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,

and

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 No. 69580

First Judicial District Court, Case No. 15-OC-00207-1B

PLAINTIFFS / REAL PARTIES IN INTEREST'S ANSWER TO PETITION FOR WRIT OF MANDAMUS

DON SPRINGMEYER
(Nevada Bar No. 1021)
JUSTIN C. JONES
(Nevada Bar No. 8519)
BRADLEY S. SCHRAGER
(Nevada Bar No. 10217)
WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP
3556 E. Russell Road, Second Floor
Las Vegas, Nevada 89120

TAMERLIN J. GODLEY
(admitted pro hac vice)
THOMAS PAUL CLANCY
(admitted pro hac vice)
SAMUEL T. BOYD
(admitted pro hac vice)
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue, Thirty-Fifth Floor
Los Angeles, California 90071-1560

DAVID G. SCIARRA
(admitted pro hac vice)
AMANDA MORGAN
(Nevada Bar No. 13200)
EDUCATION LAW CENTER
60 Park Place, Suite 300
Newark, NJ 07102
Telephone: (973) 624-4618

Attorneys for Plaintiffs / Real Parties in Interest

N.R.A.P. 26.1 DISCLOSURE

Pursuant to N.R.A.P. 26.1, the undersigned counsel of record certifies that there are no persons or entities as described in N.R.A.P. 26.1(a) that must be disclosed.

January 22, 2015

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP

By: /s/ Don Springmeyer

DON SPRINGMEYER (Nevada Bar No. 1021)
dspringmeyer@wrslawyers.com
JUSTIN C. JONES (Nevada Bar No. 8519)
jjones@wrslawyers.com
BRADLEY S. SCHRAGER (Nevada Bar No. 10217)
bschrager@wrslawyers.com
3556 E. Russell Road, Second Floor
Las Vegas, Nevada 89120
Telephone: (702) 341-5200
Facsimile: (702) 341-5300
Attorneys for Plaintiffs / Real Parties in Interest

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

TABLE OF AUTHORITIES
(Continued)

Page(s)

STATE CASES

TABLE OF AUTHORITIES
(Continued)

Page(s)

STATE RULES

CONSTITUTIONAL PROVISIONS

TABLE OF AUTHORITIES
(Continued)

Page(s)

TREATISES

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Proposed Intervenors, parents who would like public school funding to subsidize their children's private or home schooled education, sought to intervene as defendants in Plaintiffs' constitutional challenge to SB 302, Nevada's recently enacted voucher law. The district court properly ruled that the Proposed Intervenors did not meet the standard to intervene by right and declined to grant them permissive intervention. The district court's ruling does not constitute a "manifest abuse of discretion." Accordingly, Proposed Intervenors' writ should be denied.

To obtain intervention as of right, a party must show (among other factors) that the representation of the parties already in the lawsuit is inadequate. There is a presumption that the government—in this case the State Treasurer represented by the State Attorney General—is an adequate representative in a suit challenging a statute or government program where it shares the same "ultimate objective" as the proposed intervenors. Proposed Intervenors and Defendant have the very same ultimate objective—both want SB 302 to be declared constitutional. The presumption of adequate representation may be rebutted only by a very compelling showing of circumstances such as collusion, adversity of interest, nonfeasance, or incompetence. Proposed Intervenors have made no such showing, nor can they.

Even if no presumption applied, Proposed Intervenors would need to establish some basis for finding that the government cannot adequately represent them. Proposed Intervenors have not done so. They failed to articulate in their briefing how their legal positions in this case might diverge from those of the named Defendant. Likewise, their actions to date only confirm that the government is an adequate representative. Proposed Intervenors filed an unauthorized opposition to Plaintiffs' motion for a preliminary injunction that

mirrored Defendant's opposition in its arguments, citations, and ultimate objective. If anything, Proposed Intervenors have demonstrated that they will advance the same legal arguments as the government to achieve the same legal objective.

Thus, the district court correctly determined that Proposed Intervenors' interest in defending SB 302 from Plaintiffs' constitutional attack was adequately represented by Defendant. Proposed Intervenors' reliance on their counsel's intervention in litigation in other states is irrelevant. In those cases, Proposed Intervenors' counsel either intervened by the other parties' consent or identified specific legal arguments that state defendants would not make. Neither of those conditions is present here.

Furthermore, the district court did not manifestly abuse its discretion by denying Proposed Intervenors' request for permissive intervention. Reversals of such decisions are exceedingly rare, and Proposed Intervenors have not demonstrated that their case warrants such exceptional action. The district court properly concluded that adding Proposed Intervenors to the case would only add delay and unnecessary expense, prejudicing Plaintiffs and burdening the court without aiding the resolution of the issues before it. The district court also noted that Proposed Intervenors have repeatedly violated court rules by filing documents as if they were already a party without legal basis to do so. Proposed Intervenors have not carried their burden of demonstrating that the district court's ruling was a manifest abuse of discretion. Their writ should therefore be denied.

II. COUNTER-STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Did the district court manifestly abuse its discretion by denying Proposed Intervenors, who have advanced the same arguments and seek the same outcome in the case as Defendant, intervention by right and permissive intervention?

III. STATEMENT OF FACTS

A. SB 302 And Plaintiffs' Suit

During the most recent Legislative session, the Nevada Legislature enacted SB 302. This new law provides for the transfer of funds from the Legislature's biennial appropriation for the operation of Nevada public schools into private "Education Savings Accounts" to be used for private educational expenditures. On September 9, 2015, Plaintiffs, who are parents of children attending Nevada's public schools, filed suit to bar implementation of SB 302. Defendant Dan Schwartz, in his official capacity as Treasurer of the State of Nevada, is charged by SB 302 with the law's implementation.

Plaintiffs' complaint alleges that SB 302 violates Nevada's Constitution in three ways. First, Article XI, sections 3 and 6 of the Nevada Constitution expressly prohibit the use of public school funds for anything other than the operation of Nevada's public schools. SB 302's diversion of funds specifically allocated by the Legislature for public education to private education expenses violates this mandate.

Second, Article XI, section 6 of the Nevada Constitution requires that the Legislature appropriate the funds it deems sufficient to fund the public education system, before any other budget appropriation is enacted. SB 302 deducts funds from the amount the Legislature deemed "sufficient" to support the public schools. The amount remaining is necessarily less than the Legislature deemed "sufficient" and thus violates the Legislature's constitutional duty.

Third, Article XI, section 2 of the Nevada Constitution requires that the Legislature establish a uniform system of common public schools. Public schools must allow all children to attend, regardless of their religious beliefs, socioeconomic status, academic achievement, English language learner status, or special needs. In contrast, institutions that receive voucher funds may discriminate

on all these bases. Further, public schools are subject to uniform curriculum, achievement, and teaching requirements. Voucher-eligible institutions are not subject to these requirements. Thus, SB 302 diverts funds from a public education system subject to uniform education requirements and standards to a variable system of voucher-eligible institutions wholly exempt from those requirements and standards, in violation of the constitutional mandate to create, support, and maintain a uniform system of common or public schools.

B. Proceedings Before The District Court

Proposed Intervenors filed their motion to intervene on September 17, 2015. App. 32. That day they also filed with the district court an answer to Plaintiffs' complaint, even though they were not parties to the lawsuit. Proposed Intervenors are parents who would like to use public funds provided through SB 302 to pay for part of their children's private education. They were originally represented by Lieutenant Governor Mark Hutchison, in his private capacity via his law firm of Hutchison & Steffen, and Arizona-based counsel at the Institute for Justice, a nationwide group that litigates on behalf of voucher programs across the country. The law firm of Kolesar & Leatham substituted in for Hutchison & Steffen on December 7, 2015. App. 443. Plaintiffs filed an opposition to Proposed Intervenors' motion to intervene on October 5 and Proposed Intervenors replied on October 17. App. 116. Proposed Intervenors did not submit the motion for decision until December 9. App. 453.

Plaintiffs filed a motion for a preliminary injunction on October 20, 2015. App. 134. Defendant filed a combined opposition to that motion and a countermotion to dismiss on November 5. App. 311.

Although they had not been granted permission to intervene or permission to make other filings during the pendency of their motion to intervene, Proposed Intervenors nonetheless filed an opposition to Plaintiffs' motion for a

preliminary injunction on November 9 as though they were already a party to the lawsuit. App. 390. Plaintiffs filed a motion to strike Proposed Intervenors' opposition brief on November 19 on the basis that Proposed Intervenors had not been granted permission to intervene as a party. App. 423. Proposed Intervenors opposed that motion on November 25. App. 428. Plaintiffs replied and submitted the motion for decision on December 7. App. 433, 437. The district court denied Proposed Intervenors' motion to intervene and struck their unauthorized pleadings on December 30. App. 459, 462.

The district court denied Defendant's motion to dismiss on December 24, 2015 and held oral argument on the preliminary injunction motion on January 6, 2016. App. 456. The court granted Plaintiffs' motion on January 11, entering a preliminary injunction barring Defendant from implementing SB 302. App. 468. Defendant has filed an appeal from that ruling. *See* Supreme Court Case No. 69611. The parties have jointly stipulated to a stay of the merits phase of the case until that appeal is decided.

Proposed Intervenors filed this writ to challenge the denial of their intervention motion on January 14, 2016.

IV. STANDARD OF REVIEW

"A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust or station, or to remedy a manifest abuse of discretion." *Am. Home Assurance Co. v. Eighth Judicial Dist. Court ex rel. Cty. of Clark*, 122 Nev. 1229, 1234, 147 P.3d 1120, 1124 (Nev. 2006). "The petitioner bears the burden of demonstrating that mandamus relief is warranted." *Id.*

"A manifest abuse of discretion is a clearly erroneous interpretation of the law or a clearly erroneous application of a law or rule." *State v. Eighth Judicial Dist. Court of the State of Nev.*, 127 Nev. Adv. Op. 84, 267 P.3d 777, 780

(Nev. 2011) (internal alteration and quotation marks omitted). "[M]anifest abuse of discretion does not result from a mere error in judgment, but occurs when the law is overridden or misapplied, or when the judgment exercised is manifestly unreasonable or the result of partiality, prejudice, bias or ill will." *Id.* (quoting *Blair v. Zoning Hearing Bd. of Twp. of Pike*, 676 A.2d 760, 761 (Pa. Commw. Ct. 1996)).

V. ARGUMENT

Proposed Intervenors seek intervention by right under Nevada Rule of Civil Procedure 24(a)(2), and permissive intervention under Rule 24(b)(2). Rule 24 provides the following:

> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.
>
> (b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: … (2) when an applicant's claim or defense and the main action have a question of law or fact in common. 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.
>
> (c) Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. . . .

The district court rightly concluded that Proposed Intervenors did not demonstrate they were entitled to intervention by right and reasonably exercised its discretion not to grant them permissive intervention.

A. The District Court Did Not Commit A Manifest Abuse Of Its Discretion By Denying Proposed Intervenors' Motion To Intervene As Of Right

The district court relied on settled Nevada and federal law in denying Proposed Intervenors' motion to intervene under Rule 24(a)(2) because they are adequately represented by Defendant Treasurer Schwartz and his counsel, the State Attorney General. A party seeking intervention under Rule 24(a)(2) must show:

> (1) that it has a sufficient interest in the litigation's subject matter,
>
> (2) that it could suffer an impairment of its ability to protect that interest if it does not intervene,
>
> (3) that its interest is not adequately represented by existing parties, and
>
> (4) that its application is timely.

Am. Home Assurance. Co., 122 Nev. at 1238, 147 P.3d at 1126. "Determining whether an applicant has met these four requirements is within the district court's discretion." *Id.* The district court concluded that Proposed Intervenors had "arguably" satisfied all but the third of these requirements—adequate representation. App. 463.

Where the constitutionality of a statute or government program is at issue, representation by the government is presumed adequate when an intervenor has the same interest as the government in defending a government program. *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003) *as amended* (May 13, 2003).[1] The interest is the "same" if the parties share the same "ultimate

---

[1] As Prospective Intervenors note in their writ petition, federal cases discussing federal rules of civil procedure with wording similar to that of the Nevada rules "'are strong persuasive authority'" in Nevada courts. *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)).

objective" for the outcome of the litigation. *Id*.[2] To overcome this presumption an intervenor must make a "very compelling showing to the contrary." *Id.; see also Stuart v. Huff*, 706 F.3d 345, 351 (4th Cir. 2013) (noting that every federal circuit to examine the question has taken this position). This rule is consistent with Nevada law. *See Lundberg v. Koontz*, 82 Nev. 360, 363, 418 P.2d 808, 809 (1966) (where "[t]he single issue presented … [wa]s the meaning of Nev. Const. Art. 19, s 3,—an issue of law" and "[t]he interests of the parties, … the proposed intervenors, and the citizens of Nevada are identical insofar as the resolution of the legal issue is concerned … the government's representative [wa]s adequate to represent the interests of those desiring to intervene").[3] As the Fourth Circuit explained:

> In matters of public law litigation that may affect great numbers of citizens, it is the government's basic duty to represent the public interest. And the need for government to exercise its representative function is perhaps at its apex where, as here, a duly enacted statute faces a constitutional challenge. In such cases, the government is simply the most natural party to shoulder the responsibility of defending the fruits of the democratic process.

Stuart, 706 F.3d at 351.

---

[2] Courts sometimes describe two separate presumptions of adequacy. One applies "when an applicant for intervention and an existing party have the same ultimate objective," while the other applies when a government party and the intervenor "share the same interest." *See, e.g., Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003), as amended (May 13, 2003). Regardless of whether there are one or two presumptions, a presumption applies here because all of the necessary elements are present. *See Stuart v. Huff*, 706 F.3d 345, 351 (4th Cir. 2013) ("every circuit to rule on the matter" has held that "a more exacting showing of inadequacy should be required where the proposed intervenor shares the same objective as a government party").

[3] NVRCP 24(a) was revised in 1971, after *Lundberg* was decided, to conform to revisions in the federal rules that took effect in 1966. Those revisions, however, did not affect the adequacy of representation standard. *See* Charles Alan Wright and Arthur R. Miller, 7C Federal Practice & Procedure § 1909 (3d ed.) ("cases on what is or is not adequate representation decided under the former rule are equally authoritative on that aspect of the question under the amended rule").

1. The presumption of adequate representation applies because Proposed Intervenors have the same ultimate objective as Defendant

Proposed Intervenors have the same "ultimate objective" as Defendant. They both have a single goal in the case—to have SB 302 declared constitutional. None of Proposed Intervenors' arguments change this fundamental fact.

Proposed Intervenors argue that they have a different interest from Defendant because their "ultimate objective" is not to defend the constitutionality of SB 302 but "to educate their children" as they see fit. Writ at 11. But the only question in this lawsuit is whether SB 302 is constitutional. How parents may choose to educate their children is simply not at issue in this case. Whether or not SB 302 is constitutional, parents legally will be able to choose to educate their children in private school, home schooling or public schools.

Moreover, "ultimate objective" refers to a person's desired outcome *in the case*, not their personal motivations for desiring that outcome. Courts routinely hold that individual intervenors share the same "ultimate objective" as a government defendant where the goal in the litigation is the same, even if the personal motivations may diverge. *See, e.g.*, *Freedom from Religion Found., Inc. v. Geithner*, 644 F.3d 836, 841 (9th Cir. 2011) (denying intervention to a minister who did not want to pay taxes in a suit challenging a law exempting parsonages from taxation that was being defended by the IRS); *Doe v. Duncanville Indep. Sch. Dist.*, 994 F.2d 160 (5th Cir. 1993) (denying intervention to families of students claiming their religious freedom would be infringed if a basketball coach was prohibited from prayer at the end of practice where the school district defendant also was defending the practice); *United States v. S. Bend Cmty. Sch. Corp.*, 692 F.2d 623, 628 (7th Cir. 1982) (denying intervention to the NAACP where it had the same ultimate objective—desegregating the school system—as plaintiff federal

government). This court has likewise recognized that parties with different motivations can share the same "ultimate objective." *See Am. Home Assurance Co.*, 122 Nev. at 1241, 147 P.3d at 1128-29 (denying workers compensation insurer intervention in tort claim by employee where both sought the same legal objective for different reasons).

Proposed Intervenors rely on *Brumfield v. Dodd*, 749 F.3d 339 (5th Cir. 2014) in support of their claim that their interests diverge from Defendants. In *Brumfield*, the federal government sought to enjoin a Louisiana voucher law on the grounds that it violated a federal desegregation order in effect since 1975. 749 F. 3d at 340-41. Parents sought to intervene in defense of the vouchers. *Id*. at 341. The Fifth Circuit explained that the presumption did not apply because the state defendant had interests other than the parents' more narrow interest in upholding the challenged statute and the parents were taking different positions from the state:

> *The state has many interests in this case*—maintaining not only the Scholarship Program but also its relationship with the federal government and with the courts that have continuing desegregation jurisdiction. *The parents do not have the latter two interests; their only concern is keeping their vouchers*.
>
> Further, the parents are staking out a position significantly different from that of the state, which apparently has conceded the continuing jurisdiction of the district court.

Id. at 346 (emphases added). Proposed Intervenors have not identified any interest that Defendant has in the outcome of the case other than upholding SB 302. Nor have they identified any position they intend to take that is different from that advanced by Defendant. In other words, had the situation in *Brumfield* been the same as that before this Court, the presumption would have applied and intervention denied.

2. Proposed Intervenors must go beyond a showing that representation "may be inadequate"

Because Proposed Intervenors share the same interest as Defendant, "[i]n the absence of a 'very compelling showing to the contrary,' it will be presumed that [Defendant] adequately represents" them. *Arakaki*, 324 F.3d at 1086 (citing Charles Alan Wright and Arthur R. Miller, 7C Federal Practice & Procedure § 1909 (3d ed.)).

Proposed Intervenors argue at length that the presumption of adequate representation and the compelling showing needed to rebut that presumption do not apply; they aver that all they need to show is that the representation "may be inadequate." But this lower standard applies only where an intervenor and the party on whose side it wishes to intervene have different legal interests. *See United Guar. Residential Ins. Co. of Iowa v. Phila. Sav. Fund Soc'y*, 819 F.2d 473, 475-76 (4th Cir.1987) (applying "may be inadequate" standard where interests diverged). As the Fourth Circuit explained:

> Trbovich[4] and United Guaranty stand for the conventional proposition that where the existing party and proposed intervenor seek divergent objectives, there is less reason to presume that the party (government agency or otherwise) will adequately represent the intervenor. In such circumstances, it is perfectly sensible to require a more modest showing of inadequacy before granting intervention of right since an existing party is not likely to adequately represent the interests of another with whom it is at cross purposes in the first instance. That is not so here, however, where appellants concede that they share the same ultimate objective as the existing defendants and where those defendants are represented by a government agency. Both the government agency and the would-be intervenors want the statute to be constitutionally sustained. In this context, for the reasons

[4] In *Trbovich v. United Mine Workers of America*, 404 U.S. 528 (1972), a union member was permitted to intervene in a case brought by the Secretary of Labor against the union. The Supreme Court found that the Secretary of Labor had a duty to represent the "vital public interest in assuring free and democratic union elections" *in addition to* "the narrower interest of the complaining union member." *Id*. at 538. Because the Secretary had additional and competing interests, it did not share the same interest with the intervening union member and was allowed to intervene. *Id*. at 538-39.

> described above, we join our fellow courts of appeals in holding that the putative intervenor must mount a strong showing of inadequacy. To hold otherwise would place a severe and unnecessary burden on government agencies as they seek to fulfill their basic duty of representing the people in matters of public litigation.

Stuart v. Huff, 706 F.3d 345, 352 (4th Cir. 2013)

Where adequacy of representation is presumed, it may be rebutted only by evidence of circumstances such as "collusion, adversity of interest, nonfeasance, or incompetence." *Butler, Fitzgerald & Potter v. Sequa Corp.*, 250 F.3d 171, 180 (2d Cir. 2001) (collecting cases from other circuits and noting that this is not an exclusive list). There is no adversity of interest here. Proposed Intervenors have not argued that Defendant and Plaintiffs are colluding or that Defendant has demonstrated nonfeasance or incompetence.

Proposed Intervenors' speculative assertions about possible differences in future litigation strategy certainly do not rebut the presumption. This Court and federal courts have repeatedly held such unsubstantiated differences are not enough to rebut the presumption to justify intervention as a matter of right. *See People's Legislature v. Miller*, No. 2:12-CV-00272-MMD, 2012 WL 3536767, at *4 (D. Nev. Aug. 15, 2012) (rejecting as "speculative and unpersuasive" would-be intervenors' argument that they had a right to intervene in Nevada Attorney General's defense of a suit because of "unnamed future disagreements and divergent goals"); *Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 954 (9th Cir. 2009) ("'mere [ ] differences in [litigation] strategy ... are not enough to justify intervention as a matter of right'") (quoting *United States v. City of Los Angeles*, 288 F.3d 391, 402–03 (9th Cir. 2002) (alterations in original)); *Stuart*, 706 F.3d at 353 (same). Proposed Intervenors have not rebutted the presumption of adequate representation.

3. Even if the presumption did not apply, intervention as of right is not warranted

Even if Proposed Intervenors could demonstrate that the presumption of adequacy was inapplicable, which is not the case, they would still not be entitled to intervention by right. Proposed Intervenors have not met even the lower "may be inadequate" standard.

As, the district court found, "Proposed Intervenors have made no showing of how their defense would be different from the Attorney General's, specific or general."[5] App. 464. In fact, the evidence before the Court is that the Proposed Intervenors and Defendant intend to make the very same arguments. Both Defendant and Proposed Intervenors filed opposition to Plaintiffs' motion for a preliminary injunction.[6] Comparing the Proposed Intervenors' brief with Defendant's demonstrates that Defendant has and will make all of Proposed Intervenors' arguments—the two briefs make the same arguments in the same order, cite most of the same cases, and seek precisely the same result.

Having failed to identify any specific present or future differences with Defendant's arguments or strategy, Proposed Intervenors instead suggest that they should be allowed to intervene because "school-choice litigation can take years" and "divergences" "between their approach and that of the government" are "unforeseeable." Writ at 12. But if this pure speculation sufficed to justify

---

[5] Proposed Intervenors contend that the district court erred by requiring them to "definitively show" that representation would be inadequate but point to no part of the district court's opinion in which it did so. To the contrary, the district court observed that Proposed Intervenors made no showing at all.

[6] Defendant's motion was styled as an opposition to Plaintiffs' motion for a preliminary injunction and countermotion to dismiss. App. 311.

intervention, there would never be a party able to demonstrate adequacy of representation.[7]

Proposed Intervenors also say that their briefing below "contain[s] numerous examples of precisely when and how intervenor-parents' legal arguments and strategies have diverged from the state defendants in similar school choice litigation." Writ at 12 n.5. But neither of the kinds of divergence they identify in other cases has nor can occur in this case. First, Proposed Intervenors point to cases in which other intervenor parents argued that Plaintiffs lack standing. Writ at 9-10. But Proposed Intervenors themselves chose not to make a standing argument in their putative opposition to Plaintiffs' motion for a preliminary injunction or their answer. Second, Proposed Intervenors point to cases in which the intervenor parents have argued that so-called Blaine Amendments, provisions in state constitutions forbidding the payment of public funds to sectarian schools, were drafted and included in state constitutions out of anti-Catholic animus. Because Plaintiffs do not challenge SB 302 under the analogous provision of Nevada's Constitution, this potential divergence is also irrelevant.

4. Largely unopposed intervention in other cases is irrelevant

Proposed Intervenors assert that they should be granted permission to intervene in this case because counsel acting for different intervenor parents have been granted such permission in other cases in other states and the district court's opinion is therefore an "outlier." Writ at 9-10. That counsel for other intervenor parents intervened in other cases with different facts and procedural postures in other states does not justify intervention by Proposed Intervenors here if they do not meet the standards for intervention by right. Moreover, in other voucher cases in which Petitioner's counsel has been involved either intervention has not been

[7] Plaintiffs also bring a facial challenge, which will not take years.

opposed or the intervenors made a compelling showing that they would advance a separate argument the government was not prepared to make. Proposed Intervenors have made no such showing here.

Proposed Intervenors argue that the fact that intervention was not opposed in other cases[8] shows that it is appropriate here. But there are many reasons why a plaintiff might choose not to oppose intervention that have no bearing on whether the intervenor has met the standard for intervention as a matter of right, including a desire to avoid the expense of litigating the issue, timing concerns, political concerns, and other strategic considerations.

In other cases in which intervention has been granted over plaintiffs' objections, the applicants identified specific circumstances to support their position that the state would not adequately represent their interests. Several cases involved arguments that state constitutions' so-called "Blaine Amendments," which prohibit the granting of public funds or taxes for the benefit of any religious sect or denomination, violate the First Amendment of the United States Constitution.[9] Because intervenors in those cases wished to argue that Blaine amendments were adopted by the State out of religious bigotry, there was a real possibility that they

---

[8] *See Winn v. Hibbs*, No. CIV 00-287-PHX-EHC (D. Ariz. Jul. 8, 2003) (trial court order granting intervention after Plaintiffs filed a notice of no objection to parents' motion to intervene); Resp. to Mot. to Intervene, *Niehaus v. Huppenthal*, No. CV2011-017911 (Ariz. Super. Ct. Sept. 27, 2011) (noting that Plaintiffs did not oppose intervention). *Winn v. Hibbs* was the trial court proceeding prior to *Arizona Christian School Tuition Organization v. Winn*, 563 U.S. 125 (2011), cited by Proposed Intervenors.

[9] *See* Mot. to Intervene, *Boyd v. Magee*, No. 03-CV-2013-901470 (Ala. Cir. Ct. Oct. 9, 2013), Dkt. No. 42; *Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999); Order, *Duncan v. State*, No. 219-2012-CV-00121 (N.H. Super. Ct., Jun. 17, 2013); *Taxpayers for Pub. Educ. v. Douglas Cty. Sch. Dist.*, 351 P.3d 461, 485 (Colo. 2015) (Eid, J., dissenting in part); *Bush v. Holmes*, 886 So. 2d 340, 344 (Fla. 2004).

would not be adequately represented by state attorneys general who might be reluctant to attack their own state's founding documents so directly.[10]

Likewise, in *Duncan v. State*, 102 A.3d 913 (N.H. 2014)[11], cited by the Proposed Intervenors, the intervenors argued that the plaintiffs lacked standing because the state law conferring standing on taxpayers violated the state constitution, an argument the state was unlikely to make. Here, again, Proposed Intervenors have not made any collateral attack on a state law or constitutional provision that would create a divergence with arguments advanced by the State Attorney General.

B. The District Court Did Not Manifestly Abuse Its Discretion By Denying Prospective Intervenors Permissive Intervention

Permissive intervention, as its name indicates, is a privilege that a district court in its discretion may choose to grant. *See* NVRCP 24(b)(2) (anyone whose "claim or defense and the main action have a question of law or fact in common" upon a timely application "*may* be permitted to intervene") (emphasis added). Whether to grant that application is up to the district court, which should "[i]n exercising its discretion ... consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." *Id.* Nothing in the rule requires the Court to grant permissive intervention, even if there is no prejudice.

Because Rule 24(b)(2) is inherently discretionary, "[w]hen a district court denies permissive intervention … review is particularly deferential" and "a denial of permissive intervention has virtually never been reversed." *AT&T Corp.*

---

[10] Proposed Intervenors' observation that Plaintiffs in *Duncan v. State*, No. A-15-72303 (Nev. 8th Dist. filed Aug. 27, 2015) did not oppose intervention thus misses the mark. Plaintiffs in that case, unlike this one, challenge SB 302 under Nevada's Blaine amendment.

[11] This case has no connection to the Nevada case of the same name.

v. Sprint Corp., 407 F.3d 560, 561 (2d Cir. 2005) (internal quotation marks and citations omitted); *see also New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452, 471 (5th Cir. 1984) (reversal of decision denying permissive intervention by a federal circuit court is "so unusual as to be almost unique"); *S. Dakota ex rel Barnett v. U.S. Dep't of Interior*, 317 F.3d 783, 787 (8th Cir. 2003) (reversal of denial of permissive intervention is "extremely rare, bordering on nonexistent").

The district court here had sufficient and substantive reasons for not exercising its discretion to grant permissive intervention. First, it held that "the potential for delay and increased costs that additional parties may cause" was not justified because Proposed Intervenors were adequately represented by Defendant and so intervention would provide "no measurable additional benefit to the Court's ability to determine the legal and factual issue in the case." App. 465. Proposed Intervenors claim that this holding violates Rule 24(b) because the district court did not consider prejudice to the parties. This is wrong—the court specifically noted the increased cost and delay from additional litigants, which assuredly impacts the parties to the litigation. Proposed Intervenors also ignore the fact that the court has its own interest in judicial economy, which it may consider in addition to the effect on the parties. *See Garza v. Cty. of Los Angeles*, 918 F.2d 763, 777 (9th Cir. 1990) ("The decision to grant or deny [permissive] intervention is discretionary, subject to considerations of equity *and* judicial economy.") (emphasis added).

The district court also denied permissive intervention because of Proposed Intervenors' "disregard for the rules," which they demonstrated by making filings as if they were a party to the litigation before their motion to intervene had been reviewed and approved. Most notably, Proposed Intervenors filed an opposition to Plaintiffs' motion for a preliminary injunction without any

authorization to do so and thereby, in the district court's words, were "proceed[ing] as parties in spite of the fact that they are not." App. 465. *See also Aetna Life & Cas. Ins. Co. v. Rowan*, 812 P.2d 350, 350 (Nev. 1991) ("[A] proposed intervenor does not become a party to a lawsuit unless and until the district court grants a motion to intervene."); FJDCR 15(2)-(6), (8)-(10) (giving only parties the right to file motions).

Proposed Intervenors do not do cite any legal rule that authorizes their filing of an opposition to Plaintiffs' motion for a preliminary injunction. Instead, they contend that their violation of the court's rules was justified to prevent delay in the event that their motion to intervene was granted, arguing that it "makes little sense" for the court to be concerned both with avoiding delay and increased costs and to criticize them for filing motions with no legal authorization. Writ at 15-16. But their positions could have as readily been articulated in an amicus brief.[12] Far from acting, in Proposed Intervenors' words, "illogically, arbitrarily, and unreasonably," *Id.* at 16, the court very sensibly exercised its discretion to keep a party that had repeatedly demonstrated its disregard for the court's rules from further complicating and delaying the proceedings with no benefit to the just resolution of the case.

/ / /

/ / /

/ / /

/ / /

/ / /

---

[12] As the district court noted, Proposed Intervenors were free to file an amicus brief with that court. App. 465-66. They chose not to do so. Proposed Intervenors again have the option of seeking leave to file an amicus brief with this court on Defendant's appeal of the preliminary injunction order. *See* NVRAP 29.

VI. CONCLUSION

For the foregoing reasons Proposed Intervenors' writ of mandamus should be denied.

January 22, 2016

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP

By: */s/ Don Springmeyer*

DON SPRINGMEYER (Nevada Bar No. 1021)
dspringmeyer@wrslawyers.com
JUSTIN C. JONES (Nevada Bar No. 8519)
jjones@wrslawyers.com
BRADLEY S. SCHRAGER (Nevada Bar No. 10217)
bschrager@wrslawyers.com
3556 E. Russell Road, Second Floor
Las Vegas, Nevada 89120
Telephone: (702) 341-5200
Facsimile: (702) 341-5300

TAMERLIN J. GODLEY (admitted pro hac vice)
THOMAS PAUL CLANCY(admitted pro hac vice)
SAMUEL T. BOYD (admitted pro hac vice)
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue, Thirty-Fifth Floor
Los Angeles, California 90071-1560
Telephone: (213) 683-9100
Facsimile: (213) 687-3702

DAVID G. SCIARRA (admitted pro hac vice)
AMANDA MORGAN (Nevada Bar No. 13200)
EDUCATION LAW CENTER
60 Park Place, Suite 300
Newark, NJ 07102
Telephone: (973) 624-4618
Facsimile: (973) 624-7339

Attorneys for Plaintiffs / Real Parties in Interest

CERTIFICATE OF COMPLIANCE

1. I certify that this Brief complies with the formatting requirements of N.R.A.P. 32(a)(4), the typeface requirements of N.R.A.P. 32(a)(5) and the type style requirements of N.R.A.P. 32(a)(6) because it has been prepared in a proportionally spaced typeface, size 14, Times New Roman.

2. I further certify that this Brief complies with the type-volume limitations of N.R.A.P. 32(a)(7) because, excluding the parts of the Brief exempted by N.R.A.P. 32(a)(7)(C), it contains 5,580 words.

3. 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 N.R.A.P. 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 22nd Day of January, 2016

By: */s/ Don Springmeyer*

WOLF RIFKIN SHAPIRO SCHULMAN & RABKIN
DON SPRINGMEYER (Nevada Bar No. 1021)
dspringmeyer@wrslawyers.com
JUSTIN C. JONES (Nevada Bar No. 8519)
jjones@wrslawyers.com
BRADLEY S. SCHRAGER (Nevada Bar No. 10217)
bschrager@wrslawyers.com
3556 E. Russell Road, Second Floor
Las Vegas, Nevada 89120
Telephone: (702) 341-5200
Facsimile: (702) 341-5300
Attorneys for Plaintiffs / Real Parties in Interest

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of January, 2016, a true and correct copy of the **PLAINTIFFS / REAL PARTIES IN INTEREST'S ANSWER TO PETITION FOR WRIT OF MANDAMUS** was served upon all counsel of record by electronically filing the document using the Nevada Supreme Court's electronic filing system.

By /s/ Christie Rehfeld
Christie Rehfeld, an Employee of
WOLF, RIFKIN, SHAPIRO,
SCHULMAN & RABKIN, LLP