

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

ANGELA SUMMERS and FRED DAILEY,)

Petitioners,)

Case No. _____)

v.)

EARL R. TOMBLIN, in his official capacity as the)
Governor of the State of West Virginia,)

and)

MICHAEL J. MARTIRANO, in his official)
capacity as the West Virginia State Superintendent)
of Schools,)

and)

JOHN D. PERDUE, in his official capacity as)
West Virginia State Treasurer,)

and)

WEST VIRGINIA DEPARTMENT OF)
EDUCATION,)

and)

WEST VIRGINIA BOARD OF EDUCATION,)

and)

WEST VIRGINIA STATE TREASURER'S)
OFFICE,)

Respondents.)

PETITION FOR DECLARATORY AND INJUNCTIVE RELIEF

Petitioners, Angela Summers and Fred Dailey, respectfully state the following in support of their Complaint for Declaratory and Injunctive Relief:

NATURE OF THE ACTION

1. This case presents a West Virginia taxpayer challenge to the disbursement of West Virginia funds to the Smarter Balanced Assessment Consortium (“SBAC”), an illegal interstate compact not authorized by the United States Congress, whose existence and operation violate Article I, § 10, cl. 3 of the United States Constitution and other provisions of federal and state law.

2. Since 2010, West Virginia state officials have engaged in a course of conduct that would cede a portion of West Virginia’s sovereignty over educational policy within its borders to SBAC, an interstate consortium operating under the influence of federal regulators located in Washington, D.C. Congress never sanctioned the interstate compact that created this consortium. As a result, West Virginia is poised to contribute millions of dollars of taxpayer funds during Fiscal Years 2015 and 2016 to support this illegal interstate compact.

3. Petitioners, Angela Summers and Fred Dailey, as West Virginia taxpayers, will suffer irreparable harm if such taxpayer funds are disbursed before these controversies are resolved by the Court. Because Petitioners will suffer additional irreparable harm if the relief requested is delayed, thirty days’ advance notice to the Respondents is not required in this case under W.Va. Code § 55-17-3.

PARTIES

4. Petitioner Angela Summers is a West Virginia citizen, resident, and taxpayer.

5. Petitioner Fred Dailey is a West Virginia citizen, resident, and taxpayer.

6. Respondent Governor Earl R. Tomblin is the duly elected Governor of West Virginia and is sued in his official capacity.

7. Respondent Michael J. Martirano is the duly elected West Virginia State Superintendent of Schools and is sued in his official capacity.

8. Respondent John D. Perdue is the duly elected West Virginia State Treasurer and is sued in his official capacity.

9. Respondent West Virginia Department of Education (“DOE”) is an Executive Department of the State of West Virginia established and existing under the West Virginia Code § 18 and the West Virginia State Constitution, art. XII, § 2.

10. Respondent West Virginia Board of Education (“BOE”) is a public corporation established and existing under the West Virginia State Constitution, art. XII, § 2, that is vested with the general supervision of the West Virginia public schools.

11. Respondent Office of the West Virginia State Treasurer (“Treasurer’s Office”) is an Executive Office of the State of West Virginia established and existing under the West Virginia State Constitution, art. VII, § 1.

JURISDICTION AND VENUE

12. Petitioners, Angela Summers and Fred Dailey, have standing to bring the claims contained in this Complaint as citizens, residents, and taxpayers of West Virginia. Petitioners challenge expenditures of public funds and the potential increased levy in taxes that may result if this controversy is not resolved.

13. This court has jurisdiction over this action pursuant to the West Virginia State Constitution, art. VIII, § 6 and the West Virginia Code § 51-2-2.

14. All of the Respondents are either citizens of West Virginia residing within the State or are subdivisions of the State of West Virginia.

15. Venue is proper in the Circuit Court of Kanawha County pursuant to West Virginia Code § 14-2-2, because “[a]ny suit in which the Governor, any other state officer, or a state agency is made a party Respondent” shall be brought in the Circuit Court of Kanawha County.

COMMON ALLEGATIONS

A. Federal Law Preserves and Protects State Authority over Educational Policy.

16. The Compact Clause of the United States Constitution provides that “[n]o state shall, without the consent of Congress . . . enter into any agreement or compact with another state.” U.S. CONST. art. I, § 10, cl. 3.

17. The Tenth Amendment to the United States Constitution provides that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.” U.S. CONST. amend. X.

18. It has long been recognized that educational policy is an area of core state competence and concern that is not delegated to the federal government under the Constitution and our system of federalism.

19. For nearly fifty years, federal statutes have prohibited the Federal Government—and, in particular, the federal Department of Education—from controlling educational policy, curriculum decisions, or educational-assessment programs in elementary and secondary education.

20. These statutes manifest the explicit intent of Congress that authority and control over the curriculum, programs of instruction, and administration of public schools should rest with the States and local educational agencies, not the federal Government.

21. In 1965, Congress enacted the General Education Provisions Act of 1965, 20 U.S.C. §§ 1221 *et seq.*, which provides:

No provision of any applicable program shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution, school, or school system, or over the selection of library resources, textbooks, or other printed or published instructional materials by any educational institution or school system.

20 U.S.C. § 1232a. This restriction was later made applicable to all programs administered by the federal Department of Education. 20 U.S.C. § 1221(c)(1).

22. Similarly, the Department of Education Organization Act of 1979, 20 U.S.C. §§ 3401 *et seq.*, which established the federal Department of Education, provides:

No provision of a program administered by the Secretary or by any other officer of the Department shall be construed to authorize the Secretary or any such officer to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution, school, or school system, over any accrediting agency or association, or over the selection or content of library resources,

textbooks, or other instructional materials by any educational institution or school system, except to the extent authorized by law.

20 U.S.C. § 3403(b).

23. The Department of Education Organization Act reflects Congress's clear intent that States and local governments retain control over education policy and decision making:

It is the intention of the Congress in the establishment of the Department to protect the rights of State and local governments and public and private educational institutions in the areas of educational policies and administration of programs and to strengthen and improve the control of such governments and institutions over their own educational programs and policies. The establishment of the Department of Education shall not increase the authority of the Federal Government over education or diminish the responsibility for education which is reserved to the States and the local school systems and other instrumentalities of the States.

20 U.S.C. § 3403(a).

24. Echoing these principles, the Elementary and Secondary Education Act of 1965 ("ESEA"), as amended by the No Child Left Behind Act of 2001 ("NCLB"), 20 U.S.C. §§ 6301 *et seq.*, provides that "[n]othing in this Act shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local education agency, or school's curriculum, program of instruction, or allocation of State or local resources." 20 U.S.C. § 7907(a).

25. Moreover, the ESEA prohibits the Department of Education from using funds under the statute “to endorse, approve, or sanction any curriculum designed to be used in an elementary school or secondary school.” 20 U.S.C. § 7907(b).

26. The ESEA further provides that “no State shall be required to have academic content or student academic achievement standards approved or certified by the Federal Government, in order to receive assistance under this Act.” 20 U.S.C. § 7907(c)(1).

27. In enacting the ESEA, Congress contemplated that decisions regarding “the specific types of programs or projects that will be required in school districts” would be “left to the discretion and judgment of the local public educational agencies.” H.R. Rep. No. 143, 89th Congress, 1st Session, 5 (1965).

28. “The legislative history [of the ESEA], the language of the Act, and the regulations clearly reveal the intent of Congress to place plenary responsibility in local and state agencies for the formulation of suitable programs under the Act.” *Wheeler v. Barrerra*, 417 U.S. 402, 415-16 (1975), *judgment modified on other grounds*, 422 U.S. 1004 (1975). The Act reflects “a pronounced aversion in Congress to ‘federalization’ of local educational decisions.” *Id.* at 416.

B. The Common Core State Standards Reflect an Attempt to Nationalize and Federalize State Elementary and Secondary Education Curriculum.

29. In 2009, the National Governor’s Association and the Council of Chief State School Officers announced an initiative to develop the Common Core State Standards (“Common Core”). Common Core was intended to constitute a common set of standards among most or all states to define requisite skills and knowledge in English language arts and mathematics. From its inception, Common Core was intended to

replace “the existing patchwork of state standards” with a uniform, nationalized set of standards, assessments, and curriculum, which would not vary from State to State. *See* 74 Fed. Reg. 59733 (Nov. 18, 2009).

30. At present, Common Core includes uniform assessment standards for English language arts and mathematics.

31. Common Core was finalized in or around June 2010.

32. As it has been implemented, Common Core has elicited criticism nationwide from parents, teachers, public-policy experts, and elected officials, from across the political spectrum. This criticism has addressed both the substantive content of the Common Core standards and the federalization of the educational system that implementation of Common Core has occasioned. *See, e.g.,* Lindsey Burke & Jennifer A. Marshall, *Why National Standards Won't Fix American Education: Misalignment of Power and Incentives*, Heritage Foundation, available at <http://www.heritage.org/research/reports/2010/05/why-national-standards-won-t-fix-american-education-misalignment-of-power-and-incentives>; Al Baker, *Common Core Curriculum Now Has Critics on the Left*, N.Y. Times, Feb. 16, 2014, available at <http://www.nytimes.com/2014/02/17/nyregion/new-york-early-champion-of-common-core-standards-joins-critics.html>.

C. The U.S. Department of Education, with the Active Cooperation of West Virginia State Officials, Sought to Federalize West Virginia’s Curriculum by Implementing Common Core Through the Smarter Balanced Assessment Consortium.

33. On February 17, 2009, the U.S. Congress passed the American Recovery and Reinvestment Act of 2009 (“ARRA”). Sections 14005 and 14006 of the ARRA provided for federal grant funding to the states related to education. Section 14005(d)(4)

provided for grant funding relating to “standards and assessments,” and provided that recipient states would “take steps to improve State academic content standards and student academic achievement standards” 123 Stat. 115, 282 (2009). Section 14006 provided for remaining funds to be used as state incentive grants in FY 2010 for states “that have made significant progress in meeting the objectives of paragraphs (2), (3), (4), and (5) of section 14005(d).” 123 Stat. 115, 283 (2009). ARRA did not mention or authorize common state educational standards, or “consortia” of states.

34. On or about November 18, 2009, the U.S. Department of Education issued an invitation to the States to apply for Race to the Top (“RTTT”) grant funding, pursuant to the ARRA. *See* 74 Fed. Reg. 59836 (Nov. 18, 2009). This invitation conditioned RTTT grant funding on, in part, “[t]he extent to which the State has demonstrated its commitment to adopting a common set of high-quality standards.” *Id.* at 59843. To demonstrate the requisite “commitment,” a state could (a) “participat[e] in a consortium of States that . . . [i]s working toward jointly developing and adopting a common set of K-12 standards . . . that are supported by evidence that they are internationally benchmarked and build toward college and career readiness by the time of high school graduation,” and (b) “demonstrat[e] its commitment to and progress toward adopting a common set of K-12 standards . . . by August 2, 2012 . . . and to implementing the standards thereafter in a well-planned way.” *Id.*

35. To satisfy key criteria for grant funding under RTTT, a state thus had to commit to adopting a “common set of K-12 standards,” *i.e.*, Common Core.

36. On or about April 9, 2010, the federal Department of Education announced “scoring priorities” for the RTTT Assessment program, which would

“provide[] funding to consortia of States to develop assessments” aligned with common K-12 standards, *i.e.* Common Core. *See* 75 Fed. Reg. 18171 (April 9, 2010). To be eligible, a consortium of states “must include at least 15 States.” *Id.* The criteria required the adoption of “academic content standards for grades K-12” that are “substantially identical across all States in a consortium.” *Id.* at 18177. The criteria further provided that “a State may supplement the common set of . . . standards with additional content standards, provided that the additional standards do not exceed 15 percent of the State’s total standards for that content area.” *Id.* These academic content standards had to be “fully implemented statewide in each State in the consortium no later than the 2014-2015 school year.” *Id.* at 18171.

37. On or about April 14, 2010, the federal Department of Education issued a second invitation for applications for RTTT funds. *See* 75 Fed. Reg. 19496 (April 14, 2010). This invitation again conditioned RTTT grant funding on, in part, “[t]he extent to which the State has demonstrated its commitment to adopting a common set of high-quality standards.” *Id.* at 19503.

D. West Virginia State Officials Violate the State’s Open-Meetings Law in Adopting Common Core in West Virginia and Mandating a Statewide Realignment of Curriculum, Assessments, and Programs of Instruction.

38. West Virginia Code § 18-2H-2 provides: “Prior to the adoption or implementation of any state-mandated education reform which constitutes a significant change in the philosophy or goals of education in the public schools of West Virginia, the State Board of Education shall give notice and hold public hearings on the proposed education reforms.”

39. West Virginia Code § 18-2H-2 also provides: “After the minimum period of sixty days following the public notice of hearings, the state board, or the state

department of education if so delegated by the state board, shall hold not less than four public hearings at various locations in the state, during which hearings the general public and affected citizenry shall have the opportunity to have questions and objections to the proposed education reform answered and to have their views made part of the public record.”

40. On or about March 10, 2010, the West Virginia Board of Education issued a press release entitled “Common Core State Standards Available for Public Comment,” announcing that that public could now view “the first official public draft of K-12 standards developed as part of the Common Core State Standards Initiative in West Virginia.” This March 20, 2010 press release allowed the general public a period of 23 days, until April 2, 2010, in which to review the standards and provide to “complete a [pre-prepared] survey” on the standards. *See* West Virginia Board of Education Press Release, “Common Core State Standards Available for Public Comment” (March 10, 2010) (attached as Exhibit 1, and incorporated by reference herein) (available at <http://wvde.state.wv.us/news/2050/>).

41. In a press release dated June 2, 2010, the West Virginia Board of Education announced: “During its May [2010] board meeting, the West Virginia Board of Education approved the Common Core State Standards for English and mathematics. The West Virginia Department of Education will spend the next year aligning the common core with West Virginia’s 21st Century Curriculum Standards and Objectives and resources. It is expected that the new standards will be implemented across the state’s public school system in the fall of 2011.” *See* West Virginia Department of Education Press Release, “West Virginia Leads National Discussion on Common Core

State Standards” (June 2, 2010) (attached as Exhibit 2, and incorporated by reference herein) (available at <http://wvde.state.wv.us/news/2093/>).

42. The adoption of Common Core State Standards as educational standards for West Virginia public schools, and the “aligning” of West Virginia curriculum and student assessments with the Common Core State Standards, constitute “state-mandated education reform[s] which constitute[] a significant change in the philosophy or goals of education in the public schools of West Virginia.” W.Va. Code § 18-2H-2.

43. On information and belief, the West Virginia Board of Education and the West Virginia Department of Education did not provide the public with 60 days’ advance notice prior to adopting Common Core and mandating the statewide realignment of curriculum and student assessments to align with Common Core.

44. On information and belief, the West Virginia Board of Education and the West Virginia Department of Education did not hold four public hearings at various locations in the State prior to adopting Common Core and mandating the statewide realignment of curriculum and student assessments to align with Common Core.

45. On information and belief, the West Virginia Board of Education and the West Virginia Department of Education did not provide the general public and affected citizenry with the opportunity to have questions and objections to the adoption of Common Core answered and to have their views made part of the public record prior to adopting Common Core and mandating the statewide realignment of curriculum and student assessments to align with Common Core.

E. West Virginia State Officials Execute Agreements with the Smarter Balanced Assessment Consortium that Purportedly Cede a Portion of the State's Authority over Core Educational Policy and Decisions.

46. On or about June 8, 2010, former State Superintendent of Schools Steven L. Paine and former Governor Joe Manchin III signed a "Memorandum of Understanding" with SBAC. *See* Memorandum of Understanding (attached as Exhibit 3, and incorporated by reference herein). This Memorandum of Understanding ("MOU") purported to commit West Virginia to serve as a "Governing State" in the SBAC consortium.

47. The MOU purportedly committed West Virginia to "[a]dopt the Common Core Standards . . . to which the Consortium's assessment system will be aligned, no later than December 31, 2011." *Id.* at 3. The MOU also purported to commit West Virginia to participate in the development of assessments aligned with Common Core for use by states in the consortium. *Id.* at 4-5.

48. The MOU purported to commit West Virginia to:

(a) "Adopt common achievement standards no later than the 2014-2015 school year";

(b) "Fully implement statewide the Consortium summative assessment in grades 3-8 and high school for both mathematics and English language arts no later than the 2014-2015 school year";

(c) "Adhere to the governance as outlined in [the MOU]";

(d) "Agree to support the decisions of the Consortium";

(e) "Agree to follow agreed-upon timelines";

(f) "Be willing to participate in the decision-making process and, if a Governing State, final decision"; and

(g) “Identify and implement a plan to address barriers in State law, statute, regulation, or policy to implementing the proposed assessment system and to addressing any such barriers prior to full implementation of the summative assessment components of the system.”

Id. at 3.

49. The MOU also purported to commit West Virginia to submit to SBAC’s Governance Structure. *Id.* at 7-11.

50. The MOU also purported to commit West Virginia to comply with specific procedures for request and approval before exiting from the consortium. *Id.* at 12-13.

51. The MOU also purported to commit West Virginia to “identify existing barriers in State laws, statutes, regulations, or policies” to the implementation of statewide assessments aligned with Common Core, along with “the plan to remove the barrier.” *Id.* at 13.

52. The MOU also purported to commit West Virginia to agree to a “financial plan” that would become effective by “September 1, 2014,” that would “include as revenue at a minimum, State contributions” to SBAC, among other sources of funds, to fund SBAC after federal grant funding had expired. *Id.* at 5.

53. The MOU purported to agree that West Virginia would “be bound by” its terms. *Id.* at 15.

54. The MOU provided for the creation of “[a] representative governance structure” and purportedly authorized that “governance body” to “make any changes [to

the Memorandum of Understanding’s provisions] as necessary through a formal adoption process.” *Id.* at 5.

55. On information and belief, officials of the other States that were members of SBAC at the time of its application executed Memoranda of Understanding with SBAC similar or identical to the MOU signed by then Superintendent Paine and Governor Manchin.

56. West Virginia purported to join SBAC as a Governing State.

F. SBAC Receives RTTT Funds, Sets up a Governance Structure, and Operates as an Interstate Compact, Without Congressional Consent, Under the Influence and Direction of Federal Regulators.

57. On or about June 15, 2010, the State of Washington—purporting to act on behalf of SBAC and all states that had signed Memoranda of Understanding, including West Virginia—submitted an application for a Race To The Top Fund Assessment Program Comprehensive Assessment System Grant. *See* RTTT Grant Application (attached as Exhibit 4, and incorporated by reference herein).

58. SBAC’s grant application stated that SBAC would develop a uniform “multi-state assessment system based on the Common Core State Standards.” The application further stated that “the role of [SBAC] is to influence and support the development and implementation of learning and assessment systems to *radically reshape the education systems in participating States . . .*” (Emphasis added.).

59. SBAC’s RTTT application stated that “each member State is responsible for adopting the CCSS [*i.e.*, Common Core] no later than December 31, 2011, and each State that is a member of the Consortium in 2014-15 will also be responsible for adopting common achievement standards and fully implementing Statewide, no later than the 2014-15 school year, the Consortium’s summative assessment in grades 3-8 and high

school, for both English language arts and mathematics. In addition, all member States are expected to adhere to the governance as outlined in the MOU [and] support decisions of the Consortium”

60. At the time of the RTTT application, SBAC purported to include 31 states, including West Virginia. Currently, SBAC purports to include 21 states, including West Virginia.

61. On or about July 1, 2010, SBAC adopted a Governance Structure Document (“Governance Document”) that purported to supersede any provisions of governance in the Memoranda of Understanding executed by officials of the member states. *See* Governance Document (attached as Exhibit 5, and incorporated by reference herein).

62. Pursuant to the Governance Document, a Governing State must “[a]dopt[] common achievement standards no later than the 2014-2015 school year.” A Governing State also must be “committed to using the summative assessment system developed by [SBAC] and [to] fully implement[ing] statewide, no later than the 2014-2015 school year, the summative assessment for both mathematics and English language arts in grades 3 through 8 and grade 11.” *Id.* at 4.

63. The Governance Document also establishes several offices or entities, including the offices of Executive Director, Project Management Partner, a Technical Advisory Committee, Policy and Technical Consultants, Policy Advisors, and Advisory Partners. *Id.* at 11-13.

64. The Governance Document establishes an Executive Committee, composed of nine voting members and the Executive Director as a non-voting member.

The Governance Document authorizes the Executive Committee to oversee and control nearly every aspect of SBAC's operations and activities. *Id.* at 7-8. The Governance Document requires that the Executive Committee submit matters to a vote of representatives of the member states only if the decision relates to:

- (a) "Budget line item changes that are greater than \$100,000";
- (b) "Deviations from original assessment structure and scope of Consortium work (as outlined in the grant application)";
- (c) "Consortium Policy"; or
- (d) "Consortium governance."

Id. at 9.

65. The Governance Document provides that "[w]hen making decisions, the Executive Committee may act by a majority of its nine voting members." *Id.* at 10.

66. When a matter is voted on by representatives of the member states, a quorum of representatives from one half of the voting states is required. If a vote is not unanimous, discussion will be reopened, and additional votes will be conducted until there is a two-thirds majority of the voting quorum. *Id.* at 9-10.

67. Under the terms of the Governance Document, SBAC purports to possess the capacity to dictate education decisions on other member states, even if those other states might dissent from the views of most SBAC member states.

68. The Governance Document purports to impose several limitations on member states' ability to withdraw from SBAC. Although member states may withdraw from the joint organization, they "must comply with the . . . exit process" established by the Governance Document. That exit process requires that:

(a) “The chief education officer of the member requesting an exit from the Consortium must submit in writing its request to leave the Consortium and reasons for the exit request”;

(b) “The Executive Committee will act upon the request at its next regularly scheduled meeting follow receipt of the request”; and

(c) “Upon approval of the request, the Project Management Partner will then announce the changed of membership to the [United States Department of Education].”

69. As alleged further below, the federal Department of Education has also imposed de facto sanctions on withdrawal from the RTTT consortia, such as SBAC, by threatening the NCLB waivers of states who do not adopt the Common Core standards or their equivalents.

70. On or about September 28, 2010, the U.S. Department of Education awarded a grant of RTTT funds in the amount of approximately \$159 million to SBAC, plus a supplemental award of over \$15 million to “help participating States successfully transition to common standards and assessments.” Sept. 28, 2010 Letter to Hon. Christine Gregoire (attached as Exhibit 6, and incorporated by reference herein). The U.S. Department of Education advised SBAC that the federal Government would remain substantially involved in the work of SBAC: “[I]n accordance with 34 CFR 75.234(b), this award is classified as a cooperative agreement and will include *substantial involvement* on the part of the Department of Education (Department) program contact.” *Id.* (emphasis added).

71. On or about September 28, 2010, the U.S. Department of Education awarded a grant of RTTT funds in the amount of approximately \$170 million to the Partnership for Assessment of Readiness for College and Careers (“PARCC”). Like SBAC, PARCC is an interstate consortium developing uniform, multi-state educational-assessment systems aligned with Common Core. Like SBAC, PARCC operates under the “substantial involvement” of the federal Department of Education. Like SBAC, PARCC was created pursuant to an interstate compact that was not authorized by Congress.

72. PARCC and SBAC were the only two consortia to receive federal RTTT grants. Both consortia were created to design assessments aligned to Common Core.

73. There were 31 states in SBAC at the time it submitted its grant application. There were 25 states (plus the District of Columbia) in PARCC at the time it submitted its grant application. In all, 43 states were members of one or both of the consortia at the time of the applications.

74. SBAC operates with closed meetings and purports to be exempt from both state and federal open-records laws. SBAC also prevents teachers administering its assessments from reviewing the assessments. SBAC is thus insulated from public accountability in a way that state and federal governments are not. This insulation constitutes a departure from historical practice in public education and in assessment development in particular.

75. The RTTT Assessment program, in effect, granted a near monopoly over K-12 educational standards in English language arts and math to Common Core, making

it extremely difficult for the minority of non-Common Core states to decline to adopt Common Core, and making it difficult for States to opt out of Common Core.

76. On or about January 7, 2011, SBAC executed a “Cooperative Agreement” with the U.S. Department of Education. *See* Cooperative Agreement (attached as Exhibit 7, and incorporated by reference herein). This Cooperative Agreement provided for substantial federal involvement and control over the work of SBAC. Among other things, it provided for federal involvement to “ensure project consistency with ... [federal] Department goals and objectives,” and granted to a federal program officer authority to “review and approve modifications to the design of activities proposed under this Agreement.” *See id.*

77. On information and belief, SBAC has operated under the influence and/or direction of federal regulator(s) at the U.S. Department of Education.

78. The U.S. Congress never authorized, ratified, approved, or otherwise consented to SBAC, whether directly or indirectly.

79. SBAC’s lack of ratification by Congress represents a departure from historical practice. For example, the Education Commission of the States (“ECS”) was created in 1965 for purposes similar to those of SBAC. It took the form of an interstate compact that was approved by Congress. ECS created and, for many years, administered the National Assessment of Educational Progress (“NAEP”) tests, which were designed to assess the knowledge of American students in core subjects, much like the SBAC assessments. Unlike SBAC, Congress expressly consented to ECS.

80. Congress has ratified and approved numerous other interstate compacts with far less far-reaching effects than those of SBAC. These include, among many

others, the Driver License Compact, which allows states to exchange information about driving infractions committed in other states, and the New Hampshire-Vermont Interstate School Compact, which permits the formation of interstate school districts between New Hampshire and Vermont. Unlike SBAC, Congress has expressly consented to these interstate compacts.

G. The Federal Department of Education Coerces States to Remain Committed to Common Core by Threatening the States' No Child Left Behind Waivers.

81. On September 23, 2011, the federal Department of Education announced the Conditional No Child Left Behind (“NCLB”) Waiver Plan, pursuant to which the Department will waive several onerous requirements under the ESEA in exchange for agreements that the applicant-states will comply with certain conditions aimed at implementing changes in school curricula and assessment systems. *See* U.S. Dept. Of Educ., ESEA Flexibility Policy Document (attached as Exhibit 8, and incorporated by reference herein).

82. The Conditional NCLB Waiver Plan lacks statutory authority in ESEA or elsewhere in federal law. The federal Department of Education acknowledged that the waiver program operates “in a manner that was not originally contemplated by the No Child Left Behind Act of 2001.” *Id.*

83. Under Department of Education requirements, in order to receive an NCLB waiver, a state “must demonstrate that it has college- and career-ready expectations for all students in the State by adopting college- and career-ready standards in at least reading/language arts and mathematics, transitioning to and implementing such standards statewide for all students and schools, and developing and administering annual, statewide, aligned, high-quality assessments, and corresponding academic

achievement standards, that measure student growth in at least grades 3-8 and at least once in high school.” *Id.* Adoption of Common Core and membership in one of the two testing consortia (SBAC or PARCC) constitute explicit “safe harbors” for States that seek NCLB waivers. *See* ESEA Flexibility Request Form, at 10-11 (Feb. 10, 2012) (attached as Exhibit 9, and incorporated by reference herein).

84. By exercising such control over common standards and assessments, the federal Department of Education is effectively controlling curriculum in public schools nationwide. Control over standards and assessments constitutes *de facto* control over curriculum, as schools have little choice but to align their curriculum to meet the expectations of the standards and assessments.

85. By conditioning the release from NCLB’s onerous restrictions on the adoption of curriculum and assessment-system changes aligned with the Common Core or its functional equivalent, the U.S. Department of Education has sought to coerce states into adopting those changes rather than risk facing further restrictions and possible loss of federal funding under ESEA and NCLB. The principal source and vehicle of these Common Core-aligned assessments are the RTTT-created consortia, SBAC and PARCC.

86. In response to the mounting criticism of Common Core, on June 5, 2014, Oklahoma Governor Mary Fallin signed House Bill 3399, which required Oklahoma to withdraw from the PARCC consortium and reinstated Oklahoma’s previously-existing educational standards. On August 28, 2014, the U.S. Department of Education denied Oklahoma’s application for extending its NCLB waiver and reinstated numerous regulatory restrictions dictating many details of school administration. *See* August 28, 2014 Letter to Hon. Janet Barresi (attached as Exhibit 10, and incorporated by reference

herein). The letter stated that Oklahoma's application for an extension to the NCLB waiver was denied because Oklahoma had no longer committed to "adopt college- and career-ready standards that are *common to a significant number of States*," due to the "legislation enacted in Oklahoma on June 5, 2014." *Id.* (emphasis added).

87. Similarly, the U.S. Department of Education recently threatened to withhold hundreds of millions of dollars of federal funding from the State of Oregon for allowing parents and students to opt out of Common Core-aligned tests prepared by the consortia. *See* May 27, 2015 Letter to Rob Saxton (attached as Exhibit 11, and incorporated by reference herein).

88. On information and belief, the purpose and effect of the federal regulatory scheme implemented through the ARRA funding and the RTTT grants has been (1) to induce the States to create a system or systems of standards and assessments based on and aligned with Common Core; and then (2) to compel the States to adopt the Common Core-aligned standards, assessments, and corresponding curriculum through the NCLB waivers and other measures.

89. Under federal regulations promulgated by the U.S. Department of Education, the adoption of a "common set of K-12 standards" requires a commitment of 85 percent of the state's standards. *See* 74 Fed. Reg. 59838 (Nov. 18, 2009) ("A state may supplement the common standards with additional standards, *provided that the additional standards do not exceed 15 percent of the State's total standards* for that content area.") (emphasis added). The implementation of Common Core, and assessments aligned with Common Core, would thus effectively create a national curriculum in the covered subject matters, in contravention of federal law.

90. The purpose and effect of the NCLB waiver program is to place powerful pressure on States who have not yet adopted Common Core, or who wish to opt out of Common Core, to force them to align their state curricula to a federalized curriculum aligned to Common Core. The NCLB waiver program creates an important practical obstacle to prevent States from withdrawing from the testing consortia, SBAC and PARCC.

91. SBAC and PARCC are thus creatures of the federal Department of Education that are designed to implement a national curriculum in circumvention of fifty years of explicit Congressional policy and numerous federal statutes. These entities threaten the valid supremacy of the U.S. Congress over regulatory policy, and they threaten the sovereignty of both member States and non-member States over educational curriculum and policy, by extracting purportedly binding commitments from state officials and otherwise placing extreme pressure on all States to align their curricula to Common Core.

92. SBAC and PARCC are interstate compacts created without Congress's consent that threaten to undermine the policy and authority of the U.S. Congress.

93. SBAC and PARCC are interstate compacts created without Congress's consent that threaten the sovereignty of individual States over educational policy within their borders. They threaten the sovereignty over educational policy of both their member States and their non-member States.

H. West Virginia Officials Execute a New Memorandum of Understanding and Agreement with SBAC, Pursuant to Which They Plan Imminent Future Payments of West Virginia Funds to SBAC.

94. On or about January 14, 2015, West Virginia State Superintendent of Schools, Michael J. Martirano, acting on behalf of BOE and DOE, executed a

Memorandum of Understanding and Agreement with SBAC. *See* Jan. 14, 2015 Memorandum of Understanding and Agreement (“MOUA”) (attached as Exhibit 12, and incorporated by reference herein).

95. The MOUA established a partnership between SBAC and the University of California in order “to continue the work of the Consortium,” *i.e.*, SBAC. *Id.* ¶ 5.5.

96. The MOUA preserves SBAC as a separate entity, distinct from the University of California, and preserves the consortium’s governance structure under the direction of the member States. *Id.* ¶¶ 1.6, 1.9, 1.10, 1.16, 1.24.

97. SBAC’s public statements confirm that SBAC continues to exist as an interstate compact operating under the direction of its member States. *See* Smarter Balanced Assessment Consortium, “What will happen when Smarter Balanced assessments are implemented in the 2014-15 school year,” Frequently Asked Questions (*available at* <http://www.smarterbalanced.org/resources-events/faqs/>) (explaining that after the partnership with the University, SBAC “will continue to be a state-led organization committed to providing high-quality assessment tools and information to educators and policymakers in member states”); States Move Forward with Smarter Balanced, (*available at* <http://www.smarterbalanced.org/news/states-move-forward-smarter-balanced/>) (including statement by SBAC executive director that “[t]he future of Smarter Balanced as a state-led consortium is strong. . . . The Consortium will continue to be governed by its member states and will be supported by member dues.”).

98. The MOUA has an initial term of three years and provides for automatic renewal thereafter unless member States follow the MOUA’s termination provisions. *Id.* ¶ 2.1.

99. The MOUA provides that “[b]y entering into this [MOUA], Member is . . . agreeing to be bound by the Governing Board Procedures and by all other decisions and actions of the Governing Board that are intended by the terms of this [MOUA] to bind Member.” *Id.* ¶ 3.1.

100. The MOUA provides that “[t]he signatories to this [MOUA] represent that they have the authority to bind their respective organizations to this [MOUA].” *Id.* ¶ 9.9.

101. The MOUA authorizes a complex governance structure similar to that established under the prior Memorandum of Understanding. It includes a Governing Board composed of representatives from member States, *id.* ¶ 3.1; an Executive Committee with responsibility for major operational decisions, *id.* ¶ 3.4; independent staffing and a multimillion-dollar annual budget, *id.* ¶ 3.5; and an elaborate system of “rules, policies, and procedures” to govern its operations, *id.* ¶¶ 1.11, 3.3.

102. The MOUA vests governance of SBAC in the Governing Board, which consists of member States but does not include the University of California. “The Governing Board will provide direction and oversight with respect to Products and Services to be provided by SB to the members,” and “[t]he Governing Board will be responsible for approving the Planning Documents.” *Id.* ¶ 3.1.

103. The Governing Board also establishes the Governing Board Procedures that bind the member States. *Id.* ¶¶ 1.11, 3.1, 3.2.

104. “The Executive Committee will be authorized to act on behalf of the Governing Board.” *Id.* ¶ 3.4.

105. The MOUA provides that the Governance Document would continue to govern SBAC and its member states unless and until the Governing Board adopted a new governance structure. *Id.* ¶ 1.6, 1.11.

106. Other States that are members of SBAC have executed similar MOUAs with the consortium. The MOUAs of other States impose stringent restrictions on those States' ability to withdraw from SBAC. *See, e.g.*, 2014 Memorandum of Understanding and Agreement of Missouri with SBAC (attached as Exhibit 13, and incorporated by reference herein); 2014 Memorandum of Understanding and Agreement of North Dakota with SBAC (attached as Exhibit 14, and incorporated by reference herein).

107. Under the MOUA, the University of California assumed the State of Washington's role as SBAC's fiscal and administrative agent, but the consortium remains an independent compact under the direction of member States. MOUA Recitals A, D; ¶¶ 5.1, 5.2, 5.5.

108. The MOUA provides that SBAC will "be funded by members paying annual fees to [the University], in order to allow the Consortium's work to continue for those members that execute this [MOUA]." *Id.* Recital F.

109. As of October 9, 2015, West Virginia remains a Governing State member in SBAC.

110. Pursuant to the MOUA, Respondents plan and intend to make imminent future payments of West Virginia taxpayer funds from the State's treasury—either directly or indirectly—to SBAC in the form of "membership fees."

111. These payments will continue for at least the MOUA's three-year initial term. *Id.* ¶ 2.1.

112. On or about January 30, 2015, SBAC adopted a new set of Governing Board Procedures to replace the Governance Document. *See* Jan. 30, 2105 Governing Board Procedures (“Governing Board Procedures”) (attached as Exhibit 15, and incorporated by reference herein).

113. Pursuant to the Governing Board Procedures, Governing Member States such as West Virginia agreed to “[u]se the achievement standards and reporting scales initially adopted by Smarter Balanced in November 2014.” *Id.* at 4.

114. The Governing Board Procedures also require that Governing Members cede control over core educational decisions by, among other things, agreeing to:

- (a) “Actively engage in Smarter Balanced discussion and activities”;
- (b) “Abide by security and administration procedures adopted by the Governing Board”;
- (c) “Adhere to the policies and principles detailed in these Governing Board Procedures as adopted and amended”;
- (d) “Engage in and support the decisions made by the Governing Board”; and
- (e) “Abide by the terms of the [MOUA].”

Id. at 4.

115. The Governing Board Procedures state, without any qualification: “Decisions of the Governing Board shall be binding on all members.” *Id.* at 5.

116. The Governing Board Procedures specifies the procedures, power, and membership of SBAC’s Governing Board, *id.* at 4-6, and its Executive Committee, *id.* at 8-12.

117. The Governing Board Procedures also establish the office of SBAC Executive Director, *id.* at 12, and provides for SBAC to employ other staff members, *id.* at 12-13. The Governing Board Procedures also provide for several “standing committees,” including a Technical Advisory Committee, a Finance Committee, and a Performance Audit Committee. *Id.* at 13-14.

118. On information and belief, during 2015, West Virginia has made substantial regular payments of membership fees to SBAC pursuant to the MOUA.

119. Under the MOUA, West Virginia must make a substantial, imminent payment to SBAC. *Id.* at 12, § 5.1(c). The State also must make ten monthly installment payments between August 1, 2015 and May 1, 2016. *Id.*

COUNT I – DECLARATORY AND INJUNCTIVE RELIEF

120. Paragraphs 1 through 119 are hereby incorporated by reference.

121. Petitioners’ rights, status, or other legal relations are affected by the disbursement of funds from the West Virginia treasury to SBAC and by the actions of Respondents, as more fully set forth in this Complaint.

122. SBAC is an illegal entity under federal and West Virginia law, for reasons including, but not limited to, the following:

- (a) SBAC is an interstate compact that was not authorized by Congress, whose existence and operation violate the Compact Clause of Article I, § 10, cl. 3 of the United States Constitution;
- (b) SBAC’s existence, purpose, function, activities, governance, and manner of operation violate federal statutes guaranteeing state and local control of

curriculum, programs of instruction, and related matters in public schools, including those set forth herein;

- (c) SBAC was created through a course of conduct by the U.S. Department of Education, in collaboration with Respondents, that violated the doctrine of unconstitutional conditions and the sovereignty over educational policy guaranteed to the State of West Virginia and other States by the doctrine of federalism and the Tenth Amendment;
- (d) West Virginia's adoption of Common Core and its commitment to SBAC were executed in violation of West Virginia state law, including but not limited to West Virginia Code § 18-2H-2;
- (e) Any putative contractual or other obligation of the State of West Virginia to make any direct or indirect payment to SBAC is void and unenforceable under West Virginia and federal law;
- (f) The disbursement of West Virginia taxpayer funds directly or indirectly to SBAC, as an unconstitutional and illegal entity, is unlawful, and any legislation putatively authorizing such disbursement of funds is void as applied to SBAC; and
- (g) In light of the foregoing, there exists no rational basis for the disbursement of West Virginia funds, directly or indirectly, to SBAC.

123. An actual controversy, ripe for adjudication, currently exists between Petitioners and Respondents as to whether SBAC is illegal and void under federal and state law, and whether West Virginia taxpayer funds may be lawfully disbursed to the SBAC, directly or indirectly.

124. Petitioners therefore seek a declaratory judgment under West Virginia Code § 55-13-1, § 55-13-2, and § 55-13-15, and Rule 57 of the West Virginia Rules of Civil Procedure, to terminate this controversy and remove uncertainty.

125. Disbursement of funds to SBAC is not only an *ultra vires* exercise of power by Respondents but also an unconstitutional and wasteful expenditure of government resources that harms Petitioners as taxpayers of the State.

126. Petitioners lack an adequate remedy at law and therefore, under West Virginia Code § 53-5-4 and Rule 65 of the West Virginia Rules of Civil Procedure, seek to have the Court preliminarily and permanently enjoin Respondents, and each of them, and all those in active concert or participation with them, from taking any action to authorize, permit, or allow the disbursement of West Virginia taxpayer funds to SBAC.

WHEREFORE, Petitioners respectfully pray that the Court enter its judgment:

- (A) Declaring that SBAC is illegal and void as an entity whose existence, activities, and operation violate the U.S. Constitution and federal and state law;
- (B) Declaring that any putative obligations of West Virginia to SBAC are illegal, void, and unenforceable under federal and West Virginia law;
- (C) Declaring that no West Virginia taxpayer funds may be lawfully disbursed to SBAC, whether directly or indirectly;
- (D) Preliminarily and permanently enjoining Respondents, and each of them, and all those in active concert or participation with them, from taking any action to implement or otherwise


effectuate any disbursement of West Virginia funds to SBAC,
whether directly or indirectly;

- (E) Awarding Petitioners their attorneys' fees, expenses, and costs pursuant to, *inter alia*, W. Va. Code § 55-13-10 and Rule 54 of the West Virginia Rules of Civil Procedure; and
- (F) Granting Petitioners such other and further relief as the Court deems just and proper.

Dated: November 3, 2015

Respectfully submitted,

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**Pro hac vice pending*