IN THE CHANCERY COURT OF HINDS COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

PARENTS FOR PUBLIC SCHOOLS, Plaintiff, v. MISSISSIPPI DEPARTMENT OF FINANCE AND ADMINISTRATION et al., Defendants.	No. 25CH1:22-cv-00705

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO INTERVENE

Midsouth Association of Independent Schools ("MAIS") seeks to intervene as a defendant in this matter for the following reasons. MAIS has sought the position of the existing parties: the Plaintiff indicated that it opposed intervention. The State Defendants reserved their right to respond until they saw MAIS's filings.

I. MAIS satisfies the requirements for intervention as of right.

Mississippi Rule of Civil Procedure (M.R.C.P.) 24(a)(2) requires a court to grant intervention when an applicant satisfies four criteria:

> (1) he must make timely application, (2) he must have an interest in the subject matter of the action, (3) he must be so situated that disposition of the action may as a practical matter impair or impede his ability to protect his interest, and (4) his interest must not already be adequately represented by existing parties.

Guaranty National Insurance Co. v. Pittman, 501 So. 2d 377, 381 (Miss. 1987). These factors are evaluated on a sliding scale:

> Application of the rule requires that its components be read not discreetly, but together. A showing that a very strong interest exists may warrant intervention upon a lesser showing of impairment or inadequacy of representation. Similarly, where representation is

> clearly inadequate, a lesser interest may suffice as a basis for granting intervention.

Cummings v. Benderman, 681 So. 2d 97, 101 (Miss. 1996).

A. The application is timely.

The Mississippi Supreme Court in *Guarantee National* adopted the factors used by the Fifth Circuit in determining whether an application for intervention is timely. *Guaranty National,* 501 So. 2d at 381-82. These factors are:

> (1) the length of time during which the would be intervenor actually knew or reasonably should have known of his interest in the case before he petitioned for leave to intervene; (2) the extent of the prejudice that the existing parties to the litigation may suffer as a result of the would be intervenor's failure to apply for intervention as soon as he actually knew or reasonably should have known of his interest in the case; (3) the extent of the prejudice that the would be intervenor may suffer if his petition for leave to intervene is denied; and (4) the existence of unusual circumstances militating either for or against a determination that the application is timely.

Id. at 382, citing *Stallworth v. Monsanto Co.* 558 F.2d 257, 264-66 (5th Cir.1977) (additional citations omitted).

This case began with the filing of a complaint on June 15, 2022. MAIS became aware of this case shortly thereafter from news reports, and began reaching out to attorneys. After several weeks of phone calls and emails, MAIS connected with the pro bono attorneys at the Liberty Justice Center, a national firm with an education-reform practice. MAIS then promptly filed for intervention, within two months of when the case was originally filed. Such a timeline is far shorter than the four months and nine days in *Madison HMA, Inc. v. St. Dominic-Jackson Mem'l Hosp.*, 35 So. 3d 1209, 1217 (Miss. 2010) (reversing denial of motion to intervene) or the

119 days in *Guaranty National*, 501 So. 2d at 382 (same). The first factor favors MAIS.

An answer has been filed by the State Defendants, and MAIS accompanies this motion with its proposed answer. There is a pending motion for a preliminary injunction, and MAIS has attached to this motion a proposed memorandum in opposition to the preliminary injunction. MAIS filing today gives the Plaintiff a full week to read, research, and reply to any points MAIS raises in its reply brief.

The third factor, prejudice to the applicant, will be discussed in greater detail in parts B and C, and also favors MAIS.

There are no unusual circumstances militating for or against intervention. As a result, the majority of the operative factors militate in favor of a finding of timeliness.

B. MAIS has both an economic and a constitutional interest in this action.

This case concerns the allocation of federal pass-through coronavirus relief funds by the State of Mississippi. MAIS is an association of educational institutions that Plaintiff by its lawsuit seek to exclude from access to these federal funds. Plaintiff seeks to do so via the so-called Blaine Amendment, Miss. Const. art. VIII, § 208. To satisfy the second prong for intervention, "[a]ll that is necessary is that [the would-be intervenor] establish an interest in the rights that are at issue in the litigation." *Guar. Nat'l Ins. Co.*, 501 So. 2d at 383. "The interest requirement may be judged by a more lenient standard if the case involves a public interest question or is brought by a public interest group. The zone of interests protected by a constitutional

provision or statute of general application is arguably broader than are the protectable interests recognized in other contexts." 6 Moore's Fed. Practice & Proc. § 24.03[2][c], at 24-34.

MAIS's member schools stand to lose $10 million in one-time infrastructure grant funds because of this case. This is not a contingent concern, as in *Perry County v. Ferguson*, 618 So. 2d 1270, 1273 (Miss. 1993); such a loss of funds will be the direct and immediate result of an adverse judgment.

However, Mississippi courts often require "more" than only an economic interest for intervention as of right. *Kinney v. S. Miss. Planning & Dev. Dist.*, 202 So. 3d 187, 197 (Miss. 2016). Here, that "more" is the federal constitutional right asserted by MAIS. As explained in greater detail below, MAIS plans to raise First and Fourteenth Amendment questions as to the federal constitutionality of Miss. Const. art. VIII, § 208. A constitutional right not implicated for the current parties is a legally protectable interest providing grounds for intervention as of right by an intervenor party who holds the constitutional right. *See, e.g., United States v. Aref*, 533 F.3d 72, 81 (2d Cir. 2008) (media granted intervention in criminal proceeding to assert a First Amendment claim); *In re AP*, 162 F.3d 503, 513 (7th Cir. 1998) (same). This separate constitutional interest gives MAIS a "direct, substantial, legally protectable interest" in the proceedings. *Perry County v. Ferguson*, 618 So. 2d 1270, 1272 (Miss. 1993).

Moreover, MAIS is directly named in the legislation: an "Eligible independent school" means "any private nonpublic school operating within the State of

Mississippi that: is a member of the Midsouth Association of Independent Schools (MAIS) and located in the State of Mississippi . . . .” Miss. Code Ann. § 37-185-3(c)(i).

Finally, trade associations often intervene to defend the interests of their members and overall industry in litigation. *See, e.g., Araujo v. Bryant*, 283 So. 3d 73, 76 (Miss. 2019) (Mississippi Charter Schools Association, in case against state defendants); *Kinney*, 202 So. 3d at 197 (Mississippi Association of Planning and Development Districts, in case involving an individual district); *Delta Elec. Power Ass'n v. Miss. Power & Light Co.*, 149 So. 2d 504, 506 (1963) (Mississippi Municipal Association, concerning electric power in a city). MAIS's members are the “primary intended beneficiaries” of the law—“[t]hey therefore assert not only a matter of public interest but matters more relevant to them than to anyone else.” *Brumfield v. Dodd*, 749 F.3d 339, 344 (5th Cir. 2014). Trade association intervention on a question of public importance is exactly the sort in which Moore's treatise says “a more lenient standard” is appropriate.

C. Disposition of this matter will impede MAIS's ability to protect its interests.

MAIS will be prejudiced by a denial of its motion to intervene. If the State Defendants lose, the State Legislature (which is not even a party here), will lose out on seeing its desired policy accomplished. But MAIS's members are the real ones who will be hurt, as they will lose out on $10 million in federal grant funds.

But this case is about more than $10 million in federal infrastructure funds. It will set a precedent that could forever bar MAIS's members from accessing any

funds that pass through a state checking account. And this permanent prejudice will be based on a provision of the state constitution that MAIS believes was adopted in violation of the federal constitution. As discussed below, the State Defendants are not going to challenge the federal constitutionality of their own constitution. Only MAIS will make the federal constitutional argument. Only MAIS can protect its interests against the prejudice that will result from a negative ruling.

D. The named Defendants will not adequately represent MAIS's interest.

The existing State Defendants cannot adequately represent MAIS's interests. This factor imposes a "minimal burden" and can be shown by, for instance, "staking out a position significantly different from that of the state." *Brumfield v. Dodd*, 749 F.3d 339, 346 (5th Cir. 2014).

MAIS has reviewed the State Defendants' answer and agrees with several of their defenses. But the existing State Defendants will not argue MAIS's position, which is that art. VIII, § 208 is an unconstitutional abridgement of the First and Fourteenth Amendments. *See* Answer, Dkt. 12. Under well-established federal law, a facially neutral provision is nevertheless unconstitutional when religious or racial animus was a motivating factor behind its enactment. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 547 (1993) (First Amendment, as to religion); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-69 (1977) (Fourteenth Amendment, as to race). These constitutional principles are "offended by sophisticated as well as simple-minded modes of discrimination," *United States*

v. Fordice, 505 U.S. 717, 729 (1992), such that even a facially neutral law can nevertheless violate them.

The key provision at issue in this case, Mississippi Constitution art. VIII, § 208, is a so-called "Blaine Amendment." Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 Harv. J.L. & Pub. Pol'y 551, 579 (2003). Blaine Amendments were adopted in the second half of the nineteenth century in states across the country "prompted by virulent prejudice against immigrants, particularly Catholic immigrants." *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2268 (2020) (Alito, J., concurring). This "hostility to aid to pervasively sectarian schools has a shameful pedigree." *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality). Mississippi was no exception to this wave of prejudice that swept the Reconstruction-era South. *See generally* Ward M. McAfee, RELIGION, RACE, AND RECONSTRUCTION: THE PUBLIC SCHOOL IN THE POLITICS OF THE 1870S (SUNY Press 1998).

Based on history and U.S. Supreme Court precedent, MAIS will argue that the Mississippi Blaine Amendment violates the U.S. Constitution. This is an argument that the State Defendants will not make because it is a direct attack on the state constitution. Moreover, even if the State Defendants agreed with MAIS' argument, they could not assert MAIS's First and Fourteenth Amendment rights on MAIS's behalf. Only MAIS is positioned to make this argument and assert these rights, and

this is certainly sufficient to demonstrate the inadequacy of the current representation. *Brumfield*, 749 F.3d at 346.

In sum, MAIS checks all four boxes for mandatory intervention. It has moved promptly. It has a clear interest in protecting its members' grant funds and their federal constitutional rights. That interest will obviously be impaired by a ruling against the State Defendants. And MAIS will not be adequately represented because the State Defendants will not—indeed cannot—raise the federal constitutional right it plans to argue.

II. In the alternative, MAIS seeks permissive intervention.

In the alternative, MAIS seeks permissive intervention, which is permissible where, "upon timely application," "an applicant's claim or defense and the main action have a question of law or fact in common." M.R.C.P. 24(b)(2). MAIS's application is timely, as demonstrated above. *See In re Estate of Ware*, Nos. 2020-CA-00702-SCT, 2020-CA-00706-SCT, 2016-CA-00288-SCT, 2016-CA-01589-SCT, 2022 Miss. LEXIS 138, at *15 (May 26, 2022) (permissive intervention must be timely sought). MAIS seeks to raise questions of law and fact in common with this case: it seeks to defend the constitutionality of the grant program at issue against Plaintiff, based on arguments it has in common with the State Defendants and additional points not raised by the State Defendants.

Rule 24 directs that "in exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Here there will be no undue delay—this case is at an early stage,

and the addition of MAIS will not complicate the case in any meaningful way. This case raises primarily questions of law in which little if any discovery or testimony will be necessary, such that no delay or prejudice will result. Nevertheless, to ease any burden on the Court and counsel, MAIS pledges to work with counsel for the State Defendants to efficiently coordinate their briefing and any discovery to minimize duplication and overlap.

CONCLUSION

As MAIS meets the standards set in the Mississippi Rules of Civil Procedure, it respectfully moves and requests that it be granted intervenor-defendant status in this case prior to any hearing or substantive briefing in this matter.

Dated: **August 11, 2022**

Respectfully submitted,

By: */s/Benjamin B. Morgan*

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CERTIFICATE OF SERVICE

I, Benjamin B. Morgan, hereby certify that I have filed the foregoing with the Court using the MEC filing system, which served a copy of the foregoing on all counsel of record.

This the **11th** day of **August, 2022.**

/s/Benjamin B. Morgan
Benjamin B. Morgan