IN THE CIRCUIT COURT OF KANAWHA COUNTY
WEST VIRGINIA

TRAVIS BEAVER, KAREN KALAR and WENDY PETERS,

Petitioners/Plaintiffs,

v.

RILEY MOORE, in his Official Capacity as State Treasurer of West Virginia; W. CLAYTON BURCH, in his official capacity as State Superintendent of West Virginia; MILLER L. HALL, in his Official Capacity as President of West Virginia's Board of Education; CRAIG BLAIR, in his Official Capacity as the President of the West Virginia Senate; ROGER HANSHAW, in his Official Capacity as the Speaker of the West Virginia House of Delegates; and JIM JUSTICE, in his Official Capacity as Governor of West Virginia,

Respondents/Defendants,

and

KATIE SWITZER and JENNIFER COMPTON,

Movant-Intervenors.

CASE NO. 22-P-24
JUDGE BLOOM

CASE NO. 22-P-25
JUDGE WEBSTER

CASE NO. 22-P-26
JUDGE BAILEY

PARENTS' MOTION TO INTERVENE AS DEFENDANTS
AND INTEGRATED MEMORANDUM OF LAW

Katie Switzer and Jennifer Compton move to intervene as defendants in this matter under Rule 24 of the West Virginia Rules of Civil Procedure based on the following memorandum and its supporting documents:

INTRODUCTION

Katie Switzer is the mother of four young children, aged 5 and younger. Her two oldest are eligible for the Hope Scholarship Program. Likewise, Jennifer Compton is the mother of a child who is eligible for the Program this year. Both mothers ("Parent-Movants") will qualify for—and indeed will ***depend on***—the Program's education savings accounts. These Hope Scholarship Accounts can be used to purchase a variety of educational services, such as private school tuition, speech or occupational therapies, home-schooling supplies, transportation, or other necessities.

Plaintiffs' Complaint, however, seeks to enjoin the Hope Scholarship Program before it ever begins. Parent-Movants therefore apply to intervene in this case. They wish to defend the very Program they will depend on to afford the educational options that best fit their families.

Not only do Parent-Movants have a strong interest in defending their families' educational needs, but they also have a statutory right to intervene in this case: "It is the intention of the Legislature in the enactment of [the Hope Scholarship Program] that if any part of this article is challenged in court as violating either the state or federal constitution, the parents of eligible Hope Scholarship students should be deemed to have standing to be parties to such litigation, and should be permitted by the court to intervene if they are not already parties to such litigation." W. Va. Code § 18-31-13(b). Because Parent-Movants have an unequivocal statutory right to intervene, as well as a substantial interest in this litigation, their motion for intervention should be granted.

BACKGROUND

I. The Hope Scholarship Program

In the 2021 legislative session, West Virginia enacted HB 2013 to provide parents options to "better meet the individual education needs of [their] child." W. Va. Code § 18-31-5(a). Specifically, the bill creates the Hope Scholarship Program, through which an eligible child can receive a Hope Scholarship Account as an alternative to receiving an education in a West Virginia

public school. Parents can use the funds in these accounts for an array of qualifying expenses incurred for their child's education: private school tuition, online learning, after-school or summer learning programs, educational therapies (e.g., speech or behavioral therapy), homeschooling, travel costs, and more. W. Va. Code § 18-31-7(a). The amount of money deposited annually into a student's Hope Scholarship Account is equal to the "prior year's statewide average net state aid share allotted per pupil" in West Virginia's public schools, which is currently $4,624.29. W. Va. Code § 18-31-6(b); W.V. Dep't Educ., *Public Sch. Supp. Program: Basic State Aid Allowance on a Per Pupil Basis for the 2020–21 Year* 1 (Mar. 2021), https://wvde.us/wp-content/uploads/2021/03/State-Aid-Per-Pupil-21-Based-on-Adjusted-Net-Enrollment.pdf.

To be eligible for a Hope Scholarship Account, a student must be a resident of West Virginia and: (1) have been enrolled full-time in a West Virginia public elementary or secondary school the prior year; (2) be enrolled full-time and attending a West Virginia public elementary or secondary school for at least 45 calendar days at the time of application for a Hope Scholarship Account; or (3) be entering kindergarten. W. Va. Code § 18-31-2(5). A participating student continues to receive deposits in her account in future years until she graduates high school. W. Va. Code § 18-31-6(f)(4). Finally, if the number of students in the program does not reach five percent of net public school enrollment by 2024, then, beginning in the 2026 school year, the program becomes available to all West Virginia children, including those already attending private schools. W. Va. Code § 18-31-2(5)(B).

The Hope Scholarship Program does not use any funds appropriated or set aside for West Virginia's public schools. Rather, it is funded by a separate annual appropriation by the Legislature for the sole purpose of funding the program. W. Va. Code § 18-9A-25(a).

II. The Parent-Movants Will Benefit from the Hope Scholarship Program

Both parents seeking intervention are West Virginia mothers with young children who are eligible for the Hope Scholarship Program. Each mother wishes to use Hope Scholarship Account money to choose the education that best fits their family's needs.

A. Katie Switzer

Parent-Movant Katie Switzer lives in Morgantown and has four young children. Ex. A (Switzer Aff.) ¶¶ 1–2. Her two oldest children are eligible for Hope Scholarship Accounts: A.S., who is 5, and R.S., who is 4. *Id.* ¶ 2. Both A.S. and R.S. will be eligible to start kindergarten next school year. *Id.* ¶ 3.

Switzer believes that public schools will not be a good fit for her children. *Id.* ¶ 4. A.S. has thrived at a Montessori pre-school. *Id.* ¶ 5. He excels at focused work on a single project, and Switzer believes A.S. will benefit from the focus and student-directed learning that Montessori-style education offers. *Id.* Switzer is also concerned about reports of bullying in her local public schools. *Id.* ¶ 6. A.S.'s father had to withdraw from public school after being bullied, and Switzer would like to avoid that experience with A.S. *Id.* Switzer wants to use the Hope Scholarship Account money to send A.S. to a private kindergarten. *Id.* ¶ 7.

Switzer believes that R.S. will also benefit from a non-public-school environment. *Id.* ¶ 8. R.S. suffers from developmental apraxia of speech, a speech disorder that affects her ability to vocalize. *Id.* Switzer believes that R.S. would benefit from more individualized attention to and accommodation of her speech disorder than a public school could provide. *Id.*

R.S. is currently in speech therapy classes, which are expensive and place a strain on the family's finances. *Id.* ¶ 9. Switzer wishes to use the Hope Scholarship Account money to offset the costs of R.S.'s speech therapy. *Id.*

Affording both private school and speech therapy has been a struggle for the Switzer family. *Id.* ¶ 10. Although Switzer wanted to remain at home to raise her four children, she has had to return to work to afford speech therapy and preschool. *Id.* Without the Hope Scholarship Accounts, it would be impossible for Switzer to afford non-public education for all four children. *Id.* ¶ 11. To stretch their finances, she has considered homeschooling her children once they are all school age. *Id.* Were she to do so, the Hope Scholarship Program would also provide much needed home-school resources. *Id.*

B. Jennifer Compton

Parent-Movant Jennifer Compton lives in Albright with her two children: K.C., who just graduated from high school, and J.C., who is four and is in preschool. Ex. B (Compton Aff.) ¶¶ 1–2. J.C. will be eligible to use the Hope Scholarship Program to enter kindergarten next school year. *Id.* ¶ 3.

Compton believes that public school will not be a good fit for J.C. *Id.* ¶ 4. In preschool J.C. has struggled with sensory sensitivity, which has led to, among other things, a feeding disorder. *Id.* ¶ 5. To treat that disorder, J.C. received occupational therapy through West Virginia's early intervention program. *Id.* However, once he aged out of that program, Compton struggled to afford both therapy and K.C.'s private schooling. *Id.* ¶ 6. Without the Hope Scholarship Program, Compton's family would not be able to afford both non-public school and continued occupational therapy for J.C. *Id.* ¶ 7.

J.C.'s sensory sensitivity also means that noisy, large classrooms hinder his learning. *Id.* ¶ 8. K.C. had attended a private school, where Compton appreciated the small class sizes of around 15 children. *Id.* ¶ 9. J.C., however, recently attended a public preschool, where there were approximately 24 children in his class. *Id.* ¶ 10. This has caused behavioral problems for J.C. and has strained the resources of the teachers who must give him attention. *Id.* ¶ 8. Compton wishes to

use the Hope Scholarship Account to send J.C. to one of three nearby private schools where he can have small class sizes and more accommodation for his sensory sensitivity. *Id.* ¶ 13.

III. Procedural History

On January 19, 2022, Plaintiffs filed the Complaint in this matter. The Complaint seeks a declaration that the Hope Scholarship Program is unconstitutional and an injunction against its implementation. Compl., Prayer for Relief A–B. Specifically, Plaintiffs allege that the Hope Scholarship Program violates multiple sections of the West Virginia Constitution: Article 6, section 39, and Article 12, sections 1, 2, 4, and 5. *Id.* ¶¶ 67, 71, 80, 84. The named state Defendants have not yet responded to the Complaint. Movant-Intervenors now respectfully request intervention.

ARGUMENT

The Legislature has declared that "if any part of" the Hope Scholarship Program "is challenged in court as violating either the state or federal constitution, ***the parents of eligible Hope Scholarship students*** should be deemed to have standing to be parties to such litigation, and ***should be permitted by the court to intervene***." W. Va. Code § 18-31-13 (emphasis added). Furthermore, under West Virginia's liberal intervention standards, *see State ex rel. Ball v. Cummings*, 208 W. Va. 393, 403, 540 S.E.2d 917, 927 (1999); *see also Stern v. Chemtall Inc.*, 217 W. Va. 329, 337, 617 S.E.2d 876, 884 (2005), this Court should allow Parent-Movants to intervene in this case as a matter of right. As the intended beneficiaries of educational choice programs, parents are routinely granted leave to intervene when the constitutionality of such programs is challenged. Parent-Movants therefore have a right to intervene in this case, under both Section 18-31-13's statutory guarantee and West Virginia intervention law. And even if they are not entitled to intervene as of right, which the West Virginia Code makes clear they are, Parent-Movants meet the standards for permissive intervention.

I. The Parent-Movants Are Entitled to Intervene as of Right in this Action Under Both W. Va. Code § 18-31-13 and Rule 24.

Parent-Movants are entitled to intervene as a matter of right for two reasons. First and foremost, the Legislature has ***expressly*** granted Parent-Movants a statutory right to intervene in this case. And second, even without a statutory guarantee, Parent-Movants' interest in this litigation entitles them to intervene. Rule 24(a) provides that upon "timely application,"[1] an applicant is entitled to intervene in an action as of right if:

> (1) a statute "confers an unconditional right to intervene"; *or*
> (2) the applicant has an "interest relating to . . . the subject of the action," the "disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest," and the interest is not "adequately represented by existing parties."

W. Va. R. Civ. P. 24(a). Intervention is mandatory in either of these situations, *see id.* (providing that the applicant "shall be permitted to intervene"), and, here, both exist.

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[1] Here, there can be no questioning the timeliness of Parent-Movants' application, which comes a mere ***two days*** after the filing of this action. In fact, the Supreme Court of Appeals has allowed intervention ***months*** after the filing of an action, *Cummings*, 208 W. Va. at 399, 540 S.E.2d at 923 (holding intervention appropriate where application was filed nearly two months after the lawsuit), and intervention has typically been deemed untimely in only truly egregious situations. *E.g.*, *W. Va. Pub. Emps. Ins. Bd. v. Blue Cross Hosp. Serv., Inc.*, 180 W. Va. 177, 181–82, 375 S.E.2d 809, 813–14 (1988) (holding untimely an application filed three months after dismissal of an 8-year-old lawsuit); *Pauley v. Bailey*, 171 W. Va. 651, 653, 301 S.E.2d 608, 609 (1983) (holding untimely an application filed "almost one year after the evidentiary hearings had closed"). Needless to say, this is not such a situation. Rather, Parent-Movants' application comes well within the time for Defendants' answer or other responsive pleading, which has not yet been filed. *See* W. Va. R. Civ. P. 12(a)(1). Thus, no prejudice to the original parties or delay will result by virtue of their intervention at this point; rather, the case will continue to proceed on precisely the same schedule on which it has proceeded thus far. *See W. Va. Pub. Emps. Ins. Bd.*, 180 W. Va. at 181, 375 S.E.2d at 813 (considering, in assessing timeliness, "whether the underlying action had progressed to a point that intervention would substantially affect the parties to the original action").

A. Parent-Movants are entitled to intervene because W. Va. Code § 18-31-13(b) expressly confers that right.

First, a statute "confers an unconditional right to intervene" on Parent-Movants. W. Va. R. Civ. P. 24(a)(1). The legislation creating the Hope Scholarship Program specifically provides that "if any part of this article is challenged in court as violating either the state or federal constitution, the parents of eligible Hope Scholarship students should be deemed to have standing to be parties to such litigation, and should be permitted by the court to intervene if they are not already parties to such litigation." W. Va. Code § 18-31-13(b).

Here, Plaintiffs' lawsuit alleges that the Hope Scholarship Program violates the West Virginia Constitution. *See* Compl. ¶¶ 67, 71, 80, 84. And, as detailed above, Parent-Movants are parents of eligible Hope Scholarship students. Their children will be eligible for the Hope Scholarship Program when it begins awarding scholarships, and they intend to use the Hope Scholarship awards to place their children in the educational environments that best fit their families' needs. Switzer Aff. ¶¶ 2–3, 7; Compton Aff. ¶¶ 2–3, 13. Accordingly, they are entitled to intervene as of right in this case.

Because Parent-Movants have a statutory right to intervene, this Court's analysis can stop here. But out of an abundance of caution, Parent-Movants demonstrate below that they are also entitled to intervene as of right under West Virginia's liberal intervention standards.

B. Even if W. Va. Code § 18-31-13(b) did not confer a right to intervene, Parent-Movants would still have a right to intervene to defend their unique interests in this case.

Even if Section 18-31-13 did not provide an unconditional right to intervene—which it does—Parent-Movants 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." W. Va. R. Civ. P. 24(a)(2).

1. *Parent-Movants have a direct, substantial, and legally protectable interest in this action.*

First, Parent-Movants undoubtedly have an interest relating to this case: As the parents of children who are eligible to participate in the Program, they are its intended beneficiaries and thus have a strong interest in its continued existence. *See Zelman v. Simmons-Harris*, 536 U.S. 639, 649–53 (2002) (explaining that individual students—not schools—are the beneficiaries of programs like West Virginia's). That interest, moreover, is direct, substantial, and legally protectable. *SWN Prod. Co. v. Conley*, 243 W. Va. 696, 850 S.E.2d 695, 704 (2020).

The interest is direct because Parent-Movants will "either gain or lose by the direct legal operation and effect of the judgment to be rendered between the original parties." *Id.* (quoting *Cummings*, 208 W. Va. at 396, 540 S.E.2d at 920). If the Hope Scholarship Program is invalidated, as Plaintiffs wish, then Parent-Movants and their children will forever lose their opportunity to participate in it. In that light, courts have repeatedly held that the beneficiaries of a government program or law have the requisite interest to intervene as a matter of right when the 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 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").[2]

Parent-Movants' interest in this case is also substantial. The Hope Scholarship Program, after all, is designed to enable them to "better meet the individual education needs of [their] child[ren]." W. Va. Code § 18-31-5(a). In that regard, Parent-Movants' 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) (recognizing the right of parents "to control the education of their own"). The Program empowers them to exercise that liberty interest by providing them approximately $4,600 per child annually, so that Parent-Movants can best meet their children's needs. Parent-Movants' interest in the Program and its continued existence is unquestionably substantial.

Finally, Parent-Movants' interests are legally protectable. As explained above, the Legislature has created a legal right for Parent-Movants to intervene. *See* W. Va. Code § 18-31-13. That statutory right is a protectable legal interest. In addition, Parent-Movants have a constitutionally protected right to direct the education and upbringing of their children. *Pierce*, 268 U.S. at 534–35; *see also Lindsie D.L. v. Richard W.S.*, 214 W. Va. 750, 754, 591 S.E.2d 308, 312 (2003) ("Clearly, fit parents have the right to bring up their children as they choose."). Parent-Movants' interest in their fundamental right to bring up their children—a right of which they

[2] Because Rule 24 is based on Federal Rule of Civil Procedure 24, which is "substantially similar" to West Virginia's rule, West Virginia courts "giv[e] substantial weight to federal cases in determining the meaning and scope of" Rule 24. *Cummings*, 208 W. Va. at 399, 540 S.E.2d at 923 (quotation marks omitted).

cannot be deprived without due process—is a legally protectable interest that they should be permitted to defend. *See Texas v. United States*, 805 F.3d 653, 660–61 (5th Cir. 2015) (holding parent-applicants were entitled to intervention as of right where they "have an interest in directing the upbringing of their . . . children").

In short, Parent-Movants have the requisite interest to intervene as of right to defend the Hope Scholarship Program against a legal challenge, just as the Legislature recognized by giving them a statutory right to intervene.

2. *The disposition of this case may impair or impede Parent-Movants' ability to protect their interest.*

Second, an adverse ruling in this case will impair Parent-Movants' interests in the Hope Scholarship Program. "[I]n determining whether a proposed intervenor of right under West Virginia Rule of Civil Procedure 24(a)(2) is so situated that the disposition of the action may impair or impede [the movant's] ability to protect [her] interest, courts must first determine whether the proposed intervenor may be practically disadvantaged by the disposition of the action." *Cummings*, 208 W. Va. at 401, 540 S.E.2d at 925 (emphases omitted). "Courts then must weigh the degree of practical disadvantage against the interests of the plaintiff and defendant in conducting and concluding their action without undue complication and delay, and the general interest of the public in the efficient resolution of legal actions." *Id.*

It is beyond question that Parent-Movants "may be practically disadvantaged by the disposition of th[is] action": If the Hope Scholarship Program is enjoined, then Parent-Movants and their children, "the beneficiaries under the [Program,] would have no chance in future proceedings to have its constitutionality upheld," *Saunders v. Superior Ct.*, 510 P.2d 740, 741–42 (Ariz. 1973), and they will forever lose the educational opportunity that the Program affords them. Just as the intervenors in *Cummings* would lose the opportunity to protect their interests, 208 W.

Va. at 402, 540 S.E.2d at 926, here the Parent-Movants would lose their legal interest in benefitting from the Program. *See also Brumfield v. Dodd*, 749 F.3d 339, 345–46 (5th Cir. 2014) (holding parents have a right to intervene where their "access to [school] vouchers will be impaired" by an adverse ruling). Such "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), *cert. granted*, 141 S. Ct. 2883 (2021). Clearly it satisfies the requirements for intervention, as well. *See* 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.").

Moreover, Parent-Movants' defense of their legal interests does not come at the cost of delay or inefficiency. In *Cummings* the Court considered whether protection of a legal interest might create "undue complication and delay" in the litigation or compromise the "efficient resolution of legal actions." 208 W. Va. at 401, 540 S.E.2d at 925. Here, Parent-Movants are seeking to intervene at the earliest possible time—so early, in fact, that literally nothing has occurred in the case aside from the filing of the Complaint. *See supra* n.1. Their intervention will not delay or complicate anything. To the contrary, as intended beneficiaries of the Hope Scholarship Program, they have every desire for a prompt resolution of this action and will work cooperatively with the parties toward that end.

3. *Parent-Movants' interests are not adequately represented by the existing parties.*

Third, Parent-Movants' unique interest as parents and as beneficiaries of the Hope Scholarship Program is not adequately represented by the existing parties. The burden to satisfy

this requirement for intervention is "minimal." *Cummings*, 208 W. Va. at 403, 540 S.E.2d at 927. In fact, the movant "need only show that his claimed interest *may* not be adequately represented; no showing of actual inadequacy is required." *Id.* (emphasis in original). And even if the interests of a movant are similar to those of an existing party, the movant "ordinarily should be allowed to intervene unless it is clear that the [existing] party will provide adequate representation for the absentee." *Id.* (internal quotation marks omitted).

Here, the State Defendants have a different interest in this case than Parent-Movants do. The State, after all, has a duty to represent the broad interests of the general public. To that end, it must integrate its defense of the Hope Scholarship program with the State's overall approach to education policy. Parent-Movants, on the other hand, have a narrower, personal interest: They have determined that public schools are not the best options for their children. They thus have a particular private interest in preserving the availability of the Hope Scholarship Accounts that their families are eligible to receive. They likewise possess a unique liberty interest in "direct[ing] the upbringing and education of their children"—an interest the State Defendants obviously do not possess. *Pierce*, 268 U.S. at 534–35.

In such situations—where "a private person seek[s] to intervene of right in a legal action in which a government agency represents the public interest generally" and the movant "assert[s] some specialized or private interest"—intervention is warranted. *Cummings*, 208 W. Va. at 404, 540 S.E.2d at 928. In *Cummings*, for example, landowners who alleged that they were harmed by "the discharge of pollutants onto their land" sought to intervene alongside the West Virginia Division of Environmental Protection in a case concerning the Division's enforcement of the West Virginia Water Pollution Act. *Id.* at 405, 540 S.E.2d at 929. The Court held that intervention of right was required because the movants had asserted a "specialized or private interest" in abating

the discharge of pollutants, whereas the Division's interest was "broad and extend[ed] to representing the public" generally. *Id.* at 404, 540 S.E.2d at 928. The Court noted, for instance, that the State might agree to a settlement whereby discharges could continue for a period of time or simply be reduced, whereas the movants' private interest was in stopping the discharge altogether. *Id.* Thus, the Division did not adequately represent the movants' private interests.

Courts nationwide agree with *Cummings* that a governmental party representing the broad interests of the public does ***not*** adequately represent the more narrow and parochial interests of individuals. *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. ICC*, 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 that the Parent-Movants' interests can be adequately represented in this litigation is for them to be a part of it, as the Legislature intended.

Moreover, when the interests of a movant 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 v. United Mine Workers of Am.*, 404 U.S. 528, 539 (1972); *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.

Finally, Parent-Movants 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 Hope Scholarship

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 comprehend fully the repercussions of invalidating a program designed to empower West Virginia families to secure the education that will best meet their children's unique educational needs.

* * *

Parent-Movants have met the standard for intervention as of right. As beneficiaries of the Program challenged by this lawsuit, they have a legally protectable interest in this case. Disposition of this case may therefore impair their ability to benefit from the Program or protect their interests in it. And Parent-Movants' personal interests are not adequately represented by the State Defendants' more general policy interest in defending the Program. For those reasons, Parent-Movants should be allowed to intervene as a matter of right.

II. Alternatively, Parent-Movants Should Be Granted Permissive Intervention to Defend the Hope Scholarship Program.

As demonstrated above, Parent-Movants are entitled to intervene as of right to defend the Hope Scholarship Program. But if this Court disagrees, Parent-Movants apply for permissive intervention under Rule 24(b)(2), which gives courts discretion to grant intervention when "an applicant's claim or defense and the main action have a question of law or fact in common." *See also Stern v. Chemtall Inc.*, 217 W. Va. 329, 337, 617 S.E.2d 876, 884 (2005) (ordering intervention under Rule 24(b)(2) where it was "obvious to us that intervention should have been permitted due to the questions of law and fact in common between the parties"). In exercising this discretion, "the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." W. Va. R. Civ. P. 24(b). Here, Parent-Movants

satisfy the condition set forth in Rule 24(b), and intervention will not delay or prejudice adjudication of the current parties' rights.

First, for many of the reasons already discussed above, Parent-Movants' defenses of the Program share common questions of law and fact with this action. Indeed, the central question of law in this case is whether the Hope Scholarship Program is constitutional, and the interests of Parent-Movants and their children are inextricably linked with the question of the Program's constitutionality.

Second, permitting intervention will not "unduly delay or prejudice the adjudication of the rights of the original parties." W. Va. R. Civ. P. 24(b). Indeed, Parent-Movants 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 Hope Scholarship Program that only they—as the Program's beneficiaries—can provide.

Finally, Parent-Movants believe that the participation of their counsel will also assist this Court in its resolution of the issues before it. Parent-Movants' counsel successfully represented the parents in a U.S. Supreme Court case concerning a Montana educational choice 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 virtually 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. Parent-Movants respectfully request that they be permitted to do the same. Party status is necessary to ensure that the interests of the Hope Scholarship Program's beneficiaries are fully protected. Should the Program be invalidated in this case, Parent-Movants will forever lose the

opportunity to protect their interest in the greater educational opportunity and flexibility that the Program provides.

Accordingly, Parent-Movants Switzer and Compton respectfully request that this Court grant their motion to intervene as defendants and accept the accompanying answer for filing.

Respectfully submitted,

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**Pro hac vice motion to be filed*

Dated: January 21, 2022.

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of January, 2022, I served the foregoing *Parents' Motion to Intervene as Defendants* via U.S. First-Class mail on the following counsel for each party:

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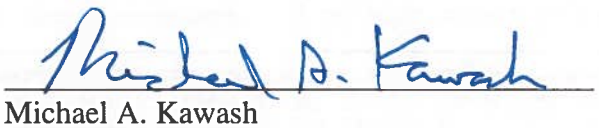

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