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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

EDWARD ALEXANDER; JOSH ANDREWS; SHELBY BECK ANDREWS; and CAREY CARPENTER

Plaintiffs,

v.

ACTING COMMISSIONER HEIDI TESHNER, in her official capacity, State of Alaska, Department of Education and Early Development,

Defendant,

v.

ANDREA MOCERI, THERESA BROOKS, and BRANDY PENNINGTON

Applicants for Intervention.

CASE NO: 3AN-23-04309CI

MOTION TO INTERVENE AS DEFENDANTS

ORAL HEARING REQUESTED

Applicants Andrea Moceri, Theresa Brooks, and Brandy Pennington (hereinafter "Applicants") move for leave to intervene as defendants in this action to assert the defenses set forth in their proposed answer, a copy of which is attached to this motion, on the grounds set forth below.

INTRODUCTION

Applicants are the parents of children who currently participate in Alaska's Correspondence Study Program ("Program"). The Program allows students to receive their education outside a traditional neighborhood public school when such a school is not available or where, as here, a traditional public school is not the best fit. Parents of eligible students receive financial allotments from their school district or the Department of Education & Early Development ("DEED"). Parents can then use the allotments to purchase "nonsectarian services and materials from a public, private, or religious organization." AS 14.03.310(b). Here, Applicant Moceri uses the allotment to help pay tuition for her son to attend Holy Rosary Academy in Anchorage. Applicant Brooks uses the allotment to help pay tuition for her daughter at Saint Elizabeth Ann Seton School ("SEAS") in Anchorage. Applicant Pennington also uses the allotment to send four of her children to SEAS. Although these are religious schools, the Program pays only for nonsectarian educational programs approved and overseen by DEED as integral to their education. Applicants depend on the funds from the Program to provide their children with the education right for them. If Plaintiffs succeed in having the Program invalidated under the Alaska Constitution's education clause, Applicants will be directly and materially harmed because their children will be denied an educational opportunity that the Program provides.

Applicants accordingly seek party status, as intervenor-defendants, to defend the constitutionality of the programs from which they benefit. They are entitled to intervene as of right under Civ.R. 24(a). Alternatively, they should be permitted to intervene under

Civ.R. 24(b). Indeed, parents of children participating in educational choice programs are routinely granted intervention to defend the programs when they are challenged in court. *See, e.g.*, *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (defense of choice program by parent-intervenors); *Metro. Gov't of Nashville & Davidson Cnty. v. Tenn. Dep't of Educ.*, 645 S.W.3d 141 (Tenn. 2022) (same); *Hart v. State*, 774 S.E.2d 281 (N.C. 2015) (same); *Magee v. Boyd*, 175 So. 3d 79 (Ala. 2015) (same); *Duncan v. State*, 102 A.3d 913 (N.H. 2014) (same); *Meredith v. Pence*, 984 N.E.2d 1213 (Ind. 2013) (same). This case is no different, and intervention is therefore warranted.

This motion is based upon the facts and law set forth herein; Applicants' affidavits, appended hereto as Appendices A through C and incorporated herein; and all the pleadings and other documents of record in this action. The motion is accompanied by Applicants' proposed answer to Plaintiffs' complaint, which Applicants proffer for filing should this motion be granted. Applicants request oral argument on this motion pursuant to Rule 77(e).

STATEMENT OF FACTS

I. Alaska's Correspondence Study Program

Alaska's Correspondence Study Program was created to address the unique challenges of providing education to children who live in America's biggest, most sparsely populated state. The Program allows school districts or DEED to provide "an annual student allotment to a parent or guardian of a student enrolled in the correspondence study program" to pay for "instructional expenses." AS 14.03.310(a). The parent or guardian may then purchase "services and materials" if:

(1) the services and materials are required for the course of study in the individual learning plan developed for the student under AS 14.03.300;

(2) textbooks, services, and other curriculum materials and the course of study
(A) are approved by the school district;
(B) are appropriate for the student;
(C) are aligned to state standards; and
(D) comply with AS 14.03.090 and AS 14.18.060; and

(3) the services and materials otherwise support a public purpose.[1]

Each student participating in the Program must receive an individual learning plan developed by their school district or DEED. The learning plan sets out a course of study and assessment plan for the individual student. AS 14.03.300. Additional regulations flesh out the duties of the correspondence school and set educational standards for students. *See generally* 4 AAC 33.421–.422. In the 2021–22 school year, over 21,000 students participated in the Program.[2] Depending on the school district and the grade level, a student may receive an allotment up to $4,500.[3]

II. Plaintiffs' Challenge To The Program

Plaintiffs—Edward Alexander, Josh Andrews, Shelby Beck, and Carey Carpenter (hereinafter "Plaintiffs")— filed this lawsuit on January 24, 2023, challenging the Program on state constitutional grounds. Specifically, Plaintiffs argue that the Program violates Article VII, Section 1 of the Alaska Constitution.

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[1] AS 14.03.310(b).
[2] Correspondence Enrollment by School and Year, https://tinyurl.com/32zewp7c.
[3] *See* AS 14.17.430 (mandating that that the Program be funded by multiplying the average daily membership of the Program by 90 percent); *see*, *e.g.*, Family Partnership Charter School - Enrollment, https://www.asdk12.org/Page/12077 (last visited Jan. 26, 2023) (setting out different allotment amounts for students depending on their grade level).

III. The Families

Applicants Andrea Moceri, Theresa Brooks, and Brandy Pennington are the parents of children who receive allotments under the Program that they use for private school tuition. As such, they are the Program's direct beneficiaries. They now seek leave to intervene in this case to defend the Program and their interests in it.

A. Andrea Moceri

Andrea Moceri is a single mother of a 14-year-old boy, G.M., who attends Holy Rosary Academy in Anchorage. Aff. of Andrea Moceri (Moceri Aff.), attached as Appendix A to Applicants' Mot. to Intervene, ¶ 2. G.M. attended his local public school until he finished sixth grade. *Id.* at ¶ 4. Andrea had become concerned about G.M. continuing to attend public school for a variety of reasons, including the student-teacher ratio, the quality of the curriculum, and drug use. *Id.* Andrea chose to enroll G.M. at Holy Rosary, both to address those problems and so that G.M. could receive a Catholic education. *Id.* at ¶ 5. Although Andrea is currently able to afford the tuition at Holy Rosary, she would face tremendous financial hardships if she were no longer able to receive the Program's allotment. *Id.* at ¶ 7.

B. Theresa Brooks

Theresa Brooks lives in Eagle River with her 12-year-old granddaughter, L.B., whom she legally adopted. Aff. of Theresa Brooks (Brooks Aff.), attached as Appendix B to Applicants' Mot. to Intervene, ¶¶ 1–2. Over the years, Theresa fostered several children with unique needs who she thinks would have benefited from the ability to go to a private school. *Id.* at ¶ 3. As with those children, Theresa believes that L.B. also benefits from

attending a nonpublic school. *Id.* at ¶ 5. In Theresa's view, the public schools are overcrowded, the curricular materials are inadequate, and the schools do not provide the proper structure to form good character. *Id.* at ¶¶ 5–6. For those reasons, as well as the fact that SEAS is a Catholic school, Theresa decided to send L.B. to nonpublic school. *Id.* at ¶ 6. Theresa believes that L.B. is thriving at her school, but she also believes that she would no longer be able to send L.B. to SEAS if she were no longer able to receive the Program's allotment. *Id.* at ¶ 8.

C. Brandy Pennington

Brandy Pennington is a mother of five who lives in Anchorage, Alaska. Brandy and her husband, Jordan, send four of their five children—L.P., age 12; D.P., age 10; A.P., age 7; and B.P., age 4—to SEAS. Aff. of Brandy Pennington (Pennington Aff.), attached as Appendix C to Applicants' Mot. to Intervene, ¶¶ 1–2. Brandy initially decided to send her children to SEAS because she was concerned that they would be discriminated against in public school. *Id.* at ¶ 4. Brandy also noticed that there were few disciplinary issues at SEAS and the students seemed engaged in their classes. *Id.* at ¶ 5. Additionally, though the Penningtons are not Catholic, Brandy appreciates SEAS's focus on ethics and character building. *Id.* For these reasons, Brandy believes that SEAS is the best fit for her children. *Id.* Without the allotment, the Pennington family is unlikely to be able to continue to send

their children to SEAS. They would only be able keep their children enrolled at SEAS by incurring great financial hardship. *Id.* at ¶ 7.

ARGUMENT

Applying the intervention rules liberally, as required under Alaska law, *Alaskans for a Common Language, Inc. v. Kritz*, 3 P.3d 906, 911–12 (Alaska 2000), this Court should allow Applicants to intervene in this case as a matter of right (Part I, below) or, alternatively, under the rules governing permissive intervention (Part II). Applicants are the intended beneficiaries of Alaska's Program. And as its intended beneficiaries, parents like Applicants are routinely granted leave to intervene when similar educational choice programs are challenged in court. Intervention is likewise warranted here.

I. Applicants, As The Intended Beneficiaries Of The Allotment Program, Are Entitled To Intervene As Of Right In This Action.

Applicants are entitled to intervene as a matter of right under Civ. R. 24(a). The Alaska Supreme Court "favor[s] allowing access to courts and will liberally construe Alaska Civil Rule 24(a)." *Kritz*, 3 P.3d at 912. Applicants are granted intervention as of right so long as they satisfy the following criteria:

> (1) the motion must be timely; (2) the applicant must show an interest in the subject matter of the action; (3) the applicant must show that this interest may be impaired as a consequence of the action; and (4) the applicant must show that the interest is not adequately represented by an existing party.

Id. at 911. As explained below, all these criteria are satisfied.

A. Applicants' Motion is Timely.

First, Applicants' motion is timely. In assessing the timeliness of a motion to intervene, Alaska courts consider:

> (1) the length of time the applicant knew or reasonably should have known that its interest was imperilled before it moved to intervene; (2) the foreseeable prejudice to existing parties if intervention is granted; (3) the foreseeable prejudice to the applicant if intervention is denied; and (4) [idiosyncratic] circumstances which, fairly viewed, militate for or against intervention.[4]

Here, each of these factors militates in favor of a finding of timeliness. First, this motion comes a mere day after this lawsuit was filed. Applicants learned of this case the day it was filed and now move to intervene less than a week later.

Second, there is no "prejudice to existing parties if intervention is granted." *Id.* The only thing that's happened so far is that the plaintiffs have filed their complaint; there have been no additional filings, no discovery, no hearings, no rulings, and the court has not set a date for "a trial or anything like a trial." *Scammon Bay Ass'n*, 126 P.3d at 145. Consequently, if Applicants are granted intervention, this case will continue to proceed on precisely the same schedule on which it has proceeded thus far.

Third, by contrast, there is grave and "foreseeable prejudice" to Applicants if intervention is denied. Applicants and their children are threatened by the lawsuit. The *purpose* of the lawsuit is to deprive Applicants and countless Alaska families of the Program funding that makes their children's educations possible. That threat is magnified by the Deputy Attorney General's repeatedly expressed and incorrect doubts about the Program's constitutionality, despite her obligation to defend the law.[5] As set out in

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[4] *Scammon Bay Ass'n, Inc. v. Ulak*, 126 P.3d 138, 143 (Alaska 2005).

[5] *See* Letter from Cori M. Mills, Deputy Attorney General, to Heidi A. Teshner, Acting Commissioner (July 25, 2022), *available at* https://education.alaska.gov/Alaskan_Schools/corres/pdf/07.25.22%20Correspondence%20Allotments%20Letter.pdf; *Deputy Attorney General's Opinion Provides Guidance to School Districts on Public Correspondence School*

Plaintiffs' Complaint, Alaska Attorney General Treg Taylor recused himself from all matters involving correspondence school allotments because of a conflict of interest. (Compl. ¶ 44.) Acting in his stead, Deputy Attorney General Cori Mills issued an opinion on the constitutionality of using correspondence school allotments to pay for services from private schools. (Compl. ¶ 46.) In her opinion, Deputy Attorney General Mills not only expressed doubts about the constitutionality of families using allotments in this manner, but expressly stated her view that "there would be a significant likelihood that use of allotments would be found unconstitutional" if, for example, a private school encouraged families to use allotments to offset tuition costs. (Compl. ¶ 52.) Applicants, who currently use allotments for private school tuition costs, will foreseeably be prejudiced if their interests are represented solely by a party that has publicly stated that such use is likely impermissible. By contrast, Applicants do not doubt the Program's constitutionality and will make a full-throated defense of the Program.

Finally, to the extent that there are idiosyncratic circumstances, they weigh heavily in Applicants' favor. As noted above, it is highly unusual for the government to repeatedly cast doubt on a law it is charged with defending. It may be that Applicants will be the only ones defending the constitutionality of a duly enacted law seeking to provide full educational opportunity for Alaska children. For all these reasons, Applicants' motion is timely.

Allotments and Private School Uses, July 25, 2022, https://law.alaska.gov/press/releases/2022/072522-SchoolsOpinion.html.

B. Applicants Have A Profound Interest In The Litigation.

Second, Applicants have more than the requisite interest to intervene as a matter of right. Alaska law simply requires that the interested be "direct, substantial, and significantly protectable." *State v. Weidner*, 684 P.2d 103, 113 (Alaska 1984).

Applicants, as the parents of children who receive allotments under the Program, are the intended beneficiaries of the Program, and thus have a direct interest in the Program's continued existence. 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 that program or law is challenged. *See, 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").[6]

Applicants' interest in the Program, moreover, 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). The very purpose of the Program, after all, is to empower parents and guardians to exercise this liberty interest. And, as noted, the very purpose of this legal challenge is to destroy the Program, deprive Applicants'

[6] The Alaska Supreme Court looks to the decisions of the federal courts in applying Rule 24, as Alaska's rule mirrors its federal counterpart. *See, e.g.*, *Scammon Bay Ass'n*, 126 P.3d at 143 ("We have relied before on federal practice in applying Rule 24").

children of their current education, and restrict Applicants' right to direct the upbringing of their children.

C. Applicants' Ability To Protect Their Interest Is Impaired Without Intervention.

Third, Applicants' interests will "be impaired as a consequence of the action." *Harvey v. Cook*, 172 P.3d 794, 800 (Alaska 2007). Indeed, impairment of Applicants' interest is not merely possible; it is a certainty if this Court grants Plaintiffs' requested relief. "If the law is struck down as unconstitutional," Applicants will be "unable to assert their alleged constitutional or actual financial interests" in the Program. *See Anchorage Baptist Temple v. Coonrod*, 166 P.3d 29, 34 (Alaska 2007) (holding that a church's interest in a tax exemption would be impaired due to a lawsuit seeking to strike down the exemption).

Applicants have weighty constitutional and financial interests in the Program: It empowers Applicants to "direct the upbringing and education of" their children, *Pierce*, 268 U.S. at 534–35, via the provision of financial aid. This litigation threatens those interests; if successful, Applicants will lose their aid, which enables them to choose the schools that will best serve their children's educational needs, as well as all future aid. "[A] lost opportunity to seek a government benefit"—including, specifically, participation in an educational choice program—is an "injury in fact" that satisfies 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), *rev'd on other grounds*, 142 S. Ct. 1987 (2022), and the more permissive standing rules of the Alaska Supreme Court. *See Kritz*, 3 P.3d at 912 n.16 (explaining that

"we broadly interpret standing requirements because we favor increased accessibility to judicial fora."). Finally, should the Program be held unconstitutional, Applicants and their children—who, again, are "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).

D. Applicants' Interests Are Not Adequately Represented By The Existing Parties.

Fourth, Applicants easily meet the "minimal" burden of establishing that existing parties "may" not adequately represent Applicants' interests. *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972) (holding that the burden under the analogous federal rule "should be treated as minimal"). Simply put, the interests of the Applicants and the state are starkly divergent for two reasons. First, Applicants seek to mount a full-throated defense of their interests in the Program, whereas the Deputy Attorney General has repeatedly criticized the Program, including Applicants' specific interests in it. Second, Applicants have a narrow and parochial interest in defending the ability of their children to benefit from the Program, including by receiving tuition for the private schools that they presently attend, whereas the state has a broader interest in defending its laws, including those governing education more generally.

On the first point, the Alaska Supreme Court case *Kritz* is apt. There, the sponsors of a ballot initiative sought to intervene in a lawsuit challenging the initiative precisely because the executive branch charged with defending the initiative had publicly opposed it. The Court held that there was inadequate representation because "the Attorney General's

Office questioned the constitutionality of the initiative." 3 P.3d at 913. Here, too, there is inadequate representation for the same reason. The Deputy Attorney General has repeatedly "questioned the constitutionality" of the Program and has described the part of the Program that directly benefits Applicants as "almost certainly unconstitutional." *See* Mills, *supra* p. 8, n.5. Even if the court judged that the state would defend the Program "energetically and capably," the court is precluded "from denying intervention as of right." *Id.* at 914.

A recent U.S. Supreme Court case reinforces *Kritz* and the "minimal" burden of satisfying the adequate representation prong set forth in *Trbovich*. In *Berger v. NAACP*, the Court reversed a ruling that required would-be intervenors to overcome a presumption that the governor "adequately represented" some legislators. 142 S. Ct. 2191, 2199 (2022). There, the NAACP sued North Carolina over a voter ID law that passed over the governor's objections. A group of legislators unsuccessfully sought to intervene to defend the law and ensure that the governor who vetoed it would not be the sole defender of a law he called unconstitutional. In reversing, the Court held that intervenors had a "minimal" burden to intervene and reversed the lower court's denial of intervention. When an intervenor's interest is not "identical" to the government, it is "normally . . . not enough to trigger a presumption of adequate representation." *Id.* at 2204.

As for the second point, the interest of the state is not sufficiently like that of the Applicants. Indeed, in a very real way, Applicants and the state are at odds. Parents have a fundamental liberty interest, protected by the Fourteenth Amendment's Due Process Clause, in directing the education of their children. And the Court has repeatedly held that

this liberty includes a parent's right to choose a private school for her child.[7] By contrast, even if the state acknowledges Applicants' rights, the state itself does not possess individual constitutional rights. Rather, it has a duty to represent the broad interests of the public and the legislative choices of the elected branches. Individual rights and the prerogatives of the state are two very different interests. To that end, the defense of the Program will be oriented around the state's overall approach to education, not around the individual rights of Parents like Applicants. In addition, on the facts, Applicants have a narrower, more parochial interest: They have determined that public education *does not work* for their children and, to that end, have a uniquely particular interest in preserving the allotments that their children receive and stand to receive in the future. Finally, the state has *already* demonstrated that its interests differ from Applicants': By arguing—like Plaintiffs—that it is unconstitutional for a school to fund a student's tuition, the

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[7] *Wisconsin v. Yoder*, 406 U.S. 205, 213–14 (1972) (recognizing "the right of parents to provide an equivalent education in a privately operated system" and that "the values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society"); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925) (recognizing the "liberty of parents and guardians to direct the upbringing and education of children under their control"); *id.* at 535 ("The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only."); *Meyer v. Nebraska*, 262 U.S. 390, 399, 400 (1923) (holding that the Due Process Clause protects the liberty "to acquire useful knowledge . . . and bring up children," including "the right of parents to engage [a private teacher] to instruct their children"); *see also Espinoza v. Mont. Dep't of Revenue*, ___ U.S.___, 140 S. Ct. 2246, 2261 (2020) ("[W]e have long recognized the rights of parents to direct 'the religious upbringing' of their children. Many parents exercise that right by sending their children to religious schools, a choice protected by the Constitution." (citation omitted)); *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) ("In a long line of cases, we have held that . . . the 'liberty' specially protected by the Due Process Clause includes the right[] . . . to direct the education and upbringing of one's children . . . ."); *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality) ("The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court.").

government has demonstrated that it is not committed to protecting Applicants' interest in receiving tuition funding.

But even if the government repudiated its past statements about the Program's constitutionality, its interests are still fundamentally different from those of Applicants. Indeed, courts nationwide have recognized the proposition that when an individuals' interests are narrower than the government's that the government does not adequately represent their interests. *See, e.g.*, *Berger*, 142 S. Ct. at 2203–04 (explaining that though an intervenor and the government "[a]t a high level of abstraction" may share the same interest, an applicant should be able to intervene because he is seeking relief "full stop" whereas the government has to "bear in mind broader public-policy implications" that may affect its defense of a law, and by extension, the intervenor's rights or interests); *Trbovich*, 404 U.S. 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" (cleaned up)); *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 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.”).[8] That is certainly true here: The only way Applicants’ 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. Past experience in educational choice litigation bears this assumption out. In *Arizona Christian School Tuition Organization v. Winn*, 563 U.S. 125, 131 S.Ct 1436. 179 L.Ed.2d 523 (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. In Tennessee, the state high court expressly credited parent-intervenors with advancing the prevailing argument that the government later adopted. *Metro. Gov’t of Nashville & Davidson Cnty. v. Tenn. Dep’t of Educ.*, 645 S.W.3d 141, 151 (Tenn. 2022). In *Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999), parent-intervenors—not

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[8] *See also 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)).

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. And in *Hart* v. *State*, 367 N.C. 775 (N.C. 2014), it was parent-intervenors—not the government—that obtained interlocutory relief ensuring that 2,000 students would not lose their scholarships after an adverse judgment from the trial court.

Finally, Applicants "seek to give voice to a different perspective" that is "not burdened by misgivings about the law's wisdom." *Berger*, 142 S. Ct. at 2205. For example, Applicants will provide testimony as to how the Program is meeting the unique educational needs of their children and of the severe, personal injury their children will suffer if the Program is enjoined, as Plaintiffs request. This Court should have that testimony to fully comprehend the repercussions of invalidating a program that has been empowering Alaska families to secure the education that will best meet their unique needs.

II. Alternatively, Applicants Should Be Granted Permissive Intervention To Defend The Program.

Applicants alternatively seek permissive intervention pursuant to Civ.R. 24(b). 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." Civ.R. 24(b). "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.* Applicants satisfy the conditions set forth in Civ.R. 24(b), and intervention will not delay or prejudice adjudication of the current parties' rights.

First, Applicants' 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 Program is constitutional, and the interests of Applicants and their children are inextricably linked with the question of the Program's constitutionality.

Second, Applicants have acted quickly to prevent any delay in this litigation. As noted above, their motion to intervene comes one day after the filing of Plaintiffs' complaint, and their participation will not prejudice the adjudication of the rights of the other parties. Rather, Applicants' participation will facilitate a thorough resolution of all issues in this case, providing a perspective on the Program that only they—the Program's beneficiaries—can provide.

Finally, Applicants believe that participation of their counsel will also assist this Court in its resolution of the questions before it. Applicants' counsel have represented intervening parents in the successful defense of over a dozen educational choice programs, at every level of federal and state court, including the U.S. Supreme Court.[9] Just this past

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[9] These programs include 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.*, 137 S. Ct. 2324 (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).

year, Applicants' counsel successfully represented intervening parents at the high courts of Tennessee and West Virginia, and counsel also presently represent parents in North Carolina.[10]

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. Applicants respectfully request that they be permitted to do the same. Party status is necessary to ensure that the interests of the Program's beneficiaries are fully protected. Should the Program be ruled unconstitutional in this case, Applicants will forever lose the opportunity to protect their interests. Particularly for this reason, Applicants seek leave to intervene as defendants.

WHEREFORE, Applicants respectfully request that this Court grant them leave to intervene as defendants in this case.

Dated this 26th day of January, 2023.

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[10] *Metro. Gov't of Nashville & Davidson Cnty. v. Tenn. Dep't of Educ.*, 645 S.W.3d 141 (Tenn. 2022); *State v. Beaver*, 2022 WL 17038564 (W. Va. Nov. 17, 2022); *Kelly v. State*, 878 S.E.2d 841 (N.C. Ct. App. 2022).

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**Pro Hac Vice* Applications To Be Filed

CERTIFICATE OF SERVICE

I certify that on this 26th day of January, 2023, a true and correct copy of the foregoing was served upon the following by e-mail:

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