

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT, DIVISION 1
CIVIL ACTION NO. 21-CI-00461
HON. PHILLIP J. SHEPHERD

COUNCIL FOR BETTER EDUCATION, INC., et al.

PLAINTIFFS

v.

HOLLY M. JOHNSON, in her official capacity as
Secretary of the Kentucky Finance and Administration
Cabinet, et al.

DEFENDANTS

NOTICE

Please take notice that the following motion will come on for hearing before the Franklin Circuit Court, Division 1, on Wednesday, June 16, 2021 at the hour of 9:00 a.m., or as soon thereafter as counsel may be heard.

MOTION TO INTERVENE AS DEFENDANTS

Come now Akia McNeary and Nancy Deaton, by and through counsel, and move this Court for leave to intervene as Intervenor-Defendants in the above-styled action as a matter of right pursuant to Civil Rule 24.01 or, alternatively, by permission pursuant to Civil Rule 24.02. They seek leave to intervene in order to defend the Education Opportunity Account Program and assert the defenses set forth in their proposed answer, a copy of which, pursuant to Civil Rule 24.03, is submitted with this motion. Their counsel provides the following Memorandum in Support of their Motion to Intervene.

MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE

Ms. McNeary is the mother of three school-age children eligible to participate in the Education Opportunity Account (hereinafter “EOA”) Program.

Similarly, Ms. Deaton is the great-grandmother—and legal guardian—of a school-age child eligible to participate in the EOA Program. The EOA Program authorizes a tax credit for private donations to nonprofit account-granting organizations (hereinafter “AGOs”), which, in turn, provide funds to private accounts for low- and middle-income families to use for certain qualifying expenses incurred for the education of their children. *See generally* H.B. 563, 2021 Reg. Sess. §§ 5-19 (Ky. 2021). The General Assembly created the EOA Program “to give more flexibility and choices in education to Kentucky residents and to address disparities in educational options available to students.” *Id.* § 5. As the parent or legal guardian of children eligible for the EOA Program, Ms. McNeary and Ms. Deaton are among the intended beneficiaries of the Program and therefore, in essence, real parties in interest.

Ms. McNeary and Ms. Deaton accordingly seek party status, as intervenor-defendants, to defend the constitutionality of the Program from which they and their children stand to benefit. They are entitled to intervene as of right under Civil Rule 24.01.¹ Indeed, the law creating the EOA Program specifically provides that if the Program is “challenged in state court as violating either the state or federal constitutions, parents of students who would meet the criteria for being eligible students” under the Program “shall be permitted to intervene as of right in such lawsuit for the purposes of defending the EOA program’s constitutionality.” *Id.* § 18. Alternatively, they should be permitted to intervene

¹ Unless otherwise noted, all references to Civil Rules herein are to the Kentucky Rules of Civil Procedure.

under Civil Rule 24.02. Parents and legal guardians of children participating in educational choice programs are routinely granted intervention to defend the programs when they are challenged in court. *See infra* pp. 18-19. This case is no different, and intervention is therefore warranted.

This motion is based upon the facts and law set forth herein; Ms. McNeary and Ms. Deaton’s affidavits, filed as Exhibits A and B to this motion and incorporated herein; and all of the pleadings and other documents of record in this action. The motion is accompanied by Ms. McNeary and Ms. Deaton’s proposed answer to Plaintiffs’ complaint, filed as Exhibit C to this motion, which they proffer for filing should this motion be granted. They also request oral argument on this motion pursuant to Franklin County Rule 4.03.

STATEMENT OF FACTS

A. The Educational Opportunity Account Program And The Lawsuit Challenging It

The EOA Program creates additional opportunity and flexibility in education for Kentucky students and helps address disparities in educational options available to children in the state. As the legislation authorizing the Program explains, the Program’s purpose “is to give more flexibility and choices in education to Kentucky residents.” H.B. 563, 2021 Reg. Sess. § 5 (Ky. 2021).

The Program’s beneficiaries are low- and middle-income families. The Program is generally limited to “member[s] of a household with an annual household income . . . of not more than one hundred seventy-five percent (175%) of the amount of household income necessary to establish eligibility for reduced-

price meals based on size of household as determined annually by the United States Department of Agriculture.” *Id.* § 6.²

This Program authorizes education savings accounts—called Education Opportunity Accounts—that qualifying families can use toward various educational expenses. These expenses include public-school tuition and fees, as well as money spent on online-learning programs, tutoring services, extracurricular programs, instructional materials, educational software, other education-related technology, school uniforms, preparation for standardized tests, summer and after-school programs, vocational education, educational therapy, dual-credit credits at colleges, and transportation to and from schools. *Id.* § 7. In counties with 90,000 or more residents, families may also use Education Opportunity Account funds “for tuition and fees to attend nonpublic schools.” *Id.*

The Commonwealth of Kentucky does not administer Education Opportunity Accounts or fund them through appropriations. Private, nonprofit account-granting organizations (AGOs) administer the accounts and allocate funds to parents of EOA students. *Id.* § 6. And Education Opportunity Accounts are funded by private donations from individuals and businesses who voluntarily donate to AGOs and may claim a tax credit for their donation. *Id.* § 16.

² The only other students eligible for an EOA are those who “previously received an EOA” and remain under certain income levels and those who are in the “household of an eligible student that currently has an EOA” under the EOA Program. H.B. 563, 2021 Reg. Sess. §§ 6, 8.

On or around June 7, 2021, Plaintiffs Council for Better Education, Frankfort Independent School Board, Warren County School Board, Michelle Grimes Jones, Katherine Walker-Payne, and Chris Rasheed filed this lawsuit challenging the EOA Program on state constitutional grounds. Specifically, Plaintiffs argue that the EOA Program violates Sections 2, 3, 29, 171, 183, 184, and 186 of the Kentucky Constitution.

B. Ms. McNeary And Her Children

Akia McNeary lives in Florence, KY with her husband and three school-age children—P.I.Y., age 14; N.Y., age 11; and M.S., age 5.³ Ex. A (McNeary Aff.) ¶ 2. Though P.I.Y. attends public school, N.Y. currently attends a private school—Zion Christian Academy (Zion)—and M.S. will begin kindergarten in the 2021-22 school year. *Id.* ¶¶ 3-4, 9.

N.Y. has thrived at Zion but did not thrive in the public school he previously attended. *Id.* ¶ 4. After Ms. McNeary sent him to Zion for preschool, financial difficulties forced her to transfer him to their local public school for kindergarten. *Id.* ¶ 5. Because of the foundation laid at Zion, N.Y. was at first ahead of his peers in public school. *Id.* But over the next two years, his education declined—he could not read at grade level and had behavioral issues. *Id.* Having seen her oldest son’s education decline similarly after transferring from private school to public school—also for financial reasons—Ms. McNeary did not want N.Y. to suffer the same fate. *Id.* ¶ 6. So she transferred N.Y. back to Zion for the

³ Ms. McNeary also has a 20-year son—R.W.—who previously attended both public and private schools and lives with the family. Ex. A ¶¶ 2, 6.

second grade. *Id.* ¶ 7. Though he was behind his classmates in reading, spelling, and writing at first, he thrived during the 2020-21 school year as a Zion fifth grader. *Id.* Because of the school’s academic strength and religious grounding, she believes it is the best option for N.Y. *Id.* ¶ 8.

Ms. McNeary also believes it would be the best option for her daughter M.S., whom Ms. McNeary would like to send to Zion for kindergarten this fall. *Id.* ¶ 9. Indeed, Ms. McNeary believes that Zion offers a much better education than M.S.’s assigned local public elementary school would provide. *Id.*

Unfortunately, however, Ms. McNeary’s family may not be able to send M.S. to Zion. Annual tuition at the school is approximately \$4,500 per student. *Id.* ¶ 10. Even with a scholarship from Zion, Ms. McNeary and her husband have had to pay \$2,200 per year in tuition for N.Y. to attend the school, which has been a significant struggle for the family. *Id.* And because Zion cannot offer a scholarship for M.S., they would have to pay the full \$4,500 tuition to send her to kindergarten there, which they cannot afford. *Id.* ¶ 11.

Accordingly, Ms. McNeary intends to apply for Education Opportunity Accounts to help defray tuition expenses for N.Y. and M.S. to attend Zion.⁴ *Id.* ¶ 12. Without the accounts, she may be unable to afford to keep N.Y. at Zion or to send M.S. there, even though she knows the school is the best option for both of them. *Id.* ¶ 15.

⁴ Ms. McNeary would also like to use EOA dollars toward P.I.Y.’s expected educational expenses, including fees paid for dual-credit courses offered by colleges. *Id.* ¶ 13.

Under the EOA Program’s guidelines, Ms. McNeary’s children are eligible for Education Opportunity Accounts that she can use toward private-school tuition and other education-related expenses. Their household income is well within the EOA Program’s income cap, which is 175% of the U.S. Department of Agriculture’s maximum for reduced-price school lunches. *Id.* ¶ 14. (Indeed, her children currently receive reduced-price lunch. *Id.*) And Ms. McNeary’s family resides in Boone County, which has more than 90,000 residents. *See id.* ¶ 1. In this county, families like hers may use Education Opportunity Account funds for tuition at private schools.

C. Ms. Deaton And Her Great-Grandson

Ms. Deaton lives in Newport, KY with her 13-year-old great-grandson—D.N. Ex. B (Deaton Aff.) ¶¶ 1-2. Ms. Deaton is D.N.’s legal guardian. *Id.* ¶ 2.

As an infant, D.N. suffered a traumatic brain injury. *Id.* ¶ 3. After falling down a stairwell, he fractured his skull in multiple places. *Id.* As a result, he needed multiple surgeries and hospitalizations, and he was forced to wear a helmet daily. *Id.*

Atop these physical challenges, D.N. has also had emotional challenges. His mother has struggled with substance abuse and has been incarcerated. *Id.* ¶ 4. Meanwhile, his father has been absent. *Id.* Given these issues, and D.N.’s needs, Ms. Deaton sought (and won) custody of D.N. shortly after his brain injury. *Id.* ¶ 5.

Ms. Deaton enrolled D.N. at Holy Trinity Elementary School, which is a small Catholic school. *Id.* ¶ 6. Ms. Deaton is very satisfied with the education he

has received there. *Id.* ¶¶ 6-7. In contrast, she worries that D.N. would have fared worse in public school, where she fears he would have been bullied. *Id.* ¶ 8. In Ms. Deaton’s view, Holy Trinity is a better option for D.N. than public school, and—in the years ahead—a private high school would be a better option for him than public school too. *Id.* ¶¶ 8-9.

Unfortunately, however, Ms. Deaton may not be able to continue sending D.N. to private school. Even at Holy Trinity—where tuition costs Ms. Deaton \$55 per month—financing D.N.’s education is a struggle for Ms. Deaton. *Id.* ¶ 10. And high school is expected to be even more expensive. *Id.*

Accordingly, Ms. Deaton intends to apply for an Education Opportunity Account to help defray tuition expenses for D.N. to attend private school. *Id.* ¶ 11. Without the account, she may be unable to afford to keep D.N. in private school, even though she knows that private school is the best option for him. *Id.* ¶ 13.

Under the EOA Program’s guidelines, D.N. is eligible for an Education Opportunity Account. Ms. Deaton’s household income is well within the EOA Program’s income cap. *Id.* ¶ 12. And she and D.N. reside in Campbell County, which has more than 90,000 residents. *See id.* ¶ 1. In this county, families like theirs may use Education Opportunity Account funds for tuition at private schools.

ARGUMENT

Applying the intervention rules liberally, as required under Kentucky law, *Yocom v. Hi-Flame Coals, Inc.*, 568 S.W.2d 757, 759 (Ky. App. 1978), this Court

should allow Ms. McNeary and Ms. Deaton to intervene in this case as a matter of right or, alternatively, under the rules governing permissive intervention. They are raising children eligible for the EOA Program and are thus intended beneficiaries of it. Parents and guardians, as intended beneficiaries of educational choice programs, are routinely granted leave to intervene when their constitutionality is challenged. *See infra* pp. 18-19. Intervention is likewise warranted here.

A. Ms. McNeary and Ms. Deaton Are Entitled To Intervene As Of Right In This Action.

Ms. McNeary and Ms. Deaton are entitled to intervene as a matter of right. Civil Rule 24.1 provides that “[u]pon timely application,”⁵ an applicant “shall be permitted” to intervene:

- (a) when a statute confers an unconditional right to intervene, *or*
- (b) when the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the applicant’s ability to protect that interest, unless that interest is adequately represented by existing parties.

⁵ There can be no question that this motion is timely, as it comes only two days after Plaintiffs filed their complaint, and the lawsuit has not progressed in any meaningful sense since; indeed, Ms. McNeary and Ms. Deaton’s motion comes well within the time for Defendants’ answer or other responsive pleading, which has not yet been filed. *See* Ky. R. Civ. P. 12.01. Thus, no prejudice to the original parties will result by virtue of allowing them to intervene at this point; rather, the case will continue to proceed on precisely the same schedule on which it has proceeded thus far. As intended beneficiaries of the EOA Program, Ms. McNeary and Ms. Deaton have every desire for a prompt resolution of this action.

Ky. R. Civ. P. 24.01(1) (emphasis added). Intervention is “mandatory” when *either* of these conditions is met, *Bailey v. Bertram*, 471 S.W.3d 687, 690 n.1 (Ky. 2015), and here Ms. McNeary and Ms. Deaton meet both.

1. Ms. McNeary and Ms. Deaton Have An Unconditional Statutory Right to Intervene.

First, “a statute confers an unconditional right to intervene” on Ms. McNeary and Ms. Deaton. Ky. R. Civ. P. 24.01(1)(a). Section 18 of H.B. 563, which created the EOA Program, provides that “[i]f any part of” the Program “is challenged in state court as violating either the state or federal constitutions, *parents of students who would meet the criteria for being eligible students as defined by Section 6 of this Act shall be permitted to intervene as of right* in such lawsuit for the purposes of defending the EOA program’s constitutionality.” H.B. 563, 2021 Reg. Sess. § 18 (Ky. 2021) (emphasis added). That statute defines a “[p]arent” as “a biological or adoptive parent, *legal guardian*, custodian, or other person with legal authority to act on behalf of an EOA student.” *Id.* § 6(11) (emphasis added).

Here, Plaintiffs’ lawsuit challenges the state constitutionality of the EOA Program. *See* Compl. ¶¶ 75-98. Ms. McNeary and Ms. Deaton, meanwhile, are parents of students who would meet the eligibility criteria for the program: Ms. McNeary is the mother of P.I.Y., N.Y., and M.S., and Ms. Deaton is D.N.’s “legal guardian,” qualifying her as a “parent” for purposes of the EOA Program. H.B. 563, 2021 Reg. Sess. § 6(11) (Ky. 2021). And P.I.Y., N.Y., M.S., and D.N. are “member[s] of . . . household[s] with an annual household income . . . of not more than one hundred seventy-five percent (175%) of the amount of household

income necessary to establish eligibility for reduced-price meals based on size of household as determined annually by the United States Department of Agriculture.” H.B. 563, 2021 Reg. Sess. § 6 (Ky. 2021).⁶ Accordingly, Ms. McNeary and Ms. Deaton are entitled to intervene as of right in this action.

2. Ms. McNeary and Ms. Deaton Have An Interest In This Litigation That May Be Impaired, And Their Interest Is Not Adequately Represented By Existing Parties.

Even if Ms. McNeary and Ms. Deaton did not have an unconditional statutory right of intervention—which they do—they would still be entitled to intervene as a matter of right in this action. They have (1) “an interest relating to . . . the subject of the action,” (2) “the disposition of the action may . . . impair or impede [their] ability to protect that interest,” and (3) their “interest is [not] adequately represented by existing parties.” *See* Ky. R. Civ. P. 24.01(1)(b).

First, Ms. McNeary and Ms. Deaton have the requisite interest to intervene. As the legal custodians of children who are eligible to participate in the EOA Program, they are intended beneficiaries of the Program and thus have a direct interest in its continued existence. Courts have repeatedly held that the

⁶ One hundred seventy-five percent of the maximum household income to establish eligibility for reduced-price meals for a family the size of Ms. McNeary’s—*i.e.*, six household members—is \$115,190.25 in the 2021-22 school year, *see* 86 Fed. Reg. 12,594, 12,596 (Mar. 4, 2021), and her family’s household income is well below that amount. McNeary Aff. ¶ 14. For a family the size of Ms. Deaton’s—two household members—one hundred seventy-five percent of the maximum household income to establish eligibility for reduced-price meals is \$56,397.25 in the 2021-22 school year, *see* 86 Fed. Reg. 12,594, 12,596 (Mar. 4, 2021). Ms. Deaton’s family qualifies for the Supplemental Nutrition Assistance Program (SNAP), so her family’s household income is well below that amount. Deaton Aff. ¶ 12; *see also* Benefits.gov, “Kentucky Food Benefits/EBT,” *available at* <https://www.benefits.gov/benefit/1213> (providing that \$22,646 is the income maximum for a two-person household to qualify for SNAP).

beneficiaries of a government program or law have the requisite interest to intervene as a matter of right when that program or law is challenged. *E.g.*, *California ex rel. Lockyer v. United States*, 450 F.3d 436, 441 (9th Cir. 2006) (allowing health care providers to intervene to defend conscience protection law because “[t]hey [we]re the intended beneficiaries of th[e] law”); *County of Fresno v. Andrus*, 622 F.2d 436, 438 (9th Cir. 1980) (allowing small farmers to intervene to defend rulemaking under reclamation acts because small farmers were “precisely those Congress intended to protect with the reclamation acts”); *Associated Gen. Contractors of Am. v. Cal. Dep’t of Transp.*, No. 09-01622, 2009 WL 5206722, at *2 (E.D. Cal. Dec. 23, 2009) (“Intervenors have a protectable interest in the lawsuit, as they represent the intended beneficiaries of the government program at issue.”); *United States v. Dixwell Hous. Dev. Corp.*, 71 F.R.D. 558, 560 (D. Conn. 1976) (allowing housing project tenants to intervene to defend portions of National Housing Act because “their interest as beneficiaries of two aspects of the . . . Act” was “sufficient to support intervention”).⁷

Moreover, Ms. McNeary and Ms. Deaton’s interest in the Program is inextricably intertwined with their fundamental liberty interest in “direct[ing] the upbringing and education of” their children. *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534-35 (1925); *see also Meyer v. Nebraska*, 262 U.S. 390, 401 (1923)

⁷ “It is well established that Kentucky courts rely upon Federal caselaw when interpreting a Kentucky rule of procedure that is similar to its federal counterpart.” *Hensley v. Haynes Trucking, LLC*, 549 S.W.3d 430, 436, n.4 (Ky. 2018) (citation omitted). And Kentucky’s procedural rule for intervention as of right is virtually identical to its federal counterpart. *Compare* Civil Rule 24.01, *with* Fed. R. Civ. P. 24(a).

(recognizing the right of parents “to control the education of their own”). The very purpose of the EOA Program, after all, is to empower parents and guardians to exercise this liberty interest. *See* H.B. 563, 2021 Reg. Sess. § 5 (Ky. 2021) (explaining the Program’s purpose “is to give more flexibility and choices in education to Kentucky residents”).

Second, it is clear that Plaintiffs’ lawsuit may impair or impede Ms. McNeary and Ms. Deaton’s ability to protect their interest. “[A] lost opportunity to seek a government benefit”—including, specifically, participation in an educational choice program—is an “injury in fact” that satisfies even the stringent Article III standing requirements of the U.S. Constitution. *Carson ex rel. O.C. v. Makin*, 979 F.3d 21, 31 (1st Cir. 2020). Should the EOA Program be held unconstitutional, Ms. McNeary, Ms. Deaton, and their children, “the beneficiaries under the [Program,] would have no chance in future proceedings to have its constitutionality upheld.” *Saunders v. Superior Court*, 510 P.2d 740, 741-42 (Ariz. 1973). “This practical disadvantage to the protection of their interest . . . warrants their intervention as of right.” *Id.* at 742; *see also* 6 James Wm. Moore et al., *Moore’s Federal Practice* § 24.03 (3d ed. Supp.2007) (“An applicant’s interest is plainly impaired if disposition of the action in which intervention is sought will prevent any future attempts by the applicant to pursue its interest.”).

Third, Ms. McNeary and Ms. Deaton’s interest is not adequately represented by existing parties. *See Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972) (holding that the burden on this element in the analogous federal rule “should be treated as minimal”). That is because the state

Defendants have a different interest in this litigation than they do. The state, after all, has a duty to represent the broad interests of the general public and, to that end, must integrate its defense of the EOA Program with the state's approach to education. Ms. McNeary and Ms. Deaton, on the other hand, have a narrower, more parochial interest: They have determined that public education *does not work* for all of their children and, to that end, they have a particular, private interest in preserving the availability of the Education Opportunity Accounts that those children are eligible to receive. They likewise possess a unique liberty interest in "direct[ing] the upbringing and education of children under their control." *Pierce*, 268 U.S. at 534-35.

Courts nationwide recognize that an existing party cannot adequately represent another party when their interests differ. *See, e.g., Californians for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1190 (9th Cir. 1998) ("[B]ecause the employment interests of IBT's members [in defending a law guaranteeing them a prevailing wage] were potentially more narrow and parochial than the interests of the public at large, IBT demonstrated that the representation of its interests by the named defendants-appellees may have been inadequate."); *Nat'l Farm Lines v. I.C.C.*, 564 F.2d 381, 384 (10th Cir. 1977) ("We have here also the familiar situation in which the governmental agency is seeking to protect not only the interest of the public but also the private interest of the petitioners in intervention, a task which is on its face impossible."); *Wildearth Guardians v. Salazar*, 272 F.R.D. 4, 15 (D.D.C. 2010) ("[I]t is well-established that governmental entities generally cannot represent the more narrow and

parochial financial interest of a private party.” (internal quotation marks omitted)); *Ass’n for Fairness in Bus., Inc. v. New Jersey*, 193 F.R.D. 228, 232 (D.N.J. 2000) (allowing intervention where “the government represent[ed] numerous complex and conflicting interests” and “the parochial interests of the Proposed Defendants–Intervenors m[ight] not be adequately represented” (internal quotation marks omitted)). That is certainly true here: The only way Ms. McNeary and Ms. Deaton’s interests can be adequately represented in this litigation is for them to be a part of it.

Moreover, when the interests of an applicant for intervention are “potentially more narrow and parochial than the interests of the public at large,” courts commonly assume the potential for disagreement over litigation strategy. *Mendonca*, 152 F.3d 1184 at 1190. This potential for disagreement is commonly regarded as “sufficient to warrant relief in the form of intervention under” the analogous federal rule for intervention of right. *See, e.g., Trbovich*, 404 U.S. at 539; *see also id.* at 538-39 (allowing union member to intervene alongside Secretary of Labor in union election dispute because the Secretary’s duty “to protect the vital public interest in assuring free and democratic union elections . . . transcend[ed] the narrower interest of the . . . union member” and the two interests therefore “may not always dictate precisely the same approach to the conduct of the litigation”) (internal quotation marks omitted).

Past experience in educational choice litigation reinforces the likelihood that the government and intervenors will disagree over litigation approaches and want to raise different issues and arguments. In *Arizona Christian School Tuition*

Organization v. Winn, 563 U.S. 125 (2011), for example, parent intervenors successfully argued that the plaintiffs challenging the educational choice program lacked standing, an issue that the state conceded. The state similarly conceded standing in *Duncan v. State*, 102 A.3d 913 (N.H. 2014), while the parent intervenors successfully argued that the statute conferring standing was unconstitutional. And in *Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999), parent intervenors—not the state—urged and convinced the court to confront the bigoted origins of the provision of the Arizona Constitution that the plaintiffs were using to attack the state’s educational choice program.

Furthermore, Ms. McNeary and Ms. Deaton will add a necessary element to this action that would not be presented by the current parties: They will provide testimony as to how the EOA Program can meet the unique educational needs of their children and of the severe, personal injury they stand to suffer if the Program is enjoined, as Plaintiffs request. This Court should have that testimony in order to fully comprehend the repercussions of invalidating a program designed to empower Kentucky families to secure the education that will best meet their children’s unique educational needs.

Because the only way to guarantee that Ms. McNeary and Ms. Deaton’s interests will be adequately represented is for them to participate in this litigation, they should be allowed to intervene as a matter of right.

B. Alternatively, Ms. McNeary and Ms. Deaton Should Be Granted Permissive Intervention To Defend The EOA Program.

Ms. McNeary and Ms. Deaton alternatively seek permissive intervention pursuant to Rule 24.02. Permissive intervention is granted upon timely motion

“when an applicant’s claim or defense and the main action have a question of law or fact in common.” Ky. R. Civ. P. 24.02. “In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.” *Id.* Ms. McNeary and Ms. Deaton satisfy the condition set forth in Rule 24.02, and intervention will not delay or prejudice adjudication of the current parties’ rights.

First, Ms. McNeary and Ms. Deaton’s defenses share a question of law or fact in common with the main action. The central question of law in this case is whether the EOA Program is constitutional, and their interests and those of their children are inextricably linked with the question of the Program’s constitutionality.

Second, Ms. McNeary and Ms. Deaton have acted quickly to prevent any delay in this litigation. As noted above, their motion to intervene comes within two days of the filing of Plaintiffs’ complaint, and their participation will not prejudice the adjudication of the rights of the other parties. Rather, their participation will facilitate a thorough resolution of all issues in this case, providing a perspective on the EOA Program that only they—as the Program’s beneficiaries—can provide.

Finally, Ms. McNeary and Ms. Deaton believe that participation of their counsel will also assist this Court in its resolution of the questions before it. Last term, their counsel won a U.S. Supreme Court victory protecting Montana’s tax-credit scholarship program. *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246

(2020). Their counsel have also represented intervening parents in the successful defense of:

- Ohio’s Pilot Project Scholarship Program, *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999);
- Arizona’s individual tax credit scholarship program, *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125 (2011); *Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999);
- Douglas County, Colorado’s voucher program, *Doyle v. Taxpayers for Pub. Educ.*, ___ U.S. ___, 137 S. Ct. 2324, 198 L.Ed.2d 753 (2017) (mem.);
- Georgia’s tax credit scholarship program, *Gaddy v. Ga. Dep’t of Revenue*, 802 S.E.2d 225 (Ga. 2017);
- North Carolina’s voucher program, *Hart v. State*, 774 S.E.2d 281 (N.C. 2015);
- Alabama’s tax credit scholarship program, *Magee v. Boyd*, 175 So. 3d 79 (Ala. 2015);
- New Hampshire’s tax credit scholarship program, *Duncan v. State*, 102 A.3d 913 (N.H. 2014);
- Indiana’s voucher program, *Meredith v. Pence*, 984 N.E.2d 1213 (Ind. 2013);
- Arizona’s educational savings account program, *Niehaus v. Huppenthal*, 310 P.3d 983 (Ariz. Ct. App. 2013);

- Arizona’s corporate tax credit scholarship program, *Green v. Garriott*, 212 P.3d 96 (Ariz. Ct. App. 2009);
- Illinois’ tax credit program, *Toney v. Bower*, 744 N.E.2d 351 (Ill. App. Ct. 2001); *Griffith v. Bower*, 747 N.E.2d 423 (Ill. App. Ct. 2001); and
- Milwaukee’s voucher program, *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998); *Davis v. Grover*, 480 N.W.2d 460 (Wis. 1992).

CONCLUSION

In nearly every legal challenge to an educational choice program over the past three decades, parents who have sought to intervene to defend the program have been permitted to do so. Ms. McNeary and Ms. Deaton respectfully request that they be permitted to do the same. Party status is necessary to ensure that the interests of the EOA Program’s beneficiaries are fully protected. Should the Program be invalidated in this case, Ms. McNeary, Ms. Deaton, and many other Kentucky parents and guardians will forever lose the opportunity to protect their interest in the greater educational opportunity and flexibility that the EOA Program provides. Particularly for this reason, Ms. McNeary and Ms. Deaton seek leave to intervene as defendants.

WHEREFORE, Ms. McNeary and Ms. Deaton respectfully request that this Court grant them leave to intervene as defendants and accept the accompanying answer for filing.

Respectfully submitted this 9th day of June, 2021.

/s/ Edward L. Metzger III
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*Applications for admission pro hac
vice to be filed

CERTIFICATION OF SERVICE

I hereby certify on this the 9th day of June, 2021, I electronically filed the foregoing using the KYeCourts system and a copy was served electronically or by mail, to the following:

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Holly M. Johnson
Secretary of the Kentucky Finance and Administration Cabinet
Office of the Attorney General
The Capitol
700 Capitol Avenue
Frankfort, KY 40601

Defendant

Thomas B. Miller
Commissioner of the Kentucky Department of Revenue
Office of the Attorney General

The Capitol
700 Capitol Avenue
Frankfort, KY 40601

Defendant

/s/ Edward L. Metzger III
Edward L. Metzger III

Council for Better Education, Inc., et al.
v. Holly M. Johnson, et al.

Case No. 21-CI-00461

Motion to Intervene as Defendants

Exhibit A

**COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION 1
CASE NO. 21-CI-00461**

COUNCIL FOR BETTER EDUCATION, FRANKFORT INDEPENDENT SCHOOL BOARD, WARREN COUNTY SCHOOL BOARD, MICHELLE GRIMES JONES, on behalf of herself and her minor children, KATHERINE WALKER-PAYNE, on behalf of herself and her minor children, and CHRIS RASHEED, on behalf of himself and his minor child

PLAINTIFFS,

vs.

HOLLY M. JOHNSON, in her official capacity as Secretary of the Kentucky Finance and Administration Cabinet, and THOMAS B. MILLER, in his official capacity as Commissioner of the Kentucky Department of Revenue,

DEFENDANTS.

AFFIDAVIT OF AKIA MCNEARY

I, Akia McNeary, being first duly cautioned and sworn, state as follows:

1. I am a resident of Florence, Kentucky and live at 10312 Memory Lane. I am 18 years of age or older and make this affidavit based on my personal knowledge of the facts set forth herein.
2. I live with my husband and my four children: my oldest son, R.W., who is 20 years old; my son, P.I.Y., who is 14 years old; my youngest son, N.Y., who is 11 years old; and my daughter, M.S., who is 5 years old. Together, our household has six members.
3. My oldest school-aged child—P.I.Y.—attends a public high school. The school meets his needs and he is doing well there.
4. However, N.Y. attends a private school—Zion Christian Academy (Zion)—and I am very happy with the education he has received there. In contrast, I do not think he received

a good education at our local, assigned public elementary school—Hillard Collins Elementary School—which he previously attended.

5. I first sent N.Y. to Zion for preschool, but I had to transfer him to public school for kindergarten because of financial difficulties. Fortunately, because of the foundation laid at Zion, N.Y. was initially ahead of public-school peers in kindergarten. But his education declined at Hillard Collins; while in first grade there, he could not read at grade level, his behavior was getting worse, and he was not being challenged like he needed to be.

6. Because of financial difficulties, I had also previously transferred my oldest son, R.W., from private school to public school. After seeing R.W.'s education decline in public school like N.Y.'s did—and after the bullying R.W. endured in public school—I did not want N.Y. to go down the same road as R.W.

7. So I transferred N.Y. back to Zion for the second grade. Though he was behind his classmates in reading, spelling, and cursive writing at first, he thrived there this past 2020-21 school year as a fifth grader.

8. Having seen N.Y.'s experience at both Zion and Hillard Collins, I think Zion is a much better option for N.Y. I think Zion is a superior school to Hillard Collins because Zion is stronger academically, Zion is a better environment to learn in, and Zion is safer. Zion's religious grounding is also very important to me.

9. Given N.Y.'s experience at Zion, I would also like to send my daughter M.S. there when she starts kindergarten this fall. Just as Zion has been a better option for N.Y. than Hillard Collins was, I think Zion would be a better option for M.S., as well.

10. Unfortunately, paying for tuition at Zion has been a real struggle for my family. Annual tuition at Zion costs approximately \$4,500 per student. Even though N.Y.'s tuition is

partially offset by a scholarship, we must still pay Zion \$2,200 per year for his education, along with fees and miscellaneous expenses, like for school uniforms. At times, it has been very difficult to come up with this money: at one point, my husband had to work two jobs while I was also working full-time to make ends meet.

11. Given our financial situation, M.S. might not be able to attend Zion this fall, even though I believe it is the best option for her. I have asked the school whether she is eligible for a scholarship, but the school is unable to offer her one. So her kindergarten tuition at Zion would cost the full \$4,500 for the 2021-22 school year, which we cannot afford.

12. To be able to afford N.Y.'s and M.S.'s tuition at Zion, I will apply for Kentucky's new Education Opportunity Account Program as soon as possible. If my children had these accounts, we would use them to pay for tuition at Zion to keep N.Y. there and to send M.S. there, as well.

13. I would also like to use an Education Opportunity Account for educational expenses for P.I.Y., such as fees for dual-enrollment courses he could take at a college while he is still in high school.

14. I know that my children are eligible for Education Opportunity Accounts. My children receive reduced-price school lunches in school, and the income cap for eligibility under the Education Opportunity Account Program is 175 percent of the income cap for reduced-price school lunch.

15. Without Education Opportunity Accounts, I might have to send both N.Y. and M.S. to public school even though I would strongly prefer they attend Zion, and even though I know that Zion is the best option for them. And because I cannot afford to pay full tuition for M.S. to attend Zion, I would likely have to bear the burden of homeschooling her because I do

not believe Hillard Collins will meet her needs. At a minimum, my family would have to endure great financial hardship to pay N.Y.'s and M.S.'s tuition at Zion without Education Opportunity Accounts.

By:

Akia McNeary
Akia McNeary

Sworn to or affirmed before me and subscribed in my presence the 8th day of June, 2021, in the Commonwealth of Kentucky and county of Bone :

Joshua Thomas Bice

Signature of Notary Public

SEAL

JOSHUA THOMAS BICE
Notary Public - State at Large
State of Kentucky
Notary ID # KYNP7586
My Commission Expires May 19, 2024

Council for Better Education, Inc., et al.
v. Holly M. Johnson, et al.

Case No. 21-CI-00461

Motion to Intervene as Defendants

Exhibit B

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION 1
CASE NO. 21-CI-00461

COUNCIL FOR BETTER EDUCATION, FRANKFORT INDEPENDENT SCHOOL BOARD, WARREN COUNTY SCHOOL BOARD, MICHELLE GRIMES JONES, on behalf of herself and her minor children, KATHERINE WALKER-PAYNE, on behalf of herself and her minor children, and CHRIS RASHEED, on behalf of himself and his minor child

PLAINTIFFS,

vs.

HOLLY M. JOHNSON, in her official capacity as Secretary of the Kentucky Finance and Administration Cabinet, and THOMAS B. MILLER, in his official capacity as Commissioner of the Kentucky Department of Revenue,

DEFENDANTS.

AFFIDAVIT OF NANCY DEATON

I, Nancy Deaton, being first duly sworn, state as follows:

1. I am a resident of Newport, Kentucky and live at 1162 Waterworks Road. I am 18 years of age or older and make this affidavit based on my personal knowledge of the facts set forth herein.

2. I live with my great-grandson, D.N., who is 13 years old. And I am D.N.'s legal guardian.

3. As a very young child, D.N. had a serious fall down a stairwell, and he consequently suffered a traumatic brain injury. His skull was fractured in several places, he needed multiple surgeries and hospitalizations, and he was forced to wear a helmet daily.

4. In addition to his physical challenges, D.N. also has had a difficult family life. His mother has had substance-abuse issues and has been incarcerated. Meanwhile, D.N.'s father is absent.

5. Because I knew D.N.'s biological parents could not take care of him and tend to his medical needs, I took matters into my own hands. After seeking custody of D.N., a court appointed me as his legal guardian while he was still an infant. I have been his guardian for nearly 13 years.

6. When it came time for D.N. to go to elementary school, I wanted a small, private school so that he would not be neglected. So, I sent him to a small Catholic school—Holy Trinity Elementary School—which he attended this past school year as a seventh grader. I have never regretted this decision.

7. Holy Trinity has been a blessing for D.N. This school is more than just a school to us—it is a family. And despite the hardships D.N. has experienced in his life, he is a refreshingly normal child at Holy Trinity.

8. In contrast, I worry how D.N. would have fared in public school. I worry that he would be teased and bullied in public school because of his size. (D.N. is a 6'4" 13-year-old.) I also worry that a public school would neglect D.N.'s educational needs, unlike Holy Trinity. As a result, I prefer to send D.N. to Holy Trinity instead of a public school.

9. Given D.N.'s experience in private school at Holy Trinity, I would

like to send him to a private high school when he reaches the ninth grade.

10. Unfortunately, paying for private-school tuition has been a struggle. Even though D.N.'s tuition is partially offset by a scholarship, I must still pay Holy Trinity \$55 per month for his education, along with miscellaneous expenses, like for school uniforms. This is difficult at my income level, which is low enough to qualify for the Supplemental Nutrition Assistance Program.

Worse yet, I know that D.N.'s tuition is expected to increase in the future, as private schools' tuition for grades 9-12 is generally higher than it is for earlier grades.

11. To be able to afford D.N.'s private-school tuition, I will apply for Kentucky's new Education Opportunity Account Program as soon as possible.

If D.N. had this account, I would use it to pay for his eighth grade and high-school tuition.

12. I know that D.N. is eligible for an Education Opportunity Account. He is eligible for reduced-price school lunches in school, and the income cap for eligibility under the Education Opportunity Account Program is 175 percent of the income cap for reduced-price school lunch. Indeed, he is eligible for free lunch.

13. Without an Education Opportunity Account, I might have to send D.N. to public school even though I would strongly prefer he attend private school. At minimum, I would have to endure financial hardship to pay his private-school tuition without an Education Opportunity Account.

By:

Nancy S. Deaton
Nancy Deaton

Sworn to or affirmed before me and subscribed in my presence the 8 day of June, 2021, in the state of GA and county of Chatham



Irvenia Renea Brooks
Signature of Notary Public

Council for Better Education, Inc., et al.
v. Holly M. Johnson, et al.

Case No. 21-CI-00461

Motion to Intervene as Defendants

Exhibit C

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT, DIVISION 1
CIVIL ACTION NO. 21-CI-00461
HON. PHILLIP J. SHEPHERD

COUNCIL FOR BETTER EDUCATION, INC., et al.

PLAINTIFFS

v.

HOLLY M. JOHNSON, in her official capacity as
Secretary of the Kentucky Finance and Administration
Cabinet, et al.

DEFENDANTS

and

AKIA MCNEARY

and

NANCY DEATON

INTERVENOR-DEFENDANTS

INTERVENOR-DEFENDANTS' ANSWER

Intervenor-Defendants Akia McNeary and Nancy Deaton (collectively, “Intervenor-Defendants”), by and through counsel, hereby submit their Answer and Affirmative Defenses to Plaintiffs’ Verified Complaint for a Declaration of Rights and for Injunctive Relief.

INTRODUCTION

1. Intervenor-Defendants admit that the allegations in paragraph 1 contain language quoted from *Rose v. Council for Better Education, Inc.*, 790 S.W.2d 186 (Ky. 1989). The remaining allegations in paragraph 1 are legal conclusions and Intervenor-Defendants therefore deny the same.

2. Intervenor-Defendants admit that the General Assembly enacted HB 563 this year. Intervenor-Defendants deny the remaining allegations in paragraph 2.

3. Intervenor-Defendants deny the allegations in paragraph 3.

4. Intervenor-Defendants admit that the allegations in paragraph 4 contain language quoted from Section 184 of the Kentucky Constitution and *Fannin v. Williams*, 655 S.W.2d 480 (Ky. 1983). The remaining allegations in paragraph 4, including subparagraphs 4(a), 4(b), 4(c), and 4(d), are legal conclusions and Intervenor-Defendants therefore deny the same.

5. Intervenor-Defendants deny that HB 563 diverts public funds to private schools. No response is required to the remainder of paragraph 5, which contains no allegation of fact or law, but rather is Plaintiffs' characterization of the relief they request.

NATURE OF ACTION

6. Admit.

7. Intervenor-Defendants admit that the allegations in paragraph 7 contain language quoted from KRS 418.040. The remaining allegations in paragraph 7 are legal conclusions and Intervenor-Defendants therefore deny the same.

8. Intervenor-Defendants admit that CR 57 permits this Court to issue a declaratory judgment in cases where declaratory relief is appropriate. Intervenor-Defendants deny that this is such a case.

9. Intervenor-Defendants admit that CR 65 permits this Court to issue a temporary injunction—and permits this Court, in a final judgment, to issue a permanent injunction, which may restrict or mandatorily direct the doing of an act—in cases where such temporary and permanent injunctive relief is appropriate. Intervenor-Defendants deny that this is such a case.

10. Intervenor-Defendants admit that Plaintiffs request expedited review and that HB 563 is scheduled to take effect on June 28, 2021. Intervenor-Defendants deny the remaining allegations in paragraph 10.

11. Intervenor-Defendants deny that HB 563 funds private schools. The remainder of paragraph 11 contains Plaintiffs' characterization of the relief they request and no response is required.

12. Intervenor-Defendants deny that HB 563 diverts public revenues to private schools. The remainder of paragraph 12 contains Plaintiffs' characterization of their action and no response is required.

THE PARTIES

13. Intervenor-Defendants deny that HB 563 violates Kentucky's constitutional commitment to its students and common schools. Intervenor-Defendants are without sufficient information or knowledge to form a conclusion regarding the truth or falsity of the remaining allegations in paragraph 13 and therefore deny the same.

14. Intervenor-Defendants deny that HB 563 will divert public revenues, will cause students to leave public school, or will harm Frankfort Independent School Board and other public schools. Intervenor-Defendants are without sufficient information or knowledge to form a conclusion regarding the truth or falsity of the remaining allegations in paragraph 14 and therefore deny the same.

15. Intervenor-Defendants deny that HB 563 will divert public revenues, will cause students to leave public school, and will harm Warren County School Board and other public schools. Intervenor-Defendants are without sufficient information or

knowledge to form a conclusion regarding the truth or falsity of the remaining allegations in paragraph 15 and therefore deny the same.

16. Intervenor-Defendants are without sufficient information or knowledge to form a conclusion regarding the truth or falsity of the allegations in paragraph 16 and therefore deny the same.

17. Intervenor-Defendants are without sufficient information or knowledge to form a conclusion regarding the truth or falsity of the allegations in paragraph 17 and therefore deny the same.

18. Intervenor-Defendants are without sufficient information or knowledge to form a conclusion regarding the truth or falsity of the allegations in paragraph 18 and therefore deny the same.

19. The allegations in paragraph 19 are legal conclusions and Intervenor-Defendants therefore deny the same.

20. Intervenor-Defendants admit that Defendant Holly M. Johnson is the duly appointed Secretary of the Finance and Administration Cabinet, a Program Cabinet of the Executive Branch of State Government. Intervenor-Defendants further admit that Secretary Johnson is named in her official capacity. Intervenor-Defendants admit the remaining allegations in paragraph 20 only to the extent they are consistent with the laws of Kentucky, which speak for themselves, and otherwise deny the same.

21. Intervenor-Defendants admit Defendant Thomas B. Miller is the Commissioner of the Department of Revenue and is named in his official capacity. Intervenor-Defendants admit the remaining allegations in paragraph 21 only to the extent

they are consistent with the laws of Kentucky, which speak for themselves, and otherwise deny the same.

JURISDICTION AND VENUE

22. The allegations in paragraph 22 are legal conclusions and Intervenor-Defendants therefore deny the same.

23. Intervenor-Defendants admit that Frankfort Independent School Board operates in Franklin County and that this action challenges the constitutionality of a Kentucky statute. Intervenor-Defendants are without sufficient information or knowledge to form a conclusion regarding the residency of Defendant Michelle Grimes Jones and her children, and Intervenor-Defendants therefore deny the allegation that they are residents of Franklin County. The remaining allegations in paragraph 23 are legal conclusions and Intervenor-Defendants therefore deny the same.

24. The allegations in paragraph 24 are legal conclusions and Intervenor-Defendants therefore deny the same.

FACTUAL BACKGROUND

25. Intervenor-Defendants admit that, on March 29, both houses of the General Assembly approved HB 563, “AN ACT relating to education,” overriding the veto of the Governor. Intervenor-Defendants are without sufficient information or knowledge to form a conclusion regarding the remaining allegations in paragraph 25 and therefore deny the same.

26. Intervenor-Defendants admit that most of HB 563’s twenty-one sections are devoted to establishing the Education Opportunity Account Program, that the first four sections of HB 563 require public school districts in the Commonwealth to adopt a

policy for admitting nonresident pupils, that the first four sections are the only sections of the bill unrelated to the Education Opportunity Account program, and that Plaintiffs' action asserts no challenge or claim regarding these nonresident admission provisions. Intervenor-Defendants deny the remaining allegations in paragraph 26.

27. Intervenor-Defendants admit the allegations in paragraph 27 only to the extent they are consistent with HB 563, which speaks for itself, and otherwise deny the allegations.

28. Intervenor-Defendants admit the allegations in paragraph 28 only to the extent they are consistent with HB 563, which speaks for itself, and otherwise deny the allegations.

29. Intervenor-Defendants deny that the Education Opportunity Account Program is "funded by \$25 million in tax credit expenditures taken from taxes raised by Kentucky but diverted to AGOs that in turn fund" the Education Opportunity Account Program. Intervenor-Defendants admit the remaining allegations in paragraph 29 only to the extent they are consistent with HB 563, which speaks for itself, and otherwise deny those allegations.

30. Intervenor-Defendants deny the allegations in paragraph 30.

31. Intervenor-Defendants deny the allegations in paragraph 31.

32. Intervenor-Defendants deny the allegations in paragraph 32.

33. Intervenor-Defendants admit the allegations in paragraph 33 only to the extent they are consistent with HB 563, which speaks for itself, and otherwise deny the allegations.

34. Intervenor-Defendants admit the allegations in paragraph 34 only to the extent they are consistent with HB 563, which speaks for itself, and otherwise deny the allegations.

35. Intervenor-Defendants deny that the Education Opportunity Account Program uses “tax-diverted funds.” Intervenor-Defendants admit the remaining allegations in paragraph 35 only to the extent they are consistent with HB 563, which speaks for itself, and otherwise deny those allegations.

36. Intervenor-Defendants admit the allegations in paragraph 36 only to the extent they are consistent with HB 563, which speaks for itself, and otherwise deny the allegations.

37. Intervenor-Defendants admit the allegations in paragraph 37.

Intervenor-Defendants Deny the Allegations in the Heading “The Voucher Program Will Fund Exclusive, Unaccountable Private Schools”

38. Intervenor-Defendants deny that Kentucky public schools must accept all students regardless of their backgrounds, abilities, and prior educational records; for example, magnet schools can use selective admissions criteria, and public schools can contract with private schools to educate certain students with special needs. Intervenor-Defendants admit the remaining allegations in paragraph 38 only to the extent they are consistent with HB 563, which speaks for itself, and otherwise deny those allegations.

39. Intervenor-Defendants admit that the allegations in paragraph 39 contain language quoted from HB 563. Intervenor-Defendants deny the remaining allegations in paragraph 39.

40. Intervenor-Defendants deny the allegations in the first sentence of paragraph 40. Intervenor-Defendants admit the remaining allegations in paragraph 40

only to the extent they are consistent with HB 563, which speaks for itself, and otherwise deny those allegations.

41. Intervenor-Defendants deny the allegations in paragraph 41.

42. Intervenor-Defendants deny the allegations in paragraph 42.

43. Intervenor-Defendants are without sufficient information or knowledge to form a conclusion regarding the truth or falsity of the allegations in paragraph 43 and therefore deny the same.

44. The allegations in the first sentence in paragraph 44 are legal conclusions and Intervenor-Defendants therefore deny the same. Intervenor-Defendants deny the allegations in the second sentence in paragraph 44.

45. Intervenor-Defendants are without sufficient information or knowledge to form a conclusion regarding the truth or falsity of the allegations in paragraph 45 and therefore deny the same.

46. Intervenor-Defendants admit the allegations in the first three sentences of paragraph 46 only to the extent they are consistent with HB 563, which speaks for itself, and otherwise deny those allegations. Intervenor-Defendants deny the allegations in the fourth sentence of paragraph 46.

47. Intervenor-Defendants admit the allegations in the first sentence of paragraph 47 only to the extent they are consistent with HB 563, which speaks for itself, and otherwise deny those allegations. Intervenor-Defendants deny the allegations in the second sentence of paragraph 47.

48. Intervenor-Defendants deny the allegations in paragraph 48.

Intervenor-Defendants Deny the Allegations in the Heading “The Voucher Program Will Drain Resources from the Common Schools”

49. Intervenor-Defendants deny the allegations in paragraph 49.

50. Intervenor-Defendants admit the allegations in paragraph 50 only to the extent they are consistent with fiscal note to HB 563 House Committee Substitute 1, which speaks for itself, and otherwise deny the allegations.

51. Intervenor-Defendants are without sufficient information or knowledge to form a conclusion regarding the truth or falsity of the allegations in the first sentence of paragraph 51 and therefore deny the same. In regard to the second sentence of paragraph 51, Intervenor-Defendants admit only that the allegations in that sentence contain an amended quotation from the cited document, which speaks for itself. Otherwise, the allegations in the second sentence are denied.

52. Intervenor-Defendants admit that the allegations in paragraph 52 contain language quoted from 2021 Ky. Acts 169, Pt. III, 16 (HB 192), which speaks for itself. Intervenor-Defendants deny the remaining allegations in paragraph 52.

53. Intervenor-Defendants are without sufficient information or knowledge to form a conclusion regarding the truth or falsity of the allegations in paragraph 53 and therefore deny the same.

54. Intervenor-Defendants deny the allegations in paragraph 54.

55. Intervenor-Defendants admit the allegations in the first sentence of paragraph 55 only to the extent they are consistent with the laws of Kentucky, which speak for themselves, and otherwise deny the same. Intervenor-Defendants deny the remaining allegations in paragraph 55.

56. Intervenor-Defendants deny the allegations in paragraph 56.

57. Intervenor-Defendants deny the allegations in paragraph 57.

58. Regarding the first sentence of paragraph 58, Intervenor-Defendants deny that any student receives “tax-diverted funds” under the Education Opportunity Account Program. Intervenor-Defendants admit the remaining allegations in the first sentence of paragraph 58 only to the extent they are consistent with HB 563, which speaks for itself, and otherwise deny those allegations. Intervenor-Defendants are without sufficient information or knowledge to form a conclusion regarding the truth or falsity of the allegations in the second sentence of paragraph 58 and therefore deny the same.

59. Intervenor-Defendants admit the allegations in paragraph 59 only to the extent they are consistent with HB 563, which speaks for itself, and otherwise deny the allegations.

60. Intervenor-Defendants deny the allegations in paragraph 60.

Intervenor-Defendants Deny the Allegations in the Heading “Private Account Granting Organizations Charged with Administering the Program Are Not Subject to Any Meaningful Limits on Their Discretion”

61. Intervenor-Defendants deny the allegations in paragraph 61.

62. Intervenor-Defendants deny the allegations in paragraph 62.

63. Intervenor-Defendants admit the allegations in paragraph 63 only to the extent they are consistent with HB 563, which speaks for itself, and otherwise deny the allegations.

64. Intervenor-Defendants admit the allegations in paragraph 64 only to the extent they are consistent with HB 563, which speaks for itself, and otherwise deny the allegations.

65. Intervenor-Defendants admit the allegations in paragraph 65 only to the extent they are consistent with HB 563, which speaks for itself, and otherwise deny the allegations.

66. Intervenor-Defendants deny the allegations in paragraph 66.

67. Intervenor-Defendants deny the allegations in paragraph 67.

68. Intervenor-Defendants deny the allegations in paragraph 68.

69. Intervenor-Defendants admit the allegations in the first sentence of paragraph 69. Intervenor-Defendants deny the allegations in the second paragraph of 69.

70. Intervenor-Defendants admit the allegations in the first sentence of paragraph 70 only to the extent they are consistent with HB 563, which speaks for itself, and otherwise deny the allegations. Intervenor-Defendants deny the allegations in the second sentence of paragraph 70.

71. Intervenor-Defendants deny that the Education Opportunity Account Program and Account Granting Organizations fund private schools. Intervenor-Defendants deny the remaining allegations in paragraph 71.

72. Intervenor-Defendants admit the allegations in paragraph 72 only to the extent they are consistent with HB 563, which speaks for itself, and otherwise deny the allegations.

73. Intervenor-Defendants admit the allegations in paragraph 73 only to the extent they are consistent with HB 563, which speaks for itself, and otherwise deny the allegations.

74. Intervenor-Defendants admit the allegations in the first sentence of paragraph 74. Intervenor-Defendants deny the allegations in the second sentence of paragraph 74.

CLAIMS

Count I

75. Intervenor-Defendants incorporate every statement in paragraphs 1-74 as if fully set forth herein.

76. Intervenor-Defendants admit only that the allegations in paragraph 76 contain a quotation from Section 183 of the Kentucky Constitution. Otherwise, the allegations are denied.

77. Intervenor-Defendants admit only that the allegations in paragraph 77 contain a quotation from Section 186 of the Kentucky Constitution. Otherwise, the allegations are denied.

78. Intervenor-Defendants deny the allegations in the first sentence of paragraph 78. The allegations in the second sentence of paragraph 78 are legal conclusions and Intervenor-Defendants therefore deny the same.

79. Intervenor-Defendants deny the allegations in paragraph 79.

80. Intervenor-Defendants deny the allegations in paragraph 80.

Count II

81. Intervenor-Defendants incorporate every statement in paragraphs 1-74 as if fully set forth herein.

82. Intervenor-Defendants admit only that the allegations in paragraph 82 contain a quotation from Section 184 of the Kentucky Constitution. Otherwise, the allegations are denied.

83. Intervenor-Defendants admit only that the allegations in paragraph 83 contain quotations from *Fannin v. Williams*, 655 S.W.2d 480 (Ky. 1983). Otherwise, the allegations are denied.

84. Intervenor-Defendants deny the allegations in paragraph 84.

85. Intervenor-Defendants admit the allegations in the first sentence of paragraph 85. Intervenor-Defendants deny the allegations in the second sentence of paragraph 85.

Count III

86. Intervenor-Defendants incorporate every statement in paragraphs 1-74 as if fully set forth herein.

87. Intervenor-Defendants admit only that the allegations in paragraph 87 contain a quotation from Section 3 of the Kentucky Constitution. Otherwise, the allegations are denied.

88. Intervenor-Defendants admit only that the allegations in paragraph 88 contain a quotation from Section 171 of the Kentucky Constitution. Otherwise, the allegations are denied.

89. Intervenor-Defendants admit only that the allegations in paragraph 89 contain a quotation from Section 186 of the Kentucky Constitution. Otherwise, the allegations are denied.

90. Intervenor-Defendants deny the allegations in paragraph 90.

91. Intervenor-Defendants deny the allegations in the first sentence of paragraph 90, as they are a legal conclusion based on the false premise that HB 563 funds private schools. Intervenor-Defendants admit the allegations in the second sentence of paragraph 91 only to the extent they are consistent with HB 563, which speaks for itself, and otherwise deny those allegations. Intervenor-Defendants deny the allegations in the third sentence of paragraph 90.

92. Intervenor-Defendants deny the allegations in paragraph 92.

93. Intervenor-Defendants deny the allegations in paragraph 93.

Count IV

94. Intervenor-Defendants incorporate every statement in paragraphs 1-74 as if fully set forth herein.

95. Intervenor-Defendants admit only that the allegations in paragraph 95 contain quotations from Sections 2 and 29 of the Kentucky Constitution. Otherwise, the allegations are denied.

96. Intervenor-Defendants admit only that the allegations in paragraph 96 contain an amended quotation from *Holsclaw v. Stephens*, 507 S.W.2d 462 (Ky. 1973). Otherwise, the allegations are denied.

97. Intervenor-Defendants deny the allegations in paragraph 97.

98. Intervenor-Defendants deny the allegations in paragraph 98.

Count V

99. Intervenor-Defendants incorporate every statement in paragraphs 1-74 as if fully set forth herein.

100. Intervenor-Defendants deny the allegations in paragraph 100.

101. Intervenor-Defendants admit only that the allegations in paragraph 101 contain a quotation from CR 65.01. Otherwise, the allegations are denied.

102. Intervenor-Defendants admit only that the allegations in paragraph 102 contain a quotation from CR 65.04. Otherwise, the allegations are denied.

103. Intervenor-Defendants deny the allegations in paragraph 103.

104. Intervenor-Defendants admit that HB 563 is scheduled to take effect on June 28, 2021. Intervenor-Defendants deny the remaining allegations in paragraph 104.

105. Intervenor-Defendants deny the allegations in paragraph 105.

PRAYER FOR RELIEF

I. No response is required as this prayer for relief contains no allegation of fact or law.

II. Intervenor-Defendants deny Plaintiffs' characterization of HB 563, which speaks for itself. No response is required to the remainder of this this prayer for relief, as it contains no allegation of fact or law.

III. No response is required as this prayer for relief contains no allegation of fact or law.

IV. No response is required as this prayer for relief contains no allegation of fact or law.

AFFIRMATIVE DEFENSES

1. Intervenor-Defendants reserve the right to assert any affirmative defense to the extent that facts discovered in the course of this litigation support such an affirmative defense.

2. The Plaintiffs' claims fail, in whole or in part, because they have failed to state a claim upon which relief can be granted.

3. The Plaintiffs' claims fail, in whole or in part, because they lack standing.

4. The Plaintiffs' claims fail, in whole or in part, because they seek a judicial decision that would violate the Establishment and Free Exercise Clauses of the First Amendment to the U.S. Constitution.

5. Intervenor-Defendants request this Court to enter a final judgment in favor of Defendants and Intervenor-Defendants as follows:

- a. dismissing Plaintiffs' claims with prejudice;
- b. denying Plaintiffs' request for declaratory relief and for a temporary and permanent injunction;
- c. awarding Intervenor-Defendants any and all such other relief as the Court deems just and equitable, including, but not limited to, an award of attorneys' fees and costs to the extent provided by Kentucky law.

Respectfully submitted this 9th day of June, 2021.

/s/ Edward L. Metzger III
 Edward L. Metzger III
 CETRULO, MOWERY, & HICKS P.S.C.
 130 Dudley Road, Ste. 200
 Edgewood, KY 41017
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Attorneys for Intervenor-Defendants

*Application for admission pro hac vice to
be filed

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COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT, DIVISION 1
CIVIL ACTION NO. 21-CI-00461
HON. PHILLIP J. SHEPHERD

COUNCIL FOR BETTER EDUCATION, INC., et al.

PLAINTIFFS

v.

HOLLY M. JOHNSON, in her official capacity as
Secretary of the Kentucky Finance and Administration
Cabinet, et al.

DEFENDANTS

ORDER GRANTING MOTION TO INTERVENE

This matter having come before the Court on the Motion to Intervene of Akia McNeary and Nancy Deaton and the Court being otherwise sufficiently advised,

IT IS HEREBY ORDERED AND ADJUDGED that said Motion is hereby
GRANTED;

IT IS FURTHER ORDERED THAT the proposed Answer submitted by Akia McNeary and Nancy Deaton (styled Intervenor-Defendants' Answer to Plaintiffs' Complaint) is deemed filed on June 9, 2021.

HON. PHILLIP SHEPHERD
FRANKLIN COUNTY CIRCUIT COURT