In the Supreme Court of Wisconsin

JULIE UNDERWOOD, CHARLES UPHOFF, RANDY WENDT, FATHER TOM MUELLER, ANGELA RAPPL, DUSTIN IMRAY AND SCOTT WALKER M.D.,

PETITIONERS,

v.

ROBIN VOS, SPEAKER OF THE WISCONSIN STATE ASSEMBLY, JILL UNDERLY, WISCONSIN STATE SUPERINTENDENT OF PUBLIC INSTRUCTION AND KATHY BLUMENFELD, SECRETARY OF THE DEPARTMENT OF ADMINISTRATION,

RESPONDENTS.

MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE ON BEHALF OF SCHOOL CHOICE WISCONSIN ACTION, INC., WISCONSIN COUNCIL OF RELIGIOUS & INDEPENDENT SCHOOLS, INC., ST. MARCUS EVANGELICAL LUTHERAN CHURCH, INC., ST. AUGUSTINE PREPARATORY ACADEMY, INC., PIUS XI CATHOLIC HIGH SCHOOL, INC., SETON CATHOLIC SCHOOLS, INC., CATHOLIC MEMORIAL HIGH SCHOOL OF WAUKESHA, INC., GREEN BAY AREA CATHOLIC EDUCATION, INC., IMMANUEL EVANGELICAL LUTHERAN CHURCH, IMPACT CHRISTIAN SCHOOLS, INC., MESSMER CATHOLIC SCHOOLS, INC., NEW TESTAMENT CHRISTIAN ACADEMY, INC., SHORELAND LUTHERAN HIGH SCHOOL FEDERATION, INC., TRINITY EVANGELICAL LUTHERAN CHURCH, ALDIRA ALDAPE, ANTHONY KLOSOWSKI, JR., JOHANNA AND NICHOLAS DENTICE, MARK ADAM, SARAH AND CALEB STORMER, TIM AND JENNIFER MEINHARDT, TONY AND GINA ELLIS, AND SARAH AND JAMES JORDAN

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INTRODUCTION

In 1990, the Milwaukee Parental Choice Program ("MPCP") was established with broad bipartisan support. 1989 Wis. Act 336, § 228. It gave low-income families the option to send their children to a private school, just like families that were better off financially. Parents embraced this program, which quickly surged in popularity. Among other things, parents sought for their children to receive a better education, to learn in a safer environment, and to be taught in a school that embraced their family values. In the ensuing decades, Wisconsin built on the success of the MPCP. Today, tens of thousands of families across the state enjoy the benefits of the MPCP and similar programs.

In this action, Petitioners ask this Court to undo years of progress by holding that multiple school choice programs are facially unconstitutional. Petitioners are not the first to challenge school choice. School choice opponents have repeatedly brought challenges and have been rebuffed by this Court. *See, e.g.*, *Jackson v. Benson*, 218 Wis. 2d 835, 578 N.W.2d 602 (1998); *Davis v. Grover*, 166 Wis. 2d 501, 480 N.W.2d 460 (1992).

Movants have filed an amicus brief asking this Court not to exercise jurisdiction over the Petition. Movants' arguments in opposition to the Petition are set forth in their amicus brief and will not be repeated herein except as may be necessary to explain Movants' intervention rights.

This Motion need not be addressed unless the Petition is granted. Movants' intense interest in the outcome of a merits decision prompts them to file this conditional Motion.

Petitioners would have this Court disturb well-settled jurisprudence, apparently on the theory that "the state's original experimental . . . [school choice] program has morphed and multiplied." *See, e.g.*, Pet., ¶88. Although this Motion does not address the merits of this argument, a program's success is not a reason to overrule precedent. Notably, with the growth of school choice has come the growth of actual reliance interests in the stability of this Court's jurisprudence. Movants have relied on this Court's precedent and the challenged programs.

Petitioners' claims threaten to disrupt the family lives of tens of thousands. For Movants Sarah and James Jordan's family, the Racine Parental Choice Program ("RPCP") has been life changing. Their children were previously enrolled in the Racine Unified School District, where they were unsafe. In turn, their children's academic performance suffered. Through the RPCP, their children enrolled in St. Matthew's School in Oak Creek where they are thriving. Without the RPCP, the Jordans would have been unable to afford this switch. Movants include other parents who, like the Jordans, have also experienced the life-changing benefits of school choice. Movant Parents will be injured if Petitioners succeed—as will many similarly situated parents

who have relied on this Court's precedent. One Movant Parent is also a teacher at an independent charter school—her career is at stake.

Petitioners' claims also threaten the ability of schools to continue successfully serving the families that enroll their children. Movant St. Marcus Lutheran School, located in Milwaukee, is exemplary. St. Marcus educates more than 1,000 students in K3 through 8th grade, many of whom are enrolled through the MPCP or another challenged program, the Special Needs Scholarship Program ("SNSP"). All of these students come from lower income families and are almost all racial minorities. St. Marcus has been rated as a four or five-star[1] school by the Department of Public Instruction ("DPI") on DPI's school accountability report for each of the past five years. St. Marcus has made significant investments to serve those students. In doing so, it relied on this Court's precedent when entering these programs and admitting students. Movants include other schools and school systems, amongst the many in this state, which educate children through these challenged programs and will likewise be injured if those programs disappear.

Movants also include school associations that represent schools in these programs. They are among the foremost advocates for educational choice in the state. The associations share Parent and School Movants' interests on behalf

[1] Under state law, DPI is required to rate schools that receive public funds on a scale of one to five stars. Wis. Stat. § 115.385(1)(b). A four-star school exceeds expectations, and a five-star school significantly exceeds expectations. *Id.*

of their school members who participate in the challenged programs. If Petitioners succeed, all Movants will be harmed because these programs will cease to exist.

Movants must intervene to ensure that their interests are adequately represented. Movants include participants in every single one of the challenged programs. Their knowledge of these programs and their lived experiences of the benefits they provide are second to none. No one stands to lose more than they if Petitioners are successful. The current Respondents simply cannot adequately represent these interests, as explained herein.

For these reasons, Movants ask this Court to grant them intervention as a matter of right under Wis. Stat. § 803.09(1). Alternatively, Movants request permission to intervene under Wis. Stat. § 803.09(2).

BACKGROUND

Petitioners have asked this Court to hear their challenges to four programs:

(1) the MPCP, Wis. Stat. § 119.23;

(2) the Independent Charter School Program ("ICSP"), Wis. Stat. § 118.40(2r) and (2x);

(3) the Wisconsin Parental Choice Program ("WPCP), Wis. Stat. § 118.60; and[2]

(4) the SNSP, Wis. Stat. § 115.7915.

[2] Although the Petition does not mention the RPCP, that program is statutorily part of the WPCP and would be impacted by any decision of this Court.

Petitioners filed their Petition on October 12, 2023. On October 31, 2023, this Court ordered the Respondents to file one or more responses no later than November 14, 2023. Movants have filed a motion to intervene, this brief in support, and various affidavits of Movants. Simultaneously, Movants have also moved this Court for leave to file a non-party brief opposing the Petition.

Parent Movants Sarah and James Jordan, Aldira Aldape, Anthony Klosowski, Jr., Johanna and Nicholas Dentice, Mark Adam, Sarah and Caleb Stormer, Tim and Jennifer Meinhardt, and Tony and Gina Ellis are parents who enrolled their children in schools through the challenged programs. Affs. Jordan, ¶6; Aldape, ¶6; Klosowski, ¶6; Dentice, ¶6; Adam, ¶6; Stormer, ¶6; Meinhardt, ¶6; and Ellis, ¶6. If these programs were to no longer exist, Parent Movants would no longer be able to send their children to these schools. Affs. Jordan, ¶10; Aldape, ¶7; Klosowski, ¶7; Dentice, ¶7; Adam, ¶8; Stormer, ¶7; Meinhardt, ¶8; and Ellis, ¶8. Additionally, Jennifer Meinhardt is a teacher at an independent charter school, and if the ICSP were to no longer exist, her career would be negatively affected. Aff. Meinhardt, ¶12. Parent Movants are also taxpayers, and Petitioners' arguments, if accepted, would change the process to increase their property taxes. Affs. Jordan, ¶¶3–5; Aldape, ¶¶3–5; Klosowski, ¶¶3–5; Dentice, ¶¶3–5; Adam, ¶¶3–5; Stormer, ¶¶3–5; Meinhardt, ¶¶3–5; and Ellis, ¶¶3–5.

School Movants St. Marcus Lutheran School, St. Augustine Preparatory Academy, Pius XI Catholic High School, Catholic Memorial High School of

Waukesha, Immanuel Lutheran School, New Testament Christian Academy, Shoreland Lutheran High School, and Trinity Lutheran School of Freistadt all participate in one or more of the challenged programs. Affs. Tyson, ¶4; Andrietsch ¶4; Herbert, ¶4; Bembenek, ¶4; Betts ¶4; Johnson, ¶4; Scriver, ¶4; Seefeld ¶4. School Movants have all made investments and developed future plans based upon their desire to continue participating in these programs. Affs. Tyson, ¶12; Andrietsch, ¶¶6, 10; Herbert, ¶10; Bembenek, ¶¶6, 10; Betts ¶¶6, 10; Johnson, ¶¶6, 10; Scriver, ¶¶6, 10; Seefeld ¶¶6, 10.

School System Movants Messmer Catholic Schools, GRACE Schools, Seton Catholic Schools, and Impact Christian Schools are school systems with schools participating in one or more of the challenged programs. Affs. Bartels, ¶5; Desotell, ¶5; Couch, ¶5; Moore, ¶5. Like the individual School Movants, School System Movants likewise have made investments and developed future plans based upon their desire to continue participating in these programs. Affs. Bartels, ¶11; Desotell, ¶10; Couch, ¶12; Moore, ¶11.

Association Movants School Choice Wisconsin Action, Inc. and Wisconsin Council of Religious and Independent Schools, Inc. are membership-based associations of schools with members throughout Wisconsin. Affs. Luehring, ¶3; Schmeling, ¶4. Their members participate in one or more of the challenged programs. Affs. Luehring, ¶5; Schmeling, ¶5. These associations have long advocated for these programs and facilitated their members' involvement in them. Affs. Luehring, ¶6; Schmeling, ¶8.

ARGUMENT

Movants satisfy each requirement to intervene as a matter of right. Alternatively, Movants seek this Court's permission to intervene.

I. Movants are entitled to intervene as a matter of right.

Movants satisfy each requirement to intervene as a matter of right under Wis. Stat. § 803.09(1):

(1) their motion is timely;

(2) they have interests sufficiently related to the subject of this action;

(3) disposition of this action may, as a practical matter, impair or impede their ability to protect their interests; and

(4) the existing parties do not adequately represent their interests.

The public policy underlying this statute is to "dispos[e] of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Wolff v. Town of Jamestown*, 229 Wis. 2d 738, 742–43, 601 N.W.2d 301 (Ct. App. 1999) (quoted source omitted). Movants' participation in this action is consistent with this policy.

A. This Motion is timely.

A motion is considered timely if "in view of all the circumstances the proposed intervenor acted promptly." *State ex rel. Bilder v. Township of Delavan*, 112 Wis. 2d 539, 550, 334 N.W.2d 252 (1983). A key consideration is whether the proposed intervenor acted quickly enough to prevent the existing parties from being prejudiced by an undue delay. *Id.*

This Motion is timely, so Movants satisfy the first requirement to intervene as a matter of right. Petitioners filed this action on October 12, 2023. On October 31, the Court ordered responses to be filed by November 14. As of the filing of this Motion, the named-Respondents have not filed anything. Movants have acted promptly.

B. Movants have multiple sufficient interests in this action.

Movants have multiple interests sufficient to warrant intervention as of right. A proposed intervenor's interest is sufficient if the proposed intervenor "will either gain or lose" as a "direct operation of the judgment." *City of Madison v. WERC*, 2000 WI 39, ¶11 n.9, 234 Wis. 2d 550, 610 N.W.2d 94 (quoted source omitted). Movants' interests need not be legally cognizable in any technical sense because this Court considers intervention interests from a practical perspective. *Bilder*, 112 Wis. 2d at 547–48; *see also Grutter v. Bollinger*, 188 F.3d 394, 398 (6th Cir. 1999) ("[A]n intervenor need not have the same standing necessary to initiate a lawsuit."); 2 *Wis. Pl. & Pr. Forms* § 13.38 (5th ed. Updated June 2023) ("[T]he liberal policy evidenced by modern provisions for bringing into an action all persons whose rights are involved, almost requires that the courts should grant the application of any person who has an interest to protect, and who applies, for that purpose, to be made a party to pending litigation."). Therefore, whether Movants could file a separate action to protect their interests is irrelevant. *Wolff*, 229 Wis. 2d at 744.

Most obviously, all Movants have an interest in protecting their or their members' statutory rights to participate in the challenged programs. Movants include parents who enrolled their children in schools in each of the challenged programs; a teacher at an independent charter school; various schools and school systems that participate in one or more of these programs; and two statewide associations of schools whose members participate in one or more of these programs. If this Court rules for Petitioners, all Movants, or their members, will be prevented from participating in these programs moving forward. Movants also have an interest in protecting their advocacy work. *See Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1397 (9th 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.").

Movants have several specific interests with respect to each claim raised by Petitioners—all of which are sufficient to warrant intervention as of right under Wis. Stat. § 803.09(1). All Movants will gain or lose as a direct operation of the judgment in this action.

1. Movants have sufficient interests related to Petitioners' public purpose claims.

Movants have interests sufficient to intervene on Petitioners' public purpose claims. For context, this Court has held that "public funds can only be used for a public purpose," although nothing in the Wisconsin Constitution explicitly states this requirement. *See State ex rel. Warren v. Reuter*, 44 Wis. 2d 201, 211, 170 N.W.2d 790 (1969). Notably, the public purpose

requirement is not "demanding." *Jackson*, 218 Wis. 2d at 897. For decades, this Court's precedent has allowed the State to fund private actors as a means to achieve public ends. *Id.* at 898–99. This Court requires "[o]nly such control and accountability as is reasonably necessary under the circumstances to attain the public purpose." *Id.* (quoting *Davis*, 166 Wis. 2d at 542). The challenged programs plainly serve a public purpose—education—and both parents and government provide the requisite control.

This Court has twice rejected public purpose challenges to school choice, but Movants ask this Court to overrule its precedent and eliminate the challenged programs. *Id.* at 897–900; *Davis*, 166 Wis. 2d at 542–45; Pet., ¶¶85–96. Petitioners—who educate or whose children are educated—in the challenged programs can demonstrate how the public interest is served by providing wider educational opportunities to lower-income families.

Movants will gain or lose as a direct operation of any judgment on Petitioners' public purpose claims, because if Petitioners are successful, the challenged programs will cease to exist.

Further, some Petitioners assert standing as parents and grandparents of children attending public schools. Pet., ¶1. They believe that school choice "acts like a cancer on the public school system" and thereby hurts the quality of their children or grandchildren's education. *Id.*, ¶92. If Petitioners have standing on this basis, Parent Movants certainly have an at least equal interest in protecting their children's education. Given the stakes, all Movants

have an interest in defending this Court's precedent, on which they have relied, and in arguing that the challenged programs comply with the public purpose requirement. Movants need to ensure that they or their members can continue to participate in these programs going forward.

2. Movants have sufficient interests related to Petitioners' Uniform Taxation Clause claims.

Movants also have interests sufficient to intervene on Petitioners' Uniform Taxation Clause claims. Under this clause of the Wisconsin Constitution, "[t]he rule of [property] taxation shall be uniform . . . ." Wis. Const. art. VIII, § 1; *see also* Jack Stark & Steve Miller, *The Wisconsin State Constitution* 194 (2d ed. 2019) (explaining this Court has interpreted this clause as applicable only to property taxes).

Petitioners argue that the challenged programs are facially unconstitutional under this clause. *See* Pet., ¶109. As far as Movants can tell, Petitioners allege that when parents enroll their child in a choice school, the school district the child would have otherwise attended loses some state aid, and the district may increase property taxes to make up for the loss. *Id.*¶¶102–04. Accordingly, a secondary effect of these programs could be an increase in taxes in some areas. Petitioners also allege that these programs "move[] local tax dollars into another taxing authority," but they appear to misunderstand how school financing works. *Id.*, ¶109. *See generally* Will Flanders, *Breaking the Chain: Decoupling School Choice Funding in Wisconsin* 5 (2023), https://will-law.org/wp-content/uploads/2023/06/Decoupling.pdf ("It is

explicitly not the case that property taxes are directly used to fund the existing voucher programs."). So, whether or not this happens (or must happen) is a matter of dispute.

Movants will show that Petitioners' argument reduces to a claim that schools in the challenged programs, all of whom receive significantly less funding[3] that their public-school counterparts, get "too much" money. Movants will gain or lose as a direct operation of any judgment on Petitioners' Uniform Taxation Clause claims. Petitioners assert taxpayer standing to bring these claims, and if Petitioners have standing as taxpayers, Parent Movants, who are also taxpayers, have an interest in refuting these claims. Affs. Jordan, ¶¶3–5; Aldape, ¶¶3–5; Klosowski, ¶¶3–5; Dentice, ¶¶3–5; Adam, ¶¶3–5; Stormer, ¶¶3–5; Meinhardt, ¶¶3–5; and Ellis, ¶¶3–5. More generally, all Movants have an interest in ensuring that the challenged programs continue to be funded. Petitioners' success on these claims could eliminate these

[3] During the 2021–22 school year (the most recent year where audited financial data is available on DPI's internet site), the average public school in Wisconsin received a total of $16,589 per student. DPI, *2021–22 School District Annual Report Data, Comparative Revenue Data*, https://dpi.wi.gov/sites/default/files/imce/sfs/xls/cmprev22.xls. During this school year, schools in the MPCP, RPCP, and WPCP received $8,336 per grade K–8 student, and $8,982 per grade 9–12 student; the base SNSP amount per student was $13,013; and ICSP schools received $9,201 per student regardless of grade. DPI, *2021–22 Funding Comparison for "WI Choice Programs"*, https://dpi.wi.gov/sites/default/files/imce/sfs/pdf/FY22-ChoiceOptionsFundingTable.pdf. The amounts received by schools in the MPCP, RPCP, WPCP, and ICSP numbers were increased for the current school year by 2023 Wis. Act 11, but a significant funding gap remains.

programs. At the very least, Petitioners would have this Court alter school financing significantly and in a manner that makes these programs difficult to implement going forward.

3. Movants have sufficient interests related to Petitioners' Superintendent Supervision Clause claims.

Movants have interests sufficient to intervene on Petitioners' Superintendent Supervision Clause Claims. This clause of the Wisconsin Constitution provides that "[t]he supervision of public instruction shall be vested in a state superintendent . . . ." Wis. Const. art. X, § 1. The gist of Petitioners' claims is that the superintendent lacks sufficient regulatory control over these schools. In effect, these claims appear to be somewhat of a rephrasing of Petitioners' public purpose claims.

Petitioners do not acknowledge that the state superintendent's "powers and duties" are prescribed by statute and that the superintendent lacks inherent constitutional authority to promulgate administrative rules. *Koschkee v. Taylor*, 2019 WI 76, ¶34, 387 Wis. 2d 552, 929 N.W.2d 600; *cf. State v. City of Oak Creek*, 2000 WI 9, ¶22, 232 Wis. 2d 612, 605 N.W.2d 526 (explaining the attorney general, while also provided for in the Wisconsin Constitution, similarly lacks inherent constitutional authority). As Justice Annette Kingsland Ziegler has explained, the Superintendent Supervision Clause "does little more than create a constitutional position . . . . What supervision *means* in the context of public instruction, the framers left to the

legislature to decide." *Coyne v. Walker*, 2016 WI 38, ¶237, 368 Wis. 2d 444, 879 N.W.2d 520 (Ziegler, J., dissenting), *overruled by Taylor*, 387 Wis. 2d 552. This Court has held that "supervision of public instruction" means whatever the legislature declares it to mean. *See Taylor*, 387 Wis. 2d 552, ¶25 (" '[T]he framers of the [Wisconsin] Constitution chose no specific duties for the [superintendent] in regard to 'supervision of public instruction.' ' Rather, powers and duties of the . . . [superintendent] were prescribed by law." (quoted sources omitted)).

Petitioners have sued the state superintendent, in her official capacity, with the apparent intent of persuading this Court to overrule or at least modify its precedent and declare that the superintendent has powers not prescribed by statute. Precisely what these powers may entail is unclear.

Movants have an interest in ensuring that the state superintendent's powers and duties are confined to those laid out in state law and in making clear that state law provides significant regulation of the challenged programs and significant oversight authority to the superintendent. Petitioners seek to make the opposite argument and to have these programs declared unconstitutional and eliminated altogether.

At bottom, any authority the state superintendent has over private schools comes from their participation in one of the challenged programs, and that authority is all vested in the superintendent and DPI by statute only.

Further, Movants include parents who have children enrolled in independent charter schools and an independent charter school teacher. Charter schools are public schools—they are regulated by state law and additionally subject to ongoing oversight by the public entity that chartered them, such as a university or other public entity. These Movants have an interest in ensuring that any supervisory authority exercised by the state superintendent is not expanded beyond what was intended, or in a way that harms current governance structures that have been working well for their children. Further, if Petitioners are successful, these schools would cease to exist altogether. Movants necessarily will gain or lose by direct operation of the judgment on these claims as well.

4. Movants have sufficient interests related to Petitioners' claims that statutory revenue limits are unconstitutional.

Movants also have interests sufficient to intervene on Petitioners' claims that statutory revenue limits are unconstitutional.

Revenue limits essentially cap the amount of funding that a school district can raise from property taxes without seeking authorization from the voters via a referendum. They do not prohibit school districts from raising and spending additional funds, they simply set up a process within which the districts must do so.

Petitioners first assert that revenue limits violate the Uniform Taxation Clause. According to Petitioners, the legislature cannot "impose a tax on a local

subdivision for a purely local purpose. . . . If the [l]egislature cannot force a local subdivision to levy a tax for local purposes, it surely cannot prohibit the local subdivision from doing so." Pet., ¶¶123–24.

Second, Petitioners argue that these limits violate Article X, Section 4 of the Wisconsin Constitution, which provides that "[e]ach town and city shall be required to raise by tax, annually, for the support of common schools therein, a sum not less than one-half the amount received by such town or city respectively for school purposes from the income of the school fund." This section cre/ates a floor, i.e., a minimum amount of money that a municipality must raise by a tax. It is a restriction on local taxing power; however, Petitioners would turn this restriction into a grant of authority to tax without any cap. Pet., ¶¶129–30.

Movants will gain or lose as a direct operation of any judgment on these claims. Movants all participate in one or more of the challenged programs and therefore necessarily have an interest in ensuring that the legislature's carefully balanced funding mechanisms for education are not thwarted. Furthermore, Movants also include taxpayers who have an interest in maintaining the revenue limits and the statutory process for exceeding those limits. Affs. Jordan, ¶5; Aldape, ¶5; Klosowski, ¶5; Dentice, ¶5; Adam, ¶5; Stormer, ¶5; Meinhardt, ¶5; and Ellis, ¶5. Elimination of the revenue limits would upset the careful balance on which the state's educational funding

system relies and take away from taxpayers a means that they currently have to control their local government.

5. Aside from interests in defending against Petitioners' specific claims, Movants also have interests in ensuring that any remedy issued by this Court is as narrow as possible.

If this Court were to rule for Petitioners on any claim, Movants have an interest in advocating for a narrow remedy. Equitable relief should be tailored to address a problem. *Johnson v. WEC*, 2021 WI 87, ¶68, 399 Wis. 2d 623, 967 N.W.2d 469. For example, Movants would seek to ensure that any such remedy would include adequate time to respond to any new rule of law that this Court may announce, and Movants have an interest in asking that any relief be stayed. *See Wisconsin Legislature v. Palm*, 2020 WI 42, ¶65, 391 Wis. 2d 497, 942 N.W.2d 497 (Roggensack, C.J., concurring) (explaining this Court has authority to stay the effect of its declaratory judgments in at least some actions); *see also id.*, ¶125 (Ann Walsh Bradley, J., dissenting) (expressing agreement with this analysis); *id.*, ¶162 (Dallet, J., dissenting) (same); *id.*, ¶263 n.25 (Hagedorn, J., dissenting) (same). As direct participants in all of the challenged programs, Movants will necessarily gain or lose by operation of the judgment on any of these claims. They seek intervention to ensure they can protect those interests.

Given Movants' actual reliance on the years of lawful operation of the challenged programs, which are based on this Court's precedent, they also have an interest in asking for some kind of prospective relief that would not force

families currently participating in one of the challenged programs to change schools. Any decision in favor of Petitioners would "establish a new principle of law, either by overruling clear past precedent on which . . . [Movants] may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed" and its retroactive operation would hurt the public schools by flooding them with over 60,000 new students and produce "inequitable results." *Walworth County v. M.R.M.*, 2023 WI 59, ¶10, 408 Wis. 2d 316, 992 N.W.2d 809 (quoted source omitted).

Simply put, if these programs are eliminated on short notice, the tens of thousands of children they currently educate will have to attend different schools. Movants have an interest in ensuring that this Court adequately considers the consequences of any remedy. *Palm*, 391 Wis. 2d 497, ¶162 (Dallet, J., dissenting) (explaining the importance of an "appreciation of the consequences" of declaring illegal a Safer-at-Home order during a pandemic). Movants will need time to restructure their family lives, careers, and businesses. More generally, the public schools that would be receiving many of these children will need time to figure out how to handle an influx of students, and the parents of these students have a right to expect the utmost from these new schools.

* * *

Any one of Movants' stated interests is sufficient to warrant intervention as a matter of right in this action under Wis. Stat. § 803.09(1). Taken as a whole, Movants' interests in this matter are overwhelmingly clear.

C. Disposition of the action may, as a practical matter, impair or impede Movants' ability to protect their interests.

Disposition of this action in favor of Petitioners will, as a practical matter, impair or impede Movants' ability to protect their stated interests. Movants far exceed this "minimal" burden. *See Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1253 (10th Cir. 2001) (quoted source omitted). Movants would not, as a practical matter, be able to protect their interests outside of this action.

First, and most obviously, this Court is the "final arbiter" on questions of state law. *Jensen v. Wisconsin Elections Bd.*, 2002 WI 13, ¶25, 249 Wis. 2d 706, 639 N.W.2d 537 (per curiam). Second, Petitioners bring facial challenges to the validity of several statutes under which Movants assert various rights. *See, e.g.*, Pet., ¶109.

Accordingly, if Petitioners are successful, Movants could not go to a lower court in this state and hope to have their interests protected. *See* 7C *Fed. Prac. & Proc. Civ.* § 1908.2 (3d ed. Updated April 2023) (noting several federal courts, interpreting an analogous federal intervention statute, "have held that stare decisis by itself may, in a proper case, supply the practical disadvantage that is required for intervention"); *see also Appellate Prac. & Proc. in Wis.* § 25.3 (9th ed. 2022–23) ("Other courts may be barred from taking any action

on the subject matter of a case once the supreme court accepts original jurisdiction.").

A "precedent," reached without Movants' "input," would be "harmful." *Ceres Gulf v. Cooper*, 957 F.2d 1199, 1204 (5th Cir. 1999). As a functional matter, these statutes would no longer exist. This action is "the most logical forum"—indeed, the only forum—for Movants to be heard, given the procedural path Petitioners have chosen. *M & I Marshall & Ilsley Bank v. Urquhart Cos.*, 2005 WI App 225, ¶16, 287 Wis. 2d 623, 706 N.W.2d 335; *see also See Armada Broad., Inc. v. Stirn*, 183 Wis. 2d 463, 475, 516 N.W.2d 357 (1994) (explaining a proposed intervenor's reputation would be irreparably injured by the release of a public record given that people who learn the information in a record cannot unlearn that information and permitting him to intervene as a matter of right to argue why the record should not be released); *Clarke v. WEC*, No. 2023AP1399-OA, unpublished order (Wis. Oct. 13, 2023) (granting a motion to intervene that advanced an argument similar to Movants').

Therefore, Petitioners satisfy the third requirement to intervene as a matter of right pursuant to Wis. Stat. § 803.09(1).

D. Existing parties do not adequately represent Movants' interests.

Finally, Movants satisfy the fourth requirement to intervene as of right: the existing parties in this action do not adequately represent Movants' interests.

As a preliminary matter, this Court, quoting the United States Supreme Court, has held that "the showing required for proving inadequate representation 'should be treated as minimal.' " *Armada Broad., Inc.*, 183 Wis. 2d at 362 (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)); *see also* 3 *Wis. Prac., Civil Proc.* § 309.2 (4th ed. Updated Oct. 2023) ("Because it may be supposed that the proposed intervenor is the best judge of the representation of the intervenor's own interests, courts should be liberal in finding that one who is willing to bear the cost of separate representation may not be adequately represented by the existing parties."). This requirement is "not onerous," and proposed intervenors "ordinarily should be allowed to intervene unless it is clear that the [existing] parties will provide adequate representation." *Public Crossroads Grassroots Pol'y Strategies v. FEC*, 788 F.3d 312, 321 (D.C. Cir. 2015) (quoted sources omitted).

A proposed intervenor need only show that the parties are unlikely to "defend" the proposed intervenor's interest with the "vehemence" that the proposed intervenor would. *Armada Broad., Inc.*, 183 Wis. 2d at 476; *see also Davis v. Lifetime Cap., Inc.*, 560 F. App'x 477, 495 (6th Cir. 2014) ("The proposed intervenor need only show that there is a *potential* for inadequate representation." (quoted source omitted)). A proposed intervenor can make this showing by pointing to the "personal nature" of his or her interest. *Armada Broad., Inc.*, 183 Wis. 2d at 476. Additionally, a proposed intervenor can show

that a party that should have a similar interest will not act on that interest. *Id.*

1. Petitioners' interests are adverse to Movants,' so Petitioners cannot represent Movants' interests—let alone adequately.

In this action, Petitioners include parents, but they want a different outcome than Movants. Unlike Movants, no Petitioner sends their children to a choice school, yet Petitioners claim to know that schools in the challenged programs are harmful. Movants also apparently desire to raise taxes—despite claiming taxpayer standing. Petitioners' interests are "adverse" to Movants' interests. *See id.* Accordingly, Petitioners cannot represent Movants' interests at all, let alone adequately.

2. Respondents do not adequately represent Movants' interests.

The three named Respondents do not represent Movants' interests adequately—if at all.

First, while Petitioners make several allegations for which they provide no citation, Petitioners make the blanket statement that "all the facts and figures in this petition come directly from the [named] Respondents' own publicly released data, which the [named] Respondents cannot themselves challenge or dispute." Pet. At 20 n.16. In effect, Petitioners argue that the named Respondents cannot contest allegations made by Petitioners because it is allegedly based upon data published by their respective state agencies.

Petitioners do not fairly characterize their own allegations, and the Petition itself is replete with incorrect, incomplete, or otherwise misleading allegations.[4] Assuming, however, that certain facts cannot currently be contested solely because of the identities of the named Respondents, Movants need to participate in this action to rebut allegations and provide context that the named Respondents cannot.

i. Current Respondents cannot defend this Court's precedent as vigorously, because they lack the same reliance interests that Movants have.

The named Respondents cannot defend this Court's precedent to the same degree as Movants. Movants have an actual reliance interest in this Court's precedent.

Parent Movants made fundamental life choices, including where their children should go to school, because this Court said they had a statutory right to do so. School Movants structure their schools around the challenged programs and have made significant investments based upon these programs being lawfully available for many years. Perhaps the named respondents have firsthand knowledge of how the State has responded to *Davis* and *Jackson*, but they do not know firsthand how everyday people will be affected if these decisions are overruled.

[4] Movants amicus brief lays out many such instances.

At most, the named respondents can describe in "ancillary," "intangible," or "vague" terms how others—like Movants—have actually relied on this Court's precedent, and this Court has generally not given much weight to such arguments. *Johnson Controls, Inc. v. Employers Ins. of Wausau*, 2003 WI 108, ¶117 n.49, 264 Wis. 2d 60, 665 N.W.2d 257; *State v. Johnson*, 2023 WI 39, ¶68, 407 Wis. 2d 195, 990 N.W.2d 174 (Rebecca Grassl Bradley, J., concurring) (quoted source omitted). As Justice Rebecca Grassl Bradley explained last term, "[t]raditional reliance interests arise 'where advance[d] planning of great precision is most obviously a necessity.' " *Johnson*, 407 Wis. 2d 195, ¶68 (quoting *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2276 (2022)). A party claiming that actual reliance justifies upholding precedent must point to "specific decisions" that people made because of the precedent. *See id.* The named Respondents do not have children enrolled in choice or charter schools. They are not administrators or teachers at such schools. They cannot describe how they structured their family lives, made career decisions, invested money, hired teachers and staff, or otherwise made important decisions based on that precedent.

Unlike the named Respondents, Movants are able to explain using firsthand knowledge how overruling *Davis* and *Jackson* "would work an undue hardship" on thousands because of their "reliance interests." *See Ray v. Swager*, 903 N.W.2d 366, 376 n.49 (Mich. 2017) (quoted source omitted). To Movants, *Davis* and *Jackson* have "become so embedded, so accepted, so

fundamental, to everyone's expectations that to change . . . [them] would produce not just readjustments, but practical real-world dislocations." *Id.* (quoted source omitted). Literally, Movants' children will be dislocated.

For similar reasons, whether the named Respondents would have standing to ask that any new rule of law be applied only prospectively is unclear.

Due to this, it is clear that Respondents do not adequately represent Movants' interests.

ii. The named Respondents lack an interest of a personal nature, which will inhibit them from contesting certain allegations, so they cannot adequately represent Movants' interests.

Relatedly, the named Respondents lack the intimate sort of interest in this action that Movants have. Parent Movants know better than anyone how vital the challenged programs are because they benefit from them every day. Additionally, Parent Movants are all taxpayers, committed to ensuring that these state laws are followed as they have been for years. One Movant Parent is also a teacher at a charter school and knows from that perspective how school choice has helped children. None of the named Respondents can claim to represent choice schools. Unlike School and School System Movants, the named Respondents have not invested in school staff and facilities, and they lack the firsthand experience of being a regulated entity within these

programs. Movant Schools and School Systems know how regulations are actually enforced and what choice schools actually do.

No named Respondent has dedicated his or her professional life to advocating for school choice. In contrast, the Association Movants have helped create and facilitate the growth of these programs over many years. They understand how the school finance laws work and how these programs fit into the overall state education framework. At bottom, if Petitioners succeed, the named Respondents will not lose a statutory right upon which they have relied. Their family lives will not be disrupted. Their school will not have to fundamentally change its operations. On a personal level, little about their lives, if anything, will change. They will not have years of their advocacy work undone or lose their livelihoods. Movants have all of that, and as a result, Respondents cannot adequately represent their interests.

This Court has held that school choice satisfies the public purpose requirement in part because "[public] [c]ontrol is . . . fashioned . . . in the form of parental choice. . . . If the private school does not meet the parents' expectations, the parents may remove the child from the school and go elsewhere." *Davis*, 166 Wis. 2d at 544. Petitioners ignore the parental control inherent in school choice, and no one is better suited to argue how meaningful parental choice can be than the very parents who have exercised such control. As a further example, Petitioners repeatedly mischaracterize school choice as a failed "experiment," insinuating that whether the public purpose

requirement is satisfied turns on the effectiveness of choice schools in educating children. *E.g.*, Pet., ¶87. Petitioners say that "[r]ather than creating better educational opportunities for all students, the programs primarily serve as a conduit for public funds to flow to private businesses." *Id.*, ¶89. Again, no one is better suited to explain how successful school choice has been than Movants who educate these children and see the positive results of these programs every single day.

iii. Speaker Robin Vos cannot adequately represent Movants' interests.

Turning to each named Respondent, Assembly Speaker Robin Vos may not even be a properly named party. In an action like this one, the proper respondent must be a "public officer[] charged with the enforcement of the challenged statute[s] . . . ." *Koschkee v. Evers*, 2018 WI 82, ¶25, 382 Wis. 2d 666, 913 N.W.2d 878 (quoted source omitted). Speaker Vos is not the public officer charged with enforcement of the challenged programs. The Petition does not make it clear why Speaker Vos is named, or why he is a properly named party at all.

Even if Speaker Vos is a proper party and/or he chooses to remain a party, his interests are different from Movants'. As Speaker, his interests would likely be primarily concerned with protecting the Legislature's lawmaking power. For example, he may argue, correctly, that this Court should defer to the policy decisions of the Legislature. *See Davis*, 166 Wis. 2d at

541 ("In considering questions of 'public purpose,' a legislative determination of public purpose should be given great weight . . . .").

But Speaker Vos does not have the same personal interests in school choice as the Movants. Unlike the Parent Movants, he cannot explain how he has personally relied upon these programs for his family, and what the positive benefits have been for his family as a result. Unlike the School Movants, he cannot explain how he has relied upon school choice to structure his school and make investments to provide options to families that are otherwise unavailable to them or speak to how public oversight already exists to ensure accountability in these programs to satisfy the public purpose requirement.

Speaker Vos is likely sympathetic to those positions by the Movants, but he does not have the same knowledge and experience that they have, and he has no legal duty to protect their interests. Nor is this presumed sympathy the same as the concrete interest that the Movants have. Even if Speaker Vos supports these programs, he is a politician who must balance that support against other political and policy interests.

Even if his interests are "general[ly]" aligned or, to some degree, "coincide," his interests are insufficiently representative. *Crossroads*, 788 F.3d at 321. Just because two parties may desire the same outcome does not mean that they want that outcome for the same reasons—i.e., they may have different interests. While Movants agree that the Legislature is the primary

policymaking branch, Movants interests in this action are of a more intimate sort.

Speaker Vos does not adequately represent Movants' interests.

iv. State Superintendent Jill Underly cannot and will not adequately represent Movants' interests.

The second named Respondent, State Superintendent Jill Underly, also will not adequately represent Movants' interests. Indeed, she said in a press release responding to this action on the day it was filed:

> Education represents an incredible opportunity to learn, grow, and strengthen our state, but public education represents even more than that. Public education is a constitutional right. It says it right there in Article X, Section 3 of the Wisconsin Constitution. And as a right guaranteed to our children, and as an opportunity for our state to put our money where our priorities should be, Wisconsin needs to fulfill its responsibility to effectively, equitably, and robustly fund our public education system. I welcome any opportunity to move Wisconsin in that direction.

News Release, *State Superintendent Statement on Private Choice Programs Lawsuit* (Oct. 12, 2023), https://dpi.wi.gov/sites/default/files/news-release/dpinr2023-68_0.pdf. Her actual interests—regardless of what her official interests should be—are at odds with Movants,' and she cannot be trusted to fulfill her duty to defend these challenged programs. *See id.*; *see also* JT Cestkowski, *Lawsuit Asks Wisconsin Supreme Court to End Private School Vouchers*, WKOM.COM (Oct. 13, 2023), https://www.wkow.com/news/lawsuit-asks-wisconsin-supreme-court-to-end-private-school-vouchers/article_0d8f02b0-6a1f-11ee-a6d2-2bec3cf14c03.html (noting

"[Superintendent] Underly released a statement where she seemed to endorse the lawsuit against her"). Additionally, the substance and timing of her release create the appearance of "collusion" between her and Petitioners. *See Armada Broad., Inc.*, 183 Wis. 2d at 462.

Lest there be any doubt, Superintendent Underly gave an interview in early September of this year, during which she spoke against the challenged programs. *Extended Interview: Dr. Jill Underly Talks Upcoming School Year*, WMTV (Sept. 1, 2023), https://www.nbc15.com/video/2023/09/02/extended-interview-dr-jill-underly-talks-upcoming-school-year/. Many of her political talking points are parroted by Petitioners. *Compare, e.g.*, *id.* at 8:43 ("[I]n Wisconsin, in the statute, they actually don't have to follow laws when it comes to gender and sexuality. They can discriminate. In admissions policies for example, they can accept a student with disabilities but then . . . say oh, wait . . . were not able to serve the student . . . and then what option do those parents have for their child? They have to go to public school. . . . [W]e got a system that serves everybody because that's the ideal, . . . and then we have another system that we're funding with public dollars but doesn't serve everybody."), *with, e.g.*, Pet., ¶77 ("Combined with other features of the private school funding program, the lack of disability protections has produced perverse incentives. There have been reports that some participating private schools enroll students with disabilities at the beginning of the school year but then expel some or all these students immediately . . . .").

Superintendent Underly would be better suited as a petitioner in this action than a respondent. She does not and could not adequately represent the interests of Movants.

v. Secretary-Designee Kathy Blumenfeld Cannot and Will Not Adequately Represent Movants' Interests.

Lastly, the third named Respondent, Department of Administration Secretary-designee Kathy Blumenfeld, also does not adequately represent the Movants' interests. A great deal of money passes through the department, but that does not mean that she is a proper party in any case involving state funds. Secretary-designee Blumenfeld's primary concern regarding these programs is as a ministerial officer who simply needs to be told what to do. *See* ministerial officer, *Black's Law Dictionary* (11th ed. 2019) ("An officer who primarily executes mandates issued by the officer's superiors; one who performs specified legal duties when the appropriate conditions have been met, but who does not exercise personal judgment or discretion in performing those duties."). Secretary-designee Blumenfeld does not enforce any school choice statutes, and Petitioners do not allege that she does. Petitioners do not allege that her office receives calls from concerned parents or choice schools when questions arise. Petitioners do not allege that she has any specialized knowledge regarding these programs or any reason to defend them as vigorously as Movants would. Much like Speaker Vos, whether Secretary-designee Blumenfeld is even a proper party is suspect.

Accordingly, none of the named Respondents can adequately represent Movants' interests in this matter and Movants therefore satisfy the fourth requirement to intervene as a matter of right pursuant to Wis. Stat. § 803.09(1).

* * *

Having satisfied all four elements to intervene as a matter of right, Movants respectfully request this Court grant their motion and allow them to intervene in this action.

II. Alternatively, Movants should be granted permissive intervention.

Alternatively, this Court should grant Movants' motion to intervene on a permissive basis. Movants satisfy all three requirements for permissive intervention under Wis. Stat. § 803.09(2):

(1) their motion is timely;

(2) they assert defenses that have a question of law or fact in common with this action; and

(3) Movants' involvement will not "unduly delay or prejudice the adjudication of the rights of the original parties."

As already explained, Movants have acted promptly. Movants also assert defenses that have questions of law or fact in common with this action because they disagree with the arguments made and outcomes sought by Petitioners, as they have already explained herein. In addition, Movants' involvement will not unduly delay or prejudice the adjudication of the rights of the original parties. Of course, Movants commit to complying with all relevant deadlines.

Notably, similar intervention motions were granted in previous challenges to school choice. For example, in a 1998 challenge, Parents for School Choice was permitted to intervene. *Jackson*, 218 Wis. 2d at 835. In cases involving especially weighty issues, this Court desires to hear fully the concerns of interested individuals and therefore takes an especially permissive view toward intervention. *See Johnson v. WEC*, 2022 WI 14, ¶2, 400 Wis. 2d 626, 971 N.W.2d 402 (noting this Court granted every intervention motion in an important redistricting case), *rev'd on other grounds*, *Wisconsin Legislature v. WEC*, 595 U.S. 398 (2022) (per curiam).

For these reasons, if Movants cannot intervene as a matter of right, then Movants respectfully request that this Court grant them permission to intervene in this action pursuant to Wis. Stat. § 803.09(2).

CONCLUSION

For the foregoing reasons, this Court should grant Movants' Motion to intervene.

Dated: November 13, 2023.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.81 for a brief produced with a proportional serif font. The length of this brief is 7,698 words, calculated using Microsoft Word.

Dated this 13th day of November, 2023.

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