SCHWARTZ V. LOPEZ AND THE FATE OF NEVADA'S EDUCATION SAVINGS ACCOUNTS

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INTRODUCTION

Law-makers across the nation have enacted various options to expand school choice.[1] School choice, an idea largely promulgated by economist Milton Friedman,[2] is a movement that focuses on "affording parents the right to choose which school their child attends."[3] These initiatives have taken the form of charter schools,[4] school vouchers,[5] scholarship tax credits,[6] and lately education savings accounts.[7] In 2015, Nevada Governor Brian Sandoval signed into law the nation's first universal education savings account program created by Nevada Senate Bill 302 ("S.B. 302").[8] Known as Education Savings Accounts ("ESAs"), the program allows eligible students to receive a state-funded grant to be used toward education outside the public school system, such as in a private school and for other private education expenditures.[9] Proponents argue that the program will

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[1] *School Choice and Charters*, NAT'L CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/research/education/school-choice-and-charters.aspx [https://perma.cc/QA2B-ULWX] (last visited Apr. 25, 2017).

[2] *See* Jon Hartley & Alex Verkhivker, *School Choice and Nevada's Revolutionary Education Savings Accounts*, FORBES (June 30, 2015, 1:51 PM), http://www.forbes.com/sites/jonhartley/2015/06/30/school-choice-and-nevadas-revolutionary-education-savings-accounts/#7190a6852aa2 [https://perma.cc/Z5A4-N9JP].

[3] *Choice*, EDUC. WEEK (Aug. 3, 2004), http://www.edweek.org/ew/issues/choice/ [https://perma.cc/425P-5SLX].

[4] Josh Cunningham, *Charter Schools*, NAT'L CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/research/education/charter-schools-overview.aspx [https://perma.cc/9FV2-HEWY] (last visited Apr. 25, 2017) (explaining that charter schools are essentially public schools that enroll students based on parental choice and are privately managed by an organization).

[5] Josh Cunningham, *Private School Choice*, NAT'L CONFERENCE OF STATE LEGISLATURES, (Mar. 22, 2015), http://www.ncsl.org/research/education/private-school-choice635174504.aspx [https://perma.cc/7DFL-D2HJ] ("School vouchers are state-funded scholarships that pay for students to attend private school rather than public school.").

[6] *Id*. ("Scholarship tax credits allow individuals and corporations to allocate a portion of their owed state taxes to private nonprofit scholarship organizations that issue public and private school scholarships to K-12 students.").

[7] *Id*. ("Education Savings Accounts are state-funded grants deposited into special savings accounts from which parents can withdraw funds for certain educational expenses.").

[8] Jonathan Butcher, Opinion, *Nevada's Education Gambit*, U.S. NEWS & WORLD REP. (June 17, 2015, 12:45 PM), https://www.usnews.com/opinion/knowledge-bank/2015/06/17/nevadas-new-education-savings-accounts-will-give-parents-lots-of-options [https://perma.cc/8CQ3-FXNH]. *See generally* S.B. 302, 2015 Leg., 78th Sess. (Nev. 2015).

[9] Josh Cunningham, *Nevada Enacts Nation's Most Expansive School Choice Program*, NAT'L CONFERENCE OF STATE LEGISLATURES BLOG (June 10, 2015), http://www.ncsl.org/blog/2015/

provide parents with choice and increase competition between private and public schools, resulting in a better education system.[10] On the other hand, opponents argue that it will strip funding from public schools that desperately need it, which by some preliminary estimates could amount to as much as $40 million.[11] Furthermore, opponents argue that the program is unconstitutional because it impedes the duties of the State under the Nevada Constitution by funneling money to religiously affiliated private schools that engage in discriminatory practices based on things like religion and sexual orientation.[12]

Shortly after Nevada passed the program, opponents challenged it on these constitutional grounds, culminating before the Nevada Supreme Court in *Schwartz v. Lopez*.[13] On September 29, 2016, the Court issued a unanimous decision striking down the ESAs' funding mechanism as an impermissible appropriation and determined that the ESAs were facially constitutional under Article XI, Section 2 of the Nevada State Constitution.[14] However, the justices in a four-to-two majority decision also determined that the ESAs were facially constitutional under Article XI, Section 10 of the Nevada State Constitution.[15] This decision resulted in both sides hailing victory, headlines reading "Nevada's School Choice Victory,"[16] "Nevada Supreme Court Strikes Down School Choice Funding Method,"[17] and "Education Savings Accounts Dead But Not Buried."[18] This Article will analyze and discuss the Nevada Supreme Court's holding in *Schwartz v. Lopez* and its implications for the State of Nevada. Part I provides a brief background and explanation of the ESA program. Part II explains the background and holding of the principal case *Schwartz v. Lopez*. Part III then analyzes the holding in light of other states' jurisprudence, dissects the Court's reasoning,

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06/10/nevada-enacts-nations-most-expansive-school-choice-program.aspx [https://perma.cc/3R9V-MA8F].

[10] Neal Morton, *Cost Reaches $545K for Nevada in Education Savings Account Challenge*, L.V. REV.-J. (Aug. 9, 2016, 6:02 PM), http://www.reviewjournal.com/news/education/cost-reaches-545k-nevada-education-savings-account-challenge [https://perma.cc/J2RZ-7NMD].

[11] *Id*.

[12] *See id*.

[13] Schwartz. v. Lopez, 382 P.3d 886, 891 (Nev. 2016).

[14] *See id*.

[15] *See id*.

[16] Allysia Finley, Opinion, *Nevada's School Choice Victory: Unions Lose Their Attempt to Kill Education Savings Accounts*, WALL ST. J. (Sept. 29, 2016, 7:40 PM), http://www.wsj.com/articles/nevadas-school-choice-victory-1475192404 [https://perma.cc/B7SP-DN4X].

[17] Sandra Chereb, *Nevada Supreme Court Strikes Down School Choice Funding Method*, L.V. REV.-J. (Sept. 29, 2016, 6:26 PM), http://www.reviewjournal.com/news/education/nevada-supreme-court-strikes-down-school-choice-funding-method [https://perma.cc/843L-G5G8].

[18] Joe Schoenmann, *Education Savings Accounts Dead but Not Buried*, KNPR (Sept. 30, 2016), http://knpr.org/knpr/2016-09/education-savings-accounts-dead-not-buried [https://perma.cc/82WP-H4DB].

and determines how this precedent should be interpreted moving forward. Finally, the Article concludes by summarizing the Article's findings and predicts the fate of Nevada's ESAs.

I. NEVADA'S EDUCATION SAVINGS ACCOUNTS

A. Background

On March 16, 2015, Republican State Senator Scott Hammond introduced S.B. 302, which set forth a plan for Nevada to be the first state to create a universal ESA program. The Senate and Assembly passed S.B. 302 on a party-line vote, and Governor Sandoval signed the bill into law on June 2, 2015.[19] Nevada's ESAs have been called one of "the nation's most aggressive school choice program[s]."[20] There are four other states that offer some type of ESA program;[21] however, each of these ESA programs is limited to certain types of students. For example, Arizona offers them to students with disabilities, in foster care, or in low-performing schools;[22] and Florida, Tennessee, and Mississippi limit them to students with disabilities.[23] Unlike ESA programs in other states, S.B. 302 provides ESAs to all public school students regardless of socioeconomic status, and, as enacted, it had no budget or enrollment caps.[24]

B. Nevada's Education Savings Accounts: How They Work

In Nevada, students ages seven through eighteen years old qualify for the ESA program, as long as they were enrolled in a public school for 100 consecutive days before applying for ESA funds.[25] While all students who fall under the 100-day requirement, or one of its exceptions,[26] are eligible for ESA funding, the

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[19] *See S.B. 302 Overview*, NELIS NEV. LEGISLATURE, https://www.leg.state.nv.us/App/NELIS/REL/78th2015/Bill/1857/Overview [https://perma.cc/D2VB-ZACN] (last visited Apr. 25, 2017).

[20] *E.g.*, Eric Schulzke, *The Nation's Most Aggressive School Choice Program Has Cleared at Least One Hurdle*, DESERET NEWS (May 22, 2016, 6:00 AM), http://www.deseretnews.com/article/865654713/Nevada-judge-upholds-Education-Savings-Accounts-program.html [https://perma.cc/P962-KPHU]; *see also* Rob Taylor, *Headlines on School Law*, 24 SCH. L. FOR PRINCIPALS, November 2015, at 1.

[21] *See* Josh Cunningham, *The Next Generation of School Vouchers: Education Savings Accounts*, NAT'L CONFERENCE OF STATE LEGISLATURES (Aug. 18, 2016), http://www.ncsl.org/research/education/the-next-generation-of-school-vouchers-education-savings-accounts.aspx [https://perma.cc/6SYH-Z44M].

[22] *Id.*

[23] *Id.*

[24] Cunningham, *supra* note 9.

[25] *Id.*; *see* S.B. 302, 2015 Leg., 78th Sess. § 7 (Nev. 2015).

[26] Private school and homeschooled students are not included in S.B. 302's "count day" component. *See* DAN SCHWARTZ, EDUCATION SAVINGS ACCOUNT: PARENT HANDBOOK 5 (2016) [hereinafter ESA PARENT HANDBOOK]. Thus, these students would technically be ineligible to participate in the program. *See id.* However, the Nevada State Treasurer's office offered two

percentage of funds awarded to each student varies.[27] Students with disabilities[28] or students from families whose household incomes are less than 185 percent of the federal poverty line are eligible to receive 100 percent of per-pupil funds[29] rather than the standard 90 percent.[30] In addition, non-traditional public school students, such as those students who are not enrolled in a full-time schedule, may receive pro-rated funding.[31] Eligibility for all qualified students is valid for one school year and subject to either early termination or renewal for the upcoming school year.[32]

The Nevada State Treasurer administers the program by setting up electronic individual "savings accounts" through a third party.[33] As enacted, the amounts to be credited to each individual ESA would be funded from the State's Distributive School Account ("DSA") with deductions from each school district's DSA distribution.[34] To participate in the program, eligible children's parents must submit

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exceptions to the one-hundred-day rule policy, allowing children between the ages of five and seven and children of active-duty military students to participate. *Id*.

[27] S.B. 302 § 8.

[28] "Pupil with a disability" as defined by NEV. REV. STAT. § 388.417(7) (2016).

[29] Funding of education is determined by "The Nevada Plan . . . a statewide, formula-based funding mechanism for public K-12 education." FISCAL ANALYSIS DIV., LEGISLATIVE COUNSEL BUREAU, THE NEVADA PLAN FOR SCHOOL FINANCE: AN OVERVIEW 6 (2015), https://www.leg.state.nv.us/Division/fiscal/NevadaPlan/Nevada_Plan.pdf [https://perma.cc/AQR2-XLLE]. Under this plan, the State develops a guaranteed amount of funding for each local school district. *Id*. at 7. The guaranteed funding is provided by both state and local sources and contributes 75–80 percent of school district resources. *Id*. "To determine the level of guaranteed funding . . . a basic *per-pupil* support amount for each district is established in law each legislative session." *Id*. (emphasis added).

[30] S.B. 302 § 8; ESA PARENT HANDBOOK, *supra* note 26, at 7.

[31] ESA PARENT HANDBOOK, *supra* note 26, at 5; *see also* Thomas W. Stewart & Brittany Walker, *Nevada's Education Savings Accounts: A Constitutional Analysis*, NEV. SUP. CT. SUMMARIES, 7–8 (2016). "For instance, if a child is enrolled one [sic] class in the public school system, they are eligible to receive one-sixth of the calculated ESA amount." *Id*. at 8, n.55.

[32] S.B. 302 § 7.

[33] *Id*.

[34] *See id*. § 16; discussion *supra* note 29. *See generally* NEV. REV. STAT. § 387.121 (2016) The school district's DSA distribution is the amount that the state distributes to each school district from the State of Nevada's General Fund to fund the per-pupil guarantee calculated each biennium under the Nevada Plan of school finance.

> The Legislature declares that the proper objective of state financial aid to public education is to ensure each Nevada child a reasonably equal educational opportunity. Recognizing wide local variations in wealth and costs per pupil, this State should supplement local financial ability to whatever extent necessary in each school district to provide programs of instruction in both compulsory and elective subjects that offer full opportunity for every Nevada child to receive the benefit of the purposes for which public schools are maintained. Therefore, the quintessence of the State's financial obligation for such programs can be expressed in a formula partially on a per-pupil basis and partially on a per-program basis as: State financial aid to school districts equals the difference between school district basic support guarantee and local available funds produced by mandatory taxes minus all the local funds attributable to pupils who reside in the county but attend a charter school or a university school for profoundly gifted pupils. This formula is designated the Nevada Plan.

an application to the Nevada State Treasurer.[35] Upon approval, parents must then enter and sign an agreement, which requires that: (1) a participating entity in Nevada will educate the child; (2) the Nevada State Treasurer will deposit the money awarded into individual savings accounts; (3) the parents will spend the money according to the established grant regulations; and (4) the money will be inaccessible during breaks in the school year.[36] The Treasurer funds ESAs on a quarterly basis, and parents may apply for ESAs only during specific open-enrollment periods.[37] When the Treasurer places funds in an ESA, the State then deducts the funds from the child's resident school district.[38] For the funds to reach a child's ESA, the child must dis-enroll from his or her public school at least one day prior to disbursement.[39]

Families may spend ESA funds only with "participating entities."[40] S.B. 302 defines a "participating entity" as: (1) "[a] private school licensed pursuant to chapter 394 of NRS or exempt from such licensing pursuant to NRS 394.211"; (2) "[a]n eligible institution"; (3) "[a] program of distance education that is not operated by a public school or the Department [of Education]"; (4) "[an accredited] tutor or tutoring facility"; or (5) "[t]he parent of a child."[41] To become participating entities, schools must apply to the Treasurer.[42] Each year, the Treasurer provides a list of participating entities for eligible ESA students.[43] Parents may use the ESA funds for various educational purposes, including tuition, fees, textbooks, tutoring, curriculum, and supplies.[44] "Tuition" is defined as money "charged by private schools, distance education programs and eligible institutions," such as community colleges.[45]

Although S.B. 302 does not speak in logistical terms as to how participating entities receive payments of tuition, the Nevada State Treasurer has developed regulations and made ESA guides available for both parents and participating entities on the Nevada State Treasurer's website.[46] According to the "Participating Entity Handbook," an entity may receive payment through the Nevada State Treasurer's website portal by either requesting payment from the parent or by

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Id.

[35] S.B. 302 § 7.

[36] *Id*.

[37] *See id*. § 8.

[38] *See id*. § 16.

[39] *See* ESA PARENT HANDBOOK, *supra* note 26, at 8.

[40] S.B. 302 § 9.

[41] *Id*. § 11.

[42] *Id*.

[43] *Id*. § 13.

[44] ESA PARENT HANDBOOK, *supra* note 26, at 8.

[45] *Id*.

[46] *Education Savings Account*, NEV. STATE TREASURER, http://www.nevadatreasurer.gov/SchoolChoice/Home/ [https://perma.cc/MB5Q-EV3A] (last visited Apr. 26, 2017).

the parent requesting to make a payment.[47] The payment is completed when either the parent accepts the entity's request for payment or the entity accepts payment from the parent.[48] For other expenses such as fees, textbooks, transportation, and educational therapies, parents must pay costs upfront and then apply for reimbursement from the child's ESA through the Nevada State Treasurer's web portal.[49] Funds that remain in a child's account at the end of the school year may be rolled over to the next school year, as long as the child neither graduates nor moves out of Nevada.[50] Any funds that fail to qualify for roll-over are transferred to the State General Fund.[51]

C. Education Savings Accounts Controversy

The program faced controversy from its inception as opponents and proponents heavily debated the policy. During committee hearings, legislators expressed concerns that the funds would be misused,[52] that public schools would suffer, and that there would be a lack of accountability on the spending of public funds.[53] However, legislators in support of the program countered that ESAs would allow children having trouble learning from the "cookie-cutter approach" to find a school where they can succeed and that the money should be with the child instead of the institution.[54] There were also lobbyists on both sides of the issue. Joyce Haldeman, lobbyist for the Clark County School District and former superintendent, expressed concern over the Clark County School District's ability to improve schools without adequate resources because S.B. 302 could cause large financial losses.[55] Victor Salcido, lobbyist for the Milton Friedman Foundation for Educational Choice, countered those concerns by claiming that the program would solve over-crowding and give parents the ability to craft education to meet their child's needs.[56] Parents of public school kids also participated

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[47] DAN SCHWARTZ, EDUCATION SAVINGS ACCOUNT: PARTICIPATING ENTITY HANDBOOK 15 (2016) [hereinafter ESA PARTICIPATING ENTITY HANDBOOK] http://www.nevadatreasurer.gov/uploadedFiles/nevadatreasurergov/content/SchoolChoice/Vendors/Participating_Entity_Handbook_ESA.pdf [https://perma.cc/LHP3-UKU4].

[48] *Id*.

[49] *See id*.

[50] S.B. 302, 2015 Leg., 78th Sess. § 8 (Nev. 2015).

[51] *Id*.

[52] *Hearing on S.B. 302 Before the Assemb. Comm. on Educ*., 2015 Leg., 78th Sess. 12 (Nev. 2015) (statement of Assemb. Edgar Flores, Member, Assemb. Comm. on Educ.).

[53] *Id*. at 13 (statement of Assemb Amber Joiner, Member, Assemb. Comm. on Educ.). Legislators were also concerned that the funds could be used for homeschooling because parents were within the definition of a participating entity. *See id*. at 22 (statement of Assemb. Elliot T. Anderson, Member, Assemb. Comm. on Educ.).

[54] *Id*. at 16 (statement of Assemb. Chris Edwards, Member, Assemb. Comm. on Educ.).

[55] *Id*. at 35 (statement of Joyce Haldeman, Associate Superintendent, Community and Government Relations, Clark County School District).

[56] *Id*. at 26 (statement of Victor M. Salcido, Director of Policy and Strategy, Argentum Partners) ("We represent the Friedman Foundation for Educational Choice.").

in the debate, with some finding the program necessary. For example, one parent believed that Nevada public schools failed her child with dyslexia and that this program would help parents like her.[57] Yet other parents weren't convinced of the program's efficacy, stating that the "CCSD's budget was insufficient to provide students with all the resources they need to succeed . . . [and] [d]iverting money from a critically underfunded public education budget will only exacerbate our teacher shortage and performance crisis."[58] The parents in opposition did not believe this type of program would actually succeed in its mission. This is because S.B. 302 only provided ESAs with about $5,100 for traditional ESA pupils and $5,900 for low-income ESA status pupils per year, and these amounts would do little to help low- and middle-income families when the average annual cost of private schools in Clark and Washoe counties is about $4,000 to $5,000 more than the allotted per-pupil dollar-value.[59] Additionally, many people were skeptical of the effectiveness of school choice programs in general.[60]

However, whether the ESAs are good policy for Nevada's children was not the issue presented before Nevada's courts. In fact, several provisions of the Nevada Constitution could stand in the way of such a program.[61] Article XI, Sections 1, 2, 6, and 10 respectively, state: "The legislature shall encourage by all suitable means the promotion of intellectual, literary, scientific, mining, mechanical, agricultural, and moral improvements . . .";[62] "The legislature shall provide for a uniform system of common schools, by which a school shall be established and maintained in each school district at least six months in every year . . .";[63] "[T]he Legislature shall enact one or more appropriations to provide the money the Legislature deems to be sufficient, when combined with the local money reasonably available for this purpose, to fund the operation of the public schools in the State for kindergarten through grade 12 . . . [,]"[64] and "[n]o public funds of any kind or character whatever, State, County or Municipal, shall be used for

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[57] *Id.* at 27–28 (statement of Jennifer Hammond, Private Citizen, Henderson, Nevada).

[58] *See* Electra McGrath-Skrzydlewski, Opinion, *One View: Why I Am a Plaintiff in the Education Voucher Lawsuit*, RENO GAZETTE-J. (July 26, 2016, 1:12 PM), http://www.rgj.com/story/opinion/voices/2016/07/26/one-view-why-am-plaintiff-education-voucher-lawsuit/87581196/ [https://perma.cc/97CU-ERTD].

[59] E-mail from Educate Nevada Now, to ryanm@jeffwagneragency.com, https://t.e2ma.net/message/xgldx/5u549l [https://perma.cc/B5UG-HKDA] (last visited Apr. 26, 2017).

[60] *See generally*, *e.g.*, Frederick M. Hess, *Does School Choice "Work"?*, NAT'L AFF., Fall 2010, at 35.

[61] *See* Stewart & Walker, *supra* note 31, at 10–11.

[62] NEV. CONST. art. XI, § 1; *see also What Does the Nevada Constitution Require?*, EDUCATE NEVADA NOW, http://www.educatenevadanow.com/initiatives/nevadas-esa-voucher-program/educate-nevada-now-faqs/ [https://perma.cc/VE7C-MX73] (last visited Apr. 26, 2017).

[63] NEV. CONST. art. XI, § 2; *see also What does the Nevada Constitution Require?*, *supra* note 62.

[64] NEV. CONST. art. XI, § 6; *see also* E-mail from Educate Nevada Now, *supra* note 59.

sectarian purpose."[65] With these constitutional provisions seemingly imposing a duty on the State to provide for a public education system and to exclude sectarian, or religious, purpose, the question for Nevada's courts to decide was whether such a program unconstitutionally funds and creates a state-supported network of private religious schools.[66]

II. THE PRINCIPAL CASE

Shortly after S.B. 302's passage, Nevada's ESAs were challenged on two separate constitutional grounds, in two separate cases: *Lopez v. Schwartz*[67] and *Duncan v. State*.[68]

A. Lopez v. Schwartz[69]

In *Lopez*, plaintiffs were seven parents of Nevada public school children who, through counsel,[70] argued that S.B. 302 violated Article XI, Sections 2, 3, 6.1 and 6.2 of the Nevada Constitution.[71] Plaintiffs subsequently filed a motion for preliminary injunction, and, on January 11, 2016, Judge James E. Wilson held that the plaintiff parents clearly showed S.B. 302 violated Article XI, Sections 6.1 and 6.2 but that the parents did not clearly show that S.B. 302 facially violated

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[65] NEV. CONST. art. XI, § 10; Neal Morton, *ACLU Sues to Stop Nevada Education Savings Accounts*, L.V. REV.-J. (Aug. 27, 2015), https://www.reviewjournal.com/news/education/aclu-sues-to-stop-nevada-education-savings-accounts/ [https://perma.cc/X53Z-WWBL].

[66] Morton, *supra* note 65 (quoting Tod Story, Exec. Dir., Am. Civ. Liberties Union of Nev.) ("The education savings account law passed this last legislative session tears down the wall separating church and state erected in Nevada's constitution"; and quoting Sylvia Lazos, Policy Dir., Educate Nev. Now, "drawing money out of traditional school districts and using that for private education contradicts a constitutional requirement that lawmakers 'sufficiently' fund public schools. . . . We're going to use public funds to subsidize and basically finance a system that is not uniform.").

[67] Order Granting Motion for Preliminary Injunction, Lopez v. Schwartz, No. 15-0C-00207-1B (1st Jud. Dist. Ct. Nev. Jan. 11, 2016).

[68] Order on Defendant's Motion to Dismiss for Lack of Jurisdiction and Failure to State a Claim, Duncan v. State, No. A-15-723703-C (Dist. Ct. Nev. May 18, 2016).

[69] Order Granting Motion for Preliminary Injunction, *supra* note 67.

[70] Plaintiffs were supported by Educate Nevada Now, which is affiliated with The Rogers Foundation, pro bono lead attorney Tamerlin Godley from Munger, Tolles & Olson, LLP, local pro bono counsel (Bradley Schrager, Don Springmeyer, and Justin Jones with Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP), and David Sciarra from the Education Law Center in New Jersey. *See* Notice of Entry of Order Granting Motion for Preliminary Injunction, Lopez v. Schwartz, No. 15-0C-00207-1B (1st Jud. Dist. Ct. Nev. Jan. 12, 2016); *see* Press Release, Educ. Law Ctr., Public School Parents to State Treasurer: Obey Court Order, Stop ESA Program, (Dec. 5, 2016), http://www.edlawcenter.org/news/archives/nevada/public-school-parents-to-state-treasurer-obey-court-order,-stop-esa-program.html [https://perma.cc/8Z4X-655V].

[71] *See* Order Granting Motion for Preliminary Injunction, *supra* note 67, at 2.

Sections 2 or 3.[72] Judge Wilson also held that the plaintiffs had met all requirements for a preliminary injunction, and it was granted.[73] The State Treasurer appealed.[74]

B. Duncan v. State[75]

In *Duncan*, the plaintiffs were five Nevada citizens who, through counsel,[76] challenged S.B. 302 on the grounds that it violated Article XI, Sections 2 and 10 of the Nevada State Constitution.[77] The State of Nevada filed a motion to dismiss for lack of jurisdiction and failure to state a claim, and the district court found that plaintiffs did have standing as taxpayers to facially challenge S.B. 302 against Article XI, Sections 2 and 10 of the Nevada Constitution.[78] However, the court found that the plaintiffs lacked standing to assert specific applied injuries, including the possibility of lost public school funding, as they had not personally suffered any harm.[79] Consequently, the district court held that S.B. 302 does not facially violate Article XI, Sections 2 or 10 and, thus, granted the State of Nevada's motion to dismiss.[80] The plaintiffs appealed.[81]

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[72] *Id*.

[73] *Id*.

[74] The State of Nevada was represented by Attorney General Adam Paul Laxalt, Solicitor General Lawrence VanDyke, Deputy Solicitor General Joseph Tartakovsky, Head of Complex Litigation Ketan Bhirud, and Paul D. Clement with Bancroft PLLC. *See* Defendant's Notice of Appeal at 2, Lopez. v. Schwartz, No. 15-0C-00207-1B (1st Jud. Dist. Ct. Nev. Jan. 15, 2016) (No. 69611).

[75] Order on Defendant's Motion to Dismiss for Lack of Jurisdiction and Failure to State a Claim, *supra* note 68, at 1.

[76] The plaintiffs in *Duncan* were supported by Amy M. Rose with the American Civil Liberties Union (ACLU) of Nevada, Daniel Mach, Heather L. Weaver with the ACLU Foundation, Richard B. Katskee and Gregory M. Lipper with Americans United for Separation of Church and State, and Nitin Subhedar, Samuel Jacob Edwards, and Anupam Sharma with Covington & Burlington, LLP. Plaintiffs' Order Admitting to Practice, Duncan v. State, No. A-15-723703-C (Dist. Ct. Nev. Apr. 8, 2016).

[77] *See* Order on Defendant's Motion to Dismiss for Lack of Jurisdiction and Failure to State a Claim, *supra* note 68, at 2.

[78] *See id*. at 18. The State of Nevada was represented by Attorney General Adam Paul Laxalt, Solicitor General Lawrence VanDyke, Deputy Solicitor General Joseph Tartakovsky, General Counsel Ketan Bhirud, Assistant Solicitor General Jordan T. Smith, and Paul D. Clement with Bancroft PLLC. *See* Notice of Entry of Order at 2, Duncan v. State, No. A-15-723703-C (Dist. Ct. Nev. June 1, 2016).

[79] Order on Defendant's Motion to Dismiss for Lack of Jurisdiction and Failure to State a Claim, *supra* note 68, at 19.

[80] *Id*. at 29, 44–45.

[81] *See* Notice of Appeal at 1, Duncan v. State, No. A-15-723703-C (Dist. Ct. Nev. June 17, 2016).

C. Schwartz v. Lopez

The Nevada Supreme Court acknowledged that while two separate complaints were filed challenging the constitutionality of S.B. 302, both complaints shared common legal questions and thus warranted a joint resolution.[82] The Court emphasized that S.B. 302's merits and policy were not before the Court, and the judiciary's role was solely to determine whether the legislation was contrary to Nevada's constitution.[83] As a threshold matter, the Court first analyzed the State of Nevada's argument that "the [*Duncan*] plaintiffs lack[ed] standing to challenge S.B. 302 because they cannot show that they will suffer any special injury"; and recognized that "[g]enerally, a party must show a personal injury and not merely a general interest that is common to all members of the public."[84] However, the Court adopted a new exception to the injury requirement when there are "issues of significant public importance," and available only when certain narrow criteria are met.[85] Therefore, the *Duncan* plaintiffs met the standing requirement under the new public-importance exception test.[86]

Next, the Court analyzed the plaintiffs' constitutional claims. While the Court recognized that the cases came before the Court through different procedural contexts, both of the lower courts' decisions concerned S.B. 302's constitutionality; thus, the Court held that these questions were reviewable under a *de novo* standard since they were purely questions of legal interpretation.[87] The Court analyzed whether S.B. 302 is constitutional under three sections of Article XI of Nevada's Constitution: (1) Section 2, the "uniformity" clause;[88] (2) Section 10, the "no-aid" clause;[89] and (3) Section 6, the "education-first" clause.[90]

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[82] Schwartz v. Lopez, 382 P.3d 886, 891 (Nev. 2016).

[83] *Id*.

[84] *Id*. at 894.

[85] *Id*.; *see, e.g*., Trs. for Alaska v. State, 736 P.2d 324, 329–30 (Alaska 1987); *see* Dep't of Admin. v. Horne, 269 So. 2d 659, 662–63 (Fla. 1972); Utah Chapter of Sierra Club v. Utah Air Quality Bd., 148 P.3d 960, 972–74 (Utah 2006).

[86] *Schwartz*, 332 P.3d at 895.

[87] *Id*.

[88] Leslie Hiner, *Educational Choice for Nevada Public School Students Threatened by Lawsuit*, ED CHOICE BLOG (Aug. 27, 2015), https://www.edchoice.org/blog/educational-choice-for-nevada-public-school-students-threatened-by-lawsuit/ [https://perma.cc/CV3S-QC85] (referring to Section 2 as the "Uniformity Clause").

[89] *Id*. (referring to Section 10 as the "No-Aid Clause").

[90] Press Release, Educate Nev. Now, Parents' Challenge to ESA Voucher Law Remains on Track Before Nevada Supreme Court (May 19, 2016), http://www.educatenevadanow.com/press_release/parents-challenge-to-esa-voucher-law-remains-on-track-before-nevada-supreme-court/ [https://perma.cc/Q27Q-5JBT] (referring to Article XI, Section 6 as the "Education First Amendment"). *See generally*, *Schwartz*, 332 P.3d at 900.

1. Article XI, Section 2

First, the Court analyzed whether S.B. 302 violated the uniformity clause, found in Article XI, Section 2 of the Nevada Constitution. It states:

> The legislature shall provide for a uniform system of common schools, by which a school shall be established and maintained in each school district at least six months in every year, and any school district which shall allow instruction of a sectarian character therein may be deprived of its proportion of the interest of the public school fund during such neglect or infraction, and the legislature may pass such laws as will tend to secure a general attendance of the children in each school district upon said public schools.[91]

Plaintiffs in both *Duncan* and *Lopez* argued that S.B. 302 violated the uniformity clause in Section 2 because it used public funds to subsidize an alternative non-uniform private system of education.[92] To support their position, plaintiffs cited to the long-recognized maxim *expressio unius est exclusio alterius*, meaning the expression of one thing is the exclusion of another, and they argued that the constitutional mandate to provide a uniform system of public schools forbids the legislature from creating a coexisting system of private schools.[93] The State repudiated that doctrine by insisting that the term "uniform" meant consistency within the public school system itself and that Section 2 must be read in conjunction with Section 1, which "require[s] the Legislature to encourage education 'by all suitable means.' "[94] The State argued that Section 1's "'suitable means clause'" gives the legislature broad education policy-making powers, and, thus, policy makers are not confined to public education.[95] Plaintiffs refuted that position by stating that the suitable-means clause was intended only to allow the legislature to encourage education *within* the public school system itself.[96]

The Court stated that the uniformity clause's plain language is "clearly directed at maintaining uniformity *within* the public school system" and determined that S.B. 302 is not contrary to Section 2's uniformity mandate because it does not transform private schools into public schools.[97] In addition, the State's

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[91] NEV. CONST. art. XI, § 2.

[92] *Schwartz*, 332 P.3d at 896; *see also* Respondents' Answering Brief at 38, *Schwartz*, 332 P.3d (No. 69611); Appellants' Opening Brief at 48–49, Duncan v. State, No. A-15-723703-C (No. 70648) (Nev. July 12, 2016).

[93] *Schwartz,* 382 P.3d at 896; *see also* Thomas v. Nevada Yellow Cab Corp., 327 P.3d 518, 521 (Nev. 2014); Galloway v. Truesdell, 422 P.2d 237, 246 (Nev. 1967); Appellants' Opening Brief, *supra* note 92, at 48–49.

[94] NEV. CONST. art. 11, § 1 ("The legislature shall encourage by all suitable means the promotion of intellectual, literary, scientific, mining, mechanical, agricultural, and moral improvements, and also provide for a superintendent of public instruction and by law prescribe the manner of appointment, term of office and the duties thereof."); *Schwartz,* 382 P.3d at 896–97.

[95] *Schwartz,* 382 P.3d at 896.

[96] *Id*. at 897.

[97] NEV. CONST. art. 11, § 1; *Schwartz*, 382 P.3d at 896.

Section 1 argument also persuaded the Court in determining that the use of the phrase "and also" signaled two legislative duties: to encourage education and to provide for a superintendent of public instruction.[98] The Court analogized this interpretation to the case of *Meredith v. Pence*, where the Indiana Supreme Court upheld a similar program under Indiana's uniformity clause.[99] The Nevada Supreme Court also adopted the *Meredith* court's interpretation of the uniform-schools requirement stating that "as long as the Legislature maintains a uniform public school system, open and available to all students, the constitutional mandate . . . is satisfied."[100] The plaintiffs' reliance on the Florida case of *Bush v. Holmes*,[101] which struck down a similar school choice program, was dismissed on the basis that Florida's constitutional provision was "inapposite."[102] In addition, the Court believed there was support for the parental freedom view in the debates during Nevada's constitutional convention.[103] Therefore, the Court held that S.B. 302 is facially constitutional under Article XI, Section 2 of the Nevada Constitution.[104]

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[98] *Schwartz,* 382 P.3d at 897 ("interpreting use of the word 'and' in the Indiana constitution's education clause as setting forth two separate and distinct duties"); *see also* Meredith v. Pence, 984 N.E.2d 1213, 1221 (Ind. 2013).

[99] *Schwartz*, 382 P.3d at 897. Indiana's uniform schools section specifically requires the legislature "to provide, by law, for a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all." *See* IND. CONST. art. 8, § 1.

[100] *Schwartz*, 382 P.3d at 898.

[101] *Id*.

[102] *Id*.; *see also* Bush v. Holmes, 919 So. 2d 392, 407 (Fla. 2006); FL. CONST. of 1868, art. IX, § 2 ("The legislature shall provide a uniform system of common schools, and a university, and shall provide for the liberal maintenance of the same. Instruction in them shall be free.").

[103] *Schwartz*, 382 P.3d at 897; *see, e.g.*, OFFICIAL REPORT OF THE DEBATES AND PROCEEDINGS IN THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEVADA 565–77 (1864). The Delegates were most concerned with the language requiring compulsory public school attendance as it seemed contrary to the spirit of the American republic. *Id*. at 571 (statement of J.H. Warwick, Lander County). However, it is also important to note that the delegates also believed that "there should be some provision by which the children of the State, growing up to be men and women, should have the privilege secured to them of attending school . . . ." *Id*. at 567 (statement of John A. Collins, Storey County). As a result, the language was modified to encourage educational instruction as a whole, rather than mandatory attendance in the public schools. *Id*. at 574 (statement of James A. Banks, Humboldt County). The Delegates settled on the language of Section 2 anticipating that future interpretations would evolve with the times. *Id*. at 573–74 (statement of James A. Banks, Humboldt County) (John A. Collins, Storey County noting that "[t]he provision is elastic and comprehensive, and may be adapted to any want of any particular portion of the community, or any condition of progress of the public mind").

[104] *Schwartz*, 382 P.3d. at 898–99.

2. Article XI, Section 10

Next, the Court in *Schwartz v. Lopez* analyzed whether S.B. 302 was an impermissible use of public funds under the no-aid clause found in Article XI, Section 10 of the Nevada Constitution.[105] Section 10 states that "[n]o public funds of any kind or character whatever, State, County or Municipal, shall be used for sectarian purpose."[106] S.B. 302 allows public funds to be deposited into an account set up by a parent on a child's behalf, and those funds may be used only for certain education expenses, including, but not limited to, tuition at a participating religious private school.[107] Plaintiffs in *Duncan* argued that this use of public monies was a sectarian purpose, relying on Nevada's only interpretation of the "no aid" clause in the 1882 Nevada Supreme Court decision of *State v. Hallock*.[108]

In *Hallock*, the Nevada Supreme Court ruled that legislative funding of a Catholic orphanage asylum was impermissible under Section 10[109] and used the "popular sense" definition of the term "sectarian," which broadly provides that a "religious sect is a body or number of persons united in tenets, but constituting a distinct organization or party."[110] Additionally, the Nevada Supreme Court in *Hallock* rejected the argument that funds would not be used for sectarian purposes because the Court determined that it would be "impossible to separate the legitimate use from that which is forbidden."[111] The plaintiffs analogized the use of ESA program funds in religious institutions to the funding of the orphanage struck down by the *Hallock* Court.[112] However, the State argued that ESA program had a secular purpose, to promote education for all of Nevada's students.[113] Furthermore, the State set forth that the public funds are provided "only to parents, not schools," claiming that the intervening decisions of parents break any link between public funds being used for sectarian purposes.[114] Plaintiffs refuted this position by arguing that the funds never lost their public identity because they are always subject to state control, citing to the State Treasurer's authority

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[105] *Id*. at 899.

[106] NEV. CONST. art 11, § 10.

[107] *Schwartz*, 382 P.3d at 899.

[108] *See* Appellants' Opening Brief, *supra* note 92, at 20; State v. Hallock, 16 Nev. 373, 386, 388 (1882).

[109] *Hallock*, 16 Nev. at 388.

[110] *See id*. at 385; *see also* Jay S. Bybee & David W. Newton, *Of Orphans and Vouchers: Nevada's "Little Blaine Amendment" and the Future of Religious Participation in Public Programs,* 2 NEV. L.J. 551, 569 (2002).

[111] *Hallock*, 16 Nev. at 388; Bybee & Newton, *supra* note 110, at 570. In *Hallock*, the Nevada Supreme Court interpreted Section 10 as a bar upon the legislature from funding sectarian institutions even when the funds were used for secular purposes. *Hallock*, 16 Nev. at 388.

[112] *See* Appellants' Opening Brief, *supra* note 92, at 20–24.

[113] *See* Respondents' Answering Brief, *supra* note 92, at 20.

[114] *Id*. at 26.

to audit the accounts, to freeze the funds for misuse, and to automatically revert unused funds back to the State's General Fund.[115]

The Court was persuaded by the State's interpretation and disagreed with the plaintiffs' reading of *Hallock*.[116] Since the *Hallock* decision concerned a direct appropriation to a sectarian institution and since S.B. 302 appropriates funds to parents, who are private individuals, the "holding in *Hallock* d[id] not require a different conclusion."[117] Further, the Court disagreed that the funds were being used for a sectarian purpose because the parties did not dispute the fact that the funds could be spent only on educational expenses, a secular purpose.[118] In addition, the Court rejected the argument that the State's control over the funds caused the funds to retain their public identity, resulting in the use of public funds for a sectarian purpose.[119] Since the funds belonged to the parents, the conditions imposed on the parents' use of the funds and the State's oversight of the accounts did not interfere with the private nature of the funds.[120] Accordingly, the Court concluded that the ESA program on its face was not appropriation of public funds for sectarian purposes and, therefore, did not violate the no-aid clause.

3. Article XI, Section 6

Finally, the Court in *Schwartz v. Lopez* determined whether the legislature lawfully funded ESAs under the education-first clause in Article XI, Section 6 of the Nevada Constitution.[121] Section 6 requires the legislature to provide funding for the "support and maintenance of [the State's] university and common schools . . . by direct legislative appropriation from the general fund . . . ."[122] In addition, the education-first clause prescribes the manner and timeline by which the legislature shall pass education funding, including the requirement that the Legislature "fund the operation of the public schools in the State for kindergarten through grade 12 . . . before any other appropriation is enacted."[123] Last, Section

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[115] *Schwartz*, 382 P3d. at 899.
[116] *Id*. 899–900.
[117] *Id*. at 900.
[118] *Id*. at 899.
[119] *Id*.
[120] *Id*.
[121] *Id*. at 900.
[122] NEV. CONST. art. XI, § 6(1).
[123] NEV. CONST art. XI, § 6(2). Subsections (3) and (4) pertain to appropriations enacted during special sessions of the Legislature and are thus inapplicable here. This provision of Section 6 was added in response to legislative gridlock over increasing revenue for education that occurred in 2003. *See, e.g.*, Jeffrey W. Stempel, *The Most Rational Branch*: Guinn v. Legislature *and the Judiciary's Role as Helpful Arbiter of Conflict*, 4 NEV. L.J. 518, 518 n.2 (2004); Guinn v. Legislature, 76 P.3d 22, 25–29 (2003); *see* DEAN HELLER, SEC'Y OF STATE, STATEWIDE BALLOT QUESTIONS 4 (2004), https://www.leg.state.nv.us/Division/Research/VoteNV/BallotQuestions/2004.pdf [https://perma.cc/GSN5-N5Y6] (arguing in favor of the amendment because "[t]he budget deadlock [Nevada] experienced during the 2003 legislative sessions must never be repeated.").

6 renders void any appropriation not enacted in accordance with the section.[124] The *Lopez* plaintiffs argued that S.B. 302's language requiring that ESA funding come from the State's Distributive School Account impermissibly diverted public school funding for private expenditures in violation of Section 6.[125] The State Treasurer argued that S.B. 302 did not violate any provision of Section 6 because it was not an appropriations bill and also contended that S.B. 515, the bill that funded the public school system, simultaneously funded ESAs because it was passed with the "full knowledge" of S.B. 302.[126] The Court did not confront either of these arguments head-on but instead endeavored to determine whether either S.B. 302 or S.B. 515 contained an appropriation for ESAs.[127]

Article IV, Section 19 of the Nevada Constitution provides that "[n]o money shall be drawn from the treasury but in consequence of appropriations made by law."[128] The Court acknowledged that "[n]o technical words are necessary to constitute an appropriation" and that "one could argue that S.B. 302 impliedly appropriates funds."[129] However, the Court rejected the State's argument that S.B. 302 impliedly appropriates funds because S.B. 302 did not limit the number of ESAs or the amount of money for ESAs.[130] In addition, because the legislature funded education after the passage of S.B. 302, the funding of the ESAs through S.B. 302 would have occurred before the funding of the public schools in violation of the education-first clause, rendering the S.B. 302 appropriation void.[131] Further, the Court rejected the State's argument that S.B. 515 simultaneously funded the ESA program.[132] The Court could not infer such a funding appropriation for three reasons: (1) S.B. 515 did not reference the ESA program; (2) S.B. 515 did not appropriate any funds to the ESA program; and (3) the legislative history of S.B. 515 contained no mention of the ESA program.[133] The Court concluded that allowing the use of funds appropriated by S.B. 515 would infringe upon the legislature's duties to education under Article XI, Sections 2 and 6.[134] Thus, the Court entered a declaratory judgment and permanent injunction upon

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[124] NEV. CONST. art. XI, § 6(5) ("Any appropriation of money enacted in violation of subsection 2, 3 or 4 is void.").

[125] *See* Respondents' Answering Brief, *supra* note 92, at 20–21; *see also* S.B. 302, 2015 Leg., 78th Sess. § 16.1 (Nev. 2015).

[126] *See* Appellant's Opening Brief at 30–31, Schwartz v. Lopez, 382 P.3d 886 (Nev. 2016) (No. 69611).

[127] *Schwartz*, 382 P.3d at 900–01.

[128] NEV CONST. art. IV, § 19; *Schwartz*, 382 P.3d at 900.

[129] *Schwartz*, 382 P.3d at 900–01.

[130] *Id*. at 901.

[131] *Id*.

[132] *Id*. at 901–02.

[133] *Id*. at 902.

[134] *Id*.

the use of any funds appropriated to the public school system by S.B. 515[135] under Section 16 of S.B. 302 in both the *Lopez* and *Duncan* cases.[136] The Court did not reach the merits of whether S.B. 302 violated other provisions of Article XI, Section 6.[137]

4. Dissent

Justices Douglas and Cherry concurred in all but part VI of the Court's opinion.[138] In their dissent, the Justices disagreed with the majority's decision on the merits of the constitutionality of S.B. 302 under the no-aid clause for two reasons.[139] First, the invalidation of the funding mechanism made it unnecessary to make a decision as to whether the legislation violated Section 10, and, second, the decision was not ripe for a decision on the merits.[140] The dissent differed with the majority's decision under the no-aid clause because the constitutional question was not procedurally before the Court in that the case was before the Court on a motion to dismiss.[141] Therefore, the only issue to be decided was "whether, accepting all factual allegations as true, the complaint alleged a claim upon which relief may be granted."[142] Since the majority seemed to recognize that the plaintiffs put forth a "legally sufficient claim," the analysis should have ended there.[143] Further, the dissent contends that the evaluation of whether the funds were public or private in nature involved "factual determinations that were not made by the

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[135] *Id*. at 902–03 ("Having determined that SB 515 did not appropriate any funds for the education savings accounts, the use of any money appropriated in [S.B.] 515 for K-12 public education to instead fund the education savings accounts contravenes the requirements in Article 11, Section 2 and Section 6 and must be permanently enjoined. . . . Additionally, because SB 302 does not provide an independent basis to appropriate money from the State General Fund and no other appropriation appears to exist, the education savings account program is without an appropriation to support its operation."); *see also* S.B. 302, 2015 Leg., 78th Sess. § 16 (Nev. 2015).

[136] *Schwartz*, 382 P.3d at 902–03 ("In *Duncan v. Nevada State Treasurer*, Docket No. 70648, we affirm in part and reverse in part the district court's order dismissing the complaint and remand the case to the district court to enter a final declaratory judgment and permanent injunction enjoining enforcement of Section 16 of SB 302 absent appropriation therefor consistent with this opinion. In *Schwartz v. Lopez*, Docket No. 69611, we affirm in part and reverse in part the district court's order granting a preliminary injunction, and we remand the case to the district court to enter a final declaratory judgment and permanent injunction enjoining enforcement of Section 16 of SB 302 consistent with this opinion.").

[137] *Id*. at 902.

[138] *Id*. at 903 (Douglas, J. and Cherry, J. concurring in part and dissenting in part).

[139] *Id*.

[140] *Id*.

[141] *Id*.

[142] *Id*.

[143] *Id*.

district court. . . ."[144] Therefore, the dissent concluded that the Court should have remanded the case to the district court for factual determinations.[145]

5. Holding

In sum, the Court held that S.B. 302 did not facially violate Article XI, Sections 2 or 10 of the Nevada Constitution.[146] However, S.B. 302 had attempted to fund its operation by diverting funds that were expressly appropriated toward the operation of public schools.[147] Nevada Revised Statutes generally prohibits using any money specifically appropriated for the operation of public schools for any other purpose,[148] but S.B. 302 attempted to exempt itself from this prohibition in order to divert funds from overall education funding to ESAs.[149] The Court rightly refused to infer such an appropriation for two reasons. First, S.B. 302 was passed before S.B. 515—the legislation that funded education in the State of Nevada—and thus, any implied appropriation within S.B. 302 would have blatantly violated Section 6's education-first clause mandating that public education be funded first.[150] Second, if S.B. 515 had funded both public education and ESAs, with no limitations on the number of ESAs or a maximum sum of money designated, the program could potentially allow all students to leave the school district, which would directly contravene the legislature's duties under Article XI, Section 2.[151] Thus, the Court permanently enjoined the funding of ESAs through the State's public education budget.[152]

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[144] *Id.*

[145] *Id.*

[146] *Id.* at 891.

[147] S.B. 302, 2015 Leg., 78th Sess. § 15.9 (Nev. 2015); *see also* discussion *supra* Part II.C.

[148] Prior to the passage of S.B. 302, NRS § 387.045 read, "No portion of the public school funds or of the money specially appropriated for the purpose of public schools shall be devoted to any other object or purpose." NEV. REV. STAT. § 387.045(1) (2013). Although, the Court does not explicitly point out this issue, the Court does acknowledge that "one could argue that SB 302 impliedly appropriates funds . . ." likely referring to this provision. *Schwartz*, 382 P.3d at 901. Therefore, this point was undoubtedly persuasive to the Court in holding that S.B. 302 did not create a permissible appropriation.

[149] S.B. 302 § 15.9.

[150] NEV. CONST. art. XI, § 6(2); *Schwartz*, 382 P.3d at 901.

[151] *Schwartz*, 382 P.3d at 901. ("Because of the 'hold-harmless' provision under NRS 387.1223(3), which allows a school district's DSA funding to be based on enrollment from the prior year if enrollment in that particular district decreases by five percent or more from one year to the next, if all students left the public school system, the State must still fund *both* the school districts' per pupil amount based on 95 percent of the prior year's enrollment *and* the education savings accounts for all students, an amount potentially double the $2 billion appropriated in SB 515 for just the public schools.").

[152] *Id.* at 903.

III. ANALYSIS

Through its permanent injunction, the Court essentially gutted the ESAs and left a shell of a program that had no permissible funding mechanism.[153] So if the program is defunct, why are proponents of ESAs also hailing victory? The reason is that the opinion declares the ESA program does not facially violate Sections 2 and 10. Proponents claim that the holding makes it "crystal clear that [universal] ESAs are constitutional" and has, at least in Nevada, "affirmed the lawfulness of transferring public monies into private education institutions . . . ."[154] On the other hand, opponents contend universal ESAs are dead because changing the funding mechanism would necessarily change the "universal" nature of the program.[155] The following segments will analyze the Court's holding on the uniformity clause and the no-aid clause in depth and will determine whether the Court truly upheld the universal nature of the program as well as whether the Court's opinion affirms the lawfulness of transferring public monies to private religious institutions in the name of education.

A. Analysis of the Court's Opinion under Article XI, Section 2, the Uniformity Clause

In upholding the facial validity of S.B. 302 under Article XI, Section 2, the Court interpreted the uniformity clause as applying only to the public school system.[156] The Court stated that because plaintiffs did not disagree that "Nevada's public school system is uniform, free of charge, and open to all to students," and because ESAs had not altered the existence of the public school system or transformed private schools into public schools, S.B. 302 did not violate the uniformity clause.[157] In the course of litigation, the plaintiffs in both cases had presented substantial evidence that S.B. 302 publicly subsidizes non-uniform private schools, and that the legislation does not require participating entities to accept all students; thus, the schools are free to deny students admission based on religion, academic achievement, disability, or sexual orientation.[158] However,

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[153] Schoenmann, *supra* note 18; Chereb, *supra* note 17.

[154] Taylor, *supra* note 20.

[155] Schoenmann, *supra* note 18 (stating that striking down the open-ended funding mechanism hit the heart of the program, and, thus, the universal program can no longer go forward); *Nevada Supreme Court Decision Permanently Blocks Use of School Funds to Pay for Vouchers*, EDUCATE NEV. NOW, Oct. 3, 2016, http://us13.campaign-archive1.com/?u=ce989d91d7a00d2638ee2dbd6&id=6d83204b55 [https://perma.cc/F4LP-2PFF] ("To implement the ESA voucher program, the Nevada Legislature will have to find over $40 million, for this academic year, to pay for it.").

[156] *Schwartz,* 382 P.3d at 896 ("Looking to the plain language of Section 2, it is clearly directed at maintaining uniformity *within* the public school system.").

[157] *Id*. at 896.

[158] *See* Respondents' Answering Brief, *supra* note 92, at 39; S.B. 302, 2015 Leg., 78th Sess. § 14 (Nev. 2015) ("[N]othing in the provisions of sections 2 to 15, inclusive, of this act, shall be deemed to limit the independence or autonomy of a participating entity. . . .").

this evidence focused on the non-uniformity of the *private* school system. In addition, while the *Duncan* plaintiffs argued in the lower court that the ESA program violates Section 2's uniformity and general attendance requirements because of the potential loss of funding to the public schools, the lower court held that the *Duncan* plaintiffs did not have standing on these issues.[159] Therefore, the lower court was "not bound to accept factual allegations for which the plaintiff does not have standing to assert to establish a cause of action."[160] The factual record establishing these claims was not properly before the Nevada Supreme Court, so in the end the Court did not review these claims.[161]

The Court's holding regarding Section 2 was quite narrow because the analysis did not address the universal nature of the program's impact on uniformity within public schools nor the impact of private school discrimination upon public schools. In fact, later in the opinion, the Court acknowledged that the unlimited nature of the program could potentially allow all students to leave the school district, resulting in a violation of the uniformity clause. The Court stated, "[S]urely the Legislature would have specified the number of education savings accounts or set a maximum sum of money to fund those accounts . . . ."[162] Thus, the Court recognized that while the program in and of itself does not facially violate the text of Section 2, the unlimited nature of the program does because "the use of any money appropriated in [S.B.] 515 for K-12 public education to instead fund the education savings accounts contravenes the requirements in Article 11, Section 2 . . . ."[163] In sum, when reading the opinion as a whole, the Court's holding under the uniformity clause should be narrowly construed. The holding in essence provides that taking public money that is not already appropriated to public schools and using it for educational purposes does not facially violate Article XI, Section 2 of the Nevada Constitution.[164] Thus, this Article posits that if the ESA program is funded in the future, the *Schwartz* opinion should not be interpreted to limit any challenge under Section 2.

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[159] *See* Order on Defendant's Motion to Dismiss for Lack of Jurisdiction and Failure to State a Claim, *supra* note 68, at 7–8.

[160] *See Id*. at 3 (first citing Doe v. Bryan, 728 P.2d 443, 444 (Nev. 1986); and then citing Blanding v. City of Las Vegas, 280 P. 644, 650 (Nev. 1929)).

[161] *See generally Schwartz,* 382 P.3d 886.

[162] *Id*. at 901 ("Because of the 'hold-harmless' provision under NRS 387.1223(3), which allows a school district's DSA funding to be based on enrollment from the prior year if enrollment in that particular district decreases by five percent or more from one year to the next, if all students left the public school system, the State must still fund *both* the school districts' per pupil amount based on 95 percent of the prior year's enrollment *and* the education savings accounts for all students, an amount potentially double the $2 billion appropriated in SB 515 for just the public schools.").

[163] *Id*. at 902.

[164] *Id*. at 898–99.

B. Analysis of the Court's opinion under Article XI, Section 10, the no-aid clause

With regard to this part of the Court's analysis, it is important to note that this portion of the opinion was decided four-two.[165] Justices Douglas and Cherry dissented under an analysis of the no-aid clause for two reasons. First, the majority's "holding that the funding of the education savings accounts must be permanently enjoined as unconstitutional makes it unnecessary for [the Court] to consider whether certain portions of [S.B.] 302 also violate Section 10."[166] Second, the issue was not ripe for a decision on the merits because it was before the Court on a motion to dismiss, and thus, it should have been remanded to the district court for factual determinations.[167] Therefore, this Article contends that the no-aid clause analysis portion of the opinion is dicta and, thus, not binding on future program challenges.[168]

1. The Court's holding that there was no permissible appropriation for education savings accounts renders the no-aid-clause issue moot.

A claim is moot if there is no actual controversy that can be solved by an enforceable judgment, and "a controversy must be present through all stages of the proceeding . . . even though a case may present a live controversy at its beginning, subsequent events may render the case moot."[169] As Justices Douglas and Cherry point out in their dissent, "our holding that the funding of the education savings accounts must be permanently enjoined as unconstitutional makes it unnecessary for us to consider whether certain portions of [S.B.] 302 also violate Section 10."[170] As discussed above, the Court held that any appropriation intended by S.B. 302 or S.B. 515 would violate Sections 2 and 6, rendering the appropriation void.[171] Accordingly, the Court prohibited the State from directing any funds appropriated by S.B. 515 to ESAs, as it would infringe upon the legislature's duties with respect to education under Article XI, Sections 2 and 6.[172] Because this holding permanently enjoined the funding of ESAs under the existing version of S.B. 302, no public money could ever be disbursed to parents or

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[165] *Id*. at 903 (Douglas, J. and Cherry, J. concurring in part and dissenting in part) ("I concur in all but Part VI of the court's opinion.").

[166] *Id*.

[167] *Id*.

[168] In Nevada, a statement in a case is dictum when it is "unnecessary to a determination of the questions involved." Argentena Consol. Mining Co. v. Jolley Urga Wirth Woodbury & Standish, 216 P.3d 779, 785 (Nev. 2009) (internal quotations omitted).

[169] Personhood Nevada v. Bristol, 245 P.3d 572, 574 (Nev. 2010).

[170] *Schwartz,* 382 P.3d at 903 (Douglas, J. and Cherry, J. concurring in part and dissenting in part) ("Constitutional questions should not be decided except when absolutely necessary to properly dispose of the particular case.") (quoting Cortes v. State, 260 P.3d 184, 192 (Nev. 2011)).

[171] *Id*. at 902.

[172] *Id*. at 902–03.

sectarian institutions. With no permissible public funding mechanism for the ESAs, the issue of whether S.B. 302 was an unconstitutional appropriation of public funds for a sectarian purpose was no longer a live controversy. Therefore, it was unnecessary for the Court to consider whether S.B. 302 impermissibly disbursed public monies to sectarian institutions under the no-aid clause because this issue was moot.

2. This issue was before the Court on a motion to dismiss, and, thus, the constitutional merits of the claim should have been remanded to the lower court to develop a factual record.

In upholding ESAs, the majority acknowledged that these cases come before the Court from different procedural contexts, with the *Duncan* case dismissed for failure to state a claim and the *Lopez* case upon appeal of a lower court's granting of a preliminary injunction.[173] Yet, the majority justifies its opinion on the merits of Section 10 because in both cases "the district court rendered a decision as to the constitutionality of SB 302, which is purely a legal question reviewed de novo by this court."[174] Justices Cherry and Douglas declared in their dissent:

> [T]he court ignores that the *Duncan* complaint (which raised the Section 10 challenge) was dismissed by the district court for failure to state a claim under NRCP 12(b)(5). At that stage of the litigation, the only issue to be considered is whether, accepting all factual allegations as true, the complaint alleged a claim upon which relief may be granted.[175]

The dissent relies upon *Buzz Stew, LLC v. City of North Las Vegas*[176] for its above proposition. In *Buzz Stew*, the Court reviewed a district court's dismissal of the plaintiff's complaint under NRCP 12(b)(5) and noted that such a dismissal

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[173] *Id.* at 895 ("Initially, we note that these cases come before us in different procedural contexts—one from an order granting a preliminary injunction and the other from an order dismissing a complaint for failure to state a claim. Consequently, these proceedings would ordinarily be governed by different standards.").

[174] *Id.* ("[T]his court reviews de novo determinations of whether a statute is constitutional.") (quoting Hernandez v. Bennett-Haron, 287 P.3d 305, 310 (Nev. 2012)). The majority cites *Hernandez v. Bennett-Haron* for this proposition. However, in *Hernandez* the district court had issued its Findings of Fact, Conclusions of Law and Judgment, denying the Hernandez plaintiffs' Motions for Preliminary Injunction and their claim for permanent injunctive relief, which the plaintiffs appealed. Appellants' Opening Brief at 5–6, Hernandez v. Bennett-Haron, 287 P.3d 305 (Nev. 2012) (No. 59861). Distinguishable from *Hernandez*, in *Duncan* the constitutional challenge of S.B. 302 under Section 10, Article XI was before the Court on a motion to dismiss for failure to state a claim. *See* Order on Defendant's Motion to Dismiss for Lack of Jurisdiction and Failure to State a Claim, *supra* note 68, at 44–45 (holding that "[t]his Court concludes Plaintiffs have not alleged facts establishing its claim that the Legislature's creation of the ESA program violates Article XI, section 10, prohibiting the use of public funds for a sectarian purpose. Plaintiffs' claim is dismissed.").

[175] *Schwartz*, 382 P.3d at 903 (citing Buzz Stew, LLC v. City of N. Las Vegas, 181 P.3d 670 (Nev. 2008)).

[176] Buzz Stew, LLC. v. City of N. Las Vegas, 181 P.3d 670 (Nev. 2008).

"is subject to a rigorous standard of review on appeal. . . . [Plaintiff's] complaint should be dismissed only if it appears beyond a doubt that it could prove no set of facts, which, if true, would entitle it to relief."[177] However, the *Schwartz* majority did not address whether plaintiffs could or could not have proven any set of facts which, if true, would entitle them to relief.[178] Instead, the Court concluded as a matter of law that the "ESA program does not result in any public funds being used for sectarian purpose and thus does not violate Article 11, Section 10 of the Nevada Constitution."[179] This is problematic because as the dissent points out, "the issue as to whether the funds in the education savings accounts are private or public in nature involves factual determinations that were not made by the district court and should not be made by this court in the first instance."[180]

The majority's holding on Section 10 departs from other states' procedural jurisprudence in that virtually all other courts consider a similar question of law—for example, high courts in Arizona,[181] Ohio,[182] Wisconsin,[183] Colorado,[184]

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[177] *Id*. at 672 (internal quotations omitted).

[178] *See generally Schwartz*, 382 P.3d at 886.

[179] *Id*. at 900.

[180] *Id*. at 903 (Douglas, J. and Cherry, J. concurring in part and dissenting in part).

[181] For example, in *Cain v. Horne*, the Arizona Supreme Court reversed a summary judgment finding that "as enacted, the State's school voucher programs do not result in an appropriation of public money for . . . the support of any religious establishment in violation of Article 2, Section 12 of the Arizona State Constitution. Cain v. Horne, 183 P.3d 1269, 1275 (Ariz. Ct. App. 2008), *rev'd*, 202 P.3d 1178 (Ariz. 2009) (internal quotations omitted); Cain v. Horne, 202 P.3d 1178, 1185 (Ariz. 2009); *see also* Minute Entry at 2, Cain v. Horne, No. CV 2007-002986 (Ariz. Super. Ct. June 14, 2007), 2007 WL 1891530, at *1 ("Having read and considered the parties' motions, supporting memoranda and statements of facts, the Court has determined (i) that there are no issues of fact material to this proceeding in dispute and this matter is a matter of law for the Court and (ii) that the defendants' reasoning and authorities are correct and applicable."). In *Niehaus v. Huppenthal*, the Arizona Supreme Court affirmed a lower court's finding after a trial on the merits that the voucher program did not violate the aid and religion clauses of the Arizona Constitution. Niehaus v. Huppenthal, 310 P.3d 983, 987–89 (Ariz. Ct. App. 2013).

[182] In *Simmons-Harris v. Goff*, the matter was before the court of appeals on a motion for summary judgment, and the Ohio Supreme Court reversed a court of appeals declaration that a school voucher program was unconstitutional under Article VI, Section 2. Simmons-Harris v. Goff, 711 N.E.2d 203, 212, 216 (Ohio 1999); *see also* OHIO CONST. art. VI, § 2 (stating that "no religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of this state.").

[183] In *Jackson v. Benson*, the Wisconsin Supreme Court reversed a court of appeals decision affirming a lower court's granting of summary judgment holding that modifications to an existing voucher program were unconstitutional. Jackson v. Benson, 578 N.W.2d 602, 632 (Wis. 1998); *see also* Jackson v. Benson, 570 N.W.2d 407, 416, 427 (Wis. Ct. App. 1997), *rev'd* 578 N.W.2d 602 (Wis. 1998) (focusing on whether the aid provided by the amended program was "for the benefit of" religious institutions as the clause of the Wisconsin constitution in question provides: "nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries." WIS. CONST. art. I, § 18).

[184] The plurality in *Taxpayers for Pub. Educ. v. Douglas Cty. Sch. Dist.* held after trial and appellate decision on the merits that the Colorado State Constitution prohibits public funds

New Mexico,[185] and Florida[186]—have made their determinations on consideration of an order granting summary judgment or upon a decision after trial on the merits.[187] By contrast, the Court here concluded, with limited to no factual determinations, that "[o]nce the public funds are deposited into an education savings account, the funds are no longer 'public funds' but are instead the private funds of the individual parent who established the account."[188] The Court reasoned that "[t]he parent decides where to spend the money for the child's education and may choose from a variety of participating entities, including religious and non-religious schools."[189] Additionally, the majority rejects the argument that the funds never lost their public identity without addressing the mechanics of how the public funds reached parents or how they reached private religious institutions.[190] When you contrast the *Schwartz* majority's reasoning with how other states have analyzed school choice programs' constitutionality on similar claims, the analysis on the funding mechanism and whether the funds were ever truly private is approached with great attention to detail. In the states mentioned above, final determinations of fact had been made at the trial level. This allows appellate-level courts to conduct a thoughtful and thorough analysis of the mechanisms by which school choice programs are funded and how they are interpreted against their own constitutional limitation on the expenditure of public monies for sectarian purposes.[191]

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from being given directly to students for use at religious schools. Taxpayers for Pub. Educ. v. Douglas Cty. Sch. Dist., 351 P.3d 461, 475 (Colo. 2015).

[185] The New Mexico Supreme Court reversed a motion for summary judgment in *Moses v. Skandera*, holding that the New Mexico state constitution prohibits public funds from being used to buy textbooks for students attending private schools. Moses v. Skandera, 367 P.3d 838, 849 (N.M. 2015) *petition for cert. filed*, 84 U.S.L.W. 3657 (U.S. May 16, 2016) (No. 15-1409).

[186] Finally, in *Bush v. Holmes*, the Florida Supreme Court reviewing an appeal after a trial court's decision on the merits held that "a program through which the State pays tuition for certain students to attend private schools, is declared to be unconstitutional on its face . . . ." Bush v. Holmes, 886 So. 2d 340, 345 (Fla. Dist. App. 2004), *aff'd in part*, 919 So. 2d 392 (Fla. 2006).

[187] *See* Cain v. Horne, 202 P.3d 1178, 1181 (Ariz. 2009); Niehaus v. Huppenthal, 310 P.3d 983, 985 (Ariz. Ct. App. 2013); *Simmons-Harris*, 711 N.E.2d at 206; *Jackson,* 578 N.W.2d at 607; *Bush,* 886 So. 2d at 345; Chittenden Town Sch. Dist. v. Dep't of Educ., 738 A.2d 539, 539 (Vt. 1999) (finding that sectarian school tuition reimbursement program was unconstitutional because it lacked safeguards against the use of funds for religious purposes).

[188] Schwartz v. Lopez, 382 P.3d 886, 899 (Nev. 2016).

[189] *Id.*

[190] *Id.* Although plaintiffs proffered multiple examples of how the funds remain within the State's control, the court was not persuaded, concluding that this control did change the private character of the funds. *Id.*

[191] *See Cain*, 202 P.3d at 1181; *Niehaus*, 310 P.3d at 984–85; *Jackson,* 578 N.W.2d at 621(after thorough analysis of the program's function in practice holding that "public funds may be placed at the disposal of third parties so long as the program on its face is neutral between sectarian and nonsectarian alternatives and the transmission of funds is guided by the independent decisions of third parties."); Stewart & Walker, *supra* note 31, at 44 (citing *Bush,* 886

An excellent example of this is illustrated by Arizona courts' differing opinions on school choice programs passed by its state legislature in the cases of *Cain v. Horne*[192] and *Niehaus v. Huppenthal*.[193] In these two cases, Arizona courts reached different conclusions because of how the programs in effect operated as a distribution of public monies. For example, in *Cain*, the court analyzed two programs ordained by the Arizona legislature that allowed students with disabilities to receive state funding to attend a private school.[194] Under these two programs, a parent of a qualifying student, after applying and being accepted, would receive a check which must be restrictively endorsed to the private school of their choice.[195] The Arizona constitutional provision at issue is referred to as the "aid clause," and it prohibits "appropriation of public money made in aid of any . . . private or sectarian school . . . ."[196] After a thorough analysis of the legislative history and relevant case law interpreting these constitutional provisions,[197] the Arizona Supreme Court then looked to the funding mechanism and held that, unlike its previous holdings, the funds here were appropriations.[198] The court next looked to where the appropriations were going and who they benefited.[199] The State in *Cain* argued that the parents exercise their own discretion in choosing where the money goes.[200] However, the Arizona Supreme Court held that the programs were unconstitutional because there were no limitations on what the funds could be used for and the programs directly transferred public money to private schools in violation of the aid clause.[201] Even though the checks were first given to the parents, that fact was irrelevant because once a student was accepted into a qualified school, the parents did not have a choice and were forced to endorse the check over to the school.[202]

Four years after the *Cain* decision, in *Niehaus v. Huppenthal*,[203] the Arizona Court of Appeals analyzed another school choice program passed by the Arizona

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So. 2d at 347) (holding that the voucher program violated the State Constitution's "no aid provision" because it was "undisputed that the OSP use[d] state revenues to fund vouchers that are paid to private schools chosen by the parents or guardians of students" and finding that because the voucher was used to pay the cost of tuition, any disbursement made to a religious school is made in aid of a " 'sectarian institution,' regardless if the voucher funds or supports a church or religious Denomination") (internal quotations omitted); *Id.* at 45 (citing *Bush,* 886 So. 2d at 352–53).

[192] *Cain*, 202 P.3d at 1180–81.

[193] Compare *Cain,* 202 P.3d at 1181 *with Niehaus*, 310 P.3d at 984.

[194] *Cain*, 202 P.3d at 1180–81.

[195] *Id.*

[196] ARIZ. CONST. art. IX, § 10; *Cain*, 202 P.3d at 1184 (internal quotations omitted).

[197] *Cain*, 202 P.3d at 1182–83.

[198] *Id.* at 1184.

[199] *Id.*

[200] *Id.* at 1182.

[201] *Id.* at 1183–84; *see also* Stewart & Walker, *supra* note 31, at 41.

[202] *Cain*, 202 P.3d at 1184.

[203] 310 P.3d 983 (Ariz. Ct. App. 2013).

legislature for certain students with disabilities.[204] However, in *Niehaus*, unlike in *Cain*, the funding for the program was subject to certain restrictions, such as the requirement that students must receive education in "reading, grammar, mathematics, social studies and science" and the requirement that parents agree "[n]ot [to] enroll the qualified student in the school district or charter school and release the school district from all obligations to educate the qualified student."[205] After fulfilling these requirements, the parent could then use the funds toward one or more of eleven permissible uses.[206] The aid clause in question "prohibits the appropriation of public money to private or sectarian schools."[207] The court focused its analysis on the "specified object" of the appropriation and held that the object of the program was to benefit families rather than sectarian schools.[208] In addition, the court distinguished this program from the program at issue in *Cain* because the funds were allowed to go toward several uses, not just tuition, depending on the parent's choice.[209] Therefore, the court held that the program was constitutional under Arizona's comparable no-aid clause.[210]

This distinction as to how the money was spent is quite subtle, and the court in each case reached its conclusion only after thorough analysis of the programs' funding distribution mechanisms. Here, unlike the courts in Arizona, the Nevada Supreme Court did not analyze the funding distribution mechanisms in order to determine whether the public nature of the funds ever truly transitioned to private funds.[211] Instead, the Court addressed and rejected the arguments that the funds remained public because the State Treasurer chooses the financial firm where the funds are held, can audit, freeze, or dissolve the accounts, and the unused funds revert back to the State General Fund.[212] The Court did not address, and the factual record may not have identified, the mechanisms by which the private schools received funds or the distribution mechanisms by which the parents chose to spend the funds.

Indeed, it is still unknown how the program would work in practice; however, the Nevada Treasurer provided handbooks for both parents and participating entities, articulating how they should work.[213] The legislation directs the parent to open the ESA, and the Treasurer to deposit the money.[214] According to the Nevada State Treasurer's "Participating Entity Handbook," a participating entity

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[204] *Id*. at 984.
[205] *Id*. (internal quotation marks omitted).
[206] *Id*. at 984–85.
[207] *Id*. at 987.
[208] *Id*. (citing League of Ariz. Cities and Towns v. Martin, 201 P.3d 517, 521 (Ariz. 2009)).
[209] *Id*. at 987–88.
[210] *Id*. at 989.
[211] *See generally* Schwartz v. Lopez, 382 P.3d 886, 902 (Nev. 2016).
[212] *Id*. at 899.
[213] *See generally* ESA PARTICIPATING ENTITY HANDBOOK, *supra* note 47; ESA PARENT HANDBOOK, *supra* note 26.
[214] *See* discussion *supra* Part I.B.

receives payment through the Nevada State Treasurer's web portal.[215] Additionally, for other expenses, such as fees for computer labs, registration, or graduation, parents must pay costs upfront and then apply for reimbursement through the Nevada State Treasurer's web portal from the child's ESA.[216] The Treasurer's Parent Handbook explains that "[f]ees are not always as straightforward as tuition . . . . For this reason, fees that are not included in the overall tuition amount must be paid for by the parent and then submitted through the web portal for staff to review for potential reimbursement."[217]

Like in *Cain* and *Niehaus*, here, the parents choose which qualifying private entity receives the funds. But the program was struck in *Cain* because parents were required to turn over the money directly to the institution; similar arguments could be made for the Nevada ESA program. For example, like in *Cain* where the parents were required to restrictively endorse the check to the qualifying institution, parents here are only allowed to disburse the money in the account directly to the institution. Additionally, Nevada's ESA program requires State approval of the purchase before the parent can be reimbursed for the expense, this is distinguishable from *Niehaus,* where account funds were accessed by parents through a pre-loaded debit card and parents were required to retain receipts to ensure funds were spent on approved purchases,[218] whereas Nevada's program requires State approval of the item before the parent can be reimbursed for the expense.[219] Thus, an argument could be made that by requiring State approval for reimbursement, the State's action actually supersedes the parent's decision when determining whether paying the cost is an appropriate use of State funds. If the use is determined to be sectarian in nature, the expenditure being approved by the State could be in violation of Article XI, Section 10 of the Nevada Constitution.

On the other hand, parallels can be drawn between the Nevada ESAs and the program upheld in *Niehaus*. For example, Nevada's ESA funds are also allowed to go toward several uses, not just tuition, depending on the parents' choice.[220] In addition, similar to the program in *Niehaus*, where the students were required to receive education in reading, grammar, math, social studies, and science, Nevada's ESA program requires students to take all required math, English, and language arts examinations.[221] Further, like *Niehaus* where the parents were pro-

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[215] ESA PARTICIPATING ENTITY HANDBOOK, *supra* note 47, at 15.

[216] *Id*.

[217] ESA PARENT HANDBOOK, *supra* note 26, at 8.

[218] James Paul, *Education Savings Accounts Policy Brief*, COMMONWEALTH FOUND. (Apr. 11, 2016), http://www.commonwealthfoundation.org/issues/detail/give-children-the-best-education-savings-accounts [https://perma.cc/2QG6-8VS6].

[219] *See* discussion *supra* Part I.B.

[220] *Id*.

[221] S.B. 302, 2015 Leg., 78th Sess. § 12 (Nev. 2015).

hibited from enrolling the student in the school district or a charter school, Nevada's ESA program requires students to dis-enroll from public school at least one day before the funds are deposited.[222] The Arizona Supreme Court used all these facts to distinguish the programs in *Niehaus* and *Cain*, and, thus, an argument could be made that that the ESA program is constitutional under Nevada's Constitution for these reasons.[223] Yet this type of detailed analysis was not apart of the *Schwartz* opinion and the Court did not reference *Cain* or *Niehaus* in its reasoning.

While the comparable section in Arizona's Constitution is not worded the same as Nevada's,[224] and Arizona precedent is certainly not binding on Nevada's courts, these cases illustrate the fine distinctions courts often make on this type of constitutional question. This Article offers this analysis not to argue that the Nevada Supreme Court should have reached an alternative conclusion, but rather to show how a different conclusion *could* have been reached. Whether these facts would have made a difference in the Court's opinion is unknown because the case was before the Court on a motion to dismiss, with the plaintiffs not having an opportunity to conduct discovery to present all relevant facts before the Court.

3. Since the no-aid clause issue was both moot and not procedurally before the Court, it must be concluded that the majority opinion under Section 10 is dicta.

When evaluating what is holding and what is dicta within judicial opinions, issues of policy, such as constraint and consideration, must be taken into account.[225] Constraint limits a court's holding to the resolution of issues implicated by meaningfully presented material case facts.[226] "The doctrines of ripeness, standing, and mootness [while often criticized] are frequently deployed in the name of judicial constraint . . . ."[227] Consideration refers to the consideration only of issues properly before the court.[228] While judges should hesitate to create new law absent sufficient opportunity to present all relevant facts and law,[229] dicta often serves a valuable purpose. For instance, it can clarify a complicated subject,

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[222] *See* ESA PARENT HANDBOOK, *supra* note 26, at 7–8.

[223] *See* discussion *supra* Part III.B.2. (discussing Niehaus v. Huppenthal, 310 P.3d 983, 984–89 (Ariz. Ct. App. 2013)).

[224] *Compare* NEV. CONST. art. XI, § 10 *with* ARIZ. CONST. art. IX, § 10.

[225] Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 1017 (2005).

[226] *Id*. at 1018–21.

[227] *Id*. at 1018.

[228] *Id*. at 1021.

[229] *Id*. at 1022.

aid other courts in their reasoning, and assist lawyers and the community to predict results. However, its distinction from a holding is frequently disregarded,[230] and it is important to distinguish the court's holding in *Schwartz* from dicta because of the doctrine of *stare decisis*.[231] It is through the doctrine of *stare decisis* that courts use opinions not just to resolve cases but also to make common law, which can be both binding and persuasive to other courts.[232] When judges deciding future cases accept dicta as if it were binding law, they fail to deliberate and decide based on the appropriate question of law.[233]

In Nevada, a statement in a case is dicta when it is "unnecessary to a determination of the questions involved."[234] In *Schwartz*, the validity of ESAs under Article XI, Section 10 of the Nevada Constitution appeared before the Court only after a lower court granted a motion to dismiss, and, thus, the merits of that issue were not before the Court for consideration.[235] In addition, the Court permanently enjoined the funding of ESAs,[236] meaning that a finding of whether the funds were public or private in nature was not necessary to determine the constitutionality of the program because there was no constitutional funding mechanism. The Court had before it important issues of constitutional law that should be resolved only if implicated by meaningfully presented material case facts, and the Court should exercise constraint in making its determinations. Therefore, because the program's constitutionality under Section 10 was not properly before the Court and also because the issue was rendered moot by the Court's holding under Article XI, Section 6, it must be concluded that the majority's opinion as to Section 10 is dicta. Consequently, while the majority's reasoning may be persuasive precedent in the future, it should not be considered binding on future Section 10 claims.

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[230] Pierre N. Leval, Madison Lecture, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1250, 1253 (2006).

[231] Abramowicz & Stearns, *supra* note 225, at 995 ("[S]tare decisis encourages a process of judicial decisionmaking in which holdings are motivated by the need to resolve cases rather than by the desire to further judicial preferences concerning legal policy. It does so by encouraging judges to rely upon a set of material facts that emerge from the case before them in their effort to explain the basis for their selected judgment."); *see also* Leval, *supra* note 230, at 1250 ("The problem is that dicta no longer have the insignificance they deserve. They are no longer ignored. Judges do more than put faith in them; they are often treated as binding law. The distinction between dictum and holding is more and more frequently disregarded.").

[232] Leval, *supra* note 230, at 1258 ("This rule [stare decisis] requires that once a court has decided a case based on a proposition of law, the court must thereafter adhere to that proposition of law, deciding like cases in like manner (unless it takes the rare step of disavowing and overruling the proposition)").

[233] *Id*. at 1250.

[234] Argentena Consol. Mining Co. v. Jolley Urga Wirth Woodbury & Standish, 216 P.3d 779, 785 (Nev. 2009) (internal quotations omitted).

[235] Schwartz v. Lopez, 382 P.3d 886, 895 (Nev. 2016).

[236] *Id*. at 902–03.

CONCLUSION

As initially created, Nevada's ESAs were the most aggressive school choice measure in the nation. However, the Nevada Supreme Court recognized that there was inherent danger to the future sustainability of the public school system by allowing all of Nevada's students to participate in the ESA program. In sum, the Nevada Supreme Court held that using money explicitly set aside for K-12 public education for ESAs was unconstitutional, leaving the program without a mechanism to fund its operation.[237] Additionally, the Court narrowly interpreted Article XI, Sections 1 and 2 of the Nevada Constitution as an endorsement upon the legislature's ability to enact programs which encourage education "as long as the Legislature maintains a uniform public school system, open and available to all students . . . ."[238] However, any claim that this decision approves of ESAs as a permissible method for the legislature to fulfill its duty to provide for a uniform school system is misguided.[239] The legislature still has duty to maintain a uniform system of public schools, and this opinion emphasizes that responsibility.[240] Further, while the Court indicated a willingness to be persuaded by an argument that public monies allocated to individual parents for educational purposes was permissible under the Nevada Constitution, the Court did not directly hold that transferring public monies to private education institutions is lawful.[241] Whether the ESA program is a constitutional appropriation of public funds is still an issue to be decided upon material facts when ripe for consideration.

Therefore, if the ESA program is to successfully continue, it will require a finite source of funding, thereby limiting the number of students able to participate and the program's universal nature.[242] With the recently regained Democratic control of the Nevada Legislature in the general election of 2016, the funding of ESAs in 2017 and 2018 will be a tough sell.[243] For example, during Governor Sandoval's State of the State address on January 17, 2017, the Governor announced his proposal of $60 million for ESAs in the State's budget.[244] In the Democratic response, Senate Majority Leader Aaron Ford stated that the funding allocation for ESAs "is the wrong priority for Nevada's kids" and that any amount of money allocated to ESAs would "result in LESS money being

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[237] *Id*.

[238] *Id*. at 898.

[239] *See, e.g*., Taylor, *supra* note 20.

[240] *Schwartz*, 382 P.3d at 898.

[241] *See* discussion *supra* Part III.B.3.

[242] E-mail from Educate Nevada Now, , *supra* note 59.

[243] Ian Whitaker, *Is the ESA Program Dead in Nevada?* L.V. SUN, (Nov. 21, 2016, 2:00 AM) http://lasvegassun.com/news/2016/nov/21/is-the-esa-program-dead-in-nevada/ [https://perma.cc/XQ7Z-MFYT].

[244] Brian Sandoval, *Full Text of Sandoval's Last State of the State Address*, RENO GAZETTE-J., (Jan. 17, 2017, 8:27 PM), http://www.rgj.com/story/news/politics/2017/01/17/full-text-sandovals-last-state-state-address/96703466/ [https://perma.cc/LY23-ZACR] ("[A]s promised, my budget includes $60 million to fund Nevada Education Savings Accounts.").

made available to public schools."[245] If the ESAs are to receive any funding, the budget line item will have to pass both the Nevada Senate and Assembly in order to make it to Governor Sandoval's desk. Repeal of ESAs is equally unlikely, as the Governor would probably veto such legislation. Therefore, the fate of Nevada's ESAs is in limbo. While the program is not dead, it does not look like it will be resuscitated in the near future.

[245] KTVN 2 News, *Sen. Aaron Ford Delivers Democratic* R*esponse Following State of the State Address*, (Jan. 17, 2017, 7:55 PM), http://www.ktvn.com/story/34277531/sen-aaron-ford-state-of-the-state-response [https://perma.cc/36HL-XTXQ].