IN THE SUPREME COURT OF THE STATE OF NEVADA

RUBY DUNCAN, an individual; RABBI MEL HECHT, an individual; HOWARD WATTS III, an individual; LEORA OLIVAS, an individual; ADAM BERGER, an individual,

Appellants,

v.

STATE OF NEVADA, ex rel. the Office of the State Treasurer of Nevada and the Nevada Department of Education; DAN SCHWARTZ, in his official capacity as Treasurer of the State of Nevada; STEVE CANAVERO, in his official capacity as Interim Superintendent of Public Instruction,

Respondents.

Supreme Court No. 70648

District Court No. A-15-723703-C

RESPONDENTS' ANSWERING BRIEF

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N.R.A.P. 26.1 DISCLOSURE

Pursuant to N.R.A.P. 26.1, the undersigned counsel of record certifies that there are no persons or entities as described in N.R.A.P. 26.1(a) that must be disclosed.

July 21, 2016

By: /s/ Lawrence VanDyke

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INTRODUCTION

Last summer, the Nevada Legislature adopted SB 302, which creates an innovative new Education Savings Account ("ESA") program that will expand Nevada families' educational opportunities. This program is plainly a critical part of our State's efforts to improve our worst-in-the-Nation education outcomes. It is just as plainly constitutional, as the court below recognized. The program does not violate Article 11, Section 10 of the Nevada Constitution because it does not use public funds "for sectarian purpose." On the contrary, it is an exercise of the Nevada Legislature's power to strengthen educational options for all Nevada children and their parents—a purely secular purpose. Under Nevada's program, not a single cent can make its way to a religiously-affiliated school unless parents and students, acting as private citizens, so choose. The State plays no role in those decisions, nor does it play any role in directing ESA payments, which will be deposited in private ESA accounts and controlled by parents. The entire design of this pathbreaking program is to place private parental decisionmaking between the State and educational institutions and to empower parents with greater educational choices.

Other states' courts have repeatedly considered and rejected similar challenges to similar educational choice programs under similar state constitutional provisions. This Court has never evaluated a private-choice program under Section

10; indeed, it has applied Section 10 only once since it was enacted. 134 years ago, in *State of Nevada ex rel. Nevada Orphan Asylum v. Hallock*, this Court held that Section 10 prohibited the Legislature from directly appropriating funds to a state-picked Catholic institution, and to that institution alone, without any limitation as to the money's purpose. But that is very different from what the law here does: SB 302 is a neutral and generally available program that provides funds to *families* who then choose how to spend those funds to meet the unique needs of their children. The State does not appropriate any public funds to any religious institutions for sectarian purposes; it appropriates money to families for educational purposes. The U.S. Supreme Court has long recognized that such programs are neutral with respect to religion, and that the intervening, individual choices of parents break any link between the State and religion.

Indeed, Plaintiffs' contrary view would require the State to discriminate *against* religion, to ensure that once-government funds never found their way into religious hands by virtue of intervening private choices. They would have this Court ignore U.S. Supreme Court teaching, stretch *Hallock*, and exacerbate the discriminatory history behind Section 10—which was adopted in a 19th-century wave of anti-immigrant and anti-Catholic sentiment—to bar certain families and religiously affiliated schools from participating in a program otherwise available to all. But the U.S. Constitution squarely forbids that sort of discrimination, and this

Court must interpret the Nevada Constitution to avoid—not invite—constitutional concerns. In the end, the most natural reading of Section 10 is also the most constitutionally sound one: it prohibits direct public funding given for religious purposes. And SB 302 clearly does nothing of the sort.

Nor does the ESA program violate Section 2 of Article 11, which requires the Legislature to provide for a "uniform system of common schools." The ESA program does not affect the uniformity of the public-school system. As two district courts below have now correctly recognized, far from violating Section 2, the ESA program is fully authorized by Section 1 of Article 11, which empowers the Legislature to encourage education by "all suitable means."

JURISDICTIONAL STATEMENT

For the reasons explained in Part IV, Plaintiffs lack standing as taxpayers to bring this challenge. Otherwise, this Court has jurisdiction over Plaintiffs' appeal.

STATEMENT OF THE ISSUES

1. Whether SB 302, enacted for the express purpose of providing educational opportunities in the State and structurally designed so that it is impossible for any government official to direct public funds to any religious entity, violates Article 11, Section 10 of the Nevada Constitution, which states that "[n]o public funds of any kind or character whatever, State, County or Municipal, shall be used for sectarian purpose."

2. Whether the invalidation of SB 302 based on Section 10 would raise a substantial question concerning the constitutionality of Section 10 under the United States Constitution.

3. Whether SB 302, which expands educational opportunities and does not detract from the uniformity of the public-school system, comports with Sections 1 and 2 of Article 11, which state that the Legislature shall encourage education "by all suitable means" and "provide for a uniform system of common schools."

4. Whether Plaintiffs have standing to bring a facial, pre-implementation constitutional challenge to SB 302 based solely on their status as taxpayers.

STATEMENT OF THE FACTS AND CASE

A. Nevada's Worst-in-the-Nation Education System

Last year, in his 2015 *State of the State* speech, Governor Sandoval delivered an alarming message to the Legislature: our State's education system is in crisis.[1] Study after study confirms that Nevada's public schools rank dead last in the nation across a variety of measures.[2] The symptoms of systematic failure are

[1] *See* Gov. Brian Sandoval, State of the State (Jan. 15, 2015), http://1.usa.gov/1TX8tjL.

[2] Trevon Milliard, *Nevada Falls to Last on Education Ranking*, Reno Gazette-Journal (Jan. 11, 2016), http://on.rgj.com/1RsjtkC ("Nevada has sunk to dead last" in education rankings); Eric Westervelt, *What Happens in Vegas Includes Crowded, Struggling Schools*, NPR (May 6, 2015), http://n.pr/29Nsg32 (noting that Nevada is "ranked 51st in education"); Paul Takahashi, *Report Says Nevada Schools Again Worst in Nation for Giving Children a Chance for Success*, Las Vegas Sun (Jan. 9, 2014), http://bit.ly/19QyQUe ("A child growing up in Nevada has the lowest

unmistakable. One out of ten schools in the State underperforms.[3] Nearly thirty percent of eighth-graders are illiterate, far exceeding the illiteracy rate of many third-world countries.[4] The Nevada Department of Education has declared a state of emergency over our school system.[5] Thousands of Nevada children are denied an adequate education; this failure disproportionately injures low-income and special-education students.[6] Some Las Vegas classrooms cram forty students into rooms without air conditioning.[7] The state of affairs is heartbreaking and untenable. It imperils the economic, demographic, and educational future of our

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chance for academic success in the country."); Trevon Milliard, *National Report Finds Nevada Students Have Poor Chance for Success*, Las Vegas Rev.-J. (Jan. 8, 2014), http://bit.ly/29TIVCI. ("Nevada children have less chance for success than those in all other states and Washington, D.C.").

[3] Gov. Sandoval, State of the State, at 8.

[4] *Compare Nevada 2015 Reading State Snapshot Report*, Nat'l Ctr. for Educ. Stat. (last visited July 21, 2016), http://bit.ly/1O7zrnM, *with Education: Literacy Rate*, UNESCO Inst. for Stat. (last visited July 21, 2016), http://bit.ly/29RiT1z (estimating Bangladesh and Haiti's youth illiteracy rates as 17% and 18%, respectively).

[5] Statement of Emergency, Nev. Dep't of Educ., available at http://bit.ly/1ThtW5I.

[6] Neal Morton, *Vacancies Continue to Leave Thousands of Clark County Students Without Licensed Teachers*, Las Vegas Rev.-J. (Feb. 3, 2006), http://bit.ly/2a7i88m; Ian Whitaker, *Families in Limbo After Court Puts Education Savings Account Program on Hold*, Las Vegas Sun (Jan. 22, 2016), http://bit.ly/2265zPW; The 74 Million, *#EDlection 2016: Desperate Nevada Parents Await Court Ruling on ESAs*, Youtube (Feb. 18, 2016), http://bit.ly/1Qqwt9A; Siobhan McAndrew, *RGJ Investigates: Washoe is Struggling to Educate its Students With Disabilities*, Reno Gazette-J. (July 18, 2016), http://on.rgj.com/29MfbH5.

[7] Gov. Sandoval, State of the State, at 6.

State. The Legislature, responding to this emergency and Governor Sandoval's call for a "New Nevada," enacted the Education Savings Account program. The purpose was to liberate Nevada students and their families from the constraints of their zip codes and pocketbooks.

B. The ESA Program

The groundbreaking ESA program, which SB 302 authorizes, is innovative, but the idea behind it is simple: parents know better than state officials how to use educational funds to improve their children's education. Just as parents have the freedom to choose the doctors their child sees and the food she eats, parents can now choose how and where their child learns. It lets Nevada parents enter into agreements with the State Treasurer to open ESAs for their children. SB 302, §§7.1, 7.2. Any school-age child in Nevada may participate. *Id*. §7.1. The only requirements are that a child take standardized tests and be enrolled in a Nevada public school for at least 100 consecutive school days before opening an account. *Id*. §§7.1(b), 12.1.

ESA funds can "only" be used for educational purposes. SB 302, §§7.l(c), 9.1. The law enumerates eleven specific educational purposes on which ESA grants may be spent, such as tuition, textbooks, tutoring, special education, and fees for achievement, advanced placement, and college-admission examinations. SB 302, §9.1(a)-(k). ESA grants may be used at a "participating entity" or

"eligible institution," including private schools, colleges or universities within the Nevada System of Higher Education, or certain colleges and distance-learning programs. *Id*. §§3.5, 5; *see also id.* §11.1. Funds left in an ESA at the end of a school year are carried forward if the parents' agreement with the Treasurer is renewed. *Id*. §8.6(a).

The ESA law creates a specific program but does not displace existing Nevada education laws. Under those statutes, no private school can operate without a license from the Department of Education. NRS 394.211(3), 394.221(2), 394.251. And no licensed schools are "exempt from state educational regulations." Br.3, 8, 9. Rather, to be licensed, every private school must submit its curriculum for approval to the Superintendent of Public Instruction. All private Nevada schools, "religious" or not, attest that they adhere to detailed, state-set curricular guidelines, for every K-12 grade, and on virtually every subject, from the Milky Way and feudalism to *The Great Gatsby* and geometry. NRS 394.125, 394.130; NAC 389.[8]

Finally, numerous regulatory safeguards ensure that ESA money is used by parents or schools consistently with SB 302's educational purpose. The Treasurer has power to freeze or dissolve accounts if he determines that there has been

[8] For more on this, *see* R.2620-23 (Defendants' Response to Court's Order of February 1, 2016).

"misuse" of the account. SB 302, §10.3. Each participating entity that accepts ESA money must give receipts to the parents. *Id*. §11(4). The Treasurer can terminate participation by an entity that for any reason has "failed to provide any educational services" it was supposed to provide. *Id*. §11.5(b). Similarly, the Attorney General's Office has authority to ensure that SB 302's educational objectives are met, such as by bringing fraud charges against entities that do not use ESA funds for educational services. *Id.* §11.5. And the Department of Education helps guarantee that every private school performs its obligatory educational services, such as by revoking private-school licenses or instituting investigations. NRS 394.231, 394.301, 394.311.

C. Legislative History of SB 302

During legislative debates on the measure, Senate Majority Leader Michael Roberson explained the purpose of the ESA program: "This would be a world-class educational choice program. We are attempting to make an historic investment in the Nevada public school system this session. There is room for a school choice system as well." *Minutes of the Sen. Comm. on Fin.*, 78th Sess. 18 (Nev. May 14, 2015). And Senator Scott Hammond, Vice Chair of the Senate Committee on Education and the sponsor of SB 302, stated that the "ultimate expression of parental involvement is when parents choose their children's school." *Minutes of the Sen. Comm. on Educ.*, 78th Sess. 7 (Nev. Apr. 3, 2015)

("*Minutes*, Apr. 3"). "More than 20 states," he said, "offer programs empowering parents to choose educational placement that best meets their children's unique needs." *Id.* He explained that educational choice programs provide greater educational opportunities by "enhancing competition in the public education system" and by giving "low-income families a chance to transfer their children to private schools that meet their needs." *Id*. He pointed to research by the nonpartisan Center on Education Policy that "students offered school choice programs graduate from high school at a higher rate than their public school counterparts," that "parents are more satisfied with their child's school," and that in jurisdictions with school choice "public schools demonstrated gains in student achievement because of competition." *Id*. Senator Hammond also observed that educational choice "would provide relief to overcrowded public schools, benefiting teachers and students," and that "[s]chools would be motivated to maintain high quality teaching and to be more responsive to the needs of students and their parents." *Id*. at 8.

The legislative record includes empirical evidence that educational-choice programs improve public schools. *Minutes of the Assemb. Comm. on Educ.*, 78th Sess. 30 (Nev. May 28, 2015) ("*Minutes*, May 28"); Greg Forster, Friedman Found. for Educ. Choice, *A Win-Win Solution: The Empirical Evidence on School Choice* (3d ed. 2013), http://bit.ly/1TdMkit ("Friedman Report"). Of 23 empirical

studies that examined the academic impact of school choice on students that remain in the public schools, 22 studies found "school choice improved outcomes in the public schools, and one found no difference." *Minutes*, May 28, at 30. Thus, school choice improves academic outcomes for participants *and* public schools "by allowing students to find the schools that best match their needs, and by introducing healthy competition that keeps schools mission-focused." Friedman Report at 1.

The Legislature also heard from Nevada parents. *Minutes*, Apr. 3, at 15 & Ex. I; *Minutes*, May 28, at 27-30. One Clark County parent testified that "[p]ublic school is not a good fit for everyone. Parents know their children best and need to be able to choose the best educational direction for them." *Minutes*, Apr. 3, at 15. Assemblyman David Gardner noted that, according to one survey of an ESA program in Arizona (the closest analog to Nevada's program), "[o]ne hundred percent of the parents" participating in it were "satisfied." *Minutes*, May 28, at 15.

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

Sands testified that "ESAs could become a game changer for the state of Nevada" because it "can provide a choice and a chance for Nevada students." *Minutes*, May 28, at 27.

D. Plaintiffs' Lawsuit

Before Nevada's families could take advantage of the options ESAs would offer, Plaintiffs sued to block the law. On August 27, 2015, Plaintiffs' two-count complaint challenged the constitutionality of the program. They contended that SB 302 violated Article 11, Section 10, because it directed public funds toward allegedly "sectarian purposes." R.19. They also claimed that the law violated Section 2 of the same article by purportedly promoting "a non-uniform and competing system of private and religious schools." *Id.* at 20. Plaintiffs sought injunctive and declaratory relief that SB 302 was facially unconstitutional in all its possible applications. *Id.*

On October 19, 2015, Nevada moved to dismiss the complaint for lack of standing and failure to state a claim and simultaneously moved to expedite the case. The State argued that Plaintiffs lacked standing to litigate their policy-centered dispute because Nevada does not recognize taxpayer standing, and it detailed the ESA Program's constitutionality under Section 10 and Section 2.

E. District Court's Decision

On May 18, 2016, the District Court issued a 45-page opinion dismissing Plaintiffs' challenge in its entirety. The court did so after permitting Plaintiffs every opportunity to present their views at numerous hearings and in multiple rounds of supplemental briefing and after offering Plaintiffs an opportunity to amend their complaint (which they declined). At the outset, the District Court acknowledged the limited role of the judiciary in resolving public-policy debates: to assess "narrow issues of Nevada constitutional law" and not to evaluate the "desirability and efficacy of the ESA program." R.2945-46. Surveying SB 302's text and legislative history, the District Court had no trouble concluding that the "purpose of the ESA program is to advance the education of all students throughout the State by offering Nevadans a broader array of educational opportunities." R.2947. And the court emphasized that ESA funds may be used "for educational purposes and those purposes alone." R.2948.

Addressing Plaintiffs' standing, the court noted that this Court has never recognized that "taxpayer standing is available in Nevada." R.2954. If anything, the District Court explained, this Court's precedents require Plaintiffs in "the instant case" to "meet *increased* jurisdictional standing requirements" because they seek to have a statute be declared facially unconstitutional. R.2955 (emphasis added). The District Court further acknowledged that no Nevada Supreme Court

case has ever recognized taxpayer standing "when considering a challenge at the state level to a legislative statute and its constitutionality." R.2959. Yet the court expressed its view that prudential considerations "justif[ied] taxpayer standing" here, R.2959, even though Plaintiffs "cannot demonstrate any peculiar injury to themselves from that suffered by any other taxpayer." R.2961. Finally, the District Court concluded that its permissive view of taxpayer standing extended only to Plaintiffs' facial challenge, but not their as-applied challenges, as Plaintiffs "have not personally suffered any harm." R.2962.

Turning to the merits, the District Court rejected both of Plaintiffs' facial challenges. The court first rejected Plaintiffs' claim under Section 2. Section 1's directive to the Legislature to encourage education by "all suitable means," the court wrote, underscores that the Constitution "grants broad authority to the Legislature in choosing the means to accomplish the goal of encouraging education." R.2967. The court read Sections 1 and 2 *in pari materia* such that as long as the Legislature provided for the uniform public schools required by Section 2, Section 1 empowered the Legislature to pursue other suitable means of promoting education. Section 1's "imperative," the court explained, "is *broader than and in addition to* the responsibility under section 2 to provide for a uniform public school system." R.2970 (emphasis added). Because the Legislature continued to provide for uniform public schools, SB 302 was constitutional.

Plaintiffs' Section 10 claim likewise failed. First, the District Court recognized that there was no question about the "Legislature's clear intent to provide Nevada parents with the broadest spectrum of educational options." R.2972. After examining the the plain text and history of Section 10, the District Court concluded that while Section 10 "precludes the Legislature from having a sectarian purpose in the appropriation of any money," that provision does not prohibit expenditures that simply have an "incidental benefit to religion," where the expenditure is made for a "primary secular purpose." R.2978-79. Because the Legislature's intent was unquestionably to "provid[e] parents a broad range of educational options for their children," the court concluded that the ESA law is constitutional. R.2980. The court noted the many other State courts that have upheld similar programs. R.2981-82. And it held that this Court's sole precedent applying Section 10 does not prohibit ESAs because SB 302 does not directly fund any religious organization but instead provides funds that parents independently direct to their chosen educational options—and to educational options only. R.2982-84.

STANDARD OF REVIEW

The District Court's decisions concerning both standing and the merits are reviewed *de novo*. But the standards of review that govern Plaintiffs' constitutional challenge in both the trial court and this Court establish the difficulty of defeating a

democratically-enacted state law as unconstitutional. This Court has long held that "[i]n case of doubt, every possible presumption will be made in favor of the constitutionality of a statute, and courts will interfere only when the Constitution is clearly violated." *List v. Whisler*, 99 Nev. 133, 137, 660 P.2d 104, 106 (1983). Thus, those "attacking a statute [have] the burden of making a clear showing that the statute is unconstitutional." *Id*. at 138, 600 P.2d at 106. "Whether a legislative enactment is wise or unwise is not a determination to be made by the judicial branch." *Koscot Interplanetary, Inc. v. Draney*, 90 Nev. 450, 456, 530 P.2d 108, 112 (1974).

Moreover, because this is a facial challenge, Plaintiffs must "demonstrat[e] that there is no set of circumstances under which the statute would be valid." *Deja Vu Showgirls v. Nev. Dep't of Tax.*, 130 Nev. Adv. Op. 73, 334 P.3d 392, 398 (2014). Because of that high bar, "[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully." *United States v. Salerno*, 481 U.S. 739, 745 (1987).

SUMMARY OF ARGUMENT

The District Court correctly dismissed Plaintiffs' claims under Article 11, Section 10, which provides that "[n]o public funds … shall be used for sectarian purpose." The unmistakable purpose of SB 302 is to empower Nevada families to choose the educational opportunities best suited for their children—not to benefit

any particular religious sect or religion generally. This purpose is set out repeatedly in the law's text and confirmed by its legislative history. The law has no religious purpose; indeed, by its very structure it *cannot* have a religious purpose because no government official can direct a single cent towards a religious entity or for a religious purpose. SB 302 says nothing about religion. It is facially neutral with respect to religious education. And the only way that money could ever arrive at a religiously affiliated school is through the private choice of participating families. Even then, participating families—not the State—will direct those funds. The State has no say in that decision, except to ensure that the funds are used solely for educational purposes.

The U.S. Supreme Court has repeatedly held that such programs advance legitimate secular goals and that private choice breaks any link between the government funds and religion. *See, e.g.*, *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). School-choice programs like SB 302 are thus fully consistent with the neutrality required by the federal Religion Clauses; Plaintiffs do not even attempt to suggest otherwise. And this Court's only case applying Section 10, in *State of Nevada ex rel. Nevada Orphan Asylum v. Hallock*, underscores the constitutionality of SB 302. There, this Court invalidated a *direct* appropriation, specifically provided to a *single* Catholic charity, without any restrictions on its potential use. Here, by contrast, ESA funds are generally available to *all* Nevada *families*, and

those funds arrive at participating schools only indirectly, through *private* choices, not legislative fiat. For these reasons, the vast majority of state supreme courts to have considered similar constitutional challenges to similar school-choice programs have upheld those laws. There is no reason for this Court to chart a contrary path.

And there are very good reasons for the Court to reject Plaintiffs' sweeping theory. Article 11, Section 10 shares a troubling history with many other States' so-called Blaine Amendments, which were conceived and adopted in an ugly wave of nativism and anti-Catholic sentiment. As the U.S. Supreme Court has highlighted, at the time of Section 10's passage, the term "sectarian" was well-known code for "Catholic," and the clear impetus for Section 10, as *Hallock* itself explains, was to block the direct appropriation of public funds to a Catholic institution. Plaintiffs would have this Court reinvigorate this century-old prejudice to mandate state hostility to all religion.

But the U.S. Constitution demands neutrality with respect to faith. This Court should interpret Nevada law in a manner that avoids—not invites—grave constitutional concerns. The District Court here followed the lead of other States that have interpreted their Blaine Amendments as co-extensive with federal Establishment Clause to forbid an improper *government* purpose behind a challenged educational program. Strong textual and historical reasons undergird

that conclusion. The text of Section 10 prohibits only the use of "public funds" for "sectarian purposes." A neutral program providing aid to parents for educational purposes does not run afoul of that textual prohibition. Plaintiffs' effort to read Section 10 to prohibit private choices that might indirectly benefit religious entities would call into question all manner of neutral programs and require the kind of affirmative discrimination against religion and religious individuals that the federal Constitution prohibits.

Nor does SB 302 violate Article 11, Section 2, which requires a "uniform system of common schools." The ESA program does not diminish the uniformity of the public-school system. And the ESA program is affirmatively authorized by Article 11, Section 1, which commands the Legislature to encourage education by "all suitable means."

Finally, Plaintiffs base their standing on their status as taxpayers, but this Court has never recognized taxpayer standing and should not do so here. Enforcing the requirement of concrete injury will let this important program go into effect and ensure that any challenge would be adjudicated based on facts, not speculation.

ARGUMENT

I. The ESA Program Does Not Violate Article 11, Section 10 Of The Nevada Constitution.

The District Court correctly held that Plaintiffs failed to state a claim for relief under Article 11, Section 10 of the Nevada Constitution, which provides that "[n]o public funds of any kind or character whatever, State, County or Municipal, shall be used for sectarian purpose." The ESA program serves educational purposes, not sectarian ones. It offers public funds to parents, not to schools. SB 302 says not one word about religious schools, parochial education, prayer, or faith. To the extent that ESA funds make their way indirectly to religious schools, they do so only through a series of private, individual decisions by the families and students who take part in the program, not through government-directed aid. The U.S. Supreme Court has recognized that the independent choices of parents break the link between government funding and the school a child ultimately attends. *See, e.g.*, *Zelman*, 536 U.S. at 649. So, too, many states' high courts have upheld school-choice initiatives as neutral programs that promote secular, not sectarian, purposes. The District Court correctly refused to interpret Nevada's Constitution as an outlier, evincing such hostility to religion that it forbids even private choices that only incidentally benefit religion. This Court should do likewise.

A. No "Public Funds" Are Spent for a "Sectarian Purpose" Under Nevada's ESA Program.

The ESA program does not use "public funds" for a "sectarian purpose." Rather it provides funds to parents for secular purposes. Plaintiffs do not even allege that the Legislature *intended* to promote or aid any religious sect by passing SB 302. Nor could they: the law does not require that ESA funds be used for sectarian schools or that recipient schools promote any religious tenets. The ESA program is wholly indifferent as to whether participating students attend religiously-affiliated schools.

SB 302 was adopted to benefit Nevada schoolchildren and families regardless of creed. The District Court correctly identified the sole purpose of the program—set forth in the law's plain text, legislative history, and public record—as a secular one: "to advance the education of all students throughout the State by offering Nevadans a broader array of educational opportunities." R.2947. The law requires that ESA funds be used for enumerated *educational* purposes and "only" those purposes. SB 302, §§7.1(c), 9.1; R.2948. Numerous organizations urged the Legislature to adopt the bill to improve academic performance. Parents who testified spoke of educational benefits to their children. The law's chief sponsor emphasized that the Legislature's goal was to "empowe[r] parents to choose educational placement that best meets their children's unique needs." *Minutes*, Apr. 3, at 7.

SB 302's structure bears this out. Plaintiffs insist on calling SB 302 a "voucher" program (nearly 100 times) in an effort to elide the difference between voucher and ESA programs. But what matters is how the law actually works. SB 302 does not (as in a voucher program) send checks directly to a chosen set of private schools, but instead deposits funds into private accounts that private individuals—participating students and families—control. The State ensures that funds are applied only to educational purposes, but beyond that it plays no role in the decisionmaking.[9] Indeed, the Legislature consciously crafted this policy of private choice to avoid concerns like those raised by Plaintiffs. Senator Hammond assured his colleagues and the public that the law "does not benefit or provide funding to private institutions, sectarian or otherwise" because "no dollar is predestined for any particular institution." *Minutes*, Apr. 3, at 9.

The U.S. Supreme Court has held in cases going back more than 30 years that educational choice programs advance the valid secular purpose of promoting education and that the intervening role of parents underscores this secular purpose. In *Mueller v. Allen*, 463 U.S. 388 (1983), the Court rejected a challenge to a

[9] Plaintiffs consistently misstate how the ESA program operates by alleging that "public funds are transferred to private religious schools." R.19; *see* Br. 6-7. SB 302 expressly provides that the grants "must be deposited in the education savings account of the child." SB 302, §8.1. The money is then distributed to a private vendor who in turn directs those funds to recipients at the direction of parents. SB 302, §10.1.

Minnesota statute authorizing tax deductions for private-school tuition. The Court held that "[a] state's decision to defray the cost of educational expenses incurred by parents—regardless of the type of schools their children attend—evidences a purpose that is both secular and understandable." *Id*. at 395. The Court explained that "[b]y educating a substantial number of students [private] schools relieve public schools of a correspondingly great burden—to the benefit of all taxpayers"—and that "private schools may serve as a benchmark for public schools." *Id*. And a State has "a legitimate interest in facilitating education of the highest quality for all children within its boundaries, whatever school their parents have chosen for them." *Id*. (citations omitted). This reasoning was reaffirmed in *Witters v. Washington Department of Services for Blind*, 474 U.S 481, 485 (1986), which held that a Washington tuition-assistance program that helped students studying at religious institutions had an "unmistakably secular purpose," and in *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 5 n.4 (1993), which concluded that a federal program subsidizing sign-language interpreters had a secular purpose and effect when it assisted deaf children, whether they happened to attend a secular and a religiously affiliated school.

Most recently, in *Zelman v. Simmons-Harris*, the Court reiterated that school-choice programs serve the "valid secular purpose of providing educational assistance to poor children." 536 U.S. at 649. The Court explained that its

"decisions have drawn a consistent distinction between government programs that provide aid directly to religious schools, and programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals." *Id.* (citations omitted). Its treatment of the latter as neutral and constitutional has "remained consistent and unbroken." *Id.* "The incidental advancement of a religious mission," the Court wrote, "or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits." *Id.* at 652. In *Zelman*, 82% of participating private schools were "religious" and 96% of scholarship recipients enrolled in such schools, 536 U.S. at 657, 658, but that did not affect the validity of the secular purpose in the slightest. *See also Mueller*, 463 U.S. at 401 (acknowledging secular purpose of program even though 96% of the children in private schools attended religious schools).[10]

This Court's only Section 10 precedent is consistent with these cases and their distinction between direct aid to religious entities and neutral aid to parents. In *State of Nevada ex rel. Nevada Orphan Asylum v. Hallock*, 16 Nev. 373 (1882), the Court held that the Legislature's direct payment of state funds to an orphanage

[10] Thus, Plaintiffs' allegation that "private religious schools currently constitute the majority of private schools in Nevada" is immaterial. R.8. It is also highly speculative, since entirely unclear are the criteria by which the Plaintiffs denominate a school "religious."

run by the Catholic Sisters of Charity was unconstitutional. The decision turned on three key facts: (1) earlier appropriations to the very orphanage at issue in *Hallock* provoked Section 10's adoption, (2) the program at issue provided *direct* aid to a pervasively sectarian organization, and to that organization alone, and (3) the statute authorizing the grant 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.

Plaintiffs seize on a single line, taken out of context, to suggest that *Hallock* prohibits any policy in which state funds might *indirectly* reach a religious institution. *Hallock* said that "public funds should not be used, directly or indirectly, for the building up of any sect," but in doing so it was not anticipating educational choice programs by 130 years and offering dictum as to their validity. The purpose and direct effect of the statute in *Hallock* was to benefit one specific sectarian institution; the best that could be said in *Hallock* was that the direct appropriation of money to a Catholic institution *indirectly* benefitted orphans. The opposite is true here: the purpose and direct effect of ESAs is to benefit students educationally; the most that can be said is that sectarian institutions *might* benefit *indirectly* as a result of *private* choices. *Hallock*, in referring to "indirect" benefits, was simply responding to the charity's argument that its *use* of the directly appropriated funds would only indirectly benefit its religious purpose. 16 Nev. at

387. Plaintiffs themselves acknowledge that what was "critical" about *Hallock*'s application of Section 10 to bar the appropriation was that it was "impossible to separate" the secular and religious purposes of the orphanage. Br.23. Not so with SB 302, which explicitly limits the use of funds to "educational" purposes—or, in Plaintiffs' own words, to a "narrow set of approved expenses," Br.7—which is precisely the point. If the *Hallock* Court really meant to impose Plaintiffs' categorical, not-a-cent-of-benefit rule, one wonders why the Court bothered with its long and careful analysis of the appropriation in that case; applying Plaintiffs' absolute rule to the facts of *Hallock* would have taken about two sentences.

The consequences of Plaintiffs' ahistorical reading of Section 10 and *Hallock* is breathtaking. If Section 10 really "flatly prohibits … the flow of public funds to religious institutions" regardless of private choice, Br.15, State employees could not use their state-funded health savings accounts at Jewish hospitals; state pension funds could not be used for services of religiously affiliated elder-care facilities; welfare recipients would be prohibited from sending even one cent to their mosque. Religious institutions would be barred from receiving routine public benefits, like police services or sidewalk repair. Funding for state prisons would be at risk since they provide extensive faith-based services. And public employees would be barred from contributing any part of their salary to religious charities—if

Section 10 really means, as Plaintiffs claim, that "[f]unds from the state treasury must not end up in the coffers of religious institutions." Br.20.

By contrast, interpreting Section 10 as focused on direct government aid to religious entities would align Section 10 with modern federal constitutional principles. While the Supreme Court has occasionally upheld even direct aid to religious schools, *see, e.g.*, *Mitchell v. Helms*, 530 U.S. 793 (2000) (plurality opinion); *Agostini v. Felton*, 521 U.S. 203 (1997), it has consistently held (as noted above) that *indirect* aid programs have neither the purpose nor effect of advancing religion, *see, e.g.*, *Zelman*, 536 U.S. at 649; *Zobrest*, 509 U.S. at 9-10; *Witters*, 474 U.S. at 488; *Mueller*, 463 U.S. at 399.[11] Given that both Section 10 and *Hallock* itself were aimed at prohibiting direct, unrestricted aid to a specific religious entity, there is absolutely no reason to extend Section 10 to programs that provide public funds only to parents, not schools, and in which any money can make its way to religious entities only through the intervening and independent choices of private individuals.

[11] To the extent Plaintiffs suggest that the Supreme Court has done no more than find that indirect aid does not run afoul of *Lemon*'s purpose prong, they are mistaken. Instead, the Court has repeatedly made "clear that where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause." *Zelman*, 563 U.S. at 652.

B. Similar Programs Have Been Upheld in Other States Against Challenges Brought Under Similar Constitutional Provisions.

Plaintiffs chose not to bring a challenge under the federal Constitution. The reason is obvious: the U.S. Supreme Court has already approved the constitutionality of educational choice initiatives like SB 302, as neutral programs available to children regardless of faith that serve valid secular interests relating to education. Plaintiffs are free to raise only state-law claims, but the reasoning of *Zelman* and prior cases in the *Zelman* line is not so easily evaded—indeed, it is fatal to Plaintiffs' claim. The key insight of these cases is that the intervening decisions of parents break the link between public funds and the schools that any student attends and so ensures that school-choice funding serves only a valid educational purpose, not any "sectarian purpose."[12]

Given that *Zelman*'s reasoning eliminates concerns about "sectarian purposes" in school-choice measures with genuine private choice, it is not surprising that numerous decisions from other states support SB 302's constitutionality. Nevada's ESA program differs in some ways from other states' school-choice programs, but only in ways—like the program's use of individual

[12] Plaintiffs emphasize that *Hallock* rejected the argument that the public funds directly provided to the orphanage were for the secular purpose of providing for orphans. But, as explained above, direct aid even for secular purposes raises more serious constitutional concerns than indirect aid for similar purposes. Moreover, as *Hallock* emphasized, Section 10 was prompted by the same aid to the same entity for the same purposes. It was not prompted by the kind of indirect aid for secular purposes at issue here and repeatedly approved by the Supreme Court.

accounts, its wide range of options, and its near-universal availability to Nevada schoolchildren—that *lessen* constitutional concerns relative to the voucher programs and direct-aid laws upheld in other States. Section 10, moreover, is textually *less* restrictive than similar provisions found in other state constitutions. Arizona's Constitution, for instance, specifically bars aid to a "private or sectarian school," Ariz. Const. art. IX, §10, not merely aid that is used for a "sectarian purpose." Nev. Const. art. 11, §10.

Even under that more-restrictive Arizona provision, the Arizona Court of Appeals upheld the State's education savings account program—similar to Nevada's but not as universally available—against a challenge like this one. *Niehaus v. Huppenthal*, 233 Ariz. 195, 199-200 (Ariz. Ct. App. 2013), *review denied* (Mar. 21, 2014). The court explained that the ESA law's object was to support the beneficiary families, not sectarian schools. *Id.* "Parents 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. "Depending on how the parents choose to educate their children, this may or may not include paying tuition at a private school." *Id.* The money *might* go to tuition—or to tutoring, online programs, standardized-test training, or innovative educational therapies. *Id.* As here, nothing in the law encourages, let alone requires, a single cent to be delivered to any particular school, sectarian or secular. This holding is especially

significant because five years earlier the Arizona Supreme Court invalidated Arizona's *voucher* law under its Blaine Amendment. *Cain v. Horne*, 220 Ariz. 77, 83 (2009). That same court then denied review of the *Niehaus* decision, confirming that ESAs raise no serious constitutional problem even under a Blaine provision more restrictive than Nevada's.

In *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998), the Wisconsin Supreme Court upheld a Milwaukee school-choice program under a state constitutional provision that prohibited the state from drawing "any money … from the treasury for the benefit of religious societies, or religious or theological seminaries." Wis. Const. art. I, §18. Because the "primary effect of the [law] is not the advancement of a religion," the court held that the funds involved were not drawn for the "benefit" of religious institutions. 578 N.W.2d at 621. In reaching its conclusion, the court stressed that "public funds may be placed at the disposal of third parties so long as the program on its face is neutral between sectarian and nonsectarian alternatives and the transmission of funds is guided by the independent decisions of third parties." *Id.* The requisite third-party choice was present in the Wisconsin law, even though the state would "'send the check to the private school,'" where the parent would then endorse it. *Id.* at 609 (quoting Wis. Act 27 §4006m).

The Ohio Supreme Court upheld a similar school-choice program under its state constitutional provision providing that "'no religious or other sect, or sects,

shall ever have any exclusive right to, or control of, any part of the school funds of this state.'" *Simmons-Harris v. Goff*, 711 N.E.2d 203, 212 (Ohio 1999) (quoting Ohio Const. art VI, §2). Like Wisconsin's program, Ohio sends its voucher checks to the recipient school directly and parents then endorse the check over to the schools. *See id.* at 206. Yet the court emphasized that, even under that program, "no money flows directly from the state to a sectarian school and no money can reach a sectarian school based solely on its efforts or the efforts of the state. Sectarian schools receive money that originated in the School Voucher Program only as the result of independent decisions of parents and students." *Id.* at 212.

Three years ago, in *Meredith v. Pence*, 984 N.E.2d 1213 (Ind. 2013), the Indiana Supreme Court unanimously upheld that state's school-choice program against challenges that are almost identical to Plaintiffs' claims in this case. The Indiana Supreme Court held that the state's program did not violate Indiana's Blaine Amendment because it did not "directly benefit" religious schools, even though, like Ohio and Wisconsin, Indiana sends funds directly to the recipient schools. *Id.* at 1227. "Any benefit to program-eligible schools, religious or non-religious," the court explained, "derives from the private, independent choice of the parents of program-eligible students, not the decree of the State, and is thus ancillary and incidental to the benefit conferred on these families." *Id.* at 1229. The court warned that a more restrictive application of its Blaine Amendment

"would put at constitutional risk every government expenditure incidentally, albeit substantially, benefiting any religious or theological institution," like fire and police protection, water and sewer services, sidewalks, streets, and other general, neutral benefits. *Id.* at 1227.

Only months ago, the Oklahoma Supreme Court upheld that state's school-choice legislation against attack under Oklahoma's Blaine Amendment. *Oliver v. Hofmeister*, No. 113267, __P.3d__, 2016 WL 614009 (Okla. 2016). Oklahoma's Blaine Amendment imposes much greater restrictions on the use of public funds than Nevada's Section 10 since it forbids the use of "public money" from being "used, directly or indirectly," to a "sectarian institution," not just a sectarian "purpose." Okla. Const. art. II, §5. Yet the Oklahoma Supreme Court unanimously concluded that the traditional voucher program at issue "does not directly fund religious activities because *no* funds are dispersed to any private *sectarian* school until there is a *private independent selection* by the parents or legal guardian of an eligible student." *Oliver*, 2016 WL 614009, at *5. "Any benefit to a participating *sectarian* school," the court wrote, "arises solely from the private and independent choice of the parent or legal guardian of the child and *not* from any decree from the State." *Id.*

The same conclusion applies *a fortiori* here. Like the programs upheld in Wisconsin, Ohio, Indiana, and Oklahoma, SB 302's purpose is to improve the

education of children, not to support sectarian institutions or instruction. But unlike the voucher programs upheld in those States, there can be no dispute that money can arrive at schools with religious affiliations *only* through private choice *and* through private hands. In Nevada, the *State* never transfers any "public funds" to a school, sectarian or otherwise.

For these reasons and others the Colorado Supreme Court's recent decision invalidating a school-voucher program does not support a different approach. *Taxpayers for Pub. Ed. v. Douglas Cty. Sch. Dist.*, 351 P.3d 461 (Colo. 2015). As an initial matter, the Colorado challengers' Blaine argument failed to garner the support of a majority of the Colorado Supreme Court; the Court split 3-3 on whether Colorado's voucher program violated its Blaine Amendment. Moreover, Colorado's Constitution contains more restrictive language than Section 10.[13] And the Colorado program was a voucher program—the public-school district issued a check directly to the participating student's school of choice, and the student's parent "then endorse[d] the check 'for the sole purpose of paying for tuition at the Private School Partner.'" *Id.* at 465. As the Arizona courts recognized, it is the unique structure of ESAs, as distinguished from vouchers, that eliminates any

[13] Colorado forbids money from going to aid "any church or sectarian society, or for any sectarian purpose, or to help support or sustain any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church or sectarian denomination...." Colo. Const. art. IX, §7.

constitutional concern. In short, the Colorado decision is not only distinguishable, but even were it not, there is no reason to follow Colorado's lead at the expense of raising the serious federal constitutional issues implicated by a decision that eschews neutrality and forces the government to discriminate against religion. Indeed, petitions for certiorari from that decision raising its impermissible discrimination against religion are being held pending the Supreme Court's decision in *Trinity Lutheran*.

In the end, the weight of authority and the force of logic lie decisively against Plaintiffs' claims. Arizona's ESA program was upheld based on the unique features of ESAs. The Indiana, Ohio, Wisconsin, and Oklahoma laws were upheld even though they are traditional voucher programs. And Colorado's decision in *Douglas County* was a non-dispositive plurality decision overshadowed by a persuasive dissent that garnered as many votes as the plurality—and that still may ultimately be overturned by the U.S. Supreme Court.

II. Invalidating The ESA Program Based On Nevada's Blaine Amendment Would Raise Constitutional Problems That This Court Should Avoid.

Plaintiffs' theory is not simply wrong; it also would place Nevada's Constitution in direct conflict with the United States Constitution.

A. Section 10 Was Born of Religious Bigotry and Designed to Allow Discrimination Between Religious Practices.

Ratified in 1880, Section 10 is a variant of language in other state constitutions that historians refer to as Blaine Amendments, after Representative James G. Blaine, who proposed a similar amendment to the federal Constitution. These Blaine Amendments sought to preserve the Protestant nature of America's public schools during a time of increasing Catholic influence. The U.S. Supreme Court has recognized that these amendments "arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that 'sectarian' was code for 'Catholic.'" *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion).

Nearly four million Catholic immigrants arrived in the U.S. before the Civil War. This wave of immigration led to anti-Catholic sentiment that "poured forth at an unparalleled rate," and by the 1860s, in the view of some, Catholic immigration "threatened to alter traditional patterns of American life." Vincent P. Lannie, *Alienation in America: The Immigrant Catholic and Public Education in Pre-Civil War America*, 32 Rev. Pol. 504, 506 (1970). But no area of disagreement between Protestants and Catholics "caused more friction than the place of religion in the public schools." *Id.* at 507. Catholics bristled at the mandatory use by Catholic schoolchildren of the Protestant King James Bible—standard in "common" schools. *Id* at 507-08. The Protestant public viewed Catholic efforts to excuse

their children from reading the King James Bible as "part of a battle against American Protestantism." *Id.* at 511. The 1844 "Bible riots" in Philadelphia killed 30 and destroyed Catholic churches. Steven K. Green, *The Bible, the School, and the Constitution: The Clash that Shaped Modern Church-State Doctrine* 35-36 (2012). In some cities children were whipped for refusing to read the King James Bible in public school. Lannie, *supra*, at 512. Boston, in 1859, expelled 400 Catholic students in a single week for refusing to say the Lord's Prayer. Green, *supra*, at 40. When efforts to obtain exemption from Protestant instruction failed, the Catholic community moved to create a separate system of parochial schools, Lannie, *supra*, at 517-18, and when they began to seek public funding, too, Blaine Amendments were erected. Green, *supra*, at 8.

Nevada's constitutional framing did not escape this national controversy. Delegate Lockwood, of Ormsby County, spoke of "persons so bigoted in their religious faith—as, for example, the Roman Catholics." Official Report of the Debates and Proceedings in the Constitutional Convention of the State of Nevada 572 (1866) [hereinafter Debates]. He cautioned delegates of the "sectarian schools in Europe," where instruction was mostly occupied by "priests." *Id.* at 573. Delegate Collins, of Storey County, fought to "keep out" such "sectarianism" from the public schools. *Id.* at 577. Delegate Brosnan, also of Storey County, expressed alarm about "sectarian instruction" of the "juvenile mind" in public schools. *Id.* at

660. The delegates created a constitution calling for a "uniform system of common schools" that denied funding to any school permitting "instruction of a sectarian character." *Id.* at 845.

The Legislature proposed Article 11, §10, in February 1877. During the preceding ten years, the Legislature controversially appropriated funding for the Nevada Orphan Asylum, a Catholic-run institution that sheltered hundreds of Nevadan orphans. *See* Jay S. Bybee & David W. Newton, *Of Orphans and Vouchers: Nevada's "Little Blaine Amendment" and the Future of Religious Participation in Public Programs*, 2 Nev. L.J. 551, 561-65 (2002); Ronald James, *The Roar and the Silence: A History of Virginia City and the Comstock Lode* 198-99 (1998). Nevada at this time experienced "a good deal of ethnic conflict and anti-Catholicism." James S. Olson, *Pioneer Catholicism in Eastern and Southern Nevada, 1864-1931*, 26 Nev. Hist. Soc'y Q. 159, 163 (1983). A Nevada newspaper in 1876 described the Catholic Church as seeking "mastery of the world" and advocated prohibiting all schools that were not public schools. John M. Townley, *Tough Little Town on the Truckee: Reno 1868-1900*, at 210 (1983) (quoting *Nevada State J.*, Sept. 22, 1876, at 2). And the *Nevada Daily Tribune* praised the Blaine Amendment as a "stepping stone to the final breaking up of a power that has long cursed the world, and that is obtaining too much of a foothold in these United States." Bybee & Newton, *supra*, at 566.

After Section 10's adoption the State Controller refused to deliver funds appropriated to the Asylum, and the Asylum sought a writ of mandamus against him. *Hallock*, 16 Nev. at 376. The three-Justice Nevada Supreme Court denied mandamus. *Id.* at 388. The Court concluded that funding to the Asylum "greatly, if not entirely, impelled the adoption" of the Blaine Amendment, and that the voters necessarily believed that providing direct appropriations from the state treasury to the Catholic institution was an "evil which ought to be remedied." *Id.* at 383.

Nevada public schools, meanwhile, continued to feature Protestant observances; the concern for "sectarianism" was thus not an effort to separate church and state, but to discriminate against Catholics and separate them from public money. In 1877, Samuel Kelly, Nevada's superintendent of public education found that the the law "prohibit[ing] sectarianism" permitted Bible reading. Report of the Superintendent of Public Instruction of the State of Nevada for the Years 1875 and 1876, at 22 (1877).[14] He noted, without concern, that prayer occurred in public schools and personally proposed that school children should recite the Lord's Prayer and beatitudes. *Id.* Nevada's official textbook had children recite Bible verses, religious hymns, and statements such as, "It is

[14] This document and other historical documents cited here were attached as exhibits to the State's Motion to Dismiss briefing in the court below, and are part of the record in this case.

impossible that God should withdraw his presence from anything" and "No true Christian can be entirely hopeless." The Pacific Coast Spelling Book 87, 90 (1873).[15] This was a different time with a different view of religion's place in school. But it is also Section 10's backdrop, and it cannot be ignored if this Court accepts Plaintiffs' invitation to interpret Nevada's Constitution as requiring wholesale discrimination against religion.

B. Striking the ESA Program on Plaintiffs' Expansive View of Section 10 Would Conflict With the U.S. Constitution.

The ESA program was enacted to promote education and provides funds to parents, not schools. These parents' private choices, directing ESA funds in their individual accounts through a private vendor, eliminates concern that the State is spending "public funds" for any "sectarian purpose." This Court need go no further. Indeed, reaching the contrary conclusion would require this Court to confront the "shameful pedigree" underlying Nevada's Blaine Amendment and address its compatibility with the federal Constitution, which demands neutrality as between religions, and between religion and non-religion, and prohibits discrimination against religious institutions. *Mitchell*, 530 U.S. at 828. But this Court's duty is to avoid, not exacerbate, these constitutional concerns.

[15] *See* May 29, 1879 Order of the State Board of Education ("prescrib[ing] the Pacific Coast Speller for use in the Public Schools of this State").

Other courts have avoided expanding these state amendments "born of bigotry," *id.* at 829, by interpreting them as consistent with modern Establishment Clause jurisprudence on neutral programs of private choice. *See, e.g.*, *Oliver*, 2016 WL 614009, at *3 n.6 (Federal Establishment Clause, as interpreted in *Zelman*, "provides guidance" in interpreting Oklahoma Blaine Amendment); *Jackson*, 578 N.W.2d at 620 (Wisconsin Blaine Amendment "carries the same import" of the Establishment Clause of the First Amendment). The District Court took that approach here, concluding that "[t]he purpose *Hallock* defines for section 10, avoiding State action to build up a sect, parallels largely the purpose of the federal Establishment Clause." R.2973. This makes good doctrinal sense: the distinction between direct aid and aid that reaches religious schools only as an indirect result of the independent and intervening choices of private individuals is relevant not just to federal Establishment Clause jurisprudence, but to the text and history of Section 10. While the two provisions' precise terminology differs, the inquiry under Section 10 is consistent with Establishment Clause jurisprudence—which indisputably does not prohibit school-choice measures like SB 302. Construing Section 10 in that manner avoids the constitutional and practical difficulties in interpreting a provision whose original public meaning was (1) to single out

Catholicism for unfavorable treatment while (2) permitting Protestant prayer and Bible reading in the public schools.[16]

Adopting Plaintiffs' sweeping view of Section 10, by contrast, would require this Court to interpret Section 10 in a manner that is both ahistorical and unconstitutional. Section 10 did not seek to eradicate religion from the public sphere. Both before and after Section 10, Nevada's public schoolrooms rang with generic, "nonsectarian" Protestant teaching. *See* Part II-A, *supra*; *see also* Steven K. Green, *The Insignificance of the Blaine Amendment*, 2008 B.Y.U. L. Rev. 295, 302, 322 (2008). Section 10 aimed to eradicate only specific *types* of religion from schools. *See id.*; *see also generally* Bybee & Newton, *supra*. Thus when the *Hallock* court evaluated whether the Sisters of Charity qualified as a "sectarian institution," it proclaimed: "The framers of the constitution undoubtedly considered the Roman Catholic a sectarian church." *Hallock*, 16 Nev. at 385. Interpreting Section 10 merely as a broad prohibition on public aid to religion would ignore the provision's original public meaning.

But applying Nevada's Blaine Amendment to prohibit ESAs would have even deeper problems. A state constitutional provision intended to discriminate

[16] This Court has similarly construed other provisions of the Bill of Rights, like the Free Speech Clause, "identical[ly]" with its Nevada counterpart. *Univ. & Cmty. Coll. Sys. of Nev. v. Nevadans for Sound Gov't*, 120 Nev. 712, 722, 100 P.3d 179, 187 (2004).

between religions or religious teachings is impermissible under modern constitutional doctrine, and has been for some time. *See, e.g.*, *Larson v. Valente*, 456 U.S. 228, 246 (1982) ("[N]o State can 'pass laws which aid one religion' or that 'prefer one religion over another'"). So is discrimination against religion generally. *See, e.g.*, *Mitchell*, 530 U.S. at 828 (collecting cases). Reinterpreting Nevada's Blaine Amendment away from its original intent—to discriminate *between* religions—to discriminating against religion *generally* is thus neither faithful to the provision's original meaning nor sufficient to avoid federal constitutional problems.

Section 10, with its use of a code word for discrimination against Catholics, *Mitchell*, 530 U.S. at 828, is hardly facially neutral. But the federal Constitution prohibits even facially-neutral laws that were enacted with a discriminatory animus aimed at specific religions. *See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993). "Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality." *Id.* And the "[r]elevant evidence" to consider in this context "includes, among other things, the historical background of the [policy] under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." *Id.*

at 540. Each of those categories of evidence, in this case, underscores that to the extent Section 10 is extended beyond the reach of the federal Establishment Clause, it is constitutionally problematic. *See* Part II-A, *supra*.

Plaintiffs rely on *Locke v. Davey*, 540 U.S. 712, 715 (2004), and its holding that a state can exempt university students who pursue degrees in devotional theology from "otherwise inclusive aid program[s]." *Id.* at 715. But their position would invert that decision. *Locke* repeatedly made clear its narrow focus on the unique problem of the state funding for the training of *clergy*. A State could choose not to subsidize "[t]raining someone to lead a congregation," the court said, because that is an "essentially religious" endeavor and there is a long history, dating back to the founding, of States denying special benefits to ministers. *Id.* at 721. Here, by contrast, SB 302 offers a religiously neutral benefit, generally available to the entire population, for purposes of education. The concern in *Locke* is entirely absent. On Plaintiffs' view, however, Section 10 would require the State to offer the benefit of ESAs to everyone except those whose choice of school is religious. Unlike *Locke*'s narrow exception, this would lay a special burden on *all* believers—and so cross the line into unconstitutional discrimination. *Locke,* as the Tenth Circuit wrote, does not mean that a State can engage in the "wholesale exclusion of religious institutions and their students from otherwise neutral and generally available government support." *Colo. Christian Univ. v. Weaver*, 534

F.3d 1245, 1255 (10th Cir. 2008); *see also*, *e.g.*, *Mitchell*, 530 U.S. at 828 ("[O]ur decisions … have prohibited governments from discriminating in the distribution of public benefits based upon religious status ….").

But this Court need not confront Section 10's troubling past nor Plaintiffs' even more troubling reinterpretation of its text. To the extent its reach is unclear, Section 10 should be applied to avoid any federal constitutional concerns. Evaluating the constitutionality of a statute is the "gravest and most delicate duty that" the courts are "called on to perform." *Rust v. Sullivan*, 500 U.S. 173, 191 (1991) (quotations omitted). Because that task is so sensitive, "[e]very reasonable presumption must be indulged in support of the controverted statute with any doubts being resolved against the challenging party, who has the substantial burden of showing that the act is constitutionally unsound." *Koscot Interplanetary*, 90 Nev. at 456, 530 P.2d at 112. Among those presumptions is the rule that, "[w]henever possible," Nevada courts "must interpret statutes so as to avoid conflicts with the federal or state constitutions." *Mangarella v. State*, 117 Nev. 130, 134-35, 17 P.3d 989, 992 (2001).

The canon of constitutional avoidance applies with double force in this case. First, just as a majority of other States' courts have interpreted analogous educational initiatives as consistent with their state constitutions, this Court should avoid any reading of SB 302 that would treat the use of *private* funds by individual

participants in the program for an *educational* purpose as an expenditure of *public* funds for a *sectarian* purpose. Any benefit to religious institutions is incidental, remote, attenuated—a byproduct of a valid and secular law. Second, this Court should avoid any reading of Section 10 that requires discrimination against religion in conflict with the federal Constitution. Section 10, at most, prohibits the sort of direct appropriation of funds to sectarian organizations invalidated in *Hallock*. Extending it further, to discriminate against parents who freely decide to send their children to a private school of their choosing, would raise serious federal constitutional questions that this Court is best to avoid. Finally, Plaintiffs' view would require courts to troll through the religious beliefs of participating families and schools—or, worse, to review and censor textbook and curricular decisions—which would raise a slew of additional constitutional concerns. *See Mitchell*, 530 U.S. at 828; *Colo. Christian Univ.*, 534 F.3d at 1256, 1259, 1261-66.

III. Sections 1 And 2 Of Article 11 Authorize The Legislature To Support Both A Uniform Public School System And The ESA Program.

As a fallback to their Blaine Amendment claim, Plaintiffs argue that SB 302 violates Section 2, which requires the Legislature to provide for a "uniform system of common schools." Nev. Const. art. 11, §2. But Sections 1 and 2 of Article 11 authorize the Legislature to support both a uniform public school system *and* an ESA program that encourages education in the private sector. The two district courts in the two ESA cases agreed that SB 302 does not violate Section 2.

Section 2 is preceded and informed by Section 1. The two provisions plainly must be read *in pari materia*. Section 1, captioned, "Legislature to encourage education," provides that "[t]he legislature shall encourage [education] by *all suitable means*." Nev. Const. art. 11, §1 (emphasis added). The drafters of the Nevada Constitution thus gave the Legislature "broad powers ... to take whatever actions it believed appropriate to encourage education." R.2966. 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*, 984 N.E.2d at 1224 n.17 (emphasis omitted); a*ccord* R.2977.

Section 2 then states that the Legislature shall provide for a "uniform system of common schools." There is no tension, let alone conflict, between these provisions. Section 1 empowers the Legislature to enact any educational program that it deems to be suitable; nowhere is this limited to *public* education. Section 2 requires the Legislature to use its broad power to create a "uniform" public school system, as one mandatory use of its education power, but this does not constrict that power to public schools or prohibit the Legislature from encouraging education through other suitable means, such as by empowering parents to pursue options outside the public schools.

Section 2 simply requires the Legislature to use its broad Section 1 power in one specific way (but not to the exclusion of all others). The Legislature has met

that requirement. Nevada's public schools are uniform, free of charge, and open to all comers—which Plaintiffs do not dispute. It does not close the public schools or make them non-uniform. Nor does it transform the private schools participating in the ESA program into non-uniform public schools. SB 302, §14. "The ESA program," wrote the District Court, "does not alter the existence or structure of Nevada's public school system." R.2970. In regulating non-public education, the Legislature carries on a long-standing tradition. For instance, it has already set out extensive rules for private schools, NRS 394, passed a law to permit homeschooling, NRS 392.070, and funded drug-treatment facilities for former public-school students unable to attend regular classes, NRS 387.1225.

The District Court correctly held that Section 1 allowed the Legislature to create an ESA program and that Section 2 did not forbid it from doing so. R.2962-72. The "ordinary and normal reading of the language" of Article 11, Section 1, the court explained, "clearly allows the Legislature to use any means suitable for encouraging education, not just those outlined in the remaining sections of the Article." R.2968. Plaintiffs attack a straw man when they say the District Court construed Section 1 "to trump Section 2" and that Section 2 (as the District Court supposedly would have it) "prohibits only a complete abolition of the public schools." Br.39. The court simply ruled that Sections 1 and 2 are "[]consistent with each other" and that the Legislature satisfied Section 2 by providing for "a

uniform system of common schools, free from religious instruction and open to general attendance by all Nevada children." R.2968.[17]

Plaintiffs argue that Section 1 confines the Legislature to encouraging education "through the public-education system." Br.46 (emphasis omitted). But text, history, and precedent all point in the opposite direction. The text of Section 1 contains no public-education limitation; it instead authorizes the Legislature to encourage education by "all" suitable means. And the history of Article 11 aligns with that conclusion. In the Constitutional Convention, the Delegates decided to grant the Legislature broad discretion over education and decided *not* to make public education compulsory. *See* Debates 565-574; Appellant's Reply Br.7-8, *Schwartz v. Lopez* (quoting the statements of Delegates McClinton, Collins, and Warwick). When they gave the Legislature the power to encourage education by "all suitable means," they meant just that. Moreover, this Court's decision in *State ex rel. Keith v. Westerfield*, 23 Nev. 468, 49 P. 119 (1897), disproves Plaintiffs' claim that the State may encourage education only through the public-school

[17] This Court explained long ago that the uniformity requirement in Section 2 is concerned with maintaining uniformity *within* the public-school system. It is aimed at avoiding certain differences between public schools in different parts of Nevada. *See State v. Tilford*, 1 Nev. 240, 245 (1865) (upholding, pursuant to Section 2, the Legislature's abolition of the Storey County Board of Education as part of the Legislature's creation of a new public-school system because the "system of schools was different [in Storey County] from that in any other county"). SB 302 has no effect on uniformity among the Nevada public schools.

system. The Court held in that case that the Legislature could spend money from the General Fund to pay the salary of a teacher at the state orphans' home, which was *not* a public school.

Plaintiffs invoke the *expressio unius* maxim—"the expression of one thing is the exclusion of another"—contending that, because the Legislature must provide for a uniform public-school system, it cannot support private educational options. Br.48-49. But Plaintiffs fail to appreciate that Sections 1 and 2 express *two* things. *See* R.2966 ("the framers indicated they intended to create two duties" that are "separate and distinct"). Section 1 empowers the Legislature to encourage education by "all suitable means." Section 2 merely requires the Legislature to encourage education through one of those means—a uniform public-school system. R.2968. *See also* Appellant's Reply Br.10-11 & nn.5-6, *Schwartz v. Lopez*.

Plaintiffs also claim that the ESA program will "rob[ ] the public schools of the money necessary to provide a meaningful education to Nevada's children," relying on nothing more than the fact that any Nevada child is eligible for the program after 100 days of public schooling. Br.52-53. But there is no reason to believe that is correct, and such speculation cannot support a facial challenge to a statute that has not even gone into effect, which requires Plaintiffs to prove that there is "no set of circumstances under which the statute can be constitutionally

applied." R.2986 (quoting *Deja Vu*, 334 P.3d at 398).

The Supreme Courts of Indiana, North Carolina, and Wisconsin have all upheld educational-choice programs against challenges similar to Plaintiffs' attack on this ground. *See Meredith*, 984 N.E.2d 1213 (Ind.); *Hart v. State*, 774 S.E.2d 281 (N.C. 2015); *Jackson*, 578 N.W.2d 602 (Wis.); *Davis v. Grover*, 480 N.W.2d 460 (Wis. 1992). Each of these cases involved a state constitutional provision requiring the legislature to establish a "uniform" public school system. *See* Ind. Const. art. 8, §1; N.C. Const. art. IX, §2(1); Wis. Const. art. X, §3. Indiana's Constitution, in particular, is strikingly similar to Nevada's; it gives the legislature the authority to encourage education "by all suitable means." Ind. Const. art. 8, §1. The sound reasons offered by the Indiana, North Carolina, and Wisconsin Supreme Courts for rejecting the "uniformity" attacks apply here. The Legislature's constitutional power to encourage education by "all suitable means," held the Indiana Supreme Court, permits the Legislature to enact a choice program. *Meredith*, 984 N.E.2d at 1224-25 & nn.17-18. 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*, 578 N.W.2d at 628. A choice program, the same court said, "in no way deprives any student the opportunity to attend a public school with a uniform character of education." *Davis*, 480 N.W.2d at 474. The uniformity

mandate, the North Carolina Supreme Court wrote, applies only to the public school system "and does not prohibit the General Assembly from funding educational initiatives outside of that system." *Hart*, 774 S.E.2d at 290.

Plaintiffs get no help from *Bush v. Holmes*, 919 So.2d 392 (Fla. 2006). Br.49-51. *Bush* struck down a Florida program under Article IX of the Florida Constitution, which makes it a "paramount duty of the state to make adequate provision for the education of all children residing within its borders" by means of a "uniform, efficient, safe, secure, and high quality system of free public schools." Fla. Const. art. IX, §1(a). *Bush* read the first sentence in that section, with its "paramount duty" language, as imposing a duty on the legislature to provide for education and construed the second sentence of that section concerning a "uniform" system of free public schools as a *restriction* on how the legislature may make that provision. *Bush* held that the Florida program violated the second sentence by "devoting the state's resources to the education of children within our state through means other than a system of free public schools." *Bush*, 919 So.2d at 407.

Significantly, *Bush* distinguished the Wisconsin decision, *Davis*, on the ground that the "education article of the Wisconsin Constitution construed in *Davis*" lacks language "analogous" to Florida's constitutional statement that it is a "paramount duty" of the state to make "adequate provision" for the education of all

Florida children. *Bush*, 919 So.2d at 407 n.10. *Bush*'s distinction of *Davis* thus distinguishes this case; the Nevada Constitution, like Wisconsin's, does not contain Florida's "paramount duty" and "adequate provision" language that *Bush* found distinguishing and dispositive.

The Indiana Supreme Court's decision in *Meredith* confirms this analysis. *Meredith* distinguished *Bush* based on *Bush*'s distinction of *Davis* and the Wisconsin Constitution. *See Meredith*, 984 N.E.2d at 1224 ("Like the Wisconsin Constitution, the Indiana Constitution contains no analogous 'adequate provision' clause."). The Indiana Supreme Court also distinguished *Bush* based on the "all suitable means" clause in the Indiana Constitution. Indiana's Constitution is the most similar to Nevada's because it contains an "all suitable means" clause as well as a "uniform system of Common Schools" clause. Ind. Const. art. 8, §1. *Meredith* held that the legislature's duty to provide for a uniform system of common schools "cannot be read as a restriction on the first duty" to encourage education by all suitable means. 984 N.E.2d at 1224. The legislature has a duty "generally to encourage improvement in education in Indiana, and this imperative is broader than and in addition to the duty to provide for a system of common schools. Each may be accomplished without reference to the other." *Id*. So too here. The Nevada Constitution, like the Indiana Constitution, empowers the Legislature to promote education by "all suitable means" and lacks the language on which the

Bush Court relied.

Here, the District Court correctly rejected Plaintiffs' reliance on *Bush*, explaining that the "consistent use of the term 'adequate provision' that existed between the sentences of the Florida constitution section does not exist in Article XI, sections 1 and 2 of our State's Constitution." R.2969. *Bush*, in sum, is an outlier, a decision based on particular language in the Florida Constitution that differs markedly from the Nevada Constitution. No court outside of Florida has ever used *Bush* to strike down an educational-choice statute. This Court should not be the first.

IV. Plaintiffs Lack Standing to Challenge SB 302 Because Nevada Law Does Not Recognize Taxpayer Standing.

Beyond the substantive flaws in Plaintiffs' legal claims, they have no standing to bring a facial or as-applied constitutional challenge to SB 302. "Standing is the legal right to set judicial machinery in motion." *Heller v. Legislature of State of Nev.*, 120 Nev. 456, 460, 93 P.3d 746, 749 (2004) (quotation marks omitted). It is a jurisdictional requirement. *Id*. at 461, 93 P.3d at 749. In this case, Plaintiffs are five taxpayers who state that they "object[] to the use of [their] taxes to fund private and religious schools." R.3-4.

But Nevada does not recognize taxpayer standing. *See Citizens for Cold Springs v. City of Reno*, 125 Nev. 625, 630, 218 P.3d 847, 850 (2009); *Doe v. Bryan*, 102 Nev. 523, 525, 728 P.2d 443, 444 (1986); *Blanding v. City of Las*

Vegas, 52 Nev. 52, 280 P. 644, 650 (1929). And the District Court recognized that this Court has never found that "taxpayer standing is available in Nevada." R.2954; *see also Little v. First Jud. Dist. Ct.*, No. 67630, 2016 WL 3749050, at *1 (Nev. July 12, 2016) (unpublished disposition) (denying mandamus petition that asked this Court "to require the district court to recognize" petitioner's standing as a taxpayer to challenge a Nevada statute).[18]

As *Blanding* explained, a taxpayer cannot maintain a suit "where he has not sustained or is not threatened with any injury peculiar to himself as distinguished from the public generally." *Id.* at 650. Furthermore, "in cases for declaratory relief and where constitutional matters arise, this court has required plaintiffs to meet increased"—not reduced—"jurisdictional standing requirements." *Stockmeier v. Nev. Dep't of Corrs. Psych. Review Panel*, 122 Nev. 385, 393, 135 P.3d 220, 225-26 (2006) (footnotes omitted), *abrogated on other grounds by Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 181 P.3d 670 (2008). Here, the District Court recognized that the "increased jurisdictional standing requirements" apply here because Plaintiffs sought "a statute to be declared unconstitutional." R.2955. Certainly nothing in SB 302's text purports to confer Plaintiffs with standing—unlike many Nevada laws that grant statutory standing. *See, e.g.*, *Stockmeier*, 122

[18] For further briefing on this Court's long-standing refusal to recognize general taxpayer standing, *see* R.1617-20 (Nevada's Reply in Support of Motion to Dismiss for Lack of Jurisdiction and Failure to State a Claim).

Nev. at 394, 135 P.3d at 226; *Hantges v. City of Henderson*, 121 Nev. 319, 323, 113 P.3d 848, 850 (2005).

This leaves Plaintiffs with a fatal problem: "increased" standing requirements apply as their attack is constitutional; they seek declaratory relief; and they make no pretense to statutory standing. Yet they stake their claim to invoke the judicial machinery on the one thing that plainly does not suffice—their status as Nevada taxpayers. Most Nevada adults are taxpayers and all Nevadans possess an interest in seeing State funds expended constitutionally. That universal condition, by definition, cannot be injury "peculiar to" Plaintiffs. In *Blanding*, 52 Nev. at 52, 280 P. at 645, plaintiffs sought to enjoin Las Vegas from vacating part of a street; in affirming the dismissal, this Court rejected as "untenable" the plaintiffs' argument that "as taxpayers" they could maintain such an action "without showing special injury." *Id.* at 650.

The District Court nevertheless decided that it could "justify taxpayer standing" in this particular case, R.2959, even though Plaintiffs could not "demonstrate any peculiar injury to themselves from that suffered by any other taxpayer." R.2961. The court attempted to limit the scope of that puzzling holding by emphasizing that taxpayer standing allowed Plaintiffs "to bring the facial challenge to the [ESA] statute"—but not as-applied challenges, as Plaintiffs "have not personally suffered any harm." R.2962. That gets things backwards. A facial

challenge is *broader* and more disfavored than an as-applied challenge. In a facial attack, a plaintiff asserts that "no set of circumstances exists under which [a law] would be valid, *i.e.*, that the law is unconstitutional in all of its applications." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) (quotation marks omitted). If Plaintiffs "have not personally suffered any harm" to justify an as-applied attack, it should follow *a fortiori* that they lack standing to bring a facial challenge.[19]

Plaintiffs, before this Court, admit that their lawsuit rests entirely on the "expenditure of Plaintiffs' tax dollars" and the "diversion of Plaintiffs' tax dollars from the public schools." Br.58. Their "claims," Plaintiffs acknowledge, are "premised" on the "harm of having their tax money spent" in ways they do not like. Br.59. The problem is that Plaintiffs, like the District Court, cite no binding authority to suggest that "having their tax money spent" undesirably or even impermissibly is a "legally cognizable harm" allowing every taxpayer to sue. Br.59.

[19] Plaintiffs suggest that their lack of particularized injury is not an obstacle to *either* an as-applied *or* a facial challenge. Br.61-63. This is so, Plaintiffs argue, because both challenges have "aspects" that "are intertwined." Br.63. Relying primarily on lower-court authority and academic commentary, Plaintiffs suggest that the "line between facial and as-applied challenges is often blurry." Br.62. But however blurry in some cases, here it is plain that Plaintiffs mount pre-enforcement facial challenges that are the most "difficult challenge to mount successfully." *Salerno*, 481 U.S. at 745.

The District Court noted that federal courts sometimes recognize taxpayer standing for Establishment Clause concerns. R.2960-61. But Plaintiffs have pointedly not brought suit under the federal Establishment Clause, and they should not be permitted to have their cake and eat it too. Having consciously eschewed the substance of the federal Establishment Clause (under which the ESAs are unambiguously valid), they should not be allowed to take advantage of a procedural quirk of the federal Establishment Clause, which is itself on shaky ground. *See, e.g.*, *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587 (2007).

Plaintiffs argued below that one of their number, Adam Berger, has standing because he is a public-school teacher and the parent of a child in public school. But Plaintiffs do not explain how the constitutional violations that they allege injure Mr. Berger or his son. With respect to Plaintiffs' Section 10 claim, if other parents and students choose to spend ESA funds at religiously affiliated schools, that does not injure Mr. Berger except in his capacity as a taxpayer, which does not confer standing. With respect to Plaintiffs' Section 2 claim, Mr. Berger may continue to teach at, and his son may continue to attend, a uniform public school. They are not injured if others use ESA funds at schools at which Mr. Berger does not teach and his son does not attend. Even if Plaintiffs explained how Mr. Berger and his son might be injured by the ESA program, such injury would be

much too "conjectural or hypothetical" or "speculative" to satisfy Nevada's standing requirements. *Miller v. Ignacio*, 112 Nev. 930, 936 n.4, 921 P.2d 882, 885 n.4 (1996).

Plaintiffs take issue with the District Court's statement that they lack standing to allege that (1) private schools receiving ESA funds will discriminate based on religion or (2) the ESA program will cause a "drastic curtailment" of public-school funding. R.2950-51; *see* Br.56-60. But the court did not "refuse[] to consider" the allegations. Br.55. It expressly considered both allegations at length in connection with Plaintiffs' §2 and §10 claims. *See* R.2970-71, 2986-87. What the court held, correctly, was that Plaintiffs could not bring an as-applied challenge to SB 302 based on these allegations because "they have not personally suffered the harm and have no actual justiciable controversy." R.2970.

Plaintiffs also object to the District Court's ruling that they were entitled to bring "only facial and not as-applied challenges to S.B. 302." Br.61; *see* R.2962. Plaintiffs' status as taxpayers gives them no standing to bring either type of challenge to SB 302, but the District Court was correct to view Plaintiffs' suit as a purely facial challenge. A challenge, such as this one, that broadly attacks a new statute before it has even gone into effect is necessarily a facial challenge. *See Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2305 (2016) (distinguinshing a party's "postenforcement as-applied challenge" from its

"preenforcement facial challenge"). Because SB 302 has not gone into effect, it has not been applied to Plaintiffs and cannot have actually harmed them in any way. At this stage they can *only* have a facial challenge. *See Rice v. Norman Williams Co.*, 458 U.S. 654, 660 n.6 (1982) ("[B]ecause the challenged statute had not as yet been put into effect, this Court ... was presented only with a facial challenge to its constitutionality").

In sum, Plaintiffs' objection to SB 302's "use" of their taxes does not establish standing. "If [Plaintiffs] do not like the law, the remedy is by an appeal to the Legislature to repeal it rather than to the courts for judicial annulment." *Riter v. Douglass*, 32 Nev. 400, 109 P. 444, 450 (1910).

CONCLUSION

For the foregoing reasons, the District Court's order dismissing Plaintiffs' claims should be affirmed.

Respectfully submitted,

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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 parts exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 13,625 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 NRAP, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the NRAP's requirements.

Dated this 21st day of July 2016.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this **RESPONDENTS' ANSWERING BRIEF** was filed electronically with the Nevada Supreme Court on July 21, 2016 and electronically served on the following parties:

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