No. 70648

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

v.

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

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

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ROUTING STATEMENT—
RETENTION IN THE SUPREME COURT

This case is presumptively retained for the Supreme Court to "hear and decide" because it raises "as a principal issue a question of first impression involving the . . . Nevada constitution" and because the case raises "as a principal issue a question of statewide public importance." NRAP 17(a)(13)–(14). This case presents the question whether the State may violate Article XI, Section 10, of the Nevada Constitution by diverting taxpayer dollars to religious schools, which inculcate religious belief through their instruction, require students to engage in religious practice, and discriminate in their admissions and employment based on faith and other exclusionary criteria such as sexual orientation and gender identity. This case also presents the question whether S.B. 302 violates Article XI, Section 2, by using public funds allocated for public education to pay for private schooling—including private religious education—at schools where the instruction is not uniform with the public schools, and where students are barred from attending based on grounds such as religion, sexual orientation, or religious judgments as to their (or their parents') compliance with religious doctrines. The Supreme Court has set oral argument for July 29. This statement is made pursuant to NRAP 28(a)(5).

INTRODUCTION

Article XI of the Nevada Constitution requires the State to provide a meaningful system of secular public instruction through public schools that are open equally to all Nevada students; the State may not fund religious instruction, religious institutions, or schools that discriminate against students based on their faith or other exclusionary criteria. *See* NEV. CONST. art. XI, §§ 2, 10. Parents may choose to send their children to religious schools, but the Constitution guarantees that Nevada taxpayers will not have to foot the bill. In that way, the Nevada Constitution ensures a strong, viable system of free public education for all, and protects against public funds being used to promote any particular religion.

Senate Bill 302, 78th Reg. Sess. (Nov. 2015), cannot be squared with these clear constitutional mandates. If permitted to take effect, the program will direct millions of dollars in state educational funds to religious schools—including schools that require students to participate in religious rituals and that discriminate in admissions based on protected characteristics such as religion, sexual orientation, and gender identity. What is more, the state funding for religious instruction and discriminatory admissions comes at the expense of the

existing system of public schools. The challenged voucher program thus directly contravenes at least two provisions of the Nevada Constitution and more than 130 years of this Court's precedent.

Article XI, Section 10, of the Nevada Constitution provides: "No public funds of any kind or character whatever, State, County or Municipal, shall be used for sectarian purpose." This Court has strictly enforced that No-Aid Clause, interpreting it to bar any expenditure of public funds that directly or indirectly supports religious activities or institutions. S.B. 302's funding of religious schools cannot be reconciled with Section 10's strict prohibition against the use of state funding for sectarian purposes.

Article XI, Section 2, directs that "[t]he legislature shall provide for a uniform system of common schools" that may not offer "instruction of a sectarian character" but must instead, be open equally for "general attendance" by all schoolchildren. By funding private and religious schools that discriminate in admissions using taxpayer dollars specially appropriated for public education, the State is creating a two-track system of publicly financed education, in which educational opportunities are dictated by religious belief, sexual orientation, gender identity, and other characteristics. Moreover, private schools vary

widely in their curricula and practices. That is especially true for religious schools, which are exempt from state educational regulations and frequently mandate worship and require even supposedly secular subjects to conform to religious doctrine rather than Nevada's academic standards. S.B. 302 thus likewise cannot be squared with the requirements of Section 2.

In dismissing this case, the district court relied on unprecedented interpretations of both provisions of Article XI.

First, Nevada's Founders crafted Section 10 to provide especially robust and straightforward protection against any taxpayer aid—whether direct or indirect—to religious schools; in that respect, the safeguards are even stronger than those provided under the federal Establishment Clause. But disregarding that strong constitutional commitment and this Court's clear Section 10 jurisprudence, the district court erroneously decided that Section 10 is merely coterminous with the Establishment Clause, under which some voucher programs have been permitted, and reduced Section 10 to a bare legislative-intent test. Section 10 requires more. Much more.

Second, the district court gave virtually no effect to the Nevada Constitution's robust safeguards for secular public education. It

construed Section 2 to have no effect even on state action that severely impairs the State's enduring promise to provide public education—unless that action shutters the entire public-school system.

If the lower court's interpretation of Sections 2 and 10 is allowed to stand, the result will not just give short shrift to Article XI's constitutional protections, it will gut them. For these reasons and more, the Court should reverse the district court's Order and remand for consideration of Plaintiffs' claims on the merits.

JURISDICTIONAL STATEMENT

This is an appeal from an order of the Eighth Judicial District Court in Clark County issued on May 18, 2016, dismissing Plaintiffs' Complaint in its entirety. See RA Vol. 13, at 2944–2988. The Order is a final judgment appealable under N.R.A.P. 3A(b)(1). On June 24, 2016, Plaintiffs timely filed and served a notice of entry of the Dismissal Order and notice of appeal.

ISSUES PRESENTED

1. Did the district court err in construing Article XI, Section 10, of the Nevada Constitution to prohibit only those legislative appropriations expressly intended to promote religion, *contra State v. Hallock*, 16 Nev. 373, 378–88 (1882), and in holding that S.B. 302

permissibly directs public funds to private religious schools to pay for religious instruction?

2. Did the district court err in construing Article XI, Section 2, to prohibit only state action that would entirely shutter Nevada's public-school system, and in holding that S.B. 302 permissibly directs funds specifically appropriated for public-education funds to private schools that do not follow uniform curricula and hiring and testing practices and do not allow universal attendance, thereby undermining the effective operation of the public-school system?

3. Did the district court err when it rejected factual allegations in the Complaint, instead of accepting them as true on a motion to dismiss, based on the view that Plaintiffs lack standing to make those allegations?

STATEMENT OF THE CASE

Plaintiffs filed their Complaint in August 2015, challenging—under Sections 2 and 10 of Article XI of the Nevada Constitution—the Nevada Education Savings Account Program enacted by S.B. 302. RA Vol. 1, at 1–21. In September 2015, six parents, who wish to send their children to private schools at public expense, moved to intervene as defendants and filed their Answer. RA Vol 1, at 24–39, 80–143. In

October 2015, Defendants (collectively, "the State") moved to dismiss this action. RA Vol. 2, at 233–335. In November 2015, Plaintiffs moved for a preliminary injunction, and the parties fully briefed that motion. After the briefing was completed, the court below ordered three additional rounds of briefing on whether there were disputed issues of fact. On May 18, 2016, the district court issued its order declining to rule on Plaintiffs' motion for preliminary injunction and granting the State's motion to dismiss. RA Vol. 13, at 2944–88.

Meanwhile, another set of plaintiffs filed a separate lawsuit seeking to enjoin the S.B. 302 program; the District Court in Carson City preliminarily enjoined the voucher program under Sections 6.1 and 6.2 of Article XI. The State's appeal of the preliminary injunction is currently pending in this Court. *See Lopez v. Schwartz*, No. 15-0C-00207-1B (filed Sep. 9, 2015), *on appeal as* No. 69611.

The Court expedited briefing in this appeal so that oral argument in both cases could be heard on July 29.

STATEMENT OF FACTS

A. The Voucher Program.

Senate Bill 302, signed into law on June 2, 2015, establishes a voucher program that authorizes taxpayer dollars to flow to private schools, including religious ones. *See* S.B. 302; RA Vol. 1, at 5, ¶ 16.

Under S.B. 302, any school-age child in Nevada is eligible to receive a religious education at taxpayers' expense once he or she has been enrolled in a public school for 100 consecutive days. RA Vol. 1, at 5, ¶ 17 (citing S.B. 302 § 7).

When an eligible student applies for a voucher, the Office of the Treasurer will draw funds from the State's Distributive School Account (a special legislative appropriation from the State General Fund that is earmarked for the public-school system) and deposit the money into a voucher account (formally labeled an "Education Savings Account"). S.B. 302 § 9. Voucher money may be used solely for a narrow set of approved expenses—including tuition at private religious schools, and religious instructional materials for use at those schools. *Id.* For students with disabilities and students residing in households with an income less than 185% above the federal poverty line, the amount transferred is equal to the statewide average per-pupil educational expenditure; for all other students, 90% of that amount is transferred. *See* RA Vol. 1, at 6, ¶¶ 22–23 (citing S.B. 302 § 8.2). The statewide average per-pupil support rate for Fiscal Year 2016 is estimated to be $5,669. *Id.* ¶ 21.

The voucher law mandates that the amount "deposited in education savings accounts established on behalf of children who reside in [a] county" be deducted on a dollar-for-dollar basis from the funds that would otherwise have been provided to that county's public schools. *Id.* ¶ 24 (S.B. 302 § 16.1). Any unspent voucher funds revert to the State's General Fund (S.B. 302 § 8.6(b))—not to the Distributive School Account from which they were drawn, and where they would have been available to support public education.

Any private school that is licensed under NRS §§ 394 *et seq.* or is exempt from licensing under NRS § 394.211 is deemed a "participating entity" in the voucher program. RA Vol. 1, at 7, ¶ 26 (citing S.B. 302 § 5). "Elementary and secondary educational institutions operated by churches, religious organizations, and faith based ministries" are exempt entities under NRS § 394.211.1(d), meaning that they are not subject to the requirements that apply to public or licensed (secular) private schools. Nevertheless, these exempt schools are eligible to receive state educational funds through the voucher program. RA Vol. 1, at 7, ¶ 26. At the time of the Complaint, 66 of Nevada's 110 private schools were exempt religious schools. *Id.* at 8, ¶ 35.

As alleged in the Complaint, these exempt religious schools have curricula, instruction, admissions policies, and hiring practices that diverge dramatically from what is required in Nevada's public schools—or in sec private schools. *Id.* at 3, ¶ 6. Many discriminate in admissions and enrollment based on students' or their families' faith, religious practice, and other religiously based criteria, including sexual orientation, gender identity, and compliance with religious codes of conduct. *Id.* at 15–18, ¶¶ 69–79. Many discriminate on similar grounds in employment. *Id*. Moreover, most use curricula that instruct students in the religious beliefs of the school's sponsoring church or denomination (*id.* at 12–15, ¶¶ 55–68); and many require students to take part in religious worship (*id.* ¶¶ 55, 62, 65). S.B. 302 does not require participating schools to change these practices; nor does it place any restrictions on how participating schools may use voucher funds. Indeed, Section 14 of S.B. 302 states that "nothing in the provisions of [this Act] shall be deemed to limit the independence or autonomy of a participating entity."

In short, the Complaint unequivocally and in great detail alleges that the voucher program will funnel public funds to religious schools that will use the money for religious purposes and will exclude would-be

students on religious grounds. Indeed, in some Nevada locales—Churchill County, Elko County, and Carson City, for example—there are ***no*** secular private schools; the ***only*** private schools are religious ones. RA Vol. 1, at 8, ¶ 37. Accordingly, students in those locales who wish to attend a voucher school will be forced to attend a religious institution—assuming, of course, that they are able to overcome discriminatory admissions requirements at those schools.[1]

Further, the amount of taxpayer dollars diverted to private and religious schools will be massive, because the Nevada voucher program is unprecedented in scope. Unlike voucher programs in other states, the Nevada program places no ceiling on the number of students who may participate statewide and no cap on the amount of public funds that may be reallocated from the Distributive School Account to private schools. *Id.* at 6, ¶ 25. And by allowing students to obtain vouchers merely by attending public school for 100 days, the legislature has created strong incentives for current private-school students to transfer to a public school for a few short months, only to return to their private

[1] Confirming that taxpayer dollars will be diverted to religious schools if the voucher program is not enjoined, the Intervenors have specifically stated that they intend to send students to such schools using voucher funds. See RA Vol. 1, at 106, ¶ 14; 115, ¶ 23; 121–22, ¶¶ 33–34; 129, ¶¶ 23, 27, 29; 136–42, ¶¶ 19, 32, 41, 51 (Mot. to Intervene Exs. A–E).

schools later the same year, armed with taxpayer dollars to finance their religious educations. *Id.* at 5, ¶ 17.

In July 2015, the Treasurer began accepting early applications for vouchers. *Id.* at 7, ¶ 32. When the voucher program was enjoined by the *Lopez* court, the Treasurer was mere weeks away from disbursing public funds to private religious schools that would spend the money on religion and would provide services on a discriminatory basis. *Id.* ¶¶ 30–32.

B. Plaintiffs.

Ruby Duncan is a mother and grandmother who lives and pays sales tax in Nevada. *Id.* at 3, ¶ 8. Rabbi Mel Hecht is a retired congregational rabbi who lives and pays taxes in Nevada. *Id.* at 4, ¶ 9. Howard Watts III is a member of the Las Vegas community who was born, raised, resides, and pays taxes in Nevada. *Id.* ¶ 10. Leora Olivas is similarly a member of the Las Vegas community who lives and pays taxes in Nevada. *Id.* ¶ 11. Adam Berger is not only a resident and taxpayer in Nevada but also a special-education teacher in a Nevada public school and the parent of a Nevada public-school student. *Id.* ¶ 12. Plaintiffs all object to the use of their tax dollars to fund private religious schools. *Id.* ¶¶ 8–12.

SUMMARY OF ARGUMENT

The court below court committed three categories of error that warrant reversal and remand for adjudication of Plaintiffs' claims on the merits.

First, the district court erred in interpreting Nevada's No-Aid Clause, NEV. CONST. art. XI, § 10, as coterminous with the federal Establishment Clause—an approach that is contrary to both the No-Aid Clause's plain language and this Court's binding precedent. *See State v. Hallock*, 16 Nev. 373, 378–88 (1882). In mistakenly focusing on the federal Establishment Clause, the court construed Section 10 to restrict only those appropriations for which the legislature openly and expressly intends to advance religion, reducing Section 10 to a pale shadow of itself. As *Hallock* held, the legislature and citizens of this state passed Section 10 to provide strong protections against funding religious entities like the private, religious schools that will receive taxpayer money under S.B. 302. And the U.S. Supreme Court has recognized that this enhanced protection for state antiestablishment interests is both permissible and proper. It should be respected.

Second, the court below incorrectly concluded that Article XI, Section 1, confers authority to enact whatever educational programs the

legislature may deem "suitable" for the "promotion of intellectual . . . improvements" and other aims, without regard to the express limitations in the rest of Article XI. The court thus determined that Section 2 provides no restrictions on the legislature other than to bar the complete abolishment of Nevada's public schools. But "suitable" in Section 1 is a word of limitation; at minimum, any means that violate Sections 2 through 10 are unsuitable as a matter of law. And because S.B. 302 establishes a publicly funded system of private education that is not uniform, secular, or open to all, and does so at the expense of Nevada's public schools and their students, it violates Article XI, Section 2. The district court's interpretation of Sections 1 and 2 would effectively eviscerate Article XI's protections.

Third, in rendering these erroneous interpretations of Article XI, the court misapplied the motion-to-dismiss standard by ignoring two categories of facts that were properly alleged in the Complaint: first, that private religious schools participating in the voucher program discriminate on the basis of religion, sexual orientation, pregnancy status, and other factors; and second, that the voucher program will defund and thereby undermine public education in Nevada. The court below cast aside these allegations because it improperly believed that

Plaintiffs lack standing to allege these facts. Standing, however, determines a plaintiff's ability to make a claim, not to assert factual allegations. Moreover, the discarded allegations are highly relevant to determining whether the State's use of taxpayer dollars under S.B. 302 violates the Nevada Constitution. These allegations should have been accepted as true and incorporated into the court's analysis of the Motion to Dismiss.

STANDARD OF REVIEW

"A district court order granting an NRCP 12(b)(5) motion to dismiss is subject to rigorous appellate review." *Munda v. Summerlin Life & Health Ins. Co.*, 127 Nev. 918, 267 P.3d 771, 774 (2011) (noting that review is de novo). The Court is "bound to accept all the factual allegations in the complaint as true" (*Marcoz v. Summa Corp.*, 106 Nev. 737, 739 (1990)), and must "construe[] the pleading liberally, drawing every inference in favor of the nonmoving party" (*Citizens for Cold Springs v. City of Reno*, 125 Nev. 625, 629 (2009)). "In reviewing the district court's dismissal order, every reasonable inference is drawn in the plaintiffs' favor." *Munda*, 267 P.3d at 774. "A claim should not be dismissed . . . unless it appears to a certainty that the plaintiff is not

entitled to relief under any set of facts which could be proved in support of the claim." *Hale v. Burkhardt*, 104 Nev. 632, 636 (1988).

ARGUMENT

I. Appellants Have Stated A Claim Under Article XI, Section 10, of The Nevada Constitution.

The court below wrongly held that Nevada's No-Aid Clause (NEV. CONST. art. XI, § 10) is functionally identical to the differently worded federal Establishment Clause, and therefore presents no bar to the challenged voucher program because the program would supposedly be permissible under federal law. RA Vol. 13, at 2979–80. That ruling cannot be squared with either Section 10's plain language or this Court's definitive interpretation of Section 10. The No-Aid Clause flatly prohibits both the flow of public funds to religious institutions and the purchase of religious services with public funds. *Hallock*, 16 Nev. at 378–88. Plaintiffs alleged that the voucher program does exactly what the No-Aid Clause proscribes: It allows public money to be used for religious purposes. Hence, Plaintiffs have stated a claim for relief under Section 10, and the order of dismissal should be reversed.

A. The Nevada Constitution provides robust protections for the State's important antiestablishment interests.

Article XI, Section 10, is straightforward: "No public funds of any kind or character whatever, State, County or Municipal, shall be used

for sectarian purpose." As the U.S. Supreme Court recognized in *Locke v. Davey*, state constitutional no-aid provisions like this one can and do afford stricter protections for state antiestablishment interests than federal law provides. 540 U.S. 712, 720–723, 124 S. Ct. 1307, 1312–15 (2004). And as this Court held in *Hallock*, that is precisely the choice that Nevada made. The district court's decision thus flies in the face of the binding precedent of *Hallock*, and in so doing, it renders the No-Aid Clause toothless, thereby defeating the intent of the Nevada legislature and citizenry in adopting that Clause.

1. By its plain language, the No-Aid Clause forbids all public funding of religious institutions.

When a constitutional provision "is clear and unambiguous," this Court "will not look beyond the language of the provision but will instead apply its plain meaning." *Lorton v. Jones*, 322 P.3d 1051, 1054 (Nev. 2014); *accord*, *e.g.*, *In re Contested Election of Mallory*, 282 P.3d 739, 741 (Nev. 2012). The language of the No-Aid Clause could not be clearer: "public funds" must not be "used for sectarian purpose." As numerous courts in other states have held when interpreting their own state constitutions' no-aid clauses, Section 10 provides greater protections than the federal Establishment Clause does.

Although Nevada's No-Aid Clause and the federal Establishment Clause are grounded in related concerns, they are not identical. The First Amendment provides that: "Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST. amend. I. If the legislature and citizens of Nevada had intended for Section 10 to be a carbon-copy of that requirement, they could easily have drawn Section 10's language from the already existing federal Clause, e.g.: "The legislature of this state shall make no law respecting an establishment of religion." They chose not to do so.

That choice matters. Instead of leaving it to future public officials and courts to determine what sorts of spending might constitute an "establishment of religion," Nevada's legislators and voters left no room for doubt: "No public funds of any kind or character whatever" should ever "be used for sectarian purpose." NEV. CONST. art. XI, § 10. In accordance with basic canons of constitutional and statutory construction, just as the same words should generally be given the same meaning when used in different places (*Nat'l Mines Co. v. Sixth Jud. Dist. Ct.*, 34 Nev. 67, 78 (1911)), so too should the conscious choice to use quite different words be respected by recognizing that the terms

convey different meanings (*see Nat'l Fed'n of Ind. Bus. v. Sebelius*, 132 S. Ct. 2566, 2583, 183 L.Ed.2d 450 (2012)).

Approximately thirty-seven states made the same choice as Nevada, adopting constitutional restrictions on the use of tax dollars to support religion with language that, on its face, is more restrictive than the First Amendment's. *See* Jill Goldenziel, *Blaine's Name in Vain?: State Constitutions, School Choice, and Charitable Choice*, 83 DENV. U.L. REV. 57, 69 (2005). And in keeping with the interpretive principles described above, most courts that have analyzed and applied these clauses have held that they mean exactly what they say: ***Any*** use of tax dollars that ultimately ends up in the coffers of religious institutions or otherwise pays to support religious exercise or instruction is strictly forbidden—even if the support is indirect, incidental, unintentional, and entirely permissible under the federal Establishment Clause.[2] As the

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[2] Various state courts have held that their state's no-aid clause forbids voucher programs that benefit religious schools. *See, e.g., Taxpayers for Pub. Educ. v. Douglas Cty. Sch. Dist.*, 351 P.3d 461, 471 (Colo. 2015) (Colorado Constitution prohibits voucher program that would provide public money to religious schools), *petition for cert. filed*, 84 U.S.L.W. 3261 (U.S. Oct. 28, 2015) (No. 15-558); *Bush v. Holmes*, 886 So. 2d 340, 352–53 (Fla. Dist. Ct. App. 2004) (same for Florida Constitution), *aff'd on other grounds*, 919 So. 2d 392 (Fla. 2006); *Chittenden Town Sch. Dist. v. Dep't of Educ.*, 738 A.2d 539, 562–63 (Vt. 1999) (Vermont Constitution forbids state reimbursement of religious-school tuition

U.S. Supreme Court has explained, the states may—and many do—"draw[] a more stringent line than that drawn by the United States

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absent safeguards to ensure that public money is not used to fund religious education); *Witters v. State Comm'n for Blind*, 771 P.2d 1119, 1121–22 (Wash. 1989) (Washington Constitution prohibits granting financial assistance to student attending religious college); *Sheldon Jackson Coll. v. Alaska*, 599 P.2d 127, 130–32 (Alaska 1979) (Alaska Constitution forbids grant programs that finance attendance at religious schools); *Hartness v. Patterson*, 179 S.E.2d 907, 909 (S.C. 1971) (South Carolina Constitution prohibits tuition grants to students attending religious schools); *Almond v. Day*, 89 S.E.2d 851, 856–57 (Va. 1955) (same for Virginia Constitution).

Similarly, many state court have found their no-aid clauses forbid aid in the form of textbooks or bus service, regardless of whether that aid is provided to religious schools or to students at those schools. *See, e.g.*, *In re Certification of Question of Law (Elbe v. Yankton Indep. Sch. Dist. No. 63-3)*, 372 N.W.2d 113, 117 (S.D. 1985) (South Dakota Constitution prohibits state from loaning secular textbooks to students attending religious schools); *Cal. Teachers Ass'n v. Riles*, 632 P.2d 953, 960–64 (Cal. 1981) (same for California Constitution); *Bloom v. Sch. Comm.*, 379 N.E.2d 578, 581–82 (Mass. 1978) (same for Massachusetts Constitution); *Gaffney v. State Dep't of Educ.*, 220 N.W.2d 550, 556–57 (Neb. 1974) (same for Nebraska Constitution); *Fannin v. Williams*, 655 S.W.2d 480, 483–84 (Ky. 1983) (Kentucky Constitution prohibits state from providing textbooks to religious schools); *Dickman v. Sch. Dist. No. 62C*, 366 P.2d 533, 539–42 (Or. 1961) (same for Oregon Constitution); *Paster v. Tussey*, 512 S.W.2d 97, 101–04 (Mo. 1974) (Missouri Constitution prohibits lending textbooks to students and teachers in religious schools); *Epeldi v. Engelking*, 488 P.2d 860, 865–66 (Idaho 1971) (Idaho Constitution prohibits using public money to transport students to religious schools); *Spears v. Honda*, 449 P.2d 130, 133–38 (Haw. 1968) (Hawaii Constitution prohibits using public funds to support bus transportation for religious-school students); *Op. of the Justices*, 216 A.2d 668, 670–71 (Del. 1966) (same for Delaware Constitution).

Constitution" to further their important "antiestablishment interests." *Locke*, 540 U.S. at 722, 124 S. Ct. at 1313. These constitutional choices are entirely permissible exercises of state legislative authority that must be respected. *See id.* at 725, 124 S. Ct. at 1315.

2. This Court has dispositively held that the No-Aid Clause strictly bars public expenditures for religious institutions and religious instruction.

But lest there be any question despite Section 10's plain language, this Court has ***already*** interpreted the No-Aid Clause to mean exactly what it says: Funds from the state treasury must not end up in the coffers of religious institutions or pay for religious instruction. That ruling is correct—and dispositive.

In *Hallock*, this Court held that the No-Aid Clause prohibited the legislature from allocating state funds to support the church-affiliated Nevada Orphan Asylum. Recognizing that "[t]he object of construction, as applied to a written constitution, is to give effect to the intent of the *people in adopting it*" (16 Nev. at 380 (emphasis in original)), this Court took care to "construe[Section 10] in the light of previous history and surrounding circumstances" (*id.* at 379), which the Court—being only two years removed from the Clause's ratification—was well placed to do.

The Court interpreted the term "sectarian," "in the popular sense," as referring, in the minds of the Clause's drafters and the people of Nevada, to any religious group "holding sentiments or doctrines different from those of other sects or people." *Id.* at 385. Thus, because the orphanage was affiliated with a church, it was by definition a sectarian institution that could not be funded. *Id.* at 386.

The Court's decision was reinforced by the facts that: At least some of the orphans were taught religious doctrine (*id.* at 384–85); there were daily prayers (*id.*) as well as worship services for Catholic children (*id.* at 385); and the orphanage's staff were members of a religious order (*id.* at 383–84). As the Court explained, "[t]he facts are, that all exercises of a religious nature [at the orphanage] are of one kind, exercises appertaining to the Catholic Church, and they are regular, and form as much a part of the daily routine, as does the study of geography or arithmetic." *Id.* at 386. Hence, the orphanage was barred by Section 10 from receiving state funds because, given the nature of the institution and its operations, the appropriation meant that money would end up being impermissibly "used for sectarian purpose." NEV. CONST. art. XI, § 10.

The Court found further support for this conclusion in the No-Aid Clause's legislative history. Noting that the legislature had made several appropriations to the orphanage in the years before the Clause was ratified, and recognizing that the orphanage was virtually the only religious institution considered for public funding at the time, the Court was "strongly impressed with the idea that, in the minds of the people, the use of public funds for the benefit of [the orphanage] and kindred institutions, was an evil which ought to be remedied, and that [the orphanage's] continued applications [for funding] greatly, if not entirely, impelled the adoption of the [Clause]." *Hallock*, 16 Nev. at 383. Indeed, the Court explained that although the Nevada Constitution at the time already prohibited religious instruction in the public schools, "the people were not satisfied with the constitution as it was. They demanded something more" (*id.* at 379)—namely, a flat ban on public funds going to religious institutions, religious exercise, or religious instruction. The Court further noted that "[p]eople of nearly all nationalities and many religious beliefs . . . met on common ground, and in the most solemn manner agreed that no sect should be supported or built up by the use of public funds." *Id.* at 387.

The Court considered, but was not swayed by, the State's argument that "the main purpose of the asylum [was] to provide for the physical wants of the orphan[s]," and "religious training occupie[d] but a small portion of the day." *Id.* at 374–75. Nor did it matter that the orphanage received children without regard to "creed or sect" (*id.* at 383); that non-Catholic students were excused from participating in the daily prayers (*id.* at 384); that the funds allocated by the legislature "d[id] not exceed the cost of the orphans' living" (*id.*); that the orphanage used the same textbooks as "those in common use in public schools" (*id.*); and that there were more than enough nonreligious uses to which the state funds could be put—such as "the physical necessities of the orphans"—to account for the entire appropriation (*id.* at 387).

Critically, the Court held that Section 10 barred the appropriation even though the orphanage manifestly served the secular purpose of caring for the orphans' physical well-being—indeed, that was the legislature's express intent in making the appropriation in the first place—because it would be impossible "to separate the legitimate use [of state funds] from that which is forbidden." *Id.* at 388.

Furthermore, "[i]t d[id] not matter that Catholic parents desire[d] their children [to be] taught the Catholic doctrines, or that Protestants

desire[d] theirs to be instructed in Protestantism," or that the orphanage respected the parents' preferences, because Section 10 "prohibits the use of any of the public funds for such purposes, whether parents wish it or not." *Id.* at 386.

In short, this Court held that the No-Aid Clause forbids using public funds "***directly or indirectly***, for the building up of any sect." *Id.* at 387 (emphasis added).[3]

3. The trial court's reliance on non-Nevada cases cannot be reconciled with Hallock.

The court below accepted the State's invitation to ignore both *Hallock* and the plain language of the Nevada Constitution in order to conclude that Section 10 is coterminous with the Establishment Clause

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[3] *Hallock*'s authoritative interpretation of the Clause has also been underscored by the Attorney General. Recognizing that parents have the absolute right to choose religious rather than public schooling for their children, the Attorney General concluded in 1956 that they are nonetheless precluded from gaining access to public funds to cover tuition or transportation costs: "The constitutional and statutory provisions against the use of public funds for educational purposes in private and parochial schools are as deep seated and deep rooted as our form of government." 56-209 Op. Nev. Att'y Gen. (Sept. 12, 1956). Nine years later, the Attorney General reiterated this strict prohibition, concluding that to accept federal funding for special education services for students in private schools, Nevada would have to keep these moneys in separate and identifiable accounts so as not to violate the prohibitions contained in Sections 2 and 10. 65-276 Op. Nev. Att'y Gen. (Nov. 6, 1965).

of the federal First Amendment. The court then applied federal law, which provides that voucher programs may be permissible if they are "programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals," and those individuals have real options to use the vouchers at secular as well as religious schools. *Zelman v. Simmons-Harris*, 536 U.S. 639, 645–46, 122 S. Ct. 2460, 2465–66 (2002); s*ee* RA Vol. 13, at 2979–80, 2983–84.[4] But this is ***Nevada***, and the voucher program is being challenged as a violation of the ***Nevada*** Constitution. So ***Nevada*** law, not ***federal*** law, is controlling.

Under the federal Clause, government impermissibly establishes religion when it acts with the purpose of advancing religion. *See, e.g.*, *McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 859–61, 125 S. Ct. 2722, 2732–34 (2005). In other words, the purpose inquiry is a legislative-intent requirement. In *Zelman*, the U.S. Supreme Court concluded that this test was met because "[t]here [wa]s no dispute that the [voucher] program challenged [t]here was enacted for the valid secular purpose of providing educational assistance to poor

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[4] The court did so without regard even for the absence of genuine (and federally required) choice for many students. *See* Section I.B.2, *infra.*

children in a demonstrably failing public school system." 536 U.S. at 649, 122 S. Ct. at 2465–66.

Based on *Zelman* and three other cases that similarly addressed indirect aid under the federal Establishment Clause, the court below held that S.B. 302 necessarily satisfied the Nevada No-Aid Clause's prohibition against putting public funds to "use[] for sectarian purpose" (NEV. CONST. art. XI, § 10) because this voucher program, like the one in *Zelman*, was enacted to promote education. *See* RA Vol. 13, at 2980. Specifically, the court below concluded that "the drafters [of Nevada's No-Aid Clause] contemplated [that] the Legislature could make expenditures which might impact upon a religion as long as the Legislature's purpose in making the appropriation was not to build up any religion." *Id.* at 2978.[5]

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[5] The court also pointed to *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 3, 113 S. Ct. 2462, 2464 (1993) (permitting federally funded sign-language interpreter to aid student attending religious high school); *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481, 488–89, 106 S. Ct. 748, 751–53 (1986) (permitting payment of vocational-rehabilitation grant to blind student who used the money for tuition at Christian college); *Mueller v. Allen*, 463 U.S. 388, 391–92, 398–400, 103 S. Ct. 3062, 3064–65, 3068–70 (1983) (upholding state tax deduction for educational expenses incurred by students attending religious schools), all of which held that the challenged funding was

That determination was triply erroneous: (1) It misconstrued the function of the word "purpose" in the No-Aid Clause to be the same as the judicially created purpose inquiry under the federal Establishment Clause; (2) it then mistakenly viewed this limited focus on legislative purpose to be the only concern of the No-Aid Clause; and (3) it straightforwardly ignored the holding in *Hallock*, 16 Nev. at 387, that, unlike the Establishment Clause, the No-Aid Clause forbids ***indirect*** aid to religion every bit as much it bars direct aid.

Although the term "purpose" appears in both the Nevada No-Aid Clause and cases applying the federal Establishment Clause, the word does not have the same function or meaning in these two entirely different contexts. The term was adopted into federal Establishment Clause jurisprudence in the early 1970s to denote, as explained above, a test of legislative intent. *See Lemon v. Kurtzman*, 403 U.S. 602, 612–13, 91 S. Ct. 2105, 2111 (1971) ("First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not

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indirect and therefore did not constitute governmental establishment of religion for First Amendment purposes.

foster an excessive government entanglement with religion.") (internal citations and quotation marks omitted).[6]

As used nearly a century earlier in the No-Aid Clause, by contrast, the term "purpose" does not denote merely a narrow legislative-intent requirement; nor did this Court contemporaneously interpret it that way in *Hallock*. Rather, in specifying that "[n]o public funds . . . shall be ***used for*** sectarian purpose" (NEV. CONST. art XI, § 10 (emphasis added)), the framers of Section 10 made clear that the focus must be on the actual "use" to which the money is put. The concern in the phrase "used for sectarian purpose" therefore is not just the intent but the actual 'end' or 'effect' of the spending—which is precisely how this Court applied the Clause in *Hallock*.

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[6] Even under the Establishment Clause's purpose inquiry, the fact that government action is motivated by a primary secular purpose is not sufficient to pass constitutional muster if it nevertheless violates any of the other myriad restrictions imposed by the First Amendment. *See, e.g.*, *Freiler v. Tangipahoa Parish Bd. of Educ.*, 185 F.3d 337, 343, 137 Ed. Law Rep. 195 (1999) (noting that the *Lemon* test is disjunctive and all three prongs must be satisfied); *see also, e.g.*, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 316, 120 S. Ct. 2266, 2282–83 (2000) (applying Establishment Clause's endorsement test); *Lee v. Weisman*, 505 U.S. 577, 587, 112 S. Ct. 2649, 2255 (1992) (coercion test); *Larson v. Valente*, 456 U.S. 228, 244–46, 102 S. Ct. 1673, 1683–84 (1982) (test assessing discrimination between faiths).

Had it been otherwise—had the No-Aid Clause been a bare requirement of secular legislative intent—*Hallock* would have come out the other way, for the appropriation (by a statute titled "An act to appropriate funds for the relief of the several orphan asylums of this state") was meant to feed and clothe orphans:

> There shall be appropriated out of the General Fund of the State of Nevada for the support and maintenance of the orphan inmates of the several orphan asylums or institutions in this State . . . a sum of seventy-five dollars per annum for each orphan thereof . . . .

1881 Nev. Stat. 122. As this Court explained, "It can not be doubted, that the appropriation was ***intended*** to be a mere charity"; the money was appropriated "for the physical necessities of the orphans"; and it was "no more than [wa]s required therefor." *Hallock*, 16 Nev. at 378 (emphasis added). Thus, although the appropriation had a manifestly secular purpose, as that term is used today under the federal Establishment Clause test, this Court considered whether the orphanage itself was sectarian—i.e., religiously affiliated (*id.* at 386–88); whether the orphanage conducted prayer services and instruction in religious doctrine for the children (*id.* at 384–85); and whether the orphanage's operators were members of a religious order or all adherents to the same faith (*id.* at 383–84). And the Court struck down

the appropriation for those reasons. In other words, what mattered—and still matters—under the No-Aid Clause is not just whether the legislature made an appropriation with the specific intent to fund religion and religious instruction, but whether the money ultimately goes to support religious institutions or religious uses.

The court below considered none of that. Because it erroneously adopted the federal purpose standard (one of many Establishment Clause tests) as the sole concern of the No-Aid Clause (RA Vol. 13, at 2979), it instead ended its review after conducting a bare legislative-intent inquiry. Indeed, it did so even though, if this case had been brought under the federal First Amendment, it would have been unlikely to survive scrutiny under the other Establishment Clause tests unrelated to purpose. *See supra* n.6.. For example, under the voucher program, there are entire counties in Nevada where the only genuine options for private schools are religious schools (RA Vol. 1, at 8, ¶ 37), and schools participating in the voucher program are permitted to discriminate in enrollment and teach any religious doctrine they wish (RA Vol. 1, at 12–18, ¶¶ 54–81). In *Zelman*, by contrast, there was a wide range of nonreligious schooling options, thus providing a more genuine "choice" for participating families and students. *See* 536 U.S. at

645–49, 662–633. And participating schools were not allowed to discriminate in enrollment on the basis of religion, race, or ethnic background, nor were they allowed to "teach hatred of any person or group" even if religiously grounded. *See id.* at 645.

Essentially the same defects explain the handful of decisions from other jurisdictions that have similarly restricted their state constitutions to what the federal First Amendment specifies. *See* RA Vol. 13, at 2978–79, 2983–84. And, of course, those non-Nevada cases do not analyze the language or legislative history of the Nevada No-Aid Clause or take account of the broad, interfaith agreement by the people of this State that "no sect should be supported or built up by the use of public funds." *Hallock*, 16 Nev. at 387. Most importantly, those courts were not bound—as the court below should have been—by this Court's precedent of *Hallock*.

B. S.B. 302 uses public funds for a sectarian purpose in violation of the No-Aid Clause.

As alleged in the Complaint, the challenged voucher program mandates that tax dollars be drawn from the state Treasury for the purchase and provision of religious instruction at religious schools (*see* RA Vol. 1, at 1–18, ¶¶ 1, 6, 26–27, 38, 45–81), thus straightforwardly violating the No-Aid Clause. The State cannot evade Section 10's strict

constitutional prohibitions by passing the public funds through accounts nominally listed in parents' names, not just because the No-Aid Clause prohibits even indirect aid, but also because the State retains ownership and control over the voucher accounts and the funds in them until the money finally reaches the religious schools; the voucher program impermissibly subsidizes parents' religious exercise by funding education in the parents' faith; and the religious schools will put the voucher funds to sectarian purposes.

1. Voucher funds are public funds.

The voucher program disburses taxpayer dollars directly out of the Distributive School Account of the State General Fund. *See* S.B. 302 § 16; RA Vol. 1, at 5, ¶¶ 18–19. Briefly holding the money in a limited-purpose, state-sponsored, state-controlled voucher account does not alter the funds' public nature—as the district court appears to have acknowledged (*see* RA Vol. 13, at 2960).

Although voucher accounts are nominally set up in parents' names, the accounts and the funds in them remain under the State's strict control until they are paid to private schools. By statute, the Treasurer deposits state funds from the Distributive School Account into voucher accounts only after parents have signed a one-year agreement with the State that provides for the State's continuing and

absolute regulatory control over the funds. S.B. 302 §§ 7(1), (4)–(5). The funds may be spent only on statutorily authorized expenses, such as tuition, fees, textbooks, and tutoring. *Id.* § 9.1. The voucher accounts are managed not by the parents but by financial managers selected and retained by the Treasurer; the accounts are randomly audited each year; and the Treasurer is empowered to freeze or dissolve any account if the money is "misused." *Id.* §§ 7(2), 10.1–10.3. The State may freeze the accounts during school breaks. *Id.* § 7.1(d). When a voucher student moves out of state or a voucher agreement otherwise terminates (e.g., at the end of the one-year contract term), any money left in the account reverts automatically to the State's General Fund. *Id.* §§ 7.5, 8.6(b). Participating schools are strictly prohibited from refunding voucher money to parents; should they do so, the parents are required by law to deposit the money back into the voucher account, where it is subject to reversion to the State. *Id.* §§ 8.6, 9.2–9.3.

In short, the voucher accounts and the funds in them are not, never were, and never can be the parents' or students' property; they are public funds that remain the property of the State and under state control unless and until they are paid to a private school. Even then,

the State, not the parents, retains strong, indefeasible reversionary interests in the money.

2. The voucher program will put state funds to religious uses.

Hallock is clear: If "public funds of any kind or character whatever" go to a sectarian institution—i.e., one that teaches religious doctrine (16 Nev. at 377, 384–85), holds prayer services (*id.*), or is operated exclusively by adherents of the same religion (*id.* at 383–84)—or if public funds otherwise end up paying for religious goods or services, even indirectly, they are being impermissibly "use[d] for sectarian purpose" (*id.* at 384–87). As detailed in the Complaint, many private schools that would receive voucher funds are sectarian institutions. Indeed, in some Nevada counties, those are the ***only*** schools where a voucher might be used, for there are ***no*** secular private schools. RA Vol. 1, at 8, ¶ 37. The educational programs purchased from these schools are explicitly religious in nature. *Id.* at 9–18, ¶¶ 45–81. And many parents who will participate in the voucher program, including the Intervenors in this case, send or will send their children to religious schools precisely for the religious content—in fact, for some, doing so is the fulfillment of a religious commandment. *Id.* at 16–18, ¶¶ 70, 72, 79. Hence, the vouchers would subsidize a religious service at

a religious institution sought by the parents as part of their religious exercise.

S.B. 302 defines "participating entit[ies]"—i.e., schools entitled to receive voucher funds—to include schools "exclusively offering religious or sectarian studies" and those "operated by churches, religious organizations and faith-based ministries." S.B. 302 § 5; NRS § 394.211(1)(c), (d).

Once these private, religious schools receive taxpayer funds, there is no law, mechanism, or procedure to restrict or monitor how they spend the public money. The court below misread the statutory scheme here to require that "[p]arents, if they choose to use the ESA program, must expend the ESA funds for secular education goods and services, even if they choose to obtain these services from religion affiliated schools." RA Vol. 13, at 2981. But nothing in S.B. 302 provides any of the limitations that the district court purported to find.

Quite the contrary. The statute expressly authorizes and directs voucher money to religious schools that, for example, serve as church ministries. RA Vol. 1, at 9, ¶¶ 39–44. The mission statements of these schools include: "produc[ing] achievers for the cause of Jesus Christ," "prepar[ing students] for a lifetime of service to God," "equipping

students to fulfill their role in the Great Commission," "provid[ing] the opportunity for . . . children to grow in their relationship with God," and "leading students to adopt scripturally based [religious] philosophy, objectives, and standards which will become their mode of life." RA Vol. 1, at 9–11, ¶¶ 46, 49–51, 53. In keeping with their religious missions, many of the schools require students to participate in religious rituals such as prayer, liturgy, or chapel services. *Id.* at 10–15, ¶¶ 48, 55, 60, 62, 65, 66, 67.

What is more, these schools' curricula are thoroughly infused with religious doctrine, even for nominally secular subjects. *Id.* at 12–15, ¶¶ 54–68. For example, Plaintiffs alleged that Logos Christian Academy in Churchill County describes itself as "teach[ing] all subjects as parts of an integrated whole with Scriptures at the center." *Id.* ¶ 57. At Foothills Church Academy in Washoe County, "Scripture passages are integrated throughout worktexts to help students connect daily learning to biblical truth." *Id.* ¶ 68. And Liberty Baptist Academy in Clark County uses the *A Beka* curriculum, which includes instruction on "creation and the Creator" in health and science class and teaches history and geography from "a Christian perspective." *Id.* ¶ 59 (citing Liberty Baptist Academy, *Curriculum*, www.tinyurl.com/p69av7p). The

A Beka curriculum even infuses religious instruction into mathematics: The textbooks teach that "the laws of mathematics are a creation of God and thus absolute"; and they exclude instruction on "modern theories such as set theory" because, as a "creation of man" rather than God, modern math is "arbitrary and relative." *Id.* ¶ 59 (citing A Beka, *The A Beka Difference*, www.tinyurl.com/osj38q5 (last visited July 11, 2016)).

Finally, many voucher-eligible religious schools employ religious tests for admission, enrollment, and employment. They require students, parents, and teachers to share in the school's religion or be members of the sponsoring church. RA Vol. 1, at 15–18, ¶¶ 70, 72, 76, 79. They require students, parents, and teachers to sign and live by statements of faith. *Id.* ¶¶ 70, 71, 74, 77, 79. They reject or expel lesbian, gay, bisexual, and transgender students—or even students who have an LGBTQ parent. *Id.* ¶¶ 70, 72, 73. They forbid students to obtain abortions. *Id.* ¶¶ 75, 78. And they fire employees and deny admission to, or expel, students who fail to live up to any of these or numerous other religious requirements. *Id.* ¶¶ 70, 72–73, 75–76, 78–79.

This Court in *Hallock* struck down a funding scheme even when the orphanage took in all children regardless of religious affiliation, excused children from daily prayer, and used the same textbooks as

those in the public schools. *See Hallock*, 16 Nev. at 383–86. Yet the voucher program here would use public money to fund schools that discriminate in admissions based on religious belief and church membership, require participation in prayer and religious rituals, and use blatantly sectarian textbooks. The voucher program cannot be upheld without overturning *Hallock*. And that would require, at a minimum, "compelling reasons" (*Miller v. Burk*, 124 Nev. 579, 597 & n.63 (2008))—which do not exist—to conclude that this Court in *Hallock* completely misunderstood the Clause and the context in which it arose.

While parents undeniably have the right to send their children to religious schools, the No-Aid Clause prohibits the State from subsidizing that sectarian education.

II. Appellants Have Stated A Claim Under Article XI, Section 2, of the Nevada Constitution.

Article XI, Section 2, places immense importance on guaranteeing a robust, secular public education for all Nevada schoolchildren. The provision mandates that the State educate Nevada's youth through common, uniform, secular schools that are open and accessible to all:

> The legislature shall provide for a uniform system of common schools, by which a school shall be established and maintained in each school district at least six months in every year, and any school district which shall allow instruction of a sectarian character therein may be deprived

> of its proportion of the interest of the public school fund during such neglect or infraction, and the legislature may pass such laws as will tend to secure a general attendance of the children in each school district upon said public schools.

NEV. CONST. art. XI, § 2. The district court showed little regard for these protections, construing Section 1 of Article XI to trump Section 2 and all other constitutional restrictions, and holding that Section 2 prohibits only a complete abolition of the public schools by the State.

The district court's interpretation, when followed to its logical conclusion, cannot be right. If Section 1, which authorizes the State to "encourage by all suitable means the promotion of intellectual, literary, scientific, mining, mechanical, agricultural, and moral improvements," takes precedence over Section 2 and, indeed over all other clauses of Article XI, there would be no need for those other provisions. The State could inculcate religion in its public schools, or take any other action in violation of Article XI's express prohibitions and mandates, as long as it did so in furtherance of any of the interests set forth in Section 1. And if Section 2 merely prohibited the State from completely abolishing the public-school system, it would allow the State to support, through taxpayer dollars, a robust private-education system, while maintaining the public-school system as only a shell of what it once was. That is not what the framers of the Education Article envisioned, and it is not what

Nevada's students and parents deserve. As pleaded in the Complaint, the voucher program violates Section 2 because it funds a non-uniform system of schools in which sectarian instruction is the norm and whole classes of children are barred from attendance. In doing so, the program severely undermines the State's ability to satisfy its constitutional responsibility to educate Nevada's public-school children. RA Vol. 1, at 1–20, ¶¶ 6–7, 18, 19, 25, 54–81, 91–92.

A. Section 1 of the Education Article does not expansively authorize the State to establish a voucher program that violates other provisions of Article XI.

The court below held that Article XI, Section 1, authorizes the State to establish a voucher program without regard to the constitutional limitations imposed by the Article's other Clauses. In doing so, the court impermissibly ignored the canons of constitutional construction by reading Section 1 in isolation, thereby abrogating Section 2—and all the other provisions of the Article. That ruling cannot be squared with the intent of Article XI's framers.

1. The district court failed to consider whether the voucher program violates Section 2 before concluding that it is authorized by Section 1.

Article XI, Section 1, reads in full:

> The legislature shall encourage by all suitable means the promotion of intellectual, literary, scientific, mining,

> mechanical, agricultural, and moral improvements, and also provide for a superintendent of public instruction and by law prescribe the manner of appointment, term of office and the duties thereof.

NEV. CONST. art. XI, § 1. The district court erred in holding that the voucher program is a "suitable means" under Section 1 ***before*** it analyzed the constitutionality of the voucher program under Section 2. *See* RA Vol. 13, at 2965–69. As a matter of constitutional and statutory construction, courts must "read each sentence, phrase, and word" in the Nevada Constitution "to render it meaningful within the context of [its] purpose . . . . Further, no part . . . should be rendered meaningless and its language should not be read to produce absurd or unreasonable results." *Harris Assocs. v. Clark Cty. Sch. Dist.*, 119 Nev. 638, 642 (2003) (internal quotation marks and citations omitted). The court below violated these rules, adopting a construction of Section 1 that negates the restrictions in Article XI and thereby renders the term "suitable" meaningless.

a. The district court accepted the State's invitation to interpret Section 1's "all suitable means" requirement as an express authorization for the State to take any action—regardless of its constitutionality—that tends to encourages "intellectual, literary, scientific, mining, mechanical, agricultural, [or] moral improvements"—

in other words, ***anything*** that the legislature deems appropriate to promote education. The court then opined that, because the legislature could view the voucher program as promoting education, it is a "suitable means" under Section 1 and therefore is constitutionally authorized. Only after reaching that conclusion did the court stop to consider whether "this interpretation [of Section 1] is inconsistent with any other provisions of the constitution" (RA Vol. 13, at 2965–66).

The district court conducted the analysis exactly backwards. "[L]anguage cannot be construed in a vacuum; it is a fundamental canon of statutory construction that the words of a statute [or Constitution] must be read in their context and with a view to their place in the overall statutory scheme." *See Roberts v. Sea-Land Servs., Inc.*, 132 S. Ct. 1350 (2012). Indeed, "oftentimes the meaning—or ambiguity—of certain words or phrases may only become evident when placed in context. So when deciding whether the language is plain, the court must read the words in their context and with a view to their place in the overall statutory scheme." *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (internal quotation marks omitted). Thus, as this Court has recognized, "[w]hen interpreting multiple provisions, we must read the provisions in harmony, unless it is clear the Legislature intended

otherwise." *City of N. Las Vegas v. Warburton*, 127 Nev. 682, 262 P.3d 715, 718 (2011).

Accordingly, to understand the suitable-means requirement, Section 1 must be read in conjunction with the rest of Article XI, which specifies the State's particular obligations with respect to education. And that entails considering ***first*** the import and effect of the other, specific constitutional provisions in Article XI before determining what might be constitutionally permissible, and hence "suitable," to further education under Section 1. In other words, an action is unsuitable as a matter of law and cannot be allowed under Section 1 if it is prohibited by Sections 2 through 10.

The requirements and restrictions of Article XI are legion. For example, Section 3 forbids the transfer of educational funds from the public schools to other purposes. Section 6 prohibits the legislature from funding other initiatives before securing sufficient funding for the public schools. Section 9 bars sectarian instruction in public schools. And, of course, Section 10 prohibits the use of public funds for sectarian purposes.

By interpreting Section 1's suitable-means requirement to authorize anything remotely promoting education without first looking

to the specific requirements and restrictions in the rest of Article XI, the court below largely nullified these other provisions—and in the process rendered the term "suitable" meaningless. If the suitable-means requirement really authorized any action thought to promote education, mining, agriculture, moral improvement, or any of the other goals listed in Section 1, and is not limited by the rest of the Article, then Section 1 licenses the legislature to divert educational funds from the schools to mining (contrary to Section 3); it permits the legislature to put the funding of the schools last in line behind other budgetary priorities that promote agriculture (contrary to Section 6); and it allows the state to teach religion in the public schools or to use tax dollars to construct churches as means to promote "moral improvement" (contrary to Sections 9 and 10). As long as the legislature deemed those activities to benefit the expansive categories identified in Section 1, they would be constitutionally permissible in the district court's view, despite the clear prohibitions in the rest of the Article. That makes no sense. It is not what the framers of the Education Article envisioned. And it is not what Nevada's students and parents deserve.

b. The proper analytical framework would have been for the court below to have determined, first, whether the voucher program violates

any other constitutional or statutory provisions (or at least those constitutional mandates that Plaintiffs have identified). Only upon concluding that there was no other legal bar should the court have even considered whether the program was otherwise "suitable" to promote education.

Put differently, reading Section 1 in light of the rest of Article XI makes clear that "suitable means" is not an expansive grant of authority; it is a ***limitation*** on an otherwise expansive authorization. The means of promoting education must be suitable and must not be unsuitable; to read the phrase any other way would violate "well-established canons of statutory [and constitutional] interpretation" that forbid rendering any words superfluous. *Arguello v. Sunset Station, Inc.*, 127 Nev. 365 (2011). And whatever else the phrase "suitable means" might entail, a "means" certainly is not "suitable" if it is constitutionally forbidden. Indeed, if some state action in the name of promoting education violates other constitutional prohibitions or prevents the State from accomplishing what it is constitutionally mandated to do, that action is ***un***suitable as a matter of law, and Section 1 cannot save it. By failing to consider the effect of the other constitutional provisions before deciding what is "suitable" in the

abstract under Section 1, the court stripped the word "suitable" of all meaning while largely abrogating the rest of Article XI.

2. Article XI, Section 1, is directed at encouraging public education.

Moreover, even if the district court's analytical structure were correct, Section 1 still does not permit the legislature to fund private and religious educational institutions. Rather, it grants authority to the legislature to ensure a robust and successful public-school system.

A plain reading of Section 1 in its entirety demonstrates that it was meant to encourage public education. Although the first clause charges the legislature with encouraging certain types of "improvements," the second requires the legislature to create the office of "superintendent of ***public*** instruction." NEV. CONST. art. XI, § 1 (emphasis added). As courts must "construe statutes to give meaning to all of their parts and language" (*Harris Assocs.*, 119 Nev. at 642), the clauses cannot be read in isolation. As a whole, they plainly refer to the encouragement of intellectual and other improvements ***through the public-education system***.

This understanding of Section 1 is affirmed by the legislative history in the Nevada Constitutional Debates:

> Mr. DUNNE: If I understand [Article XI Section 1] correctly . . . the doctrine enunciated is substantially this: that the State has a right to establish educational institutions, including therein moral instruction, and has a right to insist upon the attendance and reception of such moral instruction as the State may establish, or provide for in such institutions, on the part of all the children of the State.
>
> Mr. COLLINS: That is, in the general sense of morality. It was the view of the chairman, and I think the committee generally agreed with him on that point, that the State may properly encourage the practice of morality, in contradistinction to sectarian doctrines. For instance, if a child insist on the practice of using profane language, I presume it should be made the duty of the School Superintendent, the teacher, or the Board of Education, to insist that he shall either refrain from such practice, or be expelled. There must be power somewhere to exact conformity to the general ideas of morality entertained by civilized communities.

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Yet the court below made the unsupported determination that the drafters meant for Section 1 instead to "provide the Legislature [with] broad powers . . . to take whatever actions it believed appropriate to encourage education." RA Vol. 13, at 2966. That is plainly inaccurate. The drafters of the Nevada Constitution intended for Section 1 to promote public education, and the voucher program runs afoul of the drafters' clear intent.

B. Article XI, Section 2, forbids state funding for a non-uniform school system.

Under Article XI, Section 2, the State must use the public funds set aside for public education to provide secular instruction at public schools that are open on equal terms to all schoolchildren. The State, therefore, cannot use taxpayer dollars to promote a competing system of non-uniform private or parochial schools. Plaintiffs properly pleaded this claim and alleged that the voucher program provides public funding to private and religious schools whose curricula, instruction and educational standards are far from uniform. RA Vol. 1, at 3, ¶ 7.

The district court incorrectly held that, when read in conjunction with Section 1, Section 2 does not prohibit taxpayer dollars from funding private or parochial schools, even when those schools impart instruction wildly divergent from that offered in the public schools and bar attendance based on any number of characteristics, including religion and sexual orientation. This holding is at odds with Section 2.

This Court has embraced the canon of construction "'[E]xpressio Unius Est Exclusio Alterius', the expression of one thing is the exclusion of another," when interpreting both statutory and constitutional provisions. *Galloway v. Truesdell*, 83 Nev. 13, 26, 422 P.2d 237, 246 (1967). Thus, "[t]he affirmation of a distinct policy upon

any specific point in a state constitution implies the negation of any power in the legislature to establish a different policy." *Id.* As applied here, the constitutional directive that the State fund and maintain a public, uniform school system necessarily means that it cannot simultaneously fund and maintain a nonpublic, non-uniform, and competing school system—much less strip the funding from the former to pay for the latter. Yet that is exactly what the voucher program does.

Further, other courts have recognized that voucher programs like the one here, may violate state constitutional provisions similar to Section 2. In *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006), the Florida Supreme Court held that a voucher program violated Florida's constitutional mandate for a uniform public-school system because the program "devot[ed] the state's resources to the education of children within [the] state through means other than a system of free public schools." *Id*. at 407.

The district court disregarded *Bush* because the Nevada Constitution's language does not precisely mirror Florida's. RA Vol. 13, at 2968–69. In doing so, however, it made the erroneous assumption that Section 1 trumps Section 2 (as explained *supra*) and ignored the

many similarities between Nevada's constitutional provisions and Florida's.

In that regard, the *Bush* court engaged in a detailed analysis to determine that a competing system of private schools was contrary to the Florida Constitution. It rested its decision on two grounds: (1) the Florida Constitution made it a paramount duty of the state to educate its children adequately; and (2) the Florida Constitution specifically set forth how to accomplish that aim—through a uniform system of public schools. *Bush* 919 So. 2d at 405. The Nevada Constitution has parallel mandates: The 2006 "Education First" amendment made it the legislature's chief duty to fund public education "***before*** any other appropriation is enacted to fund a portion of the state budget." NEV. CONST. art. XI, § 6 (emphasis added); *see* State of Nevada Statewide Ballot Questions 4–5, 2006, https://nvsos.gov/Modules/ShowDocument.aspx?documentid=206 ("Education First will ensure that the funding of education in Nevada will be given the status intended by the framers of our Constitution . . . ."). And Section 2 specifically sets forth how to accomplish the State's education goals—through a system of public schools. Accordingly, this Court should hold, as the Florida Supreme Court did, that the State violates its duty to create a uniform school

system open to all children when it funds a competing, non-uniform system.

C. Article XI, Section 2, forbids the State to undermine the public-school funding system.

Even if the State were constitutionally permitted to fund a non-uniform, private, sectarian school system (which it is not), the State would still be prohibited from enacting a program that undercuts its duty to provide a uniform public-school system.[7] Nevada's unprecedented voucher program places no restrictions on enrollment and operates with money otherwise reserved for the public schools, thereby disrupting the uniform system of public instruction that the State is constitutionally required to provide under Section 2.

1. Implicit in Section 2's constitutional mandate is the promise that the State will provide a meaningful public education. The framers of the Nevada Constitution recognized the critical importance of the education imparted to Nevada's children. Albert T. Hawley, for example, one of the delegates to Nevada's Constitutional Convention, remarked that Nevadans wanted a "basis upon which to build the

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[7] As explained in Part III, *infra*, the court erroneously held that Plaintiffs do not have standing to allege facts that go to this aspect of the Section 2 claim.

educational superstructure, by means of which we can afford every child a sufficient amount of instruction to enable it to go creditably through life." K. Nicholas Portz, *Education Reform Litigation in Nevada: Is the Nevada Legislature Neglecting Its Constitutional Duties?*, 11 NEV. L.J. 849, 871–72 (2011) (citing to Official Report of the Debates and Proceedings in the Constitutional Convention of the State of Nevada 577 (1866) (statement of Mr. Hawley)).

This promise to provide a meaningful education holds true today. As this Court has held, Nevada students have a right to a public education because "[t]he framers have elevated the public education of the youth of Nevada to a position of constitutional primacy. Public education is a right that the people, and the youth, of Nevada are entitled, through the Constitution, to access." *Guinn v. Legislature of Nev.*, 119 Nev. 277, 287, *clarified on denial of reh'g*, 119 Nev. 460 (2003), *overruled on other grounds by Nevadans for Nev. v. Beers*, 122 Nev. 930 (2006). Indeed, in 2006 the people of Nevada amended the Constitution to ensure that public schools receive funding "***before*** any other appropriation is enacted." NEV. CONST. art. XI § 6 (emphasis added). Any funding scheme that robs the public schools of the money

necessary to provide a meaningful education to Nevada's children, therefore, cannot be reconciled with Article XI.

2. S.B. 302 is just such a funding scheme. As alleged in the Complaint, voucher funding comes directly from the Distributive School Account, i.e., money that has been specifically allocated to support the public schools. RA Vol. 1, at 5–6, ¶¶ 17–20. Moreover, ***any*** school-age child in Nevada is eligible to receive a taxpayer-funded voucher after enrolling in public school for 100 consecutive days. RA Vol. 1, at 5, ¶ 17. Nevada's voucher law is thus unlike any other established voucher program across the country, all of which limit enrollment in some capacity (such as to students living around the poverty line, suffering from a disability, or attending a failing school). *See, e.g.*, *Meredith v. Pence*, 984 N.E. 2d 1213 (Ind. 2013) (program limited to students at or below 150% of poverty line); *Niehaus v. Huppenthal*, 233 Ariz. 195, 196 (2013) (program restricted to students with "recognized disabilit[ies]"); *Davis v. Grover*, 166 Wis. 2d 501, 514–15 (1992) ("[T]he legislature placed significant limitations on the scope of the program."). There is no limit to S.B. 302's drain on public-education funding, making the scope of the program uniquely boundless. *Id.* at 6, ¶ 25. This unrestricted program will cause irreparable harm to Nevada's public-education

system. *Id.* at 20, ¶ 93. These facts are sufficient to constitute a violation of Section 2.

The court below erred in holding that as long as the State establishes a barebones public-school system, with some set of uniform standards, no matter how impoverished the schools or the education that they provide might be, the legislature may do anything else it wishes in the name of education, including redirecting without restriction the funds constitutionally earmarked for the public schools. That cannot be so. This interpretation of Section 2 would allow the legislature to fund the public schools at the paltriest of levels, set the most trivial of educational standards, and divert the lion's share of the Distributive School Account to a parallel system of state-funded private education—an outcome that cannot be squared with Nevada's constitutional commitment to public education. By no means should the "success [of private schools] . . . come at the expense of our public education system . . . ." *Simmons-Harris v. Goff*, 86 Ohio St. 3d 1, 11 (1999).[8] This Court should reject the district court's misguided view of Section 2 and reinstate Plaintiffs' Section 2 claim.

[8] For that reason, a far-reaching voucher program like the one here would give rise to a claim for relief even if more modest voucher

III. In Violation Of The Motion-To-Dismiss Standard, The District Court Misapplied Standing Doctrine To Exclude Properly Made Allegations.

While the court below correctly recognized the existence of taxpayer standing to challenge S.B. 302's unconstitutional spending under Article XI, Sections 2 and 10, it refused to consider multiple factual allegations in the Complaint that go directly to these claims because it determined that Plaintiffs lacked standing to allege those particular facts. RA Vol. 13, at 2946, 2962. But standing doctrine determines whether a plaintiff is entitled to state a legally cognizable claim for relief (*see, e.g.*, *Heller v. Leg. of Nev.*, 120 Nev. 456, 460 (Nev. 2004)), not whether the plaintiff is entitled to allege any particular set of facts. Allegations of fact either support a cognizable claim (meaning

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programs might be permissible. The court in *Simmons-Harris v. Goff*, 86 Ohio St. 3d at 1, for example, evaluated whether a school-voucher program violated a clause of the Ohio Constitution that required the state to fund a "system of common schools." The challenged program was open only to students residing within the Cleveland City School District, and the number of vouchers was limited by the amount of money appropriated by the Ohio General Assembly. *Id.* at 1. Although ultimately holding that the program's relatively low funding level did not undermine Ohio's obligation to provide public education, the court also concluded that "it is possible that a greatly expanded School Voucher Program or similar program could damage public education. Such a program could be subject to a renewed constitutional challenge." *Id.* at 11 n.2. That is exactly the case here: Nevada's "greatly expanded" voucher program is damaging to the public-education system and thus violates Section 2.

that, if proven, they would be evidence for that claim), or they don't. But either way, the idea of standing to allege particular facts—or the lack thereof—is a category mistake. And here, the factual allegations that the district court disregarded directly support Plaintiffs' legally cognizable claims of constitutional injury.

1. On a motion to dismiss, courts are "bound to accept all the factual allegations in the complaint as true." *Marcoz*, 106 Nev. at 739. Although the court below recited this standard, it nevertheless discarded two categories of factual allegations. First, it rejected Plaintiffs' allegations that many of the private religious schools that will receive voucher funding have discriminatory admissions and employment policies. RA Vol. 13, at 2962, 2971–72. Second, it rejected Plaintiffs' allegations that the voucher program's diversion of public funds from the Distributive School Account will harm the public schools that would otherwise have received those funds. RA Vol. 13, at 2962, 2970–71. The court's rejection of those factual allegations reflects a fundamental misunderstanding of the nature of Plaintiffs' claims.

2. Plaintiffs properly alleged that the voucher program will fund private religious schools that discriminate on the basis of religion, sexual orientation, gender identity, pregnancy status, and other

characteristics. RA Vol. 1, at 15–18, ¶¶ 69–81. These allegations necessarily follow from: (i) the nature and character of the religious schools as they formally describe themselves; (ii) Nevada's statutory exemption of these religious schools from regulation (NRS § 394.211); (iii) the statutory designation of these exempt religious schools as "participating entit[ies]" in the voucher program (S.B. 302 § 5); and (iv) the statutory guarantee that "nothing in the provisions of [S.B. 302] shall be deemed to limit the independence or autonomy of a participating entity" (S.B. 302 § 14).

The court below rejected the factual allegations about the schools' discriminatory practices, however, not on some theory that they are fanciful, but in the mistaken belief that Plaintiffs lack standing to allege them because Plaintiffs have not personally experienced discrimination at the hands of these schools and their administrators. RA Vol. 13, at 2962, 2971–72.

To be sure, students who are denied admission to or expelled from, and teachers who are denied employment with or fired from, schools that engage in discriminatory practices may well be victims of that discrimination. Whether or when such discrimination by a private party

might be actionable is a serious legal question. But that is not what this case is about.

Plaintiffs' claims are of an entirely different character. The Section 10 claim challenges the expenditure of Plaintiffs' tax dollars for religious uses—including the religiously motivated discrimination undertaken to serve the schools' religious beliefs or to further the schools' theological commitments and religious missions.[9] And the Section 2 claim challenges the diversion of Plaintiffs' tax dollars from the public schools to support a separate educational system that is neither public, nor secular, nor generally open to all. In other words, Plaintiffs challenge the state action of the ***legislature*** in funding

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[9] Courts have repeatedly held that an organization's religiously motivated discrimination matters when determining whether public funding of the organization would violate the federal Establishment Clause. *See, e.g.*, *Pedreira v. Ky. Baptist Homes for Children, Inc.*, 579 F.3d 722, 732–33 (6th Cir. 2009) (listing cases); *Moeller v. Bradford Cty.*, 444 F. Supp. 2d 316, 335–36 (M.D. Pa. 2006) (taxpayers may use fact that prison program's employees were subject to religious testing as proof that government was violating Establishment Clause); *Freedom From Religion Found. v. McCallum*, 179 F. Supp. 2d 950, 955 (W.D. Wis. 2002) (taxpayers may use fact that prison program considered "Christian-based" spirituality a factor in its hiring process as evidence of program's religious nature). Religiously based discrimination must, therefore, also be pertinent when determining whether diverting public funds to religious schools would use those funds for sectarian purposes under Nevada's far-more-restrictive No-Aid Clause.

religion and private schooling, not the private actions of the ***schools*** in choosing to discriminate in how they run their programs.

Plaintiffs' claims are thus premised on the personal, individualized, legally cognizable harm of having their tax money spent in contravention of the Nevada Constitution. In acknowledging that Plaintiffs have taxpayer standing to bring those claims (RA Vol. 13, at 2959–62), the court below should have recognized that the Complaint's allegations about discriminatory conduct by the private schools receiving voucher money are factual allegations about precisely what the State is paying to support. These allegations are thus highly relevant for determining whether taxpayer dollars are being unconstitutionally misspent—the legal question at the heart of Plaintiffs' constitutional claims. They are not and were never meant to be allegations supporting a claim (presumptively under some state antidiscrimination statute) that Plaintiffs themselves have been the targets of discrimination.

Moreover, to the extent that the district court viewed as speculative Plaintiffs' allegations that religious discrimination would actually occur at participating schools (RA Vol. 13, at 2987) and based its decision on that view, it ventured far astray from the motion-to-

dismiss standard. As noted above, the court was required to accept as true all allegations in the Complaint for purposes of the motion to dismiss.

3. The court below also cast aside Plaintiffs' allegations about the harms that Nevada's public schools will suffer once S.B. 302 diverts state educational funds to private schools, opining that because the harm has not yet occurred, Plaintiffs have no standing to allege it. *See* RA Vol. 13, at 2970–71 ("The applied effect of the ESA program is yet to be determined and can ultimately be considered based on the impact it actually makes."). But this was not a nascent proposal: The program was mere weeks away from launch when enjoined by the *Lopez* court. And both state and federal courts generally recognize that a party need not wait for an imminent harm to occur before bringing suit. *See, e.g.*, *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 181, 120 S. Ct. 693, 704 (2000); *Prigmore v. City of Redding*, 211 Cal. App. 4th 1322, 1349–50 (2012) (plaintiff need show only a "realistic danger" or "credible threat" of prosecution under handbill ordinance to have standing); *Coral Const., Inc. v. City of S.F.*, 116 Cal. App. 4th 6, 17–18 (2004) (finding standing based in part on plaintiff's likely but as-yet-indeterminate future harm under challenged statute).

These harms matter here because, once again, they are allegations that, if proven, will support Plaintiffs' claim that the State is violating Section 2 by undermining the system of public education that the State is required to maintain. Moreover, the allegations speak directly to the harm that Plaintiff Berger will face as a public-school teacher and the parent of a public-school student if the state appropriations that should go to their schools are drained away. Plaintiffs are not, and should not be, required to wait until public schools are actually and irremediably harmed before they can sue under Article XI.

4. Finally, in ruling that Plaintiffs lack standing to allege various facts, the district court incorrectly assumed that because Plaintiffs' claims are premised on taxpayer standing, Plaintiffs are entitled to bring only facial and not as-applied challenges to S.B. 302 (*see* RA Vol. 13, at 2962 ("This Court emphasizes that it finds the Plaintiffs as taxpayers only have standing to bring facial challenges to the ESA statute."); *id.* ("Plaintiffs do not have standing to assert these potential specific applied injuries as challenges to the ESA program as they have not personally suffered any harm.")).

Taxpayers who allege that public funds are being unconstitutionally misspent, however, can challenge a statute both on

its face and as applied, as federal taxpayer-standing cases under the Establishment Clause make clear. *See, e.g.*, *Bowen v. Kendrick*, 487 U.S. 589, 601–02, 618–19, 621, 108 S. Ct. 2562, 2570–71, 2579–80, 2581 (1988) (denying facial challenge to statute that provided funding to a variety of organizations, including religious ones, but remanding for determination whether statute violated Establishment Clause as applied). And the line between facial and as-applied challenges is often blurry. *See id.* at 602, 108 S. Ct. at 2570 (explaining that the "Court's opinions have not even adverted to (to say nothing of explicitly delineated) the consequences" of the distinction between facial and as-applied challenges); *see also Citizens United v. FEC*, 558 U.S. 310, 331, 130 S. Ct. 876, 893 (2010) ("[T]he distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge."). Indeed, a number of courts and commentators have recognized that, when it comes to constitutional challenges like those here, the facial-versus-as-applied "dichotomy represents nothing more than a distinction without a difference." *Plunkett v. Castro*, 67 F. Supp. 3d 1, 21 n.8 (D.D.C. 2014).[10]

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[10] *See, e.g.*, Richard H. Fallon Jr., *Fact and Fiction about Facial*

Here, the district court purported to split Plaintiffs' claims into facial and as-applied challenges. Then, after concluding that taxpayers as a category have standing solely for facial challenges, the court decided that Plaintiffs lacked standing to make the factual allegations that supported what the court deemed to be as-applied claims. But the truth is, as Plaintiffs consistently argued below, that the claims here are both facial and as-applied. Indeed, the facial and as-applied aspects are intertwined—as is very often the case. Plaintiffs properly alleged that the voucher program will use public funds in ways that further the religious missions of religious institutions. Insofar as the statute itself commands that outcome, the claim is a facial one; insofar as the facts alleged about the voucher program's participating schools demonstrate

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Challenges, 99 CAL. L. REV. 915, 917 (2011) ("Although facial and as-applied challenges are invariably contrasted with one another, the meaning of both terms is elusive. Moreover, even insofar as reasonable precision of definition can be achieved, the contrast is not nearly so stark as is often supposed."); Alex Kreit, *Making Sense of Facial and As-Applied Challenges*, 18 WM. & MARY BILL RTS. J. 657, 660 (2010) ("[C]ategorizing constitutional cases into 'facial' and 'as-applied' challenges, and relying on these categories to shape doctrine and inform case outcomes, is an inherently flawed and fundamentally incoherent undertaking."); Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 239 (1994) ("Reliance on ultimately superficial distinctions between facial and as-applied challenges to statutes only confuses the underlying concerns of substantive constitutional doctrine and institutional competence that govern the resolution of each case.").

the violation, the claim is an as-applied challenge. Likewise, Plaintiffs properly alleged that S.B. 302 will use public-education dollars to support a system of private, exclusionary, and religious schools, thereby depleting public-education funds to the detriment of Nevada's public schools. Insofar as the statute itself commands the support of a school system that violates Section 2, the claim is facial; insofar as the facts alleged about the schools that will receive voucher money and the concomitant loses to the public schools show the violation, the challenge is an as-applied one. In sum, all of Plaintiffs' allegations were properly before the court and therefore should have been considered and taken as true for purposes of the Motion to Dismiss.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type-style requirements of NRAP 32(a)(6) because this brief has been prepared using Microsoft Word 2010 in 14-point font, Century Schoolbook, a proportionally spaced font. I further certify that this Brief complies with the type-volume limitation of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 13944 words.

Pursuant to NRAP 28.2, I certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found.

…

…

I understand that I may be subject to sanctions in the event that this Brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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DISCLOSURE STATEMENT PURSUANT TO NRAP 26.1

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed:

Appellants Ruby Duncan, in individual, Rabbi Mel Hecht, an individual, Howard Watts III, an individual, Leora Olivas, an individual and Adam Berger, an individual.

These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Appellants are all individuals and thus have no parent corporations and no publicly held company owns 10% or more of its stock. The following law firms have appeared and/or are expected to appear in this court:

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this **APPELLANTS' OPENING BRIEF** was filed electronically with the Nevada Supreme Court on July 12th, 2016 and electronically served on the following parties:

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I further certify and affirm that I caused this document to be deposited via USPS first class mail, and sent via electronic mail to the following parties:

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