IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellant,

v.

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

Respondents.

Supreme Court No. 69611

District Court No. 15-OC-00207-1B

APPELLANT'S OPENING BRIEF

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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 S.B. 302, creating Nevada's new ESA program, violates Article 11, Section 6, of the Nevada Constitution. The district court entered a preliminary injunction against the law on this ground. That decision, and the ultimate questions presented, raise issues of first importance to the people of Nevada, particularly students and parents of school-age children. This statement is made pursuant to NRAP 28(a)(5).

INTRODUCTION

In 2015, the Nevada Legislature exercised its undoubted constitutional authority over education to address the crisis in the State's public education system—the nation's worst.[1] It enacted or revised a number of programs to improve the public schools, and it adopted a new Education Savings Account ("ESA") program that provides funds to parents and students who wish to pursue other educational options better suited to their unique needs. The Legislature gave priority to adopting appropriations for education and appropriated more than $2 billion for the public schools and the ESA program for the current biennium.

In this case, the district court preliminarily enjoined Senate Bill 302 ("SB 302"), the statute creating the ESA program. After rejecting Respondents' other attacks on SB 302, the court held that the funding structure of SB 302 violates Article 11, Section 6 of the Nevada Constitution. Specifically, the district court held that it was unconstitutional for the Legislature to deposit the $2 billion intended to cover the State's obligations to the public schools and the ESA program into the same account—the State Distributive School Account ("DSA").

[1] In Education Week's most recent *Quality Counts* report, Nevada ranked "dead last" in education, after the other 49 States and the District of Columbia. *See* Trevon Milliard, *Nevada Falls to Last on Education Ranking*, Reno Gazette-J. (Jan. 7, 2016), http://on.rgj.com/1RsjtkC.

The court's view of Section 6 is, however, entirely unsupported by that Section's text, structure, and purpose.

Section 6 imposes three clear and specific duties on the Legislature concerning the funding of the public schools—and the Legislature clearly satisfied all three and SB 302 violates none. First, Section 6.1 requires the Legislature to provide for the "support and maintenance [of the public schools] by direct legislative appropriation from the general fund." Nev. Const. art. 11, § 6.1. No one doubts that the Legislature has done that. For the current biennium, it passed Senate Bill 515 ("SB 515"), which established the per-pupil basic support guarantees for the school districts and transferred $2 billion in general funds to the DSA to cover both the State's obligations to the school districts and the ESA program.

Next, Section 6.2, enacted in 2006 after the public-school funding impasse of 2003, imposes two other requirements on the Legislature: "[B]efore any other appropriation is enacted to fund a portion of the state budget for the next ensuing biennium, the Legislature shall enact one or more appropriations to provide the money the Legislature deems to be sufficient" for the public schools. Nev. Const. art. 11, § 6.2. Section 6.2 thus requires the Legislature to (1) pass an appropriations bill funding the public schools *before* it passes any other appropriations bill and (2) provide the funds that it "deems to be sufficient" for the

public schools. *Id*. As to the former, there is no dispute that SB 515, the bill that appropriated $2 billion to the DSA, was the first appropriations bill for the current biennium, and that the very first section of SB 515 set aside "guarantee[d]" funding for Nevada's public schools. And while the latter is plainly not a justiciable duty, the Legislature expressly declared the amount that it set aside in SB 515 as "sufficient" funding for the public schools. Indeed, the very title of SB 515 is "An Act … ensuring sufficient funding for K-12 public education for the 2015-2017 biennium …." SB 515, Title.[2]

Section 6 might be violated if, for example, the Legislature refused to fund the public schools; or if it tried to fund them without using any general funds; or if it passed some other appropriations bill before passing the school appropriations bill. But the Legislature did none of those things here.

Nevertheless, the district court held that the funding provision of the ESA bill, SB 302, violated Sections 6.1 and 6.2 and entered a preliminary injunction against its implementation. SB 302 states that funds for the ESA program shall come from the DSA, *see* SB 302, § 16.1,[3] the same account to which the Legislature later appropriated $2 billion in SB 515. Despite no such requirement in the actual text of the Constitution, the court held that any appropriation into the

[2] SB 515 attached as Appellant's Appendix ("Aplt App.") 108-139.

[3] SB 302 attached as Aplt. App. 78-107.

DSA—here, the $2 billion—is the amount "the Legislature deems to be sufficient" for the public schools under Section 6.2—and hence the use of such money on the ESA program leaves the public schools with less than the amount that the Legislature deemed to be sufficient. Admitting that the text of Section 6 imposes no such requirement, the court held that it is unconstitutional for the Legislature to fund the public schools and the ESA program from a single appropriation deposited into the DSA. The court concluded that no portion of the money in the DSA can be used for the ESA program based on its view that any appropriation pursuant to Sections 6.1 and 6.2 must be used *only* for the public schools and that all of the money in the DSA *is* that appropriation.

The Section 6 violations that the district court perceived are wholly illusory. As the district court acknowledged, nothing in the text of Sections 6.1 or 6.2 prohibits the Legislature from appropriating a sum of money to support both the public schools and another per-pupil educational program such as the ESA program, nor do these or any other constitutional provisions require that the entirety of the DSA be set aside for public schools. Indeed, the district court would perceive no Section 6 difficulty with an appropriation into the DSA for the public schools based on an estimate of the number of pupils enrolled and a separate appropriation for the ESA program into a different account based on an estimate of the number of participants in that program. But nothing in either Section 6 or

common sense draws a distinction between those two bills and a single appropriation bill that first allocates guaranteed per-pupil funds to public schools, and also funds the ESA program based on per-pupil enrollment. Section 6 merely requires that public schools be funded first, "*before* any other appropriation," which is what SB 515 did in its very first section, when it established a per-pupil "guarantee" for public schools. Nothing in Section 6 requires lump-sum appropriations instead of per-pupil appropriations, and nothing forces the Legislature to rely on *ex ante* estimates rather than a more precise per-pupil approach. Indeed, the Legislature has been appropriating "sufficient" funds for public schools on a per-pupil basis under the Nevada Plan since long before ESAs were created.

Because the requirements of Section 6 are clear and specific, it was improper for the district court to read additional, unwritten requirements into Section 6. The first two Section 6 requirements are that the Legislature appropriate funds for the public schools from the general fund (it did that), and that the Legislature do so before passing any other appropriations bill (it did that too). The third (and plainly nonjusticiable) requirement is that the Legislature must appropriate funds for the public schools in an amount that it "deems to be sufficient." Contrary to the district court's view, SB 302 does not violate that requirement. The Legislature passed SB 302 creating the ESA program on May 29, 2015, and provided that

funds for the ESA program would come from the DSA. *See* SB 302, § 16.1. Three days later, on June 1, 2015, the Legislature passed SB 515 and appropriated $2 billion into the DSA. Having passed SB 515 right after SB 302, the Legislature knew full well that the $2 billion would fund both the per-pupil guarantee for the public schools *and* the ESA program. And the Legislature determined that the appropriation would "ensur[e] sufficient funding" for public education—both for students that stayed in the public schools and those that took advantage of the ESAs. SB 515, Title.

This was no mistake. Funding the public schools and the ESA program out of the same pool of money is the most natural and efficient way to fund the ESA program in a State such as Nevada that funds the public schools on a per-pupil basis. Under the Nevada Plan, the State's contribution to public-school funding does not come in the form of a lump sum appropriation. Instead, the State provides funds to the public schools by setting a "basic support guarantee" for each school district. The basic support guarantee is a per-pupil amount that the State assures to each school district, less the local funds received by the district. In SB 515, the Legislature set an average basic support guarantee of $5,710 per pupil for FY 2015-16. *See* SB 515, § 1. When a student enters the ESA program, Nevada deposits 90% of the average basic support guarantee for that student into her ESA.

Since both the Nevada Plan and the ESA program provide funding on a per-

pupil basis—funds for any given student will go either to the school district or into the student's ESA account—it made perfect operational sense for the Legislature to appropriate the $2 billion intended to cover the public schools' basic support guarantees and the ESA program to a single account. The Legislature could have put a small fraction of the $2 billion in one account for the ESA program and most of the money in the DSA for the public schools, but that would have required the Legislature to predict the number of public school students who would sign up for the new ESA program. If the Legislature had divided the money in that way, Respondents would have no conceivable argument that SB 302 violates Section 6. But it is impossible to believe that the ESA program is unconstitutional simply because the Legislature chose to adopt a more efficient funding mechanism that the text of the Constitution comes nowhere close to prohibiting.

Finally, even if the district court were correct that Section 6 imposed restrictions nowhere mentioned in its text, the preliminary injunction was still improper. Plaintiffs failed to demonstrate that they would suffer irreparable harm without a preliminary injunction, and the district court offered no more than the conclusory statement that irreparable harm exists. If anything, the parents and students who looked forward to improving their educational options through the ESA program have suffered irreparable harm because of the district court's unsupportable injunction. The district court's order should be reversed and the

injunction lifted.

JURISDICTIONAL STATEMENT

This is an appeal from an order of the First Judicial District Court in and for the City of Carson City issued on January 11, 2016, preliminarily enjoining the ESA program enacted by the Legislature as SB 302. *See* Aplt. App. 37-51 ("Order"). The district court's Order is appealable pursuant to N.R.A.P. 3A(b)(3). On January 15, 2016, Appellant timely filed and served a notice of entry of the Order and a notice of appeal.

ISSUES PRESENTED FOR REVIEW

1. Whether the Legislature's appropriation of $2 billion to the State Distributive School Account to fund both the public schools and the ESA program for the current biennium means that SB 302 violates Article 11, Section 6 of the Nevada Constitution.

2. Whether Respondents' claim that the Legislature, in appropriating $2 billion for both the public schools and the ESA program, did not provide the funds "the Legislature deems to be sufficient" for the public schools, Nev. Const. art. 11, § 6.2, is a non-justiciable political question.

3. Whether a preliminary injunction denying thousands of Nevada schoolchildren the opportunity to use the ESA program to attend the school that best meets their needs may issue where Respondents have not been irreparably

harmed, or even harmed at all, by the putative Section 6 violation.

STATEMENT OF THE CASE

On June 2, 2015, the Legislature adopted and the Governor approved SB 302, which created the ESA program for the benefit of Nevada schoolchildren and their parents. On September 9, 2015, Respondents—the parents of public schoolchildren—brought a facial challenge to SB 302 in the district court. In their complaint, Respondents alleged that SB 302 on its face violates Sections 2, 3, and 6 of Article 11 of the Nevada Constitution. On October 20, 2015, Respondents moved for a preliminary injunction. Nevada opposed Respondent's motion and also moved to dismiss the complaint pursuant to N.R.C.P. 12(b)(5).

On December 24, 2015, the district court denied the motion to dismiss on the view that Appellant "did not argue the complaint does not contain sufficient factual allegations, rather he alleged facts and argued that his facts demonstrate that SB 302 is constitutional." Aplt. App. 32-33.

On January 11, 2016, the district court granted a preliminary injunction. The court rejected Respondents' claims under Section 2 and Section 3 but held that SB 302 violates Section 6. Aplt. App. 43-49.

This Court expedited the briefing of this appeal. *See* Order Granting Mot. to Expedite (Feb. 12, 2016).

STATEMENT OF FACTS

A. Article 11 of the Nevada Constitution

Article 11 of the Nevada Constitution addresses the subject of education. Section 1 of Article 11—captioned "Legislature to encourage education"—instructs the Legislature to encourage education, and it grants the Legislature broad authority to fulfill its obligation by "all suitable means." Nev. Const. art. 11, § 1. Section 1 states: "The legislature shall encourage by all suitable means the promotion of intellectual, literary, scientific, mining, mechanical, agricultural, and moral improvements ...." *Id*.

While Article 11, Section 1 grants the Legislature considerable flexibility in providing for education by "all suitable means," some of the other provisions of Article 11 impose modest restrictions on that broad authority. In this case, Respondents argued that three sections of Article 11—Sections 2, 3, and 6—precluded the Legislature from enacting SB 302. The district court properly rejected the Section 2 and Section 3 claims. Section 2 states that the "legislature shall provide for a uniform system of common schools." *Id*. § 2. Section 3 provides that the money derived from certain State-owned property (*e.g*., "All lands granted by Congress to this state for educational purposes") are "pledged for educational purposes and the money therefrom must not be transferred to other funds for other uses." *Id*. § 3.

But the district court agreed with Respondents' Section 6 claim. Before 2006, Section 6 provided that "[i]n addition to other means provided for the support and maintenance of [the state] university and common schools, the legislature shall provide for their support and maintenance by direct legislative appropriation from the general fund." In 2003, however, the Legislature did not pass a balanced budget or fund the public schools until July of that year, after this Court had issued a writ of mandamus directing the Legislature "to fulfill its obligations under the Constitution of Nevada by raising sufficient revenues to fund education while maintaining a balanced budget." *Guinn v. Legislature of State of Nev.*, 119 Nev. 277, 282, 71 P.3d 1269, 1272 (2003), *pet. for reh'g dis'd & prior op. clarified*, 119 Nev. 460, 76 P.3d 22 (2003).

In the wake of the 2003 impasse and the *Guinn* litigation, Section 6 was amended by initiative petition in 2006. The first two subsections of Section 6 now provide in full as follows:

> 1. In addition to other means provided for the support and maintenance of said university and common schools, the legislature shall provide for their support and maintenance by direct legislative appropriation from the general fund, upon the presentation of budgets in the manner required by law.
>
> 2. During a regular session of the Legislature, before any other appropriation is enacted to fund a portion of the state budget for the next ensuing biennium, the Legislature shall enact one or more appropriations to provide the money the Legislature deems to be sufficient, when combined with the local money reasonably available for this purpose, to fund the operation of the public schools in the

> State for kindergarten through grade 12 for the next ensuing biennium for the population reasonably estimated for that biennium.

Nev. Const. art. 11, §§ 6.1-6.2.

Section 6.1 thus provides that the Legislature shall see to the support and maintenance of the public schools "by direct legislative appropriation from the general fund." *Id*. § 6.1. And Section 6.2 provides that, "before any other appropriation is enacted," the Legislature shall appropriate "the money the Legislature deems to be sufficient, when combined with the local money" to fund the public schools for the next biennium. *Id*. § 6.2.

Significant for this case, Section 6 does *not* say that funds appropriated for the public schools and deemed sufficient for that purpose cannot be combined with funds intended to be used for related educational purposes. Nothing in Section 6 forbids the Legislature from appropriating to one account the funds that it deems sufficient to support the public schools and another educational program, such as the ESA program. Nor does anything in Section 6 designate the entirety of the DSA funds as *the* funds that the Legislature has set aside as "sufficient" for the public schools. Rather, it simply requires that the Legislature appropriate money for public education first before it turns to other appropriations bills.

B. The "Nevada Plan" for Public School Funding

The Nevada Plan is the State's statutory scheme for funding the public schools. A central feature of the Nevada Plan is that the State provides funding to

the school districts on a per-pupil basis, rather than through lump-sum payments. For each school district, the Legislature establishes a "basic support guarantee"—the per-pupil amount that the Legislature assures that the district will receive. The Legislature provides to each school district the difference between the local educational funds it receives and the amount of its basic support guarantee.

"To fulfill its constitutional obligation to fund education, the Legislature created the Nevada Plan, a statutory scheme setting forth the process by which it determines the biennial funding for education." *Educ. Initiative PAC v. Comm. to Protect Nev. Jobs*, 129 Nev. Adv. Op. 5, 293 P.3d 874, 883 n.8 (2013). "The Nevada Plan assumes certain local money will be 'reasonably available' to fund education and envisions funding from three funding sources: local taxes consisting primarily of property taxes, local funds consisting of a portion of the same property taxes and separate sales taxes, and state funds." *Id*. (citing NRS 387.121; NRS 387.1235(1); and NRS 387.195). "In addition to financing the State's own share, the Legislature is required to 'guarantee' a shortfall in local funds when the local funds are less than projected." *Id*. (citing NRS 387.121).

Under "the Nevada Plan," NRS 387.121, "the Legislature establishes 'basic support guarantees' for all school districts." *Rogers v. Heller*, 117 Nev. 169, 174, 18 P.3d 1034, 1037 (2001) (quoting NRS 387.122). "The basic support guarantee is the amount of money each school district is guaranteed to fund its operations."

Aplt. App. 39. The basic support guarantee is a per-pupil guarantee: "The amount for each school district is determined by the number of pupils in that school district." *Id*. "After the legislature determines how much money each local school district can contribute, the legislature makes up the difference between the district's contribution and the amount of the basic support guarantee." *Id*.; *see also Rogers*, 117 Nev. at 174, 18 P.3d at 1037 (citing NRS 387.121 and 387.1235). "Funds appropriated by the legislature from the general fund sufficient to satisfy each district's basic support guarantee are deposited into the State Distributive School Account ('DSA'), which is an account within the state general fund." Aplt. App. 39; *see also* NRS 387.030.

Because the basic support guarantee is a per-pupil amount, the amount of money a school district is guaranteed fluctuates as student enrollment fluctuates. The Legislature protects school districts from large downward enrollment fluctuations with the so-called "hold harmless" statute. *See* NRS 387.1233(3), *as amended*, SB 508, § 9. Under this statute, if a school district experiences a decline in enrollment of 5% or more from one year to the next, the district is funded based on the prior year's enrollment figure. Aplt. App. 39. With this "hold harmless" provision, the Legislature ensures that districts will receive an amount the Legislature deems to be sufficient despite any sharp declines in enrollment.

C. Senate Bill 515 and Public School Funding

On June 1, 2015, just three days after it enacted SB 302, the Legislature enacted SB 515 to "ensur[e] sufficient funding for K-12 public education for the 2015-2017 biennium." SB 515, Title. In Sections 1 and 2 of SB 515, the Legislature established basic support guarantees of $5,710 per pupil for FY 2015-16 and $5,774 per pupil for FY 2016-17. *Id*. §§ 1-2.[4] In Section 7, the Legislature appropriated some $1.1 billion from the general fund to the DSA for FY 2015-16 and more than $933 million for FY 2016-17—a total of more than $2 billion for the biennium. *Id*. § 7.

The $2 billion is the amount the Legislature deemed necessary to fund the public schools *and* the ESA program, and it transferred that sum to the DSA for those purposes. The $2 billion is *not* the amount of the public schools' entitlement under the Nevada Plan. Rather, under the Nevada Plan, the school districts are entitled to their basic support guarantee, which is a per-pupil amount and so varies with enrollment. Furthermore, the amount the State pays is decreased by the amount of local funding a district collects. Thus, depending on these factors, the $2 billion may prove to be too much or too little for the biennium. SB 515 provides that, if the Legislature has appropriated more money than is necessary to

[4] Each of these figures is an "estimated weighted average." SB 515, §§ 1, 2. Each school district receives a different basic support guarantee. *See id*. § 1.

cover the basic support guarantees, the excess funds "must be reverted to the State General Fund." *Id*. § 6.6. Conversely, if the Legislature has not appropriated enough money, additional general funds are advanced to the DSA. *Id*. § 9.

D. SB 302 and the ESA Program

In 2015, the Legislature passed SB 302 and created the ESA program to empower Nevada parents and students to pursue the educational options that best meet the students' educational needs. The major provisions of SB 302 and the ESA program are described below, but only one provision rendered SB 302 unconstitutional in the eyes of the district court—its funding provision. Section 16.1 of SB 302 provides that ESAs will be funded from the DSA, the same account to which the Legislature, three days after passing SB 302, appropriated $2 billion in SB 515. *See* SB 302, § 16.1.

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. Any school-age child in Nevada may participate in the ESA program. *Id*. § 7.1. The only requirements are that a child take standardized tests and be enrolled in a Nevada public school for at least 100 consecutive school days before opening an account. *Id*. §§ 7.1, 12.1.

Most students participating in the program receive a grant equal to 90% of a formula described as the "statewide average basic support per pupil." *Id*. § 8.2(b).

Students with disabilities or in low-income households receive 100% of Nevada's per-student allocation. *Id*. § 8.2(a). For the 2015-16 school year, grant amounts will be a pro rata portion of $5,139 or $5,710. Any funds remaining in an ESA at the end of a school year are carried forward to the next year if the parents' agreement with the State Treasurer is renewed. *Id*. § 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. *Id*. § 9.1. ESA grants may "only" be used for the educational purposes specified in SB 302. *Id*. §§ 7.1(c), 9.1. 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. *Id*. §§ 3.5, 5; *see also id.* § 11.1. Participating private schools must be "licensed pursuant to chapter 394 of NRS or exempt from such licensing pursuant to NRS 394.211." *Id*. § 5.

E. Legislative History of SB 302

SB 302 was enacted as part of a comprehensive overhaul of the education system in Nevada. Governor Sandoval, 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), http://1.usa.gov/1TX8tjL. Governor Sandoval noted that "far too many of our schools are persistently failing"—10% of Nevada schools are on the Nevada Department of Education's list of underperforming schools—and "[m]any have been failing for more than a decade." *Id*. at 8. 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, including the ESA program.[5] Senate Majority Leader Michael Roberson explained the purpose of the ESA program: "This would be a world-class educational choice program. We are attempting to make an historic investment in the Nevada public school system this session. There is room for a school choice system as well." *Minutes of the Sen. Comm. on Fin.*, 78th Sess. 18 (Nev. May 14, 2015). 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 school." *Minutes of the Sen. Comm. on Educ.*, 78th Sess. 7 (Nev. Apr. 3, 2015) ("*Minutes*, Apr. 3"). "More

[5] For descriptions of many of the other new programs, see Dep't of Educ., *2015 Legislative Implementation Updates* (2015), http://1.usa.gov/1nkxY1w.

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

23 empirical studies that "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 from 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, 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.]

F. The District Court's Preliminary Injunction Order

In its order granting Respondents' motion for a preliminary injunction, the district court held that SB 302 does not violate Section 2 or Section 3 of Article 11 but does violates Sections 6.1 and 6.2. *See* Aplt. App. 38.

With respect to Respondents' Section 2 claim, the court held that "SB 302 does not create a non-uniform system of schools, or use public funds to create a system of education other than the type mandated in Article 11 Section 2." *Id*. at 48 (italics omitted). "SB 302 does not do away with public schools," the court explained, and Section 2 "does not prohibit the legislature from providing students with options not available in the public schools." *Id*. at 49.[6] In rejecting Respondents' Section 2 claim, the court also pointed to Section 1, which empowers the Legislature to promote education by "all suitable means." Nev. Const. art. 11,

[6] The Supreme Courts of Indiana, North Carolina, and Wisconsin have rejected attacks on educational choice programs based on the uniformity clauses in those States' constitutions. *See Meredith v. Pence*, 984 N.E.2d 1213, 1220-25 (Ind. 2013); *Hart v. State of North Carolina*, 774 S.E.2d 281, 289-290 (N.C. 2015); *Jackson v. Benson*, 578 N.W.2d 602, 627-628 (Wis. 1998); *Davis v. Grover*, 480 N.W.2d 460, 473-474 (Wis. 1992).

§ 1. The court said that Respondents' argument "would limit the legislature and stunt the 'encourage by all suitable means' provision of section 2." Aplt. App. 49.

As to Respondents' Section 3 claim, the district court observed that "Section 3 provides that funds from sources specified in Section 3 are 'pledged for educational purposes and the money therefrom must not be transferred to other funds for other uses.'" *Id*. at 44 (quoting Section 3). Section 3 money is kept in the Permanent School Fund, and interest on Section 3 money is transferred to the DSA. *Id*. at 39-40. The court rejected the argument that, because ESAs will be funded out of the DSA, the program violates Section 3. It agreed with Nevada that "SB 302 does not mandate the use of Section 3 money for the ESA program, and the Distributive School Account has sufficient money to fund the ESA program without using Section 3 money." *Id*. at 44. The court found that the "interest on the PSF constitutes a small portion of the funds in the DSA. In 2014, of the $1.4 billion in the DSA that came from the State Government, $1.1 billion, or 78 percent, came from the general fund, and $1.6 million, or 0.14%, came from the PSF." *Id*. at 40. *See also* Aplt. App. 22.[7]

[7] Nevada presented an alternative argument that, even if SB 302 called for or required the use of some of the Section 3 money in the DSA, SB 302 would still be constitutional because Section 3 expressly permits the use of covered money for "educational purposes," Nev. Const. art. 11, § 3, and the ESA program serves educational purposes. The district court did not accept that alternative argument, *see* Aplt. App. 45-46, but its comments on the argument are *dicta*.

Although the district court rejected Respondents' claims under Sections 2 and 3, the court held that SB 302 violates Sections 6.1 and 6.2. *See* Aplt. App. 45-48. Notably, the court admitted that Sections 6.1 and 6.2 "do not expressly say that the general funds appropriated to fund the operation of the public schools must only be used to fund the operation of the public schools," but it read those sections to "necessarily imply" such a requirement. *Id*. at 45-46. The court stated that "Sections 6.1 and 6.2 require the legislature to set apart or assign money to be used to fund the operation of the public schools, to the exclusion of all other purposes." *Id*. at 46. "Because some amount of general funds appropriated to fund the operation of the public schools will be diverted to fund education savings accounts under SB 302, that statute violates Sections 6.1 and 6.2." *Id*.

The district court also found a separate violation of Section 6.2. It stated that "[t]he legislature appears to have appropriated money from the general fund into one account to fund the operation of the public schools and to fund ESAs." *Id*. at 47. And it reasoned that "SB 302 diverts funds from the DSA thereby reducing the amount deemed sufficient by the legislature to fund public education." *Id*.

The court concluded that "the diversion of any funds in violation of Article 11, Section 6 will cause irreparable harm to students in Nevada" and that "on balance the potential hardship to [Respondents'] children outweighs the interests of

the Treasurer and others." *Id*. at 50. The court, however, offered no reasons or factual basis for these conclusions. Because plaintiffs had brought a facial challenge to SB 302, the court enjoined the implementation of the law in its entirety. *Id*. at 51.

SUMMARY OF ARGUMENT

The funding structure of SB 302 does not violate Sections 6.1 or 6.2 of Article 11 of the Nevada Constitution. Those sections impose three, and only three, requirements on the Nevada Legislature: It must fund the public schools from general funds; it must fund the public schools in the first appropriations bill for the biennium; and it must provide the funds that it "deems to be sufficient" for the public schools. The Legislature has satisfied each of those clear and specific requirements, and SB 302 violates none of them.

In SB 302, the Legislature provided that ESAs shall be funded from the DSA, the same account historically used under the Nevada Plan to fund the public schools. Three days after passing SB 302, the Legislature passed SB 515, which set the per-pupil basic support guarantees for the school districts and appropriated more than $2 billion to the DSA. The Legislature knew that both the ESA program and the school districts' per-pupil guarantees would be funded from this $2 billion, and the Legislature determined that SB 515 would "ensur[e] sufficient funding for K-12 public education for the 2015-2017 biennium." SB 515, Title.

Nothing in SB 302 or SB 515 violates the straightforward and easily understood text of Section 6, and nothing in that provision forbids the Legislature from making one lump-sum appropriation deemed to be sufficient to fund both the public schools' per-pupil basic support guarantees and another educational program. The district court conceded that Sections 6.1 and 6.2 "do not expressly say that the general funds appropriated to fund the operation of the public schools must only be used" for that one purpose. Aplt. App. at 45-46. And, contrary to the district court's view, Section 6 does not "necessarily imply" such a requirement. *Id*. at 46. The text and requirements of Section 6 are clear and specific and a court may not construe Section 6 to include additional, unstated requirements. That is especially true because Section 6 of Article 11 must be read *in pari materia* with the first section of Article 11, which expressly empowers the Legislature to encourage education by "all suitable means." The Legislature plainly and permissibly deemed a $2 billion appropriation to the DSA as the most suitable means of funding both the public schools and the ESA program.

Respondents' claim under Section 6.2 that the Legislature's passage of SB 302 caused the Legislature to fail to appropriate the funds that "the Legislature deems to be sufficient" for the public schools is not just meritless; it is not even justiciable. The text of Section 6.2 vests the Legislature with exclusive authority to decide whether it "deems" its funding of the public school to be "sufficient," and

there are no judicial standards for reviewing the Legislature's determination.

That Respondents' claims under Sections 6.1 and 6.2 lack merit and are non-justiciable is reason enough to reverse the district court's preliminary injunction order. The other preliminary injunction factors also provide compelling reasons to do so. The putative Section 6 violation arising from the Legislature's appropriation of funds for the public schools and the ESA program to one account rather than two accounts does not harm Respondents at all, let alone irreparably so. But the preliminary injunction enjoining the ESA program undeniably harms the four thousand or more Nevada students (and their parents) who have applied to open ESAs so that they may pursue the educational opportunities that best meet their unique educational needs. The relative hardship and public interest factors both support lifting the injunction and allowing the ESA program to go into effect as the Legislature intended.

STANDARDS OF REVIEW

A preliminary injunction is "extraordinary relief." *Dep't of Conserv. & Nat. Res. v. Foley*, 121 Nev. 77, 80, 109 P.3d 760, 762 (2005). "For a preliminary injunction to issue, the moving party must show that there is a likelihood of success on the merits and that the nonmoving party's conduct, should it continue, would cause irreparable harm for which there is no adequate remedy at law." *Id*. "Because statutes are presumed to be valid," Respondents bear the "burden of

clearly showing that [SB 302] is unconstitutional" to secure a preliminary injunction. *S.M. v. State Dep't of Pub. Safety*, No. 64634, 2015 WL 528122, at *2 (Nev. Feb. 6, 2015); *see also id*. at *3.

"Generally, this court reviews preliminary injunctions for abuse of discretion. Questions of law, however, are reviewed de novo." *Labor Comm'r of Nev. v. Littlefield*, 123 Nev. 35, 39, 153 P.3d 26, 28 (2007). "Factual determinations will be set aside only when clearly erroneous or not supported by substantial evidence." *Univ. & Cmty. Coll. Sys. of Nev. v. Nevadans for Sound Gov't*, 120 Nev. 712, 721, 100 P.3d 179, 187 (2004).

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*., 99 Nev. at 138, 600 P.2d at 106.

In a facial challenge to a statute, the plaintiff "bears the burden of demonstrating that there is no set of circumstances under which the statute would be valid." *Deja Vu Showgirls v. Nevada Dep't of Taxation*, 130 Nev. Adv. Op. 73,

334 P.3d 392, 398 (2014). Given the high bar set by the facial-challenge rule, "[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully." *United States v. Salerno*, 481 U.S. 739, 745 (1987).

ARGUMENT

I. SB 302's Alleged Violation Of Article 11, Section 6 Of The Nevada Constitution Is Meritless And Nonjusticiable.

A. Nothing in Section 6 Forbids the Legislature From Funding the Public Schools and the ESA Program From One Appropriation to One Account.

SB 302's funding structure for the ESA program is entirely consistent with the Nevada Constitution. SB 302 provides that "all the funds deposited in education savings accounts" shall come from the DSA. SB 302, § 16.1. That provision of SB 302 does not violate Article 11, Section 6 of the Constitution—or even come remotely close to doing so. Section 6 requires the Legislature to fund the public schools from general funds, to appropriate funds for the public schools before any other appropriation, and to appropriate funds the Legislature "deems to be sufficient" for the public schools. Nev. Const. art. 11, §§ 6.1-6.2. The Legislature complied with all of those requirements, and there is nothing in Section 6 that makes SB 302 unconstitutional as a result of funding ESAs from the same appropriation that is to be used for the public schools.

The district court gave two reasons for its ruling that Section 16.1 of SB 302 is unconstitutional. First, it said that, under Sections 6.1 and 6.2, "general funds

appropriated to fund the operation of the public schools must *only* be used to fund the operation of the public schools, but under SB 302 some amount of general funds appropriated to fund the operation of the public schools will be diverted to fund education saving accounts." Aplt. App. 45 (emphasis added). Second, it said that "SB 302 diverts funds from the DSA thereby reducing the amount deemed sufficient by the legislature to fund public education." *Id*. at 47.

But there is no support for either of the district court's conclusions in the text of Sections 6.1 and 6.2. Indeed, the court itself conceded that those sections "do not expressly say that the general funds appropriated to fund the operation of the public schools must only be used to fund the operation of the public schools." *Id*. at 45-46.

The text and meaning of Sections 6.1 and 6.2 are clear and unambiguous. Section 6.1 states that "the legislature shall provide for [the public schools'] support and maintenance by direct legislative appropriation from the general fund." Nev. Const. art. 11, § 6.1. Section 6.2 states that "before any other appropriation is enacted to fund a portion of the state budget for the next ensuing biennium, the Legislature shall enact one or more appropriations to provide the money the Legislature deems to be sufficient … to fund the operation of the public schools …." *Id*. § 6.2.

It bears repeating that the text of Sections 6.1 and 6.2 imposes only three specific duties on the Legislature. Sections 6.1 and 6.2 require nothing less, and nothing more. The district court had no authority to construe Section 6 to include additional, unstated requirements. *See In re Nilsson*, 129 Nev. Adv. Op. 101, 315 P.3d 966, 968 (2013) ("If the constitutional or statutory language 'is plain and unambiguous, and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself.'") (quoting *Hamm v. Arrowcreek Homeowners' Ass'n,* 124 Nev. 290, 295, 183 P.3d 895, 899 (2008)). So long as the public school appropriation is from general funds, is the first appropriation for the biennium, and is deemed sufficient by the Legislature for the public schools, all of the requirements of Sections 6.1 and 6.2 are satisfied.

SB 302 does not implicate—much less violate—any of these three requirements. First, SB 302 does not fund the public schools from a source other than the general fund. Second, SB 302 is not an appropriations bill and hence the fact that it was passed before SB 515, the bill that appropriated $2 billion to the DSA, raises no issue under Section 6.2. SB 515, the Legislature's first appropriations bill, *did* fund public schools first—it provided per-pupil support guarantees in the first sections of the bill. Third, with full knowledge of SB 302,

the Legislature in SB 515 expressly provided "sufficient" funding for the public schools.[8]

If anything, the sequence of the Legislature's enactments confirms that it conscientiously *complied* with Section 6.2. The Legislature passed SB 302 creating the ESA program on May 29, 2015. Three days later, on June 1, 2015, it passed SB 515—an Act "ensuring sufficient funding for K-12 public education for the 2015-2017 biennium ...." SB 515, Title.[9] When the Legislature in SB 515 established the per-pupil basic support guarantees for the school districts, transferred $2 billion in general funds to the DSA, and established the sum that it deemed to be "sufficient" for the public schools, it knew full well that ESAs also would be funded from the $2 billion pursuant to the already-passed SB 302. Thus, it cannot be said that SB 302 subtracts from the amount the Legislature deemed to be sufficient. The Legislature knew that funding for the ESA program would come from the DSA *before* the Legislature passed SB 515 and still deemed its per-pupil

[8] There is no argument that, absent SB 302, the Legislature in SB 515 failed to provide the funds that it deemed to be sufficient for the public schools. Nor have Plaintiffs even attempted to show that the entire $2 billion appropriation was necessary to fund the public schools—minus ESA students—for the biennium. The district court's Section 6.2 holding was based solely on the mistaken view that *all* of the funds in the DSA are earmarked exclusively for public schools: "SB 302 diverts funds from the DSA thereby reducing the amount deemed sufficient by the legislature to fund public education." Aplt. App. 47.

[9] Governor Sandoval approved SB 302 on June 2, 2015. He approved SB 515 on June 11, 2015.

guarantee to be "sufficient." It is generally "presumed that in enacting a statute the legislature acts with full knowledge of existing statutes relating to the same subject." *City of Boulder v. Gen. Sales Drivers*, 101 Nev. 117, 118-19, 694 P.2d 498, 500 (1985). That general principle applies with particular force to statutes relating to the same subject passed three days earlier.

Moreover, the Legislature also knew that, under the Nevada Plan, the actual amount each school district would receive under SB 515 would be based on that school district's actual enrollment, multiplied by the per-pupil basic support guarantee set forth in the first two sections of SB 515. That per-pupil amount, multiplied by whatever turned out to be the school districts' actual enrollment, was the amount "deem[ed] to be sufficient" by the Legislature under Section 6, *not* the lump-sum $2 billion appropriation in Section 7 of SB 515. Section 7's lump-sum amount could never be the amount deemed "sufficient" by the Legislature, since under the Nevada Plan (which long predated ESAs), the school districts are never guaranteed the lump-sum amount appropriated into the DSA. Instead, they are entitled only to the per-pupil guarantee. And the Legislature knew that funding the ESA program from the DSA would not affect that per-pupil guarantee.

The district court's two theories for why SB 302 violates Section 6 therefore fail. First, as just explained, SB 302 did not cause the Legislature to appropriate an amount that the Legislature did not "deem to be sufficient" for the public schools.

The Legislature knew about SB 302 and still deemed the appropriation in SB 515 sufficient. Second, the text of Section 6 does not forbid the Legislature from making a single appropriation to the DSA to fund both the public schools and the ESA program. As previously noted, the district court admitted that Sections 6.1 and 6.2 "do not expressly say that the general funds appropriated to fund the operation of the public schools must *only* be used to fund the operation of the public schools." Aplt. App. 45-46. (emphasis added).[10]

And the district court had no basis for its view that Sections 6.1 and 6.2 "necessarily imply" additional requirements. *Id.* at 46. Because the text of Sections 6.1 and 6.2 is "clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself." *In re Nilsson*, 315 P.3d at 968. The three requirements of Sections 6.1 and 6.2, as discussed above, are express and specific. The district court had no warrant to infer any additional unstated requirements.

[10] NRS 387.045, a 1956 statute, once provided that "[n]o portion of the public school funds or of the money specially appropriated for the purpose of public schools shall be devoted to any other object or purpose." Yet SB 302 amended NRS 387.045 to make it inapplicable to the ESA program. *See* SB 302, § 15.9. As the district court correctly found, "[t]he legislature amended that statute to make an exception so funds appropriated for public schools can be used to pay the education savings account grants established by SB 302." Aplt. App. 45. There is no claim in this case that SB 302 violates NRS 387.045. Furthermore, NRS 387.045 is not a redundant statute; nothing in Section 6 duplicates its requirements.

Moreover, the explicit authorization in the first provision of Article 11—Section 1—forecloses the discovery of additional implied restrictions in Section 6. Section 1 empowers the Legislature to encourage education by "all suitable means." Nev. Const. art. 11, § 1. *See Guinn*, 119 Nev. at 286, 71 P.3d at 1275. Section 1 represents a "broad delegation of legislative discretion"[11] in the area of education and allowed the Legislature the flexibility to fund the public schools and the ESA program from a single $2 billion appropriation to the DSA. The Legislature no doubt saw such means as suitable since funds distributed to ESAs need not be distributed to the public school districts. Section 1 authorized the Legislature to use those means, and Section 6 did not forbid it from doing so. The Legislature's policy is to support Nevada students who choose public school, as well as the smaller number who do not, and in both cases the Legislature acts on its constitutional authority to encourage the education of Nevada's youth.

There is no serious question under Section 6 about the constitutionality of SB 302's funding structure. Section 6's requirements are clear and were met. The district court's holding that Section 16.1 of SB 302 violates Section 6 was error.

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[11] The power to encourage education by "all suitable means," as the Indiana Supreme Court said of the similarly worded clause in its state constitution, "is a broad delegation of legislative discretion." *Meredith*, 984 N.E.2d at 1224 n.17.

B. Funding the Public Schools and the ESA Program From One Appropriation and Account Is the Optimal Means of Doing So.

In addition to complying with Section 6, the ESA's funding scheme makes perfect sense. The Legislature chose to fund both the ESA program and the public schools from the DSA because that is the most natural and efficient way to fund these per-pupil obligations. It is also an entirely constitutional means of doing so. Section 1 of Article 11 allows the Legislature to fund education in the State by "all suitable means." And the funding mechanism it chose here is eminently suitable. Just as the Legislature has always done under the Nevada Plan, it complied with Section 6 by providing the public schools with a per-pupil basic support guarantee in the very first sections of the very first appropriation of the term—here, SB 515.

As explained above, State funding of the public schools in Nevada is done on a per-pupil basis. Under the Nevada Plan, the Legislature establishes basic support guarantees for each school district. The State pays the difference between local funds received by the district and the guaranteed amount for each pupil attending a public school in the district.

The ESA program is also funded on a per-pupil basis. There is a dynamic relationship between the ESA program and the State's obligation to fund the public schools under the Nevada Plan. Each student that leaves a public school district to enter the ESA program reduces the amount of funds that the State must provide to that district pursuant to its per-pupil basic support guarantee. A student attending

public school cannot receive ESA funds, and a student participating in the ESA program cannot attend public school, which means that the student will not be counted towards any public school's enrollment. *See* Aplt. App. 25-26. Thus, it made perfect sense for the Legislature to fund both programs out of the same pool of money.

The Legislature could have written SB 302 to fund the ESA program from a separate appropriation, made to an account other than the DSA, and if it had done so Respondents would have no conceivable argument that SB 302 violates Section 6. But the Legislature's one-appropriation, one-account approach allowed it avoid the difficult task of predicting how many public school students would opt for the new ESA program. The funding structure of SB allowed the Legislature to take the school-age population in the State, establish the per-pupil basic support guarantee for each district, and deposit the funds estimated to be necessary in the DSA. Since students that enter the ESA program do not affect the per-pupil funding of the public schools, the approach taken in SB 302 and SB 515 ensures that there will be sufficient per-pupil funding for both the public schools and the ESA program.

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C. Respondents' Claim That the Legislature Did Not Appropriate the Funds "the Legislature Deems to be Sufficient" for the Public Schools Is Not Justiciable.

Not only does Respondents' claim under Section 6.2 fail on the merits, it is not even a justiciable claim. "Under the political question doctrine, controversies are precluded from judicial review when they revolve around policy choices and value determinations constitutionally committed for resolution to the legislative and executive branches." *N. Lake Tahoe Fire Prot. Dist. v. Washoe Cnty. Bd. of Cnty. Comm'rs*, 129 Nev. Adv. Op. 72, 310 P.3d 583, 587 (2013). It is hard to imagine a policy choice more obviously committed to the legislative branch and less suited to judicial second-guessing.[12]

According to Section 6.2, the Legislature "shall enact one or more appropriations to provide the money *the Legislature deems to be sufficient*" to fund the public schools. Nev. Const. art. 11, § 6.2 (emphasis added). Whether SB 302 violates this text is a non-justiciable for at least two independent reasons. First, as to the sufficiency issue, Section 6.2 clearly represents "a textually demonstrable constitutional commitment of the issue to a coordinate political department"—the Nevada Legislature. *N. Lake Tahoe Fire Prot. Dist.*, 310 P.3d at 587 (quotation marks omitted). Second, courts lack the tools to review the issue. There are no "judicially discoverable and manageable standards for resolving" the issue. *Id*.

[12] Nevada raised this issue below, *see* PI Opp. 23 & n.14, but the district court did not address justiciability in its Order.

Either one of these two *Baker*[13] factors means that Respondents' claim is non-justiciable and "necessitates dismissal based on the political question doctrine." *Id*.

Section 6.2 uses the classic language of textual commitment. The Nevada Legislature is not commanded to appropriate sufficient funds—a command that might at least arguably allow judicial second-guessing—but an amount that it "deems sufficient." That latter language is ideally suited to delegating the issue to the Legislature and ideally suited to foreclosing judicial review. *Cf. Webster v. Doe*, 486 U.S. 592, 600 (1988) (CIA Director's statutory authority to terminate an agency employee whenever the Director shall "deem such termination necessary or advisable" "exudes deference to the Director" and "foreclose[s] the application of any meaningful judicial standard of review" under the Administrative Procedure Act). And by making the constitutional test what the Legislature "deems sufficient," Section 6.2 forecloses the possibility of the development of judicially-managed standards. That conclusion is reinforced by the reality that the task of determining what level of appropriations for a particular function is sufficient is a uniquely legislative task.

In *Guinn*, this Court granted in part the Governor's petition for a writ of mandamus and directed the Legislature to fulfill its duties to pass a balanced

[13] *See Baker v. Carr*, 369 U.S. 186 (1962). In *North Lake Tahoe*, this Court "adopt[ed] the *Baker* factors to assist in our review of the justiciability of controversies that potentially involve political questions." 310 P.3d at 587.

budget and fund the public schools. But this Court explained that "we could not, nor did we, direct the Legislature to approve any particular funding amount or tax structure." *Guinn*, 119 Nev. at 472, 76 P.3d at 30. This Court's recognition that it could not tell the Legislature how much public-school funding it had to provide confirms that no court can review the question whether the Legislature has appropriated the funds that "the Legislature deems to be sufficient" for the public schools. Yet that is precisely what Respondents' claims require.

In the district court, Respondents sought to avoid this problem by insisting that they "do not in this case challenge the amount or sufficiency of the Legislature's appropriations under SB 515 for the public schools." Pls.' Reply on Mot. for Prelim. Inj. & Opp. to Def.'s Mot. to Dismiss ("Pls.' Reply") at 12. But it is hard to see how their claim is not second-guessing the Legislature's policy judgment that $2 billion is sufficient to meet the needs of the public school's per-pupil guarantee and the ESA program. Even taking Respondents' argument on its terms, it can only mean that they are challenging whether the Legislature actually *deemed* the SB 515 funding to be sufficient. But that cannot be a justiciable issue either. No court is competent to say that the Legislature did not deem its funding to be sufficient—especially since SB 515 itself states that the funding is sufficient. *See* SB 515, Title.

II. SB 302's Funding Structure Does Not Harm Respondents, Much Less Irreparably, While The Preliminary Injunction Clearly Harms The Thousands Of Nevada Students Denied The Ability To Open An ESA To Attend The School That Best Meets Their Needs.

SB 302 does not violate Article 11, Section 6, as shown above. That is reason enough to overturn the preliminary injunction. And the other preliminary injunction factors—irreparable injury, the relative hardships imposed by the injunction, and the public interest—confirm that the ESA program should be allowed to take effect. SB 302's putative violation of Article 11, Section 6 does not inflict *any* harm, let alone *irreparable* harm, on Respondents' children who attend public school. The Legislature's decision to fund both the ESA program and the public schools from a single $2 billion appropriation to the DSA, rather than dividing that appropriation between two different accounts, does not diminish by even a dime the amount of State funding for the public schools: The amount of the State's per pupil basic support guarantee for each school district is precisely the same whether the ESA program and the public schools are funded from the same account or different accounts.

Thus, not only are Respondents not harmed, it is difficult to see how they even have standing to complain about the putative Section 6 violation.[14] The

[14] Nevada does not recognize taxpayer standing. *See Blanding v. City of Las Vegas*, 52 Nev. 52, 280 P. 644, 650 (1929) (applying the general rule that 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") (quoting 28

complete absence of any harm to Respondents may explain why the district court failed to provide any reasons for its *ipse dixit* that the "violation of Article 11, Section 6 will cause irreparable harm to students in Nevada." Aplt. App. 50.[15]

While the preliminary injunction does not shield Respondents from any actual harm due to the alleged Section 6 violation, the injunction does inflict real and irreparable injury on the thousands of Nevada children who wish to take advantage of the educational opportunities the ESA program would afford. Every month, semester, or school-year that, due to the injunction, Nevada children cannot open an ESA to pursue the educational options that would best suit their unique

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Cyclopedia of L. & Proc. 1736 (William Mack ed., 1908)). When a plaintiff asserts a constitutional claim, this Court requires him "to meet increased jurisdictional standing requirements." *Stockmeier v. Nevada Dep't of Corr. Psych. Review Panel*, 122 Nev. 385, 393, 135 P.3d 220, 225-226 (2006), *abrogated on other grounds by Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 181 P.3d 670 (2008). Although some Nevada statutes confer statutory standing where constitutional standing is lacking, *see id*., 122 Nev. at 394, 135 P.3d at 226, nothing in SB 302 confers standing on Respondents. In *Guinn*, where the Legislature had not funded the public schools at all, the party that filed the mandamus petition was the Governor.

Nevada did not make an issue of standing in the district court because Respondents had asserted multiple constitutional claims, but with the case narrowed to the putative Section 6 violation, their lack of standing to complain about the Legislature's use of one account rather than two to fund the public schools and the ESA program is stark.

[15] Aside from their inability to derive standing from their status as taxpayers, the mix of Respondents in this case hail from Clark and Washoe Counties, and as a result lack standing to raise claims on behalf of other parents in other counties. Thus, at most the injunction in this case should have applied only to the counties where Respondents actually reside. And even within those counties, Respondents have utterly failed to demonstrate any irreparable harm.

educational needs, is a month, semester, or year of instruction those children will never get back. The relative hardships and the public interest thus overwhelmingly favor allowing the ESA program to go into effect.

A preliminary injunction may issue only "where the moving party can demonstrate that it has a reasonable likelihood of success on the merits and that, absent a preliminary injunction, it will suffer irreparable harm for which compensatory damages would not suffice." *Excellence Cmty. Mgmt. v. Gilmore*, 131 Nev. Adv. Op. 38, 351 P.3d 720, 722 (2015). "In considering preliminary injunctions, courts also weigh the potential hardships to the relative parties and others, and the public interest." *Univ. & Cmty. Coll. Sys. of Nev.*, 120 Nev. at 721, 100 P.3d at 187.

A. SB 302 Is Not "Clearly" Unconstitutional.

As shown above in Part I, Respondents have not met their burden of "clearly demonstrating" that SB 302 "is unconstitutional" and hence have not shown a "reasonable likelihood of success on the merits." *S.M.*, 2015 WL 528122, at *3. The Court should reverse the preliminary injunction order for this reason alone. *See id.* (holding that plaintiff "did not and could not meet his burden of clearly demonstrating that A.B. 579 is unconstitutional as applied to him and, thus, could not show a reasonable likelihood of success on the merits to maintain his preliminary injunction"); *see also*, *e.g.*, *Boulder Oaks Cmty. Ass'n v. B & J*

Andrews Enter., LLC, 125 Nev. 397, 403 n.6, 215 P.3d 27, 31 n.6 (2009).

B. The Putative Section 6 Violation Does Not Harm Respondents.

Respondents have also failed to show that the putative Section 6 violation arising from SB 302's funding structure causes them irreparable harm—or any harm at all. SB 302 provides for the funding of the ESA program out of the DSA and the Legislature in SB 515 made a single $2 billion appropriation to the DSA for that program and the public schools. Respondents' children suffer no harm from the Legislature's appropriation of funds for both purposes to a single account rather than two accounts. The district court did not articulate any reasons for its irreparable-harm ruling. *See* Aplt. App. 50. And the record contains no declarations from any of the Respondents explaining how they will be irreparable harmed.

Respondents argued below that SB 302 would cause irreparable harm by diverting funding from the public schools, but that argument fails for multiple reasons, both legal and factual.

First, the only constitutional violation the district court found was the Section 6 violation, and that putative violation does not entail any diversion of public school funds. The Legislature allegedly violated Section 6 by appropriating $2 billion to a single account, the DSA, for both the public schools and the ESA program. But, under the Nevada Plan, the amount of State funds that the school districts will receive is determined by their per-pupil basic support guarantee. That

amount is exactly the same whether the Legislature deposits general funds for the public schools and the ESA program in a single account or two separate accounts. Because the school districts are entitled to their basic support guarantees—not the $2 billion deposited in the DSA—the supposed Section 6 violation makes no difference whatsoever to the amount of State funds the public schools will receive.[16]

Second, to the extent that the ESA program decreases enrollment of students in the public schools, it may actually improve the quality of education in those schools. Nevada's public schools "are currently facing historic teacher shortages, with over 900 total vacancies as of October 2015."[17] Each student that departs the public school system will help alleviate the problem of too many students and too few teachers. And Respondents have made no meaningful effort (aside from rank speculation) to show that the relatively small amount of funds that certain schools might lose due to the ESA program will have a material effect on those schools' educational offerings.

Third, in the district court Respondents offered declarations from certain

[16] Respondents represented to the district court that they "do not in this case challenge the amount or sufficiency of the Legislature's appropriations under SB 515 for the public schools." Pls.' Reply at 12. Given that express representation, their allegations of irreparable harm are difficult to understand or credit.

[17] State of Nevada, Statement of Emergency; Regulations Allowing the Superintendent of Public Instruction to Issue Provisional Teaching Licenses (Feb. 5, 2016), http://bit.ly/1LYlDXn.

public school officials to the effect that SB 302's alleged diversion of funds would potentially cause budgetary and programmatic harms to *school districts*. But Respondents made no effort to show that *they themselves* would be irreparably harmed. Indeed, none of the seven Respondents even submitted a declaration purporting to explain how they or their children will be irreparably harmed by any alleged diversion of funds. When pointedly asked at the preliminary injunction hearing how "budget cuts" at any particular school would "impact any particular plaintiff," as opposed to the schools alone, Plaintiffs' counsel offered the following incoherent answer: "So what we know is that each of these individual students—and to—for on its face, or us to make that, you know, connection, we have to know and *we have to believe that* when there is a budget cut in a particular district, that hurts the students in that district. *We have to be able to make that step*, to go over and say, you know, that this child on this day, *we have to be able to make the jump* that when a district has less money, that it can provide less services, which will impact the children, *of which these are among those children that will be impacted*." Aplt. App. 207 (emphases added). There is zero record evidence that Respondents personally will suffer any irreparable harm.[18]

[18] Furthermore, the alleged harms the school officials posited are speculative. They addressed consequences that *might* happen if significant funds are diverted from the public schools. Especially in a facial challenge such as this one—where

Fourth, Nevada's "hold harmless" statute caps the funding loss a school district can experience due to a decline in student enrollment. *See* NRS 387.1233(3), *amended by* SB 508, § 9. The statute ensures that no school district will lose more than 5% of its total funding from one year to the next due to an enrollment decline. *See* Aplt. App. 39 ("Under NRS 387.1233(3), the so-called 'hold harmless' provision, a school district must be funded based on the prior year's enrollment figure if the school district experiences a reduction in enrollment of five percent or more."); *see also Minutes*, May 28, at 20 (testimony of Assemb. Edwards) ("If there is a diminishment of the money to a particular school, it is not really that much money. If it were, 'hold harmless' would cover that school."). The "hold harmless" statute protects Nevada's school districts from significant total funding losses from one year to the next occasioned by declines in

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Respondents must show that SB 302 is unconstitutional in *all* circumstances—unsupported hypotheticals are insufficient to justify a preliminary injunction. *See Flick Theater, Inc. v. City of Las Vegas*, 104 Nev. 87, 91 n.4, 752 P.2d 235, 238 n.4 (1988*)* (holding that the "case for a preliminary injunction" may not be "based on mere conjecture"). In addition to the speculative nature of the alleged harms, any funds diverted from the public schools would be financial losses that could be remedied at law. *See Excellence Cmty. Mgmt.*, 351 P.3d at 722 (preliminary injunction requires "irreparable harm for which compensatory damages would not suffice"). "Mere allegations of financial hardship are insufficient to support a finding of irreparable harm." *Church of Scientology of Cal. v. United States*, 920 F.2d 1481, 1489 (9th Cir. 1990); *accord Elias v. Connett*, 908 F.2d 521, 526 (9th Cir. 1990).

enrollment, whatever the reason for the decline may be.[19]

In short, for numerous reasons, the irreparable harm factor does not support a preliminary injunction.

C. The Balance of Hardships and Public Interest Support Allowing Nevada Parents and Students to Use the ESA Program.

Although Respondents have not shown any irreparable harm for which a preliminary injunction is necessary, the injunction is causing actual and irreparable harm to the thousands of Nevada families who wish to open ESAs. Before SB 302 was enjoined, more than 4,000 Nevada parents submitted applications to open ESA accounts for their children. Unlike Respondents, these Nevadans are harmed by the injunction. They cannot open an ESA to have their children attend the school that best serves their educational needs.

The injunction also harms the public schools. Nevada has the disturbing distinction of having, by some measures, the worst-rated public school system in the country. In enacting SB 302, the Legislature considered evidence that education-choice programs *improve* academic outcomes in public schools. *See*

[19] Of course, school districts experience enrollment declines and the concomitant loss of funding (capped by NRS 387.1233(3)) for many reasons unrelated to SB 302. A student might exit a district because she has moved to a different district or another State, dropped out of school, or decided to attend private school. When this happens, the district's total funding will decrease as a result of the Nevada Plan's per-pupil funding scheme. Under Respondents' theory, it would cause irreparable harm for the State to transfer a large number of government workers from Carson City to Las Vegas because the departure of those employees' school-age children could decrease total funding for the Carson City schools.

supra pp.16-17. Furthermore, to the extent that the ESA program improves academic performance and thereby reduces the number of dropouts, there will be more per-pupil funding for the Nevada public schools. And to the extent that SB 302 reduces class size, eliminates overcrowding, and shrinks student to teacher ratios, it brings immediate benefits to the students who remain in public school.

Finally, the preliminary injunction in this case severely damages the public interest. Every child in Nevada has a right to "the opportunity to receive a basic education." *Guinn*, 119 Nev. at 286, 71 P.3d at 1275. Respondents do not argue and present no evidence that the ESA program will *deprive* any child of this right and opportunity. The preliminary injunction, however, denies Nevada children the opportunity to transcend this lowest common denominator by attending the school that is best for them. The people of Nevada and their elected representatives have adopted a policy aimed at improving education in the State. A handful of plaintiffs with mere policy disagreements and no proof of irreparable harm are not entitled to obstruct the Legislature's considered judgment.

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CONCLUSION

For the foregoing reasons, the district court's order granting the preliminary injunction should be reversed.

Respectfully submitted,

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Dated: March 4, 2016

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the Nevada Supreme Court by using the appellate CM/ECF system on March 4, 2016.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, for delivery within 3 calendar days to the following non-CM/ECF participants:

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 14 pt. Times New Roman type style.

I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 12,224 words.

Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to

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sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 4th day of March 2016.

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