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FIRST JUDICIAL DISTRICT COURT OF NEVADA
CARSON CITY

NATIONAL TAXPAYERS UNION, a nonprofit 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

ORIGINAL

LEGISLATURE'S MOTION TO DISMISS FIRST AMENDED COMPLAINT AND JOINDER IN STATE EXECUTIVE DEFENDANTS' MOTION TO DISMISS FIRST AMENDED COMPLAINT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

NEVADA CONSTITUTION

NEVADA REVISED STATUTES (NRS)

NEVADA BILLS

NEVADA LEGISLATIVE HEARINGS

NEVADA RULES OF CIVIL PROCEDURE (NRCP)

FIRST JUDICIAL DISTRICT COURT RULES (FJDCR)

OTHER AUTHORITIES

MOTION

Intervenor-Defendant Legislature of the State of Nevada ("Legislature"), by and through its counsel the Legal Division of the Legislative Counsel Bureau ("LCB Legal") under NRS 218F.720, hereby submits its Motion to Dismiss First Amended Complaint and Joinder in State Executive Defendants' Motion to Dismiss First Amended Complaint. The Legislature's motion and joinder are made under NRCP 12 and FJDCR 3.7 and are based upon the attached Memorandum of Points and Authorities, all pleadings, documents and exhibits on file in this case and any oral arguments this Court may allow at any hearing on the motion and joinder.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction.

This case was brought by the following Plaintiffs. The first Plaintiff is National Taxpayers Union ("NTU"), which alleges that it is: (1) "a public interest, nonprofit, nonpartisan corporation" organized under the laws of Delaware and section 501(c)(4) of the Internal Revenue Code and authorized to do business in Nevada; and (2) acting in its representative capacity on behalf of its forty-five Nevada members and supporters. (First Am. Compl. ¶ 6) The second Plaintiff is Dr. Robin L. Titus, M.D. ("Dr. Titus"), acting in her individual and professional capacity as "a Nevada resident, a licensed and practicing physician, and an elected member of Nevada's citizen legislature."[1] (First Am. Compl. ¶ 7)

[1] When individual legislators become plaintiffs in lawsuits challenging the constitutionality of legislation, they are not acting "as duly authorized constituent members of the Legislature acting on the Legislature's behalf." State ex rel. Cannizzaro v. First Jud. Dist. Ct., 136 Nev. 315, 318 (2020). In such lawsuits, LCB Legal has the statutory authority under NRS 218F.720 to provide legal representation to the Legislature in order to "defend against claims challenging the constitutionality of legislation and to protect the institutional interests of its organizational client, the Legislature." Id. at 320. Under such circumstances, "defending a bill's constitutionality is a public, nonpartisan function." Id. at 320-21.

In their first amended complaint, Plaintiffs name the following State Executive Defendants acting in their official capacities: (1) Joseph Lombardo, in his official capacity as Governor of the State of Nevada; (2) Zach Conine, in his official capacity as Nevada State Treasurer; (3) Richard Whitley, in his official capacity as Director of the Nevada Department of Health and Human Services; (4) Scott J. Kipper, in his official capacity as the Nevada Commissioner of Insurance; and (5) Russell Cook, in his official capacity as Executive Director of the Silver State Health Insurance Exchange. However, Plaintiffs do not name the State of Nevada as a Defendant. Pursuant to a stipulation and order approved by the Court, the Legislature was granted intervention in this action under NRCP 24 and NRS 218F.720 as an Intervenor-Defendant. As a result, "the Legislature has all the rights of a party." NRS 218F.720(3).

The claims in Plaintiffs' first amended complaint involve a premature state constitutional challenge to the facial validity of specific provisions of Senate Bill No. 420 of the 2021 regular session ("SB 420"). The challenged provisions provide for the **eventual** 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)).

As set forth in its title, SB 420 is an Act "relating to insurance." SB 420, 2021 Nev. Stat., ch. 537, at 3614. It contains the challenged Public Option provisions, but it also contains other unchallenged provisions relating to insurance, all of which can be given legal effect without the challenged Public Option provisions. Even though Plaintiffs seek an injunction prohibiting the State Executive Defendants from implementing, executing, or enforcing any or all provisions of SB 420, Plaintiffs have not actually challenged the constitutionality of all provisions of SB 420 but have limited their claims to the challenged Public Option provisions. Consequently, the Court must limit its review to those challenged Public Option 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.").

Even though the Public Option provisions—codified in NRS Chapter 695K—were enacted during the 2021 regular session, they do not become effective and operative until **January 1, 2026**. 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). The reason that the Legislature selected the later operative date of January 1, 2026, was to ensure that it would have the opportunity to review and revisit the Public Option provisions during the 2023 and 2025 regular sessions. Hearing on SB 420 before Assembly Comm. on Ways and Means, at 19, 25-26 & 40, 81st Leg. (Nev. May 28, 2021) (statements of Senator Nicole Cannizzaro). As emphasized by Senator Cannizzaro in her testimony as the primary sponsor of SB 420, "I would note that there are two legislative sessions built into the timeline. . . . I think there are opportunities to make improvements if we need to." Id. at 25-26.

To ensure that the Legislature was provided with necessary information to review and revisit the Public Option provisions during the 2023 and 2025 regular sessions, the Legislature made certain provisions of SB 420 effective upon passage and approval (June 9, 2021) for the limited purposes of procurement and any other preparatory administrative tasks necessary to carry out the Public Option provisions, including the State Executive Defendants' adoption, amendment, or repeal of any rule or policy governing the Public Option plan. SB 420, 2021 Nev. Stat., ch. 537, § 20, at 3631-32 (amending the Administrative Procedure Act in NRS 233B.039), and § 41(2), at 3648 (setting forth the effective dates for the specific provisions of SB 420). As noted by Senator Cannizzaro in her testimony as the primary sponsor of SB 420:

> Our goal is to build in that lead time so there is enough space for DHHS in consultation to provide for that procurement—also, time for us to get the data in the interim through actuarial studies to ensure we are putting it in a good spot. By building in that time and allowing this to become a plan year effective in 2026, it allows the flexibility that is needed.

Hearing on SB 420 before Senate Comm. on Health and Human Servs., at 8-9, 81st Leg. (Nev. May 4, 2021).

Finally, in sections 11 and 39 of SB 420, the Legislature required the Director of the Department of Health and Human Services, the Commissioner of Insurance and the Executive Director of the Silver State Health Insurance Exchange to contract with an independent actuary to conduct an actuarial assessment of the impact that the Public Option provisions may have on the markets for health care and health insurance in this state and health coverage for natural persons, families and small businesses. SB 420, 2021 Nev. Stat., ch. 537, § 11(2), at 3618, and § 39(2), at 3647. The actuarial assessment must include an analysis of the likely effect on premiums for health insurance in this state if the Legislature were to **repeal** the Public Option provisions that require certain providers of health care to participate in the Public Option plan. Id. As explained by Senator Cannizzaro in her testimony as the primary sponsor of SB 420, "[t]he actuarial analysis will provide us with some data—if we need to make adjustments . . . then we can make those adjustments. This body is smart enough to be able to do that with two intervening legislative sessions and being able to take a look at it." Hearing on SB 420 before Assembly Comm. on Ways and Means, supra, at 40.

Despite the fact that the Public Option provisions do not become effective and operative until **January 1, 2026**, and despite the fact that the Legislature clearly intended to review and revisit the Public Option provisions during the 2023 and 2025 regular sessions, Plaintiffs nevertheless commenced this premature state constitutional challenge to the facial validity of the Public Option provisions. Given the premature posture of this case, Plaintiffs' claims must be dismissed, as a matter of law, for the following reasons.

First, Plaintiffs' state constitutional claims and statutory claims under the APA must be dismissed, as a matter of law, for lack of subject-matter jurisdiction because Plaintiffs failed to

comply with NRS Chapter 41's requirements for waiver of sovereign immunity given that they did not bring this lawsuit "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).

Second, Plaintiffs' state constitutional claims must be dismissed, as a matter of law, for lack of subject-matter jurisdiction because Plaintiffs failed to meet their burden to establish the increased jurisdictional standing and ripeness requirements for bringing such claims.

Third, Plaintiffs' statutory claims under the APA must be dismissed, as a matter of law, for failure to state a claim upon which relief can be granted because the State Executive Defendants are exempt from the APA for the adoption, amendment or repeal of any rule or policy governing the Public Option.

II. Standards of review.

A. Standards for reviewing motions to dismiss complaint under NRCP 12(b)(1) and NRCP 12(h)(3) for lack of subject-matter jurisdiction.

Under NRCP 12(b)(1), the Legislature is entitled to file a motion to dismiss Plaintiffs' first amended complaint based on "lack of subject-matter jurisdiction." Further, under NRCP 12(h)(3), "[i]f the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." Therefore, in deciding a motion to dismiss under NRCP 12(b)(1) and NRCP 12(h)(3), the Court must dismiss Plaintiffs' first amended complaint if the lack of subject-matter jurisdiction is apparent on the face of the complaint. Craig v. Donnelly, 135 Nev. 37, 39 (Nev. Ct. App. 2019).

In this case, in order to invoke the Court's subject-matter jurisdiction, Plaintiffs have the burden to establish that they complied with NRS Chapter 41's requirements for waiver of sovereign immunity. Craig, 135 Nev. at 39-40. In addition, Plaintiffs also have the burden to

establish jurisdictional standing and ripeness in order to invoke the Court's subject-matter jurisdiction. Doe v. Bryan, 102 Nev. 523, 524-26 (1986); Heller v. Legislature, 120 Nev. 456, 460-63 (2004). Because Plaintiffs failed to meet their burden regarding these matters, the Court must dismiss Plaintiffs' first amended complaint, as a matter of law, for lack of subject-matter jurisdiction.

B. Standards for reviewing motions to dismiss complaint under NRCP 12(b)(5) for failure to state a claim upon which relief can be granted.

Under NRCP 12(b)(5), the Legislature is entitled to file a motion to dismiss Plaintiffs' first amended complaint based on "failure to state a claim upon which relief can be granted." In deciding a motion to dismiss under NRCP 12(b)(5), the Court must dismiss Plaintiffs' first amended complaint if, after viewing all factual allegations in the complaint as true and drawing all inferences in Plaintiffs' favor, it appears beyond a doubt that Plaintiffs could prove no set of facts which would entitle them to relief based on the claims pled in the complaint. Buzz Stew v. City of N. Las Vegas, 124 Nev. 224, 228 (2008). Under that standard, the Court must dismiss Plaintiffs' first amended complaint if it fails to state a claim upon which relief can be granted because the claims pled in the complaint are barred by affirmative defenses as a matter of law. Hampe v. Foote, 118 Nev. 405, 408-09 (2002), *overruled in part on other grounds by* Buzz Stew, 124 Nev. at 228 n.6; Kellar v. Snowden, 87 Nev. 488, 491-92 (1971). An affirmative defense is a legal argument or assertion of fact that, if true, prohibits prosecution of Plaintiffs' claims even if all factual allegations in the first amended complaint are true. Douglas Disposal v. Wee Haul, 123 Nev. 552, 557-58 (2007); Clark County Sch. Dist. v. Richardson Constr., 123 Nev. 382, 392-93 (2007). Because Plaintiffs' claims are barred by affirmative defenses as a matter of law, the Court must dismiss Plaintiffs' first amended complaint, as a matter of law, for failure to state a claim upon which relief can be granted.

C. Standards for considering materials outside the pleadings in deciding motions to dismiss.

In deciding motions to dismiss, the Court generally may not consider materials outside the pleadings. Breliant v. Preferred Equities Corp., 109 Nev. 842, 847 (1993). However, this rule is not absolute, and the Court has the authority to consider materials outside the pleadings that are properly subject to judicial notice, such as matters of public record. Id.; Martinez v. Johnson, 61 Nev. 125, 129 (1941) (noting that courts are bound to take judicial notice of a statute, even if the statute is not pleaded by the parties); Fierle v. Perez, 125 Nev. 728, 737-38 n.6 (2009) (noting that courts generally "take judicial notice of legislative histories, which are public records."). Therefore, in deciding a motion to dismiss, the Court may take judicial notice of public records without converting the motion to dismiss into a motion for summary judgment. Nevada v. Burford, 708 F. Supp. 289, 292 (D. Nev. 1989).

D. Standards for dismissing complaint without leave to amend.

As a general rule under NRCP 15(a)(2), leave to amend the complaint should be "freely given when justice so requires." Halcrow, Inc. v. Dist. Ct., 129 Nev. 394, 398 (2013). However, leave to amend the complaint should not be granted if the proposed amendments would be futile. Id. The proposed amendments would be futile when the complaint would fail to state a claim for relief as a matter of law even after the proposed amendments. Id. at 398-402 (holding that the district court should have denied leave to amend where the proposed amendments were futile because the amended complaint failed to state a claim for relief as a matter of law).

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III. Plaintiffs' state constitutional claims and statutory claims under the APA must be dismissed, as a matter of law, for lack of subject-matter jurisdiction because Plaintiffs failed to comply with NRS Chapter 41's requirements for waiver of sovereign immunity given that they did not bring this lawsuit "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."

Under the Nevada Constitution, sovereign immunity can be waived only by the Legislature through statutory waiver. Nev. Const. art. 4, § 22; Hardgrave v. State ex rel. Hwy. Dep't, 80 Nev. 74, 76-78 (1964). Consequently, "[i]t is not within the power of the courts . . . to strip the sovereign of its armour." Taylor v. State, 73 Nev. 151, 153 (1957). Instead, the terms of the statutory waiver "define that court's jurisdiction to entertain the suit." U.S. Dep't of Treasury v. Hood, 101 Nev. 201, 204 (1985). Thus, when a plaintiff files a lawsuit but fails to comply with the statutory waiver of sovereign immunity, the courts lack subject-matter jurisdiction to entertain the lawsuit. Craig v. Donnelly, 135 Nev. 37, 39-40 (Nev. Ct. App. 2019); Wayment v. Holmes, 112 Nev. 232, 237-38 (1996).

In this case, Plaintiffs brought their claims for declaratory and injunctive relief under the Uniform Declaratory Judgments Act and the Administrative Procedure Act. NRS 30.040; NRS 233B.110. However, the Court lacks subject-matter jurisdiction over Plaintiffs' claims because they failed to comply with NRS Chapter 41's requirements for waiver of sovereign immunity given that they did not bring this lawsuit "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).

The Nevada Supreme Court has confirmed that NRS Chapter 41's requirements apply to all causes of action, including tort actions and **non-tort actions**, which would encompass Plaintiffs' action for declaratory and injunctive relief under the Uniform Declaratory Judgments Act and the Administrative Procedure Act. See Echeverria v. State, 137 Nev. 486, 490-93 (2021).

Additionally, in states like Nevada which have enacted the Uniform Declaratory Judgments Act, courts have held that the Uniform Act does not waive the state's sovereign immunity and that a plaintiff seeking declaratory and injunctive relief in an action against the state or its public officers or employees must first find statutory authorization for such an action in the statutes governing the state's waiver of sovereign immunity. JHK, Inc. v. Neb. Dep't of Banking & Fin., 757 N.W.2d 515, 522 (Neb. Ct. App. 2008); see also Nat'l Ass'n of Mut. Ins. Cos. v. Dep't of Bus. & Indus., 139 Nev. Adv. Op. 3, 524 P.3d 470, 477 (2023) (relying on cases from other Uniform Act jurisdictions and explaining that "Nevada's Uniform Declaratory Judgments Act does not . . . grant jurisdiction to the court when it would not otherwise exist." (internal quotations omitted)).

Under Nevada's statutory waiver of sovereign immunity, the courts cannot exercise subject-matter jurisdiction when the plaintiff brings the lawsuit solely against the public officers or employees arising from the performance of public duties in their official capacities; instead, the plaintiff must also bring the lawsuit "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); Craig, 135 Nev. at 39-40. The reason for this rule is that when the plaintiff brings the lawsuit against such public officers or employees arising from the performance of public duties in their official capacities, the lawsuit is effectively against the state.

In this case, because Plaintiffs brought this lawsuit against the State Executive Defendants arising from the performance of public duties under SB 420 in their official capacities as public officers or employees—and because they perform such public duties only on behalf of the state—this lawsuit is effectively against the state. Craig, 135 Nev. at 39-40. Consequently, the Court lacks subject-matter jurisdiction over Plaintiffs' state constitutional claims and statutory claims under the APA because Plaintiffs failed to comply with NRS Chapter 41's requirements for

waiver of sovereign immunity given that they did not bring this lawsuit "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).

IV. Plaintiffs' state constitutional claims must be dismissed, as a matter of law, for lack of subject-matter jurisdiction because Plaintiffs failed to meet their burden to establish the increased jurisdictional standing and ripeness requirements for bringing such claims.

A. Nevada's state courts must apply increased jurisdictional standing and ripeness requirements for state constitutional claims.

Because the Nevada Constitution does not include the "case or controversy" requirement set forth in Article III of the United States Constitution, Nevada's state courts are not strictly bound by federal constitutional standing requirements. Nat'l Ass'n of Mut. Ins. Cos. v. State, Dep't of Bus. & Indus., 139 Nev. Adv. Op. 3, 524 P.3d 470, 476 (2023). Nevertheless, because "the Nevada Constitution includes a robust separation of powers clause that the United States Constitution does not," the Nevada Supreme Court has determined that "[b]oth as a prudential matter, and because of the justiciability requirements the separation-of-powers doctrine imposes on the Nevada judiciary, [Nevada's] caselaw generally requires the same showing of injury-in-fact, redressability, and causation that federal cases require for Article III standing." Id. (citations omitted). As a result, in cases for declaratory relief or where constitutional matters arise, the Nevada Supreme Court "has required plaintiffs to meet increased jurisdictional standing requirements." Stockmeier v. State, Dep't of Corrections, 122 Nev. 385, 393 (2006), *overruled in part on other grounds by* State ex rel. Bd. of Parole Comm'rs v. Morrow, 127 Nev. 265 (2011). The reason that the judiciary requires increased jurisdictional standing requirements in constitutional challenges to legislation is that the doctrine of standing, "which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches." Clapper v. Amnesty Int'l USA, 568 U.S. 398, 408 (2013).

Therefore, when plaintiffs file a complaint for declaratory, injunctive or writ relief raising constitutional challenges to legislation, Nevada's state courts may not exercise subject-matter jurisdiction over plaintiffs' constitutional claims unless they have standing to bring the claims and the claims are ripe for adjudication. Doe v. Bryan, 102 Nev. 523, 524-26 (1986); Heller v. Legislature, 120 Nev. 456, 460-63 (2004). Consequently, "[b]ecause standing and ripeness pertain to [the] courts' subject matter jurisdiction, they are properly raised in a Rule 12(b)(1) motion to dismiss." Chandler v. State Farm Mut. Auto. Ins. Co., 598 F.3d 1115, 1122 (9th Cir. 2010).

For purposes of deciding such motions to dismiss, standing and ripeness present questions of law. San Diego Cnty. Gun Rights Comm. v. Reno, 98 F.3d 1121, 1124 (9th Cir. 1996). Because standing and ripeness are essential to subject-matter jurisdiction, plaintiffs bear the burden of proving the increased jurisdictional standing and ripeness requirements in order to defeat such motions to dismiss. Castillo v. United Fed. Credit Union, 134 Nev. 13, 15 (2018) ("The plaintiff has the burden of proving subject matter jurisdiction."); Susan B. Anthony List v. Driehaus, 573 U.S. 149, 158 (2014) ("The party invoking [subject-matter] jurisdiction bears the burden of establishing standing." (internal citations and quotation marks omitted)).

Furthermore, when plaintiffs bring claims for declaratory relief under the Uniform Declaratory Judgments Act challenging the constitutionality of legislation, plaintiffs are not entitled to statutory standing under the Uniform Act but must meet the increased jurisdictional standing and ripeness requirements for such constitutional challenges and "must still demonstrate that they suffered actual personal injury." Morency v. State, Dep't of Educ., 137 Nev. 622, 626 n.5 (2021). As explained by the Nevada Supreme Court:

> Nevada's Uniform Declaratory Judgments Act does not . . . grant jurisdiction to the court when it would not otherwise exist, it merely authorizes a new form of relief, which in some cases will provide a fuller and more adequate remedy than that which existed under common law. Declaratory relief actions under NRS 30.040 require a plaintiff to demonstrate a legally protectible interest or injury-in-fact.

Nat'l Ass'n of Mut. Ins. Cos., 139 Nev. Adv. Op. 3, 524 P.3d at 477 (internal citations and quotation marks omitted). Therefore, when plaintiffs fail to meet their burden to establish the increased jurisdictional standing and ripeness requirements in order to bring declaratory relief claims challenging the constitutionality of legislation, courts must dismiss those claims, as a matter of law, for lack of subject-matter jurisdiction. NRCP 12(h)(3); Doe, 102 Nev. at 524-26.

Generally speaking, standing is the legal right to set judicial machinery in motion, and ripeness ensures that "litigated matters must present an existing controversy, not merely the prospect of a future problem." Heller, 120 Nev. at 460 & 463 n.16 (quoting Resnick v. Nev. Gaming Comm'n, 104 Nev. 60, 66 (1988) (internal quotation marks omitted)). The doctrines of standing and ripeness are closely related, and both doctrines may stand as impediments to a justiciable controversy. Herbst Gaming, Inc. v. Heller, 122 Nev. 877, 887 (2006); In re T.R., 119 Nev. 646, 651-52 (2003). As explained by the Ninth Circuit:

> Two components of [the jurisdictional] requirement are standing and ripeness. These concepts are closely related. To have standing, a plaintiff must have suffered an injury in fact that is concrete and particularized; that can be fairly traced to the defendant's action; and that can be redressed by a favorable decision of the court. While standing is primarily concerned with *who* is a proper party to litigate a particular matter, ripeness addresses *when* litigation may occur. [I]n many cases, ripeness coincides squarely with standing's injury in fact prong. The ripeness inquiry in some cases may therefore be characterized as standing on a timeline.
>
> For example, [a] claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all. That is so because, if the contingent events do not occur, the plaintiff likely will not have suffered an injury that is concrete and particularized enough to establish the first element of standing. In this way, ripeness and standing are intertwined.

Bova v. City of Medford, 564 F.3d 1093, 1095-96 (9th Cir. 2009) (internal citations and quotation marks omitted).

Thus, a claim is ripe for adjudication only if it presents an existing controversy, not merely the prospect of a future problem. Resnick v. Nev. Gaming Comm'n, 104 Nev. 60, 65-66 (1988).

If the claim depends on an outcome that may or may not occur, it is not ripe for adjudication. Id. As a result, "[w]hen the rights of the plaintiff are contingent on the happening of some event which cannot be forecast and which may never take place, a court cannot provide declaratory relief." Knittle v. Progressive Cas. Ins. Co., 112 Nev. 8, 10-11 (1996) (quoting Farmers Ins. Exch. v. Dist. Court, 862 P.2d 944, 948 (Colo. 1993)). Simply put, judicial relief is unavailable when "the damage is merely apprehended or feared." Doe, 102 Nev. at 525.

For example, in Herbst Gaming, the Nevada Supreme Court held that a preelection challenge regarding the substantive constitutionality of a ballot initiative was not ripe for judicial review because if the voters did not approve the initiative, there would be no need for judicial review and the court's intervention before the election would be premature and potentially unnecessary. 122 Nev. at 887-88. The court explained:

> A primary focus in such cases has been the degree to which the harm alleged by the party seeking review is sufficiently concrete, rather than remote or hypothetical, to yield a justiciable controversy. Alleged harm that is speculative or hypothetical is insufficient: an existing controversy must be present. While harm need not already have been suffered, it must be probable for the issue to be ripe for judicial review.

Id. at 887.

By requiring an actual justiciable controversy, the doctrines of standing and ripeness facilitate the separation of powers by preventing courts from having to decide constitutional questions unnecessarily and ensuring that courts exercise their awesome power to review and potentially invalidate legislation approved by the legislative and executive branches through the democratic processes only when clearly necessary to remedy sufficiently concrete harm to constitutional rights. Summers v. Earth Island Inst., 555 U.S. 488, 492-93 (2009). Thus, the doctrines guarantee that "there is a real need to exercise the power of judicial review in order to protect the interests of the complaining party." Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 221 (1974). Where that need does not exist, allowing courts to oversee legislative

and executive action without an actual justiciable controversy would undermine the separation of powers and would significantly alter the allocation of power in favor of the judiciary and away from a democratic form of government. Summers, 555 U.S. at 492-93. Thus, in the absence of standing and ripeness, "courts have no charter to review and revise legislative and executive action." Id. at 492.

B. Plaintiffs failed to meet their burden to establish jurisdictional standing and ripeness for their state constitutional claims.

It is well established that "[t]he existence of a law, and the time when it shall take effect, are two separate and distinct things. The law exists from the date of approval, but its operation [may be] postponed to a future day." People ex rel. Graham v. Inglis, 43 N.E. 1103, 1104 (Ill. 1896). Thus, because the Legislature has the power to postpone the operation of a statute until a later time, it may enact a statute that has both an effective date and a later operative date. 82 C.J.S. Statutes § 531 (Westlaw Aug. 2023 Update) (Statutory effective and operative dates distinguished). Under such circumstances, the effective date is the date upon which the statute becomes an existing law, but the later operative date is the date upon which the requirements of the statute will actually become legally binding. 82 C.J.S. Statutes § 531; Preston v. State Bd. of Equal., 19 P.3d 1148, 1167 (Cal. 2001). When a statute has both an effective date and a later operative date, the statute must be understood as speaking from its later operative date when it actually becomes legally binding and not from its earlier effective date when it becomes an existing law but does not have any legally binding requirements yet. 82 C.J.S. Statutes § 531; Longview Co. v. Lynn, 108 P.2d 365, 373 (Wash. 1940). Consequently, until the statute reaches its later operative date, the statute is not legally operative and binding yet, and the statute does not confer any presently existing and enforceable legal rights or benefits under its provisions. 82 C.J.S. Statutes § 531; Levinson v. City of Kan. City, 43 S.W.3d 312, 316-18 (Mo. Ct. App. 2001).

Thus, even though the Public Option provisions were enacted during the 2021 regular session, they do not become effective and operative until **January 1, 2026**, which means that they are not legally operative and binding on Plaintiffs yet and they do not confer any presently existing and enforceable legal rights or benefits under their provisions. The reason that the Legislature selected the later operative date of January 1, 2026, was to ensure that it would have the opportunity to review and revisit the Public Option provisions during the 2023 and 2025 regular sessions. Hearing on SB 420 before Assembly Comm. on Ways and Means, at 19, 25-26 & 40, 81st Leg. (Nev. May 28, 2021) (statements of Senator Nicole Cannizzaro).

During the 2021 regular session, Senator Cannizzaro, the primary sponsor of SB 420, testified at a hearing on the bill before the Senate Committee on Health and Human Services. At the hearing, Senator Cannizzaro highlighted the Public Option's January 1, 2026, effective date and explained that the delayed effective date would provide the State with ample time to study and implement the components of the Public Option and determine whether legislative changes were necessary during the 2023 and 2025 regular sessions:

> **Senator Cannizzaro:** We have not seen other states that have implemented this type of model. One of the important key aspects about this bill is there is built-in time to allow DHHS to help implement the Public Option. There is also time to consult with the Exchange and insurance commissioner to ensure we are getting those price points correct and making the right decisions on how this would be implemented. Additionally, we are going to take time to look at the data and make sure what we are doing does not inadvertently price out other providers or result in a loss of providers. The goal is to ensure there are individuals who would be accepting the Public Option and create a network of providers.
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> **Chair Ratti:** Please walk me through the timeline. I want to make sure it is clear on the public record that this is not effective July 1 [2021], for people would think they have access to insurance in the next year.
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> **Senator Cannizzaro:** In the proposed conceptual amendment, Exhibit C, on page 2, item 9, we revised it to be available for the coverage year beginning January 1, 2026 to allow for alignment of procurement. This is not something that would be

> implemented July 1 [2021]. Our goal is to build in that lead time so there is enough space for DHHS in consultation to provide for that procurement—also, time for us to get the data in the interim through actuarial studies to ensure we are putting it in a good spot. By building in that time and allowing this to become a plan year effective in 2026, it allows the flexibility that is needed. It is also encouraging creativity on our part, as a State, to come up with a way in which to implement this, resulting in savings to Nevadans.
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> * * *
>
> **Senator Cannizzaro:** This bill, in contrast with bills in other states, provides for lead time for DHHS to put together a program that will work, and it provides the time to study the possibilities in the interim and provides a procurement period that would take into consideration all of those points that have been made.

Hearing on SB 420 before Senate Comm. on Health and Human Servs., at 8-9, 81st Leg. (Nev. May 4, 2021).

After SB 420 was passed by the Senate, the bill was considered in a hearing before the Assembly Committee on Ways and Means. At the hearing, Senator Cannizzaro explained that "the Public Option pieces would allow for procurement in 2025, with the first plan year being in 2026. I also think that is an important note because it does provide time for us to ensure that what we are implementing makes sense." Hearing on SB 420 before Assembly Comm. on Ways and Means, at 19, 81st Leg. (Nev. May 28, 2021). Later in that testimony, Senator Cannizzaro reiterated that "[t]he Public Option has a procurement year of 2025, with implementation for the first plan in 2026, which allows us time to get this set up." Id. at 21. Finally, Senator Cannizzaro emphasized that the Legislature would have the opportunity to review and reconsider the Public Option during the 2023 and 2025 regular sessions:

> **Senator Cannizzaro:** * * * Additionally, I would note that there are two legislative sessions built into the timeline. I do not think anyone in this building is ever coming in and saying I would love to implement a horrible piece of legislation that is going to do no good for Nevadans. I think there are opportunities to make improvements if we need to. The whole purpose of this is to start getting it set up so that we can be ready for procurement and make adjustments, and we will have data to help back that up.

* * *

> First, we cannot ignore the fact that we are going to do an actuarial analysis that is required as part of the waivers we are seeking to get. The actuarial analysis will provide us with some data—if we need to make adjustments such that this was not going to get at those individuals who we are attempting to get and those small groups, then we can make those adjustments. This body is smart enough to be able to do that with two intervening legislative sessions and being able to take a look at it.

Id. at 25-26 & 40.

Finally, in sections 11 and 39 of SB 420, the Legislature required the Director of the Department of Health and Human Services, the Commissioner of Insurance and the Executive Director of the Silver State Health Insurance Exchange to contract with an independent actuary to conduct an actuarial assessment of the impact that the Public Option provisions may have on the markets for health care and health insurance in this state and health coverage for natural persons, families and small businesses. SB 420, 2021 Nev. Stat., ch. 537, § 11(2), at 3618, and § 39(2), at 3647. The actuarial assessment must include an analysis of the likely effect on premiums for health insurance in this state if the Legislature were to **repeal** the Public Option provisions that require certain providers of health care to participate in the Public Option plan. Id. As explained by Senator Cannizzaro in her testimony as the primary sponsor of SB 420, "[t]he actuarial analysis will provide us with some data—if we need to make adjustments . . . then we can make those adjustments. This body is smart enough to be able to do that with two intervening legislative sessions and being able to take a look at it." Hearing on SB 420 before Assembly Comm. on Ways and Means, supra, at 40.

Despite the fact that the Public Option provisions do not become effective and operative until **January 1, 2026**, and despite the fact that the Legislature clearly intended to review and revisit the Public Option provisions during the 2023 and 2025 regular sessions, Plaintiffs nevertheless commenced this premature state constitutional challenge to the facial validity of the

Public Option provisions. Given the premature posture of this case, Plaintiffs failed to meet their burden to establish jurisdictional standing and ripeness for their state constitutional claims.

Accordingly, Plaintiffs' state constitutional claims must be dismissed, as a matter of law, for lack of subject-matter jurisdiction because Plaintiffs failed to meet their burden to establish the increased jurisdictional standing and ripeness requirements for bringing such claims. As a result, the Court should dismiss those claims in the first amended complaint without leave to amend.

V. Plaintiffs' statutory claims under the APA must be dismissed, as a matter of law, for failure to state a claim upon which relief can be granted because the State Executive Defendants are exempt from the APA for the adoption, amendment or repeal of any rule or policy governing the Public Option.

In section 20 of SB 420, the Legislature amended the APA to create an exception from the APA's regulation-making requirements with regard to "***[t]he adoption, amendment or repeal of any rule or policy governing the Public Option established pursuant to the chapter created by sections 2 to 15, inclusive, of this act.***" SB 420, 2021 Nev. Stat., ch. 537, § 20, at 3631-32 (codified in NRS 233B.039(5)(l)). In section 41(2) of SB 420, the Legislature provided in the effective-date provision of the bill that section 20 becomes effective:

> (a) Upon passage and approval [June 9, 2021] for the purposes of procurement and any other preparatory administrative tasks necessary to carry out the provisions of those sections [governing the Public Option]; and
> (b) On January 1, 2026, for all other purposes.

SB 420, 2021 Nev. Stat., ch. 537, § 41(2), at 3648.

The reason that the Legislature authorized the State Executive Defendants to undertake all preparatory administrative tasks necessary to carry out the Public Option beginning upon passage and approval of SB 420 was to ensure that the Legislature was provided with necessary information to review and revisit the Public Option provisions during the 2023 and 2025 regular sessions. As explained by Senator Cannizzaro in her testimony as the primary sponsor of SB 420:

> Our goal is to build in that lead time so there is enough space for DHHS in consultation to provide for that procurement—also, time for us to get the data in the interim through actuarial studies to ensure we are putting it in a good spot. By building in that time and allowing this to become a plan year effective in 2026, it allows the flexibility that is needed.
>
> This bill, in contrast with bills in other states, provides for lead time for DHHS to put together a program that will work, and it provides the time to study the possibilities in the interim and provides a procurement period that would take into consideration all of those points that have been made.

Hearing on SB 420 before Senate Comm. on Health and Human Servs., at 8-9, 81st Leg. (Nev. May 4, 2021).

Accordingly, based on SB 420's legislative history, the Legislature clearly intended for the State Executive Defendants to undertake all preparatory administrative tasks necessary to carry out the Public Option beginning upon passage and approval of SB 420. By enacting section 20 of SB 420, the Legislature also clearly intended to exempt the adoption, amendment or repeal of any rule or policy governing the Public Option from the APA's regulation-making requirements in order to facilitate the expedited and flexible treatment of such rules and policies without being hindered by the more time-consuming and rigid requirements of the APA. Thus, by reading section 20's APA exemption in conjunction with and in harmony with section 41(2)'s effective-date provision, the Legislature clearly intended for the State Executive Defendants' adoption, amendment or repeal of any rule or policy governing the Public Option to be exempt from the APA's regulation-making requirements—beginning upon passage and approval of SB 420—because the expedited and flexible adoption, amendment or repeal of such rules or policies is essential for "DHHS to put together a program that will work, and it provides the time to study the possibilities in the interim and provides a procurement period that would take into consideration all of those points that have been made." Hearing on SB 420 before Senate Comm. on Health and Human Servs., supra, at 8-9.

Consequently, Plaintiffs' statutory claims under the APA must be dismissed, as a matter of law, for failure to state a claim upon which relief can be granted because the State Executive Defendants are exempt from the APA with regard to the adoption, amendment or repeal of any rule or policy governing the Public Option. As a result, the Court should dismiss those claims in the first amended complaint without leave to amend.

VI. Conclusion and requested relief.

Based upon the foregoing, the Legislature requests that the Court enter an order which: (1) grants the Legislature's motion to dismiss Plaintiffs' first amended complaint without leave to amend; (2) grants the State Executive Defendants' motion to dismiss Plaintiffs' first amended complaint without leave to amend; and (3) grants a final judgment in favor of all Defendants on all claims and prayers for relief directly or indirectly pled in Plaintiffs' first amended complaint.

DATED: This **23rd** day of February, 2024.

By: 

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Nevada Legislative Counsel Bureau, Legal Division, and that on the **23rd** day of February, 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 Legislature's Motion to Dismiss First Amended Complaint and Joinder in State Executive Defendants' Motion to Dismiss First Amended Complaint, by electronic mail, directed to the following:

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