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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

IN ITS ORIGINAL JURISDICTION

Yamilette Albertson, on her own behalf and on behalf of her children, Y., A., and J.; and Constantine Shulikov, on his own behalf and on behalf of his children, A., E., P., N., and V.…….……Petitioners

v.

Ellen Weaver, in her official capacity as State Superintendent of Education……..Respondent

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MOTION TO INTERVENE

The South Carolina Education Association, Candace Eidson, Joy Brown, and Crystal Rouse ("Intervenors") move to intervene in this matter to defend the Court's recent decision in *Eidson, et. al. v. South Carolina Department of Education*, Op. No. 28235 (S.C. Sup. Ct. filed Sept. 11, 2024) (Howard Adv. Sh. No. 35 at 12). Despite cloaking their challenge as one under the federal constitution, what Petitioners seek is abundantly clear: Petitioners ask for a third bite at the apple after a majority of this Court found portions of the 2023 Act No. 8 (S. 39), known as the Education Scholarship Trust Fund ("ESTF"), unconstitutional and then denied a petition for rehearing. Contrary to Petitioners' assertion, this Court was well aware of the federal constitutional provisions that Petitioners now contend are violated by this Court's decision in *Eidson*. Indeed, Petitioners filed an *amicus curiae* brief arguing in favor of the constitutionality of the ESTF program and raising substantially similar arguments they now raise in their Petition.[1] Because

[1] Specifically, Petitioners filed an *amicus* brief in *Eidson* in which their second argument stated, "Applying the South Carolina Constitution to Bar Private School Students from Obtaining Financial Aid Would Violate the U.S. Constitution." Petitioners made substantially similar

Intervenors fulfill all the requirements to intervene, Intervenors file this motion to put an end to Petitioners' continuing attempts to undue the *Eidson* decision.[2]

LEGAL STANDARD

This Court has repeatedly permitted parties to intervene in cases brought in this Court's original jurisdiction. *See, e.g.*, Order, *Planned Parenthood S. Atl. v. State*, No. 2023-001449 (S.C. Sept. 21, 2023); *Mercury Funding, LLC v. Chesney*, 433 S.C. 591, 861 S.E.2d 35 (2021); *Bailey v. S.C. State Election Comm'n*, 430 S.C. 268, 271, 844 S.E.2d 390, 391 (2020); *State ex rel. Wilson v. Condon*, 410 S.C. 331, 333, 764 S.E.2d 247, 248 (2014); *Savannah Riverkeeper v. S.C. Dep't of Health & Envtl. Control*, 400 S.C. 196, 200, 733 S.E.2d 903, 905 (2012); *Sanford v. S.C. State Ethics Comm'n*, 385 S.C. 483, 489, 685 S.E.2d 600, 603 (2009).

Rule 24 of the South Carolina Rules of Civil Procedure permits a party to intervene as a matter of right or with permission of the court. Intervention by right applies when (1) timely application is sought, (2) an interest in the action exists, (3) that interest would be impaired without intervention, and (4) that interest is not adequately represented by other parties. *Berkeley Elec. Coop., Inc. v. Mt. Pleasant*, 302 S.C. 186, 189, 394 S.E.2d 712, 714 (1990). To gain permissive intervention, a party must "(1) establish timely application; (2) assert a claim or defense that has a question of law or fact in common with the underlying action; and (3) prove his participation in the underlying action will not delay or prejudice the adjudication of the rights of the original parties." *Builders Mut. Ins. Co. v. Island Pointe, LLC*, 431 S.C. 93, 101, 847 S.E.2d 87, 91 (2020). This Court construes the rules governing intervention liberally in favor of

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arguments and cited the same cases in their *amicus* brief that they present to the Court in their Petition.

[2] Intervenors attempted to contact Petitioners to determine whether they consent or otherwise do not object to this motion but did not receive a response by the time of filing.

intervention. *Berkeley Elec. Coop., Inc*., 302 S.C. at 189, 394 S.E.2d at 714.

ARGUMENT

I. Intervenors are entitled to intervention as a matter of right.

Intervenors meet the requirements in Rule 24, SCRCP, for intervention as a matter of right. First, Intervenors timely filed this motion to intervene twelve days following the Petition. *Berkeley Elec. Coop., Inc.*, 302 S.C. at 189, 394 S.E.2d at 714 ("The timeliness of SCE&G's application to intervene is not at issue as the motion was filed only days after Berkeley Electric's complaint was filed."); *cf. Dep't of Health & Envtl. Control v. Columbia Organic Chem. Co. (Ex Parte Reichlyn)*, 310 S.C. 495, 500, 427 S.E.2d 661, 664 (1993) (finding a motion to intervene was untimely when raised following a consent order entered into by the parties).

Second, Intervenors have an interest in the subject matter of Petitioners' challenge. Intervenors are a diverse group of parents from across the State with children in the public schools, as well as a non-profit organization representing thousands of members who work in, rely on, and support public schools. Intervenors allege that the diversion of public funds challenged in *Eidson*, and at issue here, violate state constitutional guarantees and provisions designed to preserve and protect the public education system.

This Court unanimously determined in *Eidson* that the petitioners there, which included all the Intervenors here, had standing to challenge the ESTF program. *See also Ex parte Gov't Emples. Ins. Co. v. Goethe*, 373 S.C. 132, 138, 644 S.E.2d 699, 702 (2007) ("[A] party must have standing to intervene in an action pursuant to Rule 24, SCRCP."). The majority opinion in *Eidson* cited numerous examples of cases granting standing to parties challenging "the legality of the expenditure of public funds." *Eidson* at 19-20 ("Because this case concerns legislation involving the annual transfer of $90 million dollars from the public treasury to what Petitioners claim is for

the benefit of private interests in violation of clear constitutional commands, we do not hesitate to hold Petitioners have satisfied the requirement for public importance standing."). And even the dissent acknowledged plaintiffs' standing. *Eidson* at 43 ("I take no issue with the standing of Petitioners and the presence of "public funds" in the establishment of the ESTF."). Accordingly, because the Court unanimously held that the petitioners in *Eidson* had standing to challenge the constitutionality of the ESTF program, it logically follows that Intervenors have a sufficient interest in this Petition which seeks a decision from this Court that would reverse the final decision in *Eidson*.

Intervenors also have an interest here because the Petition seeks to reverse a final decision of this Court rendered just three months ago. Petitioners do not contend that the statute has changed or that there has been any other authority decided since *Eidson* that would require this Court to revisit its decision. Intervenors could have raised their arguments dating back to *Adams*; regardless, this Court in *Eidson* was well aware of the arguments raised in the Petition, and Intervenors have an interest in upholding that decision.

Third, there is a substantial risk that denying intervention would impair Intervenors' interests. Intervenors have an interest in upholding this Court's final decision in *Eidson* in the face of arguments that were made by the same counsel representing Petitioners in this case. Without being permitted to intervene, an adverse decision in this case would impair Intervenors' ability to protect their interests because they would not be a party to a proceeding that seeks to re-argue *Eidson*. *See Berkeley Elec. Coop., Inc*., 302 S.C. at 190, 394 S.E.2d at 715 (noting that a prospective intervenor "need not prove that it would be bound in a res judicata sense by the judgment, only that it would have difficulty adequately protecting its interests if not allowed to intervene"); *Ex Parte: DeBordieu Colony Cmty. Ass'n, Inc*., 442 S.C. 285, 291, 898 S.E.2d 179,

182 (Ct. App. 2024) ("The 'impairment' factor is not designed to be a difficult standard."). Without being a party to this proceeding, Intervenors would be bound by the Court's decision without any ability to raise arguments addressing the merits of Petitioners' claims or requesting rehearing if the Court issues an adverse decision overruling *Eidson*.

Fourth, Intervenors' interests are not adequately represented by the current parties. This Court has set forth the following factors to determine whether the existing parties adequately represent an intervenor's interests:

> (1) whether the existing parties will undoubtedly make all of the intervenor's arguments;
> (2) whether the existing parties are capable and willing to make such arguments; and
> (3) whether the intervenor offers different knowledge, experience, or perspective on the proceedings that would otherwise be absent.

Berkeley Elec. Coop., Inc., 302 S.C. at 191, 394 S.E.2d at 715. All three factors demonstrate that the existing parties are inadequate to represent Intervenors' interests.

The Petition names Ellen Weaver in her official capacity as the State Superintendent of Education ("the Superintendent") as the only respondent. The Superintendent was a respondent in *Eidson* and contended there that the ESTF program was constitutional. Petitioners in this case assert the Superintendent has violated the federal constitution by complying with *Eidson's* holding, which prohibits the expenditure of ESTF funds for private tuition payments. Based on the Superintendent's prior position that ESTF funds could be used to cover private tuition, there is serious doubt as to whether Intervenors' interests are adequately represented by the current parties. Even if the Superintendent takes no position on the merits of this Petition by contending that she

will follow the law as articulated by this Court,[3] that still leaves no party in this proceeding with a strong interest in upholding *Eidson* and the constitutional mandate on which the decision rested, nor any party arguing that the Superintendent's compliance with *Eidson* does not violate the federal constitution. *Ex Parte: DeBordieu Colony Cmty. Ass'n, Inc*., 442 S.C. at 291, 898 S.E.2d at 182 (noting the fourth factor— that the intervenor's interest is not adequately represented by other parties— "is a 'minimal' burden") (citing *Berkeley Elec. Coop., Inc.*, 302 S.C. at 191, 394 S.E.2d at 715). Accordingly, there is little doubt that the current parties will fail to make any, let alone all, of Intervenors' arguments. Intervenors also offer a different perspective on this Petition since they would be the only parties that were adverse in *Eidson* to the parties in this action.

Due to Petitioners' request for expedited consideration and briefing if the Petition is granted, and to alleviate any timeliness concerns if Intervenors waited until after the Court considered the Petition, Intervenors move to intervene now and will file a conditional return. Intervening at this stage and filing a conditional return is the same approach the Court permitted the intervenor-respondents to pursue in *Eidson*. Accordingly, because Intervenors satisfy the four requirements for intervention as a matter of right, this Court should grant Intervenors' motion to intervene and permit them to file a conditional return.

II. Intervenors also satisfy the requirements for permissive intervention.

Even if the Court disagrees that Intervenors are entitled to intervention as a matter of right, this Court should grant permissive intervention. The first and third factors are easily satisfied because Intervenors' motion to intervene is timely and there is no risk of delay or prejudice to the

[3] For example, in *Eidson*, the South Carolina Office of the Treasurer took no position on the merits. If the Superintendent takes the same position here, that would result in no party responding to the dubious merits arguments raised in the Petition.

current parties.[4] Intervenors also satisfy the second factor because Intervenors assert a claim that has questions of law and fact that are not only in common with the underlying action—they lie at the heart of the Petitioners' claims. Intervenors seek to uphold this Court's ruling in *Eidson* and argue that this Court's decision in *Eidson*, and the Superintendent's compliance with it, does not violate the federal constitution, contrary to Petitioners' assertion.

Moreover, the appellate courts of this State have routinely stated that intervention should be liberally granted. *See, e.g.*, *Berkeley Elec. Coop., Inc.*, 302 S.C. at 189, 394 S.E.2d at 714 ("We interpret the rules to permit liberal intervention particularly whereas here, judicial economy will be promoted by the declaration of the rights of all parties who may be affected."); *Ex Parte: DeBordieu Colony Cmty. Ass'n, Inc.*, 442 S.C. at 291, 898 S.E.2d at 182 (reversing the denial of a motion to intervene and noting "our liberal application of Rule 24"). Thus, because all three factors favor permissive intervention, this Court should grant Intervenors' motion to intervene.

CONCLUSION

For the foregoing reasons, this Court should grant Intervenors' motion to intervene.

[4] While Intervenors contemporaneously file a motion for an extension of time to file a conditional return, Intervenors only request a ten-day extension, which does not pose a risk of delay for purposes of intervention. *Cf. Builders Mut. Ins. Co.*, 431 S.C. at 101, 847 S.E.2d at 91 (affirming denial of intervention in part because the intervenor would have complicated the case and potentially caused the trial to be delayed); *Ex Parte Reichlyn*, 310 S.C. at 500, 427 S.E.2d at 664 (noting permitting intervention would delay a party's obligation under a settlement agreement and could cause the parties to have to re-negotiate the settlement). A limited extension to file a conditional return does not present the potentially significant delays that warranted denying intervention in *Builders Mutual* or *Reichlyn* because this matter is in its early stages. Since the Court has not decided the Petition for Original Jurisdiction, no deadlines currently exist to file final briefing or for oral argument. Thus, even if the Court decides to hear this case in its original jurisdiction—which Intervenors oppose for reasons explained in its forthcoming conditional return—the Court's consideration of the merits will not be delayed.

Respectfully submitted,

s/Kaye Hearn

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* Applications for *pro hac vice forthcoming*

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