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Attorney for Proposed Intervenor

**MONTANA FIRST JUDICIAL DISTRICT COURT,
LEWIS & CLARK COUNTY**

The MONTANA QUALITY
EDUCATION COALITION;
DISABILITY RIGHTS MONTANA,

Plaintiffs,

vs.

STATE OF MONTANA; GREG
GIANFORTE, in his official capacity as
GOVERNOR OF THE STATE OF
MONTANA; and ELSIE ARNTZEN, in
her official capacity as
SUPERINTENDENT OF PUBLIC
INSTRUCTION,

Defendants,

and

SUE VINTON, in her official capacity
as a member of the Montana House of
Representatives and Sponsor of HB
393,

Proposed Intervenor.

Cause No. BDV-25-2024-0000044-IJ

**Unopposed Motion to Intervene
as a Defendant**

Proposed Intervenor Sue Vinton, in her official capacity as a member of the Montana House of Representatives and Sponsor of House Bill 393, respectfully moves to intervene in this action as of right under Montana Rule of Civil Procedure 24(a) or, in the alternative, permissively under Montana Rule of Civil Procedure 24(b). In support of this motion, Proposed Intervenor states as follows:

1. Sue Vinton is an elected member of the Montana House of Representatives and serves as the House Majority Leader. She is the sponsor of, and voted in favor of, HB 393, the statute that is the subject of constitutional challenge in this case. Accordingly, § 5-2-107(2), MCA affords Representative Vinton a right to intervene in this case to defend HB 393.
2. Contemporaneously with this motion, Proposed Intervenor has filed a brief in support of the motion and has tendered a proposed Answer to Plaintiffs' complaint for filing should this motion be granted.
3. Undersigned counsel has contacted counsel for Plaintiffs and counsel for Defendant state officials, who have authorized undersigned counsel to represent that they do not oppose this motion.

Wherefore, Proposed Intervenor Sue Vinton respectfully moves to intervene in this action as of right under Montana Rule of Civil Procedure 24(a).

Respectfully submitted,

/s/ Dale Schowengerdt

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**Pro Hac Vice Application To Be Filed*

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**Brief in Support of
Unopposed Motion to Intervene
as a Defendant**

I. INTRODUCTION

Proposed Intervenor Sue Vinton is the House Majority Leader of the Montana House of Representatives. She was the sponsor of House Bill 393 (“HB 393”) and is also the parent of a child with special needs. Although her son has graduated high school, Montana law grants her the right to intervene to defend the ESA Program as the bill sponsor.

HB 393 creates an education savings account (“ESA”) program of for children with special needs. ESAs allow parents of children with special needs who are dissatisfied with public school educational opportunities to afford other, more individually appropriate, options. ESAs also benefit Montana both by enabling competition that can prompt public schools to improve their special-needs offerings and by encouraging a variety of special-needs educational options throughout Montana, thus relieving stress on public schools to address every special need imaginable.

Proposed Intervenor seeks party status, as an intervenor-defendant, to defend the constitutionality of the Program she authored. Accordingly, the Court should grant her motion to intervene.

II. STATEMENT OF FACTS

A. Montana’s Education Savings Accounts

HB 393 became law on May 18, 2023, with an effective date of July 1, 2023. HB 393 creates ESAs for “qualified students,” which is generally defined to include all children between the ages of 5 and 19 identified as a “child with a disability” under the Individuals With Disabilities Education Act, 20 U.S.C. 1400, et seq. HB 393

§ 3(7)(a)-(b). Qualified students must also meet one of three additional criteria regarding eligibility: (1) was part of the ANB funding count during the previous school year, (2) did not reside in the state in the previous school year, or (3) is eligible to enter kindergarten in the current year. *Id.* § 3(7)(c)(i)-(iv).

Parents may use the ESA for several different educational expenses. *Id.* § 4(4).

Parents are reimbursed for the following categories:

- a. “qualified tuition, fees, textbooks, software, other instructional materials or services;
- b. “an educational program or course using electronic or offsite delivery methods, including but not limited to tutoring, distance learning programs, online programs, and technology delivered learning programs;
- c. curriculum, including supplemental materials necessary for the curriculum;
- d. tutoring;
- e. educational therapies or services, including but not limited to occupational, behavioral, physical, speech-language, and audiology therapies from licensed or certified practitioners or providers, including licensed or certified paraprofessional or educational aides;
- f. state or nationally recognized assessment tests, advanced placement exams, entrance examinations at an eligible postsecondary

institution or other assessment instruments;

- g. services provided by a public school in the state including individual classes and extracurricular activities;
- h. eligible postsecondary institution tuition, books, online courses or other fees;
- i. no more than \$50 annually in consumable education supplies, such as paper, pens, and markers;
- j. transportation required for another allowable educational service;
- k. fees paid to a cooperative educational program; and
- l. any other educational expense approved by the superintendent of public instruction.”

Id. § 4 (1)(a)-(l).

The Montana Office of Public Instruction (“OPI”) is currently researching implementation of similar legislation across the country and has invited parents to participate in a steering committee to provide feedback as OPI implements the requirements of HB 393.¹ OPI also plans to open applications for the ESAs on May 1, 2024.²

¹ <https://opi.mt.gov/Families-Students/Parent-Resources/Education-Savings-Account>

² [https://opi.mt.gov/Portals/182/Page%20Files/Parent%20Resources/ESA%20OPI%20FAQ%2004.09.2024%20\(002\).pdf](https://opi.mt.gov/Portals/182/Page%20Files/Parent%20Resources/ESA%20OPI%20FAQ%2004.09.2024%20(002).pdf)

B. Plaintiffs' Challenge To The ESA Program

Plaintiffs The Montana Quality Education Coalition and Disability Rights Montana (hereinafter "Plaintiffs") filed this lawsuit on January 23, 2024, challenging the Program on state constitutional grounds. Specifically, Plaintiffs argue that the Program violates Article VII, Section 11(5), Article VIII, Section 14, Article V, Section 1, and Article X of the Montana Constitution.

C. Proposed Intervenor

Sue Vinton is the House Majority Leader of the Montana House of Representatives. Decl. of Sue Vinton (Vinton Decl.), attached as Appendix A to Proposed Intervenor's Mot. To Intervene, ¶ 2. She was the primary sponsor of HB 393. *Id.* ¶ 3.

Representative Vinton is uniquely suited to legislate on this topic as the parent of a son, Jake, with special needs. *Id.* ¶¶ 5–6. Although Jake's local school lacked the programs and integration he needed, Jake benefited from a more appropriate special needs program at another public school during his time as a student. *Id.* ¶¶ 10–12. While Jake benefited from existing opportunities, Representative Vinton has met and spoken with many other parents and kids in the special needs community who have not had the opportunities that were available to her son. *Id.* ¶¶ 13–14. These interactions spurred her to sponsor and advance HB 393 to help all students with special needs access the services they need. *Id.* ¶¶ 14–15. Representative Vinton intended to ensure equal educational opportunity for all children with special needs by expanding opportunities for special needs education. *Id.* ¶16.

III. ARGUMENT

Representative Vinton has a statutory right to intervene. Under Montana law, “a legislator in the legislator’s capacity as the primary sponsor of legislation at issue who voted for passage and approval of the legislation may intervene as of right, individually or jointly, in declaratory judgment actions involving alleged constitutional violations of state law.” § 5-2-107(2), MCA. Rule 24(a) requires this Court, on timely motion, to “permit anyone to intervene who (1) is given an unconditional right to intervene by statute.” Mont. R. Civ. P. 24(a)(1).

Representative Vinton was the primary sponsor of HB 393 and voted for passage and approval of the legislation. Vinton Aff. ¶ 2. In addition, this case involves declaratory judgment claims raising alleged constitutional violations by HB 393. *See generally* Complaint. Accordingly, Representative Vinton is entitled to intervene.

IV. CONCLUSION

For the reasons set forth above, Proposed Intervenor Sue Vinton respectfully requests that this Court grant her leave to intervene as a defendant in this case.

Respectfully submitted,

/s/ Dale Schowengerdt

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Cause No. BDV-25-2024-0000044-IJ

**Declaration of Sue Vinton
in Support of
Motion to Intervene as a Defendant**

State of Montana)
) ss.
First Judicial District)

I, Sue Vinton, declare as follows:

1. I am a resident of Lockwood, Montana. I am an adult over the age of 18 years, have personal knowledge as to all matters contained herein, and am fully competent to make this declaration.

2. I was elected to the Montana House of Representatives for District 56 on November 8, 2016. I won re-elections in 2018, 2020 and 2022. Since January 4, 2021, I have held the position of Majority Leader of the Montana House of Representatives.

3. I was the primary sponsor of HB 393 in the 2023 session of the Montana Legislature, and I voted in favor of the bill.

4. HB 393 became law on May 18, 2023, and went into effect July 1, 2023.

5. I am also a mother of a son, Jake, who is a person with Down Syndrome.

6. Jake is now 28 years old, but when he was approaching school age, my husband Mike and I were concerned about finding an appropriate school for him. From the age of 3, Jake had an Individualized Education Program under the federal Individuals with Disabilities Education Act. But in Montana, having an IEP does not ensure access to programs and services in local public schools that are well tailored for the child's needs.

7. In Montana, every child with a disability receives an IEP that establishes learning goals based on their disability and explains what services and what accommodations are necessary for that child to learn and achieve those goals. The objective is

placement in the least restrictive environment that will meet their needs with appropriate supplements.

8. Yet, not all schools are able to provide programs and services necessary to assist each student with an IEP. Some districts with limited resources participate in a cooperative with other schools. A cooperative is a separate legal entity financed with special education funds that would otherwise go to participating districts. In the place of local school districts, a cooperative hires employees and provides instruction to students in separate facilities. The state sends each participating district's special education funds directly to the cooperative.

9. So, depending on residential location in the state, a student with an IEP might receive services at a local school or might have that funding reallocated to a cooperative that seeks to pool resources to offer more services. Montana parents are involved in the creation of their child's IEP but cannot control what options and services are available at their school or at a cooperative. Even the pooled funds of a cooperative cannot guarantee that staff with the right training are available for hire, meaning that a school might not be able to serve the needs of all its students even though participating in a cooperative.

10. Just as no two schools are the same, no two people with Down Syndrome and IEPs are the same either. Some children with Down Syndrome require full time supportive supervision. Others require speech therapy. And still others require occupational and physical therapy. For his part, Jake is an outgoing, highly engaged person, and our family thought it best to educate him in a way that maximized his integration

with other students.

11. Jake had success in grade school, including receiving services through a cooperative. Unfortunately, our local public high school lacked the programs and commitment to integration Jake needed. But we had the wherewithal to search for other educational options for Jake. We located another public school about an hour round trip from our home that offered the sort of curriculum and mainstream integration Jake needed. At that time, Montana neither required public schools to accept interdistrict transfers nor offered anything like what HB 393 offers. But we were able to convince the school to accept Jake. Fortunately, we had the means to provide him with transportation to and from school every day.

12. Jake had great success at his public school. He received a good quality education in his classes while integrating into the social life of school. He joined his high school's teams for football, basketball, and track and field, and he attended prom. He even became a competitor in the Special Olympics. Thanks to that education, Jake graduated from high school in 2015 and now lives a highly fulfilling and independent life in his own apartment with a roommate.

13. Jake's experience heightened my attention to the shortcomings in Montana's system of providing education for children with special needs. Throughout my time as a legislator, I have had the privilege of speaking with many other parents and families of children with special needs. I have learned that not every family found the same educational opportunities we did. Some lacked financial resources to pay for programs outside their local public schools. Given the sheer geographic size of our state,

others could not afford the time or cost of transportation to other schools or programs. And still others could not find programs that matched their children's needs.

14. These interactions, and my fundamental understanding that all people with special needs are different and require significant tailoring of their education, were driving forces behind my sponsorship of HB 393.

15. Many children with special needs have great success with their local public schools, but not all families have that experience. Parents are the best judges of the adequacy of their child's education, and government should not presume to tell parents how to educate their children.

16. The Legislature's objective of ensuring equal educational opportunity for all children with special needs is best met by expanding opportunities for special needs education. I sponsored HB 393 to establish a program that makes significant advances toward that objective.

I declare under penalty of perjury that the foregoing is true and correct.

Sue Vinton
Sue Vinton

04/24/2024
Date

Billings, MT
City and State

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**Answer and Affirmative Defenses
of Intervenor-Defendant
to Complaint**

Proposed Intervenor Sue Vinton (hereinafter “Intervenor-Defendant”) states the following as her Answer and Affirmative Defenses to the Complaint of The Montana Quality Education Coalition and Disability Rights Montana (“Plaintiffs”). Intervenor-Defendant denies any allegation not specifically admitted below. For further response, Intervenor-Defendant states as follows.

INTRODUCTION

1. In 2023, the Montana Legislature passed House Bill 393 (“HB 393”) to shake out Montanans’ public education piggy bank, authorizing private citizens to spend public school money on everything from private school transportation to SAT prep to college tuition. The bill sets up education savings accounts (“ESAs”) for parents of students with disabilities (“qualified students”) and begins by offering between \$5,390 and \$8,419 annually as an incentive for qualified students to leave or refrain from ever enrolling in public schools. ESAs will pull state funding directly from local public school accounts and inflate general fund budgets, leading to increased local property taxes.

ANSWER: Intervenor-Defendant admits that HB 393 became state law in 2023. Intervenor-Defendant denies the remainder of paragraph 1 as characterization of HB 393, which speaks for itself.

2. While HB 393 provides no assurance that students with disabilities will receive the services and education they need, it assuredly provides that public schools will have fewer resources to serve their students, with and without disabilities.

ANSWER: Intervenor-Defendant denies paragraph 2.

3. HB 393 violates the Montana Constitution in four ways. First, by directing public funds to private actors, it violates Article V, Section 11(5), which prohibits appropriations “for religious, charitable, industrial, educational, or benevolent purposes to any private individual, private association, or private corporation not under control of the state.” Second, in failing to specify the cost and recipients of payments, it violates Article VIII, Section 14, which bars paying money “out of the treasury unless upon an appropriation made by law and a warrant drawn by the proper officer in pursuance thereof.” Third, for the same reason, it violates Article V, Section 1’s nondelegation principle. Fourth and finally, by directing cash payments to some students to the direct disadvantage of others, it violates Article X’s unequivocal guarantee of “equality of educational opportunity” to all Montana students. Mont. Const. art. X, § 1(1).

ANSWER: Paragraph 3 is a series of legal conclusions to which no response is required. To the extent it contains any factual allegations, Intervenor-Defendant denies those allegations.

4. HB 393 is part and parcel of a recent national effort to privatize education with public funds that cannot be squared with the spirit and letter of the Montana Constitution. Indeed, the Montana legislature is obligated to “provide a basic system of free quality public elementary and secondary schools” and to “fund and distribute in an equitable manner to the school districts the state’s share of the cost” of those schools. Mont. Const. art. X, § 1(3).

ANSWER: Paragraph 4 contains legal conclusions to which no response is required. To the extent it contains any factual allegations, Intervenor-Defendant denies those allegations.

5. Plaintiffs Disability Rights Montana (“DRM”) and Montana Quality Education Coalition (“MQEC”) challenge HB 393 to prevent already limited public school funds from being diverted to private individuals and institutions. Plaintiffs are organizations committed to equal and quality public education opportunities for Montana students. Because HB 393 is antithetical to both quality and equality in education, DRM and MQEC join together in asking the Court to declare HB 393 unconstitutional and to enjoin its enforcement.

ANSWER: Paragraph 5 contains a mix of factual and legal allegations. The legal allegations require no response. Intervenor-Defendant is without sufficient knowledge to admit or deny the allegations regarding plaintiffs’ philosophical commitments and motivations for filing this lawsuit and therefore denies those allegations. Intervenor-Defendant denies any other factual allegations.

PARTIES

A. Plaintiffs

6. MQEC is a nonprofit organization headquartered in Helena, Montana. Formed in 2001, MQEC is one of the state’s largest education advocacy organizations. Its mission is to serve as a guardian of Article X’s guarantees and to advocate for adequate and equitable public school funding to provide quality education

for each of Montana's public school students.

ANSWER: Intervenor-Defendant is without sufficient knowledge to admit or deny the allegations regarding plaintiff MQEC's structure and mission in Paragraph 6 and therefore denies those allegations.

7. MQEC represents the interests of more than 100 school districts, six statewide public education advocacy organizations, and innumerable teachers, trustees, administrators, and other public school employees. MQEC represents public school districts that range from large to small, rural to urban, and east to west.

ANSWER: Intervenor-Defendant is without sufficient knowledge to admit or deny the allegations regarding plaintiff MQEC's structure and mission in Paragraph 7 and therefore denies those allegations.

8. HB 393 harms MQEC by depriving public schools of crucial tax dollars and interfering with elected officials' constitutional obligations. It diminishes public school districts' general fund money with no commensurate decrease in the cost of providing a quality education. And it prevents trustees from fulfilling their constitutional mandate under Article X. In response, MQEC will be forced to expend considerable resources to advocate for adequate funding and to equip constituent organizations to help teachers, trustees, and administrators serve students effectively. HB 393 threatens the funding, stability, and public regard of the public education system, thereby directly compromising MQEC's mission of protecting and strengthening Montana's commitment to public education.

ANSWER: Paragraph 8 contains a mix of factual and legal allegations. The legal allegations require no response. Intervenor-Defendant denies the factual allegations.

9. DRM is a nonprofit organization headquartered in Helena, Montana. DRM's mission is to protect and advocate for the human, legal, and civil rights of Montanans with disabilities while advancing dignity, equality, and self-determination.

ANSWER: Intervenor-Defendant is without sufficient knowledge to admit or deny the allegations regarding plaintiff DRM's structure and mission in Paragraph 9 and therefore denies those allegations.

10. DRM is the federally mandated civil rights protection and advocacy system (P&A) for Montana. *See, e.g.*, Developmental Disabilities Assistance & Bill of Rights Act of 2000 ("DD Act"), 42 U.S.C § 15041, *et seq.* Under federal law, DRM is required to "pursue legal, administrative, and other appropriate remedies or approaches to ensure the protection of, and advocacy for, the rights of [people with disabilities] . . . with particular attention to members of ethnic and racial minority groups." *Id.* at § 15043(a)(2)(A). P&As "are responsible for enforcing federal and state law on behalf of individuals with disabilities who otherwise would face perhaps insurmountable obstacles to seeing their rights enforced and their interests protected." *Ind. Prot. & Advoc. Servs. Comm'n v. Comm'r, Ind. Dep't of Corr.*, 642 F. Supp. 2d 872, 876 (S.D. Ind. 2009). In addition to pursuing the rights of those it protects, a P&A system may "press[

] its own rights.” *Va. Off. for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 251 (2011).

ANSWER: Paragraph 10 contains a mix of factual and legal allegations. The legal allegations require no response. Intervenor-Defendant is without sufficient knowledge to admit or deny the allegations regarding plaintiff DRM’s structure and mission and therefore denies those allegations. Intervenor-Defendant denies any remaining factual allegations.

11. DRM represents and advocates for school-aged children and youth with disabilities by providing assistance, advocacy, and legal representation to prioritize and protect access to a free appropriate public education (FAPE) for all students with disabilities. DRM works to ensure that students with disabilities are safe and fully integrated into their school environment; that parents’ and students’ rights are protected and advanced; and that state and local educational agencies are aware of and comply with students’ rights under the Individuals with Disabilities in Education Act (“IDEA”), Section 504 of the Rehabilitation Act of 1973, and the Americans with Disabilities Act (“ADA”).

ANSWER: Intervenor-Defendant is without sufficient knowledge to admit or deny the allegations regarding plaintiff DRM’s structure and mission in Paragraph 11 and therefore denies those allegations.

12. Because DRM is directly responsible for enforcing federal and state law on behalf of individuals with disabilities, HB 393 harms DRM by harming students with disabilities. Not only does it make serving students with

disabilities who remain enrolled in public school more difficult, HB 393 does not ensure that students with disabilities who opt for an ESA and leave the public school system will receive a free and appropriate public education. Many students whom DRM serves will necessarily remain in public schools while ESAs reduce funding, leaving schools with less to invest in educating students with disabilities in the least restrictive environment. Because public education is an essential component to achieving dignity, equality, and self-determination for Montanans with disabilities, HB 393 compromises DRM's mission. Protection of and advocacy for the civil, legal, and human rights of Montanans with disabilities is not only germane to DRM, but is the reason for DRM's existence.

ANSWER: Paragraph 12 contains a mix of factual and legal allegations. The legal allegations require no response. Intervenor-Defendant denies the factual allegations.

B. Defendants

13. Defendant State of Montana is a duly admitted state of the United States.

ANSWER: Intervenor-Defendant admits Paragraph 13.

14. Defendant Greg Gianforte is the Governor of the State of Montana and is responsible for the execution of state laws.

ANSWER: Intervenor-Defendant admits Paragraph 14.

15. Defendant Elsie Arntzen is the Montana Superintendent of Public Instruction, responsible for the general supervision of Montana public schools and districts,

including public school accreditation.

ANSWER: Intervenor-Defendant admits Paragraph 15.

16. The Superintendent administers HB 393's ESA program. HB 393 requires the Superintendent to reimburse parents for an array of private educational expenses and permits the Superintendent to approve reimbursement for educational expenses not otherwise specified in HB 393. The Superintendent is responsible for signing ESA contracts on behalf of the State.

ANSWER: Paragraph 16 contains a mix of factual and legal allegations. The legal allegations require no response. Intervenor-Defendant admits that the Defendant Superintendent administers the ESA program under HB 393. Intervenor-Defendant denies any remaining factual allegations.

JURISDICTION & VENUE

17. Plaintiffs bring this action under the Montana Constitution. Article VII, Section 4 of the Montana Constitution provides this Court with original jurisdiction, as does § 3-5-302, MCA.

ANSWER: Paragraph 17 contains legal conclusions to which no response is required. To the extent it contains any factual allegations, Intervenor-Defendant denies those allegations.

18. This Court has jurisdiction to grant declaratory relief pursuant to § 27-8-201, *et seq.*, MCA, and injunctive relief pursuant to § 27-19-101, *et seq.*, MCA.

ANSWER: Paragraph 18 contains legal conclusions to which no response is required. To the extent it contains any factual allegations, Intervenor-

Defendant denies those allegations.

19. Venue is proper in Lewis & Clark County under § 25-2-126(1), MCA.

ANSWER: Paragraph 18 contains legal conclusions to which no response is required. To the extent it contains any factual allegations, Intervenor-Defendant denies those allegations.

COMMON ALLEGATIONS

Public Education in Montana’s Constitutional Framework

20. The Montana Constitution is a modern document, intended “to meet the changing circumstances of contemporary life” and to “stand on its own footing and . . . to provide individuals with fundamental rights and protections far broader than those available through the federal system.” *Dorwart v. Caraway*, 2002 MT 240, ¶ 94, 312 Mont. 1, 58 P.3d 128 (Nelson, J., concurring) (quoting Dahood, Amicus Br.; Mont. Const. Conv., II Verbatim Tr., *Bill of Rights Comm. Proposal*, at 619 (Feb. 22, 1972)).

ANSWER: Paragraph 20 contains legal conclusions to which no response is required. To the extent it contains any factual allegations, Intervenor-Defendant denies those allegations.

21. About public education, the framers were unequivocal: “It is the goal of the people to establish a system of education which will develop the full educational potential of each person. Equality of educational opportunity is guaranteed to each person of the state.” Mont. Const. art. X, § 1(1).

ANSWER: Paragraph 21 contains legal conclusions to which no response is

required. To the extent it contains any factual allegations, Intervenor-Defendant denies those allegations.

22. In its first sentence, Article X, Section 1(1) sets an ambitious goal: “to establish a system of education which will develop the full educational potential of each person.” *Helena Elem. Sch. Dist. No. 1 v. State*, 236 Mont. 44, 53, 769 P.2d 684, 689 (1989). The guarantee that follows is neither abstract nor aspirational: every Montanan “is guaranteed equality of educational opportunity.” *Id.* at 52–53. As a constitutional provision, it is unusual—there is no “other instance in which the Constitution ‘guarantees’ a particular right.” *Id.* The guarantee is binding on all three branches of government, and all state officials at every level. *Id.* at 53, 769 P.2d at 690.

ANSWER: Paragraph 22 contains legal conclusions to which no response is required. To the extent it contains any factual allegations, Intervenor-Defendant denies those allegations.

23. The Constitution obligates the legislature to “provide a basic system of free quality public elementary and secondary schools.” Mont. Const. art. X, § 1(3). When, for example, the legislature failed to adequately fund state education, the Montana Supreme Court concluded that the legislature forced “an excessive reliance on permissive and voted levies” and necessarily “failed to provide a system of quality public education granting to each student the equality of educational opportunity” that Article X guarantees. *Helena Elem. Sch.*, 236 Mont. at 55, 769 P.2d at 690.

ANSWER: Paragraph 23 contains legal conclusions to which no response is required. To the extent it contains any factual allegations, Intervenor-Defendant denies those allegations.

24. While the legislature may “provide such other educational institutions, public libraries, and educational programs as it deems desirable,” it “shall fund and distribute in an equitable manner to the school districts the state’s share of the cost of the . . . school system.” *Id.* (emphasis added); *see also Columbia Falls Elem. Sch. Dist. No. 6 v. State*, 2005 MT 69, ¶ 22, 326 Mont. 304, 109 P.3d 257 (concluding “that the educational product of the current school system is constitutionally deficient and that the Legislature currently fails to adequately fund Montana’s public school system”); *Helena Elem. Sch.*, 236 Mont. at 55, 769 P.2d at 690 (“affirm[ing] that . . . spending disparities among the State’s school districts translate into a denial of equality of educational opportunity.”).

ANSWER: Paragraph 24 contains legal conclusions to which no response is required. To the extent it contains any factual allegations, Intervenor-Defendant denies those allegations.

25. Title 20 implements the legislature’s constitutional obligation, providing, among other things, for an “educational program . . . which represent[s] the minimum standards upon which a basic system of free quality public elementary and secondary schools is built,” “educational programs to provide for students with special needs,” and the “preservation of local control of schools in each district vested in a board of trustees.” Section 20-9-309(2), MCA

(emphasis added).

ANSWER: Paragraph 25 contains legal conclusions to which no response is required. To the extent it contains any factual allegations, Intervenor-Defendant denies those allegations.

26. In developing funding mechanisms, the legislature must consider, *inter alia*, “the needs of students with special needs” and “the ability of school districts to attract and retain qualified educators.” Sections 20-9-309(3)(d), (f), MCA. It must “determine the costs of providing the basic system of free quality public elementary and secondary schools,” § 20-9-309(4)(a), MCA, and “establish a funding formula that...reflects the costs associated,” § 20-9-301(4)(b)(1), MCA. In short, legislative funding must promote quality education.

ANSWER: Paragraph 26 contains legal conclusions to which no response is required. To the extent it contains any factual allegations, Intervenor-Defendant denies those allegations.

27. Consistent with its constitutional obligation to fund the public schools, the legislature imposed a restriction on itself: a law cannot “require[] a school district to” do anything “that will require the direct expenditure of additional funds” unless it also “provide[s] a specific means to finance the activity, service, or facility other than the existing property tax mill levy.” Section 1-2-113, MCA (emphasis added). “Any law that fails to provide a specific means to finance the service or facility is not effective until a specific means of financing . . . is provided by the legislature.” *Id.*

ANSWER: Paragraph 27 contains legal conclusions to which no response is required. To the extent it contains any factual allegations, Intervenor-Defendant denies those allegations.

28. The legislature passed Title 20 to implement Article X. As Justice Rice has explained,

I would nonetheless refrain from suggesting how to “best construct” the educational system, and upon what factors it must do so . . . if I was not convinced that the “suggestion” was, in fact, constitutionally compelled. Truly, the debates of the delegates demonstrate that, in assigning to the Legislature the task of designing the system, they intended the Legislature to assess the educational needs of the state before deciding funding issues. After the state has assessed the needs and established what a minimum program ought to be, we feel that the state ought then to provide, by whatever means it sees fit, for the funding of the program. Once the needs for a basic quality system of elementary and secondary schools have been realistically assessed, the state has the obligation to guarantee.

Columbia Falls Elem., ¶ 57 (Rice, J., concurring) (quoting Del. Harbaugh & Del. Habedank, Mont. Const. Conv., VI Verbatim Tr., at 1961–62).

ANSWER: Paragraph 28 contains legal conclusions to which no response is required. To the extent it contains any factual allegations, Intervenor-Defendant denies those allegations.

Local Control over Public Education

29. The framers created a system of public school oversight, forming a statewide Board of Public Education “to exercise general supervision over the public school system,” Mont. Const. art. X, § 9(3)(a), and reserving for local elected school boards “[t]he supervision and control of schools in each school district,”

Mont. Const. art. X, § 8. The two-board system rectified at least two problems with the previous structure. First, under the 1889 Montana Constitution, a statewide Board of Education held a supervisory role over public education, but the legislature retained too much authority over its powers and duties. Mont. Const. Conv., VI Verbatim Tr., at 2049–51 (Mar. 11, 1972) (Del. Champoux). Second, the two-board structure responded to concerns about unresponsive state-level bureaucracy that lacked genuinely local control. *Id.* at 2051.

ANSWER: Paragraph 29 contains legal conclusions to which no response is required. To the extent it contains any factual allegations, Intervenor-Defendant denies those allegations.

30. By constitutional design, the Board of Public Education is the only body at its level and of its kind for public schools. *Id.* at 2049–53; Mont. Const. art. X, § 9.

ANSWER: Paragraph 30 contains legal conclusions to which no response is required. To the extent it contains any factual allegations, Intervenor-Defendant denies those allegations.

31. Local school boards play a separate but similarly essential and deliberately crafted constitutional role. The framers delegated local “supervision and control” to “a board of trustees to be elected as provided by law.” Mont. Const. art. X, § 8; *see* Mont. Const. Conv., VI Verbatim Tr., at 2047 (“[O]ur local school boards certainly should have constitutional status.”) (Del. Johnson). They used the word “control” to “emphasize that [they] want[ed] the local public school

boards to have as much power as possible.” Mont. Const. Conv., VI Verbatim Tr., at 2050 (Mar. 11, 1972) (Del. Champoux).

ANSWER: Paragraph 31 contains legal conclusions to which no response is required. To the extent it contains any factual allegations, Intervenor-Defendant denies those allegations.

32. Local school boards must be able to supervise operations and control district budgets—including overseeing finances through comprehensive budget and financial management and exerting exclusive control over the district’s general fund. *See* § 20-3-324, MCA. HB 393 renders local control a mirage by forcing districts to pay out general fund monies required to deliver a quality education.

ANSWER: Paragraph 32 contains legal conclusions to which no response is required. To the extent it contains any factual allegations, Intervenor-Defendant denies those allegations.

Prohibited Payments under the Montana Constitution

33. The Montana Constitution expressly prohibits the legislature from making appropriations for “educational . . . purposes to any private individual, private association, or private corporation not under control of the state.” Mont. Const. art. V, § 11(5) (emphasis added).

ANSWER: Paragraph 33 contains legal conclusions to which no response is required. To the extent it contains any factual allegations, Intervenor-Defendant denies those allegations.

34. This strict prohibition was no accident. The framers prioritized public

education and worried about protecting and maintaining its funding. *See, e.g.*, Mont. Const. Conv., VI Verbatim Tr., at 2013–26 (Mar. 11, 1972) (discussion of amendment exempting “federal funds provided to the state for the express purpose of distribution to non-public education” from the general prohibition on aid to sectarian schools in Article X, Section 6(1)); *id.* at 2022 (Del. Harper, having witnessed attempts to use private schools to avoid desegregation, asked where the Constitution would prohibit “subversion of public school moneys . . . [to] private institutions”; Del. Champoux identified Article V, which “says that there will be no moneys given to private corporations and so forth”).

ANSWER: Paragraph 34 contains legal conclusions to which no response is required. To the extent it contains any factual allegations, Intervenor-Defendant denies those allegations.

35. Legislation that uses state money to benefit private entities violates Article V, Section 11(5). *See Hollow v. State*, 222 Mont. 478, 486, 723 P.2d 227, 232 (1986) (“What we do not and cannot condone is the direct use of tax monies by legislative provision which in effect directly pledges the credit of the state.”) (emphasis added). Even if initial deposits are into a state-administered account—like a state-established ESA trust account—programs that ultimately route taxpayer money to private entities violate Section 11(5). *See, e.g., White v. State*, 233 Mont. 81, 87, 759 P.2d 971, 974 (1988) (unconstitutional benefit to private entities where legislature obligated taxpayer funds to ensure a debt service fund remained solvent, effectively

pledging state money to secure Board- issued bonds “for the benefit of private businesses”).

ANSWER: Paragraph 35 contains legal conclusions to which no response is required. To the extent it contains any factual allegations, Intervenor-Defendant denies those allegations.

36. Generally, so long as the spending in question remains “under the control of the state, the constitutional mandate is satisfied.” *Grossman v. State*, 209 Mont. 427, 455–56, 682 P.2d 1319, 1333–34 (1984). But using state money to secure “bonds or guaranties being used to benefit private business ventures” violates Section 11(5). *White*, 233 Mont. at 86, 759 P.2d at 974; *Hill v. Rae*, 52 Mont. 378, 158 P. 826, 831 (1916) (provision unconstitutional in part because the state could not “direct the conduct or judgment of mortgagors” handling their own property); *cf. Duck Inn, Inc. v. Mont. State Univ. -N.*, 285 Mont. 519, 525, 949 P.2d 1179, 1183 (1997) (law constitutional where “implicit, but clear, rationale behind the statute is to minimize the tax support necessary to fund units of the Montana university system by leasing campus facilities”).

ANSWER: Paragraph 36 contains legal conclusions to which no response is required. To the extent it contains any factual allegations, Intervenor-Defendant denies those allegations.

37. Article VIII, Section 14 imposes a separate clarifying restriction on how the legislature can distribute money. It provides that “no money shall be paid out of the treasury unless upon an appropriation made by law and a warrant

drawn by the proper officer in pursuance thereof.” Mont. Const. art. VIII, § 14.

ANSWER: Paragraph 37 contains legal conclusions to which no response is required. To the extent it contains any factual allegations, Intervenor-Defendant denies those allegations.

38. That is, Section 14 requires that state treasury money be spent only by appropriation. “[A]n appropriation is an authority from the law-making body in legal form to apply sums of money out of that which may be in the treasury in a given year, to specified objects or demands.” *Meyer v. Knudsen*, 2022 MT 109, ¶ 12, 409 Mont. 19, 510 P.3d 1246 (cleaned up); see also *Nicholson v. Cooney*, 265 Mont. 406, 415, 877 P.2d 486, 491 (1994). It applies to state treasury money, and does not permit the legislature to write blank checks. *See generally Grossman*, 209 Mont. at 461–62, 682 P.2d at 1336–37.

ANSWER: Paragraph 38 contains legal conclusions to which no response is required. To the extent it contains any factual allegations, Intervenor-Defendant denies those allegations.

39. Education funding quintessentially is state treasury money. *Columbia Falls Elem.*, ¶¶ 24–25; see, e.g., § 20-6-330(1), MCA (requiring specified payments from state to public schools); § 20-9-325, MCA (same); § 20-9-327, MCA (same).

ANSWER: Paragraph 39 contains legal conclusions to which no response is required. To the extent it contains any factual allegations, Intervenor-Defendant denies those allegations.

40. HB 393 is a blank check. It fails to limit the amount of state money that may

be routed to private individuals and how that money may ultimately be spent.

ANSWER: Paragraph 40 contains legal conclusions to which no response is required. To the extent it contains any factual allegations, Intervenor-Defendant denies those allegations.

Delegations of Legislative Power Similarly Prohibited

41. Article V, Section 1 gives the legislative body structure and vests the legislature with some authority that cannot be delegated to other bodies or officials. To delegate authority or discretion within constitutional bounds, “it is essential that the Legislature shall fix some standard by which the officer or board to whom the power is delegated may be governed, and not left to be controlled by caprice.” *Douglas v. Judge*, 174 Mont. 32, 40, 568 P.2d 530, 534 (1977).

ANSWER: Paragraph 41 contains legal conclusions to which no response is required. To the extent it contains any factual allegations, Intervenor-Defendant denies those allegations.

42. “If the legislature fails to prescribe with reasonable clarity the limits of power delegated to an administrative agency, or if those limits are too broad, its attempt to delegate is a nullity.” *Huber v. Groff*, 171 Mont. 442, 457, 558 P.2d 1124, 1132 (1976). If instead a law’s “provisions are sufficiently clear, definite, and certain to enable the agency to know its rights and obligations,” then a statute “validly delegates administrative authority.” *Id.*; *Douglas*, 174 Mont. at 39, 568 P.2d at 534 (collecting cases).

ANSWER: Paragraph 42 contains legal conclusions to which no response is required. To the extent it contains any factual allegations, Intervenor-Defendant denies those allegations.

House Bill 393: Eligibility and Reimbursable Educational Resources

43. Representative Sue Vinton sponsored House Bill 393. It passed by a two-vote margin on April 27, 2023. A true and correct copy of the enrolled version of HB 393 is attached as Exhibit A. The bill went into effect on July 1, 2023. Ex. A, HB 393 § 16.

ANSWER: Intervenor-Defendant admits that Representative Sue Vinton sponsored HB 393 and that the bill’s effective date is July 1, 2023. Intervenor-Defendant denies the other factual allegations in Paragraph 43.

44. During the 2023–24 school year, the Office of Public Instruction will begin implementing HB 393. Mont. Off. of Pub. Instruction, *HB 393 Leg. Summ.* (Aug. 21, 2023). Parents may access ESA funds beginning in the 2024–25 school year. *Id.*

ANSWER: Intervenor-Defendant admits Paragraph 44.

45. HB 393’s claimed primary purpose is to create ESAs for “qualified students.”

ANSWER: Paragraph 45 contains legal conclusions to which no response is required. To the extent it contains any factual allegations, Intervenor-Defendant denies those allegations.

46. To qualify, a child must be identified as a “child with a disability” under the IDEA, between the ages of 5 and 19, and not currently enrolled in a department

of corrections commitment youth program or the Montana school for the deaf and blind. Ex. A, HB 393 § 3(7)(a)–(b).

ANSWER: Paragraph 46 contains legal conclusions to which no response is required. To the extent it contains any factual allegations, Intervenor-Defendant denies those allegations.

47. Qualified students include any student who was counted by a school district for ANB funding, resided outside the state in the previous year, or is eligible to enter kindergarten in the current year. *Id.* § 3(7)(c)(i)–(iv). They need not enroll in a private or nonpublic online school to qualify. *Id.* § 4(4). Kindergarten-eligible students never need to intend to enroll in a public school as they can be identified under IDEA pre-enrollment. *Id.* § 3(7)(iv). Nor does HB 393 require new resident qualified students ever to have attended public school, extending a nationwide invitation for parents of qualified students to establish residency in Montana and pull public funds from the state treasury. *Id.* § 3(7)(c)(i)–(iii).

ANSWER: Paragraph 47 contains legal conclusions to which no response is required. To the extent it contains any factual allegations, Intervenor-Defendant denies those allegations.

48. HB 393 provides that parents of qualified students shall be reimbursed for any of eleven ostensibly specific “education resources,” which include, inter alia, curriculum, tutoring, entrance examinations, books, tuition and fees at eligible postsecondary institutions, and transportation to educational services. The bill

fails to define the vast majority of these terms. *Id.* at §§ 4(1)(a)–(k).

ANSWER: Paragraph 48 contains legal conclusions to which no response is required. To the extent it contains any factual allegations, Intervenor-Defendant denies those allegations.

49. In fact, HB 393 authorizes the Superintendent to approve “any other educational expense” for reimbursement. Ex. A, HB 393 § 4(1)(l); *see also HB 393 Leg. Summ.* HB 393 offers no parameters for the Superintendent to determine what qualifies as an “educational expense.”

ANSWER: Paragraph 49 contains legal conclusions to which no response is required. To the extent it contains any factual allegations, Intervenor-Defendant denies those allegations.

50. Parents who participate must sign a contract with the Superintendent releasing the “resident school district from all obligations to educate the qualified student, including any requirements that the district provide a free and appropriate education to the qualified student or develop an individualized education program for the qualified student.” Ex. A, HB 393 § 5(1)(b). Participating students are not considered enrolled in their resident school district. *Id.* § 9(5). Unlike the IDEA’s provisions governing a parent’s authority to decline services, which provides important procedural safeguards and preserves parents’ rights to change their minds, the terms of HB 393 appear to require a full and unequivocal waiver of the student’s rights and a release of the school district from its affirmative FAPE obligations under IDEA and

Section 504. *Id.* § 5(1)(b); *see generally U.S. Dep’t of Educ., Off. of Special Educ. & Rehab. Servs., Questions & Answers on Serving Children with Disabilities Placed by Their Parents in Private Schs.* (Feb. 2022).

ANSWER: Paragraph 50 contains legal conclusions to which no response is required. To the extent it contains any factual allegations, Intervenor-Defendant denies those allegations.

51. Participating students may homeschool, attend private school, or attend an online nonpublic school. Ex. A, HB 393 §§ 3(6)(a)–(e); *see also* § 20-5-109(5), MCA. A “qualified school” is “not an agent of the state or federal government,” Ex. A, HB 393 § 8(2), and “[t]he superintendent of public instruction or any other state agency may not regulate the educational program of a qualified school that enrolls a qualified student, except” to provide for minimal record keeping, attendance, and course of study requirements set out in § 20-5-109, MCA; *id.* § 8(3). Qualified schools are not subject to the IDEA or Montana’s quality education guarantee. Ex. A, HB 393 § 3(6); *see also* § 20-5-109, MCA.

ANSWER: Paragraph 51 contains legal conclusions to which no response is required. To the extent it contains any factual allegations, Intervenor-Defendant denies those allegations.

House Bill 393: ESA Structure and Fiscal Impact

52. To create ESAs, HB 393 establishes a trust within the Office of Public Instruction using “money remitted . . . from the [resident] district’s general fund,” Ex. A, HB 393 § 9(3)(a), paid out monthly between August and May, *id.*

§§ 9(1)–(2). The money remitted “must be from the [resident] district’s general fund; [and] may not include revenue from the guarantee account.” Ex. A, HB 393 § 9(3)(a)–(b). That “remitted money” is money appropriated to the school district as part of the K-12 Base Amount for School Equity (“BASE”) aid—or the “minimum general fund budget that all public-school districts must adopt.” Mont. Off. of Pub. Instruction, *Understanding Mont. Sch. Fin. & Sch. Dist. Budgets*, at 4 (May 2020).

ANSWER: Paragraph 52 contains legal conclusions to which no response is required. To the extent it contains any factual allegations, Intervenor-Defendant denies those allegations.

53. In other words, HB 393 funds ESAs using resident school districts’ general funds. Ex. A, HB 393 § 9(3)(a). “The general fund is the largest and most important part of the school district’s overall budget.” *Columbia Falls Elem.*, ¶ 24. It is made up of state, local, and other revenue. Leg. Servs. Div., *K-12 Funding Basics – Dist. Gen. Fund*, at 1 (2022).

ANSWER: Paragraph 53 contains legal conclusions to which no response is required. To the extent it contains any factual allegations, Intervenor-Defendant denies those allegations.

54. Local funding comes from property tax levies. *Understanding Mont. Sch. Fin.*, at 5. Other revenue includes “non-levy revenues, such as oil and gas, tuition, coal gross proceeds, interest earnings, block grants, natural resources development K12 funding payment, and fund balance reappropriated.” *Id.*

ANSWER: Paragraph 54 contains legal conclusions to which no response is required. To the extent it contains any factual allegations, Intervenor-Defendant denies those allegations.

55. Of special relevance here, the state’s BASE budget contribution “is equal to 80% of the basic entitlement, 80% of the district’s per-ANB entitlement, 100% of the Quality Educator component, 100% of the At-Risk Student component, 100% of the Indian Education for All component, 100% of the American Indian Achievement Gap component, 100% of the Data for Achievement component, 140% of the district’s Special Education allowable cost payment, and 40% of the district’s prorated Special Education cooperative cost payment.” *Id.* at 12.

ANSWER: Paragraph 55 contains legal conclusions to which no response is required. To the extent it contains any factual allegations, Intervenor-Defendant denies those allegations.

56. ANB abbreviates “Average Number Belonging,” which is a student count formula “used for school funding purposes . . . based on factors that include enrollment on two count dates, [Pupil-Instruction-Related] days, and an average school year of 180 days.” *Understanding Mont. Sch. Fin.*, at 4.

ANSWER: Paragraph 56 contains legal conclusions to which no response is required. To the extent it contains any factual allegations, Intervenor-Defendant denies those allegations.

57. Generally, ANB accounts for part-time and extracurricular-only students with a fractional ANB. *See, e.g.*, § 20-9-311(13)(b)(ii), MCA (“Each completed

extracurricular activity lasting longer than 18 weeks may be counted as one-eighth enrollment.”). Fractional ANB may be as low as one-sixteenth. Section 20-9-311(13)(b)(i), MCA. Schools use fractional ANB to accurately account for services. *See generally* § 20-9-311, MCA (setting out the ANB calculation). ANB is “used to determine ANB based entitlements as well as calculate school BASE and maximum general fund budgets.” *Understanding Mont. Sch. Fin.*, at 4 (emphasis added).

ANSWER: Paragraph 57 contains legal conclusions to which no response is required. To the extent it contains any factual allegations, Intervenor-Defendant denies those allegations.

58. HB 393 sets the “ESA student amount” as the sum of:

- (a) the data-for-achievement rate under 20-9-306;
- (b) the Indian education for all payment rate under 20-9-306;
- (c) the per-ANB amounts of the instructional block grant and related service block grant under 20-9-321; and
- (d) the applicable per-ANB maximum rate established in 20-9-306 for the student multiplied by the ratio of adopted general fund budget to maximum general fund budget in the prior year.

Ex. A, HB 393 §§ 3(2)(a)–(d). HB 393 does not account for fractional ANB.

ANSWER: Paragraph 58 contains legal conclusions to which no response is required. To the extent it contains any factual allegations, Intervenor-Defendant denies those allegations.

59. The ESA student amount is based on school districts’ adopted general fund budget amounts, only 69 percent of which is funded by the state on average. Mont. Off. of Pub. Instruction, *FY24 Recap of All Sch. Dist. Gen. Fund Budgets*

Off. of Pub. Instruction: FY2024 Budget Spreadsheet. The remaining 31 percent is funded with a forced increase in local property taxes, which would necessarily be increased to fund ESA amounts. *Id.*; Ex. B, Gov.’s Off. of Budget & Program Planning, *Fiscal Note 2025 Biennium: HB0393*, at 5 (Feb. 16, 2023) (hereinafter “Fiscal Note”).

ANSWER: Paragraph 59 contains legal conclusions to which no response is required. To the extent it contains any factual allegations, Intervenor-Defendant denies those allegations.

60. Of Montana’s 395 school districts, well over a quarter—that is, 118—have adopted budgets that exceed the maximum general fund budget, while another quarter have adopted budgets between 97 and 100 percent of the maximum. FY2024 Budget Spreadsheet. When state funding cannot meet the need, local property taxes make up the difference. Mont. Off. of Pub. Instruction, *Special Educ. Report to the Bd. of Pub. Educ.*, at 22 (June 2022).

ANSWER: Paragraph 60 contains legal conclusions to which no response is required. To the extent it contains any factual allegations, Intervenor-Defendant denies those allegations.

61. Using HB 393’s funding formula, the fiscal note calculates that for elementary school students in 2025, the minimum annual ESA amount is \$5,390.32 and the maximum is \$6,651.72. Ex. B, Fiscal Note, at 2. For high school students, the minimum is \$6,804.72 and the maximum is \$8,419.72. *Id.* To meet HB 393’s requirements, “[s]chool districts may adopt higher general fund budgets to

offset the loss of funds related to [HB 393] and therefore, local property taxes could increase.” *Id.* Additionally, “[t]his funding would not be budgeted and would reduce funding for other instruction-related expenditures.” *Id.*

ANSWER: Paragraph 61 contains legal conclusions to which no response is required. To the extent it contains any factual allegations, Intervenor-Defendant denies those allegations.

62. Montana’s statewide general fund education budget is \$1.26 billion for 2024. FY2024 Budget Spreadsheet. The total includes \$43.1 million in special education funds. *Id.* (calculated by summing columns AH and AI).

ANSWER: Intervenor-Defendant denies paragraph 62 as characterization of a document which speaks for itself.

63. In 2022, the Office of Public Instruction reported that “local school districts have absorbed the largest portion of special education costs by increasing their contribution to over \$87.96 million dollars in state fiscal year 2021.” *Special Educ. Report*, at 22. The local tax portion of special education spending was “over 50 percent of the total expenditures for special education.” *Id.*

ANSWER: Intervenor-Defendant denies paragraph 63 as excerpts of a report which speaks for itself.

64. If every qualified student used an ESA, HB 393 would require spending more than 12 percent of the general fund budget on reimbursements. The Governor’s Office of Budget and Program Planning issued a fiscal note for HB 393 explaining that “[i]f all 21,127 eligible students participated in the education

savings account, the program would transfer approximately \$140 million annually of state funding and local property tax dollars from the local public-school districts to the education savings account.” Ex. B, Fiscal Note, at 5. To cover the \$140 million, schools would be required to spend 325 percent of the \$43.1 million amount of state funding dedicated to special education in 2024. FY2024 Budget Spreadsheet; *Special Educ. Report*, at 22–23. The legislature made no attempt to limit or even calculate HB 393’s potential budgetary impact.

ANSWER: Intervenor-Defendant is without sufficient knowledge to admit or deny the allegations in Paragraph 64, and they are therefore denied.

65. Reducing the number of students in a classroom does not reduce the cost of educating the class. Ex. B, Fiscal Note, at 5 (“Approximately 90% of [public school] expenditures go to teacher pay and the cost is the same with nine or ten students in the classroom.”).

ANSWER: Intervenor-Defendant denies Paragraph 65.

66. The fiscal note admonished that HB 393 fails to account for fractional ANB students in ESAs, but the bill language remained unchanged. *See* Ex. B, Fiscal Note, at 6 (“Language is needed for HB 393 to indicate the amount of the education savings account payment allocated to a student who was enrolled on a part-time basis.”). As written, HB 393 allows a student who participated in a single extracurricular activity in the preceding school year and who counted for one-sixteenth enrollment (generating \$504 to the district) to seek

reimbursements equivalent to the full ESA amount (up to \$8,419.72 for a high school student in 2025). *See* Ex. A, HB 393 §§ 3(2), 9(1)–(3).

ANSWER: Paragraph 66 contains a mix of factual and legal allegations. The legal allegations require no response. Intervenor-Defendant denies the factual allegations.

67. Failing to adequately fund a new program violates Article X—particularly the legislature’s self-imposed requirement to provide a source of funding “other than the existing property tax mill levy,” § 1-2-113(1), MCA, when establishing new educational programs.

ANSWER: Paragraph 67 contains legal conclusions to which no response is required. To the extent it contains any factual allegations, Intervenor-Defendant denies those allegations.

HB 393: Long-Term Student-by-Student Impact

68. HB 393 requires that the Superintendent “ensure that the participating student is included in the resident school district’s ANB calculation . . . in any year that the student remains otherwise eligible for inclusion and participates in the program.” Ex. A, HB 393 § 9(5).

ANSWER: Paragraph 68 contains legal conclusions to which no response is required. To the extent it contains any factual allegations, Intervenor-Defendant denies those allegations.

69. In doing so, HB 393 preserves qualified students’ eligibility year after year, for nearly a decade and a half, by ensuring that one of the necessary

conditions for eligibility—being counted in the previous year’s ANB—is continuously met. So, once a qualified student has opted into the ESA program, they remain a participant unless and until they enroll in a public school or turn 19. As a result, public schools must distribute a student’s private allotment of public money to subsidize private educational resources from the time the student’s ESA is created until they become ineligible for participation. *See* HB 393 § 3(7).

ANSWER: Paragraph 69 contains a mix of factual and legal allegations. The legal allegations require no response. Intervenor-Defendant denies the factual allegations.

70. Adjusting for annual inflation to ANB as required by § 20-9-326, MCA, and starting with the payments HB 393 would guarantee starting in 2025, a home- or private-schooled kindergarten-eligible child can begin drawing public money until they turn 19 for a total of \$125,888, as follows:

Age of qualified student	Grade	Fiscal year	Max ESA Contribution
5	Kindergarten	2025	\$6,651
6	1	2026	\$6,851
7	2	2027	\$7,056
8	3	2028	\$7,268
9	4	2029	\$7,486
10	5	2030	\$7,710
11	6	2031	\$7,942
12	7	2032	\$8,180
13	8	2033	\$8,425
14	9	2034	\$10,985
15	10	2035	\$11,314

16	11	2036	\$11,654
17	12	2037	\$12,003
18	13	2038	\$12,364
Total cumulative ESA account earnings:			\$125,888

ANSWER: Paragraph 70 contains a mix of factual and legal allegations. The legal allegations require no response. Intervenor-Defendant denies the factual allegations.

71. A qualified student’s ESA account accrues money until the student reaches age 19, Ex. A, HB 393 § 3(7)(ii), but the student retains access to spend ESA funds until their 24th birthday, *id.* § 9(6)(b). Nothing in HB 393 requires that parents seek reimbursement the same year that the money is remitted.

ANSWER: Paragraph 71 contains legal conclusions to which no response is required. To the extent it contains any factual allegations, Intervenor-Defendant denies those allegations.

72. If they choose, parents may wait until their child is 18 to 24 years old, Ex. A, HB 393 § 9(6)(b), to access the accrued money—up to fourteen years of state contributions—for reimbursement of, for example, “eligible postsecondary institution tuition, books, online courses, or other fees,” *id.* § 4(1)(h). “Eligible postsecondary institution’ means an accredited postsecondary institution located in Montana,” such as Carroll College, Rocky Mountain College, or any public Montana University System school. *Id.* § 3(1). Thus, parents of a qualified student can use public money meant for special education services to pay instead for post-secondary tuition at any in-state accredited college or university decades after the first extraction of public funds.

ANSWER: Paragraph 72 contains a mix of factual and legal allegations. The legal allegations require no response. Intervenor-Defendant denies the factual allegations.

HB 393: Relationship to Rural Schools

73. No other state in the nation has a higher percentage of rural schools or small rural districts, *see* Mont. State Univ. Cent. for Research on Rural Ed., *Overview*. And HB 393’s funding scheme will have a harsh impact on rural schools. “[D]istance, geography, poverty, housing discrimination, and lack of access to transportation” all affect access to ESAs. Annabelle V. González, *Who Benefits from Leaving the “Bad” School?*, 14 FIU L. Rev. 649, 660 (2021) (quoting Monique Langhorne, *The African American Community: Circumventing Compulsory Education Systems*, 33 Beverly Hills B. Ass’n J. 12, 24 (2000)). The legislature has obligated itself to consider legislation’s impact on education in rural areas. See § 20-9-309(3)(b), MCA (legislature must consider, at a minimum, “the needs of isolated schools with low population densities”).

ANSWER: Paragraph 73 contains a mix of factual and legal allegations. The legal allegations require no response. Intervenor-Defendant is without sufficient knowledge to admit or deny the factual allegations and therefore denies them.

74. “Similar education funding cuts have stronger negative implications for achievement in rural districts.” Emily Rauscher, *Does Money Matter More in*

the Country? Educ. Funding Reductions & Achievement in Kansas, 2010–2018, 6 AERA Open, 1 (Oct.–Dec. 2020). A set-sum reduction in funding generally draws down a larger proportion of rural districts’ budgets. *Id.* Rural districts cannot match larger urban districts’ economies of scale, and must spend more money per pupil to provide the same services. *See* Tammy Kolbe et al., *The Additional Cost of Operating Rural Schools: Evidence from Vermont*, 7 AERA Open (Feb. 2021).

ANSWER: Paragraph 74 contains a mix of factual and legal allegations. The legal allegations require no response. Intervenor-Defendant denies the factual allegations.

75. Indeed, Montana’s special education cooperatives system exists because the cost of providing specialized services, such as speech or physical therapists and psychologists, can be prohibitive for smaller districts. To maximize their special education services, “small- and mid-sized school districts usually pool their resources by forming a cooperative.” *Understanding Mont. Sch. Fin.*, at 12.

ANSWER: Paragraph 75 contains a mix of factual and legal allegations. The legal allegations require no response. Intervenor-Defendant denies the factual allegations.

CLAIMS FOR RELIEF

COUNT I:

(Violation of the Prohibition on Appropriations to Private Entities

Mont. Const. art. V, § 11(5)

76. Plaintiffs incorporate all foregoing allegations.

ANSWER: Intervenor-Defendant incorporates all responses to the foregoing allegations.

77. The Montana Constitution provides: “No appropriation shall be made for religious, charitable, industrial, educational, or benevolent purposes to any private individual, private association, or private corporation not under control of the state.” Mont. Const. art. V, § 11(5).

ANSWER: Paragraph 77 contains legal conclusions to which no response is required. To the extent it contains any factual allegations, Intervenor-Defendant denies those allegations.

78. HB 393 routes state treasury money to private institutions at the discretion of private individuals. HB 393 obligates local school districts to use their general funds, which largely comprise local property tax and state tax base dollars, to fund ESAs. Using these funds to directly benefit private entities violates Article V, Section 11(5). *See Hollow*, 222 Mont. at 486, 723 P.2d at 232; *White*, 233 Mont. at 86, 759 P.2d at 974.

ANSWER: Paragraph 78 contains legal conclusions to which no response is required. To the extent it contains any factual allegations, Intervenor-Defendant denies those allegations.

79. Without continuous taxpayer funding otherwise intended for the school districts’ general funds, HB 393 cannot exist.

ANSWER: Intervenor-Defendant denies Paragraph 79 as stated.

80. Because HB 393 violates Montana Constitution Article V, Section 11(5), Plaintiffs request that the Court declare it unconstitutional and unenforceable.

ANSWER: Intervenor-Defendant denies Paragraph 80 and denies that Plaintiffs are entitled to any relief.

COUNT II:

**(Violation of the Right to Equality of Education, Mont. Const. art. X, § 1(1)
and implementing statutes, including § 1-2-113, MCA)**

81. Plaintiffs incorporate all foregoing allegations.

ANSWER: Intervenor-Defendant incorporates all responses to the foregoing allegations.

82. The Montana Constitution provides: “It is the goal of the people to establish a system of education which will develop the full educational potential of each person. Equality of educational opportunity is guaranteed to each person of the state.” Mont. Const. art. X, § 1(1).

ANSWER: Paragraph 82 contains legal conclusions to which no response is required. To the extent it contains any factual allegations, Intervenor-Defendant denies those allegations.

83. As a result, equality of education is a constitutional guarantee. *Helena Elem.*, 236 Mont. at 52–53, 769 P.2d at 689. To meet this guarantee, the state must distribute funding to school districts equitably. *Columbia Falls Elem.*, ¶ 22.

ANSWER: Paragraph 83 contains legal conclusions to which no response is

required. To the extent it contains any factual allegations, Intervenor-Defendant denies those allegations.

84. School funding does not function on a “one-in, one-out” model. HB 393 impermissibly takes a student’s per-ANB associated cost out of school districts’ general funds and passes it into private hands on a reimbursement basis with few requirements and little oversight. The school district is poorer while total operational costs—including teacher salaries—remain largely unchanged.

ANSWER: Paragraph 84 contains a mix of factual and legal allegations. The legal allegations require no response. Intervenor-Defendant denies the factual allegations.

85. To recoup the funding deficit, school districts and local governments must raise property taxes, forcing public schools into impermissible “excessive reliance” on property tax levies to maintain a constitutional standard of free appropriate public education. *Helena Elem. Sch.*, 236 Mont. at 55, 769 P.2d at 690.

ANSWER: Paragraph 85 contains a mix of factual and legal allegations. The legal allegations require no response. Intervenor-Defendant denies the factual allegations.

86. As part of the legislature’s obligation to guarantee equality of education, § 1-2-113(1), MCA, provides that when a law “requires a school district to perform an activity or provide a service or facility and that will require the direct expenditure of additional funds,” the legislature must provide a source of funding “other than the existing property tax mill levy.” *See Columbia Falls*

Elem., ¶ 57 (Rice, J., concurring).

ANSWER: Paragraph 86 contains legal conclusions to which no response is required. To the extent it contains any factual allegations, Intervenor-Defendant denies those allegations.

87. Accordingly, a law that fails to provide non-levy funding cannot take effect until the legislature provides an appropriate and specific means of funding. Section 1-2-113(1), MCA.

ANSWER: Paragraph 87 contains legal conclusions to which no response is required. To the extent it contains any factual allegations, Intervenor-Defendant denies those allegations.

88. HB 393 draws money from school districts' general funds, which consist in large part of property tax dollars. The legislature provided no alternative means of financing ESAs.

ANSWER: Paragraph 88 contains a mix of factual and legal allegations. The legal allegations require no response. Intervenor-Defendant denies the factual allegations.

89. Given that HB 393 is impermissibly funded, Plaintiffs request that the Court declare it unlawful and unenforceable until the legislature complies with § 1-2-113, MCA, by providing an appropriate means of funding.

ANSWER: Intervenor-Defendant denies Paragraph 89 and denies that Plaintiffs are entitled to any relief.

90. And because HB 393 violates Montana Constitution Article X, Section 1(1),

Plaintiffs request that the Court declare it unconstitutional and unenforceable.

ANSWER: Intervenor-Defendant denies Paragraph 90 and denies that Plaintiffs are entitled to any relief.

COUNT III:

(Violation of the Prohibition on Unappropriated Payments,

Mont. Const. art VIII, § 14,

And the Nondelegation Doctrine, Mont. Const. art. V. § 1)

91. Plaintiffs incorporate all foregoing allegations.

ANSWER: Intervenor-Defendant incorporates all responses to the foregoing allegations.

92. Article VIII, Section 14 provides: “[N]o money shall be paid out of the treasury unless upon an appropriation made by law and a warrant drawn by the proper officer in pursuance thereof.” Mont. Const. art VIII, § 14.

ANSWER: Paragraph 92 contains legal conclusions to which no response is required. To the extent it contains any factual allegations, Intervenor-Defendant denies those allegations.

93. Thus, Article VIII, Section 14 requires that state treasury money be spent only by appropriation. *Huber*, 171 Mont. at 460, 558 P.2d at 1134; *Grossman*, 209 Mont. at 461–62, 682 P.2d at 1336–37; *see also Nicholson*, 265 Mont. at 415, 877 P.2d at 491.

ANSWER: Paragraph 93 contains legal conclusions to which no response is required. To the extent it contains any factual allegations, Intervenor-

Defendant denies those allegations.

94. HB 393 funds ESAs solely from the local school districts' general funds. Ex. A, HB 393 § 9(3)(a).

ANSWER: Paragraph 94 contains legal conclusions to which no response is required. To the extent it contains any factual allegations, Intervenor-Defendant denies those allegations.

95. General funds—"the largest and most important part of a school district's overall budget"—are largely derived from taxation and considered money in the state treasury. *Columbia Falls Elem.*, ¶¶ 24–25.

ANSWER: Paragraph 95 contains a mix of factual and legal allegations. The legal allegations require no response. Intervenor-Defendant denies the factual allegations.

96. HB 393 fails to specifically appropriate the ESA money that reimburses private spending. Nor does it place any limitation on the number of ESA accounts that may be created or the amount of money that may be used to fund them.

ANSWER: Paragraph 96 contains a mix of factual and legal allegations. The legal allegations require no response. Intervenor-Defendant denies the factual allegations.

97. Article V, Section 1 provides: "The legislative power is vested in a legislature consisting of a senate and a house of representatives."

ANSWER: Paragraph 97 contains legal conclusions to which no response is required. To the extent it contains any factual allegations, Intervenor-

Defendant denies those allegations.

98. When delegating power, the legislature must provide standards by which that power is exercised. *Huber*, 171 Mont. at 457, 558 P.2d at 1132; *Douglas*, 174 Mont. at 39, 568 P.2d at 534.

ANSWER: Paragraph 98 contains legal conclusions to which no response is required. To the extent it contains any factual allegations, Intervenor-Defendant denies those allegations.

99. HB 393 also delegates standardless spending authority over the reimbursements to the Superintendent of Public Instruction. *See, e.g.*, Ex. A, HB 393, § 4(1)(l) (authorizing reimbursement for “any other educational expense approved by the superintendent of public instruction”).

ANSWER: Paragraph 99 contains legal conclusions to which no response is required. To the extent it contains any factual allegations, Intervenor-Defendant denies those allegations.

100. Because HB 393 violates Montana Constitution Article VIII, Section 14, and Article V, Section 1, Plaintiffs request that the Court declare it unconstitutional and unenforceable.

ANSWER: Intervenor-Defendant denies Paragraph 100 and denies that Plaintiffs are entitled to any relief.

COUNT IV:

(Violation of Supervision & Control Vested in Local Board of Trustees

Mont. Const. art X, § 8)

101. Plaintiffs incorporate all foregoing allegations.

ANSWER: Intervenor-Defendant incorporates all responses to the foregoing allegations.

102. The Montana Constitution provides: “The supervision and control of schools in each school district shall be vested in a board of trustees to be elected as provided by law.” Mont. Const. art X, § 8.

ANSWER: Paragraph 102 contains legal conclusions to which no response is required. To the extent it contains any factual allegations, Intervenor-Defendant denies those allegations.

103. Local boards of trustees exercise control over, *inter alia*, their respective school districts’ budget and financial business.

ANSWER: Paragraph 103 contains legal conclusions to which no response is required. To the extent it contains any factual allegations, Intervenor-Defendant denies those allegations.

104. HB 393 usurps local control from the board of trustees by requiring nondiscretionary expenditures out of school districts’ general funds.

ANSWER: Paragraph 104 contains legal conclusions to which no response is required. To the extent it contains any factual allegations, Intervenor-Defendant denies those allegations.

105. Because HB 393 violates the Montana Constitution Article X, Section 8, Plaintiffs request that the Court declare it unenforceable and unconstitutional.

ANSWER: Intervenor-Defendant denies Paragraph 105 and denies that

Plaintiffs are entitled to any relief.

PRAYER FOR RELIEF

1. A declaratory judgment that HB 393 is unconstitutional.

ANSWER: Intervenor-Defendant denies that Plaintiffs are entitled to any relief.

2. An order enjoining Defendants and all agencies, agents, and employees from enforcing any aspect of HB 393.

ANSWER: Intervenor-Defendant denies that Plaintiffs are entitled to any relief.

3. An order granting any other appropriate relief that may be necessary to enjoin implementation of HB 393.

ANSWER: Intervenor-Defendant denies that Plaintiffs are entitled to any relief.

4. An award of attorneys' fees and costs incurred in bringing this action pursuant to the Declaratory Judgment Act and the Private Attorney General Doctrine.

ANSWER: Intervenor-Defendant denies that Plaintiffs are entitled to any relief.

5. Any further relief this Court deems just and appropriate.

ANSWER: Intervenor-Defendant denies that Plaintiffs are entitled to any relief.

AFFIRMATIVE DEFENSES

1. The Plaintiffs fail to state a claim upon which relief can be granted.
2. The Plaintiffs do not have standing to assert the claims in their complaint, and accordingly, the court lacks jurisdiction over the claims.
3. The Plaintiffs claims are barred by illegality because they seek to compel action that would violate the First Amendment or Fourteenth Amendment of the U.S. Constitution.

Respectfully submitted,

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**Pro Hac Vice Application To Be Filed*