UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

LASHAWN ROBINSON, et al.,	:	
Plaintiffs,	:	
v.	:	
	:	No. 3:18-cv-00274 (SRU)
DIANNA WENTZELL, et al.,	:	
Defendants;	:	
ELIZABETH HORTON SHEFF, et al.,	:	
Defendants-Intervenors.	:	

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO INTERVENE

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The proposed intervenors Elizabeth Horton Sheff on her own behalf; Aldwin Allen on behalf of his minor children J.A., L.A. and M.A.; Suzann Beckett on behalf of her minor children A.B. and H.B.; Charles E. Hollis and Sandra Vermont-Hollis on behalf of their minor child S.H.; Tyasha Adams Roberts on behalf of her minor child G.M.; Amanda Soto on behalf of her minor child T.S.; and Nordia Stone on behalf of her minor children G.P. and M.S. (collectively, "Intervenors" or the "*Sheff* plaintiffs") are the parents and grandparents of Black, Latino, and white students in Hartford who currently attend public or magnet schools. Intervenors are the only parties that include children in magnet and Open Choice schools who are directly impacted by *Robinson*-Plaintiffs' attack on the lottery and the reduced isolation standard. Intervenors are also plaintiffs or proposed plaintiffs[1] in *Sheff v. O'Neill*, LND-HHD-CV-17504066-S (Conn. Super. Ct.), the ongoing state court litigation, which was brought against the Governor and Commissioner of the State Department of Education ("SDE") (collectively, the "State Defendants") to challenge the racial and economic segregation of the schools in the City of Hartford ("Hartford") and its surrounding suburbs. The State Defendants are also Defendants in the present *Robinson* litigation.

Sheff was filed by Intervenors in 1989 and decided by the Connecticut Supreme Court in 1996. Like *Brown v. Board of Education*, 347 U.S. 483 (1954), and its progeny, *Sheff*'s purpose was and continues to be the "elimination of racial isolation in the schools [which] promotes the attainment of equal educational opportunity and is beneficial to all students, both black and white." *Sheff v. O'Neill*, 678 A.2d 1267, 1285 (Conn. 1996) (quoting *Lee v. Nyquist*, 318 F. Sup. 710, 714 (W.D.N.Y. 1970) (three-judge court), *aff'd* 402 U.S. 935 (1971)). Integration "helps to break down racial stereotypes, . . . enables students to better understand persons of different races[,] . . .

[1] Ms. Horton Sheff and Mr. Allen are currently plaintiffs in the *Sheff* litigation. The remaining Intervenors have recently moved to be added as plaintiffs in the *Sheff* litigation.

promotes learning outcomes, and better prepares students for an increasingly diverse workforce and society." *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2210 (2016) (internal citation and quotation marks omitted).

Only in 2003, did the State Defendants establish the current iteration of the complex system of voluntary desegregative inter-district magnet schools and voluntary inter-district transfer programs ("*Sheff* remedies"), which now serves tens of thousands of students. Students who wish to employ the *Sheff* remedies are assigned to schools through a lottery. To counteract the discriminatory effect of segregated housing, the lottery's algorithm considers, among other factors, where the applicant lives when assigning students to magnet schools. The lottery also permits students to apply for "Open Choice" transfers to public schools outside of their assigned district.

To assess whether the magnet schools are in fact desegregated, a magnet school is considered integrated or "compliant" if Black or Latino ("minority") students constitute no more than 75 percent of total enrollment (the "reduced isolation standard"). Federal courts commonly use similar standards to measure compliance with desegregation orders. *See, e.g.*, *Davis v. New York City Hous. Auth.*, 278 F.3d 64, 80-81 (2d Cir. 2002); *United States v. Yonkers Bd. of Educ*., 837 F.2d 1181, 1215 (2d Cir. 1987). The reduced isolation standard does not determine where students are assigned to schools; student assignment is decided through the race-neutral lottery. In fact, the Hartford magnets' demographics range from 57 to 84 percent minority student enrollment.

Today, the *Sheff* remedies have resulted in significant progress: nearly half of Hartford-resident minority students now attend integrated, high quality schools. Troublingly, however, the remainder of Hartford students are still trapped in racially isolated schools. Intervenors share the frustration of *Robinson*-Plaintiffs that too few magnet seats have been authorized and funded by the State Defendants causing too many students to remain on waiting lists for magnet schools. The

goal of the *Sheff* litigation has always been to offer all Hartford students the opportunity to attend integrated, high quality schools. In the *Sheff* litigation, Intervenors are presently seeking to expand options so that every Hartford lottery applicant is offered a seat in a magnet or Open Choice school.

Nevertheless, Intervenors fundamentally disagree with *Robinson*-Plaintiffs that integration must be sacrificed for minority students to attend successful schools. As the state superior court recently reiterated, "in the field of public education the doctrine of 'separate but equal' has no place. 'Separate educational facilities are inherently unequal.'" *Sheff v. O'Neill*, LND-HHD-CV-17504066-S, 2017 WL 4812624, at *5 (Conn. Super. Ct. Aug. 7, 2017) (quoting *Brown*, 347 U.S. at 495). Consistent with the U.S. Constitution, the *Sheff* remedies properly seek to address the system of extreme racial segregation and educational inequalities that existed and, in many ways, still exists in Hartford and the suburbs. Intervenors thus oppose *Robinson*-Plaintiffs' attempt to effectively end these integration efforts and return to a "separate but equal" educational paradigm.

Contrary to *Robinson*-Plaintiffs' arguments, the thousands of Hartford-resident minority students who have applied without success to a magnet school through the lottery and the perhaps dozens of empty magnet seats stem not from the utilization of the reduced isolation standard; but rather result from the placement of funding caps and capacity limitations on the magnet schools, causing a fundamental mismatch of supply and demand. Intervenors and the State Defendants remain at odds in *Sheff* precisely because Intervenors believe that the State Defendants are not doing enough to fill empty seats *and* expand the magnet school capacity by, among other options, adequately funding the existing magnet schools, authorizing seat expansions, supporting new magnet school programming and construction, or effectively using data, community outreach, and alternate race-neutral lottery selection criteria. Given these differences in their positions in *Sheff*, the State Defendants cannot represent Intervenors' interests in defending the *Sheff* remedies here.

Robinson-Plaintiffs, and to some extent the State Defendants in the *Sheff* litigation, seek retrenchment from the current standards that offer quality, integrated schools for Hartford students. But "equity cannot favor more segregation." *Sheff*, 2017 WL 4812624 at *5. Intervenors seek to protect their substantial interest in asserting their federal and state constitutional right to integrated schools and in maintaining and expanding the *Sheff* remedies ordered by the Connecticut courts.

Accordingly, Intervenors respectfully submit this Memorandum in support of their Motion to Intervene as of right or, alternatively, by permission under Federal Rule of Civil Procedure 24.

I. FACTUAL BACKGROUND

A. The Federal, State and Local Governments' Roles in Racial Segregation in Hartford.

At the time of *Brown* in 1954, Hartford and its suburbs were already racially segregated. Intentional racial discrimination in housing and school-siting choices made by federal, state, and municipal governments had long forced Black and Latino people to live and learn apart from white people in Hartford and the suburbs. In the 1940s and 1950s, federal, state, and local authorities intentionally developed public housing projects that concentrated low-income people of color in northeastern Hartford. Susan Eaton, *The Children in Room E4* 49 (Algonquin Books 2007). At the same time, government subsidized mortgage loans encouraged white people to move out of Hartford and into all-white suburban enclaves. Meanwhile, Black and Latino people were locked out of those same suburbs by "redlining": the explicit refusal of the government to back home loans in racially-integrated neighborhoods. *Id.* at 53-54. The State funded the construction of schools in segregated neighborhoods, assuring that schools would open with all-minority or all-white student bodies.

The State also maintained a 1909 law that required all children to attend schools within the district in which they reside, Connecticut General Statutes § 10-184, and a 1941 state law that set

the borders of school districts to coincide with town boundaries, *id*. § 10-240. These laws meant that the boundaries of the City of Hartford and its school district were coterminous. The predictable result was a poor, minority district in Hartford, surrounded by affluent, white suburban districts.

B. The State's Knowledge of the Causes of Segregation and Refusal to Remedy It.

The State of Connecticut has long been aware of the racial impact of its actions and inactions. In the years after *Brown*, the State and Hartford commissioned numerous studies that identified intentional discrimination as the cause of segregation and recommended specific actions the State could take to remedy segregation, all of which they knowingly declined to undertake. For example, in 1965, Hartford hired consultants from Harvard University who concluded that racial segregation caused educational damage to minority children; that low educational achievement in Hartford schools was closely correlated with high poverty levels among the student population; and that a plan should be adopted, with inter-district transfers funded by the State, to place children of color in suburban schools. *See* Harv. Univ. Grad. Sch. of Educ., Ctr. for Field Studies, *Schools for Hartford* (1965), https://bit.ly/2jGpnar. In response to intense white opposition, officials refused to act on this proposal. M.A. Faber, *Harvard Plan Seen Doomed by Hearing*, Hartford Courant, Nov. 24, 1965. Likewise, in 1969, the State's Legislature declined to fund the construction of racially-integrated, inter-district "educational-parks," which—like the present-day magnet schools—would have offered superior academic facilities to attract students from Hartford and the suburbs. Gary Orfield & Jongyeon Ee, *Connecticut School Integration: Moving Forward as the Northeast Retreats*, at 11, The Civil Rights Project (Apr. 2015), https://bit.ly/2jHa41j.

In 1969, the Legislature passed the Racial Imbalance Law, requiring school desegregation in every Connecticut school district. The Legislature had to preapprove any rules issued by the SDE to enforce this law. From 1969 to 1980, the Legislature bowed to opposition to inter-district

desegregation and refused to approve any rules. The rules that were finally adopted by the Legislature required desegregation within, but not between, districts. *A Cautious Step Toward Racial Balance*, Hartford Courant, Mar. 26, 1980. According to Black legislators, the mostly white Legislature's failure to adopt rules requiring inter-district desegregation was the result of intentional discrimination. Carol Giacomo, *Legislative Panel Backs Racial Imbalance Rules*, Hartford Courant, Feb. 27, 1980.

In 1978, the State's Commission on Human Rights and Opportunities found that towns had used exclusionary zoning laws to keep "large portions of the State's population from residing within the boundaries of their towns" and concluded that "Connecticut, by its zoning enabling legislation, has made possible the practices which, together with other public and private discriminatory acts, increase the degree of separation between higher and lower income groups and between whites and minorities." Eaton, *supra*, at 59-60 (quoting Conn. Comm'n. on Hum. Rts. and Opportunities, *The Status of Zoning in Connecticut Equal Housing Opportunity*, at 17 (May 1978)). The SDE also concluded in January 1988 that, absent further action, the State could be held liable for violating the U.S. Constitution because of the existence of inter-district segregation in greater Hartford. Conn. State Dept. of Educ., *A Report on Racial/Ethnic Equity and Desegregation in Connecticut's Public Schools*, at 8-10, 20 (Jan. 1988), https://bit.ly/2I2mm2H. But the State simply allowed these racial inequalities fester.

Accordingly, despite the State's awareness of the causes of segregation, that segregation limited the educational achievement of students, that the State could be held liable for not acting, and that specific programs existed that could remedy this segregation, the State still refused to act.

C. Intervenors File *Sheff* in Response to the State's Persistent Failure to Desegregate.

On April 26, 1989, after decades of frustration, Black, Latino, and white school children in Hartford and the suburbs filed the *Sheff v. O'Neill* lawsuit in state superior court to challenge the racial and economic isolation in greater Hartford. At that time, while 91 percent of Hartford school children were Black or Latino, and nearly half lived below the poverty line, Hartford was surrounded by middle- or upper-class suburbs that were virtually all-white.

This separate and unequal school system hampered the educational achievement of Hartford students as compared to suburban students. In 1988, according to the Statewide Mastery Test program, which was administered to all fourth, sixth and eighth grade students and was meant to test whether children had learned essential skills, 70 percent of Hartford's fourth graders scored below even the lowest level in reading, yet only 9 percent of Avon and Simsbury suburban students did as poorly. In math, 57 percent of Hartford's eighth graders scored below the remedial level, while less than 10 percent of students in West Hartford, Avon, Simsbury and other suburbs did. Eaton, *supra*, at 107.

On July 9, 1996, after seven years of litigation, the Connecticut Supreme Court found that the "public elementary and high school students in Hartford suffer daily from the devastating effects that racial and ethnic isolation, as well as poverty, have had on their education," and that Connecticut's state constitution required the State Defendants to "take further measures to relieve the severe handicaps that burden these children's education." *Sheff*, 678 A.2d at 1270.

The *Sheff* plaintiffs did not pursue or allege claims of intentional discrimination in the State Supreme Court. *Id*. at 1274-75. And they did not have to. *Id*. Instead, they argued, and the Court agreed, that proof of intentional discrimination was unnecessary because the State Constitution—unlike the federal and most other state constitutions—includes an affirmative state duty to provide

public education and an express prohibition against segregation. *Id*. at 1279. The Court held that the state laws that required Hartford students to attend schools within the city's boundaries, separated from their suburban counterparts, violated the State Constitution. But it stayed its hand in imposing a remedy. Instead, the Court directed the State Defendants and the Legislature to "put the search for appropriate remedial measures at the top of their respective agendas." *Id*. at 1290.

D. The State's Further Recalcitrance

In 1997, in response to the *Sheff* decision, the Legislature passed major new legislation that established the basic structure of the current *Sheff* remedies: two-way, voluntary integration programs, including the building of new magnets, and a greatly expanded version of the earlier "Project Concern" inter-district student transfer program, which later became Open Choice.

From 2003 until 2016, the *Sheff* remedies operated pursuant to a series of temporary stipulations between the *Sheff* parties. In early 2003, the *Sheff* parties agreed to the five-year, court-ordered "Phase I" stipulation. The Phase I Stipulation anticipated, among other things, the construction in Hartford of eight magnet schools which would enroll approximately 600 students each, and the utilization of the Open Choice program to place hundreds of Hartford minority students in suburban schools. This agreement led to the current comprehensive regional education system called the Regional School Choice Office ("RSCO") that is operated collaboratively by the SDE, Hartford and 27 "Open Choice" suburban districts and the operators of over 40 magnet schools. On April 4, 2008, the parties entered a second five-year "Phase II" Stipulation and order. A one year-extension agreement, dated April 30, 2013, continued the Phase II Stipulation through June 30, 2014. On December 13, 2013, the *Sheff* parties adopted the "Phase III" Stipulation, which set forth a plan through June 30, 2015. The parties twice extended the Phase III stipulation for one year in 2015 and 2016. The most recent stipulation ended on June 30, 2017.

The *Sheff* parties have been unable to reach a further agreement.

On May 30, 2017, the Intervenors filed a motion in state superior court seeking further implementation of the 1996 decision, which the State Defendants opposed. The State Defendants instead sought to *increase* racial isolation by defining an integrated school as one where up to 80 percent of students are Black or Latino—rather than the current standard of 75 percent—in part arguing that this will address the issue of empty seats. *Sheff*, 2017 WL 4812624, at *6.

After a three-day evidentiary hearing, in an oral ruling from the bench and in a written opinion dated August 7, 2017, the state superior court denied the State Defendants' request to increase the reduced isolation standard and sided with Intervenors. *Id.* at *5. As Judge Berger explained: "the RSCO lottery system is extraordinarily complex and subject to a great number of variables. Two such variables concern the cap on funding for each school and the estimated physical capacity of each school." *Id.* at *4. The court temporarily enjoined the State Defendants from adopting an 80 percent minority reduced isolation standard and it affirmed that the current 75 percent minority reduced isolation standard is a necessary aspect of the *Sheff* remedies. In addition, Judge Berger extended the Phase III Stipulation until further notice to the *Sheff* parties.

As the state court recognized, the "empty seats cannot simply be filled without recognizing the mandates of *Brown* and *Sheff*." *Id.* at *5. While changing the standard may create a few additional seats for waitlisted minority students, common sense shows that an 80 percent standard merely compounds the problem of racial isolation over time: if 80 percent is acceptable, why not 90 or 100 percent? Intervenors agree with the goal of providing additional magnet school seats to minority students, but Intervenors reject the idea that an integrated education system must be sacrificed toward that end and reject the idea that there are no effective ways to achieve that goal.

E. The *Sheff* Remedies Today

Today, nearly half of Hartford students attend reduced isolation schools as a part of the *Sheff* remedies. As of 2017-2018 school year, a total of 18,963 students attend the over 40 magnet schools managed by the Capitol Region Education Council, Goodwin College, the Hartford school district, several of the suburban districts, and numerous other operators. Another 2,300 students participate in Open Choice and attend 140 public and technical schools in 27 different districts.

An academic study and recent data on student performance confirm that Hartford students attending integrated regional magnet schools or attending suburban schools through Open Choice are outperforming Hartford students attending traditional public schools. *See* Stephanie Summers, *Magnet Schools Provide Academic and Social Benefits, Study Reports*, Univ. of Conn., June 1, 2010, https://bit.ly/2wkOwkg; *see also* The Sheff Movement, *Measuring Progress: Academic Outcomes* (May 2014), https://sheffmovement.org/measuring-progress/. Magnet and Open Choice students also perform extremely well in relation to Connecticut's state averages for all students on the Connecticut Mastery Test for grades three to eight. In addition, graduation rates for Hartford students attending the regional magnet high schools exceed rates for many suburban high schools.

The present action threatens to derail the progress for which Intervenors have long fought. *Robinson*-Plaintiffs allege that they were not able to gain admission to magnet schools because of the reduced isolation standard adopted as a part of the *Sheff* remedies. But the reduced isolation standard *does not* determine who is assigned to any schools; it is merely a measure used by the *Sheff* parties to assess whether magnets indeed have diverse student bodies *after* the race-neutral lottery has assigned students to schools.

The lottery system's algorithm does not consider race, it instead considers geography as a factor to counteract the impact of segregated housing on school assignments. The U.S. Constitution

lets the State "pursue the goal of bringing together students of diverse backgrounds and races through . . . general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 789 (2007) (Kennedy, J., concurring in part, and concurring in judgment). The Constitution "does not impugn [state] authorities' race-neutral efforts to encourage revitalization of communities that have long suffered the harsh consequences of segregated housing patterns. When setting their larger goals, [state] authorities may choose to foster diversity and combat racial isolation with race-neutral tools, and mere awareness of race in attempting to solve the problems facing inner cities does not doom that endeavor at the outset." *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2525 (2015).

If this Court were to hold that the mere use of a reduced isolation standard as a tool of measuring the effectiveness of the comprehensive *Sheff* remedies violates the U.S. Constitution, the significant progress made in the *Sheff* case will be lost. This Court should not allow that result.

II. ARGUMENT

A. Intervenors are Entitled to Intervene as of Right Pursuant to Federal Rule of Civil Procedure 24(a).

Intervention as of right is governed by Rule 24(a). Here, all four of the required conditions are met: (1) the motion is timely; (2) Intervenors assert interests relating to the issues that are the subject of the action; (3) disposition of the action as a practical matter will impair the Intervenors' ability to protect their interests; and (4) Intervenors' interests are not adequately represented by the other parties. Fed. R. Civ. P. 24(a)(2); *see Brennan v. N.Y.C. Bd. of Educ.*, 260 F.3d 123, 127 n.3 (2d Cir. 2001); *Oneida Indian Nation of Wis. v. New Y*ork, 732 F.2d 261, 266 (2d Cir. 1984).

1. Intervenors' Motion Is Timely.

Robinson Plaintiffs filed their complaint on February 15, 2018. This Motion is filed less than three months later on May 8, 2018. Discovery has not commenced, nor have the pleadings closed. There is no prejudice to the parties in permitting intervention at this early stage of litigation. *See Pike Co. v. Universal Concrete Prod., Inc.,* 284 F. Supp. 3d 376, 394 (W.D.N.Y. 2018).

2. Intervenors Have a Substantial Interest in the Litigation.

Intervenors sued the State Defendants in 1989 and have litigated the *Sheff* case in the Connecticut state courts for nearly three decades to establish the diverse schools that *Robinson*-Plaintiffs want to do away with. Intervenors have a significant interest in expanding and protecting the *Sheff* remedies that they have achieved and use in accordance with their state and federal constitutional rights to desegregated schools.

3. Intervenors' Interests Will Be Affected by the Disposition of the Litigation.

The third factor looks to whether the proposed intervenor has an adversely affected legal interest. *Pike Co.,* 284 F. Supp. 3d at 397. This case will inevitably implicate decisions made and actions taken by Intervenors in the ongoing *Sheff* case. *Robinson*-Plaintiffs argue that the existing means of desegregating students violates the federal Constitution. ECF No. 1 at 17-18. *Robinson*-Plaintiffs seek an end to the very remedies that Intervenors won, and that Intervenors want to improve on in the *Sheff* case: magnet schools and the operative reduced isolation standard.

Absent intervention, Intervenors' rights in the ongoing *Sheff* litigation in state court may be fully eclipsed by the disposition of this federal litigation. The present litigation includes only the families of students who oppose the reduced isolation standard and the State Defendants who also opposed the current reduced isolation standard. Intervenors' participation is needed to ensure a vigorous, complete defense of the gains made in the *Sheff* litigation and the *Sheff* remedies.

4. Intervenors' Interests Are Not Adequately Represented by Defendants.

Finally, mandatory intervention is warranted because Intervenors' interests are not "adequately represent[ed]" by "the existing parties." Fed. R. Civ. P. 24(a)(2). Courts must permit intervention under this factor unless the interests of existing parties are "so similar to those of [Intervenors] that adequacy of representation [is] assured." *Brennan*, 260 F.3d at 132-33.

First, because the objectives of Intervenors differ from those of Defendants, Defendants cannot adequately represent the interests of Intervenors. Indeed, Intervenors and Defendants are directly opposed to one another in the *Sheff* litigation as to certain aspects of the current school assignment system, including the reduced isolation standard. *See Sheff*, 2017 WL 4812624, at *3.

While *Robinson*-Plaintiffs allege here that the challenged systems are enforced and implemented by Defendants, in fact, the State Defendants have acted only when Intervenors compelled them to do so in state court. For example, only after Intervenors moved for further relief were the *Sheff* parties able to reach agreements in 2003 and 2008 setting the standards for measuring reduced isolation and increasing the number of Hartford students in integrated settings.

Second, because Intervenors may "raise[ ] different legal arguments to support the [*Sheff* remedies], [their] interest may not be adequately represented" by Defendants who may not raise the same arguments. *Olympus Corp. v. United States*, 627 F. Supp. 911, 916 (E.D.N.Y. 1985), *aff'd* 792 F.2d 315 (2d Cir. 1986), *disapproved of on other grounds by K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281 (1988). Intervenors and Defendants may both argue that the *Sheff* remedies involve no racial classifications and therefore rational basis review applies because no individual student assignment decisions are made based on race. Instead, the lottery considers, among other factors, where applicants live. While the *Sheff* remedies are race conscious, the administration of the lottery "treats all persons equally" regardless of race. *Hayden v. County of Nassau*, 180 F. 3d

42, 49-50 (2d Cir. 1999). A system "that, on its face, relies exclusively on a student's home address is necessarily race neutral." *Lewis v. Ascension Par. Sch. Bd.*, 806 F.3d 344, 356 (5th Cir. 2015).

However, should this Court determine that the race-neutral lottery program does involve racial classifications—a position that Intervenors emphatically reject—this Court may apply strict scrutiny to the *Sheff* remedies. Thereafter, to survive strict scrutiny, Defendants and Intervenors would be required to show that the *Sheff* remedies are narrowly tailored to serve a compelling state interest. *Fisher*, 136 S. Ct. at 2208. Generally, there are two defenses to constitutional attacks on remedial orders that use racial classifications, only one of which the State Defendants might raise.

One defense, which Intervenors and Defendants will likely pursue together, is that the State has compelling governmental interests in "the educational benefits that flow from student body diversity," *id*. at 2210 (citation omitted), and in complying with the State Constitution, *see Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y.*, 502 F.3d 136, 148-49 (2d Cir. 2007) (holding that a state university's nondiscrimination regulations served a compelling state interest even though those regulations went further than federal civil rights law); *see also Parents Involved*, 551 U.S. at 783 (Kennedy, J., concurring in part and concurring in judgment) (agreeing with four other justices that diversity is a "compelling educational goal"). Here, any purported racial classifications are narrowly tailored to meet those compelling interests.

Another defense, which Defendants have not raised here, is that any purported racial classifications are necessary to meet the compelling state interest in remedying past unlawful discrimination by state actors in violation of the federal Constitution or civil rights laws. *Hayden*, 180 F.3d at 51. Intervenors may argue that, even absent the *Sheff* decision, Defendants knew about their potential liability under the U.S. Constitution or federal laws for the inter-district segregation in Hartford and its suburbs, *supra* at 4-7; and that Defendants had a strong basis in evidence for

avoiding that liability by preemptively acting on their duty to eliminate all vestiges of segregation from the region's schools. *See United States v. City of Yonkers*, 96 F.3d 600, 622 (2d Cir. 1996). The Answers of Defendants do not raise this affirmative defense and Defendants face powerful disincentives that might stop them from ever doing so. Intervenors face no such constraints. Absent intervention then, Intervenors will be deprived of the opportunity to raise this important defense.

Accordingly, Intervenors' presence in this action is necessary to adequately represent their interest in continuing their efforts to fully desegregate Hartford schools through the *Sheff* remedies.

B. <u>In the Alternative, Permissive Intervention Is Appropriate.</u>

In the alternative, Intervenors request an order granting permissive intervention to allow resolution of the questions of fact and law that their defenses have in common with the main case. Fed. R. Civ. P. 24(b). Under Federal Rule 24(b)(1), a judge may grant non-statutory permissive intervention when a party: (1) "has a claim or defense that shares with the main action a common question of law or fact" and (2) seeks to intervene "on timely motion." *Id.* "The principal consideration for the court in exercising its discretion is 'whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.'" *Bridgeport Guardians v. Delmonte*, 227 F.R.D. 32, 34 (D. Conn. 2005) (quoting Fed. R. Civ. P. 24(b)). Courts also consider other factors like "whether parties seeking intervention will significantly contribute to full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented." *Schaghticoke Tribal Nation v. Norton*, No. 3:06-cv-81, 2006 WL 1752384, at *8 (D. Conn. June 14, 2006) (citation and internal quotations omitted).

First, Intervenors' claims have questions of fact and law in common with those presented by the parties in the present action. Like *Robinson*-Plaintiffs, Intervenors are residents of Hartford who have applied for magnet or Open Choice schools through the lottery. And, like Defendants,

Intervenors will defend the constitutionality of the *Sheff* remedies as race-neutral or as necessary to address compelling state interests. *See Comer v. Cisneros*, 37 F.3d 775, 801-02 (2d Cir. 1994) (granting intervention to minority residents who had applied for or were denied housing subsidies where the existing plaintiffs were challenging that subsidies program).

Additionally, this Motion is timely for the reasons discussed above at 12. Intervenors' claims would not delay this case but will in fact help to facilitate a speedy resolution of this case.

Finally, Intervenors and their counsel offer specialized expertise and great familiarity with the factual and legal issues that will "help to provide the Court with a full picture of the issues to be decided and will permit the issues to be fully and thoroughly evaluated in an efficient, just, and speedy manner." *Schaghticoke Tribal Nation*, 2006 WL 1752384, at *9. Intervenors would be the only party that includes children in magnet and open choice schools who will be directly impacted by *Robinson*-Plaintiffs' attack on the *Sheff* remedies. Intervenors' children benefit tremendously from the racial diversity in their schools and can speak to the advantages of an integrated education.

The attorneys and legal organizations representing Intervenors also bring special expertise. The NAACP Legal Defense and Educational Fund, Inc. ("LDF") undertook a coordinated legal assault against school segregation that culminated in the *Brown* decision and LDF continues to litigate dozens of school desegregation cases around the country. *See, e.g.*, *Stout v. Jefferson Cty. Bd. of Educ.*, 882 F.3d 988 (11th Cir. 2018); *Thomas v. Sch. Bd. St. Martin Par.*, 756 F.3d 380 (5th Cir. 2014), *on remand* No. 6:65-cv-11314, 2016 U.S. Dist. LEXIS 8580 (W.D. La. Jan. 21, 2016). The American Civil Liberties Union has also long challenged racial segregation in schools. *See, e.g., Brown v. Bd. of Educ. of Topeka*, 978 F.2d 585 (10th Cir. 1992). The Center for Children's Advocacy is a Connecticut-based civil rights group that challenges discriminatory policies

impacting children. And two of the attorneys representing Intervenors (Martha Stone and Dennis Parker) have worked on *Sheff* since its inception and thus bring unique knowledge and experience.

Finally, intervention will not delay the litigation, nor will intervention prejudice any party.

III. CONCLUSION

Intervenors respectfully request that this Court grant their Motion to Intervene.

Respectfully submitted on May 8, 2018 by,

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**Motions for Pro Hac Vice forthcoming*