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. 69580

First Judicial District Court,

Case No. 15-0C-00128 1B

PETITIONERS AIMEE HAIRR, AURORA ESPINOZA, ELIZABETH ROBBINS, LARA ALLEN, JEFFREY SMITH, and TRINA SMITH'S REPLY IN SUPPORT OF THEIR PETITION FOR WRIT OF MANDAMUS

Emergency Motion Under NRAP 27(e)

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INTRODUCTION AND SUMMARY OF ARGUMENT

The Plaintiffs' answer fails to rebut Petitioner-Parents' clear showing that the district court committed legal error when it denied them intervention of right. The Petitioner-Parents possess a fundamental liberty interest in directing the education and upbringing of their own children and, contrary to the district court's conclusion and Plaintiffs' argument, the Defendant State Treasurer does not adequately represent Petitioners' liberty interest. *See Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925) (striking down an Oregon public school attendance law that "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control"). Instead, Plaintiffs brush aside the Petitioner-Parents' liberty interest, claiming that how parents choose to educate their children is "simply not at issue" in this case. Pls.' Ans. 9. But, from the Petitioner-Parents' perspective, that is precisely what is at issue in this case. In its enactment of SB 302, establishing Nevada's Education Savings Account (ESA) program, the Legislature has provided the Petitioner-Parents with the means to exercise their liberty to choose the best educational placement for their children. Without the program the Petitioner-Parents simply will not have the financial resources to exercise their fundamental liberty.

The Plaintiff-Parents, on the other hand, have made their choice—they prefer to keep their children enrolled in public schools. In seeking to strike down SB 302, they also seek to ensure that Petitioner-Parents' children remain enrolled in their current public schools, many of which are not meeting the children's educational and emotional needs. *See* Writ 5–6. But Petitioner-Parents cannot exercise their freedom to change their children's educational placement without the assistance provided by the ESA program. *Id.* Plaintiffs' efforts to keep the voice of parents out of this litigation thus amount to "liberty for me, but not for thee."

Plaintiffs also fail to explain why the district court did not clearly err as a

matter of law when it claimed that Petitioner-Parents' motion to intervene was not "accompanied by a pleading setting forth the claim or defense for which intervention is sought," as required by NRCP 24(c), when in fact their motion was accompanied by an Answer, which is a pleading under NRCP 7(a). The district court's reliance upon this clear error in denying Petitioner-Parents' motion for permissive intervention easily satisfies the "manifest abuse of discretion" standard for obtaining extraordinary relief. *State v. Eighth Judicial Dist. Court*, 127 Nev. Adv. Op. 84, 267 P.3d 777, 780 (Nev. 2011) ("A manifest abuse of discretion is a clearly erroneous interpretation of the law or *a clearly erroneous application of a law or rule.*") (internal alteration and quotation marks omitted) (emphasis added).

The Plaintiffs and the district court also fault Petitioner-Parents for timely filing an opposition to the Plaintiffs' motion for preliminary injunction, claiming they were acting "as though they were already a party to the lawsuit." Pls.' Ans. 5. But that is absurd because Petitioner-Parents forthrightly stated up front in their opposition brief that their motion to intervene was still pending. App. 391. Petitioner-Parents' actions below were consistent with their obligations under the rules, their desire not to cause any delay to the proceedings, and their intent to protect their unique interests in ensuring that the ESA program begins operating as soon as possible. However, Petitioner-Parents were denied the opportunity to protect their interests when the district court denied their motion to intervene—and soon thereafter granted Plaintiffs' motion for preliminary injunction.

This Court should rectify the injustice of denying the ESA program's true and direct beneficiaries the opportunity to defend the program, and correct the district court's errors of law, by issuing a writ of mandamus directing the district court to grant Petitioner-Parents' motion to intervene, which will allow the Petitioner-Parents to participate fully as defendants as this case proceeds, both below and in the recently filed appeal of the order enjoining the ESA program.

ARGUMENT

In Part I, Petitioner-Parents rebut Plaintiffs' contention that a presumption of adequacy of representation applies in this case and show why they should have been granted intervention of right under NRCP 24(a)(2). As a matter of law, there is no presumption of adequacy of representation when, as here, the applicant-intervenors' interest in the case is narrower than, and distinct from, the existing parties' interests. Because the district court's order denying Petitioner-Parents intervention of right erroneously applied the presumption of adequacy urged by Plaintiffs, 3 App. 463–64, the district court made a clearly reversible error of law. Part II shows why Plaintiffs' efforts to rehabilitate the district court's errors of law regarding permissive intervention under NRCP 24(b)(2) are unpersuasive. The district court was manifestly wrong when it stated that Petitioner-Parents failed to file a pleading setting forth their defenses and claims along with their motion to intervene. 3 App. 465. Petitioner-Parents filed a proposed Answer on the same day they filed their motion to intervene. *Compare* 1 App. 20 (Answer filed 9/17/15 at 9:51am) *with* 1 App. 32 (Motion to Intervene filed same time); *see also* 3 App. 465. The district court's errors of law constitute an abuse of discretion for which a writ of mandamus directing the district court to grant Petitioner-Parents' motion to intervene is manifestly warranted.

I. Plaintiffs Wrongly Assert that a Presumption of Adequacy of Representation Applies in This Case.

Nevada courts ask whether "the representation of the applicant's interest by existing parties is *or may be* inadequate." *Lundberg v. Koontz*, 82 Nev. 360, 363, 418 P.2d 808, 809 (1966) (emphasis added); *see also Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972) (applicant-intervenors have only a "minimal" burden of showing that the state does not adequately represent their interest and need only demonstrate that the existing parties' representation "may

be" inadequate).[1] Petitioner-Parents easily met their burden of showing that the State Defendant "may" not adequately represent their interests.

The district court denied Petitioner-Parents' motion to intervene of right, pursuant to NRCP 24(a)(2), finding that they shared the same "legal interest" with the State Defendant and concluding that "[w]here both defendants and the proposed intervenors have the same legal interests, adequacy of representation is presumed." 3 App. 464. Plaintiffs, in their answer, defend the district court's ruling, asserting that where the constitutionality of a statute 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." Pls.' Ans. 7. There are at least three reasons why Plaintiffs are wrong to suggest that a presumption of adequacy of representation applies here.

First, the State Defendant does not possess—and therefore cannot adequately represent—Parents' fundamental liberty interest in directing the education of their own children. Second, the State Defendant and the Petitioner-Parents do not share the same "ultimate objective." Yes, both the Treasurer and Petitioners wish to defend the ESA program's constitutionality—but Petitioners' ultimate objective is to ensure each one of their children receives a high quality education in the institution that will meet each child's unique educational needs, regardless of whether that is with an ESA-funded scholarship or in a public school or by some other means. The Treasurer does not and cannot share that objective. Third, while the State Defendants' counsel, the Nevada Attorney General, may be

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[1] The parties agree Nevada courts look to federal precedent when construing NRCP 24. Pls.' Ans. 7 n.1; *see also Am. Home Assurance Co. v. Eighth Judicial Dist. Ct.*, 122 Nev. 1229, 1241–42, 147 P.3d 1120, 1128–29 (2006) (citing *Trbovich*, 404 U.S. at 538 n.10).

presumed to represent the People of Nevada generally—the Petitioner-Parents are the direct beneficiaries of the ESA program and possess interests in the outcome of this litigation that are distinct from that of the general public—interests that could be permanently impaired, and that are currently being impaired by the district court's grant of Plaintiffs' motion for preliminary injunction.

Moreover, and finally, Plaintiffs do not contradict the fact that no other court considering an opposed motion to intervene by parents seeking to defend an educational choice program has ever applied such a presumption—much less denied the motion to intervene.

A. The State Defendant does not share the Petitioner-Parents' legal interest in directing the education and upbringing of their own children—and therefore cannot adequately represent their unique interests.

In their answer, Plaintiffs rely—as did the district court—on the Ninth Circuit's decision in *Arakaki v. Cayetano*, 324 F.3d 1078 (9th Cir. 2003), to argue that the State Defendant is presumed to adequately represent Petitioner-Parents because both parties seek a declaration that the ESA program is constitutional. Pls.' Ans. 7; 3 App. 463. However, as the Ninth Circuit itself pointed out in *Arakaki*, representation of an applicant-intervenor's interest by existing parties is inadequate when "the intervenors' interests are narrower than that of the government." 324 F.3d at 1087. Here, the interest that Petitioner-Parents seek to protect is narrower than the government's interest in a declaration that the ESA program is constitutional. That is because Petitioner-Parents' interest is in protecting their fundamental liberty to direct the education and upbringing of their children. *See Pierce*, 268 U.S. at 534–35. The State Defendant does not, and could not, share that interest. Therefore, the State cannot be presumed to adequately represent the Petitioner-Parents' interests. And indeed, the precedent agrees with that logical conclusion.

No presumption of adequacy applies when, as here, the proposed intervenors' interests are distinct from, or "narrower" than, the state's interest. *Arakaki*, 324 F.3d at 1087–88 (recognizing a line of federal precedent permitting "intervention on the government's side" when "the intervenors' interests are narrower than that of the government and therefore may not be adequately represented").[2] Here, the Petitioner-Parents' legal interest in the challenged program is rooted in their fundamental liberty to raise and educate their children. The State Defendant's interest is in faithfully executing his legal duties under the ESA program. Petitioner-Parents' interests are intensely personal. The State Defendant's interests are political, pragmatic, and primarily ministerial.

Plaintiffs, and the court below, also misapply the standard for determining adequacy of representation by demanding that Petitioner-Parents identify, at the very start of litigation, and before the State Defendant has filed an Answer, specifically how their legal arguments or legal strategy will diverge from the State Defendant. However, neither this Court, nor federal law, demands a recitation of specific examples of precisely how an applicant-intervenor's legal strategy and/or arguments will differ from the existing parties. *Lundberg*, 82 Nev. at 363, 418 P.2d at 809; *Brumfield v. Dodd*, 749 F.3d 339, 345 (5th Cir. 2014) ("The movant need not show that the representation by existing parties will be, for certain, inadequate. . . . [T]he applicant's burden on this matter should be viewed as 'minimal.'" (quoting 6 Moore's Fed. Prac. § 24.03[4][a], at 24–47)); *see also Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 824 (9th Cir. 2001) ("[I]t is not

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[2] It is worth noting that the applicants denied intervention in *Arakaki* were actually the second group seeking to intervene as defendants in an equal protection challenge to the provision of benefits to native Hawaiians based on their ancestry. The applicants were denied intervention because a "similarly situated intervenor" had already been granted intervention. 324 F.3d at 1087.

Applicants' burden at this stage in the litigation to anticipate specific differences in trial strategy."). Indeed, as Petitioner-Parents have shown, in previous educational choice cases, it has been common for differences in legal arguments to arise as the cases progress.[3] 1 App. 49–50, 127–28. It is, therefore, enough to show that representation by existing parties *may be* inadequate. *Brumfield*, 749 F.3d at 346 ("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.").

B. The Petitioner-Parents and the State Defendant do not share the same ultimate objectives.

The Plaintiffs describe two "presumptions of adequacy." Pls.' Ans. 8 n.2. One applies, they say, when the government party and the intervenor "share the same interest." *Id.*; *see supra* Part I.A. (addressing divergence between interests of State and Petitioner-Parents). The other presumption, they say, applies "when an applicant for intervention and an existing party have the same ultimate objective." Pls'. Ans. 8 n.2. The Fifth Circuit, in a case reversing the denial of a motion to intervene by parents seeking to defend Louisiana's voucher program, also identified two presumptions of adequate representation. *Brumfield*, 749 F.3d at 345. "The first arises where one party is a representative of the absentee by law." *Id.* However, neither the Plaintiffs here, nor the court in *Brumfield*, ever "suggest[ed] that the state is the parents' legal representative." *Id.*

"The second presumption arises when the would-be intervenor has the same

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[3] For example, the claim made by intervenor-parents in *Duncan v. State*, 102 A.3d 913 (N.H. 2014), that a New Hampshire taxpayer standing statute was unconstitutional, was not identified by intervenors at the time they moved to intervene. Indeed, the Plaintiffs in *Duncan* tried to argue that the intervenors had waived the argument by not raising it earlier in the case and not sufficiently briefing the matter. *Id.* at 921.

ultimate objective as a party to the lawsuit."[4] *Id.* (internal quotation marks omitted). However, just as in *Brumfield*, this "second presumption does not apply here." *Id.* This is because the State Defendant and the Petitioner-Parents have different ultimate objectives.

Even though both the State Defendant and the Petitioner-Parents vigorously oppose Plaintiffs' efforts to halt the ESA program, their "ultimate objectives" are not alike in every way. Yes, both the State Defendant and the Petitioner-Parents seek to have the ESA program declared constitutional.[5] But the State Defendant has numerous objectives that the Petitioner-Parents, who are preoccupied with obtaining their ESAs, do not have. *See Sw. Ctr. for Biological Diversity*, 268 F.3d at 823 ("The interests of government and the private sector may diverge."). The State Defendant must maintain his relationship with the Superintendent of Public Instruction, who also has duties to perform under SB 302. As an elected official, he must also be concerned about future elections, and thus take public opinion into account when defending and implementing the law. *See Brumfield*, 749 F.3d at

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[4] Regardless of whether the "same interest" presumption discussed in Part I.A. is the same or different than the "ultimate objective" test discussed herein, which is arguably the case, the presumption does not apply here because the Petitioner-Parents' interests and objectives do not align entirely with the State Defendant.

[5] Plaintiffs cite *Stuart v. Huff*, 706 F.3d 345 (4th Cir. 2013), for a *reductio ad absurdum*, namely that there is no intervention, ever, in constitutional challenges to statutes. Pls.' Ans. 8, 12. But that cannot be true. Intervention has been granted in every educational-choice case in the last 25 years, even when opposed, *see infra* Part I.D. Moreover, *Stuart* expressed concern that permitting private parties to intervene in the government's defense of a statute would "greatly complicate the government's job," *id.* at 351, but here that concern is not present. The State Defendant has filed a notice of non-opposition, noting that Petitioner-Parents' participation as intervenors, in a separate Nevada case challenging the ESA program, has been "helpful." Def.'s Notice Non-Opp. 3.

346 ("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."). Petitioners do not share such concerns. *See id.* ("The parents do not have the latter two interests; their only concern is keeping their vouchers.").

Most importantly from Petitioner-Parents' perspective, the State Defendant does not share the Petitioners' ultimate objective—which is to use the ESA program to obtain the best available education for their children. While the Petitioner-Parents, in theory, are free to remove their children from their current educational placements and use private alternatives, in reality they do not possess the financial means to do so. It is the challenged ESA program that will empower them to exercise, in reality, their constitutionally protected liberty to select the best educational environment for their children. Petitioner-Parents should be afforded the opportunity to protect their distinct interests in Nevada's ESA program.

C. The Petitioner-Parents' interests, as the direct beneficiaries of the program, are distinct from, and much narrower than, the interests of the public-at-large.

Plaintiffs conflate the two presumptions of adequacy identified by the Ninth Circuit in *Arakaki v. Cayetano*, 324 F.3d 1078 (9th Cir. 2003). In *Arakaki*, the Ninth Circuit said that state defendants adequately represent applicant intervenors when either (1) the applicants' interests are identical to the state's interest, or (2) the applicants' interests are indistinguishable from those of citizens generally. Petitioner-Parents explained why the first presumption does not apply in Parts I.A. and I.B., *supra*. However, Plaintiffs treat the second presumption, situations where the applicant-intervenors' interests are indistinguishable from the general public's interest, as if it were part of the first presumption's test for determining when the applicants' interests are identical to the state's interests. Pls.' Ans. 8, 12. In doing

so, Plaintiffs cite *Stuart v. Huff*, 706 F.3d 345 (4th Cir. 2013), for the proposition that:

> 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.

Pls.' Ans. 8 (quoting *Stuart*, 706 F.3d at 351). However, the law challenged in *Stuart* was an exercise of the police power, not an individual-assistance program.

Here, Petitioner-Parents are the intended beneficiaries of the challenged ESA program, which puts them in a unique position to intervene. Petitioner-Parents' children, some of whom are already in high school, 1 App. 57, 65, 72, 77, 86, need an educational lifeline *now*. Petitioner-Parents possess immediate, as well as long-term, interests in the case that are simply not comparable to the concerns of the general public—the vast majority of whom have no personal stake in the outcome of this case. Neither the public-at-large nor the State Defendant has any comparable immediate or short-term interests.

In fact, the district court's granting of Plaintiffs' motion for preliminary injunction, 3 App. 468–83, illustrates the way that Petitioner-Parents' and the general public's interests diverge. As long as the ESA program is preliminarily enjoined, it is Petitioner-Parents' children who are suffering harm. They have been cut off from access to the ESA program while the case works its way through the judicial system. The general public, many of whom have no children or whose children (such as the Plaintiffs' children) will not participate in the ESA program, suffer no personal harm. For the general public, the injunction has merely halted

the State Treasurer from performing certain administrative functions, none of which impact the general public's daily life. Petitioner-Parents, on the other hand, may lose entirely the opportunity to access educational options for their oldest children—and they are losing months, possibly even years, to rescue their younger children from their existing schools, which have failed to meet their educational needs. Writ 5–6; 1 App. 56–95.

D. No other court to consider an opposed motion to intervene in an educational choice case has ever concluded that state defendants adequately represent the beneficiary-parents' interests.

Plaintiffs try to distinguish the numerous cases in which parents have been granted intervention to defend an educational choice program over the objection of plaintiffs. *See, e.g.*, *Citizens for Strong Sch., Inc. v. Fla. State Bd. of Educ.*, No. 09-CA-4534 (Fla. Cir. Ct. 2d Oct. 6, 2014) (order granting opposed motion to intervene), *available at* https://goo.gl/k60Xly; *Meredith v. Daniels*, No. 49D07-1107-PL-025402 (Ind. Super. Ct. Marion Cty. Aug. 4, 2011) (same), *available at* https://goo.gl/W9C91u; *Duncan v. New Hampshire*, No. 219-2013-CV11 (N.H. Super. Ct. Strafford Cty. Feb. 20, 2013) (same); *Hart v. North Carolina*, No. 13 CVS 16771 (N.C. Super. Ct. Wake Cty. Mar. 13, 2014) (same); *Richardson v. North Carolina*, No. 13 CVS 16484 (N.C. Super. Ct. Wake Cty. Mar. 13, 2014) (same); *Brumfield*, 749 F.3d at 346 (overturning denial of motion to intervene as of right). But their focus on specific ways in which the parents' legal arguments in those cases differed from the states' arguments ignores that (1) applicant-intervenors need not identify precisely how their arguments will differ from the State Defendant's arguments, *Brumfield*, 749 F.3d at 345, and (2) differences in legal arguments and strategies often arise during the long course of litigation and are not always readily apparent at the start of litigation. *See supra* n.3; 1 App. 50, 127–28.

II. The District Court's Errors of Law in Its Order Denying Permissive Intervention Constitute an Abuse of Discretion.

A district court abuses its discretion when it makes a "clearly erroneous interpretation of the law or a clearly erroneous application of a law or rule." *State v. Eighth Judicial Dist. Court*, 127 Nev. Adv. Op. 84, 267 P.3d 777, 780 (Nev. 2011) (internal alteration and quotation marks omitted); *San Jose Mercury News, Inc. v. U.S. Dist. Court—N. Dist. (San Jose)*, 187 F.3d 1096, 1100 (9th Cir. 1999) ("Where . . . the district court's decision [denying permissive intervention] turns on a legal question . . . its underlying legal determination is subject to *de novo* review."). The district court here made several clearly erroneous interpretations of the rules governing permissive intervention, NRCP 24(b)(2), (c), as well as clearly erroneous applications of those rules. Plaintiffs' efforts to explain away or justify the district court's errors, Pls.' Ans. 4, 16–18, are unavailing for the following three reasons.[6]

First, the district court erroneously concluded Petitioner-Parents failed to file a responsive pleading, as required by NRCP 24(c) ("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."). Petitioners filed an Answer, which is clearly a pleading, along with their motion. Second, Petitioner-Parents did not "disregard," Pls.' Ans. 17, any of the rules of procedure. They were candid in their response to the Plaintiffs' motion for preliminary injunction that their motion to intervene was still pending. 3 App. 391. Third, all

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[6] Plaintiffs' spurious suggestion to the contrary notwithstanding, Pls.' Ans. 16–17, courts do sometimes reverse in cases involving denial of permissive intervention after finding the lower court abused its discretion. *See San Jose Mercury News,* 187 F.3d 1096; *Coffey v. Commissioner*, 663 F.3d 947 (8th Cir. 2011); *Appleton v. Comm'r*, 430 F. App'x 135 (3d Cir. 2011).

of the Petitioner-Parents' other filings for which the district court faulted them were clearly authorized by the rules and entirely reasonable, given that nearly all of them relate to Petitioner-Parents' choice of counsel.

A. Petitioner-Parents complied with Rule 24(c)'s pleading requirement.

Plaintiffs, like the district court, criticize Petitioner-Parents for filing an Answer along with the motion to intervene. Pls.' Ans. 4 ("[T]hey also filed with the district court an answer to Plaintiffs' complaint, even though they were not parties to the lawsuit."); 3 App. 465 ("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."). NRCP 24(c) requires movant-intervenors to file, along with their motion, "a pleading setting forth the claim or defense for which intervention is sought." An Answer is clearly a pleading under NRCP 7(a) ("**(a) Pleadings.** There shall be a complaint and an answer."). The district court also, bizarrely, faults Petitioner-Parents for not "supplementing" their motion to intervene after the State Defendant filed his Answer—but the State Defendant has not filed an Answer. 3 App. 464. Petitioner-Parents clearly and appropriately satisfied their obligation under Rule 24(c) by filing an accompanying Answer with their motion to intervene.

B. Petitioner-Parents took reasonable actions to prevent any delay in the proceedings.

Plaintiffs also criticize Petitioner-Parents for filing an "unauthorized" opposition to Plaintiffs' motion for preliminary injunction. Pls.' Ans. 1. In doing so, they impliedly argue that Petitioner-Parents were trying to pull a fast one. Nothing could be further from the truth. Petitioner-Parents were completely candid when they filed their response that their motion to intervene was still pending. 3 App. 391. Moreover, in their response to Plaintiffs' motion to strike,

Petitioner-Parents acknowledged that the court should treat their response to the preliminary injunction motion as a proposed response until such time as the district court ruled on their motion to intervene. 3 App. 429. Petitioners acted reasonably and swiftly to protect their interests in this litigation and were at all times candid with the district court about the status of their motion to intervene. They should not be penalized for diligently defending the ESA program on behalf of their children.

C. All of the filings related to Petitioner-Parents' counsel were proper.

Plaintiffs' suggestions that Petitioner-Parents disregarded the rules extend beyond the filing of the response to the preliminary injunction motion. Pls.' Ans. 17. Indeed, the district court faulted Petitioners for filing their motion to associate counsel, their amended notice to set, a notice of substitution of counsel, and a notice of association of counsel, saying they had "no legal basis to file" these documents. 3 App. 465. But three of those documents relate merely to the appearance of counsel. No rule suggests that applicants for intervention are prohibited from associating with the counsel of their choice or that filing documents to properly associate counsel is impermissible until after a motion to intervene has been granted. And the amended notice to set appears to be nothing more than Petitioner-Parents' prior counsel's efforts to submit the motion to intervene for a decision. While the proper method is a request for submission, which Petitioner-Parents' new counsel submitted soon after they filed their (proper) notice of substitution of counsel, 3 App. 443–55, the filing of a notice to set should hardly be considered to demonstrate any sort of "disregard for the rules." Pls.' Ans. 17.

CONCLUSION

An order overturning the denial of a motion to intervene may only be obtained "by a petition for extraordinary relief." *Aetna Life & Cas. Ins. Co. v. Rowan*, 107 Nev. 362, 363, 812 P.2d 350, 351 (1991). As demonstrated in their Writ and this reply brief, the district court erred as a matter of law in denying Petitioner-Parents' motion to intervene. The Petitioner-Parents are the direct and intended beneficiaries of the challenged ESA program. They should be permitted to participate fully in these important proceedings to protect their interest in the outcome of this case. Petitioner-Parents respectfully request this Court to issue a writ of mandamus directing the district court to enter an order allowing them to intervene as defendants.

Respectfully submitted this 27th day of January, 2016.

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CERTIFICATE OF COMPLIANCE

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 15 pages.

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 27th day of January, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Kolesar & Leatham, and that on the 27th 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 REPLY IN SUPPORT OF THEIR PETITION FOR WRIT OF MANDAMUS** 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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First Judicial District Court
885 E. Musser St., Ste. 3031
Carson City, Nevada 89701
Attention: Honorable Judge James E. Wilson
VIA U.S. CERTIFIED MAIL – RETURN RECEIPT

An Employee of KOLESAR & LEATHAM