IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

BISHOP OF CHARLESTON, a Corporation Sole, d/b/a The Roman Catholic Diocese of Charleston, and SOUTH CAROLINA INDEPENDENT COLLEGES AND UNIVERSITIES, INC., Plaintiffs, v. MARCIA ADAMS, in her official capacity as the Executive Director of the South Carolina Department of Administration; BRIAN GAINES, in his official capacity as budget director for the South Carolina Department of Administration; and HENRY MCMASTER, in his official capacity as Governor of the State of South Carolina, Defendants.	C/A No. 2:21-cv-1093-BHH **MOTION TO INTERVENE**

Proposed Intervenors Orangeburg County School District (OCSD) and the South Carolina State Conference of the NAACP ("SCNAACP"), through undersigned counsel, hereby move, under Rule 24(a) of the Federal Rules of Civil Procedure, to intervene as of right as defendants in this action, or, in the alternative, for permissive intervention as defendants under Rule 24(b) of the Federal Rules of Civil Procedure. Defendants Marcia Adams and Brian Gaines do not oppose this motion. Defendant Governor McMaster declined to take a position on the motion at this time and reserves the right to respond.

I. Introduction

This lawsuit is an effort to transfer public funds benefiting children in public-school districts in South Carolina to private-school students, a proposal Defendant Governor McMaster publicly supports. But Article XI, Section 4 of the South Carolina Constitution ("Article XI")

prohibits giving public funds to private schools, thereby safeguarding funding for public-school districts like OCSD from which the disproportionately rural and lower-income students represented by Proposed Intervenor SCNAACP benefit.

Defendants Marcia Adams and Brian Gaines do not oppose this motion, and no party presently before the Court can adequately defend Article XI or represent Proposed Intervenors' interest in this action. The State of South Carolina is not a party to this litigation. Defendants Adams and Gaines are officials in the South Carolina Department of Administration (SCDA). SCDA's function is to administer shared services like building management, real estate services, information technology shared services, state motor fleet management, human resources guidance and support, operation of the state budget request process, and operation of the statewide enterprise accounting system. *See* S.C. Dep't Admin., https://admin.sc.gov/. Defending the constitutionality of the South Carolina Constitution in federal court is not the job of Defendants Adams or Gaines, and they have no interest in the outcome of this litigation.

Governor Henry McMaster opposes Article XI as interpreted by the South Carolina Supreme Court and has publicly expressed his support for using public education funds to cover tuition at the private schools represented by Plaintiffs. (*See, e.g.*, McMaster Resp. Opp'n Mot. Prelim. Inj. 2–3, 9, Apr. 21, 2021, ECF No. 22.); *see also* Press Release, Office of Governor Henry McMaster, Gov. Henry McMaster Invests $2.4 million in Historically Black Colleges and Universities (July 9, 2020), https://perma.cc/HB7E-BHF9. Consistent with that position, he did not defend Article XI on the merits in opposing Plaintiffs' preliminary injunction motion (*see generally* McMaster Resp. Opp'n Mot. Prelim. Inj., Apr. 21, 2021, ECF No. 22.), and he has not moved to dismiss Plaintiffs' religious discrimination claims, even though this Court held that they likely fail as a matter of law in its preliminary injunction order. *See Bishop of Charleston v. Adams*,

Civil Action No. 2:21-1093-BHH, 2021 WL 1890612, at *4 (D.S.C. May 11, 2021). Instead, the Governor answered Plaintiffs' amended complaint, sending the case to discovery. (*See generally* Answer, May 25, 2021, ECF No. 36.)

The stakes in this lawsuit could not be higher: Plaintiffs ask this Court to invoke the United States Constitution to strike down a significant provision of the South Carolina Constitution. The Court should not be forced to adjudicate a constitutional challenge of this import without adequate representation on both sides of the challenge. Proposed Intervenors have a vital interest in the merits of this action, they satisfy all requirements for intervention as of right, and they are fully able and willing to defend this case on the merits. This Court should grant their motion to intervene to defend Article XI. If Proposed Intervenors' motion to intervene is granted, they intend to file the attached proposed partial motion to dismiss (attached as Exhibit B).

II. Background

On March 27, 2020, the Coronavirus Aid, Relief, and Economic Security Act was enacted. Pub. L. No. 116-136, 134 Stat. 281 (2020). *Adams v. McMaster*, 851 S.E.2d 703, 706 (S.C. 2020). In the Act, Congress appropriated $30.75 billion to the Education Stabilization Fund in response to COVID-19. *Id.* Part of that fund is the GEER fund, which awards monies to be distributed at the direction of the Governor for educational purposes. *Id.* South Carolina's GEER fund grant was approximately $48.5 million. *Id.*

On July 20, 2020, Governor McMaster announced his intent to award $32 million in GEER funds, or about two-thirds the total, to private schools. *Id.* at 706–07. Proposed Intervenor OCSD and other parties sought declaratory judgment and injunctive relief in state court, arguing doing so would violate Article XI. *Id.* at 707. Article XI provides: "No money shall be paid from public funds nor shall the credit of the State or any of its political subdivisions be used for the direct benefit of any religious or other private educational institution." S.C. Const. art. XI, § 4.

Ultimately the South Carolina Supreme Court unanimously held "the Governor's allocation of $32 million in GEER funds" to private schools "constitutes the use of public funds for the direct benefit of private educational institutions within the meaning of, and prohibited by, Article XI, Section 4 of the South Carolina Constitution." *Id.* at 706.

On April 14, 2021, Plaintiffs filed the present action, alleging that Article XI violates the U.S. Constitution's Free Exercise and Equal Protection Clauses (Compl., ECF No. 1). The complaint was served on April 16, 2021, and on that same day Plaintiffs moved for a preliminary injunction setting aside Article XI to allow private schools access to certain South Carolina public funds (GEER funds and "Act 154 funds"). (Mot. Prelim. Inj., ECF No. 6.) The Governor allocated the remaining GEER funds under his control and responded that claims against him were thereby made moot. (Resp. Opp'n Mot. Prelim. Inj. 2, ECF No. 22.) Plaintiffs responded by amending the complaint to seek "GEER II" funds, which the Governor has not yet allocated. (Am. Compl. ¶¶ 49–51.) Defendants Adams and Gaines answered the amended complaint; the Governor obtained a two-week extension of the time. (Answer, May 10, 2021, ECF No. 31; Letter, May 11, 2021, ECF No. 33.) During the period of the extension, the Court denied the motion for a preliminary injunction, holding "Plaintiffs have not made a clear showing that they are likely to succeed on their claim grounded in religious discrimination." *Bishop of Charleston*, 2021 WL 1890612, at *4. The Governor thereafter answered the amended complaint (Answer, ECF No. 36), and the Court entered a scheduling order, under which the Rule 26(f) conference must occur by today, June 16, 2021. (Order, May 27, 2021, ECF No. 37.)

III. Discussion

A. Proposed Intervenors are entitled to intervene as of right.

Under Federal Rule of Civil Procedure 24(a), a court must permit anyone to intervene who (1) makes a timely motion to intervene, (2) has "an interest in the subject matter of the underlying

action," (3) is so situated that "denial of the motion to intervene would impair or impede [his] ability to protect [that] interest," and (4) shows that his "interest is not adequately represented by existing parties." *Hous. Gen. Ins. Co. v. Moore*, 193 F.3d 838, 839 (4th Cir. 1999). "[T]imeliness is a 'cardinal consideration . . . ." *Id.* Proposed Intervenors satisfy all four requirements for intervention as of right.

1. Proposed Intervenors' motion is timely.

Three criteria determine whether a motion to intervene is timely: (1) "how far the underlying suit has progressed," (2) the "prejudice" that granting the motion would cause to the other parties; and (3) the reason for the delay—if any—in filing the motion. *Alt v. EPA*, 758 F.3d 588, 591 (4th Cir. 2014). Proposed Intervenors did not delay in filing this motion. Governor McMaster answered Plaintiffs' amended complaint on May 5, 2021 (Answer, May 25, 2021, ECF No. 36.), making clear that none of the named Defendants would be filing a motion to dismiss and triggering Proposed Intervenors' efforts to intervene in this case. Proposed Intervenors file this motion only three weeks later—the same day as the Rule 26(f) conference deadline and the start of discovery. Granting intervention therefore will not delay the proceedings or prejudice the other parties in any way. *Cf. Scardelletti v. Debarr*, 265 F.3d 195, 202 (4th Cir. 2001) ("The purpose of the [timeliness] requirement is to prevent a tardy intervenor from derailing a lawsuit within sight of the terminal."), *rev'd on other grounds*, *Devlin v. Scardelletti*, 536 U.S. 1 (2002).

2. Proposed Intervenors have a "significantly protectable" interest in this litigation.

To satisfy Rule 24(a), Proposed Intervenors' interest in the subject of this suit must be "significantly protectable." *Donaldson v. United States*, 400 U.S. 517, 531 (1971). Proposed Intervenors have a significantly protectable interest in Article XI. OCSD is a public school district

in Orangeburg County, South Carolina. It has 11,688 students in 32 schools.[1] OCSD also was among the parties that successfully challenged under Article XI Governor McMaster's efforts to divert CARES Act funds to private schools and therefore has a significant interest defending that legal victory in this related case. *See Adams*, 851 S.E.2d at 706. The SCNAACP has more than 12,000 members, including parents of students who attend South Carolina public schools, junior youth councils, youth councils, high school chapters, and college chapters in nearly every county in South Carolina. (Decl. Brenda C. Murphy ¶ 5 (attached as Exhibit A).) Most of the SCNAACP's school-age members attend public schools, as do most of the school-age children of the SCNAACP's adult members. (*Id.*) If Article XI is invalidated, fewer funds would be available for the benefit of OCSD's students, the SCNAACP's youth members, and the children of the SCNAACP's adult members, than if Article XI were to remain in force.

The effect invalidating Article XI would have on Proposed Intervenors' students and members is not theoretical. It has already been demonstrated. When the Governor's attempt to give two-thirds of the GEER funds to private schools was blocked, those funds instead went to public charter schools (including the OCSD's High School for Health Professions), educational services for children in group home settings, to the South Carolina Technical College System, to early childhood education programs, and programs to combat juvenile delinquency and prevent students from dropping out of school. *See* Press Release, Office of the Governor, *Gov. McMaster Awards Over $12 million in GEER Funds to S.C. Department of Juvenile Justice* (Apr. 21, 2021), *available at* https://governor.sc.gov/news/2021-04/gov-mcmaster-awards-over-12-million-geer-funds-sc-department-juvenile-justice (including links to press releases for other awards of GEER

[1] *See* About Us, Orangeburg Cty. Sch. Dist., https://www.ocsdsc.org/domain/77; Active Student Headcounts, S.C. Dep't Ed., https://ed.sc.gov/data/other/student-counts/active-student-headcounts/

funds). Without Article XI, those entities would not have received the funding in question. Instead, the funds would have been used to pay tuition for students at private schools. *See* Press Release, Office of the Governor, *Gov. Henry McMaster Creates Safe Access to Flexible Education (SAFE) Grants* (July 20, 2020), *available at* https://governor.sc.gov/news/2020-07/gov-henry-mcmaster-creates-safe-access-flexible-education-safe-grants.

Proposed Intervenors' interest in preventing their students and members from losing vital resources is a "substantial, and legally protectable interest" satisfying the requirement for intervention. *Lewis v. Excel Mech., LLC*, No. 2:13-CV-281-PMD, 2013 WL 3762904, at *2 (D.S.C. July 16, 2013) ("'[A] party will not be permitted to intervene as a matter of right unless it has a direct, substantial, and legally protectable interest in the action.'" (alteration in original) r(quoting *Genesis Press, Inc. v. MAC Funding Corp.*, No. C.A. 6:08-2115-HMH, 2008 WL 4695114, at *1 (D.S.C. Oct. 23, 2008))). Courts have held that school districts have an interest justifying intervention even when the loss of school funding would result from activities unrelated to education. For example, in *Kleissler v. U.S. Forest Service*, school districts sought to intervene in a dispute between environmentalists and the U.S. Forest Service regarding tree harvesting. 157 F.3d 964 (3d Cir. 1998). The school districts received a portion of the Forest Service's revenues from logging, and elimination of the logging contracts would have denied the school districts those funds. *Id.* at 968. The Third Circuit held that the school districts were allowed to intervene:

> The school districts and municipalities have direct interests in this litigation because state law commands the Commonwealth, through its political subdivisions, to forward to them federal grant money generated through timber harvesting each year, money that they will lose, at least temporarily and perhaps permanently, if plaintiffs are successful in this lawsuit. To suspend the flow of revenue to the school districts and municipalities for even a limited period of time would affect spending for essential school activities and public projects. We are persuaded that the interests jeopardized, which are protected by state law, are direct, substantial and of adequate public interest as to justify intervention.

Id. at 973. In this case, the Proposed Intervenors' interest in the litigation is much more direct than in *Kleissler*. Here, the loss of funds for public schools would not be an incidental effect of a plaintiff's challenge to an allegedly harmful commercial activity. In this case the diversion of funds from public schools to private schools is precisely what Plaintiffs hope to achieve.

3. The Court's disposition of this case might impair Proposed Intervenors' "significantly protectable" interest.

Intervention is required under Rule 24(a) where "the disposition of a case would, as a practical matter, impair the applicant's ability to protect his interest." *Spring Constr. Co. v. Harris*, 614 F.2d 374, 377 (4th Cir. 1980). The disposition of the present case could impair Proposed Intervenors' interest in preserving resources benefitting public school children in disadvantaged communities. As explained above, the Governor has stated that but for Article XI, he would provide large sums of money to private schools that otherwise would be provided to public schools like OCSD and like the schools that the SCNAACP's youth members and the children of its adult members attend. If intervention is denied and Plaintiffs prevail, Proposed Intervenors would have no way to protect their interest in those funds.

4. The existing defendants will not adequately protect Proposed Intervenors' "significantly protectable" interest.

Intervention typically requires bearing only a "minimal" burden of showing inadequacy of representation by an existing party. *United Guar. Residential Ins. Co. v. Phila. Sav. Fund Soc'y*, 819 F.2d 473, 475 (4th Cir. 1987) (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)). However, where defendants are represented by a government agency, "the putative intervenor must mount a strong showing of inadequacy." *Stuart v. Huff*, 706 F.3d 345, 352 (4th Cir. 2013). That showing can be made by demonstrating "collusion between the existing parties, adversity of interests between themselves and the State Defendants, or nonfeasance on the part of the State Defendants." *N.C. State Conf. of NAACP v. Cooper*, 332 F.R.D. 161, 169 (M.D.N.C.

2019), *aff'd sub nom. N.C. State Conf. of NAACP v. Berger*, No. 19-2273, 2021 WL 2307483, at *19 (4th Cir. June 7, 2021) (en banc).

The heightened bar for intervention established by *Stuart* has little if any application with respect to Defendants Adams and Gaines, who do not oppose intervention and thereby implicitly acknowledge they are not positioned to adequately represent Proposed Intervenors' interests. In any event, Proposed Intervenors can easily hurdle *Stuart*'s bar. Proposed Intervenors need show only one of the three ways to rebut the adequacy of a governmental defendant: collusion, adversity of interests, or nonfeasance. *Id.* In this case, Proposed Intervenors can show all three.

First, Proposed Intervenors' interests are adverse to the Governor's interests. The Governor opposes Article XI; Proposed Intervenors support it. As the Governor has already explained in filings in this case:

> To the extent the present challenge is borne, in whole or in part, of Plaintiffs' frustration or disagreement with the South Carolina Supreme Court's decision in *Adams*, the Governor shares those sentiments and is disappointed that the far-reaching practical implications he foreshadowed to the court have since become a reality. Nevertheless, the Governor remains obligated to follow and enforce South Carolina law, as interpreted by the state supreme court, and his hands remain tied by the court's declaratory judgment.

(Resp. Opp'n Mot. Prelim. Inj. 9, ECF No. 22.) This is, of course, precisely why the Governor and OCSD were opposing parties when Article XI was litigated in *Adams*.

Second, the Governor has declined to address the merits of this case. Instead, as shown above, he has expressed sympathy for Plaintiffs' position. Further, although this Court held in its Order denying Plaintiffs' Motion for Preliminary Injunction that Plaintiffs' religious discrimination claims are likely non-meritorious as a matter of law, the Governor did not move to dismiss that claim. Instead, the Governor answered, sending this case to discovery. Defendants Adams and Gaines also could be described as nonfeasant but defending the State Constitution in federal court is simply not their job. Similarly, they were also named defendants in *Adams*, but did not file a

substantive brief, instead stating that SCDA "has acted and will act in this matter pursuant only to the authority bestowed upon it by the legislature of this State and in accordance with any order(s) issued by this Court." *Adams*, 432 S.C. at 234 n.1. Defendants Adams and Gaines did in summary fashion address the merits of this case in opposing Plaintiffs' preliminary injunction motion (Resp. Adams & Gaines Opp'n Mot. Prelim. Inj. 4–7, Apr. 21, 2021, ECF No. 19), but they, like the Governor, answered Plaintiffs' amended complaint rather than filing a motion to dismiss (Answer, May 10, 2021, ECF No. 31).

Third, there appears to be collusion between the Governor and Plaintiffs. In part, this is an unavoidable inference from the Governor's expressed support for Plaintiffs' position and the Governor's refusal to defend against Plaintiffs' position on the merits. It is also an inference from the Governor's choice of counsel: Christopher Mills. Two months before this action was filed, Mr. Mills was a constitutional law fellow at the Becket Fund for Religious Liberty. The Becket Fund has long sought to eliminate state constitutional provisions that impede proposals to allow public school funds to be used for private school tuition. *See, e.g.*, Press Release, Becket, *Amendment 8 pits religious groups against backers of church-state separation* (Oct. 3, 2012), https://perma.cc/M3KJ-YLAP (stating "Becket Fund attorneys have argued Blaine Amendments are an impediment to school vouchers in those states that have them"); Areas of Practice / Education, Becket, https://www.becketlaw.org/area-of-practice/education/ ("Religious discrimination across the country often happens under the guise of 'Blaine Amendments,' which forbid the use of state funds to support religious purposes and were specifically designed to block only Catholic groups from accessing funds. The blatant religious discrimination by state Blaine amendments had them being compared to Jim Crow laws."). In fact, about two weeks *after* this action was filed, Plaintiffs' lead counsel, Daniel Suhr of the Liberty Justice Center, filed a lawsuit

against the Berkeley County School District *with Mr. Mills as co-counsel*. *Herbst v. Berkeley Cty. Sch. Dist.*, Case No. 2021-CP-08-952 (S.C. Ct. Com. Pl. (Berkeley Cty.)). Hiring Mr. Mills to defend the instant case is rather like hiring David Bruck to prosecute a death penalty case—a lawyer with stellar credentials but not the person one would hire if the death penalty were really the goal.

In sum, the named Defendants cannot or will not defend Proposed Intervenors' substantial interest in this case.

IV. Alternatively, Proposed Intervenors Satisfy the Minimal Requirements for Permissive Intervention.

Under Rule 24(b) of the Federal Rules of Civil Procedure, the Court "may permit anyone to intervene who" files a timely motion and who "has a claim or defense that shares with the main action a common question of law or fact." Timeliness is measured by the same three criteria used for intervention as of right: "how far the suit has progressed," "the prejudice that delay might cause other parties," and the reason for the delay (if any) in filing the motion. *Students for Fair Admissions Inc. v. Univ. of N.C.*, 319 F.R.D. 490, 494 (M.D.N.C. 2017) (quoting *R & G Morg. Corp. v. Fed. Home Loan Mortg. Corp.*, 584 F.3d 1, 7 (1st Cir. 2009). As explained above, Proposed Intervenors filed their intervention motion before any dispositive motions were filed and concurrent with the start of discovery. Thus, intervention will cause no undue delay or prejudice to any existing parties.

Moreover, as shown in the Proposed Motion to Dismiss, Proposed Intervenors' defenses share with the "main action" questions of both law and fact. Plaintiffs claim Article XI violates the U.S. Constitution because it unlawfully discriminates on the basis of race or religion. Proposed Intervenors claim Article XI fully complies with the Constitution. These arguments present

completely overlapping questions of fact and law. Proposed Intervenors therefore satisfy all requirements for permissive intervention, and the Court should grant their request to intervene.

V. Conclusion

For the foregoing reasons, the Court should grant Proposed Intervenors' motion to intervene.

Respectfully submitted,

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