UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

DAVID CARSON, et al., Plaintiffs, v. ROBERT G. HASSON, JR., Defendant, and SUSAN MARCUS, JAMES TORBERT, THETA TORBERT, Intervenor-Defendants.	)	Civil Action 1:18-cv-00327-DBH

MOTION TO INTERVENE OF SUSAN MARCUS, JAMES TORBERT, AND THETA TORBERT WITH SUPPORTING MEMORANDUM OF LAW

Susan Marcus, James Torbert, and Theta Torbert move, pursuant to Fed. R. Civ. P. 24(b), for leave to intervene in this action as Defendants. The Court should exercise its discretion to grant intervention because the Intervenor-Defendants satisfy the broad standards for permissive intervention, and their counsel's subject-matter expertise in this area would assist the Court in deciding this important case. As grounds for this motion, Intervenor-Defendants state as follows.

BACKGROUND

By Complaint dated August 21, 2018, Plaintiffs have demanded that this Court render a declaratory judgment that 20-A M.R.S. § 2951(2), which limits to "nonsectarian schools" the private schools to which school administrative units may pay tuition, is unconstitutional under

various provisions of the Federal Constitution. Plaintiffs, residents of Glenburn, Orrington, and Palermo, Maine, are parents of children who attend Bangor Christian School and Temple Academy, which are religious secondary schools in Maine that would use tuition funds provided under 20-A M.R.S. § 2951(2) for religious activities and purposes. Plaintiffs have also demanded that this Court enjoin the operation and enforcement of Section 2951(2).

Plaintiffs' Complaint is very similar to ones previously brought by Plaintiffs' lead lawyers, the Institute for Justice, in Maine state court in 1997 and 2002. Both the 1997 case, *Bagley, et al. v. Raymond School Department, et al.*, and the 2002 case, *Anderson, et al. v. Town of Durham, et al.*, presented virtually identical challenges to Section 2951(2). In *Bagley*, members of the ACLU of Maine (then known as the Maine Civil Liberties Union) were granted intervenor status by Justice Mills, in October 1997. In *Anderson*, members of the Maine Civil Liberties Union were granted intervenor status by Justice Crowley, in October 2002.

The members of the Maine Civil Liberties Union, through their counsel at the ACLU and (in *Anderson*) Americans United for Separation of Church and State, actively participated in the *Bagley* and *Anderson* cases as Defendants. Their role included full participation in depositions and in discussions about discovery strategy and review; full participation in briefing of summary judgment issues; full briefing of issues in the Law Court; participation in oral argument before both the Superior Court and the Law Court; and participation in the opposition to the Petition for Certiorari filed by the plaintiffs.[1]

Intervenor-Defendants are all taxpayers residing in communities served by Regional School Unit ("RSU") 12 who are opposed to their tax dollars being used for quintessential

[1] Additionally, the Maine Civil Liberties Union, along with Americans United, participated in two separate federal challenges to Section 2951(2) involving residents of the Town of Minot, *Strout et al. v. Albanese* in 1996 and *Eulitt ex rel. Eulitt v. Gendron* in 2002. In those cases, the Maine Civil Liberties Union and Americans United participated as amici curiae but were limited in that role to briefing of legal issues.

religious activity, such as the teaching of religious doctrine and training in religious observance. James and Theta Torbert are retired school teachers with a lifelong commitment to the success of public education. Susan Marcus is an active advocate in her community for respect for civil liberties, including freedom from government-sponsored religion.

Intervenor-Defendants also are all members of the American Civil Liberties Union, which has worked on behalf of its members to oppose public funding of religious education in the legislature and in the courts, including in the four previous cases challenging the statute at issue in this case. Intervenor-Defendants are represented by counsel from the ACLU of Maine, the ACLU Program on Freedom of Religion and Belief, and Americans United. The primary interest of the ACLU is to preserve, protect, and vigorously enforce the fundamental principles in the Bill of Rights. Americans United works to ensure that government does not interfere with citizens' personal decisions about what to believe and how to practice their faith, and that discrimination is not sanctioned under the guise of religion. Both organizations have long opposed public funding of religious education. The ACLU and Americans United have been granted intervenor status or represented intervenors as counsel in several cases across the country concerning public funding of religious education, including *Thomas v. Douglas County Bd. of Educ.,* No. 1:16-cv-00876-MSK-CBS (D. Colo.), as well as state cases in Maine, New Jersey, Vermont, Florida, and Wisconsin.

Counsel for Commissioner Hasson do not object to this motion. Counsel for Plaintiffs do object to this motion.

Attached to this Motion is Intervenor-Defendants' Answer, as required by Rule 24(c).

MEMORANDUM OF LAW

Rule 24(b) of the Federal Rules of Civil Procedure provides in pertinent part:

> 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 . . . . In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

Intervenor-Defendants satisfy the criteria for intervention under Rule 24.

Rule 24(b) provides broadly for permissive intervention. The threshold for permissive intervention is low. *Mass. Food Ass'n v. Mass. Alcoholic Beverage Control Comm'n*, 197 F.3d 560, 568 (1st. Cir. 1999). Rule 24(b) does not specify any particular interest that is necessary for permissive intervention. For example, as the Supreme Court has stated, the rule "plainly dispenses with any requirement that the intervenor shall have a direct personal or pecuniary interest in the subject of litigation." *Sec. & Exch. Comm'n v. U.S. Realty & Imp. Co.*, 310 U.S. 434, 459 (1940). Nor does Rule 24(b) require that the intervenor be someone who would have been a proper party at the beginning of the suit. *See* Common Question of Law or Fact, 7C Fed. Prac. & Proc. Civ. § 1911 (3d ed.) (citing *King v. Christie*, 981 F. Supp. 2d 296 (D.N.J. 2013)). The requirement that the intervenor have "a claim or defense that shares with the main action a common question of law or fact" requires only "some interest on the part of the applicant." *Dow Jones & Co., Inc. v. United States Dep't of Justice*, 161 F.R.D. 247, 254 (S.D.N.Y. 1995).

All that said, Intervenor-Defendants have a substantial interest in this action, based on their personal opposition to the public subsidization of private religious education; their expressive association with the ACLU—an organization that has devoted substantial time and resources for many decades to legal and legislative efforts to prevent governmental funding of religious education and activity; and their status as taxpayers—of the affected school unit—whose tax dollars would be used to fund religious instruction if Plaintiffs are successful. This case challenges a long-standing Maine statute that has safeguarded the traditional governmental

interest in not funding religious training and that has survived four rounds of litigation, as well as countless efforts to repeal it legislatively. Plaintiffs seek to convince this Court that this statute is nevertheless unconstitutional, and Intervenor-Defendants have a significant interest in preventing that from happening.

Moreover, the ACLU, Americans United, and their lawyers have extensive experience and expertise in litigating the factual and legal questions presented by this kind of case, not only in the Maine cases discussed above but in cases across the country.[2] An intervenor's expertise in the subject matter at issue is a factor that weighs solidly in favor of allowing intervention. *See Daggett v. Comm'n on Governmental Ethics & Election Practices*, 172 F.3d 104, 113 (1st Cir. 1999); *In re Acushnet River & New Bedford Harbor Proceedings re Alleged PCB Pollution*, 712 F. Supp. 1019, 1025 (D. Mass. 1989). Adding such expertise to the defense of the challenged statute is particularly important here because the Institute for Justice and the First Liberty Institute, which are counsel for Plaintiffs, also have long litigated these sorts of cases.[3] Permitting Intervenor-Defendants and their counsel to participate in this case as parties will thus ensure a more balanced adversarial process, and will assist the Court in deciding the important issues here.

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[2] *See, e.g., ACLU of New Jersey v. Hendricks*, 183 A.3d 931 (N.J. 2018) (challenging state funding of construction of facilities that would be used for training of ministers and religious instruction); *Taxpayers for Public Education v. Douglas County School District*, 351 P.3d 461 (Colo. 2015) (challenging state voucher program that allowed vouchers to be used for private religious education), *vacated*, 137 S. Ct. 2327 (2017); *Schwartz v. Lopez* (a.k.a. *Duncan v. Nevada*), 382 P.3d 886 (Nev. 2016) (challenging state voucher program that allowed vouchers to be used for private religious education); *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006) (challenging state voucher program that allowed vouchers to be used for private religious education); *Owens v. Colorado Congress of Parents, Teachers and Students*, 92 P.3d 933 (Colo. 2004) (en banc) (challenging state voucher program that allowed vouchers to be used for private religious education).

[3] *See, e.g., Summit Christian Academy, et al. v. Meotti, et al.*, No. 3:18-cv-05656-TLF (W.D. Wash. Aug. 14, 2018) (plaintiffs represented by Institute for Justice); *Asoc. De Maestros v. Srio. De Educacion*, 2018 TSPR 150 (P.R. Aug. 9, 2018) (intervenor-defendants represented by Institute for Justice); *Freedom from Religion Foundation, Inc. v. Mercer County Bd. of Educ.*, No. 1:17-cv-00642 (S.D. W.Va. Jan. 18, 2017) (defendants represented by First Liberty Institute).

Intervention would not unduly delay or prejudice the adjudication of the rights of the original parties. Discovery in the case is just beginning, and none of the parties have yet been deposed. Participation in this case by Intervenor-Defendants would ensure the development of a full factual record for the Court's ultimate decision. Intervention is, therefore, "timely" within the meaning of Rule 24. Moreover, the defenses that Intervenor-Defendants seek to assert rest on the same factual premises and raise the same questions of law that this Court must analyze in resolving Plaintiffs' request for relief.

Therefore, based on the foregoing grounds and authority, Intervenor-Defendants respectfully request that they be permitted to intervene as defendants in this action and that their proposed answer be filed.

Respectfully Submitted, this 30th Day of October.

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*Certifications for admission *pro hac vice* to follow.

Counsel for Intervenor-Defendants

CERTIFICATE OF SERVICE

I hereby certify that on October 30, 2018, I electronically filed the MOTION TO INTERVENE OF SUSAN MARCUS, JAMES TORBERT, AND THETA TORBERT WITH SUPPORTING MEMORANDUM OF LAW, along with the ANSWER OF (PROPOSED) INTERVENOR-DEFENDANTS SUSAN MARCUS, JAMES TORBERT, AND THETA TORBERT with the Clerk of Court using the CM/ECF system, which will send notifications of such filings to the following counsel of record: Arif Panju; Jeffrey T. Edwards; Jonathan R. Whitehead; Lea Patterson; Michael K. Whitehead; Timothy D. Keller; Benjamin Bull; Christopher C. Taub; and Sarah A. Forster.

Dated: October 30, 2018

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