IN THE SUPREME COURT OF THE STATE OF NEVADA

DAN SCHWARTZ, in his official capacity as Treasurer of the State of Nevada, *Appellant*, v. 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., and SARAH SOLOMON AND BRIAN SOLOMON, individually and on behalf of their minor children, D.S. and K.S., *Respondents*.	Supreme Court No. 69611 District Court No. 15-OC-00207-1B

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SB 515 ..... *passim*

Other Authorities

2A Norman Singer & Shambie Singer, Sutherland Statutory Construction (7th ed.) 10

Desperate Nevada Parents Hope Courts Uphold Education Savings Accounts, The 74 (Feb. 18, 2016), http://bit.ly/1QNLmDe 34

Hasani Grayson, *School District Tries to Keep Class Sizes Down*, Elko Daily Free Press (Mar. 21, 2016), http://bit.ly/1riJhtH 14, 34

Ian Whitaker, *Families in Limbo After Court Puts Education Savings Account Program on Hold*, Las Vegas Sun (Jan. 22, 2016), http://bit.ly/2265zPW 35

Jay Bybee & David Newton, *Of Orphans and Vouchers: Nevada's "Little Blaine Amendment" and the Future of Religious Participation in Public Programs*, 2 Nev. L.J. 551 (2002) 28

Legislative Counsel Bureau, 2015 Nevada Education Data Book 14

Michael Schaus, *Education Savings Accounts Empower Parents, Not Special Interests*, Las Vegas Rev.-J. (Feb. 27, 2016), http://bit.ly/1RyhptH 36

Minutes of Sen. Comm. on Educ., 78th Sess. (Nev. Apr. 3, 2015) 26

Neal Morton, *Tighter Budget Will Force Clark County Schools to Increase Class Sizes Next Year*, Las Vegas Rev.-J. (Apr. 6, 2016), http://bit.ly/25MNuWr 34

Neal Morton, *Vacancies Continue to Leave Thousands of Clark County Students Without Licensed Teachers*, Las Vegas Rev.-J. (Feb. 3, 2006), http://bit.ly/1riGOiU 36

News 4 & Fox 11 Digital Staff & Shelby Sheehan, *Washoe County School District Trustees Approve Double-session Thresholds*, News 4-Reno (Apr. 26, 2016), http://bit.ly/1UktZAc.....34

Official Report of the Debates and Proceedings in the Constitutional Convention of the State of Nevada (1866)..... 5, 7, 8

Poll: Hispanic families in Nevada and nationally support school choice, American Federation for Children (Oct. 13, 2015), http://bit.ly/1PdlfJZ 36

Statement of Emergency, Nevada Department of Education, available at http://1.usa.gov/1ThtW5I 35

Trevon Millard, *Nevada Education Ranked Last in Nation*, Las Vegas Rev.-J. (July 21, 2014), http://bit.ly/24nqnjJ.....35

Trevon Milliard, *Nevada Falls to Last on Education Ranking*, Reno Gazette-J. (Jan. 7, 2016), http://on.rgj.com/1RsjtkC.....35

INTRODUCTION

Respondents' arguments against Nevada's ESA program, if accepted, would shatter longstanding Nevada law and practice and sweep away much more than just ESAs. Their novel interpretations of Sections 1 and 2 of Article 11 would put this Court at odds with every other state supreme court to have interpreted analogous provisions. These readings would straightjacket the Legislature and prevent it from doing something this Court has expressly authorized for over a century—namely, spending "general fund" money to encourage education outside the public-school system. *See State ex rel. Keith v. Westerfield*, 23 Nev. 468, 49 P. 119, 121 (1897). To reinterpret our Constitution and upset over a century of precedent would invert this Court's duty to interpret statutes to avoid constitutional difficulties, not to create them.

Likewise, accepting Respondents' argument that Section 6 makes the State's Distributive School Account ("DSA") a "lock box" for the public schools would impose unwritten, extra-constitutional requirements on the Legislature. Before SB 302, DSA funds went to educational purposes beyond the public schools, including reimbursement of drug-treatment facilities that also operate as private schools. NRS 387.1225. Respondents' argument that the lump-sum amount put into the DSA is *the* amount under Section 6.2 that the Legislature "deems to be sufficient" to fund public-school operations, instead of the *per-pupil* guarantee—a crucial

distinction at the heart of the district court's error—would, if taken seriously by this Court, undermine the entire Nevada Plan with its per-pupil funding allocation.

Nevada is struggling through a grave educational crisis, ranking 50th out of the 50 States. ESAs are the centerpiece of the Legislature's ambitious response. Plaintiffs dislike the Legislature's choice because they dislike school choice. But this was a democratic enactment and a popular one at that. Thousands of families eagerly await the opportunity to use the ESA program: to send a child to a school whose curriculum better serves the student; to keep siblings together; to get a class size that does not aggravate a physical disorder. Serving these interests was a valid policy choice. Respondents' *amici*, who disagree with the law, have made that clear by filing a series of policy papers. A coalition of public school boards urges this Court to "prevent" Nevada's law from "becoming part of a national crusade" to enact similar reforms.[1] The other three *amici*, between them, cite a total of four cases, underscoring that their real complaint is based on policy, not the Constitution. The time and place for those arguments was last year before the Legislature.

Finally, the Court should not be misled by Respondents' repeated references to what they call "overwhelming record evidence" or the "uncontested" and "uncontroverted" record. Respondents proferred declarations below, which the State vigorously contested as either grossly speculative or ambivalent (oftentimes

[1] Brief of *Amici* National School Boards Association 25.

both), and nothing in the district court order under appeal suggests that the court accepted them into evidence, let alone relied on them. Even in deciding Respondents' irreparable harm argument, the district court did not accept any of Respondent's vague and attenuated claims about *actual* harm, but instead relied solely on a (mistaken) legal conclusion. Indeed, given that this is a facial challenge to Nevada's ESA program, this Court should be especially wary of relying on any untested or hypothetical assertions in deciding the constitutionality of a program that has not yet even gone into effect.

In contrast, there is nothing speculative or hypothetical about the ESA program's compliance with the Nevada Constitution. Article 11 empowers the Legislature to provide for education through means the Legislature deems suitable and imposes only modest restrictions on that authority. The Legislature exercised its broad authority and complied with those narrow limits here. No other appropriations took priority over the funding of education, and education for the public schools was fully funded at the per-pupil amount the Legislature deemed appropriate. The Legislature's previous efforts to improve education in the State were not succeeding and it was imperative that the Legislature employ alternative "suitable" means. Respondents and their *amici* may not like that policy choice, but the Nevada Constitution imposes no obstacle.

ARGUMENT

I. Section 1 Gives The Legislature Broad Power Over Education.

The Constitution empowers the Legislature, in Article 11, Section 1, to encourage education "by all suitable means." This clause, as the Indiana Supreme Court said of Indiana's similarly worded "all suitable means" clause, "is a broad delegation of legislative discretion." *Meredith v. Pence*, 984 N.E.2d 1213, 1224 n.17 (Ind. 2013). Respondents suggest that Section 1 is "hortatory," by which they really mean meaningless. Br. 42. But provisions of the Nevada Constitution cannot be dismissed as nugatory, and there is nothing superfluous about Section 1, which charges the Legislature to encourage education and does so in language—"all suitable means"—which underscores the discretion that the Legislature enjoys in discharging that important responsibility.

The notion that Section 1 is meaningless is also dispelled by that part of the text providing that "[t]he legislature shall … also provide for a superintendent of public instruction." This text has real consequences and obligates and empowers the Legislature to create an office of the Superintendent; the Legislature exercised that power. *See* NRS 385.150 *et seq*. The word "shall" appears in Section 1 only once and empowers the Legislature both to encourage education *and* to provide for a Superintendent. It would make no sense to read the word "shall" as power-

conferring in the case of the Superintendent but merely precatory in the case of encouraging education.[2]

The Legislature, moreover, is plainly empowered to encourage the education of *children*, through any suitable means and no matter what school they happen to attend. As this Court has recognized, the Nevada Constitution's framers believed that "each child" is entitled to an education—since *all* children, not merely those in public school, are part of that "citizenry" on which Nevada's "economic, political, and social viability" depends. *Guinn v. Legislature of Nev.*, 119 Nev. 460, 474-75, 76 P.3d 22, 32 (2003). This is why even in the public schools, the Nevada Plan funds education for individual students on a per-pupil basis, and not to schools in some lump-sum fashion. The per-pupil funding system confirms that the point of the appropriations is to educate children, not to fund public schools.

Respondents' oddly school-centric view of education and related misperception that the Nevada Constitution cares only about education in the public-school system leads them into factual errors. They write, for example, that a private school can operate in Nevada without a State license or ignore State

[2] The convention delegates did delete a first sentence from the draft of Section 1 on the ground that it was merely a "preamble." Official Report of the Debates and Proceedings in the Constitutional Convention of the State of Nevada 567 (1866) ("Debates") (statements of Delegates Hawley, Dunne, and Collins). That demonstrates that the Framers understood the difference between a preamble and an operative clause. They preserved the "all suitable means" clause (while deleting precatory language) because they recognized that it was an operative clause empowering the Legislature and vesting it with considerable discretion. *Id.*

minimum academic requirements. Br. 12, 13, 40. But, in fact, every Nevada school needs a license to operate. Some licenses exempt a school from particular requirements, but never the requirement of adhering to detailed State curricular guidelines. NRS 394.211(2)-(3), 394.251, 394.130, 394.221; NAC 394.0195.

Pointing to the Superintendent clause, Respondents insist that the Legislature may encourage education only "*within the public schools*." Br. 43. But Section 1's "all suitable means" clause includes no such limitation. The Superintendent clause no more limits the Legislature to encouraging education through the public schools than it limits the Legislature to encouraging education through a Superintendent. Education is an area requiring breadth and flexibility, as the Constitution recognizes in the purposefully broad language of Section 1.

Respondents rely heavily on the declaration of an associate professor of history, Michael Green, but his account of Section 1's history is incomplete and flawed. Quoting Green, Respondents state that "[t]here is no evidence from the debates that in passing this version of Article XI, section 1, the delegates intended to confer power on the legislature to fund non-public educational systems." Br. 44 (quoting RA 327). But this view gets the interpretive task exactly backwards: the actual text of Section 1 is the controlling evidence of the delegates' intent. That text confers broad power on the Legislature to encourage education "by all suitable means." No additional historical evidence is necessary. And Green does not

marshal any evidence in the debates suggesting that the Legislature's broad authority somehow excluded the funding of education in non-public schools. Courts are generally reluctant to use ambiguous legislative history to cloud clear texts, *Pohlabel v. State*, 128 Nev. Adv. Op. 1, 268 P.3d 1264, 1269 (2012); *ASAP Storage, Inc. v. City of Sparks*, 123 Nev. 639, 646, 173 P.3d 734, 739 (2007), and the absence of legislative history confirming that a broad textual grant of authority extends to a specific context proves nothing at all.

The debates do affirmatively make clear two things, unmentioned by Green, that confirm the Legislature's power to enact the ESA program. First, delegates favored granting the Legislature broad discretion over education. The debate revolved around whether the Constitution should compel attendance at public schools. *See* Debates 565-574. The delegates decided against making the public schools the only means of educating students in the state and instead provided, in Article 11, Section 2, that the Legislature "may" pass laws as will "tend to secure" attendance of children in public-school districts. This intent to maintain the Legislature's discretionary authority over education was captured by Delegate McClinton:

> [E]ducation is a proper subject of legislation, but we should merely mark out here a sort of outline of the course which we intend the Legislature to pursue on that subject, and then leave the rest to the wisdom, intelligence, and patriotism of those legislators, who, we may be permitted to presume, will be not only as wise, but as earnest and zealous in the cause of education as we ourselves. [Debates 572.]

Second, delegates wanted to preserve the right of parents to direct their childrens' education and to choose whether to send them to public school. To quote Delegate Collins: "If a parent is disposed to send his children to other than a public school, or to bring a governess or tutor into his own house to instruct his children, I see no objection to it." Debates 570. Delegate Warwick spoke forcefully in favor of educational choice:

> while we are legislating on [education], do not let us forget that we are living in a Republic, that a man's house is his castle, and that in it he has a perfect right to exercise full authority and control over his children—to send them to school, or to keep them at home, just as he pleases. [Debates 571.]

Professor Green's glaring omissions not only undermine the veracity and fairness of his historical account, but consideration of his views on Section 1's legislative history is improper for a more basic reason: the plain language of Section 1 should control over a selective account of legislative history. *See ASAP Storage*, 123 Nev. at 646, 173 P.3d at 739 ("when a constitutional provision's language is clear on its face, we may not go beyond that language in determining the framers' intent").

II. Section 2 Permits The Legislature To Support A Uniform Public School System And An ESA Program.

The district court correctly held that SB 302 does not violate Article 11, Section 2's provision that the Legislature "shall provide for a uniform system of

common schools." Respondents argue that SB 302 violates Section 2 "by subsidizing with public funds non-common, non-uniform private schools and home schooling." Br. 38. They contend, without any support in text, history, or precedent, that Section 2 "prohibit[s] the Legislature from funding non-public systems of education." Br. 39 n.8. Section 2 does no such thing. It merely requires the Legislature to provide for a "uniform" *public-school* system, and the Legislature has done so. Nevada's public schools are uniform, free of charge, and open to all comers—which Respondents do not dispute. SB 302 does not close the public schools or make them non-uniform or convert participating private schools into public schools. *See* SB 302, § 14. It simply creates an educational option outside of public schools. Thus, SB 302 is not "contrary" to Section 2. Br. 39.[3]

Section 2's text does not remotely support Respondents' astounding claim that the Legislature is constitutionally forbidden "from funding non-public systems of education." Br. 39 n.8. The district court recognized that such a rule would fly in the face of Section 1, which empowers the Legislature to encourage education by "all suitable means." *See* Aplt. App. 49. Once the Legislature provides for uniform public schools, it is not limited to encouraging education only through

[3] The uniformity requirement in Section 2 is actually concerned with maintaining uniformity *within* the public-school system, *i.e.*, avoiding differences between public schools in different parts of the State. *See State v. Tilford*, 1 Nev. 240, 245 (1865) (upholding under Section 2 the Legislature's abolition of the Storey County Board of Education while creating a new public-school system because the "system of schools was different there from that in any other county").

those schools, as the Legislature itself has long recognized. It has set out extensive rules for private schools, *see* NRS 394, and passed a law to permit homeschooling, *see* NRS 392.070. Respondents' view that the Legislature must essentially be blind to the welfare of students outside the public schools is also contradicted by *Westerfield*, 49 P. at 121, in which this Court held that the Legislature could use the General Fund to pay the salary of a teacher at the state orphans' home—which was not considered a public school.[4]

Respondents misuse the *expressio unius* maxim—"the expression of one thing is the exclusion of the other"—when they contend that, because the Legislature must provide for a uniform public-school system, it cannot provide for private educational options. Br. 38.[5] Respondents fail to appreciate that *two* things are expressed in Sections 1 and 2. Section 1 broadly authorizes the Legislature to encourage education by "all suitable means." Section 2 then ensures that the Legislature always provide one of those suitable means—a uniform public-school

[4] Respondents get no help from *Louisiana Federation of Teachers v. State*, 118 So.3d 1033 (La. 2013), Br. 42 n.9, which involved a program that would have paid for private schooling with funds the state constitution expressly "allocated to parish and city school systems." La. Const. art. VIII § 13(B). SB 302 commits no such foul because ESAs will be funded with money put into the DSA from the unrestricted General Fund.

[5] That maxim must be applied "with great caution" and "courts should be careful not to allow its use to thwart legislative intent." 2A Norman Singer & Shambie Singer, Sutherland Statutory Construction § 47:25 (7th ed.). It "does not mean that anything not required is forbidden." *Id*.

system. Section 2 does not limit the Legislature's Section 1 power; it merely ensures that the broad Section 1 power will be exercised in at least one specific way. Respondents' view that the uniform public schools are the only suitable means of promoting education not only contradicts Section 1 but would render the two separate clauses essentially duplicative. In reality, SB 302 was enacted pursuant to the Legislature's Section 1 power and does not even implicate Section 2. The district court correctly held that the *expressio unius* "maxim does not prohibit the legislature from providing students with options not available in the public schools." Aplt. App. 49.[6]

This Court should follow the Supreme Courts of Indiana, North Carolina, and Wisconsin, which have all upheld educational-choice programs against challenges brought under the public-school uniformity clauses in their state constitutions. *See* Aplt.'s Br. 21 n.6 (citing cases). Respondents do not mention those decisions, and no wonder: their reasoning applies here as well. The Legislature's constitutional power to encourage education by "all suitable means," held the Indiana Supreme Court, is "broader than and in addition to the duty to provide for a system of common schools." *Meredith*, 984 N.E.2d at 1224. The

[6] Respondents' misuse of the maxim would yield absurd results in related areas. For example, Article 11, Section 4 requires a "State University which shall embrace departments for Agriculture, Mechanic Arts, and Mining." In Respondents' world, the fact that Article 11 *requires* the University to have these three departments *forbids* it from having any others. A perusal of the University of Nevada course catalogue reveals that this is not the case.

uniformity mandate, the North Carolina Supreme Court said, applies only to the public-school system and "does not prohibit the General Assembly from funding educational initiatives outside of that system." *Hart v. State*, 774 S.E.2d 281, 290 (N.C. 2015). The duty to provide for a uniform public-school system, explained the Wisconsin Supreme Court, is "not a ceiling but a floor upon which the legislature can build additional opportunities for school children." *Jackson v. Benson*, 578 N.W.2d 602, 628 (Wis. 1998). A choice program, the court continued, "in no way deprives any student of the opportunity to attend a public school with a uniform character of education." *Id.*; *accord Davis v. Grover*, 480 N.W.2d 460, 474 (Wis. 1992). Respondents have no response to this reasoning.[7]

III. Section 6 Allows SB 302's Funding Structure.

A. SB 302 Does Not Impermissibly "Divert" Public School Funding.

The Legislature has "broad discretion in determining education funding." *Rogers v. Heller*, 117 Nev. 169, 176, 18 P.3d 1034, 1038 (2001); *see* Nev. Const.

[7] Respondents cite in passing *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006), which invalidated a Florida program. Br. 38. But *Bush* itself distinguished the earlier Wisconsin case, *Davis*, on the ground that the Wisconsin Constitution did not contain the particular language in the Florida Constitution on which the *Bush* decision was based. *Bush*, 919 So. 2d at 407 n.10. That particular language is also absent from the Nevada Constitution. After *Bush*, the Indiana Supreme Court distinguished *Bush* based on *Bush*'s own distinction of *Davis* and also because Indiana's Constitution has an "all suitable means" clause, which Florida's does not have. *Meredith,* 984 N.E.2d at 1223-25. Nevada's "all suitable means" clause is very similar to Indiana's. No court has ever used *Bush* to strike down an educational-choice statute, and this Court should not be the first to do so.

art. 11, §§ 1, 6. SB 302 provides in Section 16.1 that ESAs will be funded from the Distributive School Account. Nothing about that violates Article 11, Sections 6.1 and 6.2, which command the Legislature to "provide for [the common schools'] support and maintenance by direct legislative appropriation from the general fund" and to do so "before any other appropriation is enacted." The Legislature complied with those commands: SB 515, its first appropriations bill of the session, set basic support guarantees for the school districts in the very first sections of that bill, and appropriated more than $2 billion to the DSA to cover those guarantees.

Respondents argue that SB 302 is unconstitutional nonetheless because it supposedly "diverts" the appropriation required by Section 6, which they say must be spent on the public schools "and nothing else." Br. 20-24. This argument rests on several errors.

First, the Legislature in SB 515 appropriated funds *to the DSA*, not directly to the public schools. SB 515, § 7. School districts are entitled only to their per-pupil basic support guarantees, not to the entire DSA sum irrespective of how many pupils end up in public schools. The DSA's $2 billion is intended to more than cover the State's *expected* distributions to the school districts, but the entire $2 billion was never intended for or guaranteed to the districts. Thus, it is the per-pupil amounts, and not the entire $2 billion, that the Legislature "deem[ed] to be

sufficient" under Section 6.2. Consistent with that understanding, SB 515 provides that "any remaining balance of the appropriation" to the DSA reverts to the State General Fund. *Id*. § 7.6.

Respondents' failure to grasp this basic dynamic produces their misleading claim that the ESA program will "divert" $20 million from "public education." Br. 37-38, 53. Under the Nevada Plan, public schools have never been guaranteed any lump-sum amount that could then be impermissibly "diverted" away by the ESA program; rather, public schools have always been funded *per pupil*. The money has always followed the students. Under Nevada's longstanding funding arrangement, public schools have no expectation—much less a constitutional right—to receive a lump-sum payment or any payment for students they do not educate, whether because those students move away, drop out of school, or opt to participate in the ESA program.[8]

This fundamental misunderstanding underlies another serious factual error in Respondents' brief. They quote the Treasurer's Chief of Staff as stating that ESA participation by all Nevada private- or home-schooled students "would result in the

[8] In reality, given the rapid historical growth of enrollment in Nevada's public schools, it is quite possible—even likely—that most of Nevada's public schools will *still* see an overall increase in enrollment, and thus an overall increase in funding, even with the ESA program. *See* Legislative Counsel Bureau, 2015 Nevada Education Data Book 13, available at http://bit.ly/1SCuBMJ (noting that public school enrollment growth "has increased at a rate of approximately 1 percent per year" in recent years); Hasani Grayson, *School District Tries to Keep Class Sizes Down*, Elko Daily Free Press (Mar. 21, 2016), http://bit.ly/1riJhtH.

reduction of $200 million to public school district budgets." Br. 14-15. But that is not what Mr. Hewitt said, because that is not how the ESA program works. What Mr. Hewitt said was that *if* the 100-day rule[9] were lifted, the participation of every private- and home-schooled student in the ESA program would cost *the State* approximately $200 million more than if none of those students participated. But because none of the private- and home-schooled students would be leaving a public school, their participation in the ESA program would not reduce public school enrollment by a single pupil, and therefore, under Nevada's per-pupil funding system, would not reduce the *public schools'* funding by a single cent. Respondents' inordinate fear of Nevada's new ESA program causes them to imagine diversion of funds from public schools where none exists.

If Respondents' extra-textual argument—that the Constitution somehow requires that the DSA be a "lock box" that cannot be used for anything other than the public schools, Br. 32—were correct, then returning extra money from the DSA back into the General Fund, where it will be spent on any number of non-public school expenditures, would be unconstitutional. But Nevada has long done just that without constitutional objection. And Respondents' atextual argument would wipe out statutes that pre-existed the ESA program that spend DSA funds on educational programs outside of the public schools. Indeed, Respondents'

[9] SB 302's 100-day rule requires, with some exceptions, that students who seek an ESA account must first be enrolled in public school for 100 days. SB 302 § 7.

fixation on schools instead of students leads them to overlook another class of Nevada students: youths who suffer drug addictions so severe that they must live in treatment centers. The Legislature, to ensure that restoring their bodies does not deny them a chance to improve their minds, reimburses *from the DSA* those facilities that "operat[e] [as] a *private* school" for those students. NRS 387.1225 (emphasis added). Respondents' misguided argument would render this commonsense arrangement unconstitutional. More generally, Respondents' attempt to paint the entire lump-sum appropriation to the DSA as the "sufficient" funds to which the public schools are unalterably entitled under Section 6.2 simply cannot be reconciled with the way that the Nevada Plan actually works or how the DSA has ever been treated.

Once it is recognized that the amount that the Legislature actually "deem[ed] to be sufficient" under Section 6.2 is the per-pupil basic support guarantee set out in Sections 1 and 2 of SB 515—not the entirety of the $2 billion lump-sum appropriation—Respondents' oft-repeated assertion that the ESA program "diverts" money set aside for the public schools falls apart. Irrespective of the ESA program, the public schools are guaranteed and will receive the same thing they were always guaranteed under the Nevada Plan and Section 6.2 long before the ESA program existed: the per-pupil basic support guarantee. The public schools have *never been* guaranteed the entirety of the lump-sum appropriation

made to the DSA, and it is telling that in order to argue that the ESA program violates Section 6.2 Respondents are now forced to pretend otherwise.

Second, Respondents' "diversion" argument is wrong because SB 515 appropriated to the DSA funds for the basic support guarantees *and* the ESA program. Respondents are of two minds on this. On one hand, they acknowledge that SB 515 was passed only "three days after SB 302," Br. 28, and that "the Legislature fully understood" that ESAs would be funded from the DSA funds appropriated by SB 515. Br. 24. But they then turn around and make the unbelievable claim that there is no reason to think that that "Legislature … took into account that some portion of [the amount appropriated in SB 515] would be deducted for ESAs." Br. 28. Respondents were right the first time. The Legislature did not suffer collective amnesia, but obviously knew and intended that the funds appropriated to the DSA would cover the public schools *and* ESAs. Respondents are thus doubly wrong to say that SB 302 "diverts" funds from the public schools. SB 515 was intended to appropriate funds sufficient to both cover the public schools *and* the ESA program. Since both programs are funded on a per-pupil basis, it made good sense for the Legislature to fund them in this way.

Third, Respondents are also wrong in arguing that, because SB 515 was intended to fund *both* the public schools and ESAs, it violates Section 6.2's requirement that the public schools be funded "before any other appropriation."

Br. 26. The purpose of the "Education First" amendment, which added Section 6.2's requirement to the Nevada Constitution, was to "ensure[] [that] our state's public school system will be funded, *before any other program* for the next fiscal biennium." RA 76 (emphasis added). Because the Nevada Plan is based on a per-pupil funding system, it has never been possible for the Legislature to appropriate the exact, lump-sum amount that the public schools will actually receive from the State. That actual amount will ultimately depend upon multiple factors that can only be known *after* the biennium is over, including the schools' actual enrollment and the actual amount of local funds collected.[10]

Accordingly, the way that the Legislature has always complied with Section 6.2's "education first" requirement within the structure of the Nevada Plan is by guaranteeing a per-pupil amount (SB 515, §§ 1, 2), and then appropriating a lump-sum amount expected to cover what the actual expenditures will be (SB 515, § 7), but also ensuring that if that estimate is too low or too high, funds can be added to or taken back from the DSA (SB 515, §§ 7.6, 9). Under this system, the part of SB 515 that actually "ensures [that] our state's public school system will be funded, before any other program for the next fiscal biennium," RA 76, is not just

[10] The "basic support guarantee" calculated by the Legislature under the Nevada Plan and set out in Sections 1 and 2 of SB 515 consists partially of state funds and partially of local funds. *See* Nev. Const. art. 11, § 6.2 ("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* ….") (emphasis added).

Section 7's lump-sum appropriation to the DSA (which, after all, in itself guarantees nothing to the public schools). It is the combination of that appropriation *with* the per-pupil basic support guarantees contained in the first two sections of SB 515. Sections 1 and 2 are an indispensable part of how the Legislature complied with Nevada's "education first" appropriation requirement; without Sections 1 and 2, the money appropriated to the DSA in Section 7 would never make its way to the public schools. Once those first Sections of SB 515 are properly considered in conjunction with Section 7, it is impossible to argue that SB 515 fails to set aside money for the public schools "before any other appropriation," including before any money appropriated for the ESA program in Section 7 of SB 515. SB 515 *guarantees* in its very first sections that the $2 billion appropriated under Section 7 will be used *first* for the public schools. That is enough to comply with both the text and intent of Nevada's "Education First" amendment.[11]

[11] Respondents' suggestion that this reading of SB 515 would render Section 6.2's requirement "meaningless" and undermine its "intended effect," Br. 22-23, is false. As always, the per-pupil support guarantees located in the very first sections of SB 515 ensured that "our state's public school system [was] funded" first and at the level the Legislature deemed sufficient, "before any other program for the next fiscal biennium." RA 76. The Legislature's *first* appropriation (SB 515, § 7) was set aside *first* for public education (SB 515, §§ 1, 2). Only the money in the DSA that is *not* guaranteed for public schools under Sections 1 and 2 of SB 515 will be spent for the ESA program. And if there is ever a shortfall in the DSA to fund the guarantees of Section 1 and 2, SB 515 expressly provides that additional money may be committed to the DSA from the General Fund (SB 515, § 9). It is

Fourth, the fact that the Legislature exempted the ESA program from a statutory restriction on the spending of "public school funds," NRS 387.045, does not indicate that the Legislature intentionally failed to comply with Section 6.2, a constitutional provision that is entirely separate and differently worded. There is no reason to assume that NRS 387.045's broad and undefined reference to "public school funds" should necessarily be interpreted conterminously with the per-pupil basic support guarantees deemed "sufficient" by the Legislature under Section 6.2. Indeed, the Legislature may have reasonably anticipated that a court might interpret the entirety of the DSA as "public school funds," and therefore exempted the ESA program from NRS 387.045 out of an abundance of caution. Respondents' NRS 387.045 argument asks this Court to assume that the Legislature knowingly and intentionally passed an unconstitutional statute—precisely the opposite of what this Court must assume. *See Silvar v. Eighth Judicial Dist. Court ex rel. Cty. of Clark*, 122 Nev. 289, 292, 129 P.3d 682, 684 (2006) ("Statutes are presumed valid" and "challenger must make a clear showing of invalidity.").

Respondent's unnatural overreading of Nevada's "education first" requirement that would push Section 6.2 far beyond its "intended effect." Br. 23.

B. The Legislature Accounted For The ESA Program When It Appropriated The Funds It "Deemed Sufficient" For Education.

Respondents also argue that SB 302 violates Section 6.2 because "ESAs deduct more from the DSA than the Legislature appropriated for the [basic support guarantee] component of public school funding." Br. 30. These arguments, while at least focused on the right part of SB 515, fare no better than Respondents' other contentions.

First, as Respondents acknowledge, "SB 515 was passed three days after SB 302," Br. 28, and the Legislature "fully understood that, under SB 302, ESAs would be funded" out of the money appropriated under SB 515. Br. 24. When SB 515 was passed, SB 302 was part of the background framework against which the Nevada Legislature was legislating, just like the Nevada Plan generally or more specific components of that Plan like the "hold-harmless" guarantee in NRS 387.1233(3). "[W]hen the legislature enacts a statute, this court presumes that it does so 'with full knowledge of existing statutes relating to the same subject.'" *State, Div. of Ins. v. State Farm Mut. Auto. Ins. Co.*, 116 Nev. 290, 295, 995 P.2d 482, 486 (2000) (citing cases). So even if Respondents were correct that SB 302's ESA program somehow affects the appropriation made by SB 515 to the public schools, that effect was already in place and part of the background law when the Legislature made the appropriation that it "deemed to be sufficient" for the public schools. Respondents would have this Court assume that the Legislature in SB 515

set aside an amount that it "deemed to be sufficient" and then, *three days earlier*, impermissibly "diverted" money from that "sufficient" amount so as to make it insufficient. Rather than indulging that time-bending fiction, this Court should conclude that whatever *net* amount that the Legislature appropriated under SB 515 for the public schools, after taking into account any background laws that might effect the appropriation (including SB 302), *is* the amount that the Legislature "deemed to be sufficient." Any other conclusion inverts the longstanding presumption that "the legislature enacts a statute … 'with full knowledge of existing statutes relating to the same subject,'" which applies with extra force to a legislative enactment that is just three days old. *State, Div. of Ins.*, 116 Nev. at 295, 995 P.2d at 486.

Second, even apart from that fatal defect, Respondents are still wrong that when a student leaves a public school to participate in the ESA program, the school will be affected any differently from when a student moves to another school district or out of state. The record shows that the State intends to treat transfers into the ESA program in precisely the same manner as when a student moves. *See* Aplt. App. 24-26, ¶¶ 6, 11-12. Respondents acknowledge that in a footnote, but briefly insist without explanation that SB 302 cannot be interpreted that way. Br. 31 n.4. Appellant disagrees, and this Court has "repeatedly recognized the authority of agencies … to interpret the language of a statute that they are charged

with administering; as long as that interpretation is reasonably consistent with the language of the statute, it is entitled to deference in the courts." *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 122 Nev. 132, 157, 127 P.3d 1088, 1106 (2006) (citing cases). Superintendent Canavero's interpretation is due even more deference if Respondents are right that their alternative construction would render SB 302 unconstitutional. *See Mangarella v. State*, 117 Nev. 130, 134-35, 17 P.3d 989, 992 (2001) ("Whenever possible, we must interpret statutes so as to avoid conflicts with the federal or state constitutions.") (citing cases).

Finally, even if Respondents' alternative, hypothetical interpretation of SB 302 were adopted, Respondents still would not have demonstrated any conflict with Section 6.2 of Article 11. Under Respondents' interpretation, ESA students would be counted into their resident school district's total student count, and that count would then be multipled by that school district's per-pupil basic support guarantee to determine the school district's gross lump-sum allotment. The State would then subtract from that allotment the "local funds available," *see* SB 302, § 16.1, as well as the full ESA amount for each ESA student, before sending the State's portion of funding under the Nevada Plan. Respondents argue that the full amount of the ESA that would be deducted under their interpretation (typically $5,139) would be higher than the "State's share" of the per-pupil amount that the school district would receive for that ESA student. Br. 30.

But that is comparing apples and oranges. Respondents' argument that SB 302 could result in a shortfall for the public schools inappropriately compares the per-pupil "basic support guarantee"—which includes *both* state and local funds—with only one component of that guarantee: the State's share of those funds. Section 6.2 is very clear that the per-pupil "money the Legislature deems to be sufficient" must take into account "the local money reasonably available." Nev. Const. art. 11, § 6.2. SB 515 accordingly includes the local funds in establishing the school districts' per-pupil basic support guarantees. Using Respondent's Clark County hypothetical, the total amount of state *and local* funds that the Clark County School District would receive for an ESA student that is added to their total student count for the Fiscal Year 2015-2016 would be $5,512. SB 515, § 1. The total amount that would then be subtracted before the "State's share" of the money was sent to Clark County would be $5,139 per typical ESA student. Thus, the Clark County School District would actually net an *additional* $373 ($5,512 minus $5,139) per typical ESA student.[12] Respondents' fuzzy math about a

[12] Respondents' Clark County hypothetical on page 34 of their brief suffers from the same "apples-to-oranges" defect by ignoring the *local* portion of the basic support guarantee that would be lost if a student moved to California, and comparing that to the entirety of the ESA funding for a typical student. In reality, for every student that moved to California under Respondents' example, Clark County school district would lose the entirety of the per-pupil basic support guarantee for that student: $5,512 per student for Fiscal Year 2015-2016. SB 515, § 1. Even under Respondents' own interpretation of SB 302, if instead of moving to California a student participated in the ESA program, Clark County would still

hypothetical interpretation of a statute is hardly a legitimate basis to strike down a statute on a facial challenge. *See Déjà Vu Showgirls v. Nev. Dep't of Taxation*, 130 Nev. Adv. Op. 73, 334 P.3d 392, 398 (2014) (facial challenger "bears the burden of demonstrating that there is *no set of circumstances* under which the statute would be valid") (emphasis added).

IV. Section 10 Does Not Prohibit SB 302.

Respondents did not challenge SB 302 under Article 11, Section 10 of the Nevada Constitution, but the Plaintiffs in the other ESA challenge, *Duncan v. Nevada*, through their *amicus* brief, chose to invite this Court's consideration of their argument on this ground now. Specifically, they argue that the ESA program impermissibly uses public funds for a "sectarian purpose." This argument is meritless, and if this Court is inclined to consider the Section 10 arguments in this appeal,[13] it should reject them along with the rest of Respondents' claims.[14]

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receive $5,512 and only pay out $5,139 for that student—thus resulting in a net *gain* to the school district of $373 per ESA student over a student who moves away. Br. 34.

[13] *See Nevada Power Co. v. Haggerty*, 115 Nev. 353, 365 n.9, 989 P.2d 870, 877 n.9 (1999) (addressing purely legal issue raised for first time in *amicus* brief); *Desert Chrysler-Plymouth v. Chrysler Corp*., 95 Nev. 640, 643-664, 600 P.2d 1189, 1190-91 (1979) (addressing constitutional issue raised for first time on appeal).

[14] As the *Duncan* plaintiffs' *amici* brief explains, the State's motion to dismiss and the plaintiffs' motion for a preliminary injunction in that case are fully briefed and have been pending for months. The State recently filed an EDCR 2.20(k) Notice of Readiness and Request for Setting on both filings, which informs the

SB 302 complies with Section 10's requirement that public funds not be used for any "sectarian purpose." ESAs serve educational purposes, not sectarian ones, and the law is indifferent as to whether participating students attend religious schools. Instead, SB 302's purpose and design is to increase the educational options available to all Nevada students and to "empowe[r] parents to choose educational placement that best meets their children's unique needs." *Minutes of Sen. Comm. on Educ.*, 78th Sess. 7 (Nev. Apr. 3, 2015).

If ESA funds arrive at religiously affiliated schools, they get there only through private, individual decisions by the families who take part in the program—not through government direction. As the U.S. Supreme Court recognizes, these independent parental decisions break the link between government funding and the school a child ultimately attends. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). The Supreme Court, then, has upheld school-choice initiatives as neutral, generally available programs created for secular purposes—like the one here. *Id.*; *Mueller v. Allen*, 463 U.S. 388 (1983).

Many courts in other States also recognize this distinction and have upheld school-choice laws against attacks like the *Duncan* plaintiffs'. In *Niehaus v.*

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district court that the State will seek a writ of mandamus from this Court if the pending motions are not decided by May 13, 2016. If the *Duncan* court rules before that date it is very likely that the ruling will be appealed on an expedited basis to this Court. Thus, one way or another, this Court is likely to have the opportunity to address the Section 10 issue along with the issues raised in this appeal. If so, the State intends to file full briefing on the topic.

Huppenthal, 233 Ariz. 195, 199-200, 310 P.3d 983, 987-88 (Ariz. Ct. App. 2013), *review denied* (Mar. 21, 2014), for instance, the Arizona Court of Appeals rejected a similar challenge to a similar ESA law. The court explained that the ESA program's object was to support the beneficiary families, not sectarian schools. *Id.* The court emphasized that (as with SB 302) nothing in the law encourages, let alone requires, that a single cent be delivered to any particular school, religious or not. Rather, "*[p]arents* can use the funds deposited in the [education savings] account to customize an education that meets their children's unique educational needs." *Id.* at 199, 310 P.3d at 987 (emphasis added).[15] Most other courts to address the question have reached the same conclusion, even as to traditional voucher programs. *See Jackson*, 578 N.W.2d 602; *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999); *Meredith*, 984 N.E.2d 1213; *Oliver v. Hofmeister*, No. 113267, __ P.3d __, 2016 WL 614009 (Okla. 2016).[16]

This Court has applied Section 10 only once and in very different

[15] The holding in *Niehaus* is particularly significant because five years earlier the Arizona Supreme Court invalidated a traditional voucher law under Arizona's Blaine Amendment. *See Cain v. Horne*, 220 Ariz. 77, 83, 202 P.3d 1178, 1184 (2009). That same court denied review in *Niehaus*, thus confirming that, if anything, ESA are more clearly constitutional than traditional voucher programs.

[16] The Colorado Supreme Court recently invalidated a voucher program, but it divided equally on the state constitutional claim (one Justice concluded that the program violated a state statute and thus declined to opine on the constitutional issue). *See Taxpayers for Pub. Educ. v. Douglas Cty. Sch. Dist.*, 351 P.3d 461 (Colo. 2015). A certiorari petition in that case is pending before the U.S. Supreme Court.

circumstances. In *State ex rel. Nevada Orphan Asylum v. Hallock*, 16 Nev. 373 (1882), the Court invalidated an appropriation of funds to an orphanage run by the Catholic Sisters of Charity. The Court's analysis turned on three facts: (1) earlier appropriations to the very orphanage at issue had provoked Section 10's adoption; (2) the appropriation provided direct aid to a single organization; and (3) the appropriation had no language to define or limit the purpose of the grant (to, say, feeding, clothing, or boarding the orphans). *Id*. at 380-83, 387-88. None of these facts is present here. And nothing in Section 10 or *Hallock* bars funding that in some remote or incidental way indirectly benefits a religiously affiliated institution when the funding's purpose is a non-sectarian one, like education.

Striking down the ESA program under Section 10 would also raise grave federal constitutional problems. Section 10 is one of many "Blaine" provisions found in state constitutions across the country. Born of the late 19th century's religious bigotry and nativism, these provisions sought to block public funding of Catholic schools established in response to Protestant domination of public schools. Jay Bybee & David Newton, *Of Orphans and Vouchers: Nevada's "Little Blaine Amendment" and the Future of Religious Participation in Public Programs*, 2 Nev. L.J. 551, 561-67 (2002). The U.S. Supreme Court has observed that "it was an open secret that 'sectarian' was code for 'Catholic.'" *Mitchell v. Helms*, 530

U.S. 793, 828 (2000) (plurality opinion).[17] Nevada's Blaine Amendment was no exception. Under the *Duncan* plaintiffs' view, that sordid past would require this Court to prohibit religious schools from participating in a neutral, generally applicable program aimed at better educating our youth. Thus, for all their speculative allegations about possible *private* "discrimination," the *Duncan* plaintiffs would read Section 10 to require real, wholesale *governmental* discrimination against religious individuals and institutions. That approach is untenable under the U.S. Constitution; this Court can and should avoid it.

V. The Preliminary Injunction Is Improper.

This Court has never approved a preliminary injunction under circumstances remotely close to those here. Respondents' lawsuit superimposes on its facial challenge a request for the "extraordinary relief" of a preliminary injunction. *Dep't of Conservation & Nat. Res. v. Foley*, 121 Nev. 77, 80, 109 P.3d 760, 762 (2005). The district court stated, with no factual record or legal analysis, that the putative Section 6 violation would "cause irreparable harm to students in Nevada." Aplt. App. 50. This essentially legal conclusion of the district court should be reviewed *de novo*. And Respondents make no attempt to defend it. There is not an iota of support in the record that Respondents, the parents of public schoolchildren,

[17] The U.S. Supreme Court recently granted certiorari in *Trinity Lutheran Church of Columbia v. Pauley*, No. 15-577, to review a decision holding that Missouri may apply its Blaine Amendment to exclude religious institutions from otherwise neutral and secular public programs.

or their children, will *themselves* suffer irreparable injury because the Legislature supposedly erred by funding ESAs and public schools from the same account.

For a preliminary injunction to issue, the claimed harm must be incapable of remedy by subsequent judicial relief. *Excellence Cmty. Mgmt. v. Gilmore*, 131 Nev. Adv. Op. 38, 351 P.3d 720, 722 (2015). The alleged harm in this case is worlds removed from the sort typically deemed irreparable under Nevada law. Respondents assert that the Legislature's purported Section 6 violation "deprives Nevada children of their right to a public education," Br. 46, and that this injury simply "must" constitute irreparable harm because the right at issue is "basic and fundamental." *Id.* But that analysis finds no support in this Court's cases.

Respondents do not allege irreparable harm to themselves. Rather, the entire irreparable-harm case turns on speculation that SB 302 will affect *school districts*, Br. 47-48, or even more abstractly, the "very core of the education" in Nevada. Br. 50.[18] They describe harm that might befall "public schools," *id.*, or "districts," Br. 51, or even "public education" generally, Br. 53, as if students and these entities were synonyms. But these vague, unconnected assertions do not satisfy this Court's demanding requirement that applicants for a preliminary injunction establish that *they* will likely suffer irreparable harm.

[18] It is hard to see how "the very core of the education" in Nevada can fall lower than worst in the nation—the status quo to which Respondents seek to tether other families' children.

Respondents do not dispute that their only proffered evidence of irreparable harm "focused on school districts." Br. 48. None of the seven Respondents opted to submit a declaration explaining how they might be injured, let alone irreparably harmed, by an alleged "diversion" of funds. They suggest that this alternative, school-based showing of harm is sufficient because "districts operate schools," and SB 302 impacts the budget of these schools. *Id*. In short, a speculative injury that might affect some school district might, in turn, indirectly affect Respondents. That sort of speculation piled on speculation, however, contradicts this Court's mandate that irreparable harm be "articulated in specific terms." *Foley*, 121 Nev. at 80, 109 P.3d at 762. And what Respondents say the "record below firmly established"—like "cuts in teachers" or reductions in unnamed but "crucial" programs, Br. 5—remain nothing more than unproven assertions about future possibilities. They are not even facts the district court accepted. But the extraordinary remedy of a preliminary injunction requires the sort of near-certain, concrete harm that results, for instance, from foreclosing property or trespassing on land. There is nothing of the sort in this case.

Unable to establish irreparable injury to themselves, Respondents are left with the legally unfounded argument that a "constitutional violation alone constitutes irreparable harm." Br. 45. They rely on *City of Sparks*

v. Sparks Municipal Court, 129 Nev. Adv. Op. 38, 302 P.3d 1118 (2013), but that case does not support Respondents' sweeping assertion. *Sparks* involved a separation-of-powers dispute between a municipality and its judicial department. This Court acknowledged that constitutional violations, like all other legal injuries, "may" constitute irreparable harm and found that the City's alleged violation of the Municipal Court's personnel decisions would cause a real harm that could not be financially remedied. *Id.* at 1124, 1130. That unremarkable observation did not magically convert *every* putative constitutional violation into *per se* irreparable harm. Otherwise, the irreparable harm requirement would effectively be eliminated for all constitutional challenges.

Sparks, if anything, undermines Respondents' case for irreparable harm. The aggrieved party in *Sparks* was not a collection of individuals capable of submitting declarations attesting to how they were personally and directly harmed. The applicant seeking a preliminary injunction was a judicial department, a political subdivision trying to vindicate its "inherent power to protect its ability to perform its constitutional functions." *Id.* at 1134. Even in those extraordinary circumstances, the judicial department offered far more of a concrete showing of direct, irreparable harm: it established both that the separation-of-powers violation required it "to close for one hour each day" and to dismiss "certain volunteers" integral to its functioning. *Id.* at 1124. Respondents offer nothing similar.

Indeed, Respondents' hurdle for obtaining a preliminary injunction is heightened precisely *because* they challenge the constitutionality of a law, not despite of it. Respondents who seek to enjoin implementation of a statute bear the burden of *clearly showing* that SB 302 is unconstitutional, since statutes are presumed valid. *Silvar*, 122 Nev. at 292, 129 P.3d at 684. This has been the law in Nevada at least since *Ormsby Cty. v. Kearney*, 37 Nev. 314, 142 P. 803, 808 (1914), held that "a mere doubt as to whether a statute is violative of a constitutional provision must be resolved in favor of the statute." Respondents could not meet the requirements for the "extraordinary relief" of a preliminary injunction even in the ordinary case, let alone here where they must surmount the even higher "clear showing" bar. *Foley*, 121 Nev. at 80, 109 P.3d at 762; *Silvar,* 122 Nev. at 292, 129 P.3d at 684. And the lack of harm is especially palpable in this case because the amount of money that every school district will receive as a result of the per-pupil basic support guarantee is constant and would be the same whether the Legislature transferred funds for the public schools and the ESA program into two accounts (as Respondents' theory would require) or the same account (as SB 302 requires).

The balance of equities and the public interest decisively favors reversing the preliminary injunction. Before granting a preliminary injunction, a court is also required to "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). The district court recited this test but then concluded, without any analysis at all, or even any recitation of fact, that "the potential hardship to Plaintiff Parents' children outweighs the interests of the Treasurer and others." Aplt. App. 50.

If ever there were a case when the imbalance of justice were manifest, this is it. On one side of the equitable fulcrum is "the status quo in Nevada," Br. 52, with its overcrowded public school classrooms[19] and a worst-in-the-nation system.[20] Nevada's 50th-of-50 ranking among state education is a fact not lost on one of the Respondents herself, Jennifer Carr.[21] "I think that people on both sides of this lawsuit recognize that the public school system is not working," said Ms. Carr. "I think we just have different ways of approaching the problem and different ideas

[19] *See* News 4 & Fox 11 Digital Staff & Shelby Sheehan, *Washoe County School District Trustees Approve Double-session Thresholds*, News 4-Reno (Apr. 26, 2016), http://bit.ly/1UktZAc; Neal Morton, *Tighter Budget Will Force Clark County Schools to Increase Class Sizes Next Year*, Las Vegas Rev.-J. (Apr. 6, 2016), http://bit.ly/25MNuWr; Hasani Grayson, *School District Tries to Keep Class Sizes Down*, Elko Daily Free Press (Mar. 21, 2016), http://bit.ly/1riJhtH.

[20] Trevon Millard, *Nevada Education Ranked Last in Nation*, Las Vegas Rev.-J. (July 21, 2014), http://bit.ly/24nqnjJ ("Nevada's public school system remains dead last in the nation for a third year running, according to an analysis of children's well-being that was released by the Annie E. Casey Foundation today"); Trevon Milliard, *Nevada Falls to Last on Education Ranking*, Reno Gazette-J. (Jan. 7, 2016), http://on.rgj.com/1RsjtkC.

[21] *Desperate Nevada Parents Hope Courts Uphold Education Savings Accounts*, The 74 (Feb. 18, 2016), http://bit.ly/1QNLmDe (Video at 7:48-7:52) ("Video").

about how it should be solved."[22] Respondents seek to halt desperately needed education reform dead in its tracks, and, as Carr confirms, theirs is really a policy disagreement dressed up as a constitutional violation.

On the other side of the scales are educational innovation, an executive-declared state of emergency over education,[23] and thousands of Nevada families who depend on the ESA program to help lift their children out of an educational situation that is *clearly* and *presently* failing them. Many Nevada families, determined to improve their children's education through SB 302's ESA program, have already made important financial decisions in reliance on the law's promise to them. The *Las Vegas Sun* reports on the families, like that of Jesus and Daysi Lara, a working-class Ecuadorian-American couple who learned of the preliminary injunction days before Daysi walked her two kids through the doors of the private school they thought the ESA program would let them afford. Daysi's kids were "so excited" by the prospect of a new school, she said. "That's why I'm so devastated."[24]

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[22] *Id.* at 9:13-9:25.

[23] Statement of Emergency, Nevada Department of Education, available at http://1.usa.gov/1ThtW5I.

[24] Ian Whitaker, *Families in Limbo After Court Puts Education Savings Account Program on Hold*, Las Vegas Sun (Jan. 22, 2016), http://bit.ly/2265zPW.

Thousands of Nevada children are not receiving an adequate education—a crisis disproportionately injuring low-income and special-education students.[25] A student named Rori Simms, an eighth-grader at a private school hoping to participate in the ESA program, wants the education to become a veterinarian; her grandfather, William Simms, is waiting to see if the ESA Program remains enjoined, which would require him to return Rori to the public schools where her grades fell.[26] Forty percent of our State's fourth-graders are illiterate.[27] There is a profound public interest in helping to remedy the State's education problems by empowering parents, especially low-income families, to pursue the educational options that best suit their children's needs. And this desire to better educate our children transcends demographic borders: a survey by the American Federation for Children, for example, finds that 71% of Hispanic respondents support the ESA law.[28]

The State, as well as the public interest, is harmed by the issuance of the preliminary injunction. Nevada itself "suffers irreparable injury whenever an enactment of its people or [it] representatives is enjoined." *Coal. for Econ. Equity*

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[25] Neal Morton, *Vacancies Continue to Leave Thousands of Clark County Students Without Licensed Teachers*, Las Vegas Rev.-J. (Feb. 3, 2006), http://bit.ly/1riGOiU.

[26] Video, *supra* note 21, at 2:54-5:37, 8:39-9:13.

[27] Michael Schaus, *Education Savings Accounts Empower Parents, Not Special Interests*, Las Vegas Rev.-J. (Feb. 27, 2016), http://bit.ly/1RyhptH.

[28] *Poll: Hispanic families in Nevada and nationally support school choice*, American Federation for Children (Oct. 13, 2015), http://bit.ly/1PdlfJZ.

v. Wilson, 122 F.3d 718, 719 (9th Cir. 1997). The people's representatives enacted this educational program for their benefit. Its elimination thus strikes directly at that exercise of democratic power.

As with all significant policy reforms, there are of course some uncertainties surrounding the effects of the ESA program. But there is nothing uncertain about "weigh[ing] the potential hardships" in this case. *Nevadans for Sound Gov't*, 120 Nev. at 721, 100 P.3d at 187. Respondents' interest in "preserv[ing] the status quo in Nevada," Br. 52, is outweighed by the State and public interest in doing more for our children and their futures than simply what has always been done before.

CONCLUSION

The district court's order and preliminary injunction should be reversed.

Respectfully submitted,

Dated: April 29, 2016.

By: /s/ Lawrence VanDyke

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the Nevada Supreme Court by using the appellate CM/ECF system on April 29, 2016.

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s/ Janice M. Riherd

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 14 pt. Times New Roman type style.

I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C) and (a)(7)(D), it is proportionately spaced, has a typeface of 14 points or more and contains 9415 words.

Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to

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sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 29th day of April 2016.

By: /s/ Lawrence VanDyke

Lawrence VanDyke (Bar No. 13643C)
Solicitor General

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellant,

v.

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

Respondents.

Supreme Court No. 69611

District Court No. 15-OC-00207-1B

Electronically Filed
May 02 2016 11:06 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

APPELLANT'S MOTION FOR PERMISSION TO EXCEED TYPE-VOLUME LIMITATION FOR REPLY BRIEF

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Counsel for Appellant Dan Schwartz

As authorized by Nevada Rule of Appellate Procedure 32(a)(7)(D), Appellant Treasurer of the State of Nevada, Dan Schwartz, respectfully submits this Motion for Permission to Exceed the Type-Volume Limitation by 2,415 words. The enlargement is necessary to fully develop the significant statutory and constitutional arguments raised in this appeal and on account of the *amici* briefs filed in this case, particularly the brief discussing Section 10 issues.

A motion to file a brief that exceeds the type-volume limitation is granted "upon a showing of diligence and good cause." NRAP 32(a)(7)(D)(i). First, courts allow parties excess pages or words when *amici* are involved in an appeal. *See* NRAP 29(e) ("If the court grants a party permission to file a longer brief, that extension does not affect the length of an amicus brief."); *City of Little Rock v. AT & T Commc'ns of the Sw., Inc*., 870 S.W.2d 217, 217 (Ark. 1994) ("We grant permission to file the *amicus curiae* briefs and also grant appellee an additional ten pages of argument to respond."); *Glendale Fed. Sav. & Loan Ass'n v. State Dep't of Ins*., 537 So. 2d 1097, 1098 (Fla. Dist. Ct. App. 1989) (allowing appellees and *amicus curiae* excess pages to file joint answering brief in response to appellants and two *amici* aligned with appellants). Respondents and *amici*, combined, have filed a total of 36,309 words in support of the district court's preliminary

injunction.[1] One *amici* brief, in particular, comes from the Plaintiffs in the other challenge to the ESA law (*Duncan v. State*, No. A-15-723703-C (Nev. D. Ct., Clark Cnty., filed Aug. 27, 2015). This brief makes arguments that are beyond the scope of Respondents' principal arguments.

Second, as the Treasurer has demonstrated, this appeal involves issues of first impression regarding Nevada's Education Savings Account program. Moreover, the questions presented are of preeminent State importance. This Court's decision will affect the education of thousands of students and the life choices and financial security of their families. The participation of *amici* outside of Nevada suggests that, for them, this case presents policy questions of national significance. Appellants have made every effort at brevity but nevertheless are unable to address all pertinent issues within current space limits. Appellants are endeavoring to present the legal issues to this Court to best balance concision and assistance to this Court.

As explained in the attached Declaration of Lawrence VanDyke, and shown by the proposed reply brief attached to this motion as exhibit 1, counsel have attempted to minimize the inconvenience to the Court while effectively presenting all necessary arguments. *Cf. Hernandez v. State*, 117 Nev. 463, 465, 24 P.3d 767, 768 (2001) (denying motion for leave to file 124-page opening brief because "[t]he

[1] The Brief of *Amici* Wisconsin Alliance for Excellent Schools et al. exceeded NRAP 29(e)'s word limitation without permission.

proposed brief [was] so long that it [did] not meet counsel's duty to submit a cogent, effective brief which will best serve the interests of her client" but allowing an 80-page brief).

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The Treasurer requests an extension of NRAP 32(a)(7)(A)(ii)'s 7,000-word limit on account of the *amici* briefs, particularly the brief discussing Section 10 issues, and to set forth the reasons that the district court's injunction should be dissolved. Therefore, good cause exists to grant permission to exceed the type-volume limitation by 2,415 words, for a total of 9,415 words.

Dated: April 29, 2016.

ADAM PAUL LAXALT
Attorney General

By: /s/ Lawrence VanDyke

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Counsel for Appellant

DECLARATION OF LAWRENCE VANDYKE, ESQ. IN SUPPORT OF MOTION FOR PERMISSION TO EXCEED TYPE-VOLUME LIMITATION

I, LAWRENCE VANDYKE, ESQ., declare as follows:

1. I am the Solicitor General of the State of Nevada and counsel for Appellant Treasurer of the State of Nevada, Dan Schwartz, in the above-captioned matter. I have personal knowledge of the following, and can and do competently testify thereto.

2. NRAP 32(a)(7)(A)(ii) provides that a reply brief is acceptable if it contains no more than 7,000 words. If additional words are necessary, NRAP 32(a)(7)(D) allows a party to seek permission to exceed the type-volume limitation upon a showing of diligence and good cause.

3. This matter raises significant issues of Statewide importance and first impression regarding the constitutionality of Nevada's Education Savings Account program. Respondents' Answering Brief is 13,911 words (56 pages) long and is supported by four groups of *amici*. Together, Respondents and *amici* have filed a total of 36,309 words in support of affirmance. A detailed treatment of the case law and record is required to demonstrate that Respondents' and their *amici*'s assertions lack merit and to show that the injunction should be lifted. I believe this treatment is necessary to best assist the Court in making an informed decision. The Plaintiffs in the *Duncan* challenge to the ESA program have filed a brief in this

case that makes arguments that are not among the Respondents' principal arguments.

4. Counsel has been diligently drafting and revising the reply brief. Indeed, the Treasurer requested, and received, additional time to file his reply brief to be able to address the arguments of Respondents' *amici*. The current brief consisting of 9,415words represents the most concise and succinct brief that also sufficiently addresses the issues presented. The total number of words in the reply brief is reasonable under the circumstances and is less than the permissible amount if it were a combined reply and answering on a cross-appeal. *See* NRAP 28.1(e)(2)(A).

5. Counsel has made every good faith effort to minimize the length of the reply brief. The Declarant has endeavored to ensure that the current length is no longer than needed to fairly and competently respond to Respondents' answering brief and the briefs of *amici* supporting Respondents.

6. For these reasons, the Treasurer respectfully requests permission to file the accompanying reply brief.

7. I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct and that I signed this Declaration on

DATED this 29th day of April, 2016.

/s/Lawrence Van Dyke
LAWRENCE VANDYKE, ESQ.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the Nevada Supreme Court by using the appellate CM/ECF system on April 29, 2016.

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s/ Janice M. Riherd

JANICE M. RIHERD
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I hereby certify that this Motion and Declaration comply with the formatting requirements of NRAP 27(d), the typeface requirements of NRAP 27(d)(1)(E) and the type style requirements of NRAP 32(a)(6) because this Motion and Declaration has been prepared in a proportionally spaced typeface using Office Word 2010 in size 14 font in double-spaced Times New Roman type style. This filing also complies with NRAP 32.

I further certify that I have read this Motion and Declaration and that it complies with the page or type-volume limitations of NRAP 27(d)(2) and NRAP 32 because, it is proportionately spaced, and contains 1,109 words.

Finally, I hereby certify that to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this Motion and Declaration complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires that every assertion in this brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

/s/ Lawrence VanDyke
LAWRENCE VANDYKE, ESQ.