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; et al.,

Defendants.

Case No. 2:21-cv-1093-BHH

PLAINTIFFS' OPPOSITION TO MOTION TO INTERVENE

INTRODUCTION

Earlier this month, the U.S. Court of Appeals for the Fourth Circuit, sitting *en banc*, determined that a heavy presumption weighs against intervention when state officials are the defendants. *N.C. State Conf. of the NAACP v. Berger*, No. 19-2273, 2021 U.S. App. LEXIS 16865 (4th Cir. June 7, 2021). In that case, the Fourth Circuit *en banc* agreed with the North Carolina conference of the NAACP and imposed a high standard for intervention. *Id*. at *6. Here, in the position of proposed intervenor, the South Carolina branch argues it must only overcome a minimal burden in order to intervene in the case. The Fourth Circuit has recently, and definitively, resolved this question, by rejecting entirely Proposed Intervenors' arguments. Rather, the Fourth Circuit held that there must be a "heightened showing of inadequacy to justify such an

'extraordinary finding'" that would permit intervention in this case. *Id.* at 40. Proposed Intervenors have not, indeed on this record could not, make such a showing.

This Court should also look to its own recent decision in *Harmony W. Ashley LLC v. City of Charleston*, Civil Action No. 2:19-cv-2579, 2021 U.S. Dist. LEXIS 39856, at *6 (D.S.C. Mar. 3, 2021). There, this Court correctly concluded that when one has a generalized interest in a topic rather than a particularized injury, the appropriate venue to offer insights and opinions is thru an amicus brief rather than party status.

However, this Court need not reach these questions at this time, because the Proposed Intervenors' papers are technically deficient in a way that is prejudicial to Plaintiffs, and therefore must be rejected on that basis alone.

I. The Proposed Intervenors' motion is technically deficient and prejudicial to Plaintiffs.

The Federal Rules of Civil Procedure require a proposed party seeking to intervene, whether as of right or by permission, to file a motion to intervene that must "be accompanied by a pleading that sets out the claim or defense for which intervention is sought." Fed. R. Civ. Pro. 24(c). Proposed Intervenors have failed in that charge; they have filed a proposed motion to dismiss, not a proposed pleading. ECF 41-2. It is blackletter law that "a motion to dismiss is not a responsive pleading." *World Wide Demil, LLC v. Nammo*, 51 Fed. Appx. 403, n.2 (4th Cir. 2002) (*citing Mellon Bank, N.A. v. Ternisky*, 999 F.2d 791, 795 (4th Cir. 1993) (holding that a motion to dismiss is not a "pleading")).

Though the Proposed Intervenors' submission does not comply, "in very limited circumstances an intervenor can be excused for failing to abide by the letter of Rule 24." *Bridges v. Dep't of Md. State Police*, 441 F.3d 197, 208 (4th Cir. 2006). These limited circumstances exist

when the failure only consists of "non-prejudicial technical defects." *Id*. (*quoting Spring Construction Co. v. Harris*, 614 F.2d 374, 376-77 (4th Cir. 1980)).

Here the error is more than technical. The point of requiring a proposed answer is to "set forth sufficient facts and allegations to apprise" the existing parties of the new parties' claims and defenses. *Spring Construction Co.*, 614 F.2d at 377. "The purpose of requiring an intervenor to file a pleading is to place the other parties on notice of the position, claim, and relief sought by the intervenor." *Danner Constr. Co. v. Hillsborough Cty*., No. 8:09-CV-650-T-17TBM, 2009 U.S. Dist. LEXIS 79488, at *6 (M.D. Fla. Aug. 17, 2009) (*quoting WJA Realty Limited Partnership v. Nelson*, 708 F.Supp. 1268 (S.D. Fla. 1989)). To cure the technical defect, the Proposed Intervenors' other papers must "fully state[] the legal and factual grounds for intervention." *Beckman Indus. v. Int'l Ins. Co.*, 966 F.2d 470, 474 (9th Cir. 1992).

Proposed Intervenors have failed to do that here. Their proposed motion to dismiss only addresses the religious-discrimination claim made by Plaintiffs (*see* ECF 41-2). They say nothing at all about the racial-discrimination complaint made by Plaintiffs, and thus the parties and this Court have no idea whether they intend to contest or concede this claim. A proper pleading fully sets forth all of their positions on all of Plaintiffs' factual assertions and legal claims and lists any affirmative defenses they intend to advance. Without that, the existing parties, particularly the Plaintiffs, are not adequately appraised of their arguments.

This Court should follow the lead of the District of Nevada in the same circumstance. There, the court began by noting the Ninth Circuit and other circuits, including the Fourth Circuit, generally overlook technical mistakes in motions to intervene. *Landry's, Inc. v. Sandoval*, No. 2:15-cv-01160-GMN-PAL, 2016 U.S. Dist. LEXIS 41159, at *7 (D. Nev. Mar. 28, 2016). However, the District nevertheless rejected intervention, saying, "Here, the AFL-CIO submitted a

proposed motion to dismiss with the Motion to Intervene, but not a pleading within the definition of Rule 7(a). Thus, the AFL-CIO has failed to satisfy the mandatory pleading requirement of Rule 24(c). Although this requirement is sometimes relaxed, the Court finds that the lack of a pleading is significant because it is not clear which positions of the parties are consistent with and which positions are inconsistent with the AFL-CIO's interests." *Id*. at *8. Similarly, in another case where a proposed intervenor filed a proposed motion to dismiss on standing that did not address the merits, another court said, "This failure seemingly qualifies as more than a 'non-prejudicial technical defect.'" *Farm Labor Org. Comm. v. Stein*, No. 1:17cv1037, 2018 U.S. Dist. LEXIS 141535, at *52 (M.D.N.C. Aug. 21, 2018).[1]

By proposing a motion to dismiss that only addresses one segment of the case, Proposed Intervenors fail to apprise Plaintiffs and the Court of their positions as to the rest of the case and any affirmative defenses. Thus, the error is more than technical; it is prejudicial and therefore fatal.

II. The Proposed Intervenors' do not meet the standard for intervention as of right.

A generalized concern about the possible precedent that could be set in a case is not a basis for intervention. *Gumm v. Jacobs*, 817 F. App'x 847, 849 (11th Cir. 2020). Instead, to intervene as of right a proposed party must show three familiar factors: "(1) it has an interest in the subject matter of the action, (2) disposition of the action may practically impair or impede the movant's ability to protect that interest, and (3) that interest is not adequately represented by the existing parties." *Harmony W. Ashley LLC*, Civil Action No. 2:19-cv-2579, 2021 U.S. Dist. LEXIS 39856,

[1] *See Hughes v. Abell*, Civil Action No. 09-220 (JDB), 2013 U.S. Dist. LEXIS 206851, at *22 (D.D.C. Feb. 10, 2014) (adopting magistrate's recommendation to deny intervention because failure to file pleading by proposed intervenor, though normally excusable, made it harder "in determining the common claim or defense issue."); *Villasenor v. Cmty. Child Care Council of Santa Clara Cty., Inc*., No. 18-cv-06628-BLF, 2019 U.S. Dist. LEXIS 137658, at *9-12 (N.D. Cal. Aug. 14, 2019) (intervention denied because court needs "[a] proper pleading setting out the theory of intervention [to] clarify all of these issues and allow the Court to properly determine whether and why Plaintiff-Intervenors must or may intervene here."); *Murray Maple Eagle Coal, LLC v. Brenemen*, Civil Action No. 2:19-cv-00433, 2019 U.S. Dist. LEXIS 234609, at *3 (S.D. W. Va. July 11, 2019) (intervention without pleading denied without prejudice).

at *6-7 (Plaintiffs do not contest timeliness at this point). To succeed, "all these requirements must be met before intervention is mandatory; a failure to meet any one will preclude intervention as of right." *N.C. State Conf.*, No. 19-2273, 2021 U.S. App. LEXIS 16865, at *25-26. The Proposed Intervenors here do not have a non-speculative interest, and even if they did, it is adequately represented by the existing State Defendants.

i. The Proposed Intervenors' speculative interest is insufficient to justify intervention.

First, the Proposed Intervenors have no sufficient concrete, direct interest to justify intervention. "[T]he Fourth Circuit looks for a 'significantly protectable interest.' An applicant for intervention has a 'significantly protectable interest' in the subject matter of the litigation when a party stands to gain or lose by the direct legal operation of the district court's judgment.' The interest in the subject matter of the litigation must be direct and substantial, as opposed to an interest that is too collateral, indirect, and insubstantial to support intervention as of right." *Harmony W. Ashley LLC*, Civil Action No. 2:19-cv-2579, 2021 U.S. Dist. LEXIS 39856, at *7 (cleaned up).

The Proposed Intervenors here do not have a sufficient interest in intervention because they "stand to gain or lose" nothing "by the direct legal operation of the district court's judgment." First, Orangeburg County School District does not have any interest in the Act 154 funds for higher education institutions. And though the NAACP mentions its college chapters in the affidavit from its president, ECF 41-1 at ¶ 5, the affidavit focuses on its interest in K-12 education. *Id*. at ¶¶ 5-15. Indeed, the NAACP's college chapters at Allen, Benedict, and Claflin are among the students who would *benefit* from the Act 154 and GEER money for HBCUs. Clearly, then, as to the $17

million for independent and religious higher education institutions at issue in this case, there is no basis for intervention by Proposed Intervenors.

There is also no basis for intervention as to the GEER II funds. Orangeburg County School District and the public schools in which the NAACP's members are enrolled all currently qualify for GEER II funds. *See* Coronavirus Response and Relief Supplemental Appropriations (CRRSA) Act, 2021, Public Law 116-260, Section 312. Whether the Plaintiffs win or lose this case will have zero impact on their access to GEER II funds. And though there is only so much GEER II money, Proposed Intervenors will not automatically receive no more or less of it whether Plaintiffs win or lose. Plaintiffs could win their case, and the Governor could in his discretion decide to give them zero funds. Plaintiffs could lose their case, and the Governor in his discretion could decide to give public K-12 schools like OCSD zero funds. In fact, the Governors of Kansas, New Jersey, Washington, and the Northern Marianas Islands gave 100% of their GEER I money to higher education.[2] And Governor McMaster's initial allocation of GEER I to the SAFE program and the HBCU technology upgrades program gave zero funds to K-12 public schools, which are already receiving significant infusions of cash under other CARES Act programs. Plaintiffs are injured not because they are *entitled* to GEER II funds, but because they are entitled to a fair and equal opportunity to compete for GEER II funds. Proposed Intervenors are equally not entitled to GEER II funds, and speculation about potential future policy choices by the Governor is not a sufficient interest for intervention. *Ohio Valley Envtl. Coal., Inc. v. McCarthy*, 313 F.R.D. 10, 23 (S.D. W. Va. 2015) (discussing the Fourth Circuit's high standard for contingent economic interests in intervention).

[2] *Governor's Emergency Education Relief Fund Tracker*, Nat'l Conf. of State Legislatures, https://www.ncsl.org/ncsl-in-dc/standing-committees/education/cares-act-governor-s-emergency-education-relief-fund.aspx.

Here, Proposed Intervenors assert an interest "in preventing their students and members from losing vital resources[.]" ECF-41 at 7. But they themselves use words like "might" and "could" when describing this case's effect on their interests. Proposed Intervenors write that the "disposition of this case *might* impair" their interest and "*could* impair Proposed Intervenors' interest in preserving resources." *Id.* at 8 (emphasis added). Any speculation by Proposed Intervenors on what *might* happen to their interests in preserving resources only for public school students is just that—speculation.

In this way, this case is very different from Proposed Intervenors' primary authority, *Kleissler v. United States Forest Serv.*, 157 F.3d 964 (3d Cir. 1998). There, the Third Circuit quite correctly said, "[T]he polestar for evaluating a claim for intervention is always whether the proposed intervenor's interest is direct or remote. Due regard for efficient conduct of the litigation requires that intervenors should have an interest that is specific to them, is capable of definition, and will be directly affected in a substantially concrete fashion by the relief sought. The interest may not be remote or attenuated." *Id*. at 972. The school districts in *Kleissler* met that test 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." *Id*. at 973. In other words, victory for the plaintiffs necessarily, automatically, by operation of law, meant the school districts were out money. That is very different from this circumstance, where OCSD and other school districts are not guaranteed a dime of GEER II money; its allocation is entirely within the Governor's discretion. It is, in other words, a remote and speculative interest based on Proposed Intervenors' guess at or hope for what the Governor might do with the money if he could not give it to Plaintiffs. Guesses are not good enough to create a direct interest for intervention.

ii. The current defendants adequately represent the Proposed Intervenors' interests.

This question is squarely governed by the Fourth Circuit's recent decision in *NAACP of N.C.*, and Proposed Intervenors' inability to meet this criterion is enough to sink their attempt at intervention as of right, because failure on any one of the three factors is fatal. *See N.C. State Conf. v. Berger*, No. 19-2273, 2021 U.S. App. LEXIS 16865, at *25-26.

In *NAACP of N.C.*, the *en banc* Fourth Circuit considered a case just like this one. The Republican state legislative leadership did not trust the Democrat attorney general to adequately defend a law they had passed and that he had opposed as a policy matter, but was nevertheless defending in court. *Id.* at *29.

The *en banc* Fourth Circuit held, "A government defendant, given its 'basic duty to represent the public interest,' is a presumptively adequate defender of duly enacted statutes." *Id.* at *38. The Fourth Circuit continued, "When a governmental official is legally required to represent the state's interest . . . then it is reasonable, fair and consistent with the practical inquiry required by Rule 24(a)(2) to start from a presumption of adequate representation and put the intervenor to a heightened burden to overcome it." *Id*. at *38-39 (cleaned up). And this heightened burden is high indeed: it requires an "extraordinary finding" to decide otherwise. *Id.* at *40.

Here, the Governor and other state defendants are under just such a duty to represent the public interest. The South Carolina Constitution requires that "[t]he Governor shall take care that the laws be faithfully executed." S.C. Const. Article IV, § 15. The Governor is sworn to uphold the Constitution of South Carolina, *see* S.C. Const. Art. VI, § 5, and he is responsible to execute the laws of the state, even those he may not like. *See Edwards v. State*, 383 S.C. 82, 91, 678 S.E.2d 412, 417 (2009) (if the governor vetoes a bill, and the legislature overrides that veto, the governor is required to faithfully execute the law that he tried to stop). In this instance, the Governor has specifically pledged to the Supreme Court of South Carolina that he will obey and enforce that

court's resolution of *Adams*: "we are assured Governor McMaster, as a duly elected constitutional officer of this State, will adhere to this Court's decision. As the Governor's lawyer stated during oral argument, the Governor is a 'strong proponent of the rule of law.'" *Adams v. McMaster*, 432 S.C. 225, 244, 851 S.E.2d 703, 713 (2020).

Because the Governor and other state defendants are state officials sued in their official capacity, the "heightened presumption of adequacy applies when governmental or private entities seek to intervene on the side of governmental defendants." *N.C. State Conf.*, No. 19-2273, 2021 U.S. App. LEXIS 16865, at *43.

Moreover, the "proposed intervenor's governmental status makes a heightened presumption of adequacy more appropriate, not less." *Id.* at *39. Here OCSD and the NAACP are not asserting an individualized, particularized interest or injury to them. They are asserting interests generic to all providers of K-12 education (OCSD) and all parents and students involved in K-12 education statewide (NAACP), which looks much more like "the concerns of the general public" than a truly "private party" with "his or her more individualized interests." *Id.*

Proposed Intervenors cannot overcome this heightened presumption of adequacy. First, the Governor's policy preference for school choice and his disagreement with the *Adams* decision do not create an adversity of interests. In *NAACP of N.C.*, the Republican legislative leaders sought intervention because they did not trust the Attorney General to adequately defend a law he opposed as a policy matter. The Fourth Circuit responded: "That the Attorney General may have expressed policy views at odds with S.B. 824 in the past is no ground for a federal court to infer that he would abdicate his official duty to the State by subterfuge, mounting a sham defense of the statute. To suggest otherwise is a disservice to the dignified work of government lawyers who each day put aside their own policy and political preferences to advocate dutifully on behalf of their

governments and the general public." *N.C. State Conf.*, No. 19-2273, 2021 U.S. App. LEXIS 16865, at *51. The Seventh Circuit reached a similar conclusion in *Kaul*, where the attorney general defended a pro-life statute against a challenge from Planned Parenthood, even though as a policy matter he was pro-choice and had been supported in his election by Planned Parenthood. *See Planned Parenthood of Wis., Inc. v. Kaul*, 942 F.3d 793, 810-11 (7th Cir. 2019) (Sykes, J., concurring) ("political and policy differences with the Attorney General over abortion regulations, as well as disagreements about litigation strategy in this and other cases [are] not enough to rebut the presumption of adequate representation."). As in those cases, so here: the Governor is constitutionally obligated to faithfully execute the laws, including the ones he does not like, and he has done so here.

Second, Proposed Intervenors' own motion shows that they are simply making a spat out of garden-variety decisions around litigation strategy. Proposed Intervenors' "disagreement over how to approach the conduct of the litigation . . . is insufficient to rebut the presumption of adequacy, as evidence of either nonfeasance or adversity of interests." *N.C. State Conf.*, No. 19-2273, 2021 U.S. App. LEXIS 16865, at *46.

For starters, it is worth recalling what has and has not happened in this case. The State Defendants did not get sued and then settle the case within two weeks. *See, e.g., Gender & Sexuality All. v. Spearman*, No. 2:20-cv-00847-DCN, 2020 U.S. Dist. LEXIS 47373, at *1 (D.S.C. Mar. 11, 2020) (a judge entered a consent decree on March 11, 2020, in response to a complaint filed on February 26, 2020, wherein the attorney general of South Carolina declined to defend the constitutionality of a state statute). Instead, they have (successfully) opposed the motion for a preliminary injunction and filed answers denying the Plaintiffs' case. *See* ECF 19, 22, 31, and 36.

Proposed Intervenors complain that the Governor filed an answer rather than a motion to dismiss, "sending this case to discovery." ECF 41 at 3, 9.[3] First, it's worth noting that their own proposed motion to dismiss only addresses one of the Plaintiffs' arguments, so their own preferred strategy would still "send this case to discovery" on at least half of Plaintiffs' case. *See* ECF 42-2. Second, "disagreement over how to approach the conduct of the litigation is not enough to rebut the presumption of adequacy." *Stuart v. Huff*, 706 F.3d 345, 353 (4th Cir. 2013). "There will often be differences of opinion among lawyers over the best way to approach a case. It is not unusual for those who agree in principle to dispute the particulars. To have such unremarkable divergences of view sow the seeds for intervention as of right risks generating endless squabbles at every juncture over how best to proceed." *Id*. at 354.

Finally, Proposed Intervenors raise the ugly specter of collusion because Plaintiffs' counsel has engaged one of the Governor's counsel as local counsel in a completely separate case on a completely separate topic in a completely separate court. There is nothing unusual or unethical about such an arrangement. *See, e.g.*, Scott B. Garner, *Civility in the Time of Pandemic*, 62 Orange County Lawyer 14, 14 (Aug. 2020) ("[N]ever forget how small the world is--particularly the Orange County legal community. The lawyer you oppose in one case could be your co-counsel in the next. The lawyer you accuse of deceitful conduct in August could be the lawyer interviewing you for a new job in January."). Proposed Intervenors' unsupported speculation hardly qualifies

[3] The Orangeburg County School District Board voted to permit intervention in mid-April. On April 25, 2021, the *Times and Democrat* reported that OCSD "[t]rustees unanimously agreed last week to engage the services of the Williams and Williams firm on a pro bono basis to represent the district in the Bishop of Charleston's lawsuit against the state." Gene Zaleski, "Orangeburg County School District monitors school lawsuit," The Times and Democrat (April 25, 2021), https://thetandd.com/news/local/orangeburg-county-school-district-monitors-school-lawsuit/article_81191eba-ddbf-54a3-8182-2560bf41fbec.html. OCSD Board Chair Ruby Edwards said, "'Our board of trustees unanimously voted to authorize their firm to intervene without cost, as necessary,' in the lawsuit." *Id*. Yet even after a vote in mid-April to authorize intervention, knowing then of the Governor's support for the SAFE program, the Proposed Intervenors waited two months, and did not act to intervene until after the Governor filed an answer instead of a motion to dismiss.

as "'concrete evidence of collusion.'" *Baker v. ABC Phones of N.C.*, No. 19-cv-02378-SHM-tmp, 2020 U.S. Dist. LEXIS 240695, at *26 (W.D. Tenn. Dec. 22, 2020) (*quoting Rutter & Wilbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180, 1189 (10th Cir. 2002)).

Proposed Intervenors do not say but instead implicitly ask the court to assume that one of the Governor's counsel is knowingly violating his ethical duties to his client by secretly leaking inside information about this case to his co-counsel in a separate case. Otherwise they suggest that Plaintiffs' counsel is attempting to furtively bribe one of the Governor's lawyers by paying him as local counsel in a separate case. Either way, these unsupported allegations require flights of fancy the Court should not countenance.

In sum, then, the Proposed Intervenors' attempt to enter the case as of right fails on its face. In the end, they have nothing but guesses, speculations, and allegations: guesses about potential diversion of possible funds, speculations about the Governor betraying his oath and office, and unfounded, unsupported allegations about secret collusion and a sham defense. None of this is sufficient to justify a right to intervene.

III. The Proposed Intervenors are not appropriate for intervention by permission.

Proposed Intervenors mislabel the requirements for permissive intervention as "minimal." ECF 41 at 11. But federal courts' exercise of their discretionary powers should start with Federal Rule of Civil Procedure number 1: the Rules "shall be construed to secure the just, speedy and inexpensive determination of every action." In exercising their discretion on a motion for permissive intervention, courts must consider whether that intervention will unduly delay or prejudice the adjudication of the original parties. Fed. R. Civ. Pro. 24(b)(3). "Rule 24(b)(3) . . . mandates the consideration of two — and only two — factors: undue delay and prejudice to existing parties." *N.C. State Conf.*, No. 19-2273, 2021 U.S. App. LEXIS 16865, at *55. Here, as

in most cases, permissive intervention will undermine the speedy resolution of this action, and so should be denied.

The Fourth Circuit in *NAACP of N.C.* affirmed the denial of permissive intervention, approving the district court's conclusion that "the addition of the Leaders as parties would result in unnecessary complications and delay, jeopardizing the court's ability to reach final judgment in a timely manner and likely prejudicing the plaintiffs, who would be required to address 'dueling defendants' with multiple litigation strategies all purporting to represent the same state interest." *N.C. State Conf.*, No. 19-2273, 2021 U.S. App. LEXIS 16865, at *53-54. The court sounded a similar theme earlier in the decision, discussing mandatory intervention, but warning against "the risk of rendering litigation unmanageable in the federal courts" by lightly permitting intervention. *Id.* at 41.

The dissent in *N.C. NAACP* reiterated a similar set of concerns: "Open-ended intervention greatly complicates the trial court's duty to have the trains run on time. More coordination of such mundane matters as continuances, status conferences, and discovery deadlines is required. Scheduling preferences are not the only snag. The more parties to a litigation, the more inevitable divergences in strategy arise, and the more complex the suit becomes. Intervenors are no aid to simplicity. Multi-party litigation tends to take longer to resolve and tends, as well, to run up attorneys' fees." *Id.* at *56-57 (Wilkinson, J., dissenting).

When adding intervenors would "necessarily complicate the discovery process and consume additional resources of the court and the parties," along with an undue delay in adjudication of the merits, "without a corresponding benefit to existing litigants, the courts, or the process," district courts are right to deny permissive intervention. *Stuart v. Huff*, 2011 U.S. Dist. LEXIS 147434, *9–*10 (M.D.N.C. Dec. 22, 2011), *aff'd*, 706 F.3d 345 (4th Cir. 2013). Because

as the Fourth Circuit said in *Stuart*, affirming the denial of permissive intervention, "Additional parties can complicate routine scheduling orders, prolong and increase the burdens of discovery and motion practice, thwart settlement, and delay trial." 706 F.3d at 350.

The members of SCICU have been waiting for months to access nearly $17 million in COVID relief funds tied up in the Department of Administration because of the Blaine Amendment, funds they desperately need to balance their books after a year of substantial unanticipated costs. As the Center for American Progress has noted, "[C]olleges and universities across the nation have had to spend enormous sums of money to support their students through the pandemic; switch to online education; and issue refunds to students for parking, housing, and dining services for the period of time when they were not on campus in the spring."[4] As Inside Higher Ed has reported, "Uncertainty around colleges' financial futures may be at an all-time high [because of COVID]. The one thing that's certain is that the weakest institutions are most likely to struggle."[5] Recognizing this impact, the South Carolina General Assembly designated funds to help higher education institutions survive; those funds are frozen, though, and colleges can only float these extraordinary costs on their books for so long. Similarly, the GEER II funds must be allocated by the Governor by January 2022 under federal law. First Amended Compl. at 11.

Thus, this is not the sort of case that can linger as months drag into years of discovery battles, motion practice, and dueling depositions. Plaintiffs request and require prompt relief, which will be made infinitely harder if Proposed Intervenors come into this case. The burdens and

[4] Victoria Yuen, "Mounting Peril for Public Higher Education During the Coronavirus Pandemic," Center for American Progress (June 11, 2020), https://www.americanprogress.org/issues/education-postsecondary/reports/2020/06/11/485963/mounting-peril-public-higher-education-coronavirus-pandemic/.
[5] Rick Seltzer, Coronavirus Upends Colleges' Financial State," InsideHigherEd (March 20, 2020, https://www.insidehighered.com/news/2020/03/20/coronavirus-outbreak-piles-short-term-costs-and-long-term-uncertainty-college-and.

delays that would be created by permitting intervention would not result in any additional benefit to the existing litigants, the courts, or the process.

IV. The Proposed Intervenors should participate instead as amici.

A denial of permissive intervention does not leave potential intervenors without recourse. When non-parties have a unique perspective or expertise to share on a particular case, there is a readily available role for that: amicus. OCSD and NAACP may "offer [their] insight and expertise" "without making [them] an intervenor." *Harmony W. Ashley LLC*, Civil Action No. 2:19-cv-2579, 2021 U.S. Dist. LEXIS 39856, at *12-13. "Numerous cases support the proposition that allowing a proposed intervenor to file an amicus brief is an adequate alternative to permissive intervention." *McHenry v. Comm'r*, 677 F.3d 214, 227 (4th Cir. 2012) (affirming denial of a motion to intervene) (citing *Ruthardt v. United States*, 303 F.3d 375, 386 (1st Cir. 2002); *Mumford Cove Ass'n v. Town of Groton*, 786 F.2d 530, 535 (2d Cir. 1986); *Bush v. Viterna*, 740 F.2d 350, 359 (5th Cir. 1984); *Brewer v. Republic Steel Corp.*, 513 F.2d 1222, 1225 (6th Cir. 1975)); *see also N.C. State Conf.*, No. 19-2273, 2021 U.S. App. LEXIS 16865, at *53 (affirming denial of permissive intervention when amicus participation was allowed). "While a would-be intervenor may prefer party status to that of friend-of-court, the fact remains that amici often make useful contributions to litigation." *Stuart*, 706 F.3d at 355. "[F]or many a would-be intervenor, amicus status is quite sufficient." *N.C. State Conf.*, No. 19-2273, 2021 U.S. App. LEXIS 16865, at *57 (Wilkinson, J., dissenting). So it is here; Plaintiffs would not oppose participation by these or any other amici.

CONCLUSION

At the preliminary injunction stage, this Court observed that "[t]he Plaintiffs [had] only begun to scratch the surface of what will no doubt be a well-litigated challenge to the no-aid provision on the merits." Opinion & Order, ECF 34, at 11. This will be a well-litigated case by the

current parties, and there is no justification for intervention by proposed parties who lack a direct interest and who will only complicate and delay resolution of a time-sensitive case.

Respectfully submitted,

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