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FIRST JUDICIAL DISTRICT COURT OF NEVADA
IN AND FOR CARSON CITY

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

Plaintiffs,

v.

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

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Plaintiffs National Taxpayers Union ("NTU") and Robin L. Titus, M.D. submit this response to Defendants' Motion to Dismiss ("MTD" or "Motion"). The opposition is based on this Memorandum of Points & Authorities, the papers and pleadings on file, and any additional information this Court considers.

RELEVANT FACTS

S.B. 420. In 2021, S.B. 420 passed by a simple majority in Nevada's Assembly (26–15) and Senate (12–9). First Am. Compl. ("Compl.") ¶ 25. S.B. 420 requires Defendants to design, establish, and operate Nevada's public health benefit plan (the "Public Option"). *Id.* ¶¶ 1, 24. The Public Option will be available for purchase as a "Qualified Health Plan" on the Silver State Health Insurance ("Exchange") and for "direct purchase" as an individual health insurance policy. *Id.* ¶ 27; NRS 695K.200(2).

Revenue. The Public Option will generate revenue. Nevadans may purchase a health benefit from a carrier on the Exchange; the carrier then pays a fee to the Exchange for each benefit purchased. Compl. ¶ 38. Nevada also assesses a 3.5% tax on net premiums, which includes certain Public Option plans. *Id.* ¶ 75; NRS 680B.027(1). And finally, through a waiver of Section 1332 of the Affordable Care Act, Nevada will receive new federal funding, revenue of $279 to $310 million in the first five years alone. Compl. ¶¶ 50, 83; S.B. 420, § 11. This new revenue will be held in the Public Option Trust Fund. Compl. ¶¶ 79, 89. Executive branch officials may use that fund to cover the administrative costs of the program and if, in the State Treasurer's unilateral determination, there is a surplus, the remainder may be used to "increase the affordability of the Public Option." S.B. 420, § 15(5); Compl. ¶ 82–89.

Revising Premium Targets. S.B. 420 sets targets for reduced premiums offered through the Public Option. Compl. ¶ 98. But S.B. 420 permits Defendants, who are executive branch officials, to modify those targets—i.e., revise statutory language. *Id.* ¶ 99. Defendants have already done so by issuing two "Guidance Letters" without adhering to rulemaking requirements under the Nevada Administrative Procedure Act ("NAPA"). *Id.* ¶¶ 101–02.

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The Plaintiffs. Plaintiff Robin L. Titus, M.D., is a Nevada resident and taxpayer, a practicing physician, and a member of the Nevada Senate. *Id.* ¶ 7. Plaintiff NTU is a nonprofit and nonpartisan organization whose primary purpose is to advocate for governmental transparency, accountability, and efficiency. *Id.* ¶¶ 6, 19. NTU advocated for the passage of the Nevada Constitution's two-thirds supermajority provision at issue in this case, and it has worked on several ballot measures both in Nevada and nationwide. *Id.* ¶¶ 19, 21.

LEGAL STANDARD

In adjudicating the Motion, the Court must "recognize all factual allegations in [Plaintiffs'] complaint as true and draw all inferences in [their] favor." *Buzz Stew, LLC, v. City of N. Las Vegas*, 124 Nev. 224, 227–28, 181 P.3d 670, 672 (2008). Dismissal is only appropriate "if it appears beyond a doubt that [plaintiffs] could prove no set of facts, which, if true, would entitle [plaintiffs] to relief." *Id.* at 228, 181 P.3d at 672.

ARGUMENT

I. Plaintiffs have standing.

Plaintiffs have standing for three independent reasons: (1) the public-importance exception applies, (2) they suffered an injury in fact, and (3) they qualify for taxpayer standing.

A. *This Court has standing under the public-importance exception.*

The Nevada Supreme Court has recognized a so-called "public-importance exception" to the traditional requirements of standing. *Schwartz v. Lopez*, 132 Nev. 732, 743, 382 P.3d 886, 894 (2016). The exception applies when a case involves (1) "an issue of significant public importance"; (2) "a challenge to a legislative expenditure or appropriation on the basis that it violates a specific provision of the Nevada Constitution"; and (3) the plaintiff is the "appropriate party." *Id.*, 382 P.3d at 894–95.

Plaintiffs satisfy all three prongs.[1] *First*, this case involves an issue of significant public importance: whether the Public Option, which fundamentally alters Nevada's health insurance

[1] In Plaintiffs' prior lawsuit challenging S.B. 420, the district court determined the public-importance exception did not apply. This Court is not bound by that prior decision. *See, e.g., Clark v. Columbia/HCA Info. Servs.*, 117 Nev. 468, 481, 25 P.3d 215, 224 (2001) ("[A] dismissal

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market, is consistent with Nevada's Constitution. S.B. 420 involves carrier contracts that are worth $20–$25 billion over the next five years; the Public Option will result in $401–$760 million in federal funding; and the statute will dramatically reshape healthcare in Nevada, a $15 billion industry that employs 160,000 people, which is more than 10% of the State's workforce. Compl. ¶¶ 110–11. The bill plainly affects "the financial concerns of a significant number of businesses, organizations, and individuals throughout the state, as well as the state's budget." *Morency v. State Dep't of Educ.*, 137 Nev. 622, 627, 496 P.3d 584, 589 (2021).

Second, Plaintiffs challenge an expenditure or appropriation that violates specific provisions of Nevada's Constitution. S.B. 420 violates the supermajority clause in Article IV, § 18(2)—the same challenge raised in *Morency*. *Id.* Because S.B. 420 lacks the certainty and specificity required for an appropriation—particularly as to the funds in the Public Option Trust Fund—it also violates the Appropriations Clause. *See Schwartz*, 132 Nev. at 753, 382 P.3d at 900 (alleged violation of Appropriations Clause satisfies the public-importance exception).

The second prong is also satisfied under *Nevada Policy Research Institute, Inc., v. Cannizzaro*, 138 Nev., Adv Op. 28, 507 P.3d 1203 (2022). Plaintiffs seek to enforce Defendants' "compliance with a public duty pursuant to the separation-of-powers clause." *Id.* at 1208. As detailed below, S.B. 420 improperly delegates to Defendants the lawmaking function of the legislative branch. *See* Compl. ¶¶ 99–105.

Third, Plaintiffs are appropriate parties. *See Cannizzaro*, 138 Nev., Adv. Op. 28, 507 P.3d at 1210 (discussing the three facets of appropriateness). Titus is a physician, a taxpayer, and a sitting member of the state legislature. Compl. ¶ 7. Similarly, NTU was intimately familiar with and involved in the adoption of Nevada's supermajority provision, the basis of this legal challenge. *Id.* ¶ 19. Indeed, Defendants have never identified who could be a more appropriate party. Based on their background and with assistance from counsel, *id.* ¶ 13, Plaintiffs are more

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without prejudice is not a final adjudication on the merits."); *DePaul Indus. v. Miller*, 14 F.4th 1021, 1029 (9th Cir. 2021) ("[A] decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case." (quoting *Evans v. Skolnik*, 997 F.3d 1060, 1067 (9th Cir. 2021))).

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than "capable of competently advocating [their] position." *Cannizzaro*, 138 Nev., Adv. Op. 28, 507 P.3d at 1210. There is "no one else in a better position who will likely bring an action." *Schwartz*, 132 Nev. at 743, 382 P.3d at 894–95.

B. *Plaintiffs have standing under traditional principles.*

Plaintiffs meet the requirements of "injury-in-fact, redressability, and causation[.]" *Nat'l Ass'n of Mut. Ins. Co. v. State Dep't of Bus. ("NAMIC")*, 139 Nev., Adv. Op. 3, 524 P.3d 470, 476 (2023). Plaintiffs are injured by S.B. 420's provisions.

Dr. Titus is a healthcare provider, and healthcare providers will be directly, negatively impacted by the Public Option's reduction in healthcare provider reimbursement rates. Compl. ¶¶ 53–54.[2] NTU and its members are injured by enforcement of a law passed outside the constitutional process. *Elley v. Stephens*, 104 Nev. 413, 416, 760 P.2d 768, 771 (1988). The standard in *Elley* differs from taxpayer standing in that *Elley* requires some "nexus" between the constitutional violation and an injury specific to the plaintiff. *Id.* Here, that nexus is that, on behalf of its members, NTU advocated for and passed the supermajority provision that Defendants unconstitutionally flouted in enacting S.B. 420. NTU is therefore not a "sham plaintiff[;]" its "sincerity" in challenging the law cannot be called into question. *Cannizzaro*, 138 Nev., Adv. Op. 28, 507 P.3d at 1210.

C. *Plaintiffs have taxpayer standing.*

Taxpayer standing is a well-accepted exception to traditional standing principles. *E.g.*, *Hickenlooper v. Freedom from Religion Found., Inc.*, 338 P.3d 1002, 1007 n.10 (Colo. 2014); *Ill. Ass'n of Realtors v. Stermer*, 5 N.E.3d 267, 274 (Ill. App. Ct. 2014); *Reeder v. Wagner*, 974 A.2d 858 (Del. 2009); *Citizens for R. of L. v. Senate Comm. on Rules & Admin*, 770 N.W.2d 169, 175 (Minn. Ct. App. 2009); *Sch. Bd. v. Clayton*, 691 So. 2d 1066, 1067 (Fla. 1997); *Koch v. Canyon Cty.*, 17 P.3d 372, 275 (Idaho 2008); *W. Farms Mall, LLC v. Town of W. Hartford*, 901 A.2d 649, 657 (Conn. 2006); *Ruckle v. Anchorage Sch. Dist.*, 85 P.3d 1030, 1034 (Ak. 2004); *Chambers v.*

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[2] This harm occurs even if the provider sees more patients as a result of the Public Option because, even in such a circumstance, the provider will be doing more work for less reimbursement for each service.

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Lautenbaugh, 644 N.W.2d 540, 548 (Neb. 2002); *Chapman v. Bevilacqua*, 42 S.W.3d 378, 383 (Ark. 2001); *Williams v. Lara*, 52 S.W.3d 171, 179 (Tex. 2001). It removes the "nexus" requirement noted above and allows any taxpaying plaintiff to allege a constitutional violation based on the plaintiff's "economic interest in having [their] taxpayer's dollars spent in a constitutional manner." *Barber v. Ritter*, 196 P.3d 238, 246 (Colo. 2008).

That is true here: Titus is a Nevada taxpayer, as are NTU's Nevada members. They allege that under S.B. 420, the Nevada government will unconstitutionally collect and spend revenue.[3]

II. Plaintiffs state a claim that S.B. 420 violates the supermajority clause.

Defendants insist that S.B. 420 did not require supermajority passage. They would limit *State v. Settlemeyer* to its facts, arguing that a supermajority vote is only required for a *new* tax, fee, or federal funding, while S.B. 420 increases revenue under *existing* taxes, fees, and federal funds. MTD at 4–6. But *Settlemeyer* expressly rejected this argument, refusing to adopt the State's contention there "that the supermajority provision only applies to bills that 'directly bring into existence' new state revenue 'in the first instance by imposing new or increased state taxes.'" 137 Nev. 231, 236, 486 P.3d 1276, 1281 (2021).

As for federal funding specifically, Defendants' argument proves plaintiffs' point. Even if the federal funds would have been used as tax credits for individual Nevadans, as a result of S.B. 420, those funds now go to *the State Treasury*, which will receive money it would not have otherwise had. Moreover, these new federal dollars will be treated the same as any other revenue the State receives. NRS 227.295(1) (controller to provide a table displaying "all revenues" from fees, fines, interest, licensing revenue, taxes, and "Transfers from the Federal Government").

Other states do limit the reach of their respective supermajority requirements to bills passing new taxes and fees. Max Minzner, *State Supermajority Requirements to Raise Taxes*, 14

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[3] Strictly speaking, NTU has representational standing through the doctrine of taxpayer standing. The requisite elements are satisfied because (1) NTU's members have individual standing to sue via taxpayer standing; (2) the interests the lawsuit seeks to protect are germane to NTU's purpose—promoting governmental accountability, efficiency, and transparency; and (3) litigating this case does not require the participation of any of NTU's members. *See NAMIC,* 139 Nev., Adv. Op. 3, 524 P.3d at 478.

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AKRON TAX J. 43, 64 (1999). Critically, however, those states' constitutions use different language. *Id.* ("[S]ome states restrict legislation that is *intended* to raise revenue," while Nevada, in contrast, "look[s] to the *effect* of the bill"). Nevada's Constitution is intentionally broad, covering any bill that "creates, generates, or increases any public revenue *in any form*[.]" NEV. CONST., Art. 4, § 18(2). Because S.B. 420 will increase Treasury funds, it is subject to the Constitution's supermajority provision. *Settlemeyer*, 137 Nev. at 237, 486 P.3d at 1281–82.

Defendants also complain that *Settlemeyer* stretches the supermajority clause too far, making it difficult to pass legislation: good legislation will grow the tax base, they say, and, in turn, revenue, rendering all legislation subject to supermajority approval. MTD at 5–6. That is not correct. To begin with, *Settlemeyer* follows the clause's plain language, which courts are not at liberty to ignore. *Id.* at 237, 486 P.3d at 1281–82 (rejecting "the State's argument" because it "would require [the Court] to read language into the provision that it does not contain").

In any case, the Nevada Supreme Court's opinions on the supermajority clause have a clear limiting principle: Does the bill collect funds to further a policy aim? *Id.* at 232, 486 P.3d at 1278 (collecting an extra dollar in DMV technology fees and repealing a payroll tax reduction). *Cf.* Minzner, *supra* at 64 ("The question in the supermajority arena is whether Congress is collecting funds to spend to further policy aims. If it is, those exactions should be subject to the requirement."). A bill that does not collect funds (for instance, one that reallocates the Treasury's use of existing funds) does not need supermajority approval. *Morency*, 137 Nev. at 629, 496 P.3d at 590 (reallocating the Treasury's use of existing funds, or shifts allotment of Treasury funds); *Guinn v. Legislature of Nev.*, 119 Nev. 460, 467, 76 P.3d 22, 26 (2003). S.B. 420 increases existing taxes and fees, collects those new funds, and directs that they be spent to promote the Public Option. It therefore falls in the former group, not the latter.

III. Plaintiffs state a claim that S.B. 420 violates the Appropriations Clause.

Defendants concede that S.B. 420 falls within the ambit of the Appropriations Clause. MTD at 7. Thus, the only question is whether the bill is consistent with it. It is true, as Defendants insist, that "the use of technical words in a statute is not necessary to create an appropriation."

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Schwartz, 132 Nev. at 753, 382 P.3d at 900. But the legislative power to appropriate "cannot be delegated nor left to the recipient to command from the state treasury sums to any unlimited amount for which he might file claims." *Davis v. Eggers*, 29 Nev. 469, 484–85, 91 P. 819, 824 (1907). An appropriation must state—*at a minimum*—"the amount of the appropriation, or the maximum sum from which the expenses could be paid[.]" *Id.*

Defendants claim that S.B. 420 is sufficient because there is (unspecified) "language in the bill" that is "at least a formula by which the [maximum withdrawal] amount can be determined." MTD at 7 (quoting *Schwartz*, 132 Nev. at 753, 382 P.3d at 900–01). *Schwartz* relied on *Norcross v. Cole*, which determined that the maximum amount of money appropriated was sufficiently defined because the agency "had the information which enabled him to tell *to a penny* the amount to be credited to the fund in question." 44 Nev. 88, 92, 189 P. 877, 878 (1920) (emphasis added). Here, in contrast, S.B. 420's Section 15(5) allows withdrawals from the Public Option Trust Account in "a portion to be determined by the State Treasurer." *See* MTD at 7 (citing Compl. ¶ 89). The bill, in other words, contains no limitations at all, much less a formula that can determine the maximum amount permitted.

S.B. 420 is unconstitutional for another, independent reason: it does not adequately identify a single purpose for the appropriation. S.B. 420 does identify an object—protecting the affordability of the Public Option—but that is far too nebulous. Will the funds be paid to hospitals to address labor shortages and incentivize computerization of records; to advocacy groups to promote policies that control drug prices and reform healthcare pricing models; to insurers to increase access to telehealth? It could be any of these; S.B. 420 gives taxpayers no information as to how the appropriation promotes S.B. 420's broadly defined "purpose." *Cf. Wangelin v. Pitcairn*, 21 N.E.2d 753, 756 (Ill. 1939) (statute setting aside funds "for drainage ways" was insufficient because "the challenged item gives the taxpayer no information as to whether the levy is to construct new drainage ways, to acquire right-of-way therefor, to widen or deepen existing canals, to maintain existing drainage ways, or to accomplish some other purpose").

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IV. Plaintiffs state a claim that S.B. 420 violates the separation-of-powers clause.

Nevada's separation-of-powers clause "prohibits each branch of government from exercising powers belonging to another . . . ." *Floyd v. State Dep't of Corr.*, 139 Nev., Adv. Op. 37, 536 P.3d 445, 446 (Nev. 2023) (citing NEV. CONST. art. 3, § 1, cl. 1). The Legislature generally "cannot delegate its lawmaking authority to . . . the executive branch." *Id.*

To be a valid delegation, the Legislature must provide "'suitable standards' to govern the manner and circumstances under which an executive agency can exercise its delegated authority." *NAMIC*, 139 Nev., Adv. Op. 3, 524 P.3d at 484. If the Legislature provides such a standard, the agency is left to merely "ascertain facts and conditions relevant to making operation of the . . . statute complete." *Floyd*, 139 Nev., Adv. Op. 37, 536 P.3d at 446, 448–49 ("suitable standards" were present because the director's "discretion in choosing the drug or combination of drugs" for lethal injection was guided by consultation with chief medical officer); *Smith v. State Bd. of Wildlife Comm'rs*, No. 77485, 2020 Nev. Unpub. LEXIS 434, at *3 (Nev. Apr. 2020) (unpublished disposition) (commissioner was provided "sufficient guidance" and only engaged in fact finding "to determine what constituted 'heavily used' or 'populated' areas"); *Sheriff v. Luqman*, 101 Nev. at 153, 697 P.2d at 110 (agency had "general and specific guidelines . . . [and] factors" sufficient "to classify drugs into various schedules according to the drug's propensity for harm and abuse").

S.B. 420 gives Defendants latitude beyond mere fact-finding. The bill gives Defendants free rein to unilaterally revise the premium level reduction targets set by the Legislature. S.B. 420, § 10(5); Compl. ¶¶ 99–100. Defendants may do so for any reason; and they already have, by issuing the two Guidance Letters. Compl. ¶ 101. Although S.B. 420 requires that premiums stay below a certain threshold rate, it contains no guidelines as to what conditions warrant such a revision or the complete boundary conditions that premiums must fall within. Without more, S.B. 420 fails "to guide the agency with respect to . . . the power authorized." *Luqman*, 101 Nev. at 153–54, 697 P.2d at 110. The public has no assurance "that the agency will neither act capriciously nor arbitrarily." *Id.* at 154, 697 P.2d at 110. Nor is this like *Floyd*, where the Director's discretion was guided by the expertise of the chief medical officer, who by statute

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"must be a licensed physician or administrative physician." *Floyd*, 536 P.3d at 448. While S.B. 420 requires "consultation with the Commissioner and the Executive Director of the Exchange," that consultation—without more guidance or standards from the Legislature—does little to combat arbitrary and capricious revisions to the premiums. *See* S.B. 420, § 10(5).

V. Plaintiffs state a claim for violation of the NAPA.

The Defendants failed to engage in administrative rulemaking under the NAPA when they issued the two Guidance Letters. Compl. ¶¶ 143–52.

The NAPA "establish[es] minimum procedural requirements governing the regulation-making process of state agencies." *Pub. Serv. Comm'n of Nev. v. Sw. Gas Corp.*, 99 Nev. 268, 275, 662 P.2d 624, 628 (1983) (quoting *Gibbens Co. v. Archie*, 92 Nev. 234, 235 548 P.2d 1366, 1367 (1976)). Defendants do not dispute that ordinarily, the two Guidance Letters would be subject to the NAPA. Instead, they cite to a provision of S.B. 420 providing that "[t]he adoption, amendment or repeal of any rule or policy governing the Public Option" is exempted from NAPA's rulemaking requirement. S.B. 420, § 20. But the question is *when* this provision becomes effective. And S.B. 420 provides that Section 20 becomes effective "[u]pon passage and approval" of the bill only "for the purposes of procurement and *any other preparatory administrative tasks* necessary to carry out the provisions of [S.B. 420]." S.B. 420, § 41(2) (emphasis added). For all other purposes, Section 20 becomes effective January 1, 2026. *Id.*

Revising premiums is not a "preparatory administrative task." Indeed, reducing premiums is the *whole point* of S.B. 420, as Defendants concede. MTD at 1 (explaining that S.B. 420 is "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") (emphasis added). The Guidance Letters aren't an "administrative task," i.e., "the execution of public affairs as distinguished from policymaking." Merriam-Webster, *administration,* https://www.merriam-webster.com/dictionary/administration. Defendants made a substantive decision to "revise" S.B. 420's premium reduction targets to a different figure.

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In a last-ditch effort, Defendants argue that the "guidance letters are not something that is redressable by the Court." MTD at 9. They are wrong. The Guidance Letters "interfere[ ] with or impair[ ], or threaten[ ] to interfere with or impair, the legal rights or privileges of the plaintiff." NRS 233B.110(1). The letters revised the premium reduction targets, Compl. ¶ 101, which relate to providers accepting lower reimbursement rates, *id.* ¶ 54.

VI. The Court should not dismiss Whitley.

Finally, Defendants insist Whitley must be dismissed because he and his department allegedly lost authority over the Public Option when the Legislature passed S.B. 494. MTD at 9–10. Not so fast.

NRS 695K.200(1) charges the "Director" with designing, establishing, and operating the Public Option. "Director" is currently defined as "the Director of the Department of Health and Human Services" ("DHHS"). NRS 695K.050; S.B. 420, § 5. But effective January 1, 2026, "Director" will mean "the Director of the Nevada Health Authority." S.B. 494, §§ 355, 372. Adding to the confusion, S.B. 494 also renamed DHHS the "Department of Human Services." S.B. 494, § 32. This change went into effect on July 1, 2025. NRS 695K.200 therefore references the "Director" of a department that has been rebranded. The Department of Human Services largely maintains the same divisions that it had as DHHS—with the exception of the Division of Health Care Financing and Policy. S.B. 494, § 32. The Legislature likely intended for the Department of Human Services to maintain involvement in the Public Option; otherwise, it would have made Section 355 of S.B. 494 effective on July 1, 2025, not January 2026.

If this Court accepts all factual allegations as true and draws inferences in Plaintiffs' favor, dismissing Whitley is inappropriate, particularly without a better understanding of his (and the Department of Human Services') current involvement in designing, establishing, and operating the Public Option. *See Buzz Stew, LLC*, 124 Nev. at 227–28, 181 P.3d at 672.

CONCLUSION

The Court should deny the Motion in its entirety.

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DATE: September 22, 2025

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CERTIFICATE OF SERVICE

I, Cathy Ryle, certify:

I am employed in the City of Reno, County of Washoe, State of Nevada by the law offices of Holland & Hart LLP. My business address is 5470 Kietzke Lane, Suite 100, Reno, Nevada 89511. I am over the age of 18 years and not a party to this action.

On September 22, 2025, I caused the foregoing **PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**, to be served by the following methods(s):

☐ U.S. Mail: A true and correct copy was placed in Holland & Hart LLP's outgoing mail in a sealed envelope addressed as follows:

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