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

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| UNITED STATES OF AMERICA,<br><br>Plaintiff,<br><br>v.<br><br>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,<br><br>Defendants. | Case No. 1:16-cv-00425-TDS-JEP |

**REPLY IN SUPPORT OF MOTION TO INTERVENE BY THE HON. PHIL BERGER, PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE, AND THE HON. TIM MOORE, SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES**


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## TABLE OF CONTENTS

Table of Authorities ..... ii

Introduction ..... 1

Argument ..... 2

I. A presumption in favor of adequate representation does not apply where Proposed Intervenors are themselves state officials statutorily authorized and better positioned than existing defendants to comprehensively defend the Act. ..... 2

II. Many factors show existing representation of Proposed Intervenors' interests may be inadequate. ..... 7

Conclusion ..... 9

Certificate of Service ..... 10

## TABLE OF AUTHORITIES

**Cases**

*Berger v. United States Dep't. of Justice*,
No. 5:16-cv-00240-FL (E.D.N.C. May 9, 2016) ..... 1

*Carcaño v. McCrory*,
1:16-cv-00236-TDS-JEP (M.D.N.C. Mar. 3, 2016) ..... 1

*Diamond v. Charles*,
476 U.S. 54 (1986) ..... 4

*Feller v. Brock,*
802 F.2d 722 (4th Cir. 1986) ..... 7

*Fisher-Borne v. Smith*,
14 F. Supp. 3d 699, 703-04 (M.D.N.C. 2014) ..... 3

*In re Sierra Club,*
945 F.2d 776 (4th Cir. 1991) ..... 7

*JLS, Inc. v. Public Serv. Comm'n of W. Va.*,
321 F. App'x 286 (4th Cir. 2009) ..... 7

*McCrory v. United States,*
No. 5:16-cv-00238-BO (E.D.N.C. May 9, 2016) ..... 1

*North Carolinians for Privacy v. United States Dep't. of Justice,*
No. 5:16-cv-00245-FL (E.D.N.C. May 10, 2016) ..... 1

*Patterson v. Shumate*,
912 F.2d 46, 31990 WL 122240 (4th Cir. 1990) ..... 3

*Rios v. Enterprise Ass'n Steamfitters Local U. #638*,
520 F.2d 352 (2d Cir. 1975) ..... 3

*Stuart v. Huff*,
706 F.3d 345 (4th Cir. 2013) ..... 2, 3, 4-5, 6

*Teague v. Bakker*,
931 F.2d 259 (4th Cir. 1991) ..... 2

*Titan Atlas Mfg. v. Sisk*,
2014 U.S. Dist. LEXIS 27094 (W.D. Va. Mar. 4, 2014) ..... 3, 7

*Trbovich v. UMW*,
404 U.S. 528 (1972) ..... 7

*United States v. North Carolina*,
2104 U.S. Dist. LEXIS 14787 (M.D.N.C. Feb. 6, 2014) ..... 5, 6

*Virginia v. Westinghouse Elec. Corp.,*
542 F.2d 214 (4th Cir. 1976) ..... 3, 5, 6

**Rules**

Federal Rule of Civil Procedure 24 ..... 2, 3, 4, 8

**Treatises**

6 Moore's Federal Practice § 24.03 (3d ed. 2011) ..... 6

**Orders**

Order granting consolidation,
*McCrory v. United States*, No. 5:16-cv-00238-BO (E.D.N.C. June 13, 2016) ..... 1

Order granting permissive intervention,
*Carcaño v. McCrory*, 1:16-cv-00236-TDS-JEP (M.D.N.C. Mar. 3, 2016) ..... 1

**REPLY IN SUPPORT OF INTERVENTION**

## INTRODUCTION

This action is one of five lawsuits pending in North Carolina federal district courts provoked by the federal government's recent paradigm shift on the meaning of "sex discrimination" in federal law and its consequent effects on North Carolina's Public Facilities Privacy and Security Act (the "Act" or "HB2"). Three suits are pending in the Eastern District[1] and two, including this one, are pending in the Middle District.[2]

The Proposed Intervenors here, Senate President pro tempore Berger and House Speaker Moore, originally filed a declaratory judgment action on May 9, 2016 in the Eastern District against the United States Department of Justice ("Department"), an action that has since been consolidated with a similar action filed by Governor McCrory and Secretary of Public Safety Frank Perry. *See* Order granting consolidation, *McCrory v. United States*, No. 5:16-cv-00238-BO (E.D.N.C. June 13, 2016) [Doc. 36]. Additionally, on June 6, this Court granted Proposed Intervenors permissive intervention in the other pending Middle District action on the same grounds asserted in the present motion. *See* Order granting permissive intervention, *Carcaño v. McCrory*, 1:16-cv-00236-TDS-JEP (M.D.N.C. Mar. 3, 2016) [Doc. 44].

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[1] Those three suits are *McCrory v. United States,* No. 5:16-cv-00238-BO (E.D.N.C. May 9, 2016); *Berger v. United States Dep't. of Justice*, No. 5:16-cv-00240-FL (E.D.N.C. May 9, 2016); and *North Carolinians for Privacy v. United States Dep't. of Justice,* No. 5:16-cv-00245-FL (E.D.N.C. May 10, 2016).

[2] Those two suits are the present action and *Carcaño v. McCrory*, 1:16-cv-00236-TDS-JEP (M.D.N.C. Mar. 3, 2016).

With respect to the pending intervention motion in this case, none of the existing parties opposes permissive intervention, which should be granted for the reasons stated in Proposed Intervenors' Memorandum. [Doc. 9]. Alone among the existing parties, however, the Department opposes intervention of right and, even then, disputes only one prong of the applicable test. Response [Doc. 36], at 3. The Department does not dispute that Intervenors have "an interest relating to the property or transaction that is the subject of the action and [are] so situated that disposing of the action may as a practical matter impair or impede [their] ability to protect [their] interest." *See* Fed. R. Civ. P. 24(a)(2); Response, at 5 (stating "for purposes of this motion the United States concedes that the Movants have an interest in the continued validity of H.B.2"). The Department contends only that the interests of Proposed Intervenors will be "adequately represented" by the existing defendants and that the adequacy of that representation should be "presumed." Response, at 5. As explained below, the Department is mistaken.

## ARGUMENT

### I. A presumption in favor of adequate representation does not apply where Proposed Intervenors are themselves state officials statutorily authorized and better positioned than existing defendants to comprehensively defend the Act.

A district court must permit intervention by right if the movant demonstrates "(1) an interest in the subject matter of the action; (2) that the protection of this interest would be impaired because of the action; and (3) that the applicant's interest is not adequately represented by existing parties to the litigation." *Stuart v. Huff*, 706 F.3d 345, 349 (4th Cir. 2013) (quoting *Teague v. Bakker*, 931 F.2d 259, 260-61 (4th Cir. 1991)).

The decision to grant intervention by right lies in the trial court's discretion, including the determination of adequate representation.[3]

As indicated above, the Department does not dispute that the first two requirements of Rule 24(a)(2) are met, but contends only that the interests of Proposed Intervenors are adequately represented by the existing defendants. The Department, however, mistakenly relies on a line of decisions applying a "presumption" of adequate representation where existing defendants are state officials. Response, at 3-8. None of those authorities, however, involve putative intervenors who were *themselves* state officials authorized by law to defend a state statute. North Carolina law expressly provides that the House Speaker and Senate President pro tempore "jointly have standing to intervene on behalf of the General Assembly as a party in any judicial proceeding challenging a North Carolina statute or provision of the North Carolina Constitution." N.C. Gen. Stat. § 1-72.2; *see also Fisher-Borne v. Smith*, 14 F. Supp. 3d 699, 703-04 (M.D.N.C. 2014) (noting "this court finds that, as authorized representatives of the legislature, [the Speaker's and President pro tempore's] desire to defend the constitutionality of legislation passed by the legislature is a protectable interest in the

[3] *See Stuart*, 706 F.3d at 349-50 (explaining that "it is the trial judge who is best able to determine whether … a proposed intervenor's interests are being adequately represented by an existing party"); *Virginia v. Westinghouse Elec. Corp.,* 542 F.2d 214, 216 (4th Cir. 1976) ("The district court is entitled to a full range of reasonable discretion in determining whether these requirements [of Rule 24(a)(2)] have been met") (quoting *Rios v. Enterprise Ass'n Steamfitters Local U. #638*, 520 F.2d 352, 355 (2d Cir. 1975)); *but see Titan Atlas Mfg. v. Sisk*, 2014 U.S. Dist. LEXIS 27094 (W.D. Va. Mar. 4, 2014) (explaining that only timeliness is left to the court's discretion; other factors are questions of law) (citing *Patterson v. Shumate*, No. 88-2195, 912 F.2d 46, 31990 WL 122240, at *1 (4th Cir. 1990) (unpublished).

subject matter" for purposes of Rule 24(a)(2)). Consequently, the entire premise of the Department's argument for presuming adequate representation is misplaced.

Furthermore, the authorities advanced by the Department actually support Proposed Intervenors' motion. In *Stuart v. Huff, supra,* three groups of pro-life medical professionals sought to intervene as defendants in an action challenging the constitutionality of a North Carolina abortion statute. The putative intervenors asserted inadequate representation because they disagreed with the Attorney General's handling of preliminary injunction proceedings. Unlike the present case, the Attorney General there was a named defendant and also represented other state officials named as defendants. The district court denied intervention and the Fourth Circuit affirmed. *See Stuart*, 706 F.3d at 347.

The Fourth Circuit applied a strong presumption against inadequate representation, but only because it recognized the unique and fundamental responsibility of state officials to defend state statutes. The court explained:

> [I]t is among the most elementary functions of a government to serve in a representative capacity on behalf of its people. … And 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…. *"[B]ecause the State alone is entitled to create a legal code, only the State has the kind of direct stake" needed to defend "the standards embodied in that code" against a constitutional attack…. [I]t is difficult to conceive of an entity better situated to defend it than the government ... that, through the democratic process, gains familiarity with the matters of public concern that lead to the statute's passage in the first place.*

*Id.* at 351 (quoting *Diamond v. Charles*, 476 U.S. 54, 65 (1986) (emphasis added)).

Applied in this case, the *Stuart* reasoning strongly *supports* intervention by

Proposed Intervenors, who represent the General Assembly that passed the Act. Indeed, it is difficult to imagine a party with a more "direct stake" in the litigation than the very legislators serving "in a representative capacity" who "create[d] the legal code" and possess "familiarity with the matters of public concern that lead to the statute's passage in the first place." *Id.* This holds true especially when, as here, the Attorney General refuses to defend the statute. *See Fisher-Borne,* 14 F. Supp. 3d at 704-10 (permitting intervention by right after Attorney General decided not to appeal).

Similarly, the decision in *United States v. North Carolina*, 2104 U.S. Dist. LEXIS 14787 (M.D.N.C. Feb. 6, 2014), also supports intervention here. In that case, a political candidate sought to intervene by right in a challenge to a North Carolina voter identification statute. Because several "state defendants" were already parties, the court followed *Stuart* to require a "strong showing" of inadequate representation by the existing defendants, which it found lacking. *Id.* at *8. The court specifically acknowledged that its decision would have been different if—as is the case here—the putative intervenors could have brought their own action to defend the statute. *See id.* at *15 n.2 (distinguishing the grant of intervention in a related case).[4]

[4] *Virginia v. Westinghouse*, 542 F.2d 214 (4th Cir. 1976)—also relied on by the Department—is inapposite. Response, at 4. In that case, the Commonwealth of Virginia sought to intervene in a contract dispute between a power company and an electric company on grounds that the outcome of the litigation could impact its citizens. The Fourth Circuit upheld the district court's denial of intervention by right because the proposed pleadings submitted by the state were "nearly identical" to those filed by the existing defendant, and because the state conceded at oral argument that its interests would be adequately represented at trial (it was concerned primarily with participating in settlement negotiations). *See Virginia,* 542 F.2d at 216-17.

Another important factor distinguishing *Stuart, North Carolina,* and *Virginia* is that the courts in all three decisions expressed fear of opening the proverbial floodgates to a sea of potential intervenors. The Fourth Circuit explained in *Stuart*:

> [T]o permit *private* persons and entities to intervene in the government's defense of a statute upon only a nominal showing would greatly complicate the government's job. Faced with the prospect of a deluge of potential intervenors, the government could be compelled to modify its litigation strategy…. In short, "the business of government could hardly be conducted if, in matters of litigation, *individual citizens* could usually or always intervene and assert individual points of view."

*Stuart*, 706 F.3d at 351 (quoting 6 Moore's Federal Practice § 24.03[4][a][iv][A] (3d ed. 2011)) (emphases added)*; see also North Carolina,* 2014 WL 494911 at *9 ("Allowing such interests to rebut the presumption of adequacy would simply open the door to a complicating host of intervening parties with hardly a corresponding benefit."); *Virginia*, 542 F.2d at 217 ("[W]e must also consider the potential unmanageability of the … litigation should we allow intervention. At least thirteen other states are possible litigants."). That concern obviously does not exist here, where the proposed intervenors are not "private persons" or "individual citizens," but the leaders of the General Assembly statutorily designated to defend challenged state laws in litigation.

In sum, any presumption that the existing defendants will adequately represent the interests of Proposed Intervenors is inapplicable here. None of the authorities cited by the Department dictate otherwise; in fact, they support intervention when properly read.

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Moreover, because no statutory challenge was involved in that case, the State's special interest in defending its laws was not in issue.

The interest of Proposed Intervenors in defending the Act passed by the General Assembly is recognized by statute; they are not private citizens seeking to vindicate personal agendas. Their involvement does not threaten to burden the court system with a floodgate of litigants or to delay the proceeding. For these reasons, the presumption described in *Stuart* does not apply.

## II. Many factors show existing representation of Proposed Intervenors' interests may be inadequate.

Setting aside any presumption, the Court should determine whether the interests of Proposed Intervenors may be inadequately represented by the existing defendants. The burden of demonstrating inadequate representation is "minimal": "The requirement of the Rule is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *Trbovich v. UMW*, 404 U.S. 528, 538 n.10 (1972). Furthermore, "[m]any factors may suggest inadequate representation," including whether the movants have divergent interests, new legal arguments, or superior knowledge and stronger incentives to litigate. *Titan Atlas*, 2014 U.S. Dist. LEXIS 27094, at *15*; see also In re Sierra Club,* 945 F.2d 776, 780-81 (4th Cir. 1991); *JLS, Inc. v. Public Serv. Comm'n of W. Va.*, 321 F. App'x 286, 291 (4th Cir. 2009). As with permissive intervention, intervention by right should be liberally applied. *Feller v. Brock,* 802 F.2d 722, 729 (4th Cir. 1986).

As already discussed in their Memorandum, the following differences between the Proposed Intervenors' interests and those of the existing defendants are more than enough to meet the "minimal" standard of showing potentially inadequate representation:

1. No existing defendant can defend the Act against *all* fronts of federal statutory and constitutional challenge.
2. No existing defendant represents the interests of North Carolina's elementary, middle, and high schools, whose students are most vulnerable to the federal policy at issue here, or to the associated threatened reduction in federal education funding.
3. No existing defendant is responsible for supervising the State Board of Education and county educational systems, organizing and financing all public schools, setting the boundaries of public educational districts, and selecting which educational programs to fund.
4. No existing defendant represents the interests of public institutions of higher education other than UNC.
5. No existing defendant personally participated in passing the Act or administering the special session.
6. No existing defendant represents the state government's legislative branch, which would be directly subject to the legal rule advocated by the Department here.
7. No existing defendant is responsible for enacting the state budget.
8. No existing defendant holds constitutional power to supersede or preempt local laws in conflict with general or uniformly applicable laws—a power that is challenged in the Department's complaint.

*See generally* Memorandum, at 10-13, 15-17 (discussing these differences in greater detail). In short, no existing defendant has oversight of all areas of North Carolina government potentially affected by this litigation over the validity of the Act.

These differences in the breadth and quality of interests easily meet the Proposed Intervenors' "minimal" burden of showing that the existing defendants may not fully and adequately represent their interests in defending the validity of the Act. Proposed Intervenors therefore meet the requirements of Rule 24(a)(2) for intervention of right.

## CONCLUSION

For the foregoing reasons, Proposed Intervenors respectfully ask the Court to grant them intervention, either permissively, by right, or both.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on May 17, 2016, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to all counsel of record.

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