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 III

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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

PARENT-INTERVENORS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND RESPONSE IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

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MEMORANDUM OF POINTS AND AUTHORITIES

Applicants for Intervention are parents who seek to defend the constitutionality of Nevada's Education Savings Account ("ESA") program, enacted by the Legislature as Senate Bill (SB) 302 and signed by the Governor on June 2, 2015. As of the date of this filing, Applicants' fully briefed motion to intervene is still pending. However, for ease of reference, and to best distinguish themselves from Plaintiffs and the State Defendant, Applicants will refer to themselves as Parent-Intervenors in this brief. Consistent with the pledge they made in their motion to intervene not to cause delay in this case, Mot. Interv. 14, Parent-Intervenors file this timely response in opposition to Plaintiffs' motion for preliminary injunction and in support of Defendant's cross-motion to dismiss. For the reasons stated below, Plaintiffs' motion for preliminary injunction should be denied and Defendant's cross-motion to dismiss should be granted.

INTRODUCTION

Plaintiffs and Parent-Intervenors agree about one thing: the importance of a strong, vibrant, well-functioning education system for all of Nevada's children. As the U.S. Supreme Court poignantly stated in its landmark decision in *Brown v. Board of Education*, "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms." 347 U.S. 483, 492 (1954). Sadly, many states, Nevada included, have been unable to fully deliver on *Brown*'s decades-old promise of an equal opportunity for every child to obtain a basic education. According to *Educate Nevada Now!*'s website, "Nevada has one of the nation's highest dropout and lowest graduation rates, ranks near the bottom in standardized testing, and has one of the worst rates of achieving a diploma and earning a postsecondary degree." *The Issues*, Educate Nevada Now, http://www.educatenevadanow.com/the-issues (last visited Nov. 5, 2015). In recognition of the very real need to improve the delivery of education to Nevada's schoolchildren, the Legislature passed, and the Governor signed, a wide range of education-reform measures this session, including an

historic tax increase that will raise over $1 billion in new revenues to fund Nevada's public school system. SB 483 (2015); *see also* Ray Hagar & Anjeanette Damon, *'Historic' Tax Hike for Education Heads to Governor*, Reno Gazette-J. (June 1, 2015), http://www.rgj.com/story/news/politics/2015/05/31/nevada-legislature-final-days/28264109/.

In light of Nevada's high dropout rates, stagnant public school test scores, and low rates of college graduation, it is entirely reasonable for the Legislature to pursue robust educational reform measures, like the ESA program. *See Kotterman v. Killian*, 972 P.2d 606, 623 (Ariz. 1999) (upholding a tax-credit-funded private school scholarship program and noting that "[t]he pursuit of such a strategy falls squarely within the legislature's prerogative"). This is especially true considering that the Legislature received overwhelming empirical evidence demonstrating the efficacy of educational choice programs. Def.'s Resp. Opp'n. Mot. Prel. Inj. and Cross-Mot. Dismiss ("Def.'s Opp'n") 3-4. Nevertheless, Plaintiffs challenge the ESA program under three sections of Article 11 of the Nevada Constitution. All three constitutional arguments can be distilled into one basic argument: Plaintiffs believe that the educational duties assigned to the Legislature by Article 11, specifically the duties laid out in Sections 2, 3, and 6, must be met *exclusively* through the uniform system of common schools. Plaintiffs thus seek to transform the Legislature's affirmative duty to provide for a system of common schools into a limitation on the Legislature's authority to set education policy.

The folly of Plaintiffs' argument becomes readily apparent when one begins at the beginning of Article 11. Article 11, Section 1 imposes a broad duty on the Legislature to "encourage by *all suitable means* the promotion of intellectual, literary, scientific, mining, mechanical, agricultural, and moral improvements." Nev. Const. art. 11, § 1 (emphasis added). Reduced to its core, Plaintiffs' interpretation of Article 11, Sections 2, 3, and 6, not only reads out of the Nevada Constitution the "all suitable means" language of Section 1, but also reads into Sections 2, 3, and 6 an implicit prohibition on pursuing any educational policy or initiative outside the common school system. It is difficult to fathom the notion that Nevada's founders intended to so sharply constrain the Legislature's prerogatives when it comes to setting

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education policy. Indeed, other state courts construing similar educational articles have concluded that such provisions establish a floor, not a ceiling, "upon which the legislature can build additional opportunities for school children." *Jackson v. Benson*, 578 N.W.2d 602, 628 (Wis. 1998). Plaintiffs' tortured interpretation of Article 11 neither warrants injunctive relief nor states a claim upon which relief can be granted.

BACKGROUND

I. The ESA Program.

Nevada's ESA program is the nation's most inclusive and innovative educational choice program. Under the terms of the program, families may use the funds deposited in their student's ESA to purchase multiple educational products or services in addition to—or instead of—private school tuition. SB 302 §§ 5, 9(1)(a)-(k) (copy of SB 302 attached to Def.'s Opp'n as Ex. 1). Any child who has attended a public school for at least 100 days may participate in the program. SB 302 § 7. Prior to any funds being deposited in a student's ESA, participating parents must establish an education savings account with a private financial management firm that has been qualified by the State Treasurer. SB 302 § 7(2). The State Treasurer will then deposit into that student's ESA, in quarterly installments, an amount equal to "90 percent of the statewide average basic support per pupil." SB 302 § 8(2)(b). For pupils with disabilities and for very low-income families, the amount deposited will be equal to 100 percent of the statewide average basic support per pupil. SB 302 § 8(2)(a). Parents must use the funds in their student's ESA "only" for the educational expenses authorized by the program.[1] SB 302 § 9(1). Parents decide how to spend their student's ESA funds by picking and choosing from the program's long list of permissible educational expenses. SB 302 §§ 5, 9(1)(a)-(k). Thus, parents may tailor their pupil's education by paying for any combination of allowable expenditures. The options available to parents include, but are not limited to, tuition and fees at

[1] While parents may register as a "participating entity" and provide instruction directly to their own children, there is no provision for parents to be paid for such instruction. Parents may purchase curriculum and supplemental materials for use at home, SB 302 § 9(1)(k), but parents may never receive a payment of ESA funds as compensation for providing direct instruction to their own children, SB 302 § 9(2).

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private schools, tutoring or other teaching services provided by a tutor or tutoring facility, curriculum and required supplemental materials to educate their child at home, distance learning programs, and even transportation costs. SB 302 §§ 5, 9(1)(a)-(k). No student is required to be enrolled in a private school under the terms of the ESA program, but rather may be educated by any combination of the allowable educational goods and services providers. No state actor, at any time, exercises any influence over the parents' educational choices.

II. Procedural Background.

Plaintiffs, parents of children who are enrolled in Nevada public schools, Compl. ¶¶ 8-14, filed this legal challenge to the ESA program on September 9, 2015. Their Complaint asserts the ESA program violates three provisions of Article 11 of the Nevada Constitution, specifically Sections 2, 3, and 6. Compl. ¶¶ 55-57, 60, 63. Article 11, Section 2 requires the Legislature to provide for a uniform system of common schools. Article 11, Section 3 restricts certain funds for "educational purposes." And Article 11, Section 6, in a nutshell, requires the Legislature to determine the amount of money required to sufficiently fund the public school system and appropriate those funds before any other appropriation. On September 17, 2015, five parents who plan to participate in the ESA program moved to intervene in the case to defend the program. Plaintiffs opposed the motion to intervene, which is now fully briefed and still pending. Plaintiffs moved for a preliminary injunction on October 20, 2015. The State Defendant filed his combined response in opposition to the motion for preliminary injunction and motion to dismiss the case for failure to state a claim on November 5, 2015—the day his Answer was due—and several days before the November 9, 2015 due date for his response to the motion for preliminary injunction.

III. The Parent-Intervenors.

Parent-Intervenors' children illustrate the well-known maxims that there is neither a "one-size-fits-all" nor a "one-pace-fits-all" approach to educating children. Some of the children are the Parent-Intervenors' natural children. Mot. Interv. Exs. 2 ¶ 1, 3 ¶ 1, 4 ¶ 1. Many are adopted. Mot. Interv. Exs. 1 ¶ 1; 5 ¶ 1. Some have learning or physical disabilities. Mot.

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Interv. Exs. 1 ¶¶ 21, 27; 3 ¶¶ 20-21; 5 ¶¶ 16, 24. Others are gifted. Mot. Interv. Ex. 4 ¶¶ 9, 18. Seven of the children have either an Individualized Education Program (IEP) or a 504 accommodation plan. Mot. Interv. Ex. 1, ¶¶ 19, 21, 27; Ex. 4, ¶ 7; Ex. 5 ¶¶ 18, 24. A few of the children's educational needs are being met in their current public or charter school. Mot. Interv. Exs. 1 ¶ 23; 3 ¶ 18; 4 ¶¶ 12, 16; 5 ¶ 6. For others, their learning challenges were completely ignored by their public school. Mot. Interv. Ex. 3 ¶¶ 6-17. Two never want return to a traditional public school because of the bullying and abuse they have received at the hands of their fellow classmates. Mot. Interv. Exs. 1 ¶¶ 4-15; 2 ¶ 20. While many of Parent-Intervenors' children would do well in a private school, Mot. Interv. Ex. 1 ¶¶ 15, 20, 34; Ex. 2 ¶ 23; Ex. 3 ¶ 29; Ex. 4 ¶ 23, 27; Ex. 5, ¶¶ 19, 32, 41, 51, a handful of their children would thrive best outside of a traditional classroom environment through a mixture of private tutoring and home education—options available to them under the ESA program, Mot. Interv. Exs. 1 ¶ 30; 3 ¶ 23; 5 ¶ 27.

Combined, the five Parent-Intervenors have 22 children who are eligible to participate in the program. At least five of those students will remain in their current public or charter school because those schools are adequately meeting their educational needs. Mot. Interv. Exs. 1 ¶ 23; 3 ¶ 18; 4 ¶ 12; 5 ¶ 6. Another nine will most likely be enrolled in a private school that is either affiliated with a particular religion, religious denomination, or a local church, Mot. Interv. Exs. 1 ¶¶ 15, 20, 34; 2 ¶ 23; 5 ¶¶ 19, 32, 41, 51, while three will attend a private school that will not be affiliated with any particular religion, religious denomination, or any church, but that will open the day with prayer, and thereby express a general belief in the existence of God. Mot. Interv. Exs. 3 ¶ 31; 4 ¶¶ 23, 27-31. At least one of the children will be looking for a technical or vocational school to finish her secondary education. Mot. Interv. Ex. 5 ¶ 13. And three of the children will be educated at home, using a mixture of online or distance learning tools, private tutoring, and curricula designed for home education. Mot. Interv. Exs. 1 ¶ 30; 3 ¶ 23; 5 ¶ 27. The wide variety of choices that Parent-Intervenors plan to make for their children—even children in the same family—confirms the genuine need for a policy such as the ESA program.

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ARGUMENT

Plaintiffs' motion for preliminary injunction should be denied and their Complaint dismissed because they cannot prevail on merits and because they have not stated a claim upon which relief can be granted.[2] Moreover, with regard to the motion for preliminary injunction, Plaintiffs have presented no evidence of injury and, as the Parent-Intervenors' individual stories demonstrate, the potential hardships and the public interest weigh heavily in favor of allowing the program to go into effect.

Parent-Intervenors' argument proceeds in three parts. First, Parent-Intervenors conclusively demonstrate in Section I below that the Nevada Constitution authorizes the Legislature to pursue educational initiatives outside of the public education system and that Plaintiffs have no chance whatsoever to succeed on the merits. If the Court agrees that there is no likelihood of success on the merits, there is no need to address the other factors, and the case should then be dismissed. But if the Court does find that Plaintiffs have some chance of success on the merits, the remaining factors for deciding a motion for preliminary injunction weigh heavily against enjoining the challenged ESA program. Thus, Parent-Intervenors address in Section II, the fact that Plaintiffs present absolutely no evidence of harm to themselves or the public schools they attend, but rather rely on conjecture and speculation to paint a picture of a public education system in peril. Finally, Parent-Intervenors explain in Section III why their own children's educational needs, many of which are not being met in their current educational placement, and which merely scratch the surface of the many families pre-registered for the ESA program, mean that the potential hardships and the public interest weigh heavily in favor of denying the requested preliminary injunction.

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[2] Parent-Intervenors preserved, as their First Affirmative Defense in their Answer, their argument that, pursuant to NRCP 12(b)(5), the Plaintiffs' Complaint failed to state a claim upon which relief may be granted. Parent-Intervs.' Answer 9.

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I. Plaintiffs Cannot Demonstrate a Likelihood of Success on the Merits. And They Have Failed to State a Claim Upon Which Relief Can Be Granted.

Parent-Intervenors begin, in Section I.A., by outlining the appropriate standards for deciding a motion for preliminary injunction and a motion to dismiss. Then, in Section I.B., they discuss the principles of constitutional interpretation that will guide the Court's inquiry into Plaintiffs' facial constitutional claims. In Section I.C., Parent-Intervenors show that Plaintiffs' three claims, all of which are based on the notion that the provisions at issue require that public funds be used exclusively for the common school system, share a common, fatal flaw: They ignore the plain language of Article 11, Section 1, which explicitly rejects Plaintiffs' notion of exclusivity. After discussing this common flaw, Parent-Intervenors address each of Plaintiffs' constitutional claims under Article 11, Sections 3, 6, and 2, in Sections I.D., I.E., I.F., respectively, and demonstrate why each of their claims fail as a matter of the plain text of the Nevada Constitution's education article.

A. Standards for Deciding a Motion for Preliminary Injunction and a Motion to Dismiss.

A preliminary injunction is only "proper where the moving party can demonstrate that it has a reasonable likelihood of success on the merits and that, absent a preliminary injunction, it will suffer irreparable harm for which compensatory damages would not suffice." *Excellence Cmty. Mgmt., LLC v. Gilmore*, 131 Nev. Adv. Op. 38, 351 P.3d 720, 722 (2015) (citing NRS 33.010). "In considering preliminary injunctions, courts also weigh the potential hardships to the relative parties and others, and the public interest." *Univ. & Cmty. Coll. Sys. of Nev. v. Nevadans for Sound Gov't*, 120 Nev. 712, 721, 100 P.3d 179, 187 (2004). Here, Plaintiffs are not entitled to a preliminary injunction. They cannot succeed on the merits because the plain text of Nevada's Constitution Article 11, Section 1 authorizes the Legislature to pursue educational initiatives outside of the public schools system. Plaintiffs' complaint fails to show, beyond a reasonable doubt, that there is any set of facts which would entitle them to relief if true, and so their Complaint should be dismissed. *Blackjack Bonding v. Las Vegas Mun. Court*, 116 Nev. 1213, 1217, 14 P.3d 1275, 1278 (2000). Moreover, Plaintiffs have not produced any

evidence of actual harm, but instead rely on speculation and conjecture about what may happen when the ESA program is implemented next year. Rather, it is the Parent-Intervenors and the many other parents anticipating applying for an ESA who would be irreparably harmed by an injunction, tipping the scales of justice and the public interest sharply in favor of denying Plaintiffs' motion for preliminary injunction.

B. Principles of constitutional interpretation.

Plaintiffs bring a facial constitutional challenge to the ESA program. Pls.' Mot. 1-2 (stating for each of their three constitutional arguments that the ESA program "on its face, violates the Education Article of the Nevada Constitution"). To succeed on their facial challenge, Plaintiffs must "demonstrat[e] that there is no set of circumstances under which the statute would be valid." *Deja Vu Showgirl, LLC v. Nev. Dep't of Taxation*, 130 Nev. Adv. Op. 73, 334 P.3d 392, 398 (2014). To make that determination, the Court must construe the constitutional provisions cited by Plaintiffs, which means applying "[t]he rules of statutory construction" to the constitutional provisions at issue. *We the People Nev. ex. rel. Angle v. Miller*, 124 Nev. 874, 881, 192 P.3d 1166, 1170 (2008).

Thus, when construing constitutional provisions, the Court "must give words their plain meaning unless doing so would violate the spirit of the provision." *Nev. Mining Ass'n v. Erdoes*, 117 Nev. 531, 538, 26 P.3d 753, 757 (2001). And whenever possible, the Court construes constitutional provisions so that they are in harmony with each other, *see Bowyer v. Taack*, 107 Nev. 625, 627-28, 817 P.2d 1176, 1178 (1991), and in a manner that "give[s] meaning to all of [its] parts," *Harris Associates v. Clark County School District*, 119 Nev. 638, 642, 81 P.3d 532, 534 (2003). Together, these principles mean that "[t]he Nevada Constitution should be read as a whole, so as to give effect to and harmonize each provision." *We the People*, 124 Nev. at 881, 192 P.3d at 1171. The Court "will not look beyond the plain language of the [Constitution], unless it is clear that" the framers did not intend for the words they used to be understood by their "definite and ordinary meaning." *Harris Assocs.*, 119 Nev. at 641-42, 81 P.3d at 534. In such an instance, "the court may look to the provision's legislative history and

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the constitutional scheme as a whole to determine what the Nevada Constitution's framers intended." *We the People*, 124 Nev. at 881, 192 P.3d at 1171.

In light of the principles of constitutional interpretation requiring the Court to give meaning to every part of the Constitution, Article 11, Section 1's explicit mandate to the Legislature to encourage knowledge "by all suitable means," and the utter lack of any textual basis for Plaintiffs' own gloss on Article 11, Sections 2, 3, and 6—which would severely curtail the Legislature's discretion over one of its most important duties—Plaintiffs simply cannot succeed on any of their facial constitutional claims.

C. All three of Plaintiffs' claims hinge on the argument that the exclusive means of publicly funding education is through the public school system. But that argument fails because the plain text of Article 11, Section 1 authorizes the Legislature to pursue educational alternatives outside the public school system.

Taken together, Plaintiffs' claims amount to one basic argument—that the exclusive means of publicly funding education is through the public school system. Citing to Article 11, Section 2, Plaintiffs baldly assert that "[a]t the heart of the Education Article is the command that the Legislature establish and maintain a 'uniform' public school system," Pls.' Mot. 16, and that "[i]n 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," Pls.' Mot. 18. Plaintiffs also misinterpret Article 11, Sections 3 and 6 to together limit the Legislature's spending on any "educational purposes," a term taken from Section 3, and including the funds provided under Section 6 by "direct legislative appropriation from the general fund," to spending on the public schools. Pls.' Mot. 11-13. And Plaintiffs mistakenly assert that the program will violate Section 6 because it will result in spending less money on the public schools, which not surprisingly results from there being fewer students to educate in those schools. Pls.' Mot. 14-16.

But Plaintiffs' exclusivity argument ignores the actual "heart of the Education Article," the text of Article 11, Section 1, which imposes upon the Legislature the duty to encourage "the

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promotion of intellectual, literary, scientific, mining, mechanical, agricultural, and moral improvements" by "***all suitable means***." Nev. Const. art. 11, § 1 (emphasis added). This general duty is separate from, even if overlapping with, the Legislature's specific duty to "establish and maintain" a system of public schools. *Id.* at § 2. The framers' expression in the Constitution of a separate duty to encourage knowledge "by all suitable means" grants the Legislature broad authority to undertake a variety of educational initiatives—including initiatives outside of the common school system. Adopting Plaintiffs' interpretation of Article 11, Sections 2, 3, and 6, to require that the exclusive means of publicly funding education is through the public school system, would read the Legislature's explicit duty to encourage knowledge "by all suitable means" right out of the Constitution. Such treatment violates a core principle of constitutional interpretation: to construe the Constitution in a manner to give all parts meaning. *Harris Assocs.*, 119 Nev. at 642, 81 P.3d at 534.

The Indiana Supreme Court recently rejected a similar "exclusivity" argument to the one made by Plaintiffs here. *Meredith v. Pence*, 984 N.E.2d 1213 (Ind. 2013). The reasoning in *Meredith* is worth considering because Indiana's education article contains language nearly identical to Nevada's education article.[3] Indiana's provision simply combines into one section the two duties stated in Nevada's Article 11, Sections 1 and 2. In holding that Indiana's education article "articulates two distinct duties," the Court in *Meredith* relied first upon the fact that, like Nevada's education article, Indiana's 1816 constitution originally stated these two duties as separate and distinct sections. *Meredith,* 984 N.E.2d at 1220-22. The existence of two distinct duties suggested to the Indiana Supreme Court that the legislature's duty to encourage by all suitable means moral, intellectual, scientific, and agricultural improvement "is to be

[3] Article 8, Section 1 of the Indiana Constitution, which was adopted in 1851, shortly before the adoption of the Nevada Constitution in 1864, currently states that: "Knowledge and learning, generally diffused throughout a community, being essential to the preservation of a free government; it shall be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement, and to provide, by law, for a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all."

carried out *in addition to* provision for the common school system." *Id.* at 1222. The Court then concluded that "broad legislative discretion appears to have been the framers' intent through the inclusion of the phrase 'by all suitable means.'" *Id.*

Given that Article 11, Section 1 of the Nevada Constitution encourages education "by all suitable means" in the same manner as does Indiana's Constitution, the notion that Nevada's founders intended to severely curtail innovation and adaptability in an area as challenging and important as education is difficult to fathom. Especially in light of the fact that the *Meredith* Court's interpretation of the words "by all suitable means" accords with the Nevada Supreme Court's pronouncement that, "except as limited by the Constitution, the Legislature has plenary power in authorizing the expenditure of public funds for public purposes." *Norcross v. Cole*, 44 Nev. 88, 91-92, 189 P.877, 877 (1920). Far from being limited by the text of the Constitution, Article 11, Section 1 grants the Legislature broad discretion to pursue educational measures outside of the public school system.[4] *See also, infra*, Part I.D.2., discussing *State ex rel. Keith v. Westerfield*, 23 Nev. 468 (1897) (authorizing expenditures from the State General Fund for educational expenses outside of the public school system). Because there is no explicit or implicit constitutional limitation on the Legislature's power to encourage education "by all suitable means," and the only relevant precedent allowed the Legislature to pay for educational expenses outside of the common school system, the Legislature acted well within its authority in enacting the ESA program. But even setting aside the duty imposed by Article 11, Section 1, as explained in more detail below, Plaintiffs' attempt to derive their preferred policy—no publicly funded educational options outside of the public school system—finds no support in the plain language of Article 11, Sections 2, 3, or 6.

[4] Indeed, the ESA program is not unique in allowing education dollars to be spent outside the public school system. Under NRS 387.1225, the Department of Education may, on behalf of a child who is treated by a hospital and attends a private school operated by the hospital for more than 7 school days, withhold a percentage of the basic support guarantee per pupil from the child's school district and distribute it to the hospital as reimbursement for the cost incurred by the private school.

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D. The ESA program does not violate Article 11, Sections 3 or 6 because it does not divert any money set aside for the support and maintenance of the public school system away from that system.

Plaintiffs first claim is that the ESA program violates Article 11, Section 3 and Article 11, Sections 6.1 and 6.2 by diverting legislative appropriations set aside for the support and maintenance of the public school system, Compl. ¶ 58, to so-called "non-public educational purposes," Pls.' Mot. 12. There are at least three problems with Plaintiffs' argument. First, the plain language of Article 11, Section 3 sets aside ***certain*** monies for "educational purposes"—not for the common school system. Second, even if Section 3 does restrict certain monies for the common school system, it is only those monies that are deposited in the Permanent School Fund and held in trust for the public school system. Here, the ESA program will not use a single cent from the Permanent School Fund, and the Plaintiffs do not seriously contend otherwise. Third, the state's Distributive School Account (DSA),[5] from which ESA funds are deducted, is funded primarily by State General Fund revenues; a funding source not included in Section 3 that the Nevada Supreme Court has long recognized may appropriately fund alternatives to the public education system. *Keith*, 23 Nev. 468. Finally, Article 11, Sections 6.1 and 6.2, grant plenary authority to the legislative branch to determine the amount of money "the Legislature deems to be sufficient," Nev. Const. art. 11, § 6.2, to fund the operation of the public school system and requires that the Legislature appropriates those funds before any other appropriation. Here, the Legislature passed SB 302, amending the state's statutory scheme for allocating public schools funds to take into account students participating in the ESA program, before it passed any of its appropriations bills. Therefore, the Legislature's public school funding bills took into account the fact that some families would choose to apply for the ESA program when it made its determination of the amount it deemed sufficient to fund the maintenance and operation of the public school system.

[5] The mechanics of the DSA and other sources of public school revenue are discussed in Sections I.D.2. and I.E., *infra*. *See also* Def.'s Opp'n Ex. 3.

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1. Article 11, Section 3's plain text sets aside money for "educational purposes," which is broader than just "the common school system."

Article 11, Section 3 states, in its entirety, that:

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

Nev. Const. art. 11, § 3 (emphasis added). Six times Section 3 uses the phrase "for educational purposes." It does *not* say, though it easily could have, "for the support of the common school system." Plaintiffs argue that Section 3 implements the provision of the federal Enabling Act, which granted certain lands to the State "for the support of common schools." Nevada Enabling Act of 1864, ch. 36, § 7, 13 Stat. 30, 32. But Section 3 involves more than just the funds derived from the lands granted to the State by Congress. If the framers had intended, by this Section, to restrict funds from each of these sources to strictly the common school system, they could have said so. Instead, they chose to use the broader term, "for educational purposes"—not once, but six times. Moreover, nothing in the Enabling Act requires that the funds derived from the lands granted to the State be used "exclusively" for the support of the State's common schools. Indeed, other states' constitutional provisions restricting certain funds to be used "exclusively" for the public school system contain far more restrictive and specific language. *E.g.*, N.C. Const. art. 9, § 6 (pledging certain proceeds "exclusively for establishing and maintaining a uniform system of public schools"); Wash. Const. art. 9, § 2 ("[T]he entire

revenue derived from the common school fund and the state tax for common schools shall be exclusively applied to the support of the common schools."); Wis. Const. art. 10, § 2 (mandating that all interest from the school fund be "exclusively applied" to common schools, academies, and normal schools). If Nevada's framers had wanted to restrict all educational funding to the common school system, rather than the much broader "for educational purposes," they could have readily done so.

2. Even if Article 11, Section 3 does restrict funds to only the public school system, the ESA program is not funded with any restricted monies.

Plaintiffs point to the Nevada Supreme Court's decision in *State ex rel. Keith v. Westerfield*, 23 Nev. 468 (1897), and argue that it rejected the argument that the term "for educational purposes" means anything other than public education. Pls.' Mot. 12-13. As an initial matter, it is important to understand that *Keith* predates the DSA—established in 1912, *Rogers v. Heller*, 117 Nev. 169, 173, 18 P.3d 1034, 1037 (2001)—which is the source from which ESA funds will be drawn, and which overwhelmingly consists of funds not included in Section 3. In *Keith*, the Nevada Supreme Court declared unconstitutional, in part, an appropriation for payment of an assistant teacher's salary at the Nevada orphans' home from the "general school fund," which was comprised of "the proceeds from the several sources named in [] section [3]." *Keith*, 23 Nev. at 471-72. The Court stated its belief that "the legislature is prohibited from using the funds arising from the sale of lands which were granted for educational purposes" outside the public educational system. *Id.* at 471.

However, the Court in *Keith* only declared the portion of the appropriation indicating that it be paid out of the general school fund to be null and void, and instead ordered the payment of the teacher's salary "out of what is known as the 'general fund.'" *Id.* at 474. As such, the most that can be said of *Keith* in support of Plaintiffs' argument is that, under that precedent, Article 11, Section 3 governs the funds derived from the specific sources of money described in that Section and restricts those funds—and those funds only—to the support of the

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common schools.[6] However, because *Keith* allowed the expenditure at issue—an educational expenditure outside the public school system—from the State's General Fund, there can be no doubt that as early as 1897 the Nevada Supreme Court recognized that Article 11, Section 3 is no bar to appropriating state funds to pursue educational options outside of the public school system. *Accord Meredith*, 984 N.E.2d at 1225 n.18 ("That the school fund may only be used for support of the public schools, in no way limits the legislature's prerogative to appropriate other general funds to fulfill its duty to encourage educational improvement in Indiana.").

Today, the funding sources mentioned in Article 11, Section 3 are deposited directly into the "Permanent School Fund." *See* NRS 176.265; NRS 355.050 *et seq.* The monies deposited in the Permanent School Fund are invested by the State Treasurer. NRS 355.060. The interest derived from those monies is then distributed to the public schools, as Plaintiffs read *Keith* and Section 3 to require. Those funds just so happen to be moved from the Permanent School Fund to the DSA before such distribution. NRS 387.030.

However, the DSA itself is comprised of funds from numerous other sources, such as the State General Fund, federal mineral lease revenue, and the annual slot tax. Def.'s Opp'n Ex. 2.

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[6] Plaintiffs claim that NRS 387.045 codifies Article 11, Section 3 and that the Legislature's attempt to exempt the ESA program from the restrictions of NRS 387.045 is of no consequence because the Legislature cannot exempt itself from a constitutional mandate. Pls.' Mot. 12-13. That statute reads, in its entirety, that:

> 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.

If Plaintiffs are correct that NRS 387.045 codifies Article 11, Section 3, then that statute only applies to funds derived from the Permanent School Fund, which comprises a miniscule portion of the DSA, rendering their argument meaningless. But if, however, NRS 387.045 does go beyond the sources of revenue laid out in Article 11, Section 3, then the ESA program's "notwithstanding" language, SB 302 § 15.9, is more than effective to amend a previous legislative enactment. *See In re Cowles*, 52 Nev. 171, 176, 283 P. 400, 402 (1930) ("What one legislature may enact . . . may be deemed by a subsequent legislature unwise or inexpedient, or rendered undesirable by unforeseen or altered conditions, and changed accordingly."). Either way, Plaintiffs' citation to, and their discussion of, NRS 387.045 is irrelevant.

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For FY 2016, the total amount of money appropriated to the DSA from the State General Fund was over $1 billion. SB 515, §§ 6-7 (2015); Def.'s Opp'n Ex. 2. In FY 2014, the last year for which figures are published, the interest from the Permanent School Fund that was deposited in the DSA was roughly $1.6 million. Def.'s Opp'n Ex. 2. The interest from the Permanent School Fund, therefore, is less than 0.2% of the total DSA, given that the DSA is comprised of more than just State General Fund Revenues. Plaintiffs, here, are concerned that approximately 3500 students will participate in the ESA program at a cost of approximately $17.5 million, Pls.' Mot. 20, which is also a miniscule percentage of the DSA.[7] As such, Plaintiffs cannot show that any interest restricted by Section 3 will fund the ESA Program. Indeed, it would defy common sense to hold that the tiny share of interest from the Permanent School Fund, which the Legislature already requires the State Controller to account for separately, renders the entire DSA unavailable for otherwise lawful purposes. *See* NRS 387.035(2); *cf. In re Christensen*, 122 Nev. 1309, 1323, 149 P.3d 40, 49 (2006) (holding that funds exempt from garnishment remain available to debtor in bankruptcy, even if housed in account with funds which *are* subject to garnishment, when tracing is feasible). Thus, unless and until the ESA program drains the entire DSA down to the miniscule amount of money deposited from the Permanent School Fund, not one cent of arguably restricted funds will be used to fund the ESA program, meaning that Plaintiffs utterly fail to establish any possible violation of Article 11, Section 3.

3. Article 11, Section 6 gives the Legislature plenary authority to determine the amount of money it "deems sufficient" to fund the public school system, including taking into account funds spent on the ESA program when making that determination.

There being nothing in the plain language of Article 11, Section 3, or the precedent interpreting and applying it, to support Plaintiffs' argument, they also look to Article 11, Section 6, which states in relevant part:

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[7] To put those numbers in context, 3500 students is 0.8% of Nevada's approximately 450,000 public school students. *See* Def.'s Opp'n Ex. 2. And $17.5 million is 1.3% of FY 2014's $1.4 billion in state revenue to the public schools (not including federal or local funds). *See* Def.'s Opp'n Ex. 2.

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> 1. In addition to other means provided for the support and maintenance of said university and common schools, the legislature shall provide for their support and maintenance by direct legislative appropriation from the general fund, upon the presentation of budgets in the manner required by law.
>
> 2. During a regular session of the Legislature, before any other appropriation is enacted to fund a portion of the state budget for the next ensuing biennium, the Legislature shall enact one or more appropriations to provide the money the Legislature deems to be sufficient, when combined with the local money reasonably 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.
>
> *****
>
> 5. Any appropriation of money enacted in violation of subsection 2, 3 or 4 is void.
>
> 6. As used in this section, "biennium" means 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.[8]

Article 11, Section 6, which primarily deals with procedure and timing, does not bar the ESA program. To the extent Section 6 does deal with substance, that substance is a grant of plenary authority to the Legislature.

Section 6.2 grants the Legislature—and no other branch of government—full authority to determine how much money is "sufficient . . . to fund the operation of the public school[]" system. Here, SB 302, which itself is not an appropriations bill, was adopted by the Legislature before it passed SB 515, the biennial appropriation for public schools required by Section 6.2. Thus, at the time the Legislature considered SB 515, it was well aware of the new statutory landscape into which the public school appropriation was born. As such, there is simply no argument to be made that SB 515 reflects anything other than the amount that the Legislature deemed sufficient to fund the public schools. Moreover, as explained in more detail below, and contrary to Plaintiffs' argument, each school district will receive its guaranteed basic per pupil support from the DSA, based on each district's per pupil enrollment numbers.

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[8] The deleted portion of Section 6 relates to appropriations made in certain special sessions and is therefore irrelevant here.

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E. The ESA program does not violate Article 11, Section 6.2 because it does not change the fact that school districts will receive their guaranteed per-pupil allotment from the DSA.

Plaintiffs' second claim, that the ESA program violates Article 11, Section 6.2, is based entirely on their mistaken understanding of how the ESA program interacts with the DSA. According to Plaintiffs' flawed understanding, ESA funds will be deducted from each school district's basic support guarantee—which is essentially determined by multiplying the pre-determined basic per-pupil support amount by a school district's enrollment count. Def.'s Opp'n Ex. 3 ¶¶ 5, 9-10. In other words, Plaintiffs believe the state will subtract ESA funds from the basic support guarantee. Pls.' Mot. 20. However, Defendant is clear that each District will receive their full guaranteed support, as calculated on a per-pupil basis, meaning that the ESA program will *not* reduce any school district's funding. Def.'s Opp'n Ex. 3 ¶¶ 5-6. As such, from the perspective of each district, an ESA student is no different from any other student who leaves a school district—such as a student whose family moves from one district to another or out of the state entirely. Under the ESA program, each district will receive its full guaranteed support, based on its enrollment. Thus, there is thus nothing remarkable, unjust, or unfair to school districts as a result of the ESA program. Under the program, school districts will simply not be funded to educate kids that the district, in fact, does not have to educate.

The fact that the ESA program may encourage some families to leave the public school system, thus reducing the overall number of students attending district schools, is also unremarkable. Fluctuating enrollments are inevitable. This unavoidable reality is precisely why the Legislature "holds harmless" those districts with declining enrollments by apportioning DSA funds based on prior enrollment figures.[9] NRS 387.1233. The hold harmless provision

[9] It is highly unlikely, however, that Nevada will see overall public school enrollment drop any time soon. Nevada is expected to experience tremendous population growth over the next 15 years, including adding at least 240,000 new students to public school rosters. Matthew Ladner, *Turn and Face the Strain* 76 (2015), http://static.excelined.org/wp-content/uploads/ExcelinEd-FaceTheStrain-Ladner-Jan2015-FullReport-FINAL2.pdf. While some of those projected students' families may opt to use the ESA program, Nevada's public school enrollment will most certainly continue to grow for the foreseeable future.

will be in full effect, just as it always has been, and will give school districts more than adequate room to adjust their budgets over time to reflect enrollment realities.

F. The ESA program does not violate Article 11, Section 2 because it does not interfere with or undermine the Legislature's duty to provide for a uniform system of public schools.

Plaintiffs' third and final claim is that Article 11, Section 2 sets out the exclusive means of publicly funding education and that by funding the ESA program the state is, essentially, establishing and maintaining a "separate" and "non-uniform" system of public education. Article 11, Section 2 states, in relevant part, that:

> The legislature shall provide for a uniform system of common schools, by which a school shall be established and maintained in each school district at least six months in every year . . . and the legislature may pass such laws as will tend to secure a general attendance of the children in each school district upon said public schools.

Plaintiffs' argument that the public school system is the exclusive means of publicly supporting education has no roots in the provision's actual language. Rather, it rather relies on implicit assumptions that lead to the completely unwarranted conclusion that Nevada's founders intended to sharply constrain legislative discretion over education policy.

Plaintiffs' argument must be rejected for at least four reasons. First, the ESA program in no way undermines or interferes with the Legislature's duty to establish and maintain a system of common schools. Second, the text of Article 11, Section 2 cannot be read in isolation from the text of Article 11, Section 1, which authorizes the Legislature to encourage education "by all suitable means." Third, even states without language similar to Nevada's Article 11, Section 1 have construed mandates to establish a system of common schools as a floor—not a ceiling—upon which states may build additional educational options. And finally, the ESA program does not establish or maintain a separate system of non-uniform schools. Entities that participate in the ESA program remain private entities. The state respects the private nature of those entities by not interfering with curricula, creeds, or other matters of operation. Far from establishing a separate system of "non-uniform" schools, the ESA program merely empowers

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parents and guardians to exercise their pre-existing fundamental constitutional right to opt out of the public school system and to direct the education and upbringing of their children consistent with their own personal beliefs.

1. The ESA program does not undermine the Legislature's duty to establish and maintain the public school system.

There is no dispute that Article 11, Section 2 imposes a duty on the Legislature to "provide for a uniform system of common schools." The key question is thus whether the ESA program in any way impedes the Legislature's ability to meet its obligation to provide a uniform system of common schools. *See Meredith v. Pence*, 984 N.E.2d 1213, 1223 (Ind. 2013) (holding that "so long as a 'uniform' system of public school system, 'equally open to all' and 'without charge,' is maintained, the General Assembly has fulfilled the duty imposed" to establish a public school system); *Davis v. Grover*, 480 N.W.2d 460, 474 (Wis. 1992) (holding that a school choice program passed constitutional muster because the legislature had not "deprive[d] any student the opportunity to attend a public school with a uniform character of education"). Here, just like before the passage of the ESA program, the public school system remains firmly in place and fully available to parents who wish to send their children there.[10] All students still have the opportunity to attend public schools. Because all students remain free to attend public school if they desire to do so, the state is not violating its duty to provide a uniform, free, and open system of schools. As such, by passing the ESA program the Legislature has *not* abandoned its duty to establish and maintain a public school system. *See Meredith*, 984 N.E.2d at 1223 ("The school voucher program does not replace the public school system, which remains in place and available to all Indiana schoolchildren in accordance with the dictates of the Education Clause."). Indeed, in a year when funding for Nevada public

[10] In fact, the ESA program allows participating students to take classes from the public school system—and reduces the dollar amount of ESA funding in an amount equal to what is then paid instead to the public school that provides the ESA student with public instruction. SB 302 § 8(3). In this way, the ESA program actually includes public schools in the mix of educational alternatives provided to parents.

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schools was increased by $1 *billion*, the notion that the ESA program negatively impacts school funding decisions does not comport with reality.[11]

2. The text of Article 11, Section 2 cannot be divorced from the text of Article 11, Section 1.

Plaintiffs' primary argument, however, for why the Court should construe Article 11, Section 2 as demanding exclusive funding for education through the public school system is based on the interpretative tool known as *expressio unius est exclusio alterius*—the expression of one thing is the exclusion of another. *See Bush v. Holmes*, 919 So.2d 392, 405 (Fla. 2006) (applying that maxim to the unique and unusual "paramount duty" language of the Florida Constitution's education article to conclude that it restrains legislative discretion). Of course, application of this maxim here given the expression in Article 11, Section 1 that the Legislature shall encourage "by all suitable means the promotion of intellectual, literary . . . and moral improvements"—a provision not found in Florida's Constitution—leads to the obvious conclusion that the ESA program comports with the plain language of the Constitution. The Indiana Supreme Court rejected a nearly identical appeal by the plaintiffs in *Meredith* to follow *Bush*'s application of this maxim because Indiana courts had previously relied upon it. *See Meredith*, 984 N.E.2d at 1224, n. 17 ("[W]e are not persuaded by the plaintiffs' contention that we apply the canon of construction '*expressio unius est exclusio alterius*,' . . . as discussed above, the first mandate given to the General Assembly ('to encourage, *by all suitable means* . . .') is a broad delegation of legislative discretion. We decline to so limit that discretion . . . .") (citations omitted). The *Bush* decision simply has no persuasive value here because of the fact

[11] Contrary to Plaintiffs' overly simplistic plain-arithmetic approach, which assumes a zero-sum game with regard to legislative funding priorities, as this legislative session demonstrates it is quite possible that, as a public policy matter, the ESA program might well lead to *increases* in public school funding. Perhaps somewhat ironically, if the ESA program does help lead to the overall improvement of the public education system, as it is intended to do, that improvement may lead to stronger positive feelings that Nevada's public education dollars are being spent effectively, thereby fostering a greater willingness among legislators to continue increasing public education funding.

that the Florida Constitution does not impose the separate and distinct duty to encourage knowledge by all suitable means that Nevada's Constitution imposes on the Legislature.

3. Other state supreme courts have refused to construe mandates to establish a system of common schools as setting forth the exclusive means of providing educational options to children.

Even state supreme courts interpreting state constitutions without a separate duty to encourage learning and knowledge "by all suitable means" have rejected "exclusivity" claims that are nearly identical to Plaintiffs' claims here. *Jackson v. Benson*, 578 N.W.2d 602, 628 (Wis. 1998) (holding that the challenged school voucher program "merely reflects a legislative desire to do more than that which is constitutionally mandated"); *Simmons-Harris v. Goff*, 711 N.E.2d 203, 212 & n.2 (Ohio 1999) (rejecting claim that "thorough and efficient system of common schools" provision of Ohio constitution prohibited private school voucher program absent showing that the program actually "undermine[d]" or "damage[d]" public education); *Davis*, 480 N.W.2d at 474 (holding that school choice program is permissible because the legislature's "experimental attempts to improve upon that foundation in no way deny any student the opportunity to receive the basic education in the public school system."); *see also State ex Rel. Ohio Cong. of Parents & Teachers, v. State Bd. of Educ.*, 857 N.E.2d 1148, 1159-60 (Ohio 2006) (rejecting a challenge to Ohio's charter school law on "uniformity" grounds). What distinguishes these cases from *Bush* is the lack of "paramount duty" language. Indeed, in distinguishing the Wisconsin Supreme Court's decisions upholding a school voucher program under the Wisconsin Constitution's Education Article, which is similar to Nevada's Article 11, Section 2,[12] the Florida Supreme Court emphasized the fact that the Wisconsin education article did not "contain language analogous to the statement in [Florida's] article IX, section 1(a) that it is 'a paramount duty of the state to make adequate provision for the education of all children

[12] Wisconsin's Education Clause reads as follows:

> "The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable; and such schools shall be free and without charge for tuition to all children between the ages of 4 and 20 years."

Davis, 480 N.W.2d at 473 (quoting Wis. Const. art. 10, § 3).

residing within its borders.'" *Bush*, 919 So. 2d at 407 n.10; *see also Meredith*, 984 N.E.2d at 1224 ("Like the Wisconsin Constitution, the Indiana Constitution contains no analogous 'adequate provision' clause."). Just as these several state supreme courts have recognized that the duty in their education articles to provide a public school system could not be transformed into a prohibition on the funding of educational options outside that system, the duty found in Article 11, Section 2 cannot be transformed into a similar prohibition. This is because nothing in the language of Article 11, Section 2—even if the duty in Article 11, Section 1 was cast aside—suggests that it is setting forth an exclusive means of delivering publicly funded education to Nevada children. Of course, Section 1 cannot be cast aside, and in light of Section 1's clear mandate, the notion that Nevada's framers intended to severely curtail adaptability and innovation in an area as challenging and important as education must not be lightly indulged.

4. The ESA program does not establish or maintain a separate system of non-uniform schools.

Finally, Plaintiffs suggest that the ESA program violates Section 2 by "establishing and maintaining" a separate, non-uniform system of public education. But, under the ESA program, the State is not establishing or maintaining anything. Private schools remain private. *See Jackson*, 578 N.W.2d at 627 (holding that a school choice program "does not transform" private schools into district schools). The State takes a completely hands-off approach. SB 302 § 14 ("Nothing in the provisions" of SB 302 "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."). In this fashion, the ESA program does nothing more than empower parents to exercise their constitutionally protected, fundamental right to direct the education and upbringing of their own children. *See Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (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. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare

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him for additional obligations."). Plaintiffs' concerns about private schools acting like private schools—including not altering admissions criteria or codes of conduct—are therefore inapposite.

Moreover, what Plaintiffs refer to as "discrimination"—such as some private schools applying religious criteria before admitting students—the First Amendment to the U.S. Constitution calls the "free exercise" of religion, *e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012) (Free Exercise Clause protects religious groups' right to shape their own faith; Establishment Clause prohibits governmental involvement in ecclesiastical decisions), and the Nevada Constitution calls liberty of conscience. The Nevada Constitution's Declaration of Rights, Article 1, § 4, reads, in relevant part, that "[t]he free exercise and enjoyment of religious profession and worship without discrimination or preference shall forever be allowed in this State . . . but the liberty of [conscience] hereby secured, shall not be so construed, as to excuse acts of licentiousness or justify practices inconsistent with the peace, or safety of this State." The liberty of conscience, as protected by the Nevada Constitution and Nevada's enabling act is not merely the freedom to "believe," but also the freedom to act consistent with those beliefs. The ESA program's structure and design simply respects the freedom of both participating parents and participating entities to practice their own religions.

For all the reasons just discussed, Plaintiffs are not likely to succeed on the merits. Indeed, they have not even stated a claim upon which relief can be granted, so their Complaint should be dismissed. If the Court agrees that Plaintiffs have no likelihood of success on the merits, then, as far as the injunction goes, the Court need not go any further. However, even if the Court does find Plaintiffs have some likelihood of success on the merits, Plaintiffs still are not entitled to a preliminary injunction because they have not shown they will suffer any irreparable harm to themselves or their children's schools. Moreover, it is the Parent-Intervenors and others like them who would be irreparably harmed by an injunction at this stage

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of the case, meaning the public interest weighs against granting Plaintiffs' motion for a preliminary injunction.

II. Plaintiffs Cannot Show They Will Suffer Irreparable Harm.

There are at least two reasons that plaintiffs have not met their burden to show they will be irreparably harmed absent an injunction. First, they have failed to meet their burden because they offer no actual evidence of harm to themselves or to the public school system, just speculation about what may happen when the program goes into effect. And their speculation regarding fixed costs and the type of students who will participate in the program do not comport with reality. Second, Plaintiffs' speculation flies in the face of the evidence considered by the Legislature that educational choice programs have a beneficial impact on both students who participate in the program and students who remain in the public schools. Def.'s Opp'n 3.

A. Plaintiffs offer speculation about possible harm, but no evidence of actual harm.

Plaintiffs' motion and supporting affidavits pile speculation upon speculation. Pls.' Mot. 20-21 (prefacing the vast majority of alleged harms with "if" and "may"). "If" a large number of students participate in the ESA program, school districts "may" have to halt some services, they "may" have to consider closing schools, they "may" have to revise course offerings. Yet Plaintiffs have not produced a shred of evidence of any actual or imminent harm.

Plaintiffs focus much of their alleged "harm" on the fallacy of fixed costs. If it were true that the majority of a school district's costs were fixed, then school districts would not need additional per-pupil funding every time they gained a student. But, of course, the addition of even one new student does drive up costs. Just as the loss of one or more students will save some costs. The problem with Plaintiffs' fixed cost argument is that it considers only one side of the ledger and ignores the fact that when the student leaves, the district is relieved of the obligation to educate that student. Plaintiffs point out, correctly, that the loss of one student does not allow districts to reduce the number of teachers or to turn off the lights, but they fail to explain why smaller class sizes are a negative. Smaller class sizes, where teachers can spend more one-on-one time with students, are typically viewed as a positive. And while the ESA

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program may result in some uncertainty regarding enrollment figures, particularly in its early implementation phase, the fact is that enrollment adjustments are a normal part of the public school funding process, and that has been the case long before the ESA program ever came into existence. Students may leave their public district school for numerous reasons. They may choose a public charter school instead. Or they may enroll in a public virtual school. Indeed, NRS 387.124 requires funds attributable to such students to be deducted from a school district's DSA apportionment in a manner similar to the ESA program. A parent might also decide to home school her children, in which case the student would be excluded entirely from the DSA apportionment process. Regardless of why a student leaves, the reality is that these other educational options do not cause harm to public school districts simply because the districts will lose funding for students the district is no longer obligated to educate.

Plaintiffs also hypothesize that "the highest need" students will not participate in the ESA program, leaving school districts with the burden of educating only the most challenging to educate students. Pls.' Mot. 21-22. To support this argument, Plaintiffs claim that evidence from existing school choice programs indicates that it is the "less costly" students who participate. This assertion is an odd one for Plaintiffs to make in light of their earlier assertion that most programs are targeted for high-need student populations, such as students with disabilities, students in low-performing public schools, or students living in low-income families. Pls.' Mot. 6-7. Leaving the tension between Plaintiffs' own assertions aside, the Parent-Intervenors' own circumstances belie Plaintiffs' contention and demonstrate that high need students may in fact be the first to participate. Several of the Parent-Intervenors children have serious learning and/or physical disabilities. Mot. Interv. Exs. 1 ¶¶ 21, 27; 3 ¶¶ 20-21; 5 ¶¶ 16, 24. Seven of their children have either an Individualized Education Program (IEP) or a 504 accommodation plan. Mot. Interv. Ex. 1 ¶¶ 19, 21, 27; Ex. 4 ¶ 7; Ex. 5 ¶¶ 18, 24. And Parent-Intervenor Aurora Espinoza is a single mom whose children attend some of the worst performing public schools in Nevada and who could never afford the options opened to her and her two daughters by the ESA program. Mot. Interv. Ex. 2 ¶¶ 6-7, 21-22. As the Parent-

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Intervenors' individual circumstances demonstrate, and as explained more fully in Section IV, *infra*, it is the parents and children who desire to participate in the ESA program who would be harmed by an injunction.

B. Plaintiffs' speculation flies in the face of the evidence considered by the Legislature of the beneficial effects of educational choice programs.

Finally, Plaintiffs' unwarranted and unsupported allegations of possible, future harm do not comport with the evidence considered by the Legislature concerning the impact of educational choice programs on public education. Def.'s Opp'n 3-4. From the evidence considered by the Legislature, educational choice programs improve academic performance of both participating students and students enrolled in the public schools and improve high school graduation rates. Def.'s Opp'n 3. Plaintiffs' speculation appears to be nothing more than an attempt to argue their policy differences with the Legislature, which does not satisfy the irreparable harm prong.

IV. Potential Hardships and the Public Interest Weigh Against the Granting of a Preliminary Injunction.

Although Plaintiffs' motion can and should be denied because they cannot prevail on their legal claims and because they have presented no evidence of imminent or irreparable harm, this Court should not ignore the grave hardships that a preliminary injunction would impose on Parent-Intervenors and the thousands of other Nevada families who have pre-applied for an ESA. "In considering preliminary injunctions, courts also weigh the potential hardships to the relative parties and others, and the public interest." *Univ. & Cmty. Coll. Sys. of Nev. v. Nevadans for Sound Gov't*, 120 Nev. 712, 721, 100 P.3d 179, 187 (2004); *accord Clark Cnty. Sch. Dist. v. Buchanan*, 112 Nev. 1146, 1150, 924 P.2d 716, 719 (1996); *Ellis v. McDaniel*, 95 Nev. 455, 459, 596 P.2d 222, 225 (1979). Plaintiffs claim two basic types of harm, neither of which stand up to scrutiny. *See* Mot. Prelim Inj. 19-22. Their first claimed harm—a constitutional violation—simply does not exist. *See, supra*, Section I. And their second claimed harm, discussed in Section III.A., *supra*, which boils down to an undefined educational injury, exaggerates the relative effect of the ESA program on the public school system while

ignoring its good-faith purpose: to help Nevada parents, like Parent-Intervenors, whose children's educational needs are not being met by the public school system.

The Court is well positioned to take Parent-Intervenors' individual circumstances into account. In *Ellis*, for example, an orthopedic surgeon in Elko sought to overturn a preliminary injunction that his former partners had obtained under a non-compete agreement. The Nevada Supreme Court modified the injunction after considering the relative hardships to the parties and the public interest. The Court upheld the injunction insofar as it prevented the surgeon from conducting a general medical practice, which was otherwise available to the public in the Elko area, but struck down the prohibition on the doctor's practice of orthopedic surgery. The Court found that part of the agreement unreasonable because none of the surgeon's former partners practiced orthopedic surgery themselves; to uphold that part of the injunction would have harmed the public interest by forcing "patients in need of orthopedic services . . . to travel great distances at considerable risk and expense in order to avail themselves of such services." 95 Nev. at 459, 596 P.2d at 225. And in *Buchanan*, the Supreme Court again considered the relative hardships and the public interest in affirming the denial of an injunction against a Clark County School District teacher who wanted to bring a service dog that she was training with her to school. The Court looked to the Legislature's motivation for enacting a statute requiring places of public accommodation to admit service dog trainers and found that the public interest in "allow[ing] handicapped individuals to conduct full and productive lives that benefit society" outweighed the slight and speculative harm asserted by CCSD. 112 Nev. at 1153, 924 P.2d at 720-21.

A similar analysis should prevail here. Seven of the Hairr and Smith families' twelve adopted children were exposed to drugs in their infancy or earlier. Mot. Interv. Ex. 1 ¶ 26; Ex. 5 ¶¶ 16, 22, 29, 34, 38, 43. Most were neglected or abused before being adopted. Mot. Interv. Ex. 1 ¶ 26; Ex. 5 ¶¶ 9-10, 16, 22, 28, 31, 34, 38. The public schools barely recognize these kids' real educational needs. Mot. Interv. Ex. 1 ¶ 29 (special education instructors interfere with core subjects like math and reading but not with art and music); Mot. Interv. Ex. 5 ¶ 26

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(school has not implemented AlphaSmart writing aid despite IEP authorizing use); Mot. Interv. Ex. 5 ¶¶ 35, 37 (same), ¶ 40 (school will not recognize child's legal name despite repeat notice from parents), ¶ 50 (school will not recognize child's dyslexia). Three of the Robbins's seven biological children suffer from a degenerative disorder called EDS which requires frequent medical attention, including serious surgeries. Mot. Interv. Ex. 3 ¶¶ 8, 13, 20. The public schools' treatment of these children's needs has been embarrassing. Mot. Interv. Ex. 3 ¶¶ 10-11 (child withdrawn from public school without parents' knowledge or consent and enrolled in a virtual high school called Virtual High School), 14–17 (child graduated valedictorian despite being physically unable to attend senior year). The worst of it has yet to come for one child, whose health will begin to degenerate about the time he starts high school, and Parent-Intervenor Robbins understandably does not trust the school system to be able to help. Mot. Interv. Ex. 3 ¶¶ 21-22. Children from the Hairr, Espinoza, and Allen families have been bullied and assaulted while attending public school. Mot. Interv. Ex. 1 ¶ 6; Ex. 2 ¶¶ 17, 20; Ex. 4 ¶ 8. In a lawsuit related to one of these incidents, the Clark County School District denied any responsibility for protecting enrolled children. Mot. Interv. Ex. 1 ¶¶ 7-8. Another school stood by while the bullied child became progressively more withdrawn. Mot. Interv. Ex. 2 ¶ 20. And the staff at a third public school never realized one of these children was ever bullied. Mot. Interv. Ex. 4 ¶ 8. When Intervenor Allen approached the Clark County School District about her son's 504 plan, she was advised to bribe his counselor with Albertson's cookies to get her attention. Mot. Interv. Ex. 4 ¶¶ 7-10. And these are only five families out of the thousands who could benefit from the ESA program.

The ESA program will not exacerbate any of the Nevada public education system's well-documented flaws. Indeed, the Legislature believed that the program will play a role, alongside its other reforms, in helping improve the system. Thus, for thousands of Nevada parents like the intervenors, the ESA program will allow them to find an educational setting where their children will receive the time and attention that they deserve and that their current public schools have been unable to give. As was the case in *Ellis* and *Buchanan*, the slight and

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speculative harm to Plaintiffs is far outweighed by the potential hardships of Parent-Intervenors and by the public's immediate interest in accessing educational alternatives for their children.

CONCLUSION

It is clear that Article 11—when read as a whole—does not forbid, but rather expressly allows, educational initiatives that go beyond providing a public school system. There is simply nothing about the ESA program that undermines the openness and availability of a free public education for every child in Nevada. Plaintiffs' arguments that the ESA program violates Article 11 are without merit and their motion for a preliminary injunction should be denied and the Defendant's motion to dismiss should be granted.

Respectfully submitted this 9th day of November, 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 9th day of November, 2015, I caused the above and foregoing document entitled **PARENT-INTERVENORS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND RESPONSE IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS** 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;

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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' MOTION TO STRIKE PROSPECTIVE INTERVENORS' OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION AND RESPONSE IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

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Attornevs for Plaintiffs

MEMORANDUM OF POINTS AND AUTHORITIES

A group of prospective intervenors ("Applicants") have filed unauthorized briefs with the Court that ought to be stricken as improper.

On or about September 16, 2015, Applicants filed their motion to intervene in the present action. Plaintiffs opposed, and Prospective Applicants thereafter replied in support of their motion. The Court has not yet ruled upon the motion. The Applicants remain, at present, non-parties, with no rights to oppose Plaintiffs' motion for preliminary injunction. Yet, as if already granted party status by the Court, Applicants filed a lengthy brief in opposition. Furthermore, Applicants take the liberty of "responding" in support of the Attorney General's motion to dismiss. None of this is proper litigation conduct.

"[A] proposed intervenor does not become a party to a lawsuit unless and until the district court grants a motion to intervene." *Lopez v. Merit Ins. Co.*, 109 Nev. 553, 557, 853 1266, 1269 (1993); *Aetna Life & Casualty v. Rowan*, 107 Nev. 362, 363, 812 P.2d 350 (1991); *Moore v. District Court*, 77 Nev. 357, 361, 364 P.2d 1073, 1077 (1961). FJDCR 15, regarding motion practice, restricts participation in motion practice to parties. *See* FJDCR 15(2)-(6), (8)-(10). Currently, Applicants have not been granted party status, and therefore cannot file briefs in support or in opposition to the pending motions filed with this Court by the actual parties to the suit.

In their opposition to the motion to intervene, Plaintiffs had suggested that the appropriate manner of participation in this action by Applicants, if any, was as *amici curiae*. The briefs sought to be struck here strongly support that suggestion or, at least, support the argument that intervention under NRCP 24 is unwarranted. The arguments made by Applicants mirror exactly those put forth by the Nevada Attorney General in his brief in opposition to the preliminary injunction and in support of dismissal. *Compare* Brief of Applicants 9-24 *with* Brief of the Attorney General, 7-23 (repeating arguments *seriatim)*. Applicants, therefore, cannot distinguish their defense of the constitutionality of SB 302 from that of the State. This Court presumes the representation of Applicants by the Attorney General to be adequate and Applicants do not show any differentiation at all between themselves and the Attorney General, much less the sort of

difference in approach, argument, or posture that renders his representation inadequate. *See* Plaintiffs' Opposition to Motion to Intervene, 5-11. Not only do Applicants not establish that they can overcome the presumption that the Attorney General will defend the constitutionality of the government program at issue here, they strengthen the case against their intervention by positing the self-same arguments as the Attorney General did in his own briefs.

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Because Applicants lack party status, their recent filings should be stricken. Furthermore, Applicants now have demonstrated, conclusively, that their motion to intervene should be denied.

Dated this 18th day of November, 2015

By: [signature] (NSB # 10085)

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of November, 2015, a true and correct copy of **PLAINTIFFS' MOTION TO STRIKE PROSPECTIVE INTERVENORS' OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION AND "RESPONSE IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS"** 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

PARENT-INTERVENORS' BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION TO STRIKE

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MEMORANDUM OF POINTS AND AUTHORITIES

In the opening paragraph of their Response in Opposition to Plaintiffs' Motion for Preliminary Injunction and in Support of Defendant's Motion to Dismiss ("Response"), the Parent Applicants for Intervention ("Parents") openly advised the Court and the parties (1) that their Motion to Intervene was still pending, and (2) that they were nevertheless timely filing their Response so as not to delay the case, as they promised in their Motion to Intervene. Resp. 1 (citing Mot. Interv. 14). The Parents have simply acted "to secure the just, speedy, and inexpensive determination of [the] action." Nev. R. Civ. P. 1. The Parents thus respectfully oppose Plaintiffs' Motion to Strike.

The Parents do not object to their Response being treated as a proposed filing until they formally become parties upon being granted intervention. *See, e.g.*, *Lopez v. Merit Ins. Co.*, 109 Nev. 553, 557, 853 P.2d 1266, 1269 (1993) (noting that applicants do not become parties until granted intervention). If the Court grants the Parents' Motion to Intervene, and it should, then the Response may be considered timely filed. This is consistent with *State ex rel. Moore v. District Court*, 77 Nev. 357, 364 P.2d 1073 (1961), *cited in* Pls.' Mot. Strike 2, in which the Nevada Supreme Court ruled that successful intervenors "are treated as if they had been original parties to the suit." *Id.* at 363, 364 P.2d at 1077. In *Moore*, the district court granted a motion to strike the intervenors' affidavit of prejudice because their earlier motion to intervene had been "contested," triggering a statutory requirement that such affidavits be filed before any "contested matter" is heard. The Supreme Court granted the intervenors a writ of mandamus, holding that an otherwise timely affidavit of prejudice could not be struck based on what took place before the intervenors became parties. *Id.* at 360–64, 364 P.2d at 1075–77.

The Parents object to Plaintiffs' Motion to Strike insofar as they use it as a sur-reply in opposition to the Parents' Motion to Intervene. That motion has been fully briefed, and the Parents qualify for intervention for the reasons stated therein—in short, the Parents' interests are "narrower, far more specific, and much more urgent than . . . Defendant's generalized interest,"

which easily establishes that Defendant's representation of the Parents' interests *may be* inadequate. Parents' Reply Supp. Mot. Interv. 1–3.

Respectfully submitted this 25th day of November, 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 25th day of November, 2015, I caused the above and foregoing document entitled **PARENT-INTERVENORS' BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION TO STRIKE** 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;

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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 OC 00207 1B

Dept. No.: II

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

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MEMORANDUM OF POINTS AND AUTHORITIES

Prospective intervenors' (or, "Applicants") claim the right to conduct themselves *as if* their motion to intervene had been granted by this Court, until and unless it is denied. That is not how the rules work. Applicants' opposition to the motion to strike provides no persuasive reason to disregard the simple fact that a potential intervenor does not "become a party to a lawsuit unless and until the district court grants a motion to intervene." *Lopez v. Merit Ins. Co.*, 109 Nev. 553, 557, 853 1266, 1269 (1993). Parties to a suit have particular rights, obligations, capacities, and powers—like that of subpoena, for example—that non-parties do not have. Among those rights is the right to file motions and responses on case-dispositive issues. At present, Applicants are not parties and so may not file such motions.

Applicants have also failed to follow prevailing rules that might have resolved their intervention motion in time for the proper filing of an opposition to the Motion for Preliminary Injunction. FJDCR15(6) directs that "[u]pon the expiration of the time for filing the reply memorandum, either party shall request the Clerk submit the matter for decision by filing and serving all parties with a written request for submission of the motion to the Court." In the two months since the motion to intervene was fully briefed, Applicants have not made a request for submission. Applicants cannot, simultaneously, claim the right to act as a party during the pendency of an intervention and delay the resolution of the intervention motion itself.

While Applicants should not be granted intervenor status, and their Opposition to the Motion for Preliminary Injunction should be stricken, Plaintiffs have no objection to Applicants proceeding as *amicus curiae*. Party status is of an entirely different order than *amicus curiae*, and Applicants here have not demonstrated that they merit that level of participation in this case. In

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any event, whatever treatment Applicants eventually receive, the motion to strike Applicants' unauthorized filing should be granted on the simple grounds that they remain, at present, non-parties to this suit.

Dated this 7th day of December, 2015

By: _____ (SBN #10085)

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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of December, 2015, a true and correct copy of **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"** 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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Nevada counsel of record for applicants for intervention

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

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' REQUEST FOR SUBMISSION OF MOTION TO STRIKE

DON SPRINGMEYER
(Nevada Bar No. 1021)
JUSTIN C. JONES
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Attornevs for Plaintiffs

REQUEST FOR SUBMISSION

Pursuant to F.J.D.C.R. 15(6), Plaintiffs here request that the Clerk of the Court submit their Motion to Strike Prospective Intervenors' Opposition to Motion for Preliminary Injunction and Response in Support of Defendant's Motion to Dismiss for decision, the time for filing a reply memorandum expiring this day.

Dated this 7th day of December, 2015

By: [signature] (SBN #10085)

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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of December, 2015, a true and correct copy of **REQUEST FOR SUBMISSION** 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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**Admitted Pro Hac Vice*

Attorneys for Intervenor-Defendants

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, NEVADA STATE TREASURER, in his official capacity,

Defendant.

CASE NO. 15-OC-002071-B

DEPT NO.

NOTICE OF ASSOCIATION OF COUNSEL

and

AIMEE HAIRR; AURORA ESPINOZA; ELIZABETH ROBBINS; LARA ALLEN; JEFFREY SMITH; and TRINA SMITH,

Parent Intervenors.

NOTICE OF ASSOCIATION OF COUNSEL

NOTICE IS HEREBY GIVEN that Matthew T. Dushoff, Esq. and Lisa J. Zastrow, Esq. of the law firm of KOLESAR & LEATHAM hereby associate themselves as additional counsel of record for Intervenor-Defendants AIMEE HAIRR, AURORA ESPINOZA, ELIZABETH ROBBINS, LARA ALLEN, JEFFREY SMITH, and TRINA SMITH. Please direct a copy of all correspondences, notices, pleadings, and other documents related to this case, to the undersigned counsel at the address of 400 South Rampart Boulevard, Suite 400, Las Vegas, Nevada 89145.

DATED this 2 day of December, 2015.

KOLESAR & LEATHAM

By _____

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Kolesar & Leatham, and that on the 3 day of December, 2015, I caused to be served a true and correct copy of foregoing **NOTICE OF ASSOCIATION OF COUNSEL** in the following manner:

(UNITED STATES MAIL) By depositing a copy of the above-referenced document for mailing in the United States Mail, first-class postage prepaid, at Las Vegas, Nevada, to the parties listed below at their last-known mailing addresses, on the date above written:

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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, NEVADA STATE TREASURER, in his official capacity,

Defendant.

CASE NO. 15-OC-002071-B

DEPT NO.

NOTICE OF SUBSTITUTION OF COUNSEL FOR INTERVENOR DEFENDANTS

and

AIMEE HAIRR; AURORA ESPINOZA; ELIZABETH ROBBINS; LARA ALLEN; JEFFREY SMITH; and TRINA SMITH,

Parent Intervenors.

NOTICE IS HEREBY GIVEN that Matthew T. Dushoff, Esq. and Lisa J. Zastrow, Esq., of Kolesar & Leatham are substituted in as co-counsel of record for Intervenor Defendants Aimee Hairr, Aurora Espinoza, Elizabeth Robbins, Lara Allen, Jeffrey Smith, and Trina Smith in the above-captioned matter. Mr. Dushoff and Ms. Zastrow of Kolesar & Leatham are being substituted in place of Mark A. Hutchison, Esq., Jacob A. Reynolds, Esq., and Robert T. Stewart, Esq. of Hutchison & Steffen, LLC. Intervenor Defendants Aimee Hairr, Aurora Espinoza, Elizabeth Robbins, Lara Allen, Jeffrey Smith, and Trina Smith have consented to this substitution, as indicated by the signatures below.

Please direct all future pleadings, orders and any other materials related to this case to the following:

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NOTICE IS FURTHER GIVEN that Timothy D. Keller, Esq. and Keith E. Diggs, Esq. of the Institute for Justice, will remain as co-counsel for Intervenor Defendants Aimee Hairr, Aurora Espinoza, Elizabeth Robbins, Lara Allen, Jeffrey Smith, and Trina Smith.

DATED this ____ day of November, 2015.

HUTCHISON & STEFFEN

By:_____
JACOB A. REYNOLDS, ESQ.
Nevada Bar No. 010199
ROBERT T. STEWART, ESQ.
Nevada Bar No. 013770
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Las Vegas, Nevada 89145

DATED this 12 day of November, 2015.

KOLESAR & LEATHAM

By:_____
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NOTICE IS FURTHER GIVEN that Timothy D. Keller, Esq. and Keith E. Diggs, Esq. of the Institute for Justice, will remain as co-counsel for Intervenor Defendants Aimee Hairr, Aurora Espinoza, Elizabeth Robbins, Lara Allen, Jeffrey Smith, and Trina Smith.

DATED this 13th day of November, 2015.

HUTCHISON & STEFFEN

By: RS

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ROBERT T. STEWART, ESQ.
Nevada Bar No. 013770
10080 West Alta Drive, Suite 200
Las Vegas, Nevada 89145

DATED this 12 day of November, 2015.

KOLESAR & LEATHAM

By: [signature]

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CONSENT

Intervenor Defendants Aimee Hairr, Aurora Espinoza, Elizabeth Robbins, Lara Allen, Jeffrey Smith, and Trina Smith, being fully informed in the premises, hereby consent to the substitution of Matthew T. Dushoff, Esq. and Lisa J. Zastrow, Esq. and the law firm of Kolesar & Leatham in place of Mark A. Hutchison, Esq., Jacob A. Reynolds, Esq., and Robert T. Stewart, Esq. of Hutchison & Steffen, LLC on behalf of Intervenor Defendants Aimee Hairr, Aurora Espinoza, Elizabeth Robbins, Lara Allen, Jeffrey Smith, and Trina Smith.

By:_____
AIMEE HAIRR

By:_____
AURORA ESPINOZA

By:_____
ELIZABETH ROBBINS

By:_____
LARA ALLEN

By:_____
JEFFREY SMITH

By:_____
TRINA SMITH

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By:_____
AIMEE HAIRR

By:_____
AURORA ESPINOZA

By:_____
ELIZABETH ROBBINS

By:_____
LARA ALLEN

By:_____
JEFFREY SMITH

By:_____
TRINA SMITH

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CONSENT

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By:_____
AIMEE HAIRR

By:_____
AURORA ESPINOZA

By: Elizabeth Robbins
ELIZABETH ROBBINS

By:_____
LARA ALLEN

By:_____
JEFFREY SMITH

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By:_____
AIMEE HAIRR

By:_____
AURORA ESPINOZA

By:_____
ELIZABETH ROBBINS

By: Lara D. Allen
LARA ALLEN

By:_____
JEFFREY SMITH

By:_____
TRINA SMITH

CONSENT

Intervenor Defendants Aimee Hairr, Aurora Espinoza, Elizabeth Robbins, Lara Allen, Jeffrey Smith, and Trina Smith, being fully informed in the premises, hereby consent to the substitution of Matthew T. Dushoff, Esq. and Lisa J. Zastrow, Esq. and the law firm of Kolesar & Leatham in place of Mark A. Hutchison, Esq., Jacob A. Reynolds, Esq., and Robert T. Stewart, Esq. of Hutchison & Steffen, LLC on behalf of Intervenor Defendants Aimee Hairr, Aurora Espinoza, Elizabeth Robbins, Lara Allen, Jeffrey Smith, and Trina Smith.

By:_____
AIMEE HAIRR

By:_____
AURORA ESPINOZA

By:_____
ELIZABETH ROBBINS

By:_____
LARA ALLEN

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Kolesar & Leatham, and that on the 3 day of December, 2015, I caused to be served a true and correct copy of foregoing **NOTICE OF SUBSTITUTION OF COUNSEL FOR INTERVENOR DEFENDANTS** in the following manner:

(UNITED STATES MAIL) By depositing a copy of the above-referenced document for mailing in the United States Mail, first-class postage prepaid, at Las Vegas, Nevada, to the parties listed below at their last-known mailing addresses, on the date above written:

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**Application for Pro Hac Vice Pending*

Attorneys for Parent-Intervenors

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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, NEVADA STATE TREASURER, in his official capacity,

Defendant.

CASE NO. 15-OC-002071-B

DEPT NO. 2

REQUEST FOR SUBMISSION

and

AIMEE HAIRR; AURORA ESPINOZA; ELIZABETH ROBBINS; LARA ALLEN; JEFFREY SMITH; and TRINA SMITH,

Parent Intervenors.

REQUEST FOR SUBMISSION

COMES NOW, Parent-Intervenors Aimee Hairr, Aurora Espinoza, Elizabeth Robbins, Lara Allen, Jeffrey Smith, and Trina Smith, by and through its attorneys of the law firm of Kolesar & Leatham, hereby requests that the Motion to Intervene as Defendants, filed on September 17, 2015, be submitted to the Court for decision on the papers submitted herein.

The undersigned affirms pursuant to NRS 239B.030 that the preceding document does not contain the social security number of any person.

DATED this 7 day of December, 2015.

KOLESAR & LEATHAM

By _____

MATTHEW T. DUSHOFF, ESQ.
Nevada Bar No. 004975
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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Kolesar & Leatham, and that on the 7 day of December, 2015, I caused to be served a true and correct copy of foregoing **REQUEST FOR SUBMISSION** in the following manner:

(UNITED STATES MAIL) By depositing a copy of the above-referenced document for mailing in the United States Mail, first-class postage prepaid, at Las Vegas, Nevada, to the parties listed below at their last-known mailing addresses, on the date above written:

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IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

HELLEN QUAN LOPEZ, individually and on beahlf of her minor child, C.Q.; MICHELLE GORELOW, individually and on behalf of her minor chilren, A.G. and H.G.; ELECTRA SKRYZDLEWSKI, individually and on behalf of her minor child, K.J.; SARAH and BRIAN SOLOMON, individually and on behalf of their minor children, D.D. and K.S.,

Petitioner,

v.

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

Respondents.
_____/

CASE NO: 15 OC 000207 1B

Dept. No.: 2

ORDER DENYING DEFENDANT'S MOTION TO DISMISS

Dan Schwartz filed a Countermotion to Dismiss under NRCP 12(b)(5).

On a 12(b)(5) motion the court must accept all factual allegations in a complaint as true and draw all inferences in the plaintiff's favor.[1] A "complaint should be dismissed only if it appears beyond a doubt that [the pleader] could prove no set of facts, which, if true, would entitle [him] to relief."[2]

Mr. Swartz did not argue the complaint does not contain sufficient factual allegations, rather he alleged facts and argued his facts demonstrate SB 302 is

[1] *Buzz Stew, LLC v. City of North Las Vegas*, 124 Nev. 224, 228 (2008).

[2] *Id.*

constitutional.

Mr. Swartz has not demonstrated that the allegations in the complaint, which the court must accept as true at this juncture on an NRCP 12(b)(5) motion, fail to state a claim for relief. Therefore the motion to dismiss is denied.

December 24, 2015.

James E. Wilson Jr.
District Judge

CERTIFICATE OF MAILING

I certify that on December 24, 2015 I placed a copy of the foregoing order in the United States Mail postage prepaid, addressed as follows:

Don Springmeyer, Esq.
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Deputy Clerk

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

HELLEN QUAN LOPEZ, individually and on beahlf of her minor child, C.Q.; MICHELLE GORELOW, individually and on behalf of her minor chilren, A.G. and H.G.; ELECTRA SKRYZDLEWSKI, individually and on behalf of her minor child, K.J.; SARAH and BRIAN SOLOMON, individually and on behalf of their minor children, D.D. and K.S.,

Petitioner,

v.

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

Respondents.
_____/

CASE NO: 15 OC 000207 1B

Dept. No.: 2

ORDER STRIKING PROPOSED INTERVENORS' PLEADING AND PAPERS

Plaintiffs moved to strike the proposed intervenors' Opposition to Motion for Preliminary Injunction and Response in Support of Defendant's Motion to Dismiss.

IT IS ORDERED:

The motion is granted. Proposed Intervenors' Opposition to Motion for Preliminary Injunction and Response in Support of Defendant's Motion to Dismiss is stricken.

Because the court denied Proposed Intervenor's Motion to Intervene, Proposed Intervenors' Answer, Motion to Associate Counsel, Amended Notice to Set, Response in

Opposition to Plaintiffs' Motion for Preliminary Injunction, and Response in Support of Motion to Dismiss are also stricken.

December 30, 2015.

James E. Wilson Jr.
District Judge

CERTIFICATE OF MAILING

I certify that on December 30, 2015 I placed a copy of the foregoing order in the United States Mail postage prepaid, addressed as follows:

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Gina Winder
Judicial Assistant

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 0C 00207 1B

Dept. No.: II

DECISION AND ORDER, COMPRISING FINDINGS OF FACT AND CONCLUSIONS OF LAW[1]

Before the Court is Lara Allen, Aurora Espinoza, Aimee Hairr, Elizabeth Robbins, and Jeffery and Trina Smith's (collectively, the "Proposed Intervenors") motion to intervene as party defendants in the above-captioned case, filed on or about September 16, 2015.

Plaintiffs in their action had filed the original Complaint in this matter on September 9,

[1] If any finding herein is in truth a conclusion of law, or if any conclusion stated is in truth a finding of fact, it shall be deemed so.

2015, challenging Nevada's recently passed voucher law, Senate Bill 302 ("S.B. 302"), which they allege diverts funds from public schools to pay for private school tuition and other expenses. Plaintiff parents, whose children attend Nevada's public schools, allege violation by S.B. 302 of 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 S.B. 302 is unconstitutional and an injunction to prevent its implementation. Defendant Schwartz is represented by the Nevada Attorney General.

Proposed Intervenors seek intervention in this matter either as of right pursuant to N.R.C.P. 24(a) or, alternatively, by permissive leave of the Court pursuant to N.R.C.P. 24(b). The Court addresses those requests in turn.

Intervention as of Right Pursuant to N.R.C.P. 24(a)

N.R.C.P. 24(a) states that:

> Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Here, although each other element is arguably met by the Proposed Intervenors (timeliness, interests they wish to see protected), they do not demonstrate that their interest in upholding the constitutionality of S.B. 302 will not be adequately represented by Defendant State Treasurer and his counsel, the Attorney General. Where, as here, the Defendant is a state official represented by the state's attorney general, any 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)).

Proposed Intervenors argue that their interests diverge from that of Defendant Schwartz, and that they may advance arguments that will differ from those he will advance during the course

of these proceedings. These arguments, however, are insufficient to merit granting of intervention as of right. First, the legal interest of both Proposed Intervenors and Defendant appear identical: a finding that S.B. 302 does not violate the Nevada Constitution. Their motivations, as parents of Nevada school-age children, may vary, but the interest is the same. Where both defendants and the proposed intervenors have the same legal interests, adequacy of representation is presumed. *Arakaki*, 324 F.3d at 1086.

Second, Proposed Intervenors' claim that they may make different arguments from those advanced by Defendant is too speculative to serve as grounds for intervention as of right. In general, "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)). Here, in any event, such differences are proposed only as potentialities, rather than as concrete divergences in approach to the case. The assertion that Proposed Intervenors 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, does not satisfy Rule 24(a)'s demands.

Proposed Intervenors argued they cannot make a specific showing of how their defense might differ from the Attorney General's defense because the Attorney General has not filed his answer. (Def's Reply at 2.) First, this argument shifts attention from the fact that Proposed Intervenors have made no showing of how their defense would be different from the Attorney General's, specific or general. Second, the Proposed Intervernors chose to file their motion to intervene before the Attorney General filed his answer, knowing full well the Proposed Intervenors would need to make a showing that their interest is not adequately represented. And third, Proposed Intervenors did not supplement this motion to show their interests are not adequately represented, after the Attorney General filed his answer.

Because Proposed Intervenors do not meet the requirements of N.R.C.P. 24(a) by showing that their interest is not adequately represented by existing parties, their motion for intervention as of right is denied.

Permissive Intervention Pursuant to N.R.C.P. 24(b)

In the alternative, Proposed Intervenors ask the Court to grant them permissive intervention under Rule 24(b), which states:

> Upon timely application anyone may be permitted to intervene in an action: (1) when a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Where the basic criteria for permissive intervention are met, the Court has broad discretion as to whether or not permissive intervention should be allowed. Because the Court has already determined that Proposed Intervenors have not shown that their interests are not adequately represented, in considering whether to grant permissive intervention the Court is concerned with the potential for delay and increased costs that additional parties may cause, with no measurable additional benefit to the Court's ability to determine the legal and factual issue in the case.

The Court is also concerned about the Proposed Intervenors' disregard for the rules. NRCP 24 (c) requires a person wanting to intervene to file a motion which "shall be accompanied by a pleading setting forth the . . . defense for which intervention is sought." Proposed Intervenors' motion to intervene was not accompanied by a pleading setting forth the defenses they sought. Instead they filed an answer at the same time they filed their motion to intervene. Because the motion to intervene had not been granted Proposed Intervenors were not a party and had no legal basis to file an opposition. Because they were not a party Proposed Intervenors also had no legal basis to file their motion to Associate Counsel, their Amended Notice to Set, their Response in Opposition to Plaintiff's motion for Preliminary Injunction and Response in Support of Defendant's Motion to Dismiss, their Notice of Substitution of Counsel for Intervenor Defendants, or their Notice of Association of Counsel. Proposed Intervenors have proceeded as parties in spite of the fact that they are not.

Under these circumstances, the Court declines to exercise its discretion to grant permissive intervention to Proposed Intervenors, and denies that motion as well.

Proposed Intervenors, however, are invited by the Court to apply to submit briefs on

determinative issues in the action as *amici curiae*, consistent with the Rules.

IT IS HEREBY ORDERED, therefore, and for good cause appearing, that Proposed Intervenors' motion to intervene as Defendants as of right pursuant to N.R.C.P. 24(a) is **DENIED;**

IT IS FURTHER ORDERED that Proposed Intervenors' motion for permissive intervention pursuant to N.R.C.P. 24(b) is **DENIED.**

IT IS SO ORDERED this 30 day of December 2015.

JAMES E. WILSON, JR.
DISTRICT JUDGE

CERTIFICATE OF MAILING

I certify that on December 30, 2015 I placed a copy of the foregoing order in the United States Mail postage prepaid, addressed as follows:

Don Springmeyer, Esq.
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Matthew T. Dushoff, Esq.
Lisa J. Zastrow, Esq.
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Las Vegas, NV 89145

Gina Winder
Judicial Assistant

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

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Plaintiffs,

vs.

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

Defendant.
_____/

CASE NO: 15 OC 00207 1B

DEPT.: 2

ORDER GRANTING MOTION FOR PRELIMINARY INJUNCTION

PROCEDURAL BACKGROUND

Before the Court is Plaintiffs' Motion for a Preliminary Injunction. Plaintiffs are parents whose children attend Nevada public schools. Plaintiff Parents seek an injunction to stop the State Treasurer from implementing Senate Bill 302 ("SB 302") which authorizes educational savings accounts. Plaintiff Parents alleged SB 302 violates certain sections of Article 11 of the Nevada Constitution. State Treasurer Dan Schwartz

opposed the motion. The court authorized the filing of several amicus briefs, and denied a motion to intervene. The court held a hearing on the motion.

ISSUES AND CONCLUSIONS

As a preliminary matter, the court emphasizes that the issues before it do not include the educational or public policy merits of the education savings account provisions of SB 302. The educational and public policy issues were debated and voted upon by the legislature and approved by the governor. Courts have no super-veto power, based upon public policy grounds, over legislative enactments. Therefore, this court cannot consider whether the SB 302 provisions for education savings accounts are wise, workable, or worthwhile.

Plaintiff Parents argued SB 302 violates the Nevada Constitution in three ways:

First, it violates Article 11, Section 3 and Sections 6.1 and 6.2 because those sections prohibit the transfer of funds appropriated for the operation of the public schools to any other use.

Second, it violates Article 11, Section 6.2 because it removes from the public school system a portion of the funds the Legislature has "deemed sufficient" to maintain and operate the public schools.

Third, it violates Article 11, Section 2 because it creates a non-uniform system of schools, and uses public funds to create the non-uniform system of schools.

Having examined the submissions the parties and the amicus briefs, and having heard oral argument by the parties, this court concludes Plaintiff Parents have failed to carry their burden of proof that SB 302 violates Article 11, Sections 2 or 3 of the Nevada Constitution, but that Plaintiff Parents have carried their burden of proof that SB 302 violates Article 11, Sections 6.1 and 6.2, and that irreparable harm will result if an injunction is not entered. Therefore an injunction will issue to enjoin Treasurer Schwartz from implementing SB 302.

FINDINGS OF FACT

Public School Funding

The Nevada Constitution requires the legislature to support and maintain public schools by direct legislative appropriation from the general fund, and to provide the money the legislature deems to be sufficient, when combined with the local money, to fund the public schools for the next biennium. To fulfill its constitutional obligation to fund education, the legislature created the Nevada Plan, statutes which establish the process by which the legislature determines the biennial funding for education. Under the Nevada Plan the legislature establishes basic support guarantees for all school districts.

The basic support guarantee is the amount of money each school district is guaranteed to fund its operations. The amount for each school district is determined by the number of pupils in that school district. After the legislature determines how much money each local school district can contribute, the legislature makes up the difference between the district's contribution and the amount of the basic support guarantee.

Under NRS 387.1233(3), the so-called "hold harmless" provision, a school district must be funded based on the prior year's enrollment figure if the school district experiences a reduction in enrollment of five percent or more.

Funds appropriated by the legislature from the general fund sufficient to satisfy each district's basic support guarantee are deposited into the State Distributive School Account ("DSA"), which is an account within the state general fund.

The DSA, in addition to receiving such appropriations from the general fund, also receives money from other sources, including the Permanent School Fund ("PSF"). The legislature created the PSF to implement Article 11, Section 3 of the Nevada Constitution, which provides that specified property, including lands granted by Congress to Nevada for educational purposes and the proceeds derived from these sources, are pledged for educational purposes and the money therefrom must not be

transferred to other funds for other uses. Section 3 money is kept in the PSF, and interest on Section 3 money is transferred to the DSA.

The interest on the PSF constitutes a small portion of the funds in the DSA. In 2014, of the $1.4 billion in the DSA that came from the State Government, $1.1 billion, or 78 percent, came from the general fund, and $1.6 million, or 0.14%, came from the PSF.[1]

In June 2015, the legislature enacted Senate Bill 515 ("SB 515") to ensure sufficient funding for K-12 public education for the 2015-2017 biennium. The legislature established an estimated weighted average basic support guarantee of $5,710 per pupil for FY 2015-16 and $5,774 per pupil for FY 2016-17.[2] The legislature appropriated $1.1 billion from the general fund for the DSA for FY 2015-16 and more than $933 million for FY 2016-17, for a total of more than $2 billion for the biennium.

Senate Bill 302

As part of the education reform measures enacted in 2015, the legislature passed and the governor signed SB 302 which authorized the State Treasurer to use public school funds to create private accounts called education saving accounts ("ESAs"). The money in these accounts may only be used to pay for non-public education expenses, including but not limited to private school tuition, tutoring, home-based education curricula, and transportation.

Under SB 302 the State Treasurer may enter into written agreements with a parent of a school aged child who has been enrolled in a Nevada public school for not less than 100 consecutive school days. If a written agreement is entered into, the parent must establish an ESA on behalf of the child, and the treasurer must deposit the grant money into the ESA. For a child with a disability, or a child who lives in a low income

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[1]See http://www.doe.nv.gov/uploadedFiles/ndedoenvgov/content/Legislative/DSA-SummaryForBiennium.pdf.

[2]Id. Section 7.

household, the amount of the grant is 100% of the statewide average basic support per pupil; for all other children the amount of the grant is 90% of the statewide average basic support per pupil. For the 2015-16 school year the grant amounts will be $5,710 per disabled or low income pupil, and $5,139 for all other pupils. Funds deposited into ESAs are subtracted from the legislative appropriation to fund the school district in which the child who is receiving the ESA grant resides.

Under SB 302 general fund money appropriated to fund the operation of the public schools will be used to fund education savings accounts.

SB 302 does not limit the number of ESAs that can be established, cap the amount of public school funding that can be transferred to ESAs, or impose any household income limitations on eligibility.

PRINCIPLES OF LAW

Judicial Deference

Judicial deference to duly enacted legislation is derived from three "first principles" of state constitutional jurisprudence.[3]

First, all political power originates with the people.[4]

Second, unlike the Constitution of the United States which granted specific powers to the federal government and retained all other powers in the people, the Nevada Constitution granted all of the people's political power to the government of Nevada except as limited in the Nevada Constitution.[5] The Nevada government consists of three branches, the legislative, executive, and judicial. The public officials the people elect to the constitutional offices in each branch exercise all of the people's political

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[3] *Gibson v. Mason*, 5 Nev. 283, 291-99, 1869 Nev. LEXIS 46 (1869); *King v. Board of Regents*, 65 Nev. 533, 200 P.2d 221 (1948). See *Bush v. Holmes*, 919 So.2d 392, 414 (FL 2006) Bell, J. Dissent.

[4] *Gibson* at 291.

[5] *Id.*

power except for those powers expressly denied by the Nevada Constitution.[6] Each branch is endowed with and confined to the execution of powers peculiar to itself, and each branch is supreme within its respective sphere.[7] Thus, the legislature is supreme in its field of making the law so long as it does not contravene some express or necessarily implied limitation appearing in the constitution itself.[8] The people's grant of powers upon the legislature was general in terms with specified restrictions.[9] The legislature has general legislative or policy-making power over such issues as the education of Nevada's children except as those powers are specifically limited by an express or necessarily implied provision in the Nevada Constitution or the U.S. Constitution.[10]

Third, because general legislative or policy-making power is vested in the legislature, the power of judicial review over legislative enactments is strictly limited. "Statutes are presumed to be valid, and the challenger bears the burden of showing that a statute is unconstitutional."[11] "When making a facial challenge to a statute, the challenger generally bears the burden of demonstrating that there is no set of circumstances under which the statute would be valid."[12] "In case of doubt, every possible presumption will be made in favor of the constitutionality of a statute, and courts will interfere only when the Constitution is clearly violated."[13] "Further, the

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[6] *Id.* at 291-92.

[7] *Id.* at 292.

[8] *Gibson* at 292; *King* at 542.

[9] *Gibson* at 292.

[10] *King* at 542.

[11] *Busefink v. State*, 128 Nev. A.O. 49, 286 P.3d 599, 602,(2012), citing *Flamingo Paradise Gaming v. Att'y General*, 125 Nev. 502, 509, 217 P.3d 546, 551 (2009) (quoting *Silvar v. Dist. Ct.*, 122 Nev. 289, 292, 129 P.3d 682, 684 (2006)).

[12] *Deja Vu Showgirls of Las Vegas, LLC v. Nev. Dep't of Taxation*, 130 Nev. A.O. 73, 334 P.3d 392, 398 (2014).

[13] *List v. Whisler*, 99 Nev. 133, 137-138, 660 P.2d 104, 106 (1983), citing *City of Reno v. County of Washoe*, 94 Nev. 327, 333-334, 580 P.2d 460 (1978);

presumption of constitutional validity places upon those attacking a statute the burden of making a clear showing that the statute is unconstitutional."[14] The Nevada Supreme Court has "concede[d] the elasticity of the [Nevada] constitution, as a living thing, to be interpreted in the light of new and changing conditions," and that the Supreme Court "may not condemn legislation simply because the object or purpose is new (no matter how astonishing or revolutionary) so long as a constitutional limitation is not violated...."[15]

Preliminary Injunction

A preliminary injunction may 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."

ANALYSIS

Plaintiff Parents have made a facial challenge to SB 302. Using the above principles of law the court must decide whether Plaintiff Parents have made a clear showing that SB 302 violates one or more specified sections of Article 11 of the Nevada Constitution, and that the plaintiffs will suffer irreparable harm.

Mengelkamp v. List, 88 Nev. 542, 545, 501 P.2d 1032 (1972); *State of Nevada v. Irwin*, 5 Nev. 111 (1869).

[14] *List v. Whisler* at 138, citing *Ottenheimer v. Real Estate Division*, 97 Nev. 314, 315-316, 629 P.2d 1203 (1981); *Damus v. County of Clark*, 93 Nev. 512, 516, 569 P.2d 933 (1977); *Koscot Interplanetary, Inc. v. Draney*, 90 Nev. 450, 456, 530 P.2d 108 (1974).

[15] *King* at 543.

Reasonable Probability of Success on the Merits

Plaintiff Parents have not clearly shown that SB 302 violates Article 11, Section 3.

Plaintiff Parents pointed out that Article 11, Section 3 provides that funds from sources specified in Section 3 are "pledged for educational purposes and the money therefrom must not be transferred to other funds for other uses." They cited *State ex rel. Keith v. Westerfield*[16] for the proposition that funds appropriated for the public schools under Article 11 can only be used for the support of the public schools and no portion of those funds can be used for non-public school expenditures "without disregarding the mandates of the constitution."[17] Plaintiff Parents argued that because SB 302, Section 16.1 directs the State Treasurer to transfer into 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, Section 16.1 violates Article 11, Section 3.

The Treasurer countered that SB 302 does not mandate the use of Section 3 money for the ESA program, and the Distributive School Account has sufficient money to fund the ESA program without using Section 3 money. The Treasurer argued that based upon these facts the Plaintiff Parents have not met their burden of proof.

The court concludes the Treasurer's argument is correct. Because SB 302 does not require the use of Section 3 money for the ESA program, the ESA program can be funded without Section 3 money, and therefore Plaintiff Parents have not met their burden of clearly proving that there is no set of circumstances under which the statute would be valid, and therefore Plaintiff Parents have failed to show a reasonable likelihood of success on the merits on the Article 11, Section 3 issue.

The Treasurer also argued that the ESA program was created for and serves educational purposes. The court concludes this argument lacks merit because the

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[16]23 Nev. 468 (1897).

[17]Id. at 121.

Nevada Supreme Court held in *State ex rel. Keith v. Westerfield* that the legislature is prohibited from using Article 11 Section 3 funds for any purpose except that immediately connected with the public school system.

The court concludes the other arguments made by the Treasure on the Article 11, Section 3 issue also lack merit.

Plaintiff Parents have clearly shown that SB 302 violates Article 11, Sections 6.1 and 6.2.

Plaintiff Parents argued SB 302, Section 16(1) violates Article 11, Sections 6.1 and 6.2 because general funds appropriated to fund the operation of the public schools must only be used to fund the operation of the public schools, but under SB 302 some amount of general funds appropriated to fund the operation of the public schools will be diverted to fund education saving accounts.

Under SB 302 general fund money appropriated to fund the operation of the public schools will be used to fund education savings accounts. The legislature recognized that general fund money appropriated to fund the operation of public schools would be used to fund education savings accounts. This is evidenced by the legislature's amendment of NRS 387.045 which provides:

> 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.

The legislature amended that statute to make an exception so funds appropriated for public schools can be used to pay the education savings account grants established by SB 302.

Sections 6.1 and 6.2 require the legislature to support public schools by direct legislative appropriation from the general fund before any other appropriation is enacted. Those sections do not expressly say that the general funds appropriated to fund

the operation of the public schools must only be used to fund the operation of the public schools. Sections 6.1 and 6.2 do however necessarily imply that the legislature must use the general funds appropriated to fund the operation of the public schools only to fund the operation of the public schools.

Sections 6.1 and 6.2 mandate that the legislature make appropriations to fund the operation of the public schools. An "appropriation" is "the act of appropriating to ... a particular use;" or "something that has been appropriated; *specif*: a sum of money set aside or allotted by official or formal action for a specific use (as from public revenue by a legislative body that stipulates the amount, manner, and purpose of items of expenditure)...."[18] To "appropriate" means "to set apart for or assign to a particular purpose or use in exclusion of all others."[19] Therefore, Sections 6.1 and 6.2 require the legislature to set apart or assign money to be used to fund the operation of the public schools, to the exclusion of all other purposes. Because some amount of general funds appropriated to fund the operation of the public schools will be diverted to fund education saving accounts under SB 302, that statute violates Sections 6.1 and 6.2 of Article 11.

Plaintiff Parents have met their burden of clearly proving that there is no set of circumstances under which the statute would be valid, and therefore Plaintiff Parents have shown a reasonable likelihood of success on the merits on the Article 11, Sections 6.1 and 6.2 issue.

Plaintiff Parents have clearly shown that SB 302 violates Article 11, Section 6.2.

Plaintiff Parents argued SB 302 violates Article 11, Section 6.2 because: "The direct legislative appropriation can only be used 'to fund the operation of the public

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[18]Webster's Third New International Dictionary 106 (2002).

[19]Id.

schools..., ""[20] but SB 302 diverts funds from the DSA thereby reducing the amount deemed sufficient by the legislature to fund public education.[21]

The Treasurer argued the legislature complied with Section 6.2 when it passed SB 515 which guarantees a minimum fixed amount of funding through the hold harmless guarantee and a minimum per-pupil amount of funding with no upper limit, i.e., the per-pupil basic support guarantee. The Treasurer pointed out that the legislature passed SB 515 just three days after it passed SB 302, and that "when the legislature enacts a statute, [the Nevada Supreme Court] presumes that it does so 'with full knowledge of existing statutes relating to the same subject.'"[22]

The court concludes Plaintiff Parents' argument is correct. Under Sections 6.1 and 6.2 the legislature must appropriate from the general fund an amount for the operation of the public schools. The legislature appears to have appropriated money from the general fund into one account to fund the operation of the public schools and to fund ESAs. Because Section 6.2 requires the legislature to appropriate money to fund the operation of the public schools, it is necessarily implied that the money appropriated to fund the operation of the public schools will be used to fund the operation of the public schools and not for other purposes. SB 302's diversion of funds from the Section 6 direct legislative appropriation from the general fund to fund the operation of the public schools reduces the amount deemed sufficient by the legislature to fund public education and therefore violates Article 11, Section 6.2.

Plaintiff Parents have met their burden of clearly proving that there is no set of circumstances under which SB 302 would be valid, and therefore Plaintiff Parents have

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[20]Pls.' Mot. For Prelim. Inj. p. 11.

[21]Pls.' Reply on Its Mot. For Prelim. Inj. p. 1.

[22]*Division of Ins. v. State Farm Mut. Auto. Ins. Co.*, 116 Nev. 290, 295, 995 P.2d 482, 486 (2000) citing *City of Boulder v. General Sales Drivers*, 101 Nev. 117, 118-19, 694 P.2d 498, 500 (1985).

shown a reasonable likelihood of success on the merits on the Article 11, Sections 6.2 issue.

SB 302 does not create a non-uniform system of schools, or use public funds to create a system of education other than the type mandated in Article 11 Section 2.

Article 11 Section 2 requires the legislature establish and maintain a "uniform system of common schools." Plaintiff Parents argued the Legislature has enacted an extensive framework of requirements to ensure the public schools are open to all children and meet performance and accountability standards. They argued 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, are unregulated, and not uniform. For example, they argue, the private schools, online programs and parents receiving public school funds under SB 302 do not have to use the state adopted curriculum taught in public schools; meet public school teaching requirements; comply with other educational standards and accountability requirements established for public schools; and they do not have to accept all students so they may discriminate based on a student's religion or lack thereof, academic achievement, English language learner status, disability, homelessness or transiency, gender, gender identity and sexual orientation.

Plaintiffs also alleged that in mandating the establishment of a public school system, the Nevada Constitution has, in the same breath, forbidden the Legislature from establishing a separate, publicly-funded alternative to Nevada's uniform system of public schools. They cited *State v. Javier C.*[23] for the proposition that "Nevada follows the maxim '*expressio unius est exclusio alterius*,' the expression of one thing is the exclusion of another"; and *King v. Bd. of Regents of Univ. of Nev.*[24] for the proposition that "[t]his rule applies as forcibly to the construction of written Constitutions as other

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[23]128 Nev. A.O. 50, 289 P.3d 1194, 1197 (2012).

[24]65 Nev. 533, 556, 200 P.2d 221 (1948).

instruments." Plaintiff Parents argued that under this principle, the legislature may not enact statutes that achieve constitutional goals by means different from those explicitly provided for in the Constitution. The Nevada Supreme Court 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."[25]

Plaintiff Parents have failed to show that the ESA program is contrary to or would frustrate or disappoint the Article 11, Section 2 mandate that the legislature provide a uniform system of common schools. SB 302 does not do away with public schools. Therefore the *expressio unius est exclusio alterius* maxim does not prohibit the legislature from providing students with options not available in the public schools.

Article 11, Section 1 requires the legislature to encourage by all suitable means the promotion of intellectual, literary, scientific, mining, mechanical, agricultural, and moral improvements. Plaintiff Parents' argument would limit the legislature and stunt the "encourage by all suitable means" provision of section 2.

The court concludes that Plaintiff Parents have failed to show that Article 11, Section 2 prohibits the legislature from enacting SB 302. Therefore, Plaintiff Parents have failed to show a likelihood of success on the merits on this issue.

Irreparable Harm

Plaintiff Parents argued the irreparable injury element for a preliminary injunction is met because SB 302 violates the Nevada Constitution, and cited several cases in support of their argument.[26]

The Treasurer argued the court must weigh the potential hardship to the relative parties and others, and the public interest, and cited cases in support of this proposition.

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[25] *Galloway v. Truesdell*, 83 Nev. 13, 26, 422 P.2d 237, 246 (1967) (citation omitted).

[26] *City of Sparks v. Sparks Mun. Court*, 129 Nev. A.O. 38, 302 P.3d 1118, 1124 (2013); *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir. 1997); *Eaves Bd. Of Clark Cnty Comm'rs*, 96 Nev. 921, 924-25, 620 P.2d 1248 (1980).

The court concludes that the diversion of any funds in violation of Article 11, Section 6 will cause irreparable harm to students in Nevada. The court concludes Plaintiff Parents have demonstrated irreparable harm and that on balance the potential hardship to Plaintiff Parents' children outweighs the interests of the Treasurer and others.

CONCLUSION

Having examined the submissions of the parties and the amicus briefs, and having heard oral argument by the parties, this court concludes Plaintiff Parents have failed to carry their burden of proof that SB 302 violates Article 11, Sections 2 or 3 of the Nevada Constitution, but that Plaintiff Parents have carried their burden of proof that SB 302 violates Article 11, Sections 6.1 and 6.2 and that irreparable harm will result if an injunction is not entered.

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ORDER

IT IS ORDERED:

Plaintiff Parents' Motion for Preliminary Injunction is granted.

State Treasurer Dan Schwartz will be preliminarily enjoined from implementing the provisions of SB 302.

The parties confer and by January 18, 2016 arrange with the court's judicial assistant to set a hearing on the issue of security and to set the trial on the merits. The parties may appear by telephone if no evidence will be offered at the hearing on the issue of security.

January 11, 2016.

James E. Wilson Jr.
District Judge

CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I certify that I am an employee of the First Judicial District Court, and I certify that on January 11, 2016, I deposited for mailing at Carson City, Nevada, and emailed, a true and correct copy of the foregoing Order and addressed to the following:

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