IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
CIVIL DIVISION

GWEN FAULKENBERRY,
SPECIAL RENEE SANDERS,
ANIKA WHITFIELD, and
KIMBERLY CRUTCHFIELD,

PLAINTIFFS

v. **Case No. 60CV-24-4630**

ARKANSAS DEPARTMENT OF EDUCATION;
JACOB OLIVA, in His Official Capacity as Secretary
of the Arkansas Department of Education;

DR. SARAH MOORE, Chairwoman of the State Board
of Education; **KATHY MCFETRIDGE-ROLLINS**, Vice-Chair of the State
Board of Education; **LISA HUNTER**, **JEFF WOOD**, **RANDY HENDERSON**,
ADRIENNE WOODS, **KEN BRAGG**, and **LEIGH S. KEENER**,
Members of the Arkansas State Board of Education;

SARAH H. SANDERS, **GOVERNOR**
of the STATE OF ARKANSAS; and

The **ARKANSAS DEPARTMENT of FINANCE**
and ADMINISTRATION; and
JIM HUDSON, In His Official Capacity as
Secretary of the Arkansas Department of
Finance and Administration,

DEFENDANTS

MOTION TO INTERVENE AS DEFENDANTS AND BRIEF IN SUPPORT

For the reasons set forth below, Applicants Erika Lara, Katie Parrish, and Nikita Glendenning ("Applicants") respectfully move under Arkansas Rule of Civil Procedure 24 for leave to intervene as defendants in this action, based on the following:

1. The Arkansas Children's Educational Freedom Account Program, Ark. Code Ann. §§ 6-18-2501 to -2511 (the "EFA Program"), allows families with eligible students to receive Educational Freedom Accounts, or EFAs, to help them choose the best educational options for their children.

2. Applicants either currently participate in the Program and use EFA funds for their children's education or plan to participate as soon as their family becomes eligible next year.

3. On June 7, 2024, Plaintiffs filed a lawsuit challenging the EFA Program under the Arkansas Constitution. Among other requests, Plaintiffs seek an injunction prohibiting the State from distributing any EFA Program funds as planned to families in Arkansas, including Applicants.

4. Applicants are entitled to intervene as of right under Arkansas Rule of Civil Procedure 24(a)(2). As the direct beneficiaries of the EFA Program, they have a clear interest in using the EFA funds to pay for the education that best meets their children's needs, and Plaintiffs' request to take those funds away from Applicants would directly impair that interest. No existing party is able to adequately represent that unique and deeply personal stake in the EFA Program's continued existence.

5. Alternatively, Applicants should be permitted to intervene under Arkansas Rule of Civil Procedure (24)(b), because Applicants' interest in defending the EFA Program's constitutionality shares questions of law or fact in common with the central question in this case, which is whether the EFA Program is constitutional.

6. In support of their motion, Applicants submit the following Brief in Support, their affidavits in support (Attachments A–C), and their proposed answer, as required by Rule 24(c) (Attachment D).

7. Applicants therefore move the Court for an Order allowing the Applicants to intervene in this action; for a hearing on the motion to intervene, if it is opposed; and for such further relief to which they are entitled.

BRIEF IN SUPPORT OF MOTION TO INTERVENE AS DEFENDANTS

Applicants are the parents of children who are: (1) currently eligible for and have received accounts through the Arkansas Children's Educational Freedom Account Program, Ark. Code Ann. §§ 6-18-2501 to -2511 (the "EFA Program"); or (2) will become eligible for the EFA Program and intend to apply for accounts. The EFA Program awards Educational Freedom Accounts, or EFAs, to families such as Applicants who meet certain eligibility criteria. Families may use the account to pay for a broad array of educational expenses, such as private school tuition and fees, homeschooling curricula, fees for courses and examinations for college credit or career training, and fees for examinations for industry-based credentials. *Id.* § 6-18-2503(11).

The Plaintiffs' lawsuit seeks to invalidate the EFA Program, enjoin any further implementation of it, and recoup account funds that families have already received under it. Compl. at 34. Families like Applicants—the intended and direct beneficiaries of the EFA Program—thus have the most to lose should the Plaintiffs prevail.

Applicants accordingly seek party status, as intervenor-defendants, to defend the constitutionality of the program from which they stand to benefit. They are entitled to intervene as of right under Arkansas Rule of Civil Procedure 24(a)(2). Alternatively, they should be permitted to intervene under Rule 24(b)(2). Indeed, parents of children participating in educational choice programs are routinely granted intervention to defend the programs when they are challenged in court. *See infra* pp. 19–20. This case is no different, and intervention is therefore warranted.

STATEMENT OF FACTS

I. The EFA Program

The EFA Program provides families with more choices for their children's education. Participation is optional, and families can continue to attend their traditional public school for free. If, however, a family decides that their assigned public school is not the best option for their child, that student may be eligible for an EFA to help them choose other educational options.

For the 2023–24 school year, the first year of the EFA Program, parents and guardians were able to use their EFA funds to pay tuition and fees at a nonpublic school, as well as certain related expenses such as school uniforms, standardized testing, and required school supplies. Ark. Code Ann. § 6-18-2503(11)(A). For the 2024–25 school year and thereafter, families are able to use their EFA accounts for a broader array of educational expenses, including homeschooling curricula, tutoring, fees for courses and examinations for college credit or career training, fees for examinations for industry-based credentials, and services by licensed or accredited providers for students with disabilities. *Id.* § 6-18-2503(11)(B).

Each student's EFA receives funds equal to ninety percent of the prior year's statewide foundation funding per student. *Id.* § 6-18-2505(a)(1). The EFA Program, however, does not use any funds set aside for public schools. Instead, it creates a separate treasury account in the books of the Treasurer, Chief Fiscal Officer, and Auditor of the State, which is funded through separate appropriations that the Department of Education and Governor must request each year. *Id.* § 19-5-1277(a)–(b).

The EFA Program phases in eligibility over three years. In year one (2023–24), eligibility extended to entering kindergarteners, children experiencing homelessness or living in foster homes, the children of active-duty uniformed service personnel, and children attending certain

low-performing public schools. *Id.* § 6-18-2506(a)(3)(A)(i). The Program also capped overall participation in the 2023–24 school year at 1.5% of the total public-school enrollment for 2022–23, *id.* § 6-18-2506(a)(3)(A)(ii), in all about 7,148 participants.[1]

In year two (2024–25), eligibility expands to children in additional low-performing schools, as well as to the children of veterans, military reservists, first responders, and law enforcement officers. *Id.* § 6-18-2506(a)(3)(B)(i). The cap on overall participation also expands to 3.0% of total 2022–23 public-school enrollment, or about 14,297 participants total. *Id.* § 6-18-2506(a)(3)(B)(ii). Finally, in year three and after, the program becomes universal: all students in Arkansas will be eligible and there will be no cap on overall participation. *Id.* § 6-18-2506(a)(3)(C).

II. Plaintiffs' Challenge To The EFA Program

Plaintiffs filed this lawsuit on June 7, 2024. They allege that the EFA Program lacks constitutional authorization (Count I), uses money from the "public school fund" (Count II), diverts local tax revenues (Count III), funds EFAs with funds formerly distributed to traditional public schools (Count IV), and effects "illegal exactions" (Count V). *See* Compl. ¶¶ 61–90.

Based on these claims, Plaintiffs ask this Court to declare the program unconstitutional and issue an injunction prohibiting the State from distributing any EFA Program funds as planned to families in Arkansas, including to Applicants. Compl. at 34. Plaintiffs also request that this Court order repayment of all funds already paid through the EFA Program. *Id.*; *see also id.* ¶ 90.

[1] Ark. Dep't of Educ. Data Ctr., *Arkansas K–12 Profile: 2022–2023*, *available at* https://web.archive.org/web/20230819150651/https:/adedata.arkansas.gov/ark12 (K-12 enrollment of 476,579 students).

III. Applicants Are Parents Who Use Or Soon Will Use The EFA Program

As noted above, Applicants are the parents of children who are already participating in the EFA Program or who will soon become eligible and intend to participate.

A. Erika Lara

Erika Lara is a resident of Little Rock. *See* Aff. of Erika Lara ("Lara Aff.") ¶ 1 (filed herewith at Attachment A). She is a single mother of two children. *Id.* ¶ 2. Her oldest son, I.R., just finished sixth grade. *Id.* He is on the autism spectrum and has had an Individualized Education Program under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 *et seq.* Lara Aff. ¶ 3. Her younger son, D.R., just finished third grade. *Id.* ¶ 2.

I.R. attended public school from kindergarten through fifth grade. *Id.* ¶ 3. He started sixth grade at his local public school, as well, but it was not a good fit for his needs. *Id.* ¶ 4. It was much larger than the public school he had previously attended, and he immediately experienced problems. *Id.* ¶ 4. He was bullied almost daily, and Erika felt like the school had little control over the students. *Id.* She also felt like the education I.R. was receiving had little regard for his individual needs and abilities. *Id.* I.R. was unhappy and did not want to go to school. *Id.*

Midway through I.R.'s sixth-grade year, Erika learned about the EFA Program. *Id.* ¶ 5. She applied for and received an EFA account for I.R., which she used to send him to St. Theresa Catholic School for the second half of his sixth-grade year. *Id.* The difference was striking. The school was smaller overall, and the class sizes were smaller. *Id.* ¶ 6. Unlike his previous school, which rarely had homework, there was daily homework at St. Theresa. *Id.* ¶ 6. Erika realized right away that I.R. was behind in reading and other academic skills compared to other students at St. Theresa, but the school has been working with him to catch up, and he has made great progress. *Id.* ¶ 7. Erika is extremely happy with the education he is receiving now. *Id.* I.R. is

happier now, too. *Id.* ¶ 8. Recently, while I.R. was working on a lot of homework for St. Theresa, Erika joked with I.R. about going back to his hold school, and he quickly answered, "No!" *Id.*

Erika's other son, D.R., still attends public school. *Id.* ¶ 9. She plans to keep him in public school for the fourth and fifth grade. *Id.* When the eligibility for the EFA Program expands, Erika plans to use the EFA Program to send D.R. to St. Theresa starting in the sixth grade. *Id.*

Without the EFA Program, Erika could not afford to continue sending I.R. to St. Theresa, and she would not be able to send D.R. there when he enters sixth grade. *Id.* ¶ 10. This would be devasting for her family. *Id.* ¶ 11. St. Theresa is the best fit for I.R.'s educational needs, and Erika believes it will be the best fit for D.R. when he reaches sixth grade, too. *Id.* If the EFA Program is struck down, as the Plaintiffs request, Erika will not be able to provide I.R. and D.R. with the education that she knows will best meet their needs. *Id.*

B. Katie Parrish

Katie Parrish is a resident of Paragould. *See* Aff. of Katie Parrish ("Parrish Aff.") ¶ 1 (filed herewith at Attachment B). She is a public charter-school teacher, and her husband works in IT. *Id.* ¶ 2. Katie and her husband have one child, J.P. *Id.* ¶ 3. J.P., who has been diagnosed with autism and ADHD, is a rising sixth grader at Arrows Academy. *Id.* ¶¶ 3, 6.

J.P. attended preschool at his local public school so that he could receive speech therapy. *Id.* ¶ 4. But in kindergarten and continuing through first grade, it became clear that J.P.'s local public school was not a good fit. J.P. struggled in the classroom and his teachers often sent him to the principal's office. *Id.* Katie felt that many of J.P.'s needs were not being met in that setting. *Id.* Katie and her husband tried virtual schooling for J.P.'s second-grade year and then homeschooled him for third and fourth grade. *Id.* ¶ 5. This was an improvement, but they still

worried about the lack of socialization for J.P. in the homeschool setting, because he is an only child. *Id.* ¶ 5.

For fifth grade, they enrolled J.P. at Arrows Academy, a specialized microschool that combines individualized instruction with therapy for children with autism. *Id.* ¶ 6. J.P. has thrived in that environment. *Id.* Both his academics and his ability to manage conversations have improved a lot. *Id.* It also helps Katie's family a lot that J.P. is able to receive much of his therapy in the same setting as his academics. *Id.*

Katie and her husband use the EFA Program to pay for tuition at Arrows. *Id.* ¶ 8. It is important to Katie, as a parent and educator, to recognize that every child is different, and for parents to have the ability to try to choose the educational option that will be the best fit their child's needs. *Id.* ¶ 7. For J.P., Arrows Academy provides the best fit for his education, and the EFA Program helps her family to afford tuition there while still being able to afford the other support that J.P. needs. *Id.* ¶¶ 7–8. If the EFA Program is invalidated, it would impose a financial burden on Katie and her husband and make it harder for them to afford to provide as much support to J.P. as they are currently able to provide. *Id.* ¶ 9.

C. Nikita Glendenning

Nikita Glendenning is a resident of Van Buren. *See* Aff. of Nikita Glendenning ("Glendenning Aff.") ¶ 1 (filed herewith as Attachment C). She has four children. Her oldest, V.G., is in college. *Id.* ¶ 2. Her next oldest—her son M.G.—is a rising senior attending a public high school. *Id.* Her daughter A.G. is nine years old and is the equivalent of a rising fourth grader. *Id.* And her youngest child—her son I.G.—is seven years old and is the equivalent of a rising second grader. *Id.*

The education of Nikita's children has always been extremely important to her. *Id.* ¶ 3. She has used a combination of homeschooling, private school, and public school, depending on the options available to her and what would best meet each child's unique needs at any given time. *Id.*

With her oldest son, for example, Nikita initially placed him in kindergarten at their local public school, but that was not a good fit for him. *Id.* ¶ 4. He was not engaged by the academic material and struggled with the restrictive classroom structure. *Id.* Nikita and V.G.'s father therefore moved him to a private Montessori school for several years, which was a better fit for his personality and academic needs. *Id.*. When V.G. was older, V.G.'s father homeschooled him for a year, and then he and Nikita sent V.G. to public school for several years. *Id.* V.G. homeschooled again for part of the pandemic, and later obtained his GED and attended college early. *Id.*

After the experience with Nikita's oldest son, Nikita and her ex-husband used a similar strategy for M.G. *Id.* ¶ 5. He attended a private Montessori school for several years and was homeschooled for a couple of years. *Id.* Because Nikita and her ex-husband felt that M.G. was a better fit for public school, they chose to send him to public school starting in the fifth grade. *Id.*

Nikita currently homeschools A.G. and I.G. *Id.* ¶ 6. Homeschooling them is important to Nikita because she can provide them with personalized instruction that is tailored to their specific needs. *Id.* This often means covering more material at a faster pace, because they do not need to wait for an entire group or class, but also having more time, focus, and flexibility to cover subjects that they may struggle with. *Id.* And because the instruction is based on their specific needs and interests, A.G. and I.G. can play a more active role in deciding what Nikita focuses on

with them; this sense of control keeps them engaged with the material and strengthens their love of learning. *Id.*

A.G. and I.G. will be eligible for Educational Freedom Accounts for the 2025–26 school year, when the program becomes universal. *Id.* ¶ 7. Nikita will apply for accounts for both of them in order to support their homeschooling education. *Id.*

After paying for the basics, like books and homeschooling curricula, there are often additional opportunities or options that Nikita cannot currently consider because of their cost. *Id.* There are times, for example, when Nikita would like to be able to use supplemental curriculum materials or specialized tutoring. *Id.* The choices and flexibility provided by the EFA Program would make an enormous difference for Nikita's family and for her ability to provide A.G. and I.G. with an education that is best tailored to their specific needs. *Id.* If, however, the Program is invalidated, as Plaintiffs request, she would not be able to provide them with many of the additional services and learning materials that she knows can greatly enhance their learning experience. *Id.* ¶ 8.

ARGUMENT

This Court should allow Applicants to intervene as a matter of right or, alternatively, under the rules governing permissive intervention. Courts construe intervention rules "liberally, with all doubts resolved in favor of the proposed intervenor." *Nat'l Parks Conservation Ass'n v. EPA*, 759 F.3d 969, 975 (8th Cir. 2014) (citation omitted).[2] Here, Applicants are the intended beneficiaries of the EFA Program that this lawsuit seeks to halt. And as the intended

[2] Because the federal intervention rule "is identical in relevant part" to the Arkansas rule, Arkansas courts "look to federal interpretation of that rule as persuasive authority." *Cherokee Nation Businesses, LLC v. Gulfside Casino P'ship*, 2021 Ark. 17, at 6 n.4, 614 S.W.3d 811, 815 n.4.

beneficiaries of such programs, parents like Applicants are routinely granted leave to intervene when educational choice programs are challenged in court. Intervention is likewise warranted here.

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

Applicants are entitled to intervene as a matter of right under Arkansas Rule of Civil Procedure 24(a)(2). A court "ruling on a motion to intervene must accept as true all material allegations in the motion to intervene and must construe the motion in favor of the prospective intervenor." *Nat'l Parks Conservation Ass'n*, 759 F.3d at 973. In addition to a "threshold timeliness requirement," Rule 24(a)(2) has three requirements for intervention as of right:

> (1) the applicant must have a recognized interest in the subject matter of the primary litigation; (2) the applicant's interest might be impaired by the disposition of the suit; and (3) the applicant's interest is not adequately represented by existing parties.

Bayer Cropscience, LP v. Hooks, 2022 Ark. 29, at 5, 638 S.W.3d 274, 278. "If a putative intervenor satisfies all three factors, intervention cannot be denied." *Cherokee Nation Businesses, LLC v. Gulfside Casino P'ship*, 2021 Ark. 17, at 6, 614 S.W.3d 811, 815. As explained below, all these criteria are satisfied.

A. Applicants Satisfy The Threshold Timeliness Requirement.

First, Applicants' motion is timely. When, as here, "little or no litigation has ensued, timeliness is generally not a consideration." *UHS of Ark., Inc. v. City of Sherwood*, 296 Ark. 97, 104, 752 S.W.2d 36, 39 (1988). As the Arkansas Supreme Court held in *UHS of Arkansas*, it "would not be reasonable" to find untimeliness when the motion to intervene was filed "only twenty-three days after the petition was filed and only three days after the answer was filed," and

where "[n]o discovery had been conducted, no depositions [had been] taken and no hearings had been held." *Id.*

As in *UHS of Arkansas*, timeliness here is not a close call. Applicants moved to intervene just 11 days after Plaintiffs filed their complaint, and the lawsuit has not progressed in any meaningful sense. *See Mille Lacs Band of Chippewa Indians v. Minnesota*, 989 F.2d 994, 999 (8th Cir. 1993) (holding motion filed "eighteen months after suit had been commenced and nine months after the deadline for filing motions to add parties" was timely where "the legal proceedings were still at a preliminary stage"). Indeed, this motion comes well within the thirty-day deadline for Defendants' answer or other responsive pleading, *see* Ark. R. Civ. P. 12(a)(1), which has not yet been filed. Courts routinely recognize that motions to intervene during the pleadings are timely. *See UHS of Ark.,* 296 Ark. at 104, 752 S.W.2d at 39; *Bayer Cropscience, LP*, 2022 Ark. 29, at 7, 638 S.W.3d at 279 (holding there was "no appreciable delay" where motion was filed "just twenty days" after plaintiffs filed their complaint).

B. Applicants Have An Interest In The Litigation.

Second, Applicants have the necessary interest to intervene as a matter of right. A proposed intervenor must have "a recognized interest in the subject matter of the litigation," that is, one that is "direct," "substantial," and "legally protectable." *Cherokee Nation Businesses, LLC*, 2021 Ark. 17, at 6–7, 614 S.W.3d at 815–16 (quoting *United States v. Union Elec. Co.*, 64 F.3d 1152, 1161 (8th Cir. 1995)).

Applicants here are parents of children who are currently using, or will soon become eligible for and intend to use, EFAs under the program. This proceeding therefore will have a "direct" and "substantial" effect on whether Applicants will be able to exercise their legal rights to use and direct their EFA funds to pay for their children's educational expenses. *See, e.g.*,

Bayer Cropscience, LP, 2022 Ark. 29, at 7, 638 S.W.3d at 279 (holding interest satisfied where "putative intervenor had only a monetary interest in the outcome of the litigation"); *Certain Underwriters at Lloyd's, London v. Bass*, 2015 Ark. 178, at 15, 461 S.W.3d 317, 326 (holding interest satisfied where lawsuit sought to void contracts to which putative intervenors were parties); *Nat'l Parks Conservation Ass'n*, 759 F.3d at 976 (holding "financial stake in the litigation" satisfies interest requirement).

Moreover, courts have repeatedly held that the beneficiaries of a government program or law, like Applicants here, have the requisite interest to intervene as a matter of right when that program or law is challenged. *See, e.g.*, *Texas v. United States*, 805 F.3d 653, 660 (5th Cir. 2015) (allowing immigrant parents to intervene as the "intended beneficiaries of the challenged federal policy" deferring deportation of parents of U.S. citizens (citation omitted)); *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"); *Fresno County 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").

Finally, Applicants' interest in the EFA Program is also 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); *cf. Texas v. United States*, 805 F.3d at 660 (holding interest requirement satisfied in part because policy of deferring deportation of parents with U.S.-citizen children impacted parents' "legally protected liberty interest" in "directing the upbringing" of their children). The very purpose of the Program, after all, is to empower parents and guardians to exercise this liberty interest. For all these reasons, Applicants have the requisite interest to intervene as of right.

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

Third, "disposition of the action may as a practical matter impair or impede [Applicants'] ability to protect [their] interest." *Cherokee Nation Businesses, LLC*, 2021 Ark. 17, at 5–6, 614 S.W.3d at 815 (quoting Ark. R. Civ. P. 24(a)(2)). The rule "does not require" prospective intervenors to "demonstrate to a certainty that their interests *will* be impaired in the ongoing action," only that they "*may* be" impaired. *Union Elec. Co.*, 64 F.3d at 1161–62 (internal quotation marks omitted); *see also Bayer Cropscience, LP*, 2022 Ark. 29, at 5, 638 S.W.3d at 278 (holding rule requires showing that interest "might be" impaired).

Here, impairment of Applicants' interest is not merely possible; it is a certainty if Plaintiffs receive the relief they are requesting. Erika Lara and Katie Parrish have already been using their children's EFA funds to pay for their education, and Nikita Glendening intends to do the same when her children soon become eligible for the program. Yet if this Court grants Plaintiffs' requested relief, Applicants will receive nothing. Loss of a government benefit—indeed, even "a lost opportunity to seek a government benefit"—is an "injury in fact" that

satisfies even the more stringent Article III standing requirements of the U.S. Constitution. *Carson v. Makin*, 979 F.3d 21, 31 (1st Cir. 2020), *rev'd on other grounds*, 596 U.S. 767 (2022).

Finally, should the EFA 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 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.").

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

Fourth, Applicants' interests are not "adequately represented by existing parties." *Cherokee Nation Businesses, LLC*, 2021 Ark. 17, at 6, 614 S.W.3d at 815 (quoting Ark. R. Civ. P. 24(a)(2)). "The burden of persuasion to demonstrate adequacy of representation falls on the party *opposing* intervention." *Matson, Inc. v. Lamb & Assocs. Packaging, Inc.*, 328 Ark. 705, 709, 947 S.W.2d 324, 326 (1997) (emphasis added); *accord Cherokee Nation Businesses, LLC*, 2021 Ark. 17, at 9, 614 S.W.3d at 817. Here, Plaintiffs cannot show that the State Defendants will adequately represent Applicants' interest.

Representation is adequate when a current party's interest "is identical to, or not significantly different from, that of the proposed intervenor." *Matson, Inc.*, 328 Ark. at 710, 947 S.W.2d at 326. "[W]here those interests are disparate, even though directed at a common legal goal, intervention is appropriate." *Union Elec. Co.*, 64 F.3d at 1170 (internal marks omitted); *see*

also Certain Underwriters, 2015 Ark. 178, at 17, 461 S.W.3d at 327 (party opposing intervention could not meet burden of persuasion based on putative intervenors having same counsel and raising same defenses as existing defendants).

Here, the Applicants and the State have dissimilar interests. The State, after all, has a duty to represent the broad interests of the public and, to that end, must integrate its defense of the Program with the State's overall approach to education. Applicants, on the other hand, have a narrower, more parochial interest: They have determined that public education is not the best fit for their children and, to that end, have a uniquely particular interest in preserving the EFAs that their children have already or soon will receive. Applicants 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 the government's "broader responsibility" to represent the interests of the public diverges from a private party's "narrow and parochial" interests. *Nat'l Parks Conservation Ass'n*, 759 F.3d at 977 (observing that government party would "shirk its duty were it to advance the narrower interest of a private entity" (internal quotation marks omitted)); *see also Mille Lacs Band*, 989 F.2d at 1001 (holding counties and landowners had "narrower and more parochial interests" than the state in defending against tribe's claimed hunting and fishing rights); *Bayer Cropscience, LP*, 2022 Ark. 29, at 8, 638 S.W.3d at 279–80 (holding state board defending herbicide regulation did not adequately represent interest of manufacturer selling herbicide under the regulation). Because of these distinct interests, individual beneficiaries of a program or law are not adequately represented by the government in lawsuits challenging the program. *See, e.g.*, *Trbovich v. United Mine Workers of Am.*, 404 U.S. at 538–39 (holding Secretary of Labor's "interest in assuring free and democratic union elections . .

. transcends the narrower interest of" intervening union member (citation omitted)); *Californians for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1190 (9th Cir. 1998) (holding union "demonstrated that the representation of its interests" by government defendants "may have been inadequate" because union members' interests in prevailing wage law "were potentially more narrow and parochial than the interests of the public at large").[3] That is true here: The only way Applicants' interests can be adequately represented in this litigation is for them to be a part of it.

Moreover, these distinct interests between the Applicants and the State "may not always dictate precisely the same approach to the conduct of the litigation." *Trbovich*, 404 U.S. at 539. Indeed, past experience in educational choice litigation confirms that the government and participating families often take different litigation approaches and present different 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.

[3] *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) (holding government's "numerous complex and conflicting interests" meant applicants' "parochial interests . . . may not be adequately represented" (internal quotation marks omitted)).

In *Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999), parent-intervenors—not the state—urged and persuaded 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. In *Hart v. State*, 772 N.E.2d 855 (N.C. 2014), it was parent-intervenors—not the government—who obtained interlocutory relief ensuring that 2,000 students would not lose their scholarships after an adverse judgment from the trial court. And parent-intervenors' argument about interpreting Tennessee's Home Rule Amendment, a position that the state only later embraced, proved decisive to upholding that state's program. *See Metro. Gov't of Nashville & Davidson Cnty. v. Tenn. Dep't of Educ.*, 645 S.W.3d 141, 151–52 (Tenn. 2022) (noting that "Intervenors, and now the State as well," had advanced the argument).

Finally, speaking to practical concerns, Applicants can provide insights into the issues that the current parties lack. *See Bayer Cropscience, LP*, 2022 Ark. 29, at 8, 638 S.W.3d at 279 (holding, in suit challenging state board's herbicide regulation, that herbicide manufacturer was in position to defend the information that persuaded board to adopt regulation); *Nat'l Parks Conservation Ass'n*, 759 F.3d at 977 (noting proposed intervenor's "expertise" about the issues in dispute). Simply put, without Applicants, this case will not include those with the most to lose if Plaintiffs prevail—the Program's intended beneficiaries. For example, Applicants will provide testimony as to how the EFA Program will help them meet the unique educational needs of their children and of the injury their families 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 designed to empower Arkansas families to secure the education that will best meet their individual needs.

For these reasons, intervention as of right is warranted.

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

Applicants alternatively seek permissive intervention under Arkansas Rule of Civil Procedure 24(b)(2). 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." Ark. R. Civ. P. 24(b)(2). "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 in Rule 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 here is whether the EFA 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. As noted above, their motion to intervene comes within 11 days of 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 EFA 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.[4] In fact, they have successfully defended parental choice in education five times at the U.S. Supreme Court alone. *See Carson v. Makin*, 596 U.S. 767 (2022); *Espinoza v. Mont. Dep't of Revenue*, 591 U.S. 464 (2020); *Doyle v. Taxpayers for Pub. Educ.*, 582 U.S. 950 (2017) (mem.); *Ariz. Christian Sch. Tuition Org.*, 563 U.S. 125 (2011); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). And they are currently representing intervening parents in the defense of Tennessee's education savings account program, Utah's education savings account program, Ohio's voucher programs, and Alaska's correspondence program.

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 here. Party status is necessary to ensure that the interests of the EFA Program's beneficiaries are fully protected.

[4] These programs include 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); 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); Douglas County, Colorado's voucher program, *Doyle v. Taxpayers for Pub. Educ.*, 582 U.S. 950 (2017) (mem.); West Virginia's educational savings account program, *State v. Beaver*, 887 S.E.2d 610 (W. Va. 2022); Tennessee's education savings account program, *Metro. Gov't of Nashville & Davidson Cnty. v. Tenn. Dep't of Educ.*, 645 S.W.3d 141 (Tenn. 2022); 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); New Hampshire's education savings account program, *Howes v. Edelblut*, No. 217-2022-CV-01115 (N.H. Super. Ct. Nov. 13, 2023); Indiana's voucher program, *Meredith v. Pence*, 984 N.E.2d 1213 (Ind. 2013); Arizona's education 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).

Should the Program be ruled unconstitutional here, Applicants will forever lose the opportunity to protect their interests.

Applicants therefore respectfully request that this Court grant them leave to intervene as defendants.

Dated this 18th day of June 2024.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 18, 2024, a true and correct copy of the above Motion to Intervene and all submitted attachments, was filed with the Clerk of the Court via electronic filing, which provided electronic service upon all attorneys of record; for the Defendants listed below, service of documents will be completed via process server.

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