UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

AMY BRYANT, MD, Plaintiff, v. JOSHUA H. STEIN, in his official capacity as Attorney General for the State of North Carolina; JEFF NIEMAN, in his official capacity as District Attorney for North Carolina 18th Prosecutorial District; KODY H. KINSLEY, in his official capacity as the North Carolina Secretary of Health and Human Services; MICHAUX R. KILPATRICK, MD, PhD, in her official capacity as President of the North Carolina Medical Board; and CHRISTINE M. KHANDELWAL, DO; DEVDUTTA G. SANGVAI, MD, MBA; JOHN W. RUSHER, MD, JD; WILLIAM M. BRAWLEY; W. HOWARD HALL, MD; SHARONA Y. JOHNSON, PhD, FNP-BC; JOSHUA D. MALCOLM, JD; MIGUEL A. PINEIRO, PA-C, MHPE; MELINDA H. PRIVETTE, MD, JD; ANURADHA RAO-PATEL, MD; and ROBERT RICH, JR., MD, in their official capacities as Board Members of the North Carolina Medical Board, Defendants.	**Case No. 1:23-cv-77** **MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE AS DEFENDANTS**

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INTRODUCTION AND STATEMENT OF THE NATURE OF THE MATTER

Proposed Intervenors, 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 (the "Legislative Leaders") seek intervention on behalf of the General Assembly to defend the duly enacted laws of the State of North Carolina. The Legislative Leaders have an interest in upholding the validity of state statutes aimed at protecting unborn life, promoting maternal health and safety, and regulating the medical profession. North Carolina law designates the Legislative Leaders as agents of the State for the purpose of intervening to defend these statutes. Routine application of recent Supreme Court precedent should make this a fairly simple issue.

This action seeks to undermine the U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization* by usurping the authority of the people of North Carolina, acting through their elected representatives, to reasonably regulate abortion in their state. It does so by challenging several commonsense health-and-safety laws that have been on the

books for years, based on a new and incorrect argument that the FDA's decision to permit chemical abortion drugs to be marketed under certain conditions means that states cannot enact their own laws regulating the safety of chemical abortion for their citizens.

Specifically, Plaintiff seeks a declaration that the Supremacy Clause of the U.S. Constitution invalidates North Carolina laws aimed at promoting maternal health and safety by ensuring that any abortions be performed in person by a licensed physician in a certified hospital or clinic, after a woman has provided voluntary and informed consent following a period of reflection. *See* N.C. Gen. Stat. §§ 14-44, 14-45, 14-45.1, 90-21.82, 90-21.90; 10A N.C. Admin. Code Subchapter 14E. These valid laws warrant a full-throated defense.

North Carolina law expressly permits intervention by the President *Pro Tempore* of the Senate and the Speaker of the House of Representatives on behalf of the General Assembly as a matter of right in any action challenging a North Carolina statute. N.C. Gen. Stat. §§ 1-72.2, 120-32.6. The Supreme Court recently held that this law plainly authorizes intervention by these Legislative Leaders in a case like this.

The Supreme Court recognized the Legislative Leaders' significant protectable interest in protecting valid North Carolina laws and potential impairment if they are blocked from participating in a lawsuit about the validity North Carolina laws under Rule 24(a). *See Berger v. N.C. State Conf. of the NAACP*, 142 S. Ct. 2191 (2022) (granting intervention to the same proposed intervenors in this matter to defend the constitutionality of another North Carolina statute because proposed intervenors are the state's statutorily authorized agents). Thus, they are entitled to intervene as a matter of statutory right and as a matter of right under Federal Rule of civil Procedure 24(a).

This case proves the necessity and wisdom of North Carolina's choice about who can speak on the State's behalf in federal court. Attorney General Joshua Stein is a named defendant who publicly opposes North Carolina's laws regulating abortion. He informed the Legislative Leaders that he not defend the challenged laws in this case and will *affirmatively support* Plaintiff's challenge. That makes the Legislative Leaders' intervention even more important. Thus, the Court should grant their Motion to Intervene.

STATEMENT OF THE FACTS

1. The Challenged Laws

Plaintiff challenges the following North Carolina health-and-safety statutes and regulations:

> The **Physicians-only Provision**, N.C. GEN. STAT. § 14-45.1, which provides that only qualified physicians may perform abortions in a suitable facility.
>
> The **Facility Safety Requirements**, 10A N.C. Admin. Code Subchapter 14E, which provide that abortion facilities must have facility attributes and design features that ensure patient safety, just like many other health centers do.
>
> The **Informed-consent Provision**, N.C. GEN. STAT. § 90-21.82, which gives women minimal deliberation time before making a life-altering decision by requiring that a physician wait 72 hours after providing informed-consent information before performing an abortion. A woman must be informed of: the name of the physician who will perform the procedure to ensure safety and medical attention for any complications; the requirement that the physician must be physically present when the "first drug or chemical" of a chemical abortion is "administered to the patient"; the medical risks of abortion procedures; the probable gestational age of the unborn baby; the opportunity to display the real-time view of the unborn baby and heart-tone monitoring; and whether the physician has no malpractice insurance and hospital admitting privileges. Informed consent also ensures women receive information on social welfare programs, medical assistance benefits, and child support as they

consider their options for terminating or continuing their pregnancies.

The **Assurance of Informed-consent**, N.C. GEN. STAT. § 90-21.90, which requires that informed-consent information be provided to a woman individually, typically in person, in a language she understands to ensure she has adequate opportunity to ask questions and does not fall victim to coerced abortion.

The **Enforcement Provisions**, N.C. GEN. STAT. §§ 14-44, 14-45, which impose liability on a person who administers or prescribes to a pregnant woman any medicine, drug or other substance with intent to destroy an unborn child or procure a miscarriage in violation of the other regulations governing abortion.

North Carolina's abortion regulations apply —and have always applied— with equal force to both surgical and chemical abortion procedures. For more than a century,[1] North Carolina law has included protections for the unborn and regulated chemical abortion methods. Pre-*Roe*[2], North Carolina set forth limited circumstances in which a licensed physician could

[1] *See* AN ACT TO PUNISH THE CRIME OF PRODUCING ABORTION, N.C. Pub. L. ch. 351 (1881) (enacting N.C. GEN. STAT. §§ 14-44, 14-45).

[2] *See* AN ACT TO AMEND ARTICLE II, CHAPTER 14 OF THE GENERAL STATUTES RELATING TO ABORTION AND KINDRED OFFENSES, N.C. Sess. L. ch. 367 (1967) (enacting N.C. GEN. STAT. § 14-45.1); AN ACT TO MAKE CHANGES IN THE ABORTION LAW IN ORDER TO COMPLY WITH RECENT UNITED STATES SUPREME COURT DECISIONS, N.C. Sess. L. ch. 711 (1973) (amending N.C. GEN. STAT. § 14-45.1).

perform abortions in a suitable facility. Even then, under the *Roe* regime, North Carolina successfully passed laws to protect women[3] by implementing commonsense regulations requiring that physicians perform abortions in person. This includes requiring that a physician be physically present when administering chemical abortion drugs to provide medical care for any complications that may arise.

2. Plaintiff's Lawsuit

On January 25, 2023, Plaintiff filed a Complaint seeking a declaration, under the Supremacy Clause of the U.S. Constitution, that five North Carolina statutes and an entire chapter of the Division of Health and Human Services' facility safety codes are preempted by federal law. Plaintiff contends the Food and Drug Administration's (FDA) approval in 2000 for marketing chemical abortion drugs invalidates North Carolina's longstanding abortion regulations and forecloses the state's authority to enact laws regulating health and safety when it comes to abortion-by-drug.

[3] *See* WOMAN'S RIGHT TO KNOW ACT, N.C. Sess. L. 2011-405 (enacting N.C. GEN. STAT. §§ 90-21.82, 90-21.90).

Plaintiff's Complaint misapplies the FDA's regulatory authority, which involves the approval for marketing of a drug in the U.S. by processing new drug applications. In this way, the FDA merely sets a floor for what drugs may go on the market. The FDA does not issue federal law mandating particular access to drugs. Nor does the FDA regulate the medical profession in the United States, much less any individual state. Federal courts consistently recognize that states have great deference in regulating how doctors provide medical care to citizens in each state.

STATEMENT OF THE QUESTION PRESENTED

Should the Court grant the Legislative Leaders' Motion to Intervene under Rule 24 either as of right or as permissive?

ARGUMENT

The Court should grant Legislative Leaders' Motion to Intervene and allow them to intervene as defendants in this matter to defend North Carolina's statutory scheme because they are entitled to do so as of right under Rule 24(a) or, in the alternative, because the Court finds that they

satisfied the requirements of permissive intervention under Rule 24(b).

I. The Legislative Leaders are entitled to intervene as of right.

Federal Rule of Civil Procedure 24(a) requires a court to permit anyone to intervene who, (1) "[o]n timely motion," (2) "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," (3) "unless existing parties adequately represent that interest." *Berger*, 142 S. Ct. at 2200–01 (quoting Fed. R. Civ. P. 24(a)); *Teague v. Bakker*, 931 F.2d 259, 260-61 (4th Cir. 1991). "Liberal intervention is desirable" to ensure that cases include "as many apparently concerned persons as is compatible with efficiency and due process." *Feller v. Brock*, 802 F.2d 722, 729 (4th Cir. 1986)(citations omitted).

A. Timely Motion.

Courts look to three factors to determine whether a motion to intervene is timely: (1) "how far the underlying suit has progressed"; (2) any "prejudice" that granting the

motion would cause to the other parties; and (3) any justification for any delay in filing the motion by a proposed intervenor. *Alt v. U.S. E.P.A.*, 758 F.3d 588, 591 (4th Cir. 2014). Plaintiff filed the Complaint January 25, 2023, less than four weeks ago. No named defendants have responded with an answer or substantive motion. *See Carcano v. McCrory*, 315 F.R.D. 176, 178 (M.D.N.C. 2016).

Most importantly, the Legislative Leaders learned about a week ago, on February 13, 2023, that the Attorney General would not defend the challenged laws.[4] *See Fisher-Borne v. Smith*, 14 F. Supp. 3d 699, 702 (M.D.N.C. 2014)(this Court allowed the Legislative Leaders to intervene as timely even though case had been pending over two years in large part due to a very recent change in posture of that case based on the Supreme Court's actions.) The Legislative Leaders have expeditiously sought intervention, and no prejudice will result from allowing their intervention during the pleading stage of litigation, especially because no defendant has filed any answer or substantive motions yet.

[4] Feb. 13, 2023, Letter from North Carolina Department of Justice Attorney General's Office to the Legislative Leaders' General Counsels, attached as Exhibit 1.

B. Significant Protectable Interests.

The Legislative Leaders have a significant protectable interest in the enforcement of duly enacted state statutes, enacted according to the express command of the People of North Carolina. *Berger*, 142 S. Ct. at 2201-06 (citations omitted) ("States possess 'a legitimate interest in the continued enforce[ment] of [their] own statutes' . . . . [F]ederal courts should rarely question that a State's interests will be practically impaired or impeded if its duly authorized representatives are excluded from participating in federal litigation challenging state law"... "[t]hrough the General Assembly, the people of North Carolina have authorized the leaders of their legislature to defend duly enacted state statutes against constitutional challenge.").

The Legislative Leaders have an interest in defending North Carolina's laws promoting safe distribution and administration of inherently dangerous chemical-abortion drugs. In fact, the State of North Carolina has expressly authorized intervention in such cases:

> 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 . . . .

N.C. Gen. Stat. § 1-72.2.

The U.S. Supreme Court recently applied this statutory provision to permit intervention by the same Legislative Leaders to defend the constitutionality of another North Carolina statute. *Berger*, 142 S. Ct. at 2200-01. State law affirmatively authorized the Legislative Leaders as the state's agents to protect legal challenges against the state's laws. This gives them a significant protectable interest that may be impaired whenever a state statute is challenged. *See Id.*

In *Berger*, the Supreme Court recognized that "the State has made plain that it considers the leaders of the General Assembly 'necessary parties' to suits like this one [challenging a state statute]." *Id.* at 2203 (citing § 120-32.6(b)). The Court held "where a State chooses to divide its sovereign authority among different officials and authorize their participation in a suit challenging state law, a full consideration of the State's practical interests may require the involvement of different voices with different

perspectives." *Id.* at 2203. That applies here, too. Thus, *Berger* definitively resolves the question of the Legislative Leaders' significantly protectable interest and its potential impairment, in favor of intervention.

In addition to the statutory right establishing the Legislative Leaders' significant protectable interests and their potential impairment, the state has legitimate and specific interests in promoting maternal health, regulating the medical profession, and protecting unborn life. The U.S. Supreme Court recognized as much in *Dobbs*: "A law regulating abortion, like other health and welfare laws, is entitled to a strong presumption of validity. It must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2284 (2022). The Court further explained that

> these legitimate interests include respect for and preservation of prenatal life at all stages of development, the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex, or disability.

Id.

Advancing these interests, North Carolina's laws require basic safety measures for any abortion procedure —whether surgical or chemical. North Carolina's requirements that chemical abortions be administered in person by a qualified physician in a certified abortion facility after informed consent of the mother are commonsense safety measures the people, through the General Assembly, have enacted. The Legislative Leaders' legitimate interest in and authority to enact health-and-welfare laws —an area where state legislatures should receive great deference— is at stake here. *Dobbs*, 142 S. Ct. at 2284 (citations omitted) ("under the Constitution, courts cannot 'substitute their social and economic beliefs for the judgment of legislative bodies.' That respect for a legislature's judgment applies even when the laws at issue concern matters of great social significance and moral substance . . . . [a] law regulating abortion, like other health and welfare laws, is entitled to a 'strong presumption of validity.' It must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests."); *Manning v. Hunt*, 119 F.3d 254, 266 (4th Cir. 1997) ("In the case of

abortion statutes, the Supreme Court has made it quite clear that the state also has important interests at stake . . . . *Roe* itself recognized the state interests in preserving and protecting the life of the mother and in protecting potential human life.").

C. Interests Not Adequately Represented.

A presumption of adequate representation "is inappropriate when a duly authorized state agent seeks to intervene to defend a state law." *Berger*, 142 S. Ct. at 2204. The Legislative Leaders satisfy the inadequate-representation requirement on a mere showing that representation of its interests "'may be' inadequate" and the burden of showing that is minimal. *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972); accord *In re Sierra Club*, 945 F.2d 776, 779–80 (4th Cir. 1991). The Legislative Leaders satisfied that minimal burden here.

Dispositive is the fact that the lead defendant, Attorney General Stein, sent a letter to the Legislative Leaders' respective general counsels on February 13, 2023, stating he will not defend the lawsuit and he believes that "Plaintiff's preemption arguments are legally correct." *See* Exh. 1. In

express terms, Attorney General Stein will not represent the Legislative Leaders' interests at all. *See also Bryant v. Woodall*, No. 1:16CV1368, 2022 WL 3465380, at *2 (M.D.N.C. Aug. 17, 2022) (in a case brought by abortion provider plaintiffs, including the same Plaintiff in this case, Attorney General Stein, as counsel for several executive agency officials, including Sec. Kinsley who is also a named defendant in this case, joined those plaintiffs in seeking to retain the abolished *Roe/Casey* standards after the Supreme Court overturned those cases.). Recognizing the Legislative Leaders' statutory role in defending every state law, Attorney General Stein noted that he will cooperate should the Legislative Leaders seek to intervene in this case.

The other named defendants are executive agency officials who have not yet filed an answer or substantive pleading. If they openly oppose these laws like Attorney General Stein, then they cannot represent the Legislative Leaders adequately.

If the other named defendants take a neutral position on defending these laws, that would also fail to adequately represent the Legislative Leaders' position. *Berger* provides

a good example of how this could occur. In that litigation against members of the North Carolina Board of Elections, those similarly situated executive agency officials took the position that they basically did not care what the outcome of the lawsuit was, so long as they received guidance from the court on how to apply the law. *Berger*, 142 S. Ct. at 2199 (noting that "the Board [of elections members] did not oppose the motion on timeliness grounds . . . Nor did the Board produce competing expert reports. Instead, it supplied a single affidavit from its executive director and stressed again the need for clarity about which law to apply . . . ..") If the executive branch official defendants in this case adopt the "we do not care what the law is just tell us what it is" position like the Board of Elections officials in *Berger*, they would not adequately represent the interests that the Legislative Leaders seek to represent in this case.

Even if these executive branch officials in this case purport to defend the valid laws Plaintiff questions in the Complaint, they are not the Legislative Leaders. That fact alone renders them not adequate for this analysis. Indeed, state law specifically contemplates the distinction between

the representatives of executive branch and legislative branch:

> It is the public policy of the State of North Carolina that in any action in any federal court in which the validity or constitutionality of an act of the General Assembly or a provision of the North Carolina Constitution 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; the Governor constitutes the executive branch of the State of North Carolina

N.C. Gen. Stat. § 1-72.2(a). This is further laid out in the next section of that statute: "The Speaker . . . and the President Pro Tempore of the Senate, as agents of the State, 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." *Id.*

Thus, the Legislative Leaders should be allowed to represent their specific perspective as participants in this lawsuit that could change enacted state laws, without regard to what perspective any executive agency officials may have or strategy they pursue. Especially because those executive agency officials likely have a very different set of

motivations in the outcome and defense, or not, of these existing laws.

In short, Attorney General Stein refuses to defend the challenged laws and has joined Plaintiff, the other executive branch officials named as defendants cannot substitute for the Legislative Leaders' perspective as agents of the state, and the Legislative Leaders will offer a vigorous defense of North Carolina's laws providing basic protections for women undergoing the serious and life-altering procedure of abortion. The Court should grant the Motion to Intervene and allow the Legislative Leaders to defend North Carolina's duly enacted laws.

II. In the alternative, the Legislative Leaders should be granted permissive intervention.

While the Legislative Leaders are entitled to intervention as of right, in the alternative, the Court should grant them permissive intervention. Under Rule 24(b), the Court "may permit anyone to intervene who" files a timely motion and who "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(2)(B).

An applicant for permissive intervention need not show a significant protectable interest or inadequacy of representation. Rather, the applicant need only show that (1) the intervention request is timely filed, (2) the applicant "has a claim or defense that shares with the main action a common question of law or fact," and (3) the intervention will not "unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(1)(B).

The Legislative Leaders satisfy each of those here. First, for the same reasons detailed above, the Legislative Leaders' motion is timely. Second, the Legislative Leaders will present a defense "that shares with the main action a common question of law or fact" —namely, whether the challenged laws are a constitutionally permissible means of advancing the state's interests in health, safety, and welfare by regulating chemical abortions in North Carolina. Third, no undue delay or prejudice will result from allowing the Legislative Leaders to intervene at this early stage in litigation. In fact, Attorney General Stein stated he does not oppose intervention and no other named defendants have

filed an answer or other substantive pleading. Thus, permissive intervention is proper here, in the alternative.

CONCLUSION

For these reasons, the Legislative Leaders respectfully ask this Court to grant their Motion to Intervene.

RESPECTFULLY SUBMITTED THIS 21st day of February, 2023.

/s/W. Ellis Boyle
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*This email address must be used in order to effectuate service under the Federal Rules of Civil Procedures

**Email address to be used for all communications other than service.

*** Special Appearance Forthcoming

CERTIFICATE OF SERVICE

I hereby certify that on this the 21st day of February, 2023, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to all counsel of record.

/s/ W. Ellis Boyle
W. Ellis Boyle
Attorney for Proposed Intervenors

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing document complies with L.R. 7.3(d) and contains [# not to exceed 6,250] words. I also certify that this document uses 13-point Courier New Font and has a top margin of 1.25" on each page in compliance with L.R. 7.1(a).

/s/ W. Ellis Boyle
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February 13, 2023

Joshua A. Yost
General Counsel
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Sam M. Hayes
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Messrs. Yost and Hayes:

The case of *Bryant v. Stein,* No. 1:23-CV-77 (M.D.N.C.) raises a preemption challenge to N.C. Gen. Stat. §§ 14-44, 14-45, 14-45.1, 90-21.82, 90-21.90, and 10A N.C. Admin. Code Subchapter 14E. Plaintiff Amy Bryant—a North Carolina board-certified and licensed physician—alleges that these North Carolina statutes and regulations together restrict the use of the FDA-approved medication mifepristone in ways that differ significantly from applicable provisions of federal law.

As I explained on our call earlier today, after review and analysis, we have concluded that Plaintiff's preemption arguments are legally correct. Consistent with its statutory authority, the FDA has determined that restrictions like the ones imposed under North Carolina state law would unduly burden patients' access to a safe and effective drug. The Supremacy Clause of the U.S. Constitution does not permit States to pass laws that undermine that determination.

The Department's filings in the *Bryant* case on behalf of Attorney General Stein will reflect this legal analysis on the merits.

Should the President Pro Tempore of the Senate and the Speaker of the House of Representatives decide that they wish to intervene in the case, the Department will cooperate.

Please feel free to give me a call if you have questions.

POST OFFICE BOX 629, RALEIGH, NC 27602-0629

Sincerely,

/s/ Sarah G. Boyce
Sarah G. Boyce