IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
CIVIL ACTION No. 1:15-CV-559

THE CITY OF GREENSBORO, LEWIS A. BRANDON III, JOYCE JOHNSON, NELSON JOHNSON, RICHARD ALAN KORITZ, SANDRA SELF KORITZ, AND CHARLI MAE SYKES, Plaintiffs, v. THE GUILFORD COUNTY BOARD OF ELECTIONS, Defendant, MELVIN ALSTON, JEAN BROWN, HURLEY DERRICKSON, STEPHEN GOLIMOWSKI, WAYNE GOODSON, JIM KEE, EARL JONES, SHARON KASICA, and WILLIAM CLARK PORTER, Defendant-Intervenors.	**PLAINTIFFS' OPPOSITION TO INTERVENOR DEFENDANTS' MOTION TO DISMISS OR JOIN NECESSARY PARTIES**

Plaintiffs The City of Greensboro ("City of Greensboro" or "City") and Lewis A. Brandon III, Joyce Johnson, Reverend Nelson Johnson, Richard Alan Koritz, Sandra Self Koritz, and Charli Mae Sykes (collectively "Citizen Plaintiffs") respond to the Motion to Dismiss for Failure to Join a Necessary Party and Motion to Join Necessary Parties (Doc. 61) ("Joinder Motion") filed by Defendant-Intervenors Melvin Alston, Jean Brown, Hurley Derrickson, Stephen Golimowski, Wayne Goodson, Jim Kee, Sharon Kasica, and William Clark Porter (collectively, "Intervenors").

Taken together, this Court's prior consideration of the "necessary party" issue at the preliminary injunction stage, its decision to allow Intervenors to participate in this litigation

precisely to ensure a robust presentation of the issues, and the Fourth Circuit's recent decision in *Wright v. State*, 787 F.3d 256 (4th Cir. 2015), *petition for reh'g en banc denied*, No. 5:13-CV-607-BO (E.D.N.C.), Doc. 47 (4th Cir. July 15, 2015), establish that the parties necessary to ensure a full presentation of the legal issues and provide for appropriate relief are before the Court. Neither joinder of additional parties nor dismissal is warranted.

PROCEDURAL BACKGROUND

The Intervenor-Defendants ask this Court to dismiss the Complaint for failure to join several purportedly "necessary parties" as defendants: (1) the State of North Carolina, (2) Governor Patrick McCrory, (3) the North Carolina State Board of Elections ("the State Board"), and (4) its executive director, Kim Westbrook Strach. Joinder Motion at 2. Alternatively, Intervenors ask the Court to join those parties because "this Court cannot accord complete relief among existing parties to this action." *Id.* In support of their motion, Intervenors observe that the named Defendant, the Guilford County Board of Elections ("the County Board"), has taken the position that it cannot actively defend the challenged legislation, because it views its role with respect to the conduct of municipal elections as purely ministerial. *See* Memorandum of Law in Support of Defendants' Motion to Dismiss or Join Necessary Parties (Doc. 62) ("Joinder Mem.") at 2.

Plaintiffs have addressed, and this Court has already considered—with the benefit of briefing on the issue, whether other defendants, namely, the State or the State Board, are required parties. (*See* Doc. 31, 35). As the Court observed at the outset of this litigation, "[w]hile it is possible that all required parties have not been joined, . . . that possibility is

either not strong . . . or joinder is unlikely to be feasible." Memorandum Opinion and Order (7/23/15) (Doc. 35) at 9 (citing *Wright*). Nothing in the Joinder Motion calls those conclusions into question.

Moreover, as the Order granting Intervenors' motion for permissive intervention observed, "[t]he Attorney General has not entered the case to defend the constitutionality of the legislation, nor have any other representatives of the state," and the County Board "will remain neutral on the substantive issues raised by the complaint." 10/30/15 Order (Doc. 53) at 2. The Court allowed Intervenors to intervene precisely so that the parties before the Court "will defend the legislation, develop a more complete factual record, and provide more thorough briefing." *Id.* Because all necessary parties are present before the Court, any lingering concern about the inclusiveness of this litigation has already been addressed by allowing Intervenors to participate in this litigation as parties.

ARGUMENT

I. NONE OF THE PARTIES IDENTIFIED BY INTERVENORS ARE "NECESSARY" WITHIN THE MEANING OF RULE 19

A. The Rule 19 "necessary party" standard.

Intervenor-Defendants invoke Rule 19 to support their request for mandatory joinder of several individuals and entities, including the State of North Carolina and its Governor. (Joinder Motion at 2). Rule 19(a) defines those parties "necessary" to be joined:

> (a) **Persons Required to Be Joined if Feasible.**
> (1) *Required Party.* A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:

> (A) in that person's absence, the court cannot accord complete relief among existing parties; or
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> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
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> (i) as a practical matter impair or impede the person's ability to protect the interest; or
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> (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Rule 19(b) describes the steps to be taken when a "necessary" party, as defined by Rule 19(a), cannot feasibly be brought before the Court:

> (b) **When Joinder Is Not Feasible**. If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include:
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> (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;
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> (2) the extent to which any prejudice could be lessened or avoided by:
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> (A) protective provisions in the judgment;
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> (B) shaping the relief; or
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> (C) other measures;
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> (3) whether a judgment rendered in the person's absence would be adequate; and
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> (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

As Rule 19 makes clear, the Court first asks whether any of the parties the Intervenor-Defendants name are, in fact, "necessary," either because (1) complete relief would be impossible absent their joinder, or (2) the party "claims an interest" related to the action such that adjudication in its absence would impair or impede that interest or would

create a risk of inconsistent obligations. Fed. R. Civ. P. 19(a); *see also, e.g.*, *Home Buyers Warranty Corp. v. Hanna*, 750 F.3d 427, 434-35 (4th Cir. 2014).

None of the allegedly necessary parties named in Intervenors' motion have claimed any interest in this litigation within the meaning of Rule 19(a)(1)(B). *See United States v. Bowen*, 172 F.3d 682, 869 (9th Cir. 1999) (party is unnecessary when it is "aware of this action and [chooses] not to claim an interest") (collecting authority); *Perkins v. Bennett*, No.7:14-1057-BHH, 2015 U.S. Dist. LEXIS 36405, at *15 (D.S.C. Mar. 24, 2015) (same). This Court's analysis therefore should proceed under Rule 19(a)(1)(A) alone. Only if the Court concludes that a proposed party is "necessary" to enable the Court to "accord complete relief" under subsection (a)(1)(A) should it consider the feasibility of joining that party—including the party's immunity from suit. Fed. R. Civ. P. 19(b). The Fourth Circuit has confirmed that two-step analysis:

> Rule 19 sets out separate tests for determining whether a party is "necessary" and "indispensable." It is a two-step inquiry in which courts must first ask "whether a party is necessary to a proceeding because of its relationship to the matter under consideration" pursuant to Rule 19(a). . . . If a party is necessary, it will be ordered into the action. When a party cannot be joined because its joinder destroys diversity, the court must determine whether the proceeding can continue in its absence, or whether it is indispensable pursuant to Rule 19(b) and the action must be dismissed.

Owens-Illinois, Inc. v. Meade, 186 F.3d 435, 440 (4th Cir. 1999) (footnotes omitted; quoting *Teamsters Local Union No. 171 v. Keal Driveaway Co.*, 173 F.3d 915 (4th Cir. 1999)). The Court will consider dismissal of the action, then, only if (1) one or more of

the parties identified by Intervenors are "necessary" and (2) the necessary parties cannot feasibly be joined.

B. The Fourth Circuit's *Wright* decision details the "necessary party" analysis—and confirms that the County Board is the proper defendant in a challenge to local election laws.

The Fourth Circuit fully addressed the Rule 19 necessary party issue in *Wright v. State*, 787 F.3d 256 (4th Cir. 2015), on facts nearly identical to those of the instant case. There, thirteen Wake County citizens challenged a state law that redrew the Wake County Board of Education electoral districts on the ground that the redistricting plan would undervalue some citizens' votes while overvaluing others, in violation of state and federal equal protection guarantees. *Id*. at 259. Plaintiffs originally sued both the State of North Carolina and the Wake County Board of Elections, "the entity charged with administering the Board of Education's elections." *Id*. at 260. The State and the Wake County Board moved to dismiss for failure to state a claim and, on its own behalf, the State invoked the Eleventh Amendment, asking the Court to dismiss it as a defendant if it did not dismiss the action in its entirety.[1] The plaintiffs responded by seeking leave to amend their complaint to substitute Governor McCrory, Senate President Pro Tem Berger, and Speaker Tillis as defendants in lieu of the State of North Carolina. *Id*. at 261.[2] The trial court granted the motions to dismiss as to all defendants, and denied Plaintiff's motion to amend as futile.

[1] *See Wright v. North Carolina*, No. 5:13-CV-607-BO (E.D.N.C.), Doc. 29 (Nov. 4, 2013).

[2] *See id*., Docs. 33, 34 (Nov. 19, 2013).

On appeal, the *Wright* plaintiffs did not challenge the dismissal of the State. *Id*. at 261 & n.2 (citing *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002), for the proposition that states are "immune from being hauled into federal court by private parties"). They likewise conceded that the Governor "lacked a sufficient connection to the enforcement of the redistricting plan at issue . . . to constitute a proper defendant" (787 F.3d at 261 n.2) because he had no duty to enforce the redistricting plan. *Id*. at 262 (observing that "general authority to enforce the laws of the state is an insufficient ground for abrogating Eleventh Amendment immunity" (citation and internal quotation marks omitted)). They insisted, however, that Tillis and Berger were proper defendants.

The State contended that none of the individual elected officials were proper parties, that only the Wake County Board of Elections was required to execute the provisions of the new redistricting plan, and that the plaintiffs could obtain complete relief from the Wake County Board.[3] The Fourth Circuit agreed with the State, finding that the citizen plaintiffs stated a claim upon which relief could be granted against the Wake County Board but that the district court correctly denied the motion to amend, "because the state officials Plaintiffs proposed to add as named defendants are not amenable to suit." *Id*. at 259. Proposed defendants Berger and Tillis, like the Governor, had no "special duty to enforce

[3] *See* State's Appellee Brief at 23–29 (attached as Exhibit A to Reply Brief in Support of Plaintiffs' Motions for Temporary Restraining Order and Preliminary Injunction (7/21/15) (Doc. 31)).

the challenged Session Law." *Id.* The Fourth Circuit allowed the case to move forward with only the Wake County Board as a defendant. *See id.* at 263, 270.[4]

C. Because it directly administers local elections, the County Board is the proper—and only necessary—defendant in this action.

The constitutional claims asserted by Plaintiffs involve the County Board's clear and plain statutory authority over the conduct of municipal elections:

> The registration of voters and the conduct of all elections in municipalities and special districts shall be under the authority of the county board of elections. Any contested election or allegations of irregularities shall be made to the county board of elections and appeals from such rulings may be made to the State Board of Elections under existing statutory provisions and rules or regulations adopted by the State Board of Elections.

N.C. Gen. Stat. § 163-284(b) (emphasis added). Specifically, as relevant to Plaintiffs' first claim, the County Board notices, administers, and conducts initiative/referendum elections that the City is required to call upon receipt of a valid initiative petition. *See* N.C. Gen. Stat. § 163-287 (as amended by Session Law 2014-111, § 17.5(a)) (to call a special election, the City "shall adopt a resolution specifying the details of the election, and forthwith deliver the resolution to the local board of elections. The resolution shall call on the local board of elections to conduct the election described in the resolution and shall state the date on which the special election is to be conducted." (emphasis added)). As

[4] While the Guilford County Board of Elections has chosen not to defend the constitutionality of the Greensboro Act, the Wake County Board chose otherwise. Indeed, the Wake County Board moved to dismiss the lawsuit in the trial court, litigated the plaintiffs' appeal of the dismissal to the Fourth Circuit, and, even after all other defendants were dismissed as improper parties, continued to defend the case through trial. *See Wright v. North Carolina*, No. 5:13-CV-607-BO, Docs. 27, 28, 37, 40, 43, 64, 81 (E.D.N.C. 2014).

relevant to Plaintiffs' second claim, the County Board likewise notices, administers, and conducts elections for City Council seats. N.C. Gen. Stat. § 163-284(b) ("The registration of voters and the conduct of all elections in municipalities and special districts shall be under the authority of the county board of elections." (emphasis added)).

Because the County Board alone has the duty to conduct the election procedures established by the challenged Act, it is the proper defendant—just as the Wake County Board of Elections was the proper defendant in *Wright*. *See Wright*, 787 F.3d at 262 (citing N.C. Gen. Stat. §§ 163-22, 163-33 for the proposition that, "as is the case with all election plans North Carolina," the county Board of Elections has "the specific duty to enforce [a] challenged redistricting plan."). The plain language of the governing statutes, coupled with *Wright*'s reasoning, belies Intervenors' suggestion that the County Board is not responsible for "enforcing the law." Joinder Motion at 2; *see also* Joinder Mem. at 6; *but see id*. at 2 (conceding that the County Board "is charged with the conduct of local elections in Guilford County").

Because the County Board is the proper defendant to be enjoined from enforcing and implementing the Greensboro Act, it is the only necessary party for the court to "'accord complete relief among existing parties.'" *Hanna*, 750 F.3d at 434 (quoting Fed. R. Civ. P. 19(a)(1)(A)). The County Board acknowledges that it is necessary: Because it is required by statute "to conduct fair, impartial, and lawful elections within [Guilford] County," "it is a necessary party to this action." Defendant Guilford County Bd. of Elections' Brief in Response to Plaintiffs' Complaint, Motion for Temporary Restraining

Order, Motion for Preliminary Injunction, and Requests for Temporary and Permanent Injunctive Relief (7/20/15) ("County Board Response Br.") (Doc. 27) at 2; *see also id*. at 6 (conceding that the County Board "may be a necessary party, at least to the extent necessary to implement any election to be conducted pursuant to the orders of this Court").[5] None of the parties named in Intervenors' motion, however, are "necessary" within the meaning for Rule 19.

D. None of the other parties identified in the Joinder Motion are necessary defendants.

1. The State Board of Elections and its executive director are not necessary defendants.

To begin with, the State Board of Elections is not a necessary defendant because it lacks a sufficient direct interest or role in the conduct of Greensboro's municipal elections. Fed. R. Civ. P. 19. Kim Strach, its Executive Director, is not a necessary party for the same reasons.[6] The State Board's role, instead, is one of oversight only, limited to "advis[ing

[5] Intervenor-Defendants' suggestion that the County Board is "unable to actively defend this lawsuit" (Joinder Motion at 2) is inaccurate. The County Board has represented to the Court that, as the entity responsible for implementing Greensboro municipal elections pursuant to the statutory procedures established by the General Assembly in an impartial manner, it should not take "a stand, any stand, on the underlying constitutionality issue" given the possibility of the Court "rul[ing] otherwise." County Board Response Br. (Doc. 27) at 5 (emphasis added). As *Wright* demonstrates, while this is a policy or litigation decision that the County Board has chosen to make, it is not a decision the Board was legally compelled to make. In any event, even assuming *arguendo* that the County Board is "unable" defend the Act on its merits, this Court has allowed Intervenors to join as defendants for precisely that purpose—to ensure "the inclusion of litigants who will defend the legislation." Order (Doc. 53) at 2.

[6] Intervenors' supporting Memorandum makes no independent argument that Ms. Strach should be joined as a "necessary" party in her official capacity. In fact, Intervenors mention

the local board] as to the proper methods of conducting . . . elections." N.C. Gen. Stat. § 163-22(c). (Intervenors grudgingly admit that the State's Board's role is one of "enforcement and oversight." Joinder Mem. at 2 (emphasis added).) Although the State Board has the oversight authority to "compel observance of the requirements of the election laws by county boards of elections," it is not authorized to conduct a municipal election in lieu of the county board. *Id.*

This limited role is affirmed by Section 163-25, which expressly authorizes the State Board to assist county boards of election in pending litigation, but only when "uniform administration of Chapter 163 of the General Statutes of North Carolina have been or would be threatened." N.C. Gen. Stat. § 163-25. Intervenors, in fact, argue as much: that the State Board is authorized "to step in and actively defend election law to ensure the orderly and uniform administration of elections around the state." Joinder Mem. at 5 (emphasis added). This case does not threaten the uniform administration of elections in North Carolina; rather, it involves the constitutionality of the unique—and emphatically not "uniform"—election procedure established for the City of Greensboro. Read in the context of Rule 19, Section 163-25 reflects the judgment of the State of North Carolina that the State Board is not a necessary party in this case, which does not involve a challenge to a uniform election law.[7]

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her, by name and title, only in the opening paragraph of the Memorandum and nowhere else. Joinder Mem. at 1.

[7] Intervenors' related argument—that "'the State Board has the authority to promulgate reasonable interim temporary rules and regulations regarding elections administration in

Second, even assuming the State Board (or its Director) had a sufficient direct interest in the conduct of Greensboro municipal elections for purposes of Rule 19, any such interest is adequately protected by the County Board's (and Intervenors') participation in the lawsuit. Both the County Board and the State Board share an interest in implementing constitutional election laws. *See* N.C. Gen. Stat. §§ 163-19 & 163-30 (board members take oath to uphold the constitutions of the United States and North Carolina); County Board Response Br. (Doc. 27) at 2-5, 12. Because of these identical interests, the State Board's interest in this litigation is adequately represented by the County Board. *See, e.g., Nat'l Union Fire Ins. Co. v. Rite ex rel. S.C.*, 210 F.3d 246, 251 (4th Cir. 2000) ("A court should hesitate to conclude . . . that a litigant can serve as a proxy for an absent party unless the interests of the two are identical." (emphasis added)); *South Dakota v. United States DOI*, 317 F.3d 783, 785–86 (8th Cir. 2003) (in Rule 24 context, existing party presumed to be "adequately representing [non-party's] interests" unless "its interests actually differ from or conflict with the [existing party's] interests").

Third, the absence of the State Board does not create the potential for inconsistent legal obligations. This is not a case in which Plaintiffs face a real and substantial possibility

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the event that any State election law is held unconstitutional or invalid'" (Joinder Mem. at 4)—speaks to the State Board's authority to take action if this Court holds the Greensboro Act unconstitutional but says nothing about why the State Board satisfies Rule 19's necessary party standard. Put differently, the State Board's general rulemaking and oversight authority does not suggest that the Court would be unable to accord complete relief among the existing parties or that the State Board's ability to protect its (general) interest in the conduct of municipal elections in North Carolina could be impaired by the outcome of this lawsuit.

of "legal whipsawing" resulting from multiple actions involving non-joined parties. *See, e.g., Owens-Illinois,* 186 F.3d at 441 (observing that "the increased potential for inconsistent judgments is grounds for finding a nonjoined party necessary" (citing cases)); *Nat'l Union Fire Ins.*, 210 F.3d at 252 (collecting authority). Because Plaintiffs' lawsuit is the only pending action that challenges the constitutionality of the Act, no concerns about "inconsistent" legal obligations demand joinder. *See, e.g., Coastal Modular Corp. v. Laminators, Inc.*, 635 F.2d 1002, 1108 (4th Cir. 1980) (affirming denial of Rule 19 joinder motion where movant "could only theorize the possibility that the [non-party] would institute suit against it" and "[n]othing before the court suggested a substantial likelihood of such a suit," so that there was no substantial risk of incurring multiple obligations); *Dickson v. Morrison,* No. 98-2446, 1999 U.S. App. LEXIS 17795, *15-16 (4th Cir. July 27, 1999) (finding that Rule 19 did not require joinder of non-parties where, among other things, there were "no other suits pending" and "nothing before the district court . . . suggested a 'substantial likelihood' of such suits" so that there was no "practical possibility of 'whipsaw'"; noting that "mere speculation that the absent [parties] could initiate suits resulting in Appellants facing inconsistent obligations did not require joinder").

It is irrelevant that the County Board "does not have the authority to dictate public policy and change election law or promulgate rules." Joinder Mem. at 3. Neither the currently-enjoined law nor a decision by this Court that the Greensboro Act is unconstitutional on equal protection grounds would require the board to "dictate" or

"change" anything but simply to (continue to) conduct municipal elections under pre-Act law as established by the General Statutes, or as otherwise directed by this Court. *See Wright*, 787 F.3d at 262 (noting that "[t]he district court could, for example, mandate that the [County] Board of Elections conduct the next election according to the scheme in place prior to the Session Law's enactment until a new and valid redistricting plan is implemented"—essentially the same relief granted by this Court's July 23 preliminary injunction order). The County Board, not the State Board, is the entity charged with conducting all municipal elections. N.C. Gen. Stat. §163-284(b).

2. The State of North Carolina is not a necessary defendant.

The State of North Carolina is represented by the Attorney General's office, which is charged with defending the constitutionality of North Carolina's laws. *See Martin v. Thornburg*, 320 N.C. 533, 545-46, 359 S.E.2d 472, 489 (1987). The Attorney General received notice of Plaintiffs' challenge to the constitutionality of the Act (*see* N.C. Gen. Stat. § 1-260) but, to date, has declined to participate in the action.

The North Carolina General Assembly recently also authorized itself to appear on its own behalf to defend the constitutionality of laws it passes. *See* N.C. Gen. Stat. § 1-72.2 (granting standing to the Speaker of the House and the President Pro Tempore of the Senate "to intervene on behalf of the General Assembly as a party in any judicial proceeding challenging a North Carolina statute. . ."). But the General Assembly likewise has elected not to participate in this action.

Because the Attorney General and the General Assembly have been aware of this litigation since at least mid-2015 and have not claimed their interest, they are not necessary parties. *See Bowen*, 172 F.3d at 869 (party that is "aware of this action and [chooses] not to claim an interest" is not necessary) (collecting authority); *Perkins*, 2015 U.S. Dist. LEXIS 36405, at *15 (same).

Finally, even if the State indicated (or claimed) an interest in this litigation, its decision not to appear to defend the Greensboro Act should end the Rule 19 analysis. As the Fourth Circuit has indicated, a plaintiff's challenge to an unconstitutional law should not be foreclosed by the state's failure to defend the law. *See, e.g.*, *Bostic v. Schaefer*, 760 F.3d 352, 369, 384 (4th Cir. 2014) (although state Attorney General "refused to defend the Virginia Marriage Laws," district court denied motions for summary judgment by remaining defendants—clerks of one city circuit court and one county and the State Registrar of Vital Records—and held the laws unconstitutional, and Fourth Circuit affirmed summary judgment in favor of plaintiffs and decision to enjoin the challenged laws). This action can and should proceed without the State's participation as a party, particularly in light of Intervenor-Defendants' declared interest in the litigation and willingness to defend the Greensboro Act.

3. The Governor is not a necessary defendant.

Governor Patrick McCrory is not a necessary defendant for much the same reason: The Governor has, at most, "general supervisory power" over persons responsible for state laws governing municipal elections. The Governor has no direct interest—and certainly

has not claimed to have one—in the implementation of the Greensboro Act. *See, e.g.*, *Wright*,787 F.3d at 261 n.2 (noting plaintiffs' concession that Governor McCrory "lacked a 'sufficient connection to the enforcement of the redistricting plan at issue here' to constitute a proper defendant"); *Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 330-31 (4th Cir. 2001) (holding that Virginia governor should be dismissed as a party where he lacked "direct enforcement responsibility with respect to the statutory provisions at issue" and noting that "'[g]eneral authority to enforce the laws of the state is not sufficient to make government officials the proper parties to litigation challenging the law'" (quoting *Children's Healthcare is a Legal Duty, Inc. v. Deters*, 92 F.3d 1412, 1416 (6th Cir. 1996))); *Shell Oil Co. v. Noel*, 608 F.2d 208, 211 (1st Cir. 1979) ("The mere fact that a governor is under a general duty to enforce state laws does not make him a proper defendant in every action attacking the constitutionality of a state statute.").

Indeed, even Intervenors do not appear seriously to contend that the Governor is a "necessary" party. Although Governor McCrory is among the State entities and individuals listed in Intervenors' motion (Doc. 61), they offer no rationale for considering him a "necessary" party and make no substantive argument in support of his joinder. *See, e.g.*, Joinder Mem. at 4 (arguing that, "[w]ithout having the State of North Carolina or the North Carolina State Board of Elections, the ability to receive a whole remedy is impossible"); *id*. at 7 (praying that the Court "orders the North Carolina State Board of Elections and the State of North Carolina [be] joined as additional necessary parties to this action") (all emphases added).

II. ELEVENTH AMENDMENT IMMUNITY INFORMS THIS COURT'S ANALYSIS OF THE REQUIRED PARTY DEFENDANTS

Even assuming, for the sake of argument, that some or all of the parties identified by Intervenors could fairly be considered "necessary" under the standard established by Rule 19, their joinder would not be feasible, because each of the entities named by Intervenors enjoys Eleventh Amendment Immunity.

A. All of the proposed defendants enjoy Eleventh Amendment immunity from suit.

The State of North Carolina. The State, as noted above, enjoys immunity from suit in federal court. *See Wright*, 787 F.3d at 261; *McNair v. N.C. General Assembly*, No. No. 4:13-CV-155-F, 2013 U.S. Dist. LEXIS 150136, at *3 (E.D.N.C. Oct. 17, 2013) ("It is well-settled that '[t]he Eleventh Amendment limits the Article III jurisdiction of the federal courts to hear cases against States'. . .") (quoting *Kitchen v. Upshaw*, 286 F.3d 179, 184 (4th Cir. 2002)). Even if the Court were to conclude that the State is a necessary party, then, the Eleventh Amendment would make it infeasible to add the State as a defendant. *See Wright*, 787 F.3d at 261.

Governor McCrory. The Eleventh Amendment provides less robust, but nevertheless substantial, immunity to State officials. *See Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 437 (2004); *Wright*, 787 F.3d at 261. State officials "may be enjoined from . . . unconstitutional action," but only if they have "some connection with the enforcement" of an unconstitutional act. *Ex parte Young*, 209 U.S. 123, 157 (1908); *see also Fla. Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 685 (1982); *Wright*, 787

F.3d at 261. Therefore, a constitutional challenge to a state statute must be asserted against the state official with "a special relation" to the challenged statute, *Wright*, 787 F.3d 261-62 (citations and internal quotation marks omitted)—that is, the named official must have "proximity to and responsibility for" enforcing the statute. *S.C. Wildlife Fed'n v. Limehouse*, 549 F.3d 324, 333 (4th Cir. 2008) (emphasis in original). "General authority to enforce the laws of the state is an insufficient ground for abrogating Eleventh Amendment immunity." *Id.* (alterations, internal quotations, and citation omitted).

For essentially the same reason that Governor McCrory cannot fairly be considered a necessary party, his joinder is not feasible: He lacks any "special relation" to the Greensboro Act or "specific duty" to enforce its provisions and therefore enjoys Eleventh Amendment immunity. *See, e.g.*, *Waste Mgmt. Holdings*, 252 F.3d at 331 ("The purpose of allowing suit against state officials to enjoin their enforcement of an unconstitutional statute is not aided by enjoining the actions of a state official not directly involved in enforcing the subject statute.") (footnote omitted).

The North Carolina State Board of Elections and its Executive Director. Much like the Governor, the State Board has, at most, oversight authority and "general responsibility" for enforcing the Greensboro Act, as Intervenors essentially concede and as discussed more fully above. *See* Joinder Mem. at 5; *supra* pp. 10-14; N.C. Gen. Stat. § 163-22(c). Such "general authority" is insufficient to abrogate Eleventh Amendment immunity. *See, e.g.*, *Limehouse*, 549 F.3d at 332-33; *cf. Libertarian Party of Virginia v. Virginia State Bd. of Elections*, No. 1:10-cv-615 (LMB/TCB), 2010 U.S. Dist. LEXIS 97177, at *13-15 (E.D.

Va. Sept. 16, 2010) (finding that plaintiffs' "suit against the Virginia State Board of Elections is barred by the Eleventh Amendment").[8]

B. Dismissal is not warranted.

"Courts are loath to dismiss cases based on nonjoinder of a party, so dismissal will be ordered only when the resulting defect cannot be remedied and prejudice or inefficiency will certainly result." *Owens-Illinois*, 186 F.3d at 441 (citing cases); *see also Hanna*, 750 F.3d at 433 ("the dismissal of a case is a 'drastic remedy [that] should be employed only sparingly'" (quoting *Teamsters Local Union No. 171*, 173 F.3d at 918)). That drastic remedy is not warranted here:

- None of the proposed defendants can fairly be described as "necessary" parties under the Rule 19 standard, for the reasons explained above.
- The only necessary defendant—the County Board—is already before the Court.

[8] It is true that prospective injunctive relief is available against individual state officers acting in their official capacities under *Ex Parte Young*. But even if Intervenors offered any meaningful argument for including Kim Strach, the State Board's executive director, in her official capacity for purposes of awarding prospective injunctive relief (which they do not), injunctive relief against Ms. Strach in this case would be inappropriate for the reasons explained more fully above: It is indisputably the County Board, not the State Board or its officers, that is charged with the conduct of municipal elections under Section 163-284. *Cf., e.g., Credico v. New York State Bd. of Elections*, 751 F. Supp. 2d 417, 420, 423 (E.D.N.Y. 2010) (entering injunctive relief against Commissioners of New York State Board of Elections in their official capacities and directing the inclusion of plaintiff's name on the ballot as a candidate for U.S. State Senator). Intervenors do not argue that Ms. Strach, in her official capacity, has a "special relation" to the Greensboro Act, a "specific duty" to enforce the Act, or anything more than a "general duty to enforce" state election laws. *See Limehouse*, 549 F.3d at 333 (noting that the Eleventh Amendment bars injunctive relief against state officials where "the relationship between the state official sought to be enjoined and the enforcement of the state statute is significantly attenuated"); *Gilmore*, 252 F.3d at 331.

- Intervenors have been allowed to intervene precisely to ensure a full and vigorous presentation of the issues.

- The State of North Carolina is aware of the lawsuit but has chosen not to intervene.

- No prejudice or inefficiency will result from proceeding with the litigation with the parties currently before the Court.

Application of the Rule 19(b) factors confirms that this action should be allowed to proceed among the existing parties. There is no serious or substantial risk that a judgment rendered in the absence of the named parties could prejudice either the existing parties or those not before the Court, and a judgment rendered with the existing parties before the Court would be fully adequate, for essentially the same reason: Any order granting or denying the relief sought in the Complaint will bind the County Board—which, as noted above, is the entity responsible for administering Greensboro municipal elections, *see* N.C. Gen. Stat. § 163-284(b). That absence of prejudice alleviates any concerns about crafting the judgment or any relief granted so as to avoid or lessen prejudice.

CONCLUSION

The County Board is the sole agency charged with conducting local elections—that is, with "enforcement" of the challenged legislation. It follows that the County Board is the proper, appropriate, and only necessary defendant in this action. Plaintiffs therefore respectfully request that this Court deny Intervenor-Defendants' Motion to Dismiss or Join Necessary Parties.

Respectfully submitted this the 8th day of February, 2016.

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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day electronically filed the foregoing Opposition to Intervenor Defendants' Motion to Dismiss or Join Necessary Parties in the above-titled action with the Clerk of the Court using the CM/ECF system, which provided notice of such filing to:

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Respectfully submitted this 8th day of February, 2016.

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