

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

PATRICK L. MCCRORY, in his official capacity)
as Governor of the State of North Carolina,)
and FRANK PERRY, in his official capacity)
as Secretary, North Carolina Department of)
Public Safety,)

Plaintiffs,)

vs.)

UNITED STATES OF AMERICA,)
UNITED STATES DEPARTMENT)
OF JUSTICE, LORETTA E. LYNCH, in her)
official capacity as United States Attorney)
General, and VANITA GUPTA, in her official)
capacity as Principal Deputy Assistant Attorney)
General,)

Defendants.)

CASE NO. 5:16-cv-238-BO

**PLAINTIFFS' RESPONSE IN OPPOSITION TO MOTION TO
INTERVENE FILED BY STEVEN-GLENN JOHNSON**

Plaintiffs Patrick L. McCrory, in his official capacity as Governor of the State of North Carolina (“Governor McCrory”), and Frank Perry, in his official capacity as Secretary, North Carolina Department of Public Safety (“Secretary Perry”), (collectively “plaintiffs”) hereby respectfully respond in opposition to the motion to intervene filed on June 6, 2016, by *pro se* litigant Steven-Glenn Johnson (“Johnson”) ([D.E. #33.](#))

NATURE OF THE CASE

Plaintiffs brought this declaratory judgment action pursuant to 28 U.S.C. § 2201 *et seq.*, the Federal Declaratory Judgment Act, and Rule 57 of the Federal Rules of Civil Procedure. The parties’ dispute arises from the implementation of North Carolina’s Public Facilities Privacy and

Security Act, N.C. Session Law 2016-3. This law concerns use of bathroom and changing facilities based on biological sex. Plaintiffs also seek injunctive relief.

STATEMENT OF RELEVANT FACTS

The North Carolina General Assembly enacted the Public Facilities Privacy and Security Act (“the Act”) on March 23, 2016. (D.E. #1: Pls.’ Compl. ¶ 10.) The Act created common sense bodily privacy protections for, among others, state employees, by instructing public agencies to require multiple occupancy bathroom or changing facilities to be designated for and only used by persons based on their biological sex. (Id.) Biological sex is the physical condition of being male or female, and the Act notes that such condition is “stated on a person’s birth certificate.” (Id.) The Act also allows accommodations based on special circumstances. (Id.)

On April 12, 2016, Governor McCrory issued “Executive Order 93 to Protect Privacy and Equality” (“EO 93”), which expanded discrimination protections to state employees on the bases of sexual orientation and gender identity, among others. (Id. ¶ 11.) EO 93 also affirmed North Carolina law that cabinet agencies should require multiple occupancy bathroom or changing facilities to be designated for and only used by persons based on their biological sex. (Id.) Governor McCrory’s executive order likewise reaffirmed North Carolina law that agencies may make a reasonable accommodation upon request due to special circumstances and directed all agencies to make a reasonable accommodation of a single occupancy restroom, locker room, or shower facility when readily available and when practicable. (Id.) Accordingly, under North Carolina law, state employees are required to use the bathroom and changing facilities assigned to persons of their same biological sex, regardless of gender identity or transgender status. (Id. ¶ 17.) As such, North Carolina does not treat transgender employees differently from non-transgender employees. (Id.)

ARGUMENT

Johnson's motion to intervene should be denied because he fails to satisfy the requirements for Article III standing. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (for a party to have standing to sue it must establish, *inter alia*, an "injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical") (internal citations and quotation marks omitted). According to his motion, Johnson is "a native American National, creditor to the United States, and a father of two daughters and a grandfather of a baby girl due in October 2016[.]" (D.E. # 33: Johnson's Mot. to Intervene ¶ 4.) He also describes himself as "among the general class of North Carolinians or general public . . ." (Id. ¶ 2.) Thus, by his own admission, Johnson seeks to intervene to litigate the validity of a state law simply by virtue of being a member of the public at large in North Carolina. He does not, however, allege any particularized harm that sets him apart from the other members of the state's population. Johnson's own description of his status is therefore insufficient to confer standing.¹ See Lujan, 504 U.S. at 573-74, 112 S. Ct. 2130, 119 L. Ed. 2d 351 ("[A] plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy[.]"); see also Hein v. Freedom from Religion Foundation, Inc., 551 U.S. 587, 598-99, 127 S. Ct. 2553, 168 L. Ed. 2d 424 (2007).

¹ Though Johnson also appears to allege that, due to his filing of certain papers in the Wake County Register of Deeds, he is now the "attorney in fact" for the State of North Carolina, this allegation is not plausible, particularly due to his failure to cite any legal authority for the proposition that such action could make him the State's proper representative in any capacity. (Johnson Mot. to Intervene ¶ 3.)

Indeed, in Hollingsworth v. Perry, the United States Supreme Court held that individuals who had been the official proponents of a ballot proposition that amended the California state constitution lacked standing to intervene in the court below so as to defend that amendment from a challenge under the United States Constitution. 133 S. Ct. 2652, 2659-60, 2667-68, 186 L. Ed. 2d 768 (2013). The Supreme Court explained that they “had no ‘direct stake’ in the outcome” of the case because they only sought “to vindicate the constitutional validity of a generally applicable California law.” Id. at 2662, 186 L. Ed. 2d 768. Thus, like Johnson here, the amendment’s proponents in Hollingsworth could articulate only a generalized interest that failed to separate themselves from the population at large. They therefore lacked standing under Article III and could not intervene. Similarly, Johnson lacks Article III standing and should be denied permission to intervene in this case under either provision of Rule 24.

Moreover, Johnson’s motion appears to be premised on the notion that Governor McCrory and Secretary Perry, as well as President Pro Tempore of the North Carolina Senate Phil Berger and Speaker of the North Carolina House of Representatives Tim Moore, do not lawfully hold their respective offices due to some alleged (albeit unclear) irregularity in their taking of the oaths of office prescribed by North Carolina law. Johnson presents no evidence for this contention. Even if there were some deficiency in the ability of these public officials to litigate this case—which there is not—this fact would not thereby confer upon Johnson any special standing to intervene in this matter. Furthermore, because Johnson seeks to litigate on behalf of the State of North Carolina (whose interests are already represented), rather than to vindicate any particular and legally cognizable interest of his own, his intervention would add nothing to this case. To the contrary, it would only inject extraneous issues (*e.g.*, the validity of certain state officers’ oaths) that are not germane to those raised by the current pleadings and that

would only complicate resolution of this important litigation. See Fed. R. Civ. P. 24(b)(3) (stating that, in determining whether to allow permissive intervention, “the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties’ rights”).

WHEREFORE, plaintiffs respectfully ask that Johnson’s motion to intervene under Rule 24 of the Federal Rules of Civil Procedure be denied and that they be granted such other and further relief as the Court may deem appropriate.

Respectfully submitted, this the 29th day of June, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that, on this date, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all CM/ECF participating attorneys, and that a copy was sent via First Class U.S. Mail to Mr. Steven-Glenn Johnson at the below address in accordance with Rule 5 of the Federal Rules of Civil Procedure.

SERVED VIA U.S. MAIL:

Steven-Glenn Johnson
208 Nydegg Road
New Bern, NC 28562

This the 29th day of June, 2016.

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