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IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE CARSON CITY

NATIONAL TAXPAYERS UNION, a non-profit organization, and ROBIN TITUS, MD, Plaintiffs, vs. THE STATE OF NEVADA, ex rel., JOSEPH LOMBARDO, in his official capacity as Governor of the State of Nevada; ZACH CONINE, in his official capacity as Nevada State Treasurer; RICHARD WHITLEY, in his official capacity as Director of the Nevada Department of Human Services; STACIE WEEKS, in her official capacity as Director of the Nevada Health Authority; NED GAINES, in his official capacity as the Acting Nevada Commissioner of Insurance; and JANEL DAVIS, in her official capacity as Acting Executive Director of the Silver State Health Insurance Exchange, Defendants.	Case No. 25 OC 00109 1B Dept. No. 1

DEFENDANTS' MOTION TO DISMISS

Defendants Joseph Lombardo, in his official capacity as Governor of the State of Nevada; Zach Conine, in his official capacity as Treasurer of the State of Nevada; Richard Whitley, in his official capacity as Nevada Department of Human Services; Stacie Weeks, in her official capacity as Director of the Nevada Health Authority; Ned Gaines, in his

official capacity as Acting Commissioner of the Division of Insurance; and Janel Davis, in her official capacity as Acting Executive Director of Silver State Health Insurance Exchange ("Exchange"), by and through counsel, submit this motion to dismiss.[1]

* * *

[1] Defendants recognize that Dr. Titus carries the honorable title of Nevada State Senator, but for purposes of clarity and consistency Defendants refer to her as Dr. Titus throughout this opposition consistent with Plaintiffs' caption identifying her as Robin L. Titus, MD, without reference to her position in the State Senate.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

Plaintiffs return with a new suit challenging SB 420, also known as the "Public Option." *See* 2021 Nev. Stat., ch. 537, §§ 2-15, at 3616-22 (codified as the "Public Option" in NRS Chapter 695K). But their case fares no better this time around. Plaintiffs still lack standing. They fail to state viable claims for relief. And they incorrectly named Director Whitley as a defendant. This Court should grant this motion to dismiss.

II. Factual Background

In 2021, the Legislature adopted SB 420—a provision designed to create a publicly supported option for health insurance plans intended to achieve premium reductions that make health insurance more affordable and accessible. FAC at ¶¶1, 24-44. The Public Option plans must meet minimum standards for Qualified Health Plans under state and federal law. FAC at ¶¶ 27, 38. All payments on premiums for the Public Option plans made available on the Exchange will be subject to (1) an existing fee for all Qualified Health Plans listed on the Exchange, and (2) an existing state tax imposed on all health insurance premiums. FAC at ¶39. The terms of SB 420 are set to take effect January 1, 2026, except that a limited number of provisions took effect on passage in 2021 "for the purposes of procurement and any other preparatory administrative tasks necessary to carry out the provisions of those sections." *See* 2021 Nev. Stat., ch. 537, § 20, at 3631–32 (amending the Nevada Administrative Procedure Act in NRS 233B.039), and § 41(2), at 3648 (setting forth the effective dates for the specific provisions of SB 420).

This Court dismissed Plaintiffs' prior attack on SB 420 for lack of standing and ripeness. Exhibit 1. Plaintiffs return with the same claims. *Compare* FAC, *with* Exhibit 1 at 4-5. In the interim, the federal government approved the States' waiver application. FAC at ¶50. The procurement period passed with the State finalizing contracts with carriers to provide plans that meet the premium reduction targets. FAC at ¶¶56–61. And the Public Option plans will be listed for Nevadans to purchase on the Exchange beginning in October 2025. FAC at ¶63.

III. Argument

A. Motion to dismiss standards

A complaint must be dismissed under NRCP 12(b)(1) when the Court lacks subject matter jurisdiction. *See also* NRCP 12(h)(3). Subject matter jurisdiction is "the court's authority to render a judgment in a particular category of case." *Landreth v. Malik*, 127 Nev. 175, 183, 251 P.3d 163, 168 (2011). It is Plaintiffs' burden to plead allegations sufficient to invoke the Court's jurisdiction. *Castillo v. United Federal Credit Union*, 134 Nev. 13, 15, 409 P.3d 54, 57 (2018). "[T]he district court can take evidence on the claim that the complaint does not fall within the subject matter jurisdiction of the court, and such evidence is not necessarily confined to the allegations of the complaint." *Morrison v. Beach City, LLC*, 116 Nev. 34, 36-37, 991 P.2d 982, 983 (2000).

Under NRCP 12(b)(5), a complaint is subject to dismissal if "it appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle [the plaintiff] to relief." *See Buzz Stew, LLC v. City of North Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008). This standard is rigorous, and all inferences are drawn in favor of the nonmoving party. *Id.* The Court may consider "matters of public record, orders, items present in the record of the case, and any exhibits attached to the complaint when ruling on a motion to dismiss for failure to state a claim upon which relief can be granted." *Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 848 P.2d 1258 (1993).

B. Plaintiffs still lack standing.

Nothing has changed that now gives Plaintiffs standing. In Nevada, with limited exceptions, only "one who possesses the right to enforce the claim and has a significant interest in the litigation" may bring an action. *High Noon at Arlington Ranch Homeowners Assoc. v. Eighth Jud. Dist. Ct.*, 133 Nev. 500, 507, 402 P.3d 639, 646 (2017); *see also* NRCP 17(a). Plaintiffs must establish an "injury-in-fact" except in "the rare case involving a constitutional expenditure challenge or separation-of-powers dispute that will evade review if strict standing requirements are imposed." *Nat'l Ass'n of Mut. Ins. Companies v. Dep't of Bus. & Indus., Div. of Ins.*, 139 Nev. 18, 27, 524 P.3d 470, 480 (2023) ("NAMIC").

Speculative injuries are insufficient. *Doe v. Bryan*, 102 Nev. 523, 525-36, 728 P.2d 443, 444–45 (1986). So too is taxpayer status. *Blanding v. City of Las Vegas*, 52 Nev. 52, 74, 280 P. 644, 650 (1929).

1. NTU still lacks individual and representational standing.

NTU purports to sue for itself and its Nevada members and supporters. FAC at ¶6. But Plaintiffs only allege that NTU's "members and supporters will be harmed" and do not articulate a cognizable harm to NTU. FAC at ¶6. This Court agreed there is no harm to NTU. Exhibit 1 at 8. Also, as before, NTU fails to provide means to identify its members, FAC at ¶¶19–21, thereby failing to satisfy the standard for representational standing. *NAMIC*, 139 Nev. at 24–26, 524 P.3d at 478–79; Exhibit 1 at 8. NTU lacks standing.

2. Dr. Titus lacks individual standing.

Plaintiffs' allegations that Dr. Titus will be injured by reduced reimbursement rates do not establish standing. Plaintiffs acknowledge that the contracts for 2026 are finalized, FAC at ¶ 61, but they do not allege that those contracts result in any reimbursement reductions for providers. As this Court previously noted, any reductions in provider reimbursements cannot drop below a floor that is consistent with existing reimbursement rates under existing federal programs. Exhibit 1 at 9. And even assuming reductions in reimbursement rates occur—a point Defendants do not concede—it is likely that there will be a net benefit to Dr. Titus because, as Plaintiffs seem to admit, SB 420 is likely to increase the number of Nevadans able to afford a Qualified Health Plan, which could include uninsured or underinsured patients Dr. Titus currently serves. *See infra* Part III(C)(1). For those reasons, Dr. Titus's theory of harm is too speculative to support standing.

3. Neither party satisfies the public-importance exception.

Plaintiffs also seek application of the public-importance exception. FAC at ¶¶19, 109-120. This Court rejected that argument in the prior case, Exhibit 1 at 9-10, and Plaintiffs failed to provide justification for a change in course here. The exception applies to issues of "significant public importance" in cases involving state constitutional challenges to legislative expenditures or appropriations or claims of violations of separation

of powers. *Nev. Pol'y Rsch. Inst., Inc. v. Cannizzaro*, 138 Nev. 259. 262, 507 P.3d 1203, 1207 (2022). And the Plaintiffs must also show they are "an 'appropriate' party to bring the action." *Id.*

This Court gave two reasons for rejecting Plaintiffs' reliance on the public-importance exception when dismissing Plaintiffs' prior lawsuit challenging SB 420. First, this Court explained that Plaintiffs' claims were insufficient to trigger the public-importance exception. Exhibit 1 at 9-10. Nothing about that has changed in the meantime. Plaintiffs' claims for relief are the same. And Plaintiffs present no valid reason for this Court to depart from its prior determination.

Second, this Court also concluded that Plaintiffs were not "appropriate" parties to bring a challenge to SB 420. Exhibit 1 at 10. This Court said, "If and when the law is fully implemented and facts are known as to the impact of the legislation, perhaps a more appropriate plaintiff or plaintiffs will bring the claims." Exhibit 1 at 10. That was not an invitation for Plaintiffs to return if a proper plaintiff never challenged SB 420. And the absence of any other challenge to SB 420 suggests that interested parties either want to see SB 420 move forward or see no sound legal theory to challenge the bill, reinforcing this Court's prior determination that Plaintiffs lack standing.

C. Plaintiffs fail to state a claim under Article IV, Section 18(2).

Plaintiffs misunderstand Article IV, Section 18(2) and overextend the Nevada Supreme Court's opinion from *Legislature v. Settelmeyer*, 137 Nev. 231, 486 P.3d 1276 (2021). Article IV, Section 18(2) requires a two-thirds majority for approval of any legislation that "creates, generates, or increases any revenue in any form, including but not limited to taxes, fees, assessments and rates, or changes in the computation bases for taxes, fees, assessments and rates." That provision does not apply here as a matter of law.

1. Article IV, Section 18(2) does not control legislation that incidentally increases public revenue.

In *Settelmeyer*, the Nevada Supreme Court held that any bill that extends a tax by eliminating a sunset for the tax or increases the amount of an existing fee by any amount

is subject to Article IV, Section 18(2). 137 Nev. at 234–37, 486 P.3d at 1280–82. This is not that case. Plaintiffs *do not* assert that any fee or tax is constitutionally infirm. If SB 420 were struck down, the same tax and the same fee will continue to exist.

So, Plaintiffs' theory is that SB 420 will incidentally increase public revenue through an existing fee and an existing tax. But that theory is really an admission that SB 420 will succeed in achieving the goal of increasing affordability and access to health insurance. When the aim of the bill is *reducing* the premiums that are otherwise subject to an *existing fee* and an *existing tax*, any increase in revenue must be the direct result of an increase *in transactions* subject to the existing fee and tax. And because the fee and tax payments are a percentage of the premium, a reduction in premiums will proportionately *reduce* an individual's fee and tax payments from the tax and fee payments owed on the purchase of a more expensive plan. As a result, the increase in revenue Plaintiffs expect to occur will come from people purchasing plans who would have been unable to purchase a plan without availability of the Public Option.

Any increase in revenue is a product of more people purchasing health care plans on the Exchange, not an increase in taxes or fees that would trigger Article IV, Section 18(2). So, Plaintiffs' position is incorrect on the law. What Plaintiffs really challenge here is how the State is choosing to spend public revenue the State receives from the existing, unchallenged fee and the existing, unchallenged tax. But decisions about how to spend public revenue coming from an existing fee or an existing tax are just appropriations that require only a simple-majority vote under Article IV, Section 18(1). *See Morency v. Dep't of Ed.*, 137 Nev. 622, 630, 496 P.3d 584, 591 (2021).

Moreover, accepting Plaintiffs' position leads to an outcome not intended by the enumeration of Article IV, Section 18(2). For Plaintiffs' position to be right, most (if not all) legislation would require a two-thirds majority to pass. The Legislature presumably enacts legislation to make Nevada a better place to live. Continued improvement of the quality of life for Nevadans will presumably continue to attract new residents to the State. And an increase in residents will presumably increase the number of transactions that require

payment of existing fees and taxes, thereby increasing public revenue. But even if some bills would not result in such an incidental increase in public revenue, Plaintiffs' position would require a fiscal analysis of every single bill to determine whether there is some possible way that the bill could incidentally increase public revenue before the Legislature could know whether it needs to comply with Article IV, Section 18(2).

That is not what Article IV, Section 18(2) means. Plaintiffs' position would turn the State's established tradition of majority-rule—embodied in Article IV, Section 18(1)—into an exception, if not a relic of the past. And it would give a minority of legislators control of the Legislature under continuous threat of impasse. True, Nevada has seen such an impasse once before. *See, e.g., Guinn v. Legislature*, 119 Nev. 460, 76 P.3d 22 (2003). But Plaintiffs' overbroad reading of Article IV, Section 18(2) would lead to such impasses becoming the norm.

Plaintiffs seek to extend Article IV, Section 18(2) beyond its reach. SB 420 did not impose, increase, or extend any taxes or fees; the subject tax and fee predated SB 420 and will remain in place if SB 420 is struck down. Any increase in revenue under SB 420 is merely incidental to SB 420's effectiveness. And the Legislature's choice on how to spend public revenue derived from an existing, unchallenged tax and an existing, unchallenged fee is an appropriation subject to Article IV, Section 18(1).

2. The State's reliance on federal passthrough dollars does not trigger Article IV, Section 18(2).

The State's reliance on passthrough dollars from the federal government is also not subject to Article IV, Section 18(2). The federal government "creates, generates, or increases" the revenue in question. Under the Supremacy Clause, the Nevada Constitution cannot be used to dictate how the federal government (1) "creates, generates, or increases" revenue, or (2) chooses to spend that revenue. U.S. Const. art VI, cl. 2. Also, Plaintiffs' reading of Article IV, Section 18(2), if correct, would unduly strain Nevada's ability to accept federal funding to support all kinds of state programs.

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Even so, any reliance on federal passthrough dollars does not "create[], generate[], or increase[] any public revenue" within the meaning of Article IV, Section 18(2). The federal government's decision to grant Nevada's waiver merely moves federal dollars from one place to another. The dollars in question would have been tax credits that now pass through to the State when someone buys a Public Option plan. FAC at ¶32. That is resource reallocation, which is not subject to Article IV, Section 18(2). *See, e.g.*, *Morency*, 137 Nev. at 630, 496 P.3d at 591 (concluding that a "reduction of the total amount of available tax credits is simply a reallocation of a portion of the total MBT revenue available, rather than something that increases the MBT tax that produces new or additional public revenue").

D. Plaintiffs fail to state a claim under Article IV, Section 19.

Plaintiffs' theory that SB 420 violates the Appropriations Clause of Article IV, Section 19, is also legally flawed. Plaintiffs correctly define an appropriation. FAC at ¶87. But then, seeking to graft a novel specificity requirement onto the Appropriations Clause, they assert that SB 420 "wholly lacks certainty and specificity that is required of a legislative appropriation" because "[i]t provides unbridled discretion to executive branch officials to use unspecified amounts of funds for the nebulous and vague purpose of 'increasing the affordability of the Public Option.'" FAC at ¶93.

An appropriation is "the setting aside of a certain sum of money for a specified object." *Schwartz v. Lopez*, 132 Nev. 732, 753, 882 P.3d 886, 900 (2016). "*No technical words are necessary to constitute an appropriation* if there is a clear legislative intent authorizing the expenditure and a maximum amount set aside for the payment of claims *or at least a formula by which the amount can be determined.*" *Id.* at 753, 882 P.2d at 900-01 (emphasis added). The Nevada Supreme Court has never "required any particular wording to find an appropriation" so long as there is "language manifesting a clear intent to appropriate." *Id.* at 753, 882 P.2d at 901.

Plaintiffs' allegations identify language in the bill that appropriates money for the "specific object" of "increasing affordability of the Public Option." FAC at ¶91. And Plaintiffs' allegations identify language in the bill that provides means to determine the

total amount of money available for appropriation. FAC at ¶89. The Appropriations Clause demands no more.

E. Plaintiffs fail to state a claim under Article III, Section 1.

The theory that SB 420 violates the non-delegation doctrine also fails on its face. Plaintiffs concede that SB 420 includes limits on revisions to the premium reduction targets. FAC at ¶¶98-100. But Plaintiffs fail to explain how those limitations are insufficient to guide the exercise of discretion when making factual determinations about whether and how to revise the premium reduction targets within the limits the Legislature imposed, particularly when considering more recent Nevada Supreme Court cases that apply *Sheriff v. Luqman*, 101 Nev. 149, 697 P.2d 107 (1985). This case does not present a situation materially different from the Director of the Department of Corrections having the discretion to select the drugs for an execution, *Floyd v. Dep't of Corr.*, 139 Nev. 335, 536 P.3d 445 (2023), or the Board of Wildlife Commissioners deciding how regularly animal traps need to be checked, *Smith v. Bd. of Wildlife Commissioners,* 136 Nev. 878, 461 P.3d 164 (2020) (unpublished table decision). *See also F.C.C. v. Consumers' Rsch.*, 145 S. Ct. 2482 (2025). Additionally, just as the Eighth Amendment served as a counterbalance in *Floyd*, 139 Nev. at 339–40, 536 P.3d at 449, Plaintiffs admit that the Special Terms and Conditions of the Section 1332 Waiver also impose limits on the exercise of discretion under SB 420. *See, e.g.*, FAC at 92. There is no separation-of-powers violation.

F. Plaintiffs fail to state a claim under the APA.

Plaintiffs allege, "SB 420 recognizes that the adoption, amendment, or repeal of any rule or policy governing the Public Option established pursuant to chapter 695K of NRS would constitute regulation subject to NAPA. SB 420 only *prospectively* exempted such adoption from NRS Chapter 233B, effective January 1, 2026." FAC at ¶147 (emphasis original). Thus, Plaintiffs acknowledge such regulations are exempt from NRS 233B, but they misapprehend the law and overlook an important fact. The relevant provision, NRS 233B.039(l), exempting "[t]he adoption, amendment or repeal of any rule or policy governing the Public Option established pursuant to chapter 695K of NRS" in in Section

20 of SB 420. Pursuant to Section 41 of SB 420, Section 20 becomes effective "(a) Upon passage and approval for the purposes of procurement and any other preparatory administrative tasks necessary to carry out the provisions of those sections; and (b) On January 1, 2026, for all other purposes." Plaintiffs allege that, "The Guidance Letters expressly invoke the DHS Director's authority under SB 420 to 'revise' the statutory requirements noted above." FAC ¶ 105. Since the guidance letters were part of the preparatory administrative tasks, they fall under Section 20 (aka NRS 233B.039(l)) which became effective upon passage for such purposes on or about June 9, 2021.

Because the guidance letters are exempt from the APA under NRS 233B.039(l), Plaintiffs cannot state a claim upon which relief can be granted. Moreover, these guidance letters are not something that is redressable by the Court. NRS 233B.110 permits declaratory relief with regard to such topics "when it is alleged that the regulation, or its proposed application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the plaintiff." Plaintiffs have not alleged, and cannot allege, any damages to their legal rights or privileges as a consequence of the guidance letters.

G. Director Whitley is not a proper defendant.

"The primary goals of [the redressibility] requirement are to ensure that plaintiffs do not sue the wrong parties and that courts do not issue advisory opinions." *Diamond Alternative Energy, LLC v. Environmental Protection Agency*, 145 S. Ct. 2121, 2138 (2025). Despite amending the complaint to address the creation of the Nevada Health Authority, Plaintiffs continue to incorrectly name Director Whitley as a defendant. FAC at ¶11. Plaintiffs' prayer for relief seeks prospective injunctive relief "prohibiting the Defendants from implementing, enforcing, or executing any and all provisions of S.B. 420." FAC at ¶E. But Director Whitley no longer has any authority over the Public Option.

During the 2025 Legislative Session, the Legislature established the Nevada Health Authority with passage of SB 494.[2] That bill split the Department of Health and Human

[2] The text of SB 494 is available at https://www.leg.state.nv.us/App/NELIS/REL/83rd2025/Bill/12936/Text (last viewed August 21, 2025).

Services in two. Section 32 of the bill changed Director Whitley's title to the Director of the Department of Human Services, and Section 18 created the Nevada Health Authority and the position of Director for the Authority. Stacie Weeks is Director of the Authority. FAC at ¶12.

Additionally, Plaintiffs allege that Director Whitley oversees the Nevada Division of Health Care Financing and Policy. FAC at ¶11. But as Plaintiffs later acknowledge, that entity ceases to exist. FAC at ¶11. Under Section 18(3), the Authority consists of Nevada Medicaid, Health Care Purchasing and Compliance Division, and the Consumer Health Division. And Sections 18(2)(e) and 355 of expressly place oversight of the Public Option with the Authority. So, Director Whitley's Department—the Department of Human Services—no longer oversees the Public Option. And that means a prospective injunction against Director Whitley will do nothing to redress Plaintiffs' alleged harms. [3]

For that reason, at minimum, Director Whitley should be dismissed from this case.

IV. Conclusion

For the foregoing reasons, this Court should dismiss the complaint.

RESPECTFULLY SUBMITTED this 8th day of September, 2025.

AARON D. FORD
Attorney General

By: _____
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[3] Defendants do acknowledge that there is some reasonable confusion here. Section 355 of the bill changes the definition for "Director" under NRS Chapter 695K from the Director from Director of Health and Human Services to Director of Nevada Health Authority. And Section 372(3) says Section 355 is effective January 1, 2026. But that creates an impossible situation that renders the delay in effectiveness of that change unenforceable.

This State has a long history of excusing strict compliance with plain terms of a statute on the grounds that the Legislature does not "intend to require the performance of an impossible act." *Tarsey v. Dunes Hotel, Inc.*, 75 Nev. 364, 367-68, 343 P.2d 910, 911 (1959); *see also S. End Min. Co. v. Tinney*, 22 Nev. 19, 29, 35 P. 89, 91 (1894); *Eureka Min. & Smelting Co. v. Way*, 11 Nev. 171, 177-78 (1876). Section 32 of the bill, which changed Director Whitley's title, took effect July 1, 2026. So it is impossible for the Director of Health and Human Services to be "the Director" under NRS 695K.050 because there is no longer a Director of Health and Human Services under Nevada law. The likely explanation for the discrepancy is oversight of the fact that Section 41 of SB 420 made certain provisions of that bill effective on passage, including the section that defined "Director" under Chapter 695K, when the Legislature drafted SB 494. So the most sensible conclusion is for this Court to override the limitation of Section 372(3) of SB 494 and treat Section 355 of that bill as effective July 1, 2025.

CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General and that on this 8th day of September, 2025, I served an electronic copy via email of, **DEFENDANTS' MOTION TO DISMISS,** to the following:

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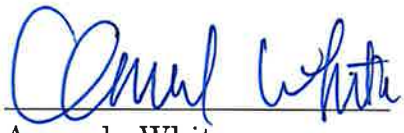

Amanda White

EXHIBIT 1

Order Granting Motions to Dismiss
First Amended Complaint

EXHIBIT 1

FIRST JUDICIAL DISTRICT COURT OF NEVADA
CARSON CITY

NATIONAL TAXPAYERS UNION, a non-profit organization, and ROBIN L. TITUS, MD,

Plaintiffs,

vs.

JOSEPH LOMBARDO, in his official capacity as Governor of the State of Nevada; ZACH CONINE, in his official capacity as Nevada State Treasurer; RICHARD WHITLEY, in his official capacity as Director of the Nevada Department of Health and Human Services; SCOTT J. KIPPER, in his official capacity as the Nevada Commissioner of Insurance; and RUSSELL COOK, in his official capacity as Executive Director of the Silver State Health Insurance Exchange,

Defendants, and

LEGISLATURE OF THE STATE OF NEVADA,

Intervenor-Defendant.

Case No. 24 OC 00001 1B

Dept. No. 2

ORDER GRANTING MOTIONS TO DISMISS FIRST AMENDED COMPLAINT

This matter came before the Court on motions to dismiss filed by Defendants. Plaintiffs filed their First Amended Complaint for Declaratory and Injunctive Relief on January 29, 2024. The named defendants, all members of the State executive branch ("Executive Defendants"), filed their motion to dismiss on February 23, 2024. The Nevada Legislature intervened in this action by way of a stipulated order entered on February 26.

The Executive Defendants and the Legislature filed, and joined in each other's, motions to dismiss, the Plaintiffs filed their responses in March, and the Executive Defendants and the Legislature filed replies by the end of that month. After reviewing the pleadings and papers on file and considering the parties' arguments at the hearing on June 26, 2024, the Court enters the following order.

FACTUAL BACKGROUND

In their First Amended Complaint ("FAC"), Plaintiffs raise several state constitutional claims challenging the validity of specific provisions of Senate Bill No. 420 of the 2021 regular legislative session ("SB 420"). SB 420, 2021 Nev. Stat., Ch. 537, at 3614. SB 420 was passed and approved on June 9, 2021, although the many different sections of the bill became, or will become, effective at the various times stated in section 41 of the bill. Plaintiffs also raise a state statutory claim under the Administrative Procedure Act ("APA") in NRS Chapter 233B. In that claim, Plaintiffs allege that the Executive Defendants violated the APA by adopting guidance letters concerning the state's administration of the challenged provisions of SB 420 without complying with the administrative rulemaking requirements under the APA. Each of Plaintiffs' four causes of action articulated in the First Amended Complaint seeks declaratory relief under NRS Chapter 30.

The Interest of the Plaintiffs in the Legislation

Plaintiff National Taxpayers Union ("NTU") alleges it is a public interest, nonprofit, nonpartisan corporation organized under the laws of Delaware and authorized to do business in Nevada. *See* FAC ¶ 6. It also alleges that its purpose is "to advocate for public policies that promote transparency, accountability, and efficiency in government" and that its leadership advocated for passage of the two-thirds supermajority provision for adopting legislation which increases revenue. FAC ¶17. Even though it lists many of its purposes, NTU does not allege that SB 420 will cause the organization any direct harm. NTU does allege that its "forty-five Nevada members and supporters will be harmed by SB 420" but

has not stated who those members are and how they will be harmed and has not provided any means for this Court to identify those members.

Plaintiff Dr. Titus is a state resident, a licensed and practicing physician, and a member of the Nevada Legislature. She alleges she "will be personally harmed by the Defendants' continued implementation of the Public Option, a government-run health insurance program that requires Nevada health care providers to participate and accept lower reimbursement rates." FAC ¶ 18. Dr. Titus does not allege that she has yet suffered any injury, but only speculates that she will be harmed by the public option if it is allowed to go into effect on January 1, 2026.

Plaintiffs assert in their first three causes of action a key identical allegation: "Without this Court's intervention, Defendants will proceed to implement SB 420 resulting in irrevocable and irreparable harm to the rights of Nevada citizens protected under Nevada's Constitution." FAC ¶ 87, 94, 101 (emphasis added).

The Challenged Legislation

The challenged provisions of SB 420 provide for the design, establishment, and operation of "a health benefit plan known as the Public Option." SB 420, 2021 Nev. Stat., Ch. 537, § 10(1), at 3617 (codified in NRS 695K.200(1)). Even though the challenged provisions were enacted during the 2021 regular session, they do not become effective and operative until January 1, 2026, with certain limited exceptions. SB 420, 2021 Nev. Stat., Ch. 537, §§ 2-15, at 3616-22 (codified in NRS Chapter 695K), and § 41(2), at 3648 (setting forth the effective dates for the specific provisions of SB 420).

Under Section 11 of SB 420 (codified in NRS 695K.210), the Executive Defendants must work collaboratively to apply to the United States Secretary of Health and Human Services for a waiver under federal law and regulations to obtain pass-through federal funding to carry out the challenged provisions of SB 420. Defendant Director Whitley submitted the State's waiver application to the federal government on December 29, 2023. FAC ¶¶ 55, 56. *See* 42 U.S.C. § 18052; The Patient Protection and Affordable Care Act, H.R. 3590, Pub. L. 111-148, § 1332, 124 Stat. 119, 203 (Mar. 23, 2010). Plaintiffs do not

allege that the State's waiver application has been granted, and they do not allege that the program can go forward without resolution of the waiver application.

Section 14 of SB 420 (codified in NRS 695K.240) states that Nevada public option health care provider reimbursements "must be comparable to or better than" the reimbursement rates under existing federal programs. Section 13 of SB 420 (codified in NRS 695K.230) only requires providers to participate in the public option if they also participate in "the Public Employees' Benefits Program established pursuant to subsection 1 of NRS 287.043 or the Medicaid program, or [provide] care to an injured employee pursuant to the provisions of chapters 616A to 616D, inclusive, or chapter 617 of NRS," which are more commonly known as the Workers' Compensation Laws. Under this section, these health care providers must enroll as a provider in at least one Public Option provider network but are not required to accept new patients; they are only required to "accept new patients who are enrolled in the Public Option to the same extent as the provider accepts new patients who are not enrolled in the Public Option." (emphasis added).

Section 41(2) of SB 420 provides that the APA exemption for the Public Option in Section 20 of SB 420 became effective upon "passage and approval" for the "purposes of procurement and any other preparatory administrative tasks necessary to carry out" the public health insurance option, which includes the adoption, amendment, or repeal of any rule or policy governing the public health insurance option. *See* 2021 Nev. Stat., Ch. 537, § 20, at 3631-32 (amending the Nevada Administrative Procedure Act in NRS 233B.039), and § 41(2), at 3648 (setting forth the effective dates for the specific provisions of SB 420). The bill does not define what is meant by "purposes of procurement and any other preparatory administrative tasks necessary to carry out the provisions of those sections . . . ."

The Constitutional and Legal Challenges

Plaintiffs assert three constitutional challenges to SB 420. First, they claim that the legislation generates public revenue, but that the bill was not passed by a two-thirds vote in both chambers of the Legislature. As such, Plaintiffs argue that the bill violates article

4, section 18 (2) of the Nevada Constitution which requires an affirmative vote of two-thirds of each House for a bill "which creates, generates, or increases any public revenue in any form . . . ." Nev. Const. art. 4, § 18 (2). Plaintiffs assert that the bill will require the State to create a health benefit plan, or "Public Option," available to consumers which will raise revenues from the purchase of the health plan or from carrier premium fees or premium taxes. FAC ¶¶ 2, 28-31, 39-61, 84-86.

Second, Plaintiffs allege that SB 420 authorizes defendants in section 15 of the bill "nearly unlimited discretion to use unspecified amounts of funds from the state treasury for unspecified purposes that the legislature did not approve in passing SB 420." FAC ¶¶ 3, 62-69, 92-93. Plaintiffs claim this violates the Appropriations Clause of the constitution. *See id.*, art. 4, §19 ("No money shall be drawn from the treasury but in consequence of appropriations made by law.").

Third, it is asserted that the legislation violates the separation of powers doctrine in article 3, section 1 of the constitution as executive branch officials are authorized by the bill to revise statutory language (a power of the Legislature) which establishes health insurance premium level reduction targets. Plaintiffs claim this revision was done by defendants who issued guidance letters as authorized by the legislation. FAC ¶¶ 4, 73-80, 98-104. Similarly, in their fourth cause of action, Plaintiffs also claim that the issuance of the guidance letters were effectively "regulations" which were not adopted and filed in accordance with Nevada's Administrative Procedure Act ("APA") in Chapter 233B of the Nevada Revised Statutes. FAC ¶¶ 105-114.

LEGAL ANALYSIS

A complaint may be dismissed at any time for lack of subject matter jurisdiction. NRCP 12(b)(1) & (h)(3). Upon a motion to dismiss for failure to state a claim under NRCP 12(b)(5), this Court typically must take all factual allegations in the complaint as true and draw all inferences in favor of Plaintiffs. The complaint should only be dismissed if it appears beyond doubt that plaintiffs could prove no set of facts which entitle them to the relief they seek. *Buzz Stew v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672

(2008). Nevertheless, this Court is not limited to the content of the complaint when it refers in this case to, and relies upon, the legislation which is central to the claims and no party questions the authenticity of the legislation. *See Baxter v. Dignity Health*, 131 Nev. 759, 764, 357 P.3d 927, 930 (2015) (citing cases). Here, no one questions the authenticity of SB 420.

It is also the case that, when plaintiffs assert constitutional questions, proof of standing is a jurisdictional requirement. *Stockmeier v. Nev. Dep't of Corrections*, 122 Nev. 385, 393, 135 P.3d 220, 225-26 (2006), *overruled in part on other grounds by State ex rel. Bd. of Parole Comm'rs v. Morrow*, 127 Nev. 265, 255 P.3 224 (2011). Thus, if these Plaintiffs do not show standing to sue, or an exception to standing, the Court is without jurisdiction to hear the case. The same is true when the allegations of a complaint are not ripe for adjudication. The lack of ripeness also affects the court's jurisdiction to hear a case. *See Allstate Ins. Co. v. Thorpe*, 123 Nev. 565, 571, 170 P.3d 989, 993 (2007) (failure to exhaust administrative remedies rendered the matter unripe and nonjusticiable); *Herbst Gaming, Inc. v. Heller*, 122 Nev. 877, 887, 141 P.3d 1224, 1230-31 (2006) (the focus is the degree to which alleged harm is sufficiently concrete to yield a justiciable controversy).

Naming the State as a Defendant

The First Amended Complaint names state officers and employees as defendants but does not name the State of Nevada as a defendant. Nevada law provides: "In any action against the State of Nevada, the action must be brought in the name of the State of Nevada on relation of the particular department, commission, board or other agency of the State whose actions are the basis for the suit." NRS 41.031(2). This statute was adopted by the Legislature which has authority to waive what is otherwise the State's immunity to suit. Nev. Const. art. 4, § 22. The Nevada Supreme Court has held that section 41.031 does not apply only to torts. *Echeverria v. State*, 137 Nev. 486, 490-92, 495 P.3d 471, 475-77 (2021). A failure to comply with this statute deprives this Court of subject matter jurisdiction. *See, e.g., Craig v. Donnelly*, 135 Nev. 37, 39-40, 439 P.3d 413, 415 (Nev. Ct. App. 2019). Defendants acknowledge that the error can be addressed by granting Plaintiffs leave to

amend. Generally, leave to amend should be "freely given when justice so requires." *Harlow, Inc. v. Dist. Ct.*, 129 Nev. 394, 398, 302 P.3d 1148, 1152 (2013). Accordingly, this Court will address the additional reasons for dismissal of the action.

Standing

Our rules state that "[e]very action shall be prosecuted in the name of the real party in interest." NRCP 17(a). A real party in interest "is one who possesses the right to enforce the claim and has a significant interest in the litigation." *Arguello v. Sunset Station, Inc.*, 127 Nev. 365, 368, 252 P.3d 206, 208 (2011). A plaintiff must demonstrate "standing" to bring an action. This is to say that there must be a "showing of injury-in-fact, redressability, and causation that federal cases require for [federal constitutional] Article III standing." *Nat'l Ass'n of Mut. Ins. Cos. v. State Dep't of Bus. & Indus.*, 139 Nev. ___, ___, 524 P.3d 470, 476 (Adv. Op. 3, 2023)["*NAMIC*"](*citing cases).* Standing presents a question of law. *Id., citing Arguello v. Sunset Station, Inc.*, 127 Nev. 365, 368, 252 P.3d 206, 208 (2011). A speculative injury is insufficient to establish standing and it is up to the plaintiffs to demonstrate that they suffered actual personal injury. *Doe v. Bryan*, 102 Nev. 523, 525-26, 728 P.2d 443, 444-45 (1986), *cited by Morency v. State, Dep't of Educ.*, 137 Nev. 622, 626 n.5, 496 P.3d 584, 588 n. 5 (2021). In sum, standing requires either a showing of injury-in-fact, statutory standing, or a constitutional expenditure challenge or separation-of-powers dispute that will evade review if strict standing requirements are imposed. *NAMIC*, 139 Nev. at ___, 524 P.3d at 476.

> The question of standing concerns whether the party seeking relief has a sufficient interest in the litigation. The primary purpose of this standing inquiry is to ensure the litigant will vigorously and effectively present his or her case against an adverse party." [*Schwartz*] Thus, "a requirement of standing is that the litigant personally suffer injury that can be fairly traced to the allegedly unconstitutional statute and which would be redressed by invalidating the statute." [*Ellie*] A general interest in the matter is normally insufficient: "a party must show a personal injury." [*Schwartz*]

Morency v. Dep't of Educ., 137 Nev. at 625, 496 P.3d at 588 (2021), *quoting Schwartz v. Lopez*, 132 Nev. 732, 743, 382 P.3d 886, 894 (2016) ("*Schwartz*"); *Elley v. Stephens*, 104 Nev.

413, 416, 760 P.2d 768, 770 (1988) ("*Elley*"). "[A] party generally has standing to assert only its own rights and cannot raise the claims of a third party not before the court." *Beazer Homes, Beazer Homes Holding Corp. v. Dist. Ct.*, 128 Nev. 723, 730, 291 P.3d 128, 133 (2012). In Nevada, a person cannot show standing simply because he or she is a taxpayer. *Blanding v. City of Las Vegas*, 52 Nev. 52, 74, 280 P. 644, 650 (1929).

Nevada does recognize a special exception to direct or personal standing known as the public importance exception. *Schwartz*, 132 Nev. at 743, 382 P.3d at 894. *See also Nevada Policy Research Inst. v. Cannizzaro*, 138 Nev. 259, 507 P.3d 1203 (2022) ("*Cannizzaro*"). The general test for applying the public importance exception requires the plaintiff to show that (1) the case "involve[s] an issue of significant public importance"; and (2) the case "involve[s] a challenge to a legislative expenditure or appropriation on the basis that it violates a specific provision of the Nevada Constitution" or when a "plaintiff seeks vindication of the Nevada Constitution's separation-of-powers clause"; and (3) "the plaintiff must be an 'appropriate' party, meaning that there is no one else in a better position who will likely bring an action and that the plaintiff is capable of fully advocating his or her position in court." *Cannizzaro*, 138 Nev. at 263, 507 P.3d at 1208; *Schwartz*, 132 Nev. at 743, 382 P.3d at 894-95. The public importance exception is a narrow exception intended to apply only when a claim is likely to evade review. *NAMIC*, 139 Nev. at __; 524 P.3d at 476. Additionally, only "extraordinary cases" that fall within the separation-of-powers class of cases will meet the exception. *Cannizzaro*, 138 Nev. at 263, 507 P.3d at 1208.

In this case, Plaintiff NTU does not have individualized standing under Nevada law, and NTU does not meet the requirements for representational standing. This plaintiff has neither alleged nor shown how SB 420 has any effect on the entity itself. It has also not shown that there is no one else in a better position who will likely bring an action against the legislation. NTU also neither identifies any of its purported Nevada members nor provides any means to sufficiently ascertain who those individuals are for this Court to analyze the limited exception of representational standing.

Plaintiff Titus also has not shown that she has individual standing under Nevada law because any allegations of harm to her are purely speculative. Dr. Titus does not allege she is currently harmed by SB 420. She asserts harm by the implementation of the public option, "a government-run health insurance program that requires Nevada health care providers to participate and accept lower reimbursement rates." FAC ¶ 18. The plain language of Section 14 of SB 420 (codified in NRS 695K.240), however, belies Dr. Titus' allegations of any current harm, as it may prohibit in the future Nevada public option provider reimbursements from being less than those under existing federal programs. Plaintiff Titus also does not assert representational standing and cannot do so as she has not demonstrated that no one else is in a better position to bring and advocate a position against the legislation.

This Court said during the arguments on the motions to dismiss that it believed the public importance exception to standing applied. Upon further reflection, the Court believes that it does not apply. The case law on this exception has stated that it is a "narrow" exception (*Schwartz*) when a claim is likely to evade review and is allowed in "extraordinary cases" involving the separation of powers issue which will evade review and be "rare" (*Cannizzaro*). The cases in Nevada have involved many citizens and parents of children in school alleging a diversion of millions of dollars of public education funds to private schools (*Schwartz*); "legislation affecting the financial concerns of a significant number of businesses, organizations, and individuals throughout the state" (*Morency*); and the protection of public funds in a separation of powers issue likely to recur (*Cannizzaro*).

In this case, there is a claimed legislative appropriation without a two-thirds vote because the Public Option, if it ever takes effect, will generate or increase public revenues in the future from the consumer purchases of the health plan or from carrier premium fees or premium taxes. The asserted appropriation of money by the State Treasurer without certainty and specificity from the Legislature is a vague and uncertain allegation which does not appear to be sufficient to meet the "narrow" exception or "extraordinary" case requirement. Similarly, the alleged separation of powers violations which stem from

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actions taken (or to be taken) by the Executive Defendants submitting a waiver application and guidance letters without administrative rulemaking and does not appear to meet the public importance exception for standing. Additionally, Plaintiffs have not met their burden (beyond simply stating) that there is "no one else in a better position who will likely bring an action and that [Plaintiffs are] capable of fully advocating [their] position in Court. If and when the law is fully implemented and facts are known as to the impact of the legislation, perhaps a more appropriate plaintiff or plaintiffs will bring the claims. Plaintiffs have not met their burden in this case.

Both Plaintiffs also lack standing to assert the fourth cause of action because they have not articulated a redressable injury resulting from the alleged violation of the APA. This cause of action also clearly does not meet the public importance exception which is limited to constitutional claims.

Ripeness

Most importantly, Plaintiffs must show that their claims are ripe for determination. "This court is confined to controversies in the true sense. The parties must be adverse and the issues ripe for determination. *Kress v. Corey*, 65 Nev. 1, 189 P.2d 352 (1948). We do not have constitutional permission to render advisory opinions. Nev. Const. art. 6, § 4." *City of North Las Vegas v. Cluff*, 85 Nev. 200, 201, 452 P.2d 461, 462 (1969). Two factors control the ripeness inquiry: "(1) the hardship to the parties of withholding judicial review, and (2) the suitability of the issues for review." *Herbst Gaming, Inc. v. Heller*, 122 Nev. 877, 887, 141 P.3d 1224, 1231 (2006).

"Of course, the duty of every judicial tribunal is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles of law which cannot affect the matter in issue before it." *NCAA v. Univ. of Nevada, Reno*, 97 Nev. 56, 57, 624 P.2d 10, 10 (1981).

The Supreme Court of Nevada has articulated the standards for obtaining declaratory relief, which Plaintiffs seek in this case:

> The requisite precedent facts or conditions which the courts generally hold must exist in order that declaratory relief may be obtained may be summarized as follows: (1) there must exist a justiciable controversy; that is to say, a controversy in which a claim of right is asserted against one who has an interest in contesting it; (2) the controversy must be between persons whose interests are adverse; (3) the party seeking declaratory relief must have a legal interest in the controversy, that is to say, a legally protectible interest; and (4) the issue involved in the controversy must be ripe for judicial determination. Declaratory Judgments, Borchard, pp. 26–57.

Kress v. Corey, 65 Nev. 1, 26, 189 P.2d 352, 364 (1948). The allegations of Plaintiffs' First Amended Complaint do not specifically state that they have currently suffered any harm. The language chosen by Plaintiffs suggesting that "the State's waiver application projects that the State will directly receive hundreds of millions of dollars in pass-through federal funding" [FAC ¶ 31 (emphasis added)] are both tacit admissions that these are elements that are yet to happen or be definitively determined. As such, the alleged generation of public revenue authorized by SB 420 without a two-thirds vote of the Legislature is something that may or may not occur in the future, depending on whether the waiver application is granted. Similarly, the alleged unlawful appropriations depend on money being available in the Public Option trust fund, which has yet to happen. Plaintiffs will suffer no hardship regarding these two issues by having to wait to adjudicate their challenges to SB 420 until there is a more concrete dispute on the parameters of the public option.

Plaintiffs assert that the ripeness requirement does not apply to the public importance exception to standing. This Court disagrees. Standing and ripeness serve different purposes—standing addresses who can bring a claim, while ripeness is a matter of timing. *Herbst Gaming, Inc.*, 122 Nev. at 887, 141 P.3d at 1230-31, *quoting Matter of T.R.*, 119 Nev. 646, 651, 80 P.3d 1276, 1279-80 (2003). For that reason, satisfaction of the public importance exception to standing does not satisfy the standards for ripeness, and Plaintiffs' first three causes of action are not ripe for judicial determination. *See Jowers v. S.C. Dep't of Health & Envtl. Control*, 815 S.E.2d 446, 458-59 (S.C. 2018) ("The public importance exception does not apply to a lack of ripeness."); *Walker v. Munro*, 879 P.2d 920,

927-28 (Wash. 1994) (declining to apply the public-importance exception because plaintiffs' constitutional challenge to statutory provisions was not ripe for review given that the challenged statutes were not effective and not operative yet); *DiNino v. State ex rel. Gorton*, 684 P.2d 1297, 1300-01 (Wash. 1984) (declining to apply the public-importance exception because plaintiffs' constitutional challenge to statutory provisions was not ripe for review given that "[t]his case presents a hypothetical, speculative controversy."). So, even if Plaintiffs could meet the public importance exception for the first three causes of action, those causes of action remain subject to dismissal because they are not ripe.

CONCLUSIONS OF LAW

In this case, Plaintiff NTU lacks individualized and representational standing to address the claimed violations of SB 420 under Nevada law. Similarly, Plaintiff Titus has also failed to demonstrate individual standing under Nevada law because the harm she asserts is too speculative. Plaintiff's also lack standing under the narrow public importance exception because the appropriation of money by the State Treasurer is uncertain at this time and, similarly, the alleged separation of powers claim is based upon actions which have yet to be finalized. Nor is it clear that Dr. Titus is an appropriate party to pursue the claims raised in this case. If SB 420 becomes fully implemented, it appears likely that the claimed violations will be raised by someone who is in a better position to identify the specific harm and that the issues will not evade review.

Plaintiffs NTU and Titus are unable to establish that the first three causes of action are ripe for judicial determination because SB 420 is not fully implemented, and it is currently unclear whether it will be fully implemented. Application of the public importance exception, if this Court were to apply it to the standing issue, would not change the requirement of ripeness in this case.

Finally, Plaintiffs lack standing to assert the fourth cause of action because they have not articulated a redressable injury resulting from the alleged violation the Administrative Procedure Act.

The issues of standing, ripeness and failure to state a claim addressed above could only be corrected if Plaintiffs were to satisfy the legal standards and demonstrate a current harm from the targeted legislation and could show that they meet the public importance exception for standing. Any amended complaint would have to satisfy each of these issues. Additionally, Plaintiff's would also be required to properly name the State of Nevada in addition to the state officers and employees for this Court to properly have subject matter jurisdiction under NRS 41.031(2). Accordingly,

IT IS HEREBY ORDERED that Plaintiffs' First Amended Complaint is dismissed without prejudice.

IT IS FURTHER ORDERED that counsel for the Executive Defendants shall serve written notice of entry of this order to all other parties and file proof of such service within seven days after the Court sends this Order to counsel.

IT IS SO ORDERED.

July 30th, 2024.

Kristin Luis
Kristin Luis
District Judge

CERTIFICATE OF SERVICE

I certify that I am an employee of the First Judicial District Court of Nevada; that on July 30, 2024, I served a copy of this document by placing a true copy in an envelope addressed to:

Joshua M. Halen, Esq. HOLLAND & HART LLP 5441 Kietzke Lane, 2nd Floor Reno, NV 89511 Constance L. Akridge, Esq. HOLLAND & HART LLP 9555 Hillwood Dr., 2nd Floor Las Vegas, NV 89134 Christopher M. Jackson, Esq. HOLLAND & HART LLP 555 17th St., Ste. 3200 Denver, CO 80202	Office of the Attorney General of Nevada Marni K. Watkins, Esq. Casey J. Quinn, Esq. 1 State of Nevada Way Suite 100 Las Vegas, NV 89119 Kevin C. Powers, Esq. Legislative Counsel Bureau, Legal Division 401 S. Carson St. Carson City NV 89701

the envelope sealed and then deposited in the Court's central mailing basket in the court clerk's office for delivery to the USPS at 1111 South Roop Street, Carson City, Nevada, for mailing.

Billie Shadron
Judicial Assistant

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