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,; SARAH and BRIAN SOLOMON, individually and on behalf of their minor children, D.S. and K.S.,

Respondents.

Supreme Court No. 69611

District Court No. 15-0[illegible]0020701-B

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N.R.A.P. 26.1 DISCLOSURE

Pursuant to N.R.A.P. 26.1, the undersigned counsel of record certifies that there are no persons or entities as described in N.R.A.P. 26.1(a) that must be disclosed.

March 25, 2016

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INTRODUCTION

The framers of the Nevada Constitution obligated the Legislature to support and maintain a uniform system of public schools. More than a century later, Nevada citizens reaffirmed and strengthened this commitment by passing the "Education First" amendment to the Constitution. This amendment mandates that the Legislature appropriate funds sufficient to operate the public schools as the *first* appropriation in the State biennium budget. Appropriations for anything other than public education first are void. Although Defendant, the State Treasurer of Nevada, may believe public education is the "lowest common denominator" (Appellant's Opening Brief ("AOB") 48), Nevada's founders and its present-day citizens do not, and they have enshrined the commitment to public education as the State's first and highest priority in Nevada's Constitution.

In its last regular session, the Nevada Legislature enacted Senate Bill 302 ("SB 302"). SB 302 directs Defendant to take funds appropriated by the Legislature for the operation of the public schools and to deposit those funds into Education Saving Accounts ("ESAs") to pay for private school tuition and other private expenditures. This, the Nevada Constitution forbids.

For this reason, the district court issued a preliminarily injunction preventing implementation of SB 302. First, the court below properly found that SB 302 violates the requirement in Article XI, Section 6, of the Nevada Constitution that funds appropriated by the Legislature for Nevada's public schools be used only for

their operation. Section 6.1 directs the Legislature to appropriate monies for the "support and maintenance" of the public schools. Section 6.2 mandates that, "before any other appropriation . . . 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." As the district court correctly held, SB 302 diverts the funds appropriated by the Legislature for the operation of the public schools to another purpose in violation of the express mandates of Sections 6.1 and 6.2.

Defendant asserts that the text of Sections 6.1 and 6.2 do not require that funds appropriated for public education be used only to operate the public schools. AOB 33. This contention directly conflicts with the plain language and meaning of Section 6. Section 6.1 requires the Legislature to appropriate monies from the general fund for the "support and maintenance" of the public schools, while Section 6.2 requires those appropriations to "fund the operation of the public schools." Under Defendant's reading of these provisions, the Legislature could simply go through the motions of appropriating funds to public schools first but then use those very same funds for other purposes, rendering Sections 6.1 and 6.2 a hollow exercise in budgetary accounting.

Defendant further asserts that, because Senate Bill 515 ("SB 515"), the legislative appropriation for the operation of the Nevada public schools in the 2015-2017 biennium, funded both the public schools and ESAs in a "single

appropriation," SB 302 does not run afoul of Section 6. AOB 33. But there is no support for this contention in the undisputed record below. The Legislature confirmed that SB 302 would divert funds appropriated for the operation of the public schools when it exempted SB 302 from the statutory prohibition against using public schools appropriations for any other purpose. Further, the plain text of SB 515 makes no allocation of funds for ESAs, nor even mentions SB 302 or the ESA program whatsoever.

Indeed, Defendant's bald contention that the Legislature somehow simultaneously appropriated funds for the public schools *and* ESAs would render any appropriation to ESAs in SB 515 void. Article XI, Section 6.5, voids any appropriation enacted in violation of the mandate to fund the operation of the public schools first. If the Legislature had appropriated funds to the public schools and ESAs simultaneously in SB 515, which it did not, the ESA appropriation would be void under Section 6.5.

Second, the district court correctly held that SB 302 violates the mandate in Section 6.2 that the Legislature's first appropriation for the public schools be in an amount it "deems to be sufficient" to operate those schools in the ensuing biennium. SB 515, on its face, appropriates the funds deemed by the Legislature to be sufficient to operate the public schools. SB 302 diverts some of that funding to an entirely different purpose—the ESA program. Thus, SB 302, without question, reduces the amount of the appropriation to fund the operation of the public schools

below the level deemed sufficient by the Legislature in SB 515.

Defendant asserts that, when SB 515 was passed, the Legislature "knew full well" that the appropriation would fund "both" the public schools and ESAs and "determined" that the appropriation would sufficiently fund "both." AOB 6. Once again, Defendant's *post hoc* attempt to salvage SB 302 has no basis in the uncontroverted record below. That record is devoid of any evidence that in passing SB 515, the Legislature considered the number of ESAs that might be approved, the amount of funding that would be diverted to ESAs, or the impact of deducting funding for ESAs from the Nevada school district budgets during the biennium. Nor could the Legislature have done so—SB 302 has no funding cap, making it impossible to forecast how much money ESAs will divert from public school appropriations.

The preliminary injunction entered by the court below should also be affirmed because SB 302 violates Article XI, Section 2, of the Nevada Constitution, which requires that the Legislature provide for a uniform system of common schools. In so doing, the Constitution forbids the Legislature from taking action that undermines or weakens Nevada's "uniform system" of public schools. SB 302 does just that by taking funding from the public schools to support non-uniform, non-common schools.

Finally, the district court did not abuse its discretion in determining that Plaintiffs demonstrated irreparable harm. Violations of Nevada's Constitution,

standing alone, constitute irreparable harm. Moreover, the record below firmly established that SB 302 will reduce funding to Nevada public schools, triggering cuts in teachers, support staff, and other crucial programs and services. In this way, SB 302 will deprive Plaintiffs' children and public school children across the state of essential educational resources and opportunities, harms that cannot be remedied by money damages. Likewise, the balance of hardships tips sharply in favor of Plaintiffs. The issuance of the preliminary injunction leaves the status quo intact, namely, the prohibition against using public school funding to subsidize private educational expenses. In contrast, the denial of the preliminary injunction means a loss of over $20 million to the public schools in SB 302's first year alone.

QUESTIONS PRESENTED

1) Does SB 302 violate Article XI, Section 6, of the Nevada Constitution by diverting funds appropriated for the operation of the public schools to private expenditures?

2) Does SB 302 violate Article XI, Section 6, of the Nevada Constitution by reducing the funding appropriated for the operation of the public schools below the amount the Legislature deemed sufficient?

3) Does SB 302 violate Article XI, Section 2, of the Nevada Constitution, which requires the Legislature to fund a uniform system of common schools?

4) Did the district court abuse its discretion in determining that there is a likelihood of irreparable harm if SB 302 is implemented while litigation over its

constitutionality is pending?

STATEMENT OF FACTS

I. CONSTITUTIONAL AND STATUTORY FRAMEWORK FOR PUBLIC EDUCATION

A. The Education Article of the Nevada Constitution

From the outset, Nevada's founders were concerned with ensuring a sufficiently funded system of public schools in the state. Respondents' Appendix ("RA") 321 (Green Decl. ¶ 8). John Collins, the constitutional convention delegate who chaired the Education Committee, summarized the purpose of the Education Article: "The great object is to stimulate the support of the public schools . . . ." RA 322 (Green Decl. ¶ 11 (citing Official Report of the Debates and Proceedings in the Constitutional Convention of the State of Nevada ("Debates and Proceedings") at 577)).

At the convention, the delegates debated whether the funding of public schools through a special tax should be left to the discretion of the Legislature. Although some advocated for such discretion, Delegate Collins explained why the Legislature's funding of the public schools must be constitutionally mandated in Section 6 of Article XI: "[The Legislature] will be under pressure, a terrible pressure I have no doubt, which will impel them to postpone the tax from year to year . . . I do not believe that the Legislature is likely to be as earnest in this matter of education as gentlemen appear to anticipate." RA 328 (Green Decl. ¶ 27 (citing Debates and Proceedings at 588)). Delegate Collins' view prevailed, and the

Nevada Constitution reflects a mandatory commitment to funding public education. The delegates' lengthy debates concerning the Education Article included no discussion of publicly subsidizing non-public education. RA 323 (Green Decl. ¶ 14 ("Despite recognizing the ability of parents to choose non-public forms of education, neither Delegate Collins nor any other delegate argued that limited public funds should be spent on non-public means of education.")).

Consistent with the delegates' intentions, the Education Article guarantees the support and maintenance of public schools in Nevada. Article XI, Section 2, states that "[t]he legislature shall provide for a uniform system of common schools . . . ." Nev. Const. art. XI, § 2. Article XI, Section 6, mandates that "the legislature shall provide for the[] support and maintenance [of the common schools] by direct legislative appropriation from the general fund." *Id.* § 6.1.

In interpreting these statutes, this Court has recognized that Article XI of the Nevada Constitution "clearly expresses the vital role that education plays in our state," finding that:

> Our Constitution's framers strongly believed that each child should have the opportunity to receive a basic education. Their views resulted in a Constitution that places great importance on education. Its provisions demonstrate that education is a basic constitutional right in Nevada.

Guinn v. Legislature of Nev., 119 Nev. 277, 286, 71 P.3d 1269, 1275 (2003), *overruled on other grounds by Nevadans for Nev. v. Beers*, 122 Nev. 930, 142 P.3d

339 (2006).

B. The Education First Amendment

In 2006, Nevada citizens reaffirmed the State's commitment to the maintenance and support of a uniform system of public schools, and cemented the primacy of that commitment, when they passed the "Education First" ballot initiative to amend Section 6 of the Education Article. This amendment was enacted in the wake of the budget crisis in the 2003 legislative session. In that year, disputes between the legislative and executive branches resulted in the absence of a timely appropriation of funds to operate the public school system. RA 76-77 (2006 Statewide Ballot Questions at 4-5). Nevada public school children were collateral damage in this budgetary stalemate as teachers and staff could not be hired and schools could not open on time. *Id.*

To prevent the State budgetary process from again impeding the operation of the public schools, the Education First Amendment mandates the Legislature to fund public education first, before any other appropriation in the State budget, in an amount it deems sufficient:

> 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 . . . .

Nev. Const. art. XI, § 6.2. The amendment further specifies that "[a]ny appropriation of money enacted in violation of subsection 2, 3, or 4 is void." *Id.* § 6.5.

The stated purpose of the Education First amendment was to "ensure[] our state's public school system will be funded, before any other program for the next fiscal biennium," and to "ensure that the funding of education in Nevada will be given the status intended by the framers of our Constitution . . . ." RA 76-77.

C. Nevada's Education Finance System

Since 1967, the Legislature has provided funding for the public school system through the "Nevada Plan" and other categorical grants. Under the Nevada Plan, the Legislature determines, for each biennium, the amount of funding necessary, when combined with certain categorical (non per-pupil) funding outside the Nevada Plan, to operate the public schools. RA 203. It guarantees that amount to school districts through the Basic Support Guarantee ("BSG"), in addition to the categorical grants. RA 203.

The BSG is funded by the Legislature through a combination of state monies appropriated to the State's Distributive School Account ("DSA") and mandated local taxes. The DSA is comprised primarily from the appropriations of state revenue made by the Legislature each biennium for the operation of Nevada's public schools pursuant to Article XI, Section 6, of the Nevada Constitution. NRS 387.030.

II. THE 2015 LEGISLATIVE SESSION

A. SB 302

The Governor of Nevada signed SB 302 into law on June 2, 2015. SB 302 authorizes Defendant, the State Treasurer, to divert funds from the Legislature's appropriation for the operation of Nevada public schools into private ESAs.

When an ESA is established, SB 302 directs Defendant to deposit into the ESA an amount equal to 90% of the statewide average BSG per pupil—$5,139 for the 2015-2016 school year. Appellant's Appendix ("AA") 80 (SB 302 § 8(2)). For children with disabilities and children in households with an income of less than 185% of the federal poverty level, Defendant must transfer 100% of the statewide average BSG per pupil—$5,710 for 2015-2016. *Id.*

The total amount of the BSG transferred to each ESA is deducted from the funding appropriated by the Legislature for the operation of the public school district in which the child receiving the ESA resides. Specifically, the statute directs Defendant to deduct "all the funds deposited in education savings accounts established on behalf of children who reside in the county" from the school district's yearly "apportionment" of the legislatively appropriated funding. AA 96 (SB 302 § 16(1)); *see also* AA 76 (SB 302, Legislative Counsel's Digest ("the amount of the [ESA] must be deducted from the total apportionment to the resident school district of the child on whose behalf the grant is made.")). Therefore, each ESA is a loss to the public school district of either $5,139 or $5,710 per year.

In contrast, under the Nevada Plan, the State only pays a fraction of the amount of the BSG for each school district. For instance, to Clark County, for the 2014-2015 school year, the State paid $2,213 per pupil. RA 229 (Nevada K-12 Education Finance Fact Sheet ("Education Finance Fact Sheet")). SB 302 directs Defendant to deduct the full amount of the BSG for each ESA from the DSA, not just the State share of the BSG paid to the public school district. Thus, SB 302 authorizes the deduction from public school budgets of an amount far in excess of the State portion of the BSG for each ESA.

Under SB 302, an ESA can be established for any child who enrolls in a public school for 100 consecutive days. AA 78-79 (SB 302 § 7). The 100-day requirement need be met only once in the child's academic career to obtain ESA funding every year until the child graduates, drops out, or leaves the state. *Id.* Under current proposed regulations, part-time or full-time enrollment will satisfy the 100-day requirement, and a student who attended public school in 2014-2015 is deemed eligible for an ESA. Third Revised Proposed Regulations § 9.4.[1] Furthermore, children entering kindergarten do not *ever* have to attend a public school to have public school funds deposited in their ESA every year until they graduate from high school. *Id.* § 9.7. Nor do children of military families have to

[1] *Available* at http://www.nevadatreasurer.gov/uploadedFiles/nevadatreasurergov/content/SchoolChoice/Forms/2015-11-19_R061-15_Regs_updated.pdf (accessed March 22, 2016).

meet the 100-day requirement. *Id.* There is no limit on the number of ESAs that may be established and funded and no limit on the amount of funding that can be deducted from the public schools in any one year or cumulatively over multiple years.

SB 302 does not require private schools or other entities receiving funds from the ESA program to meet the non-discrimination requirements established by the Legislature for the operation of Nevada's uniform system of public schools. Public schools, of course, cannot discriminate and must be open to all students. *See, e.g.*, NRS 388.450; 388.520; 388.405; 388.407. In contrast, private institutions receiving ESA funds may refuse to admit, or otherwise discriminate against, students on the basis of their religion, academic achievement, ELL status, disability, homelessness or transiency, gender, gender identity, or sexual orientation. *See generally* AA 76 (SB 302); *see also* RA 105-07 (Lubienski Decl. ¶¶ 15-18). Further, SB 302 does not require private schools or other entities to accept the ESA amount as full tuition. They may charge tuition far exceeding $5,139 or $5,710 and deny admission to those unable to make up the difference.

SB 302 also imposes no obligation for private schools and other entities receiving ESA funds ("Participating Entities") to meet the academic requirements established by the Legislature for Nevada's uniform system of public schools. The public schools are subject to numerous requirements regarding testing and curriculum. *See generally* NRS 389 et seq. (setting academic and testing standards

for public schools). Participating Entities do not have to meet any such requirements. Indeed, private schools can operate in Nevada whether they are licensed by the State or not, and approximately half of the private schools in the state are exempt from licensure. NRS 394.211; RA 61. Under SB 302, these non-licensed private schools can participate in the voucher program. AA 82 (SB 302 § 11(1)(a)).

B. SB 515

On June 1, 2015, the Legislature passed SB 515, appropriating the funds deemed sufficient for the operation of the Nevada public schools for the biennium, as required by Article XI, Section 6.2. The Legislature explained that the purpose of SB 515 was to "ensur[e] sufficient funding for K-12 public education for the 2015-2017 biennium." AA 108. SB 515 appropriates approximately $2 billion in state funding for the operation of the public schools during the 2015-2017 biennium. AA 113.

In enacting SB 515, the Legislature used the Nevada Plan formula, supplemented by categorical funding grants, and followed the exact same process and as it has in prior biennium budgets to determine the sufficiency of the appropriation for the operation of the public schools. *See* RA 196 (Legislative Counsel Bureau, Fiscal Analysis Division, *The Nevada Plan for School Finance: An Overview* (2015)). First, it calculated the BSG under the Nevada Plan for each district, multiplied by the number of students anticipated to attend the public

schools each district. The Legislature next added categorical (non per-pupil) grant funding, tied to specific state programs or initiatives, and then fixed the total state support for the public schools. After deducting certain other funding sources, including local funds, the Legislature determined $2 billion in state funds to be a sufficient appropriation, and appropriated that sum in Section 7 of SB 515.

SB 515 contains no mention of either SB 302 or the ESA program. The minutes of legislative meetings on SB 515 also contain no mention of SB 302, nor does the legislative record indicate that SB 302 was taken into account when determining the BSG, categorical grants, or in the calculation of the $2 billion appropriation to the DSA. *See* Minutes of the Senate Committee on Finance, May 30, 2015 and May 31, 2015, and Minutes of the Assembly Ways and Means Committee, June 1, 2015, at 7-8[2]; AA 22 (Distributive School Account – Summary for 2015-17 Biennium ("DSA Summary 2015-2017")).

C. Implementation of SB 302

Over 4,000 applicants have pre-registered for ESAs, according to Defendant. AOB 47. Funding just these ESAs would result in a loss of over $20 million from the public school districts' budgets in the current school year. Defendant has estimated that full participation in the ESA program by both Nevada's private school and home-based education populations would result in the reduction of

[2] *Available at* https://www.leg.state.nv.us/Session/78th2015/Reports/history.cfm?BillName=SB515 (accessed March 22, 2016).

$200 million to public school district budgets. RA 69 (Education Savings Account – SB 302, Notice of Workshop, Aug. 21, 2015, Statement of Chief of Staff Grant Hewitt (if all private and homeschooled children qualified for an ESA, "you'd have approximately a $200M []hole in the budget")).

III. PROCEDURAL HISTORY

On September 19, 2015, Plaintiffs—parents of children enrolled in the Nevada public schools—filed a Complaint challenging the constitutionality of SB 302. On October 20, 2015, Plaintiffs moved for a preliminary injunction, arguing that SB 302 violated Article XI, Sections 2, 3, and 6, of the Nevada Constitution. Defendant opposed the motion and filed a countermotion to dismiss Plaintiffs' suit.

On December 24, 2015, the Honorable James E. Wilson Jr. of the First Judicial District of Nevada denied Defendant's Motion to Dismiss. On January 11, 2006, Judge Wilson entered a preliminary injunction barring implementation of SB 302. AA 37.

In its order, the district court found that Plaintiffs were likely to prevail on the merits that SB 302 violates Article XI, Sections 6.1 and 6.2, of the Nevada Constitution because "general fund money appropriated to fund the operation of the public schools will be used to fund education savings accounts." AA 45. The district court held that because Sections 6.1 and 6.2 mandate appropriations for the operation of the public schools, such appropriations cannot be used for other purposes. AA 46. The court concluded that "[b]ecause some amount of general

funds appropriated to fund the operation of the public schools will be diverted to fund education saving accounts under SB 302, that statute violates Sections 6.1 and 6.2 of Article 11." *Id.*

The district court also concluded that Plaintiffs were likely to prevail on the merits that SB 302 violates Section 6.2 by reducing the amount the Legislature deemed sufficient to fund the operation of the public schools for the next biennium. The district court held that "SB 302's diversion of funds from the Section 6 direct legislative appropriation from the general fund to fund the operation of the public schools reduces the amount deemed sufficient by the legislature to fund public education and therefore violates Article 11, Section 6.2." AA 47.

The district court found that Plaintiffs had not shown a likelihood of success on their claim that SB 302 violates the mandate in Article XI, Section 2, that the Legislature establish a uniform system of common schools. The court acknowledged this Court's holding that "'[e]very positive direction' in the Nevada Constitution 'contains an implication against anything contrary to it which would frustrate or disappoint the purpose of that provision.'" AA 49 (citing *Galloway v. Truesdell*, 83 Nev. 13, 26, 422 P.2d 237, 246 (1967)). However, because "SB 302 does not do away with public schools," the district court found Plaintiffs had not met their burden on this claim. *Id.*

The district court also found that Plaintiffs had not shown a likelihood of

success on their claim that SB 302 violates Article XI, Section 3. The district court agreed with Plaintiffs that state funds appropriated to public schools under Section 3 can only support the public schools. AA 44-45. However, the Court found that Plaintiffs had failed to demonstrate that in all circumstances SB 302 would use Section 3 funds. *Id.*

Finally, the district court concluded that Plaintiffs had met their burden of demonstrating that SB 302 would cause "irreparable harm and that on balance the potential hardship to Plaintiff Parents' children outweighs the interest of the Treasurer and others." AA 50. Thus, the Court preliminarily enjoined implementation of SB 302.

SUMMARY OF ARGUMENT

Article XI, Sections 6.1 and 6.2, of the Nevada Constitution require that the Legislature appropriate funds it deems sufficient to support, maintain, and operate Nevada's uniform system of public schools for the ensuing biennium. SB 515 enacts a $2 billion appropriation to fund the operation of the public schools for the 2015-2017 biennium. SB 302 is unconstitutional because it diverts funds that the Legislature appropriated in SB 515 for the operation of the public schools and uses those funds to subsidize private expenses.

Article XI, Section 6.2, also requires that the Legislature, before any other appropriation in the state budget, appropriate funds in an amount it deems sufficient for the operation of the public schools for the next biennium. SB 302

diverts funds from the amount the Legislature appropriated in SB 515, thus unconstitutionally reducing public school funding below the amount the Legislature deemed sufficient for the operation of the public schools.

Defendant's argument that Section 6 does not require the Legislature's appropriation for public schools to be used only for public schools defies the plain language, meaning, and intent of Section 6. Further, Defendant's argument that it is permissible for the Legislature to pass a single appropriation to fund both the public schools and ESAs conflicts with the mandate in Section 6.2 that the appropriation to fund the operation of the public schools occur *before any other* appropriation. Even if the Legislature had funded the public schools and ESAs in a single appropriation—which it clearly did not—then the appropriation for the operation of the public schools would not come *before* the ESA appropriation, and under Article XI, Section 6.5, the ESA appropriation would be void. Defendant's interpretation would permit the Legislature to fund other government programs through the first appropriation, so long as funding for public schools was included, and even allow State officials to figure out how to divvy up the funding later. Defendant's argument contravenes the plain language and intent of the Education First Amendment—to make certain that public education, and only public education, is funded in the Legislature's first appropriation.

SB 302 also violates Article XI, Section 2, of the Nevada Constitution, which requires that the Legislature provide for a uniform system of common

schools. Under Nevada law, the expression of a positive constitutional commitment simultaneously forbids legislative action that is contrary to it. Because SB 302 diverts funds from the uniform system of common schools to a non-uniform, non-common system of schools, it violates Section 2.

Finally, the district court did not abuse its discretion in determining that Plaintiffs demonstrated irreparable harm. SB 302's violation of the Nevada Constitution is itself sufficient to constitute irreparable harm. Moreover, Plaintiffs presented overwhelming record evidence that SB 302 would cause harm to Nevada's public schools and students.

STANDARD OF REVIEW

This Court reviews the grant of a preliminary injunction for abuse of discretion, with the exception of questions of law:

> Determining whether to grant or deny a preliminary injunction is within the district court's sound discretion. In exercising its discretion, the district court must determine whether the moving party has shown 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 legal remedy. Generally, this court reviews preliminary injunctions for abuse of discretion. Questions of law, however, are reviewed de novo.

Labor Comm'r of State of Nev. v. Littlefield, 123 Nev. 35, 38-39, 153 P.3d 26, 28 (2007).

ARGUMENT

I. SB 302 VIOLATES ARTICLE XI, SECTION 6, OF THE NEVADA CONSTITUTION

A. The District Court Correctly Determined That SB 302 Violates Article XI, Sections 6.1 and 6.2, By Diverting Funds Appropriated To Public Schools

1. SB 302 Diverts Funds Appropriated To Public Schools

Article XI, Section 6.1, requires that the Legislature "provide for the support and maintenance" of the public schools "by direct legislative appropriation." Nev. Const. art. XI, § 6.1. Section 6.2—the Education First Amendment—requires 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. These two provisions unequivocally require the Legislature to appropriate the necessary funds to support, maintain, and operate Nevada's public schools, and Section 6.2 specifies that this appropriation must occur before any other appropriation in the ensuing biennium.

The obligation under Sections 6.1 and 6.2 for the Legislature to make appropriations to fund the operation of the public schools would be meaningless if, once appropriated, the funds could be taken and used for purposes other than public education. *Hunt v. Warden, Nev. State Prison*, 111 Nev. 1284, 1285, 903 P.2d 826, 827 (1995) ("A statute should be construed in light of the policy and the spirit of the law, and the interpretation should avoid absurd results."). Hence, the

district court correctly found that "Sections 6.1 and 6.2 . . . necessarily imply that the legislature must use the general funds appropriated to fund the operation of the public schools only to fund the operation of the public schools." AA 45-46.

SB 302, by its plain terms, diverts funds appropriated for the operation of the public schools to ESAs for private expenditures. The Legislature itself acknowledged this diversion by exempting ESAs from the statutory prohibition against using public school funds for non-public school expenditures. AA 93 (SB 302 § 15.9). This explicit exemption would be unnecessary if ESAs did not use public school funds. Further, the Legislative Counsel's Digest explains "the amount of the [ESA] must be deducted from the total apportionment to the resident school district of the child on whose behalf the [ESA] is made." AA 76; *see also* AA 96 (school districts are entitled to their apportioned Section 6 funds "minus . . . all the funds deposited in education savings accounts on behalf of children who reside in the county").

Thus, SB 302 diverts funds appropriated by the Legislature for the operation of the public schools in violation of Sections 6.1 and 6.2 of the Nevada Constitution.

2. Defendant's Contention That An Appropriation To Public Schools Can Be Used For Any Purpose Has No Merit

Defendant asserts that Sections 6.1 and 6.2 do not require that funds appropriated for public schools be used only for the public schools. AOB 29-30.

According to Defendant, Sections 6.1 and 6.2 require only that "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." AOB 30. Defendant ignores the plain language of Section 6.1 that the "direct legislative appropriation" be for the "support and maintenance" of the public schools, and that, under Section 6.2, the appropriation must be "to fund the operation of the public schools." Nev. Const. art. XI, §§ 6.1, 6.2. Simply put, the appropriation must be for the support, maintenance, and operation of the public schools and cannot be used, as Defendant contends, for other purposes.

Further, Defendant's contention conflicts with the plain meaning of the term appropriation. As the district court noted "[a]n 'appropriation' is 'the act of appropriating to . . . a particular use;' or 'something that has been appropriated; *specif.*: a sum of money set aside or allotted by official or formal action for a specific use . . . .'" AA 46 (citing Webster's Third New International Dictionary 106 (2002)). Similarly, "to 'appropriate' means to 'set apart for or assign to a particular purpose or use in exclusion of all others.'" *Id.* By its plain meaning the requirement that the Legislature appropriate funds for the operation of the public schools excludes those funds from being diverted and used for other purposes.

Defendant's interpretation of Sections 6.1 and 6.2 would render them meaningless. Under Defendant's interpretation, there is no limit on what public education funds can be used for after the Legislature performs the technical—but

entirely hollow—task of "appropriating" funds to public schools. Defendant would permit the Legislature to comply with Section 6.2 by going through the motions of "first" appropriating funds to the public schools, and then, under separate statutory authority, having those funds diverted to pay for roads, jails or any other state expenditure.

Defendant's interpretation would strip Sections 6.1 and 6.2 of their intended effect. As the uncontroverted record makes clear, the Constitutional framers sought to ensure that public schools were established and maintained by the Legislature. RA 321 (Green Decl. ¶ 8 ("Nevada's constitutional history is clear that the founders intended Article XI to ensure a well-funded system of public schools.")); RA 322 (Green Decl. ¶ 11 (quoting Delegate Collins to say "[t]he great object is to stimulate the support of the public schools.")). The "Education First" Amendment—Sections 6.2 through 6.5—was specifically passed by the voters to "ensure[] our state's public school system will be funded, *before any other program* for the next fiscal biennium," and to "ensure that the funding of education in Nevada is given the status intended by the framers of our Constitution . . . ." RA 76-77 (emphasis added).

At bottom, Defendant's interpretation of Sections 6.1 and 6.2 would allow the Legislature to divert unlimited funds from the appropriation for the operation of the public schools not just to ESAs, but for any other purpose. No longer would these provisions "ensure our state's public school system [is] funded before any

other program." Contrary to Defendant's assertion, Sections 6.1 and 6.2 mean what they say: funds appropriated for the public schools can be used for the operation of those schools—and nothing else. SB 302 diverts funds appropriated for the operation of the public schools to private expenditures and is, thus, patently unconstitutional.

3. There Is No Basis For Defendant's Contention That SB 515 Appropriates Funds For Both Public Schools And ESAs

Defendant also argues that SB 302 does not divert funds from the public schools because SB 515, the appropriation to fund the operation of the public schools for the biennium, *also* appropriated funds to ESAs. *See* AOB 34. Defendant's contention is without merit.

First, the record is clear that the Legislature fully understood that, under SB 302, ESAs would be funded by diverting funds directly from the appropriations for the operation of the public schools. SB 302 expressly exempts ESAs from a statutory prohibition barring the use of public school funds for any other purpose. AA 93 (SB 302 § 15.9). Specifically, SB 302 amends NRS 387.045, which provides, in pertinent part, 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." The Legislature amended NRS 387.045 so that ESAs could be funded from public school funds. As the district court concluded "[t]he legislature recognized that general fund money appropriated to fund the operation

of public schools would be used to fund education savings accounts." AA 45.

Second, SB 515 does not appropriate any funds for ESAs. Neither ESAs nor SB 302 are even mentioned in SB 515, even though, as Defendant points out, SB 302 was enacted before SB 515. In fact, SB 515, by its plain terms, makes clear that the legislation is an act "relating to education," to "ensur[e] sufficient funding for K-12 *public* education for the 2015-2017 biennium." AA 108 (emphasis added).

Further, the record below is uncontroverted that the Legislature did not consider ESAs when determining the amount of funding it appropriated for the operation of the public schools in Section 7 of SB 515. In calculating the public school appropriation in SB 515, the Legislature used the Nevada Plan formula in addition to calculating categorical grant funding—the same procedure as it has used in prior biennia to determine the appropriation sufficient to operate the public schools. *See supra* at 9. Critically, during the process of calculating the BSG and fixing the amounts of categorical grants, SB 302 and ESAs were never discussed. *See* Minutes of the Senate Committee on Finance, May 30, 2015 and May 31, 2015, and Minutes of the Assembly Ways and Means Committee, June 1, 2015, at 7-8; AA 22 (DSA Summary 2015-2017). Thus, contrary to Defendant's assertion, the record confirms that the Legislature did not factor—or otherwise take into account—ESAs in its appropriation for the operation of the public schools.

Moreover, Defendant's speculation that Section 7 of SB 515 permissibly

appropriates funding for "both" the public schools and the ESA program (AOB 4, 33, 34) renders either SB 515 itself void or Section 6.2 meaningless. If the $2 billion appropriation in SB 515 included funding for both public schools and ESAs, which it clearly did not, then that appropriation would violate Section 6.2 by not funding the operation of the public schools first "*before any other appropriation*." Nev. Const. art. XI, § 6.2 (emphasis added). A simultaneous appropriation to *both* the public schools and ESAs means that the appropriation to the public schools was not made "before any other appropriation." The consequence of Defendant's unsupportable interpretation of SB 515 is that any appropriation to ESAs—even if it were included in the appropriation for the public schools—is void. *Id.* § 6.5 ("Any appropriation of money enacted in violation of [Section 6.2] . . . is void.").[3]

Likewise, if, as Defendant argues, nothing prohibits the Legislature from funding public education and private ESAs from a single appropriation, then it follows that nothing prevents it from funding roads, jails, Medicaid or other governmental services from that same appropriation. Indeed, Defendant's position would allow the Legislature to simply pass a single appropriation for all state expenditures, deem it sufficient to fund education, and then later determine how

[3] To avoid this result, Defendant suggests that Sections 1-2 of SB 515 are in fact the Article XI, Section 6, appropriation and the rest of 515 is something else. AOB 5. But Sections 1-2, which contain the BSG calculations, are not the appropriation of public school funding within SB 515. *See infra* at 29.

much of that appropriation would be spent on education. Such a result strips Section 6.2 of force or effect, transforming a provision added to Nevada's Constitution by the voters to ensure the Legislature provides funding for public education first and before any other appropriation into a hollow accounting formality.

B. The District Court Correctly Determined That SB 302 Violates Section 6.2 By Reducing Public School Funds Below The Amount Deemed Sufficient By The Legislature

1. SB 302 Reduces Public School Funds Below The Amount Deemed Sufficient By The Legislature

Article XI, Section 6.2, not only directs the appropriation for the public schools be the first in the state budget, it also mandates that this appropriation be an amount the Legislature "deems to be sufficient," to fund the operation of Nevada's public schools for the next ensuing biennium. Nev. Const. art. XI, § 6.2. This mandate is intended "to ensure funding of education in Nevada will be given the status intended" by the Constitution's framers and to "substantially enhance Nevada's credibility as a stable environment for students and teachers." RA 76-77.

Section 7 of SB 515 appropriates approximately $2 billion to fund Nevada's public schools for the 2015-2017 biennium. AA 113. In enacting SB 515, the Legislature deemed this appropriation to be "sufficient" to fund the operation of the public schools over the ensuing two school years. SB 302 authorizes Defendant to deduct funds from the SB 515 appropriation for the public schools

and transfer those funds to ESAs. As the district court correctly found, "SB 302's diversion of funds from the Section 6 direct legislative appropriation . . . reduces the amount deemed sufficient by the legislature to fund public education and therefore violates Article 11, Section 6.2." AA 47.

Defendant asserts that, simply because SB 515 was passed three days after SB 302, the Legislature made its determination of the amount sufficient to operate the public schools *and* took into account that some portion of that amount would be deducted for ESAs. AOB 31. Defendant offers no support for this contention. Nothing in the record suggests that the Legislature, in determining the sufficiency of public school appropriations in SB 515, accounted for the diversion of that funding from public school district budgets that would occur under SB 302. *See supra* at 25. Defendant also ignores the salient fact that it was *not possible* for the Legislature to have calculated SB 302's impact on the sufficiency of the public school appropriation because it did not know, and still does not know, how many students would obtain ESAs and how much funding would be diverted from the public schools. Indeed, the Department of Education advised the Legislature when it was enacting SB 302 that it was "unable to quantify the fiscal impact" of the ESA program. RA 242 (Department of Education Unsolicited Fiscal Note on SB 302 (May 25, 2015)).

Defendant also ignores that, because SB 302 does not cap the number of students that can establish an ESA and places no limit on the amount of public

school funds that can be diverted to ESAs, the potential reduction in the amount of the public school appropriation in SB 515 is unknown. RA 102 (Lubienski Decl. ¶ 9 (because SB 302 "does not place any meaningful requirements, income or otherwise, on families who wish to register for an ESA . . . all children in Nevada are eligible" to apply for an ESA)). Defendant's unsupported assertion aside, the Legislature did not—and could not—account for SB 302's unknown and uncapped impact when appropriating the funds it deemed sufficient for the operation of the public schools in the next biennium.

2. SB 515's Appropriation Of The Amount Deemed Sufficient To Fund The Public Schools Includes The Total Amount Appropriated For That Purpose

Defendant further argues that the amount deemed sufficient by the Legislature in SB 515 to fund the operation of the public schools is only the BSG, the per-pupil amounts on which funding is based in the Nevada Plan formula, calculated in Sections 1 and 2 of SB 515, and not the total "lump sum" appropriation in Section 7. AOB 32.

For several reasons, this argument lacks merit. First, Section 6.2 compels an "appropriation" the Legislature deems sufficient to fund the operation of the public schools. Sections 1 and 2 of SB 515 are calculations of the BSG, not appropriations. Thus, the BSG per-pupil calculations in Sections 1 and 2 of SB 515 are not, nor could they be, the appropriation the Legislature deemed sufficient to fund the operations of the public schools under Section 6.2. AA 108-10.

Second, Section 6.2 requires an appropriation amount sufficient to fund the operation of the public schools and not just to support the BSG component of that funding. Indeed, SB 515's Section 7 appropriation includes both the state portion of the BSG amount for each district and categorical (non per-pupil) grants to districts that support specific education programs designated by the Legislature. *See* AA 110-17 (providing for categorical funding for special education (sections 3-4), class size reduction (sections 15-16), school lunches (section 12), and transportation (section 11)). There is no basis for Defendant's contention that the amount the Legislature deemed sufficient to fund public schools is comprised only of the BSG, exclusive of these categorical grants.

Third, even if the BSG calculation was the amount deemed sufficient, which it is not, ESAs deduct more from the DSA than the Legislature appropriated for the BSG component of public school funding. For example, in fiscal year 2014, the per-pupil BSG for Clark County was $5,393. RA 229 (Education Finance Fact Sheet). Of that, the State's share was only $2,213, the rest comes from local or other sources. *Id*. For the 2015-2017 biennium, the per-pupil BSG for Clark County is $5,512, of which the State DSA portion is only a fraction. However, for each approved ESA, Defendant subtracts either $5,139 or $5,710—the full statewide average BSG amount—from a school district's apportionment of DSA funds, which are the funds apportioned by the Legislature for public education. AA 96 (school districts are entitled to their apportioned Section 6 funds "minus . . .

all the funds deposited in education savings accounts established on behalf of children who reside in the county").

Thus, when a student in Clark County obtains an ESA, the district will lose $5,139 or $5,710 in state funds from its DSA apportionment. Defendant ignores that SB 515 does not apportion $5,139 or $5,710 of *State funding* per student in Clark County; indeed, it apportions only a fraction of that.[4] Because the Legislature apportioned only the State's share of the BSG in SB 515, it is evident that it did not account for SB 302's transfer of the full BSG amount from district funds or the total amounts allocated for public education for the state.

Defendant also asserts that the $2 billion appropriation in Section 7 cannot be the amount the Legislature deemed sufficient because school districts "are never guaranteed the lump-sum" appropriation to the DSA but only the "per-pupil guarantee." AOB 32. There is no question that districts do not receive the lump sum of funds appropriated in Section 7. Rather, they receive from Section 7's "lump-sum" appropriation the state portion of the BSG amount based on their enrollments and state grants for categorical programs for which they are eligible.

[4] To try to circumvent the harm that school districts will incur under SB 302, Defendant offers a declaration from the Interim Superintendent of Public Schools who states that the Department does not plan to track the district of residence of children who enter into ESAs. AA 26 ¶ 12. But the plain text of SB 302 requires that the ESA funds be deducted specifically from the district where the student resides. Mr. Canavero's *ipse dixit* cannot avoid this result. *United States v. State Eng'r*, 117 Nev. 585, 589-90, 27 P.3d 51, 53-54 (2001) (citation omitted) ("'An administrative agency's interpretation of a regulation or statute does not control if an alternative reading is compelled by the plain language of the provision.'").

SB 302 reduces the amount of those payments by not just the state's portion but the full amount of the BSG for each ESA established in that quarter, thus reducing those payments below the level deemed sufficient in Section 7. Further, Section 6.2 mandates that the appropriation in Section 7 of SB 515 be available to support the operation of public schools for the biennium. SB 515 makes clear that, to the extent there is a surplus in the Section 7 appropriation, those funds remain within the DSA for the operation of the public schools *until the end of the biennium*. AA 114 (SB 515 § 7.6). The Legislature in SB 515 properly placed those funds in a lock box for the public schools for the full biennium, shielding them from depletion for other purposes.

Thus, the appropriation made in Section 7 of SB 515 is the "appropriation to provide the money the Legislature deems to be sufficient . . . to fund the operation of the public schools." Nev. Const. art. XI, § 6.2. SB 302, by diverting monies appropriated under Section 7 for ESAs, reduces the amount deemed sufficient by the Legislature to fund the public schools and is unconstitutional.

3. Whether SB 302 Diverts Funds From SB 515 Is Justiciable

Defendant also argues that the question of whether SB 302 violates Article XI, Section 6.2, by reducing the appropriation to the public schools below the amount deemed sufficient by the Legislature is non-justiciable. AOB 37. This argument is without merit.

In their challenge to the constitutionality of SB 302, Plaintiffs take no

position on the Legislature's determination in SB 515 that its appropriation is sufficient to fund the operation of Nevada's public schools. Plaintiffs do not ask this Court to "direct the Legislature to approve any particular funding amount or tax structure." *Guinn*, 119 Nev. at 472, 76 P.3d at 30. Nor do they challenge whether the Legislature deemed the SB 515 appropriation to be sufficient to fund the public schools. Rather, Plaintiffs' constitutional claim is that the amount the Legislature *itself* deemed sufficient in SB 515 to fund the public schools is safe-guarded for use by the public schools and cannot be diverted and reduced. SB 302, on its face, does just that. Thus, Plaintiffs' constitutional challenge to SB 302 is justiciable.

C. Defendant's Argument That It Is "Optimal" For The Legislature To Fund ESAs From Public School Funds Is Irrelevant and Without Merit

Defendant argues that because both the BSG and SB 302 are calculated on a per-pupil basis, it is "optimal" for ESAs and public schools to be funded from a single appropriation. AOB 35. But whether SB 302 may or may not be an "optimal" way of funding private and home schooling is irrelevant—legislative or executive expediency cannot override SB 302's facial violation of the Nevada Constitution.

Moreover, Defendant's premise is wrong. Defendant argues that the reduced amount of SB 515's appropriation, after the diversion of funds to ESAs, is still sufficient because the public schools will educate fewer children. *Id.* There is

no support for this contention. As the record below makes clear, SB 302 does not have the same impact as a drop in enrollment in the Nevada schools. This is illustrated by SB 302's impact on the Clark County district budget discussed above. Although the State provides only a fraction of the BSG amount to Clark County, SB 302 authorizes the reduction of the full statewide average amount of the BSG from that district's funds. Using the 2014 estimate of the State's portion of Clark County's BSG, if 3,000 students moved from Clark County to California, the district would lose $6,639,000 in state funding (3,000 x $2,213). That money would also remain in the DSA for the remainder of the biennium to be potentially used for other public education needs. If, however, 3,000 students receive an ESA, Clark County will lose at least $15,417,000 (3,000 x $5,139), just for that year, funding that cannot be recovered and will not, under any circumstances, be used for public education.[5]

In addition, if some of the ESAs are obtained for students previously attending private schools, home-schooled students, newly entering kindergarteners, or children of military families, Clark County will lose this funding from its budget

[5] SB 302 does not provide a mechanism for school districts to make up this deficit. Districts may be forced to try to make up this deficit from local funds. It is also possible that the school district could petition the State to "back fill" the BSG; however, SB 515 only appropriated the State's expected *portion* of the BSG, not the full BSG amount. As such, if the State ends up providing districts with the full BSG amount for every student who receives an ESA, it could very well lead to the DSA being underfunded—the very consequence the Education First Amendment intended to prevent.

with no commensurate reduction in enrollment. According to Defendant's own estimate, the private and home schooled students who are eligible to receive ESAs represent a $200 million deficit in the public education appropriation. RA 69.

Defendant also ignores the record below that the funding deemed sufficient by the Legislature for the operations of the public schools includes not only expenses that may vary due to changes in student enrollment, but also the districts' fixed costs of operating a system of public schools for all students. When a student obtains an ESA under SB 302 and no longer attends a public school, the school district loses the 90 or 100 percent of the amount of the BSG yet retains the fixed costs of educating that student and all the other students in the district's schools. RA 115-16 (Johnson Decl. ¶¶ 7-8 (stating that "if a student were to leave White Pine after obtaining an ESA," the district "would nevertheless maintain many of the fixed expenditures associated with educating that child" including teachers, "school counselors, school administrators, school resource officers, custodial staff, maintenance personnel, groundskeepers, bus routes, bus drivers, nutrition programs, and other support services")).

Defendant further ignores undisputed facts in the record that the fixed costs of operating a system of public schools are not commensurately reduced by losing one or even several students. For example, the cost of a teacher remains unless there is a sufficient decline in the number of students in a particular grade or school to allow for eliminating the teaching position altogether. Nor can teachers easily

be released mid-year. RA 116 (Johnson Decl. ¶ 8 ("pursuant to N.R.S. 391.3196, school districts must notify teachers by May 1 if they will be reemployed for the ensuing school year. These staffing decisions are made based on projected enrollment, and cannot be readily adjusted during the school year.")). Likewise, the fixed costs associated with keeping a particular school operating in a safe and healthy manner—janitorial positions, administration, utilities, maintenance, grounds keeping, counseling—all remain unless enrollment were to drop to a level where the district can close a school altogether. *See* RA 82-87 (Nevada Legislative Counsel Bureau, "2015 Nevada Education Data Book" at 84-89 (breaking down per-pupil expenditures into categories that include fixed costs, such as operations and leadership)).

Defendant also fails to recognize that the estimated enrollment on which the Legislature determines the funding necessary to operate the public schools under Section 6.2 includes students who require additional staff and services and, therefore, are more costly to educate. As the Legislature has acknowledged, educating students with disabilities in need of special education services, ELLs, and students from lower socio-economic backgrounds requires more resources and funding. RA 88 (demonstrating increased per-pupil costs for special education students, ELL students, and economically disadvantaged students). Thus, as funding is redirected to ESAs under SB 302, districts will have less funding—below the level deemed to be sufficient under Article XI, Section 6.2—to provide

the resources essential to educate significant numbers of students with greater needs: students with disabilities; English language learners; students at risk due to household and neighborhood poverty, homelessness and transiency; and students with other special needs who will remain in the public schools. *See* RA 108 (Lubienski Decl. ¶¶ 20-21 (noting that typical effect of choice systems is that students who are more expensive to educate stay in the public school system)).

Finally, Defendant contends that because—according to Defendant—SB 302 could have been funded through a separate appropriation unrelated to the public schools and based on an estimate of ESA participants, the Legislature should not have to fund public education and ESAs separately. AOB 36. Of course, there are innumerable hypothetical statutes that the Legislature could have passed but those hypothetical statutes are not before this Court. Likewise, a separate appropriation for the ESA program[6]—after public schools were funded under Section 6 as required by the Constitution—would have required the Legislature to make hard choices about whether it wanted to appropriate millions of dollars to subsidize the education of students in private and home schooling or fund roads, public safety or other state priorities. But the Legislature did not do so. It enacted SB 302.

Defendant's speculation about hypothetical legislation that might pass constitutional muster does not alter the fact that SB 302 diverts funds appropriated

[6] This hypothetical statue may have Constitutional challenges of its own but such analysis is not relevant here because that is not the statute the Legislature enacted.

for public education and is unconstitutional.

II. SB 302 ALSO VIOLATES ARTICLE XI, SECTION 2, OF THE NEVADA CONSTITUTION

In addition to violating Article XI, Section 6, SB 302 also conflicts with the Section 2 mandate that the Legislature "provide for a uniform system of common schools." Nev. Const. art. XI, § 2. [7]

SB 302 violates this constitutional mandate by subsidizing with public funds non-common, non-uniform private schools and home schooling. Nevada follows the bedrock principle of "'expressio unius est exclusio alterius,' the expression of one thing is the exclusion of another," *State v. Javier C.*, 128 Nev. Adv. Op. 50, 289 P.3d 1194, 1197 (2012), and "[t]his rule applies as forcibly to the construction of written Constitutions as other instruments." *King v. Bd. of Regents of Univ. of Nev.*, 65 Nev. 533, 556, 200 P.2d 221, 232 (1948); *see Bush v. Holmes*, 919 So. 2d 392, 407 (Fla. 2006) (applying the "expressio unius est exclusius alterius" doctrine in striking down Florida's voucher system).

It is well established that the Legislature is prohibited from enacting statutes that are plainly inconsistent with constitutional mandates. As this Court has held,"[e]very positive direction" in the Nevada Constitution "contains an implication against anything contrary to it which would frustrate or disappoint the

[7] This Court may uphold the preliminary injunction on alternate grounds than that relied upon by the district court. *Washoe Cty. v. Otto*, 128 Nev. Adv. Op. 40, 282 P.3d 719, 727 (2012) ("[W]e will affirm the district court if it reaches the right result, even when it does so for the wrong reason.") (citation omitted).

purpose of that provision." *Galloway*, 83 Nev. at 26, 422 P.2d at 246 (citation omitted); *see also id.* (holding that the "affirmation of a distinct policy upon any specific point in a state constitution implies the negation of any power in the legislature to establish a different policy").

The district court held that Plaintiffs had not shown a likelihood of succeeding on their claim that SB 302 violates Article XI, Section 2, because the law "does not do away with public schools." AA 49. This Court's precedent, however, requires only that Plaintiffs demonstrate that SB 302 is "contrary" to Article XI, Section 2, not that it would do away with public schools in their entirety.[8] Based on the uncontested record below, Plaintiffs met that burden.

Plaintiffs presented overwhelming, uncontroverted evidence that SB 302 uses public funds to subsidize non-uniform private schools and home schooling. The record demonstrated that Participating Entities—private schools and entities receiving ESA funds—do not have to accept all students, as public schools must. Participating Entities also can discriminate based on a student's religion or lack thereof, academic achievement, ELL status, disability, homelessness or transiency, gender, gender identity and sexual orientation. RA 106-07 (Lubienski Decl. ¶ 16 (identifying Nevada private schools with facially discriminatory admissions

[8] The court below also concluded that Section 2 does not prohibit the Legislature from funding non-public systems of education, because Article XI, Section 1, encourages the promotion of education "by all suitable means." AA 49. For the reasons expressed below, *infra* at 41, this interpretation is not correct.

criteria, e.g., requiring a declaration of religious belief, agreement with a statement on sexuality, grade minimums, or a lack of behavior problems, or charging more for English Language Learners)). Participating Entities can also refuse to serve a student based on the student's socio-economic status and inability to pay tuition that exceeds the voucher amount. RA 107 (Lubienski Decl. ¶ 17).

The record also shows that Participating Entities receiving public school funds through ESAs do not have to use the State-adopted curriculum taught in public schools, nor administer State assessments to determine whether students are achieving State academic goals. While SB 302 requires Participating Entities to give a norm-referenced test in mathematics and English each year (AA 84), they do not have to administer the comprehensive assessments mandated by the Legislature for the public schools, nor are they required to utilize those assessment results to evaluate student and school performance to ensure accountability to the public. *Id.* Indeed, every mandated element to ensure uniformity and accountability in Nevada's system of public schools—*e.g.*, curriculum content, testing requirements, teacher qualifications, school and district performance measures—are inapplicable to the Participating Entities, which are supported by public funding through the ESA program.

Without question, SB 302 diverts funds from the operation of the uniform system of public schools to pay for non-uniform, non-common private schools and home schooling. Thus, SB 302 violates Article XI, Section 2, of the Nevada

Constitution.

III. ARTICLE XI, SECTION 1, OF THE NEVADA CONSTITUTION DOES NOT AUTHORIZE SB 302

Defendant also argues that Article XI, Section 1, of the Nevada Constitution authorizes the Legislature's enactment of SB 302. AOB 34. This argument is without merit.

Article XI, Section 1, reads in full:

> The legislature shall encourage by all suitable means the promotion of intellectual, literary, scientific, mining, mechanical, agricultural, and moral improvements, and also provide for a superintendent of public instruction and by law prescribe the manner of appointment, term of office and the duties thereof.

Nev. Const. art. XI, § 1.

As an initial matter, SB 302 is not—and cannot—be a "suitable means" of encouraging intellectual and other improvements under Article XI. Unconstitutional means are not "*suitable*." *See Williams v. Rhodes*, 393 U.S. 23, 29, 89 S. Ct. 5, 9, 21 L. Ed. 2d 24 (1968) (holding that while the federal constitution grants Congress or states "specific power to legislate in certain areas," these granted powers "are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution"). SB 302 violates Article XI, Sections 6 and 2, of the Nevada Constitution. It is, therefore, not a "suitable means" of encouraging education.

Further, Article XI's firm and unequivocal mandates to establish, fund and

maintain the Nevada public school system take precedence over the broad and general terms in Section 1. *See Lader v. Warden*, 121 Nev. 682, 687, 120 P.3d 1164, 1167 (2005) (holding that where a specific statute is "in conflict with a general one, the specific statute will take precedence").[9]

Moreover, a plain reading of Article XI, Section 1, makes clear that this provision cannot be construed to authorize the Legislature to use public funding to support education in private schools and by other private entities.[10] To the extent the "all suitable means" language is anything but hortatory, it is clear, when read with Section 1 as a whole, that the language was intended to authorize the "encouragement" of certain enumerated categories of learning (intellectual,

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[9] *See La. Fed'n of Teachers v. State*, 118 So. 3d 1033, 1051-53 (La. 2013) (declaring a voucher program an unconstitutional diversion of public school funds and expressly holding that the Louisiana Constitution's general exhortation that the Legislature "provide for the education of the people" does not authorize a voucher law that violates the more specific mandate to "maintain a public educational system").

[10] Defendant relies exclusively on *Meredith v. Pence*, 984 N.E.2d 1213 (Ind. 2013) to support its Section 1 argument. In *Pence*, the Indiana Supreme Court addressed the constitutionality of a voucher program that was not funded by public school appropriations, applied only to students at or below 150 percent of the poverty level, and required institutions receiving the public funds to meet state accountability standards. *Id.* at 1219. Further, the Court relied on the Indiana Constitution's unique language and history that originally mandated the Legislature to provide for a "general system of education" "as soon as circumstances will permit," concluding that the Indiana framers did not require the establishment of only public schools. *Id.* at 1222 & n.12 (citations omitted). In sharp contrast, the Nevada delegates made clear that the establishment and maintenance of a public school system is an unequivocal duty of the Legislature. RA 321-26 (Green Decl. ¶¶ 8-21).

literary, scientific, mining, mechanical, agricultural, and moral improvements) by all suitable means *within the public schools*. This is evident from very next clause of Section 1 that mandates the Legislature to "*provide for a superintendent of public instruction*." Nev. Const. art. XI, § 1 (emphasis added). The debate around this section by the framers centered on the public schools and even more specifically on the role of the public schools in moral instruction, which was a new concept at the time. As Delegate Collins explained, Section 1 means that:

> [T]he State may properly encourage the practice of morality in contradistinction to sectarian doctrines. For instance, if a child insists on the practice of using profane language, I presume it should be made the duty of the School Superintendent, the teacher, or the Board of Education to insist that he shall either refrain from such practice or be expelled.

RA 326-27 (Green Decl. ¶ 24 (citing Debates and Proceedings at 566)).

Defendant offers no evidence that the framers contemplated giving the Legislature a blank check in Section 1 to fund non-public means of education. Rather, they intended Section 1 to direct the Legislature to advance certain categories of learning within the uniform system of public schools that must be established under Article XI. Indeed, the framers asked that Section 1 be read in conjunction with Section 2 before passing Section 1 so that they "knew what they were voting on." RA 327-28 (Green Decl. ¶ 26).

This meaning is also consistent and harmonious with the language and intent of the Education Article as a whole. As Professor Green explains, the delegates'

clear intent in passing Article XI was to provide for a system of public education. RA 326-27 (Green Decl. ¶ 24 (citing Debates and Proceedings at 566)). In both the 1863 and 1864 debates, the delegates agreed that the Legislature had to provide for a system of public education and that this was the appropriate method of educating Nevada school children. RA 321-24 (Green Decl. ¶¶ 8-15).

Professor Green further explains that "[t]here is no evidence from the debates that in passing this version of Article XI, section 1, the delegates intended to confer power on the legislature to fund non-public educational systems." RA 327 (Green Decl. ¶ 25). Professor Green continues, "the idea that the delegates meant to empower the Legislature to fund both the public schools and other means of educating Nevada's children is inconsistent with the delegates' pronounced concerns that there would not be enough funds to provide for both common schools and higher education." RA 328-29 (Green Decl. ¶ 27).[11] It is also inconsistent with the framers' intent to reign in legislative power. RA 329-30 (Green Decl. ¶¶ 28-30).

The delegates intended that the Legislature would amply fund Nevada's public school system established under Article XI and there is no support for Defendant's contention that Section 1 authorizes the Legislature to use public

[11] While the founders did recognize the Legislature's discretion in certain matters of education, including the age at which children should attend school and whether public education should be compulsory, the delegates declined to do so with respect to matters of funding. *See supra* at 6.

funds to subsidize private school tuition and home schooling. RA 329-30 (Green Decl. ¶¶ 28-31).

IV. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT SB 302 WILL CAUSE IRREPARABLE HARM

A lower court's finding of irreparable harm is reviewed for abuse of discretion. *People of State of Cal. ex rel. Van De Kamp v. Tahoe Reg'l Planning Agency*, 766 F.2d 1308, 1313 (9th Cir. 1985) (holding that a "district court's finding of the likelihood of irreparable harm is reviewed for an abuse of discretion."). The district court did not abuse its discretion in finding that SB 302 was likely to cause irreparable harm.

A. SB 302's Violation Of Nevada's Constitution Is Itself An Irreparable Harm

SB 302 violates Article XI, Sections 2 and 6, of the Nevada Constitution. This Court has held that a constitutional violation alone constitutes irreparable harm. *City of Sparks v. Sparks Mun. Ct.*, 302 P.3d 1118, 1124, 1130, 129 Nev. Op. 38 (2013) (citing *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir. 1997)).

Federal courts are in accord with this precedent. In *Monterey Mechanical*, on which *Sparks* relied, the Ninth Circuit held that "an alleged constitutional infringement will often alone constitute irreparable harm." 125 F.3d at 715. More recently, in *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1138 (9th Cir. 2009), the Ninth Circuit affirmed that "unlike monetary injuries, constitutional violations

cannot be adequately remedied through damages." (internal alteration and quotations omitted); *see also Fyock v. City of Sunnyvale*, 25 F. Supp. 3d 1267, 1282 (N.D.Cal. 2014) ("Irreparable harm is presumed if plaintiffs are likely to succeed on the merits because a deprivation of constitutional rights always constitutes irreparable harm.").

In violating Sections 2 and 6, SB 302 deprives Nevada children of their right to a public education guaranteed by the Nevada constitution. This right is so basic and fundamental that its violation must, in and of itself, constitute irreparable harm.

B. Plaintiffs, Parents Of Nevada Public School Children, Demonstrated That SB 302 Causes Harm At The School Level

Plaintiffs also presented a substantial evidentiary record on the irreparable harm SB 302 would cause to the Nevada public schools. For this reason, the district court did not abuse its discretion in finding that SB 302 will cause irreparable harm.

SB 302 will result in a substantial reduction of funds for the public schools. There have been over 4,000 applications for ESAs. AOB 47. Those applicants represent an immediate loss of more than $20 million to public schools. Moreover, Defendant has estimated that if every private school student and home school student received an ESA, public school funding would be reduced by over $200 million. RA 69.

Paul Johnson, the Chief Financial Officer for White Pine County School District, explained in detail how "SB 302 will harm public schools and the students they serve." RA 115 (Johnson Decl.).[12] Likewise, Jim McIntosh, Clark County's Chief Financial Officer, concurred, noting a loss of even 1,000 students from the 2015-2106 school year would trigger a budgetary shortfall that "would cause significant harm to students enrolled in CCSD." RA 124 (McIntosh Decl. ¶ 4). Those harms could include "eliminat[ing] instructional materials for certain courses" or cutting certain programs like "college preparation programs, dropout prevention programs, math and science enrichment programs." *Id.* Mr. McIntosh specifically noted that the "[i]mpacts of shifting and declining enrollment and funding are felt most deeply at the school level." *Id.* (¶ 6).[13]

Plaintiffs also demonstrated the harm from SB 302 to school districts and their students by disrupting the districts' ability to provide essential services. On the one hand, SB 302 actively induces students to exit the public schools by

[12] Mr. Johnson initially thought SB 302 only allowed use of ESAs for brick and mortar private schools, and thus he submitted a statement that SB 302 would not have a fiscal impact for White Pine, a County that currently has no private schools. AA 31. Once he understood that SB 302 applied to home schooling and distance learning as well as private schools, Mr. Johnson clarified that the loss of funding through SB 302 would have a negative impact on his and other districts. RA 365 (Johnson Reply Decl. ¶ 4).

[13] Defendant argues that Plaintiffs' irreparable harm argument would support the conclusion that the State transferring workers from one county to another is an irreparable harm. AOB 47 n.19. As explained in Section I.C, *supra*, SB 302 does not impact public schools in the same way that a child changing districts impacts schools. Moreover, an irreparable harm analysis applies only to unconstitutional or illegal acts.

subsidizing non-public education. On the other hand, it incentivizes students in private schools or homeschooled students to enroll in a public school for the minimum 100 days to become ESA-eligible. This revolving door disrupts the ability of public school districts to provide and sustain quality education for all students. Jeff Zander, Superintendent of the Elko County schools, explained:

> The fact that SB 302 allows students to leave in the middle of a school year makes managing budget reductions all the more challenging. Mid-year budget reductions are particularly harmful and disruptive to schools. They require school districts to make changes in the allocation of resources and the provision of programs during the school year, to the detriment of students.

RA 122 (Zander Decl. ¶ 7); *see also* RA 119 (Johnson Decl. ¶ 13 ("SB 302 will introduce significant budgeting instability that will harm students. School districts . . . will be faced with the prospect of planning for a shifting landscape. . . . Schools would be required to revise its course offerings, change student schedules, and move students into different classrooms.").

Unable to dispute Plaintiffs' compelling evidence of harm, Defendant resorts to broad mischaracterizations of the record below. Defendant argues that Plaintiffs have not shown a likelihood of irreparable harm because the evidence from Plaintiffs' declarants focused on school districts. AOB 45. However, districts operate schools, and the budgetary impacts from SB 302 will directly impact the availability of teachers, support staff and other resources in the district's schools and classrooms. The Johnson, McIntosh, and Zander declarations all directly

address harms from SB 302 that students will experience. RA 124 (McIntosh Decl. ¶ 4 (noting "significant harm to students enrolled in CCSD")); RA 119 (Johnson Decl. ¶ 13 ("SB 302 will introduce significant budgeting instability that will harm students.")); RA 122 (Zander Decl. ¶ 7 (noting that changes caused SB 302 will be to "detriment of students")).

Defendant also characterizes Plaintiffs' declarations as relying on the speculation that "significant funds" would be diverted from public schools under SB 302. AOB 45 n.18. But, Plaintiff's declarations address both large and more limited reductions in funding. RA 115-16 (Johnson Decl. ¶¶ 8-9 (discussing harms felt from the loss of just 30 students)); RA 121 (Zander Decl. ¶ 5 (discussing harms from "minor changes in enrollment")); RA 124-25 (McIntosh Decl. ¶ 4 (discussing harms from merely 1,000 students leaving Clark County)).[14] Moreover, the significant financial impact on district budgets from SB 302 is in no way speculative. Based on Defendant's own estimate of 4,000 applicants to the ESA program, over $20 million will be cut from the public school budget in just the first year of SB 302's implementation.

Defendant also argues that the harm from SB 302 is only "financial" and,

[14] Defendant relies on *Flick Theater, Inc. v. City of Las Vegas*, 104 Nev. 87, 91 n.4, 752 P.2d 235, 238 n.4 (1988) for his position that Plaintiffs' harm is "mere conjecture." AOB 45-46 n.18. But, there, the Nevada Supreme Court reversed a preliminary injunction because of a complete absence of a record of harm to protected speech by adult business operators. The certain harm to public school children from decreased funding is not akin to the unsupported harm alleged by adult business proprietors.

therefore, not irreparable. AOB 46 n.18. But that makes no sense when discussing the education of children. Diminished resources that impact a first grader's ability to read, a fourth grader's scientific reasoning, a seventh grader's ability to write, an eighth grader's ability to master foundational algebraic concepts, and so on, will ripple out through each child's educational experience and will not be remedied by more money later. The record firmly establishes the harms SB 302 will cause at the school and classroom levels, diminishing the opportunities for students to master reading, problem solve, understand scientific reasoning and otherwise obtain the skills needed for college, career, and citizenship. The harms from SB 302 strike at the very core of the education that must be afforded all Nevada public school children, harms that cannot be remedied through the restoration of funding at some future date.

Defendant's other attempts to relitigate the factual question of irreparable harm similarly fail. First, Defendant argues that Plaintiffs cannot show irreparable harm because "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." AOB 43. This does not make sense. A violation of Section 6 means that there will be a diversion of public school funds that will cause harm, just as the district court found. AA 46 ("[G]eneral funds appropriated to fund the operation of the public schools will be diverted to fund education saving[s] accounts under SB 302").

Next, Defendant asserts that SB 302 may benefit the public schools because, by decreasing enrollments, the law will somehow address the public school teacher shortage. There is no support in the record for this brazen speculation. This assertion also ignores Plaintiffs' uncontested evidence that, as students leave the public schools and obtain ESA funds, the public schools will experience a shortfall in crucial operational funds necessary to pay its teacher workforce.

Defendant further contends, without offering evidentiary support, that the hold harmless provision in SB 515 will mitigate any losses of funding suffered by the school districts. AOB 46. Defendant ignores that a five percent year-over-year reduction in funds to school districts represents a significant funding loss. For example, five percent of Clark County's student population is approximately 16,000 students. If just less than 16,000 students applied for ESAs, the district's budget would be cut by at least $35 million (16,000 x $2,213 estimated state share of BSG).

Lastly, Defendant attempts to reframe the issue of irreparable harm as a comparison between the harms of SB 302 diverting funds from SB 515 and those from a hypothetical statute authorizing ESAs funded through an appropriation separate and distinct from the public school appropriation. *See* AOB 43-44. The record is devoid of any evidence that even suggests the Legislature would have passed both SB 515 with the funds it deemed sufficient to fund the public schools—approximately $2 billion for this biennium—and another, separate bill

with a separate appropriation for ESAs, which could well reach $200 million if just current private and home school students qualified.[15] RA 69. The harms of this hypothetical statute to the Nevada budget are also real but irrelevant to the analysis here.

Plaintiffs presented substantial, uncontested evidence that SB 302 will result in direct harm to Nevada's public schools and the students attending those schools. The district court did not abuse its discretion in determining that Plaintiffs had shown a likelihood of suffering from irreparable harm.[16]

C. The Balance Of Hardships Weighs In Favor Of Preliminarily Enjoining SB 302

The balance of hardships also weighs in favor of enjoining SB 302. Issuing a preliminary injunction preserves the status quo in Nevada for more than 150

[15] Indeed, the record shows that the Legislature enacted SB 302 precisely because it erroneously believed it was fiscally neutral by diverting funds from the appropriation for the public schools.

[16] Defendant raises in a footnote, for the first time on appeal, that Nevada does not recognize taxpayer standing. Defendant did not contest Plaintiffs' standing below, and there is no basis for depriving Plaintiffs of standing before this Court. Regardless, Plaintiffs, while Nevada taxpayers, rely not only on that status but also on the harm that SB 302 will cause to the public schools, their children, and other children across the state. Further, contrary to Defendant's statement, this Court has never determined whether taxpayer standing exists in Nevada. In *Blanding v. City of Las Vegas*, relied on by Defendant, this Court held that taxpayers could not challenge a municipality's placement of a road, but noted that the result would have been different if the challenged action has been "prejudicial to the rights of taxpayers, as such, as involving the levy of tax, creation of a municipal debt, or appropriation or expenditure of public funds, or in any way tending to increase the burden of taxation." 52 Nev. 52, 280 P. 644, 650 (1929).

years: funds appropriated to operate the public schools are used to operate the public schools. Any parent who wishes to send their child to private school or to home school their child remains free to do so; they will just continue to be unable to receive public school funds to subsidize that decision. Conversely, allowing SB 302 to go into effect will result in a reduction of over $20 million from the public schools in the first year alone.

Defendant boldly states that diverting funds from public education to ESAs may actually improve Nevada's public schools, referencing studies of voucher programs in other states that were discussed at legislative meetings. AOB 47. However, the uncontroverted record is that those partisan studies were either not conducted in adherence to scientifically recognized standards or did not actually conclude that vouchers improved outcomes for students, which is how they were characterized to the Nevada Legislature by SB 302 proponents.

For instance, the legislative testimony mischaracterized the findings of the Center on Education Policy. AOB 19. As explained in the uncontested declaration from Professor Lubienski, the Center on Education Policy's report is actually a review of the research literature on vouchers, which divides its "findings" into Tier 1 and Tier 2 findings. RA 338-40 (Lubienski Decl. ¶ 7). The pro-voucher findings reported to the Legislature are all Tier 2 findings, "meaning that the CEP . . . found substantial reason to doubt the validity of the findings in those reports." RA 340

(Lubienski Decl. ¶ 8).[17] In fact, the only Tier 1 finding made by the Center on Education Policy was that "[a]chievement gains for voucher students are similar to those of their public school peers." RA 338-40 (Lubienski Decl. ¶ 7). This is consistent with Professor Lubienski's uncontested conclusion:

> The claim that 'school choice programs provide greater educational opportunities by enhancing competition in the public education system' has simply not been demonstrated in the research literature. The evidence suggests that schools forced to compete may do so in different ways, and not always as school choice proponents predict, including by excluding more costly students; redirecting resources into marketing instead of instruction; or adopting instructional programs that, while they may be popular, are actually ineffective. Moreover, there can also be detrimental impacts on non-choosing students, as their more affluent peers are more likely to embrace choice options, leaving behind a school that can accelerate in decline.

RA 362-63 (Lubienski Reply Decl. ¶ 38).

Finally, Defendant asserts that a preliminary injunction harms the public

[17] Similarly, Defendant notes that the Legislature was told 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.'" AOB 20. However, the 100 percent satisfaction rate was based on an email survey sent to a Yahoo! message board created by ESA families. RA 347 (Lubienski Decl. ¶ 19). Even amongst this already non-representative group, the response rate was only 37 percent, and the author of the survey admits that the "results . . . cannot be accurately applied to all ESA families." *Id.* Again, the partisan study conduct by the Friedman Foundation (AOB 19) "employ[ed] an approach considered to be a relatively poor and potentially misleading research method for drawing conclusions in social science [and] present[ed] a selective and incomplete picture of the research literature that include[d] unsuitable studies and exclude[d] other empirical studies that contradict the Friedman Foundation's claims on this issue." RA 350 (Lubienski Decl. ¶ 23).

interest by preventing Nevada children from transcending what he describes as the "lowest common denominator"—namely the public school education provided to over 460,000 children in Nevada. AOB 48. Whatever dismissive opinions Defendant may have about Nevada public schools, Plaintiffs' claims do not intrude upon the decision by any parent to enroll their child in private school or to home school their child. Plaintiffs contest only SB 302's diversion of funding from the public schools to subsidize that private decision. The challenge to SB 302 is not a dispute about education policy, but rather is deeply rooted in the specific provisions of Article XI of Nevada's Constitution that embody the State's longstanding and unequivocal commitment to public education.

CONCLUSION

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

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March 25, 2016

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CERTIFICATE OF COMPLIANCE

1. I certify that this Brief complies with the formatting requirements of N.R.A.P. 32(a)(4), the typeface requirements of N.R.A.P. 32(a)(5) and the type style requirements of N.R.A.P. 32(a)(6) because it has been prepared in a proportionally spaced typeface, size 14, Times New Roman.

2. I further certify that this Brief complies with the type-volume limitations of N.R.A.P. 32(a)(7) because, excluding the parts of the Brief exempted by N.R.A.P. 32(a)(7)(C), it contains 13,911 words.

3. Finally, I hereby certify that I have read this Brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this Brief complies with all applicable Nevada Rules of Appellate Procedure, in particular N.R.A.P. 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 sanctions in the event that the accompanying Brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of March, 2016, a true and correct copy of the **RESPONDENTS' ANSWERING BRIEF** was served upon all counsel of record by electronically filing the document using the Nevada Supreme Court's electronic filing system.

By /s/ *Dannielle Fresquez*
Dannielle Fresquez, an Employee of
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