

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellant,

vs.

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NO. 69611

**HELEN 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.

**BRIEF OF *AMICI CURIAE*
NATIONAL SCHOOL BOARDS ASSOCIATION (NSBA) and
NEVADA ASSOCIATION OF SCHOOL BOARDS (NASB)
(SUPPORTING RESPONDENTS AND AFFIRMANCE)**

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NRAP 26.1 disclosure

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the justices of this court may evaluate possible disqualification or recusal.

1. All parent corporations and publicly-held companies owning 10 percent or more of the party's stock: *None*

2. Names of all law firms whose attorneys have appeared for the party or amicus in this case (including proceedings in the district court or before an

administrative agency) or are expected to appear in this court: *Lemons, Grundy & Eisenberg*

3. If litigant is using a pseudonym, the litigant's true name: *None*

DATED *April 1, 2014*



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I Identity of *amici curiae*; interest in case; source of authority to file brief

NSBA is a nonprofit organization representing state associations of school boards, and the Board of Education of the U.S. Virgin Islands. Through its member state associations, NSBA represents over 90,000 school board members who govern approximately 13,800 local school districts serving nearly 50 million public school students. NSBA regularly represents its members' interests before Congress and federal and state courts and has participated as *amicus curiae* in many cases involving the use of public funds to pay for private education. See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Locke v. Davey*, 540 U.S. 712 (2004); *Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125 (2011).

NASB is a non-partisan, non-profit organization that provides professional development, leadership training, educational advocacy, and other services to the seventeen school boards in Nevada. All 107 elected or appointed school board members are represented. Collectively, boards govern school districts serving approximately 465,000 students across Nevada, attending public schools in urban, rural, and remote communities. NASB's mission is promoting success for all students through local school board leadership. The NASB partners with UNR Extended Studies, the Nevada Association of Counties, and the Nevada

League of Cities and Municipalities to provide the Certified Public Official program for elected officials, an in-depth series that provides diverse resources for educational and professional development responsive to the changing needs of elected and appointed officials in public office throughout Nevada.

This appeal deals with the constitutionality of the Education Savings Accounts Program (ESAP) established by SB 302 (2015). The appeal is of significant importance to numerous children, parents and schools throughout Nevada. The court's decision in this appeal will have widespread consequences for education in Nevada. *Amici* believe SB 302 is unconstitutional and deprives Nevada students and their families of state and federal rights to a free, public education. *Amici* also believe SB 302 undermines public education and is part of a nationwide campaign by special interest groups to divert tax dollars away from public education and into private hands. *Amici* urge this court to affirm the district court's conclusion that the law is unconstitutional, and to avoid a ruling that would strengthen efforts that seek the destruction of one of the most important cornerstones of our democracy.

Amici were allowed to file a brief in the district court proceedings. Their authority for filing the present brief is NRAP 29.

II The Nevada Education Savings Account Program harms public education.

A. The Nevada ESAP conflicts with the judiciary's commitment to public education as an inherent American value.

Like the American people, American courts have always recognized the critical role that public education plays in American society. The judiciary's commitment to public education as expressed by the United States Supreme Court in *Brown v. Board of Education* has resonated for more than sixty years of education law:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is the principal instrument in awakening the

child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.

Brown v. Board of Educ., 347 U.S. 483, 493 (1954). The Court's emphasis in *Brown* was not on education in general, regardless of source, but on education as a *function of state and local government, i.e.,* as a public responsibility serving the public good.

These same themes are echoed throughout the jurisprudence of school law. For instance, the High Court has concluded that "public school teachers may be regarded as performing a task 'that [goes] to the heart of representative government'" and that public schools "are an 'assimilative force' by which diverse and conflicting elements in our society are brought together on a broad but common ground." *Ambach v. Norwick*, 441 U.S. 68, 75-76 (1979) (quoting *Sugarman v. Dougall*, 413 U.S. 634, 647 n.6 (1973)); see also, e.g., *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) (internal citations omitted) ("[Public] education must prepare pupils for citizenship in the Republic.... It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation."); *Plyler v. Doe*, 457 U.S. 202, 221 (1982) ("In sum, education has a fundamental role in maintaining the fabric of our society."); *San*

Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 30 (1973) (“Nothing this Court holds today in any way detracts from our historic dedication to public education.”).

Just as the federal courts have consistently recognized that education is a public function necessary to preserve a democratic society, so, too, have the states. Today, every state constitution contains an education clause that recognizes the provision of a public education as a state function.¹ Appellate courts in a majority of states have now confirmed the states’ constitutional obligations to provide an adequate public education on an equal basis to all children. Time and again the courts have insisted that the states provide for the needs of students in *all* of the public schools and eliminate disparities in educational opportunity. See, e.g., *Horton v. Meskill*, 376 A.2d 359, 375 (Conn. 1977) (holding that the state must “provide a substantially equal educational opportunity to its youth in its free public elementary and secondary schools”); *Claremont Sch. Dist. v. Governor*, 635 A.2d 1375, 1376 (N.H. 1993) (finding that the constitution “imposes a duty on the State to provide a constitutionally adequate education to every educable child and

¹ See, e.g., William Thro, *The Role of Language of the State Education Clauses in School Finance Litigation*, 79 EDUC. L. REP. 19 (West 1993); Molly McCusick, *The Use of Education Clauses in School Finance Reform Litigation*, 28 HARV. J. ON LEGIS. 307 (1991).

to guarantee adequate funding”); *Leandro v. State*, 488 S.E.2d 249, 257 (N.C. 1997) (declaring that the constitution “requires that all children have the opportunity for a sound basic education”); *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71, 91 (Wash. 1978) (concluding that “the constitution has created a ‘duty’ that is supreme, preeminent or dominant” to provide an adequate education with “sufficient funds”).²

This court has an opportunity to reiterate the value that the American judiciary has placed in public education, by recognizing that the Nevada ESAP moves away from this inherent American value. In particular, the program fails to meet the state’s constitutional obligation to provide a system of free public education wherein all children may be educated, including those with disabilities. Moreover, the Nevada ESAP is unconstitutional even under the more liberal federal framework, because of its exclusion of public schools.³ This exclusion limits the ability of families, particularly poor families, from both making the best

² This is only a small sampling of state decisions affirming the duty of the states to provide for public education. The Advocacy Center for Children’s Educational Success With Standards maintains a current and historical database of all state education litigation at <http://www.accessednetwork.org/litigationmain.html>.

³ See *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

educational choice for their children, and benefitting from the purported advantages associated with school choice. Thus, the ESAP weighs more heavily and disparately on those ill-prepared to bear its costs: the disadvantaged and poor families of Nevada.

B. The Nevada ESAP's diversion of public dollars away from schools harms Nevada public schools.

By diverting funding from the State's public schools, the Nevada ESAP categorically undermines this country's longstanding commitment to public education. Public schools rely on a critical mass of per-pupil funding to provide quality education to all their students. By diverting substantial tax revenues to private schools that could be used in public schools, the ESAP constitutes a severe threat to the quality of public education programs. The impact of this diversion in funding is amplified in Nevada where public schools have been underfunded for years; Nevada has consistently ranked near the bottom in per-pupil spending among the states. In 2012 (the latest year for which data are available), Nevada ranked 45th among the states and the District of Columbia.⁴ This underfunding is

⁴ See U.S. CENSUS BUREAU, G10-ASPEF, PUBLIC EDUCATION FINANCES: 2012, <http://www.census.gov/content/dam/Census/library/publications/2014/econ/g-12-c-g-aspef.pdf> Table 11 (June 2014).

particularly troubling in light of a 2015 study that concluded that to provide an adequate education to the school children of Nevada, the per-pupil base funding rate should be increased to \$8,251. This would come at a cost of \$1.6 billion dollars more than the actual state, local and federal expenditures in fiscal year 2013.⁵

This lack of adequate funding has caused school districts to take drastic measures in recent years. For example, in 2010 Churchill County Public Schools closed schools, moved to a 4-day school week, reduced arts, dramas, and music education, cut school electives, and instituted furlough days for some of their employees.⁶ Lincoln County Public Schools made similar cuts and also eliminated after-school programs and reduced technology purchases.⁷ In 2008, the Center on Budget and Policy Priorities reported: “In

⁵ GUINN CENTER FOR POLICY PRIORITIES, NEVADA K-12 EDUCATION FINANCE FACT SHEET15(Feb.2015), <http://guinncenter.org/wp-content/uploads/2015/02/Guinn-Center-K-12-Education-Finance-Fact-Sheet.pdf>

⁶ Jim Hull, CENTER FOR PUBLIC EDUCATION, EXAMPLES OF STATE AND DISTRICT FUNDINGCUTS(Oct.7,2010), <http://www.centerforpubliceducation.org/Main-Menu/Public-education/Cutting-to-the-bone-At-a-glance/Examples-of-state-and-district-funding-cuts.html>.

⁷ *Id.*

Nevada, the governor has ordered various cuts to K-12 education, including delaying an all-day kindergarten expansion, cutting per pupil expenditures by \$400 in a pilot program, eliminating funds for gifted and talented programs, eliminating funds for a magnet program for students who are deaf or hard of hearing, and making across-the-board cuts. Additionally, young children with developmental delays will lose more than 15,000 hours of needed services.”⁸ Nevada still has not completely recovered from the cuts made to school funding since the 2008 recession. Adjusted for inflation, state per-pupil funding in Nevada for 2015-2016 remains 3.5% less than in 2008.⁹

Given Nevada’s already significantly underfunded public education budget, the ESAP leaves most of Nevada’s families with even fewer educational resources available to them. This means that the students who remain in Nevada’s public schools will likely receive a lower-quality public education than if public funds

⁸ NICHOLAS JOHNSON, ET. AL., CENTER ON BUDGET AND POLICY PRIORITIES, MOST STATES ARE CUTTING EDUCATION (Feb. 10, 2008), <http://www.cbpp.org/sites/default/files/atoms/files/12-17-08sfp.pdg>.

⁹ See MICHAEL LEACHMAN & CHRIS MAI, CENTER ON BUDGET AND POLICY PRIORITIES, MOST STATES FUNDING SCHOOLS LESS THAN BEFORE THE RECESSION (Revised Oct. 16, 2014), <http://www.cbpp.org/sites/default/files/atoms/files/10-16-14sfp.pdf>.

were not expended on private schools. Under such circumstances, Nevada cannot afford to redirect even more money away from public schools

C. The Nevada ESAP's lack of accountability harms Nevada students and taxpayers.

The State of Nevada has a constitutional obligation to be a good and proper steward of taxpayer monies. Because public schools are entrusted with fundamental responsibilities, states must use particular care to ensure that funds appropriated for public education further the public interest. Yet the Nevada ESAP, like many choice initiatives, contains virtually no protections for taxpayers or students.

1. Participating educational providers under SB 302 do not need to meet state laws applicable to public schools.

Under SB 302, private education providers receiving ESAP funds do not have to comply with state accountability standards, open meetings laws, or open records laws. The state will not assess the performance of these schools in a way that would allow parents to determine the quality of education that their children would receive. No requirements for student achievement or demonstrated growth

in student performance are imposed on education providers participating in the ESAP.

Additionally, private schools do not have to comply with state laws regarding student discipline. Private schools do not have to provide notice and an opportunity to be heard before suspending or expelling students. This lack of due process rights means that a student who is emotionally disturbed could be expelled summarily from a private school ill-equipped to handle the student's disability with no recourse for readmission, thereby depriving the student of the education that the state has paid for and to which he is entitled.

This lack of accountability effectively negates any argument that the Nevada ESAP, or other similar voucher initiative, provides real, meaningful choice on the ground level. Instead the families of voucher students are selecting a private school for their children based on few, if any, objective measures of educational quality. Because the vast majority of voucher schools are not subject to the same accountability standards as public schools, parents have no way of making informed comparisons about which educational options will best serve their children.

Other than personal visits to a school, subjective evaluations from other parents, or self-interested promotional information from the schools themselves,

families typically would have little data to determine whether the private school they are choosing will, in fact, provide a better education to their children than the public schools. In other words, the Nevada ESAP allows public funds to be used to enroll a child in a private school, the quality of which is unknown to the parents, taxpayers, and the State.

Despite this nearly complete lack of oversight, Nevada's ESAP if upheld will, like other state choice programs, funnel millions of dollars in taxpayer funds to private institutions with no assurance that the State or its citizens will get any return on their investment. The statute that authorizes the Nevada ESAP does not contain any mechanism that would allow the state to recoup money from private schools that expel or otherwise fail to educate a student who enrolled in the school with voucher assistance. Therefore, in addition to funneling money to these schools, the ESAP provides no recompense to anyone if the school fails to meet its obligations with respect to a voucher student.

In contrast, states regulate every aspect of traditional public schools, from curriculum to procurement to assessment, to assure the responsible use of public money and the adequate education of its students. The Nevada ESAP rejects all of these safeguards and, in so doing, abandons any sincere effort to assure that the

publicly funded education provided by private schools actually meets public needs.

**2. Students receiving an education through SB 302 funds
forfeit certain federal rights designed to ensure their
access to education.**

Private schools in Nevada that do not receive federal funding are also not bound by certain federal laws applicable to public schools, particularly those prohibiting discrimination based on a wide range of protected categories.¹⁰ This means private schools may discriminate in many ways that public schools cannot. Therefore, families who participate in the ESAP are to a large extent left to the educational idiosyncrasies of the private school without regard to whether or not the educational program is truly in the best interest of the child, or meets the child's educational needs.

This is especially true for students with disabilities who choose to attend a private school by using an education savings account. Many parents of children

¹⁰ E.g., Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 (2015) (prohibiting discrimination on the basis of disability); Title IX of the Education Amendments, 20 U.S.C. §§ 1681-1688 (2015) (prohibiting discrimination on basis of gender).

with disabilities, hoping for the best education for their child, may be lured into sending their child to a private school, not realizing that the private school they select may have no capacity and has no obligation to provide the same special education and related services the child received under the Individualized Education Plan (IEP) developed while the child attended public school. The law does not require private institutions to admit or meet the needs of children with disabilities; nor are such institutions subject to the comprehensive statutory and regulatory requirements to which public schools must conform in serving children with disabilities.

If the private setting turns out to serve their child's educational needs poorly, parents have few good options if the private school fails to make changes voluntarily. Parents can enroll their child in a new private school with the hope that it will better serve their child's needs; leave the child in an inappropriate private setting that fails to provide the individualized educational services the child needs; or re-enroll the child in public school, having lost precious educational time. The possibility of such harm is substantial given that many private schools lack sufficient qualified/certified staff and other resources necessary to serve special needs students adequately. This is more likely to be the case in private schools that offer tuition rates low enough to be paid in full by the

funds available under the ESAP. The experience with voucher programs in other states already well establishes that students with physical, mental, and emotional challenges and those with limited English proficiency, or both, are the least likely to be served well in these programs.¹¹

The cost of serving children with special needs is enormous, often making it difficult, if not impossible, for private schools to provide an appropriate education to special needs students, especially where there is no critical mass of students with specific disabilities. In such circumstances, students with moderate to severe disabilities may be terribly underserved, because a private school cannot economically sustain the costly services needed to deliver an appropriate education based on the voucher amount available to students who participate in the ESAP. This has already happened in other states.

¹¹ See, e.g., Scott S. Greenberger, *Voucher Lessons Learned*, B. GLOBE, Feb. 26, 2001, at A1; JULIE MEAD, RESEARCH BRIEF: PUBLICLY FUNDED SCHOOL CHOICE OPTIONS IN MILWAUKEE: *AN EXAMINATION OF THE LEGAL ISSUES*, Vol. 88, No. 9 (July 21, 2000); BARBARA MINER, VOUCHERS: SPECIAL ED STUDENTS NEED NOT APPLY http://www.rethinkingschools.org/special_reports/voucher_report/v_vouc182.shtml (Winter 2003); Tom Held, *School choice program shuts out disabled, federal complaint says*, J. SENTINEL, June 7, 2011, available at <http://www.jsonline.com/news/education/123374903.html>.

In Ohio, for instance, one-time voucher supporter David Brennan wrote to the governor of that state to report that, “Numerous scholarship [voucher] recipients were discouraged from taking their scholarships to private schools with the full knowledge that none of the existing private schools will be able to handle a seriously handicapped child.”¹² Other jurisdictions similarly report that private schools are simply incapable of addressing the needs of special needs students without the critical mass of funding that comes from serving a broad population of students.¹³

¹² Dennis J. Willard & Doug Oplinger, *Voucher Plan Leaves Long List of Broken Vows*, AKRON BEACON J., June 6, 2011 (quoting Memorandum from David Brennan to Tom Needles, Ohio Governor’s Office (Sept. 27, 1996)), *available at* <http://www.ohio.com/blogs/ohio-school-choice/ohio-school-choice-blog-1.451828/whose-choice-how-school-choice-came-to-ohio-cleveland-voucher-program-1.484140>.

¹³ A 1998 report prepared for the U.S. Department of Education about the results of a survey of private schools in the inner cities of large metropolitan areas found that sixty-eight percent of the schools would “definitely or probably” *not* be willing to participate in a voucher program if they had to accept “special needs” students, such as those who are limited English proficient, learning disabled, or low achieving. See Lana Muraskin, *Barriers, Benefits, and Costs of Using Private Schools to Alleviate Overcrowding in Public Schools: Final Report*, 49-51 (1998), *available at* files.eric.ed.gov/fulltext/ED432063.pdf.

In August 2012, the Associated Press (AP) reported the high cost of educating students with special needs is disproportionately falling on traditional public schools as other students increasingly opt for alternatives that are not always readily open to those requiring special education. According (Continued)

A public school district already structured to deliver these services and resources (from certified teachers and specialists, to per-pupil costs spread over an entire student population) to address the divergent needs of students with varying disabilities is better situated to provide a greater degree of disability-related services across a broader spectrum of special needs. If past is indeed prologue, the experiences of other states suggest that a similar scenario may replicate itself in Nevada.

A special education student enrolled in a private setting is also not entitled to the plethora of federal procedural and substantive due process rights afforded by the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. §§ 1400-1482 (2012) – the federal special education law designed to ensure that children with disabilities receive a free appropriate public education (“FAPE”) in the least restrictive environment, 20 U.S.C. § 1411(e)(3)(F)(i) (2012). To provide

(Continued) to a consultant’s report that compared special education costs, the AP reported that public schools in Philadelphia in 2009 spent \$9,100 per regular education pupil, \$14,560 per pupil with milder disabilities, and \$39,130 per student with more severe disabilities, whereas the Los Angeles Unified School District spent \$6,900 per regular education student, \$15,180 per pupil with milder disabilities, and \$25,530 per pupil with significant needs. Christina Hoag, *Special needs kids stay in traditional schools*, ASSOCIATED PRESS, Aug. 18, 2012, at <http://www.bigstory.ap.org/article/special-needs-kids-staying-in-traditional-schools>.

FAPE, public schools are required to develop an IEP for each child with a disability, with the input of many school-based, curricular, and special needs experts. 20 U.S.C. § 1414(d) (2012). The IEP, which is modified at routine intervals, in turn guides the child's education over the course of the student's academic career with particular attention directed to addressing a child's specific disabilities. *Id.*

In addition, the IDEA provides certain procedural due process rights that guarantee a parent can participate in and challenge the educational choices developed on behalf of the child. 20 U.S.C. § 1415(b)(6) (2012). This ability to challenge the educational process is a key component of the IDEA, aimed at ensuring that the child is indeed receiving the educational benefits guaranteed by the IDEA. Some of those rights include: The right to participate in the development of the student's IEP; the right to the development of the IEP by certified experts; the right to challenge the decisions of the IEP team before an impartial administrative hearing officer; and the right to *de novo* review in state and federal district courts. 20 U.S.C. § 1415 (2012).

In contrast, by participating in the ESAP, parents must forfeit their rights to federal procedural and substantive due process in order to participate in the program. Once they enroll their children in these private schools, parents are then

at the mercy of a private school's largesse and whatever contractual and economic restrictions the private school decrees. In this way, the Nevada ESAP not only violates the Nevada Constitution's guarantee of public education, but it also is not good public policy because it neither bears the student's best interests at heart, nor does it contribute to the well-being of Nevada families.

3. Voucher programs do not uniformly improve student outcomes.

In an effort to assuage concerns about lack of accountability and oversight, voucher proponents contend that research overwhelmingly shows that voucher programs across the United States uniformly improve student performance, providing a bright educational future for voucher students. While some studies report test-score gains for low-income African American students, most show that voucher students do not outperform public school students in other student groups.¹⁴ In fact, when comparing students with similar socioeconomic status, research shows that public school students outperform their private school

¹⁴ CENTER FOR PUBLIC EDUCATION, SCHOOL CHOICE: WHAT THE RESEARCH SAYS 13(Nat'lSch.Bds.Ass'n2015), <http://www.centerforpubliceducation.org/Main-Menu/Policies/School-Choice-What-the-Research-Says-At-a-Glance/School-Choice-What-the-Research-Says-Full-Report-PDF.pdf>

counterparts.¹⁵ For example, recent research into the Milwaukee Parental Choice Program revealed that the performance of voucher students on state standardized tests lagged behind that of their public school peers; this was especially true for voucher students who attended private schools with high concentrations of voucher students.¹⁶ In a synthesis of research on the efficacy of voucher programs, the Center on Education Policy recently concluded:

Achievement gains for voucher students are similar to those of their public school peers. . . . While some studies have found limited test score gains for voucher students in certain subject areas or grade levels, these findings are inconsistent among studies, and the gains are either not statistically significant, not clearly caused by vouchers, or not sustained in the long run.¹⁷

¹⁵ See generally DAVID C. BERLINER ET AL., THE 50 MYTHS AND LIES THAT THREATEN AMERICA'S PUBLIC SCHOOLS: THE REAL CRISIS IN EDUCATION (2014).

¹⁶ PUBLIC POLICY FORUM, NUMBER OF VOUCHER SCHOOLS RELATIVELY UNCHANGED SINCE 2003 WHILE ENROLLMENT HAS DOUBLED, Vol. 102, No. 1 (Apr. 2014), <http://publicpolicyforum.org/sites/default/files/2014VoucherBrief.pdf>.

¹⁷ CENTER ON EDUCATION POLICY, KEEPING INFORMED ON SCHOOL VOUCHERS: A REVIEW OF MAJOR DEVELOPMENTS AND RESEARCH 9 (July 2011), <http://www.cep-dc.org/displayDocument.cfm?DocumentID=369>.

As to the assertion that voucher programs spur public schools to improve, the CEP report stated that no clear conclusions about cause and effect can be drawn:

In many of the cities or states with voucher programs, a variety of reforms are underway to boost public school achievement, ranging from the strict accountability requirements of the No Child Left Behind Act to the expansion of charter schools. Often the public schools most affected by vouchers are the same ones targeted for intensive interventions due to consistently low performance.¹⁸

Even if the voucher proponents' characterization of the research were an accurate portrayal of the aggregate effect of voucher programs in general, it reveals little about the likelihood that the Nevada ESAP will produce a similar positive outcome, and even less about the educational benefits that any particular private school in Nevada will provide to a child who enrolls there using public tax dollars.

¹⁸ *Id.* at 11; see also BERLINER, *supra* note 15.

III The court should not be part of a troubling wave of a nationwide effort by special interest groups to undermine public education by diverting scarce public tax dollars to private entities.

A. Privateers are, in fact, the true beneficiaries of the Nevada ESAP.

The United States Supreme Court implicitly recognized in *Zelman* that vouchers should not merely be vehicles for diverting money into private hands. But the express exclusion of public schools under the Nevada ESAP reveals that the intent of the law is not to provide true choice consistent with *Zelman*, but to channel public education dollars into private hands.

This intent is made readily apparent by the unprecedented breadth of the Nevada program. Unlike choice programs in other states that limit vouchers to low income students, students in poorly performing schools, or students with disabilities, the Nevada ESAP is open to all students as long as they have taken at least one public school course for 100 consecutive days. Once this minimal requirement is met, the student is eligible to receive public funds to replenish the student's education savings account for each year of elementary and secondary schooling. This means the Nevada ESAP could be used to subsidize a private

education for children whose parents never intended to enroll them in public school (except for the minimum required course), regardless of the quality of the education available there.

The eligibility of all students belies any argument that the law is intended to allow students to escape public schools that are failing to meet their individualized needs; instead it parallels the experience in other states, where between one-third and one-half of students participating in voucher programs were already enrolled in private schools.¹⁹ Even some voucher school administrators have acknowledged this facade. “The make-up of our student body has stayed the same. Many of our current choice kids were our students before choice.”²⁰ In May 2012, *The New York Times* reported that although Georgia’s private school scholarship program was pitched as a way to provide poor students with the same education choices as their more affluent counterparts, donations to

¹⁹ See ZACH SCHILLER, POLICY MATTERS OHIO, CLEVELAND SCHOOL VOUCHERS: WHERE THE STUDENTS COME FROM (Sept. 2001), *available at* www.policymattersohio.org/wp-content/uploads/2011/09/ClevelandVouchers.pdf; *see also* WIS. DEP’T OF PUB. INSTRUCTION, *Milwaukee Parental Choice Program Facts and Figures for 1998-99*, and *Number of Choice Students Enrolled by School in 1998-99* (Mar. 2003), *available at* sms.dpi.wi.gov/sms_geninfo.

²⁰ PUBLIC POLICY FORUM, *School Choice In Its Tenth Year* 5, 88 RESEARCH BRIEF NO. 3 (Apr. 5, 2000).

state-designated scholarship programs are benefitting students already in those private schools. According to the *Times* article:

In Georgia, a 2011 report by the Southern Education Foundation found that from 2007, the year before the program was enacted, through 2009, private school enrollment increased by only one-third of one percent in the metropolitan counties that included most of the private schools in the scholarship program. The logical conclusion was that most of the students receiving the scholarships had not come from public schools.²¹

B. This court should discourage the Nevada ESAP from becoming a national model.

At least four other states have already adopted similar education savings account programs;²² 27 states and the District of Columbia have some form of

²¹ Stephanie Saul, *Public Money Finds Back Door to Private Schools*, N.Y. TIMES, May 22, 2012, at A1, <http://www.nytimes.com/2012/05/22/education/scholarship-funds-meant-for-need-y-benefit-private-schools.html>.

²² ARIZ. REV. STAT. ANN. § 15-2402 (2015); FLA. STAT. § 1002.385 (2015); MISS. CODE ANN. § 37-181-1 *et seq.* (2015); TENN. CODE ANN. § 49-10-1401 *et seq.* (2015).

choice, including vouchers, tax credits, and education savings accounts, many of which have been challenged in court. This court should avoid a ruling that further enhances the ability of special interest groups to promote in even more states the financing of a private school education with public tax dollars. Among the proponents of voucher initiatives, the American Legislative Exchange Council (ALEC) has issued a blueprint for drafting school choice legislation that will purportedly withstand legal challenge. In April 2007, ALEC, in conjunction with The Institute for Justice, published a guide that provides analysis and recommendations for successfully enacting voucher laws.²³


Amici urge this court to prevent the Nevada ESAP from becoming part of a national crusade to create a system of education that funnels money away from public schools and denies parents the ability to exercise true choice within the public school system. This rising tide of national special interests grabbing at the public till for already scarce public school dollars is not only at odds with the state constitution, but also with the best interests of all of Nevada's children.

²³ American Legislative Exchange Council and the Institute for Justice, *School Choice and State Constitutions: A Guide to Designing School Choice Programs* (Apr. 2007), available at <http://www.alec.org/docs/IJ-ALEC-school-choice.pdf>.

IV CONCLUSION

For these reasons, *Amici Curiae* National School Boards Association and the Nevada Association of School Boards respectfully urge this court to hold the Nevada ESAP unconstitutional and to affirm the district court's order.

DATED: April 1, 2016


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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief of *amici curiae* 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 (Times New Roman) in 14 point type style and in MS/Word, version 2010.


I further certify that this brief complies with the type-volume limitations of NRAP 29(e) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 5,082 words, which is less than half of the size allowed for an opening or answering brief.

Finally, I hereby certify that I have read this appellate 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 appropriate references to page and volume numbers, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be

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

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