

STATE OF NORTH CAROLINA  
COUNTY OF WAKE

FILED

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION

2020 OCT 26 A 11: 31 20-CVS-8346

TAMIKA WALTER KELLY, KRISTY  
MOORE, AMANDA HOWELL, KATE  
MEININGER, ELIZABETH  
MEININGER, JOHN SHERRY, AND  
RIVCA RACHEL SANOGUEIRA,

WAKE CO., C.S.C.



PLAINTIFFS,

v.

THE STATE OF NORTH CAROLINA,  
NORTH CAROLINA STATE  
EDUCATION ASSISTANCE  
AUTHORITY,

**NOTICE OF INTERVENTION**  
**AS OF RIGHT**  
**N.C. R. Civ. P. 24(c)**

DEFENDANTS, *and*

PHILIP E. BERGER *in his official*  
*capacity as President Pro Tempore of*  
*the North Carolina Senate, and*  
TIMOTHY K. MOORE *in his official*  
*capacity as Speaker of the North*  
*Carolina House of Representatives,*

INTERVENOR-  
DEFENDANTS.

Notifying Intervenor-Defendants, Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate, and Timothy K. Moore, in his official capacity as Speaker of the North Carolina House of Representatives, hereby give notice of their intervention in this matter under N.C. GEN. STAT. ANN. § 1-72.2(b) and N.C. Rule of Civil Procedure 24(c).

In support of this notice, President Pro Tempore Berger and Speaker Moore show that they are entitled to intervene as of right as follows:

1. “It is the public policy of the State of North Carolina that in any action in any North Carolina State court in which the validity or constitutionality of an act of the General Assembly is challenged, the General Assembly, jointly through the Speaker of the House of Representatives and the President Pro Tempore of the Senate, constitutes the legislative branch of the State of North Carolina and the Governor constitutes the executive branch of the State of North Carolina, and when the State of North Carolina is named as a defendant in such cases, both the General Assembly and the Governor constitute the State of North Carolina.” N.C. GEN. STAT. ANN. § 1-72.2(a).

2. In light of this public policy, the N.C. Carolina Rules of Civil Procedure state that “[t]he Speaker of the House of Representatives and the President Pro Tempore of the Senate, as agents of the State through the General Assembly, must be joined as defendants in any civil action challenging the validity of a North Carolina statute or provision of the North Carolina Constitution under State or federal law.” *Id.* § 1A-1, R. 19(d); *see also id.* § 120-32.6 (“Whenever the validity or constitutionality of an act of the General Assembly or a provision of the Constitution of North Carolina is the subject of an action in any State or federal court, the Speaker of the House of Representatives and the President Pro Tempore of the Senate, as agents of the State through the General Assembly, shall be necessary parties . . .”). As described below, this is just such an action.

3. The State empowers low-income North Carolina children and their families with Opportunity Scholarships to allow them to select the school that best fits their unique needs.

4. The Opportunity Scholarship Program was first enacted in 2013. *See* N.C. Gen. Stat. 115C-562.1-562.8. It was upheld by the North Carolina Supreme Court in *Hart v. State*, 368 N.C. 122, 774 S.E.2d 281 (2015), and *Richardson v. State*, 368 N.C. 158, 774 S.E.2d 304 (2015).

5. Despite the fact that the North Carolina Supreme Court had already validated the constitutionality of the Opportunity Scholarship Program, Plaintiffs filed this action on July 27, 2020, challenging the Program's constitutionality again.

6. In particular, Plaintiffs allege in their Complaint that the Opportunity Scholarship Program violates Article I, Sections 13, 15, and 19; and Article V, Sections 2(1) and 2(7). Compl. at 34-38. In their prayer for relief, the Plaintiffs ask the Court to declare the entire program unconstitutional and enjoin any further scholarships, disbursements, or appropriations to the Program. (Compl. at 38.)

7. Plaintiffs here have ignored the clear command of N.C. Rule of Civil Procedure 19(d) because they "challeng[e] the validity of a North Carolina statute . . . under State . . . law," *id.*, and yet failed to join President Pro Tempore Berger and Speaker Moore as agents of the State on behalf of the General Assembly. *See also* N.C. GEN. STAT. ANN. § 120-32.6. As Plaintiffs' prayer for relief states, they "request that the Court declare that the Program as implemented is unconstitutional under the North Carolina Constitution." (Compl. at 38.)

8. Plaintiffs' action unquestionably seeks to call into doubt the constitutionality of the Opportunity Scholarship Program, as enacted by the General Assembly. Plaintiffs were, thus, required under Rule 19(d) and Section 120-32.6 to join President Pro Tempore Berger and Speaker Moore as defendants. North Carolina law anticipates such failures and allows the General Assembly to represent its interests, nonetheless: "The Speaker of the House of Representatives and the President Pro Tempore of the Senate, as agents of the State, by and through counsel of

their choice, including private counsel, shall jointly have standing to intervene on behalf of the General Assembly as a party in any judicial proceeding challenging a North Carolina statute or provision of the North Carolina Constitution.” N.C. GEN. STAT. ANN. § 1-72.2(b).

9. Because Plaintiffs did not join President Pro Tempore Berger and Speaker Moore as defendants to this action, Notifying Intervenor-Defendants now exercise their right under Section 1-72.2(b) “to intervene on behalf of the General Assembly as a party in [this] judicial proceeding challenging a North Carolina statute.”

10. North Carolina law dictates that President Pro Tempore Berger and Speaker Moore’s intervention “shall be effected upon the filing of a notice of intervention of right in the trial . . . court in which the matter is pending.” N.C. GEN. STAT. ANN. § 1-72.2(b); *see id.* § 1A-1, R. 24(c). Through this filing, Notifying Intervenor-Defendants, hereby, give the Court notice of their intervention as of right.

WHEREFORE, Notifying Intervenor-Defendants request that this Court give effect to their notice of intervention as of right.

This is the 26th day of October, 2020.

Respectfully submitted,



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*\*Pro Hac Vice Motion to Be Filed*

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*Philip E. Berger and Timothy K. Moore*

**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing document has been sent to the attorneys listed below by depositing the same in the First Class mail, postage prepaid, at the following addresses and by sending an e-mail to the e-mail addresses below on this 26th day of October, 2020.

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