# RECORD NO. 12-1052

In The

# United States Court Of Appeals

## For The Fourth Circuit

**GRETCHEN S. STUART, MD, on behalf of herself and her patients seeking abortions; JAMES R. DINGFELDER, MD, on behalf of himself and his patients seeking abortions; DAVID A. GRIMES, MD, on behalf of himself and his patients seeking abortions; AMY BRYANT, MD, on behalf of herself and her patients seeking abortions; SERINA FLOYD, MD, on behalf of herself and her patients seeking abortions; DECKER & WATSON, INC., d/b/a Piedmont Carolina Medical Clinic; PLANNED PARENTHOOD OF CENTRAL NORTH CAROLINA; A WOMAN'S CHOICE OF RALEIGH, INC.; PLANNED PARENTHOOD HEALTH SYSTEMS, INC.; TAKEY CRIST, M.D., on behalf of himself and his patients seeking abortions; TAKEY CRIST, M.D., P.A., d/b/a Crist Clinic for Women,**

***Plaintiffs – Appellees,***

**v.**

**JANICE E. HUFF, MD, in her official capacity as President of the North Carolina Medical Board and her employees, agents and successors; ROY COOPER, in his official capacity as Attorney General of North Carolina and his employees, agents and successors; LANIER M. CANSLER, in his official capacity as Secretary of the North Carolina Department of Health and Human Services an his employees, agents and successors; JIM WOODALL, in his official capacity as District Attorney ("DA") for Prosecutorial District ("PD") 15B and his employees, agents and successors; TRACEY E. CLINE, in her official capacity as DA for PD14 and her employees, agents and successors; DOUG HENDERSON, in his official capacity as DA for PD 18 and his employees, agents and successors; BILLY WEST, in his official capacity as DA for pd 12 and his employees, agents and successors; C. COLON WILLOUGHBY, JR., in his official capacity as DA for PD 10 and his employees, agents and successors; BENJAMIN R. DAVID, in his official capacity as DA for PD 5 and his employees, agents and successors; JIM O'NEILL, in his official capacity as DA for PD 21 and his employees, agents and successors; ERNIE LEE, in his official capacity as DA for PD 4 and his employees, agents and successors,**

***Defendants,***

**and**

**JOHN M. THORP, JR., MD; GREGORY J. BRANNON, MD; MARTIN J. MCCAFFREY, MD; CHIMERE COLLINS; DALLENE HALLENBECK; TRACIE JOHNSON; LANITA WILKS; ASHEVILLE PREGNANCY SUPPORT SERVICES; PREGNANCY RESOURCE CENTER OF CHARLOTTE,**

***Appellants.***

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA AT GREENSBORO**

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## BRIEF OF APPELLANTS

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## JURISDICTIONAL STATEMENT

This Court has jurisdiction over the district court's December 22, 2011 final order denying Appellants' Motion to Intervene, as of right or permissively, pursuant to 28 U.S.C. 1291. *Stringfellow v. Concerned Citizens in Action*, 480 U.S. 370, 377 (1987)

## STATEMENT OF THE ISSUES

1. Where Appellants have shown direct and substantial interests in the subject matter of this litigation, did the District Court abuse its discretion in not allowing Appellants to intervene as of right under Rule 24(a) of the Federal Rules of Civil Procedure?

2. Where Appellants have shown an adversity of interest with and nonfeasance by Defendants, did the District Court err in finding that Defendants adequately represented Appellants' interests and abuse its discretion in not allowing Appellants to intervene under Rule 24(a) of the Federal Rules of Civil Procedure?

3. Where Appellants have timely moved to intervene, with claims and defenses that share with the main action common questions of law and fact, and no reason or evidence exists in the record to suggest Appellants will unduly complicate or delay this litigation, did the District Court err in finding that Appellants would unduly complicate or delay litigation and abuse its discretion in

not allowing Appellants to intervene under Rule 24(b) of the Federal Rules of Civil Procedure?

## STATEMENT OF THE CASE

On September 29, 2011, a complaint for declaratory and injunctive relief (J.A. 20-49) was filed by Gretchen S. Stuart, M.D., and other abortion providers, on behalf of themselves and their patients (hereinafter the "Plaintiffs"), challenging on First Amendment, substantive due process and vagueness grounds the constitutionality of North Carolina's "Woman's Right to Know Act" (J.A.50-56, 2011 N.C. Sess. Laws 405, to be codified at N.C. Gen. Stat. §§ 90-21.80 through 90.21.92, hereafter the "Act"), which had been enacted on July 28, 2011 by the North Carolina Legislature over the Governor's veto.

On October 17, 2011, the District Court heard oral arguments (J.A. 140-243) on Plaintiffs' motion for preliminary injunctive relief (J.A. 56A-D), and also admitted certain evidence offered by the Plaintiffs in support of that motion. (J.A. 57-139). Defendants did not offer *any* evidence in opposition to the motion, choosing to rely exclusively on legal arguments based primarily upon Defendants' interpretation of the United States Supreme Court's dispositive decision in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

Based on the "record before it," including its cited reliance upon the unrebutted expert witness testimony submitted by the Plaintiffs (J.A. 245, 253-

254)[1], the District Court, in its October 25, 2011 Memorandum Opinion and Order (J.A. 244-262), denied Plaintiffs' vagueness and substantive due process claims and permitted most of the provisions of the Act to go into effect. However, finding that "Plaintiffs are likely to succeed on the merits of the First Amendment challenge," the District Court issued its preliminary injunction enjoining § 92-1.85 of the Act, which "requires [abortion] providers to perform an ultrasound at least four hours in advance of the procedure, during which time the provider must make the images produced from the ultrasound visible to the patient and describe to the patient the images seen on the ultrasound." (J.A. 263-264).

When Appellants filed their Motion to Intervene (J.A. 274-282) on November 8, 2011, as well as their proposed Answer to the Complaint (Document 46), no discovery had been requested by any party nor had any dispositive motions been filed or scheduled. In addition, Defendants had not yet filed their answer. On

[1] The District Court, contrary to the extensive testimony in the nine declarations subsequently offered by Appellants in support of their motion to intervene (J.A. 283-472), held that the "*undisputed* evidence offered by the Plaintiffs establishes these provisions are likely to harm the psychological health of the very group the state purports to protect." (J.A. 253) (emphasis added), and that "the Defendants have not articulated how the [ultrasound] speech-and-display requirements address the stated concern in reducing compelled abortion and none is immediately apparent." (J.A. 254). On December 19, 2011, The District Court reiterated these erroneous factual conclusions in its Amended Memorandum Opinion and Order (J.A. 593-594) without reference to the contrary evidence in the nine declarations submitted by Appellants on November 8, 2011 in support of Appellants motion to intervene that was denied by the District Court on December 22, 2011. (J.A. 604-608).

December 18, 2011, Appellants also timely filed their proposed Answer (J.A. 570-583) to Plaintiffs' Amended Complaint (J.A. 484-519).

On December 19, 2011, in response to Plaintiffs' motion to modify the preliminary injunction, the District Court issued its "Amended Memorandum Opinion and Order" (J.A. 584-603) refusing to modify its preliminary injunction. Concomitantly the District Court reiterated its October 25 Scheduling Order (J.A. 265) allowing the Defendants to move "to vacate or modify the Preliminary Injunction at any appropriate time" based upon whatever evidence or legal arguments that may be required "to address in more detail some of the more nuanced legal questions presented by this case." (J.A. 595).

On December 22, 2011, Judge Eagles denied Appellants' Motion for Intervention (J.A. 604-608) "because [proposed intervenors'] interests are adequately represented by existing Defendants and intervention would unnecessarily complicate the case and cause undue delay." On January 6, 2012, Appellants timely filed its Notice of Appeal (J.A. 609-611) of that Order.

On January 10, 2012, in *Texas Medical Providers Performing Abortion Services v. Lakey*, 667 F.3d. 570 (5th Cir. 2012), the Fifth Circuit, based upon its dispositive interpretation of *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), reversed the opinion that was cited and relied upon by the District Court in this case and held that the provisions of a Texas abortion statute requiring the physician

to perform an obstetric ultrasound examination and fetal heartbeat auscultation, explain the results of each procedure, and also requiring the mother to complete a form indicating that she had received certain required materials, did not compel physicians' speech in violation of the First Amendment because the required information was not ideological but, rather, truthful and non-misleading, and the provisions were within State's power to regulate the practice of medicine. On February 6, 2012, on remand from the judgment of the Fifth Circuit, the District Court in *Lakey* vacated its preliminary injunction and granted the State of Texas' summary judgment motion to dismiss the abortion providers' complaint that had alleged the same First Amendment, substantive due process and vagueness claims as are alleged in this case.

Despite the fact that the Fifth Circuit's *Lakey* decision provides strongly persuasive legal authority rebutting the likelihood that Plaintiffs' First Amendment claims can succeed in this case, and the evidence provided by Appellants in support of their motion to intervene that also rebuts these claims, Defendants have chosen neither to timely appeal the Preliminary Injunction nor, as permitted by the District Court's October 25 Scheduling Order, to make a motion to modify or vacate the preliminary injunction based upon the sound reasoning of the *Lakey* decision and the supporting evidence provided or that is otherwise available from the proposed intervenors.

According to the parties' Joint Rule 26(f) Report (J.A. 612-616), as approved and ordered by the District Court (J.A. 617), the parties are "allowed until March 9, 2012 to request leave to join additional parties or amend pleadings. After that date, the Court will consider, *inter alia*, whether the granting of leave would delay trial or otherwise prejudice any party." (J.A. 615). The deadline to file initial disclosures is not until March 16, 2012; Defendants do not have to disclose the identity of their witnesses until May 16, 2012; and, the discovery period runs until August 27, 2012. (J.A. 613).

## STATEMENT OF FACTS

On July 28, 2011, the North Carolina General Assembly passed the "Woman's Right to Know Act" (the "Act") over the Governor's veto. (J.A. 50-56). The Act was codified as N.C. Gen. Stat. § 90-21.80 through § 90-21.92. As stated in its subtitle, the Act requires "a twenty-four-hour waiting period and the informed consent of a pregnant woman before an abortion may be performed." (J.A. 50). With respect to the issue of informed consent, the Act states that "for the woman to make an informed decision" she must first receive an "obstetric real-time view" of her "unborn child" and "a simultaneous explanation of what the display is depicting" and a "medical description of the images, which shall include the dimensions of the embryo or fetus and the presence of external members and internal members, if present and viewable." §§ 90-21.85(a)(1), (2) and (5). The

Act provides that the woman is permitted to avert "her eyes from the displayed images" or "refuse to hear" the "auscultation of the fetal heart tone" and the "simultaneous explanation and medical description." § 90-21.85(b).

The Act contains no criminal penalties, but it does create certain civil remedies. The Act provides that "[a]ny person upon whom an abortion has been performed and any father of an unborn child that was the subject of an abortion may maintain an action for damages against the person who performed the abortion in knowing or reckless violation of this Article." § 90-21.88(a). Additionally, the Act includes a provision whereby injunctive relief may be sought by one of a number of different parties against "any person who has willfully violated" the Act and that such injunction shall "prevent the abortion provider from performing or inducing further abortions in this State in violation of [the Act]." § 90-21.88(b).

Appellants include three distinct groups that are each interested in preserving the constitutionality of the Act and may avail themselves of the civil remedies created by the Act. Drs. John M. Thorp, Jr., M.D., FACOG, Gregory J. Brannon, M.D., FACOG, and Martin J. McCaffrey, M.D. (collectively the "Medical Professionals") are interested in the subject matter of this litigation as licensed North Carolina health care providers charged with providing responsible

care to their patients, including pregnant women considering abortions. (*See* Declarations of Thorp, Brannon, and McCaffrey, J.A. 283-397)

As detailed in their declarations, their interests include:

- Protecting the informed consent standards in the Act (Thorp Dec. ¶ 13, J.A. 286; Brannon Dec. ¶¶ 6-13, J.A. 354-357; McCaffrey Dec. ¶ 30, J.A. 386);
- Maintaining the ability to tell women the truth about the physical and emotional risks of abortion (Thorp Dec. ¶¶ 32-37, J.A. 295-298; Brannon Dec. ¶¶ 22-26 J.A. 361-362; McCaffrey Dec. ¶ 24, J.A. 383); and,
- Maintaining the "civil remedies" granted to them in §90-21.88(b). (Thorp Dec. ¶ 41, J.A. 300; Brannon Dec. ¶ 29, J.A. 364).

Appellants Chimere Collins, Dallene Hallenbeck, Tracie Johnson, and Lanita Wilks (collectively the "Post-Abortive Women") are interested as mothers, parents, and former abortion patients, some of whom did not receive the information required by the Act from some of the Plaintiffs in this action. (*See* Decls. of Collins, Hallenbeck, Johnson, and Wilks, J.A. 398-444)

As detailed in their declarations, their interests include:

- Protecting the informed consent standards in the Act of which as women they are the intended beneficiaries (Collins Dec. ¶ 26, J.A. 407; Hallenbeck Dec. ¶ 28, J.A. 418; Johnson Dec. ¶ 19, J.A. 426-427; Wilks Dec. ¶¶ 33-34, J.A. 442); and,
- Maintaining the rights granted to them by the Act, chiefly the "civil remedies" granted to them in § 90-21.88 (b). (Collins Dec. ¶ 27, J.A. 407; Hallenbeck Dec. ¶ 29, J.A. 419; Johnson Dec. ¶ 22, J.A. 426; Wilks Dec. ¶ 35, J.A. 442).

Appellants Asheville Pregnancy Support Services and the Pregnancy Resource Center of Charlotte (collectively the "Pregnancy Medical Centers") are interested in the action as they provide the enjoined services to the women of North Carolina. The number of clients the Pregnancy Medical Centers will be able to serve will significantly increase if all the provisions of the Act are implemented, particularly the enjoined ultrasound provisions that authorize them, as well as abortion providers, to provide patients with the required certification that the ultrasound provisions have been timely performed. (Wood Dec. ¶¶ 4-10, 14, J.A. 446-449, 452; Forsythe Dec. ¶¶ 5-14, 17, J.A. 461-466, 468).

## SUMMARY OF ARGUMENT

For the reasons set forth herein, Appellants should have been allowed to intervene as defendant-intervenors in this action pursuant to Federal Rule of Civil Procedure (FRCP) 24(a)(2) and alternatively, pursuant to FRCP Rule 24(b)(1)(B).

The three groups of defendant-intervenors identified above, the Medical Professionals, the Post-Abortive Women, and the Pregnancy Medical Centers (collectively the "Appellants"), each, for different reasons, possess a direct and substantial interest in the subject matter of the litigation which will be significantly impaired or impeded if they are not allowed to intervene. Appellants are the actual intended beneficiaries of the Act; gain a new civil remedy to sue abortion providers through the Act; and, have taken steps to prepare for an increase in clientele due to an ability to provide certifications required by the Act.

Appellants' interests in the subject matter of the litigation have not been and will not be adequately represented by the State. Appellants acknowledge that in certain respects, their interests are aligned with those of the State, including its interest in protecting its citizens, which was the impetus behind the Act. Nonetheless, Appellants also have interests which are separate and distinct from those of the State, including insuring that a pregnant woman understands the potential risks and harms to the child so that she can make the decision *for the child* and preserving the "civil remedies" granted in the Act. The Appellants'

interests are also much more vital than the "general interests of the proposed intervenors" as expressed in the District's Memorandum Decision and Order. (J.A. 604).

In addition to showing an adversity of interest with Defendants, Defendants have acted in nonfeasance in regards to Appellants' interests. On multiple occasions Defendants have refused to submit evidence or appeal decisions which would have protected Appellants' interests.

For these reasons and others, the District Court abused its discretion in denying the Appellants' Motion to Intervene.

## ARGUMENT

### STANDARD OF REVIEW:

This Court reviews the denial of a motion for intervention on abuse of discretion grounds. *In re Sierra Club*, 945 F.2d 776 (4th Cir. 1991).

### DISCUSSION OF THE ISSUES:

FRCP 24(a)(2) provides that "[o]n timely motion, the court must permit anyone to intervene who...claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest."

This Court has stated that "[a]pplicants to intervene as of right must meet all four of the following requirements: (1) the application to intervene must be timely; (2) the applicant must have an interest in the subject matter of the underlying action; (3) the denial of the motion to intervene would impair or impede the applicant's ability to protect its interest; and (4) the applicant's interest is not adequately represented by the existing parties to the litigation." *Houston General Insurance Co. v. Moore*, 193 F.3d 838, 839 (4th Cir. 1999). We will discuss the reasons that Appellants have met each of these four elements below, beginning with a combined discussion on the second and third elements.

## I. APPELLANTS POSSESS A DIRECT AND SUBSTANTIAL INTEREST IN THE SUBJECT MATTER OF THE LITIGATION WHICH WILL BE IMPAIRED UNLESS THEY ARE ALLOWED TO INTERVENE

Although the District Court conceded that Appellants are interested in this case and that some Appellants have tangible interests created by the Act, it erroneously held without legal authority or factual support, that this did not necessarily rise to the level of interest necessary for intervention. The District Court's position on this matter is difficult to understand when considered in light of the declarations (J.A. 283-472) submitted by each of the Appellants with their Motion for Intervention (J.A. 274-282) and the authorities cited in the accompanying Memorandum of Law (Document 45). The declarations clearly set forth uncontradicted evidence that all Appellants have a direct and substantial

interest in the subject matter of the litigation, perhaps more so than anyone else, and that such interests may be directly impaired unless they are allowed to intervene.

### A. APPELLANTS, AND NOT DEFENDANTS, ARE THE CLASS OF BENEFICIARIES THE NORTH CAROLINA LEGISLATURE INTENDED TO BENEFIT OR PROTECT WITH THE ACT.

First and foremost, the Post-Abortive Women, as mothers, parents, and former abortion patients, are the intended beneficiaries of the Act. As such, as shown in their uncontradicted testimony, they have a direct and substantial interest in the subject matter of the litigation. (*See* Collins Dec. ¶¶ 23-27, J.A. 405-408; Hallenbeck Dec. ¶¶ 22-29, J.A. 416-420; Johnson Dec. ¶¶ 18-22, J.A. 426-429; Wilks Dec. ¶¶ 30-35, J.A. 441-444). The Medical Professionals, as licensed health care providers, are charged with providing the best care possible for their patients, which includes, *inter alia*, insuring that the women they care for are fully informed when making a decision on whether to have an abortion, so as to avoid potential negative health consequences to both themselves and their babies. As such, they also have a direct and substantial interest in the subject matter of the litigation. (*See* Thorp Dec. ¶ 13, J.A. 286; Brannon Dec. ¶¶ 6-13, J.A. 354-357; McCaffrey Dec. ¶ 30, J.A. 386). The Pregnancy Medical Centers also possess a direct and substantial interest in the action as they provide the enjoined services to the women of North Carolina. (*See* Wood Dec. ¶¶ 4-10, 14, J.A. 446-449, 452; Forsythe Dec. ¶¶ 5-14,

17, J.A. 461-466, 468). Although each of these three groups are undoubtedly the intended beneficiaries of the Act, it is inexplicable that their interests were not seen as sufficient enough by the District Court to be permitted to intervene in this action.

While the State has asserted that it has an interest in protecting all its citizens, including women considering abortions and health providers, it is important to note that only the Appellants, as proposed intervenors, have produced any evidence in this case to rebut the evidence offered by Plaintiffs and relied upon by the District Court in issuing the preliminary injunction in this case. The State failed to produce any evidence from any of its citizens in opposition to the Plaintiffs' motion for preliminary injunction. In addition, the State has failed to move to vacate the Preliminary Injunction although the District Court extended an open invitation to do so in its original and Amended Preliminary Injunction Memorandum Opinion and Orders (J.A. 244-262, 584-603), as well as its October 25 Scheduling Order (J.A. 265) even though the Fifth Circuit's subsequent decision in *Texas Medical Providers Performing Abortions v. Lakey*, *supra*, provides ample legal justification for doing so.

### B. APPELLANTS HAVE A DIRECT AND SUBSTANTIAL INTEREST IN PRESERVING THE CAUSE OF ACTION GRANTED UNDER § 90-21.88 OF THE ACT WHICH WOULD BE IMPAIRED IF PLAINTIFFS WERE TO PREVAIL.

Section 90-21.88(a) of the Act grants women such as the Post-Abortive Women, as well as any father of an unborn child that was the subject of an abortion, a statutory cause of action against Plaintiffs, and other abortion providers, for a knowing or reckless violation of the Act. Because no other North Carolina legislation or court precedent presently provides such a remedy for women injured by an abortion provider's failure to provide a pre-abortion obstetric ultrasound and to explain it to her before obtaining the required informed consent from her, the preservation and *immediate* enforceability of § 90-21.88(a) of the Act is vitally important to them. For this reason and others, the Post-Abortive Women seek to preserve and implement this statutory cause of action, which makes it far easier to legally protect their rights against such an injury than having to solely rely on a common law negligence claim. The Post-Abortion Women also have a strong legal interest in protecting the statutory remedy provided for in the Act because they either have experienced or represent women who have experienced the various types of injury that may occur when a woman receives an abortion without giving the truly informed consent required by the Act. Indeed some of the Post-Abortion women were harmed by the inadequate or non-existent informed consent they experienced at the hands of some of the Plaintiffs in this case. (Collins Dec. ¶¶

11-27, J.A. 402-408; Hallenbeck Dec. ¶¶ 6-12, J.A. 410-413; Johnson Dec. ¶¶ 8-16, J.A. 423-426; Wilks Dec. ¶¶ 11-25, J.A. 434-440).

It is important to note that all of the Defendants were sued in their official capacity, therefore, unlike Appellants, none of the Defendants can avail themselves of certain provisions of the Act.

In sum, the Post-Abortive Women, Medical Professionals and Pregnancy Medical Centers all have direct and substantial interests in preserving the civil remedies granted by the Act. Should the Act be declared unconstitutional, Appellants will have no remedy, or at best a very uncertain remedy, for injuries caused by a physician's failure to provide adequate information to a woman so that she may make a fully informed decision about whether to receive an abortion.

### C. APPELLANTS HAVE A DIRECT AND SUBSTANTIAL INTEREST IN INSURING THAT WOMEN CONSIDERING AN ABORTION IN NORTH CAROLINA HAVE THE INFORMATION THEY NEED TO DEVELOP FULLY INFORMED CONSENT.

All health care providers must provide patients with sufficient information about any proposed treatment and its attendant risks to meet the statutory informed consent standard of N.C. G.S. § 90-21.13. In addition, health care providers must impart enough information to permit a reasonable person to gain a "general understanding" of both the treatment or procedure and the "usual and most frequent risks and hazards" associated with such treatment. *Osburn v. Danek*

*Medical, Inc.*, 135 N.C. App. 234, 520 S.E.2d 88 (1999), *review denied*, 351 N.C. 359, 542 S.E.2d 215 (2000), *affirmed*, 352 N.C. 143, 530 S.E.2d 54 (2000); *Foard v. Jarman*, 326 N.C. 24, 387 S.E.2d 162 (1990).

Presently, there are no cases in North Carolina on the issue of whether an obstetric ultrasound is or is not required in order for a woman to have informed consent before receiving an elective abortion. Appellants strongly attest and believe that, in order for a woman to truly have informed consent before receiving an abortion, she must first see an ultrasound as is required by the challenged Act. The Medical Professionals, whose responsibilities include caring for pregnant women, believe that the performance of such ultrasounds is fundamental to protecting women from the negative mental and physical injuries that may result when a woman receives an abortion without her fully informed consent. As such, they have a direct and substantial interest in preserving the Act. The Pregnancy Medical Centers, who also share such beliefs, have developed policies and procedures, and acquired equipment, to provide the informed consent services and the certifications of such provision as required by the Act. As such, they too have a direct and substantial interest in preserving the Act. Finally, the Post-Abortive Women, who regretfully have experienced, first-hand, the devastating effects of the uninformed consent the Act was designed to remedy, also have a direct and substantial interest in preserving the Act.

In sum, the vital *legal* interests of Appellants will be upheld by preserving the Act.

The Appellants' direct and substantial interests are much more than the merely "general interests of the proposed intervenors" (J.A. 604) erroneously presumed by the District Court to exist without citation to any legal authority or factual evidence.

## II. APPELLANTS ARE NOT ADEQUATELY REPRESENTED BY DEFENDANTS

Because even the District Court acknowledged that Appellants had "general interests" protectable under FRCP Rule 24(a), the District Court largely based its decision to deny Appellants' intervention motion on the ground that "those interests are adequately represented by existing Defendants." (J.A. 604). They are not.

### A. CONTRARY TO THE DISTRICT COURT'S OPINION, THE BAR TO SHOWING INADEQUACY OF REPRESENTATION IN THE FOURTH CIRCUIT FOR INTERVENTION PURPOSES IS "MINIMAL" AND NOT "VERY STRONG".

The Supreme Court has held that the bar is low for showing that a party's interest is not adequately represented by existing parties. According to the Court, "[t]he requirement of … Rule 24(a) is satisfied if the applicant shows that representation of his interest '*may be*' inadequate; and the burden of making that

showing should be treated as *minimal*." *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n. 10 (1972). (Emphasis added).

The Fourth Circuit has held that when the representation *may not* be adequate, the interests of the existing party and the would-be intervenor *may not* be the same, and those interests *may not* produce the same approach to litigation, it is sufficient to permit intervention of right. *See United Guaranty Residential Insurance Co. of Iowa v. Philadelphia Savings Fund Society*, 819 F.2d 473 (4th Cir. 1987). Specifically, the Court said:

> In our case, it is seen that, while the interests of the Bank and Philadelphia may turn out to be the same, they may not be, and although the Bank's representation of Philadelphia's interest may be adequate, it also may be inadequate. Since the parties' interests may not dictate the same approach to the conduct of the litigation, and since the representation of Philadelphia by the Bank may be inadequate, we are of opinion it was error to deny Philadelphia's motions to intervene.

*United Guaranty*, 819 F.2d at 476.

This concept was aptly stated by the Court in *Rutherford County v. Bond Safeguard Ins. Co., No. 1:* 09-cv-292, 2009 WL 6543659 (W.D.N.C. DEC. 3, 2009):

> "[T]he movant need not show that the representation by existing parties will definitely be inadequate in this regard. (citing *Trbovich v. UMWA*, 404 U.S. 528, 538 n. 10, 92 S. Ct. 630, 30 L. Ed. 2d 686 (1972)). Rather, he need only demonstrate 'that representation of his interest 'may be' inadequate.' *Id.* For this reason, the Supreme Court has described the applicant's burden on this matter as ' 'minimal.' ' " (*quoting Teague v. Bakker*, 931 F.2d

259, 262 (4th Cir. 1991) (*quoting Trbovich*, 404 U.S. at 538 n. 10, 92 S. Ct. 630).).

In this action, the District Court's Memorandum Opinion and Order states that "a 'very strong showing of inadequacy' is needed when the existing defendant is a 'governmental agency.'" *quoting* 7C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1909 (3d ed. 2007) (J.A. 606). As already explained, Professor Wright's analysis here is in conflict with precedent set in the Fourth Circuit. Moreover, it bears mentioning that if Professor Wright is to be treated as authoritative on the presumption point, Professor Wright should also be authoritative on the proposition that "there is good reason in most cases to suppose that the applicant is the best judge of the representation of the applicant's own interests and to be liberal in finding that one who is willing to bear the cost of separate representation may not be adequately represented by the existing parties." *Id*. Professor Wright also stated that "[i]n cases challenging various statutory schemes as unconstitutional or as improperly interpreted and applied, the courts have recognized that the interests of those who are governed by those schemes are sufficient to support intervention." 7C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1908 (2d ed.1986) (cited in 247 F.R.D. at 514).

### B. APPELLANTS HAVE AN "ADVERSITY OF INTEREST" WITH DEFENDANTS IN THIS CASE.

At the October 17, 2011 hearing, the State argued that it had three compelling state interests: protecting the psychological health of the patient, preventing coercive abortions, and expressing its preference for the life of the unborn. (J.A. 244). While Appellants share these interests with Defendants, Appellants also have interests which are separate and distinct from the State's, including insuring that a pregnant woman understands the potential risks and harms to the child so that she can make the decision *for the child* (Brannon Decl. ¶ 16, J.A. 358) and preserving the "civil remedies" granted in § 90-21.88. (Thorp Decl. ¶ 41, J.A. 300; Brannon Decl. ¶ 29, J.A. 364; McCaffrey Decl. ¶ 29, J.A. 385-386; Collins Decl. ¶ 27, J.A. 407; Hallenbeck Decl. ¶ 29, J.A. 419; Johnson Decl. ¶ 22, J.A. 427; Wilks Decl. ¶ 35, J.A. 442; Wood Decl. ¶ 14, J.A. 452; Forsythe Decl. ¶ 17, J.A. 468).

It is important for this Court to note that the Defendants are not among the class of beneficiaries protected by the Act while the Appellants are. In addition, Defendants were sued in their "official capacities," meaning that while Plaintiffs claim to be health professionals representing themselves and their patients, without Appellants as parties there are no women or health care professionals representing the defendants. Though Appellants share Defendants' goal of having the Act upheld as constitutional, Appellants have much stronger interests in vacating the

preliminary enjoinment of the Act and ensuring its immediate and permanent implementation than a State whose governor vetoed the Act and has yet to submit any evidence in support of its enactment. Every day in which a section of the Act is enjoined is a day that Appellants are not afforded the rights and protections created by the Act. If allowed to intervene, Appellants would have appealed the Preliminary Injunction ordered by the District Court. Though Plaintiffs label this as no more than a difference of trial tactics, it is, in fact, evidence of an adversity of interests and that Appellants want more than to just prove the constitutionality of the Act.

As detailed in the cases below, within the Fourth Circuit, sharing the same primary objective does not equate to a lack of adversity of interest, and the government is not always presumed to adequately represent the interests of specific citizens.

The District Court cites *Commonwealth of Virginia v. Westinghouse Electric Corp.*, 542 F.2d 214 (4th Cir. 1976) in opining that because Appellants seek the same "ultimate objective" as Defendants "a presumption arises that [Appellants] interests are adequately represented, against which [Appellants] must demonstrate adversity of interest, collusion, or nonfeasance." (J.A. 604)[2] As described above,

[2] It should be noted that the *Westinghouse* court found two additional factors salient. First, the Commonwealth of Virginia ("Virginia") admitted at oral argument that VEPCO would adequately represent Virginia's interests at trial;

overcoming this presumption requires a *minimal* showing by Appellants that their interest *may not be* adequately represented --a showing that Appellants have certainly made in this case.

"*Trbovich* recognized that when a party to an existing suit is obligated to serve two distinct interests, which, although related, are not identical, another with one of those interests should be entitled to intervene." *United Guaranty*, 819 F.2d at 475. In *Trbovich*, "the public interest of the Secretary was broader than the narrower interest of the complaining union member." *Id.* The relevant test, according to the Circuit Court, is whether the two interests "*always* dictate precisely the same approach to the conduct of the litigation." *Id*. (*quoting Trbovich*, 404 U.S. at 539). Appellants have shown that what the District Court in the instant action has called "trial tactics" are actually divergent approaches to the conduct of litigation caused by an adversity of interest.

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Virginia's chief concern lay in potential settlement proceedings. Second, there was substantial risk of delay should intervention be granted; several other states were potential litigants, and even with Virginia's intervention, "[t]he trial court…would be provided with no new viewpoints and little if any illumination to the original Westinghouse contracts disputes." *Commonwealth of Virginia v. Westinghouse Electric Corp.*, 542 F.2d 214, 217. Distinct from the *Westinghouse* case, Appellants here would introduce evidence that Defendants would not introduce and have stated and described how Defendants have not and could not adequately represent Appellants' interests in this action.

*In re Sierra Club,* 945 F.2d 776 (4th Cir. 1991) is to the same effect.[3] In this case, this Court explained how a governmental agency which represents all constituents may have an adversity of interests with a specific group of those constituents. In reversing the denial of Sierra Club's proposed intervention, the court noted that while Sierra Club and the agency shared some objectives, the agency "is not an adequate representative for Sierra Club." *Id.* at 780. Rather, "South Carolina DHEC, in theory, should represent all of the citizens of the state, including the interests of those citizens who also may be…proponents of new hazardous waste facilities." *Id.* In contrast, "Sierra Club…appears to represent only a subset of citizens concerned with hazardous waste-those who would prefer that few or no new hazardous waste facilities receive permits. Sierra Club does not need to consider the interests of all South Carolina citizens…" *Id.* Additionally, the Fourth Circuit noted that, "South Carolina, concerned with the overall constitutionality of various aspects of its hazardous waste program, cannot be an adequate representative of environmental groups concerned with a regulation's use in the permitting process." *Id.* at 780. Much like the environmental groups in *In re Sierra Club,* Appellants are not only concerned with the constitutionality of the Act

[3] A corporation and a council of waste disposers both filed separate suits challenging an administrative regulation from the South Carolina Department of Health and Environmental Control (DHEC) imposing requirements on applicants for permit to build or expand hazardous waste disposal facilities. Sierra Club petitioned to intervene as a defendant in both suits; the District Court rejected the petitions.

but desire to also protect their own direct *legal* interests in the Act. *See also Feller v. Brock*, 802 F.2d 722 (4th Cir. 1986)[4]; *Bragg v. Robertson*, 183 F.R.D. 494 (S.D. W.Va. 1998);[5] *Cooper Technologies, Co. v. Dudas*, 247 F.R.D. 510 (E.D. Va. 2007).[6] On the other hand, the State in its obligation to protect the interests of all the citizens of North Carolina, including the Act's opponents both within and outside the government, has not to date shown any interest in providing as robust a defense of the Act as Appellants propose.

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[4] At issue in *Feller v. Brock* was wage to be paid apple pickers under a Department of Labor (DOL) program. A group of apple growers sued to overturn a DOL regulation. Apple pickers sought to intervene in defense of the regulation. The District Court rejected their petition. The Fourth Circuit reversed holding that the DOL did not adequately represent the interests of the pickers. "[T]he government's position is defined by the public interest, as well as the interests of a particular group of citizens." 802 F.2d 722, 730 (4th Cir. 1986) (citing *Trbovich*, 404 U.S. at 538-39)

[5] In *Bragg v. Robertson*, 183 F.R.D. 494 (S.D. W.Va. 1998), the District Court granted the motion to intervene, despite the fact that the defendants and intervenors shared the same ultimate objective in the litigation. According to the court, the fact that the intervenors "raise[d] a defense not raised in the [defendant's] Answer" supported a finding that their interests diverged from that of the defendants. *Id.* at 496-97.

[6] In *Cooper Technologies, Co. v. Dudas*, 247 F.R.D. 510 (E.D. Va. 2007), Thomas & Betts Technology sought to intervene in a suit against the U.S. Patent Office. The court granted intervention of right, noting that while Thomas & Betts desired the same outcome in the litigation as the patent office, they did so for different reasons. In light of the fact that the different motivations "might foreseeably dictate different approaches to the litigation," the court held that it was "proper to find that the Government does not adequately represent the interest of T & B." *Id.* at 515. For the court, the potential for "diverging litigation strategies" was sufficient to undermine the presumption of adequate representation, even if the intervening party shares the same desired outcome as one of the existing parties.

Appellants have shown that their differences with Defendants amount to much more than mere differences on tactical decisions. Nonetheless, the District Court has asserted that such differences do not rebut the presumption regarding the adequacy of representation. The District Court cites a case from the Eighth Circuit in support of its position on the subject while ignoring the fact that the Fourth Circuit has consistently held that divergent litigation strategies *can* support a finding of inadequate representation. *See e.g., United Guaranty,* 819 F.2d at 475; *In re Sierra Club* 945 F.2d at 780; *Cooper Technologies, Co. v. Dudas*, 247 F.R.D. 510 (E.D. Va. 2007).

Even under the Eighth Circuit's standards for intervention, Appellants have shown a sufficient diversity of interests to require intervention. In *Planned Parenthood Minn., N.D., S.D. v. Alpha Center*, 213 Fed. App'x 508 (8th Cir. 2007), the court allowed the intervention of Pregnancy Resource Centers to defend an abortion informed consent law. This case was later cited as persuasive authority in *Planned Parenthood of Minn. et al. v. Daugaard et. al., Not Reported in F. Supp. 2d* (2011) 2011WL 6780888, again allowing the intervention of interested parties as defendants in a lawsuit challenging an abortion Informed Consent/Right to Know law similar to the Act.

### C. THERE IS EVIDENCE OF NONFEASANCE BY DEFENDANTS WHICH APPELLANTS WOULD HAVE PREVENTED.

Several elements of the District Court's opinion are not supported by the facts contained within the Appellants' declarations. The District Court did not have the benefit of this evidence because the Defendants didn't produce any evidence prior to the October 17 hearing.[7] The District Court's own language in its Memorandum Opinion and Order (J.A. 244 - 262) shows that this evidence could have changed the decisions in that order.

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[7] It is important to note that the Declaration of Dr. Brannon does not support the District Court's opinion that "The Act goes well beyond requiring disclosure of those items traditionally a part of the informed consent process, which include in this context the nature and risks of the procedure and the gestational age of the fetus." (J.A. 252). The Appellants heartily acknowledge that the District Court did not have the benefit of Appellants declarations, or any evidence whatsoever from the Defendants, when the District Court drafted its opinion. In fact, the State chose not to introduce any evidence prior to the October 17 hearing although the State purports to protect the interests of Appellants. The evidence provided in the declarations of Dr. Brannon and the other declarants was not available to the District Court. In its Memorandum Opinion and Order, the District Court states that "The Defendants first assert that the state has an interest in protecting abortion patients from psychological and emotional distress and that this interest justifies the speech-and-display requirements. Even if this is a compelling interest, *there is no evidence in the record* supporting the state's claim that the speech-and-display requirements further this interest." (J.A. 253) (Emphasis added). PRCC's declaration, along with other medical expert and patient declarations supporting Appellants' intervention motion, contains the very evidence that the State failed to put forth and that the District Court notes could have changed its decision. (Wood Decl.¶¶ 11-12, J.A. 449-452; Dr. Thorp Decl. ¶¶ 12,23,27,29, 35-37, J.A. 283-298; Collins Decl. ¶¶ 15-27, J.A. 398-408; Hallenbeck Decl.¶¶ 9-29, J.A. 409-419; Johnson Decl.¶¶ 10, J.A. 424; Wilks Decl. ¶¶ 14-35, J.A. 435-444.)

Additionally, Appellants would have appealed the partial Preliminary Injunction ordered by the District Court. This is just another stage where Appellants, if allowed to intervene, would have acted where the government Defendants did not act. The recent success of defendant State of Texas reversing a similar preliminary injunction entered on similar First amendment grounds on appeal in *Texas Medical Providers, et al. v. Lakey, et al.*, 667 F.3d.570 (5th Cir. 2012), supports Appellants' assertion that these actions would have likely made a significant difference in the holdings in this case thus far.[8]

Much like the instant case, in *JLS, Inc. v. Public Service Com'n of West Virginia*, 321 Fed. Appx. 286 (2009), the intervening parties were more knowledgeable and had a stronger personal interest in the subject matter of the litigation. In *JLS* the Court found that a lack of knowledge and incentive to litigate vigorously amounted to a showing of inadequate representation. 321 Fed. Appx. at

[8] In *Texas Medical Providers, et al. v. Lakey, et al., supra*, discussed in more detail above, Plaintiffs were successful in getting a preliminary injunction on First Amendment grounds at the District Court level. However, the Fifth Circuit found that District Court had erroneously interpreted *Planned Parenthood v. Casey, supra*, as well as the evidence that did not support such a judgment and overturned the preliminary injunction. On remand, based upon the Fifth Circuit's judgment, the District Court in *Lakey, inter alia*, gave summary judgment for the defendants on plaintiffs' First Amendment challenge to a Texas' ultrasound informed consent law very similar to the one enjoined by the District Court in this case. The Defendants' failure to date to move to vacate the preliminary injunction based upon the reasoning of the Fifth Circuit's decision in *Lakey* is but another obvious example of Defendants' inadequate representation of Appellants' legal interests in this case.

290; *see also, Geico Gen. Ins. Co. v. Shurak*, 2006 WL 1210324 (N.D. W.Va. May 03, 2006).

It is not necessary to demonstrate that the existing litigant had "failed to perform its duty" before intervention was permitted. *United Guaranty* at 476 ("The argument that the Bank must have failed to perform its duty before intervention should be permitted has been rejected in *Trbovich*"). Appellants are not arguing that Defendants have failed to perform their duties as officials sued in their official capacity. Appellants instead point to the nonfeasance of Defendants in inadequately representing the interests of Appellants.

In *Metropolitan Property and Cas. Ins. Co. v. McKaughan*, 2011 WL 977870 (D. Md. March 17, 2011), an injured individual, Holland, moved to intervene in a case between McKaughan, the man who had injured him, and Metropolitan, McKaughan's insurance company. As Holland was trying to recover funds from McKaughan for his injuries, he was interested in McKaughan's success in his case against Metropolitan. *Id.* at 1. As the evidence showed that McKaughan was not taking actions to represent his interests in the case, Holland was allowed to intervene to overcome this nonfeasance and represent those interests. *Id*. at 3. Appellants have shown that, much like the intervenors in *JLS* and *Metropolitan Property*, they are the only ones who can be expected to

knowledgeably, robustly and adequately represent their interests considering the evidence of nonfeasance by the existing Defendants.

## III. APPELLANTS' INTERVENTION IS STILL TIMELY AND WILL NOT UNDULY COMPLICATE OR DELAY THIS CASE.

### A. APPELLANTS' INTERVENTION WAS TIMELY WHEN ORIGINALLY FILED AND IS STILL TIMELY.

As detailed above in the Statement of the Case, Appellants' intervention was and still is timely. If allowed to intervene by the District Court, Appellants could have joined the litigation before any request for discovery, before the filing or scheduling of any dispositive motions, and before Defendants filed their answer.

Discovery has just begun and is scheduled to continue until August 27, 2012. Intervention is still timely as Appellants, particularly with an expeditious disposition of this appeal in their favor, could still join the litigation at the start of the discovery stage without delaying the discovery or trial schedule.

### B. APPELLANTS WILL NOT UNDULY COMPLICATE OR DELAY THIS CASE

The District Court cited no real reason that Appellants would complicate this case other than the assumption that additional parties would add to discovery. There is no evidence in the record which shows that Appellants intend to conduct rigorous discovery or do anything in regards to discovery requests or responses that will cause any complications or delay, much less undue complications or delay. In fact, intervention by Appellants will likely assist Defendants and reduce

complications as Defendants apparently were unable to come up with the evidence provided by the Appellants in their motion for intervention.

Plaintiffs had claimed that if allowed to intervene, Appellants would complicate and delay this case through the introduction of unnecessary evidence. Appellants have shown above, citing the District Courts' own language, that the evidence which Applicants seek to introduce is vital and necessary for the Court to accurately decide this case. The mere fact that this case is proceeding to trial with a more than three month discovery plan indicates that there is evidence which is key to this case and that the intervention of Appellants will not complicate the proceeding but simply ensure that the evidence and arguments supporting Appellants' interests are presented. The necessity of Appellants' intervention can be shown in the fact that, as described above, Defendants have not submitted such necessary evidence when the opportunities arose in the past.

## IV. ALTERNATIVELY, THE APPELLANTS SHOULD BE GRANTED INTERVENTION UNDER RULE 24(b)(1)(B) BECAUSE THEY SHARE A COMMON QUESTION OF LAW OR FACT WITH THE DEFENDANTS.

FRCP 24(b)(1) provides that "[o]n timely motion, the court may permit anyone to intervene who... has a claim or defense that shares with the main action a common question of law or fact." "Unlike intervention as of right under Rule 24(a)(2), which, as noted, requires a movant to establish four separate elements, permissive intervention under Rule 24(b)(1)(B) gives the Court discretion to grant

intervention based upon 'timely application ... when an applicant's claim or defense and the main action have a question of law or fact in common.'" *First Penn-Pacific Life Ins. Co. v. William R. Evans, Chartered*, 200 F.R.D. 532, 537 (D. Md. 2001)

"[L]iberal intervention is desirable to dispose of as much of a controversy 'involving as many apparently concerned persons as is compatible with efficiency and due process.'" *Feller v. Brock*, 802 F.2d 722, 729 (4th Cir. 1986) (*quoting Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967)).

If this Court does not grant intervention as a right, Appellants request that the Court consider its arguments, as stated above, and permissively grant intervention. Among others, the Appellants share the following questions of law or facts with the Defendants in this matter:

1. The Medical Professionals and Pregnancy Medical Centers are the entities regulated by the Act.
2. The Appellants are the beneficiaries of the Act.
3. The Appellants have experienced, some first-hand, the great harm to abortion patients caused by failure to follow the informed consent procedures provide for in the Act.
4. The Appellants have a deep-set legal interests in seeing the Act fully implemented as quickly as possible, interests which the State to date has not indicated it completely shares.

## CONCLUSION

Appellants respectfully request that this Court reverse the Memorandum Opinion and Order of the District Court (J.A. 604-608) denying intervention of Appellants and allow Appellants' to intervene in this case as of right or permissively to protect their direct and substantial interests in the litigation which for the reasons set forth above are not adequately represented by Defendants.

## REQUEST FOR EXPEDITIOUS DISPOSITION AND NO ORAL ARGUMENT

As stated in their Docketing Statement, filed herein on January 25, 2012 (Document 19), Appellants do not believe oral argument is necessary and request an expedited disposition so that they may be permitted to intervene in this matter as soon as possible without disruption to the existing discovery and pretrial schedule.

Dated: March 6, 2012

Respectfully submitted,

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**UNITED STATES COURT OF APPEALS**
**FOR THE FOURTH CIRCUIT**

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Dated: March 6, 2012

## CERTIFICATE OF FILING AND SERVICE

I hereby certify that on March 6, 2012, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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