No. 21-1912

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ORANGEBURG COUNTY SCHOOL DISTRICT; SOUTH CAROLINA STATE CONFERENCE OF THE NAACP,

Movants-Appellants,

v.

BISHOP OF CHARLESTON, a Corporation Sole, d/b/a Roman Catholic Diocese of Charleston; Sole; SOUTH CAROLINA INDEPENDENT COLLEGES AND UNIVERSITIES, INC.,

Plaintiffs - Appellees,

and

MARCIA ADAMS, in her official capacity as the Executive Director of the South Carolina Department of Administration; BRIAN GAINES, in his official capacity as budget director for the South Carolina Department of Administration; HENRY MCMASTER, in his official capacity as Governor of South Carolina,

Defendants - Appellees,

and

STATE OF SOUTH CAROLINA,

Intervenor/Defendant - Appellee.

On appeal from the U.S. District Court
for the District of South Carolina
(Civil Action No. 2:21-cv-01093-BHH)

BRIEF FOR MOVANTS-APPELLANTS

PHILLIP D. BARBER
RICHARD A. HARPOOTLIAN P.A.
1410 Laurel Street
Post Office Box 1090
Columbia, South Carolina 29202
Phone (803) 252-4848
Facsimile (803) 252-4810
pdb@harpootlianlaw.com

SKYLER B. HUTTO
WILLIAMS & WILLIAMS
1281 Russell Street (29115)
Post Office Box 1084
Orangeburg, S.C. 29116
Phone (803) 534-5218
Facsimile (803) 536-6298
skyler@williamsattys.com

KELSI B. CORKRAN
AMY L. MARSHAK
JOSEPH W. MEAD
INSTITUTE FOR CONSTITUTIONAL ADVOCACY AND PROTECTION
GEORGETOWN UNIVERSITY LAW CENTER
600 New Jersey Ave., N.W.
Washington, D.C. 20001
Phone (202) 662-9765
jm3468@georgetown.edu

RULE 26.1 DISCLOSURE STATEMENT

The South Carolina State Conference of the NAACP is a nonprofit corporation with no parent corporation and no stock. Orangeburg County School District is a governmental entity.

TABLE OF CONTENTS

TABLE OF AUTHORITIES v
INTRODUCTION 1
STATEMENT OF JURISDICTION 4
STATEMENT OF THE ISSUE 4
STATEMENT OF THE CASE 4
A. South Carolina's Constitution 4
B. South Carolina Supreme Court Declares Governor McMaster's Allocation of Pandemic-Relief Funding Unconstitutional 5
C. Plaintiffs Seek Invalidation of the South Carolina Constitution and the Supreme Court of South Carolina's Judgment 6
D. Appellants' Motion to Intervene 8
SUMMARY OF ARGUMENT 11
STANDARD OF REVIEW 12
ARGUMENT 12
I. The District Court Erred in Denying Appellants Intervention of Right 12
A. Appellants have an interest in the subject matter of this litigation 12
1. Appellants would face increased competition for school funding 13
2. Appellants have an interest in intervening on behalf of the parents and children who benefit from South Carolina's commitment to public education 20
3. Appellant OCSD has an interest in defending the judgment in *Adams* 23
B. Remand is Appropriate to Allow the District Court to Apply Remaining Rule 24(a)(2) Factors 25
CONCLUSION 26
CERTIFICATE OF COMPLIANCE 27
ADDENDUM A: Pertinent Statutes, Regulations, and Rules 28
Constitution of the State of South Carolina, Article XI – Public Education 29
Federal Rule of Civil Procedure 24. 30

TABLE OF AUTHORITIES

Cases

Aams v. McMaster, 432 S.C. 225, 851 S.E.2d 703 (2020) .....passim
Am. Inst. of Certified Pub. Accts. v. I.R.S., 804 F.3d 1193 (D.C. Cir. 2015) 17
Atkins v. State Bd. of Ed. of N.C., 418 F.2d 874 (4th Cir. 1969) 21
Brennan v. N.Y.C. Bd. of Educ., 260 F.3d 123 (2d Cir. 2001) 20
Briggs v. Elliott, 103 F. Supp. 920 (E.D.S.C. 1952), *rev'd sub nom.*, *Brown v. Board of Education*, 349 U.S. 294 (1955) 10
Brumfield v. Dodd, 749 F.3d 339 (5th Cir. 2014) 20, 22
Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129 (1967) 15
City of Los Angeles v. Barr, 929 F.3d 1163 (9th Cir. 2019) 17
Coalition of Ariz./N.M. Cntys. for Stable Econ. Growth v. Dep't of Interior, 100 F.3d 837 (10th Cir. 1996) 24
Cooper v. Tex. Alcoholic Beverage Comm'n, 820 F.3d 730 (5th Cir. 2016) 17
Donaldson v. United States, 400 U.S. 517 (1971) 13
Edwards v. City of Houston, 78 F.3d 983 (5th Cir. 1996) (en banc) 15, 24
Espinoza v. Montana Dep't of Revenue, 140 S. Ct. 2246 (2020), ... 8
Feller v. Brock, 802 F.2d 722 (4th Cir. 1986) .....passim
Fleming v. Citizens for Albemarle, Inc., 577 F.2d 236 (4th Cir. 1978). 21
Fund For Animals, Inc. v. Norton, 322 F.3d 728 (D.C. Cir. 2003) 19
Grutter v. Bollinger, 188 F.3d 394, 397 (6th Cir. 1999) 15
Hill v. W. Elec. Co., 672 F.2d 381 (4th Cir. 1982) 12, 26
Idaho Farm Bureau Fed'n v. Babbitt, 58 F.3d 1392 (9th Cir. 1995) 24
In re Sierra Club, 945 F.2d 776 (4th Cir. 1991) 21, 24, 25
JLS, Inc. v. Pub. Serv. Comm'n of W. V., 321 F. App'x 286 (4th Cir. 2009) 15
Kleissler v. U.S. Forest Serv., 157 F.3d 964 (3d Cir. 1998) 15
Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367 (2020) 16, 19
LULAC v. City of Boerne, 659 F.3d 421 (5th Cir. 2011) 19
Morgan v. McDonough, 726 F.2d 11 (1st Cir. 1984) 22
N.C. State Conf. of NAACP v. Berger, 999 F.3d 915 (4th Cir. 2021) (en banc) 4, 12, 19
San Juan Cty., Utah v. United States, 503 F.3d 1163 (10th Cir. 2007) (en banc) 24
Sherley v. Sebelius, 610 F.3d 69 (D.C. Cir. 2010) 16
Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969) (en banc) 21
Tasby v. Estes, 572 F.2d 1010 (5th Cir. 1978) 23
Teague v. Bakker, 931 F.2d 259 (4th Cir. 1991) .....passim
Texas v. United States, 805 F.3d 653 (5th Cir. 2015) 22
United States v. LULAC, 793 F.2d 636 (5th Cir. 1986) 23
United States v. Mississippi, 921 F.2d 604 (5th Cir. 1991) 23
Wal–Mart Stores, Inc. v. Texas Alcoholic Beverage Comm'n, 834 F.3d 562 (5th Cir. 2016) .. 19

Yniguez v. Arizona, 939 F.2d 727 (9th Cir. 1991) 20

Statutes

28 U.S.C. § 1291 4
28 U.S.C. § 1331 4
Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 18002 .. 5

State Constitutional Provisions

S.C. Const. art. XI ..... passim

Rules

Fed. R. App. P. 4(a) 4
Fed. R. Civ. P. 24(a)(2) ..... passim

Treatises

Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1908.1 (3d ed. 2021) 21

Other Authorities

Office of Elementary & Secondary Educ., *Governor's Emergency Education Relief Fund: Methodology for Calculating Allocations* (2020), https://perma.cc/F35F-YXPU 5
Orangeburg Cty. Sch. Dist., About Us, https://www.ocsdsc.org/domain/77 9
S.C. Dep't Ed, Active Student Headcounts, https://perma.cc/M4GZ-XYLU 9
South Carolina Office of the Governor, *Gov. Henry McMaster Creates Safe Access to Flexible Education (SAFE) Grants* (July 20, 2020), available at https://perma.cc/7SJC-S6N5 5
South Carolina Office of the Governor, Gov. McMaster Announces $10.5 Million Investment in Charter Schools, Workforce Development (April 14, 2021), available at https://perma.cc/J6XK-HE9S 9
South Carolina Office of the Governor, *Gov. McMaster Awards Over $12 million in GEER Funds to S.C. Department of Juvenile Justice* (Apr. 21, 2021), https://perma.cc/7YXN-LN37 6

INTRODUCTION

The coronavirus pandemic has laid bare a fundamental conflict between South Carolina's constitutional commitment to public education and the Governor's policy preference for private schools. Article XI of South Carolina's Constitution promises "the maintenance and support of a system of free public schools open to all children in the State," S.C. Const. art. XI, § 3, and commands that public funding be preserved for public education, *id.* § 4. Appellants—a public school district and a civil rights association that includes thousands of families that depend on public schools—are the direct beneficiaries of this constitutional promise. Governor McMaster, by contrast, has publicly supported diverting public funds to private schools. When the federal government recently gave South Carolina an allotment of more than $40 million in pandemic relief to spend on education, the Governor tried to give a majority of it to private institutions rather than spend it on public schools in South Carolina struggling to respond to the ongoing pandemic. In response, Appellant Orangeburg County School District (OCSD) and others sued the Governor and secured a unanimous judgment from the South Carolina Supreme Court confirming that Article XI requires that public funding be spent on public education. *Adams v. McMaster*, 432 S.C. 225, 233, 851 S.E.2d 703, 707 (2020). Bound by the court's judgment, the Governor reallocated tens of millions of dollars to public institutions, including OCSD's public charter school.

The Bishop of Charleston and the South Carolina Independent Colleges and Universities ("Plaintiffs") then sued the Governor and other state officials, seeking to invalidate Article XI and nullify the South Carolina Supreme Court's judgment on the theory that Article XI violates the Free Exercise and Equal Protection Clauses of the U.S. Constitution. In response to Plaintiffs' motion for a preliminary injunction, the Governor lamented that he shared Plaintiffs' "frustration" and "disagreement" with the *Adams* ruling and declined to defend Article XI on the merits. McMaster Resp. Opp'n Mot. Prelim. Inj. 2–3, 9, Dist. Ct. ECF No. 22. And even though the district court ruled that Plaintiffs' religious discrimination theory likely failed as a matter of law, the Governor did not seek dismissal of Plaintiffs' claim, choosing instead to allow the case to proceed.

In light of the Governor's clear policy preference and his choice to decline—twice—to defend Article XI on the merits, OCSD and the South Carolina State Conference of the NAACP ("Appellants") sought to intervene to come to Article XI's defense.

Rule 24 entitles a party to intervene of right if: 1) it has an interest in the subject matter of the action; 2) the litigation may impair the party's interest; and 3) the existing parties do not adequately represent that party's interest. Fed. R. Civ. P. 24(a)(2). The district court denied Appellants' motion to intervene of right solely based on its view that Appellants do not have an interest in the subject matter of the litigation, without reaching the last two requirements. In the court's view, because

Appellants would not "automatically" receive more funding if the constitutional provision is upheld, they lack a protectable interest in participating in the case. Joint Appendix (JA) 73.[1] Thus, even though the Governor had already attempted to disregard Article XI—and even though OCSD received more funding when that decision was struck down—the district court concluded that Appellants' interest in the case was too attenuated to allow intervention.

By insisting that Appellants demonstrate a certain economic interest in the litigation, the district court misunderstood what Rule 24 requires for intervention. Under settled law in this and other circuits, a party is entitled to intervene even when the interest asserted might never come to fruition due to an additional contingency. *See, e.g., Teague v. Bakker*, 931 F.2d 259, 261 (4th Cir. 1991). Thus, even if Appellants could not establish that they would receive a particular allocation of funding, they have an interest in ensuring that their constitutional priority for those funds remains intact. Further, circuit precedent provides that a party that secured a judgment in another proceeding—as OCSD did in *Adams*—is allowed to intervene to defend that judgment. *See, e.g., Feller v. Brock*, 802 F.2d 722, 730 (4th Cir. 1986). Because the district court's unduly narrow view of what interests qualify for intervention cannot be reconciled with established precedent, its decision to deny intervention of right should be reversed.

[1] Citations to the Joint Appendix appear as "JA __." Citations to district-court filings appear as "Dist. Ct. ECF No. __," followed by the relevant page number.

STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's original jurisdiction under 28 U.S.C. § 1331. Appellants' motion to intervene was denied by the district court on July 26, 2021. Appellants filed a timely notice of appeal on August 17, 2021. JA 79; Fed. R. App. P. 4(a). The denial of a motion to intervene is "treated as a final judgment that is appealable," *N.C. State Conf. of NAACP v. Berger*, 999 F.3d 915, 923 (4th Cir. 2021) (en banc), and this Court has jurisdiction over this appeal under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Do Appellants have an "interest in the subject matter of the action" for the purposes of intervention of right under Rule 24(a)(2)?

PERTINENT STATUTES AND RULES

Federal Rule of Civil Procedure 24 and relevant provisions of South Carolina's Constitution are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

A. South Carolina's Constitution

Since 1868, South Carolina's Constitution has guaranteed a free public education to all children. Although the specific language has changed throughout the years, the consistent constitutional prioritization of public education has been reflected in twin provisions: 1) an affirmative guarantee of free public schools, and 2) protection of public funds from diversion to private institutions. Today, this commitment to public education is codified in Article XI. Section 3 of that article

directs the State to "provide for the maintenance and support of a system of free public schools open to all children in the State," and Section 4 provides that "[n]o money shall be paid from public funds . . . for the direct benefit of any religious or other private educational institution." S.C. Const. art. XI, §§ 3-4.

B. South Carolina Supreme Court Declares Governor McMaster's Allocation of Pandemic-Relief Funding Unconstitutional

Governor McMaster disagrees with Article XI's reservation of public funds for public schools. Last year, in response to the strain the coronavirus pandemic placed on schools, Congress appropriated $48 million to South Carolina to be used on education as part of the Governor's Emergency Education Relief Fund (GEER I). Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 18002; Office of Elementary & Secondary Educ., *Governor's Emergency Education Relief Fund: Methodology for Calculating Allocations* (2020), https://perma.cc/F35F-YXPU. Governor McMaster initially announced that $32 million—over 60 percent of South Carolina's GEER I allocation—would be used to provide tuition support for students attending private schools under a program called Safe Access to Flexible Education (SAFE). South Carolina Office of the Governor, *Gov. Henry McMaster Creates Safe Access to Flexible Education (SAFE) Grants* (July 20, 2020), available at https://perma.cc/7SJC-S6N5; *see also Adams*, 851 S.E.2d at 707. Despite the immense challenges facing public school systems during the pandemic, public schools and the families who depend on them were not eligible to participate in the Governor's program. *Id.*

Appellant OCSD and several other parties challenged the Governor's program in state court, arguing that it violated Article XI. The South Carolina Supreme Court unanimously agreed. It held that "the Governor's allocation of $32 million in GEER funds" to private schools "constitutes the use of public funds for the direct benefit of private educational institutions within the meaning of, and prohibited by, Article XI, Section 4 of the South Carolina Constitution." *Id.* at 706. On the Governor's assurance that he would comply with the Court's judgment, the Court concluded that "the issuance of an injunction [is] unnecessary." *Id.* at 713.

Bound by the Supreme Court's judgment, the Governor reallocated the money to public charter schools, including Appellant OCSD's High School for Health Professions, educational services for children in group home settings, the South Carolina Technical College System, early childhood education programs, and programs to combat juvenile delinquency and prevent students from dropping out of school. *See* South Carolina Office of the Governor, *Gov. McMaster Awards Over $12 million in GEER Funds to S.C. Department of Juvenile Justice* (Apr. 21, 2021), https://perma.cc/7YXN-LN37.

C. Plaintiffs Seek Invalidation of the South Carolina Constitution and the Supreme Court of South Carolina's Judgment

Shortly after the South Carolina Supreme Court's decision in *Adams*, Plaintiffs filed the case below seeking to invalidate Article XI. The Bishop of Charleston alleged it had "planned for its 33 schools to participate" in the Governor's program

for private schools. JA 20, 26. The South Carolina Independent Colleges and Universities ("SCICU"), describing itself as "the trade association for private, non-profit institutions of higher education in South Carolina," asserted associational standing on behalf of its member institutions who had also hoped to receive a portion of the GEER I funding. JA 20.[2] Plaintiffs claimed that Article XI violates the Free Exercise Clause and the Equal Protection Clause of the U.S. Constitution because, they contend, racial and religious animus motivated its enactment. Plaintiffs named three defendants: Governor McMaster and two officials with the South Carolina Department of Administration (which administers the GEER I funds but is not involved in the substantive allocation decisions).

Shortly after filing suit, Plaintiffs moved for a preliminary injunction that would immediately free the Governor from the restrictions placed on him by Article XI and *Adams* so that he could allocate funding to the SAFE program as he initially intended. Dist. Ct. ECF No. 6. Represented by private counsel (not the Attorney General), the Governor explained that he "share[d]" "Plaintiffs' frustration [and] disagreement" with the *Adams* decision and that he was "disappointed" in the result, but "his hands remain tied by the court's declaratory judgment." Dist. Ct. ECF No. 22, 2-3, 9.

[2] Plaintiffs also seek access to two other funding sources: (1) a federal block grant that included $115 million for state and local government and higher education institutions in South Carolina; and (2) a second federal investment in the GEER program ("GEER II"), in the amount of $21 million. JA 27-28. The Governor has concluded that the *Adams* decision applies to these programs as well.

Although the Governor raised procedural and jurisdictional objections to Plaintiffs' claims, he did not defend Article XI on the merits in opposing Plaintiffs' preliminary injunction motion. *Id.* The Department of Administration defendants' opposition included a cursory defense on the merits but emphasized that they merely "perform the administrative acts related to disbursement of funds" and "stand ready to follow the Court's directives as they pertain to the constitutionality of Article XI, Section 4 of the South Carolina Constitution." Dist. Ct. ECF No. 19, at 1-2.

The district court denied Plaintiffs' preliminary injunction motion, concluding that Plaintiffs had failed to show a likelihood of success on the merits of their constitutional challenge. Dist. Ct. ECF No. 34. In that decision, the district court explained that because South Carolina's constitution prohibits funds for *all* private institutions, not simply religious ones, Plaintiffs' religious discrimination claim was unsupported by *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246 (2020), the primary case on which Plaintiffs relied. Nevertheless, when it came time to file an answer or a motion to dismiss, Defendants did not seek dismissal of that claim. Instead, Defendants chose to allow Plaintiffs' whole case to proceed to discovery on all claims. *See generally* Dist. Ct. ECF No. 36 (Governor's Answer to Am. Compl.).

D. Appellants' Motion to Intervene

In light of the Governor's continued statements of support for Plaintiffs—including in this very litigation—and his decision to decline two opportunities to advance substantive arguments in defense of Article XI, Appellants sought to

intervene. Rule 24 provides for intervention of right when a party has an interest in the subject matter of the case that may be impaired, unless an existing party will adequately represent that interest. Fed. R. Civ. P. 24(a)(2).

OCSD is a public school district in Orangeburg County, South Carolina, with nearly 12,000 students across 32 schools. Orangeburg County School District, *About Us*, https://www.ocsdsc.org/domain/77; South Carolina Department of Education, *Active Student Headcounts*, https://perma.cc/M4GZ-XYLU. OCSD also was among the parties that successfully challenged Governor McMaster's efforts to divert CARES Act funds to private schools. *See Adams*, 851 S.E.2d at 706. That victory resulted in OCSD's High School for Health Professions receiving a portion of the GEER I funds that the Governor originally had allocated to private schools. *See* South Carolina Office of the Governor, Gov. McMaster Announces $10.5 Million Investment in Charter Schools, Workforce Development (April 14, 2021), https://perma.cc/J6XK-HE9S.

The South Carolina Conference of the NAACP (NAACP) "has more than 12,000 members, including parents of students who attend South Carolina public schools." JA 47. NAACP recognizes that "[e]ducation is one of the six 'gamechangers'" and "seeks to ensure that every Black student has access to great teaching, equitable resources, and a safe learning environment from grade school classrooms to college campuses." *Id.* NAACP has long participated in litigation to end segregation in South Carolina's schools, including in one of the cases consolidated in

the seminal *Brown v. Board of Education* ruling. *Briggs v. Elliott*, 103 F. Supp. 920 (E.D.S.C. 1952), *rev'd sub nom.*, *Brown v. Board of Education*, 349 U.S. 294 (1955). Today it "is particularly concerned about attempts by state officials to divert funds from South Carolina's already underserved public schools to private schools" which would "exacerbate[] existing educational disparities for Black students in South Carolina." JA 48.

The district court denied Appellants' motion to intervene. The court concluded that although Appellants' motion was timely, they lacked a sufficient interest in the subject matter of the case to intervene of right under Rule 24(a)(2). JA 69-78. Specifically, the district court reasoned, Appellants' interest was "not direct and substantial" because they would "not automatically receive more or less if the no-aid provision is upheld or invalidated." JA 73. The court further concluded that its "finding that Proposed Intervenors lack the required interest in the subject matter of this action obviates the need to address the remaining two requirements" for intervention of right under Rule 24(a)(2). JA 75.[3] Appellants timely filed this appeal. JA 79.[4]

[3] The district court also denied the request for permissive intervention under Rule 24(b), which is not challenged on appeal.

[4] In response to Appellants' motion to intervene, the Governor requested that the Attorney General of South Carolina seek intervention on behalf of the State to assist with the defense of Article XI. Dist. Ct. ECF No. 51-1. After the court denied Appellants' motion, it allowed the State of South Carolina, acting through the Attorney General, to intervene. Dist. Ct. ECF No. 62.

SUMMARY OF ARGUMENT

The district court abused its discretion by denying Appellants' timely motion to intervene of right under Rule 24(a)(2). An applicant may intervene of right "if the applicant can demonstrate: (1) an interest in the subject matter of the action; (2) that the protection of this interest would be impaired because of the action; and (3) that the applicant's interest is not adequately represented by existing parties to the litigation." *Teague*, 931 F.2d at 260–61; *see also* Fed R. Civ. P. 24(a)(2). The court denied Appellants' request solely because it concluded that Appellants lacked an adequate interest in the subject matter of this case to warrant intervention.

This was reversible error. First, invalidation of the constitutional limit on how public education dollars can be spent would reduce the amount of money available – not only from the recent federal appropriations sought by the Plaintiffs, but also indefinitely into the future – for children attending public school, including OCSD's students and NAACP's members and the children of its members. Appellants have an interest in preserving the current priority for public education, even if they cannot point to a specific allocation of funding that will change. *See, e.g., Teague*, 931 F.2d at 260–61 (contingent financial interest sufficient to justify intervention). Moreover, public schools and the children who attend them are beneficiaries of the state constitutional provision being challenged and have an interest in defending it for the purposes of Rule 24(a)(2). Finally, OCSD secured a judgment from the South Carolina Supreme Court, and has an interest in defending that judgment's effect. *See,*

e.g., Feller, 802 F.2d at 730 (recognizing interest to intervene of right because "[a]t its heart, this litigation is a collateral attack on [an earlier decision], to which [intervenor] was a party.").

This Court should reverse the district court's erroneous holding regarding the adequacy of Appellants' interest in this litigation, and remand to the district court to assess in the first instance the remaining factors for intervention of right under Rule 24(a)(2). *See, e.g., Hill v. W. Elec. Co.*, 672 F.2d 381, 390 (4th Cir. 1982) ("These [arguments] were not addressed by the district court in view of its decision not to permit intervention on other grounds. These [arguments] should be addressed in the first instance by the trial court…").

STANDARD OF REVIEW

A decision to grant or deny intervention is reviewed for abuse of discretion. *Berger*, 999 F.3d at 927. A district court abuses its discretion if it misinterprets applicable questions of law or misapplies a factor it is required to consider. *Feller*, 802 F.2d at 730.

ARGUMENT

I. The District Court Erred in Denying Appellants Intervention of Right

A. Appellants have an interest in the subject matter of this litigation

An applicant may intervene of right "if the applicant can demonstrate: (1) an interest in the subject matter of the action; (2) that the protection of this interest would be impaired because of the action; and (3) that the applicant's interest is not

adequately represented by existing parties to the litigation." *Teague*, 931 F.2d at 260–61; *see also* Fed R. Civ. P. 24(a)(2). "[L]iberal intervention is desirable to dispose of as much of a controversy 'involving as many apparently concerned persons as is compatible with efficiency and due process.'" *Feller*, 802 F.2d at 729 (citation omitted).

The district court denied Appellants' request to intervene solely because it concluded that Appellants "lack the required interest in the subject matter of this action." JA 73. This was in error. Although "Rule 24(a) does not specify the nature of the interest required for a party to intervene as a matter of right," the Supreme Court has described the right as "'a significantly protectable interest.'" *Teague*, 931 F.2d at 261 (quoting *Donaldson v. United States*, 400 U.S. 517, 531 (1971)).

As relevant here, prior decisions of this Court and other courts of appeals have found a protectable interest for purposes of Rule 24(a)(2) when 1) intervenors could face increased competition; 2) intervenors are beneficiaries of a constitutional protection that is under attack; and 3) intervenors are defending a judgment that they obtained in another proceeding. Each of these interests is sufficient on its own; that all are present here compels a finding that the district court erred.

1. Appellants would face increased competition for school funding

This Court's leading precedent on intervention of right, *Teague v. Bakker*, recognizes that an intervenor can have an interest in the subject matter of an action even when the "intervenor's interest is contingent on the outcome" of an independent event. *Teague*, 931 F.2d at 261. The district court erred in its reading of *Teague*,

understanding it to require that Appellants would "automatically" be entitled to funding based on the outcome of this suit in order to have a sufficient interest for purposes of Rule 24(a)(2). The high bar the district court imposed for intervention is out of step with this Court's and other circuits' precedents.

In *Teague*, an insurer filed a lawsuit against its insured, seeking a declaration that the insurer would not liable for any judgment that could arise from a pending class action against the insured. *Id.* at 260. The class action plaintiffs moved to intervene in the insurer's suit under Rule 24(a)(2), and the district court denied their motion. *Id.* This Court reversed, concluding that the intervenors "st[ood] to gain or lose" from the insurer's declaratory judgment action, as that action would affect the pool of assets from which they could collect their judgment, if they obtained any. *Id.* at 261. This was true even though "the class action suit had not yet been reduced to judgment" and the intervenors' interest was "contingent on the outcome" of the separate lawsuit. *Id.*

In *Feller v. Brock*, this Court extended this logic and found competitive injuries satisfy the protectable interest requirement for purposes of Rule 24(a)(2). This Court reversed a district court's denial of intervention under Rule 24(a)(2) for multiple classes of intervenors who sought to intervene in a lawsuit brought by apple growers against the U.S. Department of Labor regarding wage rates for foreign workers. *Feller*, 802 F.2d at 729. One of those was a group of domestic apple pickers who worked for other growers but whose wages could change depending on the availability of foreign

workers to perform the same task. *Id.* at 730. Although the lawsuit would not directly affect their wages, this Court concluded that they had a "clear" interest in the case because it could affect the rates they were paid as "competing" pickers going forward. *Id.* (citing *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 135–36, (1967) (holding potential harm from reduced competition among suppliers is a sufficient interest for intervention of right)); *see also JLS, Inc. v. Pub. Serv. Comm'n of W. V.*, 321 F. App'x 286, 290 (4th Cir. 2009) (finding intervenors' interest sufficient under Rule 24(a)(2) even though they had "no property rights at stake" because "the result of this suit [would] determine the level of competition that Movants will have, and hence, the amount of income they can expect to earn").

Other circuits' case law is in accord. For example, the Sixth Circuit has held that individuals who planned to apply to the University of Michigan were entitled to intervene of right to defend the school's affirmative action policy. *Grutter v. Bollinger*, 188 F.3d 394, 397, 401 (6th Cir. 1999). Even though the prospective students were not guaranteed admission and had no vested legal interest in the policy, the Court held that the prospective students were entitled to intervene to defend the existing policy. Similarly, the en banc Fifth Circuit held that employees who might seek promotion in the future were entitled to intervene in a case that sought changes to the promotion system, even if they were not guaranteed to receive a promotion under the old system. *Edwards v. City of Houston*, 78 F.3d 983, 1004 (5th Cir. 1996) (en banc); *see also, e.g., Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 973 (3d Cir. 1998) ("The school

districts and municipalities have direct interests in this litigation because state law commands the Commonwealth, through its political subdivisions, to forward to them federal grant money generated through timber harvesting each year"). The prospective students and the employees had an interest in intervening to defend the existing policies on how admission and promotion opportunities were allocated, without having to show that they were certain (or even likely) to receive admission or a promotion under the challenged policy.

Article III standing decisions also provide a useful analogy, as similar competitive injuries have satisfied the *higher* burden Article III puts on Plaintiffs seeking to invoke the court's jurisdiction in the first place. *See Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2379 n.6 (2020) (intervenors need not show standing when another party has properly invoked court's jurisdiction). In that context, courts have recognized that potential applicants for funding have standing to challenge changes to funding rules that open up funding to additional competitors. For example, the D.C. Circuit concluded that applicants for government research grants had standing to challenge the government's choice to open up that grant program to additional types of research. *Sherley v. Sebelius*, 610 F.3d 69, 72-73 (D.C. Cir. 2010) ("an actual or imminent increase in competition . . . will almost certainly cause an injury in fact"). The grant-seekers had standing even though "no one can say exactly how likely" the plaintiffs were to "lose funding to projects involving" new competitors; rather, the additional competition alone created "a

substantial enough probability to deem the injury to them imminent." *Id.* at 74; *accord, e.g., Am. Inst. of Certified Pub. Accts. v. I.R.S.*, 804 F.3d 1193, 1198 (D.C. Cir. 2015) (certified tax preparers had standing to challenge government rule that allowed additional preparers to be included in directory without meeting prior eligibility requirements); *City of Los Angeles v. Barr*, 929 F.3d 1163, 1173 (9th Cir. 2019) ("While DOJ states that Los Angeles would not have received funding regardless of whether DOJ awarded bonus points [for challenged considerations], Los Angeles need not prove that it would have received funding absent the challenged considerations."); *Cooper v. Tex. Alcoholic Beverage Comm'n*, 820 F.3d 730, 738 (5th Cir. 2016) ("For that reason, numerous courts have upheld the standing of competitors to challenge official actions that change the amount of competition in an economic actor's market.").

Here, by contrast, the district court concluded that Appellants do not have a significantly protectable interest in this litigation because Appellants would "not automatically receive more or less if the no-aid provision is upheld or invalidated." JA 73. But, as demonstrated by *Teague* and *Feller*, Rule 24 does not require a present property entitlement to specific funds. By ending public institutions' constitutional priority for public funds allocated for education within the state this case threatens to transform the competitive landscape for education dollars in South Carolina, immediately and forever. By force of both Article XI and *Adams v. McMaster*, the entirety of South Carolina's educational funding—which includes but is not limited to GEER funding—must be spent on public education. If Plaintiffs prevail, money

currently reserved to public education under state law can be freely reallocated away, reducing the money available to public institutions and inevitably harming OCSD and other public schools attended by NAACP members by leaving them to complete over a much smaller pot. The effect of this change will be felt immediately with respect to the funds sought by Plaintiffs below, and permanently with future education funding no longer reserved for public education. This interest easily suffices to give Appellants a stake in the subject matter of the case.

Additionally, Appellants' interest is hardly speculative. Like the students seeking admission in *Grutter* or the employees seeking a promotion in *Edwards*, Appellants recognize that they are not guaranteed success in their efforts to obtain a specific allotment from the GEER funds or from future appropriations. But that does not diminish their interest in the current constitutional policy of reserving funding for the public education that OCSD provides and NAACP families rely upon. And as demonstrated by the fact that Appellant OCSD *did* receive funding for its charter school once the South Carolina Supreme Court disallowed the Governor's attempt to divert the GEER funding to private schools, Appellants are more likely to obtain funding if there are fewer competitors seeking those funds. Further, Appellants' interest in maximizing funding for public education is grounded in the very constitutional provision that is contested in the case, confirming the significance of their interest in the subject matter of the case. That is all that is required for purposes of Rule 24(a)(2).

Indeed, Appellants have at least as much an interest in the outcome of this lawsuit as do Plaintiffs, who (unlike Appellants) must demonstrate a sufficient interest to satisfy the higher burden of Article III standing.[5] Plaintiffs' base their standing to bring the case on their wish to access GEER funds and other recent federal appropriations to the state. Appellants also seek to obtain a portion of those finite funds, and this case will determine how that money can be allocated. Accordingly, to the extent Plaintiffs have Article III standing based on that interest, then necessarily Appellants do too—and that's more than sufficient on its own to establish an interest in intervening of right at this stage. *See, e.g., Wal–Mart Stores, Inc. v. Texas Alcoholic Beverage Comm'n*, 834 F.3d 562, 566 n.3 (5th Cir. 2016) ("We have previously suggested that 'a movant who shows standing is deemed to have a sufficiently substantial interest to intervene.'" (quoting *LULAC v. City of Boerne*, 659 F.3d 421, 434 n.17 (5th Cir. 2011))); *Fund For Animals, Inc. v. Norton*, 322 F.3d 728, 735 (D.C. Cir. 2003) ("Our conclusion that the [putative intervenor] has constitutional standing is alone sufficient to establish that [the putative intervenor] has 'an interest relating to the property or transaction which is the subject of the action'"); *Yniguez v. Arizona*, 939 F.2d 727, 735

[5] Because Appellants are intervening as defendants and are not seeking any substantive relief beyond that sought by existing parties, they need not establish Article III standing. *Little Sisters of the Poor*, 140 S. Ct. at 2379 n.6 (holding Third Circuit "erred by inquiring into the [intervenor's] independent Article III standing" because another party had properly invoked the court's jurisdiction); *Berger*, 999 F.3d at 926 (commenting that the district court did not hold intervenor-defendants "to Article III's requirements" for purposes of Rule 24(a)(2)'s intervention analysis).

(9th Cir. 1991) ("Moreover, because the Article III standing requirements are more stringent than those for intervention under rule 24(a)… , our determination that [putative intervenors] have standing under Article III compels the conclusion that they have an adequate interest under the rule."). In other words, Appellants have asserted the "mirror image" of Plaintiffs' claim, and so long as Plaintiffs have a sufficient interest to invoke the Court's authority, Appellants have a sufficient interest in arguing the other side. *See, e.g., Brennan v. N.Y.C. Bd. of Educ.*, 260 F.3d 123, 130-31 (2d Cir. 2001) ("Appellants are asserting claims that are the mirror image of the claims asserted by the government" and have an interest to intervene of right). And since the interest required to intervene in an existing case is lower than to invoke the Court's jurisdiction as a plaintiff, it follows that Appellants have an interest in participating in this suit as long as Plaintiffs are permitted to continue.

2. Appellants have an interest in intervening on behalf of the parents and children who benefit from South Carolina's commitment to public education

"[I]n cases challenging various statutory schemes as unconstitutional or as improperly interpreted and applied, the courts have recognized that the interests of those who are governed by those schemes are sufficient to support intervention." Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1908.1 (3d ed. 2021); *see also Brumfield v. Dodd*, 749 F.3d 339, 344 (5th Cir. 2014) (holding applicants who are within the "zone of interests protected by a constitutional provision or statute of general application" have an interest entitling them to intervene). There can

be no serious dispute that Appellants have such an interest in Article XI's requirement that state education funding be used solely for public schools. As a public school district, OCSD and its 11,600 students are the direct beneficiaries of the protections afforded under Article XI. Indeed, OCSD secured a declaratory judgment in the South Carolina Supreme Court confirming that Article XI prohibits defendants from diverting educational money away from public school districts like OCSD to private schools like those operated and supported by Plaintiffs.

Similarly, by virtue of its associational representation of its members,[6] the NAACP asserts the interests of parents of children who are the beneficiaries of South Carolina's constitutional commitment to a "system of free public schools open to all children in the State." S.C. Const. art. XI, § 3. Even in the absence of a constitutional mandate, courts recognize that parents' general interest in their children's education is sufficient to warrant intervention. *See, e.g., Atkins v. State Bd. of Ed. of N.C.*, 418 F.2d 874, 876 (4th Cir. 1969) ("This court has long recognized the intense interest of parents in the education of their children, and it has been solicitous of their opportunity to be heard. Intervention in suits concerning public schools has been freely allowed, and we see no reason why it should be denied here…."); *Smuck v. Hobson*, 408 F.2d 175, 180 (D.C. Cir. 1969) (en banc) ("Both courts and legislatures

[6] The ability of an association to intervene based on the interests of its members is well-established. *E.g.*, *In re Sierra Club*, 945 F.2d 776, 779 (4th Cir. 1991); *Fleming v. Citizens for Albemarle, Inc.*, 577 F.2d 236, 239 (4th Cir. 1978).

have recognized as appropriate the concern for their children's welfare which the parents here seek to protect by intervention."); *Morgan v. McDonough*, 726 F.2d 11, 13 (1st Cir. 1984) ("Courts have generally assumed that parent organizations seeking to intervene in a desegregation case meet the first two requirements" to intervene of right). Thus, for example, the Fifth Circuit allowed parents to intervene to defend a voucher program challenged by the federal government as violating a school desegregation order. *Brumfield*, 749 F.3d at 344. The court of appeals reasoned that "[t]he possibility is … real that if the parents are not able adequately to protect their interests, some students who otherwise would get vouchers might not get them or might not get to select a particular school they otherwise would choose. The parents need not wait to see whether that ultimately happens; they have already described an interest justifying intervention." *Id.* at 344; *see also Texas v. United States*, 805 F.3d 653, 660 (5th Cir. 2015) ("Even though it was uncertain whether the parents' interests would be affected at all, and even though the parents' interest in the continuance of the voucher program likely was not an enforceable legal right, the parents' interest was sufficient to support intervention."). The court further noted that the "parents are also within the zone of interest of the legislation enacting the Scholarship Program; indeed, these parents and their children were its primary intended beneficiaries." *Brumfield*, 749 F.3d at 344.

While the present case involves a challenge to a system of supporting public education instead of private, the same logic allows the NAACP's representation of the

interests of families who exercise their constitutional right to a public education. Indeed, NAACP draws on a long history of fighting for the rights of public school children, including the victory in *Brown v. Board of Education*. Not surprisingly, courts have recognized the NAACP's interest in intervening as a party in education cases to "represent[]the interests of its members, and its members' children." *Tasby v. Estes*, 572 F.2d 1010, 1012 n.2 (5th Cir. 1978); *see also, e.g.*, *United States v. Mississippi*, 921 F.2d 604, 606 (5th Cir. 1991) (recognizing NAACP allowed to intervene to represent interests of a majority Black school district); *United States v. LULAC*, 793 F.2d 636, 642 (5th Cir. 1986) (recognizing NAACP allowed to represent interests of Hispanic and Black students). Appellants' interest in ensuring quality public education is sufficient to give them a stake in defending South Carolina's constitutional commitment to that education.

3. Appellant OCSD has an interest in defending the judgment in *Adams*

Finally, OCSD has an additional, independent interest in intervening: to defend the declaratory judgment that it obtained from the South Carolina Supreme Court against the Governor in *Adams v. McMaster*, 432 S.C. 225, 851 S.E.2d 703 (2020). The litigation below seeks to invalidate the force and effect of that ruling. This Court has long recognized that prevailing parties have a cognizable interest in intervening to defend the judgments they secured in other litigation. *Feller*, 802 F.2d at 730 (recognizing interest to intervene as of right because "[a]t its heart, this litigation is a collateral attack on [prior decisions], to which [intervenor] was a party."); *In re Sierra*

Club, 945 F.2d 776, 779 (4th Cir. 1991) (holding Sierra Club was entitled to intervene of right because it "is a party to the administrative permitting proceedings where Regulation 61–99 is involved" in a case where plaintiffs sought to enjoin application of Regulation 61-99); *see also, e.g., San Juan Cty., Utah v. United States*, 503 F.3d 1163, 1199 (10th Cir. 2007) (en banc) (finding intervenor had sufficient interest in part because it "has been a determined advocate for restricting vehicular access to Salt Creek Canyon, engaging in extensive, and successful, litigation to restrict that traffic"); *Edwards*, 78 F.3d at 1004 (allowing union to intervene of right when result sought in federal litigation "directly conflicts with an earlier state court judgment arising from a suit between the [union] and the City that established the [union'] members' right to make such transfers under Texas state law.").[7] Having just expended the resources to litigate and secure a judgment in its favor from the South Carolina Supreme Court, OCSD has an substantially protectable interest under Rule 24(a)(2) in ensuring the judgment's continuing viability and effect.

[7] Indeed, other courts have recognized that simply having a record of advocating for a policy is sufficient grounds for intervention in that policy's defense. *E.g.*, *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995) ("A public interest group is entitled as a matter of right to intervene in an action challenging the legality of a measure it has supported."); *Coalition of Ariz./N.M. Cntys. for Stable Econ. Growth v. Dep't of Interior*, 100 F.3d 837, 841 (10th Cir. 1996) ("[Intervenor's] involvement with the Owl in the wild and his persistent record of advocacy for its protection amounts to a direct and substantial interest . . . for the purpose of intervention as of right, even though [intervenor] has little economic interest in the Owl itself.").

In sum, Plaintiffs attack South Carolina's constitutional choice of reserving public funding for public education, and ask the Court to allow public funds to be diverted away from public schools. As a public school and as an association containing parents who exercise their constitutional right to send their children to public school, Appellants have an interest in the constitutional provision being challenged and in the funds sought by Plaintiffs. This is all that is required to show an interest in the subject matter of the action under Rule 24(a)(2). The district court's contrary conclusion is erroneous and warrants reversal.

B. Remand is Appropriate to Allow the District Court to Apply Remaining Rule 24(a)(2) Factors

The district court concluded that its "finding that Proposed Intervenors lack the required interest in the subject matter of this action obviates the need to address the remaining two requirements" for intervention of right under Rule 24(a)(2). JA 75. Thus, the district court did not decide whether, "as a practical matter," Appellants' interests might be impaired, and whether Appellants' interests are adequately represented by other parties. Accordingly, this Court should remand to allow the district court the opportunity to apply the remaining factors in the first instance.

Remand for reconsideration is the appropriate procedure in intervention cases where the district court misapplied a factor. *E.g., In re Sierra Club*, 945 F.2d at 781 ("[R]ecognizing that the question of intervention is one initially for the district court, we remand to permit the district court to reconsider Sierra Club's intervention"); *Hill*,

672 F.2d at 390 ("These [arguments] were not addressed by the district court in view of its decision not to permit intervention on other grounds. These objections should be addressed in the first instance by the trial court…"). Because the District Court has not yet assessed the remaining Rule 24(a)(2) factors, the case should be remanded for reconsideration.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's ruling denying Appellants' motion to intervene for lack of an adequate interest in the litigation, and remand for the district court to consider whether Appellants have satisfied Rule 24(a)'s remaining requirements.

Respectfully submitted,

/s/Joseph W. Mead
JOSEPH W. MEAD
KELSI B. CORKRAN
AMY L. MARSHAK
INSTITUTE FOR CONSTITUTIONAL ADVOCACY AND PROTECTION
GEORGETOWN UNIVERSITY LAW CENTER
600 New Jersey Ave., N.W.
Washington, D.C. 20001
Phone (202) 662-9765
jm3468@georgetown.edu

PHILLIP D. BARBER
RICHARD A. HARPOOTLIAN P.A.
1410 Laurel Street
Post Office Box 1090
Columbia, South Carolina 29202
Phone (803) 252-4848
Facsimile (803) 252-4810
pdb@harpootlianlaw.com

SKYLER B. HUTTO
WILLIAMS & WILLIAMS
1281 Russell Street (29115)
Post Office Box 1084
Orangeburg, S.C. 29116
Phone (803) 534-5218
Facsimile (803) 536-6298
skyler@williamsattys.com

October 12, 2021

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume, typeface, and type-style requirements of Federal Rule of Appellate Procedure 32(a). This brief contains 6,656 words, excluding the parts of the document exempted by Rule 32(f), and was prepared in fourteen-point Garamond font, a proportionally spaced typeface, using Microsoft Word.

/s/ Joseph W. Mead
JOSEPH W. MEAD

ADDENDUM A: Pertinent Statutes, Regulations, and Rules

Table of Contents

South Carolina Constitution, Article XI, sections 3 & 4 ……A1

Federal Rule of Civil Procedure 24……A2

Constitution of the State of South Carolina, Article XI – Public Education

SECTION 3. System of free public schools and other public institutions of learning.

The General Assembly shall provide for the maintenance and support of a system of free public schools open to all children in the State and shall establish, organize and support such other public institutions of learning, as may be desirable.

SECTION 4. Direct aid to religious or other private educational institutions prohibited.

No money shall be paid from public funds nor shall the credit of the State or any of its political subdivisions be used for the direct benefit of any religious or other private educational institution.

Federal Rule of Civil Procedure 24.

(a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:

> . . . .
> (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

. . .