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DISTRICT COURT
CLARK COUNTY, NEVADA

Ruby Duncan, an individual; Rabbi Mel Hecht, an individual; Howard Watts III, an individual; Leora Olivas, an individual; Adam Berger, an individual,

Plaintiffs,

v.

State of Nevada *ex rel*, the Office of the State Treasurer of Nevada and the Nevada Department of Education; Dan Schwartz, Nevada State Treasurer, in his official capacity; Steve Canavero, Interim Superintendent of Public Instruction, in his official capacity.

Defendants.

Case No.: A-15-723703-C
Dept. No.: 20

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND SUPPORTING MEMORANDUM

Plaintiffs, through their attorneys, hereby move for a preliminary injunction. This Motion is based on the pleadings and papers on file, the attached exhibits, and any other evidence and oral argument that the Court may entertain. Plaintiffs respectfully request an evidentiary hearing on this Motion.

Dated this 24th day of November, 2015.

Respectfully submitted,

/s/ *Amy M. Rose*

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NOTICE OF MOTION

TO: ALL PARTIES AND THEIR COUNSEL OF RECORD

PLEASE TAKE NOTICE that the PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION will be heard on the 13th day of January, 2016, at 8:30 a.m. in Department 20 of the above-entitled Court.

Dated this 24th day of November, 2015.

Respectfully submitted,

/s/ *Amy M. Rose*

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

Article XI of the Nevada Constitution requires the state to provide for a robust system of secular public instruction through schools that are open equally to all students; the state may not fund religious instruction, religious schools, or schools that selectively admit students based on their faith or other exclusionary religious criteria. *See* Nev. Const. art. XI, §§ 2, 10. Although parents may choose to send their children to religious schools, the Constitution guarantees that taxpayers funds will not be used to foot the bill. In that way, the Nevada Constitution ensures a strong, viable system of free public education while at the same time ameliorating intractable political disputes about which religious groups will receive tax dollars or benefit from having their doctrine taught in the public schools or at public expense.

The voucher program approved in Senate Bill 302, 78th Reg. Sess. (Nov. 2015), cannot be squared with this clear constitutional mandate. If permitted to proceed, the program will soon direct potentially millions of dollars in state educational funds to religious schools—including schools requiring students to participate in religious instruction and worship, and schools that discriminate in admissions on the basis of protected characteristics such as personal religious beliefs, sexual orientation, and pregnancy status. Funding private schools, religious instruction, and discriminatory admissions policies comes at the expense of the existing system of public schools and public instruction, directly contravening two provisions of the Nevada Constitution and more than 130 years of state-law precedent.

First, Article XI, Section 10, of the Nevada Constitution provides: "No public funds of any kind or character whatever, State, County or Municipal, shall be used for sectarian purpose." The Nevada Supreme Court has strictly enforced this No-Aid Clause, interpreting it to bar any allocations or expenditures of public funds that ***directly or indirectly*** support religious activities, religious institutions, or religious instruction. The Nevada Attorney General has time and again reaffirmed this interpretation. The voucher program, which funds religious instruction and other religious functions and activities at religious schools, simply cannot be reconciled with Section 10's strict prohibition against the use of state funding for sectarian purposes.

Second, Article XI, Section 2, directs that "[t]he legislature shall provide for a uniform system of common schools" that must not offer "instruction of a sectarian character" but must instead be open equally for "general attendance" by all schoolchildren. By funding private and religious schools that discriminate in admissions, the state is creating a two-track system of publicly financed education, in which educational opportunities are dictated by religious belief, sexual orientation, gender identity, and disability. Moreover, private schools vary widely in their curricula and practices. That is especially true for religious schools, which are exempt from educational regulations, and which frequently mandate worship, teach religious doctrine, and require even otherwise secular subjects to be taught in ways that conform to religious doctrine rather than Nevada's academic standards.

Unless the voucher program is enjoined, Plaintiffs will suffer irreparable violations of their constitutional rights under Sections 2 and 10 of Article XI. The voucher program will divert Plaintiffs' tax dollars from public school districts to private schools without placing any restrictions on the money. These public funds will then be used to provide instruction in religious doctrine and may be put to many other religious ends, including purchasing religious texts, constructing chapels, and even underwriting church mission-trips. Many parents who wish to use voucher funds—including Intervenors, who aim to send their children to religious schools at taxpayers' expense—have already applied for state voucher accounts. The transfer of funds to those voucher accounts, and from there to the private religious schools, is set to begin as early as February 2016. If the voucher program is not preliminarily enjoined before a trial on the merits, public money will flow to the religious schools; there will be no way to go back and provide complete and adequate remedies for Plaintiffs' constitutional injuries.

Accordingly, Plaintiffs respectfully request that the Court preserve the status quo and avoid irreparable violations of Plaintiffs' (and all Nevadans') constitutional rights by enjoining Defendants from disbursing S.B. 302 voucher funds or taking any other action to implement the voucher program until the Court decides this case on the merits.

FACTUAL BACKGROUND

A. The Voucher Program.

The voucher program directs the disbursement of state educational funds to be used for the education of any Nevada student who has attended public school for 100 consecutive days. The funds

may then be used to pay tuition at a private school. *See* Declaration of Amy M. Rose, Ex. 1 (S.B. 302 §§ 7.1 (100-day requirement), 9.1 (approved uses)).[1] Funds are distributed through voucher accounts maintained by a financial institution handpicked by the state. S.B. 302 § 10.1. Once the state has established a voucher account on a student's behalf, the Treasurer is required to deposit public funds into the account on a quarterly basis. S.B. 302 § 8.5. Voucher funds are drawn from the State Distributive School Account, which is a primary source of public-school funding for the school districts throughout the state. *See* S.B. 302 § 16.1. Taxes paid by Plaintiffs are included in the Distributive School Account, which is financed by legislative appropriations from the State General Fund, a tax on out-of-state sales, a slot-machine tax, mineral-land-lease income, and interest from investments held in the State Permanent School Fund. *See* NRS § 387.121 *et seq.*; *see also* Ex. 2 (Research Div., Nev. Legislative Counsel Bureau, *Nev. Plan for Sch. Fin. & Educ. Revenues & Expenditures* 75 (2013)). The State General Fund comprises money from various sales, use, business, and gaming taxes paid by Plaintiffs and other Nevadans. *See* Ex. 2 (*Nev. Plan for Sch. Fin. & Educ.* at 77); Ex. 3 (Research Div. Nev. Legislative Counsel Bureau *Revenue and Budget* 3 (2014)).

For students with disabilities and students living in families with a household income less than 185% of the federal poverty level, the per-student payout from the Distributive School Account will be 100% of the statewide average basic per-pupil support rate, which translates to $5,669 for Fiscal Year 2016. S.B. 302 § 8.2(a); *see* Ex. 4 (*Exec. Budget—DSA & Related K-12 Budgets: 2015-2017 Biennium*, Nev. Dep't of Educ. presentation to Legis. Comm'n's Budget Subcomm., Jan. 20, 2015). The payout for all other students will be 90% of that amount, or $5,102. *Id.* § 8.2(b). "[A]ll the funds deposited in education savings accounts established on behalf of children who reside in [a] county" must be deducted from the apportionment that would otherwise be disbursed from the Distributive School Account to the county's public school district. S.B. 302 § 16.1.

There is no limit on the number of students or families who may qualify for vouchers; nor is there a cap on the total amount of funds that may be siphoned from each school district's apportionment

[1] Hereinafter, all Exhibit cites refer to exhibits to the Declaration of Amy M. Rose, unless otherwise noted.

and diverted to private religious schools. *See generally* S.B. 302. What is more, the voucher law does not prohibit private schools from charging voucher students more than they charge non-voucher students—meaning that the schools may require voucher students to pay the full cost of tuition and expenses out of pocket while still collecting and using the voucher funds as a pure windfall. *See id.*[2]

Any private school that is licensed under NRS Chapter 394 or is exempt from such licensing under NRS § 394.211 may become a "participating entity" in the voucher program. S.B. 302 § 5. "Elementary and secondary educational institutions operated by churches, religious organizations and faith-based ministries" are exempt from licensing under NRS § 394.211, and are therefore not only eligible for voucher funds but also exempt from most state academic standards and regulations. The voucher law does not require the schools receiving public money to conform their admissions to even basic nondiscrimination standards, much less meet the public schools' obligation to remain open to general attendance by all Nevada students on an equal basis. *See generally* S.B. 302. Thus, religious schools that discriminate in admissions or employment on the basis of religion, sexual orientation, gender identity, disability, or other grounds may receive public money and participate in the voucher program.

Once voucher funds flow to a private school, S.B. 302 places no restrictions on how the school may use the funds, except that the school is prohibited from refunding or reimbursing the money to parents of participating students. *See* S.B. 302 §§ 9.2–4. Thus, religious schools are free to use public educational funds to pay for worship services, religious indoctrination, and all other religious activities—or for anything else that they wish, including putting the money to non-instructional uses like buying Bibles for the school's sponsoring church, renovating its chapel, or paying for church trips.[3]

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[2] Far from speculation, this exact scenario played out under a similar voucher program in Colorado. *Taxpayers for Pub. Educ. v. Douglas Cnty. Sch. Dist.*, 351 P.3d 461, 465 (Colo. 2015) (noting "instance where a Private School Partner slashed a recipient's financial aid in the amount of the scholarship.").

[3] Although the Treasurer's proposed regulations require that a participating entity "provide an educational service," there is no requirement that money disbursed under S.B. 302 actually be used for educational services. *See* Ex. 5 (Third Revised Proposed Regulation of the State Treasurer, LCB File No. R061-15, published November 19, 2015, § 17(4)).

B. The Sectarian Nature of Participating Schools.[4]

The legislature fully intended to divert state educational dollars to religious schools: The bill's sponsor specifically rejected a proposed amendment by the Legislative Counsel Bureau that would have restricted participation in the voucher program to "nonsectarian" institutions and instead expanded the list of qualified participating entities to include schools exempt from licensing under Nevada state law, thus allowing religious schools to participate in the voucher program. Ex. 6 (Senator Hammond's Amendments to S.B. 302). And in furtherance of this aim, the legislature then explicitly exempted S.B. 302 from the statutory prohibition against using public funds to support religious schools. *See* S.B. 302 § 15.9 (amending NRS § 387.045 to allow disbursement of state funds to sectarian institutions).

As a result, of the 110 private schools in Nevada currently eligible to participate in the voucher program, 63 are religious. Ex. 13 (Nevada 2015–16 Private School Directory).[5] Many of these religious schools are owned, operated, sponsored, and controlled by churches or other religious institutions. *See* Exs. 16, 26, 29, 44, 60. For example, Word of Life Christian Academy, a K-12 school in Las Vegas, is a ministry of Word of Life Christian Center. Ex. 60. Lone Mountain Academy in Las Vegas operates as a ministry of Calvary Chapel Lone Mountain. Ex. 44. Eagle Valley Christian School, a K-8 elementary school is affiliated with the Nevada–Utah Conference of Seventh-day Adventists. Ex. 26. The Faith Christian Academy is a K-8 school run by Calvary Chapel in Carson Valley. Ex. 29. And Bethlehem Lutheran School in Carson City is associated with a congregation of the Lutheran Church—Missouri Synod. Ex. 16.

Beyond mere affiliation, many eligible schools have explicitly religious mission statements and aim to inculcate particular religious beliefs or promote a particular faith or religious denomination. *See* Exs. 17, 26, 37–38, 44, 47, 51, 55, 56. For example, Liberty Baptist Academy in Clark County states

[4] Plaintiffs describe religious schools throughout this brief by way of example. Additional information about these schools and other religious schools eligible to take part in the voucher program is attached as Exhibits 13–64 to the Rose Declaration; Plaintiffs intend to present further evidence after conducting expedited discovery, as requested, in support of this Motion.

[5] The allegations in Plaintiffs' Complaint are based on the 2014–15 Private School Directory, which was available at the time the Complaint was filed. This motion reflects information from the current 2015–16 directory.

that the school's mission "is to equip leaders, train believers, and produce achievers for the cause of Jesus Christ." *See* Ex. 37. St. Teresa Avila Catholic School in Carson City seeks to ensure that its students "become active Christians and have deep admiration and respect for the Catholic faith based on catechetical teachings . . . . Students learn and practice Catholic teaching by participating and planning in liturgies, praying daily, regularly receiving sacraments and using sacramentals." Ex. 56. And Lone Mountain Academy in Clark County seeks to "glorify God through academic excellence, discipleship in the Word of God, and instilment of a Biblical worldview, thus equipping students to fulfill their role in the Great Commission." Ex. 44.

Consistent with their religious missions, many religious schools employ curricula that are infused with religious doctrine and proselytizing, and many require participation in prayer and worship services—even for students whose tuition would be paid with public funds. *See* Exs.14, 20–25, 31–34, 36–37, 40–41, 46–50, 54–55. For example, Logos Christian Academy imparts a "Christ-centered" curriculum that "teach[es] all subjects as parts of an integrated whole with the Scriptures at the center (2 Timothy 3:16–17)" and "provide[s] a clear model of the biblical Christian life through [its] staff and board (Matthew 22:37–40)." Ex. 41. Solomon Schechter Day School is aligned with the "[Jewish] Conservative Movement. [It] adopt[s] the guiding principles of [the] Movement for [the] school's curriculum and program. As such [it] provide[s] learning and experiences that encourage: development of a personal relationship with God; centrality of Mitzvah and Torah Study; valuing and cherishing Jewish plurality and diversity, both within [the] school and the larger world around us; and identity with Jews in Israel and the world." Ex. 54. And Lamb of God Lutheran School requires Bible memorization and chapel attendance: "Religion classes offer daily Christian lessons, weekly memorization of a scripture verse or selections from Luther's Small Catechism, and a weekly chapel service in the church's sanctuary. In addition, once per year, each class presents a chapel service based on scripture." Ex. 36.

Because they are exempt from state antidiscrimination laws, a number of religious schools eligible to receive public money under the voucher law exclude or strongly disfavor students and faculty of other faiths, require applicants and their parents to sign Statements of Faith, and charge more in tuition for students of other faiths. Exs. 18–19, 30, 34, 38–39, 41–45, 48–49, 52–53, 57–58. For example, Liberty Baptist Academy requires all faculty to "believe in the sovereignty of the local church

and in the doctrinal tenets which make [the] church Fundamental and Baptistic." Ex. 23 at 8. The school also requires students to "refrain from participating in worldly activities such as . . . homosexuality or other sexual perversions." Ex. 38 at 28. If the school believes that a student has violated these or other religious tenets, the student may be subjected to "administrative withdrawal," i.e., expulsion. Ex. 38 at 29. International Christian Academy will reject applicants and expel students because they ***or their parents*** are gay: The school reserves the right, "within its sole discretion, to refuse admission of an applicant or to discontinue enrollment of a student if the atmosphere or conduct within a particular home or the activities of the student are counter to or are in opposition to the Biblical lifestyle the school teaches. This includes, but is not necessarily limited to, participating in, supporting or condoning sexual immorality, homosexual activity, [or] bisexual activity." Ex. 34 at 13. Another example, Lone Mountain Academy, employs only "born-again Christians who believe God's Word to be the basis for their professional and personal lives"; and members of the associated church's congregation receive a $1,000 discount on tuition. Ex. 44. Faith Christian Academy requires at least one parent to be a Christian who adheres to Calvary Chapel's Statement of Faith, including a provision on human sexuality that states: "This Church recognizes marriage as exclusively the legal union of one man and one woman in which such union is a lifetime commitment." Ex. 30 at 5, 29.

That public funds will flow through the voucher program to sectarian schools is clear even on the record already before the Court. All five Intervenors have specifically informed the Court of their intention to send children to religious schools using voucher funds if the program is permitted to go forward. *See* Ex. 67 (Motion to Intervene Exs. A ¶ 14 (Lake Mead Christian Academy); B ¶ 23 (Mountain View Christian School); C ¶¶ 29–30 (JOY Academy); D ¶¶ 23, 27, 29 (JOY Academy); E ¶¶ 19, 32, 41, 51 (Excel Christian School)).

Moreover, in some parts of the state, religious schools are the only options for students who want to use vouchers at private schools; there are no secular private schools. For example, all the private schools in Churchill County, Elko County, and Carson City are religious and teach according to religiously based curricula. Ex. 13. In Nye County, there are just two private schools. One is religious; the other is a residential program for juvenile offenders that is not open for general enrollment. Ex. 13. Similarly, there are only three private schools in Douglas County. Two are religious; the third is limited

to at-risk youth. Ex. 13. For the parents and students in those regions who do not meet the religious schools' religious admissions criteria, there is no meaningful opportunity to attend a private school under the voucher program.

C. Current Status of the Voucher Program.

The state has already taken significant steps to implement the voucher program. *See* Ex. 7 ("Nevada's Education Savings Account Program"[6] (identifying steps taken by Office of the Treasurer to implement S.B. 302)). The Treasurer has accepted thousands of applications, appointed staff, drafted regulations, and created a schedule for enrollment in voucher-funded schools.[7] The Treasurer previously stated that disbursements of voucher funds would begin in April 2016, but recently announced that funds may be distributed as early as February 2016. *See* Ex. 8 (Nevada State Treasurer's Office, Press Release (October 20, 2015)).

ARGUMENT

"A preliminary injunction to preserve the status quo is normally available upon a showing that the party seeking it enjoys a reasonable probability of success on the merits and that the defendant's conduct, if allowed to continue, will result in irreparable harm for which compensatory damage is an inadequate remedy." *Dixon v. Thatcher*, 103 Nev. 414, 415 (1987) (applying preliminary-injunction standard in NRS § 33.010). Though not part of the formal test in this state, Nevada courts sometimes also consider the balance of equities and the public interest when considering whether to grant a preliminary injunction. *Cf. Univ. & Cmty. Coll. Sys. of Nev. v. Nevadans for Sound Gov't*, 120 Nev. 712, 721 (2004). Where, as here, the plaintiffs are likely to succeed on a constitutional claim, "[i]t is well established that the deprivation of constitutional rights unquestionably constitutes irreparable injury." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (citation and internal quotation marks omitted); *see City of Sparks v. Sparks Mun. Ct.*, 302 P.3d 1118, 1124 (Nev. 2013) ("a constitutional violation may . . . by itself, be sufficient to constitute irreparable harm."). The balance of equities and public interest

[6] *Available at* http://www.nevadatreasurer.gov/SchoolChoice/Home/.

[7] *See* Ex. 64 (Ian Whitaker, Money Could Flow to Education Savings Accounts in February, Las Vegas Sun (Oct. 20, 2015, 12:18 PM), *available at* http://lasvegassun.com/news/2015/oct/20/money-could-flow-to-education-savings-accounts-in/).

likewise favor granting a preliminary injunction when the plaintiffs have shown a reasonable probability of success on a constitutional claim. *See, e.g., Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1069 (9th Cir. 2014) ("the public interest and the balance of the equities favor preventing the violation of a party's constitutional rights." (citation, internal quotation and alteration marks omitted)).

I. There Is A Reasonable Probability That Plaintiffs Will Succeed On The Merits Of Their Claims.

Because a preliminary injunction merely preserves the status quo until the courts can resolve the merits of the dispute, Plaintiffs need show only a "reasonable probability" or "reasonable likelihood" of success on the merits. *Dixon v. Thatcher*, 103 Nev. 414, 416 (1987). "'Reasonable probability' is . . . something less than 'preponderance of the evidence.'" *Nat'l Union Fire Ins. Co. v. Kozeny*, 19 F. App'x 815, 822 (10th Cir. 2001) (citation omitted); *Ctr. of Hope Christian Fellowship, Local, Church of God in Christ v. Wells Fargo Bank Nevada, N.A.*, 781 F. Supp. 2d 1075, 1078 (D. Nev. 2011) ("'Reasonable probability' appears to be the most lenient position on the sliding scale that can satisfy the requirement of 'likely.'"). Plaintiffs must present a prima facie case but need not show that they will win at trial. *See, e.g., Dixon*, 103 Nev. at 416; 11A Charles Alan Wright et al., *Federal Practice & Procedure* § 2948.3 (3d ed. Apr. 2015). Movants who make this rather limited showing are entitled to a preliminary injunction. *See Pickett v. Comanche Constr., Inc.*, 108 Nev. 422, 430 (1992) (reversing dissolution of preliminary injunction where moving party demonstrated reasonable likelihood of success and irreparable harm); *see also Dixon*, 103 Nev. at 416 (reversing denial of preliminary injunction where moving party established *prima facie* case of essential elements of claim).

Plaintiffs have more than a reasonable probability of success on their constitutional claims; they are highly likely to succeed. The No-Aid Clause of Article XI, Section 10, is clear and has been authoritatively interpreted by the Nevada Supreme Court and the Nevada Attorney General to bar both direct and indirect public funding for religious institutions or religious instruction. Article XI, Section 2, is equally clear that state-funded education must be "uniform" and secular, and that it must be provided through public schools that are open for "general attendance." S.B. 302 straightforwardly violates both provisions. It runs afoul of the No-Aid Clause by diverting public funds to sectarian schools that will use the funds for religious purposes. It violates the uniformity, general-attendance, and secularity

requirements of Section 2 by, among other things, creating a dual-track system of education, in which curricula and standards in the voucher schools diverge dramatically from what is required in the public schools, and educational programs are discriminatorily withheld from children based solely on their (or their parents') religion or other protected characteristics (such as sexual orientation or disability).

A. Under the Voucher Program, Public Funds Will Be Used for Sectarian Purposes in Violation of Article XI, Section 10.

Article XI, Section 10, is clear, direct, and unambiguous: "No public funds ***of any kind or character whatever***, State, County or Municipal, shall be used for sectarian purpose." (emphasis added). According to Nevada law, because the No-Aid Clause is unambiguous, it is interpreted according to its plain language. And because S.B. 302 uses public funds for sectarian purpose, it violates that strict prohibition.

1. Section 10 straightforwardly bars the use of state funds for sectarian purposes.

When a constitutional provision "is clear and unambiguous," courts "will not look beyond the language of the provision but will instead apply its plain meaning." *Lorton v. Jones*, 322 P.3d 1051, 1054 (Nev. 2014); s*ee also In re Contested Election of Mallory*, 282 P.3d 739, 741 (Nev. 2012) (Nevada courts must "first look to the language itself and . . . give effect to its plain meaning."). "Sectarian" simply means "religious." *See Black's Law Dictionary* 1557 (10th ed. 2014) (defining "sectarian" as "[o]f, relating to, or involving a particular religious sect; esp., supporting a particular religious group and its beliefs"); *Webster's Third New International Dictionary* 2052 (1981) (defining "sectarian" to mean "denominational," i.e., "confined to the limits of one religious group"). Hence, the No-Aid Clause on its face absolutely bars the use of public funds "of any kind or character" for religious purposes—i.e., purposes that advance or support religious or denominational interests.

Lest there be any doubt about the plain meaning of the No-Aid Clause, binding precedent from the Nevada Supreme Court authoritatively interprets the Clause to mean exactly what Plaintiffs say that it does: Funds from the state treasury must not end up in the coffers of a religious institution and must not be used to pay for religious activities or services such as religious instruction. *State v. Hallock*, 16 Nev. 373, 385-86 (1882).

In *Hallock*, the legislature had allocated state funds to support the religiously affiliated Nevada Orphan Asylum, but the State Controller refused to disburse the funds on the ground that doing so would violate the No-Aid Clause. The Court agreed with the Controller, explaining:

> That the legislature, under the constitution, could not have appropriated moneys for sectarian purposes, is too plain for argument; and it is equally plain that state funds should not, and can not, be used for such purposes in any case.

16 Nev. at 377. In arriving at that conclusion in 1882, just two years after the No-Aid Clause was ratified, the Nevada Supreme Court interpreted "sectarian" "in the popular sense," concluding that it refers to any "sect," which is any religious group "holding sentiments or doctrines different from those of other sects or people." *Id.* at 385. In other words, the word meant "religious" or "denominational"—just as it does today. *See, e.g.*, *id.* ("In the sense intended in the constitution, every [group that has an identifiable set of religious doctrines] is sectarian."). It follows that all religious groups were—and are—within the purview of Section 10. And hence, in *Hallock* "[i]t d[id] not matter that Catholic parents desire[d] their children taught the Catholic doctrines, or that Protestants desire[d] theirs to be instructed in Protestantism. The constitution prohibits the use of any of the public funds for such purposes, whether parents wish it or not." 16 Nev. at 386.

The legislative history of the No-Aid Clause confirms this conclusion: As the Nevada Supreme Court explained, "[p]eople of nearly all nationalities and many religious beliefs . . . met on common ground, and in the most solemn manner agreed that no sect should be supported or built up by the use of public funds." *Id.* at 387. What is more, the Court read Section 10 *in pari materia* with similar language in the earlier-adopted Section 9 of the Nevada Constitution. *Id.* at 379. *See generally Harris Assocs. v. Clark Cnty. Sch. Dist.*, 119 Nev. 638, 642 (2003) (holding that laws must be interpreted "to give meaning to all of their parts and language, and . . . read[ing] each sentence, phrase, and word to render it meaningful within the context of the purpose of the legislation" (citation and internal quotation marks omitted)). Section 9 provides that "[n]o sectarian instruction shall be imparted or tolerated in any school or University that may be established under this Constitution." Nev. Const. art. XI, § 9. The *Hallock* Court thus held:

> Plainly, the object of [Sections 9 and 10 together] was to keep all sectarian instruction from the schools. For some reason the people were not satisfied with the constitution as it was [with Section 9 alone]. They demanded something more, and they embodied in the

> fundamental law a prohibition against the use of the funds of the state or of any county or municipality for sectarian purposes. Two legislatures by their acts declared the amendment a wise and needful measure, and the people at the ballot box adopted as their own the judgment of their legislators. Our constitution can be amended only after a long time and much labor. When an amendment is made it is reasonable to conclude that, in the minds of the people, there is good reason for the change; that it is wise to avoid a possible recurrence of evils borne in the past, or the happening of those which threaten them in the future, or, it may be, both. Constitutions, as well as statutes, are to be construed in the light of previous history and surrounding circumstances.

Hallock, 16 Nev. at 379. In this way, the Court thus "'*g[a]ve effect to the intent of the people in adopting*'" Section 10. *Id.* at 380 (citation omitted).

Under *Hallock*, a legislative enactment violates the Nevada Constitution if it allows for public money to flow to an institution that teaches religious doctrine, *id.* at 386, or holds prayer services, *id.* at 384—even if there are nonreligious uses to which the institution might put the state funds, *id.* at 387. Nor does it matter whether the funds serve a salutary purpose. *See id.* at 378–79 ("[T]his court should not, and will not, consider whether the statute is wise or unwise, or whether it will or will not diminish public revenues, but that it will preserve the constitution."). The legislature and the people of this state declared that "public funds should not be used, directly or indirectly, for the building up of any sect," and hence, the Nevada Constitution prohibits any allocation of public funds that directly or indirectly support religious activities of religious educational institutions. *See id.* at 387–88.

If all of that were not enough, the Nevada Attorney General has reached the same conclusion—on at least four occasions. In 1956, the Attorney General recognized that parents have the absolute right to choose religious, rather than public, schooling for their children, but that those who make this choice are precluded from gaining access to public funds to cover tuition or transportation costs. Ex. 9 (56-209 Op. Nev. Att'y Gen. (Sept. 12, 1956)). In 1965, the Attorney General reiterated this strict prohibition against using public funds for sectarian purposes, concluding that the Nevada Department of Education's use of federal funds to provide special-education services to students in private schools would violate the No-Aid Clause. Ex. 10 (65-276 Op. Nev. Att'y Gen. (Nov. 6, 1965)) (concluding that "the enrollment of a private or parochial school student in public schools, because classes are available in the public schools which are not offered in the private or parochial schools, would violate Section 10 of Article XI of the Nevada Constitution"). Later that same year, the Attorney General resolutely declared: "The constitutional and statutory provisions against the use of public funds for educational

purposes in private and parochial schools are as deep seated and deep rooted as our form of government." Ex. 11 (65-278 Op. Nev. Att'y Gen. (Nov. 15, 1965)). And in 1977, the Attorney General further explained that the "Nevada state constitutional delegates were very concerned about the relationship between religious or sectarian instruction and the educational process of the public schools." Ex. 12 (77-211 Op. Nev. Att'y Gen. (Feb. 14, 1977)).

Until now, Nevada law has not been in tension with these principles. NRS § 387.045 provides that "[n]o portion of the public school funds shall in any way be segregated, divided or set apart for the use or benefit of any sectarian or secular society or association." To be sure, the Nevada legislature had the authority to exempt the voucher program from that statute. *See* S.B. 302 § 15.9. But it has no authority to exempt the program from the mandates of the Nevada Constitution. *See Thomas v. Nev. Yellow Cab Corp.*, 327 P.3d 518, 520–21 (2014) ("It is fundamental to our . . . constitutional system of government that a state legislature has not the power to enact any law conflicting with . . . the constitution of its particular State." (citation and internal quotation marks omitted)); *see also id.* ("The Nevada Constitution is the supreme law of the state, which controls over any conflicting statutory provisions." (citation and internal quotation and alteration marks omitted)); *Hallock*, 16 Nev. at 377 (legislature's statutory allocation of funds to religious institutions was unlawful and unenforceable because "[n]o officer is justified in obeying the letter of a law if in so doing he violates the spirit and letter of the constitution").

2. The voucher-program funds are public funds.

Disbursements under the voucher program would come directly from the Distributive School Account of the State General Fund. S.B. 302 § 16. In other words, the voucher program directs the Treasurer to expend taxpayer dollars—public funds—that are slated for a particular purpose—the education of all Nevada children.

Briefly holding those public funds in a limited-purpose, state-sponsored voucher account does not alter the public nature of the funds. The legislature takes tax dollars from the public schools and allows them to be diverted to private religious schools for religious purposes. Under *Hallock*, the fact that the funds flow through straw accounts "managed" by parents on the journey to private religious institutions does not transform the public funds into private ones. Participants in the voucher program

are not free to use the funds however they see fit. Rather, the money may be spent for only a narrow set of statutorily authorized purposes. S.B. 302 § 9.1. Voucher accounts are frozen during breaks in the school year. S.B. 302 § 7.1(d). The accounts are managed by firms chosen by the state, not by the parents; the accounts are randomly audited by the state each year; and the Treasurer is empowered to freeze or dissolve any account if the money is "misused." S.B. 302 §§ 10.1–3. The Treasurer's proposed implementing regulation for S.B. 302 creates a "Committee to Review Payments," which will, when requested by the Treasurer, determine whether an expenditure from a voucher account is authorized. Ex. 5 (Revised Proposed Regulation of the State Treasurer, LCB File No. R061-15 § 11).

Under S.B. 302, the state relinquishes ownership and control of the voucher funds only when they are firmly in the hands of private institutions, which are then free to use the funds as they see fit—for educational, religious, or any other purposes.[8] If a child moves out of state or decides to no longer attend a voucher school, any money left in the voucher account reverts to the state's General Fund. S.B. 302 §§ 7.5, 8.6(b). And participating schools are prohibited from refunding any money to parents (because it is not and never was the parents' money); should such a refund occur, parents are required to deposit that money back into the state-controlled voucher account. S.B. 302 §§ 9.2–3. The fact that the state retains a reversionary interest in the funds thus underscores their public nature: A pass-through bank account for funds that the state continues to own and control is a fiction that does not alter the public character of the funds.

3. The voucher program would funnel state funds to sectarian uses.

If the voucher program is not enjoined, public funds from the state Distributive School Account will be used for sectarian purposes in violation of the No-Aid Clause.

Once students enroll at the many religious schools eligible to participate in the program, there is no doubt that schools will use voucher funds to indoctrinate students using thoroughly religious

[8] And if it is reasonably expected that a participating entity will receive more than $50,000 from the voucher program during any school year, the participating entity must post a surety bond in an amount equal to what it expects to be paid from the state, or prove it has "unencumbered assets sufficient to pay the State Treasurer." S.B. 302 §11(3).

curricula and required worship. *See generally* Exs. 13–64; *see* § B.1, *infra*. A number of the schools in which Intervenors intend to enroll likewise incorporate religious belief into their mission and value statements. *See, e.g.*, Ex. 63 (JOY Academy Articles of Learning);[9] Ex. 64 (Mountain View Christian School Mission & Core Values).[10] And should religious schools wish to divert voucher funds to wholly non-educational religious purposes, which are often central to the schools' identity and operations, there are no restrictions preventing them from doing so. *See generally* S.B. 302; Ex. 5. And in all events, *Hallock* holds that Section 10 strictly prohibits state funding of religious institutions no matter what the money is ultimately used for. Finally, as discussed further below, many religious schools will continue to discriminate in admissions and employment based on their particular religious beliefs, supported by state educational funds.

* * *

The Nevada Constitution's safeguards against the use of public funds to support religion are clear, well settled, and strict. Because S.B. 302 will inevitably use public funds to support religious activities, discrimination, and indoctrination by private religious schools, the program cannot be reconciled with the No-Aid Clause. Plaintiffs therefore have a reasonable probability—indeed, far more than that—of success on the merits of their claim under Article XI, Section 10.

B. The Voucher Program Violates the Uniformity, General-Attendance, and Secularity Requirements of Article XI, Section 2.

Article XI, Section 2, unambiguously requires the legislature to provide for the education of the children of this state by creating a "uniform system of common schools" that are open for "general attendance" by the students in each school district and do not offer "instruction of a sectarian character." Nev. Const. art. XI, § 2. Here, too, the language of the Constitution is plain: The state must use the

[9] "We believe in God the Eternal Father and in His Son Jesus Christ. We believe we should emulate Them in every way we can; if the glory of God is intelligence, then we too will seek to be intelligent in our choices and actions . . . . We believe in the admonition of Paul, that if there is anything virtuous, lovely, or of good report, we will seek after these things. (Philippians 4:8)"

[10] "The mission of Mountain View Christian Schools is to graduate Christian leaders who by their commitment to academic excellence and spiritual vitality will transform the world for Jesus Christ."

public funds set aside for instruction of the children of this state to provide secular, public education in public schools that are open to all on equal terms. Reading Section 2 in light of the rest of Article XI only underscores that conclusion.[11] *See Harris Assocs. v. Clark Cty. School Dist.*, 119 Nev. 638, 642 (2003) (construing laws "to give meaning to all of their parts and language, and . . . read[ing] each sentence, phrase, and word to render it meaningful within the context of the purpose of the legislation." (citation and internal quotation marks omitted)).

The voucher program violates Section 2 in at least three ways. First, the program violates the uniformity requirement by providing state funding to educate children in private schools, where the curricula, instruction, educational standards, teacher-training requirements, and a whole host of other factors diverge dramatically from what are required in the public schools. Second, the program violates the general-attendance requirement by providing public funding to schools that discriminate in admissions and employment, rather than ensuring that public money goes solely to public instruction that is available equally to all students regardless of religion or other protected status. Third, the program violates the uniformity, general-attendance, and secularity requirements by diverting, and thereby depriving the public schools of, the public-education dollars that are constitutionally committed to the state's provision of an open, secular, nondiscriminatory system of public schools—a system that the state is constitutionally required to provide. Through its enactment of the voucher program, in other words, the legislature has established a dual-track school system in which publicly funded educational programs and opportunities are neither secular, nor public, nor open equally to all students, but instead are private, often religious, and often restricted based solely on students' religious beliefs or other religiously based tests.[12]

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[11] Section 3 prohibits transfers of educational funds to other purposes. Section 9 prohibits sectarian instruction in the common schools. And Section 10, once again, prohibits diversions of school funds for sectarian purposes. Taken all together, these provisions establish a uniform system of public and publicly funded schools that are free from religious instruction, while ensuring that state resources for education will never be diverted to other purposes—especially not religious purposes.

[12] As such, the program also implicates the Nevada Constitution's broader guarantee of religious nondiscrimination (Nev. Const. art. I, § 4) by putting the state in the business of funding religious discrimination in state-funded educational programs.

1. The voucher program violates Section 2 by funding non-uniform instruction.

First, the voucher law makes no provision to ensure that publicly funded private-school alternatives to the public school system meet the requirement of uniformity in the system or program of instruction. On the contrary, it explicitly states that "nothing in the provisions of [this Act] shall be deemed to limit the independence or autonomy of a participating entity." S.B. 302 § 14. And there is no question that private schools that are eligible to receive public funds through the voucher program diverge dramatically from the public schools in terms of curricula, instruction, educational standards, and the like. *See* Ex. 13–64.[13]

Most obviously, religious schools that participate in the program can and do provide religious instruction that the public schools do not—and, as a matter of federal and state constitutional law, could not. At Liberty Baptist, for example, "the Bible . . . is integrated into the total educational program," and the school promises parents that their children "will not be exposed to humanistic secular philosophies." Exs. 37 and 38 at 5. At Saint Viator Parish School, "[t]eachers conduct all classes in light of the 'Gospel Message' and Catholic doctrine," and the "school environment tries to reflect 'Jesus' in all of its activities." Ex. 59 at 12. Some schools, such as Lamb of God Lutheran School and Cornerstone Christian Academy, incorporate Bible memorization into their students' courses of study. Exs. 36 and 24; *cf. Engel v. Vitale*, 370 U.S. 421, 430, 82 S. Ct. 1261, 1266 (1962) ("Under [the First] Amendment's prohibition against governmental establishment of religion, as reinforced by the provisions of the Fourteenth Amendment, government in this country, be it state or federal, is without power to prescribe by law any particular form of prayer which is to be used as an official prayer in carrying on any program of governmentally sponsored religious activity.").

And many of the private religious schools employ explicitly religious textbooks and teaching materials. Some, such as Calvary Christian Learning Academy, Liberty Baptist Academy, and DJ's Community Christian Academy, rely heavily on the A Beka curriculum. Exs. 22, 25, 37. A Beka boasts a "comprehensive, quality curriculum and materials written from a Christian perspective." Ex. 61. For

[13] Although exempt religious schools must comply with some state curricular requirements, they need not do so if it interferes with "religious instruction," allowing their curricula to diverge from state standards in a variety of subjects. *See* NRS 394.130(5).

example, A Beka textbooks "present[] the universe as the direct creation of God and refute[] the man-made idea of evolution." Ex. 61. Other religious schools, such as American Heritage Academy and Calvary Chapel Christian School, use textbooks from publisher Apologia in their science classes. Exs. 14, 20. Apologia publishes "creation-based science textbooks." Ex. 15. Similarly, Liberty Baptist Academy advertises that its "science and health program teaches the students about creation and the Creator—refuting man-made ideas of evolution." Ex. 27. The Church Academy uses the Accelerated Christian Education curriculum, which teaches a "Biblically Based Program Infused with Godly Character," and rejects basic biological theories such as evolution, opting instead to teach creationism as a scientific fact. Exs. 23, 65. These curricula do not comport with the state educational standards that govern Nevada's public schools, *see* NRS §§ 389.004 *et seq.*, much less with constitutional requirements for instruction in public schools.[14]

Moreover, although the voucher program requires that voucher students take state standardized tests and that the voucher schools report the results, there are no consequences for schools whose students as a group perform poorly on those tests. S.B. 302 § 12. Thus, there is no requirement for schools to provide instruction that is comparable in quality to that in the public schools—or even to teach the subjects that are specified by the Nevada Council to Establish Academic Standards for Public Schools (the body charged under state law with ensuring compliance with state standards through the administration of standardized tests and the regular review of public- and charter-school courses of study). NRS § 389.540. The gulf between the uniform public schools and the widely diverging private

[14] *Cf. Edwards v. Aguillard*, 482 U.S. 578, 593, 107 S. Ct. 2573, 2582 (1987) (striking down statute requiring teaching of "creation science" when evolution is taught, because federal Establishment Clause does not allow state to "restructure the science curriculum to conform with a particular religious viewpoint"); *Epperson v. Arkansas*, 393 U.S. 97, 103, 106, 108 n.16, 89 S. Ct. 266, 270-71, 272 n.16 (1968) (striking down Arkansas law that "selects from the body of knowledge a particular segment which it proscribes for the sole reason that it is deemed to conflict with a particular religious doctrine; that is, with a particular interpretation of the Book of Genesis by a particular religious group," because "the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma."); *Daniel v. Waters*, 515 F.2d 485, 487 (6th Cir. 1975) (holding that public schools are forbidden to "establish[] the Biblical version of the creation of man"); *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 766 (M.D. Pa. 2005) (holding that Establishment Clause forbids public schools to "denigrate or disparage the scientific theory of evolution, and [prohibits them] from requiring teachers to refer to a religious, alternative theory").

schools is particularly clear, of course, when a school refuses for religious reasons to cover topics, such as evolution, that are mandated by state educational standards. But even with respect to other areas of the curriculum, there is nothing in S.B. 302 to require private religious schools to teach anything required by the state standards; and because these schools are exempted by NRS § 394.211 from many regulatory requirements, the schools can simply do whatever they want—on the taxpayers' dime.

Likewise, teachers at religious schools that receive voucher-program funds are not subject to the same requirements as public-school teachers. Teachers in Nevada's public schools generally must hold a bachelor's degree, be licensed by the state, and pass a criminal-background check; requirements from which teachers at religious schools are exempt. NAC 391.0583. Many private religious schools instead hold their teachers to religious tests and other faith-based requirements. For example, Liberty Baptist's student handbook touts that "[a]ll faculty members believe in the sovereignty of the local church and in the doctrinal tenets which make our church Fundamental and Baptistic." Ex. 38. Logos Christian Academy similarly specifies that "adherence to the teachings of Jesus Christ is a necessary requirement for employment." Ex. 43. With such requirements, rather than state standards, governing their hiring, religious schools may thus select teachers based solely on their church attendance or adherence to church doctrine and not on whether, for example, they have a college degree (or even a high-school diploma) or any formal training on how to educate children or any knowledge of the subjects that they are being paid with state funds to teach.

In *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006), the Florida Supreme Court evaluated a school-voucher statute that created a voucher program far less extensive than S.B. 302 and concluded that it violated the Florida Constitution's counterpart to the Uniformity Clause Article XI, Section 2, of the Nevada Constitution. The Florida Constitution's Uniformity Clause specifies that "provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools . . . ." Fla. Const. art. IX, § 1(a). The Florida legislature nonetheless passed a voucher law that diverted state educational funds to public schools, though the program was limited—unlike Nevada's—to students in what were determined to be "failing" public schools. As in Nevada, a significant number of Florida's private schools were exempt from state-certification, curriculum, and teacher-training requirements, *see Holmes*, 919 So. 2d at 409, yet the Florida voucher law permitted those schools to receive voucher

funds. The Florida Supreme Court struck down this scheme because it violated the Florida Constitution's Uniformity Clause "by devoting the state's resources to the education of children within our state through means other than a system of free public schools." *Id.* at 407. What was true in Florida is equally true for the far more expansive voucher program at issue here: The state cannot meet its constitutional obligation to provide public education through uniform public schools by instead using public-education dollars to pay to send students to non-uniform private schools.

2. The voucher program violates Section 2 by funding religious schools that discriminate in admissions and employment.

As described above (at 9–10), private religious schools that are approved to receive state funding under S.B. 302 also discriminate in admissions and employment on the basis of religion. Many eligible schools refuse to admit students who do not subscribe to a particular faith or agree to adhere to a particular set of religious doctrines. At Faith Christian Academy, for example, "[s]tudents who desire a distinctly Christian education and environment, who have become Christians themselves, . . . and who are willing to live as Christian role models . . . will be considered for enrollment. Enrollment privileges will be withdrawn if, during the course of a year the student's desires and commitments change on any of these three points." Ex. 30. Some schools eligible to receive state funding also exclude students who ***do*** comply with religious requirements, because they have family members who do not. Once again, Faith Christian Academy provides an example: "At least one parent of students enrolling from outside the school must be a Christian who is in agreement with the Calvary Chapel 'Statement of Faith' . . . ." Ex. 30. At Liberty Baptist, students' parents must attend religious services, tithe to the church, and be "fully committed to the doctrinal position and ministry direction." Ex. 37. Some schools instead accept students on a preferential basis or charging different tuition to students based on their faith. For example, Bishop Gorman gives the lowest admissions priority to "Non-Catholic and non-active Catholic families with no previous connection to Bishop Gorman." Ex. 18. St. Viator's Admissions Tuition Schedule sets a higher admissions priority for parishioners and Catholics than for non-Catholics, and the school then charges lower tuition rates to parishioners. Exs. 57–58. Sierra Lutheran similarly provides discounted tuition for church members. Ex. 53.

Finally, some of the religious schools will expel (or discipline) students for not adhering to religious requirements. For example, Liberty Christian Academy prohibits "Blasphemy," "Immorality in any form," and "Sodomy," any of which will result in "automatic detention, in-house suspension, or expulsion." Ex. 39. Bishop Gorman considers "[a]ny sexual behavior that contradicts the teachings of the Catholic Church" a "serious infraction." Ex. 19. And International Christian Academy "reserves the right, within its sole discretion, to refuse admission of an applicant or to discontinue enrollment of a student if the [student] . . . participat[es] in, support[s] or condon[es] sexual immorality, homosexual activity, bisexual activity, [or] alternative life styles . . . ." Ex. 34.

There can be no doubt here that, absent a preliminary injunction, voucher money will be used to fund such discrimination in admissions as well as the parallel discrimination in employment described in the previous section, as it will undeniably go to schools that engage in these practices. Notably, Intervenors intend to use voucher funds to send students to schools that expressly discriminate. *See* Ex. 27("An Excel student must . . . be a Christian, or else be committed to learning about a relationship with Christ."); Ex. 35. (Lake Mead Christian Academy requires a Spiritual Letter of Recommendation for all applicants, and all new students are on probation until they demonstrate acceptable spiritual progress); Ex. 28 (Excel Christian School's application for new teachers asks: "Describe how, when, and why you became a Christian . . . ."); Ex. 45 (Mountain View Christian School requires that all teachers be "born-again").

In short, S.B. 302 does not require participating private religious schools to adhere to the constitutionally mandated general-attendance requirements for public schools, nor does it reserve public funding for schools that agree not to discriminate. Hence, some students will not be eligible to go to a particular voucher school—and if they live in a county with limited options, many well not be able to attend ***any*** voucher school—because they do not meet the faith-based criteria set by the available participating schools.

3. The voucher program violates Section 2 by impoverishing, and thereby undermining, the public schools in order to send public-education dollars to private schools instead.

Perhaps most fundamentally, the voucher program here violates Section 2 by undermining the system of public schools and public instruction that the state is constitutionally required to provide. It does so by diverting funds from (and therefore impoverishing) the public schools in order to use the money to bolster competing private schools. *See Holmes*, 919 So. 2d at 408–409 (declaring voucher program unconstitutional "because voucher payments reduce funding for the public education system, the [program] by its very nature undermines the system of 'high quality' free public schools"). Because there is no limit on the number of students that may use the voucher program, the program threatens the very existence of a system of public schools by allowing each child to have the state redirect a share of the state's collective educational funds away from collective use to support a private school, leaving dramatically fewer resources for the public schools to use in providing a common and generally available education to all Nevada schoolchildren. Indeed, private schools are free to raise tuition in an amount equal to the voucher payment, and the schools may then use the state funding however they please and without regard to students' educational needs. Thus there is no guarantee that voucher students will be benefited at all by diverting public-school funds to private schools, and the loss of funding meanwhile threatens to bankrupt the public schools.

II. If Not Enjoined, The Voucher Program Will Cause Plaintiffs To Suffer Irreparable Harm.

Because constitutional violations "may be difficult or impossible to remedy through money damages," they are the quintessential irreparable harm. *See City of Sparks*, 302 P.3d at 1124 (citing *Monterey Mech. Co. v. Wilson*, 125 F. 3d 702, 715 (9th Cir. 1997)). That is particularly true for violations of religious liberty, for which even the gravest harms to freedom of conscience cannot readily and fully (if at all) be reduced to dollar figures. Hence, when the plaintiffs show a reasonable probability of a violation of a constitutional right with respect to religion, irreparable harm is routinely found. *See, e.g., Cmty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1059–60 (9th Cir. 2006) (raising "serious questions" under Establishment Clause shows irreparable injury); *Doe v. Duncanville Indep. Sch. Dist.*, 994 F.2d 160, 166 (5th Cir. 1993) ("Assuming that the Does' Establishment Clause rights have been infringed, the threat of irreparable injury to the Does and to the public interest that the clause purports to

serve are adequately demonstrated."). Given the strong showing of probability of success on the merits, the irreparable-harm inquiry should end here.

Even outside the context of state encroachments on religious freedom, however, constitutional injuries far less severe than those that Plaintiffs will suffer here are sufficient to constitute irreparable injuries warranting a preliminary injunction. In *City of Sparks*, for example, the Nevada Supreme Court affirmed the portion of a preliminary injunction that prevented a city from unconstitutionally interfering with a municipal court's decisions about how much to pay court employees. *City of Sparks*, 302 P.3d at 1122–23, 1130–31. The District Court granted, and the Supreme Court affirmed, a preliminary injunction to prevent the encroachment on the separation of powers mandated by the Nevada Constitution. *Id*. at 1130–31. The courts found irreparable harm even though it would have been possible as a matter of simple accounting to trace salary reductions imposed by the city and to award damages to court employees accordingly. Because the injury was a constitutional one (infringing on the Nevada Constitution's separation of powers), the Supreme Court held that no monetary award after trial could fully remedy it, thus warranting a preliminary injunction.

What was true in *Sparks* is even more true here. Plaintiffs' injury is the unconstitutional expenditure of their tax dollars to support religious schools and religious instruction rather than uniform, secular public education that is open to all. The state Treasurer is already accepting applications for the voucher program, has received several thousand applications as of the date of this filing, and, in response to Plaintiffs' lawsuit, announced last month that he plans to hasten the distribution of educational funds under the voucher program, and may disburse them as early as February 2016. *See* Exs. 7–8. All the Intervenors have declared to this Court that they intend to use voucher funds at religious schools once the money starts flowing. With the payment of the public funds into voucher accounts, the likely immediate disbursement of those funds to private schools, and the use of the money by the schools, there will be no way to restore improperly spent public funds to the state treasury. Unlike in *City of Sparks*, where the money would remain in the municipal court's accounts for disbursement to injured employees following judgment, here the money will simply be gone. And Plaintiffs' constitutional rights not to have their tax dollars misspent will be irreparably harmed.

What is more, for Plaintiff Berger—a special-education teacher in a Nevada public school and the parent of a student in a public school—the diversion of state educational dollars from the public schools to private schools will mean that the public schools will have at their disposal fewer resources—likely dramatically so. With less money to operate, school districts may be forced to cut educational programs, and class sizes will surely increase as staffing decreases. The end result will be that students like Mr. Berger's child will receive fewer educational opportunities, in school environments that are less suited to the provision of high-quality education, as Mr. Berger and the state's other public-school teachers have less and less to work with (assuming that they manage to keep their jobs at all, as public-school budgets plummet).

The harm of a materially poorer education can affect a child for a lifetime; it is not something that damages can effectively and completely remedy. And the intrusion on citizens' freedom of conscience that comes with state support for religious institutions, practices, and instruction with which they do not agree are not injuries that damages can remedy at all. A preliminary injunction is essential here.

III. The Public Interest And Balance Of The Equities Also Weigh In Plaintiffs' Favor.

Preventing a constitutional violation is always in the public interest, just as it is in the interest of the particular plaintiffs who challenge the violation. *See, e.g.*, *Ariz. Dream Act Coal.*, 757 F.3d at 1069 *Sammartano v. First Judicial Dist. Ct.*, 303 F.3d 959, 974 (9th Cir. 2002) ("it is always in the public interest to prevent the violation of a party's constitutional rights") (citation and internal quotation marks omitted), *abrogated in part on other grounds by Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 129 S. Ct. 365 (2008); *Univ. & Cmty. Coll. Sys. of Nev. v. Nevadans for Sound Gov't*, 120 Nev. 712, 736 (2004) (affirming preliminary injunction against provisions that unduly restricted petition circulators' access to forum); *Legal Aid Soc'y of Hawaii v. Legal Servs. Corp.*, 961 F. Supp. 1402, 1419 (D. Haw. 1997) ("perhaps no greater public interest exists than protecting a citizen's rights under the constitution."). That is especially true here, both because Plaintiffs and all other taxpayers will suffer the irreparable injuries described above if the preliminary injunction does not issue, and because Plaintiffs and all the people of Nevada depend on the continuing vitality of the state's constitutionally mandated public-school system—a system that the disbursement of voucher-program money threatens. The public

interest will be served by resolving the constitutionality of S.B. 302 before the public schools are defunded in order to divert the tax dollars to private schools.

The balance of equities likewise favors an injunction. The voucher program has not been implemented, so the injunction would simply preserve the status quo. *See Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1422 (9th Cir. 1984) ("A preliminary injunction, of course, is not a preliminary adjudication on the merits but rather a device for preserving the status quo and preventing the irreparable loss of rights before judgment."). Absent a preliminary injunction, voucher-program funds will be disbursed and Plaintiffs' constitutional interests will be irreparably harmed. *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 765 (9th Cir. 2014) ("[W]e conclude that the balance of equities tips toward . . . plaintiffs, because the harms they face are permanent, while the intervenors face temporary delay."); *see also Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1320 (9th Cir. 1994) (explaining that injunction issued to maintain status quo faces lower burden than one granting affirmative relief).

By contrast, Defendants and Intervenors will suffer no substantial harm if the voucher program is preliminarily enjoined. The effect of the injunction will be to leave both the State Defendants and Intervenors in precisely the position that they are in right now. If Plaintiffs are ultimately successful on the merits, then the fact that nothing changed while the suit was pending means that there would be nothing to undo after final judgment (were that even possible). If Plaintiffs are unsuccessful, the worst that would have happened is a relatively brief delay before the voucher program went into effect. In all events, "[a] state . . . surely suffers no legitimate harm when an unconstitutional statute is blocked." *Coal. for Econ. Equity v. Wilson*, No. C-96-4024 TEH, 1997 WL 70641, at *4 (N.D. Cal. Feb. 7, 1997); *see Nev. Yellow Cab Corp.*, 327 P.3d at 520–21 (recognizing that the legislature has no power to enact statute that conflicts with Nevada Constitution).

CONCLUSION

For the foregoing reasons, the Court should grant a preliminary injunction to preserve the status quo pending a resolution of Plaintiffs' claims on the merits.

Respectfully submitted this 24th day of November, 2015.

/s/ *Amy M. Rose*

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**Pro Hac Vice Applications Pending*
***Pro Hac Vice Applications Forthcoming*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 24th day of November, 2015, I served a true and correct copy of the foregoing Plaintiffs' Motion for a Preliminary Injunction and Supporting Memorandum upon the appropriate parties hereto, through the court's WIZNET electronic service and by enclosing it in a sealed envelope, postage fully prepaid thereon, deposited in the United States mail, addressed to:

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