IN THE CHANCERY COURT OF HINDS COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

CHARLES ARAUJO, et al. Plaintiffs, v. GOVERNOR PHIL BRYANT, et al. Defendants.	)	CIVIL ACTION NO. G-2016-1008

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO MOTION OF GLADYS OVERTON, ANDREW OVERTON, SR., ELLA MAE JAMES, AND TIFFANY MINOR TO INTERVENE AS DEFENDANTS

Plaintiffs respectfully oppose the motion of Gladys Overton, Andrew Overton, Sr., Ella Mae James, and Tiffany Minor (collectively, "Applicants") to intervene as Defendants in the above-captioned lawsuit.

This case raises a single issue: the constitutionality of the funding structure of the Charter Schools Act of 2013 ("CSA"), codified at Miss. Code § 37-28-55, which sends taxpayer funds to unaccountable charter schools in violation of the Mississippi Constitution. Applicants' interest in this litigation – upholding the constitutionality of the funding structure of the CSA – is identical to the interest of Defendants Governor Phil Bryant and the Mississippi Department of Education ("MDE") (collectively, "State Defendants"). Applicants have failed to demonstrate that this interest is inadequately represented by the State Attorney General, which represents the State Defendants. For this reason, Applicants are not entitled to intervene in this case. Although their motion to intervene, Rec. Doc. 12, should be denied, Plaintiffs do not oppose Applicants' participation in this litigation as *amici curiae*.

ARGUMENT

I. Applicants Have No Right To Intervene Under Rule 24(a)(2) Because Their Interests Are Adequately Represented By State Defendants And The Attorney General.

To intervene as of right under Rule 24(a)(2) of the Mississippi Rules of Civil Procedure, Applicants must demonstrate: (1) a timely application for intervention; (2) an interest in the subject matter of the action; (3) that disposition of the action may, as a practical matter, impair or impede applicants' ability to protect that interest; and (4) that the interest is not already adequately represented by existing parties. Miss. R. Civ. P. 24(a)(2); *see Guar. Nat'l Ins. Co. v. Pittman*, 501 So.2d 377, 381 (Miss. 1987). An applicant who fails to meet any one of these requirements cannot intervene as of right under Rule 24(a)(2). *Perry Cty. v. Ferguson*, 618 So. 2d 1270, 1272 (Miss. 1993) (citation omitted). Mississippi courts frequently look to federal case law for guidance on interpreting this rule, which is virtually identical to Rule 24 of the Federal Rules of Civil Procedure. *See Hood ex rel. State Tobacco Litig. v. State of Mississippi*, 958 So. 2d 790, 803 n.13 (Miss. 2007).

Applicants are not entitled to intervention as of right because they cannot show that the State Defendants, which are represented by the Attorney General, do not adequately represent Applicants' interest in defending the constitutionality of the CSA.

A. The Applicants' Interest In This Lawsuit Is Identical To That Of The State Defendants.

This lawsuit raises a single issue: whether the funding provisions of the CSA violate the Mississippi Constitution. On that question – the only one presented by this lawsuit – the legal interests of Applicants and State Defendants are perfectly aligned, because both seek a finding that the CSA does not violate the Mississippi Constitution. Where both defendants and proposed intervenors have the same legal interest, adequacy of representation is presumed. *See Perry Cty.*

v. Ferguson, 618 So. 2d 1270, 1273 (Miss. 1993) (holding that intervention was properly denied because, *inter alia*, the putative intervenor "has the same ultimate objective" as the existing defendant).

Applicants' only attempt to differentiate their interest from that of the State Defendants is to characterize their interest as "very specific and personal." Rec. Doc. 12 at 7. However, they point to no legal authority in which the interests of a private party have been found to be different from those of the government in defending a challenge to the constitutionality of a state law, simply because those interests may be "very specific and personal." Moreover, "[a] subjective comparison . . . of the conviction of defendants and intervenors is not the test for determining adequacy of representation." *Keith v. Daley*, 764 F.2d 1265, 1270 (7th Cir. 1985). In fact, as Judge Posner explained in *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs.*, 101 F.3d 503, 508 (7th Cir. 1996), it is not enough to merely assert that a government defendant has a diversity of interests to overcome the presumption that it is an adequate defendant. If that were so, "then in no case brought or defended by the [government] could intervention be refused on the ground that the [government]'s representation of the would-be intervenor's interest was adequate." *Id.* While their motivations may vary, Applicants' interest in this litigation is identical to the interest of State Defendants: both seek to uphold the constitutionality of the funding provisions of the CSA.

B. The State Defendants, Represented By The Attorney General, Adequately Represent The Interest Of The Applicants.

The State Defendants are represented in this litigation by the Attorney General, the state official charged by law with representing the interests of the public in court. *See, e.g., Hood ex rel. Mississippi v. Microsoft Corp.*, 428 F. Supp. 2d 537, 543-46 (S.D. Miss. 2006) (discussing the law, history, status, and authority of the attorney general). As state officials defending the

constitutionality of the CSA, the State Defendants (and their counsel, the Attorney General) are presumed to be an adequate representative of the interests of the Applicants in defending the statute's constitutionality.

Where, as here, the existing representative in the suit is the government, there is a presumption of adequate representation. *Texas v. U.S. Dep't of Energy*, 754 F.2d 550, 553 (5th Cir. 1985). To overcome this presumption of adequate representation, Applicants bear the burden of demonstrating "adversity of interest, the representative's collusion with the opposing party, or nonfeasance by the representative." *Id*. Absent an affirmative showing that the state is unable or unwilling to adequately protect an intervenor's private interests, the government entity is presumed to adequately represent the private interests of its people. *Id.* (citations omitted).

The Fifth Circuit has cogently addressed whether the State's representation is adequate in constitutional challenges to state laws. In *Ingebretsen on Behalf of Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274 (5th Cir. 1996), various plaintiffs challenged the constitutionality of a Mississippi statute allowing prayer at school events. Although the Mississippi Attorney General actively sought to defend the statute, an organization filed a motion to intervene on behalf of certain public school students. The applicant organization argued that intervention was necessary to assert its constitutionally protected rights of free exercise of religion and free speech. *Id.* at 278.

The *Ingebretsen* court upheld the district court's denial of the applicant's motion to intervene, explaining that "the only issue before the court is the validity of the School Prayer Statute and the Attorney General, in defending that statute, can assert the rights of all Mississippians affected by the law, including the Free Exercise rights of the Proposed Intervenors. *The Attorney General undoubtedly affords the Proposed Intervenors' interests*

adequate representation." *Id.* at 281 (emphasis added). The court additionally reasoned that the proposed intervenors "do not assert that students have any rights that the Attorney General has not also asserted in support of the statute" and, as a result, "would add nothing to this action except additional parties." *Id.*

Numerous other federal courts have likewise held that adequate representation is presumed where a government entity is a party defendant.[1] These courts recognize that a government body, which is entrusted with representing the interests of its constituents, is in the best position to defend its own laws. Applicants appear to take the opposite view, contending that the government is unable to adequately represent its constituents. This is especially troubling where, as here, Defendant Governor Bryant is defending the constitutionality of a law that he signed.

Here, like in *Ingebretsen*, the sole issue before the Court is the constitutionality of a state law. Like the proposed intervenor in *Ingebretsen*, Applicants do not assert any rights that the Attorney General has not also asserted in support of the law. Applicants have not attempted to rebut the presumption of adequate representation by showing adversity of interest, collusion, or nonfeasance. Nor have Applicants demonstrated that the State Defendants, represented by the Attorney General, are unable or unwilling to adequately protect Applicant's interests. In fact, Applicants have failed to demonstrate *any* showing of inadequacy to warrant intervention, let

[1] *See, e.g., Daggett v. Comm'n on Governmental Ethics & Election Practices*, 172 F.3d 104, 111 (1st Cir. 1999) ("[T]wo converging presumptions [are] triggered because the Attorney General is prepared to defend the statute in its entirety. One is that adequate representation is presumed where the goals of the applicants are the same as those of the plaintiff or defendant, the other is that the government in defending the validity of the statute is presumed to be representing adequately the interests of all citizens who support the statute."); *Pennsylvania v. Rizzo,* 530 F.2d 501, 505 (3d Cir. 1976) (holding that a presumption of adequate representation generally arises when the representative is a governmental body or officer charged by law with representing the interests of the absentee); *Little Rock Sch. Dist. v. N. Little Rock Sch. Dist.,* 378 F.3d 774, 780 (8th Cir. 2004) (same); *Arakaki v. Cayetano,* 324 F.3d 1078, 1086 (9th Cir. 2003) (same).

alone the heightened showing of inadequacy required where, as here, existing Defendants are represented by the state Attorney General.

Instead, Applicants rely on *Guaranty National Insurance Co. v. Pittman*, 501 So.2d 377 (Miss. 1987) to support their argument that "[b]ecause neither the Governor nor MDE have actual 'skin in the game' and their 'neck is not on the line,' . . . it is hard to imagine that these defendants would argue and legally fight 'with the same vigor' as would these Movant parents and children." Rec. Doc. 12 at pp. 11-12. Applicants' reliance on *Guaranty National* is misplaced for several reasons.

First, Applicants mischaracterize *Guaranty National*, which does not include any discussion of so-called "skin in the game." In contrast to Applicants' representations, the *Guaranty National* court stated in dicta that a *court* – not an existing defendant – does not have "its neck on the line" in ruling on a motion to intervene. *See Guaranty National*, 501 So.2d 377 at 386.

Moreover, *Guaranty National* is readily distinguishable from the instant case. In *Guaranty National*, a chancery court denied an insurer leave to intervene in litigation against its putative insured. The Mississippi Supreme Court reversed, holding that the insurer, who learned of a tort suit only after entry of a default judgment, should be permitted to intervene as of right under a former version of Federal Rule of Civil Procedure 24(a)(2). *Guaranty National*, 501 So.2d at 383-84 n.4. Several years later, in *Perry County v. Ferguson*, 618 So.2d 1270 (Miss. 1993), the Mississippi Supreme Court clarified that intervention of right was appropriate in *Guaranty National* because of the "unique facts" of that case. Namely, a default judgment had been taken against the putative insured; the putative insured had sued the insurer; the judgment debtor was unable to pay the $400,000 judgment; the judgment creditor had filed garnishment

proceedings; and the judgment debtor took no appeal from the judgment. *Id.* at 1273. The *Perry* court found that these "unique facts" were absent in the case before it, and concluded that intervention was properly denied where "[the putative intervenor] has the same ultimate objective as [the existing defendant], those interests are adequately represented by [the existing defendant] absent a showing of adversity of interest, collusion, or nonfeasance, and there is none." *Id.*

As the Mississippi Supreme Court found in *Perry*, the "unique facts" of *Guaranty National* do not exist here, where the State Defendants and Applicants have the same ultimate objective, those interests are being represented by the state Attorney General, and Applicants have made no showing of adversity of interest, collusion, or nonfeasance. Moreover, unlike in the instant case, *Guaranty National* did not trigger the heightened presumption of adequacy because it did not involve State Defendants represented by the State Attorney General or raise a constitutional challenge to a state law.

Because Applicants do not meet the requirements of Mississippi Rule of Civil Procedure 24(a)(2) by showing that their interest is not adequately represented by State Defendants and the state Attorney General, their motion for intervention of right must be denied.

II. Applicants' Motion For Permissive Intervention Should Also Be Denied.

Where, as here, Applicants' only interest in this lawsuit is adequately represented by existing defendants, there is no reason to allow permissive intervention under Rule 24(b). *See Ingebretsen*, 88 F.3d 274 at 281 (denial of permissive intervention is appropriate where the proposed intervenors "bring no new issues to this action"). Accordingly, permissive intervention should be denied for the same reason that intervention of right should be denied: the Attorney

General adequately represents Applicants' sole interest in upholding the constitutionality of the CSA.

Courts routinely deny permissive intervention when intervention as of right is denied based on the government's adequate representation. *See, e.g.*, *In Re Thompson*, 965 F.2d 1136, 1142 n.10 (1st Cir. 1992) ("As we conclude that [proposed intervenors] cognizable legal interests were adequately represented by the [existing defendant], it is unnecessary to deal with the requisites for permissive intervention."); *Tutein v. Daley*, 43 F. Supp. 2d 113, 131 (D. Mass. 1999) ("[W]here, as here, intervention as of right is decided based on the government's adequate representation, the case for permissive intervention diminishes, or disappears entirely."); *Menominee Indian Tribe of Wisconsin v. Thompson*, 164 F.R.D. 672, 678 (W.D. Wis. 1996) ("When intervention of right is denied for the proposed intervenor's failure to overcome the presumption of adequate representation by the government, the case for permissive intervention disappears.").

Since Applicants' interest is adequately represented by existing parties, permissive intervention risks the potential for delay and increased costs, with no measurable additional benefit to the Court's ability to determine the legal issue in this case. Although intervention is inappropriate, Plaintiffs do not oppose Applicants' participation in this matter as *amici curiae*. *See Holly Ridge Assocs., LLC v. North Carolina Dep't of Env't & Natural Res.*, 648 S.E.2d 830, 837 (N.C. 2007) (noting that intervenors that should not have been permitted to intervene could have sought to participate as *amici curiae*).

III. Applicants Violated Rule 24(c) Because They Failed to Submit a Proposed Pleading.

Denial of the pending motion to intervene is appropriate for the additional reason that Applicants fail to comply with Mississippi Rule of Civil Procedure 24(c), which requires a

motion to intervene to be "accompanied by a pleading setting forth the claim or defense for which intervention is sought." Federal courts have denied motions to intervene for failure to comply with Federal Rule of Civil Procedure 24(c). *See Brown v. Colegio de Abogados de Puerto Rico*, 277 F.R.D. 73, 76 (D.P.R. 2011) ("The requirements of Rule 24(c) are mandatory."); *Gaskin v. Pennsylvania*, 231 F.R.D. 195, 196 n.1 (E.D. Pa. 2005) ("Such utter disregard for Rule 24(c) warrants denial of the motion."); *Harlem Valley Transp. Ass'n v. Stafford*, 360 F. Supp. 1057, 1066 n.11 (S.D.N.Y. 1973) (denying motion to intervene where unaccompanied by proposed pleading and where "the grounds for allowing intervention are far from self-evident"). Since Applicants have failed to file the required pleading, the pending motion to intervene should be denied.

CONCLUSION

For the foregoing reasons, Applicants' motion to intervene should be denied.

RESPECTFULLY SUBMITTED this 22nd day of August, 2016.

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CERTIFICATE OF SERVICE

I, Lydia Wright, hereby certify that a true and correct copy of the foregoing document was filed electronically. Notice of this filing will be sent by electronic mail to all parties by the Court's electronic filing system. Parties may access this filing through the Court's MEC/ECF System.

SO CERTIFIED, this 22nd day of August, 2016.

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