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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

IN THE ORIGINAL JURISDICTION OF THE SUPREME COURT
Appellate Case No. 2024-002062

Yamilette Albertson, on her own behalf and
on behalf of her children, Y., A., and J.; and
Constantine Shulikoy, 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.*

**RESPONDENT’S RETURN TO THE MOTION
TO INTERVENE FILED BY EIDSON ET AL.**

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INTRODUCTION

The Proposed Intervenors make a big ask of this Court: allow any group of citizens who are interested in a topic to intervene and become full parties to litigation on it. That represents a massive expansion of the public-interest exception to standing, the exact opposite of the “cautious” attitude this Court has traditionally taken to the public-interest exception. *Eidson v. S.C. Dep’t of Educ.*, 444 S.C. 166, 177, 906 S.E.2d 345, 350 (2024). It is one thing to bring an action as petitioners under the public-interest exception. It is another thing entirely to claim an interest in an action based on nothing more than the public-interest exception. And that is doubly so in the unique and time-sensitive setting of a case in the original jurisdiction. The Court should deny the request to intervene simultaneous to denying the Petition, or else hold the request in abeyance with the Petition pending legislative action.

ARGUMENT

I. This Court should be cautious to create a rule that any interested citizen can intervene in an original jurisdiction case.

The Proposed Intervenors brief this matter applying the standards and precedents from South Carolina Rule of Civil Procedure 24, which governs intervention in the trial courts. But it is not clear to Respondent that the standards and precedents from the Rules of Civil Procedure should govern this Court’s procedural decisions, especially when acting in its original jurisdiction. The Rules of Civil Procedure are written for trial courts and reflect the unique role of trial courts as fact-finders in the first instance. *See Austin v. Bd. of Zoning Appeals*, 362 S.C. 29, 38, 606 S.E.2d 209, 214 (Ct. App. 2004). The Appellate Courts have their own rules. Indeed, Rule 245, SCACR, which governs original jurisdictions, specifies in what

instances parties should look to the Rules of Civil Procedure for guidance. Intervention is not one of the specified topics. Indeed, Rule 245 also says, “The Supreme Court may provide for discovery, fact finding and/or a briefing schedule as necessary.” This seems to give the Supreme Court some flexibility to follow, or not follow, regular rules regarding discovery and fact-finding.

Such a distinction makes sense, especially in the original jurisdiction. Cases requiring this Court’s extraordinary exercise of discretion to grant original jurisdiction are supposed to move fast, to be reserved for emergencies when the normal course of litigation will not do. *See, e.g., Creswick v. Univ. of S.C.*, 434 S.C. 77, 79, 862 S.E.2d 706, 708 (2021).

Intervention by members of the public bogs down a case. It adds additional lawyers and additional layers of complication and imposes additional rounds of motion practice and briefing on the Court. It will “cause delay, added litigation complexity and expense.” *Togut v. Besen (In re Kossoff PLLC)*, 2024 Bankr. LEXIS 2002, *18 (S.D.N.Y.Bkrpt. August 28, 2024). In a normal case at the trial court, a liberal approach to intervention may be appropriate, because a trial court judge can manage the complexity to minimize the additional delay and expense, and a case may operate on a longer time-horizon anyway. But in the original jurisdiction, which is designed to act as a fast-track for emergencies of statewide import, such a liberal attitude towards intervention may not make sense.

That is especially so when the proposed intervenors are private parties. It may make sense to allow elected officials to intervene in the original jurisdiction—they represent the public interest (in that they are elected by the voters), they are limited in number, and their voice is important as a matter of interbranch respect.

Furthermore, intervention by elected officials is important because they have a clear stake in the laws that they have passed, signed, and administer. That is different in kind from treating intervention as an open door for any citizen with a political agenda to become a full party to a case. The Court should also bear in mind that participation as an *amicus* is available to any would-be participant who wants to share a view or expertise on an issue, but does so without all the attendant costs to the system of full intervention as a party.

Opening the door wide to intervention by any citizen who claims nothing more than public interest standing should give this Court pause. Again, the Superintendent takes a backseat to no one in her respect for parents' rights and the importance of parents' voices in decisions affecting education. But parents have already spoken by electing a pro-school choice superintendent and pro-school choice Governor and legislative majorities. That is different from saying every parent has a *right as of law* in every case like this to intervene and fully participate as a party on par with a constitutional officer or state agency. The Court invites chaos if any interested citizen who can demonstrate nothing more than public interest standing can intervene in any original jurisdiction action.

II. The Proposed Intervenors do not meet the standards for intervention under Rule 24.

The first requirement to intervene as of right is an “an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest.” The Proposed Intervenors lack such an interest. The *Eidson* Plaintiffs only had standing based on the public-interest exception, which is a narrow

rule relaxing the traditional rules for standing only where necessary. *Eidson v. S.C. Dep't of Educ.*, 444 S.C. 166, 177, 906 S.E.2d 345, 351 (2024). That the Plaintiffs had standing under the public interest exception demonstrates that they did not have any legally cognizable interest in the matter: the Education Savings Trust Fund program did not divert a single dollar from public schools to nonpublic schools. Nor can they claim a legally cognizable interest in how this Court interprets *Eidson* or applies the *Eidson* precedent to future cases. Again, this Court should be cautious to swing wide the door to automatic intervention by any concerned citizen in any case they feel interests them under the public-interest exception.

The Proposed Intervenors also protest about the Superintendent's adequacy as a representative, the second prong of the test. They provide no real basis beyond a skepticism of her policy positions. But she has opposed the Petition in her filing with this Court, and did so on December 25, 2024, the due date, not even asking for an extension due to the holidays. In other words, she has been diligent and has opposed the Petition. That the Proposed Intervenors would have taken a more strident or aggressive tone in their opposition is not a ground to show inadequacy of representation.

“[W]here a proposed intervenor's ultimate objective is the same as that of an existing party, the party's representation is presumptively adequate, rebuttable only by a showing of adverse interests, collusion, or nonfeasance.” *Stuart v. Huff*, 706 F.3d 345, 350 (4th Cir. 2013). Here, the Proposed Intervenors and the Superintendent have the same objective: the denial of the Petition. Their interests are not adverse as to this litigation. The Proposed Intervenors have adduced no evidence of collusion, nor

could they. And there is no hint of nonfeasance: again, the Superintendent filed her response to the Petition on Christmas Day to comply with the 20-day return deadline.

Though the burden for intervention is usually minimal, “a more exacting showing of inadequacy should be required where the proposed intervenor shares the same objective as a government party.” *Stuart*, 706 F.3d at 351. The Fourth Circuit explained the rationale for the rule:

In matters of public law litigation that may affect great numbers of citizens, it is the government’s basic duty to represent the public interest. And the need for government to exercise its representative function is perhaps at its apex where, as here, a duly enacted statute faces a constitutional challenge. In such cases, the government is simply the most natural party to shoulder the responsibility of defending the fruits of the democratic process.

Id. Indeed, this is the reason to reject permissive intervention as well. The Fourth Circuit continued later:

[T]o permit private persons and entities to intervene in the government’s defense of a statute upon only a nominal showing would greatly complicate the government’s job. Faced with the prospect of a deluge of potential intervenors, the government could be compelled to modify its litigation strategy to suit the self-interested motivations of those who seek party status, or else suffer the consequences of a geometrically protracted, costly, and complicated litigation. In short, “the business of the government could hardly be conducted if, in matters of litigation, individual citizens could usually or always intervene and assert individual points of view.”

Id. (quoting 6 *Moore’s Federal Practice* § 24.03[4][a][iv][A] (3d ed. 2011)). Again, not only are all these concerns present here, but they are present in spades when one considers both the public-interest exception as the claimed basis for standing or interest and the nature of an original jurisdiction action.

III. The same reasons that counsel patience on the Petition counsel for patience on intervention.

As the Superintendent explained in her return to the Petition, the optimal course of action is for this Court to deny the Petition without prejudice or hold everything related to the Petition in abeyance until the General Assembly acts. The legislature has promised to pass a bill on this topic soon, and various principles of judicial economy and interbranch comity counsel in favor of waiting until that legislative policy-making is complete. Just as the Court should not render an advisory opinion on the underlying Petition, it should not unnecessarily set a broad and potentially troubling precedent on intervention by members of the public in original jurisdiction cases.

Respectfully submitted,

By: 

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