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FIRST JUDICIAL DISTRICT COURT

IN AND FOR CARSON CITY, NEVADA

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,

v.

DAN SCHWARTZ, in his official capacity as Treasurer of the State of Nevada,

Defendant.

CASE NO. 15-0C-00207-1B

Dept. No: II

OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION AND COUNTERMOTION TO DISMISS

TABLE OF CONTENTS

Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

TABLE OF AUTHORITIES

Cases

Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

Constitutional Provisions

Statutes

Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

Other Authorities

Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

INTRODUCTION

Plaintiffs bring a facial challenge to Nevada's new education savings account ("ESA") program, enacted by the Legislature as Senate Bill 302 ("SB 302") to address serious and longstanding problems with the education system in Nevada. Claiming that the ESA program violates Sections 2, 3, and 6 of Article 11 of the Nevada Constitution, Plaintiffs seek a preliminary injunction. But all of Plaintiffs' claims fail as a matter of law. And Plaintiffs fail to demonstrate the irreparable injury required for a court to grant preliminary relief. Accordingly, Plaintiffs' complaint should be dismissed under Rule 12(b)(5), and their motion for preliminary injunction should be denied.

BACKGROUND

I. Nevada's New Education Savings Account Program

The State of Nevada, as part of sweeping education reforms enacted earlier this year, has empowered parents with real choice in how best to educate their children. Senate Bill 302, adopted by the Legislature and approved by Governor Sandoval on June 2, 2015, creates the ESA program. Under SB 302, Nevada parents may enter into agreements with the State Treasurer to open ESAs for their children. SB 302, §§ 7.1, 7.2 (attached as Exhibit 1). Any school-age child in Nevada may participate in the program. § 7.1. The only requirements are that a child take standardized tests and be enrolled in a Nevada public school for at least 100 consecutive school days before opening an account. §§ 7.1, 12.1.

Once an education savings account is opened, "[t]he child will receive a grant, in the form of money deposited" into the account. § 7.1(b); § 8.1. Children participating in the program receive a grant equal to 90% of a formula described as the "statewide average basic support per pupil." § 8.2(b). Children with disabilities or in low-income households receive 100% of Nevada's per-student allocation. § 8.2(a). For the 2015-16 school year, accounts will be funded in the spring, and the grant amounts will be a pro rata portion of $5,139 or $5,710. Any funds remaining in an account at the end of a school year are carried forward to the next year if the parents' agreement with the State Treasurer is renewed. § 8.6(a).

SB 302 specifies the educational purposes for which ESA grants may be spent,

Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

including tuition, textbooks, tutoring, special education, and fees for achievement, advanced placement, and college-admission examinations. § 9.1(a)-(k).[1] For these purposes, ESA grants may be used at a "participating entity" or "eligible institution," including private schools, colleges or universities within the Nevada System of Higher Education, certain other accredited colleges, and certain accredited distance-learning programs. §§ 3.5, 5; *see also* § 11.1. Participating private schools must be "licensed pursuant to chapter 394 of NRS or exempt from such licensing pursuant to NRS 394.211." § 5.

II. Legislative History of SB 302

Senate Majority Leader Michael Roberson explained the purpose of SB 302: "This would be a world-class educational choice program. We are attempting to make an historic investment in the Nevada public school system this session. There is room for a school choice system as well." *Minutes of the Senate Committee on Finance*, 78th Sess. 18 (Nev. May 14, 2015). As Senator Scott Hammond, the Vice Chair of the Senate Committee on Education and the sponsor of SB 302, stated, "[t]he ultimate expression of parental involvement is when parents choose their children's school." *Minutes of the Senate Committee on Education*, 78th Sess. 7 (Nev. Apr. 3, 2015) ("*Minutes*, Apr. 3"). "More than 20 states," he noted, "offer programs empowering parents to choose educational placement that best meets their children's unique needs." *Id.*

Senator Hammond explained that "[s]chool choice programs provide greater educational opportunities by enhancing competition in the public education system. They also give low-income families a chance to transfer their children to private schools that meet their

[1] While Plaintiffs label SB 302 a "voucher law," Plfs.' Mot. for Prelim. Inj. ("PI Mot.") 1, Nevada's ESA program is not a "voucher" program. In a voucher program, the State issues "vouchers" that authorize the disbursement of State funds directly to a private school. *See* BLACK'S LAW DICTIONARY 1809 (10th ed. 2014). Under Nevada's ESA program, by contrast, the State disburses funds into students' education savings accounts, from which parents choose where and how those funds will be spent (within the variety of educational purposes allowed by SB 302). Parents are not required to spend ESA funds at a private school, but rather may choose to spend ESA funds at, for example, a university or college within the Nevada System of Higher Education, on tutoring, on achievement, advanced placement, and admission examinations, or on a homeschool curriculum. *See* SB 302, §§ 3.5, 9(c), (e), (k), 11(d), (e).

Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

needs." *Id.* He observed that "the nonpartisan Center on Education Policy outlined the following conclusions from research studies about school choice programs: students offered school choice programs graduate from high school at a higher rate than their public school counterparts and parents are more satisfied with their child's school. In some jurisdictions with school choice options, public schools demonstrated gains in student achievement because of competition." *Id.* Senator Hammond found, too, that educational choice "would provide relief to overcrowded public schools, benefiting teachers and students," *id.* at 8, and that "[s]chools would be motivated to maintain high quality teaching and to be more responsive to the needs of students and their parents." *Id.*

The legislative record includes evidence that school-choice programs improve public schools. *Minutes of the Assembly Committee on Education*, 78th Sess. 30 (Nev. May 28, 2015) ("*Minutes*, May 28"). The Legislature received a report that examined empirical studies of school-choice programs. *See* Greg Forster, Friedman Foundation for Educational Choice, *A Win-Win Solution: The Empirical Evidence on School Choice* (3d ed. 2013) ("Friedman Report"). Of the "23 empirical studies that have looked at the academic impact of school choice on students that remain in the public schools," 22 "of those studies found school choice improved outcomes in the public schools, and one found no difference." *Minutes*, May 28, at 30 (testimony of Victor Joecks of the Nevada Policy Research Institute). The report concludes that "[s]chool choice improves academic outcomes" for participants and public schools "by allowing students to find the schools that best match their needs, and by introducing healthy competition that keeps schools mission-focused." Friedman Report at 1.

The Legislature also heard the testimony of Nevada parents. *Minutes*, Apr. 3, at 15 & Exhibit I thereto; *Minutes*, May 28, at 27-30. As one Clark County parent testified, "[p]ublic school is not a good fit for everyone. Parents know their children best and need to be able to choose the best educational direction for them." *Minutes*, Apr. 3, at 15. Assemblyman David Gardner noted that, according to a 2013 survey by the Cato Institute, "[o]ne hundred percent of the parents participating in [an ESA program in Arizona] are satisfied." *Minutes*, May 28, at 15.

Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

A number of organizations also supported SB 302, including the American Federation for Children, the Friedman Foundation for Educational Choice, Advocates for Choice in Education of Nevada, Nevada Policy Research Institute, Excellence in Education National, and Nevada Families for Freedom. *Minutes*, Apr. 3, at 13-16; *Minutes*, May 28, at 25-27, 30-32. Even private businesses weighed in. A representative of the Las Vegas Sands, for example, testified:

> ESAs could become a game changer for the state of Nevada. As a company, the Sands is dedicated to helping our employees and their children learn, advance, and share new ideas that drive innovation. We believe that S.B. 302 (R2) will provide Nevada students with the opportunity to earn a high-quality education at the institution of their choice. ... Simply put, S.B. 302 (R2) can provide a choice and a chance for Nevada students. [*Minutes*, May 28, at 27.]

III. The Enactment of SB 302 as Part of the 2015 Education Reforms

SB 302 was part of a comprehensive overhaul of the education system in Nevada. The Governor, in his 2015 *State of the State* address to the Legislature, drew attention to the serious problems that Nevada parents and students know all too well. *See* Gov. Brian Sandoval, State of the State (Jan. 15, 2015).[2] Governor Sandoval noted that "far too many of our schools are persistently failing"—10% of Nevada schools are on the Nevada Department of Education's list of underperforming schools—and "[m]any have been failing for more than a decade." *Id.* at 8. "Our most troubling education statistic," he lamented, is "Nevada's worst-in-the-nation high school graduation rate." *Id.* at 5. Nevada schools, he also noted, "are simply overcrowded and need maintenance. Imagine sitting in a high school class in Las Vegas with over forty students and no air conditioning." *Id.* at 6. "[I]mprovements will not be made," he said, "without accountability measures, collective bargaining reform, and school choice." *Id.*

In the months following the Governor's call for a "New Nevada," *id.* at 2, the Legislature proceeded to enact more than 40 education reform measures. (For descriptions of many of the new programs, *see* http://www.doe.nv.gov/Legislative/Materials/.) For example, the

[2] Available at http://gov.nv.gov/uploadedFiles/govnvgov/Content/About/2015-SOS.pdf.

Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

Legislature created the Victory schools program, under which schools with the lowest student achievement levels in the poorest parts of the State will receive an additional $25 million in annual funding. *See* Senate Bill 432. The Legislature created the Nevada Educational Choice Scholarship Program, which provides tax credits in exchange for contributions to organizations that offer scholarships to students from low-income households. *See* Assembly Bill 165. The Legislature expanded the Zoom schools program, which assists pupils with limited English proficiency. *See* Senate Bill 405. The Legislature also acted to improve Charter schools. *See* Senate Bill 491.

IV. Public School Funding in Nevada

The Nevada Constitution requires the Legislature to support and maintain the public schools by "direct legislative appropriation from the general fund." NEV. CONST. art. 11, § 6.1. The Legislature is required to "provide the money the Legislature deems to be sufficient, when combined with the local money" to fund the public schools for the next biennium. *Id.* § 6.2. "To fulfill its constitutional obligation to fund education, the Legislature created the Nevada Plan, a statutory scheme setting forth the process by which it determines the biennial funding for education." *Educ. Initiative PAC v. Comm. to Protect Nev. Jobs*, 129 Nev. Adv. Op. 5, 293 P.3d 874, 883 n.8 (2013). Under the Nevada Plan, "the Legislature establishes 'basic support guarantees' for all school districts." *Rogers v. Heller*, 117 Nev. 169, 174, 18 P.3d 1034, 1037 (2001) (quoting NRS 387.121). The basic support guarantee is the amount of money each school district is assured of having to fund its operations. *See* NRS 387.121. The guarantee is an amount "per pupil for each school district." NRS 387.122. "After the Legislature determines how much money each local school district can" contribute, the Legislature "makes up the difference between" the district's contribution and the amount of the basic support guarantee. *Rogers*, 117 Nev. at 174, 18 P.3d at 1037. Funds appropriated by the Legislature from the general fund sufficient to satisfy each district's basic support guarantee are deposited in the State Distributive School Account ("DSA"), which is an account within the State general fund. *See* NRS 387.030.

The DSA, in addition to receiving such appropriations from the general fund, also

Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

receives money from certain other sources. The Permanent School Fund ("PSF") is one of those sources. The Legislature created the PSF to implement Article 11, Section 3 of the Constitution, which provides that specified property, including "lands granted by Congress to [Nevada] for educational purposes" and "the proceeds derived from these sources," are "pledged for educational purposes and the money therefrom must not be transferred to other funds for other uses." NEV. CONST. art. 11, § 3. Section 3 money is kept in the PSF, and interest on Section 3 money is transferred to the DSA. *See* NRS 387.030. The interest on the PSF, however, constitutes a miniscule portion of the funds in the DSA. For example, in 2014, of the $1.4 billion in the DSA that came from the State Government, $1.1 billion, or 78%, came from the general fund. Only $1.6 million, just 0.14%, came from the PSF. *See* Exhibit 2 (DSA Summary).[3]

In June 2015, the Legislature enacted Senate Bill 515 to "ensur[e] sufficient funding for K-12 public education for the 2015-2017 biennium." SB 515, Title. The Legislature established an estimated weighted average basic support guarantee of $5,710 per pupil for FY 2015-16 and $5,774 per pupil for FY 2016-17. *Id.* §§ 1-2. The per-pupil basic support guarantee varies by district. For example, the FY 2015-16 guarantee for Clark County is $5,512 while White Pine County's is $7,799 and Lincoln County's is $10,534. *Id.* § 1. The Legislature appropriated some $1.1 billion from the general fund to the DSA for FY 2015-16 and more than $933 million for FY 2016-17—over $2 billion for the biennium. *Id.* § 7.

STANDARDS OF REVIEW

A number of standards govern the Court's review. "To survive dismissal [under Rule 12(b)(5)], a complaint must contain some set of facts, which, if true, would entitle [the plaintiff] to relief." *In re Amerco Derivative Litig.*, 127 Nev. Adv. Op. 17, 252 P.3d 681, 692 (2011) (quotation marks omitted).

Plaintiffs repeatedly state that they are challenging SB 302 "on its face." PI Mot. 2, 16, 17. In a facial challenge to a statute, the plaintiff "bears the burden of demonstrating that

[3] Available at http://www.doe.nv.gov/uploadedFiles/ndedoenvgov/content/Legislative/DSA-SummaryForBiennium.pdf.

Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

there is no set of circumstances under which the statute would be valid." *Deja Vu Showgirls v. Nevada Dep't of Taxation*, 130 Nev. Adv. Op. 73, 334 P.3d 392, 398 (2014). Given the high bar set by the facial-challenge rule, "[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully." *United States v. Salerno*, 481 U.S. 739, 745 (1987).

A preliminary injunction is "extraordinary relief." *Dep't of Conserv. & Nat. Res. v. Foley*, 121 Nev. 77, 80, 109 P.3d 760, 762 (2005). "For a preliminary injunction to issue, the moving party must show that there is a likelihood of success on the merits and that the nonmoving party's conduct, should it continue, would cause irreparable harm for which there is no adequate remedy at law." *Id.*

Importantly, "[b]ecause statutes are presumed to be valid," Plaintiffs bear "the burden of clearly showing that [SB 302] is unconstitutional" to win a preliminary injunction. *S.M. v. State of Nevada Dep't of Pub. Safety*, No. 64634, 2015 WL 528122, at *2 (Nev. Feb. 6, 2015); *id.* at *3 (holding that the plaintiff "did not and could not meet his burden of clearly demonstrating that A.B. 579 is unconstitutional as applied to him and, thus, could not show a reasonable likelihood of success on the merits to maintain his preliminary injunction."). In Nevada, "the judiciary has long recognized a strong presumption that a statute duly enacted by the Legislature is constitutional." *Sheriff, Washoe Cnty. v. Smith*, 91 Nev. 729, 731, 542 P.2d 440, 442 (1975). "In case of doubt, every possible presumption will be made in favor of the constitutionality of a statute, and courts will interfere only when the Constitution is clearly violated." *List v. Whisler*, 99 Nev. 133, 137, 660 P.2d 104, 106 (1983).

ARGUMENT

I. The Legislature's Constitutional Power To "Encourage Education" By "All Suitable Means" Fully Authorized The Enactment Of SB 302 And The ESA Program.

The question in this case is whether Article 11 of the Nevada Constitution allows or forbids the ESA program enacted by the Legislature in SB 302. Plaintiffs contend that the program violates the Legislature's obligations under Sections 2, 3, and 6 of Article 11.

Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

Any analysis of this issue, however, must begin with Article 11's very first section. Section 1—captioned "Legislature to encourage education ..."—provides in full:

> The legislature shall encourage by *all suitable means* the promotion of intellectual, literary, scientific, mining, mechanical, agricultural, and moral improvements, and also provide for a superintendent of public instruction and by law prescribe the manner of appointment, term of office and the duties thereof. [NEV. CONST. art. 11, § 1 (emphasis added).]

The plain language of Section 1 thus confers broad, discretionary power on the Legislature to encourage education in Nevada by "all" means the Legislature deems to be "suitable."[4] The Legislature is not limited to encouraging education through the public-school system. *See, e.g.*, NRS 392.070 (exempting children in private schools and being homeschooled from public school attendance requirements). On the contrary, Section 1 authorizes the Legislature to encourage education by "all" suitable means.

The Legislature deemed the ESA program to be a means of encouraging education. Thus, the Nevada Legislature exercised its Section 1 power when it enacted SB 302 as part of the 2015 education reforms, and Section 1 fully authorized the Legislature to enact the ESA program established by SB 302. Plaintiffs' arguments under Sections 2, 3, and 6 cannot justify the negation of the Legislature's legitimate use of its express Section 1 authority.

II. The ESA Program Does Not Violate The "Uniform System Of Common Schools" Language In Article 11, Section 2.

Article 11, Section 2 of the Nevada Constitution provides:

> The legislature shall provide for a uniform system of common schools, by which a school shall be established and maintained in each school district at least six months in every year, and any school district which shall allow instruction of a sectarian character therein may be deprived of its proportion of the interest of the public school fund during such neglect or infraction, and the legislature may pass such laws as will tend to secure a general attendance of the children in each school district upon said public schools. [NEV. CONST. art. 11, § 2.]

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[4] In *Meredith v. Pence*, 984 N.E.2d 1213 (Ind. 2013), the Indiana Supreme Court explained that the similarly worded "all suitable means" clause in the Indiana Constitution constituted a "broad delegation of legislative discretion." *Id.* at 1224 n.7. *See infra* at 13 n.8. The same is true of the "all suitable means" clause in Article 11, Section 1 of the Nevada Constitution.

Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

Plaintiffs contend (PI Mot. 16-19) that the ESA program violates that portion of Section 2 requiring the Legislature to provide for a "uniform system of common schools." *Id.* But the ESA program does not even *implicate* Section 2, much less violate its uniformity requirement. The program is instead fully authorized by Section 1. Plaintiffs' claim under Section 2 lacks merit and should be dismissed.

Section 2 confers on the Legislature both the power and the duty to establish a public-school system. It requires the Legislature to establish a "uniform" public-school system with a school in every district open at least six months per year. The uniformity requirement in Section 2 is concerned with uniformity *within* the public school system. It is aimed at avoiding certain differences between public schools in different parts of the State. *See State of Nevada v. Tilford*, 1 Nev. 240 (1865).[5]

Plaintiffs argue that "SB 302 uses public monies for private schools and entities not subject to the legal requirements and educational standards governing public schools, in violation of the uniformity mandate" of Section 2. PI Mot. 18. Plaintiffs also argue that the ESA program is unlawful because Section 2 "prohibit[s] the Legislature from establishing and maintaining a separate alternative system to Nevada's public schools." *Id.* Yet Plaintiffs' two theories wholly ignore Section 1. The Legislature did not create the ESA program as part of Nevada's "uniform system of common schools" under Section 2; it created ESAs as part of its plenary power to "encourage [education] by all suitable means" under Section 1. In all events, both of Plaintiffs' theories suffer deeper flaws.

Plaintiffs' first objection to the ESA program—that private schools receiving ESA funds are not subject to the laws and standards uniformly applied to public schools—fails because

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[5] In *Tilford* the Supreme Court upheld, based on Section 2, the Legislature's abolition of the Storey County board of education as part of the creation of a new public-school system. The Court explained: "There were county officers in Storey county which were not to be found in any other county in the State. The system of schools was different there from that in any other county. It became the imperative duty of the Legislature to either alter the systems of school and county government in Storey county so as to conform to the other counties, to make the other counties conform to Storey, or to adopt a new system of school and county government for all the counties. Certainly the legislature was not restricted in the choice of these three alternatives. The legislature adopted the latter alternative." *Tilford*, 1 Nev. at 245.

Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

Section 2 requires only that the *public schools* be uniform. Section 2 does not apply to private schools or impose any uniformity requirement on them. *Cf.* NRS 394.130 (requiring private schools to provide "instruction in the subjects required by law" for public schools "[i]n order to secure uniform and standard work for pupils in private school"). Nor does the ESA program convert participating private schools into public schools. *See* SB 302, § 14 (providing that SB 302 shall not be deemed "to make the actions of a participating entity the actions of the State Government"). Nevada had a uniform public-school system before the adoption of SB 302, and after SB 302's adoption the State continues to have a uniform public-school system—one that is open to all who wish to attend. Nothing in Section 2 bars the Legislature from funding ESAs that parents and students may choose to use for private school. Any construction of Section 2 as prohibiting the ESA program would fly in the face of Section 1, which expressly empowers the Legislature to use "all suitable means" to encourage education.

Plaintiffs' second theory—that Section 2 "prohibit[s] the Legislature from establishing and maintaining a separate alternative system to Nevada's uniform public schools"—fares no better than their first. PI Mot. 18. As an initial matter, it simply misunderstands the effect of SB 302: the Legislature has not established, let alone maintained, an alternative system of schools. Moreover, by its terms, the "uniform system of common schools" language in Section 2 does not impose any restriction on the Legislature's ability to provide grants to children for educational purposes beyond public schools. Section 2 mandates uniformity within the public school system; it does not prohibit other efforts to promote education. Section 2's public-school uniformity requirement thus does not bar the Legislature from funding ESAs that parents and students may use on private schooling. Any such interpretation of Section 2 reads out of Nevada's Constitution Section 1's clear and expansive directive to the Legislature to "encourage [education] by all suitable means," including means outside the public-school system.[6]

[6] This construction of the Nevada Constitution makes particular sense in light of the reality that parents have a constitutional right to educate their children outside the public education system. *See Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923). Given that federal constitutional right, it would be more than passing strange for

Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

Plaintiffs argue that the Legislature's duty under Section 2 "to provide for the education of Nevada's children through the establishment of a uniform system of public schools ... prohibits the Legislature from enacting SB 302, a law that allows for the education of Nevada children" outside of the public-school system. PI Mot. 18-19. This argument fails for several reasons. First, it overlooks the Legislature's express power to encourage education by "*all* suitable means." NEV. CONST. art. 11, § 1 (emphasis added). The Legislature is not restricted to encouraging education through the public schools. *See, e.g.*, NRS 392.070 (permitting private schools and homeschooling). Furthermore, Plaintiffs' argument is a non-sequitur. The Legislature has a duty to create and fund public schools; it does not follow, however, that this duty prohibits the Legislature from supporting with ESAs parents and students who choose a private-sector education. Section 2 is a floor, not a ceiling. And Plaintiffs' argument proves too much. If, as Plaintiffs argue, Section 2 prohibits the Legislature from enacting "a law that allows for the education of Nevada children" outside of the public school system, that would mean NRS 392.070—which excuses private and homeschool students from Nevada's public school attendance requirements (*see* NRS 392.040)—is unconstitutional. If this Court accepts Plaintiffs' theory of Section 2, it will make private schools and homeschooling illegal in Nevada. That cannot be the law.

Plaintiffs' argument is based on a mechanical and erroneous use of the *expressio unius* canon. *See* PI Mot. 18. That canon must be applied "with great caution" and "courts should be careful not to allow its use to thwart legislative intent." N. Singer & S. Singer, 2A Sutherland Statutory Construction § 47:25 (7th ed.). It "does not mean that anything not required is forbidden." *Id.* Plaintiffs' claim illustrates why courts call the maxim "a valuable servant" but "a dangerous master." *Ford v. United States,* 273 U.S. 593, 612 (1927) (quotation marks omitted).

Here, Plaintiffs' argument converts the *expressio unius* canon from a commonsense tool into a weapon of illogic. It would thwart the intent of Section 1 to encourage education by

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Nevada to be powerless to provide any assistance to children educated outside the uniform system of public schools.

Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

"all" suitable means. Surely Section 2 was not intended to nullify the immediately antecedent provision in the Constitution. Plaintiffs' blinkered approach in applying the maxim to Article 11 would also yield absurd results. For example, Article 11, Section 4 of the Constitution requires a "State University which shall embrace departments for Agriculture, Mechanic Arts, and Mining." In Plaintiffs' world, the fact that the Constitution *requires* the University to have these three departments *forbids* it from having any others.[7] A perusal of the UNR course catalog reveals that this is not the case.

The Supreme Courts of Indiana, North Carolina, and Wisconsin have all upheld educational choice programs against challenges brought under the "uniformity" clauses of their state constitutions. *Davis v. Grover*, 480 N.W.2d 460 (Wis. 1992), upheld the Milwaukee Parental Choice Program ("MPCP"). The plaintiffs in *Davis* argued that the MPCP violated Article X, § 3 of the Wisconsin Constitution, which states: "The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable; and such schools shall be free and without charge ....." Rejecting that argument, the *Davis* Court held:

> [T]he MPCP in no way deprives any student the opportunity to attend a public school with a uniform character of education. ... [T]he uniformity clause requires the legislature to provide the opportunity for all children in Wisconsin to receive a free uniform basic education. The legislature has done so. The MPCP merely reflects a legislative desire to do more than that which is constitutionally mandated. [480 N.W.2d at 474.]

See also Jackson v. Benson, 578 N.W.2d 602, 627-28 (Wis. 1998) (again upholding the MPCP).

The Indiana Choice Scholarship Program was upheld in *Meredith v. Pence*, 984 N.E.2d 1213 (Ind. 2013). Indiana's Constitution, like Nevada's, directs the legislature to

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[7] Plaintiffs rely on *Galloway v. Truesdell*, 83 Nev. 13, 422 P.2d 237 (1967) (PI Mot. 18). *Galloway* involved a statute that gave non-judicial powers to, and imposed non-judicial duties on, district judges. The Supreme Court struck down the statute because it violated the separation of powers set forth in Article 3, Section 1 and Article 6, Section 6 of the Constitution. In contrast to the statute at issue in *Galloway*, the ESA program is authorized by Article 11, Section 1 and does not violate any constitutional provision.

Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

(1) "encourage" education by "all suitable means" and (2) establish a "uniform system of Common Schools."[8] Rejecting the plaintiffs' "uniformity" challenge, the Court explained that the "[t]he school voucher program does not replace the public school system, which remains in place and available to all Indiana schoolchildren," and that "so long as a 'uniform' public school system ... is maintained, the General Assembly has fulfilled the duty imposed by the Education Clause." *Id.* at 1223.

The *Meredith* Court also held that the Indiana program was authorized by the legislature's power to encourage education by all suitable means, explaining that "the Education Clause directs the legislature generally to encourage improvement in education in Indiana, and this imperative is broader than and in addition to the duty to provide for a system of common schools." *Id.* at 1224. Because the Indiana program did "not alter the structure or components of the public school system," it came under "the first imperative" to encourage education "and not the second" imperative for a uniform public-school system. *Id.*

North Carolina's Opportunity Scholarship Program was recently upheld in *Hart v. State of North Carolina*, 774 S.E.2d 281 (N.C. 2015). The plaintiffs argued that the program violated Article IX, § 2(1) of the State Constitution, which provides that "[t]he General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools." The *Hart* Court rejected that argument. The uniformity clause, which "requires that provision be made for public schools of like kind throughout the state," was held to "appl[y] exclusively to the public school system and does not prohibit the General Assembly from funding educational initiatives outside of that system." *Id.* at 289-90. The Court specifically rejected the argument that the school-choice program created "an alternate system of publicly funded private schools standing apart from the system of free public schools," *id.* at 289—the same argument that Plaintiffs make here.

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[8] The Education Clause of the Indiana Constitution provides that "it should be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement; and to provide, by law, for a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all." IND. CONST. art. 8, § 1.

Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

Plaintiffs rely upon *Bush v. Holmes*, 919 So.2d 392 (Fla. 2006) (PI Mot. 19), but *Bush* is of no help to them. *Bush* struck down a Florida program under Article IX, Section 1(a), of the Florida Constitution, which reads in relevant part:

> It is ... a paramount duty of the state to make adequate provision for the education of all children residing within its borders. Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education and for the establishment, maintenance, and operation of institutions of higher learning and other public education programs that the needs of the people may require. [FLA. CONST. art. IX, § 1(a).]

The *Bush* Court read the first sentence, with its "paramount duty" language, as imposing a duty on the legislature to provide an adequate education and construed the second sentence concerning "a uniform, efficient, safe, secure, and high quality system of free public schools" as a *restriction* on how the legislature may carry out its "paramount duty." The Court held that the Florida program violated the second sentence "by devoting the state's resources to the education of children within our state through means other than a system of free public schools." *Bush*, 919 So.2d at 407.

Bush distinguished the Wisconsin Supreme Court's decision in *Davis* on the ground that "the education article of the Wisconsin Constitution construed in *Davis*, *see* WIS. CONST. art. X, does not contain language analogous to the statement in [Florida] article IX, section 1(a) that it is 'a paramount duty of the state to make adequate provision for the education of all children residing within its borders.'" *Bush*, 919 So.2d at 407 n.10. This reasoning also distinguishes this case, because the Nevada Constitution, like Wisconsin's, does not contain the "paramount duty" and "adequate provision" language that the *Bush* Court found dispositive.

The Indiana Supreme Court's decision in *Meredith* confirms the foregoing analysis. *Meredith* distinguished *Bush* based on *Bush*'s distinction of the Wisconsin case. *See Meredith*, 984 N.E.2d at 1224 ("Like the Wisconsin Constitution, the Indiana Constitution contains no analogous 'adequate provision' clause."). The Indiana Supreme Court also distinguished *Bush* based on the "all suitable means" clause in the Indiana Constitution. As

Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

noted, Indiana's Constitution is the most similar to Nevada's because it contains an "all suitable means" clause as well as a "uniform system of Common Schools" clause. IND. CONST. art. 8, § 1; *see supra* at 13 n.8. The *Meredith* Court held that the legislature's duty to provide for a uniform system of common schools "cannot be read as a restriction on the first duty" to encourage education by all suitable means. 984 N.E.2d at 1224. "[T]he legislature [has a duty] generally to encourage improvement in education in Indiana, and this imperative is broader than and in addition to the duty to provide for a system of common schools. Each may be accomplished without reference to the other." *Id.* So too here. The Nevada Constitution, like the Indiana Constitution, empowers the Legislature to promote education by "all suitable means" and does not contain the language on which the *Bush* Court relied. For the reasons articulated in *Meredith*, *Bush* does not support Plaintiffs' challenge to the ESA program.

III. The ESA Program Does Not Violate Article 11, Section 3's Pledge Of Certain Property For "Educational Purposes".

Plaintiffs argue that SB 302 violates Section 3 "on its face" because SB 302 "diverts funds allocated for the public schools to private uses." PI Mot. 2; *see also id.* at 11-13. Plaintiffs' argument is that the Legislature appropriated funds for the public schools and, contrary to Section 3, SB 302 transfers a portion of those funds to ESAs. But the plain language of Section 3 defeats Plaintiffs' facial challenge to SB 302.

Article 11, Section 3 of the Constitution provides in full:

> All lands granted by Congress to this state for educational purposes, all estates that escheat to the state, all property given or bequeathed to the state for educational purposes, and the proceeds derived from these sources, together with that percentage of the proceeds from the sale of federal lands which has been granted by Congress to this state without restriction or for educational purposes and all fines collected under the penal laws of the state are hereby pledged for educational purposes and the money therefrom must not be transferred to other funds for other uses. The interest only earned on the money derived from these sources must be apportioned by the legislature among the several counties for educational purposes, and, if necessary, a portion of that interest may be appropriated for the support of the state university, but any of that interest which is unexpended at the end of any year must be added to the principal sum pledged for

Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

educational purposes. [NEV. CONST. art. 11, § 3.]

The first point to make about Section 3 is that it simply does not require all funds covered by that section, or all funds appropriated for "educational purposes," to be used for public schools. Nothing in Section 3's text imposes any such requirement. Instead, Section 3 provides that the specific property described therein is "pledged for educational purposes and the money therefrom must not be transferred to other funds for other uses." NEV. CONST. art. 11, § 3.[9]

As explained above, the interest on Section 3 money goes from the Permanent School Fund to the Distributive School Account. *See supra* at 6. ESAs will be funded from the DSA. *See* SB 302, § 16.1. But depositing a small amount of Section 3 money with the other funds in the DSA does not mean that SB 302 violates Section 3, for two reasons.

First, Plaintiffs' facial challenge to SB 302 fails because nothing in SB 302 requires that ESAs be funded with Section 3 money. Section 3 money, as noted, constitutes a tiny fraction of the DSA. In 2014, of the $1.4 billion in State funds in the DSA, only $1.6 million—a mere 0.14%—came to the DSA from the PSF. The vast majority of the $1.4 billion—$1.1 billion or 78%—came from the general fund. *See supra* at 6; Exhibit 2 (DSA Summary). Because the amount of money from the DSA used to support the public schools is far greater than the PSF funds deposited into the DSA—orders of magnitude greater—this Court can safely conclude that all PSF funds will be used to support public schools. Funds for ESAs will constitute only a small portion of the funds distributed from the DSA, and ESA funds need not be drawn from the tiny portion of the DSA comprised of PSF funds. ESA funds may be drawn from that part of the DSA consisting of appropriations from the general fund. "[T]hose attacking a statute [have] the burden of making a *clear showing* that the statute is unconstitutional," *List*, 99 Nev. at 138, 660 P.2d at 106 (emphasis added). Speculation that PSF funds are being used to

[9] Before SB 302's enactment, NRS 387.045 provided that "[n]o portion of the public school funds or of the money specially appropriated for the purpose of public schools shall be devoted to any other object or purpose." Yet SB 302 expressly amended NRS 387.045 to exempt the ESA program from this statute. *See* SB 302, § 15.9. Thus, Plaintiffs do not contend that the ESA program violates NRS 387.045. *See* PI Mot. 12.

Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

fund ESAs is just that—speculation.

Because Plaintiffs challenge SB 302 on its face, they bear "the burden of demonstrating that there is *no set of circumstances* under which the statute would be valid." *Deja Vu Showgirls*, 334 P.3d at 398 (emphasis added). The ESA program has not yet been implemented. It is not enough for Plaintiffs to posit that some Section 3 money could in theory go to ESAs. Under the facial-challenge rule, even if SB 302 "might operate unconstitutionally under some conceivable set of circumstances [that] is insufficient." *Salerno*, 481 U.S. at 745. SB 302 does not require that Section 3 money be used for the ESA program. There is no reason to assume that the State will implement SB 302 such that Section 3 money goes to ESAs.

Second, even if some Section 3 money were used to fund ESAs, that would not violate Section 3. The plain text of Section 3 provides that Section 3 money must be used "for educational purposes." NEV. CONST. art. 11, § 3. Any Section 3 money transferred to an ESA account is being used for an educational purpose. The ESA program is unquestionably an educational program, as the legislative history makes clear. *See supra* at 2-5. The United States Supreme Court has long recognized that education-choice programs serve educational purposes. *See, e.g., Mueller v. Allen*, 463 U.S. 388, 395 (1983) ("A state's decision to defray the cost of educational expenses incurred by parents—regardless of the type of schools their children attend—evidences ... [the] purpose of ensuring that the state's citizenry is well-educated."). Plaintiffs assert that SB 302 serves "non-public educational purposes" (PI Mot. 12); but they make no argument that SB 302's purposes are not "educational purposes," which is all Section 3 requires. And in all events, SB 302 does serve public-education purposes. SB 302 was not enacted just to promote the welfare of students opting out of public schools, but also to improve the educational well-being of *all* students, whether they use ESAs or remain in public schools with smaller class sizes and better educational opportunities because of the positive effect of the "exit" option SB 302 creates has on the public schools. In considering SB 302, the Legislature examined evidence that education-choice programs improve public schools by promoting competition and reducing overcrowding. *See supra* at 3.

Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

Thus, the Legislature enacted SB 302 for *public education* purposes as well other educational purposes.

Plaintiffs rely on *State ex rel. Keith v. Westerfield*, 23 Nev. 468, 49 P. 119 (1897) (PI Mot. 12 n.4, 13 & n.5), but they misread that case. The question in *Keith* was whether the Legislature's appropriation of a sum to pay the salary of a teacher at the state orphans' home could be paid from an account known as the "general school fund." The Supreme Court concluded the salary could not be paid from that fund. *Keith*, 49 p. at 121. But the Court did not hold that the salary payment lacked an "educational purpose"; quite the opposite, the Court readily acknowledged that "moneys ... appropriated" for educating children not in public school *is* "applying [that money] to educational purposes." *Id.* The Court held the payment could not come from the "general school fund" because the orphans in *Keith* "'ha[d] not the right to attend the public school.'" *Id.* at 120 (following *State ex rel. Wright v. Dovey*, 19 Nev. 396, 12 P. 910 (1887)).[10] Here, ESA funds are spent to educate children who have the right to attend public school in Nevada. Thus, spending State funds on the ESA program is, as *Keith* explained (and common sense confirms), "applying them to educational purposes." *Id.* at 121.[11]

Moreover, even though the Supreme Court in *Keith* held that the salary of the orphan-home teacher could not be paid from the general school fund because the orphans were not

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[10] When *Wright* and *Keith* were decided, Article 11, Section 3 "provide[d] that the interest on school moneys shall be apportioned among the several counties in proportion to the ascertained number of the persons between the ages or six and eighteen years in the different counties." *Wright*, 12 P. at 910. *Wright* held that orphans were not be counted because they were "not entitled to attend the public schools." *Id.* at 912.

[11] Plaintiffs' citation of a few scattered phrases in the report of the debates in Nevada's Constitutional Convention are inapposite. The first snippet that Plaintiffs quote concerns Section 2, not Section 3. *See* PI Mot. 12 (quoting Official Report of the Debates and Proceedings in the Constitutional Convention of the State of Nevada 568 (1866)). The speaker was making the point that sectarian instruction in a school district would cause a loss of funds under Section 2 only if such instruction occurred in a public school; no funding loss would occur if there were a Catholic school in the district. Plaintiffs also misapply the statement of a speaker who was discussing, not the "educational purpose" language of Section 3, but rather "the last proviso" of Section 3, which at that time stated that interest on Section 3 proceeds "may be appropriated for the support of the State University." *See* PI Mot. 12 n.4 (citing Debates 579).

Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

allowed to attend public school, the Court went on to hold that the salary was "payable out of the general fund in the state treasury." *Id.* The implication of that latter holding for the instant case is clear: the vast majority of the money in the DSA is, in fact, from the general fund, and if this Court were to conclude that Section 3 funds cannot be used for the educational purpose of funding ESAs, then, like the Court in *Keith*, it should also conclude that ESAs are "payable out of the general fund" monies already in the DSA. *Id.* Plaintiffs admit that, under *Keith*, funding ESAs from general fund monies would not violate Section 3, PI Mot. 13 n.5, but they attempt to dismiss what the *Keith* Court did as involving only a *de minimus* amount of money. But there is nothing in *Keith* to support that distinction. Under *Keith*, there is simply no constitutional issue in paying for non-public school educational purposes out of the general fund. Section 3 does not apply to monies in the DSA appropriated from the general fund.

Plaintiffs also assert that the Legislature would not "have passed [SB 302] if it required a substantial new appropriation from the general fund," *id.*, but they ignore the fact that the Legislature *did* appropriate substantial monies for the ESA program—from the general fund. In SB 515, enacted right after SB 302, the Legislature appropriated some $2 billion from the general fund to the DSA to fund the public schools *and ESAs* for the biennium. *See* SB 515, § 7; *see also* SB 302, § 16 (ESAs to be funded from the DSA).

IV. In Enacting SB 302, The Legislature Did Not Violate Its Article 11, Section 6 Duty To Appropriate Funds "The Legislature Deems To Be Sufficient" For The Public Schools.

Plaintiffs' final claim is that SB 302 violates Article 11, Section 6, the first two paragraphs of which provide:

> 1. In addition to other means provided for the support and maintenance of said university and common schools, the legislature shall provide for their support and maintenance by direct legislative appropriation from the general fund, upon the presentation of budgets in the manner required by law.
>
> 2. During a regular session of the Legislature, before any other appropriation is enacted to fund a portion of the state budget for the next ensuing biennium, the Legislature shall enact one or more appropriations to provide the money *the Legislature deems to be sufficient*, when combined with the local money reasonably

Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

> available for this purpose, to fund the operation of the public schools in the State for kindergarten through grade 12 for the next ensuing biennium for the population reasonably estimated for that biennium. [NEV. CONST. art. 11, § 6 (emphasis added).]

Specifically, Plaintiffs argue that "SB 302, by transferring funding appropriated by the Legislature for the public schools into ESAs for private uses necessarily reduces the Legislature's appropriations for the public schools below the level deemed 'sufficient' by the Legislature under Art. XI, section 6.2." Pl Mot. 14. But Plaintiffs' notion that the Legislature has somehow violated its own judgment about what amount of funds are "sufficient" ignores the chronology of SB 302's passage, disregards the way the Legislature historically has complied with Article 11, Section 6, and engages in gross, incorrect speculation unfit for a facial challenge.

Under the Nevada Plan, the Legislature does not appropriate a sum certain for the public schools; it funds on a per-pupil basis by establishing the basic support guarantee for each school district. This per-pupil method means that a district's funding fluctuates with enrollment. This was true before ESAs, and remains so today. *See* Canavero Decl. ¶ 6 (attached as Exhibit 3).

The Legislature, in addition to this per-pupil amount, also guarantees school districts a minimum aggregate amount of funding under the Nevada Plan's "hold harmless" provision. *See* NRS 387.1233(3), *as amended*, SB 508, § 9. This provision guarantees that if a school district experiences more than a 5% reduction in enrollment, it will receive funding at a level based on the prior year's enrollment. *Id.* Thus, Nevada's "hold harmless" provision sets a lump-sum funding floor for Nevada's public schools based on 95% of the prior year's enrollment. This also was true before ESAs, and remains true today. *See* Canavero Decl. ¶ 8.

In short, both before and after ESAs, the Legislature has complied with its Article 11, Section 6 requirement the same way: by guaranteeing a minimum fixed amount of funding (*i.e.*, the hold harmless guarantee), and by guaranteeing a minimum per-pupil amount of funding with no upper limit (*i.e.*, the per-pupil basic support guarantee).

. . .

Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

On June 1, 2015, the Legislature passed SB 515 to "ensur[e] sufficient funding for K-12 public education for the 2015-2017 biennium." SB 515, Title. In Sections 1 and 2 of SB 515, the Legislature—just as it did before it created the ESA program—established per-pupil basic support guarantees for each school district, and in Section 7 it appropriated some $2 billion from the general fund to the DSA. SB 515, enacted against the backdrop of Nevada's hold harmless guarantee, was how the Legislature "enact[ed] one or more appropriations to provide the money the Legislature deems to be sufficient, when combined with the local money reasonably available for this purpose, to fund the operation of the public schools ... for the population reasonably estimated for that biennium." NEV. CONST. art. 11, § 6.2. *See* Canavero Decl. ¶ 5.

Plaintiffs complain that SB 302 violates Section 6 because it "transfer[s] funding appropriated by the Legislature for the public schools into ESAs." PI Mot. 14. This ignores that SB 302 was enacted *before* SB 515 appropriated funds under Section 6. The Legislature passed SB 302 on May 29, 2015. It passed SB 515 three days later on June 1, 2015.[12] SB 515 was passed against the backdrop of the already-passed SB 302. Therefore, even assuming Plaintiffs are correct that SB 302's ESA program somehow affects the appropriation made by SB 515, that effect had already been put in place by the Legislature when it made the appropriation it "deemed to be sufficient" for the public schools under Article 6. "Whenever possible, this court will interpret a rule or statute in harmony with other rules or statutes." *State of Nevada, Div. of Ins. v. State Farm Mut. Auto. Ins. Co.*, 116 Nev. 290, 295, 995 P.2d 482, 486 (2000) (citing cases). Furthermore, "when the legislature enacts a statute, this court presumes that it does so 'with full knowledge of existing statutes relating to the same subject.'" *Id.* (quoting *City of Boulder v. Gen. Sales Drivers*, 101 Nev. 117, 118-119, 694 P.2d 498, 500 (1985)). Nothing in Article 6 required the Legislature to ignore background laws in making the "sufficient" appropriation under Section 6. Quite the opposite, the Legislature clearly does make Section 6 appropriations against the backdrop of already-existing laws, including

[12] The Governor approved SB 302 on June 2, 2015. He approved SB 515 on June 11, 2015.

Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

Nevada's "hold harmless provision" in NRS 387.1233(3). The Legislature's passage of SB 302 could not somehow cause the Legislature, three days later, to appropriate less than that which it deemed sufficient for the public schools. Contrary to Plaintiffs' argument, this cannot be a case where the Legislature set aside an amount of money under Section 6, and then *later* impermissibly "transferr[ed]" or "removed" that money to another use. PI Mot. 14. That other use was already in place—and presumably accounted for—when the Legislature made the Section 6 set-aside. Plaintiffs' statement that it "is simple math" that SB 302 "will reduce [public school] funding below the amount deemed sufficient by the Legislature," *id.*, gets a failing grade.

Plaintiffs' argument that SB 302 violates Section 6 because public schools have "significant fixed costs," PI Mot. 15, is not really an attack on ESAs, but an attack on the Nevada Plan itself. The Legislature funded public schools under Section 6 using a per-pupil basic support guarantee long before ESAs existed. This per-pupil guarantee will fluctuate based on actual enrollment. If Plaintiffs are right that ESAs cause the Nevada Plan to violate Section 6 because the "fixed costs of operating a system of public schools are not commensurately reduced by losing one or even a handful of students," *id.*, then the Nevada Plan was unconstitutional long before ESAs. Public schools have always had "fixed costs" and lost "one or even a handful of students" for innumerable reasons, including students dropping out, moving, or withdrawing to go to a private school or homeschool. Plaintiffs' "fixed costs" argument proves too much.

In any event, the Legislature *has* accommodated Plaintiffs' concern about fixed costs—and in the same way before and after SB 302. The Nevada Plan's "hold harmless" provision protects school districts by providing a guaranteed 95% funding floor. That is the fixed amount the Legislature deems "sufficient" under Article 6. And that amount is unaffected by SB 302.[13]

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[13] In a declaration attached to Plaintiffs' motion, Paul Johnson speculates about "possible" ways that ESAs "may" affect per-pupil public school funding if his "assumptions are correct." Johnson Decl. ¶ 5. To prevail on a facial challenge, Plaintiffs must prove "that there is no set of circumstances under which the statute would be valid," *Deja Vu Showgirls*, 334 P.3d at 398,

Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

Plaintiffs' claim under Section 6 must also be rejected on the independent ground that whether the Legislature has appropriated the funds it deems sufficient for the public schools is not a justiciable question. *See N. Lake Tahoe Fire Prot. Dist. v. Washoe Cnty. Bd. of Cnty. Comm'rs*, 129 Nev. Adv. Op. 72, 310 P.3d 583, 587 (2013) ("Under the political question doctrine, controversies are precluded from judicial review when they revolve around policy choices and value determinations constitutionally committed for resolution to the legislative and executive branches.") (quotation marks omitted); *Heller v. Legislature of State of Nevada*, 120 Nev. 456, 466, 93 P.3d 746, 753 (2004) ("Separation of powers is particularly applicable when a constitution expressly grants authority to one branch of government"). Section 6 provides that "*the Legislature* shall enact one or more appropriations to provide the money *the Legislature deems to be sufficient* ... to fund the operation of the public schools." NEV. CONST. art. 11, § 6.2 (emphases added). The Legislature is the sole judge of what it "deems" to be "sufficient," and its view of the matter may not be reviewed or second-guessed by the judicial branch. *Cf. Webster v. Doe*, 486 U.S. 592, 600 (1988) (statute permitting CIA Director to terminate Agency employee whenever the Director shall "deem such termination necessary or advisable" "exudes deference to the Director" and "foreclose[s] the application of any meaningful judicial standard of review" under the Administrative Procedure Act).[14]

Finally, even if this Court were to find a violation of the Legislature's duty under Section

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not speculate about "possible" ways ESAs "may" be implemented to the detriment of a school district. Mr. Johnson's conceded speculation neither helps Plaintiffs' motion for preliminary injunction nor prevents dismissal of their facial challenge. In any event, Mr. Johnson's "assumptions ... are not correct." *See* Canavero Decl. ¶¶ 9-13. Indeed, Mr. Johnson's speculation in this case is contradicted by his own earlier statement submitted to the Legislature and included in its fiscal note on SB 302, that SB 302 would have "no impact" in White Pine County School district. *See* SB 302 Fiscal Note, at 4 (attached as Exhibit 4), available at http://www.leg.state.nv.us/Session/78th2015/FiscalNotes/8283.pdf.

[14] In *Guinn v. Legislature of State of Nevada*, 119 Nev. 277, 71 P.3d 1269 (2003), *pet. for reh'g dis'd & prior op. clarified*, 119 Nev. 460, 76 P.3d 22 (2003), the Supreme Court suspended the operation of a constitutional provision requiring a two-thirds supermajority vote of the Legislature to raise taxes because that provision caused an impasse preventing the Legislature from passing a balanced budget and funding the public schools. But the Supreme Court emphasized that "we could not, nor did we, direct the Legislature to approve any particular funding amount" for the public schools. *Id.*, 119 Nev. at 472, 76 P.3d at 30.

Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

6.2 to appropriate the money it deems to be sufficient, enjoining the ESA program would not be a proper remedy. Section 6.5 provides that "[a]ny appropriation of money enacted in violation of subsection 2, 3 or 4 is void." NEV. CONST. art. 11, § 6.5. If there were a Section 6.2 violation, this Court would have to set aside the appropriations bill, *i.e.*, SB 515—not SB 302. And because Plaintiffs have not requested any such relief, this Court should not order it even if there were a Section 6.2 violation (which there is not).

V. Plaintiffs Are Not Entitled To A Preliminary Injunction.

Plaintiffs fail to prove that a preliminary injunction should issue. Nevada courts will grant a preliminary injunction only "where the moving party can demonstrate that it has a reasonable likelihood of success on the merits and that, absent a preliminary injunction, it will suffer irreparable harm for which compensatory damages would not suffice." *Excellence Cmty. Mgmt. v. Gilmore*, 131 Nev. Adv. Op. 38, 351 P.3d 720, 722 (2015). "In considering preliminary injunctions, courts also weigh the potential hardships to the relative parties and others, and the public interest." *Univ. & Cmty. Coll. Sys. of Nevada v. Nevadans for Sound Gov't*, 120 Nev. 712, 721, 100 P.3d 179, 187 (2004). Plaintiffs do not demonstrate that any of these factors supports their request for such "extraordinary relief." *Dep't of Conserv. & Nat. Res.*, 121 Nev. at 80, 109 P.3d at 762.

As shown above, Plaintiffs have not met their burden of "clearly demonstrating" that SB 302 "is unconstitutional" and hence have not shown a "reasonable likelihood of success on the merits." *S.M. v. State of Nevada Dep't of Pub. Safety*, 2015 WL 528122, at *3. The Court can deny Plaintiffs' motion for this reason alone. *See, e.g., Boulder Oaks Cmty. Ass'n v. B & J Andrews Enter., LLC*, 125 Nev. 397, 403 n.6, 215 P.3d 27, 31 n.6 (2009).

Plaintiffs, even if this Court sets aside their meritless claims, fail entirely to show that they will suffer "irreparable harm for which there is no adequate remedy at law." *Dep't of Conserv. & Nat. Res.*, 121 Nev. at 80, 109 P.3d at 762. As a threshold matter, Plaintiffs allege potential harms to *school districts*, not to themselves—and even those harms relate only to financial loss that could be remedied at law. The principal harms that Plaintiffs allege are that public school districts will receive less funding, will face higher per-pupil education costs, and

Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

will have to adjust their budgets and program offerings in response to the ESA program. *See* PI Mot. 20-21. Because they are "[m]ere allegations of financial hardship," Plaintiffs' predictions are legally "insufficient to support a finding of irreparable harm." *Church of Scientology of Cal. v. United States*, 920 F.2d 1481, 1489 (9th Cir. 1990); *see also Elias v. Connett*, 908 F.2d 521, 526 (9th Cir. 1990) (irreparable harm not established where plaintiff "has failed to show that he will suffer more than mere monetary harm or financial hardship if denied relief"). But even if the alleged harms were cognizable, Plaintiffs have made no effort to show that the harms will have any effect on *them*. None of the Plaintiffs have submitted a declaration. There is no evidence that they personally will suffer irreparable injury.

The harms that Plaintiffs allege, moreover, are speculative. They say that "[s]chool districts *may* have to" cut educational services and extra-curricular activities, PI Mot. 20-21 (emphasis added), but they provide no concrete proof to support these chicken-little predictions. Especially in a facial challenge like this one—where Plaintiffs bear the burden to demonstrate that SB 302 is unconstitutional in *all* circumstances—unsupported hypotheticals are insufficient to justify a preliminary injunction. *See Flick Theater, Inc. v. City of Las Vegas*, 104 Nev. 87, 91 n.4, 752 P.2d 235, 238 n.4 (1988) (holding that the "case for a preliminary injunction" may not be "based on mere conjecture"); *Goldie's Bookstore, Inc. v. Super. Ct. of State of Cal.*, 739 F.2d 466, 472 (9th Cir. 1984) ("Speculative injury does not constitute irreparable injury."); *In re Excel Innovations, Inc.*, 502 F.3d 1086, 1098 (9th Cir. 2007) ("Speculative injury cannot be the basis for a finding of irreparable harm.").

The declarations that Plaintiffs offer to support their predictions are equally speculative. Paul Johnson, the Chief Financial Officer of White Pine County School District can say no more than that "[a] number of damaging *scenarios* are *possible*." Johnson Decl. ¶ 5 (emphases added); *see also* ¶ 11 ("*If* funding declines *in the coming years* as a result of SB 302, White Pine will *begin seriously considering* closing schools ....") (emphases added). Jeff Zander, the Superintendent of the Elko County School District says that SB 302 "*may* result in a mid-year or quarterly reduction of the district's operating budget." Zander Decl. ¶ 4 (emphasis added). The Chief Financial Officer of Clark County School District, Jim McIntosh,

Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

similarly warns that SB 302 "*may* result in a teacher surplus in a particular school," McIntosh Decl. ¶ 4(a) (emphasis added), that certain costs "*may* increase on a per-pupil basis," *id.* ¶ 5 (emphasis added), and that a school district "*may* be forced to make budgetary adjustments which would be detrimental to students," *id.* ¶ 4(c) (emphasis added). And the most that Dr. Christopher Lubienski, a professor from Illinois, can muster is that SB 302 "*may* lead to more inequitable opportunities and outcomes." Lubienski Decl. ¶ 7(d) (emphasis added). Courts should not preliminarily enjoin a duly-enacted, state-wide public policy based on selective conjecture from non-party declarants.

Worse yet, the declarations contradict each other and fail to understand the law. Mr. Johnson warns that class sizes in certain grades "would balloon," Johnson Decl. ¶ 11, while Mr. McIntosh worries that shrinking class sizes could lead to "a teacher surplus in a particular school." McIntosh Decl. ¶ 4. Mr. Johnson even contradicts himself. *Compare* Johnson Decl. ¶ 6 ("SB 302 will harm public schools"), *with* SB 302 Fiscal Note, at 4 (SB 302 will have "no impact"). Nor do the declarants acknowledge the "hold harmless" provision enacted by the Legislature ensures that no school district will lose more than 5% of its funding from quarter to quarter due to a decline in enrollment. *See* NRS 387.1233(3), *amended by* SB 508, § 9. The "hold harmless" provision is intended to prevent the large funding fluctuations on which Plaintiffs and their declarants base their speculations.

Even if significant fluctuations are still possible, they are not caused by SB 302, but instead by the Nevada Plan for school funding, which Plaintiffs have not challenged here. Under the Nevada Plan's funding formula, school districts are funded on a per-pupil basis. When a pupil exits the district—whether because she has moved to a different district or another State, she has dropped out of a poor-performing school, or she has decided to go to private school (whether or not with ESA funds)—the district's total funding will decrease. Enrollment fluctuations and concomitant funding fluctuations will naturally occur with or without the ESA program. Under Plaintiffs' theory, it would be unconstitutional—and cause irreparable harm—for the State to transfer a large number of government workers from Carson City to Las Vegas anytime during the school year, simply because the departure of

Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

those employees' school-age children could cause funding decreases for the Carson City schools.

In reality, the ESA program actually could stabilize public school enrollments. Nevada has the dubious distinction of having the worst high-school graduation rate in the country, as Governor Sandoval noted in his 2015 *State of the State* address. In enacting SB 302, the Legislature considered evidence that education-choice programs *improve* public school outcomes. *See supra* at 3. If through competition the ESA program improves public schools, there may be fewer dropouts and thus more funding for public schools. If the Court is to entertain Plaintiffs' conjecture about the hypothetical harms of SB 302, it should also consider the many predicted benefits of that measure.[15]

Finally, a preliminary injunction in this case would severely damage the public interest. Every child in Nevada has a right to "the opportunity to receive a basic education." *Guinn*, 119 Nev. at 286, 71 P.3d at 1275. Plaintiffs do not argue and present no evidence that the ESA program will *deprive* any child of this right and opportunity. Granting a preliminary injunction, however, would deny Nevada children the opportunity to transcend this lowest common denominator by attending the school that is best for them. The people of Nevada and their elected representatives have adopted a policy aimed at improving education in the State. A handful of plaintiffs with mere policy disagreements and no proof of irreparable harm are not entitled to obstruct the Legislature's considered judgment.

* * *

Nevada's new ESA program is a lawful exercise of the Legislature's express constitutional power to "encourage" education by "all suitable means." NEV. CONST. art. 11, § 1. The program does not violate the constitutional provision concerning a "uniform system

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[15] Plaintiffs argue that, because they allege a constitutional violation, they are not required to show actual irreparable injury. *See* PI Mot. 19-20. But Plaintiffs rely on a case that merely states that a constitutional violation "may" constitute irreparable harm. *City of Sparks v. Sparks Mun. Ct.*, 129 Nev. Adv. Op. 38, 302 P.3d 1118, 1124 (2013) (citing *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir. 1997)). Plaintiffs have not explained how they personally are irreparably harmed by the ESA program. Nor have they shown that the ESA program is unconstitutional.

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Carson City, NV 89701-4717

of common schools." *Id.*, art. 11, § 2. The program exists for an obvious and urgently needed "educational purpose," *id.* art. 11, § 3, and does not call for the use of money covered by Section 3 in any event. And in enacting the program—three days *before* it appropriated funds for the public schools for the next biennium—the Legislature did not violate its duty to "provide the money the Legislature deems to be sufficient" for the public schools. *Id.*, art. 11, § 6.2. Because none of Plaintiffs' facial attacks on the ESA program have merit, this Court should uphold the constitutionality of the program.

CONCLUSION

For the foregoing reasons, Defendant's motion to dismiss should be granted, and Plaintiffs' motion for preliminary injunction should be denied.

DATED this 5th day of November, 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General, State of Nevada, and on November 5, 2015, I deposited for mailing, first class, postage prepaid, a true and correct copy of the foregoing document, addressed as follows:

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