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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 LEGISLATURE'S MOTION TO DISMISS

Plaintiffs National Taxpayers Union ("NTU") and Robin L. Titus, MD submit this response to Intervenor-Defendant Legislature of the State of Nevada's ("Legislature") February 23, 2024 Motion to Dismiss ("Motion"). This 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 mandates the creation of a public health benefit plan in Nevada—the "Public Option." In its Motion, the Legislature asks the Court to dismiss the complaint, focusing primarily on procedural grounds. All three of its arguments fail as a matter of law.

First, the Court has subject matter jurisdiction. Plaintiffs are not required to name the State of Nevada as a defendant, and even if they were, they can amend their Complaint.

Second, Plaintiffs have standing and their claims are ripe. The "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.

Third and finally, Plaintiffs state a viable claim under the Nevada Administrative Procedure Act ("NAPA"). The Motion's arguments misinterpret 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, they 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 State's "Section 1332"

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waiver application to the federal government, another necessary step in setting up the Public Option. *Id.* ¶ 56.[1]

LEGAL STANDARDS

On the Legislature's sovereign immunity argument, the Court may grant a motion to dismiss only "when a lack of subject matter jurisdiction is apparent on the face of the complaint." *Craig v. Donnelly*, 135 Nev. 37, 39, 439 P.3d 413, 415 (Ct. App. 2019) (per curiam).

All of the Legislature's other arguments are governed by NRCP 12(b)(5). Under that "rigorous" 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 North Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008).

The Legislature claims that standing and ripeness are jurisdictional issues and therefore subject to *Craig*'s standard of review, Mot. at 5–6, but that is incorrect. The Nevada Supreme Court has repeatedly indicated that standing and ripeness are not jurisdictional. *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").

[1] The Legislature contends that the lawsuit challenges only some of SB 420's provisions, and that "the Court must limit its review to those . . . provisions exclusively." Mot. at 2. 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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ARGUMENT

I. The Court has subject matter jurisdiction.

The Legislature contends that the Court does not have subject matter jurisdiction because the Complaint doesn't name the State as a defendant or 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.'" Mot. at 8 (quoting NRS 41.031(2)). That is incorrect for two reasons: Plaintiffs are not required to name the State as a defendant, and even if they were, they can amend their Complaint to do so.

A. *Plaintiffs were not required to name the State as a defendant.*

Plaintiffs had no obligation to name the State as a defendant. The statute the Legislature cites applies only to claims for *monetary damages*, and not to cases like this one where the plaintiff seeks prospective injunctive relief against state officials.

To begin with, by its plain terms, NRS 41.031 doesn't impose this requirement. The statute provides, "In any action *against the State of Nevada*, the action must be brought in the name of the State of Nevada on relation of the particular department, commission, board or other agency of the State whose actions are the basis for the suit." NRS 41.031(2) (emphasis added). Because the Complaint isn't seeking monetary damages, it isn't an action against the State; it is an action against specific state officials seeking prospective relief. *City of Fernley v. State Dep't of Tax'n*, 132 Nev. 32, 42, 366 P.3d 699, 706 (2016) (injunctive and declaratory relief are prospective).

More importantly, Nevada's courts routinely assert jurisdiction over complaints seeking prospective injunctive relief against state officials *without* the State being named as a Defendant. These include many of the cases the parties rely on in briefing the Motion. *E.g.*, *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*") (private party sued a department and the commissioner of insurance in her official

capacity); *Nev. Pol'y Rsch. Inst. v. Cannizzaro*, 138 Nev. Adv. Op. 28, 507 P.3d 1203, 1206 (2022) (private party brought claim against members of Legislature for declaratory judgment, alleging a violation of separation of powers); *Morency v. State Dep't of Educ.*, 137 Nev. 622, 627, 496 P.3d 584, 589 (2021) (private party challenged statute under Nevada Constitution's two-thirds supermajority provision); *Schwartz v. Lopez*, 132 Nev. 732, 744, 382 P.3d 886, 895 (2016) (private parties sued state officials in their official capacity, including the State Treasurer).

This distinction between monetary claims and prospective injunctive relief is supported by the Legislature's own brief. *Every single opinion* the Legislature cited involves a claim for monetary damages only. *Craig*, 135 Nev. at 38, 439 P.3d at 414 (42 U.S.C. § 1983 claim for money damages); *Wayment v. Holmes*, 112 Nev. 233, 234, 912 P.2d 816, 817 (1996) (tortious discharge claim); *U.S. Dep't of Treasury v. Hood*, 101 Nev. 202, 204, 699 P.2d 98, 100 (1985) (per curiam) (federal sovereign immunity for fees and costs award); *Hardgrave v. State ex rel. State Hwy. Dep't*, 80 Nev. 74, 75, 389 P.2d 249, 249–50 (1964) (damages for negligence); *Taylor v. State*, 73 Nev. 151, 152, 311 P.3d 733, 734 (1957) (damages for negligence).

The Legislature asserts that "[t]he Nevada Supreme Court has confirmed that NRS Chapter 41's requirements apply to all causes of action, including tort actions and **non-tort actions**," Mot. at 8, but that is simply not true. The only authority the Legislature relies on, *Echeverria v. State*, was a damages action involving alleged unpaid wages. 137 Nev. Adv. Op. 49, 495 P.3d 471, 473–74 (2021) (certified question was whether "Nevada consented to damages liability"). In fact, *Echeverria* expressly limited its review to avoid addressing whether the State had sovereign immunity for claims under state law. *Id.* at 475 ("Whether the State is immune from state-law claims that *might* be reasserted is beyond our power to decide."). It is true that *Echeverria* refers to "nontort *liability*," *id.* at 477 (emphasis added), but that reference only confirms that the case was about monetary damages (albeit damages that sounded in statute, rather than tort). *See*

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Liability, BALLENTINE'S LAW DICTIONARY (3d ed. 1969) ("Legal responsibility, either civil or criminal. The condition of being bound in law and justice to pay an indebtedness or discharge some obligation."). Put another way, *Echeverria* only confirms the critical distinction between claims for damages and claims seeking prospective injunctive relief.

Finally, Plaintiffs' position is consistent with more than a century of federal law, under which state sovereign immunity "does not bar an action seeking prospective relief against a state official for a violation of federal law." *R.W. v. Columbia Basin Coll.*, 77 F.4th 1214, 1220 (9th Cir. 2023) (citing *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441 (1908)). That is, it is beyond debate that in federal court, states do not have sovereign immunity for claims that do not seek monetary damages. *Id.* The Legislature offers no argument at all suggesting that the State of Nevada has somehow bestowed upon itself sovereign immunity that is even broader in scope than what is found in the U.S. Constitution. In short, the Legislature's argument is inconsistent with state law, federal law, and the Nevada courts' longstanding practice.

B. *Plaintiffs can amend their Complaint.*

Even if Plaintiffs were required to name the State as a defendant, they can do so simply by amending the Complaint. Naming the State as a party isn't a substantive change: the lawsuit would move forward before the same Court with the same Plaintiffs, the same claims, and even the same attorneys (the Nevada Attorney General's Office would represent the State, NRS 228.090(2)(a)). As the Legislature acknowledges, "leave to amend the complaint should be 'freely given when justice so requires.'" Mot. at 7 (quoting *Halcrow, Inc. v. Dist. Ct.*, 129 Nev. 394, 398, 302 P.3d 1148, 1152 (2013)). That standard is easily met here.

II. Plaintiffs have standing and the claims are ripe for review.

Plaintiffs have standing and their claims are ripe for review. The Legislature's arguments do not change the analysis.

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A. *Standing: 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.'" *Cannizzaro*, 507 P.3d at 1207. However, the Supreme Court has "recognize[d] an exception to this injury requirement in certain cases involving issues of significant public importance." *Schwartz*, 132 Nev. at 743, 382 P.3d at 894. 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.*

Here, Plaintiffs easily satisfy all three criteria. *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"). 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*, 137 Nev. at 627, 496 P.3d at 589. Indeed, the State itself admits that the Public Option will result in $401–760 *million* in new revenue just from 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 lawsuit asserted "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*, 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. *Standing: 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," *NAMIC*, 524 P.3d at 476, 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. 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. Compl. ¶ 18. Pecuniary harm is straightforwardly

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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.'").

C. *Standing: 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]

D. *Ripeness: The public-importance exception forecloses the Motion's ripeness arguments.*

Standing and ripeness are inextricably intertwined. Indeed, the 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 Plaintiff of proving anything about the *timing* of the injury they suffered as well. 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.

[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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E. *Ripeness: 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 events need to occur for the Court to adjudicate those questions; all events that are relevant to that question have already happened.

In a similar vein, the Complaint satisfies both of the 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 Nevada Department of Insurance for approval, NRS 695K.220(5); or for any of the other hundreds of steps necessary to roll out this program. 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 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

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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.

F. *Standing and ripeness: The Court should reject the Legislature's argument to the contrary.*

The Legislature does not directly address any of the arguments above. It doesn't challenge any of the elements of standing or the factors courts used to assess ripeness, nor does it argue that the public-importance exception is inapplicable, that Plaintiffs failed to prove an injury in fact, or that the case can move forward under taxpayer standing. Instead, the Legislature makes two broad arguments, both of which should be rejected.

The Legislature's first argument is that SB 420 doesn't go into effect until January 1, 2026, and Plaintiffs therefore don't have standing and their claims aren't ripe. That is not correct. *First*, many portions of SB 420 *are* currently in effect. 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 State itself has admitted as much: in its Section 1332 waiver application, it identified "three key milestones" that must be met in advance of 2026. *See* Jan. 1, 2024 Nevada Section 1332 Innovation Waiver Request at 16–17, *available at* https://dhcfp.nv.gov/uploadedFiles/dhcfpnvgov/content/MarketStabilization/FinalNV1332Application.pdf.

Second, as argued above, the public-importance exception absolves Plaintiffs from having to prove that they suffered an injury in fact, and that exception likewise forecloses any argument that the case isn't ripe because Plaintiffs' injury isn't sufficiently concrete.

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Third and finally, as noted above, there are no additional facts that are necessary for the Court to adjudicate Plaintiffs' claims. The Legislature adopted SB 420 in contravention of the Nevada Constitution back in 2021, and the Defendants issued the Guidance Letters in contravention of NAPA in 2022 and 2023. There are no contingent events that need to occur for the Court to adjudicate these claims.

The Legislature's second argument is that its members contemplated the possibility that they might make "adjustments" to the law in the 2023 or 2025 regular session. Mot. at 15–18. That argument likewise fails. *First*, the Legislature's arguments do not extend to Plaintiffs' NAPA claim; the argument is only that the Legislature might amend SB 420.

Second, the Legislature quotes member testimony indicating that it would consider making "adjustments" to the law. Mot. at 4, 16–17. But "adjustments" cannot fix SB 420's constitutional infirmities, which go to the way that the bill *as a whole* was enacted. *See* Compl. ¶¶ 83–104. And even if the Court limited the scope of the Complaint to challenging specific provisions of SB 420, that would not avoid the same result because the Legislature hasn't so much as suggested that it intends to amend *those* specific provisions.

Third, while the Legislature repeatedly references its intent to revisit SB 420 "during the 2023 and 2025 regular sessions," Mot. at 3, 4, 15, 16, 17, 18, the 2023 regular session came and went, and *the Legislature did not make any amendments*. At bottom, the Legislature's argument is speculation through and through. It is always the case that the Legislature might amend a law, and that those amendments might address a constitutional infirmity. If that were enough to defeat standing or ripeness, then Nevada's courts could never hear a challenge to state law. An individual legislator's pronouncement of an intent to consider making changes cannot overcome the fact that SB 420 has been enacted and legally requires the Defendants to move forward with the Public Option program.

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

Finally, the Complaint states a viable claim that the Guidance Letters violate NAPA. At the outset, it is worth noting the tension within the Legislature's arguments. On the one hand, the Legislature contends that the Complaint isn't ripe because "the Public Option provisions . . . do not become effective and operative until **January 1, 2026**." Mot. at 15. On the other hand, it argues 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 18. In other words, the Legislature maintains the Complaint isn't ripe for adjudication despite the fact that the Executive Defendants *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 18. 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 NAPA exemption only became effective upon passage and approval "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).

The Legislature takes the position that "*any* rule or policy governing the Public Option [is exempt] from the APA's regulation-making requirements," Mot. at 19 (emphasis added), but that is inconsistent with SB 420's plain language. For the NAPA exemption to apply, the Legislature must demonstrate that the Guidance Letters were issued "for the purposes of procurement" or for "any other preparatory administrative task[]." The Legislature doesn't even attempt to do so.

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Nor could it. "Procurement" refers to the procurement process to select health maintenance organizations to provide certain healthcare services. *See* SB 420, § 30. Likewise, 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 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.

CONCLUSION

The Court should deny the Legislature's 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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