**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLORADO**

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| STEPHEN & CHRISTINA THOMAS, et al.,<br><br>Plaintiffs,<br><br>v.<br><br>DOUGLAS COUNTY BOARD OF EDUCATION and DOUGLAS COUNTY SCHOOL DISTRICT<br><br>Defendants,<br>v.<br><br>JAMES LARUE, SUZANNE T. LARUE, INTERFAITH ALLIANCE OF COLORADO, RABBI JOEL R. SCHWARTZMAN, KEVIN LEUNG, CHRISTIAN MOREAU, MARITZA CARRERA, SUSAN MCMAHON, TAXPAYERS FOR PUBLIC EDUCATION, CINDRA S. BARNARD, and MASON S. BARNARD,<br><br>Movants | **Civ. No. 1:16-cv-00876-MSK-CBS** |

**MOTION TO INTERVENE AND**
**MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE**

Pursuant to Rule 24 of the Federal Rules of Civil Procedure, James LaRue, Suzanne T. LaRue, Interfaith Alliance of Colorado, Rabbi Joel R. Schwartzman, Kevin Leung, Christian Moreau, Maritza Carrera, Susan McMahon, Taxpayers for Public Education, Cindra S. Barnard, and Mason S. Barnard respectfully move the Court for an order granting intervention as of right under Rule 24(a)(2). In the alternative, proposed Intervenors move for permissive intervention

under Rule 24(b)(1). Pursuant to Fed. R. Civ. P. 24(c), proposed Intervenors attach a Motion to Dismiss, or in the Alternative to Stay Proceedings as Exhibit 1.

**INTRODUCTION**

This case is a joint effort by the Defendants Douglas County Board of Education and Douglas County School District (collectively "the School District") and Plaintiffs' counsel (the Institute for Justice)[1] to try to obtain a ruling from this Court that would conflict with and undermine the judgment of the Colorado Supreme Court in ongoing parallel litigation. In the parallel litigation, the School District and clients of the Institute for Justice are cooperating co-defendants. *See Taxpayers for Pub. Educ. v. Douglas Cty. Sch. Dist.*, 351 P.3d 461 (Colo. 2015) (hereinafter *Taxpayers*). The proposed Intervenors here are the prevailing plaintiffs in *Taxpayers*; their legal interests secured by that judgment are threatened by the current action. Proposed intervenors obtained a permanent injunction against the School District that bars implementation of the underlying school-grant program that is being challenged here. The Institute for Justice represents parties in *Taxpayers* who intervened as defendants in order to defend the program that the Institute for Justice now challenges. As it stands, the parties on both sides of this lawsuit want the same thing: an order that excluding religious schools violates the federal Constitution. Prospective Intervenors, on the other hand, contend that the federal Constitution does *not* require the relief that the Institute for Justice seeks.

In upholding the permanent injunction in *Taxpayers*, a plurality of the Colorado Supreme Court rejected arguments that excluding religious schools from a school-grant program—as required by the Colorado Constitution—would be impermissible discrimination that violates the

[1] For ease of reference, we refer to Plaintiffs in this case by their counsel, the Institute for Justice.

U.S. Constitution. Both the School District and the Institute for Justice have petitioned the U.S. Supreme Court to overturn the Colorado Supreme Court's decision, each arguing that the exclusion of religious schools from a school-grant program would be unconstitutional—precisely the same arguments that the Institute for Justice asserts here. Rather than waiting for the Supreme Court to act on those pending petitions, however, the School District has modified the program to do exactly what it is telling the U.S. Supreme Court would be unconstitutional—provide grants to secular private schools while excluding religious schools.

The School District is currently collaborating with the Institute for Justice before the U.S. Supreme Court in seeking a ruling regarding the school-grant program that would be directly contrary to the position that the School District would need to take to defend the same program here. Intervenors' interests in preventing the funding of religious and other private schools and the injunction of the underlying program are at issue in both cases. Intervenors' legal rights in *Taxpayers* cannot be adequately represented by the School District—for the School District is simultaneously seeking, in active litigation, to secure a judgment that the actions it is supposed to be defending here are unconstitutional and should be barred under federal law. Hence, Intervenors are entitled to defend their legal rights and the injunction ordered by the Colorado Supreme Court.

As required by D.C.COLO.L.CivR 7.1(a), Intervenors' counsel has conferred with the parties' counsel regarding this Motion. Counsel for Defendants indicated that they do not object to the proposed Intervenors' request to intervene in this matter, but cannot state any position on the additional requested relief in the attached Motion to Dismiss, or in the Alternative to Stay Proceedings until they have an opportunity to review that motion. Counsel for Plaintiffs

indicated that they would consent to the requested intervention provided that the proposed Intervenors refrain from filing motions other than the Motion to Intervene until after this Court resolves Plaintiffs' Motion for Preliminary Injunction. Intervenors' counsel informed Plaintiffs' counsel that we are not willing to refrain from filing the Motion to Dismiss or in the Alternative to Stay Proceedings attached to this Motion.

## FACTUAL AND LEGAL BACKGROUND

### I. Intervenors

- Intervenors James and Suzanne LaRue reside in Douglas County and have been Douglas County homeowners for 23 years. They pay property taxes to Douglas County and income and sales taxes to the State of Colorado Department of Revenue that support the School District. They object to having their tax dollars used to fund private schools, including religious schools.
- Intervenor Kevin Leung is a resident of Douglas County and a homeowner in Castle Rock, Colorado, in Douglas County. He has two daughters who have graduated from Douglas County public schools. He has one daughter currently enrolled in a Douglas County public school. He has lived in Douglas County for 25 years. He owns and operates two commercial properties in Douglas County. He pays property taxes to Douglas County and income and sales taxes to the State of Colorado Department of Revenue that support the School District. He objects to having his tax dollars used to fund private schools, including religious schools.
- Intervenor Christian Moreau is a resident of Douglas County and a homeowner in Highlands Ranch, Colorado, in Douglas County. His daughter is a student in Douglas

County public schools. He pays property taxes to Douglas County and income and sales taxes to the State of Colorado Department of Revenue that support the School District. He objects to having his tax dollars used to fund private schools, including religious schools.

- Intervenor Maritza Carrera is a resident of Douglas County and a homeowner in Highlands Ranch, Colorado, in Douglas County. Her daughter is a student in Douglas County public schools. She pays property taxes to Douglas County and income and sales taxes to the State of Colorado Department of Revenue that support the School District. She objects to having her tax dollars used to fund private schools, including religious schools.
- Intervenor Susan McMahon is a resident of Douglas County and a homeowner in Parker, Colorado, in Douglas County. She has lived in Douglas County for more than 15 years. She has two sons enrolled as students in Douglas County public schools. She has one son enrolled at Valor Christian, a religious private school. She pays property taxes to Douglas County and income and sales taxes to the State of Colorado Department of Revenue that support the School District. She objects to having her tax dollars used to fund private schools, including religious schools.
- Intervenor Interfaith Alliance of Colorado is a Colorado nonprofit corporation. With approximately 850 clergy and lay members from 19 faith traditions, the Interfaith Alliance is dedicated to promoting the positive role of faith in civic life, challenging intolerance and extremism, safeguarding religious liberty, and strengthening public education. The Interfaith Alliance's members include Colorado taxpayers, and many

of those members are residents and taxpayers of Douglas County. Interfaith Alliance objects to its members' tax dollars being used to fund private schools, including private religious schools.

- Intervenor Rabbi Joel R. Schwartzman is a Colorado resident and property owner in Colorado. He is a plaintiff in the parallel lawsuit in which a permanent injunction was obtained against the Program. He objects to having his tax dollars used to fund private schools, including religious schools.
- Intervenor Taxpayers for Public Education is a Colorado nonprofit corporation whose purpose is to support and advocate for public education in Colorado. Its members are parents of children in Douglas County's public schools, as well as other Colorado citizens concerned with improving education in Douglas County and in the state of Colorado. It objects to its members' tax dollars being used to fund private schools, including private religious schools.
- Intervenor Cindra S. Barnard is a resident of Douglas County, Colorado. She pays property taxes to Douglas County and income and sales taxes to the State of Colorado Department of Revenue that support the School District. Her son, Intervenor Mason S. Barnard, was a student in Douglas County public schools and a plaintiff in the parallel case at the time that the permanent injunction was entered by the trial court. They both object to having their tax dollars used to fund private schools, including religious schools.
- Intervenors are plaintiffs-respondents in the pending case, *Taxpayers for Pub. Educ. v. Douglas Cty. Sch. Dist.*, 351 P.3d 461 (Colo. 2015), *petitions for cert. filed*, No. 15-

556, 15-557, 15-558. In that case—in which the School District, the Institute for Justice, and the State of Colorado each currently have separate petitions pending in the U.S. Supreme Court—the School District and the Institute for Justice both argue that exclusion of religious schools from the Douglas County school-grant program is unconstitutional.

## II. Litigation regarding Douglas County's voucher program

1. In 2011, the School District approved the Choice Scholarship Program, which authorized Douglas County's public school students to apply for, obtain, and use school vouchers—drawn from the School District's allocation of state public educational funds—to pay tuition at private schools. The Program allowed both secular and religious private schools to participate.

2. Intervenors are plaintiffs-respondents in the ongoing litigation against the Program.

3. On August 12, 2011, the Program was permanently enjoined by the District Court for the City and County of Denver, Colorado on the basis that funneling public tax monies to the private schools participating in the Program "violates both financial and religious provisions set forth in the Colorado Constitution." August 12, 2011 Order, Ex. 2, Douglas Decl. Ex. A, at 27.[2]

[2] Intervenors respectfully request that the Court take judicial notice of certain federal and state court filings, appended to the Declaration of Matthew Douglas, Esq. attached hereto as Exhibit 2, which are a matter of public record and whose accuracy has not been disputed. *See Schendzielos v. Silverman*, No. 15-cv-00564, 2015 WL 5964882, at *9 (D. Colo. Oct. 14, 2015) (noting a court "may take judicial notice of the existence of the opinions of other courts" "as well as facts which are a matter of public record").

4. After a divided panel of the Colorado Court of Appeals reversed, the plaintiffs (Intervenors here) successfully petitioned the Colorado Supreme Court for certiorari. In December 2014, the Colorado Supreme Court heard oral arguments. The Institute for Justice and the School District argued together, sharing their oral argument time as co-defendants. They specifically argued to the Colorado Supreme Court that excluding religious options from school-grant programs (i.e., forbidding the use of vouchers at religious schools) would be "impermissible under the First Amendment." December 10, 2014 Oral Argument, Ex. 2, Douglas Decl. Ex. B, at 16. On June 29, 2015, the Colorado Supreme Court rejected that view, reversed the decision of the Colorado Court of Appeals, and reinstated the trial court's permanent injunction. *Taxpayers*, 351 P.3d at 465. The Program in its entirety continues to be permanently enjoined.

5. In October 2015, the Institute for Justice filed a petition for certiorari in the U. S. Supreme Court, asking the Court to decide "[w]hether the United States Constitution tolerates barring the choice of religious schools in student aid programs." Pet'rs.' Pet. for Writ of Cert., *Doyle, et al. v. Taxpayers for Pub. Educ., et al.*, Ex. 2, Douglas Decl. Ex. C, at 6.

6. The following day, the School District submitted its petition for certiorari likewise arguing that the Colorado Supreme Court's decision would "require a government to discriminate based on religion." Pet'rs.' Pet. for Writ of Cert., *Douglas Cty. Sch. Dist., et al. v. Taxpayers for Pub. Educ., et al.*, Ex. 2, Douglas Decl. Ex. D., at 3. According to the School District, "[f]orcing school districts to deviate from . . . neutrality is nothing less than unconstitutional discrimination against religion." *Id.* The School District further contended that

"the restriction of available schools to those without religious affiliations is not just artificial and counterproductive, but unconstitutional." *Id.* at 30.

7. In April 2016 both the School District and the Institute for Justice filed *amicus curiae* briefs in the U.S. Supreme Court in *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, 788 F.3d 779 (8th Cir. 2015), *cert. granted*, 136 S. Ct. 891 (2016). According to the School District, *Trinity Lutheran* "presents the question whether . . . 'the exclusion of churches from an otherwise neutral and secular aid program violates the Free Exercise and Equal Protection Clauses,'" which "substantially overlaps with the question presented for review by" the School District's petition in *Taxpayers*. Suppl. Br. for Pet'rs, *Douglas Cty. Sch. Dist., et al. v. Taxpayers for Pub. Educ., et al.*, Ex. 2, Douglas Decl. Ex. E, at 1.

8. On May 24, 2016, concurrently with this Motion, Intervenors filed a Motion for Enforcement of August 12, 2011 Permanent Injunction Restraining Defendants' Resumed Funding and Implementation of an Unlawful School Voucher Program in the parallel state court action in Denver District Court. Ex. 2, Douglas Decl. Ex. F.

## III. The School District modifies its enjoined program

9. On March 15, 2016, the Douglas County Board of Education approved a modification to the School Choice Grant Program. Compl. ¶ 1, ECF No. 1. This enactment was not a "new resolution or policy" but rather a "revision to the previous" Choice Scholarship Program. March 18, 2016 E-mail of Douglas Cty. Bd. Pres. Meghann Silverthorn, Ex. 2, Douglas Decl. Ex. G. We therefore use the term Program to refer to both the original version and the modified version.

10. Under the modified version, religious private schools are no longer eligible to participate. Nevertheless, the School District "still disagrees with the Colorado Supreme Court's ruling regarding religious schools," and aims to revert back to the original version of the Program, which included religious schools. Douglas County School District Choice Grant Program Webpage, Ex. 2, Douglas Decl. Ex. H, at 2.

## IV. The instant action

11. On April 19, 2016, the Institute for Justice filed the Complaint in this case, seeking declaratory and injunctive relief claiming that the Program, by excluding religious schools, violates the Free Exercise, Establishment, Equal Protection, Free Speech, and Due Process Clauses. Compl. ¶ 1. The Institute for Justice also filed a Notice of Related Case disclosing the *Taxpayers* case, in which it represents intervenor-defendants, and in which proposed Intervenors here are plaintiff-respondents. Notice of Related Case, ECF No. 4.

12. On May 10, 2016, the School District filed its *pro forma* Answer. In that Answer, the School District does not so much as hint that it has changed its position, as stated in its briefs pending in the U.S. Supreme Court, that its own modified Program violates the federal Constitution—just as the Institute for Justice alleges here. Quite the contrary, the School District "admit[s] that [it] filed a petition to the United States Supreme Court" stating precisely that legal position. Defs.' Answer ¶ 10, ECF No. 12.

## ARGUMENT

After four years of litigation, Intervenors prevailed in obtaining a judgment of the Colorado Supreme Court that permanently enjoins the School District's school voucher program and prevents taxpayer money from being funneled to private and religious schools. Plaintiffs

and Defendants in this case are actively seeking to overturn that injunction in the U.S. Supreme Court, and the outcome of this case could have an impact on that litigation. The School District, as evidenced by their pending filings and consistent statements in both the U.S. Supreme Court and the state courts of Colorado, do not recognize, and therefore cannot be counted upon adequately to represent, Intervenors' legal position that the Constitution does not require the relief the Institute for Justice seeks. Nor will the School District adequately represent the Intervenors' interest in upholding the injunction secured in *Taxpayers* and Intervenors' underlying rights under the Colorado Constitution to ensure that their tax dollars are not used to fund private schools. Intervenors should therefore be permitted to intervene in this action.

## I. Intervenors Are Entitled To Intervene as of Right

Under Rule 24(a)(2), a motion to intervene should be granted if: "(1) the movant claims an interest relating to the property or transaction that is the subject of the action; (2) the disposition of the litigation may, as a practical matter, impair or impede the movant's interest; [] (3) the existing parties do not adequately represent the movant's interest;" and (4) the motion is timely. *WildEarth Guardians v. Nat'l Park Serv.*, 604 F.3d 1192, 1196-98 (10th Cir. 2010).

In applying this test, the courts of this Circuit are guided primarily by practical considerations, rather than "rigid, technical requirements," *San Juan Cty., Utah v. United States*, 503 F.3d 1163, 1195 (10th Cir. 2007), and Rule 24(a) is liberally construed in favor of intervention, *WildEarth Guardians v. U.S. Forest Serv.*, 573 F.3d 992, 995 (10th Cir. 2009).

Intervenors satisfy each part of the intervention standard.

### A. This Litigation Threatens Intervenors' Substantial Legal Rights Under the Colorado Constitution and the Judgment of the Colorado Supreme Court

A proposed intervenor must show a "significant protectable interest." *San Juan Cty.*, 503 F.3d at 1209 n.5. The "contours of the interest requirement have not been clearly defined," so "[w]hether an applicant has an interest sufficient to warrant intervention as a matter of right is a highly fact-specific determination." *Coal. of Ariz./N.M. Ctys. for Stable Econ. Growth v. Dep't of Interior*, 100 F.3d 837, 840-41 (10th Cir. 1996). But the "burden to satisfy this condition is minimal," and the "threat of economic injury from the outcome of litigation undoubtedly gives a petitioner the requisite interest." *WildEarth Guardians*, 573 F.3d at 996 (internal quotation marks and citations omitted). A movant's interest must "be based on an interest that is contingent upon the outcome of the litigation" and "could be adversely affected by the litigation." *San Juan Cty.*, 503 F.3d at 1199, 1203. The Tenth Circuit has recognized that "the requirements for intervention may be relaxed in cases raising significant public interests." *Id.* at 1201.

The Program that the Institute for Justice seeks to enjoin here is the subject of ongoing, multi-year litigation. It has already been enjoined by the Colorado Supreme Court and both the Institute for Justice and the School District have pending petitions before the U.S. Supreme Court attempting to overturn the injunction. Moreover, the Institute for Justice's requested relief threatens to funnel millions of tax dollars to religious institutions, which implicates a significant public and economic interest. Intervenors have an interest in maintaining and enforcing the existing injunction against the Program, which prevents their tax dollars from being used to support private and religious schools in violation of the Colorado Constitution. The relief that the Institute for Justice requests would impair—indeed, eviscerate—that interest. The Institute

for Justice seeks an order that the School District **must** fund religious schools because excluding them would violate the First Amendment. Not only would such a holding be contrary to existing U.S. Supreme Court and other federal precedents, but it would squarely conflict with the judgment of the Colorado state courts—the subject of currently pending certiorari petitions of the parties here in the U.S. Supreme Court—that the federal Constitution does not require, and the Colorado Constitution forbids, precisely what Plaintiffs contend is required.

In short, the outcome of the instant action would necessarily have a direct and clear effect on the ongoing state court litigation and the pending U.S. Supreme Court petitions involving the underlying school-grant program in Douglas County. Given that both cases involve the same parties, the same issues, and versions of the same program, the results are inextricably intertwined. The Institute for Justice seeks to undermine the parallel litigation, in which Intervenors are the thus-far prevailing parties; moreover, Defendants want the same result that Plaintiffs seek in both cases. Therefore, Intervenors have a direct and substantial interest in this action.

### B. Intervenors' Ability To Protect Their Interest Will Be Impaired If They Are Unable To Intervene

"In assessing whether a would-be intervenor's interest might be impaired or impeded absent intervention, the court is not limited to consequences of a strictly legal nature." *United States v. N. Colo. Water Conservancy Dist.*, 251 F.R.D. 590, 598 (D. Colo. 2008) (internal quotation marks and citations omitted). A proposed intervenor need "show only that impairment of its substantial legal interest is possible if intervention is denied." *Id.* Like the burden to show a protectable interest, the burden to show impairment is "minimal." *Utah Ass'n of Ctys. v. Clinton*, 255 F.3d 1246, 1253 (10th Cir. 2001).

This case presents a clear threat to the Colorado Supreme Court's permanent injunction in a case in which Intervenors are plaintiffs and the School District and the Institute for Justice are aligned, cooperating co-defendants. The nominally-opposing parties in this case have both argued, and continue to argue, in that ongoing, related litigation their belief that excluding religious schools from the school-grant program violates the First Amendment. *See* Pet'rs.' Pet. for Writ of Cert., *Douglas Cty. Sch. Dist., et al. v. Taxpayers for Pub. Educ., et al.*, Ex. 2, Douglas Decl. Ex. D, at 3 ("Forcing school districts to deviate from . . . neutrality is nothing less than unconstitutional discrimination against religion."); *id.* at 30 ("the restriction of available schools to those without religious affiliations is not just artificial and counterproductive, but unconstitutional"); Pet'rs.' Pet. for Writ of Cert., *Doyle, et al. v. Taxpayers for Pub. Educ., et al.*, Ex. 2, Douglas Decl., Ex. C, at 3 (arguing that a government may not bar religious schools from a voucher program); Intervenors' Combined Resp. Br. Opp. Pls.' Mot. for Prelim. Inj., Ex. 2, Douglas Decl. Ex. I, at 3 (arguing that excluding religious schools from the Program would "violate religious protections in the U.S. Constitution"). Thus, the Institute for Justice and the School District have taken, and continue to take, the same position on the central issue in this case. Together, they continue to seek dissolution of the injunction. Intervenors, who obtained that injunction at great cost and with great effort, need to intervene so that they can advocate to uphold the injunction and protect their interest in preventing public funding of religious schools.

**C. The Other Parties Do Not Adequately Represent Intervenor's Interests**

The burden to establish that the existing parties do not represent the intervenors' interests is "minimal." *Coal. of Ariz.*, 100 F.3d at 844 (internal citations omitted). And notably, "[a]n applicant may fulfill this burden by showing collusion between the [applicant's alleged]

representative and an opposing party." *Id.* (quoting *Sanguine, Ltd. v. U.S. Dep't of Interior*, 736 F.2d 1416, 1419 (10th Cir. 1984)).

Plainly, neither Plaintiffs nor Defendants in this case can adequately represent Intervenors' legal interests in preserving the *Taxpayers*' injunction and enforcing Intervenors' rights under the Colorado Constitution because they are actively working—in concert, no less—to undo the injunction and obtain a ruling that the pertinent provision of the Colorado Constitution should be struck down as a violation of the First Amendment. As noted above, intervention is appropriate where such collusion exists.

**D. Intervenors' Motion Is Timely**

Whether a motion to intervene is timely is "assessed in light of all the circumstances, including the length of time since the applicant knew of his interest in the case, prejudice to the existing parties, prejudice to the applicant, and the existence of any unusual circumstances." *Utah Ass'n of Ctys.*, 255 F.3d at 1250 (allowing intervention after 2.5 years because the case was not yet ready for trial) (internal quotation marks and citations omitted). A motion to intervene is particularly timely when, as here, it comes in the "early stage of the litigation" as there is a "lack of prejudice to [the parties] flowing from the length of time between the initiation of the proceedings and the motion to intervene." *Id.* at 1251; *see also Wurz v. Bill Ewing's Serv. Ctr., Inc.*, 129 F.R.D. 175, 177 (D. Kan. 1989) ("six [] weeks from the filing of the action is not an unreasonable amount of time within which to file a motion to intervene"). The Institute for Justice filed its Complaint on April 19, 2016 and its Motion for Preliminary Injunction on May 12. The School District's only responsive pleading has been an Answer filed on May 10. There have been no hearings, status conferences, motions for discovery, or other pre-trial or trial

proceedings. Granting intervention would not prejudice the existing parties in any manner. Moreover, Intervenors have not delayed in seeking intervention and no unusual circumstances exist that would render this motion untimely.

In sum, Intervenors satisfy all of the criteria for intervention as of right, therefore intervention as of right should be granted.

## II. Alternatively, Permissive Intervention Should be Granted

If the Court were to determine that intervention as of right is unavailable, it should grant permissive intervention under Rule 24(b)(1). Rule 24(b)(1) provides: "On timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1). Even where intervention as of right is denied, "permissive intervention is available under Rule 24(b) if the movants can "demonstrate that [they have] a claim or defense that shares a common issue of law or fact with the issues arising between the Plaintiff and Defendants, and that permitting such intervention will not unduly delay or prejudice the rights of the original parties." *Wilderness Soc'y., Ctr. for Native Ecosystems v. Wisely*, 524 F. Supp. 2d 1285, 1294 (D. Colo. 2007).

The legal and factual overlap between this case and *Taxpayers* is extensive: the central issue here—whether limiting a school-grant program to secular schools would violate the federal Constitution—is also the primary issue raised in the School District's and the Institute for Justice's petitions for certiorari in *Taxpayers*. Moreover, the version of the Program at issue in this case is identical in nearly every respect to the Program enjoined by *Taxpayers*, with the primary exception being the new exclusion of religious schools—an exclusion that the School

District states it will drop if a ruling of the U.S. Supreme Court so permits. The School District only excluded religious schools from the Program because of the injunction that Intervenors obtained in *Taxpayers* in state court—and very possibly as an integral part of its joint-defense strategy with the Institute for Justice, its cooperating codefendant in *Taxpayers*. Against the Institute for Justice's claim (and the School District's clear and consistent legal position) that exclusion of religious schools from the Program is unconstitutional, Intervenors here intend to assert as defenses the same legal position they have successfully asserted in the ongoing *Taxpayers* litigation. And, as already explained, the intervention, whether as of right or permissive, would be timely and would not prejudice the rights of the named parties. The only possible prejudice would be to Intervenors and their rights under the *Taxpayers* injunction, if intervention were denied. Therefore, permissive intervention is also appropriate in this case.

## CONCLUSION

For the reasons set forth above, Intervenors respectfully request that the Court grant intervention in this matter and direct the clerk of court to file the accompanying proposed Motion to Dismiss, or in the Alternative to Stay Proceedings, submitted herewith. Given the related nature of the parties, should the Court determine intervention is not warranted, the Court should *sua sponte* dismiss this case for lack of subject matter jurisdiction, for the reasons outlined in the accompanying Motion to Dismiss, or in the Alternative to Stay Proceedings.

Respectfully submitted this 24th day of May, 2016.

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on May 24, 2016 a copy of the foregoing: **MOTION TO INTERVENE AND MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE** was electronically filed with the clerk of the court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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