UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA, Plaintiff, v. STATE OF NORTH CAROLINA; PATRICK MCCRORY, in his official capacity as Governor of North Carolina; NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY; UNIVERSITY OF NORTH CAROLINA; and BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA, Defendants.	)	Case No. 1:16-cv-00425

UNITED STATES' MEMORANDUM IN RESPONSE TO MOTION TO INTERVENE BY THE HON. PHIL BERGER AND THE HON. TIM MOORE

The United States respectfully responds to the motion to intervene filed by proposed intervenors the Honorable Phil Berger and the Honorable Tom Moore, the President *pro tempore* of the North Carolina Senate and the Speaker of the North Carolina House of Representatives, respectively ("Putative Intervenors" or "Movants"). The United States opposes intervention as of right under Federal Rule of Civil Procedure 24(a). With respect to permissive intervention under Federal Rule of Civil Procedure 24(b), the United States takes no position and instead defers to this Court's discretion.

STATEMENT OF FACTS

On May 9, 2016, the United States filed a Complaint in this Court against the State of North Carolina, the Governor of North Carolina, the North Carolina Department of

Public Safety ("DPS"), the University of North Carolina ("UNC"), and the Board of Governors of the University of North Carolina ("Defendants"). *See* Complaint, ECF No. 1. The Complaint, among other things, alleges that by complying with and implementing Part I of North Carolina Session Law 2016-3, House Bill 2 ("H.B. 2"), the Defendants are engaged in a pattern or practice of violating Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* ("Title VII"), Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681, *et seq.* ("Title IX"), and the Violence Against Women Reauthorization Act of 2013, 42 U.S.C. § 13925(b)(13), ("VAWA"). Complaint, ECF No. 1, at 1-2.

H.B. 2 mandates, *inter alia*, that all "[p]ublic agencies . . . require multiple occupancy bathrooms or changing facilities . . . be designated for and only used by individuals based on their biological sex." H.B. 2 defines "biological sex" as "[t]he physical condition of being male or female, which is stated on a person's birth certificate." H.B. 2 further defines "public agencies" to include, among other entities, the state executive, judicial and legislative branches, including the University of North Carolina system.

The Movants are the leaders of the two houses of the North Carolina General Assembly that passed H.B. 2. *See* Motion to Intervene, ECF No. 8 at 2. After enacting H.B.2, the Movants filed an action against the United States in the Eastern District of North Carolina seeking, among other things, a declaration that H.B. 2 does not violate Title VII, Title IX, or VAWA. *See* Complaint for Declaratory Relief at 39, ECF No. 9-1; *see also* Memorandum in Support at 4, ECF No. 9. Specifically, the Movants' declaratory-judgment action in the Eastern District contains five claims for relief:

(1) that the United States violated the Administrative Procedures Act ("APA") through its "determination" that the Defendants violated Title VII; (2) that the United States violated the APA by its interpretation of Title IX; (3) that the United States violated the APA by its interpretation of VAWA; (4) that the United States' position with respect to H.B. 2 violates the separation of powers and the APA; and (5) that the United States' position with respect to H.B. 2 violates the Spending Clause, the Tenth Amendment, and the APA. *Id.*

Through their motion to intervene, the Movants seek to raise identical claims here. *Compare* Complaint for Declaratory Relief, ECF No. 9-1, *with* Proposed Answer and Counterclaims, ECF No. 8-1.

ARGUMENT

A. Intervention of Right is Not Available to the Putative Intervenors.

The Putative Intervenors do not satisfy the requirements for intervention as of right under Federal Rule of Civil Procedure 24(a)(2) because they have failed to establish that the existing North Carolina government defendants will inadequately represent North Carolina's interest in defending H.B. 2. Under the standard for intervention as of right, a court must, on a timely motion, allow intervention where a party

> claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless the existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a)(2).[1] *See also Fisher-Borne v. Smith*, 14 F. Supp. 3d 699, 702 (M.D.N.C. 2014); *United States v. North Carolina*, No. 13-CV-861, 2014 WL 494911, at *2 (M.D.N.C. Feb. 6, 2014). "A party seeking intervention of right must show 'interest, impairment of interest, and inadequate representation.'" *In re Sierra Club*, 945 F.2d 776, 779 (4th Cir. 1991) (quoting *Gould v. Alleco*, 883 F.2d 281, 284 (4th Cir. 1989)).

The Movants bear the burden of demonstrating that existing representation is inadequate. *See Teague v. Bakker*, 931 F.2d 259, 260-61 (4th Cir. 1991). Specifically, the Movants must show that (1) there are divergent interests between themselves and the existing Defendants; (2) that the intervenors have new legal arguments to introduce to the litigation that may be significant; or (3) that the movant has superior knowledge and stronger incentives. *See Titan Atlas Mfg. v. Sisk*, 11-CV-68, 2014 WL 837247, at *5 (W.D. Va. Mar. 4, 2014). Furthermore, "[w]hen the party seeking intervention has the same ultimate objective as a party to the suit, a presumption arises that its interests are adequately represented, against which the [movant] must demonstrate adversity of interest, collusion, or nonfeasance." *Virginia v. Westinghouse Elec. Corp.*, 542 F.2d 214, 216 (4th Cir. 1976). That presumption is stronger where a government agency represents the interests of the putative intervenors; in such a situation, an "exacting showing of

[1] Intervention under Federal Rule of Civil Procedure 24(a)(1) is not at issue here. Neither Title VII, Title IX, nor VAWA provide the Putative Intervenors with "an unconditional right to intervene." Fed. R. Civ. P. 24(a)(1). Nor do the Movants suggest otherwise. The Movants cite to a North Carolina statute granting them standing to intervene on behalf of the General Assembly in any judicial proceeding challenging a North Carolina statute or a provision of the North Carolina constitution, *see* Memorandum in Support at 3, ECF No. 3 (citing N.C. Gen. Stat. § 1-72.2), but they do not point to a federal statute supporting intervention and nowhere argue that the state statute satisfies the requirement of Rule 24(a)(1).

inadequacy" is required. *See Stuart v. Huff*, 706 F.3d 345, 352 (4th Cir. 2013) (holding that where a government agency and the "would-be intervenors want the statute to be constitutionally sustained . . . the putative intervenor must mount a strong showing of inadequacy."). Thus, "[w]hen a State statute is challenged and a proposed intervenor shares a common objective with the State to defend the validity of the statute, the proposed intervenor 'must mount a strong showing of inadequacy.'" *North Carolina*, 2014 WL 494911, at *3 (quoting *Stuart*, 706 F.3d at 352).

In this case, Movants have made no showing of inadequacy; they have not established that their interests diverge from those of the existing Defendants. In other words, the Movants cannot establish that they have a responsibility to represent an interest that is different from the responsibility borne by the existing Defendants. Indeed, the Movants concede that the Governor of North Carolina and the Secretary of DPS, both existing Defendants, have opposed the United States' position with respect to Title VII and VAWA. *See* Memorandum in Support at 19, ECF No. 9. Thus, rather than claiming that the Governor and Secretary of DPS will not, or cannot, adequately defend against the United States' suit, the Movants instead suggest that their interest in "the validity of the Act across all areas of North Carolina government" makes them better representatives. *See id.* at 18. That argument, however, conflates the "interest" inquiry under Rule 24 with the "adequate representation" prong of the intervention analysis. For purposes of this motion the United States concedes that the Movants have an interest in the continued validity of H.B. 2. The mere existence of that legal interest, however, does not mean that the named Defendants cannot adequately represent that interest. Stated differently, that

the Movants have some responsibility for the operation of the legislative branch of North Carolina Government in general, and an interest in the application of H.B. 2 in particular, does not mean that their interest with respect the Title VII and VAWA claims is not adequately represented by existing Defendants. As this Court has pointed out, "not all parties with strong feelings about or an interest in a case are entitled, as a matter of law, to intervene." *North Carolina*, 2014 WL 494911, at *4. Indeed, the Movants nowhere point to a conflict between their position and the position of the Governor or the Secretary of DPS. Nor can they; the Movants have an identical interest to that of the Governor, *viz.*, asserting the validity of H.B. 2 against the United States' challenges.[2] *See, e.g.*, *Stuart*, 706 F.3d at 352 (finding no inadequacy of interest where the North Carolina Attorney General and the putative intervenors were "motivated by the same underlying concerns").

With respect to the Title IX claim, the Movants argue that their interests are not adequately represented by UNC. Memorandum in Support at 19, ECF No. 9. They also stress that they have a direct interest in the United States' Title IX claim because they

[2] The Movants also point out that the North Carolina Attorney General "has publicly attacked the Act and refused to defend it in court." Memorandum in Support at 19, ECF No. 9. It is not enough that the Attorney General has indicated that he may decline to defend H.B. 2. This Court has previously found that an Attorney General's failure adequately to represent a putative intervenor's interest was not significant when there were multiple other parties with competent counsel. *See Fisher-Borne v. Smith*, 14 F. Supp. 3d 699, 706 (M.D.N.C. 2014) (allowing limited intervention for the purpose of lodging and preserving an objection). In permitting only limited intervention, the court in *Fisher-Borne* found that the regardless of the Virginia Attorney General's performance, there were multiple parties defending the suit who could represent the movants' interests. *Id.* at 706.

have oversight over "the maintenance and financing of North Carolina's higher education system including UNC." *See id.* at 11. Those arguments are flawed.

United States v. North Carolina, No. 13-CV-861, 2014 WL 494911 (M.D.N.C. Feb. 6, 2014), is apposite here. In *North Carolina*, this Court analyzed a motion to intervene by a putative defendant where the State was defending the litigation. After stressing the presumption in favor of adequacy of representation where the State is already defending the validity of a statute, this Court found that the proposed intervenors had not established that their interests were not aligned with the State. *Id.* at *4. This Court specifically emphasized that mere disagreement over litigation strategy or over the choice of legal arguments is not sufficient to rebut the presumption of adequate representation. *Id.*

The Movants here are in a position nearly identical to the movants in *North Carolina*. As in that case, the Movant's argument is premature; UNC has not yet responded to the United States' Complaint and there is no indication from the current pleadings that UNC will not fully and adequately defend against the United States' Title IX claim. *See, e.g.*, *North Carolina*, 2014 WL 494911, at *3 (noting that the difficulty in identifying divergent interests where the litigation is at an early stage). Moreover, as with the Title VII and VAWA claims, it does not necessarily follow from the fact that the Movants have an interest in the UNC system that UNC will not be adequately represent that interest. The Movants have not established that their interest in this case is any different than Defendant UNC's in defending the application of H.B. 2 to the UNC system. Accordingly, the Movants have not carried their burden to "rebut the

presumption that their interests are adequately represented by the State Defendants." *North Carolina*, 2014 WL 494911, at *4.[3]

Finally, the Movants have not argued, let alone established, the remaining factors that may establish inadequacy of representation. They have not pointed to new legal arguments that they may introduce to the litigation, let alone new arguments that may be significant. Nor have they demonstrated that they have superior knowledge to, or stronger incentives to litigate than, the existing Defendants. Indeed, through the language of their motion, the Movants tacitly admit that the existing representation may be adequate. *See* Memorandum in Support at 17, ECF No. 9 ("Because the parties sued by the Department have only limited authority under state law, they *may not be* in a position to fully defend [H.B. 2] across all state functions.") (emphasis added).

Because the Movants cannot establish that their interest in the instant case is not, or will not be, adequately represented by an existing Defendant, their motion to intervene as of right under Rule 24(a)(2) should be denied.

[3] *Trbovich v. United Mine Workers*, 404 U.S. 528 (1972), is also instructive on this point. There, the Court addressed whether Rule 24 permitted intervention by a union member in an action brought by the Secretary of Labor to enforce a statutory provision relating to union elections. *See id.* at 530. In holding that intervention was appropriate, the Court emphasized that the interest of the Secretary of Labor and those of a union member seeking to intervene are not identical. *Id.* at 539 (noting that the Secretary of Labor had a statutory obligation to "serve two distinct interests"). The same situation is not presented here. There is no evidence that UNC, in defending against the United States' Title IX claim, will take a position that is adverse to, or does not adequately represent, the Movants' interest.

B. The United States Defers to the Court on the Issue of Permissive Intervention.

The United States takes no position with respect to permissive intervention and instead defers to the Court's discretion. Under Federal Rule of Civil Procedure 24(b)(1), a court may permit anyone to intervene who: "(A) is given a conditional right to intervene by a federal statute; or (B) has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1). Permissive intervention is unavailable, however, where intervention will prejudice the original parties or unduly delay adjudication of the action.[4] *Id.* at 24(b)(3); *Stuart v. Huff*, 706 F.3d 345, 355 (4th Cir. 2013).

The standard for permissive intervention is a liberal one. *See Feller v. Brock*, 802 F.2d 722, 729 (4th Cir. 1986) (noting that liberal intervention "is desirable to dispose of as much of a controversy 'involving as many apparently concerned persons as is compatible with efficiency and due process.'") (quoting *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967)). Accordingly, the United States defers to this Court's discretion with respect to the propriety of intervention under Federal Rule of Civil Procedure 24(b).[5]

[4] The United States concedes (1) that the Putative Intervenor's motion is timely and (2) that the issues raised in the Movant's papers and proposed pleading raise common issues of law and fact.

[5] By not opposing intervention under Fed. R. Civ. P. 24(b), the United States does not concede the legitimacy of any of the Movants' counterclaims presented in the proposed answer appended to their motion, nor does the United States concede the legitimacy of the Movants' claims in the Eastern District that are the mirror image of the United States' claims here.

CONCLUSION

For the foregoing reasons, the United States opposes the Movants' request to intervene as of right, but defers to the Court's discretion and takes no position on the propriety of permissive intervention.

Respectfully submitted this 10th day of June, 2016,

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