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IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

JOANNE McCALL, *et al.*,

Plaintiffs,

v. Case No. 2014-CA-2282

RICK SCOTT, Governor of Florida, in his official capacity as head of the Florida Department of Revenue, *et al.*,

Defendants.
_____/

PLAINTIFFS' RESPONSE TO MOTION TO INTERVENE

Plaintiffs, pursuant to Rule 1.230 of the Florida Rules of Civil Procedure and Section 2.2 of the *Policies, Procedures and Preferences for All Civil Cases Assigned to Judge George S. Reynolds, III*, file this response to the Motion to Intervene and Supporting Memorandum of Law filed by proposed intervening parents Prophete, *et al*. ("Proposed Intervenors").

The rule of civil procedure governing interventions in Florida provides:

> Anyone claiming an interest in pending litigation may at any time be permitted to assert a right by intervention, *but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding*, unless otherwise ordered by the court in its discretion.

Fla. R. Civ. P. 1.230 (emphasis added). This rule, adopted from the Florida Equity Rules when the common law and equity rules were merged in 1954, has remained unchanged since its adoption. The rule embodies the policy principle long ago approved by the Florida Supreme Court:

> The courts have always striven to maintain the integrity of the issues raised by the original pleadings, and to keep newly admitted parties within the scope of the original suit. A stranger cannot intervene for the purpose of litigating with plaintiff his right or title to any relief, nor for the purpose of defeating the entire suit. The injection of an independent controversy by intervention is improper. If a person desires to set up a new and independent claim to the subject matter of the suit it must be done by an original bill; it cannot be done by an intervening petition.

Riviera Club v. Belle Mead Dev. Corp., 194 So. 783, 784 (Fla. 1939) (quoting 21 C.J. 343).

The Florida Supreme Court instructs trial courts to conduct a precise analysis in considering motions to intervene: First, the court must determine whether the asserted interest is appropriate to support intervention, and if so, it must exercise its discretion to determine whether to permit intervention. *Union Cent. Life Ins. Co. v. Carlisle*, 593 So. 2d 505, 507 (Fla. 1992). Second, the court must determine the parameters of the intervention. "[I]ntervention should be limited to the extent necessary to protect the interest of all parties." *Id.* at 508.

Plaintiffs do not dispute that the Proposed Intervenors have asserted an interest that satisfies the first step of the analysis. A judgment in Plaintiffs' favor in this suit will undoubtedly discontinue the Proposed Intervenors' ability to use tax revenues from Florida corporations to pay for their children's attendance at private schools. This potential consequence supports intervention. *Id.* at 507 (interest entitling person to intervene is one in which the intervenor will either gain or lose by direct legal operation and effect of the judgment) (quoting *Morgareidge v. Howey*, 78 So. 14, 15 (1918)). Accordingly, Plaintiffs do not object to the court exercising its discretion to allow the Proposed Intervenors to intervene in the action under the terms of Rule 1.230.

But Plaintiffs part ways with the Proposed Intervenors on the second step of the court's required analysis, the "parameters of the intervention." The Proposed Intervenors ask the court to disregard Rule 1.230 and to treat them as "full parties in interest." (Motion at 14). As support for this unusual request, the Proposed Intervenors contend that "the Defendants' interests in this lawsuit are liable to shift with the political winds," and the Proposed Intervenors "cannot be certain whether or to what extent their defenses or claims in this lawsuit will vary from the Defendants." (Motion p. 16, 17). The Proposed Intervenors do not cite a shred of authority supporting this request.[1] Indeed, the applicable legal authorities uniformly dictate that this request for unlimited intervention be denied.

The Proposed Intervenors do not specify what activities they seek to undertake in the litigation that would not be permitted by intervention consistent with the terms of Rule 1.230. If granted such intervention, the Proposed Intervenors will be permitted to argue the issues as the issues apply to them. *See National Wildlife Fed'n Inc. v. Glisson*, 531 So. 2d 996, 998 (Fla. 1st DCA 1988).[2] Their status as intervenors "assures the right to be heard and the ability to appeal an adverse ruling." *Union Central Life*, 593 So. 2d at 507. The only thing intervenors cannot do is raise new issues not raised by the Defendants, including challenges to the sufficiency of the

[1]The federal and out-of-state cases cited by the Proposed Intervenors do not address the question presented in this Florida case. Nevertheless, Plaintiffs note that to the extent the Proposed Intervenors suggest there is an absolute right to unlimited intervention in federal courts (Motion ¶ 45), they are mistaken. "[C]ourts have broad authority to limit the ability of intervening parties to expand the scope of a proceeding beyond the issues litigated by the original parties." *Johnson v. Bd. of Regents of the Univ. of Ga.*, 263 F.3d 1234, 1269 (11th Cir. 2001) (citing *Vinson v. Washington Gas Light Co.*, 321 U.S. 489, 498 (1944) (noting the "usual procedural rule" that "an intervenor is admitted to the proceedings as it stands, and in respect of the pending issues, but is not permitted to enlarge those issues or compel an alteration of the nature of the proceeding")).

[2]Furthermore, as the Defendants have not yet responded to the Complaint, the Proposed Intervenors have the opportunity to provide their input directly to the Defendants prior to the close of pleadings.

pleadings, the propriety of the procedures, or dismissal or delay absent the court's permission. *E.g., Riviera Club*, 194 So. at 785; *Krouse v. Palmer*, 179 So. 762, 763 (Fla. 1938); *National Wildlife Fed'n*, 531 So. 2d at 998.

The Motion to Intervene reveals that the Proposed Intervenors intend to raise several issues that are beyond the scope of this suit. Plaintiffs' complaint challenges the constitutionality of a single program: the Florida Tax Credit Scholarship Program, embodied in section 1002.395, Florida Statutes. (Complaint ¶¶ 1, 4, 31-56, 60-61, 65-66). Yet the Motion to Intervene and its attached declarations make repeated references to other educational programs beyond the scope of this action: McKay Scholarships, Personal Learning Scholarship Accounts, and charter schools. (Motion ¶¶ 4, 13, 15, 20, 21, 22, 24, 25, 26, 27, 30, 43, 44, nn. 1, 2, 3; Exhibits D, E, F, H, I, J, K). To the extent the Proposed Intervenors seek to raise claims regarding these programs that are not raised by the parties, this is a proper ground for the trial court to exercise its discretion to deny their intervention in the first instance. *E.g., Riviera Club*, 194 So. at 784-85 (affirming trial court's denial of intervention where intervenor's proposed answer raised issues beyond the scope of the existing case). It certainly is not grounds to allow "full party status," in contravention of Rule 1.230 and the policy repeatedly expressed by the Florida Supreme Court of desiring to maintain the integrity of the original pleadings. *Id.*; *Union Central Life*, 593 So. 2d at 507-508; *Krouse*, 179 So. at 763.

The Proposed Intervenors rest their plea for status as a "full party in interest" entirely upon the language in Rule 1.230 providing that a trial court has the discretion to allow intervention *not* in "subordination to, and in recognition of, the propriety of the main proceeding," and they assert the exercise of such discretion is warranted in this case based on their vague speculation that the Defendants may not adequately represent the Proposed

Intervenors' interests. Even if this were true (and the Proposed Intervenors have offered nothing beyond speculation to indicate that it *is* true), no Florida court has ever recognized this as a basis for unlimited participation by an intervenor. Indeed, in the cases cited by the Proposed Intervenors in which intervention was granted on the ground that the existing defendant would not adequately represent the intervenor's interest (Motion ¶ 40), the court expressly acknowledged that such intervention was still in subordination to the main action. *Bay Park Towers Condo. Ass'n, Inc. v. H.J. Ross & Assocs.*, 503 So. 2d 1333, 1335 (Fla. 3d DCA 1987) ("the Association makes no claim for relief other than that sought by [the original plaintiff], and it has agreed to be bound by the pleadings and issues as framed at the time the application to intervene was filed"); *Brickell Bay Condo. Ass'n, Inc. v. Forte*, 410 So. 2d 522, 524 (Fla. 3d DCA 1982) ("the Association has abandoned any claim for relief distinct from that sought by the developers in the main action and concedes that its intervention must be subordinate to and in recognition of the main proceeding").

Undersigned counsel has identified only two circumstances in which Florida courts have exercised their discretion to allow intervention *not* in subordination to the main proceeding: (1) where the intervenor is an indispensable party, and (2) where the intervenor is an unnamed member of a proposed class action.

In *Al Packer, Inc. v. First Union Nat'l Bank*, 650 So. 2d 165 (Fla. 3d DCA 1995), the court recognized that "ordinarily" an intervening party in an action takes the case as he finds it because the intervention is necessarily in subordination to the propriety of the main proceeding. *Id.* at 166. The court concluded, however, "that the rule is different, where, as here, the intervenor is an indispensable party to the action. Under these circumstances, the intervenor

occupies, in effect, the same status as the main parties to the action, and, accordingly, should have the same privileges . . . ." *Id.*

In *Litvak v. Scylla Properties, LLC*, 946 So. 2d 1165 (Fla. 1st DCA 2006), the court held that unnamed members of a putative class should have been permitted to intervene for purposes of objecting to class certification, because, unlike the ordinary intervenor who is a stranger to the litigation, it was the intervenors' *own lawsuit* in which they sought to be heard on questions affecting them. *Id.* at 1174-75 ("[S]ince class members are bound by decisions affecting the class, intervention as a named party is an obvious, sanctioned and sensible way for the appellants, nonnamed members of a mandatory class, to protect their interests, including the asserted right to opt out altogether.").

Clearly, neither of these circumstances are present here. This case is not a class action. Nor are the Proposed Intervenors indispensable parties to this action. The proper defendant in a lawsuit challenging the constitutionality of a statute is the state official designated to enforce the statute. *Atwater v. City of Weston*, 64 So. 3d 701, 703 (Fla. 1st DCA 2011). Plaintiffs have properly named as defendants in this action the state officials responsible for implementing the Florida Tax Credit Scholarship Program. The Proposed Intervenors have asserted no substantiated basis for their contention that these defendants will not represent their interests. Moreover, the Proposed Intervenors have no official role in implementing the program, nor any special expertise regarding the program's constitutionality.[3] Far from justifying unlimited

[3]The Motion to Intervene makes a series of detailed quantitative and qualitative assertions regarding the size, scope, and efficacy of the Tax Credit Scholarship Program (Motion ¶¶ 6-14) which are clearly beyond the personal knowledge of the Proposed Intervenors and in fact would likely be known only to a single entity, the private scholarship funding organization Step Up For Students. But as this entity does not seek intervention in the lawsuit in its own name, the Court is limited to consideration of the knowledge and interests of the named potential intervening parents.

intervention as sought in this case, these circumstances would warrant the court's exercise of its discretion to deny intervention altogether. *Dep't of Children & Family Servs. v. Brunner*, 707 So. 2d 1197, 1198 (Fla. 1st DCA 1998) (affirming trial court's denial of intervention where existing party could adequately protect the intervenor's interest and the proposed intervenor had no special expertise in the subject matter of the litigation); *Florida Wildlife Fed'n, Inc. v. Bd. of Trustees of Internal Improvement*, 707 So. 2d 841, 842 (Fla. 5th DCA 1998) (no abuse of discretion in denying intervention where trial court found that the named defendant, the Board of Trustees of the Internal Improvement Fund, was a responsible governmental entity that would fully protect the proposed intervenors' interest), *rev. denied*, 718 So. 2d 167 (Fla. 1998).

The Motion to Intervene and supporting declarations make clear that the Proposed Intervenors' interest is in preserving the Florida Tax Credit Scholarship Program because, in their view, it is a wise policy with the beneficial purpose and effect of providing a quality education for their children. But these considerations are patently outside the scope of the court's examination of the program's constitutionality. *Scott v. Williams*, 107 So. 3d 379, 385 (Fla. 2013) (the court "expresses no view as to the wisdom, policy, or motives behind the challenged statutory provisions"); *Bush v. Holmes*, 919 So. 2d 392, 398 (Fla. 2006) ("the justices emphatically are not examining whether the public policy decision made by the other branches is wise or unwise, desirable or undesirable"). Accordingly, these interests provide no support for the unlimited intervention sought here.

No Florida court has granted a right to unlimited intervention on grounds remotely similar to those asserted by the Proposed Intervenors. Florida courts throughout the state have steadfastly honored the principle that intervention is "in subordination to, and in recognition of,

the propriety of the main proceeding." Fla. R. Civ. P. 1.230.[4] Plaintiffs have expressed no objection to the Proposed Intervenors' participation in this action under these terms, which enables them to argue and be heard on the issues as they apply to the intervenors, and the ability to appeal an adverse ruling. This level of participation is commensurate with the Proposed Intervenors' interests and with the binding precedents of the courts of this State.

CONCLUSION

WHEREFORE, Plaintiffs respectfully request that this Court enter an order GRANTING IN PART and DENYING IN PART the Proposed Intervenors' Motion to Intervene, providing that the Proposed Intervenors be GRANTED intervention in this action in subordination to, and in recognition of, the propriety of the main proceeding, and that their request for full party status is DENIED.

[4]In addition to the cases previously cited, *see*, *e.g.*, *Consolidated Gov't of City of Jacksonville v. Adams*, 213 So. 2d 34, 35 (Fla. 1st DCA 1968), *East County Water Control Dist. v. Lee County*, 884 So. 2d 93, 94-95 (Fla. 2d DCA 2004), *Let Miami Beach Decide v. City of Miami Beach*, 120 So. 3d 1282, 1288 (Fla. 3d DCA 2013), *Dunscombe v. Beach Club Colony of Stuart, Inc.*, 264 So. 2d 465, 466 (Fla. 4th DCA 1972), and *Allstate Ins. Co. v. Johnson*, 483 So. 2d 524 (Fla. 5th DCA 1986).

DATED this 24th day of October, 2014.

Respectfully submitted,

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