STATE OF INDIANA) IN THE MARION SUPERIOR COURT 7
) SS:
COUNTY OF MARION) CAUSE NO.: 49D07-1107-PL-025402

TERESA MEREDITH, DR. EDWARD E. EILER, RICHARD E. HAMILTON, SHEILA KENNEDY, GLENDA RITZ, REV. MICHAEL JONES, DR. ROBERT M. STWALLEY III, KAREN J. COMBS, REV. KEVIN ARMSTRONG, DEBORAH J. PATTERSON, KEITH GAMBILL, and JUDITH LYNN FAILER,

Plaintiffs,

v.

MITCH DANIELS, in his official capacity as Governor of Indiana; and DR. TONY BENNETT, in his official capacity as Indiana Superintendent of Public Instruction and Director of the Indiana Department of Education,

Defendants.

BRIEF OF HEATHER COFFY & MONICA POINDEXTER IN SUPPORT OF MOTION TO INTERVENE AS DEFENDANTS

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INTRODUCTION

The Choice Scholarship Program, enacted by the Indiana General Assembly as part of House Enrolled Act No. 1003 and signed into law by Governor Daniels on May 5, 2011, was designed to provide parents and their children with greater educational choice. It does this by providing scholarships to parents of eligible students, who may use those scholarships to enroll their children in both eligible private schools and public schools. Ind. Code §§ 20-51-4-1 *et seq*.

Heather Coffy and Monica Poindexter, applicants for intervention (collectively, "Applicants"), are the parents of children who will attend private school next year with the aid of Choice Scholarships. Pursuant to Indiana Rule of Trial Procedure 24, Applicants respectfully move this Court for leave to intervene as Defendants in this action in order to defend against Plaintiffs' constitutional challenge to the Choice Scholarship Program. Because Applicants and their children are the direct beneficiaries of the Choice Scholarship Program, they have a tremendous stake in the outcome of this litigation. Indeed, should Plaintiffs succeed in having the Choice Scholarship Program declared unconstitutional, Applicants' children will not receive their scholarships and Applicants will face grave financial hardship paying their children's tuition at their chosen schools.

As explained below, Applicants are entitled to intervene as of right under Rule 24(A)(2). They have a significant interest in receiving Choice Scholarships that may be greatly impaired by the disposition of this matter, and their interest as beneficiaries of the program will be adequately represented only if they are allowed to intervene. Alternatively, this Court should grant Applicants permissive intervention in this case under Rule 24(B)(2). Applicants seek to intervene to answer Plaintiffs' challenges to the constitutionality of the Choice Scholarship Program, so they share the requisite common questions of law and fact.

Although Defendants welcome Applicants' intervention, Plaintiffs oppose it. In addition to denying Applicants' children the benefits of the Choice Scholarship Program, Plaintiffs also want to exclude Applicants from the opportunity to defend the program—and thus to protect the educational opportunity that is so important to their children's futures. Applicants are unaware of any school choice litigation in which parents have not been allowed to intervene, and they respectfully ask that this Court decline Plaintiffs' invitation to be the first. Although Plaintiffs seek to portray parents like Applicants as unwitting instruments used by the Defendants to funnel state money to religious schools, Applicants are instead the beneficiaries of a program which allows them—by making genuine and independent choices about where to send their children to school—to ensure that their children get a quality education. Party status for Applicants is necessary to ensure that the interests of the Choice Scholarship Program's true beneficiaries are fully protected. Should the program be ruled unconstitutional here, Applicants will forever lose the opportunity to protect their interests. Particularly for this reason, Applicants respectfully request that they be granted leave to intervene as defendants in the instant case.

STATEMENT OF FACTS

A. *The Choice Scholarship Program*

The Choice Scholarship Program is a school choice program, enacted as part of House Enrolled Act No. 1003, §§ 5-6 & 10, P.L. 92-2011, and signed into law by Governor Daniels on May 5, 2011, designed to "give Hoosier families more choices to educate their children." Press Release, Office of Gov. Daniels, Governor signs charter school and education choice bills (May 5, 2011), *available at* http://www.in.gov/portal/news_events/70007.htm. The Choice Scholarship Program took effect on July 1, 2011, and operates in a simple and straightforward manner: the state provides "Choice Scholarships" for eligible students, who may use the

scholarship to attend any eligible school, public or nonpublic, to which he or she is accepted. Ind. Code §§ 20-51-4-1 *et seq.*

To be eligible for a Choice Scholarship, a student must be an Indiana resident between the ages of five and 22 who is a member of a household with an annual income up to 150 percent of the amount needed to qualify for the federal free-or-reduced-price-lunch program, who has been enrolled in an accredited school, and who was either enrolled in a school that did not charge transfer tuition for the prior two semesters or—as the case with Applicants' children—received a scholarship from a scholarship-granting organization or a choice scholarship in a previous school year. Ind. Code § 20-51-1-4.5.

In order to be an "eligible school," public or nonpublic schools must be located in Indiana, require eligible students to pay tuition or transfer tuition to attend, be accredited by the State Board or a recognized agency, administer the ISTEP program, submit data for category designation to the Department of Education, and voluntarily agree to enroll eligible students. Ind. Code § 20-51-1-4.7.

Eligible students in households with annual incomes of not more than the amount required to qualify for the federal free-or-reduced-price-lunch program qualify for scholarships equal to the lesser of tuition costs, Ind. Code § 20-51-4-4(1), or 90 percent of the state's current share of per-pupil public-school spending. Ind. Code § 20-51-4-4(2). Eligible students in households with an annual income between that mark and 150 percent of that mark qualify for the lower of tuition or 50 percent of the state's current share of per-pupil public-school spending. Ind. Code § 20-51-4-4(2). Scholarships are capped at $4,500 for grades one through eight, but there is no cap for high school scholarships. Ind. Code § 20-51-4-4(3). The Choice Scholarship Program limits participation to 7,500 students statewide in its first year and 15,000 in its second

year. Ind. Code § 20-51-4-2(b). There is no limit on participation starting in the third year of the Choice Scholarship Program. *Id.*

Plaintiffs Theresa Meredith, Dr. Edward E. Eiler, Richard E. Hamilton, Sheila Kennedy, Glenda Ritz, Rev. Michael Jones, Dr. Robert M. Stwalley III, Karen J. Combs, Rev. Kevin Armstrong, Deborah J. Patterson, Keith Gambill, and Judith Lynn Failer ("Plaintiffs") filed this lawsuit on July 1, 2011, against defendants Governor Mitch Daniels and Dr. Tony Bennett ("Defendants"), challenging the constitutionality of the Choice Scholarship Program under the following provisions of the Indiana Constitution: Article 1, § 4, Article 1, § 6, and Article 8, § 1. Applicants are individual parents of children who will be attending private schools next year with the aid of Choice Scholarships. As such, they are the program's direct beneficiaries.

B. *Heather Coffy*

Applicant Heather Coffy is a single mother who lives in Indianapolis, Indiana. Aff. of Heather Coffy ("Coffy Aff.") attached as Exhibit 1, ¶¶ 2, 3. She has three children: Delano, who completed the eighth grade at St. Monica Catholic School ("Saint Monica") in June 2011; Darius, who completed the fifth grade at St. Monica in June, 2011; and Alanna, who completed the second grade at St. Monica in June 2011. *Id.* ¶ 3. Heather has been very happy with the education her children have received at St. Monica, which serves children up through the eighth grade. *Id.* ¶ 4. She first enrolled Delano at St. Monica in his fourth-grade year because she was dissatisfied with the education he was receiving at College Park Elementary, a public school in Pike Township. *Id.* She did not believe that he (or any of his classmates) was getting the individualized attention needed to succeed, and school administrators did not heed her complaints about this issue. *Id.* Delano was not getting good grades and was not being

Paying for tuition at St. Monica put a strain on her finances, but she did get some assistance in the form of a small scholarship that she obtained for Delano through the Educational CHOICE Charitable Trust. *Id.* ¶ 5. She subsequently obtained scholarships from the Trust for both Darius and Alanna to attend St. Monica. *Id.* Darius has been enrolled there since the first grade, and Alanna has been enrolled since kindergarten. *Id.* Heather has found attending St. Monica to be a wonderful educational experience for her children. *Id.* ¶ 6. Class sizes are small, so each child receives one-on-one instruction from intelligent and caring teachers. *Id.* Delano's grades have improved significantly and Heather feels he is blossoming into a fine young man. *Id.* Darius and Alanna are also making good grades and getting a terrific education. *Id.*

Heather and her children are not parishioners at St. Monica; she did not select the school for religious reasons, but because she thought it was better suited than the public schools to give her children a quality education. *Id.* ¶ 7. Though Heather and her children are not Catholic, they have been very comfortable with the religious atmosphere at St. Monica; it is their experience that the religious atmosphere contributes to St. Monica's success as a high-quality educational institution. *Id.* ¶ 8. This quality education, however, does not come without costs. The scholarships her children have received have helped Heather pay for her children's schooling, but those scholarships are small and thus cover only a very small portion of it. *Id.* ¶ 9. Therefore, even with the scholarships, it has been a significant financial burden on Heather to pay for their education. *Id.* Last year, Heather devoted a very substantial portion of her income from her full-time job toward that purpose. *Id.* She has also stopped paying the principal on her mortgage and is only making payments on the interest in order to free up money for tuition payments. *Id.*

The financial burden of educating Heather's children will increase next year. *Id.* ¶ 10. Since St. Monica only serves students through the eighth grade, Delano needs to enroll in a new high school. *Id.* Heather has chosen Bishop Chatard High School ("Chatard") for Delano's high-school education, but the Educational CHOICE Charitable Trust does not award scholarships to high-school students, so Heather is counting on having a Choice Scholarship to be able to afford to send Delano to Chatard. *Id.* Without a Choice Scholarship for Delano, Heather will have to reevaluate whether and how she will be able to send him to Chatard. *Id.* She is also counting on Choice Scholarships for Darius and Alanna to help offset the cost of tuition at St. Monica, as tuition there increases every year. *Id.* The Choice Scholarships will cover a much greater portion of her children's tuition than the scholarships from the Educational CHOICE Charitable Trust have, so receiving them is vital to Heather's ability to continue to pay for all of her children's education while still being able to provide for the other needs of her family. *Id.*

Chatard and St. Monica are eligible schools under the Choice Scholarship Program. *Id.* ¶ 11. Delano has been accepted by Chatard as a new student, and Darius and Alanna have been accepted at St. Monica for the upcoming school year. *Id.* Heather and her children meet all of the eligibility requirements for Choice Scholarships. *Id.* She has received scholarships for Darius and Alanna and she expects that she will soon get official notification that Delano will receive one. *Id.* If Heather's children's Choice Scholarships are taken away because of this lawsuit, she will have to carry a heavier financial burden than she's ever had to in order to provide her children with the quality education she desires for them. *Id.*

C. *Monica Poindexter*

Applicant Monica Poindexter is a single mother and resident of Indianapolis, Indiana. Aff. of Monica Poindexter ("Poindexter Aff.") attached as Exhibit 2, ¶¶ 2, 3. She has two children: Mia, who completed sixth grade at Holy Angels Catholic School ("Holy Angels") in June 2011; and Isaiah, who will be entering kindergarten at Holy Angels in fall 2011. *Id.* ¶ 3. Because Holy Angels only serves students through the sixth grade, Monica has decided to send Mia to Cardinal Ritter High School ("Cardinal Ritter"), which serves grades seven though twelve, for the 2011-2012 school year. *Id.* Monica has been very pleased with her decision to send Mia to Holy Angels. *Id.* ¶ 4. She believes Mia got a wonderful education there; Mia was actually valedictorian of her sixth-grade class. *Id.*

Monica did not choose Holy Angels or Cardinal Ritter for religious reasons, but because she thought they would provide the best educational fit for her children. *Id.* ¶ 5. Monica chose to send Mia to Holy Angels rather than a public school because Holy Angels offers much smaller class sizes and therefore more opportunity for one-on-one instruction. *Id.* ¶ 4. She was impressed that the principal and teachers knew every student and feels that Holy Angels provides a more welcoming and higher-quality educational environment. *Id.* Within that environment, Mia has thrived. *Id.* Monica and her children are not Catholic, but they have been very comfortable with the religious atmosphere at Holy Angels. *Id.* ¶ 6. In their experience—just as in the experience of Heather and her children at St. Monica—that atmosphere has contributed to the success of Holy Angels as an educational institution. *Id.* Because of Mia's excellent experience there, Monica has chosen to send Isaiah there for the 2011-2012 school year. *Id.* ¶ 4. Monica chose Cardinal Ritter for Mia because she understands that that school provides an educational environment similar to that provided by Holy Angels. *Id.*

Paying for Mia's tuition at Holy Angels was a financial sacrifice, but she did get some assistance in the form of a modest scholarship from the Educational CHOICE Charitable Trust. *Id.* ¶ 7. While this scholarship has been helpful, it only covers a small portion of Mia's tuition costs. *Id.* It has therefore been a significant financial burden, despite the scholarship, to pay for Mia's education. *Id.* Monica has a full-time job and a substantial portion of her income goes to Mia's educational expenses. *Id.* Once Isaiah starts kindergarten next year, Monica's financial burden will increase dramatically as she will also be paying tuition for his schooling. *Id.*

Mia has been accepted by Cardinal Ritter, which is an eligible school under the program, as a new student; Isaiah has been accepted at Holy Angels as a new student. *Id.* ¶ 8. Monica and Mia meet all of the eligibility requirements for the Choice Scholarship Program. *Id.* Monica has submitted her application and expects to receive official notification soon that Mia has her Choice Scholarship. *Id.* Monica plans on applying for one for Isaiah as soon as he becomes eligible to receive one next year. *Id.* If Mia's Choice Scholarship is taken away as a result of this lawsuit (and Monica loses the possibility of getting a Choice Scholarship for Isaiah in the future), it will be a tremendous financial burden for Monica to continue to keep her children enrolled in their schools, one that Monica does not think she can shoulder for long—even if Mia and Isaiah receive scholarships from the Educational CHOICE Trust. *Id.* But with a Choice Scholarship—and the greater financial support it will provide—she will be able to afford to pay for her children's education. *Id.* Monica does not want to be forced to send her children to public schools because she believes that they will not get the quality education she believes they deserve and need there. *Id.*

ARGUMENT

This Court should allow Applicants to intervene as a matter of right under Trial Rule 24(A)(2) or, alternatively, permit them to intervene under Trial Rule 24(B)(2). As the intended beneficiaries of school choice programs, parents of children participating in such programs are routinely granted leave to intervene when the programs are challenged in court. *See, e.g.*, *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006); *Owens v. Colo. Cong. Of Parents, Teachers & Students*, 92 P.3d 933 (Colo. 2004); *Griffith v. Bower*, 747 N.E.2d 423 (Ill. App. Ct. 2001); *Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999); *Chittenden Town Sch. Dist. v. Vt. Dep't of Educ.*, 738 A.2d 539 (Vt. 1999) (parents were plaintiff-intervenors); *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998).

I. APPLICANTS ARE ENTITLED, AS THE INTENDED BENEFICIARIES OF THE CHOICE SCHOLARSHIP PROGRAM, TO INTERVENE AS A MATTER OF RIGHT IN THIS ACTION.

Applicants are entitled to intervene as a matter of right. "Indiana cases interpreting Indiana Trial Rule 24(A)(2) have traditionally adopted the three-part test followed by the Federal courts in their interpretation of its numerical counterpart in the Federal Rules of Civil Procedure." *Cincinnati Ins. Co. v. Young*, 852 N.E.2d 8, 13 (Ind. Ct. App. 2006), *trans. denied.* Under this test, an applicant must show, upon timely motion, "(1) that he has an interest in the subject of the action; (2) that disposition in the action may as a practical matter impede protection of that interest; and (3) that representation of the interest by existing parties is inadequate" in order to intervene "of right." *In re: Paternity of Duran*, 900 N.E.2d 454, 467 (Ind. Ct. App. 2009); *see also* Ind. R. Trial P. 24(A)(2). In Indiana, "[t]he grant or denial of a petition to intervene," as well as "whether a particular factual situation satisfies this three-part

test," is at "the discretion of the trial court." *Cincinnati Ins. Co.*, 852 N.E.2d at 13 (citing *Herdrich Petrol. Corp. v. Radford*, 773 N.E.2d 319, 324 (Ind. Ct. App. 2002), *reh'g denied*, *trans. denied*). Notably, in addition to looking at Indiana case law for guidance in applying Trial Rule 24, Indiana courts often look to federal case law applying that rule's federal counterpart, Rule 24 of the Federal Rules of Civil Procedure. *See, e.g.*, *Cincinnati Ins. Co.*, 852 N.E.2d at 13-14; *New Haven v. Chem. Waste Mgmt of Ind., L.L.C.*, 685 N.E.2d 97, 101 (Ind. Ct. App. 1997), *trans. dismissed* ("*New Haven I*"); *Bryant v. Lake Cnty. Trust Co.*, 166 Ind. App. 92, 334 N.E.2d 730, 735 (Ind. Ct. App. 1975), *reh'g denied*. Applicants' motion is timely—it comes within twelve business days of the filing of Plaintiffs' complaint and Applicants agree to abide by any previously set schedule—and Applicants satisfy the remaining three criteria.

A. Applicants Have an Immediate and Direct Interest in this Litigation

First, Applicants have the requisite interest to intervene as a matter of right. Indiana courts require those seeking intervention to "claim an immediate and direct interest in the proceedings." *In re: Remonstrance Repealing Ordinance Nos. 98-004, 98-005, 98-006, 98-007 & 98-008*, 737 N.E.2d 767, 769 (Ind. Ct. App. 2000). Basically, this standard requires that "the intervenor of right 'must have an interest recognized by law that relates to the subject of the action in which intervention is sought.'" *In re: Remonstrance Repealing Ordinance*, 737 N.E.2d at 769 (citing *State ex rel. Prosser v. Ind. Waste Sys.*, 603 N.E.2d 181, 187 (Ind. Ct. App. 1992)).

Applicants have an immediate and direct interest in the Choice Scholarship Program, which is the subject of Plaintiffs' lawsuit. Applicants will be using Choice Scholarships this school year; these scholarships will allow them to choose the schools that are best for their children in the upcoming school year. Plaintiffs have threatened that interest with this lawsuit

and their request for a preliminary injunction. Applicants have an interest in making sure that their children will receive their scholarships.

Furthermore, Applicants' interest is recognized by law and legally protectable. The statute that created the Choice Scholarship Program states that each "eligible individual is *entitled* to a choice scholarship [] for each school year beginning after June 30, 2011, that the eligible student enrolls in an eligible school." Ind. Code § 20-51-4-2(a) (emphasis added). Applicants' children meet all of the eligibility requirements, and Applicants will use the Choice Scholarships they receive to pay for their children's education at eligible schools starting this August. *See supra*, pp. 4 to 8.

Because their children are entitled to receive Choice Scholarships and plan to use them to attend eligible schools this fall, Applicants have the requisite interest to intervene in this lawsuit as of right. Significantly, Indiana courts routinely allow people—like Applicants—whose interests are affected by government programs or actions to intervene of right in suits between the government and other parties concerning those programs or actions. *See, e.g.*, *In re: Remonstrance Repealing Ordinance*, 737 N.E.2d at 769 (finding landowners had sufficient interest to intervene as of right in lawsuit filed by remonstrators against town regarding annexation ordinances because the value of landowners' property would be affected by whether or not annexation could proceed); *Heritage House of Salem, Inc. v. Bailey*, 652 N.E.2d 69, 73-74 (Ind. Ct. App. 1995) (finding owners of nursing homes had sufficient interest to intervene as of right in lawsuit filed by other nursing homes against state because owners would suffer financial loss if plaintiffs succeeded in their challenge to Indiana's certificate-of-need law), *reh'g denied, trans. denied.* Applicants' interest in obtaining Choice Scholarships to pay for the education of

their children is at least as great as the financial interests of the intervenors in the above-mentioned cases.

Furthermore, even though the following cases do not make it clear whether intervention was as of right or permissive (perhaps because intervention was not a subject of the appeal), they do at least provide additional evidence that Indiana courts regularly allow intervention when prospective intervenors' interests are affected by the challenged government program or action. *See, e.g., Thomas v. Blackford Cnty. Area Bd. Of Zoning Apps.*, 907 N.E.2d 988, 990 (Ind. 2009) (dairy allowed to intervene in suit between neighbor and zoning board to protect the dairy's rights under an exemption granted to it by the board); *Ind. Educ. Emp't Relations Bd. v. Benton Cmty. Sch. Corp.*, 266 Ind. 491, 365 N.E.2d 752, 753-54 (Ind. 1977) (AFL-CIO allowed to intervene to defend state law governing collective bargaining); *Town of Dyer v. Town of St. John Ind.*, 919 N.E.2d 1196, 1198 (Ind. Ct. App. 2010) (landowners allowed to intervene as defendants in suit between towns over annexation powers to support the annexation of their own land); *Liberty Landowners Ass'n v. Porter Cnty. Comm'rs*, 913 N.E.2d 1245, 1248-49 (Ind. Ct. App. 2009) (hospital allowed to intervene as defendant to protect rights under rezoning plan in landowners association's suit against zoning board), *trans. denied*; *Little Beverage Co. v. DePrez*, 777 N.E.2d 74, 77 (Ind. Ct. App. 2002) (companies interested in scheduled sunset of regulation allowed to intervene to defend sunset in suit seeking to enjoin the sunset), *trans. denied*. Applicants are relying on Choice Scholarships in order to have the financial resources necessary to send their children to good private schools that provide the kind of quality education that Applicants want their children to have. Plaintiffs seek the end of Choice Scholarships, so Applicants have a great interest in intervening to defend the constitutionality of this program upon which they rely.

Finally, federal case law applying Federal Rule 24(a)(2) reinforces the conclusion that Applicants have the requisite interest to intervene as of right. Federal 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., Cal. ex rel. Lockyer v. United States*, 450 F.3d 436, 441-42 (9th Cir. 2006) (allowing health care providers to intervene to defend conscience protection law because "Congress passed the [law] to protect health care providers like those represented by the proposed intervenors . . . . They are the intended beneficiaries of this law . . . ." (internal quotation marks omitted)); *Cnty. 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"); *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"). As the direct and intended beneficiaries of the Choice Scholarship Program, Applicants possess the requisite interest to intervene as a matter of right in this case.

B. The Disposition of this Lawsuit May Impair or Impede Applicants' Ability to Protect Their Interests

Second, the disposition of this action may, as a "practical matter," "impair or impede" Applicants' "ability to protect [their] interest." Ind. R. Trial P. 24(A)(2). Indiana courts regularly allow intervention as a matter of right when prospective intervenors can show that the case's outcome could harm their interests related to the litigation. *See, e.g., In re: Remonstrance Repealing Ordinance*, 737 N.E.2d at 769-70 (allowing intervention by landowners in circumstance where a ruling for plaintiffs against annexation would harm them because they

sought annexation in order to be able to build a housing development and connect their property to sewer lines; if annexation was blocked, landowners could not do either of these things); *Heritage House*, 652 N.E.2d at 74 (allowing intervention by owners of nursing homes in circumstance where a ruling for plaintiffs would cause them to have to certify all beds for Medicare participation, which would have resulted in financial loss); *U.S. Aircraft Fin. v. Jankovich*, 407 N.E.2d 287, 291 (Ind. Ct. App. 1980) (allowing intervention by city in circumstance where a ruling for plaintiffs would cause fueling and maintenance services that the defendant provided to the city to stop), *reh'g denied*.

Applicants can make the same showing. Their interest in obtaining Choice Scholarships for their children would obviously be impeded or impaired by a decision that the Choice Scholarship Program is unconstitutional. Indeed, if Plaintiffs are successful in their attempt to obtain a preliminary injunction, that interest will be impaired *immediately*. Furthermore, Applicants "have no alternative forum where they can mount a robust defense" of the Choice Scholarship Program. *Cal. ex rel. Lockyer*, 450 F.3d at 442. Should the Choice Scholarship Program be ruled unconstitutional, Applicants and their children, "the beneficiaries under the [A]ct, would have no chance in future proceedings to have its constitutionality upheld." *Saunders v. Super. Ct. in & for Maricopa Cnty.*, 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.

C. Applicants' Interests Will Only Be Represented Adequately if They Are Allowed to Intervene

Third, Applicants' interest is not adequately protected by existing parties. Ind. R. Trial P. 24(A)(2). In order to determine whether representation by the original defendant is adequate, Indiana courts "analyze the similarity of the proposed intervenor's interests and whether that

interest is adequately represented by the named party." *Developmental Disabilities Residential Facilities Council v. Metro. Dev. Comm'n of Marion Cnty.*, 455 N.E.2d 960, 965 (Ind. Ct. App. 1983). Where the proposed intervenor has "direct interests in the case which [are] not adequately protected by" the original defendants, the proposed intervenors are "entitled to intervention as a matter of right." *Heritage House*, 652 N.E.2d at 74.

Federal courts applying Federal Rule of Civil Procedure 24(a)(2) have held that when the proposed intervenor's interest is "potentially more narrow and parochial than the interests of the public at large," the government's representation of the applicant's interests may well be inadequate and intervention is therefore warranted. *Californians for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1190 (9th Cir. 1998). In *Trbovich v. United Mine Workers of America*, 404 U.S. 528 (1972), the Supreme Court allowed a union member to intervene alongside the Secretary of Labor in a 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." *Trbovich*, 404 U.S. at 538-39 (internal quotation marks and citation omitted). Indeed, the Indiana Court of Appeals took a similar approach in *Heritage House*, in which it found that the Indiana Department of Health, which had broad and systematic interests in regulating nursing homes, could not adequately represent nursing-home owners, who had a more narrow concern about the impact of the program on the operation of their businesses. Thus, the Court allowed the owners to intervene. *Heritage House*, 652 N.E.2d at 74.

Defendants, who are answerable to the public at large, have a broad interest in administering the program as part of Indiana's overall approach to public education. Applicants

have a narrower interest in using Choice Scholarships to provide their children with the best possible education—an education fitted to what Applicants believe each of their children's educational needs to be. Moreover, Applicants' interest, unlike Defendants', stems from the fundamental "liberty of parents and guardians to direct the upbringing and education of children under their control." *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925); *see also Willis v. State*, 888 N.E.2d 177, 180 (Ind. 2008) ("A parent has a fundamental liberty interest in . . . direct[ing] the upbringing and education of children." (internal citations omitted)).

Although Defendants and Applicants both desire to see the Choice Scholarship Program upheld, their different interests create the possibility of disagreement over litigation approach.[1] Indeed, past experience in school choice litigation confirms that the government and intervenors may disagree over litigation approaches and will not necessarily raise the same arguments. In *Arizona Christian School Tuition Organization v. Winn*, 131 S. Ct. 1436 (2011), for example, intervenors successfully argued that the plaintiffs challenging the school choice program at issue lacked standing, while the state conceded that plaintiffs had standing. Similarly, it was the intervenors and not the state in *Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999), who urged the court to confront the role that anti-religious bigotry played in the "Blaine Amendments" found in many state constitutions, including Indiana's. *See* Ind. Const. art. 1, § 6.

Plaintiffs' counsel has, as noted above, indicated that Plaintiffs oppose Applicants' intervention in this matter. Applicants note that Plaintiffs' legal arguments depend on viewing parents and children as mere instruments through which the state channels money to religious schools. Pls.' Br. in Supp. of Mot. for Prelim. Inj. at 10 ("Pls.' Br."). This view ignores that the

[1] Applicants believe that Defendants have excellent legal counsel who will represent Defendants' interests well. As explained above, however, they believe it is important to have counsel in the litigation representing their interests, which are different than Defendants'.

program aids parents, who then make genuine and independent choices as to which school their children will attend using Choice Scholarships. Parents like Applicants are in the best position to contradict the manner in which Plaintiffs have tried to frame the legal issues in this case. Plaintiffs are trying to deny to Applicant's children the educational choice Indiana has tried to provide them through the Choice Scholarship Program. They should not be allowed to deny Applicants even the opportunity to defend the program as parties to this lawsuit.

In addition, because their interests are distinct from Defendants', the harm that Applicants will suffer to those interests is also distinct from the harm Defendants will suffer if the program is enjoined, either temporarily or permanently. Plaintiffs argue that Defendants will suffer no financial harm from the delay of the implementation of the Choice Scholarship Program. Pls.' Br. at 30. However, they ignore that parents like Applicants *will* suffer financial harm if the program is enjoined because they will lose the Choice Scholarships that they are planning to use to pay tuition at private schools in the upcoming school year. Coffy Aff. ¶ 11; Poindexter Aff. ¶ 8. Thus, Applicants have a much more direct and immediate stake in avoiding the disruption that would be caused by enjoining the program than do Defendants.

Because the only way to guarantee that Applicants' interests will be adequately represented is for them to participate in the litigation, Applicants should be allowed to intervene as a matter of right. Party status is necessary to ensure that the Choice Scholarship Program's intended beneficiaries may, like the intervenors in *Winn* and *Kotterman*, protect their rights vigorously and completely.

II. APPLICANTS SHOULD BE GRANTED PERMISSIVE INTERVENTION TO DEFEND THE CHOICE SCHOLARSHIP PROGRAM AS ITS INTENDED BENEFICIARIES.

Applicants alternately seek permissive intervention pursuant to Rule 24(B)(2). "Indiana courts have routinely granted permissive intervention when the applicant's claim or defense has a question of law or fact in common with the underlying action." *Herdrich*, 773 N.E.2d at 324-25 (citing *New Haven v. Chem. Waste Mgmt. of Ind., L.L.C.*, 701 N.E.2d 912, 922 (Ind. Ct. App. 1998) ("*New Haven II*")); *see also* Ind. R. Trial P. 24(B)(2). As long as the claims or defenses have issues in common, the court has broad discretion to allow permissive intervention; Indiana courts will generally only deny permissive intervention where "the intervention will unduly delay or prejudice the adjudication of the rights of the original parties," *United of Omaha v. Hieber*, 653 N.E.2d 83, 88 (Ind. Ct. App. 1995), *reh'g denied, trans. denied*, or "where the effect of granting a motion to intervene would open up new areas of inquiry or raise unrelated issues." *New Haven II*, 701 N.E.2d at 922. Applicants' intervention implicates neither of these concerns.

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 Choice Scholarship Program is constitutional, and the interests of Applicants and their children are inextricably linked with the question of the Choice Scholarship Program's constitutionality. Applicants seek intervention solely to assist this Court in answering the questions of law and fact raised in the main action.

Second, Applicants' intervention will not delay or prejudice the rights of the original parties. Applicants will follow any predetermined schedules and will not seek to delay the upcoming hearing on Plaintiffs' motion for preliminary injunction. They have intervened in a

timely manner, within twelve business days of Plaintiffs' filing of the complaint.[2] The case should be able to proceed as originally anticipated.

Third, Applicants' intervention will not open up new areas of inquiry or raise unrelated issues. This standard requires "that an intervenor takes the case as he finds it and cannot change the issues or raise unrelated issues." *New Haven I*, 685 N.E.2d at 100; *Cromer v. Sefton*, 471 N.E.2d 700, 704 (Ind. Ct. App. 1984). Applicants are seeking to support the constitutional defense of the Choice Scholarship Program and will not bring any cross-claims or introduce any issues unrelated to Plaintiffs' challenge to the constitutionality of the Choice Scholarship Program. They will focus solely on defending against the three constitutional claims brought by Plaintiffs.

Applicants believe that by addressing these claims, they will assist this Court in the resolution of this case. Significantly, Applicants' counsel have represented intervening parents in the successful defense of:

- Arizona's Individual Scholarship Tax Credit Program, *Ariz. Christian Sch. Tuition Org v. Winn*, 131 S. Ct. 1436 (2011); and *Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999);
- Ohio's Pilot Scholarship Program, *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); and *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999);
- Milwaukee's Parental Choice Program, *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998);
- Arizona's Corporate Scholarship Tax Credit Program, *Green v. Garriott*, 212 P.3d 96 (Ariz. App. 2009); and
- Illinois's Educational Expenses 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).

[2] This lawsuit was filed on Friday, July 1. On Tuesday, July 5, Applicants' counsel notified Defendants' counsel of Applicants' intention to seek intervention.

In addition, Applicants' counsel is currently representing parent-intervenors in *Larue v. Douglas County School District RE-1*, No. 2011CV4424 (Denver Cnty. Dist. Ct. filed June 21, 2011), the recent challenge to the Choice Scholarship Program adopted by Douglas County School District in Colorado. *See Larue v. Douglas Cnty. Sch. Dist. RE-1*, No. 2011CV4424 (Denver Cnty. Dist. Ct. July 14, 2011) (order granting motion to intervene).

Many of the issues raised in these earlier cases are likely to be raised in the present action, including whether the Choice Scholarship Program involves drawing state money "for the benefit of" children, on the one hand, or religious schools, on the other. *See* Ind. Const. art. 1, § 6. It is therefore appropriate to have the parties with the most direct and tangible stake in the program participating in the lawsuit.

Finally, in every court challenge to a school choice program during the past two decades, parents have been permitted to intervene in order to represent their and their children's unique interests. *See supra*, p. 9. Applicants are not aware of any school choice case in which a court has denied intervention by parents. Applicants respectfully ask that they be allowed to intervene here because they—like parents who have intervened in other school choice cases—are best situated to assist the Court in understanding the real-world need for school choice and its impact on its intended beneficiaries.

CONCLUSION

Plaintiffs seek first a preliminary, and then a permanent, injunction against Defendants that will prevent them from providing Choice Scholarships to the children of parents like Applicants. As beneficiaries of the Choice Scholarship Program, Applicants will be directly, significantly, and immediately harmed by such an outcome. Accordingly, they deserve the

opportunity to present a vigorous defense of the Choice Scholarship Program—and the chance that it has given them to send their children to schools that can best meet their educational needs.

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

Dated this 20th day of July, 2011.

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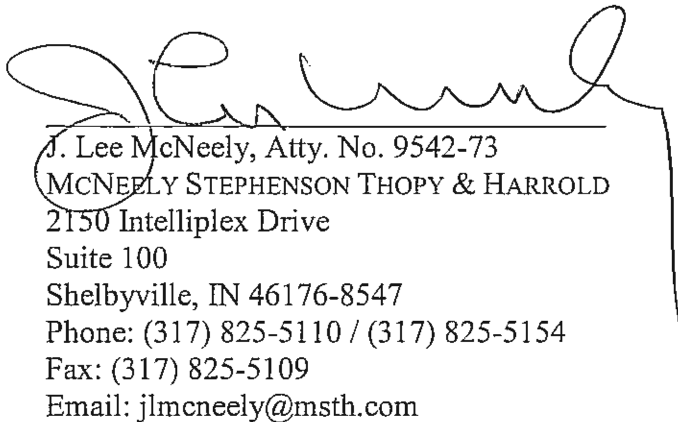
Pro Hac Vice Application Pending

MCNEELY STEPHENSON THOPY & HARROLD



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Attorneys for Applicants

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of July, 2011, a true and correct copy of BRIEF OF HEATHER COFFY AND MONICA POINDEXTER IN SUPPORT OF MOTION TO INTERVENE AS DEFENDANTS has been served upon the following counsel of record via electronic mail and First Class U.S. Mail, postage prepaid:

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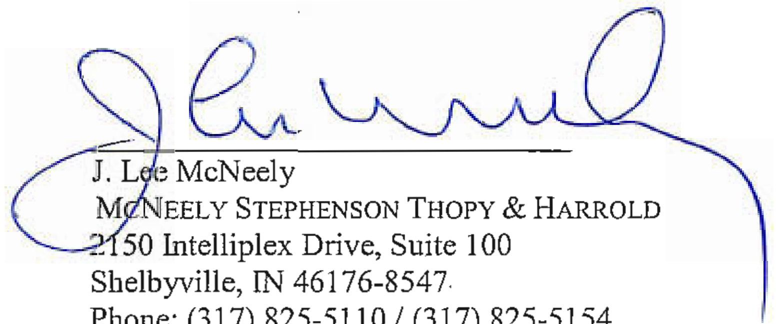

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STATE OF INDIANA) IN THE MARION SUPERIOR/CIRCUIT COURT
) SS:
COUNTY OF MARION) CAUSE NO.: 49007 11 07 PL 025402

TERESA MEREDITH, DR. EDWARD E. EILER, RICHARD E. HAMILTON, SHEILA KENNEDY, GLENDA RITZ, REV. MICHAEL JONES, DR. ROBERT M. STWALLEY III, KAREN J. COMBS, REV. KEVIN ARMSTRONG, DEBORAH J. PATTERSON, KEITH GAMBILL, and JUDITH LYNN FAILER,

Plaintiffs,

v.

MITCH DANIELS, in his official capacity as Governor of Indiana; and DR. TONY BENNETT, in his official capacity as Indiana Superintendent of Public Instruction and Director of the Indiana Department of Education,

Defendants.

AFFIDAVIT OF *HEATHER COFFY* IN SUPPORT OF MOTION TO INTERVENE

Comes now the Affiant, Heather Coffy, after being duly sworn upon her oath, states as follows:

1. I am an adult over the age of 18 years, and have personal knowledge as to all matters contained herein.

2. I am a resident of Indianapolis, Indiana.

3. I am the single mother of three children: Delano, who just completed the eighth grade at St. Monica Catholic School in June 2011; Darius, who just completed the fifth grade at St. Monica in June 2011; and Alanna, who just completed the second grade at St. Monica in June 2011.

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4. I am very happy with the education that all of my children have received at St. Monica, which serves children up through the eighth grade. I enrolled Delano at St. Monica starting in the fourth grade because I was dissatisfied with the education he was receiving at College Park Elementary, a public school in Pike Township. I did not believe that he or the other children there were getting the individualized attention they needed in order to succeed. My complaints about this issue went unheeded by school administrators. Delano was not getting good grades, he was not challenged by his classes, and I feared that he was going to get lost in the system.

5. For that reason, I enrolled Delano at St. Monica. Doing so put a strain on my finances, but I was assisted by a small scholarship that I obtained for him through the Educational CHOICE Charitable Trust. Subsequently, I also obtained scholarships from the Trust for Darius and Alanna to attend St. Monica. Darius has been enrolled there since the first grade; Alanna has been enrolled there since kindergarten.

6. Being at St. Monica has been a wonderful educational experience for my children. Class size is small, so they receive lots of one-on-one instruction from wonderful, caring teachers. Delano's grades have improved significantly, and he is blossoming into a fine young man. He thrived as a basketball player for the school's team. Darius and Alanna are also making good grades and getting a terrific education.

7. Neither I nor my children are parishioners at St. Monica. I did not select the school for religious reasons; I selected it because I thought it was better suited than the public schools to give my children a quality education.

8. My children and I are not Catholic, but we have been very comfortable with the religious atmosphere at St. Monica. In our experience, that religious atmosphere contributes to St. Monica's success as an educational institution.

9. The scholarships from the Educational CHOICE Charitable Trust have helped me pay for my children's schooling, but they are small and cover only a small part of total tuition costs. Thus, even with the scholarships, it has been a significant financial burden to pay for my children's education. Last year, I devoted a very substantial portion of my income from my full-time job to paying for my children's education. I am only making payments on the interest on my mortgage in order to free up money to pay tuition.

10. The financial burden will increase next year. St. Monica does not serve high-school grades, which means I will need to enroll Delano in a high school. The high school I have chosen is Bishop Chatard High School. The Educational CHOICE Charitable Trust does not award scholarships to high-school students, so I am counting on having a Choice Scholarship in order to afford to send Delano to Chatard, which is an excellent school where I believe Delano can continue to flourish. Without a Choice Scholarship for Delano, I will have to reevaluate whether and how I am going to be able to send him to Chatard. I am also counting on having Choice Scholarships for Darius and Alanna to help offset the cost of tuition at St. Monica; tuition there grows every year. The Choice Scholarships will cover a much greater portion of my children's tuition than the scholarships from the Educational CHOICE Charitable Trust have, so receiving Choice Scholarships is vital to my ability to continue to pay for all of my children's education while still being able to provide for the other needs of my family.

11. Both Chatard and St. Monica are participating in the Choice Scholarship Program. Delano has been accepted by Chatard as a new student, and Darius and Alanna have

been accepted at St. Monica for the upcoming school year. My children and I meet all of the eligibility requirements for Choice Scholarships. I have received scholarships for Darius and Alanna, and I have submitted my application for Delano; I expect to receive official notification soon that he will also be receiving a Choice Scholarship. If my children cannot get their Choice Scholarships as a result of this lawsuit, I will have to carry a heavier financial burden than I've ever had to in order to provide my kids with the education I know they deserve.

FURTHER AFFIANT SAYETH NOT.

Dated: 7-18-11

Heather Coffy
Heather Coffy

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

Before me, the undersigned Notary Public within and for said county and state, this day personally appeared Heather Coffy, and acknowledged the execution of the foregoing Affidavit and who, having been duly sworn, stated that any representations therein contained are true.

Witness my hand and Notarial Seal this 18 day of July, 2011.

My Commission Expires
1-19-15

Notary Public, Signed

County of Residence:
Shelby

Gretchen Morgan
Notary Public, Printed

STATE OF INDIANA) IN THE MARION SUPERIOR/CIRCUIT COURT
) SS:
COUNTY OF MARION) CAUSE NO.: 49007 11 07 PL 025402

TERESA MEREDITH, DR. EDWARD E. EILER, RICHARD E. HAMILTON, SHEILA KENNEDY, GLENDA RITZ, REV. MICHAEL JONES, DR. ROBERT M. STWALLEY III, KAREN J. COMBS, REV. KEVIN ARMSTRONG, DEBORAH J. PATTERSON, KEITH GAMBILL, and JUDITH LYNN FAILER,

Plaintiffs,

v.

MITCH DANIELS, in his official capacity as Governor of Indiana; and DR. TONY BENNETT, in his official capacity as Indiana Superintendent of Public Instruction and Director of the Indiana Department of Education,

Defendants.

AFFIDAVIT OF *MONICA POINDEXTER* IN SUPPORT OF MOTION TO INTERVENE

Comes now the Affiant, Monica Poindexter, after being duly sworn upon her oath, states as follows:

1. I am an adult over the age of 18 years, and have personal knowledge as to all matters contained herein.

2. I am a resident of Indianapolis, Indiana.

3. I am the single mother of two children: Mia, who just completed the sixth grade at Holy Angels Catholic School in June 2011; and Isaiah, who will be entering kindergarten at Holy Angels this upcoming school year. Next year, Mia will be attending Cardinal Ritter High

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School, which serves grades seven through twelve. (Holy Angels only serves students through the sixth grade.)

4. I am very pleased with my decision to send Mia to Holy Angels. I think she got a wonderful education there. Indeed, she was the valedictorian of her sixth-grade class! I chose to send Mia to Holy Angels rather than public school because Holy Angels offers much smaller class sizes—which means that there is more opportunity for one-on-one instruction. I was impressed that the principal and the teachers really knew each and every one of the students. All in all, I thought that Holy Angels provided a much more welcoming, and better, educational environment. Mia has really thrived within that environment. Because of her great experience at the school, I will be sending Isaiah there next year. Because I understand that Cardinal Ritter has a similar environment, I will be sending her there next year.

5. I did not choose Holy Angels or Cardinal Ritter for religious reasons; I chose them because they were the best educational fit for my children.

6. My children and I are not Catholic, but we have been very comfortable with the religious atmosphere at Holy Angels. In our experience, that religious atmosphere contributes to Holy Angels' success as an educational institution.

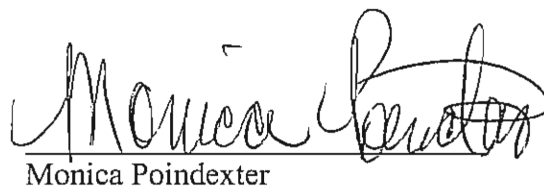
7. Sending Mia to Holy Angels was a financial sacrifice, but I did get assistance in the form of a modest scholarship from the Educational CHOICE Charitable Trust. The scholarship has been helpful, but it covers only a small part of tuition costs. Thus, even with the aid of that scholarship, it has been a significant financial burden to pay for Mia's education. I have a full-time job, and a substantial portion of my income goes toward educational expenses. My financial burden will increase next year because Isaiah will be starting kindergarten, so I will

have to start paying tuition for him. I have applied to the Educational CHOICE Charitable Trust to help defray some of that cost.

8. Cardinal Ritter is participating in the Choice Scholarship Program. Mia has been accepted by Cardinal Ritter as a new student, and Isaiah was a student in the pre-kindergarten last year and has been accepted at Holy Angels as a student in kindergarten this year. Mia and I meet all the eligibility requirements for the Choice Scholarship Program. I have submitted my application and expect to receive official notification soon that Mia has her Choice Scholarship. I will apply for one for Isaiah next year when he becomes eligible to receive one. If Mia cannot get her Choice Scholarship as a result of this lawsuit—and I lose the possibility of getting a Choice Scholarship for Isaiah in the future— it will be a tremendous financial hardship for me to continue to keep my children enrolled in their schools. I don't think it's a burden that I can shoulder for long, even if Mia and Isaiah receive scholarships from the Educational CHOICE Charitable Trust. But with a Choice Scholarship—which will cover a much greater portion of tuition—I will be able to pay for my children's education. I really don't want to have to send my children to public school because I don't believe they will get the quality education there that I believe they deserve and need.

FURTHER AFFIANT SAYETH NOT.

Dated: 7/18/11

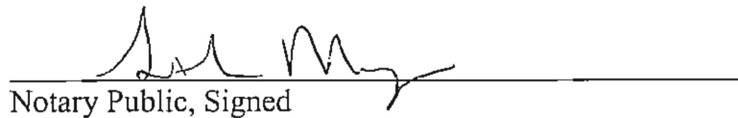


Monica Poindexter

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

Before me, the undersigned Notary Public within and for said county and state, this day personally appeared Monica Poindexter, and acknowledged the execution of the foregoing Affidavit and who, having been duly sworn, stated that any representations therein contained are true.

Witness my hand and Notarial Seal this 18 day of July, 2011.



My Commission Expires 1-19-15

Notary Public, Signed

County of Residence: Shelby

Gretchen Morgan
Notary Public, Printed