

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellant,

vs.

HELLEN QUAN LOPEZ, individually and
on behalf of her minor child, C.Q;
MICHELLE GORELOW, individually and
on behalf of her minor children, A.G. and
H.G.; ELECTRA SKRYZDLEWSKI,
individually and on behalf of her minor
child, L.M.; JENNIFER CARR, individually
and on behalf of her minor children, W.C.,
A.C., and E.C.; LINDA JOHNSON,
individually and on behalf of her minor
child, K.J.; SARAH and BRIAN
SOLOMON, individually and on behalf of
their minor children, D.S. and K.S.,

Respondents.

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Clerk of Supreme Court

Supreme Court Case No. 69611

First Judicial District Court,

Case No. 15-0C-00207-1B

**AMICI AIMEE HAIRR; AURORA ESPINOZA;
ELIZABETH ROBBINS; LARA ALLEN; JEFFREY SMITH;
and TRINA SMITH'S
APPENDIX**

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Email from Respondents granting Consent to filing Amicus Brief	03.14.16	I	AMICI000002
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State of Nevada Statewide Ballot Questions 2006		I	AMICI000062

From: Lawrence VanDyke <LVanDyke@ag.nv.gov>
Sent: Monday, March 14, 2016 11:01 AM
To: Tim Keller; Joseph F. Tartakovsky
Cc: Keith Diggs
Subject: RE: Consent to file amicus in Lopez?

We consent. Thanks Tim.

From: Tim Keller [<mailto:TKeller@ij.org>]
Sent: Monday, March 14, 2016 10:50 AM
To: Lawrence VanDyke; Joseph F. Tartakovsky
Cc: Keith Diggs
Subject: Consent to file amicus in Lopez?

Gentlemen,

Just to cover all of our bases, would you mind consenting "in writing" to our filing of an amicus?

Don consented in writing after the Supreme Court's denial of our writ last Friday.

-Tim

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From: Don Springmeyer <DSpringmeyer@wrslawyers.com>
Sent: Friday, March 11, 2016 10:13 AM
To: Keith Diggs
Cc: Tim Keller; Lisa J. Zastrow; Matthew T. Dushoff; Bradley Schrager
Subject: Re: Lopez v. Schwartz: request for consent to file amicus brief

Keith,

Apologies for the delay, I thought I had responded.
We consent.

Don

On Mar 11, 2016, at 8:56 AM, Keith Diggs <kdiggs@ij.org> wrote:

Don,

Please let us know today if you object. If we don't hear back, we will assume there will be no need for us to file a motion for leave.

Best,
Keith

From: Don Springmeyer [<mailto:DSpringmeyer@wrslawyers.com>]
Sent: Tuesday, March 08, 2016 12:57 PM
To: Keith Diggs
Cc: Tim Keller; Lisa J. Zastrow; Matthew T. Dushoff; Bradley Schrager
Subject: RE: Lopez v. Schwartz: request for consent to file amicus brief

Keith,

We are caucusing on this and I will respond shortly.

Regards,
Don

Don Springmeyer
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From: Keith Diggs [<mailto:kdiggs@ij.org>]
Sent: Monday, March 07, 2016 2:47 PM
To: Don Springmeyer
Cc: Tim Keller; Lisa J. Zastrow; Matthew T. Dushoff
Subject: Lopez v. Schwartz: request for consent to file amicus brief

Don,

As our clients' writ petition for intervention is still pending, we intend to file an amicus brief on their behalf in the State's appeal from the injunction in *Lopez v. Schwartz*. Please advise if the Plaintiffs consent pursuant to NRAP 29(a).

Best,

Keith Diggs

Attorney

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FIRST JUDICIAL DISTRICT COURT

REC'D & FILED

IN AND FOR CARSON CITY, NEVADA

2015 OCT 20 PM 2: 56

HELLEN QUAN LOPEZ, individually and on behalf of her minor child, C.Q.; MICHELLE GORELOW, individually and on behalf of her minor children, A.G. and H.G.; ELECTRA SKRYZDLEWSKI, individually and on behalf of her minor child, L.M.; JENNIFER CARR, individually and on behalf of her minor children, W.C., A.C., and E.C.; LINDA JOHNSON, individually and on behalf of her minor child, K.J.; SARAH and BRIAN SOLOMON, individually and on behalf of their minor children, D.S. and K.S.,

Plaintiffs,

vs.

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

Defendant.

Case No. 150C002071B SUSAN MERRIWETHER

Dept. No.: II

BY

V. Alegria

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

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1 MOTION

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

6 POINT AND AUTHORITIES

7 I. INTRODUCTION

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

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

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

26
27 ¹ A copy of SB 302 is attached to the Declaration of Thomas Clancy (hereinafter "Clancy
28 Declaration") as Exhibit A.

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

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

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

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

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

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

13 **II. BACKGROUND**

14 **A. Nevada Public School Funding**

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

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

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

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

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

13 The Nevada Legislature provides funding for the public school system through the
14 “Nevada Plan.” Under the Nevada Plan, the Legislature determines for each biennium² the amount
15 of funding sufficient to operate the public schools and guarantees that amount to school districts.
16 This amount—the basic support guarantee—is funded by the Legislature through a combination of
17 state monies appropriated to the State’s Distributive School Account (“DSA”) and mandated local
18 taxes. The DSA is comprised, amongst other sources, of money derived from interest on the State
19 Permanent School Fund pursuant to Article XI, section 3, of the Nevada Constitution and the
20 appropriations of state revenue made by the Legislature each biennium for the operation of
21 Nevada’s public schools pursuant to Article XI, section 6, of the Nevada Constitution. NRS
22 387.030. The Nevada Plan requires the State to make quarterly payments to school districts from
23 the DSA. NRS 387.121, 387.1235. Through the Nevada Plan, the State guarantees the amount it
24 deems sufficient to operate the public schools and provides the funding for that amount as the first
25 priority in the biennium State budget.

26
27 ² Art. XI, section 6.6, defines “biennium” as “a period of two fiscal years beginning on July 1 of an
28 odd-numbered year and ending on June 30 of the next ensuing odd-numbered year.”

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

7 Pursuant to its Constitutional obligation, the Legislature passed Senate Bill 515 ("SB
8 515")—its enactment of the Nevada Plan for the 2015-2017 biennium—and appropriated the funds
9 it deemed sufficient for the operation of the Nevada public schools for the student population
10 reasonably estimated for the biennium. SB 515 establishes the statewide average basic support per
11 public school pupil for 2015-16 at \$5,710. SB 515 § 1. In enacting SB 515, the Legislature
12 explained the bill's purpose was to "ensur[e] sufficient funding for K-12 public education for the
13 2015-2017 biennium." SB 515.

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

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

18 Any child who enrolls in a public school for 100 consecutive days may establish an ESA.
19 SB 302 § 7. The 100-day requirement need be met only once in the child's academic career in
20 order for that child to obtain funding every year until he or she matriculates, drops out, or leaves
21 the state. *Id.* Under the current proposed regulations, part time or full time enrollment will satisfy
22 the 100-day requirement, and a student who attended public school in 2014-2015 is eligible for an
23 ESA. Clancy Declaration, Exhibit 4, Second Revised Proposed Regulations of the State Treasurer
24 at § 9.4. Further, a child currently enrolled in private school may become eligible by enrolling in
25 just one public school class for 100 days. *Id.* Likewise, a child can attend a public kindergarten
26
27
28

1 for 100 days, withdraw to attend private school, and receive a state funded voucher for the next
2 thirteen years. *Id.*; SB 302 § 7.6.³

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

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

19 **C. SB 302’s Funding of Non-Uniform Private Schools**

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

24
25 ³ Indeed, Senator Scott T. Hammond, SB 302’s sponsor, has indicated his belief that the law was
26 intended to allow kindergartners to collect their ~\$5000 ESA subsidy for 13 years without meeting
27 any attendance requirements. Clancy Declaration, Exhibit 5, Statement of Senator Hammond,
28 Sponsoring Senator of SB 302, at Public Hearing (July 17, 2015) at 47 (“I just want to say that—
the intent of the bill, actually from the very beginning was to allow for kindergarten—people
coming into kindergarten to choose. So, these are students who are not yet on the rolls.”)

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

10 SB 302 also makes almost no restrictions on the private use of funds deposited into ESAs
11 by the State Treasurer. The law allows ESA funds to pay for a myriad of expenses far beyond
12 private school tuition, such as tutoring, commercial tests, home-based education curriculum
13 materials, and transportation to a private school or home-based education experiences. SB 302 §
14 9.1. The list of institutions and entities eligible to participate in the voucher program is also very
15 broad, including private schools, universities, distance education programs, tutors, tutoring
16 programs, and even parents themselves. SB 302 § 11.1. The only requirement in SB 302 for
17 participating entities is that they administer a norm-referenced achievement assessment in
18 mathematics and English/language arts each year. SB 302 § 12(1)(a).

19 SB 302 does not require private schools or other entities participating in the voucher
20 program to meet the non-discrimination, educational performance, accountability or any other
21 requirements established by the Legislature for the operation of Nevada’s uniform system of public
22 schools. Public schools, of course, cannot discriminate and must be open to all students without
23 regard to religion, household income, disability, homelessness or transiency, immigrant status,
24 English non-proficiency, academic or special needs. *See, e.g.,* NRS 388.450; 388.520; 388.405;
25 388.407. In contrast, private institutions receiving ESA funds diverted from public schools may
26 refuse to admit, or otherwise discriminate against, students based on their personal and family
27 characteristics, including household income and academic performance. *See generally* SB 302;
28 *see also* Lubienski Declaration at ¶¶ 15-18 (stating that SB 302’s lack of non-discrimination

1 requirements is “anomalous” and noting other states’ myriad non-discrimination requirements).
2 Private schools are not required to provide accommodations for students with disabilities. Further,
3 SB 302 does not require private schools or other entities to accept the ESA amount (\$5,139 or
4 \$5,710) as full tuition. Rather, private schools may continue to charge tuitions far exceeding that
5 amount and deny entry to those unable to pay. *Id.* at ¶ 17 (“[N]othing in SB 302 prevents a private
6 school from charging more than the ESA amount and denying entry to those who are unable to pay
7 the full tuition amount.”).

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

22 **D. Implementation of SB 302**

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

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

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

15 **E. Procedural Background**

16 On September 9, 2015, Plaintiffs—parents and children enrolled in the Nevada public
17 schools—filed their Complaint, challenging the constitutionality of SB 302. On September 16,
18 2015, Putative Intervenor-Defendants filed a Motion to Intervene as Defendants and their putative
19 Answer. On October 5, 2015, Plaintiffs filed their Opposition to the Motion to Intervene. The
20 Reply was filed on October 15, 2015. That motion is pending.

21 **III. ARGUMENT**

22 **A. Standard for Preliminary Injunction**

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

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

1 2. When it shall appear by the complaint or affidavit that the
2 commission or continuance of some act, during the litigation, would
3 produce great or irreparable injury to the plaintiff.

3 3. When it shall appear, during the litigation, that the defendant is
4 doing or threatens, or is about to do, or is procuring or suffering to
5 be done, some act in violation of the plaintiff's rights respecting the
6 subject of the action, and tending to render the judgment ineffectual.

5 NRS 33.010.

6 Applying this statute, the Nevada Supreme Court has held that a preliminary injunction
7 should issue “upon a showing that the party seeking it enjoys a reasonable probability of success
8 on the merits and that the defendant's conduct, if allowed to continue, will result in irreparable
9 harm for which compensatory damage is an inadequate remedy.” *Dixon v. Thatcher*, 103 Nev.
10 414, 415, 742 P.2d 1029, 1029 (1987) (citing *Number One Rent-A-Car v. Ramada Inns*, 94 Nev.
11 779, 780, 587 P.2d 1329 (1978)); *Dangberg Holdings Nevada, L.L.C. v. Douglas Cnty. & Bd. of*
12 *Cnty. Comm'rs*, 115 Nev. 129, 142, 978 P.2d 311, 319 (1999). In considering preliminary
13 injunctions, courts may also weigh the potential hardships to the relative parties and others, and the
14 public interest. *University and Community College System of Nevada v. Nevadans for Sound*
15 *Government*, 120 Nev. 712, 721, 100 P.3d 179, 187 (2004).

16 **B. Plaintiffs Are Likely To Prevail On The Merits**

17 The rules of statutory construction apply to the interpretation of a Constitutional provision.
18 As the Nevada Supreme Court has held, if a Constitutional provision “is clear and unambiguous,”
19 courts “will not look beyond the language of the provision but will instead apply its plain
20 meaning.” *Lorton v. Jones*, 322 P.3d 1051, 1054 (2014) (internal citations omitted); *see also In re*
21 *Contested Election of Mallory*, 128 Nev. Adv. Op. 41, 282 P.3d 739, 741 (2012) (Nevada courts
22 must “first look to the language itself and . . . give effect to its plain meaning.”); *We the People*
23 *Nev. ex rel. Angle v. Miller*, 124 Nev. 874, 881, 192 P.3d 1166, 1170 (2008) (same); *Kay v. Nunez*,
24 122 Nev. 1100, 1104, 146 P.3d 801, 804–05 (2006) (same).

25 Article XI of the Nevada Constitution affirmatively and unambiguously obligates the
26 Legislature to establish, maintain and support a system of free and uniform public schools that all
27 Nevada children are entitled to attend. The Nevada Supreme Court has recognized that Article XI
28

1 of the Nevada Constitution “clearly expresses the vital role education plays in our state,” finding
2 that

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

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

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

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

19 By its plain terms, the Education Article of the Nevada Constitution requires the
20 Legislature to “provide for the[] support and maintenance” of the common or public schools “by
21 direct legislative appropriation from the general fund.” Nev. Const. art. XI, § 6.1. The
22 appropriation for the public schools must occur “before any other appropriation is enacted to fund
23 a portion of the state budget for the next ensuing biennium.” Nev. Const. art XI, § 6.2. The direct
24 legislative appropriation can only be used “to fund the operation of the public schools in the State
25 for kindergarten through grade 12 for the next ensuing biennium for the population reasonably
26 estimated for that biennium.” Nev. Const. art. XI, § 6.2. “Any appropriation of money enacted in
27 violation of subsection 2. . . is void.” Nev. Const. art. XI, § 6.5. Likewise, Article XI, section 3,
28 specifies additional sources of funding for the public schools and also restricts the use of those

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

3 The debates of the founding delegates to the Nevada Constitutional Convention underscore
4 the founders’ intent that funds appropriated to the public schools be used only for that purpose.
5 Delegates were specific that Article XI makes reference “only to public schools, and to the
6 appropriation of the public funds . . . so that it has a direct reference to the public schools, and
7 clearly cannot refer to anything else.” DEBATES AND PROCEEDINGS at 568. Further, the delegates
8 explained that that funds appropriated by the Legislature pursuant to Article XI were for “the
9 support of good common schools . . . the support and encouragement of public instruction.” *Id.* at
10 594. This Constitutional mandate is affirmed by statute. Nevada Revised Statute 387.045
11 provides that “[n]o portion of the public school funds or of the money specially appropriated for
12 the purpose of public schools shall be devoted to any other object or purpose.” NRS 387.045.

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

21 The Legislature apparently understood that SB 302 runs afoul of this constitutional
22 mandate when it attempted to exclude ESAs from NRS 387.045 (prohibiting use of public school
23 funding for other purposes). But this attempt is of no legal consequence. To the extent that NRS
24

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

1 387.045 codifies the requirement in Article XI, sections 3 and 6, that public school appropriations
2 are for the exclusive use of operating the public schools, the Legislature cannot by statutory
3 enactment exempt itself from that clear constitutional mandate. *Whitehead v. Nevada Comm'n On*
4 *Judicial Discipline*, 110 Nev. 128, 166, 906 P.2d 230, 254, *decision clarified on denial of reh'g*,
5 110 Nev. 380, 873 P.2d 946 (1994) (holding that the Legislature “may not authorize that which is
6 forbidden by the Constitution.”).

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

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

21
22
23 ⁵ The *Westerfield* court ultimately permitted the disputed payment out of the general fund rather
24 than the school fund, reasoning that the Legislature would have passed the small appropriation at
25 issue in that case (\$45) even if taken out of the general fund. *Westerfield*, 49 P. at 121. The same
26 cannot be said here. As the State Treasurer acknowledges, implementation of SB 302 could cost
27 hundreds of millions of dollars, all of which will be deducted from the funding appropriated by the
28 Legislature for the operation of the public schools. Clancy Declaration at Exhibit 8, p.67. There is
simply no evidence in the legislative record on SB 302 to suggest that the legislature would have
passed the voucher law if it required a substantial new appropriation from the general fund, instead
of relying on the transfer of an unlimited amount of existing appropriations to the public schools
made under Art. XI, section 6.2.

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

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

11 SB 302, by transferring funding appropriated by the Legislature for the public schools into
12 ESAs for private uses necessarily reduces the Legislature’s appropriations for the public schools
13 below the level deemed “sufficient” by the Legislature under Art. XI, section 6.2. As a result, SB
14 302, is unconstitutional and, under Art. XI, section 6.5, void.

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

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

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

3 Second, SB 302 fails to take into account that the amounts appropriated and “deemed to be
4 sufficient. . . to fund the operation of the public schools,” Art. XI, section 6.2, includes not only
5 expenses that may vary due to changes in student enrollment, but also significant fixed costs.

6 When a student obtains an ESA under SB 302 and no longer attends a public school, the school
7 district loses the 90 or 100 percent of the amount of the guaranteed basic support yet retains the
8 fixed costs of educating that student and all the other students remaining in the district’s schools.

9 Declaration of Paul Johnson as Exhibit C, CFO for White Pine County School District (“Johnson
10 Declaration”), at ¶¶ 7-9 (stating that “if a student were to leave White Pine after obtaining an
11 ESA,” the district “would nevertheless maintain many of the fixed expenditures associated with
12 educating that child” including teachers and “school counselors, school administrators, school
13 resource officers, custodial staff, maintenance personnel, groundskeepers, bus routes, bus drivers,
14 nutrition programs, and other support services”).

15 The fixed costs of operating a system of public schools are not commensurately reduced by
16 losing one or even a handful of students. For example, the cost of a teacher remains unless there
17 is a sufficient decline in the number of students in a particular grade or school to allow for
18 eliminating the teaching position altogether. Nor can teachers easily be released mid-year.

19 Johnson Declaration at ¶ 8 (“pursuant to N.R.S. 391.3196, school districts must notify teachers by
20 May 1 if they will be reemployed for the ensuing school year. These staffing decisions are made
21 based on projected enrollment, and cannot be readily adjusted during the school year.”) Likewise,
22 the fixed costs associated with keeping a particular school operating in a safe and healthy
23 manner—janitorial positions, administration, utilities, maintenance, grounds keeping,
24 counseling—all of those expenses remain unless enrollment drops to the point where the district
25 can close a school. *See* Clancy Declaration, Exhibit 12, Nevada Legislative Counsel Bureau,
26 “2015 Nevada Education Data Book” at 84-89 (breaking down per-pupil expenditures into
27 categories that include fixed costs, such as operations and leadership).

28

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

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

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

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

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

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

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

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

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

28

1 Thus, SB 302 uses public monies for private schools and entities not subject to the legal
2 requirements and educational standards governing public schools, in violation of the uniformity
3 mandate of the Education Article. *Cf. Bush v. Holmes*, 919 So. 2d 392, 409-10 (Fla. 2006)
4 (holding Florida’s voucher system unconstitutionally non-uniform because private schools
5 receiving vouchers were not required to be accredited by the state or to adopt State-approved
6 curricula used by public schools, and could hire teachers without the training, education, and
7 background-check mandated for public school teachers).

8 SB 302 violates the Nevada Constitution’s uniformity requirement in an additional way. In
9 mandating the establishment and maintenance of a uniform public school system, the Constitution
10 has, in the same breath, prohibited the Legislature from establishing and maintaining a separate
11 alternative system to Nevada’s uniform public schools. “Nevada follows the maxim ‘*expressio*
12 *unius est exclusio alterius*,’ the expression of one thing is the exclusion of another,” *State v. Javier*
13 *C.*, 128 Nev. Adv. Op. 50, 289 P.3d 1194, 1197 (2012), and “[t]his rule applies as forcibly to the
14 construction of written Constitutions as other instruments.” *King v. Bd. of Regents of Univ. of*
15 *Nev.*, 65 Nev. 533, 556, 200 P.2d 221 (1948); *see also Thomas v. Nev. Yellow Cab Corp.*, 130 Nev.
16 Adv. Op. 52, 327 P.3d 518, 521 (2014), *reh’g denied* (Sept. 24, 2014) (applying *expressio unius*
17 *est exclusio alterius* as canon of construction); *Hernandez v. Bennett-Haron*, 128 Nev. Adv. Op.
18 54, 287 P.3d 305, 316 (2012) (similar).

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

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

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

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

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

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

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

17 SB 302 will also necessitate frequent and unpredictable adjustments of public school
18 district budgets to the detriment of students in public schools. Pursuant to NRS 387.124 and SB
19 302, a district's apportionment is established on a quarterly basis based on the number of students
20 in each school district, "minus . . . all the funds deposited in education savings accounts
21 established on behalf of children who reside in the county." SB 302 § 16.1. The deduction of
22 ESA funds from each district's allocation will require quarterly adjustments to school district
23 budgets. NRS 387.124; Johnson Declaration at ¶ 12 (SB 302 will change a district's quarterly
24 enrollment "throughout the year"); *id.* at ¶ 12(a) (a district's "budgetary allotment will be adjusted
25 on a quarterly basis."). As school districts lose funding, they will be forced to make numerous
26 budget cutting decisions that will reduce their ability to adequately serve students. School districts
27 may have to halt necessary services for students, decrease curricular supplies, "eliminate teacher
28 resources and professional development programs which are critical to improving instruction at

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

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

13 SB 302’s diversion of funds further leaves school districts with insufficient means to afford
14 the underlying fixed costs of operating the system. For example, if one student in a classroom of
15 30 leaves a school district after obtaining an ESA, the school district loses \$5,139 to \$5,710, but
16 cannot eliminate the expense of “the teacher salary, as that teacher is still needed for the remaining
17 29 students,” nor “the bus used to transport that child, the custodial staff used to maintain that
18 child’s classroom, or the nutritional staff used to provide food service to that student.” Johnson
19 Declaration at ¶ 9. Accordingly the school district, “does not recoup the funding lost as a result of
20 an ESA through savings of no longer having to serve that student” but rather “retains all of the
21 fixed costs of educating that student.” *Id.* Because fixed costs “cannot be reduced,” school
22 districts will be “forced to eliminate other services, like extracurricular activities that keep students
23 invested in school, in order to make ends meet.” *Id.*; *see also* Zander Declaration at ¶ 5 (noting
24 that fixed costs cannot be adjusted during the school year, especially in rural counties that cannot
25 “easily transfer teachers to other positions or other schools . . . because those schools can be up to
26 100 miles apart”); McIntosh Declaration at ¶ 4.b.

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

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

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

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

25 ///

26 ///

27 ///

28 ///

1 **IV. CONCLUSION**

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

5 October 20, 2015

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on this 20th day of October, 2015, a true and correct copy
3 of **PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND POINTS AND**
4 **AUTHORITIES IN SUPPORT THEREOF** was placed in an envelope, postage prepaid,
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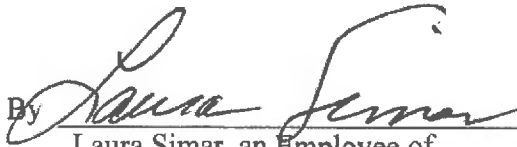
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FIRST JUDICIAL DISTRICT COURT
IN AND FOR CARSON CITY, NEVADA

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2015 NOV 24 PM 3:14

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and on behalf of her minor child, L.M.;
JENNIFER CARR, individually and on
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E.C.; LINDA JOHNSON, individually and on
behalf of her minor child, K.J.; SARAH and
BRIAN SOLOMON, individually and on
behalf of their minor children, D.S. and K.S.,

Plaintiffs,

vs.

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

Defendant.

Case No. 150C002071B

Dept. No.: II

SUSAN MERRIWETHER
CLERK

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PLAINTIFFS' REPLY ON ITS MOTION
FOR A PRELIMINARY INJUNCTION AND
OPPOSITION TO DEFENDANT'S MOTION
TO DISMISS

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 Defendant's brief waxes eloquent about "sweeping education reform" and all of the
4 purported benefits Nevada will realize from using public school funds to subsidize private school
5 tuitions and home schooling expenditures. But rhetoric and posturing aside, SB 302 simply does
6 not pass constitutional muster. Plaintiff public school parents established in their motion for a
7 preliminary injunction that SB 302 violates the Nevada Constitution on three separate grounds.
8 Defendant's brief fails to refute Plaintiffs' showing.

9 First, Plaintiffs demonstrated that SB 302 is unconstitutional because it diverts to a
10 private voucher program—Education Savings Accounts ("ESAs")—funds appropriated by the
11 Legislature solely for the operation of the public schools under Article XI, Sections 3 and 6.
12 Defendant has no answer for this nor can he. Defendant concedes that SB 302 on its face funds
13 the private ESAs authorized by SB 302 from the Distributive School Account ("DSA")—the
14 Section 3 and 6 funds. These funds cannot be used for private expenditures by express mandate of
15 the Nevada Constitution. The statute fails on this ground alone regardless of any other argument
16 raised by Defendant.

17 Second, Plaintiffs established that SB 302, by diverting funds from the DSA,
18 reduces the amounts deemed sufficient by the Legislature to fund public education in violation of
19 Section 6. In response, Defendant argues that the Legislature anticipated SB 302's diversion of
20 funds when it appropriated money for public education so the amount left in the DSA after
21 implementation of SB 302 is sufficient. This is both factually wrong and practically impossible.
22 Defendant does not dispute that the Legislature provided no additional funds—beyond the
23 appropriations for the public schools—to pay for private ESAs authorized under SB302. Indeed,
24 the Legislature could not have determined the amounts sufficient to fund both public education
25 and ESAs over the biennium. SB 302 has no cap and is not limited to any particular criteria of
26 students. There is no way to predict how many ESAs will siphon off money from the DSA.
27 Accordingly, it is impossible for the Legislature to uphold its constitutional duty to sufficiently
28

1 fund the public schools first before any other appropriation when SB 302 will divert an unlimited
2 amount of funds out of that appropriation to ESAs.

3 Third, Plaintiffs showed that SB 302 violates the Legislature's constitutional
4 obligation to maintain a uniform system of public schools under Article XI, Section 2. Defendant
5 does not dispute that the ESA funds—the diverted public school funds—will support non-uniform
6 private schools in violation of Section 2. Instead, Defendant argues that ESAs are not subject to
7 Section 2 at all but are permissible under Section 1's general aspiration that the Legislature shall
8 "encourage by all suitable means the promotion of intellectual, literary, scientific mining,
9 mechanical, agricultural, and moral improvements." This contention, however, is unsupported by
10 anything in the history or drafting of Article XI and directly conflicts with the intent of the framers
11 of the Nevada Constitution. It also goes against well-established canons of constitutional
12 construction: namely, specific terms govern the general, the Constitution must be read as a whole
13 and clear affirmative expressions exclude the contrary. While Section 1's introductory statements
14 exhort the Legislature to promote intellectual, literary and scientific development, Sections 2, 3
15 and 6 set forth the clear directives for the manner in which the Legislature must do so for K-12
16 students: the establishment, maintenance and support of a uniform system of public schools. The
17 laudatory language in Section 1 cannot be read to allow funds appropriated to maintain the
18 uniform system of public schools to be used to support non-uniform private schools and other non-
19 uniform private education expenditures.

20 For these reasons and as discussed below, Defendant's brief fails on all counts to
21 provide support for the constitutionality of SB 302. Plaintiffs, thus, have shown that they are
22 likely to succeed on their claims that SB 302 is unconstitutional on its face. Unconstitutional
23 statutes are alone sufficient harm to justify an injunction without a further showing but there is
24 ample evidence in the record that SB 302 will cause irreparable harm. SB 302 must be
25 preliminarily enjoined.

1 **II. ARGUMENT**

2 **A. Plaintiffs Are Likely To Prevail On The Merits And, Thus, Have Also Stated**
3 **Valid Claims Defeating A Motion to Dismiss**

4 Defendant's brief both opposes Plaintiffs' motion for preliminary injunction and
5 supports Defendant's separate motion to dismiss Plaintiffs' complaint (hereinafter referred to
6 jointly as "Defendant's Brief" or "Def. Br."). Because Plaintiffs are likely to prevail on their
7 motion seeking to preliminarily enjoin SB302's implementation, Defendant's motion to dismiss
8 must also be denied.

9 **1. Defendant Does Not, And Cannot, Refute SB 302's Diversion Of Public**
10 **School Funds To Private Purposes In Violation Of Article XI, Section 3**
11 **And Section 6, Of The Nevada Constitution**

12 Plaintiffs' Motion for Preliminary Injunction (hereinafter "Plaintiffs' Motion" or
13 "Pl. Mot.") demonstrates that, under the Education Article of the Nevada Constitution, funds
14 specifically allocated to public schools by the Legislature in the biennium budget for public
15 schools have a singular purpose: to provide for the support, maintenance and operation of
16 Nevada's public schools. Article XI establishes two sources of such funds—those set aside under
17 Section 3 and those appropriated under Section 6. By the plain terms of the Nevada Constitution,
18 neither of these sources of funds may be diverted to private schools or other non-public school
19 expenditures. *See, e.g., State ex rel. Keith v. Westerfield*, 23 Nev. 468 (1897) (Section 3 and
20 Section 6 funds "constitute the general school fund" which cannot be diverted away from the
21 public school system "without disregarding the mandates of the constitution"); *see also* Pl. Mot. at
22 13 (discussing relevant authority). SB 302 violates these provisions by specifically authorizing
23 the use of Article XI funds for private purposes.

24 Defendant does not directly address SB 302's unconstitutional diversion of funds
25 appropriated for the public schools under Section 6. Instead, Defendant attempts to recast
26 Plaintiffs' position as pertaining only to Section 3 and then asserts that the diversion of Section 3
27 funds to ESAs is allowable because (1) Section 3 funds comprise a small portion of the Article XI
28 funds; and (2) Section 3 funds may be used for any "educational purpose"—public or private.
Def. Br. at 15-17. Neither argument cures SB 302's constitutional defects. Further, Defendant's

1 failure to directly address the diversion of Section 6 public school funding under SB 302 is a tacit
2 admission of the law's violation of the express constitutional prohibition on using public school
3 funding for anything other than the operation of Nevada's public schools.¹

4 (a) **Defendant Fails To Directly Address The Unconstitutional**
5 **Diversion Of Public School Funding Under Article XI, Section 6**
6 **Of The Nevada Constitution**

7 Defendant does not address nor refute Plaintiffs' claim that SB 302 diverts funds
8 appropriated by the Legislature "for the support and maintenance of . . . [the] common schools"
9 under Section 6 to private purposes. Nev. Const. art. XI, § 6.1. By its plain terms, funds
10 appropriated under Section 6 must be used "to fund the *operation of the public schools* in the State
11 for kindergarten through grade 12" *Id.*, § 6.2 (emphasis added). As Defendant readily concedes,
12 the funds appropriated by legislation in the biennium State budget (SB 515) pursuant to Section 6
13 comprise the vast majority of the funds allocated to the DSA, the State account from which
14 payments to public school districts are made during the school year. *See* Def. Br. at 16 (funds
15 appropriated pursuant to Section 6 comprised 78 percent of the DSA in 2015); *see also* Boyd
16 Decl., Ex. 1.

17 Defendant does not deny, nor can he, that SB 302 by its plain terms diverts funds
18 appropriated by the Legislature for the operation of the public schools under Section 6 to ESAs for
19 private expenditures. *See* SB 302 § 16.1 (school districts are entitled to their apportioned Section 6
20 funds "minus . . . all the funds deposited in education savings accounts established on behalf of
21 children who reside in the county"); *see also* SB 302, Legislative Counsel's Digest ("the amount
22 of the [ESA] must be deducted from the total apportionment to the resident school district of the
23 child on whose behalf the [ESA] is made"). That ends the analysis. Section 6 funds are

24 ¹ Defendant suggests that, under *Keith*, funding of ESAs from the money appropriated pursuant to
25 SB 515 is not unconstitutional because those are "general fund monies." Def. Br. at 19. Yet *Keith*
26 provides no support for Defendant's position. In *Keith*, the Court specifically stated that the
27 disputed payment could not be paid from the "general school fund," comprised of Section 3 and
28 Section 6 funds. 49 P. at 121. The express and clear purpose of Section 6--to "provide[] for the
support and maintenance of said University and common schools"—has remained the same since
the Constitution's founding. Thus, the diversion of funds appropriated pursuant to Section 6 is
unconstitutional, just like it was in 1897.

1 appropriated and must be used solely for the operation of the public schools, and SB 302's
2 diversion of those funds for private purposes is unconstitutional.

3 **(b) Article XI, Section 3, Prohibits The Use Of The Permanent**
4 **School Fund For Private Schools And Other Private**
5 **Educational Programs**

6 While ignoring Section 6 funds, Defendant contends that funds established under
7 Section 3 can be used for any "educational purpose," not just for the public schools, and therefore,
8 SB 302 does not violate that provision. Def. Br. at 17-18. This reading is belied by "the history,
9 public policy, and reason for the provision," *Landreth v. Malik*, 251 P.3d 163, 166 (2011), as well
10 as the Nevada Supreme Court's precedent interpreting this provision.

11 Section 3 was drafted and established to ensure sources of funding for public
12 education in addition to direct legislative appropriations, primarily revenue from federal land
13 grants made by Congress. *See* Nevada Enabling Act, Pub. L. No. 38-30, 13 Stat. 30, 32 (1864);
14 *see also Heydenfeldt v. Daney Gold & Silver Min. Co.*, 10 Nev. 290 (1875) *aff'd sub nom.*
15 *Heydenfeldt v. Daney Gold & Silver Mining Co.*, 93 U.S. 634, 23 L. Ed. 995 (1876). Nevada's
16 Enabling Act expressly states that the federal land grants were "granted to said state *for the*
17 *support of common schools.*" Nevada Enabling Act, Pub. L. No. 38-30, 13 Stat. at 32 (emphasis
18 added). Consistent with the terms of the Nevada Enabling Act, the framers of the Nevada
19 Constitution in their debates underscored that Section 3 was explicitly intended to establish a
20 "public school fund" that would be used to support "the common school system of the State."
21 Clancy Decl. in Support of Mot. for Preliminary Injunction ("Clancy Decl.") Ex. 2, OFFICIAL
22 REPORT OF THE DEBATES AND PROCEEDINGS IN THE CONSTITUTIONAL CONVENTION OF THE STATE
23 OF NEVADA ("DEBATES AND PROCEEDINGS") at 579.

24 While Defendant asserts Plaintiffs cherry picked choice excerpts from the framers'
25 constitutional debates (Def. Br. at 18 n.11), Defendant fails to cite *any* statement by the framers of
26 the Nevada Constitution indicating an intent to authorize the use of Section 3 for anything other
27 than to support Nevada's K-12 public schools and the State University. In fact, the history of the
28 drafting of Article XI and the debates about it are to the contrary. *See generally* Declaration of
Michael Green ("Green Decl.") at ¶¶ 8-21.

1 It is also well established that the term “educational purposes” in Section 3 refers
2 only to the public K-12 schools and the State University. As the Nevada Supreme Court has long
3 held the term “educational purposes” in Section 3 refers specifically to the educational system of
4 the state, comprised of the State University and the public schools. *Keith*, 49 P. at 120. The
5 plaintiff in *Keith* raised—and the court rejected—the very same argument Defendant asserts in his
6 opposition. Def. Br. at 17-18. Specifically, the plaintiff argued that because Section 3 pledged
7 moneys “for educational purposes,” those funds could be used for the payment of teachers outside
8 of the common or public school system. *Keith*, 49 P. at 120. The court flatly rejected that
9 argument, holding that funds appropriated under Section 3 were only for the support of “the
10 educational system of this state,” comprised of the K-12 public schools and the State University.
11 *Id.* Further, the court emphasized that institutions “foreign to the educational system of the state”
12 had “no interest in [Section 3] moneys.” *Id.*

13 Defendant cites the court’s statement in *Keith* “that ‘moneys . . . appropriated’ for
14 educating children not in public school is ‘applying [that money] to educational purposes,” Def.
15 Br. at 18. But Defendant fails to note that, *in the very same sentence*, the court went on to
16 expressly state that, nevertheless, “the constitution does not include the education of these [non-
17 public school] children in the term ‘educational purposes.’” *Keith*, 49 P. at 121. Defendant
18 cannot circumvent the clear holding of *Keith*. See also *State ex rel. Wright v. Dovey*, 19 Nev. 396,
19 12 P. 910, 912 (1887) (the framers of the Constitution did not “intend[] to allow public-school
20 moneys [to be paid] to any county for persons not entitled to attend the public schools therein . . .
21 .”); *State ex rel. Stoutmeyer v. Duffy*, 7 Nev. 342, 346-47 (1872) (“certain funds are pledged and
22 certain taxation allowed for the support of common schools, which are public and open to be
23 enjoyed by all resident children between the ages of six and eighteen years”).

24 Finally, Defendant contends that SB 302 is constitutional because it does not
25 require the use of Section 3 funds for ESAs. Def. Br. at 16-17. By so arguing, Defendant
26 concedes that funds set aside by Section 3 must be used for the public schools, implying that the
27 funds for ESAs can come from Section 6 appropriations. But, as Plaintiffs have established,
28

1 Section 6 funds cannot constitutionally be used for anything other than the public schools either.
2 Any diversion of Section 3 and 6 funds to ESAs is unconstitutional.

3 **2. Defendant Cannot Refute That SB 302 Reduces Public School Funding**
4 **Below The Level Deemed Sufficient By The Legislature In Violation Of**
5 **Article XI, Section 6 Of The Nevada Constitution**

6 SB 302 also violates Section 6's mandate that the Legislature appropriate *first* the funds it
7 "deems to be sufficient" to fund the operation of Nevada's public schools for the next biennium.
8 Defendant contends that SB 302 does not violate this provision because: (a) the Legislature took
9 ESAs into account when enacting SB 515—the appropriation for public education for the 2015-17
10 biennium—by including funds to cover the funds diverted to ESAs; and (b) even if SB 302
11 reduces the monies deemed sufficient, separate and unrelated legislation mitigates any
12 unconstitutional impact SB 302 may have on the public schools. Both of these contentions are
13 erroneous and should be rejected.

14 **(a) The Fact That SB 302 Was Passed Before SB 515 Does Not Cure**
15 **Its Constitutional Defects**

16 Defendant argues that SB 302 is constitutional because the Legislature, after enacting SB
17 302, approved appropriations for the public schools in the biennium State Budget that accounted
18 for the funds to be diverted to private schools and other private expenditures through ESAs. Def.
19 Br. at 21. There is no basis for this position in the legislative record, either on SB 302, the
20 voucher law, or SB 515, the biennium State Budget.

21 Defendant's assertion that the Legislature took ESAs into account when enacting
22 appropriations for the public schools in SB 515 is based solely on timing. Defendant argues that
23 the appropriations in SB 515 accounted for ESAs because SB 515 was passed three days after SB
24 302. Def. Br. at 21. But the minutes of the various meetings regarding SB 515 never mention SB
25 302, and Defendant's own Exhibit 2 demonstrates that SB 302 was not considered when
26 determining the level of funding sufficient to fund the public schools or in calculating that
27 appropriation for the DSA. See Minutes of the Senate Committee on Finance, May 30, 2015 and
28 May 31, 2015, and Minutes of the Assembly Ways and Means Committee, June 1, 2015, at 7-8
(all online at

1 <https://www.leg.state.nv.us/Session/78th2015/Reports/history.cfm?BillName=SB515>); Def. Br.
2 Ex. 2, Distributive School Account – Summary for 2015-17 Biennium (“DSA Summary 2015-
3 2017”).

4 Further, in enacting SB 515, the Legislature followed the exact same process and funding
5 formula used in prior biennium budgets to determine the sufficiency of public school
6 appropriations for the DSA. *See* Declaration of Samuel T. Boyd (“Boyd Decl.”) Ex. 2 Legislative
7 Counsel Bureau, Fiscal Analysis Division, *The Nevada Plan for School Finance: An Overview* at
8 10-14 (2015) (“Nevada Plan”). First, it calculated the Basic Support Guarantee under the Nevada
9 Plan for each district and multiplied it by the number of students it anticipated attending public
10 schools. Next, it added categorical funds not provided on a per-pupil basis and outside the Nevada
11 Plan, to identify the total state support for the public schools, known as the “Total Required State
12 Support.” Each of these obligations is set out in SB 515 and none of them includes funding for
13 ESAs.²

14 From this figure, the Legislature deducted the local funds that flow directly to local schools
15 within the Nevada Plan to arrive at the “Total State Share” to fund the Basic Support Guarantee.
16 It also deducted sources of funds available to the DSA other than the state general fund, including
17 a portion of the slot machine tax, certain mineral taxes, and like revenues. It is this figure that is
18 appropriated by Section 7 of SB 515. This is the same formula the Legislature used for the 2013-
19 2015 biennium, and it did not change in 2015-17. Further, in no way did this formula, or the
20 Legislative appropriations, take into account the loss of funds under SB 302. *Compare* Nevada
21 Plan (laying out the manner in which education is funded in a typical biennium) *with* DSA
22 Summary 2015-2017 (showing that the Legislature followed the same steps in 2015).

23 Defendant’s claim that the Legislature considered the impact of ESAs on the biennial
24 appropriation to public schools is also belied by the legislative debates on SB 302. Contrary to
25 Defendant’s post hoc assertion in his brief, the Legislature appears to have believed that SB 302

27 ² Categorical funding includes funding for special education (sections 3-4), class size reduction
28 (sections 15-16), school lunches (section 12), and transportation (section 11). SB 515 also
contains other categorical funding not funded through the DSA.

1 would not result in *any impact* on the DSA so long as the 100 days requirement resulted in
2 participation only by students who would otherwise have been attending public school. *See* Boyd
3 Decl. Ex. 3, Minutes of the Senate Committee on Finance, Seventy-Eight Session, May 14, 2015
4 at 10-11 (“the 100-day provision helps to make this fiscally neutral”). Yet this understanding of
5 how SB 302 operates is plainly incorrect. Because students currently in private school and home
6 schooled can also readily qualify for ESAs, the diversion of funds into ESAs extends well beyond
7 students accounted for in the Legislature’s public school appropriation.

8 But even assuming—incorrectly—that only current public school students obtain ESAs,
9 the public schools will still experience a diminution of the appropriations necessary for their
10 operation. This occurs because, as Defendant fails to acknowledge, Legislative appropriations
11 from the DSA only support a *fraction* of the per-pupil Basic Support Guarantee to school districts.
12 For example, in fiscal year 2014, the per-pupil Basic Support Guarantee for Clark County was
13 \$5,393. *See* Boyd Decl. Ex. 4, Guinn Center, Nevada K-12 Education Finance Fact Sheet (Feb.
14 2015) (“K-12 Fact Sheet”) at 8. Of that, the State’s share was only \$2,213. *Id.* For the 2015-2017
15 biennium, the per-pupil Basic Support Guarantee for Clark County is \$5,512, of which the State
16 DSA portion is only a fraction. Yet, for students obtaining ESAs, the State must pay the full
17 \$5,139 or \$5,710 per pupil directly out of the DSA. *Cf.* Def. Br., Ex. 3, Canavero Decl. at ¶¶ 11-
18 12. The Legislature provided no additional funding for ESAs in SB 515, nor did it budget for the
19 increased demand on the DSA resulting from ESAs for students currently enrolled in the public
20 schools or for students already enrolled in private schools or home-schooled.

21 Indeed, it was *not possible* for the Legislature to have taken into account, let alone
22 provided extra funding, to address the public school funding depleted by SB 302 when passing the
23 public school appropriations in SB 515. The Legislature did not know, and still does not know,
24 how many students will obtain ESAs and how much funding will be depleted from the DSA in the
25 2015-17 biennium. SB 302 does not limit the number of ESAs that can be authorized or the
26 amount of funding that can be diverted from the public schools. The Department of Education
27 specifically told the Legislature this was the case when it submitted its “fiscal note” on SB 302:
28

1 The Department is unable to quantify the fiscal impact of this measure. However,
2 the Department believes there will be a fiscal impact to the State due to the
redistribution of State and local funding from school districts to other entities. . . .

3 Boyd Decl. Ex. 5, Department of Education Unsolicited Fiscal Note on SB 302 (May 25, 2015).

4 Contrary to Defendant's assertions, the Legislature could not have accounted for SB 302's
5 unknown and uncapped impact such that the funds appropriated for public school funds could
6 remain at the levels deemed sufficient by the Legislature under Section 6.³

7 **(b) SB 508 Does Not Render SB 302 Constitutional**

8 Acknowledging as he must that SB 302 will divert funds appropriated for the public
9 schools to ESAs (Def. Br. at 19, 21), Defendant nonetheless contends that the impact of SB 302's
10 diversion is ameliorated by another statute, SB 508. Def. Br. at 20. This statute limits the impact
11 on a school district's revenue from large demographic swings. Specifically, it limits a school
12 district's total decrease in funding to no more than what would be due the district from a decrease
13 of 5 percent of the district's student population from the same quarter in the prior year. Boyd
14 Decl., Ex. 6.

15 This provision fails to cure SB 302's constitutional defects. As a first point, there is
16 nothing in SB 302 that applies this provision to the reduction in a districts' funding resulting from
17 the diversion of funds to ESAs. SB 302 plainly requires the prescribed Basic Support Guarantee
18 per pupil amounts be diverted from district budgets for every ESA established by Defendant,
19 without limit or exception. SB 302, therefore, on its face, triggers diversion of public school
20 funding irrespective of the provisions in SB 508.

21 Moreover, reductions resulting from a drop of five percent or less of the student population
22 are still significant. For example, five percent of Clark County's student population is ~16,000
23 students. If just less than 16,000 students applied for ESAs this would be a reduction in at least
24 \$30 million from Clark County schools. To the extent the Legislature's appropriations are

26
27 ³ Defendant also asserts that enjoining SB 302 is not the proper remedy for a violation of Section
28 6; Plaintiff should seek to enjoin SB 515. Def. Br. at 24. But, SB 515 by itself is not at issue on
Plaintiff's Motion. It is SB 302's diversion of SB 515 public school funds that is unconstitutional
and must be enjoined.

1 reduced below those deemed sufficient by SB 302, it is unconstitutional whether that decrease is
2 more or less than 5 percent.

3 (c) **Defendant's Interpretation Of Section 6.2 Defeats The Purpose**
4 **For Which The "Education First Amendment" Was Passed**

5 The requirement in Section 6 that public school appropriations be made first and that they
6 be sufficient was added to the Nevada Constitution by proposition in 2006. The "Education First
7 Amendment" was a response to the budget crisis in the 2003 legislative session. In that year, the
8 Legislature and the Governor could not agree on how much to appropriate for the public schools.
9 Clancy Decl. Ex. 11, at 4-5. As a result of this deadlock, havoc ensued such that schools did not
10 open on time and teacher hiring was delayed. In response, the voters passed Sections 6.2 through
11 6.6, which require, *inter alia*, the Legislature to fund education first before any other
12 appropriations in the biennium budget.

13 Simply requiring the Legislature to pass *some* appropriation for education before any other
14 appropriation, would not, however, have achieved the Amendment's purpose. Thus Section 6.2
15 also required the Legislature to appropriate the monies "the Legislature deems to be sufficient ...
16 to fund the operation of the public schools." This provision prevents the Legislature from simply
17 appropriating some nominal or insufficient amount for education, turn to other appropriations, and
18 then take up education funding last. The drafters of the Education First Amendment, therefore,
19 required the Legislature to complete its appropriations for public education before turning to any
20 other appropriations, required those appropriations be sufficient to operate the public schools, and
21 prevented it from later undoing those appropriations by re-allocating those funds to other uses.
22 Nev. Const. art. XI, § 6.5.

23 Defendant's arguments would allow the Legislature to evade the requirements of the
24 Education First Amendment in precisely the manner the "deems sufficient" clause was intended to
25 prevent. So long as the Legislature made the public education funding the "first appropriation,"
26 according to Defendant, legislation—such as SB 302—that reduces the funds appropriated would
27 pass constitutional muster, a result that is plainly contrary to the text and purpose of the
28 Amendment as approved by the voters.

1 Likewise, as discussed *supra* at 9,⁴ because the draw on the DSA from ESA payments is
2 greater than the draw on the DSA for a student enrolled in public school, even a small number of
3 participants in the voucher program will reduce the funds in the DSA below the level deemed by
4 the Legislature to be sufficient under Section 6.2. And, indications are that the number will not be
5 small. As of the last public report, over 3500 have already pre-registered for the program. Clancy
6 Decl. Ex. 10. As a result, SB 302, if permitted to stand, will cause a shortfall in the DSA over the
7 course of the biennium and the Legislature will, therefore, end up funding education *last*, contrary
8 to the Education First Amendment. This is precisely the situation Section 6 sought to avoid—
9 funds necessary for the operation of the public schools being appropriated after all of the State's
10 tax revenue is spoken for, with the prospect of dire consequences to public school students if an
11 agreement cannot be reached.

12 (d) **Plaintiffs Do Not Challenge Here The Legislature's**
13 **Determination Of The Amount Sufficient To Fund Public**
Education

14 Finally, Defendant attempts to recast Plaintiffs' Section 6 claim as a purportedly non-
15 justiciable challenge to the Legislature's judgment on the amount appropriated for public
16 education. Def. Br. at 23. This argument is a straw man. Plaintiffs do not in this case challenge
17 the amount or sufficiency of the Legislature's appropriations under SB 515 for the public schools.
18 Rather, they challenge the Legislature's enactment of SB 302, which reduces the funds *the*
19 *Legislature deemed sufficient for the public schools* by diverting some of those funds to ESAs for
20 private expenditures. This is an unconstitutional attempt to siphon funds away from the public
21 schools on the back-end in contravention of the plain language and intent of Section 6.
22 Defendant's arguments concerning justiciability are beside the point.

23 The Nevada courts have the responsibility and the obligation to ensure that newly enacted
24 statutes are constitutional. *N. Lake Tahoe Fire Prot. Dist. v. Washoe Cnty. Comm'rs*, 129 Nev.
25 Adv. Op. 72, 310 P.3d 583, 589 (2013). As the Nevada Supreme Court has explained, the judicial
26

27 ⁴ As discussed above, only a portion of the Basic Support Guarantee funds actually comes from
28 the state. *See Nevada Plan* at 10-11. The remainder goes directly to districts from various local
sources that are within the Nevada Plan. *Id.* at 13.

1 branch “has no authority to levy taxes or make appropriations,” but it “must exercise its judicial
2 function of interpreting the Constitution[.]” Where a statute conflicts with the “[L]egislature’s
3 constitutional obligation to fund public education” it must be struck down. *Guinn v. Legislature of*
4 *State of Nev. (Guinn I)*, 119 Nev. 277, 285-88, 71 P.3d 1269, 1274-76 (2003), *decision clarified*
5 *on denial of reh’g sub nom. Guinn v. Legislature of State of Nev.*, 119 Nev. 460, 76 P.3d 22 (2003)
6 *overruled on other grounds by Nevadans for Nevada v. Beers*, 122 Nev. 930, 142 P.3d 339 (2006).
7 SB 302 is such a provision.

8 **3. SB 302 Violates The Constitutional Mandate To Establish And**
9 **Maintain A Uniform System Of Common Schools In Violation Of Art.**
10 **XI, Section 2, Of The Nevada Constitution**

11 **(a) Defendant Concedes That Participating Entities Receiving**
12 **Funds Under SB 302 Are Not Part Of The Uniform System Of**
13 **Common Schools.**

14 Defendant does not contest that Article XI, Section 2, mandates that the Legislature
15 establish and maintain a uniform system of common schools. Defendant also does not contest that
16 SB 302 allows funds appropriated for Nevada’s uniform system of public schools to be used by
17 private schools and other private entities outside that uniform system. *See Declaration of*
18 *Christopher Lubienski In Support of Pl. Mot. (“Lubienski Decl. to Pl. Mot.”) at ¶ 13. As Plaintiffs*
19 *have demonstrated, Pl. Mot. at 16-17, SB 302 does not require private schools and other*
20 *participating entities receiving voucher funds to adhere to the education standards and*
21 *accountability measures that are the hallmark of Nevada’s public schools. These include teacher*
22 *licensure requirements; open and non-discriminatory admissions; and assessment benchmarks to*
23 *evaluate school performance. Id.; see also Lubienski Decl. to Pl. Mot. at 16.*

24 **(b) Article XI, Section 1. Of The Nevada Constitution Does Not**
25 **Authorize The Legislature To Divert Funds From Public**
26 **Education To Private Uses**

27 Instead, Defendant argues that SB 302 is permissible under Article XI, Section 1’s, general
28 aspiration “to encourage by all suitable means the promotion of intellectual, literary, scientific. . .
and moral improvements.” Def. Br. at 7. Even if that were the case—which it is not—SB 302
violates the constitutional provisions prohibiting the diversion of public school funds to private
purposes under Sections 3 and 6, and the Legislature’s obligation to first and sufficiently fund the

1 public schools under Section 2 and 6. Thus, SB 302 is unconstitutional on these grounds standing
2 alone and regardless of Section 1.

3 Section 1, however, does not authorize enactment of SB 302.⁵ The Education Article is
4 comprised of ten sections. The first, Section 1, is a hortatory introductory provision. Beyond this
5 clause, sections 2, 3, 5, 6, 9 and 10 address, in specific terms, the establishment, maintenance and
6 funding of Nevada's K-12 public education system (the remaining sections address the State
7 University). Defendant's interpretation of Section 1 as conferring "broad, discretionary power" on
8 the Legislature to promote the education of Nevada's children in whatever manner it sees fit, Def.
9 Br. at 8, is contrary to the express terms of that provision, the intent of the framers of the
10 Constitution, and well established canons of constitutional interpretation.

11 (i) **Defendant's Interpretation Is Contrary To The Plain**
12 **Meaning Of Section 1**

13 On its face, the phrase all "suitable means" cannot include means that are unconstitutional.
14 *See Williams v. Rhodes*, 393 U.S. 23, 29, 89 S. Ct. 5, 9, 21 L. Ed. 2d 24 (1968) (holding that while
15 the federal constitution grants Congress or states "specific power to legislate in certain areas,"
16 these granted powers "are always subject to the limitation that they may not be exercised in a way
17 that violates other specific provisions of the Constitution") (footnotes omitted). Thus, even if
18 Section 1 were something other than an introductory encouragement, which it is not, because SB
19 302 violates Article XI, Sections 2, 3, and 6 of the Nevada Constitution, it is not a "suitable
20 means."

22
23 ⁵ It should also be noted that SB 302 does not actually provide the "encouragement" to education
24 that Defendant suggests. The empirical studies that were quoted to the Nevada Legislature during
25 the discussion of SB 302, and repeated by Defendant in his brief, do not accurately capture the
26 research consensus on the effects of vouchers. *See generally* Declaration of Professor Christopher
27 Lubienski Declaration in support of Reply on Motion for Preliminary Injunction and Opposition to
28 Motion to Dismiss; *id.* at ¶ 4. Defendant relies on bodies of partisan research that are not
considered credible by experts in the field. *Id.* at ¶ 22. In contrast to the claims made by
Defendant, in actuality, non-partisan scholars agree that the research on the academic effects of
vouchers is inconclusive at best. *Id.* at ¶ 33. Research does reveal conclusively, however, that
vouchers tend to increase segregation in public schools. *Id.* at ¶ 19; *see also* Lubienski Decl. to Pl.
Mot. at ¶ 19.

(ii) **Defendant's Argument Is Not Supported By The Intent
Of The Framers Of The Nevada Constitution**

Section 1 was also never intended to allow the Legislature to fund non-public educational expenditures.⁶ As Nevada historian, Michael Green, explains in his declaration, the delegates' clear intent in passing Article XI as a whole was to provide for a system of *public* education. Green Decl. at ¶¶ 8-21. In both the 1863 and 1864 debates, the delegates agreed that the Legislature had to provide for a system of public education and that this was the appropriate method of educating Nevada school children. *Id.* at ¶¶ 8-15. While there was disagreement about whether to make attendance at public schools compulsory, the delegates agreed that the public schools should be amply funded. *Id.* at ¶¶ 8, 10, 13-14.

Professor Green explains that "[t]here is no evidence from the debates that in passing this version of Article XI, Section 1, the delegates intended to confer power on the legislature to fund non-public educational systems." *Id.* at ¶ 25. In fact, Article XI, Section 1 was drafted and discussed in conjunction with the entire Education Article, particularly Section 2, which requires the Legislature to maintain a uniform system of common schools. *See, e.g., id.* at ¶ 26. Further, "the idea that the delegates meant to empower the Legislature to fund both the public schools and other means of educating Nevada's children is inconsistent with the delegates' pronounced concerns that there would not be enough funds to provide for both common schools and higher education." *Id.* at ¶ 27. The delegates actually considered and rejected giving the Legislature discretion whether to pass a special tax to fund public education because of the fear that the Legislature would not adequately fund the public education system. *Id.* Delegate Collins, whose view prevailed, expressly noted "I do not believe that the Legislature is likely to be as earnest in this matter of education as gentlemen appear to anticipate." *Id.* (citing DEBATES AND PROCEEDINGS at 588).

⁶ *See generally* Boyd Decl., Ex. 7, DEBATES AND PROCEEDINGS at 565-588 (discussing Education Article and necessity of funding public schools, with no discussion of providing funds for non-public schools).

1 Not only is there no evidence that the delegates intended to give the Legislature sweeping
2 power to provide for an alternative mechanism of education, such a view runs contrary to the
3 general aims of the delegates at the convention, which was to greatly limit the power of the
4 Legislature. *Id.* at ¶¶ 23-31. It is plainly inconsistent with the historical understanding of the 1863
5 or 1864 debates on the Constitution to conclude that the delegates intended to both mandate the
6 Legislature establish a system of public school and also allow the Legislature to take boundless
7 other actions to educate Nevada's children. *Id.* at ¶¶ 28-31.

8 (iii) **Defendant's Argument Is Contrary To Well-Established**
9 **Principles Of Interpretation**

10 Defendant's interpretation of Section 1 also violates the well-established canons of
11 construction that the specific takes precedence over the general, and the Constitution must be read
12 as a whole. *See, e.g., Gaines v. State*, 116 Nev. 359, 365, 998 P.2d 166, 169-70 (2000)
13 (reaffirming the principles that multiple legislative provisions must "be construed as a whole";
14 where possible, "a statute should be read to give plain meaning to all of its parts;" and specific
15 statutes "take precedence" over general statutes.); *Lader v. Warden*, 121 Nev. 682, 687, 120 P.3d
16 1164, 1167 (2005) (holding that where a specific statute is "in conflict with a general one, the
17 specific statute will take precedence").

18 Although Defendant urges that the Constitution's specific mandates to establish and
19 maintain a system of uniform schools give way to the general exhortation to encourage intellectual
20 improvements, *e.g.* Def. Br. at 9, 11-12, the opposite is true. To the extent that there is a conflict
21 between legislation enacted under Section 1's broad, aspirational goal and the detailed and specific
22 mandates of Sections 2, 3 and 6, those specific mandates take precedence over the general.

23 Such is the precise holding in *Louisiana Federation of Teachers v. State*, 118 So. 3d 1033,
24 1051-53 (2013), where the Louisiana Supreme Court declared a voucher program an
25 unconstitutional diversion of public school funds, expressly holding that the Louisiana
26 Constitution's general exhortation that the Legislature "provide for the education of the people"
27 does not authorize a voucher law that clearly violates the more specific mandate to "maintain a
28 public educational system." *Id.* Similarly, the Nevada Constitution's general goal of encouraging

1 education in Section 1 in no way stands as a wholly separate and independent basis for a statute
2 such as SB 302, which clearly violates the specific mandates for maintaining Nevada's uniform
3 system of public schools under Sections 2, 3 and 6.

4 **(c) The Legislature May Not Maintain And Fund A Separate**
5 **Mechanism For K-12 Education Outside Of The Public Schools**

6 Plaintiffs' Motion further established that the Nevada Constitution, in mandating the
7 establishment and maintenance of a uniform public school system, simultaneously forbade the
8 Nevada Legislature from establishing and maintaining a separate alternative system to Nevada's
9 uniform public schools. "Nevada follows the maxim 'expressio unius est exclusio alterius,' the
10 expression of one thing is the exclusion of the other," *State v. Javier C.*, 128 Nev. Adv. Op. 50,
11 289 P.3d 1194, 1197 (2012) and "[t]his rule applies as forcibly to the construction of the written
12 Constitutions as other instruments." *King v. Bd. of Regents of Univ. of Nev.*, 65 Nev. 533, 556,
13 200 P.2d 221 (1948); *see also* Pl. Mot. at 18-19.

14 Defendant asserts, without any support, that Plaintiffs' interpretation would render private
15 schools and home schooling unconstitutional. Def. Br. at 11. This contention rests upon a plain
16 mischaracterization of Plaintiffs' claims. Plaintiffs argue that the Legislature may not maintain and
17 *fund* a mechanism that provides for the education of children outside of the uniform system of
18 public schools. Plaintiffs' Complaint raises no issue regarding the right of parents to enroll their
19 children in private school or to home school their children. No matter what the outcome of this
20 litigation, parents will continue to be able to choose private and home schooling to educate their
21 children.

22 **(d) The Cases Cited by Defendant Do Not Change The Analysis**

23 Finally, to support its argument that SB 302 is authorized by Section 1 and outside Section
24 2's uniformity mandate, Defendant points to a handful of rulings in other states allowing limited
25 voucher programs. Def. Br. at 12-13. As a foundational point, these decisions rely upon
26 Education Articles with different textual provisions and mandates, and unique histories, from the
27 provisions and history of the Education Article of the Nevada Constitution. Most importantly, the
28

1 limited voucher programs upheld by other states did not violate a constitutional bar on the use of
2 public school funding for private expenditures.

3 Defendant relies heavily on *Meredith v. Pence*, 984 N.E.2d 1213 (Ind. 2013). In this case,
4 the Indiana Supreme Court considered the constitutionality of a targeted voucher program that was
5 not funded by public school appropriations, applied only to students at or below 150 percent of the
6 poverty level, and required institutions receiving the public funds to meet accountability standards.
7 As the court explained, to participate in the program “a nonpublic school must meet several
8 criteria, including accreditation from the Indiana State Board of Education (“Board of Education”)
9 or other recognized accreditation agency . . .” *Id.* at 1219. Eligible institutions were required to
10 provide “instruction in Indiana and United States history and government, social studies, language
11 arts, mathematics, sciences, fine arts, and health.” *Id.* Further, “[a]n eligible school may not
12 discriminate on the basis of race, color, or national origin.” *Id.* at 1220 (citing Ind. Code § 20–51–
13 4–3(a), (b)). The Indiana Supreme Court’s approval of *general fund* monies for a targeted,
14 regulated program for at-risk students distinguishes it from SB 302’s expenditure of public school
15 funds, without limit, for wholly unregulated private institutions and individuals.⁷ *See also Davis*
16 *v. Grover*, 480 N.W.2d 460 (Wis. 1992) (upholding limited, regulated voucher program for
17 Milwaukee low income students in an opinion that did not take up issues of public school funding
18 for private expenditures); *Hart v. State*, 774 S.E.2d 281 (N.C. 2015) (upholding a “modest,”
19 regulated voucher program for low income families paid for by the general fund).

20 Defendant’s attempts to distinguish cases that have struck down voucher programs are
21 unconvincing. Def. Br. at 14-15. Most notably, in *Bush v. Holmes*, 919 So.2d 392 (Fla. 2006), the
22 court interpreted the state’s constitutional provision requiring the Florida Legislature to create and
23

24 ⁷ The Indiana Supreme Court’s decision is also distinguishable because it was heavily dependent
25 on the development of the Indiana Constitution, which originally provided that the Legislature was
26 to provide for a “general system of education” “as soon as circumstances will permit.” *Meredith*
27 *v. Pence*, 984 N.E.2d at 1222. The Indiana Court relied on the notion that the Indiana framers did
28 not unequivocally require the establishment of public schools to support their analysis that the
Legislature could also provide for non-public systems of education. *Id.* Nevada’s constitutional
history is in stark contrast—it is clear that the delegates viewed the establishment of a public
education system as an unequivocal duty of the Legislature. Green Decl. at ¶¶ 8-21.

1 maintain “a uniform, efficient, safe, secure, and high quality system of free public schools,” Fla.
2 Const. art. IX § 1, to forbid vouchers because “providing a free education . . . by paying tuition to
3 attend private schools is a ‘substantially different manner’ of providing a publicly funded
4 education than . . . the one prescribed by the Constitution.” *Holmes*, 919 So.2d at 407.

5 Defendant argues that *Bush v. Holmes* is distinguishable because it relied on a clause
6 stating that “it is a paramount duty of the state to make adequate provision for the education of all
7 children residing in its borders,” and that Nevada’s Constitution lacks such a clause. Def. Br. at
8 14. Defendant further argues that because Indiana and Wisconsin’s constitutions also lack a
9 similar clause, those decisions are more persuasive here. *Id.* at 14-15. However, Defendant is
10 wrong that Nevada lacks a clause making it the “paramount duty” to “make adequate provision”
11 for the education of Nevada’s children. Article XI, Section 6—the Education First article—
12 requires that Nevada fund public school education “before any other appropriation” in a
13 “sufficient” amount. This amendment was passed to ensure that “education is first” in Nevada and
14 to “that the funding of education in Nevada will be given the status intended by the framers of our
15 Constitution.” Clancy Decl. Ex. 11, at 4-5. Wisconsin and Indiana lack such a provision requiring
16 that education be “first” or “paramount.” Thus, contrary to Defendant’s own assertions, the
17 commitment to education under Nevada’s Education Article is just as strong, if not stronger, than
18 the Florida constitutional provisions under which the Florida voucher law was declared
19 unconstitutional.

20 * * * * *

21 Defendant’s arguments on the various constitutional Sections also conflict and undermine
22 each other. On the one hand, Defendant argues that the Legislature appropriated money for the
23 ESAs when the Legislature, as a first priority, appropriated the funds sufficient for the public
24 schools under Section 6. Def. Br. at 21. But, if the ESAs are to be funded under Section 6—
25 which clearly and unequivocally addresses only the funding for the public schools—then they
26 need to be part of the uniform system, which they are not and which constitutes a constitutional
27 violation. On the other hand, Defendant argues that ESAs have nothing to do with the uniform
28 system. Def. Br. at 9. If that is the case, they cannot be funded through the use of Section 6

1 funds. Defendant cannot have it both ways. Either way, SB 302 is unconstitutional and should be
2 preliminarily enjoined.

3 **B. Defendant Cannot Refute The Irreparable Harm SB 302 Will Cause Or That**
4 **The Balance Of Hardships Tips Toward Plaintiffs**

5 As established in Plaintiffs' Motion, because SB 302 violates the Nevada Constitution, the
6 irreparable harm standard is presumptively met. Pl. Mot. at 19-20. (citing *City of Sparks v.*
7 *Sparks Mun. Court*, 129 Nev. Adv. Op. 38, 302 P.3d 1118, 1124 (2013); *see also Stormans, Inc. v.*
8 *Selecty*, 586 F.3d 1109, 1138 (9th Cir.2009) (same); *Rivero v. McDaniel*, No. 3:08-CV-286-
9 ECR(RAM), 2009 WL 2834958, at *2 (D. Nev. July 17, 2009) (same). Defendant does not
10 contest this blackletter law in his briefing.

11 Regardless, in their Motion, Plaintiffs demonstrated that the loss of funding to public
12 schools from SB 302 will cause irreparable harm to Plaintiffs and other Nevada public school
13 children. Larger class sizes, lack of instructional materials, inadequate maintenance, and other
14 deficits in essential education resources will impact students and result in harm to the educational
15 opportunities guaranteed them under the Nevada Constitution. *See Guinn*, 119 Nev. at 286
16 ("education is a basic constitutional right in Nevada.").

17 Unable to credibly refute the irreparable harm resulting from SB 302, Defendant attempts a
18 deflection, arguing that such harms will impact school districts and not Plaintiff students and their
19 peers. Def. Br. at 24-25. SB 302 will without question impact public school districts by reducing
20 the funding in their budgets and the resources in their schools. These cuts will have a direct impact
21 on the quality of curriculum, instruction, support and other services the district can make available
22 to Plaintiffs and all other Nevada school children. Defendant's suggestion that districts somehow
23 exist independently of the students they are obligated to serve is wrong. Public school districts
24 exist only to serve the needs of their students; they are not a for-profit venture. By forcing
25 districts to continually adjust budgets and reduce staff, programs and services over the course of
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1 the school year, the harm to districts and their schools *is* harm to the students attending those
2 schools.⁸

3 Defendant also argues that the harm from SB 302 is only “financial” and not irreparable
4 harm. Def. Br. at 25. But Plaintiffs’ complaint is not about financial harm that can be remedied
5 by money damages. Rather, deductions of funding when ESAs are established reduce district
6 budgets and, consequently, the staff and instructional resources they can provide to students in
7 schools and classrooms. This reduction in resources, in turn, directly diminishes the opportunities
8 for students to master reading, think deeply, problem solve, understand scientific reasoning and
9 otherwise obtain the skills needed for college, career, citizenship and productive employment.
10 Paying the money back to the school districts at a later date will not remedy the loss to the
11 students at the time when the funds were unavailable. These are not financial, but life altering,
12 irreparable harms.⁹

13 Defendant further argues that the harms are speculative. But, less money to public schools
14 indisputably means less money spent on instruction, teacher training, supplies, maintenance,
15 school leadership, curriculum, professional development, or some other expenditure. These are
16 not speculative harms—they are certain. School districts have limited budgets that they have to

17
18 ⁸ Defendant also takes issue with the declaration of Paul Johnson, the CFO of White Pine County,
19 claiming he has taken inconsistent positions in a previous statement on the harm created by SB
20 302. But, that is not the case. Defendant fails to quote Mr. Johnson’s full statement. When asked
21 for comment on what he understood to be the proposed legislation, Mr. Johnson said: “There are
22 no private schools at this time in White Pine county so there would be no impact at this time.”
23 Mr. Johnson thought that SB 302 only allowed use of ESAs for brick and mortar private schools
24 when he made this statement and he was considering the impact on White Pine, a County that
25 currently has no private schools. Now that the bill has been passed he knows it applies to home
26 schooling and distance learning as well as private schools, which will have a negative impact on
27 his district. Johnson Reply Decl. ¶ 4. Moreover, the harms that Mr. Johnson describes are harms
28 that will occur for all school districts for which funding is diverted to ESAs; Mr. Johnson provides
his testimony regarding harm based on his years of experience in school finance and not just on
the harms expected for his current district.

⁹ Defendant’s references to *Church of Scientology v. United States*, 920 F.2d 1481 (9th Cir. 1990)
and *Elias v. Connett*, 908 F.2d 521 (9th Cir. 1990) are irrelevant to Plaintiffs’ claims. Both cases
involve disputes with the IRS over taxes. In those cases, the Ninth Circuit denied injunctive relief
on the ground that plaintiffs had an adequate remedy at law, *i.e.*, a separate action for a tax refund,
based on a long line of cases holding that disputes over tax levies do not create irreparable harm
and cannot form the basis for a preliminary injunction.

1 maintain. That the exact reductions in services and resources cannot be named is obvious—the
2 reductions will be determined by local school boards and administrators. That cuts will be made
3 and students' education impacted when less funds are distributed to districts, however, is certain.¹⁰

4 Finally, Defendant argues that the balance of hardships tips in his favor. Granting a
5 preliminary injunction, he argues, would deny Nevada children choice. Def. Br. at 27. However,
6 the ESA amounts are not enough to cover tuition at most Nevada private schools. Pl. Mot. at 8.
7 Only those who can use SB 302 as a subsidy for costs they can otherwise afford will benefit. As
8 the preliminary data shows, those families who have pre-registered for ESAs reside in wealthier
9 neighborhoods. Boyd Decl., Exh. 8. Very few are from poorer neighborhoods. *Id.*

10 If SB 302 is not enjoined, those who can already choose private schooling stand to benefit,
11 while Plaintiffs and other public school children, many of whom are at-risk, vulnerable and
12 disadvantaged, will attend schools with less resources to provide them with the educational
13 services they need and deserve. At bottom, enjoining SB 302 will not impair the right of parents
14 to enroll their child in a private school, as Defendant asserts. Rather, the issue in this case is
15 concise and narrow: whether funding appropriated for the public schools can be diverted to
16 subsidize those decisions. Under Nevada's Constitution, it cannot.

17 **III. CONCLUSION**


18 Wherefore, Plaintiffs respectfully request that this Court issue a preliminary injunction
19 enjoining Defendant from implementing SB 302 and its regulations and deny Defendant's motion
20 to dismiss.

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24 ¹⁰ Defendant relies on *Flick Theater, Inc. v. Las Vegas*, 104 Nev. 87, 752 P.2d 235, 238 n.4 (1984)
25 and *Goldie's Bookstore, Inc. v. Superior Court*, 739 F.2d 466 (9th Cir. 1984) for his position that
26 Plaintiffs' harm is speculative and "mere conjecture." Def. Br. at 25. But, the Nevada Supreme
27 Court and Ninth Circuit respectively denied preliminary injunctions because of a complete
28 absence of a record of harm to protected speech by adult business operators and, in the *Goldie's*
case, to the good will and reputation of an adult book store owner. The certain harm to public
school children from decreased funding is not akin to the unsupported harm alleged by adult
business proprietors.

1 November 24, 2015

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on this 24th day of November, 2015, a true and correct copy
3 of **PLAINTIFFS' REPLY ON ITS MOTION FOR A PRELIMINARY INJUNCTION AND**
4 **OPPOSITION TO DEFENDANT'S MOTION TO DISMISS** was placed in an envelope,
5 postage prepaid, addressed as stated below, in the basket for outgoing mail before 4:00 p.m. at
6 WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP. The firm has established
7 procedures so that all mail placed in the basket before 4:00 p.m. is taken that same day by an
8 employee and deposited in a U.S. Mail box.

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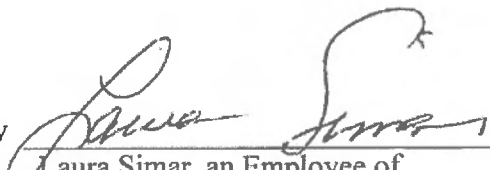
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State of Nevada

**Statewide
Ballot Questions**

2006



**To Appear on the November 7, 2006
General Election Ballot**

**Issued by
Dean Heller
Secretary of State**

EXHIBIT 11

QUESTION NO. 1

Amendment to the Nevada Constitution

CONDENSATION (Ballot Question)

Shall the Nevada Constitution be amended to require the Nevada Legislature to fund the operation of the public schools for kindergarten through grade 12 before funding any other part of the state budget for the next biennium?

Yes.....☐

No.....☐

EXPLANATION (Ballot Question)

The proposed amendment, if passed, would create five new sections to Section 6 of Article 11 of the Nevada Constitution. The amendment would provide that during a regular session of the Legislature, before any appropriation is enacted to fund a portion of the state budget, the Legislature must appropriate sufficient funds for the operation of Nevada's public schools for kindergarten through grade 12 for the next biennium, and that any appropriation in violation of this requirement is void. The appropriation requirement also applies to certain special sessions of the Legislature.

The following arguments for and against and rebuttals for Question No. 1 were prepared by a committee as required by Nevada Revised Statutes (NRS) 293.252.

ARGUMENT IN SUPPORT OF QUESTION NO. 1

Question One seeks a constitutional amendment changing the process by which public school education is funded at the State Legislature.

Education first ensures our state's public school system will be funded, before any other program for the next fiscal biennium, during each legislative session, by an appropriation the Legislature deems to be sufficient to fund the operation of our public schools for the student population reasonably estimated for that biennium.

Education First preserves the Legislature's ability to first fund the cost of the legislative session or an emergency measure demanding immediate action. Education First does not determine the level or source of funding public school education receives, so there is no fiscal impact to the state.

Education First will substantially enhance Nevada's credibility as a stable environment for students and teachers. As the fastest growing state in the nation, that is critical if Nevada is to keep pace with its growing student population.

For example, for the 2002-03 school year, Nevada hired over 2300 new teachers. Most new teachers are hired from out-of-state because Nevada's University and Community College System cannot meet our state's demand for teachers. Teachers make a serious commitment

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when they choose to move and teach here. Education First will help ensure Nevada is equally committed.

The budget deadlock we experienced during the 2003 legislative sessions must never be repeated. The consequences for our schools, our teachers and our children were significant. Schools opened late, new teachers could not be hired, and special programs were jeopardized as those teachers were designated for reassignment to the general classroom. School administrators could not adequately plan for the coming school year, a process that typically begins each January. Education First prevents that from ever happening again.

As long as public school education is allowed to be the last major budget bill considered, special sessions and court intervention could easily become the norm in the legislative process. When education is first, that won't happen, as it did in 2003. Education First will ensure that the funding of education in Nevada will be given the status intended by the framers of our Constitution and will help prevent another Supreme Court ruling that negates the Gibbons tax restraint portion of our Constitution.

Take the politics out of funding Nevada's public schools. A YES vote on Question One will put education and Nevada's children first in line at budget time.

The above argument was submitted by the Ballot Question Committee composed of citizens in favor of this question as provided for in NRS 293.252

REBUTTAL TO ARGUMENT IN SUPPORT OF QUESTION NO. 1

The Education Funding Crisis of the 2003 Legislative session is the first in 73 regular sessions of the Nevada legislature. It was generated for political reasons to push a huge tax increase. Voters have an opportunity in this election to punish those guilty without changing the constitution. One failure in 73 sessions is insufficient reason to change the constitution.

A "NO" vote on Question 1 will force legislators to do the job we elect them to do. A "YES" vote will NOT correct the grave disregard for the Nevada Constitution by the Nevada Supreme Court during 2003. The Court showed blatant disregard for the people's will of the original Gibbons' petition and there is no reason to believe this will improve their attention to their oath of office. Make representative government work by voting "NO" on Question 1.

The above argument was submitted by the Ballot Question Committee composed of citizens opposed to this question as provided for in NRS 293.252

ARGUMENT AGAINST QUESTION NO. 1

The last legislative session showed that education funding can become a political football and few would agree that scenario should ever be repeated; however, a single event should not be a reason to compromise the public health and safety of Nevadans by detrimentally removing the Legislature's and our Governor's ability to determine our state's priorities.

1. The education budget is such a large portion of the budget that it cannot be determined until after the final meeting of the Economic Forum. The Economic Forum is a panel

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of experts appointed by Nevada elected officials to formulate detailed projections regarding our state's revenue. The Economic Forum's projections would not be done until just prior to April 30th.

2. In the normal 120 day legislative process, the small budgets with little or no changes are processed starting weeks before the end of the legislative session. This allows the legislative workload to remain reasonable and matters to be handled in a logical manner. Holding all those budgets until the education budget can be decided may actually impede the process of closing budgets and make special sessions more likely, adding unnecessarily to taxpayer expense. Thus, this measure is likely to cause an adverse fiscal impact.
3. Under the current system the smaller budgets come through early providing lawmakers that do not sit on the Assembly Ways and Means or Senate Finance Committees with the time to review these budgets and ask questions. If those budgets are held until the education budget is decided, then the review by other legislators will be lost in the rush to close the session. Public health, safety and the protection of our environment will necessarily be compromised because of the limited time to review non-education budget matters that are equally important to our state's welfare.
4. Further it might be much easier for a lawmaker on the money committees to add "pork" to some budgets without the check and balance time and review process to stop potential wasteful spending.
5. While we agree that the entire budgeting and funding process in Nevada needs to be reviewed to encourage fiscal responsibility and accountability by the legislators and all with budgets within the executive branch, this measure seems to complicate the matter rather than actually improve and simplify the process.

We urge voters not to make the budget process more difficult by passing this measure.

The above argument was submitted by the Ballot Question Committee composed of citizens opposed to this question as provided for in NRS 293.252

REBUTTAL TO ARGUMENT IN OPPOSITION TO QUESTION NO. 1

1. Public education is one of five major budget bills. According to the Legislative Counsel Bureau, no budget can be closed prior to release of the Economic Forum's final report. This does not change. When budget bills are enrolled, education will be first.
2. The way the state budget is crafted does not change. The legislative workload is unaffected. The process becomes more logical when such a large component is dealt with first. The Legislature is responsible for managing its workload and adhering to a 120-day session. The status quo is more likely to result in special sessions.
3. Lawmakers not on money committees still participate. Issues are engaged in the same manner as now. Any impact should the Legislature not do its job as required by

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the state Constitution is its responsibility. Public health, safety, welfare and the environment are not compromised by Education First.

4. Adding pork will always be tempting. Education First does not make it easier. If checks and balances aren't done, regardless of where in the process, legislators would be derelict in their duties.
5. When public education is no longer the budget's sacrificial lamb, the process is brought into check, improving accountability and simplicity.

The above argument was submitted by the Ballot Question Committee composed of citizens in favor of this question as provided for in NRS 293.252

FISCAL NOTE

FINANCIAL IMPACT – NO.

Approval of the proposal to amend the *Nevada Constitution* would have no adverse fiscal impact

FULL TEXT OF THE MEASURE

Education First Initiative Petition - State of Nevada

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

AN ACT relating to the funding of public education; amending the Constitution of the State of Nevada to require the Legislature to fund the operation of the public schools for kindergarten through grade 12 before any other part of the state budget for the next biennium is funded; providing that any appropriation enacted in violation of that requirement is void; and providing other matters properly relating thereto.

THE PEOPLE OF THE STATE OF NEVADA DO ENACT AS FOLLOWS:

Section 1. Section 6 of Article 11 of the Constitution of the State of Nevada is hereby amended to read as follows:

1. In addition to other means provided for the support and maintenance of said university and common schools, the legislature shall provide for their support and maintenance by direct legislative appropriation from the general fund, upon the presentation of budgets in the manner required by law.

2. *During a regular session of the Legislature, before any other appropriation is enacted to fund a portion of the state budget for the next ensuing biennium, the Legislature shall enact one or more appropriations to provide the money the Legislature deems to be sufficient, when combined with the local money reasonably available for this purpose, to fund the operation of the public schools in the State for kindergarten through grade 12 for the next ensuing biennium for the population reasonably estimated for that biennium.*

3. *During a special session of the Legislature that is held between the end of a regular session in which the Legislature has not enacted the appropriation or appropriations required by subsection 2 to fund education for the next ensuing biennium and the first day of that next ensuing biennium, before any other appropriation is enacted other than appropriations required to pay the cost of that*

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special session, the Legislature shall enact one or more appropriations to provide the money the Legislature deems to be sufficient, when combined with the local money reasonably available for this purpose, to fund the operation of the public schools in the State for kindergarten through grade 12 for the next ensuing biennium for the population reasonably estimated for that biennium.

4. During a special session of the Legislature that is held in a biennium for which the Legislature has not enacted the appropriation or appropriations required by subsection 2 to fund education for the biennium in which the special session is being held, before any other appropriation is enacted other than appropriations required to pay the cost of that special session, the Legislature shall enact one or more appropriations to provide the money the Legislature deems to be sufficient, when combined with the local money reasonably available for this purpose, to fund the operation of the public schools in the State for kindergarten through grade 12 for the population reasonably estimated for the biennium in which the special session is held.

5. Any appropriation of money enacted in violation of subsection 2, 3 or 4 is void.

6. As used in this section, "biennium" means a period of two fiscal years beginning on July 1 of an odd-numbered year and ending on June 30 of the next ensuing odd-numbered year.