IN THE SUPREME COURT OF THE STATE OF NEVADA

AIMEE HAIRR; AURORA ESPINOZA; ELIZABETH ROBBINS; LARA ALLEN; JEFFREY SMITH; and TRINA SMITH,

Petitioners,

vs.

THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA and THE HONORABLE JAMES E. WILSON, JR.

Respondents,

vs.

HELLEN QUAN LOPEZ, individually and on behalf of her minor child, C.Q; MICHELLE GORELOW, individually and on behalf of her minor children, A.G. and H.G.; ELECTRA SKRYZDLEWSKI, individually and on behalf of her minor child, L.M.; JENNIFER CARR, individually and on behalf of her minor children, W.C., A.C., and E.C.; LINDA JOHNSON, individually and on behalf of her minor child, K.J.; SARAH and BRIAN SOLOMON, individually and on behalf of their minor children, D.S. and K.S.,

Plaintiffs/Real Parties Interest,

and

DAN SCHWARTZ, NEVADA STATE TREASURER, in his official capacity,

Defendant/Real Party in Interest.

Supreme Court Case No. _____

Petitioners Aimee Hairr, Aurora Espinoza, Elizabeth Robbins, Lara Allen, Jeffrey Smith, and Trina Smith's Petition for Writ of Mandamus from the First Judicial District Court, District Court Case No. 15-OC-002071-B

Emergency Motion Under NRAP 27(e)

Action requested by January 27, 2016

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NRAP 27(e) Certificate of Counsel

I, Lisa J. Zastrow, Esq. declare and state:

1. I make this declaration in support of Petitioners' (hereinafter Petitioner-Parents") request for emergency consideration.

2. I am an attorney with the law firm of Kolesar & Leatham, counsel of record for Petitioners in the above-entitled action.

3. Kolesar & Leatham ("K&L") was retained in the underlying matter on November 5, 2015, and substituted in as counsel for the proposed Petitioner-Parents in place of Hutchison & Steffen ("H&S").

4. The undersigned filed their Notice of Association of Counsel and Notice of Substitution of Counsel for Petitioner-Parents on December 7, 2015.

5. The proposed Petitioner-Parents' prior counsel Hutchison & Steffen filed their Motion to Intervene as Defendants on September 17, 2015.

6. H&S did not submit a request for submission of the Motion to Intervene.

7. Upon realizing that the Motion to Intervene had not been submitted for a decision by Judge Wilson, K&L promptly filed its Request for Submission on December 9, 2015.

8. On December 24, 2015, Judge Wilson denied Petitioner-Parents Motion to Intervene.

9. On January 11, 2016, Judge Wilson issued an order granting a Preliminary Injunction in favor of Plaintiffs and ordered the parties to meet on or before January 18, 2016 to discuss expedited discovery and trial on the merits.

10. Without emergency relief, Petitioner-Parents we will be unjustly and irreparably prejudiced as they will not be heard on the merits of this case. As stated above, there is currently a January 18, 2016 deadline to meet and confer, and the next step is a trial on the merits. Additionally, Nevada law is clear that post-

judgment and post-trial intervention efforts are not favored. *See Lopez v. Merit Ins. Co.*, 109 Nev. 553, 556, 853 P.2d 1266, 1268 (1993).

11. Proposed Petitioner-Parents' counsel contacted the Clerk of the Nevada Supreme Court on January14, 2016 to alert the Clerk's Office of the filing of this Petition.

12. The contact information of the attorneys for the parties is as follows:

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13. On January 13, 2016, I informed Plaintiffs' Counsel, Don Springmeyer, Esq. that proposed Petitioner-Parents intended to file the instant Petition on the same day. I represented that I would email an as-filed copy of the Petition as soon as it has been filed, as well as their being served by the Court's e-flex filing system.

14. This Motion is made in good faith and will not result in prejudice to any party.

LISA J. ZASTROW, ESQ.

PETITION FOR A WRIT OF MANDAMUS

Petitioners are six parents who seek to intervene in *Lopez v. Schwartz*, No. 15-OC-00207-1B, Dept. No. 2 (filed Sept. 9, 2015), in order to defend Nevada's new Education Savings Account (ESA) program from a constitutional challenge. Petitioner-Parents, whose children are the true and direct beneficiaries of the ESA program, respectfully seek a Writ of Mandamus directing the district court to enter an order granting them full party status as intervenor-defendants.

DATED this13th day of January, 2016.

KOLESAR & LEATHAM

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes

Constitutional Provisions

INTRODUCTION

The Petitioner-Parents respectfully request that this Court issue a writ of mandamus directing the district court to enter an order granting them full party status as intervenor-defendants. In denying Petitioner-Parents' motion to intervene below, the district court abused its discretion by making clear errors of law.

The Petitioner-Parents are among the class of persons for whom the Nevada Legislature created the ESA program. A finding that the program is unconstitutional—such as the district court has already made in the context of Plaintiffs' motion for preliminary injunction—deprives the Petitioner-Parents and their children of specific and concrete benefits. To do so while depriving Petitioner-Parents of their right to defend their interest in receiving those benefits is grossly inconsistent with the fact that intervention is to be granted liberally.

In denying intervention of right under NRCP 24(a), the district court erred as a matter of law in finding that the legal interest of the proposed intervenors, the Petitioner-Parents here, were identical to the state's interest. The district court's conclusion is unprecedented. Every other court to hear a challenge to a school choice program has allowed intervention for parents to preserve their distinct interests as beneficiaries of those programs and as holders of a liberty interest that is distinct from the government's interests.

In rejecting Petitioner-Parents' alternative request that they be granted permissive intervention under NRCP 24(b), the district court abused its discretion by wrongly stating that Petitioner-Parents disregarded the rules governing intervention. The disregard for the rules to which the district court referred was Petitioner-Parents' supposed failure to file "a pleading setting forth the defenses they sought," and instead filing an answer. This was a callous and clearly erroneous error of law, as an answer is a pleading that satisfies NRCP 24. The district court also faulted the Petitioner-Parents for filing additional documents,

including a response in opposition to plaintiffs' motion for a preliminary injunction, which Petitioner-Parents had filed in expectation that intervention would be resolved prior to consideration of Plaintiffs' motion for a preliminary injunction and out of a commitment not to delay resolution of this case. Petitioner-Parents have proceeded with the utmost dispatch and done everything in their power not to delay resolution of the underlying constitutional claims.

In the proceeding below, Petitioner-Parents stand to lose irreplaceable opportunities to provide their children with a better education. They have far more directly at stake, for example, than the taxpayer Plaintiffs do. Denying Petitioner-Parents their right to defend themselves based upon a misunderstanding of the facts and law is an injustice Petitioner-Parents urge this Court to correct.

I. RELIEF SOUGHT

Because review of an order denying a motion to intervene "may be had in this court only by a petition for extraordinary relief," *Aetna Life & Cas. Ins. Co. v. Rowan*, 107 Nev. 362, 363, 812 P.2d 350, 351 (1991), Petitioner-Parents seek a writ of mandamus directing the district court to enter an order allowing them to intervene as defendants in *Lopez v. Schwartz*, No. 15-OC-00207-1B, Dept. No. 2.

II. ISSUE PRESENTED

Did the district court err by denying Petitioner-Parents' motion to intervene as defendants in a constitutional challenge to Nevada's ESA program, thereby denying Petitioner-Parents' opportunity to sufficiently protect their unique liberty interests?

III. STATEMENT OF RELEVANT FACTS

A. Procedural Background

1. Plaintiffs' Complaint

The Plaintiffs below are seven parents who intend to enroll their children in public schools. They filed their lawsuit, *Lopez v. Schwartz*, No. 15-OC-00207-1B,

Dept. No. 2, on September 9, 2015. App. 1–19. The suit alleges that Nevada's ESA program, which allows parents to voluntarily remove their children from public school, is unconstitutional. Specifically, Plaintiffs claim that the program violates Article 11, Sections 2, 3, and 6 of the Nevada Constitution by allegedly diverting legislative appropriations for the support and maintenance of public schools to private schools and other educational service providers and by supposedly reducing the funds deemed sufficient by the Legislature to operate the public schools. App. 15–17.

2. Petitioner-Parents' Motion to Intervene

Eight days later, on September 17, 2015, the six Petitioner-Parents, who have all applied to participate in the ESA program on behalf of one or more of their minor children, moved to intervene in *Lopez* to defend the program. App. 32–95. The motion to intervene was accompanied by a proposed Answer to the Plaintiffs' Complaint. App. 20–31. Plaintiffs opposed the motion to intervene. App. 101–15. The Defendant did not oppose the motion to intervene. Petitioner-Parents filed their reply in support of their motion to intervene on October 15, 2015. App. 116–34. After substituting new Nevada counsel, and filing the requisite Notice of Substitution of Counsel, Petitioner-Parents filed a Request for Submission of their motion to intervene on December 9, 2015. *See* App. 440–55. The district court denied the motion to intervene on December 30, 2015 and Petitioner-Parents received a copy of that order, via mail, on January 4, 2015. App. 462–67.

3. Plaintiffs' Motion for Preliminary Injunction

Plaintiffs moved for a preliminary injunction on October 20, 2015. App. 135–310. The State Defendant filed a combined response in opposition to the motion for preliminary injunction and countermotion to dismiss the case for failure to state a claim on November 5, 2015—the day his Answer was due. App. 311–89.

Petitioner-Parents, while their motion to intervene was still pending, filed a response in opposition to the Plaintiffs' motion for preliminary injunction and in support of the State's motion to dismiss. App. 390–422. Petitioner-Parents noted up front in that response that their motion to intervene was still pending, but explained that they filed a response to remain "[c]onsistent with the pledge they made in their motion to intervene not to cause delay in this case." App. 391. Plaintiffs moved to strike the response and Petitioner-Parents opposed that motion. *See* App. 423–39.

The district court denied the State Defendant's motion to dismiss on December 24, 2015, without oral argument. App. 456–58.

The district court granted Plaintiffs' motion to strike on the same day it denied Petitioner-Parents' motion to intervene. App. 459–61; *see also* App. 462–67.

The district court then held a hearing on Plaintiffs' motion for preliminary injunction on January 6, 2015, and entered an Order on January 11, 2015, granting the injunction and finding a likely violation of Article 11, Sections 6.1 and 6.2 of the Nevada Constitution. App. 468–83.

4. Trial on the Merits

The District Court's Order preliminarily enjoining the ESA program orders the parties to confer no later than January 18, 2016, and to then arrange with the court a time "to set a hearing on the issue of security and to set the trial on the merits." App. 482. The Petitioner-Parents request that this Court act no later than January 27, 2016, so that they can be assured of the opportunity to participate in any scheduled trial.

5. Defendant Schwartz Has Not Yet Filed An Answer

As of the date of this Petition, the State Defendant still has not filed an Answer in the district court.

B. The ESA Program

Under the terms of Nevada's ESA program, families may use the funds deposited in their student's ESA to purchase multiple educational products or services in addition to—or instead of—private school tuition. SB 302 §§ 5, 9(1)(a)-(k). Any child who has attended a public school for at least 100 days may participate in the program. SB 302 § 7. Prior to any funds being deposited in a student's ESA, participating parents must establish an education savings account with a private financial management firm that has been qualified by the State Treasurer. SB 302 § 7(2). The State Treasurer will then deposit into that student's ESA, in quarterly installments, an amount equal to "90 percent of the statewide average basic support per pupil." SB 302 § 8(2)(b). For pupils with disabilities and for very low-income families, the amount deposited will be equal to 100 percent of the statewide average basic support per pupil. SB 302 § 8(2)(a).

Parents must use the funds in their student's ESA "only" for the educational expenses authorized by the program. SB 302 § 9(1). Parents decide how to spend their student's ESA funds by picking and choosing from the program's long list of permissible educational expenses. SB 302 §§ 5, 9(1)(a)-(k). Thus, parents may tailor their pupil's education by paying for any combination of allowable expenditures. The options available to parents include, but are not limited to, tuition and fees at private schools, tutoring or other teaching services provided by a tutor or tutoring facility, curriculum and required supplemental materials to educate their child at home, distance learning programs, and even transportation costs. SB 302 §§ 5, 9(1)(a)-(k). No student is required to be enrolled in a private school under the terms of the ESA program, but rather may be educated by any combination of the allowable educational goods and services providers.

C. The Petitioner-Parents

Petitioner-Parents' children illustrate the well-known maxim that there is no

"one-size-fits-all" approach to educating children. Some of the children are the Petitioner-Parents' natural children. App. 65, 70, 77. Many are adopted. App. 57, 86. Some have learning or physical disabilities. App. 59–60, 72, 88–89. Others are gifted. App. 78, 80. Seven of the children have either an Individualized Education Program (IEP) or a Section 504 accommodation plan. App. 59–60, 77–78, 88–89. A few of the children's educational needs are being met in their current public or charter school. App. 60, 72, 79, 86. For others, their learning challenges were completely ignored by their public school. App. 70–71. Two never want return to a traditional public school because of the bullying and abuse they received at the hands of their fellow classmates. App. 57–58, 66–67. While many of Petitioner-Parents' children would do well in a private school, App. 58–59, 61, 67, 73, 81, 88–94, a handful of their children would thrive best outside of a traditional classroom environment through a mixture of private tutoring and home education—options available to them under the ESA program, App. 61, 73, 89–90.

Combined, the Petitioner-Parents have 22 children who are eligible to participate in the ESA program. At least four of those students will likely remain in their current public or charter school because those schools are adequately meeting their educational needs. App. 60, 72, 79, 86. Another nine will most likely be enrolled in a private school that is either affiliated with a particular religion, religious denomination, or a local church, App. 58–61, 67, 88–94, while three will attend a private school that will not be affiliated with any particular religion, religious denomination, or any church, but that will open the day with prayer, and thereby express a general belief in the existence of God. App. 73, 81–82. At least one of the children will be looking for a technical or vocational school to finish her secondary education. App. 87. And three of the children may be educated at home, using a mixture of online or distance learning tools, private tutoring, and curricula designed for home education. App. 61, 73, 89–90.

IV. REASONS WHY THE WRIT SHOULD ISSUE

The issues and circumstances presented by the Petition satisfy this Court's well-defined criterion for exercising its discretion to grant extraordinary relief. *See Poulos v. Eighth Judicial Dist. Court*, 98 Nev. 453, 455, 652 P.2d 1177, 1178 (1982). Petitioner-Parents satisfy their burden of showing why this Court should grant the extraordinary relief asked for in their Petition because the Petition presents urgent questions of law and the relevant facts are not in dispute.

First, the circumstances in this case reveal a real urgency to allow the parents and children who will benefit from the ESA program to intervene in the constitutional challenge to that program in order to protect their interests, which are distinct and different from the State's interest in defending the program. *See Jeep Corp. v. Second Judicial Dist. Court*, 98 Nev. 440, 443, 652 P.2d 1183, 1185 (1982). The ESA Program presents a matter of substantial public policy, especially considering that nearly every student in the state is eligible to participate. Many of the Petitioner-Parents' children have been denied a basic education in their current public placement. It is therefore appropriate to act quickly to allow the families most affected by the program to have a say in deciding the significant constitutional issues concerning a program that so many of Nevada's children are eligible to participate in.

Second, the issues presented are purely matters of law with no need for further factual development. *Lorton v. Jones*, 130 Nev. Adv. Op. 8, 322 P.3d 1051, 1054 (2014).

V. ARGUMENT AND AUTHORITIES

The rules governing intervention are to be construed liberally in favor of applicants for intervention. *Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173, 1179 (9th Cir. 2011); *Arakaki v. Cayetano*, 324 F.3d 1078, 1083 (9th Cir. 2003). Intervention may be had either as of right or permissively, and the district court

denied Petitioner-Parents' motion to intervene as to both avenues. App. 463–65; *see* Nev. R. Civ. P. 24(a)–(b). As explained in Part A, the district court erred as a matter of law in finding that the proposed intervenors' legal interest was identical to the state's interest. No other court has denied parents the opportunity to preserve their distinct interests as beneficiaries of an educational choice program. And as shown in Part B, the district court abused its discretion by denying Petitioner-Parents permissive intervention. The district wrongly accused Petitioner-Parents of failing to follow the rules governing intervention by failing to file a pleading along with their motion. However, the Petitioner-Parents' filing of an answer clearly satisfies the rules of intervention because an answer is a pleading that satisfies NRCP 24. The district court utterly disregarded the presumption in favor of liberally granting intervention.

A. Petitioners' Interests May Not Be Adequately Represented by the Treasurer and Petitioner-Parents Have a Right to Intervene.

Intervention as of right requires several elements to be met, but the court below found that the Petitioner-Parents failed to show only one, that the State Treasurer would not adequately represent their interests. Under Nevada law as applied to the facts of this case, Petitioners are to be granted intervention "unless [their] interest is adequately represented by existing parties." Nev. R. Civ. P. 24(a); *see also* NRS 12.130; *Am. Home Assur. Co. v. Eighth Judicial Dist. Court (AHAC)*, 122 Nev. 1229, 1241–43, 147 P.3d 1120, 1128–30 (2006). The court below committed legal error in finding that their interests are adequately represented by the Treasurer.

Both this Court and federal courts[1] recognize that applicants for intervention

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[1] This Court's decisions on intervention primarily reflect a concern for timeliness. *See Estate of Lomastro ex rel. Lomastro v. Am. Family Ins. Grp.*, 124 Nev. 1060, 1070, 195 P.3d 339, 347 (2008); *Dangberg Holdings Nev. L.L.C. v. Douglas Cty.*, 115 Nev. 129, 141–42, 978 P.2d 311, 318–19 (1999); *Lopez v. Merit Ins. Co.*, 109 Nev. 553, 556, 853 P.2d 1266, 1267–68 (1993); *Lawler v. Ginochio*, 94 Nev. 623,

face only a "minimal" burden for establishing that an existing party's representation may be inadequate. *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972); *Arakaki*, 324 F.3d at 1086 (citing *Trbovich*); *AHAC*, 122 Nev. at 1241, 147 P.3d at 1128 (citing *Trbovich*). Proposed intervenors need not establish that an existing party's representation *is* or *will be* inadequate; it is enough to show that such representation "*may be*" inadequate. *Trbovich*, 404 U.S. at 538 n.10 (emphasis added); *Arakaki*, 324 F.3d at 1086 (citing *Trbovich*); *see also Brumfield v. Dodd*, 749 F.3d 339, 346 (5th Cir. 2014) ("The parents['] . . . only concern is keeping their vouchers. We cannot say for sure that the state's more extensive interests will *in fact* result in inadequate representation, but surely they might, which is all that the rule requires."); *Grutter v. Bollinger*, 188 F.3d 394, 399–401 (6th Cir. 1999). Courts presume adequate representation only when a proposed intervenor's interests are identical to those of an existing party. *See Arakaki*, 324 F.3d at 1086–87.

As parents of families who are directly benefitting from the program, Petitioner-Parents have an interest that is distinct from, and narrower than, that of the Defendant. Indeed, the fact that parents and the government have different interests in the preservation of school-choice programs is supported by the fact that in every case where they have sought intervention, parents have been granted it. The district court's decision is a glaring outlier in the realm of school-choice litigation, where parents have been granted intervention in *every* case where it has been sought. *See, e.g.*, *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 132 (2011); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Brumfield v. Dodd*,

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626, 584 P.2d 667, 668–69 (1978). Here there is no dispute that Petitioners' motion to intervene was timely. Accordingly, in the absence of Nevada precedent Petitioners turn to federal case law as "strong persuasive authority" on similarly worded rules of civil procedure. *Vanguard Piping Sys., Inc. v. Eighth Judicial Dist. Court*, 129 Nev. Adv. Op. 63, 309 P.3d 1017, 1020 (2013) (quoting *Exec. Mgmt. Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53, 38 P.3d 872, 876 (2002)).

749 F.3d 339 (5th Cir. 2014) (reversing denial of intervention as of right); *Magee v. Boyd*, 175 So. 3d 79 (Ala. 2015);[2] *Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999); *Niehaus v. Huppenthal*, 310 P.3d 983 (Ariz. Ct. App. 2013); *Taxpayers for Pub. Educ. v. Douglas Cty. Sch. Dist.*, 351 P.3d 461 (Colo. 2015); *Owens v. Colo. Cong. of Parents, Teachers & Students*, 92 P.3d 933 (Colo. 2004); *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006); *Griffith v. Bower*, 747 N.E.2d 423 (Ill. App. Ct. 2001); *Meredith v. Pence*, 984 N.E.2d 1213 (Ind. 2013); *Chittenden Town Sch. Dist. v. Dep't of Educ.*, 738 A.2d 539 (Vt. 1999); *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998).

The authorities are unanimous; Petitioners are aware of no case to the contrary.[3] The trial court's decision is thus a glaring—and unprecedented—outlier.

In holding that the Petitioner-Parents had no independent legal interest in seeing the program upheld, the district court committed legal error in not recognizing the parents' liberty interest in the educational upbringing of their children. *See Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925) ("The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only."). This interest was briefed by

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[2] The *Magee* opinion reflects that intervention was denied—to a *second* group of parents who attempted to intervene after the trial court had entered final judgment. As a first group of parents had already been granted intervention in that case, the second parent groups' interests were found to be adequately represented by the first group. 175 So. 3d at 141.

[3] The Plaintiffs below argued that intervention in many of these cases was unopposed. App. 111. This is true—but only reinforces the point that many plaintiffs similarly situated to the Plaintiffs below conceded that parents have the right to intervene to protect their legally distinct interests. Moreover, intervention has always been granted even in those cases where it *has* been opposed. App. 130 (citing cases). Ironically, this includes the plaintiffs in *Duncan v. State*, No. A-15-723703-C (Nev. 8th Dist. filed Aug. 27, 2015), another lawsuit challenging the constitutionality of Nevada's ESA program. *Duncan* shares a common claim with this case, and plaintiffs there did not oppose intervention by the Petitioner-Parents.

Petitioner-Parents and has been repeatedly held fundamental by the United States Supreme Court. *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion); *Pierce*, 268 U.S. at 534–35; *Meyer v. Nebraska*, 262 U.S. 390, 399–402 (1923); App. 126–27 (briefing issue). But the district court, borrowing language from Plaintiffs, deliberately refused to credit this interest in order to deny intervention, waving it off as a mere "motivation." App. 464 ("Their motivations, as parents of Nevada school-age children, may vary, but the interest is the same [as that of the Treasurer]."); *see also* App. 107 ("While Applicants' motives for intervening may be personal, *motivations* are not the measure.").

Petitioner-Parents wish to see SB 302 upheld, true, but their ultimate objective is to educate their children as they see fit. That is a liberty interest legally distinct from and potentially in tension with the State's interest in overseeing education policy. That SB 302 advances both interests does not render them identical, and the district court erred in characterizing them as such.

That the interests of the State and the Petitioner-Parents are legally distinct is confirmed by *Brumfield v. Dodd*, 749 F.3d 339 (5th Cir. 2014), in which the Fifth Circuit reversed a denial of intervention by a group of parents who sought to defend a Louisiana voucher program against constitutional attack under a decades-old desegregation order. There, the court *considered and rejected* an argument that the parents and the State of Louisiana shared the same interest or ultimate objective: "[a]lthough both the state [of Louisiana] and the parents vigorously oppose dismantling the voucher program," the intervening parents "easily met their minimal burden" because "their interests *may* not align precisely." *Id.* at 345–46 (emphasis added).[4] The parents' "only concern [wa]s

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[4] The court below required Petitioners to identify a specific way in which their defense may or does differ from that of the government, and even went so far as to fault Petitioners for not having supplemented their motion to intervene "after the Attorney General filed his answer." App. 464. This is unfair: the district court

keeping their vouchers"—in other words, directing their children's education—whereas the state had a far broader array of interests at stake in the case. Indeed, intervention was proper *even though the court could not say with certainty* that the State's representation would be inadequate—"surely [it] might," the court said, "which is all that the rule requires." *Id.* at 346; *see also id.* at 346 n.3 (noting overwhelming support for intervention in state-court school-choice cases).

Here, the district court failed to recognize Petitioner-Parents' distinct legal interest. Moreover, instead of evaluating whether the Defendant's representation of those interests "may be" inadequate, it instead held that Petitioner-Parents were adequately represented because they could not definitely show that representation would be inadequate. But this is not the law. As a result, the court erred when it faulted Petitioner-Parents for failing to anticipate every divergence between their approach and that of the government at the outset of the litigation. App. 464. But experience teaches that school-choice litigation can take years, with most such divergences being unforeseeable at the time intervention is granted.[5] This, indeed, is why the *potential* for inadequate representation is all that Rule 24 requires.

This "may be inadequate" standard also squares with *Arakaki*, which reiterates that intervention shall be permitted on the side of a government defendant when "the intervenors' interests are narrower than that of the government and therefore *may not be* adequately represented." *Arakaki*, 324 F.3d at 1087 (emphasis added). The court below and the Plaintiffs cite *Arakaki* as their primary authority in support of a presumption of adequate representation (and thereby against Petitioners' intervention), *see* App. 106–07, 463, but in doing so

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mistakenly believed the State had filed an answer, when in fact it had not and still has not.

[5] Petitioner-Parents' motion to intervene and reply memorandum contain numerous examples of precisely when and how intervenor-parents' legal arguments and strategies have diverged from state defendants in similar school choice litigation in

they ignore that crucial part of the opinion. A complete reading of *Arakaki* (and its progeny) reveals two lines of cases: one where the intervenors' interest is identical to that of the government and therefore presumed to be adequately represented, 324 F.3d at 1086, and another where the intervenors' interest is narrower and thus may not be adequately represented, *id.* at 1087–88. As *Brumfield* and the unanimous weight of school-choice authority make clear, parents seeking intervention in school-choice cases belong to the second line.

Moreover, both *Arakaki* and *Perry v. Proposition 8 Official Proponents*, 587 F.3d 947 (9th Cir. 2009), on which the district court relied in denying intervention, are easily distinguished: in both of those cases, a non-government party *had already intervened* and was adequately representing the second group of intervenors' interests. *Perry*, 587 F.3d at 950; *Arakaki*, 324 F.3d at 1086–87; *accord Magee*, 175 So. 3d at 141 (noting presence of first group of parent intervenors as grounds for denying intervention to second group). Courts adjudicating challenges to government programs need not accommodate every one of those programs' intended beneficiaries as intervenors. But where those beneficiaries' interest is demonstrably narrower than that of the government, as is the case here, their voice must be heard in court.

Because the validity of SB 302 affects a fundamental liberty interest that is distinct from and in tension with any interest of the Treasurer, Petitioners may not be adequately represented in the case below. The district court thus erred as a matter of law in denying intervention as of right, and Petitioners respectfully pray for this Court to issue mandamus to compel the district court to grant their motion to intervene.

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other states. App. 50, 127–28.

B. The Court Below Abused Its Discretion in Denying Petitioner-Parents Permissive Intervention.

Under NRCP 24(b), a district court has discretion to permit a party to intervene. The district court's discretion is bounded, however. In exercising its discretion, the court "shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Nev. R. Civ. P. 24(b) (emphasis added). And a district court's discretion cannot be exercised illogically, arbitrarily, or unreasonably. *See Imperial Credit Corp. v. Eighth Judicial Dist. Court*, 130 Nev. Adv. Op. 59, 331 P.3d 862, 866 (2014).

Here, the district court abused its discretion. It incorrectly (and strangely) ruled that, even though petitioners filed an answer with their motion, they did not file a "pleading." And despite questioning petitioners' adherence to the rules, the court failed to heed NRCP 24(b)'s and this Court's command that it consider any prejudice to the rights of the original parties and to the rights of the proposed intervenors.

The court below stated that:

> [I]n considering whether to grant permissive intervention the court is concerned with the potential for delay and increased costs that additional parties may cause, with no measurable additional benefit to the court's ability to determine the legal and factual issues in the case.
>
> The Court is also concerned with the Proposed Intervenors' disregard for the rules. NRCP 24 (c) requires a person wanting to intervene to file a motion which 'shall be accompanied by a pleading setting forth the ... defense for which intervention is sought.' Proposed Intervenors' motion to intervene was not accompanied by a pleading setting forth the defenses they sought. Instead they filed an answer at the same time they filed their motion to intervene. Because the motion to intervene had not been granted Proposed Intervenors were not a party and had no legal basis to file an opposition. Because they were not a party Proposed Intervenors also had no legal basis to file their motion to Associate Counsel, their Amended Notice to Set, their Response in Opposition to Plaintiff's motion for Preliminary Injunction and Response in Support of Defendant's Motion to Dismiss, their Notice of Substitution of Counsel for Intervenor Defendants, or their Notice of Association of Counsel. Proposed Intervenors have proceeded as parties in spite of the fact that they are not.

App 465.

In denying petitioners' motion for permissive intervention, the district court concluded that petitioners disregarded NRCP 24(c) by not filing a pleading setting forth defenses with their motion to intervene. App. 465. The district court was simply mistaken; by filing an answer, Petitioner-Parents satisfied the requirement that they file a responsive pleading. The court even acknowledged that petitioners filed an answer, but obviously did not regard it as a pleading for purposes of Rule 24(c). This was a clear mistake of law.

An answer is a pleading. Nev. R. Civ. P. 7(a) (listing "answer" among possible pleadings); *see Hansen v. Eighth Judicial Dist. Court*, 116 Nev. 650, 656, 6 P.3d 982, 986 (2000) (stating that an "answer" is a "responsive pleading" in which certain affirmative defenses should be raised). Petitioners filed their answer along with their motion to intervene. App. 20–31. Their answer set forth two affirmative defenses, including that the complaint failed to state a claim. App. 28–29. Therefore, petitioners satisfied NRCP 24(c)'s requirement that motions to intervene "shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought."

By not recognizing petitioners' answer as a pleading, and by not noticing the affirmative defenses pleaded in said answer, the district court abused its discretion. *Imperial Credit Corp.*, 130 Nev. Adv. Op. 59, 331 P.3d at 866 (stating that "discretion is improperly exercised when the judicial action is arbitrary, fanciful, or unreasonable or where no reasonable person would take the view adopted by the trial court" (internal quotation marks, citation, and alterations omitted)).

The district court below further suggested that, because petitioners' motion had not yet been granted, petitioners should not have filed an "opposition," apparently regarding the answer as an opposition. App. 465 But this makes little sense if the court's concern was with "delay and increased costs." Surely it would

have increased delay if the court had granted intervention and then given petitioners extra time to file responsive documents.

In addition, the court below failed to follow NRCP 24(b) or this Court's precedent. Under Rule 24(b), courts must consider whether intervention will prejudice the original parties. The prejudice to the original parties is "[t]he most important question to be resolved" when deciding whether intervention is timely. *Lawler v. Ginochio*, 94 Nev. 623, 626, 584 P.2d 667, 669 (1978). In addition, this Court has said that district courts must also weigh concerns of delay and expense "against any prejudice resulting to the applicant if intervention is denied." *AHAC*, 122 Nev. at 1244, 147 P.3d at 1130.

Here, the district court merely mentioned generalized concerns for "delay and increased costs" and noted its belief that intervention would not aid the court's decision-making. There is no indication that the district court was concerned with delays or increased costs unfairly falling on the original parties. The Defendant's non-opposition to the Petitioner-Parents' motion means that it cannot be said he was worried about prejudice to him. And the proceedings in the *Duncan v. State* case, to which Petitioner-Parents have been granted intervention, have moved swiftly and without delay. Moreover, the district court did not weigh its concern for costs and delay against the prejudice that petitioners would incur with the denial of their motion to intervene.

In sum, the district court abused its discretion by illogically, arbitrarily, and unreasonably concluding that petitioners filed an answer but did not file a pleading. It further abused its discretion by failing to follow NRCP 24(b) and this Court's precedent. The district court was required to consider whether intervention would prejudice the original parties and whether its denial would prejudice petitioners, and to balance the two considerations against each other.

CONCLUSION

At every step of this proceeding, Petitioner-Parents have proceeded so as to minimize any delay to the proceedings and undue expense to the original parties. Parents such as the Petitioner-Parents have the most to gain from an expeditious resolution of this lawsuit. Regrettably, the court below has misconstrued these efforts as an unwillingness to follow the rules, and this misperception has unfairly colored its evaluation of Petitioner-Parents' right to intervene to defend their unique and individual interests in the program and, alternatively, their right to be permitted to intervene to defend their interests. The district court's recent grant of a preliminary injunction lends urgency to Petitioner-Parents' desire to become full party defendants as quickly as possible, lest the district court's errors deprive them of a full and fair opportunity to protect their own interests.

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The district court's order denying Petitioner-Parents' motion to intervene reaches a conclusion that is incorrect, unprecedented, and unjust. Therefore, Petitioner-Parents pray for this Court to recognize the district court's error and compel it to allow them to defend their interest in a matter with such grave implications for their children's futures.

Respectfully submitted,

DATED this13th day of January, 2016.

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CERTIFICATE OF COMPLIANCE & VERIFICATION OF COUNSEL

Under pentlty of perjury the undersigned counsel declares that she is the attorney for petitioner and that she has read the forgoing Petition, *et. al.* and is familiar with its contents and the facts in support. The Petition is within the knowledge of the undersigned and is true of my own knowledge, except as any matters that may be stated upon information and belief.

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it does not exceed 30 pages.

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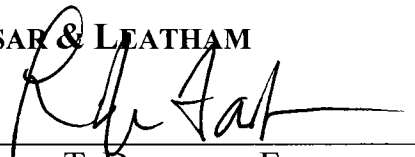
Finally, I hereby certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 13th day of January, 2016.

KOLESAR & LEATHAM



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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Kolesar & Leatham, and that on the 13th day of January, 2016, I caused to be served a true and correct copy of the foregoing **PETITIONERS AIMEE HAIRR, AURORA ESPINOZA, ELIZABETH ROBBINS, LARA ALLEN, JEFFREY SMITH, AND TRINA SMITH'S PETITION FOR WRIT OF MANDAMUS FROM THE FIRST JUDICIAL DISTRICT COURT, DISTRICT COURT CASE NO. 15-OC-002071-B** in the following manner:

(ELECTRONIC SERVICE) Pursuant to Rule 5(D) of the Nevada Rules of Civil Procedure, the above-referenced document was electronically filed on the date hereof and served through the Notice of Electronic Filing automatically generated by the Court's facilities to the parties listed below at their last-known mailing addresses, on the date above written:

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