IN THE SUPREME COURT OF THE STATE OF NEVADA

DAN SCHWARTZ, in his official capacity as Treasurer of the State of Nevada,

Appellant,

vs.

HELLEN QUAN LOPEZ, individually and on behalf of her minor child, C.Q; MICHELLE GORELOW, individually and on behalf of her minor children, A.G. and H.G.; ELECTRA SKRYZDLEWSKI, individually and on behalf of her minor child, L.M.; JENNIFER CARR, individually and on behalf of her minor children, W.C., A.C., and E.C.; LINDA JOHNSON, individually and on behalf of her minor child, K.J.; SARAH and BRIAN SOLOMON, individually and on behalf of their minor children, D.S. and K.S.,

Respondents.

Supreme Court Case No. 69611

First Judicial District Court

Case No. 15-0C-00207-1B

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AMICI AIMEE HAIRR; AURORA ESPINOZA; ELIZABETH ROBBINS; LARA ALLEN; JEFFREY SMITH; and TRINA SMITH'S UNOPPOSED AMICUS BRIEF IN SUPPORT OF APPELLANT'S OPENING BRIEF

TIMOTHY D. KELLER, ESQ. – *Pro Hac Vice Pending*
AZ Bar No. 019844
INSTITUTE FOR JUSTICE
398 S. Mill Ave., Ste. 301
Tempe, AZ 85281
Telephone: (480) 557-8300
Facsimile: (480) 557-8305
tkeller@ij.org

MATTHEW T. DUSHOFF, ESQ.
NV Bar No. 004975
LISA J. ZASTROW, ESQ.
NV Bar No. 009727
KOLESAR & LEATHAM
400 S. Rampart Blvd., Ste. 400
Las Vegas, Nevada 89145
Telephone: (702) 362-7800
Facsimile: (702) 362-9472
mdushoff@klnevada.com
lzastrow@klnevada.com

Attorneys for Amici Aimee Hairr; Aurora Espinoza; Elizabeth Robbins; Lara Allen; Jeffrey Smith; and Trina Smith

Docket 69611 Document 2016-08397

NRAP 26.1 DISCLOSURE STATEMENT

(N.R.A.P. RULE 26.1)

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26(a), and musts be disclosed:

Amici Aimee Hairr, an individual; Aurora Espinoza, an individual; Elizabeth Robbins, an individual; Lara Allen, an individual; Jeffrey Smith, an individual; and Trina Smith, an individual (collectively referred to as "Amici").

These representations are made in order that the judges of this court may evaluate possible disqualifications or recusal.

Amici have no parent corporations and no publicly held company owns 10% or more of its stock. There is no such corporation. Timothy D. Keller, Esq. – *Pro Hac Vice Pending* (AZ Bar No. 19844), Matthew T. Dushoff, Esq. (Nev. Bar No. 9727) and Lisa J. Zastrow, Esq. (Nev. Bar No. 9727) are the only attorneys that have appeared for Amici in this case, nor are any others expected to appear in this court in this case.

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The names of all law firms whose partners or associates have appeared for the party or amicus in the case or are expected to appear in this court:

Kolesar & Leatham

Institute for Justice (a non-profit organization).

DATED this 16th day of March, 2016.

KOLESAR & LEATHAM

/s/ Lisa J. Zastrow, Esq.

TIMOTHY D. KELLER, ESQ. – *Pro Hac Vice Pending*
AZ Bar No. 019844
INSTITUTE FOR JUSTICE
398 S. Mill Ave., Ste. 301
Tempe, AZ 85281
MATTHEW T. DUSHOFF, ESQ., NV Bar No. 004975
LISA J. ZASTROW, ESQ., NV Bar No. 009727
400 S. Rampart Blvd., Ste. 400
Las Vegas, Nevada 89145

Attorneys for Amici

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I. STATEMENT OF IDENTITY OF AMICI, THEIR INTEREST IN THE CASE, AND AUTHORITY TO FILE.

Aimee Hairr, Aurora Espinoza, Elizabeth Robbins, Lara Allen, and Jeffrey and Trina Smith[1] are Nevada residents with twenty-two school-aged children between them. Their wish is simple: to provide each of their children with the best education possible. As it stands, those possibilities are limited to what the Clark County and Washoe County School Districts have made available, which is to say an often-inadequate public-school system. Nevada's new Education Savings Account (ESA) program, passed last year by the Legislature and signed by the governor as SB 302, would dramatically expand those possibilities by funding their choice of a wide range of education providers including private and public schools, textbooks, tutors, curricula, and other options.

Amici have obtained all parties' written consent to file this brief, App. 1-2, and so file under the authority of Nevada Rule of Appellate Procedure 29(a).

II. ARGUMENT.

Amici's brief is organized in two parts. First, in Part A, Amici address the effect of the district court's injunction on the public interest, an element whose effect is felt far more personally by Nevada parents such as Amici than by the

[1] Amici have also filed a petition for reconsideration in *Hairr v. First Judicial Dist. Court*, No. 69580 (2016). Should this Court grant that petition, Amici ask that this amicus brief be considered as their merits brief in the instant appeal.

existing parties in this litigation. And in Part B, Amici argue that Plaintiffs cannot succeed on *any* of their claims, and therefore urge this Court to reverse the district court's injunction pursuant to Article 11, § 6 of the Nevada Constitution and affirm the district court's conclusions that the ESA program does not violate Article 11, §§ 2 and 3.

A. The Injunction Harms the Public Interest.

The district court's order works grave and direct harm on thousands of Nevada children. Amici, who for the first time in their children's lives had made concrete plans to send them to schools that would respond to their needs, are among the families most adversely affected by the district court's order. The district court, in evaluating the injunction, was aware of its obligation to consider such hardships as well as the public interest. Aplt. App. 49; *see Univ. & Cmty. Coll. Sys. of Nev. v. Nevadans for Sound Gov't*, 120 Nev. 712, 721, 100 P.3d 179, 187 (2004); *Clark Cty. Sch. Dist. v. Buchanan*, 112 Nev. 1146, 1150, 924 P.2d 716, 719 (1996), *Ellis v. McDaniel*, 95 Nev. 455, 459, 596 P.2d 222, 225 (1979).

The district court acknowledged but essentially disregarded this requirement. It mustered only two perfunctory sentences on the potential effect of its injunction:

> The Treasurer argued the court must weigh the potential hardship to the relative parties and others, and the public interest, and cited cases in support of this proposition.

> . . . The court concludes Plaintiff Parents have demonstrated irreparable harm and that on balance the potential hardship to Plaintiff Parents' children outweighs the interests of the Treasurer and others.

Aplt. App. 49–50. The empty reference to "the interests of the Treasurer and others" was insufficient consideration of the genuine plight of families like Amici. *See* Aplt. App. 50.

All of Amici's children[2] have been or are enrolled in the Nevada public schools, which have largely failed them. Amici cannot afford to wait for them to improve. They need a lifeline now. For example, the Clark County School District (CCSD) denied any responsibility for protecting Aimee Hairr's oldest son from six months of bullying and assault at Greenspun Middle School, prompting Hairr to work for the passage of SB 504, the anti-bullying legislation known as Hailee's Law, enacted last year alongside SB 302. She fears for the rest of her children's safety in the public schools. Aurora Espinoza's oldest daughter was punished academically for emailing or handwriting her assignments during a time when Espinoza was unable to afford a printer. She is on the verge of applying to colleges, and worries she will not be accepted anywhere if she remains in a school

[2] Amici each filed affidavits in support of their motion to intervene in the proceedings below. The events described in this paragraph were also described there, and Amici would be willing to testify as to these matters if called.

whose staff cannot pay attention to her. Two of Elizabeth Robbins's children are likely to develop a degenerative tissue disorder that already forced two of their older siblings to finish high school remotely from home, with zero assistance from their teachers. If and when the tissue disorder manifests itself, Robbins wants the younger two to learn from private tutors in the home, which only the ESA program would make possible. Lara Allen's son, who is diagnosed with ADD, flunked out of a public magnet school despite having scored in the 99th percentile on the ACT Explore test in 8th grade. CCSD has no program in place for "twice exceptional" children like him. The Smiths' six adopted children, all of whom come from abusive backgrounds, are stuck in Washoe County School District (WCSD) public schools that are underequipped to serve them; their teachers have ignored their dyslexic children's IEP-mandated writing aids, and an ESA application for one of their sons was denied because WCSD refuses to correct his name in their official records despite repeat requests from the Smiths.

Amici were heartbroken when the district court enjoined the ESA program. While heartbreak is not the legal standard, Amici have suffered actual harm from the injunction. Most of their children have educational needs which the public schools have demonstrably failed to address. Amici, who know their children better than *anyone*, are confident they can do more with less. Given access to the ESA program, they would be able to do what the public schools cannot—select

and provide the best education for their children—while easing the well-documented overcrowding in CCSD and WCSD. The district court did not consider the injunction's impact on parents, like Amici, who had applied for the ESA program and were relying on it to go into effect, jumping instead from its analysis finding that Plaintiffs were likely to succeed on the merits to a cursory conclusion that the ESA program would irreparably harm "students in Nevada." Aplt. App. 50.

As a result, Amici's well-made plans to meet their children's diverse educational needs with their ESA funds came to a halt. Amici's children will almost certainly be forced to remain in the public schools for another year against their parents' evaluation of their best interests. The injunction harms would-be ESA participants far more severely than the ESA program could possibly harm Plaintiffs—who have determined, as they alone can, that their own children are best served by continuing to attend a public school.

The district court failed to seriously evaluate whether its injunction would harm Nevada families in Amici's position. That harm is real. And while that harm would not erase a constitutional violation, it must be given credibility when there *is* no likelihood of showing a constitutional violation.

B. The ESA Program Does Not Violate Any Section of Article 11.

Plaintiffs construe three provisions of Article 11 of the Nevada Constitution to exclude any measure of private choice in publicly funded education programs. But this argument clashes with the text of Article 11, which expressly authorizes the Legislature to pursue education policy "by all suitable means."

Applying the canons of constitutional construction explained below in Part 1, the ESA program easily passes constitutional muster. In Part 2, Amici show that Article 11, section 1 encourages Legislative innovation of all sorts—both inside and outside of the public school system. In Part 3, Amici demonstrate that, contrary to the district court's conclusion, the program does not violate either the plain language or the intent of section 6 that is revealed by the ballot initiative materials. In Part 4, Amici explain that the district court correctly concluded that the ESA program does not violate either the plain meaning or the intent of section 2. And finally, Amici show that the district court correctly concluded that the ESA program does not violate either the plain meaning or the intent of section 3.

1. Relevant Canons of Constitutional Interpretation.

Constitutional provisions are interpreted in accordance with the ordinary rules of statutory construction. *We the People Nev. ex rel. Angle v. Miller*, 124 Nev. 874, 881, 192 P.3d 1166, 1170 (2008). They are to be given their plain meaning unless doing so would violate the spirit of the Constitution. *See McKay v.*

Bd. of Supervisors, 102 Nev. 644, 648, 730 P.2d 438, 441 (1986). When "capable of being understood in two or more senses by reasonably informed persons," a provision is ambiguous and "[t]he leading rule of statutory construction is to ascertain the intent of the [People] in enacting" it. *Id.* at 649–50, 730 P.2d at 442–43. That intent "will prevail over the literal sense of the words." *Id.* at 650, 730 P.2d at 443. Furthermore, the Nevada Constitution—including the Education Article—"should be read as a whole, so as to give effect to and harmonize each provision." *Nevadans for Nev. v. Beers*, 122 Nev. 930, 944, 142 P.3d 339, 348 (2006). It is "to be interpreted in the light of new and changing conditions," and "astonishing or revolutionary" legislation is not to be struck down "so long as a constitutional limitation is not violated." *King v. Bd. of Regents of the Univ. of Nev.*, 65 Nev. 533, 543, 200 P.2d 221, 225–26 (1948).

2. Section 1 Encourages Legislative Innovation in Education.

The Education Article begins by entreating the Legislature to "encourage *by all suitable means* the promotion of intellectual, literary, scientific, mining, mechanical, agricultural, and moral improvements." Nev. Const. art. 11, § 1 (emphasis added). The Indiana Supreme Court recently construed a nearly identical provision in its own constitution[3] and held that the phrase "by all suitable means"

[3] "[I]t shall be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement . . . ." Ind.

vests the Indiana Legislature with "broad" discretion in promoting education. *Meredith v. Pence*, 984 N.E.2d 1213, 1220–22 (Ind. 2013). The same is true in Nevada. The "by all suitable means" language vests the Legislature with broad discretion in promoting education and authorizes educational initiatives outside the public school system. There is no dispute that the ESA program is intended to promote education. Indeed, Plaintiffs concede that the program's proponents are "deeply committed to the education of Nevada children." Aplt. App. 144.

The present crisis facing Nevada's public schools may not have been exactly foreseen by the 1864 framers of the Nevada Constitution, given that Nevada was a small frontier state predominately driven by mining; Reno was nothing more than a toll bridge on the Truckee River and neither Clark County nor the Hoover Dam existed. Conditions have changed. Nevada has experienced a sustained population boom that has left the public schools overcrowded—a trend that is virtually certain to continue. *See* Matthew Ladner, *Turn and Face the Strain* 10, 18, 22, 76 (2015), http://excelined.org/wp-content/uploads/ExcelinEd-FaceTheStrain-Ladner-Jan2015-FullReport-FINAL-embargo.pdf.

Nevertheless, in their wisdom the framers empowered the Legislature in section 1 to respond to changed circumstances rather than constrain its ability to shape and direct education policy to meet new challenges. A nearly universal

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Const. art. 8, § 1.

educational choice program, which taps parents' knowledge of their children in organizing the education of a population whose growth has far outpaced the public school system's ability to accommodate it, is an eminently suitable means of adapting to the state's changed circumstances. That the program may be "astonishing or revolutionary" is not grounds for striking it down. *King*, 65 Nev. at 543, 200 P.2d at 225–26.

Reading the Education Article as a whole, as this Court must, section 1 vests the Legislature with broad discretion in adapting its educational policy to the demands of a dynamic and growing society. In light of section 1, this Court should reject Plaintiffs' contrived argument that sections 6, 2, and 3 require *exclusive* public support for the public school system. That crabbed reading is without support in Article 11.

3. The ESA Program Violates Neither the Plain Meaning nor Intent of Section 6.

In its order enjoining the ESA program, the district court held that the Plaintiffs clearly showed that the ESA program violates Article 11, sections 6.1 and 6.2. That holding should be reversed. First, Amici will show that the plain meaning of section 6 imposes two simple duties, neither of which have anything to do with the ESA program. The Legislature complied with the demands of sections 6.1 and 6.2 by establishing the per-pupil amount it deems sufficient to fund the

education of each child enrolled in a Nevada public school and then appropriating money to the state's Distributive School Account (DSA) to ensure that school districts receive their per-pupil funding for each enrolled student. Second, Amici will show that the hypothetical basis for the violation the district court found—a post-budgetary reduction in public-school funding—simply does not exist. The public schools were funded on a per-pupil basis before the ESA program, and they would continue to be funded on that same basis with the ESA program in place. Last, Amici refute the district court's finding that section 6 transforms the DSA into a constitutional lockbox. That finding is inconsistent with both the plain text and the intent of section 6.

a. The plain meaning of section 6 has nothing to do with the ESA program.

Section 6 imposes two duties on the Legislature: it must fund the public schools, and it must fund the public schools *first*. Section 6.1 requires public-school funding "by direct legislative appropriation," and section 6.2 requires that this appropriation be made "before any other appropriation is enacted" for a given fiscal biennium.[4] That is the plain meaning of sections 6.1 and

[4] The relevant two sections in full:

> 1. In addition to other means provided for the support and maintenance of said university and common schools, the legislature shall provide for their support and maintenance by direct legislative

6.2: fund the public schools, and fund the public schools first.

The Legislature fulfilled both of its section 6 duties for 2015–2017 when it passed SB 515. That bill set a "basic support guarantee per pupil" for each school district, and appropriated roughly $2 billion from the State General Fund to the State Distributive School Account (DSA) to fund that guarantee. SB 515, §§ 1, 2, 7. The Superintendent of Public Instruction is statutorily obligated to apportion funds from the DSA to each school district in an amount that, when combined with other sources such as local sales tax proceeds, will meet the basic support guarantee per pupil. *See* NRS §§ 387.121 *et seq.* Any money left in the DSA at the end of the biennium reverts to the general fund. On the other hand, SB 515 also authorizes the State Controller to advance money from the general fund if the DSA runs dry. SB 515, §§ 7.6, 9.

> appropriation from the general fund, upon the presentation of budgets in the manner required by law.
>
> 2. During a regular session of the Legislature, before any other appropriation is enacted to fund a portion of the state budget for the next ensuing biennium, the 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 for the next ensuing biennium for the population reasonably estimated for that biennium.
>
> . . . .

Nev. Const. art. 11, § 6.

b. The per-pupil funding guarantee is unaffected by the ESA program.

With SB 302 already on the books, SB 515's roughly $2 billion appropriation to the DSA was intended to fund *both* the public schools and the new ESA program. This is unremarkable. The ESA program is merely a new addition to an old statutory background that guides the apportionment of legislative appropriations to the DSA and thence to the public school districts, charter schools, special education programs, and other programs. *See* NRS §§ 387.121 *et seq.* The Legislature knew that its appropriation in SB 515 would be apportioned in accordance with that revised statutory background. *See Div. of Ins. v. State Farm Mut. Auto. Ins. Co.*, 116 Nev. 290, 295, 995 P.2d 482, 486 (2000) (stating that the Legislature enacts statutes "with full knowledge of existing statutes relating to the same subject").

The ESA program does not affect the basic support guarantee *per pupil*. The Superintendent of Public Instruction has sworn under penalty of perjury that the ESA program will be implemented so as to treat participating children as if they had simply moved out of their former school district. Aplt. App. 26–27.[5] Each school district remains entitled to, and will receive, enough public funding to meet

[5] "[T]he [Superintendent's] view of the facts [are] entitled to deference." *Installation & Dismantle, Inc. v. SIIS*, 110 Nev. 930, 932, 879 P.2d 58, 59 (1994).

its basic support guarantee per pupil that enrolls in that district.

c. The district court's order is inconsistent with the plain text of section 6 and inconsistent with its intent.

The district court essentially held that section 6 creates a constitutional lockbox around the lump-sum appropriation that the Legislature makes to the DSA every biennium. The court found the ESA program to be unconstitutional because it funds ESAs with money from this supposed lockbox. But this construction finds no support in either the plain text or intent of section 6.

There is no serious argument to be made that the State has failed its section 6.1 duty to fund the public schools. And *no* argument has been made that the State failed its section 6.2 duty to fund the public schools first. Rather, Plaintiffs' argument—from which the district court drew its legal conclusions—takes section 6.2, a simple timing requirement, and twists the phrase "deems to be sufficient" into an exclusivity requirement that it plainly is not. *See* Pls.' Mot. Prelim. Inj. App. 22-24.

"Deems to be sufficient" is a clear signal that the Legislature has discretion over how much it appropriates to the public schools. Even Plaintiffs admit that the Legislature's initial appropriation to the public schools does not have to be a particular amount. *See* Pls.' Reply Mot. Prelim. Inj. App. 49. Not only does Section 6.2 vest the Legislature with discretion to determine the particular amount

it "deems to be sufficient," it also recognizes that the Legislature's determination of that amount involves guesswork as to "the population reasonably estimated" for a given biennium. The Legislature cannot ascertain in advance precisely how many children will enroll in the public schools, which is why SB 515 provides that any excess DSA funds will revert to the general fund at the end of the biennium or, alternatively, that an impending deficit may be corrected by the State Controller by advancing money from the general fund to the DSA. SB 515, §§ 7.6, 9.

The district court also relied on a dictionary definition of "appropriation," which appears in both sections 6.1 and 6.2, to construe section 6 to require that any legislative appropriations to fund the operation of the public schools remain forever exclusive. Aplt. App. 46–47 (quoting *Appropriation*, Webster's Third New International Dictionary (2002)). But the word "appropriation" does not imply such inflexibility; if it did, it would also have been unconstitutional for the Legislature to provide, as it has, that any DSA funds left at the end of the biennium shall revert to the general fund (which is not restricted to the public schools). SB 515, § 7.6. *Webster's Third New International Dictionary*, which the district court used, diverges from other leading dictionaries in suggesting that "appropriation" implies strict exclusivity. *Black's Law Dictionary*, for example, distinguishes between an "appropriation" and a "specific appropriation." Only the latter is "earmarked for a precise or limited purpose." *Appropriation*, Black's Law Dictionary (10th ed.

2014); *see also Appropriation*, Garner's Dictionary of Legal Usage (3d ed. 2011) ("a public body's act of voting a sum of money for *any* of various public purposes" (emphasis added)). If the district court's reading is to be given any credit, and it should not, then the term is at least "capable of being understood in two or more senses by reasonably informed persons" and therefore ambiguous, meaning that the People's intent in enacting section 6 *must* prevail over the district court's hyperliteral construction. *McKay*, 102 Nev. at 649–51, 730 P.2d at 442–43.

The intent of section 6 is *very* clear with respect to section 6.2, which was added to section 6 by popular initiative in 2006 as the "Education First" amendment. Plaintiffs even attached the ballot materials in their briefing below, which indicate that the initiative's proponents and opponents both understood it to be no more than a timing requirement. The materials even state that section 6.2 "does not determine the level or source of funding public school education receives." *See* Pls.' Mot. Prelim. Inj., Ex. App. 62–65.

Section 6.1, for its part, comprised the entirety of section 6 before the Education First amendment was passed. In its original 1864 incarnation, it was a kick-start provision—a half-mill property tax for the support of the public schools, with a Legislative option to reduce it to a quarter-mill after 10 years. *Official Report of the Debates & Proceedings in the Constitutional Convention of the State of Nevada* 660 (Andrew J. Marsh rep. 1864). This tax requirement has long since

been liberalized, and now requires only that the Legislature provide for the public schools "by direct legislative appropriation." But as shown above, the Legislature has done that. The ESA program, which leaves the basic support guarantee per pupil untouched and fully honored, does nothing to erase the Legislature's compliance.

The Legislature's decision to fund both the public schools and a complementary ESA program with a single appropriation fully complies with section 6. The DSA is not a constitutional lockbox.[6] It is constitutionally irrelevant that it is also used to fund ESAs. It also does not matter that the ESA program will reduce public-school enrollment figures relative to a world without ESAs.[7] The ESA program leaves the basic support guarantee per pupil—the amount the Legislature deems sufficient to fund the public schools—untouched.

* * *

Because the ESA program does not violate section 6 in any way, the district court's order preliminarily enjoining the ESA program must be reversed.

[6] Indeed, the DSA was created by the Legislature in 1912 as a vehicle to facilitate its funding of the schools. *Rogers v. Heller*, 117 Nev. 169, 173, 18 P.3d 1034, 1037 (2001).

[7] An *actual* decline in public-school enrollment is highly unlikely given Nevada's booming population. *See* Ladner, *supra*.

4. The ESA Program Does Not Violate Section 2.

Section 2 of the Education Article requires, in pertinent part, that the Legislature "provide for a uniform system of common schools." Plaintiffs allege that the ESA program violates this requirement by providing parents with funding that may be used at schools which are not subject to the requirements applied to public schools, and further argue that the *expressio unis* canon of construction applies to transform section 2 into an exclusivity requirement. The district court rejected these theories, holding that the ESA program "does not do away with public schools" and that the "by all suitable means" language in section 1 forecloses an exclusivity argument based on section 2. Aplt. App. 49. This Court should affirm the district court's judgment for at least two reasons. First, the fact that private schools remain private under the ESA program in no way detracts from the fact that the Legislature *does* "provide for a uniform system of common schools." And second, Plaintiffs' exclusivity theory has been rejected in every jurisdiction to construe a similar uniform schools clause.

Under the ESA program, participating entities remain apart from the public school system and retain all the autonomy they previously enjoyed. The new law states that "nothing in [its] provisions . . . shall be deemed to limit the independence or autonomy of a participating entity or to make the actions of a participating entity the actions of the State Government." SB 302, § 14. This is the

ESA program's very appeal: it gives dissatisfied public-school parents a wide array of alternatives to choose from. Public-school parents who are content with the education their children are receiving there—namely, Plaintiffs—are in no danger of losing that option. The uniform public-school administration, governed by NRS chapter 388, is not going anywhere. The uniform curriculum, required by NRS chapter 389, will still be taught. Plaintiffs have their cake, and would have Amici eat it too—but section 2, which says only that the Legislature must provide for "*a* uniform system of common schools," requires no such thing. (Emphasis added.)

Second, Plaintiffs' theory has been rejected in every jurisdiction to construe a similar legislative mandate to establish and maintain a uniform school system. *See Meredith v. Pence*, 984 N.E.2d 1213, 1223 ("[S]o long as a 'uniform' public school system, 'equally open to all' and 'without charge,' is maintained, the General Assembly has fulfilled the duty imposed . . . ."); *Hart v. State*, 774 S.E.2d 281, 289–90 (N.C. 2015) ("The uniformity clause applies exclusively to the public school system and does not prohibit the General Assembly from funding educational initiatives outside of that system."); *Simmons-Harris v. Goff*, 711 N.E.2d 203, 212 & n.2 (Ohio 1999) (rejecting claim that the "thorough and efficient system of common schools" provision in the Ohio Constitution prohibits a voucher program absent showing that the program "undermines" or "damage[s]" public education); *Jackson v. Benson*, 578 N.W.2d 602, 628 (Wis. 1998) (rejecting

challenge to a voucher program which the court found "merely reflects a legislative desire to do more than that which is constitutionally mandated"); *Davis v. Grover*, 480 N.W.2d 460, 474 (Wis. 1992) ("[E]xperimental attempts to improve upon th[e public school] foundation in no way denies any student the opportunity to receive the basic education in the public school system."). Requirements like those in section 2, that the legislature maintain a uniform system of common schools, exist in *many* other state's constitutions and do not preclude additional options beyond public schools.

The *only* case that Plaintiffs cite in their briefing below for the substantive proposition that the ESA program violates section 2's requirement to maintain a uniform system of common schools construed constitutional language that stands in stark contrast to most state constitutional education articles. *See Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006). Indeed, *Bush* expressly distinguishes itself from other cases upholding educational-choice programs on the grounds that the clause interpreted therein contains a strict "paramount duty" requirement not present in the uniform-schools clauses of other jurisdictions. *Id.* at 407 n.10 (citing *Davis*). Thus, under *Bush*'s own reasoning, the ESA program does not violate section 2. Plaintiffs' section 2 claim is more properly analyzed in accordance with the line of decisions not cited by Plaintiffs—all of which reject claims similar to the one Plaintiffs have brought under section 2.

5. ESAs Do Not Violate Section 3.

Amici also urge this Court to uphold the district court's judgment rejecting Plaintiffs' section 3 claim. As established by *State ex rel. Keith v. Westerfield*, 23 Nev. 468, 49 P. 119 (1897), section 3 of the Education Article controls only the disposition of funds derived from those sources designated in section 3 itself. Those sources are housed in what was known then as the "general school fund" and is today called the Permanent School Fund. *See* NRS §§ 355.050 *et seq.* While income derived from the Permanent School Fund is deposited into the DSA, it is a miniscule component, worth barely a tenth of a percent of the total funds in the DSA. *See* Aplt. App. 22. The district court properly declined to find that this miniscule amount taints the entire DSA for purposes of section 3, and its judgment in this respect should be affirmed.

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CONCLUSION

The preliminary injunction entered by the district court should be dissolved. The district court's conclusions of law as to Article 11, sections 2 and 3 of the Nevada Constitution should be affirmed, and its conclusions of law as to section 6 should be reversed.

Respectfully submitted this 15th day of March, 2016.

KOLESAR & LEATHAM

/s/ Lisa J. Zastrow, Esq.

TIMOTHY D. KELLER, ESQ. – *Pro Hac Vice Pending*
AZ Bar No. 019844
INSTITUTE FOR JUSTICE
398 S. Mill Ave., Ste. 301
Tempe, AZ 85281
MATTHEW T. DUSHOFF, ESQ., NV Bar No. 004975
LISA J. ZASTROW, ESQ., NV Bar No. 009727
400 S. Rampart Blvd., Ste. 400,
Las Vegas, Nevada 89145
Attorneys for Amici

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it does not exceed 15 pages.

Finally, I hereby certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to

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sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Respectfully submitted this 15th day of March, 2016.

KOLESAR & LEATHAM

/s/ Lisa J. Zastrow, Esq.

TIMOTHY D. KELLER, ESQ. – *Pro Hac Vice Pending*
AZ Bar No. 019844
INSTITUTE FOR JUSTICE
398 S. Mill Ave., Ste. 301
Tempe, AZ 85281
MATTHEW T. DUSHOFF, ESQ., NV Bar No. 004975
LISA J. ZASTROW, ESQ., NV Bar No. 009727
400 S. Rampart Blvd., Ste. 400
Las Vegas, Nevada 89145
Attorneys for Amici

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Kolesar & Leatham, and that on the 15th day of March, 2016, I caused to be served a true and correct copy of the foregoing **AMICI AIMEE HAIRR; AURORA ESPINOZA; ELIZABETH ROBBINS; LARA ALLEN; JEFFREY SMITH; and TRINA SMITH's UNOPPOSED AMICUS BRIEF IN SUPPORT OF APPELLANT'S OPENING BRIEF** in the following manner:

(ELECTRONIC SERVICE) Pursuant to Rule 5(D) of the Nevada Rules of Civil Procedure, the above-referenced document was electronically filed on the date hereof and served through the Notice of Electronic Filing automatically generated by this Court's facilities to the parties listed below at their last-known mailing addresses, on the date above written:

Adam Paul Laxalt
Lawrence VanDyke
Joseph Tartakovsky
Ketan Bhirud
OFFICE OF THE ATTORNEY GENERAL
100 N. Carson Street
Carson City, Nevada 89701
Telephone: (775) 684-1100
Email: lvandyke@ag.nv.gov
jtartakovsky@ag.nv.gov
kbhirud@ag.nv.gov

Attorneys for Appellants

Tamerlin J. Godley, Esq.
Thomas Paul Clancy, Esq.
Laura E. Mathe, Esq.
Samuel T. Boyd, Esq.
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue, 35th Floor
Los Angeles, CA 90071-1560

Don Springmeyer, Esq.
Justin C. Jones, Esq.
Bradley S. Schrager, Esq.
Wolf, Rifkin, Shapiro et al.
3556 E. Russell Road, Second Floor
Las Vegas, NV 89120
Email: dspringmeyer@wrslawyers.com
bschrager@wrslawyers.com
jjones@wrslawyers.com

David G. Sciarra, Esq.
Amanda Morgan, Esq.
Education Law Center
60 Park Place, Suite 300
Newark, NJ 07102

Attorneys for Plaintiffs

First Judicial District Court
885 E. Musser St., Ste. 3031
Carson City, Nevada 89701
Attention: Honorable Judge James E. Wilson
VIA U.S. CERTIFIED MAIL – RETURN RECEIPT

/s/ Kristina R. Cole
An Employee of KOLESAR & LEATHAM