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

REPLY IN SUPPORT OF MAIS'S MOTION TO INTERVENE

ARGUMENT

The Midsouth Association of Independent Schools ("MAIS") is literally named in the statute whose constitutionality is at issue in this case, yet Plaintiff Parents for Public Schools, schools which are not in any way mentioned in this statute, nevertheless claim MAIS lacks standing to intervene. To the contrary, MAIS satisfies all of the elements necessary for intervention.

I. MAIS has a right to intervene in this case.

First, timeliness. Courts regularly recognize that moving within two months is timely action to join a case. *Sierra Club v. Espy*, 18 F.3d 1202, 1205 (5th Cir. 1994); *La. State Conf. of the NAACP v. La.*, 2022 U.S. Dist. LEXIS 121436 (M.D. La. July 11, 2022); *Northeast Patients Grp. v. Me. Dep't of Admin. & Fin. Servs.*, 2021 U.S. Dist. LEXIS 55122, *6 (D. Me. Mar. 23, 2021); U*nited States v. Marsten Apartments, Inc.*, 175 F.R.D. 265, 268 (E.D. Mich. 1997) (two months "was not a significant length of time between the period the proposed intervenors knew of their claims and the time they filed their motions to intervene.")

Indeed, Mississippi courts have permitted intervention after far longer periods. *Madison HMA, Inc. v. St. Dominic-Jackson Mem'l Hosp.*, 35 So. 3d 1209, 1217 (Miss. 2010) ("Four months and nine days transpired between St. Dominic's filing of this action and HMA's motion for leave to intervene."). Mississippi's Supreme Court has upheld an intervention's timeliness *four years* after an action was begun. *Hood ex rel. State Tobacco Litigation v. State*, 958 So. 2d 790, 808 (Miss. 2007).

MAIS hardly slept on its rights. Its executive director began a search for counsel after learning of this case's filing. It took several weeks to eventually connect to the

pro bono representation necessary from Liberty Justice Center, and another brief period to find local counsel, plus the actual work of filing not only the motion to intervene but also the proposed memorandum on the preliminary injunction. MAIS and its counsel were diligent—they hardly were asleep at the switch while $10 million for its member schools is at stake.

Plaintiff argues this case is "time sensitive," Resp. 5, but that is only so because the parties agreed to make it so before MAIS even had a seat at the table. As MAIS noted in its proposed memorandum on the preliminary injunction, the alleged harm here is hardly irreparable. If Plaintiff wins this case, the amount of money in controversy is quite clear: $10 million. And as MAIS noted in the same brief, the alleged harm to Plaintiff's constitutional rights does not demand immediate judicial protection because it is not the type of constitutional right that lacks a remedy in damages. Again, we know exactly the amount of supposed damages. There is no "duty on trial courts to be the watchdogs of the 'public purse' through the use of a temporary restraining order." *City of Cincinnati v. City of Harrison*, 2010-Ohio-3430, ¶ 12 (Ct. App. 2010). Instead, the normal rules of equity and injunctive relief apply; that taxpayer funds rather than private funds are at issue does not change the prerequisite of irreparable harm. *Id.* All of which is to say that it would be unfair to rule MAIS's motion untimely because the parties agreed to an expedited schedule and consolidation of preliminary relief with the merits. To rule otherwise would incentivize parties in future litigation who are worried about potential

intervention to agree to expedited schedules to strategically exclude potential parties with real rights at stake.

Next, though delaying a trial date may cause some disruption to the existing parties' preferred schedule, "these considerations are not dispositive." *Doe v. Duncanville Indep. Sch. Dist.*, 994 F.2d 160, 168 (5th Cir. 1993). The potential prejudice to the existing parties from delay is only one of the four factors present; the Court must weigh the prejudice occasioned by a brief delay against the prejudice to MAIS if it is denied intervention entirely. *Id.* Obviously here that prejudice is great, as MAIS will be unable to protect its members' constitutional rights, and this Court will not have before it an important constitutional consideration for its decision.

Finally, Plaintiff has not shown any delay in trial is necessary here. The hearing tomorrow is for witness testimony to establish the essential facts of the case beyond what is in the affidavits. Counsel for MAIS plan to be present at tomorrow's hearing. As MAIS indicated in its opening filing, it is comfortable allowing the State Defendants' counsel to take the laboring oar and to only add something when it believes doing so is necessary to protect its particular interests. The Court can maintain tomorrow's hearing date to hear testimony from witnesses, grant intervention, and give the Plaintiff and State Defendants a week to file supplemental briefs responding to the arguments raised in MAIS's proposed preliminary injunction memorandum (on top of the week they have already had since MAIS filed its proposed memorandum), and three days for MAIS to reply. In

the meantime, the Court can work on its opinion as to the other issues already briefed in the case if it wishes. In all events, the delay from such a schedule is slight and can be easily managed, while the prejudice to MAIS if denied intervention entirely is great.

Plus, MAIS is really the party that experiences any prejudice from a short delay in ruling—as the Plaintiff indicates, this briefing schedule was set so the case could be resolved "prior to any disbursements of public funds to private schools." Resp. 5. Plaintiff experiences no harm from waiting an extra ten days—ten more days will pass where it is guaranteed no funds will be distributed. Rather, it is the MAIS schools and students who experience prejudice from their proposed delay—they must wait ten more days before they get access to the funds which the law entitles them to. The burden of granting supplemental briefing falls on MAIS and causes no real-world prejudice to the existing parties. And the Court and Plaintiff may remain confident no funds will be distributed any sooner than otherwise, as the State Defendants are required by this Court's scheduling order to provide the Court with 30 days' notice before any potential disbursement of funds. Dkt. 13, 1-2. In sum, allowing a week for Plaintiff (and the State Defendants, if they wish) to file supplemental briefs addressing MAIS's substantive arguments, and three days for MAIS to respond, does not require this Court to reschedule its hearing, and the burden of such a short delay will fall on MAIS in any event.

Second, MAIS has asserted a concrete constitutional interest in this case. Plaintiff wishes to slice and dice Section 208 into different clauses and sub-clauses

and proclaim each unique. A natural reading of Section 208 shows the foolhardiness of this approach: "No religious or other sect or sects shall ever control any part of the school or other educational funds of this state; nor shall any funds be appropriated toward the support of any sectarian school, or to any school that at the time of receiving such appropriation is not conducted as a free school."[1] This is not a section dealing with multiple different topics in one place, like the U.S. Constitution's First Amendment with its clauses on religion, speech, press, and assembly. Section 208 is one integrated whole that targets fundings for non-public schools. And MAIS's memorandum explains why that targeting occurred: because of racial and religious prejudice against immigrant Catholics and newly freed slaves and the schools that dared to serve them in the Reconstruction period. The use of the terminology "sects" and "sectarian" just shows the section's prejudiced past: "[I]t was an open secret that 'sectarian' was code for 'Catholic.'" *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2259 (2020) (quoting *Mitchell v. Helms*, 530 U. S. 793, 828 (2000) (plurality opinion)). The final portion concerning schools "not conducted as a free school" simply ensures the full coverage of the provision's desired scope, as some non-public schools were founded by religious persons without an explicitly religious affiliation,[2] and others were founded on a purely secular basis to serve

[1] Miss. Const. Ann. art. 8, § 208.

[2] *See, e.g., Education Among the Freedmen*, Resolution of the Pennsylvania Branch of the American Freedman's Union Commission (post-1862), Library of Congress, https://www.thirteen.org/wnet/slavery/experience/education/docs5.html ("This 'Branch' is composed of representatives of the various religious denominations, and while it is not sectarian in its organization, plans, or movements, it aims to execute

newly freed slaves.[3] But all of Section 208 drives at the same goal: ensuring Catholics and the children of freed slaves were forced into majoritarian, segregated public schools.

Thus, the argument made by MAIS in its brief is directly relevant to this case. MAIS argues that all of Section 208 was motivated by the same racial and religious prejudice. The "sectarian" references prove it was a Blaine Amendment, but do not break the section up into independent provisions like the First Amendment. As a result, the determination of this case will directly affect MAIS's rights: a holding that Section 208 prohibits the program at issue will mean MAIS's members are denied $10 million in needed COVID relief funds on the basis of a provision MAIS believes is thoroughly infected with racial and religious animus. Plaintiff responds that MAIS "is free to file its own lawsuit raising" a challenge to Section 208, but the whole point of the doctrine of constitutional avoidance is to avoid such an outcome now—this Court is commanded by precedent to adopt a construction of Section 208 that avoids a federal constitutional problem that could be raised in a future lawsuit if an alternative reasonable construction is available. *See Gentry v. Booneville*, 199 Miss. 1, 4 (1945); *Jones v. Meridian*, 552 So. 2d 820, 824 (Miss. 1989).

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its trust on the basis of religion, for the promotion of 'freedom, industry, intelligence and christian morality.'").

[3] *See* James M. Smallwood, *Early 'Freedom Schools': Black Self-Help and Education in Reconstruction Texas—A Case Study,* 41 Negro History Bulletin 790 (1978) (discussing non-religious non-public cooperative schools organized by newly freed slaves for their children).

At bottom, Plaintiff's response on the second, third, and fourth prongs of the test for intervention as of right all hang on its effort to cordon the final portion of Section 208 off from the rest of the provision. It provides no plain meaning or historical evidence to justify such separation, it just asserts it. But any such effort would ultimately fail, because it is wrong. Two clauses in the same section should generally be read together as "an integrated whole" unless there is specific reason to separate them. *See Corr Wireless Communs., L.L.C. v. AT&T, Inc., LLC*, 907 F. Supp. 2d 793, 799 (N.D. Miss. 2012). And here MAIS has shown specifically why that presumption holds true in this instance. As in contracts, so in constitutions: "in the absence of anything to indicate a contrary intention," a provision adopted at the same time, by the same people, for the same purpose, in the course of the same convention, should be treated as an integrated whole. *See Knox v. Bancorpsouth Bank*, 37 So. 3d 1257, 1262-63 (Miss. App. 2010) (discussing contract rule). There is no contrary indication here: all three parts of Section 208 work together and must rise or fall as a matter of federal constitutional law together.

II. Alternatively, the Court should grant permissive intervention.

MAIS has shown above why its motion was timely: it moved with diligence to secure counsel, find local counsel, and file not one but two substantive briefs. And it has a question of law in common with the existing case: as shown above, the Plaintiff's unsupported effort to separate what it calls the "sectarian" clause from what it calls "the free schools" clause fails. It is not supported by a plain reading of the language, historical evidence, or background rules of interpretation. If the Court

concludes for some other reason that MAIS is not entitled to intervention, then it should nevertheless grant intervention by permission.

III. The Court must consider MAIS's standing argument regardless.

"Standing is a jurisdictional issue. Thus, it may be raised by the court sua sponte or by any party at any time." *Davis v. City of Jackson*, 240 So. 3d 381, 383 (¶9) (Miss. 2018) (cleaned up). Courts have an ongoing obligation to ensure themselves of their jurisdiction, and thus the general rule that amici cannot raise new issues in a case does not apply to standing arguments raised by amici. *Weaver's Cove Energy, LLC v. R.I. Coastal Res. Mgmt.*, 589 F.3d 458, 467 (1st Cir. 2009); *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 864 (8th Cir. 2006); *Bd. of Trustees v. Ft. Wayne*, 362 N.E.2d 855, 859 (Ind. Ct. App. 1977) ("lack of subject matter jurisdiction need not be raised by a party with standing to litigate the merits of an action. This defect may be raised upon motion of the court or even at the suggestion of an amicus curiae."). A similar rule should pertain to proposed intervenors. Because the court is constantly obligated to assure itself of its jurisdiction, when an argument is raised by anyone that the court lacks jurisdiction, it must be decided. And in such an instance, the Court would benefit from hearing from the existing parties on the merits of the standing argument raised by MAIS, which is another reason to grant a brief window for supplemental briefing.

Here, MAIS has raised an obvious challenge to the Plaintiff's standing. The cornerstone of its argument for standing in state court is its members' status as state taxpayers. Yet the funds at issue are not state funds, but federal funds

passing through the state treasury. As MAIS pointed out in its opening brief, the Alabama Supreme Court has confronted this very question and correctly decided that the federal nature of the funds means state taxpayers lack standing to challenge their use. *Broxton v. Siegelman*, 861 So. 2d 376, 383-86 (Ala. 2003). Numerous other courts are in accord. *Chapman v. Bevilacqua*, 42 S.W.3d 378 (Ark. 2001); *St. Paul Area Chamber of Commerce v. Marzitelli*, 258 N.W.2d 585, 589 (Minn. 1977); *White v. Philadelphia*, 408 Pa. 397 (1962); *Hotaling v. Hickenlooper*, 275 P.3d 723, 727 (Colo. App. 2011); *Altman v. Lansing*, 321 N.W.2d 707, 711 (Mich. App. 1982); *Country Club Hills Homeowners Asso. v. Jefferson Metro. Hous. Auth.*, 449 N.E.2d 460, 463 (Ohio App. 1981); *Wallner v. Sununu*, 2020 N.H. Super. LEXIS 25, *19 (Hillsborough Cnty. Superior Ct. April 22, 2020). *See McCafferty v. Oxford Am. Literary Project, Inc.*, 2016 Ark. 75 (2016) (university funds generated by housing, cafeterias, and other auxiliary streams of income). This argument presents a clear problem for the Plaintiff's taxpayer standing, and the Court should address it after receiving supplemental briefing from the Plaintiff on it.

CONCLUSION

The Court should grant intervention. MAIS acted diligently and did not wantonly sleep on its rights. Mississippi's Supreme Court has upheld delays far longer than the few weeks at issue in this instance. And the constitutional argument MAIS has made may be inconvenient for Plaintiff, but it cannot be dismissed by a wave of a wand conveniently separating Section 208 into two distinct parts when nothing in the text, history, or canons of interpretation supports such a

reading. MAIS was named in the statute, its schools stand to lose $10 million in this case, and their constitutional rights are directly affected by this Court's ruling. A brief window for supplemental briefing addressing the arguments MAIS has raised is certainly fair given the tremendous prejudice MAIS will experience if this Court bars the emergency pandemic relief funds due to its schools and students.

Dated: August 22, 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 **22nd** day of **August, 2022.**

/s/Benjamin B. Morgan
Benjamin B. Morgan