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. _____

PETITION FOR WRIT OF MANDAMUS
from the First Judicial District Court, District Court Case No. 15-OC-002071-B

PETITIONER'S APPENDIX

VOLUME I

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INDEX TO PETITIONERS' APPENDIX

DOCUMENT	FILED	VOLUME	BATES NO.
Plaintiffs' Reply in Support of Motion to Strike Prospective Intervenors' Opposition to Motion for Preliminary Injunction and Response in Support of Defendant's Motion to Dismiss	12.07.15	III	PETR000433
Plaintiffs' Request for Submission of Motion to Strike	12.07.15	III	PETR000437
Notice of Association of Counsel	12.07.15	III	PETR000440
Notice of Substitution of Counsel for Intervenor Defendants	12.07.15	III	PETR000443
Request for Submission [Motion to Intervene as Defendants]	12.09.15	III	PETR000453
Order Denying Defendant's Motion to Dismiss	12.24.15	III	PETR000456
Order Striking Proposed Intervenors' Pleading and Papers	12.30.15	III	PETR000459
Decision and Order, Comprising Findings of Fact and Conclusions of Law	12.30.15	III	PETR000462
Order Granting Motion for Preliminary Injunction	01.11.16	III	PETR000468

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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 their minor child, K.J.; SARAH and BRIAN SOLOMON, individually and on behalf of their minor children, D.S. and K.S.,

Plaintiffs,

vs.

DAN SCHWARTZ, IN HIS OFFICIAL CAPACITY AS TREASURER OF THE STATE OF NEVADA,

Defendant.

Case No.: 15OC00207 1B

Dept. No: II

COMPLAINT

Plaintiffs, parents of children attending Nevada public schools, allege as follows:

I. INTRODUCTION

1. In the last biennium session, the Nevada Legislature established the most expansive voucher program ever instituted in the United States. The new statute, Senate Bill 302, directs the State Treasurer to deposit funds appropriated by the Legislature for the operation of the Nevada public schools into private accounts to pay for private school tuition, online classes, home-based curriculums and related expenses, tutoring, transportation to and from private schools, and other private expenses. The Education Article of the Nevada Constitution expressly prohibits the use of public school funds for anything other than the operation of Nevada's public schools. The voucher statute plainly violates this and other provisions of the Nevada Constitution and will have serious deleterious effects on Nevada and its children.

2. Under the voucher statute, every child in any private school (including on-line programs), and every child taught at home, will be entitled to receive over $5,000 a year in state public school funds after attending 100 days in a public school (part time or full time) once in their academic career. This requirement is easily met. Simply enrolling a student in 100 days of public kindergarten at the outset of their education will entitle them to collect over $5,000 a year for the rest of their K-12 education. Under the regulations proposed by the State Treasurer, students already in private school or educated at home can also readily qualify by taking a single public school class for 100 days.

3. There are currently just over 20,000 students enrolled in private schools in Nevada. The yearly cost to Nevada's public schools of subsidizing their private school education under the voucher statute would be over $102 million. This hefty sum does not include payments for students who are educated at home or on-line because the Nevada Department of Education does not track how many children in Nevada are so educated. It also does not include any child attending public school who decides to leave their school and attend a private school with a voucher subsidy. The voucher statute will thus drain Nevada's public schools of the funds provided by the Legislature essential for their operation and divert those funds to private use in violation of the Nevada Constitution.

4. The voucher statute will also provide a windfall to those who can already afford to send their children to private school. The ~$5,000 voucher subsidy is not enough to cover the full tuition at all but a handful of existing private schools in Nevada. Only those families with the means to make up the significant difference will be able to use the voucher subsidy. Diverting precious Nevada taxpayer revenues to subsidize private school education for families that can already afford it is not only inappropriate but is also an unconstitutional use of tax dollars. In addition, very few of Nevada's private schools are in the urban core of Nevada's two largest cities, accessible to students in those neighborhoods. The voucher statute will consign Nevada's most vulnerable and at-risk children to public schools that will have even less funding—isolated by socioeconomic status, disability and academic need.

5. The voucher statute further violates the Legislature's constitutional obligation to establish and maintain a "uniform system" of public schools. Private schools attended by students receiving a voucher subsidy do not have to meet the same requirements as public schools. For example, students do not have to take the same tests or show mastery of the same rigorous standards. Nor do teachers in these schools have to be certified. The voucher statute will also encourage subpar private institutions to spring up to take advantage of the State Treasurer's yearly deposits of over $5,000 per child, without any real concern for educating students, to the detriment of the students and families involved.

6. Likewise, the voucher statute does not require private schools receiving voucher subsidies to be open to all students as are the public schools. They can refuse admission based on religious beliefs, ability to pay, and academic performance. The drafters of the Nevada Constitution understood the importance of establishing a "uniform system" of "common" or public schools sufficiently funded to prepare all Nevada children to become engaged, productive and contributing citizens; schools that all Nevadan children can attend regardless of beliefs, wealth or ability. SB 302's diversion of public school funds to private schools and other entities not open to all, with virtually no accountability to the taxpayers, does not maintain—indeed, undermines—the uniform system of public schools mandated by the Nevada Constitution.

7. From its original drafting through the most recent amendment of the Education Article, the Nevada Constitution has enshrined public education as the state's highest priority. Consistent with that priority, the Nevada Constitution commands that the Nevada Legislature establish a uniform system of public schools. It mandates that the Legislature maintain and support those schools by appropriating the funding it deems sufficient for their operation. It expressly bars those funds from being used for anything other than the operation of the public schools. Without question, the voucher statute on its face violates these provisions of the Nevada Constitution. The State Treasurer must be enjoined from implementing this unconstitutional law.

II. PARTIES

8. Plaintiffs are parents of students enrolled in Nevada public schools and are Nevada taxpayers.

9. Plaintiff Hellen Quan Lopez is a resident of Las Vegas, Nevada. Her minor child, C.Q., is in fourth grade in the Clark County School District. C.Q. is a native Spanish speaker and goes to after-school programs at her public school, including drama club and French club, which are provided by the school for an extra fee. Hellen also buys workbooks for C.Q. for work over the summer. Hellen is a taxpayer whose tax dollars support the Nevada public schools. She has a direct stake in ensuring public funds are only used to support public schools.

10. Plaintiff Michelle Gorelow is a resident of Las Vegas, Nevada, whose children, A.G. and H.G., have attended public schools in the Clark County School District since kindergarten and are now in fourth grade and sixth grade, respectively. A.G. and H.G. both have received speech therapy from the school district pursuant to their individualized education plans ("IEPs"). Michelle has seen first-hand the challenges her kids' schools face due to limited funding, and has supplemented her kids' public education with weekly private tutoring and workbooks. Michelle is also a taxpayer whose tax dollars support Nevada's public schools. She has a direct stake in preventing the use of public funds for private schools and other private educational expenditures that will divert tax dollars from her children's public schools and decrease the already limited funding available to those schools.

11. Plaintiff Electra Skryzdlewski is a resident of Las Vegas, Nevada, whose daughter, L.M., is a sixth-grader in Clark County School District in the Gifted and Talented Education (GATE) program. Through the hard work of her teachers and parents, L.M. has done quite well in school. However, her schools have struggled to keep class sizes small and to serve all students with limited resources. Electra is a Nevada taxpayer whose tax dollars support the public schools. She has a direct stake in making sure the public schools have the funds to provide an outstanding, high-quality education for every student and that those funds are not used for children enrolled in private schools.

12. Plaintiff Jennifer Carr is a resident of Las Vegas, Nevada. Her minor children, W.C., A.C., and E.C., all attend public magnet and charter schools in Clark County. A.C., who is in third grade, has received occupational and speech therapy services in his public school pursuant to his IEP. Although the school does provide occupational and speech therapy, these services have been limited. As a result, A.C. now attends private occupational therapy. Jennifer is also a Nevada taxpayer whose tax dollars support the public schools. She has a direct stake in preventing the transfer of funds from the public schools into private hands.

13. Plaintiff Linda Johnson resides in Las Vegas, Nevada. Her daughter, K.J., attends high school in Clark County. K.J. is an honors student who takes advanced placement courses and participates on the student council. K.J. has had great teachers in her Clark County schools, but her school has struggled to serve its students while receiving limited funding. Her school had to eliminate block scheduling because of the expense, and K.J.'s course offerings are not as broad as they otherwise would be as a result. Linda is also a Nevada taxpayer whose tax dollars support the public schools. She has a direct stake in preventing the use of public school funding for private schools that are not accountable to the public and do not have to serve English language learners, students in need of special education services, or low-income families.

14. Plaintiffs Sarah and Brian Solomon are residents of Reno, Nevada, whose children, D.S. and K.S., have attended Washoe County public schools since kindergarten and are now in third grade and second grade, respectively. Sarah and Brian believe that parents should have the choice to send their children to private schools, but object to the use of funds appropriated

specifically for public schools to subsidize private education. Sarah and Brian are also taxpayers who have a direct stake in preventing the diversion of taxpayer funds to private schools.

15. Defendant Dan Schwartz is named herein in his official capacity as the duly elected Treasurer of Nevada. Dan Schwartz, acting in his official capacity as State Treasurer, is charged under Senate Bill 302 with the enforcement and/or administration of the unconstitutional voucher program. The State Treasurer has offices in Carson City and Las Vegas, Nevada.

III. JURISDICTION AND VENUE

16. This Court has subject matter jurisdiction pursuant to Article VI of the Nevada Constitution, which vests the judicial power of the State herein.

17. This Court has personal jurisdiction over Defendant pursuant to Nev. Rev. Stat. ("NRS") 14.065 because Defendant is a resident of the state of Nevada.

18. Venue is proper in this Court, pursuant to NRS 13.020. The present cause of action arises in Carson City, and Defendant is a public officer whose office is required to be kept in Carson City pursuant to NRS 226.030. Plaintiffs are students who attend Nevada public schools and their parents are Nevada residents and taxpayers. Plaintiffs have a direct and immediate interest in the diversion of tax dollars from the operation and support of the public schools under the voucher statute and will suffer harm if the voucher statute is not enjoined from implementation.

IV. FACTS

A. The Voucher Statute

19. On May 29, 2015, the Legislature enacted Senate Bill 302 ("SB 302"), which authorizes the State Treasurer to transfer funding appropriated by the Legislature for the operation of Nevada public schools from those schools into private "education savings accounts" ("ESAs") to pay for a wide variety of non-public education services. SB 302 was signed into law by the Governor on June 2, 2015.

20. SB 302 imposes only one requirement for eligibility: enrollment in a public school for 100 consecutive school days. Children can satisfy the 100 day public school enrollment requirement once at any point in their academic career in order to obtain the funding every year

through the end of their K-12 education. Under the regulations implementing SB 302 proposed by the State Treasurer, the 100 day requirement can be met by full or part time enrollment. These proposed regulations would therefore allow the requirement to be met by enrollment in public school kindergarten at the outset of a child's education; by a single public school class taken by a child enrolled in private school now; or by attendance in 2014-15, the school year prior to enactment of the statute.

21. When an ESA is established, SB 302 requires the State Treasurer to deposit into each ESA an amount equal to 90 percent of the statewide average basic support per public school pupil, or $5,139 per pupil for the 2015-16 school year. For children with disabilities and children in a household with an income of less than 185 percent of the Federal poverty level, the State Treasurer must transfer 100 percent of the statewide average basic support per public school pupil, or $5,710 per pupil for 2015-16. SB 302 § 8(2).

22. The basic support per pupil funding is provided to school districts each year through the Nevada Plan, the Legislature's funding formula. The basic support per pupil funding consists of local revenue and state aid appropriated by the Legislature for the maintenance and support of Nevada's uniform system of public schools. It is guaranteed by the Legislature and is the primary funding appropriated to school districts to fund the operation of the public schools, kindergarten through grade 12, from year-to-year.

23. SB 302 requires the State Treasurer to transfer funds into ESAs from the basic support per pupil funding appropriated by the Legislature for the operation of the school district in which the eligible child was previously enrolled. Specifically, the statute directs the State Treasurer to deduct "all the funds deposited in education savings accounts established on behalf of children who reside in the county" from the school district's "apportionment" of the legislatively appropriated funding "computed on a yearly basis." SB 302 § 16.1. As the Legislative Counsel's Digest on SB 302 explains, "the amount of the [ESA] must be deducted from the total apportionment to the resident school district of the child on whose behalf the grant is made."

24. SB 302 directs the State Treasurer to divert the school district's apportionment of appropriated funding, on a per pupil basis, from the State Distributive School Account ("DSA") to

ESAs established by the State Treasurer. SB 302 § 15.9. The DSA is comprised primarily of money derived from interest on the State Permanent School Fund pursuant to Article XI, Section 3 of the Nevada Constitution and the appropriations of state and local revenue made by the Legislature for the operation of Nevada's public schools pursuant to Article XI, Section 6 of the Nevada Constitution. NRS 387.030.

25. SB 302 does not impose any cap on the amount of public school funding that can be transferred from the DSA and Nevada public school districts to ESAs in any school year, nor does the statute impose any limit on the number of children who can receive per pupil payments to an ESA. The statute also authorizes the State Treasurer to establish an ESA for all children who satisfy the 100 day public school enrollment requirement without any limit on household income and without regard to financial or academic need.

26. SB 302 authorizes the public school funds deposited by the State Treasurer into an ESA to be used to pay for a wide variety of private education expenses. The statute allows payments to any "participating entity", which is defined as:

> (a) A private school licensed pursuant to chapter 394 of NRS or exempt from such licensing pursuant to NRS 394.211;
>
> (b) An eligible institution—defined by SB 302§ 3.5 as:
>
> - A university, state college or community college within the Nevada System of Higher Education; or
> - Any other college or university that:
>   - Was originally established in, and is organized under the laws of, this State;
>   - Is exempt from taxation pursuant to 26 U.S.C. § 501(c)(3); and
>   - Is accredited by a regional accrediting agency recognized by the United States Department of Education.
>
> (c) A program of distance education that is not operated by a public school or the Department;
>
> (d) A tutor or tutoring facility that is accredited by a state, regional or national accrediting organization; or
>
> (e) The parent of a child.

SB 302 § 11.1.

27. Further, SB 302 authorizes the public school funding deposited into an ESA to pay for any of the following private education services and expenditures:

(a) Tuition and fees at a school that is a participating entity in which the child is enrolled;

(b) Textbooks required for a child who enrolls in a school that is a participating entity;

(c) Tutoring or other teaching services provided by a tutor or tutoring facility that is a participating entity;

(d) Tuition and fees for a program of distance education that is a participating entity;

(e) Fees for any national norm-referenced achievement examination, advanced placement or similar examination or standardized examination required for admission to a college or university;

(f) If the child is a pupil with a disability, as that term is defined in NRS 388.440, fees for any special instruction or special services provided to the child;

(g) Tuition and fees at an eligible institution that is a participating entity;

(h) Textbooks required for the child at an eligible institution that is a participating entity or to receive instruction from any other participating entity;

(i) Fees for the management of the education savings account, as described in section 10 of this act [which provides that the Treasurer may deduct up to 3 percent of the ESA's amount for management];

(j) Transportation required for the child to travel to and from a participating entity or any combination of participating entities up to but not to exceed $750 per school year; or

(k) Purchasing a curriculum or any supplemental materials required to administer the curriculum.

SB 302 § 9.1.

28. SB 302 thus explicitly permits public school funding deposited into an ESA to pay for private school tuition, tutoring, online schooling, home-based education curriculum and other related expenses, and private school and home-based education transportation. SB 302 also allows payments from ESAs for the SAT, AP and other commercial fee-based tests, as well as private tutoring services for those tests, services not generally paid for by public dollars for public school students.

29. SB 302 provides little check on the expenditure of public school funds deposited into ESAs for private expenditures. SB 302 only requires the State Treasurer to verify expenditures to "participating entities" through random audits of ESAs.

30. SB 302 authorizes the payment of public school funds deposited into ESAs to be used for private schools and entities that are not open to all students, as are the Nevada public schools. Private schools that accept payments of public school funds from an ESA can refuse to admit and serve all students and can restrict admission on the basis of religious beliefs, ability to pay, and academic ability.

31. SB 302 does not require "participating entities" accepting payment of public school funds from ESAs to meet the same educational standards and performance benchmarks required by the Legislature for public schools. Private schools can operate in Nevada whether they are licensed by the state or not; approximately half of the private schools in the state are not licensed by the state. Public school funding from ESAs can be used at non-licensed schools. SB 302 § 11(1)(a). Private schools and other participating entities are also not required to use a curriculum based on state-adopted curriculum content standards. The only requirement for participating entities is that they administer a norm-referenced achievement assessment in mathematics and English/language arts each year. SB 302 § 12(1)(a).

32. In addition to diverting public school funding from the operation of the public schools, the voucher statute will increase financial uncertainty and instability for public schools. School funding is based on "average daily enrollment" taken on a quarterly basis. When a student qualifies for an ESA, the district's quarterly enrollment will be recalculated and its funding from the state will be reduced accordingly on a quarterly basis. As the State Treasurer establishes additional ESAs throughout the year, the districts will experience a reduction in their DSA funding levels from quarter to quarter, necessitating budgetary adjustments, including cuts to teachers, support staff, programs and other expenditures during the school year.

33. The State Treasurer has already begun to pre-register children for ESAs. The Treasurer will begin accepting formal applications for the ESAs in January 2016. The State

Treasurer has also announced that he will begin depositing public school funds into ESAs in April 2016.

B. The Voucher Statute Violates the Education Article of the Nevada Constitution

34. The Nevada Constitution places a high priority on the value of public education, as memorialized in the Education Article. Nev. Const. Art. XI. As one of the drafters stated in the 1864 Constitutional debate, "[t]ime will not permit, nor is it necessary that I should recapitulate the arguments which have already been urged to show that among the first and the highest duties of the State, is the duty of educating the rising generation." OFFICIAL REPORT OF THE DEBATES AND PROCEEDINGS IN THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEVADA 587-88, 591-93 (1864) (hereinafter, "DEBATES AND PROCEEDINGS").

35. Consistent with this duty, the Nevada Constitution mandates that the Legislature: (1) make appropriations, as a first priority in the biennium budget, to be used only for the maintenance and support of the public schools; (2) appropriate funds that, when combined with available local revenue, it deems sufficient for the operation of the public schools; and (3) provide for a "uniform system" of public schools throughout the state. The voucher statute violates each of these Constitutional mandates.

1. The Voucher Statute Diverts Funds Appropriated For the Operation of the Public Schools to Private Uses

36. Article XI of the Nevada Constitution contains specific directives to the Legislature for funding the operation of Nevada's uniform system of public schools. First, Article XI directs that all proceeds derived from federal land grants and property bequeathed to the state for educational purposes be deposited into the State Permanent School Fund and that these funds "must not be transferred to other funds for other uses." NEV. CONST. art. XI, § 3. In addition, the interest earned on the State Permanent School Fund "must be apportioned by the legislature among the several counties for educational purposes." *Id.*

37. Article XI also requires the Legislature to "provide for the[] support and maintenance [of the common schools] by direct legislative appropriation from the general fund." NEV. CONST. art. XI, § 6.1. Further, the funds appropriated by the Legislature for the support and

maintenance of the public schools must be used to "fund the operation of the public schools." NEV. CONST. art. XI, § 6.2.

38. The framers of the Nevada Constitution repeatedly expressed their intent that funds appropriated by the Legislature pursuant to Article XI, §§6.1 and 6.2 be used only for the support and maintenance of public, not private, education institutions. Delegates to the 1864 Constitutional Convention explained that Article XI makes reference "only to public schools, and to the appropriation of the public funds. . . so that it has a direct reference to the public schools, and clearly cannot refer to anything else." DEBATES AND PROCEEDINGS at 568. Further, the delegates stated clearly that funds appropriated pursuant to Article XI were for "the support of good common schools . . . the support and encouragement of public instruction." *Id.* at 594.

39. The Legislature has also codified its obligation under Article XI, §§ 6.1 and 6.2 to appropriate funding to be used only for the operation of the public schools. NRS 387.045. This statute explicitly provides 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."

40. The voucher statute purports to exempt ESAs from the requirement, as codified in NRS 387.045, that funds appropriated by the Legislature for the operation of the public schools cannot be used for any other purpose. SB 302 § 15.9. However, NRS 387.045 is a statutory codification of the mandate in Article XI, §§ 6.1 and 6.2 restricting the use of Legislative appropriations for the maintenance and support of the public schools to fund the operation of those schools. The Legislature cannot exempt itself from this constitutional mandate by statute and, therefore, SB 302's exemption from that mandate is null and void.

41. The express language of Article XI, §§ 6.1 and 6.2, and the implementing statute, make plain that the Legislature's appropriations for the maintenance and support of Nevada's uniform system of public schools must be used to fund the operation of the public schools, and the public schools alone.

42. SB 302, by transferring public school funding to ESAs, diverts appropriations made by the Legislature for the maintenance and support of public schools to pay for private schools and

a wide variety of other private education expenses, in contravention of the express language, meaning and intent of Article XI, §§ 6.1 and 6.2 of the Nevada Constitution.

2. The Voucher Statute Reduces the Appropriations Deemed Sufficient by the Legislature for the Operation of the Public Schools

43. The Education Article of the Nevada Constitution requires the Legislature to enact "one or more appropriations" for the next biennium that 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 in the State for kindergarten through grade 12." NEV. CONST. art. XI, § 6.2. Because the provision for public education has the highest priority in the Nevada Constitution, the Education Article mandates that the Legislature appropriate the funds it deems sufficient to operate the public schools first "before any other appropriation." *Id.*

44. Studies commissioned by the Legislature in 2006 and 2012 recommended that funding for Nevada's public schools be substantially increased above current levels, especially for the state's growing population of low income students, English language learners, and students with special needs. The level of public school funding currently provided by the Legislature through the Nevada plan formula is far below most other states and among the lowest in the nation.

45. SB 302, by transferring the basic support per pupil guaranteed for the operation of the public schools to ESAs, and by directing the State Treasurer to deduct those transfers from the DSA and school district budgets, reduces the Legislature's appropriations for the maintenance and support of Nevada's uniform system of public schools below the level deemed sufficient by the Legislature for the operation of those public schools, in contravention of the express language, plain meaning and intent of Article XI, § 6.2 of the Nevada Constitution.

3. The Voucher Statute Diverts Funding Appropriated to Maintain the Uniform System of Public Schools to Fund Private, Non-Uniform Schools and Education Services

46. Article XI of the Nevada Constitution mandates that the Legislature "provide for a uniform system of common schools" across the state. NEV. CONST. art. XI, § 2. To ensure the public schools operate uniformly, Article XI further authorizes the Legislature to "pass such laws

as will tend to secure a general attendance of the children in each school district upon said public schools"; to establish and maintain a public school "in each school district" open to all, NEV. CONST. art. XI, § 2; and to "provide for a superintendent of public instruction" to supervise the uniform public school system. NEV. CONST. art. XI, § 1.

47. The Legislature is obligated under Article XI to establish and maintain a system of public schools that provides uniform, high quality education to children across the state and that benefits all Nevadans by preparing those children for citizenship and to be productive participants in Nevada's economy.

48. In recent years, the Legislature has exercised its constitutional obligation to maintain Nevada's system of public education by establishing uniform, rigorous education and accountability standards that all public schools must meet to give every child the opportunity to achieve and graduate from high school prepared for college and career and ready for active citizenship. These uniform education and accountability standards include, but are not limited to: curriculum content standards, assessments, teacher qualifications, and class size limits. All public schools must adhere to these uniform standards.

49. SB 302 diverts legislative appropriations for the maintenance and support of Nevada's uniform system of public schools to pay for private schools and a wide variety of other private education services. SB 302 does not require the private schools, online schools and other entities that receive payment from public school funds deposited to an ESA to adhere to any of the education and accountability standards established by the Legislature and applicable to public schools.

50. In addition to uniform education standards, the Legislature has also mandated non-discrimination in the public schools. Nevada public schools must serve all children regardless of need and be open to all without regard to characteristics such as race, disability, income level, or academic ability.

51. SB 302 does not require the private schools, online schools and other entities receiving public school funds through an ESA to be free and open to all children; to admit and serve all children without regard to race, religion, sex, disability, sexual orientation and gender

identity or expression; or to admit children with special educational needs, including English language learners, at-risk children, homeless children and children with disabilities requiring special education services.

52. Thus, SB 302 transfers public school funding to private schools that are not free and open to all students. These schools can refuse to serve students who do not meet selective admission requirements; who have disabilities, are academically at-risk, or need to learn English; or who are low income and cannot afford to pay the full cost of private school tuition, books, fees, transportation and other expenses. Conversely, SB 302 will increase the concentration in the public schools of students who are low income, English language learners, immigrants, homeless, transient, and otherwise at-risk and in need of additional educational programs, services and interventions. SB 302 will also increase the concentration in the public schools of students with disabilities in need of special education services. At the same time, SB 302 reduces the funding available to provide the teachers, staff and programs needed to give those students the opportunity to meet Nevada's uniform, rigorous standards.

53. Because SB 302 allows for the funding of private schools, online schools and other participating entities not required to meet any of the uniform education and accountability standards or the non-discrimination and open access requirements established by the Legislature for Nevada's public schools, it results in the use of public school funding to support private schools separate from the uniform system of public schools, in contravention to Article XI, § 2 of the Constitution.

FIRST CAUSE OF ACTION

(Violation of Article XI, Sections 3 and 6 of the Nevada Constitution – Prohibiting Diversion of Public School Funds)

54. The allegations in the preceding paragraphs are realleged and incorporated herein by reference.

55. Article XI, Section 3 of the Nevada Constitution provides that proceeds derived from federal land grants, which were given to Nevada "for the support of common schools," Nevada Enabling Act, ch. 36 § 7, 13 Stat. 30, 32 (1864), and property bequeathed to the state for educational purposes, must be deposited into the State Permanent School Fund for the operation of

the public schools, and "must not be transferred to other funds for other uses." NEV. CONST. art. XI, § 3.

56. Likewise, the Nevada Constitution requires the Legislature to "provide for the[] support and maintenance [of the common schools] by direct legislative appropriation from the general fund." NEV. CONST. art. XI, § 6.1.

57. The Nevada Constitution mandates that the "direct legislative appropriation from the general fund" be used only to "fund the operation of the public schools." NEV. CONST. art. XI, §§ 6.1 and 6.2.

58. SB 302 violates Article XI, Sections 3 and 6 of the Nevada Constitution because it diverts legislative appropriations for the support and maintenance of Nevada public schools to pay for private schools and a wide variety of other private educational services.

SECOND CAUSE OF ACTION

(Violation of Article XI, Section 6 of the Nevada Constitution – Reducing the Funds Deemed Sufficient to Operate the Public Schools)

59. The allegations in the preceding paragraphs are realleged and incorporated herein by reference.

60. The Nevada Constitution provides that "[d]uring 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 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. XI, § 6.2.

61. SB 302 violates Article XI, Section 6 of the Nevada Constitution because it reduces, without limitation, the appropriations for the maintenance and support of the public schools below the level deemed sufficient by the Legislature to fund the operation of those schools.

THIRD CAUSE OF ACTION

(Violation of Article XI, Section 2 of the Nevada Constitution – Mandating a Uniform System of Common Schools)

62. The allegations in the preceding paragraphs are realleged and incorporated herein by reference.

63. Article XI, § 2 of the Nevada Constitution provides that the "legislature shall provide for a uniform system of common schools." NEV. CONST. art. XI, § 2.

64. Pursuant to this constitutional obligation, the Legislature has established uniform education and accountability standards that govern all public schools across the state, and has established uniform standards requiring all public schools to be open, free, and serve all children, without regard to race, gender, disability or sexual orientation, and to provide education services to all students, including ELLs, at-risk and homeless children, and children with disabilities in need of special education.

65. SB 302 violates Article XI, § 2 of the Nevada Constitution because it authorizes the State Treasurer to divert legislative appropriations for the maintenance and support of Nevada public schools to pay for private schools and other private entities that are not governed by the legislatively established, uniform education and accountability standards applicable to Nevada public schools, and that are not free, or open or required to serve all Nevada children, thereby funding non-uniform private schools and other private education services.

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PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for the following relief:

1. For a declaratory judgment, declaring that SB 302 violates Article XI to the Nevada Constitution and is thereby null and void;

2. For preliminary and permanent injunctive relief enjoining Defendant from implementing SB 302;

3. For court costs and reasonable attorney's fees;

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4. For such other and further relief as this Court deems just and proper.

DATED: September 9, 2015

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP

By: _____
Don Springmeyer

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Attorney for applicants for intervention
**Application for pro hac vice pending*

In the First Judicial District Court of the State of Nevada
In and for Carson City

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,

vs.

Dan Schwartz, in his official capacity as Treasurer of the State of Nevada,

Defendant.

Case No.: 15-OC-002071-B
Dept. No.: 2

INTERVENOR-DEFENDANTS' ANSWER TO PLAINTIFFS' COMPLAINT

Intervenor-Defendants Aimee Hairr, Lara Allen, Elizabeth Robbins, Aurora Espinoza, and Jeffrey and Trina Smith, through their attorneys, hereby submit this Answer to the Complaint on file herein, and allege as follows:

I. INTRODUCTION

1. Answering paragraph 1, Intervenor-Defendants state that it improperly asserts legal conclusions, which are denied. As to the factual allegations, Intervenor-Defendants admit that the Nevada Legislature passed Senate Bill 302 ("SB 302") during the previous term,[1] state that SB 302 speaks for itself, admit so much as is consistent with SB 302, and deny the remainder.

2. Answering paragraph 2, Intervenor-Defendants state that it improperly asserts legal conclusions, which are denied. As to the factual allegations, Intervenor-Defendants state that SB 302 speaks for itself, admit so much as is consistent with SB 302, and deny the remainder.

3. Answering paragraph 3, Intervenor-Defendants state that it improperly asserts legal conclusions, which are denied. As to the factual allegations, Intervenor-Defendants are without knowledge or information sufficient to form a belief as to their truth, and deny the same.

4. Answering paragraph 4, Intervenor-Defendants state that it improperly asserts legal conclusions, which are denied. As to the factual allegations, Intervenor-Defendants are without knowledge or information sufficient to form a belief as to their truth, and deny the same.

5. Answering paragraph 5, Intervenor-Defendants state that it improperly asserts legal conclusions, which are denied. As to the factual allegations, Intervenor-Defendants are

[1] Plaintiffs' Complaint repeatedly characterizes SB 302 as a "voucher statute" which establishes a "voucher program." Intervenor-Defendants deny this characterization as inaccurate; however, each reference in this Answer to an "ESA" or to "SB 302" may be construed where reasonable to refer to what Plaintiffs mistakenly allege is a "voucher statute."

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without knowledge or information sufficient to form a belief as to their truth, and deny the same.

6. Answering paragraph 6, Intervenor-Defendants state that it improperly asserts legal conclusions, which are denied. As to the factual allegations, Intervenor-Defendants are without knowledge or information sufficient to form a belief as to their truth, and deny the same.

7. Answering paragraph 7, Intervenor-Defendants state that it improperly asserts legal conclusions, which are denied. As to the factual allegations, Intervenor-Defendants state that the Nevada Constitution speaks for itself, admit so much as is consistent with the Nevada Constitution, and deny the remainder.

II. PARTIES

8. Answering paragraph 8, Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations.

9. Answering paragraph 9, Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the factual allegations, and deny the legal conclusion regarding Plaintiff Lopez's stake in the litigation.

10. Answering paragraph 10, Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the factual allegations, and deny the legal conclusion regarding Plaintiff Gorelow's stake in the litigation.

11. Answering paragraph 11, Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the factual allegations, and deny the legal conclusion regarding Plaintiff Skryzdlewski's stake in the litigation.

12. Answering paragraph 12, Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the factual allegations, and deny the legal conclusion regarding Plaintiff Carr's stake in the litigation.

13. Answering paragraph 13, Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the factual allegations, and deny the legal conclusion regarding Plaintiff Johnson's stake in the litigation.

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14. Answering paragraph 14, Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the factual allegations, and deny the legal conclusion regarding Plaintiffs Solomons' stake in the litigation.

15. Answering paragraph 15, Intervenor-Defendants state that it improperly asserts legal conclusions, which are denied. As to the factual allegations, Intervenor-Defendants admit that Defendant Schwartz is a named party to the litigation in his official capacity as the duly elected Treasurer of Nevada, admit that the State Treasurer has offices in Carson City and Las Vegas, state that SB 302 speaks for itself, admit so much as is consistent with SB 302, and deny the remaining allegations.

III. JURISDICTION AND VENUE

16. Answering paragraph 16, Intervenor-Defendants state that the Nevada Constitution speaks for itself, admit so much as is consistent with the Nevada Constitution, deny the remaining factual allegations, and deny the legal conclusion regarding this Court's subject matter jurisdiction.

17. Answering paragraph 17, Intervenor-Defendants admit that this Court has personal jurisdiction over Defendant.

18. Answering paragraph 18, Intervenor-Defendants admit the first and second sentences, deny the third sentence for lack of knowledge or information sufficient to form a belief as to its truth, and deny the fourth sentence as stating a legal conclusion.

IV. FACTS

19. Answering paragraph 19, Intervenor-Defendants state that SB 302 speaks for itself, admit so much as is consistent with SB 302, and deny the remaining allegations.

20. Answering paragraph 20, Intervenor-Defendants state that SB 302 speaks for itself, admit so much in the first and second sentences as is consistent with SB 302, deny the remaining allegations in the first and second sentences, and deny the third and fourth sentences for lack of knowledge or information sufficient to form a belief as to their truth.

21. Answering paragraph 21, Intervenor-Defendants state that SB 302 speaks for itself, admit so much as is consistent with SB 302, and deny the remaining allegations.

22. Answering paragraph 22, Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations, and deny the same.

23. Answering paragraph 23, Intervenor-Defendants state that SB 302 speaks for itself, admit so much as is consistent with SB 302, and deny the remaining allegations.

24. Answering paragraph 24, Intervenor-Defendants state that SB 302, the Nevada Revised Statutes, and the Nevada Constitution all speak for themselves, admit so much as is consistent with those authorities, and deny the remaining allegations.

25. Answering paragraph 25, Intervenor-Defendants state that SB 302 speaks for itself, admit so much as is consistent with SB 302, and deny the remaining allegations.

26. Answering paragraph 26, Intervenor-Defendants state that SB 302 speaks for itself, admit so much as is consistent with SB 302, and deny the remaining allegations.

27. Answering paragraph 27, Intervenor-Defendants state that SB 302 speaks for itself, admit so much as is consistent with SB 302, and deny the remaining allegations.

28. Answering paragraph 28, Intervenor-Defendants state that SB 302 speaks for itself, admit so much as is consistent with SB 302, and deny the remaining allegations.

29. Answering paragraph 29, Intervenor-Defendants state that SB 302 speaks for itself, admit so much as is consistent with SB 302, and deny the remaining allegations.

30. Answering paragraph 30, Intervenor-Defendants state that SB 302 speaks for itself, admit so much as is consistent with SB 302, and deny the remaining allegations.

31. Answering paragraph 31, Intervenor-Defendants state that SB 302 speaks for itself, admit so much as is consistent with SB 302, and deny the remaining allegations.

32. Answering paragraph 32, Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations, and deny the same.

33. Answering paragraph 33, Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the first and second sentences, and deny the same. Upon information and belief, Intervenor-Defendants admit the allegations contained in the third sentence of that paragraph.

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34. Answering paragraph 34, Intervenor-Defendants state that the Nevada Constitution and the Debates and Proceedings speak for themselves, admit so much as is consistent with those authorities, and deny the remaining allegations.

35. Answering paragraph 35, Intervenor-Defendants state that it improperly asserts legal conclusions, which are denied. As to the factual allegations, Intervenor-Defendants state that the Nevada Constitution speaks for itself, admit so much as is consistent with the Nevada Constitution, and deny the remaining allegations.

36. Answering paragraph 36, Intervenor-Defendants state that the Nevada Constitution speaks for itself, admit so much as is consistent with the Nevada Constitution, and deny the remaining allegations.

37. Answering paragraph 37, Intervenor-Defendants state that the Nevada Constitution speaks for itself, admit so much as is consistent with the Nevada Constitution, and deny the remaining allegations.

38. Answering paragraph 38, Intervenor-Defendants state that the Nevada Constitution and the Debates and Proceedings speak for themselves, admit so much as is consistent with those authorities, and deny the remaining allegations.

39. Answering paragraph 39, Intervenor-Defendants state that the Nevada Revised Statutes speak for themselves, admit so much as is consistent with the Nevada Revised Statutes, and deny the remaining allegations.

40. Answering paragraph 40, Intervenor-Defendants state that it improperly asserts legal conclusions, which are denied. As to the factual allegations, Intervenor-Defendants state that SB 302, the Nevada Revised Statutes, and the Nevada Constitution all speak for themselves, admit so much as is consistent with those authorities, and deny the remaining allegations.

41. Answering paragraph 41, Intervenor-Defendants state that it improperly asserts legal conclusions, which are denied. As to the factual allegations, Intervenor-Defendants state that the Nevada Constitution and Nevada Revised Statutes speak for themselves, admit so much as is consistent with those authorities, and deny the remaining allegations.

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42. Answering paragraph 42, Intervenor-Defendants state that it improperly asserts legal conclusions, which are denied. As to the factual allegations, Intervenor-Defendants state that SB 302 speaks for itself, admit so much as is consistent with SB 302, and deny the remaining allegations.

43. Answering paragraph 43, Intervenor-Defendants state that the Nevada Constitution speaks for itself, admit so much as is consistent with the Nevada Constitution, and deny the remaining allegations.

44. Answering paragraph 44, Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations, and deny the same.

45. Answering paragraph 45, Intervenor-Defendants state that it improperly asserts legal conclusions, which are denied. As to the factual allegations, Intervenor-Defendants state that SB 302 speaks for itself, admit so much as is consistent with SB 302, and deny the remaining allegations.

46. Answering paragraph 46, Intervenor-Defendants state that the Nevada Constitution speaks for itself, admit so much as is consistent with the Nevada Constitution, and deny the remaining allegations.

47. Answering paragraph 47, Intervenor-Defendants state that the Nevada Constitution speaks for itself, admit so much as is consistent with the Nevada Constitution, and deny the remaining allegations.

48. Answering paragraph 48, Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations, and deny the same.

49. Answering paragraph 49, Intervenor-Defendants state that it improperly asserts legal conclusions, which are denied. As to the factual allegations, Intervenor-Defendants state that SB 302 speaks for itself, admit so much as is consistent with SB 302, and deny the remaining allegations.

50. Answering paragraph 50, Intervenor-Defendants state that it improperly asserts legal conclusions, which are denied. As to the factual allegations, Intervenor-Defendants are

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without knowledge or information sufficient to form a belief as to their truth, and deny the same.

51. Answering paragraph 51, Intervenor-Defendants state that it improperly asserts legal conclusions, which are denied. As to the factual allegations, Intervenor-Defendants state that SB 302 speaks for itself, admit so much as is consistent with SB 302, and deny the remaining allegations.

52. Answering paragraph 52, Intervenor-Defendants state that it improperly asserts legal conclusions, which are denied. As to the factual allegations, Intervenor-Defendants state that SB 302 speaks for itself, admit so much as is consistent with SB 302, and deny the remaining allegations for lack of knowledge or information sufficient to form a belief as to their truth.

53. Answering paragraph 53, Intervenor-Defendants state that it improperly asserts legal conclusions, and deny the allegations.

FIRST ALLEGED CAUSE OF ACTION

54. Answering paragraph 54, Intervenor-Defendants reallege and incorporate by reference all preceding paragraphs in this Answer.

55. Answering paragraph 55, Intervenor-Defendants state that the Nevada Constitution and the federal Nevada Enabling Act speak for themselves, admit so much as is consistent with those authorities, and deny the remaining allegations.

56. Answering paragraph 56, Intervenor-Defendants state that the Nevada Constitution speaks for itself, admit so much as is consistent with the Nevada Constitution, and deny the remaining allegations.

57. Answering paragraph 57, Intervenor-Defendants state that the Nevada Constitution speaks for itself, admit so much as is consistent with the Nevada Constitution, and deny the remaining allegations.

58. Answering paragraph 58, Intervenor-Defendants understand it to state a legal conclusion, and deny the same.

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SECOND ALLEGED CAUSE OF ACTION

59. Answering paragraph 59, Intervenor-Defendants reallege and incorporate by reference all preceding paragraphs in this Answer.

60. Answering paragraph 60, Intervenor-Defendants state that the Nevada Constitution speaks for itself, admit so much as is consistent with the Nevada Constitution, and deny the remaining allegations.

61. Answering paragraph 61, Intervenor-Defendants understand it to state a legal conclusion, and deny the same.

THIRD ALLEGED CAUSE OF ACTION

62. Answering paragraph 62, Intervenor-Defendants reallege and incorporate by reference all preceding paragraphs in this Answer.

63. Answering paragraph 63, Intervenor-Defendants state that the Nevada Constitution speaks for itself, admit so much as is consistent with the Nevada Constitution, and deny the remaining allegations.

64. Answering paragraph 64, Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations, and deny the same.

65. Answering paragraph 65, Intervenor-Defendants understand it to state a legal conclusion, and deny the same.

AFFIRMATIVE DEFENSES

Intervenor-Defendants, without altering the burdens of proof that the parties bear, assert the following affirmative defenses to the Complaint. In asserting these affirmative defenses, Intervenor-Defendants reallege and incorporate by reference all preceding paragraphs in this Answer.

FIRST AFFIRMATIVE DEFENSE

Plaintiffs' Complaint fails to state a claim upon which relief can be granted.

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SECOND AFFIRMATIVE DEFENSE

Each and every allegation of the Complaint not specifically admitted herein is denied.

Respectfully submitted this 16 day of September, 2015 by:

HUTCHISON & STEFFEN, LLC

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of HUTCHISON & STEFFEN, LLC and that on this 16 day of September, 2015, I caused the above and foregoing document entitled **INTERVENOR-DEFENDANTS' ANSWER TO PLAINTIFFS' COMPLAINT** to be served as follows:

- ☒ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and/or
- ☐ to be served via facsimile; and/or
- ☐ to be electronically served, with the date and time of the electronic service substituted for the date and place of deposit in the mail; and/or
- ☐ to be hand-delivered;

to the attorneys and/or parties listed below at the address and/or facsimile number indicated below:

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Defendant (Information regarding counsel for Defendant not available at time of filing.)

An employee of Hutchison & Steffen, LLC

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**Application for pro hac vice pending*

In the First Judicial District Court of the State of Nevada
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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,

vs.

Dan Schwartz, in his official capacity as Treasurer of the State of Nevada,

Defendant.

Case No.: 15-OC-002071-B
Dept. No.: 2

MOTION TO INTERVENE AS DEFENDANTS

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MOTION TO INTERVENE

Aimee Hairr, Aurora Espinoza, Elizabeth Robbins, Lara Allen, and Jeffrey and Trina Smith ("Applicants") are all parents of children who are eligible to participate in Nevada's Education Savings Account ("ESA") Program, signed into law as Senate Bill 302 ("SB 302"). The ESA Program creates an additional educational option for parents. Parents of qualifying students may choose to open a publicly funded education savings account and use the funds deposited therein to individually tailor an educational program for their children. Applicants move, pursuant to NRS § 12.130 and NRCP 24(a)(2) (intervention of right), or alternatively, NRCP 24(b)(2) (permissive intervention), to intervene as Defendants to defend against this constitutional challenge to the ESA Program.[1]

Applicants and their children are the direct beneficiaries of the challenged ESA Program and are thus, in essence, the real parties in interest. Applicants' motion is based upon the facts and law in the attached memorandum as well as the Applicants' unsworn declarations, made

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[1] NRS § 12.130 allows, "before the trial commences . . . [intervention] in an action under the Nevada Rules of Civil Procedure (NRCP). NRCP 24 governs intervention, providing for both intervention of right and permissive intervention." *Am. Home Assurance Co.v. Eighth Judicial Dist. Court*, 122 Nev. 1229, 1235 (2006) (footnote omitted).

under penalty of perjury, attached hereto as exhibits 1-5, and incorporated herein by this reference upon all pleadings, motions, and other documents of record in this action.

DATED this 16 day of September, 2015.

HUTCHISON & STEFFEN, LLC

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NOTICE OF MOTION

TO: ALL INTERESTED PARTIES

TO: ALL COUNSEL OF RECORD

NOTICE IS HEARBY GIVEN that the undersigned will bring the foregoing **MOTION TO INTERVENE AS DEFENDANTS** for hearing on the ____ day of _____, 2015, at _____ a.m./p.m. in Department 2.

DATED this 16 day of September, 2015.

HUTCHISON & STEFFEN, LLC

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MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE

Summary of Argument

Applicants satisfy the four requirements for intervention of right under NRCP 24(a)(2). Their application is submitted before trial—indeed, only a week after the filing of the Complaint—and is therefore timely. They have a direct and significant protectable interest relating to the subject matter of the proceeding, i.e., the continued availability of the ESA Program. Applicants' interests may, as a practical matter, be impaired or impeded by the disposition of the action because their ability to participate in the ESA Program will be lost if SB 302 is declared unconstitutional. And Applicants' interests, as parents who desire to participate in the program on behalf of their children, are not adequately represented by the existing parties.

Alternatively, Applicants seek permissive intervention under NRCP 24(b)(2). Their claims or defenses share a common question of law with the main action, their intervention will not cause undue delay or prejudice to the existing parties, and Applicants' participation in this case will not prejudice the rights of the original parties. Moreover, Applicants' participation will assist the court in focusing on the effect of the challenged law on its real beneficiaries, parents and children.

For the above reason, parents have been granted intervention in all other lawsuits challenging similar educational-choice programs around the nation. *See, e.g., Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125 (2011) (dismissing Establishment Clause challenge to Arizona's Individual Scholarship Tax Credit Program); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (upholding Cleveland's scholarship program under the First Amendment's Establishment Clause); *Magee v. Boyd*, No. 1130987, 2015 WL 867926 (Ala. Mar. 2, 2015)

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(upholding Alabama's tax-credit-funded scholarship program and refundable tax credits for private school tuition under the state constitution's religion clauses); *Meredith v. Pence*, 984 N.E.2d 1213 (Ind. 2013) (upholding Indiana's statewide scholarship program under the state constitution's religion and education clauses); *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998) (upholding Milwaukee's publicly funded scholarship program under the state constitution's religion and education clauses); and *Niehaus v. Huppenthal*, 310 P.3d 983 (Ariz. App. 2013), *review denied* (upholding Arizona's Empowerment Scholarship Account Program, an education savings account program similar to Nevada's ESA Program, under the Arizona Constitution's religion clauses).

Applicants bring a unique, real-life perspective to this case of great public interest. They should be allowed to intervene.

Statement of Facts

I. Nevada's Education Savings Account Program

This action presents a state constitutional challenge to a publicly funded education savings account program signed into law as SB 302 on June 2, 2015. The ESA Program operates in a relatively straightforward manner: In exchange for a parent's agreement not to enroll his or her student in a public or charter school, the state will make quarterly deposits into an education savings account for a total grant equal to "90 percent of the statewide average basic support per pupil." SB 302, Sec. 8(2)(b). For pupils with disabilities, and children whose household income is "less than 185 percent of the federally designated level signifying poverty,

[the total grant shall be equal to] 100 percent of the statewide average basic support per pupil."[2] SB 302, Sec. 8(2)(a).

Parents can then use their ESA funds to purchase a wide variety of educational services, such as payment of tuition and fees at private schools, tutoring services, tuition and fees for distance learning programs, special education services, tuition and fees at community colleges, curricula and supplemental materials for educating their student at home, and fees for transportation to and from participating entities providing educational services. SB 302, Sec. 9. The design and operation of this new and dynamic educational-choice program is far different than some states' publicly funded private-school scholarship (or, to use Plaintiffs' term, "voucher") programs. Under a publicly funded "voucher" program, a child receives a scholarship that a parent can use for the sole purpose of paying for tuition at either a private or public school. A parent has a larger number of options under Nevada's ESA Program because the state deposits money into an education savings account that is available for a wide range of goods and services, not just tuition.

Plaintiffs challenge the constitutionality of the ESA Program under various provisions of the Nevada Constitution. Because Applicants and their children are the direct beneficiaries of the ESA Program, they wish to intervene to protect their interests, which are summarized below.

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[2] The education of public school students in Nevada is funded from three sources: federal, state, and local funds. The ESA grants are funded exclusively by state funds. SB 302, Sec. 8; NRS §§ 387.1235, 387.124.

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II. The Applicant Parents

A. Applicant Aimee Hairr

Aimee Hairr is a married woman and the adoptive mother of five children. Exhibit ("Ex.") 1 ¶ 1 (Decl. of Aimee Hairr in Supp. Mot. to Intervene). Applicant Hairr's oldest son Nolan was bullied and assaulted for a period of about six months while enrolled in a Nevada public school. Ex. 1 ¶ 6. The school's failure to protect Nolan, combined with the school district's denial of responsibility for protecting him, ultimately led to Applicant Hairr's decision to enroll him in a private school, and to pay the tuition out of her own pocket. Ex. 1 ¶¶ 7, 9. Nolan's positive experience at his private school has further led to Applicant Hairr's desire to enroll some, but not all, of her other adopted children in private school. Ex. 1 ¶ 12. However, Applicant Hairr and her husband cannot afford private school tuition for all of their children without the financial assistance offered by the ESA Program. Ex. 1 ¶ 13.

Two of Applicant Hairr's other children are biological siblings, Landon and Alivia, a brother and a sister. Ex. 1 ¶ 32. Both have had learning struggles and Applicant Hairr believes they would be better off in a private school setting. Ex. 1 ¶¶ 19-20, 33-34. However, for another one of her adopted boys, Jaden, Applicant Hairr is satisfied with his current charter school's ability to meet his needs and comply with his Individualized Education Program ("IEP"); thus she intends to keep him enrolled in that charter school. Ex. 1 ¶ 23. Applicant Hairr also plans to apply for an ESA for her youngest son, James, but has no plans to enroll him in a private school. Ex. 1 ¶ 30. Rather, she intends to use the funds deposited in James' account for a mix of tutoring and education at home, in large part because James has learned more in the

past six months from a private tutoring facility he regularly attends than he learned in the past two years at his public school. Ex. 1 ¶¶ 28, 30.

B. Applicant Aurora Espinoza

Aurora Espinoza is a single woman and the natural mother of five children, two of whom are still in enrolled in public schools and thus eligible for the ESA Program. Ex. 2 ¶¶ 1, 2, 5 (Decl. of Aurora Espinoza in Supp. Mot. to Intervene). Applicant Espinoza's oldest daughter, Anllelli, is a junior at a low-performing public high school. Ex. 2 ¶ 6. Anllelli believes she experienced racial discrimination from at least one of her teachers at her public school. Ex. 2 ¶ 8. Anllelli has been academically punished for Applicant Espinoza's inability to afford a printer. Ex. 2 ¶ 9. And she regularly goes without eating lunch because of overcrowding and short lunch periods at her high school. Ex. 2 ¶ 11.

Applicant Espinoza's youngest daughter, Kaylie, attends a public middle school. Ex. 2 ¶ 13. In Kaylie's elementary school, she was the victim of internet bullying and still carries with her the emotional scars of that experience. Ex. 2 ¶ 20. Applicant Espinoza has seen firsthand the benefits of a private education, and desires to open an ESA for each of her two daughters so that she can enroll them in a private school. Ex. 2 ¶¶ 22-23.

C. Applicant Elizabeth Robbins

Elizabeth Robbins is a married woman and the natural mother of seven children, four of whom have already graduated from high school. Ex. 3 ¶¶ 1, 3 (Decl. of Elizabeth Robbins in Supp. Mot. to Intervene). Applicant Robbins experienced significant difficulty with two of her daughters, Lindsey and Amber, when they were enrolled in public school, due to the girls having an incurable disease known as EDS, which "adversely affects a person's connective tissue, which is supposed to provide strength and elasticity to the underlying structures of a

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person's body." Ex. 3 ¶¶ 10, 14. Both girls were forced to miss a significant amount of school and received no help or sympathy from their schools. Ex. 3 ¶¶ 10-17. Applicant Robbins has also been frustrated with her 15-year-old son Trevor's experience in high school, particularly as it relates to recent changes in curriculum. Ex. 3 ¶¶ 18-19. These experiences cause Applicant Robbins' concern for her two youngest children, especially her youngest son. Ex. 3 ¶ 22.

Applicant Robbins' youngest son, Dallin, has EDS just like his older sisters and will likely miss a lot of school in the future. Ex. 3 ¶¶ 20-21. Knowing that he will not get the assistance he needs from his public school once his EDS starts impacting his ability to attend school, Applicant Robbins plan to apply for an ESA for Dallin and use the funds for private tutors to help customize his education as needed. Ex. 3 ¶¶ 22-23.

Finally, Applicant Robbins plans to apply for an ESA for her youngest daughter, Rebecca, who has experienced a lot of sadness in her current school as a result of high teacher turnovers and controversies over standardized testing. Ex. 3 ¶¶ 25, 27-28. Applicant Robbins plans to use the ESA funds to pay for Rebecca's tuition at a brand-new private school that is set to open in January 2016 named the JOY Academy. Ex. 3 ¶¶ 29-30. But, absent the ESA Program, Applicant Robbins will not be able to afford the tuition at the JOY Academy. Ex. 3 ¶ 37.

D. Applicant Lara Allen

Lara Allen is a married woman and the natural mother of four children. Ex. 4 ¶ 1 (Decl. of Lara Allen in Supp. Mot. to Intervene). Applicant Allen is also planning to send her two youngest children, Caleb and Hayley, to the JOY Academy. Ex. 4 ¶¶ 21, 25. All of her children have distinct learning needs that have not been met in their brick-and-mortar public schools. Ex. 4 ¶ 4. While her oldest son, Jared, is now doing well at a virtual public school, Ex.

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4 ¶ 12, she is concerned about her oldest daughter, Savannah, and desires to find a private school that will meet her educational needs and without the negative atmosphere of Savannah's current school. Ex. 4 ¶ 14-15. However, Applicant Allen will not be able to afford a private education for Savannah without the ESA Program. Ex. 4 ¶ 15.

Caleb has a gifted education plan in his current public school, but he is unchallenged in his current public school and therefore has trouble concentrating. Ex. 4 ¶ 17. Applicant Allen believes the JOY Academy will provide the learning environment he needs to succeed. Ex. 4 ¶¶ 20-21. Like Caleb, Hayley is well ahead of her grade level, Ex. 4 ¶ 22, and Allen believes the JOY Academy will provide a better learning environment for her and allow her teachers to pay more attention to her individual needs. Ex. 4 ¶¶ 22, 25.

E. Applicants Jeffrey and Trina Smith

Jeffrey and Trina Smith are a married couple and have seven adopted children. Ex. 5 ¶ 1 (Decl. of Trina Smith in Supp. Mot. to Intervene). Their oldest adopted daughter, Aly, is a freshman in a public high school. Ex. 5 ¶ 8. Aly is street-smart, but not book-smart. Ex. 5 ¶ 12. She had a lot of trouble focusing and struggled in 7th and 8th grades, where she was a 'D' student. Ex. 5 ¶ 12. Applicants Smith believe Aly would be best off at a trade school and that the ESA Program could help them get her the education she needs. Ex. 5 ¶ 13.

Two of their adopted children, Abby and Josh, are biological siblings and biologically related to Applicants Smith. Ex. 5 ¶ 15. Abby has a 504 plan to help her deal with a lingering medical problem and Applicants Smith believe she could benefit from an IEP, but they have tried unsuccessfully to fight for an IEP for their son Benny, and they have only seen marginal benefits from their other children's IEPs, so they are not sure it is worth the trouble. Ex. 5 ¶ 16. While Abby's verbal skills are fine, she is unable to retain or comprehend what she reads. Ex. 5

¶ 17. She would do well at a smaller private school, but Applicants Smith can't currently afford tuition. Ex. 5 ¶ 19. Josh is a smart kid who gets good grades, but he does not test well and exhibits behavioral problems. Ex. 5 ¶ 39. Because of his behavioral issues, Applicants Smith would like to see Josh in a smaller environment that will pay attention to those issues, which they believe they can find in a private school, but they cannot afford private school tuition for any of their children without the ESA Program. Ex. 5 ¶ 41.

Applicants Smith also have adopted a second brother-sister sibling pair, Jasmine and Kenny, who have to contend with Reactive Attachment Disorder (RAD), a condition caused by a lack of nurturing relationships in early childhood, and who both have IEPs. Ex. 5 ¶¶ 21, 24. They also suffer from a noticeable lack of fine motor skills that is consistent with prenatal drug exposure. Ex. 5 ¶ 22. Both have been provided writing aids called AlphaSmarts. Ex. 5 ¶¶ 26, 35. But neither of their teachers uses their IEPs, or these devices, effectively. Ex. 5 ¶¶ 26, 35. What both children need is a firm, steady, and fair education by someone who can give them individual attention. Ex. 5 ¶ 27. The ESA Program would allow Applicants Smith to give Kenny home instruction with help from tutors and to enroll Jasmine in a private school. Ex. 5 ¶¶ 25, 37.

Cali is Applicants Smiths' "miracle" daughter, who came to them as a baby with fetal alcohol syndrome. Ex. 5 ¶¶ 29-30. Cali is a brilliant student, academically, but has emotional issues stemming from her exposure to violence as an infant that can often lead her astray. Ex. 5 ¶¶ 30-31. Applicants Smith would like to send Cali to a smaller and more nurturing environment, like the Excel Christian School, but without the ESA Program, they will not have that choice. Ex. 5 ¶ 32.

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Applicants Smiths' youngest adopted son, Benny, was born addicted to crack cocaine. Ex. 5 ¶¶ 42-43. He is a "freight train of hyperactivity" who needs the right teacher, but Applicants Smith have been unable to obtain the right fit, even though they have requested variances to attend schools that would work better for him and transfers to teachers at his current school who would be a better fit for him. Ex. 5 ¶¶ 45, 48, 50. Applicants Smith would either like to place Benny with a private tutor or in the Excel Christian School, but they can afford neither without the assistance offered by the ESA Program. Ex. 5 ¶ 51.

Legal Argument

The Nevada Rules of Civil Procedure are largely based on the Federal Rules of Civil Procedure and, therefore, federal case law is "strong persuasive authority" regarding questions of their intepretation. *Exec. Mgmt., Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53 (2002) (quoting *Las Vegas Novelty, Inc. v. Fernandez*, 106 Nev. 113, 119 (1990)). And Nevada courts have previously looked to federal interpretations of Federal Rule 24, governing intervention, when construing Nevada's intervention rule. *See Am. Home Assurance Co. v. Eighth Judicial Dist. Court*, 122 Nev. 1229, 1241–42 (2006) (citing *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972), for the proposition that, just like the federal rules, Nevada's rules governing intervention require only a minimal showing to establish that the existing parties do not adequately protect an applicant's interest).

Moreover, federal courts construe the intervention rules "broadly in favor of proposed intervenors." *Wilderness Soc'y v. U.S. Forest Service*, 630 F.3d 1173, 1179 (9th Cir. 2011) (quoting *United States v. City of Los Angeles*, 288 F.3d 391, 397 (9th Cir. 2002)). They do so because a "liberal policy in favor of intervention serves both efficient resolution of issues and broadened access to the courts." *Id.*

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Part I below demonstrates that Applicants meet the requirements for intervention of right pursuant to NRCP 24(a)(2). Part II shows that Applicants also fulfill NRCP 24(b)(2)'s criteria for permissive intervention.

I. Intervention of Right

Applicants seek intervention of right because they have a significant interest in the implementation and continued operation of the ESA Program, which is the subject of this litigation. Rule 24(a)(2), NRCP, provides that intervention of right is proper when (1) upon timely application, (2) an "applicant claims an interest relating to the property or transaction which is the subject of the action," and (3) "the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest," and where (4) the applicant's interest is not adequately represented by existing parties. Applicants satisfy all four elements for intervention of right.

A. The Motion to Intervene is Timely

First, Applicants' motion is timely because they seek intervention at the very commencement of this litigation. *Estate of Lomastro ex rel. Lomastro v. Am. Family Ins. Grp.*, 124 Nev. 1060, 1070 n.29 (2008) ("intervention is timely if the procedural posture of the action allows the intervenor to protect its interest"). Indeed, under the authority of *American Home Assurance Company v. Eighth Judicial District Court*, 122 Nev. 1229, 1235 (2006), intervention is timely if the application is filed any time "before the trial commences . . . ." Here, Applicants have moved before discovery has commenced and well within the time period in which the Defendants have to answer the Complaint. There can be no disputing the timeliness of Applicants' motion to intervene.

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Applicants also agree to abide by any previously set schedule so as not to prejudice any of the existing parties. *See Lawler v. Ginochio*, 94 Nev. 623, 626 (1978) ("The most important question to be resolved in the determination of the timeliness of an application for intervention is not the length of the delay by the intervenor but the extent of prejudice to the rights of the existing parties resulting from the delay."). Granting Applicants' motion to intervene will not delay resolution of this lawsuit. In fact, Applicants, as the beneficiaries of the ESA Program, have every interest in seeing an expeditious resolution to this case.

Applicants moved with alacrity to intervene; as such they satisfied NCRP 24(a)(2)'s first requirement by filing a timely application.

B. Applicants Have a Strong Interest in the Outcome of this Case

Second, Applicants must demonstrate an interest in the subject matter of the litigation. To satisfy this second prong for intervention of right, applicant-intervenors must possess a "significantly protectable interest"; one which is protected under the law and relates to the claims at issue. *Am. Home Assurance Co.*, 122 Nev. at 1239 (holding that an insurer's subrogation right was a sufficiently protectable interest).

Here, Applicants have a direct interest in the challenged ESA Program. Their interest stems from the fundamental "liberty of parents and guardians to direct the upbringing and education of children under their control," *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925), which the ESA program will allow them to exercise more effectively. Applicants' rights as parents to direct the education of their children is arguably even more compelling than the financial interest of an insurer in its subrogation rights. Absent the ESA Program, Applicants will not be able to afford to personalize their children's education by choosing from the à la carte menu of options allowed by the challenged ESA Program. It will be financially

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impossible for most of them—and financially difficult for all of them—to remove their children from public schools that are not meeting their needs. *See supra* Part II. Applicants thus have a "significantly protectable" interest in the viability of the ESA Program, which is directly threatened by Plaintiffs' lawsuit.

Federal case law applying Federal Rule 24(a)(2) confirms that Applicants have the requisite interest to intervene of right. Federal courts have repeatedly held that the beneficiaries of a government program or law have a sufficient interest to intervene when the program or law is challenged. *See, e.g.*, *California ex rel. Lockyer v. United States*, 450 F.3d 436, 442 (9th Cir. 2006) (allowing health care providers to intervene of right to defend conscience protection law because "Congress passed the [law] to protect health care providers like those represented by the proposed intervenors: They are the intended beneficiaries of this law . . . .") (internal quotation marks omitted); *Cnty. of Fresno v. Andrus*, 622 F.2d 436, 438 (9th Cir. 1980) (allowing small farmers to intervene of right to defend rulemaking under reclamation acts because small farmers were "precisely those Congress intended to protect with the reclamation acts"); *United States v. Dixwell Hous. Dev. Corp.*, 71 F.R.D. 558, 560 (D. Conn. 1976) (allowing housing project tenants to intervene of right to defend portions of National Housing Act because "their interest as beneficiaries of two aspects of the . . . Act" was "sufficient to support intervention"). Here, because Plaintiffs' lawsuit threatens Applicants' children's ability to participate in the ESA Program, Applicants could have no more direct an interest in the outcome of this litigation.

C. Applicants' Interests Could be Impaired by the Outcome of this Case

The third prong of NRCP 24(a)(2) requires applicants to demonstrate they will "either gain or lose by the direct legal operation and effect of the judgment which might be rendered in

the suit between the original parties." *Stephens v. First Nat'l Bank of Nev.*, 64 Nev. 292, 304–05 (1947) (quoting *Harlan v. Eureka Mining Co.*, 10 Nev. 92, 94–95 (1875). Here, Applicants—and their children—stand to directly gain or lose by the effect of the judgment. In fact, it is impossible for Plaintiffs to achieve the result they seek *without* harming the Applicants' interests. Parents who desire to take advantage of the ESA Program, like Applicants, are those with the most at stake in this litigation. If the ESA Program is declared unconstitutional, Applicants will lose the opportunity to choose the educational setting that is best suited to their children's individual needs.

Furthermore, Applicants "have no alternative forum where they can mount a robust defense of the" ESA Program. *Lockyer*, 450 F.3d at 442. Should the ESA Program be ruled unconstitutional, Applicants, who are "the beneficiaries under the [Program,] would have no chance in future proceedings to have its constitutionality upheld." *Saunders v. Superior Court in & for Maricopa Cnty.*, 510 P.2d 740, 741-42 (Ariz. 1973). "This practical disadvantage to the protection of their interest . . . warrants their intervention as of right." Id. at 742. Applicants and their children stand to gain or lose directly by the effect of this judgment and thus clearly satisfy this third prong for intervention of right.

D. Applicants' Interests are not Adequately Represented by Existing Parties

Finally, the existing parties do not adequately represent the Applicants' interests. Nevada courts follow federal law holding that, to satisfy this fourth prong, an applicant-intervenor need only show that the representation afforded by existing parties "may be" inadequate. *Am. Home Assurance Co.*, 122 Nev. at 1241-42 (citing *Trbovich*, 404 U.S. at 538 n.10). While the State has a general interest in defending the ESA Program, Applicants have a very different, personal interest in protecting the Program.

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Federal courts applying Federal Rule 24(a)(2) have repeatedly recognized that the interest of an individual participating in a government program is distinct from the broader interest of the government in running that program. That is because the government's interest is subject to a wide range of competing demands, including budgetary concerns and sometimes conflicting public-policy concerns, while an individual's interest in a lawsuit is necessarily much narrower. *See, e.g.*, *Trbovich*, 404 U.S. at 538-39 (finding intervenors showed inadequate representation when they may prefer a different litigation strategy than what was being employed by the Secretary of Labor); *Californians for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1190 (9th Cir. 1998) ("[B]ecause the employment interests of IBT's members [in a law guaranteeing them a prevailing wage] were potentially more narrow and parochial than the interests of the public at large, IBT demonstrated that the representation of its interests by the named defendants-appellees may have been inadequate."); *Sierra Club v. Glickman*, 82 F.3d 106, 110 (5th Cir. 1996) (permitting intervention by Farm Bureau in a case where the USDA was a defendant because, *inter alia*, the Bureau's members were beneficiaries of a government aquifer and had distinct economic concerns that the government did not share). Here, while the State has a general interest in protecting its laws and helping achieve the General Assembly's education policy, Applicants have a personal interest in ensuring their children remain eligible to partake in the benefits offered by the ESA Program.

While the State and Applicants will both work to see that the ESA Program is upheld, their different interests create the likelihood of divergent litigation strategies. *See Trbovich*, 404 U.S. at 538-39. While it may be too early in the litigation to determine exactly how the Applicants and the State may pursue different lines of argument, past experience in educational-choice litigation suggests that differences in legal arguments are very likely.

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Applicants' counsel have intervened on behalf of parents in 23 educational-choice cases in the last 25 years, and frequently make different legal arguments in defense of programs than does the state. In *Arizona Christian School Tuition Organization v. Winn*, 131 S. Ct. 1436, 1440-1445 (2011), for example, the U.S. Supreme Court dismissed plaintiffs' challenge to a school choice program after intervenors successfully argued that the plaintiffs lacked standing—an issue that the state had conceded. Similarly, it was the intervenors who successfully urged the Arizona Supreme Court in *Kotterman v. Killian*, 193 Ariz. 273, 291 (Ariz. 1999), to confront the role that anti-religious bigotry played in the "Blaine" Amendments, under which the plaintiffs had challenged the program and which are found in many state constitutions. And in *Duncan v. State*, 102 A.3d 913 (N.H. 2014), the state conceded the plaintiffs' standing while the intervenors successfully argued that the newly amended standing statute on which the plaintiffs relied was unconstitutional. This Court should grant the Applicants' Motion to Intervene as Defendants so that—like the intervenors in *Winn, Kotterman*, and *Duncan*—they can protect their own rights vigorously and completely.

Applicants have shown that they meet all four criteria for intervention of right. But even if this Court were to determine that Applicants have not met the criteria for intervention of right, it should still grant permissive intervention.

II. Permissive Intervention

Applicants alternatively seek permissive intervention pursuant to NRCP 24(b)(2), which provides that, upon timely application, intervention is appropriate, in the court's discretion, when (1) "an applicant's claim or defense and the main action have a question of law or fact in common"; and (2) when the intervention will not "unduly delay or prejudice the adjudication of the rights of the original parties."

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As shown above in Part I, Applicants motion to intervene is timely. And, as shown below, Applicants satisfy the remaining two conditions for permissive intervention as stated in NRCP 24(b)(2).

A. Applicants' Defenses Share Common Questions of Law

First, Applicants' defenses share a question of law or fact in common with the main action. The central question of law in this case is whether the ESA Program is constitutional. As such, Applicants' defense of the ESA Program will involve only the legal issues that are already before the Court—that is, whether or not the ESA Program violates the Nevada Constitution. Applicants will focus solely on the constitutional claims brought by Plaintiffs and will not bring any cross-claims or introduce any issues unrelated to Plaintiffs' challenge. The interests of the parents and children seeking intervention are inextricably bound up in the question of the law's constitutionality.

B. Applicants' Timely Motion will not Prejudice Existing Parties

Second, Applicants have acted quickly to ensure there is no delay in this litigation and they will continue to seek an expeditious resolution to the case. Far from prejudicing the existing parties, Applicants' participation in this case will only aid the parties and the Court in resolving the issues at stake by contributing to the store of information relevant to determining them, without adding to the complexity of the litigation. Like parents in other states who have intervened in other educational-choice cases, Applicants are best situated to assist the Court in understanding the real-world need for the educational opportunities provided by Nevada's ESA Program and its positive impact on its intended beneficiaries: parents who want to make the best possible decision regarding their children's education.

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CONCLUSION

Applicants seek to have their voices heard in this litigation and party status is necessary to ensure that the interests of the programs' beneficiaries are fully protected. Should the law be ruled unconstitutional, Applicants will forever lose the opportunity to protect their interests. Especially for this reason, Applicants respectfully request that they be granted leave to intervene as Defendants in the instant case.

Respectfully submitted this 16 day of September, 2015 by:

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of HUTCHISON & STEFFEN, LLC and that on this 11th day of September, 2015, I caused the above and foregoing document entitled **MOTION TO INTERVENE AS DEFENDANTS** to be served as follows:

- ☒ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and/or
- ☐ to be served via facsimile; and/or
- ☐ to be electronically served, with the date and time of the electronic service substituted for the date and place of deposit in the mail; and/or
- ☐ to be hand-delivered;

to the attorneys and/or parties listed below at the address and/or facsimile number indicated below:

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EXHIBIT 1

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*Application for Admission *Pro Hac Vice* Pending

Attorneys for Applicants for Intervention

DISTRICT COURT
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 SKRYDLEWSKI, 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, vs. DAN SCHWARTZ, in his official capacity as Treasurer of the State of Nevada, Defendant.	Case No. 15-OC-002071-B Dept. 2 **DECLARATION OF AIMEE HAIRR IN SUPPORT OF HER MOTION TO INTERVENE AS A DEFENDANT**

AIMEE HAIRR, under penalty of perjury, declares and says:

1. I am a married resident of Henderson, Nevada and the adoptive mother of five children.

2. I make this declaration based on my personal knowledge.

3. This declaration is made on my own behalf and in support of my motion to intervene as a defendant in *Lopez v. Schwartz*, Case No. 15-OC-002071-B, Dept. 2, a lawsuit challenging the constitutionality of Nevada's Education Savings Account ("ESA") Program, which became law when Governor Sandoval signed SB 302.

Nolan Hairr

4. My oldest son, Nolan, is 15 years old and is currently enrolled as a sophomore in the Nevada Learning Academy at CCSD (Clark County School District).

5. Nolan was born in Russia. My husband and I brought Nolan home to America when he was eight months old.

6. Prior to high school, Nolan attended Barbara and Hank Greenspun Middle School. Tragically, Nolan was bullied and assaulted for a period of about six months while at Greenspun Middle School.

7. The school's failure to protect Nolan, combined with CCSD's subsequent denial in our lawsuit (*Bryan v. CCSD*, Case No. A-14-700018-C, Dept. 27) that it is responsible for protecting the children enrolled in its school, has led to my and my husband's conviction not to enroll any of our children in any of CCSD's brick-and-mortar schools unless absolutely necessary.

8. As a result of Nolan's experience, I worked to help pass SB 504, known as Hailee's Law, which is a comprehensive anti-bullying legislation designed to help protect Nevada's school children and change the culture and mindset of Nevada public school officials toward bullying.

9. After we took Nolan out of Greenspun Middle School, we enrolled him at a charter school, Explore Knowledge Academy, where he completed junior high school.

10. There were no public school options for Nolan outside of CCSD schools

that could provide him with the "large" high school experience that we wanted for him, so we started investigating private school options. Even though my husband and I do not consider ourselves to be very religious, we chose to enroll Nolan at Lake Mead Christian Academy ("LMCA") at a cost of approximately $9,000 to $10,000 per year.

11. Nolan's experience at LMCA has been wonderful. His teachers know him well and they care deeply for his emotional, as well as academic, well-being. He has also made great friends, and his grades have been excellent. Most importantly, he feels safe again.

12. Our experience at LMCA has led me and my husband to desire a private education for some, though not all, of our other children.

13. Because we cannot afford private school tuition for each one of our children for whom we desire a private education, I have applied for Nevada's ESA program for all of my children, including Nolan. I will be denied an ESA for Nolan because he has not completed 100 days of enrollment as a public high school student, and as explained below I will likely decline an ESA for at least one of my other children. However, we are currently seeking to qualify Nolan for future eligibility to ease our future financial burden by having him complete his sophomore year at the online Nevada Learning Academy at CCSD.

14. While Nolan attends the Nevada Learning Academy, we continue to pay LMCA to hold Nolan's seat and to allow him to attend the Bible and Worldview classes at LMCA. Unfortunately, because Nolan is not enrolled full-time at LMCA, he is not allowed to participate in extra-curricular activities such as sports, band, and other clubs.

15. Once Nolan qualifies for the ESA Program, we will use the funds deposited in his account to pay tuition at LMCA.

Landon Hairr

16. Landon is 10 years old and is currently in fifth grade. He is currently enrolled at Silver Sands Montessori, a charter school. This is Landon's first year at this school.

17. We adopted Landon through a private, open adoption in Las Vegas. We were present for his birth and we were able to bring him home from the hospital after only three days.

18. Landon previously attended Explore Knowledge Academy, the same charter school Nolan attended after his incident at Greenspun. We have done everything we can, within reason, to keep our children out of CCSD schools after we pulled Nolan out of the district.

19. Landon struggles with his voice. He has been diagnosed with a nodule on his voice box and has an IEP as a result. Explore Knowledge Academy utilizes a project-based curriculum, requiring students to make a presentation in front of their class each month. Landon was really struggling with the presentations at Explore Knowledge Academy.

20. Landon is doing fine at Silver Sands Montessori. However, there are 28 kids in each classroom. I plan to use the money deposited in Landon's ESA to pay for tuition at LMCA. I think he would benefit from the smaller class sizes, from the prayer and Bible instruction that has so benefited Nolan, and from the safe, welcoming environment.

Jaden Hairr

21. Jaden will be 10 years old before the end of September. Like Landon, he is a fifth grader currently attending Silver Sands Montessori charter school. Jaden also attended Explore Knowledge Academy for a while and did very well. Jaden has an IEP because of his learning disabilities. However, after some turnover with the special education staff, the school struggled to meet the learning goals laid out in his IEP (for example, Jaden's reading scores were in the bottom sixth percentile nationally). I asked that Jaden be held back a grade, but Nevada law prohibits schools from holding back a child with an IEP.

22. Thankfully, Jaden's math and reading have improved through private tutoring that we pay for out-of-pocket at the Kumon Math & Reading Center.

23. Even though I have applied for an ESA for Jaden, I will most likely decline the ESA and keep him at Silver Sands Montessori. He is thriving in the mixed fourth and fifth grade classes there. If, for some reason, things changed and I needed to move Jaden to a new educational environment, I would desire to use the money provided for Jaden's education through Nevada's ESA Program to place him in a private Montessori school.

24. We adopted Jaden from Nevada's foster care system. He came to live with us when he was two years old, and we adopted him when he was three years old.

James Hairr

25. James is eight years old and is currently enrolled in the CCSD school for which we are zoned, Estes M. McDoniel Elementary School ("Estes"). The reason James is at Estes is that there are currently no seats available for him at Silver Sands Montessori charter school and there are no zoning variances permitted so we can't choose a different public school for him.

26. James was in the foster care system, and in our custody, from birth until he was one year old. He was then returned to his mom. When James was 18 months old, he was found in a closet in a meth lab. He was returned to our home psychologically disturbed and detoxing from exposure to meth. His mother later gave him up for adoption, for his own well-being, and we gratefully adopted him.

27. James has an IEP because of his emotional disabilities, for which he also regularly sees a psychiatrist. For James, learning is very difficult. He easily gets lost in his crowded public school classroom. He routinely throws his homework away before coming home, or hides it from us at home, and thus is behind in school.

28. James also attends the Kumon private tutoring center, especially for help with reading. He has learned more from Kumon in six months than he learned from his public school the last two years.

29. I am very concerned about James' future. Even with his IEP, James is getting nowhere. I want him to read. I want him to do math. But his special education

instructors keep pulling him out for his "specials" when his teachers are working with him in the core subjects, like math and reading. James should be pulled out for his specials during other times of the day, like art or music. I simply don't see any growth in James, especially academically, at Estes.

30. I do plan to use the ESA to provide James with a good education, but I will not enroll him in private school. Instead, I will use the ESA funds to provide James an education in the core subjects at home, either through online education or through a curriculum I purchase and use to educate him myself. I will also use the ESA to help pay for James' private tutoring.

Alivia Hairr

31. Alivia is our joyful kindergartner. Our precious five-year-old girl is currently attending Explore Knowledge Academy four days per week, for a half-day each day. She previously attended a private, faith-based school for pre-kindergarten. However, we enrolled her at Explore Knowledge Academy to satisfy SB 302's 100-day requirement.

32. Alivia is Landon's biological sibling. We were able to be present for her birth, as we were for Landon's. We finalized Alivia's private adoption approximately six months after we brought her home from the hospital.

33. Alivia is very shy and would rather play with pixie dust and dance than attend kindergarten. To supplement her learning, she too receives private tutoring at Kumon, especially to help her learn the alphabet and to learn to read.

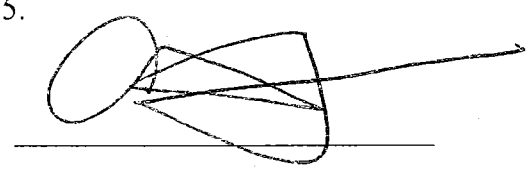
34. Once Alivia qualifies for the ESA Program, we plan to enroll her in one of two private schools, either American Heritage Academy, whose tuition is around $5,600, which is a Christian school, or LMCA. However, we are open to enrolling Alivia in other types of religious schools for elementary school.

35. My children have spent more than 10 years total in CCSD's public schools. We gave our public school system a chance and, in my strongest opinion, it has failed more than half my children.

36. I believe that our state is in need of the ESA Program. Parents deserve and need a choice as to where their children go to school and how to properly educate each individual child.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 15 day of September, 2015.



Aimee Hairr

EXHIBIT 2

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Attorneys for Applicants for Intervention

DISTRICT COURT
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 SKRYDLEWSKI, 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, vs. DAN SCHWARTZ, in his official capacity as Treasurer of the State of Nevada, Defendant.	Case No. 15-OC-002071-B Dept. 2 **DECLARATION OF AURORA ESPINOZA IN SUPPORT OF HER MOTION TO INTERVENE AS A DEFENDANT**

AURORA ESPINOZA, under penalty of perjury, declares and says:

1. I am a resident of Las Vegas, Nevada and the natural mother of five children, including two daughters who are still enrolled in public schools.

2. My two youngest daughters are eligible for the Education Savings Account Program. My other three children have already graduated from high school.

3. I make this declaration based on my personal knowledge of the facts set forth below.

4. I make this declaration on my own behalf and in support of my motion to intervene as a Defendant in *Lopez v. Schwartz*, Case No. 15-OC-002071-B, Dept. 2.

5. I am currently a single mother. I work as a solar-panel sales representative to make ends meet.

Anllelli Salas

6. My daughter Anlleli J. Salas is 17 years old and is currently in eleventh grade. She attends Canyon Springs High School, a public school with a low rating from the State of Nevada.

7. Canyon Springs has a lot of high school dropouts, low student test scores, and does not adequately prepare students for college.

8. Anlleli believes that she experienced racial discrimination in her honors English class. She was ultimately pulled out of the class against her wishes, along with other Hispanic students.

9. She was also punished academically during a period of time when I could not afford a printer, because she could not print her homework assignments from her computer. Her teachers would not accept the assignments by e-mail. Her teachers would only give her half-credit for handwritten work. Thankfully, I was finally able to purchase a printer so that she could receive more than half-credit for her assignments.

10. I am also concerned about drugs in Anlleli's school. Anlleli has told me that she has seen students selling drugs on and nearby the school campus.

11. Anlleli only gets 30 minutes for lunch, but the school often runs out of

food, or the lines are so long that she would be late for class if she waited to eat. And being late for class means getting a tardy _____ [should there be a word here?] and being in trouble. So, Anlleli often does not eat lunch at school.

12. Anlleli wants to graduate and attend Long Beach University in California, but she is afraid that the education she is receiving at Canyon Springs will not prepare her for college.

Kaylie Salas

13. Kaylie R. Salas is 11 years old and is in sixth grade. She is currently enrolled in Jim Bridger Middle School. This is her first year at Jim Bridger.

14. Kaylie's school is having problems distributing iPads to students. She is supposed to be using the school-issued iPad for projects and homework.

15. The school is going to make me sign a financial liability form, making me responsible for any damage or loss to the iPad.

16. Kaylie is supposed to have internet access at home in order to use the iPad. Currently, I do not have internet access, because there are other bills that I have needed to pay and money is tight. However, I will purchase an internet connection once Kaylie has been given an iPad.

17. When Kaylie was in elementary school, she experienced physical, academic bullying and emotional problems.

18. Physically, Kaylie repeatedly got lice at school. When she was not in school, we experienced no problems with lice. But every time she would return to school we would struggle with lice.

19. Kaylie started out at her elementary school doing okay, academically speaking. But she often had substitute teachers and because she was quiet she was ignored by her teachers and thus received very little help from those teachers.

20. She was also bullied by other children for her deep religious faith. One day, the principal called me and told me that other students at the school were saying mean things about Kaylie on the internet. I think the school put a stop to the internet

bullying, but her teachers kind of blew off the incident and did not show Kaylie much compassion. But the incident really bothered Kaylie. She started to become very quiet at school and became really introverted.

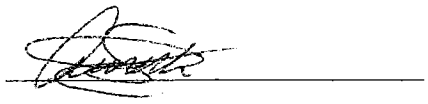
21. If Kaylie continues in the public school system, eventually she will have to go to Canyon Springs High School, where her sister Anlleli is having so many problems.

22. I have applied for the Education Savings Account (ESA) Program for both my daughters and hope to use the money deposited in each of their education savings accounts to enroll them in private school next year. There is no way I can afford tuition without help from the ESA Program.

23. I am considering enrolling them at Mountain View Christian School ("MVCS"). My nephew attends school at MVCS and he has blossomed academically and socially since starting school at MVCS. At the end of the day, I just want what is best for my daughters.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 16 day of September, 2015.



Aurora Espinoza

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EXHIBIT PAGE ONLY

EXHIBIT 3

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Attorneys for Applicants for Intervention

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ELIZABETH ROBBINS, under penalty of perjury, declares and says:

1. I am a resident of Henderson, Nevada. I am married and the natural mother of seven children.

2. I make this declaration based on my personal knowledge and on my own behalf in support of my motion to intervene as a Defendant in *Lopez v. Schwartz*, Case No. 15-OC-002071-B, Dept. 2.

3. Four of my seven children have graduated from high school.

My Two Oldest Children

4. My oldest son Jerrick, who is 26 years old, is currently a law student at Brigham Young University's J. Reuben Clark Law School.

5. My daughter Courtney, who is 25 years old, holds a degree from Brigham Young University in Athletic Training.

Lindsey's Story

6. My daughter Lindsey is 23 years old and holds a Bachelor of Arts degree in Art.

7. Lindsey was our first child to have difficulties with our local public schools. She was unable to attend high school between the second semester of her freshman year and the first part of the first semester of her senior year.

8. Lindsey was suffering physically from what we now know to be Ehler-Danlos Syndrome, or EDS. EDS is an incurable disease that adversely affects a person's connective tissue, which is supposed to provide strength and elasticity to the underlying structures of a person's body.

9. Lindsey also has a congenital heart defect, which revealed itself during her sophomore year, which resulted in a rapid health decline.

10. Up until this point in her sophomore year, Lindsey had managed to keep her grades with straight A's. However, without our knowledge or consent, her public high school withdrew her from the school approximately mid-way through her sophomore year.

11. The result of the school's sudden and uncommunicated action was that she had to repeat her sophomore year at a virtual high school named Virtual High School. Lindsey also completed her junior year at Virtual High School.

12. Throughout Lindsey's high school career, we had no tutoring or other help from anyone at the school. Lindsey was forced to become a completely self-directed learner.

Amber's Story

13. Amber is 19 years old and a high school graduate. She has been diagnosed with EDS. She has already had eight surgeries in less than three years, and her ninth surgery is coming up very soon. She is currently taking online classes from Brigham Young University because her health problems make attending the university in Utah complicated, to say the least.

14. Amber also encountered difficulties in public school due to complications with EDS. She did manage to complete her junior year of high school by physically attending the school, but she was unable to attend, physically, her senior year of high school.

15. Amber's school district did have a program for students with health impairments. However, that program offered neither tutoring nor other academic assistance, nor did it allow students using the program to take AP classes. Amber was definitely an AP-caliber student. So Amber did not participate in the district's program for students with health impairments.

16. Amber insisted on staying in her AP classes, even though she would endure brain surgery her senior year. This required Amber to complete assignments that were e-mailed to her from her teachers, such as the assignments sent by her AP Government teacher, which was difficult because she experienced double-vision as she recovered from her brain surgery.

17. Yet Amber, entirely on her own, managed to graduate as her high school class's valedictorian and scored a 5 on her AP Government exam.

Trevor's Story

18. Trevor is 15 years old and a sophomore at Basic High School. While I have serious concerns about Basic High School's new curriculum, which is supposed to be aligned with the so-called "common core," Trevor will most likely finish his high school career at Basic High School. Even though Trevor would qualify for the ESA, there are currently no viable private school alternatives for Trevor in our area and his love of team sports, particularly basketball and volleyball, would make homeschooling him difficult.

19. One example of my curriculum concerns is illustrated by an anecdote that occurred during Trevor's freshman honors English course. One of his assigned books was rated at a third/fourth grade vocabulary level. We were shocked. A freshman honors English class should be reading more challenging material. We opted to pull Trevor out of class and asked that he be allowed to read *To Kill a Mockingbird* instead. Our request was honored, but Trevor had to be excused from class and sent to the library while the rest of his class read the other book. It is unfortunate that Trevor, and quite frankly his classmates, did not have the opportunity to read *To Kill a Mockingbird* as a group and have teacher-led discussions about a challenging and worthwhile work of literature as opposed to the other book.

Dallin's Story

20. Dallin is 12 years old and currently a seventh grader at Brown Jr. High School. Dallin has EDS like his two older sisters.

21. It is likely that Dallin is going to miss a lot of school in the future as his collagen levels start to decrease. The degenerative nature of EDS means that his physical ailments will begin to increase about the time he starts high school.

22. Dallin, unlike his sister Amber, is not a disciplined, self-directed learner. He is, however, just as intelligent as his sister. He will need assistance throughout high school—and we know from experience that there is no assistance from our school district for home-bound students.

23. I plan to participate in Nevada's new Education Savings Account Program to help Dallin get the education he deserves. I will use the funds deposited in Dallin's ESA to hire private tutors and customize his education however his health allows from day-to-day, month-to-month, year-to-year.

Rebecca's Story

24. Rebecca is nine years old and attends fourth grade at Dooley Elementary School.

25. Rebecca has felt and experienced tremendous stress while enrolled at Dooley. Much of that stress has come from school administrators over-emphasizing the importance of standardized testing, which even led to substantiated instances of test manipulation.

26. I do not want Rebecca to take another standardized test at Dooley.

27. The issues concerning standardized testing at Dooley have negatively impacted teachers, leaving some in tears and resulting in high turnover rates. Dooley has lost more than 19 grade-level teachers in recent years, which is over a 70% turnover in the teaching staff. It was really an ordeal, and left my daughter feeling a lot of second-hand stress throughout her first, second and third grade years.

28. Our public education system has not provided an emotionally safe environment for my daughter so I have applied for the ESA Program.

29. I intend to enroll my daughter in a brand new private school that is set to open up, hopefully, in January 2016.

30. The new school will be named the JOY Academy and will be operated by a retired public school teacher, who used to teach at Dooley Elementary School.

31. While the JOY Academy will not be affiliated with any particular religion, it will be religion- and faith-friendly.

32. The enrollment process will not ask parents to disclose their religious affiliation.

33. But, the school will teach Bible history.

34. It will also start the school day with prayer.

35. Rebecca will be leaving close friends at Dooley, which will be difficult for her, but it is worth it for her to attend school in a happier environment.

36. The JOY Academy will use hands-on learning methods, group learning methods, and be based on Franklin Covey's Universal Values.

37. We could not afford the tuition at the JOY Academy without the financial assistance offered by the ESA Program.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 15 day of September, 2015.

Elizabeth Robbins

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EXHIBIT PAGE ONLY

EXHIBIT 4

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Attorneys for Applicants for Intervention

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LARA ALLEN, under penalty of perjury, declares and says:

1. I am a resident of Henderson, Nevada. I am married and the natural mother of four children. I make this declaration based on my personal knowledge.

2. I make this declaration on my own behalf and in support of my motion to intervene as a Defendant in *Lopez v. Schwartz*, Case No. 15-OC-002071-B, Dept. 2, a lawsuit challenging the constitutionality of Nevada's Education Savings Account ("ESA") Program, which became law when Governor Sandoval signed SB 302.

3. Each of my children is unique. They have different strengths and weaknesses, different personalities, and different needs.

4. The ESA Program will give me the means to make sure that my children get the specialized education they need to thrive. The public schools in my district have never been able to do this with their one-size-fits-all approach.

5. In addition to having four children, I am helping launch a private school named the JOY Academy with several other parents in my community as well as a retired teacher from Dooley Elementary School, which all four of my children once attended. My experience with the administration at Dooley has left me deeply skeptical that the Clark County School District (CCSD), in which I reside, can provide an adequate education for my children.

Jared Allen

6. My oldest son, Jared, is fifteen years old. He is currently enrolled in 10th grade at the Connections Academy, an online charter school that serves grades K–12. The Connections Academy allows him to learn from home and to specialize in computer science, which he is passionate about.

7. Jared started high school at the Southeast Career and Technical Academy (SECTA), a public magnet school, majoring in Website Interactive Media. He failed out of SECTA due to his attention-deficit disorder, which prevented him from concentrating on his homework. He had a 504 plan, which allows his assignments to be shortened once he's proven mastery. Some of his teachers worked with me and Jared to

cut down on his workload, but it became clear to me over the year that the school facilitator in charge of Jared's 504 plan just was not interested in helping him.

8. This wasn't the first time I found a CCSD school inattentive to Jared's needs. When Jared was in 6th grade, I had him concurrently enrolled at Odyssey online charter school as well as Brown Junior High, where he went to play the oboe. The staff at Brown never realized that Jared was being regularly bullied there. It affected Jared emotionally and I had to pull him out of Brown.

9. Despite his learning disability, Jared is highly gifted. That unique combination is termed "Twice Exceptional" or "2e," and presents a difficult challenge to educators who know he is smart enough to excel, but struggles to complete the workload. He took the ACT Explore test in the 8th grade, when he was enrolled at Pinecrest Academy, a public charter school, and scored in the 99th percentile in the nation. When he failed out of SECTA in 9th grade, it was not because of an inability to understand the subject material or to pass his tests. He always did well on his tests. He just got buried by his homework, even though that was all he ever did.

10. CCSD has nothing in place to accommodate the needs of a gifted student who is failing for no other reason than an inability to concentrate on his homework. I asked Jared's counselor at SECTA if she could do anything to help him. She said she could not. So I went to a gifted-program facilitator at CCSD, who agreed that it would be a good idea for CCSD to offer a program designed for kids like Jared. But there is no such program. The gifted-program facilitator I talked to could only suggest that I "bring Albertson's cookies" for Jared's counselor to win her favor.

11. After he failed out of SECTA, I searched hard for a good educational fit for him. Jared was accepted into a new CCSD program called "Select Schools" at Silverado High School, with a major in the Microsoft IT Academy. I was excited that he could continue specializing in computers. I spoke with their staff regarding Jared's situation, but learned that their solution for Jared would have been to put him in classes like remedial Grammar (which he has never struggled with). He would have been bored

to tears! I chose not to subject him to that.

12. At the Connections Academy, Jared is thriving. He takes his lessons online from our home, where he can learn on his own schedule and doesn't have to spend seven hours a night on pointless busywork. The program works for him, and it will certify him to do advanced work in computer science.

13. I have applied for an ESA for Jared, but I may decline it and keep Jared at Connections Academy, which is tuition-free. However, because the ESA could potentially make other programs affordable, I will do additional research and would consider enrolling him in a private school if I find one that is a good fit for him.

Savannah Allen

14. Savannah is 13 years old and currently in 8th grade at the Pinecrest Academy, the public charter school that Jared used to attend. She has been there since 6th grade. Savannah gets all A's and is regarded by her teachers as a high achiever who is easy to work with. Before Pinecrest, she attended Dooley.

15. Even though Savannah does well at school, I'm not happy with the learning environment at Pinecrest. Public school teachers are too busy with disciplinary issues and helping the many kids who are behind their grade level. They don't have time to challenge kids like Savannah or to teach kids how to treat others with respect. Savannah says that her peers at school mostly swear and talk inappropriately all day. It's a really negative atmosphere. The kids are just disrespectful and rude, and that's not how I want Savannah to grow up.

16. I want Savannah to go to a high school with a more collegial environment. A private school would be ideal, but I can't afford to send her to one unless I get an ESA. It's just too expensive otherwise. I haven't ruled out a public magnet or another charter school for Savannah—as of now, I plan to enroll her in SECTA—but I'd like to have a choice. I won't have that choice without the ESA Program.

Caleb Allen

17. Caleb is 11 years old and started 6th grade at Pinecrest this year.

18. Before Pinecrest, Caleb attended Dooley Elementary School. He has some trouble concentrating, but not to the extent that Jared does. Caleb is also gifted and has a gifted education plan, but was never challenged at Dooley. In fact, he reported towards the end of 3rd grade that he had only learned five things all year.

19. Caleb is different, and I think that's a good thing. He learns differently and thinks at a higher level. On his highly gifted math placement test in 3rd grade, he scored a grade equivalent of 7th grade, and his GATE teacher told me she was amazed that even though he hadn't been taught some formulas, he could still get the right answers. He's a highly motivated learner and relates more easily to adults than he does to his peers, who he says are mostly interested in playing video games. He is very creative and loves to take things apart to learn how they work. He comes up with great ideas and wants to invent something, and I believe he will someday.

20. I remember a meeting with Caleb's gifted-program teacher at Dooley where the teacher mentioned that Caleb was "different." The principal at Dooley chewed the teacher out for saying this and made the teacher apologize to me. I was shocked by the principal's insensitivity. Caleb *is* different. I don't understand why a professional educator wouldn't want me to appreciate that.

21. The public school system is too focused on bureaucratic rules and doesn't care whether learning is enjoyable or not. When Caleb's class was preparing to take the Smarter Balanced Assessment Consortium (SBAC), a statewide standardized test, the school spent so much time "teaching to the test" and scaring children about its importance that Caleb asked me to opt him out of the test, as several of his friends were opted out. I made him take the test to face his fears—although it didn't matter in the end, due to the computer glitches that plagued the test.

22. As with Savannah, I worry that Pinecrest isn't a good environment for Caleb. He says his friends at school mainly goof around, and don't do what the teachers

ask, which really bothers him—he gets very impatient with them. They aren't as passionate about learning as he is. I'd like to see him surrounded by kids who are.

23. I will be sending Caleb to the JOY Academy next year. The ESA, if it goes forward, will make this affordable for my family. I just want what's best for Caleb.

Hayley Allen

24. Hayley is 7 years old and enrolled in the 2nd grade at Pinecrest. Like her siblings, she is well ahead of her grade level. She reads 400-page novels, which I have never attempted to do, even though I also read voraciously.

25. When Hayley toured her classroom at the start of this year, her teacher noticed Hayley's interest in the books there and said she didn't think the books in her classroom would be advanced enough to challenge Hayley.

26. Hayley tells me that she doesn't learn much when she goes to school. The teacher is distracted by the need to control the classroom and help struggling students.

27. Like Caleb, I want to send Hayley to the JOY Academy next year. I do think Hayley's current teacher is trying her best, but I think Hayley will learn better in an environment where her instructors can pay more attention to her. The ESA program will help tremendously in that regard.

The JOY Academy

28. The JOY Academy is an effort led by Connie Stolworthy, a former CCSD teacher who taught at Dooley Elementary School for about 20 years until a new principal harassed her into retirement. Mrs. Stolworthy has a PhD in Education and is well regarded by the children and parents in my community.

29. The JOY Academy is a nonprofit organization organized under section 501(c)(3) of the Internal Revenue Code. I am the Secretary on the JOY Academy's Board of Trustees. We're aiming to launch in fall 2016. The JOY Academy will have the religious private-school exemption from state licensing, but its focus is on so much more than religion.

30. We chose the name "JOY Academy" because we feel that there should be joy in learning, and we don't believe that our local public schools can provide that. At the JOY Academy, students will get to form teams with other students with similar interests—it could be gardening, computers, dance, cooking; whatever they're passionate about—and they'll give presentations to their peers each Friday on what they have learned. They'll learn that they can make a difference in their own lives and in the lives of those around them.

31. The JOY Academy's curriculum is based in part on several schools some teachers and I toured in Arizona. These schools follow a program called "The Leader in Me", which draws on the principles in Stephen Covey's famous book *The 7 Habits of Highly Effective People*. When I toured these schools, I interacted almost exclusively with students—they had been trained to be self-confident and respectful, and needed practically no adult supervision. No discipline necessary.

32. My husband and I tell each other that sending our children to public school gets in the way of their education. During the summers, my kids read like crazy and learn whatever they're interested in from shows like "TED Talks" and "How It's Made," without me asking them to do any of it. They learn this way and I love it, but when they go back to school in the fall, learning isn't fun for them anymore. Then they always have tons of homework and we have no time to be together as a family.

33. It seems impossible for our local public schools to individualize my children's education. The CCSD curriculum leaves gifted kids to their own devices, and they get bored because they aren't challenged at school. When they get bored, they get in trouble.

34. I hope that the ESA Program will allow many schools like the JOY Academy to become viable. There's a tremendous need in southern Nevada for more specialized schools. It's not just about religion. There are nonverbal children, autistic children, gifted children with attention-deficit disorder, and all sorts of special cases that CCSD is just too big to respond to adequately.

35. As a parent, I know my children better than anyone at CCSD, and I deserve to take charge of their education. The ESA Program will help me do just that. The status quo is not working. It is time parents had more say in their children's education.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 15 day of September, 2015.

Lara J. Allen

Lara Allen

EXHIBIT 5

HUTCHISON & STEFFEN

A PROFESSIONAL LLC

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*Application for Admission *Pro Hac Vice* Pending

Attorneys for Applicants for Intervention

DISTRICT COURT
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 SKRYDLEWSKI, 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, vs. DAN SCHWARTZ, in his official capacity as Treasurer of the State of Nevada, Defendant.	Case No. 15-OC-002071-B Dept. 2 **DECLARATION OF TRINA SMITH IN SUPPORT OF HER AND HER HUSBAND'S MOTION TO INTERVENE AS DEFENDANTS**

TRINA SMITH, under penalty of perjury, declares and says:

1. I am a resident of Sparks, Nevada. I am the natural mother of three children and the adoptive mother of seven more. I make this declaration based on my personal knowledge.

2. I make this declaration on my own behalf and in support of my motion to intervene as a Defendant in *Lopez v. Schwartz*, Case No. 15-OC-002071-B, Dept. 2, a lawsuit challenging the constitutionality of Nevada's Education Savings Account ("ESA") Program.

3. I am married to Jeffrey (Jeff) Smith. Jeff and I see ourselves as advocates for our children, including the seven we adopted through the foster system. Jeff and I both have experience working in the public school system.

4. We currently have eight children living at home, including the seven we adopted. They are all enrolled in public school in the Washoe County School District (WCSD). I have two more adult biological sons who now live on their own.

Tabitha Nicole ("Tabby") Smith

5. Tabby is 17 years old and a senior at Spanish Springs High School. She is our biological daughter.

6. Tabby is happy and doing well in public school. She is an 'A' student, takes AP and honors courses, and plans to attend the University of Nevada–Reno next year.

7. Tabby is a role model to her siblings. She's very independent, and we're fortunate to have her. Her needs are being met, and we do not plan to pull her out of public school.

Allissa Marie ("Aly") Smith

8. Aly is 15 years old and a freshman at Spanish Springs High School. Jeff and I adopted her when she was 9.

9. Aly had been through a lot before she came to us. Her biological parents were alcoholics. When she was 5, her mother died and then her father lost track of her

while he was living in motels.

10. Aly wound up in the foster system after her father lost her. She spent about three years there and went through two failed adoptions before us. Her behavior at the time was consistent with past physical abuse, and her would-be adoptive parents were not emotionally prepared to handle it.

11. Despite her past, Aly is a good kid who rarely gets in trouble. She'll fight with me occasionally, but she adores Jeff.

12. Aly is street-smart but not book-smart. She has a lot of trouble focusing and we believe she has a mild form of ADHD. She did well in elementary school, but struggled in seventh and eighth grades at Shaw Middle School, where she was a 'D' student and nearly failed both years.

13. Aly would be well-suited to a trade school. She doesn't need to be an academic superstar to learn how to function independently as an adult, which is all we need her school to teach her. That probably won't happen at her current school. We may have her apply to the Academy of Arts, Careers and Technology (AACT), which is one of Washoe County's CTE options, but it isn't certain she'll get in. We would love to have more options, but without the ESA Program, we can't afford anything besides a public school.

Abigale Grace ("Abby") Smith

14. Abby is 10 years old and in fourth grade at Spanish Springs Elementary School.[1] Jeff and I adopted her (and her biological brother Josh) when she was 7.

15. Abby and her biological brother Josh came to us through the state Division of Child & Family Services, which manages foster care outside of Washoe and Clark Counties. Abby and Josh had been in and out of two drug-addled homes in Pershing County. We learned of them through a family connection.

[1] All subsequent references to "Spanish Springs" mean the elementary school, not the high school.

16. Abby and Josh were born addicted to meth and were constantly exposed to drugs and alcohol in their early childhood. Abby has told us that she was physically abused, and we strongly suspect that Josh was as well. Abby has a 504 plan which lets her excuse herself from class any time she needs to deal with a lingering medical problem connected with her past abuse. She could probably benefit from an IEP as well, but it was such a fight to try to get one for her younger brother Benny, and the benefits have been so marginal for our two children that do have IEPs, that we do not think it is worth the extraordinary effort to try to obtain one for Abby.

17. Abby's verbal communication skills are fine, but she is completely unable to retain or even comprehend what she reads. She can't do homework on her own.

18. Spanish Springs can't really help Abby. They pull her out of class occasionally for extra help as part of her 504 plan, but all they do is lump her in with a group of other "extra help" kids whose needs are totally different from hers. The school does not tell me what she's learning in these special sessions—I don't find out until she comes home with her homework, which I have to help her with anyway. I can't honestly say that going to Spanish Springs is a good use of Abby's time.

19. Abby would do well at a smaller private school, and likely a religious one, that can attend to her needs. She's very social, and she enjoys learning about Christianity. I'd love to send her to the Excel Christian School here in Sparks, but we can't currently afford tuition there. With the ESA Program, I could and would send her to Excel.

Jasmine Ariel Smith

20. Jasmine is 10 years old and also in fourth grade at Spanish Springs. Jeff and I adopted her (and her biological half-brother Kenny) when she was 7, after she had been in our home as a foster child for about a year.

21. Of all our children, Jasmine and Kenny struggle the most in school. They both have Reactive Attachment Disorder (RAD), a very severe condition caused by a lack of nurturing relationships in early childhood. RAD is poorly understood because it

is so rare.

22. We are certain that Jasmine and Kenny were physically and emotionally abused by their biological parents. Jasmine came into the foster system with a broken leg. Jasmine and Kenny's biological mother is addicted to meth, and while she has never admitted to drug use during her pregnancies, both Jasmine and Kenny suffer from a noticeable lack of fine motor skills that is consistent with prenatal drug exposure.

23. For her part, Jasmine constantly displays negative attention-seeking behavior and is prone to forming unhealthy attachments very quickly. She's the first to make friends, but also the first to get in trouble. She also has ADHD and dyslexia—although her school won't admit she's dyslexic—and she struggles to maintain eye contact with anyone or anything for more than a few seconds.

24. Jasmine and Kenny both came to us with IEPs, which they still have. The staff at Spanish Springs does not know what to do about their IEPs. The only special-education program they have is for autistic children. Jasmine and Kenny are not autistic, and that program won't help them.

25. There are 28 children in Jasmine's class. It's too big. On the one hand, it is nice that Jasmine is very social and bubbly, but she also has trouble staying seated, and is a handful to discipline. Her teacher has told me that Jasmine does not understand what is going on in class—which is true—but with 27 other kids to supervise, the teacher is not in a position to help Jasmine.

26. Jasmine's IEP allows her to use a writing aid called an AlphaSmart. It was a battle to get WCSD to approve the AlphaSmart, and now that it is approved, Spanish Springs has not made any effort to implement or supervise Jasmine's use of the AlphaSmart. Jasmine's writing is still scrunched. It is affecting Jasmine emotionally; she is losing her motivation to learn to write. She comes home every day feeling defeated.

27. I have a degree in early childhood education and experience working in special-needs classrooms. All Jasmine and Kenny need is a firm, steady, and fair

education by someone who can give them individual attention. A home tutor really would be enough. I would do it myself, but Jeff is a trucker and has to be on the road for half the week, and I can't devote all my attention to Jasmine and Kenny with my husband away for work and four other kids to take care of. But we can't afford a tutor either. So unless and until the ESA Program goes into effect, Jasmine and Kenny are stuck in Spanish Springs.

Calissa Jean ("Cali") Smith

28. Cali is 9 years old and in fourth grade at Spanish Springs. Jeff and I adopted her when she was two years old, after she had been taken away from a previous foster family who left her in a hot car in a Wal-Mart parking lot.

29. Cali has fetal alcohol syndrome (FAS), which will stay with her for life. When Cali came to us, she was non-functioning. She could not walk, could not talk, and her eyes were often rolled back.

30. Miraculously—and I use that word on purpose—Cali is a brilliant student. She has a photographic memory and does well at school. From an academic standpoint, I have no concerns about Cali attending public school.

31. My concern with Cali is her emotional issues. On top of FAS, she has post-traumatic stress disorder from early childhood. When she was 3, she reported a nightmare in which her biological mother put a knife to Cali's throat and threatened to kill her. We initially thought of it as a bad dream, but when we mentioned it to social services they said that it matched the police reports from her background. Social services had never told us about this before her dreams. Her biological parents were drug addicts who fought often, and they would regularly use Cali as a pawn in those fights.

32. Due to her violent family background, Cali tends to gravitate toward things that are not okay. She is only 9 now, and we have good reason to fear that we have only seen the tip of the iceberg. Her parents were smart people who ruined their lives with drugs. We do not want to see that happen to Cali, and we would like to send

her to a smaller and more nurturing environment, like the Excel Christian School. But without the ESA Program, we will not have that choice.

Kenneth David ("Kenny") Smith

33. Kenny is 9 years old and in third grade at Spanish Springs. He is Jasmine's biological half-brother. Kenny became our foster child when he was 4 and we adopted him not long after that.

34. Kenny shares Jasmine's background, which I have already discussed. We know he was beaten by his biological parents because when we got him, he would flinch at the slightest movement anyone made around him. He still does sometimes, although it is not as bad as it used to be. Like Jasmine, Kenny continues to suffer from a lack of fine motor skills—he still can't tie his shoes—and also has a host of other learning disabilities.

35. Like Jasmine, he has an IEP and an AlphaSmart (which was also a battle to approve), and Spanish Springs does not seem to know what to do with the IEP or the AlphaSmart. He does get a half-hour of occupational therapy every week. He used to get physical therapy and speech therapy, but they took him off those during the first year he lived with us.

36. Kenny understands concepts and I can tell that he has ideas in his head. His biggest obstacle is his lack of motor skills, which make it difficult for him to get his ideas across. We pay for him to participate in Pop Warner football and karate outside of school, which have improved his gross motor skills tenfold and have helped his fine motor skills somewhat, too. It stretches our budget, though.

37. Kenny could improve academically if his school would just engage him on the AlphaSmart. He has thoughts that he needs to learn to communicate. But Spanish Springs wastes the time they have with him, and I know he would do better learning at home with the help of a tutor. But our finances are tight, and I do not have a choice right now. I can only get him the tutor he needs if the ESA Program goes into effect.

Joshua James ("Josh" / "J.J.") Smith

38. Josh is 9 years old and in third grade at Spanish Springs. He is Abby's biological brother, and we adopted him and Abby at the same time. He shares Abby's background, which I have already discussed.

39. Josh is a smart kid who gets good grades, but he does not test well and he exhibits some behavioral problems. He is very strong-willed and thinks of himself as a leader—it is just that his leadership can be negative sometimes. He wants to do right, but has trouble distinguishing between right and wrong.

40. Josh is just a statistic as far as Spanish Springs is concerned. When we got him, his middle name was Kaleb. We changed it to James—he wants to be called "J.J." because he thinks it's a cool sports name—and have told the school about this time and time again. But the paperwork we get from the school keeps referring to him as "Joshua Kaleb Smith." We are supposed to trust Spanish Springs to get Josh's needs right, but they can't even get his name right.

41. Because of Josh's behavioral issues, we would like to see him in a smaller environment that will pay attention to them. As of now, that would be the Excel Christian School. We just can't afford it for him, and we will not be able to afford it without the ESA Program.

Benjamin Isaiah ("Benny") Smith

42. Benny is 7 years old and in second grade at Spanish Springs. Jeff and I adopted him when he was three weeks old. He is the only one of our adopted children who we have known from his infancy.

43. Benny was born addicted to crack cocaine. He suffered from constant spasms when he came to us and his muscles would spontaneously lock up. For three hours every night, I would stay up clutching him in my arms and praying to control the spasms so he could fall asleep. Only then would I sleep, still holding onto Benny and sitting upright. It took five months of this before he got his baby legs and could relax and go to sleep like a normal child.

44. Benny is a freight train of hyperactivity and almost certainly has ADHD. It is great for football—he is fearless, and his coach's jaw dropped the first time he jumped over an offensive line—but any sensory input will set Benny off, and he is not doing well in school at all.

45. Benny needs the right teacher, but between our living situation and WCSD, we do not have any say in the matter.

46. Benny started kindergarten at Alyce Taylor Elementary School, when we were renting a different house. But our landlord had to move back into that house, so we had to move to Spanish Springs's district. Benny's new teacher at Spanish Springs was a horrible fit—she refused to let him snack, which he has to do constantly—and so we pulled him from Spanish Springs and enrolled him in the Connections Academy, an online public school.

47. After a few months with Benny in the Connections Academy, I realized that Benny was reversing his letters—a classic sign of dyslexia. I am not equipped at home to help with that, so I had to re-enroll him in public school.

48. Knowing that his kindergarten teacher at Spanish Springs would not be the right fit, I pleaded with WCSD to get a variance to allow him to go back to Alyce Taylor. They told me there was no way—even though Benny had attended Alyce Taylor before and even though it is barely a mile away from Spanish Springs.

49. I eventually got a variance for Benny to finish kindergarten at Jesse Hill Elementary School, but only for one year. He had to return to Spanish Springs after that.

50. When Benny started first grade at Spanish Springs, I attended a back-to-school meeting where Benny's new teacher said she was a "stickler on penmanship." I knew right away that she would be a disaster for Benny because of his dyslexia. I called the principal and asked to switch teachers, but got rejected. So then I asked Benny's teacher if I could come in and help Benny, and again got rejected even though I have professional experience with special-needs education. Yet I heard that

another first-grade teacher at Spanish Springs allows parent helpers in his classroom all the time. It is unfair that Benny had to go through first grade with an incompatible teacher when there was another teacher who might have understood and accommodated Benny's needs.

51. WCSD is a bureaucratic roulette wheel. Benny does not deserve to be caught up in it. It is possible that he might draw a good teacher or two in the future, but it is infuriating that it is totally up to chance. We deserve a choice. We would like to place Benny either with a private tutor or in the Excel Christian School. But we can't even think about it given our financial situation. We need an ESA for Benny to succeed.

Conclusion

52. Every one of our kids could have a normal life if we could just get them a decent education. All they need to learn is common sense, not the Common Core.

53. Every day, I have to help my seven special-needs children with homework they haven't learned how to do. They barely learn anything when they're at school. It's frustrating for me, but worse, it's frustrating for them. Something is wrong when the public schools leave my children discouraged about learning.

54. I have worked in education with kids my whole life, including some special-needs classrooms. WCSD does not have what my kids need. But we can't afford to move to a school district that *does* have what my kids need, and we can't afford to pay for private school.

55. Homeschooling simply is not an option without a private tutor or an assistant to help me. We need the money Jeff makes from trucking, and that means Jeff has to be on the road from Friday to Tuesday every week. When he is gone, I am responsible for all eight children—seven of whom have special needs. I do my best, but I am pushed to the limits. I can't tutor them all myself.

56. Jeff and I stepped up to be advocates for our adopted children when no one else was willing to. How can it be a bad thing if we are trying to give them

something they need and deserve? We know how to use the money in an ESA to give our children a better education.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 15 day of September, 2015.

Trina Smith

Trina Smith

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**Applications for pro hac vice pending*

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR CARSON CITY

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.,

Plaintiff,

vs.

Dan Schwartz, in his official capacity as Treasurer of the State of Nevada,

Defendants.

Case No.: 15-OC-002071-B
Dept. No.: 2

AMENDED NOTICE TO SET

HUTCHISON & STEFFEN
A PROFESSIONAL LLC
PECCOLE PROFESSIONAL PARK
10080 WEST ALTA DRIVE, SUITE 200
LAS VEGAS, NV 89145

TO: HELLEN QUAN LOPEZ;

TO: MICHELLE GORELOW;

TO: ELECTRA SKRYZDLEWSKI;

TO: JENNIFER CARR;

TO: LINDA JOHNSON;

TO: SARAH AND BRIAN SOLOMON; and

TO: THEIR ATTORNEYS OF RECORD.

YOU WILL PLEASE TAKE NOTICE that the undersigned, Jacob A. Reynolds and/or Robert T. Stewart, Esq. of the law firm of HUTCHISON & STEFFEN, LLC, will appear telephonically before the Judicial Assistant of the above-entitled court, on Wednesday, September 30, 2015, between 9:00 a.m. and 9:30 a.m. or at a time set by the Judicial Assistant to set the following matters for hearing before the court: MOTION TO INTERVENE AS DEFENDANTS and INTERVENOR-DEFENDANTS' MOTION TO ASSOCIATE COUNSEL.

COUNSEL	TELEPHONE NUMBER
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INSTITUTE FOR JUSTICE

DATED this 28 day of September, 2015.

HUTCHISON & STEFFEN, LLC

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of HUTCHISON & STEFFEN, LLC and that on this 28 day of September, 2015, I caused the above and foregoing document entitled **NOTICE TO SET** to be served as follows:

☒ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and/or

☒ to be served via facsimile; and/or

☐ pursuant to EDCR 8.05(a) and 8.05(f), to be electronically served through the Eighth Judicial District Court's electronic filing system, with the date and time of the electronic service substituted for the date and place of deposit in the mail; and/or

☐ to be hand-delivered;

to the attorneys and/or parties listed below at the address and/or facsimile number indicated below:

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Justin C. Jones, Esq.
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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,

vs.

DAN SCHWARTZ, IN HIS OFFICIAL CAPACITY AS TREASURER OF THE STATE OF NEVADA,

Defendant.

Case No. 15 0C 00207 1B

Dept. No.: II

PLAINTIFFS' OPPOSITION TO MOTION TO INTERVENE

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Applicants' motion to intervene should be denied because they have not met their burden of establishing that Defendant will be unable to adequately represent their interests. Applicants are parents who favor Nevada's recently passed voucher law, Senate Bill 302, which diverts funds from public schools to pay for private school tuition and other expenses. Plaintiff parents, whose children attend Nevada's public schools, have brought this challenge to SB 302 because it violates on its face several provisions of Article XI of the Nevada Constitution ("the Education Article"). Plaintiffs have sued Nevada State Treasurer Dan Schwartz, who administers the program, in his official capacity, seeking a declaration that SB 302 is unconstitutional and an injunction to prevent its implementation. Defendant is represented by Nevada Attorney General Adam Laxalt.

It is well established that, absent a "very compelling" showing to the contrary, the Nevada Attorney General is fully capable of adequately representing the Treasurer and those citizens, such as Applicants, who favor the voucher law. Applicants have not made that compelling showing. Instead, they argue generally that (1) they have an interest in the voucher law different from Defendant's because they may use the funds diverted from public schools by the voucher law to pay for private expenses and (2) they might in the future advance some unidentified, meritorious argument which the Attorney General may, for unknown reasons, choose not to make. These broad assertions aside, Applicants offer no specific reasons, let alone "compelling" reasons, to show that the Treasurer, a vocal public proponent of the law, and Nevada's chief legal counsel will not adequately, effectively, and vigorously defend the constitutionality of the challenged law.

In the alternative, Applicants seek permissive intervention. But, permissive intervention is rarely granted when the standard for intervention by right is not met. This makes sense. Only in an unusual case does a court in its discretion find some other vital reason exists to add additional parties to a lawsuit—with the concomitant increase in costs, court time, and expenditure of other court and party resources—when the existing parties can already effectively litigate the dispute. This is not that case. The motion to intervene should be denied on both grounds.

II. BACKGROUND

A. The Voucher Law

On June 2, 2015, the Governor signed into law Senate Bill 302, which establishes the most expansive voucher[1] program ever instituted in the United States. SB 302 authorizes the State Treasurer to transfer funding appropriated by the Legislature specifically for the operation of Nevada public schools from those public schools into private "education savings accounts" to pay for a wide variety of private education services.

Under SB 302, all children in private school, and all children taught at home, will be entitled to receive over $5,000 a year in state public school funds after attending a public school for 100 days (part time or full time) once in their academic career. *See* SB 302 §7. This requirement is easily met. Simply enrolling students in 100 days of public kindergarten at the outset of their education will entitle them to collect over $5,000 a year for the rest of their K-12 education. Under the regulations proposed by the State Treasurer, students already in private school or educated at home can also readily qualify by taking a single public school class for 100 days. *See* LCB Draft Revised Prop. Treas. Reg. R061-15 § 9(4) (Sept. 15, 2015).[2]

The Office of the State Treasurer has already begun allowing applicants to pre-register to receive vouchers and has stated that it expects to begin disbursing funds in April of 2016. *See* Office of the State Treasurer, *Early Enrollment Application for Education Savings Accounts*.[3] There are currently just over 20,000 students enrolled in private schools in Nevada. If all of them participated in the voucher program Nevada's public schools would spend over $102 million

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[1] In the education field, the term "vouchers" generally refers to laws that authorize the use of public funds to partially or fully pay for private school tuition or other private education expenses. These programs vary by state in type, scope, eligibility, funding source and other requirements. *See* Education Commission of the States, *Vouchers, 50 State Analysis*, http://b5.caspio.com/dp.asp?AppKey=b7f93000695b3dd5abb4b68bd14&id=a0y70000000CbmMAAS (last visited October 2, 2015).

[2] Online at http://www.nevadatreasurer.gov/uploadedFiles/nevadatreasurergov/content/SchoolChoice/2015-09-15_Proposed_Final_Regulations.pdf.

[3] Online at http://www.nevadatreasurer.gov/SchoolChoice/Early_Enrollment/ (last visited Oct. 2, 2015).

subsidizing their private school education. This hefty sum does not include payments for students who are educated at home or on-line because the Nevada Department of Education does not track how many children in Nevada are so educated. It also does not include any child attending public school who decides to leave his or her school and attend a private school with a voucher subsidy. Indeed, it has been reported that full private school and home-based education participation in the voucher program will cost Nevada's public schools over $200 million. *See* State of Nevada, Office of the State Treasurer, Notice of Workshop, Education Savings Account – SB 302 (July 17, 2015) ("Public Hearing") at 64.[4] The voucher law will thus drain Nevada's public schools of desperately needed funds.

B. The Lawsuit

On September 8, 2015, Plaintiffs, Nevada residents who are also taxpayers and parents of children attending public schools across Nevada, filed suit to bar implementation of this unconstitutional law. Defendant Dan Schwarz, in his official capacity as Treasurer of the State of Nevada, is charged by SB 302 with the law's implementation.

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

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

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[4] Online at http://www.nevadatreasurer.gov/uploadedFiles/nevadatreasurergov/content/School Choice/2015-08-21_Notice_of_Workshop_Minutes.pdf.

Third, Article XI, section 2 of the Nevada Constitution requires that the Legislature establish a *uniform* system of common public schools. Public schools must allow all children to attend, regardless of their religious beliefs, socioeconomic status, academic achievement, ELL status, or special needs. In contrast, institutions that receive the voucher funds may discriminate on all these bases. Further, public schools are subject to uniform curriculum, achievement, and teaching requirements. Voucher-eligible institutions are subject only to the most minimal curriculum requirements and are not subject to achievement or teaching requirements. Thus, SB 302 diverts funds from a public education system that is subject to uniform regulations to a variable system of unregulated voucher-eligible institutions in violation of the constitutional mandate to create and maintain a uniform system.

Plaintiffs are preparing to file a motion for a preliminary injunction to enjoin implementation of the law.

III. ARGUMENT

A. There Is A Strong Presumption That Citizens Are Adequately Represented By The State In Constitutional Challenges To State Laws.

A party may intervene by right pursuant to Nevada Rule of Civil Procedure 24(a) only when it demonstrates all of the following four requirements:

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

Am. Home Assurance Co. v. Eighth Judicial Dist. Court ex rel. Cnty. of Clark, 122 Nev. 1229, 1238 (2006).

Applicants, who personally favor the voucher law, have an interest in the outcome of this litigation and their application is timely. Applicants cannot demonstrate, however, that their interest in supporting the law will not be adequately represented by Defendant State Treasurer and his counsel, the Attorney General.

Where, as here, the Defendant is a state, state entity, and/or state official represented by the state attorney general, putative intervenors must make a "very compelling showing" to overcome the presumption that the government will adequately represent their interests. *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003), as amended (May 13, 2003) ("In the absence of a 'very compelling showing to the contrary,' it will be presumed that a state adequately represents its citizens . . . ."); *see also Gonzalez v. Arizona*, 485 F.3d 1041, 1052 (9th Cir. 2007) (quoting *Prete v. Bradbury*, 438 F.3d 949, 956 (9th Cir. 2006)); 7C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1909 (3d ed.) (courts permit intervention by individuals on the side of government entities defending laws only in the "rare cases" in which they make a "very strong showing" of inadequate representation).[5]

B. Applicants Have Failed To Make A Very Compelling Showing That The State Does Not Represent Their Interests.

Applicants attempt to rebut the presumption that they are adequately represented by Defendant and the Attorney General in two primary ways. First, they argue that their interests diverge from Defendant's. Second, they argue that they may advance arguments different from those that will be advanced by Defendant. They also point to the fact that their co-counsel, the Institute for Justice, has successfully intervened in challenges to other states' voucher laws. These arguments are without merit.

1. Applicants have the same interests as Defendant

Applicants' stated goal for their intervention is to ensure their access to vouchers by defending SB 302 as constitutional.[6] Defendant and his counsel, the Attorney General, likewise have the very same aim: defending SB 302 as constitutional so that vouchers are made available

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[5] As Applicants note in their motion to intervene, federal cases discussing federal rules of civil procedure with wording similar to that in the Nevada rules "'are strong persuasive authority.'" *Vanguard Piping Sys., Inc. v. Eighth Jud. Dist. Ct.*, 129 Nev. Adv. Op. 63 (2013) (quoting *Exec. Mgmt. Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53 (2002)).

[6] Applicants have an interest in the outcome of the case. But showing that they have an interest in the case is different from showing that their interest differs from, and will be inadequately represented by, Defendant and the Attorney General. *See Lundberg v. Koontz*, 82 Nev. 360, 363 (1966).

to all eligible residents of the state. While Applicants' motives for intervening may be personal, *motivations* are not the measure. It is the *legal interest* at stake that drives the intervention inquiry. Where both defendants and applicants have the same legal interests, adequacy of representation is presumed. *Arakaki*, 324 F.3d at 1086.

This is not a case where a defendant is unwilling or unable to advance the interests he shares with the applicant. Defendant and the Attorney General have publicly declared their intention to offer a full-throated defense of SB 302. Defendant Schwartz has repeatedly expressed his support for the law and its "disruptive" effects. *See* Public Hearing at 94. Attorney General Laxalt likewise has committed to vigorously defending the law, stating that his "priority is to ensure that [his] office provides the most comprehensive, considered and successful defense possible of [SB 302]." Michelle Rindels, Associated Press, *Sandoval Wants Education Savings Account Case Fast-Tracked* (Sept. 4, 2015).[7]

Applicants argue that participants in government programs necessarily have different interests from those of the government entity running that program. Motion to Intervene as Defendants (Sept. 16, 2015) ("Mot.") at 17. But the cases they cite for this proposition actually show the opposite. In each case, the would-be intervernors demonstrated a *specific* divergence of interests between themselves and the government defendants beyond simple participation in the challenged government program. Applicants have pointed to no such difference between themselves and Defendant.

In *Sierra Club v. Glickman*, 82 F.3d 106, 110 (5th Cir. 1996), farmers, who benefited from certain ground water sources, sought to intervene on the side of defendants in a case concerning ground-water pumping brought by the Sierra Club against the U.S. Department of Agriculture. In permitting intervention, the court cited numerous differences in interests between the farmers and the USDA, including the fact that "'[t]he government must represent the broad public interest, not just the economic concerns of [one] industry'" and the fact that the USDA, unlike the proposed

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[7] Online at http://www.washingtontimes.com/news/2015/sep/4/sandoval-wants-education-savings-account-suit-fast/.

intervenors, was bound by a prior judgment concerning the effect of pumping from the aquifer on endangered species. *Id.* at 110 (quoting *Sierra Club v. Espy*, 18 F.3d 1202, 1208 (5th Cir. 1994)).

Likewise, in *Californians for Safe & Competitive Dump Truck Transportation v. Mendonca,* 152 F.3d 1184, 1185 (9th Cir. 1998), the International Brotherhood of Teamsters sought to intervene as a defendant in a case brought by public works contractors seeking to enjoin state agencies from assessing against them certain fines relating to truck drivers' wages. In the single sentence of the opinion addressing adequacy of representation, the court held that the Teamsters were not adequately represented by the state agencies because they sought to advance only their "employment interests" while the agency defendants were responsible for "the interests of the public at large." *Id.* at 1190.

Unlike the defendants in these cases, Defendant, as the official charged with implementing the voucher program, has no broader public policy interests that diverge or differ from Applicants' desire to uphold the law. Nor do Applicants have smaller, personal grievances they want to pursue that are distinct from Defendant's aim of defending the law. SB 302 will stand or fall as a whole and both Applicants and Defendant have the same interest—to see it upheld. Applicants have not shown that their interests diverge from Defendant's, and their argument that they are inadequately represented must therefore fail. *See Lundberg v. Koontz*, 82 Nev. 360, 363, 418 P.2d 808, 809 (1966) (Where "[t]he single issue [in a proceeding] [wa]s the meaning of Nev. Const. Art. 19, s 3,—an issue of law" "[t]he interests of the parties ... [we]re identical insofar as the resolution of the legal issue is concerned" and "[i]n this context the government's representative [wa]s adequate to represent the interests of those desiring to intervene.").

Federal courts in Nevada recognize that state officials represented by the Nevada Attorney General are adequate representatives of putative intervenors in challenges to government programs. In *People's Legislature v. Miller*, No. 2:12-CV-00272-MMD, 2012 WL 3536767, at *1 (D. Nev. Aug. 15, 2012), plaintiffs challenged certain laws concerning Nevada's initiative and referendum process. A group of entities representing business interests sought to intervene, arguing "that their interests and the [Defendant] Secretary [of State]'s interests '[we]re quite likely to diverge'" but not "describ[ing] *how* their common interests could diverge." *Id.* at *4. The

district court rejected this argument, holding that the Secretary of State and the would-be intervenors shared the same objective: to uphold the challenged laws against constitutional attack. *Id.; see also PEST Comm. v. Miller*, 648 F. Supp. 2d 1202, 1213 (D. Nev. 2009) *aff'd on other grounds*, 626 F.3d 1097 (9th Cir. 2010) (denying intervention on similar grounds).

Other federal courts have likewise found that where a government defendant's interests are identical to those of the would-be intervenor, the defendant's representation is adequate and intervention is inappropriate. *See, e.g., Freedom from Religion Found., Inc. v. Geithner*, 644 F.3d 836, 842 (9th Cir. 2011) (federal government adequately represented pastor who sought to intervene in establishment-clause challenge to tax exemption for ministers' homes); *Gonzalez v. Arizona*, 485 F.3d 1041, 1051 (9th Cir. 2007) (affirming denial of motion to intervene by sponsors of initiative petition because state government adequately represented the interests of its citizens); *Kane Cnty., Utah v. United States*, 597 F.3d 1129, 1134 (10th Cir. 2010) (government adequately represented environmental groups in action brought by state to quiet title over roads crossing federal lands); *Ingebretsen ex rel. Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 280-81 (5th Cir. 1996) (group representing students in public school adequately represented by Mississippi Attorney General); *Hopwood v. State of Tex.*, 21 F.3d 603, 605 (5th Cir. 1994) (advocates of affirmative action adequately represented by state in action challenging University of Texas Law School's race-conscious admissions policies); *Keith v. Daley*, 764 F.2d 1265, 1269-72 (7th Cir. 1985) (pro-life group adequately represented by state in challenge to law restricting abortion).

2. Applicants cannot show inadequacy of representation by speculating about possible future differences of opinion with Defendant over legal strategy

Applicants further claim that they are inadequately represented by Defendant because they may pursue different legal arguments from those advanced by him. But "mere [ ] differences in [litigation] strategy ... are not enough to justify intervention as a matter of right." *Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 954 (9th Cir. 2009) (alterations in original) (quoting *United States v. City of Los Angeles*, 288 F.3d 391, 402–03 (9th Cir. 2002)). Moreover, Applicants offer only speculation about what those differences in litigation strategy might be, referencing two other challenges to state voucher laws in which their co-counsel intervened and

made a standing argument that the state defendant chose not to make. But Applicants do not suggest any basis for a challenge to Plaintiffs' standing or provide a reason why, if such an argument has potential merit, Defendant would not make it. Applicants also point out that in other cases challenging the state funding of sectarian institutions, their co-counsel has argued that bans on state funding of parochial education are motivated by religious bigotry. This argument, however, is irrelevant to this litigation, in which Plaintiffs do not challenge SB 302 on the grounds that it provides state funds to sectarian institutions.

Applicants cite *Trbovich v. United Mine Workers of America*, 404 U.S. 528 (1972) for the proposition that differing legal strategy justifies intervention. That case, however, did not involve the defense of a government program—instead the Secretary of Labor filed suit pursuant to the Labor Management Reporting and Disclosure Act of 1959 under which he "in effect becomes the union member's lawyer for purposes of enforcing" their rights under the law. But the Secretary of Labor also advanced a more general public interest in protecting the freedom of union elections. *Id.* at 538-39. The Secretary was not defending a law—he was the aggressor, so there was no basis on which to apply a presumption of adequacy, nor did the Court apply one. Moreover, unlike this case, the applicant in *Trbovich* actually identified two specific bases for setting aside the union election that the Secretary chose not to advance. *Id.* at 537.

In short, Applicants assert that their lawyers might present better or different arguments than the Attorney General, without specifying any explanation of what those arguments might be or why the Attorney General will not make them. This speculative assertion does not justify intervention. *See People's Legislature* 2012 WL 3536767, at *4 (rejecting as "speculative and unpersuasive" the argument that applicants could intervene by right in suit defended by Nevada Attorney general based on prediction of "unnamed future disagreements and divergent goals"). Indeed, were this to be an accepted basis for intervention, any party could seek intervention because their lawyer might think of a different argument than the defendant's lawyer at some unidentified point down the road.

Instead, because "[t]he interests of the parties to ... the proposed intervenors[] and the citizens of Nevada are identical insofar as the resolution of the legal issue is concerned ... the

government's representative is adequate to represent the interests of those desiring to intervene." *Lundberg v. Koontz*, 82 Nev. at 363. Applicants' motion to intervene by right should therefore be denied.

3. Intervention by applicants' co-counsel in other cases was either by permission of the opposing parties or for reasons not applicable to this case

Applicants also contend that "parents have been granted intervention in all other lawsuits challenging similar educational-choice programs around the nation" and make much of the fact that Applicants' co-counsel (Institute for Justice) have intervened on behalf of parents in several voucher cases in other states. Mot. at 4-5, 18. But Applicants fail to mention that, in certain of these cases, intervention was not opposed. *See Winn v. Hibbs*, No. CIV 00-287-PHX-EHC (D. Ariz. July 8, 2003) (trial court order granting intervention after Plaintiffs filed a Notice of No Objection to parents' motion to intervene); Resp. to Mot. to Intervene, *Niehaus v. Huppenthal*, No. CV2011-017911 (Ariz. Super. Ct. Sept. 27, 2011) (noting that Plaintiffs did not oppose intervention).[8] Moreover, several others involved specific circumstances in which the parent intervenors intended to challenge either the state constitution or certain state laws and, for obvious reasons, the state attorney general was unlikely to make those arguments. Some, for example, involved challenges under the "Blaine Amendments" to state constitutions, a context in which intervenors' intended litigation strategy—to challenge the state constitution for its "anti-religious bigotry"—was likely to diverge from the government's. *See* Mot. to Intervene, *Boyd v. Magee*, No. 03-CV-2013-901470 (Ala. Cir. Ct. Oct. 9, 2013), Dkt. No. 42; *Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999); Order, *Duncan v. State*, No. 219-2012-CV-00121 (N.H. Super. Ct., Jun. 17, 2013).[9]

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[8] *Winn v. Hibbs* was the trial court proceeding preceding *Arizona Christian School Tuition Organization v. Winn*, 563 U.S. 125 (2011), cited by Applicants. Although not cited by Applicants, intervention was also unopposed in other cases in which Applicants' co-counsel successfully intervened. *See Ala. Educ. Assoc. v. James*, 373 So. 2d 1076, 1078 (Ala. 1979); *Green v. Garriott*, No. CV-2006-014135, 2006 WL 6102796 (Ariz. Super. Ct., Maricopa Cnty., Oct. 26, 2006).

[9] Although not cited by Applicants, these same divergent issues were at play in *Taxpayers for Public Education v. Douglas County School District*, 351 P.3d 461, 485 (Colo. 2015) (Eid, J.,

In *Duncan v. State*, 166 N.H. 630, 639 (2014), the intervenors also opposed standing of plaintiffs by contending that the state law conferring standing on taxpayers violated the state constitution, an argument the state was unlikely to make. That same divergence of interests is not present in this case, in which Applicants do not challenge SB 302 on the grounds that it provides state funds to sectarian institutions, and Applicants have not identified any concrete way in which their litigation strategy will differ from or conflict with Defendant's.

In fact, *Magee v. Boyd*, No. 1130987, 2015 WL 867926 (Ala. Mar. 2, 2015), demonstrates that Applicants' interests in this litigation are unlikely to diverge from Defendant's. In *Magee*, the Supreme Court of Alabama noted that the tax-credit intervenor parents (represented by Applicants' co-counsel), "incorporate[d] by reference several of the State defendants' arguments" and raised "essentially the same arguments regarding the constitutionality of the AAA as the State defendants." *Id.* at *18 n.7. The court then upheld the denial of intervention by another set of parents (also represented by Applicants' co-counsel) based in part on the fact that the parents were "making the same claims as the State defendants," who, in addition to the tax-credit intervenor parents, were "adequately representing the scholarship parents' interests." *Id.* at *53.

C. Permissive Intervention Should Be Denied Because Applicants Are Already Adequately Represented And Additional Parties Would Unnecessarily Delay And Complicate The Litigation.

The motion for permissive intervention should also be denied. Where the basic criteria for permissive intervention[10] are met, a court has broad discretion as to whether or not permissive intervention should be allowed. *Perry v. Schwarzenegger*, 630 F.3d 898, 905-06 (9th Cir. 2011) (district court has "broad discretion" over decision about whether to allow permissive intervention). A court must consider, however, whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. NRCP 24(b)(2). Here, because

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dissenting in part) (noting that intervenor-respondents presented evidence of anti-Catholic animus animating Colorado's article IX, section 7).

[10] To seek permissive intervention, a would-be intervener must show "(1) independent grounds for jurisdiction; (2) the motion is timely; and (3) the applicant's claim or defense, and the main action, have a question of law or a question of fact in common." *Perry v. Proposition 8 Official Proponents*, 587 F.3d at 955.

Applicants are adequately represented by Defendant, the addition of unnecessary parties in the case would only cause needless delay and expense for the Court and the parties. Intervention by Applicants would not "contribute to full development of the underlying factual issue" or aid in the "just and equitable adjudication of the legal questions presented," because their involvement adds no new information or interest to the case. *Spangler v. Pasadena City Bd. of Educ.*, 552 F.2d 1326, 1329 (9th Cir. 1977). Under these circumstances, there is no benefit to intervention. But there is a cost because "[a]dditional parties always take additional time that may result in delay and that thus may support the denial of intervention." 7C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1913 (3d ed.) (collecting cases).

Because there is no benefit from Applicants' intervention, the additional time it would cost the Court and the parties is without justification. Courts often deny permissive intervention in such circumstances. *See, e.g., Perry v. Proposition 8 Official Proponents*, 587 F.3d at 955-56 (it is "well within the district court's discretion to find that the delay occasioned by intervention outweighed the value added by the [would-be intervener's] participation in the suit"); *People of State of California v. Tahoe Reg'l Planning Agency*, 792 F.2d 775, 779 (9th Cir. 1986) ("given our conclusion that [applicants'] interests are adequately represented by existing parties, we cannot say that the district court abused its discretion in concluding that [applicants'] intervention would be redundant and would impair the efficiency of the litigation"); *Kane Cnty., Utah v. United States*, 597 F.3d at 1136 (no abuse of discretion to deny intervention where district court held that "'[t]here [wa]s nothing in the briefing nor the arguments to suggest that [applicant] would offer any additional defenses or claims relevant to the issue to be decided that would not already be fully and completely advocated by [the defendant]").[11]

[11] Denial of their motion to intervene does not prevent Applicants from making their views about the case known to the Court through amicus briefs. *See, e.g., People's Legislature*, 2012 WL 3536767, at *5 (rejecting permissive intervention but permitting applicants to file amicus briefs).

IV. CONCLUSION

For the foregoing reasons, Applicants' motion to intervene should be denied.

Dated this 5th day of October, 2015

By: _____ (SBN #10085)

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of October, 2015, a true and correct copy of **PLAINTIFFS' OPPOSITION TO MOTION TO INTERVENE** was placed in an envelope, postage prepaid, addressed as stated below, in the basket for outgoing mail before 4:00 p.m. at WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP. The firm has established procedures so that all mail placed in the basket before 4:00 p.m. is taken that same day by an employee and deposited in a U.S. Mail box.

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**Application for pro hac vice pending*

In the First Judicial District Court of the State of Nevada
In and for Carson City

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,

vs.

Dan Schwartz, in his official capacity as Treasurer of the State of Nevada,

Defendant.

Case No.: 15-OC-002071-B
Dept. No.: 2

REPLY MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE

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REPLY MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE

In courts across the country, parents have been granted intervention in *every* lawsuit challenging educational-choice programs similar to Nevada's Education Savings Account Program. Mot. Intv. 4–5. For the reasons explained below, Plaintiffs fail to demonstrate why this case should be the exception.

I. SUMMARY OF ARGUMENT

A. Applicant-Parents meet the requirements for intervention as of right.

Plaintiffs concede that Applicant-Parents and their children have a direct and immediate interest in this litigation and that they have timely moved to intervene.[1] Pls.' Opp'n Mot. Intv. ("Opp'n") 5. Plaintiffs' only argument against intervention as of right is that this Court should apply the Ninth Circuit's presumption that a state defendant adequately represents the interests of certain types of intervenors. The Ninth Circuit presumes that a state defendant adequately represents the interests of a proposed intervenor when one of two conditions exist: (1) when the state's interest in the case is identical to the interest of the applicant-intervenors; or (2) when the applicant-intervenors' interest is indistinguishable from the interest of citizens-in-general. *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003) ("*If the applicant's interest is identical* to that of one of the present parties, a compelling showing should be required to demonstrate inadequate representation." (emphasis added) (citing 7C Wright, Miller & Kane, § 1909, at 318–19)); *see also id.* ("In the absence of a 'very compelling showing to the contrary,' it will be presumed that a state adequately represents *its citizens when the applicant shares the same interest.*" (emphasis added) (quoting 7C Wright, Miller & Kane, § 1909, at 332.)). Neither condition exists here.

Here, Applicant-Parents' interests are narrower, far more specific, and much more urgent than the State Defendant's generalized interest in defending the constitutionality of Nevada's innovative Education Savings Account Program, enacted as Senate Bill 302.

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[1] Plaintiffs also implicitly concede, because they offer no argument otherwise, that Applicant-Parents' ability to protect their interests could be impaired or impeded if this case is decided in their absence.

Applicant-Parents are not merely taxpayers or citizens. They and their children are the intended beneficiaries of the challenged program. As such, the "presumption of adequacy" line of cases relied upon by Plaintiffs is simply inapposite. As the Ninth Circuit itself recognizes in *Arakaki*, the Plaintiffs' central authority, any such "presumption of adequacy" applies *only* if the proposed intervenors' interests are identical to the state's interests or if the proposed intervenors' interests mirror those of the citizenry in general, as opposed to a personalized interest in the outcome of the case. 324 F.3d at 1087 (noting that representation by existing parties is inadequate when "the intervenors' interests are narrower than that of the government").

Moreover, Nevada courts ask whether "the representation of the applicant's interest by existing parties is *or may be* inadequate . . . ." *Lundberg v. Koontz*, 82 Nev. 360, 363, 418 P.2d 808, 809 (1966) (emphasis added). Applicant-Parents, in their Motion to Intervene, demonstrated that time and again in educational-choice cases the state defendants have failed or refused to make dispositive arguments. Mot. Intv. 4–5. Plaintiffs complain that Applicant-Parents do not show, with specificity, precisely how their defense of the Education Saving Account Program will differ from the State Defendant's defense of the program. Any such showing is not possible at this stage of the proceedings because the State Defendant has not yet filed his Answer. Moreover, differences in strategy and arguments often do not manifest themselves in the early stages of litigation. For example, in North Carolina educational-choice cases it was the intervenor-parents who filed motions to stay lower court injunctions with appellate courts, while the state defendants would have been content to allow the programs to be enjoined pending appeal. *Hart v. State*, No. P14-659 (N.C. Ct. App. Sept. 19, 2014) (partially staying an injunction against disbursement of funds under a publicly funded K-12 scholarship program upon intervenors' motion pending appeal where the government defendant had declined to seek a stay).

Applicant-Parents thus easily satisfy their "minimal" burden of showing that the state does not adequately represent their interest because they have convincingly shown that the State Defendant's representation is, or at the very least, "may be," inadequate. *See Trbovich v.*

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United Mine Workers, 404 U.S. 528, 538 n.10 (1972). Having more than adequately met their burden to show that the State does not adequately represent their interests, this Court should grant Applicant-Parents' motion to intervene as of right.

B. Applicant-Parents also satisfy the criteria for permissive intervention.

As to permissive intervention, Plaintiffs concede that Applicant-Parents meet the "basic criteria" for intervention and argue only that Applicant-Parents will unduly delay or prejudice the adjudication of the case. Opp'n 12 (citing NEV. R. CIV. P. 24(b)(2)). Applicant-Parents' participation in this case will not cause any delay or prejudice. Far from causing any delay or prejudice to the existing parties, Applicant-Parents' distinct interests in the outcome of this case mean that they have the most urgent need for a speedy and just resolution of this case. Indeed, in other educational-choice cases, the parent-intervenors have had to seek expedited appellate review on their own, and without the state's support, in order to obtain stays of adverse decisions to ensure that the implementation and operation of educational-choice programs are not interrupted.

If for any reason this Court denies Applicant-Parents' motion to intervene as of right, this Court should grant their application for permissive intervention because Applicant-Parents' participation will sharpen and focus the legal issues, while aiding the court's understanding of both (1) the historical context in which the Nevada Constitution's Education Article was written and amended; and (2) the meaning of the words "educational purposes" in Article 11 of the Nevada Constitution.

II. APPLICANT-PARENTS ARE ENTITLED TO INTERVENE AS OF RIGHT BECAUSE THEIR NARROWER INTERESTS ARE NOT, OR AT THE VERY LEAST MAY NOT BE, ADEQUATELY REPRESENTED BY THE STATE DEFENDANT.

Applicant-Parents, in their Motion to Intervene, showed that they are entitled to intervention as of right because their distinct and personal interests are not adequately represented by the State Defendant. Mot. Intv. 16–18. In response, Plaintiffs, relying primarily

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on the Ninth Circuit's decision in *Arakaki v. Cayetano*, 324 F.3d 1078 (9th Cir. 2003),[2] argued that the Ninth Circuit's presumption—that state defendants adequately represent parties with either (1) identical interests to the state or (2) interests that are indistinguishable from citizens generally—applies to Applicant-Parents. *See* Opp'n 6–9. Plaintiffs thus reasoned that Applicant-Parents' application to intervene should fail because their interests are the same as the State Defendant's interest merely because both parties seek a declaration that the Education Savings Account Program is constitutional. Opp'n 6. This overly simplistic reasoning misses the forest for the trees.

The touchstone of the adequacy of representation inquiry is a comparison of the existing parties' interest with the applicant-intervenors' interests. *Arakaki*, 324 F.3d at 1086 ("The most important factor in determining the adequacy of representation is how the interest compares with the interests of existing parties."). The presumption simply does not apply in cases, such as this one, where the proposed intervenors' interests are distinct from, or in the words of *Arakaki* "narrower" than, the state's interest. *Id.* at 1087–88 (distinguishing *Arakaki*'s "presumption of adequacy" from those cases in which the Ninth Circuit "permitted intervention on the government's side in recognition that the intervenors' interests are narrower than that of the government and therefore may not be adequately represented").[3] Here, the Applicant-

[2] *Arakaki* is the first case Plaintiffs cite in support of a presumption of adequacy, and it is clear from the rest of Plaintiffs' cases that the Ninth Circuit understands *Arakaki* to be the legal standard on this issue. *See Freedom from Religion Found. v. Geithner*, 644 F.3d 836, 841 (9th Cir. 2011) (quoting cases which quote *Arakaki*); *Perry v. Prop. 8 Official Proponents*, 587 F.3d 947, 950–51 (9th Cir. 2009) (quoting *Arakaki*); *Gonzalez v. Arizona*, 485 F.3d 1041, 1052 (9th Cir. 2007) (citing *Arakaki*); *Prete v. Bradbury*, 438 F.3d 949, 956–57 (9th Cir. 2006) (quoting *Arakaki*); *People's Legis. v. Miller*, No. 2:12-cv-00272-MMD-VCF, 2012 WL 3536767, at *4 (D. Nev. Aug. 15, 2012) (quoting *Arakaki*); *PEST Comm. v. Miller*, 648 F. Supp. 2d 1202, 1212 (D. Nev. 2009) (quoting *Arakaki*).

[3] Also worth noting is that the applicants denied intervention in *Arakaki* were actually the second group seeking to intervene as defendants in an equal protection challenge to the provision of benefits to native Hawaiians based on their ancestry. The applicants were denied intervention because a "similarly situated intervenor"—another group of native Hawaiians—had already been granted intervention and had offered to raise the applicants' arguments. 324 F.3d at 1087; *see also Magee v. Boyd*, No. 1130987, 2015 WL 867926, at *53 (Ala. Mar. 2, 2015) (noting, in the context of a constitutional challenge to an educational-choice program,

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Parents' interest in participating in the challenged Education Saving Account Program, and seeing that it is implemented immediately, is narrower than the State Defendant's general interest in administering the program and seeing that it is ultimately upheld. Indeed, Applicant-Parents' interest is rooted in their fundamental liberty interest in directing the education and upbringing of their own children, an interest the State Defendant does not, and could not, share. *See Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925) (recognizing as fundamental the liberty interest of parents and guardians "to direct the upbringing and education of children under their control").

Finally, if the presumption of adequacy did apply more broadly, especially the crabbed "both parties seek to have the law upheld" test suggested here by Plaintiffs, it would clash with the liberal nature of intervention as of right. *Arakaki*, 324 F.3d at 1083 (recognizing that intervention as of right is construed liberally in favor of applicants). Applying Plaintiffs' version of the presumption of adequacy test to every proposed intervention would also directly contradict the U.S. Supreme Court's holding that a proposed intervenor's burden in showing inadequate representation is "minimal" and can be satisfied with a demonstration that the existing party's representation "may be" inadequate. *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972), *cited in Arakaki*, 324 F.3d at 1086. And, just like the U.S. Supreme Court, the Nevada Supreme Court does not require a recitation of specific examples of precisely how an applicant-intervenor's legal strategy and/or arguments will differ from the existing parties. It is enough to show that that representation by existing parties "may be" inadequate. *Lundberg v. Koontz*, 82 Nev. 360, 363, 418 P.2d 808, 809 (1966).

Thus, as demonstrated more fully below, Applicant-Parents should be granted intervention as of right because the State Defendant does not, or at the very least may not, adequately represent their interests.

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that a previous group of beneficiary parents had been granted intervention, which justified denial of intervention to a second such group).

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A. The Ninth Circuit's presumption of adequacy of representation does not apply in this case because the Applicant-Parents' interests are narrower than the State Defendant's interest and distinct from the interest of the general public.

The Ninth Circuit applies a presumption of adequacy of representation by a state defendant in instances where either (1) the proposed intervenor's interests are the same as the state's interest; or (2) the proposed intervenors' interests are identical to the interests of citizens generally, as opposed to some narrower personal interest. *Arakaki*, 324 F.3d at 1086. But, as the Ninth Circuit itself pointed out in *Arakaki*, representation of an applicant-intervenor's interest by existing parties is inadequate when "the intervenors' interests are narrower than that of the government." *Id.* at 1087. Here, Applicant-Parents' interests are narrower than State Defendant's interest. The *Arakaki* case and its progeny are thus inapposite because the presumption of adequacy does not apply in cases, such as this one, where the applicant-intervenor's interests are narrower than the state's interest.

As the intended beneficiaries of the challenged Education Savings Account Program, Applicant-Parents' interests are different from those of the general public—they do not have merely a general interest in seeing the law upheld, but a specific interest in preserving the opportunities afforded by the act to their kids. As such, Applicant-Parents' interest are narrower—and far more urgent—than the State Defendant's interest. This is due to the fact that Applicant-Parents' children, some of whom are already in high school, need an educational lifeline *now*. Applicant-Parents thus possess immediate, as well as long-term, interests in the case. The State Defendant has no comparable immediate or short-term interest. Applicant-Parents also have a unique liberty interest, described more fully below, in preserving an educational lifeline throughout the course of the litigation. Applicant-Parents thus possess unique interests at every stage of this litigation. In fact, the Plaintiffs' promised motion for preliminary injunction, Opp'n 5, perfectly illustrates the Applicant-Parents' and the State Defendant's divergent interests. If the Education Savings Account Program is preliminarily enjoined, it is Applicant-Parents and their children who will suffer harm because they would be immediately cut off from access to the Program while the case works its way to the Nevada

Supreme Court. The State Defendant's harm, for example by being halted from performing his administrative functions, would pale in comparison to the potentially permanent loss of educational options for Applicant-Parents' oldest children and the months or years their younger children would languish in schools that have demonstrably failed to meet their educational needs.

In *Forest Conservation Council v. U.S. Forest Service*, 66 F.3d 1489 (9th Cir. 1995), it was precisely the applicant-intervenors' particular interest in defending against the threat of a broad injunction that led the Ninth Circuit to grant intervention as of right. In that case, the State of Arizona and Apache County moved to intervene in an environmental lawsuit that sought to enjoin the U.S. Forest Service's management activities in certain federal lands pending completion of an environmental impact report. *Id.* at 1491–92. The Ninth Circuit held that the state and county, with their "more narrow, parochial interests" in managing adjacent state lands and realizing profits from timber sales were not adequately represented by the U.S. Forest Service—which was merely interested in complying with federal law, whether or not that meant its management activities were enjoined. *Id.* at 1499, *abrogated on other grounds by Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011).[4] Put simply, the state and county had narrower interests than did the federal agency. The same is true here.

Indeed, the Ninth Circuit cases cited by Plaintiffs are distinguishable because, in those cases, the proposed intervenors' interest was the same as the government's interest. *PEST Comm. v. Miller*, 648 F. Supp. 2d 1202, 1213 (D. Nev. 2009) ("There is simply no indication from the record currently before the Court that the Secretary's and the Proposed Intervenors' interests are different."), *aff'd on other grounds*, 626 F.3d 1097 (9th Cir. 2010); *see also Prete v. Bradbury*, 438 F.3d 949, 957 (9th Cir. 2006) (finding adequacy of representation when the *only* shared interest of proposed intervenors—a public interest group and its president, as

[4] *Wilderness Society* underscores why Applicant-Parents should be allowed to intervene. That case abolished, as inconsistent with FRCP 24, the so-called "federal defendant" rule which had previously prohibited private parties and state and local governments from intervening as of right on the merits of NEPA claims. 630 F.3d at 1179.

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opposed to individuals seeking to protect their own liberty interests—was to defend the constitutionality of a law); *Gonzalez v. Arizona*, 485 F.3d 1041, 1051–52 (9th Cir. 2007) (applying *Prete* in the context of a public interest group whose interests were identical to the public at large). And in *People's Legislature v. Miller*, No. 2:12-cv-00272-MMD-VCF, 2012 WL 3536767, at *4 (D. Nev. Aug. 15, 2012), intervention as of right was denied because the proposed intervenors did not possess an interest that was any different from "all Nevada citizens." As straightforward applications of the *Arakaki* "presumption of adequacy" prongs—prongs that are not met here—these four cases are not applicable to Applicant-Parents' Motion to Intervene.

Two of the out-of-circuit cases cited by Plaintiffs are inapposite for a different reason. Namely, they turn not on adequacy of representation, but rather the applicants' lack of a significantly protectable interest in the litigation. In *Kane County v. United States*, 597 F.3d 1129, 1132 (10th Cir. 2010), the Tenth Circuit quoted at length the district court's finding that an environmental group had no legal interest in the resolution of a quiet title action brought by Kane County, Utah, against the federal government over which entity held title over two roads crossing federal land. And in *Keith v. Daley*, 764 F.2d 1265, 1269 (7th Cir. 1985), the Seventh Circuit rejected all three interests claimed by a pro-life group applying for intervention in an abortion case, holding that neither their interest as lobbyists, as representatives of the unborn, nor as an organization representing members who adopt children who survive abortions conferred an interest recognized as protectable under the law as it stood. But as Plaintiffs concede, Applicant-Parents have a significantly protectable interest in the outcome of this case. Opp'n 5. Thus, these two cases do nothing to further Plaintiffs' argument.

Plaintiffs do cite two seemingly persuasive cases from the Fifth Circuit. *See Ingebretsen ex rel. Ingebretsen v. Jackson Public Sch. Dist.*, 88 F.3d 274, 280–81 (5th Cir. 1996) (finding a group of applicants for intervention adequately represented by the Mississippi Attorney General in a challenge to a statute legalizing voluntary prayer at compulsory and noncompulsory school events because applicants intended to assert the same general right to free exercise of religion and free speech); *Hopwood v. Texas*, 21 F.3d 603, 606 (5th Cir. 1994) (affirming denial of

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intervention to applicants interested in the challenged affirmative-action policy at the University of Texas School of Law).[5] However, both of these cases are thoroughly undermined by a more recent Fifth Circuit case, decided just last year, *Brumfield v. Dodd*, 749 F.3d 339, 346 (5th Cir. 2014) (reversing denial of parents' motion to intervene in a case involving an educational-choice program because the parents met the requirements for intervention as of right).

Brumfield makes crystal clear that the presumption of adequacy of representation does not apply in the educational-choice context—and thus does not stand in the way of Applicant-Parents' intervention as of right. In *Brumfield*, the United States sought, under a desegregation order dating back to 1975, to require the State of Louisiana to submit to judicial oversight of scholarship funds to private schools awarded under a voucher program. *Id.* at 340. Interested parents, such as the parents in this case, moved to intervene as of right, but were denied by the district court. The Fifth Circuit reversed, noting that under circuit precedent, the presumption of adequacy of representation "'arises when the would-be intervenor has the same ultimate objective as a party to the lawsuit,' in which event 'the applicant for intervention must show adversity of interest, collusion, or nonfeasance on the part of the existing party to overcome the presumption.'"[6] *Id.* at 345 (quoting *Edwards v. City of Houston*, 78 F.3d 983, 1005 (5th Cir. 1996)). The Fifth Circuit found that the presumption did not apply, even though both the state and the parents vigorously opposed judicial oversight of the voucher program, because the

[5] Moreover, *Hopwood* is squarely at odds with the Sixth Circuit's handling of identical facts in *Grutter v. Bollinger*, 188 F.3d 394, 400–01 (6th Cir. 1999) (disapproving *Hopwood*'s presumption of adequate representation as incompatible with the "minimal" burden required by the Supreme Court in *Trbovich*).

[6] The Fifth Circuit's adequacy of representation test is markedly different from, and more stringent than, the Ninth Circuit's *Arakaki* test for adequacy of representation. The only Ninth Circuit anomaly is *Freedom from Religion Foundation v. Geithner*, 644 F.3d 836, 844 (9th Cir. 2011) (denying intervention to a minister in a case challenging federal and state parsonage exemptions), which misapplies the *Arakaki* test in a manner that is similar to the Fifth Circuit's more rigid test. Yet, in *Brumfield*, under the clearly stricter of the two tests, parents were permitted to intervene as of right to protect their interests in the voucher program.

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parents' and the state's interests "*may* not align precisely." *Id.* at 345 (emphasis added). The Fifth Circuit explained that "it is not evident that the ultimate-objective presumption of adequate representation even applies because the state has more extensive interests to balance than do the parents." *Id.* at 346. As such, the Fifth Circuit did not hesitate to declare that "the parents have easily met their minimal burden," even though the Circuit Court could "[]not 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." *Id.* This was because the parents' narrower interest created a "lack of unity in all objectives," that, when "combined with real and legitimate additional or contrary arguments," was "sufficient to demonstrate that the representation *may* be inadequate." *Id.*; *see also Sw. Ctr. for Biol. Diversity v. Berg*, 268 F.3d 810, 823–24 (9th Cir. 2001) (finding inadequate representation because "[o]n some issues Applicants will have to express their own unique private perspectives," and reversing denial of intervention as of right); *N.Y. Public Interest Research Grp., Inc. v. Regents of Univ. of N.Y.*, 516 F.2d 350, 352 (2d Cir. 1975) (holding that an intervenor demonstrates inadequate representation when he would make a "more vigorous presentation" of a side of an argument than the government defendant).

Finally, Applicant-Parents' interests are rooted in a fundamental liberty interest not possessed by the State Defendant. Applicant-Parents have a fundamental, and thus certainly a compelling, interest in their liberty, as parents and guardians, "to direct the upbringing and education of children under their control." *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925) ("The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only."). This liberty interest has been repeatedly held to be fundamental by the U.S. Supreme Court. *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion) ("The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court."); *Meyer v. Nebraska*, 262 U.S. 390, 399–401 (1923) ("[The Fourteenth Amendment] denotes not merely freedom from bodily restraint but also the right of

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the individual to . . . establish a home and bring up children . . . . [T]he individual has certain fundamental rights which must be respected."). By its very nature, the government cannot share this interest. This challenge to Nevada's Education Savings Account Program implicates liberty interests that the State does not have and cannot assert. The fact that it is the Applicant-Parents who possess this fundamental liberty interest, and not the State Defendant, renders the government utterly incapable of adequately representing Applicant-Parents in this case.

B. Applicant-Parents more than adequately meet the U.S. and Nevada Supreme Court's minimal burden that the State Defendant's representation "may be" inadequate.

Ultimately, the question is not whether Applicant-Parents can prove at this juncture that the State Defendant's representation will be inadequate, but whether they have made a minimal showing that it "may be" inadequate. *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972); *Lundberg v. Koontz*, 82 Nev. 360, 363, 418 P.2d 808, 809 (1966). Applicant-Parents have already detailed the numerous ways in which parents and state defendants have differed in their legal arguments and strategies in other educational-choice cases nationwide. Mot. Intv. 18. Those previous examples alone suffice to meet Applicant-Parents' "minimal" burden. *Trbovich*, 404 U.S. at 538 n.10. However, those examples are only the tip of the spear. As mentioned in the summary of the argument, in *Hart v. North Carolina*, No. P14-659 (N.C. Ct. App. Sept. 19, 2014), it was the intervenor-parents who obtained a partial staying of a lower court injunction where the government defendant declined to pursue a stay, thus allowing parents' children to participate in the program. In Colorado, it was the intervenor-parents, rather than the government defendants, who ensured that an important federal question was preserved on appeal. *Taxpayers for Public Educ. v. Douglas Cnty. Sch. Dist*, 351 P.3d 461, 473–75 (Colo. 2015) (rejecting intervenors' argument that excluding religious schools from an otherwise neutral school choice program violates the federal constitution). And in *Cain v. Horne*, it was the intervenor-parents who sought to preserve the status quo with Arizona's Supreme Court—and the operation of two publicly funded scholarship programs—after the court of appeals declared the programs unconstitutional and the state defendant made known his

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intention to halt the program, even in the absence of an injunction. *Cain*, 202 P.3d 1178, 1185 n.5 (Ariz. 2009) ("On June 27, 2008, we granted the intervenors' 'Motion for Order Preserving Status Quo' to permit the Superintendent of Public Instruction to continue to fund the voucher programs as to children who participated in the programs during the 2007-2008 school year and who applied to participate in the programs for 2008-2009."). While it may not be readily apparent at this stage of the proceeding whether the State Defendant "will" fail to adequately represent Applicant-Parents' interests, it is certainly the case that the State Defendant "may" fail to adequately represent the Applicant-Parents' narrower interests. *See Brumfield*, 749 F.3d at 346 (holding that the applicant-parents in a very similar case "easily met their minimal burden" even though the court could "[]not 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").

Having carried their burden to demonstrate that the existing parties do not adequately represent their distinct interests in this case, this Court should grant Applicant-Parents' Motion to Intervene as of right.

III. EVEN IF THIS COURT DETERMINES THAT THE STATE DEFENDANT ADEQUATELY REPRESENTS APPLICANT-PARENTS' INTERESTS, THEY SHOULD BE GRANTED PERMISSIVE INTERVENTION BECAUSE THEY WILL NOT UNDULY DELAY THIS CASE OR PREJUDICE THE EXISTING PARTIES' RIGHTS.

Plaintiffs concede that Applicant-Parents meet the "basic criteria" for permissive intervention—meaning that this Court is fully within its right to grant Applicant-Parents' motion—and argue only that Applicant-Parents' presence will unduly delay or prejudice the adjudication of the case. Opp'n 12 (citing NEV. R. CIV. P. 24(b)(2)). Plaintiffs' argument sells short Applicant-Parents' overwhelming interest in seeing this matter resolved quickly.[7] Even if Applicant-Parents' participation did cause delay, which it will not, "delay in and of itself does

[7] Indeed, Applicant-Parents filed their motion to intervene and proposed answer before the State Defendant entered an appearance. This undermines Plaintiffs' claim that Applicant-Parents' participation will cause delay. Opp'n 12–13.

not mean that intervention should be denied." 7C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1913 n.17 (3d ed.). Rule 24 "requires the court to consider whether intervention will 'unduly delay' the adjudication" and then "must balance whatever delay may occur against the advantages of the disposition of all the claims or defenses in one action." *Id.* Plaintiffs' assertion that Applicant-Parents' involvement "adds no new information or interest to the case," Opp'n 13, rings especially hollow. Plaintiffs' arguments are also undermined by their failure to acknowledge that Rule 24 traditionally receives liberal construction in favor of applicants for intervention. *See, e.g.*, *My Home Now, LLC v. Bank of Am., N.A.*, No. 2:14-cv-01957-RFB-CWH, 2015 WL 4276100 (D. Nev. July 13, 2015) ("Rule 24 traditionally receives liberal construction in favor of applicants for intervention." (quoting *Arakaki*, 324 F.3d at 1083)).

In addition to meeting Rule 24(b)(2)'s "basic criteria, several other factors weigh in Applicant-Parents' favor. Applicant-Parents, and their counsel, are uniquely positioned to aid the court in ruling on the constitutionality of the challenged Education Savings Account Program. As noted in Applicant-Parents' Motion, and acknowledged by Plaintiffs in their opposition brief, parents and children with an interest in seeing educational choice programs upheld have successfully intervened in 23 educational-choice cases. Mot. 18; Opp'n 11. Plaintiffs were not able to cite to a single case in which parents were denied intervention. Applicant-Parents' counsel take seriously their obligation to help the court reach a legally sound decision and have always worked to resolve cases on the merits as quickly as possible.

Plaintiffs correctly note that intervention was unopposed in some of these cases. Opp'n 11; *see also Duncan v. State*, No. A-15-723703-C (Nev. Dist. Ct. Clark Cnty. filed Aug. 27, 2015) (intervention by the same Applicant-Parents, Hairr, Espinoza, Robbins, Allen, and Smith, unopposed by the plaintiffs in a separate constitutional challenge to Nevada's Education Savings Account Program raising at least one common issue); *Boyd v. Magee*, No. 03-CV-2013-901470 (Ala. Cir. Ct. Montgomery Cnty. Oct. 21, 2013) (order granting unopposed

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motion to intervene).[8] But far from undermining Applicant-Parents' motion to intervene, this fact *supports* Applicant-Parents' case for intervention. Plaintiffs in those cases recognized that the parents who stood to benefit from the challenged educational-choice programs brought a unique set of interests which could be heard without detracting from the court's ability to protect the plaintiffs. Recently, plaintiffs' counsel have begun opposing intervention. However, to date, every case in which there was a contested motion to intervene, the parents have been allowed to intervene. *See, e.g., Citizens for Strong Schs., Inc. v. Fla. State Bd. of Educ.*, No. 09-CA-4534 (Fla. Cir. Ct. 2d Oct. 6, 2014) (order granting motion to intervene); *Meredith v. Daniels*, No. 49D07-1107-PL-025402 (Ind. Super. Ct. Marion Cnty. Aug. 4, 2011) (same); *Duncan v. State (N.H.)*, No. 219-2013-CV-00011 (N.H. Super. Ct. Strafford Cnty. Feb. 20, 2013) (same); *Hart v. State*, No. 13 CVS 16771 (N.C. Super. Ct. Wake Cnty. Mar. 13, 2014) (same); *Richardson v. State*, No. 13 CVS 16484 (N.C. Super. Ct. Wake Cnty. Mar. 13, 2014) (same); *Brumfield*, 749 F.3d at 346 (overturning denial of motion to intervene as of right).

Plaintiffs cite several cases arguing against permissive intervention, but none support their proposition that allowing Applicant-Parents to intervene here will unduly delay resolution of this case or prejudice their rights. Thus, in *Perry v. Schwarzenegger*, 630 F.3d 898, 905–06 (9th Cir. 2011), permissive intervention was denied because "the specific interest Movants claimed . . . would require them to have standing" to appeal, which they lacked. While standing to appeal is not at issue in this case, Applicant-Parents would possess the same standing as Plaintiffs, who are also parents and who rely on their status as parents of children currently attending public school to establish their alleged harm. *See* Compl. ¶¶ 8–14, 16. The applicants in *Kane County v. United States*, 597 F.3d 1129, 1132 (10th Cir. 2010), also discussed above, lacked the requisite interest in the dispute between a county and the federal government. But Plaintiffs here concede Applicant-Parents possess the necessary interest to support both intervention as of right and permissive intervention. Opp'n 5, 12. And in *Perry v. Proposition*

[8] Applicant-Parents' counsel were not involved in *Alabama Education Ass'n v. James*, 373 So. 2d 1076 (Ala. 1979).

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8 Official Proponents, 587 F.3d 947, 955–56 (9th Cir. 2009), the Ninth Circuit, consistent with its standards for when one party adequately represents an applicant intervenor's interests, also denied permissive intervention to a group whose interests were identical to those of an earlier group of intervenors. *Cf. Arakaki*, 324 F.3d at 1087–88.

The closest Plaintiffs come to hitting the mark is *California v. Tahoe Regional Planning Agency*, 792 F.2d 775, 779 (9th Cir. 1986). But that case involved an already-crowded courtroom where "the cumulative effect of the representation of all existing parties" covered every one of the applicants' interests in the litigation. *Id.* The single State Defendant in this case does not share Applicant-Parents' interest in the Education Savings Account Program. There are also no other parties seeking to intervene in this case. There is ample space for Applicant-Parents to participate.

Rather than hinder the litigation, Applicant-Parents and their counsel can be of significant assistance to this Court. *See Ass'n of Conn. Lobbyists LLC v. Garfield*, 241 F.R.D. 100, 103 (D. Conn 2007) (finding that "additional briefing and argument will only help to facilitate a speedy, fair and accurate resolution of the case"). The Applicant-Parents can also help develop any requisite factual record, such as whether the Education Savings Account Program serves an "educational purpose[]." *See, e.g.*, Compl. ¶¶ 36–42 (alleging that term "educational purposes" in Nev. Const. art. XI, § 3 means "common schools" and that therefore the Education Savings Account Program violates this provision). And Applicant-Parents' counsel can assist the Court's understanding of the historical context in which the Education Article was drafted, as they have done in other educational choice cases. *See, e.g.*, *Hart v. State*, 774 S.E.2d 281, 287 n.8, 288–89 (N.C. 2015) (noting historical purpose of Civil War-era provision in North Carolina Constitution requiring faithful appropriation of state funds for "uniform system of free public schools"); *Kotterman v. Killian*, 972 P.2d 606, 624–25 (Ariz. 1999) (reflecting intervenors' arguments distinguishing similar provisions in the Arizona and Washington Constitutions); *see also Schaghticoke Tribal Nation v. Norton*, No. 3:06cv81, 2006 WL 1752384, at *9, 2006 U.S. Dist. LEXIS 42643, at *27 ("The Movants' experience with these issues and full participation up to this point with [sic] help to provide the Court with a full

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picture of the issues to be decided and will permit the issues to be fully and thoroughly evaluated in an efficient, just, and speedy manner.").

IV. CONCLUSION

Because Applicant-Parents' interests are not adequately represented by the State Defendant in this litigation, and because Applicant-Parents meet the remaining requirements of Nevada Rule of Civil Procedure 24(a), they are entitled to intervene in this action as of right. Alternatively, this Court should exercise its discretion and grant Applicant-Parents permissive intervention.

Respectfully submitted this 14th day of October, 2015 by:

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of HUTCHISON & STEFFEN, LLC and that on this 14th day of October, 2015, I caused the above and foregoing document entitled **REPLY MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE** to be served as follows:

- ☒ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and/or
- ☐ to be served via facsimile; and/or
- ☐ to be electronically served, with the date and time of the electronic service substituted for the date and place of deposit in the mail; and/or
- ☐ to be hand-delivered;

to the attorneys and/or parties listed below at the address and/or facsimile number indicated below:

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FIRST JUDICIAL DISTRICT COURT

IN AND FOR CARSON CITY, NEVADA

REC'D & FILED

2015 OCT 20 PM 2:56

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DEPUTY

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,

vs.

DAN SCHWARTZ, IN HIS OFFICIAL CAPACITY AS TREASURER OF THE STATE OF NEVADA,

Defendant.

Case No. 150C002071B

Dept. No.: II

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND POINTS AND AUTHORITIES IN SUPPORT THEREOF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

NEVADA CASES

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

MOTION

Pursuant to Nevada Rule of Civil Procedure 65, Plaintiffs hereby seek a preliminary injunction, enjoining Defendant, Dan Schwartz, in his official capacity as Treasurer of the State of Nevada, from implementing Senate Bill 302 on the grounds that Senate Bill 302 violates Article XI of the Nevada Constitution.

POINT AND AUTHORITIES

I. INTRODUCTION

From its founding, Nevada has recognized that a primary duty of the Legislature is to provide for the public education of Nevada's children. This duty is enshrined in the Nevada Constitution, which mandates that the Legislature maintain a uniform system of common schools, sufficiently fund that uniform system as the first appropriation of every biennium budget, and use the funds appropriated for the public schools solely for that purpose.

In its last legislative session, the Nevada Legislature passed Senate Bill 302 (See Exhibit 1 to Clancy Declaration,) ("SB 302" or the "voucher law").[1] This law authorizes the State Treasurer to divert funds from public schools to private accounts, called Education Saving Accounts ("ESAs"), to pay for a wide array of non-public education expenses, including private school tuition, tutoring, home-based education curriculums, and even transportation. SB 302 violates Article XI of Nevada Constitution (the "Education Article") on three separate grounds and must be enjoined:

First, the Nevada Constitution, Article XI, sections 3 and 6, expressly prohibits the transfer of funds appropriated for the operation of the public schools to any other use. This is exactly what occurs under SB 302—each individual ESA represents a direct diversion of public school funds from Nevada's public schools to private purposes. As the Legislative Counsel's Digest on SB 302 explains, "the amount of the [ESA] must be deducted from the total apportionment to the resident school district of the child on whose behalf the grant is made." SB 302, Legislative Counsel's

[1] A copy of SB 302 is attached to the Declaration of Thomas Clancy (hereinafter "Clancy Declaration") as Exhibit A.

Digest. Because SB 302 diverts funds allocated for the public schools to private uses, the voucher law, on its face, violates the Education Article of the Nevada Constitution.

Second, Article XI, section 6, of the Nevada Constitution mandates that the Legislature appropriate the funds it "deems sufficient" to fund the public education system first before any other budget appropriation is enacted. The Legislature did just that in the last legislative session. However, through SB 302, it then directed the State Treasure to reduce the amounts provided to public schools by the amounts deposited in private ESAs. Deductions from the amount deemed sufficient by the Legislature to operate the public schools necessarily depletes the pool of funds below the amount deemed sufficient to do so. Because SB 302 reduces the funds appropriated by the Legislature as sufficient to maintain and operate the public schools, the voucher law, on its face, violates the Education Article of the Nevada Constitution.

Third, Article XI, section 2, of the Nevada Constitution mandates that the Legislature establish a "uniform system of common," or public, schools. Public schools must educate and be free and open to all children, regardless of their religious beliefs, socioeconomic status, academic achievement, ELL status, disability or special needs. In contrast, private schools and other private entities accepting funds under SB 302 need not be open to all children and may discriminate on the basis of a student's personal characteristics, including household income, academic performance or other factors. Likewise, private schools and other private entities accepting funds under SB 302 do not have to implement the established curriculum, teaching standards, testing regimen or other education requirements applicable to all public schools across the state enacted by the Legislature to maintain uniformity in Nevada's public school system. By funding both public schools *and* private entities that are exempt from non-discrimination requirements as well as the educational performance and accountability measures mandated by the Legislature, SB 302 directly undermines the maintenance of a "uniform system." For this third reason, the voucher law, on its face, violates the Education Article of the Nevada Constitution.

Nevada courts have held that violation of the Nevada Constitution alone constitutes sufficient irreparable harm to warrant an injunction. Even if this were not the case, irreparable injury will plainly result here if the voucher law is not enjoined. Public school districts across the

state are faced with the imminent threat of losing guaranteed funding allocated by the Legislature to support and maintain the operation of their schools. This reduction in funding will impede the districts' ability to provide essential educational resources to students. As the State Treasurer deducts funding during the school year, districts will be compelled to reduce their budgets on a continuing basis—causing instability and disruption of basic educational programs and services. Students will be negatively impacted by increased class sizes, reductions in resources, reduced programming, lack of building maintenance, and other like harms. Public school children will not get this instructional time back, impairing their basic Constitutional right to a public education. The harms to that right resulting from SB 302's implementation are significant and cannot be remedied by money damages.

This court should declare the voucher law unconstitutional under the Education Article and issue a preliminary injunction forthwith to enjoin implementation by the State Treasurer.

II. BACKGROUND

A. Nevada Public School Funding

From the outset, the Nevada Constitution has placed a high priority on public education. As one of the drafters of the Constitution explained in the 1864 Constitutional debate, "[t]ime will not permit, nor is it necessary that I should recapitulate the arguments which have already been urged to show that among the first and the highest duties of the State, is the duty of educating the rising generation." Clancy Declaration, Exhibit 2, OFFICIAL REPORT OF THE DEBATES AND PROCEEDINGS IN THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEVADA (hereinafter "DEBATES AND PROCEEDINGS") at 587-88, 591-93. Likewise, in his inaugural speech to the Legislature of Nevada, Henry Blasdel, the First Elected Governor of Nevada, stated:

> The fundamental law of the State imposes on you the duty of providing for a uniform system of common schools . . . . The advantages accruing to the body politic arising from an educated, well-informed thinking population, must be obvious to those into whose hands our people have confided the law-making power. Universal education is no longer an experiment of doubtful policy . . . . Under that liberal and enlightened system of government which pervades all our institutions and which guarantees to every citizen, however humble his station in life, a voice in the management and direction of State affairs, too much importance cannot be attached to a judicious inauguration of that system, which is to have such an

> important bearing upon the future prosperity and reputation of the State. I conjure you therefore, to give your early and earnest attention to this subject . . . .

Clancy Declaration, Exhibit 3, First Annual Message of H.G. Blasdel, Governor of the State of Nevada (1864).

Consistent with this high duty, the Nevada Constitution mandates that "[t]he legislature shall provide for a uniform system of common schools . . . ." NEV. CONST. art. XI, § 2. The Constitution specifies revenue streams that are to be pledged to the public schools and "must not be transferred to other funds for other uses." *Id.* at § 3. The Constitution further mandates that "the legislature shall provide for support and maintenance [of the common schools] by direct legislative appropriation from the general fund . . . ." *Id.* at § 6(1). These appropriations must provide the funding the Legislature "deems to be sufficient," to "fund the operation of the public schools in the State" first "before any other appropriation is enacted." *Id.* at § 6(2).

The Nevada Legislature provides funding for the public school system through the "Nevada Plan." Under the Nevada Plan, the Legislature determines for each biennium[2] the amount of funding sufficient to operate the public schools and guarantees that amount to school districts. This amount—the basic support guarantee—is funded by the Legislature through a combination of state monies appropriated to the State's Distributive School Account ("DSA") and mandated local taxes. The DSA is comprised, amongst other sources, of money derived from interest on the State Permanent School Fund pursuant to Article XI, section 3, of the Nevada Constitution and the appropriations of state revenue made by the Legislature each biennium for the operation of Nevada's public schools pursuant to Article XI, section 6, of the Nevada Constitution. NRS 387.030. The Nevada Plan requires the State to make quarterly payments to school districts from the DSA. NRS 387.121, 387.1235. Through the Nevada Plan, the State guarantees the amount it deems sufficient to operate the public schools and provides the funding for that amount as the first priority in the biennium State budget.

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[2] Art. XI, section 6.6, defines "biennium" as "a period of two fiscal years beginning on July 1 of an odd-numbered year and ending on June 30 of the next ensuing odd-numbered year."

The Legislature's stated objective in funding public schools through the Nevada Plan is "to ensure each Nevada child has a reasonably equal educational opportunity." NRS 387.121. Further, the Legislature recognizes, through the Nevada Plan, the State's obligation to supplement "local financial ability to whatever extent necessary in each school district to provide programs of instruction in both compulsory and elective subjects that offer full opportunity for every Nevada child to receive the benefit of the purposes for which public schools are maintained." *Id.*

Pursuant to its Constitutional obligation, the Legislature passed Senate Bill 515 ("SB 515")—its enactment of the Nevada Plan for the 2015-2017 biennium—and appropriated the funds it deemed sufficient for the operation of the Nevada public schools for the student population reasonably estimated for the biennium. SB 515 establishes the statewide average basic support per public school pupil for 2015-16 at $5,710. SB 515 § 1. In enacting SB 515, the Legislature explained the bill's purpose was to "ensur[e] sufficient funding for K-12 public education for the 2015-2017 biennium." SB 515.

B. SB 302's Diversion of Public School Funds to Private Purposes

During the same Legislative session, the Legislature also enacted SB 302, which was signed into law on June 2, 2015. SB 302 authorizes the transfer of the Legislature's biennial appropriations for the operation of Nevada public schools from those schools into private ESAs.

Any child who enrolls in a public school for 100 consecutive days may establish an ESA. SB 302 § 7. The 100-day requirement need be met only once in the child's academic career in order for that child to obtain funding every year until he or she matriculates, drops out, or leaves the state. *Id.* Under the current proposed regulations, part time or full time enrollment will satisfy the 100-day requirement, and a student who attended public school in 2014-2015 is eligible for an ESA. Clancy Declaration, Exhibit 4, Second Revised Proposed Regulations of the State Treasurer at § 9.4. Further, a child currently enrolled in private school may become eligible by enrolling in just one public school class for 100 days. *Id.* Likewise, a child can attend a public kindergarten

for 100 days, withdraw to attend private school, and receive a state funded voucher for the next thirteen years. *Id.*; SB 302 § 7.6.[3]

When an ESA is established, SB 302 requires the State Treasurer to deposit into the ESA an amount equal to 90 percent of the statewide average basic support guarantee per pupil, or $5,139 per pupil for the 2015-16 school year. SB 302 § 8(2). For children with disabilities and children in a household with an income of less than 185 percent of the Federal poverty level, the State Treasurer must transfer 100 percent of the statewide average basic support guarantee per pupil, or $5,710 for 2015-16. *Id.*

The total amount of the basic support guarantee transferred to the ESAs is deducted from the funding appropriated by the Legislature for the operation of the school district in which the eligible children reside. Specifically, the statute directs the State Treasurer to deduct "all the funds deposited in education savings accounts established on behalf of children who reside in the county" from the school district's "apportionment" of the legislatively appropriated funding "computed on a yearly basis." SB 302 § 16.1; *see also* SB 302, Legislative Counsel's Digest ("the amount of the [ESA] must be deducted from the total apportionment to the resident school district of the child on whose behalf the grant is made."). As such, each ESA established represents a loss to the public school district of the basic support guarantee amount, that is, either $5,139 or $5,710 per year.

C. SB 302's Funding of Non-Uniform Private Schools

SB 302 authorizes the most expansive voucher program in the nation. Declaration of Christopher Lubienski as Exhibit B ("Lubienski Declaration") at ¶ 9 (noting that "no other program in the [United States] comes anywhere near" Nevada's expansiveness). Other state voucher programs are targeted at low income students, those from underperforming schools,

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[3] Indeed, Senator Scott T. Hammond, SB 302's sponsor, has indicated his belief that the law was intended to allow kindergartners to collect their ~$5000 ESA subsidy for 13 years without meeting any attendance requirements. Clancy Declaration, Exhibit 5, Statement of Senator Hammond, Sponsoring Senator of SB 302, at Public Hearing (July 17, 2015) at 47 ("I just want to say that—the intent of the bill, actually from the very beginning was to allow for kindergarten—people coming into kindergarten to choose. So, these are students who are not yet on the rolls.")

and/or are capped by a limit on the number of vouchers available or the total amount allocated for the program each year. *Id.* at ¶ 8, 10 (discussing numerous eligibility requirements other states impose for voucher recipients). SB 302 has no such limits. It does not impose any income threshold, hardship, school achievement, or academic requirement to receive an ESA. *See* Clancy Declaration, Exhibit 4, Second Revised Proposed Regulation of the State Treasurer, § 3(1)(b) (stating that the goal of SB 302 is to establish ESAs to "the largest number of children allowable"). SB 302 contains no cap on the total amount of funding that can be transferred from the public school districts to ESAs and it imposes no limit on the number of children who can receive an ESA in any given year.

SB 302 also makes almost no restrictions on the private use of funds deposited into ESAs by the State Treasurer. The law allows ESA funds to pay for a myriad of expenses far beyond private school tuition, such as tutoring, commercial tests, home-based education curriculum materials, and transportation to a private school or home-based education experiences. SB 302 § 9.1. The list of institutions and entities eligible to participate in the voucher program is also very broad, including private schools, universities, distance education programs, tutors, tutoring programs, and even parents themselves. SB 302 § 11.1. The only requirement in SB 302 for participating entities is that they administer a norm-referenced achievement assessment in mathematics and English/language arts each year. SB 302 § 12(1)(a).

SB 302 does not require private schools or other entities participating in the voucher program to meet the non-discrimination, educational performance, accountability or any other requirements established by the Legislature for the operation of Nevada's uniform system of public schools. Public schools, of course, cannot discriminate and must be open to all students without regard to religion, household income, disability, homelessness or transiency, immigrant status, English non-proficiency, academic or special needs. *See, e.g.*, NRS 388.450; 388.520; 388.405; 388.407. In contrast, private institutions receiving ESA funds diverted from public schools may refuse to admit, or otherwise discriminate against, students based on their personal and family characteristics, including household income and academic performance. *See generally* SB 302; *see also* Lubienski Declaration at ¶¶ 15-18 (stating that SB 302's lack of non-discrimination

requirements is "anomalous" and noting other states' myriad non-discrimination requirements). Private schools are not required to provide accommodations for students with disabilities. Further, SB 302 does not require private schools or other entities to accept the ESA amount ($5,139 or $5,710) as full tuition. Rather, private schools may continue to charge tuitions far exceeding that amount and deny entry to those unable to pay. *Id.* at ¶ 17 ("[N]othing in SB 302 prevents a private school from charging more than the ESA amount and denying entry to those who are unable to pay the full tuition amount.").

Private entities receiving ESA funds are also not required to meet the same academic requirements established by the Legislature for public schools. Nevada public schools are subject to numerous requirements regarding testing and curriculum. *See generally* NRS 389 *et seq.* (setting academic and testing standards for public schools). Private entities receiving ESA funding do not have to meet any such requirements. Indeed, private schools can operate in Nevada whether they are licensed by the state or not, NRS 394.211; approximately half of the private schools in the state are exempt from licensure. *See* Clancy Declaration, Exhibit 6, 2014-15 Private School Reports. Under SB 302, these non-licensed private schools can participate in the voucher program. SB 302 § 11(1)(a). Private schools and other participating entities are also not required to use a curriculum based on state-adopted curriculum content standards. SB 302's absence of educational performance and accountability requirements is anomalous when compared to other state voucher programs. Lubienski Declaration at ¶¶ 12-14 (explaining that other, more limited, voucher programs impose academic, curricular, and safety requirements for participating entities receiving voucher funds and that SB 302 is "anomalous" for its lack of such requirements).

D. Implementation of SB 302

The State Treasurer expects to open the application process for ESAs in January of 2016, and to begin disbursing funds in April of 2016. *See* Clancy Declaration, Exhibit 7, Office of the State Treasurer News Release (July 9, 2015), "Treasurer's Office Proposes Quarterly Enrollment Periods for Education Savings Accounts" (noting quarterly enrollment periods beginning in January 2016 with corresponding disbursement period of April 2016); *see also* Clancy Declaration, Exhibit 8, Education Savings Account – SB 302, Notice of Workshop, Aug. 21, 2015 at 108,

Statement of Chief of Staff Grant Hewitt (noting possibility of payments as early as January, but no later than April). The State Treasurer has already begun allowing applicants to pre-register for ESAs. *See* Clancy Declaration, Exhibit 9, Early Enrollment Form.

The Treasurer's office currently reports that over 3,500 have pre-registered for ESAs. *Id.* at Exhibit 10. If the Treasurer diverts funding away from the public schools for these 3,500 ESAs, he would deduct over $17.5 million from the public school districts budgets in the current school year. If the over 20,000 students already enrolled in private schools in Nevada each obtained an ESA, the yearly cost to Nevada's public schools under the voucher law would be over $102 million. The Treasurer's Office has estimated that full participation in the voucher program by both Nevada's private school and home-based education populations would result in the reduction of $200 million in public school district budgets. Clancy Declaration, Exhibit 8, Education Savings Account – SB 302, Notice of Workshop, Aug. 21, 2015 at 67, Statement of Chief of Staff Grant Hewitt (if all private and homeschooled children qualified for an ESA, "you'd have approximately a $200M []hole in the budget").

E. Procedural Background

On September 9, 2015, Plaintiffs—parents and children enrolled in the Nevada public schools—filed their Complaint, challenging the constitutionality of SB 302. On September 16, 2015, Putative Intervenor-Defendants filed a Motion to Intervene as Defendants and their putative Answer. On October 5, 2015, Plaintiffs filed their Opposition to the Motion to Intervene. The Reply was filed on October 15, 2015. That motion is pending.

III. ARGUMENT

A. Standard for Preliminary Injunction

Nevada Rule of Civil Procedure 65 provides this Court with the authority to issue a preliminary injunction here. By statute an injunction may issue:

> 1. When it shall appear by the complaint that the plaintiff is entitled to the relief demanded, and such relief or any part thereof consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually.

> 2. When it shall appear by the complaint or affidavit that the commission or continuance of some act, during the litigation, would produce great or irreparable injury to the plaintiff.
>
> 3. When it shall appear, during the litigation, that the defendant is doing or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual.

NRS 33.010.

Applying this statute, the Nevada Supreme Court has held that a preliminary injunction should issue "upon a showing that the party seeking it enjoys a reasonable probability of success on the merits and that the defendant's conduct, if allowed to continue, will result in irreparable harm for which compensatory damage is an inadequate remedy." *Dixon v. Thatcher*, 103 Nev. 414, 415, 742 P.2d 1029, 1029 (1987) (citing *Number One Rent-A-Car v. Ramada Inns*, 94 Nev. 779, 780, 587 P.2d 1329 (1978)); *Dangberg Holdings Nevada, L.L.C. v. Douglas Cnty. & Bd. of Cnty. Comm'rs*, 115 Nev. 129, 142, 978 P.2d 311, 319 (1999). In considering preliminary injunctions, courts may also weigh the potential hardships to the relative parties and others, and the public interest. *University and Community College System of Nevada v. Nevadans for Sound Government*, 120 Nev. 712, 721, 100 P.3d 179, 187 (2004).

B. Plaintiffs Are Likely To Prevail On The Merits

The rules of statutory construction apply to the interpretation of a Constitutional provision. As the Nevada Supreme Court has held, if a Constitutional provision "is clear and unambiguous," courts "will not look beyond the language of the provision but will instead apply its plain meaning." *Lorton v.* Jones, 322 P.3d 1051, 1054 (2014) (internal citations omitted); *see also In re Contested Election of Mallory*, 128 Nev. Adv. Op. 41, 282 P.3d 739, 741 (2012) (Nevada courts must "first look to the language itself and . . . give effect to its plain meaning."); *We the People Nev. ex rel. Angle v. Miller,* 124 Nev. 874, 881, 192 P.3d 1166, 1170 (2008) (same); *Kay v. Nunez,* 122 Nev. 1100, 1104, 146 P.3d 801, 804–05 (2006) (same).

Article XI of the Nevada Constitution affirmatively and unambiguously obligates the Legislature to establish, maintain and support a system of free and uniform public schools that all Nevada children are entitled to attend. The Nevada Supreme Court has recognized that Article XI

of the Nevada Constitution "clearly expresses the vital role education plays in our state," finding that

> [o]ur Constitution's framers strongly believed that each child should have the opportunity to receive a basic education. Their views resulted in a Constitution that places great importance on education. Its provisions demonstrate that education is a basic constitutional right in Nevada.

Guinn v. Legislature of Nev., 119 Nev. 277, 286, 71 P.3d 1269, 1275, *decision clarified on denial of reh'g Guinn v. Legislature of Nev.*, 119 Nev. 460, 76 P.3d 22 (2003), *overruled on other grounds by Nevadans for Nev. v. Beers*, 122 Nev. 930, 142 P.3d 339 (2006).

The Education Article, by its clear and unambiguous terms, contains mandatory directives to ensure the Legislature effectuates the "basic constitutional right" to education guaranteed to all Nevada children. First, the Legislature must specifically appropriate funds for the maintenance of the public schools and cannot use the funds appropriated for public education for any other purpose. Second, the appropriations must be an amount deemed to be sufficient by the Legislature to fund the operation of the public schools kindergarten through grade 12. Third, the Legislature must provide a system of public schools that is uniform throughout the state. SB 302 violates each of these explicit Constitutional mandates.

1. SB 302 Diverts Public School Funds From Public Schools to Private Purposes in Violation of Article XI, Sections 3 and 6, of the Nevada Constitution.

By its plain terms, the Education Article of the Nevada Constitution requires the Legislature to "provide for the[] support and maintenance" of the common or public schools "by direct legislative appropriation from the general fund." Nev. Const. art. XI, § 6.1. The appropriation for the public schools must occur "before any other appropriation is enacted to fund a portion of the state budget for the next ensuing biennium." Nev. Const. art XI, § 6.2. The direct legislative appropriation can only be used "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. XI, § 6.2. "Any appropriation of money enacted in violation of subsection 2. . . is void." Nev. Const. art. XI, § 6.5. Likewise, Article XI, section 3, specifies additional sources of funding for the public schools and also restricts the use of those

funds. Nev. Const. art. XI, § 3 (specifying funds "pledged for educational purposes" and stating that "the money therefrom must not be transferred to other funds for other uses").[4]

The debates of the founding delegates to the Nevada Constitutional Convention underscore the founders' intent that funds appropriated to the public schools be used only for that purpose. Delegates were specific that Article XI makes reference "only to public schools, and to the appropriation of the public funds . . . so that it has a direct reference to the public schools, and clearly cannot refer to anything else." DEBATES AND PROCEEDINGS at 568. Further, the delegates explained that that funds appropriated by the Legislature pursuant to Article XI were for "the support of good common schools . . . the support and encouragement of public instruction." *Id.* at 594. This Constitutional mandate is affirmed by statute. Nevada Revised Statute 387.045 provides 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." NRS 387.045.

Nevertheless, SB 302 explicitly authorizes the use of funds appropriated to the public schools for prohibited, non-public educational purposes. It directs the State Treasurer to transfer into private ESAs the basic support guarantee per-pupil funding appropriated by the Legislature for the operation of the school district in which the ESA-eligible child resides. SB 302 § 16.1 (school districts are entitled to their apportioned funds "minus . . . all the funds deposited in education savings accounts established on behalf of children who reside in the county"). This diversion of public schools funds is in direct contravention of the plain language and intent of Article XI, sections 3, 6.2, and 6.5 of the Nevada Constitution.

The Legislature apparently understood that SB 302 runs afoul of this constitutional mandate when it attempted to exclude ESAs from NRS 387.045 (prohibiting use of public school funding for other purposes). But this attempt is of no legal consequence. To the extent that NRS

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[4] The term "educational purposes" in Art. XI, section 3, refers specifically to the educational system of the state, comprised of the State university and the public schools. *See* DEBATES AND PROCEEDINGS at 579 (referring to Section 3 as a "public school fund" for the support of the State University and common schools); *see also State ex rel. Keith v. Westerfield*, 23 Nev. 468, 49 P. 119, 121 (1897) (rejecting argument that the term "educational purposes" in Article XI, section 3 applies beyond public education).

387.045 codifies the requirement in Article XI, sections 3 and 6, that public school appropriations are for the exclusive use of operating the public schools, the Legislature cannot by statutory enactment exempt itself from that clear constitutional mandate. *Whitehead v. Nevada Comm'n On Judicial Discipline*, 110 Nev. 128, 166, 906 P.2d 230, 254, *decision clarified on denial of reh'g*, 110 Nev. 380, 873 P.2d 946 (1994) (holding that the Legislature "may not authorize that which is forbidden by the Constitution.").

The Nevada Supreme Court has long held that Article XI prohibits the diversion of public school funding to other uses. *State ex rel. Keith v. Westerfield*, 23 Nev. 468 (1897) (holding that funds allocated to the general school fund are reserved solely for the public school system). As the Supreme Court explained, funds appropriated for the public schools under Article XI can only be used for "the support" of the public schools and no portion of those funds can be used to pay a non-public school employee "without disregarding the mandates of the constitution." *Id.* at 121. Payments of such funds for any other purpose are "unconstitutional, null and void" *Id.*;[5] *see also State ex rel. Wright v. Dovey*, 19 Nev. 396, 12 P. 910, 912 (1887) (holding that "neither the framers of the constitution nor the legislature intended to allow public–school moneys to any county for persons not entitled to attend the public schools therein . . . .").

SB 302 expressly authorizes the diversion of funds appropriated by the Legislature for the public schools, as well as funds set aside to the public schools pursuant to Section 3, to ESAs for private expenses. Such a diversion directly violates Article XI, sections 3 and 6.2, and is, therefore, "void."

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[5] The *Westerfield* court ultimately permitted the disputed payment out of the general fund rather than the school fund, reasoning that the Legislature would have passed the small appropriation at issue in that case ($45) even if taken out of the general fund. *Westerfield*, 49 P. at 121. The same cannot be said here. As the State Treasurer acknowledges, implementation of SB 302 could cost hundreds of millions of dollars, all of which will be deducted from the funding appropriated by the Legislature for the operation of the public schools. Clancy Declaration at Exhibit 8, p.67. There is simply no evidence in the legislative record on SB 302 to suggest that the legislature would have passed the voucher law if it required a substantial new appropriation from the general fund, instead of relying on the transfer of an unlimited amount of existing appropriations to the public schools made under Art. XI, section 6.2.

2. SB 302 Reduces Public School Funding Below the Level Deemed Sufficient by the Legislature in Violation of Article XI, Section 6, of the Nevada Constitution

Article XI, section 6, directs the Legislature to provide the appropriations it "deems to be sufficient," to fund the operation of Nevada's public schools for kindergarten through grade 12 for the next ensuing biennium. Nev. Const. art. XI, § 6.2. This provision was an amendment to the Constitution by a ballot initiative in 2006. *See* Clancy Declaration, Exhibit 11, State of Nevada, Statewide Ballot Questions, 2006. The stated purpose of this amendment was "to ensure funding of education be given the status intended" by the Constitutions' framers and to "substantially enhance[ ] Nevada's credibility as a stable environment for students and teachers." *Id.* at 4-5.

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. As a result, SB 302, is unconstitutional and, under Art. XI, section 6.5, void.

It cannot be disputed that deducting over $5,000 for each ESA from the funds appropriated and guaranteed to school districts will reduce that funding below the amount deemed sufficient by the Legislature to operate the public schools. This is simple math — each ESA decreases district funding by the amount deposited in the ESA. As discussed *supra* at II.D, the total reduction in the Legislative allocation of funding to districts under SB 302 is not inconsequential but substantial. Beyond this straightforward math, there are several additional reasons why the loss of funding triggered by SB 302 will reduce the funding and resources below that deemed to be sufficient by the Legislature in violation of Article XI, section 6.2.

First, SB 302 makes ESAs available to Nevada's current private school and home-schooled population. Students who never attended public school in the past can meet the 100-day requirement with a single public school class and begin to receive funds, drawing millions of dollars away from the public schools. *See* Section II.D, *supra*. These dollars are removed from the school districts without any reduction in the enrollment on which the Legislature based the sufficiency of the appropriations to operate the public schools. Thus, SB 302 will reduce the Legislature's appropriation of funds below what it has deemed to be sufficient to operate the public

schools for "kindergarten through grade 12 for the next ensuing biennium for the population reasonably estimated for that biennium." Art. XI, section 6.2.

Second, SB 302 fails to take into account that the amounts appropriated and "deemed to be sufficient. . . to fund the operation of the public schools," Art. XI, section 6.2, includes not only expenses that may vary due to changes in student enrollment, but also significant fixed costs. When a student obtains an ESA under SB 302 and no longer attends a public school, the school district loses the 90 or 100 percent of the amount of the guaranteed basic support yet retains the fixed costs of educating that student and all the other students remaining in the district's schools. Declaration of Paul Johnson as Exhibit C, CFO for White Pine County School District ("Johnson Declaration"), at ¶¶ 7-9 (stating that "if a student were to leave White Pine after obtaining an ESA," the district "would nevertheless maintain many of the fixed expenditures associated with educating that child" including teachers and "school counselors, school administrators, school resource officers, custodial staff, maintenance personnel, groundskeepers, bus routes, bus drivers, nutrition programs, and other support services").

The fixed costs of operating a system of public schools are not commensurately reduced by losing one or even a handful of students. For example, the cost of a teacher remains unless there is a sufficient decline in the number of students in a particular grade or school to allow for eliminating the teaching position altogether. Nor can teachers easily be released mid-year. Johnson Declaration at ¶ 8 ("pursuant to N.R.S. 391.3196, school districts must notify teachers by May 1 if they will be reemployed for the ensuing school year. These staffing decisions are made based on projected enrollment, and cannot be readily adjusted during the school year.") Likewise, the fixed costs associated with keeping a particular school operating in a safe and healthy manner—janitorial positions, administration, utilities, maintenance, grounds keeping, counseling—all of those expenses remain unless enrollment drops to the point where the district can close a school. *See* Clancy Declaration, Exhibit 12, Nevada Legislative Counsel Bureau, "2015 Nevada Education Data Book" at 84-89 (breaking down per-pupil expenditures into categories that include fixed costs, such as operations and leadership).

Third, SB 302 fails to recognize that the estimated enrollment on which the Legislature determines the sufficiency of the funding necessary to operate the public schools includes students requiring additional staff and services and, therefore, are more costly to educate. As the Legislature has acknowledged, educating students with disabilities in need of special education services, English language learners, and students from lower socio-economic backgrounds require more resources and funding. *Id.* at 91 (demonstrating increased per-pupil costs for Special Education students, ELL students, and economically disadvantaged students).[6]

Thus, as funding is redirected to ESAs under SB 302, districts will have less funding—below the level deemed to be sufficient under Art. XI, section 6.2—to provide the resources essential to educate the significant numbers of students with greater needs: students with disabilities; English language learners; students at risk due to household and neighborhood poverty, homelessness and transiency; and students with other special needs who will remain in the public schools. *See, e.g.* Lubienski Declaration at ¶ 20-21 (noting that typical effect of choice systems is that students who are more expensive to educate stay in the public school system).

SB 302, by deducting substantial amounts from school district budgets for ESAs, reduces the level of funding for the operation of the public schools below that which the Legislature has deemed to be sufficient in its biennium appropriations for the maintenance and support of Nevada's public schools. As a result, SB 302, on its face, violates Art. XI, section 6.2, of the Nevada Constitution.

3. SB 302 Violates the Mandate to Establish and Maintain a Uniform System of Common Schools in Violation of Art. XI, Section 2, of the Nevada Constitution

At the heart of the Education Article is the command that the Legislature establish and maintain a "uniform" public school system. Nev. Const. art. XI, § 2. To ensure uniformity consistent with this mandate, the Legislature has enacted an extensive framework of requirements to ensure the public schools are open to all children and to provide them with a quality education

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[6] Indeed, the Legislature in SB 302 itself recognized the higher cost of educating students with disabilities and at-risk, low-income students by deducting not just 90 percent, but the full amount of the basic guaranteed support for those special needs students. SB 302, § 8.1(a).

as is their basic Constitutional entitlement. *See e.g.*, NRS 388.450; 388.520; 388.405; 388.407 (providing specific standards for the instruction of ELL and special needs students); NRS 389, *et seq.* (setting academic and testing standards for public schools); NRS 391.465 (establishing statewide performance evaluation system for teachers).

SB 302 on its face violates this clear and unambiguous Constitutional requirement. SB 302 allows public school funds to pay for private schools and other entities that are not subject to the requirements applied to public schools. The private schools, on-line programs and parents receiving public school funds under SB 302 do not have to use the State adopted curriculum taught in public schools, nor administer State assessments to determine whether students are achieving State academic goals. While private schools and other entities under SB 302 have to give a norm-referenced test in mathematics and English each year, SB 302 § 12(1)(a), there is no requirement that the subjects be taught or that the assessment results will be used to evaluate performance in the same manner that the public schools are held accountable. *See id.* Private schools can also participate under SB 302 whether they are State licensed or not; approximately half of the private schools in the state are not licensed. *See* Clancy Declaration, Exhibit 6, 2014-15 Private School Reports; SB 302 § 11(1)(a). Indeed, every element designed to ensure uniformity and accountability in the public school system—curriculum guidelines, testing requirements, teacher qualifications—is inapplicable to the private schools and entities participating under SB 302.

Likewise, private schools and entities that accept ESA funds do not have to accept all students. These schools and entities may discriminate based on a student's religion or lack thereof, academic achievement, ELL status, disability, homelessness or transiency, gender, gender identity and sexual orientation. Lubienski Declaration at ¶ 16 (identifying multiple Nevada private schools with publically available admissions criteria that are facially discriminatory, *e.g.*, requiring a declaration of religious belief, agreement with a statement on sexuality, grade minimums, or a lack of behavior problems, or charging more for English Language Learners). These schools can also refuse to serve a student based on the student's socio-economic status and inability to pay tuition that exceeds the voucher amount. *Id.* at ¶ 17.

Thus, 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 the Education Article. *Cf. Bush v. Holmes*, 919 So. 2d 392, 409-10 (Fla. 2006) (holding Florida's voucher system unconstitutionally non-uniform because private schools receiving vouchers were not required to be accredited by the state or to adopt State-approved curricula used by public schools, and could hire teachers without the training, education, and background-check mandated for public school teachers).

SB 302 violates the Nevada Constitution's uniformity requirement in an additional way. In mandating the establishment and maintenance of a uniform public school system, the Constitution has, in the same breath, prohibited the Legislature from establishing and maintaining a separate alternative system to Nevada's uniform public schools. "Nevada follows the maxim 'expressio unius est exclusio alterius,' the expression of one thing is the exclusion of another," *State v. Javier C.*, 128 Nev. Adv. Op. 50, 289 P.3d 1194, 1197 (2012), and "[t]his rule applies as forcibly to the construction of written Constitutions as other instruments." *King v. Bd. of Regents of Univ. of Nev.*, 65 Nev. 533, 556, 200 P.2d 221 (1948); *see also Thomas v. Nev. Yellow Cab Corp.*, 130 Nev. Adv. Op. 52, 327 P.3d 518, 521 (2014), *reh'g denied* (Sept. 24, 2014) (applying *expressio unius est exclusio alterius* as canon of construction); *Hernandez v. Bennett-Haron*, 128 Nev. Adv. Op. 54, 287 P.3d 305, 316 (2012) (similar).

Pursuant to this fundamental principle, the Legislature is prohibited from enacting statutes that are inconsistent and conflict with clear Constitutional mandates. The Nevada Supreme Court has expressly held that "[e]very positive direction" in the Nevada Constitution "contains an implication against anything contrary to it which would frustrate or disappoint the purpose of that provision." *Galloway v. Truesdell*, 83 Nev. 13, 26, 422 P.2d 237, 246 (1967) (citation omitted); *see also id.* at 26 (holding that the "affirmation of a distinct policy upon any specific point in a state constitution implies the negation of any power in the legislature to establish a different policy"); *Moore v. Humboldt Cnty.*, 48 Nev. 397, 232 P. 1078, 1079 (1925) (same). The Legislature's obligation under the Nevada Constitution to provide for the education of Nevada's children through the establishment of a uniform system of public schools simultaneously prohibits

the Legislature from enacting SB 302, a law that allows for the education of Nevada children through a non-uniform means wholly separate and distinct from the uniform system of public schools.

In *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006), the Florida Supreme Court interpreted that state's constitutional provision requiring the Florida Legislature to create "a uniform, efficient, safe, secure, and high quality system of free public schools," Fla. Const. art. IX, § 1, to forbid the state from establishing a voucher system. *Id.* at 407. The court reasoned that the Florida Constitution "mandates that a system of free public schools is the manner in which the State is to provide a free education to the children of Florida' and that 'providing a free education . . . by paying tuition . . . to attend private schools is a 'a substantially different manner' of providing a publicly funded education than . . . the one prescribed by the Constitution." *Id.* (citation omitted). In so holding, the Court expressly relied on the maxim of constitutional interpretation that "where one method or means of exercising a power is prescribed in a constitution it excludes its exercise in other ways.'" *Id.* (quoting *S & J Transp., Inc. v. Gordon*, 176 So. 2d 69, 71 (1965)). Similarly, the Nevada Constitution mandates a uniform system of public schools, and SB 302, like the voucher law struck down in *Holmes*, provides public funding to educate Nevada children in a "substantially different manner" from the public schools. The Nevada Constitution's requirement that the Legislature maintain a uniform system of public schools necessarily forbids the Legislature from undermining that Constitutional obligation by deliberately siphoning funding from public schools in order to pay for private schools and other programs that are wholly outside of the uniform public school system. SB 302 is, therefore, unconstitutional under Art. XI, section 2, and must be enjoined.

C. Plaintiffs Will Be Irreparably Harmed If a Preliminary Injunction Is Not Issued

Because SB 302 violates the Nevada Constitution, the irreparable injury element is satisfied. *City of Sparks v. Sparks Mun. Court*, 129 Nev. Adv. Op. 38, 302 P.3d 1118, 1124 (2013) ("As a constitutional violation may be difficult or impossible to remedy through money damages, such a violation may, by itself, be sufficient to constitute irreparable harm."); *see also Monterey*

Mech. Co. v. Wilson, 125 F.3d 702, 715 (9th Cir.1997); *Eaves v. Bd. of Clark Cnty. Comm'rs*, 96 Nev. 921, 924-25, 620 P.2d 1248 (1980) (finding statute unconstitutional and, thus, ordering trial court to impose preliminary injunction without reaching irreparable harm requirement). That is the end of the analysis.

Even if it were necessary to establish irreparable harm, which it is not, irreparable injury to Nevada's public school children is readily established. The amount of funding that the voucher law will divert from school district budgets is not de minimus, but substantial. If the Treasurer diverts public school funding for just the 3,500 that have pre-registered for ESAs, he would deduct over $17.5 million from the public school districts budgets in the current school year. Further, if all of the over 20,000 students already enrolled in private schools obtained an ESA, the yearly cost to Nevada's public schools of subsidizing their private school education under the voucher law would be over $102 million. In fact, the Treasurer's Office has estimated that full participation in the voucher program by Nevada's private school and home-based education students would result in the reduction of $200 million in public school district budgets. Clancy Declaration, Exhibit 8, Education Savings Account – SB 302, Notice of Workshop, Aug. 21, 2015 at 67, Statement of Chief of Staff Grant Hewitt.

SB 302 will also necessitate frequent and unpredictable adjustments of public school district budgets to the detriment of students in public schools. Pursuant to NRS 387.124 and SB 302, a district's apportionment is established on a quarterly basis based on the number of students in each school district, "minus . . . all the funds deposited in education savings accounts established on behalf of children who reside in the county." SB 302 § 16.1. The deduction of ESA funds from each district's allocation will require quarterly adjustments to school district budgets. NRS 387.124; Johnson Declaration at ¶ 12 (SB 302 will change a district's quarterly enrollment "throughout the year"); *id.* at ¶ 12(a) (a district's "budgetary allotment will be adjusted on a quarterly basis."). As school districts lose funding, they will be forced to make numerous budget cutting decisions that will reduce their ability to adequately serve students. School districts may have to halt necessary services for students, decrease curricular supplies, "eliminate teacher resources and professional development programs which are critical to improving instruction at

our schools," and cut "extra and co-curricular activities like music programs and intramural sports" that provide "substantial benefits to students." Declaration of Jeff Zander as Exhibit D, Superintendent of the Elko County School District at ¶ 6; *see also* Declaration of Jim McIntosh as Exhibit E, CFO for Clark County School District at ¶ 4 ("McIntosh Declaration").

Further, some school districts may have to begin "seriously considering closing schools" and will be unable to afford to take on or hire new teachers such that "[c]lass sizes . . . would balloon." Johnson Declaration, at ¶ 11. Even if a school district is able to make budgetary adjustments in the middle of the year or from year-to-year, those changes "would be incredibly disruptive to a school community." *Id.* at ¶ 13. A school may be required to "revise its course offerings, change student schedules, and move students into different classrooms," all of which "reduces the quality of education that schools are able to provide." *Id.*; *see also* McIntosh Declaration, at ¶ 6.

SB 302's diversion of funds further leaves school districts with insufficient means to afford the underlying fixed costs of operating the system. For example, if one student in a classroom of 30 leaves a school district after obtaining an ESA, the school district loses $5,139 to $5,710, but cannot eliminate the expense of "the teacher salary, as that teacher is still needed for the remaining 29 students," nor "the bus used to transport that child, the custodial staff used to maintain that child's classroom, or the nutritional staff used to provide food service to that student." Johnson Declaration at ¶ 9. Accordingly the school district, "does not recoup the funding lost as a result of an ESA through savings of no longer having to serve that student" but rather "retains all of the fixed costs of educating that student." *Id.* Because fixed costs "cannot be reduced," school districts will be "forced to eliminate other services, like extracurricular activities that keep students invested in school, in order to make ends meet." *Id.*; *see also* Zander Declaration at ¶ 5 (noting that fixed costs cannot be adjusted during the school year, especially in rural counties that cannot "easily transfer teachers to other positions or other schools . . . because those schools can be up to 100 miles apart"); McIntosh Declaration at ¶ 4.b.

Finally, SB 302 will concentrate the highest need students in public schools, increasing the per pupil education cost. Although the voucher amount is fixed at the statewide average basic

support guarantee, that amount does not reflect the substantial differences in education need and cost among different student populations. Students with disabilities, English Language Learners, and those from low income households and neighborhoods require additional resources and interventions to achieve Nevada's academic standards. Voucher programs typically result in an exit of students who are less costly to educate from the public schools, while those who are more expensive to educate remain. Lubienski Declaration at ¶¶ 20-23 (explaining that private schools select lower cost students, leaving public schools to serve those more expensive to educate and that due to Nevada's anomalous lack of regulation "the segregative effects typically seen with choice programs may be more pronounced"). By its operation, SB 302 will cause a rise in the average cost-per-pupil for Nevada public school district while simultaneously reducing funding below sufficiency levels.

The need for a preliminary injunction to prevent harm to Nevada's public school children is manifest and urgent. As noted above, the Treasurer plans to accept applications for ESAs in January and commence diverting funding from public schools pursuant to SB 302 this school year. Thus, public school districts face the imminent threat of the loss of substantial amounts of guaranteed state funding from their current school year budgets. This threatened disruption of the public education system for hundreds of thousands of Nevada's children also outweighs any hardships that Defendant could claim from delay in implementation of SB 302.

Nor will money damages compensate for the educational injury resulting from the depletion of funding, and the budgetary instability, introduced by SB 302. A public school student, whose classroom is disrupted by increased class sizes, reductions in resources, and reduced programming, cannot get that instructional time back, impairing that child's Constitutional right to a public education. Accordingly Plaintiffs have more than demonstrated a threat of irreparable harm if the SB 302 if not enjoined by this court.

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IV. CONCLUSION

Wherefore, Plaintiffs respectfully request that this Court issue a preliminary injunction enjoining the Defendant State Treasure from implementing SB 302 and its regulations. A proposed order is attached to the Clancy Declaration as Exhibit 13.

October 20, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of October, 2015, a true and correct copy of **PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND POINTS AND AUTHORITIES IN SUPPORT THEREOF** was placed in an envelope, postage prepaid, addressed as stated below, in the basket for outgoing mail before 4:00 p.m. at WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP. The firm has established procedures so that all mail placed in the basket before 4:00 p.m. is taken that same day by an employee and deposited in a U.S. Mail box.

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By _____
Laura Simar, an Employee of
WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP

EXHIBIT A

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,

vs.

DAN SCHWARTZ, IN HIS OFFICIAL CAPACITY AS TREASURER OF THE STATE OF NEVADA,

Defendant.

Case No. 150C002071B

Dept. No.: II

DECLARATION OF THOMAS P. CLANCY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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Attorneys for Plaintiffs

DECLARATION OF THOMAS P. CLANCY

I, Thomas P. Clancy, declare as follows:

1. I am over the age of 18 and legally competent to make this declaration.

2. I am an attorney at the law firm of Munger, Tolles & Olson LLP and counsel for Plaintiffs in the above-captioned matter. I have personal knowledge of the facts set forth in this declaration, and, if called as a witness, I could and would testify competently to the matters set forth herein.

3. Attached as Exhibit 1 is a true and correct copy of Senate Bill 302.

4. Attached as Exhibit 2 is a true and correct copy of excerpts from the Official Report of the Debates and Proceedings in the Constitutional Convention of the State of Nevada, dated 1866.

5. Attached as Exhibit 3 is a true and correct copy of an excerpt from the First Annual Message of H.G. Blasdel, Governor of the State of Nevada. The full Message is available at: http://www.leg.state.nv.us/Division/Research/Library/Documents/HistDocs/Sos/1864.pdf.

6. Attached as Exhibit 4 is a true and correct copy of the Second Revised Proposed Regulation of the State Treasurer for SB 302, dated October 9, 2015.

7. Attached as Exhibit 5 is a true and correct copy of excerpts from the July 17, 2015 Notice of Workshop regarding Education Savings Account – SB 302. A full copy of this transcript is available at http://www.nevadatreasurer.gov/uploadedFiles/nevadatreasurergov/content/SchoolChoice/2015-07-17_Notice_of_Workshop_Minutes.pdf.

8. Attached as Exhibit 6 is a true and correct copy of a report by the Nevada Department of Education concerning Private Schools in the 2014-2015 school year. This publication is available at: http://www.doe.nv.gov/Private_Schools/Documents/201415PrivateSchoolreports/.

9. Attached as Exhibit 7 is a news release from the Office of the State Treasurer, dated July 9, 2015. This news release is available at: http://www.nevadatreasurer.gov/PublicInfo/PR/2015/NESAP/2015-07-

09__Treasurer_s_Office_Proposes_Quarterly_Enrollment_Periods_for_Education_Savings_Accounts_(SB302)/.

10. Attached as Exhibit 8 is a true and correct copy of excerpts from the August 21, 2015 Notice of Workshop regarding Education Savings Account – SB 302. A full copy of this transcript is available at: http://www.nevadatreasurer.gov/uploadedFiles/nevadatreasurergov/content/SchoolChoice/2015-08-21_Notice_of_Workshop_Minutes.pdf.

11. Attached as Exhibit 9 is a true and correct copy of the first three pages of the online Early Enrollment form for ESAs. The Early Enrollment form can be accessed at https://nevadatreasurer.gov/schoolchoice/default.aspx?appid=esaapp.ascx.

12. Attached as Exhibit 10 is a true and correct copy of the official twitter page for the Office of the State Treasurer of Nevada, as accessed on October 19, 2015. The official twitter page is available at https://twitter.com/NVTreasury.

13. Attached as Exhibit 11 is a true and correct copy of excerpts from the Statewide Ballot Questions for 2006.

14. Attached as Exhibit 12 is a true and correct copy of excerpts from the 2015 Nevada Education Data Book.

15. Attached as Exhibit 13 is a [Proposed] Decision and Order, Comprising Findings of Fact and Conclusions of Law.

16. I declare under penalty of perjury that the foregoing is true and correct.

17. Executed on October 19, 2015, at Los Angeles, California.

Thomas P. Clancy

EXHIBIT 1

EXHIBIT 1

Senate Bill No. 302–Senator Hammond

CHAPTER.....

AN ACT relating to education; establishing a program by which a child who receives instruction from a certain entity rather than from a public school may receive a grant of money in an amount equal to the statewide average basic support per-pupil; providing for the amount of each grant to be deducted from the total apportionment to the school district; providing a child who receives a grant and is not enrolled in a private school with certain rights and responsibilities; and providing other matters properly relating thereto.

Legislative Counsel's Digest:

Existing law requires each child between the ages of 7 and 18 years to attend a public school of the State, attend a private school or be homeschooled. (NRS 392.040, 392.070) Existing law also provides for each school district to receive certain funding from local sources and to receive from the State an apportionment per pupil of basic support for the schools in the school district. (NRS 387.1235, 387.124) This bill establishes a program by which a child enrolled in a private school may receive a grant of money in an amount equal to 90 percent, or, if the child is a pupil with a disability or has a household income that is less than 185 percent of the federally designated level signifying poverty, 100 percent, of the statewide average basic support per pupil. **Sections 7 and 8** of this bill allow a child to enroll part-time in a public school while receiving part of his or her instruction from an entity that participates in the program to receive a partial grant. Money from the grant may be used only for specified purposes.

Section 7 of this bill authorizes the parent of a child who is required to attend school and who has attended a public school for 100 consecutive school days to enter into an agreement with the State Treasurer, according to which the child will receive instruction from certain entities and receive the grant. Each agreement is valid for 1 school year but may be terminated early and may be renewed for any subsequent school year. Not entering into or renewing an agreement for any given school year does not preclude the parent from entering into or renewing an agreement for any subsequent year.

If such an agreement is entered into, an education savings account must be opened by the parent on behalf of the child. Under **section 8** of this bill, for any school year for which the agreement is entered into or renewed, the State Treasurer must deposit the amount of the grant into the education savings account. Under **section 16** of this bill, the amount of the grant must be deducted from the total apportionment to the resident school district of the child on whose behalf the grant is made. **Section 8** provides that the State Treasurer may deduct from the amount of the grant not more than 3 percent for the administrative costs of implementing the provisions of this bill.

Section 9 of this bill lists the authorized uses of grant money deposited in an education savings account. **Section 9** also prohibits certain refunds, rebates or sharing of payments made from money in an education savings account.

Under **section 10** of this bill, the State Treasurer may qualify private financial management firms to manage the education savings accounts. The State Treasurer must establish reasonable fees for the management of the education savings

EXHIBIT 1

accounts. Those fees may be paid from the money deposited in an education savings account.

Section 11 of this bill provides requirements for a private school, college or university, program of distance education, accredited tutor or tutoring facility or the parent of a child to participate in the grant program established by this bill by providing instruction to children on whose behalf the grants are made. The State Treasurer may refuse to allow such an entity to continue to participate in the program if the State Treasurer finds that the entity fails to comply with applicable provisions of law or has failed to provide educational services to a child who is participating in the program. **Section 16.2** of this bill authorizes a child who is participating in the program to enroll in a program of distance education if the child is only receiving a portion of his or her instruction from a participating entity.

Under **section 12** of this bill, each child on whose behalf a grant is made must take certain standardized examinations in mathematics and English language arts. Subject to applicable federal privacy laws, a participating entity must provide those test results to the Department of Education, which must aggregate the results and publish data on the results and on the academic progress of children on behalf of whom grants are made. Under **section 13** of this bill, the State Treasurer must make available a list of all entities who are participating in the grant program, other than a parent of a child. **Section 13** also requires the Department to require resident school districts to provide certain academic records to participating entities.

Sections 15.1 and 16.4 of this bill provide that a child who participates in the program but who does not enroll in a private school is an opt-in child. **Section 16.4** requires the parent or guardian of such a child to notify the school district where the child would otherwise attend or the charter school in which the child was previously enrolled, as applicable.

Existing law requires the parent of a homeschooled child who wishes to participate in activities at a public school, including a charter school, through a school district or through the Nevada Interscholastic Activities Association to file a notice of intent to participate with the school district in which the child resides. (NRS 386.430, 386.580, 392.705) **Section 16.5** of this bill enacts similar requirements for the parents of an opt-in child who wishes to participate with the school district. **Sections 15.2 and 15.3** of this bill authorize an opt-in child to participate in the Nevada Youth Legislature. **Sections 15.4-15.8 and 16.7** of this bill authorize an opt-in child to participate in activities at a public school, through a school district or through the Nevada Interscholastic Activities Association if the parent files a notice of intent to participate. **Section 16.6** of this bill requires an opt-in child who wishes to enroll in a public high school to provide proof demonstrating competency in courses required for promotion to high school similar to that required of a homeschooled child who wishes to enroll in a public high school.

Section 14 of this bill provides that the provisions of this bill may not be deemed to infringe on the independence or autonomy of any private school or to make the actions of a private school the actions of the government of this State. **Section 15.9** of this bill exempts grants deposited in an education savings account from a prohibition on the use of public school funds for other purposes.

Existing law requires children who are suspended or expelled from a public school for certain reasons to enroll in a private school or program of independent study or be homeschooled. (NRS 392.466) **Section 16.8** of this bill authorizes such a child to be an opt-in child.

EXPLANATION – Matter in ***bolded italics*** is new; matter between brackets [~~omitted material~~] is material to be omitted.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Chapter 385 of NRS is hereby amended by adding thereto the provisions set forth as sections 2 to 15, inclusive, of this act.

Sec. 2. ***As used in sections 2 to 15, inclusive, of this act, unless the context otherwise requires, the words and terms defined in sections 3 to 6, inclusive, of this act have the meanings ascribed to them in those sections.***

Sec. 3. ***"Education savings account" means an account established for a child pursuant to section 7 of this act.***

Sec. 3.5. ***"Eligible institution" means:***

1. A university, state college or community college within the Nevada System of Higher Education; or

2. Any other college or university that:

(a) Was originally established in, and is organized under the laws of, this State;

(b) Is exempt from taxation pursuant to 26 U.S.C. § 501(c)(3); and

(c) Is accredited by a regional accrediting agency recognized by the United States Department of Education.

Sec. 4. ***"Parent" means the parent, custodial parent, legal guardian or other person in this State who has control or charge of a child and the legal right to direct the education of the child.***

Sec. 5. ***"Participating entity" means a private school that is licensed pursuant to chapter 394 of NRS or exempt from such licensing pursuant to NRS 394.211, an eligible institution, a program of distance education that is not offered by a public school or the Department, a tutor or tutoring agency or a parent that has provided to the State Treasurer the application described in subsection 1 of section 11 of this act.***

Sec. 5.5. ***"Program of distance education" has the meaning ascribed to it in NRS 388.829.***

Sec. 6. ***"Resident school district" means the school district in which a child would be enrolled based on his or her residence.***

Sec. 7. ***1. Except as otherwise provided in subsection 10, the parent of any child required by NRS 392.040 to attend a public school who has been enrolled in a public school in this State during the period immediately preceding the establishment of an education savings account pursuant to this section for not less***

than 100 school days without interruption may establish an education savings account for the child by entering into a written agreement with the State Treasurer, in a manner and on a form provided by the State Treasurer. The agreement must provide that:

(a) The child will receive instruction in this State from a participating entity for the school year for which the agreement applies;

(b) The child will receive a grant, in the form of money deposited pursuant to section 8 of this act in the education savings account established for the child pursuant to subsection 2;

(c) The money in the education savings account established for the child must be expended only as authorized by section 9 of this act; and

(d) The State Treasurer will freeze money in the education savings account during any break in the school year, including any break between school years.

2. If an agreement is entered into pursuant to subsection 1, an education savings account must be established by the parent on behalf of the child. The account must be maintained with a financial management firm qualified by the State Treasurer pursuant to section 10 of this act.

3. The failure to enter into an agreement pursuant to subsection 1 for any school year for which a child is required by NRS 392.040 to attend a public school does not preclude the parent of the child from entering into an agreement for a subsequent school year.

4. An agreement entered into pursuant to subsection 1 is valid for 1 school year but may be terminated early. If the agreement is terminated early, the child may not receive instruction from a public school in this State until the end of the period for which the last deposit was made into the education savings account pursuant to section 8 of this act, except to the extent the pupil was allowed to receive instruction from a public school under the agreement.

5. An agreement terminates automatically if the child no longer resides in this State. In such a case, any money remaining in the education savings account of the child reverts to the State General Fund.

6. An agreement may be renewed for any school year for which the child is required by NRS 392.040 to attend a public school. The failure to renew an agreement for any school year does not preclude the parent of the child from renewing the agreement for any subsequent school year.

7. A parent may enter into a separate agreement pursuant to subsection 1 for each child of the parent. Not more than one education savings account may be established for a child.

8. Except as otherwise provided in subsection 10, the State Treasurer shall enter into or renew an agreement pursuant to this section with any parent of a child required by NRS 392.040 to attend a public school who applies to the State Treasurer in the manner provided by the State Treasurer. The State Treasurer shall make the application available on the Internet website of the State Treasurer.

9. Upon entering into or renewing an agreement pursuant to this section, the State Treasurer shall provide to the parent who enters into or renews the agreement a written explanation of the authorized uses, pursuant to section 9 of this act, of the money in an education savings account and the responsibilities of the parent and the State Treasurer pursuant to the agreement and sections 2 to 15, inclusive, of this act.

10. A parent may not establish an education savings account for a child who will be homeschooled, who will receive instruction outside this State or who will remain enrolled full-time in a public school, regardless of whether such a child receives instruction from a participating entity. A parent may establish an education savings account for a child who receives a portion of his or her instruction from a public school and a portion of his or her instruction from a participating entity.

Sec. 8. *1. If a parent enters into or renews an agreement pursuant to section 7 of this act, a grant of money on behalf of the child must be deposited in the education savings account of the child.*

2. Except as otherwise provided in subsections 3 and 4, the grant required by subsection 1 must, for the school year for which the grant is made, be in an amount equal to:

(a) For a child who is a pupil with a disability, as defined in NRS 388.440, or a child with a household income that is less than 185 percent of the federally designated level signifying poverty, 100 percent of the statewide average basic support per pupil; and

(b) For all other children, 90 percent of the statewide average basic support per pupil.

3. If a child receives a portion of his or her instruction from a participating entity and a portion of his or her instruction from a public school, for the school year for which the grant is made, the grant required by subsection 1 must be in a pro rata based on amount the percentage of the total instruction provided to the

child by the participating entity in proportion to the total instruction provided to the child.

4. The State Treasurer may deduct not more than 3 percent of each grant for the administrative costs of implementing the provisions of sections 2 to 15, inclusive, of this act.

5. The State Treasurer shall deposit the money for each grant in quarterly installments pursuant to a schedule determined by the State Treasurer.

6. Any money remaining in an education savings account:

(a) At the end of a school year may be carried forward to the next school year if the agreement entered into pursuant to section 7 of this act is renewed.

(b) When an agreement entered into pursuant to section 7 of this act is not renewed or is terminated, because the child for whom the account was established graduates from high school or for any other reason, reverts to the State General Fund at the end of the last day of the agreement.

Sec. 9. *1. Money deposited in an education savings account must be used only to pay for:*

(a) Tuition and fees at a school that is a participating entity in which the child is enrolled;

(b) Textbooks required for a child who enrolls in a school that is a participating entity;

(c) Tutoring or other teaching services provided by a tutor or tutoring facility that is a participating entity;

(d) Tuition and fees for a program of distance education that is a participating entity;

(e) Fees for any national norm-referenced achievement examination, advanced placement or similar examination or standardized examination required for admission to a college or university;

(f) If the child is a pupil with a disability, as that term is defined in NRS 388.440, fees for any special instruction or special services provided to the child;

(g) Tuition and fees at an eligible institution that is a participating entity;

(h) Textbooks required for the child at an eligible institution that is a participating entity or to receive instruction from any other participating entity;

(i) Fees for the management of the education savings account, as described in section 10 of this act;

(j) Transportation required for the child to travel to and from a participating entity or any combination of participating entities up to but not to exceed $750 per school year; or

(k) Purchasing a curriculum or any supplemental materials required to administer the curriculum.

2. A participating entity that receives a payment authorized by subsection 1 shall not:

(a) Refund any portion of the payment to the parent who made the payment, unless the refund is for an item that is being returned or an item or service that has not been provided; or

(b) Rebate or otherwise share any portion of the payment with the parent who made the payment.

3. A parent who receives a refund pursuant to subsection 2 shall deposit the refund in the education savings account from which the money refunded was paid.

4. Nothing in this section shall be deemed to prohibit a parent or child from making a payment for any tuition, fee, service or product described in subsection 1 from a source other than the education savings account of the child.

Sec. 10. *1. The State Treasurer shall qualify one or more private financial management firms to manage education savings accounts and shall establish reasonable fees, based on market rates, for the management of education savings accounts.*

2. An education savings account must be audited randomly each year by a certified or licensed public accountant. The State Treasurer may provide for additional audits of an education savings account as it determines necessary.

3. If the State Treasurer determines that there has been substantial misuse of the money in an education savings account, the State Treasurer may:

(a) Freeze or dissolve the account, subject to any regulations adopted by the State Treasurer providing for notice of such action and opportunity to respond to the notice; and

(b) Give notice of his or her determination to the Attorney General or the district attorney of the county in which the parent resides.

Sec. 11. *1. The following persons may become a participating entity by submitting an application demonstrating that the person is:*

(a) A private school licensed pursuant to chapter 394 of NRS or exempt from such licensing pursuant to NRS 394.211;

(b) An eligible institution;

(c) A program of distance education that is not operated by a public school or the Department;

(d) A tutor or tutoring facility that is accredited by a state, regional or national accrediting organization; or

(e) The parent of a child.

2. The State Treasurer shall approve an application submitted pursuant to subsection 1 or request additional information to demonstrate that the person meets the criteria to serve as a participating entity. If the applicant is unable to provide such additional information, the State Treasurer may deny the application.

3. If it is reasonably expected that a participating entity will receive, from payments made from education savings accounts, more than $50,000 during any school year, the participating entity shall annually, on or before the date prescribed by the State Treasurer by regulation:

(a) Post a surety bond in an amount equal to the amount reasonably expected to be paid to the participating entity from education savings accounts during the school year; or

(b) Provide evidence satisfactory to the State Treasurer that the participating entity otherwise has unencumbered assets sufficient to pay to the State Treasurer an amount equal to the amount described in paragraph (a).

4. Each participating entity that accepts payments made from education savings accounts shall provide a receipt for each such payment to the parent who makes the payment.

5. The State Treasurer may refuse to allow an entity described in subsection 1 to continue to participate in the grant program provided for in sections 2 to 15, inclusive, of this act if the State Treasurer determines that the entity:

(a) Has routinely failed to comply with the provisions of sections 2 to 15, inclusive, of this act; or

(b) Has failed to provide any educational services required by law to a child receiving instruction from the entity if the entity is accepting payments made from the education savings account of the child.

6. If the State Treasurer takes an action described in subsection 5 against an entity described in subsection 1, the State Treasurer shall provide immediate notice of the action to each parent of a child receiving instruction from the entity who has entered into or renewed an agreement pursuant to section 7 of this act and on behalf of whose child a grant of money has been deposited pursuant to section 8 of this act.

Sec. 12. *1. Each participating entity that accepts payments for tuition and fees made from education savings accounts shall:*

(a) Ensure that each child on whose behalf a grant of money has been deposited pursuant to section 8 of this act and who is receiving instruction from the participating entity takes:

(1) Any examinations in mathematics and English language arts required for pupils of the same grade pursuant to chapter 389 of NRS; or

(2) Norm-referenced achievement examinations in mathematics and English language arts each school year;

(b) Provide for value-added assessments of the results of the examinations described in paragraph (a); and

(c) Subject to the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g, and any regulations adopted pursuant thereto, provide the results of the examinations described in paragraph (a) to the Department or an organization designated by the Department pursuant to subsection 4.

2. The Department shall:

(a) Aggregate the examination results provided pursuant to subsection 1 according to the grade level, gender, race and family income level of each child whose examination results are provided; and

(b) Subject to the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g, and any regulations adopted pursuant thereto, make available on the Internet website of the Department:

(1) The aggregated results and any associated learning gains; and

(2) After 3 school years for which examination data has been collected, the graduation rates, as applicable, of children whose examination results are provided.

3. The State Treasurer shall administer an annual survey of parents who enter into or renew an agreement pursuant to section 7 of this act. The survey must ask each parent to indicate the number of years the parent has entered into or renewed such an agreement and to express:

(a) The relative satisfaction of the parent with the grant program established pursuant to sections 2 to 15, inclusive, of this act; and

(b) The opinions of the parent regarding any topics, items or issues that the State Treasurer determines may aid the State Treasurer in evaluating and improving the effectiveness of the grant program established pursuant to sections 2 to 15, inclusive, of this act.

4. The Department may arrange for a third-party organization to perform the duties of the Department prescribed by this section.

Sec. 13. *1. The State Treasurer shall annually make available a list of participating entities, other than any parent of a child.*

2. Subject to the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g, and any regulations adopted pursuant thereto, the Department shall annually require the resident school district of each child on whose behalf a grant of money is made pursuant to section 8 of this act to provide to the participating entity any educational records of the child.

Sec. 14. ***Except as otherwise provided in sections 2 to 15, inclusive, of this act, nothing in the provisions of sections 2 to 15, inclusive, of this act, shall be deemed to limit the independence or autonomy of a participating entity or to make the actions of a participating entity the actions of the State Government.***

Sec. 15. ***The State Treasurer shall adopt any regulations necessary or convenient to carry out the provisions of sections 2 to 15, inclusive, of this act.***

Sec. 15.1. NRS 385.007 is hereby amended to read as follows:

385.007 As used in this title, unless the context otherwise requires:

1. "Charter school" means a public school that is formed pursuant to the provisions of NRS 386.490 to 386.649, inclusive.

2. "Department" means the Department of Education.

3. "Homeschooled child" means a child who receives instruction at home and who is exempt from compulsory attendance pursuant to NRS 392.070 ~~[.]~~ ***, but does not include an opt-in child.***

4. "Limited English proficient" has the meaning ascribed to it in 20 U.S.C. § 7801(25).

5. ***"Opt-in child" means a child for whom an education savings account has been established pursuant to section 7 of this act, who is not enrolled full-time in a public or private school and who receives all or a portion of his or her instruction from a participating entity, as defined in section 5 of this act.***

6. "Public schools" means all kindergartens and elementary schools, junior high schools and middle schools, high schools, charter schools and any other schools, classes and educational programs which receive their support through public taxation and, except for charter schools, whose textbooks and courses of study are under the control of the State Board.

~~[6.]~~ ***7.*** "State Board" means the State Board of Education.

~~[7.]~~ ***8.*** "University school for profoundly gifted pupils" has the meaning ascribed to it in NRS 392A.040.

Sec. 15.2. NRS 385.525 is hereby amended to read as follows:

385.525 1. To be eligible to serve on the Youth Legislature, a person:

(a) Must be:

(1) A resident of the senatorial district of the Senator who appoints him or her;

(2) Enrolled in a public school or private school located in the senatorial district of the Senator who appoints him or her; or

(3) A homeschooled child ***or opt-in child*** who is otherwise eligible to be enrolled in a public school in the senatorial district of the Senator who appoints him or her;

(b) Except as otherwise provided in subsection 3 of NRS 385.535, must be:

(1) Enrolled in a public school or private school in this State in grade 9, 10 or 11 for the first school year of the term for which he or she is appointed; or

(2) A homeschooled child ***or opt-in child*** who is otherwise eligible to enroll in a public school in this State in grade 9, 10 or 11 for the first school year of the term for which he or she is appointed; and

(c) Must not be related by blood, adoption or marriage within the third degree of consanguinity or affinity to the Senator who appoints him or her or to any member of the Assembly who collaborated to appoint him or her.

2. If, at any time, a person appointed to the Youth Legislature changes his or her residency or changes his or her school of enrollment in such a manner as to render the person ineligible under his or her original appointment, the person shall inform the Board, in writing, within 30 days after becoming aware of such changed facts.

3. A person who wishes to be appointed or reappointed to the Youth Legislature must submit an application on the form prescribed pursuant to subsection 4 to the Senator of the senatorial district in which the person resides, is enrolled in a public school or private school or, if the person is a homeschooled child ~~[,]~~ ***or opt-in child,*** the senatorial district in which he or she is otherwise eligible to be enrolled in a public school. A person may not submit an application to more than one Senator in a calendar year.

4. The Board shall prescribe a form for applications submitted pursuant to this section, which must require the signature of the principal of the school in which the applicant is enrolled or, if the applicant is a homeschooled child ~~[,]~~ ***or opt-in child,*** the signature of a member of the community in which the applicant resides other than a relative of the applicant.

Sec. 15.3. NRS 385.535 is hereby amended to read as follows:

385.535 1. A position on the Youth Legislature becomes vacant upon:

(a) The death or resignation of a member.

(b) The absence of a member for any reason from:

(1) Two meetings of the Youth Legislature, including, without limitation, meetings conducted in person, meetings conducted by teleconference, meetings conducted by videoconference and meetings conducted by other electronic means;

(2) Two activities of the Youth Legislature;

(3) Two event days of the Youth Legislature; or

(4) Any combination of absences from meetings, activities or event days of the Youth Legislature, if the combination of absences therefrom equals two or more,

➥ unless the absences are, as applicable, excused by the Chair or Vice Chair of the Board.

(c) A change of residency or a change of the school of enrollment of a member which renders that member ineligible under his or her original appointment.

2. In addition to the provisions of subsection 1, a position on the Youth Legislature becomes vacant if:

(a) A member of the Youth Legislature graduates from high school or otherwise ceases to attend public school or private school for any reason other than to become a homeschooled child ~~[,]~~ ***or opt-in child;*** or

(b) A member of the Youth Legislature who is a homeschooled child ***or opt-in child*** completes an educational plan of instruction for grade 12 or otherwise ceases to be a homeschooled child ***or opt-in child*** for any reason other than to enroll in a public school or private school.

3. A vacancy on the Youth Legislature must be filled:

(a) For the remainder of the unexpired term in the same manner as the original appointment, except that, if the remainder of the unexpired term is less than 1 year, the member of the Senate who made the original appointment may appoint a person who:

(1) Is enrolled in a public school or private school in this State in grade 12 or who is a homeschooled child ***or opt-in child*** who is otherwise eligible to enroll in a public school in this State in grade 12; and

(2) Satisfies the qualifications set forth in paragraphs (a) and (c) of subsection 1 of NRS 385.525.

(b) Insofar as is practicable, within 30 days after the date on which the vacancy occurs.

4. As used in this section, "event day" means any single calendar day on which an official, scheduled event of the Youth Legislature is held, including, without limitation, a course of instruction, a course of orientation, a meeting, a seminar or any other official, scheduled activity.

Sec. 15.4. NRS 386.430 is hereby amended to read as follows:

386.430 1. The Nevada Interscholastic Activities Association shall adopt rules and regulations in the manner provided for state agencies by chapter 233B of NRS as may be necessary to carry out the provisions of NRS 386.420 to 386.470, inclusive. The regulations must include provisions governing the eligibility and participation of homeschooled children ***and opt-in children*** in interscholastic activities and events. In addition to the regulations governing eligibility ~~[, a]~~ *:*

(a) A homeschooled child who wishes to participate must have on file with the school district in which the child resides a current notice of intent of a homeschooled child to participate in programs and activities pursuant to NRS 392.705.

(b) An opt-in child who wishes to participate must have on file with the school district in which the child resides a current notice of intent of an opt-in child to participate in programs and activities pursuant to section 16.5 of this act.

2. The Nevada Interscholastic Activities Association shall adopt regulations setting forth:

(a) The standards of safety for each event, competition or other activity engaged in by a spirit squad of a school that is a member of the Nevada Interscholastic Activities Association, which must substantially comply with the spirit rules of the National Federation of State High School Associations, or its successor organization; and

(b) The qualifications required for a person to become a coach of a spirit squad.

3. If the Nevada Interscholastic Activities Association intends to adopt, repeal or amend a policy, rule or regulation concerning or affecting homeschooled children, the Association shall consult with the Northern Nevada Homeschool Advisory Council and the Southern Nevada Homeschool Advisory Council, or their successor organizations, to provide those Councils with a reasonable opportunity to submit data, opinions or arguments, orally or in writing, concerning the proposal or change. The Association shall consider all written and oral submissions respecting the proposal or change before taking final action.

4. As used in this section, "spirit squad" means any team or other group of persons that is formed for the purpose of:

(a) Leading cheers or rallies to encourage support for a team that participates in a sport that is sanctioned by the Nevada Interscholastic Activities Association; or

(b) Participating in a competition against another team or other group of persons to determine the ability of each team or group of persons to engage in an activity specified in paragraph (a).

Sec. 15.5. NRS 386.462 is hereby amended to read as follows:

386.462 1. A homeschooled child must be allowed to participate in interscholastic activities and events in accordance with the regulations adopted by the Nevada Interscholastic Activities Association pursuant to NRS 386.430 if a notice of intent of a homeschooled child to participate in programs and activities is filed for the child with the school district in which the child resides for the current school year pursuant to NRS 392.705.

2. ***An opt-in child must be allowed to participate in interscholastic activities and events in accordance with the regulations adopted by the Nevada Interscholastic Activities Association pursuant to NRS 386.430 if a notice of intent of an opt-in child to participate in programs and activities is filed for the child with the school district in which the child resides for the current school year pursuant to section 16.5 of this act.***

3. The provisions of NRS 386.420 to 386.470, inclusive, and the regulations adopted pursuant thereto that apply to pupils enrolled in public schools who participate in interscholastic activities and events apply in the same manner to homeschooled children ***and opt-in children*** who participate in interscholastic activities and events, including, without limitation, provisions governing:

(a) Eligibility and qualifications for participation;
(b) Fees for participation;
(c) Insurance;
(d) Transportation;
(e) Requirements of physical examination;
(f) Responsibilities of participants;
(g) Schedules of events;
(h) Safety and welfare of participants;
(i) Eligibility for awards, trophies and medals;
(j) Conduct of behavior and performance of participants; and
(k) Disciplinary procedures.

Sec. 15.6. NRS 386.463 is hereby amended to read as follows:

386.463 No challenge may be brought by the Nevada Interscholastic Activities Association, a school district, a public school or a private school, a parent or guardian of a pupil enrolled in a public school or a private school, a pupil enrolled in a public school or private school, or any other entity or person claiming that an interscholastic activity or event is invalid because homeschooled children ***or opt-in children*** are allowed to participate in the interscholastic activity or event.

Sec. 15.7. NRS 386.464 is hereby amended to read as follows:

386.464 A school district, public school or private school shall not prescribe any regulations, rules, policies, procedures or requirements governing the:

1. Eligibility of homeschooled children ***or opt-in children*** to participate in interscholastic activities and events pursuant to NRS 386.420 to 386.470, inclusive; or

2. Participation of homeschooled children ***or opt-in children*** in interscholastic activities and events pursuant to NRS 386.420 to 386.470, inclusive,

➥ that are more restrictive than the provisions governing eligibility and participation prescribed by the Nevada Interscholastic Activities Association pursuant to NRS 386.430.

Sec. 15.8. NRS 386.580 is hereby amended to read as follows:

386.580 1. An application for enrollment in a charter school may be submitted to the governing body of the charter school by the parent or legal guardian of any child who resides in this State. Except as otherwise provided in this subsection and subsection 2, a charter school shall enroll pupils who are eligible for enrollment in the order in which the applications are received. If the board of trustees of the school district in which the charter school is located has established zones of attendance pursuant to NRS 388.040, the charter school shall, if practicable, ensure that the racial composition of pupils enrolled in the charter school does not differ by more than 10 percent from the racial composition of pupils who attend public schools in the zone in which the charter school is located. If a charter school is sponsored by the board of trustees of a school district located in a county whose population is 100,000 or more, except for a program of distance education provided by the charter school, the charter school shall enroll pupils who are eligible for enrollment who reside in the school district in which the charter school is located before enrolling pupils who reside outside the school district. Except as otherwise provided in subsection 2, if more pupils who are eligible for enrollment apply for enrollment in the charter school than the number of spaces which are available, the charter school shall determine which applicants to enroll pursuant to this subsection on the basis of a lottery system.

2. Before a charter school enrolls pupils who are eligible for enrollment, a charter school may enroll a child who:

(a) Is a sibling of a pupil who is currently enrolled in the charter school;

(b) Was enrolled, free of charge and on the basis of a lottery system, in a prekindergarten program at the charter school or any

other early childhood educational program affiliated with the charter school;

(c) Is a child of a person who is:

(1) Employed by the charter school;

(2) A member of the committee to form the charter school; or

(3) A member of the governing body of the charter school;

(d) Is in a particular category of at-risk pupils and the child meets the eligibility for enrollment prescribed by the charter school for that particular category; or

(e) Resides within the school district and within 2 miles of the charter school if the charter school is located in an area that the sponsor of the charter school determines includes a high percentage of children who are at risk. If space is available after the charter school enrolls pupils pursuant to this paragraph, the charter school may enroll children who reside outside the school district but within 2 miles of the charter school if the charter school is located within an area that the sponsor determines includes a high percentage of children who are at risk.

➥ If more pupils described in this subsection who are eligible apply for enrollment than the number of spaces available, the charter school shall determine which applicants to enroll pursuant to this subsection on the basis of a lottery system.

3. Except as otherwise provided in subsection 8, a charter school shall not accept applications for enrollment in the charter school or otherwise discriminate based on the:

(a) Race;

(b) Gender;

(c) Religion;

(d) Ethnicity; or

(e) Disability,

➥ of a pupil.

4. If the governing body of a charter school determines that the charter school is unable to provide an appropriate special education program and related services for a particular disability of a pupil who is enrolled in the charter school, the governing body may request that the board of trustees of the school district of the county in which the pupil resides transfer that pupil to an appropriate school.

5. Except as otherwise provided in this subsection, upon the request of a parent or legal guardian of a child who is enrolled in a public school of a school district or a private school, or a parent or legal guardian of a homeschooled child ~~[,]~~ ***or opt-in child,*** the governing body of the charter school shall authorize the child to participate in a class that is not otherwise available to the child at his

or her school , ~~[or]~~ homeschool ***or from his or her participating entity, as defined in section 5 of this act,*** or participate in an extracurricular activity at the charter school if:

(a) Space for the child in the class or extracurricular activity is available;

(b) The parent or legal guardian demonstrates to the satisfaction of the governing body that the child is qualified to participate in the class or extracurricular activity; and

(c) The child is ~~[a]~~ *:*

(1) A homeschooled child and a notice of intent of a homeschooled child to participate in programs and activities is filed for the child with the school district in which the child resides for the current school year pursuant to NRS 392.705 ~~[.]~~ ***; or***

(2) An opt-in child and a notice of intent of an opt-in child to participate in programs and activities is filed for the child with the school district in which the child resides for the current school year pursuant to section 16.5 of this act.

➥ If the governing body of a charter school authorizes a child to participate in a class or extracurricular activity pursuant to this subsection, the governing body is not required to provide transportation for the child to attend the class or activity. A charter school shall not authorize such a child to participate in a class or activity through a program of distance education provided by the charter school pursuant to NRS 388.820 to 388.874, inclusive.

6. The governing body of a charter school may revoke its approval for a child to participate in a class or extracurricular activity at a charter school pursuant to subsection 5 if the governing body determines that the child has failed to comply with applicable statutes, or applicable rules and regulations. If the governing body so revokes its approval, neither the governing body nor the charter school is liable for any damages relating to the denial of services to the child.

7. The governing body of a charter school may, before authorizing a homeschooled child ***or opt-in child*** to participate in a class or extracurricular activity pursuant to subsection 5, require proof of the identity of the child, including, without limitation, the birth certificate of the child or other documentation sufficient to establish the identity of the child.

8. This section does not preclude the formation of a charter school that is dedicated to provide educational services exclusively to pupils:

(a) With disabilities;

(b) Who pose such severe disciplinary problems that they warrant a specific educational program, including, without

limitation, a charter school specifically designed to serve a single gender that emphasizes personal responsibility and rehabilitation; or

(c) Who are at risk.

➥ If more eligible pupils apply for enrollment in such a charter school than the number of spaces which are available, the charter school shall determine which applicants to enroll pursuant to this subsection on the basis of a lottery system.

Sec. 15.9. NRS 387.045 is hereby amended to read as follows:

387.045 ***Except as otherwise provided in sections 2 to 15, inclusive, of this act:***

1. No 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.

2. No portion of the public school funds shall in any way be segregated, divided or set apart for the use or benefit of any sectarian or secular society or association.

Sec. 15.95. NRS 387.1233 is hereby amended to read as follows:

387.1233 1. Except as otherwise provided in subsection 2, basic support of each school district must be computed by:

(a) Multiplying the basic support guarantee per pupil established for that school district for that school year by the sum of:

(1) Six-tenths the count of pupils enrolled in the kindergarten department on the last day of the first school month of the school district for the school year, including, without limitation, the count of pupils who reside in the county and are enrolled in any charter school on the last day of the first school month of the school district for the school year.

(2) The count of pupils enrolled in grades 1 to 12, inclusive, on the last day of the first school month of the school district for the school year, including, without limitation, the count of pupils who reside in the county and are enrolled in any charter school on the last day of the first school month of the school district for the school year and the count of pupils who are enrolled in a university school for profoundly gifted pupils located in the county.

(3) The count of pupils not included under subparagraph (1) or (2) who are enrolled full-time in a program of distance education provided by that school district or a charter school located within that school district on the last day of the first school month of the school district for the school year.

(4) The count of pupils who reside in the county and are enrolled:

(I) In a public school of the school district and are concurrently enrolled part-time in a program of distance education

provided by another school district or a charter school ***or receiving a portion of his or her instruction from a participating entity, as defined in section 5 of this act,*** on the last day of the first school month of the school district for the school year, expressed as a percentage of the total time services are provided to those pupils per school day in proportion to the total time services are provided during a school day to pupils who are counted pursuant to subparagraph (2).

(II) In a charter school and are concurrently enrolled part-time in a program of distance education provided by a school district or another charter school ***or receiving a portion of his or her instruction from a participating entity, as defined in section 5 of this act,*** on the last day of the first school month of the school district for the school year, expressed as a percentage of the total time services are provided to those pupils per school day in proportion to the total time services are provided during a school day to pupils who are counted pursuant to subparagraph (2).

(5) The count of pupils not included under subparagraph (1), (2), (3) or (4), who are receiving special education pursuant to the provisions of NRS 388.440 to 388.520, inclusive, on the last day of the first school month of the school district for the school year, excluding the count of pupils who have not attained the age of 5 years and who are receiving special education pursuant to subsection 1 of NRS 388.475 on that day.

(6) Six-tenths the count of pupils who have not attained the age of 5 years and who are receiving special education pursuant to subsection 1 of NRS 388.475 on the last day of the first school month of the school district for the school year.

(7) The count of children detained in facilities for the detention of children, alternative programs and juvenile forestry camps receiving instruction pursuant to the provisions of NRS 388.550, 388.560 and 388.570 on the last day of the first school month of the school district for the school year.

(8) The count of pupils who are enrolled in classes for at least one semester pursuant to subsection 5 of NRS 386.560, subsection 5 of NRS 386.580 or subsection 3 of NRS 392.070, expressed as a percentage of the total time services are provided to those pupils per school day in proportion to the total time services are provided during a school day to pupils who are counted pursuant to subparagraph (2).

(b) Multiplying the number of special education program units maintained and operated by the amount per program established for that school year.

(c) Adding the amounts computed in paragraphs (a) and (b).

2. Except as otherwise provided in subsection 4, if the enrollment of pupils in a school district or a charter school that is located within the school district on the last day of the first school month of the school district for the school year is less than or equal to 95 percent of the enrollment of pupils in the same school district or charter school on the last day of the first school month of the school district for the immediately preceding school year, the largest number from among the immediately preceding 2 school years must be used for purposes of apportioning money from the State Distributive School Account to that school district or charter school pursuant to NRS 387.124.

3. Except as otherwise provided in subsection 4, if the enrollment of pupils in a school district or a charter school that is located within the school district on the last day of the first school month of the school district for the school year is more than 95 percent of the enrollment of pupils in the same school district or charter school on the last day of the first school month of the school district for the immediately preceding school year, the larger enrollment number from the current year or the immediately preceding school year must be used for purposes of apportioning money from the State Distributive School Account to that school district or charter school pursuant to NRS 387.124.

4. If the Department determines that a school district or charter school deliberately causes a decline in the enrollment of pupils in the school district or charter school to receive a higher apportionment pursuant to subsection 2 or 3, including, without limitation, by eliminating grades or moving into smaller facilities, the enrollment number from the current school year must be used for purposes of apportioning money from the State Distributive School Account to that school district or charter school pursuant to NRS 387.124.

5. Pupils who are excused from attendance at examinations or have completed their work in accordance with the rules of the board of trustees must be credited with attendance during that period.

6. Pupils who are incarcerated in a facility or institution operated by the Department of Corrections must not be counted for the purpose of computing basic support pursuant to this section. The average daily attendance for such pupils must be reported to the Department of Education.

7. Pupils who are enrolled in courses which are approved by the Department as meeting the requirements for an adult to earn a high school diploma must not be counted for the purpose of computing basic support pursuant to this section.

Sec. 16. NRS 387.124 is hereby amended to read as follows:

387.124 Except as otherwise provided in this section and NRS 387.528:

1. On or before August 1, November 1, February 1 and May 1 of each year, the Superintendent of Public Instruction shall apportion the State Distributive School Account in the State General Fund among the several county school districts, charter schools and university schools for profoundly gifted pupils in amounts approximating one-fourth of their respective yearly apportionments less any amount set aside as a reserve. Except as otherwise provided in NRS 387.1244, the apportionment to a school district, computed on a yearly basis, equals the difference between the basic support and the local funds available pursuant to NRS 387.1235, minus all the funds attributable to pupils who reside in the county but attend a charter school, all the funds attributable to pupils who reside in the county and are enrolled full-time or part-time in a program of distance education provided by another school district or a charter school, ~~[and]~~ all the funds attributable to pupils who are enrolled in a university school for profoundly gifted pupils located in the county ~~[.]~~ ***and all the funds deposited in education savings accounts established on behalf of children who reside in the county pursuant to sections 2 to 15, inclusive, of this act.*** No apportionment may be made to a school district if the amount of the local funds exceeds the amount of basic support.

2. Except as otherwise provided in subsection 3 and NRS 387.1244, the apportionment to a charter school, computed on a yearly basis, is equal to the sum of the basic support per pupil in the county in which the pupil resides plus the amount of local funds available per pupil pursuant to NRS 387.1235 and all other funds available for public schools in the county in which the pupil resides minus the sponsorship fee prescribed by NRS 386.570 and minus all the funds attributable to pupils who are enrolled in the charter school but are concurrently enrolled part-time in a program of distance education provided by a school district or another charter school. If the apportionment per pupil to a charter school is more than the amount to be apportioned to the school district in which a pupil who is enrolled in the charter school resides, the school district in which the pupil resides shall pay the difference directly to the charter school.

3. Except as otherwise provided in NRS 387.1244, the apportionment to a charter school that is sponsored by the State Public Charter School Authority or by a college or university within the Nevada System of Higher Education, computed on a yearly basis, is equal to the sum of the basic support per pupil in the county

in which the pupil resides plus the amount of local funds available per pupil pursuant to NRS 387.1235 and all other funds available for public schools in the county in which the pupil resides, minus the sponsorship fee prescribed by NRS 386.570 and minus all funds attributable to pupils who are enrolled in the charter school but are concurrently enrolled part-time in a program of distance education provided by a school district or another charter school.

4. Except as otherwise provided in NRS 387.1244, in addition to the apportionments made pursuant to this section, an apportionment must be made to a school district or charter school that provides a program of distance education for each pupil who is enrolled part-time in the program. The amount of the apportionment must be equal to the percentage of the total time services are provided to the pupil through the program of distance education per school day in proportion to the total time services are provided during a school day to pupils who are counted pursuant to subparagraph (2) of paragraph (a) of subsection 1 of NRS 387.1233 for the school district in which the pupil resides.

5. The governing body of a charter school may submit a written request to the Superintendent of Public Instruction to receive, in the first year of operation of the charter school, an apportionment 30 days before the apportionment is required to be made pursuant to subsection 1. Upon receipt of such a request, the Superintendent of Public Instruction may make the apportionment 30 days before the apportionment is required to be made. A charter school may receive all four apportionments in advance in its first year of operation.

6. Except as otherwise provided in NRS 387.1244, the apportionment to a university school for profoundly gifted pupils, computed on a yearly basis, is equal to the sum of the basic support per pupil in the county in which the university school is located plus the amount of local funds available per pupil pursuant to NRS 387.1235 and all other funds available for public schools in the county in which the university school is located. If the apportionment per pupil to a university school for profoundly gifted pupils is more than the amount to be apportioned to the school district in which the university school is located, the school district shall pay the difference directly to the university school. The governing body of a university school for profoundly gifted pupils may submit a written request to the Superintendent of Public Instruction to receive, in the first year of operation of the university school, an apportionment 30 days before the apportionment is required to be made pursuant to subsection 1. Upon receipt of such a request, the Superintendent of Public Instruction may make the

apportionment 30 days before the apportionment is required to be made. A university school for profoundly gifted pupils may receive all four apportionments in advance in its first year of operation.

7. The Superintendent of Public Instruction shall apportion, on or before August 1 of each year, the money designated as the "Nutrition State Match" pursuant to NRS 387.105 to those school districts that participate in the National School Lunch Program, 42 U.S.C. §§ 1751 et seq. The apportionment to a school district must be directly related to the district's reimbursements for the Program as compared with the total amount of reimbursements for all school districts in this State that participate in the Program.

8. If the State Controller finds that such an action is needed to maintain the balance in the State General Fund at a level sufficient to pay the other appropriations from it, the State Controller may pay out the apportionments monthly, each approximately one-twelfth of the yearly apportionment less any amount set aside as a reserve. If such action is needed, the State Controller shall submit a report to the Department of Administration and the Fiscal Analysis Division of the Legislative Counsel Bureau documenting reasons for the action.

Sec. 16.2. NRS 388.850 is hereby amended to read as follows:

388.850 1. A pupil may enroll in a program of distance education unless:

(a) Pursuant to this section or other specific statute, the pupil is not eligible for enrollment or the pupil's enrollment is otherwise prohibited;

(b) The pupil fails to satisfy the qualifications and conditions for enrollment adopted by the State Board pursuant to NRS 388.874; or

(c) The pupil fails to satisfy the requirements of the program of distance education.

2. A child who is exempt from compulsory attendance and is enrolled in a private school pursuant to chapter 394 of NRS or is being homeschooled is not eligible to enroll in or otherwise attend a program of distance education, regardless of whether the child is otherwise eligible for enrollment pursuant to subsection 1.

3. ***An opt-in child who is exempt from compulsory attendance is not eligible to enroll in or otherwise attend a program of distance education, regardless of whether the child is otherwise eligible for enrollment pursuant to subsection 1, unless the opt-in child receives only a portion of his or her instruction from a participating entity as authorized pursuant to section 7 of this act.***

4. If a pupil who is prohibited from attending public school pursuant to NRS 392.264 enrolls in a program of distance education, the enrollment and attendance of that pupil must comply with all

requirements of NRS 62F.100 to 62F.150, inclusive, and 392.251 to 392.271, inclusive.

Sec. 16.3. Chapter 392 of NRS is hereby amended by adding thereto the provisions set forth as sections 16.35, 16.4 and 16.5 of this act.

Sec. 16.35. ***As used in this section and sections 16.4 and 16.5 of this act, unless the context otherwise requires, "parent" has the meaning ascribed to it in section 4 of this act.***

Sec. 16.4. ***1. The parent of an opt-in child shall provide notice to the school district where the child would otherwise attend or the charter school in which the child was previously enrolled, as applicable, that the child is an opt-in child as soon as practicable after entering into an agreement to establish an education savings account pursuant to section 7 of this act. Such notice must also include:***

(a) The full name, age and gender of the child; and

(b) The name and address of each parent of the child.

2. The superintendent of schools of a school district or the governing body of a charter school, as applicable, shall accept a notice provided pursuant to subsection 1 and shall not require any additional assurances from the parent who filed the notice.

3. The school district or the charter school, as applicable, shall provide to a parent who files a notice pursuant to subsection 1, a written acknowledgement which clearly indicates that the parent has provided the notification required by law and that the child is an opt-in child. The written acknowledgment shall be deemed proof of compliance with Nevada's compulsory school attendance law.

4. The superintendent of schools of a school district or the governing body of a charter school, as applicable, shall process a written request for a copy of the records of the school district or charter school, as applicable, or any information contained therein, relating to an opt-in child not later than 5 days after receiving the request. The superintendent of schools or governing body of a charter school may only release such records or information:

(a) To the Department, the Budget Division of the Department of Administration and the Fiscal Analysis Division of the Legislative Counsel Bureau for use in preparing the biennial budget;

(b) To a person or entity specified by the parent of the child, or by the child if the child is at least 18 years of age, upon suitable proof of identity of the parent or child; or

(c) If required by specific statute.

5. If an opt-in child seeks admittance or entrance to any public school in this State, the school may use only commonly used practices in determining the academic ability, placement or eligibility of the child. If the child enrolls in a charter school, the charter school shall, to the extent practicable, notify the board of trustees of the resident school district of the child's enrollment in the charter school. Regardless of whether the charter school provides such notification to the board of trustees, the charter school may count the child who is enrolled for the purposes of the calculation of basic support pursuant to NRS 387.1233. An opt-in child seeking admittance to public high school must comply with NRS 392.033.

6. A school shall not discriminate in any manner against an opt-in child or a child who was formerly an opt-in child.

7. Each school district shall allow an opt-in child to participate in all college entrance examinations offered in this State, including, without limitation, the SAT, the ACT, the Preliminary SAT and the National Merit Scholarship Qualifying Test. Each school district shall upon request, provide information to the parent of an opt-in child who resides in the school district has adequate notice of the availability of information concerning such examinations on the Internet website of the school district maintained pursuant to NRS 389.004.

Sec. 16.5. *1. The Department shall develop a standard form for the notice of intent of an opt-in child to participate in programs and activities. The board of trustees of each school district shall, in a timely manner, make only the form developed by the Department available to parents of opt-in children.*

2. If an opt-in child wishes to participate in classes, activities, programs, sports or interscholastic activities and events at a public school or through a school district, or through the Nevada Interscholastic Activities Association, the parent of the child must file a current notice of intent to participate with the resident school district.

Sec. 16.6. NRS 392.033 is hereby amended to read as follows:

392.033 1. The State Board shall adopt regulations which prescribe the courses of study required for promotion to high school, including, without limitation, English, mathematics, science and social studies. The regulations may include the credits to be earned in each course.

2. Except as otherwise provided in subsection 4, the board of trustees of a school district shall not promote a pupil to high school if the pupil does not complete the course of study or credits required for promotion. The board of trustees of the school district in which

the pupil is enrolled may provide programs of remedial study to complete the courses of study required for promotion to high school.

3. The board of trustees of each school district shall adopt a procedure for evaluating the course of study or credits completed by a pupil who transfers to a junior high or middle school from a junior high or middle school in this State or from a school outside of this State.

4. The board of trustees of each school district shall adopt a policy that allows a pupil who has not completed the courses of study or credits required for promotion to high school to be placed on academic probation and to enroll in high school. A pupil who is on academic probation pursuant to this subsection shall complete appropriate remediation in the subject areas that the pupil failed to pass. The policy must include the criteria for eligibility of a pupil to be placed on academic probation. A parent or guardian may elect not to place his or her child on academic probation but to remain in grade 8.

5. A homeschooled child ***or opt-in child*** who enrolls in a public high school shall, upon initial enrollment:

(a) Provide documentation sufficient to prove that the child has successfully completed the courses of study required for promotion to high school through an accredited program of homeschool study recognized by the board of trustees of the school district ~~[.]~~ ***or from a participating entity, as applicable;***

(b) Demonstrate proficiency in the courses of study required for promotion to high school through an examination prescribed by the board of trustees of the school district; or

(c) Provide other proof satisfactory to the board of trustees of the school district demonstrating competency in the courses of study required for promotion to high school.

6. As used in this section, "participating entity" has the meaning ascribed to it in section 5 of this act.

Sec. 16.7. NRS 392.070 is hereby amended to read as follows:

392.070 1. Attendance of a child required by the provisions of NRS 392.040 must be excused when:

(a) The child is enrolled in a private school pursuant to chapter 394 of NRS; ~~[or]~~

(b) A parent of the child chooses to provide education to the child and files a notice of intent to homeschool the child with the superintendent of schools of the school district in which the child resides in accordance with NRS 392.700 ~~[.]~~ ***; or***

(c) The child is an opt-in child and notice of such has been provided to the school district in which the child resides or the

charter school in which the child was previously enrolled, as applicable, in accordance with section 16.4 of this act.

2. The board of trustees of each school district shall provide programs of special education and related services for homeschooled children. The programs of special education and related services required by this section must be made available:

(a) Only if a child would otherwise be eligible for participation in programs of special education and related services pursuant to NRS 388.440 to 388.520, inclusive;

(b) In the same manner that the board of trustees provides, as required by 20 U.S.C. § 1412, for the participation of pupils with disabilities who are enrolled in private schools within the school district voluntarily by their parents or legal guardians; and

(c) In accordance with the same requirements set forth in 20 U.S.C. § 1412 which relate to the participation of pupils with disabilities who are enrolled in private schools within the school district voluntarily by their parents or legal guardians.

3. Except as otherwise provided in subsection 2 for programs of special education and related services, upon the request of a parent or legal guardian of a child who is enrolled in a private school or a parent or legal guardian of a homeschooled child ~~[,]~~ ***or opt-in child,*** the board of trustees of the school district in which the child resides shall authorize the child to participate in any classes and extracurricular activities, excluding sports, at a public school within the school district if:

(a) Space for the child in the class or extracurricular activity is available;

(b) The parent or legal guardian demonstrates to the satisfaction of the board of trustees that the child is qualified to participate in the class or extracurricular activity; and

(c) If the child is ~~[a]~~ *:*

(1) A homeschooled child, a notice of intent of a homeschooled child to participate in programs and activities is filed for the child with the school district for the current school year pursuant to NRS 392.705 ~~[.]~~ ***; or***

(2) An opt-in child, a notice of intent of an opt-in child to participate in programs and activities is filed for the child with the school district for the current school year pursuant to section 16.5 of this act.

➥ If the board of trustees of a school district authorizes a child to participate in a class or extracurricular activity, excluding sports, pursuant to this subsection, the board of trustees is not required to provide transportation for the child to attend the class or activity. A homeschooled child ***or opt-in child*** must be allowed to participate in

interscholastic activities and events governed by the Nevada Interscholastic Activities Association pursuant to NRS 386.420 to 386.470, inclusive, and interscholastic activities and events, including sports, pursuant to subsection 5.

4. The board of trustees of a school district may revoke its approval for a pupil to participate in a class or extracurricular activity at a public school pursuant to subsection 3 if the board of trustees or the public school determines that the pupil has failed to comply with applicable statutes, or applicable rules and regulations of the board of trustees. If the board of trustees revokes its approval, neither the board of trustees nor the public school is liable for any damages relating to the denial of services to the pupil.

5. In addition to those interscholastic activities and events governed by the Nevada Interscholastic Activities Association pursuant to NRS 386.420 to 386.470, inclusive, a homeschooled child ***or opt-in child*** must be allowed to participate in interscholastic activities and events, including sports, if a notice of intent of a homeschooled child ***or opt-in child*** to participate in programs and activities is filed for the child with the school district for the current school year pursuant to NRS 392.705 ~~[.]~~ ***or section 16.5 of this act, as applicable.*** A homeschooled child ***or opt-in child*** who participates in interscholastic activities and events at a public school pursuant to this subsection must participate within the school district of the child's residence through the public school which the child is otherwise zoned to attend. Any rules or regulations that apply to pupils enrolled in public schools who participate in interscholastic activities and events, including sports, apply in the same manner to homeschooled children ***and opt-in children*** who participate in interscholastic activities and events, including, without limitation, provisions governing:

(a) Eligibility and qualifications for participation;
(b) Fees for participation;
(c) Insurance;
(d) Transportation;
(e) Requirements of physical examination;
(f) Responsibilities of participants;
(g) Schedules of events;
(h) Safety and welfare of participants;
(i) Eligibility for awards, trophies and medals;
(j) Conduct of behavior and performance of participants; and
(k) Disciplinary procedures.

6. If a homeschooled child ***or opt-in child*** participates in interscholastic activities and events pursuant to subsection 5:

(a) No challenge may be brought by the Association, a school district, a public school or a private school, a parent or guardian of a pupil enrolled in a public school or a private school, a pupil enrolled in a public school or a private school, or any other entity or person claiming that an interscholastic activity or event is invalid because the homeschooled child ***or opt-in child*** is allowed to participate.

(b) Neither the school district nor a public school may prescribe any regulations, rules, policies, procedures or requirements governing the eligibility or participation of the homeschooled child ***or opt-in child*** that are more restrictive than the provisions governing the eligibility and participation of pupils enrolled in public schools.

7. The programs of special education and related services required by subsection 2 may be offered at a public school or another location that is appropriate.

8. The board of trustees of a school district:

(a) May, before providing programs of special education and related services to a homeschooled child ***or opt-in child*** pursuant to subsection 2, require proof of the identity of the child, including, without limitation, the birth certificate of the child or other documentation sufficient to establish the identity of the child.

(b) May, before authorizing a homeschooled child ***or opt-in child*** to participate in a class or extracurricular activity, excluding sports, pursuant to subsection 3, require proof of the identity of the child, including, without limitation, the birth certificate of the child or other documentation sufficient to establish the identity of the child.

(c) Shall, before allowing a homeschooled child ***or opt-in child*** to participate in interscholastic activities and events governed by the Nevada Interscholastic Activities Association pursuant to NRS 386.420 to 386.470, inclusive, and interscholastic activities and events pursuant to subsection 5, require proof of the identity of the child, including, without limitation, the birth certificate of the child or other documentation sufficient to establish the identity of the child.

9. The Department shall adopt such regulations as are necessary for the boards of trustees of school districts to provide the programs of special education and related services required by subsection 2.

10. As used in this section ~~[, "related]~~ ***:***

(a) "Participating entity" has the meaning ascribed to it in section 5 of this act.

(b) "Related services" has the meaning ascribed to it in 20 U.S.C. § 1401.

Sec. 16.8. NRS 392.466 is hereby amended to read as follows:

392.466 1. Except as otherwise provided in this section, any pupil who commits a battery which results in the bodily injury of an employee of the school or who sells or distributes any controlled substance while on the premises of any public school, at an activity sponsored by a public school or on any school bus must, for the first occurrence, be suspended or expelled from that school, although the pupil may be placed in another kind of school, for at least a period equal to one semester for that school. For a second occurrence, the pupil must be permanently expelled from that school and:

(a) Enroll in a private school pursuant to chapter 394 of NRS , ***become an opt-in child*** or be homeschooled; or

(b) Enroll in a program of independent study provided pursuant to NRS 389.155 for pupils who have been suspended or expelled from public school or a program of distance education provided pursuant to NRS 388.820 to 388.874, inclusive, if the pupil qualifies for enrollment and is accepted for enrollment in accordance with the requirements of the applicable program.

2. Except as otherwise provided in this section, any pupil who is found in possession of a firearm or a dangerous weapon while on the premises of any public school, at an activity sponsored by a public school or on any school bus must, for the first occurrence, be expelled from the school for a period of not less than 1 year, although the pupil may be placed in another kind of school for a period not to exceed the period of the expulsion. For a second occurrence, the pupil must be permanently expelled from the school and:

(a) Enroll in a private school pursuant to chapter 394 of NRS , ***become an opt-in child*** or be homeschooled; or

(b) Enroll in a program of independent study provided pursuant to NRS 389.155 for pupils who have been suspended or expelled from public school or a program of distance education provided pursuant to NRS 388.820 to 388.874, inclusive, if the pupil qualifies for enrollment and is accepted for enrollment in accordance with the requirements of the applicable program.

➥ The superintendent of schools of a school district may, for good cause shown in a particular case in that school district, allow a modification to the expulsion requirement of this subsection if such modification is set forth in writing.

3. Except as otherwise provided in this section, if a pupil is deemed a habitual disciplinary problem pursuant to NRS 392.4655, the pupil must be suspended or expelled from the school for a period equal to at least one semester for that school. For the period of the pupil's suspension or expulsion, the pupil must:

(a) Enroll in a private school pursuant to chapter 394 of NRS , ***become an opt-in child*** or be homeschooled; or

(b) Enroll in a program of independent study provided pursuant to NRS 389.155 for pupils who have been suspended or expelled from public school or a program of distance education provided pursuant to NRS 388.820 to 388.874, inclusive, if the pupil qualifies for enrollment and is accepted for enrollment in accordance with the requirements of the applicable program.

4. This section does not prohibit a pupil from having in his or her possession a knife or firearm with the approval of the principal of the school. A principal may grant such approval only in accordance with the policies or regulations adopted by the board of trustees of the school district.

5. Any pupil in grades 1 to 6, inclusive, except a pupil who has been found to have possessed a firearm in violation of subsection 2, may be suspended from school or permanently expelled from school pursuant to this section only after the board of trustees of the school district has reviewed the circumstances and approved this action in accordance with the procedural policy adopted by the board for such issues.

6. A pupil who is participating in a program of special education pursuant to NRS 388.520, other than a pupil who is gifted and talented or who receives early intervening services, may, in accordance with the procedural policy adopted by the board of trustees of the school district for such matters, be:

(a) Suspended from school pursuant to this section for not more than 10 days. Such a suspension may be imposed pursuant to this paragraph for each occurrence of conduct proscribed by subsection 1.

(b) Suspended from school for more than 10 days or permanently expelled from school pursuant to this section only after the board of trustees of the school district has reviewed the circumstances and determined that the action is in compliance with the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 et seq.

7. As used in this section:

(a) "Battery" has the meaning ascribed to it in paragraph (a) of subsection 1 of NRS 200.481.

(b) "Dangerous weapon" includes, without limitation, a blackjack, slungshot, billy, sand-club, sandbag, metal knuckles, dirk or dagger, a nunchaku, switchblade knife or trefoil, as defined in NRS 202.350, a butterfly knife or any other knife described in NRS 202.350, or any other object which is used, or threatened to be used,

in such a manner and under such circumstances as to pose a threat of, or cause, bodily injury to a person.

(c) "Firearm" includes, without limitation, any pistol, revolver, shotgun, explosive substance or device, and any other item included within the definition of a "firearm" in 18 U.S.C. § 921, as that section existed on July 1, 1995.

8. The provisions of this section do not prohibit a pupil who is suspended or expelled from enrolling in a charter school that is designed exclusively for the enrollment of pupils with disciplinary problems if the pupil is accepted for enrollment by the charter school pursuant to NRS 386.580. Upon request, the governing body of a charter school must be provided with access to the records of the pupil relating to the pupil's suspension or expulsion in accordance with applicable federal and state law before the governing body makes a decision concerning the enrollment of the pupil.

Sec. 17. This act becomes effective on:

1. July 1, 2015, for the purposes of adopting any regulations and performing any other preparatory administrative tasks necessary to carry out the provisions of this act; and

2. January 1, 2016, for all other purposes.

EXHIBIT 1