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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.

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; RUSSELL COOK, in his official capacity as Executive Director of the Silver State Health Insurance Exchange; and LEGISLATURE OF THE STATE OF NEVADA,

Defendants.

Case No. 24-OC-00001-1B

Dept. No. 2

PLAINTIFFS' RESPONSE TO THE EXECUTIVE DEFENDANTS' MOTION TO DISMISS

Plaintiffs National Taxpayers Union ("NTU") and Robin L. Titus, MD submit this response to Defendants Joseph Lombardo, Zach Conine, Richard Whitley, Scott J. Kipper, and Russell Cook's (collectively, "Executive Defendants") February 23, 2024 Motion to Dismiss ("Motion"). The opposition is based on this Memorandum of Points & Authorities, the papers and pleadings on file, and any additional information this Court considers.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

In this lawsuit, Plaintiffs NTU and Robin Titus bring a legal challenge to SB 420 (81st Leg., Nev. 2021), which provides for the creation of a public health benefit plan in Nevada—the "Public Option." In their Motion, the Executive Defendants ask the Court to dismiss the complaint, focusing primarily on procedural grounds. All three of their arguments fail as a matter of law.

First, Plaintiffs have standing to bring their claims. The so-called "public importance" exception applies to this case, and even if it did not, Plaintiffs have alleged and can establish that they suffered an injury in fact and that they have taxpayer standing.

Second, this lawsuit is ripe for adjudication. The public-importance exception also satisfies ripeness, and in any event, this lawsuit meets both criteria of the traditional ripeness inquiry.

Third and finally, Plaintiffs state a viable claim under the Nevada Administrative Procedure Act ("NAPA"). The Motion's arguments misconstrue SB 420's effective-date provision.

FACTS

Plaintiff Robin L. Titus, MD, is a Nevada resident and taxpayer, a practicing physician, and a member of the Nevada Senate. Jan. 29, 2024 First Amended Complaint ("Compl.") ¶ 7. Plaintiff NTU is a nonprofit and nonpartisan organization whose primary purpose is to advocate for governmental transparency, accountability, and efficiency. *Id.* ¶ 16. NTU advocated for the passage of the Nevada Constitution's two-thirds supermajority provision at issue in this case, and

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it has worked on a number of ballot measures both in Nevada and nationwide—including the adoption of Article IV, § 18(2); and measures in nine other states. *Id.* ¶¶ 16–17.

In 2021, the Legislature passed SB 420 by simple majorities in the Assembly and the Senate. *Id.* ¶ 61. SB 420 requires the Executive Defendants to establish the Public Option program—making Public Option "Qualified Health Plans" or "QHPs" that are available for purchase on the State's health insurance exchange and in the individual health market. *Id.* ¶¶ 22–23; NRS 695K.200(1)–(5). Public Option QHPs must provide certain minimum levels of coverage and, critically, they must be sold at a statutorily mandated discount, or what the bill calls a "premium reduction" that is consistent with certain "premium reduction targets." Compl. ¶ 24; NRS 695K.200(3)(a)–(b). The premium reduction targets must be "at least 5 percent lower than the reference premium for [each] zip code" and the cost can increase only a certain amount each year. Compl. ¶ 25. At the same time, SB 420 authorizes the Executive Defendants to "revise" those premium reduction targets to any amount they choose as long as the average is "at least 15 percent lower than the average reference premium in this State over the first 4 years." *Id.* ¶ 26; NRS 695K.200(5). In addition, the bill imposes a mandate on all healthcare providers in Nevada who care for Medicaid patients and others, requiring them to enroll as participating providers and to accept new patients who are covered by a Public Option QHP. Compl. ¶ 38; NRS 695K.230(1)–(2).

SB 420 requires Public Option QHPs to be offered for sale beginning January 1, 2026. Compl. ¶ 30; NRS 695K.200(1)–(2). To meet that deadline, the Executive Defendants have moved forward in earnest to roll out the program. In October 2022 and November 2023, the Executive Defendants issued two "Guidance Letters," which purport to exercise the power to "revise" SB 420's premium reduction targets. Compl. ¶¶ 74–77. And in December 2023, they submitted the

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State's "Section 1332" waiver application to the federal government, another necessary step in setting up the Public Option. *Id.* ¶ 56.[1]

LEGAL STANDARD

Under the "rigorous" NRCP 12(b)(5) framework, the Court must accept Plaintiffs' facts as true, draw all inferences in Plaintiffs' favor, and dismiss "only if it appears beyond a doubt that [Plaintiffs] could prove no set of facts, which, if true, would entitle [them] to relief." *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008). This rigorous framework applies to the standing and ripeness issues as well. *See Superpumper, Inc. v. Leonard*, 137 Nev. Adv. Op. 43, 495 P.3d 101, 106 n.2 (2021) ("[T]his court has never directly subscribed to the view that standing is an aspect of subject matter jurisdiction[.]"); *Allstate Ins. Co. v. Thorpe*, 123 Nev. 565, 571, 170 P.3d 989, 993 (2007) (distinguishing ripeness from subject matter jurisdiction); *City of Henderson v. Kilgore*, 122 Nev. 331, 336 n.10, 131 P.3d 11, 15 n.10 (2006) (distinguishing between a "district court [being] divested of subject matter jurisdiction" and "the matter [being] simply not ripe for the district court's review").

ARGUMENT

I. Plaintiffs have standing.

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

[1] In a footnote, the Executive Defendants claim that Plaintiffs are challenging only certain provisions of SB 420 and that "the Court must limit its review to those challenged provisions exclusively." Mot. at 2 n.1. But in fact, the Complaint challenges SB 420 *as a whole*, contending that its adoption was inconsistent with the Nevada Constitution. In any event, the question of whether a court can strike down some, but not all, of a law is governed by the severability doctrine—an issue best addressed at summary judgment or later. *See Sierra Pac. Power Co. v. State Dep't of Tax'n*, 130 Nev. 940, 945, 338 P.3d 1244, 1247 (2014) (discussing severability).

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A. *The public-importance exception applies to this case.*

Generally, "to have standing to challenge an unconstitutional act, a plaintiff . . . must suffer a personal injury traceable to that act 'and not merely a general interest that is common to all members of the public.'" *Nev. Pol'y Rsch. Inst. v. Cannizzaro*, 138 Nev. Adv. Op. 28, 507 P.3d 1203, 1207 (2022). However, the Supreme Court has "recognize[d] an exception to this injury requirement in certain cases involving issues of significant public importance." *Schwartz v. Lopez*, 132 Nev. 732, 743, 382 P.3d 886, 894 (2016). To qualify for this public-importance exception, three criteria must be met: (i) "the case must involve an issue of significant public importance;" (ii) "the case must involve a challenge to a legislative expenditure or appropriation" by claiming "that it violates a specific provision of the Nevada Constitution;" and (iii) "the plaintiff must be an appropriate party." *Id.*

The Executive Defendants all but admit that this case satisfies the public-importance exception. *See* Mot. at 6. And for good reason: all three criteria are easily met. *First*, the Complaint involves an issue of significant public importance, namely, whether the Public Option—a comprehensive scheme designed to fundamentally alter Nevada's health insurance market—is inconsistent with the State Constitution. *See* SB 420, § 2 (bill's purpose is to "[l]everage the combined purchasing power of the State to lower premiums and costs," "[i]mprove access to high-quality, affordable health care," and "[i]ncrease competition in the market for individual health insurance in this State"). There can be no reasonable dispute that SB 420 "affect[s] 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). Indeed, the State itself states that the Public Option program will result in $401–$760 *million* in new revenue just in the form of federal pass-through funding. Jan. 1, 2024 Nevada Section 1332 Innovation Waiver Request at 24, *available at*

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https://dhcfp.nv.gov/uploadedFiles/dhcfpnvgov/content/MarketStabilization/FinalNV1332Application.pdf.[2]

Second, this case involves a challenge to an expenditure or appropriation by claiming that it violates three specific provisions of the Nevada Constitution. Compl. ¶¶ 42–82. Indeed, one of those provisions is Article IV, § 19, the Appropriations Clause, under which Plaintiffs contend that SB 420 permits the Executive Defendants to spend public funds without a valid appropriation. *Id.* ¶¶ 62–69. Another constitutional provision is the two-thirds supermajority clause found in Article IV, § 18(2)—precisely the same challenge raised in *Morency*. 137 Nev. at 627, 496 P.3d at 589 (exception applied because the challenge was "on the basis that the bill did not meet the supermajority vote required under Article 4, § 18(2)").

Moreover, even if this case didn't involve a challenge to an expenditure or appropriation, this second criterion would still be met. In *Cannizzaro*, the Supreme Court extended the public-importance exception to include not just challenges to an expenditure or an appropriation, but also to claims based on the separation of powers. 507 P.3d at 1208 (exception applies "where a plaintiff seeks vindication of the Nevada Constitution's separation-of-powers clause"). Here, Plaintiffs are making just that argument, Compl. ¶¶ 98–104, and given that SB 420 enacts a comprehensive insurance regulation scheme, the issue is likely to reoccur and requires judicial resolution for future guidance, *Cannizzaro*, 507 P.3d at 1208.

Third, Plaintiffs are appropriate parties. NTU and Titus are hardly "sham plaintiffs" who have no true adversity of interest; they are "capable of competently advocating [their] position," and there is no one else "more directly affected by the challenged conduct" who is likely to sue.

[2] Citing to the State's Section 1332 waiver application does not convert the motion into one for summary judgment given that the document's authenticity cannot reasonably be questioned. *See In re CityCenter Constr. & Lien Master Litig.*, 129 Nev. 669, 676 n.3, 310 P.3d 574, 579 n.3 (2013); *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994), *overruled on other grounds by Galbraith v. Cty. of Santa Clara*, 307 F.3d 1119, 1127 (9th Cir. 2002).

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Id. at 1211. In *Morency* it was enough that the plaintiffs benefitted from the law that existed before the challenged bill "and are interested in maintaining those benefits." 496 P.3d at 589. Here, Senator Titus will be compelled as a healthcare provider to enroll in the Public Option and accept new patients who are covered by a Public Option QHP. Compl. ¶ 38. Likewise, NTU's mission is to fight for the issues this lawsuit raises, and the organization was intimately familiar with and involved in the adoption of the very constitutional provision that forms the basis of this legal challenge. *Id.* ¶¶ 16–17. And finally, in *Schwartz v. Lopez*, it was enough that the official "charged with implementing [the challenged law] has indicated his clear intent to comply with the legislation and defend it," and "the plaintiffs have demonstrated an ability to competently and vigorously advocate their interests in court." 132 Nev. at 744, 382 P.3d at 895. Because this case presents the very same circumstances, this third and final criterion is met.

B. *Plaintiffs suffered an injury in fact.*

Even if Plaintiffs were required to satisfy the traditional standing inquiry, they can do so here because they have suffered an injury in fact that would be redressed by a favorable judgment. In Nevada, standing doctrine doesn't impose a particularly high bar on a plaintiff: the Court is "not strictly bound to 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) ("*NAMIC*"), and "[t]he primary purpose of this standing inquiry is to ensure the litigant will vigorously and effectively present his or her case against an adverse party," *Schwartz*, 132 Nev. at 743, 382 P.3d at 894. Moreover, as long as one Plaintiff has standing, the case can go forward. *See Morency*, 137 Nev. at 627 n.7, 496 P.3d at 589 n.7.

Plaintiffs have suffered an injury in fact. As the Executive Defendants acknowledge, Titus alleges that as a practicing physician, she will be compelled by SB 420 to participate in the Public Option and accept lower reimbursement rates than she otherwise would have received. Mot. at 5–

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6 (quoting Compl. ¶ 18). Pecuniary harm is straightforwardly an injury in fact. *See Cent. Ariz. Water Cons. Dist. v. EPA*, 990 F.2d 1531, 1537 (9th Cir. 1993) ("Pecuniary injury is clearly 'a sufficient basis for standing.'"). In response, the Motion argues only that Plaintiffs "speculate that she will be harmed by the public option." Mot. at 6. But this injury isn't mere speculation: SB 420 requires, *by its express terms*, that the Public Option be made for sale; that premiums be reduced so they are consistent with the Act's premium reduction targets; and that healthcare providers, including Dr. Titus, participate in the Public Option and accept lower reimbursement rates. Compl. ¶¶ 18, 24–26, 31. And while the Public Option may not be available for purchase until January 1, 2026, Nevada law doesn't require the injury to have already occurred before a lawsuit is filed; it is enough if the injury is "imminent," rather than merely "conjectural or hypothetical." *Grasso v. Umpqua Bank*, 2017 Nev. Unpub. LEXIS 534, at *3 (Nev. June 27, 2017) (quoting *Bennett v. Spear*, 520 U.S. 154, 167 (1997)).

The Executive Defendants' remaining argument is, as they admit, pure speculation. They contend 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." Mot. at 5. But this kind of conjecture—that all things considered, the long-term effects of a law might cash out a certain way for Titus in particular—cannot defeat standing. After all, even after the Public Option goes to market in January 2026, the Executive Defendants could continue to speculate that perhaps Titus will receive a net benefit in a month, or a year, or a decade as the Public Option program continues. Trial courts need not engage in a full-scale case within a case and adjudicate factual disputes like this before a lawsuit is allowed to move forward. Here, Titus plausibly alleges—and the Executive Defendants have not denied—that she will suffer pecuniary harm in the form of reduced reimbursement rates for healthcare services. That is sufficient to ensure that

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Plaintiffs "will vigorously and effectively present [their] case against an adverse party." *Schwartz*, 132 Nev. at 743, 382 P.3d at 894.

C. *Plaintiffs have taxpayer standing.*

Taxpayer standing provides an independent basis for the Court to deny the Motion. The Nevada Supreme Court has never definitively ruled on whether the State recognizes taxpayer standing. *See Schwartz*, 132 Nev. at 744 n.5, 382 P.3d at 895 n.5. But a number of other jurisdictions have adopted the doctrine, noting that it "flows from an economic interest in having the taxpayer's dollars spent in a constitutional manner." *Hickenlooper v. Freedom from Religion Found., Inc.*, 338 P.3d 1002, 1007 n.10 (Colo. 2014) (internal quotation marks and brackets omitted); *see also, e.g.*, *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) (unpublished table decision); *Citizens for Rule 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 (Alaska 2004); *Chambers v. 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).

This "broad" doctrine generally applies when a plaintiff alleges a constitutional violation. *Barber v. Ritter*, 196 P.3d 238, 246 (Colo. 2008); *see also Hickenlooper*, 338 P.3d at 1007 ("[W]e have held that allegedly unlawful expenditures or transfers of public funds can constitute injuries sufficient to establish taxpayer standing."). That is exactly what Plaintiffs allege here: Titus is a Nevada taxpayer, as are many of NTU's Nevada members. Compl. ¶¶ 6–7, 16–17. They allege that under SB 420, taxes and other revenue will be collected and spent by the government pursuant

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to a law that is inconsistent with the Nevada Constitution. *Id.* ¶¶ 31, 35, 39–40, 45–60. Plaintiffs therefore have taxpayer standing to litigate their claims.[3]

II. The claims are ripe for review.

Plaintiffs' claims are ripe for two reasons: the public-importance exception forecloses the Motion's arguments, and the Complaint satisfies the traditional test for ripeness.

A. *The public-importance exception forecloses the Motion's ripeness arguments.*

As the Executive Defendants themselves admit, standing and ripeness are inextricably intertwined. Mot. at 7. Indeed, the Nevada Supreme Court has held that "the question of ripeness closely resembles the question of standing," and "ripeness focuses on the ***timing*** of the action rather than on the party bringing the action." *Herbst Gaming, Inc. v. Heller*, 122 Nev. 877, 887, 141 P.3d 1224, 1230–31 (2006) (emphasis added). The "primary focus" of ripeness is "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." *Id.* at 887, 141 P.3d at 1231; *see also id.* ("While harm need not already have been suffered, it must be probable for the issue to be ripe for judicial review.").

As a result, if the public-importance exception applies, then *both* standing and ripeness are satisfied. The public-importance exception absolves Plaintiffs of having to prove that they suffered an injury in fact. *Schwartz*, 132 Nev. at 743, 382 P.3d at 894. Given that, the public-importance exception must also absolve Plaintiffs of proving anything about the *timing* of the injury they suffered as well. This connection between standing and ripeness is most clearly

[3] Strictly speaking, NTU has representational standing through the doctrine of taxpayer standing. That is, the three elements of representational standing are satisfied because (i) NTU's members have standing to sue in their own right via taxpayer standing; (ii) the interests the lawsuit seeks to protect are germane to the organization's purpose—promoting governmental accountability, efficiency, and transparency, Compl. ¶ 16; and (iii) litigating this case doesn't require the participation of any of NTU's members. *See NAMIC*, 524 P.3d at 478 (discussing the three elements of representational standing).

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demonstrated by the Executive Defendants' own argument. They contend that this case isn't ripe because Plaintiffs "have not yet suffered any harm." Mot. at 7. But it would be internally inconsistent to hold based on the public-importance exception that Plaintiffs do not need to show an injury, and then hold that the case isn't ripe because Plaintiffs haven't yet suffered an injury. Put another way, the public-importance exception avoids the need for the Court to make any inquiry about Plaintiffs' injury—its existence or its timing.

B. *The Complaint satisfies the traditional test for ripeness.*

Even if the Court applied the traditional ripeness test to this case, the Complaint would satisfy it.

The "basic rationale" of the ripeness doctrine "is to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements." *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580, 105 S. Ct. 3325, 3332 (1985). That isn't a concern here. To begin with, many of SB 420's provisions *are already effective*. As discussed in more detail below, many of the bill's provisions became "effective upon passage and approval." SB 420, § 41. Moreover, the Complaint's first three causes of action challenge existing, codified law, and the fourth cause of action challenges the validity of the Guidance Letters, which were issued months ago. As a result, this isn't a case where "the rights of the plaintiff are contingent on the happening of some event which cannot be forecast and which may never take place." *Knittle v. Progressive Cas. Ins. Co.*, 112 Nev. 8, 10–11, 908 P.2d 724, 726 (1996) (per curiam). To the contrary, SB 420 has already been enacted, and the Guidance Letters have already been issued; the only question is whether that *past* enactment of SB 420 and that *past* issuance of the Guidance Letters were consistent with state law. No contingent event needs to occur for the Court to adjudicate those questions; all events that are relevant have already happened.

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In a similar vein, the Complaint satisfies both factors that Nevada courts use to adjudicate ripeness. Those two factors are (i) "the hardship to the parties of withholding judicial review" and (ii) "the suitability of the issues for review." *Herbst Gaming*, 122 Nev. at 887, 141 P.3d at 1231.

The hardship to the parties in withholding judicial review. This factor is satisfied for two distinct reasons. *First*, the public-importance exception applies. "The hardship to the parties" is just another way of talking about the plaintiff's injury. *See In re T.R.*, 119 Nev. 646, 651, 80 P.3d 1276, 1280 (2003) (per curiam) (finding ripeness because "delay will harm T.R., as he is unsure how the statute applies to his current and future life choices"). Because the public-importance exception avoids the need to prove an injury in fact, it likewise applies to this factor.

Second, it would be a substantial hardship not just to Plaintiffs, but to all Nevadans, to withhold judicial review. If Plaintiffs' claims are valid, then the State cannot constitutionally move forward with its Public Option program. It would be a manifest waste of *everyone's* resources—Plaintiffs', the State's, healthcare providers', insurance carriers', and more—to devote the next two years bringing the Public Option to market only to have the Court strike it down. There would be no need for the State to continue to press its Section 1332 waiver application with the federal government, Compl. ¶¶ 28–33; for the State and insurance carriers to develop and respond to requests for proposals or go through a convoluted procurement process, NRS 695K.220(1); for insurance carriers to prepare and submit proposed QHPs with the Department of Insurance for approval, NRS 695K.220(5); or for anyone to meet any of the "Implementation Milestones" before January 2026, Jan. 1, 2024 Nevada Section 1332 Innovation Waiver Request at 24, *available at* https://dhcfp.nv.gov/uploadedFiles/dhcfpnvgov/content/MarketStabilization/FinalNV1332Application.pdf). Waiting for the Public Option to go live would only run the risk that countless hours and millions of dollars are wasted. *See Hernandez v. Bennett-Haron*, 128 Nev. 580, 586 n.3, 287 P.3d 305, 310 n.3 (2012) ("[D]eferring ruling on the constitutional challenges at issue here will

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harm appellants, as they would be required to go through the inquest process without knowing the extent of any available due process protections and whether the individual presiding over the proceeding was constitutionally authorized to do so.").

The suitability of the issues for review. The issues in this case are suitable for review because there are no additional facts that are necessary for this Court to adjudicate Plaintiffs' claims. As noted above, SB 420 has already been enacted and the Guidance Letters have already issued; whether they are consistent with the Nevada Constitution or NAPA is a question of law, and no more factual development could make the dispute any more concrete. *See In re T.R.*, 119 Nev. at 651–62, 80 P.3d at 1280 ("As for the issues' suitability for review, the record is sufficiently developed to allow us to consider the legal questions before us."). While some of the *effects* of SB 420 may remain to be seen, the *validity* of the law—and the Guidance Letters—can be decided today.

III. The Complaint states a claim for violation of NAPA.

The Complaint also states a viable claim that the Guidance Letters violate NAPA. At the outset, it is worth noting the tension within the Executive Defendants' arguments. On the one hand, they contend that the Complaint isn't ripe because it was brought "[y]ears prior to SB 420 (2021) becoming effective." Mot. at 2. On the other hand, they argue that Plaintiffs' NAPA claim should be dismissed because precisely one provision of SB 420 *is* effective: the one that exempts the State from having to comply with NAPA's rulemaking requirements. *Id.* at 9. In other words, the Executive Defendants maintain that the Complaint isn't ripe for adjudication despite the fact that *they have already acted pursuant to SB 420's authority.*

In any event, the Motion's argument misconstrues SB 420's plain meaning. It is true that SB 420 contains a clause providing that "[t]he adoption, amendment or repeal of any rule or policy governing the Public Option" is exempted from NAPA's rulemaking requirements. *Id.* at 9 (citing

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2021 Nev. Stat., ch. 537, § 20, at 3631–32). But the question is *when* that provision becomes effective. SB 420 provides that different sections become effective on different dates: some "become effective upon passage and approval," while others aren't effective until July 1, 2021; January 1, 2022; January 1, 2026; or January 1, 2030. SB 420, § 41(1)–(5). The Executive Defendant simply assert "that the APA exemption in Section 20 became effective upon 'passage and approval.'" Mot. at 9. But the NAPA exemption became effective upon passage and approval only "for the purposes of ***procurement*** and ***any other preparatory administrative tasks*** necessary to carry out the provisions of [certain] sections." SB 420, § 41(2)(a) (emphasis added). And the Executive Defendants do not make any argument at all explaining why the Court should find that the Guidance Letters fall under this exception. Their failure to develop this point is fatal. *See Kor Media Grp. v. Green*, 294 F.R.D. 579, 582 n.3 (D. Nev. 2013) (courts may decline to consider arguments that are not meaningfully developed in the briefing). The Court should not allow them to explain the basis of their position in a reply that Plaintiffs have no opportunity to answer.

The Executive Defendants' position is also wrong on the merits. The Guidance Letters weren't issued "for the purposes of procurement," and the Executive Defendants do not invoke that exception. Instead, they claim that the Guidance Letters were "part of the preparatory administrative tasks necessary to carry out" the Public Option. Mot. at 10. But that assertion also misses the mark. 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 (last visited March 7, 2024). They make a substantive decision to "revise" SB 420's premium reduction targets and establish a new premium target of the DHHS Director's own making. Compl. ¶¶ 76–81. The purpose of SB 420 is to "[l]everage the combined purchasing power of the State to lower premiums and costs" by requiring insurance carriers to comply with these premium reduction targets. SB 420, § 2. Far

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from being a routine administrative task, the Guidance Letters revise the very heart of the bill, setting a new price control and mandating that carriers sell Public Option QHPs for a specific and reduced sum, and revising the measure against which the reduced price satisfies state law.

Finally, the Executive Defendants make a two-sentence argument asserting that the Guidance Letters "are not something that is redressable by the Court" because Plaintiffs do not allege "any damages to their legal rights or privileges because of the [G]uidance [L]etters." Mot. at 10. But as explained above in the arguments on standing, Plaintiffs will imminently suffer an injury in fact in the form of reduced reimbursements and other harms stated above. The amounts of those reduced reimbursements are directly correlated to the premium reduction targets—which are precisely what the Guidance Letters establish.

CONCLUSION

The Court should deny the Executive Defendants' Motion in its entirety.

DATE: March 8, 2024

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CERTIFICATE OF SERVICE

I certify that on March 8, 2024, pursuant to NRCP 5(b) and the parties' stipulation and consent in writing to service by email, I served a true and correct copy of this Response on the following:

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