

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Aug 20 2024

IN ITS ORIGINAL JURISDICTION

S.C. SUPREME COURT

Appellate Case No. 2024-001227

LEAGUE OF WOMEN VOTERS OF SOUTH CAROLINA..... Petitioner,

v.

THOMAS ALEXANDER, in his official capacity as President of the South Carolina Senate;
MURRELL SMITH, in his official capacity as Speaker of the South Carolina House of
Representatives; and HOWARD KNAPP, in his official capacity as Director of the South
Carolina Election Commission, Respondents.

GOVERNOR McMASTER'S UNOPPOSED MOTION TO INTERVENE

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Henry Dargan McMaster, in his official capacity as Governor of the State of South Carolina, moves to intervene in this matter to defend South Carolina law. In accordance with Rule 11(a), SCRCP, counsel for Governor McMaster has conferred with Petitioner’s counsel, who confirmed that Petitioner does not oppose the Governor’s intervention.

INTRODUCTION

Not long after the United States Supreme Court rejected a racial gerrymandering challenge to South Carolina’s new congressional map, *Alexander v. S.C. State Conf. of the NAACP*, 144 S. Ct. 1221 (2024), Petitioner now asks this Court to break new ground by holding hold that a partisan gerrymandering claim is cognizable under the South Carolina Constitution and striking down the congressional map as a violation of that new doctrine. The Court should reject that invitation both because the Constitution textually commits redistricting to the General Assembly and because the constitutional provisions Petitioner cites have never been understood to have anything to do with partisan gerrymandering. But those merits arguments can wait for another day.

The only question at this point is whether the Governor should be permitted to intervene. Here, as in previous cases, the Governor meets the requirements of intervention under both Rule 24(a) and Rule 24(b), SCRCP. The Governor has a unique perspective to offer, as he approved and seeks to defend the very law that Petitioner challenges. And his participation in this matter will not delay these proceedings, as the case is in its earliest stages and the Governor will comply with any deadlines the Court sets. The Court should therefore authorize the Governor to intervene in this matter, just as it has in other cases.

LEGAL STANDARD

Although the South Carolina Appellate Court Rules do not specifically address intervention in either the appellate or original-jurisdiction contexts, courts have recognized that “the policies

underlying intervention” found in Rule of Civil Procedure 24 “may be applicable in appellate courts.” *Int’l Union, United Auto., Aerospace & Agr. Implement Workers of Am. AFL-CIO, Loc. 283 v. Scofield*, 382 U.S. 205, 217 n.10 (1965). Rule 24 allows a party to intervene either as a matter of right or by permission. To intervene as of right under 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), SCRCF. To intervene with permission under Rule 24(b), a party merely 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), SCRCF. Rules of intervention should be liberally construed. *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).

This Court has repeatedly authorized parties—including Governor McMaster—to intervene in original jurisdiction cases. *See, e.g.*, Order, *Eidson v. S.C. Dep’t of Educ.*, No. 2023-001673 (S.C. Dec. 12, 2023); Order, *Planned Parenthood S. Atl. v. State*, No. 2023-001449 (S.C. Sept. 21, 2023); *Mercury Funding, LLC v. Chesney*, 433 S.C. 591, 861 S.E.2d 35 (2021); *Bailey v. S.C. State Election Comm’n*, 430 S.C. 268, 271, 844 S.E.2d 390, 391 (2020); *State ex rel. Wilson v. Condon*, 410 S.C. 331, 333, 764 S.E.2d 247, 248 (2014); *Bd. of Trs. of Sch. Dist. of Fairfield Cnty. v. State*, 395 S.C. 276, 278, 718 S.E.2d 210, 211 (2011); *Mitchell v. Spartanburg Cnty. Legislative Delegation*, 385 S.C. 621, 622, 685 S.E.2d 812, 813 (2009); *Sanford v. S.C. State Ethics Comm’n*, 385 S.C. 483, 489, 685 S.E.2d 600, 603 (2009); *Am. Petroleum Inst. v. S.C. Dep’t*

of Revenue, 382 S.C. 572, 677 S.E.2d 16, 17 (2009); *Williams v. Morris*, 320 S.C. 196, 198, 464 S.E.2d 97, 98 (1995).

ARGUMENT

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

The Governor meets all four requirements of Rule 24(a).

First, his motion is timely. This 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 is moving to intervene within a few weeks of the Petition being filed and before any Respondent has filed anything in this case. The Governor therefore satisfies this element.

Second, the Governor has multiple interests here. One, 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. The United States 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, courts have repeatedly authorized this State’s governors to intervene for purposes of defending 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 (S.C. Comm. Pls. May 25, 2021) (Act 43 adding the firing squad as a method of execution); *Williams*, 320 S.C. 196, 464 S.E.2d 97 (appropriations act and line-item-veto authority). The Governor signed the very law that Petitioner challenges, *see* 2022 S.C. Acts No. 118, so he has already analyzed the constitutionality of that law in deciding to sign it, *see* S.C. Const. art. IV, § 21.

Two, the Governor has long been a strong proponent of the separation of powers and proper method for interpreting the South Carolina Constitution. He has frequently raised such arguments in other cases in this Court, *see, e.g., Owens v. Stirling*, ___ S.C. ___, ___ S.E.2d ___, No. 2022-001280, 2024 WL 3590797 (S.C. July 31, 2024); *Planned Parenthood S. Atl. v. State*, 440 S.C. 465, 892 S.E.2d 121 (2023), and seeks to do so again here.

Three, Governors have frequently been parties to redistricting litigation. Governor Riley was a party in the 1980s redistricting litigation. *See S.C. State Conf. of Branches of Nat. Ass'n for Advancement of Colored People, Inc. v. Riley*, 533 F. Supp. 1178 (D.S.C.). Governor Campbell was in the 1990s. *See Burton on Behalf of Republican Party v. Sheheen*, 793 F. Supp. 1329 (D.S.C. 1992), *vacated sub nom. Statewide Reapportionment Advisory Comm. v. Theodore*, 508 U.S. 968 (1993), and *vacated sub nom. Campbell v. Theodore*, 508 U.S. 968 (1993). As was Governor Beasley later that decade. *See Smith v. Beasley*, 946 F. Supp. 1174 (D.S.C. 1996). The next decade, Governor Hodges was a party in redistricting litigation. *See Colleton Cnty. Council v. McConnell*, 201 F. Supp. 2d 618 (D.S.C. 2002). And Governor Haley was in the 2010s. *See Backus v. South Carolina*, 857 F. Supp. 2d 553 (D.S.C. 2012). In fact, the plaintiffs in the ultimately failed racial gerrymandering litigation in federal court named Governor McMaster as a defendant there. *See Compl. S.C. State Conf. of the NAACP v. McMaster*, No. 3:21-cv-3302 (D.S.C. Oct. 12, 2021), ECF No. 1. The Governor eventually was dismissed as a defendant, so those plaintiffs were never

forced to respond to the substance of the Governor’s arguments and declined to disavow the idea that the Governor might later have to be added back as a defendant. *See* Resp. to Mot. to Dismiss 4, *S.C. State Conf. of the NAACP v. McMaster*, No. 3:21-cv-3302 (D.S.C. Feb. 3, 2022), ECF No. 125. And although the Governor sought to be dismissed in that case, his efforts were primarily focused on Article III and immunity grounds, *e.g.*, Mot. for Summ. J., *S.C. State Conf. of the NAACP v. McMaster*, No. 3:21-cv-3302 (D.S.C. Feb. 1, 2022), ECF No. 115, whereas here, those doctrines do not apply as the Governor seeks to defend the congressional map from a state constitutional challenge.

Third, the Governor’s interests and authority risk being impaired absent intervention. “[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 Court were to grant Petitioner’s request to hear this matter in its original jurisdiction but the Governor were not a party to this case, the Governor would not have access to the proper forum to defend the map’s constitutionality and demonstrate why the enabling Act 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.”). Indeed, 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). Therefore, being a party here would ensure that the Governor has the opportunity to present both arguments and any evidence before the Court in defending his decision to sign that map into law.

Fourth, 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. 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.* Although Respondents may have similar goals to the Governor, Respondents do not share the same legal interests and authority and, thus, are unlikely to make the same arguments as the Governor. Respondents do not have the same constitutional authority and duties as the Governor. *See, e.g., Berger v. N.C. State Conf. of the NAACP*, 142 S. Ct. 2191, 2198 (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.”); *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 Respondents will “undoubtedly” make all of the arguments the Governor will make. *Berkeley Elec. Co-op., Inc.*, 302 S.C. at 191, 394 S.E.2d at 715. Governor McMaster’s distinct duties and different perspective as the State’s supreme executive authority and Chief Magistrate satisfy this final element for intervention as a matter of right. Accordingly, authorizing the Governor to intervene in this matter will facilitate “a full and fair adversarial testing of the State’s interests and arguments.” *Berger*, 142 S. Ct. at 2201.

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

At the very least, the Governor clears the low threshold for permissive intervention. As discussed already, the Governor’s request to intervene is timely, which leaves only the other two factors: (1) whether the Governor is asserting a claim or defense that shares a common question of law or fact and (2) whether 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.

Starting with common questions of law or fact, the Governor seeks to defend the very law that Petitioner challenges. A more “common” question could not exist. *Cf. Middleton v. Andino*, 481 F. Supp. 3d 563, 571 (D.S.C. 2020) (a proposed intervenor’s “interests in the constitutionality of the” challenged law “present questions of law or fact common to Plaintiffs’ Complaint”).

Turning to delay or prejudice, permitting the Governor to intervene would change nothing about this case. No deadlines currently exist other than the standard deadline to respond to the Petition for Original Jurisdiction. *See* Rule 245(c), SCACR; *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).”). As evidenced by the fact that they do not oppose the Governor’s participation, permitting Governor McMaster to intervene would not prejudice Petitioner.*

CONCLUSION

For the foregoing reasons, the Court should grant Governor McMaster’s Unopposed Motion

* Although Rule 24(c) requires a proposed pleading be filed with a motion to intervene in circuit court, there is no rule expressly requiring a proposed pleading be filed with a motion to intervene in this Court, nor has this Court required such a pleading in previous cases. Moreover, the federal courts have held that “a motion to intervene that clearly spells out the intervenor’s position satisfies Rule 24(c), as it provides notice to the Court and the parties of the intervenor’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.

to Intervene. If the Court grants the Petition, the Governor should be permitted to participate in all briefing, argument, and any other proceedings.

Respectfully submitted,

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1980)). Therefore, the Governor has not included a proposed pleading with this motion. If the Court would prefer a proposed pleading be filed, the Governor will submit one.