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DISTRICT COURT
CLARK COUNTY, NEVADA

RUBY DUNCAN, an individual; RABBI MEL HECHT, an individual; HOWARD WATTS III, an individual; LEORA OLIVAS, an individual; ADAM BERGER, an individual, *Plaintiffs*, v. STATE OF NEVADA ex rel, the Office of the State Treasurer of Nevada and the Nevada Department of Education; DAN SCHWARTZ, Nevada State Treasurer, in his official capacity; STEVE CANAVERO, Interim Superintendent of Public Instruction, in his official capacity, *Defendants*.	Case No. A-15-723703-C Dept. No. XX **MOTION TO DISMISS FOR LACK OF JURISDICTION AND FAILURE TO STATE A CLAIM** Date of hearing: Time of hearing:

NOTICE OF MOTION

TO: ALL PARTIES AND THEIR COUNSEL OF RECORD

PLEASE TAKE NOTICE that the foregoing motion will be heard before the above-captioned Court on November 25, 2015, at 8:30a.m./p.m., or as soon thereafter as counsel may be heard.

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INTRODUCTION

In this case, Plaintiffs bring a facial challenge to Nevada's new education savings account ("ESA") program, enacted by the Legislature as Senate Bill 302. Plaintiffs claim that Nevada's ESAs violate two provisions of the Nevada Constitution—Article 11, § 2 and Article 11, § 10.

Pursuant to Rules 12(b)(1) and (b)(5), this case should be dismissed because (1) Plaintiffs' taxpayer status does not give them standing to challenge the ESA program; and (2) nothing in Article 11 of Nevada's Constitution prevents the State from creating ESAs. Plaintiffs' proffered interpretations of Sections 2 and 10 have no basis in Nevada's history or legal precedent. Even if those interpretations had some merit, principles of constitutional avoidance would advise reading Nevada's Constitution to avoid bringing its provisions into conflict with the United States Constitution.

BACKGROUND

I. Nevada's New Education Savings Account Program

The State, as part of sweeping education reforms enacted this year, has empowered parents with real choice in how to best educate their children. Senate Bill 302, adopted by the Legislature and approved by Governor Sandoval on June 2, 2015, creates the ESA program. Under SB 302, Nevada parents may enter into agreements with the State Treasurer to open ESAs for their children. SB 302, §§ 7.1, 7.2 (attached as Exhibit 1). Any school-age child in Nevada may participate in the program. § 7.1. The only requirements are that a child take standardized tests and be enrolled in a Nevada public school for at least 100 consecutive school days before opening an account. *Id.* §§ 7.1, 12.1.

Once an education savings account is opened, "[t]he child will receive a grant, in the form of money deposited" into the account. § 7.1(b); § 8.1. Children participating in the program receive a grant equal to 90% of a formula described as the "statewide average basic

support per pupil." § 8.2(b).[1] Children with disabilities or in low-income households receive 100% of Nevada's per-student allocation. § 8.2(a). For the 2015-16 school year, accounts will be funded in the spring, and the grant amounts will be a pro rata portion of $5,139 or $5,710. Any funds remaining in an account at the end of a school year are carried forward to the next year if the parents' agreement with the State Treasurer is renewed. § 8.6(a).

SB 302 specifies the educational purposes for which ESA grants may be spent, including tuition, textbooks, tutoring, special education, and fees for achievement, advanced placement, and college-admission examinations. § 9.1(a)-(k).[2] For these purposes, ESA grants may be used at a "participating entity" or "eligible institution," including private schools, colleges or universities within the Nevada System of Higher Education, certain other accredited colleges, and certain accredited distance-learning programs. §§ 3.5, 5; *see also* § 11.1. Participating private schools must be "licensed pursuant to chapter 394 of NRS or exempt from such licensing pursuant to NRS 394.211." § 5.

SB 302 took effect on July 1, 2015, for the purpose of allowing the State to adopt implementing regulations. § 17. SB 302 becomes fully effective on January 1, 2016. *Id.*

II. Legislative History of SB 302

As Senator Scott Hammond, the Vice Chair of the Senate Committee on Education and the sponsor of SB 302, stated, "[t]he ultimate expression of parental involvement is when parents choose their children's schools." *Minutes of the Senate Committee on Education*, 78th Sess. 7

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[1] Under the "Nevada Plan" for public-school funding, the Legislature provides funding "partially on a per pupil basis." NRS 387.121. This involves the calculation of a "basic support guarantee per pupil for each school district." NRS 387.122.

[2] The ESA program is not a "voucher" program. In a voucher program, the State issues "vouchers" that authorize the disbursement of State funds directly to a private school. *See* Black's Law Dictionary 1809 (10th ed. 2014). Under Nevada's ESA program, by contrast, the State disburses funds into students' education savings accounts, from which parents choose where and how those funds will be spent (within the variety of educational purposes allowed by SB 302). Any funds spent through the ESA program are paid by the State to a private vendor, who in turn disburses those funds to the recipient chosen by parents.

(Nev. Apr. 3, 2015) ("*Minutes*, Apr. 3"). "More than 20 states," he noted, "offer programs empowering parents to choose educational placement that best meets their children's unique needs." *Id.*

Senator Hammond explained that "[s]chool choice programs provide greater educational opportunities by enhancing competition in the public education system. They also give low-income families a chance to transfer their children to private schools that meet their needs." *Id*. He observed that "the nonpartisan Center on Education Policy outlined the following conclusions from research studies about school choice programs: students offered school choice programs graduate from high school at a higher rate than their public school counterparts and parents are more satisfied with their child's school. In some jurisdictions with school choice options, public schools demonstrated gains in student achievement because of competition." *Id*.

Senator Hammond found, too, that educational choice "would provide relief to overcrowded public schools, benefiting teachers and students," *id.* at 8, and that "[s]chools would be motivated to maintain high quality teaching and to be more responsive to the needs of students and their parents." *Id*. The legislative record includes evidence that school-choice programs improve public schools. *Minutes of the Assembly Committee on Education*, 78th Sess. 30 (Nev. May 28, 2015) ("*Minutes*, May 28"). The Legislature received a report that examined empirical studies of school-choice programs. *See* Greg Forster, Friedman Foundation for Educational Choice, *A Win-Win Solution: The Empirical Evidence on School Choice* (3d ed. 2013) ("Friedman Report"). Of the "23 empirical studies that have looked at the academic impact of school choice on students that remain in the public schools," 22 "of those studies found school choice improved outcomes in the public schools, and one found no difference." *Minutes*, May 28, at 30 (testimony of Victor Joecks of the Nevada Policy Research Institute). The report concludes that "[s]chool choice improves academic outcomes" for participants and public schools "by allowing students to find the schools that best match their needs, and by introducing healthy competition that keeps schools mission-focused." Friedman Report at 1.

The Legislature also heard the testimony of Nevada parents. *Minutes*, Apr. 3, at 15 & Exhibit I thereto; *Minutes*, May 28, at 27-30. As one Clark County parent testified, "[p]ublic school is not a good fit for everyone. Parents know their children best and need to be able to choose the best educational direction for them." *Minutes*, Apr. 3, at 15. Assemblyman David Gardner noted that, according to a 2013 survey by the Cato Institute, "[o]ne hundred percent of the parents participating in [an ESA program in Arizona] are satisfied." *Minutes*, May 28, at 15.

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

> ESAs could become a game changer for the state of Nevada. As a company, the Sands is dedicated to helping our employees and their children learn, advance, and share new ideas that drive innovation. We believe that S.B. 302 (R2) will provide Nevada students with the opportunity to earn a high-quality education at the institution of their choice.... Simply put, S.B. 302 (R2) can provide a choice and a chance for Nevada students. [*Minutes*, May 28, at 27.]

The Legislature specifically considered the issue of SB 302's constitutionality under Article 11, § 10 of the Nevada Constitution. Senator Hammond observed that the ESA program is "consistent with this provision," *Minutes*, Apr. 3, at 9, since the program operates only to "provide families with financial assistance *for the purpose of education*." *Id*. (emphasis added). "Under this program," he added, "no dollar is predestined for any particular institution. Rather, parents have the choice [on how] to spend their education dollars ...." *Id.* He compared the ESA program to state Medicaid expenditures, under which "state funds pay for medical services regardless of religious affiliation." *Id.* Asked whether ESA funds could be spent at religious schools, he said that parents "can choose any private school they wish as long as it is on [the state-approved] list. I am not sure who is going to be on that list ...." *Minutes*, May 28, at 11.

III. The Enactment of SB 302 as Part of the 2015 Education Reforms

SB 302 was part of a comprehensive overhaul of the education system in Nevada. The Governor, in his 2015 *State of the State* address to the Legislature, drew attention to the serious problems that Nevada parents and students know all too well. *See* Gov. Brian Sandoval, State of the State (Jan. 15, 2015).[3] Governor Sandoval noted that "far too many of our schools are persistently failing"—10% of Nevada schools are on the Department of Education's list of underperforming schools—and "[m]any have been failing for more than a decade." *Id*. at 8. "Our most troubling education statistic," he lamented, is "Nevada's worst-in-the-nation high school graduation rate." *Id*. at 5. Nevada schools, he also noted, "are simply overcrowded and need maintenance. Imagine sitting in a high school class in Las Vegas with over forty students and no air conditioning." *Id*. at 6. "[I]mprovements will not be made," he said, "without accountability measures, collective bargaining reform, and school choice." *Id*.

In the months following the Governor's call for a "New Nevada," *id*. at 2, the Legislature proceeded to enact more than 40 education reform measures. (For descriptions of many of the new programs, see http://www.doe.nv.gov/Legislative/Materials/.) For example, the Legislature created the Victory schools program, under which schools with the lowest student achievement levels in the poorest parts of the State will receive an additional $25 million in annual funding. *See* Senate Bill 432. The Legislature created the Nevada Educational Choice Scholarship Program, which provides tax credits in exchange for contributions to organizations that offer scholarships to students from low-income households. *See* Assembly Bill 165. The Legislature expanded the Zoom schools program, which assists pupils with limited English proficiency. *See* Senate Bill 405. And the Legislature acted to improve Charter schools. *See* Senate Bill 491. To fund the reform package, the Legislature passed tax increases expected to generate more than $1 billion over the biennium.

In sum, the context in which SB 302 was enacted confirms that the undeniably laudable

[3] Available at http://gov.nv.gov/uploadedFiles/govnvgov/Content/About/2015-SOS.pdf.

purpose of the ESA program is to improve the quality of education services delivered to parents and students in Nevada. *See Minutes of the Senate Committee on Finance*, 78th Sess. 18 (Nev. May 14, 2015) ("This would be a world-class educational choice program. We are attempting to make an historic investment in the Nevada public school system this session. There is room for a school choice system as well.") (statement of Senate Majority Leader Michael Roberson).

IV. Plaintiffs' Lawsuit

Plaintiffs are five taxpayers who allege that the ESA program violates Sections 2 and 10 of Article 11 of the Nevada Constitution. Section 2 states in pertinent part that the "legislature shall provide for a uniform system of common schools." Section 10—known as the Nevada Blaine Amendment—states that "[n]o public funds of any kind or character whatever, State, County, or Municipal, shall be used for sectarian purpose."

STANDARDS OF REVIEW

"To survive dismissal, a complaint must contain some set of facts, which, if true, would entitle [the plaintiff] to relief." *In re Amerco Derivative Litig.*, 127 Nev. Adv. Op. 17, 252 P.3d 681, 692 (2011) (quotation marks omitted). In Nevada, "the judiciary has long recognized a strong presumption that a statute duly enacted by the Legislature is constitutional." *Sheriff, Washoe Cnty. v. Smith*, 91 Nev. 729, 731, 542 P.2d 440, 442 (1975). "In case of doubt, every possible presumption will be made in favor of the constitutionality of a statute, and courts will interfere only when the Constitution is clearly violated." *List v. Whisler*, 99 Nev. 133, 137, 660 P.2d 104, 106 (1983). Thus, "those attacking a statute [have] the burden of making a clear showing that the statute is unconstitutional." *Id.* at 138, 600 P.2d at 106. "Whether a legislative enactment is wise or unwise is not a determination to be made by the judicial branch." *Koscot Interplanetary, Inc. v. Draney*, 90 Nev. 450, 456, 530 P.2d 108, 112 (1974). Finally, because this is a facial challenge, Plaintiffs must "demonstrat[e] that there is no set of circumstances under which the statute would be valid." *Deja Vu Showgirls v. Nevada Dep't of Tax.*, 130 Nev. Adv. Op. 73, 334 P.3d 392, 398 (2014).

ARGUMENT

I. This Court Lacks Jurisdiction Because the Plaintiffs Lack Standing.

"Standing is the legal right to set judicial machinery in motion." *Heller v. Legislature of State of Nevada*, 120 Nev. 456, 460, 93 P.3d 746, 749 (2004) (quotation marks omitted). It is a jurisdictional requirement. *Id*. at 461, 93 P.3d at 749. In this case, Plaintiffs are five taxpayers who "object to the use of [their] taxes to fund private and religious schools." Compl. ¶¶ 8-12.

Nevada does not recognize taxpayer standing. *Citizens for Cold Springs v. City of Reno*, 125 Nev. 625, 630, 218 P.3d 847, 850 (2009); *Doe v. Bryan*, 102 Nev. 523, 525, 728 P.2d 443, 444 (1986); *Blanding v. City of Las Vegas*, 52 Nev. 52, 280 P. 644, 650 (1929). In particular, as *Blanding* famously explained, a taxpayer cannot maintain a suit "where he has not sustained or is not threatened with any injury peculiar to himself as distinguished from the public generally." *Id.* Further, where declaratory relief is sought, or where constitutional matters arise, this court requires "plaintiffs to meet increased jurisdictional standing requirements." *Stockmeier v. Nevada Dep't of Corr. Psych. Review Panel*, 122 Nev. 385, 393, 135 P.3d 220, 225-26 (2006), *abrogated on other grounds by Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 181 P.3d 670 (2008). And nothing in SB 302's text purports to confer Plaintiffs with standing—unlike many Nevada laws that grant statutory standing where constitutional standing is lacking. *See, e.g., id*. at 394, 135 P.3d at 226; *Hantges v. City of Henderson*, 121 Nev. 319, 323, 113 P.3d 848, 850 (2005).

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

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

II. The ESA Program Does Not Violate Nevada's Blaine Amendment.

Plaintiffs' complaint fails to state a claim for relief under Article 11, § 10 of the Nevada Constitution, which provides that "[n]o public funds of any kind or character whatever, State, County, or Municipal, shall be used for sectarian purpose." The ESA program serves educational purposes, not sectarian ones. SB 302 says not one word about religious schools, parochial education, prayer, or faith. To the extent that ESA funds find their way to religious schools, they do so only through a series of private, individual decisions by the families and students who take part in the program, just as if a state worker uses her paycheck to pay for tuition at such schools, or if that state worker uses her state-provided health savings account to pay for medical services at a religiously affiliated private hospital. The United States Supreme Court has recognized that the independent choices of parents break the link between government funding and the schools a child ultimately attends. *See, e.g.*, *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). Accordingly, the Supreme Court has upheld school-choice initiatives as neutral and generally available programs created for strictly secular, not sectarian, purposes. *See id.*; *infra* at 11-12. And courts in other States have upheld similar programs under constitutional provisions similar to Section 10.

A. No "public funds" are spent for a "sectarian purpose" under Nevada's ESA program.

The ESA program does not use "public funds" for a "sectarian purpose." Indeed, Plaintiffs do not even allege that the Legislature intended to promote or aid any religious sect by passing SB 302. Nor could they. The law contains no requirement that ESA funds be used for sectarian schools. And it does not require recipient schools to promote any religious tenets. In fact, the ESA program is indifferent as to whether or not participating students attend religious schools.

SB 302 was adopted to benefit Nevada schoolchildren and families, regardless of religious creed. The overriding purpose of the ESA program—as set forth in the plain text of the law, the legislative history, and the public record—is to provide Nevadans with a broader array of educational opportunities and thus to improve academic achievement. The law specifically requires that ESA funds be used for enumerated *educational* purposes and "only" those purposes. SB 302, §§ 7.1(c), 9.1. The law's chief sponsor emphasized that the Legislature's goal was to "empowe[r] parents to choose educational placement that best meets their children's unique needs." *See supra* at 3. Numerous organizations urged the Legislature to adopt the bill to improve high-school graduation rates and academic performance across the board. Parents who testified in support of the bill spoke of the educational benefits to their children. There can be no doubt that the purpose of the ESA program is to promote education, not to benefit any religious sect.

The structure of SB 302 bears this out. Rather than transferring funds directly to a chosen set of private schools, SB 302 requires the State to deposit funds into accounts privately controlled by parents and students. Thus, the State "uses" the public funds for an exclusively educational purpose: to empower citizens to make the best choices for their unique educational needs. Private individuals—the students and families who participate in the ESA program—decide how to spend their grants. Other than ensuring that accounts are applied to educational purposes, the State plays no role in their use of the ESA funds.[4]

In fact, the Legislature consciously enacted this policy of private choice to avoid concerns like those raised by Plaintiffs. Senator Hammond assured his colleagues and the public that the law "does not benefit or provide funding to private institutions, sectarian or otherwise"

[4] Plaintiffs misstate how the ESA program operates when they allege that "public funds are transferred to private religious schools." Compl. ¶ 85. *See also id*. ¶ 27 (alleging that ESA grants will be "paid to schools"). SB 302 expressly provides that the grants "must be deposited in the education savings account of the child." SB 302, § 8.1. All money distributed through Nevada's ESA program is distributed by the State to a private vendor. That private vendor distributes those funds to the recipients chosen by parents and students.

because "no dollar is predestined for any particular institution." *Minutes*, Apr. 3, at 9. The ESA program was deliberately designed to ensure that grants would never be paid to a religious school unless and until they are in the control of private individuals.

Simply put, the State is not using public funds to promote a sectarian purpose. An analogy illuminates the distinction. No reasonable person would suggest that Section 10 prohibits State employees from spending money in their state-funded health savings accounts for medical services at a private, religious hospital. That money begins as public funds but rests in private control when it is used for medical expenses at a religious hospital. Nor would it make any difference if the government anticipated that some employees might use some of their HSA funds in that fashion. The State has relinquished the funds into their private control, for *medical* (not sectarian) purposes and the money arrives at the religious hospital only through their private choices. The same is true with Nevada's ESAs.

The United States Supreme Court has held in cases going back more than 30 years that educational choice programs are supported by the valid secular purpose of promoting education. In *Mueller v. Allen*, 463 U.S. 388 (1983), the Court rejected a challenge to a Minnesota statute authorizing tax deductions for private-school tuition. The Court held:

> A state's decision to defray the cost of educational expenses incurred by parents—regardless of the type of schools their children attend—evidences a purpose that is both secular and understandable. An educated populace is essential to the political and economic health of any community, and a state's efforts to assist parents in meeting the rising cost of educational expenses plainly serves this secular purpose of ensuring that the state's citizenry is well-educated. [*Id*. at 395.]

The Court also reasoned that "[b]y educating a substantial number of students [private] schools relieve public schools of a correspondingly great burden—to the benefit of all taxpayers" and, "[i]n addition, private schools may serve as a benchmark for public schools." *Id*. The *Mueller* Court noted that a State has "a legitimate interest in facilitating education of the highest quality for all children within its boundaries, whatever school their parents have chosen for them."

Id. (quoting *Wolman v. Walter*, 433 U.S. 229, 262 (1977) (Powell, J. concurring in part)).[5]

Most recently, in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), the Court, in reviewing an education-choice program enacted by the State of Ohio, wrote "that the program challenged here was enacted for the valid secular purpose of providing educational assistance to poor children." *Id*. at 649. The fact that "82% of Cleveland's participating private schools [we]re religious schools" and "96% of scholarship recipients … enrolled in religious schools," 536 U.S. at 657, 658, did not affect the validity of that secular purpose in the slightest. *See also Mueller*, 463 U.S. at 401 (acknowledging secular purpose of program even though 96% of the children in private schools attended religious schools).[6] As United States Supreme Court precedent makes clear, programs like Nevada's ESA law do not spend public funds for any sectarian purpose.

Nothing in Nevada's very limited precedent applying Article 11, § 10, supports Plaintiffs' argument or counsels in favor of ignoring the U.S. Supreme Court's well-considered guidance. The Nevada Supreme Court has applied Section 10 only once, and even then to a unique set of facts. In *State of Nevada ex rel. Nevada Orphan Asylum v. Hallock*, 16 Nev. 373 (1882), the Court held that the Legislature's *direct payment* of state funds to an orphanage run by the Catholic Sisters of Charity was unconstitutional. The Court's analysis turned on two key factors: (1) earlier appropriations to that very orphanage provoked Section 10's adoption, and (2) the program at issue would provide *direct* aid to a pervasively sectarian organization, and to that organization alone. *Id.* at 380-83. Neither of those factors is present here, and so the outcome in *Hallock* does not control

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[5] *See also Witters v. Wash. Dep't of Servs. for Blind*, 474 U.S 481, 485 (1986) (noting that a Washington tuition assistance program that allowed assistance to students studying a religious institutions had an "unmistakably secular purpose"); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 5 n.4 (1993) (noting that federal program subsidizing sign-language interpreters had a secular purpose, even though it assisted deaf children attending both secular and religious schools).

[6] Thus, Plaintiffs' allegation that "private religious schools currently constitute the majority of private schools in Nevada" is immaterial. Compl. ¶ 36. It is also highly speculative. Nothing in Nevada's ESA program *requires* funds to be used at a private school at all, much less a religious private school.

this case. The *Hallock* Court would have faced a law like this one if it (1) rested on legislative findings that orphans were under-served in Nevada, and (2) created a fund available to those orphans' guardians who could (3) privately choose to obtain the money for a wide variety of approved orphanage services on behalf of their charges. Such facts would have made for a very different case.

But in expressly recognizing what motivated Nevada's Legislature and citizens to enact Section 10—*direct* funding of a specific sectarian institution and no other—*Hallock* does provide this Court with helpful insight. As the Nevada Supreme Court has explained, "[w]hen construing constitutional provisions, we use the same rules of construction used to interpret statutes. Our primary task, then, is to ascertain the intent of those who enacted [the provision] …, and to adopt an interpretation that best captures their objective." *Nevada Mining Ass'n v. Erdoes*, 117 Nev. 531, 538, 26 P.3d 753 (2001); *see also Rogers v. Heller*, 117 Nev. 169, 176 n.17, 18 P.3d 1034 (2001) (same); *Runion v. State*, 116 Nev. 1041, 1046–47, 13 P.3d 52, 56 (2000) ("The intent of the legislature is the controlling factor …."). Nothing in the intent behind Section 10—which, according to the Nevada Supreme Court was to stop the *direct* appropriation of funds to one specific sectarian organization—suggests that Section 10 broadly bars funding that in some remote or incidental way benefits a religious institution when its purpose is clearly secular. In urging the Court to adopt their expansive reading of Section 10, Plaintiffs ask the Court to ignore the actual intent behind the adoption of Section 10 and effectively to apply a strong presumption of *un*constitutionality—both in violation of well-established canons of Nevada law.

B. Similar programs have been upheld in other States against challenges brought under similar constitutional provisions.

Plaintiffs go out of their way to avoid bringing any challenge under the federal Constitution. The reason is obvious: The U.S. Supreme Court has already endorsed school-choice initiatives like this one as neutral programs, available to children regardless of faith, that serve valid secular interests relating to education and are fully compliant with the federal

Religion Clauses. Although Plaintiffs are free to raise only state-law claims, the reasoning of *Zelman* and prior cases in the *Zelman* line cannot be so easily evaded, and they doom Plaintiffs' Section 10 claim. The key insight of *Zelman* is that the intervening decisions of parents break the connection between government funds and the schools that any individual student ultimately attends. This ensures that the funding is only for a valid secular purpose—education—and not any "sectarian purpose." And SB 302 includes numerous features that provide *further* separation than the typical school-choice program between the government's decision to provide funding to parents and the schools that students may ultimately attend.

Given that the reasoning of *Zelman* renders concerns about government funding for "sectarian purposes" inapposite, it is not surprising that a number of decisions from other States support SB 302's constitutionality. To be sure, Nevada's ESA program is not identical to any other State's school-choice program. Its use of individual accounts, its wide range of options, and its availability to virtually all Nevada schoolchildren, creates *less* constitutional concern than voucher programs and direct-aid laws upheld in other States. And Nevada's Blaine Amendment is *less restrictive* than similar provisions found in many other States' constitutions. In Arizona, for instance, the Blaine Amendment bars aid to a "private or sectarian school" and not merely aid that is used for a "sectarian purpose." Ariz. Const. art. IX, § 10. Yet precedents from other States that have rejected Blaine challenges provide a helpful guide for how the Court should address SB 302's constitutionality under Section 10.

The Arizona Court of Appeals just last year upheld Arizona's education savings account program—similar to Nevada's in most respects, though not as universally available—against a challenge like this one. *Niehaus v. Huppenthal*, 233 Ariz. 195, 199-200 (Ariz. Ct. App. 2013), *review denied* (Mar. 21, 2014). The court explained that the ESA law's object was to support the beneficiary families, not sectarian schools. *Id.* "Parents can use the funds deposited in the [education savings] account to customize an education that meets their children's unique educational needs," the court said. "Depending on how the parents choose to educate their

children, this may or may not include paying tuition at a private school." *Id.* The money *might* go to tuition—or to tutoring, online programs, standardized-test training, or innovative educational therapies. *Id.* As here, nothing in the law encourages, let alone requires, a single cent to be delivered to any particular school, sectarian or secular. This holding is particularly significant because five years earlier the Arizona Supreme Court invalidated Arizona's voucher law under its Blaine Amendment. *Cain v. Horne*, 220 Ariz. 77, 83, 202 P.3d 1178, 1884 (Ariz. 2009). That same court denied review of the *Niehaus* decision, thus confirming the meaningful constitutional difference between voucher programs and ESAs.

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

The Ohio Supreme Court upheld a similar school-choice program under its state constitutional provision providing that "no religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of this state." *Simmons-Harris v. Goff*, 711 N.E.2d 203, 212 (Ohio 1999). Like Wisconsin's program, Ohio sends its voucher checks to the recipient school directly and parents endorse the check over to the schools. *See id.* at 206. Yet the court emphasized that, even under that program, "no money flows directly from the state to a sectarian school and no money can reach a sectarian school based solely on its efforts or

the efforts of the state. Sectarian schools receive money that originated in the School Voucher Program only as the result of independent decisions of parents and students." *Id.* at 212.

Two years ago, in *Meredith v. Pence*, 984 N.E.2d 1213 (Ind. 2013), the Indiana Supreme Court unanimously upheld that State's school-choice program against challenges that are almost identical to Plaintiffs' claims in this case. The Indiana Supreme Court held that the State's program did not violate Indiana's Blaine Amendment because it did not "directly benefit" religious schools, even though, like Ohio and Wisconsin (and unlike Nevada's ESA program), Indiana sends funds directly to the recipient schools. *Id.* at 1227. "Any benefit to program-eligible schools, religious or non-religious," the court explained, "derives from the private, independent choice of the parents of program-eligible students, not the decree of the State, and is thus ancillary and incidental to the benefit conferred on these families." *Id.* at 1229. The court warned that a more restrictive application of the Blaine Amendment "would put at constitutional risk every government expenditure incidentally, albeit substantially, benefiting any religious or theological institution," like fire and police protection, water and sewer services, sidewalks, streets, and other generally available benefits. *Id.* at 1227.

The same conclusion is even more obvious here. Like the programs upheld in Wisconsin, Ohio, and Indiana, SB 302's primary (and only) purpose is to improve education—not to support sectarian institutions or instruction. But unlike the voucher programs upheld in those States, there can be no dispute that ESA funds arrive at schools with religious affiliations *only* through private choice *and* private hands. Parents direct ESA funds in individual accounts through a private vendor. Under Nevada's ESA program, the State never sends any "public funds" to any ultimate recipient—sectarian or otherwise.

For these reasons, the Colorado Supreme Court's recent decision invalidating a school-voucher program is not on point. *See Taxpayers for Pub. Ed. v. Douglas Cty. Sch. Dist.*, 351 P.3d 461 (Colo. 2015). First, Colorado's Blaine Amendment contains more restrictive language

than Section 10.[7] And the Colorado program was a voucher program—the public-school district issued a check directly to the participating student's school of choice, and the student's parent "then endorse[d] the check 'for the sole purpose of paying for tuition at the Private School Partner.'" *Id.* at 465. As the Arizona courts have recognized, this distinction avoids any constitutional concern. *Compare Cain*, 202 P.3d at 1184-85 (invalidating voucher program with direct disbursement), *with Niehaus*, 310 P.3d, 988 (upholding ESA program with private accounts). Perhaps most tellingly, even under those very different facts, the Colorado challengers' Blaine argument failed to garner the support of a majority of the Colorado Supreme Court; the Court evenly split 3-3 on whether Colorado's voucher program violated its Blaine Amendment, with Justice Eid writing a persuasive dissent.

III. Invalidating the ESA Program Based on the State Blaine Amendment Would Raise Serious Constitutional Problems that this Court Should Avoid.

The ESA program does not violate the Nevada Constitution's Blaine Amendment, for the reasons stated above in Part II. But there is another reason this Court should so hold: Adopting Plaintiffs' argument would mean that Section 10 violates the United States Constitution. That is an outcome this Court can and should avoid.

A. Nevada's Blaine Amendment was born of religious bigotry and designed to allow discrimination between religious practices.

Ratified in 1880, Article 11, § 10 states: "No public funds of any kind or character whatever, State, County or Municipal, shall be used for sectarian purposes." Many states have similar language in their state constitutions, and historians refer to these provisions as Blaine Amendments. As the U.S. Supreme Court has recognized, most of these amendments "arose at a

[7] "Neither the general assembly, nor any county, city, town, township, school district or other public corporation, shall ever make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church or sectarian society, or for any sectarian purpose, or to help support or sustain any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church or sectarian denomination whatsoever ...." Colo. Const. art. IX, § 7.

time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that 'sectarian' was code for 'Catholic.'" *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion). History indicates that the notion that "pervasively sectarian schools" be excluded from programs open to non-sectarian schools is an idea "born of bigotry." *Id.* at 829. These Blaine Amendments—named after Representative James G. Blaine, who unsuccessfully proposed a similar amendment to the federal Constitution—sought to preserve the Protestant nature of America's public schools during a time of increasing Catholic influence in civic life.

The Catholic population of the United States increased significantly in the years before the Civil War. The nearly four million Catholic immigrants who arrived altered America's ethnic and religious makeup. As a result, anti-Catholic sentiment "poured forth at an unparalleled rate" such that by the outbreak of the Civil War, Catholic immigration, in the view of some, "threatened to alter traditional patterns of American life." Vincent P. Lannie, *Alienation in America: The Immigrant Catholic and Public Education in Pre-Civil War America*, 32 Rev. Pol. 504, 506 (1970). "[D]istrust of the Irish … as Catholics ran particularly deep." *Id.* One reverend warned that this immigration would turn America into "the common sewer of Ireland." *Id.* at 504.

In nineteenth-century America, no "area of disagreement between Protestants and Catholics caused more friction than the place of religion in the public schools." *Id.* at 507. Christian instruction and Bible readings—from the King James Version—were accepted practices in America's "common schools." *See id.* at 507-08. But Catholics bristled over mandatory "use of the Protestant Bible by Catholic schoolchildren." *Id.* The Protestant public viewed Catholic efforts to excuse Catholic children from reading the King James Bible in schools as "part of a battle against American Protestantism." *Id.* at 511. The 1844 "Bible riots" in Philadelphia resulted in 30 deaths and the destruction of Catholic churches. Steven K. Green, *The Bible, the School, and the Constitution: The Clash that Shaped Modern Church-State Doctrine* 35-36 (2012). In numerous cities, children were whipped for refusing to read the King James Bible in public school. Lannie, *supra*, at 512. Boston, in 1859, expelled 400 Catholic students

in a single week for refusing to say the Lord's Prayer. Green, *supra*, at 40. The School Question "captured public attention to a degree that had never happened before." Green, *supra*, at 4, 8.

The approach of the Catholic community, unsuccessful in obtaining exemptions for students from Protestant instruction, gradually shifted to creating a separate system of Catholic parochial schools mirroring, in many respects, the country's common schools. Lannie, *supra*, 517-18. Catholics began to seek public funding for their new schools. Green, *supra*, at 8.

Nevada, though containing only about 30,000 people at statehood in 1864, did not escape the national controversy about Catholicism and the public schools. The delegates to the Nevada constitutional convention squarely confronted the emotional salience of the issue. Delegate DeLong, of Lyon County, stated that this "matter of religious and sectarian influence in the public schools, is … most calculated to arouse suspicions and jealousies in the public mind." Official Report of the Debates and Proceedings in the Constitutional Convention of the State of Nevada 566 (1866). Delegate Lockwood, of Ormsby County, spoke of "persons so bigoted in their religious faith—as, for example, the Roman Catholics." *Id.* at 572. He cautioned the delegates about the "sectarian schools in Europe," where a majority of instruction was occupied by "the priests." *Id.* at 573. The delegates ultimately created a constitution that called for a "uniform system of common schools" and that denied funding to any school that permitted "instruction of a sectarian character." *Id.* at 845. During the debates, Delegate Warwick, of Lander County, asked directly: "what is meant here by 'sectarian?'" *Id.* at 568. "Does that mean," he continued, "that [school districts] have no right to maintain Catholic schools, for example?" *Id.* Delegate Collins, of Storey County, fought to "keep out sectarianism" from the public schools. *Id.* at 577. Delegate Brosnan, also of Storey County, expressed alarm about "sectarian instruction" and "the inculcation, upon the juvenile mind in the public schools." *Id.* at 660. The delegates were clear about their purpose in enacting Nevada's common-school clause. They were not worried about erecting a high wall of separation between church and state; for they were perfectly happy with Protestant religious exercise in the public schools. Nor were they

concerned about preventing parental choice; they simply wanted to keep "sectarianism"—by which they meant Catholicism—out of public schools.

Whatever impact the enactment of the common-school clause may have had on sectarianism in public schools, it apparently did not have the effect of ending Protestant Bible reading or even prayer. In 1877, Samuel Kelly, the state superintendent of public education, noted that the law, though "prohibit[ing] sectarianism," was silent "as to the reading of the Bible." Report of the Superintendent of Public Instruction of the State of Nevada for the Years 1875 and 1876, 22 (1877) (attached as Exhibit 2). He noted, without alarm, that Bible reading occurred in some public schools and that at least one school offered prayer. Kelly proposed that, going forward, "a fair compromise" would simply entail repeating "the Lord's Prayer" and "the reading of the beatitudes." *Id.* Additionally, the textbook that the State required in public schools had children recite Bible verses, religious hymns, and statements such as: "It is impossible that God should withdraw his presence from anything," "Heaven, though slow to wrath, is never with impunity defied," and "No true Christian can be entirely hopeless." The Pacific Coast Spelling Book 87, 90 (1873) (attached as Exhibit 3).[8]

Controversy over what Americans called the "School Question" reached its apex after the Civil War. Green, *supra*, vii.[9] In 1875, President Grant, speaking to a joint session of Congress, warned that "ignorant men" would "sink into acquiescence to the will of intelligence, whether directed by the demagogue or by priestcraft." 4 Cong. Rec. 175 (Dec. 7. 1875). Grant called for a constitutional amendment requiring every state to create public schools and prohibiting the use of public funds for the benefit of "any religious sect." *Id.* Some in the Republican Party had been searching for a cultural wedge issue to exploit in the election of 1876, and the public-school issue proved effective. Marie Carolyn Klinkhamer, *The Blaine Amendment of 1875: Private Motives for*

[8] *See* May 29, 1879 Order of the State Board of Education (attached as Exhibit 4) ("prescrib[ing] the Pacific Coast Speller for use in the Public Schools of this State").

[9] In 1871, in New York City, Catholic-Protestant tensions resulted in "massive rioting"—the Orange Riots—that killed sixty people. Green, *supra*, at 184-85.

Political Action, 42 Catholic Hist. Rev. 19-20 (1956). The School Question at this time remained heated, with a focus on "how to preserve the public school system while ensuring that Catholic schools did not obtain a share of the school funds." Green, *supra*, at 179. In June 1875, months before Grant's speech to Congress, future-president Rutherford B. Hayes wrote to Representative James Blaine, advising that that the "secret of our enthusiastic convention is the school question" and predicting that Republicans "shall crowd [Democrats] on the school" issue. Klinkhamer, *supra*, at 21. The amendment touted by Blaine passed the House almost unanimously, 180-7, but failed in the Senate. Philip Hamburger, *Separation of Church and State* 298 n.28 (2002). (As it happens, a few years earlier, in 1871, a similar type of amendment had been introduced—by Senator William M. Stewart of Nevada. *Id.*) Twenty-two states would adopt Blaine-like amendments in subsequent decades. Green, *supra*, at 180.

It was in the midst of this division and vitriol that Nevada enacted its Blaine Amendment. The Legislature proposed Article 11, § 10, in February 1877, following President Hayes's election with the smallest electoral-vote margin in history. During the preceding ten years, the Legislature had appropriated funding for the Nevada Orphan Asylum, a Catholic-run institution that sheltered Nevadan orphans. *See* Jay S. Bybee & David W. Newton, *Of Orphans and Vouchers: Nevada's "Little Blaine Amendment" and the Future of Religious Participation in Public Programs*, 2 Nev. L.J. 551, 561-65 (2002); Ronald James, *The Roar and the Silence: A History of Virginia City and the Comstock Lode* 198-99 (1998) (discussing how the State helped the Asylum construct a larger orphanage because it fulfilled a need by housing "hundreds of children"). Parts of Nevada at this time experienced "a good deal of ethnic conflict and anti-Catholicism," like "what much of the rest of the country had undergone in the 1840s and 1850s." James S. Olson, *Pioneer Catholicism in Eastern and Southern Nevada, 1864-1931*, 26 Nev. Hist. Soc'y Q. 159, 163 (1983). A Nevada newspaper article in 1876 described the Catholic Church as seeking "the mastery of the world" and advocated prohibiting all schools that were not public schools. John M. Townley, *Tough Little Town on the Truckee: Reno 1868-1900*, at 210 (1983) (quoting *Nevada State J.*, Sept. 22, 1876, at

2) (attached as Exhibit 5). The Legislature's appropriations became controversial, and the head of the asylum worried about the effect of anti-Catholic sentiment. Bybee & Newton, *supra*, at 565. After the Legislature proposed its Blaine Amendment, the *Nevada Daily Tribune* declared: "[T]his is a stepping stone to the final breaking up of a power that has long cursed the world, and that is obtaining too much of a foothold in these United States." *Id.* at 566.

After Nevada adopted its Blaine Amendment, the Legislature again appropriated funding to the Nevada Orphan Asylum. *Id.* at 567. When the State Controller refused to hand over the appropriated funds, the Asylum sought a writ of mandamus to compel the controller to issue the appropriation. *Hallock*, 16 Nev. at 376. The three Justices of the Nevada Supreme Court denied mandamus. *Id.* at 388. The Court concluded that the Asylum was the only institution in the State "where the question of sectarianism could have been raised" before the Legislature, that the issue of funding the Asylum "greatly, if not entirely, impelled the adoption" of the Blaine Amendment, and that the voters necessarily believed that providing direct appropriations from the state treasury to the Catholic institution "was an evil which ought to be remedied." *Id.* at 380, 383.

B. Striking the ESA program on the grounds urged would cause a collision with the U.S. Constitution.

The ESA program was enacted for the purpose of promoting education and thus does not run afoul of Section 10's ban on the use of public funds for a sectarian purpose. *See* Part II, *supra*. The intervening private choices of parents directing ESA funds in their student's individual account through a private vendor ameliorates any concern that the government is spending "public funds" for any "sectarian purpose." This Court need go no further in this case. Indeed, it should go no further because ruling that the ESA program violates Section 10 would require this Court to confront the "shameful pedigree" underlying Nevada's Blaine Amendment and address its compatibility with the federal Constitution, which demands neutrality as between religions, or between religion and non-religion, and prohibits discrimination against religious

institutions. *Mitchell v. Helms*, 530 U.S. 793, 828 (2000).

Section 10 was enacted and carefully worded to discriminate against certain religious groups. It did not seek to eradicate religion from the public sphere, as Plaintiffs would have it. Both before and after Section 10 was enacted, Nevada's public schools were full of religious teaching and instruction—generic, "nonsectarian" Protestant teaching. *See* Part III-A, *supra*; *see also* Steven K. Green, *The Insignificance of the Blaine Amendment*, 2008 B.Y.U. L. Rev. 295, 302, 322 (2008) ("That the common schools were consciously Protestant was not denied …. Public schools reinforced … nonsectarian religion."). Rather, Section 10 was enacted to eradicate specific *types* of religion from the public sphere. *See id.*; *see also generally* Bybee & Newton, *supra*.

Hallock confirms this discriminatory history. When the *Hallock* Court evaluated whether the Sisters of Charity qualified as a "sectarian institution," it was not concerned with whether the group was generally *religious*; instead, it focused on whether the group was pervasively *Catholic*. The court emphasized that only Catholic prayers were prayed out loud and that Catholic children were given Catholic instruction by the exclusively Catholic sisters. *See* 16 Nev. at 383-87. Based on these uniquely Catholic aspects of the orphanage, the Nevada Supreme Court held that the appropriation would be an unconstitutional use of funds for a *sectarian* purpose. "The framers of the constitution undoubtedly considered the Roman Catholic a sectarian church," the opinion emphatically proclaimed. *Id.* at 385.

This sort of probing inquiry is unacceptable under modern constitutional doctrine. "[T]he inquiry into the recipient's religious views required by a focus on whether a school is pervasively sectarian is not only unnecessary but also offensive. It is well established, in numerous other contexts, that courts should refrain from trolling through a person's or institution's religious beliefs." *Mitchell*, 530 U.S. at 828; *see also, e.g.*, *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1256, 1259, 1261-1266 (10th Cir. 2008). Thus, even if *Hallock* dictated the result sought by the Plaintiffs in this case, its mode of analysis would be prohibited.

But applying Nevada's Blaine Amendment to prohibit ESAs would have even deeper

problems. A state constitutional provision that was intended to discriminate between religions or religious teachings—and was in fact applied that way in the only case addressing the provision—is largely impermissible under modern constitutional doctrine, and has been so for some time. *See*, *e.g.*, *Larson v. Valente*, 456 U.S. 228, 246 (1982) ("No State can 'pass laws which aid one religion' or that 'prefer one religion over another.'"). Reinterpreting Nevada's Blaine Amendment away from its original intent—discriminating *between* religious practices and particularly against Catholics—to discriminating against religion generally only tortures the provision and violates *the* fundamental canon of constitutional construction; such a reinterpretation doesn't address the provision's original meaning and problematic past.[10]

The federal Constitution prohibits laws, like Section 10, that are neutral on their face but in fact were enacted with a discriminatory animus aimed at specific religions. *See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993). "Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality." *Id.* And the "[r]elevant evidence" to consider in this context "includes, among other things, the historical background of the [policy] under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." *Id*. at 540. Each of those categories of evidence reveals the deep religious animosity that led to Nevada's Blaine Amendment. *See* Part III-A, *supra*.

Moreover, the First and Fourteenth Amendments prohibit States from adopting laws—including state constitutional provisions—that facially discriminate on the basis of religion. *See id.* at 533; *Emp't Div., Dep't. of Human Res. of Or. v. Smith*, 494 U.S. 872, 878-79 (1990). Although the United States Supreme Court has held that a state can exempt university students

[10] It would also perpetuate Article 11, Section 10's conflict with an "irrevocable" ordinance in Nevada's Constitution that requires that "perfect toleration of religious sentiment shall be secured, and [that] no inhabitant of said state shall ever by molested, in person or property, on account of his or her mode of religious worship." Nev. Const. Ordinance, § 2.

who pursue degrees in devotional theology from "otherwise inclusive aid program[s]," *Locke v. Davey*, 540 U.S. 712, 715 (2004), it has not sanctioned more broad discrimination against religiously motived private choice, nor has it sanctioned reinterpreting constitutionally problematic provisions to discriminate against religion more generally. "[T]he State's latitude to discriminate against religion … does not extend to the wholesale exclusion of religious institutions and their students from otherwise neutral and generally available government support." *Colo. Christian Univ.*, 534 F.3d at 1255; *see also*, *e.g.*, *Mitchell*, 530 U.S. at 828 ("[O]ur decisions … have prohibited governments from discriminating in the distribution of public benefits based upon religious status or sincerity.").

Plaintiffs' position inverts *Locke*. That case held that a State could choose not to subsidize "[t]raining someone to lead a congregation" because that is an "essentially religious" endeavor and there is a long history, dating back to the founding, of States denying special benefits to ministers. *Locke*, 540 U.S. at 721, 723. Here, by contrast, SB 302 offers a generally available benefit to the entire population, for purposes of education. On Plaintiffs' view, Section 10 would require the State to offer that benefit to everyone except those whose choice of school is religious. Unlike *Locke*'s narrow exception, this would lay a special burden on the religious—and would thus cross the line into unconstitutional discrimination.

But this Court need not confront Section 10's troubling past. To the extent its reach is unclear, Section 10 should be applied to avoid any federal constitutional concerns. Evaluating the constitutionality of a statute is the "gravest and most delicate duty that" the courts are "called on to perform." *Rust v. Sullivan*, 500 U.S. 173, 191 (1991) (quoting *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.)). Because the task is so sensitive, the Nevada Supreme Court has long cautioned that "[e]very reasonable presumption must be indulged in support of the controverted statute with any doubts being resolved against the challenging party, who has the substantial burden of showing that the act is constitutionally unsound." *Koscot Interplanetary*, 90 Nev. at 456, 530 P.2d at 112. Among those presumptions is the rule that, "[w]henever possible,"

Nevada courts "must interpret statutes so as to avoid conflicts with the federal or state constitutions." *Mangarella v. State*, 117 Nev. 130, 134-35, 17 P.3d 989, 992 (2001).

The canon of constitutional avoidance applies with double force in this case. *First*, just as a majority of other states' courts have interpreted analogous provisions in their state constitutions, this Court should avoid an interpretation of SB 302 that would treat the use of *private* funds by individual participants in the program for an *educational* purpose as an expenditure of *public* funds for a *sectarian* purpose. Any benefit to religious institutions is incidental, remote, attenuated—a byproduct of a valid and secular law. To the extent that this raises a close question under the Nevada Constitution, the court must err on the side of saving the statute. *Second*, the Court should avoid applying Nevada's Blaine Amendment in a manner that would invite federal constitutional problems. Section 10 cannot bear the breadth that Plaintiffs would ascribe it. At most, it prohibits the sort of direct appropriation of funds to sectarian organizations invalidated in *Hallock*. Extending it any further to discriminate against parents who freely decide to send their children to a private school of their choosing would raise serious federal constitutional questions that this Court is best to avoid.

IV. The ESA Program Does Not Violate the "Uniform System of Common Schools" Language of Article 11, § 2.

As a fallback to their Blaine Amendment claim, Plaintiffs claim that the ESA program violates that portion of Article 11, § 2 of the Nevada Constitution which authorizes and requires the Legislature to establish a "uniform system of common schools." But the ESA program does not violate Section 2. Indeed, the program does not even implicate Section 2. The program is instead fully authorized by Article 11, § 1 of the Nevada Constitution, which empowers the Legislature to "encourage education" by "all suitable means." Plaintiffs' claim under Section 2 has no merit and should be dismissed.

Article 11, § 2 of the Nevada Constitution provides:

> 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.

Section 2 confers on the Legislature both the power and the duty to establish a public-school system. The only limits imposed by Section 2 are that the Legislature must establish a "uniform" public-school system with a school in every district open at least six months per year.

The Legislature derives broad power in the area of education from the Section 1 of Article 11, which is titled "Legislature to encourage education." It provides:

> 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. 11, § 1 (emphasis added). Section 1 authorizes the Legislature to encourage and promote education by "all" means that the Legislature deems to be "suitable." The Lawmakers are not limited to the encouragement of education through the public-school system. *See, e.g.*, NRS 392.070 (exempting children in private schools and being homeschooled from public school attendance requirements). Quite the contrary, the Legislature is required by Section 1 to "encourage" education by "*all* suitable means." Nev. Const. art. 11, § 1 (emphasis added).

Plaintiffs nonetheless claim that the ESA program violates Section 2 because "it promotes a non-uniform system by providing public funding to private and religious schools whose curricula, instruction, and educational standards diverge dramatically from those in public schools." Compl. ¶ 7. Plaintiffs also claim that the ESA program violates Section 2 because "it undermines the public school system ... by diverting funds from the public schools and supporting a parallel system of private schools, including religious schools, which teach a religious curriculum and are not open to all on equal terms." *Id.*; *see also id.* ¶¶ 90-92.

Plaintiffs' two theories completely ignore Section 1.[11] The Legislature did not create Nevada's ESA program as part of Nevada's "uniform system of common schools" under Section 2; it created ESAs as part of its plenary power to "encourage [education] by all suitable means" under Section 1. Plaintiffs' first theory—that the ESA program allegedly "promotes a non-uniform system" by funding private schools that differ from the public schools—fails because Section 2 requires only that *the public schools* be uniform. Section 2 does not apply to private schools and does not impose any uniformity requirement on such schools. *Cf.* NRS 394.130 (requiring private schools to provide "instruction in the subjects required by law" for public schools "[i]n order to secure uniform and standard work for pupils in private school"). Nor does the ESA program convert participating private schools into public schools. *See* SB 302, § 14 (SB 302 shall not be deemed "to make the actions of a participating entity the actions of the State Government"). Nevada had a uniform public-school system before the adoption of SB 302, and after SB 302's adoption the State continues to have a uniform public-school system—one that is open to all who wish to attend. Nothing in Section 2 bars the Legislature from funding education savings accounts that parents and students may choose to use for private school. Any construction of Section 2 as prohibiting the ESA program would fly in the face of Section 1, which expressly empowers the Legislature to use "all suitable means" to encourage education.

Plaintiffs' second theory—that the ESA program allegedly "undermines" public schools

[11] Even Plaintiffs' reading of the Legislature's Section 2 powers is crabbed. In *State of Nevada v. Tilford*, 1 Nev. 240 (1865), the Court upheld the Legislature's power under Section 2 to abolish the Storey County board of education as part of the creation of a new public-school system. "There were county officers in Storey county which were not to be found in any other county in the State. The system of schools was different there from that in any other county." *Id*. at 245. Thus, "[i]t became the imperative duty of the Legislature to either alter the systems of school and county government in Storey county so as to conform to the other counties, to make the other counties conform to Storey, or to adopt a new system of school and county government for all the counties." *Id*. "Certainly," the Court held, "the legislature was not restricted in the choice of these three alternatives." *Id*. *Tilford* thus confirms that, even as to Section 2's "uniform[ity]" requirement, the Legislature has broad authority to restructure the public-school system. The Legislature may alter the existing public-school system or even adopt a "new system" in place of the old, so long as its policy applies in every county.

by "diverting" funds to private schools—fares no better than their first. By its terms, the "uniform system of common schools" language in Section 2 does not impose any restriction on the Legislature with respect to public school funding. It mandates uniformity, not any particular funding level.[12] Section 2's public-school uniformity requirement thus does not bar the Legislature from funding ESAs that parents and students may use on private schooling. Any such interpretation of Section 2 reads out of Nevada's Constitution Section 1's clear and expansive directive to the Legislature to "encourage [education] by all suitable means," including means outside the public-school system, and Section 6's provision of comprehensive and exclusive authority to the Legislature to determine the adequacy of school funding.

The Supreme Courts of Indiana, North Carolina, and Wisconsin have all upheld educational choice programs against challenges brought under the "uniformity" clauses of their state constitutions. *Davis v. Grover*, 480 N.W.2d 460 (Wis. 1992), upheld the Milwaukee Parental Choice Program ("MPCP"). The plaintiffs in that case argued that the MPCP violated Article X, § 3 of the Wisconsin Constitution, which states: "The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable; and such schools shall be free and without charge ....." Rejecting that argument, the *Davis* Court held that

> the MPCP in no way deprives any student the opportunity to attend a public school with a uniform character of education. ... [T]he uniformity clause requires the legislature to provide the opportunity for all children in Wisconsin to receive a free uniform basic education. The legislature has done so. The MPCP merely reflects a legislative desire to do more than that which is constitutionally mandated. [480 N.W.2d. at 474.]

See also Jackson v. Benson, 578 N.W.2d 602, 627-28 (Wis. 1998) (again upholding the MPCP).

The Indiana Choice Scholarship Program was upheld in *Meredith v. Pence*, 984 N.E.2d 1213 (Ind. 2013). Indiana's Constitution, like Nevada's, directs the legislature to (1) "encourage"

[12] Indeed, Section 6 of Article 11 makes very clear that it is the Legislature, and only the Legislature, that decides the adequacy of public school funding: "the Legislature shall enact one or more appropriations to provide the money *the Legislature* deems to be sufficient …." Nev. Const. Art. 11, § 6 (emphasis added). Plaintiffs' second theory is effectively an unpled collateral attack on the Legislature's discretionary determination under Section 6.

education by "all suitable means" and (2) establish a "uniform system of common schools."[13] Rejecting the plaintiff's "uniformity" challenge, the Court explained that the "[t]he school voucher program does not replace the public school system, which remains in place and available to all Indiana schoolchildren," and that "so long as a 'uniform' public school system ... is maintained, the General Assembly has fulfilled the duty imposed by the Education Clause." *Id*. at 1223.

The *Meredith* Court also held that the Indiana program was authorized by the legislature's power to encourage education by all suitable means, explaining that "the Education Clause directs the legislature generally to encourage improvement in education in Indiana, and this imperative is broader than and in addition to the duty to provide for a system of common schools." *Id*. at 1224. Because the Indiana program did "not alter the structure or components of the public school system," it came under "the first imperative" to encourage education "and not the second" imperative for a uniform public-school system. *Id*.

North Carolina's Opportunity Scholarship Program was recently upheld in *Hart v. State of North Carolina*, 774 S.E.2d 281 (N.C. 2015). The plaintiffs argued that the program violated Article IX, § 2(1) of the State Constitution, which provides that "[t]he General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools." The *Hart* Court rejected this. The uniformity clause, which "requires that provision be made for public schools of like kind throughout the state," was held to "appl[y] exclusively to the public school system and does not prohibit the General Assembly from funding educational initiatives outside of that system." *Id*. at 289-90. The Court specifically rejected the argument that the program created "an alternate system of publicly funded private schools standing apart from the system of free public schools," *id*. at 289—the same argument Plaintiffs make here. *See* Compl. ¶ 7.

[13] The Education Clause of the Indiana Constitution provides that "it should be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement; and to provide, by law, for a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all." Ind. Const. art. 8, § 1.

* * *

Nevada's new ESA program was enacted for a valid secular purpose—the improvement of the education system in Nevada—and it is available to all Nevadans, regardless of creed. It does not involve the use of public funds for a sectarian purpose. Therefore, it does not violate Section 10 of the Nevada Constitution. Nor does the program violate the Legislature's duty under Section 2 to establish a uniform system of common schools. It gives parents and students the choice of attending a uniform public school, private school, or even pursue other educational options. And it falls well within the Legislature's broad Section 1 power to encourage education by all suitable means.

CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss should be granted.

Respectfully submitted,

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*Motion for admission *pro hac vice* forthcoming

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