

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

LEAGUE OF WOMEN VOTERS OF)
 NORTH CAROLINA; A. PHILIP)
 RANDOLPH INSTITUTE; UNIFOUR)
 ONESTOP COLLABORATIVE;)
 COMMON CAUSE NORTH)
 CAROLINA; GOLDIE WELLS; KAY)
 BRANDON; OCTAVIA RAINEY;)
 SARA STOHLER; and HUGH)
 STOHLER,)

Plaintiffs,

v.

THE STATE OF NORTH CAROLINA;)
 JOSHUA B. HOWARD, in his official)
 capacity as a member of the State Board)
 of Elections; RHONDA K. AMOROSO,)
 in her official capacity as a member of the)
 State Board of Elections; JOSHUA D.)
 MALCOLM in his official capacity as a)
 member of the State Board of Elections;)
 PAUL J. FOLEY, in his official capacity)
 as a member of the State Board of)
 Elections; MAJA KRICKER, in her)
 official capacity as a member of the State)
 Board of Elections; and PATRICK L.)
 MCCRORY, in his official capacity as)
 the Governor of the State of North)
 Carolina,)

Civil Action No. 1:13-CV-00660-TDS-JEP

Defendants.

**MEMORANDUM OF LAW IN SUPPORT OF MOTION TO INTERVENE AS
PLAINTIFFS BY LOUIS M. DUKE, CHARLES M. GRAY, ASGOD
BARRANTES, JOSUE E. BERDUO, AND BRIAN M. MILLER**

Louis M. Duke, Charles M. Gray, Asgod Barrantes, Josue E. Berduo, and Brian M.

Miller (the “Duke Plaintiffs”) seek to participate as intervening plaintiffs in the above-captioned lawsuit challenging the constitutionality of several recent discriminatory and

unduly burdensome changes to North Carolina's election laws set forth in House Bill 589, 2013-2014 Sess. (N.C. 2013) ("HB 589"), also known as the Voter Information Verification Act ("VIVA"). The Duke Plaintiffs are entitled to intervene in this case as a matter of right under Federal Rule of Civil Procedure 24(a)(2). In the alternative, the Duke Plaintiffs request permissive intervention pursuant to Rule 24(b). In accordance with Rule 24(c), a proposed complaint in intervention is attached as **Exhibit A**.

Counsel for the Duke Plaintiffs have conferred with counsel for the current Plaintiffs, who have stated that they consent to the intervention. Counsel for the Duke Plaintiffs have also contacted the Defendants' counsel but have not yet received a response concerning the Defendants' position.

I. BACKGROUND

The Duke Plaintiffs, all young voters residing in and registered to vote in North Carolina, seek to intervene in this action to protect their voting rights and interests that are guaranteed by the Fourteenth and Twenty-Sixth Amendments to the United States Constitution. In this litigation, several community organizations and individual voters have challenged specific provisions of VIVA, which was recently enacted by the North Carolina General Assembly on party lines after brief and hurried discussion in the final three days of the legislative session.

Like the current plaintiffs, the Duke Plaintiffs assert that the law violates their right to equal protection as guaranteed by the Fourteenth Amendment. But as young voters, the Duke Plaintiffs bring the unique perspective of a group, not currently

represented by any party to the litigation, whose voting rights are significantly impacted by VIVA. As detailed in the attached proposed complaint in intervention, VIVA infringes upon or outright denies the rights of young North Carolinians to vote through its restrictive voter identification (“ID”) requirements; the curtailment of early or “one stop” voting; the elimination of same-day registration; the elimination of out-of-precinct voting; the removal of the discretion of local boards of election to keep polling locations open for an extra hour on Election Day; and the elimination of pre-registration for 16 and 17-year-olds. These drastic changes in North Carolina’s voting laws disproportionately affect young voters as compared to the general population. Accordingly, in addition to claiming a violation of the Fourteenth Amendment, the Duke Plaintiffs allege injury under the Twenty-Sixth Amendment to the U.S. Constitution, which prohibits states from intentionally infringing or denying “[t]he right of citizens of the United States, who are eighteen years of age or older, to vote . . . on account of age.”

* * *

The Complaint in this matter was filed the day that the Governor signed VIVA into law, August 12, 2013. Defendants sought and were granted an extension of time to file their Answer, which was submitted to the Court on October 21, 2013. The initial pre-trial conference has yet to take place; it is scheduled for December 12, 2013. There has been no other motions practice and, currently, no other deadlines have been set.

II. ARGUMENT

The resolution of this litigation will have a direct impact on the Duke Plaintiffs' right to vote, a right long recognized as "fundamental . . . because [it is] preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). Given that imperative interest, which is not adequately protected by any of the current plaintiffs, and the fact that the litigation is still at an early stage, the Duke Plaintiffs' motion to intervene should be granted. As set forth below, the Duke Plaintiffs meet the requirements for intervention as a matter of right under Federal Rule of Civil Procedure 24(a)(2). But even if that Rule did not apply, this Court could and should allow the Duke Plaintiffs to intervene under Rule 24(b), which allows for permissive intervention at the Court's discretion.

A. THE DUKE PLAINTIFFS ARE ENTITLED TO INTERVENE AS A MATTER OF RIGHT UNDER RULE 24(A)(2)

The Duke Plaintiffs easily meet the test applied in the Fourth Circuit to motions to intervene as a matter of right. Specifically, (1) the motion is timely; (2) the Duke Plaintiffs possess an interest in the subject matter of the action; (3) denial of their motion would impair or impede their ability to protect their interest; and (4) their interest is not adequately represented by the existing parties to the litigation. Fed. R. Civ. P. 24(a)(2); *Houston Gen. Ins. Co. v. Moore*, 193 F.3d 838, 839 (4th Cir. 1999).

1. The Motion to Intervene Is Timely.

The Duke Plaintiffs seek to intervene in this action at an early stage. No substantive briefing has taken place, and the Court has yet to hold the initial status

conference. Accordingly, no party can legitimately claim that intervention by the Duke Plaintiffs at this early stage would cause them any prejudicial delay. Nor have the Duke Plaintiffs delayed in moving for intervention. Indeed, VIVA itself was enacted less than three months ago.

Under these circumstances, the Court should find the motion timely. *See Gould v. Alleco, Inc.*, 883 F.2d 281, 286 (4th Cir. 1989) (holding that, in determining the timeliness of an intervention motion “[a] reviewing court should look at how far the suit has progressed, the prejudice which delay might cause other parties, and the reason for the tardiness in moving to intervene”). *See also United States v. Virginia*, 282 F.R.D. 403, 405 (E.D.Va. 2012) (“Where a case has not progressed beyond the initial pleading stage, a motion to intervene is timely.”) (citing *Scardelletti v. Debarr*, 265 F.3d 195, 203 (4th Cir. 2001), *rev’d on other grounds by Devlin v. Scardelletti*, 536 U.S. 1 (2002)); *Town of Davis v. W. Va. Power & Transmission Co., Inc.*, 647 F.Supp. 2d 622, 630 (N.D.W.Va. 2007) (granting motion to intervene where discovery had not commenced and no scheduling order had been entered).

2. The Duke Plaintiffs Possess A Significantly Protectable Interest In the Substance of This Litigation.

This litigation concerns the constitutionality of specific provisions of VIVA which, if not enjoined, will directly and significantly impact the Duke Plaintiffs’ right to vote, as well as their efforts to encourage and facilitate voter participation in North Carolina. VIVA’s elimination of same-day voter registration and out-of-precinct provisional voting,

for example, is highly likely to infringe upon the Duke Plaintiffs' and other young North Carolinian's right to vote. Studies have demonstrated that same-day registration has a positive effect on youth turnout. *See* Commission on Youth Voting & Civic Knowledge Report 11. This should come as no surprise. As the Duke Plaintiffs' own experiences demonstrate, young voters are much more likely to move residences. *See* Proposed Compl. ¶¶ 8-11. Nor is it unusual for a student to have his or her registration form rejected or challenged, particularly if the student uses an on-campus address to register. *See, e.g., id.* at ¶ 8. Even when young people successfully register, they are more likely to find themselves outside of their home precinct come election time, particularly if they intend to return to their family home and remain registered there. *See, e.g., id.* at ¶ 9. Same-day registration and out-of-precinct provisional voting helped to guarantee the enfranchisement of these young voters, permitting them to register or update their registration information at the same time and in the same place that they cast their ballot. These laws also enabled young voters to cast provisional ballots if they could not return to their home precinct to vote.

VIVA's reduction in early voting also seriously threatens to infringe the Duke Plaintiffs' voting rights and the rights of other young North Carolinians. Each of the Duke Plaintiffs has used early voting in the past, and a recent analysis of Florida's 2008 election turnout determined that younger voters are disproportionately likely to use early voting on the weekend at the end of the early voting period. *See New State Voting Laws II: Protecting the Right to Vote in the Sunshine State: Hearing Before the Subcomm. on*

the Constitution, Civil Rights & Human Rights of the S. Comm. on the Judiciary, 112th Cong. 11-12 (Jan. 27, 2012) (testimony of Prof. Michael C. Herron, Ph.D. & Prof. Daniel A. Smith, Ph.D). VIVA, however, cuts back significantly on early voting, including by eliminating a critical four hours of early voting on the Saturday before the election. *See* HB 589, § 25.1. These reductions are likely to infringe on young voters' rights, as well as make it substantially more difficult for the Duke Plaintiffs to engage in get-out-the-vote activities. VIVA's severe reduction of early voting days is also likely to result in significantly longer lines and wait times, as more voters attempt to cast their votes over a much shorter period of time. These added burdens are likely to discourage many young voters from attempting to vote at all.

These are just a few examples of the serious threat to young voters' rights posed by the challenged provisions of VIVA, any one of which gives the Duke Plaintiffs an interest sufficient to merit intervention as of right. *See, e.g., Teague v. Bakker*, 931 F.2d 259, 261 (4th Cir. 1991) (holding that where the intervenor stands "to gain or lose by the direct legal operation of the district court's judgment," the intervenor's interest in the subject matter of the litigation is significantly protectable to support intervention as of right); 7C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Fed. Prac. & Proc.: Civ.* § 1908.1 (3d ed. 2007) ("[I]n cases challenging various statutory schemes as unconstitutional . . . , the courts have recognized that the interests of those who are governed by those schemes are sufficient to support intervention."). Indeed, individual voters regularly intervene as a matter of right in voting rights challenges. *See, e.g.,*

Georgia v. Ashcroft, 539 U.S. 461, 477 (2003); *Clark v. Putnam Cnty.*, 168 F.3d 458, 461-62 (11th Cir. 1999); *Smith v. Cobb Cnty. Bd. of Elections & Registrations*, 314 F.Supp. 2d 1274, 1311 (N.D. Ga. 2002).

3. Denial of This Motion Would Impair the Duke Plaintiffs' Ability to Protect Their Interests.

The Duke Plaintiffs also meet the third factor for intervention as of right, which requires that an intervenor be “so situated that disposing of the action may as a practical matter impair or impede [its] ability to protect its interest.” Fed. R. Civ. P. 24(a)(2). Generally, when considering this factor, courts “look[] to the ‘practical consequences’ of denying intervention,” recognizing that even if the party seeking to intervene may vindicate its interests in some later litigation, that is not a sufficient basis to deny intervention under Rule 24(a)(2). *Natural Res. Def. Council v. Costle*, 561 F.2d 904, 909 (D.C. Cir. 1977).

The practical consequence of a judgment upholding the challenged provisions of VIVA would mean the infringement of the Duke Plaintiffs' right to vote. Even if the Duke Plaintiffs could bring a separate action challenging the law on Twenty-Sixth Amendment or Equal Protection grounds, requiring them to do so would be contrary to the rule that courts are to construe intervention liberally so as to “‘involv[e] as many apparently concerned persons as is compatible with efficiency and due process.’” *Feller v. Brock*, 802 F.2d 722, 729 (4th Cir. 1986) (quoting *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967)). Furthermore, because the Duke Plaintiffs, like the original plaintiffs,

assert an equal protection claim, the disposition of the equal protection claim in this litigation could impair the Duke Plaintiffs' ability to prosecute their own separate claim, if the decision is treated as *stare decisis*. *Cf. id.* at 730 (finding practical impairment of intervenors' interest apparent where the *stare decisis* effect of the litigation would impact intervenors' future activities). *See also Nuesse*, 385 F.2d at 702. Thus, the letter and spirit of the Rule is best promoted by granting the Duke Plaintiffs' motion for intervention, so that their challenge may be considered and efficiently resolved together with the challenges of the original plaintiffs.

4. The Duke Plaintiffs' Interests Are Not Adequately Represented by the Current Plaintiffs.

To satisfy the final requirement of intervention as of right, the Duke Plaintiffs need only show that representation of their interest by the current parties "may be" inadequate; the burden of making this showing is "minimal." *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972). Any doubt regarding the adequacy of representation should be resolved in favor of the would-be intervenor. *See* 6 James Wm. Moore et al., *Moore's Fed. Prac.* § 24.03[4][a][i] (3d ed. 2011).

The Duke Plaintiffs' interests are not adequately represented by the current parties to this litigation. First, those interest are clearly adverse to the Defendants, who either signed VIVA into law, or are charged with enacting the very provisions that will infringe upon or deny the Duke Plaintiffs' right to vote. And, while the proposed complaint in intervention raises common issues of law and fact to those raised in the original

complaint, the Duke Plaintiffs challenge two additional provisions of VIVA -- the voter ID requirements and elimination of pre-registration of 16 and 17-year olds (both of which seem specifically crafted to suppress the vote of young voters like the Duke Plaintiffs) -- and assert an additional claim -- that the challenged provisions violate the Twenty-Sixth Amendment. *See Ex. A.* Because of these differences, the Duke Plaintiffs' interests are unlikely to be adequately represented unless their motion to intervene is granted. *See, e.g., Foster v. Gueory*, 655 F.2d 1319, 1325 (D.C. Cir. 1981) (granting intervention as a matter of right where intervenors made additional claims about racial discrimination suffered by both the original plaintiffs and the intervenors); *Smith*, 314 F.Supp. 2d at 1311 (granting motion to intervene in voting rights case by intervenors who objected to proposed apportionment plan on grounds other than those raised by original plaintiffs to the litigation); *Ohio River Valley Envtl. Coal., Inc. v. Salazar*, No. 3:09-0149, 2009 WL 1734420, at *1 (S.D.W.Va. June 18, 2009) (granting motion to intervene as of right where defendant and proposed intervenor had identical goals but the "difference in degree of interest could motivate the [intervenor] to mount a more vigorous defense" and "[t]he possibility that this difference . . . could unearth a meritorious argument overlooked by the current Defendant justifies the potential burden of having an additional party in the litigation").

Finally, even with regard to their equal protection claim, there is a possibility that the current plaintiffs will not adequately represent the Duke Plaintiffs' unique interests. For example, the current plaintiffs are unlikely to present evidence specific to VIVA's

impact on young North Carolinians, or about past and current efforts in the state to disenfranchise these young voters. This evidence is likely to be highly relevant in determining the constitutionality of the challenged provisions of VIVA and, as such, provides further reason for granting the Duke Plaintiffs' motion for intervention. *See Grutter v. Bollinger*, 188 F.3d 394, 400-401 (6th Cir. 1999) (finding lower court erred in not permitting intervention of students in challenge to race-conscious admissions policies where original parties were unlikely to present particular arguments that may be important and relevant in determining the legality of the policies).

B. IN THE ALTERNATIVE, THE DUKE PLAINTIFFS REQUEST THAT THE COURT GRANT THEM PERMISSION TO INTERVENE UNDER RULE 24(B)

If the Court does not grant the Duke Plaintiffs' motion to intervene as a matter of right, they respectfully request that the Court exercise its discretion to allow them to intervene under Rule 24(b). The Court has broad discretion to grant a motion for permissive intervention (1) where the intervenor's claim or defense and the main action have a question of law or fact in common, and (2) after considering whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights. Fed. R. Civ. P. 24(b)(1)(B); *McHenry v. C.I.R.*, 677 F.3d 214, 222 (4th Cir. 2012).

The Duke Plaintiffs easily qualify for permissive intervention. First, the Duke Plaintiffs' proposed complaint has questions of law *and* fact in common with the original complaint: both challenge the constitutionality of certain provisions of VIVA, and both raise equal protection claims. Second, for the reasons set forth above, the motion is

timely and, given the early stage of litigation, intervention will not unduly delay or prejudice the adjudication of the rights of the original parties. To the contrary, the Duke Plaintiffs' intervention will only serve to contribute to the full development of the factual and legal issues before the Court.

III. CONCLUSION

For the reasons stated above, the Duke Plaintiffs respectfully request that the Court grant their motion to intervene as a matter of right under Rule 24(a)(2) or, in the alternative, permit them to intervene under Rule 24(b). If granted permission to intervene under either provision, the Duke Plaintiffs have attached a proposed complaint in intervention for filing accordance with the Federal and Local Rules of Civil Procedure.

Dated: November 25, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this date I served a copy of the foregoing **MEMORANDUM OF LAW** by filing a copy thereof with the Court using the CM/ECF filing system, which will send a copy thereof via e-mail to the following persons:

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This the 25th day of November, 2013.

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