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

PROPOSED INTERVENORS' REPLY TO THE RESPONSES OF PLAINTIFFS AND DEFENDANT GOVERNOR MCMASTER TO THE MOTION TO INTERVENE

Proposed Intervenors the Orangeburg County School District (OCSD) and the South Carolina State Conference of the National Association for the Advancement of Colored People (SCNAACP), through undersigned counsel, hereby submit this reply to Plaintiffs' and Defendant Governor McMaster's responses in opposition to their motion to intervene.

A. A motion to dismiss satisfies Rule 24's responsive pleading requirement.

Rule 24(c) requires a "pleading that sets out a defense for which intervention is sought." The obvious reason for this requirement is to give the Court and the parties notice of the position the proposed intervenor would take in the litigation. The Court is not required to construe "pleading" in Rule 24(c) as it is defined in Rule 7, and it would be nonsensical to do so. The purpose of Rule 7 is to limit pleadings to complaints, answers, and replies to answers, and to require all other requests for court action to be made by motion. It eliminates pleadings like the

demurrer, joinder in demurrer, plea in abatement, plea of confession and avoidance, replication, rejoinder, bill in equity, and the myriad writs formerly used to commence common-law actions. Proposed Intervenors' motion to dismiss satisfies Rule 24(c)'s purpose because the motion sets forth their defenses with particularity. Indeed, it explains their defenses far more fully than would a boilerplate answer. All named Defendants have filed answers, yet Proposed Intervenors can only speculate as to what defenses they will actually assert in this action.

Plaintiffs argue that "pleading" in Rule 24(c) nonetheless must be construed as defined in Rule 7, but even if it were, their argument would rest on the trivial technicality that demurrers are now styled motions to dismiss. Such pedantry has no bearing on whether intervention should be granted and so courts routinely hold that a proposed motion to dismiss satisfies Rule 24(c). *See, e.g.*, *Black v. LaHood*, No. 11-1928, 2012 WL 13054502 (D.D.C. Apr. 30, 2012) ("That [Intervenor's motion to dismiss] incorporates other Defendants' arguments does not make it any less a pleading that sets out Intervenors' defenses. These rules [Rule 24(c) and local equivalent] are thus satisfied."); *New Century Bank v. Open Sols.*, Inc., No. 10-6537, 2011 WL 1666926, *3 (E.D. Pa. May 2, 2011) ("The FDIC's motion to dismiss and alter or amend the judgment puts the court and other parties on clear notice of the position the FDIC will advance. This satisfies Rule 24(c)."); *Danner Const. Co. v. Hillsborough County*, No. 809-CV-650-T-17TBM, 2009 WL 2525486, at *2 (M.D. Fla. Aug. 17, 2009) (allowing intervention where the "Court finds that the Motions to Intervene and the Motions to Dismiss filed by the intervenors in this action give Danner notice of the "position, claim, and relief sought"); *Petrik v. Reliant Pharms., Inc.*, No. 8:07-CV-1462-T24TBM, 2007 WL 3283170, at *2 (M.D. Fla. Nov. 5, 2007) (allowing intervention where, "[b]ecause Abbott's motion to intervene and stay clearly spells out their position in this case, the failure to attach a formal pleading could not have prejudiced Plaintiff"); *Sheesley v. St. Paul Fire*

& Marine Ins. Co., 239 F.R.D. 404, 412 (W.D. Pa. 2006) (finding that the court could consider a motion to intervene that did not contain a pleading, but instead, contained a motion to compel arbitration and stay proceedings); *WJA Realty Ltd. P'ship v. Nelson*, 708 F. Supp. 1268, 1272 (S.D. Fla. 1989) (holding that "an adequate pleading to intervene is not necessarily limited to a rule 7(a) pleading").

But even if Plaintiffs are correct that Rule 24(c) generally requires the attachment of an answer to a motion to intervene, the Fourth Circuit has held that a denial of a motion to intervene should not rest on trivial technicalities: "Although some cases have held that intervention should be denied when the moving party fails to comply strictly with the requirements of Rule 24(c), the proper approach is to disregard non-prejudicial technical defects." *Spring Const. Co. v. Harris*, 614 F.2d 374, 376–77 (4th Cir. 1980) (citing 7A Wright and Miller, Federal Practice and Procedure § 1914 (Supp. 1978) and cases cited in n.84 thereto). Plaintiffs argue that Proposed Intervenors' submission of a motion to dismiss instead of an answer somehow is a "more than technical" issue that fails to "inform the court of the question before it" because the motion to dismiss addresses their religious-discrimination claims but not their racial-discrimination claims, and so "the parties and this Court have no idea whether [Proposed Intervenors] intend to contest or concede this [racial-discrimination] claim." *Id.*; (Pls.' Resp. Opp'n 3, ECF No. 48, June 25, 2021). That argument is without merit.

Plaintiffs know Proposed Intervenors oppose their Equal Protection claim. Proposed Intervenors move to intervene to defend the validity of Article XI, Section 4 of the South Carolina Constitution ("Article XI"), not to quibble about the proper grounds for invalidating it. Proposed Intervenors did not seek dismissal of the Equal Protection claim in the proposed motion to dismiss

because the Court's decision on the motion for a preliminary injunction suggests discovery is necessary to resolve that claim:

> The Plaintiffs have only begun to scratch the surface of what will no doubt be a well-litigated challenge to the no-aid provision on the merits. For the time being, there is no evidence that the no-aid provision, as applied in Adams and the disbursement decisions by the Governor and Department of Administration, disproportionately affected African-American students, HBCUs, or religious schools. The fact remains that the majority of the SCICU member institutions are not HBCUs and the no-aid provision has been applied neutrally as to religious and non-religious institutions. In this context, it would be premature to apply the *Arlington Heights* analysis to invalidate South Carolina's no-aid provision on the current record.

(Order 11, ECF No. 34, May 11, 2021; *see* Proposed Motion to Dismiss 2 n.1, ECF No. 41-2, June 16, 2021.)

The proposed motion to dismiss will, however, narrow the issues for discovery considerably. As the Court recognized when denying Plaintiff's motion for a preliminary injunction, the Free Exercise Clause challenge to Article XI fails as a matter of law.:

> Unlike the provision at issue in *Espinoza*, South Carolina's no-aid provision prohibits the use of public funds for the direct benefit of religious and non-religious private schools alike. In other words, South Carolina's provision discriminates along the private/public divide, not the religious/non-religious divide. Suffice it to say, Plaintiffs have not made a clear showing that they are likely to succeed on their claim grounded in religious discrimination and the motion for a preliminary injunction is unavailing.

(Order 8, ECF No. 34, May 11, 2021;.) Defendants inexplicably failed to make that argument, but it is made in Proposed Intervenors' motion to dismiss as to both the Free Exercise Clause claim and the religious discrimination component of the Equal Protection claim. Pre-discovery disposition of Plaintiffs' religious-discrimination claims will narrow the scope of discovery considerably and expedite the ultimate disposition of this matter.

Nevertheless, in an abundance of caution, Proposed Intervenors attach as an exhibit a proposed answer with this reply brief (**Exhibit A**). The motion to intervene now is in essentially

the same posture as the motion to intervene in *Marshall v. Meadows*. 921 F. Supp. 1490 (E.D. Va. 1996). In *Marshall*, Senator John Warner moved to intervene as a defendant in an action challenging the constitutionality of Virginia's open primary law, where the named defendants were members of the board of elections. *Id.* at 1491. The senator's motion was accompanied by a proposed motion to dismiss the constitutional challenge. *Id.* After the plaintiffs raised the same Rule 24(c) argument raised in this case, the senator submitted a proposed answer, as Proposed Intervenors have now done. *Id.* The court then summarily rejected the Rule 24(c) argument, holding "[t]he Court need not involve itself in this preliminary squabble" because "[t]he Fourth Circuit rejects strict application of Rule 24(c)" and "Senator Warner has served all parties with each of his filed and proposed motions and has now even tendered a proposed answer to meet the technical requirements of Rule 24(c)." *Id.* at 1492. This Court likewise should summarily reject Plaintiffs' attempt to make illogical hairsplitting and handwringing over the difference between an answer and a motion to dismiss grounds for denial of a motion to intervene.

B. Proposed Intervenors' interest in this litigation is more concrete than Plaintiffs'.

Unlike Plaintiffs, Proposed Intervenors need not meet Article III standing requirements at this stage. They need show only a significant, legally protectable interest. *See Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019) (suggesting a party whose role does not "entail[] invoking a court's jurisdiction" need not demonstrate its standing); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (holding the party invoking federal jurisdiction bears the burden of establishing standing). Proposed Intervenors' significantly protectable interest is this: under Article XI, public funds are entirely reserved for public schools like OCSD and like those attended by SCNAACP's members and their children. If private schools receive a portion of those funds, that portion is no longer available to OCSD and schools attended by SCNAACP's members and their children. Indeed, when the Governor's first attempt to give public funds to private schools

was thwarted in *Adams v. McMaster*, 851 S.E.2d 703 (S.C. 2020), the OCSD was a direct beneficiary. Because of Article XI, funds allocated, pre-*Adams*, to private school tuition were reallocated to, *inter alia*, public charter schools including OCSD's High School for Health Professions.

Plaintiffs argue at length that Proposed Intervenors have no protectable interest in this litigation because they are not entitled to Act 154 or GEER II funds, in turn because the OCSD and public primary and secondary schools attended by SCNAACP members and their children are not eligible for Act 154 funds and because the Governor could decide not to give Proposed Intervenors any GEER II funds. But far more is at stake in this case than merely which schools will get Act 154 or GEER II funds. Plaintiffs do not challenge the constitutionality of Article XI as applied only to Act 154 or GEER II funds, but instead assert a facial challenge to the provision. Thus, if Plaintiffs prevail, this case will impact countless appropriations of state funds to public schools by eliminating a safeguard that ensures that public schools are the sole recipients of state education funding. Proposed Intervenors' interest in defending a constitutional provision that protects public-school funding from diversion to private schools—especially where the current Governor has expressed a policy preference to do so—is demonstrable and acute.

Ironically, Plaintiffs' argument seems to attack the interest underlying their own purported standing more than Proposed Intervenors' interest. Even if Article XI were invalidated, Plaintiffs would be left with nothing but a "guess at or hope for the Governor might do with the money if he could [] give it to Plaintiffs." (Pls.' Resp. Opp'n 7.) If Proposed Intervenors "stand to gain or lose" nothing "by the direct legal operation of the district court's judgment," then neither do Plaintiffs. (*See id.*) Thus, to the extent that Plaintiffs' argument regarding the concreteness of Proposed Intervenors' interest has any persuasive force, this Court should dismiss this case for lack

of standing. *Benham v. City of Charlotte*, 635 F.3d 129, 134 (4th Cir. 2011) ("When a question of standing is apparent, but was not raised or addressed . . . , it is [the court's] responsibility to raise and decide the issue sua sponte.").

Plaintiffs attempt to distinguish their interest in receiving public funds from Proposed Intervenors' interest in reserving those funds for public schools by arguing that Plaintiffs have standing because they, unlike Proposed Intervenors, suffer the injury of being denied the opportunity to seek funding for discriminatory reasons. This distinction fails. Proposed Intervenors seek to intervene as defendants, not as plaintiffs, so they need not assert a legal entitlement to whatever specific bucket of public funds Plaintiffs choose to be the object of their lawsuit. It is enough that Article XI reserves for Proposed Intervenors (and others) a pecuniary benefit it denies Plaintiffs. *See Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co.*, 315 F.2d 564, 566 (7th Cir. 1963) ("The primary essential element that must exist for an applicant to intervene in a pending action as of right under Rule 24(a) Fed. R. Civ. P. is that he have a direct personal or pecuniary interest in the subject of the litigation . . . .").

C. The existing Defendants are inadequate to represent Proposed Intervenors' interests.

1. The Department of Administration

Neither Plaintiffs nor the Department of Administration, sued through Defendants Adam and Gaines, appear to argue that the Department of Administration is adequate to represent Proposed Intervenors' interests. The Governor oddly is the only party arguing the Department of Administration adequately represents a public-school district's interest in Article XI. That position is contrary to the Governor's own experience in the *Adams* litigation, where he and the Department of Administration were co-defendants, but the Department of Administration declined to file a substantive brief. *See Adams v. McMaster*, 851 S.E.2d 703, 707 n.1 (S.C. 2020). The Department of Administration itself has not opposed the motion to intervene. Plaintiffs' opposition does not

directly reference the Department of Administration at all, instead repeatedly using the phrase "the Governor and other state defendants" when making arguments specific to the Governor. This is not surprising, as the Department of Administration is manifestly inadequate and beyond the scope of the *Stuart* presumption. *Stuart* holds "[a] government defendant, given its 'basic duty to represent the public interest,' is a presumptively adequate defender of duly enacted statutes." *N.C. State Conf. of NAACP (NCNAACP) v. Berger*, No. 19-2273, 2021 WL 2307483, at *14 (4th Cir. June 7, 2021) (en banc) (quoting *Stuart v. Huff*, 706 F.3d 345, 351 (4th Cir. 2013)). But this presumption "reflects no more than the normal assumption that government officials properly discharge their duties." *Id.* at *14 (citing *United States v. Chem. Found.*, 272 U.S. 1, 14–15 (1926)). The Department of Administration is a logistics agency not charged with defending the South Carolina Constitution in federal court and therefore is not a presumptively adequate representative of anyone's interest in its provisions. The law could not be otherwise, else a crafty plaintiff could challenge a state law by suing a miscellaneous government official and then object to intervention by some other official actually charged with defending the law in court.

2. The Governor

The Governor is an elected officer with a plenary responsibility to uphold South Carolina law, but it is dubious whether this extends to representing the interests of the State in litigation. Article IV, Section 15 of the South Carolina constitution provides "[t]he Governor shall take care that the laws be faithfully executed," and "[t]o this end, the Attorney General shall assist and represent the Governor." Similarly, South Carolina Code § 1-7-40 provides the Attorney General "shall appear for the State in the Supreme Court and the court of appeals in the trial and argument of all causes, criminal and civil, in which the State is a party or interested, and in these causes in any other court or tribunal when required by the Governor or either branch of the General

Assembly." Thus, if the Governor feels the State has an interest in this litigation, it appears that he is expected to ask the Attorney General to represent that interest.

But the Governor has not asserted the interests of the State. He has not advocated on the merits *at all*. All he has done is oppose a preliminary injunction on mootness grounds specific to his office, with a conclusion asking "[i]f the Court reaches the merits of Plaintiffs' challenge, the Governor requests an opportunity to supplement this response," (Def.'s Resp. Opp'n Mot. Prelim. Inj. 12, ECF No 22, April 21, 2021), and file a boilerplate answer preserving all possible future defenses. In response to Proposed Intervenors noting his refusal to engage the on the merits, the Governor truculently proclaims "not every claim in this case is directed towards the Governor" and he "is not required to 'answer the mail' for other parties or assume the defense of other claims." (Def.'s Opp'n Mot. Intervene 14, ECF No. 51, June 29, 2021.) That rather seems an admission of inadequacy to represent any state interests that do not directly touch the Office of the Governor. And if the Governor does not "answer the mail" for school districts' interest in constitutional provisions reserving public funds to their exclusive benefit, who does? Surely not the state agency responsible for building management, IT services, and human resources.

The Governor's inadequacy to represent the interests of OCSD or the SCNAACP is further underscored by his eleventh-hour decision to request that the Attorney General intervene in the case and appear on behalf of the State on the day before the Governor filed his opposition to Proposed Intervenors' motion. (*See* Def.'s Opp'n Mot. Intervene Ex. A, ECF No. 51-1, June 30, 2021 (letter dated June 29, 2021).) But in order for the Attorney General to intervene in this case, he will need to overcome the same heightened adequacy bar recognized in *Stuart* that Plaintiffs and the Governor argue precludes Proposed Intervenors from entering the case. *See NCNAACP*, 2021 WL 2307483, at *1 (holding that *Stuart* barred North Carolina's legislative leaders from

intervening on behalf of the state of North Carolina in a case where the state's attorney general was already appearing on the state's behalf). Thus, by requesting that the Attorney General intervene, the Governor effectively admitted that he is not representing the "public interest" as a whole in this case, but only narrow interests specific to his office. *Stuart*, 706 F.3d at 351.

All of that said, Proposed Intervenors agree that the Governor's statements in support of providing public funds to private schools are not, standing alone, sufficient cause to find him an inadequate representative of Proposed Intervenors' interest. *That is why Proposed Intervenors did not move to intervene at the outset of this litigation*. At the outset, the Governor's known opposition to Article XI led Proposed Intervenors to monitor the docket with apprehension, but no motion was filed because there was nothing to overcome the presumption that he would act vigorously in defense of the South Carolina Constitution, presumably through the Attorney General. Instead of bringing in the Attorney General, the Governor hired a lawyer who until recently was employed by the Becket Fund. Still, Proposed Intervenors waited. When the Governor declined to make any statement on the merits in opposition to the motion for a preliminary injunction—something even the Department of Administration attempted, recognizing that likelihood of success on the merits is an element of a request for a preliminary injunction—and expressed "frustration" with the *Adams* decision, Proposed Intervenors' suspicions deepened. (Def.'s Resp. Opp'n Mot. Prelim. Inj. 12.) But, as the Governor's decision was a plausible litigation strategy on a short timeline and it resulted in a favorable outcome, Proposed Intervenors kept their powder dry.

Only when the Governor declined to move for dismissal of any part of Plaintiffs claims, despite the Court's unmistakable signal regarding the religious-discrimination claims, did Proposed Intervenors act. As set forth in Proposed Intervenors' motion, the Governor is inadequate

to defend their interest in Article XI because all three of the ways to rebut the adequacy of a governmental defendant are present: collusion, adversity of interests, and nonfeasance. (See Mot. Intervene 9–11.) Plaintiffs' and the Governor's only response to adversity of interest or nonfeasance is to argue that some of the individual points Proposed Intervenors raise are not sufficient to show inadequacy when considered separately.

But it is the totality of circumstances that show the Governor is inadequate to defend Article XI. The Governor publicly opposes Article XI. The Governor has expressed his sympathy for Plaintiffs' position on the merits in briefs filed in this litigation. The Governor has steadfastly refused to engage the merits of Plaintiffs' challenge to Article XI at all, instead maneuvering to create non-merits justiciability arguments applicable only to his office. The Governor hired a lawyer whose recent employer is ideologically aligned with the opposing party instead of having the Attorney General appear. The Governor declined to move to dismiss claims clearly defective as a matter of law. And, since Proposed Intervenors' motion, the Governor agreed to a discovery plan calling for no discovery beyond reports from Plaintiffs' experts.[1] (Report of the Parties on Rule 26(f) Conf., ECF No. 50, June 30, 2021.) Each of these points perhaps is insufficient standing alone. But when combined, they make a single implication unavoidable: the Governor is inadequate to defend Article XI.

As to collusion, Plaintiffs and the Governor respond only with inflammatory rhetoric. To be clear, the implied collusion is between the *Governor* and *Plaintiffs*, not the Governor's external counsel, Mr. Mills, or any other lawyer. Plaintiffs in no way suggest Mr. Mills has done anything

[1] Specifically, all parties state they do not anticipate any fact witnesses or discovery apart from expert witnesses. The report states Plaintiffs will have experts on the historical background of Article XI and allows the possibility Defendants perhaps might counter-designate experts in response.

unethical. The suggestion is not that he is secretly working for the other side, but rather that the Governor and Plaintiffs are not properly contesting the issues in this case because they agree on those issues. The implication is that the Governor has made a political calculation not to go into a gubernatorial election cycle while vigorously defending a position on school choice that is deeply unpopular with many Republican voters.

Plaintiffs' and the Governor's outrage at that implication is contrived. The Governor's incendiary language and adverbs of outrage on this point are unjustified by anything in Proposed Intervenors' motion.[2] They are straw-man arguments meant to obscure the fact that hiring a lawyer prominently associated with a pro-school-voucher organization to defend an anti-school-voucher law that the Governor publicly opposes raises legitimate concerns about the Governor's intent to defend that law. If a Democratic governor appointed a legal fellow from Planned Parenthood to defend the South Carolina Fetal Heartbeat Protection from Abortion Act, instead of relying on the Attorney General, groups opposed to abortion (like the Diocese of Charleston) *of course* would vigorously express concern about what that choice suggests about the Governor's willingness to defend a law he openly opposes.

D. The motion to intervene is timely.

As Plaintiffs recognize, Proposed Intervenors' motion is timely. (Pls.' Resp. Opp'n 5.) The Governor alone challenges the timeliness of Proposed Intervenors' motion. But, as Proposed Intervenors already have explained, *supra* at Pt. C, the only reason that they did not move to intervene earlier in this case was because they recognized the high bar that *Stuart* sets for intervention when a government party is putatively representing the public interest in a case. Only

[2] Plaintiffs' claims that Proposed Intervenors are accusing persons of "secretly leaking inside information" or "attempting to furtively bribe one of the Governor's lawyers" are so far beyond the pale that they are merely bizarre rather than inflammatory. (*See* Pls.'s Resp. Opp'n 12.)

once the Governor answered Plaintiffs' complaint and failed to move to dismiss Plaintiffs' religion claims did Proposed Intervenors feel that they could overcome the "presumption of adequate representation." *Stuart*, 706 F.3d at 352. Once the Governor's inadequacy became indisputable, Proposed Intervenors promptly moved for intervention only three weeks after the Governor answered.

Proposed Intervenors' well-warranted forbearance is therefore wholly unlike *Alt v. U.S. E.P.A.*, 758 F.3d 588 (4th Cir. 2014), on which the Governor relies. (Def.'s Opp'n Mot. Intervene 5-6). There, the would-be intervenor "gambled and lost" in declining to intervene for *over a year* solely to conserve its organizational resources. *Id.* at 591. Moreover, in that time, "[s]even other parties had long since requested and received permission" to intervene; "[s]everal months of settlement negotiations had transpired"; and summary judgment briefing had begun. *Id.* By contrast, Proposed Intervenors here sought to intervene two months after the filing of the litigation, and the case—just now entering discovery without any dispositive motions having been adjudicated—"has not yet advanced so far as to render" Proposed Intervenors' request "for intervention as untimely." *Thomas v. Andino*, No. 3:20-CV-01552-JMC, 2020 WL 4934305, at *3 (D.S.C. Aug. 24, 2020) (finding motions to intervene timely when they were filed nearly four months after the case was filed even where the intervenor "made a strategic decision to wait").

Nor would the Governor be unduly prejudiced by whatever minimal delay intervention might create. Although the Governor claims that intervention will result in the parties' expending "extra effort" to resolve this litigation (Def.'s Opp'n Mot. Intervene 6), the opposite is true. As already explained, *supra* at Pt. A, resolution of the Proposed Intervenors' motion to dismiss is likely to narrow the issues for discovery and ultimately expedite the disposition of this matter. Moreover, the generic concerns that the Governor raises regarding prejudice would apply with

equal force to nearly any intervention effort. Proposed Intervenors agree that their involvement in the case will necessitate some additional briefing on the parties' part, but that is purely a function of the Governor's refusal to make a full-throated defense of Article XI on the merits. The Governor will not be prejudiced by Proposed Intervenors' taking up the mantle of defending Article XI.

If there were any doubt that Proposed Intervenors' motion is timely, that doubt is erased by the Governor's request that the Attorney General intervene on behalf of the State. Just as the Attorney General must demonstrate that the Governor is an inadequate representative of the State's interests in order to intervene, he also must demonstrate that the State's intervention is timely. *Hous. Gen. Ins. Co. v. Moore*, 193 F.3d 838, 839 (4th Cir. 1999). Despite the Governor's request, the Attorney General has yet to file a motion to intervene. The Attorney General will therefore move to intervene at least three weeks after Proposed Intervenors sought to do so. Any argument that Proposed Intervenors' motion is untimely is therefore belied by the Governor's efforts to facilitate the intervention of a different party at an even later juncture in the litigation.

E. Proposed Intervenors also satisfy the requirements for permissive intervention.

Under Rule 24(b) of the Federal Rules of Civil Procedure, this 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." Fed. R. Civ. P. 24(b)(1)(B). Neither Plaintiffs nor the Governor dispute that the legal arguments that Proposed Intervenors intend to make are directly responsive to the core issues in this case. And for the reasons set forth above, *supra* at Pt. D, Proposed Intervenors' motion to intervene is timely. Accordingly, in the event that that this Court concludes that Proposed Intervenors do not meet the requirements for intervention of right, it should permit them to intervene under Rule 24(b).

* * *

For the foregoing reasons and the reasons set forth in Proposed Intervenors' motion to intervene, the motion to intervene should be granted.

Respectfully submitted,

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