STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
Civil Action No. 2024-CP-40-00475

AMERICAN CIVIL LIBERTIES UNION OF SOUTH CAROLINA FOUNDATION,

Plaintiff,

v.

STATE ELECTION COMMISSION; SOUTH CAROLINA DEPARTMENT OF MOTOR VEHICLES,

Defendants.

GOVERNOR MCMASTER'S MOTION TO INTERVENE

Under Rule 24 of the South Carolina Rules of Civil Procedure, Henry Dargan McMaster, in his official capacity as Governor of the State of South Carolina, moves to intervene in this case to defend Plaintiff's challenge to South Carolina law. The Governor requests expedited consideration of this Motion to facilitate his participation in any hearing or further proceedings in this litigation.

INTRODUCTION

Two weeks before election day, the ACLU filed this case, seeking to change the registration deadline for a group of voters. This lawsuit suffers from myriad flaws, from standing to Rule 23 to timing to the relief sought. Consistent with the Governor's constitutional duty to "take care that the laws be faithfully executed," S.C. Const. art. IV, § 15, he intends to defend state law, as he has done repeatedly in recent years in cases involving a multitude of issues, including election law. Courts have routinely authorized the Governor's intervention in these cases, and this Court should do so here.

LEGAL STANDARD

Rule 24 allows a party to intervene either as a matter of right or by permission. To intervene as of right pursuant to Rule 24(a), an intervenor must (1) seek to intervene timely, (2) have an interest in the subject of the action, (3) have that interest be impaired if the case is decided without him, and (4) demonstrate that his interest is not sufficiently represented by the other litigants. *Ex parte Builders Mut. Ins. Co.*, 431 S.C. 93, 99, 847 S.E.2d 87, 90 (2020); *see* Rule 24(a), SCRCP. Under Rule 24(b), to intervene by permission, an intervenor must (1) seek to intervene timely, (2) assert a claim or defense that has a question of law or fact in common with the underlying action, and (3) prove his intervention will not delay or prejudice the original parties. *Ex parte Builders Mut. Ins. Co.*, 431 S.C. at 101, 847 S.E.2d at 91; *see* Rule 24(b), SCRCP. It is axiomatic that courts should liberally construe the rules governing intervention. *E.g.*, *Cooper v. S.C. Dep't of Soc. Servs.*, 428 S.C. 402, 411, 835 S.E.2d 516, 520 (2019); *Berkeley Elec. Co-op., Inc. v. Town of Mt. Pleasant*, 302 S.C. 186, 189, 394 S.E.2d 712, 714 (1990). The decision to grant intervention "is wholly discretionary with the trial court and will be reversed only for abuse of discretion." *Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 411, 581 S.E.2d 161, 168–69 (2003).

ARGUMENT

I. The Governor has a right to intervene under Rule 24(a).

A. The Governor's Motion is timely.

The ACLUE filed its Complaint on October 22, 2024. Governor McMaster now moves to intervene, just two days later, prior to any hearing on the ACLU's Motion for Temporary Restraining Order or Preliminary Injunction.

The South Carolina Supreme Court has explained that intervention is timely when a "motion [is] filed only days after [the] complaint was filed." *Berkeley Elec. Co-op., Inc.*, 302 S.C.

at 189, 394 S.E.2d at 714. In the same vein, the District of South Carolina has routinely found such prompt motions to intervene timely. *See, e.g.*, *S.C. Coastal Conservation League v. Ross*, No. 2:18-CV-03326-RMG, 2019 WL 5872423, at *2 (D.S.C. Feb. 8, 2019) (ten days); *S.C. Coastal Conservation League v. Pruitt*, No. 18-CV-330-DCN, 2018 WL 2184395, at *8 (D.S.C. May 11, 2018) (22 days); *cf. Middleton v. Andino*, 481 F. Supp. 3d 563, 568 (D.S.C. 2020) (concluding even three months is timely). The Governor therefore satisfies this element.

B. The Governor has significant interests in this action.

The Governor has multiple interests here. *First*, acting pursuant to his constitutional obligation to "be presented" with "[e]very bill or joint resolution which shall have passed the General Assembly" "before it becomes a law" and either "approv[e]" or "return" it, the Governor signed major (and bipartisan) election-reform legislation into law a couple of years ago, which included changes to voter registration. *See* S.C. Const. art. IV, § 21; 2022 S.C. Acts No. 150. These constitutional duties give Governor McMaster a "direct," "significantly protectable interest" in the litigation. *Thomas v. Andino*, 335 F.R.D. 364, 370 (D.S.C. 2020) (internal quotation marks omitted).

Second, the Governor is the State's "Chief Magistrate" and "supreme executive authority." S.C. Const. art. IV, § 1. As such, Governor McMaster is constitutionally charged with the duty to "take care that the laws be faithfully executed." *Id.* art. IV, § 15; *see Edwards v. State*, 383 S.C. 82, 91, 678 S.E.2d 412, 417 (2009) ("The Governor is charged with executing the law."). The U.S. Supreme Court has called this obligation a "Chief Executive's most important constitutional duty." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 577 (1992). Thus, this State's governors have repeatedly been allowed to intervene to defend challenges to state law. *See, e.g.*, Order Granting Mot. to Intervene, *Planned Parenthood S. Atl. v. State*, No. 2022-CP-40-03569 (S.C. Comm. Pls. July 28,

2022) (2021 Fetal Heartbeat Act); Order, *Owens v. Stirling*, No. 2021-CP-40-2306 (Richland Cnty. Ct. Comm. Pls. May 25, 2021) (Act 43 adding the firing squad as a method of execution); Mem. Op. and Order Granting Mots. to Intervene, *Planned Parenthood S. Atl. v. Wilson*, No. 3:21-cv-508 (D.S.C. Mar. 9, 2021), ECF No. 62; *Planned Parenthood S. Atl.*, 2021 WL 878791 (the 2021 Act); *Williams v. Morris*, 320 S.C. 196, 464 S.E.2d 97 (1995) (appropriations act).

Third, not only has the Governor been a longtime proponent of protecting the electoral process, but he is also actively defending election law right now. *See League of Women Voters v. Alexander*, No. 2024-001227 (S.C.). Thus, it should come as no surprise to Plaintiff's counsel, several of whom are also involved in the other pending matter, that the Governor again seeks to defend state election law.

Given the significant constitutional duties and discretionary authority entrusted to the Governor, it is imperative that he be allowed to intervene and defend state election law and his prerogative powers under South Carolina law. As the popularly elected head of the Executive Branch of the State, the Governor is uniquely positioned to represent the people when their law is challenged. *See Stuart v. Huff*, 706 F.3d 345, 351 (4th Cir. 2013). Indeed, as the Fourth Circuit has explained, "the need for government to exercise its representative function is perhaps at its apex where, as here, a duly enacted statute faces a constitutional challenge." *Id.* Accordingly, Governor McMaster satisfies the second factor.

C. The Governor's interests and authority would be impaired absent intervention.

On the third element, "a party need not prove that it would be bound in a res judicata sense by the judgment, only that it would have difficulty adequately protecting its interests if not allowed to intervene." *Berkeley Elec. Co-op., Inc.*, 302 S.C. at 190, 394 S.E.2d at 715. If the Governor is not a party to this case and the Court were to enjoin state election law (whether on a temporary or

permanent basis) such that the Executive Branch could not carry out the General Assembly's clear directives, the Governor would not have access to the proper forum to defend the constitutionality of state election law and demonstrate why it should be faithfully executed as enacted by the people's representatives. *Cf. Gibson v. City of Vancouver*, No. 3:20-cv-06162-BHS, 2020 WL 7641202, at *1 (W.D. Wash. Dec. 23, 2020) ("The Court also permitted the Governor and the Attorney General to intervene to defend the constitutionality of the COVID-19 Guidance."). To that end, absent intervention, Governor McMaster could not "make motions or [] appeal the final judgment in the case," so "the 'practical impairment' requirement for intervention is satisfied." *Feller v. Brock*, 802 F.2d 722, 730 (4th Cir. 1986).

Denying intervention would thus impair Governor McMaster's ability to assert and protect his interests and "supreme executive authority." S.C. Const. art. IV, § 1. It would impede his constitutional interests in ensuring that legislation he recently signed into law is "faithfully executed." *Id.* art. IV, § 15. Therefore, the Governor's requested intervention satisfies this element.

D. The Governor must represent his unique interests and authority.

A proposed intervenor must meet only a "minimal" burden to demonstrate that his interest is not sufficiently represented by the other litigants. *Berkeley Elec. Co-op., Inc.*, 302 S.C. at 191, 394 S.E.2d at 715. The Supreme Court has noted that in considering whether this low threshold is met in a particular case involves addressing "(1) whether the existing parties will undoubtedly make all of the intervenor's arguments; (2) whether the existing parties are capable and willing to make such arguments; and (3) whether the intervenor offers different knowledge, experience, or perspective on the proceedings that would otherwise be absent." *Id.*

The existing Defendants do not share the same legal interests and authority and, thus, are unlikely to make the same arguments as the Governor. Defendants do not have the same

constitutional authority and duties as the Governor. *See, e.g.*, *Berger v. N.C. State Conf. of the NAACP*, 597 U.S. 179, 186 (2022) ("Like the Governor, the attorney general is an independently elected official."); *Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 142 S. Ct. 1002, 1011 (2022) ("The way in which Kentucky divides executive authority . . . should not obscure the important constitutional consideration at stake."); *State ex rel. Condon v. Hodges*, 349 S.C. 232, 240, 242, 562 S.E.2d 623, 627, 628 (2002) (discussing the "dual role" and "other duties" of the Attorney General); *Williams*, 320 S.C. at 206, 464 S.E.2d at 102 (emphasizing the Governor's constitutional role related to, and participation in, the legislative process). In light of these differences, no one can say at this stage that the existing Defendants will "undoubtedly" make all of the arguments the Governor will make, whether in this Court or in any appeal. Governor McMaster's distinct duties and different perspective as the State's supreme executive authority and Chief Magistrate satisfy this final element and further support his intervention as a matter of right.

* * *

Governor McMaster therefore satisfies all four elements for intervention as a matter of right. The Court should authorize the Governor to intervene under Rule 24(a).

II. The Court should alternatively permit the Governor to intervene under Rule 24(b).

In the alternative, the Court should permit Governor McMaster to intervene under Rule 24(b), SCRCP. As explained in Part I.A., the Governor's Motion to Intervene is timely. Thus, this Part focuses on the two other elements of permissive intervention: (1) that the Governor is asserting a claim or defense that shares a common question of law or fact and (2) that his intervention will not delay or prejudice the existing parties. *See Ex parte Builders Mut. Ins. Co.*, 431 S.C. at 101, 847 S.E.2d at 91; *see* Rule 24(b), SCRCP.

A. The Governor seeks to defend state election law.

The ACLU demands that state election law be suspended or rewritten to allow certain (unnamed) individuals to register to vote after the registration deadline has passed. The Governor seeks to defend the law as written. Accordingly, there is no question that Governor McMaster's proposed intervention involves the very same question of law the ACLU has already put before this Court. *See Middleton*, 481 F. Supp. 3d at 571 ("The Proposed Intervenors' interests in the constitutionality of the Challenged Provisions present questions of law or fact common to Plaintiffs' Complaint."). Additionally, Rule 24(b) provides that "[w]hen a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action." Rule 24(b), SCRCP. Once again, the ACLU is attacking statutes that the Governor has the obligation to faithfully execute in accordance with the South Carolina Constitution. Therefore, under Rule 24(b), permissive intervention is both warranted and appropriate.

B. The Governor's intervention will not prejudice any existing party.

The ACLU will not be prejudiced by Governor McMaster's intervention. This case is in its earliest stages. The existing Defendants have not yet responded to the Complaint or Motion for Temporary Restraining Order or Preliminary Injunction, and the record reflects that the Court has not taken any formal action to date beyond scheduling a hearing. The deadlines imposed by the South Carolina Rules of Civil Procedure can remain in place. *See Planned Parenthood S. Atl.*, 2021 WL 878791, at *4 ("Here, as to the potential for delay, the Court agrees with the Proposed Intervenors that their involvement at this early stage of the litigation fails to delay this matter. The

Court will enforce all existing deadlines upon the Proposed Intervenors."). Governor McMaster is prepared to respond to the Motion for Temporary Restraining Order or Preliminary Injunction and to file a dispositive motion under Rule 12(b), SCRCP, on any expedited schedule directed by the Court. At most, the Governor's intervention at this stage might mean the ACLU feels compelled respond to any different or additional arguments raised by the Governor, but courts have repeatedly rejected the idea that "some additional work" is a reason to deny intervention. *Id.* ("Regarding prejudice to the Plaintiffs, the Court concludes briefing by the Proposed Intervenors fails to amount to a finding of prejudice, even if it creates some additional work for the Plaintiffs and the Court. Hence, the Court concludes the Proposed Intervenors' intervention fails to prejudice Plaintiffs."); *see also Middleton*, 481 F. Supp. 3d at 568 ("[T]he court finds briefing by the Proposed Intervenors would not amount to prejudicial delay, even if it creates some additional work for Plaintiffs (and the court)."). Accordingly, permitting Governor McMaster to intervene under Rule 24(b) would not and will not prejudice the ACLU and is otherwise warranted under the circumstances.[*]

CONCLUSION

For the foregoing reasons, the Court should grant this Motion and authorize him to intervene in the instant action as a matter of right under Rule 24(a), SCRCP. In the alternative, Governor McMaster requests that the Court permit him to intervene in this action in accordance

[*] Given this timing and the imminent preliminary injunction briefing and hearing, an accompanying pleading under Rule 24(c) is unnecessary. As explained by the Fourth Circuit, "a motion to intervene that clearly spells out the intervener's position satisfies Rule 24(c), as it provides notice to the Court and the parties of the intervener's interest in the litigation." *Veasey v. Wilkins*, No. 5:14-cv-369-BO, 2015 WL 7776557, at *2 (E.D.N.C. Dec. 2, 2015) (citing *Spring Constr. Co. v. Harris*, 614 F.2d 374, 376–77 (4th Cir. 1980)). Because this Motion "provides the appropriate parties with notice" of the Governor's intention to defend state election law, Rule 24 is satisfied. *Id.*; *see, e.g.*, *S.C. Elec. & Gas Co. v. Whitfield*, No. 3:18-cv-01795-JMC, 2018 WL 3470660, at *2 n.4 (D.S.C. July 18, 2018) (applying this rule) ("The court finds that President Leatherman's Motion to Intervene is proper as it provides notice to the court and the parties of his intention in the case." (internal citation omitted)).

with Rule 24(b), SCRCP. Finally, Governor McMaster respectfully requests expedited consideration of this Motion to facilitate the Governor's prompt defense of state election law and participation in any hearing and briefing on the ACLU's pending Motion. In accordance with Rule 11(a), SCRCP, the undersigned conferred with counsel for Plaintiff, who do not consent to the Governor's request to intervene.

Respectfully submitted,

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