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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. II

EXECUTIVE DEFENDANTS' MOTION TO DISMISS

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EXECUTIVE 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 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 (collectively, "Executive Defendants") move to dismiss the First Amended Complaint pursuant to Nevada Rule of Civil Procedure 12(b).

This Motion is based on the pleadings and papers on file herein.

I. INTRODUCTION

Years prior to SB 420 (2021) becoming effective, Plaintiffs National Taxpayers Union ('NTU") and Nevada State Senator Robin Titus ("Titus") (collectively "Plaintiffs") challenge the constitutionality of specific provisions of the bill, which creates a public health insurance option through federally approved transfers of existing federal health care monies. No public health insurance option yet exists for Nevada consumers and no federal monies have yet been transferred to Nevada for it. Specifically, the challenged provisions do not become effective until **January 1, 2026**, presuming Nevada's application to the federal government for a state innovation waiver is approved. *See* 2021 Nev. Stat., ch. 537, §§ 2-15, at 3616-22 (codified as the "Public Option" in NRS Chapter 695K), and § 41(2), at 3648 (setting forth the effective dates for the specific provisions of SB 420) (emphasis added).[1]

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[1] SB 420 is an Act "relating to insurance." 2021 Nev. Stat., ch. 537, at 3614. It contains the challenged provisions relating to the public health insurance option, but it also contains other unchallenged provisions relating to insurance, all of which can be given legal effect without the challenged provisions relating to the public health insurance option. Even though Plaintiffs seek an injunction prohibiting Defendants from implementing, executing, or enforcing any or all provisions of SB 420, Plaintiffs have not actually challenged the constitutionality of all provisions of the Act but have limited their claims to the challenged provisions relating to the public health insurance option. Consequently, the Court must limit its review to those challenged provisions exclusively. *See Brockett v. Spokane Arcades*, 472 U.S. 491, 502 (1985) (explaining that a court's constitutional review should not extend "further than necessary to dispose of the case before it.").

Before January 1, 2026, SB 420 is effective only for the limited purposes of procurement and any other preparatory administrative tasks necessary to carry out the public health insurance option, such as 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). Thus, as passed in 2021, SB 420 contemplates a lengthy administrative process that includes securing a state innovation waiver from the federal government. Director Whitley submitted an application for such a waiver on December 29, 2023.

In their First Amended Complaint, NTU and Titus seek a declaration that SB 420 violates various provisions of the Nevada Constitution, an injunction prohibiting Defendants from implementing, executing, or enforcing any or all of provisions of SB 420, and reasonable attorneys' fees and costs. However, for the reasons set forth below, these claims are premature, and the First Amended Complaint is undisputedly premature at best. Because Plaintiffs lack standing, their claims are not ripe, or they fail to state a claim upon which relief can be granted, the motion to dismiss should be granted.

II. ARGUMENT

A. The Court Should Dismiss the First Amended Complaint.

1. Plaintiffs Lack Standing.

NRCP 17(a) provides that "[e]very action shall be prosecuted in the name of the real party in interest." 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). As a result, "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).

Additionally, Nevada law requires the showing of an "injury-in-fact" to establish the standing necessary to seek judicial relief. *Nat'l Ass'n. of Mut. Ins. Companies v. Dep't of*

Bus. & Indus., Div. of Ins., 139 Nev. Adv. Op. 3, 524 P.3d 470, 476 (2023). A speculative injury is insufficient to establish standing. *Doe v. Bryan*, 102 Nev. 523, 525-26, 728 P.2d 443, 444-45 (1986). "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," which requires a showing "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." *Morency v. Dep't of Educ.*, 137 Nev. 622, 625, 496 P.3d 584, 588 (2021) (citations and internal quotation marks omitted).

Both NTU and Dr. Titus fail to meet the requirements for standing.

2. NTU Lacks Standing.

In Nevada, the general rule is that a party may not litigate alleged injuries of a third party. *High Noon at Arlington Ranch Homeowners Ass'n v. Eighth Jud. Dist. Ct.*, 133 Nev. 500, 507, 402 P.3d 639, 646 (2017). Recently, the Nevada Supreme Court adopted a limited exception to this general rule, holding that an organization may have standing to bring an action on behalf of its members under a theory of what is known as representational standing. *Nat'l Ass'n. of Mut. Ins. Companies*, 139 Nev. Adv. Op. 3 at ___, 524 P.3d at 478. But the first prong of the new exception requires the organization to show that "its members would otherwise have standing to sue in their own right." *Id.* And to make that showing, the Nevada Supreme Court has suggested that the organization must sufficiently identify its members. *Id.*, 139 Nev. Adv. Op. 3 at ___, 524 P.3d at 478-79. Otherwise, an organization could seek judicial relief without demonstrating the sort of interest necessary to meet Nevada's standards for standing. *Morency*, 137 Nev. at 625, 496 P.3d at 588.

Here, 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. But NTU does not allege that SB 420 will cause it any harm, dispensing with any argument that NTU has individualized standing under Nevada law.

And NTU fails to adequately allege facts that establish representational standing under *Nat'l Ass'n of Mut. Ins. Companies*. It alleges that its "forty-five **Nevada members**

and supporters will be harmed by SB 420." *Id.* (emphasis added). However, NTU 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. Instead in ¶ 17, NTU alleges that its bylaws, Sec. 3.1 provide, "Any individual or entity that provides support or assistance to NTU ***may*** be designated as a 'supporting member'..." and "NTU's forty-five **Nevada-based supporting members** include individuals and other entities who support constitutional tax limitations, individuals and other entities who support restraint in government spending, and individuals and other entities who support private sector-driven, market-based policies concerning health care and health insurance." (Emphasis added.)

In *Nat'l Ass'n of Mut. Ins. Companies*, the Nevada Supreme Court determined that the relevant organization had sufficiently identified its members by providing a list of companies that included companies that belonged to the organization. 139 Nev. Adv. Op. 3 at ___, 524 P.3d at 478. NTU makes no allegations to provide a similar way to identify its members for determining standing.

The fact that NTU does not specifically identify any members and then cites a bylaw that only says NTU may "designate" supporting members (perhaps without their direct participation) fails to demonstrate that NTU has any members in Nevada with standing. NTU only alleges that its forty-five Nevada-based supporting members (who as indicated by language like that may not even be residents of Nevada) *will* be injured.

Without making sufficient allegations for this Court to determine whether NTU's "supporting members" are persons or entities with individual standing, NTU lacks standing even under the recently adopted theory of representational standing.

3. Dr. Titus Lacks Standing.

The complaint alleges that Dr. Titus, as a practicing physician, will be personally harmed 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."[2] *FAC* ¶ 18. But Plaintiffs do not allege that Dr. Titus has suffered any injury; they only speculate that she will be harmed by the public option. *See FAC* ¶ 18. Speculative injury does not establish standing. *Doe*, 102 Nev. 525-26, 728 P.2d at 444-45.

The speculative nature of the claim is evident in the fact that Dr. Titus could plausibly benefit from participation in the public option if it results in Dr. Titus having to see fewer uninsured or underinsured patients in Lyon County. However, this scenario, like the Plaintiff's scenario of potential harm, is purely speculative in nature.

Dr. Titus may wish to allege she has standing under the public importance exception, which provides a limited exception to the injury-in-fact requirements for constitutional challenges to legislative "expenditures or appropriations." "For this exception to apply, a plaintiff must demonstrate that (1) "the case ... involve[s] an issue of significant public importance," (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," and (3) "there is no one else in a better position [than the plaintiff] who will likely bring an action and ... the plaintiff is capable of fully advocating his or her position in court."" *Morency,* 137 Nev. At 627, 496 P.3d at 589 (internal citation omitted). However, that path still leads to dismissal for two reasons. First, any constitutional challenge to SB 420 is not yet ripe. Second, even if the Court finds that Dr. Titus has standing under the public importance exception, that exception will not save the Fourth Cause of Action, which does not fit prong 2 of the test for the public importance exception. Both reasons are explained further below.

B. The Alleged Claims are not Ripe.

For the reasons set forth above, the Court should find that Plaintiffs do not have standing. However, even if the Court finds standing, three of the causes of action asserted by Plaintiffs are not ripe for determination.

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[2] The plain language of Section 14 of SB 420 belies Dr. Titus' assertion, as it prohibits Nevada public option provider reimbursements to be less than those under existing federal programs.

Although standing and ripeness resemble each other, they are different as ripeness focuses on the **timing** of the action and standing focuses on **who** is bringing the action. *See Herbst Gaming, Inc. v. Heller*, 122 Nev. 877, 887-88, 141 P.3d 1224, 1230-31 (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). And determining whether a controversy is ripe involves an assessment of "(1) the hardship to the parties of withholding judicial review, and (2) the suitability of the issues for review." *Herbst Gaming*, 122 Nev. At 888, 141 P.3d at 1231 (*quoting Matter of T.R.* 119 Nev. 646, 651, 80 P.3d 1275, 1279-80 (2003)).

Each of Plaintiffs' four causes of action articulated in the First Amended Complaint seeks declaratory relief under NRS Chapter 30. The Supreme Court of Nevada has articulated the standards for obtaining such declaratory relief:

> 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).

Here, the first three causes of action all contain 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). As indicated by the emphasized language, Plaintiffs acknowledge that they have not yet suffered any harm. They are merely asking the Court to intervene by issuing an advisory opinion on SB 420. However, that is not within the Court's purview:

> 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 N. Las Vegas v. Cluff, 85 Nev. 200, 201, 452 P.2d 461, 462 (1969).

As Plaintiffs allege, Defendant Director Whitley submitted the State's Section 1332 Waiver Application to the federal government on December 29, 2023. *See FAC* ¶ 56; 33 CFR 1332. Rightfully, Plaintiffs do not allege that a determination on the Application has been made. Plaintiffs further acknowledge that "the State's waiver application projects that the State will directly receive hundreds of millions of dollars in pass-through federal funding that the federal government would otherwise direct to offset consumers' costs to pay for health insurance." *FAC* ¶ 31. The language chosen by Plaintiffs suggesting that the application "**projects**" and that the State "**will directly receive**" are both tacit admissions that these are elements that are yet to happen or be definitively determined. And that leaves this Court in the position of issuing an improper advisory opinion on an abstract point of law, demonstrating that the first three causes of action are not ripe. Accordingly, the Court should find that the first three causes of action for declaratory relief must be dismissed as they are not ripe for judicial determination.

C. Plaintiffs' Fourth Cause of Action Fails to State a Claim.

The Fourth Cause of Action should be dismissed for lack of standing, even assuming this Court determines that Dr. Titus could satisfy the public importance exception, because it does not meet the second prong of the test for that exception for reasons stated above. Even so, the Fourth Cause of Action fails to state a claim for relief.

Pursuant to NRCP 12(b)(5), a party is permitted to make a motion to dismiss for failure to state a claim upon which relief can be granted. A motion to dismiss is properly granted based on the allegations in the complaint "only 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, with every inference drawn in favor of the nonmoving party. *See id.* When making this determination, a "court may take into account 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).

Plaintiffs' Fourth Cause of Action seeks a declaration from the Court that Defendants have violated the Nevada Administrative Procedure Act ("APA"). Specifically, 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* ¶ 109. Thus, Plaintiffs acknowledge such regulations are exempt from the APA under Section 20.

However, Plaintiffs misinterpret SB 420 by overlooking its effective-date provision in Section 41(2), which provides that the APA exemption in Section 20 became effective upon "passage and approval" for the limited 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).

Specifically, the relevant provision of the APA, NRS 233B.039(5)(l), exempting "[t]he adoption, amendment or repeal of any rule or policy governing the Public Option established pursuant to chapter 695K of NRS," was enacted in Section 20 of SB 420. *See* 2021 Nev. Stat., ch. 537, § 20, at 3631-32 (amending the Nevada Administrative Procedure Act in NRS 233B.039). Pursuant to Section 41(2) of SB 420, Section 20 became 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.

See 2021 Nev. Stat., ch. 537, § 41(2), at 3648 (setting forth the effective dates for the specific provisions of SB 420).

Plaintiffs allege that the "Guidance Letters expressly invoke the DHHS Director's authority under SB 420 to "revise" the statutory requirements noted above." *FAC* ¶ 109. *FAC* ¶ 79. However, the guidance letters are exempted by Section 20 of SB 420 as part of the preparatory administrative tasks necessary to carry out the public health insurance option, effective June 9, 2021. NRS 233B.039(5)(l).

Because the guidance letters are exempt from the APA under NRS 233B.039(5)(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 regarding 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 because of the guidance letters. Therefore, the Court should dismiss this cause of action.

III. CONCLUSION

Plaintiffs have not sufficiently alleged any facts that would give them standing. Moreover, even if they had standing, this action is premature, making any harm to Plaintiffs purely speculative. Finally, regarding the cause of action pertaining to the guidance letters, Plaintiffs have misapprehended the effective date of SB 420.

Accordingly, the Court should dismiss the First Amended Complaint.

Dated: February 23, 2024.

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AFFIRMATION
(Pursuant to NRS 239B.030)

The undersigned does hereby affirm that the foregoing document does not contain the social security number of any person.

Dated: February 23, 2024.

AARON FORD
Attorney General

By: #11543
for: Casey J. Quinn (Bar No. 11248)
Senior Deputy Attorney General

CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General, State of Nevada, and that on February 23, 2024, pursuant to NRCP 5(b) and the parties' stipulation and consent in writing to service by electronic mail, I served a true and correct copy of the foregoing document, addressed to the following:

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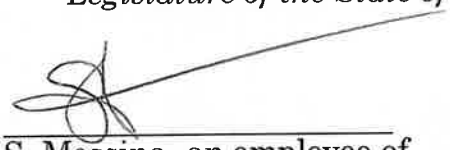

S. Messina, an employee of
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