer standing").

For example, in *United States v. Florida*, the court held that the interest of organizations and their members in ensuring confidence in the election process through accurate voting rolls are generalized interests that are "the same for the proposed intervenors . . . as for every other registered voter in the state" and thus "plainly do not afford a voter—or an organization with members who are voters—a *right* to intervene under Rule 24(a)." 2012 WL 13034013, at *1. And in *One Wisconsin Institute*, the court rejected proposed intervenor's "asserted interest in fraud-free elections" as insufficient to justify intervention as of right because such interest was "really just the proposed intervenors' agreement with the policy underlying the challenged

legislation." 310 F.R.D. at 397. The court explained that such an "[a]bstract agreement with the position of one side or another is not the type of 'direct, significant, and legally protectable' interest that gives rise to a right to intervene." *Id.* (citation omitted).

The same is true here. Without any showing that SCRP members will be deprived of the right to vote—as the individual Plaintiffs and the Family Unit's members will be if the Challenged Requirements remain in place—its generalized interest in election integrity cannot support intervention. But this is all that Movant offers, vague assertions about having a "direct interest in the subject matter of this litigation because the [Challenged Requirements] govern[] the absentee voting process currently being encouraged by the Republican Party to increase voter participation." ECF No. 11, at 3. These interests are not only shared by all South Carolina voters, but are the very stuff of Plaintiffs' claims, which seek to stop unduly burdensome requirements from "prevent[ing] tens of thousands of South Carolinians who might otherwise vote in scheduled elections from participating in those contests," Compl. ¶ 78—that is, to protect or "increase voter participation." *Cf. Somers v. S.C. State Election Comm'n*, 871 F. Supp. 2d 490, 496 (D.S.C. 2012) (three-judge court) (holding that a candidate lacked standing in voting rights litigation where she failed to articulate a "particularized" harm because she sought to represent the interests of "every" voter).

Likewise, the public at large holds an obvious interest in "maintaining ballot integrity and preventing voter fraud." ECF No. 11, at 3. Allowing intervention on such a basis would allow "anyone with an interest—however broad or universal—to intervene in any lawsuit in which the government is a party" and the case touches upon voting. *Sokaogon Chippewa Cmty.*, 214 F.3d at 948.

Not only does SCRP share no interests different from the public at large, courts have rejected intervention based on a lack of significantly protectable interests even where proposed intervenors possessed a more direct connection to the action at issue. For example, in *North Carolina State Conference of NAACP v. Cooper*, 332 F.R.D. 161, 168 (M.D.N.C. 2019), the court denied intervention to state representatives in a case challenging the constitutionality of a voter identification law, holding that the movants "failed to demonstrate that they have a significantly protectable interest in likewise defending the constitutionality of S.B. 824 sufficient to warrant a right to intervene under Rule 24(a)(2)." *See also One Wis. Inst., Inc.*, 310 F.R.D. at 397.

Because Movant's generalized interests are insufficient to support intervention, they fail to meet the "significantly protectable interest" test.

2. Movant's other asserted interests are also entirely unaffected by this case.

Movant offers an additional reason for why they have sufficient interests to intervene in this case: SCRP's broad interest in "electing Republicans." ECF No. 11, at 3. But that interest is not at all affected by this case. However, the case is resolved, there is no factual or legal basis to claim SCRP's interests will be affected whatsoever.

First, this case concerns the administrative procedures whereby *all* eligible voters may exercise their fundamental right to vote in either party's primary elections. Thus, Plaintiffs' claims challenging the state's election administration procedures do not implicate associational rights in any way. The SCRP has not even alleged, let alone offered a factual basis, that enjoining the Challenged Requirements will offer any particular advantage or disadvantage to one Republican candidate or another in the primary, or one political party over another in the general election. Rather, there is every reason to believe that all candidates and voters will

benefit equally from the opportunity to vote safely amid the COVID-19 pandemic free from fear that they might be putting themselves at grave risk of bodily harm by voting in person.

Suspending the Excuse and Witness Requirements during a pandemic will only affect the standards for whether certain ballots are counted—a prerogative of the State of South Carolina and its officers, not the SCRP. It is the Defendant South Carolina State Election Commission that sets standards to regulate state elections, not SCRP. Because the presence or absence of the Excuse and Witness requirements does nothing to change the structure of the competitive environment in a way from which the SCRP stands to gain or lose, SCRP has no significantly protectable interest in this case.[1] *Cf. Marcellus v. State Bd. of Elections*, 849 F.3d 169, 172 (4th Cir. 2017) (concluding "burden on associational rights imposed by" ballot regulations governing use of party identifiers "at most minimal").

B. Movant has not overcome the strong presumption that Defendants are adequately representing the interest in election integrity they assert.

In the Fourth Circuit, a movant seeking to intervene as a defendant alongside the government in a challenge to the constitutionality of a state statute must make a "*very* strong showing" of inadequacy of representation. *Stuart*, 706 F.3d at 351 (emphasis added). This is because in "matters of public law litigation that may affect great numbers of citizens, it is the government's basic duty to represent the public interest." *Id.* Otherwise, intervention would place "severe and unnecessary burden on government agencies as they seek to fulfill" their assigned duties. *Id.* at 352. Further, "the prospect of a deluge of potential intervenors" could

[1] SCRP also lacks standing for similar reasons to why it lacks a significant interest in this case. Its general interest in election integrity and vague fear that this case threatens Republican candidates is insufficient to establish a "substantial risk" of harm. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014). For Movant SCRP to be added to the case as an intervenor, it must establish standing separate from the plaintiffs and the defendants. *See Town of Chester, New York v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017); *Banks v. St. James Par. Sch. Bd.*, 757 F. App'x 326, 331 (5th Cir. 2018).

compel the government "to modify its litigation strategy to suit the self-interested motivations of those who seek party status, or else suffer the consequences of a geometrically protracted, costly, and complicated litigation." *Id.* at 351.

To rebut this strong "presumption of adequacy," an applicant "must show either collusion between the existing parties, adversity of interests between themselves and the State Defendants, or nonfeasance on the part of the State Defendants." *N.C. State Conf. of NAACP*, 332 F.R.D. at 169. SCRP does not show any of these.

Defendants have indicated that they intend to defend the case and are scheduled to oppose Plaintiffs' motion for injunctive relief on May 11. There is no reason to expect nonfeasance or a "clear dereliction of duty." *Chiglo v. City of Preston*, 104 F.3d 185, 188 (8th Cir. 1997). In any event, to the extent SCRP is concerned that Defendants may take a different approach to defending this case than SCRP would, a mere "disagreement over how to approach the conduct of the litigation is not enough to rebut the presumption of adequacy." *Stuart*, 706 F.3d at 353; *see also Saldano v. Roach*, 363 F.3d 545, 555 (5th Cir. 2004) ("Simply because the [intervenor] would have made a different [litigation] decision does not mean that the Attorney General is inadequately representing the State's interest."); *N.C. State Conf. of NAACP*, 332 F.R.D. at 170 ("The Court is unpersuaded by Proposed Intervenors' contention that there is adversity of interests because State Defendants will not employ the same approach to the litigation as would the General Assembly."); *Va. Uranium, Inc. v. McAuliffe*, No. 4:15-CV-00031, 2015 WL 6143105, at *3 (W.D. Va. Oct. 19, 2015).

SCRP has no reason to distrust Defendants' position in this lawsuit. Indeed, it is the state Attorney General who is "charged with the duty to represent the State in defense of its existing laws," and a disagreement as to how to defend this case is insufficient to supplant this role. *N.C.*

State Conf. of NAACP, 332 F.R.D. at 169. And while SCRP may even have a "fervent desire to protect the statute, 'stronger, more specific interests do not adverse interests make.'" *United States v. North Carolina*, No. 1:13CV861, 2014 WL 494911, at *3 (M.D.N.C. Feb. 6, 2014) (quoting *Stuart*, 706 F.3d at 353). SCRP has come nowhere close to making the needed "very strong showing" of nonfeasance, collusion, or adversity of interests necessary to overcome the presumption of adequacy of representation.

II. The Court should deny permissive intervention because Proposed-Intervenors will only complicate and delay the case and their views can be sufficiently shared through *amicus curiae* participation.

Federal Rules of Civil Procedure 24(b) permits intervention in the court's discretion "when a movant 'has a claim or defense that shares with the main action a common question of law or fact.'" *Lee*, 2015 WL 5178993, at *4 (quoting Fed. R. Civ. P. 24(b)). In evaluating permissive intervention, however, "the court must consider 'whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.'" *Stuart*, 706 F.3d at 349 (quoting Fed. R. Civ. P. 24(b)(3)). In *Stuart*, the Fourth Circuit affirmed the district court's denial of permissive intervention for this very reason, agreeing that adding multiple intervenors would "complicate the discovery process and consume additional resources of the court and the parties." *Id.* at 355 (internal citation & quotation marks omitted). Instead, the Fourth Circuit and courts within it have repeatedly counseled that amicus curiae participation offers a way for movants to "present their views" without consuming additional time and resources of the court and parties. *Id.*; *see also Lee*, 2015 WL 5178993, at *5. These "alternative avenues of expression reinforce[] our disinclination to drive district courts into multi-cornered lawsuits by indiscriminately granting would-be intervenors party status and all the privileges pertaining thereto." *Id.*

Courts have also recognized that these concerns about intervenors complicating election-related litigation in the months leading up to an election create an additional disincentive for allowing intervention. *See, e.g.*, *N.C. State Conf. of NAACP*, 332 F.R.D. at 172 ("The nature of the claims at issue and the imminence of the election require a swift resolution on the merits to bring certainty and confidence to the voting process."). Rather, in "cases like this one, where a group of plaintiffs challenge state legislation, the court should evaluate requests to intervene with special care, lest the case be swamped by extraneous parties who would do little more than reprise the political debate that produced the legislation in the first place." *One Wis. Inst.*, 310 F.R.D. at 397.

Permitting intervention here would only serve to delay and complicate resolution of this case and lead to greater risk of confusion close to the election through, among other things, additional (and likely repetitive) briefing. SCRP ought instead be permitted to participate as *amicus curiae* which would allow it to express its views on the case without hindering its timely resolution. Plaintiffs do not oppose such participation.

CONCLUSION

For the foregoing reasons, Plaintiffs request that the Court deny SCRP's motion to intervene.

Dated: May 5, 2020

Respectfully submitted,

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* *Appearing Pro Hac Vice*

** *Pro Hac Vice application pending*

CERTIFICATE OF SERVICE

I certify that on May 5, 2020, I served a copy of the foregoing Consolidated Brief in Opposition to Motions in Intervene via filing with the Court's CM/ECF system, which sent copies of this document to Counsel of Record.

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