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

Petitioners Aimee Hairr, Aurora Espinoza, Elizabeth Robbins, Lara Allen, Jeffrey Smith, and Trina Smith's

Petition for Reconsideration of Petition for Writ of Mandamus from the First Judicial District Court, District Court Case No. 15-OC-002071-B

First Judicial District Court, District Court Case No. 15-OC-002071-B

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INTRODUCTION

With the Panel's opinion, Nevada is the first state in the nation to deny parents the right or permission to intervene to defend their unique interests as beneficiaries of an educational choice program.[1] Petitioner-Parents and their

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[1] Parents have participated as intervenor-defendants, to protect their interests as beneficiaries of school choice programs in 24 cases. *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1441 (2011); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Brumfield v. Dodd*, 749 F.3d 339 (5th Cir. 2014) (reversing denial of intervention as of right); *Magee v. Boyd*, 175 So. 3d 79 (Ala. 2015); *Cain v. Horne*, 202 P.3d 1178, 1181 (Ariz. 2009); *Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999); *Niehaus v. Huppenthal*, 310 P.3d 983 (Ariz. Ct. App. 2013); *Green v. Garriott*, 212 P.3d 96, 100 (Ariz. Ct. App. 2009), *as amended* (Apr. 15, 2009); *Taxpayers for Pub. Educ. v. Douglas Cty. Sch. Dist.*, 351 P.3d 461 (Colo. 2015), *petition for cert. filed*, No. 15-558 (U.S. filed Nov. 2, 2015); *Owens v. Colo. Cong. of Parents, Teachers & Students*, 92 P.3d 933 (Colo. 2004); *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006); *Citizens for Strong Schs., Inc. v. Fla. State Bd. of Educ.*, No. 09-CA-4534, 2010 WL 8747791, at *2 (Order Denying Dismissal, Fla. Cir. Ct. Aug. 20, 2010); *Gaddy v. Ga. Dep't of Revenue*, No. 2014-cv-244538 (Order Granting, In Part, Motion to Dismiss, Ga. Super. Ct. Feb. 5, 2016) (**Exhibit A**);

children directly benefit from Nevada's Educational Savings Account (ESA) program and, as such, they have a distinct, personal interest in defending the ESA program. As the litigation progresses, their legal interests, arguments, and strategies may conflict with the State's defense of the program's constitutionality. Because the State may not adequately represent their unique interests, they should be permitted to intervene and fully participate in this case.

Griffith v. Bower, 747 N.E.2d 423 (Ill. App. Ct. 2001); *Toney v. Bower*, 744 N.E.2d 351, 356 (Ill. App. Ct. 2001); *Meredith v. Pence*, 984 N.E.2d 1213 (Ind. 2013); *La. Fed'n of Teachers v. State*, 118 So. 3d 1033, 1038 n.1 (La. 2013); *Duncan v. State*, 102 A.3d 913, 917 (N.H. 2014); *Richardson v. State*, 774 S.E.2d 304, 305 (N.C. 2015); *Hart v. State*, 774 S.E.2d 281, 287 (N.C. 2015); *Duncan v. State*, No. A-15-723703-C (Minute Order Granting Motion to Intervene, Nev. 8th Dist. Ct. Oct. 20, 2015) (**Exhibit B**); *Simmons-Harris v. Goff*, No. 96APE08-982, 1997 WL 217583, at *2 (Ohio Ct. App. May 1, 1997), *aff'd in part, rev'd in part*, 711 N.E.2d 203 (Ohio 1999); *Chittenden Town Sch. Dist. v. Vt. Dep't of Educ.*, 738 A.2d 539 (Vt. 1999); *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998). Although intervention was not always opposed, intervention was granted over plaintiffs' objections in some. *E.g.*, *Brumfield*, 749 F.3d at 339; *Richardson*, 774 S.E.2d at 306; *Hart*, 774 S.E.2d at 287.

The Panel's opinion should be reconsidered *en banc* for two reasons: The opinion does not conform to this Court's and federal courts' precedent on intervention and this case involves substantial precedential and public policy issues. *See* NRAP 40A(a).

First, the Panel opinion is out of step with this Court's precedent. For intervention of right under NRCP 24(a), Petitioner-Parents do not need to compellingly show, especially this early in litigation, that the State Defendant will not adequately represent their legal interests; they merely need a *minimal* showing that their interests *may* diverge at some point in the litigation. And the Panel did not apply this Court's usual abuse-of-discretion standard when it affirmed the district court's clearly mistaken finding that Petitioner-Parents' proposed answer was not a pleading.

Second, this case involves substantial precedential and public policy issues. The Panel opinion will affect all Nevada interventions whenever the government is defending a statute's constitutionality. The standard applied in the Panel opinion is much more stringent than federal courts' policy of construing intervention requirements liberally—even though this Court has in the past followed federal precedent on intervention. Such a shift in policy should be decided by the full Court.

A speedy resolution of this petition may allow Petitioner-Parents to fully

participate in the merits of this case.

BACKGROUND

With the recent passage of its ESA program, for which all students not already enrolled in private schools or homeschooling are eligible, Nevada has joined other states in enthusiastically embracing educational choice. Petitioner-Parents are six parents who desire to use the program for their children. 1 App. 56-95. Petitioner-Parents timely sought to intervene in a lawsuit challenging the constitutionality of the program shortly after it was filed, but were denied intervention of right under NRCP 24(a) by the district court. *Id.* at 32-55; 3 App. 462-67. The State did not oppose Petitioner-Parents' motion to intervene. The court ruled that they had not made a "very compelling showing" that the state defendant would not adequately represent their interests. 3 App. 463. The court also denied permissive intervention under NRCP 24(b), stating that it was "concerned about the Proposed Intervenors' disregard for the rules." *Id.* at 465. After noting that 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,'" the court stated that:

> 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 right to file an opposition.

Id. The court did invite Petitioner-Parents to submit a brief as *amici curiae*.[2] *Id.* at 465-66.

After the district court denied their motion to intervene, Petitioner-Parents filed an emergency motion with this Court under NRAP 27(e), submitting a petition for a writ of mandamus on January 14, 2016, seeking an order directing the district court to grant Petitioner-Parents intervenor-defendant status. Pet. i. The State Defendant filed a notice of non-opposition, "support[ing the writ petition] as

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[2] In denying permissive intervention, the district court also stated that it was "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 issue in the case." 3 App. 465. It is clear from the decision that the court was primarily concerned that it was Petitioner-Parents' alleged disregard for rules and procedures that would potentially delay and increase the costs of the litigation, a concern based on the court's mistaken idea that Petitioner-Parents' proposed answer was not a "pleading" under NRCP 24(c). *See id.* The district court was also under the mistaken impression that the State Defendant had filed an answer to the complaint that should have led Petitioner-Parents to amend their papers. *See id.* at 464. But the State Defendant had not then, and has not subsequently, filed an answer.

he believes the Petitioner-Parents participation in this case would be helpful." Treasurer Dan Schwartz's Notice of Non-Opp'n 2. Meanwhile, the district court issued an order granting Plaintiffs' motion for a preliminary injunction and ordering the parties to meet to discuss expedited discovery and trial. The State Defendant appealed the preliminary injunction, and this Court granted expedited consideration of the case. *Schwartz v. Lopez*, No. 69611 (Order Granting Motion to Expedite, Nev. Feb. 12, 2016). Briefing on the appeal from the preliminary injunction was completed on May 3, 2016.

On March 10, 2016, a Panel of this Court affirmed the district court's denial of Petitioner-Parents' motion to intervene, by denying their petition for a writ of mandamus. *Hairr v. First Judicial Dist. Court*, 132 Nev., Adv. Op. 16, ___ P.3d ___ (2016). Petitioner-Parents timely petitioned for reconsideration *en banc*, under NRAP 40, asking this Court to invoke NRAP 2 and forego its requirement that a party must first file a petition for rehearing. Alternatively, the petition asked this Court to consider the petition as one for rehearing under NRAP 40. The panel considered the petition as one for rehearing and denied rehearing. *Hairr v. First Judicial Dist. Court*, No. 69580 (Order Denying Rehearing, Nev. May 10, 2016). Petitioner-Parents now petition for reconsideration *en banc* under NRAP 40A.

ARGUMENT

Petitioner-Parents are the direct beneficiaries of the program and should be permitted to protect their distinct interests by fully participating in its defense. It is Petitioner-Parents who have the most to gain or lose in the outcome of this case. As intervenors, they would be entitled to (1) participate in oral argument, (2) petition for reconsideration of an adverse ruling, and (3) take part in discovery and develop a full record should the case be remanded to the district court. In a case where Petitioner-Parents would be the only parties before this Court to be *directly* impacted by its ruling, their full participation is vital.

This Court will order reconsideration "when (1) reconsideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) the proceeding involves a substantial precedential, constitutional or public policy issue." NRAP 40A(a). This case concerns both prongs of NRAP 40A. Reconsideration by the full court is necessary because the Panel opinion deviates from this Court's precedent as well as from the federal precedent that has always guided this Court's intervention jurisprudence. And the rule created by the Panel opinion has precedential and public policy consequences extending far beyond the contours of this specific case.

I. The Panel Opinion Contradicts This Court's Precedents on Both Intervention of Right and the Abuse-of-Discretion Standard

Reconsideration is appropriate because the Panel opinion does not conform to this Court's past precedent. First, the Panel opinion ruled that those wishing to intervene must conclusively show that their arguments will be different from the existing parties' arguments. That conclusion contradicts *American Home Assurance Co. v. Eighth Judicial Dist. Court*, 122 Nev. 1229, 1238, 1242, 147 P.3d 1120, 1127, 1129 (2006) (requiring only a *minimal* showing that representation *may* be inadequate), and it deviates from analogous federal precedent, *see, e.g.*, *Brumfield v. Dodd*, 749 F.3d 339, 345 (5th Cir. 2014) ("The burden on the movant is not a substantial one. The movant need not show that the representation by existing parties will be, for certain, inadequate . . . ."); *cf. Am. Home Assurance*, 122 Nev. at 1238, 147 P.3d at 1127 (interpreting NRCP 24 using analogous federal precedent). Second, the Panel opinion affirmed a district court's decision containing a clear mistake of law, which contradicts this Court's regular abuse-of-discretion analysis. *See State v. Eighth Judicial Dist. Court*, 127 Nev., Adv. Op. 84, 267 P.3d 777, 780 (2011) (stating that a court abuses its discretion when it makes a "clearly erroneous application of a law or rule").

A. Nevada Law Only Requires a *Minimal* Showing That Existing Parties' Representation *May* Be Inadequate

The Panel opinion claims that Petitioner-Parents did not make a "compelling showing" that the State's defense of the ESA program *would* be inadequate and that Petitioner-Parents *would* present different arguments on the issue. *Hairr*, 132 Nev., Adv. Op. 16, at *7-8. This conclusion misapplies this Court's precedent: Petitioner-Parents need only satisfy the *minimal* burden of showing that existing parties *may not* adequately represent their interest. Petitioner-Parents have distinct interests and identified several prior cases involving educational choice programs where state defendants' arguments differed significantly from the arguments made by intervenor parents. *See* 1 App. 50, 127-28. The possibility of divergent legal arguments is especially important here because the State Defendant has not yet filed an answer and the potential for protracted litigation still exists.

Under *American Home Assurance*, proposed intervenors have what this Court called a "minimal" burden: They only need to "show that the [existing party] has a different objective, adverse to its interest, or that the [existing party] otherwise *may not* adequately represent their shared interest." 122 Nev. at 1241-42, 147 P.3d at 1128-29 (emphasis added). Federal courts similarly construe the analogous federal rule[3]: Intervenors face only a "minimal" burden and it is

[3] This Court considers federal cases interpreting similarly worded federal rules to

sufficient to show that such representation "may be" inadequate. *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972); *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003) (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." (emphasis in original)); *Grutter v. Bollinger*, 188 F.3d 394, 400 (6th Cir. 1999) ("[T]his court clearly stated that the proposed intervenors were required only to show that the representation *might* be inadequate."). Courts presume adequate representation only when a proposed intervenor's interests are identical to those of an already existing party, such as where a non-government party had already intervened and is adequately representing the applicant's interests. *See Arakaki*, 324 F.3d at 1086-87.[4]

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be "'strong persuasive authority.'" *Vanguard Piping Sys., Inc. v. Eighth Judicial Dist. Ct.*, 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)).

[4] The federal cases cited by the Panel opinion, *Arakaki* and *Perry v. Proposition 8 Official Proponents*, 587 F.3d 947 (9th Cir. 2009), are easily distinguished. In both cases, a non-government party *had already intervened* and was adequately

Here, the Panel opinion departed from *American Home Assurance*'s "minimal" standard, and instead insisted that Petitioner-Parents make a "compelling showing" and "cite an argument they would make that the State would not." *Hairr*, 132 Nev., Adv. Op. 16., at *3, *8. The Panel opinion stated that, despite Petitioner-Parents identifying a separate liberty interest, they "d[id] not indicate how protecting their right . . . would result in their assertion of different defenses." *Id.* at *8. But Petitioner-Parents should not be required to identify, with certainty, arguments they would make that the State would not. Indeed, as Petitioner-Parents wish to intervene as *defendants*, their arguments are responsive and will necessarily depend on the arguments made by Plaintiffs. In this case, when Petitioner-Parents moved to intervene, the State Defendant had not—and still has not—filed an answer setting forth his defenses. Instead, he filed a motion to dismiss. *See* 3 App. 456. It is impossible to identify, at this stage in the litigation, all of the arguments that may be made by Plaintiffs if the case is remanded, let alone by Petitioner-Parents and the State Defendant in response.

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representing the second group of intervenors' interests. *Perry,* 587 F.3d at 949-50; *Arakaki,* 324 F.3d at 1086-87; *accord Magee,* 175 So. 3d at 141 (noting first group of parents' intervention as grounds for denying intervention to second group).

What can be identified, at this point in litigation, is that Petitioner-Parents have different interests in the litigation than does the State Defendant, and that these different interests *may* cause the State's representation to be inadequate. Petitioner-Parents, in their writ petition, referenced "numerous examples of precisely when and how intervenor-parents' legal interests have diverged from state defendants in similar school choice litigation in other states." Pet. 12-13 n.5 (citing 1 App. 50, 127-28). These examples included:

- Intervenors and state defendants have previously held divergent interests and made different arguments on matters of standing. *See Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1440-45 (2011); *Duncan v. State*, 102 A.3d 913 (N.H. 2014).[5]
- When the interpretation of the provision at issue may be affected by the interpretation of other statutes or provisions, state defendants must simultaneously defend the constitutionality of those other provisions

[5] In both *Winn* and *Duncan*, parent-intervenors asserted that the taxpayer plaintiffs lacked standing, while the state defendants did not. And the U.S. and New Hampshire Supreme Courts ruled in favor of the parent-intervenors on the standing issue and dismissed the cases.

while intervenor-parents need not. *See Kotterman v. Killian*, 972 P.2d 606, 624 (Ariz. 1999); *Duncan*, 102 A.3d at 913.[6]

- Intervenor-parents have a direct, personal interest to argue for temporary relief, such as staying a lower court injunction, because, unlike state defendants, their children's education is on the line. *See Cain v. Horne*, 202 P.3d 1178, 1185 n.5 (Ariz. 2009); *Hart v. North Carolina*, No. P14-659 (Order Denying Motion for Temporary Stay, N.C. Ct. App. Sept. 9, 2014) (**Exhibit C**).[7]

There are several reasons that Petitioner-Parents' and the State Defendant's distinct interests could lead to different legal interests and arguments. State

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[6] Both the Arizona and New Hampshire constitutions contain "Blaine Amendments," similar to Nevada's Article 11, § 10, that parent-intervenors alleged violated the federal Constitution because they were adopted for the purpose of discriminating against Catholics. The state defendants in Arizona and New Hampshire declined to make that argument. The same thing happened in Alabama in the *Boyd* litigation and in Indiana in the *Meredith* litigation. *Supra*, note 1.

[7] In both Arizona and North Carolina, parent-intervenors sought and obtained interim relief after adverse decisions during the pendency of appeals, relief that the state defendants did not seek.

defendants are political bodies and must craft their legal strategy in a politically acceptable way. State defendants often must also defend an existing legal regime while considering the interpretations of other statutes, instead of representing the concrete interests of clients directly affected by the case's outcome.[8] On issues like standing, state defendants are repeat-players who must keep future constitutional challenges in mind, whereas interested parents may never set foot inside a courtroom again.

Here, Petitioner-Parents' unique interests as the program's beneficiaries make it possible that the State's defense will be inadequate. Petitioner-Parents cannot say for sure that that will be the case; but the law does not require them to do so. In Nevada, all proposed intervenors need show is that the state's defense "may not" be adequate. *Am. Home Assurance*, 122 Nev. at 1242, 147 P.3d at 1129. *En banc* reconsideration is necessary to ensure that this decision accords with prior precedent.

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[8] For example, in *Hart* and *Richardson*, *see supra* n. 1, it was parent-intervenors and not the state defendants who brought to the courts' attention the poor performance of the public school students eligible for scholarships in North Carolina.

B. An Erroneous Application of Law or an Irrational Decision Is an Abuse of Discretion

The Panel opinion concluded that Petitioner-Parents did not "demonstrate[] that the district court clearly abused its discretion." *Hairr*, 132 Nev., Adv. Op. 16, at *10. Yet the Panel opinion failed to address Petitioner-Parents' main argument: The district court abused its discretion by deciding that Petitioner-Parents' answer was not a "pleading" under NRCP 24(c). 3 App. 465. This error led directly to the district court's mistaken conclusion that Petitioner-Parents had failed to comply with NRCP 24(c). *Id.* The district court's order was based on a clear mistake of law. By affirming the district court's either deeply mistaken or irrational order, the Panel opinion did not conform to this Court's prior jurisprudence on the abuse-of-discretion standard.

This Court's precedent is well settled: "[D]isregard[of] controlling law" is an abuse of discretion. *Las Vegas Metro. Police Dep't v. Blackjack Bonding, Inc.*, 131 Nev., Adv. Op. 10, 343 P.3d 608, 614-15 (2015) (concluding district court abused its discretion by incorrectly defining the term "prevailing party"), *reconsideration en banc denied* (July 6, 2015). A district court abuses its discretion when it makes 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 (2011), or its decision is "inconsistent," "fanciful," or "unreasonable," *Imperial Credit Corp. v. Eighth Judicial Dist. Court*, 130 Nev., Adv. Op. 59, 331 P.3d 862, 866 (2014)

(internal quotation marks omitted). "While review for abuse of discretion is ordinarily deferential, deference is not owed to legal error." *AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 589, 245 P.3d 1190, 1197 (2010) (reversing district court order denying NRCP 59(e) motion).

Here, in denying Petitioner-Parents' intervention, the district court abused its discretion by making several legal and logical errors.[9] The principal error was a straightforward misapplication of NRCP 24(c). The district court said that Petitioner-Parents violated NRCP 24(c) by not filing a "pleading." 3 App. 465. But Petitioner-Parents did file a pleading: They filed an answer. 1 App. 20-31; 3 App. 465; *see* NRCP 7(a) (categorizing an "answer" as a "pleading"); *see also 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); *Smith v. Eighth Judicial Dist. Court*, 113 Nev. 1343, 1346, 950 P.2d 280, 282 (1997) ("[T]he only pleadings allowed are complaints, answers, and replies."). Hence, the district court erroneously did not consider Petitioner-

[9] Petitioner-Parents also argued that the district court erred by finding their other proposed filings, including Motions to Associate Counsel, improper and "unauthorized." *See* Pet'rs' Reply Supp. Pet. 12-14.

Parents' answer to be a pleading. This is a clear mistake of law and therefore an abuse of discretion.

Reconsideration of this case is merited because the Panel opinion deviated from this Court's abuse-of-discretion jurisprudence. A district court ruling that is either legally mistaken or irrational is an abuse of discretion.

II. The Panel Opinion Involves Precedential, Constitutional, and Public Policy Issues Suitable for Resolution by the Full Court

A. Precedential and Constitutional Issues: When Can a Program Beneficiary Intervene if the State is Also Defending the Program's Constitutionality?

This case raises an important precedential issue: Under Nevada law, when may the beneficiary of a state program intervene in a lawsuit challenging the constitutionality of that program?

The Panel opinion decided that, because the lawsuit ultimately concerns the constitutionality of Nevada's ESA program, and because the State intends to argue in favor of the program's constitutionality, Petitioner-Parents' interest in the program's constitutionality is adequately represented. *Hairr*, 132 Nev., Adv. Op. 16, at *7. The Panel opinion's conclusion is a precedential outlier. No court of which Petitioner-Parents are aware has ever decided that parents may not represent their interests as school-choice program beneficiaries.[10]

[10] *See supra*, note 1.

The Panel opinion's conclusion sets a chilling precedent. It suggests that, in Nevada, intervention of right does not apply when an applicant-intervenor wishes to defend a government program of which the applicant-intervenor is a direct beneficiary. Under the Panel opinion, it is difficult to see how program beneficiaries can ever intervene if the government is already defending the constitutionality of a program.

The Panel's opinion is not consistent with federal precedent on intervention and creates a new rule that is distinct from most other states. *See, e.g.*, *Citizens for Balanced Use v. Montana Wilderness Ass'n*, 647 F.3d 893, 898 (9th Cir. 2011) ("The burden of showing inadequacy of representation is 'minimal' and satisfied if the applicant can demonstrate that representation of its interests 'may be' inadequate."); *State v. Brown & Williamson Tobacco Corp.*, 998 P.2d 1055, 1063 (Ariz. 2000) (*en banc*) ("The burden on the applicant requires only a showing that the representation *may be* inadequate." (emphasis in original)); *Frostar Corp. v. Malloy*, 933 N.E.2d 1002, 1009 (Mass. App. Ct. 2010) ("We also note that the pertinent question is not whether the intervener's interest could be protected in another action, but whether there 'may' be a practical negative impact on the protection of that interest if intervention is not allowed." (alterations and quotation marks omitted)). Petitioner-Parents respectfully submit that the novel approach offered by the Panel's opinion should be considered by this Court *en banc*.

B. Public Policy Issues: Should Nevada Follow Federal Courts and Construe Intervention Requirements Liberally and With a Policy in Favor of Intervention?

The resolution of this case concerns important public policy issues, namely, Nevadans' access to the courts and the ability of Nevada courts to hear from all interested parties.

Federal courts construe Federal Rule of Civil Procedure 24 in favor of proposed intervenors. They "do so because a liberal policy in favor of intervention serves both efficient resolution of issues and broadened access to the courts." *Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173, 1179 (9th Cir. 2011) (internal quotation marks and modifications omitted).

Here, the Panel opinion instead applied NRCP 24(a) rigidly against intervention. The Panel wrote that rule 24(a) demands a "compelling showing" to overcome a presumption against intervention. *Hairr*, 132 Nev., Adv. Op. 16, at *8. The opinion faulted Petitioner-Parents for not showing a conflict of interest and not citing specific arguments that Petitioner-Parents would make, and that the State Defendant would not make, as litigation progressed. *Id.* at *3. This standard is inappropriate, especially for those intervening on the side of defendants, because such arguments are usually responsive to the plaintiffs' arguments. It is impossible to show with certainty what arguments will be made by other defendants, in

response to plaintiffs, especially early in the litigation when the plaintiffs have not yet fully presented their arguments.

Sections (a) and (b) of NRCP 24 both begin with the phrase "[u]pon timely application," with the obvious purpose of encouraging intervenors to act swiftly in order to minimize any disruption to the ongoing litigation, which is precisely what Petitioner-Parents did here. The Panel's opinion, which would require intervenors to wait for defendants to make substantive arguments in order to show up-front precisely how they will argue differently, runs directly counter to the current policy of ensuring timely application. *Cf. Estate of Lomastro ex rel. Lomastro v. Am. Family Ins. Grp.*, 124 Nev. 1060, 1070 n.29, 195 P.3d 339, 347 n.29 (2008) ("[I]ntervention is timely if the procedural posture of the action allows the intervenor to protect its interest.").

The reality of constitutional litigation is that, in many challenges to newly-enacted statutes, the plaintiffs file a motion for preliminary injunction along with, or shortly after filing, their complaint and before the state defendants have even filed an answer or another responsive pleading. Individual-intervenors who desire to protect their interests in those statutes must seek to intervene quickly or risk being left behind. The further litigation progresses, the less likely a motion to intervene will be regarded as timely filed under NRCP 24(a) and (b). But the earlier a motion to intervene is filed, the harder it is for the proposed intervenors to

anticipate the direction litigation will take and to know, let alone make a case, that the state's representation will be inadequate.

The Panel opinion's interpretation of NRCP 24(a) restricts the availability of intervention in Nevada constitutional cases. And it suggests, despite this Court's prior interpretation of NRCP 24, that Nevada's policy is not as liberal as the analogous federal rule. Petitioner-Parents respectfully submit that such a shift in policy should be decided by the full Court.

CONCLUSION

Petitioner-Parents and their children stand to benefit a great deal from Nevada's ESA program. They also stand to lose much should the State fail to adequately defend the program's constitutionality. Intervention would permit Petitioner-Parents to fully participate in the case. It would, among other things, allow them to raise arguments that the State may avoid for various political reasons. In contrast, denying intervention mutes the voice of those most directly affected by the ESA program: Petitioner-Parents and their children. Moreover, a speedy resolution of this writ petition may also allow Petitioner-Parents to fully participate in the proceedings on the merits.

The Panel opinion deviated from Nevada law by demanding a "compelling showing," instead of a "minimal" one, and thereby requiring concrete certainty that Petitioner-Parents and the State Defendant will have conflicting interests during

the litigation. The Panel opinion further waters down this Court's abuse-of-discretion standard, by failing to correct the district court's denial of permissive intervention that was based on the clear misunderstanding that an answer is not a pleading. And the Panel opinion decides broad issues of Nevada law and policy that would be more suitably resolved by the full Court. Therefore, Petitioner-Parents respectfully request that this Court reconsider their petition *en banc*.

DATED this 13th day of May, 2016.

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CERTIFICATE OF COMPLIANCE

1. 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.

2. 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 10 pages or 4,667 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 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 May, 2016.

/s/ Lisa J. Zastrow, Esq.
LISA J. ZASTROW, ESQ.

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Kolesar & Leatham, and that on the 13th day of May, 2016, I caused to be served a true and correct copy of the foregoing **Petition for Reconsideration of 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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Carson City, Nevada 89701
Attention: Honorable Judge James E. Wilson
VIA U.S. CERTIFIED MAIL – RETURN RECEIPT

/s/ Kristina R. Cole
An Employee of KOLESAR & LEATHAM

EXHIBIT A

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

RAYMOND GADDY, BARRY HUBBARD, LYNN WALKER HUNTLEY, and DANIEL REINES,

Plaintiffs,

vs.

GEORGIA DEPARTMENT OF REVENUE, and DOUGLAS J. MACGINNITIE, in his official capacity as State Revenue Commissioner of The Georgia Department of Revenue,

Defendants,

and

RUTH GARCIA, ROBIN LAMP, TERESA QUINONES, and ANTHONY SENEKER,

Intervenor-Defendants.

CIVIL ACTION FILE NO. 2014CV244538

HON. KIMBERLY M. ESMOND ADAMS

ORDER GRANTING IN PART AND DENYING IN PART MOTIONS TO DISMISS

The above-styled case came before the Court for a hearing on the following motions: 1) Defendants' Motion to Dismiss; 2) Intervenors' Motion to Dismiss; and 3) Plaintiffs' Motion for Judgment on the Pleadings as to Count III; 4) Intervenors' Cross-Motion for Partial Judgment on the Pleadings as to Counts I – III and VI; and 5) Defendants' Motion to Stay Discovery and/or for Protective Order. Upon consideration of the complaint, applicable authority, and arguments of counsel, and for the reasons discussed *infra*, Defendants' and Intervenor's motions to dismiss are hereby **GRANTED IN PART** and **DENIED IN PART**, Intervenors' Cross-Motion for Partial Judgment on the Pleadings as to Counts I – III and VI is hereby **GRANTED IN THE**

ALTERNATIVE, Plaintiffs' Motion for Judgment on the Pleadings as to Count III is hereby **DENIED**, and Defendants' Motion to Stay Discovery and/or for Protective Order is **DENIED**.

FACTUAL BACKGROUND

Plaintiff's Verified Complaint for Writ of Mandamus and Injunctive Relief, construed in a light most favorable to Plaintiffs, shows that House Bill 1133, Georgia's Qualified Education Tax Credit Program ("the Program"), was enacted by the Georgia General Assembly in 2008 to allow tax credits for donations used to provide scholarships for students to attend private schools in Georgia. Under the Program, individuals and corporations receive dollar-for-dollar tax credits for Qualified Education Expenses which are donations and contributions made to private Student Scholarship Organizations ("SSOs"). (Compl. ¶¶ 34-35.) Qualified Education Expenses are defined by O.C.G.A. § 48-7-29.16(a)(2) as donations by a taxpayer during the tax year to an SSO operating under the Program, which are used for tuition and fees at a qualifying private school and for which a credit under the statute is claimed and allowed. (Id.) SSOs are self-appointed private charitable organizations which are exempt from federal income taxes under Section 501(c)(3) of the Internal Revenue Code pursuant to O.C.G.A. § 20-2A-1 *et seq.* (Id. ¶ 16-17.) The SSOs are tasked by the State with facilitating the transfer of the donations from individuals and corporations to eligible students attending private schools, many of which condition enrollment on specific religions. (Id. ¶¶ 15, 59-61, 65.) SSOs are not required to allocate all of the revenues they receive for scholarships and can use up to 10% of the revenues received for the SSOs' own unregulated purposes. (Id. ¶ 19.) After selecting the specific student recipient, the SSO is supposed to then disburse the funds to the private school of the student recipient's parents' choice. (Id. ¶ 23.) Most SSOs, however, have adopted their own private policies and practices to allow individuals and corporations to designate the private schools which receive

their redirected tax funds. (Id. ¶ 24.) As a result, after receiving the tax funds designated for a specific private school, SSOs many times then disburse the funds to the private school of the donors' choice, rather than first selecting student scholarship recipients and then allowing the students' parents to choose the private school to receive the funds. (Id.) The scholarship amounts are not *de minimus*, as the private school can receive up to $8,983 towards the full amount of a student's tuition which represents the average state and local expenditures per public school student. (Id. ¶¶ 25-26; Compl. Ex. 4.)

Through the tax credits, individuals and corporations in Georgia are given a dollar-for-dollar reduction in their total tax liability otherwise imposed by Georgia's income tax statute. (Compl. ¶ 35.) Pursuant to O.C.G.A. § 48-7-29.16(d), tax credits are prohibited if the taxpayer designates the taxpayer's Qualified Education Expense for the direct benefit of a particular student. (Id. ¶ 36.) In addition, when soliciting donations, SSOs shall not represent, or direct a private school to represent, that a taxpayer will receive a scholarship for the direct benefit of a particular student in exchange for the taxpayer's donation to the SSO. (Id. ¶ 37.) However, Plaintiffs allege that despite these statutory requirements and Defendants' own regulations, many taxpayers in Georgia have designated their Qualified Education Expense for the direct benefit of a particular student because multiple schools permit, encourage, or require families who wish to receive scholarships through the Program to demonstrate that they have made tax credit contributions to the schools or identify persons whom the family has recruited to make contributions. (Id. ¶¶ 77-78.) For example, Covenant Christian Academy's 2013-2014 Parent/Student Handbook stated that for a student to be eligible for scholarship funds, "The parent/guardian must make a donation, of any amount, to the Georgia SSO and designate those funds for Covenant Christian Academy." (Id. ¶ 78; Compl. Ex. 16.) The Handbook then

explained that "[a]ll funds designated for Covenant will be distributed according to donor/student relationship as indicated on the Covenant Christian Academy Scholarship Application Form." (Id.) Similarly, Faith Baptist Christian Academy's "Scholarship Selection Criteria" for the 2013-2014 academic year required the scholarship applicant to demonstrate "participation in the Georgia Private School Tax Credit – SSO program" by listing parent participation in an SSO and the amount donated by the parent to the SSO. (Compl. ¶ 79; Compl. Ex. 17.)

Moreover, some SSOs actively solicit donations by representing that scholarship recipients will receive scholarships in amounts equal to the donations received by the SSO, thereby asking parents and other individuals to donate an amount of scholarship funds they want a particular student to receive. (Compl. ¶ 80.) For example, Pay it Forward SSO represented on its website:

> Scholarship Amounts: Each month that we receive a donation for your school, your student will receive an equal share of the scholarship funds. For example, if we receive $10,000 in March for your school and there are 10 approved students, then each student at your school will receive a $1,000 scholarship at the end of March.

(Id.; Compl. Ex. 14.)

Plaintiffs allege that the tax credits provided by the General Assembly to incentivize individuals and corporations to donate money to SSOs are the sole source for making the scholarship funds available to students. (Compl. ¶ 39.) The tax credits for Qualified Education Expenses provide a substantially greater benefit to the individuals and corporations receiving the credits than would a mere tax deduction. (Id. ¶ 40.) Whereas a tax deduction is an amount subtracted from gross income when calculating adjusted gross income or from adjusted gross income when calculating taxable income, a tax credit is subtracted directly from total tax liability, resulting in a dollar-for-dollar reduction in tax liability. (Id. ¶ 41.) For example, for a Georgia taxpayer, a $1,000 tax deduction lowers the taxpayer's tax bill by at most $60, but a

$1,000 tax credit lowers the taxpayer's tax bill by the full $1,000, regardless of which tax bracket the taxpayer is in. (Id. ¶ 42.)

Tax expenditures, like the tax credits given to individuals and corporations in Georgia for Qualified Education Expenses, represent an allocation of government resources in the form of taxes that could have been collected and appropriated if not for the preferential tax treatment given to the expenditure by the General Assembly. (Id. ¶ 43.) The aggregate amount of tax credits available to Georgia taxpayers, set by the General Assembly, is currently $58 million. (Id. ¶ 51.) Defendants pre-approve the contribution amounts of individuals and taxpayers in Georgia on a first-come, first-served basis and then ensure that the proper documentation is supplied to support the taxpayers' claims to Qualified Education Expense credits when taxpayers file their tax returns. (Id. ¶ 38.) Plaintiffs assert that in all other respects, the Tax Credit Scholarship Statute empowers private, self-appointed SSOs and private schools to administer the program.

Plaintiffs contend that SSOs openly acknowledge they accept and redirect Georgia tax dollars to be used for scholarships for students to attend private and mostly religious schools. (Id. ¶ 55.) Many of these SSOs attempt to incentivize taxpayers to donate to them by pointing out that the donations are Georgia tax dollars which can be paid to the SSOs instead of the Department of Revenue under the Program. (Id. ¶ 56; see also id. ¶¶ 57-61.) Like the SSOs, numerous private schools enthusiastically ask parents and other taxpayers to redirect their Georgia tax dollars for the benefit of the schools and their religious missions, along with the students receiving scholarships. (Id. ¶ 62; see also id. ¶¶ 63-67.)

Religious private schools participating in the Program also recognize the tremendous benefits received by schools under the Program. For example, Grace Christian Academy's website explained, in pertinent part:

> How does this strengthen our ministry? Your contribution helps strengthen and grow GRACE by helping to increase enrollment. The school will be able to help more families in need of financial assistance by accessing funds that are in the new scholarship program without taxing the funds that we raise annually out of our own budget to help families in need. As our school grows, our students will be directly impacted, as we are able to add more services, more programs, more staff, more technology, more facilities, and more educational and ministry opportunities.
>
> This is a great tool we have been given to help grow our ministry to Christian families and we encourage you to consider becoming involved in the program.

(Id. ¶ 66; Compl. Ex. 12.)

Plaintiff Raymond Gaddy is the parent of two young children who attend public school. (Compl. ¶ 7.) Plaintiff Barry Hubbard is the grandparent of two children in public school. (Id. ¶ 6.) Plaintiff Lynn Walker Huntley is a former president of the Southern Education Foundation (SEF), a public charity whose mission is to advance equality and excellence in education in the southern states for low-income students, particularly minorities. (Id. ¶ 8.) Plaintiff Daniel Reines participated in the Program while his children attended private school and continues to participate in the program. (Id. ¶ 4.) Plaintiffs assert that they are Georgia taxpayers and have an interest in seeing that no other Georgia taxpayer receives an illegal tax credit under the Program. (Id. ¶ 9.) Plaintiffs allege that, because illegal tax credits place a greater tax burden on other taxpayers, they are injured by having to shoulder, directly or indirectly, a greater portion of Georgia's tax burden because of the illegal tax credits received by others under the Program. (Id.) Defendant Georgia Department of Revenue is vested with authority and responsibility for implementing relevant provisions of the Program and the Georgia Tax Code in compliance with the Georgia Constitution. (Id. ¶ 11.) Defendant MacGinnitie, in his official capacity as State Revenue Commissioner of the Georgia Department of Revenue, has ultimate authority and responsibility for implementing the provisions of the Program and for overseeing the Department

of Revenue's compliance with its statutory provisions, the Georgia Tax Code, and the Georgia Constitution. (Id. ¶ 13.)

Plaintiffs filed the present complaint against Defendants for: violation of the Educational Assistance provisions of the Georgia Constitution (Count I), violation of the Gratuities Clause of the Georgia Constitution (Count II); violation of Article I, Section II, Paragraph VII of the Georgia Constitution (Count III); violation of the Georgia Tax Code (Count IV); mandamus relief to compel Defendant MacGinnitie's compliance with specific provisions of the Georgia Tax Code (Count V); and injunctive relief to stop Defendants' implementation of the Program (Count VI). Intervenors Ruth Garcia, Robin Lamp, Teresa Quinones, and Anthony Seneker are parents of students receiving scholarships under the Program who filed their Unopposed Motion to Intervene and Defendants which was granted by the Court. Defendants and Intervenors filed the instant motions to dismiss Plaintiffs' complaint, arguing Plaintiffs lack standing to bring the action, are barred by sovereign immunity, and have failed to state a claim on the merits. Plaintiffs filed their Motion for Judgment on the Pleadings as to Count III of the complaint, and Intervenors filed their Cross-Motion for Partial Judgment on the Pleadings as to Counts I – III and VI.

I. Defendants' and Intervenors' Motions to Dismiss

Defendants and Intervenors moved to dismiss Plaintiffs' facial challenge to the constitutionality of the Program on the basis that Plaintiffs lack standing to bring their claims under Counts I, II, III, IV, and VI. In addition, Defendants argued that Plaintiffs' claims for declaratory and injunctive relief are barred by sovereign immunity, and their claim for mandamus fails to state a claim upon which relief can be granted.

A. Standard of Review for Motion to Dismiss

On a motion to dismiss,

> [t]he standard used to evaluate the grant of a motion to dismiss when the sufficiency of the complaint is questioned is whether the allegations of the complaint, when construed in the light most favorable to the plaintiff with all doubts resolved in the plaintiff's favor, disclose with certainty that the plaintiff would not be entitled to relief under any state of provable facts.

Cooper v. Unified Gov't, 275 Ga. 433, 434 (2002). See O.C.G.A. § 9-11-12(b)(6). "A motion to dismiss may be granted where a complaint lacks any legal basis for recovery." Seay v. Roberts, 275 Ga. App. 295, 296 (2005). This Court excluded matters outside the pleadings from its consideration of the motions to dismiss in accordance with O.C.G.A. § 9-11-12(b).

B. Plaintiffs lack standing to challenge the constitutionality of the tax benefits.

Plaintiffs are four individual taxpayers who claim the Program is unconstitutional under three separate provisions of the State Constitution and that Defendants have violated the Georgia Tax Code. Plaintiffs claim that they have standing as taxpayers because, in their view, the tax credits are illegal. Under Georgia law, "[t]he only prerequisite to attacking the constitutionality of a statute is a showing that it is hurtful to the attacker." Perdue v. Lake, 282 Ga. 348, 348 (2007) (quoting Agan v. State, 272 Ga. 540, 542(1), (2000)). Further, "a party must show not only that the alleged unconstitutional feature injures him and deprives him of a constitutional right but *he must establish that he himself possessed the right allegedly violated.* He must be within the class of persons affected by the statute objected to." Stewart v. Davidson, 218 Ga. 760, 770 (1963) (emphasis in original). Taxpayer standing can be used to challenge a government act resulting in an expenditure of public revenue or an increased tax burden. See, e.g., City of E. Point v. Weathers, 218 Ga. 133, 135-36 (1962).

Courts that have already considered whether a tax credit is an expenditure of public

revenue have answered this question in the negative.[1] Of particular importance is Arizona Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436 (2011), where the United States Supreme Court found that taxpayers lacked standing to challenge a scholarship tax credit program under the Establishment Clause of the United States Constitution that was almost identical to the Program at issue here. Like Georgia's Program, the Arizona program provided that taxpayers could receive a credit for donations made to independent scholarship organizations which then provided scholarships for students to attend private schools. Winn, 131 S. Ct. at 1440-1441. Although federal precedent is not binding on this Court, Georgia courts frequently look to the U.S. Supreme Court on standing issues. See Feminist Women's Health Ctr. v. Burgess, 282 Ga. 433, 434 (2007) (holding that "[i]n the absence of our own authority, we frequently have looked to United States Supreme Court precedent concerning Article III standing to resolve issues of standing to bring a claim in Georgia's courts."). Plaintiffs have not presented any arguments for why this Court should not follow this persuasive authority.

In this case, Plaintiffs have not alleged actual harm or that they themselves possessed the right allegedly violated. Plaintiffs do not challenge an expenditure of public revenue, nor have they alleged the Program will increase their taxes or otherwise result in a net loss to the state. Plaintiffs argue that because state-paid employees spend some time administering the Program, the Program results in an expenditure of public revenue. However, the Georgia Supreme Court has already rejected this argument. Weathers, 218 Ga. at 135. In addition, Plaintiffs have not alleged, nor could they demonstrate, that the Program increases their tax burden either by

[1] Arizona Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1440 (2011); Kotterman v. Killian, 972 P.2d 606, 617-18 (Ariz. 1999) (en banc); State Bldg. & Constr. Trades Council v. Duncan, 76 Cal. Rptr. 3d 507, 510, 514-15 (Cal. Ct. App. 2008); Toney v. Bower, 744 N.E.2d 351, 357-58 (Ill. App. Ct. 2001); Griffith v. Bower, 747 N.E.2d 423,426 (Ill. App. Ct. 2001); Manzara v. State, 343 S.W.3d 656, 659-61 (Mo. 2011). Although a New Hampshire trial court found to the contrary in 2013, its decision was vacated by the state supreme court after ruling that plaintiffs lacked taxpayer standing to bring the suit. Duncan v. State, No. 2013-455,2014 WL 4241774 (N.H. Aug. 28, 2014) (vacating No. 219-2012-CV-00121, slip op. at *20-26 (N.H. Super. Ct. June 17, 2013)).

causing a net loss for the state or by increasing their tax bill. Based on the text of the statutes governing the Program, Defendants argue that the Program is at the very least revenue neutral for two reasons. First, the State is already paying to educate each child in public school. When these children leave the public schools with a scholarship, the State no longer has to bear this expense. See Ga. Const. Art. VIII, § I, ¶ I (obligating the State to provide each child with an education). Second, no scholarship can exceed the amount of money that the State would have otherwise spent on these children. O.C.G.A. § 20-2A-2(1). Indeed, as some of the scholarships will inevitably be only a portion of the amount the State pays to educate each child, the Program may actually save the State money. See, e.g., Winn, 131 S. Ct. at 1438 ("The costs of education may be a significant portion of Arizona's annual budget, but the tax credit, by facilitating the operation of both religious and secular private schools, could relieve the burden on public schools and provide cost savings to the State."); Mueller v. Allen, 463 US. 388, 395 (1983) (upholding school-choice tax deduction in part because "[b]y educating a substantial number of students[, private] schools relieve public schools of a correspondingly great burden – to the benefit of all taxpayers."); Toney v. Bower, 744 N.E.2d 351, 361 (Ill. App. Ct. 2001) (upholding school-choice tax credit in part because "private schools, both sectarian and nonsectarian . . . relieve taxpayers of the burden of educating additional students [in the public schools]").

Plaintiffs cite Lowry v. McDuffie, 269 Ga. 202, 204 (1998), but Lowry is inapposite. The Lowry court found that taxpayers had standing to challenge a tax exemption for a select favored group – car dealers. That court found the plaintiff had standing because "[a]n illegal exemption place[d] a greater tax burden upon those taxpayers being required to pay" by draining the public treasury. Id. at 203. However, in this case, Plaintiffs have neither alleged, nor could they show, that the tax credit will increase their taxes or drain the state treasury. Moreover, the

Program's tax credit is available to all taxpayers, not just the select group that could use the tax exemption as in Lowry. Because Plaintiffs have no basis for standing to bring their constitutional challenges, Plaintiffs' claims in Counts I, II, and III are **DISMISSED**.

C. Defendants' alleged violation of the Tax code creates no right of action.

Plaintiffs asserted in Count IV of their Complaint that Defendants violated O.C.G.A. § 48-7-29.16(d) which provides:

> (1) The tax credit shall not be allowed if the taxpayer designates the taxpayer's qualified education expense for the direct benefit of any particular individual, whether or not such individual is a dependent of the taxpayer.
>
> (2) In soliciting contributions, a student scholarship organization shall not represent, or direct a qualified private school to represent, that, in exchange for contributing to the student scholarship organization, a taxpayer shall receive a scholarship for the direct benefit of any particular individual, whether or not such individual is a dependent of the taxpayer. The status as a student scholarship organization shall be revoked for any such organization which violates this paragraph.

Defendants argue that this provision of the tax code does not confer a right of action, either express or implied. In Georgia, "it is well settled that violating statutes and regulations does not automatically give rise to a civil cause of action by an individual claiming to have been injured from a violation thereof. Rather, the statutory text must expressly provide a private cause of action." State Farm Mut. Auto. Ins. Co. v. Hernandez Auto Painting & Body Works, Inc., 312 Ga. App. 756, 761 (2011) (citations omitted). See, e.g., O.C.G.A. §§ 48-2-35(c)(4) (authorizing a taxpayer the right to bring an action for a refund in the Georgia Tax Tribunal); 48-2-59(a) (authorizing administrative appeal of an order, ruling, or finding of the commissioner to the Georgia Tax Tribunal or the superior court); 48-3-1 (authorizing a taxpayer the right to file an affidavit of illegality from a tax execution or file a petition in the Georgia Tax Tribunal); 48-7-31(d) (authorizing a corporate taxpayer to petition the commissioner from denial of alternative

apportionment method). Further, to determine whether the violation of a statute creates a cause of action for a particular plaintiff, "it is necessary to examine the purposes of the legislation and decide whether the injured person falls within the class of persons the statute was intended to protect and whether the harm complained of was the harm it was intended to prevent." Odem v. Pace Acad., 235 Ga. App. 648, 656 (1998). See Cellular One, Inc. v. Emanuel County, 227 Ga. App. 197 (1997) (finding no private cause of action for an alleged violation of tax revenue regulations where none was provided for in the statute). In addition, unless a statutory remedy is employed, any actions are barred by sovereign immunity. See Sawnee Elec. Membership Com. v. Georgia Dep't of Revenue, 279 Ga. 22, 23 (2005) ("The statutory authorization to bring an action for a tax refund in superior court against a governmental body is an express waiver of sovereign immunity, and the State's consent to be sued must be strictly construed.").

In this case, Plaintiffs alleged that Defendants violated O.C.G.A. § 48-7-29.16(d) by awarding tax credits to individuals who designated specific student to receive the funds through recommendation solicited by SSOs and by failing to revoke the status of SSOs that solicit contributions while representing that a taxpayer will receive the scholarship for the direct benefit of a particular individual. Plaintiffs do not assert they were injured by this alleged violation of the tax code. First, the Court finds Count IV fails to state a claim because the text of O.C.G.A. § 48-7-29.16 does not create an express private right of action or remedy against Defendants. Second, the Court finds the statute does not provide an implied right of action for Plaintiffs because Plaintiffs were not harmed by its alleged violation nor do they fall within the class of persons Code Section 48-7-29.16 was intended to protect. Finally, the Court finds that even if a cause of action exists, it is nonetheless barred by sovereign immunity absent the State's express waiver. Although violation of the statute may be the basis for mandamus relief as discussed

infra, the Court finds no cause of action exists in and of itself. Therefore, Count IV of Plaintiffs' Complaint is **DISMISSED**.

D. Sovereign immunity bars Plaintiffs' request for declaratory and injunctive relief.

In their complaint, Plaintiffs' prayed that the Court enter a declaratory judgment finding the Program's statutory provisions were unconstitutional and grant injunctive relief preventing Defendants from pre-approving the tax credit contribution amounts and allowing individuals and corporations to claim dollar-for-dollar reductions in their Georgia tax liability for Qualified Education Expenses. Defendants argue that Counts I, II, III, IV, and VI of their complaint are barred by sovereign immunity. Under Georgia law:

> Sovereign immunity is the immunity provided to governmental entities and to public employees sued in their official capacities. The doctrine of sovereign immunity . . . bars any claims against [a defendant] in his official capacity. Under the Georgia Constitution, as amended in 1991, sovereign immunity extends to the state and all of its departments and agencies. The sovereign immunity of the state and its departments and agencies can only be waived by an Act of the General Assembly which specifically provides that sovereign immunity is thereby waived and the extent of such waiver. Sovereign immunity has been extended to counties and thus protects county employees who are sued in their official capacities, unless sovereign immunity has been waived. And any waiver of sovereign immunity must be established by the party seeking to benefit from that waiver.

Ratliff v. McDonald, 326 Ga. App. 306, 309 (2014) (internal quotations and citations omitted). As the Supreme Court of Georgia recently declared, "[S]overeign immunity is a bar to injunctive relief at common law . . . ." Georgia Dep't of Nat. Res. v. Ctr. for a Sustainable Coast, Inc., 294 Ga. 593, 596 (2014). Therefore, those aggrieved by the wrongful conduct of public officials must seek relief against public officials in their individual, not official, capacities. Id. at 603.

In this case, Plaintiffs seek to restrain Defendant Georgia Department of Revenue and Defendant MacGinnitie, in his official capacity as State Revenue Commissioner of the Georgia

Department of Revenue, from implementing the Program because enforcement of the allegedly unconstitutional statute is *ultra vires*. However, sovereign immunity bars the relief Plaintiffs have requested. Furthermore, Plaintiffs have failed to satisfy their burden of persuasion with respect to the waiver of sovereign immunity. Therefore, the Court finds Plaintiffs' request for injunctive relief on Count VI is barred by sovereign immunity.

As to declaratory relief, O.C.G.A. § 50-13-10 provides, in pertinent part, "[t]he validity of any rule, waiver, or variance may be determined in an action for declaratory judgment when it is alleged that the rule, waiver, or variance or its threatened application interferes with or impairs the legal rights of the petitioner." O.C.G.A. § 50-13-10(a). In this regard,

> [t]he State's sovereign immunity has been specifically waived by the General Assembly pursuant to OCGA § 50-13-10, which is part of the Administrative Procedure Act. Therein, the State has specifically consented to be sued and has explicitly waived its sovereign immunity as to declaratory judgment actions in which the rules of its agencies are challenged.

DeKalb Cnty. School Dist. v. Gold, 318 Ga. App. 633, 637 (2012) (internal quotations and citations omitted). Indeed, "[o]ur Constitution and statutes do not provide for a blanket waiver of sovereign immunity in declaratory-judgment actions . . . ." Id. at 637.

Here, Plaintiffs request that the Court declare the Program unconstitutional. However, sovereign immunity also bars relief in this regard. Furthermore, Plaintiffs have failed to demonstrate that the sought-after declaratory relief falls within the limited waiver afforded by O.C.G.A. § 50-13-10 because nothing in Plaintiffs complaint suggests that Plaintiffs challenge any agency rule, waiver, or variance. The mere allegation of a violation of a constitutional right is not, in itself, sufficient to avoid the protections afforded by the State's sovereign immunity. Id. at 639. Therefore, the Court finds Plaintiffs' request for declaratory relief also is barred by sovereign immunity.

E. Plaintiffs claim for mandamus against Defendant MacGinnitie states a claim upon which relief can be granted.

Plaintiffs bring their mandamus claim in Count V of their Complaint and contend they have standing to seek to compel Defendant MacGinnitie to comply with O.C.G.A. § 48-7-29.16(d), and Defendants acknowledge same. Under Georgia law, "whenever, from any cause, a defect of legal justice would ensue from a failure to perform or from improper performance [of an official duty], the writ of mandamus may issue to compel a due performance if there is no other specific legal remedy for the legal rights[.]" O.C.G.A. § 9-6-20. With regard to standing, "[w]here the question is one of public right and the object is to procure the enforcement of a public duty, no legal or special interest need be shown, but it shall be sufficient that a plaintiff is interested in having the laws executed and the duty in question enforced." O.C.G.A. § 9-6-24. Under this provision, "a private citizen may turn to the judicial branch to seek to compel or enjoin the actions of one who discharges public duties 'where the question is one of public right and the object is to procure the enforcement of a public duty . . . .'" Adams v. Georgia Dep't of Corr., 274 Ga. 461, 461 (2001) (quoting Brissey v. Ellison, 272 Ga. 38, 39 (2000)). A writ of mandamus is properly issued against a public official "only if (1) no other adequate legal remedy is available to effectuate the relief sought; and (2) the applicant has a clear legal right to such relief." Bibb County v. Monroe County, 294 Ga. 730, 734 (2014). "In general, mandamus relief is not available to compel officials to follow a general course of conduct, perform a discretionary act, or undo a past act." Schrenko v. DeKalb Cty. Sch. Dist., 276 Ga. 786, 794 (2003). Mandamus "will not lie to compel . . . the performance of continuous duties nor will it lie where the court issuing the writ would have to undertake to oversee and control the general course of official conduct of the party to whom the writ is directed." Solomon v. Brown, 218 Ga. 508, 509 (1962). Consequently, a petition for writ of mandamus to compel a public official to "properly

enforce and execute the laws and cease all *ultra vires* actions" is properly dismissed where a plaintiff's complaint fails to set out a framework within which he could show that he has "clear legal right to have a particular act rather than a general pattern of conduct performed . . . ." Willis v. Dep't of Revenue, 255 Ga. 649, 650 (1986).

Here, Plaintiffs request mandamus issue to compel Defendant MacGinnitie to comply with the statutory duty imposed by O.C.G.A. § 48-7-29.16(d)(2) to revoke the status of an SSO representing that, in exchange for contributing to the student scholarship organization, a taxpayer will receive a scholarship for the direct benefit of any particular individual. The Court finds that Plaintiffs have standing to bring their mandamus claim because the question is one of public right, the object is to procure the enforcement of a public duty, and Plaintiffs are interested in having the laws executed and the duty in question enforced. In addition, the Court finds Plaintiffs do not seek to compel Defendant MacGinnitie to follow a general course of conduct or undo past acts, but rather Plaintiffs cite examples in their Complaint where Defendant MacGinnitie may have failed to comply with the specific statutory duty in question. Therefore, the Court does not find that Plaintiffs' claim for mandamus discloses with certainty that Plaintiffs would not be entitled to relief under any state of provable facts. Accordingly, Defendants' Motion to Dismiss as to Count V is **DENIED**.

2. **Plaintiff's Motion for Judgment on the Pleadings and Intervenors' Cross-Motion for Partial Judgment on the Pleadings as to Counts I – III and VI**

Notwithstanding the Court's findings, *supra*, the Court finds that even if Plaintiffs had standing, judgment on the pleadings would be proper nonetheless on Plaintiffs' constitutional challenges in Counts I, II, III, and VI of the complaint. A motion for judgment on the pleadings is authorized by O.C.G.A. § 9-11-12(c). On a motion for judgment on the pleadings,

> all well-pleaded material allegations by the nonmovant are taken as true,

> and all denials by the movant are taken as false. Granting the motion is proper only where there is a complete failure to state a cause of action or defense and the movant is thus entitled to judgment as a matter of law.

South v. Bank of America, 250 Ga. App. 747, 749 (2001). Although a motion for judgment on the pleadings is limited to the pleadings, a trial court may also consider any exhibits that have been incorporated into the pleadings. Printis v. Bankers Life Ins. Co., Inc., 256 Ga. App. 266, 266 (2002).

In this case, Plaintiffs challenge the Program under three separate state constitutional provisions: the Educational Assistance Provision, the Gratuities Clause, and the Establishment Clause. These constitutional provisions only apply to government acts that use public funds. The Educational Assistance Provision permits the General Assembly to expend "public funds" for "grants, scholarships, loans, or other assistance to students and to parents of students for educational purposes." Ga. Const. Art. VIII, § VII, ¶ I(a)(1). The Gratuities Clause prohibits the General Assembly from granting any "donation or gratuity," Ga. Const. Art. III, § VI, ¶ VI(a)(1), and the General Assembly cannot donate or give what it does not own. Finally, the Establishment Clause involves only money "taken from the public treasury." Ga. Const. Art. I, § II, ¶ VII. Intervenors argue that each of these provisions applies only to government programs that use public funds where the Program at issue uses only private funds.

As discussed *supra*, tax credits are not government funds. Plaintiffs argue that the Program necessarily involves public funds because some taxpayers receive their tax credit in the form of a refund from the state treasury. However, tax refunds return a taxpayer's own money that he overpaid to the state, not the State's money. Funds that remain entirely under the control of private citizens and private institutions cannot be considered tax dollars. To find otherwise, would mean that "all taxpayer income could be viewed as belonging to the state because it is subject to taxation by the legislature." Kotterman, 972 P.2d at 618 ¶ 37. Moreover, the Supreme

Court of Georgia has already foreclosed any argument that administrative action by government employees is the equivalent of expending public funds on any specific program. Weathers, 218 Ga. at 135.

Plaintiffs further base their contention that tax credits are the equivalent of public funds on the "tax expenditure theory," which is a theory "used by government as a tool for analyzing budgetary policy." Kotterman, 972 P.2d at 619 ¶ 41. Indeed, this theory is a tool used by the General Assembly. See O.C.G.A. § 45-12-75 (requiring the preparation of a tax expenditure report). Plaintiffs ignore that the theory is not limited to tax credits. It encompasses tax credits, deductions, differential tax rates, and exclusions from income such as property tax exemptions. Indeed, courts have found no legal distinction between tax credits and other tax benefits. See, e.g., Kotterman, 972 P.2d at 621 ¶ 50; Toney, 744 N.E.2d at 357; Winn, 131 S. Ct. at 1448. Accepting Plaintiffs' argument that these three constitutional provisions govern such tax benefits would contravene the legislative scheme and the State's tax system, and this Court declines to do so. Accordingly, Plaintiffs' constitutional claims fail. Therefore, Plaintiffs' Motion for Judgment on the Pleadings as to Count III is **DENIED**, and Intervenors' Cross-Motion for Partial Judgment on the Pleadings as to Counts I – III and VI is **GRANTED IN THE ALTERNATIVE**.

3. Defendants' Motion to Stay Discovery and/or for Protective Order

Defendants filed their Motion to Stay Discovery and/or for Protective Order on the grounds that the Court had not yet ruled on their Motion to Dismiss and that Plaintiffs' discovery requests were expansive, unduly burdensome, and oppressive. Inasmuch as the Court has ruled on Defendants' Motion to Dismiss, discovery shall not be stayed pursuant to O.C.G.A. § 9-11-12(j) and is therefore **MOOT**. Furthermore, pursuant to O.C.G.A. § 9-11-26(c), Defendants'

motion is **DENIED** as it relates to the remaining mandamus claim.

SO ORDERED this 4th day of February, 2016.

HONORABLE KIMBERLY M. ESMOND ADAMS
JUDGE, SUPERIOR COURT OF FULTON COUNTY
ATLANTA JUDICIAL CIRCUIT

EXHIBIT B

From: Tim Keller
To: School Choice Team Internal
Subject: We are officially "in" in the ACLU"s challenge to NV"s ESA Program
Date: Tuesday, October 20, 2015 11:27:36 AM

Events & Orders of the Court

10/20/2015 **Minute Order** (7:30 AM) (Judicial Officer Thompson, Charles)

Minutes

10/20/2015 7:30 AM

- Law Clerk advised there has been no opposition filed as to the Intervener-Defendants' Motion to Associate Counsel and Motion to Intervene as Defendants. Therefore, COURT ORDERED, both Motions are GRANTED as unopposed and the hearing date of October 21, 2015 is VACATED. Law Clerk will notify the parties.

EXHIBIT C

North Carolina Court of Appeals

JOHN H. CONNELL, Clerk

Fax: (919) 831-3615
Web: http://www.nccourts.org

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From Wake
(13CVS16484 13CVS16771)

No. P14-659

HART ET AL,

PLAINTIFFS-APPELLEES,

V.

STATE OF NORTH CAROLINA, ET AL.

DEFENDANTS,

CYNTHIA PERRY, GENNELL CURRY,
THOM TILLIS, AND PHIL BERGER

INTERVENOR-DEFENDANTS-APPELLANTS.

RICHARDSON, ET AL.

PLAINTIFFS-APPELLEES,

V.

STATE OF NORTH CAROLINA, ET AL.

DEFENDANTS,

CYNTHIA PERRY, GENNELL CURRY,
THOM TILLIS, AND PHIL BERGER

INTERVENOR-DEFENDANTS-APPELLANTS.

ORDER

The following order was entered:

The motion filed in this cause by defendant-intervenors on 5 September 2014 and designated 'Emergency Motion for Temporary Stay Pending Appeal and Petition for Writ of Supersedeas' is decided as follows. The motion for temporary stay is denied. The petition for writ of supersedeas shall be decided upon the filing of a response by plaintiff, or upon the expiration of the period for a response, if no response is filed.

By order of the Court this the 9th of September 2014.

WITNESS my hand and official seal this the 10th day of September 2014.

John H. Connell
Clerk, North Carolina Court of Appeals

Copy to:
Mr. Robert Thomas Numbers, II, Attorney at Law, For Cynthia Perry and Gennell Curry
Mr. Richard D. Komer, Attorney at Law
Ms. Renee Flaherty, Attorney at Law
Mr. Burton Craige, Attorney at Law, For Alice Hart
Mr. Narendra Ghosh, Attorney at Law
Ms. Christine Bischoff, Attorney at Law
Ms. Carlene M. McNulty, Attorney at Law
Mr. Noah H. Huffstetler, III, Attorney at Law
Mr. Stephen D. Martin, Attorney at Law
Ms. Lauren M. Clemmons, Assistant Attorney General
Hon. Robert F. Orr, Attorney at Law, For Richardson, et al
Mr. Edwin M. Speas, Jr., Attorney at Law, For Richardson, et al
Ms. Carrie Virginia McMillan, Attorney at Law, For Richardson, et al
Hon. Nancy L. Freeman, Clerk of Superior Court