

STATE OF NORTH CAROLINA  
COUNTY OF WAKE

FILED  
IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
2020 OCT 26 A 11:31 20-CVS-8346

TAMIKA WALTER KELLY, KRISTY  
MOORE, AMANDA HOWELL, KATE  
MEININGER, ELIZABETH  
MEININGER, JOHN SHERRY, AND  
RIVCA RACHEL SANOGUEIRA,

PLAINTIFFS,

v.

THE STATE OF NORTH CAROLINA,  
NORTH CAROLINA STATE  
EDUCATION ASSISTANCE  
AUTHORITY,

DEFENDANTS, *and*

PHILIP E. BERGER *in his official  
capacity as President Pro Tempore of  
the North Carolina Senate, and*  
TIMOTHY K. MOORE *in his official  
capacity as Speaker of the North  
Carolina House of Representatives,*

INTERVENOR-  
DEFENDANTS.

WAKE CO., C.S.C.

**LEGISLATIVE**  
**INTERVENOR-DEFENDANTS**  
**ANSWER AND MOTION TO DISMISS**

Legislative Intervenor-Defendants, Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate, and Timothy K. Moore, in his official capacity as Speaker of the North Carolina House of Representatives ("Intervenor-Defendants"), by and through undersigned counsel, and hereby respond and answer Plaintiffs' Complaint for Declaratory and Injunctive Relief (the "Complaint"), as follows:

### **FIRST DEFENSE**

(Motion to Dismiss Pursuant to Rules 12(b)(1) and 12(b)(6))

Plaintiffs lack standing and, accordingly, the Court lacks jurisdiction over the subject matter of this action. Further, the allegations of the Complaint fail to state a claim upon which relief can be granted. Intervenor-Defendants, accordingly, move to dismiss this action pursuant to Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure.

### **SECOND DEFENSE**

(Motion for Transfer to Three Judge Panel,  
Pursuant to N.C. Gen. Stat. § 1-267.1 and Rule 42(b)(4))

Although Plaintiffs claim that, “This lawsuit is an as-applied challenge,” (Compl. ¶ 1), their claims actually constitute a facial challenge to the laws establishing the Opportunity Scholarship Program. As such, this action is required to be heard by three-judge panel of the Superior Court of Wake County, pursuant to N.C. Gen. Stat. 1-267.1 and Rule 42(b)(4) of the North Carolina Rules of Civil Procedure.

### **THIRD DEFENSE**

(Answer)

Intervenor-Defendants deny each and every allegation of the Complaint not specifically admitted herein. Intervenor-Defendants respond to the specifically-numbered paragraphs of the Complaint as follows:

#### **[INTRODUCTION]**

1. Intervenor-Defendants admit that the General Assembly enacted the Opportunity Scholarship Program in 2013 but deny the characterization that this is a “private school voucher program” and deny the legal conclusion that this is an as-applied challenge. Except as expressly admitted, the allegations in Paragraph 1 of the Complaint are denied.

2. Intervenor-Defendants deny the allegations in Paragraph 2 of the Complaint.
3. Intervenor-Defendants deny the allegations in Paragraph 3 of the Complaint.
4. Intervenor-Defendants deny the allegations in Paragraph 4 of the Complaint.
5. Intervenor-Defendants submit that the North Carolina Constitution speaks for itself and should be read in full and deny Plaintiffs' accompanying legal conclusion.

[PARTIES]

6. Intervenor-Defendants lack knowledge or information sufficient to admit or deny the truth of the allegations in Paragraph 6 of the Complaint.
7. Intervenor-Defendants lack knowledge or information sufficient to admit or deny the truth of the allegations in Paragraph 7 of the Complaint.
8. Intervenor-Defendants lack knowledge or information sufficient to admit or deny the truth of the allegations in Paragraph 8 of the Complaint.
9. Intervenor-Defendants lack knowledge or information sufficient to admit or deny the truth of the allegations in Paragraph 9 of the Complaint.
10. Intervenor-Defendants lack knowledge or information sufficient to admit or deny the truth of the allegations in Paragraph 10 of the Complaint.
11. Intervenor-Defendants lack knowledge or information sufficient to admit or deny the truth of the allegations in Paragraph 11 of the Complaint.
12. Intervenor-Defendants admit the allegations in Paragraph 12 of the Complaint.
13. Intervenor-Defendants admit the allegations in Paragraph 13 of the Complaint.

[JURISDICTION AND VENUE]

14. Paragraph 14 of the Complaint is a legal conclusion to which no response is necessary. To the extent a response is required, the allegations of Paragraph 14 are denied.

15. Paragraph 15 of the Complaint is a legal conclusion to which no response is necessary. To the extent a response is required, the allegations of Paragraph 15 are denied.

[FACTS]

16. Intervenor-Defendants submit the acts of the North Carolina General Assembly speak for themselves and deny Plaintiffs' accompanying characterizations.
17. Intervenor-Defendants submit the acts of the North Carolina General Assembly speak for themselves and deny Plaintiffs' accompanying characterizations.
18. Intervenor-Defendants lack knowledge or information sufficient to admit or deny the truth of the allegations in Paragraph 18 of the Complaint.
19. Intervenor-Defendants admit the allegations in Paragraph 19 of the Complaint.
20. Intervenor-Defendants admit the allegations in Paragraph 20 of the Complaint.
21. Intervenor-Defendants admit that parents who meet these criteria are eligible for scholarships but deny Plaintiffs' characterizations. Except as expressly admitted, the allegations of this Paragraph are denied.
22. Intervenor-Defendants admit that the program transfers money to the school of a parent's choosing, but deny Plaintiffs' legal conclusions. Except as expressly admitted, the allegations of this Paragraph are denied.
23. Intervenor-Defendants admit the allegations in Paragraph 23 of the Complaint.
24. Intervenor-Defendants admit the allegations in Paragraph 24 of the Complaint.
25. On information and belief, Intervenor-Defendants deny the allegations in Paragraph 25 of the Complaint.
26. Intervenor-Defendants lack knowledge or information sufficient to admit or deny the truth of the allegations in Paragraph 26 of the Complaint.

27. Intervenor-Defendants lack knowledge or information sufficient to admit or deny the truth of the allegations in Paragraph 27 of the Complaint.
28. Intervenor-Defendants deny the allegations in Paragraph 28 of the Complaint.
29. Intervenor-Defendants deny the allegations in Paragraph 29 of the Complaint. Answering further, among other provisions, N.C. Gen. Stat. § 115C-562.5, entitled “Obligations of nonpublic schools accepting eligible students receiving scholarship grants” outlines the schools’ obligations under the program as created by the North Carolina General Assembly.
30. Paragraph 30 of the Complaint presents characterizations and legal conclusions to which no response is necessary. Except as expressly admitted, the allegations of this Paragraph are denied.
31. Paragraph 31 of the Complaint presents characterizations and legal conclusions to which no response is necessary. Except as expressly admitted, the allegations of this Paragraph are denied.
32. Paragraph 32 of the Complaint presents characterizations and legal conclusions to which no response is necessary. Except as expressly admitted, the allegations of this Paragraph are denied.
33. Paragraph 33 of the Complaint presents characterizations and legal conclusions to which no response is necessary. Except as expressly admitted, the allegations of this Paragraph are denied.
34. Paragraph 34 of the Complaint presents characterizations and legal conclusions to which no response is necessary. Except as expressly admitted, the allegations of this Paragraph are denied.

35. Paragraph 35 of the Complaint presents characterizations and legal conclusions to which no response is necessary. Except as expressly admitted, the allegations of this Paragraph are denied.
36. Paragraph 36 of the Complaint presents characterizations and legal conclusions to which no response is necessary. Except as expressly admitted, the allegations of this Paragraph are denied.
37. Intervenor-Defendants deny the allegations in Paragraph 37 of the Complaint.
38. Intervenor-Defendants state that the acts of the North Carolina General Assembly speak for themselves and deny Plaintiffs' accompanying allegations or characterizations. Except as expressly admitted, the allegations of this Paragraph are denied.
39. Intervenor-Defendants submit that the North Carolina law is plain on its face and should be read in full and deny Plaintiffs' accompanying characterizations.
40. Intervenor-Defendants deny the allegations in Paragraph 40 of the Complaint.
41. Intervenor-Defendants deny the allegations in Paragraph 41 of the Complaint.
42. Intervenor-Defendants lack knowledge or information sufficient to admit or deny the truth of the allegations in Paragraph 42 of the Complaint.
43. Intervenor-Defendants lack knowledge or information sufficient to admit or deny the truth of the allegations in Paragraph 43 of the Complaint.
44. Intervenor-Defendants lack knowledge or information sufficient to admit or deny the truth of the allegations in Paragraph 44 of the Complaint, including its subsections.
45. Intervenor-Defendants lack knowledge or information sufficient to admit or deny the truth of the allegations in Paragraph 45 of the Complaint, including its subsections.

46. Intervenor-Defendants lack knowledge or information sufficient to admit or deny the truth of the allegations in Paragraph 46 of the Complaint, including its subsections.
47. Intervenor-Defendants lack knowledge or information sufficient to admit or deny the truth of the allegations in Paragraph 47 of the Complaint, including its subsections.
48. Intervenor-Defendants lack knowledge or information sufficient to admit or deny the truth of the allegations in Paragraph 48 of the Complaint, including its subsections.
49. Intervenor-Defendants lack knowledge or information sufficient to admit or deny the truth of the allegations in Paragraph 49 of the Complaint, including its subsections.
50. Intervenor-Defendants lack knowledge or information sufficient to admit or deny the truth of the allegations in Paragraph 50 of the Complaint.
51. Intervenor-Defendants lack knowledge or information sufficient to admit or deny the truth of the allegations in Paragraph 51 of the Complaint.
52. Intervenor-Defendants lack knowledge or information sufficient to admit or deny the truth of the allegations in Paragraph 52 of the Complaint.
53. Intervenor-Defendants lack knowledge or information sufficient to admit or deny the truth of the allegations in Paragraph 53 of the Complaint, including its subsections.
54. Intervenor-Defendants lack knowledge or information sufficient to admit or deny the truth of the allegations in Paragraph 54 of the Complaint.
55. Intervenor-Defendants lack knowledge or information sufficient to admit or deny the truth of the allegations in Paragraph 55 of the Complaint.
56. Intervenor-Defendants lack knowledge or information sufficient to admit or deny the truth of the allegations in Paragraph 56 of the Complaint.

57. Intervenor-Defendants lack knowledge or information sufficient to admit or deny the truth of the allegations in Paragraph 57 of the Complaint.
58. Intervenor-Defendants lack knowledge or information sufficient to admit or deny the truth of the allegations in Paragraph 58 of the Complaint.
59. Intervenor-Defendants lack knowledge or information sufficient to admit or deny the truth of the allegations in Paragraph 59 of the Complaint.
60. Intervenor-Defendants lack knowledge or information sufficient to admit or deny the truth of the allegations in Paragraph 60 of the Complaint.
61. Intervenor-Defendants lack knowledge or information sufficient to admit or deny the truth of the allegations in Paragraph 61 of the Complaint.
62. Intervenor-Defendants deny the allegations in Paragraph 62 of the Complaint.
63. Intervenor-Defendants lack knowledge or information sufficient to admit or deny the truth of the allegations in Paragraph 63 of the Complaint.
64. Intervenor-Defendants lack knowledge or information sufficient to admit or deny the truth of the allegations in Paragraph 64 of the Complaint.
65. Intervenor-Defendants lack knowledge or information sufficient to admit or deny the truth of the allegations in Paragraph 65 of the Complaint.
66. Intervenor-Defendants lack knowledge or information sufficient to admit or deny the truth of the allegations in Paragraph 66 of the Complaint, including its subsections.
67. Intervenor-Defendants lack knowledge or information sufficient to admit or deny the truth of the allegations in Paragraph 67 of the Complaint.
68. Intervenor-Defendants lack knowledge or information sufficient to admit or deny the truth of the allegations in Paragraph 68 of the Complaint.



69. Intervenor-Defendants lack knowledge or information sufficient to admit or deny the truth of the allegations in Paragraph 69 of the Complaint.
70. Intervenor-Defendants lack knowledge or information sufficient to admit or deny the truth of the allegations in Paragraph 70 of the Complaint.
71. Intervenor-Defendants lack knowledge or information sufficient to admit or deny the truth of the allegations in Paragraph 71 of the Complaint.
72. Intervenor-Defendants lack knowledge or information sufficient to admit or deny the truth of the allegations in Paragraph 72 of the Complaint.
73. Intervenor-Defendants lack knowledge or information sufficient to admit or deny the truth of the allegations in Paragraph 73 of the Complaint.
74. Intervenor-Defendants deny the allegations in Paragraph 74 of the Complaint.
75. Intervenor-Defendants lack knowledge or information sufficient to admit or deny the truth of the allegations in Paragraph 75 of the Complaint.
76. Intervenor-Defendants lack knowledge or information sufficient to admit or deny the truth of the allegations in Paragraph 76 of the Complaint.
77. Intervenor-Defendants lack knowledge or information sufficient to admit or deny the truth of the allegations in Paragraph 77 of the Complaint.
78. Intervenor-Defendants deny the allegations in Paragraph 78 of the Complaint.
79. Intervenor-Defendants lack knowledge or information sufficient to admit or deny the truth of the allegations in Paragraph 79 of the Complaint.
80. Intervenor-Defendants lack knowledge or information sufficient to admit or deny the truth of the allegations in Paragraph 80 of the Complaint.

81. Intervenor-Defendants lack knowledge or information sufficient to admit or deny the truth of the allegations in Paragraph 81 of the Complaint.
82. Intervenor-Defendants lack knowledge or information sufficient to admit or deny the truth of the allegations in Paragraph 82 of the Complaint, including its subsections.
83. Intervenor-Defendants lack knowledge or information sufficient to admit or deny the truth of the allegations in Paragraph 83 of the Complaint.
84. Intervenor-Defendants lack knowledge or information sufficient to admit or deny the truth of the allegations in Paragraph 84 of the Complaint.
85. Intervenor-Defendants lack knowledge or information sufficient to admit or deny the truth of the allegations in Paragraph 85 of the Complaint.
86. Intervenor-Defendants lack knowledge or information sufficient to admit or deny the truth of the allegations in Paragraph 86 of the Complaint.
87. Intervenor-Defendants lack knowledge or information sufficient to admit or deny the truth of the allegations in Paragraph 87 of the Complaint.
88. Intervenor-Defendants lack knowledge or information sufficient to admit or deny the truth of the allegations in Paragraph 88 of the Complaint.
89. Intervenor-Defendants deny the allegations in Paragraph 89 of the Complaint.
90. Intervenor-Defendants lack knowledge or information sufficient to admit or deny the truth of the allegations in Paragraph 90 of the Complaint.
91. Intervenor-Defendants lack knowledge or information sufficient to admit or deny the truth of the allegations in Paragraph 91 of the Complaint.
92. Intervenor-Defendants lack knowledge or information sufficient to admit or deny the truth of the allegations in Paragraph 92 of the Complaint.

93. Intervenor-Defendants lack knowledge or information sufficient to admit or deny the truth of the allegations in Paragraph 93 of the Complaint, including its subsections.
94. Intervenor-Defendants lack knowledge or information sufficient to admit or deny the truth of the allegations in Paragraph 94 of the Complaint.
95. Intervenor-Defendants lack knowledge or information sufficient to admit or deny the truth of the allegations in Paragraph 95 of the Complaint.
96. Intervenor-Defendants lack knowledge or information sufficient to admit or deny the truth of the allegations in Paragraph 96 of the Complaint.
97. Intervenor-Defendants lack knowledge or information sufficient to admit or deny the truth of the allegations in Paragraph 97 of the Complaint.
98. Intervenor-Defendants deny the allegations in Paragraph 98 of the Complaint.
99. Intervenor-Defendants lack knowledge or information sufficient to admit or deny the truth of the allegations in Paragraph 99 of the Complaint.
100. Intervenor-Defendants lack knowledge or information sufficient to admit or deny the truth of the allegations in Paragraph 100 of the Complaint.
101. Intervenor-Defendants lack knowledge or information sufficient to admit or deny the truth of the allegations in Paragraph 101 of the Complaint.
102. Intervenor-Defendants deny the allegations in Paragraph 102 of the Complaint.

[FIRST CLAIM FOR RELIEF]

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103. Intervenor-Defendants acknowledge the incorporation by reference.
104. Intervenor-Defendants submit that the North Carolina Constitution speaks for itself and should be read in full.

105. Intervenor-Defendants submit that the North Carolina Constitution speaks for itself and should be read in full.
106. Paragraph 106 of the Complaint presents characterizations and legal conclusions to which no response is necessary. Except as expressly admitted, the allegations of this Paragraph are denied.
107. Paragraph 107 of the Complaint presents characterizations and legal conclusions to which no response is necessary. Except as expressly admitted, the allegations of this Paragraph are denied.
108. Paragraph 108 of the Complaint presents characterizations and legal conclusions to which no response is necessary. Except as expressly admitted, the allegations of this Paragraph are denied.
109. Paragraph 109 of the Complaint presents characterizations and legal conclusions to which no response is necessary. Except as expressly admitted, the allegations of this Paragraph are denied.
110. Paragraph 110 of the Complaint presents characterizations and legal conclusions to which no response is necessary. Except as expressly admitted, the allegations of this Paragraph are denied.
111. Paragraph 111 of the Complaint presents characterizations and legal conclusions to which no response is necessary. Except as expressly admitted, the allegations of this Paragraph are denied.
112. Paragraph 112 of the Complaint presents characterizations and legal conclusions to which no response is necessary. Except as expressly admitted, the allegations of this Paragraph are denied.

113. Paragraph 113 of the Complaint presents characterizations and legal conclusions to which no response is necessary. Except as expressly admitted, the allegations of this Paragraph are denied.
114. Paragraph 114 of the Complaint presents characterizations and legal conclusions to which no response is necessary. Except as expressly admitted, the allegations of this Paragraph are denied.
115. Paragraph 115 of the Complaint presents characterizations and legal conclusions to which no response is necessary. Except as expressly admitted, the allegations of this Paragraph are denied.

[SECOND CLAIM FOR RELIEF]

116. Intervenor-Defendants acknowledge the incorporation by reference
117. Intervenor-Defendants submit that the North Carolina Constitution speaks for itself and should be read in full.
118. Intervenor-Defendants submit that the North Carolina Constitution speaks for itself and should be read in full.
119. Intervenor-Defendants submit that the North Carolina Constitution speaks for itself and should be read in full.
120. Paragraph 120 of the Complaint presents characterizations and legal conclusions to which no response is necessary. Except as expressly admitted, the allegations of this Paragraph are denied.
121. Paragraph 121 of the Complaint presents characterizations and legal conclusions to which no response is necessary. Except as expressly admitted, the allegations of this Paragraph are denied.

122. Paragraph 120 of the Complaint presents characterizations and legal conclusions to which no response is necessary. Except as expressly admitted, the allegations of this Paragraph are denied.
123. Paragraph 123 of the Complaint presents characterizations and legal conclusions to which no response is necessary. Except as expressly admitted, the allegations of this Paragraph are denied.
124. Paragraph 124 of the Complaint presents characterizations and legal conclusions to which no response is necessary. Except as expressly admitted, the allegations of this Paragraph are denied.
125. Paragraph 125 of the Complaint presents characterizations and legal conclusions to which no response is necessary. Except as expressly admitted, the allegations of this Paragraph are denied.

[THIRD CLAIM FOR RELIEF]

126. Intervenor-Defendants acknowledge the incorporation by reference.
127. Paragraph 127 of the Complaint presents characterizations and legal conclusions to which no response is necessary.
128. Paragraph 128 of the Complaint presents characterizations and legal conclusions to which no response is necessary.
129. Paragraph 129 of the Complaint presents characterizations and legal conclusions to which no response is necessary.
130. Paragraph 130 of the Complaint presents characterizations and legal conclusions to which no response is necessary.

131. Paragraph 131 of the Complaint presents characterizations and legal conclusions to which no response is necessary.

[PRAYER FOR RELIEF]

1. The prayers in Paragraph 1 are legal conclusions to which no response is necessary.
2. The prayers in Paragraph 2 are legal conclusions to which no response is necessary.
3. The prayers in Paragraph 3 are legal conclusions to which no response is necessary.
4. The prayers in Paragraph 4 are legal conclusions to which no response is necessary.

**FOURTH DEFENSE**

The Plaintiffs' claims fail, in whole or in part, because they are barred by *res judicata* and/or collateral estoppel.

**FIFTH DEFENSE**

The Plaintiffs' claims fail, in whole or in part, because parents, students, and families participating in the Opportunity Scholarship program have a right to practice the free exercise of their religion, as protected in the First Amendment to the United States Constitution and N.C. Const. Art. I, Sec. 13.

**RESERVATION OF ADDITIONAL DEFENSES**

Intervenor-Defendants reserve the right to plead additional defenses at a later time based on facts and evidence that may be revealed in the course of their investigation into this matter or through discovery.

WHEREFORE Intervenor-Defendants request that this Court enter a final judgment in favor of Defendants and Intervenor-Defendants that

- a. Dismisses the Plaintiffs' claims with prejudice;
- b. Denies the Plaintiffs' requests for injunctive relief; and

- c. Awards Defendant-Intervenors all other relief to which they are entitled, including attorneys' fees and costs as permitted by law.

This is the 26th day of October, 2020.

Respectfully submitted,



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*\*Pro Hac Vice Motion to Be Filed*

*Attorneys for Intervenor-Defendants*

*Philip E. Berger and Timothy K. Moore*



### CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document has been sent to the attorneys listed below by depositing the same in the First Class mail, postage prepaid, at the following addresses and by sending an e-mail to the e-mail addresses below on this 26th day of October, 2020.

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