No. 70648

IN THE SUPREME COURT OF THE STATE OF NEVADA

RUBY DUNCAN, RABBI MEL HECHT, HOWARD WATTS III, LEORA OLIVAS, AND ADAM BERGER,
Appellants,

v.

THE STATE OF NEVADA OFFICE OF THE STATE TREASURER, NEVADA DEPARTMENT OF EDUCATION, DAN SCHWARTZ, AND STEVE CANAVERO,
Respondents.

On Appeal from a Final Judgment of the
District Court for Clark County, Nevada
Case No. A-15-723703-C, Hon. Eric Johnson

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INTRODUCTION

1. The State and its Intervenors contend that this Court should no longer read Section 10 as it was written, intended, and popularly understood when adopted—the decision in *State v. Hallock*, 16 Nev. 373 (1882), and the canons of constitutional construction notwithstanding—because of a false specter: that the Constitution's Framers and the populace that ratified it were motivated by bigotry. But the State cannot evade the Clause's language and objective by tarnishing its birth. Indeed, the attempt to do so is built entirely on factual allegations that: (1) cannot be considered on a motion to dismiss, (2) are unrelated to the history of Section 10, (3) are incorrect, and (4) would be irrelevant as a matter of law in all events.

Beyond that, the State insists that the funding here is indirect and therefore permissible under Section 10—because it would purportedly be so under federal constitutional law. But Section 10 is not the federal Establishment Clause, and there is neither evidence nor case law to show that the two were ever meant to be so linked. And not only is the State's conclusion irreconcilable with Section 10's plain language, *Hallock*, and the whole point of the Clause, but its factual predicate is equally false: The payments to private schools here come directly from the State.

2. Article XI, Section 2, mandates that Nevada provide public education through uniform, secular instruction at public schools that are open on equal terms to all children. S.B. 302 violates this requirement by siphoning off unlimited amounts of public-education money for a competing system of private schools that are nonuniform, nonsecular, and not open to all.

3. Finally, this Court long ago recognized the basis for taxpayer standing. In arguing that taxpayer standing for claims of constitutional injury should not exist, the State misreads this Court's standing decisions and misunderstands Plaintiffs' claims. The finding of taxpayer standing should be affirmed.

ARGUMENT

I. Section 10 Bars The Voucher Program.

A. The State cannot evade Section 10's plain meaning.

The State and its Intervenors argue that Section 10's prohibition against the use of public funds for "sectarian purpose" means only that the legislature must not have the specific "purpose"—i.e., intent—of aiding religion when appropriating money to religious institutions. They then posit that, because the legislature here intended to promote education, Section 10 is satisfied. In advancing this reading of Section 10,

they do not refute, or even address, Plaintiffs' demonstration that *Hallock* and the Clause's plain language require something more.

1. Both when Section 10 was adopted and today, 'purpose' has two distinct meanings: (1) the "[i]ntention" or "design" of an actor, or (2) the "[e]nd," "effect," or "consequence" of an action. Noah Webster, *An American Dictionary of the English Language* (1828), http://tinyurl.com/WebsterPurpose; 2 Samuel Johnson, *A Dictionary of the English Language* 427 (1785), http://tinyurl.com/JohnsonPurpose ("purpose" means either "[i]ntention" or "consequence"). As already explained (Br. 25-29), Section 10 uses 'purpose' in the latter sense.[1]

This Court recognized precisely that in *Hallock*, holding that an appropriation to a religiously affiliated orphanage was unconstitutional even though the money manifestly "was ***intended*** to be a mere charity" for the "physical necessities of the orphans." 16 Nev. at 387 (emphasis

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[1] Section 3 of Article XI uses 'purpose' the same way, specifying that certain funding streams are "pledged for educational purposes and the money therefrom must not be transferred to other funds for other uses." NEV. CONST. art. XI, § 3; *see also* NEV. CONST. of 1864, art. XI, § 3, http://tinyurl.com/Nev1864. It correctly treats "purposes" and "uses" as synonymous. And 'use' means, and meant, the "application of any thing to a purpose, good or bad"; the 'intention' behind that use is beside the point. *See* Noah Webster, *An American Dictionary of the English Language* (1828), http://tinyurl.com/WebsterUse.

added). Because the appropriation's consequence was payment of public dollars to a religious organization that taught religious doctrine, held daily prayers and worship services, and was staffed by a religious order, the expenditure was forbidden. The legislature's secular intent could not save it. *Id.* at 383-86.

2. Premised on its incorrect interpretation of 'purpose,' the State reasons that its voucher program survives Section 10 because the legislature intended to promote education. In support, the State argues (at 19) that because the phrase 'religious schools' does not appear in S.B. 302, there cannot be any facial unconstitutionality, and the suit must be dismissed—never mind that this case challenges S.B. 302 both facially and as applied.

Although S.B. 302 may not use the words 'religious schools,' those schools were purposefully included. NRS 394.211 exempts schools "operated by churches, religious organizations, and faith-based ministries" from the curricular and teacher-qualification requirements of NRS 394.201-394.351. And S.B. 302, § 5, explicitly makes these exempt schools participating entities. If including religious schools in a funding program by referring to them as "exempt" were sufficient to evade constitutional scrutiny, then the legislature could, for example, pass one

statute that assigns to "churches" the label "valuable community organizations," pass another law that appropriates money to build "valuable community organizations" as defined in the first statute, and thereby forestall challenges to unlawful state-sponsored construction of churches.

Additionally, Senator Hammond specifically struck language from a proposed amendment to S.B. 302 that would have required eligible colleges and universities to be "nonsectarian." *See* S.B. 302, Proposed Amendment 6121 at 1:12, http://tinyurl.com/SB302MockUp. And S.B. 302 expressly exempts the voucher program from NRS 387.045(2), which prohibits public-school funds from being used by sectarian institutions.

It simply is not plausible that, in mandating that "[n]o public funds of any kind or character whatever, State, County or Municipal, shall be used for sectarian purpose," "*the intent of the people*" (*Hallock*, 16 Nev. at 380) was that incorporating an artificial label defined elsewhere in the Code should end-run Section 10's strict mandate. The intent of the people was manifestly to prevent public money from being used to purchase religious education.

B. Non-Nevada case law cannot save the voucher program.

The State contends that "many," "numerous," and "a majority of" other states' courts have rejected state constitutional challenges to voucher programs. *See* State's Br. 14, 27, 43. In reality, only five—Oklahoma, Indiana, Arizona, Ohio, and Wisconsin[2]—out of the roughly thirty-eight states with constitutional no-aid provisions have upheld voucher programs against no-aid-clause challenges. By contrast, at least seven states—Colorado, Florida, Vermont, Washington, Alaska, South Carolina, and Virginia[3]—have struck down voucher or tuition-grant programs under their clauses. And ten more have held that their clauses prohibit even in-kind aid to religious schools or to families of students at

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[2] *Oliver v. Hofmeister*, 368 P.3d 1270 (Okla. 2016); *Niehaus v. Huppenthal*, 310 P.3d 983 (Ariz. Ct. App. 2013); *Meredith* v. *Pence*, 984 N.E.2d 1213 (Ind. 2013); *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999); *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998).

[3] *Taxpayers for Pub. Educ. v. Douglas Cty. Sch. Dist.*, 351 P.3d 461 (Colo. 2015) (plurality op.), *petition for cert. filed*, 84 U.S.L.W. 3261 (U.S. Oct. 28, 2015) (No. 15-558); *Bush v. Holmes*, 886 So. 2d 340 (Fla. Dist. Ct. App. 2004), *aff'd on other grounds*, 919 So. 2d 392 (Fla. 2006); *Chittenden Town Sch. Dist. v. Dep't of Educ.*, 738 A.2d 539 (Vt. 1999); *Witters v. Washington Comm'n for the Blind*, 771 P.2d 1119 (Wash. 1989); *Sheldon Jackson Coll. v. Alaska*, 599 P.2d 127 (Alaska 1979); *Hartness v. Patterson*, 179 S.E.2d 907, 909 (S.C. 1971); *Almond v. Day*, 89 S.E.2d 851, 856-57 (Va. 1955).

religious schools, regardless of looser federal requirements. *See* Br. 18 n.2.

The non-Nevada decisions on which the State leans are also beside the point. The courts in those cases were interpreting state-law restrictions with different language and different legislative history, to reach conclusions that are irreconcilable with *Hallock*'s interpretation of Section 10.

For example, the Oklahoma Supreme Court has held that its constitution prohibits giving public funds to sectarian organizations only when the state would not receive an "'element of substantial return.'" *Hofmeister*, 368 P.3d at 1275 (quoting *Murrow Indian Orphans Home v. Childers*, 171 P.2d 600 (Okla. 1946)). That is not the rule in Nevada. Indeed, in *Murrow*—a case that the district court here found persuasive (RA Vol. 13, at 2983)—the Oklahoma court directly contradicted *Hallock*'s reasoning by approving appropriations to a sectarian orphanage because it was "render[ing] a service that goes far towards the fulfillment" of the State's duty to care for needy children. *See Murrow*, 171 P.2d at 601-03. Despite the "substantial return" in orphans' care that Nevada would have received from the *Hallock* orphanage, the appropriation was still unlawful. *See* 16 Nev. at 375, 378 (appropriation

was "used to feed the children," was "no more than is sufficient for that purpose," and was "in fact used for that purpose").

The Indiana Supreme Court held that its no-aid clause does not apply to "government expenditures for functions, programs, and institutions providing primary and secondary education." *Meredith*, 984 N.E.2d at 1228, 1230. Nevada's Section 10 straightforwardly covers religious schools; indeed, the orphanage in *Hallock* was also a school (16 Nev. at 384).

The Ohio Constitution—which provides 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" (OHIO CONST. art. VI, § 2)—focuses on the *control* of funds, not their use. *Compare Simmons-Harris*, 711 N.E.2d at 212, *with Hallock*, 16 Nev. at 387. The Wisconsin clause (WIS. CONST. art. I, § 18)) has been deemed coextensive with the federal Establishment Clause (*Jackson*, 578 N.W.2d at 620)—a result at odds with both *Hallock* and Section 10's plain meaning (Br. 24-31). Similarly, the reasoning of the intermediate appellate court in Arizona that upheld that state's second attempt at a voucher program (*Niehaus*, 310 P.3d at 987-88) is, like the State's argument here, irreconcilable with *Hallock*'s near-contemporaneous interpretation of Nevada's Section 10.

The *Hallock* Court—only two years removed from Section 10's ratification—had greater insight into what the drafters and ratifiers of that provision intended than do courts in other states that never gave any thought to Nevada's Constitution or its history.

C. Rejection of Section 10 as anti-Catholic bigotry is both impermissible and wrong.

The State and the Intervenors seek to evade Section 10 by arguing that it (and all other state no-aid clauses) are irretrievably tainted by bigotry and therefore that, unless reduced to just what the Establishment Clause requires, they violate the federal First Amendment. Those arguments fail for at least four reasons.

1. First, the State premises its argument on its own factual assertions that have no connection to the Complaint and hence, as a matter of law, cannot be considered on a motion to dismiss. *See Marcoz v. Summa Corp.*, 106 Nev. 737, 739, 801 P.2d 1346 (1990).

2. Second, those impermissible factual assertions have no connection to Section 10. On its motion to dismiss, the State impermissibly offered a hodgepodge of anti-Catholic incidents ***outside Nevada***, and the State and Intervenors repeat that effort here. *See* State's Br. 33-38; Intervenors' Br. 27-31. The State also presents (at 35-36) one stray anti-Catholic comment during Nevada's 1864 Consti-

tutional Convention; two references during the Convention to "sectarianism" or "sectarian instruction" (which, given *Hallock*'s explanation of the popularly understood meaning of "sectarian" (16 Nev. at 385), amount to nothing), two snippets from newspaper articles, a misleadingly excerpted phrase from the *Nevada Historical Society Quarterly* (which referred not to the whole State but to the area near Eureka alone), and an article from the *Nevada Law Journal* that provides no historical support for the State's thesis. None of that speaks to the legislative history of Section 10, which was first proposed ***13 years after the Constitutional Convention*** and ratified ***3 years after that***. And, of course, the State calls Section 10 a "Blaine Amendment" nearly thirty times, as though repetition alone binds Nevada's Clause to the federal proposal despite their lack of common language.

Presented in *Locke v. Davey* with the same generic material on anti-Catholic bias, the U.S. Supreme Court held that because the proponents did not establish "a credible connection between" their proffered evidence of "religious bigotry" and "the relevant constitutional provision"—Washington's no-aid clause—"the Blaine Amendment's history is simply not before us." 540 U.S. 712, 723 n.7 (2004). Here, too, the lack of credible evidence that the Nevada legislature that proposed Section 10 and the

citizens who ratified it did so with religious animus means that, as in *Locke*, "religious bigotry" "is not at issue in this case." *Id.*

3. Third, the State's cherry-picked allegations are incorrect.

Nevada was an open and accepting frontier society, where Catholics held real political power. *See* Pls.' Opp'n Mot. Dismiss 21-22. At the time of the 1870 and 1880 censuses, Nevada's populace included comparatively large numbers of Irish and Italian immigrants, who were overwhelmingly Catholic. *See* Kevin Rafferty, *Catholics in Nevada*, *in* COMMUNITY IN THE AMERICAN WEST 207-10 (Stephen Tchudi ed., 1999); RONALD JAMES, THE ROAR AND THE SILENCE 144 (1998); RUSSELL R. ELLIOTT, HISTORY OF NEVADA 379-80 (2d ed. 1987). They faced little discrimination. *See* James, *supra*, 144; Elliott, *supra*, at 379-80; Rafferty, *supra*, 207. Far from being politically oppressed, Irish Catholics "came to dominate the early politics and economics of the Silver State." Rafferty, *supra*, at 207. Notably, they settled *en masse* in the Virginia City area, which "dominated state politics" at the time, and held power in that key region. James, *supra*, 42, 144. As *Hallock* explains, Section 10 embodied Nevada's broad religious diversity and amity: "People of nearly all nationalities and many religious beliefs . . . met on common ground, and

in the most solemn manner agreed that no sect should be supported or built up by the use of public funds." 16 Nev. at 387.

The history of the no-aid principle nationwide is also not what the State and its supporters contend. The principle developed with the rise of common schools in the early nineteenth century—well before either the first significant waves of Catholic immigration or the emergence of Catholic schools. *See, e.g.*, RAY ALLEN BILLINGTON, THE PROTESTANT CRUSADE, 1800-1860, at 35-37 (1938); PETER GUILDAY, THE NATIONAL PASTORALS OF THE AMERICAN HIERARCHY, 1792-1919, at 191 (1923).

At the nation's founding, public education was practically nonexistent. *See* CARL KAESTLE, PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY 1780-1860, at 13-29 (1983). Benjamin Franklin, Thomas Jefferson, Noah Webster, and others advocated for universal public schooling and insisted that it be nonsectarian, both to ensure that the schools would serve the largest number of children and to avoid religious divisiveness that would undermine cultural unity. *See* STEVEN K. GREEN, THE BIBLE, THE SCHOOL, AND THE CONSTITUTION: THE CLASH THAT SHAPED MODERN CHURCH-STATE DOCTRINE 13-16 (2012); Noah Feldman, *Non-Sectarianism Reconsidered*, 18 J. L. & POL. 65, 74 (2002).

State legislatures thus established designated "school funds," and common schools gradually replaced denominational ones. GREEN, *supra*, at 13-44. To be sure, disputes arose over access to public funds. *See id.* at 48-52. In New York, for example, Baptists in 1824 sought a share of the public-school money for denominational schools, as did Methodists in 1830. *Id.* The Free School Society of New York countered that public money should be reserved for common schools, open to all, because funding sectarian schools would both cause competition among denominations and unfairly "impose a direct tax on our citizens for the support of religion." *Id.* at 48. The New York City Common Council agreed, because "to raise a fund by taxation, for the support of a particular sect of Christians . . . would unhesitatingly be declared an infringement of the Constitution, and a violation of our chartered rights." *Id.* at 51. Thus, the no-aid principle emerged not out of anti-Catholic bias, but out of concern that funding denominational ***Protestant*** schools would be exclusionary and divisive and would infringe on the freedom of conscience of all people to have their money support only the denomination of their choice. *Id.* at 48-52.

As for the State's and Intervenors' supposed history of the federal Blaine Amendment, the truth is more complicated—and less nefarious.

Although some saw Blaine as an appeal to anti-Catholic voters, other key concerns—including "whether public schooling should be secular or religious and truly universal for all faiths, races and nationalities; whether the national government should mandate schooling at the state or local levels; and how best to [defuse] religious strife"—"colored the debate as much as the issues of parochial school funding or anti-Catholicism." Steven K. Green, *"Blaming Blaine": Understanding the Blaine Amendment and the "No-Funding" Principle*, 2 FIRST AMEND. L. REV. 107, 146 (2005); *see, e.g.*, *The Message*, N.Y. TRIB., Dec. 8, 1875, at 6; *The News This Morning*, N.Y. TRIB., Dec. 15, 1875, at 4 ("Thinking men of all parties see much more to deplore than to rejoice over, in the virulent outbreak of discussions concerning the churches and the schools, and welcome any means of removing the dangerous question from politics as speedily as possible.").

As for Intervenors' assumption (at 29-30) that state no-aid clauses adopted after Blaine must have been inspired by the federal effort and thus are anti-Catholic—the federal proposal's actual history notwithstanding—temporal proximity is not causation. Twenty-one states adopted no-aid clauses in the 35 years after Blaine was proposed; but 17 already had no-aid provisions ***before*** Blaine. *See* Steven K. Green,

The Insignificance of the Blaine Amendment, 2008 BYU L. REV. 295, 327-28 (2008). "Despite their claims to the contrary, opponents of the no-funding principle have generally failed to demonstrate a connection between the Blaine Amendment and the various state provisions from legislative histories, convention records, or other historical sources." *Id.* at 298. That is true here, in spades. Rewriting history to strike down a democratically proposed and ratified constitutional provision requires more.

4. Finally, even if there were credible evidence that Section 10 had its roots in prejudice—and there is none—that would still be irrelevant as a matter of First Amendment law. *Cf. McGowan v. Maryland*, 366 U.S. 420, 431-35, 444 (1961) (upholding Sunday-closing laws against Establishment Clause challenge despite their unambiguously religious origin, because of legitimate modern justifications for a weekly day of rest). There is no evidence that Section 10 has ever been applied to single out Catholics for discrimination; nor do Plaintiffs advocate for discriminatory application here. And ***no court*** has invalidated or refused to apply ***any*** state no-aid clause because of its origins. *Cf. Cain v. Horne*, 183 P.3d 1269, 1273 n.2 (Ariz. Ct. App. 2008) ("[N]one of the parties has produced any authority suggesting [that courts] may disregard

constitutional provisions merely because we suspect they may have been tainted by questionable motives."), *vacated on other grounds*, 202 P.3d 1178 (Ariz. 2009); *Bush*, 886 So. 2d at 351 n.9 ("[S]uch a history does not render [the clause] superfluous."); *see also Wirzburger v. Galvin*, 412 F.3d 271, 281-82 (1st Cir. 2005) (evidence of anti-Catholic animus influencing Massachusetts no-aid clause held irrelevant because court could find no case "in which evidence of animus toward religion was itself sufficient to invalidate a government action, without the animus being tied to some resulting infringement on freedom of belief or on religious status, acts or conduct"); *Univ. of Cumberlands v. Pennybacker*, 308 S.W.3d 668, 681-82 (Ky. 2010).

D. Federal law does not compel Nevada to pay for religious schooling.

Still, the State asks this Court to redefine Section 10 to mean no more than the federal Establishment Clause because, otherwise, the State contends, Section 10 would impermissibly discriminate against religion in violation of the First Amendment. The State then reasons that, because under *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), the Establishment Clause allows indirect funding of religious schools through voucher programs (albeit only under conditions that Nevada's program does not satisfy (*see* Br. 30-31)), and because S.B. 302

purportedly involves only indirect funding, it should satisfy Section 10. The State is wrong on both the law and the facts.

1. The First Amendment does not require allowing religious schools to participate in general grant programs.

a. The State argues (at 40-43) that adhering to the long-standing interpretation of Section 10 violates the federal Establishment Clause by treating religion differently from nonreligion. But the U.S. Supreme Court has long recognized a "play in the joints" between the federal Establishment and Free Exercise Clauses that permits states to choose not to fund religious institutions or activities when funding secular ones. *Locke*, 540 U.S. at 719-720. Indeed, *Locke* rejected the very challenge to Washington's no-aid clause that the State makes to Nevada's; the Court concluded that the states' important antiestablishment interests, reflected in their no-aid clauses, are valid, permissible exercises of state legislative authority that do not violate the First Amendment. *See id.*; Br. 15-20.

The State (at 42) attempts to distinguish *Locke* by arguing that these antiestablishment interests are limited to not paying to train ministers. The State misreads both *Locke* and the history on which it rests. "[T]he most famous example of public backlash" against

governmental support for religion was the rejection of a Virginia bill to pay for religious instruction; it ultimately spurred Jefferson's "Virginia Bill for Religious Liberty," which "guaranteed 'that no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever.'" *Locke*, 540 U.S. at 722 n.6. Jefferson's bill barred government funding of religious instruction, just as Nevada's Section 10 does.

b. As in *Locke*, the State here fares no better under *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). The *Locke* Court flatly rejected the contention that refusals to fund religious instruction on the same basis as secular instruction are unconstitutional discrimination, explaining that arguments to the contrary "extend the *Lukumi* line of cases well beyond not only their facts but their reasoning." 540 U.S. at 720-21. *Lukumi* involved purposeful suppression of a particular denomination, not categorical exclusion of all church schools. 508 U.S. at 534.

Like Washington's decision not to subsidize clerical training, Section 10 "imposes neither criminal nor civil sanctions on any type of religious service or rite" and "does not deny to ministers the right to participate in the political affairs of the community," so it presents no

constitutional infirmity. *Locke*, 540 U.S. at 720-721; *see, e.g.*, *Bronx Household of Faith v. Bd. of Educ.*, 750 F.3d 184, 195 (2d Cir. 2014) (no Establishment or Free Exercise violation in refusal to extend subsidized use of school facilities to worship services), *cert. denied*, 135 S. Ct. 1730 (2015); *Eulitt ex rel. Eulitt v. Maine, Dep't of Educ.*, 386 F.3d 344, 355 (1st Cir. 2004) (Establishment Clause does not require extending general school-funding program to education at sectarian schools); *Anderson v. Town of Durham*, 895 A.2d 944, 959 (Me. 2006) (providing tuition solely for "nonsectarian" private schools does not violate Establishment Clause). "Given the historic and substantial state interest at issue," Section 10's application here is not "inherently constitutionally suspect." *Locke*, 540 U.S. at 725.

c. *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir. 2008), likewise offers the State no help. There, the court invalidated a state-funded scholarship program because it "expressly discriminate[d] *among* religions, allowing aid to 'sectarian' but not 'pervasively sectarian' institutions." *Id.* at 1256 (emphasis in original). The constitutional infirmity was that state officials had to make highly refined theological determinations about whether a particular religious college was or wasn't ***too*** religious, "on the basis of criteria that entail[ed] intrusive

governmental judgments regarding matters of religious belief and practice." *Id.* The court did "not decide" whether "wholesale exclusion of religious institutions and their students from otherwise neutral and generally available government support" was impermissible. *Id.* Rather, it acknowledged that Washington's refusal to fund the scholarships in *Locke* was lawful because it "excluded all devotional theology majors equally—without regard to how 'sectarian' state officials perceived them to be." *Id.*

d. Intervenors (at 36-37) recast this Establishment Clause argument as an equal-protection one, with no greater success. Government treats religious institutions differently from secular ones all the time—often to the religious institutions' substantial benefit.[4]

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[4] *See, e.g.*, 29 U.S.C. § 1003(b)(2) (Employee Retirement Income Security Act inapplicable to church plans); 2 U.S.C. § 1602(8)(B)(xviii) (no registration of churches under federal Lobbying Disclosure Act); 26 U.S.C. §§ 501(c)(1)(A), 6033(a)(3)(A)(i) & (iii) (no registration as nonprofit or submission to IRS of annual informational tax filings); 42 U.S.C. § 2000e-1(a) (exemption from Title VII's prohibition against religious discrimination in hiring); Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc, *et seq.* (provides religious exemptions from generally applicable laws); Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb, *et seq.* (same); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 704, 706 (2012) ("ministerial exception" exempted religious school from federal laws barring disability discrimination in employment).

Sometimes, instead, religion is not subsidized when secular institutions and activities are. *See Locke*, 450 U.S. at 715. When, as here, doing so does not violate the First Amendment, rational-basis scrutiny applies to equal-protection claims. *See id.* at 720 n.3. Intervenors do not even try to show that Section 10 fails rational-basis review. It doesn't.

Hunter v. Underwood, 471 U.S. 222, 229, 233 (1985), does not counsel otherwise. *Hunter* overturned Jim Crow laws that not only were passed to discriminate against African-Americans but had that effect right up to when the case was decided. And *Romer v. Evans*, 517 U.S. 620, 627-30, 634 (1996), invalidated a discriminatory state constitutional amendment almost immediately after it was enacted. As already noted, the U.S. Supreme Court has upheld laws originally passed with improper religious motives because they serve legitimate purposes today. *See, e.g.*, *McGowan*, 366 U.S. at 428-29, 442, 449, 453; *Braunfeld v. Brown*, 366 U.S. 599, 602, 609 (1961).

e. Finally, the State (at 25) predicts disaster if Plaintiffs' claims are allowed to proceed, supposing that all manner of government-funded programs would have to be dismantled. But the Nevada Attorney General has long since explained that Section 10 was "primarily included for the purpose of preventing sectarian religious instruction in the public

schools." *See* Nevada Att'y Gen., Opinion 67 (Sept. 5, 1963), http://tinyurl .com/NevAgOp (state-funded chaplaincy at state prisons does not violate Section 10). It was placed, after all, in Article XI. Sidewalks and fire and police services are not religious education. Wages, Health Savings Accounts, and pensions aren't either; and they belong to the employees who negotiate for them as compensation. Welfare payments are likewise the property of the recipients, to spend—or not—as they see fit; the funds do not revert to the Treasury as voucher money does here.

2. The funding here is direct.

Even setting all of that aside, the State's application of federal Establishment Clause standards here would be wrong even if those standards did define the limits of Section 10—which they don't. Specifically, the State contends that because, under *Zelman*, the First Amendment allows for some indirect funding of religious schooling, and the funding ***here*** is indirect, Section 10 must likewise license Nevada's voucher program. But the State's factual predicate is wrong, so its legal conclusion is also wrong.

The State protests that S.B. 302 funds religious institutions only indirectly: "[B]y [S.B. 302's] very structure . . . no government official can direct a single cent towards a religious entity." State's Br. 16. "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." *Id.* at 21. "In Nevada, the *State* never transfers any 'public funds' to a school, sectarian or otherwise." *Id.* at 32.

These insistent assurances are false.

Plaintiffs have already detailed myriad ways that, by statute, the State maintains absolute control over the voucher accounts and the money in them: It selects and hires financial managers as its agents to manage the accounts; it audits the accounts whenever it wishes; and the money reverts to the Treasury if any sums are unspent, misused, or refunded, or if a student leaves the State. Br. 32-34. But that is not all.

In its *Participating Entity Handbook*, a publicly available, judicially noticeable government document, the Treasurer explains to "participating entities" (i.e., schools) how the State will distribute voucher funds directly to them:

> Payments can either be initiated by a parent or requested by a participating entity through our website at www.esa.nevadatreasuer.gov. In order to request a payment for a parent through our website, a representative from your participating entity will need to log in and request a payment. An email will be generated to the parent letting them know that you have requested a payment from them. They will log-

> in and approve the payment. In this retrospect [sic], the parent may also log in and request to make a payment to a participating entity. The representative from the participating entity will then need to log-in to accept the payment.

State Treasurer's Office, *ESA Education Savings Account Participating Entity Handbook*, ver. 1.2 (2016), http://tinyurl.com/ESAHandbook, at 15. In other words, when a tuition payment is due, the school can request it directly from the State; the parent merely confirms that the payment is in fact owing; and the Treasurer (or his agent) issues the payment directly to the school. Additionally, the Handbook straightforwardly declares: "It is the State Treasurer's office[sic] responsibility to . . . maintain operations of ESA accounts." *Id.* at 8. And lest any doubt remain about who controls the money, the Handbook's cover dispels it: "Administered by Nevada State Treasurer Dan Schwartz."

In short, while *Hallock* makes clear that indirectness does not legitimize payments under Section 10 (*see* Br. 34-38), the funding here is direct, setting this program apart from federally permissible voucher programs under *Zelman*. Hence, even if directness-versus-indirectness

mattered under Section 10, the State has made clear that S.B. 302 falls on the wrong side of that line.[5]

II. Section 2 Bars the Voucher Program.

1. Nevada's founders were clear: Secular public education is a fundamental public good and paramount necessity for Nevada's welfare and future success—a deep commitment that this Court and the people of Nevada hold dear. *See, e.g.*, *Guinn v. Legis. of Nev.*, 119 Nev. 277, 287, 71 P.3d 1269 (2003) ("Public education is a right that the people, and the youth, of Nevada are entitled, through the Constitution, to access."), *overruled on other grounds by Nevadans for Nev. v. Beers*, 122 Nev. 930,

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[5] The State also contends that religious schools are licensed just like secular private schools and must provide instruction equivalent to what the public schools provide (State's Br. 7). In actuality, religious schools obtain a special "exempt private school license" by merely filling out a form to claim the exemption; secular schools must instead apply for a "private school license" through a genuine licensing procedure, with rigorous prerequisites and ongoing obligations. S*ee* NRS 394.211, 394.241, 394.251. *Compare* Nevada Dep't of Educ., *Exempt Private Licensing*, http://tinyurl.com/NVSchoolLicense, *with* Nevada Dep't of Educ., *Private School Licensing*, http://tinyurl.com/NVSchoolLicense2. As for curriculum equivalency, religious schools need only inform the State of the amount of time spent on each subject and assert that equivalency exists. *See* Nevada Dep't of Educ., *Exempt Private Licensing*, http://tinyurl.com/NVSchoolLicense. By statute, the State cannot interfere with the religious components of the curriculum. NRS 394.130(5)(a). And at many religious schools, every aspect of every subject is religious. *See* Br. 36-37.

142 P.3d 339 (2006). Legislation that presents a substantial impediment to the accomplishment of Section 2's aims, as S.B. 302 does, is irreconcilable with the constitutional mandate.

In arguing otherwise, the State conveniently ignores the voucher program's near-limitless scope. S.B. 302 sets just one requirement for students: Attend a Nevada public school for 100 days. Students who do just that can then take more than $5,000 away from their local school districts. There is no limit on the number of students who get vouchers; no cap on the amount of money that the public schools will lose; and no limit on the ability of current private-school students to transfer to public school for three short months before returning to their same private schools, with the State now paying their tuition out of funds constitutionally committed to the public schools.

The damage to public education is not speculative. At least 6,000 students have already applied to the program—meaning a loss of more than ***$30 million*** to Nevada's public schools. Office of the Treasurer, *Press Release* (June 27, 2016), http://tinyurl.com/June27PressRelease. Because public schools rely on economies of scale and cost-spreading, especially for incredibly expensive special-education services—services that private schools are not required to, and typically do not, provide—

reductions in the number of public-school attendees do not make up for funding loses. As a matter of simple math, even modest participation in the voucher program will divert substantial sums from the public schools, impeding the effective functioning of those schools.

Unsurprisingly, counties anticipate serious problems. Nye County School District predicts that "[a]ny loss in [funding] due to lower student numbers will result in the loss of teachers [and] staff in addition to an increased staff to student ratio." Local Government Fiscal Note for S.B. 302, at 3, http://tinyurl.com/SB302FiscalNote. Lyon County School District has determined that "[t]his voucher program will continue to take resources from the [public-education] fund that is already not sufficient to fund the current operations of the district." *Id.* And a Clark County School District Trustee has stated: "Especially for an area like Mesquite, where they don't have the economy of scale like in the valley, just having even 10 percent of the population opt out really damages programs." Emily Havens, *School Choice voucher program creates controversy in Mesquite*, THE SPECTRUM, July 21, 2016, http://tinyurl.com/SpectrumArticle.

In short, S.B. 302 severely threatens the State's ability to fulfill Section 2's constitutional commitment to public schooling, by

dramatically cutting public-school funding—automatically and without any legislative determination that the public schools can adequately function at the resulting depressed levels. Plaintiffs need not wait for public schools and students to suffer before asserting their constitutional rights, but should be permitted to proceed with their claims and build their record.

2. Decisions from other jurisdictions do not save S.B. 302. Every other voucher program is significantly smaller than Nevada's and therefore does not present the same magnitude of threat to a uniform public-school system. *See* Br. 53-54. Moreover, voucher funding elsewhere often comes from states' General Funds and thus does not, as here, directly deplete the money constitutionally and statutorily reserved for public education. *See, e.g.*, *Meredith*, 984 N.E. 2d at 1225 n.18; *Hart v. State*, 774 S.E.2d 281, 284-86 (N.C. 2015).

Nor, in seeking support outside Nevada, can the State explain away *Bush*, 919 So. 2d at 397, which held that a voucher program that took money from Florida's public-school fund violated that state's constitutional commitment to public education through uniform public schools. The State contends (at 50) that Florida's Constitution makes public education a "paramount duty" while Nevada's does not. *Id.*

Nonsense. Article XI embodies this State's extraordinary commitment to public education—including by requiring that the legislature fund education before ***anything*** else. NEV. CONST. art. XI, § 6. During the floor debates at the 1864 Constitutional Convention, the framers declared Nevada's fundamental and abiding commitment "to build the educational superstructure, by means of which we can afford every child a sufficient amount of instruction to enable it to go creditably through life." K. Nicholas Portz, *Education Reform Litigation in Nevada: Is the Nevada Legislature Neglecting Its Constitutional Duties?*, 11 NEV. L.J. 849, 871-72 (2011). "[T]he Nevada Constitution has created both a stronger and more specific educational mandate to promote education than seen in most other state constitutions. Such a mandate indicates that, in comparison to other states, the Nevada Constitution requires a certain baseline of quality education, and arguably establishes education as a fundamental right within the state." *Id.*

3. Article XI, Section 1, does not abrogate this constitutional mandate. In encouraging education "by all suitable means," it cannot authorize state action forbidden by the rest of Article XI. Violation of another constitutional provision—such as Section 2—is manifestly ***un***suitable.

State v. Westerfield, 23 Nev. 468, 49 P. 119 (1897), is not to the contrary. *Westerfield* authorized paying a teacher at the state orphanage, but only if the money did not come from the public-education fund, which would have "disregard[ed] the mandates of the constitution." *Id.* at 121. *Westerfield* thus confirms that Nevada cannot undermine its constitutional commitment to the public schools by siphoning off funds from the Distributive School Account—even for education outside the public schools. If Section 1 really meant that all is permitted in the name of education, *Westerfield* would have come out the other way.

III. Plaintiffs Have Standing As Taxpayers.

1. In *Blanding v. City of Las Vegas*, 52 Nev. 52, 74, 280 P. 644 (1929), this Court recognized that a taxpayer may satisfy standing requirements ***either*** by "show[ing] that he will suffer an injury differing in kind and not merely in degree from that suffered by the public generally," ***or*** by showing that "the act sought to be enjoined is or will involve the assessment of a tax for an illegal purpose." *Id.* at 74; *see also City of Las Vegas v. Craigan Indus. Inc.*, 86 Nev. 933, 939, 478 P.2d 585 (1970) ("Here any citizen . . . would have had standing to seek injunctive relief inasmuch as the relief sought is the abatement of unauthorized conduct."). The Court thus recognized the "great weight of authority"

nationwide that, if an "appropriation or expenditure of public funds" is illegal, "taxpayers may sue to restrain it, without showing any special injury different from that sustained by other taxpayers." *Blanding*, 52 Nev. at 74.

At least thirty-six states expressly recognize taxpayer standing; five more authorize "public interest" or "public importance" suits that allow any citizen to sue regardless of taxpayer status, rendering taxpayer standing unnecessarily duplicative. *See* Joshua G. Urquhart*, Disfavored Constitution, Passive Virtues? Linking State Constitutional Fiscal Limitations and Permissive Taxpayer Standing Doctrines*, 81 FORDHAM L. REV. 1263, 1277-78 (2012). Just three states have ***dis***allowed taxpayer standing and broader public-interest alternatives. *Id.* And even under the strict federal case-or-controversy requirement, federal courts recognize taxpayer standing in Establishment Clause cases. *See Flast v. Cohen*, 392 U.S. 83, 105-06 (1968).

2. The widespread recognition of taxpayer standing makes particular sense here. Plaintiffs allege that the State is taking their hard-earned dollars to support religion and undermine the public schools and public education, in contravention of Article XI and the rights conferred thereunder. Having one's money extracted as taxes to support churches,

ministers, and religious instruction contrary to the dictates of one's conscience is a real, palpable, concrete, individualized harm. *Cf., e.g.*, *Flast*, 392 U.S. at 106; James Madison, *Memorial and Remonstrance Against Religious Assessments*, http://tinyurl.com/MadisonRemonstrance (recognizing substantial injury to conscience when "even three pence contribution [is] . . . exacted from any citizen" and spent on religion). Plaintiffs' suit here to prevent their "tax money [from] being extracted and spent in violation of specific constitutional protections against . . . abuses of legislative power" (*Flast*, 392 U.S at 106) offers the only practicable remedy for the incursions on their fundamental constitutional rights.[6]

3. The district court correctly found that "no other taxpayer or potential claimant is in a better position" to sue (Order 18)—though *Blanding* makes clear that having one's taxes spent on illegal purposes

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[6] The State (at 57) misconstrues Plaintiffs' allegations about (i) religiously based state-funded discrimination and (ii) harms to the public-school system and to Plaintiff Berger as a teacher and parent. The State contends that the allegations go to premature as-applied challenges. But the allegations are expected evidence of the basic Section 10 and Section 2 violations, not additional legal claims; and "preenforcement, as-applied challenges" are proper in "discrete and well-defined instances [when, as here,] a particular condition has or is likely to occur." *Gonzales v. Carhart*, 550 U.S. 124, 167 (2007).

is a cognizable injury regardless. 52 Nev. at 74. That is precisely what Plaintiffs alleged.

4. Finally, Plaintiffs satisfy any "increased jurisdictional standing requirements" for declaratory relief and constitutional challenges (*see Stockmeier v. Nevada Dep't of Corrs. Psych. Rev. Panel*, 122 Nev. 385, 393, 135 P.3d 220 (2006), *abrogated on other grounds by Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 181 P.3d 670 (2008)). The increased-jurisdictional-standing requirement is that there must be a "justiciable controversy." *Doe v. Bryan*, 102 Nev. 523, 525, 728 P.2d 443 (1986); *see also Sereika v. State*, 114 Nev. 142, 150, 955 P.2d 175 (1998). A justiciable controversy exists if (1) "'a claim of right is asserted against one who has an interest in contesting it'"; (2) the parties' interests are adverse; (3) the party seeking relief has legally protectable interests; and (4) the issue is ripe for judicial determination. *Bryan*, 102 Nev. at 525 (citation omitted). In other words, there must be a genuine dispute, and the parties each must have a stake in the outcome.

That is certainly true here. Plaintiffs have asserted constitutional rights against the State not to have their tax money be used unlawfully to fund religion and defund the public schools; the State hotly contests Plaintiffs' claims because it fervently desires to implement S.B. 302; and

absent an injunction, the program will take effect, the State will unlawfully expend Plaintiffs' tax dollars, and Plaintiffs' rights will be violated. And Plaintiff Berger has alleged (and his allegations must be accepted as true at this stage) that the public school at which he teaches and the school that his son attends would receive less money for instruction, supplies, and salaries. The controversy is not "imaginary or speculative" (*id.* at 526), and there is far more than a bare, "unsubstantiated possibility of unconstitutional" application of a law (*Sereika*, 114 Nev. at 150). The suit is therefore justiciable, which is all that is required. *See Stockmeier*, 122 Nev. at 393.

CONCLUSION

The order of dismissal should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I 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 it has been prepared using Microsoft Word 2010 in 14-point, Century Schoolbook, a proportionally spaced font. I further certify that this Brief complies with the type-volume limitation of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 6,995 words.

Pursuant to NRAP 28.2, I certify that I have read this 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), which requires every assertion regarding matters in the record to be supported by a reference to the page 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 this Brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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